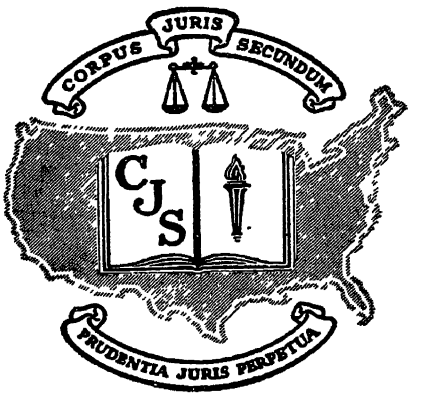

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CORPUS JURIS SECUNDUM
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CITE BY TITLE AND SECTION

Thus

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CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

FRANCIS J. LUDES
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The Combined Editorial Staffs
of
THE AMERICAN LAW BOOK CO.
and
WEST PUBLISHING CO.

VOLUME LXXX

Kept to Date by Cumulative Annual Pocket Parts

489994
Hooley-Bundschu Library

Brooklyn, N. Y.
The American Law Book Co.

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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
A 2d	Atlantic Reporter Second Series
Abb.	Abbott (U.S.)
Abb Adm.	Abbott's Admiralty (U.S.)
Abb App.Dec.	Abbott's Appeals Decisions (N Y.)
Abb Dec.	Abbott's Decisions (N Y.)
Abb N.Cas.	Abbott's New Cases (N Y)
Abb Pr.	Abbott's Practice (N.Y.)
Abb Pr N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala App.	Alabama Appellate Court
Alaska	Alaska
Alb L.J.	Albany Law Journal
A.L C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta L.	Alberta Law
A.L R.	American Law Reports
A.L.R.2d	American Law Reports, Second Series
Am.Bankr.	American Bankruptcy (U S)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am &E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L J.N.S.	American Law Journal New Series (Pa)
Am L Rec	American Law Record (Ohio)
Am L Reg.	American Law Register
Am L Reg N.S.	American Law Register New Series
Am Law Reg O.S.	American Law Register Old Series
Am L Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am Negl R.	American Negligence Reports
A M &O.	Armstrong, Macartney & Ogle (Ir.)
Am Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am Pr.	American Practice
Am R.	American Reports
Am R &Corp.	American Railroad & Corporation
Am.R Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App D C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B &Ad.	Barnewall & Adolphus (Eng.)
B &Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S C)
B &B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C Cas.	English Railway and Canal Cases
Beaw.Lex Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl &D.	Benloe & Dallison (Eng.)
Berks Co.	Berks County Law Journal (Pa.)
B.&H.Cr Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss	Bissell (U.S.)
Bitt W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S C)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U S.)
Brock Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E Pat.Cas.	Brodix's American & English Patent Cases
Bro Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

C.A.	Court of Appeals (U.S.)
Cab &E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal 2d	California Reports, Second Series
Cal App.	California Appellate Court
Cal.App.2d	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal Unrep Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can Cr Cas.	Canadian Criminal Cases
Can Exch.	Canadian Exchequer
Can.L J.	Canada Law Journal
Can L J.N S.	Canada Law Journal New Series
Can.L T.Occ. Notes	Canadian Law Times Occasional Notes
Can R Cas.	Canadian Railway Cases
Can S C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng)
Car.H &A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa)
Cas t Hardw.	Cases temp. Hardwicke (Eng.)
Cas t.Holt	Cases temp. Holt (Eng)
Cas t King	Cases temp. King (Eng)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc Rep	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J Ann.	Corpus Juris Annotations
C.J S	Corpus Juris Secundum
C &K.	Carrington & Kirwan (Eng.)
C &L	Connor & Lawson (Ir)
Cl App	Clark's Appeal Cases (Eng.)
Cl Ch	Clarke's Chancery (N Y)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N Y.)
Clarke&S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C L Chamb.	Chamber's Common Law (U.C.)
Clev L Rec.	Cleveland Law Record (Oh)
Clev L Rep.	Cleveland Law Reporter (Oh.)
Cl &F.	Clark & Finnelly (Eng.)
Clif El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S)
C L R.	Common Law Reports (Eng.)
C &M.	Carrington & Marshman (Eng.)
C M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y)
Coff Prob.	Coffey's Probate (Cal.)
Co Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col Cas.	Coleman's Cases (N Y.)
Col &C.Cas.	Coleman & Caines' Cases (N.Y.)
Col C C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn)
Coll.	Collyer (Eng.)
Col L.Rep.	Colorado Law Reporter
Col Law Review	Columbia Law Review
Coll.&E Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng)
Comb.	Comberbach (Eng)
Com Cas.	Commercial Cases (Eng.)
Com L.	Commercial Law (Can)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L C.)
Coop.	Cooper's Chancery (Eng.)
Coop Pr.Cas.	Cooper's Practice Cases (Eng)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb &D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng)
Cox Ch.	Cox's Chancery (Eng)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf &D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr L Mag.	Criminal Law Magazine
Cr &Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro Car.	Croke Charles (Eng)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng)
Cromp.&J.	Crompton & Jervis (Eng)
Cromp.&M.	Crompton & Meeson (Eng)
Crosw.Pat Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt	Curtis (U.S)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa)
Dall.	Dallas (U S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y)
Dan.	Daniell (Eng.)
Dana	Dana (Ky)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D C.	District of Columbia
D.Chipm.	D Chipman (Vt.)
D.C.Mun.App.	Municipal Court of Appeals (D.C.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J &S.	De Gex, Jones & Smith (Eng)
De G.&J	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordo (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N Y.)
Den.	Denio (N.Y)
Den.C C.	Denison's Crown Cases (Eng.)
Desaus Eq.	Desaussure (S.C.)
Dev Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng)
Dow & Cl.	Dow & Clark (Eng)
Dow &L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C)
Drew.	Drewry (Eng)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag Cas.	Dowling & Ryland's Magistrate Cases (Eng)
D &R N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr &Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S C)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East L.R.	Eastern Law Reporter (Can.)
East P C.	East's Pleas of the Crown (Eng.)
East T.	Eastern Term (Eng)
E &B.	Ellis & Blackburn (Eng.)
E.B &E.	Ellis, Blackburn & Ellis (Eng.)
E.B &S.	Ellis, Best & Smith (Eng.)
E.C L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm Sel Cas.	Edmond's Select Cases (N Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Em.App.	Emergency Court of Appeals (U.S.)
Enc.Pl &Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry &C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Erie Co.	Erie County Law Journal (Pa.)
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc &F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng)
Fay L J.	Fayette Legal Journal (Pa.)
F.Cas.No.	Federal Cases (U S.)
F (Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S)
F.2d	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F Supp.	Federal Supplement
Ferg Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng)
Fish Pat Cas.	Fisher's Patent Cases (U S.)
Fish.Pat R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl &K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng)
Fonbl.	Fonblanque (Eng.)
Fonbl R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N H)
Fost &Fin.	Foster & Finlason (Eng.)
Fount Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb C P.	Gilbert's Common Pleas (Eng.)
Gilb Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han (N.B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S C.)
Harr.	Harrison's Chancery (Mich.)
Harr Del.	Harrington (Del.)
Harr.Mich.	Harrington's Michigan Chancery Reports
Harr &G.	Harris & Gill (Md)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr &H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havl	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaii Rep.	Hawaii Reports
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz Reg.	Hazard's Register (Pa.)
H Bl.	Henry Blackstone (Eng)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem &M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Hening & Munford (Va)
Het.	Hetley (Eng.)
Het C P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y)
Hill &Den Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil T.	Hilary Term (Eng.)
H.L Cas.	House of Lords Cases (Eng.)
H &N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt's Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea.	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How Miss.	Howard (Miss)
How.A Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr	Howard's Practice (N.Y.)
How Pr N S.	Howard's Practice New Series (N.Y.)
How.St Tr.	Howell's State Trials (Eng.)
Hud &B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl &Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind	Indiana
Ind App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins L J	Insurance Law Journal
Int Com Commn.	Interstate Commerce Commission
Int Com.Rep.	Interstate Commerce Reports
Int Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir C L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R 1894.	Irish Law Reports for year 1894
Ir R C L.	Irish Reports Common Law
Ir.R Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J &C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R..	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)

Kames Rem Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng)
Keb.	Keble (Eng.)
Keen	Keen (Eng)
Keil.	Keilwey (Eng)
Keilw.	Keilway (Eng.)
Kel C C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng)
Keyes	Keyes (N Y.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng)
Knox	Knox (N S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A (Orleans)	Court of Appeal, Parish of Orleans
La Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal)
Lack Bar	Lackawanna Bar (Pa.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing Chancery Decisions (N.Y)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa)
Leg.&Ins R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt Sel.Cas.	Littell's Select Cases (Ky)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L J Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J Ch O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L J Exch.	Law Journal Exchequer New Series (Eng.)
L.J Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng)
L.J P.&M.	Law Journal Probate & Matrimonial New Series (Eng)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng)
Ll.&G.t Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll &W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf &T.	Longfield & Townsend (Ir.)
Low Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L R.	Law Reports (U.S.)
L.R A.	Lawyers' Reports Annotated
L.R A 1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N S.	Lawyers' Reports Annotated New Series
L.R C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R Eq.	Law Reports Equity Cases (Eng.)
L R Exch.	Law Reports Exchequer Cases (Eng.)
L.R H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R Indian App.	Law Reports Indian Appeals (Eng.)
L R Ir.	Law Reports Irish
L.R P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)
L T.O.S.	Law Times, Old Series (Pa)
L T.Rep.N.S.	Law Times Reports, New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)

Lutw Reg Cas.	Lutwyche's Registration Cases (Eng.)
Luz Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz Leg Reg.	Luzerne Legal Register (Pa.)
Luz.L J	Luzerne Law Journal (Pa.)
Lynd Prov.	Lyndwood's Provinciales

M

MacA Pat.Cas.	MacArthur's Patent Cases (D.C)
MacArth	MacArthur's District of Columbia Reports
MacAr &M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl &R.	Maclean & Robinson (Eng.)
Macn &G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc)
Macph S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man El.Cas.	Manning's Election Cases (Eng)
Man Exch Pr.	Manning's Exchequer Practice (Eng)
Man Gr &S.	Manning, Granger & Scott (Eng)
Man.L.J.	Manitoba Law Journal
Man &Ry.	Manning & Ryland (Eng.)
Man &Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng)
Mann Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng)
Man t Wood	Manitoba temp. Wood
March	March (Eng)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh J J.	J. J. Marshall (Ky.)
Mart	Martin Old Series (La.)
Mart	Martin (N C.)
Mart.N.S.	Martin New Series (La.)
Mart &Y.	Martin & Yerger (Tenn.)
Marv.	Marvel (Del.)
Mason	Mason (U.S)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord	McCord (S C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees &Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill Const.	Mill's Constitutional (S.C.)
Mill Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss St.Cas.	Mississippi State Cases
M &M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng)
M A L.	Modern American Law
Mod Cas L &Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Monroe L.R.	Monroe Law Reports (Pa.)
Mont	Montana
Mont.	Montagu (Eng.)
Mont Bank.Rep.	Montagu's English Bankruptcy Reports
Mont L.R.	Montreal Law Reports (Can)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont &B.	Montagu & Bligh (Eng)
Mont.&C.	Montagu & Chitty (Eng)
Mont.D &DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont &M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr Leg.N.	Montreal Legal News
Montr.Q B	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C C	Moody's Crown Cases (Eng)
Moore C.P.	Moore's Common Pleas (Eng)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S	Moore & Scott (Eng)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng)
M &P.	Moore & Payne (Eng)
M &R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Mun.L R.	Municipal Law Reporter (Pa.)
Murph.	Murphey (N C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng)
Myl.&C.	Mylne & Craig (Eng.)
Myl &K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N C Conf.	North Carolina Conference
N.C.T Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.2d	North Eastern Reporter Second Series
Neb.	Nebraska
Neb Unoff.	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law
Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases

New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal L.	New Zealand Law
N.H.	New Hampshire
N.J.	New Jersey Reports
N.J.Eq.	New Jersey Equity
N J Law	New Jersey Law
N.J L.J.	New Jersey Law Journal
N J Misc	New Jersey Miscellaneous
N J Super.	New Jersey Superior Court Reports
N M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng)
Nolan	Nolan (Eng)
North	Northington (Eng.)
North Co.	Northampton County Reporter (Pa.)
Northumb.Co Leg. N.	Northumberland County Legal News (Pa)
Northumb Leg J.	Northumberland Legal Journal (Pa.)
Notes of Cas.	Notes of Cases (Eng)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N S.	Nova Scotia
N S.Dec.	Nova Scotia Decisions
N.S Wales	New South Wales
N S Wales L	New South Wales Law
N.S.Wales L R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.W.2d	North Western Reporter Second Series
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y City Ct.Suppl.	New York City Court Supplement
N.Y.Civ Proc	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y Code Reports, N.S.	New York Code Reports, New Series
N.Y Cr.	New York Criminal
N.Y Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.S.2d	New York Supplement Second Series
N.Y.St.	New York State Reporter
N.Y Super.	New York Superior Court
N.Y.Wkly Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. Reprint	Ohio Decisions (Reprint)
Ohio F Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Ohio Supp.	Ohio Supplement
Okl	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U S)
Op Sol Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P 2d	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa Co.	Pennsylvania County Court
Pa Corp.	Pennsylvania Corporation Reporter
Pa C Pl	Common Pleas (Pa)
Pa Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Pa.Rec.	Pennsylvania Record
Park.	Parker (Eng.)
Park Cr.	Parker's Criminal (N.Y.)
Park Exch.	Parker's Exchequer (Eng.)
Park Ins	Parker's Insurance (Eng.)
Pars Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa Super.	Pennsylvania Superior Court
Paton App Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr &W	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig &R.	Pigott & Rodwell (Eng)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec Ch	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob [1917]	Law Reports, Probate Division (Eng.)
Prob.Rep.	Probate Reports (Eng.)

Pr Rep.	Practice Reports (Eng)
P.Wms.	Peere-Williams (Eng.)
P.U R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng)
[1891]Q B.	Law Reports [1891] Queen's Bench (Eng)
Q B D	Law Reports Queen's Bench Division (Eng.)
Queensl J P.	Queensland Justice of the Peace
Queensl L.	Queensland Law
Queensl L.J	Queensland Law Journal
Que.L	Quebec Law
Que.Pr.	Quebec Practice
Que Q B.	Quebec Official Reports Queen's Bench
Que Rev Jud.	Quebec Revised Judicial
Que Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rap Jud. Q C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R C L	Ruling Case Law
R &Can.Cas.	Railway & Canal Cases (Eng.)
R &Can Tr Cas.	Railway & Canal Traffic Cases (Eng.)
Redf.	Redfield's Surrogate (N.Y.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf R Cas.	Redfield's Railway Cases (Eng.)
Redf Surr.	Redfield's Surrogate (N.Y.)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng)
Reprint	English Reprint
Rep t Finch	Cases temp. Finch (Eng.)
Rep.t.Hard.	Lee's Reports *tempore* Hardwicke (Eng)
Rep.t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res.&Eq Judgm.	Reserved & Equity Judgments (N.S. Wales)
Rev.Crit.	Revue Critique (Can.)
Rev de Jur.	Revue de Jurisprudence (Can.)
Rev.de Legis.	Revue de Legislation (Can.)
Rev.Leg.	Revue Legale (Can.)
Rev Leg.N.S.	Revue Legale New Series (Can.)
Rev.Rep.	Revised Reports (Eng.)
R.I.	Rhode Island
Rice	Rice (S.C.)
Rich.	Richardson (S C.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg Ap.	Ridgeway's Appeal (Ir.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg P.C.	Ridgeway's Parliament Cases (Ir.)
Ridg t.Hardw.	Ridgeway temp. Hardwicke (Eng.)
Riley	Riley (S C.)
R &M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)
Rob Wm.Adm.	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
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Rom.Cas.	Romilly's Notes of Cases (Eng.)
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Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ.Eq Cas.	Russell's Equity Cases (N.S.)
Russ.&Geld.	Russell & Geldert, Nova Scotia
Russ &M.	Russell & Mylne (Eng)
Ry.&M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf Ch.	Sandford's Chancery (N.Y.)
Sask.L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund &C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S Austr.L.	South Australia Law
Sav.	Savile (Eng)
Sawy.	Sawyer (U S.)
Saxt.	Saxton (N J)
Say.	Sayer (Eng.)
S C	South Carolina
[1907]S C.	Court of Session Cases (Sc.)
Scam	Scammon (Ill.)
S.C Eq.	South Carolina Equity
Sch &Lef.	Schoales & Lefroy (Ir.)
Sch Leg.Rec.	Schuylkill Legal Record (Pa.)
Sch Reg.	Schuylkill Register (Pa.)
[1907]S.C (J)	Court of Justiciary Cases (Sc.)
Sc Jur.	Scottish Jurist
S C L	South Carolina Law
Sc L Rep.	Scottish Law Reporter
Scot L.T.	Scot Law Times
Scott	Scott (Eng.)
Scott N R.	Scott's New Reports (Eng.)
Scr L T	Scranton Law Times (Pa)
Sc Sess.Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S.)
S.D.	South Dakota
S.E.	South Eastern Reporter
S.E 2d	South Eastern Reporter Second Series
Searle & Sm.	Searle & Smith (Eng)
Sel Cas.Ch.	Select Cases in Chancery (Eng.)
Seld	Selden's Notes (N.Y.)
Selden	Selden (N.Y)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
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Shan.	Shannon (Tenn.)
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Sim &St.	Simons & Stuart (Eng.)
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Smale&G.	Smale & Giffard (Eng.)
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Smith	Smith (N.H.)
Smith&B.	Smith & Batty (Ir.)
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Smith Reg.	Smith's Registration (Eng.)
Sm.&M.	Smedes & Marshall (Miss)
Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So.	Southern Reporter
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Sol.J.	Solicitor's Journal (Eng.)
Som.Leg.J.	Somerset Legal Journal (Pa)
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Spinks	Spinks' Ecclesiastical and Admiral (Eng.)

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Spottisw.	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
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Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
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Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu M.&P.	Stuart, Milne & Peddie (Sc)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa)
S.W.	South Western Reporter
S.W.2d	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng)
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Swanst.	Swanston (Eng.)

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Taml.	Tamlyn (Eng.)
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Tenn Cas.	Unreported Tennessee Cases
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Terr.L.	Territories Law (Northwest Territories)
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Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex Suppl.	Texas Supplement
Tex Unrep.Cas.	Posey's Unreported Cases (Tex)
Thach.Cr.	Thacher's Criminal Cases (Mass)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T Jones	Thomas Jones (Eng)
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Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
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T.Raym.	Thomas Raymond (Eng)
Tread Const.	Treadway Constitutional (S.C.)
Treas Dec.	Treasury Decisions (U.S.)
Tr &H Pr.	Troubat & Haly's Practice (Pa.)
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Tuck.Surr.	Tucker's Surrogate (N.Y.)
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Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

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U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U C.C.P.	Upper Canada Common Pleas
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U.C.Q B O.S.	Upper Canada Queen's Bench Old Series
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U.S.App.D C.	United States Appeal Cases (D.C.)
U S.Aviation Rep	Aviation Reports (U S)
U S C.A.	United States Code Annotated
Utah	Utah

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Vern &S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.& B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Ves Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
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Virgin Islands	Virgin Islands
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W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
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Wall.C.C.	Wallace (U S)
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Wall Sr.	Wallace Senior (U.S.)
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Wash.	Washington (Va.)
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Wash.Co.	Washington County Reports (Pa.)
Wash T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
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Webb, A.B.&W.I P.& M.	Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
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Welsh	Welsh Registry Cases (Ir.)
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West	West (Eng.)
West.Co L.J.	Westmoreland County Law Journal (Pa.)
West.L.J	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
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West.L.T.	Western Law Times (Can.)
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Wilm.	Wilmot's Notes (Eng.)
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Wils Ch	Wilson's Chancery (Eng.)
Wils C P	Wilson's Common Pleas (Eng.)
Wils Exch.	Wilson's Exchequer (Eng.)
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Wils &S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N C.)
Wis	Wisconsin
W Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly L Gaz.	Weekly Law Gazette (Oh.)
Wkly.N.C.	Weekly Notes of Cases (Pa.)
Wkly Rep.	Weekly Reporter (Eng.)
Wms Saund.	Williams Notes to Saunders' Reports
W N	Weekly Notes (Eng.)
Wolf &B	Wolferstan & Bristow's Election Cases (Eng.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb.&M.	Woodbury & Minot (U.S.)
Woods	Woods (U.S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S.)
Words & Phrases	Words & Phrases
Wright	Wright (Oh.)
W Rob.	William Robinson's Admiralty (Eng.)
Wr Pa.	Wright (Pa.)
W.Va.	West Virginia
W W Harr.	W W Harrington (Del.)
W W.&D.	Willmore, Wollaston & Davidson (Eng.)
W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy &W.	Wyatt & Webb (Vict.)
Wy.W &A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y &Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
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Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A B A Jour.	American Bar Association Journal
Ala L.Rev.	Alabama Law Review
Albany L.Rev.	Albany Law Review
Am J.Int Law	American Journal of International Law
Am Law S Rev	American Law School Review
Ark L.Rev.	Arkansas Law Review
Aust L J.	Australian Law Journal
B.U L Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Calif L.Rev.	California Law Review
Camb.L J.	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed B A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Q.Rev.	Law Quarterly Review
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
La.L.Rev.	Louisiana Law Review
Loyola L.Rev.	Loyola Law Review
Marq.L.Rev.	Marquette Law Review
Md.L.Rev.	Maryland Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L Rev.	Mercer, Beasley Law Review
Miami L Q.	Miami Law Quarterly
Mich.L Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L J.	Mississippi Law Journal
Mo.L Rev.	Missouri Law Review
Montana L.Rev.	Montana Law Review
Neb.L.B.	Nebraska Law Bulletin
N J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N.C.L.Rev	North Carolina Law Review
Okla.L.Rev.	Oklahoma Law Review
Oreg L Rev.	Oregon Law Review
Phil.L.J.	Philippine Law Journal
Rocky Mt L Rev.	Rocky Mountain Law Review
Rutgers U.L.Rev.	Rutgers University Law Review
St. John's L.Rev.	St. John's Law Review
St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
So.Calif.L.Rev.	Southern California Law Review
Southwestern L.J.	Southwestern Law Journal
Stanford L.Rev.	Stanford Law Review
Temp.L.Q.	Temple Law Quarterly
Tenn.L.Rev.	Tennessee Law Review
Tex.L.Rev.	Texas Law Review
Tul L.Rev.	Tulane Law Review
U.Chi L Rev.	University of Chicago Law Review
U Cin.L.Rev.	University of Cincinnati Law Review
U.Detroit L.J.	University of Detroit Law Journal
U.Florida L Rev.	University of Florida Law Review
U.Kan.City L.Rev.	University of Kansas City Law Review
U.Pa.L.Rev.	University of Pennsylvania Law Review
U. of Pitts.L Rev.	University of Pittsburgh Law Review
U.Toronto L.J.	University of Toronto Law Journal
Vanderbilt L.Rev.	Vanderbilt Law Review
Va.L.Rev.	Virginia Law Review
Wash L.Rev.	Washington Law Review
Wash.U.L.Q.	Washington University Law Quarterly
Wash.& Lee L.Rev.	Washington and Lee Law Review
W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Wis.L.Rev.	Wisconsin Law Review
Wyo.L.J.	Wyoming Law Journal
Yale L.J.	Yale Law Journal

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CORPUS JURIS SECUNDUM

VOLUME EIGHTY

SET.

——**As a Noun.** The word "set" is commonly employed to indicate a collection or group of things of the same general character intended to be used together and, strictly speaking, more than two in number,[1] although it has been held that, by common usage, two articles may constitute a set.[2]

The word "set" is also applied to a tool used to receive the blows of a sledge in riveting the plates of metal beams.[3]

——**As a Verb.** "Set" is defined generally as meaning to seat; to fix in a situation or direction; to establish; to move with fixed direction; to put in readiness; to beset; to place in estimation; to put in a fixed state.[4]

When applied to precious stones "set" has a specific[5] and a well-known and well-defined[6] meaning, that is, to place in a frame or mounting; fasten or partially enclose, as a gem, in gold, silver, or other metal so as at once to support and display it; as, to set a ruby in a ring, hence to stud or bedeck with objects placed in some order; as, to set a crown with jewels.[7]

The verb "set" has been held equivalent to, or synonymous with, "demise" see 26 C.J.S. p 707 note 48.1, and "fix" see 36 C.J.S. p 885 note 66.

——**As an Adjective.** The word "set," as an adjective, is defined as meaning fixed in position; immovable; rigid;[8] and this is said to be its primary definition.[9]

——**Setting.** The word "setting" is defined generally as meaning a placing, or putting in a place, condition, state, or posture.[10]

In dog parlance, the term has a somewhat technical meaning; and means standing and intently looking in one direction, the attitude also being called "pointing."[11]

——**Phrases.**

Set apart. To "set apart" means more than "to designate,"[12] and means to separate to a particular use.[13] In common terminology "set apart" has been

1. U S—U. S. v. Mark Cross Co., 4 Ct.Cust.App. 274, 278.
57 C J. p 293 note 74
2. U.S.—U. S. v. Mark Cross Co., supra.
57 C.J p 293 note 75.
3. Kan.—Gillaspie v. United Iron Works Co., 90 P. 760, 761, 76 Kan. 70.
57 C.J. p 293 note 73.
4. Webster New Int D.
5. U.S.—U. S v. Bailey, Green & Elger, 24 C.C P.A.(Customs) 196, 198.
6. U.S.—Smith v. Computing Scale Co., C.C.Ohio, 147 F. 890, 891.
7. U S—U. S v. Bailey, Green & Elger, 24 C.C.P.A (Customs) 196, 198
Similarly defined
(1) To frame or mount, as a precious stone, in gold, silver, or other metal; as, to set a diamond—Smith v. Computing Scale Co., C.C.Ohio, 147 F. 890, 891
(2) To fix, as a precious stone, in a border of metal—U S. v. Bailey, Green & Elger, 24 C.C.P A.(Customs) 196, 198.
8. Wash.—State v. Vosgien, 144 P. 947, 948, 82 Wash. 685.
9. Wash.—State v. Vosgien, supra.
10. Ala—Seibs v. Engelhardt, 78 Ala. 508, 510
11. Tenn.—Citizens' Rapid-Transit Co. v. Dew, 45 S.W. 790, 100 Tenn. 317, 66 Am.S R. 754, 40 L R A. 518
57 C.J. p 289 note 63.
12. Tenn—Nashville Railway & Light Co. v. State, 234 S.W. 327, 328, 144 Tenn. 446.
57 C.J. p 289 note 85.
Phrases employing the words "set apart," or "setting apart," and as to which more recent adjudications have not been found see 57 C.J. p 289 notes 87–93
13. Mo.—McLaran v. Crescent Plan

held to be synonymous with "appropriate" see 6 C.J.S. p 121 note 86.

Set out. The meaning of the expression "set out" when applied to substance, is to allot, to assign, to mark by boundaries or distinctions of space.[14] With respect to written instruments "set out" means to allege or aver;[15] to describe or incorporate;[16] to recite or state in full;[17] to recite or narrate facts or circumstances.[18]

The term "set out" has been held synonymous with "allege" see 3 C.J.S. p 884 note 72, and "sets out" is sometimes equivalent to "establishes" see 30 C.J.S. p 1231 note 36.1.

Set up. The term "set up" has a very wide latitude of meaning,[19] and various and comprehensive connotations,[20] but is, nevertheless, quite capable of being generally understood.[21] It is applied to a great variety of human actions, such as to set up a school, a factory, a store, a business, a standard, a banner, a government, a shout, a cry, a complaint, a scheme, a play, or a game,[22] and does not necessarily and exclusively apply to the construction or setting up of some physical object or design, but may be, and frequently is, used in a figurative sense.[23]

"To establish" usually implies more permanency than "to set up" see 30 C.J.S. p 1230 note 5.1, and "in operation" is said to have a meaning different from "set up" see 42 C J.S. p 479 note 17.

Setting up a still as an offense under the Internal Revenue Code and various other statutes see Internal Revenue §§ 943, 998, and Intoxicating Liquors § 220. "Set up" as a gaming term is defined in Gaming § 1 d (2).

Other phrases employing the words "set,"[24] or "setting"[25] will be found in the notes, and for additional phrases as to which more recent adjudications have not been found see 57 C.J. p 289 notes 71–75, 77, 87–93, p 291 notes 8, 9, p 293 notes 68–72, 78–86, 93.

ing Mill Co., 93 S W 819, 117 Mo App 40, 49
Tenn.—Nashville Railway & Light Co. v State, 234 S W. 327, 328, 144 Tenn 446.

14. Conn—Booth v. Booth, 7 Conn. 350, 375.

Phrases in which the term "set out" appears and as to which more recent adjudications have not been found see 57 C.J. p 291 notes 27–32, p 292 note 44.

15. D C—U S v. Watkins, 28 F. Cas No 16,649, 3 Cranch C C 441
Or—Powder Valley State Bank v Hudelson, 144 P. 494, 497, 74 Or 191.

16. Or.—Powder Valley State Bank v Hudelson, supra.

17. Neb—Chadron First Nat Bank v Engelbercht, 79 N W. 556, 58 Neb 639.

18. Or—Powder Valley State Bank v. Hudelson, 144 P. 494, 497, 74 Or 191

19. Ark.—McGarity v. State, 236 S W 611, 612, 151 Ark. 423
Or—Frisbie v. State, 1 Or 264, 267

20. Pa.—Commonwealth v. Carson, 6 Phila. 381, 383.

21 Or.—Frisbie v. State, 1 Or 264, 267.

This form of expression is too common to be misunderstood—Frisbie v. State, supra

22. Pa—Commonwealth v. Carson, 6 Phila 381, 383.

23. Or—Frisbie v. State, 1 Or. 264, 267.

Thus it is said that a man has "set up" the business of a merchant or the trade of a carpenter, or that he has "set up" in life with fair prospects—Frisbie v. State, supra

24. Phrases employing the word "set"

(1) "Set aside" see 6 C J S. p 789 note 63

(2) "Set line" see Fish §§ 1, 30

(3) "Set net" see Fish §§ 1, 30

(4) "Set on foot" see 36 C.J S p 1131 note 5, and Neutrality Laws § 3 d.

(5) "Set screw" defined see 79 C.J. S p 473 note 37.

(6) "Set upon" construed as meaning to assault—Yazoo, etc, R. Co. v. Williams, 39 So. 489, 490, 87 Miss 344

(7) "Side set," a tool made purposely to cut rivets off boilers—El Paso Southwestern R Co v. Barrett, 101 S.W. 1025, 46 Tex Civ App. 14.

(8) "Traveling set," a combination of toilet articles made up to be carried by the traveler and designed for the toilet or for the care of his person or clothing while traveling, or put up or assembled in a form which permits of their being conveniently carried by the traveler as part of the baggage to which he has daily access while traveling.—U. S. v. Mark Cross Co, 4 Ct Cust App. 274, 277—57 C J. p 293 note 76.

25. Phrases employing the word "setting"

(1) "Setting a case for trial" see the C J S title Trial § 31, also 57 C J p 292 note 46.

(2) "Setting forth" as synonymous with "allege" see 3 C.J.S. p 881 note 71.

(3) "Setting or construction plan" see Construction 16 C.J.S. p 1512 note 41.1

(4) "Setting up" synonymous with "construct" see 16 C.J.S. p 1509 note 39.

(5) "Setting up a claim" see 14 C. J.S. p 1188 note 73.

SET-OFF AND COUNTERCLAIM

This Title includes cross demands and claims as grounds of defense to actions or of cross actions; what debts or damages constitute grounds thereof, whether liquidated or unliquidated, and whether connected with, or independent of, the principal cause of action; between what parties and in what actions such cross demands and claims are available; and their operation and effect by way of recoupment or other reduction of the demand or claim sued on, or to counterbalance a recovery thereon, or as ground for affirmative relief.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. NATURE, GROUNDS, AND RIGHT TO REMEDY IN GENERAL

§ 1. Definitions and Nature

A set-off, counterclaim, plea in reconvention, or statutory recoupment is, in its nature and effect, an independent action by defendant against plaintiff.

A set-off, counterclaim, plea in reconvention, or statutory recoupment has the nature, characteristics, and effect of an independent action or suit by defendant against plaintiff,[1] and, under the con-

1. Ark.—Bronx Fire Ins. Co. v. Cooper, 58 S.W.2d 678, 187 Ark. 93.
Fla.—Edwards v. Fitchner, 139 So. 585, 104 Fla. 52.
Ill.—Wilson v. Tromly, 89 N.E.2d 22, 404 Ill. 307.
Mo.—Usona Mfg. Co. v. Shubert-Christy Corp., App., 132 S.W.2d 1101—Hauser v. Burge, App., 121 S.W.2d 314.
N.J.—Lombardi v. Camden Trust Co., 43 A.2d 506, 137 N.J.Eq. 83.
N.Y.—Wanger v. U. S. Trust Co. of N. Y., 74 N.Y.S.2d 251, 190 Misc. 73
Tex.—Weisz v. Horton, Civ.App., 148 S.W.2d 219, error dismissed, judgment correct.
Utah—Harman v. Yeager, 134 P.2d 695, 103 Utah 208.
57 C.J. p. 372 note 3.

Defendant considered as plaintiff

A defendant who files a counterclaim is in reality a "plaintiff" with respect to the counterclaim asserting a separate and independent action, notwithstanding he continues to be denominated in the title of the pleadings as defendant and hence, in respect to the counterclaim, the titular plaintiff is the "defendant."—

struction placed on code or statutory provisions in some jurisdictions, it is an action,[2] or, in effect, a separate or new suit;[3] but in other jurisdictions it is held not to be an action[4] or a proceeding.[5]

Pleas of set-off and recoupment have been held to be distinct in themselves.[6] The fundamental philosophy of all set-offs and recoupments is that they are offered by a defendant in opposition to some money demand asserted by plaintiff.[7] Where defensive matter interposed by defendant constitutes an independent cause of action and does not go to the foundation of plaintiff's claim, it cannot operate as a reduction of the demand except by way of set-off or counterclaim.[8] A true cross action or counterclaim is not the same action asserted by plaintiff because of its very nature.[9]

Composition takes place between two debts by mere operation of law as soon as they exist simultaneously to the amount of the respective sums, where the debts are equally liquidated and demandable, under circumstances that, if one had brought an action against the other, a counterclaim could have been set up.[10]

§ 2. —— Recoupment

Recoupment is of common-law origin and is the act of rebating a part of a claim, on which one is sued, by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction.

Recoupment is the act of rebating or recouping a part of a claim on which one is sued by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction.[11] It is the right of defendant, in the same action, to claim damages from plaintiff, either because he has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposed on him in the making or performance of that contract.[12] Recoupment rests on the principle that it is just and equitable to settle in one action all claims growing out of the same contract or transaction,[13] the doctrine is remedial

O'Neill Bros. v Crowley, D.C.S.C., 24 F.Supp. 705.

2. Ky.—Taylor v. Wilson, 206 S.W. 865, 182 Ky. 592
57 C.J. p. 372 note 4
Recoupment, set-off, or counterclaim as cross action see infra §§ 2, 3, 6

3. U.S.—Roberts Min. & Mill Co. v. Schrader, C.C.A.Nev., 95 F.2d 522, 524.
Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 197 So. 540, 143 Fla. 788

4. N.Y.—Otto v. Lincoln Sav. Bank of Brooklyn, 51 N.Y.S.2d 561, 268 App.Div. 400, affirmed 62 N.E.2d 236, 294 N.Y. 798.
Wis.—In re Milwaukee Commercial Bank, 294 N.W. 538, 539, 236 Wis. 105.
57 C.J. p. 372 note 5.

5. Wis.—In re Milwaukee Commercial Bank, supra.
Moratorium acts relate to proceedings or actions on an evidence of indebtedness and a set-off is not a "proceeding" or an "action" within such rule.—In re Milwaukee Commercial Bank, supra.

6. Fla.—Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 2 So.2d 890, 147 Fla. 311.

7. Del.—Mills Novelty Co. v. Transeau, 196 A. 187, 9 W.W.Harr. 86

8. Tex.—Tenison v. Wilson, Civ. App., 151 S.W.2d 327, error dismissed—De Witt v. Kent County, Civ.App., 148 S.W.2d 213, error dismissed, judgment correct

9. Tex.—Pegues v. Moss, Civ.App., 140 S.W.2d 461, error dismissed.

10. Utah.—Zion's Savings Bank & Trust Co. v. Rouse, 47 P.2d 617, 86 Utah 574.

11. U.S.—**Corpus Juris quoted in** Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959, 961.
Mo.—**Corpus Juris quoted in** Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1067, 332 Mo. 707.
Mont.—**Corpus Juris quoted in** Francisco v. Francisco, 191 P.2d 317, 320, 120 Mont. 468, 1 A.L.R.2d 625
57 C.J. p. 358 note 3

12. Ala.—Standard Sanitary Mfg. Co. v. Benson Hardware Co., 113 So. 570, 571, 225 Ala. 412—Trammell v. Robinson, 37 So.2d 142, 146, 34 Ala.App. 91.
Mo.—**Corpus Juris quoted in** Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1067, 332 Mo. 707.
Mont.—Francisco v. Francisco, 191 P.2d 317, 120 Mont. 468, 1 A.L.R.2d 625.
Pa.—Cooper v. Frost, 43 Pa.Dist. & Co. 636, 639, 5 Fay.L.J. 5, 55 York Leg.Rec. 203.
Wash.—J. A. Campbell Co. v. Holsum Baking Co., 130 P.2d 333, 339, 15 Wash.2d 239—Motor Contract Co. v. Van Der Volgen, 298 P. 705, 706, 162 Wash. 449.
57 C.J. p. 358 note 4.
Other definitions
(1) The right of a defendant to have a reduction from amount of plaintiff's damages.—Paretta v. White Acres Realty Corp., 76 N.Y.S.2d 69, 72, 190 Misc. 649.

(2) A deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another, the balance only being recovered.—National Cash Register Co. v. Joseph, 86 N.E.2d 561, 562, 299 N.Y. 200, 12 A.L.R.2d 812—57 C.J. p. 358 note 4 [a].

"Equitable recoupment" is a rule of the law which diminishes the right of a party invoking legal process to recover a debt, to the extent that he holds money or property of his debtor, to which he has no moral right.—Electric Storage Battery Co. v. Rothensies, D.C.Pa., 57 F.Supp. 731, 735, affirmed, C.C.A., 152 F.2d 521, reversed on other grounds Rothensies v. Electric Storage Battery Co., 67 S.Ct. 271, 329 U.S. 296, 91 L.Ed. 296

13. U.S.—Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959—Crossett Lumber Co. v. U. S., C.C.A.Ark., 87 F.2d 930, 109 A.L.R. 1348
Del.—Mackenzie Oil Co. v. Omar Oil & Gas Co., 154 A. 883, 4 W.W.Harr. 435, affirmed Phoenix Oil Co. v. Mackenzie Oil Co., 154 A. 894, 4 W.W.Harr. 460.
Fla.—Marianna Lime Products Co. v. McKay, 147 So. 264, 109 Fla. 275
Mo.—**Corpus Juris quoted in** Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1067, 332 Mo. 707
N.Y.—National Cash Register Co. v. Joseph, 86 N.E.2d 561, 299 N.Y. 200, 12 A.L.R.2d 812.
57 C.J. p. 359 note 14.
Object of remedy see infra § 11.

All just allowances or demands
Under the doctrine of recoupment a defendant may claim, by way of deduction, all just allowances or demands accruing to him in respect of

in character,[14] and is spoken of as a liberal and beneficial improvement on the old doctrine of failure of consideration[15]

While the remedy of recoupment is of common-law origin,[16] it is an innovation on the strict rules of the common-law;[17] it may be employed in equity,[18] and has been said to be equitable in its nature.[19] The right to recoup has been held not abolished by code provisions,[20] and even in states wherein the codes do not specifically mention recoupment as a form of pleading the right to recoup still exists[21] Originally the remedy was of very limited application,[22] but later it was greatly extended in its application,[23] although it has been said that the defense of recoupment has lost much of its identity under the codes and is generally embraced in the subject of counterclaim[24]

In the absence of a statute providing otherwise, recoupment is purely defensive and not offensive, at least when employed in a court of law.[25] It goes to the justice[26] or existence[27] of plaintiff's claim, and only to the abatement, reduction, or mitigation of the damages claimed by plaintiff.[28] However, although it is not an independent cross claim, like a separate and distinct debt,[29] it is regarded as in the

the same transactions which form the ground of the actions —Pennsylvania R. Co. v. Miller, C.C.A.Tex., 124 F.2d 160, 140 A.L.R. 811, certiorari denied 62 S.Ct. 1047, 316 U.S. 676, 86 L.Ed. 1750.

14. N.Y.—Stafford Security Co. v. Kremer, 249 N.Y.S. 670, 232 App. Div. 265, reversed on other grounds 179 N.E. 32, 258 N.Y. 1, 78 A.L.R. 822

15. N.Y.—Peuser v. Marsh, 153 N.Y.S. 381, 167 App.Div. 604, affirmed 113 N.E. 494, 218 N.Y. 505
57 C.J. p. 359 note 15.

16. U.S.—Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959—U.S. v. New York Trust Co., D.C.N.Y., 75 F.Supp. 583.
57 C.J. p. 358 note 5

Statutory right

Mich.—Ladd v. Reed, 30 N.W.2d 822, 320 Mich. 167.

Common-law principles

Recoupment is controlled by the principles of the common law—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192

17. Mich.—Flynn v. Barry, 191 N.W. 215, 221 Mich. 422.
57 C.J. p. 358 note 6.

Derived from civil law

The doctrine of recoupment was derived from the civil law, and was adopted as a part of the common law.—Pennsylvania R. Co. v. Miller, C.C.A.Tex., 124 F.2d 160, 162, 140 A.L.R. 811, certiorari denied 62 S.Ct. 1047, 316 U.S. 676, 86 L.Ed. 1750.

18. U.S.—Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959.
57 C.J. p. 358 note 7.

19. U.S.—Gooch Milling & Elevator Co. v. C. I. R., C.C.A.8, 133 F.2d 131, reversed on other grounds Helvering v. Gooch Milling & Elevator Co., 64 S.Ct. 184, 320 U.S. 418, 88 L.Ed. 139, vacated on other grounds, C.C.A., 142 F.2d 452.

Special circumstances

A plea of recoupment is permitted if special circumstances exist which entitle defendant to equitable relief —Hellberg v. Norris, N.H., 84 A.2d 835

20. Ark.—State v. Arkansas Brick, etc., Co., 135 S.W. 843, 98 Ark. 125, 33 L.R.A.,N.S., 376.

21. Ohio—Brunet v. Holden Paper Box Co., 16 Ohio N.P.,N.S., 465.
57 C.J. p. 358 note 10

Recognition or adoption of doctrine

(1) The doctrine of recoupment is recognized in Oregon—Welch Holding Co. v. Galloway, 89 P.2d 559, 161 Or. 515.

(2) The doctrine of recoupment, being part of the common law of England in 1840, was expressly adopted by Texas, and has existed since in unimpaired form in Texas —Pennsylvania R. Co. v. Miller, C.C.A.Tex., 124 F.2d 160, 140 A.L.R. 811, certiorari denied 62 S.Ct. 1047, 316 U.S. 676, 86 L.Ed. 1750

22. W.Va.—Baltimore, etc., R. Co. v. Jameson, 13 W.Va. 833, 31 Am.R. 775.
57 C.J. p. 358 note 12.

23. Mo.—Grand Lodge of Masons v. Knox, 20 Mo. 433
57 C.J. p. 359 note 13.

24. Mo.—Brush v. Miller, Mo.App., 208 S.W.2d 816.

25. U.S.—Gooch Milling & Elevator Co. v. C. I. R., C.C.A.8, 133 F.2d 131, reversed on other grounds Helvering v. Gooch Milling & Elevator Co., 64 S.Ct. 184, 320 U.S. 418, 88 L.Ed. 139, vacated on other grounds, C.C.A., 142 F.2d 452.

Ala.—Standard Sanitary Mfg. Co. v. Benson Hardware Co., 143 So. 570, 571, 225 Ala. 412.

Fla.—Storrs v. Storrs, 178 So. 841, 130 Fla. 711—**Corpus Juris cited** in Marianna Lime Products Co. v. McKay, 147 So. 264, 266, 109 Fla. 275.

Ill.—**Corpus Juris cited in** General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 487, 358 Ill. 541.

Miss.—Moore v. Abdalla, 19 So.2d 502, 197 Miss. 125.

Mo.—**Corpus Juris cited in** State v. Weatherby, 129 S.W.2d 887, 893, 344 Mo. 848—Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1067, 332 Mo. 707—Brush v. Miller, App., 208 S.W.2d 816.
57 C.J. p. 359 note 16.

Lack of right to judgment for excess over plaintiff's claim see infra § 61.

26. U.S.—City of Grand Rapids, Mich., v. McCurdy, C.C.A.Mich., 136 F.2d 615

Fla.—Peacock Hotel v. Shipman, 138 So. 44, 103 Fla. 633.

Pa.—Artex Imp. Co. v. Borushko, Com.Pl., 98 Pittsb.Leg.J. 506.

27. U.S.—Pennsylvania R. Co. v. Miller, C.C.A.Tex., 124 F.2d 160, 140 A.L.R. 811, certiorari denied 62 S.Ct. 1047, 316 U.S. 676, 86 L.Ed. 1750—U. S. v. New York Trust Co., D.C.N.Y., 75 F.Supp. 583

28. U.S.—Electric Storage Battery Co. v. Rothensies, C.C.A.Pa., 152 F.2d 521, 526, reversed on other grounds Rothensies v. Electric Storage Battery Co., 67 S.Ct. 271, 329 U.S. 296, 91 L.Ed. 296—Gooch Milling & Elevator Co. v. C. I. R., C.C.A.8, 133 F.2d 131, reversed on other grounds, C.C.A., Helvering v. Gooch Milling & Elevator Co., 64 S.Ct. 184, 320 U.S. 418, 88 L.Ed. 139, vacated on other grounds, C.C.A., 142 F.2d 452—Pennsylvania R. Co. v. Miller, C.C.A.Tex., 124 F.2d 160, 140 A.L.R. 811, certiorari denied 62 S.Ct. 1047, 316 U.S. 676, 86 L.Ed. 1750—U. S. v. New York Trust Co., D.C.N.Y., 75 F.Supp. 583.

Fla.—Storrs v. Storrs, 178 So. 841, 130 Fla. 711.

Ill.—**Corpus Juris cited in** General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 487, 358 Ill. 541.

Mo.—**Corpus Juris cited in** State v. Weatherby, 129 S.W.2d 887, 893, 344 Mo. 848—Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1067, 332 Mo. 707—Brush v. Miller, App., 208 S.W.2d 816.
57 C.J. p. 359 note 17.

29. Ala.—Grisham v. Bodman, 20 So. 514, 111 Ala. 194.
57 C.J. p. 359 note 18.

nature of a cross action,[30] wherein defendant alleges that he has been injured by a breach by plaintiff of another branch of the same contract on which the action is founded,[31] and claims to stop, cut off, or keep back as much of plaintiff's damages as will satisfy the damages which have been sustained by defendant.[32] It implies that plaintiff has a cause of action[33] and that defendant, too, has a cause of action growing out of a breach of some other part of the contract on which the action is founded, or for some other cause connected with the contract.[34] In recoupment a defendant establishes a defense only to the extent to which he proves damage, and if he produces no evidence of damage he makes no case in recoupment.[35]

§ 3. —— Set-Off in General

A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action, and the principles thereof may be applied both at law and in equity.

A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action;[36] the right which exists between two parties, each of whom under an independent contract owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that in any action brought for the larger debt the residue only, after deduction, may be recovered.[37] It has been said that a set-off is in the nature of a cross action,[38] and constitutes a cause of action.[39] In some cases it is asserted that the right of set-off attaches to the remedy only, and not to the debt itself;[40] but in other cases it is said that the right of set-off, although first introduced as a part of the

30. Del —Mackenzie Oil Co v. Omar Oil & Gas Co, 154 A 883, 4 W W. Harr 435, affirmed Phoenix Oil Co v Mackenzie Oil Co, 154 A. 894, 4 W.W Harr. 460
Iowa —**Corpus Juris quoted in** Kelly v Emary, 45 N W.2d 866, 869
Mich —Watson-Higgins Milling Co v Pere Marquette Ry Co, 43 N.W. 2d 43, 328 Mich. 5—Smith v Erla, 26 N.W 2d 728, 317 Mich 109—Lyons v City of Grand Rapids, 9 N.W.2d 552, 554, 305 Mich 309.
57 C.J. p 359 note 19.

Pleas of recoupment are in effect complaints and declarations of defendant against plaintiff.—Trammell v. Robinson, 37 So.2d 142, 34 Ala App 91.

31. Iowa.—**Corpus Juris quoted in** Kelly v. Emary, 45 N.W.2d 866, 869
57 C.J. p 359 note 20.

32. U S —City of Grand Rapids, Mich. v McCurdy, C C.A.Mich., 136 F.2d 615.
Iowa.—**Corpus Juris quoted in** Kelly v. Emary, 45 N.W.2d 866, 869.
57 C.J. p 359 note 21.

The theory of recoupment is that plaintiff's damages are cut down to an amount which will compensate him for the value of what plaintiff has given, the theory being that defendant is not bound to perform contract, but has received something of value for which he should pay.—Tripp v. Renhard, 200 P.2d 644, 184 Or. 622.

33. Fla —**Corpus Juris cited in** Farnham v. Blount, 11 So 2d 785, 788, 152 Fla 208—Storrs v. Storrs, 178 So. 841, 130 Fla. 711—**Corpus Juris cited in** Marianna Lime Products Co v. McKay, 147 So. 264, 266, 109 Fla. 275
57 C.J. p 359 note 22.

34. Fla —**Corpus Juris cited in** Farnham v. Blount, 11 So.2d 785, 788, 152 Fla. 208—Storrs v. Storrs, 178 So 841, 130 Fla. 711—**Corpus Juris cited in** Marianna Lime Products Co v McKay, 147 So. 264, 266, 109 Fla 275
57 C J p 359 note 23.

Consequential damages may be allowed by plea in recoupment on proper showing —Jacksonville Paper Co v Smith & Winchester Mfg. Co., 32 So 2d 326, 159 Fla 532.

35. Mass —Bank of U. S. v. Thomson & Kelly Co., 195 N E 115, 290 Mass. 224.

36. U S —**Corpus Juris quoted in** Howard Johnson, Inc, of Fla. v Tucker, C.C.A Fla., 157 F 2d 959, 961—Nash v Raun, D C Pa., 67 F. Supp 212, 215—Marks v. Spitz, D. C Mass, 4 F.R.D. 348, 350.
Ind —Devenev v Treesh, 72 N.E.2d 578, 579, 117 Ind App 374
Pa —Beason v. Pierce, 184 A 650, 651, 321 Pa. 398—Davis v. Martin, 52 Pa Dist. & Co 449, 451.
57 C.J. p 359 note 25.

Other definitions

(1) The discharge or reduction of one demand by an opposite one.
U.S.—Auten v U. S. National Bank, Ark, 19 S Ct. 628, 637, 174 U.S. 125, 43 L Ed 920—Clarke v Hot Springs Electric Light & Power Co, C C A. Wyo., 76 F 2d 918, 924, certiorari denied 56 S Ct. 147, 296 U.S. 624, 80 L.Ed 443.
Ariz —American Smelting & Refining Co. v. Swisshelm Gold Silver Co, 160 P.2d 757, 760, 63 Ariz 204.

(2) A defense or independent demand of a defendant made to counterbalance plaintiff's demand in whole or in part.
Ariz.—American Smelting & Refining Co. v Swisshelm Gold Silver Co, supra.
Ga.—Cox v. Stowers, 50 S.E 2d 339, 342, 204 Ga 595.

(3) A cross claim for which an action might be maintained against plaintiff —American Smelting & Refining Co. v. Swisshelm Gold Silver Co, supra—57 C J. p 359 note 25 [a] (6).

(4) A money demand independent of, and unconnected with, plaintiff's cause of action —Otto v. Lincoln Sav. Bank of Brooklyn, 51 N Y.S 2d 561, 563, 268 App Div. 400, affirmed 62 N E 2d 236, 294 N.Y. 798

(5) A mode of defense whereby defendant acknowledges the justice of complainant's demand and sets up his own demand to counterbalance it. —Peacock Hotel v. Shipman, 138 So 44, 47, 103 Fla. 633.

37. Fla —Everglade Cypress Co v. Tunnicliffe, 148 So. 192, 193, 107 Fla. 675.
Ind —Teeters v. City Nat. Bank of Auburn, 14 N E 2d 1004, 1005, 214 Ind 498, 118 A L.R. 383.
Md —Ghingher v Fanseen, 172 A. 75, 78, 166 Md 519.
N.J.—Scarano v. Scarano, 28 A 2d 425, 429, 132 N J Eq 362—John Wills, Inc., v Citizens Nat Bank of Netcong, 16 A.2d 804, 806, 125 N J Law 516.
Ohio.—Witham v. South Side Building & Loan Ass'n of Lima, 15 N E 2d 149, 150, 133 Ohio St. 560—State ex rel. Village of Warrensville Heights v. Fulton, 190 N E. 383, 385, 128 Ohio St. 192.

38. Ala —Myles v. Strange, 145 So. 313, 226 Ala. 49.
57 C.J. p 360 note 26.
"Set-off" as "action" see supra § 1.
"Counter action"
Ind —Sams v. Kern, 98 N.E 2d 920, 921, 121 Ind App. 370

39. Hawaii.—Paxson v. Schuman Carriage Co, 24 Hawaii 393
Mass —Tilton v. Goodwin, 66 N E. 802, 183 Mass. 236.

40. Mo.—Wabash R. Co. v. Bowring, 77 S.W. 106, 103 Mo.App 158.

procedural law,[41] has been recognized and regarded as a matter of substantive right or justice,[42] affecting the substantive relations between the parties,[43] rather than a mere procedural convenience.[44]

The right of set-off is based on principles of right, justice, and benevolence.[45] The doctrine is remedial in character,[46] and is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it.[47] Set-off contemplates the right existing between two parties to set off their debts by mutual deduction.[48] It is not incompatible with the justice of plaintiff's claim but seeks to balance it in whole or in part by a counter obligation alleged to be due by plaintiff to defendant in another transaction.[49] Under the doctrine of set-off, where parties dealing together become mutually indebted, ordinarily only the balance is recoverable,[50] however, instances may arise where, under unusual circumstances, this doctrine is not applied.[51] Set-off does not require an equal balance.[52]

The broad equitable principles of set-off may be applied both at law and in equity in a proper case,[53] and courts of law and equity follow the same general doctrines on the subject.[54] Moreover, the distinction between legal and equitable set-offs is without importance in jurisdictions where equitable defenses are permitted in actions at law[55] or where both law and equity are administered in the same court.[56]

The right of set-off is an exercisable right, and not a fixed or natural right conclusively established by the mere fact that each of the parties has a claim against the other;[57] until the right is exercised, either party may do what he pleases with his property.[58] Set-off is an incident of judicial proceedings in which both parties become actors and is accomplished only by judicial action.[59]

Offset. The term "offset" is used quite commonly as a synonym of "set-off."[60] It has been defined as a contrary claim or demand by which a given claim may be lessened or canceled;[61] a demand which a defendant makes against plaintiff in the

41. U.S.—The Gloria, D.C.N.Y., 286 F. 188, questions certified, C.C.A., Luckenbach S. S. Co. v. The Thekla, 295 F. 1020, certified questions answered 45 S.Ct. 112, 266 U.S. 328, 69 L.Ed. 313.

42. U.S.—Wisdom v. Guess Drycleaning Co., D.C.Miss., 5 F.Supp. 762.
57 C.J. p. 360 note 29

43. U.S.—The Gloria, D.C.N.Y., 286 F. 188, questions certified, C.C.A., Luckenbach S. S. Co. v. The Thekla, 295 F. 1020, certified questions answered 45 S.Ct. 112, 266 U.S. 328, 69 L.Ed. 313.

44. U.S.—The Gloria, D.C.N.Y., 286 F. 188, questions certified, C.C.A., Luckenbach S. S. Co. v. The Thekla, 295 F. 1020, certified questions answered 45 S.Ct. 112, 266 U.S. 328, 69 L.Ed. 313.

45. Del.—Reed v. Central Nat. Bank of Wilmington, 184 A. 772, 7 W.W. Harr. 429.
N.Y.—People v. American Surety Co. of New York, 272 N.Y.S. 2, 241 App. Div. 199, affirmed 195 N.E. 212, 266 N.Y. 585.

The basic principle underlying the law of set-off is that a defendant has the right to set off against plaintiff's demand or claim any claim or demand that he may have against plaintiff extrinsic to the transaction out of which plaintiff's claim arises, where the cross demands are mutual, arise out of the same right, are due and payable, and are liquidated.—Ghingher v. Fanseen, 172 A. 75, 166 Md. 519.

Occasion for application of set-off

The occasion for set-off arises when one who is sued may have no defense to the exact cause of action sued upon, but may have a cause of action against the person suing him, and he asks the court to allow him in the same action to set up his cause against the party suing him so as to try to balance his cause against the suit filed against him, and so that the court hearing the suit containing the cause and the counter cause may determine what is the liability of each and set off one liability against the other.—Turkenkoph v. Te Beest, 232 P.2d 684, 55 N.M. 279.

46. N.Y.—Stafford Security Co. v. Kremer, 219 N.Y.S. 670, 232 App. Div. 265, reversed on other grounds 179 N.E. 32, 258 N.Y. 1, 78 A.L.R. 822.

47. N.Y.—People v. American Surety Co. of New York, 272 N.Y.S. 2d, 241 App.Div. 199, affirmed 195 N.E. 212, 266 N.Y. 585.

48. U.S.—Hulse v. Knapp, D.C.N.Y., 20 F.Supp. 137.

49. U.S.—Nash v. Raun, D.C.Pa., 67 F.Supp. 212.
Pa.—Beason v. Pierce, 184 A. 650, 651, 321 Pa. 398.—Davis v. Martin, 52 Pa.Dist. & Co. 449, 451.

50. U.S.—Bernheimer v. First Nat. Bank, C.C.A.Cal., 78 F.2d 139, certiorari denied 56 S.Ct. 172, 296 U.S. 639, 80 L.Ed. 454.

51. U.S.—Bernheimer v. First Nat. Bank, supra

Money derived from particular source should be first applied to relief of such source before independent claims can be set off against it.—Heflin v. Heflin, 134 So. 20, 222 Ala. 662.

52. Vt.—Lalime v. Desbiens, 55 A.2d 121, 115 Vt. 165.

53. U.S.—In re Susquehanna Chemical Corp., D.C.Pa., 81 F.Supp. 1, affirmed, C.C.A., Susquehanna Chemical Corp. v. Producers Bank & Trust Co., Bradford, Pa., 174 F.2d 783
S.C.—Ex parte Mechanics Federal Savings & Loan Ass'n of Rock Hill, 18 S.E.2d 592, 199 S.C. 23, 139 A.L.R. 714.

54. N.Y.—Bank of U. S. v. Braveman, 181 N.E. 50, 259 N.Y. 65, 82 A.L.R. 658.—Duncan v. Lyon, 3 Johns. Ch. 351, 358, 8 Am.D. 513.

55. U.S.—Storing v. First Nat. Bank, C.C.A.Minn., 28 F.2d 587.

56. N.C.—Dameron v. Carpenter, 130 S.E. 328, 190 N.C. 595.

57. Pa.—U. S. Bank & Trust Co. Case, 166 A. 871, 311 Pa. 320, followed in Fayette City Nat. Bank v. Sambert, 172 A. 9, 315 Pa. 129.

58. Pa.—U. S. Bank & Trust Co. Case, 166 A. 871, 311 Pa. 320, followed in Fayette City Nat. Bank v. Sambert, 172 A. 9, 315 Pa. 129.

59. Mass.—Lane v. Volunteer Co-op. Bank, 30 N.E.2d 821, 307 Mass. 508.

60. Vt.—Lalime v. Desbiens, 55 A.2d 121, 115 Vt. 165.

61. Vt.—**Corpus Juris cited in** Lalime v. Desbiens, 55 A.2d 121, 123, 115 Vt. 165.
46 C.J. p. 1086 note 84.

suit for the purpose of liquidating the whole or a part of his claim [62]

§ 4. —— Statutory Set-Off

The right or remedy of set-off was unknown at common law and is purely statutory in origin.

The right or remedy of set-off in actions at law is purely statutory,[63] it was unknown at early common law,[64] according to which a defendant who had a demand against a plaintiff was compelled to resort either to his cross action or a bill in chancery,[65] except in the few instances in which the limited right of recoupment was available.[66] This condition of the law led to the enactment by statute of the remedy of set-off,[67] which was designed by allowing set-offs in actions at law to supersede, or obviate the necessity of a resort to, bills in equity for that purpose.[68]

The ancient common-law rule prohibiting the allowance of a set-off was changed in England by an early statute [69] In a few states statutes of set-off were passed before the English statute,[70] or the English statute was not adopted,[71] and in some other states set-off, as such, is not, or at least at one time was not, provided for or recognized in code or statutory provisions.[72]

English decisions construing English statutes are considered to be in point in the construction of the American statutes based thereon,[73] but in some states the statutes so differ from the English stat-

62. Vt.—Lalime v Desbiens, 55 A 2d 121, 123, 115 Vt. 165

63. U S —**Corpus Juris cited in** Howard Johnson, Inc, of Fla. v Tucker, C C A Fla, 157 F 2d 959, 961—Gray v School Dist. of Borough of Brownsville, C C A Pa., 67 F 2d 141, 143, certiorari denied Hustead v School Dist. of Borough of Brownsville, 54 S Ct 377, 291 U S 660, 78 L Ed 1052—Clark Car Co v Clark, C C A Pa, 48 F.2d 169
Del —**Corpus Juris cited in** Reed v. Central Nat. Bank of Wilmington, 184 A. 772, 774, 7 W W.Harr 429
Fla —Proodian v. Plymouth Citrus Growers Ass'n, 6 So.2d 531, 149 Fla. 507—Everglade Cypress Co v Tunnicliffe, 148 So 192, 107 Fla 675
Ga.—Ætna Ins Co. v. Lunsford, 177 S.E. 727, 179 Ga. 716.
Ill —**Corpus Juris cited in** General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 487, 358 Ill. 541.
Ind.—Anderson v. Biggs, 77 N E.2d 909, 118 Ind.App. 266
Md —**Corpus Juris cited in** Ghingher v. Fanseen, 172 A. 75, 78, 166 Md. 519
Mo.—**Corpus Juris cited in** State v Weatherby, 129 S W 2d 887, 893, 344 Mo 848—Sturdivant Bank v. Stoddard County, 58 S.W.2d 702, 332 Mo 568.
N.J —**Corpus Juris cited in** Scarano v. Scarano, 28 A 2d 425, 429, 132 N.J.Eq. 362.
N.M —Turkenkoph v. Te Beest, 232 P.2d 684, 55 N.M. 279.
N.Y.—Otto v. Lincoln Sav. Bank of Brooklyn, 51 N Y S.2d 561, 268 App. Div. 400, affirmed 62 N E 2d 236, 294 N.Y. 798—Siegel v. State, 28 N.Y.S.2d 958, 262 App.Div. 388.
Pa.—**Corpus Juris quoted in** City of Pittsburgh v Gribbin, 51 Pa.Dist. & Co. 587, 593, 92 Pittsb.Leg.J. 433.
Wis.—**Corpus Juris cited in** In re Seybold's Estate, 270 N W 87, 89, 223 Wis 192.
57 C J p 360 note 33.

64. U S —Clark v. Manufacturers Trust Co, C.A.N Y, 169 F.2d 932, affirmed in part and vacated in part on other grounds McGrath v Manufacturers Trust Co, 70 S Ct 4, 338 U S. 241, 94 L Ed. 31.
Conn.—Savings Bank of New London v Santaniello, 33 A.2d 126, 130 Conn 206
Fla —Everglade Cypress Co v. Tunnicliffe, 148 So. 192, 107 Fla. 675—Coffin v. Talbot, 148 So. 184, 110 Fla 131.
Ill —**Corpus Juris cited in** General Motors Acceptance Corporation v. Vaughn, 193 N E 483, 487, 358 Ill 541—**Corpus Juris cited in** Willis v Fidelity & Deposit Co of Md, 103 N.E.2d 513, 518, 345 Ill App 373
Ind —Anderson v. Biggs, 77 N.E.2d 909, 118 Ind App 266.
Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S W 2d 922, 246 Ky. 278.
Md.—**Corpus Juris cited in** Ghingher v. Fanseen, 172 A. 75, 78, 166 Md 519.
N H.—Arcadia Knitting Mills v Elliott Mfg. Co., 195 A. 681, 89 N H. 188.
N J —**Corpus Juris cited in** Scarano v. Scarano, 28 A 2d 425, 429, 132 N J.Eq 362.
N M.—Turkenkoph v. Te Beest, 232 P.2d 684, 55 N M. 279.
N Y.—Otto v. Lincoln Sav. Bank of Brooklyn, 51 N.Y.S 2d 561, 268 App Div. 400, affirmed 62 N.E 2d 236, 294 N.Y. 798—Siegel v. State, 28 N.Y.S.2d 958, 262 App Div. 388
Pa.—**Corpus Juris quoted in** City of Pittsburgh v. Gribbin, 51 Pa.Dist. & Co. 587, 593, 92 Pittsb.Leg.J. 433
Va.—Copperthite Pie Corporation v. Whitehurst, 162 S.E. 189, 157 Va. 480.
Wis —**Corpus Juris cited in** In re Seybold's Estate, 270 N W 87, 89, 223 Wis 192
57 C J p 360 note 33.

65. Conn.—Hartford Nat Bank & Trust Co v. Riverside Trust Co, 167 A. 811, 117 Conn 276
57 C J p 361 note 35.
Equitable set-off see infra § 5.

66. W Va.—Baltimore, etc., R Co v. Jameson, 13 W Va. 833, 31 Am.R. 775

67. U S —Clark v. Manufacturers Trust Co, C.A N Y, 169 F 2d 932, affirmed in part and vacated in part on other grounds McGrath v. Manufacturers Trust Co., 70 S Ct 4, 338 U S 241, 94 L.Ed. 31—Marks v Spitz, D.C.Mass., 4 F R D 348, 350.
Conn —Hartford Nat. Bank & Trust Co. v. Riverside Trust Co, 167 A 811, 117 Conn. 276.
Ind —Anderson v Biggs, 77 N.E 2d 909, 118 Ind App 266.
57 C.J. p 361 note 37.

68. Vt —Blake v. Langdon, 19 Vt. 485, 47 Am D. 701.
57 C.J p 361 note 38
Liberal construction of statutes see infra § 11.
Statutes as not taking away equitable jurisdiction see infra § 5.

69. Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S W.2d 922, 924, 246 Ky 278.
57 C.J. p 361 note 39.

70. Pa —City of Pittsburgh v Gribbin, 51 Pa Dist & Co 587, 92 Pittsb. Leg J. 433.
57 C J. p 361 note 41.

71. Mass.—Stowers v. Barnard, 15 Pick 221.

72. Mont —Dolenty v. Rocky Mountain Bell Tel. Co., 108 P 921, 41 Mont 105.
57 C.J. p 361 note 43.

73. U S.—Pate v Gray, Super Ark., 18 F Cas No 10,794a, Hempst. 155.
57 C.J. p 361 note 44.

ute that the English decisions are held to be not of great weight in their construction.[74]

§ 5. —— Equitable Set-Off

a. In general
b. Grounds

a. In General

Equity has inherent power, as part of its general jurisdiction, and independently of statute, to allow or compel a set-off. Generally, equity will follow the law with respect to matters of set-off unless a departure from the rules obtaining in courts of law is necessary to prevent wrong and injustice.

In order to be complete, a definition of "set-off" must embrace equitable set-off.[75] A court of equity, or a court possessing equitable jurisdiction, has inherent[76] power,[77] as a part of its general jurisdiction,[78] to allow or compel a set-off. This power is independent of statutes allowing a set-off,[79] it was recognized and exercised prior to the enactment of such statutes,[80] and it has not been taken away by their enactment[81] or affected by their repeal.[82] As sometimes stated, the right of set-off is an equitable right[83] or a creature of equity,[84] and is founded on equitable principles.[85] The character

74. Vt—Hubbard v. Fisher, 25 Vt 539.
57 C.J. p 361 note 45.

75. Conn.—Downing v. Wilcox, 80 A 288, 84 Conn 437.
Equitable claims and demands generally see infra § 44.

76. U S.—**Corpus Juris cited in** In re First Nat Bank, D C Ill., 23 F Supp 255, 258—**Corpus Juris cited in** Williams v. Thomas, D C S D, 6 F Supp 1011, 1014—**Corpus Juris cited in** Messick v Rardin, D C. Ill, 6 F.Supp. 200, 202, appeal dismissed, C C.A., Rardin v. Messick, 78 F 2d 643
N J—Scarano v Scarano, 28 A.2d 425, 132 N J Eq 362.
57 C.J p 361 note 48.

77. U S—American Surety Co. v. Calcasieu Oil Co, D.C La., 3 F. Supp 939
Conn—Hartford Nat. Bank & Trust Co v. Riverside Trust Co, 167 A. 811, 117 Conn. 276.
Mo—Sturdivant Bank v Stoddard County, 58 S W 2d 702, 332 Mo. 568—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S W.2d 425, 426, 230 Mo App 800
N D—Marmarth School Dist. No 12 of Slope County v. Hall, 260 N.W 411, 65 N D 509
Va—Copperthite Pie Corporation v. Whitehurst, 162 S E. 189, 157 Va 480.
57 C.J p 361 note 49.

Enlargement of right by statute
Jurisdiction in equity is sufficiently expansive to administer remedy necessary to protect right of set-off as enlarged by local statute—Wisdom v Guess Drycleaning Co., D.C Miss., 5 F Supp. 762

78. U S.—**Corpus Juris cited in** In re First Nat. Bank, D.C Ill, 23 F. Supp 255, 258
Ky.—**Corpus Juris cited in** Bryant Bros. v. Wilson, 69 S.W.2d 1020, 1022, 253 Ky. 578.
Md.—**Corpus Juris cited in** Ghingher v. Fanseen, 172 A. 75, 78, 166 Md 519
57 C J. p 361 notes 48, 49.

79. U S—Clarke v Hot Springs Electric Light & Power Co, C.C. A Wyo, 76 F 2d 918, certiorari denied 56 S Ct 147, 296 U.S. 624, 80 L Ed 443—Shannon v. Sutherland, C C A S C, 74 F 2d 530, 79 A L R 583—Clark Car Co v. Clark, C C A Pa, 48 F.2d 169—**Corpus Juris cited in** In re First Nat Bank, D C Ill, 23 F Supp 255, 258—J L Hudson Co v Thomas, D.C Mich, 6 F Supp 857—**Corpus Juris cited in** Messick v Rardin, D.C Ill, 6 F. Supp. 200, 202, appeal dismissed, C. C.A, Rardin v. Messick, 78 F 2d 643
Ill—Willis v. Fidelity & Deposit Co of Md, 103 N E 2d 513, 345 Ill.App 373.
Ind—Anderson v. Biggs, 77 N E.2d 909, 118 Ind App 266
Ky—**Corpus Juris cited in** Bryant Bros. v Wilson, 69 S.W 2d 1020, 1022, 253 Ky. 578.
Md—Frank v Wareheim, 7 A.2d 186, 177 Md 43
Mo—Sturdivant Bank v. Stoddard County, 58 S.W 2d 702, 332 Mo 568.
N H—**Corpus Juris cited in** Arcadia Knitting Mills v. Elliott Mfg. Co, 195 A. 681, 682, 89 N H. 188.
N J—Scarano v. Scarano, N.J.Ch., 28 A 2d 425, 132 N J Eq 362.
N.Y.—Burns v. Lopez, 175 N E 537, 256 N.Y. 123—Rothschild v Mack, 21 N.E. 726, 115 N Y. 1—Siegel v State, 28 N Y.S 2d 958, 262 App. Div 388.
Okl—Southern Surety Co. of New York v. Maney, 121 P.2d 295, 190 Okl. 129.
57 C J. p 361 note 50

80. U S—**Corpus Juris cited in** Messick v Rardin, D C.Ill, 6 F. Supp 200, 202, appeal dismissed, C. C A, Rardin v. Messick, 78 F 2d 643.
N H—Arcadia Knitting Mills v. Elliott Mfg. Co, 195 A. 681, 89 N.H 188.
N Y.—Siegel v. State, 28 N.Y.S 2d 958, 262 App.Div. 388.
57 C.J. p 362 note 51.

81. U.S.—**Corpus Juris cited in** Messick v. Rardin, D C Ill, 6 F. Supp. 200, 202, appeal dismissed, C.C A., Rardin v. Messick, 78 F.2d 643.
N H—**Corpus Juris cited in** Arcadia Knitting Mills v. Elliott Mfg. Co., 195 A. 681, 682, 89 N H 188.
57 C.J p 362 note 52.

82. U S—**Corpus Juris cited in** Messick v. Rardin, D C Ill, 6 F Supp 200, 202, appeal dismissed, C.C A, Rardin v. Messick, 78 F 2d 643
N H—**Corpus Juris cited in** Arcadia Knitting Mills v. Elliott Mfg Co, 195 A 681, 682, 89 N.H. 188.
N Y—Siegel v State, 28 N.Y.S 2d 958, 262 App Div 388.
57 C J. p 362 note 53.

83. Ga—Ætna Ins Co v. Lunsford, 177 S E 727, 179 Ga 716.
Ohio—Pugh v. Conklin, 184 N E 847, 44 Ohio App 272.
Tex—Watts v. Gibson, Civ.App, 33 S.W.2d 777.

84. U S.—Commissioners of Sinking Fund of Louisville v Anderson, D C.Ky., 20 F.Supp. 217, affirmed for plaintiff, C.C.A, 110 F 2d 961, certiorari denied Commissioner of Sinking Fund of City of Louisville v. Anderson, 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—American Bonding Co v. Anderson, D.C.Ky., 20 F Supp. 217, reversed for defendant on other grounds, C.C.A., 110 F 2d 961.
Iowa—Andrew v. American Sav. Bank & Trust Co., 251 N.W. 48, 217 Iowa 657.
N D—Marmarth School Dist. No. 12 of Slope County v. Hall, 260 N.W. 411, 65 N D 509.
57 C.J. p 362 note 51 [a].

85. N J.—Newman v. Hatfield Wire & Cable Co., 174 A. 491, 113 N.J. Law 484.
Pa.—People's Bank v. McDowell Nat. Bank, 161 A 203, 307 Pa. 247.
S C—Brown v. Lowe, 188 S.E. 182, 182 S C. 9.

Equitable maxims
Equity has recognized right of set-off in exercise of its broad powers to prevent circuity of action, to enforce maxim that he who seeks equity must do equity, and in general to do equity between parties where such legal right of set-off as existed was not adequate to accomplish this

of the demand does not determine the jurisdiction of equity to entertain a plea of set-off.[86]

Discretion. Set-off in equity is not a matter of right,[87] but rests largely in the discretion of the court[88] as defined by well-recognized equitable principles of universal application.[89]

Adequacy of remedy at law. Equity will not aid a defendant in an action at law as to matters of set-off when his legal remedies are complete and adequate,[90] but it may allow a set-off where, from the nature of the claim or situation of the parties, justice cannot be done at law.[91] The right of a court of equity to take jurisdiction to enforce a set-off extends to cases where there is an intervening equity not reached by the law;[92] and the mere fact that a party claiming an equitable set-off may by assumpsit effect a recovery on his claim and collect it by execution or other legal process does not constitute in all cases, and under all circumstances, a complete and adequate remedy at law so as to preclude relief in equity.[93]

Adherence to, or departure from, legal rules. Courts of equity, as a general rule, put the same construction on statutes of set-off as do courts of law,[94] and generally follow the law with respect to matters of set-off.[95] However, the doctrine of set-off is more flexible in equity than in law,[96] and is sometimes applied independently of the limitations which attach to legal or statutory set-offs.[97] Thus equity may allow a set-off where a relaxation of, or departure from, the rules obtaining in courts of law is necessary to prevent wrong and injustice,[98]

result and case fell within limits of recognized equitable principles—Savings Bank of New London v Santaniello, 33 A.2d 126, 130 Conn 206.

86. Ga—Quitman Cooperage Co v. People's First Nat. Bank, 172 S E 17, 178 Ga 90—Hecht v. P. H. Snook & Austin Furniture Co, 41 S.E. 74, 114 Ga. 921.

87. N Y.—Reisman v Independence Realty Corp, 89 N Y S 2d 763, 195 Misc 260, affirmed 100 N.Y.S 2d 407, 277 App.Div 1020.

88. N.Y.—Reisman v. Independence Realty Corp, supra.
N.D—Marmarth School Dist No 12 of Slope County v. Hall, 260 N W 411, 65 N.D. 509.

89. N.Y.—Reisman v. Independence Realty Corp., 89 N.Y S.2d 763, 195 Misc. 260, affirmed 100 N.Y.S 2d 407, 277 App.Div. 1020.

90. Mass—In re Francis & Badger Motor Co., 8 N E 2d 797, 297 Mass 366
Utah.—**Corpus Juris cited in** Reeve v Blatchley, 147 P.2d 861, 865, 106 Utah 259
57 C J. p 362 note 54.

91. U S—U. S. v National City Bank of New York, C C A N.Y., 83 F.2d 236, 106 A.L.R. 1235, certiorari denied 57 S.Ct. 25, 299 U.S 563, 81 L Ed 414
Wash.—**Corpus Juris cited in** Reichlin v First Nat. Bank in Montesano, 51 P.2d 380, 384, 184 Wash 304
57 C J p 362 note 55.

Inconvenience
In equity, inconvenience will not be allowed to accomplish injustice by preventing set-off where it appears that defendant has no adequate means for recovery in separate suit.
U.S.—U. S. v. National City Bank of New York, C C A N Y., 83 F 2d 236, 106 A L R 1235, certiorari denied 57 S.Ct. 25, 299 U.S 563, 81 L Ed 414.
Mich.—In re McLouth's Estate, 274 N W 759, 281 Mich. 191.

92. Ala.—Fischer v. Pope, 171 So. 752, 233 Ala. 301.
Ga—Quitman Cooperage Co. v People's First Nat. Bank, 172 S E 17, 178 Ga. 90—Hecht v. P. H. Snook & Austin Furniture Co, 41 S E 74, 114 Ga 921.

93. Ala—Dudley v. Whatley, 14 So 2d 141, 244 Ala. 508, 147 A.L.R 508.

94. Mo—**Corpus Juris cited in** Sturdivant Bank v Stoddard County, 58 S.W 2d 702, 703, 332 Mo 568.
57 C.J p 362 note 56.

95. U S—Wisdom v. Guess Drycleaning Co., D C Miss., 5 F.Supp 762.
Ala.—Heflin v. Heflin, 134 So 20, 222 Ala 662.
Ind—Anderson v. Biggs, 77 N E 2d 909, 118 Ind App 266
Mo—**Corpus Juris cited in** Sturdivant Bank v Stoddard County, 58 S.W 2d 702, 703, 332 Mo 568—Smith v Citizens Bank of Gerald, 106 S. W 2d 45, 232 Mo App. 906—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S W 2d 425, 426, 230 Mo.App 800
N Y—Pink v. Title Guarantee & Trust Co, 8 N E 2d 321, 274 N Y. 167, reargument denied 10 N E 2d 575, 274 N Y. 610.
N D.—Marmarth School Dist No. 12 of Slope County v. Hall, 260 N.W 411, 65 N D. 509
Ohio.—Union Savings & Loan Co v. Watkins, 32 Ohio N.P,N.S, 409
57 C.J p 362 note 57.

96. U.S—Bromfield v Trinidad Nat Inv. Co, C.C A Colo., 36 F.2d 646, 71 A L.R 542.
N.H.—Arcadia Knitting Mills v. Elliott Mfg. Co, 195 A. 681, 89 N. H. 188.

97. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D.C Ky, 20 F Supp. 217, affirmed for plaintiff, C C A, 110 F 2d 961, certiorari denied Commissioner of Sinking Fund of City of Louisville v Anderson, 61 S Ct. 28, 311 U S. 669, 85 L Ed. 429—American Bonding Co v. Anderson, D.C Ky., 20 F Supp. 217, reversed on other grounds for defendant, C C A., 110 F 2d 961.
Iowa—Andrew v. Dundee Sav. Bank, 249 N.W 154, 216 Iowa 240, 93 A. L R 1156
N D—Marmarth School Dist. No 12 of Slope County v. Hall, 260 N.W. 411, 65 N.D. 509.

Reservation of original jurisdiction
Courts of equity reserve original jurisdiction over cross demands which do not fall within statutes permitting set-off.—Gray v. School Dist. of Borough of Brownsville, C. C A Pa., 67 F.2d 141, certiorari denied Hustead v School Dist. of Borough of Brownsville, 54 S.Ct. 377, 291 U S. 660, 78 L Ed. 1052.

98. U S—Gray v. School Dist. of Borough of Brownsville, C C A Pa, 67 F 2d 141, certiorari denied Hustead v School Dist of Borough of Brownsville, 54 S Ct 377, 291 U S 660, 78 L.Ed. 1052—J. L Hudson Co v Thomas, D.C.Mich., 6 F Supp 857
Mo.—**Corpus Juris cited in** Sturdivant Bank v Stoddard County, 58 S W.2d 702, 703, 332 Mo. 568—Smith v. Citizens Bank of Gerald, 106 S W.2d 45, 232 Mo App 906
N D—Marmarth School Dist No 12 of Slope County v Hall, 260 N.W 411, 65 N D 509.
Utah—**Corpus Juris cited in** Reeve v. Blatchley, 147 P 2d 861, 865, 106 Utah 259
57 C.J. p 363 note 58.

as where there is some peculiar circumstance or intervening equity going beyond the statutes which govern set-offs in courts of law[99] and no equity of third persons will be injured by the allowance of a set-off.[1]

b. Grounds

(1) In general
(2) Insolvency
(3) Nonresidence

(1) In General

In general, an equitable set-off will be allowed when, and only when, the party seeking it shows some equitable ground therefor, and its allowance is necessary in order to promote justice.

Generally speaking, an equitable set-off will be allowed when the party seeking it shows some equitable ground therefor[2] and it is necessary in order to promote justice,[3] to avoid or prevent wrong or irremediable injustice,[4] or to give effect to a clear equity of the party seeking it.[5] Conversely, some ground for equitable interposition must be alleged[6] and shown,[7] and the set-off will not be allowed where it would be inequitable[8] or work in-

99. U S—In re Susquehanna Chemical Corp, D C Pa, 81 F Supp 1, affirmed, C C A, Susquehanna Chemical Corp v. Producers Bank & Trust Co, Bradford, Pa, 174 F 2d 783.
N H—Arcadia Knitting Mills v Elliott Mfg. Co, 195 A. 681, 89 N H 188
Pa—Harr v. Bankers Securities Corp, 196 A 522, 129 Pa Super 547—American Radiator Co v Modern Utilities Co, 164 A 925, 108 Pa Super 96.
57 C J. p 363 note 59.

1. U.S—Gray v School Dist. of Borough of Brownsville, C.C A.Pa, 67 F 2d 141, certiorari denied Hustead v. School Dist of Borough of Brownsville, 54 S Ct 377, 291 U S 660, 78 L Ed 1052—In re Susquehanna Chemical Corp, D C Pa, 81 F Supp. 1, affirmed, C C A, Susquehanna Chemical Corp v Producers Bank & Trust Co, Bradford, Pa, 174 F 2d 783—J L Hudson Co v Thomas, D C Mich, 6 F Supp 857
Pa.—Harr v. Bankers Securities Corp, 196 A 522, 129 Pa Super 547—American Radiator Co v Modern Utilities Co, 164 A. 925, 108 Pa Super. 96.
57 C J p 363 note 60

2. U S—In re First Nat Bank, D C Ill., 23 F Supp 255, 258—**Corpus Juris quoted in** Hutchinson Coal Co v Miller, D C W.Va, 20 F.Supp 718, 730.
Ind—Anderson v Biggs, 77 N E 2d 909, 118 Ind App 266.
57 C J. p 363 note 62.

Special circumstances

If special circumstances exist which entitle a defendant to equitable relief, a plea of equitable set-off is permitted—Hellberg v. Norris, N H., 84 A 2d 835.

Mutual demands

A court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered—Harrison v. Adams, 128 P.2d 9, 20 Cal.2d 646.

Equitable set-off held proper

(1) Where bank cashier and school district treasurer embezzled tax funds, school district was held entitled to equitable set-off when sued on warrants—First Nat Bank v Consolidated School Dist No 28 of Jackson County, 238 N W 634, 184 Minn 635, reheard 240 N W. 662, 184 Minn. 635

(2) Where intervener had sought to have debt allegedly owed by defendant to plaintiff paid over to sheriff to honor intervener's alleged attachment, defendant could interpose a set-off to intervener's claim notwithstanding the existence of other attachments in sheriff's hands which might be prior to intervener's—Russo-Asiatic Bank v. Guaranty Trust Co of New York, D.C N.Y., 27 F Supp 382.

3. U S—Shannon v. Sutherland, C C A S C, 74 F 2d 530, 79 A L R 583—In re First Nat Bank, D C Ill, 23 F Supp 255—**Corpus Juris quoted in** Hutchinson Coal Co. v. Miller, D C W Va, 20 F Supp 718, 730
Md—Frank v. Wareheim, 7 A 2d 186, 177 Md 43.
N D—Marmarth School Dist. No. 12 of Slope County v. Hall, 260 N W. 411, 65 N.D 509
57 C J. p 363 note 63.

4. U S—North Chicago Rolling Mill Company v. St Louis Ore & Steel Co, Ill., 14 S Ct 710, 152 U.S 596, 38 L Ed 565—**Corpus Juris quoted in** Hutchinson Coal Co. v Miller, D C W Va, 20 F.Supp. 718, 730.
D C.—Shima v. Shima, 148 F.2d 115, 80 U S.App.D C 39.
Ind—Anderson v Biggs, 77 N E 2d 909, 118 Ind App 266—Feucht v. Real Silk Hosiery Mills, 12 N.E 2d 1019, 105 Ind.App. 405.
S.C—Ex parte Mechanics Federal Savings & Loan Ass'n of Rock Hill, 18 S E 2d 592, 199 S C. 23, 139 A. L R. 714.
57 C J. p 363 note 64.

Inequity and hardship

Set-off is at times allowed where to deny it would entail inequity and hardship which its allowance would avert.
U S.—Jewett v. Martinsville Milling Co, C.C.A.Ind., 76 F 2d 153.
Ky.—Marcum v. Wilhoit, 162 S W 2d 10, 290 Ky 532.

5. U S—**Corpus Juris quoted in** Hutchinson Coal Co v Miller, D C W.Va, 20 F Supp. 718, 730
Ind—Anderson v. Biggs, 77 N E 2d 909, 118 Ind App. 266—Feucht v. Real Silk Hosiery Mills, 12 N E.2d 1019, 105 Ind App. 405.
57 C J. p 363 note 65.

Equitable nature of set-off

Equity will give relief where the set-off is of an equitable nature—Quitman Cooperage Co. v People's First Nat. Bank, 172 S.E 17, 178 Ga 90—Hecht v P. H. Snook & Austin Furniture Co., 41 S.E. 74, 114 Ga. 921

6. U S.—**Corpus Juris quoted in** Hutchinson Coal Co. v. Miller, D.C. W Va, 20 F Supp. 718, 730.
57 C.J. p 363 note 66.

7. U S—**Corpus Juris quoted in** Hutchinson Coal Co v. Miller, D. C W.Va, 20 F Supp 718, 730.
Fla—Durham Tropical Land Corporation v Sun Garden Sales Co., 151 So. 327, 106 Fla. 429, rehearing denied 143 So. 758, 106 Fla. 429.
Utah—**Corpus Juris cited in** Reeve v Blatchley, 147 P 2d 861, 865, 106 Utah 259.
57 C J. p 363 note 67.

Superior equity of third person

A set-off will not be allowed on equitable principles if no special equity is to be subserved, especially if a superior equity of a third person will be injured.—Abrahams v. Wilson, 3 A 2d 1016, 134 Pa.Super. 297.

Profits from sale of lumber

Profits from corporation's lumber, sold by payees of corporation's notes, were held not available as equitable set-off to stockholders, liable as comakers, in absence of reason preventing payees from applying such profits on other corporate indebtedness.—Jefferson Lumber Co. v. Powers, 134 So 464, 223 Ala 63.

8. U.S.—**Corpus Juris quoted in** Hutchinson Coal Co. v. Miller, D. C.W.Va., 20 F Supp. 718, 730.
Mo.—**Corpus Juris cited in** Sturdivant Bank v. Stoddard County, 58 S.W.2d 702, 704, 332 Mo. 568.

justice,[9] or where it is not necessary to prevent irremediable injustice.[10] In dealing with the equitable right of set-off, the court looks through forms to determine the real facts and the true intention of the parties.[11]

There is some authority to the effect that the equitable grounds which will warrant overriding the statutory law have been limited to insolvency or nonresidence;[12] but it is generally held that these are not the sole grounds,[13] and other grounds are stated generally to include such a connection between the demands that one is the consideration for the other, an agreement to set them off, and a complete liquidation thereof at law.[14] Although it has been stated that there is a natural equity that cross demands should be offset against each other,[15] and that the balance only should be recovered,[16] an equitable right of set-off must be not only a natural equity, but such an equity as can be enforced by judicial action,[17] and not one arising merely from moral considerations;[18] courts of equity will not enforce any vague equities of set-off which involve no rights or interests protected by the recognized rules of justice.[19] There has been said to be no such thing as an inherent equitable right of set-off.[20] Also, a mere right of set-off is not of itself an equity;[21] it becomes one only in consequence of some additional circumstance.[22]

A set-off in equity is not authorized by the mere circumstance of mutual and independent cross demands,[23] without circumstances from which it can be inferred that one debt was contracted on the faith of the other,[24] or that there was an agreement between the parties that one debt should be deducted from, or set off against, the other,[25] or some other intervening equity which renders the interposition of a court of equity necessary for the protection of the demand sought to be set off.[26] One may not of his own election or by mere neglect, such as by a failure to assert a set-off when sued at law, create an equitable set-off in his favor.[27]

"Mutual credit," in the law of set-off, is a knowledge on both sides of an existing debt due to one party, and a credit by the other party founded on, and trusting to, such debt as a means of discharging it.[28] It differs from "mutual debts" in that it is more comprehensive.[29] An equitable set-off may be allowed where there is a mutual credit, or presumption of mutual credit, between the parties,[30] and, according to some authorities, a mutual credit is necessary to justify a set-off in equity.[31]

(2) Insolvency

The insolvency of a person against whom a set-off is claimed may be a sufficient ground for the allowance thereof, particularly where such insolvency is coupled with other matters.

Utah—**Corpus Juris cited in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259.
57 C.J. p. 363 note 68

9. U.S.—**Corpus Juris quoted in** Hutchinson Coal Co. v. Miller, D.C.W.Va., 20 F.Supp. 718, 730.
Mo.—**Corpus Juris cited in** Sturdivant Bank v. Stoddard County, 58 S.W.2d 702, 704, 332 Mo. 568.
Utah—**Corpus Juris cited in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259.
57 C.J. p. 363 note 69.

10. U.S.—**Corpus Juris quoted in** Hutchinson Coal Co. v. Miller, D.C.W.Va., 20 F.Supp. 718, 730
Mass.—Bates v. Cosmopolitan Trust Co., 133 N.E. 758, 240 Mass. 162.
Mo.—**Corpus Juris cited in** Sturdivant Bank v. Stoddard County, 58 S.W.2d 702, 704, 332 Mo. 568.

11. Pa.—In re Harr, 179 A. 238, 319 Pa. 89

12. Ind.—Anderson v. Biggs, 77 N.E.2d 909, 118 Ind.App. 266

13. Ala.—Dudley v. Whatley, 14 So.2d 141, 244 Ala. 508, 147 A.L.R. 508.
Ga.—Crandall v. Shepard, 143 S.E. 587, 166 Ga. 396.

14. Ky.—Graham v. Tilford, 1 Metc. 112.—Tribble v. Taul, 7 T.B.Mon. 455.

15. U.S.—Hoffman v. Gleason, C.C.A.Mich., 107 F.2d 101
57 C.J. p. 363 note 77.

16. U.S.—Hoffman v. Gleason, supra.
57 C.J. p. 363 note 77.

17. N.Y.—Van Pelt v. Boyer, 8 How.Pr. 319
Utah—**Corpus Juris quoted in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259.

18. N.Y.—Van Pelt v. Boyer, 8 How.Pr. 319.
Utah—**Corpus Juris quoted in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259

19. Ill.—Houston v. Maddux, 53 N.E. 599, 179 Ill. 377
57 C.J. p. 363 note 81

20. Ill.—Smith v. Billings, 62 Ill.App. 77.

21. Ky.—Graham v. Tilford, 1 Metc. 112.
Utah.—**Corpus Juris cited in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259

22. Ky.—Graham v. Tilford, 1 Metc. 112.
Utah.—**Corpus Juris cited in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259.

23. Ala.—Fischer v. Pope, 171 So. 752, 233 Ala. 301.
57 C.J. p. 363 note 85.

24. N.Y.—Pond v. Harwood, 34 N.E. 768, 139 N.Y. 111
57 C.J. p. 364 note 86

25. N.Y.—Munger v. Albany City Nat. Bank, 85 N.Y. 580
57 C.J. p. 364 note 87.

26. Or.—Pearson v. Richards, 211 P. 167, 106 Or. 78
57 C.J. p. 364 note 88.

27. Ala.—Alabama Lime & Stone Co. v. Adams, 133 So. 580, 222 Ala. 538

28. N.Y.—**Corpus Juris cited in** Irving Trust Co. v. E. Altman & Co., 270 N.Y.S. 781, 785, 151 Misc. 504
57 C.J. p. 364 note 90.

29. Del.—**Corpus Juris cited in** Reed v. Central Nat. Bank of Wilmington, 184 A. 772, 775, 7 W.W.Harr. 429
57 C.J. p. 364 note 91.

30. Iowa.—Tuttle v. Bisbee, 120 N.W. 699, 144 Iowa 53
57 C.J. p. 364 notes 92, 93.

31. Del.—Small v. Collins, 11 Del. 273.—Adair v. Newlin, 100 A. 792, 11 Del.Ch. 242.

The insolvency of a person against whom a set-off is claimed may be a sufficient ground for the allowance of the set-off in equity,[32] and in such case it is only the balance after the set-off which is the real or just sum owing by or to the insolvent.[33] Although some authorities have inclined to the view that mere insolvency alone does not constitute a ground for the interference of the court, and that some further equity must exist in order to induce an equity court to act,[34] other authorities take the position that insolvency is a distinct equitable ground of set-off[35] and may of itself raise an equity which will justify the interference of the court.[36] At any rate, insolvency is a material circumstance to be considered in determining whether an equitable set-off should be allowed,[37] and, when coupled with other matters, may authorize the allowance of a set-off.[38]

While it seems that in some early cases insolvency was the only ground of equitable set-off recognized,[39] nevertheless an equitable set-off may be allowed on other grounds against a party who is solvent.[40] Equity will not grant a set-off on the ground of insolvency where the allegation of insolvency is not sustained by proof.[41] Where insolvency is alleged rather as a reason for castigation than an equitable ground of relief, equity will not intervene.[42]

Insolvency of third person. The insolvency which will furnish a foundation for the allowance of an equitable set-off in cases not provided for by statute is not the insolvency of a third person, but of the debtor of the party seeking relief.[43]

Insolvency proceedings. It has been held that in insolvency proceedings the question of set-off is purely a question of equity, and that the general statutes of counterclaim and set-off, unless specially

32. U.S.—U. S. v. National City Bank of New York, C.C.A.N.Y., 83 F.2d 236, 106 A.L.R. 1235, certiorari denied 57 S.Ct. 25, 299 U.S. 563, 81 L.Ed. 414—First Nat. Bank v. Malone, C.C.A. Iowa, 76 F.2d 251—Gray v. School Dist. of Borough of Brownsville, C.C.A. Pa., 67 F.2d 141, certiorari denied Hustead v. School Dist. of Borough of Brownsville, 54 S.Ct. 377, 291 U.S. 660, 78 L.Ed. 1052—Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D.C.Ga., 52 F.Supp. 177

Ala.—**Corpus Juris cited in** Fischer v. Pope, 171 So. 752, 754, 233 Ala. 301—**Corpus Juris cited in** Hall v. Clark, 151 So. 445, 446, 227 Ala. 571.

Cal.—Harrison v. Adams, 128 P.2d 9, 20 Cal.2d 646—Downey v. Humphreys, 227 P.2d 484, 102 Cal. App.2d 323

Conn.—Hartford Nat. Bank & Trust Co. v. Riverside Trust Co., 167 A. 811, 117 Conn. 276.

D.C.—Brownley v. Peyser, 98 F.2d 337, 69 App.D.C. 56.

Ga.—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203

Iowa—Briley v. Board of Sup'rs of Story County, 287 N.W. 242, 227 Iowa 55—**Corpus Juris cited in** Andrew v. American Sav. Bank & Trust Co., 251 N.W. 48, 50, 217 Iowa 657.

Me.—Cooper v. Fidelity Trust Co., 170 A. 726, 132 Me. 260.

Mass.—In re Francis & Badger Motor Co., 8 N.E.2d 797, 297 Mass. 366.

Mo.—**Corpus Juris cited in** Sturdivant Bank v. Stoddard County, 58 S.W.2d 702, 703, 332 Mo. 568—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S.W.2d 425, 426, 230 Mo.App. 800.

Neb.—Sherwood v. Salisbury, 299 N.W. 185, 139 Neb. 838

N.Y.—Burns v. Lopez, 175 N.E. 537, 256 N.Y. 123—Siegel v. State, 28 N.Y.S.2d 958, 262 App.Div. 388

N.D.—Marmarth School Dist. No. 12 of Slope County v. Hall, 260 N.W. 411, 65 N.D. 509

Ohio—Union Properties v. Baldwin Bros. Co., 47 N.E.2d 983, 141 Ohio St. 303, 149 A.L.R. 725—Smith v. Fulton, 199 N.E. 218, 51 Ohio App. 12.

Okl.—Southern Sur. Co. of New York v. Maney, 121 P.2d 295, 190 Okl. 129

Tex.—Watts v. Gibson, Civ.App., 33 S.W.2d 777

57 C.J. p. 364 note 96.

Set-off against:

Assignee for benefit of creditors see Assignments for Benefit of Creditors § 157

Assignee or trustee in insolvency proceedings see Insolvency §§ 10, 14.

Trustee in bankruptcy see Bankruptcy § 211.

Basic principle giving rise to equitable right of set-off is injustice of permitting one person to enforce claim, while at same time because of his insolvency other party with equally as meritorious a claim is left with demand wholly unenforceable against insolvent debtor.—Fischer v. Pope, 171 So. 752, 233 Ala. 301—Norris v. Commercial National Bank of Anniston, 163 So. 798, 231 Ala. 204.

33. Ky.—Bryant Bros. v. Wilson, 69 S.W.2d 1020, 253 Ky. 578.

N.J.—Thomas v. National Bank of New Jersey, 198 A. 539, 16 N.J. Misc. 271.

N.Y.—Long Beach Trust Co. v. Warshaw, 190 N.E. 659, 264 N.Y. 331—In re Schwab's Estate, 68 N.Y.S.2d 776.

Ohio.—Union Properties v. Baldwin Bros. Co., 47 N.E.2d 983, 141 Ohio St. 303, 149 A.L.R. 725.

34. Miss.—Chandler v. Cooke, 137 So. 496, 163 Miss. 147.

57 C.J. p. 365 note 97.

35. Ga.—Crandall v. Shepard, 143 S.E. 537, 166 Ga. 396.

Ill.—Ehrat v. Marrone, 191 Ill.App. 121.

36. Conn.—Goodwin v. Keney, 49 Conn. 563

37. N.Y.—Hughitt v. Hayes, 32 N.E. 706, 136 N.Y. 163.

Assignments and receiverships

Courts of equity will grant relief and prevent the defeat of the equitable right of set-off by the interposition of assignments and receiverships, whenever there appears any substantial equity in favor of the claim.—Clark Car Co. v. Clark, C.C.A. Pa., 48 F.2d 169.

38. Okl.—Scrivner v. McClelland, 182 P. 503, 75 Okl. 239.

57 C.J. p. 365 note 2.

39. Conn.—Gaylord v. Couch, 5 Day 223.

Vt.—Blake v. Langdon, 19 Vt. 485, 47 Am.D. 701.

40. R.I.—Baker v. Hawkins, 14 R.I. 359.

57 C.J. p. 365 note 5.

41. Wis.—Smith v. Dickinson, 76 N.W. 766, 100 Wis. 574.

57 C.J. p. 365 note 3.

42. Tex.—Hart v. Davis, 21 Tex. 411.

43. Neb.—State ex rel. Sorensen v. Weston Bank, 251 N.W. 164, 135 Neb. 612.

made to apply to insolvency, have no bearing on the question.[44]

(3) Nonresidence

In most jurisdictions the nonresidence of a party against whom a set-off is claimed is a sufficient ground for equitable interference to allow the set-off.

In a majority of jurisdictions the nonresidence of a party against whom a set-off is claimed is deemed to be a sufficient ground for equitable interference to allow the set-off;[45] but in some jurisdictions the mere fact of nonresidence unaccompanied by any other equitable condition is considered insufficient to warrant the application of the doctrine of equitable set-off.[46] Nonresidence and fraud together may be sufficient to warrant the allowance of an equitable set-off[47] The nonresidence of a company has been held not sufficient to allow a set-off where the company was authorized to do business in the state and had designated a resident agent on whom process could be served.[48]

§ 6. —— Counterclaim

A counterclaim has been defined as a cause of action in favor of the defendant on which he might have sued the plaintiff and obtained affirmative relief in a separate action. It is a purely statutory remedy and was not known to the common law.

The term "counterclaim" is a general and comprehensive one.[49] At times the courts have found it perplexing to define,[50] or say what constitutes,[51] a counterclaim; and sometimes the courts consider it inadvisable to attempt to define the meaning of the language employed in a statutory definition which has purposely been made comprehensive in its terms and general in its expression.[52] It is defined judicially as a cause of action in favor of defendant on which he might have sued plaintiff and obtained affirmative relief in a separate action;[53] a cause of action existing in favor of defendant against plaintiff.[54] Also, the term is defined by code or statutory provision in some states,[55] although not in other states;[56] and it is not given the same meaning in all the states.[57] The word "counterclaim" is used in some statutes in its generic sense[58] and not in a technical or distinctive sense[59]

44. Iowa—Parker v Schultz, 257 N W. 570, 219 Iowa 100

45. U.S—U. S. v National City Bank of New York, C.C.A N.Y., 83 F.2d 236, 106 A.L.R. 1235, certiorari denied 57 S.Ct. 25, 299 U.S. 563, 81 L.Ed 414—Clarke v. Hot Springs Electric Light & Power Co, C.C A Wyo., 76 F 2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443.

Ga—Collins v Garrett, 177 S E 275, 50 Ga.App. 208

Ky—Cincinnati Butchers Supply Co. v Kentucky Packers, 147 S.W.2d 48, 285 Ky. 104.

N H.—Arcadia Knitting Mills v. Elliott Mfg. Co., 195 A. 681, 89 N.H 188.

Okl.—Southern Surety Co of New York v. Maney, 121 P.2d 295, 190 Okl. 129.

57 C.J. p 366 note 8.

Nonresidence and absence of property in state constitute ground for equitable set-off.—Atlantic Coast Line R. Co. v. U S. Fidelity & Guaranty Co., D.C.Ga, 52 F Supp 177.

46. Mass.—Adams v. Grundy, 152 N. E. 379, 256 Mass. 246.

57 C.J. p 366 note 9.

47. Ga.—**Corpus Juris cited in** Aetna Ins. Co. v. Lunsford, 177 S. E. 727, 729, 179 Ga. 716.

Okl.—Caldwell v. Stevens, 167 P. 610, 64 Okl. 287, L.R.A.1918B 421.

48. Ga.—Ætna Ins. Co. v. Lunsford, 177 S.E. 727, 179 Ga. 716.

49. Ariz.—Valley Gin Co. v. McCarthy, 106 P.2d 504, 56 Ariz. 181.

57 C.J. p 366 note 21.

50. N Y—Silliman v. Eddy, 8 How. Pr. 122.

51. Ark—Hays v McLain, 50 S.W. 1006, 66 Ark 400.

52. Ohio.—Price v. Kobacker Furniture Co, 152 N.E. 301, 20 Ohio App 464.

53. U.S.—**Corpus Juris cited in** Hann v. Venetian Blind Corporation, D C Cal, 15 F Supp. 372, 376

Ariz—Valley Gin Co. v. McCarthy, 106 P.2d 504, 507, 56 Ariz 181.

Neb.—**Corpus Juris quoted in** McGerr v. Marsh, 26 N.W.2d 374, 378, 148 Neb. 50.

Pa—Jeffries v. Frishman Co., 99 Pittsb.Leg J 529.

57 C.J. p 366 note 22.

Other definitions

(1) A cross-demand in liquidation or reduction of plaintiffs' claim.—Smith v. Glover, 205 S.W. 891, 892, 135 Ark. 531.

(2) A declaration by defendant against plaintiff in the nature of an independent action, deferred until defendant is brought into court.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Lynch, 162 A. 157, 158, 308 Pa. 23.

(3) Something of a legal or equitable nature arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, giving defendant a right to relief necessarily involved, or properly involved, in the action, to the end that a complete determination thereof may be had.

Kan—Hodge v. Bishop, 151 P. 1105, 96 Kan. 419.

Neb.—**Corpus Juris quoted in** McGerr v. Marsh, 26 N.W.2d 374, 378, 148 Neb 50.

54. Fla.—Peacock Hotel v. Shipman, 138 So. 44, 47, 103 Fla. 633.

Mont.—Lappin v. Martin, 228 P 763, 766, 71 Mont. 233—Babcock v Maxwell, 54 P. 943, 945, 21 Mont. 507.

N Y—Williams v. Edward De V. Tompkins, Inc., 204 N.Y S. 168, 172, 208 App Div 574—Humphrey v. Conroy Motor Corp., 298 N.Y.S. 330, 333, 164 Misc. 51.

Ohio.—Braden v. Neubrander, 101 N. E 2d 789, 89 Ohio App. 295.

Similar definition

A counterclaim usually is defined as a cause of action in favor of defendant against plaintiff, which defendant is authorized to litigate in opposition to plaintiff's claim in the same action, and, where used in a statute which does not otherwise define it, it will be deemed used in such sense.—Wilson v. Tromly, 89 N E 2d 22, 404 Ill. 307.

55. Iowa.—Evans v. Evans, 210 N W. 564, 202 Iowa 493.

57 C.J. p 367 note 23.

56. Conn—Boothe v Armstrong, 57 A. 173, 76 Conn 530.

W.Va.—Bowdish v Groscup, 74 S E 950, 70 W.Va. 758.

57. W.Va.—Bowdish v. Groscup, supra.

58. Conn.—Lescoe v. Kinstler, 70 A. 2d 131, 136 Conn. 253.

Fla—Symonds v. Browning, 24 So 2d 528, 156 Fla. 808.

59. Fla.—Symonds v. Browning, supra.

A counterclaim is a purely statutory remedy[60] of modern origin;[61] it was not known to the common law[62] or before the adoption of the codes,[63] and in some states there has been said to be no statute providing for a counterclaim, at least in an action at law.[64] It is substantially a cross action by defendant against plaintiff,[65] and secures to defendant the full relief which a separate action at law,[66] or in equity, as by a bill in chancery,[67] or a cross bill[68] would have secured to him on the same state of facts.

A counterclaim is not necessarily confined to the justice of plaintiff's claim, and does not seek to defeat it as a cause of action.[69] Rather, it meets plaintiff's claim by opposing to it a demand on the part of defendant to the end that a complete determination of the right to and amount of recovery may be had in the same action,[70] it represents defendant's right to have the claims of the parties counterbalanced in whole or in part, judgment to be entered for the excess, if any.[71] A counterclaim may be legal or equitable in character,[72] and in some jurisdictions is available at law[73] or in equity.[74] In other jurisdictions, however, pleading counterclaims is not permissible in actions at law, but defendant must use set-off or recoupment.[75] It has been said that a counterclaim is auxiliary to the proceeding in the original suit and depends on it.[76]

Counterclaim by plaintiff. There is no rule or practice of procedure which allows plaintiff to set up a counterclaim against defendant.[77]

§ 7. —— Counter Complaint

A counter complaint is a claim set up by defendant against plaintiff.

A counter complaint is a claim set up by defendant against plaintiff in an action brought against the former.[78]

§ 8. —— Reconvention

Reconvention, in the civil law, is equivalent in general to a counterclaim; it is a demand that a defendant in a suit is permitted to engraft on the main action.

"Reconvention," "reconventional demand," and

60. Ariz.—Valley Gin Co. v McCarthy, 106 P 2d 504, 56 Ariz 181
N M —Turkenkoph v. Te Beest, 232 P.2d 684, 55 N M 279.
N.Y —Seibert v. Dunn, 110 N.E. 447, 216 N.Y 237—Stafford Security Co v. Kremer, 249 N.Y S. 670, 232 App Div. 265, reversed on other grounds 179 N.E. 32, 258 N Y. 1, 78 A.L R 822.
57 C.J. p 366 note 12.

61. Iowa.—Evans v. Evans, 210 N W. 564, 202 Iowa 493.

62. U S —Clark v. Manufacturers Trust Co, C A N Y, 169 F.2d 932, affirmed in part and vacated in part on other grounds McGrath v. Manufacturers Trust Co., 70 S Ct. 4, 338 U S 241, 94 L Ed 31.
Ariz —Valley Gin Co. v. McCarthy, 106 P.2d 504, 56 Ariz 181.
N.H.—Harry I Soble, Inc. v. Fiske Lumber Co, 74 A 2d 381, 96 N.H. 279—Lehigh Nav. Coal Co. v. Keene Coal Co., 197 A 410, 89 N.H. 274.
N M —Turkenkoph v. Te Beest, 232 P 2d 684, 55 N M. 279
N.Y —Otto v Lincoln Sav. Bank of Brooklyn, 51 N.Y.S 2d 561, 268 App. Div. 400, affirmed 62 N.E 2d 236, 294 N.Y 798
57 C J. p 366 note 14.

63. N C.—Valentine v. Hallman, 63 N.C. 475.
57 C.J. p 366 note 15

64. N.H.—Harry I. Soble, Inc. v. Fiske Lumber Co., 74 A.2d 381, 96 N H. 279—Lehigh Nav. Coal Co. v. Keene Coal Co., 197 A. 410, 89 N.H 274.
57 C.J. p 366 note 16.

65. Ill —Edward Edinger Co. v. Willis, 260 Ill.App 106, 125
N.Y.—Bank of U S. v. Frost, 255 N. Y S 763, 766, 142 Misc. 589.
N C.—Manufacturers & Jobbers Finance Corporation v. Lane, 19 S. E.2d 849, 854, 221 N.C 189—Lummus Cotton Gin Co. v. Wise, 157 S.E. 20, 21, 200 N.C. 409.
N.D —Zeman v Mikolasek, 25 N W. 2d 272, 75 N D. 41
S C.—Campbell v. Moore, 1 S.E.2d 784, 797, 189 S.C 497—Mobley v. Cureton, 6 S C. 49, 68.
57 C J. p 366 note 17.
Counterclaim as constituting independent action see supra § 1.
"Counter action"
Ind —Sams v Kern, 98 N E.2d 920, 921, 121 Ind App. 208.
Matter embraced
A counterclaim relates to matter which might be the subject of an action and give rise to a judgment independent of the matters set forth in the complaint to which it is interposed.—Campbell v. Moore, 1 S E.2d 784, 189 S.C. 497—Mobley v. Cureton, 6 S C 49

66. Neb.—McGerr v Marsh, 26 N. W 2d 374, 148 Neb. 50.
57 C.J. p 366 note 18.

67. Neb.—McGerr v. Marsh, supra.
57 C.J. p 366 note 19.

68. Pa —Shrum v. Carcase, 2 Pa Dist & Co. 686.
57 C.J. p 366 note 20.

69. Iowa.—Hedinger v. Herweh, 34 N.W 2d 202, 239 Iowa 1146.
Neb.—Olsen v. McMaken & Pentzien, 297 N.W. 830, 139 Neb. 506.
Counterclaim recognizes propriety of bill and is subordinate thereto, and both may go to decree regardless of each other.—Brandtjen & Kluge, Inc., v. Joseph Freeman, Inc., C.C.A.N.Y., 75 F.2d 472, affirmed Chandler & Price Co. v Brandtjen & Kluge, 56 S.Ct. 6, 296 U.S. 53, 80 L. Ed. 39

70. Iowa.—Hedinger v. Herweh, 34 N W.2d 202, 239 Iowa 1146.

71. Neb.—Olsen v. McMaken & Pentzien, 297 N.W. 830, 833, 139 Neb. 506.

72. U.S —Tavitoff v. Stepovich, C.C. A Alaska, 91 F.2d 106.
Ill.—People ex rel. Bradford Supply Co v. Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill. 520.
N Y.—Village of Fleischmanns v. Silberman, 15 N.Y S.2d 904.
57 C.J. p 367 note 32.
Equitable set-off generally see supra § 5.

73. N.J.—Stier v. Schreiber, 66 A. 2d 463, 3 N.J.Super. 450.

74. U.S —Tavitoff v. Stepovich, C.C. A Alaska, 91 F.2d 106.

75. Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 128 So. 831, 99 Fla. 410.

76. N.J.—Hoffman v. Maloratsky, 164 A. 260, 112 N.J.Eq. 333.

77. N.C.—Gatling v. Carteret County, 92 N.C. 536, 53 Am.R. 432.

78. Puerto Rico.—People v. Martinez, 28 Puerto Rico 635.
Cross complaint or cross petition see Pleading § 167 b.

"demand in reconvention" are civil-law terms,[79] and have variously been defined as, or said to be, equivalent to "counterclaim;"[80] a demand that a defendant in a suit is permitted by a courtesy of the law to engraft on the main action;[81] the demand which defendant institutes in consequence of that which plaintiff has brought against him.[82] It is in the nature of a cross action seeking equitable relief.[83] A statute providing that, where there is no express law, the judge is bound to proceed and decide according to equity is inapplicable to the filing of a reconventional demand where there is an express statute on the subject of reconventional demands.[84]

Summary actions. It has been held that a reconventional demand amounting to an ordinary action cannot be filed in a summary action instituted by plaintiff,[85] and that defendant by reconvening cannot convert a summary action into an ordinary action so as to authorize the filing of a reconventional demand.[86] In this connection, the granting of a continuance of a summary action at the request of defendant does not change an action from a summary one to an ordinary one so as to authorize the filing of a reconventional demand;[87] but where plaintiff has been granted a long continuance, thereby destroying the summary character of his proceeding, a reconventional demand may be interposed.[88]

§ 9. —— Compensation

Compensation, as used in the civil law, is the extinction of debts of which two persons are reciprocally debtors to one another, by the credits by which they are reciprocally creditors of one another; and under this doctrine the debts extinguish each other by mere operation of law to the amount of their respective sums, without any act of either party.

"Compensation" is a civil-law term[89] and is of three kinds, legal or by operation of law; compensation by way of exception; and by reconvention.[90] "Compensation" has been defined as the extinction of debts, of which two persons are reciprocally debtors to one another, by the credits by which they are reciprocally creditors of one another;[91] a reciprocal acquittal of debts between two persons who are indebted the one to the other.[92] It was founded on a natural equity which permitted the reciprocal acquittal of mutual debts.[93]

Where two persons are indebted to each other

79. Tex.—Egery v. Power, 5 Tex. 501.
57 C.J. p 367 note 35—53 C.J. p 597 note 26.

80. Wis.—McLeod v Bertschy, 33 Wis. 176, 14 Am.R. 755.
18 C.J. p 480 note 84.

Wrongful garnishment
A plea in reconvention for damages for wrongfully procuring a writ of garnishment in aid of plaintiff's suit is a counterclaim founded on a cause of action arising out of, incident to, or connected with plaintiff's cause of action, within a statute recognizing defendant's right to plead such counterclaim in set-off. —Waldman-Ross Grain Co. v. Davison & Co., Tex.Civ.App., 251 S.W. 521.

81. La.—Suberville v. Adams, 16 So 652, 653, 47 La.Ann. 68.

82. La.—Rives v. Starcke, 196 So. 657, 659, 195 La. 378.

Similar definitions
(1) An action by a defendant against a plaintiff in a former action, based on cross demands of either a liquidated or unliquidated nature growing out of, or connected with, a principal cause of action,—Walcott v. Hedrick, 6 Tex. 406, 414—57 C.J. p 368 note 37.

(2) Other definitions see 57 C.J. p 367 note 36.

83. Tex.—Coleman v. Bunce, 37 Tex. 171.
57 C.J. p 368 note 38.

84. La.—Wallace v. Thompson, App., 8 So.2d 126.

Reconventional demands held improper
(1) Defendants' reconventional demand for dental work, done for wife of laborer suing for wages due, should have been rejected and amount thereof credited on plaintiff's claim, where dentist testified that he transferred account to apply on such claim—Shively v. Perkins, La. App., 157 So. 303.

(2) Where shipyard's demand for value of work done in repairing and painting boat was rejected, owner of boat could not recover on reconventional demand against shipyard amount paid another to caulk and paint bottom of boat—Walter E. Canulette & Son v. Clesi, La.App., 39 So.2d 853.

(3) In petitory action by niece of deceased against deceased's husband to obtain possession of realty devised to niece, the merit of husband's claim for money paid on mortgage and for repairs and on account of deceased's funeral, and loan to deceased's son at deceased's request, could not be urged by way of reconventional demand, since husband was not a possessor in good faith within the requirement of the statutes.—Wallace v. Thompson, La.App., 8 So.2d 126.

85. La.—A. N. Goldberg, Inc. v. Poynter, App., 157 So. 272.

86. La.—A. N. Goldberg, Inc. v. Poynter, supra.

87. La.—A. N. Goldberg, Inc., v. Poynter, supra

88. La.—Williams & Gray v. Stewart, App., 147 So. 103

89. Tex.—Holliman v. Rogers, 6 Tex 91
57 C.J. p 368 note 40.

90. La.—Stewart v. Harper, 16 La. Ann. 181.

91. Iowa.—Tuttle v. Bisbee, 120 N. W. 699, 144 Iowa 53.
12 C.J. p 232 note 54.

Other definitions
(1) A mode of extinguishing a debt, which takes place, by mere operation of law, where debts equally liquidated and demandable are reciprocally due.—Dorvin v. Wiltz, 11 La. Ann. 514.

(2) A mode of payment which takes place by the mere operation of law, without the knowledge of the debtor, the two debts being reciprocally extinguished as soon as they exist simultaneously to the amount of their respective sums.—Sliman v. Mahtook, 156 So. 749, 750, 17 La.App. 635.—12 C.J. p 232 note 57.

(3) Additional definitions see 12 C.J. p 232 note 53, p 233 note 58

92. Tex.—Howard v. Randolph, 11 S.W. 495, 73 Tex. 454.
12 C.J. p 232 note 55

93. La.—Teutonia Bank, etc., Co. v. Kirn, 9 La.A., Orleans, 345.

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simultaneously,[94] for clear and liquidated debts,[95] compensation takes place, under the civil law, from the moment the two debts coexist, and they extinguish each other by the mere operation of law to the amount of their respective sums,[96] without any tender or act of either party.[97] It takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable.[98]

Retroactive effect Compensation, when decided by the court to be legal, has a retroactive effect to the day both debts, simultaneously existing, were liquidated, due, and demandable.[99] A plea in compensation has a retroactive effect as of the date when the parties became indebted to each other.[1]

Exceptions. Under the civil code a demand of restitution of a deposit is an exception to the rule that compensation takes place between debtors;[2] but this does not apply so as to prevent compensation or offset where the money involved does not in fact constitute a deposit.[3] A loan for use also constitutes an exception to the doctrine of compensation.[4] Further, under the code, compensation does not take place in the case of a demand of restitution of a thing of which the owner has been unjustly deprived,[5] but the word "thing" as used in such provision should not be given a strained construction,[6] and does not refer to a sum of money.[7]

Facultative compensation is compensation which operates by the will of the parties when one of them removes an obstacle resulting from the dispositions of the law.[8] It depends on the waiver by a party of the right to the protection of a statute which makes certain debts not subject to compensation.[9] In facultative compensation one of the conditions is lacking for legal compensation,[10] as where one of the two debts is not liquidated, or is suspended by a term, or involves a credit arising out of a deposit;[11] and in such cases, if the parties agree to accept in compensation the nonliquidated debt, or if the one who had the right renounces the benefit

Ohio.—Fuller v Steiglitz, 27 Ohio St 355, 22 Am R. 312

94. La.—Blanchard v. Bank of Morgan City & Trust Co, App., 185 So 120
57 C J p 368 note 43.

95. Philippine.—Luengo v. Herrero, 17 Philippine 29
57 C.J. p 368 note 44.

96. La.—Oilbelt Motor Co v George T Bishop, Inc., 118 So. 881, 167 La 183—Beyer Transp Co v. Whiteman Contracting Co., App, 187 So 143—Blanchard v. Bank of Morgan City & Trust Co, App, 185 So. 120—Coyle v. Coyle, App., 177 So 109—Ryland v. Natchitoches Oil Mill Co., App, 148 So 457.

Matter of course or of right

(1) "Compensation" takes place as a matter of course between two debts which have equally for their object a sum of money and which are equally liquidated and demandable except in case of restitution of a deposit and a loan for use—Brown v Canal Bank & Trust Co, C C A La., 141 F. 2d 832

(2) Compensation takes place of right between individuals when the debts due by the respective parties are equally due and demandable and where the character of the debts is the same—City of New Orleans v Finnerty, 27 La.Ann. 681, 21 Am R. 569—Brock v Natalbany Lumber Co., La.App., 179 So. 322.

Insolvency

Right to plead compensation between account owed by estate and owing to estate was held not lost because of estate's insolvency, where debts arose and compensation took place during deceased's lifetime.—Ryland v Natchitoches Oil Mill Co, La App, 148 So. 457.

97. U S—Connolly v. Commercial Nat Bank in Shreveport, D.C La, 89 F Supp 976, amended on other grounds 90 F.Supp. 264, modified on other grounds, C A., 189 F 2d 608.
La.—Blanchard v. Bank of Morgan City & Trust Co, App., 185 So 120.
57 C.J p 368 note 46.

Automatic operation

(1) With certain statutory exceptions, compensation takes place automatically between two debts which are equally due and demandable—In re Interstate Trust & Banking Co, La App, 194 So. 35.

(2) In suit by discharged employee for salary and commissions, amounts of his indebtedness to defendant, as disclosed by accounting prayed in defendants' reconventional demand for sums allegedly embezzled by plaintiff, and amount admitted in answer to be due plaintiff from defendants, automatically operated pro tanto as offsets or compensation against each other—Foreman v. Pelican Stores, La.App., 21 So.2d 64.

98. La.—Blanchard v. Bank of Morgan City & Trust Co., App., 185 So. 120
12 C.J. p 232 note 52.

Exigible claims

The claims must be exigible, that is, due—Carr v. Hamilton, La, 9 S. Ct 295, 129 U S. 252, 32 L Ed. 669—12 C J. p 232 note 52

99. La.—Brock v. Pan American Petroleum Corp., 173 So. 121, 186 La. 607.

1. La.—Brock v. Pan American Petroleum Corp, supra—Oilbelt Motor Co. v. George T. Bishop, Inc., 118 So. 881, 167 La. 183.

2. U S.—Brown v. Canal Bank & Trust Co., C.C.A.La, 141 F.2d 832.
La.—Kenner v. Larrabee, 136 So. 916, 17 La.App. 602.

3. La.—Kenner v. Larrabee, supra.

Payment on purchase price

Money delivered by purchaser to broker on account of purchase price was not "deposit" within statute, and therefore was subject to compensation or offset for broker's commission.—Kenner v Larrabee, 136 So. 916, 17 La.App. 602.

4. U S—Brown v. Canal Bank & Trust Co., C.C.A.La., 141 F.2d 832.

5. La.—Saunier v. Saunier, 47 So.2d 19, 217 La. 607.

6. La.—Saunier v. Saunier, supra.

7. La.—Saunier v. Saunier, supra.

8. La.—Brock v. Pan American Petroleum Corp., 173 So. 121, 123, 186 La. 607—In re Canal Bank & Trust Co., 152 So. 578, 582, 178 La. 961—In re Interstate Trust & Banking Co., App., 194 So. 35, 40.

9. La.—In re Interstate Trust & Banking Co., supra.

10. La.—Brock v. Pan American Petroleum Corp., 173 So. 121, 186 La. 607—In re Canal Bank & Trust Co., 152 So. 578, 178 La. 961.

11. La.—Brock v. Pan American Petroleum Corp., 173 So. 121, 186 La. 607—In re Canal Bank & Trust Co., 152 So. 578, 178 La. 961.

of the term, or if the depositor agrees to be governed by compensation, their will ought to be respected, and compensation will operate.[12]

§ 10. —— Synonymity of, and Distinctions between, Terms

The terms "set-off," "counterclaim," "recoupment," "reconvention," and "compensation" have been compared to, and distinguished from, one another.

Recoupment and set-off are distinguishable from each other[13] as to origin,[14] subject matter,[15] pleading,[16] and the judgment recoverable.[17] Also in some jurisdictions recoupment does not confess the cause of action sued on to the same extent as a plea of set-off does.[18] However, recoupment and set-off are closely[19] related,[20] and a recoupment is, in a sense, a set-off.[21] In some jurisdictions, by virtue of code or statutory provisions, there is no longer any substantial difference between the two terms,[22] and sometimes the terms are used interchangeably,[23] or one is erroneously employed when the other is obviously intended.[24]

Recoupment or set-off and reconvention or compensation. The doctrine of set-off was borrowed and derived from the doctrine of compensation in the civil law;[25] the two doctrines resemble each other and are analogous in some respects,[26] and sometimes the terms are confounded.[27] Nevertheless, the two terms are distinguishable.[28] In some instances the terms "set-off" and "reconvention" have been used interchangeably,[29] but the term "re-

12. La.—Brock v. Pan American Petroleum Corp., 173 So. 121, 186 La. 607—In re Canal Bank & Trust Co., 152 So. 578, 178 La. 961.

13. U.S.—Electric Storage Battery Co. v. Rothensies, C.C.A.Pa., 152 F. 2d 521, reversed on other grounds Rothensies v. Electric Storage Battery Co., 67 S.Ct. 271, 329 U.S. 296, 91 L.Ed. 296—U. S. v. New York Trust Co., D.C.N.Y., 75 F. Supp. 583.
Ala.—Standard Sanitary Mfg. Co. v. Benson Hardware Co., 143 So. 570, 225 Ala. 412.
Pa.—Cooper v. Frost, 43 Pa. Dist. & Co. 636, 5 Fay.L.J. 5, 55 York Leg. Rec. 203.
57 C.J. p. 368 note 48.

Nature

Recoupment is not a set-off in the strict sense, because it is not in the nature of a cross demand, but rather lessens or defeats any recovery by plaintiff.—Pennsylvania R. Co. v. Miller, C.C.A.Tex., 124 F.2d 160, 140 A.L.R. 811, certiorari denied 62 S.Ct. 1047, 316 U.S. 676, 86 L.Ed. 1750.

14. Miss.—Hayes v. Slidell Liquor Co., 55 So. 356, 99 Miss. 583.
57 C.J. p. 368 note 49.

15. Ala.—Brown v. Patterson, 108 So. 16, 214 Ala. 351, 47 A.L.R. 1093.
57 C.J. p. 368 note 51.

Differences in subject matter

(1) Recoupment arises out of the contract or transaction sued on whereas a set-off may arise from an independent transaction.
U.S.—City of Grand Rapids, Mich. v. McCurdy, C.C.A.Mich., 136 F.2d 615.
Fla.—Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 2 So.2d 890, 147 Fla. 311.
Mont.—Francisco v. Francisco, 191 P.2d 317, 120 Mont. 468, 1 A.L.R. 2d 625.
Pa.—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192—Artex Imp. Co. v. Borushko, Com.Pl., 98 Pittsb.Leg.J. 506.
57 C.J. p. 368 note 51 [b].

(2) Recoupment goes to the justice of plaintiff's claim, while set-off is not necessarily confined to the justice of such particular claim.—City of Grand Rapids, Mich., v. McCurdy, supra

Plea held one of set-off

In suit by holder who took checks with notice and after dishonor, where drawer filed answer and cross bill alleging that holder and other payees had breached confidential relationship existing between them and defendant and alleging that checks had been issued to payees for use in furtherance of transaction for which defendant had employed payees, drawer's plea was properly one of set-off and not of recoupment, in absence of any showing that payees had been obligated under contract to cash checks for defendant at his demand.—Byrom v. Ringe, 63 S.E.2d 235, 83 Ga.App. 234.

16. Ill.—Luther v. Mathis, 211 Ill. App. 596.
57 C.J. p. 368 note 52.

17. U.S.—Electric Storage Battery Co. v. Rothensies, C.C.A.Pa., 152 F. 2d 521, reversed on other grounds Rothensies v. Electric Storage Battery Co., 67 S.Ct. 271, 329 U.S. 296, 91 L.Ed. 296.
Ala.—Standard Sanitary Mfg. Co. v. Benson Hardware Co., 143 So. 570, 225 Ala. 412.
57 C.J. p. 368 note 53.
Right to judgment for excess over plaintiff's cause of action see infra § 61.

Defensive or offensive

A recoupment is defensive, whereas a set-off is an offensive proceeding.—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192.

18. Ala.—Carolina-Portland Cement Co. v. Alabama Constr. Co., 50 So. 332, 162 Ala. 380—Grisham v. Bodman, 20 So. 515, 111 Ala. 200.
Admission of plaintiff's cause of action see infra § 60.

19. N.Y.—Seibert v. Dunn, 110 N.E. 447, 216 N.Y. 237.

20. Ala.—Brown v. Patterson, 108 So. 16, 214 Ala. 351, 47 A.L.R. 1093.

21. Mo.—**Corpus Juris cited in** State v. Weatherby, 129 S.W.2d 887, 893, 344 Mo. 848.
57 C.J. p. 369 note 57

22. Mo.—**Corpus Juris cited in** State v. Weatherby, 129 S.W.2d 887, 893, 344 Mo. 848.
57 C.J. p. 369 note 59.

23. Pa.—Cooper v. Frost, 43 Pa. Dist. & Co. 636, 5 Fay.L.J. 5, 55 York Leg. Rec. 203.
57 C.J. p. 369 note 60.

24. N.J.—Price v. Reynolds, 39 N.J. Law 171.
57 C.J. p. 369 note 61.

25. Fla.—Everglade Cypress Co. v. Tunnicliffe, 148 So. 192, 107 Fla. 675.
Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 246 Ky. 278.
N.J.—Scarano v. Scarano, 28 A.2d 425, 132 N.J.Eq. 362.
57 C.J. p. 369 note 62.

26. Cal.—Naglee v. Palmer, 7 Cal. 543.
57 C.J. p. 369 note 63.

27. Tex.—Holliman v. Rogers, 6 Tex. 91.
12 C.J. p. 225 note 65 [a].

28. Tex.—Brown v. Montgomery, 47 S.W. 803, 19 Tex.Civ.App. 548.
12 C.J. p. 225 note 65, p. 232 note 52 [a].

29. Tex.—Lee v. Wilkins, 1 Tex. Unrep.Cas. 287—Scott v. Mexican Nat. R. Co., App., 18 S.W. 137.

convention" is more extensive than either recoupment or set-off.[30]

Recoupment and defalcation. In its strict legal, although perhaps less-known, sense, the term "defalcation" is synonymous with recoupment.[31]

Counterclaim and other cross demands. Subject to statutory limitations, counterclaim embraces practically every kind of cross demand[32] It resembles both recoupment[33] and set-off;[34] except in a few jurisdictions,[35] it embraces both,[36] and ordinarily is a substitute for them;[37] and sometimes the terms "counterclaim" and "set-off" are used interchangeably in a generic sense,[38] as are similarly "counterclaim" and "recoupment."[39] However, counterclaim is distinguishable from both recoupment[40] and set-off,[41] and is broader and more comprehensive than either.[42]

A counterclaim is distinguishable from a recoupment in that it is a purely statutory remedy, while recoupment is a development of the common law,[43] and, while in the case of a counterclaim defendant can recover an excess of his claim over plaintiff's, recoupment is limited to the amount of plaintiff's demand and will not authorize a judgment in de-

30. U S —Pacific Express Co v Malin, Tex, 10 S Ct 166, 132 U S. 531, 33 L Ed 450
57 C J. p 369 note 68.

31. Ala —Hatchett v Gibson, 13 Ala 587
N Y.—Ives v. Van Epps, 22 Wend 155.

32. N C —Ætna L Ins Co v Griffin, 156 S E 515, 200 N C 251
57 C.J p 369 note 71
Counterclaim distinguished from cross complaint see Pleading § 167 b

All cross demands other than set-offs
Word "counterclaim" as used in statute was intended to be generic term for all cross demands other than set-offs, whether in law or in equity.—Lescoe v. Kinstler, 70 A.2d 131, 136 Conn 253.

33. Ark —Hudson v. Snipes, 40 Ark 75
57 C.J p 369 note 72

34. Mo —Fricke v W. E Fuetterer Battery, etc, Co., 288 S W. 1000, 220 Mo App. 623.
57 C.J. p 369 note 73

35. Ind —Lovejoy v. Robinson, 8 Ind 399.
57 C J p 369 note 74

36. Fla —Peacock Hotel v Shipman, 138 So 44, 103 Fla 633.
N Y —Otto v Lincoln Sav Bank of Brooklyn, 51 N.Y S 2d 561, 268 App Div. 400, affirmed 62 N.E 2d 236, 294 N Y 798—Stafford Security Co. v Kremer, 249 N Y S 670, 232 App. Div. 265, reversed on other grounds 179 N.E 32, 258 N Y. 1, 78 A.L R 822
57 C.J. p 37 note 75.

Statutory construction
Statutes relating to counterclaims should not be so narrowly construed as to prevent defendant invoking that available at common law as recoupment or set-off —Blog v. Burden & Co., 265 N.Y.S. 81, 238 App Div. 634.

Damages in automobile collision
In action involving automobile collision, counterclaim for damages to automobile, loss of time, expense, and mental anguish is in nature of set-off —Harriman v Roberts, 235 N W. 751, 211 Iowa 1372

37. Minn —Folsom v. Carli, 6 Minn 420, 80 Am D 456
N.Y.—Blog v Burden & Co, 265 N Y S. 81, 238 App Div 634.

Measure of regulation for recoupment or set-off
Statutory provisions relating to counterclaims are measure of regulation applicable to recoupment or set-off —Blog v Burden & Co, supra

Relief previously available as set-off
(1) Under some statutes relief theretofore afforded by way of set-off is allowed as a counterclaim — Henderson v. Northwest Airlines, 43 N W 2d 786, 231 Minn 503.

(2) In action on note by bank, defendants, if they sought to allege an indebtedness to them by way of contribution from bank as a set-off, should have made the indebtedness the subject of a counterclaim —Mt Vernon Trust Co. v. Oakwood Gardens, 3 N.Y.S 2d 532, 254 App Div 686

38. U S.—Terry Steam Turbine Co v. B F Sturtevant Co, D C Mass, 204 F. 103.
57 C.J p 370 note 76.

"Set-off" defined as "counterclaim"
(1) A set-off is a counterclaim arising from an independent transaction —Northwestern Nat Bank v Commonwealth, 27 A 2d 20, 345 Pa 192.

(2) A set-off is a counterclaim which a defendant may interpose by way of cross action against plaintiff.—American Smelting & Refining Co. v Swisshelm Gold Silver Co., 160 P.2d 757, 63 Ariz. 204.

39. Pa.—Cooper v. Frost, 43 Pa Dist. & Co. 636, 5 Fay.L J. 5, 55 York Leg Rec 203.
57 C.J. p 370 note 77.

40. U.S —U. S. v. New York Trust Co., D.C.N.Y., 75 F.Supp 583.
Pa —Cooper v. Frost, 43 Pa.Dist. & Co. 636, 5 Fay L.J. 5, 55 York Leg. Rec. 203.

Difference in theory
The theory of recoupment is that plaintiff's damages are cut down to an amount which will compensate him for the value of what plaintiff has given, the theory being that defendant is not bound to perform contract, but has received something of value for which he should pay, while under the statutes of counterclaim, defendant does not seek to enforce plaintiff's obligation and to deduct plaintiff's liability for breach from amount due from himself —Tripp v Renhard, 200 P.2d 644, 184 Or 622

41. Mo —Fricke v. W. E Fuetterer Battery, etc, Co, 288 S.W. 1000, 220 Mo App. 623.
57 C J. p 370 note 79.

Connection with plaintiff's cause of action
A set-off grows out of matter independent of plaintiff's cause of action, whereas a counterclaim grows out of, or is connected with, plaintiff's cause of action.—Sams v. Kern, 98 N E 2d 920, 121 Ind App. 370.

Premiums illegally collected
In action to recover premiums on public liability policy, where defendant claimed a sum alleged to have been illegally collected from it in premiums on policies issued by plaintiff in prior years, matter set up by defendant was basis of a counterclaim and not of set-off.—Employers' Liability Assur. Corp. v. Fischer & Porter Co, 75 A.2d 8, 167 Pa Super. 448.

42. Neb —**Corpus Juris cited in** McGerr v Marsh, 26 N.W 2d 374, 378, 148 Neb. 50
N Y —Otto v. Lincoln Sav. Bank of Brooklyn, 51 N.Y S 2d 561, 563, 268 App Div 400, affirmed 62 N E 2d 236, 294 N Y. 798—Stafford Security Co. v. Kremer, 249 N.Y S. 670, 232 App.Div. 265, reversed on other grounds 179 N.E. 32, 258 N Y. 1, 78 A L R. 822
N C.—Williams v. Williams, 135 S.E. 39, 192 N.C. 405.
57 C J. p 370 note 80.

43. W Va.—Bowdish v. Groscup, 74 S.E 950, 70 W.Va. 758.
57 C.J. p 371 note 81.

fendant's favor for an excess[44] Some authorities state that counterclaim and recoupment are alike in the sense that each must grow out of, or be connected with, the transaction on which plaintiff sues;[45] but other authorities state that they are unlike in that recoupment must, and counterclaim need not, be confined to the transaction sued on.[46] A recoupment has been said to be in effect a counterclaim for damages[47] or a counterclaim arising out of the contract sued on;[48] but it has also been said that a recoupment is not a counterclaim in the strict sense because it is not in the nature of a cross demand, but rather lessens or defeats any recovery by plaintiff[49]

Defense and cross demands. A defense is distinguishable from both set-off and counterclaim,[50] as well as from counterclaim alone.[51] Strictly speaking, a recoupment,[52] set-off,[53] or counterclaim[54] is not a defense, and a matter which is merely defensive is not a counterclaim.[55] However, recoupment is sometimes spoken of as a defense,[56] or at least as a partial defense,[57] or as being in the nature of a defense,[58] and the same is true of set-off[59] and counterclaim.[60] In a sense, a counterclaim is a defense,[61] but it is more than that,[62] it is an offensive as well as a defensive plea[63] Likewise, a set-off is more than a defense[64]

Claim and counterclaim. "Counterclaim" has been said to be the opposite of "claim."[65]

Discount and counterclaim, set-off, or recoup. The word "counterclaim" has been held to be synonymous with "discount."[66] "Set-off" and "discount" have been distinguished.[67] The term "recoup" has been held to be synonymous with "discount."[68]

"Reconvention" and "compensation" are distinguishable terms,[69] but in some instances they have been used interchangeably[70]

Reduction and recoupment "Reduction" is sometimes regarded or used as synonymous with "re-

44. U S —Electric Storage Battery Co. v Rothensies, C C A.Pa., 152 F.2d 521, reversed on other grounds Rothensies v Electric Storage Battery Co., 67 S Ct. 271, 329 U S 296, 91 L Ed. 296
57 C.J p 371 note 82.

45. Ark —State v Arkansas Brick, etc., Co, 135 S W. 843, 98 Ark 125, 33 L R A.,N S., 376.

46. Pa —Artex Imp. Co. v Borushko, Com Pl, 98 Pittsb Leg.J. 506
57 C J p 371 note 85.

47. Mich —Watson-Higgins Milling Co v Pere Marquette Ry Co, 43 N.W.2d 43, 328 Mich. 5—Smith v Erla, 26 N W.2d 728, 317 Mich. 109 —Lyons v City of Grand Rapids, 9 N W 2d 552, 305 Mich 309

48. Pa —Northwestern Nat Bank v Commonwealth, 27 A 2d 20, 345 Pa. 192

49. U S —Pennsylvania R Co. v. Miller, C C A Tex, 124 F 2d 160, 140 A L R 811, certiorari denied 62 S.Ct 1047, 316 U.S. 676, 86 L. Ed 1750.

50. Iowa —Secor v. Siver, 146 N.W. 845, 165 Iowa 673
57 C J. p 371 note 87.

Cross action arising out of collision
In action for damages resulting from a collision between automobile and truck, defendant's claim for damages to, and for loss of use of, truck arising out of same collision is not a set-off or counterclaim but is in the nature of a cross action.—Nash v. Raun, D.C Pa., 67 F.Supp. 212.

51. Ill —Wilson v. Tromly, 89 N.E 2d 22, 404 Ill. 307.
57 C.J. p 371 note 88.

52. N.Y.—Peuser v. Marsh, 153 N. Y S 381, 167 App Div 604, affirmed 113 N E 494, 218 N Y 505

53. Ala —Myles v Strange, 145 So. 313, 226 Ala 49
57 C J. p 371 note 90.

Defenses against negotiable paper
Statute subjecting negotiable paper in hands of holder not in due course to same "defenses" as though nonnegotiable does not enlarge scope of statute of set-off, right of set-off not being defense —Coffin v Talbot, 148 So 184, 110 Fla 131.

54. Ariz —Valley Gin Co v. McCarthy, 106 P.2d 504, 56 Ariz 181
57 C J p 371 note 91

55. N D.—Zeman v. Mikolasek, 25 N W 2d 272, 75 N D. 41.
57 C.J p 371 note 92

Need for affirmative relief
The distinction between an equitable counterclaim and an equitable defense lies in whether the facts stated in the so-called counterclaim show a need for affirmative relief for complete protection of defendants or if proved would merely defeat plaintiff's cause of action —U. S Fidelity & Guaranty Co v. Goetz, 32 N.E 2d 798, 800, 285 N.Y. 74.

56. Ark —State v. Arkansas Brick, etc., Co, 135 S W. 843, 98 Ark 125, 33 L R.A ,N.S , 376.
57 C J. p 371 note 93.

57. N Y —Peuser v. Marsh, 153 N Y S 381, 167 App Div. 604, affirmed 113 N E. 494, 218 N.Y. 505—McCullough v. Cox, 6 Barb. 386.

58. U.S.—Bull v. U. S., Ct.Cl., 55 S Ct. 695, 295 U.S 247, 79 L.Ed. 1421 —Electric Storage Battery Co. v. Rothensies, C.C.A.Pa, 152 F.2d 521, reversed on other grounds Rothensies v. Electric Storage Battery Co, 67 S Ct 271, 329 U S. 296, 91 L Ed 296—U S v. Laney, D.C S C., 96 F Supp. 482
Pa —Commonwealth v Berks County, 72 A 2d 129, 364 Pa 447

59. Mich.—Merchants' Bank v Schulenberg, 19 N.W. 741, 54 Mich 49.
57 C J p 371 note 95.

60. Mich —Flynn v Barry, 191 N W 215, 221 Mich 422
57 C J p 371 note 96

61. Ohio —Schubert v. State Banking, etc, Co, 6 Ohio N.P.,N.S, 544.
57 C.J. p 371 note 97.

62. Ky —Hatfield v Richmond, 197 S W. 654, 177 Ky 183
N.Y —Cohn v Hussen, 66 How Pr. 150.

63. Iowa —Hedinger v. Herweh, 34 N.W.2d 202, 239 Iowa 1146
Neb.—Olsen v. McMaken & Pentzien, 297 N.W. 830, 139 Neb 506.

64. Fla —Peacock Hotel v. Shipman, 138 So 44, 103 Fla 633
57 C.J. p 372 note 99.

65. N.Y.—Wolf v. H———, 13 How Pr. 84.

66. Ky —Spradlin v. Stanley, 99 S W. 965, 124 Ky. 701.

67. Tex.—Johnson v Shambeck, Com App., 13 S W.2d 350.
46 C J p 1086 note 84 [b].

68. N Y —Ives v. Van Epps, 22 Wend. 155.
N.D.—Emerson-Brantingham Co. v. Brennan, 159 N.W. 710, 35 N D. 94

69. La.—Noble v. Flower, 36 La. Ann. 737.
12 C.J. p 225 note 64 [a].

70. La.—Godbold v. Harrison, McG. 31.

coupment"[71] or "set-off."[72]

§ 11. —— Objects of, and Favor Shown, Remedies

In general, the common object of the various forms of cross demand, such as set-off and counterclaim, and of statutory provisions relating thereto, is to prevent a multiplicity of suits by allowing the entire controversy between the parties to be determined in one action, and to this end the statutes are given a liberal construction.

The object of a plea of recoupment is to rebate or recoup in whole or in part the claim sued on.[73] The object of a set-off is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set-off,[74] or, if the amount of the set-off exceeds plaintiff's demand, obtain judgment for the excess.[75] The purpose of a counterclaim has been said to be to enable a defendant to make his defense more complete and effectual than it would be if he stood on an answer alone.[76] In general, the common object of the various forms of cross demand, such as recoupment, set-off, counterclaim, and the like,[77] and of code and statutory provisions relating thereto,[78] is to avoid and prevent circuity of action and multiplicity of suits by allowing the entire controversy between the parties to be litigated and finally determined in one action, wherever this can be done with entire justice to all parties before the court,[79] without a violation of any of the settled rules of law or forms of procedure,[80] and without great inconvenience in practice.[81]

A liberal construction should be given to the rules creating and regulating the doctrines of set-off and recoupment[82] as well as to code and statutory provisions relating to counterclaims, set-offs, or other cross demands.[83] These remedies are favored by

71. U.S.—Michigan Yacht, etc., Co v. Busch, Mich., 143 F. 929, 75 C.C A. 109
57 C J. p 372 note 17.

72. Md.—Burch v. State, 4 Gill & J 444.
53 C J. p 667 note 83.

73. Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 128 So. 831, 99 Fla 410.
Mo.—**Corpus Juris quoted in** Russell v Empire Storage & Ice Co., 59 S W 2d 1061, 1067, 332 Mo 707.

74. Pa.—Shrum v. Carcase, 2 Pa Dist & Co 686.
57 C J p 372 note 19.

75. Fla.—Delco Light Co v. John Le Roy Hutchinson Properties, 128 So 831, 99 Fla 410

76. N J.—Hoffman v. Maloratsky, 164 A 260, 112 N J Eq 333.

77. Fla.—Tampa Leather Co. v Smith, 24 So.2d 523, 156 Fla 801—Payne v Nicholson, 131 So. 324, 100 Fla 1459
Ky.—**Corpus Juris quoted in** McFall v Burley Tobacco Growers' Co-op Ass'n, 54 S W.2d 922, 924, 246 Ky. 278.
N.H.—Moylan v Lamothe, 30 A.2d 11, 92 N.H 299
N J.—O'Dowd v. U. S Fidelity & Guaranty Co., 189 A. 97, 117 N J Law 444—Scarano v. Scarano, 28 A 2d 425, 132 N J Eq 362.
Pa.—People's Bank v. McDowell Nat Bank, 161 A. 203, 307 Pa 247.
57 C.J. p 372 note 21.

78. U S.—Nash v. Raun, D.C Pa., 67 F Supp 212—Grodsky v. Sipe, D.C Ill., 30 F.Supp. 656.
Cal.—Buckman v. Tucker, 71 P.2d 69, 9 Cal.2d 403—Bond v. Farmers & Merchants Nat. Bank, Los Angeles, 149 P.2d 722, 64 Cal.App 2d 842.
Ind.—Scott v. House, 91 N E 2d 853, 120 Ind.App 346.
Mass.—Liberty Mut Ins. Co. v. Hathaway Baking Co, 28 N E 2d 425, 306 Mass. 428, construing Wisconsin statute
Mo.—Keller v Keklikian, 244 S W 2d 1001—Cantrell v. City of Caruthersville, 221 S.W.2d 471, 359 Mo 282.
N Y.—Lebrecht v. Orefice, 105 N.Y.S 2d 318, 199 Misc. 1025—Public Service Heat & Power Co. v. Lipton, 94 N.Y.S 2d 664, 197 Misc. 384—Atlantic Gulf & West Indies S S Lines v. City of New York, N Y.Sup., 67 N.Y.S 2d 753, 188 Misc 279, modified on other grounds 69 N Y S.2d 796, 271 App.Div 1008, appeal denied 71 N Y S 2d 705, 272 App Div 793.
N C.—Thompson v. Pilot Life Ins. Co., 67 S E.2d 444, 234 N C 434—Johnson v. Smith, 1 S.E 2d 834, 215 N.C 322
Or.—Benton County State Bank v Nichols, 54 P.2d 1166, 153 Or. 73
Pa.—Beason v Pierce, 184 A. 650, 321 Pa. 398—Davis v. Colgan, 70 Pa. Dist. & Co. 386, 66 Montg.Co. 16.
Va.—Hoffman v. Stuart, 51 S E.2d 239, 188 Va. 785, 6 A.L.R 2d 247.
57 C J p 373 note 22.

Conservation of time, money, and property

The object of statute permitting recoupment is to reduce litigation, save a multiplicity of suits, and conserve time, money, and property from the hazard and uncertainty of trials. —Lyons v. City of Grand Rapids, 9 N W.2d 552, 305 Mich. 309—Stratford Arms Hotel Co. v. General Casualty & Surety Co., 229 N.W. 506, 249 Mich. 518.

79. Conn.—Avery v. Brown, 31 Conn. 398.
Ky.—**Corpus Juris quoted in** McFall v Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.

80. Conn.—Avery v. Brown, 31 Conn 398.
Del.—Edge Moor Iron Co. v. Brown Hoisting Co., 62 A. 1054, 22 Del. 10.

81. R I.—Davidson v. Wheeler, 22 A. 1022, 17 R I. 433.
57 C J. p 373 note 25.

82. N.J.—Newman v. Hatfield Wire & Cable Co., 174 A. 491, 113 N.J. Law 484.
N.Y.—Stafford Security Co. v. Kremer, 249 N.Y.S 670, 232 App.Div 265, reversed on other grounds 179 N.E. 32, 258 N.Y. 1, 78 A.L.R. 822.
S C.—Brown v. Lowe, 188 S.E. 182, 182 S C. 9.
Wash.—Edwards v. Surety Finance Co of Seattle, 30 P.2d 225, 176 Wash. 534—Johnson v. California-Washington Timber Co., 296 P. 159, 161 Wash. 96.

83. U.S.—Nash v. Raun, D.C.Pa., 67 F.Supp. 212.
Ariz.—Phœnix Sav Bank & Trust Co. v. Ellis, 69 P.2d 796, 50 Ariz. 116.
Fla.—Bates v. Lanier, 77 So. 628, 75 Fla. 79.
Iowa.—Linscott v. Linscott, 51 N.W. 2d 428.
Kan.—Salina Coca-Cola Bottling Corp. v. Rogers, 237 P.2d 218, 171 Kan. 688—U. S. Hoffman Machinery Corp. v. Ebenstein, 96 P.2d 661, 150 Kan. 790, opinion adhered to 103 P.2d 788, 152 Kan. 198.
Ky.—Weinstein v. Rhorer, 73 S.W.2d 25, 255 Ky. 179—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.
Mo.—Swafford Motor Co. v. Woods, App., 155 S.W.2d 550.
N.J.—McCurnin v. B. & J. Realty Co., 168 A. 161, 11 N.J.Misc. 673.
N Y.—Atlantic Gulf & West Indies S. S. Lines v. City of New York,

the courts,[84] which have been disposed to extend to the greatest length compatible with the legal rights of the parties the doctrine of allowing matters to be settled in one suit rather than compel defendant to resort to his cross action,[85] and which will, where possible, relax the strict rules of pleading where a right of set-off is shown.[86]

On the other hand, the rule of liberal construction will not be carried to a point of misconstruction;[87] and it is not always permissible to settle in one suit all differences that may exist between litigants, regardless of the nature of the respective demands.[88] A set-off will not be allowed where it in itself would be the cause of new disputes,[89] promote injustice,[90] or allow a contract to be changed by one of the parties to it.[91] Defendant will not be allowed to recoup his claim unless it would be just[92] and practicable[93] to adjust it in plaintiff's action.

§ 12. Jurisdiction

In the absence of a statute extending its jurisdiction, a court may entertain a set-off or counterclaim only where it would have jurisdiction to entertain the claim originally; and the cross demand must be within the jurisdiction of the court both as to subject matter and territorial limitations.

In the absence of statutory provisions extending its jurisdiction a court may entertain a counterclaim, set-off, or reconvention only where it would have jurisdiction to entertain the claim originally;[94] and the cross demand must be within the jurisdiction of the court as to subject matter[95] and territorial

67 N.Y.S.2d 753, 188 Misc. 279, modified on other grounds 69 N.Y.S.2d 796, 271 App.Div. 1008, appeal denied 71 N.Y.S.2d 705, 272 App.Div. 793—Antrones v. Antrones, 58 N.Y.S.2d 241—S. Z. Chodorov, Inc., v. Manheimer, 280 N.Y.S. 184, 155 Misc. 482.

N.C.—Manufacturers & Jobbers Finance Corp. v. Lane, 19 S.E.2d 849, 221 N.C. 189.

Pa.—Beason v. Pierce, 184 A. 650, 321 Pa. 398—Falsey v. Park, 20 Pa. Dist. & Co. 346.

S.C.—Griffin v. Scott, 27 S.E.2d 570, 203 S.C. 430—Coastal Produce Ass'n v. Wilson, 8 S.E.2d 505, 193 S.C. 339.

Tex.—Ferguson v. Plainview Nat. Bank, Civ.App., 42 S.W.2d 834.

57 C.J. p. 374 note 29.

84. U.S.—Hoffman v. Gleason, C.C.A. Mich., 107 F.2d 101.

Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.

La.—Foreman v. Pelican Stores, App., 21 So.2d 64.

Neb.—Louis Hoffman Co. v. Western Smelting & Refining Co., 34 N.W.2d 889, 150 Neb. 524—Indiana Harbor Belt R. Co. v. Alpirn, 296 N.W. 158, 139 Neb. 14.

N.J.—Atanasio v. Silverman, 77 A.2d 813, 11 N.J.Super. 116, affirmed 81 A.2d 492, 7 N.J. 278.

57 C.J. p. 373 note 26.

In equity the adjustment of demands by set-off rather than by independent suit is favored and encouraged.

U.S.—U. S. v. National City Bank of New York, C.C.A.N.Y., 83 F.2d 236, 106 A.L.R. 1235, certiorari denied U. S. v. National City Bank of New York, 57 S.Ct. 25, 299 U.S. 563, 81 L.Ed. 414.

Mich.—In re McLouth's Estate, 274 N.W. 759, 281 Mich. 191.

57 C.J. p. 373 note 26 [b].

Inability to coerce payment

Set-off is particularly favored if the creditor from any cause, such as sovereign immunity, cannot be coerced to pay his obligations.

U.S.—U. S. v. National City Bank of New York, C.C.A.N.Y., 83 F.2d 236, 106 A.L.R. 1235, certiorari denied 57 S.Ct. 25, 299 U.S. 563, 81 L.Ed. 414—U. S. v. Mann, C.C.Va., 26 F.Cas. 1151, Case No. 15,716.

Mich.—In re McLouth's Estate, 274 N.W. 759, 281 Mich. 191.

85. Fla.—Tampa Leather Co. v. Smith, 24 So.2d 523, 156 Fla. 801.

Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.

57 C.J. p. 374 note 27.

86. Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.

Va.—Stimmel v. Benthall, 60 S.E. 765, 108 Va. 141.

Pleading set-off see Pleading §§ 167–176.

87. Md.—Annan v. Houck, 4 Gill 325, 45 Am.D. 133.

88. Va.—Newport News, etc., R. Co. v. Bickford, 52 S.E. 1011, 105 Va. 182.

57 C.J. p. 374 note 31.

Mere recriminations

The counterclaim statute was intended to eliminate mere recriminations between the parties, and prevent the hearing from becoming a squabble or brawl.—Manufacturers & Jobbers Finance Corp. v. Lane, 19 S.E.2d 849, 221 N.C. 189.

Discretion of court

Action of trial court in sustaining exception to defendants' cross action was not an abuse of discretion where it was not shown that plaintiffs were insolvent or otherwise unable to respond in damages if a judgment should be recovered against them, and where judgment sustaining the exception was not an adjudication of defendants' claim as alleged in their cross action.—Waller Peanut Co. v. Lee County Peanut Co., Tex.Civ.App., 217 S.W.2d 183.

89. Pa.—Mangle v. Stiles, 31 Pa. 72. 57 C.J. p. 374 note 32.

90. Neb.—Hier v. Anheuser-Busch Brewing Assoc., 83 N.W. 77, 60 Neb. 320.

Tenn.—Federal Surety Co. v. Union Indemn. Co., 33 S.W.2d 421, 161 Tenn. 621.

91. Pa.—Mangle v. Stiles, 31 Pa. 72.

92. Del.—Edge Moor Iron Co. v. Brown Hoisting Mach. Co., 62 A. 1054, 22 Del. 10.

Equity and justice

In action to recover unpaid rent on written lease, a plea of recoupment, to the extent that it was predicated on malicious abuse of process, would be permissible only if it could be found that equity and justice required it.—Hellberg v. Norris, N.H., 84 A.2d 835.

93. Del.—Edge Moor Iron Co. v. Brown Hoisting Mach. Co., 62 A. 1054, 22 Del. 10.

94. U.S.—Pennsylvania R. Co. v. Musante-Phillips, Inc., D.C.Cal., 42 F. Supp. 340.

Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.

Kan.—**Corpus Juris quoted in** Malcolm v. Larson, 148 P.2d 291, 293, 158 Kan. 423.

N.J.—**Corpus Juris cited in** Navarro v. Martin, 38 A.2d 691, 692, 22 N.J.Misc. 291.

57 C.J. p. 374 note 39.

Effect of set-off or counterclaim or jurisdiction of court see Courts § 66.

95. Kan.—**Corpus Juris quoted in** Malcolm v. Larson, 148 P.2d 291, 293, 158 Kan. 423.

57 C.J. p. 375 note 40.

limitations[96] However, a party who brings an action may thereby give the court jurisdiction over him with respect to a counterclaim although such jurisdiction would not otherwise have existed.[97]

A court having no equitable jurisdiction cannot give relief on a set-off of a purely equitable right, at least where the set-off is deemed to involve the granting of affirmative relief,[98] and a court which has nothing more than common-law jurisdiction has been held without power to entertain a plea which attempts to set off damages arising ex delicto against an action on a contract, or damages arising ex contractu against an action for tort,[99] but under statutes extending the subject matter of counterclaims to include any and all claims, legal or equitable, which defendant may have, he is not precluded from setting up a counterclaim on the ground that the court would have had no jurisdiction of an original action based on the subject matter of the claim.[1]

On appeal. If a claim exceeds the jurisdictional amount and for that reason cannot be pleaded as a set-off before the inferior court, an appellate court will not permit it to be pleaded as such on appeal from the lower court,[2] and on appeal the set-off[3] or counterclaim[4] cannot, in the appellate court, be reduced by a credit or remittitur, so as to bring it within the jurisdiction of the inferior court, but will be regarded as not having been filed at all.

§ 13. Statutory Provisions and What Law Governs

a. Statutory provisions
b. What law governs

a. Statutory Provisions

Questions concerning the availability of a set-off or counterclaim as provided by statute must be determined in accordance with the language of the statute as construed in the light of its purpose.

The statutory provisions in some jurisdictions pertaining to counterclaims and crossclaims, taken together, form a comprehensive enactment intended to cover the various phases and aspects of cross claims.[5] Questions concerning the availability of a set-off or counterclaim as provided by statute must be determined in accordance with the language of the statute,[6] and any judicial construction of such a statute should be made in the light of the purpose of the statute.[7] Statutes respecting counterclaims have been held designed to enlarge previous remedies, not diminish them,[8] and the comprehensive language used in some statutes dealing with counterclaims has been held to indicate an intent on the part of the legislature to eradicate the limitations on the interposition of counterclaims which had theretofore existed, to the end that parties to a lawsuit might litigate all differences at one trial.[9]

A specific statute which is in conflict with a general counterclaim statute will control the counter-

96. U.S.—Pennsylvania R. Co. v. Musante-Phillips, D.C.Cal., 42 F. Supp. 340
Kan.—**Corpus Juris quoted in** Malcolm v. Larson, 148 P.2d 291, 293, 158 Kan. 423.
57 C.J. p. 375 note 42.

97. Okl.—Wyman v. Herard, 59 P. 1009, 9 Okl. 35.
57 C.J. p. 375 note 45.

Place where cause of action arose
Where plaintiff in reconvention was resident of state where the action was brought, and defendant was resident of sister state, the place where cause of action arose was held immaterial on question of jurisdiction.—Collins v. McCook, 136 So. 204, 17 La.App. 415.

A nonresident by bringing action in state court submitted himself to the jurisdiction of such court as to any counterclaim allowed under procedural rules and statutes of such state, and court would have jurisdiction without service of notice of counterclaim on nonresident plaintiff.—Linscott v. Linscott, Iowa, 51 N.W.2d 428.

98. Ga.—Commercial Credit Corp. v. Davis, 63 S.E.2d 353, 207 Ga. 562.—Gormley, for Use of Citizens Bank of Waynesboro, v. Chance, 191 S.E. 701, 55 Ga.App. 838.
57 C.J. p. 375 note 48

Set-off based on contribution
In action in city court on note to insolvent bank, defendant indorser could not enforce right of set-off based on indorser's contribution to fund of group, deposited in bank to credit of treasurer of group, since such right of set-off was equitable and hence within exclusive jurisdiction of superior court.—Gormley, for Use of Citizens Bank of Waynesboro, v. Chance, supra.

99. Ga.—Smith v. Bukofzer, 180 S.E. 358, 180 Ga. 585.
57 C.J. p. 375 note 48 [a].

1. Ind.—Vail v. Jones, 31 Ind. 467.

2. Mo.—Robinett v. Nunn, 9 Mo. 246.
57 C.J. p. 375 note 51.

3. Mo.—Robinett v. Nunn, supra.
S.C.—Reynolds v. Wells, 6 S.C.L. 478.

4. N.C.—Ijames v. McClamroch, 92 N.C. 362

5. Fla.—Newton v. Mitchell, 42 So. 2d 53.

6. Ill.—Sauvage v. Oscar W. Hedstrom Corp., 54 N.E.2d 725, 322 Ill. App. 427.
Ind.—Anderson v. Biggs, 77 N.E.2d 909, 118 Ind.App. 266
S.C.—Coastal Produce Ass'n v. Wilson, 8 S.E.2d 505, 193 S.C. 339.

Set-off held unavailable
(1) In action on bond secured by mortgage on realty, defendant was not entitled to an offset pursuant to section of civil practice act relating to judgments in actions on bonds.—Schumer v. Fortway Homes, 41 N.Y.S.2d 284, 266 App.Div. 752.

(2) Set-off by way of damages for violation of competition clause of contract for sale of corporate stock was recoverable if at all, in an action at law.—Ex parte Deaton, 8 So.2d 819, 243 Ala. 154.

7. Ind.—Anderson v. Biggs, 77 N.E.2d 909, 118 Ind.App. 266.

8. N.Y.—Oesterreicher v. Oesterreicher, 61 N.Y.S.2d 107.

9. N.Y.—Ritter v. Mountain Camp Holding Corp., 299 N.Y.S. 876, 252 App.Div. 602.

The sole test consonant with the purpose of a counterclaim should be whether counterclaim can be conveniently and justly determined in connection with plaintiff's cause of action.—Panzer v. Panzer, 83 N.Y.S.2d 525, 274 App.Div. 940.

claim statute and constitute a limitation on the general language thereof.[10] The right to a set-off or counterclaim given by a statute is impliedly subject to statutory provisions in pari materia,[11] and, in some jurisdictions, is expressly made subject to rules, such as rules of civil procedure.[12] A statute pertaining to counterclaims is superseded by a later statute which is in conflict therewith,[13] and the enactment of a new statute relating to counterclaims will be deemed to repeal an earlier statute on the subject, notwithstanding the absence of inconsistencies between the two, where the later statute was intended to be a revision of the entire subject and was designed as a substitute for preceding statutes on the subject.[14]

Where by statute counterclaim has been substituted for the remedies of recoupment and set-off, defendant may counterclaim for any claim which he previously could have set up by way of recoupment or set-off.[15] Under some statutes any claim which could not have been set up, either as a recoupment or set-off, is not the proper subject for a counterclaim,[16] but under other statutes a counterclaim may lie even though the facts would not have permitted a recoupment or set-off under the former practice,[17] and there is no requirement that the original demand and the counterclaim shall be of the same character.[18]

Permissive or mandatory nature of statutes. Some statutes providing for the interposition of a cross demand are considered permissive only, not mandatory,[19] and defendant may assert his claim by way of set-off or counterclaim or he may bring an independent action.[20] Other statutes, however, have been held to require a defendant to litigate particular matters as a counterclaim where possible.[21]

b. What Law Governs

Set-off, counterclaim, and recoupment are governed by the law of the place where the action is brought, and not by the lex loci contractus, since they relate to the remedy and not to the right.

Laws of set-off, counterclaim, and recoupment relate to the remedy and not to the right,[22] and therefore set-off, counterclaim, and recoupment are governed by the law of the place where the action is brought and not by the lex loci contractus,[23] but the effect of the defense must be determined by the lex loci contractus.[24] The question as to the right of set-off must be determined on the law as it stood when the action was commenced,[25] and similarly the forum in which a reconventional demand may

10. Fla.—Seven Seas Frozen Products v. Fast Frozen Foods, 43 So.2d 181.

11. N.J.—Falkenstern v. Herman Kussy Co., 59 A.2d 372, 137 N.J. Law 200.

Limitations imposed by other statutes

A counterclaim which comes within the definition thereof contained in one statute may, nevertheless, be improper under the limitations on allowance of counterclaims specified in another statute.—Jayell Films v. A. F. E. Corp., 67 N.Y.S.2d 77.

12. N.J.—Falkenstern v. Herman Kussy Co., 59 A.2d 372, 137 N.J. Law 200.

Repeal by new rules

Statute dealing with set-off was held repealed by new rules of civil procedure.—Capetillo v. Burress & Rogers, Tex.Civ.App., 203 S.W.2d 953, refused no reversible error.

13. Ariz.—Neyens v. Donato, 188 P. 2d 588, 67 Ariz. 2—Snyder v. Betsch, 130 P.2d 510, 59 Ariz. 535.

14. Cal.—Bond v. Farmers & Merchants Nat. Bank, Los Angeles, 149 P.2d 722, 64 Cal.App.2d 842.

15. N.Y.—Oesterreicher v. Oesterreicher, 61 N.Y.S.2d 107.
57 C.J. p 385 note 5.

16. Minn.—Folsom v. Carli, 6 Minn 284, 80 Am.D 456.
57 C.J. p 385 note 6.

17. Ill.—People ex rel. Bradford Supply Co. v. Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill. 520.
N.Y.—Stafford Security Co. v. Kremer, 249 N.Y.S. 670, 232 App.Div. 265, reversed on other grounds 179 N.E. 32, 258 N.Y. 1, 78 A.L.R. 822.

18. Ill.—People ex rel. Bradford Supply Co. v. Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill. 520.

19. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656
Ariz.—Kerby v. State ex rel. Frohmiller, 157 P.2d 698, 62 Ariz. 294
Fla.—Edwards v. Fitchner, 139 So. 585, 104 Fla. 52.
Ill.—First Trust & Sav. Bank of Kankakee v. Powers, 60 N.E.2d 582, 325 Ill.App. 600, reversed on other grounds 65 N.E.2d 377, 393 Ill. 97.
N.Y.—Harfried Realty Co. v. Spuyten Amusement Corporation, 264 N.Y.S. 320, 147 Misc. 647.

20. Ill.—First Trust & Sav. Bank of Kankakee v. Powers, 60 N.E.2d 582, 325 Ill.App. 600, reversed on other grounds 65 N.E.2d 377, 393 Ill. 97.
N.Y.—Harfried Realty Co. v. Spuyten Amusement Corporation, 264 N.Y.S. 320, 147 Misc. 647.

21. Ariz.—Snyder v. Betsch, 130 P. 2d 510, 59 Ariz. 535

22. N.Y.—**Corpus Juris quoted in** Fromm v. Glueck, 293 N.Y.S. 530, 537, 161 Misc. 502.
Wis.—**Corpus Juris cited in** In re Seybold's Estate, 270 N.W. 87, 89, 223 Wis. 192
57 C.J. p 376 note 55.

23. U.S.—Crane v. U. S., Ct.Cl., 55 F. 2d 734, certiorari denied 53 S.Ct. 7, 287 U.S. 601, 77 L.Ed. 523
N.M.—State Nat. Bank of El Paso, Tex., v. Cantrell, 143 P.2d 592, 47 N.M. 389, 152 A.L.R. 1216.
N.Y.—**Corpus Juris quoted in** Fromm v. Glueck, 293 N.Y.S. 530, 537, 161 Misc. 502.
Wis.—**Corpus Juris cited in** In re Seybold's Estate, 270 N.W. 87, 89, 223 Wis. 192.
57 C.J. p 376 note 56.

Foreign law as part of contract

The rule set forth in the text is not applicable where the foreign law attempted to be established is itself a part of the contract on which a recovery is predicated.—Franklin Soc. for Home Bldg. & Sav. v. Weseman, 10 N.Y.S.2d 247, 170 Misc. 1000.

24. Vt.—Harrison v. Edwards, 12 Vt. 648, 36 Am.D. 364.

25. Vt.—Farr v. Brigham, 15 Vt. 557
57 C.J. p 376 note 58.

be urged depends on the conditions existing when it is filed.[26]

§ 14. Remedies as Affected by Agreement, Waiver, or Estoppel

A party may be precluded by waiver or estoppel from asserting a right which he would otherwise have to interpose a set-off or counterclaim; and the parties to an action may agree to permit a set-off which, in the absence of agreement, would not be available.

The parties to an action may agree to permit a set-off or counterclaim to be based on claims which, in the absence of agreement, could not be set off or made the basis of a counterclaim,[27] and, similarly, may agree to recoup damages which otherwise could not be recouped.[28] An agreement to allow set-off need not be express, but may be inferred from the circumstances,[29] and since courts favor the settling of disputes between the parties in one action, as discussed supra § 11, an agreement to allow set-off will be inferred from very slight circumstances.[30]

Mere willingness to set off one demand against another or even an express understanding so to do, without some new consideration to support it as a contract, cannot defeat the right of plaintiff to recover.[31] Set-off cannot be had, under a conditional agreement for the allowance thereof, if the condition is not fulfilled.[32] Where an agreement is relied on in justification of a departure from the general rules governing set-off, it must appear that the proposed set-off is embraced therein.[33] Items not otherwise available for set-off cannot be set off under a contract when not included therein.[34] Matters which could not in any event be made the subject of set-off cannot be made so by agreement.[35]

Waiver of right to interpose. A defendant may, for a valuable consideration,[36] waive the right to use a set-off or counterclaim which would otherwise be available.[37] It is generally held that waiver of set-off may be either express[38] or implied;[39] but

26. La.—Rigney v. Monette, 13 So. 201, 45 La. Ann. 940.
27. Ga.—Long v. Cash, 189 S.E. 73, 54 Ga. App. 764.
Iowa.—Second Nat. Bank v. Mielitz, 233 N.W. 108, 211 Iowa 218.
Pa.—Manganiello v. Cello, 16 Pa. Dist. & Co. 446, 26 Luz. Leg. Reg. 207.
57 C.J. p. 377 note 64.
28. Conn.—McLean v. McLean, 1 Conn. 397.
29. N.Y.—Green v. Storm, 3 Sandf. Ch. 305.
Pa.—Leonard v. Smith, 29 A. 915, 162 Pa. 284.
30. N.J.—King v. King, 9 N.J. Eq. 44.
57 C.J. p. 377 note 68.
31. Ala.—Kennedy v. Manship, 1 Ala. 43.
If agreement to allow set-off be executed it needs no consideration.—Threlkeld v. Dobbins, 45 Ga. 144—Long v. Cash, 189 S.E. 73, 54 Ga. App. 764.
32. La.—Lees v. Dwight, 10 La. App. 711.
Mass.—Foot v. Martin, 1 Metc. 273.
33. Va.—**Corpus Juris quoted in** Armour & Co. v. Whitney & Kemmerer, Inc., 178 S.E. 889, 893, 164 Va. 12, 98 A.L.R. 596.
57 C.J. p. 376 note 63.
34. Pa.—Moore v. Galloway, 21 Pa. Dist. 759.
57 C.J. p. 377 note 72.
35. N.Y.—Diehl v. General Mut. Ins. Co., 3 N.Y. Super. 257.
36. U.S.—Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D.C. Ga., 52 F. Supp. 177.
Pa.—Appeal of Lloyd, 95 Pa. 518—Reed v. Executrix of Penrose, 36 Pa. 214—Smith v. Stricker, 186 A. 369, 123 Pa. Super. 181.
Va.—**Corpus Juris quoted in** Armour & Co. v. Whitney & Kemmerer, Inc., 178 S.E. 889, 893, 164 Va. 12, 98 A.L.R. 596.
57 C.J. p. 377 note **75.**
37. U.S.—Hoffman v. Gleason, C.C.A. Mich., 107 F.2d 101—Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D.C. Ga., 52 F. Supp. 177.
Va.—**Corpus Juris quoted in** Armour & Co. v. Whitney & Kemmerer, Inc., 178 S.E. 889, 893, 164 Va. 12, 98 A.L.R. 596.
57 C.J. p. 376 note 62, p. 377 note 76.
Validity of agreement
An agreement not to counterclaim should not be held void if in any circumstances it could be legally operative.—Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D.C. Ga., 52 F. Supp. 177.
Circumstances not constituting waiver
(1) Fact that main contractor permitted delay in completion of work did not constitute waiver of right to set off, as against claim of subcontractor's assignee, amount paid for materials furnished original subcontractor.—Empire Heating Corporation v. James Stewart & Co., 252 N.Y.S. 136, 140 Misc. 303.
(2) Renewal of note payable to trust company after maker acquired right of set-off on trust company's contract of suretyship, but before he had exercised such right, was held not waiver of such right of set-off.—Smith v. Stricker, 186 A. 369, 123 Pa. Super. 181.
(3) In action of assumpsit, fact that defendant did not include claim for board in his account when he was undertaking to make friendly settlement with plaintiff did not preclude defendant from recovering such amount by way of set-off.—Joyner v. McMurphy, 163 So. 533, 26 Ala. App. 549.
(4) In action by trustee in bankruptcy to recover from employee of bankrupt corporation for overdraft in salary account, where employee's counterclaim for amount due him by reason of his interest in certain notes of bankrupt corporation had been adjudged legally sufficient and amount due on note and amount paid employee were undisputed, dismissal of counterclaim on ground that employee admitted payment of notes in his affidavit claiming that it was intended that overdraft be credited on notes was error.—Blake v. Weiden, 34 N.Y.S.2d 879, 264 App. Div. 199, affirmed 51 N.E.2d 677, 291 N.Y. 134, 149 A.L.R. 1050.
(5) Other circumstances.—Bay Minette Land Co. v. Stapleton, 139 So. 342, 224 Ala. 175—57 C.J. p. 377 note 76 [c].
38. Pa.—Appeal of Lloyd, 95 Pa. 518—Smith v. Stricker, 186 A. 369, 123 Pa. Super. 181.
Va.—**Corpus Juris quoted in** Armour & Co. v. Whitney & Kemmerer, Inc., 178 S.E. 889, 893, 164 Va. 12, 98 A.L.R. 596.
57 C.J. p. 378 note 77.
39. U.S.—Hoffman v. Gleason, C.C.A. Mich., 107 F.2d 101.
Va.—**Corpus Juris quoted in** Armour & Co. v. Whitney & Kemmerer, Inc., 178 S.E. 889, 893, 164 Va. 12, 98 A.L.R. 596.
57 C.J. p. 378 note **77.**

it has also been held that a defendant cannot be deprived of a right of set-off by anything less than a contract,[40] and that an agreement must be clear and specific in order to deprive a party of the ordinary right of set-off[41]

Estoppel. A defendant may, by his conduct or representations, be estopped to interpose a set-off which would be otherwise available,[42] as where he has kept silent when it was his duty to speak[43] or has influenced plaintiff by false representations;[44] but it must be shown that plaintiff has acted thereon so as to alter his position to his detriment.[45] Payment on an independent claim, when an adjudication would have shown nothing due plaintiff, does not estop defendant to assert his claim when sued.[46]

§ 15. Existence of Cause of Action of Plaintiff

It has been held that the defendant cannot assert a set-off, counterclaim, or recoupment where the existence of such cross demand depends on the nonexistence of the plaintiff's cause of action; but the rule is not universal.

It has been held that the right to a set-off[47] or counterclaim[48] depends on plaintiff having a right of action against defendant, and that, where the cause of action on which defendant's cross demand is based depends for its existence on the nonexistence of plaintiff's cause of action, defendant cannot assert his demand by way of set-off,[49] counterclaim,[50] or recoupment,[51] but the rule has been held to be otherwise as to reconvention,[52] and it has also been held that if there is an independent jurisdictional basis for a counterclaim, and the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint.[53]

§ 16. Actions in Which Remedy Available

In general, a set-off is allowed only in actions on demands which could themselves be the subject of a set-off; and in some jurisdictions a counterclaim is available only in actions in which a money judgment is sought.

While it is difficult to deduce from the decisions any universal rule as to the cases in which the remedy of set-off or counterclaim is available,[54] it is held as a broad general rule that set-off can be allowed only in actions founded on demands which could themselves be the subject of a set-off.[55] Courts are loath to exercise their discretion in favor of permitting a defendant to set up counterclaims in an action brought against him for misapplication or failure to pay moneys belonging to plaintiff.[56] It is the substance of the cause of action contained in the allegations of the complaint, and not the form of action, which determines the right of set-off.[57]

Defendant may file a counterclaim in an action for the recovery of money only;[58] and in some

In Pennsylvania

(1) It has been held that a defendant may bar himself from using a set-off by an implied contract.—Reed v. Executrix of Penrose, 36 Pa. 214.

(2) However, it has also been held that the agreement must be express, and cannot be inferred from equivocal words or deduced from ambiguous expressions.—Louden v. Tiffany, 5 Watts & S. 367—Henniss v. Page, 3 Whart. 275.

40. Pa.—Appeal of Lloyd, 95 Pa. 518—Reed v. Executrix of Penrose, 36 Pa. 214—Smith v. Stricker, 186 A. 369, 123 Pa.Super. 181.

41. U.S.—Updike v. Oakland Motor Car Co., C.C.A.N.Y., 53 F.2d 369.

Promise by creditor to carry account indefinitely would not prevent creditor from setting off amount due debtor against debt due it.—Updike v. Oakland Motor Car Co., supra.

42. Pa.—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192—Walker v. Emerich, 149 A. 881, 300 Pa. 9.
57 C.J. p 378 note 80.

43. N.Y.—Jacobs v. Bernstein, 141 N.Y.S. 287, 156 App.Div. 263, affirmed 109 N.E. 1079, 215 N.Y. 743.
57 C.J. p 379 note 81.

44. Del.—Hawthorne v. Murray, 84 A. 5, 26 Del. 349.

45. Ill.—Hogden v. Kief, 63 Ill. 146.
Vt.—Ketchum v. Foot, 15 Vt. 258, 40 Am.D. 678.

46. Conn.—Holcomb Co. v. Clark, 85 A. 376, 86 Conn. 319.

47. Mich.—Walter A. Wood Mowing, etc., Mach. Co. v. Seaver, 51 N.W. 637, 90 Mich. 546.
57 C.J. p 383 note 81.

48. N.Y.—Walker v. Millard, 29 N.Y. 375.
57 C.J. p 383 note 82.

49. Miss.—Canal-Commercial Trust, etc., Bank v. Brewer, 108 So. 424, 143 Miss. 146, motion dismissed 109 So. 8, 143 Miss. 184, error dismissed 47 S.Ct. 96, 273 U.S. 638, 71 L.Ed. 816.
57 C.J. p 383 note 83.

50. Wash.—Perlus v. Market Inv. Co., 164 P. 65, 95 Wash. 484.
57 C.J. p 383 note 84.

51. Miss.—Hoover Commercial Co. v. Humphrey, 66 So. 214, 107 Miss. 810.

52. Tex.—Griffin v. Chubb, 16 Tex. 219.

53. U.S.—Tavitoff v. Stepovich, C.C.A.Alaska, 91 F.2d 106.

D.C.—Isenberg v. Biddle, 125 F.2d 741, 75 U.S.App.D.C. 100.

54. W.Va.—Baltimore, etc., R. Co. v. Jameson, 13 W.Va. 833, 31 Am.R. 775.

55. Mich.—Smith v. Warner, 16 Mich. 390.
57 C.J. p 379 note 90.

56. N.Y.—Jayell Films v. A. F. E. Corp., 67 N.Y.S.2d 77.

Taking of property

With respect to right of set-off, purchaser cannot take property contrary to obligation and apply its value to discharge just debt due from seller.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 34 S.W.2d 1009, 225 Mo.App. 1002.

57. N.Y.—Pink v. Title Guarantee & Trust Co., 8 N.E.2d 321, 274 N.Y. 167, reargument denied 10 N.E.2d 575, 274 N.Y. 610.

58. Ohio.—Baldwin v. Baldwin, App., 47 N.E.2d 792.

Money had and received

A counterclaim may be maintained in an action for money had and received although such action is to recover money under a judgment subsequently reversed for prematurity of action where the action in which the counterclaim is filed is not the

jurisdictions set-offs or counterclaims are unavailable in actions in which a money judgment is not sought,[59] as, for example, an action to declare the existence of a trust relation;[60] but other authorities do not so limit its use.[61] Some statutes have been held not to limit the right to plead a counterclaim to actions ex contractu.[62]

Within the meaning of the various statutes providing the remedy of set-off, the use of this remedy has been held allowable in probate proceedings against administrators to compel the payment of allowed claims,[63] actions to set aside the probate of a will,[64] or suits for specific performance.[65] On the other hand, set-off has been held not allowable in a scire facias action,[66] and a counterclaim sought to be interposed by the petitioners in an adoption proceeding has been held not to lie.[67] In a mechanic's lien action, under some statutory provisions and rules of court, counterclaims which theretofore would have been the subject of set-off or recoupment may be filed as compulsory counterclaims,[68] but permissive counterclaims may not be filed[69]

Possessory actions. As a general rule, a set-off or counterclaim ordinarily is not available in possessory actions[70] However, there is an exception where special circumstances exist which entitle defendant to equitable relief;[71] and a counterclaim may be interposed in such actions under the rules of civil procedure existing in some jurisdictions.[72] A counterclaim may be asserted in a proceeding which, although possessory in character, also contemplates an award of damages.[73] A counterclaim may be interposed to a count asking for injunction although another count is for replevin.[74]

§ 17. —— On Contracts in General

A recoupment, set-off, or counterclaim ordinarily is available in actions ex contractu.

Recoupment is allowed in actions ex contractu,[75] on unsealed instruments or instruments under seal.[76] Under the codes and statutes, set-offs and counterclaims are allowed in ex contractu actions,[77] and it has been held that a set-off is available only in such actions[78] Set-off is allowable in an action of assumpsit for usury,[79] or in action for wages,[80] or in actions of covenant.[81]

§ 18. —— Unliquidated Demands

Set-off is generally held unavailable in actions on unliquidated demands; but the statutes in some jurisdictions permit a set-off or counterclaim in actions on contract, whether for liquidated or unliquidated damages.

Since set-off is allowed only in actions founded on demands which could themselves be the subject of set-off, as discussed supra § 16, and since it is generally held that unliquidated demands cannot be the subject of set-off, as discussed infra § 42, the general rule is that set-off is not allowed in actions on unliquidated demands.[82] In some states, how-

summary supplemental procedure provided for by statute for securing restitution after a judgment has been reversed, but is an independent action and the counterclaim is filed after the debt on which the judgment had been obtained has matured — Buckman v. Tucker, 71 P.2d 69, 9 Cal. 2d 403.

59. Ala.—Heflin v. Heflin, 134 So. 20, 222 Ala 662.
57 C.J. p 379 note 97.

A condition precedent to the application of statutory legal set-off is that it shall be in answer to a suit on a debt.—Savings Bank of New London v. Santaniello, 33 A.2d 126, 130 Conn. 206.

60. Ala.—Heflin v. Heflin, 134 So 20, 222 Ala. 662.

61. Tex—Burt v. Stamford, Civ. App., 237 S.W. 977.

62. Ind.—Opple v. Ray, 195 N.E. 81, 208 Ind. 450.

63. Cal.—In re Bell, 141 P. 1179, 168 Cal. 253.

64. Iowa—Hoover v. Hedrick, 155 N.W 851, 178 Iowa 1235.

65. Ga.—Becker v Donalson, 67 S. E. 92, 133 Ga 864.

66. Del.—Burton v. Willin, 11 Del. 522, 22 Am S R. 363—Adair v. Newlin, 100 A 792, 11 Del Ch. 242.

67. Wyo—In re Adoption of Strauser, 196 P 2d 862, 65 Wyo. 98.

68. Del.—Stockman v. McKee, Super, 71 A 2d 875.

69. Del.—Stockman v. McKee, supra.

70. N H—Vernon Parts Corp. v. Granite State Mach. Co., 41 A.2d 605, 93 N H. 315.

71. N H—Vernon Parts Corp. v. Granite State Mach. Co., supra.

72. Utah.—White v. District Court of Fourth Judicial Dist. in and for Utah County, 232 P.2d 785.

73. Mo.—Federal Land Bank of St. Louis v. Bross, App., 122 S.W 2d 35.

74. S.C—Pee Dee River Lumber Co. v. Fountain, 72 S.E 885, 90 S.C. 122.
Set-off and counterclaim in replevin actions see Replevin § 82.

75. Md—Fidelity, etc., Co. v. Haines, 28 A. 393, 78 Md 454, 23 L R A 652.
57 C.J. p 379 note 3.

76. N Y—Van Epps v. Harrison, 5 Hill 63, 40 Am D 314.
57 C.J. p 379 note 4.

77. Va.—Newport News, etc., R., etc, Electric Co. v. Bickford, 52 S. E 1011, 105 Va. 182.
57 C.J. p 380 note 6.
Set-off in actions for unliquidated damages for breach of contract see infra § 18.

78. Okl.—Claremore Nat. Bank v. Jefferies, 259 P. 260, 126 Okl. 283.
57 C.J. p 380 note 7.

Action held on contract
Replevin action predicated on note and chattel mortgage was held to be action arising on contract against which set-off for defendant's wrongful discharge, under employment contract, would lie.—Fairmont Creamery Co. v. Ewing, 182 N.E. 883, 43 Ohio App. 191.

79. Vt.—Blair v. Ellsworth, 55 Vt. 415.
57 C.J. p 380 note 8.

80. N.Y.—Merlette v. North, etc., River Steamboat Co., 18 Daly 114.
Pa.—Rogers v. Waltz, 5 Pa.Dist. 645, 18 Pa.Co. 95, 12 Montg.Co. 160.

81. Ky.—Roebuck v. Tennis, 5 T.B. Mon. 82.
15 C.J. p 1295 note 22.

82. Mass.—Tracey v. Grant, 137 Mass. 181.
57 C.J. p 380 note 13.

ever, the statutes, more in harmony with the object of the remedy, which is to settle cross demands in one action, wherever possible, as discussed supra § 11, permit a set-off or counterclaim in actions on contract, whether for liquidated or unliquidated damages.[83]

§ 19. —— For Penalties

Some authorities permit a set-off or counterclaim to be asserted in an action for a penalty, but other authorities do not.

According to some authorities, in an action for the recovery of a statutory penalty defendant may not interpose a set-off[84] or counterclaim.[85] Other authorities, however, have held that the penal element in a statute should not be decisive on the question of the allowance of a counterclaim, provided a jurisdictional basis is established,[86] and have permitted a set-off or counterclaim to be asserted in an action for a penalty,[87] and in some jurisdictions the rule is that such an action is considered an action in debt in which a proper claim may be set off.[88] Actions on an undertaking given to secure an attachment[89] or arrest,[90] or on an appeal bond,[91] or on official bonds,[92] or on a forthcoming bond taken under a warrant of distress,[93] have been held to be actions on contract in which counterclaims or set-offs are available. A counterclaim is available in an action to recover money derived from the collection of penalties.[94]

§ 20. —— For Taxes

In the absence of express authority, it is generally held that a set-off is unavailable in an action brought for the recovery of taxes.

In an action for taxes, set-off of an indebtedness of the state or municipality to the tax debtor will not be allowed, the statutes of set-off being construed in the light of public policy as not allowing the remedy in proceedings for this purpose[95] unless expressly authorized,[96] nor is such a claim subject to compensation;[97] and it follows with greater force that a private debt of the tax collector cannot be set off against taxes due from his creditor.[98] However, a set-off against taxes may be allowed by statute, in the absence of a constitutional prohibition,[99] or by special contract to that effect.[1]

§ 21. —— For Torts

Recoupment is generally held available in tort actions, and, under some statutes, a set-off or counterclaim may also be interposed in such actions.

Under some statutes a defendant in an action at law for a tort may file a cross claim against plaintiff for damages arising out of the same trans-

Set-off in action on administration bond for unliquidated damages see Executors and Administrators § 979

83. Neb.—Raymond v Green, 10 N. W. 709, 12 Neb. 215, 41 Am R 763.
57 C J. p 380 note 15.

Contractor's delay or abandonment of work

In action for unliquidated damages alleged to have resulted from contractor's delay or abandonment of work, contractor was entitled to counterclaim on theory that delay was not his fault and that, regardless of fault, he was entitled to be paid for labor and materials which he furnished and which were of value to owner.—Smith v. Gerhardt, Mo.App., 220 S.W.2d 85

84. Ind.—Irvin v. Rushville Co-op. Tel. Co., 69 N.E 258, 161 Ind. 524.
57 C.J. p 380 note 17.

85. N.Y.—Moore v. Trimmer, 6 N.Y S. 430, 1 Silv.Sup. 171, 17 N.Y.Civ. Proc. 99.
57 C.J. p 380 note 18.

In prosecution under ordinance, action being criminal with respect to penalty, defendant could not plead in recoupment for instigation of offense by city.—Nelson v. City of Roanoke, 135 So. 212, 24 Ala.App. 277, certiorari denied 135 So. 214, 223 Ala. 317.

86. U S.—Marks v. Spitz, D.C.Mass., 4 F R.D. 348
Pa.—Davis v. Colgan, 70 Pa.Dist. & Co. 386, 66 Montg.Co. 16.

87. U S —Thompson v. Taylor, D.C. Fla., 60 F.Supp. 395.
Pa.—Davis v. Colgan, 70 Pa Dist. & Co. 386, 66 Montg.Co. 16.

88. Ala —Kelly v. Johnson, 29 So 672, 129 Ala. 627.
57 C.J. p 381 note 19.

89. Mo —State v. Mathieson, 232 S W. 181, 207 Mo.App. 676
N.Y.—Wickham v. Weil, 17 N.Y S 518, disapproving Furber v. McCarthy, 7 N Y.S. 613, 54 Hun 435.

90. N Y.—Cornell v Donovan, 14 N.Y St. 687, 14 Daly 295.
57 C.J. p 381 note 21.

91. Mo.—Green v. Conrad, 21 S.W. 839, 114 Mo. 651.
57 C.J. p 381 note 24.

92. Kan.—Sponenbarger v. Lemert, 23 Kan. 35.
N.H.—Concord v. Pillsbury, 33 N H. 310.

93. Va.—Hancock v. Whitehall Tobacco Warehouse Co., 41 S.E. 860, 100 Va. 443—Allen v. Hart, 18 Gratt. 737, 59 Va. 737.

94. Colo —Arapahoe County v. Denver, 69 P. 586, 30 Colo, 13.

95. Fla.—**Corpus Juris cited in** Aikens v. City of Rockledge, 182 So 235, 237, 132 Fla 874.
Tex —**Corpus Juris cited in** State v. Humble Oil & Refining Co., 169 S. W.2d 707, 708, 141 Tex. 40—**Corpus Juris cited in** Wedgworth v. Davenport, Civ.App., 170 S W.2d 789, 791—**Corpus Juris quoted in** Dallas Joint Stock Land Bank of Dallas v. Ellis County Levee Improvement Dist. No. 3, Civ.App., 55 S.W. 2d 227, 229.
57 C.J. p 381 note 29—61 C.J. p 1058 note 11.

96. Cal —Himmelmann v. Spanagel, 39 Cal. 389.
Tex —**Corpus Juris quoted in** Dallas Joint Stock Land Bank of Dallas v. Ellis County Levee Improvement Dist. No. 3, Civ.App, 55 S.W.2d 227, 229.

97. Pa —**Bindley v. Pittsburgh,** 64 Pa Super. 371.
57 C.J. p 381 note 31.

98. W.Va.—Miller v. Wisener, 30 S. E. 237, 45 W Va. 59
57 C.J. p 381 note 32.

99. U.S.—Amy v. Shelby County Taxing Dist., Tenn, 5 S.Ct 895, 114 U.S. 387, 29 L.Ed. 172

1. N.C.—Cobb v. Elizabeth City, 75 N C. 1.
57 C J. p 381 note 34.

action.[2] Recoupment is very generally allowed in actions which are based on a ground of tort,[3] such as actions for false representations[4] or trover,[5] but it has also been held that recoupment is not available to a defendant in a trover action except in special instances, such as insolvency or nonresidence of plaintiff.[6]

Set-off. Since set-off is statutory, as discussed supra § 4, the right to set-off in an action on a tort depends on the statutes.[7] While some statutes have been construed to allow set-offs in tort actions,[8] other statutes have been construed to exclude set-off in tort actions,[9] such as an action for damages for being summarily dispossessed,[10] libel,[11] negligence,[12] nuisance,[13] trespass,[14] case,[15] or trover.[16] It has been held that, where plaintiff joins in his complaint separate paragraphs of actions on contract and tort, defendant may plead a set-off to the paragraphs on contract,[17] but not to the paragraphs in tort[18] or to the whole complaint,[19] and that if the counts on contract are discontinued defendant will not be allowed his set-off.[20]

Counterclaim. While the statutes in some jurisdictions providing the remedy of counterclaim have been held not to authorize counterclaims in actions of tort,[21] even when the counterclaim grows out of the same occurrence,[22] it is generally held that, where the subject matter of the counterclaim is proper, the fact that a cause of action alleged in the complaint sounds in tort is no obstacle to setting up a counterclaim thereto in the answer,[23] and thus counterclaims are very generally allowed in tort actions such as actions for conversion[24] or fraud.[25] Counterclaims have also been allowed in actions of trespass where the subject matter is proper.[26]

Reconvention. In an action for tort defendant may reconvene a demand connected with or growing out of the transaction sued on.[27]

2. Va.—Hoffman v Stuart, 51 S E 2d 239, 188 Va 785, 6 A.L.R.2d 247.
A notice of motion for judgment is an action at law within such a statute—Hoffman v Stuart, supra.

3. Ala.—Brown v Patterson, 108 So. 16, 214 Ala 351, 47 A.L.R 1093.
57 C.J. p 381 note 36.

4. Mich.—Chandler v Childs, 3 N.W. 297, 42 Mich 128.
57 C.J p 381 note 38

5. Mich.—Sinker v. Diggins, 43 N.W. 674, 76 Mich 557.
57 C.J. p 381 note 39.

6. Ga.—Bell v G. Ober & Sons Co., 36 S E 904, 111 Ga 668—Harden v Lang, 36 S E 100, 110 Ga 392—Meders v Wirchball, 63 S.E.2d 674, 83 Ga App. 408—Youngblood v. Armour Fertilizer Works, 99 S E 314, 23 Ga App 731.

7. Ill.—**Corpus Juris cited in** General Motors Acceptance Corporation v Vaughn, 193 N.E. 483, 487, 358 Ill 541.
57 C.J. p 382 notes 43–60

8. Ga.—Horton v Pintchuck, 35 S E. 663, 110 Ga. 355—Ransone v. Christian, 49 Ga 491.

9. Conn.—Shaeffer v O. K Tool Co., 148 A 330, 110 Conn. 528.
7 C.J. p 382 note 46.

10. Pa.—Corpman v. Backistow, 2 Pearson 199.

11. Tex.—Brown v. Durham, Civ. App., 42 S.W. 331.
Necessity that matter arise out of same transaction see infra § 36

12. Ind.—Collins v. Groseclose, 40 Ind. 414

13. Mass.—Talbot v. Whipple, 7 Gray 122.

N Y.—Pattison v. Richards, 22 Barb. 143

14. Ind.—Humphrey v. Merritt, 51 Ind. 197.
57 C.J. p 382 note 53.

15. W Va.—Watring v. Gibson, 100 S.E 68, 84 W Va 204.
57 C.J p 382 note 54

16. U S.—Van Zandt v. Hanover Nat Bank, N Y., 149 F. 127, 79 C. C A. 23
57 C.J p 382 note 55.
Special circumstances
A defense of set-off is not available to defendant in a trover action except in special instances, such as insolvency or nonresidence of plaintiff—Barrow v Mallory, 14 S E 878, 89 Ga. 76—Meders v. Wirchball, 63 S.E 2d 674, 83 Ga App 408.

17. Ind.—Ross v. Faust, 54 Ind 471, 23 Am R. 655—Howlett v. Dilts, 30 N.E. 313, 4 Ind.App. 23.

18. Ind.—Howlett v Dilts, supra.

19. Ind.—Howlett v. Dilts, supra.
57 C.J p 382 note 59

20. Mass.—Cains v. Tirrell, 112 Mass. 22

21. Miss.—Moore v Abdalla, 19 So. 2d 502, 197 Miss. 125.
57 C.J. p 382 note 63.

22. Miss.—Moore v. Abdalla, supra.

23. N.Y.—Vandervort v. Mink, 98 N. Y S. 772, 113 App Div. 601.
57 C.J. p 382 note 65

24. Nev.—Lapham v. Osborne, 18 P. 881, 20 Nev. 168
57 C.J p 382 note 66.

25. Colo.—Warren v. Hall, 38 P. 767, 20 Colo 508.
57 C.J. p 382 note 68.

26. Cal.—De Martin v. Albert, 9 P 157, 68 Cal. 277.

In Pennsylvania
(1) No provision was made for counterclaims in trespass actions prior to the Act of April 4, 1929, P.L. 140, 12 P S § 412.—Trimmer v. Trimmer, 54 Pa.Dist & Co. 178, 93 Pittsb. Leg.J. 332, 59 York Leg.Rec. 73—Sando v. Seeley, 53 Pa.Dist. & Co. 206, 37 Luz Leg Reg. 407—57 C.J. p 383 note 70.

(2) That statute gave defendant in actions of trespass the right, in addition to denying negligence on his own part, to allege negligence on the part of plaintiff and set up against plaintiff a claim for damages arising out of the same general circumstances on which plaintiff's claim is based. —Trimmer v Trimmer, 54 Pa.Dist. & Co 178, 93 Pittsb Leg.J. 332, 59 York Leg Rec 73—Sando v Seeley, 53 Pa. Dist. & Co. 206, 37 Luz.Leg Reg. 407 —Hughes v. Ostroskie, Pa.Com.Pl., 38 Luz.Leg Reg. 93.

(3) Its purpose was to prevent either party involved in an accident from obtaining undue advantage by being first to institute action and bring it to trial.
U S.—Nash v. Raun, D C.Pa., 67 F. Supp. 212.
Pa.—Beason v. Pierce, 184 A. 650, 321 Pa 398—Trimmer v. Trimmer, 54 Pa.Dist. & Co. 178, 93 Pittsb. Leg.J. 332, 59 York Leg.Rec. 73.

(4) The statute is limited to actions involving negligence, and does not give a general right to a set-off or counterclaim in trespass.—Trimmer v. Trimmer, supra—Sando v. Seeley, 53 Pa.Dist. & Co. 206, 37 Luz. Leg.Reg. 407.

27. Tex.—Gulf, etc., R. Co. v. Tacquard, 3 Tex.A.Civ.Cas. § 250.
57 C.J. p 383 note 72.

Waiver of tort. Where a plaintiff who can sue in tort waives the tort and sues on contract, the action is considered an action on contract, within the meaning of statutes allowing set-offs[28] or counterclaims[29] in actions on contracts, and the courts, in following their inclination to settle all disputes between the parties in one action whenever practicable, will construe liberally plaintiff's pleadings to have effected a waiver of the tort, if such a construction is reasonably possible.[30] Where the facts pleaded by plaintiff would constitute an action for tort, but also constitute an action on contract, a set-off may be interposed.[31]

§ 22. Set-Off or Counterclaim against Set-Off or Counterclaim

In a proper case a claim may be allowed as a set-off against a counterclaim.

A claim may be allowed as a set-off against a counterclaim[32] or a cross complaint[33] in a proper case.

II. SUBJECT MATTER

§ 23. Nature of Indebtedness or Liability in General

The claims which may properly be made the subject of a cross demand such as set-off, counterclaim, compensation, or reconvention depend on the statutes in force as they have been interpreted by the courts, and generally, every claim must have a fair legal or equitable basis to be the subject of recoupment or set-off.

In questions involving set-off,[34] counterclaim,[35]

28. Pa.—U. S. Bank v. Macalester, 9 Pa. 475.
57 C. J. p. 383 note 76.

29. Ind.—Griffin v. Moore, 52 Ind. 295.
57 C. J. p. 383 note 77.

30. Kan.—Smith v. McCarthy, 18 P. 204, 39 Kan. 308.
Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-operative Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.

31. Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-operative Ass'n, 54 S.W.2d 922, 924, 246 Ky. 278.
57 C. J. p. 383 note 80.

32. Utah.—Salt Lake City v. Telluride Power Co., 17 P.2d 281, 82 Utah 607, rehearing denied 26 P.2d 822, 82 Utah 622.

33. Cal.—Bagdasarian v. Gragnon, 192 P.2d 935, 31 Cal.2d 744.

34. Ala.—Industrial Sav. Bank v. Groenwald, 158 So. 734, 229 Ala. 529.
Ill.—Chicago Riding Club, for Use of Klein, v. Avery, 27 N.E.2d 636, 305 Ill. App. 419.
Ind.—Noblesville Milling Co. v. Johnson, 65 N.E.2d 250, 116 Ind. App. 437.
Kan.—Stevens v. Able, 15 Kan. 584.
Mich.—Mason v. Lee-Bert, Inc., 39 N.W.2d 319, 326 Mich. 32.
Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.
Wis.—Farmer v. Pick Mfg. Co., 277 N.W. 668, 227 Wis. 99.

Defendant may set off against plaintiff's claim any claim defendant has against plaintiff extrinsic to transaction out of which plaintiff's claim arises, where cross demands are mutual, arise out of same right, are due and payable, and are liquidated.—Ghingher v. Fanseen, 172 A. 75, 166 Md. 519.

Nature of cause

Whether a cause of action is of such character as to constitute the proper basis of a set-off is to be determined from the nature of the cause as contemplated and defined by statute.—Mutual Sav. Life Ins. Co. v. Osborne, 23 So.2d 867, 247 Ala. 252.

35. Ariz.—Snyder v. Betsch, 130 P. 2d 510, 59 Ariz. 535
Or.—Wiggins v. Hendrickson, 229 P. 2d 652, 191 Or. 285.

"Claim"

Under the statute respecting counterclaims, the word "claim" does not refer to the form of the action but to the underlying facts combined with the law giving a party a right to a remedy of one form or another based on the claim, it is not essential that the claim which the statute requires to be stated as a counterclaim should seek the same relief as the opposing party's claims.—Cantrell v. City of Caruthersville, 221 S.W.2d 471, 359 Mo. 282.

Cross complaint

Insurer's cross complaint to cancel for fraud life policy sued on was a "counterclaim" within statute permitting pleading of as many grounds of defense, "counterclaim" and set-off, whether legal or equitable, as defendant may have.—Federal Life Ins. Co. v. Relias, 185 N.E. 319, 99 Ind. App. 115.

Legal nature of counterclaim

(1) Counterclaim of legal nature may be interposed in equity proceeding.—First Nat. Bank v. Erling Bros., 249 N.W. 681, 61 S.D. 364, 89 A.L.R. 1387.

(2) Legal issues may be brought in by way of counterclaim or cross complaint, even though the complaint pleads a purely equitable cause of action.—Crouser v. Boice, 124 P.2d 358, 51 Cal. App. 2d 198.

(3) The statute regarding counterclaims permits practically any counterclaim of any name or nature, whether legal or equitable, to be interposed by defendant to a plaintiff's cause of action.—Village of Fleischmanns v. Silberman, 15 N.Y.S.2d 904.

Particular counterclaims held proper

(1) In general.
U.S.—Norton v. Shotmeyer, D.C.N.J., 72 F. Supp. 188
Okl.—Moyer v. Closs, 97 P.2d 901, 186 Okl. 354.
Pa.—Englert v. Beckman, 99 Pa. Super. 162.
Wis.—Jacobosky v. Town of Ahnapee, 13 N.W.2d 72, 244 Wis. 640.

(2) In action to recover for hauling, counterclaims for loss of goods in hauling, through negligence.—Great Atlantic & Pacific Tea Co. v. Lexington-Hazard Express Co.'s Receiver, 54 S.W.2d 631, 246 Ky. 102.

(3) In action by wife of vendee to restrain conditional vendor from removing furnace from house of wife in which it was installed, counterclaim for conversion of the furnace.—Swanson v. Rock Island Stove Co., 31 N.E.2d 85, 308 Ill. App. 315.

(4) In vendor's action for specific performance of land contract, wherein vendor could not prevail because her title was defective, counterclaim by purchaser for amount paid by purchaser on the contract as a deposit together with agreed value of the title search and counsel fees constituting a sum which was fixed and readily determinable.—Welhaven v. Kohn, 15 N.Y.S.2d 183, 257 App. Div. 744, affirmed 26 N.E.2d 821, 282 N.Y. 705, reargument denied 29 N.E.2d 395, 284 N.Y. 575.

compensation,[36] and reconvention,[37] which were unknown at common law and exist to-day only by virtue or under the authority of statutory provisions, claims which may properly be made the subject of a cross demand depend on the statutes in force as they have been interpreted by the courts; and it has been said that the diversity in the decisions of the courts of the different states as to which claims are proper set-offs or counterclaims arises, from the diversity in the language of their respective statutes of set-off and counterclaim.[38] Unless the claim is embraced within the provisions of the statutes, as such provisions have been interpreted, the remedy is denied,[39] and in particular cases the assertion of certain matter in set-off[40] or as a counterclaim[41] has been held improper. Ordinarily the statutes are given a liberal interpretation, as discussed § 11, but it has been held inadvisable to devise a rule for the determination of what constitutes proper subject matter which will fit all cases which may arise in the future.[42]

Generally, damages may be set off for which a cross action would lie at the time of pleading them.[43] However, every claim must have a fair legal or equitable basis to be the subject of recoupment or set-off,[44] and a set-off[45] or counterclaim[46] will not be allowed where it would result in a double recovery for defendant; nor, in some jurisdictions, will a counterclaim be allowed where it tends to prejudice and embarrass the fair trial of plaintiff's action.[47] Whether or not a counterclaim, provided for by statute, extends to subject matter which previously could have been set up by way of recoupment or set-off, or is limited to such subject matter, is discussed supra § 13.

It has been held that the common-law equitable defense of recoupment usually invoked to establish failure of consideration is unavailable to a defendant whose sole effort is to recover personal property and not its value.[48] Nominal damages may not be

(5) In payee's action on notes, counterclaim by makers on ground that consideration supporting notes was oral contract of agency for sale of radios, washing machines, and electric refrigerators, which payee represented were fit for trade and that machines proved unfit causing buyers to refuse to make payments —Eyer v. Richards & Conover Hardware Co., 55 P.2d 60, 176 Okl. 191.

36. La.—Sliman v. Mahtook, 136 So. 749, 17 La.App. 635.
Nature of compensation generally see supra § 9.

37. La.—Southern Hide Co. v. Best, 141 So. 449, 174 La. 748

Statute has not enlarged class of claims that may be pleaded by defendant in reconvention of plaintiff's claim —Standard Sanitary Mfg. Co. v. Benson Hardware Co., 143 So. 570, 225 Ala. 412—Craft v. Standard Acc. Ins. Co., 123 So. 271, 220 Ala. 6.

38. Va.—Wartman v. Yost, 22 Gratt. 595, 53 Va. 595.

39. N.Y.—White v. White, 66 N.Y.S. 2d 273, 271 App.Div. 581—Beck v. Wollschlager, 280 N.Y.S. 254, 245 App.Div. 747.
57 C.J. p. 384 note 98.

Recoupment

Statute has not enlarged class of claims that may be pleaded by defendant in recoupment of plaintiff's claim.—Standard Sanitary Mfg. Co. v. Benson Hardware Co., 143 So. 570, 225 Ala. 412—Craft v. Standard Acc. Ins. Co., 123 So. 271, 220 Ala. 6.

Suit to quiet prescriptive title

(1) Issue in suit to quiet prescriptive title against former owner's claims being occupancy for prescriptive period, answer attacking validity of prescriptive owner's deed is not proper "counterclaim" or "set-off."—Stolfa v. Gaines, 283 P. 563, 140 Okl. 292.

(2) In suit by owner of real estate by prescription to quiet title against claims of former owner, defendant could not assert his record title as counterclaim or set-off —McGowan v. Carlton, 288 P. 338, 143 Okl. 106.

40. Tex.—Rake v. Security Loan & Investment Co., Civ.App., 83 S.W. 2d 688.

Bank's indebtedness to stockholder arising from stockholder's liability on depository bond executed to school district could not be set off against stockholder's liability to bank for note and assessment, where stockholder's indebtedness to bank had been discharged by conveyance of land, and lien thereon in favor of school district gave school district preference over other creditors in violation of statute.—Snyder Independent School Dist. v. Shaw, 88 S.W.2d 85, 126 Tex. 343.

Expenses

In an action to recover the difference between the amount paid defendant for land and the amount defendant actually paid therefor, such payment being made on defendant's agreement that he would transfer the property to plaintiff for the amount that he paid for it, and his representation as to what that amount was, defendant should not be allowed to set off against the damages of plaintiff an amount which he claims to have paid out as expenses —Jameson v. Kempton, 100 P. 186, 52 Wash. 106.

41. Ark.—Ouachita Valley Refining Co. v. Webster, 12 S.W.2d 779, 178 Ark. 845
Cal.—Hoytt Const. Co. v. White, 163 P.2d 32, 71 Cal.App.2d 526.
Pa.—Gerovica v. Dzelalia, 27 A.2d 707, 149 Pa.Super. 601—Reitz v. Reitz, Com.Pl., 5 Fay.L.J. 143, 56 York Leg.Rec. 79.
57 C.J. p. 384 note 98 [b].

Storage of property converted

Counterclaim for storage of property converted is inconsistent with conversion and cannot be proved in action for conversion.—Thomas P. Beale Furniture Co. v. McGrorty, 103 N.Y.S. 221, 53 Misc. 643.

42. Ohio.—Price v. Kobacker Furniture Co., 152 N.E. 301, 20 Ohio App. 464.

43. Neb.—Shabata v. Johnston, 73 N.W. 278, 53 Neb. 12.
57 C.J. p. 385 note 99.

44. Md.—Case of Strike, 1 Bland 50.
Tenn.—**Corpus Juris quoted in** Helms v. Citizens Bank of Erwin, 97 S.W. 2d 665, 668, 20 Tenn.App. 268.

45. Tenn.—**Corpus Juris quoted in** Helms v. Citizens Bank of Erwin, 97 S.W.2d 665, 668, 20 Tenn.App. 268.
57 C.J. p. 385 note 2.

46. N.J.—Miller v. Stieglitz, 160 A. 543, 109 N.J.Law 138.

47. Tenn.—**Corpus Juris quoted in** Helms v. Citizens Bank of Erwin, 97 S.W.2d 665, 668, 20 Tenn.App. 268.
Necessity generally that claim be such that it is just and practicable to adjust it in plaintiff's action see supra § 11.

48. Pa.—Stein v. Cherry, 44 A.2d 846, 158 Pa.Super. 329.

recovered in recoupment.[49]

§ 24. Tendency to Defeat or Diminish Plaintiff's Claim

Under some statutory provisions, a counterclaim must tend to diminish or defeat plaintiff's recovery, and to have such effect it must be such that it resists or modifies some state of facts in, or impairs, affects, or qualifies, at least in some degree, plaintiff's cause of action, and is antagonistic thereto.

Under the statutes in some of the states it is expressly provided that a counterclaim must tend to diminish or defeat plaintiff's recovery; and where, by virtue either of such specific statutory provisions or, in their absence, of the recognition of a similar requirement as existing under the statutes creating and defining counterclaims, such a principle is established, a cross demand not so tending does not constitute and is not allowed as a counterclaim.[50] In order to have that effect it must be such that it resists or modifies some state of facts in,[51] or impairs, affects, or qualifies, at least in some degree,[52] plaintiff's cause of action, and is antagonistic thereto;[53] but a claim insufficient on this ground to constitute a counterclaim may be such as to constitute an equity in defendant.[54] Under some statutes, however, counterclaims may be filed against plaintiff or a codefendant without regard to the effect it may have on plaintiff's demand.[55]

Under the rule requiring that a counterclaim have a tendency to defeat or diminish plaintiff's claim, a proposed counterclaim which shows that plaintiff's alleged claim has not in fact any existence is held not to be a counterclaim;[56] nor is a claim which cannot be proved until it is shown that plaintiff had no claim;[57] nor one which seeks the same relief as that sought by plaintiff.[58]

Money demands in actions for equitable relief. It has been held that, where plaintiff seeks an injunction, defendant cannot counterclaim for damages for breach of contract since if plaintiffs are entitled to an injunction the recovery by defendant of a money judgment against plaintiffs would not in any way tend to defeat or diminish plaintiffs' right to an injunction,[59] and the same has been held as to money demands asserted in a counterclaim by defendant in actions for mortgage foreclosure without any demand for a deficiency judgment,[60] for partition and accounting,[61] to quiet title to real es-

49. Ga.—Foote & Davies Co v. Maloney, 42 S.E 413, 115 Ga 985.
Me.—Elliott S. Peterson Co v. Parrott, 152 A. 313, 129 Me. 381.

50. Cal.—Hanes v. Coffee, 300 P. 963, 212 Cal 777—Bond v Farmers & Merchants Nat. Bank, Los Angeles, App, 149 P.2d 722—Dobbins v. Horsfall, 136 P.2d 35, 58 Cal App 2d 23—Robertson v. Maroevich, 109 P 2d 708, 42 Cal.App.2d 610—Kittle Mfg. Co. v. Davis, 47 P.2d 1089, 8 Cal.App.2d 504
Idaho.—Mochel v. Cleveland, 5 P 2d 549, 51 Idaho 468.
Mont.—Hanrahan v. Andersen, 90 P. 2d 494, 108 Mont. 218.
N.Y.—Rose v Rose, 253 N.Y.S. 173, 233 App.Div. 868—Campbell v. Pettigrew, 248 N.Y.S. 102, 139 Misc. 629.
57 C.J. p 385 notes 8, 9.

51. Cal.—Ward v. Goetting, 186 P. 640, 44 Cal.App. 435
N.Y.—Leavenworth v. Packer, 52 Barb. 132.

52. Wis.—Dietrich v. Koch, 35 Wis. 618.
57 C.J. p 386 note 11.

In absence of application of an equitable rule, a "counterclaim" or "set-off" to constitute such must in some way, directly or indirectly, affect plaintiff's right and meet the issue or part of issue tendered by plaintiff.—Yellowstone Sheep Co. v. Ellis, 96 P.2d 895, 55 Wyo 68.

Damages for conversion
Bank was held entitled to assert demand for damages for conversion of automobiles, sold by corporation president after executing bills of sale thereof to bank as security for loans to corporation, by way of counterclaim in action by corporation's creditor against bank as trustee for creditors to recover plaintiff's share of proceeds of execution sale, since such demand tends to diminish or defeat plaintiff's recovery.—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal.App.2d 639.

53. Colo.—Bannerot v. McClure, 90 P. 70, 39 Colo. 472, 12 L.R.A.,N.S., 126.
N.M.—La Mesa Community Ditch v. Appelzoeller, 140 P. 1051, 19 N.M. 75.

Parallel claims
In stockholders' derivative action, fact that counterclaims of defendant corporations against individual plaintiff, if successful, would bring additional benefits to the corporations in whose behalf plaintiff was suing would not make them proper as "counterclaims," since this circumstance would tend to show that they were parallel claims and not counterclaims.—Binon v. Boel, 66 N. Y.S.2d 425, 271 App.Div. 505, affirmed 74 N E 2d 466, 297 N.Y. 528.

54. Minn.—Memphis First Nat. Bank v. Kidd, 20 Minn. 284.

55. Ill.—People ex rel. Bradford Supply Co. v. Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill. 520.

56. N.Y.—Hudson River Power Transmission Co. v. United Tract. Co, 91 N Y.S. 179, 98 App.Div. 568.
57 C.J. p 386 note 14.
Existence of cause of action in plaintiff as condition to defendant's right to interpose cross demand see supra § 15.

Defeat of plaintiff's demand
A cause which wholly defeats the demand of plaintiff cannot be the subject of a counterclaim.—Lanyon v. Chesney, 106 S.W 522, 209 Mo. 1—Jones v. Moore, 42 Mo. 413—Hauser v. Burge, Mo.App, 121 S.W.2d 314—Markowitz v. Markowitz, Mo.App., 290 S.W. 119.

57. N.Y.—Schenectady v. Furman, 15 N.Y.S 724, 61 Hun 171, appeal dismissed 31 N.E. 626, 133 N.Y. 696.
57 C.J. p 386 note 15.

58. N.Y.—Fliess v. Hoy, 135 N.Y.S. 44, 150 App.Div. 555.

59. Mont.—Cook-Reynolds Co. v. Wilson, 214 P 1104, 67 Mont. 147.
N.Y.—Sugden v. Magnolia Metal Co, 68 N.Y.S. 809, 58 App Div 236, affirmed 64 N.E. 1126, 171 N.Y. 697.

60. N.Y.—Lipman v. Jackson Architectural Iron-Works, 27 N E. 975, 128 N.Y. 58
57 C.J. p 387 note 18.

61. N.Y.—Williams v. Clarke, 81 N. Y.S. 381, 82 App.Div. 199.

tate,[62] for the establishment of a lost instrument,[63] and for cancellation.[64]

§ 25. Subsisting Right of Action of Defendant

Generally, a party cannot avail himself of certain matter as a set-off, counterclaim, claim in recoupment, or reconventional demand, unless it is a legally subsisting cause of action in his favor on which he could maintain an independent action.

As a general rule, a party cannot avail himself of certain matter as a set-off, unless it is a legally subsisting cause of action in his favor on which he could maintain an independent action,[65] and the same rule applies where defendant in the action endeavors to set up his alleged claim by way of recoupment,[66] or where he sets up a claim by way of counterclaim,[67] or where he sets up claim by

62. Cal.—Hanes v. Coffee, 300 P. 963, 212 Cal. 777—Hayward v. Black, 189 P. 460, 46 Cal.App. 504

63. N.Y.—Macloon v. Levy, 228 N.Y.S. 162, 131 Misc. 790.

64. Cal.—Bandy v. Westover, 252 P. 593, 200 Cal. 222.

65. Ariz.—Scoville v. Vail Inv. Co., 103 P.2d 662, 55 Ariz. 486, followed in Vail v. Scoville, 103 P.2d 668, 55 Ariz. 502, and Vail Inv. Co. v. Scoville, 103 P.2d 669, 55 Ariz. 501

Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.

Iowa.—Mitchell County v. Odden, 259 N.W. 774, 219 Iowa 793

Minn.—**Corpus Juris cited in** State v. Tri-State Telephone & Telegraph Co., 295 N.W. 511, 513, 209 Minn. 86

N.J.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108—Faherty v. Branegan, 169 A. 654, 112 N.J.Law 134.

N.Y.—Cooperstown Cattle Co. v. Smith, 89 N.Y.S.2d 89, 275 App.Div. 240—Rhode Island Hospital Trust Co. v. Claude Neon, Inc., 109 N.Y.S.2d 834.

Ohio.—**Corpus Juris quoted in** Detroit, T. & I. R. Co. v. Pitzer, App., 61 N.E.2d 93, 97.

Okl.—Sarkeys v. Marlow, 235 P.2d 676.

Or.—McGilchrist v. Fiedler, 65 P.2d 388, 155 Or. 616.

S.D.—Lewis v. Rutland Independent Consol. School Dist. No. 3 of Lake County, 244 N.W. 102, 60 S.D. 163

Tex.—Rose v. Motes, Civ.App., 220 S.W.2d 734

Utah.—**Corpus Juris cited in** Reeve v. Blatchley, 147 P.2d 861, 865, 106 Utah 259

57 C.J. p. 387 note 23.

One of the tests in determining whether defendant has right to assert a set-off is whether defendant could have obtained a several judgment against plaintiff in an independent action.—Haefner v. First Nat. Bank of Elmwood Place, 36 N.E.2d 308, 67 Ohio App. 213.

Neither legal nor equitable set-off can exist unless there are actually two demands or claims in existence, that is, a claim by plaintiff and a claim by defendant.—White v. Bevilacqua, 7 N.E.2d 134, 273 N.Y. 282.

Payment of debt of another

(1) Maker of note could not set off amount paid to third person as debt of payee without proof that maker paid money at payee's request or that payee acknowledged amounts paid over as his indebtedness.—Carter v. First Trust & Savings Bank, 144 So. 885, 107 Fla. 360

(2) In subcontractor's action for balance due on contract for concrete and cement work, rejection of set-off for sums due subcontractor's creditors on ground that subcontractor directed contractor to pay creditors and deduct sums so paid from sums due subcontractor was not error, where at date of trial contractor had not paid such sums and one of subcontractor's creditors had commenced suit against him to recover amount due it.—Massiah v. Hood, 10 A.2d 79, 138 Pa.Super. 90.

Voluntary payments

In employee's suit against railroad for injuries wherein recovery was sought for decrease in earning power from filing of suit, railroad was not entitled to set-off of the amounts paid to employee for medical and hospital bills and for lost time, since suit was not for doctors' or hospital bills and payments were voluntary.—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224.

66. Mass.—Bucholz v. Green Bros. Co., 195 N.E. 318, 290 Mass. 350

57 C.J. p. 388 note 24.

Right to recoupment held not shown

Mass.—Bank of U. S. v. Thomson & Kelly Co., 195 N.E. 115, 290 Mass. 224

N.H.—E. J. Caron Enterprises v. State Operating Co., 179 A. 665, 87 N.H. 371.

67. Ariz.—Scoville v. Vail Inv. Co., 103 P.2d 662, 55 Ariz. 486, followed in Vail v. Scoville, 103 P.2d 668, 55 Ariz. 502, and Vail Inv. Co. v. Scoville, 103 P.2d 669, 55 Ariz. 501.

Iowa.—Mitchell County v. Odden, 259 N.W. 774, 219 Iowa 793.

Minn.—Fitzke v. Fitzke, 298 N.W. 712, 210 Minn. 430.

Mo.—Hayden v. Yelton, App., 237 S.W.2d 249.

Neb.—McGerr v. Marsh, 26 N.W.2d 374, 148 Neb. 50.

N.J.—Town of Montclair v. Kip, 160 A. 677, 110 N.J.Eq. 506.

N.Y.—Carney v. Morrison, 228 N.Y.S. 303, 223 App.Div. 244, motion granted 164 N.E. 565, 249 N.Y. 511—Acme Investors Corp. v. Kahn, 65 N.Y.S.2d 918—Village of Fleischmanns v. Silberman, 15 N.Y.S.2d 904

N.C.—Hoyle v. Carter, 1 S.E.2d 93, 215 N.C. 90.

S.C.—Rowland v. Harris, 61 S.E.2d 397, 218 S.C. 42.

S.D.—Lewis v. Rutland Independent Consol. School Dist. No. 3 of Lake County, 244 N.W. 102, 60 S.D. 163.

Tex.—Rose v. Motes, Civ.App., 220 S.W.2d 731—Booth v. Chadwick, Civ.App., 154 S.W.2d 268, error refused.

57 C.J. p. 388 note 25.

The test of validity of a counterclaim is whether facts stated therein would constitute a cause of action on behalf of defendant against plaintiff if plaintiff had not sued defendant.—Sanders v. Street's of Tulsa, 214 P.2d 910, 202 Okl. 427—West Nichols Hills Water Co. v. American-First Trust Co. in Oklahoma City, 158 P.2d 691, 195 Okl. 428—Watson v. American Creosote Works, 84 P.2d 431, 184 Okl. 13—Eyer v. Richards & Conover Hardware Co., 55 P.2d 60, 176 Okl. 191—57 C.J. p. 388 note 25 [a].

Several judgment

Under some statutes, counterclaim must consist of a claim of defendant as against plaintiff as between whom a several judgment could be given.—Dobbins v. Horsfall, 136 P.2d 35, 58 Cal.App.2d 23—Robertson v. Marcovich, 109 P.2d 708, 42 Cal.App.2d 610—Kittle Mfg. Co. v. Davis, 47 P.2d 1089, 8 Cal.App.2d 504.

Completeness

(1) A counterclaim must be complete in itself.—Wilson v. Tromly, 84 N.E.2d 177, 336 Ill.App. 403, affirmed 89 N.E.2d 22, 404 Ill. 307.

(2) Counterclaim must be so complete in itself as to entitle defendant to judgment on facts pleaded therein.—Amos v. Triangle Motor Co., 80 P.2d 1109, 94 Colo. 435.

Cross action

Tex.—Texas & N. O. R. Co. v. Nolan, Civ.App., 107 S.W.2d 1116.

The statutory amendment, defining counterclaim as any cause of action in favor of defendants against plaintiffs, did not remove requirement that counterclaim be cause of action in existence when counterclaim is interposed.—Atlantic Gulf & West In-

way of compensation,[68] or reconvention;[69] but some decisions have held that the test of the propriety of forcing a set-off lies, not in the right to sue, but in the right to assert one's cross demands in the suit brought against him by the other.[70] Conversely, a set-off is valid if the substance of the facts alleged, standing alone, would constitute a cause of action by defendant against plaintiff.[71] Although matter may not be interposed as a set-off because no action could be maintained thereon, it may still be available by way of defense.[72]

Merger of claim in judgment. Where defendant's claim is merged in a judgment, the claim cannot be set off[73] or counterclaimed,[74] but, if a judgment on a claim is a final judgment, it is a set-off as a judgment.[75]

§ 26. —— Void or Unenforceable Claims

Generally, only such demands may be set off as constitute valid and enforceable obligations at the time; a demand growing out of an illegal transaction and which, therefore, cannot be recovered or enforced directly cannot be set off, counterclaimed, or reconvened.

As a general rule, only such demands may be set off as constitute valid and enforceable obligations at the time.[76] Accordingly, a demand growing out of an illegal transaction and which, therefore, cannot be recovered or enforced directly cannot be set off,[77] counterclaimed,[78] or reconvened.[79] Likewise, a contract which is void under the statute of frauds, discussed in Frauds, Statute of § 225, or because of coverture,[80] or because unsupported by a consideration,[81] or, generally, a contract barred by the statute of limitations, as discussed in Limitations of Actions § 106, cannot be the subject of a set-off; and neither can a contract unenforceable by reason of defendant's disregard of conditions precedent to the allowance of damages thereunder[82] or a judgment which has been superseded and is pending on appeal.[83] A set-off is not maintainable where defendant could not have maintained an action thereon because of laches,[84] and a note, the collection of which has been enjoined, cannot be set off.[85] Where the gravamen of the set-off, however, is that defendant has been deceived by means of plaintiff's fraud, recovery may be allowed therefor notwithstanding plaintiff's fraudulent representations were made with respect to a matter within the statute of frauds;[86] and a claim for services rendered under an illegal contract, but which has been adjusted and allowed by the parties in a settlement, is available as a set-off.[87]

§ 27. —— Claims Nonexistent at Commencement of Action in General

A debt or demand must, as a general rule, have existed at the commencement of the action in order to be available as a set-off, counterclaim, or recoupment; but the rule is otherwise under some statutory provisions.

A debt or demand must, as a general rule, have existed at the commencement of the action in order to be available as a set-off,[88] or, likewise, in order

dies S. S. Lines v. City of New York, 69 N.Y.S.2d 796, 271 App.Div. 1008, appeal denied 71 N.Y.S.2d 705, 272 App.Div. 793.

68. La.—Case v. Henderson, 23 La. Ann. 49, 8 Am.R. 590.
57 C.J. p. 389 note 26.

69. Tex.—Rose v. Motes, Civ.App., 220 S.W.2d 734.
57 C.J. p. 389 note 27.

70. U.S.—J. L. Hudson Co. v. Thomas, D.C.Mich., 6 F.Supp. 857.
Ohio.—State ex rel. Gray v. Alward, 185 N.E. 560, 44 Ohio App. 281.

71. Ill.—Polish American Building & Loan Ass'n v. Zintak, 22 N.E.2d 788, 301 Ill.App. 290.
Okl.—Sanders v. Street's of Tulsa, 214 P.2d 910, 202 Okl. 427.

72. Vt.—Jewett v. Winship, 42 Vt. 204.
Wis.—Gunn v. Madigan, 28 Wis. 254.

73. N.C.—Mizell v. Moore, 29 N.C. 255.
57 C.J. p. 389 note 30.

74. N.Y.—Lowell v. Lane, 33 Barb. 292—Ives v. Goddard, 1 Hilt. 434.

75. Mo.—Gunn v. Todd, 21 Mo. 303, 64 Am.D. 231.
N.Y.—Naylor v. Schenck, 3 E.D. Smith 135.

76. N.Y.—In re Haase's Will, 20 N.Y.S.2d 19, 174 Misc. 42.

Enforceability in action at law
Where an obligation is not enforceable in an action at law, it cannot be set off against an opposing claim
Ohio.—Kocsorak v. Cleveland Trust Co., 85 N.E.2d 96, 151 Ohio St. 212.
Pa.—In re Kenin's Estate, 29 A.2d 495, 346 Pa. 127—In re Bell, 14 A.2d 98, 339 Pa. 5.

77. Conn.—Pond v. Smith, 4 Conn. 297.
57 C.J. p. 389 note 33.

78. Wash.T.—Turnbull v. Farnsworth, 1 Wash.T. 444.
57 C.J. p. 389 note 34.

79. La.—Thompson v. Gosserand, 55 So. 663, 128 La. 1029.

80. Ind.—Sanford v. Wood, 49 Ind. 165.
57 C.J. p. 390 note 37.

81. N.Y.—Hines v. Hearn, 249 N.Y.S. 658, 232 App.Div. 216.
57 C.J. p. 390 note 39.

82. Kan.—Chicago, etc., R. Co. v. Theis, 152 P. 619, 96 Kan. 494.
57 C.J. p. 390 note 40.

83. Neb.—Spencer v. Johnson, 78 N.W. 482, 58 Neb. 44.
N.Y.—Willard v. Fox, 18 Johns. 497.

84. Me.—Cutler v. Gilbreth, 53 Me. 176.

85. Tenn.—Key v. Wilson, 3 Humphr. 405.

86. Or.—Foss v. Newbury, 25 P. 669, 20 Or. 257.
57 C.J. p. 390 note 45.

87. N.C.—Lusk v. Patton, 70 N.C. 701.

88. N.H.—Derry Loan & Discount Co. v. Falconer, 152 A. 427, 84 N.H. 450
N.J.—Faherty v. Branegan, 169 A. 654, 112 N.J.Law 134—Needles v. Dougherty, 34 A.2d 396, 134 N.J. Eq. 108.
Ohio.—Columbian Bldg. & Loan Co. v. Burke, 29 Ohio N.P., N.S., 499.
S.D.—Lewis v. Rutland Independent Consol. School Dist. No. 3 of Lake County, 244 N.W. 102, 60 S.D. 168.

to be available as a counterclaim,[89] or, although there is some authority to the contrary,[90] recoupment.[91] It is not required, however, that the set-off have been a legal subsisting claim at the time the right of action accrued to plaintiff on his claim in suit.[92] Under some statutory provisions, on the other hand, a counterclaim need not have existed at the time of commencement of the action in order to be asserted.[93] Although there is some authority to the contrary,[94] under a statute requiring a counterclaim to be first, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, or second, in an action on contract, any other cause of action on contract existing at the commencement of the action, counterclaims under the first subdivision need not have existed at the commencement of the action,[95] although it is otherwise as to claims falling under the second.[96]

Under a statute providing that defendant may at the trial prove and have allowed against the debt sued for any payment or set-off described in his plea or in an account filed therewith as to give plaintiff notice of its nature but not otherwise, defendant may offset such accounts acquired before trial, whether he acquired them before or after commencement of the action.[97] Where the vendee of land has agreed to pay, as part of the purchase money, the costs recovered in a suit against the vendor, the amount of such costs cannot be set off in an action to enforce the vendor's lien where no part of it has been paid.[98]

Special agreement. The parties may, by special agreement, provide that a claim accruing subsequent to the commencement of the action may be set off[99]

On removal of suit from one court to another, where such removal is not a continuation of the suit in the original court, defendant may set off against plaintiff a claim arising after the commencement of the suit but prior to its removal.[1]

Wash.—Golmis v. Vlachos, 208 P 2d 1204, 34 Wash 2d 627.
57 C J. p 390 note 47.

The purpose of statutory requirement limiting right of set-off to claims held by defendant at commencement of suit is to prevent plaintiff's loss of costs through inability to know of set-off at time of commencing suit.—Phoenix Sav. Bank & Trust Co. v. Ellis, 69 P 2d 796, 50 Ariz 116.

89. Ind.—Kerfoot v. Kessener, 84 N. E 2d 190, 227 Ind 58
Mo —Niedringhaus v. Zucker, 208 S. W 2d 211—Northcutt v. McKibben, 159 S.W.2d 699, 236 Mo.App. 605.
N C.—Universal C I T. Credit Corp. v Roberts, 55 S E 2d 85, 230 N.C. 654.
S C.—W. T Ferguson Lumber Co v. Elliott, 172 S E 2d 616, 171 S C. 455
S.D —Lewis v Rutland Independent Consol. School Dist. No 8 of Lake County, 244 N W. 102, 60 S.D. 163
57 C J. p 390 note 48.

Subsequent acquisition or perfection of right or title

If a defendant has no valid and subsisting title or right to subject of his counterclaim at time of its commencement, he may not, by subsequent acquisition, or perfection of such right or title, remedy the defect so as to succeed in the action —Haefner v. First Nat. Bank of Elmwood Place, 86 N.E.2d 308, 67 Ohio App. 213.

90. Ala —Martin v. Hill, 42 Ala. 275.
57 C J. p 391 note 49.

91. N Y.—Harger v. Edmonds, 4 Barb 256.
57 C.J. p 391 note 50.

92. Ala —Life & Cas Ins Co v Bell, 180 So. 573, 235 Ala 548

Restricted application of statute

A set-off is not "payment" and statute permitting set-off where there is legal subsisting claim at time right of action accrued relates only to a situation where plaintiff raises defense of limitation to defendant's plea of set-off to plaintiff's demand.—Life & Cas Ins. Co v. Bell, supra.

93. N.Y.—Herendeen v. Ley Realty Co, 75 N.Y S.2d 836.

Supplemental pleading

The code section providing that a counterclaim must be an existing one in favor of a defendant and against a plaintiff and existing when the action was begun, so far as it requires that the counterclaim be an existing one at the time it was started, is superseded by subsequent code section providing that a claim, which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading —Neyens v. Donato, 188 P.2d 588, 67 Ariz. 2.

In California

(1) The code section pertaining to counterclaims does not indicate legislative intent that counterclaim must have existed at time of commencement of action in order to be asserted.—Bond v. Farmers & Merchants Nat. Bank, Los Angeles, 149 P 2d 722, 64 Cal.App.2d 842.

(2) So, the fact that defendants' counterclaim did not arise until after commencement of plaintiff's action did not make it improper as a counterclaim —Jones v. Mortimer, 170 P. 2d 893, 28 Cal 2d 627.

(3) Prior to amendment of the statute, a different rule was followed. —Paige v. Carter, 2 P. 260, 64 Cal. 489—Gannon v. Dougherty, 41 Cal. 661.

94. S C —W. T. Ferguson Lumber Co. v. Elliott, 172 S.E. 616, 171 S C. 455.

95. N.Y.—Blog v. Burden & Co., 265 N.Y.S 81, 238 App.Div. 634.
N.C.—Johnson v Smith, 1 S.E.2d 834, 215 N C. 322.
57 C J. p 391 note 53.

96. Or.—Steelman v. Oregon Dairymen's League, 192 P. 790, 97 Or. 535.
57 C J. p 391 note 54.

In New York

(1) The legislature has abolished the requirement that a counterclaim be a cause of action in existence at the commencement of the action.—Herendeen v. Ley Realty Co., 75 N Y.S.2d 836.

(2) Prior thereto, the rule stated in the text was followed.—Bernheimer v. Hartmayer, 63 N.Y.S. 978, 50 App.Div. 316—57 C.J. p 391 note 54.

97. U.S.—Wheeling Bridge, etc., R. Co. v. Cochran, W.Va., 68 F. 111, 15 C.C.A. 321.
W.Va.—Hoover-Dimeling Lumber Co. v. Neill, 87 S.E. 855, 77 W.Va. 470.

98. Ala.—Hembree v. Glover, 8 So. 660, 93 Ala. 622.

99. Pa.—Morrison v. Moreland, 15 Serg. & R. 61.

1. N.Y.—Niagara Bank v. McCracken, 18 Johns. 493.
57 C.J. p 391 note 60.

Commencement of action. The general rule that an amended declaration or complaint which does not introduce a new cause of action relates back to the original commencement of the action has been applied in determining the time of commencement with respect to the validity of a counterclaim,[2] and a counterclaim based on a judgment obtained after the first, but before a later, amendment to plaintiff's complaint has been held not in existence at the time of action where the subsequent amendment merely stated the same cause of action as the original complaint.[3] Although there is authority to the contrary,[4] damages incident to the institution of the action do not constitute a cause of action existing at the commencement of plaintiff's action within the meaning of the statutes and cannot, therefore, be counterclaimed[5] or reconvened.[6]

§ 28. —— Inchoate and Contingent Claims

Although the remedy may temporarily be suspended so that no action can be maintained, if a good cause of action exists, it may be used as a set-off. Ordinarily defendant cannot plead as a set-off a contingent liability, where the circumstances on which the liability is contingent have not yet occurred.

A distinction is sometimes drawn between the cause of action and the remedy by action, and it is accordingly held that, although the remedy may temporarily be suspended so that no action can be maintained, if a good cause of action exists, it may be used as a set-off,[7] and although, where a demand is a condition precedent to the existence of a valid legal claim as distinguished from a right to sue thereon, a demand must have been made before the commencement of the action, in order that the claim can be set off[8] or counterclaimed,[9] where a cause of action exists without a demand, the claim may be set off, although no action can be brought without a demand.[10] So a claim of a liquidated nature which would support an action without a previous demand is a proper subject of a set-off without a demand.[11] The same rule applies to other conditions precedent to bringing an action as distinguished from conditions precedent to the existence of a valid legal claim,[12] and where presentment of a claim to a designated body for auditing or allowance is a condition precedent to existence of a cause of action thereon, failure so to present it precludes offsetting it in an action.[13]

Although defendant has been allowed in equity to set off a contingent liability where plaintiff was insolvent,[14] ordinarily defendant cannot plead as a set-off a contingent liability, where the circumstances on which the liability is contingent have not occurred.[15] Likewise, it is improper to counterclaim for a possible future contingent liability.[16] So defendant cannot, in an action by his servant for wages, recoup, or counterclaim damages for plaintiff's negligence before defendant has paid or been adjudged liable to pay damages therefor, as discussed in Master and Servant § 126; and where defendant has transferred his demand against plaintiff to a third person as collateral security for a debt of defendant to the latter, he may not set off such demand in plaintiff's action against him.[17] A

2. Iowa.—Youngerman v. Long, 63 N.W. 674, 95 Iowa 185.
Mont.—Dreidlein v. Manger, 220 P. 1107, 69 Mont. 155.

3. Mont.—Dreidlein v. Manger, supra.

4. Minn.—Hall v. Parsons, 117 N.W. 240, 105 Minn. 96.
57 C.J. p. 392 note 64.

5. S.C.—**Corpus Juris quoted in** Visanska v. Roturcau, 1 S.E.2d 493, 494, 189 S.C. 433.
57 C.J. p. 392 note 65.

Undercharge
In action by carrier which had charged unlawfully low freight rates to recover undercharge from consignee, consignee could not counterclaim for amount of carrier's recovery as damages.—Fort Worth & D. C. Ry. Co. v. F. Burkart Mfg. Co., D.C.Mo., 56 F.Supp. 159, affirmed, C.C.A., 149 F.2d 909.

6. La.—Knox v. Thompson, 12 La. Ann. 114—Keene v. Relf, 11 La. 304.

Damages to reputation
In action on running account for merchandise sold by foreign corporation against superintendent of a high school, who claimed to have ordered goods as agent for high school, defendant could not reconvene for damages to his reputation and good name because of such suit until suit was terminated in defendant's favor —Wilson Sporting Goods Co. v. Alwes, La.App., 21 So.2d 102.

Loss of time attending court
In landlord's suit to cancel lease, reconventional demand for loss of time attending court was held properly disallowed.—Florsheim v. Penn, 137 So. 749, 18 La.App. 375.

7. N.Y.—Clark v. Story, 29 Barb. 295
57 C.J. p. 392 note 67.

8. N.C.—State Bank v. Cape Fear Bank, 35 N.C. 75
57 C.J. p. 392 note 68.

9. Cal.—Moore v. Gould, 91 P. 616, 151 Cal. 723.

10. Ky.—Millet v. Watkins, 4 Bush 642.
57 C.J. p. 392 note 70.

11. Mo.—Paul v. Carroll, 12 Mo. 487.
57 C.J. p. 392 note 71.

12. Va.—Craigen v. Lobb, 12 Leigh 627, 39 Va. 627.
57 C.J. p. 392 note 72.

13. Tex.—Bitter v. Bexar County, Civ.App., 266 S.W. 224.
57 C.J. p. 392 note 73.

14. N.C.—Scott v. Timberlake, 83 N.C. 382
57 C.J. p. 393 note 74.

15. S.C.—Zimmerman v. Home Ins. Co., 177 S.E. 895, 175 S.C. 18.
57 C.J. p. 393 note 75.

Rent to accrue in future is generally held not existing debt, but mere contingent liability, which, not being ascertained at adjudication of lessor's insolvency, should not be allowed as set-off.—Zimmerman v. Home Ins. Co., supra.

16. Ill.—Countiss v. Whiting, 29 N.E.2d 277, 306 Ill.App. 548.

17. Me.—Moulton v. Perkins, 100 A. 1020, 116 Me. 218.

counterclaim cannot be based on an allegation that the action in which it is filed is malicious, a judgment favorable to defendant being essential to a right of action thereon, as discussed in Malicious Prosecution § 68 A debt is not "demandable" within the meaning of a statute dealing with compensation between two debts, until all suspensive conditions on which its maturity depends are fulfilled.[18]

§ 29. —— Claims Not Yet Due at Commencement of Action

a. In general

b. Rule in equity

a. In General

Generally, a demand of defendant against plaintiff not due at the commencement of the action cannot be made the subject of a set-off, counterclaim, compensation, or reconvention; but defendant may set off a demand not due until after suit brought, if he has made an agreement with plaintiff to that effect, or if a statute so permits.

As a general rule, a demand of defendant against plaintiff not due at the commencement of the action cannot be set off,[19] and the same rule applies to counterclaim,[20] compensation,[21] and, although there is authority to the contrary,[22] reconvention [23] Defendant may, however, set off a demand not due until after suit brought, if he has made an agreement with plaintiff to that effect,[24] or if a statute so permits.[25] So, under a statute permitting a set-

18. La.—Federal Deposit Ins Corp. v. Page, App, 195 So. 629

19. Cal—Bagdasarian v. Gragnon, 192 P 2d 935, 31 Cal 2d 744
Conn.—Bridgeport-City Trust Co v Niles-Bement-Pond Co., 20 A 2d 91, 128 Conn 4, 135 A L R 690—Hartford Nat Bank & Trust Co. v. Riverside Trust Co., 167 A. 811, 117 Conn 276
Ga—Lunsford v Ferrell, 68 S E 2d 153, 85 Ga.App 37.
Ind—Old First Nat Bank & Trust Co of Fort Wayne v. Snouffer, 192 N.E 369, 99 Ind App 325
Mo—Brown v. Maguire's Real Estate Agency, 121 S W 2d 754, 343 Mo 336—Iler v Midland Nat. Bank, 69 Mo App. 64
Pa—**Corpus Juris cited in** Appeal of Commonwealth Trust Co. of Pittsburgh, 188 A 200, 202, 324 Pa. 161, 107 A L R 1453
S.C—Zimmerman v Home Ins Co., 177 S E 895, 175 S C 18.
Wash.—Merager v Turnbull, 99 P.2d 434, 2 Wash.2d 711, 127 A.L.R 1142
57 C J p 393 note 79.

Due and payable

A debt, in order to be available as a set-off, must be both due and payable, since the word "due" does not always import that debt is payable.—Otto v Lincoln Sav Bank of Brooklyn, 51 N.Y S 2d 561, 268 App.Div. 400, affirmed 62 N.E.2d 236, 294 N.Y. 798.

Insolvency

(1) Under the statutes, unmatured obligations cannot be set off in absence of a claim of insolvency of plaintiff.—Cullum v Commercial Credit Co., Tex Civ App, 134 S W 2d 826

(2) In order to prevent injustice, exception may be made to general rule that set-off is permitted only where both debts are due and payable, where one party is insolvent and other will lose part or all of his claim if debt to insolvent is paid in full, provided rights of third parties are not adversely affected and there exists no superior equity.—Hartford Nat Bank & Trust Co. v Riverside Trust Co., 167 A. 811, 117 Conn 276

(3) It has been held, however, that creditor cannot set off claim immediately payable against unmatured debt even as against insolvent debtor—Kurtz v County Nat. Bank of Clearfield, 136 A 739, 288 Pa. 472, 51 A L R 1475.

(4) Insolvency as ground for allowance of set-off of unmatured claim in equity see infra subdivision b of this section

Fund not subject to distribution

(1) Maker of note held by reorganized bank was held not entitled to set off against it interest in fund in bank belonging to failed corporation in which maker had been stockholder, where fund was being held awaiting disposition of suit pending against corporation, and was not subject to distribution to stockholders until then.—Helms v. Citizens Bank of Erwin, 97 S.W.2d 665, 20 Tenn App. 268

(2) Automobile dealers could not set off against their liability on two notes transferred to solvent corporation engaged in buying similar obligations from dealers, their right to a reserve fund held by corporation as security for dealers' indebtedness, where dealers were indebted to corporation on other notes and reserve agreement provided that no payments should be made from reserve funds while any indebtedness of dealers were unpaid.—Cullum v. Commercial Credit Co., Tex.Civ.App., 134 S W.2d 826.

20. U.S—American Surety Co. of New York v. City of Akron, C.C.A. Ohio, 95 F.2d 966
Ill.—Kemp v. Black, 10 N.E.2d 835, 291 Ill.App. 616.
57 C.J. p 393 note 80.

Counterclaim held not premature

In replevin by conditional seller, buyer's counterclaim for damages arising out of wrongful appointment of receiver over buyer's business in prior suit by seller was held not premature, where receiver had been discharged and cause of action to recover money in receivership suit had been abandoned—Petersime Incubator Co. v. Ferguson, 53 P.2d 505, 143 Kan. 151.

21. La.—Beyer Transp. Co. v. Whiteman Contracting Co., App., 187 So. 143—Sandel v. George, 18 La.Ann 526.

For a debt to be "equally demandable" within meaning of the statute dealing with compensation between two debts, both debts are required to be mature and subject to payment on demand—Federal Deposit Ins Corp. v. Page, La.App., 195 So. 629.

22. Tex.—Griffin v. Chubb, 16 Tex. 219—Dignowitty v. Alexander, 25 Tex.Suppl. 162.

23. La.—National Park Bank v. Concordia Land, etc., T. Co., 105 So. 234, 159 La. 86

24. Mass.—Warren v. Franklin Ins. Co., 104 Mass. 518.
57 C.J. p 394 note 86.

25. N.Y.—Fistere v. Janapoll, 272 N. Y.S. 332, 241 App.Div. 353.

Assignment for benefit of creditors

Under statute allowing debtor to set off, against any indebtedness owing to creditor making assignment for benefit of creditors, amount matured or unmatured owing debtor, unmatured trade acceptance discounted by bank was an "unmatured indebtedness," within the statute, since a "debt" is founded on a contract, express or implied, to pay money in a certain sum or which can readily be reduced to a certainty, as distinguished from a claim for damages arising out of breach of contract or the violation of duty.—In re Margolis & Meadow, 299 N.Y.S. 873, 252 App.Div. 513.

off only in actions for money demands on contract and requiring it to consist of matter arising out of a debt, duty, or contract, liquidated or not, held by defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off, it is not necessary that the matter of set-off be due at the commencement of the action,[26] and under a statute requiring a counterclaim to consist of a cause of action in favor of defendant and against plaintiff which the former "might have brought when suit was commenced, or which was then held, either matured or not, if matured when so pleaded," defendant may counterclaim an obligation due him by plaintiff which was positively imposed at the commencement of the action, although the time of payment of which was dependent on demand, such demand having been made after institution of the action, but before counterclaim pleaded.[27]

The right to attach for a debt not yet due, on the ground of a fraudulent conveyance of property by the debtor, does not give an immediate right of action on the debt, so as to render it available as a set-off.[28] In an action for breach of a contract whereby plaintiff was granted exclusive privileges, which contract provided that defendant was to receive a stipulated percentage of the rent of privileges subleased, defendant may, in the absence of proof that it was uncollectable, counterclaim his interest in a note received for the sublease, notwithstanding such note was uncollected.[29] Where plaintiff has, by transferring a note to the return of which defendant was entitled, imposed on the latter the obligation of paying it, the amount thereof may be set off in plaintiff's action subsequently brought notwithstanding defendant did not pay any money on such note until after the commencement of the action.[30]

Book account. If part of a book account is due before action brought, the whole may be counterclaimed, although the balance became due after suit brought, on the ground that an account is entire and cannot be subdivided.[31]

Insolvent estates. Where after a suit commenced by an administrator the estate of his intestate is regarded insolvent, defendant may set off a note against the intestate not due when the action was commenced,[32] although falling due pending the suit.[33] This does not, however, stand on the law regulating set-off generally, but on the law respecting the settlement of insolvent estates [34]

Suretyship obligation. A surety who pays the secured debt after commencement of an action against him by the principal cannot set off that payment in such action,[35] and, if a surety for a debt pays it before it is due, the payment will, after the debt has become due but not before, be a legal set-off against his note payable to the principal, and held by him.[36]

Maturity of claim. A judgment is matured, within the meaning of a statute requiring a set-off to be matured at or before the time it is offered as a set-off, although the time of stay of execution has not expired, and a stay was obtained.[37]

Puis darrein continuance. Although a debt not subsisting at the commencement of the action cannot be set off, if the debt subsist at that time, but be not demandable or due until after the commencement of the action, it may then be taken advantage of by a plea puis darrein continuance.[38]

b. Rule in Equity

A debt due at a future time cannot as a general rule be set off in equity against a debt presently due; but a right of equitable set-off ordinarily attaches where mutual demands exist and insolvency has intervened, even though one of the demands has not yet matured.

A debt due at a future time cannot as a general rule be set off in equity against a debt presently due;[39] and equity has no power to prevent a party

26. Ind.—Shannon v. Wilson, 19 Ind. 112.

27. Iowa.—Brown v. Wieland, 89 N. W. 17, 116 Iowa 711, 61 L.R.A. 417.

28. Mo.—Iler v. Rieger, 69 Mo App. 64.

29. N.Y.—Fuldner v. Trieb, 127 N.Y. S. 330.

30. Ill.—Sandwich Mfg. Co. v. Kelly, 26 Ill.App. 394.

31. Vt.—Thetford v. Hubbard, 22 Vt. 440.

32. Mass.—Aldrich v. Campbell, 4 Gray 284.

33. Mass.—Bigelow v. Folger, 2 Metc. 255.

34. Mass.—Bigelow v. Folger, supra.

35. Ind.—Balser v. Wood, 69 Ind 122.
57 C.J. p 394 note 97.

36. Ind.—Jackson v. Adamson, 7 Blackf. 597.

37. Ind.—Hays v. Boyer, 59 Ind. 341.
57 C.J. p 394 note 99.

38. Tenn.—Keith v. Smith, 1 Swan 92.

39. Neb.—Corpus Juris quoted in Lyhane v. Durtschi, 13 N.W.2d 130, 135, 144 Neb 256.
57 C.J p 394 note 2.

Absence of special equity

In a suit by the receiver of an incorporated club against a member on an account stated, a counterclaim on an unmatured note of the club could not be interposed under the claimed jurisdiction of the court to hear counterclaims of an equitable nature where there was no showing that the claim would not have been paid, no special equity requiring set-off was shown, and it was not shown that one debt was contracted on the faith of the other.—Kemp v. Black, 10 N.E. 2d 835, 291 Ill.App. 616.

from collecting at law a debt due him because he owes to defendant a debt not due which defendant may not be able to collect when it is due, if this fund is not stayed in his hands.[40] A right of equitable set-off ordinarily attaches, however, where mutual demands exist and insolvency has intervened, even though one of the demands has not yet matured,[41] although such right is not absolute or paramount to superior equities of other claimants.[42] So, according to some decisions, equity will allow a set-off if the claim of the party asserting it against an insolvent has matured, even though the claim of the insolvent against the party asserting the set-off has not yet matured,[43] but, if the debt due to the party claiming the set-off has not matured, he is not at liberty to offset it against the debt which he owes to an insolvent.[44] In some decisions, however, it has been said that there can be no set-off of an unmatured demand in cases of insolvency.[45]

§ 30. —— Pendency of Another Action Relating to Same Claim

Pendency of another action for a claim offered as a cross demand has been held not to affect the right of plaintiff in the former action to interpose, when sued by defendant in the former action, such claim in recoupment, set-off, counterclaim, or reconvention; but other decisions hold that such a cross demand cannot avail if it appears that an action is then pending for the same cause, and, in successive actions by the same plaintiff, defendant may not ordinarily interpose the same set-off or counterclaim.

It is held, in some cases, that pendency of another action for a claim offered as a cross demand does not affect the right of plaintiff in the former action to interpose, when sued by defendant in the former action, such claim in recoupment,[46] set-off,[47] counterclaim,[48] or reconvention,[49] even after verdict in the former action,[50] or after judgment from which an appeal is pending.[51] It has been held, however, that defendant may not obtain an affirmative judgment on his counterclaim, but can only use it as a defense,[52] and, where both actions shall have been put at issue, if it shall then appear that both causes of action may be tried on their merits in either suit, the court may, in its discretion, stay one until the trial of that which involves the whole merits has been disposed of,[53] or defendant may be compelled to elect between his own suit and the recoupment[54] or counterclaim[55] set up, and, if he choose the latter, his own suit may be stayed. Also, the counterclaim in the second suit will be dismissed

40. Del.—Hayes v. Hayes, 2 Del.Ch. 191, 73 Am.D. 709.
Neb.—**Corpus Juris quoted in** Lyhane v. Durtschi, 13 N.W.2d 130, 135, 144 Neb. 256.

41. U.S.—American Surety Co. of New York v. City of Akron, C.C.A. Ohio, 95 F.2d 966—J. L. Hudson Co. v. Thomas, D.C.Mich., 6 F.Supp. 857.
Iowa—Andrew v. American Sav. Bank & Trust Co., 251 N.W. 48, 217 Iowa 657.
Wis.—In re Milwaukee Commercial Bank, 294 N.W. 538, 236 Wis. 105.

Proof of insolvency

(1) Insolvency permitting a creditor to set off unmatured indebtedness owing to insolvent person need only be proven in fact.—Thomas v. National Bank of New Jersey, 198 A. 539, 16 N.J.Misc. 271.

(2) It has been held, however, that insolvency in fact, not confessed or found, will not support set-off of unmatured debt against matured one.—Sullivan v. Merchants Nat. Bank, 144 A. 34, 108 Conn. 497.

Exercise prior to insolvency

A creditor's set-off of an unmatured debt owing to insolvent person, exercised prior to insolvency, cannot be validated by a later finding of insolvency.—Thomas v. National Bank of New Jersey, 198 A. 539, 16 N.J.Misc. 271.

Insolvent bank as trustee

Beneficiary of trust funds which were held by insolvent bank as trustee and were invested in participating shares of mortgage pool was held not entitled to set off claim against banks against beneficiary's indebtedness on mortgage executed to bank which was placed in pool, since claim was not due, and, because insolvent bank was only a trustee, there was no question involved of insolvency of one of two mutual obligors.—Appeal of Commonwealth Trust Co. of Pittsburgh, 188 A. 200, 324 Pa. 161, 107 A.L.R. 1453.

42. U.S.—American Surety Co. of New York v. City of Akron, C.C.A. Ohio, 95 F.2d 966.

43. Mass.—Friedman v. Commissioner of Banks, 196 N.E. 264, 291 Mass. 108.
Neb.—**Corpus Juris quoted in** Lyhane v. Durtschi, 13 N.W.2d 130, 135, 144 Neb. 256.
N.Y.—Gerseta Corp. v. Equitable Trust Co., 150 N.E. 501, 241 N.Y. 418, 43 A.L.R. 1320—Matter of Hatch, 50 N.E. 49, 155 N.Y. 401, 40 L.R.A. 664—Siegel v. State, 28 N.Y.S.2d 958, 262 App.Div. 388.
57 C.J. p. 395 note 4.

44. N.Y.—Gerseta Corp. v. Equitable Trust Co., 150 N.E. 501, 241 N.Y. 418, 43 A.L.R. 1320.
57 C.J. p. 395 note 5.

45. Mass.—Putnam v. U. S. Trust Co., 111 N.E. 969, 223 Mass. 199.
Mo.—Carson Nat. Bank of Auburn, Neb., v. American Nat. Bank of St. Joseph, 34 S.W.2d 143, 225 Mo.App. 948.

No equitable right

A party whose debt is not due has no equitable right to have it set off against a debt of his own already due, in the hands of a party who is insolvent.—Jump v. Leon, 78 N.E. 532, 192 Mass. 511, 116 Am.S.R. 265—Spaulding v. Backus, 122 Mass. 553, 23 Am.R. 391.

46. N.Y.—Naylor v. Schenck, 8 E.D. Smith 135.

47. Md.—Steele v. Sellman, 28 A. 811, 79 Md. 1.
57 C.J. p. 395 note 11.

48. U.S.—Porter v. Reid, D.C.Mass., 79 F.Supp. 898.
57 C.J. p. 395 note 12.

49. Tex.—Continental Nat. Bank v. Weems, 6 S.W. 802, 69 Tex. 489, 5 Am.S.R. 85.

50. Md.—Steele v. Sellman, 28 A. 811, 79 Md. 1.
57 C.J. p. 395 note 14.

51. Ill.—Gaddis v. Leeson, 55 Ill. 522—King v. Bradley, 44 Ill. 342.

52. Cal.—Lindsay v. Stewart, 14 P. 516, 72 Cal. 540.

53. N.Y.—Fuller v. Read, 13 N.Y.Super. 697, 15 How.Pr. 236.

54. N.Y.—Fabbricotti v. Launitz, 5 N.Y.Super. 743.

55. N.Y.—Fuller v. Read, 13 N.Y.Super. 697, 15 How.Pr. 236.

where such course of action is necessary to avoid the possibility of double recovery, leaving available the remedy of consolidation to avoid unnecessary multiplicity of suits.[56] Defendant will be deemed to have waived his counterclaim in the second action where he also pleads as a defense to that action the pendency of the prior action which he neither asks nor offers to discontinue.[57]

Other decisions have followed the rule that a demand in set-off cannot avail if it appears that an action is then pending for the same cause,[58] and the same rule has been applied to counterclaim,[59] reconvention,[60] and compensation.[61] These cases take the ground that as a set-off is in the nature of a cross action, defendant cannot be permitted to carry on two suits for the same cause of action at the same time, or to split up his cause of action which, by introducing the offset, he would in effect do,[62] and that plaintiff may reply to defendant's set-off matter which, if he were defendant, he could set up by a plea in abatement, namely, the pendency of a former action.[63] So, although a judgment against plaintiff in the former action, appeal of which is pending, may not be a good defense in bar of his set-off in the subsequent suit,[64] it is a good defense in abatement.[65]

In successive actions by same plaintiff, defendant may not interpose the same set-off[66] or counterclaim,[67] except that, where the counterclaim is pleaded as a defense, it may properly be interposed as such in the second action.[68] Defendant may be required to elect in which suit his counterclaim shall be pleaded.[69] Where a set-off is pleaded in successive actions, however, defendant may introduce evidence to show that the verdict in the previous case could not legally operate as a bar to his defense in the subsequent action.[70]

§ 31. Necessity That Recoupment Be Based on Plaintiff's Default

Defendant in an action on a contract may recoup only such damages as were caused by plaintiff's default.

The damages which defendant in an action on a contract may recoup are only such as were caused by plaintiff's default.[71]

§ 32. Necessity That Record Protect Plaintiff from Further Litigation

An account may be set off at law only where it is of such a character that, when the case is properly settled, the record will show what was determined, and protect plaintiff from further litigation on the same subject matter.

In order to entitle defendant to set off an account at law, it must be of such a character that, when the case is properly settled, the record will show what was determined, and protect plaintiff from further litigation on the same subject matter.[72]

§ 33. Arising Out of Same Transaction

Claims arising out of the same transaction may constitute a proper basis for a cross demand, such as set-off, recoupment, or counterclaim, where other statutory requisites exist.

Claims arising out of the same transaction may constitute a proper basis for a cross demand, such as set-off, recoupment, or counterclaim, where other statutory requisites exist.[73] On the other hand, except as otherwise provided by statute, cross demands, such as counterclaim, recoupment, or reconvention, ordinarily are not properly pleaded where they do not arise out of the same contract or transaction as that constituting the basis of plain-

56. N.Y.—Loehr v. Sheffield, 81 N.Y.S.2d 871.

57. N.Y.—Bailey v. Fear, 169 N.Y.S. 581, 182 App.Div. 331.

58. Ga.—Whitaker v. Pope, 48 Ga. 13.
57 C.J. p 395 note 21.

59. Ill.—Fitzpatrick v. Blue Star Auto Stores, 37 N.E.2d 928, 312 Ill. App. 184.
57 C.J. p 395 note 22.

60. La.—Pierce v. Millar, 3 Mart.,N. S., 354—Gunby v. Lessassier, 5 La. A., Orleans, 176.

61. Puerto Rico.—Porto Rico Fertilizer Co. v. Gandia, 29 Puerto Rico 360.

62. Ala.—Lock v. Miller, 3 Stew. & P. 13.

63. Ga.—Whitaker v. Pope, 48 Ga. 13.
57 C.J. p 395 note 27.

64. Wis.—Tomlinson v. Nelson, 6 N.W. 366, 49 Wis. 679.

65. Wis.—Tomlinson v. Nelson, supra.

66. N.H.—Chase v. Strain, 15 N.H. 535.

67. N.Y.—Jefferson County Nat. Bank v. Dusckas, 2 N.Y.S.2d 336, 166 Misc. 720
57 C.J. p 396 note 31.

Actions on different notes

Rule applies where defendant pleaded the same counterclaim in successive actions on different promissory notes.—Tuckerman v. Corbin, 66 How.Pr.,N.Y., 404—Jefferson County Nat. Bank v. Dusckas, 2 N.Y.S.2d 336, 166 Misc. 720

68. N.Y.—A. B. Aldus Realty Co. v. Breslof, 231 N.Y.S. 640, 133 Misc. 149.
57 C.J. p 396 note 32.

69. U.S.—Strong v. District of Columbia, 17 Ct.Cl. 217.

70. Ga.—Merchants' Bank v. Rawls, 21 Ga. 289.

71. Tenn.—Mack v. Hugger Bros. Constr. Co., 283 S.W. 448, 153 Tenn. 260, 46 A.L.R. 389
57 C.J. p 396 note 35.

72. Me.—Stevens v. Blen, 39 Me. 420.
57 C.J. p 396 note 36.

73. Tex.—Moore v. Ferrier, Civ.App., 39 S.W.2d 120.

Contract for sale of land

As between the original parties to a contract for sale of land, amount paid by the purchaser can by proper procedure be offset against a liability to pay for use and occupation after disaffirmance.—Weeks v. Standish Hardware & Garage Co., Me., 75 A.2d 444.

tiff's claim, as discussed infra §§ 34, 36, 37, and are unrelated to the subject matter of such claim, infra §§ 38-40, although the rule is otherwise as to set-off, infra § 35. It has been broadly held, however, that cross demands, whether arising out of the same or wholly disconnected transactions, may be enforced whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice.[74] The requirement that a cross complaint or cross petition arise out of the same transaction as that involved in the main cause of action is considered in Pleading §§ 167, 168.

§ 34. —— Recoupment

a. Necessity and propriety
b. Sufficiency

a. Necessity and Propriety

In recoupment, defendant's claim must arise out of the same contract or transaction as that on which plaintiff's cause of action is founded

In recoupment defendant's claim must arise out of the same contract or transaction as that on which plaintiff's cause of action is founded,[75] or be connected with the subject of the action, as discussed infra § 39. Thus, if defendant's claim springs out of the contract or transaction on which plaintiff seeks recovery, it may be recouped,[76] but defendant cannot recoup for matters not connected with the subject matter of plaintiff's claim, and which are founded on an independent and distinct contract or transaction.[77]

b. Sufficiency

Whether or not the matter presented by the cross action of recoupment grew out of the plaintiff's demand so as to be allowable depends on the facts of the particular case. Generally, recoupment is available for the recovery of damages suffered by defendant from any fraud, breach of warranty, or negligence of complainant growing out of and relating to the transaction on which complainant's suit is founded, and is not restricted to a claim actually arising from the particular contract sued on.

Whether or not the matter presented by the cross action of recoupment grew out of plaintiff's demand so as to be allowable depends on the facts of the particular case,[78] and in this respect, the entire transaction, requiring the things agreed to be done on each side as the condition passing between the parties, must be considered.[79] Under some statutes, the subject matter of recoupment is narrowly limited, being confined to claims arising directly from the particular contract sued on,[80] but in many jurisdictions a broader view is taken so that instead

74. U.S.—North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co., Ill, 14 S.Ct. 710, 152 U.S. 596, 38 L.Ed. 565.
D.C.—Brownley v. Peyser, 98 F.2d 337, 69 App.D.C. 56.

75. Ala.—Trammell v. Robinson, 37 So.2d 142, 34 Ala.App. 91.
Fla.—Payne v. Nicholson, 131 So. 324, 100 Fla. 1459
Me.—Inhabitants of Town of Milo v. Milo Water Co., 163 A. 163, 131 Me. 372
Mass.—Holton v. American Pastry Products Corporation, 174 N.E. 663, 274 Mass. 268.
Mich.—Ladd v. Reed, 30 N.W.2d 822, 320 Mich. 167.
Miss.—**Corpus Juris quoted in** Calhoun v. McNair, 166 So. 330, 331, 175 Miss. 44—Neely v. Allis-Chalmers Mfg. Co., 165 So. 114, 174 Miss. 519
Neb.—Oft v. Dornacker, 269 N.W. 418, 131 Neb. 644.
N.H.—Lehigh Nav. Coal Co. v. Keene Coal Co., 197 A. 410, 89 N.H. 274—**Corpus Juris cited in** Arcadia Knitting Mills v. Elliott Mfg. Co., 195 A. 681, 682, 89 N.H. 188.
N.J.—Falkenstern v. Herman Kussy Co., 59 A.2d 372, 137 N.J.Law 200
Tenn.—Sledge & Norfleet v. Bondurant, 5 Tenn.App. 319
57 C.J. p 396 note 39.

76. Ala.—Trammell v. Robinson, 37 So.2d 142, 34 Ala.App. 91.
Miss.—**Corpus Juris quoted in** Calhoun v. McNair, 166 So. 330, 331, 175 Miss. 44.
N.H.—Thibault v. Lambert, 174 A. 46, 87 N.H. 77.
Pa.—Commonwealth v. Berks County, Com.Pl., 41 Berks Co. 77—Blatt v. Matten, Com.Pl., 32 Berks Co. 150.
57 C.J. p 396 note 41.

77. Ala.—Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 146 So. 387, 226 Ala. 226
Md.—Molesworth v. Schmidt, 75 A. 2d 100
Mass.—Holton v. American Pastry Products Corporation, 174 N.E. 663, 274 Mass. 268
Miss.—**Corpus Juris quoted in** Calhoun v. McNair, 166 So. 330, 331, 175 Miss. 44
Mont.—Francisco v. Francisco, 191 P.2d 317, 120 Mont. 468, 1 A.L.R.2d 625.
Neb.—Oft v. Dornacker, 269 N.W. 418, 131 Neb. 644.
N.H.—**Corpus Juris cited in** Arcadia Knitting Mills v. Elliott Mfg. Co., 195 A. 681, 682, 89 N.H. 188.
Or.—Welch Holding Co. v. Galloway, 89 P.2d 559, 161 Or. 515—Dant & Russell v. Ostlind, 35 P.2d 668, 148 Or. 204.
Tenn.—Wood v. Cannon County, 166 S.W.2d 399, 25 Tenn.App. 600—Fischer Lime & Cement Co. v. Suzore, 11 Tenn.App. 588.
57 C.J. p 397 note 42

In action for annuity payments due under deed, payments to grantor for repair of his property and to creditor of grantor with understanding that payments to creditor should be credited on annuity payments were held not proper subject for recoupment, since payments did not arise out of annuity agreements.—Oft v. Dornacker, 269 N.W. 418, 131 Neb. 644.

Torts

(1) Defendant cannot recoup for torts not connected with plaintiff's cause of action.—Tidmore v. Mills, 32 So.2d 769, 33 Ala.App. 243, certiorari denied 32 So.2d 782, 249 Ala. 648—57 C.J. p 397 note 42 [c].

(2) In action on note, defendant cannot plead in recoupment damages for alleged abuse of civil process in having writ of garnishment issued in action.—Standard Sanitary Mfg. Co. v. Benson Hardware Co., 143 So. 570, 225 Ala. 412.

78. Tenn.—Mack v. Hugger Bros. Constr. Co., 283 S.W. 448, 153 Tenn. 260, 46 A.L.R. 389.

79. Tenn.—Mack v. Hugger Bros. Constr. Co., supra.

80. Ga.—Pittsburgh Plate Glass Co. v. Moulder, 60 S.E.2d 647, 82 Ga. App. 148.
57 C.J. p 405 note 84.

Breach of contract or duty imposed by law

In order to support plea in recoupment, defendant must claim damages for plaintiff's breach either of con-

of being narrowly confined to the purpose of abating the contract price of goods sold or work done, recoupment is available for the recovery of damages suffered by defendant from any fraud, breach of warranty, or negligence of complainant growing out of and relating to the transaction on which complainant's suit is founded [81]

If plaintiff's action is based on a contract, as a general rule it is not necessary that the claim which defendant seeks to recoup should actually arise from the particular contract sued on,[82] but it is sufficient if defendant's claim arises out of the same subject matter,[83] and the claims are susceptible of adjustment in one action.[84] So, if plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time and relating to the same subject matter, defendant may recoup damages arising from the breach of another part, whether the different parts are contained in one instrument or several,[85] and whether one part is in writing and the other part by parol,[86] and although the written part is under seal.[87] However, the mere fact that by one transaction defendant came under obligation to enter into another,[88] or that both agreements are contained in one instrument,[89] does not make them the same.

Plaintiff cannot deprive defendant of his right to recoup by declaring on the common counts instead of declaring on the express contract.[90] So, in an action on a quantum meruit for labor done under a special contract, which has not been substantially performed by plaintiff on his part, damages growing out of the nonperformance of the special contract, which do not enter into the contract price, may be recouped,[91] but, where the implied contract declared on is in fact a different contract from that out of which the damages sought to be recouped arose, the claim of recoupment is excluded [92] The fact that the parties disagree as to the terms of the contract does not prevent defendant from recouping a proper claim thereunder,[93] but, where plaintiff sues on a contract, defendant cannot show that the contract does not exist, prove another and different contract than the one sued on, and recoup damages for a breach of such contract.[94]

In accordance with the foregoing rules, if the basis of plaintiff's action is a contract, defendant may recoup any damages which have resulted to him because of a breach thereof by plaintiff,[95] whether plaintiff's breach was of a duty expressly or impliedly imposed by the contract,[96] or was of a contract made at the same time and constituting a part and parcel of the same transaction.[97] Thus, recoupment of damages is allowed defendant in cases where plaintiff, who has only partially performed

tract sued on, or of some duty imposed by law by virtue of such contract; and fraudulent procurement of money in settlement of loss under contract different from one sued on is not matter in recoupment, but of set-off —Fidelity-Phenix Fire Ins Co. of New York v. Murphy, 146 So 387, 226 Ala. 226.

81. Del.—Edge Moor Iron Co. v Brown Hoisting Mach. Co., 62 A. 1054, 22 Del. 10.
57 C.J. p 406 note 85

82. U.S —Crossett Lumber Co v. U. S , C.C.A Ark., 87 F.2d 930, 109 A. L R. 1348.

83. U.S.—Mills v. U. S., D C N.Y., 35 F.Supp 738.
57 C.J p 406 note 87.

84. U.S —Mills v. U. S., supra.

85. Ga.—Alpharotta Feed & Poultry Co. v. Cocke, 62 S.E 2d 642, 82 Ga. App. 718.
Fla.—Payne v. Nicholson, 131 So. 324, 100 Fla. 1459
Ga.—Atlas Auto Finance Co. v. Atkins, 53 S E.2d 171, 79 Ga.App. 91
57 C.J. p 406 note 88.

86. Fla.—Payne v. Nicholson, 131 So. 324, 100 Fla. 1459.
Ga —Atlas Auto Finance Co. v. Atkins, 53 S E.2d 171, 79 Ga.App. 91.
57 C.J. p 406 note 89.

87. Ala —Eckles v. Carter, 26 Ala 563.
57 C J. p 406 note 90.

88. Mass.—Knitted Mattress Co. v. Griggs, 27 N.E 774, 154 Mass. 5.
57 C.J. p 406 note 91.

89. Hawaii.—Oahu R., etc, Co. v. Waialua Agricultural Co, 16 Hawaii 520
57 C.J. p 406 note 92.

90. Ala —Woodrow v. Hawving, 16 So 720, 105 Ala. 240.
57 C.J. p 407 note 94.

91. Mich —Allen v. McKibbin, 5 Mich. 449.

92. N.J.—Winter v. Schoenfeld, 73 A. 42, 78 N.J Law 92.
57 C.J. p 407 note 96.

93. Mich.—Forsyth v. Nostrand, 167 N.W. 1002, 201 Mich. 558.

94. Mich —Sharples Separator Co v. Brown, 140 N.W. 528, 174 Mich. 16.
57 C.J. p 407 note 97.

95. N.H —Thibault v Lambert, 174 A. 46, 87 N H. 77.
57 C.J. p 407 note 98

Defective materials and workmanship

(1) Claim for damages for defective materials and workmanship furnished under building contract affords basis for action of assumpsit against contractor, and may be set up as defense by way of recoupment in action brought by contractor to collect contract price.—Thibault v. Lambert, supra.

(2) In action on open account for machinery and parts, pleas of recoupment for defective machinery and parts unsuitable for use were held available, since they grew out of demand sued on —Neely v. Allis-Chalmers Mfg Co., 165 So. 114, 174 Miss. 519.

Suit on debt

When a plaintiff sues on a debt evidenced by a check given in payment thereof, it is competent for defendant, by cross action, to set up a contract under terms of which debt was incurred and to recoup damages whether or not they exceeded in amount those of plaintiff, incurred by breach of another obligation of contract by plaintiff.—Alpharetta Feed & Poultry Co v. Cocke, 62 S.E.2d 642, 82 Ga.App. 718.

96. Me —Hattin v. Chase, 33 A. 989, 88 Me. 237.
Tenn.—Mack v. Hugger Bros. Constr. Co, 283 S W. 448, 153 Tenn. 260, 46 A.L R 389.

97. W.Va —Bowling v Walls, 78 S. E 791, 72 W Va. 638.
57 C.J. p 407 note 1.

his portion of the contract, comes into court asking compensation for such partial performance.[98] So, in an action for work, labor, and services, if it appears that the work was not performed in a skillful and workmanlike manner, the amount of damages to defendant may be recouped,[99] as may damages for any other failure substantially to comply with the contract,[1] and in an action by a telegraph company for tolls for transmitting messages, defendant may recoup for damages from delay in delivering one of such messages.[2] If, however, the services are accepted, expressly or impliedly, as a full performance of the contract, defendant cannot recoup for improper performance.[3]

A bailor, when sued on a contract, may recoup for plaintiff's breach or improper performance of the contract.[4] Defendant, in an action on a promissory note, may recoup for claims growing out of the transaction of which the note was a part,[5] or for a tort growing out of plaintiff's breach of the contract for which the notes were given,[6] but defendant is not entitled to recoup the amount of damages arising from the use of actionable words by plaintiff because of defendant's failure to pay the note, since the plea of recoupment is, in such circumstances, an independent tort unconnected with plaintiff's cause of action.[7] In an action on a debt for which collateral has been given, defendant may recoup the value of any of such collateral which has been converted.[8]

Defendant may recoup for fraud or deceit which induced the making of a contract,[9] and, conversely, in an action for deceit, defendant may recoup any sum due him under the contract involved.[10] So, also, in an action by one partner against another for the amount agreed to be paid for his share of the firm assets after dissolution, defendant can recoup for any damages sustained by the fraud of plaintiff in that he concealed and did not account for certain credits which he had received.[11] In trover or conversion, defendant may recoup the amount of a lien on the goods converted for freight earned in carrying them,[12] or he may recoup the debt owed him by plaintiff for the sale price of the goods converted.[13] A claim arising on an executory contract of sale is separate and distinct from a demand predicated on a temporary injunction bond and cannot be recouped against such demand.[14]

Overpayments. Recoupment will lie for overpayments.[15]

In a suit to reform a contract. by a nonresident plaintiff, defendant cannot recoup damages for independent torts.[16]

§ 35. —— Set-Off

Generally, in set-off, it is not necessary that the defendant's claim arise from the contract or transaction sued on or be connected with the subject matter thereof.

Although there are some decisions of an apparently contrary nature,[17] it is generally the rule

98. U S—Michigan Yacht, etc., Co v. Busch, Mich., 143 F. 929, 75 C. C A. 109.
57 C.J. p 408 note 2.

99. Mo.—Lewis v. Oliver, App., 220 S W 2d 748
57 C J p 408 note 3.

1. N D—Busdicker v Peoples Opinion Printing Co, 272 N.W. 331, 67 N.D. 431
57 C J p 408 note 4.

In action by employee for compensation for labor performed under special contract, employer was held entitled to recoup damages for nonperformance of or breach of contract, but not damages which could have been prevented by reasonable diligence.—Busdicker v. Peoples Opinion Printing Co., supra.

2. Miss.—P o s t a l Telegraph-Cable Co. v. Craig, 63 So. 573, 106 Miss 279.

3. Mich.—Delbridge, etc., Co. v. Patterson, 63 N.W. 436, 105 Mich. 413.
57 C.J. p 408 note 6.

Payment
Where payments made by buyer on an account for heating plant, plumbing, and other items was more than sufficient to cover the cost of the furnace which was the first item on the account, and neither buyer nor seller designated the application of the payments, payments would be applied to the cost of the furnace, and, hence, buyer when sued for balance due on the account was not entitled to recoup against seller's demand for alleged defects in the furnace.—Wanner v. Snider, 286 N.W. 685, 289 Mich. 464.

4. Vt.—Phelps v. Paris, 39 Vt. 511.
57 C.J. p 408 note 7.

5. Tex—Minneapolis-Moline Power Implement Co. v. Gatzki, Civ.App., 57 S.W.2d 593.
57 C.J. p 408 note 8.

6. Ill.—Streeter v. Streeter, 43 Ill. 155

7. Miss.—Calhoun v. McNair, 166 So. 330, 175 Miss. 44.

8. Ga—Tennessee Chemical Co. v. George, 131 S.E. 493, 161 Ga. 563.
57 C.J p 409 note 10.

9. Del.—Travers v. Artic Roofing, 27 A.2d 78, 3 Terry 41, affirmed 32 A.2d 559, 3 Terry 293—Mackenzie Oil Co. v. Omar Oil & Gas Co., 154 A. 883, 4 W.W.Harr. 435, affirmed Phoenix Oil Co. v. Mackenzie Oil Co, 154 A. 894, 4 W.W.Harr. 460.
57 C.J. p 409 note 12.

10. Ala—Southern Building & Loan Ass'n v. Bryant, 144 So. 367, 225 Ala. 527.

11. Me.—Bailey v. Webber, 94 A. 758, 113 Me. 434.

12. N.Y—Saltus v. Everett, 20 Wend 267, 32 Am.D. 541.
57 C.J. p 409 note 13.

13. Tex—Wallace v. Renfroe, Civ. App., 124 S.W.2d 456, error dismissed, judgment correct.

14. Hawaii—Hong Hoon v. Lum Wai, 26 Hawaii 546.

15. Ga.—Wiseberg v. Novelty Hat Mfg Co., 59 S.E. 1112, 3 Ga.App. 362.
57 C.J. p 409 note 16.

16. Ga—Fambrough v. De Vane, 74 S.E. 762, 138 Ga. 47.

17. Ky.—Louisville & N. R. Co. v. Dry Branch Coal Co., 65 S.W.2d 1008, 252 Ky. 124.

Independent demands cannot be set off.—Coffin v. Talbot, 148 So. 184, 110 Fla. 131.

Claim for taxes
In suit by state for gross produc-

that in set-off it is not necessary that defendant's claim arise from the contract or transaction sued on or be connected with the subject matter thereof.[18] So as a general rule statutes of set-off are construed to allow the right of set-off of all mutual debts and demands between the parties, whether independent and unconnected with plaintiff's cause of action,[19] or springing from, and connected with, the contractual transaction on which plaintiff's claim is based.[20] However, it has been held under some statutes that the right of set-off is limited to debts or demands growing out of a transaction independent of the contract or transaction sued on.[21] In an action by an execution debtor on an indemnity bond given the sheriff for damages for the levy on, and sale of, exempt property, the amount of the original

tion taxes, together with interest and penalties, tax debtor's claim for amount of gross production taxes which debtor had paid, but did not owe, for a prior period was not an off-set claim which grew out of the subject matter of the suit and hence would not be allowed —State v Humble Oil & Refining Co., 169 S.W.2d 707, 141 Tex. 46.

Claim prior in time

In lessees' action for specific performance and damages, lessor was held not entitled to offset architect's fees against lessees' deposit where plans on which fees were based were completed before lease.—Schuman v Reily, 17 P.2d 163, 128 Cal App 315

Statutory plea in effect one of recoupment

A special plea of set-off, in effect a statutory plea of recoupment, and an enlargement of the common-law right of recoupment, is available under some statutes only when the claim sought to be set off grows out of the contract sued on.—Odessky v. Monterey Wine Co., 49 S.E.2d 330, 188 Va. 184.

Unrelated notes

Where funds were deposited in New York bank by Russian corporation which was later nationalized by the Soviet government, the bank if it had been sued for the funds by the Soviet government prior to the Litvinov assignment could not have set off the amount due on pre-Soviet Russian Government notes purchased by the bank, because notes were unrelated to the funds, and hence the bank could not set off such amount when sued by the United States after the United States acquired title to the funds under the Litvinov assignment.—U. S. v. New York Trust Co., D.C.N.Y., 75 F.Supp 583.

18. U.S.—Marks v. Spitz, D.C.Mass., 4 F.R.D. 348.
Conn.—Savings Bank of New London v. Santaniello, 33 A.2d 126, 130 Conn. 206.
Ind.—Deveney v. Treesh, 72 N.E.2d 578, 117 Ind.App. 374.
N.J.—Falkenstern v. Herman Kussy Co., 59 A.2d 372, 137 N.J.Law 200
Pa.—Taylor-Davis, Inc., v. Ely, 44 Pa.Dist. & Co. 532, 58 Montg Co. 278.
W.Va.—**Corpus Juris cited in** Bungalow Gas Co v. Swanson, 188 S.E. 235, 236, 117 W.Va. 777.
57 C.J. p 398 note 44
Connection with subject of action generally see infra § 38

A distinguishing feature of set-off is that it arises out of a transaction extrinsic to that of which the primary claim arose
U.S.—In re Monongahela Rye Liquors, C.C.A.Pa., 141 F.2d 864
Ind.—Sams v Kern, 98 N.E.2d 920, 121 Ind.App. 370.

A "set-off" at law is a money demand independent of, and unconnected with, plaintiff's cause of action.
U.S.—Clark v Manufacturers Trust Co., C.A.N.Y., 169 F.2d 932, affirmed in part and vacated in part on other grounds McGrath v Manufacturers Trust Co., 70 S.Ct 4, 338 U.S. 241, 94 L.Ed 31.
N.Y.—Otto v. Lincoln Savings Bank, 51 N.Y.S.2d 561, 268 App.Div. 400, affirmed 62 N.E.2d 236, 294 N.Y. 798.

19. U.S.—Marks v. Spitz, D.C.Mass., 4 F.R.D. 348.
Ill.—John A. Eck Co. v. Pennsylvania R. Co., 261 Ill.App. 43.
Ky.—Markwell v. Kahlkoff, 79 S.W.2d 984, 258 Ky. 231.
Mo.—Brown v Stotts City Bank, 38 S.W.2d 722, 327 Mo. 747.
57 C.J. p 398 note 45

Independent contracts

The right of set-off is said to exist between two persons each of whom under an independent contract owes an ascertained amount to the other.—Hammond Pure Ice & Coal Co v Heitman, App., 44 N.E.2d 219, reversed on other grounds 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997.

Particular claims held properly set off

(1) Note executed by insolvent vendor to third person and owned by purchaser's grantee could be set off against vendor's demand against purchaser's grantee to have balance due on purchase price declared a lien on property —Hall v. Clark, 151 So. 445, 227 Ala 571

(2) Judgment for costs against plaintiff could be set off against claim in assumpsit for rent.—Cross v. Hickey, 236 N.W. 800, 254 Mich. 330.

(3) In action on note by corporation against deceased trustee's executor, credit for salary due trustee held properly allowed on note.—Albrecht v Bellinger, 8 P.2d 983, 167 Wash. 95.

(4) Other particular claims —Warren v. Thompson, 160 S.E. 297, 111 W.Va. 48—57 C.J. p 398 note 45 [a].

20. Mich.—Bennett-Waltman & Co. v. Smith, 217 N.W. 760, 241 Mich 673.
N.Y.—Cooperstown Cattle Co. v. Smith, 89 N.Y.S.2d 89, 275 App.Div. 240.
Tenn.—Voncannon & Co. v. Burleson & Laws, 6 Tenn.App. 369.
57 C.J. p 398 note 46.

Particular claims held properly set off

(1) In action on note, maker could set off value of goods belonging to him and purchased by holder of note at void sale of goods under trust deed securing note —Charleston Milling & Produce Co. v. Craighead, 179 S.E. 69, 116 W.Va. 194.

(2) In action by employers' liability insurer on employer's agreement indemnifying insurer against liability on supersedeas bond in excess of insurance coverage, employer could set off claim against insurer for refusing in bad faith to settle employee's claim —Maryland Casualty Co v. Cook-O'Brien Const. Co., C.C.A.Mo., 69 F.2d 462, certiorari denied 55 S.Ct. 81, 293 U.S. 569, 79 L.Ed. 668.

(3) Other particular claims.—Martin v Westover Court Corp., 42 S.E. 2d 198, 186 Va. 254—57 C.J. p 398 note 46 [a]–[c].

Breach of collateral obligation

Where contract obligated roofer to install a waterproof built-up roof and as collateral obligation thereto to maintain roof in water-proof condition, judgment for balance due on primary obligation less set off allowed for breach of collateral obligation was not objectionable on ground that roofer was granted recovery either for substantial performance or in quantum meruit although roofer sued only for full performance.—Stalnaker v. Howard, Tex.Civ.App., 230 S.W.2d 563, error dismissed.

21. Ky.—Harris v. Ogg, 1 J.J.Marsh. 408.
57 C.J. p 399 note 47.

judgment cannot be set off.[22]

In equity a set-off is not confined to matters arising out of the contract or transaction sued on.[23] Accordingly, cross demands and counterclaims, whether arising out of the same or wholly disconnected transactions may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice,[24] but not where it would be inequitable to allow the set-off.[25]

In trespass. In an action for a wrongful and malicious trespass by defendant a transaction wholly apart and separate from plaintiff's claim cannot be set off.[26]

§ 36. —— Counterclaim

a In general
b. What constitutes "arising from same contract or transaction"
c. Particular subjects of counterclaim

a. In General

The distinguishing feature of counterclaim, as opposed to set-off, is that it arises out of the same transaction as that described in the complaint, and under some statutes, although not under others, a counterclaim ordinarily is authorized only where the claim arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or is connected with the subject of the action.

As a general rule, the distinguishing feature of counterclaim, as opposed to set-off, is that it arises out of the same transaction as that described in the complaint,[27] and the propriety of a counterclaim may depend on compliance with such condition under the provisions of numerous statutes presently or formerly in force, setting forth the circumstances under which counterclaims may be allowed.[28] Under statutory provisions presently or formerly in effect authorizing as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, three classes of counterclaims are provided for: (1) A demand which arises out of the contract on which plaintiff has based his action. (2) A demand which arises out of the transaction—a broader term than contract—on which plaintiff has based his action. (3) A demand which need not necessarily arise out of either the contract or the transaction involved in the action, but is sufficient if it is connected with the subject of the action.[29] Under these statutes defendant cannot set up any and every cause of action he may have against

22. Ky.—Winstead v. Hicks, 121 S.W. 1018, 135 Ky. 154, 135 Am.S.R. 446

23. U.S.—Union Indemnity Co. v. Stevens, C.C.A.Miss., 57 F.2d 839.
Ala.—Nowell v. Nowell, 50 So.2d 270, 255 Ala. 107.
N.H.—Arcadia Knitting Mills v. Elliott Mfg. Co., 195 A. 681, 89 N.H. 188.
57 C.J. p. 399 note 49.

Existence of intervening equity

(1) Court of equity will set off mutual and independent demands against each other where intervening equity exists which renders it necessary for protection of demand sought to be set off.—Hall v. Clark, 151 So. 415, 227 Ala. 571.

(2) Equity does not generally allow set-off arising from unrelated transaction unless there is some equity, such as insolvency or nonresidence.—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F.2d 42.

24. U.S.—North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co., Ill., 14 S.Ct. 710, 152 U.S. 596, 38 L.Ed. 565.
D.C.—Brownley v. Peyser, 98 F.2d 337, 69 App.D.C. 56.

25. Tenn.—Federal Surety Co. v. Union Indemnity Co., 33 S.W.2d 421, 161 Tenn. 621.

26. Ala.—Norton v. Bumpus, 127 So. 907, 221 Ala. 167

Trespass not authorized by contract

Fact that several contracts between coal companies dealt with same railroad material did not afford railroad defense or set-off to its liability for trespassing on property of coal company, not authorized by contracts.—Louisville & N.R. Co. v. Dry Branch Coal Co., 65 S.W.2d 1008, 252 Ky. 124.

27. Conn.—Savings Bank of New London v. Santaniello, 33 A.2d 126, 130 Conn. 206.
Distinctions between terms generally see supra § 10.

28. Kan.—Salina Coca-Cola Bottling Corp. v. Rogers, 237 P.2d 218, 171 Kan. 688.
N.J.—Falkenstern v. Herman Kussy Co., 55 A.2d 11, 25 N.J.Misc. 447, affirmed 59 A.2d 372, 137 N.J.Law 200.
Similar requirement as to pleading of cross complaint or cross petition see Pleading §§ 167-168.

29. Kan.—Salina Coca-Cola Bottling Corp. v. Rogers, 237 P.2d 218, 171 Kan. 288—U.S. v. Hoffman Machinery Corp. v. Ebenstein, 96 F.2d 661, 150 Kan. 790, opinion adhered to 103 P.2d 788, 152 Kan. 198.
N.C.—Ætna Life Ins. Co. v. Griffin, 156 S.E. 515, 200 N.C. 251.
Okl.—Gooldy v. J. B. Klein Iron & Foundry Co., 40 P.2d 1070, 170 Okl. 466—Union Nat. Bank of Okmulgee v. Jones, 4 P.2d 62, 152 Okl. 211.
S.C.—Globe Indem. Co. v. Cooper Motor Lines, 33 S.E.2d 405, 206 S.C. 154
57 C.J. p. 409 notes 20, 21.
Connection with subject of action as authorizing counterclaim regardless of whether arising out of same transaction see infra § 40.

Test

Under statute, the test of whether a counterclaim is properly interposed is whether the cause of action asserted therein arises out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or is connected with subject of the action.—Scott v. Shackleford, Mo.App., 125 S.W.2d 522.

Purpose of statutes defining causes of action which may be pleaded as counterclaims is to permit trial in one action of all causes of action arising out of any one contract or any transaction.—Hancaminon v. Carr, 47 S.E.2d 614, 229 N.C. 52.

Settlement of independent disputes

Counterclaim statute goes beyond common-law system of pleading and practice and gives power to settle two independent disputes between same parties in action.—Bourne v. Board of Financial Control for Buncombe County, 176 S.E. 306, 207 N.C. 170.

plaintiff,[30] but he can counterclaim only such as are allowed by the statutes.[31]

Where a counterclaim is sought to be interposed under provisions of this nature it must arise out of the subject matter of plaintiff's action[32] or be connected therewith[33] or related thereto.[34] Thus in such case if a claim arises in favor of defendant out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim,[35] or is connected with the subject of the action, discussed infra § 40, it may be counterclaimed whatever its nature,[36] whether or not arising out of contract,[37] but claims which neither arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim,[38] nor are connected with the subject of the action, as discussed infra § 40, cannot be counterclaimed under these provisions. Where, however, a counterclaim is set up not under such provisions but under another provision authorizing as a counterclaim in an action arising on contract another cause of action arising also on contract or some provision of similar

30. N.C.—Byerly v. Humphrey, 95 N. C. 151

31. N.C.—Byerly v. Humphrey, supra.
57 C.J. p. 399 note 57.

32. N.C.—Hancammon v. Carr, 47 S. E. 2d 614, 229 N.C. 52.
Tex.—Booth v. Chadwick, Civ.App., 154 S.W.2d 268, error refused.
57 C.J. p. 399 note 58.

"Subject matter"

Under a statute requiring a claim to be stated as a counterclaim if it arises out of the transaction or occurrences which are the "subject matter" of the opposing party's claim, the "subject matter of an action" is not a phrase which can mean but one thing in whatever position it be placed, but it may be applied to different things, tangible or intangible under the same circumstances, and it is not the "cause of action" nor the "object of the action," but describes physical facts in relation to which the suit is prosecuted.—Cantrell v. City of Caruthersville, 221 S.W.2d 471, 359 Mo. 282

33. Tex.—Booth v. Chadwick, Civ. App., 154 S.W.2d 268, error refused.
57 C.J. p. 400 note 59.

34. N.M.—Gomez v. Ulibarri, 174 P. 737, 24 N.M. 562.

35. U.S.—General Electric Co. v. Fan Steel Products Co., D.C.N.Y., 5 F. Supp. 828.
Cal.—Engleman v. Superior Court in and for Fresno County, 288 P. 723, 105 Cal.App. 754.
Fla.—Koretzky v. Singer, 32 So.2d 5, 159 Fla. 501—Gardenia Estates v. Grove Land & Timber Co., 140 So. 787, 104 Fla. 284.
Ky.—Maynard v. Chrisman, 192 S.W. 2d 818, 301 Ky. 631
N.Y.—Jacobowitz v. Herson, 276 N.Y. S. 816, 243 App.Div. 274, reversed on other grounds Jacobowitz v. Metselaar, 197 N.E. 169, 268 N.Y. 130, 99 A.L.R. 1198, reargument denied Jacobowitz v. Herson, 198 N. E. 528, 268 N.Y. 630—Blog v. Burden & Co., 265 N.Y.S. 81, 238 App. Div. 634—Tarbell v. Howard, 295 N.Y.S. 376, 162 Misc. 606.
Okl.—Banks v. City of Ardmore, 112 P.2d 372, 188 Okl. 611—Blackburn v. City of Healdton, 14 P.2d 943, 159 Okl. 193
Pa.—Hannigan v. Hannigan, 75 Pa. Dist. & Co. 67—Davis v. Colgan, 70 Pa. Dist. & Co. 386, 66 Montg.Co. 16—Fischer v. Solomon, Co., 99 Pittsb.Leg.J. 313—Jones v. Auto Rental Co., Com.Pl., 96 Pittsb.Leg. J. 140—Robinson v. Burrell, Com. Pl., 32 West.Co. 249
S.C.—Florence-Mayo Nuway Co. v. Eaddy, 9 S.E.2d 727, 194 S.C. 277.
Tex.—Service Drilling Co. v. Woods, Civ.App., 120 S.W.2d 608—Moore v. Ferrier, Civ.App., 39 S.W.2d 120
57 C.J. p. 400 note 61.

36. Okl.—Watson v. American Creosote Works, 84 P.2d 431, 184 Okl. 13.
S.D.—Longpre v. Schmele, 264 N.W. 201, 64 S.D. 70.

37. S.C.—Commercial Credit Co. v. Cook, 164 S.E. 17, 165 S.C. 387.
Contract or tort character of defendant's claim see infra § 41

Words in opposition

Words "arising out of transaction" and "connected with subject of action" are placed in opposition to words "arising out of contract" in statute authorizing counterclaim arising out of contract or transaction set forth in petition or connected with subject of action, and permit filing of counterclaim not arising out of contract.—U. S. Hoffman Machinery Corp. v. Ebenstein, 96 P.2d 661, 150 Kan. 790, opinion adhered to 103 P.2d 788, 152 Kan. 198.

38. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F. 2d 925—Irving Air Chute Co. v. Switlik Parachute & Equipment Co., D.C.N.J., 26 F.Supp. 329.
Colo.—Amos v. Triangle Motor Co., 30 P.2d 1109, 94 Colo. 435.
Ind.—Sams v. Kern, 98 N.E.2d 920, 121 Ind.App. 370.
Iowa.—Harriman v. Roberts, 235 N. W. 751, 211 Iowa 1372—Jenkins v. Barrows, 35 N.W. 510, 73 Iowa 438.
Ky.—Big Four Mills v. Commercial Credit Co., 211 S.W.2d 831, 307 Ky. 612—Markwell v. Kahlkoff, 79 S.W.2d 984, 258 Ky. 231—Louisville & N. R. Co. v. Dry Branch Coal Co., 65 S.W.2d 1008, 252 Ky. 124.
Mo.—Brown Motor Sales Co. v. Daugherty, 107 S.W.2d 179, 232 Mo. App. 951
Neb.—**Corpus Juris quoted in** Live Stock Nat. Bank of South Omaha v. Marshall, 267 N.W. 414, 417, 131 Neb. 185—Continental Nat. Bank of Lincoln v. Wilkinson, 247 N.W. 604, 124 Neb. 675.
N.Y.—McPherson v. Klemin, 280 N. Y.S. 296, 244 App.Div. 767, affirmed 200 N.E. 294, 270 N.Y. 511—Rose v. Rose, 253 N.Y.S. 173, 233 App.Div. 368
N.C.—Thompson v. Pilot Life Ins. Co., 67 S.E.2d 444, 234 N.C. 434—Hoyle v. Carter, 1 S.E.2d 93, 215 N.C. 90.
Ohio.—De Ran v. Stahl, 197 N.E. 144, 49 Ohio App. 262.
Okl.—Board of Education of Town of Ringling v. State ex rel. Benton, 46 P.2d 325, 172 Okl. 437—Gooldy v. J. B. Klein Iron & Foundry Co., 40 P.2d 1070, 170 Okl. 466—Union Nat. Bank of Okmulgee v. Jones, 4 P.2d 62, 152 Okl. 211.
Or.—McGilchrist v. Fiedler, 65 P.2d 388, 155 Or. 616—Dant & Russell v. Ostlind, 35 P.2d 668, 148 Or. 204—Pitts v. King, 15 P.2d 472, 141 Or. 23
Pa.—Watkins Produce Co. v. Kanitsky, 68 Pa.Dist. & Co. 198—New York, O. & W. Ry. Co. v. Commonwealth, Com.Pl., 39 Lack.Jur. 163.
S.C.—Chavis v. Griggs, 51 S.E.2d 512, 214 S.C. 168—Globe Indem. Co. v. Cooper Motor Lines, 33 S.E.2d 405, 206 S.C. 154.
Tex.—Southern Medical & Hospital Service v. Buie-Allen Hospital, Civ. App., 204 S.W.2d 996—American Heating & Plumbing Co. v. Trafton Tile & Marble Co., Civ.App., 132 S.W.2d 140, error dismissed, judgment correct.
57 C.J. p. 462 note 64.

Single subject of controversy

In order to permit the pleading of an action as a counterclaim, there must be only one subject of controversy, it is not sufficient merely that a connected story may be told or merely that there is historical sequence.—Hancammon v. Carr, 47 S.E. 2d 614, 229 N.C. 52.

effect, it need not be a claim arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject matter thereof, but any contract claim, whether or not connected with plaintiff's claim, may be counterclaimed, as discussed infra § 41.

Against codefendant. The rule that the counterclaim must arise out of, or be connected with, the subject matter of plaintiff's cause of action applies to a counterclaim set up by one defendant against a codefendant.[39]

Statutes not requiring claims to arise out of same transaction. Various statutes, some of which supersede earlier statutes establishing a different rule, broadly authorize the interposition of counterclaims without regard to whether defendant's claim arises out of the same transaction as plaintiff's demand,[40] or is connected with the subject of the action, as discussed infra § 40, as where it is only required that the counterclaim tend to defeat or diminish plaintiff's claim and consist of a claim of defendant against plaintiff as between whom a several judgment could be given.[41] Under some provisions of this nature, the only test imposed is whether the counterclaim may be conveniently and justly determined in connection with plaintiff's cause of action,[42] and the application of such test may in certain circumstances render it improper to try in the single action a counterclaim based on a wholly separate transaction.[43]

In equity the court will not dismiss a counterclaim which is shown to be just and compel claimant to institute another proceeding in order to obtain the relief to which he is clearly entitled and which can be granted in a suit between the same parties then in court, even though such counterclaim does not arise out of the same transaction,[44] nor will equity dismiss a counterclaim whether arising out of the same or wholly disconnected transactions if the circumstances are such as to warrant its interference to prevent wrong and injustice.[45]

b. What Constitutes "Arising from Same Contract or Transaction"

Whether the respective claims asserted by the parties arise out of the same contract or transaction within the limitation on counterclaims imposed by the statutes depends on a consideration of all the facts brought forth by the parties and on a determination of whether there is some legal or equitable relationship between the ground of recovery alleged in the counterclaim and the matters alleged as the cause of action by the plaintiff.

In determining whether the respective claims asserted by the parties arise out of the same contract or transaction, within the limitation on counterclaims imposed by statutes discussed supra subdivision a of this section, the court is not confined to the facts stated by plaintiff, but may take into account the facts set up by defendant, and will from them all determine whether the claims arise out of the same transaction.[46] The question must be determined as each case is presented with a view to promoting justice and dispatching litigated business.[47] A rule which arbitrarily uses the element of time to determine whether various causes of action arise out of the same contract or transaction is im-

39. Okl.—James v. Smith, 137 P.2d 904, 192 Okl. 525.
57 C.J. p. 404 note 71.

40. Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.
Ill.—People ex rel. Bradford Supply Co. v. Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill. 520.
Iowa.—Imes v. Hamilton, 269 N.W. 757, 222 Iowa 777.
N.Y.—Saxon v. Saxon, 36 N.Y.S.2d 488, 178 Misc. 781.—Town of Harrison v. Sunny Ridge Builders, 8 N.Y.S.2d 632, 170 Misc. 161.
57 C.J. p. 403 note 67.

Permissive counterclaim

Under statute so providing, there may be asserted as a permissive counterclaim any matured claim against an adverse party, not arising out of transaction or occurrence which is the subject matter of the adverse party's claim, which the party had at the time of the filing of his first required pleading.—Turner v. Alton Banking & Trust Co., C.C.A. Mo., 166 F.2d 305.

Distinct cause of action

In action on notes, defendant was not confined to defend on notes mentioned in complaint but was entitled to litigate validity of all notes and other instruments involved in his alleged dealings with plaintiff and could interpose a counterclaim on a distinct cause of action even though it was broader than, and inclusive of, plaintiff's claim.—Perlman v. Cohen, 68 N.Y.S.2d 882.

41. Cal.—Dobbins v. Horsfall, 136 P.2d 35, 58 Cal.App.2d 23.—Robertson v. Maroevich, 109 P.2d 708, 42 Cal.App.2d 610.—Kittle Mfg. Co. v. Davis, 47 P.2d 1089, 8 Cal.App.2d 504.

Claim for salary

In action by union to secure possession of union books and records and for damages for detention of property, defendant's claim for back salary on ground that union had breached contract of employment was proper subject of counterclaim.—Elevator Operators and Starters' Union, Local No. 117 of San Francisco v. Newman, 186 P.2d 1, 30 Cal.2d 799.

42. N.Y.—Panzer v. Panzer, 83 N.Y.S.2d 525, 274 App.Div. 940, and 83 N.Y.S.2d 526, 274 App.Div. 940.

43. N.Y.—Jayell Films v. A. F. E. Corp., 67 N.Y.S.2d 77.

44. U.S.—Paramount Hosiery Form Drying Co. v. Walter Snyder Co., D.C.Pa., 244 F. 192.
57 C.J. p. 404 note 68.

45. U.S.—North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co., Ill., 14 S.Ct. 710, 152 U.S. 596, 38 L.Ed. 565.
D.C.—Brownley v. Peyser, 98 F.2d 337, 69 App.D.C. 56.
57 C.J. p. 404 note 69.

46. U.S.—Woodley v. Bubendorf, D.C.Alaska, 69 F.Supp. 593.
Ind.—Muir v. Robinson, 186 N.E. 289, 205 Ind. 293.
Mont.—Griffiths v. Thrasher, 26 P.2d 995, 95 Mont. 210.
Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73.
57 C.J. p. 409 note 22.

47. N.Y.—County Plains Corporation v. Nosband Corporation, 256 N.Y.S. 10, 234 App.Div. 588.

proper.[48] There must be some legal or equitable relationship between the ground of recovery alleged in the counterclaim and the matters alleged as the cause of action by plaintiff.[49] It is not enough that the parties are the same[50] or that the transactions were made on the same day.[51] The counterclaim must be such that it could reasonably have been anticipated when the transaction set up as the foundation of plaintiff's claim culminated.[52] A counterclaim is allowable where the whole matter arises out of one connected series of transactions.[53]

"Transaction" defined. A "transaction" within the statutes as to counterclaims is defined as the act of transacting or conducting any business, negotiation, management, or proceeding.[54] The word, as used in the counterclaim statutes, is broad and comprehensive,[55] and is construed liberally[56] and according to its natural and ordinary signification.[57] In other words, the term is not a technical one and must be construed according to the context and to approved usage.[58] It is broader in meaning than "contract"[59] or "tort,"[60] and it may include either or both.[61] It means any act as affecting legal rights or obligations,[62] and properly embraces an entire occurrence[63] out of which a legal right springs or on which a legal obligation is predicated,[64] although it has been held that the term is not synonymous with "accident" or "occurrence."[65]

The term "transaction" as used in the counterclaim statutes has been said to mean that combination of acts and events, circumstances and defaults, which viewed in one aspect results in plaintiff's right of action, and viewed in another aspect results in defendant's right of action;[66] and it applies to any dealings of the parties resulting in wrong, without regard to whether the wrong was done by violence, neglect, or breach of contract.[67] It cannot be restricted to the simple statement of the wrong complained of by plaintiff, but it must be held to include all the facts and circumstances out of which arose the injury complained of.[68] Where the facts alleged in a counterclaim arise out of the

48. Mont.—Mulcahy v. Duggan, 214 P. 1106, 67 Mont. 9.

49. Ind.—Hege v. Newsom, 170 N.E. 336, 97 Ind.App. 465—Brower v. Nellis, 33 N.E. 672, 6 Ind.App. 323.

50. Ind.—Hege v. Newsom, 170 N.E. 336, 97 Ind.App. 465.

51. Ind.—Muir v. Robinson, 186 N.E. 289, 205 Ind. 293.
57 C.J. p. 410 note 26.

Logical relation of facts

A transaction is not confined to what is done in one day or at a single time and place, but the logical relation of the facts involved determines whether they together constitute a single transaction.—Muir v. Robinson, supra—Cleveland, etc., R. Co. v. Partlow, 123 N.E. 838, 70 Ind.App. 616.

52. Or.—Krausse v. Greenfield, 123 P. 392, 61 Or. 502, Ann.Cas.1914B 115.
57 C.J. p. 410 note 27.

53. Ohio.—Roots v. Nye, 2 Handy 229, 12 Ohio Dec., Reprint, 417.
57 C.J. p. 410 note 28.

54. Ind.—Muir v. Robinson, 186 N.E. 289, 205 Ind. 293.
57 C.J. p. 410 note 29.

Surrounding facts and circumstances

Term includes all the facts and circumstances out of which arose the injury complained of by plaintiff.—Cantrell v. City of Caruthersville, 221 S.W.2d 471, 359 Mo. 282—57 C.J. p. 410 note 29 [b] (2).

55. Mass.—Potter v. A. W. Perry, Inc., 190 N.E. 822, 286 Mass. 602.
Mo.—Cantrell v. City of Caruthersville, 221 S.W.2d 471, 359 Mo. 282.
Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73
57 C.J. p. 410 note 30.

56. U.S.—Woodley v. Bubendorf, D.C.Alaska, 69 F.Supp. 593.
Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73.

57. N.Y.—Xenia Branch Ohio State Bank v. Lee, 15 N.Y.Super. 694, 7 Abb.Pr. 372.
57 C.J. p. 410 note 31.

58. Nev.—Warren v. DeLong, 97 P.2d 792, 59 Nev. 481.

59. Kan.—U. S. Hoffman Machinery Corp. v. Ebenstein, 96 P.2d 661, 150 Kan. 790, opinion adhered to 103 P.2d 788, 152 Kan. 198.
Nev.—Warren v. De Long, 97 P.2d 792, 59 Nev. 481.
N.Y.—Gross v. Hochstim, 130 N.Y.S. 315, 72 Misc. 343—Kneeland v. Pennell, 96 N.Y.Supp. 403, 49 Misc. 94.
N.D.—Wrege v. Jones, 100 N.W. 705, 13 N.D. 267, 112 Am.S.R. 679, 3 Ann.Cas. 482
Okl.—Guy Harris Buick Co. v. Bryant, 233 P. 752, 108 Okl. 117.
Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73—Chance v. Carter, 158 P. 947, 81 Or. 229.
57 C.J. p. 410 note 32.

60. Nev.—Warren v. De Long, 97 P.2d 792, 59 Nev. 481.
57 C.J. p. 410 note 33.

61. Kan.—U. S. v. Hoffman Machinery Corp. v. Ebenstein, 96 P.2d 661, 150 Kan. 790, opinion adhered to 103 P.2d 788, 152 Kan. 198.
Nev.—Warren v. De Long, 97 P.2d 792, 59 Nev. 481.
N.Y.—Schechner v. Wittner, 224 N.Y.S. 66, 130 Misc. 424.
57 C.J. p. 411 note 34.

62. N.D.—Haut v. Gunderson, 211 N.W. 982, 54 N.D. 826

63. Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73.

64. N.D.—Haut v. Gunderson, 211 N.W. 982, 54 N.D. 826

65. Ind.—Hege v. Newsom, 170 N.E. 336, 97 Ind.App. 465—Excelsior Clay Works v. De Camp, 80 N.E. 981, 40 Ind.App. 26—Lake Shore, etc., R. Co. v. Van Auken, 27 N.E. 119, 1 Ind.App. 492

66. Mont.—Griffiths v. Thrasher, 26 P.2d 995, 95 Mont. 210
Nev.—Warren v. De Long, 97 P.2d 792, 59 Nev. 481
57 C.J. p. 411 note 37.

67. Mont.—Scott v. Waggoner, 139 P. 454, 48 Mont. 536, L.R.A.1916C 491.
Nev.—Warren v. De Long, 97 P.2d 792, 59 Nev. 481.

68. Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73.
57 C.J. p. 411 note 39.

All that takes place

"Transaction," within statute, authorizing defendant to file as counterclaims all causes of action which he may possess against plaintiff arising out of contract or "transaction" set forth in complaint, includes all that takes place in conducting of any item of business or an affair.—Benton County State Bank v. Nichols, supra.

same transaction as alleged in the complaint, such facts may cover a wider scope than where plaintiff's action is based on a specific contract.[69]

c. Particular Subjects of Counterclaim

Numerous particular counterclaims have been held maintainable or have been held not maintainable within the limitation imposed by statutes authorizing as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, as in actions founded on contract generally, on a note, or on a tort claim.

Under the statutory provisions authorizing as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, numerous particular counterclaims have been held maintainable as within the limitation imposed[70] or have been held not maintainable because not in compliance with the statute.[71] In an action founded on a contract, defendant may counterclaim for claims he has against plaintiff which are founded on the contract sued on[72] or which arise out of a transaction of

69. S C—Griffin v Scott, 27 S E.2d 570, 203 S C. 430

70. U S—Universal Radiator Products Co. v. Craftsman Radiator Enclosure Co, D C N Y, 1 F Supp 759.
Cal.—Gorman v. Superior Court in and for Fresno County, 72 P 2d 774, 23 Cal.App 2d 173.
Fla.—Symonds v. Browning, 24 So 2d 526, 156 Fla 808
Nev—Warren v De Long, 97 P 2d 792, 59 Nev 481.
N Y—Alpaugh v Battles, 257 N Y.S 126, 235 App Div. 321—County Plains Corporation v. Nosband Corporation, 256 N Y.S. 10, 234 App Div. 588.
Okl.—Banks v City of Ardmore, 112 P 2d 372, 188 Okl 611—Blackburn v. City of Healdton, 14 P.2d 943, 159 Okl 193.
Pa—Hannigan v. Hannigan, 75 Pa Dist. & Co. 67—Fischer v Solomon, Co, 99 Pittsb Leg J 313
S.C.—Exchange Bank of Meggett v. Bennett, 8 S E 2d 515, 193 S C. 320.
57 C J p 400 note 61 [a]

Particular claims properly interposed

(1) In action to reform deed given on exchange of property, counterclaim seeking damages on ground of plaintiffs' fraud in inducing exchange—Muir v Robinson, 186 N.E 289, 205 Ind 293

(2) In action for possession of business, claim for slander of title to property—Ward v. Gee, Tex Civ App, 61 S W 2d 555, error dismissed

(3) In replevin to recover personalty, counterclaim alleging that plaintiffs had requested defendant to acquire necessary office space and arrange for installation of personalty involved promising defendant reasonable compensation, and that plaintiffs failed to pay any compensation, and seeking recovery for personal services and for rentals for space occupied by such personalty—Woodley v. Bubendorf, D C Alaska, 69 F Supp. 593

(4) In action to foreclose chattel mortgage on hotel furniture and fixtures sold defendant, counterclaim for damages for false representations and warranties—Griffiths v Thrasher, 26 P 2d 995, 95 Mont. 210

(5) In city employees' action against city to recover difference between wages received and those required to be paid by minimum wage law, counterclaim for wages paid to employees after exhaustion of budget provided for the payment of such wages—City of Phoenix v Kidd, 94 P 2d 428, 54 Ariz 123, followed in City of Phoenix v. Price, 94 P 2d 433, 54 Ariz 137, City of Phoenix v. Enriguez, 94 P 2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139

(6) Other claims.
Kan—Petersime Incubator Co v. Ferguson, 53 P.2d 505, 143 Kan 151.
Mass—Medlinsky v. Premium Cut Beef Co., 57 N.E 2d 31, 317 Mass 25—Anderson v Connolly, 36 N E 2d 404, 310 Mass. 5
Mo.—McCluskey v. De Long, 198 S. W 2d 673, 239 Mo.App. 1026.
Neb—Van Horn v Lincoln Sales Outlet Co, 255 N W. 36, 127 Neb 301
Pa—Walch v. Capriotty, 65 Pa Dist & Co 48, 35 Del Co 273.

71. U S—Felder v. Reeth, C C A Alaska, 62 F 2d 730
Conn—Hartford-Connecticut Trust Co v. Riverside Trust Co, 197 A 766, 123 Conn 616
Ky—Kramer v Gough, 220 S.W 2d 577, 310 Ky 299—Patton v Clay Motor Co, 160 S W.2d 335, 290 Ky 84—Harrison v. Martin, 114 S W 2d 112, 272 Ky 307—Markwell v. Kahlkoff, 79 S W.2d 984, 258 Ky 231—Louisville & N. R Co v Dry Branch Coal Co., 65 S W 2d 1008, 252 Ky. 124
Mass—Potier v. A. W. Perry, Inc, 190 N E 822, 286 Mass 602
Mo—Brown Motor Sales Co. v Daugherty, 107 S W.2d 179, 232 Mo App 951
Neb—Live Stock Nat. Bank of South Omaha v Marshall, 267 N W 414, 131 Neb 185
N.Y—Swiedler v Bowery Sav Bank, 281 N Y S 353, 245 App Div. 846—Basch v Basch, 269 N Y S 696, 240 App Div. 235—Campbell v Pettigrew, 248 N Y S 102, 139 Misc 629
N C—Thompson v Pilot Life Ins Co, 67 S E 2d 444, 234 N C. 434—Weiner v Equel's Style Shop, 188 S.E 331, 210 N C. 705
Okl—Watson v American Creosote Works, 84 P 2d 431, 184 Okl 13—Board of Education of Town of Ringling v State ex rel Benton, 46 P.2d 325, 172 Okl 437—Union Nat Bank of Okmulgee v. Jones, 4 P 2d 62, 152 Okl 211
Pa.—Mann v. Diamond, 56 Pa.Dist & Co 347.
S.C—Coastal Produce Ass'n v. Wilson, 8 S E 2d 505, 193 S.C. 339—Salley v McCoy, 195 S E 132, 186 S C 1—Ocean Forest Co v. Woodside, 192 S.E. 413, 184 S C. 428
S D—State v. Parker, 241 N W. 318, 59 S D 500.
Tex.—Felker v. Gulf Coast Orchards Co, Civ App, 81 S.W.2d 1044, error dismissed.
57 C.J p 402 note 64 [a].

Particular claims not properly interposed

(1) In suit on mortgage, counterclaim for damages from false and malicious published statements of mortgagee—Buehrer v Provident Mut Life Ins Co of Philadelphia, 174 N E 597, 37 Ohio App 250, affirmed 175 N E 25, 123 Ohio St 264.

(2) In specific performance suit, counterclaim for rents and timber removed from land—Sampson v Cottongim, 61 S W 2d 309, 249 Ky. 670.

(3) In action to recover on a dishonored check, claim for damages for abuse of process by plaintiffs in prosecuting a criminal action against defendant on charge of uttering a worthless check in violation of statute—Hancammon v Carr, 47 S E 2d 614, 229 N C 52

(4) In action for conspiracy to libel minister named in husband's divorce suit against wife, husband's counterclaim for alienating wife's affections—Pitts v. King, 15 P.2d 472, 141 Or. 23.

72. Or.—State ex rel. Mitchell v. U S. Fidelity & Guaranty Co., 24 P. 2d 1037, 144 Or 535.
57 C J p 411 note 40.

In insurer's action to cancel life policy, a counterclaim based on alleged slander by insurer's agent in conversation with wife of insured

which the contract sued on is a part.[73] So, in an action on a contract, defendant may counterclaim for plaintiff's breach of the contract sued on,[74] or for damages for fraud inducing the contract,[75] or for specific performance of the contract sued on.[76]

Defendant, in an action by plaintiff for damages for breach of contract, can counterclaim for damages for a breach of the same contract by plaintiff[77] or he may recover by counterclaim for part performance of the contract by which plaintiff profited.[78] In an action based on fraud in the inducement of a contract, defendant may counterclaim for plaintiff's breach thereof.[79] Where an agreement is not canceled by a second agreement with respect to the same thing, but is incorporated in, and becomes a part of, it, any damages accruing to the promisor in the latter agreement by reason of breach of the first agreement may, in an action by the promisee, be counterclaimed as a claim arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action,[80] but if the second agreement takes the place of the first the rule is otherwise.[81]

In an action to cancel a contract on the ground of fraud, defendant may counterclaim for moneys due under the contract.[82]

Action on appeal bond. In an action on an appeal bond, it is not proper to set up counterclaims based on a tort liability which did not arise out of the bond or the giving of it, and which was not connected with the bond.[83] In an action on an appeal bond given by defendant widow in a suit by heirs to recover property alleged to belong to the estate, defendant cannot counterclaim for her allowance as widow or her interest in the estate.[84]

In action to recover a bond, defendant may counterclaim for money paid to plaintiff under the contract under which the bond sued for was placed in defendant's possession.[85]

In action on note. In an action on a note, defendant may counterclaim for damages growing out of the transaction of which the note was a part,[86] such as for damages for false representations inducing defendant to sign the note,[87] but defendant may not counterclaim for damages arising from an independent transaction.[88] In an action on a note secured by a mortgage, the notes and mortgage are part of the same transaction,[89] and any

relative to canceling policy which took place long after inception of contract was maintainable under statute as arising out of contract set forth in complaint—Ætna Life Ins. Co. v. Lourie, 23 S.E.2d 741, 201 S.C. 478.

Fraud not connected with contract

Where complaint stated cause of action as arising out of contract, defendant's counterclaim, alleging fraud in stock transaction, but which contained no allegations that fraud arose out of contract on which notes sued on were given, held demurrable.—First Wisconsin Nat. Bank of Milwaukee v. Carpenter, 259 N.W. 836, 218 Wis. 30.

73. Ky.—Philadelphia Veneer, etc., Co. v. Garrison, 169 S.W. 714, 160 Ky. 329.
57 C.J. p. 411 note 41.

74. Mo.—Leath v. Weaver, App., 202 S.W.2d 125.
57 C.J. p. 411 note 42.

Partial performance

Defendant may interpose counterclaim for damages caused by relator's failure to complete contract in action to recover for partial performance thereof.—State ex rel. Mitchell v. U. S. Fidelity & Guaranty Co., 24 P.2d 1037, 144 Or. 535.

75. N.C.—Fields v. Brown, 76 S.E. 8, 160 N.C. 295.

In absence of unusual circumstances, claim for damages resulting from fraud on plaintiff's part in inducing contract sued on may be asserted by defendant by way of counterclaim in the same action.—Artic Roofings v. Travers, 32 A.2d 559, 3 Terry, Del., 293.

76. N.Y.—Moser v. Cochrane, 13 N.E. 442, 107 N.Y. 35.
57 C.J. p. 412 note 44.

77. Mass.—Minot v. Minot, 66 N.E. 2d 5, 319 Mass. 253.
57 C.J. p. 412 note 45.

78. U.S.—Chautauqua Inst. v. Zimmerman, Ohio, 233 F. 371, 147 C.C.A. 307, certiorari denied 37 S.Ct. 114, 242 U.S. 642, 61 L.Ed. 542.

79. N.Y.—Chemex Distributors v. Winslow, 241 N.Y.S. 484, 137 Misc. 130.

80. N.Y.—Dempsey v. Moeslein, 16 N.Y.S. 849.

81. Cal.—Griswold v. Pieratt, 42 P. 820, 110 Cal. 259.
N.Y.—Corrigan v. Ritter, 15 N.Y.S. 163, 21 N.Y.Civ.Proc. 82.

82. N.Y.—Stevenson v. Devins, 143 N.Y.S. 916, 158 App.Div. 616.
57 C.J. p. 412 note 50.

83. S.C.—Renneker v. Rehkopf, 67 S.E.2d 138, 208 S.C. 72.

84. S.D.—Bem v. Shoemaker, 74 N.W. 239, 10 S.D. 453.

85. Tex.—Burt v. Stamford, Civ. App., 237 S.W. 977.

86. Or.—**Corpus Juris cited in** Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73.
57 C.J. p. 412 note 54.

Breach of contract

In action on note, cross action alleging payee's breach of contract made in connection with note presented a cause of action arising out of or incident to or connected with plaintiff's cause of action.—Davis v. Miller Rubber Products Co., Tex.Civ.App., 63 S.W.2d 901.

Conversion

In action on notes and mortgage given for purchase price of personalty, where holder of notes and mortgage wrongfully seized a portion of the property and converted it to his own use, maker of the instruments could as a defense plead such conversion as a counterclaim.—Wilson v. Tilcheff, 164 P.2d 396, 196 Okl. 243.

87. Or.—Benton County State Bank v. Nichols, 54 P.2d 1166, 153 Or. 73.

88. Neb.—Continental Nat. Bank of Lincoln v. Wilkinson, 247 N.W. 604, 124 Neb. 675.
N.Y.—First Nat. Bank & Trust Co. of Tuckahoe v. Quimby, 272 N.Y.S. 28, 241 App.Div. 888.
Okl.—Haffner v. First Nat. Bank, 5 P.2d 351, 152 Okl. 169.

89. Tex.—Blocksom v. Guaranty State Bank, etc., Co., Com.App., 251 S.W. 1025.

cause of action growing out of defendant's rights under the mortgage may be counterclaimed.[90]

Tort actions The rule that defendant may plead a counterclaim for damages arising out of the same transaction as that involved in plaintiff's demand,[91] but not for damages arising out of a different transaction,[92] applies in actions in tort for damages. So, in an action for assault and battery, defendant may counterclaim for a libel or slander which was the cause of the assault;[93] but other cases hold that in such an action defendant cannot counterclaim for a libel of himself by plaintiff.[94] In an action for conversion, a counterclaim having such a close relation to, and connection with, the matters alleged in the petition that it would be only just and equitable between the parties to settle them all in the one action is proper;[95] but in an action by a tenant against the landlord for the conversion of chattels placed on the premises defendant cannot set up as a counterclaim that he has a lien on the chattels as security for rent.[96] In an action for defendant's negligence in driving a vehicle against plaintiff's vehicle, defendant may counterclaim for plaintiff's negligence in driving against defendant.[97]

In an action for libel or slander, it has been held that defendant can set up as a counterclaim only such acts or declarations on the part of plaintiff as are connected with the acts or transaction constituting the basis of plaintiff's cause of action,[98] and where the answer is by way of a general denial a counterclaim for slander alleged to have been uttered by plaintiff shortly before the day mentioned in the complaint cannot be set up, since the denial shows that there is no connection between the two.[99] In an action for libel defendant cannot set up as a proper counterclaim slanderous words uttered by plaintiff before and after the alleged libel, at least where there is no connection between the libel and the slanders, and where the libel was not provoked by the slanderous utterances of plaintiff.[1] A cause of action for alienation of affections cannot be set up as a counterclaim to the action for defamation unless it appears that the cause of action for alienation of affections arose out the same transaction.[2]

§ 37. —— Reconvention and Compensation

The defendant may claim in reconvention only claims arising out of the same contract or transaction which affords the ground of suit, and if his demand is not connected with, and incidental to, the main demand ordinarily it cannot be reconvened. Demands in compensation must be connected

Defendant may claim in reconvention claims arising out of the same contract or transaction which affords the ground of suit,[3] whether the agreement be embodied in one instrument or several.[4] If defendant's demand is not connected with, and incidental to, the main demand ordinarily it cannot be

90. Tex.—Montgomery v. Gallas, Civ.App., 202 S.W. 993.
57 C.J. p. 413 note 56

91. U.S.—Carstens v. Great Lakes Towing Co., D.C.Ohio, 71 F.Supp. 394
Ariz.—Tom Reed Gold Mines Co. v. Brady, 99 P.2d 97, 55 Ariz. 133, 127 A.L.R. 905.
Iowa.—Harriman v. Roberts, 235 N.W. 751, 211 Iowa 1372.
Ky.—Kramer v. Gough, 220 S.W.2d 577, 310 Ky. 299
N.Y.—Throckmorton v. Johnson, 250 N.Y.S. 426, 232 App.Div. 495
Ohio.—Howe v. Struble, 104 N.E.2d 197, 90 Ohio App. 172.

Shooting

Where complaint alleged damage by reason of shooting of plaintiff by defendant, counterclaim charging that plaintiff caused the shooting and invaded certain rights of defendant was proper as charging a tort arising out of the same transaction set forth in the complaint.—Griffin v. Scott, 27 S.E.2d 570, 203 S.C. 430.

92. Ky.—Louisville & N.R. Co. v. Dry Branch Coal Co., 65 S.W.2d 1008, 252 Ky. 124
Minn.—Skluzacek v. Wilby, 263 N.W. 95, 195 Minn. 326.—Habedank v. Baker, 244 N.W. 546, 187 Minn. 123.
N.Y.—Mateo v. Abad, 267 N.Y.S. 436, 239 App.Div. 376.
N.C.—Commercial Finance Co. v. Holder, 68 S.E.2d 794, 235 N.C. 96
Okl.—Hogue v. Stephens, 14 P.2d 219, 159 Okl. 31.

93. Mont.—Mulvahy v. Duggan, 214 P. 1106, 67 Mont. 9.
Ohio.—Mogle v. Black, 5 Ohio Cir.Ct. 51, 3 Ohio Cir.Dec. 27

94. Cal.—Macdougall v. Maguire, 35 Cal. 274, 95 Am.D. 98.

95. Neb.—McGerr v. Marsh, 26 N.W.2d 374, 148 Neb. 50

96. N.Y.—Monroe Miller Co. v. Stokes, 27 N.Y.S. 940, 7 Misc. 433

97. N.Y.—Heigle v. Willis, 3 N.Y.S. 497, 50 Hun 588.
57 C.J. p. 413 note 59.

98. Minn.—Thomssen v. Ertz, 101 N.W. 304, 93 Minn. 280.
37 C.J. p. 48 note 42.

99. N.Y.—Fellerman v. Dolan, 7 Abb.Pr. 395 note.

1. N.Y.—Udovichky v. Bacheff, 187 N.Y.S. 474, 195 App.Div. 860

2. N.Y.—Ellis v. Wood, 177 N.Y.S. 730, 108 Misc. 478.

3. La.—Green v. Norsworthy, 135 So. 713, 17 La.App. 548.
Tex.—Service Drilling Co. v. Woods, Civ.App., 120 S.W.2d 608.
57 C.J. p. 404 note 74.

Claims held proper to reconvene

(1) In general.—Poland v. Woodard, La.App., 49 So.2d 488.—57 C.J. p. 404 note 74 [a].

(2) Where plaintiffs' petition, seeking recovery of proceeds of fraternal benefit insurance from defendant, also alleged ownership of parcel of land by inheritance, with prayer to be sent into possession, defendant's title and ownership of buildings situated on such land and right to occupy buildings during her natural life held proper subject of reconventional demand.—Succession of Stevenson, La.App., 158 So. 33.

(3) Purchaser's main demand for damages for failure to obtain possession of premises and vendor's reconventional demand for resolution of sale for nonpayment of purchase price were connected with, and incidental to, one another, as required by statute.—Frantom v. Rusca, La.App., 182 So. 331.

4. Tex.—Henry v. Sanson, Civ.App., 36 S.W. 122.
57 C.J. p. 404 note 75.

reconvened.[5] Thus rule is applicable, under particular statutory provisions, if plaintiff and defendant reside in the same parish,[6] but if a plaintiff resides out of the state,[7] or within the state but in a different parish,[8] defendant may institute a demand in reconvention against plaintiff for any cause, although such demand is not necessarily connected with, or incidental to, the main cause of action.

In determining whether defendant's claim is proper to plead in reconvention, the court is not limited to the facts stated by plaintiff, but may consider the facts stated by defendant.[9] In an action on a note, defendant may set up in reconvention matters of which the note formed a part and by which damages were inflicted by plaintiff on defendant.[10] Claims which arise out of the proceedings resorted to by plaintiff in order to enforce his legal rights are not necessarily connected with, and incidental to, the cause of action set forth in plaintiff's petition.[11]

Compensation. Demands in compensation must be connected.[12] In an action to require defendants to sign and live up to a lease in which defendants by a counter complaint claim the value of improvements made on the property, plaintiff may claim under compensation for the rent of the property occupied by defendants.[13]

§ 38. Connection with Subject of Action

Generally, new matter not germane to the original subject matter of a suit may not over objection be gated in that action.

As a general rule, independent and unrelated causes of action cannot be litigated by cross action,[14] that is, new matter not germane to the original subject matter of a suit may not over objection be litigated in that action;[15] and, under particular statutes so providing, a cross demand such as a counterclaim may not be interposed where it is not connected with the subject of the action brought by plaintiff, and is not otherwise permissible by virtue of other provisions of law, as discussed infra § 40. However, in set-off it is usually not necessary that defendant's claim be connected with the subject matter of the claim sued on, as discussed supra § 35.

§ 39. —— Recoupment

Generally, if the claim of the defendant is connected with the subject of the action, it may be recouped.

As a general rule, if the claim of defendant is connected with the subject of the action, it may be recouped,[16] but if defendant's claim is legally distinct from the contract sued on, close connection with it in point of time is not sufficient to allow it to be recouped.[17]

§ 40. —— Counterclaim

a In general
b "Subject of the action" defined
c. What constitutes connection with subject of action

5. La.—Cerom v Harris, 175 So 462, 187 La. 701—Southern Hide Co. v. Best, 141 So 449, 174 La 748—Hill v. Selico, App., 49 So 2d 763.
57 C J. p 404 note 76.

Particular reconventional demands

(1) Defendant's reconventional demand to recover value of his interest in corporation on alleged ground that such interest was destroyed by plaintiff's tortious acts, set out by answer in action between residents of same parish on note for part of purchase price of stock in such corporation, was properly stricken on plaintiff's motion as not connected with, and incidental to, plaintiff's demand.—Sheppard v. Morgan, La App., 184 So 386.

(2) Attorneys being sued by client for proceeds of judgment collected by attorneys could not in such suit, by reconventional demand, recover compensation for services unrelated to litigation resulting in such judgment or by plea of compensation, set off against client's demand unliquidated claim for such unrelated services.—Noel Estate v Dickson & Denny, 31 So 2d 810, 212 La. 313, 173 A.L.R 423.

6. La.—Burgin v. Jumonville Pipe & Machinery Co., 29 So 2d 595, 211 La 148—Wetherbee v. Lodwick Lumber Co., 193 So. 671, 194 La 352—Mente & Co v. Louisiana State Rice Milling Co., 146 So 28, 176 La 476—Suberville v. Adams, 16 So 652, 47 La Ann. 68—Jones v. Davis, App., 155 So. 269
57 C J p 405 note 77.

7. La.—Dawson v. Frazar, 90 So 570, 150 La 203.
57 C.J. p 405 note 78.

8. La.—Dugas v. Lewis-Chambers Const. Co., App., 187 So 117
57 C J p 405 note 79.

Purported assignment of claim

Where purported assignment of claim by seller was made to permit assignee to bring suit in buyer's parish for seller without subjecting seller to risk of reconventional demand in that parish, seller would be considered party plaintiff, and, being domiciled in a parish other than buyer's parish, buyer could assert against seller the reconventional demand, even though based on cause of action not necessarily connected with main demand.—Dugas v. Lewis-Chambers Const. Co., supra.

9. Tex.—McDonnell v. Home Bitters Co., 1 Tex A Civ Cas § 1159
57 C J. p 413 note 62

10. Tex.—Blair v Reid, 20 Tex 310.
57 C J p 413 note 63

11. La.—Morgan v. Driggs, 17 La. 176
57 C J. p 413 note 64

12. La.—Patterson v. New Orleans, 20 La Ann. 106.
57 C J. p 405 note 81.

13. Puerto Rico.—Batlle v Lichtenstein, 33 Puerto Rico 136

14. N C.—Bost v. Metcalfe, 14 S E 2d 648, 219 N C. 607.
Tex.—Ex parte Richards, 155 S.W.2d 597, 137 Tex. 520.

15. Neb.—Glissmann v. Bauermeister, 30 N W.2d 649, 149 Neb. 131.

16. Miss.—**Corpus Juris cited in** Calhoun v. McNair, 166 So 330, 331, 175 Miss 44.
57 C J. p 413 note 67.
Claims arising out of same transaction as subject to recoupment see supra § 34.

17. Ga.—Blackshear Mfg. Co. v. Stone, 70 S E. 29, 8 Ga.App. 661.

a. In General

t is generally a necessary element of a counterclaim t it grow out of, or be connected with, the cause of ion asserted by the plaintiff, and, where a statute au- rizes as a counterclaim a cause of action connected th the subject of the plaintiff's action, a counterclaim hich meets such requirement may be allowed while a ounterclaim which does not have the requisite connec- ion and is not otherwise permissible by law will not be llowed.

It has been generally held that a necessary element of a counterclaim is that it grow out of, or be connected with, the cause of action asserted by plaintiff,[18] and without reference to any statute it has been held that a counterclaim not germane to the issue involved in plaintiff's suit may not be maintained.[19] So, under some practice, a defendant by counterclaim cannot bring in for adjudication any matter which is not so connected with the matter in controversy under the original complaint that its consideration by the court is necessary to a full determination of the rights of the parties as to such matter in controversy, or, if it is of a wholly independent character, is a claim on plaintiff by way of set-off.[20] Moreover, connection with the subject of plaintiff's action or absence thereof may affect the propriety of a counterclaim where, as discussed supra § 36, the statutes presently or formerly in force authorize as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or "connected with the subject of the action."

Under such statutes, if defendant's claim is connected with the subject of plaintiff's cause of action, it is proper subject matter for a counterclaim,[21] whatever its nature,[22] whether or not it arises out of the contract or transaction set forth in the complaint,[23] and although based on a stipulation different from the one sued on.[24] On the other hand, if the counterclaim set up by defendant does not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, as discussed supra § 36, and is not connected with the subject of the action,[25] it is not proper under statutory provisions authorizing it in such cases.

Numerous particular counterclaims have been al-

18. Ind—Sams v. Kern, 98 N E 2d 920, 121 Ind App 370

19. N J—Hollingsworth v Lederer, 4 A 2d 291, 125 N J Eq 193, affirmed 4 A 2d 300, 125 N J Eq 193
Okl—West Nichols Hills Water Co. v American-First Trust Co in Oklahoma City, 158 P 2d 691, 195 Okl 428

New facts which defendant may introduced by means of counterclaim are only such as are necessary to decide question raised in original suit —Hoffman v Maloratsky, 164 A 260, 112 N J Eq 333.

Court rule

In suit to foreclose a mortgage, prayer of the two answering defendants, in their counterclaim, that another defendant be commanded to account for all moneys received by him from the income and assets of hotel business would not, under court rule, be considered, since it was not germane to the subject matter of the foreclosure suit and could not be conveniently disposed of therein—Johnson v. Traymore Co, 28 A 2d 603, 132 N J Eq 449

20. U S—Sydney v. Mugford Printing etc, Co, D C Conn, 214 F 841
Conn—National Bank of Commerce of New London v. Howland, 22 A 2d 773, 128 Conn 307—Hartford-Connecticut Trust Co v. Riverside Trust Co, 197 A 766, 123 Conn 616—Schaefer v O K Tool Co Inc, 148 A 330, 110 Conn 528—Downing v Wilcox, 80 A 288, 84 Conn 437—Harral v Leverty, 50 Conn. 46, 47 Am R 608.

21. Ind—Muir v Robinson, 186 N. E 289, 205 Ind 293
Kan—Salina Coca-Cola Bottling Corp v Rogers, 237 P 2d 218, 171 Kan 688—U S Hoffman Machinery Corp v Ebenstein, 96 P 2d 661, 150 Kan 790, opinion adhered to 103 P 2d 788, 152 Kan 198
Okl—Blackburn v City of Healdton, 14 P 2d 943, 159 Okl 193
S C—Florence-Mayo Nuway Co. v. Eaddy, 9 S E 2d 727, 194 S C. 277.
57 C J p 414 note 71.

Purpose

The purpose of the statute providing that a defendant may plead in set-off any counterclaim founded on a cause of action arising out of, or incident to, or connected with, plaintiff's cause of action is to prevent a multiplicity of suits, and it is therefore to be liberally construed—Booth v. Chadwick, Tex Civ App, 154 S W 2d 268, error refused

22. Okl—Watson v American Creosote Works, 84 P 2d 431, 184 Okl 13
S.D—Longpre v Schmele, 264 N W. 201, 64 S D 70

23. Kan—Salina Coca-Cola Bottling Corp v. Rogers, 237 P 2d 218, 171 Kan 688—U S Hoffman Machinery Corp v Ebenstein, 96 P 2d 661, 150 Kan. 790, opinion adhered to 103 P.2d 788, 152 Kan 198

24. Ky—Louisville, etc, R Co v. Thompson, 18 B Mon 735
Wis—Atwater v Schenck, 9 Wis. 160

25. Ga—Warwick v Ocean Pond Fishing Club, 58 S E 2d 383, 206 Ga 680.
Ind—Sams v Kern, 98 N E 2d 920, 121 Ind App. 370
Ky—Big Four Mills v. Commercial Credit Co, 211 S W 2d 831, 307 Ky. 612
Mo—Brown Motor Sales Co. v. Daugherty, 107 S.W 2d 179, 232 Mo. App 951.
Neb—**Corpus Juris quoted in** Live Stock Nat. Bank of South Omaha v Marshall, 267 N.W. 414, 417, 131 Neb. 185
N J—Midland Corporation v. Levy, 177 A 685, 118 N J Eq 76, affirmed 184 A 516, 120 N J Eq 197
N Y—Bohmert v Weiss, 291 N.Y.S. 423, 249 App Div. 644—Rose v. Rose, 253 N.Y S. 173, 233 App.Div. 868.
N C.—Thompson v. Pilot Life Ins. Co, 67 S E 2d 444, 234 N C 434—Hancammon v Carr, 47 S E 2d 614, 229 N C 52—Moore v Massengill, 41 S E 2d 655, 227 N C 244, 170 A L.R 147—Farmville Oil & Fertilizer Co v Bowen, 176 S E 565, 207 N C 308—Commercial Finance Co. v Holder, 68 S E 794, 235 N.C 96
Ohio—De Ran v Stahl, 197 N.E. 144, 49 Ohio App. 262.
Okl—Board of Education of Town of Ringling v State ex rel Benton, 46 P 2d 325, 172 Okl. 437—Gooldy v. J B Klein Iron & Foundry Co, 40 P 2d 1070, 170 Okl. 466—Union Nat Bank of Okmulgee v Jones, 4 P.2d 62, 152 Okl. 211
S C—Chavis v Griggs, 51 S E.2d 512, 214 S C 168—Globe Indem. Co. v. Cooper Motor Lines, 33 S.E 2d 405, 206 S C 154
57 C J p 402 note 64, p 414 note 73.

lowed as connected with the subject of the action,[26] as in actions in tort,[27] for conversion,[28] fraud,[29] and unfair competition,[30] and other particular counterclaims have been disallowed as not connected with the subject of the action.[31]

Under some statutes, which in some states have superseded earlier statutes providing otherwise, no requirement is imposed with respect to connection of a counterclaim with the subject of plaintiff's action,[32] it being only necessary that the counterclaim

26. Ga.—Lankford v. Milhollin, 37 S.E.2d 197, 200 Ga. 512.
Ind.—Muir v. Robinson, 186 N.E. 289, 205 Ind. 293
Kan.—Bryant v. Fordyce, 78 P.2d 32, 147 Kan. 586.
Ky.—Kramer v. Gough, 220 S.W.2d 577, 310 Ky. 299
N.Y.—Schering & Glatz v. American Pharmaceutical Co., 185 N.E. 109, 261 N.Y. 304—County Plains Corporation v. Nosband Corporation, 256 N.Y.S. 10, 234 App. Div. 588
S.C.—Ætna Life Ins. Co. v. Lourie, 23 S.E.2d 741, 201 S.C. 478—Exchange Bank of Meggett v. Bennett, 8 S.E.2d 515, 193 S.C. 320—Columbia Nat. Bank v. Reynolds, 164 S.E. 911, 166 S.C. 426
Tex.—Burnell v. Schmidt, Civ. App., 104 S.W.2d 551
Wis.—Elder v. Sage, 42 N.W.2d 919, 257 Wis. 214
57 C.J. p. 400 note 61 [a], p. 414 note 71 [a].

Particular claims

(1) In seller's action for balance due on automobile purchase contract, counterclaim for damages growing out of alleged misrepresentation as to condition of automobile.—Greenville Motor Co. v. Thackston, 166 S.E. 357, 167 S.C. 305.

(2) In action to restrain use of trade-mark, counterclaim to restrain plaintiff from interfering with defendant's sales of products thus named and "other products".—Schering & Glatz v. American Pharmaceutical Co., 185 N.E. 109, 261 N.Y. 304

(3) In action on paving maintenance bond, cause of action against plaintiff city for damage to pavement allegedly caused by negligent failure to remedy defect in water system.—Blackburn v. City of Healdton, 14 P.2d 943, 159 Okl. 193.

(4) In action by tenant against landlord for reimbursement of rents paid in advance over full period of term lease when building on leased premises was destroyed by fire before expiration of the term, landlord's claim against tenant for damage to building on ground that fire was result of tenant's negligence.—Salina Coca-Cola Bottling Corp. v. Rogers, 237 P.2d 218, 171 Kan. 688.

Demand in reconvention

Counterclaim in petitory action in state court to set aside foreclosure proceeding, succession proceeding, and mineral lease, and determine title to land which alleged that plaintiffs having accepted succession unconditionally made themselves individually liable, each for his share of all debts of succession, was sufficiently connected with main action so as to authorize filing of counterclaim under Louisiana law relating to demand in reconvention.—Milburn v. Proctor Trust Co., D.C.La., 54 F. Supp. 989

27. N.Y.—S. Z. Chodorov, Inc., v. Manheimer, 280 N.Y.S. 184, 155 Misc. 482

28. Mo.—National Bank of Commerce v. Maryland Casualty Co., 270 S.W. 691, 307 Mo. 417.
57 C.J. p. 417 note 99

29. Ind.—Grimes v. Duzan, 32 Ind. 361
57 C.J. p. 417 note 1.

30. Ohio.—McCaskey Register Co. v. American Case, etc., Co., 8 Ohio N.P., N.S., 415.
57 C.J. p. 417 note 2.

31. Iowa.—Foster v. Read, 237 N.W. 634, 212 Iowa 803
Ky.—Kramer v. Gough, 220 S.W.2d 577, 310 Ky. 299—Allen v. Chesapeake & O. R. Co., 202 S.W.2d 157, 304 Ky. 846—Harrison v. Martin, 114 S.W.2d 112, 272 Ky. 307—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 246 Ky. 278.
Neb.—Live Stock Nat. Bank of South Omaha v. Marshall, 267 N.W. 414, 131 Neb. 185.
N.Y.—Swiedler v. Bowery Sav. Bank, 281 N.Y.S. 353, 245 App. Div. 846—Washington Trading Corporation v. Cornell Fabrics, 278 N.Y.S. 375, 244 App. Div. 38—Basch v. Basch, 269 N.Y.S. 696, 240 App. Div. 235
N.C.—Thompson v. Pilot Life Ins. Co., 67 S.E.2d 444, 234 N.C. 434—Manufacturers & Jobbers Finance Corp. v. Lane, 19 S.E.2d 849, 221 N.C. 189—Hoyle v. Carter, 1 S.E.2d 93, 215 N.C. 90.
Okl.—West Nichols Hills Water Co. v. American-First Trust Co. in Oklahoma City, 158 P.2d 691, 195 Okl. 428—Watson v. American Creosote Works, 84 P.2d 431, 184 Okl. 13—Board of Education of Town of Ringling v. State ex rel. Benton, 46 P.2d 325, 172 Okl. 437.
Or.—McGilchrist v. Fiedler, 65 P.2d 388, 155 Or. 616
S.C.—Coastal Produce Ass'n v. Wilson, 8 S.E.2d 505, 193 S.C. 339—Salley v. McCoy, 195 S.E. 132, 186 S.C. 1.
S.D.—State v. Parker, 241 N.W. 318, 59 S.D. 500.
Tex.—Wilson v. English, Civ. App., 144 S.W.2d 946.
Wis.—First Wisconsin Nat. Bank of Milwaukee v. Carpenter, 259 N.W. 836, 218 Wis. 30
57 C.J. p. 402 note 64 [a], p. 414 note 73 [a].

Particular claims

(1) In action for price of goods sold and delivered, counterclaim against plaintiffs for slander impairing defendant's credit which occurred some time after sale.—Weiner v. Equel's Style Shop, 188 S.E. 331, 210 N.C. 705.

(2) In action for libel based on affidavit filed in bankruptcy proceeding, cause of action for damages for fraud and conspiracy in financial transaction prior to alleged libel.—Habedank v. Baker, 244 N.W. 546, 187 Minn. 123

(3) In action on account for goods sold and delivered, counterclaim alleging breach of contract giving defendant exclusive agency as distributor of plaintiff's products in certain city.—Rocky Mountain Beverage v. Walter Brewing Co., 108 P.2d 885, 107 Colo. 63.

(4) In action on note, counterclaim for rental of room occupied by plaintiff.—Markwell v. Kahlkoff, 79 S.W.2d 984, 258 Ky. 231

(5) In suit to enjoin co-operative distributing association from interfering with plaintiff's business and for damages for past interference, association's claim under contract with plaintiff and for statutory penalties for inducing members of association to breach marketing contracts.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, 86 S.W.2d 1046, 261 Ky. 25

(6) In action for assault, counterclaim alleging in effect that assault was in retaliation for plaintiff's repeated trespasses on defendants' land for purpose of using water impounded by dam which plaintiff maliciously cut several days previously, and seeking damages for resulting loss of water.—Longpre v. Schmele, 264 N.W. 201, 64 S.D. 70.

32. Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.
Iowa.—Imes v. Hamilton, 269 N.W. 757, 222 Iowa 777
N.Y.—Town of Harrison v. Sunny Ridge Builders, 8 N.Y.S.2d 632, 170 Misc. 161.
57 C.J. p. 403 note 67.

Conversion

In wife's action against husband to recover for expenses for necessaries, counterclaim was maintainable for wife's conversion of husband's per-

tend to defeat or diminish plaintiff's claim and consist of a claim of defendant against plaintiff as between whom a several judgment could be given[33] or that the counterclaim be such as may be conveniently and justly determined in connection with plaintiff's cause of action.[34] However, even in jurisdictions where such statutes prevail, a counterclaim which has nothing in common with plaintiff's action may in certain circumstances be disallowed.[35]

b. "Subject of the Action" Defined

The words "subject of the action" as used in statutes authorizing counterclaims connected with the subject of the action should be construed liberally with a view to settling disputes in one action as far as possible, and may be defined as the plaintiff's principal primary right, to enforce or maintain which the action is brought, and as the facts constituting the plaintiff's cause of action; the term has a broader meaning than "cause of action."

While it has been said that the words "subject of the action" as used in statutes authorizing counterclaims "connected with the subject of the action" are of rather indefinite meaning,[36] it has been held that they should be construed liberally with a view to settling disputes in one action as far as possible.[37] The "subject of the action" is not the same as the "cause of action;"[38] it has a broader meaning[39] and should be distinguished therefrom.[40] The "subject of the action" has been defined as plaintiff's principal primary right, to enforce or maintain which the action is brought,[41] and as the facts constituting plaintiff's cause of action.[42]

As to whether it may also denote the specific physical thing with respect to which the legal controversy is carried on, there is a diversity of opinion. Thus in some cases it is held that the subject of an action is the thing or subject matter to which the litigation pertains,[43] or that it may be regarded as either the property involved or a right alleged to have been violated;[44] but in other cases it has been construed as relating not to the thing itself about which the controversy has arisen, but rather to the origin and ground of plaintiff's right to obtain the relief asked.[45] However, even in cases where the courts consider the thing as the subject of the action in determining whether defendant's counterclaim is connected therewith, it appears that each party is claiming rights in the thing in controversy, which, if established, will defeat or materially affect the rights therein claimed by the other;[46] and where there is no conflict or intermingling of interests the fact that the cause of action set up by each party involves the same physical thing is not sufficient to connect them within the meaning of the statutes.[47] In an action in which plaintiff claims ownership to certain chattels or

sonalty, in view of removal by statute of previous requirement that counterclaim be connected with plaintiff's cause of action.—Dorfman v Dorfman, 77 N.Y S.2d 267, 191 Misc 227—Saxon v Saxon, 36 N.Y S 2d 488, 178 Misc. 781.

33. Cal—Buckman v. Tucker, 71 P 2d 69, 9 Cal 2d 403—Luse v. Peters, 28 P.2d 357, 219 Cal. 625—Casaretto v DeLucchi, 174 P 2d 328, 76 Cal App 2d 800—Bond v Farmers & Merchants Nat Bank, Los Angeles, 149 P 2d 722, 64 Cal App 2d 842.

34. N.Y—Panzer v Panzer, 83 N.Y S 2d 525, 274 App Div. 940, and 83 N.Y.S 2d 526, 274 App.Div. 940.

35. N Y—Murphy v. Appelli, 77 N Y S 2d 199, 273 App Div 261.

Counterclaim foreign to primary issue

It has been held, without reference to the statute, that on replevin and sale of automobiles by automobile finance company, where holder of automobiles on trust receipt claimed damages, finance company could not file counterclaim to enforce liability of dealer on automobile purchasers' notes since the counterclaim was foreign to the primary issue of title to the automobiles—Universal Credit Co. v Sample Motor Co, 59 S W 2d 21, 187 Ark. 1164.

36. N D—Braithwaite v. Akin, 56 N W. 133, 3 N D. 365.

37. Minn—Wild Rice Lumber Co v Benson, 130 N W 1, 114 Minn. 92. 57 C.J. p 415 note 85.

38. Nev—Lapham v. Osborne, 18 P. 881, 20 Nev 168. 57 C.J p 415 note 86.

39. N Y—Ter Kuile v. Marsland, 31 N Y S 5, 81 Hun 420.

40. Iowa—Revere F. Ins. Co. v Chamberlin, 8 N W. 338, 9 N W. 386, 56 Iowa 508.

41. Kan—Salina Coca-Cola Bottling Corp. v Rogers, 237 P 2d 218, 171 Kan. 688. 57 C J. p 415 note 89.

42. Okl.—Union Nat. Bank of Okmulgee v. Jones, 4 P 2d 62, 152 Okl. 211. 57 C J p 415 note 90.

43. Kan.—U S. Hoffman Machinery Corp v Ebenstein, 96 P 2d 661, 150 Kan 790, opinion adhered to 103 P. 2d 788, 152 Kan. 198. 57 C J. p 416 note 92

Other statement of rule

The phrase "subject of the action," as used in statutes dealing with joinder of causes of action and counterclaims, means the thing in respect of which plaintiff's right of action is asserted, whether it be specific property, a contract, or a threatened or violated right.—Hancammon v. Carr, 47 S E 2d 614, 229 N C. 52.

44. Kan—U. S Hoffman Machinery Corp v Ebenstein, 96 P.2d 661, 150 Kan 790, opinion adhered to 103 P.2d 788, 152 Kan 198
N C—Hancammon v. Carr, 47 S E 2d 614, 229 N.C. 52.
57 C J p 416 note 93.

Specific property

Where specific property is involved, "subject of action" is property itself, as respects whether counterclaim is connected with subject of action—Tavitoff v Stepovich, C.C.A Alaska, 91 F.2d 106.

45. Mont—Collier v. Erwin, 3 Mont. 142. 57 C J. p 416 note 94.

The mere fact of relation to the same physical thing cannot be regarded as within the meaning of the provisions relating to "connected with the subject of the action"—Allen v Chesapeake & O R Co, 202 S W 2d 157, 304 Ky. 846

46. Iowa.—Sigler v. Hidy, 9 N W. 374, 56 Iowa 504. 57 C J. p 416 note 95.

47. N.C—Brazemore v. Bridgers, 10 S E 888, 105 N C 191. 57 C J. p 416 note 96.

realty, a counterclaim in which defendant asserts ownership or special property therein in himself is connected with the subject of the action.[48]

c. What Constitutes Connection with Subject of Action

It is difficult to construe the phrase "connected with the subject of the action," as used in statutes authorizing counterclaims, so that any definite rule can be derived therefrom, but a connection of claims may be shown from their originating in the same contract, or transaction, or both, involving some right or interest in the subject of the action; the connection must be immediate and direct.

In determining whether defendant's claim is connected with the subject of plaintiff's action, so as to be a proper counterclaim under statutes imposing such a limitation, the courts have found difficulty, so much so, in fact, that it has been asserted difficult to construe the phrase "connected with the subject of the action" so that any explicit and definite rule can be extracted therefrom,[49] since the word "connected" may have a broad signification, and the connection may be slight or intimate, remote or near.[50] The question must be determined as each case is presented with a view to promoting justice and dispatching litigated business.[51]

A rule sometimes followed for determining the required connection is that the counterclaim must have such a relation to, and connection with, the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action and by one litigation, and that the claim of the one should be offset against, or applied on, the claim of the other.[52] However, some connection between the claims themselves, independent of their being held by the parties to the action, is required, which may be shown from their originating in the same contract, or transaction, or both, involving some right or interest in the subject of the action.[53]

The connection must not be casual or incidental;[54] it must be immediate and direct,[55] such as may be assumed to have been contemplated by the parties in their dealings with each other.[56] The mere fact that the subject matter of defendant's claim grew out of the subject matter of plaintiff's action does not establish a sufficient connection rendering the counterclaim proper,[57] but there must be agreement between such subjects in interest or substance or similarity of causes, and such subjects must be germane.[58] Also, the mere fact that defendant sets up acts on the part of plaintiff which are prejudicial to the rights of defendant, and that he alleges that these prejudicial acts on plaintiff's part are the reason defendant committed the acts complained of by plaintiff, does not constitute such a connection with the subject of plaintiff's cause of action as to make such acts pleadable as a counterclaim.[59] Where the facts set up by defendant constitute a defense to plaintiff's claim, they are connected with the subject of the action.[60]

48. Ky.—Whitlock v. Redford, 82 Ky 390
57 C J. p 416 note 97.

49. Wyo—Studebaker Corp v. Hanson, 157 P 582, 160 P 336, 24 Wyo 222, Ann.Cas 1917E 557.
57 C J. p 415 notes 74, 75.

50. Utah.—**Corpus Juris quoted in** Workman Motor Co. v. Pacific Finance Corp, 26 P.2d 961, 964, 83 Utah 19.
57 C J. p 415 note 76.

51. N.Y—County Plains Corporation v. Nosband Corporation, 256 N Y S. 10, 234 App Div. 588.

52. S C—Salley v. McCoy, 195 S E 132, 186 S C 1.
Utah—**Corpus Juris quoted in** Workman Motor Co v. Pacific Finance Corp, 26 P 2d 961, 964, 83 Utah 19
57 C.J. p 415 note 76.

53. Utah—**Corpus Juris quoted in** Workman Motor Co v Pacific Finance Corp., 26 P.2d 961, 964, 83 Utah 19
57 C J. p 415 note 77.

54. Neb—**Corpus Juris cited in** McGerr v Marsh, 26 N W.2d 374, 378, 148 Neb 50—**Corpus Juris quoted in** Live Stock Nat. Bank of South Omaha v. Marshall, 267 N W 414, 417, 131 Neb 185
N C—Thompson v. Pilot Life Ins Co, 67 S E 2d 444, 234 N C. 434—Hancammon v. Carr, 47 S E 2d 614, 229 N C 52—Manufacturers & Jobbers Finance Corp v Lane, 19 S E 2d 849, 221 N C. 189.
Utah—**Corpus Juris quoted in** Workman Motor Co. v Pacific Finance Corp, 26 P.2d 961, 964, 83 Utah 19.
57 C J. p 415 note 78

55. Ky—Allen v Chesapeake & O R Co., 202 S W.2d 157, 304 Ky. 846
Neb—**Corpus Juris cited in** McGerr v. Marsh, 26 N W 2d 374, 378, 148 Neb. 50—**Corpus Juris quoted in** Live Stock Nat Bank of South Omaha v. Marshall, 267 N W. 414, 417, 131 Neb 185.
N.C—Thompson v Pilot Life Ins Co, 67 S E 2d 444, 234 N C 434—Hancammon v. Carr, 47 S.E 2d 614, 229 N C. 52.
S C—Salley v. McCoy, 195 S.E 132, 186 S C 1.
Utah.—**Corpus Juris quoted in** Workman Motor Co v. Pacific Finance Corp, 26 P 2d 961, 964, 83 Utah 19
57 C J p 415 note 79.

56. Ky.—Allen v Chesapeake & O R Co, 202 S W.2d 157, 304 Ky. 846.
Neb—**Corpus Juris quoted in** Live Stock Nat. Bank of South Omaha v. Marshall, 267 N.W. 414, 417, 131 Neb 185.
N C—Thompson v. Pilot Life Ins. Co, 67 S E.2d 444, 234 N C 434—Hancammon v. Carr, 47 S.E 2d 614, 229 N.C. 52
S.C—Salley v. McCoy, 195 S E. 132, 186 S C. 1.
Utah—**Corpus Juris quoted in** Workman Motor Co v Pacific Finance Corp, 26 P.2d 961, 964, 83 Utah 19.
57 C J. p 415 note 80.

57. N.C—Manufacturers & Jobbers Finance Corp v. Lane, 19 S.E.2d 849, 221 N C. 189.

58. N C.—Manufacturers & Jobbers Finance Corp v. Lane, supra.

59. Utah—**Corpus Juris quoted in** Workman Motor Co. v. Pacific Finance Corp, 26 P.2d 961, 964, 83 Utah 19
Wis—Mulberger v. Koenig, 22 N.W. 745, 62 Wis. 558.

60. Utah.—**Corpus Juris quoted in** Workman Motor Co. v. Pacific Fi-

§ 41. Character of Claim as on Contract or in Tort

a Recoupment
b Set-off
c. Counterclaim
d. Reconvention and compensation

a. Recoupment

Tort claims as well as contract claims are proper subjects for recoupment, and it is ordinarily not necessary that the opposing claims should be of the same character

Provided they satisfy other requirements essential to assertion of the right of recoupment, either contract or tort claims may, as a general rule, be recouped,[61] and, ordinarily, it is not essential that the opposing claims should be of the same character.[62]

Claims arising out of contract. Thus, defendant may recoup a contractual obligation against a contractual obligation,[63] and he may recoup a contract claim against a tort claim.[64] However, in some jurisdictions defendant cannot recoup a liability arising under a contract against an action sounding in tort,[65] except where equitable principles are involved, such as insolvency or nonresidence of plaintiff;[66] and, hence, in such jurisdictions, in an action of trover, a claim for damages arising from a breach of contract cannot be recouped if plaintiff's action of trover runs its course to the end as an action at law,[67] but, if defendant by an equitable answer changes plaintiff's action into a proceeding in equity, such claim can be recouped.[68]

Claims arising out of tort. Recoupment is allowed of claims arising out of tort as well as of those arising out of contract.[69] So, as a general rule, defendant may recoup a tort claim against a tort claim,[70] or a tort claim against a contract claim.[71] However, in some jurisdictions defendant cannot recoup a liability in tort against a suit maintained on a contract,[72] except where equitable principles are involved, such as insolvency or nonresidence of plaintiff.[73] It has been held that there can be no recoupment in an action for libel by showing another libel which provoked that sued on, since the two libels cannot be said to arise from the the same transaction.[74]

b. Set-Off

(1) Claims based on contract
(2) Claims based on tort

(1) Claims Based on Contract

Provided other requirements of set-off are complied with, any cause of action arising from contract may ordinarily be asserted as a set-off in an action based on contract; but, in the absence of statutory provision to the contrary, a contract claim cannot ordinarily be asserted as a set-off in an action based on tort.

Under some statutes set-off must be founded on a contract, express or implied, or a judgment,[75] and a purely statutory claim does not satisfy the requirement.[76] In an action founded on a contract, where the other requirements of set-off are complied with, any cause of action arising from contract may ordinarily constitute a set-off,[77] even though it

nance Corp., 26 P.2d 961, 964, 83 Utah 19
Wis.—Telulah Paper Co v Patten Paper Co, 112 N.W 522, 132 Wis 425

61. Ill.—Stow v. Yarwood, 14 Ill. 424.
57 C.J. p 417 note 5.
Necessity that defendant's claim
Arise out of same contract or transaction as that on which plaintiff's cause of action is founded or be connected with subject matter thereof see supra §§ 34, 39
Be subsisting right of action see supra §§ 25–30
Be liquidated see infra § 42.

62. Ill.—Stow v. Yarwood, supra.
57 C.J. p 417 note 6

63. Ga.—Porter v. Davey Tree-Expert Co, 129 S.E. 557, 34 Ga.App 355
Ill.—Burroughs v Selleck, 185 Ill App 446

64. Ill.—Stow v Yarwood, 14 Ill 424
57 C.J. p 417 note 8.

65. Cal.—Kramer v. Associated Almond Growers of Paso Robles, 295 P 873, 111 Cal.App 595.
57 C.J. p 417 note 9

66. Ga.—Bell v. Ober, etc, Co, 36 S.E. 904, 111 Ga. 668.
57 C.J. p 417 note 10.

67. Ga.—Dyson v Washington Tel Co, 121 S.E. 105, 157 Ga 67.
57 C.J. p 417 note 11

68. Ga.—Dyson v. Washington Tel Co, supra

69. Ala.—Brown v Patterson, 108 So 16, 214 Ala. 351, 47 A.L.R. 1093

70. Ala.—Alabama Power Co. v Kendrick, 123 So 215, 219 Ala 692
57 C.J. p 417 note 14.

71. Ill.—Stow v. Yarwood, 14 Ill 424
57 C.J. p 418 note 15.

72. Ga.—Waits v. Rice, 135 S.E. 848, 36 Ga.App 116.
57 C.J. p 418 note 16

73. Ga.—Porter v Davey Tree-Expert Co, 129 S.E. 557, 34 Ga.App 355

74. Ill.—White v Bourquin, 204 Ill App 83

75. U.S.—Marks v. Spitz, D.C.Mass., 4 F.R.D. 348
Vt.—Vaillancourt v. Gover, 20 A.2d 122, 112 Vt. 24
57 C.J. p 418 note 20
Confined to debts
It has been said that generally, although not always, the statutes expressly or impliedly confine set-offs to debts.—Baltimore, etc, R. Co. v. Jameson, 13 W.Va 833, 841, 13 Am. R 775.
Action of account
The statute making the action of account at law in form an action of contract does not make such action pleadable as a complaint in set-off.—Vaillancourt v Gover, 20 A.2d 122, 112 Vt 24.

76. Ky.—Montgomery v Montgomery, 78 S.W 465, 25 Ky.L. 1682
57 C.J. p 418 note 21.

77. U.S.—Tiger v Sellers, C.C.A. Okl, 145 F.2d 920
Ga.—Hartman v. Citizens' Bank & Trust Co., 171 S.E. 195, 47 Ga.App. 562
Okl.—Sanders v Street's of Tulsa, 214 P.2d 910, 202 Okl. 427.—Wood &

arises from a contract totally distinct from the one sued on.[78] Thus, set-off of a cause of action arising on contract has been allowed in an action on a note[79] or draft,[80] and it may be allowed where it is based on a claim for contribution;[81] but in order for the contract to be the basis of a set-off, it must satisfy the general requirements as to requisites and validity of contracts.[82] The right to maintain indebitatus assumpsit for a claim is a test in favor of its allowance as a set-off,[83] and the rule is sometimes stated that a set-off must be such a claim as defendant could have maintained an action of assumpsit or debt for,[84] or that it must arise on contract.[85] So, whenever the party offering the set-off could maintain debt or indebitatus assumpsit on the claim against his adversary, if it existed at the commencement of the suit, it is a proper subject of set-off.[86]

A cause of action founded on an implied contract may ordinarily be the subject of set-off.[87] Thus, liability as for money had and received,[88] money paid for plaintiff's use and benefit,[89] or money paid under a mistake of fact,[90] is a proper subject of set-off; and the same has been held as to a claim based on a statute making persons organizing a company and transacting business in its name before the minimum capital stock has been subscribed for liable to creditors to make good the minimum capital stock with interest.[91] Some courts, however, draw a distinction between implied contracts and constructive or quasi contracts, and hold, under a statute providing that a claim, to be available as a set-off, must have arisen on judgment or on contract, express or implied, that claims arising from constructive or quasi contracts are not the subject of set-off.[92] There is authority to the effect that, in an action of debt, damages arising on a special contract cannot be set off.[93]

In tort action. In accordance with the general rule that excludes set-off in actions sounding in tort, as discussed supra § 21, in the absence of statutes permitting it,[94] a claim on a contract is not allowable to defendant as a set-off to a claim based on a tort,[95] at least where the contractual claim is

Co. v. Sutton, 61 P.2d 700, 177 Okl 631—Standard Paving Co v. Norris, 56 P.2d 384, 176 Okl. 498.
57 C J p 418 note 23.

Claims held to arise from contract
(1) Generally—Wainwright v. Roots Co, 97 N E 8, 176 Ind. 682—57 C J. p 418 note 23 [a].

(2) In suit on contract, plea of set-off for damages from plaintiff's breach of another contract by which plaintiff agreed to make quantity survey of granite for defendant was a claim based on contract and not demurrable on ground that plea set off cause of action ex delicto against cause of action ex contractu—Georgia Quincy Granite Co v W F. Jackson Co., 176 S E. 679, 49 Ga App 575.

78. Minn.—Henderson v. Northwest Airlines, 43 N.W.2d 786, 231 Minn. 503
57 C.J. p 419 note 24.

79. Ky—Bell v. Pitman, 136 S W. 1026, 143 Ky. 521, 35 L R.A.,N.S., 820
57 C J. p 419 note 25.

80. Ga.—Robson v Weatherly Lumber Co., 78 S.E. 610, 12 Ga App 781
57 C J. p 419 note 26.

81. Ark—Southern Tel. Co. v. Banks, 158 S W 158, 108 Ark 283
57 C.J. p 420 note 27.

82. Ga.—Jones v. Americus Auto. Co, 83 S E. 642, 15 Ga App. 453.
57 C J. p 420 note 28

83. Pa.—Rothrock v. Wolfe, 99 Pa. Super 30.
Va—Dexter-Portland Cement Co v Acme Supply Co., 133 S.E. 788, 147 Va. 758.

84. Pa—Jenkins v. Rush Brook Coal Co., 54 A. 715, 205 Pa. 166.
57 C J p 420 note 30.

85. N Y—Merry Realty Co. v. Shamokin, etc, Real Est. Co., 174 N Y S 627, 186 App Div. 538.
57 C J p 420 note 31.

86. Ala.—Brazier v. Fortune, 10 Ala 516.
57 C J p 420 note 32.

87. U S—Tiger v Sellers, C C.A. Okl, 145 F 2d 920
Ill—Nichols v Ruckells, 4 Ill 298.
Ky—Weinstein v Rhorer, 73 S.W 2d 25, 255 Ky 179—Gover's Adm'r v. Waddle, 54 S W 2d 19, 245 Ky 652.
57 C.J p 420 note 34.

88. Neb.—Hinds, etc., Grain Co v Farmers' El Co, 156 N W. 1045, 99 Neb. 502.
57 C.J. p 420 note 35.

89. Mich—Miller Rubber Co. v Rose Tire Co., 211 N W. 41, 237 Mich 152.
57 C.J p 420 note 36.

90. Ala—Converse Bridge Co v. Collins, 24 So. 561, 119 Ala 534.
57 C.J. p 420 note 37.

91. Ga—Crandall v. Shepard, 143 S E 587, 166 Ga 396.
57 C J. p 420 note 38

92. Mich.—Woods v. Ayres, 39 Mich. 345, 33 Am R. 396
57 C.J. p 420 note 41.

93. N J.—Smock v Warford, 4 N.J. Law 352
57 C.J. p 421 note 42.

94. Kan—Starkey v. Almena State Bank, 287 P. 251, 130 Kan 568.
57 C.J. p 421 note 44.

Statutory exception inapplicable
Defendant in action of trover by debtor to recover notes and security deed could not maintain cross action to recover balance due on notes under statutory exception permitting defendant in action of trover, although there are no exceptional circumstances sufficient to give rise to equitable relief, to plead a set-off or recoup in damages if action was brought to recover personal property where vendor retained title—Powers v. Wren, 31 S E 2d 713, 198 Ga. 316.

95. Cal—Kramer v. Associated Almond Growers of Paso Robles, 295 P. 873, 111 Cal App. 595.
Colo.—Mangini v. Dando Co., 74 P 2d 675, 101 Colo 543.
Ga—Mercer v Shiver, 60 S E 2d 263 81 Ga App. 815—Holloway v. Dorsey, 32 S E.2d 858, 72 Ga App. 1—Sterchi Bros Stores v. Daniels, 31 S E 2d 679, 71 Ga App. 669—Hartman v Citizens' Bank & Trust Co, 171 S E 195, 47 Ga App. 562
Ohio—De Ran v. Stahl, 197 N.E. 144, 49 Ohio App. 262.
57 C J p 421 note 45.

Penalty
A cause of action for recovery of penalty for alleged usury is a cause of action on contract, and such cause of action cannot be pleaded as a counterclaim to a cause of action sounding in tort for conversion—Commercial Finance Co. v. Holder, 68 S E 2d 794, 235 N.C. 96.

unconnected with the tort claim;[96] and this applies as well to claims founded on implied contracts.[97] It has been held, however, that since an action for deceit in inducing a contract ratifies the contract, as discussed in Fraud § 63, in such an action defendant is entitled to set off any sum due him under the contract.[98]

(2) Claims Based on Tort

(a) In general

(b) In equity

(c) Waiver of tort

(a) In General

Generally speaking, claims arising out of tort cannot be set off against plaintiff's cause of action.

Although in a few jurisdictions statutes are construed to permit set-off of matters sounding in tort under certain circumstances,[99] statutes of set-off generally, and more particularly those framed only to allow set-off of debts and demands, are usually construed as excluding set-off of claims arising in tort,[1] at least where such claims do not arise out of, and are not incident to, the demand or transaction sued on,[2] and even, according to some authorities, where such claims relate to the subject matter of plaintiff's cause of action.[3] Accordingly, set-off has been disallowed as to claims arising out of as-

Action other than on indebtedness

Under a statute allowing a set-off against "any indebtedness" to plaintiff, plaintiff's claim for money unlawfully and without consideration diverted from plaintiff's assignor was not for a "debt," hence defendant could not set off against such claim an amount claimed to be due from plaintiff.—Fistere v. Janapoll, 272 N. Y. S. 332, 241 App. Div. 353.

Action other than on contract

Where guarantee company purchased mortgages from trust company at excessive price through fraud of common directorate, and subsequently became insolvent, trust company was not entitled to set-off of its claims against guarantee company in action by rehabilitator of guarantee company for purchase price, despite fact that form of action brought by rehabilitator was on contract, since debt was not really contractual.—Pink v. Title Guarantee & Trust Co., 8 N. E. 2d 321, 274 N. Y. 167, reargument denied 10 N. E. 2d 575, 274 N. Y. 610

96. N. Y.—Hughes v. Frank M. Murphy, Inc., 6 N. Y. S.2d 833, 169 Misc. 239.

97. Okl.—Nation v. Planters', etc., Bank, 119 P. 977, 29 Okl. 819.

98. Ala.—Preston Motors Corp. v. Wood, 94 So. 70, 208 Ala. 172.

99. Ark.—Coats v. Milner, 203 S. W. 701, 134 Ark. 311
57 C. J. p. 421 note 51.

In Alabama

(1) Under express provision of the statute, mutual debts, liquidated or unliquidated, demands not sounding in damages merely, subsisting between the parties at the commencement of the suit, whether arising ex contractu or ex delicto, may be set off one against the other by defendant or his personal representative, whether or not the legal title is in defendant.—Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 146 So. 387, 226 Ala. 226.

(2) A claim by a chattel mortgagor against the mortgagee for damage to property, by use or waste, taken in detinue against the mortgagor and improperly delivered to the mortgagee by the sheriff, could be set off in the detinue action, being a demand not sounding in damages merely.—Torbert v. McFarland, 55 So. 311, 172 Ala. 117.

(3) Plea alleging plaintiff's fraudulent procurement of specific sum of money in settlement of loss under contract different from one sued on and seeking recovery thereof sets up demand sounding in damages merely, not available as set-off.—Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, supra.

(4) While one who has been defrauded may bring an action for deceit and so shape his claim as to justify a recovery with interest, he cannot change the nature of his claim, so as to justify him in pleading set-off when he is being sued on some other cause of action.—Mutual Sav. Life Ins. Co. v. Osborne, 23 So. 2d 867, 247 Ala. 252.

In Illinois

(1) The Practice Act grants right of set-off in torts as well as contracts.—State Bank of St. Charles v. Burr, 14 N. E. 2d 511, 295 Ill. App. 15

(2) Prior to the adoption of the statute granting such right, set-off of claims arising in tort was not permitted.—Robison v. Hibbs, 48 Ill. 408—57 C. J. p. 421 note 52.

1. Fla.—Meyer v. Florida Discount Corporation, 150 So. 601, 112 Fla. 412—Coffin v. Talbot, 148 So. 184, 110 Fla. 131.
Ga.—Jacksonville Paper Co. v. Owen, 17 S. E. 2d 76, 193 Ga. 23
Ind.—Sams v. Kern, 98 N. E. 2d 920, 121 Ind. App. 370—French v. Fletcher Trust Co., 12 N. E. 2d 386, 105 Ind. App. 221.
Ky.—Big Four Mills v. Commercial Credit Co., 211 S. W. 2d 831, 307 Ky. 612—Weinstein v. Rhorer, 73 S. W. 2d 25, 255 Ky. 179.
Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.
N. C.—Crescent Hat Co. v. Chizik, 26 S. E. 2d 871, 223 N. C. 371.
Pa.—Dale v. Medway, 1 Wilcox 155
Wash.—Golmis v. Vlachos, 208 P. 2d 1204, 34 Wash. 2d 627.
57 C. J. p. 421 note 52.

Nature of opposing claims

(1) In an action ex contractu a right of action ex delicto cannot be used as a set-off.
U. S.—Stevenson v. Ruth, C. C. A. Pa., 76 F. 2d 501.
Ga.—Ætna Ins. Co. v. Lunsford, 177 S. E. 727, 179 Ga. 716—Welch v. Williford, 171 S. E. 768, 177 Ga. 837—Ellis v. Taylor, 159 S. E. 266, 172 Ga. 830—C. M. Miller Co. v. Ramey, 62 S. E. 2d 768, 82 Ga. App. 807—Overstreet v. Schulman, 48 S. E. 2d 474, 77 Ga. App. 320—Holloway v. Dorsey, 32 S. E. 2d 858, 72 Ga. App. 1—Trotter v. Lunceford, 195 S. E. 475, 57 Ga. App. 358—Lewallen v. Dalton Auto & Machinery Co., 195 S. E. 305, 57 Ga. App. 328—Georgia Power Co. v. Banks, 194 S. E. 63, 56 Ga. App. 774—Collins v. Garrett, 177 S. E. 275, 50 Ga. App. 203—Decatur Bank & Trust Co. v. Brannen, 159 S. E. 758, 43 Ga. App. 622—Henderson v. Hardeman, 94 S. E. 317, 21 Ga. App. 297
Wash.—Golmis v. Vlachos, 208 P. 2d 1204, 34 Wash. 2d 627.
57 C. J. p. 421 note 52 [a].

(2) However, it has been held that a tort liability may be set off against an action in tort.—Hartman v. Citizens' Bank & Trust Co., 171 S. E. 195, 47 Ga. App. 562.

2. Pa.—Groetzinger v. Latimer, 23 A. 393, 146 Pa. 628.
Tex.—Southern Medical & Hospital Service v. Buie-Allen Hospital, Civ. App., 204 S. W. 2d 996.

3. Fla.—Matthews v. Lindsay, 20 Fla. 962.
57 C. J. p. 422 note 53.

sault,[4] breach of trust,[5] conspiracy,[6] conversion,[7] embezzlement,[8] fraud and deceit,[9] injury to credit,[10] libel,[11] malicious prosecution,[12] negligence,[13] nuisance,[14] slander,[15] slander of title,[16] trespass,[17] and wrongfully suing out an attachment[18] or garnishment[19]

(b) In Equity

A claim arising out of tort cannot ordinarily be the subject of set-off in equity; but an exception is sometimes made permitting set-off of a claim sounding in tort on equitable grounds, as where plaintiff is insolvent or nonresident.

In equity damages arising out of tort are not ordinarily the subject of set-off.[20] However, although there is authority to the contrary,[21] an exception has been made which permits interposition of a claim for set-off sounding in tort on equitable grounds,[22] as where plaintiff is insolvent[23] or nonresident;[24] and, where the court has equitable jurisdiction,[25] the exception applies whether plaintiff's action is brought in contract[26] or in tort.[27]

(c) Waiver of Tort

Where defendant, having a claim sounding in tort, waives the tort and sets up his claim as on an implied contract, the claim will be considered as arising out of contract for purposes of set-off.

Where defendant, having a claim against plaintiff sounding in tort, waives the tort and sets up his claim as on an implied contract, the claim is considered to be one arising on contract, within the meaning of the statutes, and may be set off;[28] and so, where a breach of the contract, which is the subject of the suit, results in a tort, damages for the breach may be set off, although it also constitutes a tort[29] The tort must, however, be waived in fact,[30] although it has been held that merely by claiming the set-off defendant may be considered as waiving the tort.[31] In cases of doubt the court will incline against construing the set-off to sound in tort.[32] Where the tort cannot be waived, a set-off sounding in tort will not be allowed.[33]

c. Counterclaim

(1) In general
(2) Claims arising out of contract
(3) Claims arising out of tort

(1) In General

Ordinarily, a claim which arises out of the transaction or is connected with the subject of the action may be counterclaimed, irrespective of whether it or plaintiff's claim arises out of contract or tort.

While it has been broadly stated that a tort cannot be the subject of a counterclaim,[34] a claim

4. Ind—Sams v. Kern, 98 N.E.2d 920, 121 Ind App 370.
57 C.J. p 422 note 54.

5. Pa.—Heck v. Shener, 4 Serg & R 249, 8 Am D. 700.

6. Ky—Big Four Mills v Commercial Credit Co., 211 S W.2d 831, 307 Ky 612
57 C J. p 422 note 56.

7. Ga.—Lewallen v Dalton Auto & Machinery Co, 195 S E. 305, 57 Ga App. 328.
57 C.J. p 422 note 57.

8. Pa—Heck v Shener, 4 Serg. & R. 249, 8 Am.D. 700.
Wis.—Pierce v. Hoffman, 4 Wis. 277.

9. U.S—Dushane v. Benedict, Pa., 7 S Ct. 696, 120 U S. 630, 30 L Ed 810.
57 C.J. p 423 note 59.

10. Fla.—Matthews v. Lindsay, 20 Fla. 962.

11. Tex—Yelton v Bird Lime & Cement Co, Civ App, 161 S W 2d 353, error refused.
57 C.J. p 423 note 61.

12. Fla—Brash v. Ehrman, 47 So. 937, 56 Fla. 153.
57 C.J. p 423 note 62.

13. Pa.—Philadelphia v. Pierson, 60 A. 999, 211 Pa 388
57 C.J. p 423 note 63.

14. Ga—Nashburn v. Inman, 24 S E. 39, 97 Ga 396.
57 C.J p 423 note 64.

15. Mich—Cross v Hickey, 236 N W 800, 254 Mich 330

16. Fla—Matthews v. Lindsay, 20 Fla 962

17. W.Va—Hargreaves v Kimberly, 26 W.Va. 757, 53 Am R 121.
57 C J. p 423 note 66.

18. Ark—Bloom v. Lehman, 27 Ark 489
Pa.—Kellett v. Freeman, 8 Del Co 98.

19. Fla.—Brash v. Ehrman, 47 So. 937, 56 Fla 153.

20. U S—Williams Patent Crusher, etc., Co. v. Kinsey Mfg. Co', D.C. N.Y, 205 F 375.
57 C J. p 423 note 70.

21. N D—Braithwaite v. Akin, 56 N. W. 133, 3 N.D. 365.
57 C J. p 423 note 71.

22. Ga—Ætna Ins. Co v. Lunsford, 177 S E. 727, 179 Ga. 716—Collins v. Garrett, 177 S E 275, 50 Ga.App. 203.

23. Ga—Welch v. Williford, 171 S E 768, 177 Ga. 837—Overstreet v Schulman, 48 S E.2d 474, 77 Ga App 320—Holloway v Dorsey, 32 S E.2d 858, 72 Ga App 1—Collins v. Garrett, 177 S.E. 275, 50 Ga App. 203
57 C J p 423 note 72.

24. Ga.—Welch v. Williford, 171 S E. 768, 177 Ga 837—Overstreet v Schulman, 48 S E 2d 474, 77 Ga. App 320—Holloway v. Dorsey, 32 S E 2d 858, 72 Ga.App 1—Collins v Garrett, 177 S E 275, 50 Ga.App 203
57 C J p 423 note 73.

25. Ga—Jones v. Coweta Fertilizer Co, 124 S E 545, 32 Ga App 730.
57 C J p 423 note 74.

26. Ga.—Jacksonville Paper Co. v. Owen, 17 S.E 2d 76, 193 Ga. 23.
57 C J. p 423 note 75.

27. Ga.—Porter v. Davey Tree-Expert Co., 129 S E 557, 34 Ga App. 355.

28. U.S—Stevenson v. Ruth, C C.A. Pa, 76 F 2d 501.
Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 246 Ky. 278.
57 C.J p 424 note 78.

29. U S—Stevenson v. Ruth, C C A. Pa, 76 F 2d 501.
57 C.J. p 424 note 79.

30. N.D—Braithwaite v Akin, 56 N. W. 133, 3 N D 365.

31. Pa—Nickle v Baldwin, 4 Watts & S. 290.

32. N D—Braithwaite v Akin, 56 N. W. 133, 3 N D. 365.

33. Kan.—Atchison, etc, R. Co. v. Phelps, 46 P 183, 4 Kan App 139.
57 C J. p 424 note 83.

34. Ind—Avery v. Dougherty, 2 N E. 123, 102 Ind. 443, 52 Am R. 680

which arises out of the contract or transaction or is connected with the subject of the action may ordinarily be counterclaimed, whatever its nature,[35] whether contract or tort,[36] and irrespective of the nature and form of plaintiff's action,[37] whether in contract[38] or tort,[39] although it has been said that neither tort nor contract demands can be counterclaimed in a tort action.[40] It is only where the cause of action sought to be counterclaimed arises from an independent transaction that it becomes material whether or not the cause of action so sought to be counterclaimed is one on contract[41] In those jurisdictions which authorize any claim as a counterclaim, defendant may set up any counterclaim, whatever its nature,[42] whether contract or tort.[43]

(2) Claims Arising Out of Contract

(a) Contract against contract

(b) Contract against tort

(a) Contract against Contract

In an action on contract, a contract claim arising from the transaction on which plaintiff's cause of action is based, or connected with the subject of the action, may be asserted as a counterclaim; and, under a statute to such effect, any cause of action arising out of contract, whether the one sued on or an independent one, may be asserted as a counterclaim in an action on contract.

Under the statutes providing for counterclaims of demands arising out of the transaction on which plaintiff's cause of action is based, or connected with the subject of the action, discussed supra §§ 36, 40, where plaintiff's cause of action is founded on contract, a contract claim arising out of the transaction on which plaintiff's cause of action is based, or connected with the subject of the action, may be counterclaimed[44]

Where the counterclaim statutes provide that in actions arising out of contracts defendants may counterclaim against plaintiff any demand also arising out of contract, the rule is well established that any cause of action arising out of a contract, either the one declared on by plaintiff, or some other contract disconnected therefrom, may be counterclaimed in an action ex contractu,[45] provided such claim is in existence at the time of the commencement of the action, discussed supra §§ 25–30. A liberal construction is accorded these provisions,[46] and the counterclaim is to be likewise liberally construed to be ex contractu.[47] The test for determining whether a particular demand arises on contract, within the meaning of these statutes, is whether the demand could have been redressed at common law by any of the forms of actions which might be resorted to in order to recover damages for breach of a contract,[48] and, where defendant's claim could be enforced by an action ex contractu, he may counterclaim it, even though he could also have re-

—Lake Shore, etc., R Co v Van Auken, 27 N E 119, 1 Ind App 492

35. Pa—Reo Motors, Inc v Wolf, 70 Pa Dist & Co 463, 60 Dauph Co 394.
57 C J p 424 note 88.

36. Minn—King v Coe Commission Co, 100 N W. 667, 93 Minn. 52
57 C J p 424 note 90

37. N Y—Numan v Wolf, 76 N Y S 371, 73 App Div. 38

38. N C—Smith v. Young, 13 S E 735, 109 N C 224—Bitting v Thaxton, 72 N C. 541.

39. N Y—Vandervort v Mink, 98 N Y S 772, 113 App Div. 601
57 C J p 425 note 93.

40. N Y—Zysman v. 147, etc, West 57th St Corp, 221 N Y S. 492, 129 Misc 350, reversed on other grounds 223 N Y S 62, 221 App Div. 84

41. S D—Northwestern Port Huron Co. v. Iverson, 117 N.W. 372, 22 S D 314, 133 Am S R 920.

42. Ark.—Missouri, etc, R. Co v. Bridwell, 9 S W.2d 781, 178 Ark. 37
57 C J p 425 note 97.

43. Ark.—Coats v Milner, 203 S.W. 701, 134 Ark. 311

44. Ohio—Braden v Neubrander, 101 N E 2d 789, 89 Ohio App. 295.
Va—American Chlorophyll v Schertz, 11 S E 2d 625, 176 Va. 362.
57 C J. p 425 note 2

Claim arising out of independent contract may not be asserted as counterclaim—City of Lawton v. Sherman Machine & Iron Works, 77 P.2d 567, 182 Okl 254.

45. Minn—Henderson v. Northwest Airlines, 43 N W 2d 786, 231 Minn 503
N.Y.—Nussbaum v Sobel, 54 N Y S 2d 228, 269 App Div 105, reargument denied 55 N Y S 2d 117, 269 App Div. 767.
N C—Smoke Mount Industries v Fisher, 29 S E 2d 128, 224 N.C 72
N D—**Corpus Juris cited in** Grant v Jacobs, 32 N.W 2d 881, 884, 76 N D 1
Or—Heider v. Bernier, 173 P 2d 302, 179 Or. 516
Pa—E Keeler Co v Sanitary Family Washing Co, 60 Pa.Dist. & Co 525, 58 Dauph.Co. 410—Hedden v. Levi, Com Pl, 41 Luz Leg Reg 23—Abent v F & M Coal Co, Com Pl., 37 Luz Leg.Reg 200, 57 York Leg Rec 165—Webb v. Curtis, Com Pl, 64 Montg Co. 180—Fischer v Solomon Co., 99 Pittsb Leg.J 313.
S C—Bomar v. Gantt, 166 S.E 90, 167 S C 139
57 C J p 425 note 4.

In action on appeal bond, defendant may, under statutes authorizing as a counterclaim, in an action arising on contract, any other cause of action arising also on contract, counterclaim on a promissory note which was given to those who were defendants in the previous action—Brecher v Morres, 199 N.Y.S. 746.

46. Minn—Midland Co v. Broat, 52 N W. 972, 50 Minn. 562, 17 L R A. 312.
N C—McClure v. Fulbright, 146 S E 74, 196 N.C. 450.

47. S C—Coastal Produce Ass'n v. Wilson, 8 S E 2d 505, 193 S C 339.
57 C.J p 425 note 7.

48. Mo—St Louis Public School Board v. Broadway Sav Bank, 12 Mo App. 104, affirmed 84 Mo 56.
57 C J p 426 note 8
Counterclaims held based on contracts
Wash.—Farmers', etc, Bank v. Eagon, 211 P 278, 122 Wash 586.
57 C J p 426 note 14.
Counterclaims held not based on contracts
Cal—Imperial Water Co. No. 4 v. Meserve, 217 P. 548, 62 Cal.App. 593.
57 C.J. p 426 note 15.

covered on the claim in an action ex delicto.[49] An implied contract may be the basis of a counterclaim.[50] The relief asked by plaintiff does not affect defendant's right to counterclaim where plaintiff's cause of action is founded on contract within the meaning of the statute,[51] but no counterclaim can be properly urged under such a statute where plaintiff's action is not based on contract.[52]

(b) Contract against Tort

Under some statutes a demand based on contract may be counterclaimed in an action on tort, provided it arises out of the transaction on which plaintiff's cause of action is based or is connected with the subject of the action.

Where it arises out of the transaction on which plaintiff's cause of action is based, as discussed supra § 36, or is connected with the subject of plaintiff's action, as discussed supra § 40, a demand based on contract may be counterclaimed against a claim founded on tort under some statutes [53] Where these essential requisites are absent, however, such a counterclaim is improper,[54] accordingly, counterclaims ex contractu have been disallowed in actions for conversion,[55] fraud,[56] negligence,[57] trespass,[58] wrongful arrest,[59] or for wrongful diversion of a stream.[60] Where plaintiff's action sounds in tort, no counterclaim can be allowed under a statute permitting the counterclaiming of any demand arising out of contract, in an action based on a contract;[61] nor can a contract be the basis of a counterclaim in a tort action under a statute allowing defendant, in an action sounding in tort, to counterclaim a similar cause of action.[62]

(3) Claims Arising out of Tort

(a) Tort against contract

(b) Tort against tort

(a) Tort against Contract

Under some statutes a tort may be counterclaimed in an action ex contractu, provided it arises out of the transaction on which plaintiff's cause of action is based, or is connected with the subject of the action.

Although it is frequently stated or held, without any express qualification, that a counterclaim in tort cannot be set up in an action ex contractu,[63] the true rule appears to be that a tort may be counterclaimed in an action ex contractu when it is within the statutory requirements that it arise out of the transaction on which plaintiff's cause of action is based, or is connected with the subject of the action [64] Thus, where these requirements have been met, counterclaims for conspiracy,[65] conversion,[66] fraud or misrepresentation,[67] injury to

49. Minn —Kubat v. Zika, 242 N.W 477, 186 Minn 122.
57 C J p 426 note 10.

50. Mo —Avil Printing Co v. Fred P. Kaiser Pub Co, 89 S W. 900, 127 Mo App 141
57 C J p 426 note 11.

51. N Y —Petrakion v. Arbelly, 26 N Y S 731, 23 N Y Civ Proc 183
57 C J. p 426 note 12

52. N Y —D'Auxy v. Dupre, 62 N Y S 244, 47 App Div 51.
57 C J. p 426 note 13.

53. Pa —Jones v. Auto Rental Co, 63 Pa Dist. & Co. 207, 96 Pittsb. Leg.J. 140
Utah —Workman Motor Co v. Pacific Finance Corporation, 26 P 2d 961, 83 Utah 19.
57 C.J p 426 note 18

54. Utah —Workman Motor Co v. Pacific Finance Corporation, supra
Wash —Golmis v Vlachos, 208 P 2d 1204, 34 Wash 2d 627.
57 C J p 427 note 19.

55. Ga —Powers v. Wren, 31 S E 2d 713, 198 Ga. 316.
57 C J p 427 note 21

56. Wis —Ring v. Ogden, 45 Wis. 303

57. Wis.—Rylander v. Laursen, 89 N.W. 488, 113 Wis. 461.

58. S.C —Sharp v. Kinsman, 18 S C 108.

Wis —Tallman v. Barnes, 11 N.W 478, 54 Wis 181.

59. N Y —Ferris v. Armstrong Mfg Co, 10 N Y S 750, 57 Hun 592.

60. N Y.—Pattison v Richardson, 22 Barb 143

61. N Y —Basch v Basch, 269 N.Y.S 696, 240 App Div 235.
57 C J p 427 note 27.

62. S C —McNinch v. Columbia, 122 S E 403, 128 S.C 54.

63. Mich —Mason v Lee-Bert, Inc., 39 N W 2d 319, 326 Mich 32
N.J —Schwartz & Nagle v Langer Transport Corp, 33 A 2d 907, 130 N J Law 562—Schwartz & Nagle, Inc, v. Central Brewing Co, Inc., 17 A 2d 166, 125 N J Law 565—Elizabeth Trust Co. v Central Lumber Co, 171 A 810, 112 N J Law 522.
S.C —National Loan, etc, Bank v. New York Life Ins Co, 147 S.E 322, 149 S C. 378.
S D —Slate v. Eastman, 191 N.W. 450, 46 S D. 166.
Wash —Golmis v Vlachos, 208 P 2d 1204, 34 Wash 2d 627.

64. Kan —Salina Coca-Cola Bottling Corp. v Rogers, 237 P 2d 218, 171 Kan 688
N Y —County Plains Corporation v Nosband Corporation, 256 N Y.S. 10, 234 App Div. 588.
N C —Hancammon v Carr, 47 S.E 2d 614, 229 N C. 52

S.D —Longpre v. Schmele, 264 N W. 201, 64 S D. 70.
57 C J p 527 note 30.

In Pennsylvania

(1) The rules of civil procedure provide that a defendant in an action of assumpsit may set forth as counterclaim any cause of action or set-off which he has against plaintiff at the time of filing his answer which arises from the same transaction or occurrence from which plaintiff's cause of action arose, and it seems that a tort claim arising out of the transaction may be counterclaimed under this rule —Hedden v. Levi, Com Pl, 41 Luz Leg Reg 23—Jones v. Auto Rental Co, Com Pl, 96 Pittsb.Leg.J. 140.

(2) Prior to such rule, it was held that a tort could not be counterclaimed under the statute providing for counterclaims of demands enforceable in any action of assumpsit —Rothrock v Wolfe, 99 Pa Super 30—57 C J p 430 note 59.

65. N.Y —Siebrecht v. Siegel-Cooper Co, 56 N Y.S 425, 38 App.Div. 549
57 C J. p 427 note 31.

66. Tex.—Ferguson v. Plainview Nat Bank, Civ App, 42 S W 2d 834.
57 C.J p 427 note 32

67. N Y —Laska v Harris, 109 N.E. 599, 215 N.Y. 554
57 C J p 428 note 33.

reputation,[68] injury to property,[69] and negligence[70] have been held proper in actions ex contractu; but the counterclaim must be so connected with the matter in controversy that its consideration is necessary for a full determination of the rights of the parties,[71] and is improper if it does not arise out of the transaction on which plaintiff's cause of action is based, or is not connected with the subject of the action.[72] Thus, because of their failure to comply with these essential requirements, counterclaims for assault,[73] conspiracy,[74] conversion,[75] ejectment,[76] forcible entry and detainer,[77] forcible exclusion and detainer,[78] fraud and misrepresentations,[79] injury to credit,[80] libel,[81] malicious prosecution,[82] misconduct in employment,[83] negligence,[84] slander,[85] trespass,[86] unlawful sale of goods,[87] waste,[88] wrongful attachment,[89] or wrongful filing of contract of sale after default[90] have been disallowed in actions ex contractu. The statutory provisions allowing defendant to counterclaim any claim on a contract in an action on a contract do not permit defendant to counterclaim a tort in an action ex contractu.[91]

(b) Tort against Tort

A tort claim may be asserted as a counterclaim in an action for tort, under some statutes, provided it arises out of the transaction on which plaintiff's cause of action is based, or is connected with the subject of the action.

Although it has been stated, without qualification, that a tort cannot be counterclaimed against a tort,[92] where a tort claim complies with the general requirements of a counterclaim, namely, that it arise out of the transaction on which plaintiff's cause of action is based, or be connected with the subject of the action, it may be counterclaimed in an action for tort[93] Accordingly, counterclaims for torts have been allowed in actions for assault,[94] conversion,[95] ejectment,[96] libel,[97] negligence,[98] slander,[99] or waste.[1] On the other hand, a tort not connected with the tort on which plaintiff sues cannot be counterclaimed;[2] and thus counterclaims

68. N Y —Stamps v Mills Music, 92 N.Y.S.2d 79, 196 Misc 480.

69. Idaho —Tage v. Tage, 211 P 548, 36 Idaho 472.

70. S D.—Advance Thresher Co v. Klein, 133 N.W 51, 28 S.D. 177, L R.A.1916C 514.
57 C J. p 428 note 36.

71. N C —Hancammon v. Carr, 47 S E 2d 614, 229 N C. 52.
57 C J. p 428 note 37.

72. N Y —Union Trust Co of North Tonawanda v Rasch, 267 N.Y S 861, 149 Misc. 616.
N C.—Lawing v. Wheeler, 61 S E 2d 341, 232 N.C. 517—Hancammon v. Carr, 47 S E 2d 614, 229 N.C 52—Crescent Hat Co. v. Chizik, 26 S E 2d 871, 223 N.C. 371—Life Ins. Co of Virginia v. Smathers, 190 S E 484, 211 N C. 373.
Pa —O'Brien v. O'Brien, 66 A.2d 309, 362 Pa 66, 10 A.L R.2d 714—Anderson Equipment Co. v. Findley, 39 A 2d 520, 350 Pa 399
S C —Coastal Produce Ass'n v Wilson, 8 S E 2d 505, 193 S C. 339.
Tex —Southern Medical & Hospital Service v. Buie-Allen Hospital, Civ. App , 204 S.W 2d 996.
57 C J. p 428 note 38.

73. Ky —Lyric Piano Co v. Purvis, 241 S.W. 69, 194 Ky 826
N C —Godwin v. Kennedy, 145 S E 229, 196 N C 244.

74. Kan.—Arkansas City First Nat Bank v. Hasie, 48 P. 22, 57 Kan 754.
S.C.—Liles v. Harris-Grimes Co., 76 S E. 115.

75. N J —Schwartz & Nagle v Langer Transport Corp., 33 A 2d 907, 130 N J Law 562.
57 C.J. p 428 note 41.

76. N.D —Farmer v. Dakin, 149 N. W. 354, 28 N.D 452.

77. N D —Farmer v. Dakin, supra.

78. N.Y.—Safran v. Silverman, 129 N Y.S 116, 72 Misc. 14.

79. N.Y.—Haberle-Crystal Spring Brewing Co v. Handrahan, 165 N Y S 251, 100 Misc. 163.
57 C J. p 429 note 45.

80 Minn —Jefferson v. Hackney, 200 N W. 473, 160 Minn 445.
57 C J. p 429 note 46.

81. Tex —Yelton v. Bird Lime & Cement Co , Civ App , 161 S.W 2d 353, error refused.
57 C.J. p 429 note 47.

82. Minn —Schmidt v. Bickenbach, 12 N W. 349, 29 Minn. 122.
57 C J. p 429 note 48

83. N Y —Weeks v. Berry, 3 N.Y S 840, 51 Hun 640.
57 C.J. p 429 note 49.

84. Wis.—Kuhn v. Sol Heavenvich Co , 91 N.W. 994, 115 Wis. 447, 60 L.R A. 585.
57 C.J. p 429 note 50.

85. Ind —Blue v Capital Nat Bank, 43 N E. 655, 145 Ind. 518.
57 C.J p 429 note 51.

86. Neb.—Brugman v. Burr, 46 N W. 644, 30 Neb 406
57 C.J p 429 note 52.

87. Ky.—Brannin v. Crouch, 10 Ky L. 773.

88. Mont —Collier v. Ervin, 3 Mont. 142.

89. N Y.—J M , etc , Osborn Co. v Kennedy, 185 N Y S. 75, 113 Misc 615
57 C.J p 429 note 55.

90. N Y.—Bloom v. Sutton, 168 N Y S 403, 181 App Div. 247.

91. N M —Cassell Motor Co v. Gonzales, 255 P. 636, 32 N.M. 259.
57 C.J. p 429 note 57.

92. Ariz —Rayner v. Anderson, 278 P 62, 35 Ariz 343.
57 C.J. p 430 note 60.

93. Pa —Lisowski v. Jaskiewicz, 76 Pa Dist & Co. 79.
S C —Coastal Produce Ass'n v. Wilson, 8 S E 2d 505, 193 S C. 339.
57 C.J. p 430 note 62.

94. Mont —Mulcahy v. Duggan, 214 P 1106, 67 Mont 9.
57 C.J p 430 note 63.

95. N.Y —Carpenter v. Manhattan Life Ins Co , 93 N.Y. 552.
57 C J. p 430 note 64.

96. Cal —Parish v. Studebaker, 195 P 721, 50 Cal.App. 719.

97. Ohio —Cincinnati Daily Tribune Co v. Bruck, 56 N E. 198, 61 Ohio St. 489, 76 Am S R 433.
57 C J. p 430 note 67.

98. Ind —Grevenstuk v. Hubeny, 24 N E 2d 924, 216 Ind 379.
57 C.J. p 430 note 68.

99. Wis —Powell v. Powell, 152 N W. 168, 160 Wis. 504, Ann Cas 1917D 113.
57 C.J. p 430 note 69.

1. Wis —Gilbert v. Loberg, 57 N.W. 982, 86 Wis. 661.
57 C.J. p 430 note 70.

2. N C —Manufacturers & Jobbers Finance Corp. v. Lane, 19 S E.2d 849, 221 N.C. 189.
Pa.—Rose v. De Chesere, 40 Pa Dist. & Co 280, 2 Monroe L.R. 154
S C —Baitary v. Ilderton, 52 S E 2d 417, 214 S.C. 357, 10 A L.R.2d 1163 —Coastal Produce Ass'n v. Wilson, 8 S E 2d 505, 193 S C. 339.
57 C.J. p 430 note 71.

disconnected with the transaction sued on, or with the subject of the action, have been disallowed in actions for assault,[3] conversion,[4] duress,[5] ejectment,[6] false imprisonment,[7] fraud,[8] injury to property,[9] libel,[10] malicious prosecution,[11] negligence,[12] nuisance,[13] slander,[14] and trespass.[15] The mere fact that the tort happens at or near the same time as the transaction on which the action is based does not sufficiently connect it therewith to entitle defendant to counterclaim it.[16]

d. Reconvention and Compensation

Demands in reconvention may be either in contract or in tort.

Subject to other applicable requirements, demands in reconvention may be either in contract[17] or in tort.[18] Compensation between mutual debtors takes place without distinction between different forms of debt.[19]

§ 42. Liquidated and Unliquidated Demands

a. Liquidated demands as basis of cross demands
b. Unliquidated demands as basis of cross demands

a. Liquidated Demands as Basis of Cross Demands

Liquidated demands are generally proper subjects of cross demands, whether in the form of recoupment, set-off, counterclaim, or compensation.

Liquidated damages are generally the subject of cross demands, whether in the form of recoupment,[20] set-off,[21] counterclaim,[22] or compensation.[23] Thus liquidated damages, as distinguished from a penalty, may be set off.[24] Liquidated damages cannot, however, be set off against an unliquidated claim where the statute provides that, if plaintiff's cause of action is a claim for unliquidated or uncertain damages founded on a tort or breach of covenant, defendant shall not be permitted to set off any debt due him by plaintiff.[25]

b. Unliquidated Demands as Basis of Cross Demands

(1) Recoupment
(2) Set-off
(3) Counterclaim
(4) Reconvention and compensation

(1) Recoupment

Unliquidated damages may be recouped, provided they arise out of the transaction forming the basis of plaintiff's action.

Unliquidated damages may be recouped, if they arise out of the transaction forming the basis of plaintiff's action;[26] but unliquidated damages aris-

3. Ark.—Ward v Blackwood, 3 S.W 624, 48 Ark 396.
57 C J p 430 note 72.

4. Ariz—Rayner v. Anderson, 278 P 62, 35 Ariz. 343
57 C J p 430 note 73.

5. Wis—Heckman v. Swartz, 12 N W. 439, 55 Wis 173.
57 C J. p 430 note 74

6. N C—Louisville, etc, R. Co. v Nichols, 120 S E 819, 187 N.C 153.
57 C J. p 430 note 75

7. N Y.—Adams v. Schwartz, 122 N Y S 41, 137 App Div. 230, followed in Pettis v Schwartz, 122 N.Y S. 50, 137 App Div. 242.

8. Ark—Jones v. Lewis, 117 S.W. 561, 89 Ark 368
57 C J. p 430 note 77.

9. S C.—Smoak v. Robinson, 153 S E. 342, 156 S.C. 370

10. Cal—Earl v. Times-Mirror Co, 196 P. 57, 185 Cal. 165.
57 C J p 431 note 79

Counterclaim for slander allegedly uttered by plaintiff before and after the alleged libel cannot be set up in an action for libel, where there is no connection between the libel and the slander and the libel was not provoked by the slander—Udovichky v Bacheff, 187 N Y.S. 474, 195 App. Div 860.

11. N Y—Rothschild v. Whitman, 30 N E. 858, 132 N Y. 472.
57 C J. p 431 note 80.

12. Ind.—Hooven v Meyer, 128 N.E. 614, 74 Ind App. 9.
57 C J. p 431 note 81.

13. N.C—Street v. Andrews, 20 S E. 450, 115 N C. 417.
57 C.J. p 431 note 82.

14. N Y—Sheehan v. Pierce, 23 N. Y.S. 1119, 70 Hun 22.
57 C.J. p 431 note 84.

15. Ark—Chandler v. Lazarus, 18 S W. 181, 55 Ark. 312.
57 C J. p 431 note 85.

16. S C.—Roberts v. Jones, 51 S E. 240, 71 S C. 404—Simkins v. Columbia, etc., R Co., 20 S.C. 258.

17. Tex—Carroll v. Welch, 26 Tex. 147.
57 C.J. p 431 note 89.

18. La.—Dixie Mach., Welding & Metal Works v. Boulet Transp Co., App, 38 So.2d 546.
57 C.J. p 431 note 90.

19. La—Sliman v Mahtook, 136 So. 749, 17 La App. 635

20. Pa—Northwestern Nat. Bank v Commonwealth, 27 A 2d 20, 345 Pa. 192.
57 C J. p 433 note 29.

21. Mo—Brandtjen & Kluge v. Hunter, 145 S.W.2d 1009, 235 Mo. App 909.
57 C J p 433 note 30.

Necessity of judgment
The doctrine of set-off is of equitable origin, and in an ordinary civil action instituted for the purpose where there are grounds for the exercise of equitable jurisdiction, the right of set-off is not limited to demands which have been reduced to judgment—Lee v Sioux Falls Motor Co, 274 N W. 614, 65 S.D. 401.

22. N J—McCurnin v. B. & J. Realty Co, 168 A. 161, 11 N.J Misc. 673.
Tex—Ferguson v. Plainview Nat. Bank, Civ.App, 42 S.W.2d 834.
57 C J. p 434 note 31.

23. La—Saunier v. Saunier, 47 So. 2d 19, 217 La. 607—Moore v. Hamilton, 133 So. 790, 16 La.App. 630.
57 C.J. p 434 note 32.

24. Pa.—Dannenhauer v. Woods, 16 Pa Dist 226, 23 Pa.Co. 258.
Liquidated damages distinguished from penalty see Damages § 101.
Penalty as subject matter of set-off see infra § 46.

25. Tex.—Baldwin v. Richardson, 87 S W. 746, 39 Tex Civ.App. 406.
57 C J. p 434 note 36.

26. U S.—Hoffman v. Gleason, C.C.A. Mich, 107 F.2d 101
Miss—Lancaster v. Jordan Auto Co.,

ing out of an independent transaction,[27] as unliquidated damages arising out of a tort independent of, and disconnected with, the transaction sued on[28] cannot be recouped.

(2) Set-Off

(a) At law

(b) In equity

(a) At Law

In the absence of a statute providing otherwise, unliquidated damages ordinarily cannot be pleaded as a set-off; but in a number of jurisdictions, the statutes are construed as allowing a set-off of unliquidated demands in a proper case.

Although in some jurisdictions statutes of set-off and counterclaim have been construed, in the absence of any limitations therein, to permit any cause of action arising from contract, whether for a liquidated demand or for unliquidated damages, to constitute a set-off, and be pleaded as such in any action founded on contract,[29] ordinarily, in the absence of statutory provision therefor, unliquidated damages cannot be pleaded as a set-off,[30] even though they are based on contract,[31] or even though plaintiff agreed to pay them when ascertained,[32] or although the demand which defendant seeks to interpose as a set-off becomes liquidated after the commencement of the action in which it is sought to be interposed.[33] Moreover, since a claim sounding in tort generally is not the subject of set-off, as discussed supra § 41 b (2) (a), it follows with greater force that a claim for unliquidated damages sounding in tort is unavailable as a set-off.[34] However, in keeping with the object and spirit of the remedy, which, as discussed supra § 11, is to litigate matters between the parties in one action, so far as is possible, some statutes are construed to allow a set-off, although the claim may be for an unliquidated amount.[35]

187 So. 535, 185 Miss 530—Neely v. Allis-Chalmers Mfg. Co., 165 So 114, 174 Miss 519.
N.H.—Moylan v. Lamothe, 30 A.2d 11, 92 N.H. 299.
Pa.—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192.
Tenn.—Voncannon & Co. v. Burleson & Laws, 6 Tenn. App. 369.
57 C.J. p. 435 note 68.

Where plaintiff's demand is under seal, defendant cannot recoup unliquidated damages.—Kinzie v. Reiley, 42 S.E. 872, 100 Va. 709.

27. Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.
57 C.J. p. 435 note 69.

"Consequential" damages

Damages which are purely consequential cannot be considered under recoupment.—Mills Novelty Co. v. Transeau, 196 A. 187, 9 W.W.Harr., Del., 86.

28. Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.
57 C.J. p. 436 note 70.

29. Kan.—Stevens v. Able, 15 Kan. 584.
Okl.—Braden v. Gulf Coast Lumber Co., 215 P. 202, 89 Okl. 215.

30. U.S.—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F. 2d 42—Marks v. Spitz, D.C.Mass., 4 F.R.D. 348.
Iowa.—In re Nairn's Estate, 247 N.W. 220, 215 Iowa 920.
Ky.—Kortz v. Union Central Life Ins. Co., 95 S.W.2d 611, 264 Ky. 750—Weinstein v. Rhorer, 73 S.W. 2d 25, 255 Ky. 179—Wilhoit v. McCubbin, 61 S.W.2d 897, 250 Ky. 60—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 246 Ky. 278.
Mass.—Soares v. Weitzman, 183 N.E. 763, 281 Mass. 409.
Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.
Mo.—Brandtjen & Kluge v. Hunter, 145 S.W.2d 1009, 235 Mo.App. 909.
N.H.—Lehigh Nav. Coal Co. v. Keene Coal Co., 197 A. 410, 89 N.H. 274—Arcadia Knitting Mills v. Elliott Mfg. Co., 195 A. 681, 89 N.H. 188—Derry Loan & Discount Co. v. Falconer, 152 A. 427, 84 N.H. 450.
Ohio.—Columbian Bldg. & Loan Co. v. Burke, 29 Ohio N.P.,N.S., 499.
Tenn.—Fischer Lime & Cement Co. v. Suzore, 11 Tenn. App. 588.
Va.—Odessky v. Monterey Wine Co., 49 S.E.2d 330, 188 Va. 184—John H. Maclin Peanut Co. v. Pretlow & Co., 11 S.E.2d 607, 176 Va. 400.
57 C.J. p. 436 note 73.

31. Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 246 Ky. 278.

Demands not payable in money but in property, the value of which is not ascertained either by the contract of the parties or the law, cannot be set off.—Prather v. McEvoy, 7 Mo. 598—57 C.J. p. 439 note 80.

Action on sheriff's bond

A sheriff or constable or the sureties on his official bond cannot, in an action on the bond to recover a sum established by a previous judgment against the officer, set off an unliquidated claim of such officer against plaintiff for fees.—State v. Welsted, 11 N.J.Law 397.

32. Ill.—Robison v. Hibbs, 48 Ill. 408.
57 C.J. p. 437 note 74.

33. N.H.—Haselton v. Pray, 18 N.H. 554.
Ohio.—Cleveland Rubber Co. v. Bradford, 6 Ohio Dec., Reprint, 1160, 11 Am.L.Rec. 44.

34. D.C.—Smith v. O'Connor, 88 F.2d 749, 66 App.D.C. 367.
Miss.—Vines v. Perry, 45 So.2d 734, 208 Miss. 869—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.
N.C.—Crescent Hat Co. v. Chizik, 26 S.E.2d 871, 223 N.C. 371—Manufacturers & Jobbers Finance Corporation v. Lane, 19 S.E.2d 849, 221 N.C. 189.
Pa.—Pennsylvania Turnpike Commission to Use of Albright v. U.S. Fidelity & Guaranty Co., Com.Pl., 51 Dauph.Co. 256, affirmed 23 A.2d 416, 343 Pa. 543.
57 C.J. p. 437 note 77.

35. U.S.—Manufacturers' Finance Corporation v. Vye Neill Co., C.C.A.Mass., 62 F.2d 625, certiorari denied Kane v. Manufacturers' Finance Corporation, 53 S.Ct. 657, 289 U.S. 738, 77 L.Ed. 1486.
Md.—H. J. McGrath Co. v. Wisner, 55 A.2d 793, 189 Md. 260.
Mass.—Ryder v. Warren, 3 N.E.2d 221, 295 Mass. 24—Blackler v. Boott, 114 Mass. 24.
Minn.—Henderson v. Northwest Airlines, 43 N.W.2d 786, 231 Minn. 503.
Vt.—Vaillancourt v. Gover, 20 A.2d 122, 112 Vt. 24.
57 C.J. p. 437 note 79.

Arising on contract

Any cause of action arising from contract, whether for a liquidated demand or for unliquidated damages, may constitute a set-off and be pleaded as such in an action founded on contract.
U.S.—Tiger v. Sellers, C.C.A.Okl., 145 F.2d 920.
Okl.—Eyer v. Richards & Conover

Demands "not sounding in damages merely." In at least one jurisdiction, unliquidated demands may be set off if they do not "sound in damages merely,"[36] if they "sound in damages merely," they may not be set off.[37] Within the meaning of this rule, a debt or demand which may be set off as "not sounding in damages merely" is one which, when the facts on which it is based are established, the law is capable of measuring accurately by a pecuniary standard;[38] and, conversely, demands "sounding in damages merely" include those which, when the facts are established, the law is incapable of measuring by a pecuniary standard.[39] A claimant cannot make his demand one "not sounding in damages merely" by splitting off from an entire demand only such features of it as are measurable by definite standards.[40]

(b) In Equity

As a general rule, unliquidated damages cannot be set off in equity, at least in the absence of special equities, such as insolvency or nonresidence of plaintiff.

Since, as discussed supra § 5, in matters of set-off equity usually follows the law, and as unliquidated damages ordinarily cannot be set off at law, it is held as a broad general rule that unliquidated damages cannot be set off in equity,[41] unless some special equity intervenes;[42] and this rule applies with even greater force to unliquidated damages sounding in tort.[43] So unliquidated damages cannot

Hardware Co, 55 P.2d 60, 176 Okl 191.
57 C.J p 437 note 79 [i].

In Illinois

(1) Under express statutory provision, demands in the nature of set-off, whether in tort or contract and whether liquidated or unliquidated, may be pleaded as a cross demand in any action, such plea being called a counterclaim—State Bank of St Charles v Burr, 14 N E 2d 511, 295 Ill App 15—Heiple v. Lehman, 272 Ill App 513.

(2) Prior to such provision, the rule was that unliquidated demands could be set off, but only where they arose from the transaction sued on —Duncan Lumber Co. v Leonard Lumber Co, 163 N E 416, 332 Ill 104—57 C J. p 437 note 79 [c].

In Pennsylvania

(1) Some cases lay down the broad rule that unliquidated damages cannot be set off—Somerset Colliery Co. v. John, 68 A 843, 219 Pa. 380—Pennsylvania Turnpike Commission to Use of Albright v. U. S. Fidelity & Guaranty Co, Com.Pl., 51 Dauph. Co. 256, affirmed 23 A.2d 416, 343 Pa 543—Township of Lower Merion v. Miller's Estate, Com.Pl, 54 Montg. Co 52—Porter v. Levering, Com.Pl., 54 Montg Co. 1, 8 Som Leg J. 388—57 C J. p 438 note 79 [j] (2).

(2) Other cases take the stand that unliquidated damages arising from contract may be set off in an action on contract.—Shoup v Shoup, 15 Pa 361—57 C.J. p 438 note 79 [j] (5), (6).

(3) Many cases announce or follow the rule that a defendant may set off damages capable of liquidation by any known legal standard, but not damages which are not capable of such liquidation.—Appeal of Commonwealth Trust Co of Pittsburgh, 188 A. 200, 324 Pa. 161, 107 A.L R. 1453—E. Keeler Co v Sanitary Family Washing Co., 60 Pa Dist & Co 525, 58 Dauph Co. 410—57 C J. p 437 note 79 [j] (8)–(12).

(4) It is frequently held that the debt or damages which can be set off as an independent counterclaim must be such as the jury can find and liquidate in the ordinary way, just as if defendant were a plaintiff suing in debt, assumpsit, or covenant—Appeal of Commonwealth Trust Co. of Pittsburgh, 188 A. 200, 324 Pa 161, 107 A L R 1453—Bank of Erie Now to Use of Kurczewski v. Dombrowski, Com.Pl., 21 Erie Co. 198—First Nat Bank & Trust Co of Bethlehem v. Shaffer, Com.Pl., 18 Leh.L.J. 89—57 C.J. p 438 note 79 [j] (13).

(5) The test is whether the right can be enforced in an action at law and is capable of liquidation by any known legal standard—Appeal of Commonwealth Trust Co. of Pittsburgh, supra.

In Texas

(1) Unliquidated damages arising from tort or breach of a covenant cannot be set off against a liquidated and certain claim—Parker v. Moore Grocery Co, Civ App., 107 S W 2d 1083—57 C J. p 437 note 79 [m] (3)–(5).

(2) However, such damages may be set off if they arise from the same transaction as plaintiff's cause of action.—Parker v Moore Grocery Co, supra.

(3) They may also be set off where the parties so agree—Parker v Moore Grocery Co, supra.

36. Ala.—Industrial Sav. Bank v. Greenwald, 158 So. 734, 229 Ala. 529—Troy Laundry Mach. Co v Joyce, 157 So. 214, 229 Ala 331—Donnelly v. House, 49 So. 324, 160 Ala. 325.
57 C.J. p 437 note 79 [a].

37. Ala.—**Corpus Juris cited in** American Life Ins Co of Alabama v. Aladdin Temple Ben Ass'n, D O. K K., 191 So. 903, 907, 238 Ala. 512—Tidmore v Mills, 32 So.2d 769, 33 Ala App 243, certiorari denied 32 So 2d 782, 249 Ala 648.
57 C.J. p 437 note 79 [a].

38. Ala—Industrial Sav. Bank v. Greenwald, 158 So. 734, 229 Ala. 529—Mobile & O R. Co v. Williams, 121 So 722, 219 Ala. 238—Donnelly v. House, 49 So 324, 160 Ala 325
57 C J. p 437 note 79 [a].

39. Ala—Blackmon v. Gilmer, 130 So. 192, 221 Ala. 554—Norton v. Bumpus, 127 So 907, 221 Ala. 167.
57 C J. p 437 note 79 [a]

Particular demands "sounding in damages merely"

(1) Damages for malicious prosecution—American Life Ins. Co of Alabama v Aladdin Temple Ben. Ass'n, D O K K., 191 So. 903, 238 Ala. 512—Barnes v. Marshall, 69 So 436, 193 Ala. 94.

(2) Damages for mental and physical pain—Mobile & O R. Co v. Williams, 121 So. 722, 219 Ala. 238

40. Ala.—**Corpus Juris cited in** American Life Ins Co. of Alabama v. Aladdin Temple Ben. Ass'n, D O. K K, 191 So. 903, 907, 238 Ala. 512—Nelms v. Hill, 5 So. 344, 85 Ala 583—Walker v. McCoy, 34 Ala. 659

41. U.S—Sinclair Refining Co. v. Midland Oil Co., C.C.A N.C., 55 F 2d 42
57 C J. p 439 note 83.

42. U S—North Chicago Rolling-Mill Co. v St. Louis Ore & Steel Co, Ill., 14 S.Ct 710, 152 U.S 596, 38 L Ed 565—Sinclair Refining Co. v. Midland Oil Co, C.C.A N C., 55 F 2d 42
D.C—Brownley v. Peyser, 98 F.2d 337, 69 App.D C. 56.
Ky.—Oglesby v. Prudential Ins Co. of America, 82 S W 2d 824, 259 Ky. 620—Weinstein v Rhorer, 73 S W.2d 25, 255 Ky. 179—Wilhoit v. McCubbin, 61 S W.2d 897, 250 Ky. 60.
57 C J. p 440 note 85

43. U S.—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N C., 55 F. 2d 42
57 C J. p 440 note 86.

be pleaded as a set-off in an action in equity in aid of a fraud,[44] or where defendant has an adequate remedy at law against plaintiff[45] If, however, there is an agreement express or implied of stoppage pro tanto between the parties,[46] or a mutual credit,[47] or defendant confesses the amount to be due in his answer,[48] unliquidated demands may be set off in equity

Insolvency of plaintiff will move a court of equity to set off claims of defendant which would otherwise be disallowed, because unliquidated,[49] but not where the insolvency is denied and not supported by proof;[50] and it has been held that unliquidated damages sounding in tort cannot be set off in equity, even when insolvency intervenes[51]

Nonresidence of plaintiff. Although the right of set-off has been denied in such a case,[52] nonresidence of plaintiff is generally held to be such a circumstance as will move equity to set off unliquidated demands,[53] provided they arise out of the transaction on which plaintiff's cause of action is based,[54] but defendant cannot set up a claim for unliquidated damages against a nonresident, where the latter has a process agent within the state and sufficient property to discharge any claim defendant might recover against him.[55] The mere fact that one of several plaintiffs is a nonresident or insolvent will not move a court of equity to interpose an unliquidated set-off if other plaintiffs are residents and solvent.[56]

Deferment of decree. A court of equity will sometimes defer a decree to enable defendant to have the account liquidated, referring him to a cout of law to liquidate the claim.[57]

(3) Counterclaim

A claim for unliquidated damages generally may be pleaded as a counterclaim, provided it arises out of the same transaction as plaintiff's cause of action or is connected with the subject of the action.

It is generally held that a counterclaim which is otherwise available may be interposed, although for unliquidated damages,[58] but to bring in a counterclaim for an unliquidated debt, under a statute allowing counterclaims arising out of the contract or transaction sued on or connected with the subject of the action, discussed supra §§ 36, 40, the counterclaim must relate to the same transaction,[59] and a claim for unliquidated damages, disconnected with the cause of action sued on, cannot be counterclaimed.[60] Where defendant, an accommodation indorser of a note secured by a deed of trust, made payments on the note before the collateral security was exhausted, he cannot counterclaim the amount so paid, since, until definite determination of the worth of such security, whether he is entitled to re-

44. Ark.—Matthews v. Weiler, 22 S W. 569, 57 Ark 606

45. Ky.—Lyric Piano Co v. Purvis, 241 S W 69, 194 Ky. 826
57 C J p 440 note 88.

46. N.Y.—Hackett v. Connett, 2 Edw 73
57 C J. p 440 note 89

47. U S.—Ritchie v. McMullen, Ohio, 79 F 522, 25 C C A. 50, certiorari denied 18 S Ct 945, 168 U S. 710, 42 L Ed 1212.
N.Y.—Hackett v. Connett, 2 Edw 73

48. Vt.—Ferris v. Burton, 1 Vt. 439

49. U S.—Hoffman v Gleason, C C. A Mich, 107 F 2d 101—Sinclair Refining Co v Midland Oil Co., C.C.A N C, 55 F 2d 42
Iowa.—Briley v. Board of Sup'rs of Story County, 287 N W. 242, 227 Iowa 55.
Ky.—Kortz v. Union Central Life Ins Co, 95 S W.2d 611, 264 Ky 750—Weinstein v. Rhorer, 73 S W 2d 25, 255 Ky 179—Wilhoit v. McCubbin, 61 S W 2d 897, 250 Ky 60—McFall v. Burley Tobacco Growers' Ass'n, 54 S W 2d 922, 246 Ky. 278
Va.—Odessky v Monterey Wine Co, 49 S E 2d 330, 188 Va. 184.
57 C.J. p 440 note 92.

50. Ky.—Bradley v. Morgan, 2 A K Marsh 369
Va.—Bunting v. Cochran, 39 S E 229, 99 Va 558.

51. Tex.—Duncan v. Magette, 25 Tex 245
57 C.J p 440 note 94.

52. N Y.—Murray v. Toland, 3 Johns Ch 569
57 C.J. p 440 note 95.

53. Ky.—Kortz v. Union Central Life Ins. Co, 95 S W 2d 611, 264 Ky 750—Weinstein v. Rhorer, 73 S W 2d 25, 255 Ky. 179—Wilhoit v. McCubbin, 61 S.W.2d 897, 250 Ky 60—McFall v. Burley Tobacco Growers' Ass'n, 54 S W 2d 922, 246 Ky. 278
57 C J. p 440 note 96

54. Ky.—Big Four Mills v Commercial Credit Co, 211 S.W.2d 831, 307 Ky. 612

55. Ky.—Bates v. Reitz, 163 S.W. 451, 157 Ky. 514.

56. Ky.—Garner v. Jones, 21 S.W. 647, 94 Ky. 135, 14 Ky L. 792

57. Mo.—Strong v Gordon, 221 S W 770, 203 Mo App. 470.
47 C J p 441 note 99

58. Cal.—Sunrise Produce Co of San Francisco v Malovich, 225 P. 2d 973, 101 Cal App 2d 520
Ill.—State Bank of St Charles v. Burr, 14 N E 2d 511, 295 Ill App. 15—Heiple v. Lehman, 272 Ill App. 513.
Minn.—Henderson v Northwest Airlines, 43 N W 2d 786, 231 Minn 503
Mo.—Brandtjen & Kluge v Hunter, 145 S W 2d 1009, 235 Mo App 909.
N Y.—County Plains Corporation v. Nosband Corporation, 256 N Y S 10, 234 App Div 588—Perlman v. Perlman, 247 N Y S 453, 139 Misc. 396, appeal dismissed 257 N.Y S. 53, 235 App Div. 317.
57 C J p 441 note 4

59. Mo.—Brandtjen & Kluge v. Hunter, 145 S.W 2d 1009, 235 Mo. App 909.

60. Mo.—Brandtjen & Kluge v. Hunter, supra.
N J.—Falkenstern v. Herman Kussy Co, 59 A.2d 372, 137 N J.Law 200—Doyle v Corn, 152 A. 329, 8 N.J Misc 865, affirmed 160 A. 637, 109 N J Law 263
N C.—Crescent Hat Co. v. Chizik, 26 S E 2d 871, 223 N.C. 371.
Tex.—Brooks Tire Mach. Co. v. Shields, Civ App., 108 S.W. 1005.
57 C J. p 441 note 5.

cover any payments, and the amount, is uncertain.[61]

(4) Reconvention and Compensation

Reconventional demands need not be liquidated, provided they are connected with, and incidental to, the demand sued on. A debt offered in compensation must be liquidated to the same extent, and only to the same extent, that the demand sued on is liquidated

Reconventional demands connected with, and incident to, the demand sued on need not be liquidated,[62] but a demand in reconvention for unliquidated damages not arising out of the transaction sued on, or connected with, plaintiff's cause of action will not be allowed.[63] Although it is sometimes broadly stated that unliquidated damages cannot be set up in compensation,[64] the rule more accurately stated is that a debt offered in compensation must be equally liquidated with that of plaintiff,[65] and, under this latter rule, in an action on an unliquidated demand, unliquidated damages may be pleaded in compensation;[66] but in an action on a liquidated demand, defendant cannot plead in compensation an unliquidated claim.[67]

§ 43. —— What Constitutes

a. Liquidated demands
b. Unliquidated demands

a. Liquidated Demands

A claim is liquidated when the amount of it has been ascertained or is capable of ascertainment by mere calculation or computation in accordance with established or accepted legal standards or a rule or criterion agreed on by the parties.

The cases defining what is a liquidated demand within the meaning of statutes of set-off have been said to be confusing and unsatisfactory,[68] and, as will be seen hereinafter, vary according to the wording of the statute and the disposition of the various courts to extend or restrict the right of set-off. Whether damages are liquidated or unliquidated depends primarily on the terms of the contract itself.[69] Generally speaking, a claim is liquidated when the amount of it has been determined,[70] or, where the amount is capable of ascertainment, without trial[71] by jury,[72] by mere calculation or computation in accordance with known legal standards[73] or established market values,[74] or by rule or criterion fixed by the parties or by law,[75] and, if there is data given from which damages can be so ascertained, they are liquidated, within the meaning of the statutory requirement.[76] A claim is liquidated when the amount due has been fixed by law[77] or by a definite rule of law[78] or has been agreed on by the parties.[79] So, where plaintiff has acknowledged the amount due defendant, the claim, although formerly unliquidated, is so no longer,[80] and the same rule applies where the parties have fixed the value of the set-off,[81] but the rule is otherwise

61. Mo—Schelp v. Nicholls, App., 263 S.W. 1017.

62. La—Ouachita Nat Bank v. McIlhenny, 125 So. 69, 169 La. 258.
57 C.J. p. 441 note 8.

63. La—Agaisse v. Guedron, 2 Mart., N.S., 73.

64. La—Burbridge v. Anderson, 32 La. Ann. 877.
57 C.J. p. 441 note 11.

65. La.—Beyer Transp. Co. v. Whiteman Contracting Co., App., 187 So. 143—Blanchard v. Bank of Morgan City & Trust Co., App., 185 So. 120—Dugus v. Lewis-Chambers Const. Co., App., 185 So. 59, annulled on other grounds 187 So. 117—Brock v. Natalbany Lumber Co., App., 179 So. 322—Jones v. Davis, App., 155 So. 269—Sliman v. Mahtook, 136 So. 749, 17 La. App. 635.
57 C.J. p. 441 note 12.

66. La—Succession of Durnford, 8 Rob. 488—Walker v. McMurray, 125 So. 486, 12 La. App. 356.

67. La—Blanchard v. Bank of Morgan City & Trust Co., App., 185 So. 120—Del Bondio v. Albrecht, App., 181 So. 610—Jones v. Davis, App., 155 So. 269—Bennett v. Bordelon, App., 146 So. 176.
57 C.J. p. 442 note 14.

68. Tex.—Harrington Lumber Co. v. Smith, 99 S.W. 110, 44 Tex. Civ. App. 363.
Va.—Odessky v. Monterey Wine Co., 49 S.E. 2d 330, 188 Va. 184.

69. Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W. 2d 922, 925, 246 Ky. 278.
Va.—Dexter-Portland Cement Co. v. Acme Supply Co., 133 S.E. 788, 147 Va. 758.

70. La.—Saunier v. Saunier, 47 So. 2d 19, 217 La. 607—Moore v. Hamilton, 133 So. 790, 16 La. App. 630.
Okl.—Wood & Co. v. Sutton, 61 P.2d 700, 177 Okl. 631.
57 C.J. p. 432 note 95.

71. Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 246 Ky. 278.

72. D.C.—Dale v. Richards, 21 D.C. 312.

73. U.S.—Hoffman v. Gleason, C.C.A. Mich., 107 F.2d 101.
Pa.—In re Gordon, 176 A. 494, 317 Pa. 161.

74. U.S.—Hoffman v. Gleason, C.C.A. Mich., 107 F.2d 101.

75. D.C.—Dale v. Richards, 21 D.C. 312.
57 C.J. p. 432 note 97.

76. U.S.—Marks v. Spitz, D.C. Mass., 4 F.R.D. 348.
Ky.—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op. Ass'n, 54 S.W.2d 922, 925, 246 Ky. 278.
Me.—Barton v. McKay, 193 A. 733, 135 Me. 197—Lamson v. Dirigo Fish Co., 147 A. 655, 128 Me. 364.
Va.—**Corpus Juris cited in** Odessky v. Monterey Wine Co., 49 S.E.2d 330, 333, 188 Va. 184—John H. Maclin Peanut Co. v. Pretlow & Co., 11 S.E.2d 607, 176 Va. 400.
57 C.J. p. 432 note 96.

77. Okl.—Wood & Co. v. Sutton, 61 P.2d 700, 177 Okl. 631.

78. Tenn.—Lowry v. Hawes, 10 Heisk. 688.
57 C.J. p. 433 note 11.

79. Ill.—Robison v. Hibbs, 48 Ill. 408, 410.
Okl.—Wood & Co. v. Sutton, 61 P.2d 700, 177 Okl. 631.

80. Tex.—Tolbert v. Swain, Civ. App., 137 S.W. 2d 1051.
57 C.J. p. 432 note 98.

81. Tex.—Arlington First Nat. Bank v. Lynch, 25 S.W. 1042, 6 Tex. Civ. App. 590.

where the parties have agreed as to the amount only conditionally.[82]

Although, as discussed supra § 41 b (1), it has been said that the right to maintain indebitatus assumpsit for a claim is a test in favor of its allowance as a set-off, and not whether the demand is liquidated or unliquidated,[83] there is authority to the effect that defendant's claim is so liquidated as to entitle him to use it as a set-off when it would support an action of indebitatus assumpsit,[84] as for the value of property appropriated,[85] or for goods sold and delivered,[86] or money had and received.[87] Under the rule that any claim capable of exact ascertainment is a liquidated demand, it is held that there may be a set-off of claims arising on contract, the amount of which can be shown by the testimony of witnesses acquainted with the market.[88] A counterclaim for commissions for procuring a sale of property is liquidated, although the parties did not agree on the amount of commissions to be paid, the usual and customary charges for the performance of such services being read into the contract by operation of law.[89] Defendant's claim for brokers' commissions is not unliquidated where there is no controversy as to the price to be paid for the services performed, although there is a dispute as to whether defendants had performed any services.[90] Other claims which have been held sufficiently certain or liquidated within the meaning of statutes of set-off include claims for fees,[91] salary,[92] loss of profits,[93] the conversion of money,[94] a specific sum owing by plaintiff to defendant,[95] such as accrued alimony,[96] a definite sum of money paid under a contract,[97] as the price or value of goods received by plaintiff under a contract, performance of which he prevents,[98] an agreed price for work and labor,[99] money advanced,[1] money which defendant bank was led to pay its customer because of the negligence of plaintiff, a clerk in the bank, in having overstated the balance to a customer's credit,[2] the alleged difference between the price plaintiff as agent for defendant in the sale of notes received therefor and the price he represented himself to have received,[3] the sum paid by an original contractor to repair a wall which collapsed through the act of a subcontractor,[4] and the contract price of a specified quantity of defective goods sold to defendant by plaintiff.[5] In an action for the purchase price of food guaranteed to conform to the pure food law, a fine paid by defendant by reason of the impurity of the food is in the nature of liquidated damages for breach of contract,[6] and not, as between the parties to the suit, a penalty.[7]

Account annexed. A claim on an account annexed to the pleading is one for liquidated damages, notwithstanding allegations showing that defendant's right to recover thereon arose out of a breach of contract.[8]

b. Unliquidated Demands

An unliquidated demand is one, the amount of which is unascertained and incapable of ascertainment by mere computation or calculation in accordance with agreed on criteria or established or accepted legal standards.

Generally speaking, a demand is not liquidated unless it appears how much is due;[9] unliquidated damages are unascertained damages. They are such

82. N Y—Diehl v General Mut. Ins Co, 3 N.Y Super 257.
57 C.J. p 432 note 1

83. Va.—Dexter-Portland Cement Co. v. Acme Supply Co., 133 S E. 788, 147 Va 758.

84. Ky—**Corpus Juris quoted in** McFall v. Burley Tobacco Growers' Co-op Ass'n, 54 S W 2d 922, 925, 246 Ky 278
N.J—Scarano v Scarano, 28 A 2d 425, 132 N J Eq 362.
57 C J p 432 note 4.

85. Va—Tidewater Quarry Co v Scott, 52 S E 835, 105 Va 160, 115 Am S.R. 864.
57 C J p 432 note 5.

86. Ky.—Jenkins v Richardson, 6 J J.Marsh 441, 22 Am D. 82.

87. Conn—Bulkeley v. Welch, 31 Conn. 339.
Ky—Wake v. Commonwealth Bank, 2 Dana 394.

88. Conn.—Avery v Brown, 31 Conn 392—Bulkeley v. Welch, 31 Conn 339
57 C.J p 432 note 8.

89. Tex—Shaw v Faires, Civ App., 165 S.W. 501.

90. Ark—Burton v. Blytheville Realty Co, 158 S.W. 131, 108 Ark 411
57 C J p 433 note 12.

91. Tex—Cocke v. Wright, Civ App., 299 S W 446
57 C J p 433 note 13.

92. Tex.—Cocke v Wright, supra.

93. Va—New Idea Spreader Co. v Rogers, 94 S E. 351, 122 Va. 54.
57 C.J. p 433 note 15

94. Tex—Jones v. Hunt, 12 S W 832, 74 Tex 657.

95. Ill—Luther v Mathis, 211 Ill App 596.

96. W Va—Harman v Harman, 196 S E 361, 120 W Va. 199.

97. Ill—Ideal Coated Paper Co. v Cupples Envelope Co., 169 Ill App 484
Mo—Moore v. Black, App, 275 S W. 549

98. W.Va.—West Virginia Pulp, etc, Co. v. Whitmore, 109 S E. 722, 89 W Va. 622
57 C.J. p 433 note 19.

99. Tex—Tolbert v. McSwain, Civ. App., 137 S W 2d 1051

1. Tex—Cocke v. Wright, Civ.App, 299 S W 446

2. Tex—Commercial State Bank v Van Hutton, Civ App, 208 S W. 363.

3. Tex—Andrews v. Whitehead, Civ App., 60 S.W. 800.

4. Ill.—Kraft v. Grider, 221 Ill.App. 467.

5. Tex.—Birdsong v. Azar, Civ.App., 258 S.W 197.
57 C J. p 433 note 24.

6. Pa.—Dannenhauer v. Woods, 16 Pa.Dist 226, 33 Pa.Co. 258.

7. Pa.—Dannenhauer v. Woods, supra.

8. Mass—Ford v. Burchard, 130 Mass. 424.

9. Va—Dexter-Portland Cement Co. v. Acme Supply Co., 133 S.E. 788, 147 Va 758.

as rest in opinion only,[10] which cannot be ascertained by computation or calculation,[11] but require ascertainment by a jury,[12] whose verdict is regulated by the peculiar circumstances of each particular case.[13] Claims which would have to be determined from the conflicting opinions of witnesses are neither liquidated[14] nor capable of being ascertained by calculation;[15] and so, where data for calculating the amount of a claim depend on values to be established by witnesses, the claim is not liquidated.[16]

Thus damages are so unliquidated as not to be the subject of set-off, when there is no criterion provided by the parties or by the law for their ascertainment,[17] or when they have not been adjusted, or settled, or agreed on by the parties,[18] and, if there is a genuine controversy as to which of two sums is due, the demand is unliquidated.[19] Where the trial of the issues under defendant's set-off would involve the question as to whether or not there were any damages and, if so, how much, and would necessarily require proof as to market value, it cannot be said that the amount of damages is fixed and certain;[20] and a claim for damages for failure to deliver goods in pursuance of an executory contract of sale is a claim for unliquidated damages,[21] notwithstanding the Uniform Sales Act states the measure.[22] Damages for breach of covenant[23] or breach of warranty[24] are regarded as unliquidated; and the same has been held as to damages for breach of a contract not to carry on a particular business in a certain place,[25] a claim to an inchoate or contingent right of dower,[26] charges for changes and repairs, made by the purchaser of machinery and billed to the seller,[27] damages for defects in goods sold and delivered,[28] damages for the flowing of land,[29] a claim for the market value of work and labor,[30] a claim on an unsettled partnership account,[31] and a claim for breach of a contract to renew or procure insurance.[32] A claim recoverable only by action of account or bill in equity is so unliquidated as not to be the subject of set-off.[33]

Although it has been held that, where defendant counterclaims for plaintiff's breach of an agreement to pay his expenses and the reasonable value of his time in the performance of services, the value of the time and amount of expenses being alleged, the items so claimed are not unliquidated,[34] there is authority to the effect that damages from breach of contract are not rendered certain and capable of calculation by allegations in the declaration of set-off in respect of the prices which defendant had to pay to supply himself with the goods contracted for,[35] or by the statement of the exact amount of

10. Ill.—American Laundry Mach Co. v. Barr, 176 Ill.App. 519.
Md.—Schlens v. Poe, 97 A. 649, 128 Md 352.
Va.—**Corpus Juris cited in** Odessky v Monterey Wine Co, 49 S E 2d 330, 333, 188 Va 184—John H. Maclin Peanut Co v Pretlow & Co, 11 S E 2d 607, 176 Va. 400.
57 C.J. p 434 note 40.

11. N.H.—Derry Loan & Discount Co. v Falconer, 152 A. 427, 84 N.H. 450
Va.—John H. Maclin Peanut Co. v. Pretlow & Co., 11 S E.2d 607, 176 Va 400
57 C J. p 434 note 41.

12. Mass.—Taylor-Stites Glass Co. v. Manufacturers' Bottle Co., 87 N.E. 558, 201 Mass. 123.
57 C.J. p 434 note 42.

13. Va.—Tidewater Quarry Co. v. Scott, 52 S E 835, 105 Va. 160, 115 Am S.R 864, 8 Ann.Cas. 736.
57 C J. p 434 note 43.

14. Mich.—Carter v. Jaseph, 12 N. W. 876, 48 Mich. 615.

15. Mich.—Carter v. Jaseph, supra
57 C J. p 434 note 45.

16. Mich.—Smith v. Warner, 14 Mich. 152.

17. Mo.—Scarritt Estate Co. v. J. F Schmelzer, etc, Arms Co, 86 S. W. 489, 110 Mo App 406
57 C J. p 434 note 47.

18. La.—Jones v Davis, App, 155 So 269—Bennett v Bordelon, App, 146 So 176.
Tenn.—Arco Co. v. Garner, 227 S.W. 1025, 143 Tenn. 262.

19. Va.—Dexter-Portland Cement Co v. Acme Supply Co., 133 S E. 788, 147 Va 758

20. Ill.—Benedict v. Bear, 252 Ill. App. 439.
57 C.J. p 435 note 50

21. Ga.—Findlay Brick Co v. American Sewer Pipe Co., 89 S E. 535, 18 Ga App 446.
57 C J. p 435 note 51.

22. Md.—Westminster Metal, etc, Co v. Coffman, 91 A. 716, 123 Md. 619.

23. Mo.—State v. Eldridge, 65 Mo. 584
57 C J. p 435 note 53.

24. W.Va.—American Sugar Refining Co. v Martin-Nelly Grocery Co, 111 S.E. 759, 90 W Va 730.
57 C J p 435 note 54

25. Ky.—Collins v. Farquar, 4 Litt. 153.

26. Ala.—Johnston v. Smith, 70 Ala. 108.

27. Mo.—Hoffman v. Hiram Lloyd Bldg, etc, Co., 223 S.W. 813, 204 Mo App. 539

28. Ill.—Illinois Glass Co. v. Ozell Co., 197 Ill App 626.

29. Mass.—Pitts v. Holmes, 10 Cush. 92.

30. Tex.—Tolbert v McSwain, Civ. App, 137 S W.2d 1051.

31. Mo.—Willis v. Barron, 45 S.W. 289, 143 Mo 450, 65 Am S R 673—Berthold v. O'Hara, 25 S.W. 845, 121 Mo. 88—Jones v. Shaw, 67 Mo. 667—Leabo v Renshaw, 61 Mo 292—Wright v. Jacobs, 61 Mo. 19—Glaus v. Gosche, App., 118 S W.2d 42—State v. McHale, 16 Mo App 478
N.Y.—Perlman v. Perlman, 247 N Y. S. 453, 139 Misc 396, appeal dismissed 257 N.Y S. 53, 235 App Div. 317

32. Tex.—Wise v. Ferguson, Civ. App, 138 S W. 816.

33. Pa.—Russell v. Miller, 54 Pa. 154.
57 C.J p 435 note 62.

34. Tex.—McKinney v. Southwestern Liquor Co, Civ.App., 201 S.W. 1162—McCarty v. Squyres, Civ App., 34 S.W. 356.

35. Mass.—Taylor-Stites Glass Co. v Manufacturers' Bottle Co., 87 N. E. 558, 201 Mass 123.

damages claimed,[36] and the verification of an open account sued on does not affect the nature of the demand so as to make it a certain demand within a statute providing that, if plaintiff's suit is founded on a certain demand, defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of plaintiff.[37]

§ 44. Legal and Equitable Claims or Demands

In the absence of statutes authorizing it, an equitable demand ordinarily may not be set off in an action at law; but under code provisions, statutes, or rules of court to such effect, equitable demands may be asserted by way of set-off and counterclaim.

In the absence of statutes authorizing it, an equitable claim ordinarily may not be set off, counterclaimed, or recouped in an action at law[38] Such relief has been granted, however, in an action brought by the administrator of an insolvent estate;[39] and in an action at law against the equitable owner of a judgment obtained by a third party against plaintiff, it was held that the judgment was a proper set-off.[40] In the federal courts an equitable defense has been held not available as a set-off in an action at law[41]

Under code provision, statute, or rule of court Under a court rule to such effect, an equitable claim which arises out of the transaction which is the subject matter of the suit may be set up as a counterclaim thereto;[42] and under some statutes or rules of court, an equitable demand may be set off against a claim for money demands on contract,[43] or counterclaimed regardless of whether it arises from the same transaction as plaintiff's demand and irrespective of the nature of plaintiff's demand.[44] Under a statute permitting defendant, in an action on a debt, to plead any counterclaim which he may have, subject to such limitations as may be prescribed by law, in the absence of provisions limiting the right, defendant may, in an action at law, set off an equitable demand[45] It has been held that a claim at law may be set off against a claim sounding in equity,[46] and, under a provision to such effect, legal as well as equitable counterclaims may be interposed in an equitable action.[47] On the other hand, under a statute providing that a counterclaim shall be one on which suit might be maintained by defendant against plaintiff, a valid counterclaim in an equity suit must contain matters of equitable, and not legal cognizance.[48] Statutes authorizing set-offs have been held to recognize no greater range of equitable claims than that permitted by established chancery practice.[49]

Where the code provides that counterclaims may be such as were formerly denominated legal or equitable, a corporate defendant may, in an action on a promissory note, counterclaim for secret profits made in the transaction by its director through the medium of plaintiff as trustee;[50] and, where plaintiff sues to recover possession of land, defendant may set up his claim thereto as cestui que trust and compel plaintiff to convey legal title to him[51] In an action at law by the vendee in a contract for the purchase of real estate to recover the purchase money paid under the contract, defendants may interpose an equitable counterclaim for specific performance,[52] and so, where plaintiff brings an action to recover rent, defendant may set up as a counterclaim an extinguishment of the right to recover rent under an option in the lease, and also demand a specific performance of an agreement therein to convey.[53]

In an action in the nature of ejectment for nonpayment of rent, defendant may set up an equitable counterclaim for damages resulting from his partial eviction from the demised premises.[54] Where a vendor of land brings an action for possession

36. Mass—Taylor-Stites Glass Co v Manufacturers' Bottle Co, supra.

37. Tex—Hallinan v. Levytansky, Civ.App, 102 S W 463.

38. Mo—State v Weatherby, 129 S W 2d 887, 344 Mo 848.
Or—Jacobson v. Wheeler, 230 P.2d 550, 191 Or 384
57 C J. p 442 note 16.
Equitable set-off generally see supra § 5.

39. Me—Lyman v Estes, 1 Me 182

40. Va—Wartman v. Yost, 22 Gratt 595, 53 Va 595.

41. U.S—Elliott v. Peet, D C Pa, 192 F. 699, affirmed 202 F. 434, 120 C C A 540
57 C J. p 442 note 20.

42. Mass—Stuart v Sargent, 186 N E 649, 283 Mass. 536.

43. Ind—Noblesville Milling Co v Johnson, 65 N E 2d 250, 116 Ind App 437.

44. Ill—People ex rel. Bradford Supply Co v. Circuit Court of Pulaski County, 66 N E 2d 420, 393 Ill 520—Townsend v Brinton, 10 N.E 2d 832, 292 Ill App 633
N J—Massari v. Einsiedler, 78 A 2d 572, 6 N J. 303.

45. Tex—Reeves v. White, Civ.App, 161 S W 43.

46. Cal.—Bank of America Nat Trust & Savings Ass'n v. Richardson, 85 P.2d 139, 29 Cal.App 2d 554

47. U S.—Tavitoff v Stepovich, C C.A Alaska, 91 F 2d 106.

48. Or—Wiggins v. Hendrickson, 229 P 2d 652, 191 Or. 285.

49. Conn—Hartford Nat. Bank & Trust Co v. Riverside Trust Co, 167 A 811, 117 Conn. 276.

50. N Y—New York Trust Co. v American Realty Co, 213 N.Y S 569, 215 App.Div 416.
57 C J. p 442 note 22.

51. N C.—Dempsey v. Rhodes, 93 N C 120.

52. N Y.—Weinheimer v. Ross, 99 N E. 145, 205 N.Y. 518.

53. N Y.—Hicksville, etc, R. Co v Long Island R Co, 48 Barb. 355

54. N.Y—Blair v. Claxton, 18 N.Y. 529.

against his vendee, who has been let into possession, the title being reserved, the latter may, by counterclaim in the same action, set up the contract of sale and ask for an account of the payments on the purchase money[55] In an action to recover the contract price of goods sold, defendant may counterclaim for an accounting of trust funds held by plaintiff, such relief necessarily or properly being involved in the action;[56] and in an action on promissory notes, given for the price of an interest in a chattel, defendant may set up an equitable counterclaim for an accounting of moneys subsequently received by plaintiff from the use or unlawful sale of the property.[57] The amount due on a bond for the conveyance of land may be counterclaimed in an action on a promissory note against the maker of the bond, where plaintiff was in possession of the land and defendant offered to make the conveyance provided for.[58]

§ 45. Secured Claims

A secured claim may ordinarily be set off or asserted as a counterclaim without first surrendering or exhausting the security; and an unsecured claim may be set off against a secured claim.

Since, as discussed in Pledges § 55 d (2), a pledgee is as a general rule under no obligation to surrender or enforce collaterals held by him before suing on the principal obligation, a secured claim may be set off without first surrendering the security,[59] or exhausting it;[60] nor is defendant compelled to realize on the security before setting up the demand as a counterclaim,[61] in the absence of an agreement to the contrary.[62] Conversely, a claim unsecured may be set off against a secured claim[63]

§ 46. Penalties

Whether or not a penalty may be set off or counterclaimed depends both on the statute involved and the nature of the penalty.

On the ground that a claim for a statutory penalty is for a sum certain rather than for a tort act, it has been held defendant may set off such a claim under a statute permitting a set-off in a suit for any debt and allowing a debt itself to lie for this set-off[64] or providing that mutual debts and liquidated or unliquidated demands not sounding in damages merely may be set off.[65] So, a party was authorized, in an action on a promissory note, to set off double damages provided by statute for injuries to property by disloyal parties during the Civil War[66] On the other hand, where recovery only by direct action is expressly provided by statute, penalties may not be recovered by way of counterclaim or other defensive pleading.[67] A statute authorizing a town to recover in an action of debt a penalty from a collector of taxes for failure to file his accounts, however, being exclusive of other remedies, the amount of the penalty cannot be set off in an action by the collector to recover his agreed compensation for collecting the taxes;[68] and under a statute requiring a counterclaim to be based on a contract existing at the time of the commencement of the action, a counterclaim based on defendant's right as creditor of a manufacturing corporation to recover a statutory penalty of plaintiff, trustee thereof, for the latter's failure to file the yearly report of the company will not lie.[69]

Under federal equity rule authorizing a counterclaim arising out of the transaction which is the subject matter of the suit or which may be the subject matter of an independent suit in equity, defendant, sued on secured promissory notes, could not counterclaim for the statutory penalty for failure of plaintiff, as assignee of such notes, to enter the assignment on the margin of the record of the lien.[70]

§ 47. Taxes

A claim for taxes generally is not a proper subject of set-off, recoupment, or reconventional demand.

A claim for taxes is not such a debt, demand, contract, or judgment as is allowed to be set off under the statutes of set-off, which are construed uniformly, in the light of public policy, to exclude the remedy in an action on any indebtedness of the state

55. N.C.—Pearsall v. Mayers, 64 N.C. 549

56. Okl.—Wyman v. Herard, 59 P. 1009, 9 Okl. 35

57. Wis.—Boyd v. Beaudin, 11 N.W. 521, 54 Wis. 193

58. Wis.—Atwater v. Schenck, 9 Wis. 160

59. Mich.—Wallace v. Finnegan, 14 Mich. 170, 90 Am.D. 243
57 C.J. p. 443 note 33.

60. W.Va.—Hudkins v. Ward, 3 S.E. 600, 30 W.Va. 204, 8 Am.S.R. 22.

61. N.Y.—Mattern v. Sage, 9 N.Y.S. 527, 16 Daly 142, affirmed 32 N.E. 649, 134 N.Y. 617
57 C.J. p. 443 note 35

62. Mich.—Willard v. Fralick, 31 Mich. 431.

63. Ind.—Spencer v. Chrisman, 15 Ind. 215
N.C.—Dameron v. Carpenter, 130 S.E. 328, 190 N.C. 595.

64. W.Va.—Beuke v. Boggs Run Min., etc., Co., 130 S.E. 132, 100 W.Va. 141
57 C.J. p. 443 note 40
Definition and nature of penalties see Penalties § 1.

65. Ala.—Rosser v. Bunn, 66 Ala. 89
57 C.J. p. 443 note 41

66. Ky.—Haddix v. Wilson, 3 Bush 523

67. S.C.—Globe Indem. Co. v. Cooper Motor Lines, 33 S.E.2d 405, 206 S.C. 154

68. Me.—Bragdon v. Freedom, 24 A. 895, 84 Me. 431.

69. N.Y.—Clapp v. Wright, 21 Hun 240.
57 C.J. p. 443 note 44.

70. U.S.—Bankston v. Commercial Trust, etc., Bank, Miss., 250 F. 985, 163 C.C.A. 235.

or municipality to one who is liable to the state or municipality for taxes.[71] Neither are they a proper subject of recoupment, since they do not arise out of the contract or transaction sued on.[72] A constitutional provision that taxes shall be collected without suit precludes a reconventional demand made for taxes, praying for a personal judgment against the tax debtor.[73]

§ 48. Parties to, and Mutuality of, Cross Demands

a. In general
b. In equity
c. Demands in favor of or against third persons

a. In General

(1) In general
(2) Set-off
(3) Counterclaim

(1) In General

As a general rule, in order that the defendant may set up a demand in recoupment, compensation, or reconvention to the plaintiff's demand, the demands must be mutual and subsisting between the same parties and must be due in the same capacity or right.

As a general rule, in the absence of a statute providing otherwise and subject to certain exceptions, in order that defendant may set up a demand in recoupment to plaintiff's demand the demands must be mutual and subsisting between the same parties,[74] and must be due in the same capacity or right.[75] This rule applies when defendant sets up his demand in compensation of plaintiff's demand[76] or when defendant sets up his demand in reconvention.[77] In accordance with statutory provisions, compensation cannot take place to the prejudice of the rights of a third person.[78]

(2) Set-Off

As a general rule, in order to warrant a set-off the demands must be mutual and subsisting between the same parties, and furthermore must be due in the same capacity or right, and there must be mutuality as to the quality of the right.

It is a broad general rule of practically universal application that, in the absence of statutes otherwise providing and subject to certain exceptions, in order to warrant a set-off the demands must be mutual and subsisting between the same parties,[79] and

71. Neb.—Nebraska City v. Nebraska City Hydraulic Gas Light, etc., Co., 2 N.W. 870, 9 Neb. 339.
47 C.J. p. 443 note 49.

72. Mass.—Home Sav. Bank v. Boston, 131 Mass. 277.

73. La.—Rivers v. New Orleans, 8 So. 484, 42 La.Ann. 1196.

74. Mass.—Holton v. American Pastry Products Corporation, 174 N.E. 663, 274 Mass. 268.
57 C.J. p. 446 note 58.

75. Conn.—Kinne v. New Haven, 32 Conn. 210.
Ga.—Kinard v. Sanford, 64 Ga. 630.

76. La.—Edwards v. Max Thieme Chevrolet Co., App., 191 So. 569—Brock v. Natalbany Lumber Co., App., 179 So. 322—Pan American Petroleum Corporation v. Featherstone, App., 153 So. 566.
57 C.J. p. 446 note 60.

77. La.—Findley v. Breedlove, 4 Mart.,N.S., 105.

Party called in warranty to defend an action the same as, or in place of, the original defendant, may plead in reconvention the same as the original defendant.—Warren v. Creel, La.App., 191 So. 153.

78. La.—In re Liquidation of Canal Bank & Trust Co., 162 So. 31, 182 La. 421, 102 A.L.R. 1091.

Prejudice held not shown.
La.—Saunier v. Saunier, 47 So.2d 19, 217 La. 607.

79. U.S.—American Sur. Co. of New York v. City of Akron, C.C.A.Ohio, 95 F.2d 966—Southern Ry. Co. v. Elliott, C.C.A.S.C., 86 F.2d 294—Western Powder Mfg. Co. v. Brewerton Coal Co., C.C.A.Ill., 81 F.2d 85, certiorari denied Central Illinois Elec. & Gas Co. v. Manufacturers Finance Co., 57 S.Ct. 11, 299 U.S. 549, 81 L.Ed. 404—Jewett v. Martinsville Milling Co., C.C.A. Ind., 76 F.2d 153—Minneapolis Nat. Bank of Minneapolis, Kan., v. Liberty Nat. Bank of Kansas City, C.C.A.Kan., 72 F.2d 434—Dickens v. Howard, C.C.A.Ga., 67 F.2d 263—Barrington v. Maner, C.C.A.Tex., 54 F.2d 917—Hutchinson Coal Co. v. Miller, D.C.W.Va., 20 F.Supp. 718—Hulse v. Knapp, D.C.N.Y., 20 F.Supp. 137—U.S. v. Clawson, D.C. Wyo., 13 F.Supp. 178—Wisdom v. Guess Drycleaning Co., D.C.Miss., 5 F.Supp. 762.
Ala.—King v. Porter, 160 So. 101, 230 Ala. 112.
Ariz.—Mortgage Inv. Co. of El Paso, Tex. v. Taylor, 68 P.2d 340, 49 Ariz. 558.
Cal.—Harrison v. Adams, 128 P.2d 9, 20 Cal.2d 646—Petersen v. Lyders, 33 P.2d 1030, 139 Cal.App. 303, certiorari denied Lyders v. Petersen, 55 S.Ct. 514, 294 U.S. 716, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 635, 294 U.S. 734, 79 L.Ed. 1262—Patterson v. Henderson Tire & Rubber Co., 296 P. 304, 112 Cal.App. 48.
Colo.—Todd v. Elkins, 72 P.2d 696, 101 Colo. 269.
Conn.—Shippee v. Pallotti, Andretta & Co., 159 A. 494, 114 Conn. 560.
Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 6 So.2d 531, 149 Fla. 507—W. E. Lee, Inc., v. Trailer Co. of America, 160 So. 678, 119 Fla. 696, followed in Standard Grove Co. v. Trailer Co. of America, 160 So. 927, 119 Fla. 698—Everglade Cypress Co. v. Tunnicliffe, 148 So. 192, 107 Fla. 675.
Ga.—Cox v. Stowers, 50 S.E.2d 339, 204 Ga. 595—MacNeill v. Bazemore, 21 S.E.2d 414, 194 Ga. 406—Hollingsworth v. Georgia Fruit Growers, 196 S.E. 766, 185 Ga. 873—Trotter v. Lunceford, 195 S.E. 475, 57 Ga.App. 358.
Ind.—Hammond Pure Ice & Coal Co. v. Heitman, 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997—Teeters v. City Nat. Bank of Auburn, 14 N.E.2d 1004, 214 Ind. 498, 118 A.L.R. 383—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 192 N.E. 369, 99 Ind.App. 325—Wolcott v. Pierre, 188 N.E. 596, 100 Ind. App. 16.
Kan.—Beeler & Campbell Supply Co. v. Warren, 86 P.2d 482, 149 Kan. 135.
Ky.—McBride v. Dewey Portland Cement Co., 181 S.W.2d 46, 297 Ky. 662—Marcum v. Wilhoit, 162 S.W. 2d 10, 290 Ky. 532—Daniel v. Wilhoit, 158 S.W.2d 153, 289 Ky. 79—Supreme Liberty Life Ins. Co. v. Ridley's Adm'r, 87 S.W.2d 940, 261 Ky. 403—Louisville & N.R. Co. v. Dry Branch Coal Co., 65 S.W.2d

furthermore must be due in the same capacity or | right,[80] and there must be mutuality as to the quality

1008, 252 Ky. 124—Sowards Ins Agency v Ohio Valley Fire & Marine Ins. Co, 47 S W 2d 1043, 243 Ky. 224.

Md.—Cockey v Hospelhorn, 11 A 2d 466, 178 Md. 80, 128 A L R 802—Perring v Baltimore Trust Corporation. 190 A. 516, 171 Md 618—Ghingher v. Fanseen, 172 A. 75, 166 Md. 519.

Mass—Goldstein v. Katz, 91 N E 2d 237, 325 Mass 428

Mich—Reichert v. Farmers' State Sav Bank, 248 N.W. 630, 263 Mich 305

Miss—Landau v. Landau, 187 So 224, 185 Miss 45—General Motors Acceptance Corporation v. Trull, 148 So 390, 166 Miss. 490

Mo—**Corpus Juris cited in** Sturdivant Bank v Stoddard County, 58 S W 2d 702, 704, 332 Mo 568—**Corpus Juris cited in** Mitchell v Bank of Ava, 65 S W 2d 104, 106, 333 Mo 1195—**Corpus Juris cited in** Helstein v. Schmidt, App, 78 S W 2d 132, 136—**Corpus Juris cited in** Dalton v Sturdivant Bank, 76 S.W. 2d 425, 426, 230 Mo App 800.

Neb—Ben B Wood Realty Co. v. Wood, 273 N W. 493, 132 Neb. 817—Luikart v. Jamieson, 256 N W 507, 127 Neb. 670—Bliss v. Farmers' Grain & Stock Co, 254 N W 725, 127 Neb 147—State ex rel Sorenson v. Weston Bank, 251 N W. 164, 125 Neb. 612—Continental Nat. Bank of Lincoln v. Wilkinson, 247 N.W. 604, 124 Neb. 675—American Gas Const. Co v. Lisco, 241 N.W. 89, 122 Neb 607.

N.H.—Plante v. M. Shortell & Son, 24 A 2d 498, 92 N.H. 38, 139 A.L R 1325.

N.Y.—In re Consolidated Indem. & Ins. Co, 38 N.E 2d 119, 287 N.Y 34—In re New York Title & Mortgage Co. (Series Q-1), 23 N.Y S 2d 303, 260 App.Div. 729—In re Proffen's Estate, 24 N.Y.S.2d 889, 175 Misc. 447—In re Schwarzmann's Estate, 21 N.Y S 2d 912, 174 Misc. 834.

N.C.—Hoyle v. Carter, 1 S E 2d 93, 215 N C 90—In re Bank of Sampson, 171 S E 436, 205 N.C. 333.

Ohio—Witham v. South Side Building & Loan Ass'n of Lima, 15 N E 2d 149, 133 Ohio St 560—Andrews v. State, 178 N E 581, 124 Ohio St. 348, 83 A L R 141—Reconstruction Finance Corp v. Howell Motor Car Co, 31 Ohio N.P,N S., 409

Okl—Sarkeys v. Marlow, 235 P 2d 676—Security Nat Bank of Duncan v Johnson, 155 P 2d 249, 195 Okl 107—**Corpus Juris cited in** Wattenbarger v. City of Vinita, 40 P.2d 6, 9, 170 Okl. 222.

Pa.—Dickerson v Dickersons Overseas Co., 85 A 2d 102, 369 Pa. 244—In re Kenin's Estate, 29 A 2d 495, 346 Pa. 127—Porter v. Levering, 199 A. 482, 330 Pa. 392—Appeal of Commonwealth Trust Co of Pittsburgh, 188 A 200, 324 Pa 161, 107 A L R. 1453—Adler v Dickstein, 12 A 2d 489, 139 Pa Super 447—Ames v Coleraine Colliery Co., 200 A. 261, 131 Pa Super 286—Squire v Merchants' Warehouse Co, 196 A. 915, 130 Pa Super 8—In re Thacher's Estate, 17 Pa Dist & Co. 657, affirmed 166 A. 873, 311 Pa 278—B F Perkins & Son v Capital Bakers, Com Pl, 47 Dauph Co 399—Duddy v Ciccarone, Com. Pl, 57 Montg Co. 7.

S C—Zimmerman v Home Ins. Co, 177 S.E. 895, 175 S C 18—**Corpus Juris quoted in** Elliott v. Carroll, 173 S E 908, 911, 172 S.C 276—Ex parte Rizer, 164 S E 131, 165 S C 487

Tex—Rose v. Motes, Civ.App, 220 S. W 2d 734—Thompson v Prince, Civ.App, 126 S W 2d 574 Error refused—Dennis v Smith, Civ. App, 49 S W 2d 909

Va—First Nat Bank of Waynesboro v. Johnson, 31 S E 2d 581, 183 Va 227—Broaddus v Gresham, 26 S.E 2d 33, 181 Va 725—Dickenson v. Charles, 4 S E 2d 351, 173 Va. 393—Elswick v Combs, 198 S E 501, 171 Va. 112—Stowers v. Dutton, 171 S E 510, 161 Va 658

Wash—Johnson v California-Washington Timber Co., 296 P. 159, 161 Wash 96

Wis.—Heinemann Bros Co. v Wendt, 209 N W 699, 190 Wis. 503.

57 C.J. p 444 note 55.

Mutuality is implied in the word "set-off."—Barton v. McKay, 193 A. 733, 135 Me. 197

A technical set-off is applicable to mutual demands, debts, and credits—Frank v. Warehelm, 7 A.2d 186, 177 Md. 43.

Only cancellation of mutual indebtedness is involved in right of set-off.—American Bonding Co v. Anderson, C.C.A.Ky, 110 F 2d 961—Commissioners of Sinking Fund of Louisville, Ky. v. Anderson, C.C A Ky., 110 F.2d 961, certiorari denied Commissioners of Sinking Fund of City of Louisville v Anderson, 61 S.Ct. 28, 311 U.S. 669, 85 L Ed. 429

Reciprocal rights and obligations of the parties may be considered in determining whether mutuality exists between the parties with respect to a particular transaction, as concerns set-off—Teeters v City Nat Bank of Auburn, 14 N E 2d 1004, 214 Ind 498, 118 A.L.R. 383

Statute prohibiting payment from tendered set-off

Where a statute prohibits defendant's payment of plaintiff's demand from what is tendered as a set-off, parties are not mutually indebted, within statute allowing set-off.—Sturdivant Bank v Stoddard County, 58 S W 2d 702, 332 Mo. 568—Smith v. Citizens Bank of Gerald, 106 S. W 2d 45, 232 Mo.App. 906.

80. U S—Southern Ry Co v. Elliott, C C A S C, 86 F 2d 294—Western Powder Mfg Co. v Brewerton Coal Co, C C A Ill, 81 F.2d 85, certiorari denied Central Illinois Elec & Gas Co v Manufacturers Finance Co, 57 S Ct 11, 299 U.S 549, 81 L Ed. 404—Jewett v. Martinsville Milling Co, C C A Ind, 76 F 2d 153—Dickens v. Howard, C C. A Ga, 67 F 2d 263—U S. v. Clawson, D.C Wyo, 13 F Supp 178—Wisdom v Guess Drycleaning Co, D C Miss., 5 F Supp 762—Thomas v. Potter Title & Trust Co., D.C. Pa, 2 F Supp 12

Ala.—King v Porter, 160 So 101, 230 Ala 112

Cal—Harrison v Adams, 128 P 2d 9, 20 Cal 2d 646—Petersen v Lyders, 33 P 2d 1030, 139 Cal.App. 303, certiorari denied Lyders v Petersen, 55 S Ct. 514, 294 U.S 716, 79 L Ed 1249, rehearing denied 55 S Ct 635, 294 U S 734, 79 L Ed. 1262—Patterson v Henderson Tire & Rubber Co, 296 P. 304, 112 Cal. App 48

Conn—Shippee v. Pallotti, Andretta & Co, 159 A 494, 114 Conn 560.

Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 6 So 2d 531, 149 Fla. 507—Everglade Cypress Co. v. Tunnicliffe, 148 So 192, 107 Fla. 675—Coffin v. Talbot, 148 So. 184, 110 Fla. 131.

Ga—Hollingsworth v. Georgia Fruit Growers, 196 S E 766, 185 Ga. 873

Ill.—Knowles v. Goodrich, 60 Ill.App. 506

Ind.—Hammond Pure Ice & Coal Co. v. Heitman, 47 N E 2d 309, 221 Ind. 352, 145 A L R. 997—Teeters v. City Nat. Bank of Auburn, 14 N.E 2d 1004, 214 Ind. 498, 118 A.L R. 383—Old First Nat Bank & Trust Co of Fort Wayne v. Snouffer, 192 N E. 369, 99 Ind App. 325—Wolcott v. Pierre, 188 N.E. 596, 100 Ind.App. 16.

Ky—Marcum v. Wilhoit, 162 S.W 2d 10, 290 Ky 532—Daniel v. Wilhoit, 158 S W 2d 153, 289 Ky 79—Supreme Liberty Life Ins. Co. v Ridley's Adm'r, 87 S W.2d 940, 261 Ky 403.

La—Wilkinson v. Victory Gravel Co, 150 So. 18, 177 La 1064.

Md—Perring v Baltimore Trust Corporation, 190 A. 516, 171 Md. 618—Hagerstown Bank & Trust Co v. Trustees of College of St James, 176 A. 276, 167 Md. 646—Ghingher v. Fanseen, 172 A. 75, 166 Md 519

Mo—**Corpus Juris cited in** Mitchell v Bank of Ava, 65 S W.2d 104, 106, 333 Mo 1195—**Corpus Juris cited in** Sturdivant Bank v. Stoddard Coun-

of the right.[81] In order to be mutual the cross demands set up ordinarily must be shown to belong individually to defendant,[82] with a corresponding right to sue for them in his individual name,[83] and defendant, as a general rule, cannot set off a demand on which he is not entitled to sue in his own name,[84] but the names in which suit may be brought is not the only criterion of the right of set-off and mutuality of right in a set-off is not necessarily circumscribed by the right to bring an action.[85]

It has been held that the rule of mutuality relates to identity of interest at the time the right of set-off arises and not to identity of origin,[86] and that the right of set-off is not limited to mutual dealings[87] and need not necessarily arise between the same parties.[88] An exception to the rule requiring mutuality of demands in order to warrant a set-off may arise out of the agreement of the parties.[89] Under some statutory provisions either party can plead and prove a set-off in defense of a claim by the other party,[90] and the set-off need not exist between all the parties plaintiff and defendant,[91] but under a statute which provides that defendant may set forth a set-off in his answer the remedy of set-off is limited to a defendant in an action.[92]

Litigation between husband and wife. It has been held that in a suit by a wife against her husband he cannot plead as a set-off a promissory note given to his wife for moneys belonging to her before marriage, but remaining her separate property after-

ty, 58 S W 2d 702, 704, 332 Mo 568 —**Corpus Juris cited in** Dalton v Sturdivant Bank, 76 S W 2d 425, 426, 230 Mo.App 800

Neb —Ben B. Wood Realty Co v Wood, 273 N W 493, 132 Neb 817 —Luikart v Jamieson, 256 N W 507, 127 Neb 670—Bliss v Farmers' Grain & Stock Co, 254 N W. 725, 127 Neb. 147—Continental Nat Bank of Lincoln v Wilkinson, 247 N.W 604, 124 Neb 675

N H —Plante v M Shortell & Son, 24 A.2d 498, 92 N H 38, 139 A L R 1325

N J.—Goodwillie v City of Bayonne, 65 A.2d 742, 2 N.J 88, 89 A L R 2d 206

N Y.—In re Consolidated Indem & Ins Co, 38 N E.2d 119, 287 N.Y 34—Pink v Title Guarantee & Trust Co, 8 N E 2d 321, 274 N.Y 167, reargument denied 10 N E 2d 575, 274 N.Y 610—In re New York Title & Mortgage Co (Series Q-1), 23 N.Y S 2d 203, 260 App Div 726—In re Proffen's Estate, 24 N.Y S 2d 889, 175 Misc 447—In re Schwarzmann's Estate, 21 N Y S 2d 912, 174 Misc 834—In re Chinese Merchants' Bank, Limited, New York Agency, 272 N.Y S. 764, 151 Misc 425.

N C.—Hoyle v Carter, 1 S E 2d 93, 215 N C 90—In re Bank of Sampson, 171 S E. 436, 205 N C 333.

Ohio —Witham v. South Side Building & Loan Ass'n of Lima, 15 N.E 2d 149, 133 Ohio St 560—Andrews v. State, 178 N E 581, 124 Ohio St 348, 83 A.L R 141—Reconstruction Finance Corp v. Howell Motor Car Co, 31 Ohio N P,N S, 409

Okl —Sarkeys v. Marlow, 235 P 2d 676—**Corpus Juris cited in** Wattenbarger v. City of Vinita, 40 P 2d 6, 9, 170 Okl. 222

Pa —Dickerson v Dickersons Overseas Co, 85 A 2d 102, 369 Pa 244 —In re Kenin's Estate, 29 A 2d 495, 346 Pa. 127—Appeal of Commonwealth Trust Co of Pittsburgh, 188 A. 200, 324 Pa 161, 107 A L R. 1453 —Kelter v American Bankers' Finance Co, 160 A 127, 306 Pa 483, 82 A.L R 999

S.C —Zimmerman v Home Ins Co, 177 S E 895, 175 S C 18—**Corpus Juris quoted in** Elliott v. Carroll, 173 S.E 908, 911, 172 S C 276

Tex —Rose v. Motes, Civ App., 220 S W 2d 734—Thompson v. Prince, Civ App, 126 S W 2d 574, error refused—Dennis v. Smith, Civ.App, 49 S W 2d 909

Va —Hoffman v. Stuart, 51 S E 2d 239, 188 Va 785, 6 A L R 2d 247—First Nat Bank of Waynesboro v Johnson, 31 S E 2d 581, 183 Va 227

Wash —Johnson v. California-Washington Timber Co, 296 P. 159, 161 Wash 96

57 C J p 445 note 56.

81. U S —Huchinson Coal Co v. Miller, D C W Va, 20 F Supp. 718

Conn —Shippee v Pallotti, Andretta & Co, 159 A 494, 114 Conn. 560

Mo —**Corpus Juris cited in** Mitchell v Bank of Ava, 65 S.W 2d 104, 106, 333 Mo 1195—**Corpus Juris cited in** Sturdivant Bank v Stoddard County, 58 S W 2d 702, 704, 332 Mo 568

Okl —Sarkeys v. Marlow, 235 P 2d 676

Pa —Dickerson v Dickersons Overseas Co, 85 A.2d 102, 369 Pa 244

S C —**Corpus Juris quoted in** Elliott v Carroll, 173 S E 908, 911, 172 S C 276

57 C.J. p 445 note 57.

82. Pa —Hunter v Henning, 103 A 61, 259 Pa 347

S C —**Corpus Juris quoted in** Elliott v Carroll, 173 S E 908, 911, 172 S C 276

83. Pa —Dickerson v Dickersons Overseas Co., 85 A 2d 102, 369 Pa 244—Hunter v Henning, 103 A 61, 62, 259 Pa 347.

S C —**Corpus Juris quoted in** Elliott v Carroll, 173 S E 908, 911, 172 S C. 276

Independent action

Test of mutuality of demand in order to determine whether a defendant is entitled to a set-off is whether defendant could recover against plaintiff in an independent action, so that when legislature creates an action that does not admit of such mutuality of adjustment set-off does not apply —O'Dowd v U S. Fidelity & Guaranty Co., 189 A. 97, 117 N J Law 444

84. Md —Fidelity etc, Co v. Poe, 128 A 465, 147 Md 502.

57 C J p 446 note 62

85. Pa —In re Gordon, 25 A 2d 304, 344 Pa 262—Gordon v Union Trust Co of Pennsylvania, 162 A. 293, 308 Pa 493

86. Conn —Hartford Nat Bank & Trust Co v Riverside Trust Co, 167 A 811, 117 Conn 276—Bassett v City Bank & Trust Co, 160 A 60, 115 Conn 1, 81 A L R 1488.

Pa —In re Thacher's Estate, 17 Pa Dist & Co 657, affirmed 166 A 873, 311 Pa 278

87. Ga —Trotter v. Lunceford 195 S E. 475, 57 Ga App. 358—Wood v. Keysville Lumber Co, 175 S E 923, 49 Ga App 799

Assigned claim as set-off or counterclaim see infra § 55

88. Ga —Trotter v Lunceford, 195 S E 475, 57 Ga App 358—Wood v Keysville Lumber Co, 175 S E. 923, 49 Ga App. 799.

89. Ill —Walker v. Chovin, 16 Ill. 489

90. Okl.—Robertson v. Howerton, 156 P 329, 56 Okl 555.

57 C J. p 446 note 65.

91. Ill —State Bank of St Charles v Burr, 14 N.E 2d 511, 295 Ill.App 15

Okl —Robertson v. Howerton, 156 P 329, 56 Okl 555.

57 C J p 446 note 65.

92. Ind —Anderson v Biggs, 77 N. E.2d 909, 118 Ind App. 266.

ward,[93] and in an action on a note by a wife against her husband he has been held not entitled to plead as set-off gratuitous improvements made by him upon their farm owned by them as tenants in common.[94] On the other hand, in a husband's action against his wife for contribution for expenditures made by the husband on property owned by them, before their separation, as tenants in common, the wife has been held entitled to credit for expenditures made by her unless the evidence shows they were intended to be made without claim for credit.[95]

(3) Counterclaim

The rule that cross demands must be mutual and subsisting between the same parties, in the same capacity or right, and that there must be mutuality as to the quality of the right generally applies when the defendant sets up his demand as a counterclaim to the plaintiff's demand.

The rule that cross demands must be mutual and subsisting between the same parties, in the same capacity or right, and that there must be mutuality as to the quality of the right generally applies when defendant sets up his demand as a counterclaim to plaintiff's demand.[96] Accordingly, defendant cannot set up as a counterclaim allegations of such a character that, if they were in the form of a complaint in a separate action, another person, not a party to the pending suit, would be a necessary defendant to such separate action.[97] One who is not entitled to sue on a contract cannot maintain a counterclaim based on such contract.[98] The rule as to the necessity of mutuality of cross demands does not apply where the counterclaim interposed is really in the nature of a cross suit within the meaning of a statute permitting such a suit.[99]

Under some statutory provisions it has been held unnecessary that a counterclaim exist as between all parties plaintiff and defendant,[1] and, in a proper case, one defendant in an action can counterclaim against another defendant therein;[2] but under other statutory provisions a counterclaim which involves a controversy between defendants only is not authorized,[3] and a counterclaim must raise issues affecting plaintiff.[4] Under some statutes one brought into a lawsuit on the theory of securing a complete determination of the issues has been held entitled to proceed by counterclaim against the original plaintiff,[5] or against the original defendant,[6] or against

93. Ind.—McCarty v. Mewhinney, 8 Ind. 512
Debt or demand of husband or wife of party to action see infra § 53.

94. Kan.—Greer v. Greer, 24 Kan. 101.

95. Conn.—Seidel v. Seidel, 149 A. 394, 110 Conn. 651.

96. U.S.—Minneapolis Nat. Bank of Minneapolis, Kan., v. Liberty Nat. Bank of Kansas City, C.C.A.Kan., 72 F.2d 434.
Ariz.—Correll v. Peoples Freight Line, 68 P.2d 677, 50 Ariz. 38.
Cal.—Walters v. Bank of America Nat. Trust & Sav. Ass'n, 59 P.2d 983, 106 A.L.R. 55, reheard 69 P.2d 839, 9 Cal.2d 46, 110 A.L.R. 1259—Terry Trading Corp. v. Barsky, 292 P. 474, 210 Cal. 428—Bond v. Farmers & Merchants Nat. Bank, Los Angeles, 149 P.2d 722, 64 Cal.App.2d 842.
Ga.—MacNeill v. Bazemore, 21 S.E.2d 414, 194 Ga. 406.
Ill.—**Corpus Juris cited in** People v. Frick, 11 N.E.2d 955, 958, 367 Ill. 446—Countiss v. Whiting, 29 N.E.2d 277, 306 Ill.App. 548.
Ind.—London & Lancashire Indem. Co. of America v. Community Sav. & Loan Ass'n, 4 N.E.2d 688, 102 Ind.App. 665.
Iowa.—Harriman v. Roberts, 235 N.W. 751, 211 Iowa 1372.
Neb.—American Gas Const. Co. v. Lisco, 241 N.W. 89, 122 Neb. 607.
N.Y.—Select Theatres Corp. v. Harms, Inc., 78 N.Y.S.2d 159, 273 App.Div. 505, appeal denied 79 N.Y.S.2d 880, 273 App.Div. 1007—Binon v. Boel, 66 N.Y.S.2d 425, 271 App.Div. 505, affirmed 74 N.E.2d 466, 297 N.Y. 528—Alex Grossmann & Co. v. Merchants Refrigerating Co., 5 N.Y.S.2d 494, 255 App.Div. 146, affirmed 21 N.E.2d 618, 280 N.Y. 784—In re Proffen's Estate, 24 N.Y.S.2d 889, 175 Misc. 447—Truman Homes v. Lane Holding Corp., 38 N.Y.S.2d 403.
N.C.—Hoyle v. Carter, 1 S.E.2d 93, 215 N.C. 90.
Pa.—Dickerson v. Dickersons Overseas Co., 85 A.2d 102, 369 Pa. 244—Porter v. Levering, 199 A. 482, 330 Pa. 392—Abrahams v. Wilson, 3 A.2d 1016, 134 Pa.Super. 297—B. F. Perkins & Son v. Capital Bakers, Com.Pl., 47 Dauph.Co. 399—Hughes v. Ostroskie, Com.Pl., 38 Luz.Leg.Reg. 93.
Utah.—Wood v. Akridge, 36 P.2d 804, 84 Utah 468.
Wis.—Chalupnik v. Savall, 263 N.W. 352, 219 Wis. 442.
57 C.J. p. 446 note 59.

97. Conn.—Lowndes v. City Nat. Bank, 66 A. 514, 79 Conn. 693.
Wis.—McConihe v. Hollister, 19 Wis. 269.

98. U.S.—Craig v. Consolidated Cement Corporation, C.C.A.Kan., 69 F.2d 613.
Right of action vested in trustee
Where bondholder was sued by corporation, bondholder's counterclaim on defaulted bonds issued by corporation and on which right of action was vested in trustee was held not maintainable on ground that only relief sought was use of corporation's obligation represented by bonds, to arrive at balance owing to corporation.—Craig v. Consolidated Cement Corporation, supra.

99. Pa.—Beason v. Pierce, 184 A. 650, 321 Pa. 398.

1. Okl.—Robertson v. Howerton, 156 P. 329, 56 Okl. 555.
57 C.J. p. 446 note 65.

2. U.S.—U.S., for Use and Benefit of Magnolia Petroleum Co. v. Core & Planche, D.C.La., 58 F.Supp. 607, modified Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527.
Ill.—Sheets v. Security First Mortg. Co., 12 N.E.2d 324, 293 Ill.App. 222.

3. N.Y.—Hillary Holding Corp. v. Brooklyn Jockey Club, 78 N.Y.S.2d 151, 273 App.Div. 538, appeal and reargument denied 79 N.Y.S.2d 868, 273 App.Div. 996—Csicsics v. Hallay, 10 N.Y.S.2d 440, 170 Misc. 364.

4. N.Y.—Hillary Holding Corp. v. Brooklyn Jockey Club, 78 N.Y.S.2d 151, 273 App.Div. 538, appeal and reargument denied 79 N.Y.S.2d 868, 273 App.Div. 996—Csicsics v. Hallay, 10 N.Y.S.2d 440, 170 Misc. 364—Schwabacher v. Ehrich, 6 N.Y.S.2d 316, 168 Misc. 869, affirmed 6 N.Y.S.2d 381, 254 App.Div. 847.

5. Ill.—Lutgert v. Schaeflein, 47 N.E.2d 359, 318 Ill.App. 83.

6. Ill.—Lutgert v. Schaeflein, supra.

both,[7] provided the nature of his claim so warrants,[8] but under other statutes, where an additional defendant is brought into a suit by the original defendant therein, it has been held that such additional defendant cannot file a counterclaim against the original defendant.[9]

b. In Equity

Where there are cross demands between two parties of such a nature that if both were recoverable at law they would be the subject of legal set-off, then if either of the demands is a matter of equitable jurisdiction the set-off ordinarily will be enforced in equity.

In accordance with the rule that courts of equity usually follow the law in matters of set-off, in the absence of any intervening equity, where there are cross demands between two parties of such a nature that if both were recoverable at law they would be the subject of legal set-off, then if either of the demands is a matter of equitable jurisdiction the set-off ordinarily will be enforced in equity.[10] However, a right to an equitable set-off[11] or counterclaim[12] will be disallowed where to permit it would impair or destroy the rights or equities of a third person

As a general rule in equity, as at law, the right of set-off is reciprocal, and only mutual claims and such as are in the same right or capacity can be set off,[13] but this doctrine of mutuality is not permitted to work an injustice, for whenever it is necessary to effect a clear equity or to prevent an irremediable injustice the set-off will be allowed, in equity, even though the debts are not mutual, and the set-off, therefore, one which a court of law would not be authorized to make,[14] unless the rights of third persons will thereby be adversely affected[15] or unless one of the claims is owned in whole or in part by a third person[16]

In such jurisdictions as permit or require the administration of law and equity by the same court, it has been held that the equitable exception to the strict rule of mutuality may be applied even when plaintiff's action was really an action at law[17]

7. Ill—Lutgert v Schaeflein, supra

8. Ill—Lutgert v. Schaeflein, supra

9. Pa—Stack v Latimer, 27 Pa Dist. & Co. 166.

10. Md—Berger v. Clendinen, 40 A. 705, 88 Md 151.
57 C J. p 446 note 68.
An equitable cross-bill has been held to be a counterclaim within the meaning of a statute requiring a counterclaim to be in favor of defendant and against plaintiff—Wanstrath v. Kapel, 190 S W 2d 241, 354 Mo 565—Fulton v. Fisher, 143 S W. 438, 239 Mo. 116

11. Ky—Supreme Liberty Life Ins Co v. Ridley's Adm'r, 87 S W.2d 940, 261 Ky 403.

12. U.S—Southern Pac Co v. H. Moffat Co, D C Nev., 45 F.Supp. 924.

13. U.S—Dickens v. Howard, C C. A Ga., 67 F 2d 263—Union Indemnity Co v Stevens, C C.A Miss, 57 F 2d 839—Updike v. Oakland Motor Car Co, C C A.N Y, 53 F.2d 369—In re First Nat Bank, D.C Ill., 23 F Supp 255—Messick v Rardin, D C Ill, 6 F Supp 200, appeal dismissed, C C A, Rardin v Messick, 78 F 2d 643—Thomas v. Potter Title & Trust Co., D C.Pa., 2 F Supp. 12.
Fla.—**Corpus Juris cited in** Durham Tropical Land Corporation v Sun Garden Sales Co, 151 So 327, 106 Fla. 429, rehearing denied 143 So. 758, 106 Fla. 429.
Ga—Holmes v Walker, 63 S E 2d 359, 207 Ga 582.
Ky.—Greasy Brush Coal Co. v Hays, 166 S W.2d 983, 292 Ky. 517—Supreme Liberty Life Ins. Co. v Ridley's Adm'r, 87 S W 2d 940, 261 Ky 403—Bryant Bros. v Wilson, 69 S W.2d 1020, 253 Ky 578
Me—Cooper v Fidelity Trust Co, 170 A 726, 132 Me 260.
Md—Perring v Baltimore Trust Corporation, 190 A. 516, 171 Md 618
Mo—Sturdivant Bank v Stoddard County, 58 S W 2d 702, 332 Mo 568—Smith v Citizens Bank of Gerald, 106 S W 2d 45, 232 Mo App. 906—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S W 2d 425, 426, 230 Mo.App 800—England v. Barnes, App., 70 S W 2d 69
Neb—State ex rel Sorensen v. Weston Bank, 251 N W 164, 125 Neb 612
Ohio—Metropolitan Life Ins Co v Riek, 23 N E 2d 524, 62 Ohio App 216—Black & Decker Mfg Co v Union Trust Co, 4 N E 2d 929, 53 Ohio App 356—Reconstruction Finance Corp v Howell Motor Car Co, 31 Ohio N P, N S, 409
Pa—Abrahams v Wilson, 3 A 2d 1016, 134 Pa Super 297.
S.C—**Corpus Juris quoted in** Elliott v Carroll, 173 S E 908, 911, 172 S C 276.
Tenn—Helms v Citizens Bank of Erwin, 97 S W.2d 665, 20 Tenn App. 268
Va—Broaddus v. Gresham, 26 S.E 2d 33, 181 Va. 725—Elswick v. Combs, 198 S E 501, 171 Va 112—Stowers v. Dutton, 171 S E. 510, 161 Va 658.
57 C J. p 446 note 70

14. U S—Commissioners of Sinking Fund of Louisville v Anderson, D C Ky, 20 F Supp 217, affirmed for plaintiff, C C A, 110 F 2d 961, certiorari denied Commissioners of Sinking Fund of City of Louisville v Anderson, 61 S Ct. 28, 311 U S 669, 85 L Ed 429—American Bonding Co v Anderson, D C.Ky, 20 F. Supp 217, reversed for defendant on other grounds, C C A, 110 F 2d 961
Ill—People ex rel Nelson v Joliet Trust & Savings Bank, 275 Ill App. 138.
Ind—Hammond Pure Ice & Coal Co v Heitman, 47 N E 2d 309, 221 Ind 352, 145 A L R. 997—Feucht v. Real Silk Hosiery Mills, 12 N E 2d 1019, 105 Ind App 405—Old First Nat Bank & Trust Co of Fort Wayne v Snouffer, 192 N E 369, 99 Ind App 325—Wolcott v Pierre, 188 N E 596, 100 Ind App 16.
Ky—Marcum v Wilhoit, 162 S W 2d 10, 290 Ky 532—**Corpus Juris quoted in** Bryant Bros v Wilson, 69 S W 2d 1020, 1023, 253 Ky 578
Me—Cooper v Fidelity Trust Co, 170 A 726, 132 Me 260
Mo—**Corpus Juris cited in** Dalton v Sturdivant Bank, 76 S W 2d 425, 426, 230 Mo App 800
N D—Marmarth School Dist No 12 of Slope County v Hall, 260 N.W. 411, 65 N D 509
Ohio—Black & Decker Mfg. Co. v Union Trust Co, 4 N E 2d 929, 53 Ohio App 356
57 C J. p 447 note 71.

15. Pa—Appeal of Commonwealth Trust Co of Pittsburgh, 188 A 200, 324 Pa 161, 107 A L R. 1453.

16. Ind—Hammond Pure Ice & Coal Co v Heitman, 47 N E.2d 309, 221 Ind 352, 145 A.L R. 997—Teeters v City National Bank of Auburn, 14 N E.2d 1004, 214 Ind 498—Wolcott v Pierre, 188 N E 596, 100 Ind App 16

17. Ind—Porter v. Roseman, 74 N

Thus equity may, in a proper case, set off a debt without regard to strict mutuality or whether the debts are due in the same right on a showing of insolvency[18] or in cases of nonresidence.[19]

c. Demands in Favor of or against Third Persons

As a general rule a debt against a third person not a party to the record, or a demand against the plaintiff in favor of a third person not a party to the action cannot be pleaded in recoupment, compensation, or reconvention, or as a counterclaim, cross action, or set-off.

As a general rule a debt against a third person not a party to the record cannot be pleaded in recoupment,[20] compensation,[21] or as a set-off.[22] A debt or demand against a third person not a party to the record ordinarily cannot be pleaded in reconvention[23] or as a counterclaim,[24] but the mere mention of the connection which a third person not a party to the action had with plaintiff in the transaction on which the counterclaim is based does not render the counterclaim defective.[25] Under some statutes defendant may, in a proper case, seek relief by counterclaim against other persons as well as against the original plaintiff,[26] regardless

E. 1105, 165 Ind. 255, 112 Am.S.R. 222, 6 Ann.Cas. 718.
57 C.J. p. 447 note 73.

18. Ind.—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 192 N.E. 369, 99 Ind.App. 325.
Me.—Cooper v. Fidelity Trust Co., 170 A. 726, 132 Me. 260.
Mo.—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S.W.2d 425, 426, 230 Mo.App. 800.
N.D.—Marmarth School Dist. No. 12 of Slope County v. Hall, 260 N.W. 411, 65 N.D. 509.
Ohio.—Black & Decker Mfg. Co. v. Union Trust Co., 4 N.E.2d 929, 53 Ohio App. 356.
57 C.J. p. 447 note 74.

Accounts of subsidiary corporations

Corporation has been held entitled to set off accounts of its subsidiary corporations in insolvent bank against its debt to bank where it was parties' intention that corporation and subsidiaries were to be treated as one organization in their relations with bank, although corporation did not own all stock of one of its subsidiaries.—Black & Decker Mfg. Co. v. Union Trust Co., 4 N.E.2d 929, 53 Ohio App. 356.

19. Ind.—Porter v. Roseman, 74 N.E. 1105, 165 Ind. 255, 112 Am.S.R. 222, 6 Ann.Cas. 718.—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 192 N.E. 369, 99 Ind.App. 325.

20. Ga.—Hollingsworth v. Georgia Fruit Growers, 190 S.E. 802, 55 Ga.App. 541, affirmed 196 S.E. 766, 185 Ga. 873.
57 C.J. p. 448 note 86.

Corporations with same officers

(1) In action on notes payable to one corporation, answer based on collateral contract with another corporation with same officers, directors, and agents as payee corporation, alleging breaches of collateral contract and damages therefrom as recoupment was held properly stricken since person who contracts with two corporations, however closely related, for different services must look to each for only its part of responsibility.—Hollingsworth v. Georgia Fruit Growers, supra.

(2) Evidence, that corporation which allegedly sold inferior oil to buyer and corporation which sold oil used by buyer to blend with inferior oil to make oil salable occupied same offices, had largely same directors and officers, and that all stock of both corporations was owned by foreign corporation was held not to show that corporations were a single entity so as to permit buyer to recoup losses sustained by reason of purchase of inferior oil when sued by corporation selling oil used for blending.—James B. Berry Sons' Co. v. Owens, 169 So. 685, 176 Miss. 562.

21. La.—Pan American Petroleum Corporation v. Featherstone, App., 153 So. 566.—Frigidaire Sales Corporation v. Alexandria Bank & Trust Co., App., 145 So. 703.

22. Ariz.—Mortgage Inv. Co. of El Paso, Tex. v. Taylor, 68 P.2d 340, 49 Ariz. 558.
Colo.—Todd v. Elkins, 72 P.2d 696, 101 Colo. 269.
Md.—Perring v. Baltimore Trust Corporation, 190 A. 516, 171 Md. 618.
Miss.—Crosby v. Keen, 28 So.2d 322, 200 Miss. 590.—Landau v. Landau, 187 So. 224, 185 Miss. 45.
Okl.—Sarkeys v. Marlow, 235 P.2d 676.
Pa.—Ciccone v. Stewart Contracting Co., Com.Pl., 37 Luz.Leg.Reg. 379.—Duddy v. Ciccarone, Com.Pl., 57 Montg.Co., 7.
R.I.—Columbus Exchange Trust Co. v. Pennacchini, 27 A.2d 187, 68 R.I. 196.
Tex.—Giant Mfg. Co. v. Davis, Civ.App., 91 S.W.2d 1099, reversed on other grounds 121 S.W.2d 590, 132 Tex. 220.
57 C.J. p. 448 note 87.

Allied or subsidiary corporations

(1) Set-off against one corporate subsidiary could not be pleaded by defendant in suit by another corporate subsidiary of common parent corporation.—Frigidaire Sales Corporation v. Alexandria Bank & Trust Co., La.App., 145 So. 703.

(2) Debtors of wholly owned subsidiary of parent corporation could not pay their debts to subsidiary by offsetting claims possessed by them against parent corporation, in absence of any reason for disregarding corporate entity of subsidiary.—In re New York Title & Mortgage Co., 296 N.Y.S. 550, 163 Misc. 42.

(3) In action on notes payable to one corporation, demands based on collateral contract with another corporation with same officers, directors, and agents as payee corporation could not be set off.—Hollingsworth v. Georgia Fruit Growers, 190 S.E. 802, 55 Ga.App. 541, affirmed 196 S.E. 766, 185 Ga. 873.

(4) In corporation's suit on note, defendants were held not entitled to set off debt due defendants by allied corporation, which was not connected with debt evidenced by note sued on or with transaction out of which note sued on originated, on theory of identity of plaintiff corporation and debtor corporation.—Porter v. Wootten, 181 S.E. 866, 51 Ga.App. 834.

23. La.—Bayley Mfg. Co. v. Wilhelm Moss Co., 112 So. 38, 163 La. 439.
57 C.J. p. 450 note 89.

24. Ariz.—Sturges v. Bennett, 56 P.2d 1038, 47 Ariz. 470.
Ill.—Aaron v. Dausch, 40 N.E.2d 805, 313 Ill.App. 524.
Ky.—Taylor, for Use and Benefit of Laurel County, v. Scoville, 68 S.W.2d 423, 252 Ky. 809.
Md.—Perring v. Baltimore Trust Corporation, 190 A. 516, 171 Md. 618.
N.Y.—A. Rosen & Sons v. Silverman, 258 N.Y.S. 15, 235 App.Div. 524.
Pa.—Ciccone v. Stewart Contracting Co., Com.Pl., 37 Luz.Leg.Reg. 379.
57 C.J. p. 449 note 88.

25. S.C.—Farmers' Union Mercantile Co. v. Anderson, 93 S.E. 422, 108 S.C. 66.

26. Fla.—Hendricks v. Williams, 9 So.2d 923, 151 Fla. 538.
Ky.—BancoKentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 137 S.W.2d 357, 281 Ky. 784.
N.Y.—Hall v. Crailo Sweets, 29 N.Y.

of whether such other persons are already parties to the action,[27] but relief must also be claimed against the original plaintiff[28] or the matter set up in the counterclaim must also affect the original plaintiff's rights[29]

Demands in favor of third persons. In accordance with the rule of mutuality, it is very generally held that a demand against plaintiff in favor of a third person not a party to the action cannot be recouped,[30] set off,[31] counterclaimed,[32] reconvened,[33] or compensated,[34] in the absence of the execution of an assignment[35] Payments made to plaintiff by defendant's agent may be pleaded in reconvention.[36]

§ 49. —— Debts and Demands of Nominal Parties and Real Parties in Interest

While it has been held that the apparent legal holder of a claim may plead it in set-off, although the real interest be in another, the rule requiring mutuality of debts or demands has been held to refer not merely to the nominal plaintiff and defendant but to the real parties in interest

While it has been held that the apparent legal holder of a claim may plead it in set-off, although the real interest be in another,[37] the rule requiring mutuality of debts or demands has been held to refer not merely to the nominal plaintiff and defendant but to the real parties in interest,[38] and it has further been held that the court will go outside of the record to find the real party.[39] Thus it has been held that a set-off will not be allowed against plaintiff if he is a mere nominal party suing for another beneficially interested,[40] and, on the other hand, it has been held that a claim against the person having the real beneficial interest in the cause sued on, although not a party to the record, may be set off[41] or counterclaimed,[42] and that, in cases where a judgment ought not to be obtained against plaintiff for the excess over the debt sued on, as much of the set-off may be allowed as will extinguish the claim.[43]

S 2d 381, 177 Misc 120, affirmed 29 N.Y S 2d 512, 262 App Div. 866

27. Fla —Hendricks v. Williams, 9 So.2d 923, 151 Fla 538
N.Y.—Hall v. Crailo Sweets, 29 N. Y S 2d 381, 177 Misc 120, affirmed 29 N.Y S 2d 512, 262 App Div. 866

28. Fla.—Hendricks v Williams, 9 So 2d 923, 151 Fla 538.
Ky —BancoKentucky Co's Receiver v. National Bank of Kentucky's Receiver, 137 S W 2d 357, 281 Ky. 784
N Y —National City Bank of New Rochelle v Holzworth, 248 N Y S. 584, 231 App Div. 688—Hall v Crailo Sweets, 29 N.Y S 2d 381, 177 Misc 120, affirmed 29 N Y S 2d 512, 262 App Div 866—Tauro v Queens-Nassau Transit Lines, 6 N Y S 2d 176, 168 Misc 879—Kail v. Cedric Realty Co, 63 N Y.S 2d 461.

29. Fla —Hendricks v Williams, 9 So 2d 923, 151 Fla 538

30. Del —Frantz v Templeman Oil Corporation, 134 A. 47, 3 W W. Harr 221
Fla —Marianna Lime Products Co v McKay, 147 So 264, 109 Fla 275
57 C J p 447 note 79.

31. Fla —**Corpus Juris cited in** Durham Tropical Land Corp v Sun Garden Sales Corp, 151 So. 327, 328, 106 Fla 429
La —Edwards v Max Thieme Chevrolet Co, App, 191 So 569
Md —Perring v Baltimore Trust Corporation, 190 A 516, 171 Md 618
Okl —Security Nat Bank of Duncan v Johnson, 155 P 2d 249, 195 Okl 107
57 C J p 447 note 80.

Misapplication of funds of subsidiary corporation, all of whose stock is held by holding company, cannot be pleaded in set-off to suit by holding company —Frantz v Templeman Oil Corporation, 134 A 47, 3 W W Harr, Del, 221—Tilden v Stevenson, 130 A. 236, 33 Del. 47.

32. Fla.—**Corpus Juris cited in** Durham Tropical Land Corporation v Sun Garden Sales Co, 151 So. 327, 328, 106 Fla 429, rehearing denied 143 So. 758, 106 Fla 429
Ga.—MacNeill v. Bazemore, 21 S E. 2d 414, 194 Ga. 406.
Ill —Countiss v Whiting, 29 N.E 2d 277, 306 Ill.App 548.
Md —Perring v. Baltimore Trust Corporation, 190 A 516, 171 Md 618.
N J —Ruchlin v. A G Motor Sales Corporation, 22 A 2d 767, 127 N.J Law 378
Pa —Pittsburgh Radio Supply House v. Wattras, Com Pl, 28 West.Co L.J. 25
57 C J. p 448 note 81.

33. La.—Mente & Co v. Louisiana State Rice Milling Co, 146 So 28, 176 La 476.
57 C J. p 448 note 82

Demand of subsidiary corporation
In action against corporation for price of rice bags delivered, defendant was held not entitled to reconvene for defective bags shipped to defendant's subsidiary whose entire capital stock defendant directly or indirectly owned —Mente & Co v. Louisiana State Rice Milling Co., supra

34. La —Smith v. Adams, 14 La. Ann 409
57 C J p 448 note 83

35. N.Y —Newton v. Lee, 34 N E 905, 139 N Y 332
Assigned claim as set-off or counterclaim see infra § 55.

36. La.—Williams v. Robinson, 39 So 2d 848, 215 La. 132

37. Tex —Thomas v. Young, 5 Tex 253

38. U S.—**Corpus Juris cited in** In re First Nat Bank, D C Ill, 23 F Supp 255, 258
Fla —Proodian v. Plymouth Citrus Growers Ass'n, 6 So 2d 531, 149 Fla 507.
Pa —In re Thacher's Estate, 17 Pa Dist. & Co 657, affirmed 166 A. 873, 311 Pa 278.
57 C J p 450 note 95

Mutuality shown by evidence
Mutuality which is implied in the word "set-off" need not be the nominal mutuality indicated by the record, but the real mutuality shown by the evidence —Barton v McKay, 193 A 733, 135 Me 197—Collins v. Campbell, 53 A 837, 97 Me 23.

Equity court can look through the transactions and determine who are real parties in interest and whether, under the circumstances shown, such mutuality exists as warrants and requires mutual set-off —Gallagher v Clark, D C Iowa, 7 F Supp 158

39. U S —**Corpus Juris cited in** In re First Nat Bank, D.C Ill, 23 F Supp 255, 258
D C —Baltimore United Oil Co v Barber, 13 D C 4.

40. Ind —Flournoy v Jeffersonville, 17 Ind 169, 79 Am D 468.

41. Vt —Blake v Langdon, 19 Vt. 485, 47 Am D 701
57 C J p 450 note 97.

42. N Y —Kelly v Rathburn, 38 N. Y S 2d 391, 265 App Div 883.
57 C J p 451 note 98

43. Ala —Bowen v. Snell, 9 Ala 481

In a suit by a trustee defendant may set off or counterclaim a debt due him from the cestui que trust,[44] and, conversely, in an action against a cestui que trust he may set off a claim, the legal title to which is in the trustee,[45] and a third person for whose benefit a simple contract has been entered into for a valuable consideration may plead it by way of set-off.[46] Notwithstanding a set-off may be asserted against the actual party in interest, it has been held necessary to show against that person a cause of action for which defendant could sue him in his own name,[47] and that such third person is the real party in interest.[48] Under a statute defining the parties between whom a counterclaim may be enforced, the words "defendant" and "plaintiff" have been held to include cestuis que trusts[49] and their trustees.[50]

§ 50. —— Debts and Demands in Representative and Individual Capacities

a. In general
b. Executors and administrators
c. Trustees
d. Public officers

a. In General

Ordinarily a claim against the plaintiff in a representative capacity cannot be set off in a suit brought in his individual capacity, and vice versa, and an individual demand against a plaintiff suing in a representative capacity cannot be counterclaimed.

In accordance with the general rules requiring mutuality of the debts or demands, ordinarily a claim against plaintiff in a representative capacity cannot be set off in a suit brought in his individual capacity,[51] and vice versa,[52] and an individual demand against plaintiff suing in a representative capacity cannot be counterclaimed[53] Similarly, when the cause of action sued on is defendant's failure to fulfill an official or fiduciary obligation, he cannot set off a debt due from plaintiff to him in his individual capacity,[54] and a claim due defendant in a representative capacity cannot be counterclaimed against an individual demand[55]

b. Executors and Administrators

In the absence of a statute or court rule providing otherwise, ordinarily in a suit by or against an executor or administrator claims owed by or owing to him in his individual capacity may not be asserted as a set-off or counterclaim.

In the absence of a statute or court rule providing otherwise,[56] ordinarily in an action by an executor as such a claim against him in his individual capacity cannot be pleaded as a set-off[57] or as a counterclaim,[58] and the same rule applies to an action by an administrator,[59] although when he

44. U S —White v Stone, C.C A. Mass, 78 F 2d 136, affirmed 57 S.Ct 851, 301 U S 532, 81 L Ed 1265, 302 U S 639, 82 L Ed 497, rehearing denied 58 S Ct 260, 302 U S. 777, 82 L Ed 601
57 C J. p 451 note 1.

45. Miss —Hunt v. Shackleford, 55 Miss 94
57 C J. p 451 note 2.

46. Colo.—Green v. Morrison, 5 Colo 18.
57 C J. p 451 note 3.

47. Ala —Bowen v. Snell, 11 Ala 379.

48. U S —McGill v. Sorensen, D.C.N. Y., 209 F 876.

49. Ariz —Phœnix Sav Bank & Trust Co. v. Ellis, 69 P.2d 796, 50 Ariz. 116.

50. Ariz —Phœnix Sav Bank & Trust Co v Ellis, supra

51. Mo —**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S W 2d 425, 426, 230 Mo.App 800.
57 C J p 451 note 10.

52. Fla —Proodian v. Plymouth Citrus Growers Ass'n, 6 So.2d 531, 149 Fla 507.
Mo —**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S W.2d 425, 426, 230 Mo App 800.
Pa.—In re Merion Title and Trust Co, No. 3, 19 Pa Dist. & Co. 490
57 C.J. p 451 note 11.

53. La —**Corpus Juris quoted in** Investors Syndicate & Deposit Guaranty Bank & Title Co., App, 172 So 39, 43.
57 C J. p 451 note 12.

In stockholder's derivative action, where cause of action was one brought on behalf of the corporation and not for plaintiff's individual benefit, counterclaims interposed, not against the corporation, but against plaintiff individually, could not be maintained —Select Theatres Corp v Harms, Inc, 78 N Y.S 2d 159, 273 App Div 505, appeal denied 79 N Y S 2d 880, 273 App Div 1007—Binon v Boel, 66 N.Y S 2d 425, 271 App Div 505, affirmed 74 N E.2d 466, 297 N Y 528.

In action by next friend of minor, brought in behalf of minor, defendant could not interpose as a counterclaim a liability incurred by the next friend
Iowa —Smith v Dawley, 60 N.W. 625, 92 Iowa 312.
La —**Corpus Juris quoted in** Investors Syndicate & Deposit Guaranty Bank & Title Co, App, 172 So. 39, 43.

54. Pa —Hostetter v. Giffen, 112 A. 150, 268 Pa 530
57 C J. p 451 note 13.

55. Ky —Avritt v Russell, 58 S W 811, 22 Ky.L. 752.
Md —**Corpus Juris cited in** Ghingher v Fanseen, 172 A. 75, 78, 166 Md. 519

56. U S —Turner v Alton Banking & Trust Co., C C A Mo, 166 F.2d 305
Set-off and counterclaim in actions by and against personal representatives generally see Executors and Administrators §§ 717–724

Foreign executor
Under some court rules a defendant can assert a counterclaim against foreign executor as individual, where foreign executor sued in that state on judgment recovered by it in its representative capacity in state of its appointment —Turner v Alton Banking & Trust Co, supra.

57. Ky —Rose v. Finley's Ex'x, 63 S W 2d 948, 250 Ky 769
57 C J. p 452 note 17.

58. N.Y.—Wakeman v Everett, 41 Hun 278, affirmed 18 N E 481, 110 N Y 675
57 C J p 452 note 18.

59. N.Y.—In re Laegen's Estate, 43 N Y S.2d 924
57 C J. p 452 note 19.

sues in his individual capacity it may be set off.[60] In an action by an administrator, defendant cannot set off a demand against him in another capacity,[61] and it has been held that even though an executor sues in his own name if he is in fact claiming a debt due the estate a set-off against him personally will not be allowed,[62] but where defendant proves that plaintiff individually owns the demand a set-off may be had against plaintiff individually, although the action was brought by plaintiff nominally as executor.[63]

In an action by an individual, a claim against him as executor[64] or administrator[65] cannot be pleaded as a set-off. In an action against an executor[66] or an administrator[67] a demand due defendant in his individual capacity cannot be set off even though the administrator has acquired the interest of the heirs of decedent in the estate,[68] and in an action against defendant in his own right he cannot set off a debt due him as administrator[69] or as executor.[70] However, an executor or administrator sued in his individual capacity can set off a debt due him individually,[71] or due to himself and another individually, provided the other consents, but not otherwise,[72] and where an administrator has filed his final account and charged himself with a debt such debt becomes his own, and in an action thereon he may set off individual claims against plaintiff.[73] Where the executor or administrator is sole heir or legatee, he may, on proof that all debts of deceased have been paid, counterclaim a demand in favor of the estate in an action against him individually,[74] and in the same circumstances an individual debt may be counterclaimed against him in a suit brought by him in his official capacity.[75]

In equity. In the absence of any special equities, a debt due from plaintiff, to defendant as administrator, is not available as a set-off against an individual debt in equity,[76] and the individual debt of an administrator is not available as a set-off to a demand due him in his representative capacity.[77] However, in a suit by an insolvent plaintiff against an administrator in his representative capacity, a debt due the administrator in his individual capacity may be set off,[78] and also, if plaintiff is insolvent, a debt due defendant as administrator may be set off against an individual debt;[79] and the same rule applies where plaintiff is a married woman against whom a personal judgment cannot be rendered.[80]

c. Trustees

As a general rule claims owed by or owing to a trustee in his individual capacity cannot be set off against a claim owed to or by him in his capacity as trustee.

As a general rule a claim which defendant has against plaintiff in his individual capacity cannot be set off against a claim due plaintiff as trustee,[81] and such demand cannot be counterclaimed;[82] and

60. Md.—Turner v. Plowden, 2 Gill & J. 455
Mo.—Lacompte v. Seargent, 7 Mo. 351.

61. Ala.—Tate v. Chandler, 4 Stew. & P. 417

62. N.Y.—Merritt v. Seaman, 6 N.Y. 168.

63. Ky.—Lee v. Russell, 38 S.W. 874, 18 Ky.L. 951

64. Conn.—Pitkin v. Pitkin, 8 Conn. 325
57 C.J. p. 452 note 24.

65. Pa.—In re Kenin's Estate, 45 Pa. Dist. & Co. 333, affirmed 29 A.2d 495, 346 Pa. 127.
57 C.J. p. 452 note 25.

66. Ala.—Phillips v. Thompson, 9 Port. 664
Ga.—Shingler v. Furst, 168 S.E. 557, 176 Ga. 497
N.Y.—Mead v. Merritt, 2 Paige 402
Pa.—In re Kenin's Estate, 29 A.2d 495, 346 Pa. 127—Estate of Cotton, 6 Pa.Dist. 205.
Tex.—House v. Collins, 42 Tex. 486
Utah.—Cook v. Jones, 206 P.2d 630, 115 Utah 536
57 C.J. p. 452 note 26.

67. Me.—Rich v. Hayes, 64 A. 656, 101 Me. 324, 115 Am.S.R. 321, 8 Ann.Cas. 304.
Mass.—Stickney v. Clement, 7 Gray 170.
N.H.—Lamberton v. Freeman, 16 N.H. 547.
N.C.—Barnard v. Jordan, 25 N.C. 268
Pa.—Appeal of Bradshaw, 3 Grant 109.
57 C.J. p. 452 note 27.

68. N.H.—McCaffrey v. Kennett, 60 A. 96, 73 N.H. 189

69. N.H.—Woodward v. Tupper, 58 N.H. 577
57 C.J. p. 452 note 29.

70. Ala.—Collins v. Greene, 67 Ala. 211.
Md.—Ghingher v. Fanseen, 172 A. 75, 166 Md. 519
Pa.—Prouty v. Hudson, 5 Pa.L.J. 311.
S.C.—Lanier v. Brunson, 21 S.C. 41.
57 C.J. p. 452 note 30.

71. N.Y.—Barlow v. Myers, 24 Hun 286.
Wis.—Vaughn v. Walsh, 100 N.W. 840, 122 Wis. 486.
24 C.J. p. 762 note 22

72. Pa.—Solliday v. Bissey, 12 Pa. 347.

73. Ky.—Jones v. Everman, 15 B. Mon. 631, 63 Am.D. 521.
57 C.J. p. 452 note 31.

74. N.Y.—Blood v. Kane, 29 N.E. 994, 130 N.Y. 514, 15 L.R.A. 490

75. N.Y.—Anderson v. Carlson, 194 N.Y.S. 112, 201 App.Div. 260

76. Me.—Clark v. Downes, 110 A. 364, 119 Me. 252.
57 C.J. p. 453 note 36.

77. Ala.—Jones v. Brevard, 59 Ala. 499.
Mass.—Pinner v. Temple, 197 N.E. 50, 291 Mass. 406.

78. Ala.—Fischer v. Pope, 171 So. 752, 233 Ala. 301.

79. Mo.—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S.W.2d 425, 426, 230 Mo.App. 800.
57 C.J. p. 453 note 38

80. Ala.—Farris v. Houston, 78 Ala. 250.
Mo.—**Corpus Juris cited in** Dalton v. Sturdivant Bank, 76 S.W.2d 425, 426, 230 Mo.App. 800.

81. Fla.—Everglade Cypress Co. v. Tunnicliffe, 148 So. 192, 107 Fla. 675
Mo.—**Corpus Juris cited in** Buder v. Holt, 117 S.W.2d 235, 237, 342 Mo. 666.
N.Y.—In re Chinese Merchants' Bank, Limited, New York Agency, 272 N.Y.S. 764, 151 Misc. 425.
57 C.J. p. 453 note 41.

82. N.Y.—York-Buffalo Motor Exp.

in a suit by plaintiff in his individual capacity defendant cannot set off a claim against him as trustee.[83] In a suit against one in an individual capacity he cannot set off a debt due to him as trustee,[84] and in a suit against a trustee he cannot set off a claim due to him in his individual capacity,[85] but where the demand against defendant and the demand in favor of him are in his capacity as trustee he may set off the one against the other [86]

A trustee cannot, as a rule, set off against the trust fund or property his individual demand against the creator of the trust[87] or an indebtedness due him individually by the beneficiary,[88] and a debt due a trustee from a beneficiary cannot be set off against a debt owed the beneficiary by the trustee where the demands arise out of different trust estates.[89] The equitable rule allowing a set-off in case of insolvency does not apply where the one asserting a set-off is a trustee and the set-off is a trust fund.[90]

Trustee in bankruptcy cannot set off a claim due him against a joint indebtedness of himself and his cotrustees.[91]

d. Public Officers

Ordinarily, in an action to recover money received by an officer in his official capacity, a debt due from the plaintiff to the officer in his private capacity is not a proper subject of a set-off.

Ordinarily, in an action to recover money received by an officer in his official capacity, a debt due from plaintiff to the officer in his private capacity is not a proper subject of a set-off [92] Thus a public officer when sued for money which he has failed to pay over as required by statute cannot set off a debt due himself from the municipality for salary[93] or for fees.[94] A claim against an officer for neglect of duty cannot be set off against a debt due him as an individual,[95] and in an action against a public officer on a claim for which he is personally liable he cannot set off a claim due the municipality in which he officiates.[96]

A debt due to an officer from a city[97] or county[98] cannot be set off against a debt due from the officer to the state. Also, the private demands of a public officer cannot be set off against a claim by him in his official capacity[99] or recouped [1] In an action against an officer in his individual capacity, he may set off demands due him in that capacity.[2] A municipal corporation may properly set off, in an action by an officer for his salary, a claim against the officer for moneys of the corporation unlawfully received by him [3]

In a suit on an official bond, it has been held that defendant may set off against a shortage in certain public funds in his hands the amount due him for his services and overpayments made by him for the

v. National Fire & Marine Ins Co, 63 N.E.2d 61, 294 N.Y. 467.
57 C J. p 453 note 42.

83. Mich —Watson v. Andrews, 167 N W. 1013, 201 Mich 484.

84. U.S —Dakin v. Bayly, Fla., 54 S Ct. 113, 290 U.S. 143, 78 L.Ed 229, 90 A.L R. 999.
Colo.—Shotkin v. Lindsley, 193 P.2d 880, 118 Colo. 223
Md —Hagerstown Bank & Trust Co. v Trustees of College of St James, 176 A. 276, 167 Md. 646—Ghingher v. Fanseen, 172 A. 75, 166 Md 519
Pa.—Westerhoff v. Farmers Nat Bank of Ephrata, Com Pl, 50 Lanc. L Rev. 483.
57 C J p 453 note 44.

85. N J.—Goodwillie v. City of Bayonne, 65 A.2d 742, 2 N J 88, 8 A. L R 2d 206.
N.Y —Ritter v. Mountain Camp Holding Corp., 299 N.Y S. 876, 252 App Div. 602.
57 C.J p 453 note 45

86. Mo —Smallwood v. Lafayette County, 75 Mo. 450.
57 C J. p 453 note 46.

87. Okl.—Morton v. Beidleman, 237 P 2d 421.
Pa.—Massachusetts Bonding & Ins. Co. v Johnston & Harder, 199 A. 216, 330 Pa 336.
Va —First Nat Bank of Waynesboro v. Johnson, 31 S E 2d 581, 183 Va 227.

88. Ill —Knowles v. Goodrich, 60 Ill App. 506.
Okl —Morton v. Beidleman, 237 P.2d 421.

Necessity of prior accounting
Trustee under resulting trust could not set off, against proceeds of trust property, indebtedness due from beneficiary on independent transaction without first accounting for portion of trust fund used to pay expenses for care of trust property and showing that balance remained —Heflin v. Heflin, 134 So. 20, 222 Ala. 662

89. Mo —Wittich v. Wittich, App., 263 S.W. 1001.

90. Ohio —Rubel v. Hunt, 179 N.E 367, 40 Ohio App 561

91. Vt —Wells v. Mace, 17 Vt 503, reversed on other grounds 7 How., U.S , 272, 12 L Ed. 698

92. Ala.—Harper v. Howard, 3 Ala. 284
57 C J. p 454 note 50.

93. Conn —Waterbury v. Lawlor, 51 Conn. 171
57 C J. p 454 note 51.

94. Ill —Moore v. People, 37 Ill App. 641.
57 C.J p 454 note 52.

95. Ky —Sternberg Dredging Co v. Bondurant, 4 S W 2d 686, 223 Ky 668
Pa.—Clark v Cook, 14 Pa Super. 309, affirmed 47 A. 851, 197 Pa. 643

96. Iowa —Bayliss v. Pearson, 15 Iowa 279
Ky —Avritt v. Russell, 58 S.W 811, 22 Ky L 752.

97. N Y —People v. Starkweather, 42 N Y.Super. 325.
57 C J p 454 note 55.

98. Ohio —Byers v. State, 2 Ohio. 106
57 C J. p 454 note 56.

99. Ala.—Harper v. Howard, 3 Ala 284
57 C J. p 454 note 58.

1. Mass —Wright v. Quirk, 105 Mass. 44.

2. Ind —Law v Vierling, 45 Ind 25.
57 C.J. p 454 note 60.

3. N Y —Wood v. New York, 73 N.Y. 556.
57 C J. p 454 note 57.

benefit of other public funds[4] or services and expenses.[5]

§ 51. —— Joint and Separate Demands and Liabilities

a. Joint demands against separate demands
b Separate demands against joint demands
c. Joint demands against joint demands
d. Joint debts against separate debts
e Separate debts against joint debts
f. Joint and several debts or demands against separate debts or demands, and vice versa
g. Discontinuance or want of service as to some of defendants
h. Equitable set-off of joint and separate demands and liabilities

a. Joint Demands against Separate Demands

Subject to certain exceptions, as a general rule a joint demand cannot be set off or counterclaimed against an individual demand.

As a general rule a joint demand cannot be set off[6] or counterclaimed[7] against an individual demand. However, exceptions to the rule, depending on the peculiar circumstances of the particular case, have been recognized,[8] and it has been held that, where plaintiff sues several defendants for breach of a joint contract and some of them denying a joint liability aver a several liability as to themselves, these may set up a counterclaim, and if their averment of several liability is sustained the counterclaim will be allowed[9]

b. Separate Demands against Joint Demands

Ordinarily, unless otherwise provided by statute, separate demands cannot be set off or counterclaimed against joint demands in the absence of insolvency or some other ground for equitable relief.

Ordinarily separate demands may not be set off or counterclaimed against joint demands[10] in the absence of insolvency[11] or some other ground for equitable relief,[12] but this is permissible under statutes which so provide.[13]

c. Joint Demands against Joint Demands

In an action to enforce a joint demand, a joint demand in favor of the defendants usually may be pleaded as a counterclaim or as a set-off.

In an action to enforce a joint demand, a joint demand against plaintiffs in favor of defendants usually may be pleaded as a counterclaim[14] or as a set-off,[15] and it has been held that this is so although the action is brought against only one of the parties liable,[16] but this last proposition has also been denied.[17] It has been held that one of the defendants sued on a joint demand for damages may individually set off a joint demand in favor of all the defendants and recover damages for any amount over and above the damages sustained by plaintiffs,[18] irrespective of whether one or more of the defendants defaulted[19]

d. Joint Debts against Separate Debts

As a general rule a joint debt cannot be set off against a separate debt, or counterclaimed, in the absence of an agreement authorizing it.

As a general rule a joint debt cannot be set off against a separate debt,[20] nor can a joint debt, as

4. Ind—State v Finney, 25 N E 544, 125 Ind. 427

5. N H—Concord v. Pillsbury, 33 N H 310.

6. U.S—Hulse v Knapp, D C N.Y., 20 F Supp 137—Wisdom v Guess Drycleaning Co, D C Miss, 5 F Supp. 762.
Ky—Daniel v. Wilhoit, 158 S W 2d 153, 289 Ky 79
57 C J p 454 note 65

7 U S—Ecorse Transp Co v. Earhart, C C Minn, 96 F. 925
57 C J. p 454 note 66

8. Ky—Garvey v. Crouch, 35 S W. 273, 18 Ky L. 84
57 C J p 455 note 69

9. N.Y—Clegg v. Cramer, 32 Hun 162, 66 How.Pr 411

10. U S—Wisdom v. Guess Drycleaning Co, D C Miss, 5 F Supp 762.
Iowa—Harriman v Roberts, 235 N W. 751, 211 Iowa 1372.
Ky—Daniel v Wilhoit, 158 S W 2d 153, 289 Ky 79.
Mass—Goldstein v Katz, 91 N E 2d 237, 325 Mass 428
S.C—Lyles v. Collins, 169 S E 666, 170 S C. 27.
57 C.J p 455 note 71

11. Mont—Collier v. Ervin, 3 Mont. 142.

12. Kan—Ruby v Baker, 190 P 6, 106 Kan. 855, 107 Kan. 186, 10 A. L R 1247.
57 C J p 455 note 73

13. Cal—Merchants' Nat Bank of Los Angeles v Clark-Parker Co, 9 P 2d 826, 215 Cal 296, 81 A L.R 778—Calara Valley Realty Co. v. Smith, 156 P 369, 29 Cal App. 589
57 C J p 455 note 74

14. U S—York Mfg Co v Rothwell, Ohio, 119 F 144, 56 C C A 52
Wash—Brodek v Farnum, 40 P. 189, 11 Wash 565.

15. Mass—Goldstein v Katz, 91 N E 2d 237, 325 Mass. 428

16. U S—York Mfg Co v Rothwell, Ohio, 119 F 144, 56 C C A. 52.
57 C J p 455 note 77.

17. Vt.—Lamoille County Nat Bank v Hunt, 47 A 1078, 72 Vt 357.
57 C J. p 455 note 78.

18. Wash—Brodek v. Farnum, 40 P 189, 11 Wash 565
57 C J. p 456 note 79.

19. Wash.—Brodek v. Farnum, supra

20. Md—Seaboard Terminals Corp v. American Oil Co, 181 A. 746, 169 Md 369—Ghingher v Fanseen, 172 A 75, 166 Md. 519
N H.—Plante v M. Shortell & Son, 24 A 2d 498, 92 N H. 38, 139 A L R 1325.
N J—Keyes v. Kimmel, 155 A 19, 9 N.J Misc. 604, affirmed 160 A. 684, 109 N J Law 268.
Tex—American General Ins. Co. v. Nance, Civ.App., 60 S.W.2d 280, error refused.

a general rule, be counterclaimed,[21] in the absence of an agreement authorizing it.[22] Thus it has been held that a joint debt owed by plaintiff and another or others cannot be set off[23] or counterclaimed[24] against a debt due plaintiff individually. It has been held, however, that a debt due by plaintiff on a note jointly executed by him and another who has since died may be set off against the claim which is the subject of the suit.[25]

Debt due to defendant and another against debt owing by him alone. Defendant, in a suit against him for a debt owing by him alone, has been held not entitled to set off[26] or counterclaim[27] a debt due to him and another, inasmuch as the demands are not mutual.

e. Separate Debts against Joint Debts

As a general rule a separate debt cannot be set off against a joint debt, and the rule applies with respect to a debt due from a sole plaintiff to one of several joint defendants, and to a debt due from one of plaintiffs against a joint debt due all plaintiffs

As a general rule, a separate debt cannot be set off against a joint debt[28] Thus it has been held that a separate debt cannot be set off or counterclaimed[29] or pleaded in reconvention[30] unless there is an agreement permitting it[31] or unless there are circumstances calling for an application of the rules of equitable set-off.[32] It has been held, however, that set-off and recoupment are governed by different principles and that a demand due one defendant may be recouped against a joint demand;[33] and it has also been held that in an action on a joint contract the individual debt of one joint contractor may be pleaded in compensation of his share in the joint contract.[34]

Individual debts of plaintiff to one or more defendants. Ordinarily a debt due from a sole plaintiff to one of several joint defendants cannot be set off[35] or counterclaimed,[36] and in like manner the separate debts of a sole plaintiff to each of several joint defendants less than all,[37] or separate debts due from him to each of the joint defendants,[38] or a debt due from plaintiff to one of the defendants and a third person not a party to the suit,[39] ordinarily cannot be set off or counterclaimed. Nevertheless, if a claim offered as a set-off belongs to all the defendants jointly at the commencement of the suit, it has been held to be no objection that one of the defendants has derived his title by assignment from a codefendant.[40] So it has been held that, where one of two joint debtors dies and the obligation survives against the other, the debt may be set off against the survivor in an action by him on a debt due him individually.[41]

In some jurisdictions, sometimes by virtue of statute, it has been held that a debt due from plaintiff to one only of the joint defendants may be set off[42]

W Va —Waugh v Hood, 198 S E. 515, 120 W Va 291
57 C J. p 456 note 82.

21. Ariz —Ives v. Sanguinetti, 85 P 480, 10 Ariz 83
57 C J. p 456 note 83

22. Va —Perkins v. Hart, 9 Gratt 649, 50 Va 649
57 C J p 456 note 84

23. Pa —Mintz v Tri-County Natural Gas Co, 103 A 285, 259 Pa 477
57 C J p 456 note 88.

24. N.Y.—In re Miller, 52 N Y.S 245, 23 Misc 319
Or —Hammer v. Campbell Automatic Safety Gas Burner Co, 144 P. 396, 74 Or. 126.

25. Mich —McCarthy v Sleight, 72 N.W. 165, 114 Mich 182.
57 C J. p 457 note 91.

26. Ind.—Proctor v. Cole, 22 N.E 101, 120 Ind 102
57 C J. p 457 note 93.

27. Mo —D'Amato v. Kohlmeyer, App., 65 S W 2d 178.
57 C J. p 457 note 94.

28. Me —**Corpus Juris cited in** Barton v. McKay, 193 A 733, 734, 135 Me. 197
Md.—Seaboard Terminals Corp v. American Oil Co, 181 A. 746, 169 Md 369—Ghingher v. Fanseen, 172 A. 75, 166 Md 519
N H —Plante v M Shortell & Son, 24 A.2d 498, 92 N.H. 38, 139 A L R 1325
Ohio —Cohn v Krauss, App, 67 N.E. 2d 62.
57 C J p 457 note 96.

29. Minn —Wade v. Citizens' State Bank, 197 N W. 277, 158 Minn 231
57 C.J. p 458 note 97.

30. Tex —Senter v. Whitaker, 2 S W. 89, 66 Tex. 624.

31. Ga —Threlkeld v. Dobbins, 45 Ga. 144
57 C.J p 458 note 99.

32. Ohio —Cohn v. Krauss, App, 67 N.E 2d 62
57 C J. p 458 note 1.

33. Ill.—Waterman v. Clark, 76 Ill 428.
57 C J p 458 note 2.

34. La —Langfitt v Clinton, etc, R Co, 2 Rob 217.

35. U S —White v. Stone, C C A Mass, 78 F 2d 136, affirmed 57 S Ct. 851, 301 U.S 532, 81 L.Ed 1265, 302 U S 639, 82 L Ed. 497, rehearing denied 58 S Ct 260, 302 U S 777, 82 L Ed 601—Roelker v Bromley-Shepard Co., C.C.A.Mass., 73 F 2d 618, certiorari denied 55 S Ct 509, 294 U S 713, 79 L Ed 1246.
Ky —Daniel v. Wilhoit, 158 S W.2d 153, 289 Ky 79
Me —Barton v McKay, 193 A. 733, 135 Me 197
57 C J p 458 note 5

36. Cal —Bartlett Estate Co. v. Fraser, 105 P 130, 11 Cal App 373.
57 C J. p 459 note 6

37. Colo —Thatcher v Rockwell, 4 Colo 375, affirmed 105 U S. 467, 26 L Ed 949
57 C J. p 459 note 7.

38. N H —Ross v Knight, 4 N H 236
57 C J p 459 note 8

39. N M —Parker v. Beasley, 54 P 2d 687, 40 N M 68
57 C J. p 459 note 9.

40. N Y —Bell v. Davis, 8 Barb 210
57 C J p 459 note 10.

41. Ind —Wells v. Teall, 5 Blackf. 306
Vt.—Congdon v. Torrey, 112 A 202, 95 Vt. 38.

42. Ky —Bryant Bros v Wilson, 69 S W.2d 1020, 253 Ky 578.
57 C J. p 459 note 13.

or counterclaimed[43] against a joint debt; and it has also been held that separate debts due from plaintiff to each of several joint defendants less than all are a proper subject of set-off.[44]

Individual debts due by one or more plaintiffs against joint debts due all plaintiffs Generally a debt due from one of plaintiffs cannot be set off[45] or counterclaimed[46] against a joint debt due all of plaintiffs, and separate debts due from several plaintiffs,[47] or from all plaintiffs individually,[48] cannot be set off against a debt due all of plaintiffs jointly. In a suit by several plaintiffs for a joint demand, a debt due from one of the plaintiffs and another person, not a party to the suit, jointly, cannot be set off,[49] but it has been held that, where defendant shows that one of several plaintiffs is the sole party in interest, he may avail himself of a set-off against that plaintiff if he might have done so had the action been brought by such plaintiff alone[50]

f. Joint and Several Debts or Demands against Separate Debts or Demands, and Vice Versa

As a general rule, where action is brought against two or more defendants on a joint and several demand, or on a several demand, a set-off or counterclaim consisting of a demand in favor of one of them against the plaintiff may, if otherwise without objection, be interposed.

Although, under some statutory provisions, a claim due from plaintiff to one of defendants alone cannot be set off in an action on a joint and several demand brought against two defendants jointly,[51] as a general rule, where action is brought against two or more defendants on a joint and several demand,[52] or on a several demand,[53] a set-off or counterclaim consisting of a demand in favor of one of them against plaintiff may, if otherwise without objection, be interposed; and it is immaterial in such case that the action is joint in form,[54] or that, by agreement of the parties, actions on several demands are tried together, where the parties in one suit do not become parties in the other suit and their rights and obligations remain unchanged[55]

In an action on a joint and several demand against one obligor, a payment made by the coöbligor on account of or in part payment of the obligation may be pleaded as a set-off,[56] but he cannot plead a joint demand as a counterclaim for damages for unskillful work done by plaintiff for defendant, his coobligor on the note sued on, and a stranger to the note and suit.[57] A demand which is joint and several may be set off or counterclaimed against a separate demand.[58] In an action by several plaintiffs on a contract which itself divides the fund claimed and makes a specific share due to each, a cause of action existing in favor of defendants against one of plaintiffs, although it could not be

43. Iowa.—Sherman v. Hale, 41 N W 48, 76 Iowa 383.
57 C J. p 459 note 14.

44. Ky—Bryant Bros. v Wilson, 69 S W 2d 1020, 253 Ky. 578.
57 C J p 459 note 15.

45. Me—Barton v. McKay, 193 A 733, 135 Me 197.
57 C J p 459 note 17.

46. Minn—Wade v. Citizens' State Bank, 197 N W 277, 158 Minn 231
57 C.J. p 460 note 18.

47. Mass—Williams v. Ocean Ins Co, 2 Metc 303.

48. Ala—Boykin v Persons, 11 So 67, 95 Ala 626
57 C.J. p 460 note 20.

49. N C—Bunting v. Ricks, 22 N C 130, 32 Am D 699.

50. N Y—Cowles v. Cowles, 9 How Pr 361.

51. Mass—Plymouth County Trust Co. v. Thornell, 197 N E. 91, 291 Mass 189

52. U S—Messick v Rardin, D C Ill, 6 F Supp 200, appeal dismissed, C C.A., Rardin v. Messick, 78 F 2d 643
Cal—Merchants' Nat Bank of Los Angeles v. Clark-Parker Co, 9 P 2d 826, 215 Cal. 296, 81 A L R 778
Ga—Johnson Lumber Co v. Akers Lumber Co, 172 S.E 667, 48 Ga. App 329.
Md.—Seaboard Terminals Corp. v American Oil Co, 181 A. 746, 169 Md 369.
N J.—**Corpus Juris cited in** Scarano v. Scarano, 28 A.2d 425, 430, 132 N J Eq. 362
N.Y.—Fox Chase Knitting Mills v. Handal, 250 N.Y.S. 416, 232 App. Div. 498.
W Va.—Waugh v. Hood, 198 S.E. 515.
57 C.J p 460 note 24.

In tort actions
Iowa—Harriman v. Roberts, 235 N W. 751, 211 Iowa 1372.
S C—Griffin v Scott, 27 S.E.2d 570, 203 S C 430
Tex—Manley v Razien, Civ.App, 160 S W 2d 995.
57 C.J p 460 note 24 [c].

53. U.S—Messick v Rardin, D C Ill, 6 F Supp 200, appeal dismissed, C C A., Rardin v. Messick, 78 F 2d 643
Ill—Heiple v. Lehman, 192 N E 858, 358 Ill 222
Me—Barton v. McKay, 193 A. 733, 135 Me. 197.
Mass—Commissioner of Banks v T C Lee & Co, 197 N E 88, 291 Mass 191—Rossi Bros, Inc. v. Commissioner of Banks, 186 N.E. 234, 283 Mass 114
57 C J. p 461 note 25.

54. Mass.—Commissioner of Banks v T. C Lee & Co, 197 N.E. 88, 291 Mass 191—Rossi Bros, Inc. v. Commissioner of Banks, 186 N.E. 234, 283 Mass. 114.
N.Y—Fox Chase Knitting Mills v. Handal, 250 N Y.S. 416, 232 App. Div 498.
57 C J p 461 note 26.

Reason for rule
This does not alter the original character of the contract itself—Harrison v. Henderson, 4 Ga. 198

55. Me—Barton v. McKay, 193 A. 733, 135 Me 197.

56. U S—Messick v. Rardin, D C Ill, 6 F Supp 200, appeal dismissed, C C A, Rardin v. Messick, 78 F.2d 643
57 C J p 461 note 28.

57. Cal—Hook v White, 36 Cal. 299

58. U,S—**Corpus Juris quoted in** First Nat Bank of Indianola, Iowa v. Malone, C C A.8, 76 F 2d 251, 253.
Md—Seaboard Terminals Corp v. American Oil Co, 181 A. 746, 169 Md. 369.
S C—Exchange Bank of Meggett v. Bennett, 8 S E 2d 515, 193 S.C 320
57 C J p 461 note 30.

set up to bar the right to an accounting, is a proper counterclaim against the share of the plaintiff whom it affects,[59] but it has been held that joint demands in favor of two out of a number of defendants against plaintiff cannot be set up by way of counterclaim unless the action is such that a joint judgment can be rendered against such two defendants separately from the others.[60]

g. Discontinuance or Want of Service as to Some of Defendants

Ordinarily, if a discontinuance be entered as to one or more of several defendants, the others may plead in set-off a debt due from the plaintiff to all the original defendants

Ordinarily, if a discontinuance be entered as to one or more of several defendants, the others may plead in set-off a debt due from plaintiff to all the original defendants,[61] and where, in an action against several defendants, plaintiff discontinues as to some of them the remainder may set off a claim existing in their favor against plaintiff, although they could not have done so while the action stood against all the defendants.[62] According to some decisions, where process is against two on a joint liability, but only one is served, the one served is entitled to any set-off which would be available for the two;[63] but other decisions hold to the contrary, the view being taken that the demands are not mutual.[64] It has been held that where an action is commenced against two defendants but in consequence of a return of non est inventus as to one defendant the action is entered and prosecuted only against the other defendant, such defendant may set off a demand due to himself alone.[65]

h. Equitable Set-Off of Joint and Separate Demands and Liabilities

The general rule in equity is that joint and separate debts cannot be set off against each other, but wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, a set-off of joint and separate debts will be allowed.

The general rule in equity, as at law, is that joint and separate debts cannot be set off against each other[66] Thus, in the absence of some special equitable circumstance, a set-off, in equity, of joint or separate debts or demands will not be allowed,[67] and it will not be allowed where the allowance would work injustice.[68] Debts nominally due between the same persons cannot be set off in equity, if, by assignment or otherwise, the real interest is different.[69]

On the other hand, wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, a set-off of joint and separate debts will be allowed,[70] as where justice will not be obtained unless the court will disentangle the reciprocal liabilities of the parties.[71] Thus, where plaintiff is a nonresident, it has been held that a claim of one of several joint defendants can be set off against the joint debt.[72] Also, in cases of joint credit given because of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, it has been held that the equity is obvious and that a set-off will be allowed.[73]

Insolvency. While it has been held that individual claims may be set off, in equity, against a joint liability even though the party asserting the joint liability is solvent,[74] in determining whether joint and separate debts may, in equity, be set off against

59. N.Y.—Taylor v. Root, 4 Abb.Dec. 382, 4 Keyes 335.

60. N.Y.—Bockover v. Harris, 43 N.Y. Super. 548

61. N.C.—Sellers v. Streator, 50 N.C. 261
57 C.J. p 461 note 34.

62. Ill.—Bensley v. Brockway, 27 Ill. App 410

63. Vt.—Mott v. Mott, 5 Vt. 111.
57 C.J. p 462 note 36.

64. Ind.—Carter v. Berkshire, 8 Blackf. 193.
57 C.J. p 462 note 37.

65. Vt.—Snow v. Conant, 8 Vt 301

66. Fla.—**Corpus Juris cited in** Durham Tropical Land Corp. v. Sun Garden Sales Co., 151 So. 327, 106 Fla. 429
N.J.—Scarano v. Scarano, 28 A.2d 425, 132 N.J.Eq. 362.
N.C.—**Corpus Juris cited in** In re Bank of Sampson, 171 S.E. 436, 437, 205 N.C. 333
57 C.J. p 462 note 42.

67. Ga.—Ingram v. Jordan, 55 Ga. 356.
57 C.J. p 462 note 49
Clear proof and strong equity
Except under very special circumstances, and where the proof is clear and the equity is very strong, an equity court will not allow a set-off of a joint debt against a separate debt, and vice versa.—Williams v. Thomas, D.C.Mich., 6 F.Supp. 1011

68. Ohio.—Williams v. Pultze, 5 Ohio Dec., Reprint, 503, 6 Am.L.Rec. 337
Pa.—Stewart v. Coulter, 12 Serg. & R. 252, 14 Am.D. 680.

69. N.C.—Cotton v. Evans, 21 N.C. 284.

70. U.S.—White v. Stone, C.C.A. Mass., 78 F.2d 136, affirmed 57 S.Ct. 851, 301 U.S. 532, 81 L.Ed. 1265, 302 U.S. 639, 82 L.Ed. 497, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601—Shannon v. Sutherland, C.C.A.S.C., 74 F.2d 530, 79 A.L.R. 583—Roelker v. Bromley-Shepard Co., C.C.A.Mass., 73 F.2d 618, certiorari denied 55 S.Ct. 509, 294 U.S. 713, 79 L.Ed. 1246
Ala.—Bay Minette Land Co. v. Stapleton, 139 So. 342, 224 Ala. 175.
57 C.J. p 462 note 44.

71. Ohio.—Union Properties v. Baldwin Bros. Co., 47 N.E.2d 983, 141 Ohio St. 303, 149 A.L.R. 725

72. U.S.—Roelker v. Bromley-Shepard Co., C.C.A.Mass., 73 F.2d 618, certiorari denied 55 S.Ct. 509, 294 U.S. 713, 79 L.Ed. 1246.

73. N.J.—Brewer v. Norcross, 17 N.J.Eq. 219.
57 C.J. p 462 note 48.

74. U.S.—Binenstock v. Willing, D.C.Pa., 18 F.Supp. 262, affirmed, C.C.A., Willing v. Binenstock, 88 F.2d 474, reversed on other grounds 58 S.Ct. 175, 302 U.S. 272, 82 L.Ed. 248.

each other, the insolvency of one of the parties to the suit should be considered,[75] and on proof of insolvency a joint debt may be set off against a several debt[76] and a several debt may be set off against a joint debt,[77] but the insolvency must be clearly shown.[78]

§ 52. —— Partnership and Individual Demands

a. In actions by individual partner or partners
b. In actions against individual partner
c. In actions by firm
d. In actions against firm
e. In actions against firm and individual partners
f. Equitable set-off of partnership and individual debts and demands
g. Survivorship, and representation of deceased partner

a. In Actions by Individual Partner or Partners

As a general rule, in a suit by a partner individually, a firm debt due defendant cannot be pleaded as a set-off, counterclaim, or in compensation or recoupment, unless all the partners consent, but by reason of statute, or under the terms of an agreement of the parties, or where plaintiff has assumed the debts of the firm, a firm debt due defendant may be allowed as a set-off in a suit by a partner.

As a general rule, in a suit by a partner individually, a firm debt due defendant cannot be pleaded as a set-off,[79] counterclaim,[80] or in compensation[81] or recoupment,[82] unless all the partners consent.[83] This has been held to be true notwithstanding plaintiff is insolvent where it is not claimed that the other partners are also insolvent,[84] or although defendant thought the firm contained but one person.[85]

On the other hand, a firm debt due defendant may be allowed as a set-off in a suit by a partner by reason of the terms of an agreement of the parties,[86] or where plaintiff has assumed the debts of the firm,[87] in which case the demand against the firm may also be counterclaimed.[88] Further, in an action by an individual, a demand against the firm of which plaintiff is a member may be set off, where it is alleged that the causes of action sued on are those of the firm and not of plaintiff alone,[89] and, in a suit by one of two partners, in whose name the particular business respecting which the suit is brought is uniformly done, a demand against the partnership may also be allowed as a set-off[90]

Under a statute making partnership debts joint and several, it has been held that, in a suit by a partner on an individual claim, a debt of the firm of which plaintiff is a member may be set off,[91] and this has also been held to be true under a statute expressly authorizing actions on partnership obligations against one partner alone,[92] as well as under

75. U S —Binenstock v. Willing, D C Pa., 18 F.Supp 262, affirmed, C C A., Willing v Binenstock, 88 F 2d 474, reversed on other grounds 58 S.Ct 175, 302 U S. 272, 82 L Ed 248.

Danger of losing claim

Insolvency of one of parties to suit whereby other party is in danger of losing his claim is very common instance of set-off of joint and separate debts in equity —Union Properties v. Baldwin Bros Co., 47 N E.2d 983, 141 Ohio St 303, 149 A.L R 725.

76. Wis.—Piotrowski v Czerwinski, 120 N W 268, 138 Wis. 396.
57 C J p 462 note 45

77. U S —Roelker v. Bromley-Shepard Co., C C A Mass., 73 F 2d 618, certiorari denied 55 S.Ct 509, 294 U S. 713, 79 L Ed 1246
Ohio —Cohn v. Krauss, App., 67 N.E 2d 62
57 C J. p 462 note 46.

78. Ill.—Phelps v. Reeder, 39 Ill 172.
57 C J. p 462 note 47.

79. Ohio —Simon v Rudner, 182 N E. 650, 43 Ohio App 38
57 C J p 463 note 55.
Recoupment, set-off, and counterclaim in action by one partner against another see Partnership § 121.

Reason for rule

At common law, and in all states where the matter is not controlled by statute, the liability of partners is joint and not several, so that a partnership debt cannot be used as set-off against the claim of a partner individually.—Stewart v. Terwilliger, 143 N W. 17, 177 Mich. 313, Ann Cas 1915C 808.

In Alabama

(1) The rule as stated in the text ordinarily applies, notwithstanding under statutory provisions, plaintiff partner is individually liable for the firm debt, and may be sued individually and alone therefor —Stinson v Lanier, 134 So 793, 223 Ala. 62—57 C J. p 463 note 55 [c]

(2) The text rule does not apply where the debt of the partnership is due by judgment, bond, covenant, or promise in writing —Bradley Fertilizer Co. v Pollock, 16 So 138, 104 Ala 402—57 C.J p 463 note 55 [c] (1).

80. Colo —Ingols v. Plimpton, 16 P. 155, 10 Colo 535.
57 C J. p 463 note 57.

81. La —Ashley v. Sholars, 22 La. Ann. 442.
57 C J. p 463 note 58.

82. Ga —Metcalf v. People's Grocery Co, 101 S E 768, 24 Ga App 663.
57 C.J. p 463 note 56.

83. Pa.—Schalcher v. Bergdoll, 41 Pa.Super. 547.

84. Ind —Fleming v. Palmer, 133 N. E 926, 77 Ind App. 572

85. Ill —Dameier v. Bayor, 68 Ill App 477, affirmed 47 N E 770, 167 Ill. 547.

86. Ala —Stinson v. Lanier, 134 So. 793, 223 Ala 62
57 C J. p 463 note 65.

87. Colo —Lehow v. Simonton, 3 Colo 346
57 C J. p 463 note 66.

88. N Y.—Griffin v Hungerford, 44 N.Y S 1054, 19 Misc. 683.

89. Ind —Griffin v. Kemp, 46 Ind. 172.

90. N.Y.—Platt v. Halen, 23 Wend. 456

91. Mo —Ruddle v. Horine, 34 Mo App 616
57 C J. p 464 note 70

92. Iowa —Allen v. Maddox, 40 Iowa 124.

a statute providing that, if two or more persons are jointly bound by contract, an action thereon may be brought against all or any of them at plaintiff's option[93] Similarly, it has been held that, in an action by a partner on an individual claim, a debt of the partnership of which he is a member may be counterclaimed under a statute making partnership liability for partnership debts joint and several;[94] and, under a statute providing that a counterclaim may be any cause of action in favor of defendants, or some of them, or plaintiffs, or some of them, and that it may be pleaded in any action for the recovery of money, and may be a cause of action arising either on contract or tort, it has been held that defendant, in an action by a partner on a personal claim, may set up as a counterclaim a cause of action against the partnership.[95]

Suit by partners in individual capacity. In a suit by plaintiffs in their individual capacity to enforce rights which they assert they have as joint owners of the assets of a partnership, a counterclaim against plaintiffs individually may be asserted.[96]

b. In Actions against Individual Partner

Ordinarily, in an action against one partner for a debt due by him, a debt due to his firm cannot be pleaded by way of set-off, counterclaim, compensation, or reconvention.

Ordinarily, in an action against one partner for a debt due by him, a debt due to his firm cannot be pleaded by way of set-off,[97] counterclaim,[98] compensation,[99] or reconvention.[1] This has been held to be true notwithstanding defendant is the only solvent member of the firm,[2] or, under a statute so providing, partners may be held individually liable for partnership debts.[3] Furthermore, in an action against a partner he cannot set off a claim he holds against his firm.[4]

On the other hand, if goods furnished by a partnership are charged to an individual partner, and are by him furnished to plaintiff, the debt may be set off against plaintiff's demand.[5] Where one member of a partnership is sued individually for the entire amount of a partnership debt, he may counterclaim a debt due from plaintiff to the partnership, arising out of the same transaction,[6] and a partner may recoup a claim arisirg out of the same transaction in which he was jointly interested with another as partner.[7] In an action against one partner on an individual obligation given for a partnership debt, defendant may avail himself of any recoupment available to the partners in a suit on the debt against them[8] Where plaintiff is individually indebted to defendant on a claim not founded on a tort or breach of covenant, defendant may set off such debt against his individual debt to plaintiff, founded on a note, even though defendant's demand arose out of former partnership transactions.[9] Advances made to plaintiff by a partner acting in his individual capacity may be asserted as a set-off against a debt which the partner contracted as an individual acting through the other partner as his agent[10]

Assignment to defendant. Where the claim against, or the indebtedness of plaintiff to, the firm has been assigned to the individual defendant partner with plaintiff's consent, the claim or debt may be set off.[11]

Consent of other partners. A partnership debt may be set off in an action against an individual partner if the other partners assent to its use for that purpose,[12] and if no rights of third persons have intervened before such assent was given,[13] but it has been held that the mere assent of the partnership alone that the firm debt might be set off is insuffi-

93. Ky.—Owsley v. Cumberland Bank, 66 S.W. 33, 23 Ky.L. 1726
57 C.J. p 464 note 74.

94. U.S.—Davis v Bessemer City Cotton Mills, N.C., 178 F. 784, 102 C.C.A. 232
N.C.—Adams v. First Nat. Bank, 18 S.E. 513, 113 N.C. 332, 23 L.R.A. 111.

95. Ark.—Coats v Milner, 203 S.W. 701, 134 Ark. 311
57 C.J. p 464 note 78.

96. U.S.—Abraham v. Selig, D.C.N.Y., 29 F.Supp. 52.

97. Mo.—Powell v. Downing, App., 225 S.W.2d 952.
N.Y.—Burns v. Lopez, 175 N.E. 537, 256 N.Y.S. 123
N.C.—**Corpus Juris** cited in In re Bank of Sampson, 171 S.E. 436, 205 N.C. 333.
57 C.J. p 464 note 79.

98. Mo.—Powell v. Downing, App., 225 S.W.2d 952
57 C.J. p 465 note 80.

99. La.—Terran v. De Lastra, 2 La. 324.
57 C.J. p 465 note 81.

1. Tex.—Kirbs v Provine, 14 S.W. 849, 78 Tex. 353.

2. Ky.—Garvey v. Crouch, 10 Ky.L. 937.

3. Ala.—Drennen v. Gilmore, 31 So. 90, 132 Ala. 246, 90 Am.S.R. 902.

4. Pa.—Trunick v. Gilchrist, 81* Pa. 160

5. Mo.—Lamb v Brolaski, 38 Mo. 51.

6. U.S.—Seaman v. Slater, C.C.N.Y., 49 F. 37.
57 C.J. p 465 note 86.

7. D.C.—Baltimore United Oil Co. v Barber, 13 D.C. 4.

8. Minn.—McKinnon v. Palen, 64 N.W. 387, 62 Minn. 188.

9. Tex.—Reeves v. White, Civ.App., 161 S.W. 43.

10. Cal.—Hartman v. Humason, 177 P.2d 988, 78 Cal.App.2d 511

11. Me.—Stevens v. Lunt, 19 Me. 70
57 C.J. p 465 note 93

12. Pa.—Montz v. Morris, 89 Pa. 392
—Edelman v. Scholl, 65 Pa.Super. 357.
57 C.J. p 465 note 94.

13. Pa.—In re Smith's Estate, 8 Pa. Dist. 168.
57 C.J. p 465 note 95.

cient without the assent of plaintiff,[14] and that assent of the partners at the trial to a partnership claim being counterclaimed against an individual debt of a partner does not make it a proper counterclaim within a statute defining counterclaims as "(1) A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action on contract, any other cause of action on contract, existing at the commencement of the action."[15]

c. In Actions by Firm

The general rule is that a debt due from an individual partner, or from less than all of the partners, cannot be set off or be made the subject of a counterclaim in an action by the firm unless the other partners consent.

Subject to the exceptions and limitations hereinafter enumerated, the general rule is that a debt due from an individual partner,[16] or from less than all of the partners,[17] cannot be set off in an action by the firm. It is of no importance that defendant may not have had notice of the existence of the partnership,[18] or that the member of the firm against whom the demand exists represented that he was a creditor of the firm and that he had been authorized to manage the business thereof.[19] It has been held that the general rule applies, even though the partner against whom the set-off is claimed is the real owner of the business, and the other only a nominal partner,[20] and to executed, as well as to executory, contracts.[21] As between a partnership debt and a debt to the partners as tenants in common the principles of set-off are not applicable, the demands not being due in the same right.[22]

In accordance with the rule with respect to set-off, a debt due from an individual partner,[23] or from less than all of the partners,[24] cannot be made the subject of a counterclaim in an action by the firm, or the subject of a plea of compensation.[25] In a suit by a partnership in which defendant interposes a reconventional demand, plaintiff cannot set up a debt due an individual member of the firm in compensation of a debt due by the firm.[26] Under a statute allowing the courts to grant a defendant "any affirmative relief to which he may be entitled," it has been held that a defendant, sued by partners on a demand of the firm, may set up and obtain judgment on a demand held by him against one of the firm only.[27] A maker of a joint and several note payable to a firm may, in an action by the firm against him and the comaker, set up a counterclaim due him from the firm.[28]

Consent. Where all the partners consent that a debt owing by one of them shall be set off against the debt owing to all of them, such debt may be set off[29] or counterclaimed[30] in an action by the firm, and it has been held that such an agreement operates with full force and effect against an assignee of the partnership,[31] or of their debtor,[32] provided the consent of all the partners was obtained before the interest of the assignee arose, but not otherwise.[33] The consent may be either express[34] or implied,[35]

14. Ala.—Jones v. Blair, 57 Ala. 457
57 C.J. p. 465 note 96

15. Mont.—Heinrich v. Kirby, 208 P. 897, 64 Mont. 1.

16. Ala.—Stinson v. Lanier, 134 So. 793, 223 Ala. 62.
Cal.—Yankelewitch v. Beach, 2 P.2d 498, 115 Cal. App. 629.
Okl.—Kleinschmidt v. White, 15 P. 2d 127, 159 Okl. 234
Tex.—Rose v. Motes, Civ. App., 220 S.W. 2d 734
57 C.J. p. 465 note 99.

17. U.S.—Boehm v. U. S., 20 Ct.Cl. 142
57 C.J. p. 466 note 1.

18. Ga.—Nellis v. Green, 137 S.E. 843, 36 Ga. App. 684.
57 C.J. p. 466 note 2.

19. N.Y.—Harrison v. Vanderbilt, 9 N.Y. St. 810

20. Miss.—Jones v. Howard, 53 Miss. 707

21. Ky.—Warder v. Newdigate, 11 B. Mon. 174, 52 Am. D. 567.
57 C.J. p. 466 note 5.

22. Ohio.—Fuher v. Buckeye Supply Co., 5 Ohio S. & C.P. 187, 7 Ohio N.P. 420

23. Cal.—Yankelewitch v. Beach, 2 P. 2d 498, 115 Cal. App. 629.
N.Y.—Ravold v. Fred Beers, Inc., 270 N.Y.S. 894, 151 Misc. 628.
57 C.J. p. 467 note 7.

24. U.S.—Boehm v. U. S., 20 Ct.Cl. 142.

25. La.—Bliss v. Patrick, 6 La. Ann. 546—Thompson v. Crow, 3 La. App. 158.

26. La.—Atkinson & Co. v. Hibernia Nat. Bank in New Orleans, 173 So. 768, 186 La. 1074.

27. N.C.—Sloan v. McDowell, 71 N.C. 356.

28. N.C.—Shell v. Aiken, 71 S.E. 230, 155 N.C. 212.

29. Ala.—Stinson v. Lanier, 134 So. 793, 223 Ala. 62
57 C.J. p. 467 note 12.

Unless all partners consent to set-off, the general rule preventing such set-off applies.—Rose v. Motes, Tex. Civ. App., 220 S.W. 2d 734—57 C.J. p. 467 note 24

Evidence of assent

(1) It has been held that proof of assent of all of the partners should be clear and satisfactory.—Wise v. Copley, 36 Ga. 508

(2) However, it has also been said that slight evidence will be sufficient to establish such assent.—Warder v. Newdigate, 11 B. Mon., Ky., 174, 52 Am. D. 567—57 C.J. p. 467 note 22

30. N.Y.—Hartung v. Siccardi, 3 E. D. Smith 560
57 C.J. p. 467 note 13

31. S.C.—Kinsler v. Pope, 36 S.C.L. 126.
57 C.J. p. 467 note 14.

32. S.C.—Wilson v. Dargan, 38 S.C. L. 544.

33. S.C.—Wilson v. Dargan, supra.
57 C.J. p. 467 note 17.

34. Ga.—Wise v. Copley, 36 Ga. 508.
S.C.—Wilson v. Dargan, 38 S.C.L. 544.

35. Ala.—Clark v. Taylor, 68 Ala. 453.
57 C.J. p. 467 note 19.

and it has been held that it is not necessary to show even that all the members of the firm knew of the agreement, but that it will be sufficient to show that the partner who made it, by previous assent, express or implied, between the partners, was authorized to bind the firm by such an agreement.[36]

Permitting member to appear as sole owner; pretended partnership. Where the members of a firm permit one of their members to conduct their business as the sole owner thereof, they ordinarily subject themselves, in a joint action by them, to the same right of set-off by defendant as he would have had in a several action by the partner with whom he dealt.[37] It has been held that, where a pretended partnership is a mere sham resorted to as a cover to prevent creditors of one of the alleged partners from reaching his property, defendant may counterclaim a debt against him as being the real owner of the business.[38]

Formation or dissolution of partnership; separate partnerships. Where an individual makes a contract and thereafter forms with another a partnership which endeavors unsuccessfully to carry out the contract, defendant in an action by the firm to recover for goods furnished under the contract may recoup his damages for breach of the contract[39] In an action by former partners, defendant cannot recoup claims against a single partner arising out of independent matters after the dissolution of the partnership.[40]

While it has been held that, in an action by a firm, defendant can set off a debt contracted with the members thereof when doing business together as another partnership,[41] it has also been held that, in an action to recover on a partnership demand, defendant cannot set off a demand against another partnership having the same members as the first.[42] Where a partnership has been reorganized so as to contain different members, in an action on a demand due the new partnership, defendant cannot set off a claim against the old partnership[43]

d. In Actions against Firm

In an action against a partnership for a partnership debt, the general rule, in the absence of a statute otherwise providing, is to the effect that the claim of an individual partner is not available as a set-off or counterclaim, and this is true, although the partner seeking to make use of his claim in this manner is the only one served with process.

In an action against a partnership for a partnership debt, the general rule, in the absence of a statute otherwise providing, is to the effect that the claim of an individual partner is not available as a set-off[44] or counterclaim,[45] and this is true, although the partner seeking to make use of his claim in this manner is the only one served with process;[46] but in some jurisdictions it has been held that separate claims of partners are available as set-offs in an action against a partnership for a partnership debt.[47] A claim of an individual partner may be available as a set-off against an obligation of the firm where a statute provides that persons jointly liable on contracts or obligations shall be severally liable also,[48] or where a creditor of a firm avails himself of a statute authorizing a suit against one partner for the obligations of all.[49] It has been held that a partner may offset his separate claim against an obligation sought to be enforced against the partnership where the contract sued on is the joint and several obligation of defendant and plaintiffs ask for a several judgment against them which by statute may be entered on a partnership obligation against one person.[50]

Ordinarily, in an action against a partnership, defendants cannot set off a debt due to another partnership composed of some, but not all, of defendant partners,[51] but they may set off or counterclaim a demand in favor of the partnership;[52] and, if only one of the partners answers, he is entitled to set off any claim which his firm has against plaintiff, which could have been asserted by way of counter-

36. S C—Wilson v. Dargan, 38 S C L 544.

37. Va—Dixon Livery Co. v. Bond, 86 S E. 106, 117 Va. 656, L.R.A. 1916A 1211.
57 C J. p 468 note 26.

38. N.Y.—Rosenberg v. Block, 6 N. E. 580, 102 N Y. 255

39. Miss.—Posey v. West Constr Co., 46 So 402, 92 Miss 736.

40. Mass.—Holton v. American Pastry Products Corporation, 174 N.E 663, 274 Mass. 268.
Tort claim
Mass—Holton v. American Pastry Products Corporation, supra.

41. Ala—McGehee v. Harrison, 51 Ala. 522.

42. Tex.—Rose v. Motes, Civ.App, 220 S W 2d 734

43. Ind T—Citizens' Bank v. Carey, 48 S W. 1012, 2 Ind T 84.

44. Kan.—Omaha Crockery Co v. Cleaver, 180 P 273, 104 Kan 642, 5 A L.R 1537
57 C.J. p 468 note 34.

45. S.C.—Pope Mfg Co. v. Charleston Cycle Co, 33 S E 787, 55 S C 528.
57 C J p 468 note 35.

46. Ohio.—Williams v. Pultze, 5 Ohio Dec., Reprint, 503, 6 Am.L Rec. 338.

47. Pa.—Montz v. Morris, 89 Pa. 392
57 C J. p 469 note 41.

48. Ky—Fidelity Trust, etc., Co. v Shannahan, 14 Ky.L 111.
57 C J. p 468 note 39

49. Ala.—Trann v. Gorman, 9 Port 456.
57 C.J. p 469 note 40.

50. Minn.—Nordsell v. Neilsen, 184 N.W. 1023, 150 Minn. 224

51. N H—Winnipiseogee Paper Co. v. Eaton, 18 A. 171, 65 N.H. 13.
57 C J. p 469 note 47.

52. Iowa—Bird v. McCoy, 22 Iowa 549
57 C.J. p 469 note 48.

claim.[53] In an action against a partnership, one partner may avail himself of a counterclaim in favor of the partnership to defeat plaintiff's recovery, although he answers separately,[54] and it has been held that, where a suit is brought against defendants on a contract made by them as a firm, they may use a demand of the firm against plaintiff as a set-off.[55]

Consent to set-off. Where all the members of a partnership agree that a debt owing to one of them may be applied in payment of a demand existing against the firm, such individual debt is a proper subject of a set-off against a partnership debt.[56]

Compensation. While compensation of partnership and individual debts does not take place by operation of law, in a suit against the partnership for a debt, an individual demand of a partner against plaintiff may, by way of defense or exception, offset or oppose a compensation of this demand to that of plaintiff.[57] In an action against a partnership for a debt, brought by an assignee of a creditor, under an assignment with notice to the partnership, defendants cannot compensate by way of exception a debt due by the assignor to a member of the partnership individually.[58]

e. In Actions against Firm and Individual Partners

Ordinarily, where an action is brought on a partnership liability not only against the partnership but also against its members individually, a defendant may plead as set-off a debt due him individually.

Ordinarily, where an action is brought on a partnership liability not only against the partnership but also against its members individually, a defendant may plead as a set-off a debt due him individually.[59] In such an action one or more defendants may set up as a counterclaim in their individual answers any claim which the firm has against plaintiff,[60] although all the partners are not served in the action and, therefore, do not answer.[61] Under a statute providing that a counterclaim must state a cause of action in favor of all defendants in the action, an account for family necessaries sold by a partnership to plaintiff's family was held not pleadable as a counterclaim in a suit against the firm and the individual partners where plaintiff's husband was one of the partners.[62]

f. Equitable Set-Off of Partnership and Individual Debts and Demands

(1) In general
(2) Insolvency

(1) In General

In equity, an individual debt of one of the partners cannot, as a rule, be set off against a partnership debt, or vice versa, the rule being that equity on this subject follows the law, in the absence of special grounds for equitable interposition.

In equity, an individual debt of one of the partners cannot, as a general rule, be set off against a partnership debt,[63] or vice versa,[64] the rule being that equity on this subject follows the law,[65] in the absence of special grounds for equitable interposition,[66] such as render it probable that defendant will lose his demand and be compelled to pay the demand of plaintiff.[67] Equity may take cognizance of cross claims between litigants, although they are wanting in mutuality, wherever it becomes necessary to effect a clear equity or prevent injustice,[68] and in an action against a partnership and the individ-

53. Ky.—McMasters v Burnett, 17 S.W 1021, 92 Ky. 358, 13 Ky L 617.
N Y—Fox Chase Knitting Mills v Handal, 250 N Y S. 416, 232 App. Div. 498.

54. N Y—Tilden v. Washburn, 6 N Y S 556

55. Pa—Bartlett v. Loomis, 16 Montg Co 206

56. Or—Barnes v Esch, 169 P. 512, 87 Or 1—McDonald v. Mackenzie, 14 P 868, 24 Or 573.
57 C.J. p 469 note 43

57. U.S—Beauregard v Case, La., 91 U S 134, 23 L Ed. 263.
57 C.J. p 469 note 45.

58. La—Dick v Byrne, 7 Rob. 465.

59. Ga.—McAllister v. Millhiser, 23 S E 502, 96 Ga. 474.
57 C J. p 468 note 38

60. N.Y—Alpaugh v. Battles, 257 N. Y S 126, 235 App.Div. 321—Fox Chase Knitting Mills v. Handal, 250 N Y.S 416, 232 App Div 498

61. N Y—Alpaugh v. Battles, 257 N. Y S. 126, 235 App Div 321—Fox Chase Knitting Mills v Handal, 250 N.Y S 416, 232 App Div. 498

62. Iowa—Jordison v. Jordison Bros, 247 N.W. 491, 215 Iowa 938.
Reason for rule
The individual partners who are part of the defendants, as such, have no cause of action against plaintiff on the account for family expenses, and, furthermore, defendant husband cannot sue his wife for such expenses—Jordison v. Jordison Bros., supra.

63. N.C.—Cotton v. Evans, 21 N C. 284.
57 C J p 469 note 54.

64. U S—Vose v. Philbrook, C C Mass, 28 F Cas No.17,010, 3 Story 335.
57 C.J. p 469 note 55.

65. U S.—Howe v. Sheppard, C C Me, 12 F Cas No 6,773, 2 Sumn 409
57 C.J. p 469 note 56.

66. U S—Vose v. Philbrook, C C Mass., 28 F.Cas.No 17,010, 3 Story 335
57 C J. p 470 note 57.

67. Okl.—Morey v. State, 263 P 1098, 129 Okl. 136.

68. Ky—**Corpus Juris quoted in** Bryant Bros v. Wilson, 69 S.W.2d 1020, 1023, 253 Ky. 578.
57 C J. p 470 note 60.
Claim barred by statute of limitations
When a partner is sued on a partnership debt and there exists a demand in favor of the partnership which, had the firm instead of the partner been sued, could be set off, but which would not support an independent action because barred by the statute of limitations, equity will give relief—Fowler v. Bellinger, 37 So. 225, 140 Ala. 240.

ual members thereof, it has been held that the court may permit the individual defendants to plead a counterclaim of which they claim to be joint owners where the court can dispose of all the issues raised by the pleadings and the rights of third persons are not involved.[69] Even where set-off is allowable in equity, a partnership accounting with all the partners made parties is essential in order to adjudicate the interest of the individual partner involved.[70]

Nonresidence. It has been held that, if one partner of a nonresident firm is individually indebted to a resident debtor of that firm, in a suit by the firm against such resident, he may plead the debt of the partner to him as an equitable set-off.[71] However, it has also been held that the mere fact that plaintiff and the partnership, of which he is a member and which is a debtor of defendant, are nonresidents does not amount to such a special equitable circumstance as will take the case out of the general rule against the set-off of a partnership debt against an individual debt and authorize the admission of the equitable set-off[72]

(2) Insolvency

In an action involving partnership and individual debts and demands, the insolvency of one of the parties is very generally recognized as a sufficient ground for the allowance of a set-off in equity, but the right to a set-off on this ground is not an absolute one.

In an action involving partnership and individual debts and demands, the insolvency of one of the parties is very generally recognized as a sufficient ground for the allowance of a set-off in equity,[73] but the right to a set-off on this ground is not an absolute one, and the rights of all parties concerned must be considered in order to determine what is equity.[74]

Debt owing by firm against individual claim of partner. A debt owing by a firm may be set off against a claim of an individual partner of the firm, where the firm is insolvent,[75] or where only the partner owning the claim is insolvent[76] It has been held, however, that in an action on contract brought by one member of a firm on an individual claim defendant may not avail himself of a claim against the firm as a set-off, on the ground of the insolvency of plaintiff's copartners, in the absence of an averment that the firm is insolvent[77]

Individual debt of partner against debt due firm. It has been held that a court of equity will not permit a set-off of a separate debt due from one partner against a joint debt due to the partnership on the mere ground of the insolvency of that partner alone,[78] but there is authority to the contrary.[79] An individual partner may, in equity, set off his own judgment against an insolvent debtor who seeks to enforce a judgment against the firm[80]

Debt due firm against individual debt of partner. In an action by an insolvent debtor of a firm against an individual partner, it has been held that plaintiff's indebtedness to the partnership may be set off where all the partners assent,[81] but not otherwise[82]

Debt of partner to firm against debt of firm to partner. In a suit in equity by a member of an insolvent partnership to dissolve and settle such partnership, the individual indebtedness of the partner to his firm may be set off against plaintiff's claim for an amount lent by him to the firm[83]

Debt of one partnership to another cannot be set off in a suit in equity brought by the representatives of a member of one firm, who has died since the contracting of the debt, against one member of the other, since the claims of the parties are not due in the same right, and could not have been set off in the lifetime of plaintiffs' intestate.[84]

g. Survivorship, and Representation of Deceased Partner

(1) In general
(2) Actions against surviving partner
(3) Actions by or against administrators of deceased partners

69. Iowa—Read v. Ferguson, Barnes & Ferguson, 293 N.W 474, 228 Iowa 1191

70. Tex—Shaw v Centerfield Oil Co, Civ App, 10 S.W 2d 144.
57 C J. p 470 note 59

71. Ky.—Wallenstein v. Sellizman, 7 Bush 175

72. Ga.—Metcalf v. People's Grocery Co., 101 S.E 768, 24 Ga App 663.

73. Md—Dubreuil v Gaither, 56 A 965, 98 Md 541.
57 C J p 470 note 62.

74. Ohio—Williams v. Pultze, 5 Ohio Dec., Reprint, 503, 504.

75. N Y—Shipman v. Lansing, 25 Hun 290
57 C J p 470 note 64.

76. Ala—Bean v. Cabbaness, 6 Ala 343
57 C J p 470 note 65.

77. N Y—Spofford v. Rowan, 26 N E. 350, 124 N.Y. 108.
57 C J. p 470 note 66

78. U.S—Howe v Sheppard, C C.Me, 12 F Cas.No 6,773, 2 Sumn. 409
57 C J p 470 note 67.

79. Tex—Hahn v. Cook, 1 Tex A Civ Cas § 689
57 C.J. p 471 note 68.

80. Ky—Jeffries v. Evans, 6 B Mon. 119, 43 Am D. 158.
57 C J p 471 note 69.

81. N Y—Burns v Lopez, 175 N E 537, 256 N Y.S 123
57 C J. p 471 note 70.

82. Pa.—Wrenshall v. Cook, 7 Watts 464.
57 C.J p 471 note 71.

83. Ala.—Leach v. Gray, 77 So 341, 201 Ala 47, 7 A L.R. 890
57 C J. p 471 note 72

84. Mass.—Reed v. Whitney, 7 Gray 533.

(1) In General

While it has been held that defendant, in a suit by a surviving partner to recover a debt due to the firm, may set off a debt due to him from the surviving partner alone, it has also been held that in an action by the surviving members of a partnership to recover a debt due the firm, defendant cannot offset debts due him by individual partners.

It has been held or stated without qualification that, in a suit by a surviving partner to recover a debt due to the firm, defendant may set off a debt due to him from the surviving partner alone,[85] but this rule has been qualified, under some decisions, so as to permit such a set-off provided it does not appear that the partnership creditors have any lien on the account sued on[86] or provided there is no equitable interest in another which the law can protect.[87] On the other hand, it has been held that in an action by surviving members of a partnership to recover a debt due the firm, defendant cannot offset debts due him by individual partners,[88] and that in an action by a surviving partner for a debt due the firm, an individual debt against the deceased partner cannot be set off,[89] even though such deceased partner agreed to pay defendant's claim against him from partnership funds, where it is not shown that the surviving partner had notice of such agreement.[90]

In a suit by a surviving partner in his own name on an obligation for a debt belonging to the partnership, but executed to him, defendant may set off a claim against the partnership held by him,[91] without reference to the solvency or insolvency of the members of the firm.[92] It has been held or said that, where a person who is a surviving partner sues for a debt owing to him individually, defendant may set off a partnership debt against it,[93] but there is authority to the contrary.[94] In an action by a partnership, defendant may set off a demand against a former partnership of which plaintiffs are the surviving members and to which they succeeded.[95]

In an action by a surviving partner and another against a partnership for the balance of an account, defendants cannot plead by way of set-off a debt to them from one of plaintiffs alone, the demands not being mutual.[96]

(2) Actions against Surviving Partner

In an action against a surviving partner to enforce a partnership debt, he may, ordinarily, set off or counterclaim a debt due him in his own right, but it has been held that unliquidated damages sustained by the surviving partner cannot be counterclaimed in such an action.

In an action against a surviving partner to enforce a partnership debt, he may, ordinarily, set off[97] or counterclaim[98] a debt due him in his own right, since, as respects plaintiff, he may treat the debt as his own,[99] but it has been held that unliquidated damages sustained by the surviving partner cannot be counterclaimed in such an action.[1] It has also been held[2] or said[3] that in an action against a surviving partner on a demand against him individually, he may set off a claim against plaintiff in his favor as a surviving partner, but there is authority to the contrary.[4] In an action against the surviving partner and the widow and sole heir of deceased partner, who have formed a new firm, defendant may set off a debt due the old firm in an action against the new firm.[5] In an action by the wife of a deceased partner against the surviving partner, on a note made by the firm, the defendant cannot be permitted to set off an indebtedness alleged to be due him from the estate of the deceased partner on the ground that the money lent to the firm, for which the note was given, was advanced to plaintiff by the deceased partner when his estate was in fact insolvent.[6]

85. Mass.—Hewitt v. Hayes, 90 N.E. 985, 204 Mass. 586, 27 L.R.A.,N.S., 154
57 C.J. p. 471 note 80.

86. Vt.—Meader v. Leslie, 2 Vt. 569.

87. Vt.—Meader v. Scott, 4 Vt. 26.
57 C.J. p. 471 note 82.

88. Ark.—Sessoms v. Ballard, 254 S.W. 446, 160 Ark. 146
57 C.J. p. 471 note 83.

89. N.C.—Norment v. Johnston, 32 N.C. 89
57 C.J. p. 471 note 84.

90. N.C.—Norment v. Johnston, supra.

91. Tex.—Masterson v. Goodlett, 46 Tex. 402

92. Tex.—Masterson v. Goodlett, supra.

93. Ill.—Harris v. Pearce, 5 Ill.App. 622.

94. Pa.—Waln v. Hewes, 5 Serg. & R. 468.
57 C.J. p. 472 note 89.

95. U.S.—Stewart v. Morris, Ill., 88 F. 461, 32 C.C.A. 7, 89 F. 290, 32 C.C.A. 203, certiorari denied 19 S. Ct. 886, 172 U.S. 646, 43 L.Ed. 1180

96. Ohio.—Richardson v. Windgate, 1 Ohio Dec. (Reprint) 478, 10 West L.J. 145.

97. Pa.—Lewis v. Culbertson, 11 Serg. & R. 48, 14 Am.D. 607.
57 C.J. p. 472 note 91.

98. Mont.—First Nat. Bank v. Silver, 122 P. 584, 45 Mont. 231.

99. Pa.—Waln v. Hewes, 5 Serg. & R. 468.

1. Mo.—National Handle Co. v. Huffman, 120 S.W. 690, 140 Mo.App. 634.
57 C.J. p. 472 note 94.

2. N.J.—Johnson v. Kaiser, 40 N.J. Law 286
57 C.J. p. 472 note 95.

3. Mich.—Newberry v. Trowbridge, 13 Mich. 263.

4. Pa.—In re Smith's Estate, 8 Pa. Dist. 168.

5. Pa.—Cochran v. Cutter, 18 Pa. Super. 282.

6. Minn.—Little v. Simonds, 49 N.W. 186, 46 Minn. 380.

(3) Actions by or against Administrators of Deceased Partners

In a suit by an administrator for a debt due his decedent, defendant may set off a debt due him by the firm of which decedent was a member, where by statute the estate of a deceased partner is liable for the whole debt of the firm of which he is a member, whether the surviving partner is solvent or insolvent.

In a suit by an administrator for a debt due his decedent, defendant may set off a debt due him by the firm of which decedent was a member, where by statute the estate of a deceased partner is liable for the whole debt of the firm of which he is a member, whether the surviving partner is solvent or insolvent;[7] and in an action by the administrator of a deceased partner against the surviving partner to recover the share of the deceased partner in the partnership assets, defendant may set off an indebtedness of decedent to him.[8] So, also, the administrators of a surviving partner may set off a partnership debt in an action against them in their representative capacity on a note made by the survivor.[9]

§ 53. —— Debt or Demand of Husband or Wife of Party to Action

a. Actions by husband
b. Actions against husband
c. Actions by wife
d. Actions against wife
e. Actions by husband and wife
f. Actions against husband and wife

a. Actions by Husband

As a general rule, in an action by a husband, defendant cannot assert for the purpose of set-off or counterclaim a claim against the wife or a claim against the husband and wife jointly.

As a general rule, in an action by a husband, defendant cannot assert as a set-off[10] or counterclaim[11] a claim against the wife. It usually is not permissible, in such an action, to set off a claim for damages resulting from the tortious act of plaintiff's wife, it not appearing that the husband consented to the tort or gave to it his subsequent sanction,[12] and in an action by plaintiff alone to recover money overpaid by him on a mortgage given by himself and wife on his wife's property, the amount due on another mortgage assumed by the wife as part of the purchase price of the property involved cannot be offset, because she is not a party to the action.[13] Where a husband sues an executor to recover a legacy to his wife, the executor may set off a debt by the husband to the testator, where the husband may make such legacy his own by any step which amounts to a reduction of it to possession.[14]

A claim against husband and wife jointly ordinarily cannot be set off[15] or counterclaimed,[16] in an action by the husband.

b. Actions against husband

Ordinarily, in an action against the husband, he cannot plead by way of set-off or counterclaim a claim in the right of the wife, or a debt due to, or owned by, him and his wife jointly.

Ordinarily, in an action against the husband, he cannot plead by way of set-off,[17] counterclaim,[18] compensation,[19] or reconvention,[20] a claim in the right of the wife, or constituting her separate property, and he cannot assert as a set-off or counterclaim a debt due to, or claim owned by, him and his wife jointly.[21] Accordingly, it has been held that a note in the hands of a defendant, given by plaintiff, but payable to a third person, although belonging to defendant in right of his wife, is not available as an offset, unless there is an express promise on the part of plaintiff, to pay the amount called for by the note, to defendant.[22] A husband is not precluded from recovering on a plea of set-off for board furnished because the wife did not join in the plea,[23] and he may plead by way of a set-off

7. Pa.—Blair v. Wood, 108 Pa. 278

8. Ind.—Skillen v. Jones, 44 Ind. 136.

9. Ala.—Hale v. Brown, 11 Ala. 87.

10. Ala.—Vaught v. Wellborn, 16 Ala. 377.
57 C.J. p. 472 note 5.
Without expressed assent of wife, a claim against the wife or her separate property cannot be used as a set-off against a claim by her husband.—Canfield v. Nagle, 19 Pa.Super. 210.
Action by husband's assignee
In action by assignee of chose in action assigned by husband, defendant cannot set off a claim against the wife of the assignor.—Shields v. Stark, Tex.Civ.App., 51 S.W. 540.

11. S.D.—Harrison v. State Banking, etc., Co., 89 N.W. 477, 15 S.D. 304.

12. Ala.—Vaught v. Wellborn, 16 Ala. 377.

13. S.D.—Harrison v. State Banking, etc., Co., 89 N.W. 477, 15 S.D. 304.

14. Pa.—Appeal of Lowman, 3 Watts & S. 349.

15. Vt.—Congdon v. Torrey, 112 A. 202, 95 Vt. 38.
57 C.J. p. 473 note 13.

16. N.Y.—Richards v. Reed, 26 N.Y.S. 540, 6 Misc. 217.

17. Tex.—King v. Driver, Civ.App., 183 S.W. 87.
57 C.J. p. 473 note 18.

18. Wis.—Dolph v. Rice, 21 Wis. 590.
57 C.J. p. 473 note 19.

19. La.—Stokes v. Forman, 12 La.Ann. 671.
57 C.J. p. 473 note 20.

20. La.—Smith v. Reddick, 8 So. 539, 42 La.Ann. 1055.
57 C.J. p. 473 note 21.

21. Ga.—Brooks v. Turner, 63 Ga. 297.
57 C.J. p. 473 note 22.

22. Ala.—French v. Garner, 7 Port. 549.

23. Ala.—Joyner v. McMurphy, 163 So. 533, 26 Ala.App. 549.

a claim for services rendered by his wife, where the earnings of the wife belong to the husband.[24] Rental of premises owned by husband and wife as tenants by the entirety may be set off in an action against the husband by the party owing it.[25]

Chose in action of which wife died seized Since a husband cannot recover choses in action of which his wife died seized, and to which he is entitled as a distributee, except through administration, such claims are not due to him personally, and cannot, therefore, be set off against a personal debt due by him to plaintiff[26]

c. Actions by Wife

In an action by a wife to enforce a claim due her as her separate property, defendant cannot ordinarily set off or counterclaim a claim against the husband.

In an action by a wife to enforce a claim due her as her separate property, defendant ordinarily cannot set off[27] or counterclaim[28] a claim against the husband. So, in an action by a wife to reduce to possession a chose in action accruing to her in her own right after marriage, the husband's marital right not having attached, a claim against the husband cannot be set off,[29] and, where, in an action by a wife in her own name to recover judgment on notes and for a decree foreclosing a mortgage given to secure them, the court erroneously refuses a motion to have the husband made a party plaintiff as being the real party in interest, defendant cannot counterclaim a demand against the husband.[30]

In an action by a wife for services, defendant has been permitted to set off a debt due from the husband, on the ground that the wife's earnings belong to the husband,[31] and, where the wife is only the nominal plaintiff and the husband is the real party in interest, a debt due from the husband may be set off[32] In an action by a wife for moneys had and received which belong to her statutory separate estate, it has been held that defendant can set off an amount due to him for necessary family supplies furnished to plaintiff and her husband, for which, by virtue of statute, her estate may be held liable.[33]

Action by wife to secure set-off. In view of the rule requiring mutuality of demands in order to warrant a set-off, a wife cannot ordinarily maintain an action to secure a set-off of her claim for damages against a judgment against her husband to which she was not a party,[34] even though defendant is insolvent and a nonresident of the state.[35]

d. Actions against Wife

In an action against a wife she cannot ordinarily set off or plead in compensation a debt claimed in the right of the husband.

In an action against a wife she cannot ordinarily set off[36] or plead in compensation[37] a debt claimed in the right of her husband. However, in an action against a wife on a running account for services rendered and materials expended in improving her property, credit for materials returned is a proper set-off, although credited in a statement rendered to her husband, where it appears that the husband acted as her agent[38] Also, in an action to foreclose a mortgage against a wife, she has been held entitled to plead a counterclaim for a debt due to her by the mortgagee for services rendered by her, where the husband himself makes no claim for such services, and she is entitled to her earnings as separate property[39]

e. Actions by Husband and Wife

In an action by a husband and wife based on a chose of action or claim which is the separate property of the wife, defendant usually cannot set off a separate claim against the husband or a debt due by the husband and wife jointly.

Reason for rule
In absence of special contract to contrary, amount due for board was payable to husband as head of household and right to sue was in him—Joyner v. McMurphy, supra.

24. Ind—Cranor v. Winters, 75 Ind. 301.

25. Mich—Way v. Root, 140 N.W 577, 177 Mich 418.
57 C J. p 473 note 26.

26. U S—Richter v. Hanneman, C C N Y, 119 F 471.

27. Ky—Terry v Warder, 78 S W 154, 25 Ky L 1486
57 C J p 473 note 27

In action by wife's assignee husband's debts to obligor cannot be set off against amount due in absence of authorization of such credits by wife—Niccloy v. Treasure, 115 N Y S 1030

28. N Y—Paine v. Hunt, 40 Barb 75
57 C J p 474 note 28.

In action by wife's administrator, a claim against the husband personally cannot be counterclaimed—Holliday v McMillan, 83 N C 270—57 C J p 474 note 36.

29. S C—Roberts v. Adams, 2 S C 337
57 C J. p 474 note 29

30. Idaho—Campbell v. Kearns, 90 P 108, 13 Idaho 287.

31. Del.—Emmertz v. Thurlow, 3 Del Co 368

32. Kan—Citizens' Bank v. Bowen, 21 Kan 354
57 C J p 474 note 32.

33. Ala—Castleman v. Jeffries, 60 Ala 380

34. Or—Barnes v. Esch, 169 P. 512, 87 Or. 1.

35. Or—Barnes v. Esch, supra.

36. Tex—Reuter v. Sullivan, Civ. App, 47 S W. 683

37. La—Buard v Buard, 5 Mart, N S., 132

38. N Y—Vetault v. Kennedy, 165 N Y S. 203, 178 App Div 228, affirmed 123 N E 894, 226 N Y 607

39. N Y—Carver v. Wagner, 64 N Y S. 747, 51 App Div. 47.

In an action by a husband and wife based on a chose of action of the wife, defendant usually cannot set off a separate claim against the husband for the reason that a wife's right of survivorship in respect of choses in action belonging to her, before or after coverture, until reduced to his possession by her husband, is a right treated by the law as an interest of substance and importance and entitled to protection.[40] Accordingly, where husband and wife join in an action on a chose in action owned by her before marriage,[41] or on a chose in action accruing to the wife after marriage,[42] a set-off of the husband's separate debt is not permissible, since the right of survivorship in the wife might thereby be defeated.[43] In like manner, in an action by husband and wife based on a debt or claim which is the separate property of the wife, a debt of the husband cannot ordinarily be set off[44] or pleaded in compensation.[45] It has been held that, where husband and wife sue for property claimed through the wife, and during the pendency of the suit the husband sells his interest and dies, a court of equity will allow a credit for the purchase money to be set off against the wife where the purchaser had the possession,[46] but in order to set off a debt of a deceased husband against his widow the equity must be clearly shown, and, although the husband died insolvent, if the widow is not insolvent and the demands are not connected, and no understanding is shown in the parties that one demand should be set off against the other, equity will not allow the set-off.[47]

In actions on debts or claims owned by husband and wife jointly. In an action by husband and wife on debts or claims owned by them jointly, a claim against the husband individually cannot be set off.[48]

Separate claim against wife When husband and wife join in an action on a promise made to the wife, it has been held that a debt secured by a contract made by the wife after marriage cannot be pleaded as a set-off,[49] but, in an action brought by the original obligee of a bond for the use of a married woman and her husband, it has been held that the maker may set off an account for medical services rendered for the married woman before her marriage, the wife and her husband being plaintiffs beneficially interested in the action,[50] and it has further been held that in a suit by husband and wife on a note given to them jointly for a debt created with defendants, by the dealing of the wife with the consent of the husband, defendants may set off an account not included in the note, created in the same course of dealing.[51]

Joint claim against husband and wife. Where husband and wife join in an action on a chose in action accruing to her during coverture, a debt due by the husband and wife jointly cannot be pleaded as a set-off,[52] for the reason that a joint promise by them would, in any conceivable case, be void at law as regards the wife, and would in effect be the promise of the husband.[53]

f. Actions against Husband and Wife

Ordinarily, where husband and wife are sued on a joint liability, a claim against plaintiff existing solely in favor of one spouse may not be asserted as a set-off or counterclaim. In an action on a joint and several obligation of a husband and wife a separate demand in favor of the husband may be counterclaimed.

Ordinarily, where husband and wife are sued on a joint liability, the husband cannot set off a debt due him[54] or set up by way of cross demand a claim in his favor against plaintiff.[55] In such an action, the husband and wife cannot set up by way of cross demand[56] or set-off[57] a claim against plaintiff existing solely in favor of the wife; and the wife cannot plead as a counterclaim a claim against plaintiff existing in her favor alone.[58] Where the cause of action is only against the separate property of the wife, and the husband is joined as a technical party only, debts due from plaintiff to the husband cannot be pleaded as a counterclaim.[59]

40. Ala.—Morris v. Booth, 8 Ala 907.
57 C.J. p 475 note 40

41. Del.—Smith v. Johnson, 5 Del 40.
57 C.J. p 475 note 41

42. Ala.—Morris v Booth, 8 Ala 907.
57 C.J. p 475 note 42.

43. Ala.—Morris v. Booth, supra.

44. Tex.—Hubby v. Camplin, 22 Tex. 582
57 C.J. p 475 note 46.

45. La.—Defau v Pelane, 15 La. 273.
57 C.J. p 475 note 47.

46. Ky.—Holloway v. Conner, 3 B Mon 395.
57 C.J. p 475 note 44.

47. Ill.—Houston v. Maddux, 53 N. E. 599, 179 Ill 377.

48. Va.—Stowers v Dutton, 171 S.E 510, 161 Va 658
57 C.J. p 475 note 48

49. Ala.—Morris v. Booth, 8 Ala. 907.
57 C.J. p 476 note 49.

50. N.C.—Gary v. Johnson, 72 N.C. 68

51. Ala.—Case v. Byrne, 12 Ala. 115.
57 C.J. p 476 note 51

52. Ala.—Morris v. Booth, 8 Ala. 907.

53. Ala.—Morris v. Booth, supra.

54. Ill.—Lucas v Johnson, 176 Ill. App 143.
57 C.J. p 476 note 54.

55. Iowa.—Musselman v. Galligher, 32 Iowa 383.

56. Iowa.—Musselman v. Galligher, supra.

57. Iowa.—Musselman v. Galligher, supra.

58. Iowa.—Evans v Evans, 210 N. W 564, 202 Iowa 493.
57 C.J. p 476 note 57.

59. Minn.—Carpenter v. Leonard, 5 Minn. 155
57 C.J. p 476 note 58.

In equity the rigid rules of a statute relating to set-off may be relaxed so as to allow, in an action against husband and wife, a set-off which the law would refuse.[60]

When suit is brought against husband and wife on a note executed by the wife dum sola, it has been held that the husband may set off one half of the amount paid by him before suit brought on a judgment which was recovered against the wife dum sola and plaintiff, on a note executed by them jointly,[61] but that he cannot set off such a payment made by him after the institution of the suit.[62] While it has been held that, in an action against husband and wife to foreclose a mortgage on his property executed by them, a claim against plaintiff in favor of the wife and others cannot be set off, she having no individual or proprietary title to the land mortgaged or being in any way liable for the debt,[63] it has also been held that in a suit to foreclose a mortgage on the wife's separate property given by husband and wife to secure the payment of a loan made to the husband, a cross complaint in the nature of set-off for moneys alleged to be due and owing by plaintiff to the husband may properly be pleaded.[64]

On joint and several obligation. In an action on a joint and several obligation or liability of a husband and wife a separate demand in favor of the husband may be counterclaimed.[65]

Judgment in favor of wife against judgment against husband. Where judgment in an action against husband and wife is rendered against the husband and in favor of the wife for costs, the judgment against the husband may be discharged pro tanto by offsetting the smaller judgment in favor of the wife, under a statute providing that all property acquired by either the husband or the wife after marriage shall be community property, subject to the husband's debts.[66]

§ 54. Recoupment, Set-Off, and Counterclaim against Assigned Causes of Action

a In general
b. Existence and maturity of claim at time of assignment or notice
c Assigned cause of action not mature at time of assignment
d Claims against assignor and another jointly, assignee and intermediate assignees
e Equitable set-off
f Contingent or secondary liability
g Waiver and estoppel

a. In General

A cause of action which is assigned is generally subject to any right of recoupment, set-off, or counterclaim held by the obligor against the assignor at the time of the assignment or notice thereof.

A cause of action which is assigned is generally subject to any right of recoupment,[67] set-off,[68] cross demand or counterclaim,[69] as well as being

60. Md—Lane v Fallen, 16 Md 352.
57 C J p 477 note 66.

61. Ala—Johnson v. King, 20 Ala. 270
57 C J p 476 note 61.

62. Ala—Johnson v King, supra

63. Mich—Hendricks v Toole, 29 Mich 340

64. Ind—Daly v. National Life Ins. Co, 64 Ind. 1.

65. N J—Scarano v Scarano, 28 A. 2d 425, 132 N J Eq 362
57 C J p 476 note 63

66. Nev—Adams v. Baker, 55 P. 362, 24 Nev 375

67. Cal—Bank of America of California v Pacific Ready-Cut Homes, 10 P.2d 478, 122 Cal App 554
Pa.—Northwestern Nat. Bank v. Commonwealth, 27 A 2d 20, 345 Pa. 192
57 C.J. p 477 note 68.

68. U S—Ozanic v. U S, C A N Y, 188 F 2d 228
Cal—Bank of America of California v. Pacific Ready-Cut Homes, 10 P. 2d 478, 122 Cal App. 554.
Mass—Gill v Richmond Co-op. Ass'n, 34 N E 2d 509, 309 Mass 73—Forastiere v. Springfield Inst. For Savings, 20 N E 2d 950, 303 Mass. 101—Federal Reserve Bank of Boston v Gray-United Stores, 194 N E 709, 290 Mass 77—Goldman v Noxon Chemical Products Co, 175 N E 67, 274 Mass 526.
Minn—First Nat Bank v Consolidated School Dist No 28 of Jackson County, 238 N W 634, 184 Minn. 635, affirmed 240 N W. 662, 184 Minn 635—Campbell v State Bank of Litchfield, 261 N W. 1, 194 Minn 502
N Y—McMann v Meehan, 61 N Y S. 58, 29 Misc 630
Pa—Northwestern Nat Bank v. Commonwealth, 27 A.2d 20, 345 Pa 192—Kentner Tp. Treasurer v. Society Maid Hosiery Mills, Inc, 17 Pa Dist. & Co 305
S D—Smee School Dist No. 4 of Corson County v. Salzsiedler, 257 N W 111, 63 S D. 158.
57 C J p 477 note 70.
Set-off against assigned judgments see Judgments § 568 e (2)

Where agreement between assignor and obligor permits set-off, such right is exercisable against subsequent assignee—Peoples Pittsburgh Trust Co v Commonwealth, 60 A 2d 53, 359 Pa 622

69. U S—Ozanic v. U. S, C A N Y, 188 F 2d 228
Cal—Harry Hall & Co v Consolidated Packing Co, 131 P 2d 859, 55 Cal App 2d 651
Kan—Sinclair Refining Co. v Rosier, 180 P 807, 104 Kan 719.
N Y—James Talcott, Inc, v. Le Bou Slax, Inc, 87 N Y S 2d 509, 194 Misc 620
Pa—Peoples Pittsburgh Trust Co. v. Commonwealth, 60 A 2d 53, 359 Pa 622—Northwestern Nat Bank v. Commonwealth, 27 A 2d 20, 345 Pa 192
Utah—Chesney v. District Court of Salt Lake County, 108 P 2d 514, 99 Utah 513
Wyo—Dallas Dome Wyoming Oil Fields Co v Brooder, 97 P 2d 311, 55 Wyo 109.
57 C J p 480 note 71.

Good faith

(1) The statutory requirement that a counterclaim against plaintiff's assignor, to be available against plaintiff, must belong to defendant in "good faith" does not relate to the merits of the counterclaim but rather to defendant's acquisition thereof—Chas Chipman's Sales Co. v Ely & Walker Dry Goods Co, 48 N.Y S 2d

generally subject to any right of compensation[70] held by the obligor against the assignor before and at the time of the assignment or notice thereof, and this rule applies, although the assignor is bankrupt.[71] In respect of such claims, the assignee ordinarily has no greater rights than the assignor,[72] and the obligor is not by reason of the assignment put in a worse position than if the action were by the assignor.[73] However, the obligor is not by the assignment placed in a better position, and his claim against the assignor, in order to be available by way of recoupment, set-off, or counterclaim against the assignee, must satisfy the general rules as discussed supra §§ 12–53 with respect to the requisites therefor,[74] such as the requirement that the claim constitute a valid cause of action,[75] and the requirements as to the subject matter of the claim and its relationship to the cause of action sued on.[76] Under some statutes, defendant is not permitted to set off against an assignee a claim against the assignor arising from a transaction independent of that which gave rise to the obligation assigned.[77]

Where the cause of action on which defendant's cross demand is based depends for its existence on the nonexistence of the assigned cause of action, it cannot be urged as a counterclaim against the assignee.[78] No set-off can be successfully asserted which the debtor could not have been heard to insist on.[79] The right to a set-off is preserved where there has been an assignment of a claim solely for the benefit of the debtor who owes the claim assigned.[80]

Assignee's lack of knowledge. Although the assignee takes without knowing of the outstanding claim, it may still be asserted against him as a set-off.[81] Defendant may have recoupment despite the assignee's lack of knowledge of the existence

483, 183 Misc 531, affirmed 60 N.Y.S 2d 282, 270 App Div. 808.

(2) Where buyer purchased with intention not to make payment but to set off a claim for seller's nondelivery of previous order, buyer's claim against seller for breach of first contract was available as a counterclaim in action brought by seller's assignor under second contract, as having been acquired in "good faith"—Chas Chipman's Sales Co v. Ely & Walker Dry Goods Co, 48 N Y S 2d 483, 183 Misc 531, affirmed 60 N Y S 2d 282, 270 App Div. 808

70. La.—Adams v. Webster, 25 La. Ann 117—Succession of Plunkett, 12 La Ann 558

71. Ala—Harwell v Steel, 17 Ala 372
57 C.J. p 477 note 70 [r]

72. Mass—Edmund Wright Ginsberg Corp v C D Kepner Leather Co., 59 N E 2d 253, 317 Mass 581.
57 C J p 477 note 70 [a], [e], p 480 note 71 [b].

73. Mass—Edmund Wright Ginsberg Corp v C. D. Kepner Leather Co, 59 N E 2d 253, 317 Mass 581
Scope and extent of relief available to obligor in action by assignee see infra § 61

74. Conn—Bridgeport-City Trust Co. v. Niles-Bement-Pond Co., 20 A 2d 91, 128 Conn 4, 135 A.L.R. 690

Mutuality in opposing demands at time of assignment of one is necessary to sustain set-off as against assignee.—Widdows v. Keaton, D.C. Okl, 44 F.2d 839

Agreement to take up shares of stock at par

Where, at the time a corporation is put in voluntary liquidation, one of the directors, who owes a debt to the corporation for goods bought from it, agrees with the liquidating agent to buy more goods on credit and to receive a cancellation of his debt and a further payment of money in such amount as to constitute payment at par of shares of stock held by him, the director cannot set off, as against a bona fide assignee of the account for goods sold, an amount equal to the par value of his shares, either by virtue of his ownership of such shares, or by virtue of his agreement with the liquidating agent—Interstate Distributing Co v. Connell, 46 Pa Super. 551.

75. U.S—Steingut v. Guaranty Trust Co of N Y, D.C.N Y., 58 F. Supp 623, modified on other grounds 60 F Supp 103, affirmed, C C A, 161 F 2d 571, certiorari dismissed Guaranty Trust Co. of N. Y v U S, 68 S Ct 81, two cases 332 U S 753, 92 L Ed 339, 68 S Ct 89, 332 U S 753, 92 L Ed. 340, and 68 S Ct. 90, two cases 332 U S. 753, 92 L Ed 340, certiorari denied Tillman v Millard, 68 S Ct 106, 332 U. S 807, 92 L Ed. 385, and Steingut v Guaranty Trust Co of N. Y, 68 S Ct. 106, 332 U S 807, 92 L Ed 385
Conn—Bridgeport-City Trust Co. v Niles-Bement-Pond Co., 20 A 2d 91, 128 Conn 4, 135 A.L.R 690.

Claim admittedly paid cannot be urged as a set-off.—Steingut v. Guaranty Trust Co. of N. Y., D C N.Y., 58 F Supp. 623, modified on other grounds 60 F.Supp. 103, affirmed, C C A, 161 F 2d 571, certiorari dismissed Guaranty Trust Co. of N Y. v. U. S, 68 S.Ct. 81, two cases 332 U.S 753, 92 L.Ed 339, 68 S Ct. 89, 332 U.S. 753, 92 L Ed. 340, and 68 S Ct. 90, two cases 332 U S. 753, 92 L Ed. 340, certiorari denied Tillman v. Millard, 68 S Ct. 106, 332 U.S. 807, 92 L Ed 385, and Steingut v Guaranty Trust Co. of N. Y, 68 S.Ct 106, 332 U S. 807, 92 L Ed 385.

76. Mo—Scarritt Estate Co. v. J F. Schmelzer, etc, Arms Co, 86 S W. 489, 110 Mo.App. 406.
57 C J p 477 note 70 [b], p 480 note 71 [e].

Unrelated claim against nonresident of parish

The rule that an unrelated claim may be set up in reconvention against a plaintiff not residing in the same parish as defendant does not apply where plaintiff is an assignee who acquired his cause of action without notice of defendant's claim. —Dugas v. Lewis-Chambers Const. Co, La App., 185 So. 59, annulled 187 So. 117.

77. U S—Panama City v. Federal Reserve Bank of Atlanta, C.C.A Fla, 97 F 2d 499
57 C J p 477 note 70 [t].

78. N Y—Potomac Ins. Co. v. Schmedes, 63 N Y.S 2d 548—Occidental Ins Co. v. Herman, 38 N.Y S 2d 278, 179 Misc 499.
Existence of plaintiff's cause of action as condition to recoupment, set-off, or counterclaim generally see supra § 15
Judgment against assignee for excess over assignee's cause of action see infra § 61.

79. Minn—Quigley v. Welter, 104 N W. 236, 95 Minn. 383.
57 C J. p 481 note 74.

80. Minn—Quigley v. Welter, supra.

81. Cal—Bank of America of California v. Pacific Ready-Cut Homes, 10 P 2d 478, 122 Cal App. 554.
57 C J. p 481 note 75.

and terms of a supplemental contract on which defendant's claim is based.[82]

Transfer of all rights and obligations. Where all the contract rights and liabilities of one person were transferred to another, the transferee was held to have taken the liabilities in the condition in which they were in the hands of the transferor and to be entitled to the benefit of any set-offs available to the latter at the time of transfer.[83]

Existence of bond. The fact that the assignor has given a bond to defendant securing him against claims of the character asserted as a counterclaim does not prevent defendant from setting them up as counterclaims against the demand of the assignee [84]

b. Existence and Maturity of Claim at Time of Assignment or Notice

(1) In general
(2) Claims arising subsequent to assignment
(3) Claims maturing subsequent to assignment
(4) Claims arising from same contract or transaction
(5) Judgment against assignor after assignment

(1) In General

As a general rule, whether or not a claim against the assignor sought to be raised by way of set-off or counterclaim against the assigned cause of action must have been acquired and matured at the time of the assignment or notice thereof is dependent on the terms of the statutes.

The diversity of decisions as to whether or not a claim against the assignor sought to be raised by way of set-off or counterclaim against the assigned cause of action must have been acquired and matured at the time of the assignment or notice thereof arises in part from the varying phraseology of the different statutes.[85] Statutory provisions to the effect that, when cross demands have existed under such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment of the other, and those to the effect that set-off or counterclaim may be had against an assignee if the demand is such as might have been set off against such plaintiff or such assignee while the contract belonged to him are substantially the same;[86] and in each the test of whether the debtor preserves his set-off or counterclaim depends on whether he could have set it up before the assignment, that is, while the contract belonged to the assignor [87] The effect of a statutory provision to the effect that, in case of assignment, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment, as respects defendant's right to interpose a set-off or counterclaim, is that, until he has notice of the assignment, he occupies the same position as if the assigned demand was still held by the assignor.[88] Such a statute merely expresses what was the equitable effect of an assignment in the absence of any statute.[89] Where, however, provisions of the former character exist, although in conjunction with provisions of the latter character, it has been held that the former are operative and control matters of set-off and counterclaim between the parties,[90] at least where the latter provisions appear as part of the practice act whose chief purpose is to deal with the procedure for the enforcement of rights rather than the elements going to make up the existence of the rights to be enforced.[91]

"Now allowed." Under statutes declaring that, in case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed, it has been held that the effect of the language used is to preserve to the debtor the same remedial rights as existed under the law preceding the adoption of the statute without change,[92] and this is true, although the nature of the claims available under such rights is altered by another statutory provision adopted at the same time;[93] but there is other authority holding, where at the time of the enactment of such statutory provision the legislature by further enactment adopted portions of the statutes of set-off and counterclaim of another state, that the words "now allowed" are used in contradistinc-

82. Cal.—Stern v. Sunset Road Oil Co., 190 P. 651, 47 Cal. App. 334
83. N. Y.—Taylor v. New York, 82 N. Y. 10.
57 C. J. p. 481 note 77.
84. Or.—Ashley v. Portland, 175 P. 447, 90 Or. 40
57 C.J. p. 481 note 78.
85. Cal.—St. Louis Nat. Bank v. Gay, 35 P. 876, 101 Cal. 286.
57 C. J. p. 487 note 25.
86. Ohio.—Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. D. 312
87. N. Y.—Martin v. Kunzmuller, 37 N. Y. 396, 4 Transcr. A. 464.
57 C. J. p. 482 note 82
88. Nev.—San Francisco First Nat. Bank v. Nye County, 145 P. 932, 38 Nev. 123, Ann. Cas. 1917C 1195
57 C. J. p. 482 note 84.
89. Ariz.—Martin v. Wells, 28 P. 958, 3 Ariz. 355.
90. Mont.—Stadler v. Helena First Nat. Bank, 56 P. 111, 22 Mont. 190, 74 Am. S. R. 582.
91. Mont.—Stadler v. Helena First Nat. Bank, supra.
92. Wyo.—Petters v. Albany County School Dist. No. 5, 260 P. 678, 37 Wyo. 237.
57 C. J. p. 482 note 96.
93. Ohio.—Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. R. 312.

tion to the character of claims that could be set off before such adoption,[94] and that the phrase refers to demands of such character as might be set off by virtue of the provisions thus adopted, rather than to the law prior to the enactment,[95] the words "now allowed" referring to allowance under the law of the state whose set-off statutes were adopted concurrently with the provision in question.[96]

When demand is liquidated. In an action on a liquidated demand held by plaintiff as assignee, an unliquidated claim existing in favor of defendant against the assignor at the time of the assignment has been held not a proper set-off.[97]

(2) Claims Arising Subsequent to Assignment

As a general rule, claims arising in favor of the defendant against the assignor subsequent to the assignment or notice thereof cannot be set off or counterclaimed against an assigned cause of action.

As a general rule, claims arising in favor of defendant against the assignor subsequent to the assignment[98] or notice thereof[99] cannot be set off or counterclaimed against the claim of the assignee, at least where they accrue on independent contracts or transactions separate from that giving rise to the assigned cause of action,[1] even though they had their origin in transactions previous to the giving of notice.[2] It has been held that defendant may set off or counterclaim against the assignee claims against the assignor arising or acquired prior to notice of the assignment,[3] even though such claim was not acquired or did not arise until after the assignment,[4] at least where the assigned demand is in its nature not assignable at law,[5] but it has also been held that a claim against the assignor arising out of an independent contract or transaction after the assignment but before notice thereof is not available as a set-off or counterclaim against the assignee,[6] and it has been held that an assigned cause of action is not subject to set-off or counterclaim arising out of an independent contract, whether the contract was made before or after notice of the assignment.[7]

(3) Claims Maturing Subsequent to Assignment

Whether or not a claim by the obligor against the assignor, not matured at the time of the assignment or notice thereof, is available as a set-off or counterclaim against the assigned cause of action is largely a question of statutory construction.

The question of the allowance as set-off or counterclaim of a demand unmatured at the time of the assignment against an assigned matured demand is largely one of statutory construction.[8] Under some statutes, as, for example, those providing in effect that, when cross demands have existed under such circumstances, if one had brought an action against

94. Okl.—McMann v. H. F. Wilcox Oil, etc., Co., 250 P. 780, 121 Okl. 167

95. Okl.—McMann v. H. F. Wilcox Oil, etc., Co., supra.

96. Okl.—McMann v. H. F. Wilcox Oil, etc., Co., supra.

97. N.Y.—Allgoever v. Edmunds, 66 Barb. 579
57 C.J. p. 487 note 40.

98. U.S.—U. S. Fidelity & Guaranty Co. v. Levy, C.C.A.Ala., 77 F.2d 972.
N.Y.—James Talcott, Inc., v. Weiss, 273 N.Y.S. 1003, 153 Misc. 317.
57 C.J. p. 483 notes 4, 8

Garnishee's expenditures after service of attachment cannot be set off.—Frazier v. Berg, 159 A. 541, 306 Pa. 317

99. Conn.—Bridgeport-City Trust Co. v. Niles-Bement-Pond Co., 20 A.2d 91, 128 Conn. 4, 135 A.L.R. 690.
Neb.—**Corpus Juris quoted in** Cronkleton v. Hastings Theatre & Realty Corporation, 278 N.W. 144, 147, 134 Neb. 168
Pa.—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192
Wash.—Ropes, Inc., v. Rubinstein, 104 P.2d 329, 4 Wash.2d 380.
57 C.J. p. 485 note 15—5 C.J. p. 980 note 47 [c].

Record notice
Ky.—Bramblett v. Slemp, 108 S.W. 339, 32 Ky.L. 1329
57 C.J. p. 484 note 12 [c], [d]

1. Colo.—H. C. Lallier Construction & Engineering Co. v. Weicker Transfer & Storage Co., 25 P.2d 195, 93 Colo. 231.
Neb.—**Corpus Juris quoted in** Cronkleton v. Hastings Theatre & Realty Corporation, 278 N.W. 144, 147, 134 Neb. 168.
N.Y.—James Talcott, Inc., v. Weiss, 273 N.Y.S. 1003, 153 Misc. 317.
57 C.J. p. 483 note 5, p. 485 note 16.

2. Conn.—Bridgeport-City Trust Co. v. Niles-Bement-Pond Co., 20 A.2d 91, 128 Conn. 4, 135 A.L.R. 690.
N.Y.—James Talcott, Inc. v. Weiss, 273 N.Y.S. 1003, 153 Misc. 317.
57 C.J. p. 486 note 17.

3. Cal.—Ornbaun v. First Nat. Bank, 8 P.2d 470, 215 Cal. 72, 81 A.L.R. 1146, followed in Ornbaun v. Savings Bank of Mendocino County, 8 P.2d 473, 215 Cal. 770.
Ky.—Louisa Nat. Bank v. Paintsville Nat. Bank, 85 S.W.2d 668, 260 Ky. 327, 100 A.L.R. 819
Pa.—Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 345 Pa. 192
S.D.—Waverly Independent Consol. School Dist. No. 1 v. Young, 253 N.W. 480, 62 S.D. 434
57 C.J. p. 484 note 14

4. Ky.—Louisa Nat. Bank v. Paintsville Nat. Bank, 85 S.W.2d 668, 260 Ky. 327, 100 A.L.R. 819
Va.—Armour & Co. v. Whitney & Kemmerer, Inc., 178 S.E. 889, 164 Va. 12
57 C.J. p. 484 note 12.

5. S.C.—Burkett v. Moses, 45 S.C.L. 432.

6. Mont.—Stadler v. Helena First Nat. Bank, 56 P. 111, 22 Mont. 190, 74 Am.S.R. 582
N.Y.—Diossy v. Heuberer, 1 N.Y. City Ct. 13.

7. Ill.—**Corpus Juris cited in** Chessen v. Morick, 260 Ill.App. 1, 4
Tenn.—**Corpus Juris quoted in** Union & Planters Bank & Trust Co. v. Christian Church, 3 Tenn.App. 540, 549
5 C.J. p. 965 note 30.

8. Wash.—King v. West Coast Grocer Co., 129 P. 1081, 72 Wash. 132
57 C.J. p. 488 note 49.

the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment of the other, or those providing in effect that, if an action is founded on an assigned contract, a demand existing against the assignor, or any assignee, at the time of the assignment, and belonging to defendant, in good faith, before notice of such assignment, may be set off if the demand is such as might have been set off against such assignor or assignee, when the contract belonged to him, it is held that a debtor, when sued by the assignee of the claim, cannot set off or counterclaim against such assignee demands which the debtor has against the assignor which matured after the assignment[9] or notice thereof,[10] although such claim became due before suit;[11] and further, no statements or conduct of the debtor, unassented to by the assignee, on receipt of the notice of assignment, can operate to change this rule so as to make such claims available for this purpose.[12] However, the operation of this rule is limited to cases where the set-off or counterclaim arises out of a contract or transaction independent of that on which the assigned cause of action is based[13]

It has been held that a claim against the assignor not matured at the time of the assignment is not available as a counterclaim or set-off against the assigned cause of action, although it matures before notice of the assignment,[14] though, as discussed infra § 56, a claim which has matured at the time of the assignment is available as a set-off or counterclaim, even though it is not acquired by defendant until after the assignment, but before notice thereof; but it has also been held that a demand, not due at the time of assignment, but which has become due before notice thereof, is available against the assignee as a set-off or counterclaim.[15]

Under some statutes a claim may be set off or counterclaimed against the assignee, in a suit on the assigned obligation, although the claim thus asserted was not due and payable at or before the assignment,[16] and the fact that the demand claimed as an offset has not matured when defendant receives notice of the assignment of his obligation does not render it unavailable as a set-off or counterclaim;[17] it is sufficient if the transaction out of which the claim arises commenced before defendant was informed of the transfer,[18] and it is not essential that the liability of the assignor should be complete at that time.[19] A demand, although unmatured at the time of notice, may be successfully pleaded, where it is of such a character that it could have been pleaded against the assignor, provided defendant acquired it before notice of assignment and provided further that it was existing at the commencement of the action[20] Whether or not the demand was due and suable before notice constitutes no element in the determination of whether it existed before notice so as to render it available as set-off or counterclaim.[21]

Stipulation in assignment for allowance. If the assignor at the time of assignment requires the assignee to recognize and allow the debtor's offset, such offset is available, although it does not mature until after the assignment.[22]

(4) Claims Arising from Same Contract or Transaction

As a general rule a claim by the defendant against the assignor arising from the same contract or transaction as the assigned cause of action may be availed of by way of recoupment, set-off or counterclaim without regard to the fact that the claim did not exist or mature until after the assignment or notice thereof.

9. N.Y.—James Talcott, Inc. v. Weiss, 273 N.Y.S. 1003, 153 Misc. 317.
Okl.—**Corpus Juris quoted in** Board of Education of Town of Ringling v. State ex rel. Benton, 46 P.2d 325, 327, 172 Okl. 437—Sisler v. Sapulpa Industrial Finance Corporation, 45 P.2d 91, 172 Okl. 207.
57 C.J. p. 486 notes 18, 20

10. Tenn.—**Corpus Juris quoted in** Union & Planters Bank & Trust Co. v. Christian Church, 3 Tenn. App. 540, 549.
57 C.J. p. 487 note 35—5 C.J. p. 965 note 29

11. Ill.—Hibernian Banking Assoc. v. Chicago, 178 Ill. App. 138
Okl.—Board of Education of Town of Ringling v. State ex rel. Benton, 46 P.2d 325, 172 Okl. 437.

12. Ill.—Hibernian Banking Assoc. v. Chicago, 178 Ill.App. 138

13. N.Y.—James Talcott, Inc., v. Weiss, 273 N.Y.S. 1003, 153 Misc. 317
Okl.—Board of Education of Town of Ringling v. State ex rel. Benton, 46 P.2d 325, 172 Okl. 437—Sisler v. Sapulpa Industrial Finance Corporation, 45 P.2d 91, 172 Okl. 207
57 C.J. p. 486 note 21

14. Mont.—Stadler v. Helena First Nat. Bank, 56 P. 111, 22 Mont. 190, 74 Am.S.R. 582
N.Y.—Michigan Sav. Bank v. Millar, 96 N.Y.S. 568, 110 App.Div. 670.
Okl.—McMann v. H. F. Wilcox Oil, etc., Co., 250 P. 780, 121 Okl. 167.

15. Minn.—Martin v. Pillsbury, 23 Minn. 175
57 C.J. p. 487 note 24

16. Cal.—Harry Hall & Co. v. Consolidated Packing Co., 131 P.2d 859, 55 Cal.App.2d 651.
Pa.—**Corpus Juris quoted in** Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 25, 345 Pa. 192.
57 C.J. p. 486 note 23

17. Pa.—**Corpus Juris quoted in** Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 25, 345 Pa. 192
57 C.J. p. 487 note 32.

18. Cal.—St. Louis Nat. Bank v. Gay, 35 P. 876, 101 Cal. 286
Pa.—Northampton Bank v. Balliet, 8 Watts & S. 311, 42 Am.D. 297.

19. Cal.—St. Louis Nat. Bank v. Gay, 35 P. 876, 101 Cal. 286
57 C.J. p. 487 note 30

20. Cal.—St. Louis Nat. Bank v. Gay, supra.
57 C.J. p. 487 note 33

21. Cal.—St. Louis Nat. Bank v. Gay, supra

22. N.Y.—Fort v. McCully, 59 Barb. 87.

As a general rule, a claim by defendant against the assignor arising from the same contract or transaction as the assigned cause of action may be availed of by way of recoupment, set-off, or counterclaim without regard to the fact that the claim did not exist or mature until after the assignment or notice thereof.[23] Where a claim is assigned, defendant may, in an action by the assignee, have recoupment for a default in performance by the assignor of his obligations under the executory contract on which the assigned claim was based, although such default occurred after the assignment[24] and after notice thereof to defendant,[25] or for a default which existed at such time, but was discovered subsequent thereto;[26] and this has been held both where the claim assigned was due and payable at the time of assignment and notice,[27] and where it had not matured at that time.[28] The right of recoupment is not affected by the fact that the assignee does not actually know at the time of assignment of those terms in the contract which give rise to the obligation asserted in recoupment.[29]

(5) Judgment against Assignor after Assignment

It has been held that a judgment against the assignor, rendered after the assignment or notice thereof, or the claim on which such judgment is based, is not available as a set-off or counterclaim against the assigned cause of action, but the rule has been relaxed where its application would be inequitable.

It has been held that a judgment against the assignor, rendered after the assignment or notice thereof, or the claim on which such judgment is based, is not available as a set-off or counterclaim against the assigned cause of action; the claim is not available because it is merged in the judgment; the judgment is not available because it was not in existence or mature at the time of the assignment or notice thereof[30] Other authorities deny this rule[31] or qualify it and hold that the obtaining of a judgment under such circumstances does not bar the debtor's right to assert his demand as an offset where such a result would be inequitable,[32] as where the assignor is insolvent and the judgment was recovered without knowledge of the assignment.[33]

Dormant judgment Although the judgment obtained against the assignor asserted as a set-off is dormant at the time the judgment against which it is sought to be set off is assigned, it is still available as a set-off against the assignee[34]

c. Assigned Cause of Action Not Mature at Time of Assignment

Dependent on statutory provisions, a claim by the obligor may or may not be available against the assignor of a cause of action which was not mature at the time of the assignment.

Under statutory provisions limiting the availability of set-off or counterclaim to such claims as were allowable against an assigned demand when it could have been asserted against such demand at the time of the assignment and as against the original owner, defendant cannot set off or counterclaim for a

23. U.S.—**Corpus Juris cited in** Standard Acc Ins Co v Federal Nat. Bank, C C A Okl, 112 F.2d 692, 695, adhered to 115 F 2d 34.
Cal.—Stern v. Sunset Road Oil Co, 190 P 651, 47 Cal App. 334.
N J.—**Corpus Juris cited in** Fidelity & Deposit Co v McClintic-Marshall Corporation, 171 A 382, 386, 115 N.J Eq 470, affirmed 176 A. 341, 117 N J Eq 440.
57 C J p 483 notes 5–7, p 485 note 16, p 486 note 21.

In New York

(1) As a result of a change in the statute, a claim, in order to be available as a counterclaim or set-off, must have matured at the time of the assignment, even though it arises from the same contract or transaction as the assigned cause of action. —Whitehall Mercantile Corp v Jamaica Ellbee Furriers' Corp, 54 N.Y. S.2d 653

(2) Prior to the change in the statute, a claim arising from the same contract or transaction was available as a set-off or counterclaim against the assigned cause of action, even though the claim arose or matured after the assignment.—Callanan v Edwards, 32 N.Y. 483—Blog v. Burden & Co, 265 N Y S 81, 238 App Div. 634—Stanford v. Cayuga Linen & Cotton Mills, 14 N Y S 2d 217, 171 Misc. 1001, affirmed 25 N Y S.2d 65, 261 App Div 877—James Talcott, Inc, v Weiss, 273 N.Y.S. 1003, 153 Misc. 317—57 C J p 482 notes 92–94

24. Mont.—**Corpus Juris cited in** Apple v. Edwards, 16 P.2d 700, 704, 92 Mont 524, 87 A.L R 179.
57 C J. p 488 note 43.

25. Mont.—**Corpus Juris cited in** Apple v Edwards, 16 P 2d 700, 704, 92 Mont. 524, 87 A L R 179.
57 C J. p 488 note 44

26. Md.—Schenuit v. International Finance Corp, 130 A. 331, 148 Md. 403.
57 C J. p 488 note 45.

27. Mass.—American Bridge Co v. Boston, 88 N E 1089, 202 Mass. 374.
57 C J p 488 note 46.

28. Cal.—Stern v. Sunset Road Oil Co, 190 P. 651, 47 Cal.App. 334.
57 C.J p 488 note 47.
Set-off and counterclaim against assigned cause of action not mature at time of assignment generally see infra subdivision c of this section.

29. Cal.—Stern v. Sunset Road Oil Co, supra.
57 C J. p 488 note 48.

30. N Y.—Jacobs v. Tannenbaum, 274 N.Y.S 772, 242 App Div. 833, appeal dismissed 198 N.E 567, 268 N.Y 705.
34 C.J. p 716 note 27—57 C J. p 490 notes 73–75, p 515 note 44 [a]
Merger of debt in judgment as affecting right to set off or counterclaim debt generally see Judgments § 599
Set-off and counterclaim of judgment against assignor against assigned claim generally see Judgments § 571.

31. Pa.—Jordan v. Stewart, 1 Pittsb 54.

32. Mich.—Bacon v Reich, 80 N W. 278, 121 Mich 480, 49 L R A. 311.
57 C J. p 490 note 77.

33. Mich.—Bacon v. Reich, supra.

34. Ohio.—Oliver v Canan, 73 N E. 466, 71 Ohio St. 360.

demand which matured at or before the assignment against a cause of action by the assignee which was not mature at the time of the assignment,[35] such as a cause of action based on the performance of a contract executory at the time of assignment.[36] In like manner, set-off or counterclaim of demands unmatured at the time of assignment against assigned causes of action unmatured at such time has been refused.[37] It has been intimated, however, that this rule may be applicable to prevent unavailability of a matured claim as a set-off or counterclaim only where the formerly unmatured demand, asserted by the assignee, was, at the time of assignment, merely a right under an executory contract to demand payment after performance of the assignor's obligations under the contract, which are unperformed at the time of the assignment,[38] and may not be applicable to prevent set-off of such matured claim against a liquidated demand, existing as a debt at the time of the assignment, for the payment of money already earned, contingent on nothing, but not yet due and payable at the time of the assignment.[39]

Under statutory provisions to the effect that an action on an assigned claim shall be without prejudice to any set-off existing at the time of or before notice of the assignment, the fact that the contract assigned has not matured at the time of assignment does not deprive defendant of any set-off or counterclaim then held by him against the assignor,[40] or acquired against the assignor before notice of the assignment.[41] Defendant may assert as a set-off or counterclaim to such an obligation, unmatured at the time of the assignment, an obligation of the assignor which is then due and demandable,[42] and defendant has even been permitted to avail himself as an offset against an obligation unmatured at the time of assignment of a demand against the obligor which was likewise unmatured at that time,[43] and even at the time of notice of the assignment,[44] although it has been intimated that in the last mentioned situation, the offset is allowable only where the claim asserted as a set-off or counterclaim matures before or as soon as the assigned claim,[45] but it has been held elsewhere that the respective times with respect to each other at which the claims mature are immaterial.[46]

Assignment and reassignment of executory contract to build. Where one entered into an agreement with a contractor, who assigned the contract to another before there had been any work done under it and before any demand existed against the obligor in favor of the contractor by virtue of the contract, there is authority that the obligor could not set off, against claims by the assignee of the second contractor, after the latter's performance of the contract without notice of any claims against his assignor, an antecedent claim which he held against the first contractor,[47] regardless of any agreement respecting set-off entered into between defendant and the assignor;[48] but it has been held, where a contractor before any performance assigned the contract to another, who so performed as to give rise to a cause of action in favor of the obligor under the contract, and then assigned to a third person, that the obligor could counterclaim against the second assignee for the claim arising against the first assignee by reason of his incomplete performance.[49]

d. Claims against Assignor and Another Jointly, Assignee, and Intermediate Assignees

Ordinarily defendant cannot assert as a set-off or counterclaim a demand against the assignor of a cause of action and another jointly, but he may set off or counterclaim a claim he holds directly against the assignee. The authorities are not in accord on the question wheth-

35. U S—Widdows v. Keaton, D C Okl., 44 F 2d 839.
Wash—Ropes, Inc, v. Rubinstein, 104 P 2d 329, 4 Wash 2d 380.
57 C J. p 488 note 51.
Recoupment, set-off, or counterclaim for claim arising out of same contract or transaction as against assigned cause of action not matured at time of assignment see supra subdivision b (4) of this section
Rent accruing after assignment
Matured claim arising out of different transaction is not available as set off against claim for rent accruing after assignment—Stafford Security Co v. Kremer, 179 N.E 32, 258 N Y. 1, 78 A.L.R. 822.

36. Mich—Koegel v Michigan Trust Co, 76 N W 74, 117 Mich. 542.
57 C.J. p 489 note 52.

37. N Y—Coffin v McLean, 80 N Y 560
Ohio—Fuller v Steiglitz, 27 Ohio St. 355, 22 Am R. 312

38. Mich—Bradley v. Smith, 57 N W 576, 98 Mich. 449, 39 Am S R 565, 23 L R A. 305

39. Mich—Bradley v. Smith, supra

40. Minn.—Nordsell v Neilsen, 184 N W 1023, 150 Minn 224.
57 C J p 489 note 57.

41. Minn—Nordsell v. Neilsen, supra—Martin v. Pillsbury, 23 Minn 175

42. Minn—Nordsell v Neilsen, 184 N.W 1023, 150 Minn. 224.
57 C J. p 489 note 59.

43. U S—Stewart v. Anderson, D.C, 6 Cranch 203, 3 L Ed 199.
57 C J p 489 note 60.

44. Cal.—St. Louis Nat Bank v Gay, 35 P. 876, 101 Cal. 286
57 C J p 489 note 61.

45. U S—Stewart v. Anderson, D C, 6 Cranch 203, 3 L.Ed. 199

46. Cal—St Louis Nat. Bank v Gay, 35 P. 876, 101 Cal. 286.

47. Cal—Himmelmann v. Reay, 38 Cal 163.

48. Cal.—Himmelmann v. Reay, supra

49. Wash.—Young v. Borzone, 66 P 135, 26 Wash. 4.
Set-off and counterclaim of demands against intermediate assignee generally see infra subdivision d of this section.

er claims against intermediate assignees are available as a set-off or counterclaim.

Ordinarily, defendant cannot set off a demand against the assignor of a cause of action and another jointly,[50] and a counterclaim based on such a demand is not allowable.[51] Thus where one of the coobligees in a joint obligation assigns his rights therein to the other, who sues thereon, it has been held that defendant cannot set off a claim against the assigning obligee and another jointly.[52] However, the rule has been held to be otherwise where the assignor was principal and the third person a surety,[53] or where the liability of the third person had been transferred to the assignor prior to his assignment to plaintiff.[54] Where the obligation of the assignor and another is joint and several, it may be availed of by defendant against the assigned cause of action.[55] Where defendant held claims against a number of persons, who also held claims against defendant, and all the others of those so situated with respect to defendant assigned their claims to one of their number, defendant, when sued by that one as assignor, was held entitled as a proper deduction to the sum total of his claims against the assignor and all the assignees,[56] although, had they sued defendant individually, he could not perhaps have deducted his claim against any single one of the persons, because such claim had been ascertained in the mass and not as to individuals.[57]

Claims against assignee. In an action on a contract by an assignee thereof, defendant may set up as a set-off or counterclaim a claim existing directly against the assignee, which defendant holds,[58] subject to the general rules discussed supra § 33 et seq which may restrict the claims which defendant may present to those growing out of the same transaction as plaintiff's claim.[59] Where the assignment is made and the assignee holds the claim assigned solely for the benefit of a third person, the debtor cannot set off against a claim so assigned obligations due directly by the assignee to the debtor.[60]

Claims against Intermediate Assignee. A debtor defendant in an action brought by the last of several assignees of the debt has been permitted, by some authorities, to set off against such debt claims in the nature of a set-off which he held against plaintiff's assignor, an intermediate assignee, prior to assignment and while such intermediate assignee was the owner of the obligation in suit;[61] and, in construing a statute providing that an assignee shall take subject to any set-off or other defense, existing at the time of, or before notice of, the assignment, it has been held that an obligation assigned a number of times will be subject to any set-off or other defense that the maker had against any one or all of the assignees at the date of assignment, or before notice thereof.[62] Elsewhere, however, the authorities announce the contrary conclusion, holding that defendant cannot, as against plaintiff, set off[63] or counterclaim for[64] demands against plaintiff's intermediate assignees, at least in the absence of any fraud in the assignment,[65] unless there is an agreement between the parties allowing it,[66] the result being grounded on the controlling statutory provisions applicable to the transaction.[67] Moreover, even though there has been an actual agreement between the intermediate assignee and the debtor while the former held the debt that claims against him should be allowable as set-offs, that is not necessarily of itself sufficient to make such claims available in that manner after a further assignment;[68] in order to have that effect, the agreement must amount to a binding contract made on a new consideration.[69] Where assignment to intermediate assignee includes assumption by him of all liabilities of his assignor as an express contractual provision, it has been held that as to liabilities incurred by reason of such assumption clause, a plaintiff to

50. Ind.—Woods v. Harris, 5 Blackf. 585.
57 C.J. p. 492 note 3.

51. N.Y.—Samuels v. Twin State Realty Co., 145 N.Y.S. 44.
57 C.J. p. 492 note 4.

52. Wis.—Carpenter v. Fulmer, 95 N.W. 403, 118 Wis. 454.

53. Ind.—Hoffman v. Zollinger, 39 Ind. 461.

54. Pa.—Robinson v. Beall, 3 Yeates 267.
57 C.J. p. 492 note 6.

55. Minn.—Campbell v. State Bank of Litchfield, 261 N.W. 1, 194 Minn. 502.

56. Wash.—Kempe v. Johnson, 106 P. 619, 57 Wash. 154.

57. Wash.—Kempe v. Johnson, supra.

58. Kan.—Tracy v. Kerr, 28 P. 707, 47 Kan. 656.
57 C.J. p. 490 note 85.

59. La.—Jackson v. Taylor Bros. Garage, App., 4 So. 2d 41.

60. N.D.—Storing v. Mandan Special School Dist., 204 N.W. 837, 53 N.D. 24.

61. Kan.—Produce Exchange Bank of Kansas City v. School Dist. No. 86 of Nemaha County, 28 P.2d 742, 138 Kan. 834.
57 C.J. p. 491 note 89.

62. N.C.—Harris v. Burwell, 65 N.C. 584, overruling Neal v. Lea, 64 N.C. 678.

63. Ala.—Stocking v. Toulmin, 3 Stew. & P. 35.
57 C.J. p. 491 note 91.

64. N.Y.—Thompson v. Harrison, 1 Daly 302.
57 C.J. p. 491 note 92.

65. Tenn.—Hooper v. Spicer, 2 Swan 494.

66. Ala.—Goldthwaite v. National Bank, 67 Ala. 549.
Mo.—Frowein v. Calvird, 75 Mo. App. 567.

67. Ala.—Stocking v. Toulmin, 3 Stew. & P. 35.
57 C.J. p. 492 note 96.

68. Ala.—Kennedy v. Manship, 1 Ala. 43.

69. Ala.—Kennedy v. Manship, supra.

whom the claim is assigned by such intermediate assignee stands in the same position as his assignor and takes subject to any offset which might, by virtue of the assumption agreement, be asserted against the latter.[70]

e. Equitable Set-Off

As a general rule, an equitable right of set-off is not defeated by an assignment of the debt.

As a general rule an equitable right of set-off is not defeated by assignment of the debt,[71] at least where the assignee takes with notice [72] Thus, where there are mutual debts, and an express or implied agreement of mutual credit, a court of equity will enforce it against an assignee [73] Equity will not allow a set-off against an assignee of claims against an assignor on mere general equities and in the absence of a showing of some specific ground of equitable set-off;[74] and equity will not allow a set-off against an assignee where to do so would be inequitable,[75] or to any further extent than may be equitable [76] Thus, the rights of equitable assignees will be protected in equity against claims in set-off acquired against the assignor after notice of the assignment [77]

While there is some authority holding that equity will not allow a set-off against an assignee of a claim against the assignor not due at the time of the assignment,[78] or of a claim which has not yet arisen at such time,[79] there is other authority to the contrary,[80] and, on the existence of those equities which move that court to allow set-offs unavailable at law, it has been held that a set-off may be allowed of a claim accruing after commencement of the action.[81] Equity relaxes the rules of the law regarding the effect of the time of assignment or notice, but goes beyond them only when the departure is necessary to prevent wrong and injustice,[82] and, however persuasive defendant's equity, his claim, in order to be effective as a counterclaim, must comply with the statutory requirements concerning offsets in this connection.[83]

Insolvency and nonresidence of assignor. The insolvency of the assignor at the time of assignment is good ground in equity to authorize a set-off against the assignee of claims against the assignor at the time of assignment,[84] especially when coupled with the assignor's nonresidence at the time of assignment;[85] but, where a demand against which a set-off is pleaded on the ground of the debtor's insolvency or nonresidence has been assigned, it must appear, in order that equity set off the demand, that the insolvency or removal occurred before the assignment,[86] or notice thereof [87] In equity, on proof of the nonresidence or insolvency of the assignor at the time of the assignment, it has been held that even an unliquidated claim sounding in tort may be set off against the assignee.[88]

f. Contingent or Secondary Liability

The authorities are not in accord on the question whether a debtor, when sued by the assignee of his debt, can set off against the plaintiff a demand against the assignor arising from the defendant's having become secondarily liable as surety, indorser, or guarantor on a debt wherein the assignor was the principal debtor.

According to some authorities, a debtor, when sued by the assignee of his debt, can set off against plaintiff a demand against the assignor arising from defendant's having become secondarily liable as surety, indorser, or guarantor on a debt wherein the assignor

70. N Y —May v Haight, 218 N Y.S 241, 218 App Div. 90.

71. N.Y.—Gay v Gay, 10 Paige 369
57 C J. p 499 note 55
Equitable set-off generally see supra § 5.
Where defendant has no adequate remedy to enforce claim against assignor of another party to suit, pleading of that claim as a set-off against demand of the other party is favored in equity —Russo-Asiatic Bank v. Guaranty Trust Co of New York, D C.N Y., 27 F Supp 382

72. U S —Greene v. Darling, C.C R I, 10 F Cas No 5,765, 5 Mason 201
57 C J p 499 note 56

73. U S —Greene v. Darling, supra.
57 C J p 499 note 57.

74. U S —Greene v Darling, supra
57 C.J p 499 note 58

75. U S —U. S. Fidelity & Guaranty Co v. Levy, C C A Ala., 77 F. 2d 972.
57 C J. p 499 note 59

76. N Y —Barber v. Spencer, 11 Paige 517

77. Me —American Bank v. Wall, 56 Me 167.
57 C J p 499 note 61

78. Mont —Stadler v. Helena First Nat Bank, 56 P 111, 22 Mont 190, 74 Am S R 582
57 C J. p 499 note 62

79. N.Y.—Perry v. Chester, 53 N Y 240.

80. Ky.—Kentucky Flour Co v. Merchants' Nat. Bank, 13 S W 910, 90 Ky 225, 12 Ky.L. 198, 9 L R A. 108
57 C J. p 499 note 64.

81. Ind —Eigenman v. Clark, 51 N E. 725, 21 Ind App 129.

82. N.Y.—Beecher v. Peter A. Vogt Mfg. Co, 125 N E. 831, 227 N.Y. 468

83. N Y —Bamberger v. Oshinsky, 48 N Y S 139, 21 Misc. 716, 26 N Y Civ.Proc 346.
57 C J. p 499 note 69

84. Ohio —Smith v Fulton, 199 N E 218, 51 Ohio App 12.
57 C J. p 500 note 71.
Insolvency as ground for equitable set-off generally see supra § 5.

85. Ky —Dorsey v. Reese, 14 B.Mon 157.
Nonresidence as ground for equitable set-off generally see supra § 5.

86. Ky.—Talbot v. Warfield, 3 J.J. Marsh 83
57 C J. p 500 note 73.

87. Ky.—Wathen v. Chamberlin, 8 Dana 164—Ridgway v. Collins, 3 A. K Marsh 410.

88. Ky —Bramblett v Slemp, 108 S W 339, 32 Ky.L. 1329.

was the principal debtor,[89] although there has been no payment of such contingent claim at the time of the assignment,[90] or at the time of notice of the assignment,[91] especially where such payment has been made at the time that the offer of set-off is made.[92] Furthermore, there is authority to the effect that it is immaterial, in this connection, that the demand on which the debtor is secondarily liable has not matured at the time of assignment of his debt or of notice thereof,[93] but there is other authority to the contrary.[94]

On the other hand, it has been held that a claim, based on the assumption of secondary liability on an obligation of the assignor prior to any assignment of the debt, is not a claim of such character as can constitute a legal or equitable set-off against the assignee of another demand, held by the assignor against the person secondarily liable, where no payment has been made by the latter by reason of his secondary liability until after the assignment of the demand,[95] or, until after notice of such assignment.[96] This result has been reached despite the insolvency of the assignor, the person primarily liable on the claim urged in offset,[97] and although the debtor has, at a period subsequent to the time of assignment or notice, actually paid the assignor's debt whereon the debtor was secondarily liable.[98] Moreover, the status of such latter debt as matured or unmatured at the time of payment has been treated as immaterial in this connection,[99] although elsewhere weight has been accorded to the circumstance that such debt was not yet due at the time of assignment.[1] The rule discussed infra § 56 that a claim against the insolvent assignor purchased with knowledge of the insolvency cannot be set-off against an assigned cause of action has been held to apply where the obligor on the assigned cause of action pays the assignor's debt pursuant to his guaranty so that such payment cannot be set off against the assigned cause of action.[2]

The discharge of his contingent liability on the assignor's obligation, by the debtor secondarily liable thereon, may operate to render the amount thus paid and discharged available as an offset against the assignee, where such payment occurs before the assignment by the principal obligor,[3] or, according to other authority, where it is before notice of the assignment, although after the assignment has in fact been made.[4] It has been held that defendant cannot set off against the assignee a claim as surety for contribution against the assignor as cosurety, although defendant paid the whole debt prior to the assignment.[5]

g. Waiver and Estoppel

A debtor may waive the right to assert a set-off against the assignee, as where by his conduct he induces the assignee to believe that the assigned claim will be met and that there is no defense thereto.

A debtor may waive the right to use a set-off against the assignee.[6] What will amount to such a waiver must depend on the circumstances surrounding each particular case.[7] The debtor by his conduct in inducing the assignee to believe that the obligation will be met, and that there is no defense thereto, may be held to have waived the right to avail himself of a set-off against the assignor in an action by the assignee.[8] A waiver of the right to urge a claim arising from a different transaction as a counterclaim or set-off may be inferred where the obligation to the assignor was incurred with the knowledge and understanding that it would be promptly assigned,[9] but this has been

89. W.Va.—Belcher v. Bays, 197 S.E 732, 120 W.Va 271, 117 A.L.R. 897.
57 C J. p 501 note 86.

90. W.Va —Belcher v. Bays, supra.
57 C.J. p 501 note 87.

91. W.Va.—Belcher v. Bays, supra
57 C.J. p 501 note 88.

92. W.Va.—Belcher v. Bays, supra.
57 C.J. p 502 note 89.

93. W.Va.—Belcher v. Bays, supra
57 C J. p 502 note 90.

94. Wis —Kinsey v. Ring, 53 N.W. 842, 83 Wis. 536.
57 C J p 502 note 91.

95. Md —Richardson v. Anderson, 72 A 485, 109 Md 641, 130 Am.S.R. 543, 25 L R A ,N S., 394.
57 C.J. p 500 note 80.

96. Ky.—Walker v. McKay, 2 Metc 294.
57 C J. p 500 note 81.

97. Md.—Richardson v. Anderson, 72 A. 485, 109 Md 641, 130 Am S R. 543, 25 L R A,N.S, 394
57 C J. p 501 note 82

98. Md.—Richardson v. Anderson, supra.
57 C J. p 501 note 83.

99. Mo.—Huse v. Ames, 15 S W 965, 104 Mo 91, overruling Morrow v. Bright, 20 Mo 298.
57 C J. p 501 note 84.

1. Md —Richardson v. Anderson, 72 A. 485, 109 Md 641, 130 Am S R 543, 25 L R A,N S, 394
N Y —Chance v. Isaacs, 2 Edw 348, affirmed 5 Paige 592.

2. Ohio —Pugh v Conklin, 184 N.E 847, 44 Ohio App. 272

3. Tenn —Nolan Bros. Lumber Co v. Dudley Lumber Co, 156 S W 465, 128 Tenn 11, 46 L R A.,N.S., 62, Ann Cas 1914D 744.
57 C J. p 500 note 77.

4. S C.—Columbia Bank v. Gadsden, 33 S E 575, 56 S C. 313.
57 C.J. p 500 note 78

5. U S —Howe v. Sheppard, C.C Me, 12 F.Cas No 6,773, 2 Sumn. 409.

6. Pa.—**Corpus Juris quoted in** Palmer, to Use of Conewango Furniture Co., v Heath, 174 A. 824, 825, 114 Pa.Super 256.
57 C.J p 502 note 93—5 C J. p 940 note 12 [b]
Waiver and estoppel as to set-off and counterclaim in general see supra § 14

7. Md —Johnston v. Phœnix Ins. Co, 39 Md 233.

8. U S.—Cudahy Packing Co. v Sioux Nat Bank, Iowa, 75 F. 473, 21 C C A. 428
57 C.J p 503 note 98

9. U.S —R F C v Globe Wernicke Co., D.C.Ohio, 35 F.Supp. 909, af-

denied.[10] If the debtor promises the assignee of a chose in action to pay the debt to him, he cannot afterward avail himself in set-off of claims he may have against the assignor,[11] at least where the assignee was induced to purchase the obligation in consequence of representations by the obligor that he had no defense to it,[12] and especially where the absolute promise of payment is made after there has been a previous expression of a wish to deduct demands due from the assignor.[13]

There is authority to the effect that a promise by the debtor to pay the assignee will not preclude the former from asserting a set-off, where it has been made without consideration,[14] or where the assignee has not been induced, by means of the promise made to him, to act to his detriment.[15] It has been held that the assignment is a sufficient consideration for a promise by the debtor to pay the debt to the assignee, and may estop him to claim a counterclaim or set-off which would have been available against the assignor.[16] A promise to pay only as much of the assigned demand as may prove to be due after deduction of the obligor's offsets against the assignor is not, it seems, such a promise as precludes the promisor from asserting a set-off.[17] It has been held that, if the right to a set-off is waived or abandoned, even for an instant, the law will not restore it as against an assignee,[18] and that the assignee has the right to insist that it shall have been continuously available.[19] Thus, where defendant has waived the right to set off his claim against the assignor, he may not set it off against the assignee.[20]

Defendant is not precluded from setting up offsets otherwise available, unless he had estopped himself by his admissions or conduct.[21] He cannot be precluded except by some act of his own,[22] and information obtained by the assignee from strangers is not sufficient to raise an estoppel preventing the availability of set-off,[23] particularly where the assignee has neglected to take the precaution to make any inquiries of the debtor regarding the claim assigned to him.[24] In the absence of any element of concealment, a debtor is not estopped to assert demands against the assignor, in set-off against the assignee, merely by reason of the fact that the debtor has not acted affirmatively to notify the assignee of the existence of such demands.[25] Thus, it has been held that a debtor, by merely remaining silent when notified that his debt has been assigned to another, without making any promises with respect to payment, is not precluded from the subsequent assertion against the assigned demand of claims against the assignor;[26] and this is true, although he did, at such time, mention the existence of another and separate claim which he held against the assignor without any mention of the one asserted by him subsequently as an offset.[27]

Where the debtor remains silent when he is under a duty to speak, such silence may estop him to set off against the assignee claims held against the assignor.[28] The debtor is not estopped to set off, against an assignee, demands against the assignor, merely by reason of the fact that, in a previous suit wherein the debtor was defendant and the assignor plaintiff, he failed or omitted to claim such demands as set-offs against the assignor;[29] and, where the debtor has given two notes in the same transaction,

firmed, C C A, Globe Wernicke Co. v. R. F. C., 126 F 2d 468
Pa.—Palmer, to Use of Conewango Furniture Co., v Heath, 174 A 824, 114 Pa.Super 256

10. Cal.—Harry Hall & Co. v. Consolidated Packing Co., 131 P 2d 859, 55 Cal App 2d 651

Independent contract with assignee

Where receipts were issued with understanding that they were to be assigned, their assignment did not create a new and independent contract between the obligor and the assignee precluding the interposition of claims against the assignor.—Harry Hall & Co. v. Consolidated Packing Co., supra.

11. Wis.—Batavian Bank v Minneapolis, etc, R. Co., 101 N W 687, 123 Wis. 389.
57 C J p 502 note 95—5 C J. p 938 note 76

12. Pa.—Elliott v. Callan, 1 Penr. & W. 24.

13. Mass.—Mowry v. Todd, 12 Mass 281

14. Cal.—Bank of America of California v Pacific Ready-Cut Homes, 10 P 2d 478, 122 Cal App 554
Vt.—Foot v Ketchum, 15 Vt 258, 40 Am D 678.

15. Cal.—Bank of America of California v Pacific Ready-Cut Homes, 10 P 2d 478, 122 Cal App. 554
57 C J. p 504 note 18.

16. Ind.—Henry v. Ritenour, 31 Ind 136
5 C J p 966 note 34.

17. La.—Williams v Roach, 125 So 465, 12 La App 305
Mass.—Mowry v Todd, 12 Mass 281

18. Ky.—Johnson v. Pearson, 7 Dana 374.
57 C J p 503 note 99.

19. Ky.—Johnson v Pearson, supra

20. Va.—Armour & Co v. Whitney & Kemmerer, Inc, 178 S E 889, 164 Va 12.

21. Md.—Johnston v. Phœnix Ins. Co., 39 Md 233
Pa.—Dean v Herrold, 37 Pa 150

22. Pa.—Dean v. Herrold, supra

23. Pa.—Dean v. Herrold, supra

24. Pa.—Dean v. Herrold, supra

25. Cal.—Bank of America of California v Pacific Ready-Cut Homes, 10 P 2d 478, 122 Cal App 554.
57 C J p 504 note 9.

26. U S.—Stewart v Anderson, D C, 23 F Cas No 13,421, 1 Cranch C C 586, affirmed 6 Cranch 203, 3 L Ed 199.
Vt.—Keyes v. Waters, 18 Vt. 479.

27. Vt.—Keyes v. Waters, supra.

28. N Y.—Tylee v. Yeates, 3 Barb. 222.

29. Cal.—Machado v. Borges, 150 P. 351, 170 Cal 501.
57 C.J p 504 note 13.

one of which was transferred before and the other after maturity, the debtor is not estopped to set off, in an action by the transferee of the latter note, demands held against the assignor, merely because he has voluntarily paid to a holder in due course the amount of the former note, without asserting the offsets.[30] Where it does not appear that the assignee ever changed its position in reliance on any act or omission of the debtor, the conduct of the latter will not estop it from claiming set-off.[31]

As a party to a compromise is estopped from afterward urging matter constituting a set-off or counterclaim existing at the time of making the compromise, a debtor, compromising a claim with the assignee thereof, has been held to be precluded from counterclaiming against such assignee for demands against the assignor.[32] Where the circumstances are such as to preclude the debtor from set-off of the assignor's debts against the assignee, the latter may be protected, although there was an express agreement of which the assignee was ignorant, between the assignor and the debtor, that the assignor's claim shall be applied in payment of the debtor's claim against him.[33] Mere giving of a note, at a time when there are outstanding debts owed by the payee therein to the maker of the note, is not such conduct as will estop defendant from setting off against an assignee from the payee the debts outstanding against the payee.[34] There is authority to the effect that the execution of a mortgage, by the debtor as mortgagor, to the assignee as mortgagee, after the assignment as collateral security for the assigned debt does not estop the mortgagor to assert in set-off against the mortgagee demands against the assignor of the debt thus later secured.[35]

Estoppel against estoppel The circumstances may be such as to estop the assignee of a claim to assert an estoppel against the debtor to set off demands due from the assignor to the debtor,[36] and under the rules generally applicable to an estoppel against an estoppel, the effect of such an estoppel against the assignee is to open up the supposed estoppel of the debtor and place the merits of the controversy on the real facts of the case.[37]

§ 55. Assigned Claim as Set-Off or Counterclaim

a. In general
b. Nature and validity of assignment
c. Equitable set-off of assigned claim
d. Demands acquired after commencement of action

a. In General

A claim against the plaintiff which is assigned to the defendant before the commencement of the action may be available as a set-off or counterclaim against the plaintiff.

A claim against plaintiff which is assigned to defendant before the commencement of the action may be set off against plaintiff's cause of action,[38] as fully as though the action were between the original parties,[39] in the absence of statutory provisions to the contrary,[40] at least if defendant could bring an action thereon in his own name,[41] and, according to some authority, only then,[42] although elsewhere such a claim has been held available if defendant could bring an action on the obligation for his own use in the name of the assignor.[43] Similarly, such an assigned demand may be available to defendant as a counterclaim[44] or in compensation.[45] Thus,

30. Ind.—Wolf v. Shelton, 65 N.E. 582, 159 Ind. 531.

31. Mass.—Harmon v. Wm. Filene's Sons Co., 121 N.E. 504, 232 Mass. 52.
57 C.J. p. 504 note 15

32. Colo.—Holy Cross Gold Min., etc., Co. v. Goodwin, 223 P. 58, 74 Colo. 532
57 C.J. p. 504 note 4.

33. Mich.—Bradley v. Smith, 57 N.W. 576, 98 Mich. 449, 39 Am.S.R. 565, 23 L.R.A. 305

34. Or.—Rayburn v. Hurd, 25 P. 635, 20 Or. 229.

35. Ala.—Carroll v. Malone, 28 Ala. 521

36. Ohio.—Miller v. Florer, 15 Ohio St. 148.

37. Ohio.—Miller v. Florer, supra.

38. Cal.—Bond v. Farmers & Merchants Nat. Bank, Los Angeles, 149 P.2d 722, 64 Cal.App.2d 842.
Conn.—**Corpus Juris cited in** Searle v. Crampton, 170 A. 480, 481, 118 Conn. 42.
Ga.—Cox v. Stowers, 50 S.E.2d 339, 204 Ga. 595—Trotter v. Lunceford, 195 S.E. 475, 57 Ga.App. 358—**Corpus Juris cited in** Wood v. Keysville Lumber Co., 175 S.E. 923, 924, 49 Ga.App. 799.
Okl.—**Corpus Juris cited in** Wood & Co. v. Sutton, 61 P.2d 700, 701, 177 Okl. 631
Pa.—Pioneer Knitting & Mfg. Co. v. Kensington Security Bank & Trust Co., 18 Pa.Dist. & Co. 265.
57 C.J. p. 505 note 27.

Alimony
In action on note, the payor could offset against it accrued alimony assigned to him by plaintiff's divorced wife.—Harman v. Harman, 196 S.E. 361, 120 W.Va. 199

39. Miss.—Ashby v. Carr, 40 Miss. 64
57 C.J. p. 506 note 28.

40. Me.—Soule v. Kennebec Maine Ice Co., 27 A. 92, 85 Me. 166
57 C.J. p. 506 note 29

41. Ga.—Cox v. Stowers, 50 S.E.2d 339, 204 Ga. 595—Trotter v. Lunceford, 195 S.E. 475, 57 Ga.App. 358—**Corpus Juris cited in** Wood v. Keysville Lumber Co., 175 S.E. 923, 924, 49 Ga.App. 799.
57 C.J. p. 506 note 30.

42. Ill.—Ayres v. McConnel, 15 Ill. 230
57 C.J. p. 506 note 31.

43. Pa.—Pioneer Knitting & Mfg. Co. v. Kensington Security Bank & Trust Co., 18 Pa.Dist. & Co. 265.
57 C.J. p. 506 note 32

44. Okl.—**Corpus Juris cited in** Wood & Co. v. Sutton, 61 P.2d 700, 701, 177 Okl. 631.
57 C.J. p. 506 note 34.

45. La.—Lewy v. Wilkinson, 64 So. 1003, 135 La. 105.

a debtor has a right to purchase a cross demand to extinguish a claim against himself by set-off.[46]

The claim of a third person not assigned to defendant is not ordinarily available as a set-off.[47] Thus, the mere holder of an obligation from plaintiff, not assigned to him, has been held not to be entitled to set off such an obligation against a debt which he owes plaintiff,[48] and it has been held that the holder of a claim to whom it has not been assigned cannot use it as an equitable set-off without making the obligee a party.[49] However, it has been held that, in an action against an ancillary administrator, a claim against plaintiff held by the principal administrator is available as a set-off, even though the claim has not been assigned to the ancillary administrator.[50]

Assignment of unliquidated claim. There is authority to the effect that the assignee of an unliquidated claim cannot set it off[51] or counterclaim on it,[52] but there is other authority permitting a counterclaim on an unliquidated assigned demand.[53]

Plaintiff's lack of knowledge. The availability of the assigned claim as an offset has been sustained, although plaintiff debtor in such claim was not aware at the time he acquired the demand against defendant that defendant held the claim.[54]

Effect of defenses to assigned claim. The right to use an assigned claim for purposes of offset may be destroyed, where there are defenses to such claim which operate in part or in whole to prevent or to destroy its existence and enforceability as an obligation against plaintiff.[55] Thus, where defendant produces an assigned note of plaintiff as a set-off, plaintiff may show a total or partial failure of consideration for which the note was given,[56] at least where defendant knew of such failure of consideration at the time of the transfer;[57] or he may show extinguishment of his debt by part[58] or full[59] payment of the assigned claim offered in set-off. Similarly, assigned demands barred by the statute of limitations cannot be set off.[60]

b. Nature and Validity of Assignment

The rules governing the validity and sufficiency of assignments generally apply to the assignment of claims urged as offsets by an assignee, and, where an attempted assignment of a claim is invalid, the assignee cannot assert the claim as a set-off or counterclaim.

The rules governing the sufficiency and validity of assignments generally apply to the assignment of claims urged as offsets by an assignee, and, where an attemted assignment of a chose in action is invalid and inoperative to transfer the subject matter to the assignee, he cannot set off or counterclaim the chose in action.[61] In order to determine whether an assignment is of such a kind as to render the assigned claim available as an offset, the substance of the whole contract must be examined to ascertain its legal effect.[62] An assignment of a principal's demand by an agent without authority, it has been held, is not operative to permit the assignee to use the assigned demand as an offset,[63] and an assigned claim cannot be used in set-off, where the assignee is a corporation not authorized by its charter to enter into such a contract of assignment.[64] An attempted assignment of a demand owned by a partnership executed by a partner in his own name individually and not in the name of the firm does

46. N Y —Scientific & Hospital Supply Corp v. Board of Ed. of City of New York, 16 N.Y.S.2d 91, 172 Misc. 770
57 C J p 506 note 33.

47. Ariz —Phoenix Sav Bank & Trust Co v. Ellis, 69 P 2d 796, 50 Ariz. 116.

48. Ala —Gayle v. Randle, 1 Stew. 529.
S.C —Bishop v Tucker, 38 S C L 178

49. Ky —Winebrinner v. Weisiger, 3 T.B Mon 32
Equitable set-off of assigned claim in general see infra subdivision c of this section

50. Ariz.—Phoenix Sav Bank & Trust Co. v. Ellis, 69 P 2d 796, 50 Ariz 116.

51. N H.—Wolf Klein & Sons v Bronstein, 13 A 2d 149, 91 N.H. 42
57 C J. p 507 note 37.
Set-off of unliquidated demands generally see supra §§ 42, 43.

Purpose of statute permitting set-off of unliquidated claims
The purpose of Practice Act provisions and implementing rules in enlarging the field in which cross claims for unliquidated damages may be asserted by counterclaim was not to afford a defendant opportunity to take assignments from several creditors of plaintiff and by counterclaiming thereon try out the then financial position of plaintiff ad infinitum —Falkenstern v Herman Kussy Co, 59 A 2d 372, 137 N J Law 200

52. Okl.—Sandlten v Allied Refining Co, 202 P. 316, 84 Okl. 47
57 C J. p 507 note 38.

53. Colo —Michigan Stove Co v. Pueblo Hardware Co., 116 P. 340, 51 Colo 160

54. U S —Primer v Kuhn, Pa., 1 Dall 452, 1 L Ed. 219

55. Mo.—Savage v. Allen, 34 Mo 224

56. Ala —J. R Raible Co. v. City Bank, etc, Co, 124 So. 866, 220 Ala. 293
Ill —Messmore v. Larson, 86 Ill 268

57. Ill.—Messmore v. Larson, supra

58. Mo —Savage v. Allen, 34 Mo 224
57 C J. p 507 note 48

59. S C.—Compty v. Alken, 2 S C L 481

60. Colo —Gibbs v Gibbs, 40 P. 781, 6 Colo App. 368
57 C.J p 507 note 50.

61. Pa —Shryock v Basehore, 82 Pa. 159
Requisites, mode, and validity of assignment generally see Assignments §§ 41–81.

62. Ala —McDade v Mead, 18 Ala 214

63. Pa —Shryock v Basehore, 82 Pa. 159.

64. Ohio —Straus v. Eagle Ins. Co., 5 Ohio St. 59.

not pass any interest to the assignee so as to make the demand available as a set-off in his favor.[65]

Informal character of assignment. There is authority holding that an assignment sufficient to convey to defendant the interest in the demand sought to be set off is sufficient to allow him to use it as an offset, although the assignment was not made in compliance with the formal requirements established by statute for a full assignment entitling the assignee to sue in his own name,[66] and that a formal assignment is not requisite to the use of the assigned claim as an offset.[67] Thus, delivery without written assignment has been held a sufficient assignment to render a claim available as a set-off.[68]

Incomplete assignment. A claim incompletely assigned is not available as a set-off.[69] A claim assigned to defendant, conditioned on the existence of difficulty between plaintiff and defendant with respect to the subject matter of plaintiff's claim, and not to be operative unless there should be such difficulty, is not so assigned as to be a valid set-off.[70] A claim agreed to be, but not actually, assigned to defendants before the commencement of plaintiff's action cannot be availed of as a counterclaim,[71] although such claim is assigned after the commencement of the suit in accordance with the prior agreement.[72]

Necessity of beneficial interest in assignee. The rule that the party who pleads a set-off must be the real party in interest in the matter of such set-off applies to cross demands by assignees.[73] It is sufficient, as regards defendant's interest in the claim, to justify the use of an assigned claim as a set-off if it is actually and not merely colorably owned by defendant;[74] but a demand assigned conditionally for the purpose of being used by the assignee as a set-off, with an agreement that it be returned if not so used, cannot be used as a set-off or counterclaim to a valid claim against the assignee.[75] This rule is not altered by the fact that, after the original assignment but before the commencement of suit, the assignee has paid the amount of the claim assigned and has taken back a bond from the assignor conditioned for the defense of any suit on the assignee's debt by the assignor and for the payment of any judgment and costs by the latter in the event that such suit should result adversely to the assignee,[76] or by the fact that a judgment on such a claim has been obtained, by the assignee, after the assignment.[77] In like manner, if the demand has merely been borrowed for the purpose of set-off, it will not be allowed.[78] Moreover, defendant cannot set off a claim assigned to him for the sole purpose of enabling him to collect it for the assignor.[79] However, where a claim has been assigned absolutely, although in part for the benefit of a third person, the assignee may, at least to the extent to which he is beneficially interested in the claim, set it off against his demand held by plaintiff;[80] such an assignment is not subject to the objection that there has been a division of the claim and a partial assignment only to defendant.[81]

Necessity for and sufficiency of consideration. According to some authority, it is not essential that there should be any consideration passed for the assignment of a claim in order that the assignment may be valid and operative for the purpose of allowing a set-off of the claim by the assignee,[82] and the assignor has the right to give the claim to the assignee if he chooses,[83] or to sell it for an inadequate consideration,[84] the consideration paid

65. Tenn.—McIntire v. McLaurin, 2 Humphr. 71, 36 Am.D. 300

66. Pa.—Murray v. Williamson, 3 Binn. 135.

67. Kan.—Kansas City Paper House v. Foley R. Printing Co., 118 P. 1056, 85 Kan. 678, 39 L.R.A.,N.S., 747, Ann.Cas.1913A 294.
57 C.J. p. 508 note 60.

68. Miss.—Ashby v. Carr, 40 Miss. 64
57 C.J. p. 508 note 61.

69. Ohio.—Stanbery v. Smythe, 13 Ohio St. 495
57 C.J. p. 483 note 8 [a].

70. N.Y.—Arnold v. Johnston, 28 How.Pr. 249.
57 C.J. p. 510 note 90.

71. Colo.—Gibbs v. Gibbs, 40 P. 781, 6 Colo.App. 368
57 C.J. p. 510 note 88.

72. Colo.—Gibbs v. Gibbs, supra
57 C.J. p. 510 note 89.

73. Conn.—Olmstead v. Scutt, 10 A. 519, 55 Conn. 125.
57 C.J. p. 508 note 63.

74. Neb.—Salladin v. Mitchell, 61 N.W. 127, 42 Neb. 859.
57 C.J. p. 508 note 65.

75. Ala.—Adams v. McGrew, 2 Ala. 675.
57 C.J. p. 508 note 67.

76. Ala.—McDade v. Mead, 18 Ala. 214.
57 C.J. p. 509 note 68.

77. Ill.—Sprigg v. Granneman, 36 Ill.App. 102.

78. N.Y.—Cornell v. Donovan, 13 N.Y.St. 704
57 C.J. p. 509 note 70.

79. Conn.—Olmstead v. Scutt, 10 A. 519, 55 Conn. 125.
57 C.J. p. 509 note 71.

Use of trust property for individual purpose

If an assignee for collection should attempt to set-off the assigned chose in action against his individual obligation, he would be violating law forbidding a trustee from using trust property for his private or individual purposes.—Harrison v. Adams, 128 P.2d 9, 20 Cal.2d 646.

80. Vt.—Plattsburg First Nat. Bank v. Post, 25 A. 1093, 65 Vt. 222.
57 C.J. p. 509 note 72

81. Vt.—Plattsburg First Nat. Bank v. Post, supra.

82. Pa.—McGowan v. Budlong, 79 Pa. 470.
57 C.J. p. 509 note 75.

83. N.Y.—Norton v. McCarthy, 30 N.Y.S. 1057, 10 Misc. 222

84. N.Y.—Norton v. McCarthy, supra.

is immaterial,[85] and plaintiff cannot inquire into it or question it.[86] However, it has elsewhere been held that an assigned claim is not available to defendant as an offset to his claim in the hands of a plaintiff, to whom it has been assigned, unless defendant paid value for the claim assigned to him before notice of the assignment of the claim owed by him to plaintiff,[87] and that in such a situation defendant cannot set off a claim purchased for a mere nominal consideration.[88]

A demand assigned to defendant before the commencement of the suit may be set off, although defendant has not paid for it, but only agreed to pay.[89] A creditor's note may be set off by his debtor, although the latter obtained possession thereof at a discount[90] and with a view to the set-off after he became indebted to the creditor.[91] Defendant purchasing claims to be used as set-off may set off the full amount of the claims and not merely the amount actually paid therefor,[92] and a debtor may purchase debts due from his creditor to others at a greater discount than legal interest, and demand a set-off of the full amount with legal interest.[93] A precedent obligation for services rendered by the assignee to the assignor prior to assignment has been held sufficient to sustain the assignment and permit the set-off [94]

Partial assignment. It has been held that, where only part of a demand is assigned, such part is not available as a set-off,[95] but there is authority to the contrary.[96]

c. Equitable Set-Off of Assigned Claim

In equity, as at law, a claim against plaintiff purchased by the defendant before suit may be set off against the plaintiff's cause of action.

In equity, as at law, a claim against plaintiff purchased by defendant before suit may be set off against plaintiff's cause of action,[97] or may serve as the ground of an equitable reconvention.[98] Where an assigned demand is asserted as an equitable offset, it has been held to be an available defense to plaintiff that the assigned claim so offered is barred by the statute of limitations [99] The doctrine discussed supra § 5 that the insolvency of the party against whom the set-off is claimed may be sufficient ground for the allowance of a set-off in equity does not apply as to claims acquired by defendant by assignment unless they were acquired without knowledge of plaintiff's insolvency.[1]

An unliquidated claim assigned to defendant is, it seems, in equity, as in law, unavailable as an offset [2]

Nature and validity of assignment. There is some authority to the effect that an assignment made without consideration therefor is not such a transfer as enables the assignee to set off the claim assigned in equity,[3] but there is other authority to the contrary, wherein it is held that the consideration of the assignment is immaterial in this connection [4] A claim conditionally assigned to defendant expressly for use as a set-off and to be returned if it is unavailable for that purpose is not assigned in such a way that it can be used as a valid equitable set-off;[5] and this has been held to be true even where a different rule prevails at law.[6]

d. Demands Acquired after Commencement of Action

As a general rule, demands against the plaintiff acquired by the defendant after the commencement of the action cannot be interposed as set-offs or counterclaims.

Since the defense of set-off is regarded in the nature of a cross action, it is very generally held that a set-off can be made only of a demand existing and owned by defendant at the time of commencement of the action in which the set-off is sought to be interposed,[7] and claims acquired by defendant

85. N.Y.—Norton v. McCarthy, supra.

86. N.Y.—Norton v. McCarthy, supra.

87. Ind.—Proctor v. Cole, 3 N.E. 106, 4 N.E. 303, 104 Ind. 373

88. Ind.—Proctor v. Cole, supra

89. U.S.—Everit v. Strong, 5 Hill 163, affirmed 7 Hill 585
57 C.J. p. 510 note 82.

90. Mich.—Smith v. Warner, 16 Mich. 390
57 C.J. p. 510 note 83.

91. Md.—Foley v. Mason, 6 Md. 37.

92. Ky.—Brackett v. Boreing, 110 S.W. 276, 115 S.W. 766, 131 Ky. 751, 33 Ky.L. 292
57 C.J. p. 510 note 85.

93. Ky.—Young v. Miller, 7 B.Mon. 540.

94. Ky.—Winebrinner v. Weisiger, 3 T.B.Mon. 32.

95. Ohio.—Cohn v. Krauss, App., 67 N.E.2d 62
57 C.J. p. 510 note 91.

96. N.Y.—Scientific & Hospital Supply Corp. v. Board of Education of City of New York, 16 N.Y.S.2d 91, 172 Misc. 770.

97. Ala.—Martin v. Mohr, 56 Ala. 221.
57 C.J. p. 510 note 93

98. Tex.—Bennett v. Hollis, 9 Tex. 437

99. Tex.—Bennett v. Hollis, supra.

1. Fla.—Durham Tropical Land Corporation v. Sun Garden Sales Co., 151 So. 327, 106 Fla. 429.

2. Va.—Dangerfield v. Rootes, 1 Munf. 529, 15 Va. 529

3. Miss.—Stone v. Buckner, 20 Miss. 73

4. Ala.—Martin v. Mohr, 56 Ala. 221.
Neb.—Clark Impl. Co. v. Wallace, 170 N.W. 171, 103 Neb. 26.

5. Ky.—Tinly v. Martin, 80 Ky. 463
Md.—Fusting v. Sullivan, 51 Md. 489

6. Ky.—Tinly v. Martin, 80 Ky. 463

7. Okl.—Wood & Co. v. Sutton, 61 P.2d 700, 177 Okl. 631
57 C.J. p. 511 note 8

Judgment obtained after commencement of action

Where, at commencement of suit

against plaintiff after commencement of the action cannot be interposed in an action by defendant as a set-off[8] or counterclaim,[9] at least where the counter demand is not one arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or one connected with the subject of plaintiff's action,[10] or by way of compensation.[11]

Equitable set-off. It has been held that assignment of a claim to defendant after suit commenced does not empower him to use such claim as an equitable set-off,[12] at least in the absence of some such further circumstance as fraud on which a special equity against plaintiff may be based,[13] but there is authority to the contrary,[14] wherein the rule has been announced that if, on trial, it should appear that there are any equitable reasons why a set-off should be allowed of a debt acquired after the action was brought, the court of equity has jurisdiction to direct it to be done.[15] At any rate, the fact that plaintiff is insolvent and the demand against him purchased with full knowledge of the insolvency does not of itself afford equitable ground for moving the court to allow such demand as an offset.[16]

Presumptions and burden of proof. Where defendant uses a note payable to a third person or bearer, as a set-off the time of transfer to defendant not appearing, there is some authority holding that there is a presumption that the negotiation and transfer were at the time the instrument is dated, and, hence, if the date of the instrument is before the commencement of the action, that the transfer is prior to suit, rendering such note available as a set-off,[17] but there is other authority holding that, in order that the assigned claim be a valid offset, the assignee must prove the assignment to have been prior to the commencement of the action.[18]

§ 56. Availability of Assigned Claim as against Assigned Cause of Action

An assigned claim against the plaintiff's assignor may be available as a set-off or counterclaim against the assigned cause of action.

In an action on an assigned demand, defendant may set off or counterclaim a claim against plaintiff's assignor assigned to defendant before the assignment to plaintiff,[19] such a result being held to be clearly within the terms of the set-off statutes,[20] provided, of course, the claim is one which, under the general rules heretofore discussed §§ 12-53, ordinarily is available as a set-off or counterclaim.[21] Where the circumstances are otherwise sufficient to permit such relief, such an assigned demand is available to defendant as an equitable set-off against a plaintiff assignee.[22] Defendant, in

to recover usurious interest paid, defendant owned plaintiff's note on which another was suing, defendant as assignee could set off judgment subsequently obtained on such note against plaintiff's claim—Edwards v Surety Finance Co of Seattle, 30 P 2d 225, 176 Wash 534

8. U.S—Prosperity Co v. American Laundry Machinery Co, D C Ohio, 7 F.Supp 585
Miss.—Chandler v Cooke, 137 So 496, 163 Miss 147.
N J—Faherty v Branegan, 169 A 654, 112 N J Law 134
Ohio—Cohn v. Krauss, App., 67 N.E 2d 62.
57 C J p 511 note 9.

9. N.Y—Kalb v Leff, 246 N.Y.S. 158, 138 Misc 830
57 C J. p 512 note 10.

Acquisition of legal title by beneficial owner

In action on note, defendant was held not entitled to counterclaim for conversion of stock assigned to defendant by third person after commencement of plaintiff's action, although cause of action was allegedly always in defendant, and transfer was merely for purpose of placing legal title in defendant—Elizabeth Trust Co v. Central Lumber Co, 169 A 344, 12 N.J Misc 8, affirmed 171 A 810, 112 N J Law 522.

10. N Y—Kalb v Leff, 246 N Y S 158, 138 Misc 830

11. La.—Bean v Mississippi Union Bank, 5 Rob 333

12. S C—Enter v Quesse, 8 S E. 796, 30 S C 126, 14 Am S R 891.
57 C J p 512 note 13

13. N C—Riddick v Moore, 65 N C 382

14. N Y—Pond v Harwood, 34 N E. 768, 139 N Y 111
57 C J. p 512 note 15

15. N Y—Pond v Harwood, supra.

Beneficial ownership in defendant

Under statute directing equity to take jurisdiction to enforce a set-off of an equitable nature, defendants sued in equity by administratrix could set off as against administratrix a note of her decedent, notwithstanding defendants' legal title to note was acquired by formal assent of an executor pending the suit, where executor held only the naked legal title at time suit was instituted and defendants were the beneficial owners by virtue of will—Nixon v. Nixon, 21 S E 2d 702, 194 Ga. 301

16. N Y—Pond v Harwood, 34 N E 768, 139 N Y 111
S C—Enter v. Quesse, 8 S E 796, 30 S C. 126, 14 Am S R 891.

17. Ga—May v Dorsett, 30 Ga 116
57 C J p 512 note 18.

18. S C.—Godley v. Barnes, 47 S C.L. 161
57 C.J p 513 note 19.

19. Md—Steele v Sellman, 28 A. 811, 79 Md 1.
57 C J p 513 note 22.

20. Ky—Triplett v. Bradley, 6 T B. Mon 354
Miss—Phipps v Shegogg, 30 Miss. 241.

21. N J—Falkenstern v. Herman Kussy Co, 59 A 2d 372, 137 N J Law 200
N.Y—Perlman v Perlman, 257 N Y. S 48, 235 App Div. 313.
57 C J p 513 note 21

Unliquidated demand

Causes of action against plaintiff's assignor for breach of implied warranty which were assigned to defendant by third persons were not a proper subject of set-off in action for money due plaintiff's assignor for goods sold and delivered to defendant, since they did not arise out of same transaction and were for unliquidated damages while main case was for liquidated damages—Falkenstern v Herman Kussy Co, 59 A 2d 372, 137 N J Law 200

22. Tenn—Nolan Bros Lumber Co. v Dudley Lumber Co, 156 S W 465, 128 Tenn 11, 46 L.R A,N S., 62, Ann Cas 1914D 744.
57 C J p 513 note 25.

an action by an assignee, cannot counterclaim a demand against the assignor in favor of a third person and not assigned to defendant [23]

Effect of insolvency. Where the creditor is insolvent, defendant cannot set off, in a subsequent action by the creditor's assignee, a claim purchased by him against the creditor subsequent to the insolvency and after he has reasonable cause to believe that the creditor is insolvent,[24] and this is true in the absence of any statute on the subject.[25] There is authority, however, permitting such set-off where the assigned cross demand was acquired after insolvency but before notice thereof by defendant as a bona fide purchaser,[26] and it has been held that, even having notice of the insolvency, defendant may be allowed as a set-off the amount of the consideration actually paid for the assigned claim.[27]

Assignee of debtor. Where the owner of property, which constituted security for a personal obligation, assigned the property, subject to the outstanding rights of his creditor, to a third person who, prior to such assignment or to the assignment of the obligation by the creditor, held a demand against such creditor, it was held that the holder of such demand, when sued by the creditor's assignee, was entitled to set off the demand held by him at the time he acquired his interest in the property.[28]

Claim acquired after assignment to plaintiff. Where defendant takes an assignment of a claim against plaintiff's assignor after the assignment to plaintiff[29] or after notice thereof,[30] he cannot set it off against plaintiff's claim, although defendant, while having notice of the assignment, did not have notice of the identity of the assignee,[31] and such set-off will not be allowed if defendant had knowledge of facts sufficient to put him on inquiry or abstained from inquiry for the purpose of avoiding notice [32] The same rule respecting the effect of notice of assignment prior to the purchase of claims against the assignor in rendering the purchased claims unavailable in an action by the assignee has been held to apply to counterclaim,[33] equitable set-off,[34] compensation,[35] and reconvention [36] There is authority permitting defendant, in an action on an assigned demand, to set off[37] or counterclaim for[38] a claim against plaintiff's assignor, although it was assigned to defendant after the assignment to plaintiff, if it was so assigned prior to any notice to defendant of such assignment to plaintiff, at least where it does not appear that plaintiff paid value for the assignment to him.[39] It has been intimated that after notice of assignment an obligor may purchase claims against the assignee and use them by way of set-off to suit brought by the assignee on the obligation assigned.[40]

Effect of prior agreement to assign. Defendant cannot set off an assigned demand against plaintiff's assignor in a suit by plaintiff on an assigned claim against defendant, where the assignment of such demand occurred after notice of the assignment of the claim in suit, although prior to such notice an executory agreement for the assignment of the demand was entered into between defendant and the then holder, where such agreement was not executed or such assignment actually made until after notice.[41]

Express agreement permitting set-off. The unavailability as a set-off against the assignee of a debt of a claim assigned to the debtor after notice of the assignment of his debt by the creditor is not altered by the fact that the creditor has expressly agreed at the time the debt was incurred that the debtor might purchase claims against him and use them in set-off against the debt,[42] even though such

23. Cal.—Davis v. Bakersfield Oil, etc., Exch., 83 P. 260, 2 Cal.App. 195
57 C.J. p. 492 note 9

24. N.C.—Citizens' Bank v. White, 162 S.E. 736, 202 N.C. 311.
Ohio.—Pugh v. Conklin, 184 N.E. 847, 44 Ohio App. 272
57 C.J. p. 507 note 11.

25. Mass.—Smith v. Hill, 8 Gray 572.

26. Mass.—Aldrich v. Campbell, 4 Gray 284.

27. N.Y.—Nichols v. Martin, 35 Hun 168.
57 C.J. p. 507 note 44

28. N.C.—Dameron v. Carpenter, 130 S.E. 328, 190 N.C. 595

29. N.Y.—Martine v. Willis, 2 E.D. Smith 524
S.C.—Cain v. Spann, 26 S.C.L. 258.
57 C.J. p. 515 note 44

30. U.S.—Whitaker v. Pope, C.C.Ga., 29 F.Cas.No.17,528, 2 Woods 463
57 C.J. p. 513 note 28—5 C.J. p. 962 note 7 [a]

31. Ky.—Small v. Browder, 11 B. Mon. 212.

32. W.Va.—Cochrane v. Hyre, 38 S.E. 554, 49 W.Va. 315.

33. N.Y.—Beecher v. Peter A. Vogt Mfg. Co., 125 N.E. 831, 227 N.Y. 468
57 C.J. p. 514 note 31

34. Ky.—Jackson v. Holloway, 14 B. Mon. 133

35. La.—Harrison v. Wilson, 5 Rob. 275
57 C.J. p. 514 note 33.

36. La.—Falls v. Thoms, 22 La.Ann. 173

37. S.C.—Russell v. Lithgow, 1 S.C.L. 437.
57 C.J. p. 514 note 40.

38. N.Y.—Michigan Sav. Bank v. Millar, 96 N.Y.S. 568, 110 App.Div. 670
57 C.J. p. 484 note 9, p. 515 note 41.

39. Pa.—McGowan v. Budlong, 79 Pa. 470.

40. Ky.—Bramblett v. Slemp, 108 S.W. 339, 32 Ky.L. 1329.

41. Ind.—Weader v. Crawfordsville First Nat. Bank, 25 N.E. 887, 126 Ind. 111.

42. Ind.—Goldthwait v. Bradford, 36 Ind. 149.
57 C.J. p. 514 note 36.

agreement was in writing.[43]

§ 57. Waiver of Objections

An objection to the interposition of a set-off, counterclaim, or reconventional demand may be waived.

An objection to the interposition of a set-off, counterclaim, reconventional demand, etc, may be waived,[44] as where the objection is not timely made[45] or there is an express agreement allowing the set-off or counterclaim[46]

III. OPERATION AND EFFECT

§ 58. Compensation between Cross Demands in General

In the absence of a statute providing otherwise, the general rule in common-law jurisdictions is that a mutual indebtedness does not work an extinguishment of the respective debts without an application of them by the parties.

In a sense, where the parties have cross demands against each other, the real debt is the excess of one debt over the other[47] and this view is embodied in the civil-law doctrine of compensation under which mutual debts extinguish each other by the mere operation of law, as discussed supra § 9. The common law does not recognize the principle of compensation and extinguishment of debts by the mere operation of law[48] and, as a general rule, mutual indebtedness does not work an extinguishment of the respective debts, without an application of them to each other by the concurrent acts of the parties[49] However, there is authority, sometimes based on statute, that mutual demands compensate and extinguish each other by operation of law[50] A claim not pleaded will not be considered as a set-off or counterclaim[51]

Plaintiff is not entitled to recover where defendant who has set up a cross demand by set-off,[52] recoupment,[53] or counterclaim[54] establishes a demand equal to, or greater than, plaintiff's claim, and this principle will be applied in courts of equity when conditions require it in order to do equity between the parties.[55] Where a cross demand, established under a plea of set-off,[56] recoupment,[57] counterclaim,[58] reconvention,[59] or compensation[60]

43. Ind.—Goldthwait v. Bradford, supra.

44. La.—Younger Bros. v Spell, 193 So 354, 194 La. 16.
Okl.—Morton v. Beidleman, 237 P.2d 421.

45. La.—Younger Bros. v. Spell, 193 So. 354, 194 La 16.
Applicability of limitations
Civil practice act relating to waiver of objection to counterclaim and rule limiting time for service of notice of motion to dismiss a counterclaim apply to counterclaims improperly interposed and not to properly interposed counterclaims which may be stricken in discretion of court without time limitation whenever the interests of justice require.—Jayell Films v. A. F. E. Corp., 67 N.Y S 2d 77.

46. Okl.—Morton v. Beidleman, 237 P.2d 421.

47. Ala.—Norris v. Commercial Nat. Bank of Anniston, 163 So. 798, 231 Ala 204.
Cross demands should compensate each other by deducting the smaller sum from the greater and the difference is the only sum which can be justly due.—Dallas Dome Wyoming Oil Fields Co. v Brooder, 97 P.2d 311, 55 Wyo 109

48. Ark.—Small v. Strong, 2 Ark. 198.
Mo.—**Corpus Juris quoted in** Jackson v. Farmers Union Livestock Commission, 181 S W.2d 211, 220, 238 Mo App 449.

49. U S.—Bailey v. C. I. R., C C.A. Tex, 103 F.2d 448.
Mo.—**Corpus Juris quoted in** Jackson v. Farmers Union Livestock Commission, 181 S W.2d 211, 220, 238 Mo App. 449.
Pa.—In re Bell, 24 A.2d 101, 147 Pa Super 471—Palmer, to Use of Conewango Furniture Co. v Heath, 174 A 824, 114 Pa Super. 256.
57 C J. p 517 note 75
Cross demand not payment
A cross demand, no matter how clearly established, is not payment, and cannot be treated as such, and it can become payment only by agreement of parties to so treat and liquidate it.—McCurdy v Middleton, 2 So. 721, 82 Ala. 131—Dudley v Whatley, 10 So.2d 43, 30 Ala App. 579

50. Cal.—Jones v. Mortimer, 170 P. 2d 893, 28 Cal 2d 627—Downey v. Humphreys, 227 P.2d 484, 102 Cal. App 2d 323.
Ga.—Taylor v. Jordan, 195 S.E 215, 57 Ga App. 285.
Ohio.—Russell v. Rexroad, 3 Ohio Supp. 316.
Wyo.—Dallas Dome Wyoming Oil Fields Co. v Brooder, 97 P.2d 311, 55 Wyo 109.
57 C.J. p 517 note 74.
Limits of rule
The statute providing when cross demands must be deemed compensated so far as they equal each other is limited in its application to such cross demands as could have been pleaded as set-offs or counterclaims had the action been filed on either.—Cohn v. Krauss, Ohio App, 67 N.E 2d 62.

51. Cal.—Brown v. Oxtoby, 114 P 2d 622, 45 Cal App 2d 702.
Or.—Winchell v. Pacific Fruit & Produce Co., 14 P 2d 626, 140 Or 552.

52. N H.—Elliot v. Heath, 14 N.H 131.
Tenn.—Galbraith v East Tennessee, etc, R Co, 11 Heisk 169.

53. Del.—Webster v. Beebe, 77 A. 769, 25 Del 161.

54. N.Y.—Parker v Dairymen's League Co-op Assoc, 226 N.Y S. 226, 222 App.Div 341.
57 C J. p 515 note 48

55. Neb.—Taylor v Harvey, 134 N. W. 647, 90 Neb. 770

56. Mo.—Shreve v. Skeele, 31 Mo. 216.
57 C J. p 515 note 50.

57. W.Va.—Harper v. Clear Fork Coal, etc, Co., 92 S E. 565, 80 W.Va. 246.
57 C J p 515 note 51.

58. N Y.—Pyramid Dress Co v. Erdrich, 172 N Y S 187
57 C J p 516 note 52

59. La.—Payne v Amos Kent Brick, etc, Co., 34 So. 763, 110 La 750—Orleans Nav. Co. v. Bingey, 6 Mart., N S, 688.

60. La.—Stewart v. Harper, 16 La. Ann. 181.

is less than plaintiff's demand, he is entitled to recover the difference, but no more.[61] Where the court has found that a set-off is valid in the full amount claimed, it must apply the whole thereof to the extinguishment of the judgment to be offset and it is error arbitrarily to deduct less than the full amount found due on the set-off.[62] It is also erroneous to render judgment for the full amount of plaintiff's demand without deducting the amount set up by defendant's counterclaim which plaintiff admitted defendant was entitled to recover.[63] However, the amount which may be offset or recouped in reduction of plaintiff's demand is limited to the amount demanded in the plea of recoupment or counterclaim,[64] and this is so although the evidence shows that defendant is entitled to an amount greater than was claimed by his plea [65] In the case of an action and counterclaim for tort arising out of the same transaction, there can be no balancing of fault or offsetting of damage done by one against damage done by the other.[66]

Supplemental petition. Reconvention may be pleaded in a supplemental petition, where defendant has set up a reconventional demand superior in amount to the sum claimed in the petition [67]

Judgment. Where a set-off or counterclaim is pleaded, it becomes part of a single controversy between the parties and only one judgment is required.[68] If there is any evidence in support of a counterclaim, rendition of judgment for plaintiff without passing on it is erroneous and ground for reversal.[69] However, a failure to decide specifically on a counterclaim, where it is practically decided, is not error.[70] Where defendant establishes a counterclaim to an amount equal to, or greater than, plaintiff's demand, the judgment must be in favor of defendant,[71] and if defendant establishes a counterclaim for an amount less than plaintiff's demand, although there may be a finding for each party, only one judgment is proper, a judgment for plaintiff for the difference between the amounts of the findings [72] Where plaintiff is in default in an action in which a counterclaim is filed, a judgment for defendant on the counterclaim is proper regardless of the propriety of the action of the court in rendering a judgment on the merits of plaintiff's cause of action.[73]

Interest. It has been held that defendant's non-interest-bearing claim should be set off against plaintiff's interest-bearing claim as of the date such claim became due and owing,[74] and that interest should be awarded only on the net difference between the principals of the claims allowed,[75] but it has also been held that where plaintiff sues on a demand bearing interest, and defendant pleads a discount not drawing interest, plaintiff is entitled to calculate interest on his whole demand up to the time of the verdict,[76] and that, where plaintiff's demand does not bear interest, and defendant pleads a demand drawing interest, the jury must give interest on the set-off to the time the verdict is rendered in the action, and reduce plaintiff's demand by the amount of the set-off and such interest.[77]

When defendant owes plaintiff a much larger amount in damages than plaintiff owes defendant at the time the damages accrued, defendant is not entitled to interest on the amount owed by plaintiff [78] If defendant's cross demand is for unliquidated damages, he can only use the amount of such claim as a set-off, without interest, no interest being allowable on unliquidated damages,[79] and one indebted on a liquidated demand who claims an unliqui-

61. Ind —Doering v Davenport, 91 N E 243, 45 Ind App 465.
57 C J p 516 note 55

62. Tex —Montgomery v. Gallas, Civ App, 257 S W 956.

63. N Y —Fish v Hahn, 108 N Y S 782, 124 App Div 173

64. Iowa —Lewis v Farmers' Grain Co of Cambridge, 241 N W. 469, 214 Iowa 143.
57 C.J. p 516 note 58

65. N Y.—Itkin v Abramson-Engesser Co., 130 N Y S. 234

66. Va —Hoffman v. Stuart, 51 S E 2d 239, 188 Va. 785, 6 A L R 2d 247

67. La —Parker v. Starkweather, 6 Mart, N S., 609.

68. Mo.—Brandtjen & Kluge v. Hunter, 145 S W 2d 1009, 235 Mo. App. 909
Ohio —Baldwin v. Baldwin, App, 47 N.E.2d 792.

69. N J —Maplewood Bank & Trust Co v. Carragher Const. Co., 170 A 832, 12 N J Misc 227.
57 C J. p 516 note 62.

70. Conn —Essex v Day, 1 A. 620, 52 Conn 483.

71. N Y —Strathman v Williams, etc, Co, 133 N Y S. 650
Pa —Pennsylvania Co for Insurances on Lives and Granting Annuities v. Lynch, 162 A 157, 308 Pa. 23
Wyo —F. E Warren Mercantile Co v. Myers, 45 P.2d 5, 48 Wyo. 232.

72. N.D —Kramer v. K O. Lee & Son Co., 250 N W 373, 64 N D. 84
Ohio —Baldwin v. Baldwin, App, 47 N E 2d 792
Pa —Pennsylvania Co for Insurances on Lives and Granting Annuities v. Lynch, 162 A 157, 308 Pa. 23.
57 C J. p 516 note 65.

73. Mo —Gooding v. Vaught, App, 279 S W 208

74. Cal —Willett v Schmeiser Mfg Co., 255 P 529, 82 Cal App. 219.
57 C J p 516 note 67.

75. Tex —Dines Bldg Co v. Cherry, Civ App., 49 S W 2d 913, error dismissed.
Addition of interest to each allowed claim and rendition of judgment for the net difference is improper —Dines Bldg Co v. Cherry, supra.

76. S C.—Rogers v. Russell, 10 S.C L. 24

77. S.C —Morse v. Ellerbe, 38 S.C. L. 600.

78. Tex —Kirby Lumber Co. v. Cummings, 122 S.W. 273, 57 Tex.Civ App 291.

79. Ill —Smith v. Gray, 147 N E. 459, 316 Ill. 488.

dated set-off amounting to much less than the debt is liable for interest on the amount which he admits to be due [80] It has been held that an offset should not be allowed a greater rate of interest than the principal against which it is set off.[81]

§ 59. Election of Defendant to Interpose Cross Demand or Bring Independent Action

The failure to urge a claim by way of set-off may constitute laches where it is coupled with delay in asserting the claim

The question whether defendant having a claim against plaintiff must urge it by way of set-off, recoupment, or counterclaim or may instead maintain an independent action thereon is in substance the same as whether a judgment is a bar as to set-offs and counterclaims not interposed in the action and is discussed in the title Judgments § 684 In any event, the failure to urge a claim by way of set-off may constitute laches where it is coupled with delay in asserting the claim.[82] Where defendant has used his claim as a set-off, it is satisfied to the extent that it was so used.[83] Where a debtor has a set-off equally applicable to two defendants against him, it is not for him to elect which of the demands he will satisfy by his set-off, but the court will direct the application according to the equities between the parties [84]

§ 60. Admission of Plaintiff's Cause of Action

a. Recoupment
b. Set-off
c. Counterclaim
d. Compensation and reconvention

a. Recoupment

The authorities are not in accord with respect to the question whether a plea of recoupment admits the plaintiff's cause of action.

In some jurisdictions it has been held that a plea of recoupment admits plaintiff's cause of action[85] and alleges a cause of action in defendant's behalf growing out of a breach of some other part of the contract on which the action is founded, or for some other cause connected with the contract,[86] and that defendant cannot deny plaintiff's cause of action and at the same time claim a recoupment arising out of the same transaction on which plaintiff's cause of action is based.[87] In other jurisdictions it has been held that a plea of recoupment does not confess plaintiff's cause of action[88] but asserts that plaintiff has no demand, or right to demand the amount claimed;[89] and this rule, in a jurisdiction where it obtains, has been affirmed by express statutory provision.[90] It has also been held that while a plea of recoupment alone is equivalent to an admission of plaintiff's claim, a plea of nonassumpsit accompanied by a plea of recoupment, or a notice of recoupment, will not have that effect [91] Under the construction put on some statutes and rules of court, where defendant admits part of the indebtedness under a contract sued on by plaintiff and claims the right to recoup as to the other part, the court has power to render judgment for the amount so admitted and submit the issue as to the balance to the jury.[92]

b. Set-Off

A plea of set-off ordinarily admits the plaintiff's cause of action, but in some jurisdictions the defendant may plead a general denial in addition to the set-off and thereby deny the plaintiff's claim.

As a general rule a plea of set-off is considered as one of confession and avoidance,[93] and it admits plaintiff's cause of action[94] in the absence of a statute providing to the contrary;[95] and this is especially true where the wording of the plea is such that an admission is necessarily implied.[96] It has

80. Colo —Henrylyn Orchards Co. v. F W Meneray Crescent Nursery Co, 135 P 980, 55 Colo. 438.
57 C J p 516 note 70.

81. Fla.—Holly Hill Grove & Fruit Co v. Wicker, 143 So. 882, 107 Fla 765.

82. Pa —Gilberton Fuels v. Philadelphia & Reading Coal & Iron Co, 20 A.2d 217, 342 Pa. 192.

83. Cal.—Week v Luthy Co., 11 P. 2d 410, 123 Cal.App. 427

84. N Y —Tallmadge v. Fishkill Iron Co., 4 Barb 382.

85. Fla.—Ness v Cowdery, 149 So 33, 110 Fla 427.
57 C J p 518 note 11.

86. N.Y.—Vassear v. Livingston, 13 N.Y. 248—Nichols v. Dusenbury, 2 N.Y 283.

87. Mich —Meyers v. Jay-Bee Realty Corp., 2 N.W 2d 488, 300 Mich. 522

88. Ala.—Carolina-Portland Cement Co v. Alabama Constr. Co., 50 So 332, 162 Ala 380
57 C.J. p 519 note 13.

89. Ala —Carolina-Portland Cement Co. v Alabama Constr. Co., supra

90. Ala —Alabama Power Co v Kendrick, 123 So 215, 219 Ala 692

91. D C —Hornblower v. George Washington Univ., 31 App.D C. 64, 14 Ann.Cas 696.

92. Ill.—Severin v. Conway, 172 Ill App. 257.

93. Ala —St. Louis, etc., Packet Co v McPeters, 27 So 518, 124 Ala 451.
57 C J. p 519 note 19.

94. Fla —Ness v. Cowdery, 149 So 33, 110 Fla 427—Scott v National City Bank of Tampa, 139 So 370, 107 Fla. 818, reheard 142 So 650, 107 Fla 818, rehearing denied 143 So. 444, 107 Fla. 818.
N.J.—Cook v. Soden, 171 A. 558, 12 N J Misc 337.
57 C J p 519 note 20.

95. Ala —Alabama Power Co. v Kendrick, 123 So 215, 219 Ala 692
57 C.J. p 519 note 21.

96. Ill —U S Fashion, etc, Co. v. Schmidt, 209 Ill App. 240
57 C J p 519 note 22.

been held that, if defendant fails to establish his set-off, judgment should be rendered against him for plaintiff's demand,[97] but in some jurisdictions defendant may plead a general denial or another defense in addition to the set-off and thereby deny plaintiff's claim,[98] and judgment for defendant is not dependent on his establishment of set-off.[99]

c. Counterclaim

While it has been held that the pleading of a counterclaim does not admit the plaintiff's cause of action, there is also authority to the contrary.

It has been variously held, sometimes under express statutory provisions, that the pleading of a counterclaim does not admit plaintiff's cause of action,[1] that a counterclaim may be set up without conceding the existence of a cause of action,[2] or that defendant's counterclaim jointly with his codefendant for offsets to plaintiff's account, in an action for goods sold, did not create an estoppel or constitute an admission of his liability on plaintiff's cause of action against the codefendant, where in his answer, separately from counterclaim, he denied the allegations of the complaint relating to such account.[3] Under a statute providing that the answer shall contain, first, a general or specific denial of each allegation of the petition controverted by defendant, and second, a statement of any new matter constituting a defense, counterclaim, or set-off, defendant need not admit the truth of facts alleged in plaintiff's petition as a condition precedent to his maintaining a counterclaim.[4]

The wording of a counterclaim may be such that it cannot be otherwise construed than as an admission of the cause of action set out in the complaint;[5] and some decisions hold without qualification that a cause of action set up in the complaint is admitted by the pleading of a counterclaim in the answer, although there was no specific admission of the indebtedness pleaded by plaintiff.[6]

d. Compensation and Reconvention

It is of the essence of the civil-law plea in compensation that it admits the debt sued on.

It is the essence of the civil-law plea in compensation that it admits the debt sued on.[7] However, one pleading compensation may admit only part of his opponent's claim and set up a reconventional demand against such portion,[8] but if this is not done, and a plea of compensation is made, generally this admits the correctness of the demand sued on.[9]

Reconvention for damages for nondelivery of goods shipped by a consignee, when sued for freight, admits his ownership and authorizes personal judgment against him, under a prayer for general relief, on a claim to be satisfied out of the goods.[10] Where defendant admitted the contract sued on and asked judgment in reconvention for the amount paid thereunder and damages for plaintiff's nonperformance without pleading that the contract was a nudum pactum, such question dropped out of the case, although defendant attempted to reserve its rights under an overruled exception.[11]

§ 61. Right to Judgment for Excess over Plaintiff's Cause of Action

a. Recoupment
b. Set-off
c. Counterclaim
d. Compensation or reconvention
e. Actions by or against assignee or fiduciary

a. Recoupment

As a general rule, in the absence of a statute providing otherwise, matter availed of by way of recoupment cannot be made the ground for an affirmative judgment for damages in the defendant's favor, but this rule has been changed by statute in many jurisdictions.

While the contrary view has been taken,[12] it is generally held that, in the absence of a statute

97. Ill.—Raymond v. Kerker, 81 Ill. 381.
57 C.J. p. 519 note 23.

98. Fla.—Scott v. National City Bank of Tampa, 139 So. 370, 107 Fla. 818, reheard 142 So. 650, 107 Fla. 818, rehearing denied 143 So. 444, 107 Fla. 818.
57 C.J. p. 519 notes 24, 25.

99. Fla.—Scott v. National City Bank of Tampa, supra.

1. Minn.—Trainor v. Worman, 25 N. W. 401, 34 Minn. 237.
57 C.J. p. 519 note 28.

2. Mo.—**Corpus Juris cited in** Shade v. Brinkopf, App., 119 S.W.2d 444, 446.
57 C.J. p. 520 note 30.

3. Cal.—Isom v. Shields, 231 P. 587, 69 Cal. App. 515.

4. Ohio.—McCaskey Register Co. v. American Case, etc., Co., 8 Ohio N.P.,N.S., 415.
57 C.J. p. 520 note 32.

5. Tex.—Radford v. Hutto, Civ.App., 113 S.W.2d 563.
57 C.J. p. 519 note 27.

6. Cal.—Calara Valley Realty Co. v. Smith, 156 P. 369, 29 Cal. App. 589.

7. La.—Jackson v. Taylor Bros. Garage, App., 4 So.2d 41.—Chickasaw Wood Products Co. v. Vail-Donaldson Co., 138 So. 680, 19 La.App. 315.—Young v. Williamson, 133 So. 807, 16 La.App. 406.—Moore v. Hamilton, 133 So. 790, 16 La.App. 630.—Peter Gardner Cooperage Co. v. Gilbert Hattier Co., 9 La.A., Orleans, 18.

8. La.—Dorwin v. Wiltz, 11 La.Ann. 514.
57 C.J. p. 520 note 36.

9. La.—Ashley v. Sholars, 22 La. Ann. 442.—Dorvin v. Wiltz, 11 La. Ann. 514.

10. La.—Cole v. Bartlett, 4 La. 130.

11. La.—Sherer-Gillett Co. v. Bennett, 95 So. 777, 153 La. 304.
57 C.J. p. 520 note 40.

12. N.H.—Vernon Parts Corp. v. Granite State Mach. Co., 41 A.2d 605, 93 N.H. 315.
57 C.J. p. 520 note 43.

In an early case it was held that

providing otherwise, matter availed of by way of recoupment only goes in reduction or extinguishment of damages and cannot be made the ground for an affirmative judgment for damages in defendant's favor.[13] The common-law doctrine above stated has been changed by statute in many jurisdictions, and a defendant who successfully sustains a plea of recoupment is entitled to judgment for any excess of his claim over plaintiff's demand,[14] subject, of course, to the obvious limitation that he cannot recover an amount larger than claimed in his plea.[15] A party who has a defense by way of recoupment will not be permitted to seek affirmative relief by making another person in interest a party defendant, by way of subrogation.[16]

b. Set-Off

In the absence of statute so providing, a defendant who has pleaded set-off is not entitled to recover the excess of his claim over the plaintiff's demand, but under the statutes of many jurisdictions the defendant is entitled to do so.

In the absence of statute expressly or by necessary implication so providing, a defendant who has pleaded set-off is not entitled to recover the excess of his claim over plaintiff's demand,[17] but under the statutes of many jurisdictions on establishing a set-off defendant is entitled to do so,[18] although a recovery in excess of the amount alleged by the plea to be due is, of course, unwarranted.[19] Where defendant pleads a set-off, plaintiff cannot, by refusing to proceed with the case, defeat defendant's right to recover under his set-off.[20] According to some decisions, there can be no judgment on the set-off unless some portion of plaintiff's demand is allowed,[21] but other authorities hold that where plaintiff fails to show a right of recovery on his alleged cause of action, defendant, if he establishes the set-off, as pleaded, is entitled to judgment for the full amount of his claim.[22] A certificate of the balance in favor of defendant pleading a set-off can only be had where the verdict is for defendant.[23] A set-off against plaintiff's action to authorize a balance in favor of defendant must be of a matter mutually subsisting between the parties,[24] and it has been held that a debt to one of several defendants, although a good defense to the action, does not authorize a judgment in favor of defendant against plaintiff for the excess.[25] Where an infant misrepresented his age at the time of purchasing goods under a conditional sale contract, it was held that the seller, in an action by the infant after attaining his majority to recover amounts paid, was entitled to set off a claim for damage to the goods only to the extent of the infant's claim.[26]

c. Counterclaim

It is generally held that, where the defendant pleads and proves a counterclaim which exceeds the plaintiff's demand, the defendant is entitled to a judgment for the excess.

There is authority that a defendant who sets up a counterclaim is not entitled to an affirmative judgment for the excess of his counterclaim over

defendant could not recoup his whole damages and, after applying them in the first place to plaintiff's demand, then recover an excess by way of set-off.—Ellsworth v. Brown, 55 N H. 396.

13. Fla.—Peacock Hotel v. Shipman, 138 So 44, 103 Fla 633.
Ill.—Baumgartner v. Montavon, 276 Ill App 498.
Mass.—Tegelaar Bros v. Auburndale Conservatories, 190 N.E. 599, 286 Mass 363.
Miss.—Moore v Abdalla, 19 So.2d 502, 197 Miss 125—James v Williams Furniture Co, 137 So. 101, 161 Miss. 358.
Pa.—Lysle v. Borushko, 76 Pa.Dist. & Co 323.
57 C J. p 520 note 45.
Judgment as bar to subsequent action on defendant's claim see Judgments § 684.

14. Fla.—Jacksonville Paper Co v Smith & Winchester Mfg. Co, 2 So 2d 890, 147 Fla. 311.
Mich.—Watson-Higgins Milling Co. v. Pere Marquette Ry. Co, 43 N.W. 2d 43, 328 Mich. 5—Lyons v. City of Grand Rapids, 9 N.W.2d 552, 305 Mich. 309.
Tenn.—Sledge & Norfleet v. Bondurant, 5 Tenn App 319
57 C J p 521 note 50
Provision for same effect as set-off
Purpose of statute providing that plea in recoupment should have the same force and effect and create the same right of recovery to defendant as a plea of set-off is to remove the restriction by which the pleader was formerly prevented from recovering amount established by him over that found to be due to plaintiff, in the case of a plea of recoupment, and other feature differentiating the pleas of set-off and recoupment was not intended to be extinguished.—Jacksonville Paper Co v. Smith & Winchester Mfg Co., 2 So 2d 890, 147 Fla. 311.

15. Tenn.—Paragon Refining Co. v. Lee, 41 S W. 362, 98 Tenn 643.

16. Ark.—Lyman v. Corwin, 27 Ark 580.

17. Tenn.—Manor v. Nicely, 3 Tenn. App 657.
57 C.J. p 523 note 73.

18. Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 6 So 2d 531, 149 Fla. 507.
Ill.—Baumgartner v. Montavon, 276 Ill App. 498
Mo.—Brandtjen & Kluge v. Hunter, 145 S W 2d 1009, 235 Mo.App. 909
57 C J. p 523 note 74.

19. Mass.—Mondello v. Hanover Trust Co, 148 N E 136, 252 Mass. 563.

20. Ga.—Simon v Myers, 68 Ga 74

21. Tenn.—Baker v. Grigsby, 7 Heisk 627.
57 C J. p 523 note 77.

22. Ala.—Jordan v. Austin, 50 So 70, 161 Ala 585
Pa.—Snyder v. Rainey, 47 A. 998, 198 Pa. 356.

23. N.Y.—Hepburn v. Hoag, 4 Cow. 57.

24. Ala.—Jasper Mercantile Co. v. O'Rear, 20 So 583, 112 Ala 247—Locke v Locke, 57 Ala 473
Mutuality generally see supra § 48–53.

25. Ala.—Locke v. Locke, 57 Ala. 473—Scott v. Rivers, 1 Stew. & P. 19.

26. U.S.—Myers v. Hurley Motor Co., 18 F.2d 187, 57 App.D.C. 145

plaintiff's demand,[27] but it is generally held, sometimes by reason of statute, that, where defendant pleads and proves a counterclaim which exceeds plaintiff's demand, defendant is entitled to a judgment for the excess.[28] A counterclaim, when admitted, will not entitle defendant to a judgment for the full amount thereof, unless plaintiff fails to establish his cause of action,[29] and it has been held that he can only recover the excess over plaintiff's recovery where plaintiff succeeds as to some part of his claim[30] and that a dismissal of plaintiff's cause of action carries with it defendant's counterclaim;[31] but there is also authority to the effect that where plaintiff fails to show a right of recovery, defendant is entitled to judgment for the full amount of his counterclaim if established by the evidence,[32] and that plaintiff cannot by dismissal defeat defendant's right to recover on his counterclaim.[33]

Where defendant has admitted plaintiff's claim, a judgment awarding defendant the whole amount of his counterclaim, without deducting plaintiff's claim therefrom, is erroneous[34] and in any event defendant is not entitled to a judgment for a sum larger than that claimed[35] or in excess of the highest sum warranted by the evidence,[36] or for a larger sum than he could have recovered if he had brought a separate action on the demand availed of as a counterclaim.[37] Where defendant is sued for failure to pay the balance of the contract price for work and labor performed by defendant and counterclaims for insufficiency in the work, he is entitled to judgment only for the cost of making good the sufficiency, less such unpaid balance.[38] It has been held that defendant cannot recover by way of a counterclaim against a person not a plaintiff.[39]

In action on a joint and several demand, a counterclaim by one defendant inures to the benefit of all defendants with respect to a recovery by plaintiff against them[40] and with respect to the one pleading it for an affirmative recovery for any surplus.[41]

Cause of action barred by statute. Under statutes providing that, in an action on contract, any other cause of action on contract, although barred by the statute of limitations, may be interposed as a counterclaim, the counterclaim may be availed of as a defense only, and no judgment can be recovered for the excess over plaintiff's demand.[42]

d. Compensation or Reconvention

The defendant may recover an affirmative judgment on a plea in compensation or reconvention.

Where a plea in compensation or reconvention is sustained by the evidence and the amount exceeds that of plaintiff's claim, judgment will be given against plaintiff for the excess,[43] and it has been held that where a plea in reconvention is sustained by the evidence the debt set up by the plea will be allowed even if plaintiff does not establish his claim.[44] It has been held, however, that where plaintiff takes a nonsuit defendant's reconvention will be disregarded, if he be left as he was before the suit.[45] Where a plea in reconvention admits plaintiff's title to the property sued for but claims damages for a breach of contract, and defendant has recovered damages under his plea, it is error for the

27. W Va —Monongahela Tie, etc., Co v Flannigan, 87 S E 161, 77 W. Va. 162
57 C.J. p 521 note 54

28. Cal —Tomales Bay Oyster Corp v. Superior Court in and for City and County of San Francisco, 217 P 2d 968, 35 Cal 2d 389—Union Sugar Co v. Hollister Estate Co, 47 P 2d 273, 3 Cal 2d 740—Hanes v Coffee, 300 P 963, 212 Cal 777.
Neb —Olsen v McMaken & Pentzien, 297 N W 830, 139 Neb 506
N.Y.—Carter v Bradlee, 280 N Y S 368, 245 App.Div 49, affirmed 200 N E 48, 269 N Y 664.
N.D.—Kramer v. K O Lee & Son Co., 250 N.W 373, 64 N D. 84
Ohio.—Baldwin v Baldwin, App, 47 N E 2d 792—Harris v De Paulina, 178 N.E. 225, 40 Ohio App. 57
Tenn.—Voncannon & Co v. Burleson & Laws, 6 Tenn App. 369
Wis.—Elder v. Sage, 42 N W.2d 919, 257 Wis 214.
57 C.J p 521 note 57.

29. N.Y —Kelsy v. Tremaine, 29 How.Pr. 439.

30. N.Y —Kelsy v Tremaine, supra. 57 C.J. p 522 note 60.

31. Idaho —Savage v Stokes, 28 P 2d 900, 54 Idaho 109.
Defendant's failure to move for dismissal or nonsuit as to plaintiff's cause of action was held not to prevent trial and recovery on counterclaim, where complaint and counterclaim involved same transaction, both relating to accounting —Savage v Stokes, supra.

32. Ill.—Moore v. Wright, 4 Ill App. 443

33. Tex.—Gooch v. Isbell, Civ.App., 77 S W. 973

34. N.Y.—Darlington v. Hamilton Bank, 116 N Y S 678, 63 Misc. 289

35. Minn.—Nichols, etc, Co v Wiedemann, 75 N W. 208, 76 N.W. 41, 72 Minn 344
N Y —Standard Oil Co. of New York v Boyle, 261 N Y S 512, 237 App. Div 471.

36. Iowa —Callender v. Drabelle, 35 N.W 240, 73 Iowa 317.

37. Wis.—Akerly v. Vilas, 21 Wis 88.

38. N.Y —Drescher-Rotberg Co. v. Strauss, 145 N.Y S 280.

39. Ky —Wells v. Boyd, 1 Duv. 366.

40. N Y —American Guild v. Damon, 78 N E. 1081, 186 N.Y. 360.
57 C J. p 522 note 68.

41. N Y.—A. D Knouper Specialty Co. v Knouper, 157 N.Y.S. 395, 171 App Div. 555.

42. N M —Great Western Oil Co. v Bailey, 295 P. 298, 35 N M. 277.

43. La —Moore v Hamilton, 133 So. 790, 16 La.App. 630.
57 C J p 523 note 82

44. La —Gilly v. Logan, 2 Mart., N. S., 196.
57 C J. p 523 note 83.

45. La.—McDonough v. Hart, 3 La. 457.

court to enter judgment denying plaintiff the recovery of the property [46]

e. Actions by or against Assignee or Fiduciary

In an action by an assignee, the defendant cannot recover an affirmative judgment against the assignee on a claim against the assignor.

It is well settled that in an action by an assignee, a claim in favor of defendant against the assignor can be allowed as a set-off,[47] counterclaim,[48] or reconvention[49] only to the extent of the claim sued on, and judgment cannot be rendered against the assignee for the excess. Defendant is entitled to use his claim defensively, and not offensively,[50] and especially is this so where a statute expressly so provides [51] However, the assignment of plaintiff's claim, after the commencement of the action and before trial, will not prevent defendant from entering judgment on a verdict for a balance in his favor, where payment and a set-off were pleaded and the trial was between the original parties to the record.[52]

Fiduciaries Where suit is brought by one suing in a fiduciary capacity, a counterclaim can be allowed against him only to the extent of the claim sued on,[53] and, conversely, on a reference of a disputed claim against a decedent's estate, there is no power, either in the referee or the court, to render an affirmative judgment against claimant on a counterclaim in favor of the executors;[54] they can avail themselves of the counterclaim only to the extent necessary to extinguish claimant's demand.[55]

§ 62. Abandonment or Withdrawal of Cross Demand

As a general rule, unless provided otherwise by statute, a defendant may withdraw a set-off or counterclaim before final submission of the cause.

Unless provided otherwise by statute,[56] a defendant who has filed a plea of set-off has the right to withdraw it before proceeding to trial,[57] or at any time before final submission of the case,[58] or before adjustment of the claim [59] A set-off, it is said, may be withdrawn in analogy to suffering a nonsuit,[60] but, like a nonsuit, the withdrawal of it ought to be explicit [61] Where a set-off has been withdrawn, it is in the discretion of the court to allow or refuse a reinstatement thereof,[62] and a reinstatement at a subsequent term when the opposite party might not be prepared to meet the claim is properly refused [63] A defendant who appears and files an answer of set-off and abandons his defense, and does not appear at the trial until he is defaulted, waives his

46. Tex.—Barker v. Broadus, 103 S. W. 191, 46 Tex. Civ. App. 516

47. U. S.—Manufacturers' Finance Corporation v. Vye-Neill Co., C. C. A. Mass., 62 F. 2d 625, certiorari denied Kane v. Manufacturers' Finance Corporation, 53 S. Ct. 657, 289 U. S. 738, 77 L. Ed. 1486—First Acceptance Corp. v. Kennedy, D. C. Iowa, 95 F. Supp. 861, reversed on other grounds, C. A., 194 F. 2d 819.
N. J.—Pargman v. Maguth, 64 A. 2d 456, 2 N. J. Super. 33.
Pa.—Peoples Pittsburgh Trust Co. v. Commonwealth, 60 A. 2d 53, 359 Pa. 622
S. C.—**Corpus Juris quoted in** Bank of Commerce of Charlotte, N. C. v. Waters, 56 S. E. 2d 350, 353, 215 S. C. 543.
57 C. J. p. 524 note 91, p. 477 note 70 [d].

48. U. S.—First Acceptance Corp. v. Kennedy, D. C. Iowa, 95 F. Supp. 861, reversed on other grounds, C. A., 194 F. 2d 819—Steingut v. Guaranty Trust Co. of N. Y., D. C. N. Y., 58 F. Supp. 623, affirmed, C. C. A., 161 F. 2d 571, modified on other grounds 60 F. Supp. 103, certiorari dismissed Guaranty Trust Co. of N. Y. v. U. S., 68 S. Ct. 81, two cases, 332 U. S. 753, 92 L. Ed. 339, 68 S. Ct. 89, 332 U. S. 753, 92 L. Ed. 339, 68 S. Ct. 90, 332 U. S. 753, 92 L. Ed. 339, and U. S. v. Steingut, 68 S. Ct. 90, 332 U. S. 753, 92 L. Ed. 340, certiorari denied Tillman v. Millard, 68 S. Ct. 106, 332 U. S. 807, 92 L. Ed. 385, and Steingut v. Guaranty Trust Co. of N. Y., 68 S. Ct. 106, 332 U. S. 807, 92 L. Ed. 385
Cal.—Manufacturers' Finance Corporation v. Pacific Wholesale Radio, 19 P. 2d 1013, 130 Cal. App. 239
Ill.—Pacific States Life Ins. Co. v. Richcreek, 6 N. E. 2d 247, 288 Ill. App. 469.
N. J.—Pargman v. Maguth, 64 A. 2d 456, 2 N. J. Super. 33
N. Y.—Levy v. Commercial Decal, 75 N. Y. S. 2d 116, 273 App. Div. 764—Warsaw v. Voit, 272 N. Y. S. 672, 151 Misc. 807.
S. C.—**Corpus Juris quoted in** Bank of Commerce of Charlotte, N. C. v. Waters, 56 S. E. 2d 350, 353, 215 S. C. 543.
Utah.—Chesney v. District Court of Salt Lake County, 108 P. 2d 514, 99 Utah 513.
57 C. J. p. 524 note 92.

49. S. C.—**Corpus Juris quoted in** Bank of Commerce of Charlotte, N. C. v. Waters, 56 S. E. 2d 350, 353, 215 S. C. 543.
Tex.—Reese v. Teagarden, 31 Tex. 642.

50. U. S.—First Acceptance Corp. v. Kennedy, D. C. Iowa, 95 F. Supp. 861, reversed on other grounds, C. A., 194 F. 2d 819.
Miss.—Graham v. Stewart, 120 So. 171, 152 Miss. 307.
N. J.—R. F. C. v. Oates, 70 A. 2d 197, 6 N. J. Super. 606—Pargman v. Maguth, 64 A. 2d 456, 2 N. J. Super. 33

51. Ill.—Bradley v. Progressive Metal, etc., Co., 205 Ill. App. 552.

52. Pa.—Kline v. Gundrum, 11 Pa. 242

53. N. Y.—U. S. Trust Co. v. Stanton, 34 N. E. 1098, 139 N. Y. 531
57 C. J. p. 524 note 98

54. N. Y.—Mowry v. Peet, 88 N. Y. 453.

55. N. Y.—Mowry v. Peet, supra.

56. Mich.—People v. McCutcheon, 40 Mich. 244
57 C. J. p. 525 note 6.

57. Me.—Theobald v. Colby, 35 Me. 179

58. Colo.—**Corpus Juris cited in** Prell v. Gormley, 38 P. 2d 775, 776, 95 Colo. 579.
57 C. J. p. 525 note 8.

59. Mass.—Cary v. Bancroft, 14 Pick. 315, 25 Am. D. 393

60. Pa.—Muirhead v. Fitzpatrick, 5 Watts & S. 506
57 C. J. p. 525 note 10.

61. Pa.—Muirhead v. Fitzpatrick, supra.

62. Ill.—Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. D. 124.

63. Ill.—Mineral Point R. Co. v. Keep, supra.

right with respect to the set-off in that action.[64] Whether or not defendant is barred from suing on a demand which was the subject of a withdrawn set-off is discussed in Judgments § 684.

Counterclaim. While it has been held that defendant may abandon or withdraw his counterclaim[65] at any time before final submission,[66] it has also been held that a defendant cannot do so and thus keep back a portion of the matter in litigation from adjudication,[67] and that a defendant, pleading a counterclaim arising out of the contract constituting the basis of plaintiff's action, cannot withdraw his counterclaim over plaintiff's objections.[68] Under statutes requiring counterclaim to be set up on pain of defendant's losing his right of action and allowing the dismissal of an action at plaintiff's request provided a counterclaim may not have been presented, the court will not allow the withdrawal of a counterclaim with the reservation of presenting it in a separate action.[69] It has been held that defendant may not withdraw or dismiss his counterclaim after final submission,[70] but it has also been held that refusal to permit defendant to dismiss his counterclaim before judgment where plaintiff had been permitted to dismiss his case without prejudice was error, prejudicial to defendant.[71]

The cause of action set up in a counterclaim is considered abandoned where defendant fails to introduce evidence in support of it,[72] or fails to introduce evidence in support of it and moves for a directed verdict,[73] or files the transcript of the record in the appellate court with motion for appeal where judgment was rendered on verdict for plaintiff after defendant's motion for new trial was overruled.[74]

Where defendant's answer contains only a counterclaim, on withdrawal of the counterclaim, judgment must be rendered for plaintiff for the amount of his claim.[75] Plaintiff is not entitled to the benefit of any admissions contained in an abandoned counterclaim unless it is introduced in evidence.[76]

Reconvention. Defendant has the right to discontinue a reconventional demand at any time prior to judgment unless some acquired right of plaintiff would thereby be impaired.[77]

SETTLE. It has been said that the word "settle" is of equivocal meaning,[1] and that it means different things in different connections,[2] and that the particular sense in which it is used may be explained[3] by the context or the surrounding circumstances.[4]

The word "settle" is commonly used with reference to accounts and claims and demands, that is, the status of affairs between parties,[5] and when the term is used in this connection it may mean either to adjust or determine or it may mean to pay or satisfy,[6] but it may also be used with a double

64. Ind.—Aston v. Wallace, 43 Ind 468

65. Neb.—Miller v. McGannon, 113 N.W. 170, 79 Neb. 609
57 C.J. p. 525 note 16

66. Neb.—Miller v. McGannon, supra.
57 C.J. p. 525 note 20

67. Mo.—Snell v. Harrison, 16 S.W. 152, 104 Mo. 158

68. N.C.—McGee v. Froham, 177 S.E. 327, 207 N.C. 475

69. Philippine.—Reyes v. Osorio, 39 Philippine 214.
57 C.J. p. 525 note 19.
Judgment as bar to counterclaims not adjudicated see Judgments § 684.

70. U.S.—Elliott v. Peet, Pa., 202 F. 434, 120 C.C.A. 540.
57 C.J. p. 525 note 21.

71. Ohio.—Piesekar v. Eschuk, 161 N.E. 355, 27 Ohio App. 439.

72. Iowa.—Kurtz v. Hoffman, 21 N.W. 597, 65 Iowa 260.
Mo.—**Corpus Juris cited in** Shade v. Brinkopf, App., 119 S.W.2d 444, 446.

73. Iowa.—Farnsworth v. Crabb, 159 N.W. 1042, 178 Iowa 565

74. Ky.—Edwards v. Storms, 294 S.W. 165, 219 Ky. 675.

75. U.S.—Atlanta Mach. Works v. U. S., C.C.Ga., 114 F. 364.

76. Mo.—Shade v. Brinkopf, App., 119 S.W.2d 444.

77. La.—Barbara, Inc., v. Dillelo, 33 So.2d 689, 212 La. 937.

1. Tex.—**Corpus Juris quoted in** Edwards v. Edwards, Civ.App., 52 S.W.2d 657, 661
57 C.J. p. 526 note 7

2. Tex.—**Corpus Juris quoted in** Edwards v. Edwards, Civ.App., 52 S.W.2d 657, 661.
57 C.J. p. 526 note 8.

Phrases

(1) "Settle up and liquidate" synonymous with "pay" see 70 C.J.S. p. 201 note 48.

(2) Other phrases as to which more recent adjudications have not been found see 57 C.J. p. 528 note 71—p. 529 note 92.

3. Cal.—Auzerais v. Naglee, 15 P. 371, 373, 74 Cal. 60.
Tex.—**Corpus Juris quoted in** Edwards v. Edwards, Civ.App., 52 S.W.2d 657, 661

4. Tex.—**Corpus Juris quoted in** Edwards v. Edwards, Civ.App., 52 S.W.2d 657, 661
57 C.J. p. 526 note 10.

5. W.Va.—Michael v. Donohoe, 102 S.E. 803, 805, 86 W.Va. 34.

6. W.Va.—Michael v. Donohoe, supra

Similarly stated

(1) "Settle" denotes an adjustment and a payment.—Longview v. Capps, Tex.Civ.App., 123 S.W. 160, 162

(2) "Settle" is either synonymous with "adjust" or it means "to pay."—People v. Green, 5 Daly (N.Y.) 194, 201.

(3) The word "settle" is sometimes used in the sense of "paying," at other times it is used in the sense of accounting together and striking a balance by computation; at other times it is used in the sense of adjusting matters of controversy about which there has been a difference of opinion and striking a balance by

meaning to denote an adjustment of a demand and a payment.[7]

Whether the word "settle" means to adjust or to pay may depend on whether the account, claim, or demand with respect to which the term is used is liquidated or unliquidated.[8] When applied to a liquidated account or demand, the word "settle" means to pay it;[9] but when applied to an unliquidated claim or demand "settle" means its mutual adjustment between the parties and an agreement on the balance.[10]

It has been said that the word "settle" may be explained to mean pay,[11] and that it frequently is used in the sense of paying[12] or payment,[13] and thus it is defined as meaning to pay;[14] to close by payment, as accounts;[15] and it has been said that to settle a debt means to discharge it.[16] However, the word "settle" does not necessarily or always mean to pay[17] or a payment.[18]

It is recognized that the word "settle" has an established legal meaning,[19] and implies a mutual adjustment of accounts between different parties, and an agreement on the balance,[20] and this is said to be the proper meaning and ordinary acceptation of the term.[21] In this sense the word "settle" is defined as meaning to adjust;[22] to adjust differences,[23] claims,[24] accounts,[25] or matters of controversy.[26]

The word "settle" is further defined as meaning to agree;[27] to come to[28] or reach[29] an agreement; to go into a settlement;[30] to satisfy;[31] to establish,[32] to liquidate;[33] to dispose of,[34] to compound.[35] "Settle" is also defined as meaning to determine;[36] to ascertain;[37] to fix;[38] to arrange,[39]

agreement—Moore v. Hyman, 35 N.C 272, 274.

Mere intent to adjust

Va.—Bell v. Crawford, 8 Gratt 110, 123, 49 Va 110, 123—Aylett v Robinson, 9 Leigh 45, 49, 36 Va 45, 49.

7. Cal—Piggly Wiggly Yuma Co v. New York Indemnity Co., 3 P 2d 15, 16, 116 Cal.App 541
57 C J. p 526 note 8 [d]

8. Conn.—State v Staub, 23 A. 924, 927, 928, 61 Conn 553

9. Conn—State v Staub, supra.
57 C J. p 527 note 49 [d]

10. Conn—State v. Staub, supra.

Established legal meaning as applied to an unliquidated claim or demand.—State v Staub, supra.

11. Va—Bell v. Crawford, 8 Gratt 110, 123, 49 Va. 110, 123.

12. Iowa—Lynch v. Nugent, 46 N W. 61, 63, 80 Iowa 422
57 C.J. p 527 note 49 [b].

13. Ill.—Wright v. Takito, 210 Ill. App 58, 60

14. Cal—Auzerais v. Naglee, 15 P. 371, 373, 74 Cal. 60.
57 C.J. p 527 note 49.

Similarly defined

(1) To pay one's bill.—M. Zimmerman Co. v. Goldberg, 69 Pa.Super. 254, 255.

(2) To meet one's pecuniary obligations fully.—M Zimmerman Co. v. Goldberg, supra.

15. Or.—Dalk v. Lachmund, 70 P.2d 558, 560, 157 Or. 152.

To close up

Tex—Block v. Largent, Civ.App., 135 S W. 1078, 1080.

16. N.Y.—Francis v. Rycroft, 132 N Y.S. 14, 16, 148 App Div. 65.

17. N.Y.—In re Brant, 201 N.Y.S. 60, 61, 121 Misc. 102.
57 C.J. p 528 note 52.

18. Pa—Kearney v Collins, 2 Miles 13, 14.
57 C J p 528 note 53

19. Or—National Surety Co v Johnson, 239 P 538, 540, 115 Or 624, 631—Phipps v Willis, 96 P. 866, 870, 53 Or 190, 8 Ann Cas 119. Wis—Baxter v State, 9 Wis. 38, 44

20. Or.—National Surety Co v Johnson, 239 P. 538, 540, 115 Or 624, 631
57 C J p 527 note 43 [b].

21. Va—Bell v. Crawford, 8 Gratt. 110, 123, 49 Va 110, 123.

22. Mont.—Gilna v Barker, 254 P. 174, 177, 78 Mont. 357.
57 C J. p 526 note 27.

Similarly defined

To together adjust and ascertain what may be due to the one or the other—McMasters v Burnett, 17 S W. 1021, 1022, 92 Ky. 358, 13 Ky.L 617—57 C J. p 527 note 43

23. Or—Dalk v. Lachmund, 70 P.2d 558, 560, 157 Or. 152.
57 C J. p 526 note 30

24. Mich—Toombs v Stockwell, 92 N.W. 288, 131 Mich. 633.

25. Or.—Dalk v. Lachmund, 70 P.2d 558, 560, 157 Or 152.
57 C.J. p 526 note 28

26. N.C—Moore v. Hyman, 35 N.C 272, 274.
57 C J. p 527 note 31.

27. Tex—Edwards v Edwards, Civ App., 52 S.W.2d 657, 661.

28. Mich.—Toombs v Stockwell, 92 N.W. 288, 131 Mich 638.
Or.—Dalk v. Lachmund, 70 P.2d 558, 560, 157 Or. 152.
Tex—**Corpus Juris quoted in** Edwards v Edwards, Civ.App., 52 S W.2d 657, 661.

29. Ill.—Wright v. Takito, 210 Ill App. 58, 60.
Tex.—**Corpus Juris quoted in** Edwards v Edwards, Civ App., 52 S. W 2d 657, 661.

30. Va—Bell v Crawford, 8 Gratt. 110, 123, 49 Va 110, 123—Aylett v Robinson, 9 Leigh 45, 50, 36 Va 45, 50.

31. Mont—Gilna v. Barker, 254 P 174, 177, 78 Mont. 357.

32. Tex—**Corpus Juris quoted in** Edwards v Edwards, Civ.App., 52 S W.2d 657, 661
57 C.J. p 526 note 17.

33. Or.—Dalk v Lachmund, 70 P 2d 558, 560, 157 Or. 152.
57 C.J p 527 note 42

34. Mont.—Gilna v Barker, 254 P. 174, 177, 78 Mont 357.
57 C.J. p 527 note 38.

35. Or.—Dalk v. Lachmund, 70 P.2d 558, 560, 157 Or. 152.

36. N Y.—Casler v. Connecticut Mut. L. Ins. Co, 22 N.Y. 427, 429
N C—Yancey v. Yancey, 55 S E 2d 468, 469, 230 N C 719
Tex—**Corpus Juris quoted in** Edwards v. Edwards, Civ.App., 52 S. W.2d 657, 661.
57 C.J. p 527 note 35

37. Tex.—**Corpus Juris quoted in** Edwards v. Edwards, Civ.App., 52 S.W.2d 657, 661.
57 C.J. p 526 note 13.

38. Tex.—**Corpus Juris quoted in** Edwards v Edwards, Civ.App, 52 S.W 2d 657, 661.
57 C J. p 526 note 18, p 527 note 39.

Similarly defined

To fix or determine a balance, which may be on the one side or the other.—Bell v. Crawford, 8 Gratt 110, 123, 49 Va 110, 123—Aylett v Robinson, 9 Leigh 45, 50, 36 Va. 45, 50

39. Tex—**Corpus Juris quoted in** Edwards v Edwards, Civ.App., 52 S.W.2d 657, 661.
57 C.J. p 526 note 12.

to free from uncertainty;[40] to regulate;[41] to balance;[42] to compare with another account.[43]

"Settle" is frequently used with somewhat similar shades of meaning in connection with litigation, and signifies that the controversy has been adjusted and brought to an end,[44] and, nothing else appearing, it indicates a determination on the merits.[45]

In a different sense, the word "settle" means to place;[46] to place in a fixed or permanent condition.[47]

As applied to lands, "settle" conveys the idea of permanent inhabitance,[48] and bona fide use and improvement,[49] and means to fix one's place of residence thereon.[50]

As applied to ministers "to settle" is a technical term and means to place the minister in a permanent seat or fix him in a stable course of life as stated in Religious Societies § 39 a.

"Settle" has been held equivalent to, or synonymous with, "dispose" see 27 C.J.S. p 347 note 11, and "fix" see 36 C J.S. p 885 note 67, and it has been compared with, or distinguished from, "adjust" see 2 C.J S. p 51 note 23, and "dispose" see 27 C.J.S. p 348 note 16.

Settled. The term "settled" in its primary sense[51] means placed; fixed; established;[52] agreed.[53] As applied to a debt, and as ordinarily understood, "settled" means paid,[54] discharged;[55] satisfied.[56] The term is also used as descriptive of a section of country that is "planted with inhabitants."[57]

It has been said that the term "settled," when used with relation to pending litigation, has not acquired such a well-defined meaning as would enable the courts to interpret the intent of the parties in making use of the term in connection with the ending of such litigation without the aid of extrinsic evidence.[58]

"Settled" has been held equivalent to, or synonymous with, "determined" see 26 C.J.S. p 1260 note 20, "discharged" see 26 C.J S. p 1330 note 61, "established" see 30 C.J.S. p 1233 note 64, "fixed" see 36 C.J.S. p 886 note 84, and "paid" see 67 C.J.S. p 551 note 37.

SETTLEMENT. The word "settlement" has several different meanings. In one sense the term is variously applied to accounts,[59] claims,[60] controversies,[61] and transactions,[62] and it implies a meeting of the minds of the parties to a transaction or controversy[63] and the mutual adjustment of accounts and an agreement on the balance.[64] In this sense the term is defined as meaning the act or process of adjusting or determining;[65] an adjusting;[66] an

40. Mont.—Gilna v. Barker, 254 P 174, 177, 78 Mont 357
Tex.—**Corpus Juris quoted in** Edwards v Edwards, Civ App., 52 S W 2d 657, 661

41. Iowa.—Lynch v. Nugent, 46 N W 61, 63, 80 Iowa 422
Tex.—**Corpus Juris quoted in** Edwards v Edwards, Civ.App., 52 S.W.2d 657, 661

42. N C.—Taylor v. Miller, 18 S E 504, 505, 113 N C 340.
57 C.J. p 527 note 32.

43. Va.—Aylett v. Robinson, 9 Leigh 45, 50, 36 Va 45, 50.

44. N C.—Yancey v. Yancey, 55 S E 2d 468, 469, 230 N C 719.

45. N.C.—Yancey v Yancey, supra

46. N.Y.—Casler v Connecticut Mut L. Ins. Co., 22 N.Y 427, 431
Tex.—**Corpus Juris quoted in** Edwards v. Edwards, Civ App., 52 S. W.2d 657, 661.

47. N C.—Yancey v Yancey, 55 S. E.2d 468, 469, 230 N C. 719.

48. Tex.—Burleson v. Durham, 46 Tex. 152, 160.

49. Mich.—In re Selby, 6 Mich. 193, 204.
57 C.J. p 528 note 58.

50. Kan.—Bratton v. Cross, 22 Kan 673, 677.
Tex.—Smith v Florence, 96 S W 1096, 1097, 43 Tex Civ App 557

51. N Y.—Casler v Connecticut Mut L Ins Co, 22 N.Y. 427, 431.

52. N Y.—Casler v Connecticut Mut L Ins. Co, supra
57 C J. p 529 notes 95, 97.
Phrases
(1) "Settled estate" see Estates § 1 a

(2) "Settled insanity" see Insane Persons § 2 b (5).

(3) "Settled minister" defined see Religious Societies § 39 a; statutes exempting settled ministers from taxation see the C J S title Taxation § 241, also 61 C J p 414 notes 24–25

(4) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 530 note 17 –p 531 note 51.

53. Ky.—Green v. Commonwealth, 204 S.W. 82, 83, 181 Ky 253

54. N Y.—Gandolfo v. Appleton, 40 N Y. 533, 541
57 C J p 529 note 3.

55. Ala.—Waters v. Creagh, 4 Stew & P 410, 414.
57 C J p 529 note 2.

56. Ky.—Green v. Commonwealth, 204 S W. 82, 84, 181 Ky. 253.
57 C J. p 529 note 4.

57. N Y.—Casler v Connecticut Mut. L Ins Co, 22 N Y. 427, 431.

58. Cal.—Setzer v. Moore, 260 P 550, 552, 203 Cal. 333, 55 A.L.R. 423
57 C J. p 529 note 1.

59. Mich.—Toombs v. Stockwell, 92 N W. 288, 131 Mich 633.

60. D C.—Warner Const. Co. v Krug, D C, 80 F Supp. 81, 83.

61. Cal.—Ezmirlian v. Otto, 34 P 2d 774, 778, 139 Cal.App 486.

62. Cal.—Ezmirlian v. Otto, supra.

63. Cal.—Ezmirlian v Otto, supra
A settlement consummated by a bilateral agreement is as much a settlement as is a unilateral adjustment or allowance of a claim, since the word "settlement" covers both methods of adjusting a claim.—Warner Const. Co. v. Krug, D.C D C., 80 F. Supp 81, 83

64. Mich.—Toombs v. Stockwell, 92 N.W. 288, 131 Mich. 633.

65. D C.—Warner Const. Co. v. Krug, D C, 80 F.Supp. 81, 83.
Kan.—**Corpus Juris quoted in** Sowers v. Robertson, 58 P.2d 1105, 1107, 144 Kan. 273
N.D.—Bauer v. National Union F. Ins. Co, 198 N.W. 546, 550, 51 N.D. 1.

66. Kan.—**Corpus Juris quoted in**

adjustment[67] between persons concerning their dealings or difficulties,[68] an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other;[69] arrangement[70] of difficulties;[71] composure of doubts or differences;[72] determination by agreement;[73] liquidation.[74] "Settlement" does not necessarily mean payment or satisfaction,[75] although it may have that meaning,[76] and it may mean payment in full.[77]

When employed in connection with public contracts and accounts, the word "settlement" has a well-defined meaning,[78] denoting the appropriate administrative determination with respect to the amount due.[79]

In a very general sense the word "settlement" is used to signify the act of conferring anything in a formal and permanent manner; a bestowing or granting under legal sanction.[80] The term is used in conveyancing with a somewhat similar meaning, signifying the limitation of real or personal property or the enjoyment thereof to several persons in succession, prescribing the mode of holding, enjoying, and disposing of it;[81] any disposition of property, real or personal, by any instrument or number of instruments, for the purpose of securing that the property comprised in the settlement shall be enjoyed by persons in succession, and in particular of regulating the enjoyment of the settled property among the persons or classes of persons nominated by the settlor;[82] the conveyance of any estate for the benefit of some person or persons;[83] the conveyance of property or the creation of estates therein to make future provision for one or more beneficiaries,[84] usually of the family of the creator of the settlement, in such manner as to secure to them different interests, or to secure their expectancies in a different manner, from what would be done by a mere conveyance or by the statutes of descent and distribution;[85] the disposition of property for the benefit of some person or persons,[86] usually through the medium of trustees.[87]

The word "settlement" is used in a technical sense

Sowers v Robertson, 58 P 2d 1105, 1107, 144 Kan 273.
57 C J p 531 note 54.

67. Ark —Ledbetter v Hall, 87 S W.2d 996, 999, 191 Ark. 791.
Kan —**Corpus Juris quoted in** Sowers v Robertson, 58 P.2d 1105, 1107, 144 Kan. 273.
57 C J p 531 note 55.

68. Kan —**Corpus Juris quoted in** Sowers v Robertson, 58 P 2d 1105, 1107, 144 Kan 273.
57 C.J p 532 note 56

69. Kan —**Corpus Juris quoted in** Sowers v Robertson, 58 P.2d 1105, 1107, 144 Kan. 273.
57 C J p 532 note 57.
Similarly defined
An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other.—Warner Const. Co v Krug, D C D.C, 80 F Supp. 81, 83.

70. Ark.—Ledbetter v. Hall, 87 S W 2d 996, 999, 191 Ark 791.
Kan —**Corpus Juris quoted in** Sowers v. Robertson, 58 P.2d 1105, 1107, 144 Kan 273.
57 C J. p 532 note 58.

71. Kan.—**Corpus Juris quoted in** Sowers v. Robertson, 58 P.2d 1105, 1107, 144 Kan. 273.
57 C.J. p 532 note 59.

72. Kan —**Corpus Juris quoted in** Sowers v. Robertson, 58 P 2d 1105, 1107, 144 Kan. 273.
N.D.—Bauer v. National Union F. Ins. Co., 198 N W. 546, 550, 51 N D. 1

73. Kan —**Corpus Juris quoted in** Sowers v. Robertson, 58 P.2d 1105, 1107, 144 Kan 273.
57 C J. p 532 note 61

74. Kan —**Corpus Juris quoted in** Sowers v Robertson, 58 P.2d 1105, 1107, 144 Kan 273
57 C J p 532 note 62

75. U S.—Beall v Hudson County Water Co, C C.N J, 185 F. 179, 182.
Ark —Ledbetter v Hall, 87 S W 2d 996, 999, 191 Ark 791

76. U.S —Beall v. Hudson County Water Co, C C.N J, 185 F. 179, 182
Ark —Ledbetter v. Hall, 87 S.W 2d 996, 999, 191 Ark 791

77. D C —Warner Const. Co. v. Krug, D.C, 80 F Supp. 81, 83

78. Utah —Campbell Bldg. Co. v. District Court of Millard County, 63 P.2d 255, 258, 90 Utah 552.
57 C.J p 532 note 65.

79. Utah.—Campbell Bldg Co. v District Court of Millard County, supra
57 C J p 532 note 66.
Similarly stated
The word "settlement," in connection with public transactions and accounts, has been used from the beginning to describe administrative determination of the amount due.
Pa.—Commonwealth to use of Concrete Steel Co v Globe Indemnity Co., 167 A. 576, 577, 312 Pa. 244.
Utah —Campbell Bldg Co v. District Court of Millard County, 63 P 2d 255, 258, 90 Utah 552.
57 C J p 532 note 66 [a]

80. N Y —In re Backer's Estate, 266 N.Y.S. 47, 50, 148 Misc. 256.

81. Ga —Phinizy v Wallace, 71 S. E. 896, 899, 136 Ga 520.

82. N.Y —In re Stern's Estate, 56 N. Y S.2d 631, 640, 189 Misc 639
English definition
N Y —In re Stern's Estate, supra.

83. Cal —**Corpus Juris quoted in** In re Hale's Estate, 170 P 2d 961, 964, 75 Cal App 2d 227.
N.Y.—In re Brant, 201 N Y S. 60, 61, 121 Misc 102.

84. Cal.—**Corpus Juris quoted in** In re Hale's Estate, 170 P.2d 961, 964, 75 Cal.App 2d 227
N Y —In re Backer's Estate, 266 N Y S 47, 50, 148 Misc 256.
57 C.J p 532 note 78.

85. N Y —In re Backer's Estate, supra—In re Brant, 201 N Y S. 60, 61, 121 Misc 102.

86. Cal.—**Corpus Juris quoted in** In re Hale's Estate, 170 P 2d 961, 964, 75 Cal App 2d 227.
N Y —In re Brant, 201 N Y.S 60, 61, 121 Misc 102.

87. Cal.—**Corpus Juris quoted in** In re Hale's Estate, 170 P 2d 961, 964, 75 Cal App 2d 227.
N Y.—In re Brant, 201 N.Y S 60, 61, 121 Misc. 102.
Intervention of trustees
A settlement at once suggests the intervention of trustees, on whom is conferred a fund or property in some form, which constitutes a source of maintenance, education, etc
N.Y —In re Stern's Estate, 56 N.Y.S 2d 631, 641, 189 Misc 639.
Ohio —Rhodes v. Weldy, 20 N.E. 461, 465, 46 Ohio St. 234, 15 Am.S.R 584.

in connection with paupers, and is defined in this sense in Paupers § 20 as the place where a person has a legal right to receive support if he becomes a public charge.

"Settlement" is defined in Compromise and Settlement § 1, and is treated in various connections throughout that title. The term is also treated in various other connections throughout this work The authority of an agent or attorney to effect a settlement of a claim is discussed in Agency § 118 and Attorney and Client § 105.

The settlement of decedents' estates is discussed in Executors and Administrators §§ 827–943, of wards' estates generally in Guardian and Ward §§ 143–167, and of estates of persons of mental incapacity in Insane Persons § 87.

Both by common law and by statute, a change in circumstances of the testator, such as marriage and birth of children, will operate as a revocation of a will unless some settlement for the spouse and issue is made, and what constitutes such settlement is treated in the C.J.S. title Wills §§ 290–292, also 68 C.J. p 828 note 55–p 841 note 47.

For other particular applications and specific uses of the term consult the Descriptive-Word Index.

"Settlement" has been held equivalent to, or synonymous with, "allowance" see 3 C.J.S p 891 note 70, and "liquidated" see 54 C.J.S. p 565 note 8, and it has been compared with, or distinguished from, "accord and satisfaction" see Accord and Satisfaction § 1 b (8), "compromise" see Compromise and Settlement § 1 a, "payment" see Payment § 2, and "satisfaction" see 78 C.J.S. p 581 note 80.

Social settlement. As a designation applied to organizations or societies engaged in charitable or philanthropic work, the term has been said to be one of comparatively recent origin[88] and that its precise legal definition is not free from difficulty.[89] While it has been defined as meaning the settled place of abode or residence of a group of persons concerning themselves with the social condition or well-being of the inhabitants of the district where they live,[90] this definition was recognized by the courts as not being sufficiently precise.[91]

Statutes exempting property of social settlements from water charges are treated in the C.J.S. title Waters § 283, also 67 C J. p 1234 note 2

Other phrases employing the word "settlement" are set out in the note.[92]

SETTLER. The word "settler" is defined generally as meaning one who settles; especially, one who establishes himself in a colony or new country; a colonist.[93] A settler upon land is one who resides thereon,[94] and a settler in any particular locality is anyone who has taken up his permanent abode in that locality.[95] The word "settlers" ordinarily is applied to those who first come to a country or section of a country either partially or wholly uninhabitated, and who make their residence there.[96]

"Settler" has been distinguished from "resident" see 77 C.J.S. p 308 note 6.

SETTLOR. The word "settlor" is used to denote the person who creates or establishes a trust, or who furnishes the consideration for the creation of a trust, as stated in the C.J.S. title Trusts § 4, also 65 C.J. p 217 note 74.

SEVEN. The sum of one and six; a cardinal number.[97]

SEVENTY. The sum of ten and sixty; seven times ten; a cardinal number.[98]

88. N Y.—In re Young Women's Christian Assoc., 141 N Y S 260, 261
58 C J. p 783 note 46.

89. N Y —In re Young Women's Christian Assoc, supra
58 C J p 783 note 47.

90. N Y.—People v Monroe, 81 N.Y S 972, 973, 40 Misc 286.

91. N Y —People v. Monroe, supra.

92. **Phrases**
(1) "Judicial settlement" see 50 C J S. p 572 note 88.

(2) "Marriage settlement" see Husband and Wife §§ 75–118.

(3) "Place of pauper settlement" distinguished from "dwelling house" see 28 C J.S. p 604 note 21.

(4) "Settlement and entry" compared with "location and development" see 26 C J S p 1294 note 42.

(5) Additional phrases as to which more recent adjudications have not been found see 57 C.J. p 533 notes 86–10

93. New Standard D

Phrases employing the term and as to which more recent adjudications have not been found see 57 C.J p 534 notes 19–22

94. Kan —Bratton v Cross, 22 Kan 673, 677.
Tex —Smith v. Florence, 96 S W. 1096, 1097, 43 Tex Civ App. 557.

95. Tex —Hume v. Gracy, 27 S W. 584, 86 Tex. 671.

96. Tex.—Hume v. Gracy, supra.
57 C.J. p 534 note 18.

97. New Standard D.
Presumption of death arising from unexplained absence for seven years see Death § 6.

Phrases as to which more recent adjudications have not been found see 57 C.J. p 534 notes 30–32.

98. New Standard D.
As a term applied to a member in good standing in the Mormon church, or to certain officers of the church, see Religious Societies § 1.

Phrases
(1) "Seventy-eighty prunes" as meaning those which will require from seventy to eighty to weigh a pound.—National Grocery Co. v. Pratt-Low Preserving Co., 17 P.2d 51, 52, 170 Wash. 575.

SEVER. The term "sever" is defined as meaning to separate;[99] to divide;[1] to disjoin;[2] to part;[3] to part in any way, especially by violence, as by cutting, rending, etc.;[4] to cut off from something; to cut or break open or apart; to cut through;[5] to disunite; disconnect; part possession of;[6] to put or keep distinct or apart.[7] "Sever" is also defined as meaning to distinguish; discriminate; know apart.[8]

It has been stated that when the word "severed" is given its usual and ordinary meaning it implies no unlawful act.[9]

SEVERABLE. Capable of being severed.[10] The term has been held synonymous with "several."[11]

The severability of statutes is treated in the C.J.S. title Statutes § 93, also 59 C.J. p 642 note 21–p 647 note 37.

SEVERAL. The term "several" is indefinite[12] and its meaning may vary according to the context or the circumstances under which it is used.[13]

In a numerical sense,[14] it is variously defined[15] as meaning a number greater than one;[16] more than one;[17] an indefinite quantity more than one;[18] consisting of a number[19] more than two,[20] but not very many;[21] consisting of any small number more than two;[22] an uncertain[23] or any[24] number not less than two; being of an indefinite number, yet not large.[25]

"Several" has other meanings,[26] and in a different

(2) "Seventy per cent;" the commonly accepted meaning of this phrase is well recognized, and when applied to an examination it means, if the phrase is unqualified, that the examinee answered correctly seven out of every ten questions.—Taylor v McSwain, 95 P 2d 415, 422, 54 Ariz 295.

99. Tex—Enterprise Co. v. Wheat, Civ.App., 290 S.W. 212, 218
57 C J p 534 note 45

Referring to things that are distinct but united by some tie.—Enterprise Co. v Wheat, supra

Similarly defined

(1) To separate, as one from another—Muse v. Metropolitan Life Ins Co, 192 So. 72, 74, 193 La. 605, 125 A.L R 1075

(2) To separate from the rest—Enterprise Co v. Wheat, Tex Civ App, 290 S W. 212, 218—57 C J. p 534 note 46

1. La—Muse v Metropolitan Life Ins Co, 192 So. 72, 74, 193 La 605, 125 A L R 1075.

To divide into parts

La—Muse v. Metropolitan Life Ins Co, supra.

2. La.—Muse v. Metropolitan Life Ins. Co., supra

Tex—Enterprise Co. v. Wheat, Civ App, 290 S.W 212, 218

3. Tex—Enterprise Co. v. Wheat, supra.

4. La—Muse v. Metropolitan Life Ins Co, 192 So. 72, 74, 193 La. 605, 125 A L R. 1075
57 C.J. p 534 note 41.

5. La.—Muse v. Metropolitan Life Ins Co., supra

6. Tex.—Enterprise Co. v. Wheat, Civ App, 290 S W. 212, 218.

7. Tex—Enterprise Co. v. Wheat, supra.

To put apart

Miss.—Metropolitan Casualty Ins Co. v. Shelby, 76 So. 839, 116 Miss 278

8. Tex—Enterprise Co. v Wheat, Civ App, 290 S.W. 212, 218.

9. Tex—Enterprise Co. v. Wheat, supra.

Phrases employing the word "severed" and as to which more recent adjudications have not been found see 57 C J. p 535 notes 50–52.

10. Century D.

Phrases

(1) "Severable contract" is a contract which in its nature and purpose is susceptible of division and apportionment as stated in Contracts § 331.

(2) Other phrases as to which more recent adjudications have not been found see 57 C.J p 535 notes 58, 59

11. Mo—Lawson v. Muse, 165 S.W 396, 397, 180 Mo App 35.

12. W Va—Barber v Brooke County Court, 171 S E 589, 590, 114 W.Va. 255

13. Ky.—Eversole v Eversole, 183 S W. 494, 495, 169 Ky. 234.

14. U S—B B. Chemical Co v Cataract Chemical Co., C C.A.N Y, 122 F 2d 526, 531.

15. Tex—Avant v. Broun, Civ.App., 91 S W 2d 426, 429.

16. Cal—First Nat Trust & Savings Bank of San Diego v. Industrial Accident Commission, 2 P. 2d 347, 351, 213 Cal 322, 78 A.L R. 1324.
Tex.—**Corpus Juris quoted in** Avant v. Broun, Civ.App, 91 S.W.2d 426, 429
57 C.J. p 535 note 65.

17. Tex—**Corpus Juris quoted in** Avant v Broun, Civ.App, 91 S W 2d 426, 429.
57 C J p 535 note 71.

18. Tex.—Western Union Tel. Co. v De Andrea, 100 S W. 977, 980, 45 Tex Civ.App. 395.

19. U.S.—B. B. Chemical Co. v. Cataract Chemical Co., C C A.N.Y., 122 F 2d 526, 531.

20. U.S—B B. Chemical Co v. Cataract Chemical Co, supra
Ala—Brown-Service Ins Co. v. Wright, 28 So 2d 318, 320, 32 Ala App 578
Cal—First Nat Trust & Savings Bank of San Diego v. Industrial Accident Commission, 2 P 2d 347, 351, 213 Cal. 322, 78 A L R 1324
Tex—**Corpus Juris quoted in** Avant v. Broun, Civ.App, 91 S.W.2d 426, 429
W.Va—Barber v. Brooke County Court, 171 S.E. 589, 590, 114 W. Va 255.
57 C J p 535 note 72.

21. U.S—B. B. Chemical Co. v. Cataract Chemical Co., C.C.A.N Y, 122 F 2d 526, 531.
Ala—Brown-Service Ins Co. v. Wright, 28 So.2d 318, 320, 32 Ala. App. 578
Tex.—**Corpus Juris quoted in** Avant v. Broun, Civ.App, 91 S W 2d 426, 429.
W Va—Barber v. Brooke County Court, 171 S.E. 589, 590, 114 W.Va. 255
57 C.J. p 535 note 73.

22. N.Y.—Strickland v. Harger, 16 Hun 465, 467
Tex—**Corpus Juris quoted in** Avant v. Broun, Civ.App., 91 S.W 2d 426, 429.

23. Tex.—Avant v. Broun, Civ.App, 91 S.W 2d 426, 429

24. Ga—Rowe v Walker, 148 S.E. 762, 764, 40 Ga.App 1.
Tex—**Corpus Juris quoted in** Avant v. Broun, Civ.App., 91 S.W.2d 426, 429

25. Tex—**Corpus Juris quoted in** Avant v Broun, Civ.App., 91 S. W.2d 426, 429—Black v. Brooks, 129 S W 177, 178, 60 Tex Civ App 533.

26. Cal—First Nat Trust & Savings Bank of San Diego v. Industrial

sense is defined as meaning separate;[27] distinct;[28] different,[29] respective;[30] independent;[31] and severable.[32]

The word "several" is further defined as meaning various;[33] divers;[34] individual;[35] and sundry.[36]

While it has been stated that the dictionaries furnish no authority for saying that "several" means "all,"[37] the term is sometimes construed as meaning "all."[38]

"Several" has been held equivalent to, or synonymous with, "divers" see 27 C.J.S. p 506 note 33, "many" see 55 C.J.S. p 707 note 20, "severable" see supra p 127 note 11, "sundry,"[39] and "various."[40]

It has been compared with, or distinguished from, "all" see 3 C.J S. p 869 note 74, "exclusive" see 33 C.J.S. p 112 note 32.2, "individual" see 42 C.J.S. p 1366 note 61.3, "joint" see 48 C J.S. p 798 note 3, and "sole."[41]

Joint and several liability for tort is discussed generally in the C.J S title Torts §§ 34–39, also 62 C J. p 1130 note 42–p 1136 note 99; for negligence generally in Negligence § 102; and for the negligent operation of a motor vehicle in Motor Vehicles § 427. Joint, several, and joint and several contracts are treated generally in Contracts §§ 349–355.

Phrases employing the term are set out in the note.[42]

SEVERALLY. The term "severally" is defined as meaning individually;[43] independently;[44] respectively;[45] separately;[46] distinctly;[47] apart from others[48] It has been said that the word "severally" directly connotes severalty of interest.[49]

"Severally" has been held synonymous with "respectively" see 77 C.J.S. p 317 note 92.

SEVERALTY. See Estates § 17.

SEVERANCE. The word "severance" is defined generally as meaning the act of severing, dividing, or separating; the state of being severed or separated; the state of being disjoined or separated;[50]

Accident Commission, 2 P 2d 347, 351, 213 Cal 322, 78 A.L.R. 1324

27. Cal —First Nat. Trust & Savings Bank of San Diego v Industrial Accident Commission, supra
Minn —Park Enterprises v. Trach, 47 N W.2d 194, 196, 233 Minn 467.
57 C J. p 536 note 84.

Similarly defined

Each particular, or a small number, singly taken —Nashville, etc, R Co v. Marshall County, 30 S W 2d 268, 271, 161 Tenn. 236—Lauderdale County v Fargason, 7 Lea, Tenn, 153, 168

28. Ky —Commonwealth v Jones, 84 S W 305, 307, 27 Ky L. 16.

29. Cal —First Nat Trust & Savings Bank of San Diego v. Industrial Accident Commission, 2 P 2d 347, 351, 213 Cal. 322, 78 A L R. 1324—San Diego First Nat. Trust, etc, Bank v Industrial Acc Commission, App., 294 P 87, 89.

30. R I —Brown v Hawkins, 59 A 78, 79, 26 R I. 400.
57 C J. p 536 note 83.

31. Minn —Park Enterprises v Trach, 47 N.W 2d 194, 196, 233 Minn. 467.

32. Minn —Park Enterprises v Trach, supra
Mo —Lawson v Muse, 165 S W. 396, 397, 180 Mo.App. 35

33. N Y —Strickland v. Harger, 16 Hun 465, 467.

34. Tex —Black v Brooks, 129 S.W 177, 178, 60 Tex Civ App 533
57 C.J p 535 note 74.

35. Minn.—Park Enterprises v. Trach, 47 N W.2d 194, 196, 233 Minn 467.

36. N Y —Strickland v. Harger, 16 Hun 465, 467

37. N Y —Strickland v. Harger, supra

38. N J —Outcalt v. Outcalt, 8 A 532, 42 N J Eq 500
57 C J p 536 note 78

39. N Y.—Strickland v. Harger, 16 Hun 465, 467

40. N Y —Strickland v. Harger, supra

41. D C.—Seitz v. Seitz, 11 App D C 358, 373.

42. **Phrases**

(1) "Several actions," where a separate and distinct action is brought against each of two or more persons who are all liable to the plaintiff in respect to the same subject matter, the actions are said to be "several"—Black L D

(2) "Several covenants" see Covenants § 27

(3) "Several fishery" as the exclusive right of fishing derived from ownership of soil see Fish § 1.

(4) "Several inheritance" see 43 C. J S. p 394 note 27

(5) "Several issues" see 48 C J.S p 778 note 17.

(6) "Several months" as an indefinite expression of time see the C J S. title Time § 10

(7) "Several obligation" see 67 C.J. S p 17 note 43.

(8) "Several tenancy" see Estates § 17.

(9) Other phrases as to which more recent adjudications have not been found see 57 C J. p 536 note 5–p 537 note 20.

43. Ill.—Kaspar American State Bank v Oul Homestead Ass'n, 22 N E 2d 785, 786, 301 Ill App 326

Phrases employing the term and as to which more recent adjudications have not been found see 57 C.J. p 537 notes 33–39

44. Iowa —Dickson v. Yates, 188 N. W 948, 951, 194 Iowa 910, 27 A L R. 533

45. U S —Board of Sup'rs of Presque Isle County v Thompson, Mich, 61 F 914, 926, 10 C C A 154
Or.—Hanley v Medford, 108 P. 188, 192, 56 Or. 171.

46. Ill —Meisser v. Thompson, 9 Ill App 368, 370.
57 C J. p 537 note 32.

47. Ill —State Nat. Bank v Reilly, 14 N E. 657, 660, 124 Ill. 464

48. Ill —State Nat. Bank v. Reilly, supra.

49. Colo.—In re Kwatkowski's Estate, 29 P 2d 639, 640, 94 Colo 222

50. La.—Muse v. Metropolitan Life Ins Co, App, 191 So. 586, 590
Miss —Metropolitan Casualty Ins. Co v. Shelby, 76 So. 839, 116 Miss 278

Similarly defined

The act of severing, or state of being severed —Muse v. Metropolitan Life Ins. Co., 192 So. 72, 74, 193 La 605, 125 A.L.R. 1075.

Phrases

(1) "Severance of actions" see Actions §§ 117–122.

partition; separation;[51] the removal of anything[52]

As applied to realty, "severance" means the removing of anything from the realty, as trees, crops, etc.[53]

"Severance" in pleading is defined in Pleading § 117 a. Accident insurance policies providing for indemnity for loss of members of the body by severance are discussed in Insurance § 900 b (2) The term "severance" is treated in various other connections throughout this work, particular reference being made to Fixtures § 21, Joint Tenancy § 4, Mines and Minerals §§ 151, 152, 154, and to the title indexes to Crops and Logs and Logging.

For other particular applications and specific uses of the word consult the Descriptive-Word Index.

SEVERE. Sharp; distressing; violent; extreme; difficult to be endured; rigorous.[54]

SEW. To unite or fasten by stitches made with a flexible thread or filament.[55]

"Sewed" is the past participle of "sew."[56] The term is used to describe a process of bookbinding which contemplates the folding and placing of one "signature" (a sheet of paper to be folded into several pages) on another until the back is completed, then the cutting of grooves in the back in which cords are inserted, and the sewing of each signature to such cords.[57]

"Sewing" is the present participle of "sew;"[58] it has been compared with "cementing" see 14 C.J.S. p 61 note 1.

SEWAGE or SEWERAGE. Although the words "sewage" and "sewerage" are frequently used interchangeably,[59] there is in fact a distinction between them, the word "sewerage" being usually applied to a system of sewers, and "sewage" to the matter carried off[60]

The term "sewerage" is often used to indicate anything pertaining to sewers,[61] and is commonly employed for systems conveying sewage,[62] and is defined as meaning the systematic removal and disposal of sewage and general surface waters by sewers[63] "Sewerage" is also defined as meaning any substance which contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals.[64]

The primary meaning of the word "sewage" is that which passes through a sewer,[65] and a secondary meaning is derived from the usual character of the contents of a sewer,[66] and as used in that sense the word signifies the refuse and foul matter, solid or liquid, which is so carried off;[67] excreted, as well as waste, refuse or foul matter, carried off in sewers

(2) "Severance tax" defined, persons liable for, and collection of, see Licenses §§ 1 c, 47 b (3), 52 b

(3) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 538 note 68–p 539 note 79.

51. La.—Muse v Metropolitan Life Ins Co, 192 So 72, 74, 193 La 605, 125 A.L.R. 1075.

52. La.—Muse v. Metropolitan Life Ins Co, App., 191 So 586, 590

53. Miss.—Metropolitan Casualty Ins Co v. Shelby, 76 So 839, 116 Miss 278.
Tenn.—King v. Metropolitan Life Ins Co v. Shelby, 76 So. 839, 116 Tenn.App. 246

54. Tex.—Traders & General Ins Co v Crouch, Civ.App., 113 S.W 2d 650, 652.

Phrases

(1) "Severe illness" see 42 C.J.S p 385 note 64 1

(2) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 539 notes 84–89.

55. Webster New Int.D.

56. Webster New Int.D.

57. Iowa.—State v. Young, 110 N.W 292, 294, 134 Iowa 505, 13 Ann. Cas 345
57 C.J. p 539 note 91.

58. Webster New Int D
"Sewing machine" defined see 54 C.J.S. p 892 notes 86, 87, as distinguished from "embroidery machine" see 29 C.J.S. p 759 note 5

59. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 420, 53 Wyo 223, 116 A.L.R. 1250

Interchangeable use

"Sewerage is a system of drainage by means of sewers, and sewage is sometimes used to denote the water flowing in or carried off by sewers, and sometimes the system of sewers for carrying off filth or superfluous water Sewerage, or drainage by sewers, exists only, as a general thing, in cities or incorporated towns or villages"—Wilson v. Board of Trustees of Sanitary District, 27 N.E. 203, 215, 133 Ill. 443

Phrases

(1) "Sewage system" is one which has for its purpose the collection and drainage of the foul waters of the community—Pioneer Real Estate Co. v. Portland, 247 P 319, 321, 119 Or. 1.

(2) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 540 notes 10–12, 16–19

60. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 420, 53 Wyo. 223, 116 A.L.R. 1250

61. Or.—Pioneer Real Estate Co v. Portland, 247 P 319, 321, 119 Or 1

62. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 421, 53 Wyo 223, 116 A.L.R 1250

63. Neb.—Faiman v. City of Omaha, 270 N.W. 484, 485, 131 Neb. 870

64. Pa.—Commonwealth v Emmers, 70 A 762, 766, 221 Pa 298, 301.

65. Conn.—Morgan v. Danbury, 35 A 499, 500, 67 Conn 484

66. Conn.—Morgan v. Danbury, supra
Pa.—Wilkinsburg Boro v Wilkinsburg School Dist, 148 A. 77, 79, 80, 298 Pa. 193.

67. Conn.—Morgan v. Danbury, 35 A 499, 500, 67 Conn 484
Pa.—Wilkinsburg Boro v Wilkinsburg School Dist., 148 A. 77, 80, 298 Pa 193.

Similarly expressed

The refuse and foul matter, solid and liquid, carried through the sewer by the water therein flowing.—Winchell v Waukesha, 85 N.W 668, 671, 110 Wis. 101, 84 Am.S.R. 902.

and drains, whether open or closed, by water flowing therein.[68]

The words "sewage" and "sewerage" both have reference to the general drainage of a city or town by means of sewers,[69] and are applied to matter carried away in drains as well as that carried away in sewers,[70] and the terms include all kinds of drainage and water discharge.[71] On the other hand, it has been held that the terms do not apply to surface drainage,[72] even though it includes feculent matter from open privies.[73]

Sewerage systems and the disposal of sewage are matters of particular importance to municipalities and for specific references in this connection see the index to the title Municipal Corporations.

The disposal of sewage may give rise to certain rights and liabilities, and these rights and liabilities are treated in various titles throughout this work. A state may grant, permit, or suffer the deposit of sewage in navigable water as stated in Navigable Waters § 11 b (1), and it has been held that the use of tidal waters for the discharge of sewage is a public use see Navigable Waters § 55. The pollution of nonnavigable waters by the discharge of sewage is treated in the C.J.S. title Waters § 45, also 67 C.J. p 771 notes 79–84. See also Injunctions § 31, and the indexes to the titles Drains, Eminent Domain, Health, and Nuisances.

SEWER. In discussing the different significations of the word "sewer" the courts frequently employ such expressions as "storm sewer,"[74] "drainage sewer,"[75] "sanitary sewer,"[76] and "combined sewer."[77] The term "storm sewer" is used to signify a sytem intended to convey away storm water, surface water, street wash, and other drainage,[78] and is, in other words, a drain,[79] and it is sometimes

68. N C—Durham v Eno Cotton Mills, 57 S E 465, 466, 144 N C. 705, 11 L R A,N.S, 1163

69. Ind—Valparaiso v Parker, 47 N E 330, 331, 148 Ind. 379, 381
Wyo—Anselmi v City of Rock Springs, 80 P 2d 419, 421, 53 Wyo 223, 116 A.L.R. 1250.

Sewage consists of human excrements and refuse animal and vegetable matter, which constantly and continuously generates gases—Fuchs v. St Louis, 67 S.W. 610, 614, 167 Mo 620, 57 L R A 136.

70. Ark—Barton v Drainage Dist No 30, 294 S W. 418, 419, 174 Ark 173

71. Wyo—Anselmi v City of Rock Springs, 80 P 2d 419, 421, 53 Wyo 223, 116 A.L R 1250
57 C J. p 539 note 9 [a] (1).

Sewage and drainage included

(1) "The National Encyclopaedia, 9, 166 (1932), states in connection with 'sewerage' as follows 'The term is more commonly used for systems conveying sewage but is also applied to "storm sewers" intended to convey away storm water, surface water, street wash and other drainage' "—Anselmi v City of Rock Springs, supra

(2) "Defendant's principal contention is that the drainage is not sewage, but ordinary surface drainage unaffected by the fact that it is from the streets of the town. It is immaterial by what name it is called. If the water is polluted by the filth from the buildings and streets, it may well be called 'sewage' The Universal Dictionary says 'sewage' includes the water by which the foul matter, which passes through the drains, conduits, or sewers of a town, is carried off, the waste water of baths, washhouses, and other domestic operations, and of the greater part of the surface drainage of the area drained"—Ulmen v. Mt Angel, 112 P 529, 530, 57 Or 547, 36 L R A, N S, 140.

72. Ark.—Barton v. Drainage Dist No 30, 294 S W. 418, 419, 174 Ark 173.
57 C J. p 539 note 9 [d]

73. N C—Durham v Eno Cotton Mills, 57 S E 465, 466, 144 N C 705, 11 L R A.,N S, 1163

74. Ark.—Atkinson v City of Pine Bluff, 76 S W.2d 982, 983, 190 Ark 65.
Colo—City of Denver v. Dumars, 80 P 114, 115, 33 Colo 94
Fla—Ft. Myers v State, 117 So 97, 104, 95 Fla 704
Mo—Terminal R. R. Ass'n of St Louis v City of Brentwood, 230 S W 2d 768, 769, 770
Okl—Sand Springs v Hohl, 216 P 138, 140, 90 Okl 124.
S C—Marshall v Rose, 49 S.E.2d 720, 723, 213 S C 428
Tex.—Texas Bitulithic Co. v Dallas Consol. Electric St R Co, Civ App, 248 S.W 746, 748.
Wis—Trustees of University Co-op Co v City of Madison, 288 N.W. 742, 745, 233 Wis 100.
Wyo—Anselmi v City of Rock Springs, 80 P.2d 419, 420, 421, 422, 53 Wyo. 223, 116 A L R. 1250.

75. Mo—Terminal R. R Ass'n of St Louis v. City of Brentwood, 230 S W.2d 768, 769.

76. Ark—Atkinson v. City of Pine Bluff, 76 S.W.2d 982, 983, 190 Ark 65.
Mich.—Lake Tp., Macomb County v Millar, 241 N W. 237, 239, 257 Mich 135.
Mo.—Terminal R. R. Ass'n of St. Louis v City of Brentwood, 230 S. W 2d 768, 769, 770
S C—Marshall v Rose, 49 S E 2d 720, 723, 213 S C. 428
Wis—Trustees of University Co-op Co v City of Madison, 288 N W. 742, 745, 233 Wis 100
Wyo—Anselmi v. City of Rock Springs, 80 P 2d 419, 420, 421, 422, 53 Wyo 223, 116 A L R. 1250.
57 C J p 541 note 57.

77. Wyo—Anselmi v. City of Rock Springs, supra

78. Wyo—Anselmi v. City of Rock Springs, supra

Purpose of storm sewer

(1) To carry off flood water—City of Denver v. Dumars, 80 P 114, 115, 33 Colo 94.

(2) No road or pavement can be properly constructed without providing for the drainage of the surface water, and in road building this is usually taken care of by surface drainage, but this is not practical in paving in cities as a general rule, and it is a necessary incident in most cases to arrange for the disposition of this surface water by storm sewers—Sand Springs v. Hohl, 216 P 138, 140, 90 Okl. 124.

(3) Storm sewers are, in the main, auxiliaries to drainage, and usually are constructed along with, and become a part of, a paving program—Ft Myers v. State, 117 So. 97, 104, 95 Fla. 704.

79. Tex—Texas Bitulithic Co. v. Dallas Consol. Electric St. R. Co., Civ.App, 248 S.W. 746, 748.
Wyo—Anselmi v City of Rock Springs, 80 P.2d 419, 420, 53 Wyo. 223, 116 A.L R 1250.

"Sanitary sewer" distinguished

Okl—Sand Springs v. Hohl, 216 P. 138, 140, 90 Okl 124.

called a "drainage sewer."[80] The term "sanitary sewer" signifies a system conveying sewage,[81] that is, waste water and refuse from houses and towns.[82] A "combined sewer" is one which functions both as a storm sewer and a sanitary sewer.[83]

In considering the word "sewer" etymologically, it has been said that it comes from the word "sew," meaning to drain,[84] and that originally it meant an artificial conduit for water drainage, encompassed with banks on both sides to convey surface waters into the sea and thereby preserve the adjacent lands from inundation.[85] Thus the word "sewer" was formerly defined to mean a fresh-water trench, artifically made, encompassed with banks on both sides to carry surface water into the sea;[86] a small current or little river.[87] It seems, accordingly, that the term "sewer" as meaning a storm sewer was in general use earlier than the meaning of sanitary sewer.[88] More recently, however, and probably from the appropriation of the word "sewer" in acts and ordinances to the common conduits for liquid filth, the term is usually associated with such use.[89] In modern usage the word "sewer," at times under special circumstances,[90] may not include a storm sewer,[91] or it may apply only to a drainage sewer,[92] and not include a sanitary sewer.[93] However, in the absence of anything which would indicate a limitation on the meaning of the term,[94] the word "sewer" will be construed as meaning both storm and sanitary sewers[95]

The word "sewer" is defined as meaning an artificial, usually subterranean, conduit to carry off water and certain waste matter, as (a) surface water due to rainfall;[96] (b) household waste, as slops, waste water from sinks, baths, etc., and excreta consisting of urine, or feces; (c) waste water from industrial works;[97] a large underground passage for fluid and feculent matter, the refuse and filth necessarily present in populated centers, by means of which this matter is carried off;[98] a large and generally, though not always, underground passage or conduit for fluid and feculent matter from a house or houses to some other locality, usually the place of discharge;[99] an artificial canal or conduit, usually subterranean, now used to carry waste water and the refuse from houses and towns;[1] a closed or covered waterway for conveying and discharging filth, refuse, and foul matter, liquid or solid;[2] a drain or passage to carry off water and filth underground;[3]

80. Mo.—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S.W.2d 768, 769

81. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 421, 53 Wyo. 223, 116 A.L.R. 1250

82. Wyo.—Anselmi v. City of Rock Springs, supra.

83. Wyo.—Anselmi v. City of Rock Springs, supra.

84. Eng.—Sutton v. Norwich, 27 L.J. Ch. 739, 742

85. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 420, 421, 53 Wyo. 223, 116 A.L.R. 1250

86. Wyo.—Anselmi v. City of Rock Springs, supra
57 C.J. p. 540 note 30.

87. R.I.—Wetmore v. Fiske, 5 A. 375, 378, 15 R.I. 354.

88. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 420, 421, 53 Wyo. 223, 116 A.L.R. 1250.

Transition in use

"In the New International Encyclopædia, 2d Ed., Vol. 20, p. 757 (1916), it is stated, 'In most of the larger cities provisions for surface drainage preceded the introduction of sanitary sewers. Convenience gradually led to the use of these surface or storm sewers for the disposal of liquid and then of solid house wastes, the connections for the latter purpose often being surreptitious at first. As public water supplies were introduced and the per capita water consumption greatly increased, the disposal of the water thus brought into the houses often became even more serious a matter than the removal of surface and ground drainage. This led to the construction of sewers on the combined plan.'"—Anselmi v. City of Rock Springs, supra

89. R.I.—Wetmore v. Fiske, 5 A. 375, 378, 15 R.I. 354.

90. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 420, 53 Wyo. 223, 116 A.L.R. 1250.

91. Wyo.—Anselmi v. City of Rock Springs, supra

92. Mo.—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S.W.2d 768, 769, 770

93. Mo.—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, supra

94. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 422, 53 Wyo. 223, 116 A.L.R. 1250

95. Wis.—Trustees of University Co-op. Co. v. City of Madison, 288 N.W. 742, 745, 233 Wis. 100
Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 422, 53 Wyo. 223, 116 A.L.R. 1250.

96. Tex.—Town of Freeport v. Sellers, 190 S.W.2d 813, 814, 144 Tex. 389.
Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 420, 53 Wyo. 223, 116 A.L.R. 1250

97. Wyo.—Anselmi v. City of Rock Springs, supra.

98. Mich.—Lake Tp., Macomb County, v. Millar, 241 N.W. 237, 239, 257 Mich. 135
57 C.J. p. 540 note 31 [a].

Similarly defined

"A passage or canal underground by which filthy, corrupt, and offensive matter may run off or may be carried off by water."—Clark v. Peckham, 9 R.I. 455, 467.

99. Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission of Pennsylvania, 162 A. 469, 473, 107 Pa. Super. 225.
57 C.J. p. 540 note 31.

1. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 421, 53 Wyo. 223, 116 A.L.R. 1250.

2. Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission of Pennsylvania, 162 A. 469, 473, 107 Pa. Super. 225.
57 C.J. p. 540 note 24

Closed or covered waterway

N.J.—State Board of Health v. Jersey City, 35 A. 835, 838, 55 N.J. Eq. 116.

3. Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 421, 53 Wyo. 223, 116 A.L.R. 1250.
57 C.J. p. 540 note 27.

Similarly defined

(1) A drain or passage to convey water or filth underground.
Neb.—Hanscom v. Omaha, 7 N.W. 739, 742, 11 Neb. 37, 43
R.I.—Wetmore v. Fiske, 5 A. 375, 378, 15 R.I. 354.

a ditch;[4] a drain;[5] a subterraneous canal[6] or channel[7] through which water runs off,[8] particularly in cities.[9]

As generally understood in law, the term "sewer" has reference to the underground canal or passage by means of which cities are drained and the filth or refuse liquids are carried to the sea, river, or other places or reception,[10] and ordinarily is applied to drains in the city, whether of water or filth or both;[11] but it has also been applied to an underground structure for conducting the water of a natural stream,[12] and the word "sewer" is sometimes defined as meaning an artificial watercourse for draining marsh land and carrying off surface water into a river or sea.[13]

There is nothing in the nature of a sewer which excludes it from being made, in whole or in part, out of a natural waterway.[14] Usually, but not necessarily, sewers are closed,[15] and generally are covered over to prevent the escape and dissemination of foul odors and noxious gases and to conceal the passage of their contents through the streets.[16]

Sewers are constructed as sanitary measures for the public good;[17] and both storm and sanitary sewers subserve the public health.[18] It has been said that sanitary sewers are much more complicated and costly systems than are drainage sewers.[19]

"Sewer" has been distinguished from "culvert" see 25 C.J.S. p. 25 note 40, "ditch" see 27 C.J.S. p. 505 note 14, and "drain" see Drains § 1.

Sewers are treated in various connections throughout the title Municipal Corporations. The creation of offices or departments dealing with sewers, the term of office, powers, and duties are discussed in §§ 617–625. Tort liability for defects in sewers is treated in §§ 873–894. The power of municipalities to construct and maintain sewers is treated in § 1049, and liability by reason of such construction and maintenance is treated in § 1235. The right to levy special assessments for sewer construction is discussed in § 1318, and the regulation and use of public sewers are treated in §§ 1802–1806. For other specific references consult the title index.

Sewers are also treated in various other connections throughout this work. Condemnation of land for sewer purposes is treated in Eminent Domain § 451 c. The public easement in a highway may include the right to make sewers as stated in Highways § 139. Mandamus for the purpose of compelling duties with respect to sewers is treated in Mandamus § 180 f. The attractive nuisance doctrine has been held inapplicable to sewers and sewer excavations as stated in Negligence §§ 29(12) e, 41. The duty of a railroad to construct sewers is discussed in Railroads § 186 b (2).

For other specific references see Sewage or Sewerage ante; and consult the Descriptive-Word Index.

Trunk sewer In general usage a "trunk sewer" is one which bears the same relation to an entire sewer system that the trunk of a tree bears to its branches, or the main stream of a river bears to its

(2) "A drain or passage to carry off water under ground."—Clark v Peckham, 9 R I. 455, 467

4. Tex.—Town of Freeport v. Sellers, 190 S.W.2d 813, 814, 144 Tex. 389.
57 C J. p 540 note 25

5. Tex.—Town of Freeport v. Sellers, 190 S W 2d 813, 814, 144 Tex. 389.
57 C J p 540 note 26.

6. Neb.—Hanscom v Omaha, 7 N. W 739, 742, 11 Neb. 37.

A subterranean canal
R I.—Clark v. Peckham, 9 R.I. 455, 467.

7. Mo.—Fuchs v St Louis, 67 S W 610, 614, 167 Mo. 620, 57 L.R.A 136
57 C J p 541 note 36.

8. N H.—Gale v. Town of Dover, 44 A. 535, 68 N.H. 403

9. Iowa.—Aldrich v. Paine, 76 N.W 812, 814, 106 Iowa 461.
57 C J. p 541 note 37.

10. Ind.—Valparaiso v. Parker, 47 N E. 330, 331, 148 Ind 379.

Wyo.—Anselmi v. City of Rock Springs, 80 P 2d 419, 422, 53 Wyo 223, 116 A L R 1250.

11. Iowa.—Aldrich v Paine, 76 N.W 812, 814, 106 Iowa 461
Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 421, 53 Wyo 223, 116 A L R. 1250.

12. Wyo.—Anselmi v. City of Rock Springs, supra.
57 C J. p 540 note 33.

13. Wyo.—Anselmi v. City of Rock Springs, supra

14. Mich.—Clay v. City of Grand Rapids, 27 N.W 596, 599, 60 Mich 451.
Wyo.—Anselmi v City of Rock Springs, 80 P.2d 419, 421, 53 Wyo. 223, 116 A.L R 1250.

15. Iowa.—Aldrich v Paine, 76 N.W. 812, 814, 106 Iowa 461.
Wyo.—Anselmi v. City of Rock Springs, 80 P 2d 419, 421, 53 Wyo 223, 116 A L R. 1250.

16. Ark.—Barton v. Drainage Dist No 30, 294 S W. 418, 419, 174 Ark. 173.

Mo.—Mound City Land & Stock Co v Miller, 70 S.W. 721, 724, 170 Mo. 240, 94 Am S R 727.
Or.—Pioneer Real Estate Co. v. City of Portland, 247 P. 319, 321, 119 Or. 1.

17. Mo.—Fuchs v St Louis, 67 S.W. 610, 614, 167 Mo. 620, 57 L.R A. 136.

Similarly expressed
"A sewer is employed for the convenience of the people, and its prime purpose is for the benefit of the health of the public"
Mich.—Lake Tp, Macomb County, v. Millar, 241 N W. 237, 239, 257 Mich 135—Clinton v. Spencer, 229 N W 609, 614, 250 Mich. 135
Ohio.—Roebling v. City of Cincinnati, 132 N.E. 60, 64, 102 Ohio St. 460.

18. Wyo.—Anselmi v. City of Rock Springs, 80 P 2d 419, 422, 53 Wyo. 223, 116 A.L.R. 1250.

19. Mo.—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S. W.2d 768, 770.

tributaries.[20] It is sometimes called a "trunk line sewer," an "intercepting sewer," or a "trunk line intercepting sewer."[21]

Other phrases employing the word "sewer" are set out in the note,[22] and for additional phrases as to which more recent adjudications have not been found see 57 C.J. p 541 note 50–p 542 note 70.

SEX. The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female.[23]

Under the Nineteenth Amendment to the federal Constitution, the United States or any state may not deny or abridge the right of United States citizens to vote on account of sex as stated in Elections § 8 b (2). Sex as affecting competency and qualification for jury service see Grand Juries § 6 n, and Juries § 136. For other specific references see the Descriptive-Word Index.

SEXAGESIMA SUNDAY. In ecclesiastical law, the second Sunday before Lent, being about the sixtieth day before Easter.[24]

SEXTANS. Latin, in Roman law, a subdivision of the "as," containing two "unciæ;" the proportion of two twelfths, or one sixth.[25]

SEXTON. A person who has the care of a house of public worship, and who discharges certain duties connected therewith, which differ more or less, according to the requirements or practice of the religious sect to which the congregation belongs for whom he acts; the keeper of the holy things belonging to the divine worship.[26]

SEXUAL. Pertaining to, or associated with, sex, as sexual differentiation; specifically, pertaining to sex as concerned in reproductive processes, as the sexual instinct or impulse.[27] It is synonymous with "venereal," and is so accepted in common usage.[28]

S. F. As an abbreviation for "San Francisco" and for "scire facias" see 1 C.J.S. p 276 note 5.

SHACK, COMMON OF. See Common Lands § 4 b (2).

SHACKERS. A term applied to hogs fed on mast, such as beech-nuts and acorns.[29]

SHADE TREES. Statutes making it an offense to cut down shade trees are treated in the C.J.S. title Trespass § 149, also 63 C.J. p 1082 note 25. Shade trees are also treated in various connections in the title Municipal Corporations, and for specific references see the title index sub verbo "Streets or other public ways."

SHADOWGRAPH. A silhouette taken by the photographic process.[30]

SHAFT. The word "shaft" has various significations,[31] and it may be applied to an architectual column, to the trunk or main stem of a tree, to the central stem or body of a feather, or to an arrow,[32] and it may mean an opening in the ground or in a structure,[33] and it has many other applications,[34] but it is said to convey to the ordinary mind the general idea of a body having considerable length in proportion to its diameter, more or less rounded or cylindrical in form, and continuous from end to end.[35]

20. Mont.—Rush v. Grandy, 213 P 242, 243, 66 Mont. 222.
65 C.J p 181 note 98.

21. Mich.—Berston v. City of Flint, 142 N.W 576, 577, 578, 176 Mich 266.
Intercepting sewer as proper for county to build see Counties § 167.

22. Phrases
(1) "Combined sewer" defined see supra p 131 note 83.

(2) "Common sewer" is a term applied to a structure underground constructed by a city, not only to carry off sewage from the houses and streets, but also to conduct surface water and the waters of a natural stream.—Anselmi v City of Rock Springs, 80 P 2d 419, 421, 53 Wyo. 223, 116 A.L.R. 1250—57 C.J. p 541 note 51.

(3) "Drainage sewer" see supra p 131 note 89

(4) "Sanitary sewer" defined see supra p 131 notes 81, 82.

23. Black L.D.
Sex perversion see the C.J.S. title Sodomy § 1.

24. Black L.D.

25. Black L.D.

26. N.Y.—Stern v. Congregation Schaare Rachmin, 2 Daly 415, 417

27. Webster New Int.D.

Phrases
(1) "Sexual intercourse" defined see 46 C.J.S. p 1109 notes 66–70.

(2) "Sexual perversity" see the C.J.S. title Sodomy § 1.

(3) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 543 notes 93–97

28. Or.—State v Hollinshead, 151 P. 710, 711, 77 Or. 473.

29. N.Y.—Bartlett v Hoppock, 34 N.Y. 118, 119, 88 Am.D 428.

30. Mo.—Frankel v. German Tyrolean Alps Co., 97 S.W. 961, 962, 121 Mo App. 51.

31. Or.—Franklin v. Webber, 182 P. 819, 820, 93 Or. 151.

Phrases
(1) "Line or main shaft;" in a factory, a bar of considerable length, usually bearing a number of pulleys by which power is transmitted to countershafts.—Hohenstein-Hartmetz Furniture Co v Matthews, 92 N.E 196, 199, 46 Ind.App. 616—57 C.J. p 543 note 17.

(2) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 544 notes 18–22, 24, 27.

32. Iowa.—Peterson v. Modern Brotherhood, 101 N.W 289, 291, 125 Iowa 562, 67 L.R.A. 631.

33. Or.—Franklin v Webber, 182 P. 819, 820, 93 Or. 151.

34. Iowa.—Peterson v. Modern Brotherhood, 101 N.W. 289, 290, 291, 125 Iowa 562, 67 L.R.A. 631.

35. Iowa.—Peterson v. Modern Brotherhood, supra.

"Shaft" is defined as meaning a handle or haft; a shaven or smooth rod;[36] a lengthy shafting.[37] More specifically, it means an axle, mandrel, arbor, or other long and usually cylindrical bar, especially if rotating, and subject to torsional stress; as a steamer shaft, a flywheel shaft,[38] a revolving bar to convey the force which is generated by some prime mover to the different working machines[39]

In medical terminology, a "shaft" is defined as an elongated rod-like structure, as the part of a long bone between the epiphyseal extremities.[40]

The word "shaft" has been distinguished from "shafting."[41]

A master's liability for injury to his servant due to defective shafts is discussed in Master and Servant § 221, and "shaft," as a mining term, is defined in Mines and Minerals § 3 h. Consult also the indexes to these titles for references to the word as employed in other connections.

SHAFTING. A revolving shaft connecting the power to machinery;[42] a system of connecting shafts for communicating motion;[43] a system of stout rods or shafts, usually cylindrical, mounted in bearings, and serving to carry pulleys, gear wheels, or the like, for communicating power;[44] the system of shafts which connects machinery with the prime mover, and through which motion is communicated to the former by the latter.[45] The general term "shafting" has been held to include countershafts,[46] pulleys which are necessary attachments of the countershaft,[47] and set screws attaching parts of a machine to the shaft.[48]

The term "shafting" has been distinguished from "shaft" see ante note 41.

SHAKE. The noun "shake" is defined generally as meaning the act or an act of shaking; a series of jolts, jerks, or other quick oscillatory movements, or one of such a series of movements; concussion; agitation; jog, shock.[49]

As applied to timber, a "shake" is an opening of the grain, caused by rapid growth of the tree[50]

As a verb, the word "shake" means to move rapidly and shortly to and fro or up and down.[51]

Shakedown, shake down. As a noun the word "shakedown" means an act or process of shaking down;[52] but in slang the word has a well-defined meaning and signifies an instance or means of depriving one of money by persuasion or compulsion.[53]

The verb "to shake down" means to force (one) to give up money.[54]

SHALE. A rock formed by the consolidation of clay, mud, or silt, having a finely stratified or laminated structure.[55] It presents almost endless varieties of texture and composition, passing, on the one hand, into clays, or, where much indurated, into slates and argillaceous schists; on the other into flagstones and sandstones; or again through calcareous gradations into limestone, or through ferruginous varieties into clay ironstone, and through bituminous kinds into coal.[56]

SHALL. An irregular,[57] future,[58] auxiliary[59] verb,

36. Iowa—Peterson v. Modern Brotherhood, supra

37. Mo—Cole v North American Lead Co, 112 S W. 753, 754, 130 Mo App 253.

38. Mo—Cole v. North American Lead Co, supra

39. Ind—Hohenstein-Hartmetz Furniture Co v Matthews, 92 N E. 196, 199, 46 Ind App 616

40. Stedman Med D

The medical profession are agreed that the shaft of a bone is something entirely distinct from the malleolus process.—Peterson v Modern Brotherhood, 101 N W 289, 290, 125 Iowa 562, 67 L.R A. 631.

41. **In mechanics**
"Shafting" appears to have a different meaning in mechanics from "shaft"—Cole v. North American Lead Co, 112 S.W. 753, 754, 130 Mo App 253.

42. Ohio.—National Coal Co v. Potts, 2 Ohio App 338, 344, 19 Ohio Cir Ct ,N.S., 379, 383. 34 Ohio Cir Ct. 655.

Phrases
(1) "Flexible shafting" defined see 36 C.J.S. p 1026 note 88.
(2) Other phrases as to which more recent adjudications have not been found see 57 C J p 544 notes 36–38

43. Mo—Cole v North American Lead Co, 112 S W 753, 754, 130 Mo App 253

44. Mo—Cole v. North American Lead Co, supra
Wis—Van de Bogart v Marinette, etc, Paper Co, 112 N.W. 443, 447, 132 Wis 367

45. Wis—Van de Bogart v. Marinette, etc, Paper Co, supra.
57 C J p 544 note 31

46. Ind—Hohenstein-Hartmetz Furniture Co. v Matthews, 92 N E 196, 198, 46 Ind App 616.
57 C J. p 544 note 32.

47. Ind—Hohenstein-Hartmetz Furniture Co v. Matthews, supra.

48. Wis—Van de Bogart v. Marinette, etc., Paper Co, 112 N.W. 443, 447, 132 Wis 367.
57 C J p 544 note 34.

49. New Standard D

50. U.S—Kramer v. Mills Lumber Co, C C A Mo, 24 F 2d 313, 315, 60 A L R 366

51. New Standard D

52. N C—State v Sawyer, 29 S E 2d 34, 37, 224 N C 61.

53. N C—State v. Sawyer, supra.

54. N C—State v. Sawyer, supra

55. U S—R J. Funkhouser & Co v. Fiske & Co., C C A Pa, 106 F 2d 679, 680
57 C J p 544 note 39

56. U S—R J. Funkhouser & Co. v. Fiske & Co., supra

57. N J—Public Serv. Electric Co v. Board of Public Utility Comrs., 96 A. 1013, 1015, 88 N.J.Law 603

58. Ark—Fort Smith Gas Co. v Kincannon, 150 S W 2d 968, 970, 202 Ark 216.

59. Ark.—Fort Smith Gas Co. v. Kincannon, supra.
57 C.J. p 545 note 43.

sometimes referred to as the imperative "shall,"[60] the imperative auxiliary "shall,"[61] the mandatory "shall."[62]

The word "shall" is elastic,[63] and is not of inflexible signification,[64] and it has been said that its various meanings range under two general classes, according as it is used, as implying futurity or implying a mandate.[65] The word is sometimes used as expressive of condition apart from futurity,[66] and it frequently is used in the sense of "may"[67] or "will,"[68] and it may be used in the preterit sense of "must."[69]

"Shall" has been held to be synonymous with "may" see 57 C.J.S. p 459 notes 25, 28, "must" see 64 C.J.S. p 1080 note 40, and "will,"[70] and "shall" has also been distinguished from "will."[71]

Phrases employing the word "shall" are set out in the note.[72]

Expressing Time

Various statements have been made by the courts as to the signification of the word "shall" when used to express the time concept, and it has been stated that in relation to time "shall" does not always express an absolute limitation.[73] It has been said that "shall" sometimes expresses futurity[74] only,[75] and implies no idea of obligation;[76] that "shall" naturally imports futurity,[77] or commonly,[78] or usually,[79] refers to the future,[80] and indicates action to be had in the future;[81] that in common and ordinary usage,[82] unless accompanied by qualifying words which show an intent to the contrary,[83] "shall" always refers to the future. On the other hand, it has been said that "shall" is not always, or perhaps not most frequently, used in the auxiliary future sense.[84] Such statements are not necessarily in conflict since, in early English, "shall" was mainly used in all persons to express simple futurity,[85] but in modern English "shall" primarily denotes obli-

60. Neb —Howard v Jensen, 219 N W 811, 812, 117 Neb 102
Pa —Connell v Board of School Directors of Kennett Tp, 52 A 2d 645, 647, 356 Pa 585—In re Fear, 26 A 2d 457, 459, 344 Pa 624—Appeal of Anderson, 64 A 443, 444, 215 Pa 119.

61. Cal —Thomas v Driscoll, 108 P 2d 43, 45, 42 Cal App 2d 23.

62. Cal —Yee Kee Chong v. Pacific Freight Lines, 164 P.2d 43, 45, 72 Cal App 2d 219
S.C —Ex parte Tolbert, 34 S.E 2d 49, 50, 206 S C 300
Tenn —Home Telegraph Co v Nashville, 101 S W 770, 773, 118 Tenn 1, 11 Ann Cas. 824.

63. Minn.—In re Trusteeship of First Minneapolis Trust Co, 277 N W. 899, 902, 202 Minn 187

64. Mass —City of Boston v Quincy Market Cold Storage & Warehouse Co, 45 N.E 2d 959, 965, 312 Mass. 638.

65. Me —Cunningham v. Long, 135 A. 198, 201, 125 Me 494.

66. Eng —Metcalf v. Williams, [1914] 2 Ch. 61, 64

67. U.S —U S. v. Boyd, C C N Y, 24 F 692, 695
Minn —Jerome v Burns, 279 N W 237, 240, 202 Minn 485
Mo —State ex rel Hanlon v. City of Maplewood, 99 S W 2d 138, 141, 231 Mo App 739
Tenn —Sanford Realty Co v City of Knoxville, 110 S.W 2d 325, 327, 172 Tenn. 125.

68. U S —U S. v. Boyd, C.C.N.Y., 24 F 692, 695.

69. Cal.—National Auto & Cas. Ins Co v. Garrison, 173 P.2d 67, 68 76 Cal App 2d 415.

Io —State ex rel Hanlon v City of Maplewood, 99 S.W 2d 138, 141, 231 Mo App 739
Ohio —Christman v State ex rel Norris, 187 N E. 584, 586, 45 Ohio App 541.
Pa —Specht v. Moyer, 10 Pa Dist. & Co 311.
W Va —Buskirk v State-Planters' Bank & Trust Co., 169 S E 738, 740, 113 W Va. 764.
57 C.J. p 546 note 65

70. Tenn —Tennessee Cent R. Co v. Morgan, 175 S W. 1148, 1153, 132 Tenn. 1

71. Cal —Chenoweth v Chambers, 164 P 428, 431, 33 Cal.App 104

72. **Phrases**
(1) "Shall attach" see 7 C J S p 168 note 42

(2) "Shall be" as indicating the future and not the past see 10 C.J S p 215 note 26

(3) "Shall expire" see 35 C J S p 214 note 80

(4) "Shall have" see 39 C J.S p 782 note 96

(5) Other phrases employing the word "shall" and as to which more recent adjudications have not been found see 57 C.J p 546 note 66–p 547 note 11, p 551 note 47–p 552 note 20, p 556 note 42–p 557 note 91

73. Ohio.—Richter v. Anderson, 10 N E 2d 789, 791, 56 Ohio App. 291

74. La.—State v. Spence & Goldstein, Inc, App, 6 So 2d 102, 105
Pa —Damiani v. Lobasco, 79 A.2d 268, 271, 367 Pa. 1.
W.Va —Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 740, 113 W Va. 764.
57 C.J. p 545 note 54.

75. U S —Brown v Southern R Co, Tenn., 187 F. 481, 484, 109 C C A 333
Pa —Damiani v. Lobasco, 79 A 2d 268, 271, 367 Pa 1.

76. U S —Brown v Southern R. Co, Tenn, 187 F. 481, 484, 109 C.C A. 333
Pa —Damiani v Lobasco, 79 A 2d 268, 271, 367 Pa 1.

77. N J —National State Bank of Newark v. Stewart, 39 A 2d 435, 437, 135 N J Eq 603.

78. Tex —Ex parte Norton, 21 S.W 2d 663, 666, 113 Tex Cr 306.

79. Cal —People v Allied Architects' Assoc, 257 P 511, 514, 201 Cal. 428
La —State v Alden Mills, App., 8 So 2d 98, 104.

80. Mass —Ratner v Hill, 170 N E 69, 71, 270 Mass 249
Pa —Specht v Moyer, 10 Pa Dist. & Co 311
57 C J p 545 note 60

81. La —State v. Alden Mills, App, 8 So 2d 98, 104.

82. Md —Hemsley v. McKim, 87 A. 506, 511, 119 Md 431
57 C J p 545 note 56.

83. Colo —Jones v. Stockgrowers' Nat Bank, 67 P 177, 179, 17 Colo. App 79
Pa.—Specht v Moyer, 10 Pa.Dist. & Co. 311.
57 C J p 545 note 57.

84. U S —Blake v Pine Mountain Iron & Coal Co, Ky, 76 F. 624, 656, 22 C C.A. 430

85. Colo —Jones v. Stockgrowers' Nat. Bank, 67 P. 177, 179, 17 Colo. App 79.

gation, although in the first person it simply denotes future fact, while in the second and third persons the idea of obligation remains, and is felt to be imposed by the person speaking; hence, "you shall" or "they shall" means, "I will compel you or them to act," and, consequently, "you (he or they) shall" expresses command or necessity, never simple future action.[86]

Statements have also been made to the effect that "shall," in some instances, denotes present time,[87] and that it is often used in a general sense to include both past and future,[88] and should be so considered when a more restricted interpretation is not required.[89]

Expressing Mandate, Obligation, Permission or Direction

In general. It is stated in the following subdivisions that the word "shall" always has a mandatory meaning, although at times on sufficient reason it may be construed as having only a permissive or directory meaning, and whether the term, as used in constitutional, contractual, statutory, or testamentary provisions, should be construed to be mandatory or directory depends on the intention, and its construction is controlled by the object sought to be reached or by the subject matter and context.[90]

Compulsory, peremptory, imperative, or mandatory sense. In common,[91] and ordinary[92] usage, "shall" has a compulsory,[93] peremptory,[94] imperative,[95] or mandatory[96] meaning, and it has been

86. Cal—Chenoweth v. Chambers, 164 P. 428, 431, 33 Cal App 104

87. Cal—Chenoweth v. Chambers, supra.

Retrospective effect

"While authorities hold that when used as indicative of past, present, or future operation, the word 'shall' commonly refers to the future . . . this will be found to be the result of accompanying words or the use of 'shall' in such connection as necessitates such interpretation Other authorities give the word a present or what might be called a retrospective effect"—Ex parte Norton, 21 S. W.2d 663, 666, 113 Tex Cr. 306.

88. Md—Hemsley v. McKim, 87 A 506, 511, 119 Md 431.
Minn—Fitzpatrick v Simonson Bros Mfg Co, 90 N.W. 378, 380, 86 Minn. 140.
Wis—Plum v. Fond du Lac, 8 N.W 283, 284, 51 Wis. 393.

89. Md—Hemsley v McKim, 87 A 506, 511, 119 Md 431
Minn—Fitzpatrick v. Simonson Bros Mfg. Co, 90 N.W. 378, 380, 86 Minn 140.

90. Cal.—**Corpus Juris quoted in** Hall v. Williams, App, 25 P.2d 891, 894.
57 C J. p 547 note 12—p 548 note 20

91. Cal—**Corpus Juris quoted in** People v. O'Rourke, 13 P 2d 989, 992, 124 Cal.App 752.
Ill—Weill v Centralia Service & Oil Co., 51 N.E 2d 345, 347, 320 Ill App 397—People ex rel Ledbetter v. Hadfield, 45 N.E 2d 45, 47, 316 Ill App. 245.
Kan—Elless v. Rantoul State Bank, 195 P. 875, 877, 108 Kan 403
Mass—City of Boston v Quincy Market Cold Storage & Warehouse Co., 45 N E 2d 959, 965, 312 Mass 638.
Pa—Specht v. Moyer, 10 Pa.Dist. & Co. 311.
57 C.J. p 548 note 21.

92. Cal—**Corpus Juris quoted in** People v. O'Rourke, 13 P 2d 989, 992, 124 Cal App 752—Pleasant Grove Union School Dist v Algeo, 215 P 726, 61 Cal App 660, 661
D C—Ballou v Kemp, 92 F.2d 556, 558, 68 App D.C 7
Ill—Weill v Centralia Service & Oil Co, 51 N E 2d 345, 347, 320 Ill App. 397—People ex rel Ledbetter v Hadfield, 45 N.E 2d 45, 47, 316 Ill App 245
Minn—In re Trusteeship of First Minneapolis Trust Co., 277 N.W 899, 901, 202 Minn. 187
Miss—State ex rel Attorney General v School Board of Quitman County, 181 So 313, 315, 181 Miss 818
Tenn—Louisville & N. R Co. v Hammer, 236 S W.2d 971, 973, 191 Tenn 700.

93. Cal—**Corpus Juris quoted in** People v. O'Rourke, 13 P 2d 989, 992, 124 Cal App 752—Pleasant Grove Union School Dist v Algeo, 215 P. 726, 61 Cal App 660
Ill—Weill v Centralia Service & Oil Co, 51 N E 2d 345, 347, 320 Ill. App 397
Kan—Elless v. Rantoul State Bank, 195 P 875, 877, 108 Kan. 403
Pa—Specht v. Moyer, 10 Pa Dist. & Co 311

Similarly expressed

"The word 'shall,' I think, must be given a compulsory meaning"—U S ex rel Arcara v. Flynn, D C N.Y., 11 F 2d 899, 900.

94. Cal—**Corpus Juris quoted in** People v. O'Rourke, 13 P.2d 989, 992, 124 Cal.App 752.
Ill.—Weill v Centralia Service & Oil Co, 51 N.E 2d 345, 347, 320 Ill.App 397.
57 C J p 548 note 28.

95. Cal.—**Corpus Juris quoted in** People v. O'Rourke, 13 P.2d 989, 992, 124 Cal App. 752.
D C—Ballou v Kemp, 92 F 2d 556, 558, 68 App D C 7
Ill—Weill v Centralia Service & Oil Co, 51 N E 2d 345, 347, 320 Ill App 397—People ex rel Ledbetter v Hadfield, 45 N.E.2d 45, 47, 316 Ill.App 245.
N J—State v Shahadi, 61 A 2d 299, 300, 137 N J Law 626—Henderson v Weber, 24 A.2d 508, 510, 20 N J Misc 67
Pa.—In re Fear, 26 A 2d 457, 459, 344 Pa 624
Tenn.—Sanford Realty Co. v. City of Knoxville, 110 S W 2d 325, 327, 172 Tenn. 125
Wash—Spokane County ex rel Sullivan v Glover, 97 P.2d 628, 631, 2 Wash 2d 162.
57 C.J p 548 note 29.

Generally regarded as imperative

Pa—National Transit Co v. Boardman, 197 A. 239, 241, 328 Pa. 450.

96. Cal—**Corpus Juris cited in** People v. Williams, App., 145 P 2d 366, 368—**Corpus Juris quoted in** People v O'Rourke, 13 P.2d 989, 992, 124 Cal.App. 752.
Idaho—Munroe v. Sullivan Min Co., 207 P.2d 547, 548, 69 Idaho 348
Ill—Weill v Centralia Service & Oil Co, 51 N E 2d 345, 347, 320 Ill. App 397
Iowa—Wisdom v. Board of Sup'rs of Polk County, 19 N W 2d 602, 608, 236 Iowa 669—School Tp. No. 76 of Muscatine County v. Nicholson, 288 N W 123, 128, 227 Iowa 290.
Mass—City of Boston v. Quincy Market Cold Storage & Warehouse Co, 45 N E.2d 959, 965, 312 Mass 638.
Minn—In re Trusteeship of First Minneapolis Trust Co., 277 N.W. 899, 901, 202 Minn. 187.
Miss—State ex rel. Attorney General v. School Board of Quitman County, 181 So 313, 315, 181 Miss. 818.
Neb—State ex rel. Smith v. Nebraska Liquor Control Commission, 42 N.W.2d 297, 299, 152 Neb. 676.

said that it always,[97] or usually,[98] has this meaning, as opposed to a permissive[99] or directory[1] meaning, although, as stated infra p 138 notes 34–38, at times on sufficient reason it may be construed as having only a permissive or directory meaning.

In its ordinary signification,[2] "shall" is a word of command,[3] and is the language of command,[4] and is the ordinary, usual, and natural word used in connection with a mandate.[5] In this sense "shall" is inconsistent with,[6] and excludes,[7] the idea of discretion, and operates to impose a duty which may be enforced,[8] particularly if public policy is in favor of this meaning,[9] or when addressed to public officials,[10] or where a public interest is involved,[11] or where the public or persons have rights which ought to be exercised or enforced,[12] unless an intent to the contrary appears;[13] but the context ought to be very strongly persuasive before it is softened into a mere permission.[14]

When the word "shall" is employed with respect to a right or benefit to any person, and that right or benefit depends on giving the word a mandatory meaning[15] or an imperative construction,[16] the presumption is that the word was used with respect to such right or benefit,[17] and it cannot be given a

N H —North Hampton Racing & Breeding Ass'n v. Conway, 48 A.2d 472, 474, 94 N H 156
N J —Henderson v Weber, 24 A 2d 508, 510, 20 N J Misc. 67
Pa —In re Fear, 26 A 2d 457, 459, 344 Pa. 824—Specht v. Moyer, 10 Pa Dist & Co 311
Tenn —Louisville & N. R. Co v Hammer, 236 S W 2d 971, 973, 191 Tenn 700
Tex —Hodges v Coke County, Civ App , 196 S W 2d 935, 936—Samuell v American Mortgage Corporation, Civ App , 78 S W 2d 1036, 1040
W.Va —State ex rel. Boone County Coal Corp v. Davis, 56 S E 2d 907, 913.
57 C J p 549 note 30.

Positive mandatory statement
Cal.—Gordon v Harris, 271 P 779, 780, 94 Cal.App 682.

97. Cal.—**Corpus Juris quoted in** People v O'Rourke, 13 P 2d 989, 992, 124 Cal App 752
Ill —Weill v. Centralia Service & Oil Co , 51 N.E.2d 345, 347, 320 Ill App 397
Pa —Specht v. Moyer, 10 Pa.Dist. & Co 311
57 C J p 548 note 25.

98. Cal.—People v Williams, App., 145 P 2d 366, 368.

99. Ill —Weill v. Centralia Service & Oil Co , 51 N E 2d 345, 347, 320 Ill App 397.

1. Tenn —Louisville & N R. Co v. Hammer, 236 S W.2d 971, 973, 191 Tenn 700.

2. Cal.—**Corpus Juris quoted in** People v O'Rourke, 13 P 2d 989, 992, 124 Cal App. 752.
Tex.—Samuell v. American Mortgage Corporation, Civ App., 78 S.W.2d 1036, 1040.
57 C J. p 548 note 23.

3. Cal.—**Corpus Juris cited in** Thomas v. Driscoll, 108 P 2d 43, 45, 42 Cal.App 2d 23—**Corpus Juris quoted in** People v O'Rourke, 13 P 2d 989, 992, 124 Cal.App 752.
Mass —Grant v. Aldermen of Northampton, 55 N.E 2d 705, 706, 316 Mass. 432
57 C.J. p 548 note 24.

In its accurate sense, a word of command —Brummett v Hewes, 40 N.E 2d 251, 253, 311 Mass. 142.

4. U S —Anderson v Yungkau, Ky , 67 S Ct 428, 430, 329 U S 482, 91 L Ed 436—Escoe v Zerbst, Kan , 55 S Ct 818, 820, 295 U S 490, 79 L Ed 1566—Lawrence Warehouse Co v Defense Supplies Corp , C C A Cal , 168 F 2d 199, 201.
D C —Brown v. Hecht Co , 137 F 2d 689, 692, 693, 694, 78 U S.App D C. 98
N Y —Gay v Pope & Talbot, 47 N Y S 2d 16, 18, 183 Misc 162.

5. Ind —City of Lebanon v. Dale, 46 N E 2d 269, 272, 113 Ind.App. 173.

6. Mass —Elmer v. Commissioner of Insurance, 23 N.E.2d 95, 97, 304 Mass. 194.

7. Cal —**Corpus Juris quoted in** People v O'Rourke, 13 P.2d 989, 992, 124 Cal App 752
Iowa —Wisdom v Board of Sup'rs of Polk County, 19 N.W.2d 602, 608, 236 Iowa 669—School Tp. No. 76 of Muscatine County v Nicholson, 288 N W. 123, 128, 227 Iowa 290
Mass —Grant v Aldermen of Northampton, 55 N E.2d 705, 706, 316 Mass. 432.
Pa —In re Fear, 26 A.2d 457, 459, 344 Pa 824.
W Va.—State ex rel. Boone County Coal Corp. v Davis, 56 S E 2d 907, 913.
57 C J. p 549 note 31.

8. Cal.—**Corpus Juris quoted in** People v O'Rourke, 13 P 2d 989, 992, 124 Cal App. 752
Ohio.—State ex rel. Smith v Barnell, 142 N E 611, 614, 109 Ohio St 246
Tenn —Sanford Realty Co v City of Knoxville, 110 S W 2d 325, 327, 172 Tenn. 125
Wash.—Spokane County ex rel. Sullivan v. Glover, 97 P 2d 628, 631, 2 Wash.2d 162

9. Cal.—**Corpus Juris quoted in** People v O'Rourke, 13 P.2d 989, 992, 124 Cal.App. 752.
57 C.J. p 550 note 33.

10. Cal —**Corpus Juris quoted in** People v O'Rourke, 13 P.2d 989, 992, 124 Cal.App 752.
Iowa.—Wisdom v. Board of Sup'rs of Polk County, 19 N W 2d 602, 608, 236 Iowa 669—School Tp No 76 of Muscatine County v. Nicholson, 288 N.W. 123, 128, 227 Iowa 290
Neb.—State ex rel Smith v. Nebraska Liquor Control Commission, 42 N. W 2d 297, 299, 152 Neb. 676.
57 C.J p 550 note 34

11. Cal —**Corpus Juris quoted in** People v. O'Rourke, 13 P.2d 989, 992, 124 Cal App 752.
Ill —Crowe v Marshall, 262 Ill App. 128, 132.
N J —Fagen v Hoboken, 88 A. 1027, 1028, 85 N.J Law 297

Relating to a ministerial act
The word "shall" is mandatory when it relates to a ministerial act which involves the public interest —People v. O'Rourke, 13 P.2d 989, 992, 124 Cal.App. 752.

12. Cal.—**Corpus Juris quoted in** People v. O'Rourke, 13 P.2d 989, 992, 124 Cal App. 752.
Mo —State v. St Louis, 2 S.W 2d 713, 727, 318 Mo. 870.

13. Cal.—**Corpus Juris quoted in** People v. O'Rourke, 13 P.2d 989, 992, 124 Cal App 752.
57 C J p 550 note 37.

14. Cal —**Corpus Juris quoted in** People v O'Rourke, 13 P.2d 989, 992, 124 Cal App. 752
57 C J p 550 note 38.

15. Ill —Weill v Centralia Service & Oil Co , 51 N.E 2d 345, 347, 320 Ill App. 397.
57 C J. p 550 note 40.

16. Iowa —Wisdom v. Board of Sup'rs of Polk County, 19 N.W 2d 602, 608, 236 Iowa 669—School Tp 76 of Muscatine County v. Nicholson, 288 N.W. 123, 128, 227 Iowa 290.
57 C J p 550 note 39.

17. Iowa.—Wisdom v. Board of Sup'rs of Polk County, 19 N W.2d 602, 608, 236 Iowa 669—School Tp. 76 of Muscatine County v Nicholson, 288 N.W. 123, 128, 227 Iowa 290
57 C.J. p 550 note 41.

permissive meaning merely;[18] and when a right to a person or property is lost or destroyed by a failure to do an act within a limited time it is given a mandatory effect;[19] and it ought to be construed as meaning "must,"[20] for the purpose of sustaining or enforcing an existing right,[21] but it need not be so construed for the purpose of creating a new right.[22]

Expressing obligation. Primarily,[23] and usually,[24] "shall" denotes,[25] and is expressive of,[26] obligation, and is commonly a word of imperative obligation.[27] "Shall" imports the imposition of a duty,[28] and implies a duty or necessity whose obligation is derived from the person speaking[29]

As directory or permissive. The word "shall" is frequently used without intending that it be taken literally,[30] so that it is not always imperative[31] or mandatory,[32] but may be consistent with an exercise of discretion.[33] Accordingly at times, on sufficient reason,[34] or where such intent is indicated,[35] or where the subject matter requires,[36] the word may be construed as being merely directory,[37] or as being merely permissive,[38] or as meaning "may,"[39] especially when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government.[40] The word "shall" will be construed to mean "may," and to be merely directory, when by giving it that construction no advantage is lost,[41] no benefit is sacri-

18. Ill.—Weill v Centralia Service & Oil Co, 51 N E 2d 345, 347, 320 Ill App 397
57 C.J. p 550 note 42

19. U S—U S ex rel Arcara v. Flynn, D C N Y, 11 F 2d 899, 900

20. Me—Rogers v. Brown, 190 A 632, 633, 135 Me 117.
57 C J p 550 note 44.

21. Me—Rogers v. Brown, supra.
57 C.J. p 551 note 45.

22. U.S—West Wisconsin R Co v Foley, Wis, 94 U S 100, 103, 24 L Ed. 71
Me—Rogers v. Brown, 190 A. 632, 633, 135 Me 117.

23. Cal.—Chenoweth v. Chambers, 164 P. 428, 431, 33 Cal App. 104.

24. N J—State v. Griffin, 90 A 259, 260, 85 N.J.Law 613

25. Cal—People v. O'Rourke, 13 P 2d 989, 992, 124 Cal App 752.
57 C.J. p 548 note 27.

26. Eng—Metcalf v. Williams, [1914] 2 Ch. 61, 64.

27. Mass—Elmer v Commissioner of Insurance, 23 N E 2d 95, 97, 304 Mass 194
Similarly expressed
"Shall" ordinarily imports an imperative, rather than a directory, obligation—State ex rel De Armond v. Superior Court of Madison County, 25 N E 2d 642, 643, 216 Ind 641

28. R I—Gould v Trenberth, 199 A. 696, 698, 61 R.I. 5

29. N C—Battle v Rocky Mount, 72 S E. 354, 355, 156 N C. 329.

30. D C.—Fields v. U. S, 27 App D.C 433, 440
57 C J. p 552 note 21.

31. N Y—In re St. Lawrence County Toll Bridge, 101 N E 462, 207 N.Y 582, 585
Pa—Specht v. Moyer, 10 Pa Dist & Co 311
57 C.J p 552 note 22.

32. Me—**Corpus Juris cited in** Rogers v Brown, 190 A 632, 633, 135 Me 117.
Minn—In re Trusteeship of First Minneapolis Trust Co, 277 N W 899, 901, 202 Minn 187—Wenger v. Wenger, 274 N W 517, 519, 200 Minn 436
Miss—State ex rel Attorney General v School Board of Quitman County, 181 So 313, 315, 181 Miss 818
Tex—Thomas v Groebl, 212 S W 2d 625, 630, 147 Tex 70.
57 C.J p 552 note 23

33. Cal—People v San Bernardino High School Dist, 216 P. 959, 961, 62 Cal App 67
Pa—Specht v. Moyer, 10 Pa Dist. & Co 311.
57 C J. p 553 note 24.

34. Ill—Clark v Patterson, 73 N E 806, 808, 214 Ill 533, 105 Am S R 127.
57 C.J. p 553 note 25

35. Ala—**Corpus Juris cited in** White v Board of Adjustment of City of Birmingham, 15 So 2d 585, 587, 245 Ala 48
57 C.J. p 553 note 26.

36. Mass—City of Boston v. Quincy Market Cold Storage & Warehouse Co, 45 N E 2d 959, 965, 312 Mass. 638—Murray v Edes Mfg. Co, 25 N E 2d 746, 747, 305 Mass 311.

37. Cal—In re Mitchell's Estate, 123 P 2d 503, 504, 20 Cal 2d 48
Ill—People ex rel Crowe v. Marshall, 262 Ill App 128, 131, 132
Iowa—Wisdom v Board of Sup'rs of Polk County, 19 N W 2d 602, 608, 236 Iowa 669—School Tp 76 of Muscatine County v Nicholson, 288 N W 123, 128, 227 Iowa 290.
Mass—City of Boston v Quincy Market Cold Storage & Warehouse Co, 45 N.E 2d 959, 965, 312 Mass 638.
Minn—Jerome v. Burns, 279 N.W 237, 240, 202 Minn 485.
Tex—Thomas v. Groebl, 212 S W 2d 625, 630, 147 Tex. 70—Smith v Curtis, Civ App, 223 S W.2d 712, 715
57 C J. p 553 note 27.

38. Ala—**Corpus Juris cited in** White v Board of Adjustment of City of Birmingham, 15 So 2d 585, 587, 245 Ala 48
Ill—Crowe v Marshall, 262 Ill.App 128, 131, 132
Mass—City of Boston v Quincy Market Cold Storage & Warehouse Co, 45 N E 2d 959, 965, 312 Mass 638—Murray v Edes Mfg Co, 25 N E 2d 746, 747, 305 Mass 311
Minn—Jerome v Burns, 279 N.W. 237, 240, 202 Minn 485
Miss—State ex rel Attorney General v. School Board of Quitman County, 181 So 313, 315, 181 Miss 818
N J—In re Norrell's Estate, 52 A 2d 407, 410, 139 N J Eq 550
Pa—National Transit Co v Boardman, 197 A 239, 241, 328 Pa 450
57 C J p 554 note 28.

39. Ky—Clark v. Riehl, 230 S W 2d 626, 627, 313 Ky. 142.
Pa—Specht v Moyer, 10 Pa.Dist. & Co 311.
Tex—Thomas v. Groebl, 212 S W 2d 625, 630, 147 Tex 70—Smith v. Curtis, Civ.App, 223 S W.2d 712, 715.
57 C J. p 554 note 29.

40. Pa—Commonwealth ex rel. Bell v. Powell, 94 A. 746, 748, 249 Pa 144, 150—Specht v. Moyer, 10 Pa. Dist. & Co. 311
57 C J p 555 note 31.

41. Iowa—Wisdom v. Board of Sup'rs of Polk County, 19 N.W.2d 602, 608, 236 Iowa 669—School Tp 76 of Muscatine County v. Nicholson, 288 N.W. 123, 128, 227 Iowa 290.
Pa—Specht v. Moyer, 10 Pa.Dist. & Co 311.
57 C.J. p 555 note 32.

ficed,[42] either to the public or to any individual,[43] or no right is destroyed,[44] or when no right or benefit to any one depends on its imperative use,[45] or when the provision in which it is found does not confer a private right and the public interest does not demand a mandatory construction.[46]

Should

The word "should" is the imperfect of the word "shall."[47] It is an auxiliary verb,[48] and it is used either as the conditional present[49] or the past[50] tense, that is, the preterit,[51] of the verb "shall."

"Should" has various shades of meaning,[52] and it may be imperative,[53] and employed as a word of obligation,[54] having the force or meaning of "must," or "ought to."[55] In this sense "should" is defined as meaning obliged or compelled (to); would have (to); must; ought (to); used with an infinitive (without to) to express obligation, necessity, or duty in connection with some act yet to be carried out.[56] Thus it has been said that "should" carries,[57] denotes,[58] expresses,[59] or implies[60] the sense of[61] duty[62] or obligation[63] equivalent to compulsion.[64] In this sense it is not merely advisory,[65] and does not carry the idea merely of authority or discretion.[66] However, in its ordinary meaning "should" does not express certainty.[67]

The word "should" may be employed merely as indicating futurity,[68] and it may be merely directory.[69] Thus it has been said that the word "should" may imply merely[70] a moral obligation,[71] or the obligation of fitness,[72] propriety, expediency,[73] and the like.[74]

42. Iowa—Wisdom v. Board of Sup'rs of Polk County, 19 N W 2d 602, 608, 236 Iowa 669—School Tp 76 of Muscatine County v Nicholson, 288 N W. 123, 128, 227 Iowa 290
Pa—Specht v. Moyer, 10 Pa Dist & Co 311
57 C J p 555 note 33.

43. Iowa—Wisdom v. Board of Sup'rs of Polk County, 19 N.W.2d 602, 608, 236 Iowa 669—School Tp. No 76 of Muscatine County v Nicholson, 288 N W. 123, 128, 227 Iowa 290.
Pa—Specht v. Meyer, 10 Pa.Dist. & Co 311.
57 C J. p 555 note 34.

44. Iowa—Wisdom v. Board of Sup'rs of Polk County, 19 N W 2d 602, 608, 236 Iowa 669—School Tp No 76 of Muscatine County v Nicholson, 288 N W. 123, 128, 227 Iowa 290.
Pa—Specht v Moyer, 10 Pa Dist & Co. 311.
57 C J. p 555 note 35.

45. Iowa—Wisdom v. Board of Sup'rs of Polk County, 19 N W 2d 602, 608, 236 Iowa 669—School Tp. No 76 of Muscatine County v. Nicholson, 288 N.W 123, 128, 227 Iowa 290.
Pa—Specht v. Moyer, 10 Pa.Dist. & Co 311
Tex—Ross v. Tide Water Oil Co, 145 S W 2d 1089, 1092, 136 Tex. 66—Smith v. Curtis, Civ App., 223 S W 2d 712, 715.
57 C.J. p 555 note 37.

46. N J—In re Norrell's Estate, 52 A 2d 407, 410, 139 N.J.Eq 550.
57 C.J. p 556 note 39.

47. La.—Fegan v. Lykes Bros. S S Co, 3 So 2d 632, 635, 198 La. 312

48. La—Fegan v. Lykes Bros. S. S Co, supra
Pa.—Foresi v. Hudson Coal Co, 161 A. 910, 912, 106 Pa.Super. 307.

49. La—Fegan v. Lykes Bros S. S Co, 3 So 2d 632, 635, 198 La. 312

50. La—Fegan v. Lykes Bros. S. S Co, supra
Okl—St Louis & S F. R. Co. v Brown, 144 P 1075, 1080, 45 Okl 143.

51. La—Fegan v Lykes Bros S. S Co, 3 So 2d 632, 635, 198 La 312
Pa—Foresi v Hudson Coal Co, 161 A. 910, 912, 106 Pa Super 307.

52. Mo.—Hubbard v. Turner Dept Store Co, 278 S W. 1060, 1061, 220 Mo App. 95.

Phrases employing the word "should" and as to which more recent adjudications have not been found see 57 C.J. p 558 note 21–p 559 note 43.

53. Ind—Smith v State, 41 N E 595, 596, 142 Ind 288.

54. N J—Durand v New York & L B R. Co, 48 A 1013, 1018, 65 N J Law 656

55. Pa—Foresi v Hudson Coal Co, 161 A. 910, 912, 106 Pa Super 307

56. Pa—Foresi v Hudson Coal Co, supra

57. Pa—Foresi v. Hudson Coal Co, supra

58. Kan—Moseley v. Kansas City, 228 P 2d 699, 704, 170 Kan 585

59. Cal—Lashley v Koerber, 156 P. 2d 441, 445, 26 Cal.2d 83

60. La—Fegan v Lykes Bros. S S Co, 3 So 2d 632, 635, 198 La. 312
57 C J p 557 note 99.
Imports duty or obligation
Mo—Kippenbrock v Wabash R. Co, 194 S W. 50, 52, 270 Mo 479
Conveyed the sense of duty and obligation.—State v Connor, 87 P. 703, 74 Kan. 898

61. Pa—Foresi v. Hudson Coal Co, 161 A. 910, 912, 106 Pa Super. 307

62. Kan—Moseley v. Kansas City 228 P.2d 699, 704, 170 Kan. 585.
Pa—Foresi v. Hudson Coal Co, 161 A. 910, 912, 106 Pa Super. 307.
57 C J p 557 note 3.

63. Cal—Lashley v. Koerber, 156 P. 2d 441, 445, 26 Cal 2d 83
La—Fegan v Lykes Bros. S S. Co, 3 So 2d 632, 635, 198 La. 312.
Pa—Foresi v. Hudson Coal Co, 161 A. 910, 912, 106 Pa.Super. 307.
57 C J p 557 note 4

64. Pa.—Foresi v. Hudson Coal Co, supra.

65. Okl—St. Louis & S. F. R Co v. Brown, 144 P. 1075, 1080, 45 Okl. 143
Pa—Foresi v Hudson Coal Co, 161 A. 910, 912, 106 Pa Super 307.

66. Ga.—Scarborough v Walton, 136 S E. 830, 36 Ga.App. 428.
57 C.J p 558 note 5.

67. Mo.—Hubbard v. Turner Dept Store Co, 278 S W 1060, 1061, 220 Mo App 95.

68. Ont—In re Sheard, 49 Ont.L. 320, 58 Dom L R 539, 543
57 C J p 557 note 96.

69. La—Texas & P Ry. Co. v. Consolidated Companies, 156 So. 215, 217, 180 La. 180

70. U S—U S. v. Stickrath, D C Ohio, 242 F 151, 153
Mont—State v. Blaine, 124 P. 516, 517, 45 Mont 482

71. U S—U S v. Stickrath, D C Ohio, 242 F 151, 153.

72. Cal.—Lashley v Koerber, 156 P 2d 441, 445, 26 Cal 2d 83

73. U S—U S. v. Stickrath, D.C. Ohio, 242 F 151, 153
Cal—Lashley v. Koerber, 156 P.2d 441, 445, 26 Cal.2d 83
Mont—State v. Blaine, 124 P. 516, 517, 45 Mont. 482.

74. Cal—Lashley v Koerber, 156 P. 2d 441, 445, 26 Cal.2d 83
Mont—State v. Blaine, 124 P. 516 517, 45 Mont 482.

"Should" is used with frequency in instructions to advise the jury that it is their duty as jurors to find as stated.[75]

"Should" has been held to be equivalent to, or synonymous with, "may" see 57 C.J.S. p 459 notes 26, 29, "might" see 57 C.J.S. p 459 note 50, "ought" see 67 C.J.S. p 534 note 26, and "would."[76]

"Should" has been compared with, or distinguished from, "could" see 12 C J S. p 892 note 83.1, "entitled" see 30 C.J.S. p 265 note 75 1, "may" see 57 C J.S. p 459 note 32, "ought" see 67 C.J.S. p 534 notes 27, 28, "will,"[77] and "would."[78]

Cross References

Because of the established general rule that constitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest, the word "shall," as used in constitutional provisions, is usually imperative or mandatory as stated in Constitutional Law § 61.

Statutes and ordinances are more frequently considered to be directory or permissive than are constitutional provisions, and therefore the word "shall," when used in a statute, while generally imperative, may be construed as merely permissive as stated in the C.J.S. title Statutes § 380, also 59 C.J. p 1080 note 95–p 1087 note 27. Similarly, the presumption is that the word "shall" in an ordinance is mandatory, but it may be construed as merely permissive where the spirit and purpose of the ordinance require such a construction, or where such a construction is necessary in order to give effect to the legislative intent as stated in Municipal Corporations § 442 a.

In the construction of contracts the word "shall" is generally regarded as imperative as stated in Contracts § 304.

The use of the words "shall" and "should" in civil cases in instructions to jurors is treated in the C.J.S. title Trial § 327, also 64 C.J. p 637 note 68.

SHAM. As a noun, the word "sham" primarily means that which deceives expectation; any trick or fraudulent device which disappoints; a make-believe, imposition, humbug.[79] The word is also defined as meaning something which is false in fact, although good in form.[80]

As a verb, "sham" means to deceive or delude with false pretenses; to trick; cheat.[81] It has been held synonymous with "assume" see 7 C.J.S. p 105 note 25.

The adjective "sham" is defined as meaning false;[82] counterfeit; pretended;[83] feigned; unreal.[84] It is held to be equivalent to "dummy" see 28 C.J S. p 588 note 87, and "false" see 35 C.J.S. p 496 note 12, and it has been contrasted with "frivolous" see 37 C.J.S. p 1382 note 20.

Sham and frivolous pleadings are discussed generally in Pleading §§ 35, 109, and Equity §§ 196 a, 299, 327, 351, 387.

SHAMEFUL. Deserving shame or disgrace; bringing reproach; disgraceful; scandalous; infamous.[85] It has been held equivalent to, or synonymous with, "immodest" see 42 C.J.S. p 395 note 42, "indecent" see 42 C.J.S. p 560 note 77, and "infamous" see 43 C.J.S. p 43 note 65.

SHAMELESSNESS. The state or character of being shameless; utter want of shame; lack of sensibility to disgrace or dishonor; impudence.[86]

SHANKING. A term employed in golf which means swinging under the ball or lower than intended so that the ball is hit with the shank or shaft instead of with the face of the club.[87]

SHAPE. The term "shape" is defined generally as meaning the disposition of the external bounding surface of a body or lines of a plane figure; outward form or construction; configuration; contour.[88] The word also has a technical meaning and is applied to certain standard products of structural steel material, such as tees, angle bars, bulbs, etc.[89]

75. Mo.—Kippenbrock v Wabash R Co, 194 S W. 50, 270 Mo 479, 485

76. U S.—Southern R. Co v King, Ga, 160 F. 332, 336, 87 C.C A. 284
57 C.J. p 558 note 14.

77. Mo.—Hubbard v. Turner Dept Store Co., 278 S W 1060, 1061, 220 Mo.App. 95.

78. Ga.—Barnett v. Savannah Electric Co., 82 S.E. 910, 912, 15 Ga App. 270.

79. Ariz.—Williams v. Territory, 108 P 243, 245, 13 Ariz 27, 27 L R.A., N.S., 1032.

80. N Y.—Esteves v Swobodzien, 90 N Y S 2d 844, 846, 195 Misc. 956.

81. Webster New Int.D

82. Ariz.—Williams v Territory, 108 P. 243, 245, 13 Ariz. 27, 27 L R.A, N S, 1032
57 C J p 559 note 47.

83. Ariz.—Williams v. Territory, supra
57 C.J. p 559 note 46

84. Ariz.—Williams v. Territory, supra

85. New Standard D.

86. Century D.

No fixed standard

"There is no fixed standard of pruriency It is largely a matter of education and taste And the same is true in respect of scandal and shamelessness"—MacDonald v. Sun Printing, etc, Assoc, 92 N.Y.S. 37, 40, 45 Misc. 441.

87. Conn.—Walsh v. Machlin, 23 A. 2d 156, 128 Conn 412, 138 A L R. 538

88. New Standard D

89. U.S.—U S. v. Buehne Steel Wool Co, C C N Y, 154 F. 93, 94.
57 C J p 560 note 63.

"Structural shape" or "structural shapes." The term imports in general a capacity to sustain heavy weights or to resist great tension, or both,[90] and, in engineering and architecture, is the shape of a member especially adapted to structural purposes, especially in giving the greatest strength with the least material, hence, colloquially, any steel or iron member of such shape, as channel irons, I beams, T beams, etc., or, sometimes, a column, girder, etc., built up with such members.[91]

SHARE. The word "share" ordinarily signifies a part or definite portion of a thing[92] owned by a number of persons in common,[93] and the term is frequently applied to one of the parts into which a sum of money or other divisible thing may be divided.[94]

It has been stated that when the "share" of another in an estate is spoken of the natural thought is of the whole and complete portion or fraction which is to be received,[95] and that when used to mark out an inheritance in an estate the words "the share" do not import that there is something more, outside of and beyond it, to be otherwise and elsewhere pointed out, but they indicate totality.[96]

"Share" has been held equivalent to, or synonymous with, "interest" see 47 C.J.S. p 1 note 16, "part" see 67 C.J.S. p 878 note 38, "portion" see 72 C.J.S. p 230 note 35, and "unit."[97]

It has been compared with, or distinguished from, "amount" see 3 C J.S. p 1056 note 81, and "interest" see 47 C.J S. p 2 note 17.

The verb "share" is defined as meaning to partake[98] of[99] or enjoy with others;[1] to have a part or share in;[2] to have a portion of;[3] to participate;[4] and it has been said that to share does not demand necessarily an equal division.[5]

The shares or portions to which beneficiaries are entitled under a will are discussed in the C.J.S. title Wills §§ 697–706, also 69 C.J. p 278 note 19–p 287 note 29. Renting land on shares, see Landlord and Tenant §§ 793–829.

Phrases employing the term are set out in the note.[6]

SHAREHOLDER. As a term used synonymously with "stockholder" see Corporations § 475.

SHARP. A relative term, commonly applied with respect to the cutting edge of a knife or razor, to the tooth of a man or animal, or to the prow of a

90. U S —Judson Freight Forwarding Co v. U S, 20 C C P A (Customs) 229, 234—European Trading Co. v U S, 19 C C P A. (Customs) 82, 84—U. S v Henry L Exstein, 16 Ct Cust App 328, 331—Simon, Buhler & Baumann v. U. S., 8 Ct Cust App. 273, 276.
"Structural shapes" as subject to tariff see Customs Duties § 34.

91. U.S —Judson Freight Forwarding Co. v U S, 20 C C.P.A (Customs) 229, 235—European Trading Co v. U. S., 19 C C.P.A (Customs) 82, 85—U S v. Frank, 15 Ct.Cust App 97, 103
Similarly defined
(1) Any steel or iron member of such shapes, as channel irons, iron beams being especially adapted to structural purposes in giving the greatest strength with the least material —Texas Steel Co v. Missouri, K. & T R. Co., Tex.Civ App., 70 S W.2d 484, 485.
(2) Beams, girders, angles, etc, having any special shape, and intended to be used in the form of a structure, are structural shapes — Birtwell v. Saltonstall, C.C Mass., 39 F 383, 385—European Trading Co v. U S., 19 C C P.A.(Customs) 82, 84—U S v. Henry L Exstein, 16 Ct Cust App. 328, 331, 332.

92. N.Y.—In re Bond & Mortgage Guarantee Co, 283 N Y S. 623, 639, 157 Misc. 240
Wyo —**Corpus Juris quoted in** Radalj v Union Savings & Loan Ass'n, 138 P 2d 984, 997, 59 Wyo. 140.
57 C J p 560 notes 66, 67
The meaning of the word "shares" is parts or portions of a whole —In re Manegold's Will, 291 N.W. 753, 756, 234 Wis 525.

93. N.Y —In re Bond & Mortgage Guarantee Co, 283 N Y.S 623, 639, 157 Misc 240
57 C J p 560 notes 66, 67
It contemplates something owned by two or more persons, and has reference to that part of the undivided interest which belongs to some one of them —In re Bond & Mortgage Guarantee Co., supra—57 C J. p 560 note 68 [a].
In its popular and familiar sense, the word "share" denotes a part or portion of a thing owned in common —United Soc. v Eagle Bank, 7 Conn. 456, 471.

94. Ga —Cook v Cook, 146 S.E. 548, 550, 167 Ga 723
N Y.—De Nottebeck v Astor, 13 N.Y 98, 102.

95. Mass.—Jones v. Gane, 91 N E. 129, 131, 205 Mass. 37
57 C.J. p 561 note 93.

96. Mass.—Jones v Gane, supra.

97. U S —Chew v. U S, C C A.Ark., 9 F.2d 348, 351.
57 C J p 560 note 75.

98. Mich —People v. Sigers, 187 N. W 373, 374, 217 Mich. 578.

99. Ark —Cook v. Worthington, 173 S W. 395, 396, 116 Ark 328.

1. Ark —Cook v Worthington, supra
Mich —People v Sigers, 187 N W. 373, 374, 217 Mich 578

2. Mich —People v Sigers, supra

3. Ark —Cook v Worthington, 173 S W 395, 396, 116 Ark 328

4. Mich —People v Sigers, 187 N W. 373, 374, 217 Mich. 578.

5. Cal —Hellings v. Wright, 156 P. 365, 367, 29 Cal.App 649.

6. Phrases
(1) "Share and share alike," in its popular and ordinary sense, means in equal shares or proportions.— Succession of Lambert, 28 So.2d 1, 8, 210 La 636.
(2) "Share cropper" defined see Landlord and Tenant § 793.
(3) "Share of stock" defined see Corporations § 194.
(4) Other phrases as to which more recent adjudications have not been found see 57 C J. p 561 notes 76–88, p 561 note 98–p 562 note 7, p 562 notes 17, 18, 20–24.

ship,[7] and in this sense defined as meaning having a keen edge or an acute point; capable of cutting or piercing.[8]

In a different sense the term is defined as meaning vigilant; attentive.[9]

SHAVE. The verb "shave" is defined generally as meaning to make bare or smooth by scraping or drawing an edged instrument along the surface; also, to shape or reduce by paring or cutting.[10]

As used with respect to money, the word "shave" commonly means lending it on usury, or making unfair purchases with it; in short, availing one's self of others' wants in order to obtain an advantage and make an unconscientious profit.[11] Thus the word may be defined as meaning to fleece; to oppress by extortion; to pillage; to strip.[12]

The word is also used to denote the buying of existing notes, and other securities for money at a discount, beyond the nominal amount of the debt and interest due or to become due on such notes or securities,[13] and without reference to the question whether any such paper was created for the purpose of being discounted,[14] and in this latter application it has been said to be, at least in one state, a technical term.[15]

SHAVING. That which is shaved off; a thin slice or strip pared off with a shave, a knife, a plane, etc.[16]

SHAWL. A cloth of wool, cotton, silk, or hair, used especially by women as a loose covering for the neck and shoulders;[17] an article of wearing apparel; a wrap which a woman wears when she goes out walking, driving, or traveling.[18] It is distinguished from "rug" see 77 C.J.S. p 544 note 45.

SHAWLING. A term of the glass-working industry, used particularly in the cylinder drawing art, being a practice or system of cutting the cylinder longitudinally, whereunder the cylinders are made large and split into a number of segments before flattening.[19]

SHE. The pronoun of the third person singular feminine.[20]

SHEARS. The word "shears" is defined as meaning any of the various cutting instruments operating by the action of opposed edges of metal;[21] an instrument to cut with, consisting of two blades, usually moving on a pin, between which the thing to be cut is interposed; a kind of large scissors;[22] a machine which cuts by means of a blade or set of blades working against a resisting edge, the material to be sheared being between the two.[23]

In various of the dictionaries are found more specific definitions of "shears" having relation to the purpose which they serve, such as tinman's shears, various kinds of bench shears, bar and metal shears, hydraulic shears, and others.[24]

SHEATHING. In general, any material, such as tin, copper, slate, tiles, etc., prepared for application to a structure, as covering; that which sheathes or covers, or protects, or may be used for that purpose.[25]

In carpentry, a covering or lining to conceal a rough surface or to cover a timber frame; the first covering of boards, or of waterproof material, on the outside wall of a frame house or on a timber

7. U S—Austin Mfg Co. v American Wellworks, Ill., 121 F 76, 79, 57 C.C.A 330.

8. New Standard D.
Phrases as to which more recent adjudications have not been found see 57 C J p 562 notes 34–37.

9. Pa—Rhoads v Central Taxicab, etc, Co, 12 Pa Dist & Co. 647, 652

10. New Standard D.
Phrases as to which more recent adjudications have not been found see 57 C J. p 563 notes 51–55.

11. N Y—Stone v. Cooper, 2 Den 293, 295, 300.

12. N Y.—Stone v. Cooper, supra
57 C J p 562 note 43

13. N Y—Stone v Cooper, supra
57 C.J p 562 notes 46, 47.

14. Tenn—Trentham v Moore, 76 S W. 904, 905, 111 Tenn. 346
57 C J. p 563 note 48

15. Tenn—Wetmore v. Brien, 3 Head 723, 726
57 C J. p 563 note 50

16. Webster New Int D.
Shingle shavings
Another kind of waste produced in the sawing or manufacture of shingles, made by the machinery in edging and trimming the shingles after the shingle saw has gone through the bolt, being the common designation among mill men for a substance consisting of the portions of the shingles taken off by the machine in edging and trimming the shingle and being of the length, or nearly of the length, of the shingle—State Howard, 72 Me. 459, 463—57 C J p 1146 notes 3, 4.

17. U S—Ingersoll v. Magone, C.C N.Y., 48 F. 159, 160.

18. Pa—Commonwealth v. Gombert, 11 Pa Dist 435, 438, 439.
57 C J. p 563 note 57

19. U S—Window Glass Mach. Co v Pittsburgh Plate Glass Co, D. C Pa., 46 F.2d 484, 485

20. Webster New Int D
Corresponding masculine form "he" see 39 C J S p 804 note 32–p 805 note 38.

21. U S—Sheldon v. U. S, 2 Ct Cust App 109, 110, 111
Shears as subject to tariff see Customs Duties § 34.

22. U S—Sheldon v. U. S, supra.

23. U S.—Sheldon v. U. S, supra.

24. U S—Sheldon v. U. S., supra.

25. Cal.—Ex parte Smith, 263 P. 555, 557, 88 Cal App. 464
57 C J. p 563 notes 64, 65.

roof;[26] it is referred to as a covering, and when applied to a roof is said to include thatch, tile, or shingles.[27] Both in its general and technical sense, it means a mere covering of any material; also the material so used[28]

SHEAVE. A grooved wheel in a block, mast, yard, etc., on which a rope works; the wheel of a pulley;[29] a pulley wheel with a grooved edge, over which a cord or rope may run;[30] the casting or block on which the wheel is fixed.[31]

SHEEP. A generic term,[32] general and comprehensive,[33] defined as any ruminant of the genus "ovis" especially any of the domesticated varieties.[34] It may include within its meaning the ewe,[35] lamb,[36] ram,[37] and wether,[38] although in the connection in which used the term may include only a wether more than a year old,[39] and not include unweaned lambs.[40]

Liability for injuries to sheep and other domestic animals by dogs is discussed in Animals §§ 155–159; other references to the word "sheep" are made in the title index. Sheep as subject to tariff, and sheep dip and sheep wool as exempt therefrom, see Customs Duties §§ 38, 58, 72.

SHEER. As a deviation from the line of the course in which a vessel should be steered see Collision § 2 a; references to the word "sheering" are made in the index to that title.

SHEET. The word "sheet" is defined generally as meaning a broad, usually flat, and relatively thin piece of anything; a large, broad piece of anything comparatively thin, as paper, cloth, etc.[41]

The term is frequently applied to a piece of metal or other substance, hammered, rolled, fused or cut very thin, as a sheet of tin, a sheet of glass, a sheet of veneer;[42] and it is often used in composition to denote that the substance to the name of which it is prefixed is in the form of sheets or thin plates, as sheet-iron, sheet-glass, sheet-tin.[43]

The word "sheet" is also used to denote a broad piece of paper,[44] and, in the printer's art, it is what is used for one impression.[45]

The term is also applied to an article of bed furniture, composed of various substances, as linen, cotton, wool, singly or in combination;[46] and when so used the word has reference to the form and not to the material of which the article is made.[47]

"Sheet" has been compared with, or distinguished from, "disc" see 26 C.J.S. p 1329 note 23, "plate" see 70 C.J.S. p 1104 note 41, and "slab."[48]

26. Cal.—Ex parte Smith, supra

27. Cal.—Ex parte Smith, supra. 57 C.J. p 563 note 68.

28. Cal.—Ex parte Smith, supra

29. Tenn.—Gregson v. New Soddy Coal Co., Ch.A., 54 S.W. 113, 114

30. U.S.—Willamette Iron & Steel Works v. Columbia Engineering Works, Or., 252 F. 594, 164 C.C.A. 510

31. Tenn.—Gregson v. New Soddy Coal Co., Ch.A., 54 S.W. 113, 114. 57 C.J. p 563 note 73.

32. Eng.—Regina v. McCulley, 2 Moody C.C. 34, 37, 169 Reprint 14

33. U.S.—U. S. v. Debs, C.C.Ill., 64 F. 724, 749
57 C.J. p 564 note 78.

34. Webster New Int. D.
Sheep as cattle see Cattle 14 C.J.S. p 37 note 97; as live stock see Live 54 C.J.S. p 635 note 75

Phrases

(1) "Sheep dip or sheep wash" defined see Dip 26 C.J.S. p 1315 note 61.

(2) "Sheep range" and "cattle and sheep range" distinguished from "cattle range" see 14 C.J.S. p 38 note 38.

(3) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 564 notes 92, 93.

35. U.S.—U. S. v. Debs, C.C.Ill., 64 F. 724, 728, 748, 749.
57 C.J. p 564 note 80

36. U.S.—U. S. v. Debs, supra.
57 C.J. p 564 note 81.

37. U.S.—U. S. v. Debs, supra.

38. U.S.—U. S. v. Debs, supra.
57 C.J. p 564 note 83

39. Eng.—Rex v. Birket, 4 C. & P. 216, 217, 19 E.C.L. 482.

40. Cal.—Ex parte McCoy, 101 P. 419, 431, 10 Cal.App. 116.

41. U.S.—American Express Co. v. U. S., 3 Ct. Cust. App. 475, 476, 477

Similarly defined

(1) A broad, thin portion of any substance.—American Express Co. v. U. S., 3 Ct.Cust.App. 475, 476, 477.

(2) A very thin and broad piece of any substance.—American Express Co. v. U. S., supra.

(3) Anything having considerable expanse with very little thickness.—American Express Co. v. U. S., supra.

Size of article

"Our conception of the meaning of the word 'sheet' of anything, as generally understood, would be, in the first instance, somewhat varied according to the nature, value, and use of the material of which the alleged sheets were composed. For instance, it is very likely that an article might properly be referred to as a sheet of gold which was of less size than a sheet of tin or iron or a sheet of cloth or paper, and we do not undertake to fix the size above which an article, if it otherwise conforms to the definition of a sheet, is such, and below which it is not."—American Express Co. v. U. S., supra.

42. U.S.—American Express Co. v. U. S., supra

Ordinarily a sheet of metal is comprehended to be broad, thin, and expanded.—Boker v. U. S., C.C.N.Y., 152 F. 589, 590

43. U.S.—American Express Co. v. U. S., 3 Ct.Cust.App. 475, 476.

44. U.S.—Falk v. Heffron, C.C.N.Y., 56 F. 299.

Ordinary definition

U.S.—Falk v. Heffron, supra.

45. U.S.—Falk v. Heffron, supra.

46. N.Y.—Alkenbrack v. People, 1 Den. 80

47. N.Y.—Alkenbrack v. People, supra
57 C.J. p 564 note 99.

48. U.S.—Theodore W. Morris & Co. v. U. S., N.Y., 174 F. 656, 657, 98 C.C.A. 410
57 C.J. p 564 note 4.

Phrases employing the term are set out in the note.[49]

SHEETING. In hydraulic engineering, a form of piling; a lining of timber to a caisson or cofferdam formed of sheet piles or piles with planking between; any form of sheet piling used to protect a river bank.[50]

SHELL. Any flat, hollow structure, framework or exterior structure which is frail in construction or that has had its interior removed or destroyed or is regarded as not complete or filled in, as the shell of a house or ship;[51] also, a hollow projectile for cannon, containing an explosive bursting charge which is ignited by a fuse at some point of its flight, upon impact, or after penetration, the effect being produced by the force of explosion or by the impact of its scattered fragments.[52]

SHELLAC. Crude lac melted into cakes for varnish.[53]

SHELLEY'S CASE, RULE IN. The rule in Shelley's case is stated in Deeds § 123, and Estates § 4. The rule is treated in the C.J S. titles Estates § 29, Trusts § 186, also 65 C.J. p 540 note 29–p 541 note 40, and Wills §§ 870–879, also 69 C.J. p 505 note 89–p 526 note 34.

SHELLFISH. Defined see Fish § 1; for other references to the term consult the title index.

SHELTER. That which covers or shields from exposure or danger; a place of safety; refuge; retreat; as a shelter from the storm or heat; a shelter from reproach.[54] It has been said that shelter does not mean sustenance, but that it is included in the term[55]

Statutes enjoining the failure or refusal of a parent to furnish necessary food, clothing, shelter, or medical attendance for a child are discussed in Parent and Child § 92 c (2).

The duty of an agistor to provide shelter for animals committed to his custody is discussed in Animals § 17; willful failure to afford shelter or sustenance to a domestic animal on the part of the owner or person charged with such duty as constituting cruelty to animals see Animals § 71.

SHERIFF. The term is defined in Sheriffs and Constables § 1. It is also used in various phrases which are set out in the note.[56]

49. Phrases

(1) "Sheet glass" as subject to tariff see Customs Duties § 33

(2) "Sheet steel;" what is commercially known as "sheet steel" is steel rolled hot in mills called "sheet mills," specially adapted for this purpose, between rolls running so slowly that the sheets cannot be run over twelve feet in length, and such sheets are not less than eight inches wide—Boker v U S, N Y, 124 F 59, 60, 59 C.C A 425—57 C J p 565 note 10

(3) "Stock sheets," in the glass trade, the sheets of glass which, when taken from the machines, are squared and put in stock—James H Rice Co v Penn Plate Glass Co, 117 Ill.App. 356, 360.

(4) Other phrases as to which more recent adjudications have not been found see 57 C J p 565 notes 5–8, 11, 12, 16, 17.

50. N Y—Mazzarisi v Ward, 156 N Y S 964, 965, 170 App Div. 868

"Pile sheeting" defined see 70 C J.S p 1060 note 42

51. U.S—Delaney Patents Corporation v Johns-Manville, D C Cal, 29 F Supp 431, 433.

"Shell band" defined see 8 C.J S. p 384 note 13 1.

52. Webster New Int D

"Shell shock," within contemplation of criminal law, see Criminal Law § 56.

53. New Standard D

Shellac is derived from a resinous substance called "lac," which is produced when bark lice puncture the twigs of certain trees growing in eastern countries, it is much used in the making of varnishes, lacquers, and like materials—Hurst & Co. v U S, 12 Ct Cust App 81, 82 See Lac 51 C J S p 481 notes 77, 78.

54. New Standard D.

55. Ohio—State ex rel Mastracci v. Rose, 74 N.E 2d 654, 79 Ohio App 556

56. Phrases

(1) "Sheriff's court," "Court-leet of the county or sheriff's tourn," see Courts § 11.

(2) "Sheriff's deed" see the title index to Executions.

(3) "Sheriff's jury" see Juries § 2.

SHERIFFS AND CONSTABLES

This Title includes the chief executive officers of counties, and inferior officers authorized to perform the functions of peace officers within their counties or territorial subdivisions thereof, eligibility for the office, appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of such officers, their deputies, assistants, and substitutes in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITIONS, AND NATURE AND EXISTENCE OF OFFICE

§ 1. Sheriff

The sheriff ordinarily is an elective public officer and chief executive officer in his county, and is an officer of the court and subject to its orders and directions.

The sheriff ordinarily is an elective public officer and chief executive officer in his county,[1] is an officer of the court and subject to its orders and directions,[2] and is made responsible by common and statutory law as conservator of the peace within his jurisdiction.[3] Statutes may authorize a board

1. U S—Bishop v. Atlantic Smokeless Coal Co., D C W Va., 88 F Supp 27, 30
Mo—State, on Inf of McKittrick, v Williams, 144 S W 2d 98, 103, 346 Mo 1003
N C—Southern Ry Co v Mecklenburg County, 56 S E.2d 438, 440, 231 N C 148
57 C J p 730 notes 1, 2.
Sheriff as.
Coroner see Coroners § 11.
Jailer see Prisons § 8

Origin

The office of sheriff is one of ancient origin. Its creation goes back to the time of King Alfred of England, and maybe further. The holder of the office has always been the chief executive officer and conservator of the peace in his county—Sweat v. Waldon, 167 So 363, 364, 123 Fla 478

Sheriff held to be:

(1) Chief magistrate of county
Minn—In re Olson, 300 N W. 398, 400, 211 Minn. 114.
Mo—Farmers' Mut. F. Ass'n v Hunolt, App., 81 S W 2d 977, 981

(2) Constitutional officer.—State v Knox County, 54 S W.2d 973, 977, 165 Tenn. 319.

(3) County officer.
Ala.—In re Opinions of Justices, 143 So 345, 225 Ala. 359.
Mo—State, on Inf of McKittrick, v Williams, 144 S W.2d 98, 103, 346 Mo 1003
N Y.—Burke v. Kern, 38 N E 2d 500, 504, 287 N Y. 203
Or—In re Hampson's Estate, 223 P 2d 1039, 1044, 190 Or. 279
S C—State v. Sanders, 110 S E 808, 810, 118 S C 498
Utah—Sheriff of Salt Lake County v Board of Com'rs of Salt Lake County, 268 P. 783, 785, 71 Utah 593

(4) Local officer.—Winkler v. Sheriff of Queens County, 12 N Y S.2d 290, 291, 256 App Div 770.

(5) Public civil officer—Cooper v Mullenax, 28 S E 2d 426, 428, 126 W Va. 256

State officer

(1) A sheriff has been held to be a state officer—Hanley v. City of New York, 295 N.Y S. 1002, 1004, 250 App. Div. 552, motion denied 296 N Y S 824, 250 App Div. 852, affirmed 11 N E 2d 308, 275 N Y. 482.

(2) He has also been held not to be a state officer—State v Spencer, 3 S.W 410, 91 Mo 206—State v Dillon, 2 S.W. 417, 419, 90 Mo 229.

Independent agent

Even though the duties and compensation of a sheriff are limited and prescribed by statute, his status as an independent agent or as a separate adjunct of the courts and of the state remains undisturbed—Enstrom v City of New York, 17 N Y S 2d 964, 968, 258 App Div 672, reargument denied 19 N Y S 2d 1022, 259 App Div 832, appeal denied 27 N E 2d 819, 283 N Y. 777.

2. U S—Bishop v Atlantic Smokeless Coal Co, D C W Va, 88 F Supp 27, 30—**Corpus Juris cited in** In re Garner, D C Pa, 10 F Supp 380, 382
Ariz—State v. Superior Court of Maricopa County, 5 P 2d 192, 195, 39 Ariz 242.
Cal—Sparks v. Buckner, 57 P 2d 1395, 1399, 14 Cal App 2d 213
N Y—Hanley v. City of New York, 295 N Y.S 1002, 1005, 250 App Div. 552, motion denied 296 N Y S. 824, 250 App Div 852, affirmed 11 N E. 2d 308, 275 N Y 482.
57 C J p 730 note 3

3. Fla—Sweat v Waldon, 167 So 363, 364, 123 Fla 478
Minn—**Corpus Juris quoted in** In re Olson, 300 N W. 398, 399, 211 Minn 114
57 C.J p 730 note 4.

Representative of sovereign power

U S—South v Maryland, Md, 18 How 396, 402, 15 L Ed 433.
Md—Harrison v. Carroll, 191 A 574, 575, 172 Md. 386.

to consolidate the duties of the office of sheriff with another county office,[4] and, subject to the restrictions of the constitution, the office may properly be abolished.[5]

"Sheriff" as generic term. The term "sheriff" used in the statutes frequently is construed as a generic term to include the whole class of officers performing duties usually appertaining to the office of sheriff, such as a deputy sheriff[6] or constable,[7] although under the construction put on some statutes a deputy sheriff is not a sheriff.[8] Similarly "sheriff" may include a coroner.[9]

§ 2. Deputy Sheriff; Undersheriff

A deputy sheriff is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person, or right.

A deputy sheriff is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person, or right.[10] He has been held to be a public officer,[11] although there is also authority to the contrary.[12] A deputy sheriff is

4. Cal.—Brooks v. Stewart, 218 P. 2d 56, 97 Cal. App. 2d 385.

Ordinance held valid

Under statutes authorizing board to consolidate and reconsolidate duties of certain county offices, where consolidated office of coroner-public administrator had been created, subsequent ordinance consolidating the duties of the office of sheriff and coroner was valid, although it might have been preferable for the subsequent ordinance to have expressly separated the offices of coroner-public administrator before consolidating it with the office of sheriff.—Brooks v. Stewart, supra.

5. N.Y.—Burke v. Kern, 38 N.E.2d 500, 287 N.Y. 203.

Date abolished

Where amendment to charter, abolishing offices of county sheriff in the counties within a city, provided that it should become effective on Jan. 1, 1942, the county office of sheriff was abolished as of such date, notwithstanding officers were elected to fill such offices for the term commencing Jan. 1, 1942, at the same election at which city charter amendment was adopted.—Burke v. Kern, supra.

6. N.C.—Lanier v. Greenville, 93 S.E. 850, 853, 174 N.C. 311.

57 C.J. p. 730 note 6.

7. Vt.—Winchell v. Pond, 19 Vt. 198, 201.

57 C.J. p. 731 note 7.

8. N.H.—George v. Fellows, 58 N.H. 494.

57 C.J. p. 731 note 9.

9. N.J.—De Wit v. Decker, 9 N.J. Law 148, 149.

57 C.J. p. 731 note 10.

Coroner acting as sheriff see infra § 32.

10. N.C.—Towe v. Yancey County, 31 S.E.2d 754, 755, 224 N.C. 579.—**Corpus Juris cited in** Gowens v. Alamance County, 3 S.E.2d 339, 340, 216 N.C. 107.—**Corpus Juris cited in** Styers v. Forsyth County, 194 S.E. 305, 309, 212 N.C. 558.—**Corpus Juris quoted in** Borders v. Cline, 193 S.E. 826, 829, 212 N.C. 472.

Wyo.—**Corpus Juris cited in** Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 704, 46 Wyo. 142, rehearing denied 26 P.2d 153, 46 Wyo. 142.

57 C.J. p. 731 note 13.

Appointment by sheriff see infra § 22.

Origin

(1) The office of under sheriff or deputy sheriff is a common-law office unless a change is effected by constitution or statute.—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 298, 80 Ohio App. 447.

(2) The deputy is an officer coeval in point of antiquity with the sheriff.

N.Y.—Tillotson v. Cheetham, 2 Johns. 63, 70.

N.C.—Gowens v. Alamance County, 3 S.E.2d 339, 340, 216 N.C. 107.—Borders v. Cline, 193 S.E. 826, 829, 212 N.C. 472.—Lanier v. Town of Greenville, 93 S.E. 850, 853, 174 N.C. 311.

Undersheriff is simply what has been termed a general deputy, slightly more important than a simple deputy, by reason of the fact that he is qualified and designated by law as the particular deputy who, under certain conditions, shall become the sheriff.—Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 704, 46 Wyo. 142, rehearing denied 26 P.2d 294, 46 Wyo. 142.

11. La.—Gray v. De Bretton, 188 So. 722, 724, 192 La. 628.

Mo.—Maxwell v. Andrew County, 146 S.W.2d 621, 625, 347 Mo. 156.—Scott v. Endicott, 38 S.W.2d 67, 68, 225 Mo. App. 426.

N.C.—Towe v. Yancey County, 31 S.E.2d 754, 755, 224 N.C. 579.—Blake v. Allen, 20 S.E.2d 552, 554, 221 N.C. 445.—**Corpus Juris cited in** Gowens v. Alamance County, 3 S.E.2d 339, 340, 216 N.C. 107.—**Corpus Juris quoted in** Borders v. Cline, 193 S.E. 826, 829, 212 N.C. 472.

S.C.—**Corpus Juris cited in** Willis v. Aiken County, 26 S.E.2d 313, 316, 203 S.C. 96.

Tex.—Murray v. State, 67 S.W.2d 274, 276, 125 Tex.Cr. 252.

Vt.—Gross v. Gates, 194 A. 465, 468, 109 Vt. 156.

57 C.J. p. 731 note 15.

Deputy sheriff held to be:

(1) Agent of sheriff.—State ex rel. Rusch v. Board of Com'rs of Yellowstone County, 191 P.2d 670, 672, 121 Mont. 162.

(2) County officer.

N.Y.—In re Uterhart, 257 N.Y.S. 348, 349, 144 Misc. 188.

S.C.—State v. Johnson, 115 S.E. 748, 749, 123 S.C. 50.

(3) Ministerial officer.—Styers v. Forsyth County, 194 S.E. 305, 307, 212 N.C. 558.

(4) Peace officer.

N.Y.—Netarz v. Fagan, 257 N.Y.S. 610, 611, 143 Misc. 893.

S.C.—Pulliam v. Board of Police Com'rs of Police Insurance and Annuity Fund, 24 S.E.2d 745, 202 S.C. 324.

(5) State officer or officer of the state.

Ala.—Andrews v. State, 78 Ala. 483, 485.

La.—Williams v. Guerre, 162 So. 609, 614, 182 La. 745.—State ex rel. Porterie v. Jones, 159 So. 594, 597, 181 La. 390.

Deputy sheriff held not to be:

(1) Agent, servant, or employee of the sheriff.—Blake v. Allen, 20 S.E.2d 552, 554, 221 N.C. 445.—Styers v. Forsyth County, 194 S.E. 305, 307, 212 N.C. 558.

(2) County officer or county employee.

Ga.—Drost v. Robinson, 22 S.E.2d 475, 194 Ga. 703.

Va.—Board of Sup'rs of Rockingham County v. Lucas, 128 S.E. 574, 575, 142 Va. 84.

(3) Independent officer.—State ex rel. Rauscher v. Gandy, 178 So. 166, 167, 130 Fla. 407.

(4) Officially connected with the county except through the sheriff.—Styers v. Forsyth County, 194 S.E. 305, 307, 212 N.C. 558.

Employer and employee

The relationship between sheriff and one whom he appointed chief deputy was that of employer and employee.—Mosely v. Kennedy, 17 So. 2d 536, 537, 245 Ala. 448.

12. Mont.—State ex rel. Rusch v. Board of Com'rs of Yellowstone County, 191 P.2d 670, 672, 673, 121 Mont. 162.

not the sheriff,[13] but is merely the substitute of the sheriff,[14] although it has been held that the sheriff and his deputies are considered as one and the same officer,[15] and that the deputy is the alter ego of the sheriff.[16] There are two kinds of deputies, a general deputy or undersheriff and a special deputy,[17] and a deputy sheriff may be special in the sense that he is authorized to perform only part of the duties of the sheriff,[18] or in the sense that he is appointed by the sheriff without being assigned to perform any duties of the sheriff but being subject to assignment to duty by the sheriff from time to time as the sheriff in his discretion may determine.[19] The sheriff may be authorized to abolish the office of deputy sheriff,[20] but the county commissioners may not do so.[21]

§ 3. Constable

Generally, a constable is an officer of a municipal corporation, usually elected, whose duties are similar to those of the sheriff, although his powers are less and his jurisdiction smaller.

Generally, a constable is an officer of a municipal corporation, usually elected, whose duties are similar to those of the sheriff, although his powers are less and his jurisdiction smaller. He is to preserve the peace, execute process of magistrates' courts and of some other tribunals, serve writs, attend the sessions of the criminal courts, have the custody of juries, and discharge other functions sometimes assigned to him by the local law or by statute.[22] Constables are local peace officers of their vicinage, the ministerial officers of justices of the peace, and the bailiffs of courts of record of criminal jurisdiction in the county,[23] officers charged with a duty to the public of the gravest and most delicate nature, in which the whole commonwealth is vitally interested,[24] and originally their duty was to keep the peace, and they had no authority to serve process

13. Mont.—State ex rel. Rusch v Board of Com'rs of Yellowstone County, supra

14. Mont.—State ex rel Rusch v Board of Com'rs of Yellowstone County, supra

15. N.Y.—Broschart v City of New York, 3 N.Y.S.2d 18, 21, 166 Misc 515, affirmed 7 N.Y.S.2d 646, 255 App.Div 776.

16. Ala.—Mosely v Kennedy, 17 So 2d 536, 537, 245 Ala 448—Jefferson County v. Dockerty, 30 So 2d 469, 472, 33 Ala.App. 30, affirmed 30 So 2d 474, 249 Ala 196.

17. N.C.—Borders v. Cline, 193 S.E. 826, 829, 212 N.C. 472.
57 C.J. p 731 note 13 [2]

Distinction

There are two kinds of deputies well known in practice. First, a general deputy or undersheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the sheriff, and who executes process without special power from the sheriff, second, a special deputy, who is an officer pro hac vice to execute a particular writ in some certain action, and who acts under a specific, and not a general, appointment of authority.—Borders v. Cline, supra—Lanier v. Greenville, 93 S.E. 850, 853, 174 N.C. 311—57 C.J. p 731 note 13 [a].

18. Ohio.—State ex rel. Gever v Griffin, 76 N.E.2d 294, 300, 80 Ohio App. 447.

Special deputy sheriff held to be:

(1) Agent of sheriff.—State ex rel Geyer v. Griffin, supra

(2) Civil officer.—Reves v. State, 11 Lea, Tenn., 124, 126—57 C.J. p 1111 note 8 [a]

19. Ohio.—State ex rel Geyer v Griffin, 76 N.E.2d 294, 300, 80 Ohio App. 447.

20. N.J.—Kessel v Civil Service Commission, 34 A.2d 131, 130 N.J. Law 618

Reasons of economy

Where, two days before indictment against deputy sheriff was nolle prossed, sheriff abolished position for reasons of economy and nine other vacancies during incumbency of sheriff were not filled, and no one was appointed to position vacated by deputy sheriff, and deputy sheriff was junior in service to all other deputy sheriffs, abolition was not merely colorable, and, where there was no suggestion that public interest had been prejudiced, action of sheriff abolishing position of deputy sheriff was sustained.—Kessel v. Civil Service Commission, supra.

21. Ga.—Board of Com'rs of Richmond County v. Whittle, 178 S.E. 534, 180 Ga. 166, followed in Whittle v Board of Com'rs of Richmond County, 178 S.E. 536, 180 Ga. 170

22. Ind.—State v. Clements, 22 N.E. 2d 819, 820, 215 Ind. 666
Ohio.—Somerset Bank v. Edmund, 81 N.E. 641, 643, 76 Ohio St. 396, 11 L.R.A.,N.S., 1170, 10 Ann.Cas. 726
Pa.—In re Borough High Constables, Quar.Sess., 32 Del.Co. 335
Utah.—Rich v. Industrial Commission, 15 P.2d 641, 646, 80 Utah 511, 57 C.J. p 731 note 17.

Stands on same footing as sheriff

S.C.—State v. Franklin, 60 S.E. 953, 955, 88 S.C. 332, 338.

Constable held to be:

(1) Public officer
Ga.—McCain v. Bonner, 51 S.E. 36, 37, 122 Ga. 842, 844
Pa.—Clemens v Northampton County, Com.Pl., 26 North.Co. 109, 8 Som.Leg.J. 377, 51 York Leg.Rec. 134

(2) State officer
Mo.—State v McKee, 69 Mo. 504, 508
W.Va.—Town of Lester v. Trail, 101 S.E. 732, 733, 85 W.Va. 386.

County officer

(1) A constable has been held to be a county officer.—Croswell v Lee County Board of Com'rs, 103 S.E. 518, 114 S.C. 154

(2) He has also been held not to be a county officer.—McBrien v Starkweather, 160 S.E. 548, 549, 43 Ga.App. 818.

High constable

(1) A high constable is a municipal rather than a county officer.—Bovee v. Willis, 31 Pa.Dist. & Co. 119, 121, 19 Erie Co. 446, 51 York Leg. Rec. 162—Carthch Service v. Reber, 27 Pa.Dist. & Co. 253, 256.

(2) Distinguished from constable.—In re Appointment of High Constable of Canonsburg, Pa.Quar.Sess., 18 Wash.Co. 202, 30 Mun.L.R. 60

Deputy constable is a public officer.—Murray v. State, 67 S.W.2d 274, 276, 125 Tex.Cr. 252.

Precinct constable is not included in the term "county officers."—Rich v Industrial Commission, 15 P.2d 641, 648, 80 Utah 511.

23. Mich.—Allor v. Wayne County, 4 N.W. 492, 500, 48 Mich. 76.

24. Va.—Pearson v Brunswick County, 21 S.E. 483, 485, 91 Va. 322.

in civil actions except such as was expressly conferred on them by statute.[25] The office of constable cannot be abolished by the legislature where it has been established by the constitution.[26] Where the office of constable is not established by the constitution, it may be abolished by the legislature,[27] but the abolition thereof from a single township contravenes the constitution guaranteeing a uniform system of township government throughout the state.[28]

II. SELECTION, QUALIFICATION, AND TENURE

A. SHERIFFS

§ 4. In General

The office of sheriff ordinarily is elective, and it is usually provided that the office be filled by a person chosen by the people of the county.

The office of sheriff ordinarily is elective, and it is usually provided by the constitutions or statutes that the office be filled by a person chosen by the people of the county[29] at an election held under, and governed by, the general rules relating to popular elections.[30]

§ 5. Duty to Serve

Under some early statutes and decisions, it appears that a person elected or appointed sheriff was bound to serve.

Under some early statutes and decisions, it appears that a person elected or appointed sheriff was bound to serve.[31] A statute providing for a penalty on the refusal of a person commissioned to the office of sheriff to accept was not applicable to a person whose name is not in the sheriff's commission although the office was offered him by the county court.[32]

§ 6. Eligibility

Either at common law or by virtue of the constitutions and statutes, certain qualifications are prerequisite for the holding of the office of sheriff.

Either at common law or by virtue of the constitutions and statutes, certain qualifications are prerequisite for the holding of the office of sheriff.[33] Thus provision is made by the constitutions and statutes requiring the sheriff to be a qualified elector,[34] a resident of the county,[35] and possessed of certain property qualifications.[36] Even in the absence of constitutional or statutory provision, citizenship has been considered a prerequisite to the holding of office of sheriff.[37]

Likewise, ordinarily it is provided by the constitution or statutes that the candidate for the office of sheriff be free from certain disqualifications.[38] Thus a person may be disqualified by reason of his liability for public money unaccounted for,[39] or by

25. Mass.—Leavitt v. Leavitt, 135 Mass. 191, 193.

26. Md.—Little v. Schul, 84 A. 649, 118 Md. 454.

27. La.—Hillman v. Police Jury of Webster Parish, 133 So. 839, 840, 16 La.App. 237.
57 C.J. p. 761 note 56.

28. Nev.—Moore v. Humboldt County, 204 P. 880, 210 P. 401, 46 Nev. 220

29. S.C.—Privette v. Grinnell, 4 S.E.2d 305, 191 S.C. 376.
Wash.—State ex rel. Johnston v. Melton, 73 P.2d 1334, 192 Wash. 379.
57 C.J. p. 732 note 22.
Intent of people
Under a constitutional provision requiring the election of sheriffs and other officers, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold.—State ex rel. Johnston v. Melton, 73 P.2d 1334, 192 Wash. 379.

30. Conn.—Pratt v. Allen, 13 Conn. 119
57 C.J. p. 732 note 23.
Temporary appointment in case of vacancy see infra § 8.
Statute inapplicable
While the determination of the time for election of a sheriff is, where not provided for by constitution, within the legislative power and discretion, the statute fixing the time for the holding of the biennial general elections is inapplicable to the office of sheriff.—Privette v. Grinnell, 4 S.E.2d 305, 191 S.C. 376

31. N.C.—Collins v. Nall, 14 N.C. 457.
57 C.J. p. 732 notes 27, 28.

32. Va.—King v. McClanahan, Jeff. 9.

33. **Term "eligible"** means capacity to be elected and to hold office if chosen.—State ex rel. Haff v. Pask, 186 N.E. 809, 126 Ohio St. 633.

34. S.D.—State v. Schmidt, 173 N.W. 838, 42 S.D. 267, rehearing denied 173 N.W. 951, 42 S.D. 294.
57 C.J. p. 732 note 33.

35. Ky.—Patterson v. Miller, 2 Metc. 493
57 C.J. p. 732 note 34.

36. Md.—Roberts v. Gibson, 6 Harr. & J. 116.
57 C.J. p. 732 note 35.

37. Iowa.—State v. Van Beek, 54 N.W. 525, 87 Iowa 569, 43 Am.S.R. 397, 19 L.R.A. 622
Wis.—State v. Smith, 14 Wis. 497.

38. Ga.—Weems v. Glenn, 34 S.E.2d 511, 199 Ga. 388.

39. Ga.—Weems v. Glenn, supra
57 C.J. p. 733 note 40
Willful default
Former county tax collector is not holder of public money unaccounted for within statute relating to ineligibility to hold office merely because he failed to pay over taxes collected, with result that execution was issued and was paid by his bondsmen, and hence he could later become sheriff, where it did not appear whether the former default was willful or due to burglary or the like.—Weems v. Glenn, supra.

being an attorney at law,[40] or by a conviction of an infamous crime,[41] or by holding or exercising functions of an office under the government of the United States.[42] A judgment removing a sheriff does not disqualify him from reëlection,[43] and the pendency of a suit against him does not disqualify him as a candidate or affect the validity of his reëlection.[44] The removal of a sheriff does not necessarily render him ineligible to reelection as sheriff during the remainder of his original term,[45] although under statute, where a nomination or election has been annulled or set aside for any offense mentioned in the act, the candidate is ineligible for office during the period fixed by law for the term of office.[46]

The eligibility of a person is not established by the fact that he has been elected by the people,[47] or has been issued a certificate of election,[48] or has taken the oath of office and given an official bond as sheriff,[49] or has received a commission as such officer.[50] An election of an unqualified person has been held to be voidable merely and not void.[51]

Previous incumbency of office. In some states the the constitutions provide that the same person shall be ineligible for the office of sheriff for more than a certain number of years within a prescribed larger period of time;[52] but a limitation of this character is on the person and has no such relation to the tenure as to permit the computation, as against a pro tempore incumbent appointed to fill an unexpired term, of the time his predecessor had occupied the office.[53] Constitutional provisions prohibiting the same person from holding the office of sheriff for two successive terms have been held to apply only to full terms,[54] and not to render a person who has served the unexpired portion of a term under an appointment or election to fill a vacancy,[55] or who has been elected sheriff of a newly created county for a statutory term less than the full constitutional term and running until the next general election,[56] ineligible to reelection for the succeeding full term. So also one who has served one term is eligible for election to fill a vacancy occurring during the next ensuing term.[57]

Where a constitutional provision that sheriffs should serve two years and be eligible for only four years in any period of six was amended by increasing the term to four years and making sheriffs ineligible to reëlection, a person who was elected sheriff for a two-year term at the same election at which the amendment was adopted by the voters was eligible for reelection for a four-year term.[58] In at least one jurisdiction a person is ineligible for the office of sheriff for more than two consecutive terms,[59] and this includes holding office for part or all of such terms,[60] and the provision may not be evaded by resigning near the close of a term.[61]

Removal of disqualification. Although a sheriff, at the time of his election, is an alien, and is consequently ineligible to hold office, his naturalization as a citizen before induction to office has been held to remove this disability and entitle him to the office.[62]

§ 7. Commission and Qualification

a. In general
b. Bond

40. S.C.—State v. Boyles, 60 S.E. 233, 80 S.C. 352.
57 C.J. p. 733 note 41.

41. Pa.—Commonwealth v. Shaver, 3 Watts & S. 338.
57 C.J. p. 733 note 42.

42. Fla.—In re Advisory Opinion to Governor, 8 So.2d 26, 150 Fla. 556, 140 A.L.R. 1481, opinion supplemented 9 So.2d 172, 151 Fla. 44, 140 A.L.R. 1492.

The induction of a sheriff into the United States Army Reserve as captain does not constitute holding or exercising functions of an office under the government of the United States.—In re Advisory Opinion to Governor, supra.

43. La.—State ex rel. Riddle v. Jeansonne, 18 So.2d 306, 205 La. 818.

44. La.—State ex rel. Riddle v. Jeansonne, supra.

45. Tex.—Gordon v. State, 43 Tex. 330.

46. Mont.—State ex rel. Palagi v. Regan, 126 P.2d 818, 113 Mont. 343.

47. Ky.—Patterson v. Miller, 2 Metc. 493.

48. Ky.—Patterson v. Miller, supra.
57 C.J. p. 733 note 46.

49. Ky.—Patterson v. Miller, supra.
57 C.J. p. 733 note 47.

50. N.J.—State v. Anderson, 1 N.J. Law 318, 1 Am.D. 207.

51. N.J.—State v. Anderson, supra.
57 C.J. p. 733 note 50.

52. Ohio.—State ex rel. Haff v. Pask, 186 N.E. 809, 126 Ohio St. 633.
57 C.J. p. 733 note 52.

Provision construed

Where no person is eligible to the office of sheriff for more than four years in any period of six years, a sheriff who has served more than two years is ineligible for reelection for two-year term.—State ex rel. Haff v. Pask, supra.

53. Ind.—State v. Linkhauer, 41 N.E. 325, 142 Ind. 94.
57 C.J. p. 733 note 53.

54. Ky.—McGinnis v. Cossar, 18 S.W.2d 988, 230 Ky. 213.
57 C.J. p. 733 note 55.

55. Ala.—Black v. Pate, 30 So. 434, 130 Ala. 514.
57 C.J. p. 733 note 56.

56. Miss.—Bozeman v. Laird, 45 So. 722, 91 Miss. 719.

57. W.Va.—Gorrell v. Bier, 15 W.Va. 311.
57 C.J. p. 733 note 58.

58. Mo.—State v. Dirckx, 111 S.W. 1, 211 Mo. 568.
57 C.J. p. 733 note 59.

59. Kan.—Coates v. Camp, 173 P.2d 266, 161 Kan. 732.
57 C.J. p. 734 note 60.

60. Kan.—Coates v. Camp, supra.

61. Kan.—Coates v. Camp, supra.

62. Iowa.—State v. Van Beek, 54 N.W. 525, 87 Iowa 569, 43 Am.S.R. 397, 19 L.R.A. 622.

a. In General

Where one is elected by the people to the office of sheriff, a commission from the governor is not necessary to authorize him to act unless the issuance of such commission is made a condition precedent to his entering on the duties of the office. Statutes requiring the person elected to qualify within a prescribed time have in some cases been held to be merely directory.

Where one is elected by the people to the office of sheriff, a commission from the governor is not necessary to authorize him to act[63] unless the issuance of such commission is made, by constitution or statute, a prerequisite to his entering on the duties of the office.[64] In at least one jurisdiction, a person elected cannot receive a commission to act until a bond is approved and he otherwise qualifies under the law, but on compliance with such statutory and constitutional provisions he is entitled to his commission.[65] It is not a good objection to the validity of a sheriff's commission that it bears date prior to the expiration of the term of his predecessor where it was not to take effect until after such term expired.[66] If the governor should ascertain that he has, through mistake or otherwise, improperly issued a commission to one person when it ought to have been issued to another, he may correct the error by issuing a commission to the person legally entitled thereto.[67]

Statutes requiring the person elected sheriff to qualify within a prescribed time, failing in which the office shall be deemed vacant,[68] have in some cases been held to be merely directory.[69] The statutory directions as to the time within which a sheriff-elect must qualify are not applicable to a person to whom the election board refuses a certificate,[70] and a statute providing that the office shall be deemed vacant on the neglect or failure to qualify after notice of the election is inapplicable where the sheriff-elect receives no such notice.[71]

Where the statute provides that, when any election is contested, the person elected shall have a certain number of days in which to qualify after the date of the decision, an injunction restraining the person elected from qualifying as sheriff is so much in the nature of a contest that he will be entitled to at least a reasonable time after a decision in his favor in which to qualify.[72] Although a sheriff fails to qualify by giving a bond within the prescribed time, the exercise of the duties of the office may constitute him a de facto sheriff.[73] It is error to permit a person to qualify as sheriff where it does not appear that he has been appointed or elected to the office.[74] Where a claimant of the office of sheriff is acting as such, that circumstance, together with the certificate of election, raises the presumption that he has executed his bond and taken the oath of office.[75]

Oath. Ordinarily, as one of the requisite formalities for the qualification of a sheriff, it is provided by statute that the person chosen shall take an official oath,[76] although when the sheriff himself acts as bailiff to the jury no special oath is required.[77] In administering the oath, a clerk of court acts ministerially under the direction of the law and not of the court, and this may be done as well out of court as in court.[78] Where the sheriff-elect complies with the law as to giving bond, and offers to take the oath of office within the time allowed by statute in which to qualify, the clerk of the court may be compelled by mandamus to administer the oath.[79]

Production of receipts or settlements. Statutes requiring that a sheriff shall periodically during his term, or before being inducted into office for a second or subsequent term, produce receipts or settlements showing that his dealings with public moneys have been faithful and just must be complied with,[80] and they are not unconstitutional as imposing qualifications on the eligibility of such sheriff-elect other than those required by the con-

63. Ky.—Graves v. Hayden, 2 Litt 61.
64. Mo—State v. Pool, 41 Mo. 32, followed in State v. Morrison, 41 Mo. 238.
S.C—Richardson v. Croft, 17 S.C.L. 264.
65. Fla.—State ex rel. Davis v. Howell, 131 So. 320, 100 Fla. 1391.
66. S.C.—Treasury Comrs v Muse, 5 S.C.L. 150
67. Ind—Gulick v. New, 14 Ind. 93, 77 Am.D. 49.
57 C.J. p 734 note 70.
68. Ill.—People v. Fletcher, 3 Ill. 482.
57 C.J. p 734 note 72.
69. Ohio.—State v Paulding County, 56 N.E. 473, 61 Ohio St 506
57 C.J. p 734 note 73
70. Mich—People v. Mayworm, 5 Mich 146.
71. Tex—Dobkins v. State, Civ.App., 19 S.W.2d 574.
72. Iowa—State v. Van Beek, 54 N.W. 525, 87 Iowa 569, 43 Am.S.R. 397, 19 L.R.A. 622
73. Ga.—Crawford v. Howard, 9 Ga 314.
Va—Monteith v. Commonwealth, 15 Gratt 172, 56 Va. 172.
De facto sheriffs generally see infra § 12.
74. Ky—Johnson v. Ellis, Litt Sel Cas. 24.
75. Cal—People v. Clingan, 5 Cal 389
76. Ind.—Kirkpatrick v. King, 91 N.E.2d 785, 228 Ind. 236
57 C.J. p 735 note 81.
77. Fla—Nicholson v. State, 20 So 818, 38 Fla. 99.
78. Ill.—People v. Fletcher, 3 Ill. 482.
79. Ill.—People v. Fletcher, supra.
80. N.C—Lenoir County v. Taylor, 130 S.E. 25, 190 N.C. 336.
57 C.J. p 738 note 56.

stitution.[81] Where the statute declares that the board of county commissioners shall elect a suitable person to fill the unexpired term on the failure of the sheriff-elect to qualify by settling his accounts, a successor duly appointed and qualified is entitled to a writ of mandamus to compel the incumbent to surrender the property of the sheriff's office.[82]

Setting aside qualification It has been held that, where the court has permitted one to qualify and give bond as sheriff, it may at the same term set aside such qualification and bond.[83]

Evidence of qualification. Where the record of the court, after reciting the election of a sheriff, states that he appeared in court and took the several oaths prescribed by law, and entered into and acknowledged a bond in a named penalty with certain persons as security, the record is, in the absence of fraud, conclusive that the bond was properly executed by the persons whose names are affixed to it.[84]

b. Bond

The bond or recognizance which a sheriff-elect is required to execute or enter into for the faithful performance of the duties of his office is collateral security for the performance of such duties and operates to protect and give indemnity to all persons who may be damnified by neglect or failure in the performance of such duties

A sheriff-elect is required to execute or enter into a bond or recognizance for the faithful performance of the duties of his office,[85] and such bond or recognizance is collateral security for the performance of his duties[86] and operates to protect and give indemnity to all persons who may be damnified by neglect or failure in the performance of such duties.[87] Statutes requiring bonds, however, have been held not to affect the capacity of the sheriff to execute judicial process without having executed a bond[88] or to sue a receiptor in conversion for personal property delivered on an attachment.[89] It has been held also that the irregularity of inducting a sheriff into office without all the bonds required by law is cured by a subsequent tender and acceptance thereof.[90] In at least one jurisdiction a recognizance is a security or obligation entirely distinct from the bond,[91] having different characteristics and affording separate remedies,[92] although both are to secure the faithful performance and execution of the sheriff's official duties.[93]

Form and sufficiency A failure to comply literally with the form of bond prescribed by statute does not invalidate the bond,[94] since it is sufficient if the conditions of the bond are substantially and in effect the same as those prescribed by the statute,[95] and a bond which has been accepted and approved is not invalidated by the fact that the obligee is not the obligee designated by the statute.[96] In the absence of a clear intent to the contrary, statutory conditions will be read into the bond.[97] A bond, executed in the form and for the sum pre-

81. N C—Lee v Dunn, 73 N C. 595
57 C J p 738 note 57.

82. N C—Lenoir County v Taylor, 130 S.E 25, 190 N C. 336

83. Va—Bunting v. Willis, 27 Gratt 144, 68 Va 144, 21 Am.R 338.

84. Va—Calwell v. Commonwealth, 17 Gratt 391, 58 Va. 391

85. Ark—Gower v Looney, 133 S.W 2d 451, 199 Ark 272
Ga—Walker v Whittle, 64 S E 2d 87, 83 Ga.App 367.
Ind—Kirkpatrick v King, 91 N.E 2d 785, 228 Ind 236
Pa.—Milliken v. Taylor, 24 Pa.Dist & Co 531, 41 Dauph Co. 269
57 C J p 735 note 85

"During the continuance in office"
Va—Commonwealth v. Fairfax, 4 Hen & M. 208, 14 Va. 208
13 C.J. p 118 note 58 [a] (4).

86. Ill.—People v Wochner, 244 Ill. App. 30
Pa—Keating v White, 15 A.2d 396, 141 Pa Super 495.

87. Ga—Walker v. Whittle, 64 S.E 2d 87, 83 Ga.App 367
Mich.—Bay County v. Brock, 6 N.W 101, 44 Mich. 45.

Security for enforcement of cause of action
The wrong committed by the sheriff is the substantial and actual foundation of the cause of action against a surety on the bond The sheriff's bond is only collateral security for the enforcement of such cause of action. It does not give the cause of action It is the wrong which gives that, and the bond simply furnishes security to indemnify the person who suffered because of the wrong
Idaho—Oakes v. American Surety Co of New York, 76 P 2d 932, 58 Idaho 482
Kan—Ryus v Gruble, 3 P. 518, 31 Kan 767

Purpose of bond
(1) Purpose of official bond of sheriff is to provide indemnity against malfeasance, nonfeasance, and misfeasance in office—Gray v. De Bretton, 188 So 722, 192 La 628

(2) Official bonding system for sheriffs was created with sole purpose of protecting public against abuse of extraordinary powers conferred on sheriffs, and it was in no way intended to furnish protection against abuse of those general and ordinary powers which they as non-officials formerly possessed and were accustomed to exercise—Nelson v. Bartell, 103 P 2d 30, 4 Wash 2d 174

88. La—Mechanics', etc, Bank v Labiche, 3 La Ann 539.

89. Vt.—Taylor v. Nichols, 29 Vt 104.

90. N.C.—People v. Smith, 81 N C 304

91. Pa.—Keating v. White, 15 A 2d 396, 141 Pa Super 495—Commonwealth, to Use of Blystone v. Davis, 186 A 382, 122 Pa Super 280

92. Pa—Commonwealth, to Use of Blystone v. Davis, supra.

93. Pa—Keating v. White, 15 A 2d 396, 141 Pa Super 495.

94. Md—Young v. State, 7 Gill & J 253.

95. Kan.—McCracken v. Todd, 1 Kan 148.
57 C J. p 735 note 94

96. Mich.—Bay County v. Brock, 6 N W. 101, 44 Mich 45.
57 C J. p 735 note 95.

97. Kan.—Farmer v. Rutherford, 15 P.2d 474, 136 Kan. 298.

scribed by law, is not vitiated by having annexed to the names of some of the sureties words expressing the true liability of the parties.[98] Where, under the statutes, the sureties are jointly and severally liable, it is immaterial whether the bonds are signed by the sureties on the same date or on different dates,[99] or whether the date of each bond was in fact the date on which the bond was signed[1] Where the bonds are signed by personal sureties instead of by a surety company authorized to do business in the state, the clerk may refuse to accept or file the bonds.[2]

Where the statute provides that the sureties shall justify before a designated tribunal or official, if no sufficient sureties are offered or those offered refuse to justify, the sheriff-elect is not entitled to a peremptory mandamus to the designated tribunal to induct him into office.[3] In the absence of a statute requiring a sheriff's official bond to be acknowledged by the signers thereof, such acknowledgment is not necessary to its validity,[4] and, although the law may require the bond to be acknowledged in open court, the omission of this formality does not invalidate the bond[5] Where there is not a local chief judge in each county, a statute requiring a sheriff's recognizance to be taken before the first judge of the county court is complied with by its being taken before the assistant judge of the county whose name appears first in order upon the record of the election.[6]

Amount. The penalty of a sheriff's bond is usually fixed by statute; but a bond in a larger penalty may be required when the exigencies of the case demand it[7] When a sheriff's official bond has been accepted, it is not void because the penalty is less than is required by the statute.[8]

Delivery, approval, filing, and recording Where the statute requires that the sheriff's bond, in order that it may become effective as a part of his qualifications, shall be delivered, accepted, and approved by a designated officer or tribunal, the bond becomes operative only on delivery to the person authorized to receive it[9] The statutory provisions for the approval and filing of the bond are for the benefit and security of the public[10] Unless a statutory provision or order of court designates the mode of delivery, there is no precise form in which the delivery must be made, but it is sufficient if it is made by any acts or words which show an intention of the obligors to perfect the instrument[11] In the absence of a showing to the contrary, it will be presumed that a bond in the possession of the proper authorities has been accepted[12] If the principal delivers the bond contrary to an understanding with the sureties that it shall not be delivered until others have become obligated thereon, the sureties are nevertheless bound unless the obligee has accepted it with notice of the conditions under which the bond was intrusted to the principal.[13]

Ordinarily the sheriff's bond must be approved by a designated tribunal or official,[14] whose duty to approve is ministerial and not judicial,[15] and who, in respect of the approval of the bond, has no discretion other than to determine whether the security offered is sufficient,[16] and after approval his duties with respect thereto cease.[17] Where the statute empowers and requires the board of supervisors to approve the sheriff's bond, its approval of a bond, in which all the substantial requirements appear, is conclusive.[18] A duly elected sheriff is entitled to have the bond presented by him passed on and, if sufficient, approved by the officers whose approval is required by statute,[19] and if the bond is rejected for an insufficient or improper reason the proper remedy, it has been held, is mandamus to compel an acceptance of the bond,[20]

98. N.Y.—State v. Yates, 3 Hill 230. 57 C.J. p. 735 note 96.

99. Ky.—Gay v. Jackson County Board of Education, 265 S.W. 772, 205 Ky. 277.

1. Ky.—Gay v. Jackson County Board of Education, supra.

2. Ark.—Gower v. Looney, 133 S.W. 2d 451, 199 Ark. 272.

3. Tenn.—Thomason v. Justices, 3 Humphr. 233

4. Va.—Washington County v. Dunn, 27 Gratt. 608, 68 Va. 608.

5. N.C.—McLean v. Buchanan, 53 N.C. 444.

6. Vt.—Wing v. Gleason, 36 Vt. 371.

7. Ala.—Burnett v. Nesmith, 62 Ala. 261
57 C.J. p. 736 note 8.

8. Ky.—Grimes v. Butler, 1 Bibb 192

9. Ala.—McLure v. Colclough, 17 Ala. 89

10. S.D.—Gray v. Sanderson, 238 N.W. 137, 59 S.D. 41.

11. Ala.—McLure v. Colclough, 17 Ala. 89
57 C.J. p. 736 note 13.

12. Tex.—Wright v. Leath, 24 Tex. 24.

13. W.Va.—Raleigh County Ct. v. Cottle, 92 S.E. 110, 79 W.Va. 661, Ann.Cas.1918D 510.
57 C.J. p. 736 note 15.

14. S.C.—Spivey v. Fidelity & Deposit Co. of Maryland, 160 S.E. 275, 162 S.C. 146.
57 C.J. p. 736 note 16.

15. Ala.—Ex parte Candee, 48 Ala. 386

16. Ind.—Gulick v. New, 14 Ind. 93, 77 Am.D. 49.

17. Ill.—People v. Fletcher, 3 Ill. 482

18. Mich.—Bay County v. Brock, 6 N.W. 101, 44 Mich. 45.

19. Pa.—In re Ewing, 4 Phila. 370

20. Ala.—Ex parte Candee, 48 Ala. 386
57 C.J. p. 737 note 22.

and not a proceeding in quo warranto to oust the former incumbent from office.[21]

Under a statute providing for the filing of the bond with the clerk of court it is improper to deposit the bond with the court.[22] The clerk may be compelled by mandamus to receive a bond which has been executed within the prescribed time and approved by the judge.[23]

Although the bond is not recorded as provided by statute, it is nevertheless valid[24] Where no separate book is designated for the recording, a registry in the mortgage book has been held sufficient.[25] The proper court should keep a record of the delivery and acceptance of sheriffs' bonds,[26] and enter the approval of such bonds upon the minutes,[27] although a failure to do these things does not prevent the enforcement of a bond regularly given and accepted.[28]

Validity of bond. The validity of a bond accepted and approved by a judge of the county court cannot be affected by his negligence or mistake in the performance of an act not within the scope of his official duties[29] Where a sheriff's bond is joint and several, it is not invalidated by the sheriff's failure to sign it[30] It has been held that a sheriff's official bond which is not accepted by the county court within the time fixed by statute is void, although it was executed within such time,[31] but it has also been held that a bond given voluntarily by the sheriff after the time limited by statute, although bad as a statutory bond, is good as a common-law bond.[32] The failure of the justices of the orphans' court to attest a sheriff's bond does not affect its validity.[33] Where a sheriff's bond is given to "the justices composing" the county court, and one of such justices is also one of the obligors, the bond is void.[34] A sheriff's bond will not become void by a failure to take and subscribe the oath of office.[35]

Periodic renewal of bond. The sheriff is sometimes required by statute to renew his official bond periodically during his term of office,[36] and on his failure to comply with such a requirement his office may be declared to have become vacant.[37] Where the sheriff is not absolutely required to renew his general official bond annually, but it is the duty of the court to cause him to do so, unless the court requires a renewal there is no forfeiture of office[38]

New or additional bonds. Although a sheriff has been already inducted into office, and is acting under an official bond, duly executed and approved, there is nothing to prevent him from voluntarily executing another official bond[39] A statute providing that in case of the death, removal, or insolvency of a surety, or on application of a surety to be discharged from the bond, the sheriff, at the risk of a vacancy in office, must give new or additional security within a prescribed time, is not in conflict with a constitutional provision that sheriffs shall hold their offices for a specified term.[40]

A statute providing that the surety of any clerk or any other public officer may notify his principal that further security is required at the risk of a vacancy in office is applicable to a sheriff.[41] A statute providing that the court may require the sheriff to give an additional bond or bonds is applicable, without express mention, to the various bonds required of the sheriff under statutory provisions[42] On a proper application of a surety to be discharged, the duties of the court under some statutes are purely ministerial rather than judicial,[43] and if the court certifies a vacancy when in fact none exists an appointment by the governor is void and does not affect the rights of the incumbent.[44]

21. Ohio—State v. Lewis, 10 Ohio St 128

22. La—State v Armstrong, 1 Mart .N S. 269
57 C.J p 737 note 25.

23. Ill—People v Fletcher, 3 Ill 482

24. N C—McLean v. Buchanan, 53 N C 444.

25. La.—Copeley v. Dinkgrave, 7 La Ann 595

26. Or.—Baker County v Huntington, 79 P. 187, 46 Or 275

27. Or.—Baker County v. Huntington, supra.

28. Or.—Baker County v. Huntington, supra.

29. Ala—McLure v. Colclough, 17 Ala 89.
57 C J p 737 note 36.

30. Idaho.—State v McDonald, 40 P 312, 4 Idaho 468, 93 Am S R. 137.

31. Ky—Commonwealth v Yarbrough, 2 S W. 68, 84 Ky 496, 8 Ky L 483

32. Ga—Crawford v Howard, 9 Ga. 314—Stephens v Crawford, 1 Ga 574, 44 Am D 680.

33. Md—Young v. State, 7 Gill & J 253.

34. N C—Dickey v. Alley, 15 N.C 43

35. Ill.—Davis v. Haydon, 4 Ill. 35

36. Ky.—Renshaw v. Cook, 111 S.W 377, 129 Ky 347, 33 Ky.L. 860, 895
57 C.J. p 737 note 44.

37. Ky.—Schuff v. Pflanz, 35 S.W 132, 99 Ky. 97, 18 Ky L. 25.
57 C.J p 737 note 45.

38. Ky—Leslie County v. Eversole, 2 S W.2d 644, 222 Ky. 793

39. Ala.—Johnson v. Caffrey, 59 Ala 331.

40. S C—State v. Taylor, 18 S C L 524.

41. Ky.—Catching v. Davis, 3 B Mon. 61.

42. Ky—Fidelity, etc, Co v Brown, 20 S W.2d 284, 230 Ky. 534.

43. Ala—Bruner v. Bryan, 50 Ala. 522
57 C J. p 738 note 54.

44. Ala.—Bruner v. Bryan, supra

§ 8. Term of Office, Holding Over, and Vacancies

a. Term of office
b. Holding over
c. Vacancies

a. Term of Office

Ordinarily the term of office of sheriff is fixed by constitutional or statutory provisions.

Ordinarily the term of office of sheriff is fixed by constitutional or statutory provisions[45] Where the term of office is prescribed by the constitution, it is not within the power of the legislature to prolong or diminish it,[46] although such term may be changed by constitutional amendment.[47] In the absence of constitutional restrictions, the legislature having the power to create the office may fix the term thereof.[48] A statute providing that on the expiration of his term he shall vacate his office, but shall collect delinquent tax bills, does not extend the sheriff's term.[49]

Under some constitutional and statutory provisions the term of sheriff begins on his election or qualification and runs for a certain period thereafter,[50] or it may begin on a certain day after the election[51] A person who is elected to the office and qualifies is entitled to hold it for the full term to which he was elected,[52] and the term expires at the end of the particular term for which he was elected.[53] Where a sheriff is elected for a term of fixed length merely, and not with reference to some designated time when his tenure shall commence, his election entitles him to the office from the time that the term of his predecessor expires,[54] and if his predecessor dies or resigns before the expiration of his term the new sheriff is thereupon entitled to the office at once.[55]

It has been held that a constitutional provision that sheriffs shall hold their offices for two years means that the term of a sheriff shall be from one general election to another and not exactly two calendar years;[56] but it has also been held that where, under the law, an election gave only a right to be inducted into the office a provision that sheriffs should hold office for two years meant calendar years.[57] A statute changing the date of the commencement of the terms of sheriffs has been held void as creating a vacancy which in some counties could not be filled by the incumbent of the office holding over by reason of a constitutional limitation of tenure.[58] The induction of a sheriff

45. Ind.—Kirkpatrick v King, 91 N.E.2d 785, 228 Ind 236
S.C.—Privette v Grinnell, 4 S.E.2d 305, 191 S.C. 376

46. S.C.—Privette v. Grinnell, supra.
57 C.J. p 738 note 68
Continuance not implied
Provision continuing incumbent sheriff's term to end of odd-numbered year could not be implied in amended section of constitution dealing with election of city officers and certain county officers to be held in odd-numbered years, particularly in view of fact that, on adoption of like constitutional amendments in past, provision was expressly made for extension of incumbent's term of office until end of odd-numbered years.—Fitzgerald v. Cohen, 22 N.Y.S.2d 863, 175 Misc. 148, affirmed 22 N.Y.S.2d 527, 260 App.Div. 804.

47. N.C.—Freeman v. Cook, 6 S.E.2d 894, 217 N.C. 63.
Construction
(1) Word "years" is used as meaning official years, which may or may not correspond with calendar years.—Kirkpatrick v. King, 91 N.E.2d 785, 228 Ind 236.

(2) In constitutional amendment providing that, notwithstanding any other provision "hereof," sheriff of each county shall be elected at 1950 general election and each four years thereafter, quoted word refers to constitution which previously fixed sheriff's term at two years, and as thus construed amendment is not ambiguous.—Kirkpatrick v. King, supra.

(3) Sheriffs elected at 1948 general election for terms commencing Jan 1, 1950, would continue to hold office until Jan. 1, 1955, by virtue of proviso in constitutional amendment providing that sheriff holding office on Dec 31, 1950, who had been elected to such office for a period of less than two consecutive years immediately preceding should continue in office for four-year term commencing Jan 1, 1951, but proviso did not extend for additional four years terms of sheriffs elected in 1948 for two-year term from Jan 1, 1949, to Dec. 31, 1950.—Kirkpatrick v. King, supra.
Submission to voters
When general assembly authorized submission to voters of amendment increasing term of office of sheriff from two to four years and voters came to vote on question of its adoption, it is presumed that each acted in light of existing law fixing the first Monday of December next ensuing general election in November as time for beginning of term of office of sheriffs elected at such election.—Freeman v. Cook, 6 S.E.2d 894, 217 N.C. 63.

48. N.Y.—O'Brien v. Boyle, 114 N.E. 68, 219 N.Y. 195.
57 C.J. p 738 note 65.

49. Ky.—Madison County v. Hamilton, 47 S.W.2d 938, 243 Ky. 29.

50. Ala.—Garner v. Clay, 1 Stew 182
57 C.J. p 738 note 70.

51. N.C.—Freeman v. Cook, 6 S.E.2d 894, 217 N.C. 63.

52. Wis.—State v. Saxton, 13 Wis 168.
57 C.J. p 738 note 66.

53. N.Y.—Fitzgerald v. Cohen, 22 N.Y.S.2d 863, 175 Misc. 148, affirmed 22 N.Y.S.2d 527, 260 App.Div 804
Election in odd-numbered year
The term of the sheriff, who was elected for a term of three years in the general election of 1937, would expire at the end of 1940, notwithstanding that under the constitution an election for that office could be held only in odd-numbered years.—Fitzgerald v. Cohen, supra.

54. Ala.—State v. Spence, 7 Ala 500.

55. Ala.—State v Spence, supra.

56. Miss.—Thornton v. Boyd, 25 Miss 598.
57 C.J. p 739 note 73.

57. Tenn.—Burt v Bobo, 4 Sneed 234
57 C.J. p 739 note 74.

58. Ohio.—State v Heffner, 52 N.E. 785, 59 Ohio St. 368.
57 C.J. p 739 note 75.

into office before the beginning of the term for which he was elected is a nullity.[59]

b. Holding Over

In the absence of constitutional or statutory restriction and sometimes by virtue of the constitution and statutes, a sheriff is entitled to hold his office until his successor is duly elected and qualified.

In the absence of constitutional or statutory restriction and sometimes by virtue of the constitution and statutes, a sheriff is entitled to hold his office until his successor is duly elected[60] and qualified,[61] and so, where a constitutional amendment or statutory provision readjusting the times of holding elections leaves an interval between the expiration of the term of a sheriff and the time when his successor can be elected, the incumbent is entitled to hold over during such period,[62] although no provision is made by the constitutional amendment or by statute for such interval,[63] and even though the effect of such holding over is to continue him in office for a longer consecutive period than is permitted by the constitution.[64]

A constitutional or statutory provision providing that every officer shall hold his office until his successor is elected or appointed and qualified applies to the office of sheriff.[65] The indefinite portion of time indicated by the phrase "until his successor shall be qualified" is as much a part of the term of office as the time which the sheriff is entitled absolutely to hold.[66] A sheriff, by assuming office under a new term following an election which was subsequently declared to be void, abandons his rights as a holdover.[67]

c. Vacancies

(1) In general
(2) Filling vacancies

(1) In General

Where a sheriff-elect is entitled, on qualifying, to hold office for a specified term, anything which prevents him from so doing creates a constructive or virtual vacancy in the office for his entire term.

Where a sheriff-elect is entitled, on qualifying, to hold office for a specified term, anything which prevents him from so doing creates a constructive or virtual vacancy in the office for his entire term,[68] which is as effectual to authorize an appointment to fill the office as a literal vacancy caused by his death after qualifying would be;[69] and hence, where the sheriff-elect dies after the term of his predecessor has expired, although before he has received notice of his election, the previous incumbent is not entitled to hold over for the succeeding term.[70] The office cannot be deemed vacant when it is in the possession of one designated by law to hold it through a prolongation of his term until his successor can be not only elected or appointed, but also qualified.[71] Where a sheriff holds over under an appointment to fill a vacancy, the arbitrary refusal of the county clerk to accept and approve a proper official bond does not create a vacancy.[72] No vacancy occurs when a sheriff is inducted into the armed forces of the United States.[73]

The expiration of a term creates a vacancy in office,[74] especially where the incumbent does not hold over,[75] and failure of the legislature to prescribe that the office shall be deemed vacant at the expiration of a term of an incumbent lawfully elected thereto does not change the fact that on such expiration the office is vacant.[76] A vacancy has been held to exist where there is no de jure sheriff,[77] and whenever the office is not occupied by some one elected by the people, and a particular period of time has intervened between the beginning

59. N.C.—People v. Smith, 81 N.C. 304.

60. S.D.—State v. Vincent, 104 N.W. 914, 20 S.D. 90.
57 C.J. p. 739 note 79.

61. Ind.—State v. Linkhauer, 41 N.E. 325, 142 Ind. 94
57 C.J. p. 739 note 80.

62. Kan.—Pruitt v. Squires, 68 P. 643, 64 Kan. 855.
57 C.J. p. 739 note 81.

63. Kan.—Pruitt v. Squires, supra
57 C.J. p. 739 note 82

64. Ohio—State v. Harris, 83 N.E. 912, 77 Ohio St. 481
57 C.J. p. 739 note 83.

65. Tenn.—State v. Malone, 174 S.W. 257, 131 Tenn. 149.
Wis.—State v. Johnson, 184 N.W. 683, 186 N.W. 729, 176 Wis. 107.

66. Kan.—Pruitt v. Squires, 68 P. 643, 64 Kan. 855.

67. Mont.—State ex rel. Kommers v. District Court of Eighth Judicial Dist. in and for Cascade County, 96 P.2d 271, 109 Mont. 287.

68. Ohio—State v. McGregor, 10 N.E. 66, 44 Ohio St. 628
57 C.J. p. 739 note 89

69. Tex.—Maddox v. York, 54 S.W. 24, 21 Tex. Civ.App. 622.

70. Tex.—Maddox v. York, supra.

71. Kan.—Pruitt v. Squires, 68 P. 643, 64 Kan. 855.
57 C.J. p. 740 note 92.

72. Neb.—State v. Willott, 174 N.W. 429, 103 Neb. 798.

73. Fla.—In re Advisory Opinion to Governor, 8 So.2d 26, 150 Fla. 556, 140 A.L.R. 1481, opinion supplemented 9 So.2d 172, 151 Fla. 44, 140 A.L.R. 1492
Expiration of leave of absence
Where a sheriff who had been inducted into the United States Army Reserve as a captain had been granted a thirty-day leave of absence by the governor, there would be no "vacancy," with respect to governor's power to fill vacancies in office, in sheriff's office on expiration of the thirty days.—In re Advisory Opinion to Governor, supra.

74. N.Y.—People v. Voorhis, 125 N.E. 86, 227 N.Y. 167.

75. N.Y.—People v. Voorhis, supra.

76. N.Y.—People v. Voorhis, supra.

77. Ky.—Wilson v. Vanbeber, 65 S.W.2d 1021, 251 Ky. 735.

of the vacancy and the annual election of officers[78] The term "vacancy" is said to relate not only to the office which is to be filled, but to the term for which the appointment is to be made.[79] Under various constitutional or statutory provisions the office of sheriff may be declared vacant because of the ineligibility of the sheriff,[80] or the failure of the sheriff to give a new bond when required,[81] or the unauthorized and protracted absence of the sheriff from the county[82]

The failure of a sheriff to execute or renew the official bond required by the statute has been held not ipso facto to vacate his office,[83] but is merely a cause of forfeiture and vacancy which may be declared in a proper judicial proceeding,[84] but it has also been held that no formality of trial before the county commissioners' court is necessary to determine whether the office has become vacant by failure to give bond[85] A sheriff's acceptance of an incompatible office ipso facto vacates the office of sheriff,[86] or, according to other authority, warrants a declaration by the court that the office is vacated.[87] If the court accepts a bond not executed until after the time prescribed by the statute, it cannot subsequently declare the office vacant for failure to give the bond in time[88] Under a statute providing that, when certain grounds for the removal of the sheriff shall be presented to the governor, he shall publish a proclamation declaring the office vacant, and the office shall thereby and thereafter immediately be vacated, on such proclamation the office becomes vacant,[89] and it is not necessary to await the refusal of reinstatement by the governor in order to have a vacancy in the office.[90]

A vacancy in the office of sheriff which may be filled by appointment implies that no one has any title to the office,[91] and such a vacancy does not exist when judgment of ouster against the incumbent of the office is obtained on quo warranto on the ground that relator has a superior title.[92] The vacancy is to be declared by the officer or court designated by the statute,[93] but a statute authorizing a designated officer to certify to the executive the existence of the facts which under the law create a vacancy does not authorize such officer to declare the office vacant,[94] and if such officer certifies a vacancy when in fact none exists an appointment to fill such supposed vacancy is void and does not affect the right of the incumbent.[95]

Death. While the office of sheriff becomes vacant by the death of the incumbent during his term of office,[96] a vacancy in the office is not deemed to occur as a result of the death of one elected before the beginning of the new term where deceased has not qualified and where the term of the incumbent continues until a successor is appointed[97] Where the incumbent sheriff dies after his election to a new term but before he had qualified and before the expiration of his old term, the death creates a vacancy in the old term but not in the new term.[98]

(2) Filling Vacancies

The filling of a vacancy in the office of sheriff, which is not provided for by the constitution, is within the legislative power and discretion.

The filling of a vacancy in the office of sheriff, which is not provided for by the constitution, is within the legislative power and discretion,[99] and where the term of office of the sheriff is made to correspond with the general elections by the people, and the constitution makes no provision for

78. Ky.—Wilson v. Vanbeber, supra.

79. Colo.—People v. De Guelle, 105 P. 1110, 47 Colo 13.

80. Wis.—State v Johnson, 177 N. W. 899, 171 Wis 521.

81. Ky.—Clark v. Anderson, 190 S. W 2d 342, 300 Ky. 727.
57 C.J. p 740 note 1.

Time of filing

Where sheriff failed to file revenue bond by June 1 as required by statute, county judge properly declared office vacant and appointed a new sheriff to fill the vacancy even though other bonds required of sheriff may have been filed and although sheriff made a tardy application for leave to file revenue bond—Clark v. Anderson, supra.

82. Ky.—Stokes v. Kirkpatrick, 1 Metc. 138
57 C.J. p 740 note 2.

83. N J.—Clark v. Ennis, 45 N.J. Law 69.
57 C J. p 740 note 7.

84. Ala.—Ex parte Candee, 48 Ala. 386.
57 C.J. p 740 note 8.

85. Tex.—Flatan v. State, 56 Tex 93.
57 C.J. p 740 note 9.

86. Va.—Shell v. Cousins, 77 Va. 328.

87. Ky.—Stokes v. Fitzpatrick, 1 Metc. 138.

88. Ky.—Schuff v. Pflanz, 35 S.W. 132, 99 Ky. 97, 18 Ky.L. 25.

89. Ill.—People v. Nellis, 94 N.E 165, 249 Ill. 12.

90. Ill.—People v. Nellis, supra.

91. Mo.—State v. Ralls County Ct., 45 Mo. 58.

92. Mo.—State v. Ralls County Ct., supra.

93. Tex.—Flatan v. State, 56 Tex 93
57 C J. p 740 note 18.

94. Ala.—Hill v. State, 1 Ala. 550.

95. Ala.—Bruner v. Bryan, 50 Ala. 522
57 C J. p 741 note 20.

96. Ky.—Wilson v. Vanbeber, 65 S. W 2d 1021, 251 Ky 735.
57 C.J. p 741 note 22.

97. Tenn.—State v. Malone, 174 S. W, 257, 131 Tenn. 149.

98. Ohio.—State ex rel. Smith v. Hummel, 66 N.E.2d 111, 146 Ohio St. 341.

99. S C.—Privette v. Grinnell, 4 S.E 2d 305, 191 S.C. 376.

filling vacancies which may occur during the term, the mode of filling vacancies in the office is within the control of the legislature.[1] The power granted to the legislature to provide for filling vacancies does not imply a power to create an interval between the official terms of two persons elected to fill the office.[2]

By appointment. There can be no appointment in the office of sheriff until a vacancy occurs.[3] The power of appointment is exhausted when once exercised, and any subsequent appointment, until the incumbent has been removed or the office has become vacant, is void.[4] Constitutions and statutes ordinarily provide that under certain circumstances the office of sheriff may be filled by an appointment by the governor,[5] by county commissioners,[6] by a county court,[7] by commissioners of the court,[8] by the district judge,[9] or by the judge of probate, county clerk, and prosecuting attorney,[10] but a district court has been held to have no power to fill it.[11] Where the incumbent of the office of deputy sheriff cannot succeed to the duties of sheriff because of his ineligibility, the governor may appoint a sheriff.[12] A constitutional provision that the governor may appoint a sheriff to fill a vacancy is not abridged by a provision of a statute that the deputy sheriff may continue the duties of a deceased sheriff.[13] A statute authorizing the governor to fill vacancies by appointment is valid, although the constitution provides that sheriffs shall be chosen by the electors, and fails to confer the power of appointment on the governor in any case.[14] A constitutional requirement that sheriffs shall be chosen by the electors as often as vacancies shall occur does not mean that such vacancies may not be filled temporarily by the governor.[15] If the governor does not appoint a party to fill the vacancy, it is error to permit such party to qualify.[16] An appointment by the executive is complete on the delivery of the commission, and such commission is at least prima facie evidence that the person holding it is lawfully entitled to the office.[17]

Except where the term of office of an appointee is regulated by constitutional or statutory provi-

1. Ark.—State v. Crow, 20 Ark. 209

2. Ohio.—State v Heffner, 52 N.E. 785, 59 Ohio St 368.

3. Tenn.—State v Malone, 174 S W 257, 131 Tenn 149

4. S D.—State v. Vincent, 104 N W 914, 20 S D 90.

5. Fla.—In re Advisory Opinion to the Governor, 9 So 2d 172, 151 Fla 44, 140 A L R 1492.
Pa.—Commonwealth v. Milliken, 24 Pa Dist & Co. 519.

Election in odd-numbered years

Where the office of sheriff can be filled only in an election to be held in odd-numbered years, a vacancy, if any should occur on Jan 1, 1941, would be required to be filled by gubernatorial appointment.—Fitzgerald v Cohen, 22 N Y S 2d 863, 175 Misc 148, affirmed 22 N.Y S.2d 527, 260 App Div 804

Unexpired term less than one year

(1) Under constitution, governor had authority to fill vacancy in office of sheriff for unexpired term of less than year by appointment, if senate was in session and confirmed the appointment, but could not by recess appointment fill vacancy in office for unexpired term of less than one year.—State ex rel Palfrey v. Judges of Criminal District Court of Parish of Orleans, 5 So 2d 756, 199 La. 232

(2) Fact that legislature would not meet in regular session until after expiration of sheriff's unexpired term of office of less than year, so that person appointed to vacancy in such office by judges of criminal district court pursuant to constitutional provision conferring authority on judges to fill vacancy temporarily until vacancy is filled by appointment as provided by law, would probably serve until end of term, did not permit departure from constitutional provisions limiting governor's recess appointment to fill vacancy in office of sheriff for term of less than year to cases not otherwise provided for in constitution.—State ex rel Palfrey v. Judges of Criminal District Court of Parish of Orleans, supra.

(3) Where incumbent sheriff died on June 1 and it appeared that upon the following April 18 a successor would be elected for a full term, and that successor could take office on May 19, unexpired portion of term of incumbent sheriff was less than one year and governor had right to fill vacancy.—Blaize v. Hayes, 15 So 2d 217, 204 La. 263, rehearing denied 15 So.2d 228, 204 La. 298.

6. N C.—Freeman v. Cook, 6 S E.2d 894, 217 N C. 63
Ohio.—State ex rel. Grace v. Board of Elections of Franklin County, 78 N E 2d 38, 149 Ohio St 173.—State v. Paulding County, 56 N.E. 473, 61 Ohio St. 506.

7. Ky.—Wilson v. Vanbeber, 65 S W.2d 1021, 251 Ky. 735.

8. Tex.—Flatan v. State, 56 Tex. 93.

9. La.—State ex rel. Palfrey v. Judges of Criminal District Court of Parish of Orleans, 5 So 2d 756, 199 La 232
57 C J p 741 note 32 [c].

10. Mich.—Attorney General ex rel Baird v Johnson, 293 N W 545, 294 Mich 250.

Notice

Jurisdiction does not depend on notice mentioned in statute providing that notice of vacancy in public office shall within ten days be given in writing to those having power of appointment, since such notice is intended to bring action, and, if action is had in proper instance without such notice, purpose of statute of not leaving a public office vacant, is accomplished.—Attorney General ex rel. Baird v Johnson, supra

Number of judges participating

Fact that only three of the four county probate judges participated in the making of an appointment to fill vacancy in office of sheriff did not make appointment invalid.—Attorney General ex rel Baird v. Johnson, supra.

11. Tex.—Leonard v. Speer, Civ. App., 48 S W 2d 474, error dismissed, Com App., 56 S W.2d 640.

12. Miss.—State v. Nichols, 63 So 1025, 106 Miss 419.
57 C J p 741 note 33.

13. Miss.—Baker v. Nichols, 72 So 1, 111 Miss 673.

14. Wis.—Sprague v. Brown, 40 Wis 612.

15. N Y.—In re Mitchell, 114 N E 382, 219 N.Y. 242.

16. Ky.—Johnson v. Ellis, Litt.Sel. Cas. 24.

17. N M.—Conklin v. Cunningham, 38 P. 170, 7 N.M. 445.

sions,[18] as a rule such appointments are merely temporary and are operative only until a new sheriff can be elected,[19] and do not give the appointee the right to the office for the entire unexpired term of his predecessor.[20] Where a sheriff is reelected to succeed himself, but dies before qualifying, an appointee under particular constitutional and statutory provisions serves only until the expiration of the first term of the deceased sheriff,[21] and until the election and qualification of his successor.[22] Where the constitution restricts the length of time an appointee may serve, the legislature cannot enlarge the term.[23] An appointee to fill a vacancy holds, however, for the period fixed in the statute, without regard to the time the appointing power may fix for his tenure of office,[24] and holds office from the date of appointment and qualification and not from the date of the receipt of the commission.[25]

It has been held that a sheriff appointed to fill a vacancy is entitled to the benefit of a general statutory provision that officers shall hold over until their successors are elected and qualified.[26] It has also been held, however, that where one is appointed to fill a vacancy for an unexpired term his right to the office ceases on the expiration of the term for which he was originally appointed, and he is not entitled to hold over, although the sheriff elected for the succeeding term fails to qualify or the election for such term is void, but in such case there is again a vacancy in the office which can be filled by another appointment.[27]

By election. The policy of the states with respect to vacancies in elective offices such as the office of sheriff is to fill them by election as soon as is practicable,[28] but a constitution providing for the filling of vacancies by election does not mean that they must be filled by election as soon as they occur.[29] Ordinarily it is provided by the constitutions and statutes that the office of sheriff be filled for the unexpired term at the next general election or at a special election held for the purpose.[30] A stat-

18. Ohio—State v. McGregor, 10 N.E. 66, 44 Ohio St 628.
57 C.J. p 741 note 39.

19. Fla—In re Advisory Opinion to the Governor, 9 So 2d 172, 151 Fla 44, 140 A.L.R. 1492—State ex rel Landis v. Taylor, 146 So 549, 108 Fla 541
Kan—Moore v. Smith, 160 P 2d 675, 160 Kan. 167.
Ky.—Jordon v Baker, 66 S.W.2d 84, 252 Ky 40, 93 A.L.R 813
Ohio—State ex rel Grace v Board of Elections of Franklin County, 78 N.E 2d 38, 149 Ohio St. 173—State ex rel Smith v Hummel, 66 N.E 2d 111, 146 Ohio St 341—State ex rel Haff v Pask, 186 N.E 809, 126 Ohio St 633
S.C—Jackson v White, 62 S.E 2d 776, 218 S.C 311—Privette v. Grinnell, 4 S.E.2d 305, 191 S.C. 376.
57 C.J. p 741 note 40.

Term of temporary appointee

Constitutional provision that sheriff appointed by judges of district court to fill vacancy temporarily shall serve until vacancy is filled by appointment as provided by law is controlled by the phrase as "provided by law," and means that temporary appointee shall serve until vacancy is filled by appointment by governor with advice and consent of senate if unexpired part of term is less than year, and does not mean that temporary appointee of judges shall serve only until governor can fill vacancy by recess appointment, since governor has no authority to make recess appointment under constitution in a case where temporary filling of vacancy is otherwise provided for in constitution.—State ex rel Palfrey v Judges of Criminal District Court of Parish of Orleans, 5 So 2d 756, 199 La 232.

Preserving status under civil service

Chief deputy sheriff could succeed to office of sheriff, on a vacancy occurring, for period pending a future election and at same time preserve his status as chief deputy under civil service statute while thus discharging duties of sheriff, where chief deputy did not thereafter offer himself as a candidate in the election—Foster v. Brown, 34 S.E 2d 530, 199 Ga 444.

20. Ala.—State v. Ayres, Minor 323

21. Fla—State ex rel. Landis v. Taylor, 146 So. 549, 108 Fla. 541
57 C.J. p 741 note 42.

22. Ohio—State ex rel. Smith v Hummel, 66 N.E.2d 111, 146 Ohio St. 341

Resignation and reappointment after new term

Sheriff, who was appointed to fill a vacancy caused by death of former sheriff after reelection but prior to expiration of old term, by resigning after period of new term had begun, in reality terminated term which he held by appointment and which normally would have ended on election and qualification of his successor. By his resignation and reappointment after new term normally would have commenced, he did not acquire any right to tenure which he did not have before, and he continued to hold the office until his successor was elected at the next general election and qualified—State ex rel. Smith v Hummel, supra

23. N.Y—People v. Boyle, 163 N.Y.S 72, 98 Misc 364, affirmed 164 N.Y.S. 1107, 178 App Div 908

24. Ky.—Neeley v. McCollum, 53 S.W 37, 107 Ky. 143, 21 Ky.L. 823

25. Ohio—State ex rel. Gahl v Lutz, 9 N.E 2d 288, 132 Ohio St 466

26. Neb—State v. Willott, 174 N.W 429, 103 Neb 798.

27. Ky.—Terry v Hargis, 74 S.W. 271, 24 Ky.L 2498
57 C.J. p 742 note 46.

28. N.Y—In re Mitchell, 165 N.Y.S 972, 178 App Div 690, affirmed 118 N.E. 1068, 222 N.Y. 543.

29. N.Y—In re Mitchell, 114 N.E 382, 219 N.Y 242

30. Fla—State ex rel. Davis v Howell, 132 So 647, 101 Fla 656
Ky—Wilson v Vanbeber, 65 S.W.2d 1021, 251 Ky 735
Mont—Bailey v Knight, 168 P.2d 843, 118 Mont 594
57 C.J. p 742 note 50

Election at which office may be filled

Where there was no regular election to be held in entire county for an officer in the same territory or boundary except a member of United States house of representatives, there could be no election for unexpired term of sheriff resulting from death of incumbent under constitutional provision that if unexpired term will not end at next succeeding annual election at which either city, town, county, "district or state officers" are to be elected, vacancy should be filled by election for remainder of the term, since a United States representative is not a "district or state officer" within the constitutional provision—White v Hubbard, 195 S.W 2d 781, 302 Ky 820.

ute providing for a proclamation by the governor for a special election to fill a vacancy in the office of sheriff is mandatory.[31] If a vacancy in the office occurs before the next general election but subsequent to the time provided by statute for the filling of the vacancy at the next general election, the vacancy cannot be filled at the next general election,[32] but may be filled at a special election called pursuant to the statute.[33]

In the absence of constitutional and statutory provisions prescribing when the term of a sheriff elected at a special election to fill a vacancy shall begin, the term of such sheriff commences to run from the date of the special election.[34] Under some constitutions it has been held that, where a person is elected to fill a vacancy in the office of sheriff, he does not hold during the unexpired term of his predecessor merely, but for the constitutional term of the office of sheriff,[35] although it has also been held that he is elected to fill the unexpired term and not the full term,[36] notwithstanding the ballot did not specify the length of time for which the candidate sought office.[37]

§ 9. Resignation, Abandonment, Forfeiture, Suspension, or Reinstatement

A sheriff may resign or abandon his office, and under constitutions and statutes may forfeit, be suspended from, or reinstated to, such office

Under a statute providing that the resignations of certain county and township officers shall be made to the clerk of the board of supervisors of the county, the mere manual transmission of a sheriff's resignation to the clerk by an attorney without authority and contrary to the sheriff's express directions is of no effect.[38] A freely made and unconditional resignation is effective when accepted by the proper authority.[39] Where a sheriff transmits his resignation, to take immediate effect, to the proper authorities, and it is received by them, a vacancy exists in the office,[40] and he cannot withdraw such resignation,[41] even with the concurrence of the authorities to whom it was sent.[42] Where threats are made that proceedings would be brought to remove the sheriff from office unless he resigned, such threats do not constitute duress inducing the resignation.[43] Where a person, prior to appointment and qualification, is required to sign an undated resignation which would terminate his tenure before the expiration of the term of the vacant office, such resignation has been held to be void.[44]

Abandonment. If a lawful sheriff, whose sureties have been discharged on their own application, and whose office has been certified to the governor to be vacant because of his failure to give a new bond, when in fact there is no vacancy, accepts an appointment by the governor as in case of vacancy, such acceptance does not amount to an abandonment of his right to the office under his former title.[45]

Forfeiture. The office may be forfeited at the suit of the proper authorities designated by the constitution or statute.[46] Where the constitution directs suit to be brought in the name of the attorney general, such official is the proper party,[47] and a statute providing for suits against usurpers and intruders into office is inapplicable.[48] Unless the county requires its renewal, a failure to renew an official bond of a sheriff does not work a forfeiture of the office.[49]

Suspension The governor cannot suspend a sheriff from office unless authorized by constitution or statute,[50] but sheriffs have been held to accept election to office subject to suspension by the governor for specified grounds.[51] Where the constitution prescribes the grounds for which the governor may suspend officers, a statute, in so far as it attempts to enlarge the powers of the governor

31. N.Y.—In re Mitchell, 165 N.Y.S. 972, 178 App.Div. 690, affirmed 118 N.E. 1068, 222 N.Y. 543.

32. N.Y.—In re Mitchell, 114 N.E. 382, 219 N.Y. 242
57 C.J. p. 742 note 52.

33. N.Y.—People v. Boyle, 163 N.Y.S. 72, 98 Misc. 364, affirmed 164 N.Y.S. 1107, 178 App.Div. 908.

34. N.Y.—In re Mitchell, 165 N.Y.S. 972, 178 App.Div. 690, affirmed 118 N.E. 1068, 222 N.Y. 543.
57 C.J. p. 742 note 54.

35. N.Y.—People v. Voorhis, 125 N.E. 86, 227 N.Y. 167.
57 C.J. p. 742 note 55

36. Mont.—Bailey v. Knight, 168 P. 2d 843, 118 Mont. 594.

37. Mont.—Bailey v. Knight, supra

38. Cal.—McKelley v. Turner, 273 P. 1101, 96 Cal.App. 292.

39. Tex.—Willborn v. Deans, Civ.App., 240 S.W.2d 791, refused no reversible error.

40. Ind.—State v. Hauss, 43 Ind. 105, 13 Am.R. 384

41. Ind.—State v. Hauss, supra.

42. Ind.—State v. Hauss, supra.

43. Tex.—Willborn v. Deans, Civ.App., 240 S.W.2d 791, refused no reversible error.

44. S.C.—Jackson v. White, 62 S.E. 2d 776, 218 S.C. 311.

45. Ala.—Bruner v. Bryan, 50 Ala. 522.

46. La.—Coco v. Oden, 79 So. 287, 143 La. 718, 8 A.L.R. 179, error dismissed 39 S.Ct. 386, 249 U.S. 587, 63 L.Ed. 790.

47. La.—Coco v. Oden, supra.

48. La.—Coco v. Oden, supra.

49. Ky.—Cornett v. Duff, 141 S.W.2d 870, 283 Ky. 466—Leslie County v. Eversole, 2 S.W.2d 644, 222 Ky. 793.

50. S.C.—State v. Hough, 87 S.E. 436, 103 S.C. 87.

51. Fla.—State ex rel. Hatton v. Joughin, 138 So. 392, 103 Fla. 877, rehearing denied 145 So. 174, 107 Fla. 850.

in the suspension of sheriffs, is unconstitutional.[52] A statute authorizing the governor to remove a sheriff from office for malfeasance or nonfeasance in the performance of his official duties gives him by implication, as an incident to such power, the power to suspend a sheriff pending removal proceedings.[53]

A statute may provide that the sheriff may be suspended for cause by designated courts.[54] A statute, authorizing a suspension by the circuit court of any county or township officer pending an indictment for nonfeasance in office, has been held applicable to a sheriff.[55] Under a statute authorizing a district judge to suspend an officer against whom removal proceedings are brought, such judge may suspend a sheriff after judgment of removal and before jurisdiction is divested by the perfection of an appeal.[56] The suspension of a sheriff from office does not destroy, but merely suspends, the acquired right to the office.[57] It renders the incumbent incapable of functioning until the disability is removed.[58] Where the county supervisors are authorized to appoint a temporary sheriff on the suspension of the sheriff by the court, such appointee, and not the deputy of the suspended sheriff, is authorized to discharge the duties of the office.[59] The procedure followed in suspending a sheriff should meet every requirement of the constitution or statute.[60] In at least one jurisdiction the governor may not suspend a sheriff while the senate is in session,[61] and a review of the charges preferred by executive order[62] and the sufficiency of the evidence to support the charges[63] are questions solely for the determination of the senate, and it may adopt such rules of procedure as it sees fit.[64]

Reinstatement. A sheriff suspended by the governor may be reinstated by him,[65] although the senate is in session at the time.[66]

§ 10. Removal and Proceedings Therefor

a. In general
b. Grounds for removal
c. Proceedings

a. In General

The removal of a sheriff is a matter usually regulated by constitution or statute.

The removal of a sheriff is a matter usually regulated by constitution or statute.[67] Where the constitution is silent as to a method of removal, the legislature may provide a method,[68] such as that the governor shall have the power of removal,[69] or that sheriffs may be removed by judicial proceedings.[70] However, the governor cannot remove a sheriff from office unless the power to do so is conferred by the constitution or statutes.[71] Statutes authorizing the removal of a sheriff by the governor are ordinarily penal in their nature, and as such are to be strictly construed.[72] Although a sheriff is an elective officer, a statute authorizing his removal by the governor is not in violation of a constitutional provision providing that the governor may remove in certain cases any officer whom he appoints.[73] The power of a court summarily to remove sheriffs is an extraordinary one, to be executed out of the usual course of the administration of the law, and should never be called into operation except in cases of great necessity and for clear and manifest cause, and even then should be exercised with great caution and in strict conformity with the authority given.[74] Under constitution or statute, the sole power vested in the

52. S.C.—State v. Hough, 87 S.E. 436, 103 S.C. 87.

53. Minn.—State v. Megaarden, 88 N.W. 412, 85 Minn. 41, 89 Am.S.R. 534.
57 C.J. p. 743 note 76.

54. Iowa.—McCue v. Wapello County Cir. Ct., 50 N.W. 488, 51 Iowa 60.
57 C.J. p. 743 note 77.

55. Ark.—Mays v. Robertson, 288 S.W. 382, 172 Ark. 279.

56. Tex.—McDaniel v. Phillips, Civ. App., 3 S.W.2d 1117.
57 C.J. p. 743 note 79.

57. S.C.—State v. Hough, 87 S.E. 436, 103 S.C. 87.

58. Ark.—Leonard v. Luther, 48 S.W.2d 242, 185 Ark. 572.

59. Iowa.—McCue v. Wapello County Cir. Ct., 50 N.W. 488, 51 Iowa 60.

60. Fla.—State ex rel. Hatton v. Joughin, 138 So. 392, 103 Fla. 877, rehearing denied 145 So. 174, 107 Fla. 850

Not entitled to notice and hearing
Fla.—State ex rel. Hatton v. Joughin, supra.

Executive orders held sufficient
Fla.—State ex rel. Hardie v. Coleman, 155 So. 129, 115 Fla. 119, 92 A.L.R. 988.

61. Fla.—State ex rel. Kelly v. Sullivan, 52 So.2d 422.

62. Fla.—State ex rel. Hardie v. Coleman, 155 So. 129, 115 Fla. 119, 92 A.L.R. 988.

63. Fla.—State ex rel. Hardie v. Coleman, supra

64. Fla.—State ex rel. Hardie v. Coleman, supra

65. Fla.—State ex rel. Kelly v. Sullivan, 52 So.2d 422.

66. Fla.—State ex rel. Kelly v. Sullivan, supra

67. Ala.—State ex rel. Moore v. Blake, 142 So. 418, 225 Ala. 124.

Statute held valid
Ala.—State ex rel. Moore v. Blake, supra.

68. S.C.—State v. Ballentine, 150 S.E. 46, 152 S.C. 365.

69. Ill.—People v. Nellis, 94 N.E. 165, 249 Ill. 12.

70. Tex.—Robinson v. State, Civ. App., 28 S.W. 566.
57 C.J. p. 744 note 94.

71. S.C.—State v. Hough, 87 S.E. 436, 103 S.C. 87

72. Mich.—Attorney General v. Bairley, 176 N.W. 403, 209 Mich. 120.

73. Ill.—People v. Nellis, 94 N.E. 165, 249 Ill. 12

74. Tex.—Davis v. State, 35 Tex. 118.

governor to remove a sheriff after a hearing may be executive.[75]

A statute allowing the governor to remove all officers[76] or county officers[77] appointed by him to fill a vacancy is applicable to a sheriff; and "county office," in a statute providing for the removal for cause by the governor of an appointee to fill a vacancy, includes the office of a sheriff, even though a separate statute providing for the appointment of a sheriff to fill a vacancy contains no removal clause.[78]

What amounts to removal. A statute providing for the election of sheriffs by the people, and that the persons then holding the office of sheriff in the several counties shall hold it until a designated day, and no longer, unless elected by the people, is a legal and effective removal from office, after the day named, of those sheriffs who are not so elected.[79]

b. Grounds for Removal

The causes for which a sheriff may be removed are usually enumerated in the constitution or statutes, and, in addition to other reasons, he may be removed for malfeasance, misconduct, or neglect of duty.

The causes for which a sheriff may be removed are usually enumerated in the constitution or statutes.[80] While the legislature may designate offenses within the meaning of the constitution, it cannot enlarge or extend the terms of that instrument by adding offenses, as grounds for removal, not within the purview of the constitutional provision.[81] A sheriff who has made an honest and reasonably intelligent effort to do his duty will not be removed, although he is not wholly successful.[82] A sheriff will not be removed for a technical disregard of laws governing his official conduct, where his acts were done pursuant to advice of counsel and in good faith,[83] or where an honest difference of opinion exists as to the meaning of statutes under which he is acting,[84] or for mere irregularities,[85] or for failure to make arrests and execute process, not showing corruption, gross neglect, or inefficiency,[86] or for failure to comply with a verbal command of the judge to convey prisoners to the jail of an adjacent county, where such an order is not lawful authority to the sheriff to make the transfer.[87]

The term "bad faith," within the meaning of a statute providing for the summary removal of a sheriff where he in bad faith refuses or neglects to perform the duties of his office, does not mean "corruptly," which involves some affirmative, ulterior motive,[88] but may involve merely the absence of a proper motive.[89] The sheriff may be removed for sufficient cause,[90] and a removal for cause means a cause which is constitutionally and legally sufficient to warrant the exercise of the power,[91]

75. N Y—In re Guden, 64 N E 451, 171 N Y. 529.

76. N Y—People v. Parker, 6 Hill 49.

77. S C—State v Sanders, 110 S E 808, 118 S.C 498.

78. S.C.—State v. Sanders, supra

79. Conn—Pratt v. Allen, 13 Conn 119.

80. Mo—State, on Inf. of McKittrick, v Williams, 144 S W.2d 98, 346 Mo 1003.

"Unless sooner removed for malfeasance in office"

Under constitutional provision that sheriff shall serve for four years and until his successor is duly elected and qualified, "unless sooner removed for malfeasance in office," the designation of malfeasance as a ground for removal does not exclude all other grounds under doctrine "expressio unius est exclusio alterius." "Unless sooner removed for malfeasance in office" is but a limitation of term of office which it modifies, and is not a provision for removal, and, hence, constitutional amendment authorizing assembly to provide for removal from office of county, city, town, and township officers, on conviction of willful, corrupt, or fraudulent violation or neglect of official duty applies to a sheriff, although amendment is limited to removal of officers "not otherwise provided for in this constitution"—State, on Inf of McKittrick, v Williams, supra.

Report to clerk of court

Where sheriff furnished a monthly report to police jury listing expenditures of his office and names and salaries of his deputies and employees, his failure also to furnish report to clerk of court, although a violation of statute, would not justify sheriff's removal—State ex rel Riddle v Jeansonne, 18 So 2d 306, 205 La 818.

81. Ky—Holliday v. Fields, 275 S. W 642, 210 Ky. 179

82. Tenn—Vandergriff v. State ex rel. Davis, 206 S.W 2d 395, 185 Tenn 386—State v. Reichman, 188 S.W 597, 135 Tenn. 685.

83. La—State v Bourgeois, 16 So. 655, 47 La Ann 184

84. Neb—Ehlers v Gallagher, 22 N. W 2d 396, 147 Neb 97.

85. Ala—State ex rel Carmichael v Baggett, 41 So.2d 584, 252 Ala 540.

Irregularities relating to acceptance of bonds executed by certain company did not constitute willful neglect of duty by sheriff or corruption in office.—State ex rel. Carmichael v Baggett, supra

86. La—State v Bourgeois, 16 So 655, 47 La Ann 184.

87. Tex.—Davis v. State, 35 Tex 118

88. Idaho—Cornell v. Mason, 268 P. 8, 46 Idaho 112.

89. Idaho—Cornell v. Mason, supra

90. Ga—Adamson v. Leathers, 3 S E 2d 871, 60 Ga App. 382

91. S C—State v. Sanders, 110 S.E 808, 118 S.C. 498.

"Sufficient cause" means legal cause and that which specially relates to and affects the administration of office, and must be restricted to something of a substantial nature, directly affecting rights and interests of the public—Adamson v. Leathers, 3 S.E 2d 871, 60 Ga App. 382.

Commissions for collection of tax

Sufficient cause was shown in proceedings to remove a sheriff from office on ground that he had received more money than that to which he was entitled in connection with collection of state and county taxes where there was no law authorizing sheriffs to charge and receive

and a constitutional provision authorizing the governor to remove a sheriff without specifying the grounds contemplates that the removal shall be for legal cause.[92] Where a sheriff unlawfully demands and recovers from an accused person in custody a sum of money as a condition precedent to his release on an appearance bond and in advance of any trial, he commits extortion for which he may be removed [93]

Intemperance in the use of intoxicating liquors or narcotics as unfits a sheriff for the discharge of his duties, within a constitutional provision providing for impeachment by a court, does not mean that a sheriff, unfit on one occasion to discharge the duties of his office, should be impeached.[94]

A sheriff may be removed for corruption in office,[95] and a sheriff who, besides receiving compensation for services of a bailiff, procures the allowance to himself of fees for services of the latter, knowing he is not entitled thereto, is guilty of corruption in office,[96] although he makes no false returns.[97] He may also be removed from office on conviction of willful, corrupt, or fraudulent violation of official duty,[98] or on sentence to the penitentiary [99] Nonfeasance may be a valid ground for the removal of a sheriff,[1] and nonfeasance has been held to include the neglect of a sheriff to perform his duty in the arrest of one attempting to bribe him [2] A failure to enforce the law may be ground for removal.[3]

When a sheriff ignores the law and advertises each piece of property separately instead of in a list, and in larger type than such as the law requires, in a newspaper which he personally owns, he is guilty of extortion and oppression in office.[4] The fact that after the election and qualification of a sheriff his name is stricken from the list of registered and qualified voters is not ground for his removal.[5] A sheriff will not be removed from office for misconduct of his deputy where he was in ignorance of the misconduct up to the time of filing of the suit for removal,[6] or for a crime of his deputy where he has taken proper measures to prevent the crime and after its commission has brought the deputy to justice.[7]

Malfeasance. The sheriff may be removed for malfeasance in office [8] Malfeasance has been held to include permission by a sheriff to a prisoner to escape,[9] and he is guilty of malfeasance in knowingly permitting bets on horse races at tracks he allowed to operate.[10]

Misconduct. A sheriff who knowingly or willfully misconducts himself in office may be removed.[11] The removal for misconduct does not mean official misconduct, it has been held, where the constitution or statutes do not so provide.[12] Misconduct has been held to include the failure of a sheriff to enter and promptly pay over tax collections as provided by statute,[13] and the appearance of a sheriff as attorney for one charged with crime before a justice of the peace of his county [14] Official misconduct, within the meaning of the constitutions and statutes, has been held to include

such commissions as sheriff admitted charging and receiving under alleged contract with county board of commissioners of roads and revenues. —Adamson v Leathers, supra.

92. Wis —State v. Verage, 187 N.W 830, 177 Wis. 295, 23 A.L.R 491 57 C J. p 744 note 14

93. La.—State v. Waggner, 8 So 209, 42 La Ann 54.

94. Ala.—State v Latham, 61 So 351, 174 Ala. 281.

95. Ala —State ex rel. Carmichael v Baggett, 41 So 2d 584, 252 Ala 540.

96. Iowa.—State v. Welsh, 79 N W 369, 109 Iowa 19

97. Iowa —State v. Welsh, supra

98. Mo.—State, on Inf. of McKittrick, v Williams, 144 S.W 2d 98, 346 Mo 1003

99. Ala.—State ex rel. Moore v Blake, 142 So. 418, 225 Ala 124

1. Minn.—In re Olson, 300 N.W. 398, 211 Minn 114

2. Mont —State v Musselshell County Fifteenth Judicial Dist Ct., 241 P. 1075, 76 Mont 116.

3. Ohio —In re Sulzmann, 29 Ohio N P ,N S , 92, affirmed 183 N.E. 531, 125 Ohio St 594

Open and notorious condition

Where operation of slot machines was open and notorious within corporate limits of cities and villages of county, including county seat where sheriff resided and had his office, sheriff's claim of ignorance as to operation of slot machines could not excuse him from failure to take steps to enforce laws prohibiting operation of slot machines.—In re Olson, 300 N W. 398, 211 Minn. 114.

4. La —State v Waggner, 8 So 209, 42 La Ann 54

5. W Va —Phares v State, 3 W.Va 567, 100 Am.D. 777.

6. La.—State v Reid, 55 So. 748, 129 La 158, Ann Cas 1912D 1081— State v Budd, 1 So. 453, 39 La Ann. 232.

7. La —State v Reid, 55 So 748, 129 La 158, Ann Cas 1912D 1081.

8. Mo —State, on Inf of McKittrick, v Williams, 144 S.W.2d 98, 346 Mo 1003.

9. Ark —Houpt v. State, 140 S.W. 294, 100 Ark. 409, Ann.Cas.1913C 690.

10. Ohio.—In re Sulzmann, 183 N.E 531, 125 Ohio St. 594.

11. Kan.—State ex rel. Boynton v Jackson, 33 P.2d 118, 139 Kan 744, 100 A L R 1394
N M —State v Chavez, 145 P 250, 19 N M 575
Tenn —Vandergriff v. State ex rel. Davis, 206 S W 2d 395, 185 Tenn 386

12. S C —State v. Sanders, 110 S E 808, 118 S.C 498.

13. La.—State v. Cannon, 16 So. 666, 15 So 626, 47 La Ann 278.
57 C J p 745 note 24

14. N M —Territory v. Sanches, 94 P 954, 14 N M. 493, 20 Ann Cas. 109.

adultery,[15] the collection of illegal fees,[16] and the presentation of unfounded claims for services.[17] Willful misconduct, in order to justify a removal, has been held to include voluntary intoxication while engaged in the performance of an official duty.[18]

Neglect of duty. A sheriff may be removed for neglect of duty,[19] or on conviction of neglect of official duty.[20] Neglect of duty has been construed as a careless or intentional failure to exercise due diligence in the performance of an official duty,[21] and to include such acts as the failure to enforce the prohibitory liquor laws.[22] It does not include acts amounting to malfeasance,[23] such as misconduct[24] and intoxication.[25] Where it is shown that the sheriff enforced the laws in every locality in which he had enough information and necessary co-operation, his failure to enforce such laws in a few localities where he received no co-operation does not show a neglect of duty [26]

Under a provision providing for the removal of an officer for neglect and refusal to perform official duties, it is not necessary to show that a sheriff acted with an evil or corrupt attempt or motive;[27] but it is sufficient that the omission to perform was intentional, designed, and without lawful excuse.[28] Neglect, as used in a constitution providing for the impeachment of a sheriff by the court whenever a prisoner is taken from his custody and put to death or injured, means a failure to do and perform some duty of the office [29] Willful neglect of duty has been held to include the permission of a sheriff to a prisoner to be unlawfully at large,[30] the failure of a sheriff to enforce the prohibitory liquor laws[31] or to report their violation to the prosecuting attorney as provided by law,[32] and a failure to take a prisoner before a magistrate before commitment to jail [33] A willful neglect of duty does not necessarily import an evil motive [34]

Failure to give bond. Provision is sometimes made for the removal of a sheriff for failure to qualify by giving bond or for failure to give additional security on motion by the sureties [35] A statute providing for the removal of clerks and other public officers who fail to give additional security at the instance of their sureties is applicable to a sheriff.[36] A statute providing for the removal of a sheriff by a county court on his failure to give a new bond does not contravene a constitutional provision subjecting sheriffs to indictment for malfeasance or misfeasance in office.[37] A district court is not deprived of jurisdiction to remove a sheriff who fails to give bond after reëlection by virtue of a constitutional provision authorizing officers to continue their duties until their successors are qualified.[38] The motive of a commissioners' court in removing a sheriff for failure to give the required bond is immaterial.[39]

Offenses before election and during prior term. In some jurisdictions a sheriff may be removed for offenses committed during a prior term,[40] at least if there has been no intervening term in which the office has been held by another person,[41] but in other

15. S C—State v. Sanders, 110 S E 808, 118 S C 498.

16. Tex—McDaniel v. State, Civ App., 9 S W 2d 478

17. Minn—State v. Megaarden, 88 N.W. 412, 85 Minn 41, 89 Am S R 534

18. Iowa—State v. Welsh, 79 N.W 369, 109 Iowa 19.

19. Ala—State ex rel Carmichael v Baggett, 41 So 2d 584, 252 Ala 540
Ky.—Holliday v. Fields, 275 S W. 642, 210 Ky 179.
Tenn—Vandergriff v. State ex rel Davis, 206 S W.2d 395, 185 Tenn 386.

20. Mo—State, on Inf of McKittrick, v. Williams, 144 S W 2d 98, 346 Mo. 1003.

21. Minn.—**Corpus Juris cited in** In re Olson, 300 N.W. 398, 400, 211 Minn. 114
57 C.J. p 745 note 32.

22. Minn.—**Corpus Juris cited in** In re Olson, 300 N.W. 398, 400, 211 Minn. 114.
Tenn—State v. Reichman, 188 S W. 597, 135 Tenn 685

23. Ky—Holliday v Fields, 275 S W. 642, 210 Ky 179.

24. Ky—Holliday v Fields, supra

25. Ky.—Holliday v. Fields, supra. 57 C J p 745 note 36.

26. La—State ex rel Riddle v Jeansonne, 18 So.2d 306, 205 La. 818

27. Idaho—Archbold v. Huntington, 201 P. 1041, 34 Idaho 558

28. Idaho.—Archbold v. Huntington, supra.

29. Ala—State v. Jinwright, 55 So 541, 172 Ala 340, Ann Cas 1913D 635—State v Cazalas, 50 So. 296, 162 Ala 210, 19 Ann.Cas. 886.

30. Iowa—State v Welsh, 79 N.W. 369, 109 Iowa 19.
Okl—McCasland v Adair County, 258 P. 750, 126 Okl 103.
13 C.J. p 921 note 41.

31. Kan—State v. Martin, 126 P. 1080, 87 Kan. 817.
Va—Barbee v. Murphy, 141 S.E. 237, 149 Va. 406.

32. Kan—State v. Martin, 126 P. 1080, 87 Kan. 817.

33. Idaho—Archbold v. Huntington, 201 P. 1041, 34 Idaho 558.

34. Ala—State v. Martin, 61 So. 491, 180 Ala. 458

35. Tex—State v. Box, 78 S.W. 982, 34 Tex.Civ App. 435.

36. Ky—Catching v. Davis, 3 B. Mon. 61.

37. Ky—Bartly v. Fraine, 4 Bush 375.

38. Tex—Robinson v. State, Tex. Civ.App, 28 S.W. 566

39. Tex.—State v Box, 78 S.W. 982, 34 Tex.Civ.App. 435.

40. Iowa.—State v Welsh, 79 N.W. 369, 109 Iowa 19
57 C J. p 746 note 59.

41. N M.—Territory v. Sanches, 94 P. 954, 14 N M. 493, 20 Ann.Cas. 109.
57 C.J. p 746 note 60.

jurisdictions offenses committed during a prior term do not furnish cause for removal from office.[42] Where a statute providing that no officer shall be removed from office for any act he may have committed prior to his election to office, a sheriff cannot be removed for offenses committed during a prior term of office.[43] A sheriff may be removed, it has been held, for misconduct prior to his election, affecting his usefulness as a public officer,[44] as where he corruptly promises to appoint another his counsel in the event of his election.[45]

c. Proceedings

(1) In general
(2) Parties
(3) Pleading
(4) Evidence
(5) Trial
(6) Verdict; judgment; review; costs

(1) In General

The procedure for removing sheriffs from office usually is prescribed by constitutional or statutory provisions.

The procedure for removing sheriffs from office usually is prescribed by constitutional or statutory provisions.[46] The power conferred on the governor to remove must be exercised in strict pursuance of the constitution or statutes prescribing the manner.[47] Under statutory provisions authorizing the removal of sheriffs by the governor and providing that the governor may direct the attorney general or county attorney to conduct an inquiry into the charges made, the governor himself may conduct the inquiry.[48] An original proceeding in an appellate court to remove will be dismissed where the controversy can be heard better in a district court.[49]

A court has no jurisdiction summarily to remove under a statute allowing removal for nonfeasance where the evidence shows the sheriff is guilty of acts of misfeasance.[50] A constitutional provision authorizing all officers to continue to perform their duties until their successors shall qualify does not deprive a court of jurisdiction under a statute to remove a sheriff who fails to give bond after reelection.[51] An action may lie to enjoin the holding of a recall election of a sheriff where the provisions of the act authorizing the proceedings are not deemed complied with.[52]

The power exercised by a governor in conducting an inquiry into charges made is said to be quasi-judicial in character.[53] An action by the state to remove a sheriff under some provisions is said to be a civil suit,[54] although, in so far as compelling the sheriff to be a witness against himself, a judicial proceeding has been considered criminal in its nature.[55] A summary proceeding instituted by citizens has been held to be quasi-criminal only.[56] An action by a county board of commissioners to remove a sheriff is said to be a special proceeding as regards the quantum of proof.[57]

A removal on accusation by a grand jury under the statute is said to be a special proceeding[58] which is to be conducted in all respects in the same manner as a trial on an indictment for a misdemeanor.[59] Where it is not alleged in the petition to oust the sheriff that the relators have suffered or are threatened with some damage peculiar to themselves as individuals, as a result of the alleged acts sought to be complained of, the right involved is a public right as distinguished from a private right.[60]

Notice and hearing. Constitutional and statutory provisions for notice to a sheriff of the charges preferred and for an opportunity to be heard thereon in his defense must be complied with.[61] Under such provision the governor's power of removal is not absolute,[62] and the charges must consist of matters

42. Cal.—Thurston v. Clark, 40 P. 435, 107 Cal 285.
57 C.J. p 746 note 61.

43. Tex.—Reeves v. State, 267 S.W 666, 114 Tex. 296.

44. N.Y.—Matter of Guden, 75 N.Y. S 794, 71 App Div 422, affirmed 64 N E. 451, 171 N.Y. 529.

45. N.Y.—Matter of Guden, supra

46. Ga.—Adamson v. Leathers, 3 S E 2d 871, 60 Ga App. 382.
57 C J. p 746 note 67.

Statute as to clerks of court
The provisions of statute providing for removal of clerks of the superior court from office apply to removal of sheriffs from office.—Adamson v Leathers, supra.

47. S C.—State v. Hough, 87 S E 436, 103 S C 87.
57 C.J. p 746 note 69.

48. Mich.—Groesbeck v Bairley, 176 N W. 403, 209 Mich. 120.

49. Kan.—State v. Welfelt, 85 P. 583, 73 Kan 791.

50. Mont.—State v. Beazley, 250 P 1114, 77 Mont. 430

51. Tex.—Robinson v. State, Civ App., 28 S W. 566.

52. Wash.—Gibson v. Campbell, 241 P 21, 136 Wash. 467.

53. Mich.—Groesbeck v. Bairley, 176 N W. 403, 209 Mich 120

54. Neb.—State v. Dyson, 183 N.W 298, 106 Neb. 277
57 C J. p 746 note 75.

55. Cal.—Thurston v. Clark, 40 P. 435, 107 Cal. 285.

56. Idaho.—Archbold v Huntington, 201 P. 1041, 34 Idaho 558.

57. Okl.—McCasland v. Adair County, 258 P. 750, 126 Okl. 103.

58. Okl.—Rutter v. Territory, 68 P. 507, 11 Okl 454.

59. Okl.—Rutter v. Territory, supra.
57 C J p 747 note 81.

60. Tex.—State ex rel Hancock v. Ennis, Civ.App., 195 S W 2d 151, refused no reversible error.

61. Tex.—Gordon v. State, 43 Tex 330
57 C J p 747 note 84.

62. N.Y.—Matter of Guden, 75 N.Y.

against which a public officer may reasonably be required to defend himself.[63] A statute providing that, if the assessment list of taxable property is not returned according to law by the sheriff, the governor, on an ex parte certificate of neglect of this duty, shall declare the office vacant is repugnant to the constitution as depriving the sheriff of notice of the charge and a trial.[64] In a summary proceeding before a district court, a rule requiring the sheriff to show cause why he should not be removed was held to answer the purpose of a citation on the ground that he is supposed to be always in court and to be apprised of its orders.[65] A statute providing for the removal of a county officer after trial and conviction has been held to apply to sheriffs elected or appointed for a full term,[66] and to such sheriffs only,[67] and not to an appointee of the governor to fill a vacancy where a separate statute permits removal by the governor.[68]

Defenses. In a suit by the state to remove a sheriff for misconduct in collecting claims against the state, it is no defense that pursuant to statute the sheriff's accounts were approved by the district court.[69] The fact that an act committed by a sheriff is punishable as a crime does not affect his liability to removal from office for the same act.[70] Under a provision requiring officers to devote their time personally to their official duties, the act of a sheriff in absenting himself from the performance of his duties is not excused by the fact that his duties were performed in his absence by his deputies as well as, or better, than he would have performed them.[71]

The fact that the sheriff's failure to perform his official duties may be due to his own weakness and moral delinquency is no defense.[72] The fact that a sheriff-elect had qualified by giving bond under a previous appointment does not preclude his removal for failure to give a new bond after his election as required by law.[73] In a suit to remove a sheriff on the ground of ineligibility, the state is not estopped to deny the eligibility of the sheriff on the ground that in a suit subsequently filed for his removal it was averred that he was commissioned and qualified where such averment was not for the purpose of raising such issue.[74] It has been held that the sheriff's claim that he did not know what his duties were is no defense.[75] A statute creating a prescription applicable to the civil liability of a sheriff for acts of misfeasance and nonfeasance has no application to proceedings for his removal under the constitution.[76]

(2) Parties

Constitutions and statutes usually provide what authority may institute proceedings to remove a sheriff.

Constitutions and statutes usually provide what authority may institute proceedings to remove a sheriff,[77] and an attorney general may have the power on his own initiative to sue to remove the sheriff.[78] Where the constitution authorizes a proceeding by the state for the removal of a sheriff, the fact that the title of the action reveals the names of the accusers as well as the state does not invalidate the proceeding.[79]

(3) Pleading

Some official delinquency or some default or occurrence since his election, showing his unfitness for the office, must be alleged against the sheriff sought to be removed.

General allegations of incompetency or unfitness do not show sufficient cause for the removal of a sheriff.[80] Some official delinquency or some default or occurrence since his election, showing his unfitness for the office, must be alleged against him.[81] An allegation that the sheriff willfully, tacitly neglected and refused to enforce the laws is not bad because the word "tacitly" is not found in the statute providing for removal of officers.[82] Under a statutory provision authorizing the removal

S 794, 71 App Div 422, affirmed 64 N E 451, 171 N Y 529.
Tex —Gordon v State, 43 Tex. 330

63. N Y —Matter v Guden, 75 N Y S. 794, 71 App Div. 422, affirmed 64 N E. 451, 171 N.Y. 529

64. Ark —State v. Carneall, 10 Ark 156

65. Tex —Davis v. State, 35 Tex 118.

66. S C —State v. Hough, 87 S E 436, 103 S.C 87.

67. S.C —State v. Sanders, 110 S E 808, 118 S C. 498.

68. S C.—State v. Sanders, supra.

69. Tex —McDaniel v. State, Civ. App , 9 S W 2d 478.

70. N.M —Territory v. Sanches, 94 P 954, 14 N.M 493, 20 Ann Cas. 109.

71. Mo —State v Yager, 157 S W 557, 250 Mo 388

72. Mo —State v Yager, supra.

73. Tex —State v Box, 78 S.W. 982, 34 Tex Civ App 435

74. La —State v. Reid, 12 So. 189, 45 La Ann. 162

75. Ohio —In re Sulzmann, 29 Ohio N P ,N S , 92 affirmed 183 N E. 531, 125 Ohio St 594.

76. La —State v Bourgeois, 16 So 655, 47 La Ann 184.

77. Okl —Garrett v. State, 238 P 846, 113 Okl. 63.

78. Okl —Garrett v. State, supra

79. Mont —State v. Driscoll, 144 P. 153, 49 Mont 558.

80. Tex —Gordon v. State, 43 Tex 330

81. Ohio —In re Sulzmann, 29 Ohio N P ,N S., 92, affirmed 183 N E. 531, 125 Ohio St 594
57 C.J p 747 note 6.
Petition held sufficient to confer jurisdiction
Ohio —In re Sulzmann, supra.

82. Va —Barbee v. Murphy, 141 S E 237, 149 Va. 406.

of a sheriff by summary proceedings initiated on a written accusation verified by the oath of any person, an accusation need not allege that the accusers are electors of the county.[83]

Failure to suppress riot. Where the ground of removal alleged is the failure of a sheriff to suppress a riot, the accusation may be in general terms,[84] and it is not necessary to describe the riot in the language of a statute defining "riot."[85]

Misconduct during term of office. In jurisdictions where the offense must be committed during the present term of the sheriff, the petition should allege such fact,[86] but the defect may be cured by an amendment;[87] and a charge that the sheriff during his terms of office removed and disposed of intoxicating liquors in his possession without a court order is sufficiently definite to include the term of office which the sheriff is filling.[88]

In proceeding before governor While the strict rules which apply to pleadings in courts should not prevail in removal proceedings before the governor,[89] enough should be made to appear to show that the sheriff is guilty of the charge.[90]

Setting up defense. Any matters which tend to justify the neglect of a sheriff to perform his duty are matters of defense which need not be anticipated in an accusation;[91] but, where the action is a civil proceeding, the sheriff must answer as in other actions.[92] In a proper case a demurrer to a defense may be sustained[93] and such defense stricken from the answer.[94]

(4) Evidence

The general rules of evidence govern in proceedings to remove a sheriff.

In an original proceeding on information of impeachment and prayer for ouster, the relator has the burden of proving the guilt of the sheriff beyond all reasonable doubt[95] In a proceeding by the state on accusation of a grand jury that a sheriff corruptly omitted to levy on property under a tax warrant, the burden of proof is on the sheriff to show the illegality of the warrant,[96] and it is not necessary for the state to show that the tax warrant was legal as long as it was regular on its face and issued by a competent officer.[97]

General rules as to admissibility of evidence apply[98] In a summary action to oust a sheriff for neglect of duty and unauthorized release of prisoners, evidence of alleged neglect of duty other than duties chargeable in the information is properly admitted as bearing on the sheriff's intent or motive.[99] Error in the admission of nunc pro tunc amendments of judgments of imprisonment in a summary action to remove a sheriff was harmless where the judgments were sufficient without amendment.[1] In a proceeding by the state to remove a sheriff for neglect of duty, an information filed by the prosecuting attorney charging the sheriff with assault was not admissible where it did not appear that the sheriff was convicted thereunder.[2] Excluding testimony of a custom of sheriffs to permit prisoners to run at large is proper where the custom is repugnant to express statutory provisions.[3] Where a sheriff cannot be removed for acts committed during a prior term, the admission of such acts has been held to constitute error,[4] although it has also been held that evidence of similar conduct during a prior term is admissible for the purpose of showing his habit, custom, and method and manner of performing duties.[5]

83. Mont.—State v. Driscoll, 144 P 153, 49 Mont 558.

84. Mont—State v. Driscoll, supra.

85. Mont—State v. Driscoll, supra

86. Va—Barbee v. Murphy, 141 S E 237, 149 Va. 406.

87. Va.—Barbee v Murphy, supra

88. Wyo—State v. Dahlem, 263 P 708, 37 Wyo 498.

89. Minn—State v. Megaarden, 88 N W. 412, 85 Minn. 41, 89 Am S.R 534
N Y—In re Guden, 64 N.E. 451, 171 N Y 529

90. Minn—State v. Megaarden, 88 N W 412, 85 Minn. 41, 89 Am.S.R 534.
57 C.J. p 748 note 16.

91. Mont—State v. Driscoll, 144 P 153, 49 Mont 558.

92. Neb—State v Dyson, 183 N.W. 298, 106 Neb 277.

93. Ga—Adamson v. Leathers, 3 S E 2d 871, 60 Ga App. 382

94. Ga—Adamson v. Leathers, supra.

No question for jury

In proceedings to remove sheriff from office on ground that he had received more money than that to which he was entitled in connection with collection of state and county taxes, where, with plaintiff's demurrer to portions of defendant's answer properly sustained and with parts of answer attacked by demurrer stricken, the answer admitted that defendant had collected commissions as alleged, but denied that they were illegal, there was no question for jury to pass on—Adamson v. Leathers, supra

95. Ala—State ex rel. Carmichael, Attorney General, v Baggett, 41 So.2d 584, 252 Ala 540

96. Okl.—Rutter v. Territory, 68 P. 507, 11 Okl. 454.

97. Okl.—Rutter v. Territory, supra.

98. Kan—State ex rel Boynton v Jackson, 33 P 2d 118, 139 Kan 744, 100 A.L.R 1394.
57 C.J p 748 note 23.

99. Idaho—Cornell v. Mason, 268 P. 8, 46 Idaho 112.

1. Idaho.—Cornell v. Mason, supra

2. Mo—State v. Yager, 157 S.W. 557, 250 Mo. 388.

3. Okl.—McCasland v. Adair County, 258 P. 750, 126 Okl 103

4. Tex—Reeves v State, 267 S.W. 666, 114 Tex. 296.

5. Kan—State ex rel Boynton v. Jackson, 33 P 2d 118, 139 Kan. 744, 100 A.L R. 1394.

General rules as to the weight and sufficiency of evidence govern in proceedings to remove a sheriff.[6] Where the offenses of giving away and selling intoxicating liquors are the same offense, evidence that a sheriff gave away or sold intoxicating liquors is sufficient to sustain an allegation charging that he permitted intoxicating liquors to be given away in his presence and with his knowledge[7] Where the proceeding is civil in its nature, it is not necessary to prove the guilt of a sheriff beyond a reasonable doubt,[8] and it is sufficient to charge the jury that guilt must be proved by a clear preponderance of the evidence,[9] but in impeachment proceedings before a court, it has been held that the court, in order to convict, must be convinced of the sheriff's guilt beyond a reasonable doubt.[10]

(5) Trial

The proceedings to remove a sheriff may be summary or he may be entitled to a jury trial, depending on the provisions therefor.

In at least one jurisdiction the proceedings to remove a sheriff are summary, and he is not entitled to a jury trial[11] Although a sheriff may be entitled to a jury trial where he is accused of misfeasance or malfeasance in office,[12] and may be summarily tried where he is accused of nonfeasance,[13] where he is accused of malfeasance, he cannot be summarily tried because nonfeasance also is pleaded since that is a mere conclusion of the pleader[14] Where a board of county commissioners is authorized to vacate the office of sheriff on receipt of a certificate from the clerk or auditor that the sheriff is in default to the county for funds collected, the board cannot consider the acts of a defaulting sheriff without first receiving such certificate.[15] A constitutional provision requiring that in a summary proceeding before a district court the cause of removal shall be spread on the court record is for the reason that the order and cause may be seen and known, and, if necessary, revised and corrected by appeal.[16]

Where the statute prescribes the manner in which the case should be submitted to the jury, a substantial compliance is sufficient[17] An instruction that the sheriff has the duty to enforce the criminal laws of the state is not prejudicial for the failure to instruct as to the correlative duties resting on other officers[18] Where the nature of the proceeding is civil, the trial court has the right to direct a verdict against a sheriff if the evidence would warrant such a direction in a civil case, and, if the facts thus found, or any of them, constitute as a matter of law any one of the grounds for removal enumerated in the statute, enter a judgment for removal[19]

(6) Verdict; Judgment; Review; Costs

General rules as to verdicts, judgments, review, and costs apply in proceedings to remove a sheriff from office

Where, in a proceeding for the removal of the sheriff from office for failure to qualify and to execute his bond as sheriff and tax collector, defendant admitted that he had never qualified after his election, a verdict finding that defendant had not "neglected and failed to present and have approved" official bonds as sheriff, and "take the oath of office as such sheriff within the time prescribed by law," was insufficient to sustain a judgment for defendant[20]

Review Where the removal of a sheriff by a court is irregular or for insufficient cause, the order or judgment is subject to revision on appeal.[21] In a summary action under a statute it has been held that, where the statute does not provide for appeals from interlocutory orders, an appeal from an order overruling a demurrer will not lie,[22] and a provi-

6. Evidence held sufficient
Kan.—State ex rel Boynton v. Jackson, supra
S.C.—Spivey v. Fidelity & Deposit Co of Maryland, 160 S.E. 275, 162 S.C. 146
57 C.J. p 748 note 31 [a].
Evidence held insufficient
Tenn.—Vandergriff v State ex rel Davis, 206 S.W.2d 395, 185 Tenn 386.
57 C.J. p 748 note 31 [b].

7. Neb.—State v. Dyson, 183 N.W. 298, 106 Neb. 277.

8. Okl.—McCasland v Adair County, 258 P. 750, 126 Okl. 103.

9. Okl.—McCasland v. Adair County, supra

10. Ala.—State v. Latham, 61 So. 351, 174 Ala. 281.

Evidence held sufficient
Ala.—State ex rel Garrett v. McPeters, 56 So.2d 102, 256 Ala. 555—State ex rel Carmichael, Attorney General, v. Baggett, 41 So.2d 584, 252 Ala. 540.

11. Tex.—Davis v. State, 35 Tex. 118

12. Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 241 P. 1075, 75 Mont. 116

13. Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, supra.

14. Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, supra.

15. N.M.—Armijo v. Bernalillo County, 7 P. 19, 3 N.M. 297.

16. Tex.—Davis v. State, 35 Tex. 118.

17. Tex.—McDaniel v. State, Civ. App., 9 S.W.2d 478
57 C.J. p 749 note 42

18. Okl.—Freas v. State, 235 P. 227, 109 Okl. 205.

19. N.M.—Territory v. Sanches, 94 P. 954, 14 N.M. 493, 20 Ann.Cas. 109

20. Tex.—State v. Box, 78 S.W. 982, 34 Tex.Civ.App. 435.

21. Tex.—Gordon v. State, 43 Tex. 330.

22. N.D.—Myrick v. McCabe, 67 N.W. 143, 5 N.D. 422.

sion in the statute authorizing an appeal as provided by law in a civil action contemplates only an appeal from a final judgment.[23] On certiorari the court has refused to vacate the commission of a person who had been elected and was acting as sheriff, although ineligible, because it deemed that the public service would suffer by such removal.[24]

While the action of the governor may be reviewed in a direct proceeding,[25] in an indirect proceeding, as long as the governor's action in removing a sheriff is within the limits of the power conferred on him, the courts cannot review the proceedings before him.[26] He is the exclusive judge, as far as the courts are concerned, of the sufficiency of the proved charges, and his findings are not reviewable by any court.[27]

Costs. In an action by the state to remove a sheriff from office, in some jurisdictions the state is not required to pay any costs, and cannot be required to make a deposit of jury costs.[28]

Restoration after reversal. Where a judgment removing a sheriff from office and declaring the office vacant is reversed, an order of court is not necessary to restore the sheriff to his office.[29]

§ 11. Title to, and Possession of, Office

A person possessing all the qualifications required by law to vote and hold office at the time he is elected and qualified as sheriff of a county has a vested right in the office of which he cannot be deprived except for cause and by due process of law.

A person possessing all the qualifications required by law to vote and hold office at the time he is elected and qualified as sheriff of a county has a vested right in the office of which he cannot be deprived except for cause[30] and by due process of law.[31] A sheriff-elect has not such a complete title to the office, however, as will entitle him to a mandamus to compel his induction into the office until he has given bond with sufficient sureties who have justified.[32] It has been held that a governor's commission of an appointee gives him prima facie title to the sheriff's office.[33] If an ex-sheriff is entitled to recover the office of sheriff, he will recover it regardless of whether or not the incumbent is entitled to hold the office,[34] but, if he is not entitled to recover the office, then he has no interest, not common to the public at large, in the incumbent's lack of qualifications.[35]

A sheriff who wishes to prove his title to the office must produce record evidence;[36] but a third person may, in his own behalf, prove by parol that the alleged sheriff acted as such officer.[37] An order of court appointing a person sheriff is admissible to prove that he was sheriff,[38] and a sheriff's official bond is competent evidence to show that he was sheriff[39] and was in office at a particular time.[40] The fact that a person acted as sheriff at a certain time is, as against him, prima facie evidence that he was sheriff,[41] and proof by reputation that a certain person was the sheriff has been held sufficient to establish his official character.[42] Where a person has acted as sheriff, he is estopped to deny his incumbency and official character.[43]

Proceedings to determine right to office. Jurisdiction of proceedings to try title to office or to try actions involving title to office is controlled by constitutional or statutory provisions.[44] In a proceeding by quo warranto to try the title to the office of sheriff, the question is one as to the de jure title to the office and not as to a de facto office or officer.[45] In a suit against a sheriff and ex officio tax collector to determine his right to hold the office, no advantage can be taken of respondent for declining to make a settlement on terms with which he was under no legal obligation to comply.[46] One ap-

23. N.D.—Myrick v McCabe, supra
24. N J—State v Anderson, 1 N.J Law 318, 1 Am D. 207
25. Wyo—State v. Dahlem, 263 P 708, 37 Wyo 498
57 C.J. p 749 note 52
26. N Y.—In re Guden, 64 N.E 451, 171 N Y 529.
Wyo—State v. Dahlem, 263 P. 708, 37 Wyo. 498.
27. Wyo.—State v. Dahlem, supra.
28. La.—State v. Waggner, 8 So 209, 42 La Ann. 54.
29. W Va.—Phares v. State, 3 W. Va 567, 100 Am.D. 777.
30. W.Va.—Phares v. State, 3 W.Va 567, 100 Am.D 777.
31. W.Va—Phares v. State, supra.
32. Tenn.—Thomason v. Justices, 3 Humphr 233
33. S C—Spivey v. Fidelity & Deposit Co. of Maryland, 160 S E. 275, 162 S.C. 146
34. Tex—Willborn v. Deans, Civ App., 240 S W 2d 791, refused no reversible error
35. Tex.—Willborn v. Deans, supra.
36. Ky—Wells v. Caldwell, 1 A K Marsh. 441.
37. Ky.—Wells v. Caldwell, supra.
38. Ark—State v. Crow, 20 Ark. 209.
39. Ark—State v. Crow, supra.
57 C.J. p 750 note 66.
40. Ala—Brazeal v. Smith, 5 Ala. 206.
41. N.H.—Lucier v. Pierce, 60 N.H 13.
N J—Brewster v Vail, 20 N.J Law 56, 38 Am D. 547.
42. N.Y.—Hall v. Luther, 13 Wend 491
43. Wis.—Sprague v. Brown, 40 Wis. 612
57 C J. p 750 note 72
44. Iowa—State v. Van Beek, 54 N W 525, 87 Iowa 569, 43 Am.S.R 397, 19 L R.A 622.
57 C J. p 750 note 75.
45. Mo.—State v. Finn, 4 Mo.App. 347.
46. La.—State v. Reid, 12 So. 189, 45 La.Ann. 162.

pointed as sheriff to fill an unexpired term is not estopped to claim that his appointment extended to the succeeding term by the fact that he applied for the appointment to the succeeding term where on such application he stipulates that he waives no rights under his former appointment.[47]

Under some statutes authorizing suit to try title to the office to be brought by the attorney general, provisions for obtaining leave from a judge are only applicable to suits by private parties and not to suits by the attorney general.[48] The right of a sheriff to his office cannot be collaterally questioned by third persons.[49]

In an action to compel surrender of the office of sheriff, together with the effects thereof, the complaint must state the essentials of the cause of action,[50] and new matter used as a defense by the incumbent must be pleaded.[51] A plea of denial by the hold-over incumbent in such an action simply controverts the material allegations of the complaint and forces the candidate for the office to prove them,[52] and the evidence must correspond with, and be confined to, the issues raised by the pleadings.[53] Where, in an action by the defeated candidate against the successful candidate for the office of sheriff, it is alleged that the latter is an alien and that he has fraudulently concealed that fact from the electors, allegations in the answer of facts tending to refute the charge of fraud are material.[54]

In proceedings to ascertain whether a sheriff is entitled to hold the office, it is incumbent on him to prove his eligibility;[55] and, where a party declares that the office is vacant by reason of the failure of the incumbent on reelection to qualify within the time prescribed, he has the burden of proving such allegation.[56] Where an appointee under the law serves only for the unexpired term of the deceased sheriff, testimony of members of a commissioners' court respecting the intent of the court in making the appointment was properly excluded.[57] In an action to compel the hold-over incumbent to surrender the office of sheriff and the effects thereof, evidence that the relator had been declared the successful candidate by the county board is sufficient to defeat a motion of nonsuit.[58]

Proceedings to protect possession of office. A court of equity may, at a suit of a lawful sheriff, in possession of his office, interfere by injunction to restrain another person from usurping, intruding on, or exercising the duties of the office,[59] but, where a person is in lawful possession of the office, an injunction will not lie at the instance of a former sheriff.[60]

§ 12. De Facto Sheriffs

A person who has been duly elected sheriff and exercises the duties of the office is sheriff de facto, although his bond is defective or is not executed within the time prescribed by law.

A person who has been duly elected sheriff and exercises the duties of the office is sheriff de facto, although his bond is defective[61] or is not executed within the time prescribed by law;[62] and a sheriff who has properly qualified by giving the bond required by statute, and who is reelected at the next election, but fails to renew the bond, is a de facto sheriff after the expiration of the first term.[63] So, also, although the statute makes the election of a defaulter to any office of trust or profit void, where a defaulter is elected sheriff, and acts as such, he is sheriff de facto.[64] A sheriff duly elected as such and exercising the duties of the office is a de facto sheriff although he has not received his commission,[65] but a person attempting to hold the office of sheriff in opposition to the authority of the United States and the laws and decisions of the courts of the state cannot be regarded as a de facto officer.[66]

Sheriff de jure distinguished. A de jure sheriff is one in all respects legally appointed or elected

47. Tex.—Dobkins v. Reece, Civ App., 17 S.W.2d 81
48. S.C.—State v. Sanders, 110 S.E. 808, 118 S.C. 498
49. Ky.—Stokes v. Kirkpatrick, 1 Metc. 138.
57 C.J. p. 750 note 82
50. N.C.—Cohoon v. Swain, 5 S.E.2d 1, 216 N.C. 317.
51. N.C.—Cohoon v. Swain, supra.
52. N.C.—Cohoon v. Swain, supra.
53. N.C.—Cohoon v. Swain, supra.
54. Iowa.—State v. Van Beek, 54 N.W. 525, 87 Iowa 569, 43 Am.S.R. 397, 19 L.R.A. 622.
57 C.J. p. 750 note 78.
55. N.J.—State v. Anderson, 1 N.J. Law 318, 1 Am.D. 207.
57 C.J. p. 750 note 84
56. Tex.—Dobkins v. State, Civ.App., 19 S.W.2d 574
57 C.J. p. 750 note 85.
57. Tex.—Dobkins v. State, supra.
58. N.C.—Cohoon v. Swain, 5 S.E.2d 1, 216 N.C. 317.
59. Pa.—Ewing v. Thompson, 43 Pa. 372
57 C.J. p. 751 note 89.
60. Wis.—Doberstein v. Dahl, 195 N.W. 416, 181 Wis. 491.
57 C.J. p. 751 note 90.
61. Ga.—Cooper v. Ricketson, 80 S.E. 217, 14 Ga.App. 63.
62. Ga.—Crawford v. Howard, 9 Ga. 314
Va.—Monteith v. Commonwealth, 15 Gratt. 172, 56 Va. 172.
63. Mich.—Springett v. Colerick, 34 N.W. 683, 67 Mich. 362
64. Tenn.—Jones v. Scanland, 6 Humphr. 195, 44 Am.Dec. 300
65. Ga.—Bailey v. Kennett, 122 S.E. 804, 32 Ga.App. 255.
66. La.—State v. McFarland, 25 La. Ann. 547.
Tenn.—Bates v. Dyer, 9 Humphr. 162.

and qualified to exercise the office,[67] and, although there may be a question of the validity of an appointment, where such appointment is ratified and confirmed by the proper agency, the sheriff is not a de facto officer of his county.[68]

Collateral attack on acts. The acts of a de facto sheriff cannot be attacked collaterally in a proceeding to which he is not a party.[69]

B. CONSTABLES

§ 13. Election or Appointment

a. In general
b. Time, mode, and validity of election
c. Time, mode, and validity of appointment
d. Record and evidence of appointment or election

a. In General

Constables may be selected either by election or appointment, in accordance with constitutional or statutory provisions.

Under varying constitutional and statutory provisions selection of a constable may be effected either by election or by appointment.[70] Where the constitution provides for election, a statute providing for appointment is of no effect,[71] and, in like manner, a municipal ordinance with respect to the election of constables is void when it conflicts with a state statute on the subject.[72] Where a statute providing for appointment is superseded by a statute providing for election, an appointment cannot be legally made.[73] Statutes authorizing municipal authorities to appoint a town constable apply to all incorporated towns where such statutes are not inconsistent with special acts of incorporation or other special laws.[74] An appointment by the proper officials acting under constitutional or statutory authorization confers a good title to the office.[75]

Number of constables. The courts have upheld the validity of statutes regulating the number of constables to be elected by municipalities in accordance with their population.[76] A constitutional provision directing that the different counties shall be laid off in districts of convenient size and providing for the election of constables for the different districts does not limit the power of the legislature to increase the number.[77] Where a statute provides that in cities of various populations there shall be the same number of constables as there are justices of the peace and limits the number of justices without reference to a limitation on the number of constables, the legislative intent is to restrict the number of constables to the number of justices of the peace.[78]

b. Time, Mode, and Validity of Election

Statutes regulating the time and mode of elections of constables are mandatory in character. No one may be elected constable of a new precinct before such precinct becomes legally existent.

The requirements of statutes regulating the time for election of constables are mandatory.[79] Under statutes prescribing the method of election of constables, it has been held that the vote must be for definite and identified individuals rather than for indefinite persons who may fulfill certain qualifications.[80] A statute declaring that a justice of the peace, if one is to be had, must preside at the constable's election is mandatory as affecting the legality of the election.[81]

Where the statutes give notice of the time and place of election and of the officer to be elected, an election of a constable is valid, although the township supervisors, by proclamation, called for the election of two constables, whereas the township was entitled to elect only one.[82] No one may be

67. Colo—Israel v Wood, 56 P.2d 1324, 98 Colo 495
W Va—Snee v White, 90 S E 1045, 79 W Va 409
68. W Va—Snee v White, supra
69. Ga.—Cooper v Ricketson, 80 S. E. 217, 14 Ga App. 63
70. Cal—Sanchez v. Fordyce, 75 P. 56, 141 Cal. 427
Md—Smith v. Thursby, 28 Md 244.
57 C J. p 751 notes 6, 7.
Election or appointment of constables to fill vacancies see infra § 16.
71. Ill—People v Bollam, 54 N E. 1032, 182 Ill 528
72. Mo—State v McKee, 69 Mo. 504.
73. Pa—Comfort v. Cumberland County, 23 Pa Co 414.
57 C J p 752 note 11.
74. N C—Wilson v. Town of Mooresville, 22 S E 2d 907, 222 N.C 283.
75. Md—Smith v. Thursby, 28 Md. 244
57 C J p 751 note 8.
76. Cal—Sanchez v Fordyce, 75 P. 56, 141 Cal. 427
57 C J p 752 note 17.
77. Tenn—Britton v. Moody, 2 Coldw. 15.
78. Wash—State v Hamilton, 159 P 379, 92 Wash 347.
57 C J p 752 note 19
79. Pa—Murphy's Case, 19 Pa Co 160
57 C J. p 752 notes 24–26
80. Me—Crowell v. Whittier, 39 Me 530.
57 C.J. p 752 note 29
Vote for "lowest bidder"
The vote of a town that whoever shall make the lowest bid for collecting taxes shall be constable will not authorize such person to perform the duties of constable—Crowell v Whittier, 39 Me 530.
81. Ga—Franklin v. Kaufman, 65 Ga 260
82. Cal.—Sanchez v. Fordyce, 75 P. 56, 141 Cal. 427.

elected constable of a new precinct before such precinct becomes legally existent,[83] and where a candidate is nominated for constable of a new precinct to be created and voted for as such by electors of an old precinct, who will eventually become electors of the new precinct, his purported election cannot make him constable of either the new precinct[84] or the old precinct,[85] both the nomination and the election being invalid.[86] In some jurisdictions the county court is the proper judge of the return of the election of a constable, and its adjudication that a person was elected cannot, while it remains in force, be questioned.[87]

c. Time, Mode, and Validity of Appointment

A statute which prescribes a mode of appointment of constables different from that authorized by the constitution is void. The appointment must be made by the person or persons authorized by law.

A statute which prescribes a mode of appointment different from that authorized by the constitution is void;[88] but constitutional provisions for the election of constables by the voters have been construed as not repealing a mode of selection by appointment pursuant to charter granted by a territorial legislature before adoption of the state constitution.[89] Although it may be the duty of the county court to lay off the county into districts, and, in the appointment of constables, to designate their districts, an appointment of a constable for the county generally is not void.[90]

By whom appointment made. Under some statutes providing for the appointment of a constable by the mayor and common council without any direction as to the mode of appointment, the mayor should nominate the constable subject to confirmation by the council,[91] and an appointment by the council of one not nominated by the mayor is illegal.[92] Under other statutes providing for the appointment by the mayor and city council, the appointment is properly made by the mayor and council by ordinance rather than by the mayor subject to confirmation by the council.[93] An order of court appointing a person constable is void and confers no authority where it does not appear that any case existed in which the court could by law exercise the power of appointing a constable.[94] Statutes authorizing one government official to appoint constables are invalid in so far as they attempt to take away the constitutional power of other officials to make such appointments.[95]

Time when appointment by ordinance effective. Under an ordinance appointing constables, the appointment takes effect, it has been held, when the ordinance does, although no commission or certificate of appointment has issued.[96]

d. Record and Evidence of Appointment or Election

Court records may afford sufficient evidence of the appointment or election of constables.

A record of the county court reciting that the court appointed a certain person constable, he having been elected in a certain district, is sufficient evidence of an election by the people, and not of an appointment by the court;[97] and it has been held that a statement in the record of the county court that a certain person, having been "appointed" constable, came into court and qualified, must be understood to mean that he had been elected by the people according to law.[98] An entry on the county court records that a certain person was permitted to renew his bond as constable is not evidence that such person was duly appointed a constable.[99] Parol evidence that a person acted as constable is admissible against him;[1] and it has also been held that proof of general reputation and acting as constable is competent evidence on behalf of the person claiming to have been constable,[2] although the township records, where these have been properly kept, are the best evidence of such official character.[3]

83. Tex.—Brown v. Meeks, Civ.App., 96 S.W.2d 839, error dismissed.
84. Tex.—Brown v. Meeks, supra.
85. Tex.—Brown v. Meeks, supra.
86. Tex.—Brown v. Meeks, supra.
87. N.C.—Bailey v. Washburn, 26 N.C. 19.
57 C.J. p. 753 note 30.
88. Md.—Levin v. Hewes, 86 A. 233, 118 Md. 624.
57 C.J. p. 751 note 9.
89. Ark.—Helena v. Biscoe, 19 Ark. 417.
90. Ky.—Chambers v. Thomas, 1 Litt. 268, 3 A.K.Marsh. 536.
91. N.J.—Loper v. Millville, 21 A. 568, 53 N.J.Law 362.
92. N.J.—Loper v. Millville, supra.
93. Md.—Levin v. Hewes, 86 A. 233, 118 Md. 624—Little v. Schul, 84 A. 649, 118 Md. 454.
94. N.C.—State v. Briggs, 25 N.C. 357.
95. S.C.—Harrison v. Lancaster, 28 S.E.2d 835, 204 S.C. 318.
Appointment by senator
Statute authorizing senator of county to designate constable for city is unconstitutional in so far as it attempts to take away magistrate's constitutional power to appoint constables to execute writs and processes issued by magistrate.—Harrison v. Lancaster, supra.
96. Md.—Little v. Schul, 84 A. 649, 118 Md. 454.
97. N.C.—Dickson v. Eskridge, 27 N.C. 411.
98. N.C.—Welch v. Scott, 27 N.C. 72—McCall v. Fullenwider, 26 N.C. 364.
99. N.C.—McRae v. Wall, 24 N.C. 267.
57 C.J. p. 753 note 37.
1. N.J.—Stout v. Hopping, 6 N.J. Law 125.
2. Ohio.—Johnson v. Stedman, 3 Ohio 94, followed in Eldred v. Sexton, 5 Ohio 215.
3. Ohio.—Johnson v. Stedman, 3

§ 14. Eligibility

Ordinarily residence in the district of his appointment is essential to the eligibility of a constable. Where the legislature has laid down the standard of eligibility of candidates, other bodies may not vary such standard.

Residence in the district in which he is to serve is essential to the eligibility of a person for the office of constable under common-law principles[4] and by virtue of provisions of some constitutions and statutes[5] Such residence has been held necessary for a constable by implication from statutes requiring local residence for selectmen of towns[6] or officers of boroughs[7] Further it may be required that candidates for the office of constable shall be qualified voters of the district[8]

Where the legislature has fixed the qualifications of candidates for the office of constable, the commissioners' court may not add to, or take from, such qualifications[9]

Disqualifications. A mere charge of crime, of which one has never been convicted, does not render one ineligible for the office of constable at the discretion of a court authorized to select the officer.[10] Where the statute forbids the reelection of a constable who fails on or before a certain day in each year "to pay over all moneys collected by him to the treasury to which they belong," the mere fact that certain taxes remain uncollected has been held not to preclude the reelection of a constable.[11]

§ 15. Qualification

a. In general
b. Bond
c. Oath

a. In General

While a constable should qualify before entering on the performance of his duties, in the absence of statutory requirement there is no set period within which he must qualify in order to prevent the office from becoming vacant.

A constable should qualify before entering on the performance of his duties;[12] but in the absence of statutes providing for vacancy unless the constable qualifies within a prescribed time of election or appointment, there is no time limit within which one selected as constable must qualify in order to prevent a vacancy[13] Some statutes imposing such a time limit have been construed as mandatory,[14] but other statutes have been held to be merely directory.[15] Where, in addition to a statutory provision, the constitution provides that a neglect to qualify shall be deemed a refusal to accept the office, a neglect to take the oath of office within the time prescribed by statute must be treated as a refusal to accept the office.[16] Under a statute requiring a constable to qualify after he shall have been notified of his election, the notice contemplated means personal service.[17] The qualification of a constable should be noted by the proper officer in his book of record.[18]

b. Bond

(1) In general
(2) Form and sufficiency; amount
(3) Delivery
(4) Approval, filing, and recording
(5) Amendment; new or additional bond

(1) In General

Under statutes which so provide, a constable must execute a bond or enter into a recognizance for the faithful discharge of the duties of his office.

Under statutes which so provide, a constable must execute a bond or enter into a recognizance for the faithful discharge of the duties of his office.[19] The purpose of such statutes is to protect the town or district against the possible misfeasance or nonfeasance of constables in the exercise of their duties.[20] It has been held that a person elected to the office of constable may discharge its duties without having executed a qualifying bond if it has not been required of him or if its execution and delivery are delayed for the time being with the

Ohio 94, followed in Eldred v. Sexton, 5 Ohio 215.

4. Pa.—In re Plymouth Borough Constable, 27 Pa.Co. 204
5. Mass.—Barre v. Greenwich, 1 Pick 129
6. Mass.—Barre v. Greenwich, supra
57 C.J. p 753 note 45.
7. Pa.—In re Plymouth Borough Constable, 27 Pa.Co 204
57 C.J. p 753 note 46.
8. Vt.—Wilson v. Wheeler, 55 Vt. 446.
57 C.J. p 753 note 47.
9. Tex.—Brown v. Meeks, Civ.App., 96 S.W.2d 839, error dismissed.
10. Pa.—In re Miller, 1 Browne 349.
57 C.J. p 753 note 48.
11. Vt.—Pawlet v. Kelley, 38 A. 92, 69 Vt. 398
12. Pa.—In re Borough High Constables, Quar.Sess., 32 Del.Co. 335.
13. Pa.—Application of Smith, 28 Pa.Dist. 978
57 C.J. p 754 note 51.
14. Vt.—State v. Buchanan, 27 A. 166, 65 Vt. 445.
57 C.J. p 754 note 52.
15. N.Y.—Dutton v. Kelsey, 2 Wend 615
16. Md.—Little v. Schul, 84 A. 649, 118 Md. 454.
57 C.J. p 754 note 55.
17. Mo.—State v. Caldwell, 276 S.W. 631, 310 Mo. 397.
18. Ohio.—Johnson v. Stedman, 3 Ohio 94
57 C.J. p 756 note 24.
19. Ga.—Franklin v. Kaufman, 65 Ga. 260
57 C.J. p 754 note 66
20. Vt.—State v. Buchanan, 27 A. 166, 65 Vt. 445.

consent of the selectmen,[21] and that a statute providing for a forfeiture by the constable for every process he serves before giving bond does not mean that the bond must be approved before he may serve process without incurring a penalty.[22] The view has been taken that a constable's failure to file his official bond does not ipso facto work a forfeiture of office or effect a vacancy,[23] but merely makes the constable's title to office defeasible until forfeiture is pronounced in due form,[24] so that all acts of such officer prior to pronouncement of forfeiture are valid as to the public and third persons;[25] but it has also been held that if the constable fails to qualify and give bond there is in legal contemplation a vacancy in the office.[26]

A constable's bond is not void because it is not given until after he has commenced the discharge of his official duties[27] or until after the time allowed by statute in which to qualify.[28] A statute providing for the qualifying of a constable by filing his bond within a prescribed time after his election or appointment has been held to mean that the time is to be computed after the certificate of election has been issued.[29] Where the appointment of a constable is void, the bond taken under it is also void.[30] A constable's official bond is not vacated or rendered void by his temporary removal from office, but covers his official conduct after his reinstatement in office as well as before the suspension of his functions.[31] A bond, extorted from the constable and his sureties under color of office, but without lawful authority, as a condition precedent to his remaining in office, is void.[32]

(2) Form and Sufficiency; Amount

A constable's bond should substantially comply with statutory requirements regulating its form and sufficiency.

A bond taken in more than the amount prescribed by statute may be held valid, at least to the extent of the statutory sum.

While ordinarily a bond substantially complying in form to the requirements of the statute is sufficient,[33] a bond exacting conditions not prescribed has been held void.[34] A condition in a constable's bond that he shall execute all writs and process to him directed does not render the bond open to the exception that the condition is beyond the terms required by law, since only legally directed writs must be executed.[35] In the absence of a statutory requirement it is not necessary that a constable's bond should specify the township for which he was elected.[36] Where statute requires security but is silent as to its form, the security may be in the form of a penal bond to the people,[37] but it has been considered preferable that it should be in the form of a simple agreement, without any penalty, to pay to any person who may be aggrieved by the constable's neglect of duty.[38]

Obligee in bond. A constable's bond should name an obligee,[39] and the bond should run to the obligee designated by the statute,[40] but, although the bond names the wrong obligee, it is valid as a common-law bond when it is voluntarily executed and there is nothing in the condition contrary to law,[41] and a constable may justify his acts under his office, although his bond does not run to the proper obligee.[42] A statutory provision that a constable's bond shall be in trust for the benefit of all persons who may sustain injury and for like purposes and uses as sheriff's bonds does not constitute a condition of the bond, but does indicate that it is to cover not only breaches of his official duty to the commonwealth buth also injuries done to others.[43] Where the statute does not designate an obligee, the bond may run

21. Vt.—Langdon v. Rutland, etc., R. Co., 29 Vt. 212

22. Me.—Stacey v. Graves, 74 Me. 368

23. N.J.—Bachmeier & Co. v. Semel, 163 A. 126, 10 N.J. Misc. 1172.

24. N.J.—Bachmeier & Co. v. Semel, supra.

25. N.J.—Bachmeier & Co. v. Semel, supra.

26. Ga.—Franklin v. Kaufman, 65 Ga. 260.

27. Ind.—Dickens v. State, 7 Blackf. 358

28. N.Y.—Dutton v. Kelsey, 2 Wend. 615
Ohio.—Westerhaven v. Clive, 5 Ohio 136.

29. Ark.—Hutcheson v. Pitts, 278 S.W. 639, 170 Ark. 248.
57 C.J. p. 751 note 57.

30. N.C.—Little v. Powell, 24 N.C. 275—Little v. Wall, 24 N.C. 272

31. D.C.—U. S. v. Bill, 24 F.Cas.No. 14,594, 2 Cranch C.C. 518.

32. N.J.—Woolwick Tp. v. Forest, 2 N.J. Law 115.

33. Mo.—State v. Kirby, 9 Mo. 298.
57 C.J. p. 754 note 72.

Equivalent words

The words "shall well and truly execute the duties of the office of constable," appearing in constable's bond were equivalent of words "shall justly and faithfully discharge the duties of his office of Constable," as used in condition of bond required by statute pursuant to which bond was given.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa. Super. 451

34. N.J.—Nottingham v. Giles, 2 N.J. Law 111.
57 C.J. p. 755 note 73.

35. Pa.—Musselman v. Commonwealth, 7 Pa. 240

36. Mo.—State v. Kirby, 9 Mo. 298.

37. N.Y.—People v. Holmes, 5 Wend. 191.

38. N.Y.—People v. Holmes, supra.
57 C.J. p. 755 note 77.

39. Ill.—Roberts v. Parlin, 81 Ill. 230.

40. N.J.—Middletown Tp. v. McCormick, 3 N.J. Law 500.
57 C.J. p. 755 note 79.

41. Mass.—Farr v. Rouillard, 52 N.E. 443, 172 Mass. 303.
57 C.J. p. 755 note 80.

42. Ohio.—Barret v. Reed, 2 Ohio 409.

43. Pa.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa.Super. 451.

to the people of the state[44] or to "each and every person" to whom "the constable shall become liable"[45]

Amount. Although the penalty of a constable's bond is usually fixed by statute, a bond taken in more than the amount required by statute but not extorted colore officii is valid,[46] at least for the amount of the statutory penalty.[47] A bond not executed in pursuance of a statute and not conditioned for the payment of a certain sum of money is not good as a common-law bond.[48] Where the law does not fix any amount as the penalty, a bond in which a reasonable sum is fixed as the penalty is not invalid where not given as the result of extortion, duress, or any kind of unfairness;[49] on the other hand, no limitation of liability is necessary in order to make the bond valid.[50]

(3) Delivery

Ordinarily a constable's bond should be accepted by a duly authorized representative of the state or municipality in order to complete its delivery.

A constable's bond is not delivered so as to become effective unless it has been accepted by some authorized agent of the state or the municipality[51] or unless in law its acceptance can be presumed.[52] A city or town clerk is an officer to whom a constable may properly deliver his bond in the first instance, the statute not designating to whom such bond shall be delivered,[53] but it has also been considered that a delivery of the bond to the selectmen of the town would be sufficient.[54]

(4) Approval, Filing, and Recording

The bond of a constable should be approved and filed in compliance with statutory regulations.

When so required by statute, the bond of a constable must be approved by the official or tribunal designated by statute in order that it may become effective as a part of his qualification.[55] Where the statute provides that the clerk of court in vacation shall approve the bond, but does not designate a particular mode of approval, the receipt of, the indorsement on, and filing of, the bond by the clerk is sufficient evidence of his approval,[56] and, although the statute further provides that the court at the next term shall approve or reject the bond taken by the clerk in vacation, its failure to do so does not invalidate the bond.[57] Where the statute provides that a judge's certificate that the constable has given bond shall be sufficient evidence of such officer's right to act, such certificate executed in pursuance of the statute is sufficient evidence that the bond has been approved.[58]

In the absence of statutory direction to the contrary, the approval of the bond need not be made in writing,[59] or in open court,[60] or a matter of record.[61] A statute providing that the official bonds of all county and township officers shall be filed and recorded in the office of the county clerk has been held to include the official bond of a constable.[62]

(5) Amendment; New or Additional Bond

A constable's bond is subject to amendment in a proper case, and provision may be made for a new or additional bond in event of death, removal, or insolvency of the surety.

In a case where a constable's bond is in proper form, and recites his election, but by a clerical error the name of his surety is inserted in the condition, the court may grant, it has been held, a rule to amend the bond by substituting the name of the constable.[63]

New or additional bond. Statutes sometimes provide that in case of the death, removal, or insolvency of the sureties, or for other cause, the constable, at the risk of a vacancy in office, shall give new or additional security within a prescribed time. Where the statute provides that a county court may require

44. N Y —People v. Holmes, 2 Wend 281, 282
57 C.J p 755 note 82.

45. N.Y —Dutton v. Kelsey, 2 Wend. 615

46. Me —Quimby v. Adams, 11 Me. 332
57 C.J. p 755 note 86.

47. Ala.—Bagby v. Chandler, 9 Ala. 770.

48. Ill —Roberts v. Parlin, 81 Ill 230

49. Neb —Williams v Golden, 6 N W. 766, 10 Neb. 432, followed in Noble v Himeo, 10 N W. 499, 12 Neb. 193

50. Neb.—Noble v Himeo, 10 N.W. 499, 12 Neb 193.

51. N.C.—Braddy v. Shirley, 23 N.C 597.
57 C J. p 755 note 93.

52. N C.—Braddy v. Shirley, supra

53. Me.—Stacey v. Graves, 74 Me. 368
Vt —State v Buchanan, 27 A. 166, 65 Vt. 445.

54. Vt —State v Buchanan, supra

55. Pa —Commonwealth v. Ross, 5 Pa Co. 593
Wash —In re Appointment of High Constable of Canonsburg, 18 Wash 202, 30 Mun. 60
57 C.J p 755 note 99
Approval of new or additional bond see infra subdivision b (5) of this section.

56. Mo —Jones v. State, 7 Mo. 81, 37 Am D 180.

57. Mo.—Jones v. State, supra

58. Ala.—Seaman v. Dufphey, 4 Stew & P 159.

59. Me —Quimby v Adams, 11 Me 332

60. Ala.—Seaman v. Dufphey, 4 Stew & P 159

61. Ala.—Seaman v Dufphey, supra

62. Wash —State v Yourex, 71 P 203, 30 Wash 611

63. Pa —Matter of Bransby, 1 Wkly. N C 326.

a constable to show cause why a new bond should not be given, the statute must be followed,[64] and an order of the court not entered in pursuance of the statute is void.[65] Clerks of circuit courts may have authority to approve additional official bonds of constables[66]

c. Oath

In the absence of a statutory or constitutional provision directing otherwise, the qualifying oath of a constable may be oral.

In the absence of a statutory or constitutional provision directing otherwise, the qualifying oath required of a constable may be oral.[67] A constable who is reelected to office may lawfully continue to serve before he has been sworn in for the second term,[68] and a provision in a newly adopted constitution requiring all officers to take an oath before entering the duties of their office is inapplicable to a constable in office at the time of its adoption[69] A statute requiring county and township officers to file a copy of their official oath with the town clerk is not applicable, it has been held, to a constable.[70]

A statute declaring that any person shall be deemed to have refused to accept his office on his failure to take an oath within a prescribed time after he receives his commission or notice of appointment does not apply to constables where other statutory provisions specifically treat the time within which constables shall take the oath of office[71] An entry on the record of a town meeting that a certain candidate for the office of constable was "declared elected and sworn" sufficiently indicates that such person was sworn.[72]

§ 16. Term of Office, Holding Over, and Vacancies

a. Term of office
b. Holding over
c. Vacancies

a. Term of Office

The term of office of a constable is subject to statutory and constitutional regulation Where no constitutional prohibition exists the legislature may change the term as it sees fit.

As a general rule the term of office of a constable is fixed by constitutional or statutory provision,[73] and where it is so fixed, and a constable is duly elected, his term will be for the period set by statute even though the certificate of election erroneously specifies a different term.[74] The term of office ordinarily begins and ends at the time specified by constitutional or statutory provision,[75] and under some statutory provisions the term commences at the date of qualification, and not at the date of election[76]

Changing term of office. In accordance with general rules discussed in Officers § 47, the term of office of a constable can be altered by the legislature either where the office is not a constitutional one[77] or where the term is not fixed by the constitution creating the office,[78] but it cannot be altered by the legislature where it is fixed by constitutional provisions[79] Where the office of constable is not established by the constitution, the legislature may shorten the term of an incumbent,[80] extend the term of office of constable,[81] or discontinue the tenure.[82]

b. Holding Over

Under constitutional or statutory provisions a constable whose term expires may hold over until qualification of his successor.

Under constitutional or statutory provisions a constable may hold office until his successor shall be chosen and qualified,[83] but some constitutional

64. Mo.—Sheeley v. Wiggs, 32 Mo 398
57 C.J. p 756 note 17

65. Mo.—Sheeley v Wiggs, supra

66. Ind.—Winningham v State, 56 Ind 243
Approval of bond generally see supra subdivision b (4) of this section.

67. Pa.—In re Constables' Bonds, 16 Pa Co 93
57 C J p 754 note 61

68. Conn.—Kelsy v. Wright, 1 Root 83
Time of qualification generally see supra subdivision a of this section.

69. Conn.—Stone v. Healy, 5 Conn. 278.

70. Pa.—Brunott v. McKee, 6 Watts & S. 513.

71. Md.—Little v Schul, 84 A. 649, 118 Md. 454
57 C J. p 754 note 58.

72. Mass.—Commonwealth v. Sullivan, 42 N.E 566, 165 Mass. 183

73. Pa.—Commonwealth v. Atticks, 16 Pa Co 147
57 C J p 756 note 27.
Statute held valid
Kan.—Powers v. Thorn, 129 P 2d 254, 155 Kan. 758

74. Ga.—Motes v Davis, 4 S E 2d 597, 188 Ga 682, 125 A.L.R. 289.

75. Pa.—In re Constable's Bond, 5 Pa Dist 185
57 C J p 757 note 28

76. Tenn.—State v. Parchmen, 3 Head 609
57 C.J. p 757 note 29.

77. Ariz.—Barrows v. Garvey, 193 P. 2d 913, 67 Ariz 202.
57 C J. p 757 note 31.

78. Ariz.—Barrows v. Garvey, supra.
Pa.—In re Allegheny County Constables, 17 Pa.Co. 622

79. Md.—Little v. Schul, 84 A. 649, 118 Md. 454

80. Pa.—Commonwealth v. Benfield, 5 Pa Dist. 382.

81. Ariz.—Barrows v. Garvey, 193 P. 2d 913, 67 Ariz 202.

82. La.—Hillman v. Police Jury of Webster Parish, 133 So 839, 16 La. App 237.
Abolition of office see supra § 3.

83. N C.—State v. Wilroy, 32 N.C. 329.
57 C J. p 757 note 37.

provisions relative to holding over have been held inapplicable to the office of constable.[84] Notwithstanding a determination at an annual town meeting that the number of constables shall be three, the election of only two ousts all of the constables elected for the preceding year, and, although the number then chosen was three, no one of them can hold over on the pretense that no person is chosen in his place.[85] Where a constable at the close of his term turns over to a person holding a certificate of election the symbols of his office and accepts from such person an appointment as deputy, and takes the oath and thereafter acts as such, he thereby surrenders and abandons the office of constable, under principles discussed infra § 17, and cannot thereafter claim that he was holding over after his term.[86]

On abolition of office. Where there are two constables in a township having a certain population, and a statute is enacted providing that in townships of such population there shall be but one constable, the effect of such statute is to abolish the two previously existing offices and to create a new office which can be filled only by election or appointment, and consequently neither of the constables then in office is entitled to hold over after the expiration of his term.[87]

c. Vacancies

(1) In general
(2) Filling vacancies

(1) In General

Failure to appoint or elect a constable at the proper time, or the failure of a constable-elect to qualify, may result in the creation of a vacancy in the office.

A vacancy in the office of constable may occur when there is a failure to appoint or elect a constable or the constable-elect fails to qualify;[88] and a vacancy may also result from the constable's resignation, removal from office, suspension, or abandonment of the office, under principles discussed infra §§ 17, 18. Under a constitutional provision declaring that no person shall hold more than one lucrative office at the same time, an acceptance by a constable of the office of deputy sheriff ipso facto vacates the office.[89] The office of constable is not ipso facto vacated, it has been held, by the incumbent's going into military service as a conscript.[90]

Change of residence. While under some statutes requiring residence in the district as a prerequisite to the holding of the office the removal of a constable to another town with intent to remain there vacates his office,[91] under other statutes the mere fact that a constable removes his residence out of the voting district for which he was elected does not in itself create a vacancy in office.[92]

Power of court to declare vacancy. The power of a court to declare the office vacant depends on the authority given by constitutional or statutory provisions.[93] Where the court's only power is to require the constable to show cause why a new bond should not be given, the law must be strictly pursued,[94] and an order peremptorily requiring a new bond and thereafter declaring the office vacant without an order to show cause is absolutely void.[95]

(2) Filling Vacancies

In accordance with constitutional or statutory provisions, a vacancy in the office of constable may be filled by appointment or by election.

Unless there is a vacancy in the office of constable there can be no appointment[96] or election[97] for the purpose of filling a vacancy. Where a high constable is a borough officer as distinguished from a county or court officer, it has been held that the court of quarter sessions lacks authority to accept the bond or otherwise qualify one appointed to fill a vacancy in such office.[98]

By appointment. Under provisions of constitution or statute a vacancy in the office of constable may be filled in the first instance by an appointment

84. N.C.—State v. McLure, 84 N.C. 153.
57 C.J. p 757 note 37 [a] (1).

85. N.Y.—People v. Jones, 17 Wend. 81

86. Cal.—People v. Davidson, 83 P. 159, 2 Cal.App. 96
57 C.J. p 757 note 40.

87. Cal.—People v. Davidson, supra
Right of legislature to abolish see supra § 8.

88. Ala.—State ex rel. Benefield v. Cottle, 49 So.2d 224, 254 Ala. 520
Ill.—People ex rel. Sinsheimer v. Pierson, 48 N.E.2d 754, 318 Ill.App. 573.
57 C.J. p 757 notes 45, 46.

89. Tenn.—State v. Slagle, 89 S.W. 326, 115 Tenn. 336
57 C.J. p 758 note 58

90. N.C.—In re Bradshaw, 60 N.C. 379.

91. Mass.—Barre v. Greenwich, 1 Pick. 129
57 C.J. p 758 note 55.

92. Ga.—Johnson v. State, 109 S.E. 526, 27 Ga.App. 679.

93. Mo.—Sheeley v. Wiggs, 32 Mo. 398.

94. Mo.—Sheeley v. Wiggs, supra

95. Mo.—Sheeley v. Wiggs, supra

96. N.C.—State v. Lightfoot, 24 N.C. 306.
57 C.J. p 758 note 62

97. Pa.—In re Burrell Tp. Constable, 11 Pa.Co. 436.

98. Pa.—Petition of Saint, 33 Pa.Dist. & Co. 417, 31 Mun.L.R. 118, 88 Pittsb.Leg.J. 18.

by a designated officer or tribunal.[99] Under some statutes, on the failure to elect a constable because of the illegality of the election, there cannot be a new election, but the vacancy must be filled by appointment.[1] The statutory power given a county court by statute to appoint a constable to fill a vacancy has been held to be a special power,[2] and the statute must be followed.[3] An appointment by a court is void where the requisite number of justices required by statute is not present,[4] but the fact that the statute provides that the appointment shall be by the next county court does not prevent an appointment at a subsequent term if the requisite number of justices was not present at the preceding term.[5] Where, by statute, a justice of the peace under certain contingencies has the right to appoint a constable to fill a vacancy, the death of the justice in no way affects the appointment[6] Where there is no existing vacancy in the office at the time of a purported election of a constable, but a vacancy occurs thereafter, one appointed to fill such vacancy takes the office in preference to one elected to fill it at a time when the vacancy did not yet exist.[7]

The particular statute authorizing his appointment controls as to the term of office of a constable appointed to fill a vacancy.[8] Under some statutes one appointed to fill a vacancy in the elective office of constable holds such office until the next general election and the qualification of his successor,[9] but under other statutes the appointee holds for the unexpired term of his predecessor [10]

A statutory provision continuing a constable in office until a successor shall have been chosen and qualified has been applied in the case of a constable appointed to fill a vacancy [11] A statute providing that an appointee to fill a vacancy shall be qualified to act until the next election of constables has been held to mean not only until the election, but also until the successor qualifies [12] Under a statute providing that on the happening of a vacancy a certain board shall appoint a person to fill the vacancy until a successor is appointed and qualified, a constable who is elected his own successor, but who does not qualify, holds over until his successor is qualified [13]

By election. In accordance with statutory provisions, vacancies in the office of constable may be filled at a general or special election,[14] and the time for calling a special election may be committed to the discretion of a particular official.[15] Dependent on the provisions of the statute, a constable elected to fill a vacancy serves for the full term of constable provided by the constitution.[16] Under some statutes there can be no election for the purpose of filling a vacancy in the office of constable, but a vacancy can be filled by appointment only.[17]

§ 17. Resignation, Abandonment, Forfeiture, Suspension, or Removal

The resignation of a constable is not effective prior to acceptance, but by unequivocal acts he may abandon his office. Provision may be made for suspension of a constable for malfeasance in office or commission of a felony.

The resignation of a constable is not effective until accepted,[18] but he may abandon his office by unqualified acts indicating such intent.[19] If a con-

99. Pa.—In re Marcus Hook Constable, 69 Pa.Super. 237.
57 C.J. p. 758 note 64

Rescission of order of appointment
Where a person is appointed constable by the court to fill a vacancy and after taking the oath and filing a bond he is duly elected constable, but neglects to file a new bond or take a new oath, an order appointing another constable on petition may be rescinded if no notice of the petition was given.—Appointment of Constable in Newtown Tp., 75 Pa.Dist. & Co. 520, 38 Del.Co. 91, 110.

1. Ga.—Franklin v. Kaufman, 65 Ga. 260.
57 C.J. p. 758 note 65.
2. N.C.—State v. Powell, 24 N.C. 275
3. N.C.—State v. Powell, supra.
4. N.C.—State v. Powell, supra—State v. Wall, 24 N.C. 272.
5. N.C.—McRae v. Wall, 24 N.C. 267.
6. Ga.—Burke v. State, 108 S.E. 119, 27 Ga.App. 314.
7. Fla.—State ex rel. Gibbs v. Lunsford, 192 So. 485, 141 Fla. 12
8. Kan.—Starr v. Flynn, 62 P. 659, 62 Kan. 845.
57 C.J. p. 758 note 74.
9. W.Va.—McCoy v. Fisher, 67 S.E. 2d 543

General statutory provision declaring that an appointee on filling a vacancy in an elective office holds office until the next general election has been held applicable to an appointee to fill a vacancy in the office of constable.—State v. Comer, 7 Ohio Cir.Ct. 258, 4 Ohio Cir.Dec. 585

10. Pa.—In re Sadbury's Constable, 3 Pa.Dist. 589.
57 C.J. p. 758 note 77.
11. N.Y.—Hammondsport Law, etc., Assoc. v. Knizell, 89 N.Y.S. 534, 43 Misc. 505.
12. N.C.—State v. Wilroy, 32 N.C. 329
13. Ind.—Miller v. Burger, 2 Ind. 337.
14. Ill.—People ex rel. Sinsheimer v. Pierson, 48 N.E.2d 754, 318 Ill.App. 573
57 C.J. p. 759 note 85.
15. Ill.—People ex rel. Sinsheimer v. Pierson, supra.

Town clerk
Ill.—People ex rel. Sinsheimer v. Pierson, supra.

16. Tenn.—State v. Clark, 1 Head 369
17. Pa.—In re Sadbury's Constable, 3 Pa.Dist. 589
57 C.J. p. 759 note 86.
18. Fla.—State ex rel. Gibbs v. Lunsford, 192 So. 485, 141 Fla. 12
19. Cal.—People v. Davidson, 83 P. 159, 2 Cal.App. 96.

Acceptance of appointment as deputy
Where a constable at the close of his term turns over to a person holding a certificate of election his badge, pistol, and handcuffs and accepts from such person an appointment as deputy, and takes the oath and

stable is suffering from illness or other incapacity of a permanent character, instead of appointing a deputy he should resign so that a successor may be selected in his place.[20]

Suspension. In accordance with constitutional or statutory provisions, the power to suspend a constable for malfeasance may be exercised by a designated officer.[21] Under a statute providing that when any indictment shall be filed against a county or township officer for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance, or nonfeasance in office the officer may be suspended, the phrase "criminal conduct amounting to a felony" is applicable to personal acts not connected with the office of constable,[22] so that a constable may be suspended pending an indictment against him for murder,[23] but such statute has been held not to authorize a suspension for the violation of a statute prohibiting the transportation of intoxicating liquors from another state.[24] It has been held that on an affidavit stating that a constable has dismissed a peace warrant, and has received a certain sum for his services, he may be suspended from office without notice, and ruled to show cause why an attachment for contempt should not issue.[25]

§ 18. —— Removal and Proceedings Therefor

a. In general
b. Grounds
c. Proceedings

a. In General

Under constitution or statute designated officials or tribunals may have power to remove constables for cause

In accordance with constitutional or statutory provisions, a constable may be removed for cause by a designated official or tribunal,[26] and it has been held that even in the absence of such provisions, a county court authorized by the constitution to appoint a constable has the power to remove him for cause.[27] Where, under a city charter, constables form part of the city police force, they are within the protection of an act prohibiting the removal of police officers of cities except for cause and after trial,[28] but a constable who was not legally appointed cannot avail himself of the provisions of such an act.[29]

b. Grounds

A constable is subject to removal for the causes enumerated in the constitution or statutes.

A constable is subject to removal for the causes enumerated in the constitution and statutes.[30] A constable may be removed for misconduct while in the exercise of the duties of his office,[31] and a previous conviction of a misuser of office is not a necessary prerequisite.[32] Thus a constable may be removed for collecting an illegal fee[33] or for an abuse of process.[34] A constable may not be removed for failure to take certain action where such action is not a part of his official duties,[35] or, it has been held, for a violation of law in presenting

thereafter acts as deputy, such acts constitute an abandonment of the office of constable.—People v. Davidson, supra.

20. Pa.—Petition of Preno, 77 Pa. Dist. & Co. 193.

21. Fla.—State ex rel. Gibbs v. Lunsford, 192 So. 485, 141 Fla. 12.

Suspension by governor

Fla.—State ex rel. Gibbs v. Lunsford, supra.

22. Ark.—Jones v. State, 149 S.W. 56, 104 Ark. 261, Ann.Cas.1914C 302.

23. Ark.—Jones v. State, supra.

24. Ark.—Winfrey v. State, 202 S.W. 23, 133 Ark. 357.
57 C.J. p. 759 note 95.

25. D.C.—Ex parte Bowling, 3 F. Cas. No. 1,737, 1 Cranch C.C. 39.

26. Pa.—In re Summers, 20 Pa.Dist. 802.—In re Peters, 10 Kulp 93.

High constable

Pa.—Flynn's Case, 154 A. 368, 303 Pa. 198.—In re Borough High Constables, Quar. Sess., 32 Del. Co. 335.

27. Tenn.—Fields v. State, Mart. & Y. 168.

28. N.J.—Loper v. Millville, 21 A. 568, 53 N.J. Law 362.

29. N.J.—Loper v. Millville, supra.

30. Pa.—In re Peters, 10 Kulp 93.
57 C.J. p. 759 note 5.

Existence of any of enumerated causes

Constable was removable from office if any of enumerated causes for removal existed, regardless of whether constable was guilty of charges made in other causes.—Jones v. State, Tex.Civ.App., 109 S.W.2d 244.

31. D.C.—U. S. v. McGill, 26 F.Cas. No.15,677, 1 Hayw. & H.C.C. 59.

"Official misconduct"

(1) Under statute defining "official misconduct" as any "unlawful behavior in relation to the duties of office," false imprisonment or violation of many other penal statutes constitutes "unlawful behavior in relation to the duties of office" of constable.—Jones v. State, Tex.Civ.App., 109 S.W.2d 244.

(2) Acts of constable in instructing his subordinates to keep prisoners in jail unless they wanted to plead guilty and to put any one in jail who came to jail to get any one out constituted "official misconduct" in form of "unlawful behavior in relation to duties of office," authorizing removal of constable from office, as against contention that acts were performed by constable in personal capacity, not in official capacity.—Jones v. State, supra.

32. S.C.—State v. Williams, 29 S.C.L. 26.
Tenn.—Fields v. State, Mart. & Y. 168.

33. D.C.—U. S. v. McPherson, 26 F. Cas. No. 15,704, 1 Hayw. & H.C.C. 105.
57 C.J. p. 760 note 8.

34. D.C.—U. S. v. Merryman, 26 F. Cas. No. 15,759a, 2 Hayw. & H.C.C. 337.
57 C.J. p. 760 note 9.

35. Cal.—Ferguson v. Kern County Super. Ct., 147 P. 603, 26 Cal.App. 554.

a bill for services where he did actually render the services.[36]

The words "sufficient cause" in a statute providing for the removal of a constable should not be construed, it has been held, to embrace any cause not affecting the competency of the officer and his official conduct[37] Thus, under such statute, it has been held to constitute sufficient cause that the constable makes an illegal levy for the purpose of oppression;[38] but it is not sufficient cause that he was guilty of rudeness or incivility[39] or that he merely threatened to levy an execution in order to collect his fees in disregard of instructions of the creditor.[40]

c. Proceedings

In accordance with statutes or rules of practice, proceedings for the removal of a constable may be summary in nature, or they may consist of a hearing based on a filed accusation.

In accordance with statutes or rules of practice, proceedings for the removal of a constable may be summary in nature,[41] at least where the constable is an appointee of the court,[42] or the proceedings may consist of a hearing based on a filed accusation.[43] The common-law right of a court to strike an offending constable from its rolls summarily is not impaired by a statute prescribing removal proceedings by indictment.[44] Where constables form part of a city police force under a city charter, they are entitled to the protection of a statutory provision requiring a reasonable notice, a fair hearing, and an investigation of the charges on the removal of police officers.[45] In some jurisdictions the proceedings to remove a constable are said to be civil in their nature and not criminal.[46]

Pleading In a proceeding to remove a constable from office, the petition must state wherein the constable has neglected his duty.[47] An accusation alleging that a number of persons "willfully and unlawfully" disturbed the peace by fighting in the streets, and that defendant refused to prevent them, is sufficient under the statute although it does not allege that such persons "maliciously" disturbed the peace[48] On a rule on a constable to show cause why he should not be removed for extortion under color of his office, it is not necessary, it has been held, that there should be any specification of the particular facts relied on[49] Where an original petition charges generally that defendant constable is guilty of official misconduct and guilty of certain alleged misbehavior, the petition is not so defective that it cannot be perfected by proper amendments[50] In some jurisdictions, where a petition for a rule on a constable to show cause why he should not be removed from office sets forth an indictable offense, he is not required to answer under oath, since such answer might incriminate him[51]

Evidence. General rules apply to evidence in proceedings to remove a constable from office.[52]

Judgment or order. In a suit for removal of a constable, a temporary order of suspension is interlocutory and not to be regarded as a final judgment or decree of removal.[53]

Costs. A constable on judgment for his removal may be liable for the payment of costs,[54] and a constable who resigns his office pending a prosecution commenced for his removal is not thereby protected from payment of the costs[55] A provision requiring the presence of a majority of the justices of a county court to dismiss a constable from office does not apply to a judgment against the constable for costs.[56]

§ 19. Title to, and Possession of, Office

A constable's right to his office is not open to collateral attack.

The right of a constable to his office cannot be

36. N Y—In re Reidulski, 12 N Y S 2d 624, 257 App Div 962

37. Ga—Lancaster v Hill, 71 S E 731, 136 Ga. 405, Ann Cas.1912C 272.

38. Ga—Lancaster v. Hill, supra

39. Ga.—Lancaster v. Hill, supra.

40. Ga—Lancaster v Hill, supra.

41. Pa—Application for Removal from Office of Taylor, Quar Sess., 5 Chest Co 81.
S C.—State v. Williams, 29 S.C.L 26.

42. Tenn.—Fields v. State, Mart. & Y. 168.

43. Cal.—Ferguson v. Kern County Super. Ct, 147 P 603, 26 Cal App 554.

44. S C—State v. Williams, 29 S.C L. 26.

45. N J—Loper v. Millville, 21 A 568, 53 N J Law 362.

46. Tenn—Fields v. State, Mart. & Y. 168

47. Cal—Ferguson v. Kern County Super Ct., 147 P. 603, 26 Cal App 554

48. Cal—Larue v Davies, 97 P 903, 8 Cal App. 750

49. D.C—Jones v. Woodrow, 13 F Cas No 7,509, 1 Cranch C.C. 455.

50. Ga.—Lancaster v. Hill, 71 S E. 731, 136 Ga 405, Ann.Cas.1912C 272

51. Pa—Smith's Case, 4 Pa.Dist & Co. 60—In re Rathbone, 38 Pa.Co. 70.

52. Cal.—Larue v. Davies, 97 P. 903, 8 Cal App. 750
Pa—Application for Removal from Office of Taylor, Quar.Sess., 5 Chest Co 81.
57 C J. p 760 note 29.

53. Tex.—Ormes v. Quinn, Civ.App., 113 S.W.2d 242.

54. Tenn.—Fields v. State, Mart. & Y. 168.

55. Ky.—Glass v. Jacoby, Litt.Sel. Cas. 181.

56. Ky—Glass v. Jacoby, supra.

collaterally questioned,[57] and where one has received a commission as constable, and has qualified, his right to the office or his subsequent vacation of it can be determined only by a direct proceeding to which he is a party.[58] A person who is not entitled to the office of constable cannot maintain an action to prevent another from usurping the office.[59] Where defendant in replevin justifies as a constable, and his official character is directly put in issue, proof that he was an acting constable is insufficient, but he must show that he was a constable de jure.[60]

Evidence of title or incumbency. The records of a county court, showing several bonds, executed by a constable biennially, the last within one year of the time when the question arose, with proof that he was recognized as such by the county court, is sufficient proof that he was in office, without proof that he took the oaths or was allotted to a district;[61] and evidence that a certain person acted as constable and was generally reputed to be such is admissible in proof that he was a constable.[62]

§ 20. De Facto Constables

The acts of one serving under color of office, although he has not qualified as a constable de jure, may be valid as those of a constable de facto

The acts of one serving under color of office may be valid as those of a de facto constable, although he is not under bond,[63] as where he failed to renew his bond,[64] or did not furnish a bond within the time required by statute,[65] or his bond is defective,[66] or where he has ceased to be a resident of the county in which he holds his office,[67] or where the term of his appointment has expired.[68] Irrespective of whether a coroner of a county is prohibited from becoming a constable, where he does hold the office of constable after regular appointment he acts under color of authority and his acts are valid as those of a constable de facto if not de jure.[69] Where the statute provides for the appointment of one constable only in each township, a person appointed by the county court as additional constable in a township having one constable whose tenure is undisputed is not an officer de facto.[70]

C. DEPUTIES, ASSISTANTS, SUBSTITUTES, AND SPECIAL OFFICERS

§ 21. In General; Delegation of Powers

Ministerial duties of a sheriff, but not his judicial functions, may be delegated to a deputy or undersheriff.

While the ministerial duties of the office of sheriff may be delegated to a deputy or undersheriff,[71] who performs the duties delegated, not in his own name or right, but as the representative of the sheriff,[72] in the absence of statutory authority the judicial functions of the office may not be delegated.[73] Where a county freeholders' charter contains no limitation on the power of the legislature to give the sheriff additional deputies, and does not authorize the supervisors to make provision for the deputies, the right of providing for deputy sheriffs remains with the legislature.[74] Statutes providing that an undersheriff shall perform the duties of the sheriff during a vacancy in the office of the latter are not in conflict with other statutes providing that certain designated officials shall fill vacancies in county offices by appointment,[75] but

57. Tex.—Smith v. Horton, Civ.App., 134 S.W.2d 320.
57 C.J. p 761 note 39.

58. Ala.—Ex parte Strobach, 49 Ala. 443.

59. Ky.—Rutledge v. Farrar, 6 Bush 491.

60. Ill.—Outhouse v. Allen, 72 Ill. 529.

61. Ky.—Linville v. Black, 5 Dana 176.

62. Iowa.—State v. Row, 46 N.W. 872, 81 Iowa 138.
57 C.J. p 761 note 45.

63. Ark.—Abbott v. Norman, 204 S.W. 303, 134 Ark. 535.
57 C.J. p 761 note 47.

64. N.J.—Bachmeier & Co. v. Semel, 163 A. 126, 10 N.J. Misc. 1172.

65. Vt.—Weston v. Sprague, 54 Vt. 395.

66. N.Y.—Adams v. Tator, 42 Hun 384.

67. Ind.—Case v. State, 69 Ind. 46.

Nonresident at time of defalcation

Notwithstanding constable was nonresident when defalcation occurred, he was constable de facto, whose acts as to execution creditor and his surety were valid.—Bachmeier & Co. v. Semel, 163 A. 126, 10 N.J. Misc. 1172.

Pursuit of occupation outside precinct

A party who was duly elected to the office of constable of a precinct in which he kept his household belongings, voted, and paid his poll tax was not only a constable de facto, but he was such de jure, even though he spent a great deal of time outside his precinct in pursuit of his occupation.—Smith v. Horton, Tex.Civ.App., 134 S.W.2d 320.

68. Mass.—Petersilea v. Stone, 119 Mass. 465, 20 Am.R. 335.

N.Y.—Hammondsport Law, etc., Assoc. v. Kinzell, 89 N.Y.S. 534, 43 Misc. 505.

69. Ga.—McBrien v. Starkweather, 160 S.E. 548, 43 Ga.App. 818.

70. Mo.—Jester v. Spurgeon, 27 Mo. App. 477.

71. Mont.—Hogan v. Cascade County, 92 P. 529, 36 Mont. 183.
57 C.J. p 761 note 59.

72. Dak.—Wilson v. Russell, 31 N.W. 645, 4 Dak. 376.

73. Cal.—Jobson v. Fennell, 35 Cal. 711.
57 C.J. p 761 note 61.

74. Cal.—Martin v. De Shields, 203 P. 118, 187 Cal. 340.

75. Mich.—Attorney General ex rel. Finley v. Fawcett, 248 N.W. 624, 263 Mich. 288.

they are intended merely to prevent an interregnum by designating an ad interim assumption of duties by the undersheriff [76]

§ 22. Appointment

a. Deputy sheriff or undersheriff
b Deputy constable

a. Deputy Sheriff or Undersheriff

(1) In general
(2) Mode, time, and approval of appointment; filing and recording

(1) In General

Ordinarily a sheriff has the power under general common-law principles or under statutes to appoint deputies or assistants.

In the absence of constitutional or statutory restriction, a sheriff may appoint deputies and assistants under common-law principles,[77] and such right of appointment may be exercised under statutes so providing;[78] but the sheriff cannot delegate to another the power to appoint a deputy for him [79] A statute limiting the power of the sheriff to appoint deputies, being in derogation of the common law, must be strictly construed.[80] A sheriff has no authority, it has been held, to appoint or detail a deputy to guard and watch railroad property except to prevent threatened injury.[81] A private citizen may be impressed into service by a sheriff to assist in the apprehension of a criminal [82] Under a statute making the sheriffs of the various counties in the state ex officio deputies of the sheriff of the supreme court, no special appointment of the deputies as such is necessary.[83] On due appointment and qualification a deputy sheriff becomes an officer de jure [84]

Appointment by board of supervisors. Where the statute provides for the appointment of deputies by the sheriff, a board of supervisors has no power to appoint.[85]

Appointment by district judge. Where a district judge has power to appoint deputies, or to authorize the sheriff to do so, such power is purely statutory,[86] and a district judge has no inherent power to appoint deputy sheriffs.[87]

Appointment by undersheriff. While an undersheriff may appoint a deputy or bailiff to do a particular act, under principles discussed infra § 29, he cannot, it has been held, appoint a deputy to do the general business of the office.[88]

Deputies for highway patrol and traffic duty. Under a statute authorizing the sheriff to appoint deputies he may appoint, where conditions warrant the appointment, deputies to patrol the highways of the county in motor vehicles,[89] and where the court under the constitution fixes the number of deputies the necessity for deputies for highway patrols is exclusively for such court [90] A statute authorizing sheriffs to appoint, with the approval of the county commissioners, a certain number of deputies in certain counties to patrol the county high-

76. Mich.—Attorney General ex rel Finley v Fawcett, supra

77. Ga.—Foster v Vickery, 42 S.E. 2d 117, 202 Ga. 55, conformed to Vickery v. Foster, 42 S.E.2d 451, 75 Ga.App. 121
N.C.—Towe v Yancey County, 31 S.E.2d 754, 224 N.C. 579—Styers v. Forsyth County, 194 S.E. 305, 212 N.C. 558.
Ohio—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447 57 C.J. p. 762 note 65.

Common-law right
The right of a sheriff to appoint deputies is a common-law right and does not arise under the constitution—Gowens v Alamance County, 3 S.E.2d 339, 216 N.C. 107.

Discretion
A sheriff has absolute discretion to determine what deputies shall be employed and the length of their employment—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447.

78. Ill.—People ex rel Meyering v Whealan, 190 N.E. 693, 356 Ill. 402.
N.J.—Ackley v. Norcross, 6 A.2d 721, 122 N.J.Law 569, affirmed 11 A.2d 106, 124 N.J.Law 133
W.Va.—Raleigh County Court v Painter, 15 S.E.2d 396, 123 W.Va. 415

Provision for tenure
A statute providing that deputies' tenure should be at pleasure of sheriff is tantamount to a provision that both appointment and tenure are discretionary with him—Murray v. Harris, Tex.Civ.App., 112 S.W.2d 1091, error dismissed

Statutes held valid
La.—Williams v. Guerre, 162 So. 609, 182 La. 745.
Okl.—Protest of Chicago, R. I. & P. R. Co., 25 P.2d 690, 164 Okl. 239.

79. Ala.—Perkins v. Reed, 14 Ala. 536

80. N.Y.—Connery v. Sewell, 213 N.Y.S. 602, 126 Misc. 418

Restriction applying to one sheriff
Any statutory restriction applying to only one sheriff in the state must be strictly construed, and no powers or rights will be given to the reviewing authority except those definitely granted by the general assembly—Foster v Vickery, 42 S.E.2d 117, 202 Ga. 55, conformed to Vickery v Foster, 42 S.E.2d 451, 75 Ga.App. 121.

81. Tex.—Texas, etc., R. Co. v Parsons, 113 S.W. 914, 102 Tex. 157, 132 Am.S.R. 857—Lancaster v. Carter, Com.App., 255 S.W. 392.

82. Neb.—Anderson v. Nincehelser, 43 N.W.2d 182, 152 Neb. 857.
Posse comitatus see infra § 34.

83. Fla.—State v. Johnson, 17 So. 650, 35 Fla. 539.

84. Ohio—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447.

85. Ill.—McWilliams v. Richland County, 16 Ill.App. 333.

86. La.—State ex rel. Porterie v. Jones, 159 So. 594, 181 La. 390.

87. La.—State ex rel. Porterie v. Jones, supra.

88. Ga.—McGuffie v. State, 17 Ga. 497.

89. Ill.—People v. Cermak, 239 Ill.App. 195, transferred, see 148 N.E. 382, 317 Ill. 590.

90. Ill.—People v. Cermak, supra.

ways has been held not to be mandatory;[91] but under such statute the sheriff and county commissioners have the right to create a road patrol,[92] and the appointing power, direction, and control of the deputies are in the sheriff.[93] Statutes regulating the employment of traffic officers have been construed as contemplating that the sheriff shall observe reasonable recommendations of the county commissioners relative to appointment of deputies for employment as traffic officers,[94] and as contemplating that the traffic officers provided for shall be duly appointed and qualified deputy sheriffs employed by the county commissioners with the consent of the sheriffs.[95] Under some statutory provisions neither the sheriff nor the commissioners' court may act alone, but they must act in conjunction, in the selection of deputies as traffic officers.[96]

(2) Mode, Time, and Approval of Appointment, Filing and Recording

There should be a due compliance with constitutional and statutory regulations governing the mode of appointment of deputy sheriffs and the filing and recording of such appointment. Where required by statute, the approval of certain county officials or of the court is necessary.

While the constitutional and statutory provisions requiring the general appointment of a deputy to be in writing must be complied with,[97] in the absence of such provisions a general appointment of a deputy by a sheriff need not be in writing.[98] Where a written appointment is required, the fact that an appointment is signed by the sheriff as an individual and not as sheriff does not invalidate the appointment where it is otherwise in due form and properly filed.[99] Where a sheriff gives a deputy's badge to a person and authorizes him to arrest an offender, the appointment as deputy is general and not special, within a statute requiring appointments to do particular acts to be in writing.[1]

Time for appointment Under a statute authorizing the sheriff to appoint deputies he may appoint them at any time during the fiscal year for which they are allowed, without reference to whether the county board has provided for their compensation.[2]

Filing and recording. Statutes requiring that the appointment of a deputy sheriff be filed in the office of the county clerk have been held directory,[3] and an acting deputy may constitute a de facto officer notwithstanding the failure to file the appointment, as discussed infra § 28. The fact of filing in the clerk's office a warrant constituting a person deputy sheriff need not appear by an indorsement of the clerk thereon, but it may be proved by other evidence.[4]

Statutes providing that the appointment of a deputy is to be recorded in the office of the clerk have been held to be merely directory,[5] and prospective only in operation,[6] and hence inapplicable to a deputy in office at the time of passage.[7] After the commission is recorded according to statute it is notice to everyone of the fact of the appointment,[8] and the deputy may then withdraw the original without impairing the validity of his appointment.[9]

Approval of appointment. Although the sheriff is authorized to appoint his deputies for good cause, the court may refuse to approve the appointment,[10] but if such approval is withheld without proper cause mandamus will lie to compel the approval.[11] Constitutional and statutory provisions making the appointment by the sheriff subject to the approval of the county supervisors, the county court, or judge have been held to be purely prospective in operation.[12] The statutory requirement of ap-

91. Kan.—Sedgwick County v. Toland, 245 P. 1019, 121 Kan 109.

92. Kan.—Sedgwick County v. Toland, supra

93. Kan.—Sedgwick County v. Toland, supra

94. Fla.—State ex rel Rauscher v. Gandy, 178 So. 166, 130 Fla 407

Requirement to make recommended appointment

Statute relating to appointment of traffic officers cannot legally require sheriff to appoint deputy on recommendation of county commissioners if sheriff has valid objection to making appointment, since that would be attempt to impose on sheriff responsibility for acts of deputy without consent of sheriff.—State ex rel. Rauscher v. Gandy, supra.

95. Fla.—State ex rel. Rauscher v Gandy, supra

96 Tex.—Anderson v Wood, 152 S W 2d 1084, 137 Tex. 201.

97. N.J.—Meyer v. Bishop, 27 N J Eq 141, affirmed 28 N J Eq. 239
57 C.J p 763 note 88.

98. Wash.—Crose v. Tony John, 164 P 941, 96 Wash 216.
57 C J. p 763 note 89.

99. S D.—Guernsey v. Tuthill, 82 N.W 190, 12 S D. 584.

1. Wash.—Crose v Tony John, 164 P 941, 96 Wash. 216.

2. Ill.—People v. Cermak, 239 Ill. App 195, transferred, see 148 N E 382, 317 Ill 590.

3. Kan.—Orchard v Peake, 77 P 281, 69 Kan 510

4. Ohio.—Haines v. Lindsey, 4 Ohio 88, 19 Am.D. 586

5. Wis.—Sprague v. Brown, 40 Wis 612.
57 C J p 763 notes 98, 99.

6. Me.—Coffin v Chase, 13 Me 72

7. Me.—Coffin v Chase, supra

8. Me.—Dane v Gilmore, 51 Me 544

9. Me.—Dane v Gilmore, supra

10. Ky.—Dassey v Sanders, 33 S.W. 193, 17 Ky.L. 972
57 C J. p 762 note 75.

11. Ky.—Fox v Petty, 30 S W 2d 945, 235 Ky 240
57 C J p 762 note 76.

12. N.M.—State v Rio Arriba County, 157 P 656, 21 N.M 632.
57 C J. p 762 notes 77, 78.

proval by a board of commissioners[13] or judge[14] does not take away from the sheriff the power of appointment, but the appointment by the sheriff does not become effective or binding unless consented to by the proper authority.[15] Under a constitutional provision authorizing the county commissioners to empower the sheriff to appoint such deputies as the business of the office requires, before the commissioners are authorized to empower the appointment of a deputy they must find that the business of the office requires the assistance of one.[16] A statute authorizing the sheriff with the written consent of a probate judge to employ a temporary guard for the protection of the county jail or for the safekeeping of prisoners has reference to temporary and emergency cases where it is necessary to protect the jail or the inmates thereof[17] and cannot be extended into a general authority to employ regular or permanent deputies.[18] One who has been appointed deputy sheriff without authority of the county commissioners, and who presents a bill for his services, must show the circumstances of his appointment and the emergency existing which required immediate action on the part of the sheriff, and that the latter was so necessarily engaged that he could not perform the service and had no other assistant.[19]

Where the appointment is subject to the approval of a board of supervisors which is compelled by law to keep its orders and decisions in a minute book, the failure of the minute book to show an approval of the appointment of an alleged deputy sheriff, and the absence from the files in the auditor's office of any written appointment of such deputy sheriff, constitute at least prima facie evidence that the appointment was never made or approved.[20]

b. Deputy Constable

A constable may, in the absence of a statute providing otherwise, act by a deputy in the performance of particular matters. Compliance with statutory requirements as to the mode of appointment is necessary.

Since the functions and duties of a constable are wholly ministerial,[21] he may, in the absence of a statute providing otherwise, act by deputy,[22] at least for the execution of a particular duty, as discussed infra § 29; but according to some authorities his power in this respect is limited to delegating his authority to and acting by a deputy with respect to particular acts which he is for some reason unable to perform in person,[23] and he cannot appoint a permanent deputy for the general discharge of the duties of his office.[24] Under some statutes it has been held that a constable has no power to appoint a deputy in any case.[25] A statute allowing a constable a certain number of deputies does not require that he appoint such deputies,[26] and the fact that one of the appointees of the constable shall be the humane officer does not mean the agent of the humane society shall be ex officio a deputy constable.[27] Where provision is made for appointment of deputy constables, there should be a compliance with statutory requirements as to mode of appointment.[28]

Filing. Statutes requiring that the appointment of a deputy constable be filed in the office of the clerk have been held directory.[29]

Approval Under some statutes approval of the appointment by the court is essential.[30] An appointment subject to the approval of a county court makes the appointment conditional and the approval of the court a condition precedent to its validity.[31] A county commissioners' court may assist in ap-

13. Wash.—Thomas v. Whatcom County, 143 P. 881, 82 Wash. 113.
57 C.J. p. 762 note 79

14. Minn.—State v. McIntyre, 25 Minn. 383

15. Ohio.—State ex rel. Geyer v. Griffin, App., 76 N.E.2d 294.
57 C.J. p. 762 note 81

Unauthorized approval by court
Statute authorizing sheriffs to name deputies with district court's approbation having been repealed by act requiring approval of such appointments by superintendent of bureau of criminal identification and investigation, district judge's ex parte order, authorizing sheriff to appoint deputies whose appointments such superintendent had refused to approve, was illegal, null and void, and subject to attack by attorney general, governor, such superintendent, and parish police jury at any time in any proceeding without first applying to judge for rescission thereof.—State ex rel. Porterie v. Jones, 159 So. 594, 181 La. 390

16. Idaho.—Taylor v. Canyon County, 56 P. 168, 6 Idaho 466.
57 C.J. p. 762 note 82.

17. Idaho.—Lansdon v. Washington County, 102 P. 344, 16 Idaho 618

18. Idaho.—Lansdon v. Washington County, supra

19. Idaho.—Roberts v. Custer County, 105 P. 797, 17 Idaho 379.

20. Iowa.—Buck v. Hawley, 105 N.W. 688, 129 Iowa 406.

21. Utah.—Kaysen v. Steele, 44 P. 1042, 13 Utah 260

22. Cal.—Jobson v. Fennell, 35 Cal. 711.
57 C.J. p. 763 note 15

23. Utah.—Kaysen v. Steele, 44 P. 1042, 13 Utah 260.
57 C.J. p. 764 note 17.

24. Utah.—Kaysen v. Steele, supra.
57 C.J. p. 764 note 18.

25. Neb.—Gilbert v. Brown, 2 N.W. 376, 9 Neb. 90
57 C.J. p. 764 note 19.

26. Ark.—Rankin v. Allnutt, 187 S.W. 934, 125 Ark. 120
Ind.T.—Helms v. U. S., 52 S.W. 60, 2 Ind. T. 595.

27. Ark.—Rankin v. Allnutt, 187 S.W. 934, 125 Ark. 120

28. Pa.—Petition of Preno, 77 Pa. Dist. & Co. 193.

29. Mo.—State v. Dierberger, 2 S.W. 286, 90 Mo. 369.

30. Pa.—Petition of Preno, 77 Pa. Dist. & Co. 193—Townsend's Application, 22 Pa. Dist. & Co. 14, 15 Wash. Co. 1—Appointment of Dapp, Quar. Sess., 98 Pittsb. Leg. J. 335.

31. Ark.—Rankin v. Allnutt, 187 S.W. 934, 125 Ark. 120.

pointment of a deputy constable only in the manner prescribed by statute.[32]

§ 23. Number of Deputies

The number of deputies to be appointed by a sheriff or constable may be limited by statute or by a court or official body acting under authority of constitutional or statutory provisions.

The number of deputies to be appointed by a sheriff or constable may be fixed or limited by statute or by a court or official body acting under authority of statute.[33] Constitutional provisions to the effect that the number of deputy sheriffs and assistants shall be determined by rule of court are mandatory.[34] Statutes authorizing the sheriff to appoint one or more deputies not exceeding the number allowed by rule of court constitute a limitation on the sheriff's power of appointment,[35] under which he may in his discretion appoint less than the number allowed by rule,[36] but may not appoint more.[37] Some statutes have been held to be merely directory.[38] Under some statutory provisions a sheriff may appoint additional deputies as required in emergencies,[39] but not otherwise.[40] A statute providing that, if the judges of a court deem the attendance of an additional number of constables desirable or necessary, they may authorize the sheriff to summon "such additional constables" has been held to authorize the judges to require the sheriff to summon as constables such persons as they select, and not to limit their power to determining the necessity for constables and the number to be summoned.[41]

Where the number of deputies is not limited by law, the rule is that it is the duty of the sheriff to have a sufficient number of deputies to execute the mandates of the court within the time prescribed by law.[42] The number of deputy constables appointed should not be so great as to deprive the elected constables of the honors and functions of their offices.[43]

§ 24. Eligibility

Under statutes which so provide, a deputy sheriff or deputy constable must be a qualified elector or a resident of the county in order to be eligible to hold the office.

Under some statutes a deputy sheriff must be a qualified elector,[44] and, where the statute requires the sheriff to be a qualified elector and empowers him to appoint deputies for whose acts he shall be liable, the deputy must also be a qualified elector.[45] Under statutory provisions requiring the sheriff to be a resident of the county and providing that he may appoint deputies who shall possess the power and perform the duties of the office of sheriff in the absence of the sheriff or during a vacancy in the office, the sheriff may not appoint a person a deputy sheriff for a county other than that in which he resides;[46] but, where the statute does not expressly require a deputy sheriff to be a resident of the state or county, it has also been held that such residence is not necessary,[47] notwithstanding the sheriff authorized by statute to appoint deputies to aid in the enforcement of law must be an elector of the county.[48] Where the constable is allowed a deputy because he cannot attend to the duties of the office, the person deputized must be a resident of the same ward or township with the constable who deputizes him.[49]

Character, conviction of crime. The fact that a person was previously of bad moral character does not authorize the county court to refuse to approve his appointment as deputy sheriff where a complete reformation is shown.[50] A deputy sheriff may not

32. Tex.—State v. Johnson, Civ App., 52 S.W 2d 110, error dismissed

33. La.—Williams v. Guerre, 162 So 609, 182 La 745
Pa.—Centre County v. Keeler, 27 Pa Dist. & Co 352
Tex.—Tarrant County v. Smith, Civ App., 81 S W.2d 537, error refused
57 C.J. p 764 note 26.

34. Ill.—People ex rel. Meyering v. Whealan, 190 N E 693, 356 Ill. 402.

35. Ill.—People ex rel. Meyering v. Whealan, 190 N.E 693, 356 Ill. 402

36. Ill.—People ex rel. Meyering v. Whealan, supra.

37. Ill.—People ex rel. Meyering v. Whealan, supra.
Allowance of additional deputies held valid where permitted by the court.—People ex rel. Collins v. Nash, 278 Ill.App. 211.

38. Tex.—Trammel v. Shelton, 45 S W. 319, 18 Tex Civ App. 366
57 C J. p 764 note 27.

39. La.—State ex rel. Williams v City of New Orleans, 141 So. 460, 174 La 785.
Deputy criminal sheriffs to guard sick prisoner
Statute fixing salary and defining duties of deputy criminal sheriffs was held not to deprive criminal sheriff for parish of New Orleans of power to employ additional deputies in cases of emergency, as to guard sick prisoner in hospital.—State ex rel Williams v. City of New Orleans, supra.

40. La.—State ex rel Williams v. City of New Orleans, supra

41. N.J.—Cox v. Passaic County Ct. of Com.Pl., 45 N J Law 328.

42. Ala.—Hallett v. Lee, 3 Ala. 28.
57 C.J. p 764 note 28

43. Pa.—Petition of Preno, 77 Pa. Dist. & Co 193

44. Ala.—Henry v. State, 87 So 816, 205 Ala. 196
57 C J p 764 note 32.

45. Miss.—State v Nichols, 63 So. 1025, 106 Miss 419.

46. N.Y.—People v. Champlain Auditors, 37 N Y S. 633, 16 Misc 92

47. Iowa.—Rehmel v. Muscatine County, 154 N.W. 596, 172 Iowa 455, L.R.A 1916B 897.

48. Iowa.—Rehmel v. Muscatine County, supra

49. Pa.—In re Schnyder, 2 Lehigh Val L R 424.

50. Ky.—Dassey v Sanders, 33 S.W. 193, 17 Ky.L. 972.
57 C J. p 765 note 40.

be held ineligible on the ground of his conviction of crime where the judgment of conviction has been vacated,[51] or has been reversed and the indictment dismissed.[52]

§ 25. Qualification

a In general
b. Bond

a. In General

A deputy sheriff should qualify in accordance with the provisions of the constitution and statutes.

A deputy sheriff should qualify in accordance with the provisions of the constitution and statutes,[53] and in some jurisdictions such provisions are said to be mandatory.[54] Where a deputy sheriff duly qualifies for the office he becomes a deputy sheriff de jure,[55] but, if the deputy acts as such without qualifying, he may be considered a de facto officer under principles considered infra § 28.

Oath. A deputy sheriff must take the oath of office required by statute,[56] but, in the absence of a statutory requirement, an oath is not necessary.[57] Although the statute requires a written oath, the official acts of a deputy sheriff are valid under a verbal oath where the statute so provides and there is no statute specially declaring the act invalid.[58] A requirement that the oath be filed in the office of the county clerk has been held directory,[59] and, although he fails so to file his oath, an acting deputy may nevertheless constitute a de facto officer under principles discussed infra § 28. Mandamus is a proper remedy to compel the court to administer the oath to a person appointed a deputy sheriff.[60]

b. Bond

In accordance with constitutional or statutory provisions, a deputy sheriff may be required to give bond for the faithful performance of the duties of his office.

In accordance with constitutional or statutory provisions, a deputy sheriff may be required to give bond to his principal or to the state or county for the faithful performance of the duties of his office.[61] Even in the absence of such provisions, it is not unreasonable to permit a sheriff to take security for his indemnity against any violation of the duties of the office by the deputy.[62] The bond of indemnity given the sheriff by his deputy has been held to be the property of the sheriff,[63] and distinct and different from the official bond given to the county by the sheriff.[64] Where the condition counts on and refers to a deputation already made for a limited term, the bond operates for such term and no longer,[65] although the deputy continues in office after the expiration of such term.[66] The validity of a deputy sheriff's bond is not affected by the fact that he did not take the oath of office,[67] or that, through inadvertence, the proper record of his qualifications was not made by the court at the time of his appointment.[68]

Form and sufficiency. Where the statute prescribes no condition for violation of which the deputy and his surety would become liable, the bond in any event should be conditioned on the faithful discharge of the duties of his office,[69] and, where the premium for a deputy's bond is paid from public funds, the courts will read into it the statutory covenant for faithful discharge of official duties.[70] Unless the condition of the bond is contrary to public policy, it will be upheld, although there may be irregularities.[71] In the absence of a statutory form,

51. Pa.—Commonwealth ex rel. McClenachan v Reading, 6 A.2d 776, 336 Pa. 165.

52. Pa.—Commonwealth ex rel. McClenachan v. Reading, supra.

53. Neb.—McFadden v. Cedar County, 145 N.W. 639, 95 Neb. 318.

54. Cal.—Hill v. New Amsterdam Casualty Co., 286 P. 1103, 105 Cal. App. 156.

55. Ohio—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 800 Ohio App. 447.

56. Ga.—Eldson v. State, 15 S.E.2d 452, 65 Ga.App. 119.
57 C.J. p. 765 note 47.

57. Md.—Turner v. Holtzman, 54 Md. 148, 39 Am.R. 361.

58. Ga.—Stephens v. State, 32 S.E. 13, 106 Ga. 116.

59. Kan.—Orchard v. Peake, 77 P. 281, 69 Kan. 510.

60. Ky.—Fox v. Petty, 30 S.W.2d 945, 235 Ky. 240.—Day v. Justices Fleming County Ct., 3 B.Mon. 198.

61. Ky.—Casey v. Fidelity & Cas. Co. of New York, 128 S.W.2d 939, 278 Ky. 426.

Permission to sheriff

Under statute providing that sheriff "may" take such bond from his deputy as he shall deem necessary, the giving of bond by deputy is not "mandatory," since the permission to require bond is for the sheriff's protection if he deems it necessary.—Trammel v. Fidelity & Cas. Co. of New York, D.C.S.C., 45 F.Supp. 366.

62. Ky.—Lewis v. Knox, 2 Bibb 453.

63. Cal.—San Francisco v. McAllister, 18 P. 315, 76 Cal. 246.

64. Cal.—San Francisco v. McAllister, supra.

65. Conn.—Williams v. Miller, Kirby 189.

Year of appointment

A deputy sheriff's bond, conditioned for the performance of his duty, indemnifying the sheriff "during his continuance in office," without specifying the length of time, binds only for the year for which he was first appointed.—Munford v. Rice, 6 Munf. 81, 20 Va. 81.

66. Conn.—Williams v. Miller, Kirby 189.

67. Va.—Cecil v. Early, 10 Gratt. 198, 51 Va. 198.

68. Va.—Cecil v. Early, supra.

69. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., 33 S.E.2d 168, 199 Ga. 56, conformed to 33 S.E.2d 526, 72 Ga.App. 171.

70. W.Va.—Hatfield ex rel. Rose v. Cruise, 197 S.E. 23, 120 W.Va. 16.

71. Ill.—Gradle v. Hoffman, 105 Ill. 147.

a deputy sheriff's bond conditioned to perform "the duties of the said office as deputy sheriff" is sufficient whether or not the deputy sheriff is considered as an officer.[72] Where the statute provides that all official bonds of county officers must be made payable to the county in which the officer is elected or appointed, and that deputies shall give bonds in the same manner and for the same sum as their principals, the bond of a deputy sheriff must be for the same amount as his principal's, and must run to the county, and not to his principal.[73]

Delivery and approval. A deputy sheriff's bond is operative only from the time of its delivery.[74] Where the statute does not require the indemnity bond of a deputy sheriff to be approved, he is not guilty of a misdemeanor for performing official acts without the approval of the bond under a statute making public officers guilty of a misdemeanor under such circumstances.[75] Where the statute provides that the bond of a deputy sheriff, payable to the governor, shall be approved by the county commissioners before he shall be allowed to perform any service as such deputy, a deputy sheriff cannot lawfully act without such approval.[76]

Sale of public office Since contracts for the sale of public offices ordinarily are considered void, as discussed in Contracts § 219 b, a bond containing, besides the usual indemnity conditions, a condition to pay the sheriff a certain sum of money is void,[77] unless such a bond is declared valid by statute notwithstanding the sale of the office,[78] but in order to invalidate the bond such consideration must appear from the face of the bond or be pleaded specially.[79] Where the sheriff is entitled to the fees of the office, a bond, wherein the sheriff at the time of the appointment reserves a part of the fees, is not void as in violation of the statute prohibiting the sale of offices.[80] An indemnity bond executed after the illegal sale of the office and after the deputy has been qualified has been held valid.[81]

§ 26. Term of Office; Resignation and Removal

a. In general
b. Removal of deputy

a. In General

Where the term of a deputy sheriff or deputy constable is not otherwise fixed by statute, he holds office during the term and at the pleasure of the sheriff or constable who appointed him.

In accordance with the rules governing tenure of deputies generally, as discussed in Officers § 149, where the term of a deputy sheriff or deputy constable is not fixed by statute, he serves at the pleasure of the sheriff or constable who appointed him,[82] and his deputation expires with the office on which it depends.[83] A sheriff lacks power to extend the term of his undersheriff beyond the period of his own term,[84] or by contract to bind himself to keep his deputy in office for a specified period.[85] If the sheriff is reëlected, a new appointment is necessary to continue the deputy in office.[86]

72. Ill.—Gradle v Hoffman, supra 57 C J. p 765 note 62.

73. Neb —Riggs v. Miller, 52 N.W 567, 34 Neb. 666.

74. N Y.—Reilly v. Dodge, 42 Hun 646
W.Va —Davis v. Baker, 32 S E. 239, 45 W.Va. 455.

75. Ga —Stephens v. State, 32 S E 13, 106 Ga 116.

76. Fla —Stinson v. State, 80 So 506, 76 Fla 421.

77. Ky —Davis v. Hull, 1 Litt 9—Lewis v. Knox, 2 Bibb 453

78. Ky.—Kouns v Davis, 2 B Mon. 278—Combs v. Brashears, 6 J.J. Marsh 631.

79. Ky —Combs v. Brashears, 6 J.J. Marsh. 631—Lewis v. Knox, 2 Bibb 453.

80. N.Y.—Mott v. Robbins, 1 Hill 21, 37 Am.D. 286.
Validity of bond for fees as dependent on amount see infra § 225.

81. Ky.—Baldwin v. Bridges, 2 J.J. Marsh. 7.

82. Ohio —State ex rel. Geyer v. Griffin, 76 N E.2d 294, 800 Ohio App 447.
Tex —Murray v Harris, Civ.App , 112 S W 2d 1091, error dismissed.
57 C J p 766 note 83.

Sheriff making appointment or his successor

Although statute authorizing appointment of undersheriffs provides that they shall hold office during the pleasure of the sheriff making the appointment "or his successor," the quoted words do not indicate that the term of undersheriff is indefinite.—Ackley v. Norcross, 6 A.2d 721, 122 N J Law 569, affirmed 11 A.2d 106, 124 N J Law 133.

83. Mich —Abt v. Wilcox, 249 N.W 483, 264 Mich. 183.
Mont —State ex rel Rusch v. Board of Com'rs of Yellowstone County, 191 P 2d 670, 121 Mont 162.
N.J —**Corpus Juris cited in** Ackley v. Norcross, 6 A 2d 721, 722, 122 N.J Law 569, affirmed 11 A.2d 106, 124 N.J.Law 133.
Pa —National Cash Register Co. v Berg, 99 Pa Super. 34.
57 C J. p 766 note 81.

84. N.J.—Ackly v. Norcross, 6 A.2d 721, 122 N J Law 569, affirmed 11 A 2d 106, 124 N.J.Law 133.

85. Tex —Murray v. Harris, Civ. App , 112 S W.2d 1091, error dismissed

Discharge before expiration of term

The fact that deputy sheriff's contract of employment with sheriff provided that deputy's employment would continue until expiration of sheriff's term of office did not preclude sheriff from discharging deputy prior to expiration of term —Murray v. Harris, supra.

Deputy charged with knowledge

A deputy appointed by sheriff is charged with knowledge of statute providing that deputies should continue in office during sheriff's pleasure, and deputy accepts precarious tenure, regardless of contrary provisions in his contract of employment —Murray v. Harris, supra.

86. Ark.—Greenwood v. State, 17 Ark. 332.
Tex —Trinkle v State, 127 S W. 1060, 59 Tex Cr 257.

At common law the office and functions of a deputy terminate ipso facto when the sheriff goes out of office,[87] as when the sheriff dies,[88] resigns,[89] or is removed,[90] or is duly succeeded by another sheriff,[91] or if his term expires under such circumstances that he is not entitled to hold over,[92] but under statute in some jurisdictions the status and duty to discharge the functions of the office by a deputy or undersheriff continue until a new sheriff is selected and qualifies.[93] The status of an undersheriff on the death of the sheriff to execute the duties of the sheriff as prescribed by statute continues only until the vacancy is filled by election or appointment.[94]

Absconding of sheriff does not deprive his deputy of power to act, but the latter may discharge the duties of the office until the office is declared vacant by a court of competent jurisdiction or an election is held and a successor to the sheriff is elected and qualified.[95]

Resignation of deputy. A deputy sheriff may resign his office under a statute permitting the resignation of officers to the authority which appoints them,[96] and to be effective the deputy's resignation must be made to the officer designated by statute.[97] The act of resignation is the act of the deputy,[98] and, when he resigns, the office becomes vacant under a statute declaring an office vacant on the resignation of the incumbent.[99] In the absence of statutory requirement, the resignation need not be under seal.[1]

b. Removal of Deputy

As a general rule, unless otherwise provided by statute, the power of removal or suspension of a deputy sheriff or constable is vested in the appointing agency.

As a general rule, unless otherwise provided by statute, the power of removal or suspension of a deputy sheriff or constable is vested in the appointing agency.[2] Under a statute providing that the sheriff may appoint his deputies with the consent of a board of county commissioners or a judge, the appointing power remains in the sheriff, as discussed supra § 22, so that the sheriff,[3] and not the board of commissioners,[4] or a judge, has the power to remove the deputies summarily.[5]

87. Mich.—Attorney General v. Fawcett, 248 N.W. 624, 263 Mich. 288
57 C.J. p. 766 note 86
Powers and duties of deputies on termination of sheriff's incumbency see infra § 37.

88. Ala.—McMullen v. Daniel, 155 So. 687, 229 Ala. 194.
57 C.J. p. 766 note 87.

89. N.Y.—Boardman v. Halliday, 10 Paige 223

90. N.Y.—Boardman v. Halliday, supra.

91. Dak.—Wilson v. Russell, 31 N.W. 645, 4 Dak. 376.

92. Mich.—Abt v. Wilcox, 249 N.W. 483, 264 Mich. 183.
57 C.J. p. 766 note 91.

93. Ga.—Foster v. Brown, 34 S.E. 2d 530, 199 Ga. 444
Mich.—**Corpus Juris quoted in** Attorney General v. Fawcett, 248 N.W. 624, 625, 263 Mich. 288
Wyo.—**Corpus Juris quoted in** State ex rel. Peterson v. Ellsworth, 139 P.2d 744, 746, 59 Wyo. 288.
57 C.J. p. 777 note 56.

Purpose of statute providing that undersheriff becomes sheriff on vacancy in office of sheriff is to circumvent common-law rule that authority of a deputy sheriff ipso facto terminates when sheriff goes out of office.—State ex rel. Peterson v. Ellsworth, 139 P.2d 744, 59 Wyo. 288.

94. Mich.—Attorney General ex rel. Baird v. Johnson, 293 N.W. 545, 294 Mich. 250—**Corpus Juris quoted in** Attorney General ex rel. Finley v. Fawcett, 248 N.W. 624, 625, 263 Mich. 288
N.Y.—In re Mitchell, 165 N.Y.S. 972, 178 App.Div. 690, affirmed 118 N.E. 1068, 222 N.Y. 543.
Wyo.—**Corpus Juris quoted in** State ex rel. Peterson v. Ellsworth, 139 P.2d 744, 746, 59 Wyo. 288.

Statutory recognition of existing laws
Amendment to statute giving board of county commissioners power to fill vacancies in county offices declaring that undersheriff should fill office of sheriff only until vacancy should be filled by board merely recognized and made certain existing laws.—State ex rel. Peterson v. Ellsworth, supra.

Exercise of power to fill vacancies
Under the statute providing that the judge of probate, county clerk, and prosecuting attorney shall fill vacancies in county offices, an undersheriff, after sheriff's removal for misfeasance and nonfeasance in office, was not entitled to hold office of sheriff until a successor sheriff was elected.—Attorney General ex rel. Baird v. Johnson, 293 N.W. 545, 294 Mich. 250.

95. Ill.—Ballance v. Loomis, 22 Ill. 82.

96. N.Y.—Gilbert v. Luce, 11 Barb. 91.

97. Ky.—Sparks v. Adkins, 200 S.W. 2d 307, 304 Ky. 212.

98. N.Y.—Gilbert v. Luce, 11 Barb. 91.

99. N.Y.—Gilbert v. Luce, supra

1. N.Y.—Gilbert v. Luce, supra.

2. Ga.—McCutcheon v. MacNeill, 28 S.E. 2d 469, 197 Ga. 72.
Miss.—In re Bishop, 52 So. 2d 18, 211 Miss. 518.
Ohio.—State ex rel. Geyer v. Griffin, 76 N.E. 2d 294, 800 Ohio App. 447
W. Va.—Raleigh County Court v. Painter, 15 S.E.2d 396, 123 W. Va. 415.
57 C.J. p. 767 notes 1, 2, 5.

Duty of judge to sign constable's orders
Deputy constables could be deprived of their official positions by removal, executed and recorded with county court clerk in proper manner by constable, so that county judge was required to sign constable's orders, entered on court's records by clerk, for such deputies' removal.—Sparks v. Adkins, 200 S.W.2d 307, 304 Ky. 212

3. Minn.—State v. McIntyre, 25 Minn. 383.
Utah.—Sheriff Salt Lake County v. Salt Lake County, 268 P. 783, 71 Utah 593.

4. Ga.—Board of Com'rs of Richmond County v. Whittle, 178 S.E. 534, 180 Ga. 166, followed in Whittle v. Board of Com'rs of Richmond County, 178 S.E. 536, 180 Ga. 170
Utah.—Sheriff Salt Lake County v. Salt Lake County, 268 P. 783, 71 Utah 593.

5. Minn.—State v. McIntyre, 25 Minn. 383.

Under the general rules discussed in Officers § 62, where a deputy or undersheriff comes within the protection of civil service statutes, he may not be dismissed arbitrarily, but is protected by the civil service laws as a minor public officer.[6] On the other hand, where the statutes are construed as not including deputy or undersheriffs within the protection of civil service, such officer is regarded as a mere sheriff's appointee without tenure of office,[7] removable at the will of the appointing power,[8] and, having accepted appointment and pay on the theory that he is not covered by the statute, a deputy may not claim permanency of position or avoid removal at the pleasure of the appointing sheriff.[9] In accordance with statutory provisions it has been held that a chief deputy may succeed to the office of sheriff during a vacancy pending election of a new sheriff without losing his civil service status as chief deputy where he does not thereafter offer himself as a candidate in the election.[10]

Grounds. Under statutes authorizing a sheriff to remove deputies at his pleasure, and further providing that the circuit court shall have power to remove such deputies whenever in its opinion such removal will subserve the public interest, it is implicit under the latter provision that there must be some cause or ground for removal of a deputy by the court,[11] and that such cause must be a fact affecting adversely the service that the deputy renders the public and the court.[12] Under some statutes a deputy constable may be removed for any cause deemed sufficient by the constable.[13]

Manner of removal; proceedings. Under a statute providing that the term of office of a deputy sheriff shall expire with the term of the sheriff unless sooner removed, a sheriff has the right summarily to remove the deputy,[14] notwithstanding the statute further provides that such deputy shall be removed on complaint of certain officers that the deputy is not discharging his duties satisfactorily.[15] While it is very proper that the removal should be in writing and on notification to the displaced deputy,[16] a seal is not necessary.[17] Under some statutory provisions, the sheriff and the commissioners' court must act in conjunction in the discharge of a deputy.[18] Where a deputy sheriff or constable may be removed only for cause, he has a right to notice[19] and an opportunity to be heard.[20] While the charge may be made by the circuit judge where the circuit court is vested with the power of removal,[21] it has been held more appropriate for the charges to be brought by the prosecuting officials,[22] and to let such charges be heard by the trial judge.[23] If the charges are upheld and removal is ordered, an appeal can be granted,[24] with or without supersedeas in the discretion of the presiding judge.[25]

Vacation of appointment. Where statute requires residence in the ward or district as an element of eligibility, nonresidence is ground for vacation of the appointment of a deputy constable,[26] and the rule that a judge is without power to set aside a judgment after the term is inapplicable to his vacation of such appointment.[27]

§ 27. Title to, and Possession of, Office

The title of a deputy sheriff to his office or the validity of his appointment may not be attacked collaterally. One who has acted as deputy sheriff is estopped to deny that he was such.

The title of a deputy sheriff to his office or the validity of his appointment may not be attacked collaterally.[28]

6. Ga.—Foster v. Brown, 34 S.E.2d 530, 199 Ga. 444.
46 C.J. p. 991 note 81.

7. N.Y.—Bates v. Offerman, 264 N.Y.S. 547, 147 Misc. 800.

8. N.J.—Ackley v. Norcross, 6 A.2d 721, 122 N.J.Law 569, affirmed 11 A.2d 106, 124 N.J.Law 133

Legislative intent to give sheriff free rein

The statutes authorizing sheriff to remove undersheriff at pleasure and providing that undersheriffs shall not be classified under the civil service indicate that the legislative intention was to give the sheriff free rein to control the terms of office of his undersheriffs, and to appoint and remove at his pleasure.—Ackley v. Norcross, supra.

9. N.Y.—Bates v. Offerman, 264 N.Y.S. 547, 147 Misc. 800.

10. Ga.—Foster v. Brown, 34 S.E.2d 530, 199 Ga. 444

11. Miss.—In re Bishop, 52 So.2d 18, 211 Miss. 518.

12. Miss.—In re Bishop, supra

13. Ky.—Sparks v. Adkins, 200 S.W.2d 307, 304 Ky. 212.

14. S.C.—State v. Goldsmith, 81 S.E. 147, 96 S.C. 484.

15. S.C.—State v. Goldsmith, supra
57 C.J. p. 767 note 12

16. N.Y.—Edmunds v. Barton, 31 N.Y. 495.

17. N.Y.—Edmunds v. Barton, supra.

18. Tex.—Anderson v. Wood, 152 S.W.2d 1084, 137 Tex. 201.

19. Miss.—In re Bishop, 52 So.2d 18, 211 Miss. 518.

20. Miss.—In re Bishop, supra.

21. Miss.—In re Bishop, supra.

22. Miss.—In re Bishop, supra.

23. Miss.—In re Bishop, supra.

24. Miss.—In re Bishop, supra.

Liberality in upholding trial court

On appeal by deputy sheriff from an order removing him, supreme court will be very liberal in upholding the finding of fact and causal connection of the fact bearing on efficient service of deputy sheriff as might be adjudicated by trial judge —In re Bishop, supra.

25. Miss.—In re Bishop, supra.

26. Pa.—Appeal of Reed, 164 A. 610, 309 Pa. 556

27. Pa.—Appeal of Reed, supra.

28. S.D.—Williamson v. Lake County, 96 N.W. 702, 17 S.D. 353.
57 C.J. p. 767 note 17.

Evidence of official character. As a general rule evidence that a person acted as deputy sheriff or constable and was reputed to be and recognized as such is admissible and sufficient to prove his official character,[29] but, where one seeks to justify as a deputy sheriff, proof that he acted as such is not sufficient to establish his official character.[30] Where a deputy sheriff has taken a forthcoming bond, and returned it forfeited, it is not sufficient evidence of his legal incapacity to do so that the clerk of the probate court had twice searched the records of his office unsuccessfully to find the record of his appointment as deputy sheriff, and believed it did not exist in that office, it being proved that the office has been kept carelessly by his predecessor, and there being other evidence besides the taking and returning of the bond that the deputy had served in that capacity[31] In passing on a deputy sheriff's claim for services, the deputy's affidavit that he is such, his commission, and proof of his oath of office establish a prima facie de jure title to the office, behind which the town board of auditors cannot go.[32]

In an action against a sheriff for the default or misconduct of a person alleged to have been his deputy the fact that the sheriff appointed such person his deputy,[33] or an admission by the sheriff that such person was his deputy,[34] is sufficient proof of the deputation; but the return of the person alleged to have been a deputy is not sufficient proof that he was such.[35] Declarations of a person performing the duties of an undersheriff that he was such undersheriff and had charge of all the business, made while transacting no business incident to such position or connected with its duties, are inadmissible to prove the authority conferred on him by the sheriff.[36] The records of the county clerk showing the approval of the appointment of a deputy sheriff by the county commissioners is some evidence of the appointment sufficient to make the question an issue of fact for the court or jury.[37]

Estoppel to deny title or incumbency. One who has acted as deputy sheriff is estopped to deny that he was such,[38] and a person ruled in the superior court as a deputy of the county to show cause why he had not collected the amount of an execution levied by him cannot raise the question of his official character after he has answered the rule and a verdict has been rendered against him on a traverse of his answer.[39]

§ 28. De Facto Deputies

One who is actually acting as deputy sheriff or constable under color of right is such officer de facto, although the statutory requisites of appointment have not been complied with, or he is ineligible or has failed to take the requisite oath or to give the requisite bond.

One who is actually acting as a deputy sheriff or constable under color of right is such officer de facto,[40] although the statutory requisites of appointment have not been complied with, as where the appointment is not in writing,[41] or not under seal,[42] filed,[43] or confirmed by the judge of a particular court,[44] or where the appointment contains limitations which are void.[45] Likewise, one acting as deputy is a de facto officer notwithstanding he is ineligible,[46] or has failed to take,[47] or file,[48] the requisite oath, or has failed to give,[49] or sign[50] the necessary bond. Where one who was appointed a deputy sheriff refused to take the oath and cut the same from his appointment, and there was no showing that he exercised the duties of the office, or had the reputation in the community of being a deputy sheriff, it was held that he was not an officer de facto.[51]

29. Ga.—Earl v. State, 52 S.E. 78, 124 Ga. 28
57 C.J. p. 767 note 19.

30. Wis.—Eaton v. White, 2 Wis. 292
57 C.J. p. 767 note 20.

31. Miss.—Pritchard v. Myers, 19 Miss. 169.

32. N.Y.—People v. Champlain, 53 N.Y.S. 739, 33 App. Div. 277.

33. Me.—Currier v. Brackett, 18 Me. 59.
Liability of sheriff for acts or defaults of deputy see infra § 55.

34. S.C.—Bunch v. Delliesseline, 16 S.C.L. 226.

35. Ky.—Slaughter v. Barnes, 3 A.K. Marsh. 412, 13 Am.D. 190

36. N.Y.—Buttling v. Hatton, 62 N.Y.S. 899, 48 App. Div. 577.

37. Okl.—Correll v. Morgan, 174 P. 509, 70 Okl. 295.

38. Ky.—Hughes v. James, 3 J.J. Marsh. 699.
Miss.—Womack v. Nichols, 39 Miss. 320

39. Ga.—O'Pry v. Kennedy, 12 S.E. 940, 86 Ga. 662.

40. Fla.—Malone v. Howell, 192 So. 224, 140 Fla. 693
Ky.—Combs v. McKenzie, 158 S.W.2d 938, 289 Ky. 360.
57 C.J. p. 768 note 33.

41. Tex.—Broach v. Garth, Civ.App., 50 S.W. 594
57 C.J. p. 768 note 34.

42. N.H.—Jewell v. Gilbert, 5 A. 80, 64 N.H. 13, 10 Am.S.R. 357

43. S.D.—Gulbrandson v. Town of Midland, 36 N.W.2d 655, 72 S.D. 461.
57 C.J. p. 768 note 36.

44. U.S.—Commercial Bank v. Sandford, C.C.S.C., 103 F. 98.

45. Tex.—Trammell v. Shelton, 45 S.W. 319, 18 Tex. Civ.App. 366.

46. Tex.—Broach v. Garth, Civ.App., 50 S.W. 594.

47. Ga.—Stephens v. State, 32 S.E. 13, 106 Ga. 116
57 C.J. p. 768 note 40.

48. S.D.—Gulbrandson v. Town of Midland, 36 N.W.2d 655, 72 S.D. 461.
57 C.J. p. 768 note 41.

49. Tex.—Broach v. Garth, Civ.App., 50 S.W. 594.

50. Cal.—Hill v. New Amsterdam Casualty Co., 286 P. 1103, 105 Cal. App. 156.

51. Tex.—Brown v. State, 66 S.W. 547, 43 Tex.Cr. 411.

§ 29. Special Deputies and Persons Specially Authorized

a. Functions of sheriff
b. Functions of constable

a. Functions of Sheriff

Ordinarily a sheriff is empowered to appoint persons to perform particular functions of his office, such appointees being regarded as special, rather than general, deputies.

When authorized by law to do so, a sheriff may appoint persons to do particular acts falling within the functions of the sheriff,[52] such as to serve a particular process,[53] or to make an arrest, as discussed in Arrest § 4 b (1), or to preserve the peace.[54] The power of appointment by the sheriff under a statute providing that any person may be deputed by the sheriff to perform particular acts is not abrogated by a statute leaving the necessity of employment and compensation to a board of supervisors,[55] and under such statute the sheriff may appoint a deputy to act as quarantine inspector.[56] Where a special deputy sheriff has been appointed to execute a writ, it will be presumed that an "urgent occasion" existed to authorize the appointment.[57]

A special deputy is said to be the mere agent of the sheriff in each particular case and not a public officer,[58] and the sheriff may appoint a minor as his special deputy to perform a particular act.[59] The phrase "special and non-pay," as applied to a deputy sheriff, has been held to imply that, while he holds a commission as deputy sheriff, his activities in that respect are limited to performing acts specifically directed, and that he is under no obligation to devote time to investigating criminal offenses.[60] Where a private citizen is impressed into service by a peace officer, a contract of employment results.[61]

Appointment by person other than sheriff. The sheriff cannot delegate, it has been held, to an attorney of a plaintiff in attachment the power to appoint a special deputy to make a levy.[62] While a deputy or undersheriff may not appoint another for the purpose of conducting the general business of the office, as discussed supra § 22 a, he may appoint a bailiff or special deputy to do a particular act.[63] Under statutory provisions authorizing the sheriff to appoint general deputies who shall perform the duties of the sheriff, a deputy sheriff has the same power to appoint a special deputy to serve a summons as is given by statute to the sheriff.[64]

Mode of appointment. Even in the absence of a statute requiring it, it has been held that a written appointment is necessary to authorize a special deputy to do a particular act,[65] such as to serve a writ of ne exeat,[66] or to make an arrest,[67] or to sell property under execution.[68] A statute requiring an indorsement on a summons must be complied with,[69] but in the absence of statute the appointment need not be indorsed on a summons[70] or on a writ of venire.[71] Statutes requiring the appointment of a special deputy to be in writing must be complied with;[72] but the delivery of a deputy sheriff's badge has been held a sufficient compliance.[73] Where a sheriff gives a deputy's badge to a person and authorizes him to arrest an offender, the appointment is a general, and not a special, deputation within a statute requiring appointments to do particular acts to be in writing.[74] Where goods in

52. S.C.—State v. Toland, 15 S.E. 599, 36 S.C. 515.
57 C.J. p 768 note 48.

53. Ill.—Guyman v. Burlingame, 36 Ill. 201.
Ind.—Hartford F. Ins. Co. v. Applebaum, 125 N.E. 237, 71 Ind.App. 514.
50 C.J. p 472 notes 8, 9.
Who may appoint special deputy to serve process generally see Process § 29

54. Ill.—Christian County v. Merrigan, 61 N.E. 479, 191 Ill. 484—Philips v. Christian County, 87 Ill. App. 481.
57 C.J. p 768 note 51

55. N.Y.—People v. Lyon, 138 N.Y.S. 973, 154 App.Div. 266

56. N.Y.—People v. Lyon, supra.

57. Tenn.—State v. Kizer, 4 Sneed 563.

58. S.C.—State v. Toland, 15 S.E. 599, 36 S.C. 515.
57 C.J. p 769 note 55.

59. Ind.—New Albany, etc., R. Co. v. Grooms, 9 Ind. 243.
S.C.—State v. Toland, 15 S.E. 599, 36 S.C. 515.

60. Kan.—Elkins v. Wyandotte County Board of Com'rs, 138 P. 578, 91 Kan. 518, 519, 51 L.R.A.,N.S., 638, Ann.Cas.1915D 257.
58 C.J. p 816 note 2.

61. S.D.—Gulbrandson v. Town of Midland, 36 N.W.2d 655, 72 S.D. 461.

62. Ala.—Perkins v. Reed, 14 Ala. 536.

63. Miss.—Welch v. Jamison, 2 Miss. 160.
57 C.J. p 769 note 61.

64. Ill.—Gehrke v. Foreman, 52 N.E. 852, 177 Ill. 618.

65. Mich.—People v. Moore, 2 Dougl. 1.
N.J.—Greisner v. Greisner, 97 A. 287, 86 N.J.Eq. 76.

66. N.J.—Greisner v. Greisner, supra.
Service of writ of ne exeat generally see Ne Exeat § 11.

67. Mich.—People v. Moore, 2 Dougl. 1.

68. N.J.—Meyer v. Patterson, 28 N.J.Eq. 239.
Authority of officer to sell under execution see Executions § 199.

69. Kan.—Baxter v. Yeagley, 56 P. 509, 8 Kan.App. 657.

70. Miss.—Nelson v. Nye, 43 Miss. 124

71. S.C.—State v. Toland, 15 S.E. 599, 36 S.C. 515.

72. Kan.—Baxter v. Yeagley, 56 P. 509, 8 Kan.App. 657.

73. Wash.—Crose v. John, 164 P. 941, 96 Wash. 216.
57 C.J. p 769 note 71.

74. Wash.—Crose v. John, supra.

the hands of a third person who claims a lien thereon are attached by a sheriff and placed in the charge of the deputy sheriff, the lienor is not the custodian of the goods under the sheriff's authority.[75]

Filing of appointment. In the absence of statute it is not necessary to file the appointment of a special deputy in a clerk's office,[76] or with the papers in a cause.[77] A statute providing that the appointment of an undersheriff be filed has been held inapplicable to a special deputy.[78]

Oath. In the absence of statutory requirement, an oath need not be taken by a special deputy.[79] A statute providing that an undersheriff shall take an oath of office has been held inapplicable to a special deputy.[80]

b. Functions of Constable

(1) In general
(2) Mode of appointment
(3) Oath and bond; evidence of appointment

(1) In General

A constable may appoint special deputies for the performance of particular functions of his office, and a justice of the peace may likewise possess power to appoint special constables.

While a constable ordinarily may not appoint a permanent deputy, as discussed supra § 22 b, at common law under certain circumstances he may appoint persons as special constables to do particular acts,[81] such as to serve a summons[82] or writ of execution.[83] Where there are statutes governing appointment of special deputy constables, an appointment not authorized by the statute has been held void.[84] Where a landlord's warrant is directed to a constable, naming him, "or next constable," the constable named may legally deputize or appoint a person, not a constable, to make distress thereunder.[85]

Appointment by justice of the peace. Under statutory authorization, a justice of the peace may appoint special constables for particular purposes.[86] Where the statute authorizes a justice to appoint a constable for a special purpose when the pressure of official business demands it, an appointment under such circumstances is properly made,[87] and it is not material whether the appointee is denominated a constable or a special constable.[88] The appointment must be in strict, if not literal, compliance with the statute,[89] and the justice may not appoint special constables for specific purposes not included within those enumerated in the statute.[90] Under a statute authorizing generally the appointment of a special constable by the justice whenever a qualified constable cannot conveniently be found in the township, it must appear that some legal right is subject to jeopardy or that some substantial harm will come to a litigant before a regular officer can be found to serve the process;[91] but, if the justice has personal knowledge that there is no regular constable at his command to serve process, it is not necessary that any showing be made to him before he appoints a special constable.[92]

The phrase "special purposes," as used in statutes authorizing a justice of the peace to appoint a constable for special purposes, has been construed as meaning for the purposes of certain cases then pending before the appointing justice, when the conditions specified in the statute prevail.[93] Under some statutes it is necessary that a party to the suit make and file an affidavit with the magistrate that there is no constable at hand and the business is urgent;[94] and whether an "emergency" under the

75. Cal.—Dreisbach v. Braden, 181 P. 262, 40 Cal.App. 407.

76. Miss.—Nelson v. Nye, 43 Miss. 124.

77. Miss.—Nelson v. Nye, supra.

78. N.J.—Allen v. Smith, 12 N.J.Law 159.

79. Ind.—Procter v. Walker, 12 Ind. 660.

80. N.J.—Allen v. Smith, 12 N.J. Law 159.

81. Utah.—Kaysen v. Steele, 44 P. 1042, 13 Utah 260.
57 C.J. p 769 note 83
Appointment of deputies to serve writs of replevin see Replevin § 116.

82. Ind.—New Albany, etc., R. Co. v. Grooms, 9 Ind. 243.
57 C.J. p 769 note 84.
Constable in another county
In the absence of statutory authorization a constable cannot deputize a constable in another county to serve a writ of summons.—Peouch v. Dougherty, 60 Pa.Dist & Co. 663, 49 Lack.Jur 150, 62 York Leg.Rec 168

83. Del.—Lawson v. Buzines, 3 Del. 416
57 C.J. p 770 note 86.

84. Ill.—Gordon v. Knapp, 2 Ill. 488.
57 C.J. p 770 note 88.

85. Pa.—Pickering Co. v. Lutz, 67 Pa.Super 479
Who may levy distress in general see Landlord and Tenant § 689

86. W.Va.—State v. Morris, 161 S.E. 576, 111 W.Va. 347.
Power of justice as conservator of peace to appoint special constables see Justices of the Peace § 12.

87. Ohio.—Gould v. State, 152 N.E. 788, 21 Ohio App. 26.

88. Ohio.—Gould v. State, supra.

89. Wash.—Davis v. C. E. Blackwell & Co., 298 P. 730, 162 Wash. 415.

90. W.Va.—State v. Morris, 161 S.E. 576, 111 W.Va. 347.

91. Colo.—Cunningham v. Bostwick, 43 P. 151, 7 Colo.App. 169.
57 C.J. p 770 note 92.

92. Colo.—Bruce v. Endicott, 66 P. 679, 16 Colo.App. 506.—Brewer v. Mock, 60 P. 578, 14 Colo.App. 454.

93. Okl.—National Surety Co. v. Bounds, 50 P.2d 185, 174 Okl. 111.

94. Tenn.—Hazleton v. Simpson, 11 Heisk. 679.
57 C.J. p 770 note 96.

terms of a statute exists authorizing the appointment of a special constable by the justice is a question of which the justice is the exclusive judge.[95]

Under statutory provisions giving a justice of the peace authority when the office of constable is vacant or in other case of emergency to appoint a person to act as constable, when the office is vacant and an emergency also exists, there may be an appointment of two or more special constables.[96]

Appointment by commissioner. One appointed and commissioned under statutory and charter provisions as a special police officer by the commissioner of public safety of a city at the request of a justice of the peace, to serve process issued out of the justice's court, has been held to have the status of a constable at common law.[97]

(2) Mode of Appointment

An appointment of a special deputy constable should be made in compliance with the mode prescribed by statute.

Where the statute designates the manner in which a special constable shall be appointed, the appointment must be in strict conformity therewith or it will be void.[98] Where the statute authorizes an appointment by a justice to serve a writ of attachment, as discussed in Justices of the Peace § 77, or garnishment, as considered in Justices of the Peace § 78, in case of an emergency without designating the mode of appointment, it need not be in writing.[99]

Indorsement on process. Where the statute authorizing the appointment of a special constable to serve process requires that the appointment by the justice shall be made by a written indorsement under seal on the back of the process which the person receiving it shall be deputed to execute, an indorsement under seal is necessary, although the justice's court is not a court of record having a seal,[1] and, while an indorsement on a separate piece of paper has been held insufficient,[2] an indorsement under seal on a separate piece of paper securely fastened to, and on the back of, the writ before delivery to the appointee is sufficient as a substantial compliance with the statute.[3]

(3) Oath and Bond; Evidence of Appointment

A special constable need not take an oath of office or furnish a bond unless he is required or directed to do so by statute or by the appointing justice. There is no presumption of the validity of the appointment, and a person who justifies under the appointment must show affirmatively that the statutory causes justifying the appointment existed.

In the absence of a statutory requirement, a constable appointed by a justice for a special purpose need not take an oath,[4] unless directed to do so by the appointing justice.[5] In like manner, in the absence of a statutory requirement, a constable appointed by a justice for a special purpose need not give a bond,[6] but the justice himself may require a bond.[7] While a bond may be required by statute from a special constable in the performance of certain acts, a statute requiring a bond where the appointment is to serve an attachment, execution, or order for the delivery of property does not apply where the appointment is to serve a search warrant.[8] A statute requiring all civil officers to give bond has been held inapplicable to a special constable appointed by a justice to serve a search warrant.[9]

Evidence of appointment. Where the statute authorizes an appointment of a special constable under certain circumstances to serve process, there is no presumption of the validity of the appointment,[10] and a person who justifies under such appointment must show affirmatively that the statutory causes authorizing the appointment existed,[11] and that the appointment was made in the manner prescribed by statute.[12] Where the statute requires the appointment of a special constable by a justice of the peace to be noted on the docket of such justice, the appointment can be proved only by the record.[13]

95. Ala.—Murkison v. State, 65 So. 684, 11 Ala.App. 105.

96. Ala.—Murkison v. State, supra

97. Minn.—Russ v. Kane, 285 N.W. 472, 205 Minn. 187.

98. Wash.—Davis v. C. E. Blackwell & Co., 298 P. 730, 162 Wash. 415.
57 C.J. p 770 note 99.

99. Miss.—Brown v. Williams-Brooke Co., 63 So. 351, 106 Miss. 182.

1. Colo.—Bruce v. Endicott, 66 P. 679, 16 Colo.App. 506.

2. Ill.—Gordon v. Knapp, 2 Ill. 488.

3. Colo.—Lewis v. Smith, 101 P. 762, 45 Colo. 557.

4. Ind.—State v. Trapp, 8 Blackf. 312.

5. Ind.—State v. Trapp, supra.

6. Ind.—State v. Trapp, supra.

7. Ind.—State v. Trapp, supra.

8. Iowa.—Hoeg v. Pine, 121 N.W. 1019, 143 Iowa 243.

9. Iowa.—Hoeg v. Pine, supra.

10. Colo.—Hamill v. Ferrier, 45 P. 522, 8 Colo.App. 266.
57 C.J. p 771 note 15.

11. Colo.—Cort v. Newman, 40 P. 242, 6 Colo.App. 154.
57 C.J. p 771 note 16.

12. Colo.—Bruce v. Endicott, 66 P. 679, 16 Colo.App. 506—Cort v. Newman, 40 P. 242, 6 Colo.App. 154.

13. Ind.—Benninghoof v. Finney, 22 Ind. 101.
57 C.J. p 771 note 18.

§ 30. Bailiffs, Keepers, Clerks, and Other Assistants and Employees

a. Bailiffs
b. Clerks and other employees

a. Bailiffs

Where the sheriff lacks time to attend sessions of court, he should appoint deputies or bailiffs to do so for him. A special oath may be required of a special deputy acting as bailiff, and, where he serves during a term of court under color of appointment, he is at least a bailiff de facto.

It is the duty of the sheriff, when he cannot attend to such duties in person, to appoint deputies to attend on the terms of court,[14] and, when such deputies are put in charge of juries, the term "bailiff" is applied to them.[15] The term "bailiff" is also used, however, as meaning a sheriff's officer or deputy generally.[16] Under a statute providing that the sheriff shall summon bailiffs to serve in court in cases tried by a jury when the judge certifies that such bailiffs are necessary, the employment of a bailiff is left to the discretion of the court.[17] Where the statute authorizes the sheriff to employ as many bailiffs as may be necessary, an order of court limiting the number is unauthorized.[18]

While no special oath is required of the sheriff when he acts as bailiff to the jury, under principles discussed supra § 7, when the duty of acting as bailiff is assigned by the sheriff to a deputy specially appointed for that purpose alone, a special oath is necessary to be administered to him.[19]

Evidence of appointment. It is not necessary, it has been held, that the appointment of a constable as bailiff to serve during a term of court be shown by the minutes of the court, and, when not so shown, the fact can be proved by other evidence.[20]

De facto bailiff. A constable selected by the sheriff to serve as bailiff during a term of court, and who serves in such capacity, and is presumably sworn, is at least a de facto officer whose acts are valid.[21]

b. Clerks and Other Employees

In accordance with statutory authorization the sheriff may appoint his own clerks and assistants who retain their positions at his pleasure but not beyond his term.

In accordance with statutory authorization, the sheriff may appoint the employees and assistants in his office.[22] A deputy sheriff, by adopting the act of his clerk in signing the sheriff's and the deputy sheriff's names to a certificate of attachment, makes it to all intents and purposes the act of the deputy.[23] An appointment by a sheriff to a position as clerk in his office cannot extend beyond his own term,[24] and such clerk may be dismissed by the sheriff at any time,[25] and it has been said that both under the rules of the common law and the statute law sheriffs are not restricted in their right to discharge their employees.[26]

Number of clerks. Under the statutory practice prevailing in some counties it rests with a salary board and not alone with the sheriff to determine the number of assistants and clerks necessary properly to transact the business in the sheriff's office.[27]

§ 31. Substitutes for Sheriff

Under some statutes private persons may be appointed to perform particular services where there is no sheriff or the sheriff is unavailable.

Under some statutes special appointments of persons to perform particular services appertaining to the sheriff's office may be made if there is no sheriff or the sheriff is unable to act, and the coroner is unable to fulfill his duties.[28] A statute providing that a private person may be appointed to serve process where the sheriff is disqualified and the coroner is unable to act does not authorize an appointment of a private person to act as sheriff during the trial of a case in which the sheriff

14. Fla.—Nicholson v State, 20 So 818, 38 Fla. 99
57 C.J. p 771 note 21.

15. Fla.—Nicholson v. State, supra.
57 C.J. p 771 note 22

16. 1 Blackstone Comm. p 344—Black L.D.

17. Ala.—Ward v. State, 82 So. 660, 17 Ala.App 170, certiorari denied 82 So. 662, 203 Ala. 306.
57 C.J. p 771 note 27.

18. Ala.—Ex parte Strobach, 49 Ala. 443.

19. Fla.—Nicholson v. State, 20 So. 818, 38 Fla 99.
57 C J. p 771 note 31.

20. Ga.—Johnson v. State, 109 S.E 526, 27 Ga.App. 679.

21. Ga.—Johnson v. State, supra.

22. N Y.—Sheldon v MacArthur, 133 N Y.S. 194, 73 Misc. 575, affirmed 133 N Y.S. 194, 148 App.Div. 908.
57 C J. p 771 note 35.

Appointment of rural police
U.S.—Trammell v. Fidelity & Cas Co. of New York, D.C.S.C., 45 F. Supp. 366.

23. N.Y.—Gibson v. National Park Bank, 98 N.Y. 87.

24. N.Y.—Sargent v. Gorman, 29 N. E. 946, 131 N.Y. 191.

25. N Y.—Sargent v. Gorman, supra.
57 C.J. p 772 note 38.

26. Ga.—Foster v. Vickery, 42 S E. 2d 117, 202 Ga. 55, conformed to Vickery v. Foster, 42 S.E.2d 451, 75 Ga App. 121.

27. Pa.—Appeal of Ludwick, 178 A. 339, 117 Pa Super. 471.

28. La.—Whitehead v. Brigham, 1 La.Ann 317.

is a party.[29] Where a sheriff is in his office ready to serve process issued by the probate judge, and the sheriff's office is in the same building with that of the probate judge, the latter has no authority to appoint a special sheriff to serve the process.[30]

§ 32. —— Coroner Acting as Sheriff

Under the common law or under provisions of constitutions or statutes which expressly confer the right, a coroner may act in his ministerial capacity as a substitute for the sheriff where the latter is unavailable or is disqualified.

Under the common law or under provisions of constitutions or statutes which expressly confer the right, a coroner may act in his ministerial capacity as a substitute for the sheriff when the latter is unavailable or is disqualified.[31] On the occurrence of a vacancy in the office of sheriff it has been held that, if there is no undersheriff, the coroner may discharge the duties of the sheriff's office,[32] but there is other authority which holds that the coroner is merely the substitute for the sheriff and has no authority to act in that capacity when there is no sheriff in office.[33] Where the right is expressly conferred by statute, a coroner cannot exercise the powers and perform the duties of the sheriff under circumstances not specified in the statute.[34] Under a statute providing that in case of a vacancy in the office of sheriff the powers and duties shall devolve on the coroner to be executed by him until a new sheriff is appointed or elected, it has been said that strictly speaking there is no vacancy in the office by reason of the death, removal, or resignation of the incumbent,[35] but under other statutes a vacancy exists in the office of sheriff whenever the person elected or appointed ceases for any reason to be sheriff, although the duties may for the time being be performed by a coroner acting as sheriff.[36]

While acting in discharge of the duties of the sheriff, the coroner is still regarded as such and not as a true sheriff.[37] Under constitutional provisions to the effect that, if there is a vacancy in the office of sheriff, the coroner shall perform the duties pertaining to such office until the vacancy is filled, the coroner does not in case of vacancy succeed to the office or become sheriff,[38] but merely performs duties pertaining strictly to the office of sheriff until filling of the vacancy,[39] and on the filling of the vacancy by appointment by the governor the coroner has no color of title to the office of sheriff.[40] Under a statute providing that in case of a vacancy in the office of sheriff the powers and duties devolve on the coroner until a new sheriff is appointed or elected, the coroner holds office only until an appointment authorized by statute is made by the court.[41]

Rights of coroner or deputies to perform duties. Under a statute providing that, if for any cause there is a vacancy in the sheriff's office, and there is no deputy to act as authorized by law in case of the death of the sheriff, the coroner shall perform the duties of sheriff, as construed in connection with a statute providing that the deputy may continue to discharge the duties of any state or county officer on the latter's death, the deputy of a sheriff discharges the duties of a sheriff only on his death,[42] so that, if the sheriff is living and disqualified, the coroner, and not the deputy, is the proper officer to assume the duties.[43] Where a sheriff does not die, an undersheriff cannot execute the duties of the office of sheriff under a statute providing that he shall execute such duties on the death of the sheriff,[44] but on a vacancy caused by the election of the sheriff to another office, the duties devolve on the coroner.[45] Where the coroner is authorized by statute to summon jurors, his authority to do so is not abrogated by a statute authorizing the appointment by the sheriff of a deputy to

29. La.—Whitehead v. Brigham, supra.

30. Kan.—Skinner v. Cowley County, 66 P. 635, 63 Kan. 557.

31. La.—Blaize v. Hayes, 15 So.2d 217, 204 La. 263, rehearing denied 15 So 2d 228, 204 La 298
Pa.—Wray v. Allegheny County, 30 Pa Dist. 344, 50 Pa Co. 174, 69 Pittsb.Leg J 172—Case of Fayette County Deputy Coroner, 20 Pa.Co 641.
S.C.—Richardson v. Croft, 17 S C.L. 264—Giles v. Brown, 8 S.C L. 230.
Tex.—Powell v. Wilson, 16 Tex. 59
57 C.J. p 772 notes 44–48, 51.

As peace officer
The coroner performs the functions of a peace officer only under certain circumstances and then only those of a displaced sheriff for a temporary period under conditions specified by statute—Millwood v State, 23 So.2d 496, 198 Miss. 485.

32. N.Y.—People v. Parker, 6 Hill 49.

33. S C.—Richardson v. Croft, 17 S C.L. 264.
57 C.J. p 772 note 50.

34. Colo.—Tate v. People, 40 P 471, 6 Colo.App. 202
Miss.—Millwood v. State, 23 So.2d 496, 198 Miss. 485.

35. Cal.—People v. Phœnix, 6 Cal. 92.

36. Ohio.—State v. MacGregor, 10 N. E. 66, 44 Ohio St. 628.
57 C.J. p 773 note 64.

37. Tenn.—Allen v. Hickman, 53 S. W 2d 383, 165 Tenn 136.

38. La.—Blaize v. Hayes, 15 So 2d 217, 204 La. 263, rehearing denied 15 So.2d 228, 204 La. 298.

39. La.—Blaize v. Hayes, supra.

40. La.—Blaize v. Hayes, supra.

41. Cal.—People v. Phœnix, 6 Cal. 92.

42. Miss.—Lipscomb v. State, 25 So. 158, 76 Miss 223

43. Miss.—Lipscomb v. State, supra.

44. N.Y.—Paddock v. Cameron, 8 Cow. 212.

45. N.Y.—Paddock v. Cameron, supra.

execute and make returns of all writs and other processes directed to the sheriff, and to perform all other duties incumbent on the sheriff.[46]

Rights of coroner against hold-over sheriff. While the sheriff is generally entitled to hold over until his successor is elected and qualified, under principles discussed supra § 8, it has been held that on the death of a sheriff-elect before qualifying, the coroner-elect, after qualification, is entitled to the office of sheriff as against the former sheriff claiming to hold over.[47]

§ 33. —— Elisors

Where neither sheriff nor coroner can act in the performance of functions of the sheriff's office, the emergency may in a proper case be met by appointment of a special officer called an "elisor," to perform the required duties.

An "elisor" may be defined as a person appointed to perform certain duties pertaining to certain officers, when the latter are disqualified;[48] a person appointed by the court to return a jury when the sheriff and coroner have been challenged as incompetent.[49] Where neither the sheriff nor the coroner can act, such emergency is met by appointment of a special officer, called an "elisor," to perform the required duties.[50] In accordance with statutory provisions appointment of an elisor has been held proper where both the sheriff and coroner are disqualified,[51] or where the office of sheriff is vacant and the coroner is disqualified to act,[52] but, where the statute requires the inability of both the sheriff and coroner to act, an appointment of an elisor is erroneous when no showing is made that the coroner as such is disqualified,[53] and this is true, even though such appointee is the coroner.[54] Where an elisor has been appointed, the presumption is that the circumstances authorizing such appointment existed.[55] Strict compliance with the statutory procedure, as by failing to show the disqualification of the coroner, is subject to waiver.[56] Where there is no effort to show actual disqualification of the marshal and the coroner, but the claim is merely that the marshal and his deputies have been unable to find and serve defendant, there is no authorization for appointment of an elisor to serve writs either at common law or under court rule.[57]

Residence. It is not necessary that an elisor appointed by the court to serve an attachment on a sheriff, for his failure to return an attachment delivered to him, should be a resident of the same county with the officer in default, but under special circumstances an elisor residing in a different county may be appointed.[58]

Oath. In the absence of a statute so requiring, it is not necessary that an elisor should take an oath of office.[59]

§ 34. Posse Comitatus

In a proper case a sheriff may summon to his aid, in the enforcement of the law and preservation of the peace, the "posse comitatus," or the whole power of the county, and persons so called by the sheriff are bound to aid and assist him.

In a proper case the sheriff may summon to his aid, in the performance of his duties, the "posse comitatus,"[60] or the whole power of the county.[61] The right of the sheriff to summon a posse comitatus exists by virtue of the common law,[62] and statutes empowering a sheriff to summon suitable aid in the suppression of disturbances of the peace have been held to be an affirmance of the common law by which the sheriff might raise a posse com-

46. Pa.—Commonwealth v. Mallini, 63 A. 414, 214 Pa. 50.

47. Ohio.—State v. Epler, 12 Ohio St. 428.

48. Cal.—Bruner v. San Francisco Super. Ct., 28 P. 341, 92 Cal. 239.
D.C.—Doherty v. Kalmbach, 87 F.2d 539, 66 App.D.C. 322.

49. Cal.—People v. Nakis, 193 P. 92, 184 Cal. 105.
D.C.—Doherty v. Kalmbach, 87 F.2d 539, 541, 66 App.D.C. 322.
20 C.J. p. 402 note 76.

50. Mo.—State v. Smith, 1 S.W. 753, 90 Mo. 37, 59 Am.R. 4.

51. Cal.—People v. Sehorn, 48 P. 495, 116 Cal. 503.
57 C.J. p. 773 note 70.

52. Ill.—Reed v. Moffatt, 62 Ill. 300.

53. Cal.—People v. Fellows, 54 P. 830, 122 Cal. 233.

54. Mo.—Orscheln v. Scott, 79 Mo. App. 534.

55. Cal.—Turner v. Billagram, 2 Cal. 520.

56. Cal.—People v. Nakis, 193 P. 92, 184 Cal. 105.

57. D.C.—Doherty v. Kalmbach, 87 F.2d 539, 66 App.D.C. 322.

58. N.Y.—Anonymous, 23 Wend. 102.

59. Ill.—Reed v. Moffatt, 62 Ill. 300.

60. Cal.—City of Los Angeles v. Industrial Accident Commission of State of California, 47 P.2d 1096, 8 Cal.App.2d 580.
Ky.—**Corpus Juris cited in** Black Mountain Corporation v. Lee, 90 S.W.2d 1016, 1017, 262 Ky. 632.
Mo.—**Corpus Juris cited in** State v. Parker, 199 S.W.2d 338, 339, 355 Mo. 916.
N.M.—**Corpus Juris cited in** Eaton v. Bernalillo County, 128 P.2d 738, 742, 46 N.M. 318, 142 A.L.R. 647.
57 C.J. p. 773 note 79.
Deputy sheriff has the right to summon a posse comitatus, but only when he has process for execution or other valid cause.—Black Mountain Corporation v. Lee, 90 S.W.2d 1016, 262 Ky. 632.

61. Cal.—City of Los Angeles v. Industrial Accident Commission of State of California, 47 P.2d 1096, 8 Cal.App.2d 580.
Mo.—**Corpus Juris cited in** State v. Parker, 199 S.W.2d 338, 339, 355 Mo. 916.
57 C.J. p. 773 note 80.
Militia distinguished from posse comitatus see Militia § 1.

62. N.M.—Eaton v. Bernalillo County, 128 P.2d 738, 46 N.M. 318, 142 A.L.R. 647.

itatus.[63] The sheriff may call on a posse comitatus in preservation of the peace,[64] or where necessary for assistance in a criminal case.[65] There is a duty to summon a posse comitatus when such aid is necessary for the execution of mesne process in criminal proceedings,[66] or final process in civil actions,[67] but the sheriff is not required to summon the posse comitatus to aid in the execution of mesne process in civil actions,[68] although he has the right to do so.[69]

In order to constitute a posse comitatus the persons involved must be summoned by the sheriff in the exercise of the power of the county.[70] Persons called on by the sheriff are bound to aid and assist him;[71] to disobey the summons of the sheriff is to be guilty of an offense for which the offender may be punished.[72] Those orally deputized by a sheriff to aid him in making an arrest for felony are neither officers nor private persons,[73] but occupy the legal position of a posse comitatus;[74] and generally a member of a posse comitatus, while co-operating with the sheriff and acting under his orders, is just as much clothed with the protection of the law as is the sheriff himself.[75] Officers of different municipalities acting with a deputy sheriff in performance of duties owing to the respective political units each represents are not to be regarded as a posse comitatus.[76]

Number to be called. A sheriff may call on such number of men of the county as is necessary for assistance in any criminal case or in preservation of the peace.[77] Under a statute authorizing a county judge to order the sheriff to summon a posse of not less than two nor more than ten, the discretion as to the number within the limits of the provision is vested in the sheriff,[78] and, therefore, it is proper for the judge to leave the number to be determined by the sheriff.[79]

III. RIGHTS, POWERS, AND DUTIES

A. NATURE AND EXTENT

§ 35. In General

Sheriffs and constables have all the powers and duties appertaining to their office at common law except as modified by statute or the state constitution. Such powers and duties ordinarily are of a ministerial nature.

Sheriffs and constables have all the powers and duties appertaining to their office at common law[80] except as modified by statute[81] or the state constitution.[82] Their powers and duties are, at the

63. Mo.—**Corpus Juris cited in** State v Parker, 199 S.W.2d 338, 339, 355 Mo 916.
Vt—Hooker v. Smith, 19 Vt 151, 47 Am.D. 679

64. N M.—Eaton v Bernalillo County, 128 P 2d 738, 46 N M. 318, 142 A L.R. 647

65. N.M—Eaton v. Bernalillo County, supra.

66. N.C.—State v. Allison, 47 N.C. 339.

67. Ky.—Bell v North, 4 Litt 133.
N C.—State v. Allison, 47 N.C. 339

68. Ky—Bell v. North, 4 Litt. 133
N.C—State v. Allison, 47 N C. 339

69. Ky.—Bell v. North, 4 Litt. 133

70. Wis—Village of Schofield v. De Lisle, 235 N.W. 396, 204 Wis. 84.

71. Cal.—City of Los Angeles v. Industrial Accident Commission of State of California, 47 P 2d 1096, 8 Cal App.2d 580.
Mo—**Corpus Juris cited in** State v Parker, 199 S.W.2d 338, 339, 355 Mo. 916.
57 C J. p 774 note 81.

72. Pa.—Commonwealth v. Martin, 7 Pa.Dist. 219, 9 Kulp 69.
57 C J. p 774 note 82.

73. Mo.—State v. Parker, 199 S.W. 2d 338, 355 Mo. 916

74. Mo.—State v. Parker, supra.

75. Mo.—State v. Parker, supra.

76. Wis—Village of Schofield v. De Lisle, 235 N.W 396, 204 Wis. 84, followed in City of Wausau v Coerper, 235 N.W. 398, 204 Wis 88.

77. N M—Eaton v. Bernalillo County, 128 P 2d 738, 46 N M. 318, 142 A.L.R. 647

78. Ky.—Hopkins County v. St Bernard Coal Co, 70 S W 289, 114 Ky 153, 24 Ky.L. 942.

79. Ky—Hopkins County v. St. Bernard Coal Co., supra

80. Ariz—Merrill v. Phelps, 84 P.2d 74, 52 Ariz 526.
Ga—Foster v. Vickery, 42 S E 2d 117, 202 Ga 55, conformed to Vickery v. Foster, 42 S E 2d 451, 75 Ga App 121—Elder v Camp, 18 S E 2d 622, 193 Ga. 320
Ill—People ex rel Walsh v. Board of Com'rs of Cook County, 74 N. E.2d 503, 397 Ill. 293
Tenn—**Corpus Juris cited in** State v. Freeman, 61 S.W 2d 459, 166 Tenn. 296
57 C J. p 774 note 90
City marshal as having the authority, powers, duties, and obligations of sheriff see Municipal Corporations § 566.
Competency of sheriff as arbitrator see Arbitration and Award § 46.

Duties and powers of constable within the jurisdiction of a justice of the peace are identical with those of a sheriff—State ex rel. McDonald v. Frankenhoff, 125 S.W.2d 816, 344 Mo. 188—Huhn v. Lang, 27 S W. 345, 122 Mo. 600.

A citizen who attempts to decide for himself whether the sheriff is acting within the scope of his authority does so at the citizen's own peril. —People v. Spear, 89 P.2d 445, 32 Cal. App 2d 165, certiorari denied Spear v People of State of Cal., 60 S.Ct. 116, 308 U.S 555, 84 L Ed 466.

81. Ariz—Merrill v. Phelps, 84 P 2d 74, 52 Ariz. 526
Ga—Foster v. Vickery, 42 S.E 2d 117, 202 Ga 55, conformed to Vickery v. Foster, 42 S.E 2d 451, 75 Ga. App. 121—Elder v Camp, 18 S E 2d 622, 193 Ga 320
Tenn—**Corpus Juris cited in** State v. Freeman, 61 S W.2d 459, 460, 166 Tenn. 296
57 C J. p 774 note 91.

82. Ark—Cain v Woodruff County, 117 S.W. 768, 89 Ark 456.
57 C J. p 774 note 93.

Duties imposed on sheriff as county officer

The sheriff is obligated to perform such duties as may be constitutionally imposed upon him in his capacity

present time, to a very large extent regulated by statute[83] or the state constitution.[84] The authority of the sheriff includes not only that expressly given by statute, but also such implied authority as is necessary to carry out such express authority.[85] The powers and duties of a sheriff ordinarily are of a ministerial nature,[86] and the proper discharge of his duties calls for the exercise of good judgment and discretion,[87] particularly where he is considered the most important official functionary of the county.[88] The sheriff may at times exercise judicial functions and examine evidence and make up judgments which are to become the basis of his actions and conduct and of the actions and conduct of others.[89]

Since the duties and responsibilities of sheriffs are fixed by law,[90] they cannot be enlarged by private agreement between litigants,[91] and since a sheriff acts as an officer of the law[92] he is not, normally, an agent of either party to litigation.[93] A sheriff, while in the discharge of his official duties, cannot divest himself of his official character and do as an individual that which he cannot do as a public officer.[94]

Duty as to keeping office. There must be a compliance with statutory provisions requiring a sheriff to keep an office in the city or county in which the county courts are held, and to file notice of the place in the clerk's office.[95]

Change of duties. The legislature may, in the absence of constitutional restrictions, vary,[96] abridge,[97] or increase[98] the duties of sheriffs and constables.

Conferring duties on other officers. A constitutional provision that sheriffs shall be elected by the people of their respective counties does not prohibit the legislature from authorizing the governor to appoint other officers with the power of sheriffs for the enforcement of the state laws within the counties.[99] A statute requiring that traffic officers on public highways outside the limits of incorporated cities and towns be duly appointed and qualified deputies acting under the respective sheriffs of the several counties does not preclude reasonable regulations by county commissioners with respect to the duties of such statutory officers, provided no undue responsibility is imposed on the sheriff for the conduct of his duties with respect to traffic control.[1]

With respect to courts; court officers. A sheriff or his deputy required to attend sessions of court held in his county, as discussed in Courts § 169, has the duty to obey the lawful orders and directions of the court,[2] and to execute its process[3] and or-

as a county officer—Pearce v. Stephens, 45 N.Y.S. 422, 18 App.Div. 101, affirmed 48 N.E. 1106, 153 N.Y. 673—57 C.J. p. 774 note 93.

83. Fla.—Lang v. Walker, 35 So. 78, 46 Fla. 248.
Pa.—Bovee v. Willis, 31 Pa.Dist. & Co. 119, 19 Erie Co. 446, 51 York Leg.Rec. 162.
57 C.J. p. 774 note 92.

Furnishing report

Where sheriff furnished a monthly report to police jury listing expenditures of his office and names and salaries of his deputies and employees in compliance with statute, his failure also to furnish report to clerk of court as required by statute constituted a violation thereof—State ex rel. Riddle v. Jeansonne, 18 So.2d 306, 205 La. 818.

Strict construction

A statute limiting or restricting the powers of sheriffs is to be strictly construed.—Foster v. Vickery, 42 S.E.2d 117, 202 Ga. 55, conformed to Vickery v. Foster, 42 S.E.2d 451, 75 Ga.App. 121.

84. W.Va.—Detroit Fidelity & Surety Co. v. Kidd, 182 S.E. 113, 116 W.Va. 511.

Personal performance

A sheriff who personally performs the duties of his office or superintends their performance as much as is practicable for him to do does not violate a constitutional provision requiring that the duties of the office of sheriff shall be performed by him in person or under his superintendence—Detroit Fidelity & Surety Co. v. Kidd, supra.

85. Idaho.—Lansdon v. Washington County, 102 P. 344, 16 Idaho 618.

86. Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.
Kan.—**Corpus Juris cited in** Whalen v. Cristell, 173 P.2d 252, 255, 161 Kan. 747.
57 C.J. p. 774 note 95.

87. Kan.—Brooks v. Marquess, 139 P.2d 395, 157 Kan. 244.

88. Kan.—Brooks v. Marquess, supra—State v. McCarty, 179 P. 309, 104 Kan. 301, 3 A.L.R. 1283.

89. U.S.—South v. Maryland, Md., 18 How. 396, 15 L.Ed. 433.
57 C.J. p. 774 note 96.

90. La.—H. R. Hayes Lumber Co. v. H. M. Jones Drilling Co., 148 So. 899, 177 La. 626.

91. La.—H. R. Hayes Lumber Co. v. H. M. Jones Drilling Co., supra.

92. Minn.—Donaldson v. Mona Motor Oil Co., 251 N.W. 272, 190 Minn. 231.

93. Minn.—Donaldson v. Mona Motor Oil Co., supra.

94. N.Y.—Ball v. Pratt, 36 Barb. 402.
57 C.J. p. 774 note 97.

95. N.Y.—Dunford v. Weaver, 84 N.Y. 445.

96. Ark.—Cain v. Woodruff County, 117 S.W. 768, 89 Ark. 456.
Ga.—State v. Dews, R.M.Charlt. 443.

97. Ga.—State v. Dews, supra.
N.J.—State v. De Lorenzo, 79 A. 839, 81 N.J.Law 613, Ann.Cas.1912D 329.

98. Ark.—Cain v. Woodruff County, 117 S.W. 768, 89 Ark. 456.
N.Y.—Pearce v. Stephens, 45 N.Y.S. 422, 18 App.Div. 101, affirmed 48 N.E. 1106, 153 N.Y. 673.

99. Me.—Gilmore v. Penobscot County, 78 A. 454, 107 Me. 345.

1. Fla.—State ex rel. Rauscher v. Gandy, 178 So. 166, 130 Fla. 407.

2. Ariz.—Merrill v. Phelps, 84 P.2d 74, 52 Ariz. 526.
Or.—In re Hampson's Estate, 223 P.2d 1039, 190 Or. 279.

Sheriff is executive arm of court, and acts under its orders in all respects.—Merrill v. Phelps, 84 P.2d 74, 52 Ariz. 526.

3. Or.—In re Hampson's Estate, 223 P.2d 1039, 190 Or. 279.

Power and duty as to service, execu-

ders[4] He has no power to originate motions or present questions, in the names of the parties to a suit, for the action of the court.[5] The powers and duties of sheriffs and their deputies, while acting as court officers, are defined by statute, court rule, and order of the court,[6] and no discretion is vested in them to disobey.[7] A provision of a city charter for the appointment by the judges of the municipal court, from the constables elected for the several wards of the city, of such a number thereof as may be required to do the work of the court, does not create a new office, but the acts of an appointee are by virtue of his office as constable.[8]

§ 36. Territorial Extent of Authority

a. Of sheriff or deputy
b. Of constable or deputy

a. Of Sheriff or Deputy

As a general rule in the absence of a statute providing otherwise the authority of a sheriff is coextensive with his county.

Since the sheriff is a county officer, his authority extends over the entire county,[9] and includes all municipalities[10] and townships[11] within his county. As a general rule, however, his authority,[12] and the authority of a deputy sheriff appointed by him,[13] are limited to his own county. Accordingly, a sheriff cannot, as such, serve process outside his county.[14] Also a sheriff of one county ordinarily cannot levy on property in another county.[15] After a sheriff has levied on property within his county, he may pursue it if it is removed to another county,[16] but he has no right to exercise force to recover possession of such property,[17] although, where he has obtained peaceable possession of the property in another county, he may defend his possession by necessary force against anyone seeking to deprive him of it by force.[18]

Under a statute granting general authority to a sheriff to execute process issued and delivered to him, without territorial limitations on his authority to execute a warrant of arrest, a sheriff is authorized to go outside his county to execute such process.[19] Also, under statutes expressly conferring such power, a sheriff can make an arrest in certain cases beyond the limits of his own county,[20] as, for example, where the sheriff pursues an escaping offender into another county.[21] Where a statute so provides, the authority of a sheriff to arrest is coextensive with the bounds of the state,[22] but he is without power or authority beyond the state boundaries[23] except where he is designated as the

tion, and return of process generally see infra § 44.

4. Ariz.—Merrill v. Phelps, 84 P.2d 74, 52 Ariz. 526
Or.—In re Hampson's Estate, 223 P. 2d 1039, 190 Or. 279.
Providing attendants to execute orders
It is the duty of the sheriff to provide such attendants as are necessary to carry out the orders of the court —Merrill v. Phelps, 84 P.2d 74, 52 Ariz. 526

5. Fla.—Rhodes v. Mosely, 6 Fla. 12.

6. Colo.—Mainland v. State, 139 P.2d 366, 111 Colo. 198

7. Colo.—Mainland v. State, supra.

8. N.Y.—Levin v. Robie, 25 N.Y.S. 982, 5 Misc. 529.

9. U.S.—McLean v. State of Mississippi ex rel. Roy, C.C.A.Miss., 96 F.2d 741, 119 A.L.R. 670, certiorari denied State of Mississippi ex rel. Roy v. McLean, 59 S.Ct. 84, 305 U.S. 623, 83 L.Ed. 399.
Mo.—State, on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003.
Ohio.—In re Sulzmann, 183 N.E. 531, 125 Ohio St. 594.
Tex.—Dudley v. Jones, 26 S.W. 445, 6 Tex.Civ.App. 466.

10. Mo.—State, on Inf. of McKittrick, v. Williams, 144 S.W.2d 98, 346 Mo. 1003.
Ohio.—In re Sulzmann, 183 N.E. 531, 125 Ohio St. 594

11. Ohio.—In re Sulzmann, supra.

12. Fla.—**Corpus Juris cited in** Roberts v. Dean, 187 So. 571, 579, 133 Fla. 47.
Ind.—State ex rel. Penrod v. French, 51 N.E.2d 858, 222 Ind. 145, 149 A.L.R. 1084.
La.—Adams v. Citizens' Bank, 136 So. 107, 17 La.App. 422
Va.—**Corpus Juris cited in** City of Alexandria v. McClary, 188 S.E. 158, 160, 167 Va. 199.
57 C.J. p. 775 note 9.

13. Fla.—**Corpus Juris cited in** Roberts v. Dean, 187 So. 571, 579, 133 Fla. 47.
Ind.—State ex rel. Penrod v. French, 51 N.E.2d 858, 222 Ind. 145, 149 A.L.R. 1084
57 C.J. p. 775 note 10.

14. Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 112 Mont. 229.
Serving process directed to sheriff of another county see infra § 44 b
Private citizen
Outside his county a sheriff has no more power to serve process than a private citizen.—Merchants Credit Service v. Chouteau County Bank, supra.

15. Nev.—Sadler v. Tatti, 30 P. 1082, 17 Nev. 429

16. Nev.—Peterson v. Wiesner, 146 P.2d 789, 62 Nev. 184.
57 C.J. p. 775 note 12.

17. N.Y.—Hill v. Haynes, 54 N.Y. 153

18. N.Y.—Hill v. Haynes, supra.

19. Kan.—State v. Dreiling, 14 P.2d 644, 136 Kan. 201.

20. U.S.—McLean v. State of Mississippi ex rel. Roy, C.C.A.Miss., 96 F.2d 741, 119 A.L.R. 670, certiorari denied State of Mississippi ex rel. Roy v. McLean, 59 S.Ct. 84, 305 U.S. 623, 83 L.Ed. 399.
Ind.—State ex rel. Penrod v. French, 51 N.E.2d 858, 222 Ind. 145, 149 A.L.R. 1084

21. U.S.—McLean v. State of Mississippi ex rel. Roy, C.C.A.Miss., 96 F.2d 741, 119 A.L.R. 670, certiorari denied State of Mississippi ex rel. Roy v. McLean, 59 S.Ct. 84, 305 U.S. 623, 83 L.Ed. 399.

22. U.S.—McLean v. State of Mississippi ex rel. Roy, C.C.A.Miss., 96 F.2d 741, 119 A.L.R. 670, certiorari denied State of Mississippi ex rel. Roy v. McLean, 59 S.Ct. 84, 305 U.S. 623, 83 L.Ed. 399
Mont.—Brannin v. Sweet Grass County, 293 P. 970, 88 Mont. 412.

23. U.S.—McLean v. State of Mississippi ex rel. Roy, C.C.A.Miss., 96

agent of the state in cases of extradition.[24] Under statute requiring any person when called on by a peace officer to aid or assist in the execution of a duty incumbent on such officer, a sheriff is under a duty to render such aid or assistance in making an arrest when he is called on by a peace officer while outside his county.[25]

Sale of land partly outside county. A sale under execution by a sheriff of land lying partly outside his county is void as to that part outside the county, although valid as to the part within the county.[26]

Effect of division of county. Where, after an execution is levied on realty in a certain county, the county is subdivided, such subdivision does not deprive the officer of the power to complete the execution of the process by a sale of the property.[27]

b. Of Constable or Deputy

In the absence of constitutional or statutory authority a constable cannot act outside his own district, precinct, or town.

It has been held that a constable, in the absence of constitutional or statutory authority, cannot act outside his own district, precinct, or town.[28] The legislature, however, may determine the area within his county in which a precinct constable may or must officially act,[29] and it has been held that, under express or implied statutory provisions, the authority of a constable may be coextensive with the limits of the county to which his precinct, district, or town belongs,[30] at least for some purposes[31] although not for others.[32] So it has been held that even though a constable is prohibited by law, under a penalty, from executing warrants and levying executions out of his particular precinct, his official acts in any part of the county are valid.[33] A constable may be empowered to serve process throughout the state,[34] but power to act throughout the county does not authorize a constable to execute process outside the limits of the county.[35]

§ 37. Authority of Deputies and Assistants

a. In general
b. Termination of incumbency of sheriff

a. In General

As a general rule a deputy sheriff is clothed with the power and authority of his principal, and he has authority to exercise any of the powers or to perform any of the duties appertaining to the office of the sheriff which are ministerial in their nature.

As a general rule a deputy sheriff is clothed with the power and authority of his principal,[36] and he may perform the duties of the sheriff.[37] Ordinarily a deputy sheriff is empowered to act only for,[38]

F 2d 741, 119 A L R 670, certiorari denied State of Mississippi ex rel Roy v McLean, 59 S Ct. 84, 305 U S. 623, 83 L Ed 399.
Mont.—Brannin v Sweet Grass County, 293 P. 970, 88 Mont. 412

24. U.S.—McLean v. State of Mississippi ex rel Roy, C C A Miss, 96 F 2d 741, 119 A L.R 670, certiorari denied State of Mississippi ex rel Roy v McLean, 59 S Ct 84, 305 U. S. 623, 83 L Ed 399
Mont.—Brannin v Sweet Grass County, 293 P. 970, 88 Mont. 412

25. Tex.—Smith v State, 140 S.W 2d 452, 139 Tex Cr 355.

Assisting state patrolmen
Where sheriff of neighboring county was attending rodeo, it was his duty to assist state patrolmen when they called on him to aid them in making an arrest in performing their duty as peace officers.—Smith v. State, supra.

26. Tex.—Alred v Montague, 26 Tex 732, 84 Am D 603.

27. U S.—Tyrell v Rountree, Tenn., 7 Pet 464, 8 L Ed. 749

28. W.Va.—Totten v Winters, 177 S E 627, 115 W.Va 679.
57 C J. p 775 note 17.

Deputies
Under a statute restricting appointment of deputy constables to persons who are, and shall continue during their incumbency to be, bona fide residents of the ward, deputies cannot exercise their functions beyond the limits of their wards.—Petition of Preno, 77 Pa Dist & Co 193.

29. Ala.—Henry v. Waldrop, 89 So 371, 206 Ala 135

30. Mo.—State ex rel and to Use of Kaercher v. Roth, 49 S.W 2d 109, 330 Mo. 105.
N C.—Taylor v. Town of Wake Forest, 45 S E 2d 387, 228 N C 346—Wilson v Town of Mooresville, 22 S E 2d 907, 222 N C. 283—State v Corpening, 178 S E 564, 207 N.C 805
Okl.—Beck v. Sulser, 150 P. 107, 48 Okl 187—State v. Sanford, Cr, 221 P 2d 818
57 C J p 775 note 19.

Election provision not restrictive
Constitutional provision for election of constable in each township was not intended to restrict constable's powers and duties to township in which elected, but to intersperse constables throughout every part of county.—State v Corpening, 178 S E 564, 207 N C 805.

31. Okl.—Beck v. Sulser, 150 P 107, 48 Okl. 187—State v. Sanford, Cr., 221 P.2d 818
57 C J p 775 note 19.

Service of warrant or other process
Okl.—Beck v. Sulser, 150 P. 107, 48 Okl 187—State v. Sanford, Cr., 221 P 2d 818.

32. N.C.—Wilson v. Town of Mooresville, 22 S E 2d 907, 222 N C. 283
57 C J p 775 note 19.

Arrest without warrant
N C.—Wilson v. Town of Mooresville, supra.
Okl.—State v. Sanford, Cr, 221 P.2d 818.

33. Va.—McNeale v Governor, 3 Gratt 299, 44 Va. 299

34. Vt.—Dix v. Batchelder, 55 Vt. 562.

35. N Y.—Loewer's Gambrinus Brewing Co v Lithauer, 73 N.Y S 947, 36 Misc 539
57 C.J. p 776 note 22

36. Tex.—Murray v. State, 67 S.W. 2d 274, 125 Tex Cr. 252.

37. Mo.—Maxwell v. Andrew County, 146 S W.2d 621, 347 Mo. 156.

38. Fla.—State ex rel. Rauscher v. Gandy, 178 So. 166, 130 Fla. 407.

Acts of deputy as acts of sheriff
The acts of a deputy sheriff in the performance of his official duties are in effect the acts of the sheriff as principal.—Jefferson County v. Dockerty, 30 So.2d 469, 33 Ala.App. 30, affirmed 30 So.2d 474, 249 Ala. 196.

Authority of deputy at pleasure of sheriff
The deputy's authority to act as a

and in the name of,[39] the sheriff as principal, and he can perform no independent action of office,[40] and he has no greater rights or powers than the sheriff.[41] It has been held, however, that a return by a deputy in his own name as deputy sheriff is valid;[42] and under statute it has been broadly stated that deputy sheriffs have the same power and authority, as to official acts and duties, as that possessed by their principals.[43]

In some jurisdictions the sheriff is vested with absolute discretion to determine the duties of his office which shall be performed by his deputies.[44] On the other hand, it has been stated that the duties to be performed and the ends to be accomplished by a deputy sheriff are as prescribed and directed by law,[45] and that the deputy is neither the agent, servant, nor employee of the sheriff.[46]

While a deputy sheriff cannot exercise any judicial authority belonging to the sheriff,[47] he has authority to exercise any of the powers or to perform any of the duties appertaining to the office of the sheriff which are ministerial in their nature.[48] Accordingly, a deputy sheriff may act for the sheriff in the service[49] and return[50] of process, and the like,[51] in making an execution[52] or other judicial[53] sale, including the appraisal of the property as a

substitute for the sheriff is at his pleasure.—State ex rel Rusch v. Board of Com'rs of Yellowstone County, 191 P 2d 670, 121 Mont. 162.

39. Fla.—State ex rel. Rauscher v. Gandy, 178 So 166, 130 Fla 407.
Mont—State ex rel Rusch v. Board of Com'rs of Yellowstone County, 191 P 2d 670, 121 Mont. 162.
57 C J. p 777 note 41

40. Fla.—State ex rel. Rauscher v. Gandy, 178 So 166, 130 Fla. 407.
Mont—State ex rel Rusch v Board of Com'rs of Yellowstone County, 191 P.2d 670, 121 Mont. 162.

41. Kan—Zurbucken v Glens Falls Indemnity Co, 149 P.2d 617, 158 Kan. 599.
N.C.—State ex rel. Cain v. Corbett, 69 S E.2d 20, 235 N C. 33—Styers v Forsyth County, 194 S E 305, 212 N.C. 558.

Arrest

When a sheriff appoints deputies, he confers on them authority to make arrests only when the law authorizes arrest to be made.—Malone v. Howell, 192 So. 224, 140 Fla. 693.

Grant of authority

A sheriff cannot give his deputy authority to do an act which the sheriff himself is not authorized to do—Calvert v. Stone, 10 B Mon, Ky., 152

Public funds

Under statute relating to the return of public funds a deputy sheriff had no greater right than his principal, the sheriff, to retain such funds—Zurbucken v Glens Falls Indemnity Co., 149 P.2d 617, 158 Kan. 599.

Unlawful entry

Under statute relating to the appointment of deputy sheriffs, a deputy entering the sheriff's office for an unlawful purpose is a trespasser—State v. Coleman, 249 P. 1049, 119 Or 430.

42. Tex.—Towns v Harris, 13 Tex 507.

43. Tex—Murray v Harris, Civ. App., 112 S.W.2d 1091, error dismissed.

44. Ohio—State ex rel. Geyer v. Griffin, 76 N E 2d 294, 80 Ohio App 447.

45. N.C—Blake v. Allen, 20 S.E 2d 552, 221 N C 445—Borders v. Cline, 193 S.E. 826, 212 N C. 472.

Limitation on duties

Common pleas judge was without authority to place any limitation on duties to be performed by special deputy sheriff and hence any representations made by sheriff to judge as to any limitation on deputy's employment were immaterial—State ex rel. Geyer v Griffin, 76 N E 2d 294, 80 Ohio App. 447.

46. N C—Blake v. Allen, 20 S E 2d 552, 221 N C 445—Borders v. Cline, 193 S E 826, 212 N C. 472.

47. Mass—Wood v. Ross, 11 Mass 271.
57 C J. p 776 note 24.
Service of writ de homine replegiando by deputy sheriff see Habeas Corpus § 2.

Holding of an inquisition

Fla—Willingham v. State, 21 Fla. 761.
57 C.J. p 777 note 40.

48. Ala—**Corpus Juris cited in** Shelton v. State of Tennessee ex rel State of Alabama, 12 So 2d 103, 105, 31 Ala.App. 58.
N.C.—State ex rel. Cain v. Corbett, 69 S E 2d 20, 235 N C. 33—Gowens v. Alamance County, 3 S.E 2d 339, 216 N C 107—Styers v Forsyth County, 194 S E 305, 212 N C 558.
Ohio—State ex rel Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447.
57 C J p 776 note 25.

Vice-principal or alter ego of sheriff

While acting for the sheriff, with respect to his ministerial duties, the deputy acts as vice-principal or alter ego of the sheriff—State ex rel. Cain v Corbett, 69 S E 2d 20, 235 N.C. 33—Blake v Allen, 20 S E 2d 552, 221 N C. 445—Styers v Forsyth County, 194 S.E. 305, 212 N.C. 558.

49. Fla—Willingham v. State, 21 Fla. 761.
Ohio—State ex rel. Geyer v. Griffin, 76 N E 2d 294, 80 Ohio App 447
46 C J. p 1085 note 27 [d].

De facto deputy

(1) A de facto deputy sheriff may validly serve process—Rounds v. McGeown, 3 A 2d 547, 110 Vt. 185.

(2) Authority of de facto officers generally see infra § 40.

Statutory basis of power

Power of deputy sheriffs to serve process is statutory, and unless conferred by statute expressly or by fair implication does not exist.—State ex rel. Madden v. Padberg, 101 S W.2d 1003, 340 Mo. 667.

As agent of law and of party

A deputy sheriff in serving process is the agent of the law and acts as a public officer, and is also an agent of the party at whose instance such process is issued—Gross v. Gates, 194 A 465, 109 Vt. 156.

Communicating with person addressed

A deputy sheriff armed with process for service has the right to insist on communicating with person to whom such process is addressed.—People ex rel. Paul v. Warden of City Prison of City of N. Y., 74 N.Y.S.2d 438, 190 Misc. 528.

50. Ohio—State ex rel. Geyer v. Griffin, 76 N.E 2d 294, 80 Ohio App. 447.

51. Ohio—State ex rel. Geyer v. Griffin, supra.

52. N Y.—Jackson v. Davis, 18 Johns 7.

Character of act

In conducting an execution sale a deputy sheriff is more than a mere private trustee or agent, since, in addition to his character as a minister of the law, he is regarded as a sort of trustee and agent both for the creditor and the debtor—Gross v. Gates, 194 A. 465, 109 Vt. 156.

53. Idaho—Dobbins v. Mounce, 48 P 1070, 5 Idaho 325.
57 C J. p 776 note 27.

preliminary to such sale[54] and the execution of a deed to the purchaser;[55] in executing a writ of ad quod damnum;[56] in serving a garnishment summons;[57] in serving an execution for taxes,[58] in receiving an appearance bond[59] and discharging accused on its execution;[60] in investigating an automobile accident;[61] in executing a warrant of arrest,[62] in executing process of attachment for witnesses;[63] in executing a death sentence;[64] and in impaneling a sheriff's jury[65] and administering the oath to them.[66]

A deputy has no general authority to make advances for the sheriff,[67] nor can a surety on a bail bond defend an action thereon by showing that he signed the bond on advice of a deputy sheriff[68] Likewise, a deputy sheriff has no authority to designate another to act in his stead for the sheriff.[69]

Notice to deputy sheriff is notice to the sheriff.[70]

Contracts. A deputy has no general or implied authority to bind the sheriff by a contract or promise[71] unless it be to pay over money collected under process.[72] On the other hand, it has been held that a deputy sheriff acts as the general agent for the sheriff while discharging his official duties and may bind his principal for expenses incurred therein.[73]

Chief deputy sheriff. Under a statute providing for the appointment of a chief deputy sheriff, in legal contemplation he acts in the sheriff's place;[74] and he and the sheriff may be considered as one as far as third persons are concerned.[75]

Deputy constable. A deputy constable ordinarily has the same authority, rights, powers, and duties as his principal, the constable,[76] and such deputy's acts are as valid as though performed by the constable;[77] but under statutes authorizing a magistrate to appoint constables for the service of his process a deputy constable cannot be vested by such a constable with power to make such service.[78]

Deputy sheriff as public officer. Since, as discussed supra § 2, a deputy sheriff is a public officer, he is intrusted, as such, with a portion of the sovereign power of the state,[79] and his duties in the execution of the law are performed in the exercise of power and authority bestowed by law.[80] A deputy sheriff must be disinterested and impartial,[81] and hence he lacks a private agent's usual characteristic which implies an interest favorable to one party and adverse to the other.[82]

Office assistants. A sheriff's division of some of his official work among office assistants who are given full charge with respect thereto is not violative

54. Neb.—Scottish-American Mortg. Co. v. Nye, 79 N.W. 553, 58 Neb. 661.
57 C.J. p. 776 note 28.

55. Ky.—Winslow v. Austin, 5 J.J. Marsh. 408
N.Y.—Jackson v. Davis, 18 Johns. 7.

56. Ky.—Gay v. Caldwell, Hard. 63
Va.—Wroe v. Harris, 2 Wash. 126, 2 Va. 126.

57. Ga.—Luke v. Luke, 129 S.E. 443, 34 Ga. App. 284.

58. Conn.—Clark v. Bray, Kirby 237.
57 C.J. p. 776 note 32.

59. La.—State v. Wilson, 12 La. Ann. 189.

60. La.—State v. Wilson, supra.

61. La.—Robertson v. Palmer, App., 55 So. 2d 68.

Manner

While investigating an automobile accident a deputy sheriff has a duty of investigating in an orderly and lawful manner and is justified in telling a bystander to keep back and not to interfere and has a right to use force if necessary to prevent interference.—Robertson v. Palmer, supra.

62. Mo.—State v. Green, 66 Mo. 631.
57 C.J. p. 777 note 35.

63. Tex.—Shely v. State, 32 S.W. 901, 35 Tex.Cr. 190.
57 C.J. p. 777 note 36.

64. Fla.—Buchanan v. Chapman, 146 So. 585, 108 Fla. 280, followed in Jeffcoat v. Chapman, 146 So. 588, 108 Fla. 288.

Duty of sheriff as ex officio executioner

Under statute providing that the sheriff of the county wherein the conviction was had shall be ex officio deputy executioner, the duty of the sheriff may be performed by his deputy.—Buchanan v. Chapman, 146 So. 585, 108 Fla. 280, followed in Jeffcoat v. Chapman, 146 So. 588, 108 Fla. 288.

65. Tenn.—Stevens v. Duck River Nav. Co., 1 Sneed 237.

66. Tenn.—Stevens v. Duck River Nav. Co., supra.

67. S.C.—Hanks v. Williams, 15 S.C. Eq. 203

68. Pa.—Smith v. Michie, 29 Pa. Dist. 899
57 C.J. p. 777 note 44.

69. N.C.—Blake v. Allen, 20 S.E.2d 552, 221 N.C. 445.

70. Tex.—Snouffer v. Heisig, 130 S.W. 912, 62 Tex. Civ.App. 81.

71. Pa.—Walter v. Jenkins, 92 Pa. Super. 526
57 C.J. p. 777 note 48.

72. Vt.—Tomlinson v. Wheeler, 1 Aik. 194.

73. Wis.—American Wrecking Co. v. McManus, 181 N.W. 235, 183 N.W. 250, 174 Wis. 300.

74. Ala.—Shelton v. State of Tennessee ex rel. State of Alabama, 12 So. 2d 103, 31 Ala.App. 58.

Return of process

It is chief deputy sheriff's duty to make return of process issued to sheriff, if he is absent and unavailable, as where he is sick in hospital outside county.—Shelton v. State of Tennessee ex rel. State of Alabama, supra.

75. Ala.—Shelton v. State of Tennessee ex rel. State of Alabama, supra.

76. Ky.—Johnson v. Commonwealth, 105 S.W. 2d 641, 268 Ky. 555.
Pa.—National Cash Register Co. v. Kline, 99 Pa. Super. 299.—National Cash Register Co. v. Berg, 99 Pa. Super. 34.—LaMantia v. Victor Brewing Co., Com.Pl., 21 West Co. 297.

77. Pa.—National Cash Register Co. v. Berg, supra.

78. Pa.—Petition of Preno, 77 Pa. Dist. & Co. 193.

79. Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156.

80. Vt.—Gross v. Gates, supra.

81. Vt.—Gross v. Gates, supra.

82. Vt.—Gross v. Gates, supra.

of a constitutional provision that the duties of a sheriff must be performed by him personally or under his superintendence.[83]

Undersheriff. The undersheriff has the same duties and authority with respect to the ordinary duties of the sheriff as the sheriff himself,[84] but while the sheriff is in the execution of his office the undersheriff has no more power than any other general deputy.[85]

Special deputy Where a deputy sheriff is special in the sense that he is authorized to perform only part of the sheriff's duties, as discussed supra § 2, the time and extent of the exercise of the authority of the sheriff by such special deputy are matters solely for the determination of the sheriff.[86]

Ratification of act of unauthorized person. A sheriff cannot ratify the illegal act of one assuming without authority to act as his deputy in making a levy in his name, so as to render such act valid.[87]

b. Termination of Incumbency of Sheriff

An execution once begun by a deputy sheriff may be carried on to completion by him notwithstanding the sheriff has gone out of office.

At common law the office and functions of a deputy sheriff ipso facto terminate when the sheriff goes out of office by death, resignation, removal, or otherwise, as discussed supra § 26, except that an execution once begun by a deputy may be carried on to completion by him notwithstanding the sheriff has gone out of office.[88] Under a statute expressly so providing, a deputy sheriff may after the expiration of the sheriff's term execute all such original or final process as are in the deputy's hands at the time such term expires.[89] Where a sheriff who, at the expiration of his term of office, has in his hands process not fully executed dies before the complete execution thereof, it has been held that his late undersheriff becomes substituted in his place, and assumes all his duties in respect of such process.[90]

§ 38. Authority of Coroner Acting as Sheriff

A coroner who is performing the duties of the sheriff has the same rights and powers as the sheriff.

A coroner who is performing the duties of the sheriff has the same rights and powers as the sheriff,[91] and may convey land sold by him under execution.[92] Where the sheriff is disqualified[93] or the office of sheriff is vacant[94] the coroner is authorized to serve process. Accordingly, where there is a vacancy in the office of sheriff, the coroner may complete the execution of a process directed to the sheriff and partly executed by him before the vacancy occurred[95] A coroner is authorized to serve process on the sheriff,[96] and the fact that he is also a deputy sheriff does not preclude him from acting as sheriff in a case in which the sheriff is interested[97] Where a coroner has acted as sheriff, the legal presumption is that the facts existed which rendered it proper for him to act in the particular instance;[98] and a coroner to whom an execution has been directed and who pretends to act under it is estopped to deny his authority to do so in an action on his bond, although the necessity for the writ being executed by the coroner does not appear[99] It has been held that, in order to entitle a coroner to serve a writ of error, the petition for the writ must state that there is no sheriff or that there is some objection to the sheriff.[1]

Right to appoint deputy. A coroner acting as sheriff has been held authorized to appoint a deputy to assist him.[2]

§ 39. Authority of Special Officers

Where a special constable has once been appointed in a cause, he is authorized to perform all the subsequent duties required of a constable in that cause.

83. W.Va.—Detroit Fidelity & Surety Co. v. Kidd, 182 S.E. 113, 116 W. Va. 511

Fiscal records and finances

Sheriff's division of official work under which his cashier had full charge of all fiscal records and finances of sheriff's office did not violate constitution.—Detroit Fidelity & Surety Co. v. Kidd, supra.

84. N.J.—State v. Lombardo, 87 A. 2d 375, 18 N.J.Super. 511.

85. N.Y.—Tillotson v. Cheetham, 2 Johns 63, reversed on other grounds 5 Johns. 430.

86. Ohio.—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447.

87. Ala.—Perkins v. Reed, 14 Ala 536

88. Ky.—Neilson v. Churchill, 5 Dana 333.

N.Y.—Jackson v. Collins, 3 Cow. 89

Effect of change in incumbency on powers of sheriff see infra §§ 50, 51.

89. Mich.—Stott v. Weadock, 284 N.W. 605, 287 Mich. 678

90. N.Y.—Newman v. Beckwith, 61 N.Y. 205.

91. Ill.—Reed v. Reber, 62 Ill. 240.

Right of coroner to act as substitute for sheriff see supra § 32.

92. Ky.—Winslow v. Austin, 5 J.J. Marsh. 408.

93. Colo.—Montez v. People, 132 P. 2d 970, 110 Colo 208

94. Ill.—Reed v. Reber, 62 Ill. 240—Greenup v. Stoker, 12 Ill. 24, 52 Am D 474.

95. Ill.—Greenup v. Stoker, supra

96. Criminal process

Mass.—Adams v. Vose, 1 Gray 51.

97. Mass.—Wood v. Quincy, 11 Cush 487.

57 C.J. p. 778 note 66.

98. Tex.—Kirk v. Murphy, 16 Tex 654, 67 Am.D. 640

99. Miss.—Longacre v. State, 2 Miss 637.

1. Tex.—Mays v. Forbes, 11 Tex. 284.

2. Ill.—Reed v. Reber, 62 Ill. 240.

Where a special constable has once been appointed in a cause, he is authorized to perform all the subsequent duties required of a constable in that cause.[3] A person acting as a special constable to execute a warrant is authorized to command assistance in case of opposition.[4] Under a statute providing for the appointment of a special constable, such a constable can execute only the specific papers enumerated in the statute.[5]

Appointment for special purposes. Under a statute authorizing the appointment of a constable for special purposes, the constable so appointed has no authority to act as a constable generally.[6]

High constable. A statute providing for the office of high constable for boroughs and granting such constables the power and authority of constables of the several townships of the county has been construed to grant to a high constable the general power and authority of a constable,[7] but it has also been held that the statute does not enlarge the power and authority of a high constable to those of a constable.[8]

§ 40. Authority of de Facto Officers

The acts of a de facto sheriff, deputy, or constable, as far as the public or third persons are concerned, have the same validity as though the officer were such de jure.

The acts of a de facto sheriff, deputy sheriff, or constable, as far as they concern the public or third persons, have the same validity as though the officer were such de jure,[9] and his authority can be questioned only by those whose persons or property are directly affected by his acts.[10]

§ 41. Disqualification or Inability to Act in Particular Cases

a. Disqualification
b. Inability

a. Disqualification

A sheriff or constable is disqualified to perform the duties of his office in a case in which he is interested The disqualification of a deputy sheriff does not disqualify the sheriff.

A sheriff or constable cannot lawfully perform the duties of his office in a case in which he is interested[11] even though he is not directly affected by the act to be performed.[12] A sheriff has been held not to be disqualified, for interest, in the performance of the duties of his office, or otherwise, in the trial of a particular case unless he is a party to the proceedings or is related to a party by blood or affinity.[13] Although it has been held that usually the disqualification of a sheriff and his deputies for interest or prejudice is a matter within the discretion of the trial court,[14] the granting of a motion to disqualify them to participate in a case because of the sheriff's interest or prejudice has also been held to be mandatory where there has been a compliance with a statute authorizing such disqualification.[15] The disqualification of a deputy sheriff does not disqualify the sheriff,[16] but the disqualification of the sheriff in a particular case extends to the entire force of his office, and hence a deputy cannot do an act as to which the sheriff is disqualified.[17]

In accordance with the foregoing rules, prejudice on the part of the sheriff against a person accused

3. Ind.—Hood v. Sennett, 70 Ind 329
57 C.J. p 778 note 70
4. Ind.—Patterson v. Kise, 2 Blackf. 127.
5. W.Va.—Lopinsky v. Preferred Realty Co., 163 S.E. 1, 111 W.Va. 553.

Writ of fieri facias

Special constable had no authority to execute a writ of fieri facias.—Stutler v. Casey, 168 S.E. 371, 113 W.Va. 335—Lopinsky v. Preferred Realty Co., 163 S.E. 1, 111 W.Va. 553.

6. Okl.—National Surety Co. v. Bounds, 50 P.2d 185, 174 Okl. 111
7. Pa.—Wingard v. Armstrong County, 18 Pa.Dist. & Co. 743—In re Borough High Constables, Quar.Sess., 32 Del.Co. 335.
8. Pa.—Petition of Saint, 33 Pa.Dist. & Co. 417, 31 Mun.L.R. 118, 88 Pittsb.Leg.J. 18—Carney v. Luzerne County, 18 Pa.Dist. & Co. 624, 27 Luz.Leg.Reg. 49.
9. Ga.—Powell v. Fidelity & Deposit Co. of Maryland, 163 S.E. 239, 45 Ga.App. 88
S.D.—Gulbrandson v. Town of Midland, 36 N.W.2d 655, 72 S.D. 461
Vt.—Rounds v. McGeown, 3 A.2d 547, 110 Vt. 185.
57 C.J. p 778 note 73.
10. N.H.—Moore v. Graves, 3 N.H. 408
11. Colo.—Montez v. People, 132 P. 2d 970, 110 Colo. 208
Or.—**Corpus Juris cited in** In re Hampson's Estate, 223 P.2d 1039, 1044, 190 Or. 279
57 C.J. p 778 note 76.
12. Ga.—State v. Jeter, 60 Ga. 489.
13. Pa.—Commonwealth v. Musto, 35 A.2d 307, 348 Pa. 300.

Conversation with accused

A sheriff who is not personally concerned with the outcome of a homicide trial is not disqualified, either in the performance of the duties of his office or as a witness by accused's having sought him out when arrested and voluntarily conversing with him.—Commonwealth v. Musto, supra.

14. Mo.—State v. McDonald, 119 S.W.2d 286, 342 Mo. 998.

Conflicting evidence

The mere fact that the sheriff's office cooperates with the prosecutor's office in an effort to discover facts relating to an offense does not call for interference with the action of the trial court in refusing to disqualify the sheriff and his deputies from acting in a criminal prosecution where evidence of misconduct by the sheriff's office in aiding the prosecutor's office is conflicting.—State v. McDonald, supra.

15. Colo.—Montez v. People, 132 P. 2d 970, 110 Colo. 208.
16. Cal.—People v. Le Doux, 102 P. 517, 155 Cal. 535.
17. Cal.—People v. Le Doux, supra
Idaho.—State v. Barber, 88 P. 418, 13 Idaho 65.
Or.—In re Hampson's Estate, 223 P. 2d 1039, 190 Or. 279.

of crime may disqualify him for the duty of summoning jurors for his trial, as discussed in Juries § 173; and the sheriff is disqualified to act as a guardian of a ward of the court of which the sheriff is an officer.[18] The sheriff and his deputies are disqualified to serve process in a case in which the sheriff is interested,[19] and a deputy sheriff may be disqualified to serve process in a case when he is a party to the proceeding[20] notwithstanding he has no pecuniary interest in the cause,[21] but a sheriff who is merely a formal party, without interest in the case, is not thereby disqualified to serve process.[22] The sheriff cannot legally serve or execute process on his deputy[23] even though such process is directed to the sheriff;[24] and the fact that the sheriff attached property before the owner was appointed deputy does not authorize him to serve the execution after such appointment.[25] Likewise, it is not proper for one deputy to serve process in a cause to which another deputy of the same sheriff is a party.[26]

b. Inability

Inability to act by reason of physical illness does not excuse a sheriff or constable for failure to perform the duties of his office.

The physical illness of a sheriff will not excuse a failure to perform the duties of his office, since he should provide deputies to act in such an emergency;[27] nor can a constable who retains process intrusted to him avoid liability for a failure to perform his duties in respect thereof on the ground of disability resulting from illness,[28] although it has been held that he may in such case relieve himself of liability by putting the business into the hands of another constable who is qualified to act.[29] On the other hand, it has been held that a constable cannot relieve himself from liability for failure to return an execution by turning over the writ to another constable.[30] The inability of an officer to serve process in a particular case is discussed in Process § 28 c.

B. PARTICULAR POWERS AND DUTIES

§ 42. Conservation of Peace and Arrest of Offenders

a. Sheriffs
b. Constables
c. Concurrent or conflicting powers and duties

a. Sheriffs

Sheriffs, and their deputies or undersheriffs, are peace officers, and, as such, exercise the powers and perform the duties of police officers, including the enforcement of the criminal law and the conservation of the peace.

At common law and under statutes declaratory thereof, sheriffs[31] and deputy sheriffs and undersheriffs[32] are peace officers. The duties of a sheriff are in a large measure the same as are imposed on police officers,[33] he necessarily exercises police powers[34] and must enforce the laws enacted for the protection of the lives, persons, property, health, and morals of the people.[35] Accordingly, a sheriff

18. Or.—In re Hampson's Estate, 223 P 2d 1039, 190 Or 279.

19. Colo.—Montez v. People, 132 P. 2d 970, 110 Colo 208
Disqualification of officer or deputy to serve process generally see Process § 28 b.

20. Hawaii.—Coulter v. Sterling, 33 Hawaii 621.

21. Hawaii.—Coulter v. Sterling, supra.

22. Ga.—Lightner v. Belk, 174 S E 349, 178 Ga. 766.
Sheriff making levy
In suit to enjoin sale under execution, sheriff, joined as party defendant merely because he was officer who made levy, was not disqualified to serve process on other defendants. —Lightner v Belk, supra.

23. Me.—Dane v. Gilmore, 51 Me 544.
57 C.J. p 779 note 81.

24. Me.—Dane v. Gilmore, supra.

25. Me.—Dane v. Gilmore, supra.

26. Mass.—Gage v. Graffam, 11 Mass 181.
57 C J. p 779 note 84.

27. Ill.—Freudenstein v McNeir, 81 Ill. 208.
Iowa.—Evans v Thurston, 4 N W 895, 53 Iowa 122

28. Ill.—Freudenstein v. McNeir, 81 Ill 208
Mo.—Campbell v. Luttrell, 13 Mo. 27

29. Iowa.—Evans v Thurston, 4 N W 895, 53 Iowa 122
57 C.J. p 779 note 88.

30. Ill.—Calhoun County Court v Buck, 27 Ill. 440
57 C.J. p 779 note 89.

31. Fla.—Fields v. State, 36 So 2d 919, 160 Fla. 877
N.C.—Wilson v Town of Mooresville, 22 S E 2d 907, 910, 911, 222 N C. 283
48 C J p 776 note 86
Chief law-enforcement officer
The sheriff is the chief law-enforcement officer of the county.
N C.—Southern Ry Co v. Mecklenburg County, 56 S E 2d 438, 231 N C 148
Ohio.—In re Sulzmann, 183 N E 531, 125 Ohio St 594

32. Fla.—Fields v. State, 36 So 2d 919, 160 Fla 877
48 C.J p 776 note 87.

33. N Y.—Pearce v. Stephens, 45 N. Y S 422, 18 App Div 101, affirmed 48 N E 1106, 153 N.Y. 673.

34. N.Y.—Pearce v. Stephens, supra

35. Ga.—**Corpus Juris quoted in** Elder v. Camp, 18 S.E 2d 622, 625, 193 Ga. 320.
Minn.—In re Olson, 300 N W. 398, 211 Minn 114.
N C.—Southern Ry Co v Mecklenburg County, 56 S E 2d 438, 231 N C 148
57 C J. p 779 note 93
Deputy sheriffs have the same responsibility for the proper discharge of duties relating to the public peace and enforcement of law as the sheriffs who are their principals.—Mur-

must enforce the criminal law.[36] He is under a legal duty to investigate crimes,[37] to suppress them,[38] and, in a proper case, to arrest and prosecute persons who commit them.[39] It is also his right and duty to arrest all persons, with their abetters, who oppose the execution of process[40] As a peace officer it is the sheriff's duty to act as a conservator of the peace within his county,[41] using, however, such force as may be necessary to preserve the peace.[42] So it is his duty to prevent breaches of the peace[43] and assaults and batteries,[44] to suppress an affray,[45] a riot,[46] an insurrection,[47] or an unlawful assembly,[48] and to arrest one provoking an assault.[49]

In the discharge of his duty to prevent and suppress breaches of the peace and other offenses, the sheriff is bound to use all the means provided by law to accomplish such end,[50] and he cannot shut his eyes to what is common knowledge in the community, or purposely avoid information, easily acquired, which will make it his duty to act.[51] He is under a duty to be active and vigilant,[52] to exercise initiative,[53] to be reasonably alert with respect to possible violations of law,[54] and to use all proper efforts to secure obedience to the law[55] The efforts of a sheriff to obtain a confession from a prisoner should be directed to the one purpose of getting a truthful statement without regard to whether or not the statement will lead to a conviction.[56]

b. Constables

A constable is a peace officer with limited powers, having the authority and duty to arrest offenders against the law; but he is not required to leave his ordinary occupation to seek such offenders.

A constable is a peace officer[57] with limited powers.[58] As such peace officer, a constable has authority, and it is his duty, to arrest offenders against

ray v Harris, Tex Civ App., 112 S. W 2d 1091, error dismissed.

36. Mo—State, on Inf of McKittrick v. Williams, 144 S W 2d 98, 346 Mo. 1003
Ohio—In re Sulzmann, 29 Ohio N P.,N.S., 92, affirmed 183 N E 531, 125 Ohio St 594.

37. Mo—Maxwell v. Andrew County, 146 S.W 2d 621, 347 Mo. 156

38. Mo.—Maxwell v. Andrew County, supra.

39. Mo—Maxwell v. Andrew County, supra.
Hawaii—Territory v. Desha, 31 Hawaii 474
Violators of National Prohibition Act
Hawaii—Territory v. Desha, supra.
Murder
The duty of arresting and apprehending persons charged with murder is on the sheriff—Brite v Board of Sup'rs of Siskiyou County, 68 P.2d 1007, 21 Cal App 2d 233.
Person in state penitentiary
A sheriff is not authorized to execute a warrant of arrest on a person during the time he is confined in the state penitentiary and is not required to request such person's parole or other release for arrest and prosecution of another offense—McCullough v Hudspeth, 210 P.2d 413, 168 Kan. 39.

40. N Y.—Coyles v. Hurtin, 10 Johns. 85.

41. U S—McLean v. State of Mississippi ex rel. Roy, C C.A.Miss., 96 F.2d 741, 119 A.L.R. 670, certiorari denied State of Mississippi ex rel Roy v. McLean, 59 S.Ct. 84, 305 U. S. 623, 83 L Ed 399.
Ga.—Corpus Juris quoted in Elder v Camp, 18 S E 2d 622, 625, 193 Ga. 320
Minn—In re Olson, 300 N W. 398, 211 Minn. 114
Mo—State on Inf. of McKittrick v. Williams, 144 S W 2d 98, 346 Mo 1003
57 C J p 779 note 94.

42. Ky—Lusk v Commonwealth, 164 S W 2d 389, 291 Ky 339.
Ohio.—State v. Coit, 8 Ohio S. & C. P. 62, 35 Cinc L Bul. 82

43. Ky—Lusk v Commonwealth, 164 S W.2d 389, 291 Ky. 339
57 C.J p 779 note 96
Arrest
It was the duty of the sheriff to arrest a breaker of the peace, if the offense happened within his view.—Corder v. People, 287 P 85, 87 Colo. 251—57 C.J. p 779 note 99.
Disorderly conduct
Sheriff had the right to keep peace and to subdue disorderly conduct which might be calculated to provoke others to commit a breach of the peace—Lusk v. Commonwealth, 164 S.W.2d 389, 291 Ky 339.

44. Mo—Maxwell v Andrew County, 146 S W 2d 621, 347 Mo. 156.

45. Mo—Maxwell v. Andrew County, supra
N Y.—Pearce v. Stephens, 45 N Y.S. 422, 18 App.Div. 101, affirmed 48 N.E. 1106, 153 N.Y. 673.

46. Mo.—Maxwell v. Andrew County, 146 S.W.2d 621, 347 Mo. 156.

47. Mo.—Maxwell v. Andrew County, supra.

48. Mich.—Scougale v. Sweet, 82 N. W. 1061, 124 Mich 311.
57 C.J. p 779 note 98.

49. Fla—Fields v. State, 36 So.2d 919, 160 Fla. 877

50. Tenn—State v Reichman, 188 S W. 225, 597, 135 Tenn. 653, 685, Ann Cas 1918B 889

51. Minn.—In re Olson, 300 N W. 398, 211 Minn. 114.
Ohio.—In re Sulzmann, 29 Ohio N.P, N S, 92, affirmed 183 N E 531, 125 Ohio St 594.
57 C J. p 779 note 3.
Failure to see obvious
Sheriff's statutory duties and his obligations to the public cannot be discharged by willful failure to see the obvious—In re Olson, 300 N.W. 398, 211 Minn. 114.

52. Minn.—In re Olson, supra.

53. Minn.—In re Olson, supra.
Mo—Farmers' Mut Fire Ass'n v. Hunolt, App, 81 S.W 2d 977.

54. Minn.—In re Olson, 300 N.W. 398, 211 Minn. 114.
Sheriff is not entitled to wait until violations of the law come to his personal knowledge, but must follow up information received from any source.
Minn.—In re Olson, supra.
Mo—Farmers' Mut. Fire Ass'n v. Hunolt, App., 81 S.W.2d 977.

55. Minn.—In re Olson, 300 N.W. 398, 211 Minn 114.

56. Mo—Farmers' Mut Fire Ass'n of Shelby County v. Hunolt, App, 81 S.W.2d 977.

57. N.C.—Wilson v. Town of Mooresville, 22 S E.2d 907, 222 N.C. 283.
Pa.—Kirkpatrick v. Alan Wood Steel Co., 12 A.2d 22, 23, 338 Pa 120—In re Borough High Constables, Quar.Sess., 32 Del.Co. 335.
57 C J. p 780 note 4—48 C.J. p 776 note 77.

58. N C—Wilson v. Town of Mooresville, 22 S.E.2d 907, 222 N.C. 283.

the law,[59] but he is not required to leave his ordinary occupation to act as a detective and search for offenders,[60] and it is not a neglect of official duty for a constable to fail to cause the prosecution of persons for misdemeanors not committed in his presence.[61] A deputy constable who is hired and paid by the state has no right to hire out his services and talents to a defendant in a state case.[62]

c. Concurrent or Conflicting Powers and Duties

The sheriff may properly assume that local authorities are enforcing the law, but where the primary duty of law enforcement is his, if he has reason to believe that local enforcement is lacking he must undertake such enforcement. The authority of the sheriff is superior to that of a constable and in case of conflict it is the constable's duty to yield.

While the sheriff may, in the absence of information to the contrary, assume that a local police department will do its duty in enforcing the law,[63] the primary duty of such enforcement is his[64] and cannot be altered by custom.[65] So the sheriff may leave local law enforcement in local hands only as long as reasonable efforts in good faith are made, by the local police authorities, to enforce the law;[66] but if he has reason to believe that the police force is neglecting its duty or is in league with offenders he must inform himself,[67] and if he knows that city officials are deliberately ignoring or permitting violations of law his duty to prevent and suppress offenses is the same as though there were no municipality and no police force.[68] So, where it is the duty of both the mayor of a city and the sheriff of a county to maintain peace, the sheriff cannot justify his failure on the ground that it was the duty of the mayor.[69] A constitutional provision giving the attorney general direct supervision of sheriffs does not contemplate absolute control and direction of such officials[70] or permit them to avoid or evade the duties and responsibilities of their office by permitting a substitution of judgment.[71] A sheriff is not authorized to yield the general control of his office and duties to the attorney general under a constitutional provision making it the duty of that official to prosecute cases when in his opinion the law of the state is not being adequately enforced in any county.[72] Neither the creation of the office of state commissioner of prohibition nor the employment of a county prohibition officer by the prosecuting attorney pursuant to statute relieves the sheriff of the county from his duty to enforce the prohibition law,[73] and a constable is not deprived of his common-law powers as conservator of the peace by a statute establishing a police force.[74]

Conflict of authority of sheriff and constable. The sheriff's authority is superior to that of a constable,[75] and he has a right, and it is his duty, if he holds a felony warrant against a person held by a constable under a misdemeanor warrant, to take such person into his custody if he deems it necessary, and it is the duty of the constable to yield to the sheriff's superior authority.[76]

§ 43. Attendance at Inquests and Meetings of County Board

A sheriff is not required to attend an inquest under a statute making it the duty of a constable to do so. Where a statute so provides, a sheriff, when so ordered, must attend meetings of a county board.

Where a statute makes it the duty of a constable to attend a coroner's inquest, and provides for the calling of a householder when the constable cannot

59. Okl.—Beck v. Sulser, 150 P. 107, 48 Okl. 187.
Pa.—In re Borough High Constables, Quar. Sess., 32 Del. Co. 335.
57 C.J. p. 780 note 5.

60. Mass.—Hartley v. Granville, 102 N.E. 942, 216 Mass. 38, 48 L.R.A., N.S., 392, Ann. Cas. 1915A 725

61. Cal.—Ferguson v. Kern County Super. Ct., 147 P. 603, 26 Cal.App. 554.

62. Mo.—Carey v. Gossom, 218 S.W. 917, 204 Mo.App. 695

63. Mo.—State on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003.
Tenn.—State v. Reichman, 188 S.W. 225, 597, 135 Tenn. 653, 685.

64. Mo.—State on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003.

65. Mo.—State on Inf. of McKittrick v. Williams, supra.

Leaving local policing to local authorities

A sheriff's custom to leave local policing to local enforcement officers cannot alter his responsibility under the law.—State on Inf. of McKittrick, v. Williams, supra.

66. Mo.—State on Inf. of McKittrick v. Williams, supra.

67. Tenn.—State v. Reichman, 188 S.W. 225, 597, 135 Tenn. 653, 685.

68. Mo.—State on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003.
57 C.J. p. 780 note 11.

Insufficient excuses

Where the sheriff has knowledge of local violations and negligence of local officers it is no excuse for his own neglect that he is engaged in other duties, that he has not a sufficient staff for proper enforcement, or that he relies on the advice of his statutory attorney.—State, on Inf. of McKittrick, v. Williams, supra.

69. U.S.—Niles-Bement-Pond Co. v. Iron Molders' Union, D.C.Ohio, 246 F. 851, reversed on other grounds 258 F. 408, 169 C.C.A. 424, affirmed 41 S.Ct. 39, 254 U.S. 77, 65 L.Ed. 145.

70. Cal.—People v. Brophy, 120 P.2d 946, 49 Cal.App.2d 15.

71. Cal.—People v. Brophy, supra.

72. Cal.—People v. Brophy, supra.

73. W.Va.—State v. Greenbrier County Court, 117 S.E. 135, 93 W.Va. 481.

74. Mich.—Allor v. Wayne County, 4 N.W. 492, 43 Mich. 76.

75. Kan.—State v. McCarty, 179 P. 309, 104 Kan. 301, 3 A.L.R. 1283.
57 C.J. p. 780 note 15.

76. Kan.—State v. McCarty, supra.

act, it is not the sheriff's official duty to attend an inquest.[77]

Attendance of the sheriff or other officer at court is considered in Courts § 169; the rights, powers, and duties of sheriffs and constables as such attendants are discussed supra § 35.

Meetings of county board. Under a statute authorizing a county board of review to make orders, and requiring the sheriff to obey them, a sheriff, when ordered by the board to attend its sessions, must obey the order.[78]

§ 44. Service, Execution, and Return of Process

a. In general
b. Authority as affected by direction of process
c. Time for execution
d. Mode of executing process
e. Diligence required
f. Return

a. In General

The power of a sheriff or constable, to serve process is wholly statutory. When such power and duty are conferred on a sheriff or constable he must serve all process delivered for that purpose, provided it appears on its face to have issued from competent authority, with legal regularity, and such service is within the lawful powers of his office.

With respect to the execution of process, the power possessed by the sheriff[79] or constable[80] is wholly statutory, and no power exists in him except such as is expressly so conferred or may be fairly implied from the provisions thereof.[81] Where such power is conferred on a sheriff, the service of process is one of the ministerial duties pertaining to his office,[82] and he can deputize another to make such service.[83] Where the power and duty to serve or execute process are conferred on a sheriff or constable, he must serve or execute all process delivered to him for that purpose,[84] which appears on its face to have issued from competent authority,[85] and with legal regularity,[86] and the service or execution of which is within the lawful powers of his office.[87] This duty is not affected by any private knowledge which he may have concerning the existence of the cause of action to which the process relates[88] or the validity of the proceedings in which the process was issued;[89] nor can a sheriff refuse

77. Mo—Hagener v Pulitzer Pub Co, 158 S.W. 54, 172 Mo App 436
78. Ind—Boone County v Lewis, 144 N E 623, 81 Ind App 601.
79. Mo—State ex rel Madden v Padberg, 101 S W 2d 1003, 340 Mo. 667
57 C J p 781 note 36—50 C J. p 470 note 52.
Power of officer or deputy to serve process generally see Process § 28
80. Okl.—National Surety Co v. Bounds, 50 P.2d 185, 174 Okl 111.
Pa—Kreiling v. Treffinger, 14 Pa. Dist 357.
Utah—Rich v Industrial Commission, 15 P 2d 641, 80 Utah 511
Same powers and duties as sheriff
Under statute a constable has the same powers and duties as the sheriff with respect to the execution of civil process—Medlin v. Seideman, 88 S W 250, 39 Tex Civ App 553—57 C.J. p 781 note 38.
81. Mo—State ex rel. Madden v Padberg, 101 S.W 2d 1003, 340 Mo. 667.
Okl—National Surety Co v. Bounds, 50 P.2d 185, 174 Okl. 111.
57 C.J. p 781 note 37.
Special constable
Statute authorizing justice of peace to appoint constable for "special purposes" was construed to mean for purpose of certain cases then pending before justice making such appointment when one or more of conditions mentioned in statute existed; hence constable appointed by one justice had no authority to execute process issued by another—National Surety Co v. Bounds, supra.
82. Ga—Davis v Lexington Bank, 116 S E. 56, 29 Ga. 454.
50 C J. p 470 note 51
83. Pa—Aversa v Aubry, 154 A 311, 303 Pa 139
Authority of deputy to serve process see supra § 37
84. U.S—In re Garner, D C Pa, 10 F Supp 380
Ark—**Corpus Juris cited in** J B. Pearson Flour & Feed Co v Pittman, 95 S.W.2d 1143, 1144, 192 Ark 1062
Colo.—Goldsmith v. McAnally, 20 P 2d 1009, 92 Colo 384.
Fla—Cassady v Sholtz, for Use and Benefit of Edwards, 169 So 487, 124 Fla 718
Minn—Hoppe v Klapperich, 28 N W 2d 780, 224 Minn 224, 173 A L R 819
Mont—Harri v. Isaac, 107 P 2d 137, 111 Mont. 152.
N D—Gilbertson v. Helle, 290 N W. 269, 69 N D 735.
Or—In re Hampson's Estate, 223 P. 2d 1039, 190 Or 279
Wash—Ladd v. Miles, 17 P.2d 875, 171 Wash 44
57 C J. p 781 note 40.
85. Ariz—Schuster v. Merrill, 106 P 2d 192, 56 Ariz 114
Cal—First Nat. Bank v McCloy, 297 P 571, 112 Cal App. 665.
Minn.—Hoppe v. Klapperich, 28 N.W. 2d 780, 224 Minn. 224, 173 A.L.R. 819.
Mont—Harri v Isaac, 107 P 2d 137, 111 Mont 152.
N D—Gilbertson v. Helle, 290 N.W. 269, 69 N D 735.
57 C J p 781 note 41.
Subpœna issuing from office of prothonotary or court clerk
A constable cannot be compelled to serve a subpœna issued from the office of the prothonotary or by the clerk of the court of quarter sessions for the attendance of witnesses at court.—Kottcamp v. York County, 28 Pa Super 96.
86. Ariz—Schuster v. Merrill, 106 P 2d 192, 56 Ariz. 114.
Cal—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.
Minn.—Hoppe v. Klapperich, 28 N.W. 2d 780, 224 Minn. 224, 173 A.L.R. 819
Mont—Harri v. Isaac, 107 P.2d 137, 111 Mont 152
N D—Gilbertson v Helle, 290 N.W. 269, 69 N.D 735.
Okl—Pappe v. Law, 35 P.2d 941, 169 Okl 15, 95 A.L.R. 939.
57 C.J. p 781 note 42.
87. Fla.—Johnson v. Price, 36 So. 1031, 47 Fla. 265
57 C J. p 781 note 43
88. Conn—Watson v. Watson, 9 Conn. 140, 23 Am.D 324.
89. Minn.—Hoppe v. Klapperich, 28 N W.2d 780, 224 Minn. 224, 173 A. L R. 819.
N.Y.—Clearwater v. Brill, 4 Hun 728,

to serve a process regularly issued to him because in his opinion it is irregular[90] or should not have been issued.[91] On the other hand, he may refuse to execute process which is illegal on its face,[92] or appears to have been issued without jurisdiction,[93] or to have been issued on a void judgment.[94]

Conflict of authority. A process of one court to its officer may not be served by a manual interference with the possession of property in the custody of an officer of another court by virtue of its process.[95] Where a conflict arises between a sheriff acting under process of a state court and a United States marshal who has made a subsequent levy on the same property, the sheriff must either apply to the state court to be protected or petition the federal court to order its officers to withdraw.[96]

Arrest under body execution. Under a statute providing that constables shall serve all lawful process issued and legally directed to them, a constable is authorized to arrest a debtor under an execution against his body.[97] A sheriff is not bound to arrest defendant on a capias ad satisfaciendum, lodged with him for fixing his bail, even if he can arrest him as well as not.[98]

Deprivation of right to execute process. An inferior court cannot arbitrarily refuse to place process in the hands of a regularly appointed and competent constable for execution.[99]

Execution of writ of assistance. A sheriff is bound to execute a properly issued writ of assistance,[1] and cannot refuse to do so on the ground that the person in possession has a better title than the claimant under the writ.[2]

Marking day of receipt on process. Under a statute making it the duty of the sheriff to mark on each process the day on which he received it, a sheriff is bound to mark the true date on a writ placed in his hands for execution.[3]

Order of execution. Where two or more writs against the same defendant are placed in the hands of the sheriff, it is his duty to execute them in the order in which he received them.[4]

b. Authority as Affected by Direction of Process

The authority of a sheriff or constable to serve process is derived from its being addressed to him.

A sheriff's power to serve process is derived from its being addressed to him,[5] and, as a general rule, he has no authority to serve process which is not directed to him.[6] A constable cannot execute process addressed to the sheriff,[7] although the sheriff delivers it to him,[8] unless he is appointed a deputy sheriff for the purpose.[9] Likewise, the sheriff cannot serve process addressed to a constable[10] unless the statute so provides.[11] Where process directed to "any constable or other lawful officer of the county" comes into the hands of the sheriff, he must execute it.[12]

A sheriff of one county cannot legally serve process directed to the sheriff of another county.[13] Similarly, a constable of one county cannot serve process directed to the sheriff or any constable of another county.[14]

reversed on other grounds 63 N.Y. 627—People v. Warren, 5 Hill 440.

90. Minn.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 173 A.L.R. 819.
N.Y.—Lamont v. Fitzgerald, 26 N.Y.S.2d 888, 176 Misc. 534.
Pa.—Taggart v. Schrumpf, 46 Pa. Dist. & Co. 282.
57 C.J. p. 782 note 46.

91. Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.
Sheriff cannot function as court
"The sheriff cannot set himself up as a court of review to determine the legality and validity of a writ regular upon its face."—Pappe v. Law, 35 P.2d 941, 943, 169 Okl. 15, 95 A.L.R. 939.

92. U.S.—Allen v. Clark, D.C.Cal., 22 F.Supp. 898.

93. U.S.—Allen v. Clark, supra.

94. Cal.—Magnaud v. Traeger, 226 P. 990, 66 Cal.App. 526.
N.Y.—Cornell v. Barnes, 7 Hill 35

95. N.Y.—Dunlop v. Patterson Fire Ins. Co., 74 N.Y. 145, 30 Am.R. 283

96. U.S.—The Circassian, D.C.N.Y., 5 F.Cas.No. 2,721, 1 Ben. 128.

97. Mass.—Dalton-Ingersoll Co. v. Hubbard, 54 N.E. 862, 174 Mass. 307.

98. N.J.—Van Winkle v. Alling, 17 N.J.Law 446

99. Ala.—Woods v. Wood, 122 So. 835, 219 Ala. 523

1. Wash.—State v. Frandsen, 30 P.2d 371, 176 Wash. 558.
57 C.J. p. 785 note 21.

2. Wis.—State v. Giles, 10 Wis. 101

3. Tenn.—Cherry v. Kennedy, 232 S.W. 661, 144 Tenn. 320.
57 C.J. p. 782 note 63.

4. Wis.—Knox v. Webster, 18 Wis. 406, 86 Am.D. 779.
57 C.J. p. 782 note 64.

5. Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 112 Mont. 229.

6. Kan.—Home Owners' Loan Corporation v. Clogston, 118 P.2d 568, 154 Kan. 257.

7. Ark.—Winkler v. State, 32 Ark. 539.
N.C.—McGloughan v. Mitchell, 36 S.E. 164, 126 N.C. 681.

8. **Warrant of arrest**
Ark.—Winkler v. State, 32 Ark. 539.

9. Ark.—Winkler v. State, supra.

10. N.C.—McGloughan v. Mitchell, 36 S.E. 164, 126 N.C. 681.

11. Mich.—Foster v. Wiley, 27 Mich. 244, 15 Am.R. 185.

12. N.C.—McGloughan v. Mitchell, 36 S.E. 164, 126 N.C. 681.

13. Ga.—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga.App. 590—Caldwell v. Alexander Seed Co., 87 S.E. 843, 17 Ga.App. 571.
Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 112 Mont. 229
Tex.—Hitt v. Bell, Civ.App., 111 S.W.2d 1164

14. Tex.—Hitt v. Bell, supra.

c. Time for Execution

As a general rule a sheriff should execute a writ without delay and within a reasonable time after he receives it.

As a general rule a sheriff should execute a writ without delay and within a reasonable time after he receives it,[15] although it has been held that in the absence of special circumstances a sheriff has until the return day in which to make service of process.[16] At any rate, in the absence of directions by plaintiff in the writ[17] or knowledge of special circumstances requiring greater diligence,[18] execution of the writ within the time allowed by law is sufficient.[19] Where a sheriff has knowledge or reasonable ground to believe that there will be danger of loss to the creditor through delay in the execution of a writ, it is his duty to execute it immediately.[20]

d. Mode of Executing Process

(1) In general
(2) Direction as to mode

(1) In General

A sheriff should execute process in such manner as to do as little mischief as possible.

A sheriff should execute every writ put in his hands in such a manner as to do as little mischief as possible,[21] and where he acts wrongfully or causes unnecessary hardship the process affords him no protection, as considered infra § 127, and he is liable for the resulting damages as discussed infra § 62. An officer is not required to declare by what authority he acts until his authority is questioned.[22]

Use of force. In executing a writ of assistance the sheriff has the right to use such force as is reasonably necessary to effectuate such process.[23] The rule is well established, however, that a sheriff or constable may not break into or forcibly enter a dwelling house for the purpose of seizing goods under attachment, as discussed in Attachment § 216, execution, discussed in Execution § 96 a, or other process, in Process § 34 d; and if he does so he will be liable for damages, as discussed infra § 62.

(2) Direction as to Mode

(a) Directions of party or attorney
(b) Duty in absence of directions
(c) Application to court for directions

(a) Directions of Party or Attorney

The sheriff is bound to follow the directions of the party procuring the process or his attorney as to how it shall be executed, at least where such directions are not in conflict with the law.

The party at whose instance certain process or writs, such as attachment or executions, have issued, or his attorney, has the right to give the sheriff directions as to how they shall be executed,[24] which directions, when not in conflict with the law, the sheriff is bound to follow,[25] and the officer is not bound, in such case, to execute the process or writ in any manner other than according to the directions given him.[26] It is not the duty of the sheriff on an execution against one person to levy on the property of another,[27] or to apply firm property to the satisfaction of an execution against one of the partners,[28] even though plaintiff may direct him to do so.

Conflicting directions. If the execution plain-

15. Okl.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.
Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.
Wash.—State v. Frandsen, 30 P.2d 371, 176 Wash. 558.
57 C.J. p. 782 note 58.

Prompt action.
It is the sheriff's duty to act promptly and in accordance with the mandate of the court.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.

"Reasonable celerity."
Or.—Skulason v. Pratt, supra.

It is improper for a sheriff to modify the writ delivered to him for execution as to the time of such execution.—Skulason v. Pratt, supra.

16. Ill.—Sarelas v. Fagerburg, 45 N.E.2d 690, 316 Ill.App. 606.

17. Conn.—Tucker v. Bradley, 15 Conn. 46.
Ill.—Corpus Juris quoted in Sarelas v. Fagerburg, 45 N.E.2d 690, 696, 316 Ill.App. 606.
57 C.J. p. 782 note 62.

18. Ill.—Corpus Juris quoted in Sarelas v. Fagerburg, 45 N.E.2d 690, 696, 316 Ill.App. 606.
57 C.J. p. 782 note 62.

19. Ill.—Corpus Juris quoted in Sarelas v. Fagerburg, 45 N.E.2d 690, 696, 316 Ill.App. 606.
57 C.J. p. 782 note 61.

20. Minn.—Guiterman v. Sharvey, 48 N.W. 780, 46 Minn. 183, 24 Am.S.R. 218.
57 C.J. p. 782 note 62.

21. Mich.—Handy v. Clippert, 15 N.W. 507, 50 Mich. 355.
N.M.—Gallegos v. Sandoval, 106 P. 373, 15 N.M. 216.

22. Conn.—Tierney v. Martone, 101 A. 497, 92 Conn. 93.

23. Wash.—State v. Frandsen, 30 P.2d 371, 176 Wash. 558.

24. Vt.—Corpus Juris cited in Gross v. Gates, 194 A. 465, 468, 109 Vt. 156.
57 C.J. p. 783 note 71.

Effect of special instructions.
Where a party assumes to give to a sheriff special instructions different from his legal duty with respect to execution of process in his hands, the officer ceases to be a public officer and becomes a private agent.—Gross v. Gates, 194 A. 465, 109 Vt. 156.

25. Vt.—Corpus Juris cited in Gross v. Gates, 194 A. 465, 468, 109 Vt. 156.
57 C.J. p. 783 note 71.

26. Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156.
57 C.J. p. 783 note 72.

27. Ill.—Swan v. Gilbert, 67 Ill.App. 236, affirmed 51 N.E. 604, 175 Ill. 204, 67 Am.S.R. 208.

28. Ill.—Swan v. Gilbert, supra.
57 C.J. p. 783 note 74.

tiff and his attorney give contrary directions, those of plaintiff must be followed.[29]

Ownership of judgment; assignment. The sheriff is not bound to obey the directions of a person other than the owner of the judgment on which the writ was issued, or his attorney, although such person claims an interest in the judgment;[30] but where the sheriff has notice of the assignment of the judgment he cannot take instructions from plaintiff's attorney, but must obey his execution and conform to the rules of law with regard to it, except as otherwise instructed by the assignee.[31]

Revocation of attorney's authority. After a sheriff has notice of the revocation of the authority of the attorney by whom the execution was issued, he must obey his execution and conform to the rules of law applicable to it, except as instructed by plaintiff himself.[32]

(b) Duty in Absence of Directions

In the absence of directions, a writ is to be served according to its precept, and agreeably to its direction, if the officer can find property by the exercise of reasonable diligence.

Where an officer receives a writ without any special directions, he is bound to execute it according to its precept,[33] and agreeably to its direction,[34] if he can find property by the exercise of reasonable diligence.[35]

(c) Application to Court for Directions

The court will not direct or advise the sheriff as to the manner of executing process.

The court will not direct the sheriff in what manner he shall execute process,[36] nor will it advise the sheriff by ordering him to do particular acts as being essential and proper to the rightful performance of his duty,[37] but the sheriff must act on his own responsibility.[38]

e. Diligence Required

A sheriff must use due diligence in executing process; but he is not required to use all possible efforts in any particular case.

Where a sheriff has in his hands a summons to serve or a writ to execute, he must in good faith make all reasonable effort and use due diligence to find defendant, or discover property subject to the writ, and serve or execute such process in the most effective manner,[39] but he is not required to use all possible efforts to execute process in any particular case,[40] since he might thereby lose the opportunity of executing other process in his hands.[41]

f. Return

The sheriff or constable is under the duty to return process of a nature requiring a return, and, on his refusal, the court will compel him to do so.

Where the process is of a nature requiring a return, it is the duty of the sheriff or constable to return it,[42] whether or not executed;[43] and the officer does not fulfill this duty by sending the return by mail without paying the postage thereon.[44] An agreement by the execution creditor with the officer to postpone the sale after a levy issued by a justice of the peace does not absolve the officer from his duty to return the writ.[45] If the sheriff refuses to return a writ, the court will compel him to do so,[46] and if he makes an evasive return he may be required to perfect it according to the facts of the case;[47] but a special return showing what property was sold cannot be compelled.[48] In garnishment proceedings, the sheriff, after making his return, has no further duty to perform.[49] A sheriff may be permitted to amend his return according to the truth of the case, provided rights acquired under it are not thereby prejudiced.[50] Where the sheriff

29. Wash.—Murray v. Meade, 32 P. 780, 5 Wash. 693

30. Tex.—Daugherty v. Moon, 59 Tex. 397.

31. N.Y.—Robinson v. Brennan, 90 N.Y. 208.

32. N.Y.—Robinson v. Brennan, supra.

33. Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156—Hill v. Pratt, 29 Vt. 119.

34. Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156—Hill v. Pratt, 29 Vt. 119.

35. Vt.—Hill v. Pratt, supra.

36. N.Y.—Bowie v. Brahe, 11 N.Y. Super. 676, 2 Abb Pr. 161.

37. N.Y.—Bowie v. Brahe, supra.

38. N.Y.—Bowie v. Brahe, supra.

39. Ala.—Davis v. Griffin, 150 So. 326, 227 Ala. 390
57 C.J. p. 784 note 89.

40. Ky.—Commonwealth v. Gill, 14 B. Mon. 17.
57 C.J. p. 784 note 90.

41. Ky.—Commonwealth v. Gill, supra
Mo.—State v. Finn, 87 Mo. 310.

42. N.Y.—Jenkins v. McGill, 4 How. Pr. 205.
57 C.J. p. 785 note 25.
Powers and duties of constable
Under a particular statute a constable has the same powers and duties as the sheriff with respect to the return of civil process.—Medlin v. Seideman, 88 S.W. 250, 39 Tex.Civ. App. 553—57 C.J. p. 781 note 38.

43. Ala.—Brown v. Baker, 9 Port. 503.
Miss.—Beall v. Shattuck, 53 Miss. 358

44. N.Y.—Jenkins v. McGill, 4 How. Pr. 205.
57 C.J. p. 785 note 27.

45. Tenn.—Clingman v. Barrett, 6 Humphr. 20

46. N.Y.—Bowie v. Brahe, 11 N.Y. Super. 676, 2 Abb Pr. 161

47. N.Y.—Davis v. Weyburn, 1 How. Pr. 153.
57 C.J. p. 785 note 30.

48. N.Y.—Shindler v. Blunt, 3 N.Y. Super. 683.

49. Cal.—Johnston v. Jones, 248 P. 286, 78 Cal.App. 84.

50. Ala.—Clarke v. Gary, 11 Ala. 98.

levies on property claimed to belong to defendant in the writ, but in the adverse possession of a stranger, he is not bound to make a return of such levy.[51]

Time. A statute requiring a return within a stated time has been held to be mandatory[52]

"Nihil;" "nihil est;" "nihil est inventus" "Nihil,"[53] "nihil est,"[54] and "nihil est inventus"[55] are forms of return made by a sheriff when he has been unable to serve the writ.

§ 45. —— Levy of Attachment or Execution

a. Attachment
b. Execution

a. Attachment

A sheriff must levy a writ of attachment according to its command and nature, taking into his custody the goods to be seized.

In accordance with general rules, a sheriff must execute a writ of attachment according to its command and nature,[56] and he is bound to take into his custody the goods to be seized.[57] It is the duty of the constable to remove property attached from the attachment debtor's premises within a reasonable time,[58] and he has no right to exclude the debtor from such premises by permitting such property to remain thereon.[59] In levying an attachment, a sheriff is not bound to levy on property whereof the title is not in doubt, in preference to property as to the title to which there is some doubt.[60] Where a sheriff or constable finds personal property in possession of the attachment defendant, he may presume, in the absence of notice to the contrary, that the person in possession is the owner of the property, and it is his duty to levy on it accordingly.[61]

b. Execution

(1) In general
(2) Property to be levied on
(3) Release of levy; claims by third persons

(1) In General

A sheriff must execute a writ of execution pursuant to its mandate, and retain or distribute the proceeds as ordered by the court.

The sheriff must execute a valid writ of execution pursuant to its mandate,[62] and retain[63] or distribute[64] the proceeds as ordered by the court. In levying an execution it is the duty of the sheriff to seize as much of defendant's goods as will be reasonably sufficient, if sold, to satisfy the debt and costs.[65] Where the right of exemption is one which may be waived or claimed at will, it is the duty of the officer to proceed until some claim for exemption is lawfully interposed.[66] It is ordinarily the duty of a sheriff in levying on goods in execution to take them into his possession,[67] or at least to have them

51. Ky.—Commonwealth v. Abell, 6 J.J.Marsh. 476.

52. Ark.—J. B. Pearson Flour & Feed Co. v. Pittman, 95 S.W.2d 1143, 192 Ark. 1062.

53. Pa.—Sherer v. Easton Bank, 33 Pa. 134, 138, 139
"Nihil" defined see 66 C.J.S. p. 596 notes 40, 41.

54. Pa.—Sherer v. Easton Bank, supra
"Non est inventus" return has been distinguished from a "nihil est" return.—Sherer v. Easton Bank, supra

55. Pa.—Sherer v. Easton Bank, supra.

56. Md.—First Nat. Bank v. Corporation Commission of North Carolina, 157 A. 748, 161 Md. 508, 86 A.L.R. 1407.
Levy of attachment generally see Attachment §§ 201-243.

57. Md.—First Nat. Bank v. Corporation Commission of North Carolina, supra.
Custody and care of property generally see infra § 46.

58. Cal.—Stevenson Bros. Co. v. Robertson, 131 P. 326, 21 Cal.App. 224.

59. Cal.—Stevenson Bros. Co. v. Robertson, supra.

60. Iowa.—Robinson v. Chapline, 9 Iowa 91.

61. Ala.—Mattingly v. Houston, 52 So. 78, 167 Ala. 167.

62. Ala.—Braswell v. Watkins, 112 So. 343, 216 Ala. 62.
Pa.—Braun, for Use of Fisher, now to Use of Louik v. De Rosa, 194 A. 514, 128 Pa.Super. 318.
Consideration of debt
The levying officer must obey his writ and he cannot consider the debt out of which the judgment arose.—Bell v. Jones, 139 P.2d 884, 104 Utah 306.
Effect of statute
Duty of sheriff is not affected by his belief as to the effect of a statute relieving the judgment debtor of liability.—Ghent v. State, to Use of School Districts, 75 S.W.2d 67, 189 Ark. 747.
Unsuperseded dismissal of suit to restrain execution
Where decree dismissing suit to restrain sheriff from levying execution was not superseded on appeal, sheriff was required to carry the decree into execution, pursuant to the mandate of the court.—Choukas v. Severyns, 99 P.2d 942, 3 Wash.2d 71, opinion adhered to 103 P.2d 1106, 3 Wash.2d 71.
Recall of execution by clerk does not alter text rule.—Braswell v. Watkins, 112 So. 343, 216 Ala. 62.

63. La.—Penn Liberty Oil Co. v. Crescent Magnolia Planting & Mfg. Co., 132 So. 254, 15 La.App. 670.
Intervener's judgment
The sheriff is under a duty to retain a sufficient amount of the proceeds of an execution to pay an intervener's judgment under court order requiring such retention.—Penn Liberty Oil Co. v. Crescent Magnolia Planting & Mfg. Co., supra.

64. Pa.—Braun, for Use of Fisher, now to Use of Louik, v. De Rosa, 194 A. 514, 128 Pa.Super. 318.

65. Neb.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97.
57 C.J. p. 784 note 97.

66. Ind.—Terrell v. State, 66 Ind. 570
57 C.J. p. 784 note 99.

67. Pa.—Commonwealth, to Use of French v. Weglein, 24 A.2d 628, 147 Pa.Super. 257.

in sight.[68] The responsibility of the sheriff levying on goods for execution to produce them when required for sale continues after a stay of sale,[69] and he continues to have a special property or qualified right in such goods while the responsibility itself continues.[70]

(2) Property to Be Levied on

In levying an execution it is the duty of the sheriff to levy on any goods or chattels of the judgment debtor which are subject to execution and can be found within the sheriff's jurisdiction.

In levying an execution it is the duty of the sheriff to levy on any goods or chattels of the judgment debtor which are subject to execution[71] and can be found within the sheriff's jurisdiction.[72] In execution proceedings it is not, however, the business of the sheriff to judge, as between parties, who is the legal owner of land, but it is proper for him to levy on land as the property of him who appears to be owner, according to the land records of the county.[73] If he finds the property in the possession of the execution defendant, it is his duty to take and deliver it as commanded;[74] and, if he finds the property in the possession of a third person, he must also take and deliver it, unless he can justify his refusal to do so by showing that such person has a title or right of possession superior to that of defendant.[75] Notwithstanding a statute allowing defendant in execution to designate the property on which the levy shall be made, where defendant is absent, and cannot be notified thereof, it is the duty of the sheriff to levy on all property not specifically exempt,[76] and permit defendant to make his selection afterward.[77] Where plaintiff in execution is permitted to point out the property to be levied on, it has been held that this is only to aid the officer in identifying the property as that of defendant, and does impose on him an obligation to levy on that particular property in preference to other property.[78] On the other hand, it has been held that, where specific land is pointed out, it is the sheriff's duty to levy thereon regardless of what he may believe as to the title.[79]

(3) Release of Levy; Claims by Third Persons

A sheriff, having attached property and made a return, has no authority to release such property, even though it is exempt. On the filing of an affidavit of claim by a third person, under some statutes, a sheriff is under a duty to impanel a jury to determine the claimant's title.

After a sheriff has attached property and made a return, he has no authority to release the property, even though it is exempt.[80] Under a statute declaring the effect of perfecting an appeal and giving a stay bond to be to release from levy property levied on under execution issued on the judgment, it has been held to be the duty of the sheriff to release all property levied on immediately on notice of the perfection of an appeal and the filing of the stay bond, without regard to the sufficiency of the sureties.[81] Under a permissive statute a sheriff who is prevented by injunction from selling personal property taken in execution may, without becoming, answerable to plaintiff, redeliver such property to the party from whom it has been taken.[82] Under some statutes it is the duty of the sheriff to see that a valid bond is given for all property which is released from levy.[83]

On the filing of an affidavit of claim by a third person with the sheriff, under some statutes he is under a duty forthwith,[84] or at least before incurring storage charges,[85] to impanel a jury to determine claimant's title.

§ 46. Custody and Care of Property

It is the duty of the sheriff to keep in his custody property of which he has taken possession under any process or writ, and within certain limits to do all things necessary for its preservation, until it can be lawfully disposed of, unless it is necessary to sell it prior thereto because of its perishable nature.

It is the duty of the sheriff to keep in his custody property of which he has taken possession under any process or writ,[86] and within certain limits to

68. Pa.—Commonwealth, to Use of French, v. Weglein, supra

69. Del.—Short v. Landes, 39 A 2d 17, 3 Terry 510.

70. Del.—Short v. Landes, supra.

71. Neb—Ehlers v. Gallagher, 22 N. W 2d 396, 147 Neb. 97.

72. Neb—Ehlers v. Gallagher, supra.

73. Ky—Hardin v. Grover, 2 S.W. 64, 8 Ky.L. 260.

74. N.Y—Hoffman v. Conner, 76 N. Y. 121.

75. N.Y.—Hoffman v. Conner, supra.

76. Ill—People v. Palmer, 46 Ill 398, 95 Am D. 418

Right of debtor to designate property on which to levy writ of execution see Executions § 95.

77. Ill—People v. Palmer, supra.

78. Ark—Lawson v. State, 10 Ark 28, 50 Am.D. 238.

79. Tex—Wilson v. Dearborn, Civ. App, 174 S.W. 296, rehearing denied, Civ.App., 179 S.W. 1102.

80. Idaho.—Roth v Duvall, 1 Idaho 149.

81. Cal.—Sam Yuen v. McMann, 34 P. 80, 99 Cal 497.

82. Md.—Redding v. Redding, 26 A. 2d 18, 180 Md. 545.

83. Ga.—Barnett v. Culberson, 8 S E 2d 900, 62 Ga App. 582.

84. N.Y.—B Altman & Co v. Broad Park Plaza Corporation, 271 N.Y.S. 317, 241 App.Div. 836

85. N.Y—B. Altman & Co. v. Bread Park Plaza Corporation, supra.

86. Ariz—Fidelity & Deposit Co. of Maryland v McFadden, 53 P.2d 1085, 47 Ariz 116.
Cal—First Nat Bank v. McCoy, 297 P. 571, 112 Cal App. 665.

do all things necessary for its preservation,[87] until it can be disposed of in some lawful manner, as by sale to satisfy the debt,[88] or by a return thereof to the owner,[89] unless it is necessary to sell the property before such time because of its perishable nature.[90] Likewise, the sheriff does not have the right to permit plaintiff to use attached property pending litigation.[91] Good faith on the part of a sheriff in executing a possessory warrant may require that he take the property seized before the judge or justice who issued the warrant[92] or some other judge or justice of the county.[93]

Custody of courthouse and jail. Custody of the courthouse is a duty which at common law rests on the sheriff as an incident to his general duties,[94] but under a statute giving a sheriff the custody and care of the courthouse and jail of his county, "except as otherwise provided," the sheriff is a mere custodian of the building, and he has no estate or interest, possessory or other, therein.[95] A statute putting the sheriff in charge and control of the courthouse, subject to regulations of the commissioners' court, places the sheriff in charge and control merely for the purpose of keeping order and preserving the property,[96] and not for the purpose of keeping the building in usable condition,[97] which is a duty calling for the exercise of discretion in the use of the contracting power of the county.[98]

Use of force to protect possession A sheriff has a right to use all necessary force to protect his possession of property seized under process.[99]

§ 47. Sales and Conveyances

It is the duty of the sheriff to conduct the sale of property seized by him under execution, and to collect the purchase money.

It is one of the duties of the sheriff to conduct the sale of property seized by him under execution[1] within a reasonable time,[2] and at a reasonable price,[3] at the time of the sale,[4] and to collect the purchase money,[5] and the fact that, if he made the sale, some superior lien might claim the money is not a sufficient reason for failure to perform his duty in this respect.[6] It is the sheriff's duty to execute conveyances of real estate sold by him,[7] and, where he sells personal property, he must deliver it to the purchaser,[8] but he has no authority to give a warranty deed.[9] It is not the sheriff's duty to settle disputes arising, after a sale and delivery to the purchaser of a certificate of sale, between the purchaser and third persons as to the right of possession.[10]

Mont.—Fergus Motor Co v. Schott, 26 P.2d 365, 95 Mont 245.
57 C.J p 786 note 36

Protection restricted to goods under levy

Where writ of fieri facias issued on judgment against loan company was levied on only a part of the property in loan company's pawnshop, and none of pawned articles were taken into possession of sheriff, his obligation was to provide protection only for the goods under levy. —Commonwealth, to Use of French, v Weglein, 24 A.2d 633, 147 Pa Super. 257.

87. Ariz—Fidelity & Deposit Co of Maryland v. McFadden, 53 P.2d 1085, 47 Ariz. 116.
La—Olson v. American Guaranty Co., 90 So. 764, 150 La. 470.
57 C.J p 786 note 37.

Feeding attached cattle

Ariz—Fidelity & Deposit Co. of Maryland v. McFadden, 53 P.2d 1085, 47 Ariz. 116.

88. Cal.—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.
57 C.J. p 786 note 38.

89. Conn.—Boseli v. Doran, 25 A. 242, 62 Conn. 311.
57 C.J. p 786 note 38.

90. Nev.—Newman v. Kane, 9 Nev 234.
N.Y—McKay v. Harrower, 27 Barb. 463.

Slaves

La—Bowman v. McKleroy, 14 La Ann 587.

91. N.C—Saliba v. Mother M. Agnes, 136 S.E. 706, 193 N.C. 251

92. Ga—Goforth v. Fidelity & Cas Co. of N. Y., 55 S.E.2d 656, 80 Ga App. 121.

93. Ga.—Goforth v. Fidelity & Cas Co. of N. Y., supra.

94. Ill.—People ex rel. Walsh v. Board of Com'rs of Cook County, 74 N.E.2d 503, 397 Ill. 293.

Such duty flows from his position as an executive officer of the court. —People ex rel. Walsh v Board of Com'rs of Cook County, supra.

95. Ill.—Hardin v. Sangamon County, 71 Ill App. 103.

96. Tex.—Anderson v. Wood, Civ. App., 152 S.W.2d 1084, 137 Tex 201.

Ministerial duty

Tex.—Anderson v. Wood, supra.

97. Tex—Anderson v. Wood, supra.

98. Tex—Anderson v. Wood, supra

99. N.Y—Ansonia Brass, etc., Co. v. Babbitt, 74 N.Y. 395.
Wash.—**Corpus Juris cited in** State v. Frandsen, 80 P.2d 371, 373, 176 Wash. 558.

1. N.Y.—Ball v. Pratt, 36 Barb. 402
57 C.J. p 786 note 46.

Sheriff as officer designated to make:
Judicial sale see Judicial Sales § 12.
Sale on foreclosure of mortgages see Mortgages § 728

2. Tenn—Campbell v Cobb, 2 Sneed 18
57 C.J p 786 note 47.

3. Kan—Ferguson v. Tutt, 8 Kan. 370.

4. Kan—Ferguson v. Tutt, supra.

5. Ga—Anderson v. Frazier, 37 S. E. 93, 112 Ga. 66.
57 C.J. p 786 note 50
Collection and disposition of money generally see infra § 48.

6. Ga—Puckett v. State Banking Co., 61 S.E. 465, 130 Ga. 586

7. Cal.—People v. Boring, 8 Cal. 406, 68 Am.D. 331.
57 C.J. p 787 note 53.

Enforcement of judgment

Under statute, where the judgment of a court requiring a party to convey property is disobeyed, the sheriff may be designated to make such conveyance—Schaefer v. Fisher, 242 N. Y.S. 308, 137 Misc. 420.

8. Pa.—Patterson v. Anderson, 40 Pa. 359, 80 Am.D. 579.

9. N.Y.—Ball v. Pratt, 36 Barb. 402.

10. Cal.—Dreisbach v. Braden, 181 P. 262, 40 Cal.App. 407.

Power of constable. Where the statutes require constables to execute all process delivered to them by any lawful officer, and also require all process, unless otherwise provided, to be directed to both sheriff and constable, a constable has power to sell land under an order of sale issued from the district court, although the sheriff is competent to act[11]

§ 48. Collection, Custody, and Disposition of Money

a. Collection or receipt
b. Custody and disposition

a. Collection or Receipt

A sheriff or constable is bound to obtain, if he can, the amount of an execution placed in his hands, but he has no authority as such to receive payment of a debt due a party to an action until a writ of execution is issued to him.

A sheriff or constable is bound to obtain, if possible, the amount of an execution placed in his hands,[12] but he has no authority in his official capacity to settle the demand and receive the money of the debtor.[13] A sheriff, in receiving money paid to redeem property sold on foreclosure of a mortgage, acts only in his official capacity and is in no sense the agent of the purchaser at the foreclosure sale,[14] and the fact that the person redeeming pays the sheriff more than is necessary gives him no rights as against the purchaser[15] In the absence of provision in the writ of execution for the collection of costs the sheriff has no duty to collect them.[16] Where the statute makes it the duty of the sheriff to collect forthwith the jury fee from the person in whose favor a verdict is rendered, the sheriff is responsible for the fee, and the court will aid him in its collection.[17] A sheriff or constable has no authority as such to receive payment of a debt due a party to an action until a writ of execution is issued to him;[18] nor, unless the statute so provides,[19] is it any part of his official duty to endeavor to collect demands put into his hands without process,[20] but, if he undertakes to do so, he acts merely as the agent of the creditor.[21] Where it is the sheriff's duty to collect a fine adjudged against a prisoner in his custody, he is entitled to sue on a note given to him by the prisoner to effect his release.[22]

Payment of a judgment to the sheriff is considered in Judgments §§ 551, 552.

b. Custody and Disposition

(1) In general
(2) Payment to person entitled or into court

(1) In General

A sheriff or constable is bound to keep safely and properly dispose of all moneys received by him in his official capacity.

A sheriff or constable is bound to keep safely and properly dispose of all moneys received by him in his official capacity[23] He does not hold funds collected under execution as agent for plaintiff in execution,[24] and is under no legal obligation to follow his direction as to their distribution.[25] Where the duties of a sheriff or constable as to moneys received by him are expressly defined by statute, a garnishee, in depositing a check for the amount of his indebtedness, is chargeable with knowledge of such duties,[26] and cannot impose on the officer conditions on which the check shall be received.[27] A sheriff who receives two writs against the same fund must, on receiving the fund, hold it until the conflicting claims of the parties can be determined.[28] Where a sheriff having several writs against the same person in favor of different creditors takes an indemnity bond from one of the creditors and sells in consequence of that indemnity, he has no right to apply to the court for its advice as to the distribution or payment of the money raised by it, especially where he has not paid the money into court.[29]

11. Tex—Texas Land, etc, Co v Masterson, 33 S W. 376, 11 Tex Civ App 483

12. Tenn—Neely v. Woodward, 7 Heisk. 495.

13. Me—Waite v. Delesdernier, 15 Me. 144.

14. Minn—Horton v. Maffitt, 14 Minn 289, 100 Am.D. 222.

15. Minn.—Horton v. Maffitt, supra.

16. Ariz—Schuster v Merrill, 106 P.2d 192, 56 Ariz 114.

17. Pa—Evans v Reed, 4 Luz.Leg. Reg. 277, 5 Pittsb.Leg.J.,N.S., 79.

18. Ala—Chapman v. Cowles, 41 Ala 103, 91 Am D 508
57 C J p 787 note 65.

19. N.C—Morgan v. Horne, 44 N C. 25
57 C J p 787 note 66.

20. La—Merchants' Bank v. Peters, 2 Rob 214.
57 C.J. p 787 note 67.

21. N C—Harding v. Chappell, 51 N. C 350.
57 C.J. p 787 note 68

22. Ark.—Wilson v. Chaney, 174 S. W. 564, 117 Ark. 287.

23. Fla.—Scott v Caldwell, for Use and Benefit of Bay County, 37 So. 2d 85, 160 Fla. 861
57 C.J. p 787 note 70.

24. Ga—Hixon v. Bank of Siloam, 159 S.E 901, 43 Ga App. 696

25. Ga—Hixon v. Bank of Siloam, supra.

26. Iowa—Gutschenritter v. Whitmore, 139 N W. 567, 158 Iowa 252.

27. Iowa—Gutschenritter v. Whitmore, supra.

28. N Y.—Davy v. Field, 1 Abb Dec 490, 2 Keyes 608—Shea v Conant, 134 N.Y S 315, 149 App Div. 583, 3 N.Y Civ.Proc 220.

29. N C—Ramsour v. Young, 26 N. C. 133.

Refunding money collected. Under a statute authorizing the sheriff to collect debts and credits of defendant which have been attached, on the dismissal of an attachment, the sheriff is bound to pay to the successful defendant moneys collected under the attachment from such defendant's debtor.[30] So, also, when an execution on which money has been made is superseded, it is the duty of the sheriff to refund the money to defendant, if it is in his hands at the time.[31]

Recovery back of money paid. Where a sheriff has paid out money collected under process in satisfaction of a junior lien, he cannot recover it back on his being compelled to pay a senior lien to which such money should have been applied.[32]

Statements of fees and disbursements. One holding the office of sheriff and ex officio collector should prepare and file separate statements of account of fees and disbursements of each office.[33]

(2) Payment to Person Entitled or into Court

The sheriff is bound to pay money which he has collected to the person entitled thereto or to his attorney. The sheriff may properly pay such money into court, particularly where there are conflicting claims.

When money is collected by the sheriff, ordinarily he is bound to pay it over to the person entitled thereto,[34] or his attorney,[35] and the pendency of a motion to discharge an attachment of the debtor's property does not affect the officer's duty.[36] Where the officer has notice of the assignment of the judgment, the sheriff must hold the proceeds of the execution thereon for the use of the assignee,[37] although payment to the creditor's attorneys has been held binding where the assignee recognized and acquiesced in the acts of such attorneys in issuing execution.[38] He may, if he sees fit, pay over such money before the return day of the writ,[39] but he is not bound to do so.[40] Indeed, it is held that a sheriff or constable may lawfully hold money collected by him on an execution until a demand upon him therefor is made by one entitled to receive it,[41] but a demand on the officer turns the claim into an ordinary debt and renders it his duty to seek out the creditor and make payment within a reasonable time.[42]

Payment into court. At common law it is proper for the sheriff to pay into court money collected under an execution,[43] and this practice has been held to be proper at the present time,[44] especially where there are conflicting claims to the fund,[45] so that the officer may be protected from liability in case of mistake, as discussed infra § 91.

§ 49. Miscellaneous Powers and Duties

The powers and duties of sheriffs and constables with respect to various miscellaneous matters have been judicially determined.

In addition to those particular powers and duties considered supra §§ 42-48, the courts have passed on various other powers and duties of sheriffs and constables, such as the rights and powers of the sheriff or constable with respect to elections,[46] and the posse comitatus.[47] The capacity of a constable to act as attorney is discussed in Attorney and Client § 49.

Bail. In the United States there are decisions, apparently based on the rule of the English courts, to the effect that a sheriff cannot become special bail;[48] but it has been held that a sheriff who

30. Mont.—Michener v Fransham, 81 P. 953, 33 Mont 108

31. Ky—Trueman v. Berry, 6 B Mon. 536

32. Pa—Krumbhaar v. Yewdall, 26 A. 219, 153 Pa 476
57 C J. p 788 note 79

33. Ark—State, to Use of Union County, v. Harman, 80 S W.2d 619, 190 Ark. 621

34. Fla—Scott v Caldwell, for Use and Benefit of Bay County, 37 So 2d 85, 160 Fla. 861
Pa—Liebel v. Butler, Com Pl, 19 Erie Co. 476.
57 C.J p 788 note 80.

35. N Y.—Paige v Willet, 38 N Y 28—Buckley v Sharpe, 186 N.Y.S. 327, 114 Misc 206.

36. N.Y.—Paige v. Willet, 38 N.Y. 28.

37. Tex.—Owens v. Clark, 15 S.W 101, 78 Tex. 547
57 C J p 788 note 84.

38. Minn.—Gill v Truelsen, 40 N W 254, 39 Minn 373

39. Ill—Howe v Thayer, 24 Ill 246—McInerney v Chicago Times Co, 41 Ill App 438

40. Ill—McInerney v. Chicago Times Co, supra
57 C.J p 788 note 87.

41. Ala.—McBroom v. Governor, 6 Port. 32
57 C J p 788 note 88.

42. N C—Wills v. Sugg, 25 N.C. 96.
57 C J p 788 note 89.

43. Pa—Cynkar v Kaczynski, 161 A. 761, 105 Pa Super 434.
57 C.J. p 789 note 91.

44. Pa.—Cynkar v. Kaczynski, supra.
57 C.J. p 789 note 92.

45. Pa.—Cynkar v. Kaczynski, supra.
57 C.J. p 789 note 93.

46. **Attending elections**
Under statute constables are required to attend all elections personally or by deputy.—McBride v. Berryman, 31 Pa.Dist. & Co. 451

Keeping office open
Under statute it is the mandatory duty of the sheriff to keep his office open for the purpose of permitting voters to sign the poll books and secure poll certificates—Molero v. Rowley, 194 So 7, 194 La. 527.

47. **Under common law, the sheriff commanded the posse comitatus.**—State, on Inf. of McKittrick, v. Williams, 144 S.W.2d 98, 346 Mo. 1003.
Posse comitatus generally **see supra** § 34.

48. Conn.—**Brown v. Lord, Kirby** 209.

voluntarily assumes the position of a bail may be estopped from denying his capacity to become such.[49] Where there is no prohibitory rule, it has been held that a deputy sheriff may become bail.[50]

Contracts and agreements. An agreement by a sheriff colore officii not in conformity with statute,[51] such as an agreement to delay execution sale,[52] or an agreement by which a party under arrest is permitted to go at large on terms other than those prescribed by statute,[53] is void. The sheriff, considered as a mere ministerial officer, has no authority, in the absence of statute, to pledge the credit of the county or create a county debt.[54]

Custody and control of convicts. On the conviction and sentence of a person, it is the duty of the sheriff of the county where the judgment of conviction has been rendered[55] to take such convicted person into custody,[56] and to keep him in custody[57] or dispose of him[58] in accordance with the judgment of the court and the law. So, such sheriff must convey to the penitentiary one convicted and sentenced thereto;[59] and it is the duty of the sheriff in another county, where the convicted person is found, to assist by holding him for delivery to the sheriff of the county where the judgment has been rendered.[60] It is no part of the duty of the sheriff to see that county convict contractors execute the bonds required by statute before entering on the discharge of their duties.[61] A constable who is also a city police officer, in delivering prisoners to state institutions pursuant to precepts from a municipal court and making his return as constable, is acting for the state as constable and is not answerable to the city.[62]

The right of the sheriff, as jailer ex officio, to the custody and control of the county prisons and of the prisoners confined therein, is discussed in Prisons § 8.

Destruction of dogs running at large; entry on private property. A statute directing sheriffs and constables to kill unlicensed dogs which they find going at large does not authorize an officer to enter into private premises in order to kill a dog,[63] or to obtain possession of and carry away the body of a dog which he has killed in the exercise of his official duty.[64]

Juries. The power of a county sheriff, under statute, to select sheriff's juries is divested by a constitutional provision vesting in other specified county officers power to summon grand and petit juries.[65] The sheriff, as the proper officer for the selection, drawing, and summoning of juries generally, is considered in Juries §§ 165, 173, and for the drawing and summoning of a grand jury, in Grand Juries §§ 10, 15.

Preservation and exhibition of papers. It is the duty of the sheriff to preserve the papers left with him by a creditor redeeming property sold under execution, and to exhibit them, on request, to any third person having an interest in the matter.[66]

Protection of property. A sheriff, constable, or deputy cannot, as such, engage to guard the property of a private individual or corporation not in the custody of the law,[67] and the fact that one is a

N Y —Bailey v. Warden, 20 Johns. 129.

49. Vt —Meriam v. Armstrong, 22 Vt 26.
6 C.J p 909 note 57 [a].

50. N.H.—Plumer v. Brewster, 2 N H. 473.

51. N Y.—Perkins v. Proud, 62 Barb 420.
57 C.J. p 789 note 4.

52. N Y —Perkins v Proud, supra.
57 C J. p 789 note 5.

53. N Y.—Winter v. Kinney, 1 N.Y. 365.
57 C.J. p 789 note 6.

54. N J —**Corpus Juris quoted in** Monmouth County Pub. Co v. Monmouth County, 6 A 2d 487, 488, 17 N J.Misc. 147, affirmed 11 A.2d 95, 124 N.J.Law 105
57 C.J. p 789 note 8.

55. Ohio.—Ex parte Silverman, 42 N. E.2d 87, 69 Ohio App. 128, appeal dismissed In re Silverman, 43 N. E.2d 238, 140 Ohio St. 335.

56. Ohio.—Ex parte Silverman, 42 N E.2d 87, 69 Ohio App. 128, appeal dismissed In re Silverman, 43 N E 2d 238, 140 Ohio St. 335.
13 C J. p 921 note 41.

57. S D —Bartron Clinic v Kallemeyn, 245 N.W 393, 60 S.D 598.
13 C J. p 921 note 41.

Commitment for payment of fine and costs

When a person convicted of a misdemeanor has been committed to the custody of the sheriff until the fine and costs are paid, it is the duty of the sheriff to enforce the judgment by retaining custody until such time as they are paid.—Spradley v. State, 56 S W. 114, 23 Tex. Civ.App. 20.

58. Ohio.—Ex parte Silverman, 42 N E.2d 87, 69 Ohio App. 128, appeal dismissed In re Silverman, 43 N E 2d 238, 140 Ohio St. 335.
13 C.J. p 921 note 41.

59. Ohio.—Ex parte Silverman, 42 N E 2d 87, 69 Ohio App. 128, appeal dismissed In re Silverman, 43 N.E.2d 238, 140 Ohio St. 335.

60. Ohio.—Ex parte Silverman, 42 N E 2d 87, 69 Ohio App. 128, appeal dismissed In re Silverman, 43 N.E 2d 238, 140 Ohio St. 335.

61. Miss.—State v Busham, 27 So. 996, 77 Miss. 688.

62. Me —Cushing v Babcock, 38 A. 2d 137, 141 Me. 14

63. Mass —Cozzens v. Nason, 109 Mass 275
57 C.J p 781 note 26.

64. R.I —McAuliffe v. Gash, 22 A. 276, 17 R.I 355.

65. N Y —Livoti v Fitzgerald, 5 N. Y.S 2d 588, 255 App Div. 711, affirmed 18 N E 2d 319, 279 N Y 696

66. N Y.—People v. Ranson, 4 Den 145, affirmed 2 N.Y. 490.
57 C.J. p 789 note 2.

67. Ind —Hogle v. Reliance Mfg Co., 48 N.E 2d 75, 113 Ind App. 488, rehearing denied 48 N E.2d 999, 113 Ind.App 488
57 C.J. p 780 note 22.

deputy sheriff does not entitle him to any more rights or privileges in and about private property than any other person except in the performance of some official duty;[68] but an act of such character done in his private capacity may not be unlawful[69] Likewise, it is not within the functions of a constable or deputies to engage in conducting and soliciting business for a private patrol service.[70]

C. EFFECT OF CHANGE IN INCUMBENCY

§ 50. Rights, Powers, and Duties of Retiring Sheriff

a. In general
b. Custody of property levied on or seized under attachment
c. Making or amendment of return
d Undertaking new business
e. Turning over books, papers, records, process, and prisoners to successor

a. In General

While the general powers of a sheriff or constable cease when he goes out of office, at common law and under a number of the statutes the officer who commences the execution of a process or writ must complete it, even though he goes out of office before he can do so.

While the general powers of a sheriff or constable cease when he goes out of office,[71] it is a rule of the common law, preserved by express statute in many jurisdictions, that the officer who commences the execution of a process or writ must complete it, even though he goes out of office before he can do so;[72] and it has been laid down that a sheriff who has, during his term, begun an execution under proper authority may be compelled to proceed with it.[73] A sheriff is not authorized to execute any writ not in his hands at the time his term expired, and which he had not before that time begun to execute.[74] Under a statute providing that every sheriff going out of office at the expiration of his term, and having any execution which he may have levied but not collected, may proceed and collect it in the same manner as if his term of office had not expired, a sheriff who commences a suit before the expiration of his term, for the conversion of property levied on by him, may continue to prosecute the suit to judgment, even though the trial takes place after the expiration of his term.[75] A sheriff who has gone out of office may sue on a forthcoming bond given and made payable to him by a claimant of property seized under a writ[76] A retiring constable who delivers to his successor unexpired executions is not required to return them.[77]

Deputy sheriff. It is not competent for a deputy sheriff, after his term has expired, or while he is the deputy of a succeeding sheriff, to perfect the entry of a levy on a described lot of land by signing it;[78] nor can a deputy who has removed from the county in which he held office complete the execution of process commenced before his removal.[79]

Collection of purchase money or enforcement of liability on bid. A sheriff who has sold property at judicial or execution sale may, after going out of office, sue the successful bidder for the purchase money,[80] or for the difference between his bid and the price at which the property was resold on his default in payment.[81] On the other hand, it has been held that, after a sheriff has resigned, he has no right to keep or collect bonds given to him for the price of the property sold.[82]

Since all official trusts pass to a deceased sheriff's successor in office, as considered infra § 51, and not to his personal representative, the administrator of a deceased sheriff is not entitled to recover the price of property sold by the sheriff at a judicial sale without the assent of his successor in office.[83]

68. Tex.—Texas, etc, R Co v. Parsons, Civ App, 109 S W. 240, affirmed 113 S W. 914, 102 Tex. 157, 132 Am.S R 857.

69. Tex.—Hudson v. St. Louis, etc, R. Co., Com.App, 293 S W. 811, rehearing denied 295 S.W 577.
57 C J p 781 note 24.

70. Cal.—Ex parte Hitchcock, 166 P. 849, 34 Cal.App. 111.

71. Mich.—Fletcher v. Morrell, 44 N W 133, 78 Mich 176.
N Y.—Hinds v. Doubleday, 21 Wend 223.

72. U.S.—Kent v. Roberts, C.C.Me., 14 F.Cas.No.7,715, 2 Story 591.
57 C.J. p 790 note 11.

73. Ala.—Bondurant v. Buford, 1 Ala 359, 35 Am D 33

74. Okl.—Independent Oil, etc., Co v Woolley, 232 P. 77, 105 Okl 235

75. Ill.—Grimes v. Rodgers, 263 Ill. App. 429

76. Ga.—Harrell v. Emanuel, 109 S E 294, 27 Ga App 546.
57 C.J. p 790 note 14.

77. Ind.—Northern v. State, 1 Ind 113, Smith 71.

78. Ga.—Rutherford v. Crawford, 53 Ga. 138
Powers of deputy after termination of incumbency of sheriff see supra § 37.

79. N.Y.—Ferguson v. Lee, 9 Wend. 258.

80. Kan.—Trustees, etc., Ins. Corp v. Bowling, 44 P. 42, 2 Kan.App. 770
S C—Underwood v. Jacobs, 14 S.C.L. 447.

81. Pa.—Dickson v. McCartney, 75 A 735, 226 Pa. 552, 29 L.R.A.,N.S, 792, 134 Am S.R. 1078, 18 Ann.Cas 500.
57 C.J. p 791 note 80.

82. La.—Buisson v. Hyde, 17 La. 22.

83. La.—Bradley v. Frellsen, 10 La. Ann. 310.

Sale of property. As a general rule it is obligatory on the outgoing sheriff to sell, after the expiration of his term, property which he had seized during his term,[84] or complete a sale which he had advertised while in office.[85] Where, however, pending the arrest of a levy by an affidavit of illegality, and after the sheriff has taken the statutory bond, his term of office expires, he is in no default for returning the papers to the clerk's office without selling the property.[86]

Execution of deed. In the absence of a statute to the contrary,[87] the sheriff who conducted a sale of property under legal process may execute a deed therefor after the expiration of his term of office.[88]

Paying over money. It is proper for a sheriff, on going out of office, to pay over money which he has realized on writs and has on hand to the person legally entitled to receive it.[89] A statute requiring county officers to pay over to the county treasurer unclaimed moneys and providing for their payment to claimants is inapplicable to a sheriff whose term of office has expired prior to the effective date of such statute.[90]

b. Custody of Property Levied on or Seized under Attachment

In the absence of a statute providing otherwise, a sheriff going out of office is not required to transfer the goods levied on by him under an execution to his successor, and a sheriff or constable who seizes property under attachment should retain possession thereof until the suit is determined or the attachment is dissolved, although he goes out of office before that time.

In the absence of a statute providing otherwise, a sheriff going out of office is not required to transfer the goods levied on by him under an execution to his successor,[91] and is not relieved of responsibility for such goods.[92] Likewise a sheriff or constable who seizes property under attachment should retain possession thereof until the suit is determined or the attachment is dissolved, although he goes out of office before that time,[93] and he is not required to turn over the attached property to his successor[94] unless the statute so provides.[95] So, where a deputy sheriff has made a valid attachment, his subsequent resignation does not deprive him of the right to bring an action for conversion of the property.[96] On the other hand, in the absence of a permissive statute,[97] it has been held that a sheriff cannot, after going out of office, retain attached property for the purpose of sale under final process.[98]

c. Making or Amendment of Return

After going out of office a sheriff or constable may make a return on process which he commenced to execute while in office. He may also, with the sanction of the court, amend a return made while in office; but it has been held that this may not be done without court sanction.

After going out of office a sheriff or constable may make a return on process which he commenced to execute during his incumbency.[99] However, it has been held that a sheriff who has arrested a person on a capias ad respondendum has no right to return the writ after he is out of office,[1] but should deliver it to his successor, with the assignment of the prisoner, so that the new sheriff may return it with his indorsement of the discharge of the prisoner on bail.[2]

Amendment. A return made by an officer while in office may, with the sanction of the court, be amended by him after going out of office,[3] and a sheriff may be permitted to amend a return of his deputy, since deceased, after, as well as before, the expiration of his own term of office.[4] On the other hand, it has been held that, without the sanction of the court, an officer cannot amend a return after he has gone out of office,[5] although there is authority to the contrary.[6]

84. Ala.—Ryan v. Couch, 66 Ala 244
57 C.J. p 790 note 25.
Authority of officer to sell property levied on in execution see Executions § 199

85. N.Y.—Union Dime Sav. Inst. v. Anderson, 83 N.Y. 174.

86. Ga.—Tucker v. Keen, 60 Ga. 410

87. N.C.—Taylor v. Allen, 67 N.C. 346.
57 C.J. p 791 note 35 [a].

88. Mass.—Welsh v. Joy, 13 Pick 477.
Tex.—Carter v. Bendy, Civ.App., 251 S.W. 265.

89. La.—Sauvinet v. Maxwell, 26 La.Ann. 280.

90. Pa.—Commonwealth ex rel. Margiotti v. Weglein, 10 A.2d 572, 337 Pa. 314

91. Del.—Short v. Landes, 39 A.2d 17, 3 Terry 510

92. Del.—Short v. Landes, supra.

93. Okl.—Independent Oil, etc., Co. v. Woolley, 232 P. 77, 105 Okl. 235
57 C.J. p 790 note 19.

94. Okl.—Independent Oil, etc., Co. v. Woolley, supra.
57 C.J. p 790 note 19

95. Ark.—State, for Use of Glover, v. McIlroy, 116 S.W.2d 601, 196 Ark. 63.
57 C.J. p 790 note 21.

96. Mass.—Polley v. Lenox Iron Works, 4 Allen 329.

97. N.Y.—McKay v. Harrower, 27 Barb. 463.
57 C.J. p 790 note 23 [a].

98. Mich.—Fletcher v. Morrell, 44 N.W. 133, 78 Mich. 176.
57 C.J. p 790 note 23.

99. Ill.—Howell v. Albany City Ins. Co., 62 Ill. 50.
Mass.—Welsh v. Joy, 13 Pick 477.

1. N.Y.—Richards v. Porter, 7 Johns. 137.

2. N.Y.—Richards v. Porter, supra.

3. Ala.—**Corpus Juris** cited in Jaffe v. Leatherman, 146 So. 273, 276, 226 Ala. 182.
57 C.J. p 791 note 41.

4. N.H.—Avery v. Bowman, 39 N.H. 393.

5. Ga.—Beutell v. Oliver, 15 S.E. 307, 89 Ga. 246.
57 C.J. p 791 note 43

6. Ill.—Howell v. Albany City Ins. Co., 62 Ill. 50.

Omission of jurat. Where the return of the sheriff does not appear to be sworn to, the fact that it was in fact sworn to, and that the clerk's jurat was omitted, may be shown by the sheriff after he has gone out of office.[7]

Amendment pending action for trespass The court has refused to allow a sheriff who had gone out of office to amend his return pending an action against him for trespass committed under the writ [8]

d. Undertaking New Business

A sheriff who has gone out of office cannot commence to execute a writ or process.

The mere delivery of a process or writ to a sheriff does not give him an indefeasible right to execute it, but, if he does not commence to execute it before going out of office, he cannot afterward proceed to do so [9] It is not proper to issue a process or writ to a sheriff after his term has expired,[10] and, when a process or writ comes to his hands after the expiration of his term of office, he has no more authority to execute it than any other private individual [11] A fortiori a sheriff who has gone out of office has no authority to do an official act under an execution which is directed to his successor.[12]

Sheriff holding over. A sheriff may enter on new business notwithstanding the expiration of his term where he is holding over by reason of his successor having not yet qualified and taken possession of the office.[13]

e. Turning Over Books, Papers, Records, Process, and Prisoners to Successor

It is the duty of the outgoing sheriff to turn over to his successor all books and papers appertaining to the office, as well as all process and writs on which he has not begun execution, and bonds payable to the outgoing sheriff in his official capacity. He must also turn over prisoners in his custody.

It is the duty of the outgoing sheriff, either under the common law or under the express or implied provisions of the statutes, to turn over to his successor all books and papers appertaining to the office;[14] all process and writs which he has not begun to execute,[15] and bonds payable to him in his official capacity [16]

Prisoners in custody of outgoing officer. It was the doctrine of the common law that an outgoing sheriff must deliver by indenture all prisoners in his custody under an execution,[17] and, having done so, is relieved from liability for an escape as discussed infra § 118. Statutes enacted in some jurisdictions have not materially changed the law in this respect.[18]

§ 51. Rights, Powers, and Duties of New Sheriff

The new sheriff, in so far as his agency is necessary, has the duty to complete the unfinished business of his predecessor. All official trusts pass to the successor of a deceased sheriff.

It is the duty of the new sheriff to complete the unfinished business left by his predecessor in so far as his agency is necessary therefor,[19] where the business is not of such character that the retiring sheriff should complete it notwithstanding his having gone out of office as discussed supra § 50. So, in the absence of a statute to the contrary,[20] where a sheriff goes out of office after levying an attachment, his successor is the proper person to levy an execution issued on a judgment in the action in which the attachment issued.[21] All official trusts pass to the successor of a deceased sheriff.[22]

Execution of process. It is the duty of a new sheriff to execute all process and writs which are in the sheriff's office at the time when he is inducted thereinto and which his predecessor has not previously begun to execute,[23] notwithstanding such process or writs are directed to his predecessor,[24]

7. Pa.—Lake Winola Assoc. v. Mott, 1 Pa Super 304.

8. Pa.—McElrath v. Kintzing, 5 Pa 336

9. Del.—Simonton v. Pattin, 41 A. 91, 15 Del. 399.
57 C.J. p 791 note 47.

10. Ark.—Cotton v. Atkinson, 13 S. W. 415, 53 Ark. 98.
57 C J. p 791 note 48

11. Ark.—Cotton v. Atkinson, supra.
57 C.J. p 791 note 49

12. N C.—Spruill v. Bateman, 20 N. C 627.

13. N Y.—Curtis v. Kimball, 12 Wend. 275, approved Littlejohn v Leffingwell, 54 N.Y.S. 536, 34 App. Div. 185.

14. S C.—Osborne v. Huger, 1 S C L 179.
57 C.J. p 792 note 54

15. Miss.—W T Rawleigh Co v Hester, 200 So 250, 190 Miss. 329
57 C J p 792 note 57.

16. La.—Simpson v. Allain, 7 Rob 500
57 C J. p 792 note 58.

17. Va.—Meredith v. Duval, 1 Munf 76, 15 Va. 76.
57 C.J p 792 note 61.

18. N.Y.—Partridge v. Westervelt, 13 Wend 500
57 C.J. p 792 note 63.

19. Ark.—Wilson v. Chaney, 174 S. W 564, 117 Ark 287.
57 C J p 792 note 64

20. N Y.—McKay v. Harrower, 27 Barb 463

21. Minn.—Butler v. White, 25 Minn. 432.

22. La.—Bradley v. Frellsen, 10 La. Ann 310.

23. Ala.—Lawson v. Orear, 4 Ala. 156.
57 C J. p 793 note 70.

24. Ill.—Greenup v. Stokes, 12 Ill. 24, 52 Am D 474—Maxton v. Mount, 86 Ill.App. 187.

and it has been held that, for the purpose of receiving a summons to be served, an outgoing sheriff, retaining possession of the office after his successor is entitled to it, may be deemed the latter's agent [25] Where his predecessor has begun to levy execution on process directed to him, the new sheriff has no liability or responsibility for the property levied on,[26] and on a return of no goods found to a writ of venditioni exponas he does not have such interest in the property levied on as will authorize him to maintain trover for its conversion during his predecessor's term of office.[27]

Sale of property. An order for the sale of real estate taken in an attachment suit goes to the sheriff in office at the time, and not to his predecessor, who served the writ.[28] Under a statute providing that process remaining with the officer unexecuted at the expiration of his term may be executed by his successor, where a sheriff has made a levy on personalty under an execution, his successor in office may complete the sale.[29] Also, under a statute providing that, when an officer shall have begun to serve an execution and shall die, or be incapable of completing the service and return thereof, it may be completed by any other officer who might by law have executed it if originally delivered to him, where an execution has been issued and a levy has been made by a deputy sheriff, a deputy of a succeeding sheriff may validly conduct the sale where the deputy of the original sheriff is unable to do so [30]

Receipt and distribution of money. The successor of a sheriff is the proper person to take over moneys received by his predecessor by virtue of his office, and to distribute such money to the person entitled thereto.[31] An incoming sheriff does not have the right to require his predecessor to deliver to him the moneys realized by the latter on executed writs, for which the outgoing sheriff and his sureties are liable on his official bond.[32]

Amendment of return. A return made by a sheriff while in office may, with the sanction of the court, be amended by his successor.[33]

Execution or acknowledgment of deed for property sold by predecessor. A sheriff cannot execute a deed for property sold by his predecessor,[34] unless the statute so provides;[35] nor can a sheriff acknowledge a deed executed by his predecessor for property sold by him.[36]

IV. CIVIL LIABILITIES

A. IN GENERAL

§ 52. General Rules

As a general rule a sheriff or constable is liable for his wrongful acts to persons injured thereby.

Sheriffs and constables are held to a high degree of accountability in the enforcement of the law and the proper and honest conduct of their office;[37] and one may rely on their faithfully performing the duties of their office [38] As a general rule, a sheriff or constable who is guilty of misfeasance or nonfeasance in office is liable therefor to the person injured thereby,[39] and the ignorance of the officer as to what was his duty under the circumstances

25. N.Y.—Littlejohn v. Leffingwell, 54 N.Y.S. 536, 34 App.Div. 185

26. Del.—Short v. Landes, 39 A.2d 17, 3 Terry 510.

27. Del.—Short v. Landes, supra.

28. Mich.—Crane v. Hardy, 1 Mich. 56.

29. Cal.—Weldon v. Rogers, 108 P. 266, 157 Cal. 410

30. Mich.—Stott v. Weadock, 284 N. W. 605, 287 Mich. 678.

31. Pa.—Trestrail v. Johnson, 148 A. 493, 298 Pa. 388
57 C.J. p. 792 note 69.

32. La.—Sauvinet v. Maxwell, 26 La. Ann. 280.

33. Ala.—Jaffe v. Leatherman, 146 So. 273, 226 Ala. 182.

34. Cal.—Anthony v. Wessel, 9 Cal. 103.

35. S.C.—McElmurray v. Ardis, 34 S.C.L. 212
Tenn.—Wortham v. Cherry, 3 Head 468

36. Pa.—Woods v. Lane, 2 Serg. & R. 53—Lutes v. Randall, 9 Kulp 295

37. U.S.—Trammell v. Fidelity & Casualty Co. of New York, D.C.S.C., 45 F.Supp. 366.

Constables, as conservators of the peace under statute, must discharge their primary duties in a prudent and lawful manner—Whitlock v. Wood, 101 S.W.2d 950, 193 Ark. 695, 110 A.L.R. 955

38. N.Y.—Vangellow v. East Side Sav. Bank, 11 N.Y.S.2d 982.
Va.—Narrows Grocery Co. v. Bailey, 170 S.E. 730, 161 Va. 278.

39. Fla.—Holland, for Use and Benefit of Williams v. Mayes, 19 So.2d 709, 155 Fla. 129.
Ga.—Harris v. Bennett Bros., 34 S.E.2d 615, 72 Ga.App. 589.
Idaho.—Jacobson v. McMillan, 132 P.2d 773, 64 Idaho 351.
Tenn.—Marable v. State ex rel. Wackernie, 222 S.W.2d 234, 32 Tenn.App. 238.
Wash.—Young v. Long, 214 P. 821, 124 Wash. 460.
57 C.J. p. 793 note 79
Actions against sheriffs see infra §§ 146-167.
Criminal responsibility see infra §§ 209, 210.

Unlawful exercise of authority
The law gives to a citizen a right of action against a sheriff for an unlawful exercise of his authority.—People v. Spear, 89 P.2d 445, 32 Cal.App.2d 165, certiorari denied Spear v. People of State of Cal., 60 S.Ct. 116, 308 U.S. 555, 84 L.Ed. 466.

cannot protect him from liability for neglect to perform that duty.[40] A sheriff may be liable personally although not liable on his official bond.[41] Thus, while the liability of the sureties attaches only to acts done by the sheriff in the execution of his official duties, as considered infra § 178, his personal liability extends to any wrongful act whether or not committed in the performance of his official duties.[42]

A sheriff or constable is, of course, not liable for damages arising from his lawful acts,[43] and ordinarily he is not liable at the suit of a third person to whom he owes no official duty.[44] Where a duty of the sheriff may lawfully be performed by the judgment creditor and he undertakes to perform it he cannot hold the sheriff liable for failure to perform it;[45] and a fortiori a sheriff cannot be held liable for a failure to do something which he had no authority to do.[46] Where an act of a sheriff, although perhaps an invasion of right, is of little importance and the injury resulting therefrom, if any, is trifling, an application of the maxim de minimis non curat lex may prevent any recovery therefor.[47]

Lien on fees of office A sheriff's official defalcations create no lien on fees of office due to him, but debts due him on whatever account form, with his other property, a common fund for all his creditors.[48]

Judicial or ministerial functions. While the general rule of liability of a sheriff or constable applies always to breaches by a sheriff or constable of his ministerial duties,[49] ordinarily no liability can arise out of what he has done when acting in a judicial capacity,[50] even though he has acted corruptly,[51] but it has been held or said that a sheriff or constable may be subject to liability for judicial acts where he has maliciously deprived some person of his rights.[52]

§ 53. —— Liabilities of Deputies, Assistants, Coroner Acting as Sheriff, and de Facto Officers

a. Deputies
b. Coroners acting as sheriffs
c. De facto officers
d. Persons aiding officers

a. Deputies

A deputy of a sheriff or constable may be held personally liable for his voluntary or negligent wrongful acts.

Where a deputy of a sheriff or constable, acting in the sphere of his office, does a voluntary or negligent wrongful act, he may be held personally liable therefor, since by such act he becomes a personal wrongdoer;[53] but he incurs no personal lia-

40. Ga.—York v. Clopton, 32 Ga. 362

41. N.C.—Sutton v. Williams, 155 S.E. 160, 199 N.C. 546
Liabilities on official bonds see infra §§ 177-208.

42. Cal.—Gomez v. Scanlan, 102 P. 12, 155 Cal. 528.
Colo.—Corder v. People, 287 P. 85, 87 Colo. 251.

As trespasser ab initio
Where an authority given by law is exceeded, the sheriff loses benefit of his justification and the law holds him a trespasser ab initio, although to a certain extent he acted under authority given.—Wallner v. Fidelity & Deposit Co. of Md., 33 N.W.2d 215, 253 Wis. 66, 10 A.L.R.2d 745.

Negligence
(1) Sheriffs and constables are not relieved from liability for acts of negligence.—Falasco v. Hulen, 44 P.2d 469, 6 Cal.App.2d 224.

(2) They are bound by the same rule of negligence that a civilian is bound by under like circumstances.—Holland, for Use and Benefit of Williams, v. Mayes, 19 So.2d 709, 155 Fla. 129.

43. Tex.—Choate v. Renfro, Civ. App., 126 S.W.2d 718.
57 C.J. p. 793 note 84.

44. Mass.—Harrington v. Ward, 9 Mass. 251.
Wash.—McPhee v. U.S. Fidelity, etc., Co., 100 P. 174, 52 Wash. 154, 132 Am.S.R. 958, 21 L.R.A.,N.S., 535

45. Me.—Thompson v. Goding, 63 Me. 425.
57 C.J. p. 793 note 86.

46. Ga.—Hall, etc., Woodworking Mach. Co. v. Barnes, 42 S.E. 276, 115 Ga. 945.
57 C.J. p. 793 note 87.

47. Vt.—Paul v. Slason, 22 Vt. 231, 54 Am.D. 75.
57 C.J. p. 793 note 89.
"De minimis non curat lex" defined see 26 C.J.S. p. 705 note 20

48. La.—Alabama Bank v. Hozey, 2 Rob. 150.

49. N.Y.—**Corpus Juris cited in** Eckstein v. Massachusetts Bonding & Insurance Co., 24 N.E.2d 114, 116, 281 N.Y. 435.
57 C.J. p. 793 note 93.

50. U.S.—South v. Maryland, Md., 18 How. 396, 15 L.Ed. 433.
Ala.—Scott v. Ryan, 22 So. 284, 115 Ala. 587.

51. Ala.—Scott v. Ryan, supra.

52. U.S.—South v. Maryland, Md., 18 How. 396, 15 L.Ed. 433.
N.Y.—**Corpus Juris cited in** Eckstein v. Massachusetts Bonding & Insurance Co., 24 N.E.2d 114, 116, 281 N.Y. 435.

Rule criticized and held inapplicable
U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

53. Fla.—Holland, for Use and Benefit of Williams, v. Mayes, 19 So.2d 709, 155 Fla. 129.
Iowa.—Drake v. Keeling, 299 N.W. 919, 230 Iowa 1038
Mo.—Maxwell v. Andrew County, 146 S.W.2d 621, 347 Mo. 156.
57 C.J. p. 794 note 98
Actions against deputies see infra § 146.
Liability of inferior officers or deputies for false imprisonment see False Imprisonment § 42 b.
Summary remedies against deputies see infra § 168.

High degree of accountability is imposed.—Trammell v. Fidelity & Casualty Co. of New York, D.C.S.C., 45 F.Supp. 366.

Constable acting as deputy sheriff
The fact that a person is a constable cannot shield him from liability for an act patently committed by him as a deputy sheriff.—Chaudoin v. Fuller, 192 P.2d 243, 67 Ariz. 144.

Particular acts subjecting deputy to liability
(1) Acts of trespass and assault

bility to an individual who is injured by reason of his mere official nonfeasance,[54] neglect,[55] or unintentional misfeasance,[56] since in such case the wrong is purely official and not the personal act of the deputy and hence is attributable to the sheriff alone,[57] unless the statute expressly gives a remedy against the deputy.[58] So, where a deputy sheriff collects money on an execution and pays it over to the sheriff, the deputy cannot be held liable for not paying the money to the execution plaintiff.[59] In some jurisdictions, however, it has been held that, for neglect of duty by a deputy sheriff, an action will lie either against him or the sheriff.[60] A deputy sheriff who gives his receipt for notes placed in his hands to be collected thereby assumes an agency for the owner of such notes which is extra-official, and is personally liable for negligence or misconduct in the matter,[61] and a deputy sheriff who insures property in his hands as such is liable for the premium.[62]

Deputy acting as sheriff. It has been held that, where a sheriff who at the expiration of his term of office has in his hands process not fully executed dies before the complete execution thereof, his undersheriff becomes substituted in his place, assumes all his liabilities in respect of such process, and is personally liable for moneys collected by him thereunder.[63]

Deputy's liability to sheriff The deputy is liable to the sheriff for nonfeasance and unintentional misfeasance as well as for wilful misfeasance;[64] but no liability exists where the deputy is not in default[65] or where the sheriff is in pari delicto with the deputy.[66] A sheriff may maintain an action against his deputy for the latter's failure to pay over money collected by him without a demand.[67] Where a sheriff, sued for an alleged default of his deputy, makes no defense, and gives the deputy no notice of the proceedings, in consequence of which judgment is rendered which is erroneous as to the law and unjust as to the merits, the sheriff cannot recover the amount of the judgment from the deputy.[68]

Liability of deputy for acts of other deputies. Deputy sheriffs cannot, as a general rule, be held liable for matters beyond their own sphere of activity,[69] and thus they cannot be held liable for acts of other deputies over whom they have no authority.[70]

b. Coroners Acting as Sheriffs

The liabilities of a coroner acting as a sheriff are the same as those of the sheriff.

Where a coroner acts as sheriff as considered supra § 32, his liabilities are the same as those of the sheriff.[71]

in execution of process—Mendoza v Singer Sewing Machine Co, 84 S W 2d 715, 125 Tex. 639.

(2) Ejectment of tenant and his property without warrant and without waiting statutory period.—Perres v Munsch & Arnoudin, 6 La.App. 770.

(3) Negligence in operation of motor vehicle.—Culpepper v U S Fidelity & Guaranty Co., 33 S E 2d 168, 199 Ga. 56, conformed to 33 S E 2d 526, 72 Ga.App 171.

(4) Unnecessary killing of unarmed man in attempting an arrest without a warrant.—Hinton v Sims, 158 So. 141, 171 Miss. 741, suggestion of error overruled 158 So. 778, 171 Miss. 741.

(5) Wanton and reckless assault by firing of tear-gas gun.—Chaudoin v. Fuller, 192 P.2d 243, 67 Ariz. 144.

(6) Wrongful sale under execution of property of third person.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.

(7) Wrongful search—McMahan's Adm'x v. Draffen, 47 S.W.2d 716, 242 Ky. 785.

54. Ala.—Pondv v. Vanderveer, 17 Ala. 426.
57 C.J. p 794 note 99.

55. Vt.—Buck v. Ashley, 37 Vt. 475.

56. Ky—Murrell v. Smith, 3 Dana 462.
57 C J. p 794 note 2.

57. Ky.—Murrell v. Smith, 3 Dana 462.
N Y—Paddock v. Cameron, 8 Cow 212.

58. Ky.—Helm v. Haycraft, 2 Litt 171.
Wis—Heymann v Cunningham, 8 N W 401, 51 Wis. 506.
Amercement of deputies see infra § 173

59. Ga.—Varner v. Wooten, 38 Ga 575.
57 C.J. p 794 note 5.

60. Mass—Draper v. Arnold, 12 Mass. 449

61. Tenn.—Rose v. Lane, 3 Humphr 218.

62. N.Y—White v. Madison, 26 N Y. 117, 26 How.Pr. 481.
57 C J. p 794 note 8

63. N Y.—Newman v. Beckwith, 61 N.Y. 205.

64. Ky.—Harlan v. Lumsden, 1 Duv. 86.
57 C.J. p 794 note 10.

65. Va—Holland v. Helm, 7 Gratt 245, 48 Va 245.
57 C.J. p 794 note 11.

66. Ky.—Alexander v. Alexander, 157 S.W 377, 154 Ky. 324, rehearing denied 159 S W. 583, 154 Ky 773.

Conversion of taxes collected
A sheriff who collected and converted money to his own use without accounting to the county therefor, and acquiesced in similar action by his deputies, was held to be in pari delicto with his deputies as to the amount converted by them and not entitled to recover such amounts from them, although he was subsequently required to account to the county.—Alexander v. Alexander, supra.

67. Ala—Nelms v Williams, 18 Ala. 650.

68. Va—Fletcher v. Chapman, 2 Leigh 560, 29 Va. 560.

69. Wash.—Maciejczak v. Bartell, 60 P.2d 31, 187 Wash. 113.

70. Wash.—Maciejczak v. Bartell, supra.

71. Miss.—Longacre v. State, 3 Miss. 637.

Estoppel
Coroner acting as sheriff on execution directed to him is estopped to deny his authority.—Longacre v. State, supra.

c. De Facto Officers

A de facto sheriff or constable is subject to the same liability for his wrongful acts as a rightful incumbent of the office.

One who has acted as a sheriff, deputy, or constable under such circumstances as to make him an officer de facto, as considered supra §§ 12, 20, 28, is subject to the same liability for official misfeasance or nonfeasance as though he were the rightful incumbent of the office;[72] and in addition to this he may be held liable for acts which would impose no liability were he the rightful incumbent, under the rule that one who justifies his acts under his official character puts his title in issue and must establish his right to the office in order to escape liability.[73]

d. Persons Aiding Officers

A stranger who assists a sheriff or constable in the lawful execution of process incurs no liability thereby, but a stranger who aids the officer in an unlawful act knowing of its unlawfulness is liable to the person injured thereby.

A stranger who comes to the aid of a sheriff or constable in the lawful execution of process incurs no liability thereby,[74] although the subsequent acts or omissions of the officer are such as to make the officer a trespasser ab initio.[75] However, where the original act of the officer is unlawful in itself, any stranger who aids him in it,[76] knowing its unlawfulness,[77] is liable to the person injured thereby, although he acts at the officer's command.[78] On the other hand, if such aid is extended on the command of the officer, and in ignorance of the unlawfulness of the act in which he participates, he is not liable.[79] The mere fact that an officer has committed illegal acts in the course of the execution of process can impose no liability on persons who come to his assistance after the illegal acts have been committed and without knowledge thereof, and who aid only in acts which are in themselves legal.[80] So a person who merely appraises or assists in making an inventory of goods levied on by a sheriff in obedience to the summons of the officer is not a trespasser.[81] Where plaintiff in replevin undertakes to serve the writ as the servant of the sheriff, and in doing so takes property of a third person, he is liable as a trespasser, although the sheriff might have a valid defense, since in such case he is a principal as well as a servant of the officer.[82]

§ 54. —— Effect of Directions or Interference of Party or Attorney

a. Failure to follow directions
b. Compliance with directions
c. Effect of interference of party or attorney

a. Failure to Follow Directions

As a general rule the sheriff or constable is liable to the party causing process to issue for damages resulting from a failure to follow legal directions of such party as to how the process shall be executed.

As a general rule, where the party at whose instance process is issued or his attorney directs the sheriff or constable as to how the process shall be executed,[83] and no indemnity is demanded,[84] the officer is liable for any loss resulting from his failure to follow the directions unless he could not legally have done so.[85] It is not necessary that the grounds of the direction be communicated to the officer in order to render him liable for disregarding it,[86] and the fact that his noncompliance is in good faith will not relieve him from liability.[87]

Conflicting directions. Where an execution plaintiff and his attorney give conflicting directions, the sheriff is liable if he obeys those of the attorney

72. U.S.—Lawrence v. Sherman, C.C. Ill., 15 F.Cas.No.8,144, 2 McLean 488.
57 C.J. p. 795 note 16.

73. Ky.—Patterson v. Miller, 2 Metc. 493.
57 C.J. p. 795 note 17.

74. Mass.—Oystead v. Shed, 12 Mass. 506.

75. Mass.—Oystead v. Shed, supra.

76. Mich.—Kane v. Hutchisson, 53 N.W. 624, 93 Mich. 488.
57 C.J. p. 795 note 20
Enforcement of criminal laws
Persons engaged in an attempt to aid sheriffs and their deputies in the enforcement of the criminal laws of the state may be liable as for wrongs done to, or injuries inflicted on, third persons or on one another under certain circumstances.—Alabama Great Southern R. Co. v. Bonner, 75 So. 986, 200 Ala. 228, 10 A.L.R. 1160

77. Tex.—Cartwright v. Canode, 171 S.W. 696, 106 Tex. 502.
57 C.J. p. 795 note 21.

78. Mass.—Oystead v. Shed, 12 Mass. 506
Vt.—Hooker v. Smith, 19 Vt. 151, 47 Am.D. 679.

79. Tex.—Cartwright v. Canode, 171 S.W. 696, 106 Tex. 502.

80. Mass.—Oystead v. Shed, 13 Mass. 520, 7 Am.D. 172.
57 C.J. p. 795 note 24.

81. Neb.—Thrailkill v. Daily, 19 N.W. 595, 16 Neb. 114.

82. Me.—Williams v. Bunker, 5 A. 882, 78 Me. 373.

83. N.Y.—Root v. Wagner, 30 N.Y. 9, 86 Am.D. 348
57 C.J. p. 795 note 29.
Directions to deputy as affecting liability of sheriff see infra § 55.

84. N.H.—Ranlett v. Blodgett, 17 N.H. 298, 43 Am.D. 603.
Failure or refusal to give indemnity as affecting liability of officer for failure to execute process see infra § 60 d.

85. N.H.—Ranlett v. Blodgett, supra.

86. Mass.—Peirce v. Partridge, 3 Metc. 44.

87. N.H.—Smith v. Judkins, 60 N.H. 127.

instead of those of the party;[88] and where the statute gives the execution defendant the right to designate the property first to be taken, if there be no reasonable doubt of title, the sheriff is not liable for failure to levy on personal property of the debtor as directed by defendant where he has levied on real estate designated by such defendant.[89]

b. Compliance with Directions

A sheriff or constable who complies with lawful directions of a party in the execution of process is relieved from liability to such party for the results of such compliance.

A sheriff or constable is relieved from liability to the party for any results proceeding from his compliance with directions of the party or his attorney with respect to the execution of process[90] unless such directions were given in ignorance of the facts;[91] and in an action against a sheriff for an escape he may rely on the fact that the attorney of plaintiff ordered defendant's discharge;[92] but the sheriff will not be relieved from liability if the order was given after the escape,[93] and an execution creditor's assent to an escape, after it has happened, and without consideration, will not discharge the sheriff from liability.[94] Directions from a person other than the party or his attorney will not excuse a sheriff for failure to perform his duty.[95] So, a direction as to certain matters in connection with the execution of a writ does not relieve the sheriff from the consequences of a neglect of duty in another respect,[96] and a direction which the party had no authority to give affords no protection whatever.[97] The fact that the officer has acted under directions of plaintiff does not relieve him of liability to defendant or others for what he has done;[98] but, although a debt has been assigned before judgment, if the judgment is rendered and execution issued in the name of the assignor, the sheriff not knowing of the assignment incurs no liability to the assignee by following the assignor's directions.[99]

Directions to stay execution. A direction from an execution plaintiff or his attorney to stay the execution of the writ will relieve the officer from liability for failure to levy,[1] or delay in levying,[2] under such execution, or for failure to arrest defendant on a body execution;[3] but a stay of "sales only," indorsed on a fieri facias, does not excuse a failure to levy,[4] and such failure is not excused by directions of the judgment creditor after assignment of the execution.[5]

Directions as to return of process. Authority or instructions from plaintiff in execution or his attorney to hold up the writ will relieve the sheriff from liability for a failure to return it;[6] but he is not excused from a failure to return an execution by reason of instructions to return it "to be renewed,"[7] or to hold up or postpone a sale after levy,[8] and authority from the judgment creditor to retain the execution beyond the return-day will not relieve him from liability for failure to hold his levy and retain possession of the property to answer the writ.[9] In like manner a failure to return will not be excused by directions of an attorney representing only one of the parties for whose benefit the execution was issued.[10] A sheriff who would otherwise be liable as bail may be relieved by the fact that his deputy returned the execution at the request and by the direction of plaintiff's attorney before the return-day thereof,[11] and a sheriff is not

88. Wash.—Murray v. Mead, 32 P. 780, 5 Wash. 693.

89. Ind.—State v. Willis, 33 Ind. 118.

90. N.D.—**Corpus Juris cited in** Smith v. Hanson, 293 N.W. 551, 556, 70 N.D. 241, 129 A.L.R. 1356.
57 C.J. p. 795 note 36

Release of property in compliance with directions of the party for whose benefit the property was attached or held under levy does not subject the sheriff or constable to liability for damages resulting from its release.—Smith v. Hanson, 293 N.W. 551, 70 N.D. 241, 129 A.L.R. 1356.—57 C.J. p. 795 note 36 [b].

91. Me.—Steele v. Putney, 15 Me. 327.
57 C.J. p. 796 note 37.

92. Pa.—Scott v. Seiler, 5 Watts 235.

93. Pa.—Scott v. Seiler, supra.

94. N.Y.—Powers v. Wilson, 7 Cow. 274

95. N.J.—Stephens v. Clark, 8 N.J. Law 270
57 C.J. p. 796 note 41.

96. Vt.—Austin v. Burlington, 34 Vt. 506.
57 C.J. p. 796 note 42

97. U.S.—Lewis v. Hamilton, Super. Ark., 15 F.Cas. No. 8,324a, Hempst. 21.
57 C.J. p. 796 note 43.

98. Iowa.—Minthorn v. Hemphill, 34 N.W. 844, 73 Iowa 257.
57 C.J. p. 796 note 44

99. Tenn.—Atkinson v. Cooper, 2 Humphr. 361.

1. N.Y.—Smith v. Smith, 60 N.Y. 161
57 C.J. p. 797 note 50.

2. Del.—State v. Gemmill, 6 Del. 9

3. S.C.—King v. Deliesseline, 16 S.C.L. 357.

4. S.C.—Farrar v. Wingate, 38 S.C. L. 35, 53 Am.D. 709

5. Ga.—Gregory v. Waters, 19 Ga. 71.

6. Ark.—Hammons v. Pendleton, 133 S.W. 177, 96 Ark. 444.
57 C.J. p. 797 note 55
Liabilities of sheriff or constable arising out of duty to return process generally see infra §§ 110–116.

7. Tenn.—Bershears v. Warner, 5 Sneed 676, approved in Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424
57 C.J. p. 797 note 56

8. Tenn.—Clingman v. Barrett, 6 Humphr. 20.
57 C.J. p. 797 note 57.

9. N.Y.—Ansonia Brass, etc., Co. v. Babbitt, 74 N.Y. 395.

10. Tenn.—State v. Rose, 3 Lea 531.
57 C.J. p. 797 note 59

11. N.Y.—Douglas v. Haberstro, 88 N.Y. 611.

liable for making a false return, where he indorses such return on a writ of execution in accordance with plaintiff's directions.[12]

Necessity of written directions. Verbal directions will afford a sufficient protection to the officer[13] unless the statute requires them to be in writing.[14]

Evidence. An officer who attempts to escape liability on the ground that he acted in accordance with plaintiff's instructions has the burden of proof as to such instructions.[15]

c. Effect of Interference of Party or Attorney

The sheriff is not liable to a party for failure to perform a duty which he has been prevented from performing by such party.

Where the interference of a party or his attorney has prevented the sheriff from performing his duty, such party cannot hold the sheriff liable for such failure,[16] and a sheriff is not liable to plaintiff for an insufficient return where the delinquency is attributable to a statement of facts made to the sheriff by the agent of plaintiff,[17] but a sheriff cannot escape liability for failure to return a writ by showing that the conduct of plaintiff embarrassed him in making sales or adjusting or collecting the proceeds thereof[18]

Liability of party. If the sheriff exceeds his authority on his own instance and not on the direction of a party, the party is not responsible for such acts of excess[19]

§ 55. Liability for Acts or Omissions of Deputies

a. Acts or omissions within scope of official duties
b. Acts outside scope of official duties
c. Acts of de facto deputies
d. Acts done after termination of office
e. Acts of deputy of predecessor
f. Acts of deputy nominated by creditor
g. Direction to deputy as affecting liability of sheriff
h. Release from duty or liability

a. Acts or Omissions within Scope of Official Duties

(1) In general
(2) Applications of rule

(1) In General

As a general rule a sheriff is liable for acts, defaults, or misconduct of a deputy committed in the performance of official duties.

For all civil purposes the acts of a deputy sheriff or deputy constable are those of his principal, the sheriff or constable,[20] a deputy sheriff being the alter ego of the sheriff,[21] and his knowledge in most instances will be imputed to such principal,[22]

12. N.Y.—Gregg v. Murphy, 26 N.Y.S. 556, 73 Hun 389.
13. S.C.—Treasury Comrs. v. Allen, 9 S.C.L. 88.
57 C.J. p. 796 note 46.
14. Ky.—Carmical v. Broughton's Adm'x, 61 S.W.2d 612, 249 Ky. 749.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486.
57 C.J. p. 796 note 47.

Acquiescence by attorney for purchaser of realty at sheriff's sale did not, in absence of written authority, excuse sheriff's delay in executing writ of assistance.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.

15. Ind.—Bohon v. State, 5 Blackf. 467.
57 C.J. p. 796 note 49.
16. Ark.—Jett v. Shinn, 1 S.W. 693, 47 Ark. 373.
57 C.J. p. 797 note 62.

Delay in filing return

Where plaintiff's attorney in attachment proceeding drew deputy sheriff's return and, after it was signed by deputy, sent it out of state for service on a nonresident defendant, with result that return was not filed within the time required and attachment was thus invalidated, plaintiff could not recover from sheriff for damages resulting from invalidation of attachment, since delay in filing was due largely to conduct of plaintiff's attorney.—Summerfield v. Paulson, 278 N.W. 248, 68 N.D. 161.

17. Tenn.—Billingsly v. Rankin, 2 Swan 82.
18. Ark.—Norris v. State, 22 Ark. 524.
19. N.Y.—Treiber v. Mouriocourt, 258 N.Y.S. 206, 143 Misc. 741.
20. Ala.—National Surety Co. v. Boone, 151 So. 447, 227 Ala. 599.—Hereford v. Brentz, 68 So. 350, 192 Ala. 465.—Rogers v. Carroll, 20 So. 602, 111 Ala. 610.—**Corpus Juris cited in** Jefferson County v. Dockerty, 30 So.2d 469, 472, 33 Ala. App. 30, affirmed 30 So.2d 474, 249 Ala. 196.
Ark.—Davidson v. Chandler, 175 S.W.2d 567, 206 Ark. 375.—Whitlock v. Wood, 101 S.W.2d 950, 193 Ark. 695, 110 A.L.R. 955.
La.—Gray v. De Bretton, 188 So. 722, 192 La. 628.
N.C.—Styers v. Forsyth County, 194 S.E. 305, 212 N.C. 558.
Tenn.—State ex rel. Blanchard v. Fisher, 245 S.W.2d 179.
Tex.—**Corpus Juris quoted in** Rich v. Graybar Electric Co., 84 S.W.2d 708, 709, 125 Tex. 470, 102 A.L.R. 171.
Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465.
57 C.J. p. 797 note 66.

At common law all acts of undersheriffs or deputies are done in the name of the sheriff.—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447.

21. U.S.—Trammell v. Fidelity & Casualty Co. of New York, D.C.S.C., 45 F.Supp. 366.
Ala.—Mosely v. Kennedy, 17 So.2d 536, 245 Ala. 448.

One person

In legal contemplation, a deputy sheriff and the sheriff are one officer, as far as third persons are concerned, as to all questions of civil responsibility.—Rogers v. Carroll, 20 So. 602, 111 Ala. 610.

22. Fla.—Holland, for Use and Benefit of Williams v. Mayes, 19 So.2d 709, 155 Fla. 129.—Malone v. Howell, 192 So. 224, 140 Fla. 693.
N.Y.—Shea v. Conant, 134 N.Y.S. 315, 149 App.Div. 588, 3 N.Y.Civ.Proc., N.S., 220.
Tex.—**Corpus Juris quoted in** Rich v. Graybar Electric Co., 84 S.W.2d 708, 709, 125 Tex. 470, 102 A.L.R. 171.
57 C.J. p. 797 note 67.

although it is otherwise as to knowledge acquired by the deputy before his appointment.[23] Hence, in the absence of a statute relieving him from liability,[24] or providing in terms or in effect that a right of action for a specific tort shall be against the person committing it,[25] it is the general rule, sometimes by reason of statute, that a sheriff or constable is liable for the acts, defaults, or misconduct of the deputy done or committed in the performance of his official duties,[26] notwithstanding an action could not be maintained against the county.[27] His liability in this respect extends not only to acts of misfeasance but also to official nonfeasance,[28] and the fact that the deputy is mistaken as to the lawfulness of his act will not relieve the sheriff from liability.[29] The rule is particularly applicable to the acts of a special deputy appointed for a particular purpose.[30] It has been held that in order to make the sheriff liable the official act of the deputy must result in the wrong or bear some relation to the injury inflicted.[31]

The liability of a sheriff for acts of his deputy is grounded on the common law.[32] Statutes imposing

Limits on rule

A sheriff and his deputy are for many purposes regarded as one officer in law, but this rule does not extend so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies or to require impossibilities of the sheriff or to impose unconscionable exactions.—Roberts v. Dean, 187 So. 571, 133 Fla. 47, 136 Fla 421.

23. Colo.—Schraeder v. Mitchell, 215 P. 147, 73 Colo 320.
Tex.—**Corpus Juris quoted in** Rich v Graybar Electric Co, 84 S W.2d 708, 709, 125 Tex. 470, 102 A.L R 171

24. Ala.—Edmonds v. Shirley, 116 So 303, 22 Ala App 398
Tex.—**Corpus Juris quoted in** Rich v. Graybar Electric Co, 84 S.W 2d 708, 709, 125 Tex. 470, 102 A.L R 171
57 C J. p 798 note 69.

Statute held valid

Ala.—Tuscaloosa County v Shamblin, 169 So 234, 233 Ala 6.

25. Tex.—**Corpus Juris quoted in** Rich v Graybar Electric Co, 84 S W 2d 708, 709, 125 Tex. 470, 102 A L R. 171.
57 C.J. p 798 note 70.

26. U S.—State of Missouri ex rel. and to Use of De Vault v Fidelity & Casualty Co of New York, C C.A.Mo, 107 F 2d 343—Chambers v. Anderson, C.C A.Tenn., 58 F 2d 151—Bracken v. Cato, C C A Tex., 54 F.2d 457—Trammell v. Fidelity & Casualty Co. of New York, D.C S. C., 45 F.Supp. 366
Ala.—National Surety Co. v. Boone, 151 So. 447, 227 Ala 599—Hereford v. Brentz, 68 So. 350, 192 Ala. 465.
Fla.—Swenson v. Cahoon, 152 So 203, 111 Fla. 788
Ga.—Standard Surety & Casualty Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 828.
Ind.—**Corpus Juris cited in** Magenheimer v. State ex rel. Dalton, 90 N E 2d 813, 817, 120 Ind App. 128.
Iowa.—Drake v. Keeling, 299 N.W 919, 230 Iowa 1038.
Kan.—Zurpucken v. Glens Falls Indemnity Co., 149 P.2d 617, 158 Kan 599—Pfannenstiel v Doerfler, 105 P.2d 886, 152 Kan. 479
La.—Gray v. De Bretton, 188 So 722, 192 La 628—Britt v Merritt, App, 45 So 2d 902, affirmed in part and reversed in part on other grounds 53 So 2d 121, 219 La. 333
N C.—**Corpus Juris cited in** Davis v. Moore, 2 S E 2d 366, 368, 215 N C 449—Styers v Forsyth County, 194 S E. 305, 212 N.C. 558.
Ohio.—State ex rel Geyer v. Griffin, 76 N.E 2d 294, 80 Ohio App. 447.
Pa.—Fetrow v. Fetrow, Com.Pl., 59 Dauph.Co. 375.
S.C.—Rutledge v. Small, 6 S E.2d 260, 192 S C. 254
Tenn.—State ex rel. Blanchard v Fisher, 245 S W.2d 179.
Tex.—Ætna Casualty & Surety Co. v. Clark, 150 S W 2d 78, 136 Tex 238—**Corpus Juris cited in** Mendoza v Singer Sewing Mach. Co., 84 S.W 2d 715, 717, 125 Tex. 639—**Corpus Juris quoted in** Rich v. Graybar Electric Co, 84 S W 2d 708, 709, 125 Tex 470, 102 A L R. 171—Graves v. Buzbee, Civ App., 45 S W 2d 392.
Wash.—Biehn v Bannick, 7 P.2d 567, 166 Wash 465
57 C J. p 798 note 71.

Amercement of sheriff for defaults of deputy see infra § 173.
Liability of sheriff on official bond for act of deputy see infra § 179.
Summary remedies against sheriff for acts of deputy see infra § 168.

Purpose of statute

By enactment of statute making the sheriff responsible for neglect of duty or misconduct in office of his deputies it was the intention of the legislature to place on the sheriff the responsibility of seeing to it that his choice of deputies be wisely made, and that trustworthy and dependable peace officers be chosen as his aids.—Hahratty v Godfrey, 184 N.E 842, 44 Ohio App. 360

Basis of liability

(1) The liability of the sheriff for the acts of his deputy has been held to be governed by the law applicable to the relationship of principal and agent.—Davis v. Moore, 2 S.E 2d 366, 215 N.C. 449.

(2) On the other hand, it has been held that the liability of a sheriff for the acts of his deputies is not based on the theory that the relationship of master and servant or principal and agent exists, but on the theory that the deputy is the representative of the sheriff, and his acts are those of the sheriff
Cal.—Michel v Smith, 205 P. 113, 188 Cal. 199—Clement v Dunn, 299 P. 545, 114 Cal.App. 60.
Fla.—Holland, for Use and Benefit of Williams v. Mayes, 19 So.2d 709, 155 Fla. 129—Malone v Howell, 192 So. 224, 140 Fla 693
La.—Gray v De Bretton, App, 184 So. 390, affirmed 188 So. 722, 192 La 628—Simoneaux v. Gonzales, App, 4 So 2d 35
Mo.—Humphrey v. Ownby, App., 104 S W 2d 398
S C.—Rutledge v Small, 6 S.E 2d 260, 192 S C 254
Tex.—Rich v. Graybar Electric Co., 84 S W 2d 708, 125 Tex 470, 102 A L R. 171

Repeal of statute

Act expressly repealing statute authorizing sheriff to appoint deputies with judge's approval has been held to repeal such statute in its entirety, including provision thereof that sheriff remains responsible for deputies' acts.—Gray v De Bretton. App, 184 So 390, affirmed 188 So. 722, 192 La. 628

27. Ohio.—Hanratty v. Godfrey, 184 N E 842, 44 Ohio App. 360
28. Idaho.—Price v. Pace, 296 P. 189, 50 Idaho 353.
Tex.—**Corpus Juris quoted in** Rich v. Graybar Electric Co, 84 S W.2d 708, 709, 125 Tex. 470, 102 A.L.R. 171.
57 C.J. p 799 notes 71, 72.
29. U.S.—Reichman v. Harris, Tenn, 252 F. 371, 164 C C.A. 295.
Ala.—Rogers v. Carroll, 20 So. 602, 111 Ala 610.
30. Tenn.—Love v. Bass, 238 S W. 94, 145 Tenn. 522.
31. Mo.—Humphrey v. Ownby, App., 104 S.W 2d 398.
32. Tenn.—State ex rel Blanchard v. Fisher, 245 S W.2d 179.

such liability on the sheriff are declaratory of the common law, not in derogation thereof,[33] and hence are not construed strictly so as to render the sheriff liable only for positive or aggressive wrongs.[34] The liability of a constable for the official acts of his deputy is the same at common law as the liability of a sheriff for the acts of his deputy,[35] and the omission of a statute declaring this liability of a sheriff to declare the similar liability of a constable does not abolish the latter's liability.[36]

Acts by virtue of office or under color of office. Sheriffs and constables are civilly liable for the acts and omissions of their deputies performed within the scope of their legal authority and by virtue of their office.[37] Some authorities hold that a sheriff or constable is liable for any act of a deputy done under color of office,[38] but other authorities hold that a sheriff or constable is liable only for acts of a deputy done by virtue of office and is not liable for acts done merely under color of office.[39] It has been variously held or stated that in order to render a sheriff or constable liable for the acts of a deputy the acts must be performed by the deputy by virtue of his office,[40] or by virtue or under color of office,[41] or both by virtue of office and under color of office.[42]

Mode of selection of deputy. The rule which imposes liability on a sheriff for acts of his deputies has been held to be inapplicable in the case of deputies who are selected from restricted lists, and who are governed by civil service regulations and city or county charters, as to acts which the sheriff has not directed or in which he has not cooperated.[43] On the other hand, the sheriff has been held liable for the tortious acts of his deputy in the performance of official duties notwithstanding a statute creating the office of the deputy or the application of a civil service statute to such office.[44] Where the law contemplates that the appointment of deputies by constables shall be voluntary and in the exercise of a free choice, the constable has been held not to be relieved of liability for acts of his deputies merely because he has no free hand in hiring and firing deputies, as where their appointment must be confirmed by a commissioners' court.[45]

Deputy as independent officer. A sheriff has been held not liable for the defaults or misconduct of deputies or bailiffs who do not act merely as his agents, but are in effect independent public officers,[46] unless, and only to the extent that, the statute renders them liable.[47]

Policemen. A sheriff has been held not to be liable for the torts of policemen appointed by him[48] unless he has been negligent in their selection,[49]

33. Ark.—Davidson v. Chandler, 175 S.W.2d 567, 206 Ark. 375
Ind.—Magenheimer v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind. App. 128
Tex.—Rich v. Graybar Electric Co., 84 S.W.2d 708, 125 Tex. 470, 102 A.L.R. 171.

34. Ind.—Magenheimer v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind. App. 128

35. Tex.—Rich v. Graybar Electric Co., 84 S.W.2d 708, 125 Tex. 470, 102 A.L.R. 171.

36. Tex.—Rich v. Graybar Electric Co., supra

37. Fla.—Holland, for Use and Benefit of Williams v. Mayes, 19 So.2d 709, 155 Fla. 129—Malone v. Howell, 192 So. 224, 140 Fla. 693—Swenson v. Cahoon, 152 So. 203, 111 Fla. 788.
Tenn.—State ex rel. Blanchard v. Fisher, 245 S.W.2d 179.

38. Ariz.—Chaudoin v. Fuller, 192 P.2d 243, 67 Ariz. 144
Ark.—Davidson v. Chandler, 175 S.W.2d 567, 206 Ark. 375—Whitlock v. Wood, 101 S.W.2d 950, 193 Ark. 695, 110 A.L.R. 955—Usrey v. Yarnell, 27 S.W.2d 988, 181 Ark. 804.
Cal.—Abbott v. Cooper, 23 P.2d 1027, 218 Cal. 425.
Ga.—Hawkins v. National Surety Corp., 11 S.E.2d 250, 63 Ga.App. 367.
La.—Gray v. De Bretton, 188 So. 722, 192 La. 628
N.C.—Styers v. Forsyth County, 194 S.E. 305, 212 N.C. 558
Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465

"Official act" does not mean what deputy may lawfully do in execution of his office, but means whatever is done under color or by virtue of his office.
Ariz.—Chaudoin v. Fuller, 192 P.2d 243, 67 Ariz. 144.
Cal.—Abbott v. Cooper, 23 P.2d 1027, 218 Cal. 425
Mass.—Knowlton v. Bartlett, 1 Pick. 271.

39. Tenn.—State ex rel. Blanchard v. Fisher, 245 S.W.2d 179—State v. National Surety Co., 39 S.W.2d 581, 162 Tenn. 547—Ivy v. Osborne, 279 S.W. 384, 152 Tenn. 470

40. Fla.—Roberts v. Dean, 187 So. 571, 133 Fla. 47, 136 Fla. 421—Swenson v. Cahoon, 152 So. 203, 111 Fla. 7 8
Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80.

41. Miss.—State, for Use of Dew, v. Lightcap, 179 So. 880, 181 Miss. 893.

42. La.—Simoneaux v. Gonzales, App., 4 So.2d 35
Or.—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.

43. Cal.—Lorah v. Biscailuz, 54 P.2d 1125, 12 Cal.App.2d 100

44. Ga.—Standard Sur. & Cas. Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 823.

45. Tex.—Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 125 Tex. 639.

46. Ala.—**Corpus Juris cited in** Tuscaloosa County v. Shamblin, 169 So. 234, 238, 233 Ala. 6.
57 C.J. p. 799 note 75.
Prison matrons
Act providing for prison matrons to take charge of and properly care for female prisoners in county jails has been held not to make such matrons public officers or servants, as distinguished from sheriffs' deputies, so as to relieve sheriffs from responsibility for matrons' acts.—Magenheimer v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind. App. 128.

47. Ala.—**Corpus Juris cited in** Tuscaloosa County v. Shamblin, 169 So. 234, 238, 233 Ala. 6.
57 C.J. p. 799 note 76.

48. Hawaii.—County of Hawaii v. Martin, 33 Hawaii 677.

49. Hawaii.—County of Hawaii v. Martin, supra.

or has directed or ratified their wrongful acts,[50] or has personally participated therein.[51]

Subordinate assistants. It has been held that the doctrine of respondeat superior applicable to the relationship of master and servant, as discussed in Master and Servant §§ 561–575, does not, in the absence of statute, apply to a sheriff so as to render him liable for defaults or misfeasance of subordinate assistants[52] unless he has been negligent in their appointment or supervision.[53]

Extent of liability. While at common law a sheriff is liable for the acts of his deputy to the full amount of damage suffered,[54] this liability may be limited by statute.[55]

(2) Applications of Rule

The liability of a sheriff or constable for acts or omissions of his deputy may include liability for assaults committed by the deputy while performing the duties of the office, reckless or wanton acts while making an arrest, negligence in caring for and protecting prisoners, failure to serve process, failure to return a writ, and many other acts or omissions of the deputy.

In the absence of a statute providing otherwise, the liability of a sheriff or constable for the acts of his deputy extends to those acts of a deputy which involve an abuse of power reposed in him.[56] Under the circumstances of the case, a sheriff or constable has been held liable for particular acts of a deputy,[57] such as an assault committed by the deputy while performing the duties of the office,[58] negligent, reckless, or wanton acts while making an arrest[59] or preventing the escape of persons arrested,[60] false imprisonment or wrongful arrest,[61] negligence in caring for and protecting prisoners in his custody,[62] negligently allowing a prisoner to escape,[63] and wrongfully taking money or extorting illegal fees.[64]

Execution of process generally. A sheriff or constable is liable for his deputy's failure to serve process,[65] abuse of process,[66] and an assault[67] or tres-

50. Hawaii—County of Hawaii v Martin, supra

51. Hawaii—County of Hawaii v. Martin, supra

52. Ala.—Langis v. Byrne, 131 So. 444, 222 Ala. 183

Convict cleaning jail

The doctrine of respondeat superior has been held not to make the sheriff liable for injury to a third person by the negligent or wrongful acts of a convict while engaged in cleaning the jail under employment by the sheriff or his deputy, in the absence of negligence in the appointment of such subordinate or of failure properly to supervise his acts.—Langis v. Byrne, supra

53. Ala.—Langis v Byrne, supra

54. Wash.—Coles v. McNamara, 230 P. 430, 131 Wash. 377

55. Wash.—Coles v. McNamara, supra
57 C.J. p. 799 note 78.

56. Fla.—Swenson v. Cahoon, 152 So. 203, 111 Fla. 788

At common law sheriff is responsible for all acts of undersheriffs or deputies, although such acts would amount to trespass or an extortion.—State ex rel. Geyer v. Griffin, 76 N.E.2d 294, 80 Ohio App. 447

Exceeding rights

Sheriff is liable for acts of deputy in exceeding rights as arresting officer in discharge of official duties.—West v. Nantz' Adm'r, 101 S.W.2d 673, 267 Ky. 113

57. **Negligence in operation of motor vehicle**

Negligence of deputy sheriff in operating motor vehicle belonging to county and under control of sheriff, when conveying prisoners to penitentiary, was held official misconduct for which sheriff was liable.—Hanratty v. Godfrey, 184 N.E. 842, 44 Ohio App. 360

58. Ala.—National Surety Co. v Boone, 151 So. 447, 227 Ala. 599
Kan.—Pfannenstiel v. Doerfler, 105 P.2d 886, 152 Kan. 479.
Ky.—West v. Nantz' Adm'r, 101 S.W. 2d 673, 267 Ky. 113
La.—Robertson v. Palmer, App., 55 So.2d 68.—Dufrene v. Rodrigue, App., 38 So.2d 511.
57 C.J. p. 799 note 79

59. U.S.—Chambers v. Anderson, C.C.A. Tenn., 58 F.2d 151.
Ariz.—Chaudoin v. Fuller, 192 P.2d 243, 67 Ariz. 144
Miss.—Hinton v. Sims, 158 So. 141, 171 Miss. 741, suggestion of error overruled 158 So. 778, 171 Miss. 741
57 C.J. p. 799 note 83

Shooting person in fleeing car

(1) Where deputy constable, in pursuit of driver of car who had committed misdemeanor in constable's presence, fired at fleeing car and struck passenger therein, constable was liable.—State ex rel. and to Use of Kaercher v. Roth, 49 S.W. 2d 109, 330 Mo. 105.

(2) Fact that such deputy pursued fleeing car across county line and there shot passenger therein was held not to relieve constable of liability.—State ex rel. and to Use of Kaercher v. Roth, supra.

Killing of innocent person

Fla.—Holland, for Use and Benefit of Williams, v. Mayes, 19 So.2d 709, 155 Fla. 129
Wash.—Crose v. John, 164 P. 941, 96 Wash. 216.

60. Miss.—Brown v. Weaver, 23 So. 388, 76 Miss. 7, 71 Am.S.R. 512, 42 L.R.A. 423.
57 C.J. p. 799 note 84.

61. Ala.—Hereford v. Brentz, 68 So. 350, 192 Ala. 465.
Cal.—Abbott v. Cooper, 23 P.2d 1027, 218 Cal. 425.
57 C.J. p. 799 note 80.
Liability of superior executive officers for false imprisonment by inferiors or deputies generally see False Imprisonment § 42 a.

Arrest without warrant or reasonable cause

U.S.—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Casualty Co. of New York, C.C.A. Mo., 107 F.2d 343
Kan.—Elwell v. Reynolds, 51 P. 578, 6 Kan. App. 545.

62. Ga.—**Corpus Juris** cited in Kendrick v. Adamson, 180 S.E. 647, 51 Ga. App. 402
Ind.—Magenheimer v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind. App. 128
Wash.—Kusah v. McCorkle, 170 P. 1023, 100 Wash. 318, L.R.A. 1918C 1158

63. N.Y.—Palmer v. Hatch, 9 Johns. 329
Pa.—Wheeler v. Hambright, 9 Serg. & R. 390.

64. N.Y.—McIntyre v. Trumbull, 7 Johns. 35.

65. Ala.—Rogers v. Carroll, 20 So. 602, 111 Ala. 610
57 C.J. p. 799 note 86

66. Wash.—Young v. Long, 214 P. 821, 124 Wash. 460.
57 C.J. p. 799 note 87.

67. Tex.—Mendoza v. Singer Sewing Machine Co., 84 S.W.2d 715, 125 Tex. 639.

pass[68] committed in enforcing legal process.

Return of process. A sheriff or constable is liable for the deputy's failure to return a writ,[69] making a premature return by reason of which the party is damaged,[70] and making a false[71] or improper[72] return.

Levy on, or other taking of, property, and sale thereof. The deputy's failure to make a levy according to the mandate of a writ is a default for which the sheriff or constable is liable[73] unless such failure is justified;[74] and liability also attaches to the deputy's failure on receiving an execution to make a demand on attaching officer so as to fix his liability,[75] making a wrongful levy on, or other taking of, property under color of legal process,[76] taking possession of goods under a void execution,[77] releasing an attachment,[78] failure to sell goods levied on,[79] giving erroneous information as to the place of sale,[80] a sale of property under a defective execution,[81] or a sale of property of a third person with knowledge of such person's claim thereto.[82]

Collection, custody, and disposition of money or property. A sheriff or constable is liable for the defaults or negligence of the deputy with respect to the care of property in his official custody,[83] loss through the deputy's negligence of property levied on by him and in his possession,[84] the release of property on an invalid claim of exemption,[85] failure or refusal of the deputy to pay over money collected by him,[86] or to apply money received from sales of property attached to the satisfaction of executions issued on judgments obtained by the attaching creditors.[87] Where a deputy sheriff receives an execution commanding, not his principal, but the sheriff of another county, to make the money for which the process issues, and proceeds to collect the money, he becomes possessed of it under color or by virtue of his office, and the sheriff is liable to plaintiff therefor.[88] A sheriff has also been held liable for money paid into the hands of a clerk in his office who embezzled it.[89]

Taking insufficient bond or security. Where a deputy takes insufficient bail[90] or an insufficient bond in replevin[91] the sheriff is liable to the person injured thereby.

b. Acts outside Scope of Official Duties

As a general rule a sheriff is not liable for acts of his deputy outside the scope of his official duties.

As a general rule a sheriff or constable is not liable for the acts of his deputy outside of the scope of his official duties[92] or for the deputy's neglect of any act or duty which the law does not require

68. Tex.—Mendoza v. Singer Sewing Machine Co., supra.
57 C.J. p. 799 note 88

69. Tenn.—Clingman v. Barrett, 6 Humphr. 20
57 C.J. p. 799 note 90

70. Mich.—Prosser v. Coots, 15 N.W. 448, 50 Mich. 262.

71. N.C.—Houser v. Hampton, 29 N.C. 333.
57 C.J. p. 799 note 92

72. Mich.—Prosser v. Coots, 15 N.W. 448, 50 Mich. 262

73. N.H.—Haley v. Thurston, 60 N.H. 204.
57 C.J. p. 800 note 94.

74. Me.—Lambard v. Pike, 33 Me. 141.
57 C.J. p. 800 note 95.

75. Me.—Kelley v. Tarbox, 66 A. 9, 102 Me. 119.

76. Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.
57 C.J. p. 800 note 97.

77. Ala.—Stephens v. Head, 35 So. 565, 138 Ala. 455.

78. Cal.—Neff v. Redmond, 202 P. 925, 54 Cal.App. 757.

79. U.S.—Clute v. Goodell, C.C.Mich., 5 F.Cas.No. 2,911, 2 McLean 193.

80. Mo.—State v. Moore, 72 Mo. 285.
57 C.J. p. 800 note 2.

81. U.S.—Lawrence v. Sherman, C.C. Ill., 14 F.Cas.No. 8,144, 2 McLean 488.

82. N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.

83. N.H.—Eastman v. Judkins, 59 N.H. 576.
57 C.J. p. 800 note 5.

84. Vt.—Buck v. Ashley, 37 Vt. 475

Leaving property unprotected

Sheriff was held negligent, justifying recovery against him, where deputy allowed seized property to remain on premises of defendant, unprotected, unenclosed, and practically unguarded.—Price v. Pace, 296 P. 189, 50 Idaho 353.

85. Va.—Sage v. Dickinson, 33 Gratt. 361, 74 Va. 361.

86. N.Y.—James v. Gurley, 48 N.Y. 163.
57 C.J. p. 800 note 8.

87. Mass.—New Hampshire Sav. Bank v. Varnum, 1 Metc. 34

88. N.Y.—Walden v. Davison, 15 Wend. 575

89. S.C.—Abercrombie v. Marshall, 2 S.C.L. 90, followed in Carlin v. Kerr, 2 S.C.L. 112
57 C.J. p. 801 note 11.

90. Mass.—Young v. Hosmer, 11 Mass. 89
S.C.—Teasdale v. Hart, 2 S.C.L. 173.

91. Ky.—Murrell v. Smith, 3 Dana 462.

Me.—Harriman v. Wilkins, 20 Me. 93.

92. U.S.—Trammell v. Fidelity & Casualty Co. of New York, D.C.S.C., 45 F.Supp. 366.
Ark.—Davidson v. Chandler, 175 S.W. 2d 567, 206 Ark. 375.
Fla.—Malone v. Howell, 192 So. 224, 140 Fla. 693.
Ky.—Commonwealth, for Use and Benefit of Coombs v. Vincent, 137 S.W.2d 1091, 282 Ky. 95
Miss.—State, for Use of Dew v. Lightcap, 179 So. 880, 181 Miss. 893.
Mo.—Humphrey v. Ownby, App., 104 S.W.2d 398.
57 C.J. p. 801 note 15.

Reason for rule

Sheriff is responsible for wrongs of deputy sheriff only when he acts officially, since deputy is public officer and not servant or agent of sheriff in private sense.—Humphrey v. Ownby, supra.

Unauthorized unofficial acts of deputy do not render sheriff liable.—Ætna Casualty & Surety Co. v. Clark, 150 S.W.2d 78, 136 Tex. 238—Sheppard v. Gill, Civ.App., 58 S.W.2d 168, affirmed 90 S.W.2d 563, 126 Tex. 603—Graves v. Buzbee, Tex.Civ.App., 45 S.W.2d 392.

Usurpation of power

In the absence of a statute providing otherwise, the sheriff is not liable for acts of his deputy in-

him officially to perform.[93] In other words, a sheriff or constable is not responsible for a wrongful act of his deputy unless such act was done in violation of an official duty or was an unfaithful or improper performance of an official act.[94] Authorization, participation, or ratification by the sheriff may subject him to liability for an act outside the scope of the deputy's duties,[95] but it has been held that the fact that an unofficial act was done by the deputy sheriff in the belief that it was within his official power, and that the sheriff, on being informed of it, approved it, and afterward acted on it, in the same belief, will not render the latter liable.[96] Where a sheriff delivered a fieri facias to a deputy sheriff, with written directions to make a levy and await further orders from the execution plaintiff, thereby severing the relationship of principal and deputy, and making the deputy plaintiff's agent, the sheriff was held not answerable for the deputy's subsequent acts or defaults.[97] A sheriff cannot be held liable for the breach of an unofficial or unauthorized contract made by his deputy.[98]

Application of rule. Under the particular circumstances of the case, in the application of the rule that a sheriff or constable is not liable for the acts of his deputy outside the scope of his official duties, the sheriff or constable has been held not to be liable for failure of a deputy, who has undertaken to secure an alias execution, to secure it in time to be available,[99] for failure to record the levy of an execution,[1] for failure to turn over money not received by the deputy in the line of his official duties,[2] for acceptance of service of a notice of a claim to property levied on,[3] for executing an order of a justice of the peace for the removal of an obstruction in a town way or private way,[4] for a search and seizure without a lawful warrant or other authority,[5] for an unlawful imprisonment,[6] for a malicious prosecution,[7] for an arrest without a warrant or other legal authority[8] or an injury or death inflicted by the deputy while making such arrest,[9] for an assault on a person under arrest, not

volving a usurpation of power—Swenson v. Cahoon, 152 So. 203, 111 Fla. 788

Individual or private wrongs of deputy

(1) Sheriff is not responsible for private or negligent acts of his deputy.—Bolton v. Sevario, La.App., 25 So.2d 115.

(2) Fact that sheriff appoints deputy does not make sheriff liable for individual wrongs of deputy.—Humphrey v. Ownby, Mo.App., 104 S.W.2d 398.

93. Me.—Harrington v. Fuller, 18 Me. 277, 36 Am.D. 719

94. La.—Gray v. De Bretton, 188 So. 722, 192 La. 628—Sanders v. Humphries, 78 So. 168, 143 La. 43—Robertson v. Palmer, App., 55 So.2d 68—Britt v. Merritt, App., 35 So.2d 281—Simoneaux v. Gonzales, App., 4 So.2d 35—Davis v. McDowell, App., 185 So. 634.

95. N.Y.—Blair v. Flack, 17 N.Y.S. 64, 62 Hun 509

57 C.J. p. 801 note 19.

Acts not authorized, participated in, or ratified, by sheriff

Fla.—Goodrich v. Lawrence, 189 So. 233, 138 Fla. 287.

Tenn.—Ivy v. Osborne, 279 S.W. 384, 152 Tenn. 384

Tex.—Taylor v. Stanford, Civ.App., 229 S.W.2d 427—Graves v. Buzbee, Civ.App., 45 S.W.2d 392.

Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465.

96. Minn.—Dorr v. Mickley, 16 Minn. 20.

97. N.Y.—Mickles v. Hart, 1 Den. 548.

57 C.J. p. 801 note 17.

98. Vt.—Hunt v. Hill, 143 A. 307, 101 Vt. 311.

57 C.J. p. 801 note 20.

99. Vt.—Cowdery v. Smith, 50 Vt. 235.

1. Mass.—Tobey v. Leonard, 15 Mass. 200.

57 C.J. p. 802 note 23.

2. Cal.—Neff v. Redmond, 202 P. 925, 54 Cal.App. 757.

57 C.J. p. 802 note 24

3. Iowa.—Chapin v. Pinkerton, 12 N.W. 282, 58 Iowa 236

4. Mass.—Davis v. Smith, 130 Mass. 113.

57 C.J. p. 802 note 26.

5. Tex.—Taylor v. Stanford, Civ.App., 229 S.W.2d 427—Sheppard v. Gill, Civ.App., 58 S.W.2d 168, affirmed 90 S.W.2d 563, 126 Tex. 603.

6. Fla.—Swenson v. Cahoon, 152 So. 203, 111 Fla. 788.

Tex.—Graves v. Buzbee, Civ.App., 45 S.W.2d 392

7. Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465

8. Ky.—Edens v. Hudson, 243 S.W. 2d 501

Tenn.—Stephens v. Hinds, 194 S.W.2d 483, 183 Tenn. 652—Ivy v. Osborne, 279 S.W. 384, 152 Tenn. 384

Tex.—Graves v. Buzbee, Civ.App., 45 S.W.2d 392.

Arrest on search warrant

If search warrant for third person's house was valid, plaintiff's arrest thereunder by deputy sheriffs would not constitute official act of deputies, where warrant did not direct plaintiff's arrest; hence sheriff would not be liable for such arrest.—Sheppard v. Gill, Civ.App., 58 S.W.2d 168, affirmed 90 S.W.2d 563, 126 Tex. 603

Offense not committed in presence of deputy

Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80, L.R.A.1915E 172.

Tex.—Maddox v. Hudgeons, 72 S.W. 414, 31 Tex.Civ.App. 291.

Personal wrong of deputy

Unlawful arrest by deputies without warrant was a personal wrong of deputies for which deputies alone would be liable unless sheriff directed, authorized, or cooperated in wrongful act of deputies.—Stephens v. Hinds, 194 S.W.2d 483, 183 Tenn. 652.

9. Ky.—Commonwealth, for Use and Benefit of Coombs, v. Vincent, 137 S.W.2d 1091, 282 Ky. 95.

57 C.J. p. 802 note 28

Deputy must have authority to make arrest in order to render the sheriff liable.

Fla.—Malone v. Howell, 192 So. 224, 140 Fla. 693.

Tex.—King v. Brown, 94 S.W. 328, 100 Tex. 109.

Agreement by group of deputies to make an arrest which is unauthorized will not make the sheriff liable for acts of his deputies unless deputies were acting within their authority under law authorizing such an arrest.—Malone v. Howell, 192 So. 224, 140 Fla. 693.

Person's approach to an unlawful liquor still, in absence of other circumstances, was not such conduct as would authorize his arrest without a warrant on theory that he had committed crime in presence of deputy sheriffs guarding still, with respect

made in discharge of any duty of the deputy,[10] for a malicious killing,[11] or for the killing of a person by a deputy holding a warrant for arrest, but before announcing that he held a warrant;[12] and it has been held that a deputy who, while fleeing from a person whom he is called to arrest, shot and killed one of his own party was not acting within his official authority so as to make the sheriff liable,[13] unless, of course, the latter was present aiding and abetting the act.[14]

Where a special deputy, without the knowledge or direction of the sheriff, voluntarily procured a "John Doe" warrant and, in attempting to make an arrest, shot a bystander, the sheriff was not liable [15] It has also been held that where a sheriff was not present when his deputies killed a person in the execution of a writ, and they acted, in the killing, on their own initiative, the liability of the sheriff, if any, could not be enforced in an action for wrongful death [16] The representations of a deputy sheriff at an execution sale that the title to the property is clear and all right, made under the belief that they are true, will not bind the sheriff so as to render him liable to the purchaser for failure of title.[17] So, where under the law the sheriff has nothing to do with the collection of taxes until executions have been issued and delivered to him, he is not liable for taxes collected by a deputy before the issuance and delivery of execution, where such deputy embezzles the money so collected.[18] Other cases illustrating the rule that a sheriff or constable is not liable for the acts of a deputy outside the line of his official duties appear in the note [19]

c. Acts of de Facto Deputies

A sheriff or constable generally is held liable for official misconduct of a de facto deputy.

A sheriff or constable generally is liable for the official misconduct, defaults, etc, of a de facto deputy,[20] that is, a person whom the sheriff or constable has held out as his deputy,[21] and who has acted as a deputy[22] with the consent of the sheriff or constable,[23] although such person may not have been legally appointed a deputy[24] or may not have

to sheriff's liability for death of deceased shot by deputies in attempting to flee from still —Malone v Howell, supra.

10. Fla —Goodrich v Lawrence, 189 So 233, 138 Fla 287

Shooting

A sheriff is not liable for injuries sustained by one not under arrest when a deputy shot him because he insisted on being present while the deputy spoke to another who likewise was not under arrest and against whom the deputy had no warrant of arrest —State, for Use of Dew v Lightcap, 179 So 880, 181 Miss 893.

11. Ky —Casey v Fidelity & Cas Co of New York, 128 S W.2d 939, 278 Ky 426—Howard v. Caudill, 15 S W 2d 245, 228 Ky 403

12 U S —Tate v Baugh, C C A. Tenn, 264 F 892

13. Okl —McLain v Arnold, 174 P 563, 73 Okl 52

14. Okl —Jordan v Neer, 125 P 1117, 34 Okl 400

15. N.C.—Hamie v Rice, 139 S E 380, 194 N C 234.

16. Ala —Wise v Curl, 58 So 286, 177 Ala 324

17. Ind.—Lewark v Carter, 20 N.E 119, 117 Ind 206, 10 Am S.R 40, 3 L.R A 440

18. S C —Dillon County v. Lane, 104 S E 184, 114 S.C 494.

19. Pa.—Miller v. Heck, 9 Watts 439.
57 C.J p 802 note 37.

Acts growing out of conspiracy

Where deputy sheriff and others conspired to get a wife to return to her husband by having deputy, who was commissioned in another parish, serve a false warrant for her arrest, and while carrying out the conspiracy one of conspirators shot and killed third person, sheriff who had commissioned the deputy was not liable to third person's widow for his death, since deputy was not acting with official authority —Davis v. McDowell, La App, 185 So 634.

Deputy sheriff acting as marshal

Under evidence that village mayor appointed deputy sheriff to act as town marshal in absence of regular marshal, that appointee's duties as deputy sheriff did not embrace that of maintaining order in dance halls of village, that he performed such duty only when he was designated to act in place of town marshal, that deputy arrested deceased at dance hall and carried him to village jail, and that deceased attempted to escape and was shot by deputy, sheriff was not liable regardless of whether deputy recklessly or maliciously shot deceased —Simoneaux v. Gonzales, La App, 4 So 2d 35.

Deputies working for county commissioners

Where a county, through the county commissioners, was working a prisoner in the county jail, the sheriff was held not liable for his deputy's negligence, if any, resulting in the death of the prisoner, because the deputy was working for the commissioners and not for the sheriff —Kebert v. Board of Com'rs of Wilson County, 5 P.2d 1085, 134 Kan 401.

Negligence in operating motor vehicle

(1) Traveling or going to place for performance of official act by deputy sheriff is not part of "official act," and injury caused by his negligence in operating motor vehicle while driving to place to perform official act did not make sheriff liable
Cal —Clement v Dunn, 299 P. 545, 114 Cal.App 60
Mo —Humphrey v. Ownby, App, 104 S W.2d 398

(2) Sheriff was held not liable for injuries to motorist or pedestrian struck by motor vehicle negligently operated by deputy while conveying prisoner to jail, on ground that act causing injuries was not official or committed by color or by virtue of office, and was not act of malfeasance, nonfeasance, or misfeasance
La —Gray v De Bretton, 188 So. 722, 192 La 628
Tex —Ætna Casualty & Surety Co v. Clark, 150 S W 2d 78, 136 Tex. 238.

(3) Other cases.—Usrey v Yarnell, 27 S W 2d 988, 181 Ark. 801—57 C J p 802 note 37 [c]

20. Fla —Malone v. Howell, 192 So. 224, 140 Fla. 693.

21. Fla —Malone v Howell, supra 57 C.J. p 802 note 39.

22. Fla.—Malone v. Howell, supra 57 C.J. p 802 note 40

23. Miss.—McCoy v. Key, 123 So. 873, 155 Miss. 64.
57 C.J p 803 note 41

24. Ky —Mann v. Martin, 82 Ky 242
57 C J. p 803 note 43.

qualified in the manner required by statute.[25] However, it has been held that a sheriff is not liable for the wrongful acts of a person claiming to act as his deputy, but that the authority to act as such deputy must be established by producing a written appointment.[26]

d. Acts Done after Termination of Office

The sheriff is liable for acts of a deputy done in connection with the execution of process begun while the deputy was still in office, notwithstanding the wrong occurred after the deputy was no longer in office, or for acts of the deputy in the execution of process placed in his hands while the sheriff was in office, notwithstanding the wrong complained of occurred after the sheriff had gone out of office.

Where a deputy ceases to be such, as by removal, expiration of term, or otherwise, the sheriff is liable for his subsequent acts in connection with the execution of process which he had begun to execute while in office,[27] but the sheriff is not liable for any acts of the former deputy in connection with new business which he has assumed to undertake after ceasing to be deputy.[28]

Termination of sheriff's incumbency. Where a sheriff, while in office, places process in the hands of his deputy for execution, he is liable for the official misfeasance or nonfeasance of the deputy with respect to such process, although the act or omission complained of does not occur until after the sheriff has gone out of office,[29] and the deputy has become the deputy of his successor.[30] So it has been held that although his term of office has expired, and he has made a final settlement with his deputy, a sheriff is liable for the deputy's default in withdrawing from a solvent bank, public money necessary to pay checks given to the holder of orders.[31]

e. Acts of Deputy of Predecessor

A sheriff is not liable for acts of the deputy of his predecessor with respect to process placed in the deputy's hands by such predecessor.

A sheriff is not responsible for the acts or omissions of the deputy of his predecessor with respect to process placed in his hands for execution by the prior sheriff,[32] although the new sheriff has appointed the same person his own deputy[33] and the acts or omissions complained of did not occur until after the new sheriff had gone into office.[34]

f. Acts of Deputy Nominated by Creditor

The mere fact that the deputy sheriff was appointed to office at the good-faith nomination of the execution creditor has been held not to relieve the sheriff of liability to such creditor for the misconduct of such deputy.

It has been held that the mere fact that a special deputy to execute certain process was appointed by the sheriff on the nomination of the creditor does not relieve the sheriff from liability to the creditor for the misconduct or neglect of such deputy[35] unless there was collusion or a want of good faith in making the nomination.[36] So it has been held that the sheriff is not relieved from liability for the default of a deputy levying an attachment because the deputy was appointed for the purpose at the request of plaintiff in attachment.[37]

g. Direction to Deputy as Affecting Liability of Sheriff

The sheriff is not liable for acts of the deputy in executing a writ in compliance with the instructions of the plaintiff or his attorney.

Where plaintiff in a writ gives instructions to a deputy sheriff as to its execution, and such instructions are followed, the sheriff is discharged from liability for the deputy's acts on the ground that plaintiff has made the deputy his agent,[38] and this is also true where the deputy acts under the instructions of the attorney of such party,[39] but the mere fact that plaintiff has given instructions to a deputy does not affect the liability of the sheriff for the deputy's acts where the deputy has done nothing in pursuance of such instructions[40] or where the default complained of was not committed in the course of following such directions.[41]

25. Ala.—Mathis v. Carpenter, 10 So. 341, 95 Ala. 156, 36 Am S.R 187.
Miss.—Pickens v. McNutt, 20 Miss. 651.

26. N.Y.—Curtis v. Fay, 37 Barb 64.

27. Me.—Morton v. White, 16 Me 53.
57 C.J. p 803 note 47.

28. N.Y.—Edmunds v. Barton, 31 N. Y 495.

29. Vt.—Stimpson v. Pierce, 42 Vt. 334
57 C J p 803 note 49.

30. Vt.—Stimpson v. Pierce, supra.

31. W Va.—Arnold v. Hawkins, 90 S. E. 678, 79 W Va 205

32. Me.—Barden v Douglass, 71 Me 400.
57 C.J. p 803 note 52.

33. Me.—Wilton Mfg. Co. v. Butler, 34 Me 431.
57 C J. p 803 note 53.

34. Ky.—Hamilton v. Vail, 2 Metc 511
Me.—Barden v. Douglass, 71 Me. 400

35. N C.—Martin v. Martin, 47 N.C 285.
57 C J p 803 note 55.

36. N.C.—Martin v. Martin, supra.

37. Miss.—State v Dalton, 10 So 578, 69 Miss. 611
57 C J p 803 note 57.

38. N Y.—Smith v. Smith, 60 N.Y. 161
57 C.J. p 803 note 59
Effect of directions of party or attorney generally see supra § 54

39. Mass.—Wright v. Willis, 2 Allen 191
57 C.J. p 803 note 60.

40. N.Y.—Sheldon v. Payne, 10 N.Y. 398
57 C.J p 804 note 61.

41. Vt.—Seaver v. Pierce, 42 Vt. 325
57 C.J. p 804 note 62.

h. Release from Duty or Liability

A creditor who has released the deputy from performance of his duty cannot hold the sheriff liable for the deputy's neglect of such duty.

A creditor who has by his own act released the deputy from the obligation to perform his legal duty cannot hold the sheriff liable for the deputy's neglect.[42] It has been held that where the owner of goods wrongfully levied on brings trespass against the deputy and recovers judgment and takes out execution, the sheriff is discharged of his responsibility,[43] but where a deputy, relying on defendant in an execution to pay it, and for his special accommodation, has suffered the execution to run out in his hands, and the consequent liability of the sheriff has become fixed, the mere passive acquiescence of plaintiff in a further delay in order to give time to the deputy and defendant in the execution to make the money does not ipso facto operate as a release of the cause of action against the sheriff.[44]

B. DEFAULTS AND WRONGFUL ACTS IN EXECUTION OF PROCESS

§ 56. Defaults in General

As a general rule a sheriff or constable is liable for damages resulting from his failure to execute process delivered to him for execution.

As a general rule, a sheriff or constable to whom process has been delivered for execution is liable for failure to serve or execute it,[45] for any damage which may have resulted from his negligence, or default in the execution of the process,[46] or from delay in proceeding to execute it.[47] Matters affecting or relieving the sheriff or constable from liability for his failure or default in the execution of process are considered infra § 60.

Necessity for demand. A demand is not a prerequisite to an action against a sheriff for a default in respect of the execution of process.[48]

Particular process or writs. The liability of the sheriff for failure to execute, or negligence or delay in the service or execution of process, extends to summonses,[49] subpœnas,[50] attachments,[51] executions against property,[52] writs of possession, such as writs of assistance,[53] writs of replevin,[54] writs of restitution,[55] body executions,[56] and warrants of arrest.[57]

§ 57. Particular Defaults or Omissions

a. Recognizing claim of exemption
b. Giving preference to junior writ
c. Failure to file statutory notice; demand

42. Vt.—Mason v. Ide, 30 Vt. 697

43. Me.—Harrington v. Fuller, 18 Me. 277, 36 Am.D. 719.
57 C.J. p. 804 note 66.

44. N.Y.—McKinley v. Tucker, 59 Barb. 93
57 C.J. p. 804 note 65.

45. Ariz.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 114.
Ga.—Harris v. Bennett Bros., 34 S.E.2d 615, 72 Ga.App. 589—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524.
Idaho.—**Corpus Juris cited in** Jacobson v. McMillan, 132 P.2d 773, 778, 64 Idaho 351
Ohio.—Smith v. MacKenzie, Com. Pl., 71 N.E.2d 277
Okl.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.
Tex.—Burkett v. Simmons Hardware Co., Civ.App., 52 S.W.2d 675
Va.—Narrows Grocery Co. v. Bailey, 170 S.E. 730, 161 Va. 278.
57 C.J. p. 804 note 68.

46. Idaho.—**Corpus Juris cited in** Jacobson v. McMillan, 132 P.2d 773, 778, 64 Idaho 351.
Va.—Narrows Grocery Co. v. Bailey, 170 S.E. 730, 161 Va. 278.
57 C.J. p. 804 note 69.
Amercement for defaults in execution of process see infra § 173.
Liability for default of deputies see supra § 55
Summary remedies against officer for defaults in execution of process see infra § 168

47. Mich.—People ex rel. Springett v. Colerick, 34 N.W. 683, 67 Mich. 362.
Okl.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.
Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.
57 C.J. p. 805 note 70.
Warrant delivered on holiday
A sheriff may be held liable for failure to "immediately" execute a warrant of attachment placed in his hands as required by statute, although it is delivered to him on a holiday when his office is closed.—Dailey v. Fenton, 62 N.Y.S. 337, 47 App.Div. 418, 7 N.Y.Ann.Cas. 222—57 C.J. p. 809 note 47.

48. Mo.—Douglass v. Baker, 9 Mo. 41.
57 C.J. p. 807 note 11.
Conditions precedent to actions against officers or indemnitors see infra § 148.

49. N.C.—Swain v. Phelps, 34 S.E. 110, 125 N.C. 43
Va.—Narrows Grocery Co. v. Bailey, 170 S.E. 730, 161 Va. 278.

50. Ala.—Birmingham Dry Goods Co. v. Bledsoe, 23 So. 153, 117 Ala. 495.

51. Ala.—Smith v. Heineman, 24 So. 364, 118 Ala. 195, 72 Am.S.R. 150
57 C.J. p. 807 note 15

52. Ariz.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 114.
57 C.J. p. 807 note 16

53. Okl.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.
Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.
57 C.J. p. 808 note 17.

54. Ill.—People v. Wiltshire, 9 Ill.App. 374.
Bail trover
Ga.—Harris v. Bennett Bros., 34 S.E.2d 615, 72 Ga.App. 589.

55. Ohio.—Bode v. Mungavin, 4 Ohio S. & C.P.D. 270, 2 Ohio N.P. 269.

56. N.C.—Jenkins v. Troutman, 52 N.C. 169, 75 Am.D. 459.
57 C.J. p. 808 note 20.

57. Ky.—Phillips v. Ronald, 3 Bush 244, 96 Am.D. 216.
57 C.J. p. 808 note 21.

a. Recognizing Claim of Exemption

As a general rule the sheriff is not liable to an execution creditor for recognizing a claim of exemption made by the debtor.

A sheriff is not liable to an execution creditor for recognizing a claim of exemption made by the debtor[58] except in case of a formal waiver[59] or a willful and wanton disregard of the creditor's plain rights.[60] However, the fact that a defendant, against whom execution has been issued, is absent and cannot be notified thereof, so as to claim his exemption, does not excuse the sheriff for a failure to levy.[61]

b. Giving Preference to Junior Writ

As a general rule, a sheriff who improperly gives preference to the junior of two writs in his hands for execution is liable to the plaintiff in the senior writ for resulting loss.

A sheriff who, having two or more writs in his hands for execution, improperly gives preference to a junior writ, is liable to plaintiff in the senior writ if his debt is thereby lost or the amount which he would otherwise have received diminished[62] unless the junior writ is more specific.[63] If the giving of such preference results in a seizure of the property of a surety of defendant in the writs, who was surety for only the debt represented by the senior writ, and hence would not have been compelled to pay the sum had the proper order of precedence been observed, the sheriff is liable to such surety.[64]

c. Failure to File Statutory Notice; Demand

A sheriff levying an attachment is liable for damage resulting from his negligent failure to file the requisite statutory notice.

A sheriff levying an attachment on land is liable for the resulting damage where the debt is lost by reason of his negligent omission to file a notice required by statute in such cases,[65] and the fact that the sheriff files a notice at the request of plaintiff's attorney after a conveyance of the land to a bona fide purchaser, and after rendition of judgment in the attachment suit, does not defeat plaintiff's right of action against him for the original default.[66] The sheriff cannot, by interposing as a defense a suggestion that the deed is invalid, and that the purchaser had actual notice, compel plaintiff, in effect, to litigate with such purchaser the validity of his deed.[67]

Demand. Although ordinarily no demand need be made by the sheriff on the possessor of the property before acting under an execution in ejectment or other writ for the possession of property,[68] the sheriff may be liable for damages from failure to make the demand if such failure would of itself subject the possessor to unreasonable hardship or loss and it is reasonably possible to make the demand.[69]

§ 58. —— Failure to Arrest Defendant

A sheriff may be liable for damages resulting from a failure to arrest a defendant on civil process.

A sheriff may be held liable in damages for a negligent failure to arrest a defendant on civil process.[70] However, where a person at liberty under bail was arrested and placed in jail under another charge, and while so confined a surety on the bail bond indorsed on a certified copy of the bond a direction to the sheriff to "execute this process" on the prisoner, it was held that the officer sufficiently performed his duty by reading the copy to him, without having him rearrested or taking a receipt from the jailer, and was not liable to the bail sureties where the prisoner afterward escaped and the bail was forfeited.[71]

§ 59. —— Insufficient or Defective Levy

A sheriff may be liable for failure to seize sufficient available property to satisfy the debt.

The sheriff is liable to the party at whose instance process was issued, where, in making the levy thereunder, he fails to seize so much of defendant's goods as a reasonable and prudent man would deem sufficient to satisfy the debt and costs if so much is available;[72] but if the property is sufficient when

58. Pa.—Williamson v. Krumbhaar, 19 A. 281, 132 Pa. 455.
57 C.J. p 808 note 23.

59. Pa.—Williamson v. Krumbhaar, supra.

60. Pa.—Williamson v. Krumbhaar, supra.

61. Ill.—People v. Palmer, 46 Ill 398, 95 Am D 418.

62. Wis.—Ohlson v. Pierce, 12 N.W. 429, 55 Wis. 205.
57 C.J. p 808 note 28.
Extent of liability see infra § 61.

63. Utah.—Remington v. Weber, 39 P. 822, 11 Utah 181
57 C.J. p 808 note 29.

64. Ky.—Staton v Commonwealth, 2 Dana 397.

65. N.Y.—Lewis v. Douglass, 6 N.Y.S. 888, 53 Hun 587, 590.
57 C.J. p 809 note 31.

66. N.Y.—Lewis v. Douglass, supra

67. N.Y.—Lewis v. Douglass, supra.

68. Conn.—Nourse v. Lycett, 159 A 277, 114 Conn 432.
Mass.—Howe v Butterfield, 58 Mass. 302, 50 Am Dec. 785.

69. Conn.—Nourse v Lycett, 159 A. 277, 114 Conn. 432

70. Ga.—Harris v Bennett Bros., 34 S.E.2d 615, 72 Ga.App 589—Little v. Lawrence, 193 S.E 181, 56 Ga. App. 524.
57 C.J. p 809 note 34.

71. Ky.—James v. Geiger, 238 S.W 753, 194 Ky. 273.

72. Ala.—Governor v. Powell, 9 Ala. 83.
57 C.J. p 809 note 37
Extent of liability see infra § 61.

levied on the sheriff does not become liable because of a subsequent depreciation in its value[73] unless the depreciation is such as a prudent man should have foreseen and provided for[74] Where he levies on property, which would satisfy the judgment were it sold for bank notes, but would be insufficient were it sold for specie, the officer is not chargeable with a breach of duty unless he was notified that specie alone would be received[75] Where the officer levies on property which ought in the estimation of a prudent person to produce sufficient to satisfy the writ, but the sale thereof proves unproductive, and he immediately levies on other property of sufficient value to satisfy the writ, he has shown sufficient diligence, and is not liable for failure to make the money, although the property last seized cannot be sold until after the return-day[76]

Property described in petition. A sheriff levying execution is liable for damages resulting from his failure to seize all the property described in the petition of the execution plaintiff.[77]

Defective levy. A sheriff is liable to the party at whose instance process was issued, where, in executing it, he makes a levy so defective that property which might have been secured to satisfy the debt is lost to the creditor.[78] Thus a sheriff levying execution is liable for damages resulting from his failure to take the property into his own possession and exercise dominion over it;[79] and if he attaches goods and neglects to remove them he is liable to plaintiff in the event a subsequent creditor attaches the same goods[80]

§ 60. Relief From Liability

- a In general
- b Regularity and validity of proceedings, judgment, and process
- c. Availability of property for levy or seizure
- d Acts or defaults of party issuing process
- e Collectability or payment of debt
- f. Prevention of execution of process by bond, supersedeas, stay, or injunction
- g Injury to party at whose instance process issued

a. In General

The failure of a sheriff or constable to execute process does not impose on him an absolute liability, but he may escape liability by showing that the circumstances are not such as to impute to him official negligence or misconduct or that his negligence or misconduct was not the proximate cause of the damage.

The failure of a sheriff or constable to execute process does not impose on him an absolute liability, but he may escape liability by showing that the circumstances are not such as to impute to him official negligence or misconduct[81] or that his negligence or misconduct was not the proximate cause of the damage.[82] Since the officer is required only to use reasonable diligence in the execution of process, as considered supra § 44, he is not liable unless he has been lacking in such degree of diligence.[83] A sheriff or constable will not be liable for not executing a writ before the return-day[84] unless there were special circumstances making it his duty to do so;[85] and the burden is on plaintiff to show such special circumstances[86] So a party who seeks to hold a

73. Ark.—Lawson v State, 10 Ark 28, 50 Am D 238
N C—Governor v Carter, 10 N.C 328, 14 Am D 588

74. Ill—French v Snyder, 30 Ill 339, 83 Am D 193
Tex—Dewitt v Oppenheimer, 51 Tex 103.

75. N C—Governor v Carter, 10 N C 328, 14 Am.D 588

76. Ala—Powell v Governor, 9 Ala 36.

77. Ga.—Harris v Bennett Bros, 34 S E 2d 615, 72 Ga.App. 589—Battle v. Ricks Lumber Co, 144 S E 919, 38 Ga App 621

78. Ga—Sanders v. Carter, 52 S.E 887, 124 Ga 676
57 C J. p 809 note 43

Failure to index execution and levy
Where irregular execution is issued by clerk of common pleas court to another county, and sheriff to whom it is directed levies on judgment debtor's realty but fails to index execution and levy in debtor's name, and lien of execution is lost because of debtor's sale of realty to innocent purchaser, judgment creditor, suffering damage thereby, may recover from sheriff for negligence in failing to index in foreign execution docket, in judgment debtor's name, the case in which execution was issued—First Nat Bank v Hassinger, 196 N E 425, 129 Ohio St. 642

79. Ga—Battle v Ricks Lumber Co, 144 S E 919, 38 Ga.App 621
57 C.J p 809 note 45

80. Mass—Gale v. Ward, 14 Mass. 352, 7 Am D. 223.

81. Ga—Wilkin v. American Freehold Land Mortg. Co, 32 S E. 135, 106 Ga 182
57 C J p 810 note 49
Directions of party or attorney see supra § 54.

82. Summons in action barred by limitations
Even if sheriff's ultimate failure to serve summons on defendant by return-day was caused by negligence, such failure would not give rise to cause of action in favor of plaintiff against the sheriff where plaintiff's cause of action against defendant was barred by expiration of the two-year period prior to the return-day.—Sarelas v. Fagerburg, 45 N E 2d 690, 316 Ill App. 606

83. Minn.—Guiterman v. Sharvey, 48 N W. 780, 46 Minn. 183, 24 Am. S R. 218.
57 C J p 806 note 98.

84. Ill—Sarelas v. Fagerburg, 45 N. E.2d 690, 316 Ill App. 606.
57 C J p 807 note 1.

85. Mo—State v. McMahan, 13 Mo. 179—State v. Ferguson, 13 Mo. 166.

86. Mo—State v. McMahan, 13 Mo 179—State v. Ferguson, 13 Mo. 166.

sheriff liable for damages resulting from failure to serve a citation sooner than ordinary diligence would have required,[87] as where earlier service was necessary to prevent prescription of the claim,[88] must show that the officer was notified of such necessity.

A sheriff cannot be held liable for a failure to levy on particular property pointed out by the execution plaintiff when he levies on other property of the execution defendant sufficient to satisfy the execution;[89] and where a writ of attachment is issued to a county other than the one in which the action was brought the officer executing the writ, in the manner provided by statute, is not liable for damages because, subsequently to the levy, the land was sold by the owner to an innocent purchaser, whereby plaintiff in attachment lost his security for the payment of his judgment.[90] Where an officer had no authority to execute a writ, he cannot be held liable for a failure to do so.[91]

Various circumstances relied on to relieve a sheriff or constable from liability for defects or defaults in the execution of process have been held insufficient for that purpose.[92] The fact that the sheriff had no corrupt or bad intentions does not relieve him from liability for failure to serve or execute process.[93] So a sheriff is not excused from a default in levying an execution because he delayed in reliance on the debtor's promise to pay,[94] or because of threats of bankruptcy proceedings,[95] even though he was prompted by a sincere desire to serve creditors' interests and an honest belief that he was doing so.[96] An attachment against an execution plaintiff does not relieve the sheriff from liability for failure to collect the execution placed in his hands.[97] Where a sheriff has failed to attach property, and before judgment in the suit such property has gone beyond the reach of process, the issuance of an execution within the time after the judgment for which an attachment lien remains in effect is not necessary to fix the liability of the sheriff.[98]

Absence of debtor. A sheriff is not liable for failure to serve process on a nonresident where he has followed the directions of plaintiff and failed to find defendant.[99] So, in an action against a sheriff for failure to arrest an execution defendant, the sheriff may show that such defendant was out of the county from the date of the writ until he applied for the benefit of the bankruptcy law.[1]

Affidavit of illegality. Where a sheriff holds several executions against the same defendant, an affidavit of illegality as to one does not excuse him from proceeding with the rest.[2]

Consideration for debtor. It is no excuse for the default of a sheriff in levying an execution that he delayed because the sickness of the debtor or the distress of his family;[3] but in a case where an attachment was issued against a life tenant for disobedience of a decree requiring him to give security for the principal intrusted to him, and the writ which ordered him to be brought before the court was placed in the hands of the assistant sheriff, with instructions to execute it, and, finding him so ill that he could not be moved, he procured a physician's certificate as to his condition, and made return of the facts, and the court made no further order in the matter, and no further application was made to it, it was held that the sheriff was not liable to the remainderman as for a neglect of duty.[4]

Difficulty in executing process. Difficulty in obtaining possession of property on which the sheriff is directed to levy does not excuse his failure to levy,[5] and it is not any excuse to a sheriff for failing to execute a capias ad satisfaciendum that he and his deputies had always found difficulty in arresting defendant in execution.[6]

b. Regularity and Validity of Proceedings, Judgment, and Process

Mere irregularities in the proceedings in which process is issued, or in the process or judgment, do not re-

87. La.—Bloomfield v. Jones, 2 La Ann 936

88. La.—Bloomfield v. Jones, supra

89. Ark.—Lawson v. State, 10 Ark 28, 50 Am.D. 238.

90. Okl.—Mount v. Trammel, 175 P 232, 73 Okl 96.

91. Ala.—Governor v. Lindsay, 14 Ala 658.
57 C J p 806 note 96.
Protection afforded by process, judgment, or order of court generally see infra §§ 122–127

92. Ga.—Griner v Smith, 106 S E 20, 26 Ga App. 319.
57 C J. p 815 note 54.

93. N C.—Swain v Phelps, 34 S E 110, 125 N C 43
Belief that property against which process was issued was exempt see supra subdivision d of this section

94. Tenn.—Cowan v Sloan, 32 S W 388, 95 Tenn 424
Tex.—B F Goodrich Rubber Co v Valley Plumbing, etc, Co, Civ App., 267 S.W 1036

95. Tex.—Goodrich Rubber Co v Valley Plumbing, etc., Co., supra.

96. Tex.—Goodrich Rubber Co. v. Valley Plumbing, etc, Co., supra

97. N.Y.—Wehle v Conner, 63 N.Y 258.

98. Me.—Townsend v. Libbey, 70 Me 162
57 C J. p 816 note 55

99. Pa.—Hamilton v. Lyle, 9 Phila 98.

1. Mo.—State v. Rollins, 13 Mo 179.

2. Ga.—Carr v. Morris, 86 S E 94, 17 Ga App 45.

3. Tenn.—Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424.

4. Pa.—Potteiger v. Ridgway, 34 A. 19, 173 Pa 292

5. Cal.—Howe v. White, 49 Cal. 658.
57 C J. p 814 note 21

6. Ala.—Spence v. Tuggle, 10 Ala. 538.

lieve the sheriff of liability for failure to execute the process; but it is otherwise if the judgment or process is absolutely void.

A sheriff or constable is liable for his default in the execution of process notwithstanding defects or irregularities in the proceeding in which the process was issued,[7] where the court has jurisdiction of the cause,[8] and he cannot escape liability on the ground that prior to the entry of judgment the parties agreed to dismiss the cause and that thereafter plaintiff took judgment and caused the execution to issue.[9] On the other hand, a sheriff or constable is not liable for failure to levy on an execution in an action in which the court had no jurisdiction.[10] It has been held that a sheriff is not liable for refusal to deliver a bail bond to the creditor or to return it to the clerk's office, after returning that he had arrested the debtor and taken bail, where the affidavit accompanying the writ was not sufficient to justify an arrest.[11]

Validity and force of judgment. A sheriff or constable is not liable for failure to serve a writ which, although regular on its face, is based on a void judgment,[12] or for failure to levy and sell under an execution based on a judgment which was dormant when the writ was placed in his hands.[13] However, it is no excuse for a sheriff's failure to levy an execution on a judgment that the judgment is irregular[14] or erroneous,[15] or that the consideration therefor has failed[16]

Validity of process A sheriff or constable is not liable for failure to serve process which is void on its face,[17] and, even though a writ be regular on its face, if it is in fact unauthorized and void the sheriff is not liable for refusing to execute it.[18] It has also been held that the officer has a right to demand that process shall be in strict accordance with the statute, and that he is not liable for failure to execute a writ which fails to comply with statutory requirements.[19] However, a sheriff who has failed to execute a writ cannot escape liability by reason of a statute, enacted after his default, establishing certain requisites which the writ did not have.[20] A sheriff cannot escape liability for failure to execute or neglect or delay in executing process by reason of the fact that it is merely irregular,[21] erroneous,[22] or defective in form.[23]

c. Availability of Property for Levy or Seizure

(1) In general
(2) Ownership of property
(3) Property subject to liens

(1) In General

A sheriff or constable is not liable for failure to seize property which he could not legally seize under the writ.

A sheriff or constable cannot be held liable for not seizing property which he could not legally seize under his writ,[24] as where it is in the custody of the law,[25] and in order to charge him with liability for failure to seize property under a writ it must appear that there was property of defendant available for seizure,[26] and that the officer knew of such property,[27] or had notice of facts which should

7. Ga.—Horrigan v Savannah Grocery Co., 54 S E 961, 126 Ga 127.
57 C J p 805 note 77
Protection afforded by process, judgment, or order of court generally see infra §§ 122–127.

8. Tenn—Reams v. McNail, 9 Humphr. 542
57 C J p 805 note 78.

9. Mo—State v Stokes, 73 S.W. 254, 99 Mo App. 236

10. Ind—State v Forry, 64 Ind 260
N Y—Cornell v. Barnes, 7 Hill 35

11. Me—Whiting v. Trafton, 16 Me. 398.

12. Mass—Belcher v Sheehan, 51 N E. 19, 171 Mass 513, 68 Am S R. 445.
57 C.J. p 805 note 82.
Protection afforded by process, judgment, or order of court generally see infra §§ 122–127.

13. Ga.—Blue v. Collins, 34 S.E 598, 109 Ga 341.
Judgment for support held not dormant
Ariz.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 114.

14. Mo—State v Rainey, 73 S W 250, 99 Mo App. 218.
N Y—Forsyth v. Campbell, 15 Hun 235.

15. Ala—Smith v. Alabama Great Southern R. Co., 102 So. 118, 212 Ala 166
57 C.J p 806 note 85.

16. Ky.—Arnold v. Commonwealth, 8 B Mon. 109.

17. U.S—**Corpus Juris cited in** Allen v Clark, D C.Cal., 22 F Supp 898, 904.
57 C J p 806 note 88.

18. Ala—Tombeckbee Bank v. Godbold, 3 Stew 240, 20 Am.D. 80.
57 C.J p 806 note 89.

19. Tex.—Warren v. Barron Bros Millinery Co., 23 S.W 2d 686, 118 Tex 659
57 C J p 806 note 90.

20. Ga—Kemp v. Williams, 43 Ga 211.
57 C.J. p 806 note 91.

21. N Y—Mollineaux v Mott, 79 N. Y S 661, 78 App.Div. 493.
57 C.J. p 806 note 92.
Uncertainty of amount of execution
Sheriff could not escape liability for failure to carry out the commands of a writ of execution on ground that execution was uncertain in its direction as to the amount of the judgment, interest, and costs required to be collected from judgment debtor, where principal of the judgment was named and the interest due could be easily ascertained.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 114.

22. Vt.—Stoddard v. Tarbell, 20 Vt. 321.
57 C J. p 806 note 93.

23. Fla—Johnson v. Price, 36 So. 1031, 47 Fla. 265.
57 C J. p 806 note 94.

24. Ga—Brannon v. Barnes, 36 S E. 689, 111 Ga 850
57 C.J p 810 note 51.

25. Vt.—West River Bank v. Gorham, 38 Vt. 649.
57 C J. p 810 note 52.

26. Wash.—Wilcox v. Bear, 248 P. 58, 140 Wash. 39
57 C.J. p 810 note 53.

27. Ala.—Governor v. Campbell, 17 Ala. 566.
57 C J. p 810 note 54.

have caused him to make a search therefor,[28] or failed to use due diligence in searching for property on which to levy.[29] It has also been held, however, that a sheriff cannot escape liability for failure to levy an execution by setting up want of knowledge of defendant having any estate or effects,[30] or showing that plaintiff did not point out to him any property on which to levy,[31] or notify him that defendant resided or had property within the county[32]

The sheriff cannot relieve himself from liability for neglect to levy an execution on goods attached by him by showing that he had previously sold them without the consent of the creditor.[33] A sale and delivery of property by an attachment debtor after the writ came to the hands of the officer does not excuse the officer from levying on such property, but he is liable if he fails to do so.[34]

Amount of property available. It is not essential to the liability of a sheriff for failure to levy under an execution that there should have been enough property of defendant available to pay the entire debt, but if he might have seized enough property to pay a part thereof and failed to do so he is liable.[35] However, if a sheriff honestly thinks that the value of property on which he can levy will not pay the expense of sale, he may refuse to levy, state the facts, and return the execution unsatisfied, although he does so at his peril, and if he is mistaken is liable to the injured party.[36] Where the sheriff seizes all the property of the debtor which can be found, he is not liable for failure to seize other property mentioned in the writ.[37]

Property in possession of sheriff. A sheriff cannot exonerate himself from failure to levy an attachment or execution on personal property by claiming to have possession of it under chattel mortgages.[38]

Property on Indian reservation. The refusal of an Indian agent to consent to entry by a sheriff on the reservation to levy execution on the property of one not an Indian does not excuse the sheriff from making the levy,[39] even though the sheriff has been advised by the United States district attorney that he has no right to enter the reservation without the agent's consent.[40]

Exempt property. A showing that property was exempt relieves the sheriff from liability for a failure to levy thereon,[41] but a mistaken belief that the property was exempt is insufficient.[42]

(2) Ownership of Property

A sheriff is not liable for failure to levy on property which does not belong to the defendant.

A sheriff is not liable for failure to levy on property which does not belong to defendant,[43] even though it was pointed out to him as defendant's property,[44] but a sheriff cannot escape liability for failure to make the money on an execution on the ground that there was a doubt as to the title to property on which he might have levied, or of an adverse claim thereto, if the property was really liable,[45] even though the property was in the possession of a third person,[46] especially if the property was shown to him as liable,[47] and he has not demanded and been refused indemnity[48] Where a mortgage is valid on its face, and the mortgagee is in possession, the sheriff is not liable for failure to levy an execution against the mortgagor of the goods, even though the mortgage is in fact fraudulent as to the execution creditor[49] So it has been held that a sheriff is not liable for failure to levy an execution issued pending the trial of the right of property under a former levy on the property as that of a third person.[50]

28. Mo.—Taylor v. Wimer, 30 Mo 126
29. Ala.—Newcomb Bros Wall Paper Co v. Wiggins, 78 So. 905, 201 Ala. 551.
57 C.J p 810 note 56.
30. Ill.—Hargrave v. Penrod, 1 Ill. 401, 12 Am D. 201.
31. Ill.—Hargrave v. Penrod, supra
32. N.Y.—Tomlinson v. Rowe, Lalor p. 410.
33. Me.—Fairbanks v. Stanley, 18 Me 296
34. Ark.—McKinney v. Blakely, 112 S.W. 976, 87 Ark 405.
35. Ky.—Commonwealth v. Hurt, 4 Bush 64.
36. Wis.—In re Mowry, 12 Wis. 52.
37. Ga.—Hall, etc., Woodworking Mach. Co. v Barnes, 42 S E 276, 115 Ga 945.
38. Kan.—Chittenden v. Crosby, 48 P 209, 5 Kan App. 534.
39. Mont.—Stiff v. McLaughlin, 48 P. 232, 19 Mont. 300.
40. Mont.—Stiff v. McLaughlin, supra.
41. Ind.—Moss v. Jenkins, 45 N.E. 789, 146 Ind 589
57 C J p 811 note 66.
42. Tex.—Harston v. Langston, Civ App, 292 S.W. 648.
43. La.—Ammonette v. Crandell, 10 La.Ann 174
57 C J. p 811 note 68.
44. Miss.—Redus v. State, 54 Miss 712.
57 C J. p 811 note 69.
45. N M.—Bachelder v. Chaves, 25 P 783, 5 N M 562.
57 C J. p 811 note 70
46. Me.—Webster v. Ballou, 81 A. 1009, 108 Me. 522, Ann.Cas 1913B 567
57 C.J p 811 note 71.
47. Ala.—Minter v. Bigelow, 9 Port. 481
Ky.—Emanuel v. Cocke, 6 Dana 212.
48. Ala.—Minter v Bigelow, 9 Port 481.
Effect of failure to demand, or failure or refusal to give, indemnity see infra subdivision d of this section.
49. S D.—Ayers, etc., Co. v. Sundback, 58 N W. 4, 5 S D. 31
50. Ill.—Hill v. Reitz, 24 Ill App. 391.

(3) Property Subject to Liens

The existence of prior liens on property subject to an execution will relieve a sheriff of liability for a failure to levy thereon only if the prior liens exceed the value of the property.

The mere existence of liens on property which are prior to an execution does not excuse the sheriff for a failure to levy thereon.[51] Thus, where a senior execution is stayed by agreement of the parties, the officer is liable for failure to levy under a junior execution,[52] and a levy under a prior attachment, which has been discharged, does not excuse the officer's failure to levy a subsequent attachment on the same goods.[53] A sheriff may justify a refusal to levy by showing that the property was subject to valid liens to an amount exceeding its value and prior to the writ in his hands,[54] and, where firm property has been attached in a suit against one of the partners individually, subsequent judgment creditors of the firm who have not applied to the court to set aside the attachment or to have their debts first paid out of the firm property cannot recover for the sheriff's failure to proceed under their executions.[55]

Secret deed of trust. A sheriff cannot excuse failure to levy an execution on the ground that there was an unrecorded and secret deed of trust on the goods to secure other creditors, in a sum greater than their value, and that they were subsequently disposed of and the proceeds applied to such debt.[56]

Validity of lien on which process based A sheriff cannot escape liability for a failure to levy a mortgage fieri facias on the mortgaged property on the ground that the mortgage lien is superseded in consequence of a failure to record it.[57]

d. Acts or Defaults of Party Issuing Process

(1) In general
(2) Failure or refusal to give indemnity
(3) Issuance of, or failure to issue, second writ
(4) Agreements; release of debtor or levy

(1) In General

Contributory negligence on the part of the injured party may relieve a sheriff from liability for negligence in levying under a writ.

One cannot recover from a sheriff for negligence by which an attempted levy of a writ was rendered ineffectual if he has contributed to the result by his own negligence or that of an attorney employed to supervise the procedure,[58] and where part of the loss was due to plaintiff's negligence he cannot recover for such part.[59]

A sheriff or constable is relieved from liability to the party having process issued for any results proceeding from his compliance with directions of the party or his attorney with respect to the execution of the process, as considered supra § 54. A statutory provision requiring a written direction to arrest a debtor on execution to be indorsed on the writ is for the officer's benefit and may be waived,[60] and, when such requirement is waived, noncompliance therewith by the execution plaintiff does not excuse the officer for failure to make the arrest.[61]

(2) Failure or Refusal to Give Indemnity

As a general rule failure of the party causing process to issue to provide indemnity in a proper case after a good-faith demand relieves the sheriff or constable from liability for failure to proceed under the process.

As a general rule, where the circumstances are such that the sheriff or constable is entitled to demand indemnity before proceeding to execute a writ, and he in good faith demands indemnity, which is refused, his subsequent failure to proceed subjects him to no liability to the party at whose instance the writ issued,[62] although as a matter of fact

51. S D.—Jewett v Sundback, 58 N W 20, 5 S D 111
57 C J p 812 note 76.
Reason for rule
Defendant's equity of redemption is subject to his debts, and plaintiff in execution has the right to have that sold for what it will bring and the proceeds applied to the payment of his judgment.—Smothers v Field, 65 Tex 435.

52. Ill.—Ross v. Weber, 26 Ill 221.

53. Ala.—Smith v Heineman, 24 So. 364, 118 Ala 195, 72 Am.S R 150.

54. Ala.—Smith v. Heineman, supra
57 C J. p 812 note 80.
Recovery limited to nominal damages see infra § 61.

55. Wash.—Haas v Gaddis, 23 P 1010, 1 Wash 89

56. Tex.—Grove v Harris, 35 Tex 320

57. Ga.—Wallace v. Holly, 13 Ga 389, 58 Am.D. 518
57 C J. p 812 note 84

58. Neb.—Parrott v. McDonald, 100 N.W 132, 72 Neb. 97
Service on dissolved corporation
Plaintiff could not recover from sheriff for alleged negligence in failing to serve dissolved corporation with summons on ground that the summons was served on individual defendants prior to time of return of summons "not found" as to corporation, where summons did not indicate that plaintiff thought service on corporation could be effected by serving individual defendants in its behalf and plaintiff did not inform sheriff of name of any officer or agent of the corporation within the county.—Sarelas v Fagerburg, 45 N E.2d 690, 316 Ill App. 606.

59. Conn.—Palmer v. Gallup, 16 Conn 555.

60. Me.—Stewart v Leonard, 68 A. 638, 103 Me. 128.

61. Me.—Stewart v Leonard, supra.
57 C.J. p 812 note 88.

62. Wash.—Canfield-Caulkins Impl Co v. Cowden, 127 P. 216, 70 Wash. 587
57 C J. p 813 note 92.

he would have incurred no liability to any other person by proceeding [63] However, it has been held that if the execution debtor has in his possession property which is prima facie subject to the writ, and there is nothing to rebut the presumption that he owns it, the refusal of the execution creditor to give indemnity demanded by the sheriff does not relieve the officer from liability for failure to levy.[64]

In the absence of a demand for indemnity, the failure of plaintiff to furnish it does not release the sheriff from liability for failure to levy under the writ,[65] and after a default has occurred the officer cannot escape liability therefor by a subsequent demand for indemnity which is refused [66] On the other hand, it has been held that where the title to the property is in dispute, the mere failure of the officer to give notice and demand indemnity will not render him liable for failure to levy, in the absence of fraud or negligence.[67]

(3) Issuance of, or Failure to Issue, Second Writ

Where a sheriff or constable has neglected to levy an execution, the act of the plaintiff in taking out an alias execution and causing it to be levied on other property, and thus collecting part of the debt, does not deprive him of his remedy against the officer for the previous neglect.

Where a sheriff or constable has neglected to levy an execution, the act of plaintiff in taking out an alias execution and causing it to be levied on other property, and thus collecting a part of his debt, does not deprive him of his remedy against the officer for the previous neglect [68] So, where a sheriff has negligently failed to make the money on an execution, plaintiff is not deprived of his right of action against the sheriff by the fact that he has failed to proceed further against the execution defendant, although he might have made the money by so doing;[69] but where plaintiff who has recovered judgment in ejectment fails, on the expiration of the term of office of the sheriff, to place an alias writ of restitution in the hands of the new sheriff he cannot, in an action against the former sheriff for failing to execute the original writ, recover damages for any time subsequent to that at which he might have obtained possession under such alias writ [70]

(4) Agreements; Release of Debtor or Levy

Agreements between the parties suspending execution of the writ or settling the claim on which it is based, which do not discharge or satisfy the debt, do not relieve the sheriff of his liability for failure to proceed, where he has received no instructions from the plaintiff or his attorney not to proceed.

Agreements between the parties merely suspending the execution of the writ[71] or settling the claim on which it is based,[72] which do not constitute a satisfaction or discharge of the debt, do not relieve the sheriff of liability for failure to proceed with the writ, where he has received no instructions from plaintiff or his attorney not to proceed.[73]

Release or discharge of debtor. Where an execution against two defendants is placed in the hands of a sheriff, he cannot escape liability for failing to make the money merely because plaintiff has released one of defendants.[74] A judgment creditor's right of action against a sheriff for failure to levy an execution is not barred by the creditor's discharging the debtor from a capias ad satisfaciendum, although such discharge operates as a satisfaction of the judgment, where the remedy against the sheriff has been perfected before such discharge.[75]

Release of levy by creditor. A sheriff is not released from liability for failure to levy on property of the debtor out of which the money could have been made by proper diligence by the fact that plaintiff had released a levy which had been made on his own property as that of the execution defendant.[76] In like manner, the sheriff cannot properly claim to be discharged from liability because plaintiff releases a levy on property to which a claim is interposed by a third person who gives bond to try the right of property, according to the statute.[77]

e. Collectability or Payment of Debt

The fact that the debt is not collectable by exercise of due diligence by the sheriff ordinarily will relieve the

63. Ky.—Crane v. Crane, 105 S W. 370, 32 Ky.L. 82.

64. Ala—Smith v. Alabama Great Southern R Co, 102 So 118, 212 Ala 166—Pilcher v. Hickman, 31 So 469, 132 Ala. 574, 90 Am S.R 930

65. Mass.—Bond v. Ward, 7 Mass 123, 5 Am D 28
57 C.J. p 813 note 95.

66. Neb—Steele v. Crabtree, 58 N. W 1022, 40 Neb. 420.

67. Tenn—State v. Sharp, 2 Sneed 615.

68. Vt—Wetherby v. Foster, 5 Vt. 136.

69. Mass—Franklin County Nat Bank v Kimball, 25 N.E. 460, 152 Mass. 331
57 C J. p 813 note 1

70. Mo—State v. Harrington, 44 Mo App. 297.

71. Conn—Derby Bank v. Landon, 2 Conn. 417
57 C J. p 813 note 7.

72. Ala—Crenshaw v. Harrison, 8 Ala 342
57 C J p 813 note 8.

73. Ala.—Crenshaw v. Harrison, supra.

74. Ala—Mason v. Watts, 7 Ala. 703.
57 C.J p 813 note 3.

75. Ill—Hargrave v. Penrod, 1 Ill 401, 12 Am D. 201.

76. Ala—Poe v. Dorrah, 20 Ala. 288, 56 Am.D. 196.

77. Ala.—Poe v. Dorrah, supra.

sheriff of liability for failure to make a levy, as in the case of bankruptcy or insolvency of the debtor.

A sheriff cannot escape liability for failure to levy under an execution by showing that the judgment debtor is solvent and has property which may be subjected to the judgment, and that the judgment debt is thus collectable.[78] It has been held, however, that where a sheriff, ordered to attach real estate, neglects to do so, and it is conveyed by the debtor before judgment in the action, the value of other real estate owned by the debtor and remaining subject to levy, but which had not been levied on, should be allowed in reduction of damages.[79] A sheriff is relieved from liability for failure to levy, where the debt could not have been collected by due diligence,[80] or such fact may be shown in mitigation of damages.[81]

Bankruptcy or insolvency of debtor. Where a judgment is avoided by an adjudication of bankruptcy against the judgment debtor within four months after its rendition, the sheriff is not liable for a failure to make the money on an execution issued on such judgment,[82] or at most can be subjected to only nominal damages for not serving the execution, as considered infra § 61. So the insolvency of the debtor will relieve the officer for failure to serve a writ of execution,[83] or, at least, may be shown in mitigation of damages;[84] but if a sheriff, holding final process against the body of a debtor, neglects the opportunity to arrest him, and he afterward absconds, the sheriff cannot show the insolvency of such debtor in mitigation of damages.[85] Under a statute making an officer liable for failure to levy execution, when this might have been done, mere insolvency of the execution debtor is insufficient to relieve the officer from liability for such failure unless he shows that there was no property belonging to the debtor, subject to execution within the officer's jurisdiction, out of which the judgment could have been made.[86]

Payment of debt. An officer may show, as an excuse for not making the money on an execution placed in his hands, that the amount has been paid to the execution plaintiff,[87] and payment after return of the writ is sufficient to relieve the officer from liability.[88] If a part of the execution has been paid the sheriff's liability is decreased pro tanto.[89]

f. Prevention of Execution of Process by Bond, Supersedeas, Stay, or Injunction

As a general rule the sheriff is not liable for his failure to execute process in his hands where he was prevented from so doing by a valid bond, stay order, or injunction.

Where the statute allows a defendant in attachment to prevent a levy by giving bond, a sheriff who omits to make a levy on such bond being given is not liable therefor,[90] although plaintiff in attachment is unable to collect his full claim on the bond.[91]

Supersedeas or stay of writ. A sheriff's failure to levy an execution on a day named, as peremptorily directed by the judgment creditor's attorney, cannot be excused by any judicial order staying the execution served on the sheriff after that day,[92] although such subsequent order, acquiesced in by the execution plaintiff, would be a good defense to an attachment of the sheriff for contempt, as considered infra § 171. A stay law which has expired before an execution is placed in a sheriff's hands cannot excuse his failure to levy,[93] and where, while a statute known as the "stay law" was considered in force, plaintiffs in a fieri facias notified the sheriff that a judgment was recovered against defendant as bail, which was one of the excepted cases in the statute to which it did not apply, and directed him to proceed to make the money by a levy, it was held to be no excuse for his refusal to levy that the fieri facias did not show on its face that the case was within the exception.[94]

A sheriff is not justified in refusing to levy an

78. Ala.—Evans v. Governor, 18 Ala. 659, 54 Am.D. 172
57 C.J. p. 814 note 29.

79. Me.—Townsend v. Libbey, 70 Me. 162.

80. Tex.—B. F. Goodrich Rubber Co. v. Valley Plumbing, etc., Co., Civ. App., 267 S.W. 1036—Richardson v. Johnson-Lazue Coffee Co., Civ. App., 252 S.W. 253

81. N.Y.—Jones v. Huter, 239 N.Y.S. 221, 136 Misc. 49
57 C.J. p. 814 note 32
Limitation of recovery to nominal damages see infra § 61.

82. Ga.—Wohr v. Mattox, 48 S.E. 410, 120 Ga. 962.

Tex.—Hale v. Lange, Civ. App., 8 S.W.2d 1046.

83. Ky.—Commonwealth v. Hudson, 2 Ky. Op. 27.
Insolvency is judicial question for court, not sheriff—Burkett v. Simmons Hardware Co., Tex. Civ. App., 52 S.W.2d 675.

84. Me.—Varrill v. Heald, 2 Me. 91.
N.Y.—Dininny v. Fay, 38 Barb. 18

85. Vt.—Goodrich v. Starr, 18 Vt. 227.

86. Tex.—B. F. Goodrich Rubber Co. v. Valley Plumbing, etc., Co., Civ. App., 267 S.W. 1036.

87. Ga.—Wheeler v. Thomas, 57 Ga. 161
57 C.J. p. 815 note 45.

88. Ala.—Freeman v. Womack, 4 Ala. 539.

89. Ga.—Wheeler v. Thomas, 57 Ga. 161.
57 C.J. p. 815 note 47.

90. Cal.—Ayres v. Burr, 64 P. 120, 132 Cal. 125

91. Cal.—Ayres v. Burr, supra.

92. Wis.—State v. Brophy, 38 Wis. 413.
57 C.J. p. 815 note 36.

93. Ga.—Armstrong v. Jones, 34 Ga. 309.

94. Ga.—Pinney v. Levy, 38 Ga. 141.

execution, because he has been served with notice of appeal and of the filing of an undertaking staying proceedings on the judgment unless the appeal has been duly perfected and the undertaking on which the stay is claimed is in due form;[95] but a constable is excused for not serving an execution issued by the justice, where the justice has gone to him and withdrawn the execution in consequence of a certiorari delivered to him, although no bail was entered on taking out the certiorari.[96] Where a sheriff, on a capias ad satisfaciendum being placed in his hands, received the amount of the debt and costs from defendant, and gave his receipt, stipulating to return the money if an injunction to restrain further proceedings should be obtained, and the injunction was obtained, and he returned the money, he was held not to be liable to an attachment for having failed to execute the capias ad satisfaciendum.[97] It is no excuse for failure to levy an execution that defendant in execution falsely represented that he had taken a stay of, or appeal from, the judgment on which it issued.[98]

Injunction against process. The fact that the execution of process has been enjoined relieves the sheriff of liability for failure to execute it,[99] even, it has been held, where the execution was in his hands several years before a perpetual injunction was granted.[1] On the other hand, it has been held that the officer is not relieved from liability by an injunction which was without merit, and which did not in fact prevent the officer from making the money on the execution,[2] as where the officer's neglect of duty occurred before the injunction issued.[3]

g. Injury to Party at Whose Instance Process Issued

Ordinarily, unless actual pecuniary damage is shown, a sheriff is not liable for not executing or not properly executing a writ.

Ordinarily, unless actual pecuniary damage is shown, a sheriff is not liable for not executing or not properly executing a writ,[4] or at most is liable only to nominal damages, as considered infra § 61. So under a statute making a sheriff liable to plaintiff in execution for failure or refusal to levy on or sell property liable to execution, no liability attaches where no injury has been sustained.[5] Moreover, mere neglect of duty by the sheriff cannot give rise to a cause of action where injury may or may not result, depending on the conjectural and undeterminable action of some third person;[6] and hence failure to serve notice of the expiration of time for redemption from tax sale does not entitle the holder of the tax certificate to sue the sheriff for the value of the land, since it cannot be known that redemption would have been made had notice been served.[7]

§ 61. Extent of Liability

a. Failure to execute process
b. Giving preference to junior writ
c. Insufficient or defective levy

a. Failure to Execute Process

The liability of a sheriff or constable for failure to execute process ordinarily is limited to the injury actually sustained by the party having the process issued.

A sheriff or constable who fails to execute, or properly to execute, process is prima facie liable for the amount of the debt or judgment[8] or the value of the property if that be less than the amount of the judgment,[9] together with interest[10] and costs,[11] although it has been held that interest is not allowable for refusal to execute a writ where no pecuniary benefit has, or could have, accrued to the officer through his default[12] or where no demand was made on him for the money claimed.[13] The officer may reduce his liability by showing that his default was not the real cause of the loss,[14] as in a case where

95. N.Y.—Clark v. Carnley, 3 Code Rep. 136.
96. Pa.—Sherfy v. Fisher, 2 Rawle 147.
97. S.C.—Wilks v. Hasket, 16 S.C.L. 490
98. Neb.—Steele v. Crabtree, 58 N.W. 1022, 40 Neb. 420.
99. Ga.—Cason v. Mulling, 50 Ga. 598
1. Ala.—McCall v. McRae, 10 Ala. 313.
2. Ga.—Caruthers v. Sprayberry, 26 Ga. 437—Neal v. Price, 11 Ga. 297.
3. Ga.—Caruthers v. Sprayberry, 26 Ga. 437—Neal v. Price, 11 Ga. 297.
4. Ala.—Newcomb Bros. v. Wall Paper Co. v. Wiggin, 78 So. 905, 201 Ala. 551
57 C.J. p. 807 note 6
Damage as prerequisite to enforcement of penalty for default see infra § 175.
5. Tex.—B. F. Goodrich Rubber Co. v. Valley Plumbing, etc., Co., Civ. App., 267 S.W. 1036—Richardson v. Johnson-Layne Coffee Co., Civ. App., 252 S.W. 253.
6. Minn.—Foster v. Wagener, 151 N.W. 407, 129 Minn. 11.
7. Minn.—Foster v. Wagener, supra.
57 C.J. p. 807 note 10.
8. Mass.—Beacon Trust Co. v. Wright, 192 N.E. 70, 288 Mass. 1.
57 C.J. p. 816 note 62.
9. Mass.—Beacon Trust Co. v. Wright, supra
10. N.J.—Hunt v. Gulick, 9 N.J. Law 205
Tex.—Murray v. Evans, 60 S.W. 786, 25 Tex.Civ.App. 331
Allowance of interest in action on officer's bond see infra § 207
11. Ind.—Miller v. State, 61 Ind. 503.
57 C.J. p. 816 note 64.
12. Mo.—State v. Harrington, 44 Mo. App. 297
57 C.J. p. 816 note 65.
13. Ga.—Battle v. Ricks Lumber Co., 144 S.E. 919, 38 Ga.App. 621.
14. N.Y.—Humphrey v. Hathorn, 24 Barb. 278—Ledyard v. Jones, 6 N.Y. Super. 67, affirmed 7 N.Y. 550.

the debt could not have been collected in any event, as considered supra § 60 e, so that his ultimate liability is only for the injury actually sustained by reason of his default,[15] unless his default has been willful.[16] So, where it appears that there was property of defendant which might have been levied on and the value of which equaled or exceeded the debt, the officer is liable for the entire debt,[17] but where such property was worth less than the amount of the debt the officer is liable for only the value of the property at the time it should have been seized.[18] In some cases the cash value of the property which might have been seized, and not a fluctuating auction price, has been held to be the measure of damages,[19] while in others it has been held that the measure of the sheriff's liability is the amount which the property not levied on would have brought if sold at public sale to the highest and best bidder.[20]

Liability on final and mesne process distinguished, bail trover. In some jurisdictions it has been held that, while the sheriff's liability for failure to execute, or his default in executing, final process is presumptively the amount of the execution,[21] his liability for failure to execute ordinary mesne process is only the amount of actual damages sustained by the creditor,[22] and that, where the officer fails without good excuse to render services legally incumbent on him in executing (mesne) bail process in a trover case, he must respond to plaintiff in damages for whatever amount the services, if faithfully performed, would have been worth in the proceeding in which they were due,[23] which is the eventual condemnation money.[24] Damages for failure to execute bail and trover process, although reducible by funds derived from a sale of the property under a subsequent common-law levy,[25] cannot be so reduced where the property when sold under the levy was insufficient to pay costs.[26]

Nominal damages. If there has been no actual loss from a default in the execution of process, plaintiff is entitled to no more than nominal damages.[27] Accordingly, only nominal damages can be recovered against a sheriff for refusing to levy on and sell property on executions against the mortgagor where the amount of the mortgages exceeds the value of the property.[28] So, where neither the body nor any property of an execution defendant was within the territorial jurisdiction of an officer during the time the execution was in his hands, only nominal damages can be recovered against the officer for failure to execute the process,[29] and where the judgment has been avoided by an adjudication in bankruptcy, nominal damages, at most, can be recovered for failure of the sheriff to make the money on an execution issued on such judgment.[30]

b. Giving Preference to Junior Writ

For wrongfully giving precedence to a junior writ the sheriff has been held liable to the holder of the senior writ for the amount which the latter would have received but for such wrong.

It has been held that a sheriff who improperly gives precedence to a junior writ is liable to the holder of the senior writ for the amount which he would have received had the officer done his duty;[31] but other authorities have held that the proper measure of damages is the value of the goods at the time of the sale, and not the difference between the price obtained and that which could have been obtained by a sale under the senior lien.[32] If the act of the officer results in the property of a surety of the execution defendant as to the debt represented by the senior writ being seized, whereas, but for the sheriff's wrongful act, the surety would not have been compelled to pay the debt, the surety is entitled to recover from the sheriff an amount equal to the value of as much of the debtor's property as was wrongfully applied on the junior writ,[33] un-

15. Neb —Ehlers v Gallagher, 22 N. W 2d 396, 147 Neb 97.
57 C J p 816 note 69.

16. Conn —Ackley v. Chester, 5 Day 221.
Me —Hodsdon v Wilkins, 7 Me 113, 20 Am.D 347
Exemplary damages for wrongful acts of officer generally see infra § 166.

17. Tex —Murray v. Evans, 60 S.W. 786, 25 Tex Civ App 331
57 C J. p 816 note 71.

18. Ky —Barnett v. Gilbert, 133 S. W.2d 529, 280 Ky 402
Mass —Tyler v Ulmer, 12 Mass. 163.
57 C J p 816 note 72.

19. Vt —Wetherby v. Foster, 5 Vt 136.

20. Ill —Gilbert v. Gallup, 76 Ill. App. 526

21. Ga —Beck, etc, Hardware Co v. Knight, 48 S E 930, 121 Ga. 287, 2 Ann Cas 9.
57 C J. p 816 note 62

22. Ga —Snell v Mayo, 62 Ga. 743— Houston v Howell, 136 S E 474, 36 Ga App. 330

23. Ga —Snell v. Mayo, 62 Ga. 743.

24. Ga —Battle v. Ricks Lumber Co, 144 S E 919, 38 Ga App 621.
57 C J. p 817 note 79

25. Ga —Battle v. Ricks Lumber Co, supra.

26. Ga.—Battle v. Ricks Lumber Co., supra.

27. Mass —Beacon Trust Co v. Wright, 192 N E 70, 288 Mass. 1.
Vt —Ives v Strong, 19 Vt. 546

28. Ohio —Coopers v. Wolf, 15 Ohio St. 523.

29. Vt —Ives v. Strong, 19 Vt. 546— Kidder v. Barker, 18 Vt. 454

30. Mass —Selfridge v. Lithgow, 2 Mass 374.

31. La —Grabenheimer v. Budd, 3 So. 724, 40 La Ann 107.

32. Wash —Continental Distributing Co. v Hays, 150 P. 416, 86 Wash. 300, Ann Cas 1917B 708.

33. Ky —Staton v. Commonwealth, 2 Dana 397.

less the execution defendant's effects were insufficient to satisfy the senior execution,[34] in which case the officer is liable only for as much of the property as sold for the sum which the effects of the principal brought, and not for what would have been in any event required to make up a deficiency on the execution for which the surety was liable as such.[35]

c. Insufficient or Defective Levy

As a general rule, for negligently making an insufficient or defective levy the sheriff or constable is liable only to the extent of the actual damage caused thereby.

Where a sheriff or constable negligently makes an insufficient levy, by reason of which a part of the debt is lost, the prima facie measure of damages is the difference between the amount named in the writ, with costs, and the amount realized from a sale of the goods seized,[36] and the officer cannot be held liable for the full amount of the execution unless that measures the injury;[37] but if it is not shown that the omitted goods were of any value, only nominal damages can be recovered.[38] A sheriff who makes a levy so defective that the property is lost to the execution creditor is liable for all the resulting damage.[39] If the debtor had no title to the property at the time of the defective levy, the officer is not liable for the amount of the debt,[40] but only for nominal damages.[41]

§ 62. Wrongful Acts Committed in Execution of Process

a. Abuse of process and other tortious acts in general
b. Causing unnecessary injury or hardship
c. Entry on, or breaking into, premises
d. Failure to note time of receipt of writ
e. Failure to make inventory of property levied on

a. Abuse of Process and Other Tortious Acts in General

A sheriff or constable is liable for damages resulting from his unauthorized or wrongful acts done under color of executing process.

A sheriff or constable is liable for damages resulting from his unauthorized or wrongful acts done under color of executing process,[42] as where he commits an assault,[43] unlawfully injures property,[44] or arrests and imprisons a citizen, and while holding him under duress illegally seizes and takes away and disposes of his property.[45] Where a constable arrests defendant immediately on receiving an execution, without searching or inquiring for property, he does so at his peril,[46] and if it is shown that defendant had property in his open and visible possession, which was subject to execution, and might with reasonable diligence have been found, he will be liable for making the arrest.[47] Where a constable arrested a debtor under an execution, and also on the same day seized certain goods, chattels, and wearing apparel of the debtor, but wholly neglected to render an account of the moneys arising from the sale of such goods, or to indorse them as a credit on the execution, by reason whereof the debtor was kept in jail until he paid the whole of the debt, interest, and costs, without any credit for the goods, the officer was held liable to the debtor for the injury.[48] However, it has been held that where a defendant's Christian name is erroneously stated in process against him, but such process is

34. Ky.—Staton v. Commonwealth, supra.

35. Ky.—Staton v. Commonwealth, supra.

36. U.S.—Farmers', etc., Bank v. Maines, Mich., 183 F. 37, 105 C.C.A. 329.
57 C.J. p. 817 note 90.

37. Ky.—Commonwealth v. Lightfoot, 7 B.Mon. 298.

38. U.S.—Farmers', etc., Bank v. Maines, Mich., 183 F. 37, 105 C.C.A. 329.

39. Vt.—Parker v. Peabody, 56 Vt. 221.

40. Conn.—Fitch v. Smith, 9 Conn. 42.

41. Vt.—Bell v. Roberts, 15 Vt. 741.

42. Or.—Gatt v. Hurlburt, 284 P. 172, 131 Or. 554, rehearing denied 286 P. 151, 132 Or. 415.

Liability:
For acts or defaults of deputy see supra § 55
On official bond see infra §§ 177-208

Protection afforded by process, judgment, or order of court from liability for wrongful acts in execution of process, see infra § 127.

Use of warrant of arrest to coerce debtor into paying debt is an abuse of process by sheriff, particularly where he pursued such course for purpose of obtaining a commission in transaction as an attorney.—In re Williams, 128 S.W.2d 1098, 233 Mo.App. 1174.

Ejectment of tenant and his property without a warrant and without waiting the statutory period renders constable liable.—Perres v. Munsch & Arnoudin, 6 La.App. 770.

Unlawful search
Constable who, under valid search warrant, knowingly searched portion of premises occupied by person not named in warrant was held individually liable in damages.—McMahan's Adm'x v. Draffen, 47 S.W.2d 716, 242 Ky. 785.

43. Tex.—Mendoza v. Singer Sewing Machine Co., 84 S.W.2d 715, 125 Tex. 639.

44. U.S.—Grothgar v. Lewis, Miss., 100 F. 326, 40 C.C.A. 382.
57 C.J. p. 817 note 98.

45. La.—Frazier v. Parsons, 24 La. Ann. 339.
57 C.J. p. 818 note 99.

46. N.Y.—Hollister v. Johnson, 4 Wend. 639.

47. N.Y.—Hollister v. Johnson, supra.
57 C.J. p. 818 note 2.

48. N.J.—Mershon v. McCullough, 3 N.J.Law 416.

served on the person intended and he does not plead the misnomer in abatement, but suffers judgment by default, he cannot hold the officer liable for arresting him under final process in which the misnomer also appears.[49]

Committing debtor to jail other than that nearest residence. Where there are several jails in the county to which a sheriff may lawfully commit a debtor arrested on civil process, he is not guilty of oppression or abuse of authority rendering him liable to the debtor where he commits the debtor to the jail farthest from his residence, although the debtor requests that he be committed to a nearer jail.[50]

Defeating execution. Where a constable received an execution, and without the consent of the creditor delivered it to another officer, and then gave information of it to the debtor, who in consequence thereof avoided the execution, the constable was held liable to the creditor for the damages sustained by him.[51]

Delay in removal of attached property from leased premises. While the failure of an officer who has attached a tenant's property to remove it from the leased premises, within a reasonable time, is an invasion of the tenant's rights,[52] it does not render the officer liable to the landlord for rent,[53] and, the tenancy being still in existence, a promise by the officer to the landlord to pay the rent is unenforceable.[54]

Peaceable retaking. If, after one person's property has been seized under an attachment against another, the rightful owner can quietly and peaceably take possession of such property, he is entitled to retain such possession, and the officer who levied on such property is not justified in using forcible means to regain possession thereof.[55]

Purchase of debtor's property. While an execution is in the hands of a sheriff for levy, he may not buy the property of the execution debtor to the prejudice of the creditor.[56]

Refusal to release debtor. Under a statute providing that no man's person shall be arrested and imprisoned for any debt where sufficient means of satisfaction can otherwise lawfully be found from his estate, to be shown and presented by him, a constable who, on demand, is refused property to satisfy an execution, and thereupon arrests defendant, is not liable because he subsequently refuses to release the debtor on the receipt of chattels sufficient to satisfy the execution.[57]

b. Causing Unnecessary Injury or Hardship

Execution of process at such improper time and in such improper manner as willfully to cause unnecessary injury or hardship may render the sheriff liable.

Where a sheriff executes process at such an improper time and in such an improper manner as willfully to cause unnecessary injury or hardship, he may be held liable therefor;[58] and if the manner of executing the process causes physical and mental suffering the officer is liable for actual damages based thereon,[59] and for punitive damages where he acted maliciously and oppressively,[60] but no recovery can be had because of the manner of executing a writ if it results in no actual damage.[61] A sheriff does not become a trespasser ab initio by doing slight injury to a building while exercising reasonable care in removing machinery therefrom in executing a writ of attachment.[62]

c. Entry on, or Breaking into, Premises

A sheriff or constable may be liable for wrongfully breaking into a dwelling house to serve or execute civil process.

A sheriff or constable is liable for breaking into a dwelling house through an outer door to serve or execute civil process,[63] and this is also true where he forcibly enters an open window;[64] but he is not liable if he enters through an open outer door,[65] or otherwise gains a peaceable entrance,[66] and then forcibly enters an inner room in order to

49. Mass.—Trull v. Howland, 10 Cush. 109, 57 Am D 82.

50. Mass.—Woodward v. Hopkins, 2 Gray 210.

51. Vt.—Isham v. Eggleston, 2 Vt 270, 19 Am D. 714.

52. Cal.—Stevenson Bros Co. v Robertson, 131 P. 326, 21 Cal App 224.

53. Cal.—Stevenson Bros. Co. v. Robertson, supra.

54. Cal.—Stevenson Bros. Co. v. Robertson, supra.

55. Wis.—Brownell v. Durkee, 48 N. W. 241, 79 Wis 658, 24 Am S.R 743, 13 L R A. 487.

56. Ky.—West v. Criscillis, 46 S W 2d 1082, 242 Ky 549.

57. Conn.—Hall v. Hall, 1 Root 120. 57 C J. p 818 note 10.

58. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96. 57 C J. p 818 note 11.

59. Kan.—Townsend v. Seefeld, 169 P. 1157, 102 Kan 302.

60. Kan.—Townsend v. Seefeld, supra.

61. Tex.—Colwick v. Wright, Civ. App., 275 S.W. 152.

62. Vt.—Fullam v. Stearns, 30 Vt. 443
57 C J p 819 note 15.

63. Tex.—Mendoza v. Singer Sewing Machine Co., 84 S W.2d 715, 125 Tex 639
57 C J p 819 note 16.
Right to break doors in making arrest under civil process see Arrest § 66

64. Tex.—Hillman v. Edwards, 66 S W. 788, 28 Tex.Civ.App. 308.

65. Ill.—Connor v. Greenberg, 198 Ill.App. 129.

66. Tex.—Hillman v. Edwards, 66 S. W. 788, 28 Tex.Civ.App. 308.

seize the goods subject to the writ. So it has been held that a sheriff or constable is not liable where he uses reasonable care in removing furniture from a dwelling pursuant to an execution requiring him to dispossess a tenant, although he forces open a locked door on the tenant's refusal to grant him admission.[67] Where an attachment is made by breaking into a house, the value of the goods attached cannot be deducted from the damages for which the sheriff is liable for his wrongful act.[68]

Entry and search of premises of stranger. Where a sheriff, having an execution, enters the outer door of a stranger to the writ, goes into his buildings, and breaks open his outhouses in search of property of defendant, but finds none, he is liable in trespass.[69] However, where an officer having a writ of replevin enters a house peaceably and on the invitation of the owner and makes a search for the goods he incurs no liability thereby[70] unless he does unnecessary injury in making the search.[71]

d. Failure to Note Time of Receipt of Writ

Failure of a sheriff to comply with a statute requiring him to make a minute on an execution as to the time of its receipt may render him liable for resulting damage.

Where a statute makes it the duty of the sheriff, on receiving an execution, to make a minute thereon of the time of its receipt, as considered supra § 44, he is liable for an omission to do so if any loss or damage results from such neglect.[72] The fact that the execution plaintiff, after delivery of the writ to the sheriff, ordered him to return it before the return-day, does not relieve the sheriff from liability for failure to indorse on the writ the date of delivery,[73] and where a sheriff accepts a writ of execution from another than plaintiff, without requiring evidence of his authority to deliver it, he cannot excuse his neglect to indorse the date of delivery by urging a want of authority in such person to deliver the writ.[74]

e. Failure to Make Inventory of Property Levied on

Failure of a sheriff or constable to make an inventory of the property levied on may render him liable for resulting damage.

Where it is the duty of a sheriff or constable to make an inventory of the property levied on, his failure to do so will render him liable for any damages resulting therefrom.[75]

C. WRONGFUL LEVY ON, OR TAKING OF, PROPERTY

§ 63. In General

Where the act of a sheriff or constable in seizing or levying on property is wrongful, he is liable to the owner of the property for the resulting damage.

Where the act of a sheriff or constable in seizing or levying on property is wrongful, he is liable to the owner of the property for the resulting damage,[76] unless he has protected himself by an indemnity bond.[77] It has been held that a sheriff who seizes property in claim and delivery proceedings is merely the agent of plaintiff, and he incurs no liability by the seizure unless plaintiff is liable therefor.[78]

What constitutes seizure. In order to constitute a seizure of real property for which, if wrongful, the sheriff will be liable, it is not necessary that there should be an ouster of the owner, but it is sufficient that the sheriff has, through himself or another, asserted an unlawful dominion over the property,[79] as by putting a receiver in possession.[80] In order to constitute a seizure of personalty, the sheriff or constable must exercise some dominion or control over it,[81] which amounts to an interference with the owner's right to possession and control,[82] but it is not necessary that he should take

67. Conn.—Fry v. Taylor, 138 A. 138, 106 Conn. 387.

68. Mass.—Ilsley v. Nichols, 12 Pick. 270, 22 Am.D. 425.

69. Ky.—Walker v. Fox, 2 Dana 404.

70. Mo.—Bruce v. Ulery, 79 Mo. 322.

71. Mo.—Bruce v. Ulery, supra.

72. Ala.—O'Connor Min., etc., Co. v. Dickson, 20 So. 413, 112 Ala. 304. 57 C.J. p. 819 note 26.

73. Ala.—O'Connor Min., etc., Co. v. Dickson, supra.

74. Ala.—O'Connor Min., etc., Co. v. Dickson, supra.

75. Tex.—Mayo v. Branch, Civ.App., 135 S.W. 661.

76. Ariz.—Fidelity & Deposit Co. of Maryland v. McFadden, 53 P.2d 1085, 47 Ariz. 116.
Ga.—Chambers v. Self, 186 S.E. 203, 53 Ga.App. 437.
Vt.—Commercial Credit Corp. v. Dusckett, 49 A.2d 106, 114 Vt. 450.—Duncan v. Stone, 45 Vt. 118.
57 C.J. p. 819 note 32.
Liability of sheriff or constable for acts of deputy see supra § 55.
Liability on official bond for wrongful levy see infra § 185.

77. Miss.—Breithaupt v. Dean, 169 So. 792, 144 Miss. 292.
Indemnity to officer see infra §§ 128-145.

78. Cal.—Francisco v. Aguirre, 29 P. 495, 94 Cal. 180.

79. Cal.—Rowe v. Bradley, 12 Cal. 226.

80. Cal.—Rowe v. Bradley, supra.

81. Tex.—Little v. Newton, Civ.App., 92 S.W.2d 1094, error dismissed.
57 C.J. p. 820 note 37.
Taking inventory of property to be levied on without an actual levy does not subject the sheriff to liability for wrongful attachment.—Little v. Newton, supra.

82. Minn.—Kloos v. Gatz, 105 N.W. 639, 97 Minn. 167.
57 C.J. p. 820 note 38.

the property into his actual possession,[83] or remove[84] or sell[85] it, and, if he seizes property of a third person, it is immaterial that he assumes to levy only on the interest of the execution debtor therein.[86] When property is already in the possession of an officer under a lawful seizure, he incurs no liability by a formal levy on the same property under another writ, even though the latter levy is wrongful, where the property is not detained from the owner by reason of the second levy.[87]

§ 64. Acts or Omissions Constituting Wrongful Levy or Seizure

Generally stated, possession by a sheriff or constable under a warrant, whether actual or constructive, is not wrongful unless the officer is not justified in executing the warrant because it is not regular on its face or not issued by competent authority, unless the property held is not that described by the writ, or unless the writ, if originally effective, is no longer so.

Generally stated, possession by a sheriff or constable under a warrant, whether actual or constructive, is not wrongful unless the officer is not justified in executing the warrant because it is not regular on its face or not issued by competent authority, unless the property held is not that described by the writ, or unless the writ, if originally effective, is no longer so.[88] A sheriff or constable who levies on property under a void writ is liable in damages for the trespass,[89] and it is no defense that he afterward seized and sold the property under a valid writ in favor of a person other than plaintiff in the void writ,[90] but a sheriff or constable levying a writ of attachment[91] or sequestration[92] according to its mandate is not liable for the wrongful suing out of the writ in the absence of any showing that he conspired with or instigated plaintiff in its procurement. Although it is better practice for a sheriff or constable who has a writ of replevin to show it at the time he replevies property in the possession of a person other than defendant, the failure of the officer to show the writ is not fatal, where there is no request on the officer to produce it, and does not render the taking wrongful,[93] and the failure of the officer to submit to defendant in the replevin suit, for his inspection and approval, the replevin bond before he replevies the property does not render the taking of the property under the writ wrongful.[94]

Seizure without process or warrant. A sheriff or constable who, without any process, seizes property against the protest of the owner is liable therefor, although he believed that his act was authorized,[95] and even though the statute authorizes a seizure of property without a warrant under certain circumstances, an officer acting under such statute is held to a strict compliance with all its requirements, failing in which he is liable for the seizure.[96] However, it has been held that a seizure without a warrant will not render the officer liable for the detention of the property under a warrant subsequently issued.[97]

§ 65. —— Matters Relating to Property Seized in General

A sheriff or constable is liable for the seizure of property outside the territory over which his authority extends, or for the seizure of property other than that designated in the process or order of court.

A sheriff or constable who seizes property outside of the territory over which his authority ex-

Seizure of land on crop

Sheriff was held not liable for wrongful seizure of crops belonging to third possessor gathered after seizure of land in foreclosure proceedings but before acquisition by mortgagee with sheriff's consent, since seizure of crop does not automatically result from seizure of land, notwithstanding statute providing that fruits gathered under seizure of immovable shall be considered part thereof, which statute is affected by exceptions protecting preexisting rights to crops—Vosburg v. Federal Land Bank of New Orleans, La App., 172 So. 567.

83. Minn.—Kloos v Gatz, 105 N W 639, 97 Minn. 167
57 C.J. p 820 note 39.

84. Ala.—Rogers v. King, 44 So 655, 151 Ala. 628.
N Y.—Stewart v. Wells, 6 Barb. 79.

Prevention of removal by owner

Where sheriff went to property, consisting of bundles of stock feed stacked in field, and in view thereof asserted that he had levied on it and prevented owner from removing it, sheriff's conduct constituted a levy thereon such as would render sheriff liable for wrongful levy—Smith v Harvey, Tex Civ App., 104 S W.2d 938, error refused.

85. Cal.—Ronning v Way, 123 P. 615, 18 Cal App. 527.
57 C J. p 820 note 41.

86. Minn.—Kloos v. Gatz, 105 N W. 639, 97 Minn 167—Leonard v Maginnis, 26 N W 735, 34 Minn 506

87. N H.—Page v. Carpenter, 10 N H 77.
57 C.J. p 820 note 43.

88. Mont.—Harri v. Isaac, 107 P.2d 137, 111 Mont 152

89. Mo.—Leise v. Mitchell, 53 Mo App 563

Validity of process as protection to officer see infra § 126.

90. Mo.—Leise v Mitchell, supra.

91. Tex.—Faroux v Cornwell, 90 S W. 537, 40 Tex Civ App. 529.

92. Tex.—Rountree v. Walker, 46 Tex 200.

93. R I.—McDonald v. Brown, 199 A 750, 61 R.I. 40.

94. R I.—McDonald v. Brown, supra.

95. La.—Ader v. Foley, 24 So. 333, 50 La.Ann 1262

Intent of officer as affecting liability generally see infra § 72.

96. Me.—Adams v. Allen, 59 A. 62, 99 Me. 249.
57 C.J. p 821 note 51.

97. Kan.—Hanger v Woodward, 210 P. 1114, 112 Kan. 388.
57 C.J. p 821 note 52.

tends is to be regarded as though he were a stranger having no writ, and is liable in trespass to the owner.[98] Where a process or order of court requires the sheriff to seize or take possession of certain designated property, he is liable if, under color of such process or order, he seizes other property,[99] and no demand is necessary before bringing an action against him for such unlawful seizure.[1]

§ 66. —— Property Not Subject to Levy

a. In general
b. Exempt property
c. Property in custodia legis

a. In General

A sheriff or constable is liable for damages caused by his act in seizing property not subject to levy under the writ.

A sheriff or constable is liable for damages caused by his act in seizing property not subject to levy under the writ which he was assuming to execute.[2]

b. Exempt Property

(1) In general
(2) Necessity of claim and selection by debtor
(3) Failure to allow or set off exemption

(1) In General

A sheriff or constable may be held liable for the damage which has resulted from his making a levy on exempt property.

A sheriff or constable may be held liable for the damage which has resulted from his making a levy on exempt property,[3] and refusing to restore the same on proper and timely demand,[4] where he knew,[5] or was bound under the law to know,[6] or had reasonable ground for believing,[7] that the property was specifically exempt, or the exemption was claimed by the debtor,[8] or some other person entitled to take advantage of his statutory exemption,[9] although the sheriff may disregard a claim of exemption as to all of the debtor's property to an amount greater than the law allows.[10] A mere seizure of property does not render the sheriff liable, where he did not know that the property was exempt.[11]

Waiver of exemption. The officer does not incur any liability by making a levy on exempt property, where the debtor has waived his exemption,[12] although a waiver will not relieve the officer if he seizes property to which the waiver does not apply.[13]

Second levy after release of property as exempt. Where a sheriff or constable has levied on goods and afterward released them as exempt from seizure, an attempt by such officer to make a second seizure of such goods is without authority of law and a trespass.[14]

Intermingling of exempt and nonexempt property. Where the exempt property is confused with property not exempt, the sheriff is not liable for levying on the whole, unless the debtor sets apart, or claims to set apart, the exempt property,[15] but an intermingling in the owner's house of articles of household furniture, which are exempt from attachment, with other articles not so exempt,

98. Ala.—Stephenson v. Wright, 20 So. 622, 111 Ala. 579.
57 C.J. p. 821 note 54.
Territorial extent of authority see supra § 36
Seizure beyond jurisdiction in mitigation of damages see infra § 75

99. N.Y.—Popkin v. Lubin, 62 N.Y.S. 480, 30 Misc. 773.
57 C.J. p. 821 note 56
Seizure of property not subject to levy see infra § 66.

1. Mich.—Kane v. Hitchison, 53 N.W. 624, 93 Mich. 488

2. Or.—Industrial Chrome Plating Co. v. North, 153 P.2d 835, 175 Or. 351, 156 A.L.R. 250
Pa.—Commonwealth, to Use of French, v. Weglein, 24 A.2d 633, 147 Pa.Super. 257.
57 C.J. p. 821 note 59.
Seizure of property belonging to third person see infra § 68

3. Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.
Ga.—Personal Finance Co. v. Evans, 163 S.E. 250, 45 Ga.App. 53.
Wash.—Findel v. Chester, 13 P.2d 442, 169 Wash. 151.
57 C.J. p. 822 note 62
Amercement of officer for levying on exempt property see infra § 173
Damage during possession of officer
Officer who attached exempt property is liable for damage to it while in his possession, whether negligent or not.—Findel v. Chester, supra

4. Colo.—Smith v. Pueblo Mercantile, etc., Assoc., 260 P. 109, 82 Colo. 364
57 C.J. p. 822 note 63.

5. Ga.—Personal Finance Co. v. Evans, 163 S.E. 250, 45 Ga.App. 53.
57 C.J. p. 822 note 64.

6. Mass.—Mannan v. Merritt, 11 Allen 582.
57 C.J. p. 822 note 65.

7. N.H.—Ahearn v. Connell, 56 A. 189, 72 N.H. 238.

8. Ind.—Moss v. Jenkins, 45 N.E. 789, 146 Ind. 589
57 C.J. p. 822 note 67.
Necessity of claim of exemption see infra subdivision b (2) of this section.

9. S.D.—Thompson v. Donahoe, 92 N.W. 27, 16 S.D. 244.
57 C.J. p. 822 note 68

10. Mo.—Brown v. Hoffmeister, 71 Mo. 411

11. Ind.—Moss v. Jenkins, 45 N.E. 789, 146 Ind. 589
57 C.J. p. 822 note 71.

12. Ala.—Ward v. Deadman, 26 So. 916, 124 Ala. 288, 82 Am.S.R. 172.
57 C.J. p. 823 note 76.

13. Pa.—Schock v. Waidelich, 27 Pa. Super. 215
57 C.J. p. 823 note 77

14. Mo.—State v. Davies, 80 Mo.App. 239.

15. Me.—Smith v. Chadwick, 51 Me. 515.
57 C.J. p. 824 note 99.

has been held not such a confusion of goods as will justify the officer, on failure of the owner to claim any of the articles as exempt, in attaching all of them.[16]

Claim of articles other than those set off. Where a debtor has more property of a particular kind than is exempt from execution, and a writ is levied on a portion of such property, leaving as much as the law exempts, and thereafter the debtor claims as exempt a portion of the property levied on, and the residue in the hands of the officer would not be sufficient to satisfy the writ, the debtor must, in order to make good his claim of exemption, surrender to the officer the other property of the same general kind subject to execution, or as much as may be necessary to satisfy the writ, and, if he fails to do so, he is not entitled to recover against the officer for an unlawful seizure.[17]

(2) Necessity of Claim and Selection by Debtor

A demand or claim of exemption may be necessary to support an action against the sheriff or constable, where he did not know, and was not chargeable with knowledge, that the property levied on was exempt.

A demand or claim of exemption may be necessary to support an action against the sheriff or constable where he did not know, and was not chargeable with knowledge, that the property levied on was exempt,[18] as where the debtor has property of a certain kind in excess of his exemption,[19] but no demand is necessary where the officer knows of the exemption or wrongfully levies on articles which are specifically exempted by statute.[20] A mere seizure of property does not render the sheriff liable where the property is not specifically exempt by statute and the debtor declines to designate the articles which he desires to claim,[21] especially where the levy is released before a schedule of the property is delivered to the officer as provided by statute.[22] Under a statute relieving an officer from liability where the debtor fails to make affidavit that the property about to be levied on is exempt, a purchaser of property which, in the hands of the vendor, is exempt may, without making such affidavit, maintain an action against a sheriff who levies on it under an execution against the vendor.[23]

Time of claim. In order to render the sheriff or constable liable, the claim must ordinarily be made before or at the time of the levy,[24] or within a reasonable time thereafter,[25] or at least before sale,[26] but, where the statute requires the officer to appraise the goods and set aside as much as is exempt, the debtor need not make his claim at the time of the levy.[27]

(3) Failure to Allow or Set Off Exemption

Under some statutes if, after the levy, the sheriff or constable fails to apprise the debtor of his exemption rights or refuses to cause an appraisement to be made, or to allow the debtor to select the property which he will hold as exempt, or to set off the debtor's exemptions for him, he is liable to the debtor for failing to perform his duties in these respects.

Under some statutes, the sheriff may in the first instance levy on any of the debtor's property which he can find, and hold it until an inventory and appraisement can be made, and he cannot be held liable for wrongful seizure of exempt property before an appraisement is made[28] and the debtor has demanded and selected his exemption;[29] but if, after such levy, the sheriff or constable fails to apprise the debtor of his exemption rights,[30] or refuses to cause an appraisement to be made,[31]

16. Mass.—Copp v. Williams, 135 Mass. 401

17. Cal.—Keybers v. McComber, 7 P. 838, 67 Cal. 395

18. Okl.—Parsons v. Evans, 145 P. 1122, 44 Okl. 751, L.R.A.1915D 381
57 C.J. p. 823 note 78
Necessity of claim for exemption generally see Exemptions § 130.

Release of property held by third person

In absence of agreement with judgment creditor, officer to whom execution is delivered cannot release debtor's property in hands of third person, unless formal provisions of statute relating to exemption have been complied with by delivery of a schedule.—Hatfield ex rel. Rose v. Cruise, 6 S.E.2d 243, 121 W.Va. 742.

19. Colo.—Harrington v. Smith, 23 P. 331, 14 Colo. 376, 20 Am.S.R. 272.

20. Colo.—Harrington v. Smith, supra.
57 C.J. p. 823 note 80.

21. Colo.—Behymer v. Cook, 5 Colo. 395.

Failure to request debtor to designate property

A sheriff or constable who attaches an entire flock of sheep, without leaving the debtor the number exempt by law, cannot justify the wrong by the claim that he did not know which to leave, when he did not request the debtor to designate them.—Frost v. Mott, 34 N.Y. 253—57 C.J. p. 822 note 70.

22. Ill.—Lenzi v. Zimmer, 210 Ill. App. 260

23. Ala.—Cook v. Baine, 37 Ala. 350.

24. Mass.—Clapp v. Thomas, 5 Allen 158.

25. N.Y.—Seaman v. Luce, 23 Barb. 240.

26. Ind.—Pate v. Swann, 7 Blackf. 500.
S.D.—Longley v. Daly, 46 N.W. 247, 1 S.D. 257.

27. Mich.—Vanderhorst v. Bacon, 38 Mich. 669, 31 Am.R. 328.

28. Minn.—Tullis v. Orthwein, 5 Minn. 377.
57 C.J. p. 823 note 88.

29. Okl.—Parsons v. Evans, 145 P. 1122, 44 Okl. 751, L.R.A.1915D 381.
57 C.J. p. 823 note 89.

30. Mo.—State to Use of Woodrome v. Freeman, 158 S.W. 726, 173 Mo. App. 294.
57 C.J. p. 823 note 90.

31. Neb.—Bender v. Bame, 59 N.W. 105, 40 Neb. 521.
57 C.J. p. 823 note 91.

or to allow such debtor to select the property which he will hold as exempt, and have it set apart to him,[32] or, in a proper case, to set off the debtor's exemptions for him,[33] he is liable to the debtor for failing to perform his duties in these respects, without any further demand.[34]

Where the statute requires an officer levying an execution to see that an appraisement of the debtor's property is made for the purpose of determining how much thereof he is entitled to hold exempt from execution, the sheriff or constable cannot, in an action against him by the debtor for taking exempt property, claim in defense that the property was not shown to be exempt because no appraisement was made,[35] but it has been held that, where a debtor learns of his rights in time to make application for his exemption, and does make such application, he can recover nothing on a petition which alleges that the sheriff failed to apprise him of his exemption rights.[36] So, where the debtor claims that all his property is exempt before a levy, but the officer afterward levies on a part of it, there is no necessity for the officer then to go through the idle ceremony of informing the debtor of his exemption rights, and he is not liable for failing to do so.[37]

Where an execution is never issued in an attachment suit, the officer's failure to give the debtor the benefit of the exemption law does not result in damage to the debtor, and no action will lie against the officer for the trespass.[38]

c. Property in Custodia Legis

A sheriff or constable may be held liable for any damages resulting from a seizure or attempt to seize property in custodia legis.

As property in custodia legis is not subject to seizure under other process, a sheriff or constable may be held liable for any damage resulting from a seizure or attempt to seize it.[39] Where plaintiff, a constable, attached certain goods, and defendant, another constable, subsequently attached the same goods while they were in plaintiff's custody, the fact that the person under whose process plaintiff acted had agreed to save him harmless for not removing the property was held not to affect his right of action against defendant for the trespass.[40]

§ 67. —— Property Subject to Lien or Encumbrance

a. In general
b. Landlord's lien

a. In General

A sheriff may incur liability by seizing personal property which is subject to a lien or encumbrance, but he incurs no liability to the mortgagee of personal property which is in the possession of the mortgagor by seizing the property under process against the mortgagor, where he does nothing to place the property beyond the reach of the mortgagee or to prevent him from taking possession of it when his right of possession accrues.

Under the common-law rule that the equity of a mortgagor of chattels was not subject to attachment or execution a sheriff has been held liable as a trespasser where he seized mortgaged chattels under process running against the mortgagor,[41] with notice of the mortgagee's claim,[42] but under the modern rule that the mortgagor's interest is subject to levy, as considered in Attachment § 73 b and Executions § 45, it is held that, where personal property subject to a chattel mortgage remains in the possession of the mortgagor, the sheriff incurs no liability to the mortgagee by seizing it under process against the mortgagor,[43] where he does nothing to place the property beyond the reach of the mortgagee[44] or to prevent him from taking possession of it when his right of possession accrues;[45] and the same rule applies to a levy on property in possession of a conditional sale purchaser.[46] However, where the mortgagee of chattels is in possession, an officer renders himself liable to the mortgagee by levying on the chat-

32. Mich.—Stilson v. Gibbs, 18 N.W. 815, 53 Mich. 280.
57 C J p 824 note 92.

33. Mich.—Wyckoff v. Wyllis, 8 Mich 48.
57 C J p 823 note 93.

34. S D.—Millerke v. Reiley, 141 N. W. 136, 31 S D. 342.
57 C J p 824 note 94.

35. S.D.—Paddock v. Balgord, 48 N. W. 840, 2 S.D. 100.

36. Mo.—State v. O'Neill, 78 Mo. App. 20.

37. Mo.—Brown v. Hoffmeister, 71 Mo 411.

38. Pa.—Blakeley v. Smith, 27 Pa Super. 583.

39. Cal.—Withington v. Shay, 117 P 2d 415, 47 Cal.App 2d 68, hearing denied 119 P.2d 1, 47 Cal App. 68.
57 C.J. p 824 note 5.
Nominal damages see infra § 76.
Property in custodia legis as subject to:
Attachment see Attachment § 88.
Execution see Execution § 55.
Replevin see Replevin §§ 25–41.

40. Conn.—Huntley v. Bacon, 15 Conn 267.

41. Iowa.—Coleman v. Reel, 39 N W. 510, 75 Iowa 304, 9 Am S.R 484.
57 C.J. p 824 note 11.

42. Iowa.—Coleman v. Reel, supra.
57 C J. p 824 note 12.

43. N.J.—Ayres v. Tinsman, 65 A. 887, 74 N J Law 295.
57 C.J. p 825 note 14.

44. Neb.—Locke v. Shreck, 74 N.W. 970, 54 Neb 472.

45. Neb.—Locke v. Shreck, supra.

46. Wash.—Hess v. Starwich, 272 P. 75, 149 Wash 679.

tels under process against the mortgagor,[47] and the same is true where the mortgagee is entitled to possession under the mortgage[48] and the property is detained by the officer after demand for possession by the mortgagee.[49] So, where a sheriff or constable, with notice of the mortgagee's claim, attaches the entire mortgaged property, and not the interest of the mortgagor alone, takes it from the mortgagee's possession, and detains it until it is sold under the process, he is liable to such mortgagee for the mortgage debt.[50]

A statute providing that personal property may be attached when in possession of the mortgagor, and the mortgagee be summoned as trustee, does not exonerate the officer from liability to the mortgagee for conversion, where the property is not in fact in the mortgagor's possession,[51] but is in the possession of the mortgagee,[52] or of the attaching officer's keeper under a prior levy,[53] and in the latter case, the mortgagor may bring an action against the officer,[54] unless he has waived the conversion[55]

A sheriff who seizes goods while they are in transit under an attachment against the purchaser is liable to the seller for refusing to recognize the seller's lien or right of stoppage in transitu.[56] So, a sheriff has been held liable for seizing under process goods shipped for transportation and thus subject to the lien of the master or shipowner for freight, expenses, charges, etc., without furnishing indemnity.[57] It has also been held that, where a sheriff seizes under attachment goods in the possession of a consignee, who has made advances thereon, he is liable to the consignee as a trespasser,[58] although there is authority to the contrary.[59]

Necessity of demand. Where, under the statute, the mortgage vests the legal title and right of possession in the mortgagee, no demand by him is necessary in order to hold the officer liable for wrongfully seizing the goods on an attachment against the mortgagor,[60] but, if the mortgage gives the mortgagee the right to take possession on default in payment of the debt, or if he deems himself unsafe, a sheriff is not liable for levying on, and removing to a safe place, goods in possession of the mortgagor before default, and before any claim to possession is made by the mortgagee under the insecurity clause, until the mortgagee has demanded the goods[61] So, where a mortgage entitles the mortgagee to immediate possession on attachment against the mortgagor, a voluntary release of an attachment against the mortgagor, followed by delivery of the property to the mortgagor or to the person in whose possession it was when attached, discharges the officer from liability to the mortgagee, in the absence of any demand, either on the creditor or officer, as required by statute.[62]

Tender or deposit of amount due mortgagee. Where the statute requires the officer on seizing mortgaged chattels to tender to, or deposit for, the mortgagee the amount due him, a sheriff or constable is liable for seizing the property under process without making such tender or deposit.[63] Under a statute permitting an attaching creditor of a conditional vendee to attach the property on payment of the unpaid purchase price to the vendor, after default in payment or tender the officer who holds the property or attachment is a trespasser and is liable for his unlawful taking,[64] and cannot discharge himself by showing a loss of the property without his fault.[65]

Statement of claim and demand for payment. Where the statute provides that a mortgagee of property attached, demanding payment of the money due, shall present to the officer or attaching creditor a just and true account of his claim, no action can be maintained against the attaching offi-

47. Tex.—Fox v. Young, Civ.App., 91 S.W.2d 857.
57 C.J. p. 825 note 18.

48. Cal.—Rider v. Edgar, 54 Cal. 127.
Kan.—Johnson v. Anderson, 57 P. 513, 60 Kan. 578.

49. Mo.—State v. White, 70 Mo.App. 1.
57 C.J. p. 825 note 20.

50. N.J.—Fox v. Cronan, 2 A. 444, 4 A. 314, 47 N.J.Law 493, 54 Am.R. 190.

51. Mass.—Simmons v. Carroll, 122 N.E. 408, 232 Mass. 428
57 C.J. p. 825 note 27.

52. Mass.—Porter v. Warren, 119 Mass. 535.

53. Mass.—Simmons v. Carroll, 122 N.E. 408, 232 Mass. 428—Shapira v. Walker, 114 N.E. 668, 225 Mass. 451.

54. Mass.—Haskell v. Carroll, 122 N.E. 407, 232 Mass. 424

55. Mass.—Haskell v. Carroll, supra
57 C.J. p. 825 note 31

56. Tex.—Harris v. Tenney, 20 S.W. 82, 85 Tex. 254, 34 Am.S.R. 796

57. N.Y.—Campbell v. Connor, 70 N.Y. 424.

58. N.Y.—Truslow v. Putnam, 4 Abb.Dec. 425, 1 Keyes 568—Brownell v. Carnley, 10 N.Y.Super. 9.

59. La.—Kenner v. Morgan, 3 Mart. 209.

60. Kan.—Johnson v. Anderson, 57 P. 513, 60 Kan. 578

61. N.Y.—Hall v. Samson, 23 How.Pr. 84, reversed on other grounds 35 N.Y. 274, 91 Am.D. 56—Hall v. Samson, 19 How.Pr. 481.

62. Mass.—Scigliano v. Palmer, 105 N.E. 445, 217 Mass. 555.

63. Cal.—Sousa v. Lucas, 105 P. 413, 156 Cal. 460—Berson v. Nunan, 63 Cal. 550—Bank of California v. McCoy, 72 P.2d 923, 23 Cal.App.2d 192—Lackenbach v. Finn, 147 P. 471, 26 Cal.App. 482
S.D.—Schievelbein v. Boos, 45 N.W.2d 453
57 C.J. p. 825 note 33.

64. Vt.—Commercial Credit Corp. v. Dusckett, 49 A.2d 106, 114 Vt. 450—Duncan v. Stone, 45 Vt. 118.

65. Vt.—Duncan v. Stone, supra.

cer without presenting such account[66] and demanding payment.[67] The mortgagee cannot maintain a suit for conversion against the attaching officer where he has demanded more than the amount due him,[68] but it has been held that a demand is not invalidated by including therein the costs of protest of the notes secured by the mortgage, where the amount due exceeds the value of the property.[69] If proper demand for payment is made, failure of the officer to comply therewith renders him liable to the mortgagee as a trespasser ab initio.[70] Notwithstanding the mortgagee's failure to present the account of his claim and demand judgment, he may recover for conversion of the property, where the officer attached it in the hands of a third person to whom the mortgagor had let it, with the mortgagee's consent, and placed it in charge of a keeper, where, after the seizure, the officer released the attachment, but left the property in possession of the keeper, and refused the mortgagee's request to restore it to the person from whose possession he had taken it.[71] Statutes requiring a claim and demand for payment have been held to have no application to a seizure of mortgaged property in an action against a person who has no interest in the property,[72] and in such a case the mortgagee may maintain the action without demanding payment.[73]

Invalidity of mortgage. The officer may show in defense that the mortgage is invalid,[74] or that the mortgage debt had no real existence, in which case the mortgagee's damages will be only in respect of the possession;[75] but failure to record the mortgage does not render it invalid as against the attaching officer, so as to relieve him from liability, under a statute making an unrecorded mortgage void as to creditors of the mortgagor and subsequent purchasers in good faith,[76] especially where such provision is qualified by another provision to the effect that mortgages not made in conformity with the requirements of the statute shall be valid between the parties and as to persons having actual notice thereof.[77]

b. Landlord's Lien

In some jurisdictions a sheriff or constable, levying on a tenant's goods, who removes the goods from the premises, or permits them to be removed, without payment of the rent due to the landlord, may be liable to the landlord.

In jurisdictions in which the law forbids the taking of a tenant's goods on execution, unless, before their removal from the demised premises, the execution plaintiff pays to the landlord the rent due, as considered in Executions § 128 b, where a sheriff or constable, levying on a tenant's goods, removes them from the premises,[78] or permits them to be removed,[79] without such payment, he is liable to the landlord, although, in order to enforce such liability, it must be shown that the officer had notice that rent was due[80] before he removed the goods.[81] However, a sheriff is not liable to a landlord for removing the goods of an undertenant, leaving the rent unpaid, although notice that the rent is due is duly served;[82] and he is not liable for rent becoming due after the levy.[83] A sale of the property has been held to be a removal thereof as far as affects the officer's liability.[84]

§ 68. —— Property Belonging to Third Person

a. In general
b. Possession of property at time of seizure; notice and demand
c. Confusion of goods

a. In General

The general rule is that a sheriff or constable who levies on property belonging to a person other than the defendant in a writ which specifies no particular property is liable to the owner of the property for the resulting damages if the owner presents his claim in the manner and form prescribed by statute, but, where a writ is-

66. Mass.—Haskell v. Gordon, 3 Metc. 268.
57 C.J. p 826 note 35

67. Mass.—Hanly v. Davis, 49 N.E. 914, 170 Mass. 517.
57 C.J. p 826 note 36.

68. Mass.—Cousins v. O'Brien, 74 N.E. 289, 188 Mass. 146—Hanly v. Davis, 49 N.E. 914, 170 Mass 517

69. Mass.—Bigelow v. Capen, 13 N. E 896, 145 Mass. 270.

70. Mass.—Simmons v. Carroll, 122 N.E. 408, 232 Mass. 428.

71. Mass.—Scigliano v Palmer, 105 N.E. 445, 217 Mass. 555.

72. Mass.—Ashcroft v Simmons, 34 N.E. 188, 159 Mass. 203.

73. Mass.—Ashcroft v. Simmons, supra.

74. Mass.—Fletcher v. Wrighton, 69 N E 313, 184 Mass 547.
57 C J p 826 note 41.

75. Tex.—Jones v. Hess, Civ.App., 48 S W. 46

76. Cal.—Ronning v. Way, 123 P. 615, 18 Cal App. 527.

77. Cal.—Ronning v. Way, supra.
57 C J. p 826 note 44.

78. N J.—Hand v. Howell, 38 A 748, 61 N.J.Law 142, affirmed 43 A. 1098, 61 N J Law 694
57 C.J. p 826 note 48.

79. S.C.—In re Connor, 46 S C L. 349.

80. N.J.—Hand v. Howell, 38 A. 748, 61 N J.Law 142, affirmed 43 A 1098, 61 N J.Law 694.
57 C J. p 826 note 51.

81. N J.—Ayres v. Johnson, 7 N J. Law 119
57 C J. p 826 note 52.

82. N.Y.—Brown v. Fay, 6 Wend 392.

83. S.C.—In re Connor, 46 S C.L. 349.
57 C.J. p 827 note 56

84. Ky.—Burket v. Boude, 3 Dana 209.
57 C.J. p 827 note 59.

sued by a court or judge having jurisdiction commands the sheriff to seize certain property specified therein, the sheriff incurs no liability by obeying such mandate, although the property belongs to a person other than the party against whom the writ issued.

It is the general rule that a sheriff or constable who levies on property belonging to a person other than defendant in a writ which specifies no particular property is liable to the owner of the property for the resulting damages[85] if the owner presents his claim in the manner and form prescribed by statute;[86] and the officer's liability for such a wrongful seizure is not dependent on his taking the property into his actual possession,[87] or selling it.[88] The officer is liable for taking property in which the execution debtor has no interest, although he assumes to levy only on the interest of the execution debtor therein,[89] but, where property levied on belongs to the execution debtor, the sheriff, levying execution thereon, is not liable to a third person claiming the same, although there is an agreement, unknown to the sheriff, between such person and the execution creditor whereby the creditor is estopped to question such person's ownership of the property.[90]

Although two persons or corporations have the same name, the sheriff is liable for executing against one of them a writ directed against the other.[91] Where a sheriff takes the goods of one person under an attachment against another, recovery may be had against him for the trespass after he has gone out of office, although his successor sold the goods and received the proceeds thereof.[92]

Property specified in writ. Where a writ issued by a court or judge having jurisdiction commands the sheriff to seize certain property specified therein, the general rule is that the sheriff incurs no liability by obeying such mandate, although the property belongs to a person other than the person against whom the writ issued,[93] although some authorities have apparently refused to recognize the rule,[94] and others, while recognizing the rule,[95] have held it to be inapplicable where the officer finds the property in the adverse possession of a third person who is not in privity with defendant on the writ,[96] but the sheriff, although incurring no liability for seizing the goods, is liable for refusing to restore them to the owner after demand.[97] The general rule does not apply, however, where a writ, such as a writ of replevin, commands the officer to take certain specified property from the possession of defendant named therein, and in such case the officer is liable if he executes the writ by taking the property from a stranger to the writ, who is the bona fide owner and in the actual possession.[98]

Property purchased pendente lite. One who, during the pendency of an action of replevin and with

85. Ariz.—Fidelity & Deposit Co of Maryland v. McFadden, 53 P 2d 1085, 47 Ariz. 116.
Ark.—Wright v. Husband, 99 S.W 2d 583, 193 Ark. 347.
Mass —Atlantic Finance Corp. v. Galvam, 39 N E 2d 951, 311 Mass. 49
Mo —State ex rel. Webb v. King, App , 73 S W.2d 460
Nev —Bowler v. Vannoy, 215 P.2d 248, petition denied 216 P 2d 274.
N Y —Long Island Tinsmith Supply Corp. v. John H Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc 158.
Ohio —Schaub v. Welfare Finance Corp., 29 N.E 2d 223, 65 Ohio App 68.
Wash.—**Corpus Juris quoted in** Choukas v. Severyns, 99 P.2d 942, 944, 3 Wash 2d 71, opinion adhered to 103 P.2d 1106, 3 Wash 2d 71.
57 C.J. p 827 note 67, p 828 note 68.
Matters relieving officer from liability generally see infra § 72.

Responsibility for wrongful acts

A sheriff who levied general execution on property not belonging to the judgment debtor, under mistaken belief that property did belong to judgment debtor, could be held responsible to true owner only for his own wrongful acts —Choukas v. Severyns, 99 P.2d 942, 3 Wash.2d 71, opinion adhered to 103 P.2d 1106, 3 Wash 2d 71.

86. Wash —**Corpus Juris quoted in** Choukas v. Severyns, 99 P 2d 942, 944, 3 Wash 2d 71, opinion adhered to 103 P 2d 1106, 3 Wash 2d 71.
57 C.J. p 828 note 69.
Notice of claim and demand see infra subdivision b of this section.

87. Wash.—**Corpus Juris quoted in** Choukas v. Severyns, 99 P 2d 942, 944, 3 Wash.2d 71, opinion adhered to 103 P.2d 1106, 3 Wash.2d 71.
57 C J. p 828 note 70
What constitutes seizure generally see supra § 63.

88. Pa.—Bank v. Allen, 1 Del.Co. 277.
Wash.—**Corpus Juris quoted in** Choukas v. Severyns, 99 P 2d 942, 944, 3 Wash 2d 71, opinion adhered to 103 P 2d 1106, 3 Wash.2d 71
Liability for sale of property not belonging to defendant see infra § 87.

89. Minn.—Leonard v. Maginnis, 26 N W. 733, 34 Minn. 506.
Wash —**Corpus Juris quoted in** Choukas v. Severyns, 99 P.2d 942, 944, 3 Wash 2d 71, opinion adhered to 103 P.2d 1106, 3 Wash.2d 71.

90. N Y —Young v. Stone, 53 N Y. S. 656, 33 App.Div. 261.

91. Mass —Hallowell, etc., Bank v. Howard, 14 Mass 181.
57 C J. p 828 note 74.

92. Iowa —Duke v. Vincent, 29 Iowa 308
57 C.J. p 828 note 75

93. Wash.—**Corpus Juris quoted in** Choukas v. Severyns, 99 P.2d 942, 945, 3 Wash 2d 71, opinion adhered to 103 P.2d 1106, 3 Wash.2d 71.
57 C J. p 828 note 76.

94. Cal.—Rhodes v. Patterson, 3 Cal. 469.
57 C.J. p 829 note 77.

95. Mo —State v. Hailey, 71 Mo.App. 200.
57 C J. p 829 note 78.

96. Mo —State v. Hailey, supra

97. N H.—Carpenter v. Lott, 31 Hun 349
57 C.J. p 829 note 80.

98. Ohio —State v. Jennings, 14 Ohio St. 73—Universal Credit Co. v. Gosney, 46 N.E 2d 305, 70 Ohio App. 379.
57 C.J. p 829 note 82—54 C.J. p 490 note 69 [b].
Possession of property as affecting liability generally see infra subdivision b of this section.

notice thereof, purchases the property from defendant does so at his peril, and must abide the result of the action, and the sheriff incurs no liability by taking the property from his possession [99]

Property fraudulently conveyed. In an action against a sheriff for seizing property of one person under process against another he may show that the property was conveyed to the claimant by the debtor in fraud of creditors,[1] provided he makes the necessary showing that he represents a creditor of the seller entitled to attack the validity of the transfer,[2] and this is true notwithstanding a subsequent affirmance of the sale by the creditor, without the officer's consent,[3] but, if he fails to make such showing,[4] or, for any reason, is not in a position to attack the transfer,[5] he is liable. So, it has been held that a sheriff who, under a warrant from the insolvent court commanding him to take the property of the insolvent, seizes property conveyed by the insolvent prior to his insolvency, cannot justify the seizure on the ground that the conveyance was in fraud of creditors.[6]

Seizure of common property under process against cotenant. In the absence of statute an officer under process against one of several cotenants may, without liability, seize and take into his exclusive possession the common property under a levy on defendant's interest therein,[7] but, if he assumes to levy on the whole property, his act is wrongful as against the cotenant not named in the process, and he is liable therefor.[8]

Seizure of partnership property under process against one partner. An officer who levies on and sells partnership property as the property of one of the partners is guilty of a trespass.[9] On the other hand, it has been held that a partner cannot recover against a sheriff for levying on the firm property on an execution against his copartner.[10] So, it has been held that an officer is not liable merely because he takes into his possession partnership property on a writ directed against one of the partners only.[11]

Seizure of wife's property under process against husband. A sheriff or constable is liable for the resulting damage where he levies on the separate property of a married woman under process against her husband,[12] and a like rule obtains where the officer levies an attachment on property owned by the debtor's Indian wife, residing on a reservation.[13]

b. Possession of Property at Time of Seizure; Notice and Demand

(1) In general
(2) Form, requisites, and service of notice or demand

(1) In General

The general rule is that, where property is in the possession of the defendant in a writ as apparent owner, and the sheriff or constable at the time of the levy has no actual knowledge or reason to suppose that another person is the true owner, an action cannot be maintained against the officer for seizing such property until he has received notice of the true ownership and has refused to restore the property to the true owner on demand; but, where the property is in the possession of a person other than the defendant in the writ, and if defendant is not the true owner, no demand or notice is essential to support an action against the sheriff or constable for seizing the property.

Although there is authority to the contrary,[14] the general rule is that, where property is in the possession of defendant in a writ as apparent owner, and the sheriff or constable at the time of the levy has no actual knowledge or reason to suppose that another person is the true owner, an action cannot be maintained against the officer for seizing such property until he has received notice of the true ownership,[15] and has refused to restore the

99. Ark.—Swantz v. Pillow, 7 S.W. 167, 50 Ark. 300, 7 Am.S.R. 98.

1. Mont.—Reagan v. Armstrong, 165 P.2d 1004, 118 Mont. 273.
57 C.J. p. 829 note 86

2. Ark.—Townsly-Myrick Dry Goods Co. v. Fuller, 24 S.W. 108, 58 Ark. 181, 41 Am.S.R. 97
57 C.J. p. 829 note 87.

3. U.S.—Carson v. Hawley, Minn., 122 F. 55, 58 C.C.A. 237.
57 C.J. p. 829 note 88.

4. Mich.—Trowbridge v. Bullard, 45 N.W. 1012, 81 Mich. 451.
57 C.J. p. 829 note 89.

5. Minn.—Sanders v. Chandler, 3 N.W. 351, 26 Minn. 273.
57 C.J. p. 829 note 90.

6. Me.—La Page v. Hill, 32 A. 801, 87 Me. 158

7. Cal.—Conolley v. Power, 232 P. 744, 70 Cal.App. 70.
57 C.J. p. 829 note 94.

8. Cal.—Conolley v. Power, supra.
57 C.J. p. 830 note 95.

9. N.Y.—Michalover v. Moses, 46 N.Y.S. 456, 19 App.Div. 343.
57 C.J. p. 830 note 97.
Attachment of partnership property under writ directed to individual partner see Partnership § 216.

10. Cal.—Hughes v. Boring, 16 Cal. 81.

11. N.Y.—Smith v. Orser, 43 Barb. 187, affirmed 42 N.Y. 132
Vt.—Reed v. Shepardson, 2 Vt. 120, 19 Am.D. 697.

12. Neb.—Gilbert v. Rothe, 184 N.W. 119, 106 Neb. 549.
57 C.J. p. 830 note 2.

13. U.S.—McKnight v. U. S., Mont., 130 F. 659, 65 C.C.A. 37.
57 C.J. p. 831 note 3.

14. Mich.—Hopkins v. Bishop, 51 N.W. 902, 91 Mich. 328, 30 Am.S.R. 480.
Necessity of demand for replevin where property taken under process see Replevin § 70.

15. Idaho.—Oakes v. American Surety Co. of New York, 76 P.2d 932, 58 Idaho 482.
N.Y.—Corpus Juris cited in Universal Credit Co. v. Knights, 261 N.Y.S. 252, 258, 145 Misc. 876.
57 C.J. p. 831 notes 4–6.

property to the true owner on demand,[16] but, where the officer levies on goods in the possession of defendant in the writ, with notice that they belong to a third person, he is liable to the owner for the trespass,[17] and a formal demand for possession is not necessary before instituting suit where the officer has knowledge or notice that the person in possession is not the owner.[18] In an administrator's action to set aside judgments against deceased and to enjoin a sheriff's sale of property, it was held not error to award possession of the property to interveners claiming under assignment from deceased, although no demand had been made on the sheriff for possession before action was instituted,[19] as the sheriff, in such a case, does not have such possession at the time the cross complaint was filed as would make a demand necessary,[20] because, as the property was in the actual custody of the law at the time of the filing of the cross complaint in the equitable proceeding wherein the title to the property was in issue, a demand is unnecessary where the sheriff could not comply therewith.[21]

Under statutory provisions requiring a third party claimant of property seized under process against another to give notice of his claim to, or make a demand for, the property, such notice or demand is necessary to render the officer liable,[22] and the third party's failure to assert his claim after knowledge of the seizure will bar his right of action for trespass or conversion.[23] In accordance with the provisions of the statutes, such a notice or demand is required only where the property is levied on while in the possession of the person named in the process,[24] under such circumstances as to raise a presumption that he is the owner thereof.[25] Some statutes have been held to apply only when the property was taken from the possession of defendant by the officer in the proper discharge of his duty,[26] and, hence, where the taking was not authorized by the process under which the officer acted, a compliance with the statute is not necessary to render the officer liable.[27]

Property in possession of third person. Where the property is in the possession of a person other than defendant in the writ, the general rule is that the sheriff or constable acts at his peril in seizing it,[28] and, if defendant is not the true owner, the seizure is wrongful in the first instance, and no demand or notice is essential to fix the liability of the officer or support an action against him,[29] unless the statute so requires;[30] but an officer is not liable as a trespasser for making the levy if the property really belongs to defendant.[31] Statutory provisions requiring notice or demand by the owner where the person named in the writ is in pos-

16. Ala.—Pilcher v Hickman, 31 So. 469, 132 Ala. 574, 90 Am.S R. 930
N Y.—**Corpus Juris cited in** Universal Credit Co v Knights, 261 N.Y.S 252, 258, 145 Misc. 876.
57 C.J. p 831 note 7.
Demand where goods intermingled see infra subdivision c of this section.

17. Idaho—Oakes v. American Surety Co of New York, 76 P 2d 932, 58 Idaho 482
57 C.J p 831 note 8

18. Colo.—Hollenbeck v. People, for Use of Churchill, 37 P 2d 387, 95 Colo 493
Sheriff acts at his peril if before seizure, under execution, of property in custody of execution debtor he has knowledge or notice of another's claim to property—Hollenbeck v. People, for Use of Churchill, supra.

19. Ind—Stroup v Myers, 21 N E 2d 75, 106 Ind App. 538.

20. Ind.—Stroup v. Myers, supra.

21. Ind—Stroup v Myers, supra.

22. Cal.—Stanley v. Bedford, 265 P. 216.
Mont.—Jackson v. McDonald, 143 P 2d 898, 115 Mont 269.
N.Y.—Universal Credit Co. v Knights, 261 N.Y.S. 252, 145 Misc 876.
Philippine.—Quesada v. Artacho, 9 Philippine 104—Waite v. Peterson, 8 Philippine 449
57 C J p 831 note 6 [a]—6 C.J p 380 note 86.
Detention prior to claim
Officer is not liable for period of detention prior to filing of claim—Mutch v. Long Beach Imp. Co., 190 P 638, 47 Cal App 267
Assignee of property after seizure may maintain action under statute—Waite v. Peterson, 8 Philippine 449

23. Cal—Stanley v. Bedford, 265 P. 216.
N Y—Universal Credit Co v. Knights, 261 N Y.S. 252, 145 Misc 876

24. Cal.—Henriques v. Cottonwood Bank, 276 P 134, 97 Cal App. 725
57 C.J. p 831 note 6 [a] (1).

25. Minn.—Haubrich v. Heaney, 200 N.W. 930, 161 Minn 92—Kiewel v Tanner, 117 N.W 231, 105 Minn. 50—Moulton v. Thompson, 1 N.W 836, 26 Minn 120
57 C J. p 831 note 6 [a] (6), p 832 note 12.

26. N Y.—King v. Orser, 11 N Y.Super. 431.

27. N Y—Einstein v. Dunn, 70 N.Y. S 520, 61 App.Div. 195, affirmed 63 N E 1116, 171 N.Y. 648.
57 C J. p 831 note 6 [a] (10).

28. Wash.—Interior Warehouse Co v. Hays, 158 P 99, 91 Wash. 507.
57 C J. p 831 note 10.

29. Mass—Atlantic Finance Corporation v. Galvam, 39 N E 2d 951, 311 Mass. 49—Malden Center Garage v Berkowitz, 168 N E 916, 269 Mass. 303.
Nev.—Bowler v Vannoy, 215 P 2d 248, petition denied 216 P 2d 274.
57 C J. p 832 note 11—23 C.J. p 587 note 12.
Mortgagee
Where defendant attached automobiles under a writ against a third party and plaintiff, at the time of bringing action against defendant for conversion of automobiles, claimed them as owner entitled to possession, fact that plaintiff had a mortgage on one of the automobiles before plaintiff acquired title did not require plaintiff to make a demand as mortgagee under statute before bringing action.—Atlantic Finance Corporation v. Galvam, 39 N E 2d 951, 311 Mass. 49.

30. La.—Pembrook v. Goldman, App., 176 So. 888.
57 C J. p 832 note 12.

31. Me.—Knight v. Mayberry, 48 Me. 158
57 C.J. p 832 note 13.

session of the property have no application where the property is in the possession of a person other than the person named in the writ.[32]

(2) Form, Requisites, and Service of Notice or Demand

The form and contents of the notice or demand must comply with statutory requirements.

Where notice or demand is required to render the officer liable, the form and contents of such notice or demand must comply with the statute in order to charge the officer.[33] Thus, if the statute requires written notice, the officer is not liable unless the statute is complied with,[34] and it has been held that the officer must in some manner receive the original notice,[35] and that it is not sufficient to read the notice to him[36] and deliver to him a copy thereof.[37] It is sometimes required that the notice shall state the nature and extent of claimant's interest in the property,[38] and a notice which fails to state the source of claimant's interest or the consideration paid as required by statute is insufficient to charge the officer.[39] A demand on a special bailiff in custody of the property has been held sufficient,[40] although it has been held that a conversation between claimant and the bailee of the officer is not notice to the latter.[41]

If the mode of service is not prescribed, it will be sufficient if it appears that the officer in fact received the notice,[42] the manner of receiving the notice is immaterial, and it is enough that the officer actually receives it.[43] The service on the levying officer of the affidavit and notice of claim prescribed by statute is a sufficient demand.[44] So, it has been held that where, at the time of the levy, a third person was owner of and entitled to immediate possession of the property, and so notified the officer in writing, identifying it and forbidding the sale, such notice was equivalent to a demand for return of the property.[45]

Necessity of second notice. Where the owner of property taken on execution against a third person asserts his claim before the sheriff, who notifies the execution plaintiff of such claim, and the latter gives an indemnity bond in which he admits knowledge of the claim, the owner is not required, as against the sheriff or executive plaintiff, to assert his claim again by forbidding the sale.[46]

Waiver of notice or defects therein. Although the notice required by statute is not obviated by the fact that officer has been indemnified,[47] where the notice is merely to enable the officer to secure a proper indemnifying bond, defects in form or substance are waived where that purpose is accomplished.[48] The execution of an indemnity bond to the levying officer after notice of a claim to the seized property has been given, for the purpose of having him retain the property, and the acceptance by the officer of such bond amounts to a waiver of defects in the notice.[49]

c. Confusion of Goods

Where goods of a third person are mixed with goods of the debtor so that they cannot be distinguished, the levying sheriff or constable will not be liable to the third person until he has received notice and demand from him and has refused such demand where the confusion of goods is due to the act of the third person.

Where goods of a third person are mixed with goods of the debtor so that they cannot be distinguished, the levying sheriff or constable may seize the whole,[50] and will not be liable to the third person until he has received notice and demand from him and has refused such demand,[51] where the confusion of goods is due to the act of the third person,[52] and he makes no attempt to point out, or have set aside his own goods on being afforded an opportunity to do so;[53] but the officer has been

32. Minn.—Haubrich v. Heaney, 200 N.W. 930, 161 Minn. 92.
57 C.J. p. 832 note 12

33. Minn.—Kroll v. Moritz, 127 N.W. 1120, 112 Minn. 270.
57 C.J. p. 832 note 15.

34. Minn.—Barry v. McGrade, 14 Minn. 163—Dodge v. Chandler, 9 Minn. 97.

35. Iowa.—Frazier v. Hill, 98 N.W. 569, 123 Iowa 116.

36. Iowa.—Frazier v. Hill, supra—Gray v. Parker, 5 N.W. 697, 49 Iowa 624, 53 Iowa 505.
57 C.J. p. 832 note 19.

37. Iowa.—Frazier v. Hill, 98 N.W. 569, 123 Iowa 116.

38. Iowa.—McFarlane v. Dick, 123 N.W. 1005, 145 Iowa 89.
6 C.J. p. 383 note 19.

39. Iowa.—Gray v. Carroll, 120 N.W. 1035, 144 Iowa 68—Bradley v. Miller, 69 N.W. 426, 100 Iowa 169.

40. Ky.—Armstrong v. Bell, 42 S.W. 1131, 102 Ky. 149, 19 Ky.L. 1156.

41. Cal.—Taylor v. Seymour, 6 Cal. 512.

42. Iowa.—Turner v. Younker, 41 N.W. 10, 76 Iowa 258.

43. Iowa.—Frazier v. Hill, 98 N.W. 569, 123 Iowa 116.
57 C.J. p. 832 note 25.

44. N.Y.—Manning v. Keenan, 73 N.Y. 45.

45. N.Y.—Ford Garage Co. v. Brown, 191 N.Y.S. 539, 198 App.Div. 467

46. Mo.—Anthony v. Bartholow, 69 Mo. 186.

47. Cal.—Taylor v. Seymour, 6 Cal. 512

48. N.D.—Abner v. Twichell, 116 N.W. 95, 17 N.D. 229

49. Iowa.—McFarlance v. Dick, 123 N.W. 1005, 145 Iowa 89.
6 C.J. p. 385 note 46.

50. Iowa.—Allen v. Kirk, 47 N.W. 906, 81 Iowa 658.
57 C.J. p. 833 note 28.

51. Wis.—Smith v. Welch, 10 Wis. 91.
Levy on intermingled property see Executions § 97 b (3).

52. Mich.—McCausey v. Hoek, 124 N.W. 570, 159 Mich. 570.
57 C.J. p. 833 note 31.

53. Mich.—McCausey v. Hoek, supra.
57 C.J. p. 833 note 32.

held liable where the intermingling was not due to any act of the third person done with fraudulent intent, and he did nothing to induce the officer to levy on the goods,[54] and a demand is not necessary where the goods of the third person could readily be separated from those of the debtor.[55] Where merchandise belonging to a debtor has been fraudulently mixed with that of a third person and the latter points out such goods as he prefers should be taken by an officer making an attachment against the debtor, the officer is not liable for taking the goods pointed out, although they did not belong to the debtor.[56]

Where goods of a third person in the possession of the debtor as apparent owner are so intermingled with goods belonging to the latter that they cannot be distinguished, the officer is not liable for levying on the whole until the third person has given notice and demanded their return,[57] identifying and pointing out to the officer the articles belonging to him,[58] and it is immaterial that they were intermingled without his consent;[59] but it has been held that, if the third person offers to designate his goods, and the officer refuses to allow him to do so or to heed his designation, no demand is necessary before suit,[60] and, where a debtor, with the intent to prevent a seizure of his goods on execution, has intermixed them with the goods of another in the possession of such other, and without such other's knowledge, the officer must at his peril avoid seizing the goods of the innocent third person.[61] The owner of goods levied on is not estopped to sue for their conversion, although they were mixed with others levied on, and he did not till the next day claim that they belonged to him where none of the goods belonged to the execution defendant, and he told the officer that this was the case before the levy.[62]

Effect of notice or demand. Where the owner, before suit, gives the officer notice of his ownership, designating the particular articles belonging to him, and demands their return, the officer is liable for a failure or refusal to do so.[63]

§ 69. —— Matters Relating to Mode, Time, and Sufficiency of Levy in General

A sheriff may be liable for damages where he fails to comply with the statute prescribing the mode and the time of the levy.

Where the debtor has the right to point out the property to be levied on, the sheriff is liable if he fails to respect such designation[64] or to allow the debtor an opportunity to designate.[65] Where the statute provides that in levying execution "personal property shall be last taken," a sheriff who levies on the personal property of an execution defendant who designates sufficient real property for the levy is liable for all damages resulting therefrom;[66] but, where the statute requires personalty to be first levied on, a sheriff does not become liable to a recovery for a misfeasance in office by levying on lands where defendant in the execution had personal property to satisfy the debt, unless it appears that such property was known and accessible to the sheriff,[67] and that he knew it to belong to defendant,[68] or it was pointed out to him as such and an indemnity offered to sell it.[69]

Property of principal and surety. As a general rule an officer charged with the execution of a writ is not required to investigate and determine the respective equities of the different defendants as against each other, and may, without incurring any liability, levy on the property of either, without inquiring whether he was principal or surety in the liability which was merged in the judgment,[70] but, where a judgment is rendered and execution issued

Claim of all property
Rule that, where goods of execution debtor are intermingled with those of another, third party must point out to officer specific goods he claims on peril of having them sold under execution, is inapplicable where third party claims all property.—Turner v Rosema, 268 N.W. 757, 276 Mich. 620.

54. Ill.—Foote v. People, 14 Ill App 280.

55. Wis.—Norwegian Plow Co. v. Hanthorn, 37 N.W. 825, 71 Wis. 529.

56. Ill.—Slattery v. Stewart, 45 Ill. 293.

57. Ill.—Greenberg v. Stevens, 72 N E 722, 212 Ill 606
57 C.J. p 833 note 36.

58. N H.—Wilson v. Lane, 33 N.H 466.

59. N H.—Lewis v. Wittemore, 5 N. H 364, 22 Am D. 466.

60. Ill.—Greenberg v. Stevens, 72 N. E 722, 212 Ill 606.

61. N H.—Kingsbury v. Pond, 3 N. H 511.
57 C.J. p 833 note 40.

62. Colo.—Beaman v. Stewart, 74 P. 342, 19 Colo.App. 222.

63. N H.—Lewis v. Whittemore, 5 N H. 364, 22 Am D. 466.
57 C J. p 833 note 42.

64. Ga.—Hollinshed v. Woodward, 52 S.E. 815, 124 Ga. 721.
Tex.—Fatheree v. Williams, 35 S.W. 324, 13 Tex.Civ.App. 430
Necessity of claim and selection by debtor see supra § 68 b.

65. Mich.—Handy v. Clippert, 15 N. W. 507, 50 Mich. 355.
Tex.—Fatheree v. Williams, 35 S.W. 324, 13 Tex.Civ.App. 430.

66. Ill.—MacVeagh v. Bailey, 29 Ill. App. 606.

67. Tenn.—Swingle v. Boyler, 1 Overt. 226

68. N.C.—McCoy v. Beard, 9 N.C. 377, 6 Am.D. 773.

69. N.C.—McCoy v. Beard, supra.

70. Tex.—Mitchusson v. Wadsworth, 1 Tex.A.Civ.Cas. § 976.

against a principal and a surety, and the surety has caused the question of suretyship to be tried and determined, and has procured an order to be made as provided by statute, that the principal's property shall be first exhausted, the sheriff may be held liable for levying on the property of the surety before exhausting that of the principal.[71]

Time of levy. It has been held that an officer is not to be regarded as a trespasser because he levies under an attachment less than the time required before the return day,[72] although he might be so regarded if he levied on a day, such as Sunday, on which service is made null and void by statute;[73] but it has also been held that a sheriff is liable as a trespasser where he levies under an attachment more than the time prescribed by statute before the return day,[74] or before the expiration of the time allowed by statute to the debtor within which to file a schedule of his property.[75]

An officer who makes a levy under a writ after he has returned it[76] or after the return day[77] is a mere trespasser, and an officer who levies an execution after the writ has expired is liable in damages therefor.[78] Where a sheriff levies on and sells property under an execution coming to his hands after the expiration of his term, he is liable as a trespasser,[79] and the same is true where, at the time of the levy, the writ, as well as his term of office, had expired.[80]

§ 70. —— Excessive Levy

The sheriff is liable to defendant against whom process is issued for an unreasonable and unnecessary levy on more of his goods than is necessary to satisfy the debt and costs.

The sheriff is liable to defendant against whom process is issued for an unreasonable and unnecessary levy on more of his goods than is necessary to satisfy the debt and costs,[81] although the officer, in making such levy, does not become a trespasser ab initio.[82] A constable who, under a distress warrant, makes a distress for more rent than is due is liable therefor,[83] but the mere fact that a levy may be excessive does not subject the officer to any liability where he acts in good faith and in the exercise of a sound discretion.[84] The officer cannot be held as a trespasser where he attaches a single indivisible article of personal property, although of much greater value than the amount he is directed to attach, where no other or sufficient property to satisfy his precept can be found.[85]

Where a sheriff, on levying an attachment on part of a stock of goods, takes and holds possession of the whole stock, and refuses to yield possession to the owner, he is liable as for the conversion of the entire stock,[86] and the fact that other levies were subsequently made by the sheriff on the other portions of the same stock has been held not to affect his liability for the wrongful possession first taken, which was never surrendered.[87] An officer who has levied a wrongful attachment on a stock of merchandise, and excluded the owner from the store, is responsible for whatever articles he allows others to take therefrom, although he has not levied on them, and they are taken under process against another person.[88] Likewise, where an officer who attaches cattle on mesne process takes defendant's hay to feed them without his consent, he will be held liable in trover for the hay.[89]

Waiver. The debtor may waive an excessive levy as far as any liability on the part of the officer is concerned.[90]

§ 71. —— Irregularities Subsequent to Seizure

A sheriff or constable cannot be made a trespasser for attaching property under mesne process, by reason of any irregularity in the proceedings of another officer in selling the property under execution.

A sheriff or constable cannot be made a trespasser for attaching property under mesne process, by

71. Ind.—Bliss v Douch, 11 N.E. 293, 110 Ind. 296.

72. Vt.—Hammond v Wilder, 25 Vt. 342.

73. Vt.—Hammond v. Wilder, supra

74. Vt.—Nelson v. Denison, 17 Vt. 73.

75. Ill.—Taylor v. Crowe, 122 Ill. App. 518.

76. Ala.—Chaney v. Burford Lumber Co., 31 So. 369, 132 Ala. 315.

77. Tex.—Jordan v. Henderson, 86 S.W. 961, 39 Tex.Civ.App. 89.
57 C.J. p 834 note 62.

78. Mich.—Isaacs v. McLean, 64 N.W. 2, 106 Mich. 79.

79. Ala.—Andress v. Broughton, 21 Ala. 200.

80. Mich.—Isaacs v. McLean, 64 N.W. 2, 106 Mich. 79.

81. Ga.—Barfield v. Barfield, 77 Ga. 83.
R.I.—Holland v. Anthony, 36 A. 2, 19 R.I. 216.
Tex.—Cornelius v Burford, 28 Tex. 202, 91 Am.D. 309.
57 C.J. p 834 note 68.

82. Ind.—Jarratt v. Gwathmey, 5 Blackf. 237.

83. Pa.—McElroy v. Dice, 17 Pa. 163.

84. N.M.—Gallegos v. Sandoval, 106 P. 373, 15 N.M. 216.
57 C.J. p 834 note 72.

85. Me.—Devereux Co v. Silsby, 114 A. 460, 120 Me. 362

86. Kan.—Burdge v. Kelchner, 72 P. 232, 66 Kan. 642.

87. Kan.—Burdge v. Kelchner, supra.

88. Kan.—Simpson v Vose, 1 P. 601, 31 Kan. 227.

89. N.H.—York v. Sanborn, 47 N.H. 403.

90. Mo.—State v. Stoutt, 253 S.W. 43, 215 Mo.App. 361.
57 C.J. p 835 note 74.

reason of any irregularity in the proceedings of another officer in selling the property under execution.[91] So, a sheriff was held not liable to a buyer for conversion of the goods attached when owned by the attachment debtor, merely because after the attachment the property was sold, and, on dismissal of the original action, and the beginning of a second, the sheriff continued in possession under a second attachment.[92]

§ 72. Particular Matters Affecting Liability

Particular matters which have been held to affect or not to affect the liability of a sheriff or constable for a wrongful levy on, or taking of, property include subsequent orders or executions, intent of the officer, matters relating to title, assent to the officer's acts or estoppel to show title, taking or failing to take indemnity, trial of right of property, application of the proceeds of the property, return of, or offer to return, the property, and sale of the property by the owner.

The circumstances of a case may be such as to relieve a sheriff or constable from liability for a wrongful levy.[93] The filing of an attachment bond required by a statute, authorizing the issuance of an attachment against any defendant on the filing of a bond, and providing that, when the property is in possession of a person other than defendant, such person shall be summoned as a garnishee, will not excuse the sheriff from liability for seizing the garnishee's goods, as the bond inures as security only to defendant in the attachment, and not to the garnishee.[94] So, an officer who has attached the property of one person on a writ against another person cannot set up, in bar of an action of trover against him by the owner, that the property when attached was in the possession of a carrier who had a lien on it for freight.[95] Where a sheriff seizes the property of a third person under an attachment, a subsequent order of court directing sale of the property as perishable,[96] or a subsequent judgment and special execution[97] will not protect him from liability.

Intent of officer. While it has been said that the conduct and motives of an officer at the time of making an attachment are to be looked at in determining whether he acted unlawfully,[98] the intent of the officer cannot be inquired into when he acts in accordance with the law;[99] and it is well settled that the good faith of an officer or the innocence of his intent do not relieve him of liability for levying on exempt property[1] or on property which does not belong to defendant in the process under which he acts.[2]

Matters relating to title in general. An officer against whom replevin is brought for property attached by him under process against a person other than plaintiff in replevin may avail himself of any title of the person for whom he made the attachment,[3] but an officer sued as a trespasser for an unlawful taking of property in the hands of a person other than defendant in the process under which he acted cannot set up a paramount title in a stranger as a defense.[4] The title of plaintiff to the property seized may be attacked by an officer justifying under the writ.[5] So, in an action in a state court against a sheriff for taking and carrying away plaintiff's goods to satisfy an attachment against a third person, defendant has the right to show that the title claimed by plaintiff to the goods is void, because deduced from a sale in violation of a state law,[6] but he cannot set up that such sale was void under the national bankruptcy law.[7] Where property in the possession of a person claiming title to it from a corporation of which a receiver had been appointed was levied on as property of the corporation, under an execution on a judgment rendered subsequent to the appointment of the receiver, it was held that the obligors on an indemnity bond given to the sheriff on such seizure could not, in order to escape liability, set up that the corporation's title had never passed to the person in possession of the property.[8]

91. Vt.—Paul v Slason, 22 Vt 231, 54 Am.D. 75.

92. S D—Scott v. Hantz, 153 N W 894, 35 S D 634.

93. La.—Whitton v Jones, 2 La Ann 802.
57 C J. p 835 note 81.

94. Pa—Rothermel v. Marr, 98 Pa 285

95. Mass—Stearns v. Dean, 129 Mass 139

96. Ky—Hill v. Ragland, 70 S W 634, 114 Ky. 209, 24 Ky L. 1053.
Mo—State v. Hadlock, 52 Mo App 297.

97. Mo.—State ex rel Webb v King, App., 73 S W 2d 460.

98. Me—Moulton v. Chadborne, 31 Me 152

99. Ala—Northern Alabama R. Co v. Lowery, 57 So 260, 3 Ala.App 511
57 C J. p 835 note 89.

1. Ark—Meadow v Wise, 41 Ark. 285
57 C J. p 835 note 90
Liability for levy on exempt property see supra § 66

2. Ark—Wright v Husband, 99 S W.2d 538, 193 Ark 347.
57 C J. p 835 note 91
Liability for seizure of property not belonging to defendant see supra § 68.

3. Vt—Reed v. Starkey, 37 A. 297, 69 Vt. 200.
Property fraudulently conveyed see supra § 68

4. N Y—King v. Orser, 11 N.Y.Super. 431.

5. Or—Fisher v Kelly, 46 P. 146, 30 Or. 1
57 C J. p 836 note 95.

6. Ind—Stanley v Sutherland, 54 Ind 339.

7. Ind.—Stanley v. Sutherland, supra.

8. N.Y—Chapman v. Douglas, 5 Daly 244.
57 C.J p 536 note 98.

Assent to officer's acts, and estoppel to show title. An officer incurs no liability for levying on exempt property where the debtor assents to the levy,[9] but, where a mortgagee of chattels assents to a levy thereon under process against the mortgagor, on condition that such levy be made in recognition of the mortgage, such assent will not protect the officer in making an unqualified levy.[10] So, where an officer takes goods from the possession of one person under an execution against a third person, he cannot justify by an authority from the real owner of the property.[11] On the other hand, it has been held that a plaintiff in replevin who accepts delivery of the goods and ratifies the seizure makes the sheriff his agent, and the latter may justify the taking as by direction of the true owner.[12]

In an action against a sheriff for seizing goods alleged to belong to a third party, general rules as to estoppel are applicable.[13] Thus, a representation which does not mislead the sheriff cannot furnish the foundation for an estoppel of the owner of property,[14] and a claim or notice cannot constitute an estoppel in the absence of a reliance thereon by the officer.[15] Where a sheriff levied on property as that of the husband, and, although both the husband and wife were present at the time of the levy, inventory, and appraisement, neither of them claimed that the wife had any interest therein or that they were holding the property as tenants in entirety, but they permitted the sheriff to treat the property as that of the husband, they were estopped thereafter to assert that the title to the property was other than in the husband.[16]

Where the statute with respect to trustee process requires all questions affecting the interests of a mortgagee in the chattels to be finally determined in the action in which they were attached, a mortgagee who is summoned as trustee but defaults is estopped to maintain an action against the officer for conversion of the chattels.[17] Where a person acquired title to property stored in a warehouse by a transfer of the warehouse receipt and the issuance of a new one in his name, the delivery of the goods by the warehouseman to the sheriff on replevin process against another person will not operate as a voluntary surrender by the owner so as to defeat a recovery against the sheriff for conversion.[18]

Taking, or failure to take, indemnity. The liability of a sheriff for wrongfully levying on property not belonging to defendant is not affected by the fact that he took a bond of indemnity,[19] unless the statute makes the indemnity a substitute for the liability of the sheriff, as considered infra § 133. The failure to act under a statute providing for indemnity does not affect his liability,[20] and the officer's failure to take the indemnity provided for by statute, being his own neglect, cannot relieve him from liability for damages resulting from a wrongful seizure.[21]

Trial of right of property or recovery of judgment for property According to some authorities, where the right to property is tried by a sheriff's jury or adjudicated by a court, a finding that the property belongs to defendant in the process and is subject to levy relieves the sheriff from all liability for levying thereon,[22] but other authorities hold that such a finding does not relieve the sheriff from all liability,[23] although it may be shown in mitigation of damages, as discussed infra § 75. A trial of the right of property levied on will not protect the sheriff where the debtor claims it as exempt,[24] and, where the trial results in an order of

9. Colo.—Duncan v. Burchinell, 61 P. 61, 14 Colo App 471.

10. U S.—Norris v. McCanna, C.C Mich, 29 F. 757.

11. Pa —Rogers v Fales, 5 Pa 154 Nominal damages see infra § 76

12. N.Y —Gandy v. Collins, 108 N.E 415, 214 N.Y. 293

13. La.—Vosburg v. Federal Land Bank of New Orleans, App, 172 So. 567
Mich.—Turner v. Rosema, 268 N.W 757, 276 Mich. 620.
N.H.—Bosen v Larrabee, 23 A 2d 331, 91 N H 492.

Estoppel by laches or silence
La.—Vosburg v. Federal Land Bank of New Orleans, App, 172 So 571.

Failure to object to sale
Fact that third party claimant attended sale and made no objection to it was held not to estop him from claiming title where recovery was sought from sheriff to whom specific claim of title had been made before sale —Turner v. Rosema, 268 N.W. 757, 276 Mich. 620.

14. N H —Bosen v Larrabee, 23 A. 2d 331, 91 N H. 492

Motor vehicle registration
An automobile owner who permitted automobile to be registered in name of another was not "estopped" to replevy automobile from deputy sheriff who had attached the automobile where before making attachment deputy sheriff was told that owner owned the automobile and, hence, was not misled by the registration —Bosen v. Larrabee, supra.

15. Mich —Turner v. Rosema, 268 N W. 757, 276 Mich. 620.

16. Mich —Zuehlke v. Stone, 111 N W. 1065, 148 Mich. 478.

17. Mass —Flanagan v. Cutler, 121 Mass. 96.

18. N.Y.—Einstein v. Dunn, 70 N.Y. S. 520, 61 App.Div. 195, affirmed 63 N E 1116, 171 N Y. 648
57 C J. p 836 note 9

19. La —Macias v. Sheriff, 8 So. 866, 43 La Ann 289.
57 C J p 836 note 11.

20. La —Pembrook v. Goldman, App, 176 So 888.

21. U.S —Norris v. McCanna, C.C. Mich, 29 F. 757.

22. Or —Francisco v Stringfield, 114 P.2d 1026, 166 Or 683.
57 C.J. p 837 note 16.

23. N.Y.—Townsend v. Phillips, 10 Johns. 98
57 C J. p 837 note 17.

24. Ky —Prewit v. Walker, 7 J.J. Marsh. 332.

restitution and a return of the property pursuant to the order, it is no bar to an action by claimant against the officer to recover damages for the seizure and detention of the property,[25] unless the statute so provides.[26]

One whose property has been wrongfully seized by an officer under process against another person does not lose his right to recover damages for the trespass by recovering judgment for the property in replevin against the officer,[27] or the purchaser at the execution sale,[28] even though there is a tender of the goods to the owner after judgment in replevin;[29] and such owner does not lose his right to damages when the seizure is under attachment, by coming into court in the attachment case, filing his plea claiming the property, and recovering judgment for its restitution.[30] On the other hand, however, it has been held that, where a claimant of property levied on under process against another resorts to the statutory remedy to try the right of property, this amounts to a waiver of his remedy by action against the levying officer;[31] but a provision in a statute providing a method of trying the right of a third person to property levied on under attachment that a claim made by one intervening under the statute shall operate as a release of damages for making the levy, being in derogation of common law, will not be extended to claims otherwise made,[32] and where one to whom attached property had been assigned by the debtor was made defendant in the attachment and he answered, claiming title and right of possession, a judgment restoring the property to him did not bar an action by him against the sheriff for the trespass.[33]

Application of proceeds of property. Where an officer has made a wrongful seizure of property, he cannot escape liability[34] or even reduce the amount of his liability, as discussed infra § 75, by showing that the proceeds of the property or a part thereof was applied to the payment of the debts of the owner; and the fact that a sheriff, after taking and selling exempt property under execution, deposited with the justice who issued the execution the surplus proceeds, which the owner might, if he chose, have demanded and received, has been held not to affect the owner's right in an action against the sheriff for wrongfully taking the property, where he had not received the money.[35]

Return or offer to return property. An officer cannot escape liability for a wrongful seizure of property by returning it to the owner,[36] or by an offer to restore or an actual return without acceptance,[37] but such return can avail only to mitigate the damages which would otherwise be recoverable, as discussed infra § 75; and, even though the owner agrees to receive the property in settlement of the claim, defendant will not be discharged from liability if the owner repudiates such agreement before all the property is returned.[38] So, where a return of exempt property is demanded, and a reasonable time for its return is allowed before bringing action, a return of the property by the sheriff after commencement of the action will not relieve him from liability,[39] although it may be shown in mitigation of damages as discussed infra § 75. In any event, a sheriff cannot relieve himself from liability for a wrongful seizure of property by a mere paper release of the levy without a restoration of the property,[40] but in order to relieve the officer there must be a formal release of the property and an acceptance of it by the owner[41] or by some one authorized by him to receive it.[42] Moreover, the return must be made to the place from which the property was taken, or to some place which the owner might reasonably designate.[43]

Where personal property attached on a writ was surrendered to defendant therein, at his request and for his convenience, on the substitution of an equivalent in money, it was held that defendant could not maintain an action against the officer for the wrong-

25. Ohio.—Abbey v. Searls, 4 Ohio St. 598.

26. Ala.—Cheek v. Odom, 100 So 782, 20 Ala.App. 31.
57 C.J. p 837 note 21.

27. Colo.—Woodworth v. Gorsline, 69 P. 705, 30 Colo. 186, 58 L.R.A. 417.
57 C.J. p 838 note 39.

28. Pa.—Nagle v. Mullison, 34 Pa. 48.

29. Colo.—Woodworth v. Gorsline, 69 P. 705, 30 Colo. 186, 58 L.R.A. 417.

30. Md.—Trieber v. Blocher, 10 Md. 14.

31. Tex.—Howeth v. Mills, 19 Tex 295

32. Tex.—Terry v. Webb, Civ.App., 96 S.W. 70.

33. Tex.—Terry v. Webb, supra.

34. Minn.—Welsh v. Wilson, 24 N. W. 327, 34 Minn 92.
57 C.J p 837 note 23.

35. Minn.—Allen v. Coates, 11 N.W. 132, 29 Minn 46.

36. Mich.—McGraw v. Sampliner, 64 N.W 1060, 107 Mich. 141.
57 C.J. p 837 note 26.

37. Minn.—Haubrich v. Heaney, 200 N.W. 930, 161 Minn. 92.

38. Vt.—Smith v. McCall, 48 Vt. 422.
57 C J. p 837 note 28.

39. Colo.—Duncan v. Burchinill, 61 P. 61, 14 Colo.App. 471.

40. Mo.—Kreher v. Mason, 25 Mo. App 291.

41. S.D.—Kieffer v. Smith, 93 N.W. 645, 16 S D 433.
57 C.J. p 837 note 32.

42. Minn.—Caldwell v. Arnold, 8 Minn 265.
57 C J. p 837 note 34.

43. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

ful attachment of such property, although the writ was not returned to court.[44] Where a purchaser under a conditional sale contract has possession of the property, and a sheriff, on levying thereon under an attachment against such purchaser, does not take manual possession of the property, and thereafter releases it from the levy, leaving it in the the possession of the purchaser, he is not liable to the conditional seller for its subsequent loss.[45]

Sale of property by owner. Where, after a levy under execution on property not belonging to defendant, the true owner sells such property to defendant, he parts with his right of action against the officer for the making of such levy,[46] and such right of action cannot be reinvested in the original owner by a resale to him by the execution debtor before a sale under the execution.[47]

Relinquishment of claim to damages. Where the goods of one person are attached on a writ against another person, and subsequently again attached on another writ in favor of a different creditor, a release by the owner of all claim to damages in consequence of the second attachment in consideration of its relinquishment has no effect on his right to recover damages for the first taking.[48]

Withdrawal of claim to property. A person whose goods are taken by a sheriff in proceedings of claim and delivery against another person can maintain an action against the sheriff for damages, although, after giving the sheriff notice of his claim, he withdrew it to enable the sheriff to deliver the goods.[49]

§ 73. Extent of Liability

The liability of a sheriff or constable for a wrongful levy on, or taking of, property includes the damages which arise as a direct and proximate result of the wrongful act.

The liability of a sheriff or constable for a wrongful levy on, or taking of, property includes the damages which arise as a direct and proximate result of the wrongful act;[50] there is no liability for damages which are too remote and uncertain.[51]

§ 74. —— Measure and Elements of Recovery

a. In general
b. Injury to business and credit; loss of profits
c. Counsel fees; interest

a. In General

As a general rule, the sheriff or constable is liable to the owner of property wrongfully seized for the value of the property where the property is not restored to the owner; but where the owner recovers the property he is considered as having received it in mitigation of damages, and the measure of damages is the expense of procuring its return and any other special damage which may be shown, such as depreciation of value or loss of use.

As a general rule, where property wrongfully seized by a sheriff is not restored to the owner, the sheriff or constable is liable to such owner, whether he is the general owner, or has only a special ownership,[52] for the value of the property[53] at the time of the seizure[54] and at the place where the property was when seized,[55] although where property is wrongfully seized while in transit the measure of damages is the value of the property at the time at the place of consignment, less the charges of the carrier for delivering it there.[56] If the property has such a value, the value to be taken is its fair market value,[57] not the value of the goods in the retail market[58] or the amount received on a sale by the officer,[59] although the officer cannot object that the value of the property is less than the amount received on the sale.[60] However, the market value will not be adhered to as the absolute measure

44. Mass.—Taylor v. Knowlton, 10 Allen 137.

45. Wash.—Hess v. Starwich, 272 P. 75, 149 Wash. 679
Liabilities arising out of custody of property see infra §§ 78, 79.

46. N.Y.—Hodge v. Adee, 2 Lans 314.

47. N.Y.—Hodge v. Adee, supra.

48. Me.—Weston v. Dorr, 25 Me 176, 43 Am.D. 259.

49. N.Y.—Haskins v. Kelly, 24 N.Y Super. 160, 1 Abb.Pr.,N.S., 63.

50. Ky.—Commonwealth, for Use and Benefit of Harding, v. Bartholomew, 98 S.W.2d 882, 266 Ky. 270.

51. Ky.—Commonwealth, for Use and Benefit of Harding v. Bartholomew, supra.
Wrongful levy on pressing and cleaning business
In action for damages resulting from alleged excessive levy on property used in pressing and cleaning business, defendant in execution could not recover damages because garments of his customers were also locked up in store unless he could show direct and specific damages to him growing out of such levy.—Commonwealth, for Use and Benefit of Harding, v. Bartholomew, supra.

52. Me.—Warren v. Kelley, 15 A. 49, 80 Me. 512.

53. Mass.—Koski v. Haskins, 128 N.E. 427, 236 Mass. 346.
57 C.J. p 838 note 52

54. Mass.—Koski v. Haskins, supra.
57 C.J. p 839 note 53.

55. Mass.—Ayer v. Bartlett, 9 Pick 156.
Neb.—Barlass v. Braash, 42 N.W. 1028, 27 Neb. 212.

56. Pa.—Eby v. Schumacher, 29 Pa 40.

57. Iowa.—Wilson v. Wright, 198 N.W. 782, 197 Iowa 1300
57 C.J. p 838 note 52 [a].

58. Mo.—State v. Smith, 31 Mo. 566.

59. Mass.—Ayer v. Bartlett, 9 Pick 156.

60. Del.—Kirkley v. Lacey, 30 A. 994, 12 Del. 213.
57 C.J. p 838 note 52 [b] (1).

of recovery where to do so would be a departure from the more fundamental principle of just compensation for the loss sustained,[61] and if the property is of greater value as in use than as property being sold on the market the measure of damages is the value of the property as in use.[62]

Ordinarily plaintiff cannot, in addition to the value of the property, recover the value of its use or hire after the seizure,[63] although, on the other hand, it has been held that he may, instead of interest from the time of the taking, recover the value of the use of the property for the same period.[64] According to some cases a fair compensation for the time and money expended in pursuit of the property is recoverable,[65] although some authorities have held that a successful claimant of property seized under attachment is not entitled to recover for expenses incurred in defending his title where the seizure was not attended by any willful wrong or oppression.[66] Where, after property is wrongfully seized from plaintiff, it is taken from the sheriff or constable by one claiming under a paramount title, the damages recoverable by plaintiff from the sheriff or constable are measured not by the value of the property, but by the injury caused by its actual detention by the officer from the date of the levy until it is taken from him.[67] A tenant ousted under a void writ issued against the landlord may recover damages for the humiliation suffered.[68]

Where owner regains possession. Where the owner recovers his property, he is considered as having received it in mitigation of damages,[69] and the measure of damages is the expense of procuring its return.[70] Where plaintiff has repurchased his property, the measure of damages is the amount paid by him therefor,[71] together with the expenses of procuring a deed,[72] and any other special or substantial damage which may be shown;[73] and if the property depreciates in value while withheld by the sheriff or constable he is liable for such depreciation.[74] The sheriff cannot object that the sum paid for the return of the property exceeds its value;[75] but, on the other hand, it has been held that the sum recoverable cannot exceed such value.[76] Apart from the expense of regaining possession, if it appears that the property has a usable value, the sheriff or constable is liable for the value of the use of the property during the time of its detention by him,[77] or a reasonable amount for the loss of use,[78] unless the circumstances were such that the seizure did not deprive the owner of the use of his property,[79] together with the amount of any damage to the property occasioned by the officer or his agents while it was under seizure.[80] Where the property seized is kept for sale rather than for use, the measure of damages is the diminution of the value of the property by reason of its seizure and detention.[81]

Seizure of mortgaged or pledged property. Where mortgaged property is wrongfully seized and thereby lost to the mortgagee, he is entitled to recover from the sheriff or constable the amount of his mortgage if the property is worth so much,[82] or the value of the property if it is worth less than the mortgage debt,[83] together with compensation for the loss of time and expenses properly incurred in pursuit of the property in either case.[84] In an action

61. N.J.—Farrell v. Colwell, 30 N.J. Law 123.

62. N.J.—Farrell v. Colwell, supra
57 C.J. p. 838 note 52 [a] (1)

63. Ky.—Daniel v. Holland, 4 J.J. Marsh. 18.

64. Tex.—Railey v. Hopkins, 131 S.W. 624, 62 Tex. Civ. App. 544.
57 C.J. p. 839 note 59

65. Dak.—Keith v. Haggart, 33 N.W. 465, 4 Dak. 438.
57 C.J. p. 839 note 55

66. Miss.—Brinker v. Leinkauff, 1 So. 170, 64 Miss. 236.

67. D.C.—Palmer v. U.S., 41 App. D.C. 341, Ann. Cas. 1915B 1216

68. Ky.—Perkins v. Ogilvie, 146 S.W. 735, 148 Ky. 309.
57 C.J. p. 841 note 88.

69. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal.App. 716.
N.H.—Connors v. Dionne, 159 A. 355, 85 N.H. 400.

70. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal.App. 716.
57 C.J. p. 839 note 63.

Proof of damages
Damages for money spent in pursuit of property wrongfully levied on are not recoverable where money or work so expended is not proved.—Ross v. Sweeters, supra

71. Minn.—Leonard v. Maginnis, 26 N.W. 733, 34 Minn. 506
57 C.J. p. 839 note 64.

72. Mo.—Mason v. Wilks, App., 288 S.W. 936
57 C.J. p. 840 note 65.

73. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal.App. 716.
57 C.J. p. 840 note 66—23 C.J. p. 615 note 38.

74. Cal.—Ross v. Sweeters, supra.
Miss.—Breithaupt v. Dean, 109 So. 792, 144 Miss. 292
N.H.—Connors v. Dionne, 159 A. 355, 85 N.H. 400
57 C.J. p. 840 note 67.

75. Minn.—Leonard v. Maginnis, 26 N.W. 733, 34 Minn. 506

76. Wis.—Sprague v. Brown, 40 Wis. 612.

77. Ky.—Commonwealth, for Use and Benefit of Harding, v. Bartholomew, 98 S.W.2d 882, 266 Ky. 270.
57 C.J. p. 840 note 70.

78. Miss.—Breithaupt v. Dean, 109 So. 792, 144 Miss. 292.

79. Va.—Shearer v. Taylor, 55 S.E. 7, 106 Va. 26
57 C.J. p. 840 note 71.

80. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal.App. 716.
57 C.J. p. 840 note 72.

81. Cal.—Ross v. Sweeters, supra.
57 C.J. p. 840 note 73

82. Ind.—Collins v. State, 30 N.E. 12, 3 Ind.App. 542, 50 Am.S.R. 298
57 C.J. p. 840 note 75

83. Neb.—Hamilton v. Lau, 37 N.W. 688, 24 Neb. 59.
57 C.J. p. 840 note 76.

84. Cal.—Irwin v. McDowell, 27 P. 601, 91 Cal. 119.

by a pledgee against a sheriff for a conversion of goods pledged, if the sheriff has seized them under a lawful writ in his hands, he will be treated as in privity with the owner, the pledgor, provided he has pursued the law in making such seizure, and will be held only for plaintiff's special interest in the goods,[85] but in any other event he will be treated as a stranger and held for their full value.[86]

Seizure of property subject to landlord's lien. Where a sheriff or constable seizes and sells property which is subject to a landlord's lien, by reason of which the lien is lost, the measure of damages is the value of the property,[87] unless such value exceeds the amount of rent due, in which case the latter amount is the measure of damages [88]

Seizure of property subject to factor's or carrier's lien. Where goods of an owner in possession of a factor or agent to sell who has a lien for advances are taken out of his possession under an attachment against the owner, the sheriff or constable is liable for the whole value of the goods if the lien exceeds such value.[89] So, where a sheriff takes goods from the possession of a carrier having a lien for freight charges, and does not give the indemnity required by statute, he is, in the absence of bad faith on the part of the carrier, a trespasser, and the carrier is entitled to recover the full value of the goods and to hold it as security for his lien in lieu of the property [90]

Seizure of property in custody of law. A sheriff or constable who seizes and sells property which at the time of the seizure was in the custody of another officer under a prior seizure is liable to the latter officer for the value of such property.[91]

b. Injury to Business and Credit; Loss of Profits

It has been both affirmed and denied that in an action against a sheriff for wrongfully seizing property the injury to the plaintiff's business and credit or loss of profits may properly be considered as an element of damages.

In an action against a sheriff for wrongfully seizing property, it has been held that the injury to plaintiff's business[92] and credit[93] may properly be considered although it has been held in some cases that no recovery can be had for such injury,[94] and in others that recovery therefor can be awarded only where there is a willful and wanton trespass, or trespass marked by some circumstance of malice, oppression, or fraud.[95] In an action against a sheriff by a merchant for wrongful seizure of part of his stock in trade, by reason of which he was compelled to discontinue business and sell the balance of his stock for less than its value, the loss resulting from the sale of such balance was held too remote a consequence of the levy to form the basis of an assessment of damages.[96]

Loss of profits. Loss of prospective profits as an element of damage in an action for a wrongful seizure of plaintiff's stock in trade has been both affirmed[97] and denied.[98]

c. Counsel Fees; Interest

One whose property has been wrongfully seized cannot recover from the sheriff or constable the attorney's fees which he has incurred and paid in asserting or defending his claim to the property, at least where there is no element of fraud, malice, or oppression. Interest on the amount of the loss may properly be allowed.

One whose property has been wrongfully seized cannot recover from the sheriff or constable the attorney's fees which he has incurred and paid in asserting or defending his claim to the property,[99] at least where there is no element of fraud, malice, or oppression.[1] In like manner, the fee of the attorney who brings the action for the wrongful seizure cannot be allowed as part of the damages [2]

85. Cal.—Treadwell v. Davis, 34 Cal. 601, 94 Am D. 770.
Colo.—Cramer v. Marsh, 38 P. 612, 5 Colo App. 302.

86. Cal.—Treadwell v. Davis, 34 Cal. 601, 94 Am D. 770.

87. Ky.—Burket v. Boude, 3 Dana 209
Va.—Crawford v. Jarrett, 2 Leigh 630, 29 Va. 630.

88. Ky.—Burket v. Boude, 3 Dana 209
57 C.J. p. 840 note 83

89. N.Y.—Truslow v. Putnam, 4 Abb. Dec. 425, 1 Keyes 568.

90. N.Y.—Campbell v. Conner, 70 N.Y. 424.

91. Mass.—Robinson v. Ensign, 6 Gray 300
57 C.J. p. 841 note 87.

92. La.—Ader v. Foley, 24 So. 333, 50 La. Ann. 1262
Neb.—Kyd v. Cook, 76 N.W. 524, 56 Neb. 71, 71 Am.S.R. 661.

93. La.—Ader v. Foley, 24 So. 333, 50 La. Ann. 1262.
Neb.—Kyd v. Cook, 76 N.W. 524, 56 Neb. 71, 71 Am.S.R. 661.
57 C.J. p. 841 note 90

94. Cal.—Dexter v. Paugh, 18 Cal. 372.
Ohio.—Searles v. Abbey, 4 Ohio Dec., Reprint, 48, Clev. L.Rec. 63.

95. Cal.—Phelps v. Owens, 11 Cal. 22.

96. Minn.—Casper v. Klippen, 63 N.W. 737, 61 Minn. 353, 52 Am.S.R. 604.

97. Neb.—Kyd v. Cook, 76 N.W. 524, 56 Neb. 71, 71 Am.S.R. 661.
57 C.J. p. 841 note 94

98. Minn.—Casper v. Klippen, 63 N.W. 737, 61 Minn. 353, 52 Am.S.R. 604.
57 C.J. p. 841 note 95

99. Ky.—Vaughn v. Justice, 78 S.W. 424, 25 Ky.L. 1666.
Md.—Corner v. Mackintosh, 48 Md. 374.

1. Kan.—Adams v. Gillam, 36 P. 51, 53 Kan. 131.
57 C.J. p. 841 note 98.

2. La.—Ader v. Foley, 24 So. 333, 50 La. Ann. 1262.

Interest on the amount of the loss is properly allowed in a suit against a sheriff for seizing goods under process against another[3] or for seizing exempt property under process against the owner.[4]

§ 75. —— Reduction or Mitigation of Damages

As a general rule a sheriff or constable is entitled to show in reduction or mitigation of damages any facts or circumstances which would tend to reduce the amount required justly to compensate for the actual loss sustained as the proximate result of the officer's unlawful act.

As a general rule a sheriff or constable is entitled to show in reduction or mitigation of damages any facts or circumstances which would tend to reduce the amount required justly to compensate for the actual loss sustained as the proximate result of the officer's unlawful act[5] In an action for levying on goods which were exempt from execution, a sheriff or constable may show, in mitigation of damages, that the debtor had other property, exceeding in value the amount of his exemption, which he fraudulently withheld from levy.[6] Where the right to property is tried by a sheriff's jury, a finding that the property belongs to defendant in the process, and is subject to levy, may be shown in mitigation of damages.[7] Where a sheriff or constable seized plaintiff's property under void process against a third person, it was held that the facts that he retained possession for several months and then sold the property under an execution issued in another action could not be shown in mitigation of damages.[8] The tender of a part of the value of property sold under void process does not entitle the sheriff to a mitigation of damages.[9]

Seizure of property beyond jurisdiction. It has been held that a constable who is sued for taking property out of his precinct by virtue of mesne process may show, in mitigation of damages, that, having taken the property to a place within his precinct, he attached it there, on the same process, as the property of the same debtor, subsequently to the commencement of the action against him.[10]

Return or offer to return property. A return of the property to the owner after wrongful seizure can be shown in mitigation of damages.[11] So where, after a levy on exempt property, its return is demanded, and a reasonable time for the return is allowed before bringing an action against the officer, a return of the property after the commencement of the action may be shown in reduction of damages.[12] There is authority for the view that the owner of the property has the right to refuse to receive it when the officer offers to return it, in which case such offer cannot avail even to mitigate the damages,[13] at least where the officer does not show that the goods tendered back had subsequently and continuously been held for the owner's benefit;[14] but it has also been held that, where a sheriff offers to restore property wrongfully levied on, he is not liable for its value but only for the temporary detention,[15] provided he follows up his tender by an application for a stay of proceedings on restoration of the property and an offer to pay plaintiff the damages he has sustained[16] If all the property levied on is exempt, a return of part of the property relieves the officer from liability only pro tanto.[17] A mere paper release of the levy without a restoration of the property will not reduce the damages for the temporary detention.[18]

Application of proceeds of property. A sheriff or constable cannot reduce the amount of his liability by showing that the proceeds or a part thereof were applied to the payment of the debts of the owner[19] unless such application was with the

3. Cal.—Sukeforth v. Lord, 25 P 497, 87 Cal. 399
57 C.J. p 843 note 43.

4. Mass.—Clapp v. Thomas, 7 Allen 188.
Tex.—Railey v. Hopkins, 131 S.W. 624, 62 Tex Civ App 544.

5. Ala.—Mitchell v. Corbin, 8 So. 810, 91 Ala. 599—Fields v. Williams, 8 So 808, 91 Ala 502.
Mich.—McGraw v Sampliner, 64 N. W. 1060, 107 Mich. 141.

6. Pa.—Freeman v. Smith, 30 Pa. 264.

7. N.Y.—Townsend v. Phillips, 10 Johns. 98.
N.C.—Pearson v. Fisher, 4 N.C. 72.
Finding as relieving officer from all liability see supra § 72.

8. N.Y.—Smith v. Healey, 121 N.Y.S 230.

9. N.Y.—Clarke v. Hallock, 16 Wend 607.

10. Vt.—Stewart v. Martin, 16 Vt 397.

11. Ala.—Mitchell v. Corbin, 8 So. 810, 91 Ala. 599—Fields v. Williams, 8 So. 808, 91 Ala. 502
Mich.—McGraw v. Sampliner, 64 N. W 1060, 107 Mich. 141.
57 C.J. p 842 note 9.
Measure of damages where owner regains possession generally see supra § 74.
Return or offer to return property as relieving officer from liability see supra § 72.

12. Colo.—Duncan v. Burchinell, 61 P. 61, 14 Colo.App. 471.

13. Me.—Carpenter v. Dresser, 72 Me. 377, 39 Am R. 337.
N.Y.—Hanmer v. Wilsey, 17 Wend. 91

14. Tex.—Weaver v. Ashcroft, 50 Tex. 427.

15. Mo.—Kreher v. Mason, 25 Mo. App 291—Kreher v. Mason, 20 Mo. App. 29.

16. Ind.—Dugan v. Melogue, 7 Blackf. 144.
57 C.J p 842 note 15.

17. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

18. Mo.—Kreher v. Mason, 25 Mo App. 291—Kreher v. Mason, 20 Mo App. 29.

19. Mich.—Isaacs v. McLean, 64 N. W 2, 106 Mich. 79.
57 C.J. p 842 note 19.

consent of the owner[20] or unless the debt paid was a valid and subsisting lien by way of mortgage on the property applied to the payment thereof.[21] So the fact that a claimant of property attached as that of a debtor obtains a judgment on appeal directing the clerk of the trial court to turn over to claimant the proceeds of the sale does not prevent him from receiving the value of the property, undiminished by the proceeds of sale, where the clerk does not comply with the judgment because it has in the meanwhile been paid over to plaintiff in attachment on the judgment recovered in the trial court.[22]

In an action against a sheriff for seizing and selling plaintiff's property under process against another, the fact that the surplus proceeds of the sale were paid over to plaintiff as agent of the execution defendant is not available in reduction of damages.[23] So also in an action against a sheriff by an administrator with the will annexed for seizing the goods of the testator, while in the hands of the administrator pendente lite, under an execution against such administrator for his personal debt, the sheriff cannot reduce the damages by showing that he had paid the administrator pendente lite the surplus of money arising from the sales which remained after satisfying the execution.[24] However, even though the original taking was wrongful, if the property is afterward legally taken and sold on execution against the owner and the proceeds applied to his debt, this will reduce the damages to such only as resulted from the wrongful taking and preclude inquiry as to the value of the property.[25] On the other hand, where plaintiff's exempt property was levied on and sold under execution against another person, it was held that the proceeds could not be applied, in reduction of damages, to an execution subsequently issued against plaintiff.[26]

§ 76. —— Nominal Damages

Nominal damages may be recovered where there has been a wrongful seizure of property by a sheriff or constable, although it is shown that there were no actual damages.

Nominal damages may be recovered where there has been a wrongful seizure of property by a sheriff or constable, although it is shown that there were no actual damages.[27] Where a sheriff or constable takes goods from the possession of one person under an execution against another, the former is entitled at least to nominal damages for the trespass to his possession even though the taking was authorized by the real owner.[28] On the other hand, it has been held that, where a plaintiff in replevin accepts delivery of the goods and ratifies the seizure, the sheriff or constable is not liable even for nominal damages.[29] If the owner of exempt property, being present at the time it is sold under execution, makes no objection to the sale, and consents to the application of the proceeds to his debt, he can recover only nominal damages from the sheriff for the unlawful seizure.[30] So, where a sheriff or constable, after attaching as the property of the debtor goods which the latter had sold, turns them over to one claiming to act for the debtor in settling the attachment claims, the buyer can recover from the officer only nominal damages for his unlawful temporary possession, which did not affect the manner of settling the claims.[31]

In an action against the sheriff for a wrongful levy on exempt property, the fact that the jury found that the property was mortgaged for more than its value does not prevent the owner from recovering more than nominal damages, where the sheriff had sold the property for a considerable sum and there was no finding that he did not require the purchaser to comply with the mortgage conditions as provided by statute.[32] Where levy of attachment is made by a mere indorsement on the writ, without disturbing the property, the sheriff is liable only for nominal damages if the levy proves to be wrongful,[33] even though the property is subsequently sold under order of court as perishable.[34]

Seizure of goods in custody of law. A sheriff or constable who in levying an execution on goods in the custody of another officer under a prior levy

Application of proceeds of property as relieving officer from liability see supra § 72.

20. Ala.—Mitchell v. Corbin, 8 So. 810, 91 Ala. 599.
57 C.J. p 842 note 20.
Nominal damages see infra § 76.

21. Wash.—Chezum v. Parker, 54 P. 22, 19 Wash. 645.
57 C.J. p 842 note 21.

22. Tex.—Griffin v. Terry, 124 S.W. 115, 58 Tex.Civ.App. 229

23. Ala.—Locke v. Garrett, 16 Ala. 698.

24. N.C.—Satterwhite v. Carson, 25 N.C. 549.

25. Minn.—Howard v. Manderfield, 17 N.W. 946, 31 Minn. 337.
57 C.J. p 842 note 25.

26. Ala.—Cambell v. Anderson, 18 So. 218, 107 Ala. 656.
57 C.J. p 843 note 26

27. Ala.—Mitchell v. Corbin, 8 So. 810, 91 Ala. 599.
Mo.—Allen v. Davis, 53 Mo.App. 15.
Pa.—Rogers v. Fales, 5 Pa. 154.
Wis.—Wing v. Stackhouse, 127 N.W. 955, 143 Wis. 343

28. Pa.—Rogers v. Fales, 5 Pa. 154.

29. N.Y.—Gandy v. Collins, 108 N.E. 415, 214 N.Y. 293

30. Ala.—Mitchell v. Corbin, 8 So. 810, 91 Ala. 599.

31. Wis.—Wing v. Stackhouse, 127 N.W. 955, 143 Wis. 343.

32. Ind.—Adams v. Hessian, 39 N.E. 530, 11 Ind.App. 598.

33. Pa.—Peoria Cent. Nat. Bank v. Gallagher, 30 A. 212, 163 Pa. 456.

34. Pa.—Peoria Cent. Nat. Bank v. Gallagher, supra.

interferes with the latter's possession is liable only for nominal damages, if the first execution is subsequently satisfied by the sale of part of the property levied on.[35]

§ 77. —— Exemplary Damages

Where a sheriff or constable acts maliciously in making a wrongful levy, he is liable for exemplary damages.

Where a sheriff or constable acts maliciously in making a wrongful levy, he is liable for exemplary damages,[36] but if he does not act maliciously he is not so liable;[37] and where the sheriff or constable takes only the steps necessary to secure the delivery of the property, should he find that it actually belongs to the party against whom the writ is directed, he is liable only for the actual damages sustained.[38] Malice may be implied for the purpose of awarding exemplary damages if it appears that the sheriff or constable seized the property when he knew that it was exempt and that he had no right to levy on it,[39] although this inference may be rebutted by evidence that he acted under advice of counsel.[40] Where a statute makes it the duty of the sheriff or constable to levy on and sell property when indemnified by the execution plaintiff, he cannot be made liable in exemplary damages for such a levy and sale merely because he knew that the property was exempt.[41]

Mental pain or suffering. A recovery for mental pain or suffering has been allowed as an element of exemplary damages.[42]

D. LIABILITIES ARISING OUT OF CUSTODY OF PROPERTY

§ 78. Loss of, or Injury to, Property

a. In general
b Degree of care required
c. Loss or injury through act or negligence of custodian or receiptor

a. In General

A sheriff or constable who has property in his custody or under his control is not an insurer of its safety, and as a general rule if the property is lost, destroyed, or damaged without neglect on his part he is not liable.

A sheriff or constable who has property in his custody or under his control is not an insurer of its safety,[43] and as a general rule if the property is lost, destroyed, or damaged without neglect on his part, he is not liable,[44] although in some jurisdictions it is held that a sheriff cannot escape liability unless the loss or injury is due to an act of God, the public enemy, or some irresistible accident.[45] A sheriff or constable who removes goods under a writ of restoration in forcible entry and detainer proceedings has been held not liable for injury to the goods occurring subsequent to the removal.[46]

If loss or injury is due to the failure of the sheriff or constable to exercise proper care and diligence, the sheriff or constable is liable;[47] and property is

35. Mo.—Allen v. Davis, 53 Mo.App. 15
Liability in general for seizure of property in custodia legis see supra § 66

36. Ala.—Ewton v. McCracken, 64 So 177, 9 Ala.App 619.
57 C J p 843 note 36

37. Kan.—Adams v. Gillam, 36 P 51, 53 Kan 131—Winstead v Hulme, 4 P 994, 32 Kan 568.

38. La.—Connell v David Bernhardt Paint Co., 112 So 495, 163 La 586

39. Ala.—Johnson v. Collier, 49 So 761, 161 Ala. 204, affirmed 32 S Ct. 104, 222 U S 538, 56 L Ed. 306
57 C.J. p 843 note 39

40. Minn.—Grimestad v. Lofgren, 117 N W. 515, 105 Minn. 286, 127 Am S.R. 566, 17 L R.A.,N S, 990

41. Ala.—Alley v. Daniel, 75 Ala 403.
57 C J. p 843 note 41.

42. Ark.—Wright v. Husband, 99 S. W.2d 583, 193 Ark. 347.

43. Del.—State, to Use of Henderson, v. Clark, 13 A 2d 445, 1 Terry 441, reversed on other grounds 20 A 2d 127, 2 Terry 246, 138 A L R. 704.
Tex.—Callihan v Montrief, Civ App, 71 S W 2d 564, error refused
Wash.—Capper v. Callahan, 239 P.2d 541, 39 Wash 2d 882.
57 C.J. p 844 note 47.

44. Del.—**Corpus Juris cited in** State, to Use of Henderson, v. Clark, 20 A 2d 127, 129, 2 Terry 246, 138 A L R 704.
Wash.—Capper v Callahan, 239 P. 2d 541, 39 Wash 2d 882.
57 C.J. p 844 note 47.

45. Pa.—Commonwealth to Use of French v. Weglein, 24 A.2d 633, 147 Pa Super 257
57 C J p 844 note 48.
Extent of applicability of rule
The text rule does not apply for the benefit of the execution debtor or to a claim by a third person, but it applies only for the benefit of plaintiff in execution.—Commonwealth v Weglein, 28 Pa.Dist & Co. 393.

46. Ill.—Przybylski v. Remus, 207 Ill.App. 106.
57 C.J. p 844 note 49.

47. Idaho.—Price v. Pace, 296 P 189, 50 Idaho 353.
Ky.—Morris v Bolt, 53 S.W.2d 337, 245 Ky 169.
Miss.—Kersh v Dufore, 38 So 2d 474, 205 Miss. 144.
N.Y.—Vangellow v. East Side Sav Bank, 11 N.Y.S 2d 982.
57 C J. p 844 note 51.
Failure to guard, keep, or protect
(1) Fact that owners of crane left it where it was levied on, unguarded and unprotected, is not, of itself, material in determining whether sheriff was negligent in leaving crane unguarded and unprotected after levy.—State, to Use of Henderson, v. Clark, 20 A 2d 127, 2 Terry, Del., 246, 138 A.L R. 704.
(2) Sheriff who in attaching growing crop of lettuce did not require attaching creditor to deposit fees for keeper was liable to attaching creditor for loss of crop which was sold by debtor.—Huston v. Abbott, 85 P 2d 518, 30 Cal.App.2d 5.
(3) Where sheriff levied writ of attachment against vessel and then left it at place of moorage without

lost within this rule where it goes beyond the reach of the party for whom it was the duty of the sheriff to keep it available.[48] The issuance of a venditioni exponas is not a prerequisite to an action against a sheriff who has negligently permitted the removal of goods levied on.[49]

Property stolen from sheriff. Where property in the sheriff's custody or control is stolen without negligence on his part, he is not liable for the loss,[50] although a view to the contrary obtains in some jurisdictions where the officer is held liable unless the loss of the property in his custody is due to the act of God, the public enemy, or some irresistible accident.[51]

Return of stolen property to owner. Where, pending an action for recovery of stolen property, the sheriff is holding it for plaintiff without legal process, he commits no legal wrong against plaintiff by surrendering the property to another claimant, not a party to the action, where the sheriff would have been liable to such claimant for conversion if the latter was in fact the owner.[52]

Possession taken by receiver. A sheriff who is in possession of goods by virtue of a levy made under writs of attachment is not liable to a subsequent chattel mortgagee for conversion, when a receiver, duly appointed by the court from which the attachments issued, takes exclusive possession and control of the goods, sells them, and receives the proceeds.[53]

Duty of sheriff to retake property taken from him. If goods which a sheriff has attached are taken from him, it is his duty to retake them, by force, if necessary, or by replevin, or obtain their value in an action for conversion, failing in which he is liable for the loss[54]

Effect of change in incumbency Failure of a retiring sheriff or constable to deliver to his successor all the property appertaining to his office, where there is no direct evidence of assumption of possession by the successor, renders the outgoing officer liable to the owner for the care of the property[55] An actual delivery of property to the new sheriff is sufficient to make him liable therefor and relieve the retiring sheriff from liability,[56] although a receipt provided for by statute is not taken;[57] and even an offer of the sheriff, on expiration of his term of office, to deliver property to his successor discharges him from future responsibility for the safe-keeping of the property.[58]

Liability to subsequent creditors of property owner. Where a sheriff so negligently conducts himself in respect of personal property levied on by him that it is lost, and the execution is satisfied out of the real estate of defendant, whereby the security of subsequent mortgage creditors on the real estate of defendant in the execution is reduced, no action lies by such mortgage creditors against the sheriff for such malfeasance unless there has been a fraudulent intent to diminish their security[59]

Loss of, or injury to, property not taken. Where the sheriff levies on only part of a debtor's property he is not liable, in the absence of negligence, for loss of property of which he has not taken possession[60] However, a sheriff who falsely represents

draining water pipes of vessel when weather conditions were such that sheriff should reasonably have foreseen that pipes containing water might freeze and burst, and as result of sheriff's failure to drain water pipes they froze and broke, causing damage to vessel, sheriff was guilty of negligence and liable for damages.—Capper v Callahan, 239 P. 2d 541, 39 Wash 2d 882.

48. Ga.—O'Pry v. Kennedy, 12 S.E. 940, 86 Ga 662.
56 C.J. p 845 note 52.

49. Pa.—Commonwealth v. Rowland, 2 Del.Co. 31

50. Iowa.—Folson v. Piper, 186 N.W. 28, 192 Iowa 1056
57 C.J p 845 note 53½

51. Pa.—Hartleib v McLane, 44 Pa 510, 84 Am D 464—In re Clevenger's Estate, 1 Lanc L Rev. 277

52. Tex.—Craven v. Buchanan, Civ App., 248 S W. 89.

53. Kan.—Smith-Frazier Boot, etc, Co. v. Ware, 28 P. 159, 47 Kan. 483.

54. N Y.—Williamson Mill, etc, Co v. Valentine, 200 N.Y S. 527, 206 App Div. 252—Wood v. Bodine, 32 Hun 354.

55. N D.—Kukowski v. Emerson-Brantingham Impl. Co, 175 N W. 706, 43 N D 333
57 C J p 845 note 59

56. La.—Coleman v. Hope, 26 La Ann. 629
57 C J. p 845 note 60.

57. Iowa.—McKay v. Leonard, 17 Iowa 569—McKay v. Thorington, 15 Iowa 25.

58. Iowa.—Fockler v. Martin, 32 Iowa 117.

59. N Y.—Rome Bank v. Mott, 17 Wend 554

60. Pa.—Commonwealth, to Use of French, v. Weglein, 24 A.2d 633, 147 Pa Super. 257.

Theft of pawned article from pawnshop

(1) Where writ of fieri facias issued on judgment against loan company was levied on only part of the property in company's pawnshop, none of pawned goods being taken into possession of sheriff, sheriff's consent to keeping shop open during day for convenience of those who had pledged articles on loans did not charge sheriff with negligence imposing on him liability for theft of pledged diamond ring, which occurred while sheriff's watchman was on premises in possession of goods under levy.—Commonwealth, to Use of French v. Weglein, supra.

(2) Fact that sheriff discontinued service of burglar alarms on safes was not proximate cause of loss of ring from safe by theft during business hours, so as to render sheriff liable therefor to pledgor, where alarm system in the usual course of company's business never had been connected during business hours.—Commonwealth, to Use of French, v. Weglein, supra.

to the debtor that he has attached certain property, and refuses to permit the debtor to take care of the property, may be liable for the loss of the property.[61] A sheriff is not liable in the absence of negligence for damage to household articles which he and his assistants are removing from premises under a writ of restitution valid on its face.[62] So, where an officer acting under a writ of sequestration of a house and lot exercises ordinary care in the removal of defendant's effects from the premises, he is not liable for injuries resulting to the property in consequence of the removal.[63]

Necessity for demand. Where the sheriff negligently loses property in his official custody, no demand for a restoration thereof is necessary to support an action by the owner [64]

Liability as trespasser ab initio. With respect to the care and management of personal property levied on, much must be left to the judgment of the officer,[65] and there are many irregularities for which the officer would be liable in damages to an aggrieved party, but which would not render him a trespasser from the beginning by relation.[66] The rule as to this is that the officer will not, by reason of his disposition or management of personal property before sale, become a trespasser ab initio unless there has been a substantial violation of the legal rights of the party, of such a character as to show a gross or wanton disregard of duty on the part of the officer.[67]

b. Degree of Care Required

In protecting property under seizure and in his custody, a sheriff or constable is held to the exercise of ordinary or reasonable care.

In protecting property under seizure and in his custody, a sheriff or constable is held to the exercise of ordinary[68] or reasonable[69] care, that is, the same degree of care which a careful and prudent man would be likely to exercise over his own property[70] of a like class or nature,[71] and this rule applies to the officer's statutory duty to regain possession of property which has passed out of his possession.[72] Where a boat is attached and articles left in the boat, but not a part of it, go into the officer's possession along with the boat, his responsibility for such articles is merely that of a gratuitous bailee.[73]

c. Loss or Injury through Act or Negligence of Custodian or Receiptor

A sheriff who has property in his official custody is liable for a loss of, or injury to, the property resulting from the default or negligence of a keeper or custodian whom he has placed in charge of the property. Where a sheriff delivers attached property to a receiptor, he does so at his own risk.

A sheriff who has property in his official custody is liable for a loss of, or injury to, the property resulting from the default or negligence of a keeper or custodian whom he has placed in charge of the property;[74] and where a sheriff leaves property

61. Mass.—Burns v. Lane, 138 Mass. 350

Fish traps

Where defendant in attachment was incorrectly notified by the sheriff that he had attached certain fish traps lying in a field, and that defendant, if he meddled with the traps, would do so at his peril, the sheriff was liable to defendant for the loss of the traps, the representation to defendant not being one of law as to whether the facts constituted an attachment, but a representation that the traps had in fact been attached.—Burns v. Lane, supra

62. Wash.—Johnson v. Nelson, 263 P. 949, 146 Wash. 500, 56 A.L.R. 1035.

63. Tex.—Patton v. Slade, 38 S.W. 832, 15 Tex.Civ.App. 156.

64. Ky.—Conover v. Commonwealth, 2 A.K.Marsh. 566, 12 Am.D 451.
57 C.J. p 846 note 79.

65. Minn.—Ladd v. Newell, 24 N.W. 366, 34 Minn. 107.

66. Minn.—Ladd v. Newell, supra.
Vt.—Nutt v. Wheeler, 30 Vt. 436, 73 Am.D. 316.
57 C.J. p 847 note 81.

67. Minn.—Ladd v. Newell, 24 N.W. 366, 34 Minn. 107.
57 C.J. p 847 note 82.

68. Del.—State to Use of Henderson v. Clark, 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704.
Tex.—Callihan v. Montrief, Civ.App., 71 S.W.2d 564, error refused.
57 C.J. p 846 note 63.

69. Del.—State, to Use of Henderson v. Clark, 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704.
Idaho.—Price v. Pace, 296 P. 189, 50 Idaho 353.
57 C.J. p 846 note 64.

Due care

Sheriff or constable who makes common-law attachment and takes actual possession has duty of due care to protect attached goods from damage or loss, even though by act of a trespasser.—Claremont Gas Light Co. v. Wooster, 21 A.2d 171, 91 N.H. 439.

Instruction from creditor

Execution creditor is not bound to instruct sheriff in his duty, but it is for sheriff to judge of necessities of case.—State, to Use of Henderson, v. Clark, 20 A.2d 127, 2 Terry, Del., 246, 138 A.L.R. 704.

70. Del.—State, to Use of Henderson, v. Clark, supra.

N.H.—Claremont Gas Light Co. v. Wooster, 21 A.2d 171, 91 N.H. 439.
Wash.—Capper v. Callahan, 239 P.2d 541, 39 Wash.2d 882.
57 C.J. p 846 note 65.

71. Del.—State, to Use of Henderson, v. Clark, 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704.
Wash.—Capper v. Callahan, 239 P. 2d 541, 39 Wash.2d 882.

72. Wis.—Phillips v. Eggert, 129 N. W. 654, 145 Wis. 43, 32 L.R.A.,N.S., 132, Ann.Cas.1912A 1112.
57 C.J. p 846 note 66.

Due care

Since officer obtaining right to possession of property attached under statute providing for bulky article attachments has duty of due care to protect property even though he does not have actual possession, that care must be exercised in pursuing property after he has learned of its removal without his consent as well as before.—Claremont Gas Light Co. v. Wooster, 21 A.2d 171, 91 N.H. 439.

73. Mass.—Briggs v. Dearborn, 99 Mass. 50.

74. Idaho.—Price v. Pace, 296 P. 189, 50 Idaho 353.
57 C.J. p 846 note 69.
Liability of sheriff for acts or omissions of deputies see supra § 55.

levied on in the debtor's possession, and it is taken beyond the jurisdiction of the court, so that plaintiffs in execution lose a portion of their debt, the sheriff is liable for the damages sustained, since his responsibility for property levied on continues as long as he can keep possession under the execution.[75]

Delivery of property to receiptor. A sheriff who has attached property and delivered it to a third person on his own responsibility and for his own convenience, and taken an accountable receipt therefor, is not thereby relieved from liability to the parties, but remains liable by virtue of the attachment for the safe-keeping and legal disposition of the property.[76] Thus, where a sheriff delivers attached goods to a receiptor, he does so at his own risk unless the taking of the receipt is directed or ratified by the creditor, and is liable for their safe-keeping;[77] but a sheriff is not liable for the negligence of a receiptor to whom he has delivered the attached property by direction of plaintiff in the attachment.[78]

An officer attaching goods on mesne process, and delivering them to a bailee nominated by plaintiff, is not responsible to plaintiff for the fidelity of such bailee,[79] but it has been stated that a sheriff in selecting the creditor's nominee as bailee of the goods attached is liable to any third person sustaining loss by reason of any default in the manner in which the writ was executed.[80] So it has been held that an officer who attaches goods under a writ, and deposits them for safe-keeping with a bailee, who converts them to his own use without the knowledge or consent of the officer, is not liable for the conversion.[81] Furthermore, the officer is not liable when the property attached by him and placed in the custody of a warehouseman, with the consent of the attachment plaintiff, is taken from the warehouseman under a valid chattel mortgage.[82]

§ 79. —— Particular Matters Affecting Liability

Particular matters which have been held to affect or not to affect the liability of a sheriff or constable for the loss of, or injury to, property in his custody include an absence of injury to the complaining party, the propriety of the levy, the validity of judgment or process, acts or omissions of the parties, and withdrawal of the attachment suit.

A sheriff cannot be held liable for failure to retain possession of property seized by him unless such failure has resulted in some injury to the complaining party.[83] Where an officer is charged by the original debtor with having lost or wasted a portion of the goods which he has attached, it is competent for him to excuse himself from liability by showing that he has applied the amount to the use of the debtor by paying with it the expenses of keeping the goods,[84] but where a sheriff has become liable to an execution plaintiff by the loss of property levied on he cannot escape liability by a subsequent levy of the execution on other property, which fails to yield enough for its satisfaction.[85] In a suit against a sheriff for not retaining and selling on execution property on which it has been attempted to enforce a lien claim, if no judgment confirming the validity of the lien appears on record it is competent for him to show, in defense, that the lien did not exist or that it has been lost.[86]

Propriety of levy. Where the officer levies on the property of one person under process against another and takes possession of the property, he is liable to the owner for the loss thereof, although such loss was not due to his fault;[87] but no such liability accrues where the officer did not take possession of the property levied on, and the loss was not attributable to his fault or to the making of the levy.[88] A sheriff is not liable to account to the creditor for property attached on his suit where that property did not belong to the debtor,[89] or was exempt from attachment,[90] unless it was attached by consent of the owner.[91] So also in an action

75. La.—Byrne v. Anderson, 8 La. Ann. 139.

76. Me.—Torrey v. Otis, 67 Me. 573.

77. N.H.—Porter v. Tarlton, Smith p. 372.

78. Iowa.—Citizens' Nat. Bank v. Loomis, 69 N.W. 443, 100 Iowa 266, 62 Am.S.R. 571.
Directions of party or attorney as affecting liability of sheriff generally see supra § 54.

79. Mass.—Donham v. Wild, 19 Pick. 520, 31 Am.D. 161.

80. Md.—First Nat. Bank v. Corporation Commission of North Carolina, 157 A. 748, 161 Md. 508, 86 A.L.R. 1407.

81. N.H.—Barron v. Cobleigh, 11 N. H. 557, 35 Am.D. 505.

82. Mich.—Leszczynski v. Stein, 194 N.W. 554, 224 Mich. 195.

83. N.H.—West v. Meserve, 17 N. H. 432.
Vt.—Munger v. Fletcher, 2 Vt. 524.
Mitigation of damages see infra § 85.

84. Me.—Twombly v. Hunewell, 2 Me. 221.

85. Ala.—Eldridge v. Spence, 16 Ala. 682.

86. Me.—Annis v. Gilmore, 47 Me. 152.

87. Pa.—Commonwealth, to Use of French, v. Weglein, 24 A.2d 633, 147 Pa.Super. 257.
Vt.—Duncan v. Stone, 45 Vt. 118.

88. Ohio.—Sammis v. Sly, 44 N.E. 508, 54 Ohio St. 511, 56 Am.S.R. 731.
57 C.J. p. 847 note 86.

89. N.H.—West v. Meserve, 17 N.H. 432.—Cilley v. Jenness, 2 N.H. 87.

90. N.H.—Cilley v. Jenness, supra.

91. N.H.—Cilley v. Jenness, supra.

by a surety against a sheriff for failing to keep the property of the principal, which was levied on, whereby the surety was compelled to pay more than he otherwise would have paid, it is a sufficient defense that the property was replevied by another person who, in an action whereof the surety herein had due notice, was adjudged to be the owner.[92]

Validity of judgment or process. A sheriff who is sued for neglect safely to keep attached property cannot impeach the validity of plaintiff's judgment in the attachment suit in order to escape liability;[93] and where an execution is not void the fact that it is irregular does not relieve the sheriff of liability for the loss of property levied on thereunder.[94] The statutory affidavit, order, and undertaking in a claim and delivery action constitute the process under which the sheriff takes the property making him liable for the subsequent negligent loss,[95] and the fact that the owner of the property in such action failed promptly to demand possession from the sheriff does not release the sheriff from liability for the subsequent negligent loss.[96]

Acts or omissions of parties. The consent of the owner of property to its destruction by a sheriff relieves the latter from liability to such owner;[97] and an attaching creditor, knowing the circumstances, and assenting to what is done, is estopped to claim that the officer's act in leaving the property in the care of a keeper was negligent.[98] A sheriff who levies execution on the property of a judgment debtor is not liable for a loss resulting by reason of obeying the unlawful directions of the judgment creditor.[99] So, where the parties restrain the sheriff by orders or agreements so that he has no control over property which he has been ordered to seize and keep, and loss results from such orders or agreements, there can be no recourse against the sheriff therefor.[1] However, it has been held that where a sheriff, on attaching a vessel lying at a wharf, does not put a custodian in charge because plaintiff's attorney informed the officer that it would not be necessary, the latter is not thereby excused from using reasonable care to recover possession of the vessel after it has sailed for another port.[2]

Withdrawal of suit. The withdrawal of an attachment suit is a bar to a recovery by plaintiff therein against the sheriff for neglect to preserve the property under his attachment,[3] although the suit is revived at the same term and judgment entered against defendant therein.[4]

§ 80. Release of Property Levied on

A sheriff who wrongfully releases a levy and surrenders the property is liable to the party at whose instance the process was issued for the resulting damage.

A sheriff or constable who wrongfully releases a levy and surrenders the property is liable to the party at whose instance the process was issued for the resulting damage,[5] and in order to escape liability the officer must affirmatively show that he parted with the possession of the property under the order of a court of competent jurisdiction[6] or that the writ under which he levied could not legally have been enforced.[7] An order for the sale of attached property is not essential to render the sheriff or constable liable for releasing the attachment, it being sufficient that an execution has issued on the judgment.[8]

Release on bond. Where the statute allows defendant to dissolve the levy and secure the return of the property by giving bond, the sheriff incurs no liability by releasing the property on a sufficient

92. Ind.—Wells v. Baldwin, 61 Ind. 265

93. Me.—Adams v. Balch, 5 Me 188 57 C J p 847 note 93

94. Tex.—Cleveland v Tittle, 22 S W. 8, 3 Tex Civ.App 191

95. Idaho.—Price v. Pace, 296 P. 189, 50 Idaho 353.

96. Idaho.—Price v Pace, supra

97. Cal.—Diener v. Shaul, 213 P. 706, 60 Cal.App 633
57 C.J p 847 note 96.

98. N H.—Eastman v. Judkins, 59 N H. 576.

Consent to use by bailee

Where the action of the sheriff in permitting a bailee of attached property to use the property was induced by the acts or request of the attachment creditor's attorneys, acting within the scope of their authority, the attachment creditor is estopped to claim from the sheriff damages for injury to the property while in the bailee's possession.—Callihan v Montrief, Tex Civ App., 71 S.W.2d 564, error refused.

99. Del.—State v. Stidham, 110 A 680, 31 Del 8.

1. La.—Pepin v. Dunham, 20 La Ann 88.

2. Wis.—Phillips v. Eggert, 129 N W 654, 145 Wis 43, 32 L R.A.,N S., 132, Ann Cas 1912A 1112.

3. Conn.—Union Mfg. Co v. Pitkin, 14 Conn. 174.

4. Conn.—Union Mfg Co. v. Pitkin, supra

5. Cal.—Sparks v Buckner, 57 P.2d 1395, 14 Cal App 2d 213.

N Y.—H. B. Koenig, Inc., v. Biglow, 15 N Y S 2d 966, 258 App.Div. 855.—Long Island Tinsmith Supply Corp. v. John H Ramberg & Son, 15 N Y. S.2d 159, 172 Misc. 158.
57 C J p 848 note 9.
Extent of liability see infra §§ 84, 85.
Relief from liability see infra § 81.

6. Ga.—Woodward v. McDonald, 42 S E. 1030, 116 Ga. 748.
57 C J. p 848 note 10.
Judicial proceedings affecting possession of property as defense see infra § 81.

7. Ga.—Woodward v. McDonald, 42 S E 1030, 116 Ga. 748.
Invalidity of levy as defense see infra § 81.

8. Colo.—Bishop v. Poundstone, 52 P. 222, 11 Colo.App. 73.

bond being given,[9] but a sheriff or constable who fails to take the required bond before releasing the seized property subjects himself to liability for damages,[10] notwithstanding the sheriff's additional fee for making the particular levy to which he was entitled by statute had not been paid in advance,[11] and he is liable if he releases the property on a bond which is invalid on its face[12] or if he fails to comply with the law in returning the release bond.[13] Furthermore, it has been held that a sheriff who, without an order of court, releases property provisionally seized, on a bond not accepted by plaintiff in the writ, is liable for the amount of the seizure.[14] Where the sheriff delivers property levied on under execution to a claimant on a forthcoming bond pursuant to statute, he is not liable where the property is found subject to the writ and not forthcoming.[15]

An execution plaintiff who consents to a release of the property by the sheriff on a forthcoming bond given by defendant cannot hold the sheriff liable for following his directions,[16] and a suit brought by plaintiff on the bond, accepted by the sheriff, who delivers the property to the debtor, is a ratification of the sheriff's act in taking the bond,[17] although the sheriff, after the release, and without plaintiff's consent, has taken a substitute bond on which no suit was ever brought.[18] Where the statute provides for redelivery of property to defendant in replevin on giving bond, and declares that a sheriff who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed by the statute, shall be liable in damages to the party aggrieved, if the sureties in a redelivery bond given by defendant have justified, and the bond is approved by the court and the sheriff exonerated from further liability pursuant to statute, plaintiff in the replevin suit is not aggrieved within the meaning of the statute because the sheriff mistakenly delivered the property to defendant before the sureties had justified.[19] If a replevin suit is illegally brought to recover possession of property in possession of a sheriff under a writ of seizure, the sheriff is liable for surrendering the property on a forthcoming bond given in the replevin suit.[20]

§ 81. —— Particular Matters Affecting Liability

Particular matters which have been held to affect or not to affect the liability of a sheriff or constable for releasing property include the validity of the attachment, ownership of the property, exemption of the property, failure or refusal to indemnify the officer, bankruptcy or insolvency of the debtor, dissolution or expiration of the writ, judicial proceedings affecting right of possession, and directions of a party or his attorney.

A plaintiff in attachment cannot hold a sheriff liable for releasing property unless there was a valid attachment[21] and actual levy on the property under the writ.[22] Thus, where a levy is void because the property is already in the custody of the law under a prior levy, the officer is not liable for allowing the property to be taken away by the purchaser at a sale under the first levy.[23] The surrender of property seized on attachment to a person

9. Cal.—Walsh-Col Co. v Emig, 41 P.2d 223, 4 Cal.App.2d 509.
57 C.J. p 848 note 15.

Cross bond

Where seller gave buyer bill of sale to automobile to prevent sheriff from levying attachment on automobile, but sheriff had notice from both buyer and seller that automobile was buyer's, and buyer filed cross bond to replevy automobile after levy of attachment on automobile, sheriff did not wrongfully convert automobile when, without consent and knowledge of seller, it was turned over to buyer on acceptance of his cross bond.—Hubacek v. Manufacturers Casualty Ins Co, Tex. Civ.App., 247 S.W.2d 173, error refused no reversible error.

10. Ala.—Campbell v. Tucker, 154 So. 825, 228 Ala. 658—Harbin v. O'Rear, 121 So. 547, 219 Ala. 173—Traweek v. Heard, 12 So. 166, 97 Ala. 715
Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213
Ga.—Eslinger v. Land, 163 S.E. 522, 45 Ga.App. 96.

Indemnity against claims of third persons

Sheriff who negligently released attached property without receiving proper release bond was held liable to judgment creditor for loss sustained, notwithstanding sheriff obtained court's approval of bond indemnifying sheriff against claims of third-party claimants to the property.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.

11. Ga.—Eslinger v. Land, 163 S.E. 522, 45 Ga.App. 96.

12. Mass.—Bowditch v. Harmon, 67 N.E. 333, 183 Mass. 290.
57 C.J. p 848 note 16.

Omissions in bond

Replevy bond taken by sheriff which omitted name of obligee and date for redelivery of property levied on in attachment was not statutory bond and sheriff's taking such bond rather than required statutory bond on redelivering property to defendant in attachment was breach of sheriff's official bond making him liable.—Campbell v. Tucker, 154 So. 825, 228 Ala. 658.

13. La.—Raziano v. Clancy, App., 23 So.2d 776, rehearing refused 24 So.2d 402.

14. La.—Fernandez v. McVittie, 2 Rob. 239.

15. Ga.—United Glass Co. v. Chamlee, 68 S.E. 796, 135 Ga. 152.

16. Ga.—Hand v. Brown, 86 S.E. 1080, 144 Ga. 272.

17. Ga.—Hand v. Brown, supra—Hunter v. Garmany, 136 S.E. 465, 36 Ga.App. 275.

18. Ga.—Hunter v. Garmany, supra

19. N.Y.—Spellman v. Spellman, 196 N.Y.S. 664, 203 App.Div. 373

20. Miss.—Union Motor Car Co. v. Farmer, 118 So. 425, 151 Miss. 734.

21. S.D.—Stokes v. Christenson, 213 N.W. 950, 51 S.D. 365.
Mitigation of damages see infra § 85

22. Tex.—Freiberg v. Johnson, 9 S.W. 455, 71 Tex. 558.
57 C.J. p 849 note 29.

23. Ga.—Camp v. Williams, 46 S.E. 66, 119 Ga. 152.

claiming to act as agent of the attachment defendant pursuant to a settlement relieves the sheriff from liability to the true owner of the property who had knowledge of all the facts and accepted payment of a part of his claim;[24] but where plaintiff in execution indemnifies the sheriff against a third-party claim by giving an undertaking pursuant to statute he cannot defend an action for wrongful release of the goods on the ground that he rejected the sureties as insufficient[25]

Ownership of property. It is a sufficient excuse for a release of property levied on that such property did not belong to defendant in the process under which it was seized, but to the person by whom it was claimed and to whom it was released,[26] and the receipt of an indemnity bond by the sheriff before making the levy will not preclude him from showing that the property was not subject to seizure under the writ[27] It has been held that a sheriff is not liable to a judgment creditor for releasing property seized on execution which was claimed by a third person without complying with the statutes relating to a trial of the right to seized property.[28] Where, however, a sheriff levies on property, and leaves it with a third-party claimant who receipts for it, and who is in fact the owner, and the sheriff recovers judgment against him on failure to deliver, the sheriff is estopped, in an action by the judgment creditor, to show that the goods did not belong to the judgment debtor.[29]

Exemption of property. A sheriff who has levied on exempt property incurs no liability by releasing it,[30] and cannot be held liable on the ground that plaintiff's debt was contracted before the enactment of the exemption law unless it be shown that the sheriff had notice, actual or implied, of that fact.[31]

Failure or refusal to indemnify sheriff. Where property levied on by a sheriff is claimed by a third person and the sheriff demands indemnity, which is refused, he is not liable for releasing the property,[32] but where he did not demand indemnity he cannot escape liability for releasing the property because of the fact that none was given[33] On the other hand, the refusal of claimant to give an indemnity bond on demand will not relieve the sheriff from liability where there is no statute authorizing the sheriff to demand such bond.[34]

Bankruptcy or insolvency of debtor. Where a sheriff has seized goods under a writ of sequestration issued by a state court to enforce a vendor's lien, he is liable for releasing them, without an order of the state court or consent of plaintiff in the writ, to a trustee appointed in bankruptcy proceedings begun subsequently to the seizure under the writ,[35] but under an insolvency statute a sheriff or constable has been held not liable for delivering attached property to the debtor's assignee in insolvency[36] even though the insolvency proceedings were subsequently annulled[37] It has been held under particular statutory provisions that whether the debtor is insolvent so as to render the sheriff not liable for a release of the levy depends on a judicial determination, not the sheriff's determination.[38] A sheriff who has levied on the interest of one partner on the suit of his separate or individual creditors, may, without liability, release the levy when the partnership is insolvent and

24. Wis.—Wing v. Stackhouse, 127 N.W. 955, 143 Wis. 343.
57 C.J. p. 851 note 61.

25. Cal.—Cowsert v. Stewart, 236 P. 940, 72 Cal.App. 255

26. Neb.—Miller v. Crosson, 267 N.W. 145, 131 Neb. 88
57 C.J. p. 849 note 31.

Opportunity to furnish bond
If sheriff properly released property levied on to third-party claimant, judgment creditor could not complain because release was made without giving creditor opportunity to furnish bond.—Skid Evans, Inc. v. Patten, 1 P.2d 959, 78 Utah 116.

Release of motor vehicle
(1) Fact that assignee of conditional automobile coach sales contract failed to have transfer registered did not aid judgment creditor seeking to recover from sheriff for releasing coaches levied on to assignee.—Skid Evans, Inc. v. Patten, supra.

(2) Fact that secretary of state assumed that applicant for automobile license was legal owner because owner's name was omitted from application could not affect legal owner's rights, with respect to sheriff's liability to judgment creditor for releasing to legal owner automobile coaches levied on.—Skid Evans, Inc. v. Patten, supra

27. Tex.—Freiberg v. Johnson, 9 S.W. 455, 71 Tex. 558.

28. Neb.—Miller v. Crosson, 267 N.W. 145, 131 Neb. 88

29. N.Y.—People v. Reeder, 25 N.Y. 302

30. Ga.—Seamans v. King, 5 S.E. 53, 79 Ga. 611.
57 C.J. p. 849 note 35.

31. Ala.—Wilson v. Brown, 58 Ala. 62, 29 Am.R. 727.

32. Neb.—**Corpus Juris cited in** Miller v. Crosson, 267 N.W. 145, 148, 131 Neb. 88
Tenn.—State v. Sharp, 2 Sneed 615.
Right to demand indemnity see infra § 128

33. Tex.—Dewitt v. Oppenheimer, 51 Tex. 103.

34. Mo.—State v. Rayburn, 22 Mo. App. 303.

35. La.—Ardis v. Turner, 4 La.App. 452
57 C.J. p. 850 note 43.

36. Mass.—Penniman v. Freeman, 3 Gray 245
57 C.J. p. 850 note 44.

37. Mass.—Penniman v. Freeman, supra.

38. Tex.—Burkett v. Simmons Hardware Co., Civ.App., 52 S.W.2d 675.

Exclusive jurisdiction
Sheriff's levy on merchandise under execution issued by state court placed merchandise in such court's possession and gave it exclusive jurisdiction to determine solvency or insolvency of judgment debtor.—Burkett v. Simmons Hardware Co., supra.

the sale of the partner's interest would not have satisfied the execution.[39] Where a sheriff has wrongfully released property levied on under execution the execution plaintiff does not lose his right of action against the sheriff by proving his claim against the bankrupt estate of the execution debtor and accepting a dividend.[40]

Dissolution of writ. Since it is the duty of the officer to return the attached property to defendant in the writ, when the attachment is dissolved, as discussed in Attachment § 472, the sheriff is not liable to the attachment plaintiff for failure to hold the property in order to give plaintiff time to appeal and file a supersedeas[41] even though on a subsequent appeal the order dissolving the attachment is reversed;[42] and the existence of a stipulation that plaintiff should, on dissolution of the attachment, have time to appeal and give a supersedeas bond is immaterial if the officer was not a party to the stipulation.[43]

Expiration of writ. A sheriff is not liable for failure to keep attached property where no execution is issued or no demand for the property is made on him by the attaching creditor until after the expiration of the period after judgment for which the sheriff is entitled to hold the goods under the attachment,[44] and this is true although before the judgment the sheriff had accepted a receiptor and relinquished the property.[45]

Judicial proceedings affecting right of possession. When a sheriff holds, under attachment, property seized as that of the attachment debtor, and the court in which the attachment suits are pending appoints a receiver in a suit commenced to determine conflicting rights in the property and directs such property to be turned over to him, such taking of the property from the sheriff's possession is a proper defense in an action against him, by plaintiff in one of the attachment suits, for an unauthorized release of the attached property;[46] and where a sheriff levies an execution on goods, and, an injunction being served on him, redelivers the goods, he is not liable to plaintiff, although no security has actually been given for the injunction.[47] So also a sheriff who has levied an execution on personal property and has been deprived of the possession thereof by writ of replevin at the suit of a claimant is not liable for the debt and damages on the motion of the judgment creditor,[48] even though the creditor has given the sheriff indemnity.[49]

Payment of amount claimed in writ. The sheriff who makes the attachment incurs no liability to plaintiff by releasing the property on defendant's payment to him of the amount of the claim as stated in the writ, and costs,[50] although the amount of the claim is understated through mistake and plaintiff afterward recovers a judgment for a larger amount.[51]

Directions of party or his attorney. Plaintiff in attachment is not entitled to recover damages from the sheriff because of the alleged wrongful release of the attached property, where plaintiff's attorney has told the sheriff to release the attached property,[52] but, where an attorney for an execution creditor authorizes the sheriff to retain the execution until requested to make return, the authority to retain the execution beyond the return-day does not relieve the sheriff from liability for releasing the levy and failing to retain possession of the property.[53] Where the statute provides that no direction by a party with respect to the execution of process shall excuse the sheriff from liability for neglect or misconduct unless in writing, etc., a sheriff levying attachment on real estate cannot show oral instructions by the attaching creditor to release the levy on the real property and place it on certain money held in escrow, so as to relieve himself from liability to the creditor for the amount of judgment not satisfied because of such release.[54]

§ 82. Other Acts and Omissions with Respect to Custody of Property

Acts or omissions for which a sheriff or constable may be liable include the failure to have property seized by him forthcoming to satisfy final process, release of the

39. Ala.—Wilson v. Strobach, 59 Ala 488.

40. N.Y.—Dorrance v. Henderson, 27 Hun 206, affirmed 92 N.Y. 406.
57 C.J. p 850 note 47.

41. Miss.—Memphis Grocery Co., v. Anderson, 24 So. 387, 76 Miss. 322
57 C.J. p 850 note 50.

42. Wash.—Lind Bank v. Coss, 145 P. 207, 83 Wash 151.
57 C.J. p 850 note 51.

43. Wash.—Lind Bank v. Coss, supra.

44. Mass.—Howard v. Smith, 12 Pick. 202.
Vt.—Goodrich v. Church, 20 Vt 187.

45. Mass.—Howard v. Smith, 12 Pick. 202.

46. U.S.—Lowenberg v. Jefferies, C. C.Mont, 74 F. 385.

47. N.C.—Taggert v. Hill, 3 N.C. 81 —Tagert v. Hill, 1 N.C. 370, Cam & N. Conf 164.

48. Miss.—Swain v. Alcorn, 50 Miss. 320.
S.C.—Taylor v. Howren, 12 S.C.L. 418.

49. Miss.—Swain v. Alcorn, 50 Miss 320.

50. Mo.—Page v. Belt, 17 Mo 263.

51. Mo.—Page v. Belt, supra

52. Okl.—Bronough v. Jones, 49 P. 2d 715, 173 Okl 386.
Effect of directions generally see supra § 54.

53. N.Y.—Ansonia Brass, etc, Co. v. Babbitt, 74 N.Y. 395.

54. Cal.—Robinson v. Baker, 169 P. 694, 35 Cal.App. 318.

surety by delivery of the property to the principal debtor, failure to deliver the property to the particular person entitled thereto, wrongful conversion of the property to his own use or permitting a third person to use the property, and wrongful holding possession of premises containing goods seized under process.

Where a sheriff or constable has taken possession of property under mesne process, and plaintiff is successful in the action, he is liable if he fails to have the property forthcoming to satisfy final process issued on behalf of plaintiff[55] unless it appears that the property did not belong to the debtor[56] or was not subject to sale on final process,[57] or the mesne process has been dissolved,[58] or the facts are such that the officer's failure to produce the property cannot be attributed to his negligence or fault;[59] but the sheriff or constable holding property under attachment cannot excuse his failure to have the property forthcoming to satisfy final process by the fact that it did not belong to the debtor, but to a receiptor, where the latter is estopped to deny the debtor's title;[60] and the sheriff or constable is not exonerated because the property attached has been taken from him by a trespasser[61] or by his offer to the officer having the execution to deliver the property to him at the place of deposit, if the property is deposited at an inconvenient and unreasonable place.[62] So the approval by an attachment plaintiff of the person taken as receiptor will not excuse the sheriff from making an effort to find the property so that it may be sold on execution.[63]

Property attached by lodging a copy in the town clerk's office is in custody of the sheriff or constable and he is liable for failure to produce it unless he can excuse himself by showing that he exercised the same degree of care regarding it that is required of property taken into actual possession.[64]

A demand on the sheriff or constable or the delivery of final process to him, within the time after judgment during which the mesne process remains in force, is necessary to fix his liability for failure to have property seized on mesne process forthcoming to satisfy final process[65] unless other facts are shown which supersede the necessity of a demand,[66] and failing such demand or delivery he is not liable, although he would have been unable to produce the property if demand had been made or the process delivered to him.[67] Where a personal demand is made, under an execution, on a sheriff or constable outside his official territory, for goods previously attached by him, an unqualified refusal to deliver up such goods will render him liable to the execution creditor.[68]

Release of surety by delivery of property to principal debtor. Where a sheriff, after levying on property, delivers it to the principal debtor, thereby releasing the surety from the judgment debt, he becomes liable to the creditor, if the latter is not in fault.[69]

Failure to deliver property to person entitled thereto. When it becomes the duty of the sheriff to deliver to a particular person property of which he has taken possession in his official capacity, his failure to so deliver it is a default for which he is liable.[70] Thus a sheriff or constable who seizes property under a writ of detinue and fails to deliver it to defendant after plaintiff's failure to give a forthcoming bond, as required by statute, is liable for damages,[71] and he cannot justify his misconduct by showing that defendant did not own the property[72] or that he had only a qualified interest therein,[73] or that it was subject to mortgage,[74] or that it was subsequently adjudged to belong to plaintiff in the writ.[75]

55. Conn.—Jordan v. Gallup, 16 Conn. 536
57 C.J. p. 851 note 65.
Extent of liability where property is applied to senior execution writs see infra § 84.
Circumstances held insufficient to relieve officer from liability
Me.—Lovejoy v. Hutchins, 23 Me. 272.
57 C.J. p. 852 note 74.

56. Ala.—Governor v. Gibson, 14 Ala. 326.
57 C.J. p. 851 note 66.

57. Me.—Taggard v. Buckmore, 42 Me. 77.

58. Mass.—Grant v. Lyman, 4 Metc. 470.
57 C.J. p. 851 note 68.

59. Conn.—Dayton v. Lynes, 31 Conn. 578.
57 C.J. p. 851 note 69.

60. Me.—Penobscot Boom Corp. v. Wilkins, 27 Me. 345
57 C.J. p. 851 note 70

61. N.H.—Lovell v. Sabin, 15 N.H. 29.

62. Me.—Gordon v. Wilkins, 20 Me. 134.

63. Me.—Allen v. Doyle, 33 Me. 420

64. Vt.—Smith v. Church, 27 Vt. 168
57 C.J. p. 852 note 75

65. Vt.—Jameson v. Mason, 12 Vt. 599.
57 C.J. p. 852 note 76.

66. Me.—Wetherell v. Hughes, 45 Me. 61.
57 C.J. p. 852 note 77.

67. Me.—Wetherell v. Hughes, supra.
57 C.J. p. 852 note 78.

68. Conn.—Scott v. Crane, 1 Conn. 255.

69. Ga.—Lumsden v. Leonard, 55 Ga. 374.

70. Mass.—Munro v. Stowe, 55 N.E. 992, 175 Mass. 169.
57 C.J. p. 852 note 81.

71. Ala.—Thorn v. Kemp, 13 So. 749, 98 Ala. 417
57 C.J. p. 853 note 82.

72. Ala.—Burton v. Cefalu, 51 So. 721, 165 Ala. 362.
57 C.J. p. 853 note 83.

73. Ala.—Elrod v. Hamner, 24 So. 882, 120 Ala. 463, 74 Am.S.R. 43.

74. Ala.—Elrod v. Hamner, supra.

75. Ala.—Burton v. Cefalu, 51 So. 721, 165 Ala. 362.

While a sheriff or constable executing criminal process is authorized to take possession of stolen property, he cannot retain possession for an unreasonable time without rendering himself liable to the owner for conversion,[76] but a sheriff or constable cannot be held liable for failure to return attached property to defendant on payment of the debt to plaintiff or a settlement between the parties, where no notice is given to him and the suit is not discontinued.[77] The failure of an officer to deliver goods seized by him on demand does not amount to a conversion, when he has lawfully parted with their possession,[78] and he cannot be held liable for conversion because, before the dissolution of an attachment, he refused to deliver the property to a mortgagee, who had been summoned as trustee;[79] and failure of a sheriff or constable to deliver the property to defendant on dissolution of an attachment is excused where the property is already in possession of defendant's assignee for the benefit of creditors by virtue of a replevin suit.[80] A sheriff who levies under a judgment for restitution of demised premises, and on order of plaintiff releases the levy as to all of the personal property, is not liable to the evicted defendant for the value of a crop which, after the release, defendant permitted to remain on the premises.[81] Furthermore, a sheriff or constable is not liable for failure to deliver unless the party entitled to delivery is injured thereby.[82]

It has been held that a previous demand is necessary to support an action against a sheriff for a refusal to return property in his official custody to the owner when the latter has become entitled to such return,[83] but under some statutes a demand has been held to be unnecessary.[84] A sheriff or constable may waive the right to notice of facts entitling a judgment debtor to a return of the property.[85] Where a writ of replevin enjoins the sheriff to take and deliver the goods, there must be an actual delivery, and a symbolic delivery is insufficient[86] unless plaintiff consents to such delivery.[87]

Conversion of property. A sheriff is liable for wrongfully converting property to his own use, although he originally obtained possession thereof by a lawful seizure under process.[88]

Disposition of property. A sheriff incurs no liability to a prior lienholder by turning over attached property to plaintiff on order of defendant, although he knew of the existence of the prior lien.[89] So the wrongful acts of plaintiff in replevin in concealing the goods after their delivery to him by the sheriff and refusing to surrender them impose no liability on the sheriff.[90] Where property in the hands of an agent is sequestered and there is a nonsuit in the sequestration proceedings the sheriff incurs no liability to the owner of the property by returning it to the agent;[91] and, where the interest of one tenant in common in personal property is attached, a sheriff or constable, after the attachment is dissolved, may relieve himself from liability to the debtor for the property by delivering it to the cotenant.[92]

Where the right of a sheriff to hold attached property has ceased by reason of a composition between the debtor and creditor, and the property is seized by another officer under process, without the knowledge and against the will of the sheriff, the sheriff is not liable because the debtor or his assignee is unable to get possession of the property;[93] but where a sheriff or constable who has seized property under attachment releases the lien of the attachment by turning over the property to plaintiff in the attachment he becomes a trespasser from the beginning.[94] Where property has been

76. Vt.—Holyoke Mut. Fire Ins Co v Horton, 136 A. 385, 100 Vt. 228
57 C.J p 853 note 87.

Seizure of automobile with changed engine number

Where sheriff acting under statutes providing for seizure of automobile where engine number has been destroyed, removed, altered, or defaced, and institution of criminal proceedings against owner or custodian, seized an automobile on which engine numbers had been changed from the good-faith purchasers thereof and refused to return it although criminal prosecution was barred and true owner was not found, the purchasers could recover against the sheriff for conversion.—Flint v. Grimes, 293 P. 953, 131 Kan. 814.

77. U S—Livingston v Smith, N.J., 5 Pet. 90, 8 L.Ed 57.
Me.—Wheeler v. Nichols, 32 Me 233

78. Conn—Halsey v. Huse, 46 Conn 389

79. Mass—Jackson v. Kimball, 121 Mass 204.

80. Wis—Clark v. Lamoreux, 36 N. W. 393, 70 Wis 508.

81. Mo—State v. Bode, App., 219 S W 1001.

82. La—Vawter v. Morgan, 6 Mart, N.S., 46.

83. Ky.—Conover v. Gatewood, 2 A K.Marsh. 566, 12 Am.D. 451.

84. Ala—Elrod v. Hamner, 24 So. 882, 120 Ala. 463, 74 Am.S.R. 43.

85. Mass.—Dorman v Kane, 5 Allen 38
57 C.J. p 853 note 96.

86. Md.—Hayes v. Lusby, 5 Harr & J. 485

87. Md—Hayes v. Lusby, supra

88. Utah.—Christensen v. Beebe, 91 P 129, 32 Utah 406.

89. Ky—Baldwin v. Manning, 50 S. W. 683, 20 Ky.L 1995.

90. Ill—King v. Cook, 4 Ill App 525.

91. La—Hasluck v. Morgan, 2 Mart, N S., 9

92. Vt—Gassett v. Sargeant, 26 Vt 424—Frost v Kellogg, 23 Vt 308.

93. Ohio.—Irwin v. Kessler, 2 Cinc. Super. 1.

94. S D.—Griswold v. Sundback, 57 N.W. 339, 4 S.D. 441.

attached and judgment obtained, the sheriff or constable is liable for turning over the proceeds to a third person on mere notice of claim without proof of title[95]

If the court fails to acquire jurisdiction of an appeal from justice court by plaintiff in a distress warrant, a constable who turns over the distrained property to such plaintiff is liable to the owner of the property for damages.[96] So a sheriff or constable who turns over to a third person property held by him under a writ of sequestration is liable to the owner[97] and cannot, in an action by such owner to recover the value of the property, discharge his liability by returning it to plaintiff.[98]

Use of property. A sheriff or constable who uses, or allows a third person to use, personal property in his official custody ordinarily is regarded as a trespasser ab initio;[99] but it is otherwise where he does not use the property for his own benefit or the benefit of a person other than the debtor, and it is not injured by such use.[1] So it was held that, where a sheriff had the custody of slaves, the mere fact that he removed them from the parish prison to his own place did not make him liable for their hire,[2] but that he became responsible only for their forthcoming, and for the value of any benefit he might have derived from their labor.[3]

Holding possession of premises containing goods seized under process. Where a sheriff or constable seizes goods he may, without subjecting himself to liability, hold the house in which they are for such time as is reasonably sufficient to make an inventory and remove the goods,[4] or may remain in the premises for such time as is reasonably necessary to enable him to remove the goods;[5] but if he remains in, or holds possession of, the premises for a longer time he becomes liable as a trespasser,[6] and may be held liable for rent.[7] It has been held that where a sheriff wrongfully seizes goods under an attachment, and takes exclusive possession of the premises on which they are, he is liable, in an action for the wrongful seizure, for the rent of the premises for the time they are occupied by him,[8] and that, where a sheriff keeps possession of an entire building in which attached property is found, the owner is entitled to recover for loss of the use and occupation of that portion of the building not occupied by the attached property.[9] So, where a sheriff or constable who has attached the goods of a tenant by the day holds possession of the premises with the tenant's consent, he is liable for the rental value thereof after notice from the landlord to vacate.[10]

On the other hand, it has been held that a sheriff or constable who levies on the goods of a tenant and uses the demised building for the safekeeping of the goods, the lease to the tenant not being terminated, does not become liable to the landlord for the rent during such occupancy.[11] So it has been held that where property of a tenant, located in rooms of an office building which he occupied under a yearly lease, is attached and left there by the sheriff in charge of a watchman, the tenant, and not the sheriff, is liable for the rents pending a disposition of the property,[12] and that the owner of premises in which a sheriff has left the goods of the tenant after seizure or attachment cannot hold the sheriff personally liable for the rent where there was no evidence authorizing the inference that the parties intended to assume the relationship of landlord and tenant.[13]

A sheriff or constable who enters a house under process and attaches goods therein becomes a trespasser ab initio by placing therein an unfit person as keeper of the goods against the remonstrance of the owner of the house.[14] An officer who attaches personal property and summons a mortgagee as trustee of defendant, who thereupon surrenders possession of the property to the mortgagee, does not, by unreasonably keeping possession of a building of defendant in which the property is situated,

95. Mo.—State v. Langdon, 57 Mo. 353.

96. Tex.—Dupree v Massey, Civ. App, 192 S.W. 790.

97. La.—Crane v. Quinn, 23 La Ann. 512.

98. La.—Crane v. Quinn, supra.

99. Vt—Collins v. Perkins, 31 Vt 624.

1. Vt.—Paul v. Slason, 22 Vt. 231, 54 Am.D. 75.
57 C.J. p 854 note 16.

2. La.—Callaway v. Bobo, 15 La. Ann. 467.

3. La.—Callaway v. Bobo, supra.

4. Tex—Hooks v Pafford, 78 S.W. 991, 34 Tex Civ.App. 516.

5. Mass—Malcom v. Spoor, 12 Metc. 279, 46 Am D. 675—Rowley v. Rice, 11 Metc. 337.

6. Mass.—Davis v. Stone, 120 Mass. 228.
57 C.J. p 854 note 21.

7. Tex—Hooks v. Pafford, 78 S.W. 991, 34 Tex Civ.App. 516.
57 C.J. p 854 note 22.

8. N.Y—Carman v. Kelly, 5 Hun 283.

9. Mass.—Clapp v. Thomas, 7 Allen 188.

10. Ark.—Frizzell v. Duffer, 25 S.W. 1111, 58 Ark. 612.

11. Ala.—Whidden v. Toulmin, 6 Ala. 104.
Ill.—People v. Gilbert, 64 Ill.App. 203.

12. Tenn.—Northwestern Mut. L Ins. Co. v. Hill, Ch.A., 46 S.W. 1009.
57 C.J. p 854 note 27.

13. N.Y—Whitman v. Bowe, 9 N.Y. S. 65, 56 Hun 141.

14. Mass.—Malcom v. Spoor, 12 Metc. 279, 46 Am.D. 675.

render himself liable to defendant in damages for depriving him of the use of the personal property.[15]

Liability for value of use of real property under seizure. It is the duty of the sheriff when he seizes productive real estate to take at the same time all the rents, issues, and revenues which the property may yield,[16] and when he neglects to do so efficiently in a proper case, and the judgment and seizing creditor is injured thereby, the sheriff is bound to repair the damage which he has occasioned by his fault;[17] but where the sheriff seizes the residence of a defendant which is occupied by defendant, and is without power either to expel defendant or to compel him to pay rent, he cannot be held liable for the value of the use of the property.[18]

§ 83. Estoppel to Deny Lawful Possession

A sheriff or constable may be estopped to show that in fact he had made no legal attachment.

Where a sheriff or constable having a writ of attachment, and, not being misled by any instructions from plaintiff or his attorney, represents to plaintiff that he has made a valid attachment, and thereby induces plaintiff to rely on it, and forego making any further attachment, he is estopped, in an action of trespass on the case, to show that in fact he made no legal attachment.[19]

§ 84. Extent of Liability

A sheriff or constable who voluntarily releases or negligently loses control of property levied on is liable only to the extent of the injury.

A sheriff or constable who voluntarily releases or negligently loses control of property levied on is liable only to the extent of the injury,[20] and if he releases the goods to the attaching creditor, who sells them for their full value, he is liable to the debtor only for the value of the interest in the goods which the latter claims as against his creditor.[21] A sheriff who voluntarily releases or negligently loses control of property levied on so that it is not available for the satisfaction of an execution is liable to the execution plaintiff for the amount of the debt[22] and costs[23] unless the property seized was not sufficient to satisfy the debt, in which case the measure of damages is the value of the property.[24] It has been variously stated that the value of the property should be determined as of the time when the levy was made,[25] as of the time when it should have been applied to the debt,[26] or as of the time when the property should have been sold by the sheriff.[27] If property in the custody of a sheriff or constable is destroyed through his negligence the owner is entitled to recover its value.[28]

Nominal damages, application of property to senior writs. Where a sheriff levies successive attachments of different creditors on property of a debtor, he will be liable only for nominal damages for failure to have it forthcoming to satisfy the execution of a junior attaching creditor, where he has applied it to satisfy the executions of senior attaching creditors previously obtained, complying with

15. Mass.—Leavitt v. Butterfield, 15 Gray 67.

16. La.—Conte v. Handy, 34 La.Ann. 862.

17. La.—Conte v. Handy, supra.

18. La.—Conte v. Handy, supra.

19. Vt.—Howes v. Spicer, 23 Vt. 508.

20. Ark.—Duty v. Jones, 184 S.W. 419, 123 Ark. 46.
Tex.—Fidelity & Deposit Co. v. First Nat. Bank of Teague, Civ.App., 88 S.W.2d 605.

21. Ark.—Duty v. Jones, 184 S.W. 419, 123 Ark. 46.

22. Ala.—**Corpus Juris cited in** Campbell v. Tucker, 154 So. 821, 823, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658
Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.
N.Y.—H. B. Koenig, Inc., v. Biglow, 15 N.Y.S.2d 966, 258 App.Div. 855.
Tex.—**Corpus Juris cited in** Fidelity & Deposit Co. v. First Nat. Bank of Teague, Civ.App., 88 S.W.2d 605, 607.
57 C.J. p. 855 note 36.

23. Ala.—**Corpus Juris cited in** Campbell v. Tucker, 154 So. 821, 823, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658
La.—Montegut v. Waggaman, McG. 69.

24. Ala.—**Corpus Juris cited in** Campbell v. Tucker, 154 So. 821, 823, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658
Del.—State, to Use of Henderson, v. Clark, 13 A.2d 445, 1 Terry 441, reversed on other grounds 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704.
Ky.—Barnett v. Gilbert, 133 S.W.2d 529, 280 Ky. 402.
Tex.—**Corpus Juris cited in** Fidelity & Deposit Co. v. First Nat. Bank of Teague, Civ.App., 88 S.W.2d 605, 607.
57 C.J. p. 855 note 38.

Statutory penalty

Statute authorizing recovery of value of property lost and a certain per cent thereof as penalty from an officer whose negligence has resulted in loss of personalty levied on after notice in court from which execution issued was inapplicable to case where automobile was levied on by virtue of writ of attachment and not execution.—Johnson v. Henderson, Tex.Civ.App., 132 S.W.2d 458.

25. Ala.—Campbell v. Tucker, 154 So. 821, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658.

26. Mass.—Tyler v. Ulmer, 12 Mass. 163.
57 C.J. p. 855 note 39.

27. Del.—State, to Use of Henderson v. Clark, 13 A.2d 445, 1 Terry 441, reversed on other grounds 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704.

28. Ga.—Westberry v. Hand, 91 S.E. 930, 19 Ga.App. 529.

Freezing of water pipes

Where as result of negligence of sheriff, who had issued a writ of attachment against vessel, water pipes of vessel froze and broke causing damage to vessel, correct measure of damages was difference between market value of vessel immediately before and immediately after freezing.—Capper v. Callahan, 239 P.2d 541, 39 Wash.2d 882.

all the requirements of the statute in making the application.[29]

§ 85. —— Mitigation or Reduction of Damages

As a general rule a sheriff or constable is entitled to show in mitigation or reduction of damages any facts or circumstances which would tend to reduce the amount justly required to compensate for the actual loss sustained as the proximate result of the voluntary release or negligent loss of control of seized property.

As a general rule a sheriff or constable is entitled to show in mitigation or reduction of damages any facts or circumstances which would tend to reduce the amount justly required to compensate for the actual loss sustained as the proximate result of the voluntary release or negligent loss of control of seized property.[30] Thus, a sheriff or constable may reduce his liability for releasing or negligently losing control of goods held under process by showing that the property was subject to prior liens by reason of which the full amount of the execution could not have been realized by a sale.[31] So in an action against a sheriff for an unauthorized release of attached property, he may set up in mitigation of damages the facts that plaintiff's attachment was subsequent to many others, and that judgments have been rendered in the other actions more than sufficient to exhaust the attached property,[32] but he cannot mitigate damages by showing that the judgment debtor is solvent.[33] The payment and discharge of the execution during the pendency of an action against a sheriff for not properly keeping property attached goes merely in mitigation of damages and does not prevent a recovery of nominal damages.[34]

The fact that, after the neglect of a sheriff or constable to keep the property, the creditor could, by a new process or execution, obtain satisfaction of his debt, cannot be shown in mitigation of damages,[35] and the officer holding property under a writ of detinue, who fails to deliver it to defendant where plaintiff does not give a forthcoming bond, cannot mitigate damages by showing that defendant in the detinue suit did not own the property,[36] or that he had only a qualified interest therein,[37] or that it was subject to mortgage,[38] or that it was subsequently adjudged to belong to plaintiff in the writ.[39] In a suit by a creditor against a sheriff or constable for neglecting to keep personal property attached on mesne process so that it might be taken on execution, such officer is not entitled to have a reduction made from the full value of the property, in mitigation of damages, for the expenses which might have attended the keeping, had it been kept safely,[40] and a sheriff or constable who has permitted property attached by him to return to the hands of the debtor cannot be allowed a deduction from his liability for expense of keeping the property, where such expense was borne by the debtor.[41]

Use of property. Although the use of property seized is such as to make the officer a trespasser ab initio, and prima facie liable for the full value thereof, yet if the property is received back by its owner, or is legally disposed of on execution against him issued in the suit in which it was seized, the officer is not liable for the full value of the property, but only for such damages as were occasioned by the use.[42]

E. LIABILITIES ARISING OUT OF SALE OF PROPERTY

§ 86. In General

a. In general
b. Conveyance or delivery without payment of price
c. Failure to enforce payment of bid
d. Liability for cost of advertising sale
e. Wrongful acts of purchaser
f. Liability as warrantor of title
g Liability as trespasser ab initio

a. In General

A sheriff may be held liable to a purchaser for failure to deliver the property sold, or for a failure to execute a deed for it; but he is not liable for loss of personal property after he has delivered it to the purchaser.

29. Conn.—Jordan v. Gallup, 16 Conn. 536

30. U.S.—Lowenberg v Jefferies, C. C.Mont., 74 F. 385
Pa.—Commonwealth v. Contner, 18 Pa. 439.
Vt.—Collins v. Perkins, 31 Vt. 624—Brown v. Richmond, 27 Vt 583—Southwick v. Weeks, 3 Vt 49.

31. Pa.—Commonwealth v Contner, 18 Pa. 439.
Vt.—Southwick v. Weeks, 3 Vt. 49.

32. U S.—Lowenberg v. Jefferies, C. C Mont, 74 F 385

33. Mass.—Tyler v. Ulmer, 12 Mass 163

34. Vt.—Brown v. Richmond, 27 Vt 583.

35. Vt.—Bowman v. Barnard, 24 Vt. 355.

36. Ala.—Burton v. Cefalu, 51 So 721, 165 Ala. 362—Elrod v Hamner, 24 So 882, 120 Ala. 463, 74 Am S R. 43.

37. Ala.—Elrod v. Hamner, supra.

38. Ala.—Elrod v. Hamner, supra

39. Ala.—Burton v. Cefalu, 51 So. 721, 165 Ala. 362.

40. Me.—Lovejoy v. Hutchins, 23 Me. 272.

41. Me.—Higgins v. Kendrick, 14 Me. 83.

42. Vt.—Collins v. Perkins, 31 Vt. 624.

A sheriff may be held liable to a purchaser for failure to deliver the property sold,[43] but no liability arises because of failure to make manual delivery of goods not capable of such delivery.[44]

Refusal to execute deed. A sheriff is liable for a refusal to execute a deed for land sold by him.[45]

Loss of personal property after delivery to purchaser. An officer is not ordinarily liable for loss of personal property after he has delivered it to the purchaser at the sale.[46]

Trespass committed in delivery. Where a sheriff, by virtue of a sale on execution, proceeds to turn out of the possession of the premises sold by him persons other than defendant in execution and his heirs or tenants, he becomes a trespasser, and may be sued therefor at law[47]

Removal of goods from premises ordered sold. A sheriff who has an order of sale fair on its face, authorizing him to sell a certain house in foreclosure of a chattel mortgage, is not liable for entering such house and removing therefrom the goods of persons who are not parties to the suit, even though such persons are the owners of the house, and in possession of it.[48]

b. Conveyance or Delivery without Payment of Price

A sheriff or constable who conveys or delivers property sold on execution to the purchaser without payment of the purchase money is liable to the execution creditor for the amount of the debt, not exceeding the purchase price, and to the owner of the property or the person entitled thereto for any surplus of the price over the amount of the debt.

Where a sheriff or constable conveys or delivers property sold on execution to the purchaser without payment of the purchase money, he becomes liable to the execution creditor for the amount of the debt, not exceeding the purchase price,[49] and for any surplus of the price over the amount of the debt the sheriff is liable to the owner of the property or the person entitled thereto,[50] but, if the amount realized is less than the amount of the execution, the sheriff is not liable to the creditor.[51] So, if an officer sells on credit, without any agreement of the parties or order of the creditor, he is liable for a consequent loss.[52] Also, where the property is sold on mesne process, the officer is liable to the owner of the property for the full price, although the purchaser has not paid it.[53] The sheriff cannot excuse his failure to receive the purchase money on execution sale of land, by showing that the purchaser was the real owner of the property.[54] A sheriff has been held not liable because no actual cash passed to him from the purchaser at the sale, where he accepted in payment receipts for all judgments against the property after payment of costs.[55]

c. Failure to Enforce Payment of Bid

A sheriff may be held liable for the loss caused by his failure to enforce a bid made and accepted at a sale of property made by him.

A sheriff may be held liable for failing to enforce a bid made and accepted at a sale of property made by him, by reason of which the property is resold at a lower price and the difference lost to the owner or the creditor,[56] although there is authority to the contrary[57] In an action by the execution defendant for such default, the sheriff may show in defense that the price bid by the first purchaser was in consequence of the fraudulent misrepresentations of the execution defendant respecting his title.[58]

43. Pa.—Dunkle v. Harrington, 101 Pa. 462
57 C.J. p 864 note 19.

44. Cal.—Dreisbach v. Braden, 181 P. 262, 40 Cal App 407.

45. Mo.—Lusk v. Briscoe, 65 Mo. 555.

46. Pa.—Spear v. Alexander, 2 Phila 89.
57 C.J. p 864 note 23.

47. Ga.—Anthony v. Brooks, 5 Ga 576.

48. Ind.—Thompson v. State, 28 N.E. 996, 3 Ind.App. 371.

49. Minn.—Kumler v. Brandenburg, 38 N.W. 704, 39 Minn. 59.
57 C.J. p 864 note 25.
Liabilities of sheriff or constable for failure to collect money generally see infra § 92.

50. Minn.—Kumler v. Brandenburg, 38 N.W. 704, 39 Minn 59.
N.Y.—Coats v. Stewart, 19 Johns. 298

51. Ala.—Moore v. Barclay, 8 Ala 672.

52. N.J.—Irving Trust Co. v. Conway, 167 A. 680, 11 N.J.Misc 515.
57 C.J. p 864 note 28.

53. Mass.—Appleton v. Bancroft, 10 Metc. 231—Wheelock v. Hastings, 4 Metc. 504.

54. S.C.—Davis v. Hunt, 18 S.C.L. 412.

55. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal App 2d 52.
Judgment creditor holding assignments of other judgments
Where judgment creditor holding assignments from all other judgment creditors purchased property at execution sale for amount of liens, purchaser's failure to pay sheriff cash purchase price did not invalidate sale so as to render sheriff liable in collateral proceeding, where executions held by sheriff were settled by purchaser giving receipts for judgments after payment of costs, as against contention that purchase money in excess of purchaser's judgment should have been paid to sheriff in cash.—Mitchell v. Alpha Hardware & Supply Co., supra

56. Mo.—State v. Spencer, 79 Mo. 314
Liability of successful bidder on refusal to comply with bid see Executions § 219.

57. Tenn.—Roberts v. Westbrook, 1 Coldw 115

58. S.C.—Ford v. Godbold, 33 S.C.L. 109.

d. Liability for Cost of Advertising Sale

As a general rule, in the absence of any special contract or agreement to that effect, a sheriff is not personally liable to the publisher for the cost of advertisements of sales to be made by him in his official capacity.

The general rule is that, in the absence of any special contract or agreement to that effect, a sheriff is not personally liable to the publisher for the cost of advertisements of sales to be made by him in his official capacity,[59] although he procures the publication thereof;[60] but the publisher must look to the person for whose benefit the advertisement is made.[61] Some authorities, however, have held that the sheriff is liable for such expense in the absence of any agreement to the contrary.[62]

e. Wrongful Acts of Purchaser

A sheriff is not liable for the wrongful acts of the purchaser of property sold by him.

If the purchaser of property, which is wrongfully sold under execution, has caused any damage to the execution defendant in removing the property, he alone, and not the sheriff, is liable therefor.[63] Where a sale by a sheriff as substituted trustee is set aside for conspiracy between the purchaser and the beneficiary in the trust deed, the sheriff, having acted in good faith, is not liable to the owner of the property for damage due to the wrongful acts of the purchaser in evicting the owner.[64]

f. Liability as Warrantor of Title

A sheriff or constable selling property under process incurs no liability as a warrantor of title.

A sheriff or constable selling property under process incurs no liability as a warrantor of title,[65] but, if he knows of defects in the title or the existence of an adverse claim, he should make these facts known at the sale for the guidance of purchasers.[66]

g. Liability as Trespasser Ab Initio

A sheriff who has originally acted properly under legal process, pursuant to which property has come into his possession, is not liable as a trespasser ab initio for subsequent acts of mere nonfeasance connected with the sale thereof, but he is liable as a trespasser ab initio if he grossly abuses his authority by positive acts of misfeasance.

A sheriff who has originally acted with propriety under legal process, pursuant to which property has come into his possession, cannot be made liable as a trespasser ab initio for subsequent acts of mere nonfeasance connected with the sale thereof,[67] but, if he grossly abuses his authority by positive acts of misfeasance, he becomes a trespasser ab initio.[68] Previous demand on the officer for the property is not necessary in order to maintain an action against an officer who has become a trespasser ab initio by selling attached property without complying with statutory requirements.[69]

§ 87. Invalid or Irregular Sale

a. In general
b. Sale of property not belonging to defendant
c. Sale of common property under process against cotenant
d. Sale of exempt property
e. Sale of mortgaged or encumbered property
f. Sale of property on demised premises
g. Sale of property in custody of law
h. Sale without levy, order of court, appraisement, or notice
i. Improprieties in conduct of sale
j. Sale at inadequate price
k. Excessive sale

a. In General

A sheriff who sells property under process which is void on its face, or property which he has no authority to sell under his process, or who sells property after he has knowledge of satisfaction of the judgment or after he has received notice of an injunction restraining the sale, or an order staying the proceedings, may be liable for any damages resulting from such act.

A sheriff who sells property under process which is void on its face,[70] or property which he has no authority to sell under his process,[71] is liable for any damages resulting from such act unless the

59. Ind.—Gardner v. Brown, 22 Ind. 447.
57 C.J. p 865 note 86.

60. Ind.—Gardner v Brown, supra
Kan.—Baker v. Wade, 25 Kan 531.

61. Ky.—Ellis v. Casey, 12 Ky.L. 508.

62. La.—Downes v. Scott, 2 La.Ann. 399—Haile v. Rils, 9 Rob. 509.

63. Ky—Davis v. Gott, 113 S.W 826, 130 Ky. 486.

64. Mo.—Hurst Automatic Switch, etc., Co. v. St. Louis County Trust Co., 236 S W. 58, 291 Mo. 54.

65. Tenn.—Estes v. Doty, 90 S W 2d 754, 169 Tenn 683.
57 C.J. p 868 note 2
Right of execution purchaser to recover purchase price from officer in case of failure of title see Executions § 308.

66. Ky.—Harrison v. Shanks, 13 Bush 620.

67. Ala.—Griel v. Hunter, 40 Ala 542.
Ky—Bell v. North, 4 Litt. 133.

68. Mich.—Terry v. Metevier, 62 N. W. 164, 104 Mich 50.
57 C.J. p 868 note 6.

69. Mass—Wallis v. Truesdell, 6 Pick. 455.

70. Mass.—Brayman v. Whitcomb, 134 Mass. 525.
Liability on official bond because of invalid or irregular sale see infra § 187.

71. N.C.—Shannon v. Jones, 34 N.C. 206.
57 C.J. p 856 note 53.

execution defendant is estopped to complain.[72] So, a sheriff who attaches property on mesne process and sells it thereon without authorization of court or the consent of the creditor and owner,[73] or otherwise than by the mode prescribed by statute,[74] becomes liable as a trespasser; and the liability of the officer for an illegal sale under attachment is not affected by the fact that he has subsequently attached the proceeds of the sale on another writ in favor of the same plaintiff and against the same defendant.[75] The fact that a purchaser at a sheriff's sale has notice of the circumstances under which the sale is made does not bar an action by him against the sheriff for breach of the implied covenant that the sheriff had authority to sell, which was recited in his deed.[76]

Second sale of property already sold. In an action against a sheriff for selling under execution the same property which he has previously sold on a different execution, the sheriff may show that the first sale was fraudulent.[77]

Sale after satisfaction of judgment or tender of amount due. A sheriff who sells property seized under execution after the judgment has been, to his knowledge, satisfied,[78] or after his refusal of a tender by the judgment debtor of the amount due,[79] is liable therefor to the execution defendant.

Sale after garnishment of debt. A sheriff incurs no liability by a sale of property under execution, although he is notified that the debt has been garnished in a suit by a third person against the creditor, where he is not a party to the garnishment proceeding.[80]

Sale after death of debtor. Where a sheriff levies an execution on property and sells it, after the death of defendant, for its full value, and returns the execution satisfied, the personal representatives of defendant cannot, in an action against the sheriff, recover the value of the property which may have been so appropriated in satisfaction of the debts of the decedent.[81] So, where administrators neglect to procure a stay of execution against the estate of their intestate, and his chattels are afterward sold on such execution, the estate being insolvent, they have no right of action against the officer who levied the execution.[82]

Sale after bankruptcy of debtor. It has been held that a debtor cannot, as against a sheriff's plea of justification under a writ of execution, set up a discharge in bankruptcy subsequent to the judgment, it being the duty of the debtor to have availed himself of such defense against the judgment by audita querela and supersedeas to the execution.[83]

Sale after injunction, stay, or supersedeas. A sheriff is liable where he sells property after receiving notice of an injunction restraining the sale,[84] or an order staying proceedings on the writ,[85] or a supersedeas of the writ.[86]

Sale pending appeal. Where a prior attachment was vacated and declared subordinate to a second attachment against the same defendant, but subsequently such vacation was set aside on appeal, but no stay of proceedings pending such appeal was obtained, and the sheriff, without notice of the pendency thereof, in good faith and in accordance with the decision setting aside the first attachment, sold the property and distributed the proceeds under the second attachment, he was not liable to plaintiff in the first attachment for the amount of his execution.[87]

Sale under writ subsequently set aside. Where a sheriff permits plaintiff in execution to purchase the goods levied on before the return day of the writ, and the writ is set aside by the court, he is liable to subsequent execution creditors.[88] Where a sheriff sells attached goods on mesne process, pursuant to statute, and, after the suit on which they were attached is dismissed, defendant in that suit brings an action against the officer to recover the proceeds of the goods, the officer may defend by showing that the goods were the property of a third person who has recovered or demanded satisfaction of him for seizing them.[89]

72. Colo.—Sproul v Monteith, 185 P 270, 66 Colo 541.
57 C.J. p 856 note 59.

73. Me.—Ross v. Philbrick, 39 Me. 29.

74. Me.—Ross v. Philbrick, supra.
Mass.—Wallis v. Truesdell, 6 Pick. 455.

75. Me.—Everett v. Herrin, 48 Me. 537.

76. S.C.—Stoney v. Shultz, 10 S.C. Eq. 465, 27 Am.D. 429.

77. Pa.—McMichael v McDermott, 17 Pa 353, 55 Am.D. 560.
57 C.J. p 864 note 18.

78. N.Y.—Sherman v. Boyce, 15 Johns 443.
57 C.J. p 856 note 65.

79. N.Y.—Tiffany v. St. John, 65 N.Y. 314, 22 Am R. 612

80. Ky.—Gastineau v. Sanders, 68 S.W. 5, 24 Ky L. 126.

81. Ky.—Boyer v. Herndon, 14 B. Mon 222
57 C.J. p 856 note 69.

82. Mass.—Clark v. May, 11 Mass. 233.

83. Miss.—Moore v. Allen, 25 Miss 363.

84. Cal.—Buffandeau v. Edmondson, 17 Cal 436, 17 Am D 139

85. Cal.—Spencer v. Long, 39 Cal. 700.

86. Pa.—O'Donnell v. Mullin, 27 Pa. 199, 67 Am.D 458

87. N.Y.—Clark v Smith, 68 N.Y.S. 39, 57 App Div. 524.

88. Pa.—Appeal of Williams, 9 Pa. 267.

89. Mass.—Mansfield v. Sumner, 6 Metc. 94.

b. Sale of Property Not Belonging to Defendant

(1) In general

(2) Notice or demand; estoppel of owner or claimant

(1) In General

As a general rule, a sheriff or constable who sells property not belonging to defendant in the process under which he acts is liable to the true owner for the resulting damage. A sheriff selling property under a special execution directing him to seize and sell that identical property is not liable for the execution of the process, unless the writ is obviously invalid.

As a general rule, a sheriff or constable who sells property not belonging to defendant in the process under which he acts is liable to the true owner for the resulting damage,[90] although the sale was made without taking actual possession of the property,[91] and the officer making the sale did not remove it.[92] He cannot escape liability because he sold only "the right, title, and interest" of the debtor,[93] or on the ground that the property was purchased by the owner's bailee, and that the latter was bound to return it to the owner on demand,[94] or by reason of a consent to the sale, given by an unauthorized person,[95] but it has been held that, where a sheriff levies on the debtor's "right, title, and interest in a certain leasehold upon which is erected a certain stationary steam sawmill," and sells the property as the "leasehold interest . . . with the improvements," he is not liable to a third person claiming ownership of the sawmill by purchase thereof prior to the levy.[96]

The sheriff who levies an attachment and makes a sale thereunder is not protected from action by claimants of the property by the fact that he takes a bond from the attaching creditor, containing a provision, unauthorized by the statute under which it is taken, obligating such creditor to pay to any claimant of the property the damage he may sustain from the seizure or sale.[97] If the sheriff after selling under execution property not belonging to the debtor surrenders the property to the true owner and returns the purchase price to the purchaser, he thereby incurs no liability to the execution creditor.[98]

Liability to purchaser. If the true owner recovers the property from the purchaser, the sheriff is liable to the purchaser for the damage which he has sustained.[99]

Sale of property levied on by predecessor. Where a sheriff levies on the goods of a wife under an execution against her husband, and the sheriff's successor in office sells them in disregard of a notice that they belong to the wife, the sheriff who made the sale is liable to her in trespass.[1]

Sale of subtenant's crops for rent Where a statute makes crops raised on rented land liable for the rent, the mere fact that the sheriff, after levying on a sufficiency of the crop of a tenant to satisfy the rent, suffers him to retain and dispose of it does not render him liable to a subtenant for a subsequent seizure and sale of the crop raised by the subtenant on the rented premises.[2]

Property in possession of fraudulent grantee Where a sheriff levies an attachment in favor of existing creditors of the grantor, on goods claimed by the grantee under a conveyance which is fraudulent and void as to such creditors, his subsequent sale of the goods, without an order of court, does not render him liable to the grantee as a trespasser ab initio.[3]

Effect of trial of right of property. According to some authorities where the right of property is tried in the manner provided by statute, a finding

90. Mo.—State ex rel Webb v. King, App., 73 S.W.2d 460.
Wash.—Pacific Finance Corporation v. Snohomish County, 295 P. 110, 160 Wash. 384.
57 C.J. p. 857 note 85.

Conditional seller of property which was sold at execution sale by creditor of buyer for sum smaller than amount of seller's lien note and not subject to lien is entitled to recover from officer conducting execution sale for its conversion.—Commercial Credit Corp. v. Dusckett, 49 A.2d 106, 114 Vt. 450.—Reed v. Whitham, 181 A. 129, 107 Vt. 482.

Trespasser

A sheriff who sells on execution goods not belonging to the judgment debtor is guilty of a trespass and is liable in conversion.

Ohio.—Schaub v. Welfare Finance Corp., 29 N.E.2d 223, 65 Ohio App. 68.
Vt.—Commercial Credit Corp. v. Dusckett, 49 A.2d 106, 114 Vt. 450.

91. Mo.—Burk v. Baxter, 3 Mo. 207.

92. Mich.—Scudder v. Anderson, 19 N.W. 775, 54 Mich. 122.
N.Y.—Reynolds v. Shuler, 5 Cow. 323.

93. Cal.—Rankin v. Ekel, 1 P. 895, 64 Cal. 446.

94. Pa.—Frantz v. Oberholtzer, 22 Pa. Co. 58.

95. Vt.—Lathrop v. Lawson, 121 A. 438, 96 Vt. 513.
57 C.J. p. 858 note 90.

96. Pa.—Kile v. Giebner, 7 A. 154, 114 Pa. 381.
57 C.J. p. 858 note 91.

97. Ky.—Fite v. Briedenback, 105 S.W. 1182, 127 Ky. 504, 32 Ky. L. 400.

98. Mont.—McCarthy v. O'Marr, 47 P. 953, 19 Mont. 215, 61 Am.S.R. 502.
57 C.J. p. 858 note 92.

99. Ky.—McGhee v. Ellis, 4 Litt. 244, 14 Am.D. 124.

1. Pa.—Freeman v. Apple, 99 Pa. 261.

2. Ala.—Givens v. Easley, 17 Ala. 385.

3. Ala.—Hartshorn v. Williams, 31 Ala. 149.
Levy on property fraudulently conveyed see supra § 68.

that the property belongs to the debtor relieves the sheriff from liability for subsequently selling it under his process, even though it really belongs to another,[4] and the same rule has been applied where the jury on trial of right of property fail to agree;[5] but other authorities hold that, the proceeding being not judicial, a finding of the debtor's ownership affords the sheriff no protection if it is erroneous.[6] After an appeal by a claimant from a judgment rendered against him on a trial of the right of property, the officer selling the property does so at his peril of a reversal of such judgment.[7]

Process against specific property sold. A sheriff seizing and selling property under a special execution, directing him to seize and sell that identical property, is not liable for the execution of the process,[8] unless it appears from the writ itself that the court issuing it had no jurisdiction of the subject matter,[9] or unless he finds the property in the possession of one not in privity with the execution defendant.[10]

(2) Notice or Demand; Estoppel of Owner or Claimant

A demand is not necessary to entitle the owner of property sold under process against another to maintain an action against the officer for the wrong; but the failure of the real owner to give the sheriff notice of his claim may constitute an abandonment of his claim or estop him from suing the sheriff for selling the goods levied on.

A sale of property of one person under process against another makes the conversion complete and no demand is necessary to entitle the owner to maintain an action against the officer for the wrong.[11] On the other hand, it has been held that a person whose property is seized under a writ directed against another is estopped to sue the sheriff or constable for selling the goods levied on, where the officer acts in good faith and the true owner, having knowledge of the seizure and an opportunity to act, gives the officer no notice of his claim,[12] and remains silent beyond the period for commencing suit against the seizing creditor.[13] Notice given by one at the sheriff's sale that the goods belong to him, and that the purchaser will take no title, does not, in the absence of bad faith, estop him to sue the sheriff in trespass, and confine him to his remedy against the purchaser.[14] Under some statutes a claimant of property seized by a sheriff or constable is deemed to have abandoned his claim unless he takes action to vindicate and enforce the same within a specified time after it is asserted,[15] and in such case the officer incurs no liability by proceeding to sell the property.[16]

A person who notifies the officer that the property seized under an execution against a third person belongs to him, will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer,[17] and, where claimant has taken the proper steps under the statute to protect his rights until a trial thereof can be had, a sheriff who refuses to recognize such rights and sells in violation thereof is liable in damages.[18] Where the owner notifies the sheriff of his ownership and forbids a sale, this is tantamount to a demand for the property and renders the sheriff liable if he subsequently sells it.[19]

Confusion of goods. Where goods of a debtor and a third person have, without fraud or collusion, become mixed so that they cannot be distinguished, but after seizure the third person points out his goods to the officer, and demands a redelivery of them, and the officer, notwithstanding, sells all the goods, he will be liable;[20] but, where the goods are so intermingled that the sheriff is unable to distinguish them and the third person does not himself identify and point out his goods, the officer is justified in selling the whole as the property of the debtor.[21]

4. Ky.—Emanuel v. Cocke, 6 Dana 212—Terril v. Cockeril, 3 Bibb 258

5. Ky—Commonwealth v. Herndon, 2 Dana 429

6. Cal.—Perkins v. Thornburgh, 10 Cal 189.

7. Ill—People v. Ward, 41 Ill App 464.

8. Md—Ranahan v. O'Neale, 6 Gill & J 298, 26 Am.D 576.
57 C J p 859 note 16.
Liability for levy on property specified in writ see supra § 68.

9. Mo.—State v. Hailey, 71 Mo App. 200.

10. Mo.—State v. Hailey, supra

11. Ill—Hanchett v. Williams, 24 Ill. App 56.
Me.—Lothrop v Arnold, 25 Me 136, 43 Am D. 256

12. Ala.—Stephens v. Head, 24 So 738, 119 Ala. 511.
Presence of claimant
It is not indispensable to application of this estoppel that claimant be actually present at or witness disposition of his property—Vosburg v. Federal Land Bank of New Orleans, La App., 172 So. 567.

13. La.—Vosburg v. Federal Land Bank of New Orleans, supra.

14. Pa—Hyde v Kiehl, 38 A. 998, 183 Pa. 414

15. N J.—Masters v. Champion, 69 A. 224, 75 N.J Law 768.
57 C.J. p 858 note 99.

16. N J.—Masters v. Champion, supra—Van Marter v. Lucas, 44 A 865, 64 N.J Law 182.

17. La.—Wright v. Cain, 4 Rob. 136.

18. Mo—Houx v. Shaw, 18 Mo App 45.

19. Mo.—Vaughn v. Allgaier, 27 Mo. App 523.

20. Mass.—Shumway v. Rutter, 8 Pick 443, 19 Am D. 340.
Levy on intermingled goods see supra § 68.

21. N H.—Robinson v. Holt, 39 N.H 557, 75 Am.D. 233.

c. Sale of Common Property under Process against Cotenant

A sheriff who assumes to sell all of the property of cotenants under process against one of them is liable to the cotenant not named in the process for the resulting damage.

Although the sheriff may sell the interest of a cotenant in the common property under process against him, if he assumes to sell the entire property, his act is wrongful as against the cotenant not named in the process, and he is liable for the resulting damage,[22] although this rule has been held inapplicable where a sale on execution against one cotenant passes only his undivided interest.[23] Where a tenant in common of personalty assigns his share, and, after the assignment, the sheriff, under an execution against the assignor, sells the common property and delivers it to the other original tenant who is the purchaser at the sale, the sheriff is not liable to the assignee for conversion.[24]

d. Sale of Exempt Property

A sheriff or constable who sells exempt property after he has been notified of the exemption is liable to the owner for the resulting damage.

A sheriff or constable who sells exempt property after he has been notified of the exemption is liable to the owner for the resulting damage,[25] notwithstanding the failure of the justice who issued the writ to comply with directory provisions of the statute.[26] The sheriff is not relieved from liability because a third person at the time of the levy claimed the property under a mortgage and the debtor did not at the time deny such claim.[27] An officer cannot justify the sale of property selected as exempt on the ground that the debtor had other property,[28] although, where a debtor was in possession of two cows as the apparent owner, he could not, having made the question of ownership doubtful by his own act, recover in trespass against the sheriff who sold one of the cows which the debtor claimed was exempt.[29] An officer may be held liable where a claim of exemption is made and he sells the property without taking the steps required by statute to ascertain the extent of the exemption,[30] or he may be liable where he sells the property after the debtor withdraws his previous consent to the levy.[31]

In order to hold the sheriff liable it must be made to appear that the property was exempt at the time when it was levied on,[32] that the exemption was claimed by the debtor,[33] and that the exemption was available against the debt under which the sale was made.[34] Where the sheriff fails to inform the appraisers of property seized on execution of a mortgage lien thereon, set forth in the claim by defendant in execution that the property is exempt from seizure and sale, and the appraisement is made without any allowance therefor, the sheriff cannot interpose such appraisement as a defense in an action for selling the property when the amount of the lien would reduce defendant's interest to less than the amount exempt by law.[35]

Sale under specific lien. Where an officer sells property under a chattel mortgage covering both exempt and nonexempt property, and the proceeds of the nonexempt portion are sufficient to satisfy the debt, and the mortgagor demands that they be so applied, but the officer further proceeds to sell the exempt part, he is personally liable for its value.[36]

Effect of disclaimer. Where a debtor at the time of the appraisement of goods levied on, for the purpose of setting aside his exemption, disclaims title to a portion of the goods, he cannot afterward maintain an action of trespass against the officer for selling such goods.[37]

Purchase by debtor. A judgment debtor whose exempt property is sold under execution is not prejudiced in an action by him on the sheriff's indemnity bond, by his having bidden off the property in good faith and without collusion for a bank which had a mortgage thereon.[38]

22. Utah—Spalding v. Allred, 64 P 1100, 23 Utah 354
57 C J. p 859 note 27.
Levy on common property under process against cotenant see supra § 68.

23. N H.—Pettingill v. Bartlett, 1 N. H. 87.
Utah—Spalding v. Allred, 64 P. 1100, 23 Utah 354.

24. N.C.—Grim v. Wicker, 80 N C 343.

25. Ala—Stallings v. Gilbreath, 41 So. 423, 146 Ala. 483.
57 C.J. p 860 note 31.
Levy on exempt property see supra § 66.

26. Tenn.—Davis v. Bryan, 7 Yerg. 88.
57 C J. p 860 note 32

27. Mo.—State v. Farrell, 6 Mo.App. 581.

28. Ind—Austin v. Swank, 9 Ind. 109.

29. Pa.—Trovillo v. Shingles, 10 Watts 438.

30. Neb.—Daley v. Peters, 66 N.W. 862, 47 Neb. 848.
57 C.J. p 860 note 35.

31. Pa—Hutchinson v. Campbell, 25 Pa. 273.

32. Me.—Greaton v. Pike, 34 Me. 233

33. Mich—McGuire v. Galligan, 23 N.W. 479, 57 Mich. 38.

34. Pa.—Harleman v. Buck, 30 Pa. 267.

35. Neb.—Strong v. Combs, 94 N.W. 149, 68 Neb. 315.

36. Tex.—Baughn v. Allen, Civ.App., 73 S.W. 1068.

37. Pa.—Gilleland v. Rhoads, 34 Pa. 187.

38. Ky—Commonwealth v. Burnett, 44 S.W. 966, 19 Ky.L. 1836.

e. Sale of Mortgaged or Encumbered Property

A sheriff or constable incurs no liability to a mortgagee of personal property by selling under process the mortgagor's interest therein, but he is liable to the mortgagee for conversion if, having notice of the mortgage, he assumes to make an absolute sale of the mortgaged property under process against the mortgagor.

A sheriff or constable incurs no liability to a mortgagee of personal property by selling under process the mortgagor's interest therein,[39] where the property is found in the possession of the mortgagor,[40] the mortgage is not due,[41] and the officer does not deliver possession of the property to the purchaser,[42] although some authorities have held that the sheriff is not relieved from liability by the fact that he announced that he sold "defendant's interest" only, and subsequently returned that he had levied on it and sold such interest.[43] It has also been held that an officer who has levied on the mortgagor's interest in goods in the latter's possession is not liable in trespass or trover to the mortgagee, even though he sells the goods in general terms, without recognizing the mortgagee's interest, and delivers them to the purchaser.[44] So, also, where a judgment is assigned as collateral security for an indebtedness in a sum smaller than the face of the judgment, the assignee cannot maintain an action for conversion against an officer because of a levy and sale of the judgment, subject to the assignment, under an execution against the judgment plaintiff.[45]

On the other hand, it is the general rule that, where property is covered by a mortgage of which the sheriff has notice, he is liable to the mortgagee for conversion if he assumes to make an absolute sale of the property under process against the mortgagor,[46] and consents to the removal thereof,[47] in the absence of any act by the mortgagee to estop him to claim under the mortgage.[48] So, the sheriff will be liable if he sells the property on execution against the mortgagor, when the mortgagee is in possession,[49] and, where by the terms of the mortgage the mortgagee is entitled to demand possession of and sell the property at any time and has demanded possession, the sheriff is liable to the mortgagee if he subsequently assumes to sell even the mortgagee's interest.[50] Where a mortgagee's agent had no power to sell the mortgaged property after foreclosure, a sheriff who made return in the name of, and executed a bill of sale to, one to whom the agent, after bidding in the property at the foreclosure sale, had sold it was held liable for damages resulting to the mortgagee.[51]

f. Sale of Property on Demised Premises

Under a statute which provides that no property on demised premises shall be liable to be taken under execution, unless the party at whose suit the execution is sued out shall pay the landlord the rent due, a sheriff or constable who, with notice that rent is due on demised premises, sells property thereon without paying the rent is liable to the landlord therefor.

Under a statute providing that no property on demised premises shall be liable to be taken under execution, unless the party at whose suit the execution is sued out shall pay the landlord the rent due, as considered in Executions §§ 128 b, 247 c, a sheriff or constable may be held liable to a landlord where he sells property on demised premises on which rent is due,[52] without paying the rent,[53] provided he had notice that rent was due,[54] and he cannot escape liability by showing that the levy under which he sold was invalid.[55] The liability of the officer extends to the amount of the entire proceeds of the sale when they are less than the rent.[56]

g. Sale of Property in Custody of Law

A sheriff who sells property held by another officer under prior executions for enough to satisfy the prior executions is liable to the other officer for that amount.

Where a sheriff levies on property held by a con-

39. Minn.—Johnson v. Gerber, 130 N. W. 995, 114 Minn. 174.
57 C J. p 860 note 46
Levy on mortgaged property see supra § 67.

40. Ill.—Pike v. Colvin, 67 Ill. 227.
57 C J. p 861 note 47.

41. Ill.—People v. Dickson, 65 Ill. App. 99.

42. N.J.—Ayres v. Tinsman, 65 A. 887, 74 N.J Law 295.
Nominal damages where property is delivered to purchaser see infra § 90.

43. Mich.—Eggleston v. Mundy, 4 Mich. 295.

44. N.Y.—Porter v Parmley, 52 N. Y. 185, 14 Abb Pr.,N.S., 16.
57 C.J. p 861 note 51.

45. Iowa.—Baker v. Mills, 79 N.W. 268, 108 Iowa 490.

46. Minn.—Johnson v. Gerber, 130 N.W. 995, 114 Minn 174.
57 C.J. p 861 note 53

47. Ind.—Collins v. State, 30 N.E. 12, 3 Ind.App. 542, 50 Am.S.R 298.
57 C J. p 861 note 54.

48. N.Y.—Butler v. Miller, 1 N.Y. 496.
57 C.J. p 861 note 55.

49. N.Y.—Gelhaar v. Ross, 1 Hilt. 117.

50. N.Y.—Farrell v. Hildreth, 38 Barb. 178.

51. Wash.—Larson v. Hodge, 171 P. 251, 100 Wash. 419.

52. N.J.—Hand v. Howell, 38 A. 748, 61 N J.Law 142, affirmed 43 A. 1098, 61 N J.Law 694.
57 C J. p 861 note 61.
Levy on property subject to landlord's lien see supra § 67.

53. N.J.—Hand v. Howell, supra.
57 C.J. p 861 note 62.

54. N.J.—Hand v. Howell, supra.
57 C.J. p 861 note 63.

55. N.Y.—Westervelt v. Pinckney, 14 Wend. 123, 28 Am.D. 516.
57 C.J. p 861 note 64.

56. S.C.—Sullivan v. Ellison, 20 S. C. 481.

stable under prior executions, and sells it for enough to satisfy the prior executions, he is liable for that amount to the constable, without any promise to pay [57]

h. Sale without Levy, Order of Court, Appraisement, or Notice

A sheriff or constable is liable if he sells property without a levy thereon, or a court order therefor, or without compliance with statutory conditions precedent to the sale, such as appraisement of the property or proper notice of the sale.

A sheriff or constable who sells the goods of a debtor without a levy thereon is liable therefor to the owner.[58] A sheriff who attaches property on mesne process and sells it without an order for such sale becomes liable as a trespasser,[59] but such sale does not render him liable as a trespasser ab initio to a fraudulent grantee of the debtor.[60]

Sale without appraisement. A sheriff or constable who sells property distrained for rent without appraisement will be liable in trover for a wrongful conversion thereof in a jurisdiction where a statute requires that property distrained for rent must be appraised before its sale.[61]

Sale without proper notice. A sheriff or constable who omits to advertise or give notice of a sale of property as required by statute, or does not advertise or give notice of the sale in the manner and for the time required by statute, becomes a trespasser ab initio,[62] or is guilty of conversion;[63] and he is liable for any damage occasioned by such neglect of duty.[64] In such case no demand for the return of the property is necessary.[65]

i. Improprieties in Conduct of Sale

(1) In general
(2) Sale at improper time
(3) Sale at improper place

(1) In General

Where a sale by a sheriff fails because of his noncompliance with the law, he may be held liable to the purchaser for the damage which he has sustained by reason of such failure.

Where a sale by a sheriff fails because of his noncompliance with the law, he may be held liable to the purchaser for the damage which he has sustained by reason of such failure.[66] It is negligence for which the sheriff is liable to sell a large amount of miscellaneous merchandise on an advertised list which he knows to be defective, without ascertaining and making known to the bidders the extent of the discrepancy.[67] Also, where a sale of personal property on execution is void for failure to comply with a statute requiring the presence of the property at the sale, as considered in Executions § 207 c, the sheriff, having delivered the property to the purchaser, is liable for conversion [68] It has been held that an attaching officer who merely lodged a copy of the writ, with his return, in the sheriff's office, and did not take possession of the property from the debtor, and who received nothing for it on a subsequent sale, was not liable to the debtor, either in trespass or trover, where the statutory requirements with respect to attachment sales were not complied with [69]

The sale at one time on several executions of a large variety of goods in one lot at one price is not necessarily irregular or improper, so as to render the officer liable for a conversion thereof.[70] The sale of a property as a unit instead of in separate parcels does not render the sale invalid so as to render the sheriff liable where there is no showing that a larger sum could have been realized had the property been sold in parcels,[71] and, even though property should have been sold in parcels, a sale in bulk is merely irregular and not void, and the sheriff can only be held liable for it thereafter if

57. N.Y.—Betts v Hoyt, 19 Barb 412.
Levy on property in custody of law see supra § 66

58. Pa.—Ward v. Taylor, 1 Pa 238
Tex.—Mara v. Branch, Civ.App., 135 S.W. 661.
Levy as necessary to validity of execution sale see Executions § 91

59. Mich.—Terry v. Metevier, 62 N. W. 164, 104 Mich 50.

60. Ala.—Hartshorn v. Williams, 31 Ala. 149.

61. Ill.—Tripp v. Grouner, 60 Ill 474.
Necessity for appraisement of distrained chattels as condition precedent to sale see Landlord and Tenant § 697 c.

62. Mass.—Kolas v. LaRochelle, 169 N.E. 662, 270 Mass. 49.

63. Miss.—Rigby v. Stone, 13 So.2d 230, 194 Miss 775.
N.Y.—Alexander v. McLaughlin, 285 N.Y.S. 261, 246 App.Div. 189.
Sale for adequate price
The neglect of the officer to give the public notice required by statute cannot be excused by showing that the sale was made for an adequate price.—Alexander v McLaughlin, 285 N.Y.S. 261, 246 App.Div. 189.

64. Miss.—Rigby v. Whitten, 18 So. 2d 152, 196 Miss. 661—**Corpus Juris cited in** Rigby v. Stone, 13 So.2d 230, 231, 194 Miss. 775.
57 C.J. p 862 note 78.
Extent of liability see infra § 90.

65. Vt.—Bean v. Colton, 130 A. 580, 99 Vt. 45

66. La.—Friedlander v. Bell, 17 La Ann 42.
57 C.J. p 862 note 84.
Amercement of officer for failure properly to execute order of sale see infra § 173.

67. Colo.—Cramer v. Oppenstein, 27 P. 716, 16 Colo 504
57 C.J. p 862 note 83.

68. Tex.—Hopping v. Hicks, Civ.App., 190 S.W. 1119.

69. Vt.—Goodrich v. Chappell, 98 A. 46, 90 Vt. 263.

70. Mass.—Bergin v. Hayward, 102 Mass. 414.

71. Cal.—Mitchell v. Alpha Hardware & Supply Co., 45 P.2d 442, 7 Cal.App.2d 52.

he wrongfully fails to retake the property after the sale is set aside.[72] The mere fact that the sheriff, when about to sell property, stated, at a time not defined and under circumstances not disclosed, that if any one bid at his sale he would get the property is not sufficient to show that his conduct was tortious and render him liable.[73]

Purchase by officer. An action lies against a sheriff or constable if he purchases property sold by him at judicial sale,[74] but, as considered infra § 90, the amount paid by him on the goods may go in mitigation of damages.

Sale in improper order. Where the statute requires the principal's property to be exhausted before proceeding to sell that of the surety, the officer is liable to the surety for any damage resulting from a disregard of such direction.[75]

(2) Sale at Improper Time

A sheriff or constable selling property at an improper time is liable for the damage caused thereby.

Where the statute absolutely limits the time within which a sale must be made, a sheriff or constable selling after such time is liable to the owner of the property as a trespasser ab initio.[76] An officer may also be held liable for selling property levied on before the time when he was legally authorized to do so.[77] Where the statute absolutely forbids a sale before the prescribed time, the officer is a trespasser ab initio if he sells the property before that time,[78] but, if he is vested by statute with discretion to sell property without an order of court when the expense of keeping it is very great, he cannot be held liable as a trespasser ab initio because of a sale on that ground, unless he grossly abuses his discretion.[79]

(3) Sale at Improper Place

A sheriff or constable who sells property under process at an improper place is liable for the damage caused thereby.

Where a sheriff or constable advertises property seized under process for sale at a designated place and sells it at another and a different place, he becomes a trespasser ab initio,[80] and is liable to the owner of the property for the damage sustained,[81] but not to a fraudulent mortgagee.[82] The fact that the officer has paid over the proceeds of the sale does not relieve him from liability.[83] It has also been held that, where property is advertised for sale and is sold at a place other than that designated by statute, the officer will be liable in the absence of a sufficient legal excuse.[84] Where the statute vests the sheriff with some discretion in selecting the place of sale, a sale at a place not embraced in the terms of the statute does not constitute the sheriff a trespasser, but is at most an irregularity rendering him liable in an action on the case for any actual damages sustained by reason of such irregularity.[85]

j. Sale at Inadequate Price

A sheriff who fairly conducts a sale of property is not liable in damages merely because the price realized is inadequate, but he is liable if the property is sold for less than its fair value by reason of his misconduct amounting to fraud or gross negligence.

Where a sale of property is fairly conducted by the sheriff, he is not liable in damages merely because the price realized is inadequate,[86] but, where property is sold for less than its fair value by reason of the misconduct of the officer,[87] amounting to fraud or gross negligence,[88] he is liable, unless the owner of the property has waived his right of action.[89] Where a sheriff sells land for less than two thirds of its appraised value, in violation of the statute, but the judgment debtor, who is the only person injured, waives the invalidity of the sale, by suing the sheriff for damages sustained by reason of such irregular sale, the sheriff will not be allowed to plead his own wrong, or set forth his own void sale,

72. Cal.—Orton v. Brown, 45 P. 835, 113 Cal. 561

73. N.J.—Atkinson v. Hires, 43 N.J. Law 297.

74. N.H.—Perkins v. Thompson, 3 N.H. 144.
N.J.—Giberson v. Wilber, 3 N.J.Law 410.

75. Tenn.—Sellars v. Fite, 3 Baxt 131
Failure to observe statutory order of levy see supra § 69.

76. Mass.—Pierce v. Benjamin, 14 Pick. 356, 25 Am.D. 396.
Philippine—Campomanes v. Bartolome, 38 Philippine 808.

77. Ill.—Camp v. Ganley, 6 Ill.App. 499.

78. Mass.—Smith v. Gates, 21 Pick 55.

79. Ala.—Griel v. Hunter, 40 Ala 542.

80. Ala.—Brock v. Berry, 31 So. 517, 132 Ala. 95, 90 Am.S.R. 896.
57 C.J. p 863 note 96.

81. Ala.—Brock v. Berry, supra.
57 C.J. p 863 note 97.

82. Ala.—Ryan v. Young, 41 So. 954, 147 Ala. 660.

83. Tex.—Molette v. Hodges, 1 Tex A.Civ.Cas § 398

84. Conn.—Jordan v. Gallup, 16 Conn 536.
57 C.J. p 863 note 1.

85. Ala.—Sheppard v. Shelton, 34 Ala. 652.

86. Ala.—Powell v. Governor, 13 Ala 516.
Pa.—Lynch v. Commonwealth, 6 Watts 495, 31 Am.D. 490

87. Me.—Daggett v. Adams, 1 Me. 198.

88. Ala.—Powell v. Governor, 13 Ala. 516.
57 C.J. p 863 note 11.

89. Kan.—De Jarnette v. Verner, 19 P. 666, 40 Kan. 224.
57 C.J. p 863 note 12.

to defeat the action.[90]

k. Excessive Sale

A sheriff who sells more property of the debtor than is necessary to satisfy the debt and costs is liable with respect to the excess.

A sheriff who sells more property of the debtor than is necessary to satisfy the debt and costs is liable with respect to the excess,[91] although he has not been guilty of actual corruption or intentional fraud.[92] Also, where a sheriff, under an order of sale in a partition suit authorizing him to sell half of a tract of land, advertises and sells the entire tract, a purchaser who has paid for the full tract without knowledge of the sheriff's want of authority to sell it may recover of the sheriff for any loss which he has sustained thereby.[93] An officer making an excessive sale does not render himself liable as a trespasser ab initio to one who holds an unrecorded mortgage on a portion of the property which was rightfully sold.[94]

§ 88. Failure to Sell

a. In general
b. Excuses for failure to sell

a. In General

A sheriff who improperly neglects or refuses to sell property levied on is liable to the execution plaintiff for the resultant damages.

A sheriff is liable in damages to the execution plaintiff, in some states under statutes so providing, where he improperly neglects or refuses to sell property levied on or subject to execution.[95] However, such failure has been held not to make the sheriff a trespasser ab initio,[96] although there is authority to the contrary.[97]

Failure to resell on default of purchaser. A sheriff who sells property and, on the failure of the purchaser to pay his bid, allows the return day of the writ to pass without putting the property up for resale is liable to another execution creditor who is injured by the neglect.[98]

What constitutes failure to sell. Where the successful bidder at a sheriff's sale repudiated the sale because of an omission in the advertisement, and the sheriff duly returned the order of sale, with a certificate of the facts thereon, and afterward another order of sale was issued, the fact that the property sold for a much smaller sum than at the first sale did not constitute a failure on the part of the sheriff to execute the first order, so as to subject him to an amercement provided for by statute.[99]

b. Excuses for Failure to Sell

(1) In general
(2) Property not belonging to defendant
(3) Property claimed as exempt
(4) Property subject to prior liens or claims
(5) Injunction against sale
(6) Impossibility of selling

(1) In General

A sheriff or constable may avoid liability for failure to sell property levied on or subject to execution by showing that he was justified in failing to enforce the execution or that no injury resulted to the judgment creditor by reason of his default.

A sheriff or constable may avoid liability for failure to sell property levied on or subject to execution by showing that he was justified in failing to enforce the execution or that no injury resulted to the judgment creditor by reason of his default.[1] Where the proceedings after the levy of a fieri facias are interrupted by the act of plaintiff in the writ, he cannot hold the sheriff liable for failure to sell.[2] It is no excuse for failure to sell that the ex-

90. Kan.—De Jarnette v. Verner, supra

91. Ala.—Roberts v. Beeson, 4 Port 164
57 C.J. p. 863 note 14.

92. N.Y.—Cantine v. Clark, 41 Barb. 629.

93. Mo.—Lusk v. Briscoe, 65 Mo 555

94. Mass.—Wolcott v. Root, 2 Allen 194.

95. Tex.—Burkett v. Simmons Hardware Co., Civ.App., 52 S.W.2d 675
57 C.J. p. 865 note 43.
Extent of liability see infra § 90 d
Statutory penalties for failure to sell see infra § 173.
Summary remedies against officer for failure to sell see infra § 168

Purpose of statute
The primary object of the statute is to give compensation to the judgment creditor for any injury suffered by him because of the default of the officer in the performance of his duty.—Burkett v. Simmons Hardware Co., supra.

"Order of sale" is included within the meaning of the term "execution," as used in statute imposing liability on sheriff and his sureties for failure to sell property subject to execution.—Blanscet v. Palo Duro Furniture Co., Tex.Civ.App., 68 S.W.2d 527.

Perishable property
Where the property attached is perishable, the officer should sell it, and, if he fails to do so, he is liable for its value.—Cilley v. Jenness, 2 N.H. 87.

96. Ky.—Bell v. North, 4 Litt. 133

97. Vt.—Bond v. Wilder, 16 Vt 393.

98. Pa.—Commonwealth v. Conroy, 34 A. 581, 174 Pa. 355

99. Kan.—Moore v. Burdge, 52 P. 912, 7 Kan.App. 80.

1. Tex.—Burkett v. Simmons Hardware Co., Civ.App., 52 S.W.2d 675

Burden to justify failure to sell
The officer's failure to sell the property makes him prima facie liable and imposes on him the burden to justify his failure.—Burkett v. Simmons Hardware Co., supra

2. Ga.—Williams v. Chambers, 90 S.E. 273, 140 Ga. 858.
57 C.J. p. 866 note 55.

ecution defendants notified the sheriff of their intention to file a bill to enjoin the execution, and he thought the bill would be sanctioned;[3] that, on advice of counsel, he refrained from selling on the interposition of an affidavit of illegality, where he ought not to have received such affidavit;[4] that he had delivered the execution and goods to his successor in office;[5] or that the property would not sell for its appraised value as required by a statute enacted after the levy was made.[6]

Good faith of officer. It is no excuse for failure to sell that the officer acted honestly and in good faith,[7] and intended no disobedience to the precept of the court.[8] On the other hand, a sheriff has been held not liable where he acted in good faith under a statute, the proper construction of which was unsettled.[9]

Bankruptcy of debtor. It was held in an early case that, where property is levied on by a sheriff under an execution from a state court and defendant is adjudged a bankrupt, and no proceedings are taken in the bankruptcy court to compel the property levied on to be brought into that tribunal for distribution, the adjudication of bankruptcy and the issuing of the ordinary writ of protection will not excuse the sheriff for not proceeding to sell the property and raise the money.[10]

Several executions. Where property is seized under several writs, it has been held a good defense to a suit by the creditor whose writ was last levied, for failure to sell the property, that if a sale had been made the amount would have been absorbed in satisfying the prior writs,[11] although there is authority to the contrary.[12] Where a sheriff levies on defendant's property under two executions in favor of different plaintiffs, and the first execution is withdrawn by consent of the parties, but the sheriff neglects to proceed and sell under the second execution, he is liable to the second plaintiff for such neglect[13]

Property seized by predecessor. A sheriff cannot be held responsible for failure to sell property seized by his predecessor in office, without proof that the property so seized had come into his possession, or that he had bound himself in some way for it.[14]

Expiration of term before return day. The fact that the execution or order for the sale of property was returnable after the sheriff's term of office expired is not a good defense to the sheriff's liability for his failure or refusal to sell the property, where he could have sold it.[15]

(2) Property Not Belonging to Defendant

A sheriff may excuse himself from liability for failure to sell property levied on by showing that it did not belong to the execution defendant.

Where it is sought to hold a sheriff liable for failure to sell property on which he has made a levy under execution, he may exculpate himself by showing that the property was not subject to the execution but belonged to a third person,[16] and the failure of the real owner to come in and interplead under a rule taken by the sheriff does not preclude the latter from setting up the owner's title as a defense for not selling[17] However, the officer will be liable to the creditor if he fails to prove that the property did not belong to the debtor, where he relies thereon as an excuse for his failure to sell.[18] The mere interposition by a third person of a claim to the property which is not duly authenticated does not excuse the officer's failure to sell,[19] even though such officer acted in good faith;[20] and a proper claim of title by a third person will not excuse the officer's failure to sell, where a jury impaneled to try the right of property have found it subject to the process.[21]

Where a laborer who had a lien for helping to drive the logs of several owners intermingled together, in order to enforce his lien, attached a part of them, and seasonably delivered the execution to the sheriff, who refused to sell them, the sheriff was

3. Ga.—Dawson v. Merchants', etc., Bank, 30 Ga 664.

4. Ga.—Treadwell v. Beauchamp, 9 S E. 1040, 82 Ga 736.

5. Ala.—Leavitt v. Smith, 7 Ala. 175.

6. Ind—Caldwell v. Sheffer, 8 Blackf. 116.

7. Ga.—Gladden v. Cobb, 6 S E. 161, 78 Ga. 235.
57 C.J. p 865 note 52.

8. Ga.—Gladden v Cobb, supra.

9. Ga.—Myers v. Wilcox, 44 Ga. 336.
57 C.J. p 865 note 54

10. Ga—Sharman v. Howell, 40 Ga. 257, 2 Am.R. 576.
Bankruptcy as excuse for release of property levied on see supra § 81.
Dissolution by adjudication in bankruptcy of execution lien obtained within four months of filing of petition in bankruptcy of execution debtor see Bankruptcy § 245 a (4)
Sale after bankruptcy of debtor see supra § 87 a.

11. Ala.—Smith v. Hogan, 4 Ala. 93
Me—Commercial Bank v. Wilkins, 9 Me. 28.

12. Ky.—Potts v. Commonwealth, 4 J.J Marsh. 202, 20 Am.D. 213.
57 C.J. p 866 note 57.

13. N.Y.—Van Winkle v. Udall, 1 Hill 559.

14. La.—Ballew v. Bobb, 13 La Ann. 375.

15. Tex.—Blanscet v. Palo Duro Furniture Co., Civ.App., 68 S W 2d 527.

16. Utah—Skid Evans, Inc v. Patten, 1 P.2d 959, 78 Utah 116.
57 C.J. p 866 note 60.

17. Pa—Commonwealth v. Megee, 4 Phila 258.

18. Mo—State v. Tucker, 229 S.W. 163, 286 Mo 466
57 C.J. p 866 note 63

19. Ga.—Charles v. Foster, 56 Ga. 612.

20. Ga.—Charles v. Foster, supra.

21. Ky—Potts v Commonwealth, 4 J.J.Marsh. 202, 20 Am.D. 213.

held liable for such refusal, where he did not show that he would have been required to take the property of one person to pay the debt of another, or to do any unlawful act;[22] but where, previous to the time appointed for an execution sale, the property levied on was replevied on a writ in favor of a third person, served on the sheriff by one of his deputies, this was held a sufficient excuse to the sheriff for not selling it under execution.[23] The verdict of a jury, summoned by the sheriff to find whether goods belong to defendant in execution, is not conclusive on plaintiff in the execution so as to bar his action against the sheriff for failure to sell.[24]

(3) Property Claimed as Exempt

A sheriff is not liable for failing to sell property which the debtor claims as exempt where the creditor fails to contest the claim or refuses to indemnify the sheriff.

A sheriff is not liable for failing to sell property which the debtor claims as exempt,[25] where the creditor fails to contest the claim[26] or the contest remains undetermined,[27] or where the creditor refuses to indemnify him.[28]

(4) Property Subject to Prior Liens or Claims

A sheriff is not liable for a failure to sell property which is encumbered by prior liens or claims to an amount greatly exceeding its value.

Where property seized on execution is encumbered to an amount greatly exceeding its value, the sheriff is not liable for failure to sell it.[29] It has been held that, where a third party claim to property levied on showed that claimant was a mortgagee or pledgee of the property in possession after maturity of the debt, the sheriff was not liable for failure to release the interest of the claimant, and sell the equity of redemption which was in the execution debtor,[30] but, where a sheriff has levied on a crop in the field, but neglected to sell it, and is ruled by the execution plaintiff for failure to make the money, it is not a sufficient answer that after the levy the landlord of the owner of the crop carried the crop away in satisfaction of a lien due him superior to that of plaintiff.[31]

Conditional sale. A sheriff has been held not liable for his refusal to sell property levied on, where the judgment creditor failed to pay a balance owing thereon to a conditional seller of the property or his assignee.[32]

(5) Injunction against Sale

A sheriff is not liable for not selling property where the sale of the property has been enjoined.

A sheriff is not liable for not selling property where the sale of the property has been enjoined,[33] and this is true, even though the injunction has been dissolved on condition that plaintiff give security to refund the proceeds, where such security is not given.[34] However, it has been held that, where the sheriff is chargeable with negligence in not selling property levied on before the time when an injunction against the collection of the execution was granted, such injunction affords him no protection.[35]

(6) Impossibility of Selling

A sheriff is not liable for not selling property which it is impossible to sell.

Where the property has been properly offered for sale but remains unsold for want of buyers, the sheriff is not liable,[36] and a failure to make a sale may also be excused where the property is so obviously valueless that an attempt to sell it would be an idle ceremony.[37] The sheriff is not liable for neglect or refusal to make a sale of property levied on under execution, where it appears by his return that he had not time to sell on the day appointed by law for making sales, because other sales required by law to be made on that day consumed the whole time within which sales might lawfully be made.[38] So, also, it has been held to be a sufficient excuse for a sheriff for not selling property, advertised for sale on execution during a certain term of court, that the court adjourned at an un-

22. Me.—Doyle v. True, 36 Me 542

23. Vt.—Shaw v. Baldwin, 33 Vt 447.

24. N.C.—Person v. Fisher, 4 N.C. 72

25. Neb.—Burton v. Cave, 41 N.W. 1099, 26 Neb. 186
57 C.J. p. 867 note 71.

26. Ala.—Block v. Bragg, 68 Ala. 291.

27. Ala.—Block v. Bragg, supra.

28. S.C.—Corry v. Tate, 26 S.E. 794, 48 S.C. 548.
Indemnity to officer see infra §§ 128–145

29. N.Y.—People v. Ames, 35 N.Y. 482, 91 Am.D. 64
Excuse for failure to levy see supra § 60

30. Mo.—State v. Nolte, 203 S.W. 956.

31. Ga.—Prince v. Walker, 58 S.E. 61, 1 Ga.App. 282.
47 C.J. p. 867 note 78.

32. Utah.—Skid Evans, Inc., v. Patten, 1 P.2d 959, 78 Utah 116.

33. Ga.—Broadway Nat. Bank v. Byers, 70 S.E. 328, 135 Ga. 721.
57 C.J. p. 867 note 83.

34. Tenn.—Conway v. Jett, 3 Yerg. 481, 24 Am.D. 590.

35. Ga.—Neal v. Price, 11 Ga. 297
57 C.J. p. 867 note 85.

36. Ky.—Commonwealth v. Fuqua, 3 Litt. 41
57 C.J. p. 867 note 86.

37. Tex.—Scranton v. Conlie, 29 Tex. 237.
57 C.J. p. 867 note 87.

38. Ark.—State v. Borden, 15 Ark. 611.

usually early hour of the first day of the term and continued all pending causes until the next term.[39]

§ 89. Delay in Selling

A sheriff who improperly delays making a sale of property seized under process is liable for the damages resulting therefrom, but a sheriff is not liable for deferring the sale of property claimed as exempt until such claim can be passed on.

A sheriff who improperly delays making a sale of property which he has seized under process and should sell is liable to plaintiff in the process for the damage resulting from the delay,[40] and a mere postponement of the sale, if improper, renders the sheriff liable to plaintiff for the damage resulting therefrom;[41] but, unless the sheriff has grossly abused his authority, a delay in selling does not render him liable as a trespasser ab initio.[42]

Delay at instance of creditor. A sheriff is not liable to defendant in execution for damages resulting from the postponement of a resale of land, where he acted at the instance of the judgment creditor.[43]

Delay pending proceedings to open judgment. Where a rule to show cause why a judgment should not be opened was entered, and the sheriff delayed an execution sale under the judgment, although no order staying the proceedings was entered, he was liable for the loss occasioned by the property being sold under a subsequent execution.[44]

Property claimed as exempt. Where property levied on is claimed as exempt, the sheriff is not liable for deferring a sale until such claim can be passed on,[45] unless there is collusion between him and the debtor to prevent any sale.[46]

§ 90. Extent of Liability

a. In general
b. Sale without proper notice
c. Improprieties in conduct of sale
d. Failure to sell or deliver possession after sale

a. In General

Where a sale of property legally seized is wrongful, the value of the property at the time of the sale fixes the measure of damages.

As a general rule a sheriff is liable for the value of property wrongfully seized and not restored to the owner, or, if the owner regains the property, for the expense of doing so, as considered supra § 74, but, if the property was legally seized and only the sale was wrongful, the value of the property at the time of the sale, and not at the time of the seizure, fixes the measure of damages.[47] Where by reason of a sheriff's misconduct goods taken under execution by him are sold for less than their fair value, he is responsible for the difference between the fair value and the amount realized by the sale.[48] Where plaintiff, the grantee of an equity of redemption, for the purpose of strengthening his title, caused the equity to be sold on an execution which he held against his grantor, and bid it off himself for the amount of the execution, and took a deed of it from the sheriff, paying the latter no money except his expenses, and in consequence of a neglect of the sheriff the sale proved ineffectual, but plaintiff's title was valid independent of the sale, the measure of plaintiff's damages, in an action on the case against the sheriff for his default, was held not the sum bid by plaintiff at the sale, but the amount of the expenses actually paid by him, with interest from the time of payment.[49] So, where a sheriff's sale of land is declared a nullity because of his failure to seize the land, he may be held liable to the purchaser for all expenses incurred in consequence of his purchase.[50]

Nominal damages. A sale of the mortgagor's interest in personal property, even though possession is delivered to the purchaser without requiring the satisfaction of the mortgage, it being due and payable, subjects the officer only to nominal damages, where the property is still within the county, at a place near the residence of the mortgagee, and the security has not been in any way injured.[51] Where,

39. Mo—Mitchel v. Gregg, 4 Mo. 37.

40. Ga—Neal v. Price, 11 Ga 297
57 C.J p 867 note 90.
Reasonable diligence
A sheriff must sell goods levied on with reasonable diligence and may not put off the sale to the last day allowed by the writ if plaintiff is injured by such delay—State, to Use of Henderson, v. Clark, 13 A.2d 445, 1 Terry 441, reversed on other grounds 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704—Jaavier v. Vandever, 3 Del 29.

41. Ill.—Gilbert v. Watts-De Golyer Co, 66 Ill App 625, affirmed 48 N. E. 430, 169 Ill. 129, 61 Am.S.R. 154.
57 C.J. p 868 note 91

42. Ala—Griel v. Hunter, 40 Ala 542.

43. S C.—State v. Yongue, 44 S C.L 448.

44. Pa—Spang v. Commonwealth, 12 Pa. 358.

45. Ga.—Van Horn v. Bradford, 49 Ga 75.
57 C J. p 868 note 96.

46. Ga.—Kimbro v. Edmondson, 46 Ga. 130
57 C.J. p 868 note 97.

47. Nev—Newman v. Kane, 9 Nev 234.
Vt—Walker v. Wilmarth, 37 Vt 289
Conveyance or delivery of property to purchaser at sale without payment of price see supra § 86 b.

48. Me—Daggett v. Adams, 1 Me. 198.

49. Mass—Sexton v Nevers, 20 Pick 451, 32 Am D. 225.

50. La—Friedlander v Bell, 17 La. Ann 42

51. Ind.—State v. Bergner, 50 N.E. 824, 20 Ind App. 390, 67 Am.S.R. 261.

in an action against a sheriff for selling property exempt from execution, it appears that plaintiff fraudulently concealed property to more than the value of his exemptions, he is entitled to only nominal damages.[52]

Mitigation of damages. Where a sheriff sells goods on execution unlawfully, he cannot set up, in mitigation of damages, a subsequent sale on another valid execution,[53] but in an action against a sheriff for selling exempt property he may show, in reduction of damages, that plaintiff owned only a part interest in the property.[54] If an officer wrongfully becomes the purchaser at his own sale, the amount paid by him may go in mitigation of damages.[55]

b. Sale without Proper Notice

The liability of a sheriff or constable for selling property without giving proper notice is the difference between the price it sold for and the price it would have sold for if proper notice had been given, or, in some instances, the value of the property sold.

In an action against an officer for selling property without giving proper notice, the measure of damages, it has been held, is not the value of the property, but the difference between the price it sold for and the price it would have sold for if proper notice had been given.[56] On the other hand, it has been held that the officer is liable to the original owner for the value of the property sold,[57] or that the measure of damages, in the absence of special circumstances, is the value of the property at the time and place of its conversion with interest thereon.[58] The owner, however, is not entitled to demand more from the sheriff than the sheriff received for the property at the sale, where the acquiescence of the owner in the sale caused title to the property sold to pass to the purchaser, even though the sale was invalid because made without legal notice.[59] Where the sheriff sells property on execution without serving on the owner a written notice as required by statute, it is error to limit the owner to nominal damages only, unless he proves that the property sold for less than it would have sold for if the notice had been given.[60]

Where the sheriff sells without lawful notice, he is not entitled to the protection of the writ under which he acted and the writ cannot be used in diminution of damages.[61] This rule, however, has been held to have reference to the damage growing out of that which the sheriff himself did on his own direction to make the sale illegal and with respect to which he departed from his duties under the warrant, and not to apply to acts which the sheriff did within, and in strict pursuance of, the command of the warrant;[62] and, hence, it has been held that he is entitled to a credit for amounts paid out in accordance with the direction of the warrant,[63] but that he is not entitled to a credit for the costs of the sale.[64] However, it has been held that the officer cannot show in mitigation of damages that he paid the execution plaintiff out of the proceeds of the sale.[65]

c. Improprieties in Conduct of Sale

A sheriff or constable is liable for improprieties in the conduct of a sale only to the extent of the loss or damage resulting as a natural and legal consequence of the irregularities and improprieties of which complaint is made.

In order to entitle a party to recover damages for irregularities in the conduct of an execution sale, he must show some loss or damage resulting to himself as a natural and legal consequence of the irregularities and improprieties complained of,[66] and the execution defendant cannot fix the measure of his own damages by his voluntary act in paying money to recover back from the execution purchaser the property alleged to have been irregularly sold.[67] However, where, in an action of trespass against an officer, it appeared that the officer had advertised to sell at a certain place goods of plaintiff taken on an execution against him, but had actually sold them at a different place, without the consent of plaintiff and without having adjourned the sale from the place advertised, it was held that plaintiff was entitled to recover the full

52. Pa.—Smith v. Emerson, 43 Pa 456.

53. N.Y.—Parker v. Conner, 44 N.Y. Super. 416
57 C.J. p 869 note 16.

54. Wis.—Wright v. Pratt, 31 Wis 99.

55. N.H.—Perkins v. Thompson, 3 N.H. 144.

56. Ala.—Wright v. Spencer, 1 Stew. 576, 18 Am.D. 76.
57 C.J. p 869 note 19.

57. Pa.—Carrier v. Esbaugh, 70 Pa 239.

58. Miss.—Rigby v. Stone, 13 So.2d 230, 194 Miss. 775.
Market value
Miss.—Rigby v. Whitten, 18 So.2d 152, 196 Miss. 661—Rigby v. Stone, 13 So.2d 230, 194 Miss 775.

59. Miss.—Rigby v. Whitten, 18 So 2d 152, 196 Miss. 661.

60. N.C.—Winburne v. Bryan, 73 N. C. 47, 50
57 C.J. p 869 note 22.

61. Miss.—Rigby v. Whitten, 18 So. 2d 152, 196 Miss. 661.

62. Miss.—Rigby v. Whitten, supra.

63. Miss.—Rigby v. Whitten, supra.

64. Miss.—Rigby v. Whitten, supra.

65. Pa.—Carrier v. Esbaugh, 70 Pa. 239.

66. Mo.—Duncan v. Matney, 29 Mo. 368, 77 Am.D. 575
Tex.—Dallas Joint Stock Land Bank of Dallas v. Randerson, Civ.App., 127 S.W.2d 593, reversed on other grounds Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S.W.2d 769, 136 Tex. 91.

67. Mo.—Duncan v. Matney, 29 Mo. 368, 77 Am.D. 575.

value of the goods, although the officer had paid over the proceeds of the sale to the execution creditor.[68] A sheriff who sold property belonging to a person other than the execution defendant has been held liable to the true owner of the property for attorney's fees and costs incurred in a suit to avoid the sale and quiet title in himself.[69]

d. Failure to Sell or Deliver Possession after Sale

The measure of a sheriff's liability for not selling property levied on is the actual injury sustained by the execution plaintiff, which ordinarily will be the value of the property at the time when it should have been sold up to the amount of the writ, or such proportion of the value as would have been applicable on the plaintiff's writ, if the property is finally lost to plaintiff and satisfaction cannot otherwise be had.

The measure of the sheriff's liability for not selling property levied on is the actual injury sustained by the execution plaintiff,[70] which will ordinarily be the value of the property[71] at the time when it should have been sold[72] up to the amount of the writ,[73] or such proportion of the value as would have been applicable on plaintiff's writ,[74] if the property is finally lost to plaintiff and satisfaction cannot otherwise be had.[75] The sheriff may show in mitigation of damages that the property was encumbered by a lien sufficient to absorb it,[76] or that other executions would have exhausted it or shared in the proceeds.[77] Where part of the property levied on did not belong to the execution defendant, and the value of the balance was less than the amount of the execution, the sheriff cannot be held liable for the full amount of the execution.[78]

Failure to put purchaser in possession. A sheriff who refuses to execute an order requiring him to put a purchaser at foreclosure sale in possession of the land sold is liable to the purchaser for the loss of rent due to such failure during the time possession was withheld from him.[79]

F. LIABILITIES ARISING OUT OF COLLECTION, CUSTODY, OR DISPOSITION OF MONEY

§ 91. In General

a. In general
b. Medium of payment
c. Liability for deferred payments on credit sale
d. Liability for money lent out or left with third person
e. Payment into court
f. Payment to agent or attorney
g. Payment to wrong person
h. Repayment of money to defendant on supersedeas of writ
i. Interest or penalty
j. Necessity of demand
k. Necessity for order of court as to payment
l. Effect of reversal of judgment

a. In General

A sheriff or constable is liable in his official capacity for the safe-keeping and proper disposition of all moneys which have come into his possession by virtue of his office

A sheriff or constable is liable in his official capacity for the safe-keeping and proper disposition of all moneys which have come into his possession by virtue of his office,[80] and an agreement

68. Vt.—Hall v. Ray, 40 Vt. 576, 94 Am.D. 440

69. Wash.—Choukas v. Severyns, 99 P.2d 942, 3 Wash.2d 71, opinion adhered to 103 P.2d 1106, 3 Wash.2d 71.

70. Ga.—Brannon v. Barnes, 36 S.E. 689, 111 Ga. 850.
57 C.J. p. 869 note 27.

71. Ga.—Wilkin v. American Freehold Land Mortg. Co., 32 S.E. 135, 106 Ga. 182.
57 C.J. p. 870 note 28.

72. W.Va.—Virginia Exch. Bank v. Horner, 26 W.Va. 442.
57 C.J. p. 870 note 29.

73. Pa.—Hamner v. Griffith, 1 Grant 193.

74. N.C.—Buckley v. Hampton, 23 N.C. 316.

75. Ky.—Royse v. Reynolds, 10 Bush 286.

76. Ky.—Potts v. Commonwealth, 4 J.J.Marsh. 202, 20 Am.D. 213.

77. Ky.—Potts v. Commonwealth, supra.

78. Ga.—Wilkin v. American Freehold Land Mortg. Co., 32 S.E. 135, 106 Ga. 182.

79. N.Y.—Tubiola v. Baker, 233 N.Y.S. 373, 225 App.Div. 420.

80. Fla.—Scott v. Caldwell, for Use and Benefit of Bay County, 37 So.2d 85, 160 Fla. 861.
Mo.—State ex rel. Karnes v. Poole, App., 72 S.W.2d 803.
57 C.J. p. 870 note 38.
Amercement of officer for acts or omissions see infra § 173.
Liability for acts or defaults of deputies see supra § 55.

Settlements

(1) Purported settlements made with fiscal court of sheriff's county revenue account including school fund which were nothing more than a list of amounts collected by sheriff as taxes and what he had paid out, and did not include any sum retained by himself as commissions, and which were not recorded in county court, were held not to constitute settlements made or recorded according to law.—Shipp v. Bradley, 275 S.W. 1, 210 Ky. 51.

(2) A report made and recorded by commissioners appointed by the fiscal court to make a settlement with the sheriff, which was made in the absence of the sheriff, and after he had absconded, cannot be treated as a settlement binding on the sheriff and his sureties.—Fidelity & Deposit Co. of Maryland v. Logan County, 84 S.W. 341, 119 Ky. 428.

of parties to leave in the hands of the sheriff a fund of which he is the legal custodian does not release him from responsibility for that fund.[81] Where an officer executing a writ obtains more money than is necessary to satisfy it, he is liable to defendant for the surplus.[82] In order to render a sheriff liable with respect to money received by him, it must be shown that he has violated some duty or obligation owing to the person seeking to recover.[83]

Liability to state for money received as bail. A sheriff who had in his charge a prisoner arrested by him on a warrant on which bail was indorsed has been held liable to the state for money received by him on deposit from such prisoner in lieu of bail, even though there was no statute permitting the sheriff to receive such deposit.[84]

Money sent by mail. Where a sheriff, without any directions to that effect, sends money through the mail, he does so at his own risk, and if the money is lost he is liable therefor to the person to whom he should have paid it,[85] but it is otherwise if he has been authorized by such party to remit by mail.[86]

Agreement as to application of money. Where a sheriff receives money from a judgment debtor, and agrees with him to apply it on the execution, provided such execution is just and legal, otherwise to return it, he is not bound to do more than to allow to such debtor the full time which the execution has to run to determine the legality of the execution, and where, at the expiration of that time, no proceedings to attack the execution have been instituted, he incurs no liability to the debtor by applying the money on the execution.[87]

b. Medium of Payment

A sheriff or constable who receives anything other than cash in discharge of an execution or in payment for property sold by him is liable for the amount he should have received in cash unless his action in the matter was authorized by the execution plaintiff.

A sheriff or constable who receives anything other than cash in discharge of an execution or in payment for property sold by him makes the debt his own and must respond to the execution plaintiff's demand in cash[88] unless his action in the matter was authorized by the execution plaintiff;[89] and if there are several executions the officer has no right to make an arrangement with some of the execution creditors to receive from them something other than cash for such property as they may buy unless the other execution creditors assent to the arrangement.[90] It has also been held that where a sheriff, selling goods on attachment, took a note with an indorser, making due inquiry as to the solvency of the indorser at the time of the sale, he was not liable, on the note being protested for nonpayment, although it appeared that each indorser was insolvent when the sale was made, but that such fact was not generally known in the commercial community.[91] The sheriff's return that he has made the money estops him to deny that he received cash.[92]

Acceptance of depreciated currency. A sheriff is liable to the execution plaintiff, where he receives depreciated currency in satisfaction of the execution, without plaintiff's consent.[93]

c. Liability for Deferred Payments on Credit Sale

A sheriff or constable who extends credit to a buyer at a sale under process, the terms of which are to be for cash, must respond in cash for the amount of the sale to the party who caused the process to issue.

A sheriff or constable who extends credit to a buyer at a sale under process, the terms of which are to be for cash, does so on his own responsibility and he must respond in cash for the amount of the sale to the party who caused the process to issue.[94] Where a sheriff, under proceedings in partition, has sold the land for a certain sum in hand, taking judgment notes for the balance as he was authorized to do, his return of sale renders

81. La.—New Orleans v. Waggaman, 31 La.Ann 299.
82. Mo—Damm v. O'Connell, 1 Mo App. 268.
57 C.J. p 870 note 41.
83. Wis—Porter v. Burtis, 221 N. W 741, 197 Wis. 227.
57 C.J. p 870 note 42.
84. Ind—State v Scanlon, 28 N E 426, 2 Ind App 320.
57 C J p 870 note 43.
85. Mass—Wakefield v. Lithgow, 3 Mass 249.
86. Mass.—Wakefield v. Lithgow, supra.
87. Or—Richards v. Nye, 5 Or 382
88. N.J—Irving Trust Co. v. Conway, 167 A 680, 11 N.J Misc. 515
57 C.J p 871 note 49.
Check
Officer accepting check, in lieu of cash, from purchaser at sale is liable for the amount thereof in case the check is not paid
Kan—Metz v. Hicklin, 268 P. 823, 126 Kan 516
N J—Irving Trust Co v. Conway, 167 A. 680, 11 N J Misc 515.
57 C J p 871 note 49 [a].
89. Ky.—Allin v. Davis, 1 A.K Marsh 567.
90. Ga—Phillips v Behn, 19 Ga 298
91. La—Borgstede v. Lewis, 6 La Ann. 322.
92. Miss—Tiffany v. Johnson, 27 Miss 227.
57 C J. p 871 note 53.
93. Ark—Randolph v Ringgold, 10 Ark. 279, 52 Am D 235, overruling Ringgold v. Edwards, 7 Ark. 86.
57 C J p 871 note 55.
Reduction of liability see infra § 97.
94. Ala—Grace v. Wooley, 153 So. 659, 26 Ala App 83
N J—Irving Trust Co v. Conway, 167 A. 680, 11 N.J Misc. 515.

him liable to pay the money into court, or to the several persons interested, as soon as their shares are ascertained, or to a call to bring the judgment notes into court, in order that the parties may have them properly disposed of,[95] and in case the money represented by the judgment notes is lost his liability therefor depends on whether or not he was guilty of negligence.[96]

d. Liability for Money Lent Out or Left with Third Person

A sheriff or constable is liable for money he lends out or leaves with a third person. It has been held that a sheriff may be liable for a loss resulting from the failure of a bank in which he has deposited the funds, but there is other authority which holds that he is not so liable in the absence of negligence or bad faith.

A sheriff who lends out money in his hands is responsible therefor;[97] and an order of court directing a sheriff to lend money in his hands on certain terms and on certain security will not protect him from liability to account for such money where he does not, in making a loan, exact the terms and security prescribed.[98]

A sheriff who, in execution of a writ of attachment, leaves a sum of money in the hands of a third person, and takes his receipt for it, constitutes him keeper, and the legal possession is in the sheriff, who is accountable to defendant on the dissolution of the attachment in the same manner as though the money had been actually taken into the sheriff's own possession.[99]

Loss by failure of bank. A sheriff who deposits in a bank money collected on process or otherwise in his custody is liable for loss resulting from the failure of the bank,[1] where the bank is not a lawful depositary for funds in the possession or custody of the sheriff.[2] On the other hand, it has been held that the liability of a sheriff for money in his hands is only that of a bailee for hire,[3] and that he is not liable for such loss unless he was negligent or acted in bad faith.[4]

e. Payment into Court

A sheriff or constable may end his responsibility for money collected on process by paying it into court in a case where payment into court is proper.

A sheriff or constable may end his responsibility for money collected on process by paying it into court in a case where payment into court is proper;[5] if the officer pays directly to the execution plaintiff in a case where the writ requires payment of the money into court he acts on his own responsibility.[6] Where an execution commands the sheriff to have the money ready for plaintiff on the return-day, he cannot discharge himself from liability to plaintiff by paying the clerk of the court and taking his receipt.[7] After the commencement of an action against him, a sheriff's payment to the clerk of the court of money collected on process is no defense to the action,[8] at least where the payment has not been accepted by the execution plaintiff.[9]

Order of court. The compliance, by a sheriff, with an order of court, directing him to pay into court the money realized from a distress for rent, relieves him from liability under a statute requiring him to pay over such money to the landlord or the agent.[10] So, where adverse claims are made on the money in the sheriff's hands, he may apply for leave to pay it into court, and thus be protected.[11]

f. Payment to Agent or Attorney

A sheriff or constable is relieved from liability for money in his possession by payment of it to the authorized agent or attorney of the person entitled to it.

Payment to the attorney of record of a party in whose favor a judgment has been rendered will relieve the sheriff or constable from liability[12] if he

95. Pa.—Snively v. Commonwealth, 40 Pa. 75.

96. Pa.—Snively v. Commonwealth, supra.
57 C J. p 871 note 57.

97. Ga.—Lindsey v. Cock, 40 Ga 7
57 C J. p 872 note 62.

98. Ohio.—Hubbard v Elden, 2 N E 434, 43 Ohio St 380.
57 C J. p 872 note 63.

99. La.—Watkins v. Cawthon, 33 La Ann. 1194.

1. Ga.—Phillips v. Lamar, 27 Ga. 228, 73 Am D. 731.

Direction of attorney
The sheriff is liable even though the attorney for the plaintiff in execution directed the sheriff to deposit the money in the bank.—Hixon v. Bank of Siloam, 159 S.E. 901, 43 Ga App. 696.

2. Ala.—Jefferson County v. Downs, 147 So 626, 226 Ala 427.

3. Ohio.—Ikert v. Wells, 13 Ohio Cir Ct., N S, 213, 32 Ohio Cir Ct. 82, affirmed Ikirt v. Wells, 92 N.E 1117, 82 Ohio St. 401.

4. Mont.—Wells-Dickey Co. v. Benjamin, 239 P. 771, 74 Mont. 170.
57 C.J p 871 note 61.

Proceeds of partition sale
Ohio.—National City Bank of Cleveland v. Crawfis, 2 Ohio Supp 52

5. Del.—Ableman v. Conoway, 199 A 278, 9 W W Harr. 324.
57 C J. p 872 note 67
Propriety of sheriff or constable paying money collected on process into court see supra § 48.

6. Pa.—McDonald v. Todd, 1 Grant 17.
Tenn.—Nelson v. Williams, 4 Hayw. 161.

7. Colo.—Brown v. People, 3 Colo 115.

8. N Y.—Crane v. Dygert, 4 Wend. 675.

9. N.Y.—Dygert v. Crane, 1 Wend. 534.

10. N.Y.—Acker v. Ledyard, 8 N.Y 62.

11. N Y.—Hexter v Pennsylvania R. Co., 59 N.Y.S 453, 43 App.Div. 113.

12. Ark.—Williams v. State, 46 S.W 186, 65 Ark 159
Ill.—Custer v. Agnew, 83 Ill. 194.

has no knowledge that the attorney's authority has been revoked;[13] but the sheriff is liable to the judgment creditor if he pays money to the latter's attorney when he is chargeable with knowledge or notice that such attorney's authority has been revoked[14] or after notice from plaintiff not to pay the money to the attorney.[15] A sheriff's liability for moneys received by him at a partition sale is not discharged by paying the money to the attorney who procured the sale, but who was not specially authorized to receive the proceeds, either by the parties entitled thereto or by order of court.[16] Where a statute requires that the appointment of an agent shall be indorsed on an execution when plaintiff does not reside in the county to which it goes, or shall be made in writing, the sheriff may refuse to pay until such evidence is furnished him,[17] but he waives such evidence where he either pays any part of the money or in any other manner recognizes the agency.[18]

g. Payment to Wrong Person

A sheriff who has collected money under process is liable if he pays it out to a person to whom he was not authorized to pay it.

A sheriff who has collected money under process is liable to plaintiff in such process if he pays out such money to another person to whom he was not authorized to pay it;[19] but the sheriff cannot be held liable for paying over money realized on an execution to the execution creditor unless he is affected with notice that another person is entitled thereto[20]

Effect of assignment of judgment. Where, after notice of the assignment of a judgment, the sheriff voluntarily appropriates the money received from the debtor to the claims of other parties who have executions in his hands against the judgment plaintiff, he is liable to account therefor to the assignee.[21] However, the assignee of a judgment cannot hold liable a sheriff who collects the money on execution and pays it over to the judgment creditor, although the assignee had given the sheriff notice of the assignment and demanded payment before it was paid to the assignee, where the assignment was not indorsed on the execution, and the judgment creditor insisted that he was entitled to the money.[22]

h. Repayment of Money to Defendant on Supersedeas of Writ

A sheriff to whom an execution defendant has paid the amount of the execution is liable for the return of the money on the execution being superseded.

A sheriff to whom an execution defendant has paid the amount of the execution in order to secure the release of property levied on is liable for the return of the money on the execution being superseded,[23] and he incurs no liability to the execution plaintiff by returning such money to defendant.[24]

i. Interest or Penalty

A sheriff who places money in his official custody so that it produces interest is liable therefor to the person entitled to the money; and he is chargeable with interest on money withheld by him after it becomes his duty to pay over or distribute it and on money which he has paid to the wrong person.

Where the sheriff so places money in his official custody that it produces interest, such interest should be treated as an accretion to the money, and belongs to the party entitled to the money,[25] and if the sheriff be authorized to sell on credit he is liable for the interest received by him on deferred payments.[26] However, where the officer, on his own responsibility, sells property on credit, and applies the full amount for which the property sold to the satisfaction of executions in his hands, he cannot be held liable to the creditor on account of interest which he receives on the amounts for which he extended credit.[27]

A sheriff is properly charged with interest on money withheld by him after it became his duty to pay it over or distribute it,[28] or on money which he has paid to the wrong person,[29] or with a penalty prescribed by statute for such a default.[30] He

13. N.Y.—Schuldenfrei v. Enright, 138 N.Y.S. 1065, 79 Misc. 1.
14. Ill.—Custer v. Agnew, 83 Ill. 194. Mass.—Parker v. Downing, 13 Mass. 465.
15. S.C.—State v. Goettie, 41 S.C.L. 126.
16. Ohio—Calvin v. Bruen, 39 Ohio St. 610.
17. Ala.—Brazeal v. Smith, 5 Ala. 206.
18. Ala.—Brazeal v. Smith, supra.
19. Ill.—Chicago First Nat. Bank v. Hanchett, 16 N.E. 907, 126 Ill. 499. 57 C.J. p. 873 note 87.
20. Wis.—Russell v. Lawton, 14 Wis. 202, 80 Am. D. 769. 57 C.J. p. 873 note 88.
21. Tex.—McClane v. Rogers, 42 Tex. 214.
22. Ky.—Triplett v. Helm, 5 J.J. Marsh. 651.
23. Neb.—Kyd v. Exchange Bank, 76 N.W. 1058, 56 Neb. 557.
24. N.Y.—Seymour v. Dascomb, 12 Wend. 584. 57 C.J. p. 873 note 92.
25. N.H.—Jackson v. Smith, 52 N.H. 9. 57 C.J. p. 878 note 75.
26. Me.—Gannett v. Cunningham, 34 Me. 56.
27. N.H.—Chase v. Monroe, 30 N.H. 427. 57 C.J. p. 879 note 77.
28. Del.—In re Jefferson, 3 Del. 25. 57 C.J. p. 879 note 78. Necessity for demand to charge sheriff with interest see infra subdivision j of this section.
29. Pa.—Reed v. Reed, 1 Watts & S. 235. 57 C.J. p. 879 note 79.
30. Ala.—Grace v. Wooley, 153 So. 659, 26 Ala. App. 83.

is not liable, however, for interest on the amount found to be due in addition to a statutory penalty prescribed for his default.[31] In an action against a sheriff for the defalcation of his deputy in not paying over to the county money collected by the deputy on a tax levy, the sheriff has been held not liable for interest accruing before the date of the judgment.[32] Where an agreement was made between two contending claimants for money in the sheriff's hands that the sheriff should deposit the amount in bank until the questions were decided, and the sheriff deposited it, but took it out again soon after, he was held liable for interest from the time the money was thus taken out of the bank.[33]

A statute relating to the liability of depositaries for interest has been held to have no reference to the duties of sheriffs and hence not to limit the liability of sheriffs for interest on the proceeds of sales made by them.[34]

j. Necessity of Demand

As a general rule a demand is a necessary prerequisite to an action against a sheriff or constable for failure to pay over money collected by him.

While some authorities have held that a demand is not necessary in order to render a sheriff liable for failure to pay over money collected by him,[35] the general rule is that a demand is a necessary prerequisite to an action against the officer for such failure,[36] but it has been held that the rule does not apply where the sheriff asserts a right to retain the money in opposition to plaintiff's claim[37] or where the money retained is public money collected for taxes due,[38] and in some jurisdictions the statutes relating to actions against sheriffs or constables for failure to pay over money collected on execution have been construed as requiring a demand before suit only where the creditor resides in a county other than that in which the money is collected.[39] So, where an officer, without authority, receives money from defendant in a writ, and agrees to pay it over to the creditor, but fails to do so, defendant, after being again sued and paying the money to the creditor, may, without previous demand, recover the money paid to the officer.[40] It has also been held that, where an officer has sold property levied on under execution for more than sufficient to satisfy the debt and costs, no demand is necessary to entitle the execution debtor to sue him for the surplus.[41] Where demand is necessary, an action of debt on a sheriff's official bond for money collected, and a nonsuit therein, is a sufficient demand to enable plaintiff to sustain an action on the case for the same cause of action.[42]

Money collected by deputy. Where money has been collected by a deputy, a demand on either the deputy[43] or the sheriff, where the deputy has gone out of office and left the state,[44] is sufficient to sustain an action against the sheriff.

Liability for interest dependent on demand. A sheriff cannot be charged with interest on money collected by him until a demand has been made on him for such money.[45]

k. Necessity for Order of Court as to Payment

An order of court requiring a sheriff or constable to pay over money in his possession is necessary in order to make him liable for a failure so to do, where there is a contest between claimants as to the right to the money or where he is required by law to retain it until the court has made an order for its disposition.

Where a contest arises between creditors as to the priorities of their respective liens on a fund collected by the sheriff under attachment or execution, the officer is not liable for failure to pay over such fund until he has been ordered to do so by the court, and has failed to comply with such order.[46] So, where the sheriff is required by law to retain the proceeds arising from a sale of perishable property held under attachment, made by order of the court during the pendency of the action, subject to the order of the court after the final judgment in the action, a sheriff cannot be sued for the proceeds of such property until the court has made an order for the disposition thereof.[47]

31. Ala.—Grace v. Wooley, 174 So. 799, 27 Ala.App. 464, certiorari denied 174 So. 801, 234 Ala. 248

32. Ky.—Colter v. Morgan, 12 B. Mon. 278—Grayham v. Washington County Ct., 9 Dana 182.

33. Pa.—Commonwealth v. Crevor, 3 Binn. 121.

34. La.—Cason v. Cecil, 10 So.2d 692, 201 La. 890.

35. N.Y.—Nelson v. Kerr, 59 N.Y. 224.
57 C.J. p. 879 note 83.
Demand as prerequisite to liability for failure to collect see supra § 92.

36. Ark.—Governor v. Pleasants, 4 Ark. 193.
57 C.J. p. 879 note 84.

37. S.C.—Sims v. Anderson, 19 S.C.L. 394.

38. N.C.—State v. McIntosh, 31 N.C. 307.
57 C.J. p. 879 note 86.

39. Ky.—Commonwealth v. Bartlett, 7 J.J. Marsh. 161—Canterberry v. Commonwealth, 1 Dana 415.

40. Me.—Steele v. Putney, 15 Me. 327.

41. Mich.—Munger v. Sanford, 107 N.W. 914, 144 Mich. 323.

42. N.C.—Fagan v. Williamson, 53 N.C. 433.

43. N.C.—Lyle v. Wilson, 26 N.C. 226.

44. Mass.—King v. Rice, 12 Cush. 161.

45. Pa.—Hantz v. York Bank, 21 Pa. 291.
57 C.J. p. 880 note 95.

46. Mo.—State v. Hickman, 51 S.W. 680, 150 Mo. 626

47. Ark.—Yell v. Lawson, 7 Ark. 352.

Money due from outgoing sheriff on final settlement. An action for balances found due from an outgoing sheriff in his final settlement cannot be maintained until he has been served with an order directing him to turn over such balances to his successor.[48]

1. Effect of Reversal of Judgment

A sheriff who has collected the amount of an execution and paid the money over to, or on the order of, the plaintiff is not liable for such amount in the event the judgment is reversed.

An officer who has collected the amount of an execution and paid the money over to, or on the order of, plaintiff is not, in case the judgment is reversed on appeal, liable for such amount to defendant[49] or to a garnishee from whom the money was collected.[50] Where one member of a firm confessed a judgment against himself and his copartner, and execution was issued thereon, and the partners paid the amount to the sheriff after a levy on partnership property, and subsequently the judgment was reversed as to the partner who was not a party to it, plaintiff in execution was held entitled to recover of the sheriff the amount received by him on the execution.[51]

Notice of appeal. A sheriff who has been given notice that an appeal will be taken from a court order directing him to pay money in his possession to a specified person has been held liable if he pays it as directed before the appeal has been disposed of either by prosecution or abandonment.[52]

§ 92. Default or Delay in Collecting

A sheriff or constable is liable for money which, through his negligence, he fails to collect.

A sheriff or constable who negligently fails to collect money which he might have collected is liable therefor,[53] but under some statutes a demand within a certain time is essential to fix such liability.[54] An officer who undertakes to collect money but fails to take any steps for that purpose for an unreasonable time is liable for such negligence.[55] Where property levied on under an execution is replevied and thereafter judgment in the replevin proceeding is in favor of the sheriff, it is the duty of the sheriff to institute an action on the replevin bond where the property replevied on is not returned to him, and where he fails to do so he is liable for the amount of the debt for which the execution was levied.[56]

A sheriff has been held not liable for the amount of a bid above the judgment, where it was the result of a mistake made in the computation of interest and no part of such amount was ever paid to the sheriff.[57] In a proceeding against a sheriff for his failure to collect out of partnership assets or property the money due on a judgment against a partner recovered by an individual creditor, it is competent for the sheriff to prove the insolvency of the partnership.[58]

§ 93. Distribution of Proceeds of Sale

A sheriff or constable is liable for his failure to distribute properly the proceeds of sales made by him.

A sheriff or constable in distributing or paying over the proceeds of sales made by him must at his peril see that each person entitled to share in such proceeds receives the amount to which he is entitled, failing in which he is liable to the person injured by his default,[59] although his action may have been based on the belief that the writ under which the party whom he failed to pay claims was invalid.[60] It is a clear breach of duty for which a sheriff is liable to suffer the attorney for plaintiff to take into his hands the proceeds of a sale and to deal with, and dispose of, them at his pleasure, and at a time most suitable to his convenience,[61] at least in case of partition or other sale where several persons are entitled to share in the pro-

48. W.Va.—State v. Turner, 100 S.E. 294, 84 W.Va. 485—State v. Carter, 97 S.E. 825, 83 W.Va. 331.

49. Ill.—Elliott v. Sneed, 2 Ill. 517.
Pa.—Commonwealth v. Rogers, Brightly 450.

50. Ill.—Elliott v. Sneed, 2 Ill. 517.

51. Pa.—Harper v. Fox, 7 Watts & S. 142.

52. Ill.—Greene v. Toman, 54 N.E. 2d 230, 322 Ill.App. 179.

53. Ga.—Boyles v. State Bank, 22 S.E. 582, 96 Ga. 796.
57 C.J. p. 870 note 44.

54. Ky.—Walters v. Chinn, 1 Metc. 499.
57 C.J. p. 871 note 45.
Necessity for demand generally see supra § 91 j.

55. N.C.—Lipscomb v. Cheek, 61 N.C. 332.
57 C.J. p. 871 note 47.

56. N.Y.—Swezey v. Lott, 21 N.Y. 481, 78 Am.D. 160.

57. S.D.—First Nat. Bank v. Bowe, 273 N.W. 4, 65 S.D. 255.

58. Ala.—Wilson v. Strobach, 59 Ala. 488.

59. Neb.—Bowman v. Nelson First Nat. Bank, 54 N.W. 124, 36 Neb. 117.
57 C.J. p. 873 note 94.
Necessity for order of court see supra § 91 k.

Surplus after payment of lien.
A judgment creditor purchasing at execution sale subject to existing lien could recover judgment against constable for alleged conversion of proceeds remaining after payment of the prior lien and expenses of sale, notwithstanding the judgment creditor had not caused levy to be made on the surplus remaining in the constable's hands.—Siccardi v. Caruso, 198 A. 370, 120 N.J.Law 111.

60. Mass.—Felton v. Wadsworth, 7 Cush. 587.

61. N.Y.—Van Tassel v. Van Tassel, 31 Barb. 439.

ceeds.[62] However, where, of several attachments levied on property, some are prior to and some subsequent to a mortgage covering only a part of the property, and executions in all the attachment cases are delivered to the sheriff without special directions, he is not bound so to sell the property attached and so apply the proceeds as to satisfy all the executions, if he can, without regard to the right of the mortgagee, and if the method adopted by him is legal he incurs no liability to execution creditors who remain unpaid, although he might by proceeding in a different manner have secured payment for them to the exclusion of the mortgagee.[63]

Proceeds on foreclosure of mortgage on homestead Where a debtor's homestead was sold by a sheriff under mortgage foreclosure, the sheriff was not liable for failure to apply an excess arising on the sale on an execution in his hands against the mortgagor, and for delivering such excess to the mortgagor,[64] unless the sheriff knew when he turned over the money to the mortgagor that he did not intend it for reinvestment in another homestead.[65]

Proceeds of sale of property not belonging to debtor. A sheriff who, having received an indemnity bond, sells property on execution is liable to the execution creditor for the proceeds, although the execution debtor does not own the property.[66]

Distribution prior to return day A sheriff who distributes the proceeds of an execution sale prior to the return day of the writ does so at his own risk and peril.[67] Thus a sheriff who makes distribution prior to the return day of the writ is liable therefor, if at that time he knew the execution debtor was insolvent and if an involuntary petition in bankruptcy was filed against the execution debtor and a restraining order served on the sheriff prior to the return day of the writ and at a time when payment of the check by which distribution was made could have been stopped;[68] but a sheriff's distribution of the proceeds of a sale under process prior to the return day of the writ is lawful and he is not liable to the debtor's trustee in bankruptcy for the amount thereof, at least on summary proceeding, where, at the time the distribution of the proceeds was accomplished, there was no other execution in the sheriff's hands, no bankruptcy petition had been filed against the execution debtor, and there was no fact or circumstance to warn the sheriff of a conflicting claim to the money,[69] and no liability arises against the sheriff even though the debtor is adjudicated a bankrupt on the return date of the writ.[70]

§ 94. —— Relief from Liability

A sheriff or constable who acts in good faith is not liable for paying the proceeds of a sale to a claimant who was apparently, although not really, entitled thereto, or for failing to pay a claimant of whose prior claim he did not have proper and sufficient notice.

Where the sheriff or constable acts in good faith, he is not liable for paying the proceeds of a sale to a claimant who was apparently, although not really, entitled thereto,[71] or for failing to pay a claimant of whose prior claim he had no notice and was not chargeable with notice,[72] unless such claimant has been prejudiced by the officer's distributing the proceeds before the proper time;[73] but if the officer had notice of the claim he will be liable.[74] Where the property sold was not subject to a certain debt, the creditor cannot hold the sheriff liable for not applying the proceeds thereto.[75] A person cannot hold the sheriff liable for not paying over to him a part of the proceeds which he was not entitled to receive[76] or for failure to apply the proceeds of a sale to his debt where the debt has since been satisfied.[77]

62. N Y —Van Tassel v. Van Tassel, supra.
57 C.J p 874 note 97.

63. Mass —Laflin v. Willard, 16 Pick. 64, 26 Am.D 629

64. Mo —State v. Hull, 74 S.W. 888, 99 Mo App 703
57 C J. p 874 note 99

65. Mo.—State v Hull, supra.
57 C.J. p 874 note 1.

66. N.J.—Adams v. Disston, 44 N.J. Law 662

67. Del —Ableman v. Conoway, 199 A. 278, 9 W W Harr. 324
Pa.—Summit Motor Co v Modern Tire Repair Shop, 141 A. 647, 293 Pa. 33
Discretion as to time of distribution of proceeds see supra § 48.

Risk of proper distribution
Sheriff in making distribution of proceeds of execution sale prior to return day of writ assumes risk of proper distribution.—Smith v. Chamberlain, 200 A. 610, 132 Pa.Super. 115.

68. Pa —Summit Motor Co v. Modern Tire Repair Shop, 141 A 647, 293 Pa. 33.
Right of trustee in bankruptcy to proceeds of sale see Bankruptcy § 255

69. Del —Ableman v. Conoway, 199 A. 278, 9 W W Harr 324

70. Pa —Smith v. Chamberlain, 200 A 610, 132 Pa Super. 115.

71. S C —Burnett v Gentry, 11 S.E. 96, 32 S.C. 597.
57 C.J. p 874 note 5.

Payment to wrong person generally see supra § 91 g.

72. Neb —Downing v Overmire, 55 N.W 880, 37 Neb 412.
57 C J. p 874 note 6

73. Ohio —Doll v Barr, 50 N E 434, 58 Ohio St. 113.
57 C.J. p 875 note 7.

74. S C —State v. Boles, 18 S C 534.
57 C J p 875 note 8

75. Ky.—Staton v Commonwealth, 2 Dana 397.
57 C J p 875 note 9.

76. La.—Adams v. Duprey, 8 Mart, N S, 470
57 C.J. p 875 note 10.

77. N.J.—Strong v Linn, 5 N J.Law 799.
57 C J. p 875 note 11.

A sheriff who applies the proceeds of property seized to the judgment of a junior attaching creditor may avoid liability to the senior attaching creditor by showing that his judgment was fraudulently obtained,[78] but a sheriff who is sued for his failure to apply on an execution the proceeds of attached property cannot defend on the ground that the judgment was erroneous if the judgment debtor has given a release of errors therein.[79] It has been held that, where a lien creditor purchases land at execution sale, for a price greater than the amount of the lien, the reading of the sheriff's return in open court, and acknowledgment of his deed, without objection, does not relieve him from liability for wrongful distribution of the proceeds of sale over and above the amount of the lien.[80] However, under a statute authorizing a sheriff to distribute the proceeds of a sale of real estate under process in accordance with a schedule of distribution attached to his return and read in open court on a day fixed by the court where such schedule of distribution is not questioned or disputed within a reasonable time as fixed by the court, a sheriff who makes such a distribution is not liable to a claimant who did not previously record his lien or give notice of his claim at the sale or before distribution of the proceeds.[81]

Refusal of proper offer of payment. Where an officer has in his hands the proceeds of several executions, but not enough to satisfy them, and one of the creditors, entitled only to a small part, demands the whole or none, and refuses the officer's offer of more than his proportion, such creditor cannot recover,[82] and the officer is not bound to show that he had the money with him when he made the offer.[83]

Direction of party. Where a person entitled to receive part of such proceeds directs the sheriff to pay the money to another person who is not entitled to receive it, he cannot hold the sheriff liable for so doing.[84]

Necessity of injury to complainant. A sheriff who, after satisfying the creditor under whose process property is sold, applies the surplus to subsequent general mortgages binding on the debtor thereby incurs no liability to the debtor, since the latter is not thereby prejudiced.[85]

§ 95. Failure or Refusal to Pay Over Money

A sheriff or constable is liable for money in his possession in his official capacity which he refuses or fails to pay over to the person or persons entitled to it

A sheriff or constable who has made the money on a writ placed in his hands, or is otherwise in possession of money in his official capacity, is liable for the amount if he fails or refuses to pay it over to the person or persons entitled thereto,[86] in the absence of a valid excuse for such failure or refusal, as considered infra § 96. So an officer who receives money or a draft from a garnishee in garnishment proceedings is liable in damages for returning it to the garnishee without authority.[87]

Where sale not made by levying officer. An officer who levies execution and procures another officer to sell is liable for the failure of the latter to pay over the proceeds of sale to the execution plaintiff.[88]

Proceeds of property sold under mesne process. Where property seized on mesne process is sold before judgment, the sheriff is not in default or liable for not paying over the proceeds of such sale to the party at whose instance the process issued until the court has ordered him to do so,[89] and under some statutes a sheriff cannot be required to pay over such money, or be held liable for failure to do so, until final process has issued.[90]

§ 96. —— Particular Matters Affecting Liability

a. In general

b. Right of, or payment to, another person in general

78. Mass.—Pierce v. Jackson, 6 Mass. 242

79. Mass.—Hill v. Keyes, 10 Allen 258.

80. Pa.—Commonwealth v. Robinson, 7 Kulp 253.

81. Pa.—Cunningham v. Asher, 182 A. 78, 120 Pa. Super. 121

Insurer of sheriff could not recover money paid in settlement of unenforceable claim for sheriff's wrongful distribution of proceeds of mortgage foreclosure sale from distributee of proceeds on theory of unjust enrichment, where payment was voluntary. —Cunningham v. Asher, supra.

82. N.C.—State v. Fair, 46 N.C. 173.

83. N.C.—State v. Fair, supra.

84. Ga.—Fitts v. Johnson, 22 Ga. 307.

Directions of party or attorney generally see supra § 54.

85. La.—Powell v. Kellar, 5 Rob. 272.

86. Fla.—Walling v. Carlton, 147 So. 236, 109 Fla. 97

Mo.—State ex rel. Karnes v. Poole, App., 72 S.W.2d 803.

N.J.—Siccardi v. Caruso, 198 A. 370; 120 N.J. Law 111

57 C.J. p. 875 note 20.

Payment to wrong person see supra § 91 g.

Penalty for failure or refusal to pay over money see infra § 173.

87. Iowa.—Gutschenritter v. Whitmore, 139 N.W. 567, 158 Iowa 252

88. Tenn.—Cook v. Smith, 1 Yerg. 148.

89. Mo.—State v. Hickman, 51 S.W. 680, 150 Mo. 626.

90. U.S.—Sabin v. Barnett, C.C. Wash., 79 F. 947, error dismissed 82 F. 1005, 27 C.C.A. 685.

57 C.J. p. 876 note 25.

c. Claim by third persons; attachment or garnishment of money
d. Recovery against officer for selling property

a. In General

A sheriff or constable is not liable for failure or refusal to turn over money where he is not in default or where the person claiming it is not entitled thereto; but he is liable to the person entitled thereto for all money collected under color of his office, whether or not he was in fact authorized to collect it, and even though the process or the judgment on which it issued was in fact invalid.

An action will not lie against a sheriff or constable for his failure or refusal to turn over money where he is not in default[91] or where the person claiming the money is not entitled thereto.[92] On the other hand, he is liable for all money collected under color of his office, whether or not he was in fact authorized to collect it;[93] and even though the process[94] or the judgment on which it issued[95] is in fact invalid, if the officer treats it as valid, for the purpose of collecting the money for plaintiff from his debtor, he cannot treat it afterward as invalid and withhold the money. Where a sheriff is authorized under certain circumstances to sell attached property without obtaining an order therefor, he is estopped in a proceeding against him to account for the proceeds of property so sold to set up that the sale was not properly made and therefore claim that he is not liable to account for the money.[96]

Various circumstances have been held sufficient[97] or insufficient[98] to excuse an officer for failure or refusal to pay over money. It is no excuse for the failure of an officer to pay over money collected under final process that he retained the money merely because defendant in execution insisted on its application to some other debt[99] or because he desired the direction of the court as to the application thereof.[1] The fact that an execution issued for a smaller sum than that for which judgment was rendered furnishes no excuse for the sheriff who has collected it for failing to pay to the creditor the money so collected,[2] and an injunction against paying out a portion of a fund does not excuse the officer's failure to pay out the remainder.[3] The fact that the person entitled to money in the sheriff's possession has once refused to receive the money does not relieve the sheriff from liability if the person entitled to the money subsequently demands it and he refuses to pay it over.[4] However, an officer who releases a levy on receiving the money to cover the amount of the execution, and agrees that such money is held subject to the disposition of the "matter" according to law, is not liable to return such money to the execution defendant after an appeal has been taken, which is dismissed for failure to file a sufficient appeal bond.[5]

Receipt of money after return day of writ. A sheriff who receives money on an execution after the return day is not liable therefor to the execution plaintiff in his official capacity[6] although he is personally liable for the amount.[7]

Recovery of judgment against deputy. It has been held that, since a sheriff and his deputy are jointly and separately liable to the execution creditor for moneys collected by the deputy, a recovery of a judgment against the deputy is no bar to an action against the sheriff while such judgment remains unsatisfied.[8]

b. Right of, or Payment to, Another Person in General

It is a good defense to an action against a sheriff for not paying over money to a certain person that such money has been rightfully paid to another.

It is a sufficient answer to an action against a sheriff for not paying over money to a certain per-

91. Pa.—Mylin v. Ransley, 73 Pa. Super 554.
57 C.J. p 878 note 57.

92. Cal.—Gamble v. Biscailuz, 84 P. 2d 178, 29 Cal.App.2d 236.
57 C.J. p 878 note 58.

Garnishment of judgment after assignment

Where a judgment was assigned by the judgment creditor, a sheriff who paid the money collected on the judgment to the assignee was not liable to a person having a claim against the judgment creditor because of a garnishment served on the judgment debtor after the judgment had been assigned.—Gamble v. Biscailuz, supra.

93. Fla.—Walling v. Carlton, 147 So. 236, 109 Fla. 97.

94. Mo.—State ex rel. Karnes v. Poole, App., 72 S.W.2d 803.
57 C.J. p 876 note 27
Reduction of liability see infra § 97.

95. Ala.—Baker v. Sparks, 81 So. 609, 202 Ala. 653.

96. Ala.—Dane v. McArthur, 57 Ala. 448.

97. Ark.—Boone County Bank v. Eoff, 50 S.W. 688, 66 Ark. 321.
57 C.J. p 878 note 59

98. Ala.—Chandler v. Riddle, 24 So. 498, 119 Ala. 507.
57 C.J. p 878 note 60.

99. Miss.—Mackey v. Smith, 7 So. 222.

1. Miss.—Mackey v. Smith, supra

2. Vt.—Coburn v. Chamberlin, 31 Vt. 326.

3. Ga.—Phillips v. Bean, 19 Ga. 298

4. Minn.—Hull v. Chapel, 80 N.W. 692, 78 Minn. 6.
57 C.J. p 878 note 55.

5. Ill.—People v. Peck, 138 Ill.App. 348.

6. Miss.—Edwards v. Ingraham, 31 Miss. 272.
57 C.J. p 877 note 45.

7. Ala.—Dean v. Governor, 13 Ala. 526.

8. Tenn.—Christian v. Hoover, 6 Yerg. 505.

son that such money has been rightfully paid to another,[9] and a general plea of payment is a proper defense to an action to recover from a sheriff the surplus proceeds of an execution sale.[10] However, a sheriff who is called on by rule to pay over to the execution plaintiff the proceeds of the sale cannot set up as a defense inferior liens in favor of attaching creditors who, although made parties to the rule, do not make such claim for themselves.[11]

c. Claim by Third Persons; Attachment or Garnishment of Money

A sheriff or constable is not liable for failing or refusing to pay over money claimed by a third person where the claim is supported by litigation or other legal procedure, but a mere notice of a claim to the money by a third person will not justify a sheriff or constable in withholding it from the plaintiff under whose process it was received.

Where the statute provides that the proceeds of sales on execution shall be paid into court, or otherwise disposed of as the court or judge may order, it requires the disobedience by the sheriff of an order of court, or the judge thereof, to put the sheriff in default as to an execution plaintiff, where there is a pending action by a third person against the sheriff, claiming the property or proceeds of the sale thereof on execution.[12] However, a mere notice by a third person stating that he holds a claim against the execution creditor, and has sued out an attachment against him as a nonresident, and requiring the sheriff to retain money collected until the next term of court, will not justify the sheriff in withholding the money from plaintiff under whose process he received it.[13] So, where a judgment is assigned and the property sold on execution issued at the instance of the assignee, an action against the judgment creditor, to which the assignee is not a party, together with a proceeding in attachment against such creditor, and a notice of garnishment served on the sheriff, is no justification for the sheriff's refusal to pay over to the assignee the proceeds of the execution sale.[14]

Notification not to pay over money. It is no justification of the failure of a sheriff to pay over money collected on execution that he was notified not to pay over such money, on the ground that the estate of defendant was insolvent, and therefore returned the money into court, and asked direction as to its payment, where it does not appear that such estate was insolvent in fact or that it had been so declared by the probate court before the levy of the execution.[15] Similarly, a mere direction by an execution debtor to a sheriff not to pay over to plaintiff money made on the execution is not a sufficient excuse for not paying it over.[16] So, where a sheriff who had sold the interest of one partner in the partnership goods, which was brought by the other partner, was called on to pay over the proceeds to the execution plaintiff, he could not excuse his default by showing that, some time before, he had been notified by one claiming to be a creditor of the firm not to pay over such proceeds.[17]

Attachment or garnishment of money. It is no defense to an action against a sheriff for not paying over money collected on execution that such money was garnished in the hands of a deputy sheriff,[18] and a service of summons of garnishment on defendant in execution will not avail the sheriff himself in an answer to a rule against him to show cause why he should not pay the money due on the execution.[19]

d. Recovery against Officer for Selling Property

A sheriff or constable cannot be held liable for not paying over money collected by him on the sale of property under process where a recovery equal to or exceeding the amount of the execution has been had against him for selling the property.

A sheriff or constable cannot be held liable for not paying over money collected by him on execution, where a recovery has been had against him for selling the property, by the sale of which the money collected by him was made, and such recovery equals or exceeds the amount of the execution,[20] and this is true although the execution plaintiff on the delivery of the process executed a bond of indemnity to the officer who sued thereon.[21] However, a party who elects to proceed in an action of trespass against an officer for selling his property under void process, and recovers therein, is precluded from bringing suit against the officer for

9. Cal.—Gamble v. Biscailuz, 84 P.2d 178, 29 Cal.App.2d 236.
57 C.J. p. 876 note 30.

10. Ind.—State v. Early, 81 Ind. 540
57 C.J. p. 876 note 32.

11. La.—Chase v. Bell, 32 La.Ann. 460.

12. Mo.—State v. O'Neill, 90 S.W. 410, 114 Mo.App. 611.

13. Ga.—Smith v. Wade, 64 Ga. 116—Strickland v. Smith, 53 Ga. 79.

14. Ohio—Mosholder v. Culbertson, 134 N.E. 654, 103 Ohio St. 489
57 C.J. p. 877 note 36

15. Miss.—Trotter v. Parker, 38 Miss. 473

16. S.C.—Walker v. Kennerly, 37 S.C.L. 64

17. S.C.—Hooks v. Byrd, 44 S.C.L. 120
57 C.J. p. 877 note 39.

18. Colo.—Tate v. People, 40 P. 471, 6 Colo.App. 202
57 C.J. p. 877 note 43.

19. Ga.—Cowart v. Chaffee, 51 Ga. 606.

20. N.Y.—Newland v. Baker, 21 Wend. 264

21. N.Y.—Newland v. Baker, supra.

an admitted balance remaining in his hands, the proceeds of the sale, after satisfying the amount for which the process issued.[22]

§ 97. —— Extent of Liability

A sheriff is liable for the full amount of money collected by him which he fails or refuses to pay to the person entitled thereto.

In an action against a sheriff for failure to pay over money, he is liable for the full amount collected,[23] or, if he unlawfully extends credit to the buyer, for the amount which he should have collected;[24] and the damages recoverable are the same, whether the action is brought in the name of the creditor of record or that of the real owner of the judgment.[25] The sheriff, however, is entitled to credit for lawful costs and a reasonable sum for his expense in taking care of the property prior to the sale.[26] In an action against a sheriff to recover the amount of an execution collected by him, plaintiff is not entitled to recover as costs fees coming to his attorney on the judgment obtained by him for plaintiff on which the executions were issued, plaintiff not having paid these fees to the attorney.[27] Where, in an action against a sheriff for money collected by him on an execution in favor of plaintiff, it appeared, from the return indorsed by the sheriff on the execution, that he had paid part of the sum levied to a certain person for rents due and demanded for the property where the goods seized were located, it was held that the sheriff must be deemed to have paid the rent in plaintiff's behalf and for his benefit, and plaintiff was entitled to recover no more than the residue of the sum levied after deducting the amount paid for the rent.[28]

Receipt of depreciated currency by officer. An officer proceeded against for failure to pay over money collected cannot reduce his liability by showing that the payment was received by him in a depreciated currency.[29]

§ 98. Delay in Paying Over Money

A sheriff is liable for the damages caused by an improper delay in the payment of money in his possession to the person entitled thereto.

A sheriff may be held liable for an improper delay in paying money in his hands to the person entitled thereto,[30] and if the money has in the meanwhile depreciated he may be compelled to pay other and good money.[31] However, he is guilty of no breach of duty and incurs no liability by failure to pay over money before the return day of the process under which it was collected.[32] If both plaintiff and defendant consent that the sheriff sell property levied on on credit, they cannot complain that he does not pay the proceeds immediately on the sale.[33]

G. LIABILITIES ARISING OUT OF TAKING BOND OR SECURITY

§ 99. Failure to Take Bond

Where it is the duty of a sheriff to take a bond for the protection of a person and he acts without exacting such bond, he becomes liable for the resulting damage.

Where it is the duty of a sheriff to take a bond for the protection of a person before taking certain steps and he takes such steps without exacting such bond, he thereby becomes liable for the resulting damage.[34] So, where an officer fails to take a bond from plaintiff in replevin, as required by statute, he becomes liable to defendant as a trespasser if he takes the property from his possession.[35] How-

22. N Y —Clarke v. Hallock, 16 Wend. 607

23. Ky —Hudgin v. Warner, 9 Dana 196
Vt —Bradley v Chamberlain, 31 Vt 468
Interest see supra § 91 1
Liability to third-party claimant
Holder of one of a series of mortgage notes who intervened in foreclosure action and was granted preference in payment out of proceeds of sale of mortgaged property, under judgment directing sheriff to pay third opponent's claim in full with costs and interest until definite judgment had been rendered on question of priority, was entitled to recover from sheriff full amount of the judgment including interest from date of sale —Cason v. Cecil, 10 So 2d 692, 201 La. 890.

24. Ala.—Grace v. Wooley, 153 So 659, 26 Ala App 83

25. Vt —Bradley v. Chamberlain, 31 Vt. 468

26. Ala —Grace v. Wooley, 153 So 659, 26 Ala App. 83
Storage charge
Where the property was stored prior to the sale, the sheriff is entitled to an allowance of a reasonable storage charge —Grace v. Wooley, supra.

27. Pa —Pontius v. Commonwealth, 4 Watts & S 52.

28. N Y —Griffith v. Ketchum, 12 Johns. 379.

29. Tenn —Rigsby v. Walter, 7 Coldw 147.
57 C J p 878 note 67.
Liability generally for accepting payment in depreciated currency see supra § 91 b

30. S C.—Wallace v Graham, 47 S. C.L 322.

31. S C.—Wallace v. Graham, supra

32. Mo —State v. Muir, 24 Mo. 263.
57 C J. p 878 note 70

33. Ohio.—Langdon v. Summer, 10 Ohio St. 77

34. Ala —Harbin v. O'Rear, 121 So. 547, 219 Ala. 173
57 C.J p 880 note 4.
Liability on official bond see infra § 189
Summary remedies against officer for failure to take bond see infra § 168.

35. Me —Williams v. Dunn, 115 A. 276, 120 Me 506.

ever, a sheriff cannot be held liable in damages for failure to take a bond from a defendant arrested on civil process, unless plaintiff shows that he recovered judgment in the action in which the arrest was ordered.[36] Where, under the statute, the officer making a levy under an execution may take a delivery bond, his failure to take such bond places the risk as to the property on him, and, where such property is not forthcoming on the day of sale, he is personally liable to the execution creditor.[37]

In bail trover, if the officer fails to take bail from defendant, he is liable to plaintiff for the resulting damage.[38] Where there is more than one defendant, and the sheriff takes a bond from defendant who has possession of the property, he is not liable for failure to take bond from the other defendants.[39]

§ 100. Failure or Refusal to Deliver or Return Bond

A sheriff may be liable for failure to deliver or return a bond.

Where a sheriff returns on an original writ that he has taken bail, but refuses to deliver the bond, he is liable for such default,[40] and a sheriff who fails to return a replevin bond[41] or a release bond[42] as required by law is liable for the resulting damage.

§ 101. Acceptance of Insufficient or Defective Bond

a. In general
b. Insufficient sureties

a. In General

A sheriff who accepts a bond which is defective in form or insufficient in amount, and for that reason does not afford the proper protection to the person for whose protection it is taken, may be held liable for the resulting damage.

A sheriff who accepts a bond which is defective in form, and for that reason does not afford the proper protection to the person for whose protection it is taken, may be held liable for the resulting damage,[43] notwithstanding such person has failed seasonably to take advantage of the defect.[44] However, where the officer takes and returns with his writ a sufficient replevin bond, the fact that an imperfect bond is also found among the papers, even if placed there by the officer, will not render the good bond void, or make him liable for a failure to take a sufficient bond.[45] Where it becomes the duty of a sheriff to take a bond conditioned in a particular manner, he is liable if he accepts a bond conditioned otherwise.[46]

Bond not conforming to statute. Where the statute makes it the duty of sheriffs to collect fines, the taking of a bond not in conformity with statutory requirements does not acquit the sheriff of liability for a fine adjudged against a prisoner in his custody,[47] and this is true, even though the bond taken is valid as a common-law bond.[48] So, if an officer, indemnified by an execution creditor, is protected only by the delivery bond of a claimant of the property levied on and advertised for sale under an execution for the debt of another, and such bond, although good as a common-law obligation, is invalid as a statutory forthcoming bond, and the officer permits the possession of the property to remain undisturbed, so that it is not produced for sale, he is liable in damages to the execution creditor,[49] even though such creditor approved claimant's bond before the acceptance by the officer.[50]

Bond with forged signatures. An officer who is lawfully directed to arrest a defendant is answerable to plaintiff, if he takes a bail bond to which the sureties' names are forged, and thereupon discharges defendant from custody.[51]

Bond in insufficient amount. Where the sheriff is invested with the power to determine the amount of a bond to be taken by him in the course of his duties or the amount of the bond is fixed by statute, he is

36. S C—Lyles v Bolles, 8 S C. 258. Tenn—Nelson v. Williams, 4 Hayw 161.

37. U S.—Campbell v Pope, Super Ark, 4 F.Cas No 2,365a, Hempst. 271.

38. Ga—Everett v American Security Co, 158 S.E 526, 172 Ga. 683—First Joint Stock Land Bank v Pitts, 178 S E. 732, 48 Ga App. 805.
57 C J. p 880 note 8.

39. Ga.—Kimball v. Smith, 72 S E 163, 9 Ga.App. 790.

40. Mass—Seeley v. Brown, 14 Pick. 177.
57 C J. p 881 note 10.
Mitigation of damages see infra § 105.

41. Ill.—Robinson v People, 8 Ill. App. 279.

42. La—Raziano v Clancy, App, 23 So.2d 776, rehearing refused 24 So. 2d 402.

43. Ala.—Campbell v Tucker, 154 So 821, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658—Livings v. Barnes, 137 So. 44, 24 Ala App. 367, certiorari denied 137 So 45, 223 Ala. 443.
57 C.J p 881 note 12

44. Mass—O'Grady v. Keyes, 1 Allen 284.
57 C.J p 881 note 13.

45. Ill—Rodrick v. People, 81 Ill. App. 121.

46. Ga—Hardy v. Poss, 47 S E. 947, 120 Ga. 385.
57 C J. p 881 note 15.

47. Ark—Wilson v White, 102 S.W. 201, 82 Ark. 407.

48. Ark.—Wilson v. White, supra.

49. W Va.—Sayre v. Kunst, 98 S E. 559, 83 W.Va 456.

50. W.Va—Sayre v. Kunst, supra.

51. Mass.—Marsh v. Bancroft, 1 Metc. 497.

liable if he negligently accepts a bond in an insufficient amount.[52]

b. Insufficient Sureties

Where a sheriff is required to take a bond with sufficient sureties, he is liable if he willfully or negligently accepts a bond with insufficient sureties.

Where a sheriff is required to take a bond with sufficient sureties, he is liable if he willfully or negligently accepts a bond with insufficient sureties,[53] or with an improper person as surety,[54] whether his acceptance is evidenced by a formal approval in writing, or by merely executing the process without a formal approval of the bond;[55] and the failure of the sureties to justify is satisfactory evidence that they are not qualified, notwithstanding their affidavit to the contrary, attached to the undertaking.[56] The good faith of the officer will not protect him from liability if he has been negligent,[57] and it is not essential to his liability that he should have known the sureties to be insufficient.[58] However, where one of the sureties is sufficient, the officer is not liable, although the other is insufficient.[59]

Improper justification. Where the statute requires sureties in replevin bonds to swear that they are worth sums amounting in the whole to the penalty of the bond, "over and above all debts and exemptions," the omission of the words "and exemptions" in the oath of one surety renders the officer liable as a trespasser ab initio.[60]

Necessity of exceptions. In order to hold the sheriff liable for taking a replevin bond with insufficient sureties, it is not necessary that objection be made to their insufficiency,[61] unless the statute so requires.[62]

Liability as guarantor of sufficiency. Some cases hold that the officer is absolutely liable for the sufficiency of sureties accepted by him, and cannot escape liability by any showing of diligence,[63] but the weight of authority is that the officer is not a guarantor or insurer of the sufficiency of sureties accepted by him, and, if he has acted in good faith and exercised reasonable care and diligence to ascertain their sufficiency, he is not liable if they ultimately prove insufficient.[64]

Insolvency or insufficiency occurring after acceptance. According to some authorities the sheriff is answerable for the solvency and sufficiency of sureties accepted by him, not only at the time when the bond is accepted, but also at the time when the sureties are called on to respond to their obligations,[65] but, even where this rule is recognized, it is conceded to establish a hardship only tolerated because of established precedent and not to be extended to a case not clearly within the precedent,[66] and the preponderance of authority supports the view that, if the sureties were sufficient when they were accepted, the sheriff cannot be held liable because they have subsequently become insolvent or insufficient.[67]

Bond with insufficient number of sureties. Where the law requires a certain number of sureties, the sheriff is liable if he accepts a bond with a smaller number and the bond proves insufficient,[68] although the sureties on the bond were apparently sufficient in respect of credit and means when the bond was accepted.[69]

Bond without sureties. Where the statute requires an officer before executing certain process to take a bond with sureties for the protection of defendant, he is liable as a trespasser if he accepts a bond without sureties, and proceeds with the process.[70] So, where a sheriff, on a sale of property on credit, accepts a bond without a surety, he is liable for the amount of the bond,[71] and the acceptance

52. Ill.—Pickett v. People, 114 Ill. App. 188.
57 C.J. p 881 note 21.

53. Ky.—E. I. Du Pont De Nemours & Co. v. Combs, 56 S.W.2d 523, 246 Ky. 802.
57 C.J. p 881 note 22

54. Va.—Garland v. Lynch, 1 Rob. 545.
57 C.J. p 882 note 23.

55. Mass.—Parker v. Young, 75 N. E. 98, 188 Mass. 600.

56. N.Y.—Hofheimer v. Campbell, 7 Lans. 157

57. Neb.—Shull v. Barton, 93 N.W. 132, 67 Neb. 311.

58. Mass.—Sparhawk v. Bartlet, 2 Mass. 188.
57 C.J. p 882 note 26

59. Me.—Lord v. Bicknell, 35 Me. 53.

60. Wis.—Whitney v. Jenkinson, 3 Wis. 407

61. Ga.—Hartford Accident, etc., Co. v. Young, 151 S.E. 680, 40 Ga.App. 843.

62. Neb.—Busch v. Moline, etc., Co., 71 N.W. 947, 52 Neb. 83.
57 C.J. p 882 note 32.

63. Vt.—Middlebury Bank v. Rutland, 33 Vt. 414
57 C.J. p 882 note 33.

64. R.I.—Andrews v. Paine, 163 A. 182, 53 R.I. 20.
57 C.J. p 882 note 34.

65. Pa.—Myers v. Clark, 3 Watts & S. 535.
57 C.J. p 882 note 35.

66. Pa.—Watterson v. Fuellhart, 32 A. 597, 169 Pa. 612.
57 C.J. p 883 note 36.

67. Ky.—E. I. Du Pont De Nemours & Co. v. Combs, 56 S.W.2d 523, 246 Ky. 802.
57 C.J. p 883 note 37.

68. Mass.—Rice v. Hosmer, 12 Mass. 127.
57 C.J. p 883 note 40.

69. Mass.—Rice v. Hosmer, 12 Mass. 127.—Long v. Billings, 9 Mass. 479.

Single surety

A sheriff who accepts a single surety where the law requires two does so at his peril, and cannot escape liability by showing that the surety was sufficient when accepted.—Rice v. Hosmer, 12 Mass. 127.

70. Ark.—Wilson v. Williams, 12 S.W. 780, 52 Ark. 360.
57 C.J. p 883 note 43.

71. La.—Overton v. Ricord, 2 La.

of the purchaser's wife as surety is equivalent to taking no surety.[72]

§ 102. To Whom Officer Liable and Conditions Precedent to Liability

The liability of a sheriff for failure to take a proper bond exists only in favor of a party to whom he owed a duty in the premises, to whose benefit the bond would accrue, and who has been damaged by his default.

The liability of a sheriff for failure to take a proper bond exists only in favor of a person to whom he owed a duty in the premises, to whose benefit the bond would accrue, and who has been damaged by his default.[73]

A sheriff cannot be held liable for the acceptance of insufficient sureties until such a judgment has been rendered as to charge the bond,[74] or there has been such a breach of the condition that the liability of the sureties has accrued,[75] and an execution has been issued against the sureties and returned unsatisfied.[76] On the other hand, it has been held not a prerequisite to an action against an officer who has taken insufficient bail that proceedings should first be brought against the bail,[77] and that an action will lie against a sheriff for taking insufficient sureties on replevin bonds when plaintiff had brought one suit on both bonds, which had failed because the makers could not be found.[78]

Where, in a suit on a prison bounds bond, a court of competent jurisdiction has adjudged the bond to be invalid, plaintiff may sue the sheriff without appealing from such judgment.[79] Where a sheriff who has seized goods in replevin delivers them to plaintiff in replevin, without requiring a sufficient bond as provided by statute, the act of delivery is an exercise of authority and dominion, which deprives the replevin defendant of his property, and furnishes evidence of a conversion sufficient to support an action against the sheriff without proof of a previous demand.[80]

§ 103. Particular Matters Affecting Liability

A sheriff cannot be held liable for failure to take a bond where he was not under a legal obligation to do so.

Where a sheriff is under no legal obligation to take a bond for the benefit of a party, he cannot be held liable for failure to take a bond,[81] or, if he does take a bond, for the insufficiency of the sureties.[82] An officer cannot be held liable for taking insufficient security unless the obligation of seeing that the security was sufficient rested on him, and he acted on insufficient security when he might legally have reframed because of such insufficiency.[83] It has been held that the fact that the principal is insolvent does not excuse the officer from liability for taking insolvent sureties on a prison bounds bond.[84] An agreement by defendant in replevin to discharge a sheriff from liability for nonjustification of the sureties on the replevin bond, on his delivery to defendant of the property replevied, has been held void.[85]

Irregularities or defects in bond or in proceedings in which given. It is no defense to an action against a sheriff for accepting insufficient sureties on a replevin bond that such bond did not run to the proper obligee;[86] but, where bail given on mesne process is insufficient, the sheriff, when sued for damages, may defend on the ground that the writ of scire facias was radically defective.[87]

Sufficiency of recourse on bond. Where a bond taken by an officer is merely irregular and not void, and when recourse to the bond would afford the person for whose benefit the bond was taken all the relief to which he is entitled, he cannot hold the officer liable.[88] So, where the sheriff assigns a replevin bond to defendant, suit cannot be brought

Ann. 805—Semple v. Buhler, 6 Mart,N.S, 469.

72. La.—Semple v Buhler, supra.

73. Ga—Ford v Perkerson, 59 Ga. 359.
57 C.J. p 883 note 46.

74. Ky.—Edwards-Barnard Co. v Pflanz, 73 S W. 1018, 115 Ky. 393, 24 Ky L. 2296.
57 C J. p 883 note 48
Conditions precedent to actions against sheriff or constable generally see infra § 148.

75. Neb—Shull v. Barton, 93 N.W. 132, 67 Neb 311.
57 C.J. p 883 note 49.

76. Ga.—Hartford Accident, etc., Co v. Young, 151 S E. 680, 40 Ga.App. 843.

N.C—Wells v. Bourne, 18 S E. 106, 113 N.C 82.

77. Mass—Rayner v. Bell, 15 Mass 377—Young v. Hosmer, 11 Mass. 89.

78. Mass—Stern v. Knowlton, 67 N. E 869, 184 Mass. 29.

79. Va.—Hooe v Tebbs, 1 Munf. 501, 15 Va. 501.

80. Mass—Parker v. Young, 75 N E. 98, 188 Mass. 600.

81. Va—Williams v. Campbell, 1 Wash. 153, 1 Va. 153.

82. Me—Mason v. Hutchings, 20 Me. 77.
57 C J. p 884 note 57.

83. Me.—Chase v. Stevens, 11 Me. 128.
57 C J. p 884 note 58.

84. S C—Jones v. Blair, 15 S C L. 281.

85. N Y.—Hofheimer v Campbell, 7 Lans. 157, affirmed 59 N.Y. 269
57 C J. p 884 note 68.

86. Mass.—Stern v Knowlton, 67 N. E. 869, 184 Mass 29
57 C.J. p 884 note 59.

87. Vt.—Sherwood v. Pearl, 1 Tyler 319.
Irregularities in mesne process as defense in action to hold sheriff liable as bail see infra § 108.

88. Mass.—Glezen v. Rood, 2 Metc. 490.
57 C J. p 884 note 61.

against the sheriff by the assignee, until judicial proof of the insolvency of the obligors in the bond is produced.[89]

Attempt to enforce bond. Where a sheriff takes an insufficient bond, the person for whose benefit the bond was taken does not lose his remedy against the sheriff by attempting to enforce the bond,[90] but, where a replevin bond is in an insufficient amount, but the replevin defendant nevertheless resorts to his remedy under the bond, he waives his right to hold the sheriff as a trespasser.[91]

Release of surety. The release of a surety in a replevin bond by defendant in replevin releases the sheriff from liability for taking insufficient security.[92]

§ 104. Extent of Liability

The measure of damages for a sheriff's or constable's failure to take proper security is the actual loss suffered in consequence thereof.

In accordance with the general rule governing damages for a sheriff's or constable's default, the measure of damages for failure of the officer to take security or for taking insufficient security is the actual loss suffered in consequence thereof,[93] including sums reasonably expended by plaintiff in endeavoring to avail himself of the bond taken.[94] Thus, an officer may escape liability for taking insufficient security where no injury resulted from his default.[95] The measure of damages, where insufficient bail or other security is taken, may be the amount of the debt,[96] or of plaintiff's judgment against the debtor if it represents his actual loss,[97] or of his judgment against the bail, after deducting what he might probably be able to collect on it, and on his judgment against the principal.[98] So, where there is no proof of the insolvency of a debtor who has absconded, the liability of an officer for failure to take bail is the full amount of the debt;[99] but the liability of a sheriff for accepting insufficient sureties cannot exceed that of the sureties themselves.[1] Where the statute makes the sheriff responsible for defendant's sureties on a redelivery bond in replevin, the measure of the liability of a sheriff who took an insufficient bond is the amount plaintiffs were entitled to recover on such bond.[2]

§ 105. —— Mitigation of Damages

The inability of the debtor to pay the judgment rendered against him in the suit in which he was arrested may be shown in mitigation of damages in an action against the sheriff for taking insufficient bail.

In an action by a defendant in replevin against the officer who served the writ for taking an informal bond, by reason of which the suit was dismissed, the officer may show, in mitigation of damages, that the property replevied was, at the time of the service of the replevin, and had since remained, the property of plaintiff in replevin, and was in his possession.[3] So, in an action on the case against the sheriff for taking insufficient bail, it is competent for defendant to prove in mitigation of damages the inability of the original debtor to pay the judgment which has been obtained against him in the suit in which he was arrested.[4] On the other hand, it has been held that an officer's liability for taking insolvent sureties to a prison bounds bond of a debtor arrested on an ad capias satisfaciendum cannot be mitigated by showing that the debtor is an insolvent.[5]

Failure to deliver bond. Where a sheriff returns on an original writ that he has taken bail, but refuses to deliver the bond, he cannot show in mitigation of damages that the original debtor is poor or insolvent and unable to pay the debt,[6] but he may show the insolvency of the bail in mitigation of damages.[7]

§ 106. —— Nominal Damages

Nominal damages may be awarded where no actual damage is sustained.

89. Pa.—Commonwealth v. Rees, 3 Whart. 124.

90. S.C.—Bennett v. Brown, 32 S C L. 303.
57 C.J. p 884 note 63.

91. Me.—Hall v. Monroe, 73 Me 123.
57 C J. p 884 note 64.

92. Pa.—Myers v. Clark, 3 Watts & S. 535
Vt.—Follett v. Shumway, 33 A. 1067, 68 Vt. 68

93. Ill.—Robinson v. People, 8 Ill. App. 279.
57 C.J p 885 note 74.

94. N.H.—Choate v. Stark, 18 N H 131.
57 C J p 885 note 75.

95. Neb.—Shull v Barton, 77 N W. 132, 56 Neb 716, A.S.R. 698—Shull v Barton, 79 N.W. 732, 58 Neb. 741
57 C J. p 885 note 69.

96. S C.—Jones v. Blair, 15 S.C L. 281.

97. Me.—Isenman v. Burnell, 130 A 868, 125 Me 57.
57 C.J. p 885 note 77.

98. N H.—Gerrish v. Edson, 1 N H 82.

99. Vt.—Crane v. Warner, 14 Vt. 40.
57 C J. p 885 note 79.

1. Ky.—Edwards-Barnard Co. v. Pflanz, 73 S W. 1018, 115 Ky. 393, 24 Ky.L. 2296.

2. Wash.—Magnus v. Woolery, 44 P. 130, 14 Wash 43.

3. Mass.—Case v. Babbitt, 16 Gray 278.

4. Mass.—Danforth v. Pratt, 9 Cush. 318
57 C.J. p 885 note 84.

5. S.C.—Jones v. Blair, 15 S C L. 281.

6. R.I.—Bradt v. Holden, 12 R.I. 335.
57 C J. p 885 note 86.

7. R.I.—Bradt v. Holden, supra.

In certain cases, where it was made to appear not only that defendant was insolvent, but that he could be taken on execution at any time, plaintiff has been awarded nominal damages only, for the officer's default.[8] So, it has been held that, where plaintiff in replevin was entitled to possession of the property as mortgagee, and title finally vested in him by foreclosure, defendant in replevin suffered no actual damages because of the sheriff's failure to take bond, and could recover only nominal damages for the default.[9]

§ 107. Liability of Officer as Bail

Under some statutes, an officer who arrests a defendant under civil process, and permits him to go at large without bail, or on insufficient bail, or without taking the proper steps with respect to the bail bond, may be held liable as special bail.

Under the statutes in some jurisdictions, an officer who arrests a defendant under civil process, and permits him to go at large without bail, or on insufficient bail, or without taking the proper steps with respect to the bail bond, may be held liable as special bail[10] Such liability is the same as that of the sureties, where a proper undertaking has been given,[11] and accrues when, and only when, the officer's neglect can, by a proper construction of the statute, be held to fall within its terms.[12] Where the circumstances are such that the sheriff had no power to take bail, he cannot, on a failure to produce the prisoner, be held as bail;[13] but his liability is for the escape.[14] So, it has been held that the sheriff does not become liable as special bail where, after he has committed a debtor on mesne process, he permits him to go at large;[15] and a sheriff cannot be charged with liability as bail where plaintiff furnished the debtor with articles by means whereof he made his escape,[16] or where a sheriff returns on a writ of capias ad respondendum that defendant broke custody before he reached the jail.[17]

Deposit in lieu of bail. Where a sheriff accepts a cash deposit from a third person in lieu of bail, he is liable as special bail under the statute making him liable as such when he fails to take, or takes an insufficient, bail bond;[18] and, where the receipt of the deposit is illegal, and the sheriff has admitted his liability as special bail by paying the money into court, the payor, being in pari delicto with the sheriff, cannot recover the amount from him.[19]

Conditions precedent to liability. In order to hold a sheriff liable as bail, any statutory conditions precedent to the liability of the principal must be complied with, such as the issuance of an execution against the property of the principal and its return unsatisfied, or proof that he is a nonresident;[20] but it is not essential to the maintenance of such an action that an execution against the body of defendant should be issued and returned unsatisfied.[21]

Necessity of judgment sufficient to charge sureties. Where a sheriff releases a defendant arrested on mesne process, on bond being given, he cannot be held liable for the failure of the sureties to justify on being excepted to, where the final judgment rendered in the case is not such as to charge the sureties.[22]

Exceptions and notice. Where the statute provides for exceptions to the bond and notice to the officer, the officer cannot be held liable as bail, unless exceptions are taken in due time,[23] and notice given;[24] and there must be a judgment declaring the insufficiency of the bail[25] and adjudging that the officer stand as special bail.[26] Such a statute has been held to require exceptions and notice only where the officer takes insufficient bail, but not where he fails to take bail,[27] and, where the paper returned by the sheriff is so defective and imperfect

8. Mass.—Nye v. Smith, 11 Mass. 188.
57 C.J. p 886 note 88.
9. Me.—Williams v. Dunn, 115 A. 276, 120 Me. 506.
10. Miss.—Cooper v. Rivers, 48 So. 1024, 95 Miss. 423.
11. N.Y.—McKenzie v. Smith, 48 N. Y. 143.
57 C.J. p 886 note 92.
12. Miss.—Cooper v. Rivers, 48 So. 1024, 95 Miss. 423.
57 C.J. p 886 note 93
13. N.C.—Montgomery v. McAlpin, 23 N.C. 463.
14. N.C.—Montgomery v. McAlpin, supra.
Liability for escape generally see infra § 118.
15. N.C.—Buffalow v. Hussey, 44 N. C. 237.
16. Tex.—Love v. McAlister, 4 Hayw. 65.
17. N.C.—Hart v. Lanier, 10 N.C. 244.
18. Miss.—Cooper v. Rivers, 48 So. 1024, 95 Miss. 423.
19. Miss.—Cooper v. Rivers, supra.
20. N.Y.—Tiffany v. Harvey, 110 N. E. 625, 216 N.Y. 300.
57 C.J. p 886 note 3.
Conditions precedent to actions against sheriffs and constables generally see infra § 148.
21. N.Y.—Gallarati v. Orser, 17 N.Y.Super. 94, reversed on other grounds 27 N.Y. 324.
22. N.Y.—Gallarati v. Orser, 27 N. Y. 324.
57 C.J. p 887 note 5.
23. Ala.—Neal v. Gaines, 1 Stew. 158.
N.C.—Watt v. Johnston, 48 N.C. 124.
24. N.C.—Worth v. Winbourne, 52 N. C. 431.
57 C.J. p 887 note 8.
25. Ky.—Dougherty v. Morrison, 1 Ky.Dec. 267.
N.C.—Worth v. Winbourne, 52 N.C. 431.
26. N.C.—Worth v. Winbourne, supra.
57 C.J. p 887 note 10.
27. N.C.—Adams v. Jones, 60 N.C. 198.
57 C.J. p 887 note 11.

as to be adjudged not a bail bond, there is a failure to take bail within such rule.[28]

§ 108. —— Relief from, or Waiver of, Liability

A sheriff is relieved from liability as special bail by any plea and method of escaping liability which would exonerate bail.

Since the liability of the officer is the same as that of ordinary bail, he is entitled to every plea and method of escaping liability which would exonerate bail, and every other plea adapted to his peculiar situation by way of defense,[29] although, on the other hand, it has been held that, where a sheriff fails to take bail, he is not entitled to the privileges of bail.[30] Just as sureties on a bail bond may be discharged from liability by a valid surrender of their principal, so a sheriff or constable who, by his default, has rendered himself liable as bail may exonerate himself by surrendering the debtor into custody.[31]

Irregular judgment or process. A sheriff who has become liable as bail cannot escape liability because of the fact that the judgment in the original action is irregular and erroneous, where it is not void;[32] and he cannot object that the order of arrest was improperly or irregularly granted,[33] or take advantage of irregularities in the execution under which the debtor was arrested.[34]

Insolvency of debtor is not a defense to an action against the officer as bail,[35] although as discussed infra § 119, the contrary is true where the officer is sued, not as bail, but for an escape.

Waiver of liability. It has been held that, where a sheriff, liable as bail, has forty days to arrest the prisoner, under an execution against his person, and plaintiff's attorney directs the sheriff forthwith to return the execution, "Defendant not found," which he does, such direction is a waiver of the sheriff's liability as bail.[36] So, it has been held that the filing of a declaration in chief after receiving notice of special bail is a waiver of any objection to the sufficiency of the bail, and plaintiff cannot subsequently proceed against the sheriff on the ground of insufficiency of the bail.[37]

§ 109. —— Extent of Liability

It has been held that a sheriff sued as bail cannot show the debtor's insolvency in mitigation of damages.

It has been held that a sheriff who is proceeded against as bail cannot show the insolvency of the debtor in mitigation of damages,[38] but, as discussed infra § 120, a contrary rule obtains where the sheriff is sued for the debtor's escape, and not as bail. A statute limiting the damages recoverable from a sheriff for escape of a prisoner arrested on mesne process, to the amount of damage sustained by the aggrieved party, has been held not to limit the liability of a sheriff as bail for such escape.[39]

H. LIABILITIES ARISING OUT OF DUTY TO RETURN PROCESS

§ 110. Failure to Make, or Delay in Making, Return

A sheriff or constable is liable if he fails to return a process or writ placed in his hands for service or execution.

Where a process or writ is placed in the hands of a sheriff or constable for service or execution, he is liable if he fails to return the process or writ[40] within the time which is allowed by law for the making of his return thereon,[41] and the fact that

28. N.C.—Adams v. Jones, supra.

29. N.Y.—Lewis v. Stevens, 93 N.Y. 57, 4 N.Y.Civ.Proc. 224, 2 McCarty Civ.Proc. 450, 65 How.Pr. 525.
57 C.J. p 887 note 15.

30. S.C.—Sims v. Tarrant, 11 S.C.L. 123.

31. N.Y.—Brady Brundage, 59 N.Y. 310.
57 C.J. p 887 note 19.

32. N.C.—Savage v. Hussey, 48 N.C. 149.
57 C.J. p 887 note 20.

33. N.Y.—Bensel v. Lynch, 44 N.Y. 162.

34. N.Y.—Douglas v. Haberstro, 25 Hun 262, reversed on other grounds 88 N.Y. 611, 2 N.Y.Civ.Proc. 166.

35. N.Y.—Slagle v. Burden, 266 N.Y.S. 834, 239 App.Div. 104, affirmed 191 N.E. 559, 264 N.Y. 548.
57 C.J. p 887 note 23
Mitigation of damages see infra § 469.

36. N.Y.—Douglas v. Haberstro, 88 N.Y. 611, 2 N.Y.Civ.Proc. 186.
Effect of directions of party or attorney generally see supra § 54.

37. N.Y.—People v. Stevens, 9 Johns. 72.

38. N.Y.—Slagle v. Burden, 266 N.Y.S. 834, 239 App.Div. 104, affirmed 191 N.E. 559, 264 N.Y. 548
57 C.J. p 888 note 27.

39. N.Y.—Buczynski v. Anderson, 161 N.Y.S. 697, 174 App.Div. 790.

40. Miss.—**Corpus Juris quoted in** W. T. Rawleigh Co. v. Hester, 200 So. 250, 253, 190 Miss. 329.
57 C.J. p 888 note 31.
Liability for acts of deputy generally see supra § 55.
Return of process generally see Process § 90 et seq.
Statutes imposing penalty for failure to return see infra § 173 et seq.
Summary remedies against officer for failure to return see infra § 168.

41. Del.—Ableman v. Conoway, 199 A. 278, 9 W.W.Harr. 324.
Miss.—**Corpus Juris quoted in** W. T. Rawleigh Co. v. Hester, 200 So. 250, 253, 190 Miss. 329.
N.Y.—Gagen v. Taylor, 246 N.Y.S. 347, 231 App.Div. 830.
57 C.J. p 888 note 32.

a return is made after the expiration of such time does not relieve him of liability for his default;[42] but in order to enforce such liability, it must be shown that the writ was actually placed in his hands for execution,[43] and that he actually failed to return it on the return day.[44] It is not necessary, however, that the officer should have been ruled to return the writ,[45] or that he was bound, under the instructions given him by plaintiff, to serve it[46]

Liability as trespasser ab initio. It has been held that an officer who seizes property under a writ, but fails to make return as required by law, becomes a trespasser ab initio,[47] and is liable for conversion of the property seized, without any demand by the owner for its return.[48]

Necessity of injury to party complaining. There is authority for the view that a sheriff cannot be held liable,[49] even for nominal damages,[50] for failure to return process at the proper time, unless the complaining party was injured by such default; but it has also been held that an execution creditor may recover nominal damages against a sheriff for neglect to return an unsatisfied execution, although he may have sustained no damages in consequence thereof.[51]

§ 111. —— Relief from Liability

As a general rule the liability of a sheriff or constable for failure to return a writ within the proper time is not absolute, but he will be relieved from liability on a showing of circumstances which excuse his default.

As a general rule the liability of a sheriff or constable for failure to return a writ within the proper time is not absolute, but he may be relieved from liability on a showing of circumstances which excuse his default.[52] It has been held that a sheriff may excuse his default by showing that plaintiff in execution undertook to return the writ and that the officer delivered it to him for that purpose,[53] that the writ was mislaid and could not be found after careful search;[54] that, by mistake, the writ was erroneously addressed;[55] that the writ had been abolished by statute before the return day;[56] or that the writ was never regularly delivered to him[57]

It has been held that a sheriff or constable cannot escape liability for default in the return of process on the ground that he had more official business than he and his deputies could perform;[58] that he was deprived of the services of his clerk because of illness;[59] that the delay was due to a mistake as to the time for making return;[60] that plaintiff agreed that the sale of the property levied on be postponed,[61] that the officer was defendant in the process received by him for execution;[62] that he was plaintiff's agent for the collection of the debt on which the execution was issued;[63] that the property was already held under execution by another officer who made no claim thereto,[64] or that the writ was received only a short time before the return day.[65] Mere indulgence, without consideration, by an execution creditor to an officer who has collected the money affords him no excuse for failing to make the proper return

42. Miss.—**Corpus Juris quoted in** W. T. Rawleigh Co. v. Hester, 200 So. 250, 253, 190 Miss. 329.
57 C. J. p. 888 note 33.

43. Miss.—**Corpus Juris quoted in** W. T. Rawleigh Co. v. Hester, 200 So. 250, 253, 190 Miss. 329.
57 C. J. p. 889 note 34

44. Ga.—Youmans v. Consumers Financing Corp., 48 S.E. 2d 684, 77 Ga. App. 373.
La.—Destrehan v. Garcia, 2 Rob. 291.
Miss.—**Corpus Juris quoted in** W. T. Rawleigh Co. v. Hester, 200 So. 250, 253, 190 Miss. 329.

Service on numerous defendants
Where summons directed sheriff to make return within five days after service, the five-day period began to run at the time of service on all defendants named, and failure to return summons within five days after service on two defendants but at a time when fourteen individual defendants and a corporate defendant had not been served did not constitute a violation of duty of sheriff.—Sarelas v. Fagerburg, 45 N.E. 2d 690, 316 Ill. App. 606.

45. N.Y.—Burk v. Campbell, 15 Johns. 456.

46. N.H.—Webster v. Quimby, 8 N. H. 382

47. S.D.—Shaffner v. Price, 260 N.W. 703, 63 S.D. 456, 98 A.L.R. 689.
57 C. J. p. 889 note 38

48. S.D.—Malchoff v. Knewel, 215 N.W. 689, 51 S.D. 520.

49. Iowa.—Musser v. Maynard, 6 N. W. 55, 7 N.W. 500, 55 Iowa 197.

50. Mo.—State v. Case, 77 Mo. 247.—Stevenson v. Judy, 49 Mo. 227.

51. Mass.—Goodnow v. Willard, 5 Metc. 517.
57 C. J. p. 889 note 41.

52. Ky.—Bassett v. Bowmar, 3 B. Mon. 325.
57 C. J. p. 889 note 44.
Direction of attorney see supra § 54.
Nonpayment of fees see supra § 256

53. Ala.—Vastbinder v. Spinks, 16 Ala. 385.

54. Ky.—Shippen v. Curry, 3 Metc. 184.—Waring v. Thomas, 1 Litt. 253.

55. Ky.—Thompson v. Ross, 1 J. J. Marsh. 600

56. La.—Frey v. Hebenstreit, 1 Rob. 561.
57 C. J. p. 892 note 2

57. Del.—Rash v. Parris, 4 Del. 81

58. Ala.—McRae v. Colclough, 2 Ala. 74.

59. Miss.—Helm v. Gridley, 1 Miss. 511
57 C. J. p. 891 note 90.

60. N.C.—Bell v. Wycoff, 42 S.E. 608, 131 N.C. 245.
57 C. J. p. 891 note 91

61. Tenn.—Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424.—Clingman v. Barrett, 6 Humphr. 20

62. Tenn.—Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424.—Kinzer v. Helm, 7 Heisk. 672.

63. Tenn.—Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424.—Clingman v. Barrett, 6 Humphr. 20.

64. Pa.—Commonwealth v. Lelar, 1 Phila. 336.

65. Tenn.—Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424.
57 C.J. p. 891 note 96.

of the execution.[66] The fact that plaintiff and defendant in attachment made a compromise by which a portion of the property was released from the attachment and the rest delivered to plaintiff is no excuse for not duly returning the attachment.[67] In an action by a mortgagee against a sheriff who made a sale under a decree of foreclosure to recover damages for the sheriff's failure to return the order of sale, whereby plaintiff was prevented from obtaining a deficiency judgment, the sheriff cannot escape liability because of the failure of plaintiff to enforce by execution a personal judgment taken in the foreclosure suit.[68]

Validity of process or judgment. Where an execution is issued from competent authority and duly authenticated, an officer cannot escape liability for failure to return the same by setting up that the writ is irregular,[69] or founded on an erroneous or voidable judgment.[70] On the other hand, an officer has been held excused from liability for failure to return a writ which is unauthorized,[71] or which, although regular on its face, is issued on a void judgment,[72] or is not founded on any judgment.[73] It as been held that the officer is not liable for failure to return an execution on or before the return day where the writ purports to have been issued for an amount greater than the actual judgment.[74]

Uncollectability of debt. A sheriff may avoid liability for failure to return an execution by showing that the money for which the writ issued could not have been collected by the use of proper official diligence.[75]

Insolvency of defendant. A mere showing that the execution defendant was insolvent does not absolve the sheriff from liability[76] at least for nominal damages,[77] for failure to return the execution, as this does not necessarily establish that the debt was not collectable,[78] especially where there is other evidence tending to show that defendant owned property subject to execution and within the sheriff's jurisdiction.[79]

Payment to plaintiff of amount due. While it has been held that, where plaintiff has received payment of the amount due him, he cannot hold the sheriff liable in damages for a failure to return or delay in returning the writ,[80] or at most can recover only nominal damages for the default, as discussed infra § 112, there is also authority for the view that the failure to return an execution within the time prescribed by law fixes the liability of the officer, which cannot be discharged by a subsequent tender of the amount due.[81]

Unsuccessful effort to make return. A sheriff may excuse his default in the return of a writ issued from another county, by showing that the execution with his return therein had in due time been enclosed and directed to the execution plaintiff, and sent by mail or some other safe conveyance, to the proper county.[82] So, where a sheriff acted in good faith in attempting to return an execution emanating from another county, and actually included it in a letter for the purpose of returning it, and put it in the post office addressed to the proper place, he was held not liable, although there was a mistake in the name of the person to whom it was addressed.[83] However, a sheriff is not excused from liability for failure to return an execution by the fact that he had indorsed a return on the writ and had gone to the clerk's office to file the same, but did not do so because of the absence of the clerk, where it does not appear that the filing could not have been made at another time.[84]

Offer to deliver writ to proper officer. A sheriff or constable may be protected from liability as for failure to return a writ by the fact that he has offered to deliver it to the proper officer before the

66. Ky.—Judy v. Howard, 2 Metc. 44
67. Ala.—Womack v. Bird, 63 Ala 500
68. Cal.—Boyd v. Desmond, 71 P. 755, 79 Cal. 250.
57 C.J. p 892 note 6.
69. Ark.—Jones v Goodbar, 29 S.W. 462, 60 Ark. 182
57 C.J. p 889 note 46.
Duty to execute process generally see supra § 44
70. Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.
57 C.J. p 889 note 47.
71. N.Y.—Josuez v. Conner, 7 Daly 448.
72. Miss.—McIntosh v. Munson Road Machinery Co, 145 So 731, 167 Miss. 546
57 C J p 889 note 49
73. Ala.—Shute v. McRae, 9 Ala. 931—Godbold v. Planters', etc, Bank, 4 Ala. 516.
74. Kan.—Fisher v. Franklin, 16 P 341, 38 Kan 251.
75. Neb.—Hellman v. Spielman, 27 N W. 131, 19 Neb. 152.
57 C J p 889 note 52.
Mitigation of damages see infra § 112.
Uncollectability of debt under statutes imposing penalty for sheriff's default see infra § 175.
76. Tenn.—Cowan v. Sloan, 32 S.W. 388, 95 Tenn. 424.
57 C.J. p 890 note 55.
77. Mass.—Gallup v. Robinson, 11 Gray 20.
78. Tex.—Griswold v. Chandler, 22 Tex 637.
57 C.J. p 890 note 57.
79. Tex.—Hale v. Bickett, 78 S.W 531, 34 Tex.Civ App. 369.
80. Ark.—Powell v Massey-Herndon Shoe Co., 62 S W. 66, 69 Ark. 79.
57 C J. p 890 note 60
81. Tenn.—Chaffin v. Crutcher, 2 Sneed 360
82. Ky.—Wilson v. Huston, 4 Bibb 332.
83. Ky.—Thompson v. Ross 1 J J. Marsh. 600.
84. Ark.—Atkinson v. Heer, 44 Ark. 174.

return day;[85] but, where the law requires a writ to be returned to the court and not to the clerk, it is not a sufficient excuse to an officer for neglecting to return a process to the proper term of the court that he had tendered it to the clerk, who had refused to receive it, or that the clerk had died during the term.[86]

Indorsement of return on writ. The mere indorsement of a return on an execution does not avoid the liability of the sheriff for a failure to make an actual return to the clerk of the execution itself within the time required by law.[87] On the other hand it has been held that a manual delivery of execution to a justice, with the money collected, relieves an officer from liability, although he did not indorse his return on the writ.[88]

Renewal of writ. A sheriff is not liable for failure to return an execution where plaintiff has obtained, directed, or consented to a renewal of the writ,[89] but the renewal of an execution at the instance of an officer, without the consent of plaintiff, will not relieve such officer from liability for the damages sustained by plaintiff because of his failure to make return of the execution within the time named in the writ as provided by statute.[90]

Issuance of second writ. The issuing of a second execution after a sheriff has failed to return the first within the time prescribed does not release him from liability for his default,[91] especially where the alias writ was issued at the request of the sheriff and for his benefit,[92] although it has been held that in such case the officer is entitled to credit for the amount made on the subsequent execution in reduction of his liability.[93] On the other hand, it has been held that plaintiff in a writ, by procuring an alias writ, waives his right to proceed against the sheriff for failure to return the previous writ in due time.[94]

Attachment or replevin against plaintiff in execution. A sheriff is not excused for failure to return an execution because prior to the return day he received a warrant of attachment against plaintiff, a copy of which he served on the judgment debtor, and received a certificate acknowledging indebtedness to plaintiff in the amount of the judgment.[95] The fact that the debt has been replevied will not relieve the sheriff from liability for failure to return an execution.[96]

Appeal or writ of error. The taking of an appeal or the suing out of a writ of error does not excuse a sheriff for failure to return an execution unless a stay of execution has been obtained[97] and the undertaking for the stay is in proper form.[98]

Injunction or restraining order. While an injunction against the collection of a debt has been held not to excuse the failure of a sheriff to return an execution issued therefor,[99] it has also been asserted that, where a sheriff is restrained by an order of the United States court, made in a pending bankruptcy proceeding, from proceeding under an execution, the time for the return is thereby extended for as many days as the restraining order is in force, and no action can be maintained against him for failure to return the execution before the expiration of the extended time.[1]

Waiver or ratification of default. A waiver or ratification of the sheriff's default in returning process relieves him from liability.[2] Where an execution plaintiff treats the execution as being properly in the officer's hands after the return day, he waives his right of action against the officer for failure to return the writ.[3]

Termination of incumbency. A sheriff who goes out of office before the return day of a writ cannot be held liable for failure to return it unless he commenced to execute it while in office.[4] Under a statute providing that, if an officer to whom an

85. Ark.—Loveless v State, 41 S.W 418, 64 Ark 205
57 C.J p 890 note 66.

86. N C.—Hamlin v March, 31 N.C. 35.

87. Ark.—Smith v. Drake, 297 S W. 817, 174 Ark. 715.
57 C J. p 890 note 68.

88. N.Y —Hunt v. Barry, 6 N.Y.S 568, 16 N.Y Civ.Proc. 362.

89. N Y.—Homan v. Lıswell, 6 Cow. 659.
57 C.J. p 890 note 70.

90. N Y —McGuire v. Bausher, 65 N. Y.S. 382, 52 App Div. 276.

91. Tenn.—Sawyers v. Glenn, 11 Heisk. 754.
57 C.J. p 891 note 72.

92. Tenn —Doyle v Glenn, 4 Humphr. 309—Kirkmans v. Rice, 4 Humphr 267.

93. Ky —Bruce v. Dyall, 5 T.B.Mon 125—Chaffin v Stuart, 1 Baxt. 296
Mitigation of damages generally see infra § 112

94. La.—Miller v. Roy, 10 La Ann. 744.

95. N.Y.—Wehle v. Conner, 63 N Y 258.

96. Ky.—Kennedy v. Coleman, 2 Litt. 6.

97. N.Y.—Clark v. Carnley, 3 Code Rep. 136—People v. Allen, 9 Wend. 224.

98. N Y.—Clark v. Carnley, 3 Code Rep 136.
57 C J p 891 note 81.

99. Ky —Kennedy v. Coleman, 2 Litt 6.

1. N.Y.—Ansonia Brass, etc., Co. v. Conner, 11 Daly 326, affirmed 6 N.Y. Civ.Proc. 173.

2. Ark.—Hammons v. Pendleton, 133 S.W. 177, 96 Ark. 444.

3. N.Y.—McKinley v. Tucker, 6 Lans 214.
57 C J. p 891 note 86.

4. Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.
57 C.J. p 891 note 87.

execution has been delivered goes out of office before the writ has been executed, his successor shall proceed therein, a constable who, on going out of office, delivers an unexpired execution to his successor is not liable for failure to make a return.[5]

§ 112. —— Extent of Liability

As a general rule the liability of a sheriff or constable is for the actual loss sustained by his neglect to make a return.

An officer who fails to return an execution is prima facie liable for the whole amount thereof,[6] without deduction for expenses,[7] but he may relieve himself of such liability by showing that the execution creditor was not injured by his default,[8] or not injured to the extent of the entire debt;[9] and, hence, the general rule is that the liability of the officer is for the actual loss sustained by his neglect to make the return.[10] Where the officer's default was intentional, the jury may award, in addition to the amount of the debt, the costs and incidental expenses incurred by plaintiff.[11] In an action for failure to return a venditioni exponas, the value of the property levied on, which should have been sold, is the proper measure of damages.[12]

Exemplary damages. Although an officer becomes a trespasser ab initio by his failure to return a writ executed by him, as discussed supra § 110, if he does not act oppressively or improperly in executing such writ, he cannot, in an action of trespass, be held liable for exemplary damages,[13] and the malice entertained by plaintiff in the writ cannot be imputed to him.[14]

Interest is recoverable in a common-law action on the case for loss resulting from failure to return process.[15]

Mitigation of liability; nominal damages. In an action against a sheriff for failure to return an execution, it may be proved, in mitigation of damages, that prior to the return day plaintiff's interest in the judgment was levied on by virtue of an attachment, and was liable to be applied thereon,[16] and in such case only nominal damages are recoverable.[17] So, plaintiff has been held entitled only to nominal damages where he has received payment of the amount due him,[18] or where the return is made after the commencement of an action against him for failing to make a return of execution.[19] Even though the property levied on was not subject to attachment and could not have been subjected to any judgment recovered by plaintiff, the sheriff is liable for at least nominal damages for failure to return the attachment.[20] It has been held that a sheriff who failed to file a return could not, when sued for conversion, offset the amount realized from the property seized which was applied to the owner's benefit, unless the application was made with the owner's consent.[21]

Ownership of property A sheriff who is sued for failing to return an attachment may show in mitigation of damages that, by a mortgage and sale of the property levied on, previous to its seizure, defendant had parted with his interest.[22]

Collectability of debt. The fact that the debt is still collectable cannot serve to mitigate the damages in an action against a sheriff for failure to return an execution,[23] although there is contrary authority.[24] It may be shown in mitigation of damages that the debtor did not own sufficient property out of which the writ could have been satisfied.[25] A sheriff or constable who is sued for default in making return of process may show, in mitigation of

5. Ind.—Northern v. State, 1 Ind. 113.

6. N.Y.—Pach v. Gilbert, 27 N.E. 391, 124 N.Y. 616, 20 N.Y.Civ.Proc 302.
57 C.J. p. 892 note 7.

7. N.Y.—Swezey v. Lott, 21 N.Y. 481, 78 Am.D. 160.
57 C.J. p. 892 note 8.

8. Cal.—Hoag v. Warden, 37 Cal. 522.
57 C.J. p. 892 note 9
Necessity of injury generally see supra § 110

9. N.Y.—Ledyard v. Jones, 7 N.Y. 550.
57 C.J. p. 892 note 10.

10. Neb.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97.
57 C.J. p. 892 note 11.
Measure of liability under statute imposing penalty see infra § 174.

11. Ga.—Dobbs v. Murray County, 17 Ga. 624.

12. Ky.—Johnston v. Gwathney, 2 Bibb 186, 4 Am.D. 694.

13. Vt.—Moore v. Duke, 80 A. 194, 84 Vt. 401.

14. Vt.—Moore v. Duke, supra.

15. N.Y.—Thomas v. Weed, 14 Johns. 255.
Allowance of interest in:
Penal action see infra § 174.
Summary proceedings see infra § 172.

16. N.Y.—Wehle v. Conner, 69 N.Y. 546.

17. N.Y.—Wehle v. Conner, 83 N.Y. 231—Wehle v. Conner, 69 N.Y. 546.

18. Ala.—Governor v. Baker, 14 Ala. 652.

19. N.H.—Bechstein v. Sammis, 10 Hun 585.

20. Ala.—Governor v. Baker, 14 Ala. 652.

21. S.D.—Shaffner v. Price, 260 N.W. 703, 63 S.D. 456, 98 A.L.R. 689.

22. Ala.—Governor v. Baker, 14 Ala. 652.

23. N.Y.—Ledyard v. Jones, 7 N.Y. 550, overruling Stevens v. Rowe, 3 Den. 327.

24. Neb.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97—Crooker v. Melick, 24 N.W. 689, 18 Neb. 227.
57 C.J. p. 893 note 26.

25. Neb.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97—Crooker v. Melick, 24 N.W. 689, 18 Neb. 227.
N.Y.—Gagen v. Taylor, 246 N.Y.S. 347, 231 App.Div. 830.
57 C.J. p. 893 note 27.

damages, that the debtor was insolvent,[26] and proof of this fact and that the debtor had no property out of which any part of the debt could have been collected exempts the officer from more than nominal damages.[27]

§ 113. Insufficient or Defective Return, and Failure to Enter

A sheriff who makes an insufficient or defective return of process is liable for the resulting damage.

A sheriff who makes an insufficient or defective return is liable for the resulting damage,[28] as such return is in legal effect equivalent to no return at all.[29] A premature return may subject the officer to an action for damages.[30]

Failure to enter or verify return. A sheriff who has seasonably returned a writ is not responsible for the return not having been duly entered,[31] and, where a writ of attachment is directed to one, as an indifferent person, for service, and he takes the property into his possession, he does not become a trespasser merely by failing to verify his return.[32]

Relief from liability. The acceptance by a justice of the peace of a constable's return to an execution will not relieve the constable from liability, if it is in fact insufficient.[33] A plaintiff in execution who receives a part of his debt, which has been made by the officer, does not thereby waive the right to hold the officer liable for an insufficient return of the writ,[34] but, where a constable to whom a justice directs and delivers an execution erases his name therefrom and substitutes that of another constable, to whom he delivers the writ, such other constable incurs no liability for making an insufficient return.[35]

Issuance of alias writ; sale of property. The issuance of an alias writ does not operate as a waiver of the right to hold the officer liable for an insufficient return on the original writ;[36] and a sale of property levied on under a pluries venditioni exponas does not relieve the officer from liability for an insufficient return of any previous process.[37]

§ 114. False Return

A sheriff or constable who makes a false return to process is liable for any injury resulting therefrom.

A sheriff or constable who makes a false return to process in his hands is liable for any injury resulting therefrom.[38] However, it has been held that the mere fact that an officer's return is erroneous in some respect does not subject him to liability unless the error is properly attributable to some official misconduct or negligence,[39] and that a fraudulent intent on the part of the sheriff is necessary to render him liable for a false return,[40] but it has also been held a sheriff is liable for the damage resulting from a false return notwithstanding its falsity was unintentional.[41]

Necessity for injury to party complaining. In order to entitle a person to maintain an action against a sheriff for a false return, he must have sustained some damage by reason thereof.[42]

26. Me.—Ware v. Fowler, 24 Me 183
57 C J p 893 note 28.
27. Tex—Smith v. Perry, 18 Tex. 510, 70 Am.D. 295.
28. Pa—Bandish v. Borough of Pringle, Com Pl., 37 Luz.Leg.Reg 389
Tenn.—Standifer v May, 42 S.W.2d 343, 163 Tenn 210.
Va—Narrows Grocery Co v. Bailey, 170 S E 730, 161 Va 278
57 C J. p 893 note 31
Amercement of officer for making insufficient or defective return see infra § 173.
Liability on official bond see infra § 189.
Summary remedies against officer for making insufficient or defective return see infra § 168
29. Tenn.—State v. McDonald, 9 Humphr. 606—Harman v. Childress, 3 Yerg 327.
30. Wis.—Glover v. Rawson, 3 Pinn. 226, 3 Chandl. 249.
31. Mich—Gregivere v Chalker, 83 N W 1024, 125 Mich 80.
57 C.J. p 893 note 33.
32. Conn—Edmonds v. Buel, 23 Conn. 242.
33. Pa.—Shover v Funk, 5 Watts & S. 457—Daniel v Buss, 4 Whart. 56
34. Tenn—Barnes v. White, 2 Swan 442, followed in Dunnaway v. Collier, 2 Heisk 10.
35. Pa—Farley v Newton, 1 Pa Super. 300.
36. Tenn—Dunnaway v. Collier, 2 Heisk. 10—Barnes v. White, 2 Swan 442.
37. Tenn—Sawyers v. Glenn, 11 Heisk. 754.
38. Ill—Albert Pick Co. v. Valos, 64 N E 2d 319, 327 Ill App. 404.
Kan—Board of Com'rs of Labette County v. Abbey, 100 P.2d 720, 151 Kan 710
N.J.—**Corpus Juris cited in** Lipman v. Arfield, 33 A 2d 703, 704, 21 N J.Misc. 287.
Pa—Morris v. Bender, 177 A. 776, 317 Pa 533—Wood v. Industrial Health, Accident & Life Ins Co, 163 A 391, 107 Pa Super 338—Seminole Building & Loan Ass'n v. Levit, 163 A. 345, 107 Pa.Super. 252—Lieberman v Harrigan, Com.Pl, 28 Del.Co. 481, 53 York Leg Rec. 87—Zajac v. Mehalshuck, Com Pl, 10 Sch Reg. 1, 57 York Leg Rec. 187.
57 C J. p 894 note 43.
Liability on official bond for false return see infra § 189
Statutory penalty for false return see infra § 173.
Summary remedies against officer for making false return see infra § 168.
False return to writ of scire facias
Del.—Wax v Riverview Cemetery Co, 24 A 2d 431, 2 Terry 424.
Pa—Smith v. Hooton, 3 Pa Dist 250.
39. N.J—**Corpus Juris cited in** Lipman v. Arfield, 33 A.2d 703, 704, 21 N J Misc 287
57 C.J p 894 note 44.
40. Ala—Sutherland v. Cunningham, 1 Stew. 438
41. Mass.—David v. Larochelle, 5 N. E.2d 571, 296 Mass. 302.
42. Ky.—Bennett v. Bell, 46 S.W. 4, 701, 20 Ky L 308.
57 C.J. p 895 note 53.

What constitutes false return. A "false return" is defined as a return made by the sheriff or other ministerial officer to a writ in which is stated as a fact something contrary to the truth and injurious to one of the parties or to someone having an interest in it.[43] As there is an obvious distinction between a false statement and a failure to state all the facts, a sheriff cannot be held liable as for a false return because he has failed to make a full return of all he did or of all the facts,[44] although it has been held in some cases that a failure to state all the facts may constitute a false return.[45] In order to make a return of nulla bona a false return, the sheriff must be informed, or chargeable with knowledge, that the debtor has goods in the county, and must have an opportunity to make a levy.[46] Where a sheriff makes a return to an execution, in the usual form, in an action for the claim and delivery of personal property, that he could not find the property so as to make delivery, and he knows where the property can be found within his county but refuses to take it, or to take any action in respect thereof on the ground that it is in the possession of a third person, his return is false.[47] The return of non est inventus by an officer, after an execution has run out in his hands, with a view to charge bail on mesne process, is a false return.[48]

To whom officer liable In case of a false return the sheriff is liable to the person injured thereby.[49] Thus one whom the sheriff falsely states he served with process may hold the sheriff liable [50] A sheriff making a false return may be liable to a person who is not a party to the suit in connection with which the return is made,[51] but it has been held that an action for a false return can be maintained only by a party to the proceedings in which the process was issued.[52]

Rights of surety on bail bond. In case of a recovery on an undertaking on arrest, and payment thereof, the bail is entitled to recover from the sheriff the amount so paid, where it appears that the sheriff's return was false.[53] Where a person becomes bail at the request of a third person, the sheriff is liable to him for a false return on the execution,[54] although such third person subsequently pays the bail the principal part of the judgment which the bail was compelled to pay [55]

§ 115. —— Particular Matters Affecting Liability

Particular matters which have been held to affect or not to affect the liability of a sheriff or constable for making a false return include the validity of the process or judgment, title to the property sought to be attached, bankruptcy or insolvency of the debtor, and waiver or estoppel.

If process is regular on its face and issued by competent authority, an officer is not excused for a false return because the process was irregularly or erroneously issued,[56] but a false return to void process subjects the officer to no liability,[57] and the fact that the officer has treated the process as valid does not estop him to set up that it was void.[58] Where the circumstances are such that the elder of two writs must be deemed fraudulent and void as against a junior writ, the sheriff is not liable for applying goods levied on to the junior writ and returning nulla bona to the other.[59] Where there is statutory authority for the issuance of an execution to a county other than that in which the judgment was rendered, the issuance of two executions to different counties on the same day affords no defense to an officer who has made a false return on one of such executions.[60] The sheriff cannot protect himself from liability by showing that the judgment was void,[61] although such fact may be shown in mitigation of damages as discussed infra § 116.

43. Mo.—State v. Jenkins, 70 S.W. 152, 170 Mo. 16.
57 C J p 894 note 46

Decree entered without jurisdiction
Falsity of return is not established by decree entered without jurisdiction.—Stewart v. Williams, 140 So 624, 25 Ala.App 46.

44. Ala.—Tarleton v Gibson, 2 Ala 638
57 C J. p 894 note 47.

45. Ky.—Commonwealth v. Booker, 6 Dana 441.
57 C.J. p 895 note 48.

46. Tenn.—Barnes v. Thompson, 2 Swan 313—Trigg v. McDonald, 2 Humphr. 386.

47. N Y.—Hoffman v. Conner, 76 N Y. 121.

48. Vt.—Cooper v. Ingalls, 5 Vt. 508

49. Pa.—Morris v Bender, 177 A 776, 317 Pa 533.
57 C J. p 895 note 51.

50. Ill.—Albert Pick Co. v. Valos, 64 N E 2d 319, 327 Ill App 404
Kan.—Board of Com'rs of Labette County v Abbey, 100 P 2d 720, 151 Kan 710
Pa.—Morris v. Bender, 177 A. 776, 317 Pa 533—Wood v. Industrial Health Accident & Life Ins Co., 163 A. 391, 107 Pa Super 338

51. Me.—Remick v. Wentworth, 36 A. 622, 89 Me 392.
57 C.J. p 895 note 52.

52. Pa.—Butler v. Bennett, 11 Pa Co. 83.
57 C.J. p 895 note 53.

53. N.Y.—Cozine v. Walter, 55 N.Y. 304

54. Me.—Kidder v. Parlin, 7 Me. 80.

55. Me.—Kidder v. Parlin, supra.

56. N.Y.—Bacon v. Cropsey, 7 N.Y. 195
57 C J. p 895 note 62.

57. N.Y.—Dunham v. Reilly, 18 N E. 89, 110 N.Y. 366.

58. N Y.—Dunham v. Reilly, supra.
57 C J. p 896 note 64.

59. N.Y.—Storm v Woods, 11 Johns. 110.
57 C J. p 896 note 65.

60. Colo.—People v Finch, 76 P. 1120, 19 Colo App 512.

61. N.Y.—Dorrance v Henderson, 47 Hun 206, affirmed 92 N.Y 406—Watson v. Brennan, 39 N.Y.Super

An officer is not liable for a false return of nulla bona where the judgment on which the execution issued has since been reversed.[62] An amendment of the return, by leave of court, by striking out the false statement does not relieve the sheriff of liability.[63] The fact that in the regular course of practice an order of publication intervened between an officer's false return of non est to a summons and judgment by default will not shield him from liability for the false return[64] Where a summons was issued against a certain person, which the constable by mistake served on another person, and returned the summons "personally served," and judgment was rendered against the real defendant for a penalty alleged to have been incurred by the violation of a statute, the officer was entitled, in an action by such defendant against him for a false return, to show that defendant had been guilty of the offense.[65]

Title to property. In order to relieve himself from liability for a false return on an attachment levy, the sheriff is entitled to sustain his return of nulla bona by showing that the property in question was not the property of the attachment debtor,[66] and this may be done notwithstanding the sheriff's failure to demand indemnity from plaintiff in the writ.[67] The sheriff is not estopped to set up such defense because he had seized part of the property as owned by the debtor, and had made and filed a proper return, stating that he had so attached the property and taken an inventory thereof as the property of the debtor;[68] and he is not estopped by the fact that he had previously sold the property in a prior execution against the debtor, and paid over the surplus money to the purchaser at the sale, who claimed the property also by virtue of a bill of sale from the debtor.[69] However, the fact that a judgment debtor against whom an execution was issued held the property which had been levied on by an assignment fraudulent as to one of the assignors does not relieve the sheriff from liability for a false return on the execution, the other assignor having the right to convey.[70] A finding by a sheriff's jury in an inquisition that the property in goods taken on a fieri facias is not in defendant exonerates the sheriff from liability for a false return of nulla bona[71] unless it is shown that the sheriff did not act in good faith.[72] It has been held that, where the sheriff in an action against him for a false return does not set up a determination of a jury against the debtor's title in the special proceeding provided for by statute, or that the property was not in the debtor's possession, or that it was not clear that it belonged to him, the refusal of the judgment creditor, on demand, to indemnify the sheriff is no defense.[73]

Bankruptcy or insolvency of debtor. In an action against a sheriff for a false return of execution, a defense is available that the judgment debtors were bankrupts, and that the property levied on, or its proceeds, belonged to their assignees[74] A sheriff who makes a false return on a writ of execution is not exonerated by the fact that the execution defendant was insolvent.[75]

Improper direction of writ. Where an indifferent person who was not authorized to serve a writ of attachment for want of a legal direction made service in fact, his acting under the writ did not preclude him, in an action against him for a false return, from denying that the writ was legally directed to him.[76]

Failure of bail to complete proceedings for exoneration. The failure of a surety to an undertaking on arrest to complete proceedings for his exoneration will not wholly discharge the sheriff's liability incurred by a false return,[77] and a sheriff who prevents the surety from procuring exoneration is precluded from raising the objection in an action against him for rendering a false return that plaintiff did not complete the proceedings for his exoneration.[78]

Waiver or estoppel affecting right of action. The right to recover damages for a false return may

81, reversed on other grounds 66 N Y 621.

62. N Y.—Inman v. McNeil, 57 How Pr 151.

63. Mo.—State v. Case, 77 Mo. 247

64. Mo —State v. Finn, 87 Mo. 310.

65. N.Y.—Green v. Ferguson, 14 Johns. 389.

66. N Y.—Blair v. Flack, 17 N.Y.S (64) 62 Hun 509.
57 C.J p 896 note 69.

67. N Y.—Blair v. Flack, supra

68. N.Y.—Buffalo Third Nat. Bank v. Elliott, 42 Hun 121, affirmed 21 N. E. 416, 114 N.Y. 622.

69. N Y.—Blivin v. Bleakley, 23 How.Pr 124.

70. N.Y.—Colwell v. Bleakley, 1 Abb Dec. 400

71. N Y.—Craft v. Brandow, 52 N.Y S. 1078, 24 Misc. 306—Bayley v Bates, 8 Johns 185.

72. N.Y.—Bayley v. Bates, supra.

73. N.Y.—Craft v. Brandow, 52 N. Y.S. 1078, 24 Misc. 306.

74. N.Y —Dorrance v. Henderson, 92 N.Y. 406.

75. Ind.—Stevens v. Beckes, 3 Blackf. 88.
Mo —State v Case, 77 Mo. 247.
Mitigation of damages see infra § 116.

76. Conn.—Case v. Humphrey, 6 Conn. 130.

77. N.Y.—Cozine v. Walter, 55 N.Y. 304.

78. N.Y —Cozine v. Walter, supra.
Mitigation of damages see infra § 116.

be waived,[79] and a person cannot recover against a sheriff for an alleged false return of service of summons on him where he appeared in the action for the purpose of litigating the question whether he was before the court, and such question was decided in the affirmative.[80] However, where a sheriff returns on an execution that part of the debt has been made and that the debtor has no goods which can be levied on for the remainder, the creditor does not waive his right of action for a false return by accepting the amount collected.[81] So, a sheriff's liability for falsely returning that he had taken bail is not discharged by the creditor's omitting to demand the bail bond within a year after he has recovered judgment.[82] A subsequent attaching creditor is not estopped from maintaining an action against a sheriff for a false return of the sale of an equity of redemption on execution, by a representation, made by such creditor when acting as an auctioneer, that the land was under no encumbrance but the mortgage.[83]

§ 116. —— Extent of Liability

Where a sheriff makes a false return of process, the measure of damages is the injury suffered by the complaining party.

A sheriff who makes a false return on an execution is prima facie liable for the amount thereof,[84] but he may reduce his liability by showing that the loss resulting from the false return was less than that amount,[85] so that the real measure of damages for a false return is the injury suffered by the complaining party.[86] Where a deputy sheriff, having a writ of attachment against a person who had removed out of his precinct, falsely returned that he had left a summons at his last and usual place of abode, being the place of his late residence, and the judgment went by default, defendant having no notice of the suit, it was held that the officer was not liable for the cost of an application for a review of the original judgment,[87] or for the amount of such judgment until it had been proved erroneous by the successful termination of the proceedings to review it,[88] but, if the debt should prove to be due, the officer might be liable for the amount of the original costs.[89]

Where a litigant is prejudiced by a false return of the sheriff, but discovers the error in time to avoid such damages as would arise from proceeding further, the sheriff cannot be held liable for the consequences of the litigant so proceeding unless he assented thereto.[90] Where a sheriff makes a false return of personal service in an action on a special tax bill, by reason of which defendant's property is sold, the measure of damages is the reasonable value of the land when sold.[91]

Mitigation of damages. In an action against a sheriff for a false return on an execution, he may show, in mitigation of damages, that other executions in his hands would have taken the proceeds of a sale,[92] or that the judgment on which the execution was issued was void.[93] However, the officer cannot be permitted to show, in order to reduce damages, that the execution directed the collection of a greater sum than was due plaintiff.[94] A sheriff may show in mitigation of his prima facie liability for the amount of the execution that defendant had no property subject to execution,[95] but he cannot show that the judgment is still collectable.[96] So, also, where, in an action by a creditor against a sheriff for falsely returning that he had served on the creditor a copy of the notification that a debtor intended to take the poor debtor's oath, it appears that the copy actually served was such that the creditor, if he had chosen, might have been present at the examination, the officer may show in mitigation of damages that the debtor had no attachable or visible property;[97] and it has been held that the poverty of a debtor may mitigate the damages in an action against the sheriff for a false re-

79. Ky.—Bennett v. Bell, 46 S.W. 4, 701, 20 Ky.L. 308.
Mo.—State v. McCarthy, 114 S.W. 1110, 134 Mo.App. 630.

80. Ky.—Bennett v. Bell, 46 S.W. 4, 701, 20 Ky.L. 308.
57 C.J. p. 897 note 86.

81. Tenn.—Dunnaway v. Collier, 2 Heisk. 10, disapproving Trigg v. McDonald, 2 Humphr. 386.

82. Mass.—Caesar v. Bradford, 13 Mass. 169.

83. Mass.—Whitaker v. Sumner, 7 Pick. 551, 19 Am.D. 298.

84. U.S.—Pierce v. Strickland, C.C. Me., 19 F.Cas.No. 11,147, 2 Story 292.
57 C.J. p. 897 note 97.

85. U.S.—Pierce v. Strickland, supra.
57 C.J. p. 897 note 98.

86. N.Y.—Hirshorn v. A. L. Tuska, Son & Co., 281 N.Y.S. 41, 156 Misc. 453.
57 C.J. p. 897 note 99.

87. Me.—Waterhouse v. Gibson, 4 Me. 234.

88. Me.—Waterhouse v. Gibson, supra.

89. Me.—Waterhouse v. Gibson, supra.

90. Ohio.—Colello v. Bates, 100 N.E. 2d 258, 88 Ohio App. 313.
57 C.J. p. 897 note 4.

91. Mo.—State v. Finn, 13 Mo.App. 285.

92. Pa.—Forsyth v. Dickson, 1 Grant 26.

93. N.Y.—Dorrance v. Henderson, 27 Hun 206, affirmed 92 N.Y. 406.

94. N.Y.—Bacon v. Cropsey, 7 N.Y. 195.

95. N.Y.—Ledyard v. Jones, 7 N.Y. 550.

96. N.Y.—Ledyard v. Jones, supra.

97. Mass.—Woods v. Varnum, 21 Pick. 165.

turn on a capias that he had taken bail for the debtor's appearance.[98]

Where a sheriff, having in his hands final process against the body of a debtor, neglects an opportunity to arrest him, and afterward the debtor absconds and the sheriff returns "non est inventus," he cannot show the insolvency of the debtor in mitigation of damages in an action for the false return.[99] The failure of sureties on a bail bond to surrender their principal in accordance with the provisions of the statute after action begun on the bond and before answer, when such surrender was advised by the sheriff, and the sureties were able to make it, may be pleaded by the sheriff in mitigation of damages in an action on the sureties' claim for damages sustained by reason of the sheriff's false return to an execution issued against the person of the principal.[1]

I. OTHER LIABILITIES

§ 117. Liabilities as to Prisoners or Convicts

A sheriff or constable must exercise reasonable care under the circumstances to preserve the life, health, and safety of a prisoner in his custody, and he is liable to the prisoner or his representatives for negligent or wrongful acts causing his injury or death.

A sheriff owes a duty to a prisoner in his custody to keep him in health and free from harm.[2] He must exercise ordinary and reasonable care under the circumstances to preserve the life, health, and safety of a prisoner in his care and custody,[3] and he is liable to the prisoner or his representatives for negligent or wrongful acts causing his injury or death.[4] However, the fact that the sheriff enforces the law against a prisoner with malice does not render him liable where his conduct is not unlawful.[5] It has been held that a sheriff is liable to a prisoner where he fails to provide medical attention plainly and urgently needed by the prisoner,[6] but it has also been held that, in the absence of an express contract, a sheriff is not personally liable for medical services required by the condition of a prisoner by reason of a wound inflicted on him in making the arrest.[7]

Any cruel or unnecessary exposure of a prisoner to cold, or deprivation of suitable clothing or covering, while in the custody of the constable arresting him is unlawful, and the officer is liable therefor.[8] So a sheriff or constable is liable for an unlawful assault on a prisoner,[9] and he is also liable for an assault on a prisoner committed by others where he had reasonable grounds to anticipate the assault and did not take reasonable measures to protect the prisoner.[10] A sheriff has the right to take such measures as in his discretion may appear to be nec-

98. Mass.—Weld v. Bartlett, 10 Mass. 470.
57 C.J. p. 898 note 12

99. Vt.—Goodrich v. Starr, 18 Vt. 227.

1. N.Y.—Prividi v. O'Brien, 91 N.Y.S. 324, 46 Misc. 56
57 C.J. p. 898 note 14.

2. Ga.—**Corpus Juris cited in** Kendrick v. Adamson, 180 S.E. 647, 648, 51 Ga. App. 402
Iowa.—**Corpus Juris cited in** Smith v. Miller, 40 N.W.2d 597, 598, 241 Iowa 625, 14 A.L.R.2d 345
Neb.—**Corpus Juris cited in** O'Dell v. Goodsell, 30 N.W.2d 906, 909, 149 Neb. 261
Okl.—Taylor v. Slaughter, 42 P.2d 235, 171 Okl. 152
57 C.J. p. 899 note 37.
Injuries to prisoners generally see Prisons § 13.
Liability of sheriff or constable on official bond see infra § 189.

Mental and physical health
Where commitment required sheriff to keep prisoner safely until ordered otherwise by the court, it was also sheriff's duty to safeguard prisoner and protect his mental and physical health as far as possible.—Jacobson v. McMillan, 132 P.2d 773, 64 Idaho 351.

3. Okl.—Allen v. Cavin, 66 P.2d 40, 179 Okl. 460.

Guard at night
A sheriff was not liable for the prisoner's death in fire on ground that he was negligent in not having a guard at jail throughout night to look after safety of prisoners, where it was not shown that county furnished quarters for a guard or that commissioners' court had authorized salary for such a guard.—Baker v. Walston, Tex.Civ.App., 141 S.W.2d 409, error dismissed, judgment correct.

4. Ga.—**Corpus Juris cited in** Kendrick v. Adamson, 180 S.E. 647, 648, 51 Ga. App. 402
Iowa.—**Corpus Juris cited in** Smith v. Miller, 40 N.W.2d 597, 598, 241 Iowa 625, 14 A.L.R.2d 345
Okl.—Allen v. Cavin, 66 P.2d 40, 179 Okl. 460
57 C.J. p. 899 note 39.

5. Miss.—State ex rel. Trigg v. West, 157 So. 81, 171 Miss. 203

6. Kan.—Pfannenstiel v. Doerfler, 105 P.2d 886, 152 Kan. 479

Attendance by jail physician
A sheriff was not free from negligence in failing to call physician for jail prisoner, who became ill and died as result of eating unsanitary food, on ground that duty to attend all jail prisoners was that of jail physician appointed by county commissioners, in view of such physician's testimony that he was subject to call at any time by sheriff and his staff.—Magenheimer v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind.App. 128.

7. N.C.—Spicer v. Williamson, 132 S.E. 291, 191 N.C. 487, 44 A.L.R. 1280

8. Del.—Petit v. Colmery, 55 A. 344, 20 Del. 266.

9. La.—Cobb v. Jeansonne, App., 50 So.2d 100
57 C.J. p. 899 note 41.

Violence toward prisoner is violation of law except under circumstances permitted or justified.—Brooks v. State, 95 S.W.2d 136, 130 Tex.Cr. 561.

10. Okl.—Allen v. Cavin, 66 P.2d 40, 179 Okl. 460.—Taylor v. Slaughter, 42 P.2d 235, 171 Okl. 152.

Prisoner placed in cell with insane person
Sheriff was liable for death of prisoner who was negligently placed in cell with violently insane man who during night killed prisoner.—Dunn v. Swanson, 7 S.E.2d 563, 217 N.C. 279.

essary to the identification and recapture of prisoners should they escape, and one so doing does not render himself liable in the absence of malice, wantonness, or a reckless disregard for the common dictates of humanity.[11] It has been held that a sheriff is not liable for an injury to a convict occurring while the latter is in the custody of a county convict contractor.[12]

Injuries by mobs or rioters. Unless provided otherwise by constitution or statute,[13] a sheriff cannot be held liable for injuries to persons or property suffered through the violence of mobs, riots, or insurrections,[14] where his failure to prevent the injury was due to physical inability to cope with the force confronting him,[15] but he is liable if he knowingly commits acts amounting to a participation in the unlawful purposes of the mob,[16] or if, having the force at hand to prevent the injury, he stands idle and permits it.[17]

§ 118. Escape

As a general rule a sheriff is liable for the damage resulting from the escape of a prisoner in his custody.

As a general rule a sheriff is liable for the damage resulting from an escape of a prisoner in his custody,[18] provided he has such prisoner legally in his custody.[19] It is not essential to the maintenance of an action against an officer for the escape of a prisoner arrested on mesne process that a demand should be made on him for the body of defendant on final process in the original action[20] or that he should have written notice that such final process is in the hands of an officer for service.[21] In order to constitute an escape for which the sheriff is liable, it is necessary that there be some agency of the prisoner employed or some wrongful act of another against whom the law gives a remedy,[22] and no liability is incurred where a prisoner is removed from custody by legal process.[23] Where a sheriff commits a person arrested on mesne process to nonofficial control, and is unable to produce him on the return day, he is liable for an escape,[24] and there cannot be a subsequent escape without a new arrest;[25] but the officer may, at his peril, allow the debtor freedom from official restraint, provided he produce him at the proper time.[26] A sheriff is not liable to a prisoner or his representatives for injuries suffered in consequence of his escape.[27]

Effect of change in incumbency. A former sheriff is not liable for the escape of a prisoner during the term of his successor, although such prisoner was committed on civil process during his own term, if he has regularly delivered him to his successor,[28] but it has been held that it is not the imperative duty of a returning sheriff to sign over, at the end of his term, to the new sheriff, a debtor taken on execution, who is on the jail limits, so as to make the officer, if he fails to do so, liable to the judgment creditor in the amount of the debt, as for an escape.[29] It has also been held that a sheriff whose term of office has expired, and who has turned over to his successor the jail and prisoners actually therein, is not liable for a failure to deliver to him a prisoner in his custody on a body execution, if the new sheriff has not served the certificate of appointment as required by statute.[30]

11. Ind.—State v. Clausmier, 57 N.E. 541, 154 Ind. 599, 50 L.R.A. 73, 77 Am.S.R. 511.
57 C.J. p 899 note 42.

12. Miss.—State v. Basham, 27 So. 996, 77 Miss. 688.
57 C.J. p 899 note 43.
Injury to convicts generally see Convicts § 9.

13. Mont.—Annala v. McLeod, 206 P.2d 811, 122 Mont. 498.

14. U.S.—South v. Maryland, Md., 18 How. 396, 15 L.Ed. 433.
Mont.—Annala v. McLeod, 206 P.2d 811, 122 Mont. 498.

15. Md.—State v. Wade, 40 A. 104, 87 Md. 529, 40 L.R.A. 628.
57 C.J. p 902 note 92.

16. U.S.—Asher v. Cabell, Tex., 50 F. 818, 1 C.C.A. 693.
57 C.J. p 902 note 93.

17. Md.—State v. Wade, 40 A. 104, 87 Md. 529, 40 L.R.A. 628.

18. N.J.—Gural v. Engel, 25 A.2d 257, 128 N.J.Law 252, reversed on other grounds 28 A.2d 109, 129 N.J. Law 63.
57 C.J. p 900 note 46—5 C.J. p 529 note 33 [a].
Liability
For acts of deputy see supra § 55
Of jailer or sheriff acting as such for escape of prisoners generally see Prisons § 23.
On official bond see infra § 189
Penalties for permitting escape see infra § 173
Summary remedies against officer for allowing escape see infra § 168

19. U.S.—Barth v. Clise, Wis., 12 Wall. 400, 20 L.Ed. 393.
57 C.J. p 900 note 47.

20. Conn.—Hart v. Stevenson, 25 Conn. 499.

21. Conn.—Hart v. Stevenson, supra.

22. N.Y.—Wilckens v. Willet, 4 Abb. Dec. 596, 1 Keyes 521.
Acts constituting escape generally see Prisons § 23 c.

23. N.Y.—Wilckens v. Willet, supra
57 C.J. p 900 note 51.

24. Wis.—Gebhardt v. Holmes, 135 N.W. 860, 149 Wis. 428

25. Wis.—Gebhardt v. Holmes, supra.

26. Wis.—Gebhardt v. Holmes, supra.

27. Ky.—McFarland v. Ellison, 99 S.W.2d 779, 266 Ky. 628.
Failure to rescue prisoner
Deputy sheriff and marshal were held not liable to prisoner's wife for death of drunken prisoner because of their failure to render assistance when he called for help after escaping from their custody and falling into river where he was drowned.—McFarland v. Ellison, supra.

28. N.Y.—Partridge v. Westervelt, 13 Wend. 500.
57 C.J. p 900 note 55.

29. N.Y.—French v. Willet, 23 N.Y. Super. 566

30. N.Y.—Feerick v. Conner, 9 Daly 523.

A new sheriff who has regularly received a prisoner from his predecessor is liable for his escape,[31] although a voluntary escape may have existed in the time of his predecessor,[32] but the mere termination of the former sheriff's incumbency, without a regular assignment of the prisoner to the new sheriff, does not make the latter liable for a subsequent escape.[33] If plaintiff elects to sue the former sheriff and recovers, the judgment bars any action against the new sheriff for a fresh escape.[34]

§ 119. —— Relief from Liability

The sheriff is not liable for an escape where the process on which the prisoner was arrested was void, but he is not relieved from liability where the process was only irregular and voidable.

A sheriff is not relieved from liability for an escape by the fact that the process on which the prisoner was arrested was irregular and voidable,[35] but he is not liable for an escape where the process on which the prisoner was arrested was void[36] or insufficient to authorize the arrest.[37] So, if the court rendering judgment was without jurisdiction, the sheriff is relieved from liability for an escape,[38] but if the judgment is not void, but merely erroneous, the sheriff is not relieved from liability.[39]

Poverty or insolvency of debtor. In an action against a sheriff for an escape, the poverty or insolvency of the debtor may be shown in mitigation of damages, as discussed infra § 120, but it is not available as a bar to the action.[40] A sheriff who releases a debtor on an instrument not complying with the statute for the relief of insolvent debtors may be liable for an escape.[41]

Privilege from arrest. Where the person arrested is absolutely privileged from arrest, the officer incurs no liability by allowing him to escape,[42] but in some cases it has been held that, where the privilege is temporary and limited, the sheriff is liable for an escape if, on his own responsibility, he releases the prisoner.[43]

Discharge by order of court. The fact that a prisoner arrested under an execution in a civil action has been discharged from imprisonment by the order of a court or judicial officer having jurisdiction to make it is a good defense to the sheriff, in an action for escape, although the order was erroneously made and might have been avoided,[44] but it is otherwise where the order was granted without jurisdiction or is void on its face.[45] In any event, plaintiff by accepting benefits under the order of discharge may be estopped to claim that the prisoner's release was an escape for which the sheriff is liable.[46]

Waiver of right of action. Where, after the sheriff has become liable for an escape by taking an insufficient bond from a prisoner in contempt, the prosecutor takes an assignment of the bond after breach of its condition, and also takes an order for a further attachment, but fails to issue such further attachment, and the prisoner is surrendered by his bail, the prosecutor's right of action against the sheriff for the escape is waived.[47]

31. N.Y.—Partridge v. Westervelt, 13 Wend 500—Hempstead v. Weed, 20 Johns 64, 11 Am D 244.

32. N.Y.—Stickle v. Reed, 23 Hun 417—Rawson v. Turner, 4 Johns 469.

33. N.Y.—Partridge v Westervelt, 13 Wend 500—Hempstead v Weed, 20 Johns 64, 11 Am D 244.

34. N.Y.—Rawson v. Turner, 4 Johns 469

35. N.J.—Woodruff v Barrett, 15 N J Law 40—Patten v. Halsted, 1 N J Law 320.
57 C.J p 901 note 63
Defenses in actions against jailer or sheriff acting as such for escape of prisoners see Prisons § 23 k.
Protection afforded by process generally see infra § 122 et seq

36. N.Y.—Carpenter v. Willett, 31 N.Y. 90, 1 Abb Dec. 312, 1 Keyes 510, 28 How.Pr. 225.
57 C.J. p 901 note 64.

37. Mass.—Hitchcock v. Baker, 2 Allen 431.
57 C J p 901 note 65.

38. Conn.—Austin v. Fitch, 1 Root 288

39. N.Y.—Wesson v. Chamberlain, 3 N.Y. 331.

40. N.J.—Gural v Engle, 25 A 2d 257, 128 N J Law 252, reversed on other grounds 28 A.2d 109, 129 N J Law 63
57 C J. p 901 note 71.

41. N J—Gural v. Engel, 28 A 2d 109, 129 N J Law 63.

42. N H—Green v. Edson, 2 N H 293
N Y—Ray v. Hogeboom, 11 Johns 433.

43. N.Y.—Sperry v. Willard, 1 Wend 32
57 C J. p 901 note 75.

44. N.Y.—Land Finance Corporation v. Jacoby, 272 N.Y.S. 318, 151 Misc 159, affirmed 275 N.Y.S. 890, 243 App.Div. 530, affirmed 196 N.E. 600, 267 N Y 600—Deitz v. Mangano, 30 N Y S 2d 8.
57 C J. p 901 note 76.

Release in response to writ
Sheriff who, in good faith and obedience to mandatory writs of supersedeas and habeas corpus, valid on their face, released prisoner convicted of felony to state officer armed with mittimus was held not civilly liable to plaintiff who had caused sheriff to take prisoner into custody under writs of capias ad satisfaciendum while felony prosecution was pending.—Andrews v. Wilcox, 270 N. W 191, 277 Mich 697.

45. N Y—Perry v. Kent, 34 N.Y S. 843, 88 Hun 407, affirmed 53 N E 1130, 157 N.Y. 710—Bullymore v. Cooper, 2 Lans. 71, affirmed 46 N. Y. 236

46. N Y—Land Finance Corporation v. Jacoby, 275 N Y S. 890, 243 App Div. 530, affirmed 196 N.E 600, 267 N Y 600—Deitz v. Mangano, 30 N Y.S.2d 8.

47. N.Y—Morton v. Campbell, 14 Abb.Pr. 410.

§ 120. —— Extent of Liability

The actual loss sustained is the measure of damages for the escape of a prisoner arrested on mesne process.

A sheriff who allows a prisoner arrested on mesne process to escape is prima facie liable for the entire debt,[48] but may reduce his liability by showing that the creditor was not injured to that extent,[49] thus making the actual loss the real measure of damages.[50] According to some authorities the same rule applies in case of an escape of a prisoner arrested on final process;[51] but other authorities hold that where a debtor is arrested on final process his escape renders the sheriff absolutely liable for the debt.[52] A sheriff who illegally releases a prisoner sentenced for default in payment of a fine is liable to the county authorities for the amount of the fine.[53]

Mitigation of damages. Where a plaintiff, having obtained security from defendant for his debt, relinquishes it, after knowledge of an escape, the sheriff may avail himself of such fact in mitigation of damages, in an action against him for the escape.[54] So it may be shown in mitigation of damages that the debt could not have been made out of the debtor.[55] The poverty or insolvency of the debtor may be shown in mitigation of damages in an action against an officer for an escape.[56]

§ 121. Miscellaneous

General rules with respect to liability for the use of excessive force in making an arrest, and for unlawful arrests, by public officers apply to sheriffs and constables.

The general rules with respect to the force which may be used by public officers in making an arrest, as discussed in Arrest § 11 et seq, apply to sheriffs and constables.[57] Thus a sheriff or constable is liable for an assault where in performing his duties he uses unnecessary force and a person is thereby injured.[58] Where a sheriff had arrested one by mistake for another, and under the mistake shot at him, when escaping, he was held liable if he could, with due care and diligence, have ascertained his mistake before shooting.[59] A sheriff who, in attempting to arrest, without a warrant, a person guilty at most of a misdemeanor, shoots such person while he is running away is liable to him for the injury sustained.[60] So a sheriff or constable who, attempting to make an arrest without a warrant, shoots a third person accompanying the person sought to be arrested is liable therefor,[61] and the person shot is not guilty of contributory negligence because, in the general excitement, not knowing which way to go to escape injury, he runs into the range of fire intended for his companion.[62]

Where officers, without a warrant, agreed to intercept travelers on a certain highway, on information that liquor was being unlawfully transported, and, in following out such agreement, one of the officers shot at innocent travelers who refused to stop, all of the officers are liable for the resulting injury,[63] and it is no defense that the other officers did not agree to do any shooting, the agreement to intercept travelers being the proximate cause of the injury;[64] and it is not a defense that there was, unknown to the person injured, a pint of liquor in the car in which he was traveling,[65] or that the occupants of the car, without knowledge of the identity of the officers, violated the speed laws in trying to escape,[66] or that the officers acted in good faith and on the advice of the city attorney that they were au-

48. N Y.—Latham v. Westervelt, 26 Barb. 256.
57 C.J p 901 note 80
Amount of recovery under statutes imposing penalty see infra § 174

49. R.I —Sheldon v. Upham, 14 R. I, 493

50. N Y —Singer v Knott, 196 N.Y S 565, 203 App.Div 556, reversed on other grounds 142 N E 435, 237 N.Y. 110, reargument denied 143 N E 744, 237 N Y. 563.
57 C.J. p 901 note 82.

51. Va.—Perkins v. Giles, 9 Leigh 397, 36 Va 397, 33 Am D 249
57 C.J. p 901 note 83.

52. N Y —Latham v. Westervelt, 26 Barb. 256.
Pa.—Shewel v. Fell, 4 Yeates 47.

53. Pa —In re Sheriff's Duty, 43 Pa. Co. 531.

54. N.Y.—Russell v. Turner, 7 Johns 189, 5 Am D. 254.

55. Vt —Mangan v. Franzoni, 75 A 2d 665, 116 Vt 351.
57 C J p 902 note 87.

56. N.Y.—Slagle v Burden, 266 N Y S. 834, 239 App Div 104, affirmed 191 N E 559, 264 N.Y. 548
Vt —Mangan v Franzoni, 75 A.2d 665, 116 Vt 351.
57 C J p 902 note 88.

57. W.Va —State ex rel Mullins v. McClung, 17 S E 2d 621, 123 W Va 682.
Assault on prisoner see supra § 117
Liability on official bond see infra § 189.

Liability in official and private capacities

A sheriff, acting viciously, immoderately, and with excessive force in making arrest, becomes ipso facto accountable, in his official, as well as his private, capacity, to person injured thereby.—Price v. Honeycutt, 4 S E 2d 611, 216 N C. 270.

58. N C —Price v. Honeycutt, supra.
57 C J. p 898 note 17.

59. Neb —Kopplekom v. Huffman, 10 N W. 577, 12 Neb 95.

60. Miss —Holland v. Martin, 56 So 2d 398, suggestion of error overruled 58 So 2d 62
Utah —Geros v Harries, 236 P 220, 65 Utah 227, 39 A L.R. 1297.

61. Ark —Edgin v Talley, 276 S W. 591, 169 Ark 662, 42 A.L.R. 1194.
Miss —State v Cloud, 116 So 814, 150 Miss. 697.

62. Miss.—State v. Cloud, supra.

63. Wash.—Mitchell v. Hughes, 176 P. 26, 104 Wash. 231.

64. Wash.—Mitchell v. Hughes, supra

65. Wash —Mitchell v. Hughes, supra.

66. Wash —Mitchell v. Hughes, supra.

thorized to stop travelers unlawfuly transporting liquor.[67] In preventing the escape of one arrested for a misdemeanor, a sheriff or constable may not use greater force than would be proper in effecting the arrest and may not take life or inflict great bodily harm except to prevent like injury to himself.[68] A sheriff may be liable for false imprisonment where he refuses to permit one arrested for a misdemeanor to give an appearance bond.[69]

False arrest. The general rules as to the liability of a public officer who makes an unlawful arrest, as discussed in False Imprisonment §§ 14-35, have been applied to sheriffs and constables.[70]

Injury to property in making arrest. An officer who, in making a lawful arrest of a person attempting to escape in an automobile, shoots at the tires of the automobile in order to stop it is not liable for injury to the car.[71]

Taking arrested person before wrong magistrate. A sheriff who arrested a person for drunkenness and took him before a trial justice in an adjoining town, instead of one in the town wherein the arrest was made, as required by statute, has been held to be a trespasser[72] and liable for false imprisonment.[73]

Seizure and detention of property on making arrest for larceny. An officer on arresting a person charged with larceny has no right to take from him property other than that alleged to have been stolen, and if he does so is liable in damages.[74] So, although an officer serving a warrant for larceny may lawfully take from defendant goods alleged to have been stolen,[75] he is liable for conversion if he refuses to return them on defendant's being discharged,[76] and he is not excused from liability because complainant in the criminal process had obtained judgment against him on his default for conversion of the property, and taken it away from him on execution, where complainant was not in fact the owner of the property.[77]

Furnishing erroneous information. Where a surety on a poor debtor's bond, before the condition had expired, applied to the sheriff for information as to its date, and the officer stated to him a time later than its true one, the surety could not maintain an action against the officer in consequence of such erroneous statement unless he knew it to have been false or made it with an intention to deceive.[78]

Failure to record assignment Where a deed of assignment of an insolvent person, executed in pursuance of the assignment laws, in favor of the sheriff as assignee, is rendered void because of the latter's failure to have it filed and recorded within the time required by law, and by reason thereof the property of the insolvent is lost to the general creditors, the sheriff is liable to such creditors;[79] and it is not a prerequisite to the maintenance of an action by a creditor who has thus suffered loss that he should have his claim against the insolvent filed with, and approved by, the county court.[80]

Trespass. A sheriff who trespasses on the property of one engaged in violating the law may be civilly liable for the trespass.[81]

J. PROTECTION AFFORDED BY PROCESS, JUDGMENT, OR ORDER OF COURT

§ 122. In General

a. General rule
b. Subsequent action of court or party

a. General Rule

It is a well-established general rule that the process, judgment, or order of a court having apparent jurisdiction, if valid on its face, affords complete protection to a sheriff or constable from liability for any proper or necessary act done in its execution.

It is well established as a general rule that the process, judgment, or order of a court having apparent jurisdiction, if valid on its face, affords complete protection to a sheriff or constable from liability for any proper or necessary act done in its execution,[82] and the officer need not look be-

67. Wash.—Mitchell v. Hughes, supra.

68. Ark.—Whitlock v. Wood, 101 S.W.2d 950, 193 Ark. 695, 110 A.L.R. 955
Ky.—Head v. Martin, 3 S.W. 622, 85 Ky. 480, 9 Ky.L. 45

69. Tex.—King v. Roberts, 84 S.W.2d 718, 125 Tex. 623

70. Ariz.—Platt v. Greenwood, 69 P.2d 1032, 50 Ariz. 158
W.Va.—State ex rel. Verdis v. Fidelity & Casualty Co. of New York, 199 S.E. 884, 120 W.Va. 593.
Liability for wrongful arrest under civil process see supra § 62.

71. Ark.—Edgin v. Talley, 276 S.W. 591, 169 Ark. 662, 42 A.L.R. 1194.

72. Mass.—Papineau v. Bacon, 110 Mass. 319.

73. Tex.—King v. Roberts, 84 S.W.2d 718, 125 Tex. 623.

74. Mass.—King v. Ham, 6 Allen 298.
57 C.J. p. 899 note 32.

75. Mass.—Fitzgerald v. Jordan, 11 Allen 128.

76. Mass.—Fitzgerald v. Jordan, supra.

77. Mass.—Fitzgerald v. Jordan, supra.

78. Me.—Moulton v. Jose, 25 Me. 76

79. Neb.—Huddleson v. Polk, 102 N.W. 464, 70 Neb. 492.

80. Neb.—Huddleson v. Polk, supra.

81. Ala.—Wiggins v. State, 143 So. 188, 25 Ala. App. 192

82. U.S.—Allen v. Clark, D.C.Cal., 22 F.Supp. 898.

yond the face of the judgment or order.[83] A sheriff or constable is protected by anything which may properly be considered as process or judgment,[84] even a municipal ordinance under which the officer acts,[85] but he is not protected by matter not properly considered process or judgment of the court.[86] Thus an instrument signed by a sheriff, directing his deputy to rearrest a defendant for failure of his bail to justify, is not process, within the rule that process regular on its face protects those acting under it.[87]

Statutes protecting officers from liability in the execution of process are to be liberally construed.[88] Where the statute provides for the foreclosure of chattel mortgages by notice of sale, a sheriff who seizes and sells under such a notice incurs no liability to the mortgagor, although the latter protested against the sheriff's action, where he did not avail himself of a method provided by statute for preventing an unauthorized foreclosure.[89] A sheriff is not protected where he acts in other than his official capacity.[90] It has been held that the protection from liability afforded by apparently valid process is personal to the officer executing it, and affords no shelter to a wrongdoer under color of whose process the officer is called on to act,[91] but it has also been held that, where a sheriff acts in response to a mandate of the court, the party at whose instance the mandate was issued is not responsible for his acts.[92]

Protection of deputies and special officers. A deputy sheriff or constable executing process is entitled to the same protection in respect of his acts in connection therewith as would be afforded his principal,[93] and this rule applies to a special constable appointed to make an arrest.[94]

Protection of coroner acting as sheriff A coroner performing the duties of sheriff is entitled to the same protection in the execution of apparently valid process as would be accorded the sheriff.[95]

Protection of persons assisting sheriff. Persons aiding an officer in the execution of apparently valid process are protected from liability, even though the process was in fact invalid, where they have acted in good faith under the command of the officer,[96] and the property levied on was actually taken by the officer under his process,[97] but if they were mere volunteers in the service or acted officiously they must show a valid process in order to escape liability,[98] and if the process is void on its face it furnishes no protection even though the person aiding the officer did so at his command.[99] A person assisting an officer, in order to be protected, need not remain in the actual presence of the officer, if the two are in the same neighborhood,

Ark.—State Life Ins. Co. v. Grave, 79 S.W.2d 268, 190 Ark. 460.
Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.
La.—Saia v. Phœnix Building & Homestead Ass'n, 162 So. 640, 182 La. 844—Pembrook v. Goldman, App., 176 So. 888.
Minn.—Robinette v. Price, 8 N.W.2d 800, 214 Minn. 521.
Mont.—Harri v. Isaac, 107 P.2d 137, 111 Mont. 152.
N.J.—Galka v. Tide Water Associated Oil Co., 30 A.2d 881, 133 N.J.Eq. 137.
N.Y.—Land Finance Corporation v. Jacoby, 272 N.Y.S. 318, 151 Misc. 159, affirmed 275 N.Y.S. 890, 243 App.Div. 530, affirmed 196 N.E. 600, 267 N.Y. 600—**Corpus Juris cited in** Universal Credit Co. v. Knights, 261 N.Y.S. 252, 258, 145 Misc. 876—Treiber v. Mauriocourt, 258 N.Y.S. 206, 143 Misc. 741—Deitz v. Mangano, 30 N.Y.S.2d 8.
Wash.—Cavitt v. McCrite, 79 P.2d 637, 194 Wash. 684.
57 C.J. p. 902 note 98.
Wrongful acts see infra § 127.

83. Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.
La.—Pembrook v. Goldman, App., 176 So. 888.
Minn.—Robinette v. Price, 8 N.W.2d 800, 214 Minn. 521.

Factual allegations
A constable or sheriff need not inquire into the verity of factual allegations on which litigant bases his right to coercive process.—Pembrook v. Goldman, La.App., 176 So. 888.

Statements in court order
Sheriff need not search records to dispute specific statements in court order directing him to perform ministerial duty.—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.

84. Ky.—Worland v. Sutten, 3 Dana 477.
57 C.J. p. 917 note 78.

85. Pa.—Cessna v. Clouse, 52 Pa.Super. 442.
57 C.J. p. 917 note 79.

86. Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.

Ex parte approval of bond
Sheriff who released property seized under writ of attachment on an insufficient bond is not relieved of liability by the court's ex parte approval of the bond.—Sparks v. Buckner, supra.

87. N.Y.—Arteaga v. Flack, 2 N.Y.Civ.Proc. 152.

88. Pa.—J. B. Van Sciver Co. v. New Irving Hotel, 148 A. 518, 298 Pa. 463—Jones v. Hughes, 5 Serg. & R. 299, 9 Am.D. 364.

89. Wash.—Mack v. Doak, 96 P. 825, 50 Wash. 119.

90. N.Y.—Grayrock Land Co. v. Wolff, 121 N.Y.S. 953, 67 Misc. 153.

91. Ill.—Housh v. People, 75 Ill. 487—Tuttle v. Wilson, 24 Ill. 553.

92. N.Y.—Treiber v. Mouriocourt, 258 N.Y.S. 206, 143 Misc. 741.

93. Ky.—Enterprise Mfg. Co. v. Reed, 185 S.W. 80, 169 Ky. 676.
57 C.J. p. 904 note 6.
Liabilities of deputies generally see supra § 53.

94. Ohio.—Carothers v. Scott, Tapp. 227.

95. N.Y.—Manning v. Keenan, 73 N.Y. 45.
Liabilities of coroner acting as sheriff generally see supra § 53.

96. Minn.—Dahl v. Halverson, 226 N.W. 405, 178 Minn. 174.
57 C.J. p. 904 note 11.
Liabilities of persons aiding officers generally see supra § 53.

97. N.H.—Johnson v. Stone, 40 N.H. 197, 75 Am.D. 706.
57 C.J. p. 904 note 12.

98. Ky.—Hunt v. Ballew, 9 B.Mon. 390.
57 C.J. p. 904 note 13.

99. La.—McKinney v. Chambliss, 3 La.Ann. 577.

and acting in concert, the officer giving orders, and the other obeying them.[1]

Authority to execute process. A sheriff or constable who seeks to justify his acts by a claim that he acted under legal process must show that he was authorized to execute such process,[2] since, although process is valid and properly issued, it can afford no protection to an officer who is not authorized to execute it.[3]

Necessity for showing justification. In case of an action against the officer by the party against whom process is issued, the process itself, being valid on its face, constitutes a complete justification,[4] but in case of a suit by a third person claiming title to the property seized, under the party against whom process issued, which title is contested on the ground of fraud, the officer must, in addition to showing that he acted under such process, show that he acted for, or on behalf of, a creditor.[5] So, under such circumstances, when the officer claims to have acted under process of execution he must produce the execution[6] and the judgment on which it issued,[7] and such judgment must be valid in order to entitle the officer to protection.[8] Some authorities, however, have held that, where a third person claims property taken under a writ regular on its face, the sheriff need not, in order to justify the seizure, produce the judgment[9] unless he has occasion to rely thereon.[10] It has also been held that voluntary assignees of a debtor, who became such after a levy under an execution, are not strangers within the rule which requires an officer justifying against a stranger to show a judgment as well as an execution,[11] and such an assignee cannot impair the sheriff's right to retain the goods levied on by attacking the judgment[12]

If the officer claims to have acted under mesne process in seizing the property claimed by a stranger to the process, the debt must be proved by some competent evidence,[13] and the officer must show a valid writ,[14] regularly issued on proper proceedings,[15] by a court having jurisdiction of the parties as well as of the subject matter of the suit,[16] and, after trespass has been brought by the person claiming title, defects in the service of the process cannot be cured by taking out a new writ.[17] Where, however, a sale by the debtor of property seized under mesne process is merely colorable, or only a transfer of possession merely for concealment, with no intention of transferring the title, the writ alone, if regular on its face and emanating from a tribunal having jurisdiction of the subject matter, is a full protection to the officer.[18]

Return of process. In order to be protected from liability for acts done in the execution of mesne process, the sheriff must make his return thereon[19] within the time prescribed by the statute,[20] or at least show a legal excuse for his failure to do so;[21] but a return is not necessary to entitle the officer to protection in the execution of final process.[22] A search warrant reciting the essential facts of a complaint as enumerated in the statute, and otherwise complying with the provision requiring a return where the person or thing searched for is found, and bearing the return statement "nothing found," is sufficient to protect the officer executing it, although it was not returned into court[23] So, where an officer attaches property on a justice's

1. Ga.—Robinson v. State, 18 S.E. 1018, 93 Ga. 77, 44 Am.S.R. 127.

2. Mo.—Corpus Juris cited in Adams v. Stockton, 151 S.W.2d 127, 128, 235 Mo.App. 1183.
N.Y.—Copley v. Rose, 2 N.Y. 115.

3. Ind.—Benninghoof v. Finney, 22 Ind. 101
57 C.J. p. 909 note 64.

4. Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.
R.I.—McDonald v. Brown, 199 A. 750, 61 R.I. 40
57 C.J. p. 910 note 74.

5. Okl.—Masters v. Teller, 56 P. 1067, 7 Okl. 668.
57 C.J. p. 910 note 75.

6. N.Y.—Koland v. Van Aken, 290 N.Y.S. 768, 248 App.Div. 918.
57 C.J. p. 911 note 76.

7. N.Y.—Koland v. Van Aken, supra.
57 C.J. p. 911 note 77.

8. Mont.—Palmer v. McMaster, 19 P. 585, 8 Mont. 186.
57 C.J. p. 911 note 78.
Validity of judgment generally see infra § 125.

9. S.C.—Traylor v. McKeown, 46 S.C.L. 251.
57 C.J. p. 911 note 79.

10. Del.—Davis v. White, 6 Del. 228

11. N.Y.—Heath v. Westervelt, 4 N.Y. Super. 110.

12. N.Y.—Heath v. Westervelt, supra

13. N.H.—Sanford Mfg. Co. v. Wiggin, 14 N.H. 441, 40 Am.D. 198.
57 C.J. p. 911 note 85.

14. Kan.—Huey v. Brimer, 58 P. 485, 9 Kan.App. 149.
57 C.J. p. 912 note 86.

15. Cal.—Laughlin v. Thompson, 18 P. 330, 76 Cal. 287.
57 C.J. p. 912 note 87.

16. Neb.—Hakanson v. Brodke, 53 N.W. 1033, 36 Neb. 42.
57 C.J. p. 912 note 88.
Jurisdiction of court generally see infra § 123.

17. Mich.—Fairbanks v. Bennett, 17 N.W. 696, 52 Mich. 61.

18. Colo.—Buddee v. Spangler, 20 P. 760, 12 Colo. 216.
57 C.J. p. 912 note 90.

19. Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.
57 C.J. p. 910 note 66.

20. Fla.—Dowling v. Bowden, 6 So. 765, 25 Fla. 712.
57 C.J. p. 910 note 67.

21. Fla.—Dowling v. Bowden, supra.
57 C.J. p. 910 note 68.

22. Me.—Corpus Juris cited in Trafton v. Hoxie, 180 A. 800, 802, 134 Me. 1.
57 C.J. p. 910 note 69.

23. Me.—Zanoni v. Cyr, 104 A. 629, 117 Me. 399.

writ, and, while the case is pending on appeal in the county court, sells the property by request of the creditor, he is not a trespasser ab initio because he makes his return to the magistrate instead of to the county clerk.[24] It has been held that the failure of a sheriff to make timely return after execution of a writ of replevin does not destroy the validity of the writ ab initio, so as to render the sheriff liable in trespass for taking the property under authority of the writ.[25] A mistake or omission in return on mesne process does not render the officer liable as a trespasser ab initio.[26]

Particular process, judgments, or orders. The general rules with respect to the protection of the officer, and the exceptions to, and qualifications of, such rules, have been applied to orders for the sale of property,[27] or directing the disposition of the proceeds of sales,[28] orders for the payment of money into court,[29] orders of county authorities requiring a sheriff to open a road,[30] warrants for sale,[31] warrants of arrests,[32] writs of capias ad satisfaciendum,[33] attachments against defaulting witnesses,[34] orders for the discharge of prisoners,[35] possessory warrants,[36] search warrants,[37] distress warrants,[38] warrants for the collection of taxes,[39] writs of assistance,[40] writs of attachment,[41] writs of execution,[42] writs of possession,[43] writs of forcible entry and detainer,[44] writs of, or requisitions in, replevin,[45] writs of restitution,[46] writs of sequestration,[47] and writs of habeas corpus ad testificandum.[48]

b. Subsequent Action of Court or Party

A sheriff who executes the mandate of a writ is protected thereby regardless of the subsequent action of the court with respect to the matter.

A sheriff who executes the mandate of a writ is protected thereby regardless of the subsequent action of the court with respect to the matter.[49] Thus a sheriff is protected where he seizes goods under a valid attachment, although it is subsequently vacated.[50] The omission to take out execution on a judgment within the time during which an attachment remains effective does not render the officer who levied the attachment a trespasser ab initio,[51] and a sheriff who levies under mesne process is not deprived of protection by irregularities in the subsequent proceedings resulting in the judgment.[52] So, where a search warrant, valid at the time it was issued, has been legally executed by an officer, he is not affected by an omission of the magistrate in the subsequent proceedings in the case.[53] A sheriff is protected in enforcing a decree from which an ap-

24. Vt.—Bentley v. White, 54 Vt 564.

25. Iowa.—Gibson v. Collings, 205 N W. 304, 200 Iowa 721.

26. N H —Smith v Moore, 17 N H 380—Parker v. Pattee, 4 N H. 530.

27. U S.—Conner v. Long, N.Y., 104 U S 228, 26 L Ed 723
57 C J. p 916 note 56.

28. U S —O'Brien v Weld, N.Y., 92 U S. 81, 23 L Ed 675.
N Y —American Hosiery Co. v. Riley, 12 Abb.N Cas 329.

29. N.Y.—Acker v. Ledyard, 8 N Y. 62.

30. Tex —Morgan v. Oliver, 129 S.W. 156, 60 Tex.Civ App 210.

31. Miss —Rigby v Whitten, 18 So. 2d 152, 196 Miss 661.

32. Mass.—Jordan v. C I. T. Corp., 19 N.E.2d 5, 302 Mass. 281.
Minn —Hoppe v Klapperich, 28 N W. 2d 780, 224 Minn 224, 173 A L R. 819.
57 C J. p 916 note 60.

33. Mo —State v. Hamilton, 9 Mo 794.
57 C J. p 916 note 61.

34. Wis.—Holz v Rediske, 92 N.W 1105, 116 Wis 353

35. N.Y.—Land Finance Corporation v Jacoby, 272 N.Y S. 318, 151 Misc 159, affirmed 275 N.Y.S. 899, 243 App Div. 530, affirmed 196 N E 600, 267 N Y. 600—Deitz v. Mangano, 30 N Y S 2d 8.
57 C J. p 916 note 64.

36. Ga —Hearell v Vann, 108 S.E 808, 27 Ga App 430.
57 C.J. p 916 note 65.

37. Ala —Walker v. Graham, 172 So 655, 233 Ala. 539
Okl —Moore v. Kilmer, 90 P.2d 892, 185 Okl 158
Utah —Allen v Holbrook, 135 P 2d 242, 103 Utah 319, 158 A L R 224, modified on other grounds 139 P.2d 233, 103 Utah 599.
57 C.J. p 916 note 66.

38. Ky.—Roberts v. Tennell, 4 Litt 286
57 C.J. p 916 note 67.

39. N.Y.—Woolsey v. Morris, 96 N. Y. 311.
57 C J. p 916 note 68.

40. Mont —Bingham v. National Bank of Montana, 72 P 2d 90, 105 Mont. 159, 113 A L R 315
Okl —Pappe v Law, 35 P.2d 941, 169 Okl 15, 95 A.L.R 939.
Or.—Skulason v Pratt, 130 P.2d 17, 169 Or 617
57 C J. p 916 note 69.

41. U.S —Matthews v. Densmore, Mich., 3 S.Ct. 126, 109 U.S. 216, 27 L.Ed 912.
57 C.J p 916 note 70.

42. U S.—Smith v. Miles, Super.Ark., 22 F Cas No 13,079a, Hempst 34.
57 C J. p 916 note 71.

43. Mass.—Fiske v. Chamberlin, 103 Mass. 495.
57 C.J. p 917 note 72.

44. Ky.—Ackerson v Semple, 173 S. W. 1153, 163 Ky. 395.
Tex —Ferguson v. Barnes, Civ.App., 274 S.W. 277.

45. R.I —McDonald v Brown, 199 A. 750, 61 R I. 40.
57 C J. p 917 note 74.

46. Wash —Johnson v Nelson, 263 P. 949, 146 Wash 500, 56 A.L R 1035.
57 C.J. p 917 note 75

47. Tex —Vickery v. Crawford, 55 S. W 560, 93 Tex. 273, 77 Am.S R 891, 49 L R.A. 773
57 C.J. p 917 note 76.

48. N.Y —Wattles v. Marsh, 5 Cow 176

49. Mo —State v Spencer, 30 Mo App. 407.
57 C.J. p 913 note 9

50. N.Y.—Hess v. Hess, 22 N E 956, 117 N.Y. 306.

51. Mass —McGough v. Wellington, 4 Allen 502.

52. N.Y —Grady v. Bowe, 11 Daly 259
Vt —Eaton v. Cooper, 29 Vt. 444.

53. Conn.—Gray v. Davis, 27 Conn 447.

peal is pending where enforcement of the decree has not been stayed.[54]

Effect of supersedeas or stay. A sheriff is protected in acts done in the execution of process in his hands, although such process has been superseded, where he had no notice from the proper source of the supersedeas[55] and there is nothing on the face of the process to show such fact;[56] but he is entitled to no protection in respect of anything which he does after receiving notice of the supersedeas[57] if the notice is sufficient[58] and proceeds from the same authority as the process.[59] An officer is not protected where by his fraud a stay of proceedings is prevented.[60]

A supersedeas or stay order protects the officer from any liability for not proceeding with the process[61] if such supersedeas or order is sufficient,[62] and it has been held that the officer is protected although the stay order is issued by two justices, whereas it should have been issued by the clerk.[63] A stay order, for the purpose of protecting a sheriff, takes effect from the time of its service on him.[64]

Ultimate success of party at whose instance process issued. The right of the sheriff to protection in proper acts done in the execution of mesne process valid on its face does not depend on the ultimate success in the action of the party at whose instance the process issued,[65] and an officer is not deprived of protection in executing final process by the subsequent reversal of the judgment under which he has acted.[66] It has been held that, where, on appeal, an order vacating the attachment is reversed, the erroneous order of the lower court, vacating the attachment, is a protection to the sheriff who acted on it while it was in force,[67] but it has also been held that a constable who returns replevied property to defendant under instructions of the justice of the peace may be liable where the order of the justice of the peace is not a final judgment and is reversed on appeal.[68]

§ 123. Jurisdiction of Court

The process, order, or judgment of a court cannot protect the sheriff or constable executing it unless the court had jurisdiction of the matter.

The process, order, or judgment of a court cannot protect the sheriff or constable executing it unless the court had jurisdiction of the matter in which it acted[69] and authority to issue the process under which the officer justifies,[70] although the officer acted in good faith in proceeding under it.[71] Where the court had jurisdiction of the subject matter and the process shows apparent jurisdiction in the particular case, the officer is protected[72] if he acted in good faith,[73] although the court did not in fact acquire jurisdiction[74] or although the court

54. Wash.—Choukas v. Severyns, 99 P.2d 942, 3 Wash.2d 71, opinion adhered to 103 P.2d 1106, 3 Wash.2d 71

55. Ga.—King v. Haley, 90 S.E. 715, 146 Ga. 85.
57 C.J. p. 913 note 13.

56. Ga.—King v. Haley, 90 S.E. 715, 146 Ga. 85.

57. Ala.—Morrison v. Wright, 7 Port. 67
Ga.—Henderson v. Maddox, 185 S.E. 153, 53 Ga. App. 127.

58. Mich.—Foster v. Wiley, 27 Mich. 244, 15 Am. R. 185
57 C.J. p. 913 note 16

59. Pa.—Leonard v. Dillon, 76 Pa. 44

60. Wis.—Streeter v. Frank, 4 Chandl. 9, 3 Pinn. 285.
57 C.J. p. 913 note 18.

61. N.C.—Massengill v. Lee, 44 S.E. 2d 356, 228 N.C. 35
57 C.J. p. 913 note 19
Liability for failure to execute process generally see supra § 56 et seq.

62. Ala.—Walker v. Hunter, 36 Ala. 125.
57 C.J. p. 913 note 20.

63. Mo.—State v. Ferguson, 13 Mo. 166.

64. N.Y.—Bernheim v. Daggett, 12 Abb. N. Cas. 316, affirmed 84 N.Y. 670.
57 C.J. p. 913 note 22.

65. Minn.—Robinette v. Price, 8 N.W.2d 800, 214 Minn. 521.
57 C.J. p. 913 note 23

66. Minn.—Robinette v. Price, supra
57 C.J. p. 913 note 24

67. N.Y.—Clark v. Smith, 68 N.Y.S. 39, 57 App. Div. 524
57 C.J. p. 914 note 25

68. Ill.—People, for Use of Vancil Motor Co. v. Weaver, 40 N.E.2d 83, 313 Ill. App. 317.

69. U.S.—Allen v. Clark, D.C. Cal., 22 F. Supp. 898
Ala.—Rasmus v. Schaffer, 160 So. 244, 230 Ala. 245.—Pickett v. Richardson, 138 So. 274, 223 Ala. 683.
Conn.—**Corpus Juris cited in** Ætna Ins. Co. v. Blumenthal, 29 A.2d 751, 754, 129 Conn. 545.
57 C.J. p. 904 note 17.

Waiver of objection to jurisdiction
A constable is not liable for seizing a motor vehicle, under the authority of a writ of replevin which by mistake has the venue laid in the wrong county, on the theory that the justice of the peace before whom the case is brought does not have jurisdiction of the person of defendant, when defendant appears in the case and impliedly waives the objection to jurisdiction.—People v. White, 263 Ill.App. 425

70. Ala.—Pickett v. Richardson, 138 So. 274, 223 Ala. 683
57 C.J. p. 905 note 18.

Colorable authority
In order to afford protection to executive officer in execution of process, issuing court must have jurisdiction, or colorable authority.—Pickett v. Richardson, supra.

71. Ga.—Hamer v. White, 34 S.E. 1001, 110 Ga. 300.—Minhinnett v. Jackson, 164 S.E. 96, 45 Ga. App. 207.

72. Ala.—Walker v. Graham, 154 So. 806, 228 Ala. 574.
Conn.—Ætna Ins. Co. v. Blumenthal, 29 A.2d 751, 129 Conn. 545
57 C.J. p. 905 note 21.

73. Cal.—Magnaud v. Traeger, 226 P. 990, 66 Cal. App. 526
Ill.—People v. Zimmer, 96 N.E. 529, 252 Ill. 9.

74. Wash.—Johnson v. Nelson, 263 P. 949, 146 Wash. 500, 56 A.L.R. 1035.
57 C.J. p. 905 note 23.

had lost jurisdiction before the process was issued.[75] It has been held that it is sufficient if the court has general jurisdiction to issue such process, even though it may not have jurisdiction in the particular case,[76] and that, where the jurisdiction of the subject matter depends on matters of fact, the existence or nonexistence of which cannot be determined from the law and which is not of public notoriety, an officer is not bound to ascertain it at his peril unless the law has clearly given him the right to demand the information and to determine the fact.[77]

Necessity of affirmative showing. Where the authority of a court to make a particular order is not appurtenant to its general jurisdiction but is derived solely from a statute which requires that certain proceedings shall be taken in order to warrant the granting of such an order, the sheriff cannot justify under an order simply directing what is to be done but must show that all proceedings were taken which the statute requires in order to give jurisdiction in the particular case,[78] but if the order recites facts showing that such proceedings were taken he may rely on such recitals as proof thereof and is justified in acting under the order, although the proceedings were never in fact taken.[79] It has also been held that, where the power of a justice of the peace to issue an order of delivery depends on the amount and the law requires the value of the property to be stated in the order, an order which does not state the value affords no protection.[80]

§ 124. Regularity of Proceedings

Defects or irregularities in the proceedings leading to the judgment, order, or process do not deprive the sheriff or constable of protection in executing the order or process.

Defects or irregularities in the proceedings leading up to a judgment or order[81] or to the issuance of process[82] do not deprive the sheriff or constable of protection in executing such process or order. A sheriff or constable is not bound to inquire into the validity of the proceedings forming the basis of the process which is placed in his hands for execution.[83]

§ 125. Validity of Judgment or Order

A sheriff or constable is not deprived of protection by reason of the fact that the order under which he acts or the judgment on which process is based is erroneous or invalid and voidable.

A sheriff or constable is not deprived of protection by reason of the fact that the order under which he acts or the judgment on which the process is based is erroneous,[84] or invalid and voidable,[85] provided, as discussed supra § 123, the court had jurisdiction of the subject matter, and the judgment or order is apparently valid.[86] It has also been held that the officer will be protected even when the judgment or order is void for any cause other than a lack of jurisdiction of the subject matter.[87] However, the sheriff or constable is not protected where the writ or the papers attached thereto give notice of the defects in the proceedings[88] where the order is void on its face[89] or where the officer has acted willfully with the intent to oppress defendant.[90]

Necessity for amendment of judgment. It has been held that a sheriff cannot justify a wrongful seizure of property under an execution in which the debtor's name is misstated until the judgment

75. Wis.—Holz v. Rediske, 92 N.W. 1105, 116 Wis. 353.

76. Ala.—Walker v. Graham, 154 So. 806, 228 Ala. 574—Wilson v. Sawyer, 37 Ala. 631.

77. Mich.—People v. Rix, 6 Mich. 144
57 C.J. p. 905 note 20.

78. N.Y.—Shaffer v. Riseley, 20 N.E. 630, 114 N.Y. 23—Seward v. Wales, 58 N.Y.S. 42, 40 App. Div. 539, affirmed 60 N.E. 1120, 167 N.Y. 538.

79. N.Y.—Shaffer v. Riseley, 20 N.E. 630, 114 N.Y. 23
57 C.J. p. 906 note 29.

80. Ark.—McClure v. Hill, 36 Ark. 268

81. U.S.—Allen v. Clark, D.C. Cal., 22 F.Supp. 898
Minn.—Hoppe v. Klapperich, 28 N.W. 2d 780, 224 Minn. 224, 173 A.L.R. 819—Robinette v. Price, 8 N.W. 2d 800, 214 Minn. 521.
Mont.—Harri v. Isaac, 107 P.2d 137, 111 Mont. 152.
N.Y.—Lang v. Dreyer, 9 N.Y.S. 2d 970, 170 Misc. 207.
Pa.—Smith v. Houghwot, 1 A.2d 517, 132 Pa. Super. 501.
57 C.J. p. 906 note 31.

82. Mont.—Harri v. Isaac, 107 P.2d 137, 111 Mont. 152
57 C.J. p. 906 note 32.

83. Minn.—Robinette v. Price, 8 N.W. 2d 800, 214 Minn. 521.
Pa.—Taggart v. Schrumpt, 46 Pa. Dist. & Co. 282
57 C.J. p. 906 note 36.

84. Minn.—Robinette v. Price, 8 N.W. 2d 800, 214 Minn. 521.
57 C.J. p. 906 note 37.

Statute limiting force of judgment

An officer acting under a valid execution issued out of a justice court pursuant to a valid and final judgment in a forcible entry and detainer action does not act at his peril in performing his duties under the writ by virtue of statute providing that judgments either before a justice or in the district court, in actions brought under the article dealing with forcible entry and detainer, shall not be a bar to any other action brought by either party.—Schuman v. Wallace, 104 P.2d 432, 187 Okl. 535

85. Minn.—Robinette v. Price, 8 N.W. 2d 800, 214 Minn. 521
57 C.J. p. 906 note 38.

86. Pa.—Breckwoldt v. Morris, 24 A. 300, 149 Pa. 291
57 C.J. p. 907 note 40.

87. Tex.—Wilson v. Moore, 122 S.W. 577, 57 Tex.Civ.App. 418.
57 C.J. p. 907 note 42.

88. Ga.—Wilbur v. Stokes, 43 S.E. 856, 117 Ga. 545

89. N.Y.—Politano v. Jacoby, 265 N.Y.S. 653, 240 App.Div. 733, affirmed 189 N.E. 703, 263 N.Y. 573.

90. Iowa.—Thompson v. Jackson, 61 N.W. 1004, 93 Iowa 376, 27 L.R.A. 92.

and all the proceedings are amended in a direct action for that purpose.[91]

Judgment or order based on unconstitutional statute. A judgment or order of court will protect an officer in what he does pursuant thereto notwithstanding the statute under which the judgment was rendered or the order made is unconstitutional.[92] On the other hand, it has been held that an officer is not protected in executing process to enforce a judgment or order founded on an unconstitutional statute.[93]

Necessity for entry of order or judgment. It has been held that an action will not lie against a sheriff for the payment of money pursuant to an order for judgment before the judgment is entered unless the order is set aside;[94] but there is also authority for the view that a sheriff cannot justify under an execution which was delivered to him prior to the docketing of the judgment on which it is based,[95] although he is not deprived of protection by the fact that the execution bears a date prior to the docketing of the judgment where it was not delivered to him until after such time.[96]

§ 126. Validity of Process

It is sufficient for the protection of a sheriff or constable that the process under which he acted should be valid on its face even though the process may be in fact irregular and voidable.

It is sufficient for the protection of a sheriff or constable that the process under which he acted should be valid on its face,[97] even though the process may be in fact irregular and voidable,[98] where he acted in good faith,[99] or even where he acted collusively and in bad faith,[1] or at the interest and request of plaintiff in the writ.[2] It has been held that even though process be in fact void, if it does not on its face carry knowledge of the fact to the officer but is regular on its face, he is protected in levying thereunder.[3] The sheriff may limit his inquiry to the face of the writ[4] and is not responsible

91. Minn.—Casper v. Klippen, 63 N.W. 737, 61 Minn. 353, 52 Am.S.R. 604
92. U.S.—Norris v. McCanna, C.C. Mich., 29 F. 757
Iowa—Webster v. Reid, Morr. 467.
93. Me.—Warren v. Kelley, 15 A. 49, 80 Me. 512
57 C.J. p. 907 note 48.
94. Minn.—Gribble v. Wagener, 82 N.W. 640, 79 Minn. 306.
57 C.J. p. 909 note 60.
95. S.D.—Carson v. Fuller, 78 N.W. 960, 11 S.D. 502, 74 Am.S.R. 823
96. S.D.—McDonald v. Fuller, 77 N.W. 581, 11 S.D. 355, 74 Am.S.R. 815
97. U.S.—Allen v. Clark, D.C.Cal., 22 F.Supp. 898.
Ala.—Walker v. Graham, 172 So. 655, 233 Ala. 539.
Ark.—State Life Ins. Co. v. Graue, 79 S.W.2d 268, 190 Ark. 460.
Ind.—Hall v. Smith, 176 N.E. 558, 92 Ind.App. 509.
La.—Fontenot v. Stark, App., 192 So. 550.
Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.
Mass.—Roseman v. Korb, 40 N.E.2d 255, 311 Mass. 75—Jordan v. C. I. T. Corp., 19 N.E.2d 5, 302 Mass. 281—David v. Larochelle, 5 N.E.2d 571, 296 Mass. 302
Minn.—Robinette v. Price, 8 N.W.2d 800, 214 Minn. 521.
Miss.—Rigby v. Whitten, 18 So.2d 152, 196 Miss. 661
Mo.—**Corpus Juris cited in** Adams v. Stockton, 151 S.W.2d 127, 128, 235 Mo.App. 1183.
Mont.—Harri v. Isaac, 107 P.2d 137, 111 Mont. 152.
N.D.—Gilbertson v. Helle, 290 N.W. 269, 69 N.D. 735.
Okl.—Moore v. Kilmer, 90 P.2d 892, 185 Okl. 158—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939
Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.
Pa.—Nelson v. Wick, 53 Pa.Dist. & Co. 269, 3 Lawrence L.J. 215—Taggart v. Schrumpf, 46 Pa.Dist. & Co. 282
R.I.—McDonald v. Brown, 199 A. 750, 61 R.I. 40.
Utah—Allen v. Holbrook, 135 P.2d 242, 103 Utah 319, 158 A.L.R. 224, modified on other grounds 139 P.2d 233, 103 Utah 599
Wash.—Cavitt v. McCrite, 79 P.2d 637, 194 Wash. 684.
Wis.—Kalb v. Luce, 291 N.W. 841, 234 Wis. 509.
57 C.J. p. 907 note 50.

Requirements for regularity of process

(1) All that is required to make process regular on its face, so as to protect a sheriff acting pursuant thereto, is that it must proceed from a court having jurisdiction of the subject matter and contain nothing which ought reasonably to apprise the sheriff that it was issued without authority—Robinette v. Price, 8 N.W.2d 800, 214 Minn. 521—57 C.J. p. 907 note 50 [a].

(2) A process under which a sheriff acts need not show jurisdiction of the person affected to afford the sheriff protection and justification for his acts in executing it.—Robinette v. Price, supra.

Declarations of officer

The lawfulness of a seizure of property does not depend on what the officer declared, but on the sufficiency of his authority, and hence, where the officer justifies under valid process, it is immaterial what he said at the time of the seizure.—State v. Elrod, 28 N.C. 250.

98. Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.
Mont.—Bingham v. National Bank of Montana, 72 P.2d 90, 105 Mont. 159, 113 A.L.R. 315.
57 C.J. p. 908 note 51.
99. La.—Saia v. Phoenix Building & Homestead Ass'n, 162 So. 640, 182 La. 844
Wis.—Kalb v. Luce, 291 N.W. 841, 234 Wis. 509.
1. Ky.—Moser v. Summers, 189 S.W. 715, 172 Ky. 553.
Minn.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 173 A.L.R. 819.
2. Wash.—Johnson v. Nelson, 263 P. 949, 146 Wash. 500, 56 A.L.R. 1035.
3. Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437.
N.Y.—Land Finance Corporation v. Jacoby, 272 N.Y.S. 318, 151 Misc. 159, affirmed 275 N.Y.S. 890, 243 App.Div. 530, affirmed 196 N.E. 600, 267 N.Y. 600
57 C.J. p. 908 note 54.
4. Cal.—First Nat. Bank v. McCoy, 297 P. 571, 112 Cal.App. 665.
La.—Pembrook v. Goldman, App., 176 So. 888
Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.
Mass.—David v. Larochelle, 5 N.E.2d 571, 296 Mass. 302
Minn.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 173 A.L.R. 819
Pa.—Taggart v. Schrumpf, 46 Pa.Dist. & Co. 282.

for anything of which the writ gives no notice and of which he does not have actual knowledge.[5]

A sheriff is not protected in obeying a mandate of a writ or order of court which is on its face void[6] or improper and unauthorized.[7] The process or order of court affords no protection where it shows upon its face that the court did not have jurisdiction[8] or exceeded its authority in issuing the process,[9] or where the order is made in proceedings to which the person affected and complaining was not made a party[10] Where a writ of restitution describes the land as a part of a certain tract, but fails to state what part of it, it is void for uncertainty, and will not protect an officer in evicting another under it,[11] but a writ of restitution, voidable by reason of having been issued while a motion for a new trial was pending, constitutes absolute justification to the officer.[12] Where the proceedings before a magistrate on which he issued an execution are annexed to the execution, and it is apparent from them that there is no judgment authorizing an execution, the constable who has the execution must take notice of the fact, and will be guilty of a trespass if he proceeds to make a levy under the process[13] A warrant of arrest which, after it has left the hands of the magistrate who issued it, was altered by another magistrate, who inserted the name of another person to be arrested, is no justification to the officer who executed it for taking such other person[14]

Rejection of affidavit of illegality. If a sheriff levying under a dormant judgment rejects an affidavit of illegality, he does so at his own risk and becomes liable to the injured party.[15]

Second levy. Although a sheriff or constable has levied on property sufficient to satisfy an execution, the writ protects him from liability for a second levy on other property[16]

Levy after payment of debt An officer having a valid execution in his hands and not being instructed by plaintiff to forbear is protected in levying thereunder, although the execution has been satisfied[17] and defendant exhibits to him a receipt given by plaintiff in full for the judgment debt.[18] So, where a judgment is not satisfied when execution issues, the writ, being fair on its face, protects the officer in case the judgment is afterward satisfied[19] An officer cannot be held liable for levying an attachment on a satisfied debt[20] unless there has been a discontinuance of the suit or at least notice to the sheriff of the satisfaction,[21] and a capias ad satisfaciendum, issued on a judgment which has previously been paid, will protect the officer making the arrest from liability to the debtor for false imprisonment[22]

Action after expiration of writ. A writ which under the statute remains in force for a limited time only can afford the officer no protection as to anything done after such time,[23] and a constable is not protected in executing process not properly renewed.[24]

Levy after return or return-day. A sheriff is not protected by a writ which he levies after he has returned it[25] or after the return-day.[26]

Process against two or more parties. Where an execution against two parties does not distinguish which is principal and which is surety, the sher-

5. Cal.—First Nat Bank v. McCoy, 297 P 571, 112 Cal App 665
Effect of personal knowledge of invalidity see infra § 127.

6. U S.—Allen v. Clark, D C Cal, 22 F.Supp 898.
Ala.—Pickett v. Richardson, 138 So 274, 223 Ala. 683.
Miss.—Gilbert v. Crosby, 135 So 201, 160 Miss 711, motion overruled 142 So 507.
Utah.—Allen v. Holbrook, 135 P 2d 242, 103 Utah 319, 158 A.L.R. 224, modified on other grounds 139 P. 2d 233, 103 Utah 599.
57 C J. p 908 note 55.

7. Kan.—Wilton Town Co. v. Humphrey, 15 Kan 372.
57 C J. p 909 note 59.

8. Wash.—Interior Warehouse Co v Hays, 158 P. 99, 91 Wash. 507.
57 C.J. p 905 note 25.

9. Me.—Thurston v. Adams, 41 Me 419

10. S.C.—State v Boles, 13 S.C 283
57 C.J. p 905 note 27.

11. Ill.—Haskins v. Haskins, 67 Ill. 446

12. Tex.—Rosenfield v. Barnett, 64 S.W 944, 26 Tex Civ App. 71.

13. N C.—Whitfield v Johnston, 23 N C 473

14. N.C.—Haskins v Young, 19 N. C. 527, 31 Am D 426

15. Ga.—Mosely v Sanders, 76 Ga 293.

16. N Y.—Denvrey v. Fox, 22 Barb 522.
57 C.J. p 912 note 91.

17. N H.—Brick v Blanchard, 20 N H. 323, 51 Am D. 222
S C.—Thrower v. Vaughan, 30 S C L 18
Effect of knowledge of officer that debt has been paid see infra § 127.

18. Mass.—Twitchell v. Shaw, 10 Cush. 46, 57 Am D 80.
57 C J. p 912 note 93.

19. Ky.—Davis v. Gott, 113 S.W. 826, 129 Ky 486.

20. U S.—Livingston v Smith, N.J, 5 Pet 90, 8 L Ed. 57.

21. U S.—Livingston v. Smith, supra.

22. N Y.—Deyo v. Van Valkenburgh, 5 Hill 242

23. N Y.—Bander v. Burley, 15 Barb 604
Liability for wrongful or unauthorized acts in connection with execution of process generally see supra § 62
Process as protection for wrongful acts see infra § 127.

24. N.Y.—Barhydt v. Valk, 12 Wend 145, 27 Am.D. 124.
57 C.J. p 912 note 99

25. Ala.—Chaney v. Burford Lumber Co, 31 So 369, 132 Ala 315

26. N.Y.—Hathaway v. Howell, 54 N.Y. 97, 70 N Y 610.
57 C.J. p 912 note 2.

iff has a right to collect it from either,[27] and the one from whom the debt is collected has no cause of action, although he claims to be only a surety,[28] and plaintiff in the execution directed the sheriff to collect it from the other party.[29]

§ 127. Forfeiture of Protection

a. In general
b. Wrongful acts

a. In General

A sheriff or constable who fails to perform his full duty under a process or writ may thereby forfeit all right to protection and become liable for his acts while assuming to execute it.

A sheriff or constable who fails to perform his full duty under a process or writ may thereby forfeit all right to protection and become liable for his acts while assuming to execute it.[30] It has been held that, where, in an action against a justice and a constable for false imprisonment under a warrant void because the justice was without jurisdiction to issue it, defendants answer jointly, the constable thereby puts himself on the same grounds as the justice, and it is immaterial whether the warrant could have been a protection to the constable had he defended separately.[31] On the other hand, it has been said that "the officer has not, in any case that the courts have observed, lost his justification by joining in a notice with others who could not avail themselves of the same justification."[32]

Effect of taking indemnity. The fact that an officer has taken indemnity from the persons under whose process he has acted does not deprive him of the protection which his process affords.[33]

Personal knowledge of officer. The rule of protection against liability for proper acts in the execution of process valid on its face is not affected by the personal knowledge of the officer with respect to the justice of the claim to which the process relates or the propriety of its issuance,[34] or any irregularity or fraud in the obtaining of the judgment[35] or in the judgment itself,[36] or any irregularity in the process under which he acts,[37] and a sheriff is protected in complying with an order of court which he knows was made under an error of fact.[38] It has also been held that, where the court has jurisdiction of the subject matter and the process is apparently valid, the officer is protected in executing it, although he has notice of the fact that the court did not acquire jurisdiction of defendant.[39] However, there is also authority for the view that, although process is valid on its face, an officer may be held liable for executing it where he knows that the court acted without jurisdiction[40] or that the process was issued without authority of law.[41] So also it is held that an officer selling property under the mandate of a writ of venditioni exponas is not protected thereby if he knows that the property does not belong to the party under judgment against whom it is sold.[42]

Knowledge of payment of debt. Some authorities have held that the officer is deprived of the protection afforded by process valid on its face where he knows that the debt for which the process issued has been paid,[43] but there is also authority to the contrary.[44]

b. Wrongful Acts

A process, judgment, or order of court does not protect a sheriff or constable from liability for wrongful acts committed in connection with its execution.

A process, judgment, or order of court, valid on its face, is available to the officer as a defense only, and not as a weapon of attack on the rights of third persons,[45] and cannot protect him from liability for

27. N C—Shuford v. Cline, 35 N.C. 463

28. N.C.—Shuford v Cline, supra

29. N C—Shuford v Cline, supra

30. Me—Boston, etc., R Co v. Small, 27 A 349, 85 Me. 462, 35 Am S R 379.
57 C J. p 914 note 26
Liability of officer for defaults in execution of process generally see supra § 206 et seq.

31. Conn—Church v Pearne, 53 A 955, 75 Conn 350

32. N Y—Jennings v. Carter, 2 Wend. 446, 451, 20 Am D. 635

33. N Y—Keller v Paine, 13 N E 635, 107 N.Y. 83—Horton v. Hendershot, 1 Hill 118.

34. Minn.—Hoppe v Klapperich, 28 N W 2d 780, 224 Minn. 224, 173 A. L R 819
Wash.—Cavitt v. McCrite, 79 P 2d 637, 194 Wash 684.
57 C J. p 914 note 31.

35. Ky—Fort v Kremer, 197 S.W. 538, 177 Ky. 120
57 C J p 914 note 32.

36. Mo—State v Cameron, 273 S. W. 746, 216 Mo App 683.
Utah—Hammer v Ballantyne, 44 P 704, 13 Utah 324, 57 Am S R 736.

37. Wash—Cavitt v. McCrite, 79 P. 2d 637, 194 Wash 684.
57 C.J. p 914 note 34.

38. La—Brainard v. Head, 15 La Ann 489.

39. Iowa—Heath v. Halfhill, 76 N. W 522, 106 Iowa 131.
57 C J p 914 note 36

40. Ill—Parker v. Smith, 6 Ill 411.
57 C J. p 914 note 37.

41. Ill—Martin v Walker, 15 Ill 377—Tefft v. Ashbaugh, 13 Ill 602

42. Ala—Burgin v Raplee, 14 So 205, 100 Ala 433.

43. N.H—Breck v Blanchard, 20 N. H 323, 51 Am D. 222—Stanley v Nutter, 16 N H. 22.

44. Or.—Barr v. Combs, 45 P. 776, 29 Or. 399.
57 C J p 914 note 42.

45. Ala—Walker v. Graham, 154 So. 806, 228 Ala 574—Wilson v. Sawyer, 37 Ala. 631.
Cal—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236.

wrongful acts which he has committed in connection with its execution,[46] as where he levies on exempt property as discussed supra § 66, or seizes property not mentioned in the process, as discussed supra § 65, or property in the possession of, or belonging to, a person other than defendant in the writ or process, as discussed supra § 68, although such process may be effective to protect him against a recovery of exemplary damages by showing that his act was not malicious.[47] So an officer seizing property in the possession of a third person under a void writ of attachment cannot, when sued for conversion, require plaintiff to prove that he was the owner of the property, in good faith and for value, plaintiff's title, whatever its origin, being good as against a wrongdoer.[48]

Where a valid writ is executed in such manner as to show a willful abuse of it, the officer and his assistants will be deemed trespassers ab initio.[49] An officer having a search warrant for a particular house cannot justify his search of another house by altering the warrant to include the house searched.[50] An attempt to make a second search on a warrant once served makes the officer a trespasser, although the warrant was originally valid.[51] However, in order to hold the officer liable as a trespasser and deprive him of the right to protection, "there must be such a departure from the line of official duty, such an active willful wrong perpetrated, as will warrant the conclusion that its perpetration was intended from the first, and that the process was used only as a cloak for illegal conduct."[52]

Process issued at instance of sheriff. The sheriff is not protected as to his acts in the execution of process where he is the moving party in causing the process to be wrongfully issued for his own sole benefit,[53] and knows that the judgment on which it is issued has been fully paid and satisfied.[54] It has been held that a sheriff is not protected in executing a warrant he procured without probable cause,[55] but there is also authority to the contrary.[56]

V. INDEMNITY TO OFFICER

§ 128. Right to Require, Time of Requirement, and Demand

a. Right to require
b. Time of requirement
c. Demand

a. Right to Require

Generally a sheriff or constable has the right to require indemnity before proceeding with the execution of a writ or as a condition of continuing to hold property on which a writ has been levied.

While a sheriff or constable ordinarily is liable for any damage resulting from his failure or neglect properly to execute process, or from his wrongful levy on, or seizure of, property not subject thereto or his wrongful release of property rightfully levied on, ordinarily he has the right, in many or most jurisdictions, under statutes granting such authority, to require indemnity, before proceeding with the execution of a writ, or as a condition of continuing to hold property on which a writ has been levied, in case he reasonably anticipates that he may subject himself to some liability by proceeding;[57] and it has been held that even in the absence of statute

46. Ga.—Goforth v. Fidelity & Casualty Co. of N. Y., 55 S.E.2d 656, 80 Ga.App. 121
Pa.—Nelson v. Wick, 53 Pa.Dist. & Co. 269, 3 Lawrence L.J. 215.
57 C.J. p. 915 note 45.
Liability for improper acts in connection with execution of process generally see supra § 66.

Extortion
Ministerial officer, such as sheriff, using warrant of arrest for purpose for which it was not designed, as in attempt to extort property from person arrested, acts entirely outside scope of his official duties and forfeits protection from liability for abuse of process.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 173 A.L.R. 819

47. Tex.—Land v. Klein, 50 S.W. 638, 21 Tex.Civ.App. 3.

48. N.Y.—Smith v. Healey, 121 N.Y.S. 230.

49. Ill.—Haskins v. Haskins, 67 Ill. 446

50. Del.—Fennemore v. Armstrong, 96 A. 204, 29 Del. 35.

51. Okl.—Duncan v. State, 144 P. 629, 11 Okl.Cr. 217

52. Tex.—Modesett v. Emmons, Civ.App., 286 S.W. 276

53. Minn.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 173 A.L.R. 819
57 C.J. p. 913 note 7.

54. Minn.—Johnson v. Randall, 76 N.W. 791, 74 Minn. 44

55. Wash.—Ladd v. Miles, 17 P.2d 875, 171 Wash. 44.

56. Okl.—Knisley v. Ham, 136 P. 427, 39 Okl. 623.

57. Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 183 Ark. 786
Cal.—Fulton v. Webb, 72 P.2d 744, 9 Cal.2d 726.
Okl.—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55
Pa.—Cieslak v. Karwowski, Com.Pl., 28 Erie Co. 76
Tex.—Fant Mill Co. v. May, Civ.App., 240 S.W.2d 445, error refused no reversible error.
57 C.J. p. 918 note 87
Civil liability of sheriff or constable see supra §§ 52-127

Statutes held applicable only to personalty
Ark.—Keith v. Drainage Dist. No. 7 of Poinsett County, 38 S.W.2d 755, 183 Ark. 786.
Tex.—Fant Mill. Co. v. May, Civ.App., 240 S.W.2d 445, error refused no reversible error
57 C.J. p. 918 note 87 [b].

Writ of assistance
Where the statute provides for requiring of indemnity before levy of execution, and where writ of assistance in mortgage foreclosure action

the same right exists,[58] at least where there is reasonable ground to doubt his authority to act in a particular case,[59] but there is also authority to the contrary.[60] In general, under such statutes, an officer is entitled to require indemnity where he has reason to believe that there is a doubt as to the title of property which he is required to seize[61] and that a controversy may arise with respect thereto,[62] or where the property is in the possession of a person other than defendant,[63] or where a third person asserts a claim to the property adverse to that of defendant,[64] or where it is claimed by defendant that the property is exempt from levy,[65] or where the officer in good faith doubts whether it is subject to levy and sale.[66] He has, however, no right to act arbitrarily or capriciously in demanding indemnity, but in order to support such a demand there must be a real and substantial reason to doubt defendant's title to the property or to apprehend that the officer may incur liability by proceeding,[67] and a fortiori the officer is not entitled to require indemnity where he would incur no liability by executing the writ according to its mandate.[68]

Under some statutes permitting a third person to file a claim to property on which a levy has been made, and authorizing the sheriff in his discretion to require indemnity from the judgment creditor, where the sheriff chooses to exercise that discretion the creditor may either furnish a bond or institute proceedings to determine the validity of the claim.[69]

Where attachment bond required. Where the statute provides for an attachment bond to protect defendant or claimants of the attached property from damage, a sheriff has been held to have no right to demand any indemnity beyond such bond as a condition of levying the attachment.[70]

Determination by sheriff's jury. Under some statutes where property levied on is claimed by a third person a sheriff is not entitled to require, nor is plaintiff bound to tender, an indemnity bond until the claim has been passed on by a sheriff's jury and determined in favor of the claimant,[71] but it has

is directed against defendants and not against strangers to action, sheriff is not authorized to demand indemnity bond before executing writ —Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.

58. Mass.—Binda v. Sheriff of Middlesex County, 85 N.E.2d 627, 324 Mass. 267.
57 C.J. p. 918 note 88.

59. Mass.—Binda v. Sheriff of Middlesex County, supra.

60. Mo.—Good v. Sleeth, 160 S.W. 1, 176 Mo.App. 619.
57 C.J. p. 918 note 89.

61. Ark.—Mayfield Woolen Mills v. Lewis, 117 S.W. 558, 89 Ark. 488, 16 Ann.Cas. 1041.
57 C.J. p. 918 note 90.

Reliance on judgment debtor

Sheriff had right in good faith to rely on information furnished him by judgment debtor that title to property sought to be levied on was claimed by other persons, so as to justify demand by sheriff of judgment creditor for an indemnity bond before levy, and, where judgment creditor refused or failed to furnish bond, sheriff was not liable in amercement for failure to make levy. —Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55.

62. Ark.—Mayfield Woolen Mills v. Lewis, 117 S.W. 558, 89 Ark. 488, 16 Ann.Cas. 1041.
57 C.J. p. 919 note 91.

63. Tex.—Head v. Carlin, Civ.App., 240 S.W. 1051.
57 C.J. p. 919 note 92.

64. N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.
57 C.J. p. 919 note 93.

65. Cal.—Mayberry v. Whittier, 78 P. 16, 144 Cal. 322.
Miss.—Gulfport Bank v. O'Neal, 38 So. 630, 86 Miss. 45.

66. Pa.—Trainer v. Saunders, 113 A. 681, 270 Pa. 451, 19 A.L.R. 861.
57 C.J. p. 919 note 95.

67. Ark.—Endicott-Johnson Corporation v. Davis, 56 S.W.2d 178, 186 Ark. 788.
57 C.J. p. 919 note 96.

Reasonable doubt

Where judgment debtor, owner of feed store, told sheriff that feed in his possession was purchased on consignment basis, which was verified by company which sold feed to judgment debtor, sheriff could reasonably entertain doubt as to title to feed, and was not liable for failure to levy in view of judgment creditor's refusal to execute demanded indemnity bond, notwithstanding other statements of judgment debtor that feed was purchased on open account, and fact that feed might have constituted goods, wares, or merchandise daily exposed to sale, in parcels in regular course of business, against which no lien could attach.—Fant Mill. Co. v. May, Tex.Civ.App., 240 S.W.2d 445, error refused no reversible error.

68. La.—Stevenson v. Exchange Nat. Bank, 120 So. 96, 10 La.App. 179.
57 C.J. p. 919 note 97.

69. N.Y.—Simon v. Bailey, 14 N.Y.S. 2d 822, 172 Misc. 186.

Purpose of procedure

The procedure outlined by statute is designed to protect the judgment creditor, third persons with claims to the property sought to be reached, and the sheriff.—Simon v. Bailey, supra.

Fraudulent conveyances

The statute permitting a creditor to disregard a fraudulent conveyance and to attach or levy execution on the property conveyed does not give a judgment creditor the right to insist that sheriff go forward with sale under execution after claim has been filed by a third person under a chattel mortgage which judgment creditor alleges to be fraudulent, and the statute does not abrogate the rights of third persons to advance their claims or the right of the sheriff to insist on a compliance with statute authorizing him in his discretion to require indemnity from the judgment creditor, once those claims have been formally presented.—Simon v. Bailey, supra.

70. Ind.T.—Cutler v. Tully, 82 S.W. 714, 5 Ind.T. 180.

71. N.Y.—B. Altman & Co. v. Broad Park Plaza Corporation, 271 N.Y.S. 317, 241 App.Div. 836.
57 C.J. p. 920 note 2.

On decision by sheriff's jury

Under statute authorizing proceeding to try title to personalty levied on as property of judgment debtor and claimed by third person, jury, ordinarily impaneled by sheriff, must, if they find that property belongs to judgment creditor, determine value thereof and claimant's damages above value if levy is not released, and thereupon sheriff can relinquish levy unless judgment creditor gives

been held that where plaintiff voluntarily executes an undertaking of indemnity without a jury having been summoned, and the sheriff thereupon seizes and holds the property, such undertaking is valid and enforceable [72]

Indemnity for expenses of suit. Where property levied on by a sheriff has been taken from him by replevin, in which he afterward obtains judgment, he has been held entitled to demand indemnity from the original plaintiff before prosecuting the sureties on the replevin bond, if necessary;[73] but there is also authority to the contrary.[74] Where a constable has delivered attached property to a bailee, a contract not under seal to indemnify the officer against the expense of a suit to recover the property from the bailee has been held void for want of consideration [75]

Indemnity on allowing claim of exemption. A sheriff has no right to demand indemnity from an execution defendant as a condition of allowing a claim of exemption.[76]

b. Time of Requirement

If doubts arise or claims are made after the property is seized, a sheriff or constable may demand indemnity before proceeding further.

The right of a sheriff or constable to be indemnified against personal liability or loss is not confined to cases where doubts arise or claims are made before a seizure, but if doubts arise or claims are made after the property is seized the officer may demand indemnity before proceeding further,[77] and a bond to indemnify him against the consequences of a levy on property is valid, although not given until after the levy has been made.[78] It has been held that even after making a sale a sheriff, on being notified of an adverse claim, may demand indemnity before paying over the proceeds to plaintiff,[79] but on this point there is also authority to the contrary.[80]

c. Demand

Ordinarily a demand for indemnity is required.

Ordinarily it is not the duty of plaintiff to tender to a sheriff or constable an indemnity bond without a request or demand therefor,[81] but it has been held that, under a statute containing no provision for notification to plaintiff or a demand on him, no demand is necessary to entitle the officer to be furnished with an indemnity in a case where he is entitled to such protection [82] A statute requiring written demand for indemnity has been held applicable in either attachments or executions.[83]

§ 129. Form, Requisites, and Sufficiency of Indemnity and Bond or Undertaking

a. In general
b. By whom given
c. Amount of indemnity
d. Validity of indemnity

a. In General

The terms and conditions of a bond for the indemnification of a sheriff or constable should comply with statutory requirements, but mere clerical errors in a bond do not affect its validity

In the absence of a statute prescribing the terms and conditions of a bond for the indemnification of a sheriff or constable, the maker of the bond can fix them.[84] There should be a compliance with statutory requirements as to the terms and conditions of such bonds;[85] but the fact that a bond contains more in the way of indemnity than the statute requires does not divest it of the character of a statutory bond,[86] and, on the other hand, a bond conditioned according to the statute to indemnify the sheriff has been held good as a statutory bond, and sufficient to protect the sheriff, although it does not contain a provision, required by the statute, for the protection of the purchaser of the property.[87] Under a statute providing that a bond in any le-

an undertaking to indemnify sheriff against damages in any action against sheriff because of levy, and, if undertaking is given, sheriff must retain property as belonging to judgment debtor, and if property is found to belong to judgment debtor levy is continued by sheriff and undertaking is not required.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc 158.

72. S D —Matheson v. F. W. Johnson Co., 92 N.W. 1083, 16 S.D 347

73. Me —Myers v Levenseller, 102 A 776, 117 Me. 80.

74. N Y.—Swezey v. Lott, 21 N.Y. 481, 78 Am.D. 160.

75. Mass —Balcom v. Craggin, 5 Pick. 295

76. Pa —Williamson v. Krumbhaar, 19 A. 281, 132 Pa 455.

77. Neb —Omaha Nat Bank v. Robinson, 77 N W. 73, 56 Neb. 590
57 C J p 920 note 11.

78. Tex —Dewitt v. Oppenheimer, 51 Tex. 103

79. N Y.—Westervelt v. Frost, 1 Abb.Pr 74
57 C.J. p 920 note 13.

80. Ky —Carrington v. Herrin, 4 Bush 624.
57 C.J. p 920 note 14.

81. N.Y —Platt v. Sherry, 7 Wend. 236
57 C J p 920 note 8.

82. Tenn.—State v. Sharp, 2 Sneed 615

83. Nev.—Bowler v Vannoy, 215 P. 2d 248, petition denied 216 P.2d 274

84. Ariz.—Fidelity & Deposit Co of Maryland v. McFadden, 53 P.2d 1085, 47 Ariz. 116.

85. Mo.—State v. Slayback, 90 Mo. App 300
57 C J p 921 note 25.

86. Mo.—State v. Slayback, supra.

87. Va.—Aylett v. Roane, 1 Gratt. 282, 42 Va. 282.

gal proceeding shall inure to the person of whom it is designed by law as security, and be subject to judgment in his favor and against the obligor the same as though it were conditioned as prescribed by law, a recovery may be had on an indemnity bond, although not conditioned according to law to meet the case presented by the facts appearing of record.[88] The failure of a bond to describe the property seized or to be seized does not render it invalid, at least where the execution creditor has not pointed out any property as that to be levied on,[89] nor is the bond invalidated by a slight inaccuracy in the description of the property to which it refers, where it is certainly identified.[90]

A bond indemnifying an officer levying an execution is a continuation of the proceedings on the execution,[91] and it is not necessary that it should set out the execution[92] or state in detail the proceedings thereunder,[93] nor is it invalidated by an imperfect recital thereof.[94] Where a partnership is plaintiff in execution the recital of the partnership named in the indemnifying bond is sufficient, without the names of the partners being set out;[95] and a bond executed by one member of the firm in the partnership name is a good bond of the person executing it.[96] Where a bond of indemnity is signed and acknowledged by three persons, it is the joint promise of all, although only two of them are named in the body of the instrument.[97]

Mere clerical errors in a bond do not affect its validity.[98]

Single indemnity on two or more writs. A sheriff or constable having in his hands two or more executions in favor of different plaintiffs against the same defendant may properly take a single indemnity bond to protect him in what is done under both or all the executions [99]

Necessity for writing. It is not necessary to the validity of an agreement by plaintiff in a writ to indemnify a sheriff or constable for proceeding therewith that it shall be in writing,[1] but, in view of the statute of frauds, a writing is necessary to the validity of such a promise by another person.[2]

Consideration. A bond given to an officer who has no right or authority to demand or take indemnity has been held to be without consideration and void,[3] and a promise to indemnify an officer is invalid for lack of consideration where it is made after the acts out of which the liability arises have been performed and the officer incurs no new liability in reliance on the promise.[4] Where, however, the officer is entitled to be indemnified, an indemnity bond is not void for want of consideration merely because it is given by a stranger to the writ [5]

Seal. Where not required by statute the bond need not be sealed[6] or accompanied by affidavits as to the financial qualifications of the sureties.[7] The fact that a bond of indemnity is sealed does not affect its validity or standing as a statutory undertaking, although the statute does not require a seal.[8]

Objections to indemnity. Under some statutes, where property seized or about to be seized by a sheriff or constable is claimed by a third person, the latter may object to the sufficiency of the indemnity given to such officer within the time specified in the statute,[9] but an order sustaining any such objections may be made only on due notice to the officer and to plaintiff in the writ, even though the statute does not expressly require notice.[10]

b. By Whom Given

A bond given to indemnify a sheriff or constable may be executed by a stranger to the writ sought to be enforced. There must be compliance with statutory requirements as to sureties.

It is not necessary to the validity of a bond given to indemnify a sheriff or constable against liability or loss that plaintiff in the writ shall be the obligor, but such a bond executed by a stranger

88. Miss.—Gulfport Bank v. O'Neal, 38 So. 630, 86 Miss 45
57 C J. p 921 note 28

89. Tex.—Sharp v Morgan, Civ App., 192 S W. 599

90. Mo.—Smith v Rogers, 90 S W 1150, 191 Mo 334.

91. Mo.—Gatzweiler v. Morgner, 51 Mo. 47.

92. Va.—Davis v. Davis, 2 Gratt 363, 43 Va. 363

93. Mo.—Gatzweiler v. Morgner, 51 Mo 47.

94. Mo.—Gatzweiler v. Morgner, supra.

95. Va.—Davis v. Davis, 2 Gratt. 363, 43 Va. 363.

96. Va.—Davis v. Davis, supra.

97. Va.—Crawford v Jarrett, 2 Leigh 630, 29 Va. 630.

98. Tex.—Sharp v Morgan, Civ.App., 192 S W 599—Maxwell-Clark Drug Co v Singley, Civ.App., 152 S W 827.

99. Iowa.—Baxter v Ray, 17 N.W. 576, 62 Iowa 336
57 C J. p 922 note 48

1. Me.—Tarr v. Northey, 17 Me. 113, 35 Am D. 232.
N J.—Thompson v. Coleman, 4 N.J Law 216.

2. Vt.—Snow v. Hix, 54 Vt. 478.

3. Cal.—Servanti v. Lusk, 43 Cal 238.
Mo.—Good v. Sleeth, 160 S.W. 1, 176 Mo App. 619.

4. Vt.—Snow v. Hix, 54 Vt. 478

5. Me.—Tarr v. Northey, 17 Me. 113, 35 Am D. 232.

6. Or.—Commercial Credit Corp. v Marden, 62 P.2d 573, 155 Or. 29, 112 A L R. 931.

7. Or.—Commercial Credit Corp. v. Marden, supra

8. Minn.—Schoregge v Gordon, 13 N W 194, 29 Minn 367.

9. Mo.—State v. Harrington, 38 Mo. App 303.

10. Mo.—State v. Harrington, supra.

is a good statutory bond and enforceable as such[11] It has, however, been held that an officer who is entitled to indemnity has a right to demand it from plaintiff and cannot be compelled to proceed on receiving the bond of any other person[12]

Sureties. In order to relieve a sheriff or constable from responsibility, a bond of indemnity must have such number of sureties as may be required by the statute.[13] It has been held that the officer has the right to require that the sureties shall be persons residing in his county.[14]

c. Amount of Indemnity

A sheriff or constable is not entitled to demand an indemnity bond with a penalty in excess of the sum necessary to secure him.

A sheriff or constable is not entitled to demand an indemnity bond with a penalty in excess of the sum necessary to secure him,[15] and where he wrongfully levies on property greatly in excess of the amount necessary to satisfy the writ he is not entitled to a bond for the value of the whole thereof;[16] but he is justified in refusing to accept a bond of indemnity, the penalty of which is less than the value of the property rightfully seized or to be seized[17]

d. Validity of Indemnity

An agreement to indemnify a sheriff or constable against the consequences of a willful trespass, or a bond given to indemnify him for levying under a writ which is void on its face, or a promise or undertaking to indemnify him against the consequences of a subsequent or future violation or neglect of his duty is void.

An agreement to indemnify a sheriff or constable for seizing under an execution or other writ property which is really not subject thereto is valid, where the sheriff acts in good faith, with no other view than obtaining satisfaction of the execution or obeying the mandate of the writ, and the act committed amounts simply to an unintentional wrong,[18] even though the writ is in fact invalid if it does not appear on its face to be so.[19] Similarly, an indemnity against the consequences of an illegal act previously done and not known at the time to be illegal is valid[20] An agreement to indemnify an officer against the consequences of a willful trespass, however, is void, as being against public policy,[21] as is also a bond given to indemnify him for levying under a writ which is void on its face,[22] or a promise or undertaking to indemnify him against the consequences of a subsequent or future violation or neglect of his duty,[23] and the unlawful purpose for which a bond was given may be shown, although it does not appear on the face of the instrument[24] Where there is a controversy between the owner of property taken on execution and the judgment creditor as to whether such property is exempt, an indemnity bond given by the judgment creditor to an officer to induce the sale of the property is valid, regardless of such creditor's knowledge as to whether or not the property was exempt at the time of levy or of any secret purpose he may have had in giving the bond,[25] and notwithstanding it turns out that the property was not subject to levy[26] It has been held that an indemnity bond given in a case where the officer had no right to demand it is void,[27] but there is also authority for the view that such a bond may be upheld as a common-law obligation.[28] A bond given to the sheriff to indemnify a claimant of the property levied on is not invalidated by omission of the condition prescribed by statute for indemnifying the sheriff.[29] The fact that a claim made to property seized is informal does not invalidate the bond given to indemnify the officer against such claim.[30]

11. Tenn.—Jobe v. Sellars, 9 Humphr 178

12. Ala.—Hall v. McHenry, 5 Port 123

13. Mo—Kreher v. Mason, 25 Mo App 291

14. Pa—Commonwealth v. Vandyke, 57 Pa 34.

15. Iowa—Wadsworth v. Wallıker, 2 N W 420, 51 Iowa 605

Demand held improper

Where third person claimed title to property, sheriff's demand of judgment creditor for bond of nine thousand two hundred fifty dollars was improper, where jury finally determined value of property as two hundred fifty dollars—B. Altman & Co. v Broad Park Plaza Corporation, 271 N Y.S 317, 241 App Div. 836.

16. N M—Bachelder v. Chaves, 25 P 783, 5 N.M 562
57 C J p 921 note 22

17. Mo—State v. Springgate, 58 Mo App 402

18. Me—Frothingham v. Maxim, 141 A 99, 127 Me. 58
57 C J p 922 note 50.

19. Tex—Illies v. Fitzgerald, 11 Tex. 417

20. N Y—Griffiths v. Hardenbergh, 41 N Y. 464.
Tex—Illies v. Fitzgerald, 11 Tex 417.

21. Me—Frothingham v. Maxim, 141 A 99, 127 Me 58
57 C.J p 922 note 53.

22. Ala—Collier v Windham, 27 Ala 291, 62 Am D 767.
Tex—Illies v. Fitzgerald, 11 Tex 417.

23. Mo—Harrington v Crawford, 38 S W 80, 136 Mo 467, 58 Am R. 653, 35 L R A 477.
57 C J p 922 note 55.

24. Cal—Buffendeau v. Brooks, 28 Cal 641.

25. Iowa—Whitney v. Gammon, 72 N W. 551, 103 Iowa 363—Whitney v. Gammon, 83 N W. 807

26. Iowa—Whitney v. Gammon, supra

27. La—Stevenson v Exchange Nat. Bank, 120 So. 96, 10 La App. 179.
57 C J p 922 note 59.

28. S D—Matheson v F. W Johnson Co, 92 N.W 1083, 16 S D. 347
57 C J p 922 note 60.

29. Mo.—Flint ex rel Lumpkin v. Young, 70 Mo. 221

30. Mo.—State v. Smit, 20 Mo App.

§ 130. Express and Implied Promises to Furnish Indemnity

Generally, where the plaintiff in an attachment, execution, replevin, or other writ directs a sheriff or constable to serve the process in a particular manner or to seize certain designated property thereunder, the law implies a promise on his part to indemnify such officer against any liability arising out of his compliance with such directions.

While it has been held that there is no implied liability to indemnify an officer making a levy where the statute prescribes that he does so at his own risk where he does not require the execution of a bond of indemnity,[31] generally, where plaintiff in an attachment, execution, replevin, or other writ directs a sheriff or constable to serve the process in a particular manner or to seize certain designated property thereunder, the law implies a promise on his part to indemnify such officer against any liability arising out of his compliance with such directions;[32] and a similar promise has been implied on the part of an attorney who gives directions as to the execution of a writ which he has placed in the hands of the officer.[33] The officer is not, however, bound to seize property pointed out by plaintiff and to rely merely on the implied promise of indemnity arising from such action,[34] and such implied promise does not preclude him from demanding indemnity in the usual mode.[35] No promise to indemnify an officer will be implied where a process or writ is merely delivered to him for service or execution without any directions as to how he shall proceed;[36] nor can any promise of indemnity be implied, so as to give rise to a right of recovery thereon, where a bond of indemnity has been given, even though the circumstances are such that no recovery can be had on the bond.[37]

Promise to furnish indemnity. A sheriff or constable who acts in reliance on a promise to furnish him indemnity must, in executing the writ, exercise the same degree of diligence and be subject to the same liability as in ordinary cases where no bond is given.[38]

§ 131. When Indemnity Becomes Effective

A bond of indemnity to a sheriff or constable takes effect from the time of its delivery.

A bond of indemnity to a sheriff or constable takes effect from the time of its delivery.[39]

§ 132. Effect of Indemnity

The effect of a bond of indemnity given to a sheriff or constable as protection on his official bond and as giving a right of action to a claimant is discussed infra §§ 133, 134. The duty of the officer to proceed on receiving indemnity is considered infra § 135.

Examine Pocket Parts for later cases.

§ 133. —— As Protection for Officer and Sureties on Official Bond

In the absence of a statute providing otherwise, and under statutes so providing, the taking of an indemnity bond by a sheriff or constable does not relieve him of his primary responsibility to a person injured by his acts, but under some statutes the bond is a substitute for the liability of the officer and is a bar to a suit against him.

In the absence of statute providing otherwise, the giving of an indemnity bond to a sheriff or constable merely furnishes one injured or damaged by his acts with a remedy additional or cumulative to the right of action against such officer to enforce his primary or common-law liability, and is not substitutionary therefor,[40] and under some statutes the bond or promise of indemnity does not protect the officer or the sureties on his official bond from direct and primary liability to a person or party injured by his acts,[41] but is intended to shield him from ultimate loss by enabling him to resort to the indemnity in case he is subjected to any liability,[42] which right of recourse extends to the

50—Eichelmann v. Weiss, 7 Mo App. 87.

31. Tex—Stevens v. Wolf, 14 S.W 29, 77 Tex. 215.

32. Mont—Weir v Hum Tong, 46 P 2d 45, 100 Mont. 1
N H.—Strain v. Chandler, 188 A. 461, 88 N H 318
57 C J. p 923 note 65.

33. Conn—Higgins v Russo, 43 A 1050, 72 Conn 238, 77 Am S R 307.
57 C J p 923 note 66

34. Ga.—Levy v. Shockley, 29 Ga 710

35. Ga.—Levy v. Shockley, supra.

36. Ill—Nelson v. Cook, 17 Ill. 443
57 C.J. p 923 note 69

37. N Y.—Preston v. Yates, 17 Hun 92, 24 Hun 534.

38. Tex—Dewitt v. Oppenheimer, 51 Tex 103.

39. Cal—Buffendeau v. Brooks, 28 Cal 641.

40. Or—Howard v. Coude, 30 P. 454, 22 Or. 581

41. Ill.—**Corpus Juris quoted in** Maxwell, for Use of Maxwell, v Nieft, 40 N.E.2d 554, 556, 313 Ill. App 354.
57 C J p 923 note 77.

Liability not affected
Constable who seized all property on leased premises under provisional seizure obtained by landlords, and who sold it after receiving affidavit of third person without requiring landlords to furnish bond for double amount of value of property claimed by third person, properly ignored affidavit of third person stating ownership of property, since act authorizing bond did not affect constable's liability—Pembrook v. Goldman, La. App., 176 So. 888.

42. Ill—**Corpus Juris quoted in** Maxwell for Use of Maxwell v.

sureties on the official bond of the officer.[43] Under other statutes, however, the effect of the indemnity bond is to impute to the obligors of the bond the entire responsibility which rested at the common law on the officer for an illegal levy on personal property,[44] and the bond is in substitution and bar of a suit against the officer,[45] its effect being to relieve him of all legal responsibility.[46] The sole remedy of an injured person in such case is a suit on the bond[47] unless the obligors thereon are or become insolvent[48] or unless the bond is for some reason invalid[49] or insufficient.[50] Some of these latter statutes are by their terms applicable only to cases of bonds taken as indemnity for making sales under execution,[51] and do not protect the officer from suit where the bond is taken in a replevin action[52] or where the bond is taken in attachment proceedings.[53]

In order to bar action against the officer the bond must conform strictly to the statute,[54] must have been taken before the action is commenced,[55] and, where its return is required by statute, must have been returned.[56] Where an officer is not entitled to demand a bond in a particular case, a bond actually given, even though valid as a common-law obligation, does not relieve him from his primary liability to one injured or damaged by his acts.[57]

§ 134. —— As Giving Right of Action to Claimant

The owner or claimant of property improperly seized or levied on by a sheriff or constable has no right of action against the officer's indemnitors on the bond as such unless he is named in the bond or a statute provides that it shall be for his benefit.

Except where the bond names him, or a statute provides that it shall be for his benefit, the owner or claimant of property improperly seized or levied on by a sheriff or constable has no right of action against the officer's indemnitors on the bond as such;[58] but he may, in the case of a bond indemnifying against a levy on or sale of such particular property, maintain an action for his loss or damage against them as trespassers or against persons authorizing and responsible for the wrongful taking by the officer.[59] A bond given for the indemnity of a particular claimant, however, becomes inoperative when he withdraws his claim, and it does not give one subsequently asserting a claim any right of action.[60] Where a bond is given to the sheriff or his assigns, a claimant assignee of the sheriff may have a right of action on the bond.[61]

§ 135. —— Duty of Officer to Proceed on Receiving Indemnity

Generally, where proper indemnity is given, it is the duty of a sheriff or constable to proceed under the process, but this duty is not mandatory unless made so by statute.

Under some statutes so providing, it is the duty of a sheriff or constable to whom proper indemnity has been given or promised to proceed under

Nieft, 40 N.E 2d 554, 556, 313 Ill App. 354
La.—Pembrook v. Goldman, App., 176 So 888
57 C J. p 923 note 78.

43. Ill.—**Corpus Juris quoted in** Maxwell for Use of Maxwell v. Nieft, 40 N.E 2d 554, 556, 313 Ill. App. 354.
N.H.—Philbrick v. Shaw, 61 N.H. 356

44. Ky.—Lane v. Rowland, 175 S. W 2d 1000, 295 Ky. 868
Va.—Wheeler v. City Savings & Loan Corporation, 157 S.E. 726, 156 Va 402.
57 C J p 924 note 82.

Statute held valid
Cal.—Cory v Cooper, 4 P 2d 581, 117 Cal App 495.

45. Philippine.—Waite v. Peterson, 8 Philippine 449
Va.—Wheeler v City Savings & Loan Corporation, 157 S.E 726, 156 Va. 402.
57 C J p 924 note 83.

46. Mo.—State v. Doan, 39 Mo. 44.
57 C.J. p 924 note 84.

Conversion
(1) Sheriff who seized property under execution and complied with statute in receiving bonds indemnifying third party claimant was not liable for conversion.—Rowland v. Bruton, 14 P 2d 116, 125 Cal.App. 697.

(2) Likewise, sheriff attaching property, who complied with provisions of statute, which require sheriff to procure undertaking indemnifying third-party claimant, was not liable to such claimant for conversion.—Cory v. Cooper, 4 P.2d 581, 117 Cal App 495.

47. Ky.—Lane v. Rowland, 175 S W. 2d 1000, 295 Ky 868.
57 C J p 924 note 85

48. Miss.—Shattuck v. Miller, 50 Miss. 386

49. Miss.—Shattuck v Miller, supra

50. Mo.—Kreher v. Mason, 25 Mo App 291.
57 C J. p 924 note 88.

51. Ark.—Harris v. Harrison, 40 Ark. 50.
Ky.—Chisholm v. Gooch, 79 Ky. 468.—Rudy v. Johnson, 11 Bush 543.—Gunn v Gudehus, 15 B.Mon. 447

52. Ark.—Harris v. Harrison, 40 Ark 50.

53. Iowa.—Hall v Ballou, 12 N.W. 475, 58 Iowa 585.—Wadsworth v. Wallicker, 45 Iowa 395, 24 Am.R 788.
Ky.—Lewis v. Mansfield, 78 Ky. 460.—Cincinnati Cooperage Co. v. Woodyard, 54 S W. 831, 21 Ky.L 1221.—Turner v. Robinson, 11 Ky. L. 717.

54. Ky.—Curry v Ball, 58 S.W. 534, 22 Ky.L. 592
57 C J p 924 note 89.

55. Ky.—Rudy v Johnson, 11 Bush 543.
57 C J p 924 note 90.

56. Miss.—New Albany Wholesale Grocery Co v Wells, 74 So 817, 114 Miss 144.
57 C J p 924 note 91.

57. Iowa.—Hall v Ballou, 12 N.W. 475, 58 Iowa 585.
57 C J p 924 note 93.

58. Mo.—Trammel v. Kirk, App., 278 S W 789
57 C.J. p 924 note 95.

59. U.S.—Lovejoy v Murray, Mass., 3 Wall. 1, 18 L Ed 129.
57 C J. p 925 note 96

60. Mo.—State v. Jenkins, 70 S.W. 152, 170 Mo. 16.

61. Pa.—Acker v. Delp, 76 Pa.Super. 447.

the process in his hands,[62] and he must levy on the property,[63] or, if a levy thereon has already been made, hold[64] and sell[65] it, and he cannot escape liability for releasing property levied on or by refusing to proceed by showing that the title was actually not in defendant but in another.[66] Unless the absolute duty to proceed is so imposed by statute, however, an officer may decline to proceed notwithstanding indemnity is furnished him,[67] and may justify his refusal by showing that the property did not belong to defendant or was not subject to levy.[68] The burden of proof in such case is on him,[69] and if he fails to make out his justification he is liable to plaintiff for not executing the writ.[70] An indemnity bond given by plaintiff against a claim of ownership made by a third person does not impose on the sheriff any duty to withhold the property from defendant on a claim of exemption made by him.[71]

Where indemnity defective. Where a sheriff or constable has a right to be indemnified against personal loss or liability, he is entitled to an indemnity bond which needs no explanations and is on its face subject to no objections,[72] and he is justified in refusing to act where the bond furnished him is defective.[73]

§ 136. Effect of Refusal to Furnish Indemnity

A sheriff or constable who has a right to indemnity may refuse to proceed further where his request or demand for indemnity is refused.

Where a sheriff or constable is entitled to receive indemnity, and plaintiff refuses or neglects, after proper demand has been made on him, to furnish a proper bond, the officer may rightfully refuse to execute the writ[74] or make a levy,[75] or, if a levy has already been made, he may refuse to proceed to a sale,[76] and may release the property,[77] or the court will on his own application enlarge the time to make his return.[78] In the case of conflicting claims to money collected on execution, the refusal of the execution creditor to give the officer a bond of indemnity may excuse the officer for retaining the money until the question of title is decided.[79] Where, however, in a particular case an officer has no right to be indemnified, he cannot refuse to act, or release property seized, because such indemnity is not given.[80]

Refusal by one of two or more creditors. Where a sheriff or constable is entitled to indemnity, and there are two or more creditors, one or some of whom fail or refuse to furnish indemnity after proper demand is made therefor, the officer, without acting further in behalf of the latter, may proceed to make a levy and sell the property on the writs of the one or ones who comply with such demand.[81]

§ 137. Liabilities of Indemnitors

The liability of the obligors on a bond of indemnity given to a sheriff or constable is measured by the terms of the contract of indemnity contained therein, as construed in the light of the statute providing therefor.

62. Wash.—Johnson v. Nelson, 263 P 949, 146 Wash. 500, 56 A.L.R. 1035.
57 C.J. p 925 note 99.

Discharge of duty
Officer taking from execution creditor indemnifying bond and paying proceeds of sale to execution creditor discharged duties to all parties. —Wheeler v. City Savings & Loan Corporation, 157 S.E. 726, 156 Va. 402.

63. S.D.—Jewett v. Sundback, 58 N.W. 20, 5 S.D. 111
57 C.J. p 925 note 1.

64. Iowa.—Cox v. Currier, 17 N.W. 767, 62 Iowa 551.
57 C.J. p 925 note 2

65. Cal.—Von der Kuhlen v. Cline, 176 P. 883, 38 Cal.App. 545
23 C.J. p. 611 note 7—57 C.J. p. 925 note 3.

66. Idaho.—Smith v. Graham, 136 P. 801, 25 Idaho 174.
57 C.J. p. 925 note 4.

67. Kan.—Phelps, etc., Co. v. Skinner, 65 P. 667, 63 Kan. 364.
57 C.J. p. 925 note 5.

68. Kan.—Phelps, etc., Co. v. Skinner, supra

69. Iowa.—Wadsworth v. Walliker, 45 Iowa 395, 24 Am.R. 788.
Tex.—Freiberg v. Johnson, 9 S.W. 455, 71 Tex. 558.

70. Mich.—Colville v. Bentley, 42 N.W. 1116, 76 Mich. 248, 15 Am.S.R. 312.
57 C.J. p. 925 note 8

71. Mo.—State v. Thomas, 7 Mo. App. 205

72. Ill.—Second Nat. Bank v. Gilbert, 70 Ill.App. 251, reversed on other grounds 51 N.E. 584, 174 Ill. 485, 66 Am.S.R. 306

73. Ill.—Second Nat. Bank v. Gilbert, supra
Mich.—Smith v. Cicotte, 11 Mich. 383
57 C.J. p. 926 note 12.

74. Cal.—Long v. Neville, 36 Cal. 455, 95 Am.D. 199.

75. Tex.—Fant Mill. Co. v. May, Civ. App., 240 S.W.2d 445, error refused no reversible error.
57 C.J. p. 926 note 16.

76. Ark.—Harris v. Harrison, 40 Ark. 50.
N.H.—Smith v. Osgood, 46 N.H. 178.

77. N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.
57 C.J. p. 926 note 18.

Purpose of statute
One of main purposes of statute providing for release of property levied on under execution, if plaintiff fails to give sheriff undertaking to indemnify third person filing claim thereto, and declaring sheriff not liable for damages to third person filing no claim, is to protect officer making levy from claims for damages by third persons.—Sunset Realty Co. v. Dadmun, 88 P.2d 947, 34 Cal.App.2d Supp. 733

78. Pa.—Commonwealth v. Van Dyke, 57 Pa. 34.
57 C.J. p. 926 note 19.

79. Mass.—Rogers v. Sumner, 16 Pick. 387.

80. Ind.—Bosley v. Farquar, 2 Blackf. 61.
La.—Dunlap v. Freret, 10 La.Ann. 83, 63 Am.D. 590.

81. Ill.—Baker v. Duddleson, 125 Ill. App. 483.
N.H.—Smith v. Osgood, 46 N.H. 178.

The liability of the obligors on a bond of indemnity given to a sheriff or constable is measured by the terms of the contract of indemnity contained therein,[82] as construed in the light of the statute providing therefor,[83] but the bond extends to all acts reasonably within its terms,[84] and the right of an officer to resort to a bond given to protect him in the execution of a writ is not affected by the fact that an alias writ was necessary to be, and was, issued in order to make the levy and sale.[85] When a bond of indemnity can reasonably be construed otherwise, however, a construction will not be given to it which will make the obligors liable to the officer for the consequences of a trespass or other wrongful act committed by him or his agent or deputy which they neither directed nor authorized.[86] Similarly, the obligors on a bond given to a sheriff to indemnify him against any levy on property of a third person cannot be held liable for a levy on property of the judgment debtor which was exempt from execution,[87] and the obligors on a bond conditioned to secure an officer harmless for levying on goods which he or they may judge to belong to the debtor are not liable for the act of the officer in seizing goods conceded to belong to a third person[88] except where they have expressly or impliedly authorized or ratified such act.[89] The liability of the indemnitors includes damages resulting from a wrongful levy even though the property levied on is afterward sold under another writ.[90] Where an officer acting under two indemnity bonds from different parties is damaged by making a levy, he may resort for compensation to either or both of the parties, and, if he bring action against one and recover only a part of his damages, he may then institute action on the other bond for the balance.[91]

Exemplary damages may not be recovered from indemnitors by the claimant of the property levied on where there was no fraud or malice in the levy.[92]

Acts done before execution of bond. A bond of indemnity to a sheriff or constable will apply to, and protect the officer from, the consequences of acts done before its execution where by a fair construction its terms are applicable thereto,[93] but not otherwise.[94]

Liability of claimant on indemnity bonds. Where claimant of property levied on under execution has possession of it, and refuses to deliver it to the sheriff, and gives a bond of indemnity to the sheriff for not assessing and selling it, he is liable to the sheriff on such bond.[95]

§ 138. —— Extent of Liability

Ordinarily the liability of the obligors on a bond of indemnity given to a sheriff or constable is limited to the penal sum named in the bond, but they may be liable as joint trespassers with the officer

The liability of the obligors on a bond of indemnity given to a sheriff or constable ordinarily is limited to the penal sum named in the bond,[96] together with interest on such amount,[97] which runs, however, only from the time of the breach;[98] but in the case of a wrongful levy under such circumstances as to make them joint trespassers with the officer they are liable for the full amount of the damage or injury sustained, and not merely for the amount specified in the bond.[99] Subject to the rule just stated, such indemnitors are liable to the officer for the amount of a judgment rendered against him in any action based on the act to which

82. Minn.—Lesher v Getman, 15 N W 309, 30 Minn 321.
57 C J p 926 note 27

83. Wis.—Sanger v Baumberger, 8 N W. 421, 51 Wis. 592

84. **Matters within terms of bond**
(1) A bond by which attachment creditor's surety agreed to indemnify sheriff against loss sustained by reason of sheriff's levy on, or retention, of cattle covered damages to cattle caused by negligence of person with whom surety's attorney in fact and attachment creditor's attorney instructed sheriff to leave cattle—Fidelity & Deposit Co of Maryland v. McFadden, 53 P 2d 1085, 47 Ariz 116

(2) Other matters as within terms of bonds see 57 C J p 926 note 29 [a].

85. Cal.—Tunstead v. Nixdorf, 22 P. 472, 80 Cal 647.

86. Ala.—Smith v. Johnson, 11 So 20, 95 Ala 482.

Mass.—Gast v. Goldenberg, 183 N E 257, 281 Mass 214.
57 C J p 927 note 31

87. Mich.—Evans v. Collar, 42 N.W. 957, 75 Mich 433
57 C J p 927 note 32

88. N Y.—Chapman v. Douglas, 5 Daly 244
57 C J. p 927 note 33

89. N.Y.—Chapman v. Douglas, supra.

90. Tex.—Maxwell-Clark Drug Co. v. Singley, Civ.App., 152 S W. 827.

91. Pa.—Findlay v Hutzell, 29 Pa 337.

92. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal App. 716

93. Tex.—Hines v. Norris, Civ.App., 81 S W. 791.
57 C.J. p 928 note 37.

94. N Y.—Leonard v. Buttling, 44 N. Y S 273, 19 Misc 219, affirmed 43 N Y S 387, 13 App Div. 179
57 C J p 928 note 38

95. Ky.—Lampton v Taylor, Litt. Sel Cas. 273.

96. Neb.—Omaha Carpet Co v Clapp, 89 N.W 246, 2 Neb. (Unoff.) 406
57 C.J p 928 note 39.

97. Mass.—White v. French, 15 Gray 339
Neb.—Omaha Carpet Co. v Clapp, 89 N W 246, 2 Neb. (Unoff.) 406.

98. Neb.—Omaha Carpet Co. v. Clapp, supra.

99. N.Y.—Dyett v Hyman, 29 N E. 261, 129 N Y. 351, 26 Am S R 533—Cassani v Dunn, 60 N.Y S. 756, 44 App Div. 248.

the indemnity relates,[1] together with reasonable counsel fees, costs, and expenses incurred by him in the defense of such action,[2] or for the amount of a compromise made by him in good faith after unsuccessfully endeavoring to compel the indemnitors to defend the action;[3] and their liability is not affected by any considerations as to whether or not the officer is solvent or actually able to pay the judgment against him.[4] Such liability does not extend, however, to the officer's costs or disbursements in the action in which the process was issued,[5] and does not cover expenses incurred in the employment of a watchman or guard[6] or for insurance on the property levied on;[7] nor does it extend to attorney's fees or costs in a suit on the indemnity bond[8] except where the bond provides otherwise.[9]

Indemnitors of an officer against whom judgment is rendered in an action for conversion cannot require him to pay such judgment and, for the purpose of fixing the amount for which they are liable, to deduct the value of the property converted, their obligation being to protect him from such judgment by paying it, and to take the property.[10] Where property is wrongfully sold for an amount greater than that needed to satisfy the writ, the officer's indemnitors are liable not merely for the amount of the execution but for the entire damage sustained in consequence of the seizure and sale.[11] The indemnitors of an officer levying on money are liable for interest thereon required to be paid by him to the rightful owner thereof;[12] but a bond given to indemnify a sheriff attaching money will not support a recovery by the attachment defendant, to whom the officer has assigned the bond, for the loss of interest on the money attached.[13]

An attachment plaintiff who, at his own request, is appointed custodian of attached property cannot reduce his liability on a bond of indemnity given by him to the officer by the amount of a loss due to damage sustained by the goods while in his custody and through his negligence;[14] but the liability of the surety on the bond may be thereby reduced.[15]

Exemplary damages. An officer who is not liable for exemplary damages for wrongful or improper acts in connection with the execution of process is entitled to no more than compensatory damages from his indemnitors;[16] and where an officer is subjected to exemplary damages for acts outside the line of his duty as such officer his indemnitors are not liable therefor on their bond unless they participated in such acts.[17]

In action by injured person against indemnitors they are liable only for such damages as plaintiff could recover from the officer if there were no bond.[18]

§ 139. —— When Liability Accrues

The terms of the undertaking given a sheriff or constable generally determine when the indemnitors become liable.

Where the covenant or undertaking, in a bond of indemnity to a sheriff or constable, is in general terms to protect the officer from liability or judgments, a cause of action against the indemnitors accrues when judgment is rendered against him, even though it has not been paid;[19] and where a liability of the officer becomes fixed otherwise than by judgment the officer may resort to his indemnity before paying out his own money to discharge such liability.[20] Where, however, the undertaking is to save the officer harmless from damage or expense, his cause of action does not accrue until he has been compelled to pay out some-

1. Colo.—McKnight v. Ballif, 100 P. 433, 45 Colo. 138.
57 C.J. p. 928 note 44.

2. N.H.—Strain v. Chandler, 188 A. 2d 461, 88 N.H. 318.
Tex.—Agricultural Bond & Credit Corporation v. Shepherd, Civ.App., 69 S.W.2d 213.
57 C.J. p. 928 note 45.

3. N.Y.—Dunn v. National Surety Co., 80 N.Y.S. 744, 80 App.Div. 605, affirmed 70 N.E. 1098, 178 N.Y. 552.

4. Cal.—White v. Fratt, 13 Cal. 521.

5. Ind.T.—Cutler v. Tully, 82 S.W. 714, 5 Ind.T. 180.
57 C.J. p. 929 note 48.

6. Pa.—Appeal of Brabb, 42 Leg.Int. 28.

Tex.—Smith v. Scott, Civ.App., 261 S.W. 1089.

7. Pa.—Appeal of Brabb, 42 Leg.Int. 28.

8. Tex.—Maxwell-Clark Drug Co. v. Singley, Civ.App., 152 S.W. 827—Moore v. Moore, Civ.App., 52 S.W. 565.

9. Cal.—Tunstead v. Nixdorf, 22 P. 472, 80 Cal. 647.

10. Mass.—Briggs v. McDonald, 43 N.E. 1003, 166 Mass. 37.
57 C.J. p. 929 note 53.

11. Ky.—Secrets v. Markwell, 11 Bush 316.
La.—Lobdell v. Union Bank, 8 La. Ann. 117.

12. Conn.—Jones v. Mallory, 22 Conn. 386.

13. Pa.—Clement v. Courtright, 9 Pa.Super. 45.

14. Mass.—Briggs v. McDonald, 43 N.E. 1003, 166 Mass. 37.

15. Mass.—Briggs v. McDonald, supra.

16. Iowa.—Constantine v. Rowland, 124 N.W. 189, 147 Iowa 142.

17. Iowa.—Constantine v. Rowland, supra.

18. Miss.—Moore v. Lowrey, 21 So. 287, 74 Miss. 413.
57 C.J. p. 929 note 61.

19. Cal.—Thomas v. Layer, 191 P. 949, 48 Cal.App. 199.
57 C.J. p. 929 note 63.

20. N.Y.—Bancroft v. Winspear, 44 Barb. 209.
57 C.J. p. 930 note 64.

thing because of the acts as to which he has been indemnified [21]

Implied indemnity. An officer relying on an implied indemnity has no cause of action until he has suffered actual damage by being compelled to pay over something.[22]

§ 140. —— Conclusiveness on Indemnitors of Judgment against Officer

Generally a judgment against the sheriff or constable is conclusive as against his indemnitors unless it resulted from fraud or collusion or unless the indemnitors were not given necessary notice of the suit.

Where a sheriff or constable has given his indemnitors notice of the institution or pendency of an action against him based on the matters to which the indemnity relates, so as to afford them an opportunity to come in and defend or aid in the defense, a judgment against the officer is conclusive, as between him and the indemnitors, on the question of his liability;[23] and there is authority for the view that, where the indemnity is against judgments, a judgment against the officer is conclusive against the indemnitors even though they had no notice of the action against the officer[24] unless such judgment was obtained through fraud or collusion[25] or the officer refused to permit the indemnitors to make or aid in the defense.[26] Ordinarily, however, it is held that in the absence of notice to the indemnitors a judgment against the officer is not conclusive on them,[27] although it is prima facie evidence of the officer's liability [28] Indemnitors may show that a judgment against an officer is founded on the levy of other or prior writs than that to which their bond relates.[29]

§ 141. —— Estoppel to Deny Ownership of Property

Indemnitors of a sheriff or constable may be estopped to deny that the debtor was the owner of the property seized.

Where indemnitors of a sheriff or constable are plaintiffs in the writ and have directed a levy on, and sale of, property thereunder, they are estopped, in an action on the bond of indemnity, to deny that the debtor was the owner of the property.[30]

§ 142. —— Liability as Affected by Disposition of Proceeds of Property

The liability of the indemnitor of a sheriff or constable may depend on the disposition of the proceeds of the sale of the property seized.

Where an execution plaintiff has indemnified a sheriff or constable for a sale of property levied on, which is accordingly sold, it is not essential to the officer's right to resort to his indemnity that he should have paid over the proceeds of the sale to such plaintiff or to the court which issued the writ.[31] According to some authorities, where property has been seized under writs issued by two or more different persons, each of whom has given indemnity to the officer, the liability of each indemnitor is limited to the extent of his participation in the distribution of the proceeds of the property,[32] and, similarly, where one of two or more seizing creditors gives indemnity and part of the property is applied to the satisfaction of writs levied before that to which the indemnity relates, the indemnitors are liable only to the extent of what remains after such payments,[33] or, if all the property goes to satisfy writs entitled to priority, the indemnitors whose indemnity relates to the writ on which nothing was paid are not liable to the officer for the damage which he has sustained by reason of the seizure.[34] According to other authorities, however, it has been held that the fact that a portion of the proceeds of an execution sale accrued to the benefit of creditors other than the one who indemnified the officer does not affect the liability on the indemnity bond,[35] and that the indemnitors may be held liable, although all the property seized was applied on writs prior to that to which the indemnity relates [36] Similarly, where two or

21. Iowa—Cousins v Paxton, etc., Co, 98 N W 277, 122 Iowa 465.
57 C.J. p 930 note 65.

22. Mass—Williams v. Mercer, 29 N E. 540, 139 Mass 141.

23. U.S—Lovejoy v. Murray, Mass, 3 Wall. 1, 18 L.Ed. 129.
57 C J. p 930 note 68.

24. N Y.—Wheeler v. Sweet, 33 N E. 483, 137 N.Y 435.
57 C J. p 930 note 69.

25. N.Y.—Wheeler v. Sweet, 33 N.E. 483, 137 N.Y. 435.
57 C J. p 930 note 70.

26. N.Y.—Wheeler v. Sweet, supra.
57 C J p 930 note 71.

27. N Y—Audley v Townsend, 96 N. Y S. 439, 49 Misc 23, reversed on other grounds 110 N.Y.S. 575, 126 App Div. 431.
57 C J. p 930 note 72.

28. Colo—Whinnery v. Wiley, 88 P. 171, 38 Colo. 203.
57 C J p 930 note 73.

29. Ala.—Smith v. Johnson, 11 So. 20, 95 Ala. 482.

30. Ky—Sharp v. Wood, 51 S W 15, 21 Ky.L. 189

31. N J.—Thompson v. Coleman, 4 N.J Law 216.

32. N Y—Dyett v Hyman, 13 N Y S 895, affirmed 29 N E 261, 129 N. Y. 351, 26 Am S.R. 533.

33. Mich—Lee v. Maxwell, 57 N W. 581, 98 Mich. 496.
N Y—Posthoff v. Schrieber, 47 Hun 593.

34. Idaho—Fury v. White, 23 P. 535, 2 Idaho (Hasb) 662.
57 C J. p 931 note 79.

35. Wash—Brotton v. Lunkley, 40 P. 140, 11 Wash 581.

36. Pa.—Watmough v. Francis, 7 Pa. 206
57 C J p 931 note 81.

more creditors suing together have given a joint indemnity bond, it has been held that the full amount of damages resulting to the officer may be adjudged against both or all, and not merely prorated between or among them in proportion to the amount received by each out of the proceeds of the property.[37] A fortiori, the liability of an indemnifying creditor whose claim has been satisfied in full is not avoided or reduced by the fact that the surplus proceeds of the property have been applied to the claims of other creditors who had given no indemnity.[38]

§ 143. —— Release or Discharge of Liability

An indemnitor may be released or discharged from liability by acts or omissions of the officer which increase the indemnitor's risk or liability, or otherwise injure his rights or remedies.

An indemnitor of a sheriff or constable is released and discharged from liability on his bond of indemnity by a failure on the part of the officer to use due diligence in executing the process[39] or making return,[40] or by any act or omission by such officer which increases the indemnitor's risk or liability or otherwise injures his rights or remedies,[41] but not by any act or omission which involves no violation of the officer's duties or does not increase the risk or liability of the indemnitor.[42]

Irregularities in process. Indemnitors cannot escape liability to the officer by showing that there were irregularities in the process to which the indemnity related.[43]

Judgment against indemnitor as trespasser. The rendition of judgment against an indemnitor as a trespasser with the officer in making a wrongful levy does not reduce or discharge his liability to the officer on the indemnity bond.[44]

Covenant not to sue. An officer cannot, by a covenant not to sue the sureties on an indemnity bond, exempt them from liability to the owner of property wrongfully seized.[45]

Discharge in bankruptcy. The contingent liability of the principal in an indemnity bond is not affected by his discharge in bankruptcy before the actual liability has accrued.[46]

Cancellation of bond. The fact that a suit in which an attachment was issued has been discontinued will not justify the cancellation of an indemnity bond given by the attaching creditor, where the property attached is claimed by a third person and the rights of the latter against the officer have not been determined,[47] and even though an officer has taken nothing under the writ of attachment with respect to which a bond of indemnity was given, and has sold all defendants' property under a judgment in another action, the court will not cancel the bond until the time limited by statute for bringing action against the sheriff has expired[48]

Cessation of officer's liability. When the liability of an officer ceases the liability of his indemnitors ceases also[49]

§ 144. Summary Remedies of Officers against Indemnitors

Under statutes so providing, a sheriff or constable may resort to summary remedies in order to recover from his indemnitor.

Under statutes so providing, a sheriff or constable is entitled to recover judgment on motion against his indemnitors if a judgment is rendered against him because of the act or acts to which the indemnity relates,[50] provided he has given the indemnitors notice of the action against him[51] and of the motion for judgment over against them[52] Such a statute is not to be rigidly construed against the officer and in favor of the obligors,[53] but it cannot apply to cases not falling within its terms[54] On a motion for judgment over on the bond, the officer makes a prima facie showing by the production of the bond and the judgment against him and proof of notice to the indemnitors to appear and defend

37. Tex.—Maxwell-Clark Drug Co v. Singley, Civ.App, 152 S.W 827.

38. N Y—Chamberlain v. Beller, 18 N.Y 115—Berry v Hemingway, 56 Barb 70

39. N Y.—O'Donohue v Simmons, 12 N Y.S 843, 58 Hun 467.

40. Mass—Wiggin v. Atkins, 136 Mass 292

41. N Y—Preston v. Yates, 17 Hun 92, 24 Hun 534.
57 C J p 931 note 86.

42. Mo—State v. Benedict, 51 Mo. App 642.
57 C J. p 931 note 87.

43. Ill—Stanton v. McMullen, 7 Ill. App. 326.

44. Pa—Findlay v Hutzell, 29 Pa 337.

45. N C—Martin v Buffaloe, 38 S. E 902, 128 N C 305, 83 Am S R. 679

46. Ala—Leader v Mattingly, 37 So. 270, 140 Ala 444.

47. U S—Thebaud v National Cordage Co, C C N Y, 57 F 567.

48. N Y—Allen v Marckwald, 58 N Y.S 706, 27 Misc. 683.

49. Mass—Stackpole v. Hilton, 121 Mass. 449
57 C.J p 932 note 95

50. Cal—Moore v McSleeper, 36 P. 593, 102 Cal 277.
57 C.J. p 932 note 97.

51. Ariz—Barth v. Hall, 299 P. 122, 38 Ariz 251.
57 C J p 932 note 98.
Sufficiency of notice
Copies of complaint against sheriff for recovery of attached property was sufficient written notice to sureties to warrant recovery of judgment over—Barth v Hall, supra.

52. Ala.—Magee v. Toulmin, 5 Ala. 141
57 C J p 932 note 99.

53. Ala.—Atwood v. Craig, 3 Stew. & P. 21.

54. Ala—Mansony v. Toulmin, 6 Ala 474
57 C.J. p 932 note 2.

the action,[55] and the burden is on the indemnitors to show that the judgment against the officer has been satisfied by themselves, or by a return of the property seized, or that the property to satisfy it still is, or ought to be, in the officer's possession.[56] A statute providing for judgment over against the indemnitors does not require a joint judgment, if the indemnitors' bond is several, and for different amounts or forbid a judgment for less than that against the officer, if the indemnitors are bound for less, but in such case judgment should be entered against the indemnitors for the amount of the bond, and for which each has bound himself, not to exceed the judgment against the officer, and costs.[57] Failure of the court to give the indemnitors the notice provided for by statute before entering judgment over against them has been held a mere irregularity.[58]

§ 145. Actions by Officers against Indemnitors

a. In general
b. Defenses
c. Parties, pleading, and evidence
d. Trial, judgment, and costs

a. In General

A sheriff or constable, a deputy sheriff in a proper case, or the sureties of an officer, may maintain an action ex contractu against his indemnitors.

A sheriff or constable who has suffered injury or loss through an act as to which he has been indemnified has a right of action on the bond of indemnity for reimbursement.[59] An officer's failure to give his indemnitors notice of an action against him does not preclude an action by him against the indemnitors on the bond,[60] since such omission affects merely the conclusiveness as against the indemnitors of the judgment rendered in such action against him,[61] nor will his failure to notify his indemnitors of his payment of a judgment against him, before commencing an action against them, preclude a recovery therein.[62]

Actions by deputies. Action may be maintained by a deputy sheriff or deputy constable in his own name on a bond of indemnity given to him as such deputy.[63]

Actions by sureties of officer. A surety on the official bond of a sheriff or constable who has been compelled to pay out money on account of an act of the officer, as to which he was indemnified, may maintain an action against the indemnitors on their bond of indemnity.[64]

Conditions precedent. Unless provided otherwise by the terms of a bond of indemnity given to a sheriff or constable, a demand on the indemnitors is not a condition precedent to the institution of an action on the bond;[65] nor is it necessary that the officer shall appeal from a judgment rendered against him as to the matter to which the indemnity relates, before proceeding on the bond.[66]

Nature of action. An action on a bond given to indemnify a sheriff or constable against the consequences of a levy under process is ex contractu.[67]

Joinder of actions. It has been held that a sheriff or constable may maintain one action on two or more bonds given to indemnify him on proceeding with a sale of property levied on under execution, so that the court may apportion the liability of each bond, and of the several sureties thereon;[68] but there is also authority for the view that, where each two plaintiffs executes a bond to an officer to indemnify him for attaching the same property, he must sue separately on each bond.[69] Where a promise of indemnity made by one person is adopted and ratified by another, both may be sued jointly thereon.[70]

b. Defenses

In an action on a bond given to indemnify a sheriff or constable, the obligors may make any defense which defeats their liability thereon, and as a general rule they may assert any defense which could have been made by the officer in the suit wherein liability was imposed on him.

It is a good defense to an action by a sheriff or

55. Ariz.—Barth v. Hall, 299 P. 122, 38 Ariz. 251.
Cal.—Moore v. McSleeper, 36 P. 593, 102 Cal. 277.

56. Cal.—Moore v. McSleeper, supra.

57. Cal.—Moore v. McSleeper, supra.

58. Ariz.—Barth v. Hall, 299 P. 122, 38 Ariz. 251.

59. N.C.—Teague v. Collins, 45 S.E. 1035, 134 N.C. 62.
57 C.J. p. 933 note 7.

60. Colo.—Whinnery v. Wiley, 88 P. 171, 38 Colo. 203.
57 C.J. p. 933 note 8.

61. Colo.—Whinnery v. Wiley, supra.

62. Vt.—Topliff v. Hayes, 20 Vt. 362.

63. Tex.—Heidenheimer v. Johnston, 1 Tex. A. Civ. Cas. § 645.
57 C.J. p. 933 note 11.

64. Ill.—**Corpus Juris quoted in** Maxwell for Use of Maxwell v. Nieft, 40 N.E. 2d 554, 556, 313 Ill. App. 354.
57 C.J. p. 933 note 13.

65. Cal.—Thomas v. Layer, 191 P. 949, 48 Cal.App. 199.

66. Cal.—Thomas v. Layer, supra.
57 C.J. p. 934 note 23.

67. Ala.—Leader v. Mattingly, 37 So. 270, 140 Ala. 444.

68. N.C.—Teague v. Collins, 45 S.E. 1035, 134 N.C. 62.

69. Cal.—White v. Fratt, 13 Cal. 521.

70. Mass.—Marsh v. Gold, 2 Pick. 285.

constable on an indemnity bond that the judgment on which the action is based was obtained through fraud[71] or collusion,[72] or that the action was not properly defended,[73] or, where the action is founded on a liability incurred by levying on exempt property, that the officer refused to restore such property to the debtor at the creditor's direction;[74] and in general the obligors on the bond may make any defense, in an action thereon, which could have been made by the officer in the suit wherein liability was imposed on him.[75] While the language of the bond may estop defendant to deny that the officer made an attachment at his request,[76] he is not estopped to set up that the officer willfully exceeded his authority and defendant's directions.[77] The validity of a bond of indemnity cannot be attacked on the ground of duress,[78] or because of a variance in the description of the property, where it is otherwise described in the bond the same as in the officer's return, and the evidence shows that the property taken was that for which the bond was given,[79] or because the statement of claim omits some material matter, if the bond was given by the execution plaintiff without objection on the demand of the officer.[80] Matters not affecting the liability of the officer or increasing the risks of the indemnitors are no defense to an action on the bond.[81]

Limitations. It has been held that the statute of limitations does not begin to run against an action on a bond of indemnity for the amount paid out by a sheriff or constable on a judgment against him until the time of such payment.[82]

c. Parties, Pleading, and Evidence

General rules apply as to parties, pleading, and evidence in an action to enforce liability on an indemnity bond given a sheriff or constable.

An action on a bond of indemnity of which a sheriff or constable is obligee is properly brought in the name of such officer, even though the bond was given for the benefit of his deputy,[83] and, under a bond of indemnity to an officer and all persons assisting him in the execution of a writ, action lies against the indemnitors in the name of such officer for damage or loss sustained by his deputy, without an assignment by the latter of the cause of action.[84] Where it clearly appears from a bond that a particular officer is the person beneficially interested thereunder, action thereon may be brought by him notwithstanding the erroneous insertion of names of other persons as obligees[85]

Pleading. The rules relating to pleadings in civil actions generally are applicable, in an action by a sheriff or constable on a bond of indemnity given to him, as to the propriety and sufficiency of the declaration or complaint,[86] motion or demurrer,[87] and plea or answer.[88] In an action by a sheriff or constable on an indemnity bond to recover the amount of a judgment rendered against him in a suit by a party claiming the property levied on, the only issue is whether the judgment is included in the terms of the bond;[89] and the merits of the action in which such judgment was rendered[90] or the legality or propriety of the act on which it was founded[91] cannot be inquired into unless an issue of fraud or collusion in such judgment is raised[92] The admission of evidence tending to show a release of the indemnitors, where release has not been pleaded, does not affect the propriety or validity of a judgmnt for the officer.[93] There is no material variance between an allegation that the officer paid the judgment against him and proof that it was paid through him by one of the sureties on his official bond.[94]

71. Colo.—Whinnery v. Wiley, 88 P. 171, 38 Colo. 203.

72. Colo.—Whinnery v. Wiley, supra
Okl.—Armour Packing Co. v. Orrick, 46 P. 573, 4 Okl. 661.

73. Colo.—Whinnery v. Wiley, 88 P. 171, 38 Colo. 203.

74. Ohio.—American Security Co. v. American Bonding Co., 17 Ohio Cir.Ct., N.S., 229

75. Mo.—Stewart v. Thomas, 45 Mo. 42
Tex.—Maxwell-Clark Drug Co. v. Singley, Civ.App., 152 S.W. 827.

76. Mass.—Gast v. Goldenberg, 183 N.E. 257, 281 Mass. 214

77. Mass.—Gast v. Goldenberg, supra.

78. Mo.—Smith v. Rogers, 73 S.W. 243, 99 Mo.App. 252.

79. Mo.—Smith v. Rogers, supra.

80. Mo.—Smith v. White, 48 Mo.App. 404

81. N.Y.—Bowe v. Brown, 26 N.Y. Wkly.Dig. 47.
57 C.J. p. 933 note 20

82. Neb.—Benson v. Caulfield, 89 N.W. 664, 64 Neb. 101.
57 C.J. p. 934 note 25.

83. Me.—Frothingham v. Maxim, 141 A. 99, 127 Me. 58.

84. N.Y.—Stillwell v. Hurlbert, 18 N.Y. 374.

85. Tex.—Maxwell-Clark Drug Co. v. Singley, Civ.App., 152 S.W. 827.

86. Kan.—Tucker v. Smith, 68 P. 40, 65 Kan. 551
57 C.J. p. 934 note 36.

87. Colo.—Whinnery v. Wiley, 88 P. 171, 38 Colo. 203.
57 C.J. p. 935 note 37.

88. Ala.—Leader v. Mattingly, 37 So. 270, 140 Ala. 444.
57 C.J. p. 935 note 38

89. Neb.—Omaha Carpet Co. v. Clapp, 89 N.W. 246, 2 Neb. (Unoff.) 406

90. Neb.—Omaha Carpet Co. v. Clapp, supra

91. Tex.—Illies v. Fitzgerald, 11 Tex. 417.

92. Neb.—Omaha Carpet Co. v. Clapp, 89 N.W. 246, 2 Neb. (Unoff.) 406.

93. Ala.—Leader v. Mattingly, 37 So. 270, 140 Ala. 444.

94. Neb.—Benson v. Caulfield, 89 N.W. 664, 64 Neb. 101.

Evidence As in civil actions generally, the burden of proof rests on the party having the affirmative of the issues,[95] and the general rules of evidence as to the admissibility[96] and sufficiency[97] of evidence in civil actions are applicable to an action on a bond of indemnity to a sheriff or constable. Where the bond is to indemnify the officer for selling under a particular execution, he must show that he sold under the execution mentioned in the bond in order to recover thereon.[98]

d. Trial, Judgment, and Costs

Actions by sheriffs and constables against their indemnitors are controlled by the general rules governing trial, judgments, and costs in civil actions.

In an action by a sheriff or constable on a bond of indemnity, it is within the discretion of the court to refuse to permit the sureties on such bond to file, during the trial, a plea setting up a release to themselves from liability thereon.[99] Whether the judgment against the officer, on which the action for indemnity is founded, was fraudulent or collusive is a question for the jury.[1] In an action of this character, proper instructions must be given,[2] on request therefor duly made;[3] but an instruction on a question not in issue,[4] or an instruction which is partly or wholly erroneous or misleading,[5] is properly refused. Where there is a disputed question of fact, refusal of a directed verdict is proper.[6]

Judgment. Subject to the ordinary rules relative to judgments by default, judgment may be entered against defendant in an action by a sheriff or constable on a bond of indemnity, in case of his failure to answer at a proper time.[7]

Costs. Where, on default of defendant in an action by a sheriff or constable on an indemnity bond, a referee has been appointed to assess the sheriff's damages, but the default is subsequently opened by an order which does not tax the fees of the referee, such fees are a proper item of disbursement to be taxed in the costs on final judgment for the officer.[8]

VI. ACTIONS AGAINST OFFICERS OR INDEMNITORS

§ 146. Right of Action

- a. In general
- b. Act or default of officer
- c Act or default of deputy
- d. Duty or obligation of defendant to plaintiff
- e. Matters affecting right of action

a. In General

A civil action against a sheriff or constable, or his indemnitors, for his default or wrongful act may be brought by, and only by, a person who has sustained some injury through the act or default of the officer and who has a sufficient title or interest to sue.

A civil action against a sheriff or constable for his default or wrongful act may be brought by, and only by, a person who has a sufficient title or interest to sue,[9] and has not estopped or precluded himself from bringing suit, as discussed infra subsection f of this section. Also, where an indemnity bond has been given, a suit thereon may be brought by a person other than the officer, his deputy or surety, when, and only when, the bond was given for the benefit and protection of the owner or a claimant of the property involved, as discussed supra § 134, and he has a sufficient title or interest on which to base his right to sue.[10]

Injury to plaintiff. In order to support a civil action against a sheriff or constable, it is ordinarily necessary that plaintiff shall have sustained some injury through the act or default of the officer,[11]

95. Miss.—Butler v Alcus, 51 Miss 47.
57 C.J. p 935 note 50.

96. N.Y.—O'Brien v McCann, 58 N Y. 373.
57 C.J. p 935 note 51

97. Mass.—Gast v. Goldenberg, 183 N.E. 257, 281 Mass. 214.
57 C.J. p 935 note 52.

98. N.C.—Dickinson v Jones, 34 N C. 45.

99. Ala.—Leader v. Mattingly, 37 So. 270, 140 Ala. 444.

1. N.Y.—Dunn v National Surety Co., 80 N.Y.S. 744, 80 App.Div. 605, affirmed 70 N.E. 1098, 178 N.Y. 552.

2. Instructions held erroneous
Instructions that, in order to recover on execution creditor's indemnity bond, absolute ownership in claimants of lumber levied on must be shown were erroneous despite allegations of absolute ownership in claimants' notice of claim to constable and petition.—Carrow ex rel. Gross v Pinnell, Mo.App., 44 S.W.2d 884.

3. N.Y.—O'Donohue v. Simmons, 86 Hun 331
57 C.J. p 936 note 59.

4. Mont.—Weir v. Hum Tong, 46 P. 2d 45, 100 Mont. 1

Instructions held properly refused
Mont.—Weir v. Hum Tong, supra.

5. Mont.—Weir v. Hum Tong, supra
57 C.J. p 936 note 60.

6. Mont.—Weir v. Hum Tong, supra.

7. Cal.—Stark v. Raney, 18 Cal. 622.

8. N.Y.—Bowe v. Brown, 26 N.Y. Wkly.Dig. 47.

9. Ga.—Zugar v. Glen Falls Indem. Co., 11 S.E.2d 839, 63 Ga.App. 660.
57 C.J. p 936 note 73
Actions on official bonds see infra §§ 193-208.

10. N.C.—Flowers v. Spears, 130 S. E. 710, 190 N.C. 747.
57 C.J. p 937 note 76

11. Ga.—Zugar v. Glen Falls Indem. Co., 11 S.E.2d 839, 63 Ga.App. 660.
57 C.J. p 938 note 16.

and that the injury suffered shall have been the legal and natural consequence of the default or misconduct of which complaint is made,[12] and not the result of the negligence of the complaining party.[13] However, where a statute imposes an absolute liability on an officer as a consequence of an official default, damage to plaintiff is not necessary to support an action against the officer;[14] and where, under statutory authority, an action on a bond of indemnity is prosecuted by a claimant of property in the name of the sheriff or other officer to whom the bond was given, it need not appear that any damage was sustained by such officer.[15]

b. Act or Default of Officer

A civil action may be brought against a sheriff for any official default or misconduct on his part which caused injury.

A civil action may be brought against a sheriff for any official default or misconduct on his part which caused injury,[16] such as failure to execute process[17] by levy,[18] releasing property levied on,[19] failure to sell property levied on,[20] levying on[21] and selling[22] exempt property, seizing or levying on[23] and selling[24] property not belonging to defendant in the process, seizing property in the custody of the law,[25] selling property attached on mesne process without the consent of the creditor and owner,[26] or otherwise than by the mode prescribed by statute,[27] failure to collect money,[28] failure or refusal to pay over money collected by him[29] or in his official custody,[30] loss of property in his official custody[31] or negligently permitting it to be damaged,[32] misapplying the proceeds of a sale,[33] failure to return process,[34] making a false return,[35] or permitting an escape of a person arrested under civil process.[36] On the other hand, it has been held that an action at law may not be brought against a sheriff for performing his duty under a fieri facias which is legal on its face.[37]

c. Act or Default of Deputy

An action is properly brought against the sheriff for the default of his deputy and it has been held, although there is authority to the contrary, that no action lies against the deputy therefor.

Under the rule that the official default of a deputy is chargeable to the sheriff, as discussed supra § 55, an action is properly brought against the sheriff for such default,[38] and it has been held that no action lies against the deputy therefor,[39] although in some jurisdictions it has been held that an action may be brought against either the sheriff or the deputy.[40] However, it has been held that an action will lie against the deputy for his negligence,[41] or for a breach of his direct promise to the person suing,[42]

12. Ill.—Hullinger v. Worrell, 83 Ill. 220.
57 C.J. p 939 note 17.

13. Tex.—Jacobs v. Shannon, 21 S. W. 386, 1 Tex.Civ.App. 395.
57 C.J. p 939 note 18

14. Mo.—Douglass v. Baker, 9 Mo. 41.

15. Va.—Carrington v. Anderson, 5 Munf. 32, 19 Va. 32.

16. Miss.—Hutchins v. Lee, 1 Miss. 293.

Where the sheriff exceeds his authority, his conduct is actionable.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Torts

(1) Sheriff may be sued in his individual capacity for torts committed by him in course of his official duties.—Thompson v. Byers, 2 P.2d 496, 116 Cal.App. 214.

(2) Sheriff is bound by same rule of negligence that civilian is bound by under like circumstances.—Holland, for Use and Benefit of Williams v. Mayes, 19 So.2d 709, 155 Fla. 129.

17. N.Y.—Packard v. Hesterberg, 96 N.Y.S. 72, 48 Misc. 30.
57 C.J. p. 937 note 79

18. Mo.—Douglass v. Baker, 9 Mo. 41.
57 C.J. p. 937 note 80.

19. U.S.—Lowenberg v. Jefferies, C.C.Mont., 74 F. 385.
La.—Raziano v. Clancy, App., 23 So.2d 776, rehearing refused 24 So.2d 402.

20. Pa.—Hamner v. Griffith, 1 Grant 193.

21. S.D.—Paddock v. Balgord, 48 N.W. 840, 2 S.D. 100.
57 C.J. p. 937 note 83

22. Neb.—Strong v. Combs, 94 N.W. 149, 68 Neb. 315.
57 C.J. p. 937 note 84

23. Ky.—Lane v. Rowland, 175 S.W.2d 1000, 295 Ky. 868.
57 C.J. p. 937 note 85.

24. Utah.—Truitt v. Patten, 287 P. 175, 75 Utah 567.
57 C.J. p. 937 note 86

25. Conn.—Huntley v. Bacon, 15 Conn. 267.
57 C.J. p. 937 note 87.

26. Me.—Ross v. Philbrick, 39 Me. 29.

27. Me.—Ross v. Philbrick, supra.

28. La.—Crane v. Lewis, 4 La.Ann. 320.

29. Colo.—Cramer v. Oppenstein, 27 P. 713, 16 Colo. 495.
57 C.J. p. 938 note 91.

30. Mich.—Munger v. Sanford, 107 N.W. 914, 144 Mich. 323.

31. Ky.—Conover v. Commonwealth, 2 A.K.Marsh. 566, 12 Am.D. 451.

32. Vt.—Briggs v. Taylor, 35 Vt. 57.

33. Pa.—Enterline v. Comrey, 15 Pa.Co. 627.

34. Ky.—Groom v. Pickett, 4 Bush 372.
57 C.J. p. 938 note 96

35. N.H.—Clough v. Monroe, 34 N.H. 381.
57 C.J. p. 938 note 97.

36. Conn.—Hart v. Stevenson, 25 Conn. 499.
57 C.J. p. 938 note 98

37. Ga.—Colter v. Livingston, 114 S.E. 430, 154 Ga. 401.

38. Mass.—Campbell v. Phelps, 17 Mass. 244.
57 C.J. p. 938 note 3.
Joinder of sheriff and deputy as parties defendant see infra § 153.

39. Cal.—Beggs v. Smith, 147 P. 585, 26 Cal.App. 532.
57 C.J. p. 938 note 4.

40. Me.—Frothingham v. Maxim, 141 A. 99, 127 Me. 58.
Mass.—Draper v. Arnold, 12 Mass. 449.

41. Fla.—Holland, for Use and Benefit of Williams v. Mayes, 19 So.2d 709, 155 Fla. 129.

42. Ky.—Winterbower v. Haycraft, 7 Bush 57.

or for active malfeasance,[43] since such an action is against him as a wrongdoer[44] and not in his capacity of deputy[45]

d. Duty or Obligation of Defendant to Plaintiff

In order to support an action against a sheriff or constable for an official default, as distinguished from active misconduct in the nature of a trespass, it must appear that the sheriff or constable officially owes some duty to the plaintiff. In the absence of a statute to the contrary, a suit on an indemnity bond may not be maintained by a person other than the sheriff or his deputy or surety, where the bond is conditioned to indemnify the sheriff.

In order to support an action against a sheriff or constable for an official default, as distinguished from active misconduct in the nature of a trespass, it must appear that the sheriff or constable officially owes some duty, or is under some obligation, to plaintiff.[46] An action for damages will not lie against a sheriff and his bondsmen, for alleged failure of the sheriff to serve a process or make a levy, in favor of a person not a party to such proceeding calling for an exercise of such duty.[47] A suit on an indemnity bond may not be maintained by a person other than the sheriff or his deputy or surety, where the bond runs to, and is conditioned to indemnify, the sheriff only,[48] and there is no statute authorizing another person to sue on the bond.[49] According to some statutes, and the construction placed thereon, the right of action against indemnitors of the sheriff is confined to claimants who gave notice to the sheriff of their claims, and with respect to whose claims the bond was given,[50] and other claimants are left to their remedy by a common-law action against the sheriff.[51]

e. Matters Affecting Right of Action

(1) Against officer
(2) Against indemnitors

(1) Against Officer

An action may be maintained against an officer, even though his acts up to the time of the commencement of the action were regular and legal, where thereafter and before trial he is guilty of acts which render him a trespasser ab initio, and ordinarily a person is not precluded from bringing an action by the mere fact that another remedy is, or was, available, but it has been held that a person who has ratified the officer's acts may not maintain an action based thereon.

An action may be maintained against a levying officer notwithstanding his proceedings up to the time of the commencement of the action were regular and legal, where after such time and before the trial he is guilty of acts which render him a trespasser ab initio[52] A person is not precluded from bringing an ordinary civil action against a sheriff or constable by the mere fact that another remedy is, or previously was, open and available to him[53] An action of tort against an officer for taking property from plaintiff by virtue of a writ of replevin in which the bond was defective is not defeated by proof that plaintiff in replevin became nonsuit, and the present plaintiff had judgment therein for damages and a return of the goods, if in fact that judgment remains unsatisfied and the goods have not been returned.[54] Where an officer sells goods taken on a void execution after having been notified by a creditor, who has placed in his hands another execution against the same debtor, that he claims the first execution to be void, and that, if the officer sells the goods under it, so that they cannot be taken on his execution, he will hold him responsible therefor, such creditor does not

N C —Tarkinton v. Hassell, 27 N C 359.

43. Mass —Campbell v. Phelps, 17 Mass. 244
57 C J p 938 note 7.

44. Md.—Mark v Lawrence, 5 Harr & J 64.
Philippine —Singh v. Sulse, 49 Philippine 563.

45. Md —Mark v. Lawrence, 5 Harr & J. 64
Philippine —Singh v Sulse, 49 Philippine 563.

46. Ga.—Zugar v. Glen Falls Indem Co., 11 S E 2d 839, 63 Ga.App. 660
57 C.J p 938 note 10.

Ascertainment of interest of claimant in equity
An action against sheriff to recover a share of foreclosure sale bid, which was not collected from bidder, was not maintainable on ground that plaintiff's intestate and bidder at foreclosure sale were joint owners of the mortgage under foreclosure, where there was evidence of a partnership or at least a joint adventure between intestate and bidder and bidder was claiming ownership of the mortgage, since the remedy was in equity to establish plaintiff's ownership of an interest in the mortgage —Morgan v Van Meter, 31 A.2d 767, 130 N J Law 78.

47. Ga —Zugar v Glen Falls Indem Co., 11 S E 2d 839, 63 Ga App 660.

48. Ky.—McGuire v. Westover, 267 S.W. 149, 206 Ky. 256
N M.—DeWitt v. U S Fidelity, etc, Co., 148 P 489, 20 N.M. 163.

49. N M —DeWitt v. U. S. Fidelity, etc, Co, supra
57 C J p 938 note 12.

50. Mo —Steele v Farber, 37 Mo. 71 —Stewart v. Ball, 35 Mo 209

51. Mo —Stewart v Ball, supra.

52. Mass —McGough v. Wellington, 6 Allen 505.

53. Mont —Englehart v. Sage, 235 P 767, 73 Mont. 139, 40 A.L R 590.
57 C J. p 939 note 23.
Effect of indemnity as protection for officer and sureties on official bond see supra § 133.
Summary proceedings against officers see infra § 168.

Statute giving right to prosecute bond of sheriff in the name of the people of the state for injured person's use does not take away the right to sue the sheriff, the wrongdoer, alone.—King v. Snow, 266 Ill.App. 462

54. Mass —Dearborn v. Kelley, 3 Allen 426.

by purchasing the goods at the sale and receiving possession of them become estopped from maintaining an action against the officer.[55] The fact that a person received the chattels in question as a bailee from the purchaser at the execution sale does not preclude him from recovering their value from the sheriff who wrongfully seized them under an execution against another person.[56] Also, the right to recover for property seized on execution against another person is not affected by the fact that a third person made a claim to the sheriff for property which included that in question, where there is nothing to show that plaintiff knew of, or acquiesced in, such claim,[57] and it has been held that the fact that an attaching creditor, after the release under bond of the property seized under his writ of attachment, was thereafter appointed keeper of the same property when it was attached by another, without protest at that time that his attachment had been improperly released, does not estop him from thereafter attacking the release of his attachment without proper bond.[58] On the other hand, it has been held that a person who has ratified the acts of a sheriff with respect to the disposal of property levied on cannot thereafter maintain an action against him because of such acts;[59] where a party proceeds by attachment, and receives the principal of the debt, he cannot afterward sue the sheriff for damages for the detention thereof;[60] a person who has failed to appeal from a dismissal of his claim may not maintain trover against the sheriff;[61] and after a judgment against a deputy in trespass de bonis asportatis, and execution levied on the body of the deputy, but not satisfied, no action lies against the sheriff for the same cause.[62]

Court's exoneration and release of sheriff from accountability to it do not release or protect him from liability to third persons.[63]

(2) Against Indemnitors

An action may not be maintained against the indemnitors of the sheriff, unless an action could have been maintained against the sheriff for the act complained of if no indemnity had been given, and various other matters have been held to affect or not to affect an action against the indemnitors.

An action cannot be maintained against indemnitors of the sheriff, unless an action could have been maintained against the sheriff for the act complained of if no indemnity had been given.[64] The right of a judgment debtor to sue on a bond of indemnity for the seizure and sale of exempt property is not affected by his failure to give the sheriff notice of his claim of exemption,[65] and the fact that claimant has executed a bond to retain possession of the property will not prevent his instituting an action on the indemnity bond for the damages previously sustained.[66] It has been held that a person is not deprived of his right of action on an indemnifying bond executed to the officer because the officer has rendered himself liable by failure to return the indemnifying bond,[67] but there is also authority to the contrary.[68] Where two indemnity bonds have been given by different execution creditors, and the surplus of the proceeds of the execution sale, remaining after satisfying one execution, have been paid by the sheriff to the other execution creditor, the facts that a claimant brought an action on the bond given by the former execution creditor and recovered for the amount of the goods applied to his execution do not bar him from bringing an action on the bond given by the other execution creditor.[69]

§ 147. Nature and Form of Remedy

A sheriff who has wrongfully seized property may be sued therefor in any appropriate form of action, and, where a sheriff permits property he has seized to be wrongfully used or makes a false return, the remedy of the injured person is an ordinary civil action.

A sheriff, who has wrongfully seized property may be sued therefor in any appropriate form of action the aggrieved party may elect to pursue.[70] Where a sheriff permits property he has seized to be wrongfully used, the remedy of the injured

55. Mass.—Brayman v. Whitcomb, 134 Mass 525.

56. S D.—Huston v. Benjamin, 112 N.W. 842, 21 S D 318

57. S D.—Comeau v. Hurley, 123 N W. 715, 24 S D 275

58. La.—Raziano v. Clancy, App., 23 So 2d 776, rehearing refused 24 So. 2d 402.

59. Mass.—Hewes v. Parkman, 20 Pick 90.

60. S C.—Daniel v. Capers, 15 S C L 237.

61. Ga.—Griner v Lowe, 91 S E 919, 19 Ga App. 520.

62. Mass.—Campbell v Phelps, 1 Pick 62, 11 Am.D 139.
57 C.J p 940 note 31.

63. Hawaii.—Wiley v. Boyd, 1 Hawaii 20.

64. Iowa.—Whitney v. Gammon, 67 N.W. 405.
57 C J. p 940 note 33
Effect of indemnity as giving right of action to claimant see supra § 134.

65. Iowa.—Whitney v Gammon, 72 N W 551, 103 Iowa 363.
57 C J. p 940 note 34.

66. Ky.—Brock v. Church, 5 Ky L. 855
23 C J p 615 note 30

67. Ky.—Chisholm v. Gooch, 79 Ky. 468

68. Miss.—New Albany Wholesale Grocery Co. v Wells, 74 So. 817, 114 Miss 144.

69. Mo.—State v Doan, 39 Mo. 44.

70. Mont.—Bank of Commerce v U. S. Fidelity, etc., Co., 194 P. 158, 58 Mont. 236
Summary proceedings against officers see infra § 168.

person is an ordinary civil action.[71] Likewise, where a sheriff makes a false return, the remedy of the injured person is an action for damages against the officer,[72] and not a motion to set aside the return.[73] Where a sheriff returns an execution nulla bona, and refuses to pay over money collected on it, the action must be for a false return.[74] It has been held that an action against a sheriff for an unauthorized release of attached property is in tort.[75]

Accounting. A suit in equity for an accounting may be maintained against a sheriff, his estate, and indemnitors where appropriate grounds of equity jurisdiction are shown to exist.[76]

Assumpsit. Assumpsit is a proper form of action against a sheriff who has failed or refused to pay over to the person entitled thereto money collected by him[77] or by his deputy,[78] or has paid money in his hands to a person other than the one really entitled thereto,[79] and, if the officer selling property at an official sale delivered it to the purchaser without collecting the purchase money, the person entitled to the proceeds of the sale may recover the amount in an action of assumpsit.[80] It has also been held that a person who is injured by the misconduct of an officer may waive the tort and recover by an action of assumpsit any money in the hands of the tort-feasor as the fruits derived from the wrongful act.[81] So, also, where an officer failed to execute and return a writ which had been renewed on his agreement to be responsible therefor, the remedy is by assumpsit on his promise.[82]

Book account. An action of book account does not lie against an officer for money which he has failed to collect.[83]

Case. An action on the case is a proper remedy to enforce the liability of a sheriff for failure to execute process,[84] permitting the escape of a debtor arrested on civil process,[85] failure to set aside to the debtor goods exempt from execution,[86] selling property claimed as exempt,[87] making a false[88] or improper[89] return, making an excessive levy,[90] selling property levied on at a place other than one of those authorized by the statute,[91] neglect to take proper care of property seized by him under process,[92] refusing to take bail from a debtor arrested on mesne process,[93] disregarding a proper notice of labor claims when he has in his hands funds derived from the master's property,[94] failure to take security,[95] taking insufficient security,[96] failure to pay over money collected,[97] or seizing property under an execution on a judgment procured by fraud to which the officer was a party.[98] However, case is not a proper remedy against a sheriff for levying an execution after the return day,[99] or selling property levied on without giving the proper notice.[1] Ordinarily, an action on the case is a proper form of remedy to enforce the liability of a sheriff for failure to return process;[2] but, where an original execution has been renewed on a constable's responsibility and on good consideration, case is not the proper form of action

71. La.—Bloomenstiel v. Tridico, App., 156 So. 793.

72. Pa.—Jacobs v. People's Electric, etc., Co., 21 Pa. Co. 492.

73. Pa.—Jacobs v. People's Electric, etc., Co., supra.

74. Cal.—Egery v. Buchanan, 5 Cal. 53.

75. U.S.—Lowenberg v. Jefferies, C.C. Mont., 74 F. 385.

76. **Where record showed many bond estreatures and fines,** the proceeds of which were paid into sheriff's office during decedent's term of office, equity had jurisdiction of suit against deceased sheriff's estate and surety on his official bond for an accounting and to recover money due county.—Scott v. Caldwell, for Use and Benefit of Bay County, 87 So.2d 85, 160 Fla. 861.

77. Del.—Pettyjohn v. Hudson, 4 Del. 468.
57 C.J. p. 940 note 47.

78. Mo.—Evans v. Hays, 1 Mo. 697.
Va.—Overton v. Hudson, 2 Wash. 172, 2 Va. 172.

79. Mont.—Merchants', etc., Nat. Bank v. Barnes, 45 P. 218, 18 Mont. 335, 56 Am.S.R. 586, 47 L.R.A. 737.
57 C.J. p. 940 note 49.

80. Mass.—Appleton v. Bancroft, 10 Metc. 231.
N.Y.—Denton v. Livingston, 9 Johns. 96, 6 Am.D. 264.

81. Me.—Richardson v. Kimball, 28 Me. 463.

82. N.Y.—Homan v. Liswell, 6 Cow. 659.

83. Vt.—Gleason v. Briggs, 28 Vt. 135.

84. N.Y.—Platt v. Sherry, 7 Wend. 236.
Vt.—Flinn v. St. John, 51 Vt. 334.

85. Ala.—Sawyer v. Ballew, 4 Port. 116.
57 C.J. p. 941 note 57.

86. N.J.—Briggs v. Bell, 8 N.J.L.J. 251.

87. Pa.—Van Dresor v. King, 34 Pa. 201, 75 Am.D. 643.

88. Conn.—Humphrey v. Case, 8 Conn. 101, 20 Am.D. 95.
N.H.—Clough v. Monroe, 34 N.H. 381.
57 C.J. p. 941 note 60.

89. Ala.—Sutherland v. Cunningham, 1 Stew. 438.

90. Ind.—Jarratt v. Gwathmey, 5 Blackf. 237.

91. Ala.—Sheppard v. Shelton, 34 Ala. 652.

92. Vt.—Nutt v. Wheeler, 30 Vt. 436, 73 Am.D. 316.

93. Vt.—Churchill v. Churchill, 12 Vt. 661.

94. Pa.—Yeager v. Toole, 1 Dauph. Co. 120.

95. N.Y.—Gibbs v. Bull, 18 Johns. 435.

96. Ill.—Gilbert v. Buffalo Bill's Wild West Co., 70 Ill.App. 326.
N.Y.—Gibbs v. Bull, 18 Johns. 435.

97. N.C.—Fagan v. Williamson, 53 N.C. 433.

98. S.C.—Brown v. Wood, 17 S.C.L. 457.

99. N.Y.—Vail v. Lewis, 4 Johns. 450, 4 Am.D. 300.

1. Pa.—Carrier v. Esbaugh, 70 Pa. 239.

2. N.Y.—Burk v. Campbell, 15 Johns. 456.

against him for not returning it.[3]

The common-law right of suing in case is not taken away by a statute permitting an action of debt for the same cause.[4]

Where process was issued by competent authority, was regular on its face, and was executed by an officer according to its mandate, case for malicious motive on his part is the only remedy available against him.[5]

Debt. At least where it is so provided by statute, an action of debt is a proper remedy against a sheriff who has failed to execute[6] or return[7] process, received depreciated currency in satisfaction of an execution,[8] failed to pay over money collected,[9] or failed without legal excuse to apply property levied on under an execution to the satisfaction of it.[10]

While debt did not lie at common law against an officer for the escape of a prisoner,[11] this remedy was by statute in early times extended to an escape on execution and has been so applied in this country,[12] although its application has been denied for an escape on mesne process.[13]

Trespass Trespass is a proper form of remedy to enforce the liability of a sheriff or his indemnitors for a wrongful seizure[14] and sale[15] of property not belonging to defendant in the process, levying on property which is exempt under the statute,[16] or on which, under the circumstances, a levy was not authorized,[17] selling property claimed as exempt,[18] levying an execution after the return day,[19] selling, under a levari facias, grain growing on mortgaged premises,[20] selling property levied on without giving the proper notice,[21] delivering property seized under a writ of replevin to plaintiff therein without requiring a sufficient bond,[22] or an injury done by his deputy to the person or property of another [23] On the other hand, trespass is not a proper form of action to enforce a sheriff's liability for making an excessive levy,[24] seizure of property under an execution on a judgment procured by fraud to which the officer was a party,[25] refusing to permit an attachment defendant to replevy the property on a valid and sufficient bond,[26] taking property out of the custody of defendant in replevin on an insufficient replevin bond,[27] selling property levied on at a place other than one of those authorized by statute,[28] taking the goods of the execution defendant without an auction sale, on defendant's consent,[29] misapplication of the proceeds of a sale of property levied on,[30] making an improper return,[31] or refusing to take bail from a debtor arrested on mesne process,[32] and, where a writ was issued by competent authority and was regular on its face, an officer cannot be held liable in trespass for executing it according to its mandate,[33] even though he acted maliciously [34] It has been both affirmed[35] and denied[36] that trespass is a proper remedy for a refusal to release property claimed as exempt.

3. N.Y.—Homan v. Liswell, 6 Cow. 659.

4. N.Y.—Rawson v Dole, 2 Johns 454.
N C—Fagan v. Williamson, 53 N C 433.

5. U S.—Smith v Miles, Super Ark, 22 F.Cas No 13,079a, Hempst 34

6. N.Y.—Pierce v. Sheldon, 13 Johns. 191

7. N Y—Pierce v. Sheldon, supra.

8. Ark—Randolph v Ringgold, 10 Ark 279, 52 Am D 235.

9. N C.—Fagan v Williamson, 53 N C 433
Tenn—Bodenhamer v Bodenhamer, 6 Humphr 264

10. Tenn—Bodenhamer v. Bodenhamer, supra.

11. U S—Steere v Field, C C.R I, 22 F Cas No 13,350, 2 Mason 486
18 C J p 9 note 22

12. Ill—Plumleigh v. Cook, 13 Ill 669
Mass—Porter v. Sayward, 7 Mass. 377.
N.Y—Rawson v. Dole, 2 Johns. 454.
S C—Boyce v. Barksdale, 15 S C L 441
18 C J. p 9 notes 23–25

13. N H—Lovell v Bellows, 7 N H 375.

14. Ark—Moores v Winter, 53 S W 1057, 67 Ark 189
57 C J p 941 note 88.

15. Pa—Berwald v Ray, 30 A 727, 165 Pa 192.
57 C J. p 941 note 89.

16. Ill—Cornelia v Ellis, 11 Ill. 584.
57 C J. p 942 note 90

17. Ga—Gorham v Hood, 27 Ga 299.

18. Pa—Van Dresor v. King, 34 Pa 201, 75 Am.D. 643.
57 C J p 942 note 92

19. N Y—Vail v Lewis, 4 Johns 450, 4 Am D 300

20. Pa—Myers v. White, 1 Rawle 353

21. Ala—Wright v. Spencer, 1 Stew 576, 18 Am.D 76
Pa—Carrier v. Esbaugh, 70 Pa. 239

22. Mass—Parker v. Young, 75 N. E 98, 188 Mass. 600.
57 C.J. p 942 note 96.

23. Mass—Campbell v. Phelps, 17 Mass. 244
57 C J p 942 note 97

24. Ind—Jarratt v. Gwathmey, 5 Blackf 237

25. S C.—Brown v. Wood, 17 S C L 457

26. Ala—Walker v Hampton, 8 Ala. 412

27. Ill.—Gilbert v Buffalo Bill's Wild West Co, 70 Ill App 326

28. Ala—Sheppard v. Shelton, 34 Ala 652

29. Ill—Barnes v. Rogers, 23 Ill. 350

30. N H—Walker v. Lovell, 28 N.H 138, 61 Am D. 605

31. Ala—Sutherland v. Cunningham, 1 Stew. 438

32. Vt—Churchill v. Churchill, 12 Vt 661

33. U.S—Smith v. Miles, Super Ark, 22 F.Cas No 13,079a, Hempst 34

34. U S—Smith v. Miles, supra

35. N.D—Oliver v. Wilson, 80 N.W. 757, 8 N.D. 590, 73 Am S.R. 784.

36. N J.—Briggs v. Bell, 8 N.J L J. 251.

Trover. Trover is a proper form of action against a sheriff or his indemnitors where sheriff seized[37] or sold[38] the property of one person under process against another, seized mortgaged chattels in the possession of the mortgagee,[39] seized exempt property,[40] refused to release it,[41] and sold it under his process notwithstanding the claim of exemption,[42] or sold property without giving the notice required by law;[43] and the purchase by an officer at his own sale of goods seized by him on execution may be regarded as a conversion of the property, so as to justify an action of trover against him[44] So, also, where an officer who had attached animals fed them on defendant's hay without his consent, defendant, on being successful in the attachment suit, may maintain trover against the officer for the hay,[45] and, where an officer, by his subsequent misconduct, became a trespasser ab initio, he is liable in conversion for the property seized by him to the same extent as if he had wrongfully taken it in the first place.[46] However, trover is not an appropriate remedy for the injury caused by the act of the sheriff in selling property levied on at a place other than one of those authorized by the statute,[47] by his failure to take a bond with sufficient sureties on executing a writ of replevin,[48] by his taking judgment against a receiptor for property for too small a sum,[49] or by his neglect to take proper care of property seized by him under process[50]

An officer who has attached and sold property under regular process cannot be held liable in trover therefor,[51] although defendant is ultimately successful in the suit[52] Where a sheriff levied on property under executions prior to an assignment for the benefit of creditors by the owner, and after such assignment other executions came into his hands and he claimed the right to apply the unsold portion of the goods to the latter executions, and the assignee in order to procure the release of the goods paid to the sheriff the amount of such executions, the assignee had no right of action against the sheriff as for conversion of the goods[53]

In order to maintain trover complainant must have had not only a property in the goods[54] but also a right to the actual possession thereof,[55] at the time of the conversion. It is not necessary that a conversion by the officer shall have been to his own use.[56]

§ 148. Conditions Precedent

Conditions precedent to the right to maintain an action against the sheriff or his indemnitors must be performed before the action may be instituted, but the plaintiff will not be called on to perform any act as a condition precedent which is not clearly made such by statute, or is not required in the interest of justice and would serve no useful purpose.

Conditions precedent to the right to maintain an action against a sheriff or his indemnitors must be performed or complied with before the action may be instituted.[57] However, plaintiff will not be called on to do or perform any act as a condition pre-

37. Cal.—Brinkley-Douglas Fruit Co. v Silman, 166 P. 371, 33 Cal App 643.
57 C J. p 942 note 14.

38. Ky.—Lane v Rowland, 175 S W 2d 1000, 295 Ky 868.
57 C J. p 942 note 15.

39. Cal.—Rider v Edgar, 54 Cal 127

40. Wis.—Below v Robbins, 45 N W. 416, 76 Wis. 600, 20 Am S R. 89, 8 L R A 467.
57 C.J. p 942 note 17.

41. N D.—Oliver v. Wilson, 80 N.W. 757, 8 N D. 590, 73 Am.S R. 784.

42. Wis.—Below v Robbins, 45 N.W 416, 76 Wis. 600, 20 Am S R. 89, 8 L R A. 467.
57 C J. p 942 note 19.

43. Ala.—Wright v Spencer, 1 Stew. 576, 18 Am D 76

44. N.H.—Perkins v. Thompson, 3 N H. 144

45. N H.—York v. Sanborn, 47 N H. 403.

46. Mass.—Morrin v. Manning, 91 N. E 308, 205 Mass. 205.

47. Ala.—Sheppard v. Shelton, 34 Ala 652.

48. Mass.—Parker v Young, 75 N. E 98, 188 Mass. 600.

49. N H.—Bissell v. Huntington, 2 N H. 142

50. Vt.—Nutt v. Wheeler, 30 Vt 436, 73 Am D. 316—Abbott v. Kimball, 19 Vt. 551, 47 Am D. 708.

51. N H.—York v. Sanborn, 47 N H 403
Vt.—Abbott v Kimball, 19 Vt. 551, 47 Am.D 708.

52. N H.—York v. Sanborn, 47 N H 403
Vt.—Abbott v Kimball, 19 Vt. 551, 47 Am D 708

53. N.Y.—Freeman v. Grant, 30 N. E 247, 132 N Y. 22.

54. N Y.—Dubois v. Harcourt, 20 Wend 41

55. N Y.—Dubois v Harcourt, supra
57 C.J p 943 note 32.

56. Iowa.—Nutter v. Ricketts, 6 Iowa 92.

57. N Y.—Powers v. Wilson, 7 Cow. 274.

Claim, notice, or demand as prerequisite to action for:
Failure to
Collect money see supra § 92.
Execute process see supra § 56.
Have property forthcoming to satisfy writ see supra § 82.
Pay over money see supra § 91.
Loss of, or injury to, property see supra § 78.
Sale of property under process against another see supra § 87.
Taking insufficient security see supra § 102.
Wrongful seizure see supra §§ 66, 68.
Effect of failure of sheriff to return indemnity bond see supra § 146.
Order for payment of money as prerequisite to suit therefor see supra § 91.
Proceedings against bail as condition precedent see supra § 102.

Where plaintiff agreed with sheriff, in consideration of the latter not retaking defendant who had escaped, that plaintiff would not sue the sheriff without notice, and reasonable time to retake, it was held that he could not sue without such notice.—Powers v. Wilson, 7 Cow., N.Y., 274.

cedent which is not clearly made such by statute,[58] or is not required in the interest of justice and would serve no useful purpose.[59] Thus, where the sheriff sells property belonging to a person not named in the writ with full knowledge of such person's rights therein, a demand by such person is not a condition precedent to an action against the sheriff,[60] and it has been held that an attaching creditor need not, before suing an officer, go through the useless formality of demanding attached goods which the officer released and did not afterward take possession of [61]

Demanding copy of warrant. A statute providing that no action shall be brought against any constable for anything done in obedience to any warrant until demand has been made for a copy of the warrant will be given effect in cases wherein it is applicable,[62] but it does not apply where the constable did not act in pursuance of the warrant,[63] or the warrant does not constitute a defense, excuse, or justification for the acts or conduct complained of,[64] as where the sheriff levies on the property of a person not named in the warrant [65]

§ 149. Defenses

A sheriff who is sued for an act done by him has the right to take on himself the conduct of the defense and set up such proper defenses as he has, and, where suit is brought by a person other than the plaintiff in the process in question, matters which would be available to such plaintiff are available to the sheriff.

A sheriff who is sued for an act done by him has the right to take on himself the conduct of the defense,[66] and set up such proper defenses as he has,[67] notwithstanding he has been indemnified by the party suing out the process;[68] and, where the suit is brought by a person other than plaintiff in the process in question, matters which would be available to such plaintiff are available to the sheriff,[69] but in an action by a mortgagee, the fact that he has other security is not a defense;[70] and in an action by a conditional seller, a tender of money to him is not a defense where it was not timely[71] or of the full amount owing.[72] In an action by plaintiff in the process for failure to execute or return the process, the officer may defend on the ground that his omission was due to the conduct or instructions of plaintiff or his attorney,[73] but not on the ground that delay was requested by the attorney for defendant in the process, where the attorney for plaintiff refused to consent to the delay and insisted that the sheriff should proceed [74]

Where the action is against indemnitors, they may avail themselves of any defense which would be available to the sheriff if no bond had been taken.[75]

58. La.—Pembrook v. Goldman, App., 176 So. 888.

Affidavit of ownership

A statute providing that before any bond of indemnity can be required of a plaintiff seeking to have a sheriff or constable seize property a third person claiming the property must make an affidavit that he is the real bona fide owner does not require that third persons make such oath as a condition precedent to suing the sheriff for damages.—Macias v Lorio, 6 So 538, 41 La Ann 300—Pembrook v. Goldman, La App., 176 So. 888

59. Mich.—Sleeper v. Wilson, 253 N. W. 274, 266 Mich. 218.

Suit on bond

Where a bond given to the sheriff and his assigns for his protection is assigned to the use-plaintiffs, the use-plaintiffs may proceed at once thereon, and it is not necessary that suit be first brought against the sheriff and that he thereafter bring suit on the bond.—Acker v. Delp, 76 Pa Super. 447

60. Mich.—Sleeper v. Wilson, 253 N W. 274, 266 Mich 218.

61. Me.—Isenman v. Burnell, 130 A. 868, 125 Me 57.

62. Pa.—Shane v Gulf Refining Co., 173 A. 738, 114 Pa Super. 87—Nelson v. Wick, 53 Pa Dist. & Co. 269, 3 Lawrence L.J 215—Pride v. Pride, Com Pl., 29 Del.Co 352. 57 C J p 943 note 46.

Primary purpose of statute is to protect constable when he acts in obedience to warrant and relieve him of liability for want of jurisdiction in justice issuing writ, or for any irregularity in the proceedings.—Smith v. Houghwot, 1 A 2d 517, 132 Pa Super 501.

63. Pa.—Nelson v. Wick, 53 Pa Dist & Co 269, 3 Lawrence L J. 215—Pride v Pride, Com Pl., 29 Del.Co 352—Mollison v Bowman, 5 Pa L J 181.

64. Pa.—Shane v Gulf Refining Co., 173 A. 738, 114 Pa Super. 87—Nelson v. Wick, 53 Pa.Dist. & Co 269, 3 Lawrence, L.J. 215—Pride v. Pride, Com Pl., 29 Del.Co 352 57 C J. p 943 note 48

65. Pa.—Shane v. Gulf Refining Co., 173 A. 738, 114 Pa Super 87

66. N.Y.—Peck v. Acker, 20 Wend. 605.

67. N Y.—Hart v Clarke, 87 N.E 808, 194 N Y. 403. 57 C J. p 944 note 52.

Matters affecting liability for particular defaults see supra §§ 52–127.

Assumption of risk and contributory negligence

Where constable as a member of a posse with sheriff and his deputies to apprehend a suspect was shot by a deputy who thought constable was fleeing suspect, in action against sheriff and sheriff's bondsman for constable's death assumption of risk and contributory negligence were not defenses.—Holland, for Use and Benefit of Williams, v. Mayes, 19 So 2d 709, 155 Fla. 129.

68. N.Y.—Peck v. Acker, 20 Wend 605.

69. Ala.—**Corpus Juris cited in** Huett v Nevins, 50 So 2d 160, 162, 255 Ala. 37. 57 C J. p 944 note 54.

70. N.D.—Godman v. Olson, 165 N. W. 515, 38 N.D. 360
Or.—Bankers' Discount Corp. v. Noe, 242 P 610, 116 Or. 570

71. Utah.—Truitt v. Patten, 287 P. 175, 75 Utah 567.

72. Utah.—Truitt v. Patten, supra

73. Ark.—G F. Harvey Co v Huddleston, 189 S.W. 181, 125 Ark 522.

74. Ky.—James Mfg Co. v. E. Rehkopf Saddlery Co., 140 S.W. 693, 145 Ky 524.

75. N.Y.—Hess v. Hess, 22 N.E. 956, 117 N.Y. 306. 57 C J. p 944 note 60.

The fact that an indemnity bond recites that the officer has been directed to levy on property of the judgment debtor will not prevent a recovery against the indemnitors if the officer was actually directed to levy on property of a third person by the principal in the bond.[76]

§ 150. Jurisdiction and Venue

The question what particular court has jurisdiction of an action against the sheriff or constable for official default or misconduct is generally governed by statute.

The question what particular court has jurisdiction of an action against a sheriff or constable for official default or misconduct is generally governed by the statute.[77] Under some statutes an action against a sheriff or constable for a neglect of duty with respect to the execution of process is properly brought in the county in which the judgment was rendered or the proceeding had pursuant to which the process issued, even though the sheriff or constable is an officer in another county,[78] but the remedy is not necessarily to be sought in the court from which the process issued,[79] and under other statutes such an action must be brought in the sheriff's own county,[80] although the process issued from a court of another county.[81] Sometimes a certain court is considered as the same court when sitting in any county in the state, so as to permit an action against a sheriff for neglecting to return an execution to be maintained in a county where either party dwells.[82] Under some statutes an action against a sheriff or constable for official misconduct must be tried in the county where the cause of action arose;[83] but the limitations contained in such statutes thereof must be observed.[84] It has been held that an action of debt against the sheriff for an escape is a transitory action so that plaintiff may lay the venue in any county he pleases.[85]

§ 151. Time to Sue and Limitations

a. Time when action may be commenced
b. Time within which action must be commenced

a. Time When Action May Be Commenced

An action against a sheriff or constabe may be brought at any time after the right of action arises and before it is barred by the statute of limitations.

An action against a sheriff or constable may be brought at any time after the right of action arises and before it is barred by the statute of limitations.[86]

For delivery of, or failure to deliver, property. Where the property of defendant in replevin is taken by the officer and delivered to plaintiff without authority of law, defendant may sue the officer at once,[87] or he may elect to abide the result of the replevin suit.[88] Also an officer who has seized property under a writ of detinue may be sued at once on his failure to comply with a statute requiring him to turn the property over to defendant after the failure of plaintiff to give a forthcoming bond;[89] but, where an officer would not be justified in turning replevied property over to either party to the replevin action until the merits of that action have been adjudicated, a suit against him for not delivering the property to one party may not be brought while an appeal from a dismissal of the replevin action is pending.[90]

Before or after return day of writ. It has been held that an action for failure to pay over money collected on a writ, or on a sale under a writ, cannot be brought until after the return day of the writ,[91] at least where no demand on the officer has been made,[92] but there is also authority for the view that, where a sheriff who has collected money on a writ refuses to pay it over on demand, an action may be brought against him before the return day.[93]

76. Neb.—Benson v. Caulfield, 89 N.W. 664, 64 Neb. 101.

77. Tex.—Ostrom v. McCloskey, Civ. App., 44 S.W. 307.
57 C.J. p. 944 note 63.

County where tort committed and sheriff resided
The venue of a suit for a tort of the sheriff committed in county of which sheriff was sheriff and in which he resided, was exclusively in such county.—Bachus v. Foster, 122 S.W.2d 1058, 132 Tex. 183, answer to certified question conformed to, Civ. App., 125 S.W.2d 641.

78. N.C.—Watson v. Mitchell, 12 S.E. 836, 108 N.C. 364.
57 C.J. p. 944 note 64.

79. La.—Oger v. Daunoy, 7 Mart., N.S., 656.
57 C.J. p. 944 note 66.

80. N.Y.—Packard v. Hesterberg, 96 N.Y.S. 72, 48 Misc. 30.

81. N.Y.—Packard v. Hesterberg, supra.

82. Conn.—Burrows v. Fitch, Kirby 113.

83. N.Y.—Murphy v. Callan, 74 N.Y.S. 1009, 69 App. Div. 413.
57 C.J. p. 944 note 70.

84. N.C.—Harvey v. Brevard, 3 S.E. 911, 98 N.C. 93.
57 C.J. p. 945 note 71.

85. N.J.—Jones v. Pemberton, 7 N.J.Law 350.

86. Ala.—Burton v. Cefalu, 51 So. 721, 165 Ala. 362.

87. Wis.—Whitney v. Jenkinson, 3 Wis. 407.

88. Wis.—Whitney v. Jenkinson, supra.

89. Ala.—Burton v. Cefalu, 51 So. 721, 165 Ala. 362.

90. N.Y.—Rich v. Conley, 64 N.Y.S. 333.

91. Ill.—McInerney v. Chicago Times Co., 41 Ill.App. 438.
57 C.J. p. 945 note 78.

92. N.Y.—Bortel v. Ostrander, 15 How.Pr. 572.
57 C.J. p. 945 note 79.

93. Mass.—Rogers v. Sumner, 16 Pick. 387.

During pendency of attachment or trustee proceedings. Where goods in the possession of a mortgagor are attached and the mortgagee is summoned by a trustee writ, an action by the mortgagee for conversion[94] or wrongful attachment[95] is premature when it is brought while the attachment is still in force and before the officer has been discharged as trustee, but the pendency of an action in which property was attached presents no obstacle to an immediate suit by the owner against the sheriff for improperly selling the property,[96] and, where a deputy sheriff, having collected money on execution, was summoned as trustee of the execution creditor, the pendency of the trustee proceedings does not suspend the right of the execution creditor to commence an action on the case against the sheriff for refusal to pay him the money on demand.[97]

A former sheriff may be sued in his individual capacity after he has gone out of office.[98]

On indemnity bond. A claimant of property sold under execution may commence action against the obligors in an indemnity bond immediately after they have become liable.[99] The action may be brought as soon as the injury is inflicted.[1]

b. Time within Which Action Must Be Commenced

Statutes providing special periods of limitation for actions against sheriffs or constables will be given effect.

Statutes providing special periods of limitation for actions against sheriffs or constables will be given effect.[2] Such statutes obviously do not relate to actions based on conduct of the sheriff which is entirely within the sheriff's authority, since such conduct would not be actionable in any case.[3] It has been held that such statutes relate to actions based on actionable unlawful conduct of a sheriff and pose for the courts the problem of drawing a line between unlawful conduct sufficiently close to being "official" to be treated as such in applying the short period of limitations and unlawful conduct which is so far from being "official" that for the purposes of the statute of limitations it is treated like that of an ordinary nonofficial person.[4] In drawing such line the intent, purpose, and knowledge of the sheriff is to be considered and may be the controlling factor.[5] Thus, it has been held that the short period of limitations provided by such a statute does not apply if the sheriff, when engaged in his unlawful conduct, knew that he was not acting officially, that is, did not have an intent or purpose to carry out his official duties.[6]

94. Mass—Emery v Seavey, 20 N. E 177, 148 Mass 566

95. Mass—Jackson v. Colcord, 114 Mass. 60

96. Me—Ross v Philbrick, 39 Me 29.

97. Vt.—Hicks v. Gleason, 20 Vt. 139

98. Ill—King v Snow, 266 Ill App 462

99. Ky—Chisholm v Gooch, 3 Ky. L. 247.

1. Miss.—Woolner v. Spalding, 3 So. 583, 65 Miss 204.

2. U S—Ingo v Koch, C C A.N Y, 127 F 2d 667—Haws v Fracarol, C C.A Ariz., 72 F 2d 461.
La—Waterall v W. I Swain Show Co, 121 So 189, 10 La.App 653
Or—Barnes v Massachusetts Bonding Co, 172 P 95, 89 Or. 141
Pa.—Smith v. Houghwot, 1 A 2d 517, 132 Pa Super 501.
57 C J. p 945 note 89
Accrual of cause of action based on negligence or misconduct of sheriffs and constables see Limitations of Action § 177 b.
Limitations of actions for acts or omissions in official capacity generally see Limitations of Action §§ 82, 84.

Such statute is special exception to general statutes limiting time for actions on liabilities created by statute—Haws v Fracarol, C C A Ariz, 72 F 2d 461

Acts done in obedience to warrant

(1) The statute, providing that an action against a constable for an act done by him in obedience to a warrant must be commenced within prescribed time after constable's commission of act, should be construed favorably to constable if he endeavors in good faith to carry out what he reasonably believes to be authority granted him in his warrant, and, where a constable does not act strictly in obedience to his writ, but does not act willfully or fraudulently but in good faith, an action must be brought against him within the period provided by statute, but, where constable willfully makes a false return or commits a fraudulent act in executing a warrant, he is individually liable, since he is not acting in obedience to warrant, and warrant furnishes no authority for such act, and statute does not apply—Smith v. Houghwot, 1 A 2d 517, 132 Pa Super. 501.

(2) Such statute applies to civil actions only—Commonwealth v Dempsey, 22 A 2d 76, 146 Pa Super 124.

(3) Under a statute providing in one section that no action could be brought against a constable or any person "acting by his or their order, and in his aid, for anything done in obedience to any warrant," until certain statutory conditions had been complied with, and providing in another section that no action should be brought against a constable or person "acting as aforesaid" unless commenced within prescribed time, the words "acting as aforesaid" referred to a person acting by the constable's order and in his aid, and did not refer to constable so as to subject a constable, more than prescribed time after his commission of an act, to liability for his act done in good faith but not strictly in obedience to warrant—Smith v. Houghwot, supra—Mellick v. Osterstock, 11 Pa Co. 82

Release under forthcoming bond

Obligation of sheriff omitting to perform obligation imposed by law in releasing property under forthcoming bond is prescribed by specific statute—Waterall v. W. I Swain Show Co, 121 So 189, 10 La App 653.

3. U S—Ingo v. Koch, C C A.N.Y, 127 F 2d 667

4. U S—Ingo v Koch, supra.

5. U.S—Ingo v. Koch, supra

6. U.S—Ingo v Koch, supra
N Y—Board of Supervisors of Kings County v. Walter, 4 Hun 87.

On the other hand, if the sheriff, although acting unlawfully, did not know he was acting outside his official authority and intended in good faith to carry out his official duties, the short period of limitations applies.[7]

Such statutes have been held not applicable to actions against sheriffs and constables to recover money collected by them or in their official custody,[8] actions based on contracts entered into by the sheriff for his own convenience and not in his official capacity,[9] or actions for acts done merely colore officii, and not virtue officii;[10] and they do not protect the obligors in a bond of indemnity given to the officer in respect of the act complained of.[11] An action against a sheriff for a false return of a fieri facias, being founded on a judgment, is within a statutory provision that no statute of limitations shall ever be pleaded as a bar, or operate as such, to any action founded on an instrument or contract in writing, whether it is sealed or unsealed.[12]

Action for escape. A statute limiting the time for bringing suits against sheriffs for escapes of persons imprisoned on civil process applies as well to escapes after arrest and before commitment[13] as to escapes after commitment;[14] but a statutory limitation of time within which an action may be brought against bail is not applicable to an action against a sheriff for an escape.[15]

§ 152. Parties

a. In general
b. Joinder

a. In General

General rules governing the persons who may or must sue have been applied in actions against a sheriff or his indemnitors, and an action for neglect of an officer to return an execution must be brought in the name of the execution plaintiff.

General rules governing the persons who may or must sue, as discussed in Parties §§ 3-16, have been applied in actions against a sheriff or his indemnitors.[16] An action for the neglect of an officer to return an execution may[17] and must[18] be brought in the name of the execution plaintiff, although he was a mere nominal party, without any interest in the execution.[19] Where goods purchased by an individual are afterward seized as the property of the vendor, the purchaser is the proper party to sue for the resulting damage,[20] although the property was purchased on account of and paid for by a firm of which the purchaser was a member.[21]

Cestui que trust has been held entitled to sue in his own name for the damage resulting from a levy on the property held in trust for him under process against a third person;[22] but it has also been held that the beneficiary in a trust deed given to secure a debt due him cannot sue in his own name for a seizure and sale of the property under process against the debtor.[23]

Assignee. It has been held that, where a sheriff, after receiving an execution with notice that the claim on which the judgment had been recovered had been assigned to another person, and was prosecuted at his cost, collects the amount of the execution, and pays it to the nominal plaintiff, the assignee may maintain an action against him in the name of the assignor,[24] but there is also authority for the view that the assignee of an execution may, in his own name, without styling himself assignee, bring an action against the sheriff for money collected on the execution.[25]

Action on bond of indemnity for the wrongful

Short period held inapplicable
N Y —Pickle v Page, 233 N Y S 461, 225 App Div 454, affirmed 169 N E 650, 252 N Y 474, 72 A L R 842

7. U S —Ingo v. Koch, C C A N.Y., 127 F.2d 667
N Y —Cummings v. Brown, 43 N Y 514—Dennison v. Plumb, 18 Barb 89

Bona fide intent will be assumed in the absence of adequate evidence to the contrary —Ingo v Koch, C.C A N Y, 127 F.2d 667.

Short period held applicable
(1) In general —Politano v Jacoby, 191 N E 627, 264 N Y 686.
(2) Action against sheriff for making false return —Wiener v Ellrodt, 198 N.E 537, 268 N.Y. 646

8. Conn —Church v. Clark, 1 Root 303
57 C.J. p 946 note 90.

9. N.Y —Rice v Penfield, 2 N Y S 641, 49 Hun 368, 15 N Y Civ Proc 268—Doyle v Page, 223 N Y S. 499, 130 Misc 149

10. N Y —Morris v. Van Voast, 19 Wend. 283.

11. Wis —Bishop v McGillis, 51 N. W. 1075, 82 Wis 120.
57 C J p 946 note 93.

12. Ind.—Stevens v. Beckes, 3 Blackf 88.

13. N.Y —Roe v. Beakes, 7 Wend. 459.

14. N.Y —Roe v. Beakes, supra.

15. Conn —Brown v. Lord, Kirby 209.
57 C.J. p 946 note 98

16. **County commissioners and not ordinary** had authority to maintain suit against sheriff to recover allegedly illegal costs collected.—Sanders v. Wilkinson County, 26 S E.2d 467, 69 Ga App. 676.

17. Vt —Chase v Plymouth, 20 Vt. 469, 50 Am D 52.
57 C J p 948 note 47.

18. N H.—Woodman v Jones, 8 N H. 344.

19. N H —Woodman v Jones, supra.
Vt —Chase v Plymouth, 20 Vt 469, 50 Am D 52

20. Mo —State v. Merritt, 70 Mo. 275

21. Mo —State v. Merritt, supra.

22. Mo —State v. McKellop, 40 Mo 184.

23. Miss.—Marshall v. Stewart, 7 So. 284, 67 Miss. 494

24. Mass —Riley v Taber, 9 Gray 372

25. S C —Alexander v. Hancock, 31 S.C L. 100.

seizure or sale under process of property not belonging to defendant therein may be prosecuted by claimant in his own name,[26] or in the name of the officer to whom the bond was given for the benefit of claimant.[27]

b. Joinder

(1) Plaintiffs
(2) Defendants

(1) Plaintiffs

Where a sheriff receives money of one of several debtors against whom he has a writ, under agreement to pay it over to the creditor, but neglects to do so, and the debtor is again sued and pays the money, the debtor alone may maintain an action against the officer, and, where the goods of one of several joint debtors are taken in execution and are wasted, he alone may sue the sheriff.

Where a sheriff receives money of one of several debtors against whom he has a writ, under an agreement to pay it over to the creditor, but neglects to do so, and the debtor is again sued and pays the money, the debtor alone may maintain an action against the officer, without joining as plaintiffs the other defendants in the original writ,[28] and, where the goods of one of several joint debtors are taken in execution and are wasted, he alone can sue the sheriff for redress,[29] it not being proper to join the other debtors as plaintiffs.[30] On the other hand, the liability of a sheriff for failure to deliver to the proper parties the money paid him on the purchase price of land sold on partition may be enforced by the parties in interest in a joint action against him, when no objection is made for misjoinder.[31]

(2) Defendants

While, in an action against a sheriff or constable, it may be proper to join as parties defendant other persons who are also liable, nevertheless the suit may be brought against the officer alone.

While, in an action against a sheriff or constable, it may be proper to join as parties defendant other persons who are also liable,[32] such as sureties on the officer's bond,[33] indemnitors,[34] and, except in some jurisdictions,[35] a deputy whose wrongful act is complained of,[36] nevertheless the suit may be brought against the officer alone without joining a deputy,[37] or, in the absence of a statute otherwise providing, against the deputy alone,[38] sureties on the officer's bond,[39] or indemnitors,[40] and, where two or more persons are jointly and severally liable with a sheriff for a wrong, it is no defense, in an action by the owner of the property wrongfully seized or sold against one or more of the wrongdoers, to show that others who are also liable were not joined as defendants.[41] A person may not be joined as a party defendant in an action against a sheriff unless it is shown that he is answerable for the wrong alleged.[42] In an action against a sheriff for damages resulting from his wrongful seizure, it has been held improper and unnecessary to join as a party defendant the purchaser at a sheriff's sale,[43] and in an action against a sheriff to recover specific money or property or the proceeds of a sale, another person is a necessary party when, and only when, the determination and relief sought will affect or destroy his rights, liabilities, liens, or claims.[44] A sheriff in office and his predecessor cannot be joined as defendants in an action for the value of property alleged to have

26. U S.—Williams v Simons, Ark., 70 F. 40, 16 C C A 628.

27. Va.—Lewis v. Adams, 6 Leigh 320, 33 Va 320—Carrington v. Anderson, 5 Munf. 32, 19 Va. 32

28. Me—Waite v. Delesdernier, 15 Me 144.

29. Me—Ulmer v. Cunningham, 2 Me. 117.

30. Me.—Ulmer v. Cunningham, supra

31. Ohio—Calvin v. Bruen, 39 Ohio St. 610.

32. Ga—Chambers v. Self, 186 S E 203, 53 Ga App. 437—Personal Finance Co. v. Evans, 163 S.E. 250, 45 Ga App. 53
57 C.J. p 949 note 62.

33. Tex—Fox v. Cone, 13 S.W.2d 65, 118 Tex 212.

34. Ala—Cheek v. Odom, 100 So 782, 20 Ala App 31
57 C J. p 949 note 64.

35. Mass.—Campbell v. Phelps, 1 Pick. 62, 11 Am D. 139.

36. Pa—Jadwin v. Bell, 165 A. 511, 108 Pa.Super. 543
57 C J p 949 note 66.

37. Tex—Fox v Cone, 13 S W 2d 65, 118 Tex 212.

38. **Statute protecting against misfeasance**
Where conditional sale contract had been seasonably recorded by vendors, conduct of deputy sheriff in attaching automobile at suit of creditor of vendee and in selling automobile at execution sale, where there was no tender or payment made of the amount unpaid on the contract to vendor or assignee, was more than misfeasance, and deputy sheriff was not entitled to protection from suit by the statute requiring actions for official misfeasance of deputy sheriff to be sustained only against the sheriff—Commercial Credit Corp. v. Duckett, 49 A.2d 106, 114 Vt. 450.

39. Tex—Murray v. Evans, 60 S.W. 786, 25 Tex Civ App 331.
57 C J. p 949 note 68.

40. U S.—Lovejoy v Murray, Mass., 3 Wall 1, 18 L Ed 129
Ark.—Rice v Wood, 33 S.W. 636, 61 Ark 442, 31 L R.A 609

41. N.Y.—Dyett v. Hyman, 29 N.E. 261, 129 N.Y. 351, 26 Am.S R 533

42. **Sureties not proper parties in tort action**
Considering plaintiff's cause of action for false arrest against sheriffs and their sureties as one in tort, the sureties were not proper parties to the action, and, where there were no facts alleged showing that either of them participated in the alleged false arrest, such defendants should have been stricken on proper and timely objection of misjoinder of parties—Jackson v Norton, 44 S.E. 2d 269, 75 Ga App 650.

43. Pa—Gloss v. Black, 91 Pa. 418.

44. Iowa.—Bannister v McIntire, 84 N W. 707, 112 Iowa 600.
Tex—Needham v. Cooney, Civ.App., 173 S.W. 979.

been seized by the former and lost while in charge of the latter.[45] Where indemnity has been given, suit may be brought against the indemnitors alone[46]

§ 153. —— Addition or Substitution of Parties

a Addition
b Substitution

a. Addition

General rules governing the bringing in of new parties have been applied in actions against sheriffs, and under some statutes the sheriff's indemnitors may be brought in as defendants.

General rules governing the bringing in of new parties, as discussed in Parties §§ 72–84, have been applied in actions against sheriffs[47] Under some statutes, where the action is commenced against the sheriff alone, his indemnitors may be brought in as defendants,[48] if a complete determination of the action pending before the court cannot be had without their presence,[49] but in such case the sheriff remains a necessary party to the action[50] It has been held that a sheriff may invoke the broad powers of a court of equity to make the obligors in a forthcoming bond parties defendant.[51]

Intervention General rules governing the intervention of parties, as discussed in Parties §§ 53–71, have been applied in actions against a sheriff.[52]

b. Substitution

(1) In general
(2) Indemnitors

(1) In General

Under a statute so providing the party in whose favor process issued may be substituted as defendant in an action against the sheriff for alleged wrongful seizure under such process, and in an action against a sheriff and his deputy as individuals it has been held that the sheriff's successor in office may not be substituted.

Under a statute so providing the party in whose favor process issued may be substituted as defendant in an action against the sheriff for an alleged wrongful seizure under such process;[53] but the granting of permission to substitute is discretionary with the trial court.[54]

Successor in office. In an action against a sheriff and his deputy, as individuals, for an unlawful seizure of property, the sheriff's successor in office is not liable so as to be properly substituted by defendants, against plaintiff's will, on the expiration of their terms of office[55]

Substitution of sheriff. In an action against a justice of the peace to recover a deposit, a sheriff who has levied, but not returned, an attachment or execution on the money may properly be substituted as a party defendant[56]

(2) Indemnitors

Under a statute authorizing or permitting the substitution of the sheriff's indemnitors as defendants in an action against the sheriff, such an order of substitution may be granted on proper application, and on substitution they are liable to the same extent as the sheriff.

Some statutes are construed not to authorize an order of court substituting indemnitors of a sheriff as defendants in an action against the sheriff;[57] but under a statute authorizing and permitting such an order of substitution, it may be granted,[58] provided a sufficient application and showing therefor are made[59] by a person entitled to ap-

45. La.—New Orleans Ins Assoc v Harper, 32 La Ann 1165.

46. U S.—Lovejoy v Murray, Mass., 3 Wall 1, 18 L Ed 129.
Ark.—Rice v Wood, 33 S W. 636, 61 Ark 442, 31 L R A. 609.

47. La.—Cohen v. Avery, 26 La Ann 359
Or.—Continental Guaranty Corporation v Chrisman, 294 P. 596, 134 Or 524

Persons not under legal obligation to plaintiff or sheriff may not be called in as parties by the sheriff, so that, where the principal and surety on an injunction bond were not under any obligation to warrant the sheriff against the consequences of his own illegal acts, they could not be called in warranty by the sheriff.—Cohen v. Avery, 26 La Ann 359.

48. Tex.—Agricultural Bond & Credit Corporation v. Shepherd, Civ. App., 69 S.W.2d 213.
57 C.J. p 949 note 79.

49. **Sureties held not proper parties** in action against sheriff negligently failing to serve writ of attachment, in which sheriff relied on bond defectively executed.—Continental Guaranty Corporation v Chrisman, 294 P. 596, 134 Or 524

50. U S.—Thorn Wire Hedge Co v Fuller, Minn., 7 S Ct. 1265, 122 U S. 535, 30 L Ed 1235

51. W Va.—Sayre v. Kunst, 98 S E 559, 83 W.Va. 456.

52. **Interest in subject matter or success of party**
Under the rule that intervention is permissible in any case where the person asking to intervene can show either an interest in the subject matter, or an interest in the success of either of the parties, in action for conversion of property claimed to be owned by plaintiff and which was alleged to have been taken by defendant as sheriff, allowing mortgagees to intervene was not error where mortgagees, at whose request property was seized, claimed to be interested in defendant's success on ground that they delivered to sheriff their indemnity bond.—Smith v. Armstrong, 166 P.2d 793, 118 Mont. 290.

53. **Statute held inapplicable**
Iowa.—Sperry v. Ethridge, 30 N.W. 4, 70 Iowa 27.
57 C J p 949 note 82 [a].

54. Okl.—Pierce v. Engelkemeier, 61 P 1047, 10 Okl 308.
57 C.J p 949 note 83.

55. Colo.—Greig v. Ware, 55 P 163, 25 Colo 184

56. Cal.—Israel v. Bryan, 197 P 121, 52 Cal App. 66.

57. Nev.—Gaudette v. Roeder, 13 Nev. 341.

58. N.Y.—Levy v. Dunn, 55 N.E. 288, 160 N Y. 504, 73 Am S R 699.
57 C.J. p 950 note 89.

59. Cal.—Culley v Cochran, 13 P.2d 540, 124 Cal App 730.
57 C.J. p 950 note 90.

ply,[60] and notice of the application is given to the persons who, under the statute, are entitled to notice.[61] In jurisdictions wherein there are statutes relating to a substitution of indemnitors for the sheriff as parties defendant, whether it shall be allowed in a particular case rests in the discretion of the court,[62] and it is properly refused where it would make it necessary for plaintiff to litigate other questions than those arising between him and the sheriff,[63] or where the damages claimed by plaintiff greatly exceed the amount of the indemnity bond, and the indemnitors claim that the bond fixes the limit of their liability,[64] but it is proper to substitute the indemnitors in place of the sheriff notwithstanding the damages claimed exceed the amount of the bond, where according to the law under which the bond was given the liability of the indemnitors extends to all the injury done and is not limited to the amount specified in the bond.[65] The substitution of indemnitors in place of the sheriff may be granted on his application without requiring him to furnish additional security to answer the final result of the litigation,[66] although such security might have been required of the indemnitors if they had made the application.[67]

After judgment by default Where a sheriff, indemnified as to property levied on, makes willful default in replevin, so that judgment is taken against him, it is proper on motion of the indemnitors to set aside the default and substitute the indemnitors as defendants and allow them to defend;[68] but a motion by the sureties on an indemnity bond to set aside a judgment rendered against the sheriff by default, and to permit them to come in and defend, is properly denied where it appears that the action against the sheriff was pending about eight months before judgment was rendered and that the judgment was paid and satisfied of record before the motion was made and there is no proof of collusion and no disclosure as to the proposed defense.[69]

Effect. Where the indemnitors of a sheriff are substituted as defendants with their own consent and the consent of the other parties, by an order of court providing that they shall be responsible for the acts of the sheriff on the levy and for his other acts with respect to the matter, their liability is not limited to the amount of their undertakings,[70] but they are liable to the same extent as the sheriff.[71]

Similar practice. Even where there is no formal substitution or intervention of parties, it has been held to be proper practice when a sheriff or constable has notified his indemnitors of the pendency of the suit to permit them to conduct and control the defense in his name.[72]

§ 154. Process and Appearance

An action against a sheriff must be commenced by the service of process on him, but under some statutes delivery to his office is sufficient, and it has been held that in a proper case the county attorney may appear on behalf of the sheriff.

An action against a sheriff must be commenced by the service of process on him;[73] but under some statutes the delivery of a summons to a deputy of the sheriff at the sheriff's office is a sufficient service on the sheriff.[74]

Appearance. In an action against the sheriff or his deputy, where defendant claims that the acts on which the action is based were done in the performance of official duties, the county attorney may, if duly authorized, appear on behalf of defendant.[75]

§ 155. Petition, Declaration, or Complaint

a. In general
b. In actions for particular defaults or misfeasances

60. N Y —Leonard v. Buttling, 43 N Y S 387, 13 App Div 179.

61. N Y —Hero Fruit Jar Co v Grant, 11 N.Y.S. 28, 57 Hun 587.
57 C J p 950 note 92.

62. N Y.—Hayes v Davidson, 98 N Y. 19, 7 N Y Civ Proc 46, 1 How Pr., N.S, 310
57 C J. p 950 note 93

Fact that there were other indemnifiers would in itself be sufficient for not substituting one indemnifier as sole defendant in place of constable—Culley v Cochran, 13 P.2d 540, 124 Cal App. 730.

63. N.Y.—De Shields v Creamer, 60 N Y S 245, 43 App Div. 579
57 C J. p 950 note 94.

64. N.Y —Levy v. Dunn, 57 N.Y.S 972, 39 App Div. 605, affirmed 55 N E. 288, 160 N.Y. 504

65. N Y —Cassani v Dunn, 60 N.Y S 756, 44 App Div 248.
57 C J p 950 note 96

66. N Y —Fleig v Gorman, 20 N Y. S 615, 1 Misc 194

67. N Y —Fleig v Gorman, supra

68. N Y —Jakobi v Gorman, 21 N Y S 466, 1 Misc. 222, affirmed 21 N Y S. 762, 2 Misc. 190

69. N Y —Cohen v Gorman, 25 N.Y. S 460.
57 C.J p 950 note 1.

70. N Y.—Smedley v Smith, 8 N.Y. S. 100, 15 Daly 421, affirmed 27 N E. 411, 126 N Y. 637.

71. N.Y.—Smedley v. Smith, supra

72. Cal —Culley v Cochran, 13 P.2d 540, 124 Cal App 730
57 C J p 950 note 4

73. S C —Smith v Hunt, 12 S C L 464.
57 C J. p 951 note 6
Exemption of sheriff from arrest see Arrest § 29

74. N Y.—Dunford v. Weaver, 84 N. Y 445
57 C J. p 951 note 7.

75. **Board of supervisors' resolution authorizing** county attorney to appear for deputy sheriff sued for acts which defendant claims were done in performance of his official duties was not reviewable on motion to strike out county attorney's appearance —Netarz v Fagan, 257 N.Y S. 610, 143 Misc. 893.

a. In General

A petition or complaint in an action against a sheriff or constable must state a cause of action, and the common-law rules of construction of pleadings have been applied In certain actions an averment of official capacity has been held unnecessary

A petition or complaint in an action against a sheriff or constable must state a cause of action [76] Under code or statutory provisions requiring the statement of facts to be plain and concise, certainty to a common intent is all that is required in a complaint against a sheriff for official misconduct or default;[77] and in an action against a sheriff for a neglect of an official duty the complaint must allege the particular neglect or omission on which plaintiff relies [78]

Averment of official capacity. In trespass[79] or trover[80] against an officer, or a suit against him for money collected by him on execution,[81] it is not necessary to declare against him in his official capacity. Likewise, it is not necessary, in a suit against a sheriff for the misfeasance of his deputy, that defendant should be described as sheriff [82] Under a statute providing that capacity or relation may be pleaded as a legal conclusion, it seems that it may be alleged in general terms that the acts complained of were committed by a deputy sheriff while acting in his official capacity.[83] At any rate, reasonable certainty in an averment of such matter is sufficient.[84] A complaint or declaration may contain allegations as to the official capacity of the sheriff and yet be regarded as stating an action against the sheriff as an individual.[85]

In action on indemnity bond In an action by claimant of the property or the execution defendant on an indemnity bond, it is not necessary to allege that the bond was returned by the sheriff.[86] It is improper to assert claims for attorney's fees[87] and exemplary damages[88] in a petition in an action solely on an indemnity bond.

Construction. The common-law rule that a pleading will be construed most strongly against the pleader has been applied to a petition in an action against a sheriff.[89] However, where the common law has been abrogated by statute, a rule of liberal construction has been applied [90] Where a recital of facts and a general allegation are in conflict, the former controls.[91]

Demurrer. It has been held that the sufficiency of a writ of execution or a claimant's notice of ownership which is set out in the petition or complaint may be questioned by,[92] and only by,[93] a demurrer.

Cure by pleading of another party Defects in the complaint may be cured by the pleading of another party.[94]

Cure by verdict. A defect or informality in a declaration or complaint which states a cause of action is cured by verdict.[95]

b. In Actions for Particular Defaults or Misfeasances

(1) In general
(2) Wrongful levy on, and seizure or removal of, property
(3) False return

(1) In General

The rule that the petition or complaint in an action against a sheriff or constable must state a cause of action has been applied in actions for various defaults or misfeasances.

76. Fla —Malone v Howell, 192 So 224, 140 Fla 693—Goodrich v Lawrence, 189 So 233, 138 Fla 287
57 C.J p 951 note 10.

Cause of action held stated
Ga —Tippins v American Plant Co, 174 S E 378, 178 Ga. 726
Wis —Kalb v Luce, 291 N W 841, 234 Wis 509, appeal dismissed 59 S Ct 107, 305 U.S. 556, 83 L Ed 356
57 C J p 951 note 10 [a]

Cause of action held not stated
(1) Complaint based on assault committed by deputy—Goodrich v Lawrence, 189 So 233, 138 Fla 287.

(2) Complaint based on alleged negligence of deputy —Humphrey v Ownby, Mo App, 104 S W.2d 398.

(3) Other complaints held not to state cause of action see 57 C J. p 951 note 10 [b].

77. Ind —Chatten v. Snider, 26 N E 166, 126 Ind 387
57 C J. p 951 note 12.

78. Or —Kohn v. Hinshaw, 20 P. 629, 17 Or 308.

79. Mo —Davis v. Cooper, 6 Mo 148

80. Me.—Dane v. Gilmore, 49 Me. 173

81. N Y —Armstrong v. Garrow, 6 Cow 465
57 C J p 951 note 17.

82. Wash —Young v. Long, 214 P 821, 124 Wash. 460
57 C J p 951 note 18

83. Utah —Jackson v. Harries, 236 P 234, 65 Utah 282.

84. Utah.—Jackson v. Harries, supra

85. U S —Kirkes v. Askew, D.C Okl, 32 F Supp 802.

86. Ky.—Chisholm v. Gooch, 3 Ky. L. 247.

Va —Carrington v Anderson, 5 Munf 32, 19 Va 32
57 C J p 951 note 22.

87. Iowa —Constantine v. Rowland, 134 N.W. 549, 154 Iowa 115.

88. Iowa —Constantine v. Rowland, supra

89. Ky —Bennett v. Bell, 46 S.W. 4, 701, 20 Ky L 308

90. Wis.—Kalb v. Luce, 291 N.W. 841, 234 Wis 509.

91. N.Y —Clark v. Bowe, 60 How. Pr. 98
57 C J p 951 note 28.

92. Iowa.—Gray v Carroll, 120 N.W. 1035, 144 Iowa 68

93. Ind —State v Hart, 12 Ind. 424

94. Minn —Lesher v. Getman, 15 N. W 309, 30 Minn 321

95. Mass —Livermore v. Boswell, 4 Mass 437
57 C J. p 961 note 17.

In an action against a sheriff or constable for failure to execute a process, the petition, declaration, or complaint must state a cause of action[96] by alleging the nonperformance of some duty by defendant or his deputy[97] and resulting damage to plaintiff.[98] Where the action is for failure to levy on or seize property, it must be alleged that, during the life of the writ, defendant in the process owned or possessed property subject to levy or seizure under the writ;[99] but, where the action is for not arresting defendant in an execution running against real and personal estate, and, in default thereof, against the body of defendant, plaintiff should allege that there was not sufficient property of defendant on which to levy the judgment, and that the sheriff failed to have the money before the court before the return day of the writ.[1] Matters not constituting the gist or gravamen of the action are not considered important in passing on the sufficiency of a declaration.[2]

Refusal to permit replevin of attached property. A count in an action on the case against a sheriff for refusing to permit one whose property was attached to replevy it is sufficient if it alleges a tender to the sheriff of a bond executed by plaintiff with good and sufficient sureties, conforming to the requirements of the statute, and a refusal to accept it.[3]

Loss, injury, release, or conversion of, or failure to apply, property. In an action for the default or wrongful act of a sheriff or constable or his deputy in losing, injuring, releasing, or converting property which has been levied on or taken under a writ, or in not applying attached property to an execution, or keeping it so that it could be so applied, the petition, declaration, or complaint must state a cause of action[4] by means of proper and sufficient averments of matters essential to constitute a cause of action,[5] but nonessential matters need not be alleged.[6]

Improper sale. A petition against a sheriff for wrongfully selling exempt property under final process, alleging the seizure, the sale, and the filing of an affidavit with the officer showing the exempt character of the property, that it was exempt, that plaintiff was a resident of the state, the head of a family, and not the owner of a homestead, and that the property was of a stated value, is sufficient,[7] although the allegations do not follow strictly the language of the statute.[8] In trespass,[9] but not in trover,[10] the declaration must aver that plaintiff was the head of a family. In an action by an execution debtor against a sheriff for selling land without notice, the complaint need not allege that the sheriff's return that he has given notice is false.[11] Where an action against a sheriff is for the injury done in causing, by his wrongful representations, property seized by him under legal process to be sold for less than its value, it is not necessary to aver that the representations were made maliciously.[12]

Failure to sell property or execute deed. Where the complaint in an action for failure to dispose of property levied on shows a levy on sufficient

96. Ga.—Zugar v. Glen Falls Indem. Co., 11 S.E.2d 839, 63 Ga.App. 660.
57 C.J. p. 951 note 30

97. N.J.—Leaming v. Denney, 3 N.J.Law 611.
57 C.J. p. 952 note 31

98. Ga.—Zugar v. Glen Falls Indem. Co., 11 S.E.2d 839, 63 Ga.App. 660.
Extent of plaintiff's special interest in property must be alleged.—Zugar v. Glen Falls Indem. Co., supra.
Allegations held sufficient
(1) Petition against sheriff for purchasing debtor's property after issuance of writ and before levying, alleging return of "no property found," was not demurrable for not averring debtor's lack of leviable personal property.—West v. Criscillis, 46 S.W.2d 1082, 242 Ky. 549.
(2) Other allegations held sufficient see 57 C.J. p. 952 note 32 [a].

99. U.S.—Haws v. Fracarol, C.C.A.Ariz., 27 F.2d 74.
57 C.J. p. 952 note 33.

1. Ark.—Hammett v. State, 7 Ark. 220.

2. Ill.—Beveridge v. Wagner, 48 Ill. 525.
57 C.J. p. 952 note 35

3. Ala.—Chenault v. Walker, 14 Ala. 151.
57 C.J. p. 954 note 74.

4. Mont.—Harri v. Isaac, 107 P.2d 137, 111 Mont. 152.
57 C.J. p. 954 note 75.

5. Mont.—Harri v. Isaac, supra.
57 C.J. p. 954 note 76
Allegations held sufficient
(1) Allegation that property was cared for in negligent or careless manner.—Marshall v. Chapman's Estate, 195 P.2d 656, 31 Wash.2d 137.
(2) Allegations showing that sheriff dealt with property seized in manner beyond scope of warrant.—Allen v. Holbrook, 135 P.2d 242, 103 Utah 319, 158 A.L.R. 224, modified on other grounds 139 P.2d 233, 103 Utah 599.
(3) Other allegations held sufficient.—Vangellow v. East Side Sav. Bank, 11 N.Y.S.2d 982.—57 C.J. p. 954 note 76 [b]
Allegations held insufficient
(1) To state cause of action for conversion.—Harri v. Isaac, 107 P.2d 137, 111 Mont. 152.
(2) To state cause of action in nature of "trespass" or "trespass on the case".—Harri v. Isaac, supra.

6. Mass.—Hale v. Dennie, 4 Pick. 501.
57 C.J. p. 954 note 77.

7. Neb.—Hamilton v. Fleming, 41 N.W. 1002, 26 Neb. 240.

8. Neb.—Hamilton v. Fleming, supra.

9. Tenn.—Pollard v. Thomason, 5 Humphr. 56.
57 C.J. p. 955 note 80.

10. Tenn.—Hawkins v. Pearce, 11 Humphr. 44.

11. Cal.—Raker v. Bucher, 34 P. 654, 100 Cal. 214.
57 C.J. p. 955 note 82.

12. Ala.—Griffin v. Isbell, 17 Ala. 184.
57 C.J. p. 955 note 85.

personal property to satisfy the judgment, and a breach of duty in failing to advertise and sell, it need not also show that the debtor did not have other property out of which the judgment could have been made.[13] A complaint against a sheriff for not executing a deed to plaintiff for property purchased by him at sheriff's sale, and claiming special damages for the failure to get possession of the land sold, is bad without an averment that plaintiff's failure to get possession was caused solely by the want of the deed.[14]

Failure to collect or pay over money. An averment in the petition in an action against an officer for failure to collect the money on fee bills put into his hands for collection that if he did not collect the money it was his own neglect and fault is not sufficient under a statute making him liable "for failing to collect the same when by proper diligence it might have been collected."[15] The declaration in an action against a sheriff for failure to collect a list of militia fines should show the name of each person fined[16] and the amount of his fine.[17] In an action against a sheriff or constable for failure to pay over money collected, the petition, declaration, or complaint must aver the collection of the money,[18] a demand on the officer,[19] a failure to pay over,[20] and plaintiff's right to the money.[21] In an action against a sheriff for money received by him by virtue of his office, the nature of the debt or demand should be so far stated in the declaration as to distinguish it from private debts or contracts.[22]

Improper application of money. Where a sheriff, having two executions in his hands, one against plaintiff and another jointly, and another against the other person alone, levied both on lands belonging to plaintiff and wrongfully applied a portion of the proceeds on the execution against the other person alone, it is not necessary, in a suit by plaintiff against the sheriff to recover the amount so wrongfully applied, to set out in the complaint the judgments on which the executions were issued.[23] In an action against a sheriff for not paying over surplus money arising from a sale on execution, after paying off previous attachments, it is necessary to aver that plaintiff's execution was delivered to the sheriff before he paid over the surplus money to the debtor.[24] Where a complaint against a sheriff for misappropriation of a surplus arising on a sale of land under a senior mortgage averred that plaintiff was a junior encumbrancer, whose mortgage had been foreclosed, and that his claim was in the form of a sheriff's certificate of purchase, that the suit to foreclose the senior mortgage was brought subsequent to his purchase, that he was a party thereto, and that the court therein decreed that he held the next oldest lien on the land, evidenced by such certificate, and was entitled to redeem within a year, these averments are sufficient to raise the question of priority of liens, without setting out all the steps by which plaintiff's lien was acquired.[25]

Acceptance of defective or insufficient security. A complaint in an action against a sheriff for taking an insufficient surety on a replevin bond must, in addition to alleging the insufficiency of the surety,[26] aver that the principal was insolvent or unable to pay;[27] and in an action against the sheriff for taking a bail bond insufficient because not in proper form, the declaration should aver that the principal failed to appear in the original suit.[28] In an action for an injury caused by sheriff's alleged negligence in releasing property on an insufficient undertaking as altered by him, a complaint has been held insufficient in the absence of an allegation that the sheriff was the agent of plaintiff or of anyone for the purpose of altering the undertaking or consenting thereto.[29] In order to bring the case within a statute, averments appropriate for that purpose must be made.[30] A petition alleging proceedings by attachment, and levy thereunder, and the release of the property by the sheriff on a void replevin bond, the loss of plaintiff's lien on the property, and that it had been removed by the debtor beyond the jurisdiction of the court, and that the

13. Ind.—Waymire v State, 80 Ind 67

14. Cal.—Knight v Fair, 12 Cal 296

15. Ky.—Walters v. Chinn, 1 Metc. 499.

16. Ind.—State v. Leavell, 3 Blackf. 117.

17. Ind.—State v. Leavell, supra.

18. Ky.—Walters v Chinn, 1 Metc. 499
57 C J. p 955 note 94.

19. Ala.—McBroom v Governor, 6 Port 32
57 C J. p 955 note 95

20. Or.—Butler v Smith, 25 P. 381, 20 Or 126
57 C J. p 955 note 96

21. Ala.—Moore v Barclay, 18 Ala 672.
57 C J p 955 note 97.

22. Va.—Overton v Hudson, 2 Wash. 172, 2 Va 172.
57 C.J. p 955 note 98.

23. Ind.—State v Hamilton, 32 Ind. 104

24. Mass.—Wheeler v Willard, 14 Pick. 486.

25. Ind.—White v. Shirk, 51 N E 126, 20 Ind App 589

26. Ky.—Fisher v. Davis, Litt.Sel Cas 132

27. Ky.—Fisher v. Davis, supra.

28. Ky.—Handley v. Ewings, 4 Bibb 505.

29. Cal.—Walsh-Col Co v Emig, 41 P.2d 223, 4 Cal App 2d 509.

30. N Y.—Gibbs v Bull, 18 Johns. 435
57 C J. p 956 note 6.

debtor was insolvent, whereby plaintiff had lost his debt, is sufficient on demurrer.[31]

Failure to return process or bail bond. In an action for failing to return an execution, although there is authority to the contrary,[32] it has been held that it is not necessary to allege damages,[33] or that the officer's fees were paid,[34] but it is necessary to allege that the sheriff violated his duty by not making a return on the writ on the return day thereof.[35] In a declaration for not returning a bail bond with the writ on which the officer returned an arrest and the taking of bail, an allegation of such failure is sufficient;[36] it is not necessary to allege a return of non est inventus within one year,[37] an avoidance of the principal,[38] or that the oath necessary to authorize an arrest was taken[39]

Escape. In an action against a sheriff or constable for an escape, the petition, declaration, or complaint must allege that the prisoner was at large beyond the liberties of the jail,[40] set forth the proceedings to, and including the escape,[41] and demand appropriate judgment;[42] but all allegations as to the character of the sheriff as statutory bail should be omitted.[43] In a proceeding against a sheriff as bail, the complaint must contain the same allegations as a complaint in an action for an escape,[44] and also allege that defendant is bail.[45] Where the action is for an escape of a prisoner arrested on mesne process, the fact that the prisoner is indebted to plaintiff must be distinctly alleged in the complaint.[46]

Failure to deliver prisoner to successor in office. In an action against a sheriff for not delivering to his successor in office a prisoner taken by him and committed to jail on an execution against the body, averred to have been duly issued on a judgment in an action brought to recover a debt which was fraudulently contracted, it is not essential that the complaint should also state that an order of arrest was obtained.[47]

(2) Wrongful Levy on, and Seizure or Removal of, Property

(a) In general
(b) Under process against another person
(c) Exempt property
(d) Mortgaged property

(a) In General

In an action against an officer for a wrongful or illegal levy on, or seizure of, property, a petition which states a cause of action is sufficient, and reasonable certainty in the description of the property is all that is required.

In an action against an officer for a wrongful or illegal levy on, or seizure of, property, a petition which states a cause of action is sufficient.[48] Where plaintiff relies on the fact that the process under which the officer levied and sold had been superseded, he should not only state this fact in the petition or declaration,[49] but should also charge notice of the fact to the officer.[50] In action for fraudulent levy on the lands of plaintiff, and a return thereof to the court, whereby an order of sale was obtained, and the lands sold, it is necessary to state an eviction of plaintiff, or some disturbance by defendant, or by some person deriving a title under the sheriff's sale and conveyance.[51] In an action by one of two codefendants, claiming to be the surety of the other, against the sheriff for his failure to levy the executions, issued against both, on his principal's property, the complaint is bad if it does not allege that the court made an order directing the sheriff to levy the execution on, and exhaust the property of, the principal debtor before making a levy on the surety's property, and that the clerk indorsed a memorandum of such order on the executions[52]

Where it is sought to recover damages for loss of credit sustained by reason of a wrongful attachment, the petition is not demurrable for omitting to give the names of persons who refused plaintiff credit because of such attachment.[53] An allegation

31. Tex.—Barclay v. Scott, 1 Tex. A. Civ. Cas. § 110.

32. Mo.—Bennett v. Vinyard, 34 Mo. 216

33. Miss.—W. T. Rawleigh Co. v. Hester, 200 So. 250, 190 Miss. 329

34. Cal.—Van Cleave v. Bucher, 21 P. 954, 79 Cal. 600

35. Miss.—W. T. Rawleigh Co. v. Hester, 200 So. 250, 190 Miss. 329

36. Mass.—Prescott v. Bancroft, 1 Metc. 500

37. Mass.—Prescott v. Bancroft, supra.

38. Mass.—Prescott v. Bancroft, supra.

39. Mass.—Prescott v. Bancroft, supra

40. N.Y.—Cosgrove v. Bowe, 10 Daly 353, 2 N.Y. Civ. Proc. 61

41. N.Y.—Smith v. Knapp, 30 N.Y. 581
57 C.J. p. 957 note 23.

42. N.Y.—Smith v. Knapp, supra

43. N.Y.—Smith v. Knapp, supra.

44. N.Y.—Smith v. Knapp, supra.

45. N.Y.—Smith v. Knapp, supra.

46. N.Y.—Cosgrove v. Bowe, 10 Daly 353, 2 N.Y. Civ. Proc. 61.

47. N.Y.—French v. Willett, 17 N.Y. Super. 649, 10 Abb. Pr. 99.

48. Ga.—Hathaway v. Smith, 43 S.E. 984, 117 Ga. 946
57 C.J. p. 952 note 37.

49. Ga.—Johnson v. Fox, 51 Ga. 270
57 C.J. p. 952 note 38

50. Ga.—Johnson v. Fox, supra

51. N.C.—Honeycut v. Angel, 20 N.C. 371.
57 C.J. p. 952 note 40

52. Ind.—Douch v. Bliss, 80 Ind. 316

53. Neb.—Kyd v. Cook, 76 N.W. 524, 56 Neb. 71, 71 Am. St. R. 661.
57 C.J. p. 952 note 42.

in the complaint that the writ of attachment was "duly issued" means that it was based on a debt and the affidavit required by statute.[54]

A complaint in an action against a sheriff for removing plaintiff's goods from a house about to be sold under a mortgage which alleges that the removal was done "wrongfully, maliciously, and without right," during a rainstorm, is not sufficient to show that the removal was effected in an oppressive or negligent manner.[55]

Allegations as to property. In an action for a wrongful seizure of property, reasonable certainty in the description of the property is all that is required;[56] but a petition, declaration, or complaint in an action against an officer for making an excessive levy is insufficient where it merely alleges a levy on, or seizure of, property of a greater value than the debt to be satisfied,[57] without stating whether the property was real or personal,[58] or, if personal, that it was divisible,[59] or that defendant in the process owned,[60] and the officer knew that he owned,[61] other property in the jurisdiction which the execution could have been levied on and which was of a sufficient amount to satisfy it.

Cure by pleading of another party. Where a sheriff's indemnitors have been brought in as defendants in an action against the sheriff for a wrongful levy, it has been held that, although the facts as to the giving of the indemnity and showing that the indemnitors are chargeable are not pleaded either in the complaint or in the answer of the sheriff, the defect is cured by the answer of the indemnitors, setting forth those facts [62]

(b) Under Process against Another Person

In an action against an officer for the seizure of property of the plaintiff under process against another, the complaint should contain averments sufficient to state the essential elements of a cause of action against the officer, but the plaintiff is not required to set out facts which constitute him the owner of the property

In an action against an officer for the seizure of property of plaintiff under process against another, the complaint should contain averments sufficient to state the essential elements of a cause of action against the officer.[63] Plaintiff is not required to set out the facts which constituted him the owner of the property,[64] and a petition which alleges that the goods were taken from plaintiff, and that defendant knew that they belonged to him, is sufficient as an averment of ownership where not excepted to.[65]

Seizure under attachment. Where plaintiff seeks to recover from the sheriff, for a wrongful seizure of his property under a writ of attachment, the money paid the sheriff for the surrender of the property to him, it must appear in the complaint that he was compelled to pay the money as a condition to the delivery of possession of the property detained,[66] that such detention was unlawful,[67] that the payment was made under protest,[68] and that the detention was attended by circumstances of hardship or inconvenience to plaintiff.[69]

Notice and demand. Ordinarily, in an action to recover the possession of property seized under process against another person in whose possession the property was, plaintiff must affirmatively allege notice and demand;[70] but, where a sheriff failed to comply with a statute requiring the return in claim and delivery to be made within a certain time after seizure of the property, it is not necessary for plaintiff in an action to recover property wrongfully seized to allege that he had served on the sheriff the affidavit and notice of his claim required by statute.[71]

Action against indemnitors. Where it is sought in an action against the indemnitors of the seizing officer to hold them as trespassers, the complaint must, in order to state a cause of action, allege that the seizure was induced by the giving of the indemnity bond.[72]

54. Cal.—Citizens' Securities Co. v. Hammel, 112 P. 731, 14 Cal.App. 564.
57 C.J. p. 952 note 43.

55. Ind.—Thompson v. State, 28 N.E. 996, 3 Ind.App. 371.

56. Ala.—Harris v. Russell, 9 So. 541, 93 Ala. 59
57 C.J. p. 953 note 45.

57. N.C.—Honeycut v. Angel, 20 N.C. 371.

58. N.C.—Honeycut v. Angel, supra.

59. N.C.—Honeycut v. Angel, supra.
57 C.J. p. 953 note 48.

60. N.C.—Honeycut v. Angel, supra.

61. Ark.—St. Louis, etc., R. Co. v. Andrews, 143 S.W. 1084, 102 Ark. 175, Ann.Cas.1914A 304
N.C.—Honeycut v. Angel, 20 N.C. 371.

62. Minn.—Lesher v. Getman, 15 N.W. 309, 30 Minn. 321

63. Ill.—Rockhold v. O'Brien, 38 N.E.2d 819, 312 Ill.App. 601
Liability for rent of seized premises held sufficiently alleged
Ill.—Rockhold v. O'Brien, supra.

64. Tex.—Rains v. Herring, 5 S.W. 369, 68 Tex. 468.
57 C.J. p. 953 note 51.

65. Tex.—Tillman v. Fletcher, 15 S.W. 161, 78 Tex. 673.

66. Mont.—O'Brien v. Quinn, 90 P. 166, 35 Mont. 441

67. Mont.—O'Brien v. Quinn, supra

68. Mont.—O'Brien v. Quinn, supra.

69. Mont.—O'Brien v. Quinn, supra.

70. Cal.—Killey v. Scannell, 12 Cal. 73.
Iowa.—Shaw v. Tyrell, 105 N.W. 1006, 129 Iowa 556

71. S.D.—Guernsey v. Tuthill, 82 N.W. 190, 12 S.D. 584.

72. Tex.—Unsell v. Sisk, 83 S.W. 34, 37 Tex.Civ.App. 34.

(c) Exempt Property

Although there is authority to the contrary, it has been held that in an action against a sheriff or his indemnitors for the seizure of exempt property, the complaint must show the plaintiff's right to the exemption, but it is not necessary specifically to plead any statute under which the property is claimed as exempt.

Although there is authority to the contrary,[73] it has been held that in an action against a sheriff or his indemnitors for the seizure of exempt property, the complaint must show plaintiff's right to the exemption[74] and that he has taken the steps required by statute to entitle him to assert the right.[75] However, it is not necessary specifically to plead any statute under which the property is claimed as exempt where facts making a case within the provisions of the statute are stated.[76] Likewise, express allegations that plaintiff is the head of a family[77] and a resident[78] and citizen[79] of the state are not necessary where the facts stated indicate that such is the case Where the action is one for refusing to allow plaintiff to select, as exempt, certain articles seized on execution, an allegation in the declaration that defendant, by his deputy, did convert the property to his own use is sufficient to show that the deputy was acting under defendant as sheriff.[80]

(d) Mortgaged Property

In an action by a mortgagee for seizure of mortgaged goods in his possession under process against the mortgagor, a complaint alleging peaceable possession, and that the taking was wrongful, and further alleging that the mortgagee had taken possession under the mortgage, states a cause of action.

In an action by a mortgagee for a seizure of the mortgaged goods in his possession under an attachment against the mortgagor, a complaint alleging peaceable possession, and that the taking was wrongful, and further alleging that the mortgagee had taken possession by virtue of a chattel mortgage executed to him by the attachment debtor, states a cause of action,[81] even though it does not affirmatively show any default in the mortgage[82] It is not necessary to allege that the demand made by plaintiff on the officer, as required by statute, contained a just and true account of the mortgage debt[83] Likewise, it is not necessary to plead the value of the goods taken, where no elements of special damage are pleaded,[84] but special damages are not recoverable unless pleaded[85]

(3) False Return

In an action for a false return the complaint must state the nature of the return made and show in what respect it was false or injurious to the plaintiff, but it need not allege deceit or fraud, or the giving of statutory notice to the officer or his deputy.

In an action for a false return, an averment that the officer "failed to make true and correct returns" is insufficient;[86] the complaint must state the nature of the return made,[87] and show in what respect it was false[88] or injurious to plaintiff,[89] but it need not allege deceit or fraud,[90] or the giving of statutory notice to the officer or his deputy.[91] It is proper to charge the false return to have been made when the writ was returnable, although it was actually made long afterward[92]

Construction. Where the complaint in an action against an officer for making a false return of service of summons on plaintiff, whereby judgment was rendered against plaintiff avers that plaintiff filed a motion to quash the alleged false return, it will be assumed, in the absence of any averment to the contrary, that such motion was made before judgment was rendered in the action.[93] Where the declaration, in an action on the case for the false return of a writ, avers that the writ was directed to defendant, as an indifferent person, to serve and return, and that, after it had been returned to the court to which it was returnable, plaintiff in that suit recovered judgment by default, this is equiv-

73. N Y —Stevens v Somerindyke, 4 E D Smith 418.
57 C.J p 953 note 61.

74. Ind —Huseman v. Sims, 4 N E 42, 104 Ind 317.
57 C J p 953 note 62

75. Ind —Huseman v. Sims, supra.
57 C J. p 953 note 63.

76. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo 96.

77. S D.—Thompson v. Donahoe, 92 N W 27, 16 S D 244.

78. S D.—Thompson v. Donahoe, supra.
57 C J p 953 note 66.

79. Colo —Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.
57 C.J. p 953 note 67.

80. Mich —Hutchinson v Whitmore, 51 N W. 451, 90 Mich 255, 30 Am S R. 431.

81. S D —First Nat Bank v. North, 51 N W 96, 2 S D 480

82. S D —First Nat. Bank v. North, supra.

83. Mass —Gassett v. Sanborn, 8 Gray 218.

84. Wash —Sheehan v. Levy, 23 P. 802, 1 Wash 149.

85. Or.—Bankers' Discount Corp v Noe, 242 P 610, 116 Or. 570

86. Ky —Commonwealth v. Bartlett, 7 J.J Marsh. 161.

87. Ky —Commonwealth v. Bartlett, supra.

88. N J —Astor v Heller, 38 A. 819, 61 N J.Law 78.
57 C J p 956 note 16.

89. Ky.—Commonwealth v. Bartlett, 7 J.J Marsh 161.
N.J —Astor v Heller, 38 A. 819, 61 N.J Law 78

90. N C.—Peebles v. Newson, 74 N.C. 473.

91. Pa.—Jadwin v Bell, 165 A. 511, 108 Pa Super. 543.

92. N.Y.—Michaels v. Shaw, 12 Wend. 587.

93. Ky —Bennett v Bell, 46 S W. 701, 20 Ky.L. 308.

alent to an averment that the writ was legally directed to defendant, and that a lawful judgment was rendered thereon [94]

§ 156. Plea or Answer, and Subsequent Pleadings

a Plea or answer
b. Replication or reply
c Rejoinder

a. Plea or Answer

(1) In general
(2) To charges of particular defaults or misfeasances

(1) In General

Where, in an action against a sheriff or constable, a good cause of action is sufficiently alleged in the plaintiff's pleadings, the defendant must, by a proper plea or answer, raise an issue to make available any defense to which he may deem himself entitled. Where warranted by statute, a plea alleging the taking and return of an indemnity bond and notice to the plaintiff thereof should not be rejected, and, if the officer seeks to justify under process, such justification should be specially pleaded.

In an action against a sheriff or constable, defendant must, by a proper plea or answer, raise an issue to make available any defense to which he may deem himself entitled,[95] or, if the complaint is insufficient to state a cause of action, he must interpose a demurrer thereto.[96] Where an action against a sheriff or deputy sheriff falls within one of the classes of actions enumerated in a statute providing for less stringency in pleading in certain suits, he is entitled to the benefit of the statute,[97] even though he has taken indemnity.[98] Also, when a sheriff is sued, he is held to no greater diligence in pleading than a private individual,[99] and a default by him will be set aside and an answer permitted where the circumstances are such that it would be proper to grant such indulgence to an individual.[1]

Indemnity. In jurisdictions wherein it is provided by statute that the taking of an indemnity bond and the return thereof to the office of the clerk of court shall bar an action by a claimant of property against the officer, a plea alleging the taking and return of an indemnity bond and notice to plaintiff thereof should not be rejected[2] where the return was made before the action was begun,[3] even though after the time provided by statute [4]

Limitations. Where the statute provides that actions against sheriffs for any act in their official capacity shall be brought within three years after the cause of action shall have accrued, a plea in such action of "Not guilty within three years" is bad on a special demurrer for not following the terms of the statute,[5] although it might be good on general demurrer.[6]

Justification under office. Where defendant in an action for an alleged wrongful act seeks to justify under his office, he must, in his pleading, show a good title to such office.[7]

Justification under process. Where an officer seeks to justify under process, such justification must be specially pleaded,[8] and the plea must set forth matters which, if true, will bar the action.[9] In order to conform to this rule the plea should substantially describe the process,[10] state the facts relied on to justify the acts done under it,[11] and allege, where a seizure of property is complained of, that defendant in the process had some interest in the property seized subject to seizure,[12] or that the property was subject to the process;[13] but it is not necessary to state that defendant sold the property levied on.[14] Where the officer seeks to justify under mesne process, he must aver the return thereof,[15] or show some legal excuse for not returning

94. Conn.—Case v. Humphrey, 6 Conn. 130.

95. **Answer held sufficient against demurrer**
Ind.—Hall v Smith, 176 N E 558, 92 Ind App. 509
Denial held demurrable as conclusion
Ky.—West v Criscillis, 46 S.W.2d 1082, 242 Ky. 549.

96. **Speaking demurrer**
Defendant is not permitted to interject a statement of facts in the nature of a speaking demurrer.—Jadwin v Bell, 165 A 511, 108 Pa Super 543.

97. N.Y.—Hull v. Southworth, 5 Wend. 285.

98. N.Y.—Hull v. Southworth, supra.

99. Utah.—Cutler v Haycock, 90 P 897, 32 Utah 354.

1. Utah.—Cutler v Haycock, supra

2. W.Va.—Balisle v Johnson, 88 S. E 1068, 78 W Va. 340.
Indemnity as protection for officer and sureties on official bond see supra § 133.

3. W Va.—Balisle v Johnson, supra.

4. W.Va.—Balisle v. Johnson, supra

5. N.Y.—Fisher v. Pond, 2 Hill 338

6. N Y.—Fisher v. Pond, supra.

7. Ill.—Case v. Hall, 21 Ill. 632.
57 C J p 957 note 41.

8. N D.—MacLaren v Kramar, 144 N.W. 85, 26 N D. 244, 50 L.R.A.,N. S., 714.
57 C.J. p 957 note 43.

9. Ala.—West v. Hayes, 23 So. 727, 120 Ala. 92, 74 Am S R 24.—McAden v Gibson, 5 Ala 341.

10. Ala.—Gillespie v McCleskey, 49 So 362, 160 Ala 289
57 C J p 958 note 45

11. Tenn.—Kelly v. Fritz, 11 Heisk. 7.

12. Or.—Howard v. Conde, 30 P 454, 22 Or. 581.
57 C J p 958 note 47

13. Ala.—West v Hayes, 23 So. 727, 120 Ala 92, 74 Am S R 24.
57 C J p 958 note 48

14. Mo.—Burton v. Sweaney, 4 Mo 1

15. Ala.—McAden v Gibson, 5 Ala. 341.
57 C.J. p 958 note 52.

it,[16] unless the action is brought before return day.[17] It has been held that, where a sheriff justifies under a writ of execution, it is not necessary to allege that a judgment was rendered in the case in which the execution issued,[18] or to set out the judgment;[19] but, as against a stranger to the writ, it has been held necessary to allege a valid judgment, as discussed infra subdivision a (2) of this section.

Cure by verdict. A defect or informality in an answer stating a defense may be cured by verdict.[20]

(2) To Charges of Particular Defaults or Misfeasances

The rule that, where a good cause of action is sufficiently alleged in the plaintiff's pleadings, the defendant must, by a proper plea or answer, raise an issue to make available any defense to which he may deem himself entitled has been applied to the pleas and answers of sheriffs and constables to charges of various defaults or misfeasances

In an action for not levying an execution on a particular lot of land pointed out by plaintiff in execution, a plea that, after return of such execution, plaintiff sued out another execution on the same judgment, which was, by his direction, levied on other property, is bad where it does not allege what disposition was made of the property under the levy.[21]

Wrongful levy or seizure. In an action for a wrongful attachment of exempt property, a waiver of exemption must, if relied on as a defense, be specially pleaded;[22] but, where it is not intended to plead a waiver, the answer should be confined to denials.[23]

Where an officer seeks to justify his seizure and possession of attached property as against a stranger to the writ who claims it, he must allege all the facts necessary to support the writ,[24] including the existence of a debt in favor of the attachment plaintiff against the attachment defendant.[25] If the seizure was under final process, the sheriff must plead that the property was taken under a valid execution[26] and judgment.[27] A plea alleging that the property was taken under an execution as the proper goods and chattels of the execution defendant is bad, as it does not traverse that plaintiff was the owner,[28] and in trespass de bonis against a sheriff, a plea that the goods belonged to a third person, and were taken by virtue of an execution against him, has been held bad, as amounting to the general issue.[29] Where the sheriff relies on the fact that a sale, mortgage, or pledge by the debtor to plaintiff was fraudulent, the fraud must be specially pleaded.[30] In an action to recover the possession of property seized under attachment against a person in whose possession the property was, it is not necessary for the sheriff to plead want of notice and demand from plaintiff.[31] In an action on an indemnifying bond it has been held that an answer denying plaintiff's ownership of the property is defective, if it fails to negative his ownership of any part thereof.[32]

In a plea of justification by an officer for taking property in satisfaction of a rate or tax imposed by an incorporated aqueduct company, it has been held sufficient to aver that by the act of incorporation the original proprietors were declared a body politic and corporate in fact, if such were the terms of the act, without averring the organization of the company.[33]

Improper sale or removal of property. In an action by an owner of chattels leased to a third person against an officer for selling them under an execution against the lessee, a plea that the officer sold only the right, title, and interest of the lessee and that plaintiff has not sustained, and will not sustain, any damages by reason of the sale is good.[34]

Loss, release, or conversion of property. A plea

16. Ala.—McAden v. Gibson, 5 Ala 341, followed in Kirksey v Dubose, 19 Ala 43.
17. Vt.—Briggs v Mason, 31 Vt 433
18. Ala.—Shepherd v Nabors, 6 Ala 631
19. Mo.—Burton v Sweaney, 4 Mo 1.
57 C J. p 958 note 56.
20. Mass.—Wheeler v. Train, 3 Pick 255
21. Ark.—Lawson v State, 10 Ark. 28, 50 Am D 238
22. Minn.—Murphy v Sherman, 25 Minn 196
Pa.—Cortelucci v. Benz, Com Pl, 54 Montg Co 209.
23. Colo.—Smith v Pueblo Mercantile, etc, Assoc, 260 P. 109, 82 Colo 364
24. Or.—Bankers' Discount Corp v. Noe, 242 P 610, 116 Or 570.
57 C J. p 958 note 64.
25. Idaho.—Beckstead v. Griffith, 83 P. 764, 11 Idaho 738.
57 C J p 958 note 65.
26. Okl.—Masters v. Teller, 56 P 1067, 7 Okl. 668
27. Okl.—Masters v Teller, supra
28. Ky.—Harris v. Paynes, 5 Litt 105.
Mo.—Barley v. Cannon, 17 Mo. 595.
29. N Y.—Brown v. Artcher, 1 Hill 266
30. Tex.—Merchants' Nat Bank v. Barker, 28 S W. 698, 8 Tex.Civ App. 332
Wis.—Norton v. Kearney, 10 Wis. 443.
31. Cal.—Killey v. Scannell, 12 Cal. 73.
57 C J. p 959 note 71.
32. Ky.—Harris v. McClure, 52 S W. 941, 21 Ky.L. 686
33. N Y.—Beekman v. Traver, 20 Wend 67
34. N J.—Graffin v. Jackson, 40 N. J Law 440.

or answer in an action for the loss,[35] wrongful release,[36] or conversion[37] of property by a sheriff or like officer will not be upheld unless it contains proper and sufficient allegations.

Failure to produce or deliver property or pay over money In an action for failure to have attached property forthcoming to satisfy execution, a plea averring generally that the property had been appropriated in the manner prescribed by law in satisfaction of prior attachment liens is insufficient.[38] Where, in an action to recover money from an officer, the complaint alleges that defendant refused to pay plaintiff the money, and wrongfully retains and still holds the possession thereof, and the answer merely contains a denial "that defendant wrongfully retains or holds possession" of the sum or any part thereof, such denial operates merely to deny the "wrongful" possession[39] and constitutes an admission of possession.[40] On the other hand, in an execution sale, the purchaser's action against a sheriff for failure to deliver goods purchased, an answer denying that the sheriff "has failed and neglected, or failed or neglected, or refused, in any manner or at all, to deliver," is a sufficient denial of failure to deliver,[41] and an admission in the answer that actual possession was not delivered is not fatal where the answer declares that the property was not capable of manual delivery.[42]

False return. Where an action against a sheriff is for damages for a false return of an execution issued by plaintiff, an answer merely alleging the issuing of prior executions by other creditors should be stricken, where it does not aver that the prior executions had been or could be levied on the debtor's property, or that the property was exhausted by a sale under such prior executions.[43]

Escape. In an action for the escape from custody of a person arrested on a process for contempt, it is essential to the sufficiency of the answer that it contain averments amounting to a distinct allegation that the alleged escape was made without defendant's consent.[44] Where a declaration alleges the escape to have been in September, and the sheriff's pleas allege that the debtor was in custody in April, and admit that he has not been in custody subsequent to that time, it appears with sufficient certainty, on general demurrer, that the escape mentioned in the plea is the same escape for which the action was brought[45]

b. Replication or Reply

A reply or replication is not proper or necessary where the officer's plea or answer is merely a denial or amounts to a denial, and a new assignment may or may not be necessary according to the pleadings already filed in the particular case.

A reply or replication is not proper[46] or necessary[47] where the officer's plea or answer is merely a denial, or amounts to a denial, of plaintiff's cause of action. A new assignment may,[48] or may not,[49] be necessary according to the pleadings already filed in the particular case. Where a reply or replication is filed, it must be sufficient in contents.[50]

c. Rejoinder

Where the defendant in trespass justifies on the ground that he acted under the command of a lawful officer serving a warrant, and the replication sets forth that such officer had not qualified and, therefore, had no authority, a rejoinder that the officer was such de facto, and that the defendant believed him to be such de jure, is sufficient.

Where defendant in trespass justifies on the ground that he acted under the command of a lawful officer serving a warrant, and the replication sets forth that such officer had not qualified and, therefore, had no authority either to act himself or to compel defendant to act, a rejoinder that the

35. Vt—Perkins v Gibbs, 29 Vt 343
57 C J p 959 note 76

36. Ill—People v. Snow, 250 Ill App 170.

37. Iowa—Hanson v Carl, 207 N W 579, 201 Iowa 521
57 C.J p 959 note 78

38. Conn.—Jordan v. Gallup, 16 Conn 536
57 C.J. p 959 note 79

39. Mont.—Yank v. Bordeaux, 74 P. 77, 29 Mont 74

40. Mont—Yank v. Bordeaux, supra.

41. Cal—Dreisbach v. Braden, 181 P. 262, 40 Cal App. 407.

42. Cal—Dreisbach v. Braden, supra

43. N Y—Johnson v Reilly, 59 How Pr 354.

44. N Y—Loosey v Orser, 17 N Y. Super 391

45. N Y—Powers v. Wilson, 7 Cow. 274

46. N J—Graffin v. Jackson, 40 N. J Law 440

Failure to reply not an admission

Where the complaint in an action against a sheriff to recover property taken by him on attachment averred that plaintiff owned and was entitled to possession of the property in question, and the answer denied the averment, and set up that, at the time of the levy for the wrongful making of which defendant was sued, the property was possessed and owned by a third person, such averments were not new matter which was admitted by failure to file a replication—Woodworth v Knowlton, 22 Cal 164.

47. Ohio—Long v. Hoban, 7 Ohio Dec., Reprint, 688, 4 Cinc L.Bul. 986
57 C J. p 960 note 96

48. Conn—Soudant v Wadhams, 46 Conn 218.
57 C J p 960 note 97.

49. Vt—Perry v. Carr, 42 Vt. 50.
57 C J. p 960 note 98

50. N J—McWilliams v. King, 32 N. J Law 21.
57 C.J p 960 note 99.

officer was such de facto, and that defendant believed him to be such de jure, and, therefore, might lawfully submit to his command, is sufficient.[51]

§ 157. Amendment of Pleadings

General rules governing the amendment of the pleadings have been applied in an action against a sheriff or constable, and as a general rule the court may in its discretion permit the pleadings to be amended where such course appears proper.

General rules governing the amendment of pleadings, as discussed in Pleadings §§ 275–282, have been applied in an action against a sheriff or constable.[52] As a general rule, the court may in its discretion permit the pleadings to be amended where such course appears proper,[53] or may refuse to allow an amendment which would in its opinion cause injustice[54] or be otherwise improper,[55] or unnecessary,[56] or strike out an improper amendment previously made.[57] Where, in an action against a sheriff for levying on property claimed by plaintiff under process against another, the indemnitors of the sheriff are brought in or substituted as defendants, as discussed supra § 153, it is not necessary for plaintiff to amend his complaint so as to show the nature of their liability.[58]

§ 158. Issues, Proof, and Variance

a. In general
b. Under general issue or denial

a. In General

The proof adduced in an action against a sheriff or constable must be within the issues presented, relate to the matters set up in the pleadings, and conform to and support, or at least not be materially variant from, the pleadings of the party by whom it is introduced, although sometimes the pleading or evidence of the defendant renders it proper for the plaintiff to introduce evidence of a matter not pleaded by him.

The proof adduced in an action against a sheriff or constable must be within the issues presented,[59] relate to matters set up in the pleadings,[60] and conform to and support,[61] or at least not be materially variant from,[62] the pleadings of the party by whom it is introduced or sought to be introduced. Sometimes, however, the pleading or evidence of defendant renders it proper for plaintiff to introduce evidence of a matter not pleaded by him,[63] the fact that plaintiff disproves a defense not made cannot prejudice defendant,[64] in an action to recover from a sheriff the amount received on a sale of property under execution, an order of court fixing the compensation of a special custodian in accordance with a statute providing that the court shall allow such compensation is admissible without being specially pleaded,[65] and an immaterial variance is not fatal.[66] The material allegations of the complaint or petition must be proved as laid,[67] unless such allegations are admitted by the answer;[68] but such proof is not necessary as to al-

51. Conn.—Soudant v. Wadhams, 46 Conn 218

52. N H—Grafton Bank v. White, 17 N H. 380.

Where demurrer to answer is sustained, sheriff is entitled to amend if he so desires, and, if the demurrer is erroneously overruled on correction of the error, he should likewise be permitted to amend—West v Criscillis, 46 S W 2d 1082, 242 Ky 549.

Amendment after action barred

In an action against a sheriff for conversion, where the petition alleged that the levy of the execution was by him as sheriff, an amendment, filed after an action was barred, which alleged that the levy was made by a deputy sheriff, acting by authority of the sheriff, did not state a new cause of action—Herring v Patten, 44 S.W. 50, 18 Tex.Civ.App 147

53. Colo—Buddee v Spangler, 20 P 760, 12 Colo. 216.
57 C.J p 961 note 5.

54. N.H.—Redding v. Dodge, 59 N H 98.
N Y—Roessel v. Rosenberg, 30 N Y. S. 812, 10 Misc. 38.

55. Mont—Palmer v. McMaster, 25 P. 1056, 10 Mont 390
Vt—McCutcheon v Leonard, 39 A 2d 348, 114 Vt. 38.

56. **Pleading confusion of goods**
In action for conversion, denying defendant's motion to amend answer so as to plead the doctrine of confusion of goods was not error, since the doctrine as applied to the facts was merely one of evidence and defendants could take advantage thereof by questioning the sufficiency of plaintiff's proof to identify the property in question—Smith v Armstrong, 166 P 2d 793, 118 Mont 290.

57. Ga—Battle v. Ricks Lumber Co, 144 S.E 919, 38 Ga.App 621
57 C.J p 961 note 8

58. Minn.—Richardson v McLaughlin, 57 N W 210, 55 Minn. 489
N Y—Poole v Ellison, 9 N.Y S. 171, 56 Hun 108

59. Ala—Grace v Wooley, 153 So 659, 26 Ala App 83
57 C.J p 961 note 20.

Proof of fraudulent conveyance
Where a conveyance has been made in fraud of creditors, and an execution levied as if there had been no conveyance, the sheriff who is sued for conversion by virtue of such execution may prove under a denial of the grantee's title that the conveyance was fraudulent—Strong v Strong, 140 P.2d 386, 22 Cal 2d 540.

60. Minn—Johnson v Gerber, 130 N W 995, 114 Minn 174.
57 C J p 961 note 21.

61. Ala—Griffin v. Ganaway, 6 Ala 148
57 C J p 962 note 22.

62. Mo—State v Martin, 77 Mo 670
57 C J. p 962 note 23.

63. N.Y—Bowe v. Wilkins, 11 N.E 839, 105 N Y 322.
57 C.J p 962 note 24.

64. Cal.—Paden v Goldbaum, 37 P. 759, 4 Cal Unrep.Cas 76.

65. Colo.—Blyth v. People, 66 P. 680, 16 Colo App. 526

66. Ala—Ewton v McCracken, 64 So 177, 9 Ala App 619.
57 C J. p 962 note 27.

67. Ala—Walker v Graham, 172 So 655, 233 Ala. 539.
Fla—Malone v Howell, 192 So 224, 140 Fla. 693
Miss—W. T Rawleigh Co v Hester, 200 So. 250, 190 Miss 329.
Mont.—Reagan v Armstrong, 165 P. 2d 1004, 118 Mont 273.
57 C J p 962 note 28.

68. Ala.—Smith v Kaufman, 14 So. 111, 100 Ala. 408.

legations which are merely surplusage.[69] A sheriff is not bound to prove all the facts set up in his defense if he proves enough to relieve him of legal liability;[70] and, where indemnitors, who have been made parties at the instance of the sheriff, have not answered his cross action, it is not necessary for him to put the indemnity bond in evidence to entitle him to judgment over against the indemnitors as by default.[71]

b. Under General Issue or Denial

Under the general issue or general denial it has been held that the defendant cannot show in evidence matters tending to excuse or justify merely, and not to disprove, the act or default complained of, but there is also authority to the contrary.

Under the general issue or a general denial it has been held that defendant cannot show in evidence matters tending to excuse or justify merely, and not to disprove, the act or default complained of,[72] unless, where such is the practice, notice has been given that defendant intends to show such matters,[73] but there is also considerable authority to the contrary.[74] At any rate, evidence tending merely to mitigate the damages, but not to justify the trespass complained of, is admissible under the general issue;[75] and evidence which refutes plaintiff's allegations[76] or evidence,[77] or both,[78] is admissible under a general denial.

§ 159. Presumptions and Burden of Proof

a. Presumptions
b. Burden of proof

a. Presumptions

Various presumptions have been held to exist, or not to exist, in actions against sheriffs or constables or their indemnitors.

The presumption of law that public officers have done their duty is generally applicable to sheriffs and constables and their deputies and assistants, as discussed in Evidence § 146 c; but such presumption will not be indulged as to the acts of one officer where the effect thereof would be to put another officer in default.[79] Where an officer is sued on the ground that he exceeded his authority, it is not to be presumed that he was justified by extraordinary circumstances;[80] and all presumptions are against an officer suppressing process of the court in his hands.[81] It will be presumed that proper steps were taken by the moving parties to secure process and place it in the hands of the sheriff;[82] that an officer acted legally[83] and in good faith[84] in making an attachment; that property on which a sheriff levied an execution was liable to the process,[85] that the statements in his return are true;[86] that he exercised proper care in respect of property in his official custody,[87] and that he properly applied, disbursed, or paid over money which came into his hands.[88] It is also presumed that a sheriff or constable knows his duty,[89] and, hence, when he is shown to have been guilty of misconduct, the presumption arises that his act was willful.[90] In an action against a sheriff for not executing process, if a writ of sequestration is proved to have issued, the presumption is that the citation also issued as prayed for in the petition.[91]

Where a sheriff, who has attached goods on process against a fraudulent vendee, refuses, on demand by the vendor, to deliver the goods, without requiring any evidence of the vendor's title, or expressing any doubts concerning it, the jury, in an action of trover by the vendor, may presume a waiver by the officer of any information on the

69. Wash.—Marshall v. Chapman's Estate, 195 P.2d 656, 31 Wash.2d 137.
57 C.J. p. 963 note 30.

70. Me.—Clark v. Foxcroft, 6 Me. 296, 20 Am.D. 309
57 C.J. p. 963 note 31

71. Tex.—Davis v. Bingham, Civ. App., 33 S.W. 1025

72. Tex.—Reilly v. Lewis, Civ. App., 47 S.W. 552.
57 C.J. p. 963 note 33.

73. Mich.—Wait v. Kellogg, 30 N.W. 80, 63 Mich. 138.
57 C.J. p. 963 note 34.

74. N.J.—Hall v. Snowhill, 14 N.J. Law 551
57 C.J. p. 963 note 35

75. Vt.—Collins v. Perkins, 31 Vt. 624.

76. N.Y.—Saunders v. Reilly, 12 N. E. 170, 105 N.Y. 12, 59 Am.R. 472.

77. S.D.—Karlen v. Trebble, 189 N.W. 519, 45 S.D. 570.

78. Kan.—Phelps v. Skinner, 65 P. 667, 63 Kan. 364
57 C.J. p. 963 note 39

79. Tex.—Brown v. Wallis, Civ. App., 101 S.W. 1068.
57 C.J. p. 963 note 44

80. Mich.—Stilson v. Gibbs, 40 Mich. 42.

81. N.J.—Stout v. Hopping, 6 N.J. Law 125

82. Ind.—Hall v. Smith, 176 N.E. 558, 92 Ind.App. 509.
Affidavit for attachment
It must be presumed that affidavit for attachment not set out was proper.—Hall v. Smith, 176 N.E. 558, 92 Ind.App. 509.

83. Ind.—Hall v. Smith, supra
Pa.—Commonwealth v. Pflaumer, 16 Pa.Dist. & Co. 193.

84. Ark.—Bridwell v. Anderson, 156 S.W.2d 231, 203 Ark. 69
Vt.—Mullen v. Sherman, 37 Vt. 493.

85. Ala.—Newcomb Bros. Wall Paper Co. v. Wiggins, 78 So. 905, 201 Ala. 551
57 C.J. p. 963 note 48.

86. La.—Lay v. Boyce, 3 La.Ann. 622

87. Me.—Mills v. Gilbreth, 47 Me. 320, 74 Am.D. 487

88. Va.—Harrison v. Garnett, 34 S.E. 612, 97 Va. 697
57 C.J. p. 964 note 51.

89. Cal.—Chapman v. Thornburgh, 17 Cal. 87, 76 Am.D. 571.

90. Cal.—Chapman v. Thornburgh, supra.

91. La.—Dupuy v. Barlow, 4 Mart., N.S., 239.

subject.[92] It will not be conclusively presumed that a prisoner was injured by the arresting officer where he was unhurt when arrested by defendant and injured when brought into court the following day in defendant's custody,[93] if a prisoner returns after a voluntary escape, the affirmation of the recaption by plaintiff in execution, so as to destroy his right of action against the sheriff for the escape, will not be presumed,[94] where an officer who has attached a horse and wagon is seen driving them, there is no presumption that such use is unlawful;[95] and in an action against a sheriff for failure to return an execution, it will not be presumed without any allegation to that effect that he failed to pay over the money collected under the writ.[96]

Ownership In an action by a mortgagor against a sheriff for damages for having sold the mortgaged premises without giving due notice of sale, it will be presumed that the mortgagor was the owner of the premises at the time the mortgage was executed,[97] and in an action against an officer for neglect to seize property in a debtor's possession, it may be presumed that such property belonged to the debtor.[98]

Sufficiency of property to satisfy debt. Where an officer has failed to return an order for the sale of attached property, it will be presumed that the property was sufficient to satisfy the debt;[99] but, where, in an action for failure to levy sufficient property to satisfy the debt, plaintiff showed that the debtor possessed at the time of the levy property other than that levied on, without proving that such omitted property was substantially sufficient to satisfy the balance due, the court may not indulge a presumption that it was of such value.[1]

Loss, injury, or damage. Plaintiff in an action is presumed to have been injured by the failure of an officer to levy an attachment or execution on property in defendant's possession,[2] as well as by the failure of the officer to return an execution,[3] or make the money,[4] within the time prescribed by law. A like presumption will be indulged where the officer, after making a levy, left the property in defendant's possession without taking a bond and subsequently it could not be found.[5] The failure of a sheriff to execute bail process in a trover case is presumed to have damaged plaintiff to the extent of the final money judgment recovered by him against defendant in the action.[6] Where a sheriff allowed a debtor arrested on civil process to escape, the presumption is that the creditor lost the entire debt thereby.[7]

Where indemnity was given to a sheriff for the purpose of inducing him to levy on certain property, the presumption is that the indemnitors thereby made themselves parties to the trespass.[8] Where a sheriff holds two executions against the same debtor, on one of which he has received an indemnifying bond, and he levies and sells the property levied on, and an action on the bond is brought by a claimant of the property, it will be presumed, in the absence of evidence to the contrary, that the sheriff sold the property under the execution for which he was indemnified, rather than under that for which he had no indemnity.[9]

b. Burden of Proof

In an action against a sheriff or constable or his deputy for an official default or misfeasance, the burden rests on the plaintiff to make out his case, but, where the officer admits the act or omission complained of and seeks to justify it, he assumes the burden of proof as to the matters relied on in justification, and the burden of proof also rests on him where he sets up affirmative defenses resting on matters peculiarly within his knowledge.

In an action against a sheriff or constable or his deputy for an official default or misfeasance, the burden rests on plaintiff to make out his case,[10] and show the extent of the damage suffered by

92. Conn.—Thompson v. Rose, 16 Conn 71, 41 Am D 121.

93. Ark.—McCamey v Wright, 132 S W. 223, 96 Ark. 477.

94. N.Y.—Brown v Littlefield, 1 Wend 398

95. Vt—Paul v. Slason, 22 Vt 231, 54 Am.D 75.

96. Cal—Hoag v. Warden, 37 Cal. 522

97. Ind—State v. Leach, 10 Ind 308

98. Me—Bradford v. McLellan, 23 Me. 302

99. Tex—Ranken v Jones, Civ App., 53 S W. 583.

1. U S—Farmers', etc., Bank v. Maines, Mich, 183 F. 37, 105 C.C A 329

2. Ga—Hicks v Warfield, 78 S.E 1096, 13 Ga App. 154.
57 C J p 964 note 65.

3. Or—Moore v Floyd, 4 Or. 101.
57 C J. p 964 note 66.

4. Ga—Hixon v Callaway, 58 S E 1120, 2 Ga App 678.

5. Ga—Hicks v Warfield, 78 S E 1096, 13 Ga.App. 154.

6. Ga—Houston v Howell, 136 S E 474, 36 Ga.App. 330

7. Ark—Faulkner v. State, 6 Ark. 150.

8. N Y.—Pool v. Ellison, 9 N Y S 171, 56 Hun 108.

9. W Va—Hartman v. Campbell, 5 W Va 394

10. Ala—Walker v. Graham, 172 So 655, 233 Ala. 539.
N Y.—Singer v Knott, 142 N E 435, 237 N Y 110—Jackson v. Comisky, 62 N Y S. 705, 30 Misc 622
Okl—William Catlin, Inc, v. Norton, 42 P.2d 819, 171 Okl 390.

Illegality of proceedings
Burden of establishing illegality of proceedings in action against sheriff was on party alleging wrongful act complained of.—Hall v. Smith, 176 N. E 558, 92 Ind.App. 509

In action for excessive levy, burden is on the debtor to show that the officer acted oppressively or that he

him;[11] but, where the officer admits the act or omission complained of and seeks to justify it, he assumes the burden of proof as to the matters relied on in justification,[12] and the burden of proof also rests on the officer where he sets up affirmative defenses resting on matters peculiarly within his knowledge.[13] Where a sheriff or constable justifies under his office, it is incumbent on him to establish his title to such office,[14] and, if he justifies under process, he must produce such process in evidence,[15] but, where he executed a search warrant which was regular on its face, and was issued by an officer duly authorized to issue it, it is improper to place on him the burden of proving the truth of the facts set out in the complaint on which the search warrant was issued,[16] even though he himself filed the complaint.[17]

In actions for particular defaults or misfeasances. The foregoing rules as to the burden of proof are applicable in actions for: Failure to serve, levy, or otherwise execute process,[18] record an attachment lien,[19] or indorse on an execution the date of its delivery to the officer,[20] a wrongful levy on, or seizure of, property,[21] or an unlawful arrest on execution,[22] service of a writ of replevin without taking a bond;[23] loss,[24] release,[25] or wrongful sale of,[26] or a delay in selling,[27] property, a wrongful purchase of the property by the sheriff before levy,[28] wrongfully, maliciously, and without probable cause procuring the issuance of a search warrant and for wrongful search thereunder,[29] escape

intended to do defendant a wrong under authority of the writ in his hands—Bridwell v. Anderson, 156 S W 2d 231, 203 Ark 69—57 C.J p 965 note 85 [a] (2).

11. Me—Jones v Fletcher, 41 Me 254

12. Ky—West v. Criscillis, 46 S W 2d 1082, 242 Ky. 549.
57 C J p 965 note 75

13. Ark—Faulkner v State, 6 Ark 150.

14. Ky—Calvert v. Stone, 10 B Mon 152.
R I—Smith v Wilson, 43 A 634, 21 R I 327

15. N Y—McCune v Peters, 105 N Y S 896, 54 Misc 165.
Showing necessary where property claimed by person other than defendant in process see supra § 126.

16. Okl—Knisley v. Ham, 136 P. 427, 39 Okl. 623, 46 L R A,N S., 770

17. Okl—Knisley v. Ham, supra

18. Neb—Conway v. Magill, 73 N. W 702, 53 Neb. 370
57 C J p 965 note 82.

19. Tex—Neville v Miller, Civ App., 171 S W. 1109
57 C J p 965 note 83.

20. Ala—O'Connor Min., etc., Co v Dickson, 20 So 413, 112 Ala 304.
57 C J p 965 note 84.

21. Mont—Smith v. Armstrong, 166 P 2d 793, 118 Mont. 290.
57 C J. p 965 note 85.

Plaintiff has burden of identifying property claimed—Smith v. Armstrong, 166 P 2d 793, 118 Mont 290—57 C.J p 965 note 85 [a] (5).

Filing of mortgage

In mortgagee's action against sheriff for conversion of mortgaged property levied on, mortgagee had burden to prove allegation that mortgage was duly filed before levy.—Consumers Credit Co v Manifold, 142 P 2d 150, 65 Idaho 238.

Consideration for transfer

(1) Where plaintiff purchased from one to whom debtor had sold property, in action against sheriff and his surety for levying execution against debtor thereon, burden rested on plaintiff to prove that he paid a valuable and adequate consideration—Sauls v. Leath, 106 So. 133, 213 Ala 664

(2) So, in action by wife against sheriff for conversion of property levied on under execution against husband, who had transferred property to wife after action against him had been commenced, wife had burden to prove fair consideration for transfer—Gould v Ellis, 286 N.Y.S. 422, 247 App.Div 847

22. N Y—Barhydt v Valk, 12 Wend. 145, 27 Am D 124.
57 C J. p 966 note 86.

23. Me—Dolbier v. Norton, 17 Me 307
57 C J p 966 note 87.

24. Okl—Foster v. Wooley, 220 P 938, 93 Okl. 53.
57 C J p 966 note 88

In an action for the negligent keeping of property levied on, where it is proved or admitted that the property has been damaged, destroyed, or stolen, it becomes the duty of the sheriff to go forward with the proof to show if he can that proper care in the keeping of the property was in fact exercised by him—State, to Use of Henderson, v Clark, 20 A 2d 127, 2 Terry, Del., 246, 138 A L R. 704.

25. Utah—Skid Evans, Inc., v. Patten, 1 P.2d 959, 78 Utah 116.
57 C.J. p 966 note 89.

Third person's ownership

(1) The burden rests on the sheriff to establish that the property released was owned by a third person. Iowa.—Wadsworth v Walliker, 45 Iowa 395, 24 Am R 788
Neb—Miller v. Crosson, 267 N W. 145, 131 Neb 88
57 C.J p 966 note 89 [a] (3).

(2) This is true at least where the property is released without complying with statutes relating to a trial of the right to seized property.—Miller v Crosson, supra

26. Cal—Bone v Trafton, 159 P 819, 31 Cal App 30
57 C.J. p 966 note 90

Sale of property belonging to another

In an action against an officer for the sale of plaintiff's property under an execution against another, the burden of proof is on plaintiff where the property was in possession of the execution defendant and his possession was apparently exclusive, but, where plaintiff in trespass derived title from a judicial sale, the record of which is put in evidence, the burden is then cast on the officer.—Berwald v. Ray, 8 Pa.Super. 365, 43 Wkly.N C 217.

Sale in wrongful collection of tax

One seeking damages for sale of goods in wrongful collection of sales tax had burden of proving that no assessment of sales was made, or that assessment was not made in good faith, or that governing statute was not complied with—Rigby v. Stone, 11 So.2d 822, 194 Miss 775, affirmed in part and reversed in part on other grounds 13 So.2d 230, 194 Miss 775.

27. Va—Fisher v Vanmeter, 9 Leigh 18, 36 Va. 18, 33 Am D 221.
57 C J. p 966 note 91

28. **Lack of prejudice**

Burden of showing that purchase did not prejudice creditor rests on sheriff—West v. Criscillis, 46 S W. 2d 1082, 242 Ky 549.

29. Ala—Walker v Graham, 172 So 655, 233 Ala 539

Falsity of affidavit on which search warrant was issued must be proved by plaintiff—Walker v. Graham, supra.

of a person arrested on mesne process;[30] wrongful death of a prisoner;[31] injury inflicted by a deputy,[32] failure to pay over money collected on execution;[33] wrongful distribution of the proceeds of a sheriff's sale;[34] failure to return process[35] or an order of sale;[36] and falsely returning an execution nulla bona.[37] The general rules have also been applied in an action to impose liability on the sheriff for expenditures in excess of budget appropriations.[38]

§ 160. Admissibility of Evidence

a. In general
b. Documentary evidence

a. In General

Any competent and material evidence which tends to establish or refute the contentions of either party, or to indicate the amount which should be recovered, is admissible in an action against a sheriff or constable or his deputy, but evidence which is irrelevant, immaterial, or is otherwise objectionable under the general rules of evidence may and should be excluded.

Provided it is within the pleadings and issues made thereby, as discussed supra § 158, any competent and material evidence which tends to establish or refute the contentions of either party,[39] or to indicate the amount which should be recovered by the successful party,[40] is admissible in an action against a sheriff or constable or his deputy, such as an action against such officer for a failure to execute process,[41] a wrongful levy on, or seizure of, property,[42] a release of goods which have been seized by the officer,[43] a failure to sell property which has been levied on,[44] a wrongful sale,[45] the taking of insufficient bail[46] or insufficient sureties on a bond,[47] a failure to return an attachment,[48] a failure to record an attachment resulting in a loss of preference,[49] a false return of process,[50] a false arrest,[51] wrongfully, maliciously, and without probable cause procuring issuance of search warrant

30. N Y—Singer v. Knott, 142 N E 435, 237 N Y 110, reargument denied 143 N E 744, 237 N Y. 563
57 C.J. p 966 note 92.

31. Ark—McCamey v Wright, 132 S W. 223, 96 Ark 477.
57 C.J. p 966 note 93.

32. S C—Staton v. Bell, 170 S E. 666, 170 S C 395.
57 C J. p 966 note 94.

In action against sheriff, it is incumbent on plaintiff to show that, when the injury was inflicted, the deputy was acting within the scope of his authority
S C—Staton v. Bell, 170 S E 666, 170 S.C 395
Tex—Brown v. Wallace, Civ.App., 101 S W. 1008

33. S.C.—Thomas v. Yates, 26 S C L. 179
57 C J. p 966 note 95.

34. Pa—Knoell v. Carey, 132 A. 702, 285 Pa. 498, 140 A. 522, 291 Pa 531.
57 C J. p 966 note 96.

35. Neb—Ehlers v Gallagher, 22 N. W 2d 396, 147 Neb. 97.
57 C J. p 966 note 97.

Burden is on plaintiff to prove that there was property subject to levy which sheriff failed to seize and the value thereof—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97
57 C J. p 966 note 97 [a] (1).

36. Tex—Ranken v Jones, Civ.App., 53 S W. 583
57 C J. p 966 note 98.

37. N Y.—Watson v Brennan, 66 N. Y. 621.
57 C J p 966 note 99.

38. **Propriety of expenditure**
Sheriff in order to escape liability for expenditures made in excess of budget appropriations had burden to prove that expenditures were not only reasonable in amount but were incurred for things which were indispensably required for discharge of governmental functions—Association Collectors v King County, 76 P 2d 998, 194 Wash 25.

39. Ala—Walker v Graham, 172 So 655, 233 Ala 539
Conn—Ward v. Green, 11 Conn. 455
57 C.J. p 967 note 3.

Conduct prior to arrest
In action against sheriff and deputy for injuries sustained when tear gas gun was discharged during attempted arrest of plaintiff, testimony of witnesses concerning activities of plaintiff and his sons immediately prior to attempted arrest was competent on question whether plaintiff committed offense in presence of officer—Overstreet v. Thomas, Ky, 239 S W 2d 939

40. Neb.—Huddleson v. Polk, 102 N. W. 464, 70 Neb 492, 100 N W 802, 70 Neb. 489, 97 N W. 624, 70 Neb. 483
57 C J p 967 note 4.

41. Wash—Zelinsky v. Price, 36 P. 28, 8 Wash 256.
57 C J p 967 notes 5, 6.

42. N D—Janssen v. Kohler, 299 N. W 900, 71 N D. 247.

Testimony that sheriff took indemnifying bond was admissible.
Kan—Bouchey v. Gillilan, 4 P.2d 412, 134 Kan 29
Okl—Sale v. Shipp, 160 P. 502, 58 Okl 598.

Motive
Evidence was held admissible to show motive, even though it was hearsay as to plaintiff.—Janssen v Kohler, 299 N W. 900, 71 N.D. 247.

43. N C—Peck v Manning, 5 S E. 743, 99 N C 157.
57 C J p 968 note 7.

Defendant may introduce evidence showing that defendant in the process under which the seizure was made was not the owner of the goods
Iowa—Wadsworth v Walliker, 45 Iowa 395, 24 Am R 788, 2 N W 420, 51 Iowa 605
Utah—Skid Evans, Inc, v. Patten, 1 P.2d 959, 78 Utah 116

44. Pa.—Necker v. Sedgwick, 36 Pa. Super. 593
57 C.J. p 968 note 8.

45. Ky.—Ashcraft v Elliott, 38 S.W. 1062, 18 Ky L 934.
57 C J. p 968 note 9.

46. Mass—Danforth v. Pratt, 9 Cush 318
57 C J p 968 note 10.

47. Mass—Stern v Knowlton, 67 N. E. 869, 184 Mass 29.
57 C J. p 968 note 11.

48. N J.—Stout v. Hopping, 6 N J. Law 125.
57 C.J p 968 note 12.

49. Mass.—Beacon Trust Co. v. Wright, 192 N E. 70, 288 Mass. 1.

50. Mich—Knopf v. Herta, 180 N W. 629, 212 Mich 622.
57 C J p 968 note 13.

51. **Arrest outside jurisdiction**
Acts of deputy sheriffs in arresting a man in a jurisdiction outside that in which warrant issued and returning with him to jurisdiction issuing warrant were "colore officii," although void and without legal authority, and evidence thereof was properly submitted to jury in action against sheriff and such deputies for false arrest—Drake v. Keeling, 299 N.W. 919, 230 Iowa 1038.

and for wrongful search thereunder,[52] or an escape of a person taken in custody on mesne process.[53] Plaintiff may introduce evidence tending to show that the officer was actuated by bad faith or malice in what he did,[54] while on his part the officer may introduce evidence tending to show that he acted honestly and in good faith.[55]

On the other hand, evidence which is irrelevant,[56] immaterial,[57] tends merely to prejudice the jury against one of the parties,[58] or is otherwise objectionable under the general rules of evidence[59] may and should be excluded in an action against a sheriff or constable or his deputy, such as an action against such officer for failure to execute process,[60] a wrongful or illegal levy on, or seizure of, property,[61] a release of property from an attachment on a claim of exemption,[62] failure to pay over money held by a deputy as custodian,[63] a wrongful sale of property under an execution,[64] failure to file an order of sale, with the return thereon, in the clerk's office,[65] failure to return an execution,[66] a false return of process,[67] wrongfully, maliciously, and without probable cause procuring the issuance of a search warrant and for wrongful search thereunder,[68] a wrongful killing by an alleged deputy,[69] or an escape.[70] It is not error to refuse to admit certain evidence in bar of the action where it is admitted in mitigation of damages and, if believed, will make the damages only nominal.[71]

In action on indemnity bond, competent evidence showing the loss plaintiff sustained is properly admitted,[72] but it may not be prejudicial error to exclude remote and indefinite circumstantial evidence,[73] or evidence which is competent only for the purpose of contradicting a witness.[74]

b. Documentary Evidence

(1) In general
(2) Process and return

(1) In General

General rules governing the admissibility of documentary evidence have been applied in actions against a sheriff or constable or his indemnitors.

Subject to the general rules governing admission of such evidence, documentary evidence may[75] or may not[76] be received in an action against a sheriff or constable or his indemnitors for an official default or misfeasance. Where claimant brings trespass against plaintiff in execution, the officer making the levy and the sureties on the bond of indemnity given the officer, the bond is competent

52. **Plaintiff had right to show general reputation** of himself and his business in community at time in question on issue of probable cause for issuance of search warrant.—Walker v. Graham, 172 So 655, 233 Ala 539

53. Conn—Hart v. Stevenson, 25 Conn 499.
57 C J p 968 note 14.

54. Tenn—Barton v. Wexler, 10 Tenn App 19
Tex—Land v Klein, 50 S W 638, 21 Tex Civ.App 3

55. Iowa.—Howe v. Mason, 12 Iowa 202
Mass—Richmond v Willis, 13 Gray 182.

56. N.D.—Ward v Gradin, 109 N W. 57, 15 N D 649.
57 C.J p 968 note 17.

57. Miss—Rigby v Stone, 11 So 2d 823, 194 Miss 775, affirmed in part and reversed in part on other grounds 13 So 2d 230, 194 Miss 775
N J—Gural v Engle, 25 A 2d 257, 128 N J Law 252, reversed on other grounds 28 A 2d 109, 129 N J Law 63
57 C J p 968 note 18.

58. Ky.—Whittington v. Pence, 47 S.W. 877, 20 Ky L. 900.

59. Ala.—Walker v Graham, 172 So. 655, 233 Ala. 539
Miss—Rigby v. Stone, 11 So 2d 823, 194 Miss 775, affirmed in part and reversed in part on other grounds 13 So 2d 230, 194 Miss 775
57 C J p 968 note 20.

60. Colo—Bartell v. Griffin, 108 P. 171, 47 Colo 569
57 C J p 969 note 21.

61. Iowa—Tubbs v Garrison, 25 N. W 921, 68 Iowa 44
57 C.J p 969 note 22

62. S D—Noyes v Belding, 59 N W. 1069, 5 S D 603
57 C J p 969 note 23.

63. Cal—Neff v. Redmond, 202 P. 925, 54 Cal.App 757.
57 C J p 969 note 24

64. Ky—Whittington v. Pence, 47 S W 877, 20 Ky L. 900
57 C J p 969 note 25

65. Cal—Boyd v. Desmond, 21 P. 755, 79 Cal 250.
57 C.J. p 969 note 26

66. N Y—Wehle v Conner, 83 N Y. 231
57 C J p 969 note 27

Evidence offered in mitigation of damages was inadmissible where statute provided for recovery of amount of execution—Ditsch v. Finn, 252 N W 562, 214 Wis 305

67. Conn—Gibney v Lewis, 36 A 799, 68 Conn 392.
57 C J p 969 note 28

68. Ala—Walker v Graham, 172 So. 655, 233 Ala 539

Refusal to permit testimony as to talk in community that law was being violated at premises searched was not erroneous.—Walker v. Graham, supra.

Questions in nature of call for speculative damages were properly disallowed—Walker v Graham, supra

69. U S—Tate v Baugh, C.C A. Tenn, 264 F 892
57 C J. p 969 note 29.

70. N J—Gural v Engle, 25 A.2d 257, 128 N J Law 252, reversed on other grounds 28 A 2d 109, 129 N. J Law 63
57 C J. p 969 note 30.

71. Pa—Smith v Emerson, 43 Pa. 456
57 C J. p 969 note 31.

72. Ky—Richmond Lumber Co. v Butler, 170 S W. 955, 161 Ky. 344

73. Ky—Richmond Lumber Co. v. Butler, supra.

74. Ky—Richmond Lumber Co. v. Butler, supra.

75. Ala.—Thrasher v. Neeley, 72 So. 115, 196 Ala. 576
57 C J p 969 note 36.

76. U S—Farmers', etc, Bank v. Maines, Mich, 195 F 62, 115 C C A. 64, certiorari denied 33 S Ct. 211, 226 U S 610, 57 L.Ed 380.
57 C J p 970 note 37.

evidence to connect the sureties with the alleged trespass.[77] Where the holder of a note secured by chattel mortgages sues an officer for levying on and selling the mortgaged chattels under execution against the mortgagor, the note is not admissible without proof of its execution.[78]

Generally,[79] but not always,[80] the record and proceedings in the action in which process issued are admissible in an action against an officer for his alleged default or misconduct in respect of the execution of such process. Whether a judgment, or the record thereof, in an action other than the one in which the process in question issued is admissible depends on the purpose for which it is offered in evidence.[81] In an action against a sheriff for failure to return property attached in a prior action after dissolution of the attachment it has been held that the verdict and judgment in the prior action are admissible in evidence.[82]

(2) Process and Return

In an action against an officer or his indemnitors for an official default or misfeasance in connection with the execution of process, it is ordinarily proper to admit in evidence the process under which the officer acted and his return thereon, and writs other than the one involved may be admissible for limited purposes.

In an action against an officer or his indemnitors for an official default or misfeasance in connection with the execution of process, it is ordinarily proper to admit in evidence the process under which the officer acted,[83] and his return thereon;[84] but sometimes the circumstances may call for the exclusion of the process,[85] or the return thereon,[86] or both.[87] Writs other than the one involved may be admissible for limited purposes[88] and, even though the action is for accepting insufficient sureties, where plaintiff seeks to prove the insufficiency of the bond by showing that he brought suit on it and had been unable to realize anything therefrom, the return of the officer on the execution issued therein is admissible.[89]

Copies. Where deputy sheriffs had seized property in a claim and delivery action, and the clerk of the court testified that there were no papers on file in the action, it has been held that copies of the papers served on defendant are admissible.[90]

§ 161. Weight and Sufficiency of Evidence

a. In general
b. Conclusiveness of officer's return

a. In General

The general rule that the party having the affirmative of an issue must establish it by a preponderance of the evidence has been applied in actions against sheriffs and constables.

The general rule that the party having the affirmative of an issue must establish it by a preponderance of the evidence has been applied in actions against sheriffs and constables with respect to issues as to whether a deputy was acting officially at a particular time;[91] the existence of a judgment,[92] the seasonable delivery of process to an officer;[93] the nonservice of a summons or writ;[94] the ownership of property or money,[95] the bona

77. Ala.—Reeves v. McNeill, 28 So. 623, 127 Ala. 175.

78. Ill.—Flynn v. Hathaway, 65 Ill. 462.

79. Vt.—Sartwell v. Sowles, 48 A. 11, 72 Vt. 270, 32 Am. S. R. 943.
57 C.J. p. 970 note 39.

80. S.D.—Smith v. Hawley, 66 N.W. 942, 8 S.D. 363.
57 C.J. p. 970 note 40.

Order of discharge of debtor was held inadmissible as not material to issue.—Gural v. Engle, 25 A.2d 257, 128 N.J.Law 252, reversed on other grounds 28 A.2d 109, 129 N.J.Law 63.

81. Wash.—Wilcox v. Bear, 248 P. 58, 140 Wash. 39.
57 C.J. p. 970 note 41.

82. Vt.—McCutcheon v. Leonard, 45 A.2d 200, 114 Vt. 368.

83. S.D.—Karlen v. Trebble, 189 N.W. 519, 45 S.D. 570.
57 C.J. p. 970 note 42.

84. Iowa.—Crawford v. Nolan, 34 N.W. 754, 72 Iowa 673.
57 C.J. p. 971 note 43.

85. Mo.—Adams v. Stockton, 151 S.W.2d 127, 235 Mo. App. 1183.
57 C.J. p. 971 note 44.

86. Mo.—Adams v. Stockton, supra.
57 C.J. p. 971 note 45.

87. Mo.—Adams v. Stockton, supra.
57 C.J. p. 971 note 46.

88. Md.—Keedy v. Newcomer, 1 Md. 241.
57 C.J. p. 971 note 47.

Allowing writ in prior trover action to be introduced in evidence in action against sheriff for failure to return property attached in trover action after dissolution of attachment was not error.—McCutcheon v. Leonard, 45 A.2d 200, 114 Vt. 368.

89. Mass.—Carter v. Duggan, 10 N.E. 486, 144 Mass. 32.
57 C.J. p. 971 note 48.

90. S.D.—Guernsey v. Tuthill, 82 N.W. 190, 12 S.D. 584.

91. Tex.—Brown v. Wallis, 101 S.W. 1070, 100 Tex. 546, 12 L.R.A.,N.S., 1019.
57 C.J. p. 971 note 52.

92. Ala.—Tombeckbee Bank v. Godbold, 3 Stew. 240, 20 Am. D. 80.
57 C.J. p. 971 note 53.

93. N.Y.—Wilson v. Gale, 4 Wend. 623.

94. Colo.—Chetelat v. Kelter, 42 P. 495, 7 Colo. App. 68.
Philippine.—Gonzalez v. Banes, 7 Philippine 158.

95. Tex.—Martin-Brown Co. v. Auld, Civ. App., 34 S.W. 1050.
57 C.J. p. 972 note 56.

Evidence held sufficient
(1) In general.—Rosander v. Knee, 271 N.W. 292, 222 Iowa 1164.—57 C.J. p. 972 note 56 [b] (3).

(2) To show that plaintiff was the owner of the property or money in dispute.
Ala.—Clark v. Austin, 34 So.2d 683, 250 Ala. 407.
Iowa.—Rosander v. Knee, 271 N.W. 292, 222 Iowa 1164.
57 C.J. p. 972 note 56 [b] (1).

(3) To sustain finding that plaintiff was not the owner.—Janssen v. Kohler, 299 N.W. 900, 71 N.D. 247.

fides of a claim to property;[96] fraud in a transfer of property,[97] fair consideration for a transfer of property,[98] actual possession of property by plaintiff at the time of a seizure thereof,[99] the possession of property by an officer,[1] or his exercise of dominion over,[2] or conversion of,[3] it; whether certain articles claimed to have been levied on were merchandise,[4] notice to the sheriff of a claim of exemption[5] or of the existence of a mortgage on the property seized,[6] whether certain property was in fact exempt from seizure and sale on execution;[7] whether goods were fraudulently intermingled;[8] substantial abuse[9] or excess[10] of his authority by the officer; malice[11] or intentional misconduct[12] of the officer in making a levy, or seizing property, under process, oppression of the officer in refusing to attach other property instead of the property attached[13] or to take a bond in place of the attachment;[14] the payment of money to an officer to release a levy,[15] negligence in the care, custody or removal of the property,[16] or in failing to sell it;[17] the existence of debt[18] and that such debt is due,[19] the collection or receipt of money by the sheriff,[20] a demand on the sheriff for money collected by him,[21] a ratification of the officer's disposition of the proceeds of a sale,[22] the execution and acceptance of a bond,[23] and the exercise of reasonable care by the officer in passing on the sufficiency of the sureties,[24] the giving of a bond by a person to prevent the attachment of his own property,[25] the value of property,[26] damage to plaintiff from failure to make a return of process;[27] whether failure to return an execution was brought about by instructions from plaintiff's attorney and failure to give further instructions,[28] the falsity of a return,[29] whether a debtor alleged to have escaped was in the custody of the officer against whom the action for the escape is brought,[30] whether the officer had knowledge or good reason to believe that prisoners contemplated an assault on another prisoner, and took no steps to prevent it;[31] injury to plaintiff by reason of the matters complained of;[32] and other matters tending, if established,

(4) To show that property involved belonged to judgment debtor
Cal.—Burns v Hammel, 162 P. 669, 32 Cal App 214.
La—Brookfield v. Neely, 133 So. 529, 16 La App. 246.

Evidence held insufficient
(1) In general—Williamson Mill, etc, Co v Valentine, 200 N Y S 527, 206 App Div 252—57 C.J. p 972 note 56 [c].

(2) To show plaintiff's ownership of offspring of animals transferred to him—Galbreath v. Armstrong, 167 P 2d 337, 118 Mont 299.

96. Mo.—State v. Steele, 83 S.W. 1023, 108 Mo App 363.

97. Cal—Ford v Chambers, 19 Cal 143
57 C J p 972 note 58.

98. **Evidence held insufficient**
N.Y—Gould v Ellis, 286 N.Y S 422, 247 App Div. 847.

99. Vt—Marcy v. Parker, 62 A 19, 78 Vt 73

1. Me—Wetherell v Hughes, 45 Me. 61

2. N Y—Copley v. Rose, 2 N Y 115

3. N H—Connors v. Dionne, 159 A. 355, 85 N H 400.

4. **Evidence held insufficient**
Tex—Mara v Branch, Civ.App, 135 S W 661.

5. **Evidence held to support finding of notice**
Ky—Winstead v. Hicks, 121 S W. 1018, 135 Ky 154, 135 Am S R 446

6. Iowa.—Coleman v. Reel, 39 N W 510, 75 Iowa 304, 9 Am.S.R. 484
57 C.J p 972 note 64.

7. **Evidence held insufficient**
N D—Hansen v Ross, 217 N W. 657 56 N D. 496

8. Mass—Davis v. Stone, 120 Mass 228.

9. **Evidence held insufficient**
Mass—Keith v Perlis, 121 N E 108, 231 Mass 409.

10. Me—Edgecomb v. Lawlis, 140 A 182, 126 Me 550.
57 C J. p 972 note 68

Evidence held insufficient to show alleged unlawful and excessive levy on property of judgment debtor—Bridwell v Anderson, 156 S W 2d 231, 203 Ark. 69.

11. N H—Ahearn v Connell, 56 A 189, 72 N H 238

12. Ala—Ewton v McCracken, 64 So. 177, 9 Ala App 619.
57 C J p 972 note 70.

13. **Evidence held insufficient**
Me—Jensen v. Cannell, 76 A. 914, 106 Me. 445.

14. **Evidence held insufficient**
Me.—Jensen v. Cannell, 76 A 914, 106 Me 445

15. N.Y—Cafe Union v. Reordan, 84 N Y S 994.

16. Del—Woodall v. Buckingham, Super., 74 A 2d 460
Ky—Morris v. Bolt, 53 S.W.2d 337, 245 Ky. 169.

Evidence held insufficient to support judgment on ground that officer was guilty of negligence in the care or custody of the property—Lippel & Feit v Horan, 3 N.E 2d 345, 286 Ill.App. 609.

17. Ala—O'Bryan v. Webb, 37 So. 935, 142 Ala 259.
57 C J p 972 note 74

18. N C—Johnston v. Donaldson, 4 N.C 727.
S D—Howard v Dwight, 66 N W 935, 8 S D 398

19. N.C.—Johnston v. Donaldson, 4 N C 727.

20. Idaho—Work v. Kinney, 63 P. 596, 7 Idaho 460
57 C J p 972 note 77.

21. Me—Currier v. Brackett, 18 Me. 59.

22. Ind—State v Early, 81 Ind 540.

23. Mass—Carter v Duggan, 10 N. E 486, 144 Mass. 32.

24. Ky—Edwards-Barnard Co. v. Pfianz, 73 S W 1018, 115 Ky. 393, 24 Ky L 2296.

25. **Evidence held sufficient**
Cal.—Thayer v. Braden, 150 P. 653, 27 Cal.App 435

26. N Y—Lapotin v. Cummings, 9 N Y.S 2d 255, 256 App Div. 880.
57 C J p 972 note 83.

27. **Evidence held insufficient**
Neb—Ehlers v Gallagher, 22 N W 2d 396, 147 Neb. 97.

28. **Evidence held sufficient**
Ark—Burnside v Pendleton, 132 S. W 221

29. N Y.—Magne v. Seymour, 5 Wend 309.

30. N Y—Jackson v. Comisky, 62 N. Y.S 705, 30 Misc 622

31. **Evidence held insufficient**
Wash—Riggs v. German, 142 P 479, 81 Wash 128.

32. Ind.—Magenheimer v. State ex

to support or defeat a recovery,[33] shift the burden of proof,[34] or indicate the amount which should be recovered by the successful party.[35]

Where the sheriff's indemnitors have been substituted in an action against the sheriff for the wrongful seizure of plaintiff's property, proof of a right to recover against the sheriff will authorize a recovery against the substituted defendants,[36] and, where judgment has been rendered against the sheriff in a replevin action, it is conclusive on his indemnitors in an action by the owner of the property against them.[37]

b. Conclusiveness of Officer's Return

The return of the sheriff is conclusive against him, and a deputy's return cannot be contradicted by either the deputy or the sheriff, but the return is not conclusive in favor of the officer, or against the party seeking to hold him liable.

The return of the sheriff is conclusive against him,[38] and he cannot be allowed to introduce evidence contradicting it.[39] Also, a deputy's return cannot be contradicted by either the deputy[40] or the sheriff.[41] While the return is not conclusive in favor of the officer,[42] or against the party seeking to hold him liable for an official default or misfeasance,[43] it has been held to be prima facie evidence in favor of the officer.[44]

§ 162. Trial

a. In general
b. Questions for court and jury
c. Instructions
d. Verdict and findings

a. In General

General rules governing the trial of civil actions have been applied in actions against sheriffs, constables, or indemnitors, as with respect to the order of proof, continuances, and questions proper for determination.

General rules governing the trial of civil actions have been applied in actions against sheriffs, constables, or indemnitors.[45] At the trial of an action against an officer for taking property which plaintiff claims, on levy of an execution against another, on plaintiff adducing evidence of his right to the property, if the officer relies on the fact that the property was in the possession of such other person at the time of the taking, he must adduce evidence to show that it was in such possession, under circumstances raising a presumption of ownership

rel. Dalton, 90 N.E.2d 813, 120 Ind App 128.
57 C.J. p 973 note 88

Evidence held insufficient
La.—Cobb v. Jeansonne, App., 50 So 2d 100.

33. Mich.—Sleeper v. Wilson, 253 N.W. 274, 266 Mich. 218.
57 C.J. p. 973 note 89

Evidence held sufficient
(1) In general
Cal.—Culley v. Cochran, 62 P.2d 168, 17 Cal.App.2d 498.
Del.—Woodall v. Buckingham, Super., 74 A.2d 460.
57 C.J. p. 973 note 89 [c]

(2) To show that sheriff demanded his fees before serving execution issued on judgment obtained by plaintiff who refused to pay such fees.—Swift & Co. v. Russell, 63 S.W.2d 279, 188 Ark. 17.

(3) To show that sheriff levied on and sold property in disregard of mortgage lien.—Sleeper v. Wilson, 253 N.W. 274, 266 Mich. 218.

(4) To show that officer was justified in seizing plaintiff's property.—Nourse v. Lycett, 159 A. 277, 114 Conn. 432.

(5) To sustain finding that transaction was a sale accompanied by immediate delivery and followed by actual and continued change of possession.—Foster v. Howell, 220 P.2d 717, 122 Colo. 64.

(6) To sustain finding that property taken by claim and delivery based on chattel mortgage was not covered by mortgage.—Dalton v. Chapman, 9 P.2d 598, 121 Cal.App. 707.

(7) To show that physical condition of person to be served did not warrant apprehension that service would prove fatal.—Narrows Grocery Co. v. Bailey, 170 S.E. 730, 161 Va. 278.

Evidence held insufficient
(1) In general.
Ga.—Avery v. Samuels, 195 S.E. 437, 185 Ga. 514.
Wash.—Association Collectors v. King County, 76 P.2d 998, 194 Wash. 25.
57 C.J. p. 973 note 89 [d].

(2) To prove that purchase of property by sheriff before levying did not prejudice creditor.—West v. Criscillis, 46 S.W.2d 1082, 242 Ky. 549.

(3) To sustain finding that plaintiff was not resisting lawful arrest at time and place injury complained of occurred.—Chaudoin v. Fuller, 192 P.2d 243, 67 Ariz. 144.

34. U.S.—Farmers', etc., Bank v. Maines, Mich., 183 F. 37, 105 C.C.A. 329.
57 C.J. p. 973 note 90.

35. Neb.—Gilbert v. Rothe, 184 N.W. 119, 106 Neb. 549.
57 C.J. p. 973 note 91.

36. N.Y.—Kerner v. Boardman, 14 N.Y.S. 787, affirmed 30 N.E. 1148, 133 N.Y. 539.

37. Colo.—Woodworth v. Gorsline, 69 P. 705, 30 Colo. 186, 58 L.R.A. 417.

38. U.S.—Hardesty v. Pyle, C.C.Pa., 15 F. 778, affirmed 122 U.S. 642, 30 L.Ed. 1244.
57 C.J. p. 973 note 95
Conclusiveness of officer's return:
Generally see Process § 100.
As against his sureties see infra § 204.
On.
Attachment see Attachment § 252.
Execution see Executions § 329.

39. Tex.—Rankin v. Jones, Civ.App., 53 S.W. 583.
57 C.J. p. 973 note 96.

40. Mass.—Gardner v. Hosmer, 6 Mass. 325.

41. Mass.—Gardner v. Hosmer, supra.
57 C.J. p. 974 note 98.

42. Cal.—Raker v. Bucher, 34 P. 654, 100 Cal. 214.
57 C.J. p. 974 note 99.

43. N.J.—Browning v. Flanagin, 22 N.J.Law, 567.
57 C.J. p. 974 note 1.

44. Tex.—Vaughan v. Warnell, 28 Tex. 119.

45. U.S.—Brabham v. State of Mississippi, for Use of Smith, C.C.A. Miss., 96 F.2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.

in such person;[46] and plaintiff, in reply thereto, if he relies on an affidavit claiming the property under the statute, or on notice, must then prove it.[47] In trespass against a person for entering plaintiff's premises, defendant cannot introduce in evidence an execution against plaintiff and a written authority from a sheriff, empowering him to levy the execution on the property of plaintiff, without first introducing evidence to show that the person from whom he received the authority was then the sheriff.[48]

Continuances. It has been held that a statute providing that, when a court has allowed the principal and surety on an indemnity bond to be made codefendants in an action against a sheriff for a wrongful seizure, a continuance "may" be granted to allow service on such codefendants is mandatory,[49] and the allowance of such continuance does not rest in the court's discretion.[50]

Questions proper for determination. Where, in an action against a sheriff for money collected under a delinquent tax judgment, the sheriff claims the right to withhold a part of the fund for costs, the question of his right thereto may be properly determined.[51] Where a sheriff is sued for not keeping attached goods, so that they might be forthcoming to satisfy an execution, and he shows in defense, for the purpose of proving a dissolution of the attachment, that the estate of the judgment debtor was assigned before judgment, plaintiff cannot be permitted to contest the validity of the assignment by showing irregularities in the proceedings had against the debtor under the insolvent law.[52]

b. Questions for Court and Jury

Where the evidence is sufficient to warrant the submission of the case to the jury, and there are disputed questions of fact to be determined, the case should be submitted to the jury for the determination of such questions, and the court should not dismiss the action, order a nonsuit, or direct a verdict for the defendant.

Where the evidence is sufficient to warrant the submission of the case to the jury,[53] and there are disputed questions of fact to be determined,[54] the case should be submitted to the jury for the determination of such questions, and the court should not dismiss the action,[55] order a nonsuit,[56] or direct

46. Minn.—Perkins v. Zarracher, 19 N.W. 385, 32 Minn. 71.

47. Minn.—Perkins v. Zarracher, supra.

48. Ky.—Calvert v. Stone, 10 B. Mon. 152.

49. Tex.—Rains v. Herring, 5 S.W. 369, 68 Tex. 468.

50. Tex.—Rains v. Herring, supra.

51. Tex.—San Antonio v. Campbell, Civ. App., 56 S.W. 130.

52. Mass.—Grant v. Lyman, 4 Metc. 470.

53. U.S.—Brabham v. State of Mississippi, for Use of Smith, C.C.A. Miss., 96 F.2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.
Cal.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal. App. 415.
N.C.—Davis v. Moore, 2 S.E.2d 366, 215 N.C. 449.
57 C.J. p. 974 note 12.

Uncontroverted testimony of plaintiff held to warrant submission of case to jury.—Walker v. Graham, 172 So. 655, 233 Ala. 539.

54. Ala.—Clark v. Austin, 34 So.2d 683, 250 Ala. 407.—U. S. Fidelity & Guaranty Co. v. Miller, 179 So. 239, 235 Ala. 340.—Newcomb Bros. Wall Paper Co. v. Wiggins, 78 So. 905, 201 Ala. 551.
Ark.—Holman v. Nutt, 179 S.W. 811, 120 Ark. 446.

Held questions of fact
(1) In general.
Ky.—Overstreet v. Thomas, 239 S.W.2d 939.
Tex.—Fox v. Young, Civ.App., 91 S.W.2d 857.
57 C.J. p. 974 note 13 [a].

(2) Whether sheriff used due diligence in levying on sufficient available personalty.—Reaume v. Winkelman, 255 N.W. 81, 192 Minn. 1, 93 A.L.R. 313.

(3) Whether defendant exercised due diligence or was guilty of negligence with respect to other matters.
Ala.—Barnhill v. Lightner, 2 So.2d 779, 241 Ala. 303.
Del.—State, to Use of Henderson, v. Clark, 20 A.2d 127, 2 Terry 246, 138 A.L.R. 704.
Iowa.—Smith v. Miller, 40 N.W.2d 597, 241 Iowa 625, 14 A.L.R.2d 345.
Ky.—Overstreet v. Thomas, 239 S.W.2d 939.
N.C.—Davis v. Moore, 2 S.E.2d 366, 215 N.C. 449.
57 C.J. p. 974 note 13 [a] (21)-(24).

(4) Contributory negligence of person injured or killed by officer's alleged negligence.—Magenheimer v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind. App. 128.

(5) Whether sheriff was guilty of conversion.—Barnhill v. Lightner, 2 So.2d 779, 241 Ala. 303.

(6) Whether defendant accepted sureties who were insolvent when bond was executed.—E. I. Du Pont De Nemours & Co. v. Combs, 56 S.W.2d 523, 246 Ky. 802.

(7) Whether property levied on and sold was property of plaintiff.—May v. Strickland, 180 So. 93, 235 Ala. 482.

(8) Whether officer was acting within scope of his agency in committing trespass on plaintiff's property.—Staton v. Bell, 170 S.E. 666, 170 S.C. 395.

(9) Whether death of prisoner resulted from acts of deputies.—Franko v. Crosby, 278 Ill.App. 416.

(10) Whether officer made disclosure of sufficient material facts to establish probable cause for issuing search warrant.—Ladd v. Miles, 17 P.2d 875, 171 Wash. 44.

(11) Whether sheriff ratified act of deputy.—Brabham v. State of Mississippi, for Use of Smith, 96 F.2d 210, C.C.A. Miss., rehearing denied 97 F.2d 251, certiorari denied State of Mississippi for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.

(12) The amount of damages.—Rigby v. Stone, 13 So.2d 230, 194 Miss. 775.—57 C.J. p. 974 note 13 [a] (32).

(13) Value of property levied on.
Colo.—Foster v. Howell, 220 P.2d 717, 122 Colo. 64.
N.Y.—Lapotin v. Cummings, 9 N.Y.S.2d 255, 256 App.Div. 880.

55. Ark.—Holman v. Nutt, 179 S.W. 811, 120 Ark. 446.
Neb.—Miller v. Crosson, 267 N.W. 145, 131 Neb. 88.
57 C.J. p. 975 note 14.

56. Cal.—McGaffey Canning Co. v.

a verdict for defendant[57] A failure to prove all the allegations of the complaint will not warrant a dismissal where enough is proved to support the cause of action.[58] On the other hand, questions of law must be passed by the court, rather than by the jury;[59] and a question of law, within the meaning of this rule, may pertain to a matter as to which there is no controversy or uncertainty, and no room for opposing inferences, in the evidence[60] Whether a sheriff has used reasonable diligence in endeavoring to arrest a debtor on execution is a mixed question of law and fact[61] An immaterial question need not be submitted to the jury[62] Where there is a complete failure of proof as to facts essential to plaintiff's right to recover, it is proper to dismiss the complaint when plaintiff closes his case,[63] order a nonsuit,[64] or direct a verdict for defendant.[65] Also, a verdict for defendant may and should be directed where undisputed evidence shows that he is entitled to a verdict.[66]

Direction of verdict for plaintiff. Where plaintiff has introduced evidence prima facie sufficient to entitle him to recover, and defendant introduces no controverting evidence, it is proper and necessary to direct a verdict for plaintiff.[67] Also, in an action for damages for the attachment of exempt property, plaintiff is entitled to a directed verdict, leaving the damages to the jury, where the exemption, taking on attachment, demand, and refusal are admitted.[68]

c. Instructions

The court should explain to the jury the character of the action, and properly instruct them as to the legal principles governing the right of the complaining party to a recovery, the issues which are presented for their consideration, the questions which are involved therein, the matters proper to be considered in deciding those questions, and the measure and elements of damage.

The court should explain to the jury the character of the action,[69] and properly instruct them as to the legal principles governing the right of the complaining party to a recovery,[70] the issues which are presented for their consideration,[71] the questions which are involved therein,[72] the matters proper to be considered in deciding those questions,[73] and the measure and elements of damages,[74] taking care that the instructions are clear and not

Bank of America, 294 P. 45, 109 Cal App 415.
N C—Davis v. Moore, 2 S E 2d 366, 215 N C 449.

57. Ill.—Franko v Crosby, 278 Ill. App 416.
57 C J. p 975 note 15.

58. N Y—McGuire v. Bausher, 65 N Y S 382, 52 App Div 276.

59. N C—Bevan v. Byrd, 48 N.C 397.
Pa—Commonwealth v Vandyke, 57 Pa. 34

60. Vt—Holyoke Mut F. Ins Co. v Horton, 136 A 385, 100 Vt 228.
57 C J. p 975 note 18.

61. Vt—Hopkinson v. Holmes, 18 Vt 18

62. Wash—Western Bond, etc, Co. v. Chester, 259 P. 13, 145 Wash 81.
57 C J. p 975 note 20.

63. N Y—Lucker v Gross, 63 N.Y. S. 1074, 31 Misc 750

64. S C.—Milling v Sanders, 2 S E 386, 26 S C 610.

Nonsuit as to some of defendants held proper—Davis v. Moore, 2 S E 2d 366, 215 N.C. 449

65. Ga—Walker v Smith, 121 S E 692, 31 Ga App 205

66. Iowa—Wilson v. Wright, 198 N. W 782, 197 Iowa 1300
57 C.J. p 975 note 24.

67. Or—Bankers' Discount Corp. v Noe, 242 P. 610, 116 Or. 570
57 C J. p 975 note 25.

68. Colo—Smith v. Pueblo Mercantile, etc, Assoc, 260 P 109, 82 Colo 364

69. N Y—Goldstein v Abramson, 86 N.Y.S. 30

70. U S—Brabham v State of Mississippi, for Use of Smith, C C A Miss, 96 F.2d 210, rehearing denied 97 F 2d 251, certiorari denied State of Mississippi for Use of Smith v. Brabham, 59 S Ct. 103, 305 U S 636, 83 L Ed 409.
Conn—Nourse v Lycett, 159 A. 277, 114 Conn. 432.
Idaho—MacDonald v Ogan, 129 P. 2d 654, 64 Idaho 168
Ill—Perry v. Darlington, 2 N E 2d 387, 285 Ill App 582.
57 C.J p 975 note 29

Instructions held proper or improperly refused

(1) In general—Purnell v. Gandy, 46 Tex. 190—57 C J. p 975 note 29 [b], [c]

(2) Instruction that a sheriff is liable for acts or omissions of his deputies when acting officially or under color of office—Foster v Howell, 220 P 2d 717, 122 Colo 64.

(3) Instruction that, when a sheriff or deputy acting under an execution and fee bill directing him to levy and seize property of one person, seizes property belonging to a third person, the sheriff and his bondsmen are liable to such third person for conversion—Foster v Howell, supra

(4) Instruction that an automobile in the physical custody of an agent with the permission of the owner is in law deemed to be in the possession of the owner—Foster v. Howell, supra.

(5) Instruction as to measure of damages for conversion—Foster v Howell, supra.

(6) Instruction that warrant was issued by authorized officer who was authorized by law to issue search warrants—Walker v. Graham, 172 So 655, 233 Ala. 539.

Instruction held properly denied

Charge that it was not necessary for deputy sheriff acting under execution in ejectment in foreclosure proceeding to remove plaintiff's goods from house.—Nourse v Lycett, 159 A 277, 114 Conn. 432

71. Kan—Townsend v. Seefeld, 169 P 1157, 102 Kan 302.
57 C J. p 976 note 30.

72. **Instructions held not erroneous**
Ala—Hopkins v Gary, 7 Ala 46
Conn—Bosell v. Doran, 25 A. 242, 62 Conn. 311.

73. Mich—Sexton v. McDowd, 38 Mich 148.

74. Va.—Shearer v. Taylor, 55 S E. 7, 106 Va. 26
57 C J. p 976 note 33.

Punitive or exemplary damages

(1) Instruction held erroneous—Perry v. Darlington, 2 N E 2d 387, 285 Ill App 582

(2) Instruction held not warranted—Smith v. Armstrong, 166 P.2d 793, 118 Mont. 290.

(3) An instruction that, unless the jury found that the sheriff had ratified the acts of the deputy, the sher-

such as to mislead, or be liable to mislead, the jury.[75] The court should not give instructions which assume matters in controversy,[76] are predicated on a state of facts not established by the evidence,[77] or ignore, or exclude from consideration, matters which have been properly brought before the jury.[78] Although the evidence as a whole tends to show that plaintiff is either the owner of all the property or of none of it, but is such that the jury might believe the evidence as to one part of the property but not the other, it is proper to instruct the jury that if they believe plaintiff is the owner of the property, "or any part thereof," they will find for him the value of the property, or of such part as they believe from the evidence he owned at the time of the levy.[79]

d. Verdict and Findings

The general rules governing the findings of the court or jury in civil actions are applicable in an action against a sheriff or constable.

The general rules governing the findings of the court or jury in civil actions are applicable in determining the necessity of findings as to particular matters,[80] the construction of findings which have been made,[81] and their sufficiency to warrant or support a judgment for plaintiff[82] or defendant,[83] in an action against a sheriff or constable

Contradiction. A verdict that the sheriff suffered a prisoner "voluntarily and negligently to escape" has been held contradictory and insufficient.[84] There is no conflict between a general verdict against a sheriff in an action of trespass and a special finding that he acted oppressively.[85]

§ 163. Judgment and Enforcement Thereof

General rules governing judgments have been applied in actions against sheriffs and constables and their indemnitors.

General rules governing judgments have bee applied in actions against sheriffs and constable and their indemnitors.[86] Where the owner of at tached property, which has been destroyed throug negligence, sues the sheriff for the value of th property, and the attaching creditor is made a par ty, and awarded a sufficient portion of the judg ment to satisfy his debt, the sheriff is not prejudiced by the fact that the judgment against him is for the whole amount.[87] An officer who gives in evidence in justification the process under which he made the seizure complained of is entitled to judgment, although the suit is brought in favor of one who claims the property by virtue of a sale from the person as whose the property was seized, where the jury have found the sale to be fraudulent against the creditors of the vendor.[88] Where, in an action against a sheriff for refusing to sell land on execution, the court has found that the complicated condition of the title justified the sheriff in refusing to sell, it is proper to render a decree directing the sale, but exonerating the sheriff, where no damages appear to have been sustained.[89] Where an action on a sheriff's indemnifying bond was dismissed as to the sureties, but continued as to the principal, and there are issues with respect to an oral contract of indemnity preceding the bond, it has been held proper to deny a motion for judgment for defendant notwithstanding the verdict for plaintiff, on the ground that the complaint does not state a sufficient cause of action on the oral contract of indemnity, where it is sufficient, counting on the bond, to support the judgment.[90]

Enforcement. Under some statutes a judgment against a sheriff may be enforced by an execution against the body where an execution against property has proved unavailing.[91] A statute authorizing a stay of proceedings on a judgment against the sheriff for an escape until he can collect of

iff could not be held in punitive damages, should have been given on request—Brabham v State of Mississippi, for Use of Smith, C C A Miss, 96 F 2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi for Use of Smith v Brabham, 59 S Ct. 103, 305 U S 636, 83 L Ed 409.

75. Ill.—Perry v Darlington, 2 N E 2d 387, 285 Ill App. 582.
57 C J p 976 note 34.

76. Ill.—Perry v. Darlington, supra.
57 C J. p 976 note 35.

77. Ill.—Windmiller v Chapman, 28 N.E. 979, 139 Ill. 163.
57 C.J. p 976 note 36.

78. Ala.—Birmingham Dry-Goods Co v. Bledsoe, 23 So 153, 117 Ala 495
Va—Shearer v. Taylor, 55 S.E 7, 106 Va 26

79. Ky—Harris v. McClure, 52 S W 941, 21 Ky.L. 686

80. Cal.—Hunt v. Hammel, 76 P 378, 142 Cal 456
57 C J p 976 note 40.

81. N H—Pierce v Jackson, 18 A. 319, 65 N H 121
57 C.J. p 976 note 41.

82. Cal—Berg v. Traeger, 292 P. 495, 210 Cal 323
57 C J p 977 note 42.

83. Cal.—Joshua Hendy Mach. Works v. Connolly, 18 P. 327, 76 Cal. 305
57 C.J p 977 note 43.

84. Ky.—Grimes v. Butler, 1 Bibb 192.

85. N M.—Gallegos v Sandoval, 106 P 373, 15 N M 216.

86. **Judgment construed**
Ga—Tippins v American Plant Co., 174 S E 378, 178 Ga. 726

87. Ky—Fields v. Vallance, 87 S.W. 770, 27 Ky L 992.

88. Vt.—Stewart v. Martin, 16 Vt. 397.

89. Neb—Porter v Trompen, 96 N W 226, 2 Neb (Unoff) 76

90. Or—Houser v. West, 65 P. 82, 39 Or. 392.

91. La—Chaffe v. Handy, 36 La Ann 22.

the bondsman of the escaped judgment debtor confers a discretionary power on the court, which will not be exercised where the sheriff has not proceeded with diligence.[92] It has been held that a transcript of a judgment of a justice of the peace against a constable for not returning an execution may be filed in the court of common pleas and an execution issued from that court, without any previous issuance of an execution from the justice.[93] Where an officer who is sued for failure to execute a writ of execution has the obligors in a claim bond under which the property levied on was taken from him made parties to the suit, so that, in case of judgment against him, he may have judgment over against them, he cannot enforce the judgment over until he has paid the judgment against him.[94] Money recovered by defendant sheriff on a judgment in his favor for the value of property attached in a proceeding which is still pending will be held by him subject to the attachment process.[95]

Payment of judgment by state or political subdivision. A statute providing for the payment of judgments for damages against public officers by the state or political subdivision of which he is an officer has been held to protect marshals, constables, and the like,[96] but not sheriffs [97]

Equitable relief against judgment. A judgment entered against a sheriff, under a mistaken view of the clerk that a bail piece was insufficient, may be relieved against in equity;[98] and it has been held that, where judgment has been obtained against a sheriff for failing to return an execution, he may have relief in equity by showing that, as between plaintiff and defendant in the execution, it ought never to have been collected.[99]

§ 164. Damages

As a general rule the actual injury sustained by the plaintiff in consequence of the act or default complained of furnishes the measure of damages in an action against a sheriff or constable or his indemnitors, and special damages cannot be recovered where not sufficiently alleged in the petition or complaint.

As a general rule the actual injury sustained by plaintiff in consequence of the act or default complained of furnishes the measure of damages in an action against a sheriff or constable or his indemnitors for official misfeasance or nonfeasance;[1] but the officer should not be held liable for losses which are remotely consequential [2]

Mental pain and suffering. The acts of the sheriff must have been willful or intentional in order to justify a recovery of damages for mental pain and suffering where there is no physical injury.[3] Where an attachment was illegally and maliciously levied on exempt property of a married woman, by reason of which she was compelled to suffer from cold and exposure, it has been held that she can recover full compensation for all injuries sustained, mental as well as material,[4] but, in the absence of fraud, malice, or other aggravating circumstances, mental suffering is not an element of damages for the acts or negligence of an officer with respect to personal property.[5]

Special damages cannot be recovered where not sufficiently alleged in the petition or complaint.[6]

Nominal damages. An award of nominal damages is proper where a wrongful act has been committed or a duty negligently omitted by the officer

92. N.Y.—Potts v Davidson, 15 Abb N Cas. 185.

93. Pa—Parchment v. Aiken, 3 Watts 278.

94. Tex—Denson v. Ham, Civ App., 16 S.W. 182.

95. N C—Tatham v. DeHart, 112 S E 430, 183 N.C 657.

96. Wis—Larson v Lester, 49 N.W. 2d 414, 259 Wis. 440

97. **Constitutional provision held to exclude sheriffs.**—Larson v. Lester, supra.

98. Va—Smith v. Wallace, 1 Wash. 254, 1 Va. 254.

99. Ky—Harrison v. Harrison, 1 Litt. 137.

1. Tex—Dallas Joint Stock Land Bank of Dallas v Randerson, Civ App., 127 S W.2d 593, reversed on other grounds Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S.W 2d 769, 136 Tex. 91.
57 C J. p 978 note 67.

Conversion

Where a sale of property under execution is void and the property is not returned, the rule applicable in cases of conversion of personal property should govern, and recovery should be of the reasonable value of the property at the time of levy, with interest, not to exceed the amount of the bond.—Mead v. Blurton, Mo.App., 189 S W. 637.

Interest

In proceeding to recover from sheriff damages arising out of sheriff's conduct of alleged unlawful foreclosure sale, where there was no plea that mortgagee was prevented from receiving amount bid at sale, interest on amount bid at sale was not recoverable item of damage—Dallas Joint Stock Land Bank of Dallas v. Randerson, Tex Civ.App., 127 S.W.2d 593, reversed on other grounds Randerson v Dallas Joint Stock Land Bank of Dallas, 147 S W 2d 769, 136 Tex. 91.

2. Tex—Fatheree v. Williams, 35 S. W. 324, 13 Tex Civ.App 430.
57 C J. p 978 note 68

3. Ark—Wright v. Husband, 99 S. W 2d 583, 193 Ark. 347.

4. N H—Ahearn v. Connell, 56 A. 189, 72 N.H. 238.

5. Neb—Gilbert v Rothe, 184 N.W. 119, 106 Neb 549.
Wash—Brabston v Shrewsbury, 171 P. 1012, 101 Wash 31.

6. Ky—Commonwealth, for Use and Benefit of Harding, v. Bartholomew, 98 S W 2d 882, 266 Ky. 270
57 C.J p 979 note 72.

Loss of business profits held insufficiently pleaded

Ky—Commonwealth, for Use and Benefit of Harding, v. Bartholomew, supra.

but no real injury is shown to have resulted therefrom.[7]

Attorney's fees charged a claimant of property in his intervention proceedings in an attachment suit may not, in the absence of a statute so providing, be recovered in a suit by him on an indemnifying bond.[8]

§ 165. —— Mitigation of Damages

Facts which legitimately tend to show that the injury to the plaintiff was not as great as he claims are proper for consideration in mitigation of damages.

Facts which legitimately tend to show that the injury to plaintiff was not as great as he claims are proper for consideration in mitigation of damages.[9] Plaintiff's lack of diligence in pursuing his remedy after default may be shown in mitigation of damages.[10] Where, pending a suit against an officer for wrongful attachment, plaintiff assigned his cause of action to one to whom the officer had delivered the property, taking his receipt therefor, stipulating that it would be returned on demand, it has been held that a refusal of the receiptor to deliver the property on demand may not be shown in mitigation of damages, where the officer did not offer to surrender the receipt and release him from his obligation.[11]

§ 166. —— Punitive or Exemplary Damages

Punitive or exemplary damages may be awarded where it appears that the officer has acted corruptly, wantonly, maliciously, or oppressively.

Punitive or exemplary damages may be awarded where it appears that the officer has acted corruptly, wantonly, maliciously, or oppressively,[12] but it is otherwise in the absence of such showing.[13] The malicious motives of plaintiff in the writ under which an officer acted cannot be imputed to the latter so as to furnish ground for an award of exemplary damages.[14] Exemplary damages have been held not to be recoverable in an action by a claimant on an indemnifying bond.[15]

For act or default of deputy A sheriff cannot be held liable in punitive damages for the misconduct of his deputy,[16] unless he authorized,[17] participated in,[18] or ratified[19] such misconduct: and, where plaintiff seeks to charge the sheriff with punitive damages on the ground of ratification, he should, before commencing the action, make his cause of action complete by informing the principal of the facts and giving him an opportunity of redressing the wrong before being forced to defend it.[20]

§ 167. Review and Costs

a. Review
b. Costs

a. Review

Persons not parties in the trial court have no right to appeal, and, where an indemnified sheriff is sued for damages and the obligor has notice of the suit, and the plaintiff recovers, it has been held that the officer is not bound to appeal.

Persons not parties in the trial court have no right to appeal from a judgment rendered against a sheriff or constable.[21] Where an indemnified sheriff is sued for damages, the obligor has notice of the suit, and plaintiff recovers, it has been held that the officer is not bound to appeal.[22] Where, in

7. Del.—Fennemore v. Armstrong, 96 A. 204, 29 Del. 35.
57 C.J. p. 979 note 74.
Nominal damages for:
Defaults and wrongful acts in execution of process generally see supra § 61
Failure to return execution see supra § 112
Levy on exempt property see supra § 76.
Property returned to claimant
Where a sale of property by a sheriff or constable is void, and the property is returned to claimant, and no substantial damage is shown, in an action on the bond of indemnity claimant is entitled to nominal damages only.—Burge v. Hunter, 67 S.W. 697, 93 Mo. App. 639.

8. Iowa.—Constantine v. Rowland, 124 N.W. 189, 147 Iowa 142.

9. Neb.—Huddleson v. Polk, 102 N.W. 464, 70 Neb. 492, 100 N.W. 802, 70 Neb. 489, 97 N.W. 624, 70 Neb. 483
57 C.J. p. 979 note 76.

10. Vt.—Blodgett v. Brattleboro, 30 Vt. 579

11. Vt.—Ellis v. Howard, 17 Vt. 330.

12. Ky.—Commonwealth for Use and Benefit of Harding v. Bartholomew, 98 S.W.2d 882, 266 Ky. 270.
57 C.J. p. 979 note 78.

13. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal. App. 716.
Ky.—Commonwealth, for Use and Benefit of Harding, v. Bartholomew, 98 S.W.2d 882, 266 Ky. 270.
Tex.—Taylor v. Stanford, Civ. App., 229 S.W.2d 427.
57 C.J. p. 979 note 79.

14. Cal.—Nightingale v. Scannell, 18 Cal. 315.

15. Iowa.—Constantine v. Rowland, 124 N.W. 189, 147 Iowa 142.

16. Cal.—Ross v. Sweeters, 7 P.2d 334, 119 Cal. App. 716.
Tex.—Taylor v. Stanford, Civ. App., 229 S.W.2d 427.
57 C.J. p. 979 note 82.

17. Cal.—Foley v. Martin, 71 P. 165, 75 P. 842, 142 Cal. 256, 100 Am.S.R. 123.—Ross v. Sweeters, 7 P.2d 334, 119 Cal. App. 716.
Tex.—Taylor v. Stanford, Civ. App., 229 S.W.2d 427.

18. Tex.—Taylor v. Stanford, supra

19. Cal.—Foley v. Martin, 71 P. 165, 75 P. 842, 142 Cal. 256, 100 Am. S. R. 123.—Ross v. Sweeters, 7 P.2d 334, 119 Cal. App. 716
Tex.—Taylor v. Stanford, Civ. App., 229 S.W.2d 427.

20. Cal.—Foley v. Martin, 71 P. 165, 75 P. 842, 142 Cal. 256, 100 Am. S. R. 123.

21. Ga.—Riley v. Bank of Jersey, 160 S.E. 540, 43 Ga. App. 836

22. Tex.—Illies v. Fitzgerald, 11 Tex. 417.

an action by a mortgagee against an officer for levying on the mortgaged property, the court erroneously decided that the mortgage was void and that no right could be asserted thereunder, and gave judgment for defendant, the fact that the record does not show that defendant ever levied on or sold the property is no ground for affirming the judgment.[23]

In so far as general rules governing review are applicable in actions against sheriffs or constables, they are discussed in Appeal and Error.

b. Costs

A sheriff who has been guilty of negligence is properly adjudged to pay costs.

A sheriff who has been guilty of negligence is properly adjudged to pay costs,[24] even though he has been guilty of no actual corruption or intentional fraud.[25] While it is not proper to tax against the officer costs incurred by reason of other persons being made defendants,[26] he will not, on the substitution of an indemnitor as defendant, be awarded anything for expenses where he has incurred none.[27]

VII. SUMMARY PROCEEDINGS AGAINST OFFICERS

§ 168. Availability of Remedy and Persons Entitled Thereto

a. In general
b. Defaults for which summary remedies available
c. Considerations affecting availability of summary remedies

a. In General

A statute providing for the institution of summary proceedings against an officer to establish and enforce his liability, or to compel the performance by him of duties devolving upon him under law, or to remedy an official mistake, is penal in nature and is to be strictly construed

Under permissive statute summary proceedings may be brought against an officer to establish and enforce his liability,[28] or to compel the performance by him of duties devolving on him under law,[29] or to remedy an official mistake.[30] Such a summary remedy is cumulative to the remedy by action,[31] but the complaining party is put to his election and cannot pursue both remedies at the same time.[32] The pendency of an action, however, against an officer and his surety for an official delinquency in failing to collect an execution when it was in his hands, and for making a false return thereon, is no bar to the prosecution of a summary remedy against them to recover statutory damages for the failure of the officer to return the execution within the proper time.[33]

Since statutes giving such summary remedies are penal in nature,[34] they are to be strictly construed,[35] and not extended beyond the cases for which they were, by their terms, intended to provide, as discussed infra subdivision b of this section, and a statute will not be held to authorize summary proceedings unless such intent is clear.[36] When a summary remedy is invoked, there must be strict compliance with all the statutory requirements.[37] No such proceedings can be maintained in the absence

23. Iowa—Plano Mfg Co. v Griffith, 39 N.W 214, 75 Iowa 102.
57 C J p 980 note 95.

24. Fla.—Lawyers' Co-op Pub Co v Bennett, 16 So 185, 34 Fla. 302
57 C J. p 980 note 97.
Security for costs as condition precedent to action see supra § 148.

25. N Y—Tiernan v. Wilson, 6 Johns Ch 411.
57 C J p 980 note 98.

26. Tex—Baughn v Allen, Civ App., 73 S W. 1063

27. N.Y—Coddington v Harburger, 137 N.Y S 536, 77 Misc 211

28. Tenn.—Farmers' Bank v Wyatt, 40 S W.2d 402, 163 Tenn 31.
57 C J p 980 note 5

29. Miss—Caperton v Winston County Fair Ass'n, 153 So. 801, 169 Miss 503.
57 C.J. p 980 note 6.

Officers subject to summary proceedings

Only sheriff or other officer under duty to court out of which process has issued, and under such duty at time of alleged default by officer, may be proceeded against by summary motion under statute—Caperton v. Winston County Fair Ass'n, supra.

At common law

At common law, sheriff who commenced execution of writ of fieri facias by levy usually completed it by sale, even though his term of office had expired between levy and sale, and if he failed to do so a writ of venditioni exponas was issued to him as a writ of compulsion—Short v Landes, 39 A 2d 17, 3 Terry, Del., 510.

30. S C—Moore v. Byne, 30 S C.L 94.
57 C J p 981 note 7.

31. Ala—Chapman v Weaver, 19 Ala 626
57 C J p 981 note 8

32. Ga—Wood v Hunt, 23 Ga 379.

33. Ky—Sanders v Kentucky Bank, 2 Metc 327.

34. Tenn—Farmers' Bank v. Wyatt, 40 S W 2d 402, 163 Tenn 31
Tex—Hackler v H Kohnstamm & Co of Texas, Civ.App., 227 S W 2d 347.

35. Tex—Randerson v Dallas Joint Stock Land Bank of Dallas, 147 S W.2d 769, 136 Tex 91—Hackler v. H Kohnstamm & Co. of Texas, Civ App., 227 S.W 2d 347—J M Radford Grocery Co v. Owenby, Civ App., 34 S W 2d 385
57 C J p 981 note 12.

36. Ala—Sample v. Royall, 4 Ala. 344

37. Ala.—Chandler v. Francis Vandegrift Shoe Co., 10 So. 353, 94 Ala 233
57 C.J. p 981 note 15.

of statutory authority,[38] and when a statute authorizing a summary judgment against an officer is repealed without a saving clause there can be no judgment subsequently entered thereunder, even in proceedings begun before the repeal.[39] However, it has been held that where a sheriff is an officer of the court, the court has power to control his conduct when acting under color of its authority, and hence may summarily order him to refund the money collected under a process improperly issued.[40]

Proceedings against deputies. Statutes providing summary remedies against officers are not available against deputies[41] except where a legislative intent to the contrary clearly appears.[42] Where so provided by statute, a sheriff has the right to proceed summarily against his deputy for an official default.[43]

Persons entitled to summary remedy. The right to a remedy by summary proceedings against a sheriff or constable belongs only to the persons or parties for whose benefit the remedy is provided by statute,[44] and ordinarily a proceeding may be maintained only by one injured by the default on which it is based.[45] A solicitor pro tempore of the county court who obtains an order allowing him fees may proceed against an officer for money collected in such court for fines and forfeitures.[46] An execution plaintiff does not, by opposing a claim made to property levied on, waive the right to proceed summarily against the officer for failing to make the money.[47]

Institution by court sua sponte. When the statute designates the party or person by whom summary proceedings shall be instituted the court cannot take such proceedings on its own motion.[48]

b. Defaults for Which Summary Remedies Available

Summary remedies against a sheriff or constable are available for such acts and defaults as are specified by statute and not for any other official default or misconduct.

Summary remedies against a sheriff or constable, under statutes providing therefor, ordinarily are applicable to cases of neglect of duty[49] as well as to those of active misconduct.[50] Such remedies are, however, available for such acts or defaults only as are specified by the statute,[51] and not for any other official default or misconduct[52] A statute providing a summary remedy ordinarily is not to be given retroactive effect, so as to apply to a pre-existing default.[53]

Defaults of deputies. Under a statute providing a summary remedy against a sheriff or constable, such a proceeding may be maintained against an officer for the official default or misconduct of his deputy within the terms of the statute.[54]

Particular defaults. Under the various statutes it has been held that a sheriff or constable may be proceeded against summarily for failure to execute process,[55] delay in levying under an execution,[56]

38. Ala.—Braswell v. Watkins, 112 So. 343, 216 Ala. 62.
57 C.J. p. 981 note 16.

39. Ala.—Williams v. McCurdy, 22 Ala. 696.

40. Cal.—McMann v. Superior Ct., 15 P. 448, 74 Cal. 106.

41. Tex.—**Corpus Juris quoted in** Rich v. Graybar Electric Co., 84 S.W.2d 708, 709, 125 Tex. 470, 102 A.L.R. 171
57 C.J. p. 981 note 21.

42. Wis.—Heymann v. Cunningham, 8 N.W. 401, 51 Wis. 506.
57 C.J. p. 981 note 22.

43. Ala.—Baldwin v. Gully, 11 Ala. 716.
Va.—Stowers v. Smith, 5 Munf. 401, 19 Va. 401.

44. Ga.—Carr v. Berry, 42 S.E. 726, 116 Ga. 372.
57 C.J. p. 981 note 25.

45. Ga.—Turner v. Winn, 10 S.E. 368, 83 Ga. 761.
57 C.J. p. 981 note 26.

46. Ga.—Mize v. Blalock, 71 Ga. 861

47. Ala.—Leavitt v. Smith, 7 Ala. 175.

48. Ala.—Hodges v. State, 8 Ala. 55

49. Del.—Wright v. Cannon, 3 Del. 487.

50. Del.—Wright v. Cannon, supra
57 C.J. p. 982 note 32.

51. La.—Foret v. Stark, App., 16 So. 2d 79
57 C.J. p. 981 note 13, p. 982 note 33

Attachment proceedings
Officer's failure to make return on order of sale in attachment did not render him summarily liable for debt under statute relating to execution.—J. M. Radford Grocery Co. v. Owenby, Tex.Civ.App., 34 S.W.2d 385.

Money taken at time of arrest
A person cannot maintain a summary proceeding against officers to recover money which was taken from him at the time of his arrest and turned over to an attorney defending him on a criminal charge where the money was not received by the officers in the scope of their official duties.—Carroll v. Sullivan, 220 S.W.2d 590, 310 Ky. 289

Restitution of property
Suit to compel sheriff to return property, seized by defendant's deputy, to plaintiff after termination of criminal proceedings against him for theft of property, should have been instituted by petition and citation as ordinary action, not as summary proceeding.—Foret v. Stark, La.App., 16 So.2d 79.

52. Ala.—Chandler v. Francis Vandegrift Shoe Co., 10 So. 353, 94 Ala. 233
57 C.J. p. 982 note 34.

53. Tenn.—Burroughs v. Goodall, 2 Head 29
57 C.J. p. 982 note 35.

54. Tex.—**Corpus Juris quoted in** Rich v. Graybar Electric Co., 84 S.W.2d 708, 710, 125 Tex. 470
57 C.J. p. 982 note 37.

55. Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478.
57 C.J. p. 982 note 39.

56. Ga.—Caruthers v. Sprayberry, 26 Ga. 437.

failure to arrest defendant in a body execution,[57] failure to make or collect the money on a writ,[58] failure to pay over money collected[59] or received[60] by him by virtue of his office, paying over money in his hands to the wrong person,[61] failure to comply with an order made in summary proceedings directing him to pay over money,[62] failure to pay over the amount realized by a sale of property in his official capacity, whether or not he receives the money,[63] failure to account for the amount realized by hiring out property in his official custody,[64] failure to sell property levied on,[65] failure to take bond or security when it became his duty to do so,[66] failure to return process[67] within the proper time,[68] making a false[69] or insufficient[70] return, permitting the escape of a debtor arrested on civil process,[71] or failure to release an execution on defendant being adjudged a bankrupt.[72] An officer cannot be held liable on motion for omission to collect more than the usual rate of interest on a judgment where neither the execution nor the judgment directs it to be done.[73]

c. Considerations Affecting Availability of Summary Remedies

Summary remedies provided by statute for defaults of a sheriff or constable are available only when a plain and undisputed duty has been willfully neglected, and not where the officer's duty or liability is fairly open to dispute.

Summary remedies provided by statute for defaults of a sheriff or constable are available only when a plain and undisputed duty has been willfully neglected, and not where the officer's duty or liability is fairly open to dispute.[74] Accordingly, where there are conflicting claims to money in an officer's hands, he cannot be proceeded against summarily by one of the claimants for failure to pay it over, but is entitled to have the question as to who is entitled to the money determined in a civil action to which all the claimants may be made parties.[75] A party who has acquiesced in the acts of a sheriff or constable cannot proceed against him summarily for such acts unless there has been some fraud or collusion.[76] Summary remedies ordinarily are not available against a sheriff or constable where no injury has resulted to the complaining party from the officer's act or default.[77]

§ 169. Method of Proceeding

The method of proceeding summarily against a sheriff or constable, under a statute providing for summary proceedings, ordinarily is prescribed by the statute.

The method of proceeding summarily against a sheriff or constable, under a statute providing for summary proceedings, ordinarily is prescribed by the statute. Accordingly, under some statutes a sheriff or constable may be summarily proceeded against for an official default by motion,[78] or by a suggestion to the court, on which an issue as to

57. Ga.—De Longchamp v. Hicks, 25 Ga 200—Currell v Phillips, 18 Ga 469
58. Ga—Horrigan v Savannah Grocery Co, 51 S E. 961, 126 Ga 127
57 C J p 982 note 42
59. U S—Turner v Fendell, D.C., 1 Cranch 116, 2 L Ed 53
57 C J. p 983 note 43.
60. Minn.—In re Grundysen, 55 N. W. 557, 53 Minn. 346
57 C J p 983 note 44.
61. Ga—English v Reid, 55 Ga 240.
62. N.Y—Whitman v Haines, 4 N Y S 48, 51 Hun 640, affirmed 23 N E 1148, 119 N Y 639
57 C J p 983 note 46
63. Ark.—Scarborough v. Arnold, 21 Ark. 231
57 C J. p 983 note 47.
64. Ga—Hendrick v. Tompkins, 14 Ga. 86.
65. La—Mulling v. Jones, 114 So 725, 164 La 894
57 C J p 983 note 49
66. Miss—Rowand v. Gridley, 2 Miss. 210
57 C J p 983 note 50.
67. Del—Ableman v Conoway, 199 A 278, 9 W W Harr. 324.
57 C.J. p 983 note 51.
68. Del—Stidham v. Chase, 3 Del 118
57 C J. p 983 note 52.
69. Ga—De Longchamp v. Hicks, 25 Ga 200.
57 C J p 983 note 53.

Object of statutes

The primary object of statutes authorizing proceedings to collect debt from officer who neglects to return execution or who makes false return thereon is to give compensation to plaintiff in execution for any injury suffered by him because of default of officer—Hackler v. H. Kohnstamm & Co of Tex., Tex.Civ.App, 227 S.W 2d 347.

70. Tenn—Standifer v. May, 42 S W 2d 343, 163 Tenn 210.
57 C J p 983 note 54
71. Va—Stone v Wilson, 10 Gratt 529, 51 Va. 529
57 C.J. p 984 note 55
72. Ala—Garry v. Bates, 12 Ala. 544
73. Ala—Herrin v. Woodward, 11 Ala 792.
74. Minn—Brach v Fitzgerald, 193 N.W 585, 155 Minn 369.
57 C J. p 984 note 59
75. Minn—Roche v. Dunn, 106 N.W. 965, 97 Minn 529.
57 C J. p 984 note 60.
76. Ga—Bottoms v Mithvin, 26 Ga. 481, 71 Am D 225.
57 C J. p 984 note 61.
77. Tex—Hackler v. H Kohnstamm & Co. of Tex, Civ.App., 227 S W.2d 347
57 C J p 984 note 63.
78. Tenn—Farmers' Bank v Wyatt, 40 S.W 2d 402, 163 Tenn. 31.
57 C.J. p 987 note 9.

Execution proper on record

Judgment creditor was not entitled to judgment on motion against sheriff and bondsmen for insufficient, false, or nonreturn of execution appearing proper on record—Farmers' Bank v Wyatt, supra.

Successor sheriff

On a statutory motion to recover damages for failure to return executions on return-day against succeeding sheriff where executions were delivered to former sheriff, and were never placed in successor sheriff's hands for execution and were never in his office or in his possession at any time after he qualified as sheriff, he was not liable—Parks v. Herrington, Miss, 56 So.2d 836.

the alleged default is ordered;[79] and an officer may proceed against his deputy by motion for a failure to pay over money collected by the deputy on executions placed in his hands.[80] An officer may properly be proceeded against on the same motion for a failure to pay over money collected on an execution and a failure to return the execution, and judgment may be rendered for either cause.[81] In the absence of statute authorizing a remedy by motion, or in a case not within the statute, no such remedy is available.[82]

Scire facias. Under a permissive statute the liability of a sheriff or constable for an official default may be enforced by scire facias.[83] A scire facias to subject an officer as special bail, by reason of his default in not taking a bail bond, need not set forth the declaration in the original action, but it must show how he became bail, by stating that the writ in the original action came into his hands as such officer, and that he arrested defendant therein and neglected to take a bail bond.[84] A statute providing a remedy against an officer by scire facias for failing to make due return of process or to pay over moneys collected or received by him does not make such remedy available for permitting an escape under a civil arrest.[85]

§ 170. —— Rule or Order to Show Cause

In a number of jurisdictions a usual remedy against a sheriff or constable who has failed in the discharge of his duty is by a rule nisi, or rule or order to show cause why he should not pay to the person injured by his default the amount which prima facie such person has lost because of such default.

In a number of jurisdictions a usual remedy against a sheriff or constable who has failed in the discharge of his duty is by a rule nisi, or rule or order to show cause why he should not pay to the person injured by his default the amount which prima facie such person has lost in consequence thereof,[86] together with any statutory penalty to which the officer has become subject through such default,[87] and the performance of duties devolving on the sheriff is also ordinarily compelled by rule.[88] Two or more writs of fieri facias may be introduced in one rule nisi against the officer,[89] and, where such officer has simultaneously collected different sums by process in several different actions against the same defendant, one order requiring him to pay it over may be properly made in all the actions.[90] When a prima facie case is made against an officer, either on affidavit or other sufficient proof, a rule nisi is granted as of course,[91] and surplusage in the affidavit will not impair its effect.[92] A rule against an officer to show cause should be given a fair and reasonable construction so as not to work oppressively on him,[93] but should not be so construed as to allow him to take his own time to prepare to be heard or to require the court to wait until he is ready.[94] Where, pending a rule against him, the officer is guilty of a new default, such default may be alleged by way of amendment to the rule, and the rule may be made absolute as a consequence of that default.[95] A promise by an officer to pay money for which he is liable because of a failure to make the money on an execution will not warrant a rule for failing to pay over money collected.[96]

Form and sufficiency. A rule on an officer to pay over money collected on execution must state the court in which the judgment was rendered on which the execution issued.[97] A rule setting forth at its head the name of plaintiff and defendant in the fieri facias, the amount of the principal and interest at the date of the judgment, and the court to which the fieri facias is returnable, and alleging that the officer has had the fieri facias long enough to have

79. Ala.—Gary v. Hathaway, 6 Ala 161.
57 C.J. p. 987 note 10

80. Miss.—Womack v. Nichols, 39 Miss 320
57 C.J. p. 988 note 11.

81. Tex.—Spinks v. Caldwell, 23 Tex 623.

82. La.—Bloomenstiel v. Tridico, App., 156 So. 793
57 C.J. p. 988 note 13.

83. N.C.—Malpass v. Fennell, 48 N.C. 79
57 C.J. p. 988 note 16.

84. N.C.—Malpass v. Fennell, supra

85. Ind.—Hall v. Johnson, 3 Blackf 363.

86. Ga.—Puckett v. State Banking Co., 61 S.E. 465, 130 Ga. 586
57 C.J. p. 984 note 66.

Civil rules of procedure applicable
All rules of procedure governing civil actions apply to proceeding by rule to compel sheriff to return property, seized by him, to plaintiff after termination of criminal proceedings against plaintiff for theft of such property.—Foret v. Stark, La. App., 16 So. 2d 79.

87. Minn.—Roche v. Dunn, 106 N.W. 965, 97 Minn. 529.

88. La.—Mulling v. Jones, 114 So. 725, 164 La. 894.
57 C.J. p. 985 note 68.

89. Ga.—Lee v. Armstrong, 49 Ga. 609.
57 C.J. p. 985 note 69.

90. N.Y.—Whitman v. Haines, 4 N.Y.S. 48, 51 Hun 640, affirmed 23 N.E. 1148, 119 N.Y. 639.

91. N.C.—Ex parte Schenck, 63 N.C. 601

92. N.C.—Ex parte Schenck, supra

93. Ga.—Puckett v. State Banking Co., 61 S.E. 465, 130 Ga. 586

94. Ga.—Puckett v. State Banking Co., supra.
57 C.J. p. 985 note 74.

95. Ga.—Valentine v. Kwilecki, 14 S.E. 878, 89 Ga. 98

96. Ala.—Hodges v. Laird, 10 Ala 678.

97. Ga.—Bethune v. Bonner, 2 Ga. 169.

made the money, is not demurrable for want of certainty.[98] Where an officer has received money on a fieri facias, exceptions to the sufficiency of a rule against him, taken on the trial, long after the filing of the rule, come too late[99]

Rule absolute. A rule ordinarily is made absolute on the officer's failure to excuse his default[1] A rule is properly discharged, however, where the effect of making it absolute would be to prevent the officer from obeying the mandate of a coordinate court;[2] and on a rule against an officer to show cause why he should not be compelled to pay over the amount of an execution in his hands it is not proper to give summary relief in the premises by ordering him to pay the money or to stand committed, where it appears that he has not made the money thereon.[3] Although an officer has become liable for a debt by allowing a defendant, arrested on a ne exeat, to leave without giving sufficient bail, an order will not issue against the officer to compel him to pay the debt without first giving him time to produce defendant or to recover the debt on the bail bond.[4]

Service. It has been held that an order or rule on a sheriff or constable should be served on him by copy, and not by reading it to him[5] The rule cannot properly be served until after the default has occurred or become complete.[6]

Vacation or setting aside. A rule absolute against a sheriff or constable for failure does not, like a judgment, operate as an estoppel,[7] but rests on the fact of a contempt by the sheriff,[8] and may be set aside by the court for sufficient cause,[9] as where the charge of contempt is disproved[10] A peremptory order made without notice to the officer is properly set aside and vacated[11]

§ 171. —— Contempt Proceedings

It has been held proper to proceed summarily against a sheriff or constable for an official default by attachment, by a rule to show cause why an attachment should not issue, or by other proceedings as for contempt

It has been held proper to proceed summarily against a sheriff or constable for an official default by attachment,[12] by a rule to show cause why an attachment should not issue,[13] or by other proceedings as for contempt.[14] It does not necessarily follow, however, from the fact that an officer would be liable under the law in an action on the case against him for a particular default that he is liable to proceedings for contempt of court,[15] since ordinarily there is no liability in the latter proceeding where the officer acted reasonably and in good faith.[16] On an attachment against an officer for not returning a fieri facias, it has been held that the court may properly order him to recognize in double the amount of the fieri facias[17] and direct that he shall answer such interrogatories as may be regularly exhibited[18] Where an attachment against an officer for not returning an execution is not accompanied by instructions in what amount to take the recognizance for the officer's appearance, and a recognizance is taken for a smaller amount than the execution, and the officer does not appear on his recognizance, plaintiff may, on motion, proceed by an alias attachment without a suit on the recognizance.[19]

Purging contempt. An attachment or other summary proceeding against a sheriff or constable as for contempt is properly dissolved where such officer purges himself of the contempt, as by performment out of debtor's personalty and realty, unsatisfied until almost seven months after delivery was held guilty of contempt for failure to perform statutory duties, where debtor owned undivided interest in personalty at time execution was issued and for several months thereafter, and during seven months' period judgment creditor's attorneys notified sheriff of such interest by letter and personally —Cordts v. Reuter, supra.

98. Ga —Lee v. Armstrong, 49 Ga 609.

99. Ga —Thompson v Central Bank, 9 Ga 413

1. Ga —Puckett v. State Banking Co, 61 S E 465, 130 Ga 586
57 C J. p 985 note 80

2. Pa —Meixell v Meixell, 1 Lehigh Val L R 127
57 C J. p 985 note 81

3. Fla —McLeod v Ward, 9 Fla. 18

4. N Y —Brayton v Smith, 6 Paige 489.

5. Ill —People v. McHatton, 3 Ill 566

6. N Y —Coons v. McManus, 15 Johns 181

7. Ga —Holcombe v Dupree, 50 Ga 335.

8. Ga —Holcombe v Dupree, supra

9. Ga —Davis v. Dempsey, 15 Ga 182
57 C.J. p 986 note 89.

10. La —Castagnos Cane Loader Co v. David, 69 So 843, 137 La. 1074
57 C.J p 986 note 90

11. Pa —Dewoody v. Dewoody, 27 A 667, 157 Pa 603.

12. Ga —Brannon v. Barnes, 36 S E 689, 111 Ga 850
57 C J p 986 note 93.

At common law

At common law, a sheriff might be ruled to return executed writs and for neglect to do so an attachment would issue —Ableman v Conoway, 199 A 278, 9 W W Harr, Del, 324.

13. U S —Ex parte Bowling, D C, 3 F Cas No 1,737, 1 Cranch C C. 39.
57 C J p 986 note 94.

14. Wis.—Cordts v. Reuter, 271 N W 39, 223 Wis. 518
57 C J p 986 note 96

Failure to return execution

Sheriff who did not return execution, directing him to satisfy judg-

15. S.C —Brown v. Furze, 31 S C.L 530
57 C J p 986 note 97.

16. Ga —Pugsley v. Drew, 52 Ga 339
57 C J p 987 note 98

17. N Y —People v Lownds, 1 N.Y. Super 252.

18. N.Y —People v. Lownds, supra

19. N Y —People v. Chapman, 1 Cow. 579.

ing his duty for default of which he was in contempt,[20] or by showing that he acted in good faith[21] and under the advice of counsel.[22]

§ 172. Proceedings, Review, and Costs

a In general
b Defenses
c. Notice or process
d Parties
e. Pleading
f Evidence
g Trial or hearing
h Judgment
i. Damages and costs
j. Review

a. In General

A demand ordinarily is a condition precedent to a summary proceeding by notice and motion against a sheriff or constable for failure to pay over the amount made on an execution. Jurisdiction of summary proceedings against a sheriff or constable usually is in the court out of which issued the process in connection with which the default occurred.

A demand ordinarily is a condition precedent to a summary proceeding by notice and motion against a sheriff or constable for failure to pay over the amount made on an execution,[23] but a personal demand is not a prerequisite to contempt proceedings against an officer who fails to pay over money after service on him of an order requiring such payment,[24] and it is not necessary that an officer be ruled or notified to return process before summary proceedings may be instituted against him for failure to make a return[25]

Jurisdiction. Jurisdiction of summary proceedings against a sheriff or constable belongs to such court as may be given it by the statute providing for such proceedings,[26] and ordinarily is in the court out of which issued the process in connection with which the default occurred[27] or to which such process is returnable,[28] rather than in any other court,[29] unless grounds for relief in such other court are specially pleaded.[30] It has been held that a court of one county may entertain summary proceedings against the sheriff of another county for defaults in respect of the execution of its process,[31] but there is also authority to the contrary.[32] Where a motion presents two separate and distinct causes of action, as to one of which the court is without jurisdiction, a demurrer to the motion is properly sustained,[33] but before dismissing the motion opportunity must be given to the moving party to amend by striking the cause as to which there is no jurisdiction.[34]

Time for instituting proceedings. Where a statute limits the time within which summary proceedings against a sheriff or constable may be instituted, the remedy is lost if proceedings are not begun within such time,[35] and it has been held that, even though a general statute with respect to the commencement of actions against such officers does not by its terms apply to proceedings as for contempt, it is applicable in its spirit and intent and the court has power to withhold the exercise of its jurisdiction in a summary proceeding on motion against an officer whenever an action for the claim sought to be enforced is barred by the statute of limita-

20. S C—McLean v. DuBose, 17 S C L 646
57 C J p 987 note 5.

21. Ga—Glenn v. Winn, 10 S.E 368, 83 Ga 761.
57 C J. p 987 note 6.

22. Ga.—Harrell v. Feagin, 59 Ga 821.

23. Tenn—Cook v Smith, 1 Yerg 148.
57 C J. p 988 note 19

24. N Y—Whitman v Haines, 4 N Y S 48, 51 Hun 640, affirmed 23 N.E 1148, 119 N Y 639

25. N.Y—Parker v. Bradley, 46 N Y Super 244

26. Ala—Hood v. Blair, 10 So 671, 95 Ala 629.
57 C.J. p 988 note 27.

27. Ark—Perry County v. Gatlin, 52 S W.2d 626, 186 Ark 116—Smith v. Drake, 297 S.W. 817, 174 Ark 715.
Fla.—Sweat v Waldon, 167 So. 363, 123 Fla. 478.
57 C.J. p 988 note 28.

Suit wherein motion made

Motion for summary judgment against former sheriff for amount of execution not returned by him may be made in suit wherein execution issued—Perry County v. Gatlin, 52 S W 2d 626, 186 Ark 116—Smith v Drake, 297 S W 817, 174 Ark. 715

28. Miss—Tapp v. Bonds, 57 Miss 281
57 C J p 989 note 29

29. Ga—Griffin v. Nix, 125 S E 732, 33 Ga App 136—Pyles v. Easterling, 119 S E 351, 30 Ga App 783

Appeal from justice court

Where motor vehicle was attached under attachment sued out in justice court and judgment therein was for defendant, and constable later delivered motor vehicle to defendant, who departed from state, and plaintiff subsequently appealed to circuit court and recovered judgment, liability of constable could not be reviewed in circuit court under summary motion—Caperton v Winston County Fair Ass'n, 153 So. 801, 169 Miss. 503

30. Ga—Griffin v. Nix, 125 S.E 732, 33 Ga App 136—Pyles v. Easterling, 119 S E. 351, 30 Ga App 783.

31. Fla—Sweat v Waldon, 167 So. 363, 123 Fla 478
57 C J p 989 note 32.

32. Ga—Pyles v Keels, 178 S.E. 412, 50 Ga App 490.
57 C J p 989 note 33.

Failure to execute and return execution

Where chattel mortgage execution issued by city court in one county was sent to sheriff of another county for levy on property in that county, sheriff was liable to rule for contempt issued by superior court of county of his residence for failure to properly execute and return execution—Pyles v Keels, supra.

33. Ala—Hood v. Blair, 10 So 671, 95 Ala 629

34. Ala—Hood v Blair, supra.

35. Ky—Quiry v. Prather, Hard. 294.

tions.[36] In the absence of statute summary proceedings must be instituted within a reasonable time after the default.[37] As a general rule the summary remedy against an officer for a default with respect to the execution of process is not limited to the return term, but may be sought at a subsequent term,[38] and a statute providing for summary proceedings to be instituted at a particular term does not require that the judgment shall be rendered at such term.[39] It has been held that an officer may be proceeded against summarily after he has gone out of office,[40] but there is also authority to the contrary.[41]

b. Defenses

Anything which would constitute a valid defense for an officer in an action on the case for an official default is equally available as a defense in a summary proceeding against him.

Since summary proceedings against a sheriff or constable are a mere substitute for the more tedious and expensive remedy by action,[42] anything which would constitute a valid defense for an officer in an action on the case for an official default is equally available as a defense in a summary proceeding against him,[43] but an officer against whom a rule absolute is granted at one term and an attachment nisi at the next cannot, in answer to the latter, set up grounds decided against him before the rule was made absolute.[44] In a contempt of court proceeding against a constable for losing property of which he had been custodian, the constable may set up as a defense that the property was intrusted by him to another person for safe-keeping, that such property was stolen, and that both his conduct and that of the person to whom the property was intrusted were in good faith.[45]

c. Notice or Process

Generally, under statutes providing for summary proceedings against sheriffs and constables for official defaults, such a proceeding must be preceded by notice to the officer or the issuance of process advising him of the proceedings against him.

As a general rule, under statutes providing for summary proceedings against sheriffs and constables for official defaults, such a proceeding must be preceded by notice to the officer[46] or the issuance of process advising him of the proceedings against him,[47] which notice or process must be served on the officer the statutory length of time before the hearing or the granting of the rule or attachment sought.[48] Where notice is given to an officer that a motion for judgment against him for an official default will be made at a specified time, the motion must be made at the time appointed, or some other proceedings had to keep alive the notice, or it will lose its force.[49] An officer may, however, waive the requirement of notice[50] or objections founded on its irregularity.[51] Where an officer amends his return to a writ, after notice of a proceeding against him founded on the original return, a second notice is not necessary.[52]

Form, contents, and sufficiency. Where notice of a summary proceeding against a sheriff or constable is required, it must inform the officer to whom it is directed of the act or default on which his alleged liability is based[53] and of the remedy which it is sought to enforce against him.[54] Where the statute prescribes the form of process to be issued, such form must be adhered to,[55] and it has been held that the notice must contain all the requi-

36. N Y —Van Tassel v Van Tassel, 31 Barb. 439.
57 C.J p 989 note 39

37. N Y.—Jourden v. Hawkins, 17 Johns. 35.
57 C.J. p 989 note 40

38. Ala —Kirkmans v. Harkins, 1 Port 22.
Miss —Steen v. Briggs, 11 Miss 326

39. U.S.—Turner v. Fendall, D C, 1 Cranch 116, 2 L.Ed 53.

40. Ga —Bell v. Thorpe, 44 Ga. 509.
57 C.J. p 989 note 43.

41. Tenn —Cowan v Sloan, 32 S.W. 388, 95 Tenn 424.
57 C.J p 989 note 44.

42. Tenn —Billingsly v. Rankin, 2 Swan 82.

43. Ala.—Corpus Juris cited in Huett v. Nevins, 50 So 2d 160, 162, 255 Ala 37
Tenn —Billingsly v. Rankin, 2 Swan 82.

Falsity of return
Where sheriff marked a forthcoming bond forfeited for failure of defendant to have the property forthcoming on a particular date, sheriff could not in a summary proceeding against him say that the property was then forthcoming and that the return was false unless sheriff connected plaintiff with fraudulently inducing him to make return.—Huett v. Nevins, 50 So 2d 160, 255 Ala 37

44. Ga —Mize v. Blalock, 71 Ga 861

45. Ga —American Plant Co. v. Tippins, 188 S.E. 275, 54 Ga App. 439

46. Miss —Weber v. Everman, 47 Miss. 540—Vance v. Connell, 1 Miss 254.
57 C J. p 989 note 48

47. Del.—Hukill v. Staats, 2 Del. 385.

48. Tex —Murray v. Evans, 60 S.W. 786, 25 Tex Civ App 331.
57 C J. p 990 note 51

49. Ala —Armstrong v. Robertson, 2 Ala. 164.
57 C.J. p 990 note 52.

50. Ky —Champion v Dunn, 25 S.W. 2d 1023, 233 Ky 366.
57 C.J. p 990 note 53.

51. Tenn —Chaffin v. Crutcher, 2 Sneed 360
57 C.J. p 990 note 54.

52. Va —Stone v. Wilson, 10 Gratt. 529, 51 Va. 529.

53. Ala.—Godbold v. Planters', etc., Bank, 4 Ala 516.
57 C.J. p 990 note 57.

54. Ala.—Caskey v. Nitcher, 8 Ala. 622.
57 C J. p 990 note 58.

55. Del —Hukill v. Staats, 2 Del. 385.

sites of a petition.[56] It has been held sufficient to specify the term at which the motion is to be made, without designating any particular day.[57] The notice of a motion against an officer for failure to return an execution need not require him to produce the execution,[58] nor is the validity of such a notice affected by the fact that it demands, as a legal conclusion, more or less by way of interest or damages than plaintiff is entitled to.[59] Where a rule nisi calls on a sheriff to make return of his actings and doings in the premises, and also to show cause why he should not be attached for a contempt, this is such a notice as to justify making the rule absolute and granting an attachment.[60] A notice is not invalidated by an error in the date.[61]

d. Parties

As a general rule summary proceedings against a sheriff or constable are properly instituted by, and in the name of, the person who is injured by his default.

As a general rule summary proceedings against a sheriff or constable are properly instituted by, and in the name of, the person who is injured by his default,[62] although it has been held that proceedings by attachment as for contempt should be in the name of the state.[63] There is authority for the rule that two or more persons having distinct interests may unite in a summary proceeding against an officer,[64] but the contrary has also been held.[65] The officer whose default forms the basis of the proceeding must be made a party thereto,[66] and a motion against "the sheriff of" a designated county, without mentioning his name, cannot be considered.[67] An applicant for a rule against an officer for the distribution of a fund in his hands need not in the first instance make other claimants of the fund parties to the proceeding,[68] but after the granting of the rule, on proper notice to such other claimants, either by the applicant or by the officer, they may, if they so desire, come in and be made parties.[69] Plaintiff's attorney is not a proper party to a motion against an officer for a failure to pay over money collected on execution because of the fact that he claims a lien on such money for the compensation for professional services and has notified the officer of such claim.[70] The permission of an execution plaintiff that a motion for statutory damages for the sheriff's failure to return an execution shall be carried on for the benefit of one of the defendants who was a mere surety for the others, but paid the amount, does not invest the surety with such a beneficial interest as requires that he be a party to the motion.[71] An officer who has been ruled for a failure to make the money due on an execution placed in his hands cannot convert the proceeding thus instituted against him into a rule against himself and a third person, not an official, by having the latter made a codefendant to the rule.[72] The sureties on the official bond of an officer are not necessary parties to summary proceedings against him for an official default.[73]

e. Pleading

The rules relating to the sufficiency of the petition or moving papers in summary proceedings generally are applicable to summary proceedings against a sheriff or constable for an official default. Similarly, the sufficiency of the officer's answer is to be determined under the ordinary rules of pleading.

The rules relating to the sufficiency of the petition or moving papers in summary proceedings generally, considered in Summary Proceedings § 4, also 60 C.J. p 1015 note 22–p 1016 note 34, are applicable to summary proceedings against a sheriff or constable for an official default.[74] In some juris-

56. Ky.—Johnson v. Bradley, 11 Bush 666
57 C.J. p 990 note 60.

57. Ala.—Welch v Fourier, 6 Ala 516—McRae v. Colclough, 2 Ala. 74.

58. Tenn.—Armstrong v. Apple, 2 Coldw. 280.

59. Tenn.—Lashley v. Wilkinson, 2 Head 482.

60. Ga.—Brannon v. Central Bank, 18 Ga. 361.

61. N.J.—Scott v. Dow, 14 N.J.Law 350
57 C.J. p 990 note 65.

62. U.S.—Turner v. Fendall, D.C., 1 Cranch 116, 2 L.Ed. 53
57 C.J. p 990 note 67.

63. S.C.—State v. Charleston Dist., 8 S.C.L. 145.
57 C.J. p 991 note 68.

64. Ga.—Taylor v Johnson, 17 Ga. 521.

65. Ala.—Patterson v Mobile Cir Ct, 11 Ala 740

66. La.—Buckner v Baker, 11 La. 459.

67. Tex.—Weems v. Brazoria County, 48 Tex. 481.

68. Ga.—Berrie v Smith, 25 S.E. 757, 97 Ga 782.

69. Ga.—Berrie v. Smith, supra.

70. Miss.—Pugh v Boyd, 38 Miss 326

71. Ky.—Sanders v. Commonwealth Bank, 2 Metc. 327.

72. Ga.—McConnell v. West, 30 S.E 654, 105 Ga 468

73. Ala.—Garey v. Frost, 5 Ala. 636.

74. Tex.—Murray v Evans, 60 S.W 786, 25 Tex.Civ.App 331.
57 C.J. p 991 note 81

Actual damages suffered

Pleading seeking recovery for actual damages arising from alleged unlawful execution sale must set forth the actual damages suffered.—Dallas Joint Stock Land Bank of Dallas v Randerson, Civ.App., 127 S.W. 2d 593, reversed on other grounds Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S.W.2d 769, 136 Tex 91.

Attorney's fees

In proceeding to recover from sheriff actual damages resulting from alleged unlawful foreclosure sale, where it was not alleged that plaintiff had become obligated to pay two thousand five hundred dollars attorney's fees, claims for attorney's fees in such amount was unreasonable on face of petition.—Dallas Joint Stock Land Bank of Dallas v. Randerson, 127 S.W.2d 593, reversed on other grounds Randerson v. Dallas

dictions, where the proceeding is by motion, the notice of the motion serves as the initiatory pleading of the moving party,[75] and a written declaration is not necessary.[76] The officer may be permitted by the court to make answer at any time before the order or rule against him becomes absolute,[77] and the sufficiency of his answer is to be determined under the ordinary rules of pleading.[78] In proceedings by suggestion under a statute requiring the court to cause an issue to be made up to try the fact, a denial of the allegations of the suggestion presents an issue.[79] An omission to verify an answer or traverse is at most an amendable defect,[80] and in the absence of objection thereto the irregularity is deemed waived.[81] An answer is to be taken as true if not traversed,[82] and, therefore, when no traverse is taken, or a traverse filed is stricken, and the facts set out in the answer constitute a sufficient defense, the rule should be discharged or the proceedings dismissed.[83] It has been held that, in the absence of laches, a traverse may be filed at any time before the proceeding comes to trial.[84]

Issues; variance. Where a general denial is interposed in a summary proceeding against one as sheriff or constable for an official default, the question whether defendant is or is not such officer is in issue.[85] On scire facias against an officer to hold him as special bail, he having discharged defendant without taking bail, the objection that a capias ad satisfaciendum had not issued against defendant and been returned non est inventus, as required by statute, must be taken by special plea, and cannot be raised under the plea of nul tiel record.[86] Whether or not a variance between the execution described in a notice of motion against a sheriff or constable and that offered in evidence is fatal depends on the extent and materiality of the variance.[87] When a motion against a sheriff is based on an alias writ, a variance between the writ described in the notice and the one produced in evidence cannot be aided by the production of the original writ which corresponds with the notice.[88] A motion for a failure to return process cannot be sustained by proof of falsity or insufficiency of the return made.[89]

f. Evidence

General rules of evidence govern in summary proceedings against a sheriff or constable for an official default.

In summary proceedings against a sheriff or constable for an official default, general rules of evidence govern with respect to the matters necessary to be proved,[90] the presumptions which are to be indulged,[91] the burden of proof,[92] and the admissibility,[93] as well as the competency,[94] materiality,[95] and weight and sufficiency,[96] of the evidence.

Joint Stock Land Bank of Dallas, 147 S W 2d 769, 136 Tex 91.

75. Ala.—Walker v. Turnipseed, 8 Ala. 679
57 C J p 991 note 83.

Allegations held insufficient against demurrer

On a statutory motion to recover damages for failure to return execution on return day against former sheriff, and his successor, allegations that if former sheriff ever turned execution over to his successor, movants did not know when, or whether it was in person or by mail, that neither the execution nor notation on writ showed when successor sheriff received it, that movants did not have knowledge of facts, and that defendant sheriffs refused to give information, were insufficient as against demurrers, since presumption that former sheriff performed duty by delivering execution to successor was neutralized by presumption of equal dignity that successor would have performed his duty by making return at time required by law.—W T Rawleigh Co. v. Hester, 200 So 250, 190 Miss 329.

76. Ala.—Condry v. Henley, 4 Stew & P. 9.

77. Ga.—Hixon v Callaway, 58 S E 1120, 2 Ga App 678
57 C J. p 991 note 85.

78. Ga.—Sanders v Carter, 52 S E 887, 124 Ga 676, 677.
57 C.J p 991 note 86

79. Ala.—Hallett v. Lee, 3 Ala 28

80. Ga.—Pace v. Tarver, 92 S E 227, 19 Ga.App 708—Melton v Hicks, 67 S E 116, 7 Ga App 462.

81. Ga.—Pace v Tarver, 92 S E 227, 19 Ga App. 708—Black v Weaver, 67 S E. 389, 7 Ga App 507

82. Ga.—Smith v West, 67 S E 405, 134 Ga 11
57 C J. p 992 note 90

83. Ga.—Perry v. Christie, 65 Ga. 642.
57 C.J p 992 note 91

84. Ga.—Melton v Hicks, 67 S E 116, 7 Ga App. 462—Brantley Co v Southerland, 57 S E 960, 1 Ga App 804.

85. Ala.—Hopkins v. Gary, 7 Ala. 46.

86. N C.—Gray v. Hoover, 15 N.C. 475.

87. Ala.—Spence v Rutledge, 11 Ala 557
57 C J. p 992 note 97.

88. Ala.—Walker v. Turnipseed, 8 Ala. 679.

89. Tenn.—Watkins v. Barnes, 1 Sneed 201.

90. Ky.—Johnson v. Bradley, 11 Bush 666
57 C J. p 993 note 2.

91. Va.—Stone v. Wilson, 10 Gratt 529, 51 Va 529
57 C J. p 993 note 3

92. Tenn.—Cannon v Wood, 2 Sneed 177.
57 C J p 993 note 4.

93. Miss.—Watson v Boyett, 118 So 629, 151 Miss 726
57 C.J p 993 note 5.

94. Ala.—Gresham v. Walker, 10 Ala. 370
57 C J. p 993 note 6.

95. Ga.—Sanders v. Carter, 52 S E. 887, 124 Ga 676
57 C.J. p 994 note 7.

96. Ala.—Casky v Haviland, 13 Ala. 314.
57 C.J p 994 note 8

Evidence held insufficient

Evidence not showing that deceased was sheriff at time of alleged failure to execute order of sale or that order of sale was sent to him was insufficient to support judgment

g. Trial or Hearing

Issues of fact arising in summary proceedings against a sheriff or constable ordinarily are properly submitted to the jury, and questions of law are for the court

Issues of fact arising in summary proceedings against a sheriff or constable ordinarily are properly submitted to a jury[97] unless submitted to the court by agreement,[98] and questions of law are for the court.[99] The issue must be tried at the time at which the cause is called for trial unless good cause for a continuance is shown[1] It has been held that the trial must be by the court itself, and not by a referee[2] Where all the facts are admitted or not denied there is nothing to be submitted to a jury,[3] and where no evidence is introduced in support of a traverse of the answer of an officer on a rule against him it is proper for the court to dispose of the case on the facts set forth in the answer[4] Where the parties to summary proceedings appear and an issue is tried by a jury, the proceedings are like other suits in court commenced in the ordinary mode, and governed by the same rules,[5] with the single exception that it must appear affirmatively on the record that the court had jurisdiction to entertain the proceeding[6] Collateral questions cannot be considered.[7]

In a summary proceeding for a false or insufficient return, the inquiry is confined to the face of the return.[8] Where, in summary proceedings against an officer for failure to make the money on a writ, his sureties are not made parties, the fact of suretyship need not be found by the jury to sustain a judgment against them, but the proper course is to prove the fact of suretyship to the court.[9] A finding by the jury for plaintiff on the merits of a summary proceeding includes all the facts necessary to the ascertainment of defendant's liability, unless the statute requires the facts to be specially found.[10]

h. Judgment

Every fact which is necessary to give the court jurisdiction of summary proceedings against a sheriff or constable and to authorize the judgment must be set out in the judgment as having been made to appear.

Every fact which is necessary to give the court jurisdiction of summary proceedings against a sheriff or constable and to authorize the judgment must be set out in the judgment as having been made to appear[11] A motion against an officer charging him with failing to pay over money collected by him on execution, and also with failing to return the execution, will warrant a judgment against him for either of the causes alleged, although it be asked for only on one of these grounds.[12] In a proceeding against an officer for failure to return executions issued on two judgments against different parties for the same debt, the court will render but one judgment.[13] Whether or not claimants to a fund in the hands of an officer come in and cause themselves to be made parties to a summary proceeding against him for the distribution of such fund, they are bound by the judgment rendered if they actually participate in the hearing.[14] Where an officer neglects to take a bail bond, and in a proceeding had thereon against defendant and the officer the latter pleads, but defendant makes default, a verdict against the officer alone is proper, but the judgment should be against both him and defendant[15] A judgment commanding the officer to pay out of a fund in his hands plaintiff's claim and the costs of the proceeding, which, together, exceed the amount of such fund, is erroneous.[16] Where a judgment nisi is rendered against an officer for failure to return process and he shows no sufficient reason for such failure the judgment is properly made absolute.[17]

Discretion of court. In a contempt proceeding, the court may exercise its discretion under the cir-

against his estate.—Huff v Matula, Tex.Civ App, 58 S W 2d 855

97. Ga.—Read Phosphate Co v. S Weichselbaum Co., 58 S.E 122, 1 Ga App 420
57 C J. p 995 note 10

98. Ga.—Read Phosphate Co. v. S Weichselbaum Co, supra

99. Ala.—Whitsett v. Slater, 23 Ala 626.
57 C J p 995 note 12.

1. Ga.—Brantley Co v. Southerland, 57 S E. 960, 1 Ga App 804.

2. Del.—Stidham v Chase, 3 Del 418.

3. Ga.—Pace v. Tarver, 92 S.E. 227, 19 Ga.App. 708
S.C.—Eve v. Mosely, 33 S.C.L. 203

4. Ga.—Brown v Usry, 25 S.E. 650, 99 Ga 302.
57 C J p 995 note 16.

5. Ala.—Garey v. Frost, 5 Ala 636

6. Ala.—Garey v. Frost, supra

7. Ga.—Rambo v. Bell, 3 Ga. 207.
57 C J p 995 note 19.

8. Tenn.—Hill v. Hinton, 2 Head 124
Inadvertence no defense
On motion for summary judgment against sheriff, fact that action in making insufficient return was inadvertent was no defense.—Standifer v May, 42 S.W.2d 343, 163 Tenn. 210

9. Ala.—Garey v. Frost, 5 Ala 636.

10. Ala.—Welch v. Fourier, 6 Ala 516.

11. Tenn.—Burt v. Davidson, 5 Humphr 425
57 C J p 995 note 24.

12. Tex.—Spinks v. Caldwell, 23 Tex 623

13. Tenn.—Tennessee Bank v. Cannon, 2 Heisk 428.

14. Ga.—Berrie v. Smith, 25 S E 757, 97 Ga. 782.

15. Ky.—Bartlett v. Marshall, 2 Bibb 467.

16. Ga.—Grimsley v. Alexander, 32 S E 24, 106 Ga 165.

17. N C.—Graham v. Sturgill, 31 S E 705, 123 N.C. 384.

cumstances of the case as to whether it will attach a constable for contempt.[18]

Modification. After notice of appeal from an order, made in summary proceedings against an officer, directing an attachment to issue against him, the trial court may modify such order so as to meet the justice and law of the case.[19]

Setting aside. Where judgment directing the mode of disposition of funds in an officer's hands is rendered in summary proceedings to which all the claimants are parties, the officer cannot object to the mode of distribution so directed and has no standing to ask that the judgment be set aside.[20]

Judgment by default. No judgment by default can be rendered, nor can the averments of the moving party be taken as confessed, on the failure of an officer to appear or answer in summary proceedings against him, but the matters relied on to sustain his liability must be established by proof.[21]

i. Damages and Costs

Only such amount as is contemplated by statute may be recovered in summary proceedings against a sheriff or constable. Such an officer may be liable for the costs of the proceeding.

Only such amount as is contemplated by statute may be recovered in summary proceedings against a sheriff or constable.[22] Accordingly, where the proceeding is under a statute allowing a recovery of the amount of the debt or of the debt and damages, interest cannot be allowed, even though it might be recoverable in a common-law action.[23] Unless provided otherwise by statute, an execution plaintiff cannot recover from the sheriff more than the value of the execution defendant's property subject to levy;[24] and on a motion by a plaintiff in an execution against an officer for failure to return it in the proper time, when the amount of the execution has been paid to plaintiff by one of defendants after such default, plaintiff cannot recover the amount of the execution, but only the statutory damages for which the officer has rendered himself liable by his delinquency.[25] Where an officer's answer to a rule against him for money realized on a levy sets up expenses incurred by him in selling the property, and the like, and is not traversed, such expenses are properly allowed to him.[26]

In proceeding by officer against deputy. An officer against whom a judgment is rendered for the default or misconduct of his deputy cannot recover against such deputy, in summary proceedings, judgment for greater damages than have been recovered against himself,[27] except that in addition to the amount of such judgment he may recover his costs in defending the action in which it was rendered.[28]

Costs. A sheriff or constable may be liable for the costs of a summary proceeding against him for an official default.[29]

j. Review

An appeal lies from a final order or judgment against a sheriff or constable in summary proceedings, except where a statute provides otherwise.

An appeal lies from a final order or judgment against a sheriff or constable in summary proceedings, the same as from other final orders,[30] except where the statute relating to such proceedings provides otherwise, expressly or by clear implication.[31] A refusal to allow an officer to amend his return on an execution, pending a motion against him for neglect of duty in respect to the execution, cannot be assigned as error in the judgment on the motion.[32] An appellate court will not interfere with the discretion of the trial court in making absolute a rule against an officer, where his answer to the rule is evasive;[33] and a court has refused to disturb on appeal a rule absolute against an officer on his failure to make a sum of money on a mort-

18. Ga.—American Plant Co. v. Tippins, 188 S.E. 275, 54 Ga.App. 439

19. S.C.—Gibson v. Gibson, 7 S.C. 356.

20. Ga.—Mattox v. Berry, 71 S.E. 155, 136 Ga. 183.

21. Ky.—Lampton v. Scott, 3 A.K. Marsh. 172.
57 C.J. p. 996 note 34.

22. Ala.—Birmingham Dry Goods Co. v. Bledsoe, 23 So. 153, 117 Ala. 495
57 C.J. p. 996 note 36.

23. N.Y.—Brown v. Littlefield, 1 Wend. 398—Thomas v. Weed, 14 Johns. 255.

24. Ala.—Gary v. Hathaway, 6 Ala. 161.
57 C.J. p. 996 note 39

25. Ky.—Sanders v. Kentucky Bank, 2 Metc. 327

26. Ga.—Wall v. Clark, 59 Ga. 631.

27. Va.—Stowers v. Smith, 5 Munf. 401, 19 Va. 401.

28. Va.—Stowers v. Smith, supra.

29. Ga.—Sutton v. Robinson, 72 Ga. 195.
N.Y.—Mitchell v. Roulstone, 1 N.Y. Super. 218

Reasonable attorney's fee
Under a statute providing that the officer shall be liable to plaintiff for the costs, "legal and extraordinary," of recovering the sum due the latter on account of the former's default, plaintiff is entitled to recover a reasonable attorney's fee.—Champion v. Dunn, 25 S.W.2d 1023, 233 Ky. 366.

30. S.C.—Emory v. Davis, 4 S.C. 23.

Leave of court held not necessary
Pa.—Bachman v. Messina, 45 Pa.Dist. & Co. 47.

31. Pa.—Johnston v. Meeker, 10 Watts 403.

32. Ala.—Casky v. Haviland, 13 Ala. 314.

33. Ga.—Willis v. Powell, 51 Ga. 475.

gage execution on lands, although the trial court certified that by inadvertence execution was issued against the officer on the rule absolute, and also an attachment against him, whereas the statute authorizes only one of those remedies at a time.[34] Irregularities in the proceedings will not defeat them where a just result is reached.[35] A final order in a proceeding by rule against an officer is in the nature of a final judgment, on appeal from which the court may revise any intermediate order in the same proceeding involving the merits and necessarily affecting the judgment.[36] Where an error in a judgment is merely clerical, it will be amended by the appellate court and affirmed.[37] Defendant in an execution cannot except to, or appeal from, a judgment rendered in summary proceedings against an officer for failure to make the money on the execution.[38]

VIII. AMERCEMENT, FINES, AND PENALTIES

§ 173. In General

a General considerations
b. Construction and operation of statutes
c. Defaults for which amercement or penalization proper

a. General Considerations

Proceedings for the amercement of, or for the imposition of penalties on, sheriffs or constables for official defaults are purely statutory, and the courts will hold persons who claim the benefit of such statutes to a strict observance of the statutory requirements.

Some statutes provide for the amercement of sheriffs and constables, or for the imposition on them of prescribed fines and penalties, for various designated official defaults.[39] The liability to amercement or for a penalty for defaults is purely statutory,[40] and, in the absence of statute providing therefor, an officer is not subject to such liability.[41] The right to demand a judgment of amercement or for a penalty against a sheriff or constable rests on no equitable grounds,[42] and in the enforcement of a statutory penalty the courts will hold parties to a strict observance of the requirements of the statute,[43] and it is not permissible to invoke mere presumptions or inferences to support the imposition of a penalty.[44] It has been stated that certain statutes providing for amercement give a more expeditious remedy against sheriffs and other officers but give no additional rights, except, perhaps, with respect to the penalty provided for by the statutes.[45] A statutory proceeding for amercement is not the sole remedy against an officer who has been guilty of conversion.[46]

Under some statutes it has been held that the amercement of a sheriff or constable rests in the discretion of the court;[47] but by other authorities it has been held or recognized that when a case clearly within the statute is presented the court has no discretion but must render judgment of amercement.[48]

b. Construction and Operation of Statutes

Generally, statutes making provision for the amercement of, or for the imposition of penalties on, sheriffs or constables for official defaults are regarded as penal in nature, and, as such, are to be strictly construed and applied only to defaults clearly within their terms.

While a statute imposing a penalty on a sheriff or constable for an official default has been regarded as remedial rather than penal,[49] generally, statutes providing for the amercement of, or for the imposition of penalties on, sheriffs or constables for official defaults are regarded as penal in nature,[50] and, like other penal statutes, are to be

34. Ga.—Clement v. Bunn, 60 Ga. 334.
35. Ga.—Thrash v. Harman, 94 S.E. 54, 21 Ga.App. 98.
36. S.C.—Emory v. Davis, 4 S.C. 23
37. Va.—Tyree v. Donnally, 9 Gratt. 64, 50 Va. 64
57 C.J. p. 997 note 53.
38. Ga.—White v. Haslett, 49 Ga. 262.
39. Kan.—Flowers v. Gray, 225 P.2d 94, 170 Kan. 266.
57 C.J. p. 997 note 60.
"Amercement" defined see 3 C.J.S. p. 1044.
40. Kan.—Flowers v. Gray, supra.
57 C.J. p. 997 note 61.
41. Ky.—Wilson v. Commonwealth, 262 S.W. 965, 203 Ky. 616.
42. Kan.—Fisher v. Franklin, 16 P. 341, 38 Kan. 251
Ohio.—Moore v. McClief, 16 Ohio St. 50
43. Tex.—Huff v. Matula, Civ.App., 58 S.W.2d 855.
57 C.J. p. 998 note 73
44. Tex.—Huff v. Matula, supra.
45. Neb.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97—Crooker v. Melick, 24 N.W. 689, 18 Neb. 227.
46. S.D.—Malchoff v. Knewel, 215 N.W. 689, 51 S.D. 520.
47. Ala.—Rodgers v. Waters, 2 Ala. 644.
Ky.—McClelland v. Hobbs, Hard. 2
48. Kan.—Flowers v. Gray, 225 P.2d 94, 170 Kan. 266.
57 C.J. p. 998 note 76.
49. Tenn.—Cherry v. Kennedy, 232 S.W. 661, 144 Tenn. 320.
50. Ark.—State v. Warner, 48 S.W.2d 246, 185 Ark. 610.
Kan.—Riffel v. Konecny, 88 P.2d 1077, 149 Kan. 533
Miss.—W.T. Rawleigh Co. v. Brantley, 19 So.2d 808, 197 Miss. 244, 157 A.L.R. 188—W.T. Rawleigh Co. v. Causey, 16 So.2d 397, 195 Miss. 842—W.T. Rawleigh Co. v. Foxworth, 11 So.2d 919, 194 Miss. 205—W.T. Rawleigh Co. v. Hester, 200 So. 250, 190 Miss. 329.
N.D.—Glynn v. Wanner, 244 N.W. 14, 62 N.D. 499.
Okl.—Redwine v. Alexander, 241 P.2d 376—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55—First State Bank

strictly construed, and applied only to defaults clearly within their terms or purview.[51] So one who seeks to amerce or penalize an officer must bring himself within both the letter and the spirit of the law,[52] and very slight circumstances are sufficient to exempt the officer from the operation of the statute.[53] A statute imposing a certain penalty will not yield and give place exclusively to a later statute imposing a larger penalty unless there is such a clear repugnance between the statutes that both cannot stand;[54] but when the incongruity between two statutes is so great as to leave but little doubt that the legislature intended the later enactment to repeal the former it will be so construed.[55]

c. Defaults for Which Amercement or Penalization Proper

A sheriff or constable may be amerced or penalized for such defaults, and such only, as may be within the statute providing for the amercement or penalty.

A sheriff or constable may be amerced or penalized for such defaults, and such only, as may be within the statute providing for the amercement or penalty,[56] such as failure to execute process,[57] including any misconduct which deprives a party of the substantial benefits of his process,[58] or leaving goods levied on in possession of the judgment debtor,[59] failure to sell property levied on,[60] failure to sell property under an order of sale[61] or properly to execute the order of sale,[62] failure to return process[63] within the time allowed by law for the making of the return,[64] making a false[65]

of Lovell v Graybeal, 37 P 2d 912, 169 Okl 543
57 C J p 997 note 65.

51. Ala—Evans v. Stevens, 8 Ala 517.
Ark—State v. Warner, 48 S W 2d 246, 185 Ark 610
Miss—W. T Rawleigh Co. v Brantley, 19 So 2d 808, 197 Miss. 244, 157 A L R 188—W T. Rawleigh Co v Causey, 16 So 2d 397, 195 Miss 842—W T Rawleigh Co v. Foxworth, 11 So 2d 919, 194 Miss 205—W T. Rawleigh Co v Hester, 200 So 250, 190 Miss 329
N D.—Glynn v Wanner, 244 N.W 14, 62 N.D. 499
Okl—Redwine v Alexander, 241 P 2d 376—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55—First State Bank of Lovell v Graybeal, 37 P.2d 912, 169 Okl 543
57 C J p 997 note 67.

52. Kan—Riffel v. Konecny, 88 P 2d 1077, 149 Kan 533—Kothman v Prest, 8 P. 228, 34 Kan 179
Ohio—Moore v McClief, 16 Ohio St 50—Mine Safety Appliances Co. v Best, Com Pl, 76 N E 2d 108
Okl—Redwine v Alexander, 241 P 2d 376—Riddle v Bishop, 79 P 2d 801, 183 Okl 55—First State Bank of Lovell v Graybeal, 37 P 2d 912, 169 Okl. 543
57 C J p 998 note 68.

53. Miss—W T. Rawleigh Co v Brantley, 19 So 2d 808, 197 Miss 244, 157 A L R. 188—W. T Rawleigh Co v Causey, 16 So 2d 397, 195 Miss 842—W T Rawleigh Co v Foxworth, 11 So 2d 919, 194 Miss. 205—W. T Rawleigh Co v. Hester, 200 So 250, 190 Miss 329—Crawford v Bank of Seminary, for Use of Williams, 172 So 750, 178 Miss 129.

54. Ark—Hawkins v Taylor, 19 S W 105, 56 Ark 45, 35 Am S.R. 82
57 C J. p 998 note 69.

55. Ky—Wilson v Slaughter, 3 J J Marsh 593
57 C J. p 998 note 70.

56. Kan.—Flowers v. Gray, 225 P 2d 94, 170 Kan 266.
Miss—W T Rawleigh Co v Brantley, 19 So 2d 808, 197 Miss 244, 157 A L R 188
N D—Glynn v. Wanner, 244 N W. 14, 62 N D 499.
57 C J. p 997 note 67 [a], p 1000 note 3.

57. Tex—Hackler v H Kohnstamm & Co of Texas, Civ.App, 227 S W. 2d 347.
57 C J p 998 note 78.

Order of sale is an "execution" within the purview of a statute rendering an officer liable for failure to levy on, or sell, property subject to execution—Blanscet v. Palo Duro Furniture Co., Tex Civ App, 68 S W. 2d 527.

Order for delivery of personal property in replevin was not a writ of execution within contemplation of statute providing for amercement of sheriffs, and sheriff's default in handling of such order in replevin could not be made the subject of amercement of sheriff.—Redwine v Alexander, Okl, 241 P 2d 376

Default under warrant of seizure

Failure of the sheriff properly to keep property seized under a warrant of seizure did not subject him to amercement under a statute providing that a sheriff should be amerced on his neglect or refusal to execute a writ of execution—Glynn v. Wanner, 244 N W. 14, 62 N D. 499.

58. N J—Hoagland v. Todd, 37 N.J. Law 544.
57 C J. p 999 note 79.

59. Ohio—Pettit v Ebright, 2 Ohio Dec, Reprint, 651, 4 West.L.Month 328.

60. N J—Scott v Dow, 14 N J Law 350
57 C J p 999 note 81

61. Neb—Shufeldt v. Barlass, 51 N W 134, 33 Neb. 785

62. Ohio—Sharp v Ross, 7 Ohio Cir Ct. 55, 3 Ohio Cir Dec 660.
57 C J p 999 note 83

63. Kan—Flowers v. Gray, 225 P 2d 94, 170 Kan 266
57 C J p 999 note 84, p 1039 note 87 [a].

64. Ark—J B Pearson Flour & Feed Co v Pittman, 95 S.W.2d 1143, 192 Ark 1062
57 C J p 999 notes 84, 85.

Statute held mandatory

Ark—J B Pearson Flour & Feed Co v. Pittman, supra

Officers liable

In statute providing for liability of officer neglecting to return execution within specified time, word "officer" includes both sheriff and constable—Ditsch v. Finn, 252 N.W. 562, 214 Wis. 305.

Alleged default held not within statute

Ark—State v Warner, 48 S W 2d 246, 185 Ark 610.
Miss—W T Rawleigh Co. v. Hester, 200 So. 250, 190 Miss 329
N D—Glynn v Wanner, 244 N W 14, 62 N D. 499.

65. N C—Finley v. Hayes, 81 N C 368.
57 C J. p 999 note 86.

What constitutes "false return"

Making of "false return" within statute is conduct on part of officer which stigmatizes his representation of fact as dishonest one, and as calculated to deceive another by suppression of truth or nondisclosure of some material fact which should be revealed and return must be designedly untrue in order to subject sheriff and surety to penalty.—W. T Rawleigh Co. v. Brantley, 19 So 2d

or an insufficient or improper[66] return, failure of the officer to indorse on an execution the date of its delivery to him,[67] failure to file an inventory when it was the officer's duty to do so,[68] delivering a chattel seized in replevin proceedings to either party without the consent of the other,[69] selling property without giving notice as required by statute,[70] failure to collect money which might have been collected by the use of reasonable diligence,[71] failure to pay over money actually collected,[72] failure to have the amount of sale on execution or the money so made before the court and to pay it over according to law,[73] misapplication or improper distribution of the proceeds of a sale,[74] serving a writ without having given bond,[75] levying on[76] or selling[77] exempt property, taking excessive fees,[78] discharging a prisoner arrested without taking him before a magistrate,[79] permitting a prisoner arrested under an execution against the person to escape,[80] refusal to give a prisoner a copy of the process under which he is detained,[81] delivering property under a writ of replevin before trying the validity of a claim interposed,[82] or failure to turn over to his successor all the books, furniture, etc., appertaining to his office.[83]

Default of deputy. A sheriff or constable may be amerced or penalized for a default of his deputy[84] unless under the statute the deputy himself is liable to amercement therefor.[85] A statute providing for the amercement of a sheriff or constable does not authorize the amercement of his deputy for the latter's defaults.[86] Where, however, the statute so provides, a deputy may be amerced for an official default.[87]

§ 174. Amount of Penalty or Amercement

The amount of amercement or of a penalty for which a sheriff or constable may be liable for an official default depends on the terms of the statute providing for the amercement or the penalty.

Since an amercement is, strictly speaking, a penalty, and so is properly for a fixed sum without regard to the extent of the injury suffered by the complaining party by reason of the default for which it is imposed,[88] a sheriff or constable may be liable, under some statutes so providing, for a

808, 197 Miss. 244, 157 A.L.R. 188—57 C.J. p 999 note 86 [a], [b].

Return held not false

Where judgment creditor and his attorney were advised by sheriff that judgment debtor claimed homestead exemption and that the other property of unknown value was subject to mortgage, subsequent return that sheriff had been unable to find anything on which he could levy was not a false return within the statute—W. T. Rawleigh Co. v. Brantley, supra.

66. Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 516
57 C.J. p 999 note 87.

67. N.C.—Hathaway v. Freeman, 29 N.C. 109.
57 C.J. p 999 note 88.

68. N.J.—Todd v. Hoagland, 36 N.J.Law 352
57 C.J. p 999 note 89

69. N.Y.—Koerkle v. Pangburn, 62 N.Y.S. 814, 30 Misc. 776
57 C.J. p 1000 note 90

70. Cal.—Raker v. Bucher, 34 P. 654, 100 Cal. 214, rehearing denied 34 P. 849, 100 Cal. 214
57 C.J. p 1000 note 91.

71. Minn.—Breuer v. Elder, 22 N.W. 622, 33 Minn. 147
57 C.J. p 1000 note 92.

72. Minn.—Coykendall v. Way, 12 N.W. 452, 29 Minn. 162.
57 C.J. p 1000 note 93.

Failure of bank in which money deposited

A sheriff was not liable to amercement for the loss of money received by him from the sale of lands in partition and deposited by him, pending distribution, in a bank in a separate account to his credit as sheriff, where the money was lost by reason of the failure of the bank—Ikert v. Wells, 13 Ohio Cir.Ct.,N.S., 213, 32 Ohio Cir.Ct. 82, affirmed 92 N.E. 1117, 82 Ohio St. 401—National City Bank of Cleveland v. Crawfis, Com.Pl., 2 Ohio Supp. 52.

73. Mo.—State ex rel. and to Use of Dietrich v. Schade, App., 167 S.W. 2d 135

Purpose of such statute is to insure certainty and uniformity in procedure at execution sale and to deter officers from departing from definite procedure marked out, particularly with respect to handling of proceeds of sales—State ex rel. and to Use of Dietrich v. Schade, supra.

Statute held mandatory, and not merely directory

Mo.—State ex rel. and to Use of Dietrich v. Schade, supra.

74. Kan.—Kothman v. Prest, 8 P. 228, 34 Kan. 179
57 C.J. p 1000 note 94.

75. Me.—Eustis v. Kidder, 26 Me. 97.
57 C.J. p 1000 note 95.

76. Ill.—Shear v. Reynolds, 90 Ill. 238.
57 C.J. p 1000 note 96.

77. Ill.—Shear v. Reynolds, supra.
57 C.J. p 1000 note 97

78. **The purpose of the statute** is to shield the public from official extortion.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97.

79. N.H.—Crowley v. Hurd, 58 N.H. 75

80. **Opportunity to escape**

Where the prisoner was under surveillance and restraint all the time until delivered to the sheriff, and was not permitted to and did not attempt to go at large, the sheriff was not liable for the debt for permitting an escape under statute, because the giving of a mere opportunity to escape does not constitute an escape, which consists of gaining liberty before being delivered in due course of law.—Brady v. Hughes, 106 S.E. 829, 181 N.C. 234

81. Mo.—Duff v. Karr, 91 Mo.App. 16

82. N.Y.—Colton v. Mott, 15 Wend. 619.

83. S.C.—State v. Kennedy, 36 S.C.L. 160

84. N.C.—Horne v. Allen, 27 N.C. 36.
57 C.J. p 1000 note 6.

85. Miss.—State v. Nichols, 39 Miss. 318.

86. Ky.—Caldwell v. Holly, 1 A.K. Marsh. 429.

87. Miss.—State v. Nichols, 39 Miss. 318.

88. N.C.—Thompson v. Berry, 65 N.C. 484.

penalty of a fixed amount prescribed by the statute[89] or of an amount not exceeding a fixed statutory limit.[90] Under other statutes, however, the amount of the penalty for an official default is fixed with respect to the injury resulting or which may be assumed to have resulted therefrom;[91] and so, under particular statutes, an officer may be liable for a prescribed multiple of the value of exempt property levied on,[92] or for the amount of the debt for the collection of which the process issued,[93] or for the amount of the actual loss sustained by plaintiff in the value or availability of his security by reason of the acts or omissions of the officer.[94] Under still other statutes, interest at a specified rate, sometimes exceeding the ordinary legal rate, on the amount for which the officer's default has made him liable may be imposed on an officer as a penalty,[95] or he may be liable for a multiple of the amount of lawful interest on the amount collected on a writ and not paid over.[96]

It has been held that not more than one fine can be legally imposed on an officer for failing to return one execution.[97] Some statutes prescribing a penalty of a specified amount for each day for failure of an officer to release an execution against exempt wages have been construed to provide for a separate penalty of the specified amount for each day while the release is wrongfully withheld.[98]

Discretion of court. Where discretion is reposed in the court as to the amount of the amercement or penalty to be imposed on a sheriff or constable for an official default, such discretion must be exercised reasonably and not arbitrarily, and the fine must not be excessive.[99]

§ 175. Particular Matters Affecting Liability

a. Duty to act in general
b. Validity and regularity of judgment, process, or sale
c. Necessity of injury; collectability, payment, or satisfaction of debt or judgment
d. Receipt or nonreceipt of money by officer
e. Conflicting claims or proceedings
f. Innocent mistake
g Illness or incapacity of officer
h Termination of incumbency of office
i. Acts, omissions, or status of complaining party
j. Miscellaneous matters

a. Duty to Act in General

In the absence of any duty of a sheriff or constable to act under the particular circumstances involved, he may not be amerced or held liable for a penalty for an alleged default.

A sheriff or constable may not be amerced or held liable for a penalty for an alleged default where he was not under a duty to act under the particular circumstances involved.[1] Accordingly, he cannot be amerced for not executing process where the circumstances are such that he is not bound to execute it.[2] A statute imposing a penalty on an officer neglecting a pay over on demand money collected on execution has been held to apply only where it is his plain duty to pay, and his neglect is willful, and not where the right of plaintiff to the payment is doubtful.[3] Similarly, where a writ is delivered to an officer other than one of those to whom under the statute it should be directed, he is not liable to a statutory penalty for failure to return it.[4] An officer cannot be amerced for failing to file an inventory before it becomes his duty to file it.[5]

b. Validity and Regularity of Judgment, Process, or Sale

In order to authorize the amercement of a sheriff or constable, on the application of an execution plaintiff,

89. N C.—Graham v Sturgill, 31 S. E 705, 123 N C. 384.
57 C J. p 1001 note 24.

90. Ala—Patterson v. Gaston, 17 Ala 223
Minn.—Breuer v. Elder, 22 N.W. 622, 33 Minn. 147.

91. Ark—Hawkins v. Taylor, 19 S W. 105, 56 Ark 45, 35 Am S R 82
Neb—Crooker v. Melick, 24 N W. 689, 18 Neb. 227.

92. Colo.—Smith v. Pueblo Mercantile, etc, Assoc., 260 P. 109, 82 Colo. 364
57 C.J p 1001 note 28.

93. Ark—Hawkins v. Taylor, 19 S W. 105, 56 Ark. 45, 35 Am.S.R. 82.
57 C J. p 1001 note 30.

94. Neb—Ehlers v. Gallagher, 22 N. W.2d 396, 147 Neb. 97.
57 C J. p 1001 note 31.

95. Del—Smith v. Simmons, 46 A 746, 18 Del. 462.
57 C.J. p 1001 note 33.

96. Ill.—Custer v. Agnew, 83 Ill. 194.

97. Va—Tomkies v. Downman, 6 Munf. 557, 20 Va. 557

98. W.Va—State ex rel. Sabatino v. Richards, 34 S E.2d 271, 127 W.Va 703

99. Va—Bullock v. Goodall, 3 Call 44, 7 Va 44.

1. Ill—Custer v. Agnew, 83 Ill. 194.
N J.—Hoagland v. Todd, 37 N.J.Law 544.
Ohio—Levi v. The Steamboat Baltimore, 12 Ohio Dec, Reprint, 387, 2 Handy 172.

2. Ohio—Duncan v. Drakeley, 10 Ohio 45—Bereman v Xenia Bank, 1 Ohio Dec, Reprint, 218, 4 West.L.J. 500.
57 C.J p 1002 note 36.

3. Ill—Custer v. Agnew, 83 Ill 194.

4. Pa—Bachman v. Fenstermacher, 2 Pa Co. 499

5. N.J—Hoagland v. Todd, 37 N.J. Law 544.

for an alleged default with respect to the execution or return of a writ of execution, there must be a valid and enforceable judgment and a writ conforming to such judgment, and such officer may not be subjected to a penalty for a sale of property without due notice, where the sale is void because it is made under an invalid statute or where the sale is made under void process.

Where an execution plaintiff seeks to amerce a sheriff or constable for a default with respect to the execution or return of his writ he must show a valid and enforceable judgment[6] and an execution conforming strictly to such judgment.[7] Where an execution is null and void, an officer cannot be amerced for neglecting or refusing to make a return thereon;[8] and an officer may not be subjected to a charge in the nature of a penalty for failure to levy execution, where the writ of execution is so irregular because of noncompliance with statutory requirements that the officer is not required to make the levy.[9] It has been held, however, that the judgment must be void in order to avail the officer of relief from his liability for failure to return execution, in view of the fact that his attack on the judgment is a collateral one,[10] and that the fact that the judgment on which execution was issued was set aside as to some of the judgment defendants while the officer held the execution does not necessarily relieve the officer from liability for failure to make a return in due time.[11]

Where, by mistake of the clerk, certain costs are erroneously taxed and indorsed on an execution, the officer, after selling land under it, cannot be amerced for failing to pay over to the execution creditor the amount of such costs.[12]

Sale. A sheriff or constable does not incur a penalty provided by law for selling property without the required notice, if the sale is void in consequence of the unconstitutionality of the law under which it was made[13] or if the process under which the sale is made is void.[14] The fact that property levied on by a sheriff or constable is bid in by or for a prohibited person does not render the proceeding any the less a sale, so as to exempt the officer from the penalty for making a sale contrary to statutory provisions.[15]

c. Necessity of Injury; Collectability, Payment, or Satisfaction of Debt or Judgment

(1) In general
(2) Whether or not debt or judgment collectable
(3) Payment or satisfaction of debt or judgment; tender

(1) In General

Under some, but not under all, statutes, a sheriff or constable may be amerced or held liable for a penalty, notwithstanding the complaining party was not injured by the default in question.

A sheriff or constable cannot avoid amercement or the imposition of a penalty, under some statutes, for a failure to serve, execute, or return process by showing that the party at whose instance the process issued was not injured by his default[16] The rule does not apply, however, where the statute provides otherwise, either expressly or by implication.[17] Furthermore, there is authority for the view that, under some statutes, injury must be shown, even in the absence of provision to that effect.[18]

6. Okl.—Stein v. Scanlan, 127 P 483, 34 Okl. 801, 42 L.R.A.,N.S., 895 57 C.J. p 1002 note 39.

7. Okl.—Ridpath v. Lancaster, 286 P. 780, 142 Okl. 282. 57 C.J. p 1002 note 40.

8. N.C.—Bowen v. Jones, 35 N.C. 25, 55 Am.D. 426.

Writ held not invalid
Miss.—W. T. Rawleigh Co. v. Howell, 18 So.2d 134, 196 Miss 489.

9. Tex.—Warren v. Barron Bros. Millinery Co., 23 S.W.2d 686, 118 Tex. 659—Merrill v. Rose Mfg. Co., Civ.App., 78 S.W.2d 1075.

Premature issuance of alias execution to county other than where judgment recovered
Tex.—Merrill v. Rose Mfg. Co., supra.

10. Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.

Fact that judgment is erroneous does not relieve officer of liability if judgment is not void—McIntosh v. Munson Road Machinery Co., supra

Default judgment held not void
Miss.—McIntosh v. Munson Road Machinery Co., supra

11. Ark.—J. B. Pearson Flour & Feed Co. v. Pittman, 95 S.W.2d 1143, 192 Ark. 1062.

12. Kan.—Kothman v. Prest, 8 P. 228, 34 Kan. 179.

13. Mich.—Willard v. Longstreet, 2 Dougl. 172.

14. Cal.—Bellmer v. Blessington, 68 P. 111, 136 Cal. 3.

15. N.C.—Freeman v. Leonard, 6 S.E. 259, 99 N.C. 274.

16. N.D.—Lee v. Dolan, 158 N.W. 1007, 34 N.D. 449.
57 C.J. p 1004 note 67, p 816 note 62 [a].

Failure to sell property under execution
Kan.—Riffel v. Konecny, 88 P.2d 1077, 149 Kan. 533.

17. Iowa.—Enfield v. Blyler, 25 N.W. 251, 67 Iowa 295
57 C.J. p 1004 note 68.

"Party aggrieved"
Where sheriff failed to mark on execution the day of its receipt, as required by statute, and defendants had no property out of which judgment could be satisfied, and sheriff so returned on execution, sheriff was not liable for statutory penalty, recoverable by "the party aggrieved" under the terms of the statute, for failure to mark on execution the day of its receipt, since execution creditors were not damaged.—McInnis v. Parker, 184 So. 418, 183 Miss. 648

18. Tenn.—Cherry v. Kennedy, 232 S.W. 661, 144 Tenn. 320.
Tex.—Smith v. Perry, 18 Tex. 510, 70 Am.Dec. 295—Hackler v. H.

Escape. It has been held that immediate retaking and imprisonment of a debtor can be pleaded in bar of a suit for the penalty for his negligent escape, where the complaining party has not been prejudiced.[19]

(2) Whether or Not Debt or Judgment Collectable

The view has been taken that an absolute liability imposed by statute on a sheriff or constable for an official default may be enforced, even though the debt involved could not have been collected if there had not been a default; but it has been held or recognized, under some statutes, that such an officer may not be amerced for various defaults involving writs of execution, if there was no property of the judgment debtor out of the proceeds of which the claim covered by the writ could have been paid.

According to some authority, where a statute imposes on a sheriff or constable who is guilty of an official default in connection with the execution or return of process an absolute liability for the amount of debt, such liability cannot be reduced by showing that the debt could not have been collected even though there had been no default,[20] but it has been held or recognized that the mere fact that the officer does not collect the amount of an execution cannot subject him to amercement or to a penalty where it appears that the debtor had no property out of which the amount or any part thereof could have been made,[21] that it is a complete defense to a proceeding to amerce, or to impose a penalty on, an officer for failure duly to return an execution that the debtor had no property subject to execution during the life of the writ, and hence that the judgment creditor was not injured,[22] and that an officer cannot be amerced for failure to sell property attached or levied on where it appears that at the time of the levy the property was subject to a chattel mortgage for its full value[23] or was inadequate to pay more than the amount of a senior writ already levied thereon.[24] The mere fact, however, that there are prior liens on the property of defendant in execution does not relieve the officer of liability for failure to levy execution.[25]

It has been held or recognized that the mere insolvency of the judgment debtor does not necessarily relieve the officer of liability for failure to levy execution[26] or to return execution,[27] but it has also been held that the officer cannot be held liable for failure to levy on property or to make due return of execution, where nothing could have been realized because of the filing of a voluntary petition in bankruptcy by the defendant in execution,[28] and that the fact that the officer did not make a levy under, or due return of, an execution is not ground for amercement, where, at the time of the motion to amerce, enforcement of the judgment was barred by the discharge of the judgment debtor in bankruptcy proceeding.[29]

(3) Payment or Satisfaction of Debt or Judgment; Tender

While under some statutes a penalty for failure to return a writ may be imposed on a sheriff or constable notwithstanding the debt has been paid after the return

Kohnstamm & Co. of Texas, Civ. App., 227 S.W.2d 347

Failure to complete execution

A sheriff may not be amerced for failure to complete an execution where no injury has resulted, if he has acted in good faith and has made a return on the execution within the time prescribed by statute—Mine Safety Appliances Co. v. Best, Ohio Com Pl., 76 N.E.2d 108

19. N C—Brady v. Hughes, 106 S.E 829, 181 N C 234

20. N Y.—Rutzkowski v George, 36 N Y S 762, 92 Hun 412
57 C.J p 1003 note 48

21. Tex—Hackler v H Kohnstamm & Co. of Texas, Civ App., 227 S.W. 2d 347.
57 C J p 1003 note 49

22. Neb—Ehlers v. Gallagher, 22 N W 2d 396, 147 Neb 97
Tex—Hackler v H Kohnstamm & Co of Texas, Civ App, 227 S W 2d 347
57 C J p 1004 note 70

No property in county

Sheriff cannot be amerced for failure to make return on execution placed in his hands for levy, where there is no property belonging to judgment debtor in sheriff's county subject to levy—Sioux Falls Corrugating Co v. Gurius, 259 N.W 275, 63 S D 385.

23. Neb—Shufeldt v Barlass, 51 N W 134, 33 Neb. 785.

24. S C.—Townsend v. Kleckley, 38 S C L. 206.

25. Tex—Smothers v. Field, Thayer & Co, 65 Tex 435—Hackler v. H Kohnstamm & Co of Texas, Civ. App, 227 S W 2d 347.

Reason for rule

Equity of redemption of defendant in execution is subject to his debts, and plaintiff in execution has right to have that sold for what it will bring and proceeds applied to payment of his judgment—Smothers v Field, Thayer & Co, 65 Tex. 435—Hackler v. H Kohnstamm & Co. of Texas, Civ App., 227 S W.2d 347.

26. Tex—Hackler v H Kohnstamm & Co of Texas, supra—Webb v First Texas Chemical Mfg Co, Civ App, 86 S W 2d 818—Roos v Garner, Civ App, 45 S.W 2d 633—B F Goodrich Rubber Co v. Valley Plumbing & Supply Co, Civ App, 267 S.W. 1036.

27. Tex—Vaughan v Warnell, 28 Tex 119—Griswold v. Chandler, 22 Tex 637.

28. Tex—Richardson v. Johnson-Layne Co, Civ.App., 252 S W. 253

29. Kan—Flowers v. Gray, 225 P.2d 94, 170 Kan 266.

Exempt or nonexempt property

(1) The rule stated in the text applies whether or not the property involved is exempt property—Flowers v. Gray, supra.

(2) In an amercement proceeding in which the judgment involved was based on a work and labor claim, where it appeared that the enforcement of judgment was barred by reason of discharge of judgment debtor in bankruptcy, contention that, since judgment debtor made no appearance in state court since judgment was rendered against him, and that at no time could he have asserted that his exempt property could not be taken in execution and, sheriff could not raise such question was erroneous—Flowers v. Gray, supra.

date, there is authority for the view that the amercement of such an officer for failure to levy an execution may properly be denied where the debt or judgment for the collection or enforcement of which the execution was issued has been satisfied.

Under some statutes a penalty for the failure of a sheriff or constable to return a writ may be imposed notwithstanding the payment of the debt after the return day,[30] and, where an officer fails to return an execution within the proper time and a defendant surety pays the amount thereof to plaintiff, the latter does not lose his right to recover the penalty imposed by statute on the officer for his failure by allowing the motion against the officer for such penalty to be carried on for the benefit of the surety.[31] The view has been taken, however, that the amercement of an officer for failure to levy an execution is properly denied where it appears that the debt or judgment for the collection or enforcement of which the execution issued has been in fact satisfied,[32] especially where it further appears that the judgment has been duly canceled or an entry of satisfaction has been made by plaintiff,[33] and that the acceptance by plaintiff of the amount collected by an officer on an execution absolves such officer from amercement for failing to return such execution.[34] It seems that an officer may escape a fine for a false return, in not returning property attached and sold as perishable, by showing that the proceeds were paid to the attachment plaintiff.[35] A tender of the amount due on a writ, if not accepted, does not discharge the officer from liability for a penalty for failing to make a return.[36]

d. Receipt or Nonreceipt of Money by Officer

A sheriff or constable is not subject to amercement for a failure to pay over the proceeds of property which has properly been sold on credit under a writ, where the purchase price has not been paid to him, or he has received a check or note which has not been paid, but his liability for a penalty for making a sale without authority or for selling property which is not subject to sale is not affected by the fact that he has not received the purchase price.

A sheriff or constable who has sold property under a writ cannot be amerced for failure to pay over the proceeds where the property was properly sold on a credit and the purchase money has not been paid to him,[37] or where he has received only a check[38] or note[39] which has not been paid. The fact, however, that a sale was on credit and that the officer has received no money does not affect his liability for a penalty for making a sale without authority or selling property not subject to be sold.[40]

Return showing receipt of money. It has been held that a penalty imposed by statute on sheriffs and constables for a failure to pay over money is recoverable only when by his return the officer has admitted the collection of money, and refuses to pay it over, and not where he has returned nulla bona,[41] but there is also authority, to the contrary, that a return admitting the receipt of money is not a condition precedent to the imposition of a penalty, and that the fact that the money has been received by the officer may be established by other evidence.[42]

e. Conflicting Claims or Proceedings

Under some, but not under all, circumstances, a sheriff or constable is not subject to amercement or to the imposition of a penalty for failure to pay over the proceeds of property or to levy on, or to sell, property under a writ of execution, where there are conflicting claims or proceedings with respect to such proceeds or property.

Generally a statutory penalty for the failure of a sheriff or constable to pay over money is not recoverable where the failure is caused by the fact that there are conflicting claims to such money which the officer cannot determine and which have not been determined by the courts,[43] and it has been held that, where a sheriff or constable who has collected money on execution is notified not to pay it over to plaintiff, and a motion for that purpose is made in court, the officer is not liable to a penalty for not paying the money to plaintiff until the decision of such motion.[44] A sheriff or constable who has been enjoined from paying over money cannot be amerced for his failure to make such payment.[45]

30. Tenn.—Smith v. Van Bebber, 1 Swan 110—Planters' Bank v. Porter, 10 Humphr. 316.

31. Ky.—Sanders v. Commonwealth Bank, 2 Metc. 327.

32. Ala.—Freeman v. Womack, 4 Ala. 539
57 C.J. p. 1003 note 52.

33. Kan.—Union Stove, etc., Works v. Caswell, 32 P. 362, 50 Kan. 787
Tenn.—Young v. Donaldson, 2 Heisk. 52.

34. Kan.—Graves v. Bulkley, 25 Kan. 249, 37 Am.R. 249.

35. Miss.—Garrett v. Hamblin, 19 Miss. 241

36. Tenn.—Chaffin v. Crutcher, 2 Sneed 360
57 C.J. p. 1003 note 56.

37. Ohio.—Langdon v. Summers, 10 Ohio St. 77.

38. Ohio.—In re Worstall, 8 Ohio S. & C.P. 264, 6 Ohio N.P. 525.
57 C.J. p. 1002 note 44

39. Ohio.—Shewry v. Shewry, 6 Ohio N.P., N.S., 238

40. Ill.—McCluskey v. McNeely, 8 Ill. 578.

41. Cal.—Egery v. Buchanan, 5 Cal. 53.

42. Nev.—Nash v. Muldoon, 16 Nev. 404.

43. Cal.—Johnson v. Gorham, 6 Cal. 195, 65 Am.D. 501.
57 C.J. p. 1003 note 57.

44. Mo.—Conway v. Campbell, 11 Mo. 71.

45. Ohio.—Langdon v. Summers, 10 Ohio St. 77.

Attachment of money in officer's hands. Where an execution commands a sheriff or constable to make the money, and have it before the court on the return day to satisfy plaintiff, he cannot protect himself against a motion to amerce for failure to have the money by showing that a foreign attachment has been served on him,[46] nor can an officer who has received satisfaction of an execution escape liability for failure to pay over the money on the ground that by direction of the debtor he has attached it on a writ in favor of the debtor against the creditor.[47]

Claim of exemption. An officer cannot be amerced for failure to levy on and sell the property of a judgment debtor under a writ of execution, where such debtor had given timely notice that the property on which levy was contemplated was his homestead.[48]

Claim of third person to property. The fact that property found in the possession of a defendant in execution and levied on by a sheriff or constable is claimed by a third person will not prevent the amercement of the officer for refusing to sell the property at the request of plaintiff, where he asks no indemnity of plaintiff, and takes no measure to secure himself against such claim;[49] but where, on an adverse claim to property levied on being made, the officer asks for instructions from plaintiff's attorneys, which are promised him, he is not liable to amercement for not selling until he has disobeyed or disregarded positive, reasonable, and lawful directions to that end.[50]

Proceedings for appointment of receiver. It has been held that an officer is not subject to amercement for failure to complete an execution, where such failure results from his belief in good faith that an application for the appointment of a receiver of the property of the judgment debtor abated the execution process in his hands.[51]

f. Innocent Mistake

While it has been held that a sheriff or constable may be subject to a penalty for making a return which is false in fact, notwithstanding the return was made as the result of an innocent mistake, it has also been held or recognized that such an officer may not be amerced or penalized for various alleged defaults which resulted from such a mistake.

There is authority for the view that a return of process made by a sheriff or constable which is false in fact will subject him to the penalty for a false return, even though it was made through mistake, without any criminal intent.[52] It has, however, been held that an officer is not liable to amercement for applying money collected in satisfaction of the wrong execution, where he was not influenced by corrupt or personal motives,[53] or for a mistake in the application of money, without gross carelessness, and where none of the money is in the officer's hands,[54] and that an officer who, acting in good faith and with the intention of returning a writ, by mistake mails it to the wrong person is not liable to the penalty prescribed for failure to return process.[55]

g. Illness or Incapacity of Officer

The physical disability of a sheriff or constable to perform the duties of his office does not prevent his amercement for failure to make a return in due time, if, at the pertinent time, he had a deputy.

While there is apparent authority for the view that the fact that the failure of an officer to return an execution at the proper time has been caused by his illness may relieve him from a statutory penalty for the default,[56] it has been held that the physical disability of the officer to perform the duties of his office does not excuse failure to make a return in due time so as to prevent amercement, where such officer was, at the pertinent time, provided with a deputy.[57]

h. Termination of Incumbency of Office

A sheriff or constable may be amerced, after his incumbency of office has terminated, for an official default which occurred during incumbency; but he may not be amerced for failure to return a writ if he had not commenced to execute such writ and his incumbency terminated before the return day.

A sheriff or constable who is guilty of an official default while in office may be amerced therefor after his incumbency has terminated by expiration of his term or otherwise;[58] but where an officer

46. Ohio—Dawson v Holcomb, 1 Ohio 275, 13 Am D 618.

47. Mass—Thompson v. Brown, 17 Pick 462.

48. Kan.—Brooks v Marquess, 139 P.2d 395, 157 Kan 244.

49. N J—Harris v. Kirkpatrick, 35 N J.Law 392.
57 C J. p 1003 note 64.

50. N.J—Kemble v. Harris, 36 N.J. Law 526.

N D—Solberg v. Rettinger, 168 N.W. 572, 40 N.D 1.

51. Ohio—Mine Safety Appliances Co v. Best, Com Pl, 76 N E 2d 108

52. N C—Finley v. Hayes, 81 N.C. 368.
57 C J p 1004 note 73.

53. Tex—McMahan v. Hall, 36 Tex 59

54. Nev—Nash v. Muldoon, 16 Nev 404—Giffin v. Smith, 2 Nev. 374.

55. Ky.—Thompson v. Ross, 1 J J Marsh. 600.

56. Ky.—Bruce v. Dyall, 5 T.B Mon. 125.

57. N D—Farmers' State Bank of Van Hook v Crandell, 236 N W 264, 60 N.D. 619.

58. Kan—Armstrong v. Grant, 7 Kan. 285
57 C.J. p 1006 note 7.

who has not commenced to execute a writ goes out of office before the return day he is not subject to amercement or to a penalty for failure to return it.[59]

i. Acts, Omissions, or Status of Complaining Party

(1) In general
(2) Necessity and sufficiency of demand
(3) Ratification or waiver

(1) In General

Generally a sheriff or constable may not be amerced for an alleged official default which resulted from, or was induced by, acts or omissions of the complaining party.

As a general rule, a sheriff or constable is not subject to amercement or to the imposition of a penalty for an act or omission to which the complaining party has consented,[60] or to which an act of such party contributed directly or indirectly,[61] or for an act or omission constituting the alleged default which was in accordance with such party's instructions or was induced by him,[62] or for an improper act or course of proceeding where the impropriety thereof resulted from facts within the knowledge of such party but not of the officer and of the existence of which he was not notified.[63] So also, a sheriff or constable will not be amerced where the interference of the complaining party has prevented him from discharging his duty.[64] A sheriff or constable cannot be amerced for failure to pay over money to a person of whose rights he had no notice.[65] It has been held, however, that directions or instructions by plaintiff in a writ to a sheriff or constable not to proceed with the collection of the debt or the execution of the writ do not justify the officer in failing to return the writ, and that he may accordingly be amerced for such failure.[66]

Failure to furnish indemnity. When a sheriff or constable is entitled to indemnity before proceeding further in the execution of process, and has demanded it, he cannot be amerced for not proceeding if the indemnity is not furnished.[67] It has been held that, regardless of the propriety of the officer's demand for a bond, the complaining party loses his right to charge such officer with a penalty for failing to return an execution, by accepting the writ from the officer and thus preventing the latter from correcting his mistake, if any,[68] and that the judgment creditor's failure to reply to, or to act on, the sheriff's demand for indemnity before levying execution may excuse the sheriff's failure to make a due return.[69]

Issuance of second or subsequent writ. A sheriff or constable is not relieved from the penalty for failure to return an execution at the proper time by the fact that an alias execution has been issued on which he has collected the money;[70] but where plaintiff, with knowledge of the facts, issues process which is necessarily dependent on, and subsequent to, former process which has been improperly executed or irregularly returned, he thereby loses the right to amerce the officer for the default.[71]

Fraudulent or insufficient claim of exemption. A sheriff or constable cannot be subjected to a statutory penalty for levying on exempt property where the claim of exemption is fraudulent.[72] Similarly, where a debtor is entitled to select property up to the amount of his exemption, provided he turns over all the remainder of his property to be levied on, he cannot recover a statutory penalty for levying on property selected by him as exempt where he has not so offered to turn over the balance of his property.[73]

Residence of complainant. A debtor is not precluded from recovering the statutory penalty from

Failure to levy

A former sheriff may be held liable, under some statutes, for failure to execute an order of sale during his incumbency of office, notwithstanding such incumbency terminated before the return day of such order—Blanscet v. Palo Duro Furniture Co, Tex.Civ.App, 68 S.W 2d 527.

59. Miss.—W. T. Rawleigh Co v. Hester, 200 So 250, 190 Miss. 329.
57 C J p 1006 note 8.

60. Miss.—Simms v. Quinn, 58 Miss. 221.
57 C J p 1005 note 88.

61. Miss—Crawford v. Bank of Seminary, for Use of Williams, 172 So. 750, 178 Miss. 129.

62. N.D—Farmers' Nat Bank v Wright, 209 N.W. 796, 54 N D. 422
57 C J. p 1005 note 95.

63. N C.—Thompson v. Berry, 65 N C 484.
57 C J. p 1005 note 92.

64. Kan—**Corpus Juris quoted in** Riffel v Konecny, 88 P.2d 1077, 1081, 149 Kan 533
N J—Stryker v Merseles, 24 N.J Law 542

65. N J.—State v. Judges of Inferior Ct. Com Pl, 10 N.J Law 319
57 C.J. p 1005 note 85.

66. N C.—Morrow v. Allison, 33 N C. 217.

67. N J.—Weller v. Lanning, 41 N.J Law 477
Okl.—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55—First State Bank of Lovell v Graybeal, 37 P 2d 912, 169 Okl 543

68. Miss—Crawford v. Bank of Seminary, for Use of Williams, 172 So 750, 178 Miss. 129.

69. Miss—W T. Rawleigh Co v. Foxworth, 11 So 2d 919, 194 Miss 205

70. N C.—Turner v. Page, 16 S E 174, 111 N.C. 291.

71. N J.—Hustick v. Allen, 1 N.J. Law 195.
57 C.J. p 1004 note 81

72. Colo—Yates v Gransbury, 12 P 206, 9 Colo 323.
57 C J. p 1006 note 4

73. Ill—Udell v. Howard, 28 Ill App 124.

a sheriff or constable for selling on execution property exempt under the law by the fact that he lives in a county other than that in which the levy on his property was made.[74]

(2) Necessity and Sufficiency of Demand

Under some statutes a demand is essential in order to render a sheriff or constable liable for a penalty for failure to pay over money, but, in the absence of a statutory provision requiring demand, a demand is not essential to authorize amercement for failure to return process.

Under some statutes a demand on a sheriff or constable is necessary to render him liable to a penalty for failure to pay over money[75] or for failure to give to a person arrested a copy of the process under which he is detained,[76] and, where the penalty is in the form of interest, such interest on money collected can be computed only from the time of the demand made.[77] In the absence of a statutory requirement of demand, no demand is necessary in order to justify amercement for failure to return process.[78] Under some statutes a demand for a copy of process must be made by or in behalf of the person held or detained under it,[79] and a demand for money must be made by a person having authority to receive such money and to execute a legal and valid discharge to the officer.[80] The institution of a suit against an officer for money collected by him is a demand therefor.[81] A demand for an amount greater than that claimed in a suit therefor, and much greater than that found due by the court, is not sufficient to justify the court in imposing a penalty for failure to pay over money.[82]

(3) Ratification or Waiver

An execution plaintiff who has ratified acts with respect to the writ or has waived a default of a sheriff or constable may not thereafter obtain amercement for such acts or default.

An execution plaintiff who has ratified the acts of a sheriff or constable with respect to the writ[83] or waived a default of a sheriff or constable[84] cannot subsequently procure his amercement because of such acts or default.

j. Miscellaneous Matters

Various other matters or circumstances have been regarded as sufficient to prevent, or as insufficient to authorize, amercement of, or penalizing, a sheriff or constable for an alleged default.

Where a sheriff or constable deposits a duly executed return of process in the United States mails, in a cover properly addressed to the clerk of the court to which such process is returnable, in time to reach such clerk in ordinary course on the return-day, the failure of such return to reach the addressee until after the return-day does not subject the officer to amercement for failing to make return at the proper time.[85] A statute imposing a penalty on a sheriff or constable for the seizure of exempt property has been held not to apply to a mere seizure, in the absence of some act equivalent to a conversion of the property,[86] so that an officer cannot be amerced where, on demand, he returns, or tenders the return of, property so seized.[87] It has been held that an officer is not liable for a penalty for having served a writ without having given a bond, where a bond which was binding on the obligors had actually been given, although the public officials who approved the bond signed in the wrong place[88] or although changes were made in the signatures after the writ was served.[89] In view of the fact that a statute imposing a penalty on an officer for taking excessive fees is to protect the public from official extortion, it does not apply to a voluntary payment.[90] A statute providing for the imposition of a fine on a sheriff or constable for a palpable omission of duty or for willful or corrupt malfeasance or partiality in the discharge of his official duties has been held not to apply to an act as to the propriety of which differences of opinion honestly exist.[91] Under a statute providing that a sheriff or constable against whom a judgment is rendered for a delinquency shall forfeit and pay a prescribed sum, to be recovered at the same time for the use of the county, the judgment for the penalty is only an incident to the principal judgment against the officer, and, on reversal of the latter judgment, the judgment for

74. Ill.—McCluskey v. McNeely, 8 Ill. 578

75. Cal.—Shumway v. Leakey, 14 P. 841, 73 Cal. 260
57 C.J. p. 1000 note 8.

76. Mo.—Duff v. Karr, 91 Mo. App. 16

77. Mo.—State v. Cayce, 85 Mo. 456
57 C.J. p. 1001 note 11

78. N.D.—Solberg v. Rettinger, 168 N.W. 572, 40 N.D. 1.

79. Mo.—Duff v. Karr, 91 Mo. App. 16
57 C.J. p. 1001 note 13.

80. Me.—Bulfinch v. Balch, 8 Me. 133

81. Mo.—State v. Cayce, 85 Mo. 456.

82. Cal.—Shumway v. Leakey, 14 P. 841, 73 Cal. 260

83. N.J.—Waterman v. Merrill, 33 N.J. Law 378.
57 C.J. p. 1005 note 97.

84. N.J.—Scott v. Dow, 14 N.J. Law 350.
57 C.J. p. 1005 note 98, p. 1004 note 81 [a]

85. Kan.—Reese v. Rice, 41 P. 218, 1 Kan. App. 311

86. Colo.—Madera v. Holdrege, 35 P. 52, 4 Colo. App. 126

87. Colo.—Madera v. Holdrege, supra

88. Me.—Fournier v. Cyr, 64 Me. 32.

89. Me.—Fournier v. Cyr, supra.

90. Neb.—Ehlers v. Gallagher, 22 N.W. 2d 396, 147 Neb. 97.

91. Neb.—Ehlers v. Gallagher, supra.

the penalty falls with it.[92] Where, pending proceedings to amerce a sheriff or constable, the statute providing for the amercement is repealed without any saving clause as to pending suits, the penalty falls with the law and cannot be enforced.[93]

§ 176. Proceedings

a In general
b Jurisdiction and time for proceeding
c Notice or process
d Parties
e Pleading
f. Evidence
g. Trial or hearing
h. Judgment or order
i. Review

a. In General

The mode of proceeding prescribed by a statute providing for amercement must be pursued in order to obtain the amercement of a sheriff or constable for an official default.

No mode of proceeding to procure the amercement of a sheriff or constable for an official default may be pursued other than that prescribed by the statutes providing for such amercement.[94] Ordinarily it is proper to proceed summarily, as by notice or motion,[95] but a penalty based on the amount of plaintiff's loss or damage has been said to be recoverable by action,[96] although it has also been held that penalties prescribed by statute for failure of a sheriff or other officer to do certain acts cannot be inflicted in an independent action.[97]

Pendency of civil action. It has been held that a summary proceeding for the amercement of a sheriff or constable cannot be instituted during the pendency of a civil action brought by complainant against the officer in which all the matters relating to the default will be inquired into and every object attained for which the summary proceeding was intended.[98]

Who may proceed to enforce liability. Under a statute providing that the party aggrieved by the default of an officer may proceed for amercement, a purchaser at an execution sale is not a party aggrieved within a statute imposing a penalty on an officer for selling real property without notice,[99] and some statutes do not authorize a proceeding to enforce liability for failure to make a return to be brought by an execution debtor[1] or by defendant in replevin.[2] Where, on a sale under a decree in foreclosure, the price obtained is sufficient only to pay the prior liens, the holder of a subsequent lien has no claim against the officer for amercement.[3]

b. Jurisdiction and Time for Proceeding

Except as provided otherwise by statute, jurisdiction of a proceeding to amerce a sheriff or constable is vested in the court from which the writ involved in the alleged default issued. Such a proceeding must be brought within the time prescribed by statute.

Except as provided otherwise by statute,[4] the jurisdiction of a proceeding for the amercement of a sheriff or constable belongs to the court out of which issued the process in respect of which occurred the default on which the proceeding is founded.[5]

Where the time within which proceedings to amerce a sheriff or constable is to be brought is prescribed by statute, a proceeding not brought within such time is barred,[6] but, in the absence of any statute of limitations applying in terms to amercement proceedings, it has been held that an officer's liability to amercement continues indefinitely, or at least until the lapse of such time as would raise a presumption of payment.[7] Under a statute imposing a separate penalty of a separate amount for

92. N.C.—Buchanan v. McKenzie, 53 N.C. 93.

93. Ala.—Broughton v. Mobile Branch Bank, 17 Ala. 828.
Ind.—State v. Youmans, 5 Ind. 280.

94. N.C.—Walker v. Odom, 118 S.E. 2, 185 N.C. 557.

95. Okl.—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55
57 C.J. p. 1006 note 11.

96. Vt.—Smith v. Pike, 44 Vt. 61
Nature of civil action
The proceedings on a motion to amerce a sheriff are in the nature of a civil action.—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55.—Fenton v. White, 47 P. 472, 4 Okl. 472

97. Miss.—Caperton v. Winston County Fair Ass'n, 153 So. 801, 169 Miss. 503

98. N.Y.—People v. Dole, 1 Cai. 181

99. Cal.—Kelley v. Desmond, 63 Cal. 517.

1. Ky.—Sanders v. Commonwealth Bank, 2 Metc. 327.
Proceeding in name of execution plaintiff
Execution debtor was not entitled to maintain a proceeding in the name of the execution plaintiff.—Fletcher v. Chapman, 2 Leigh 560, 29 Va. 560

2. Tenn.—Whitsett v. Wright, 291 S.W. 447, 155 Tenn. 207

3. Neb.—Russell v. Grimes, 44 N.W. 107, 27 Neb. 812, 48 N.W. 905, 31 Neb. 784.

4. Ala.—Evans v. Stevens, 8 Ala. 517
57 C.J. p. 1006 note 20

5. Kan.—Reynolds v. Nelson, 19 P. 353, 40 Kan. 41.
57 C.J. p. 1006 note 21.
Justice of peace
Jurisdiction to recover a penalty for failure to return an execution was held confined to the justice of the peace who issued the execution.—Evans v. Stevens, 8 Ala. 517

6. Kan.—Fuller v. Wells, 22 P. 561, 42 Kan. 551.

7. Ohio.—State v. Crowell, 1 Ohio Dec., Reprint, 41, 1 West L.J. 305

each day the officer fails to release an execution against exempt wages, it has been held, with respect to the running of limitations, that a right of action for each separate penalty accrues each day while the release is wrongfully withheld.[8] It is not necessary that a proceeding founded on failure to return process shall be at the term to which the process is returnable, but it may be at a subsequent term;[9] and an officer who fails to sell property levied on may be amerced at a term after that to which the execution is returnable.[10]

c. Notice or Process

A sheriff or constable should be given due notice of a proceeding for his amercement.

A sheriff or constable is entitled to notice of proceedings for his amercement[11] for such time as may be prescribed by statute,[12] and a judgment of amercement is without validity where proper notice has not been given or process served[13] unless the want of notice or process has been waived.[14] A notice of a motion to amerce to be made on a day specified, which is a legal holiday, "or as soon thereafter as the court can attend to the same," has been held a good notice for the day succeeding the one designated.[15] A notice of an amercement proceeding is operative from the time of service,[16] and has been held good without a date[17] or with an impossible date.[18] Any irregularity in a notice is waived by the taking of testimony under the notice and the adjournment of the hearing without objection.[19] Unless provided otherwise by statute, such notice must be served personally on the officer,[20] and proof of mailing it to him is not sufficient.[21]

d. Parties

Who are proper or necessary parties to a proceeding to amerce, or to impose a penalty on, a sheriff or constable depends largely on the terms of the statute providing for the proceeding.

A proceeding to amerce a sheriff or constable for a false return on a writ in which two persons are plaintiffs may be instituted by such plaintiffs jointly,[22] and a proceeding for a penalty for making deliverance of property under a writ of replevin before trying the validity of a claim interposed must be brought in the names of all those making the claim.[23] It has been held that an action to recover from an officer the penalty for neglecting to note on process the day of receiving it must be brought in the name of the state,[24] and an action against an outgoing officer for a statutory penalty for refusal to turn over to his successor all the books, furniture, etc., appertaining to the office must be brought by and for the state, and not by or for any private person, or through the means of a qui tam action.[25] The makers of a bond indemnifying an officer from the consequences of paying out an execution fund to them are entitled to contest the right of plaintiffs, who claim the fund, to recover the statutory penalty from such officer for failure to pay over the fund to them.[26] In an action to recover a penalty for levying on exempt property, under a statute giving such penalty only against the officer, plaintiff in the execution cannot be made a party.[27]

e. Pleading

Under some statutes pleadings are not required in a proceeding to amerce a sheriff or constable for an official default, but it has been held or recognized, where something in the nature of a declaration or complaint is essential, that the complaining party must allege a default within the terms of the statute or facts showing liability.

Under some statutes no pleadings are necessary in a proceeding to amerce a sheriff or constable for an official default.[28] Where, however, the notice takes the place and performs the office of the declaration in an action at common law, it must set out the cause of complaint with the same cer-

8. W.Va.—State ex rel. Sabatino v. Richards, 34 S.E.2d 271, 127 W.Va. 703

9. N.C.—Hyatte v. Allison, 48 N.C. 533—Halcombe v. Rowland, 30 N.C. 240.

10. N.J.—Lorillard v. Welsted, 8 N.J.Law 271.
57 C.J. p. 1007 note 26

11. Neb.—Philadelphia Fire Assoc. v. Ruby, 79 N.W. 723, 58 Neb. 730.
57 C.J. p. 1007 note 29.
Rule nisi in summary proceeding see supra § 170.

12. Ohio.—Woodbury v. Berry, 18 Ohio St. 456.

13. Neb.—Philadelphia Fire Assoc. v. Ruby, 79 N.W. 723, 58 Neb. 730.
57 C.J. p. 1007 note 31.

14. Ark.—Hawkins v. Taylor, 19 S.W. 105, 56 Ark. 45, 35 Am.S.R. 82.
57 C.J. p. 1007 note 32

15. N.J.—White v. Rockafellar, 45 N.J.Law 299

16. N.J.—Scott v. Dow, 14 N.J.Law 350.

17. N.J.—Scott v. Dow, supra.

18. N.J.—Scott v. Dow, supra.

19. N.J.—White v. Rockafellar, 45 N.J.Law 299

20. N.J.—Anonymous, 6 N.J.Law 159

21. N.J.—Melvin v. Purdy, 17 N.J.Law 162—Anonymous, 6 N.J.Law 159.

22. N.C.—Houser v. Hampton, 29 N.C. 333.

23. N.Y.—Colton v. Mott, 15 Wend. 619
57 C.J. p. 1007 note 45.

24. N.C.—Duncan v. Philpot, 64 N.C. 479.

25. S.C.—State v. Kennedy, 36 S.C.L. 160

26. Tex.—Rickards v. Bemis, Civ. App., 78 S.W. 239.

27. Ill.—Pace v. Vaughan, 6 Ill. 30

28. Ohio.—Wadsworth v. Parsons, 6 Ohio 449.
Pleading by officer is not required in summary proceeding by motion for his amercement.—Riddle v. Bishop, 79 P.2d 801, 183 Okl. 55.

tainty, although not necessarily with the same formality, as would be required in a declaration,[29] and must set forth a default within the terms of the statute providing for amercement.[30] It has been held or recognized that, where a petition or moving papers are necessary, they must set forth facts showing the liability of the officer,[31] and it has been held that the statute under which a penalty is sought to be recovered must be specially pleaded,[32] but there is also authority, to the contrary, that a pleading is sufficient without referring to the statute where it alleges facts rendering the officer liable and prays judgment for an amount equivalent to the statutory penalty.[33] Some statutes do not require the complaining party to make an allegation of damages sustained.[34] The officer may properly set forth, by plea, the facts on which he relies as a defense,[35] and under some statutes he must allege matters relied on to relieve him of liability for an apparent default.[36] Where the statute contemplates summary proceedings rather than a civil action, a summons and complaint in an action to recover the statutory penalty cannot be treated as a motion in the original cause where that is pending in a different court.[37]

Issues, proof, and variance. Under some statutes it is not essential to make up formal issues in a proceeding for amercement.[38] Where payment of the debt is a defense to a proceeding for the amercement of a sheriff or constable, or relieves him from liability, it seems that evidence of such payment before the institution of the proceeding is admissible without a special plea of the fact,[39] and that evidence of payment after the proceeding was instituted is admissible where properly pleaded.[40] Some statutes do not require proof of damages sustained by the complaining party,[41] and such party need not prove facts which are admitted by defendant officer's pleading.[42] Any but the slightest variance between the notice of a motion to amerce and the motion itself is fatal.[43]

Waiver of objection. Plaintiff in a proceeding to amerce an officer waives his right, if any, to base an objection on the failure of defendant officer to plead, in such officer's response to the motion to amerce, a particular defense, by proceeding to the trial of the case without objection, as though the defense had been pleaded,[44] or, for example, by failure to object to the admission of evidence in support of the defense.[45]

f. Evidence

Subject to some qualifications based on the nature of the proceeding, general rules as to evidence apply in a proceeding to amerce, or to impose a penalty on, a sheriff or constable for an official default.

In proceedings to amerce, or to subject to a penalty, a sheriff or constable for an official default, the complaining party must prove affirmatively every essential element of his right to recover.[46] While it has been held, under some statutes, that the complaining party has the burden to show that he has been damaged by the alleged default,[47] where the complaining party has established a prima facie case against the officer under the statute, the latter has the burden to prove facts relied on to relieve him of liability,[48] as, for example, that no injury

29. N J.—Ritter v. Merseles, 24 N J. Law 627.
57 C J p 1007 note 36.

30. N J —Ritter v. Merseles, supra
56 C.J. p 1007 note 37.

31. Miss —W. T. Rawleigh Co v Hester, 200 So. 250, 190 Miss 329
57 C J p 1008 note 54

Presumption of performance of official duty was held unavailable to aid an insufficient motion.—W. T. Rawleigh Co. v. Hester, supra.

Motion held sufficient against general demurrer
Tex —Blanscet v. Palo Duro Furniture Co., Civ App, 68 S.W 2d 527.

32. Ill.—Pace v Vaughan, 6 Ill. 30

33. Colo —Madera v. Holdrege, 35 P. 52, 4 Colo App. 126.

34. Miss.—W. T. Rawleigh Co. v Hester, 200 So. 250, 190 Miss. 329.

35. Ala —Spenney v. Sorrell, 68 So. 547, 12 Ala.App. 650.

36. Tex.—Blanscet v. Palo Duro Furniture Co., Civ.App., 68 S.W.2d 527—Roose v Garner, Civ.App, 45 S W.2d 633.

37. N C —Walker v. Odom, 118 S.E. 2, 185 N.C. 557.

38. Ohio —Wadsworth v. Parsons, 6 Ohio 449.

Answer and reply superfluous
Under statute contemplating proceeding in amercement on motion of aggrieved party, answer and reply filed after motion to amerce sheriff could probably be regarded as superfluous —Riffel v. Konecny, 88 P.2d 1077, 149 Kan. 533.

39. Cal.—Glascock v. Ashman, 52 Cal. 493.

40. Cal.—Glascock v. Ashman, supra.

41. Miss —W. T. Rawleigh Co. v Hester, 200 So. 250, 190 Miss. 329.

42. N.D —Lee v. Dolan, 158 N.W. 1007, 34 N D. 449
57 C.J. p 1008 note 68.

43. Ohio —Webb v. Anspach, 3 Ohio St. 522.

44. Okl —Riddle v. Bishop, 79 P.2d 801, 183 Okl 55

45. Okl —Riddle v. Bishop, supra

46. Kan —Riffel v. Konecny, 88 P 2d 1077, 149 Kan. 533.
Miss —W T Rawleigh Co. v Hester, 200 So 250, 190 Miss. 329.
57 C J p 1008 notes 66, 67, 69.

Delivery of writ of execution to officer before return-day
Miss.—W T. Rawleigh Co. v. Causey, 16 So 2d 397, 195 Miss. 842—W. T. Rawleigh Co. v. Causey, 16 So 2d 395, 195 Miss. 835.

47. Neb —Ehlers v. Gallagher, 22 N.W 2d 396, 147 Neb. 97

48. Tex —Webb v. First Texas Chemical Co, Civ App, 86 S W 2d 818—Roos v. Garner, Civ App., 45 S.W.2d 633—Ellis v. Blanks, Civ. App., 25 S.W. 309.

Insolvency of judgment debtor during pertinent time
Tex —Webb v First Texas Chemical Co., Civ App., 86 S.W.2d 818.

was sustained by the complaining party[49] because nothing could have been collected under an execution.[50]

Admissibility. Whether or not particular evidence is admissible depends generally on the relevancy and materiality of such evidence with respect to the issues involved.[51]

Weight and sufficiency. In proceedings to amerce, or to impose a penalty on, a sheriff or constable for an official default, the complaining party is held to strict or clear and convincing proof of the alleged delinquency,[52] and must overcome the presumption in favor of the propriety of the officer's official conduct by at least a preponderance of proof.[53] If the evidence leaves the propriety of amercing the officer in doubt, no judgment should be rendered against him.[54] One moving to amerce an officer for neglecting to levy a fieri facias need not show the precise value of the property on which levy might have been made, but it is sufficient to show that the neglect has deprived him of a substantial benefit under his writ.[55] Proof of failure of the officer to perform an act within the purview of the statute makes out a prima facie case of liability under some statutes.[56] Likewise, proof that a writ was directed by the clerk to a sheriff of another county, and mailed in due time to reach him in the regular course of the mail, is sufficient evidence that the writ came to his hands to authorize the entering of a judgment nisi for an amercement for failure to return it.[57] In an action for a penalty for selling property without notice, the officer's return is only prima facie evidence in his favor[58] and may be overcome by slight evidence aliunde,[59] and when, in the face of positive testimony that subsequent to making the return he has admitted its falsity, the officer offers neither denial nor explanation of such admissions, the effect of the return as evidence in his favor is completely overcome.[60]

g. Trial or Hearing

Unless the statute provides otherwise, general rules with respect to trial of an action apply to a proceeding to amerce, or to impose a penalty on, a sheriff or constable for an official default.

Under some statutes a motion for the amercement of a sheriff or constable must be made in open court,[61] and the mere filing of a written motion in the clerk's office in vacation is not effective.[62] On scire facias against an officer, issued on an amercement nisi, for not returning a writ, to which the officer appears and pleads, plaintiff is entitled to a trial at the return term of the scire facias.[63] Although statutes providing for summary proceedings without a jury against sheriffs and constables for failure to return or levy execution or pay over money collected have been held valid, as discussed in Juries § 73, in proceedings founded on a failure to make due return of an execution the question whether it was made in proper time has been held to be a question of fact to be decided by a jury.[64] In amercement proceedings in a supreme or other appellate court which has no power to call a jury,

49. Tex.—Smith v. Perry, 18 Tex. 510, 70 Am. D. 295—Blanscet v. Palo Duro Furniture Co., Civ. App., 68 S. W. 2d 527.

50. Tex.—Vaughan v. Warnell, 28 Tex. 119—Hackler v. H. Kohnstamm & Co. of Texas, Civ. App., 227 S. W. 2d 347—B. F. Goodrich Rubber Co. v. Valley Plumbing & Supply Co., Civ. App., 267 S. W. 1036.

51. **Evidence held admissible**

(1) In a proceeding to amerce an officer for failure to sell property, where such officer's return recited that the property had been sold by the complaining party, evidence as to the circumstances of such sale was admissible on behalf of such officer both as explanatory of the return and on the issue whether or not such officer had neglected or refused to sell the property without just cause.—Riffel v. Konecny, 88 P. 2d 1077, 149 Kan. 533.

(2) Such evidence was not vitiated by the refusal of the trial court to admit in evidence an amended return.—Riffel v. Konecny, supra.

Evidence held not admissible

A statement in a return of the cause for delay in making it is not admissible as evidence in behalf of the officer in a proceeding to subject him to a penalty for failure to return the writ within the proper time.—Bruce v. Dyall, 5 T.B.Mon., Ky., 125.

Admissibility of parol evidence to show clerk's file mark erroneous as to time when writ was returned see Evidence § 865.

52. Kan.—Riffel v. Konecny, 88 P. 2d 1077, 149 Kan. 533.

57 C. J. p. 1008 note 66.

Evidence held sufficient

Miss.—W. T. Rawleigh Co. v. Causey, 16 So. 2d 395, 195 Miss. 835.

N. D.—Farmers' State Bank of Van Hook v. Crandell, 236 N. W. 264, 60 N. D. 619.

Tex.—Blanscet v. Palo Duro Furniture Co., Civ. App., 68 S. W. 2d 527—Roos v. Garner, Civ. App., 45 S. W. 2d 633.

Evidence held insufficient

Kan.—Riffel v. Konecny, 88 P. 2d 1077, 149 Kan. 533.

Miss.—W. T. Rawleigh Co. v. Causey, 16 So. 2d 397, 195 Miss. 842.

Neb.—Ehlers v. Gallagher, 22 N. W. 2d 396, 147 Neb. 97.

53. N. J.—Force v. Gardner, 43 N. J. Law 417.

57 C. J. p. 1008 note 69.

54. N. D.—Farmers' Nat. Bank v. Wright, 209 N. W. 796, 54 N. D. 422.

55. N. J.—White v. Rockafellar, 45 N. J. Law 299.

56. Tex.—Hackler v. H. Kohnstamm & Co. of Texas, Civ. App., 227 S. W. 2d 347—B. F. Goodrich Rubber Co. v. Valley Plumbing & Supply Co., Civ. App., 267 S. W. 1036—Ellis v. Blanks, Civ. App., 25 S. W. 309.

57. N. C.—State v. Latham, 51 N. C. 233.

58. Cal.—Raker v. Bucher, 34 P. 654, 100 Cal. 214.

59. Cal.—Raker v. Bucher, supra.

60. Cal.—Raker v. Bucher, supra.

61. Ohio.—Webb v. Anspach, 3 Ohio St. 522.

62. Ohio.—Webb v. Anspach, supra.

63. N. C.—Hogg v. Bloodworth, 1 N. C. 531.

64. N. C.—Waugh v. Brittain, 49 N. C. 470.

issues of fact must be tried on affidavits [65] Where the trial is to a jury, under a statute by which the penalty is fixed as a multiple of plaintiff's damages or loss, the verdict may be either for the full amount of such penalty[66] or the jury may return the amount of the damages and the court may enter judgment for the proper multiple thereof;[67] but where the jury has been instructed that plaintiff is entitled to recover a multiple of the damages it cannot be assumed that a verdict represents merely the damages and not the penalty.[68]

h. Judgment or Order

In a summary proceeding for the amercement of a sheriff or constable, the judgment or order of amercement should set forth the facts necessary to give the court jurisdiction and should show that the moving party was entitled to make the motion. An order of amercement has the force and effect of a judgment.

Where proceedings for the amercement of a sheriff or constable are summary, the judgment or order of amercement must set forth the facts necessary to give the court jurisdiction[69] and make it appear that the moving party was entitled to make the motion.[70] An order of amercement has the force and effect of a judgment.[71]

Judgment nisi. Under a statute subjecting a sheriff or constable to a stated penalty for an official default, to be paid on motion and proof of the default unless the officer can show sufficient cause, a judgment nisi should be rendered against him for the amount of the penalty,[72] which judgment is subsequently to be made absolute if no sufficient justification or excuse for the default is shown.[73]

Setting aside judgment or order. Where a judgment of amercement has been improperly entered, it may be set aside,[74] provided application therefor is made in due time [75] Where a plaintiff in an execution files a motion to compel the officer to pay over money collected under execution, and for a penalty for failing to pay on the return-day, and the motion is overruled, and plaintiff receives the principal sum, he cannot then have the judgment overruling the motion set aside and proceed for the penalty.[76]

i. Review

A petition in error has been held to be the proper method to obtain the review of an order for the amercement of a sheriff or constable

The proper mode of reviewing an order for the amercement of a sheriff or constable has been held to be by petition in error [77] An order setting aside an amercement is not reviewable on writ of error or certiorari [78]

IX. LIABILITIES ON OFFICIAL BONDS

§ 177. In General

The official bond of a sheriff or constable binds him no further than he would be liable without it. It goes with him in all of his official acts, and the statute authorizing or requiring the bond to be given controls in determining the liability thereon.

An official bond of a sheriff or constable binds him no further than he would be liable without it,[79] and no official act can be considered a breach of the condition of the bond faithfully to execute the duties of the office unless it would, without bond, amount to a breach of official duty.[80] The bond goes with the officer in all of his official acts,[81] and

65. N.C.—Kea v. Melvin, 48 N C. 243
66. Colo —Wymond v. Amsbury, 2 Colo 213.
67. Colo —Wymond v. Amsbury, supra.
68. Colo —Wymond v. Amsbury, supra.
69. Tenn.—Atkins v. Murphey, 9 Yerg 264.
70. Tenn —Atkins v. Murphey, supra
71. Kan.—Knox v. Merrill, 22 Kan. 572.
57 C J p 1009 note 94.
72. N.C.—Graham v. Sturgill, 31 S E 705, 123 N C. 384
Rule nisi in summary proceeding against sheriff or constable generally see supra § 170.
73. N.C.—Graham v. Sturgill, supra.
74. N D —Wilhelm v. Bang, 184 N W. 268, 48 N D 240
57 C J. p 1009 note 98
75. N J —Le Roy v Blauvelt, 13 N. J Law 341
57 C.J. p 1009 note 99
76. Mo —Conway v. Campbell, 11 Mo. 71.
77. Neb —Ghost v. Hill, 9 N.W. 642, 11 Neb. 472.
78. N J —Wright v. Green, 11 N.J Law 334.
79. Fla —Roberts v. Dean, 187 So 571, 133 Fla 47, 136 Fla. 421—Cassady v. Sholtz, for Use and Benefit of Edwards, 169 So. 487, 124 Fla 718.
Civil liabilities of sheriff or constable in general see supra §§ 52–127.
Liabilities on
Indemnity bonds see supra §§ 137–143.
Official bond of:
Officer generally see Officers §§ 155–177.
City or town marshal see Municipal Corporations § 566 g (2).
Requirement of official bond see supra §§ 7, 15, 25.
Liability in official capacity
Where sheriff in his individual capacity executed bond as principal to guarantee that he would faithfully discharge his duties as sheriff, he could not in his official capacity be liable on his bond —State ex rel Penrod v French, 51 N E.2d 858, 222 Ind. 145, 149 A L R. 1084
80. Fla —Roberts v Dean, 187 So. 571, 133 Fla. 47, 136 Fla 421—Cassady v Sholtz, for Use and Benefit of Edwards, 169 So 487, 124 Fla 718.
81. Ill —Maxwell for Use of Max-

the statutes authorizing or requiring the bond to be given control in determining liability thereon,[82] although provisions of other statutes governing the official conduct of the sheriff will not be ignored.[83] Substantial compliance with a directory statute relative to required provisions of an official bond binds the surety.[84] The bond is governed by the statutes of the state in which the bond was given.[85]

What bonds official. In general, any bond required by law to be given by a sheriff or constable to assure the proper performance of his official duties is to be regarded as an official bond.[86]

Persons protected by bond Even though the obligee named in an official bond of a sheriff or constable is the state or a designated public officer, the bond inures to the benefit of individuals who are injured by a default of the obligor,[87] and the nominal obligee is a mere trustee of the bond for those who are injured by breaches of the condition thereof.[88] A bond of a deputy sheriff or constable, however, in which such deputy's principal is named as obligee, is, under some statutes, for the officer's protection only and does not inure to the benefit of persons damaged by the deputy's defaults;[89] but under other statutes it protects all persons who may be injured by a violation of its terms [90]

§ 178. General Rules as to Liability

a. In general
b. Liability as limited by terms of bond
c. Liability as between sureties on different bonds
d. Liability on bond voluntarily given in addition to required bond
e. Defaults prior to execution or approval of bond
f. Duties imposed on officer after execution of bond
g Unofficial acts
h Acts of sheriff outside state or of constable outside precinct or district
i. Irregularities or informalities in bond
j Bond procured by misrepresentation
k. Acts or instructions of complaining party
l. Lien arising from bond
m. Effect of action brought against officer

a. In General

Where the office of sheriff or constable has no legal existence, or where the appointment of such an officer is void, the sureties on his official bond are not liable thereon, but the failure of one entering on the duties of sheriff or constable to take the oath of office does not defeat the liability of the sureties on his official bond

Where the office of sheriff or constable is not provided for by law and has no legal existence, a bond given by one assuming to hold such office and intended as an official bond imposes no liability on the sureties thereon [91] Likewise, where the appointment of a sheriff or constable is void for lack of authority in the appointing officer to make the appointment, an official bond given by the person so attempted to be appointed is also void and imposes no liability on the sureties,[92] but the sureties are nevertheless lia-

well v Nieft, 40 N E.2d 554, 313 Ill.App 354

Answerability of sureties for official misconduct or neglect of sheriff or constable causing injury or damage to another generally see infra § 183

82. Ark —State for Use of Glover v McIlroy, 116 S W 2d 601, 196 Ark 63.
Ky —Cotton v. Walton-Verona Independent Graded School Dist, 174 S W 2d 712, 295 Ky 478

Statute held applicable to official bond

Ky —Russell County Board of Education v Leach, 157 S W 2d 70, 288 Ky. 769.

83. Ark —State, for Use of Glover, v. McIlroy, 116 S W 2d 601, 196 Ark. 63.

84. Mich.—Stark Hickey, Inc. v. Standard Acc Ins. Co., 280 N.W 172, 291 Mich. 350.

85. Ala —Scott v. U. S. Fidelity & Guaranty Co., 41 So 2d 298, 252 Ala. 373.

86. Ky —Commonwealth v. Adams, 3 Bush 41.
57 C J p 1010 note 6.

Bond given by deputy sheriff

Ga —Culpepper v. U S Fidelity & Guaranty Co, 33 S E 2d 168, 199 Ga 56, conformed to 33 S E 2d 526, 72 Ga App. 171.

W Va —Hatfield ex rel. Rose v Cruise, 197 S E 23, 120 W Va 16

87. Ga —Richards v. American Surety Co. of New York, 171 S E. 924, 48 Ga App 102.

Ky —Cotton v. Walton-Verona Independent Graded School Dist., 174 S W.2d 712, 295 Ky. 478.

Pa —Commonwealth, to Use, v. Weglein, 21 Pa Dist & Co. 509.

Tex —Bordelon v Philbrick, 84 S W. 2d 710, 125 Tex. 460—Webb v First Texas Chemical Mfg Co., Civ App., 86 S.W 2d 818.
57 C J p 1010 note 7.

Lien created by bond as operating for protection of persons injured by officer's defaults see infra § 178

Contract for benefit of injured persons

A sheriff's bond constitutes a contract between sheriff as an individual and the state for the benefit of anyone who might suffer damage by reason of his failure faithfully to discharge his duties as sheriff.—State ex rel. Penrod v. French, 51 N.E 2d 858, 222 Ind. 145, 149 A L R 1084—Magenheimer v. State ex rel Dalton, 90 N E 2d 813, 120 Ind.App. 128.

88. Mass —Skinner v. Phillips, 4 Mass 68.

89. Ky.—Casey v. Fidelity & Cas. Co of New York, 128 S.W.2d 989, 278 Ky 426.
Tenn —Ivy v. Osborne, 279 S.W. 384, 152 Tenn. 470.

Liability of officer's sureties for acts of deputies see infra § 179.

90. Ala —Union Indemn. Co v Webster, 118 So. 794, 218 Ala. 468.

91. S C —Tinsley v Kirby, 17 S.C 1
57 C J. p 1015 note 74.

92. Ind —Olds v. State, 6 Blackf. 91.

ble for his official acts or defaults while he is actually holding the office or acting as such officer, where the appointment or election of a sheriff or constable and his induction into office are objectionable only because of his ineligibility to the office,[93] or because of irregularities or informalities in the appointment or election.[94] Where one duly elected or appointed a sheriff or constable has duly entered on his duties and assumed to act as such, the sureties on his official bond cannot escape liability for his acts or defaults on the ground that he never took the oath of office prescribed by law.[95]

Estoppel of sureties to deny official character of principal. The execution of the official bond of a sheriff or constable estops the sureties to deny the official character of their principal.[96]

b. Liability as Limited by Terms of Bond

The contract of the sureties on the official bond of a sheriff or constable is strictissimi juris and the principal or the sureties on such bond cannot be held liable unless there is a breach of the conditions of the bond; nor can their liability be extended by implication or construction.

The contract of the sureties on the official bond of a sheriff or constable is strictissimi juris;[97] they stand on the letter of the bond, and are bound no further than the letter goes,[98] and cannot be held liable for a default not fairly covered by the condition of the bond.[99] So the principal[1] or the sureties[2] cannot be held liable unless there is a breach of the conditions of the bond; nor can their liability be extended by implication or construction.[3] In order for there to be a breach of the conditions of the bond the sheriff or his deputy must be guilty of misfeasance, malfeasance, or nonfeasance.[4] The strict interpretation of sureties' liability on fidelity bonds, however, has been modified by recent decisions with the change from personal to commercial sureties.[5]

In determining the liability of the sureties on a bond its terms are to be given their reasonable meaning, considered with respect to the purposes contemplated by the statute requiring the bond;[6] and such a bond cannot be construed so as to operate as a policy of insurance in favor of the traveling public against damage in an automobile collision.[7] Where the bond contains a condition not authorized, or illegal, such condition may, unless the statute makes the bond void in consequence thereof, be disregarded and the bond enforced as though it were not present.[8] A bond executed by a deputy sheriff to his principal for the performance

93. Ky.—Commonwealth v. Teal, 14 B Mon 29.
Tenn.—Jones v. Scanland, 6 Humphr 195, 44 Am D 300
Eligibility to office of:
Constable see supra § 14.
Deputy see supra § 24
Sheriff see supra § 6.

94. N C.—Shipman v. McMinn, 60 N C 122.
57 C J p 1015 note 78.
De facto officers in general:
Constable see supra § 20.
Deputy see supra § 28
Sheriff see supra § 12.

95. Md.—Burtles v. State, 4 Md. 273
Pa.—Musselman v. Commonwealth, 7 Pa. 240

96. Tenn.—State v. Clark, 1 Head 369.
57 C.J. p 1023 note 18.

97. Tex.—Citizens' State Bank of Wheeler v American Surety Co., Civ App., 65 S.W.2d 778, error refused.
57 C J p 1010 note 13.
Liability of sureties as limited to penal sum named in bond generally see infra § 181.

98. Md.—State v Brown, 54 Md. 318.
W Va.—State v. Barnes, 43 S.E. 131, 52 W.Va 85.

99. U S.—State of North Carolina ex rel. Wimmer v. Leonard, C.C.A.N. C., 68 F.2d 228.
Ga.—Tate v. National Sur Corp., 200 S E. 314, 58 Ga App 874
La.—Gray v. De Bretton, 188 So. 722, 192 La 628
57 C.J p 1010 note 15.
"The liability of the surety is limited by the terms of the bond"—Davis v Moore, 2 S.E 2d 366, 368, 215 N.C 449.

Acts covered by bond

Since the sheriff of a county is the chief law enforcement officer of that county, and since he and his officers are held to a high degree of accountability in the enforcement of law and the proper and honest conduct of his office, his official bond covers those acts.—Trammell v. Fidelity & Cas Co of New York, D C. S C., 45 F Supp 366.

1. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., 33 S E.2d 168, 199 Ga 56, conformed to 33 S.E.2d 526, 72 Ga App. 171.
La.—Gray v De Bretton, 188 So. 722, 192 La. 628.

2. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., 33 S E 2d 168, 199 Ga. 56, conformed to 33 S E.2d 526, 72 Ga App. 171.
Ill.—People, for Use of Boerger v. Martin, 29 N.E 2d 119, 306 Ill.App 505.
La.—Gray v. De Bretton, 188 So. 722, 192 La 628
Extent of liability as limited by terms of bond generally see infra § 181.

Liability dependent on provisions of bond

The liability of surety for personal injuries due to wrongful manner in which a constable or peace officer performs his duty depends on provisions of bond.—Estell v. New Amsterdam Cas. Co., 192 P.2d 194, 164 Kan 712.

3. Ga.—Tate v. National Sur Corp., 200 S E. 314, 58 Ga App. 874
57 C.J. p 1010 note 16.

4. La.—Gray v De Bretton, 188 So. 722, 192 La. 628
Liability on official bond of sheriff or constable for acts of deputies and assistants see infra § 179.

5. U.S.—State of Missouri ex rel and to Use of De Vault v. Fidelity & Cas Co of New York, C.C.A Mo., 107 F 2d 343.
Mo.—State ex rel and to Use of Kaercher v Roth, 49 S.W 2d 109, 330 Mo 105.

6. N C.—Governor v Matlock, 12 N. C. 214.
57 C.J. p 1010 note 17.

7. La.—Gray v. De Bretton, 188 So. 722, 192 La 628.

8. W.Va.—State v. McGuire, 33 S E. 313, 46 W.Va. 328, 76 Am S R. 822.
57 C J. p 1010 note 18.
Irregularities or informalities in bond in general see infra subdivision 1 of this section.

of "all the duties required of him as deputy sheriff" embraces all the duties which by law devolve on the sheriff.[9] A bond executed by the sureties and delivered to the officer before the expiration of his term cannot be held as a matter of law to relate to and cover a new term to which the officer is appointed or elected to succeed himself, where the language of the bond would apply to either term.[10]

c. Liability as between Sureties on Different Bonds

(1) Successive bonds
(2) General and special bonds
(3) Bonds given in different capacities

(1) Successive Bonds

The general rule, subject to some qualifications and exceptions, is that, where a sheriff or constable gives two or more successive bonds, the liability for a default falls on the sureties on the bond which was in force when the default occurred, and that a new or renewal bond does not cover any defaults which occurred before its execution unless an intention to the contrary appears.

It is a general rule that, where a sheriff or constable gives two or more successive bonds, the liability for a default falls on the sureties on the bond which was in force when the default occurred,[11] and that a new or renewal bond does not cover any defaults which occurred before its execution,[12] unless an intention to the contrary appears.[13] It has, however, been held that as soon as process is delivered to an officer it attaches itself, in contemplation of law, to the bond which is then in force and which gives him authority to act at that time, and that such bond, rather than a subsequent bond, must respond for any default in connection with such writ.[14] Where a new bond does not supersede the older one, the sureties on both bonds are bound as cosureties for any future default or misfeasance of the officer.[15]

Where officer serves successive terms. Where a sheriff or constable serves two or more successive terms, the liability for a default by him falls on the sureties on his official bond for the term in which such default occurs.[16] Thus, where process is delivered to an officer during one term of his office, but he does not commence to execute it until he has entered on a new term with new sureties, such new sureties are liable for any defaults with respect to the execution of such process,[17] and the old sureties cannot be held therefor,[18] except where the statute makes it the duty of an officer receiving process to execute it, even though his term expires before the return day, in which case the sureties on the old bond are liable for his defaults in respect thereof.[19] Where the failure to execute the process before the expiration of his term constitutes a default on the part of the officer, the sureties on his bond for such term are liable for such default,[20] and, where the failure continues during a succeeding term, the injured person may proceed against the sureties on either or both the old and the new bond.[21] Under the rule considered supra § 50, that an officer who commences execution of process must complete it, where an officer commences the execution of process during one term of office, it is ordinarily held that his sureties for that term are responsible for whatever he does or neglects to do with relation thereto, although his default does not occur until after he has entered on a new term of office and qualified with new sureties,[22] and that the sureties for the new term cannot be held to respond for such default;[23] but there is also some authority to the contrary.[24]

(2) General and Special Bonds

Where a sheriff or constable gives a special bond in respect of particular duties as required by law, the liability for a default in respect of such duties falls on such special bond rather than on his general official bond; but,

9. Ill.—Wood v. Cook, 31 Ill. 271.
10. Mass.—Thomas v. Bleakie, 136 Mass 568.
11. Ala.—Dumas v. Patterson, 9 Ala 484.
57 C J. p 1011 note 22.
Regular official bond and bond required of officer as tax collector see infra § 189.
12. W Va.—State v. Turner, 100 S.E. 294, 84 W Va 485
57 C J p 1011 note 23.
Liability for defaults occurring prior to execution of bond in general see infra subdivision e of this section
13. Mo.—State v. Finn, 11 S W 994, 98 Mo. 532, 14 Am S R 654.
S C.—Treasurers v. Taylor, 18 S.C.L. 524.
57 C J. p 1011 note 24.
14. N J.—State v. McDonald, 2 N.J. Law 355
57 C J p 1011 note 25
15. Ky.—Baker v Maryland Fidelity, etc, Co., 73 S W. 1025, 24 Ky L. 2196
57 C J. p 1011 note 26.
16. Tenn.—Sherrell v. Goodrum, 3 Humphr. 419
57 C J p 1011 note 27.
17. N J.—State v. Roberts, 12 N.J Law 114, 21 Am.D. 62
Tenn.—Sherrell v. Goodrum, 3 Humphr 419.
18. Tenn.—Sherrell v. Goodrum, supra
57 C.J p 1011 note 29
Termination of officer's incumbency as terminating liability of sureties in general see infra § 180.
19. Ill.—McCormick v. Moss, 41 Ill. 352
57 C J p 1012 note 30.
20. N.C.—Hubbard v. Wall, 31 N.C. 20.
57 C J. p 1012 note 31.
21. N.C.—Hubbard v. Wall, supra.
57 C J. p 1012 note 32
22. Ky.—Colyer v. Higgins, 1 Duv 6, 85 Am D 601.
57 C J. p 1012 note 34.
23. Ky.—Colyer v. Higgins, supra.
24. Mo.—State v. McCormack, 50 Mo 568
57 C.J. p 1012 note 36.

where the default is in respect of the officer's general duty or conduct, the liability falls on his general official bond, and not on the special bond.

Where a sheriff or constable is required by law to give a special bond in respect of particular duties, the liability for a default in respect of such duties falls on such special bond rather than on his general official bond,[25] and a surety on the special bond who is subjected to liability can have no recourse on the general official bond of the officer.[26] Where, however, the default of an officer is in respect of his general duty or conduct, the liability falls on his general official bond and not on a special bond which he may have given,[27] and a special bond given by an officer in a particular capacity or with respect to particular duties does not cover his acts or defaults in his general capacity as such officer.[28] Where a justice of the peace appoints a constable for a special purpose and by statute the surety on such justice's official bond becomes the surety of the constable so appointed, such surety, and not the surety on a private bond taken from the constable by the justice and made payable to the justice, is liable to the public generally or any person aggrieved by the illegal acts of such constable.[29]

(3) Bonds Given in Different Capacities

Where a sheriff or constable holds two distinct offices and gives an official bond for each office, liability for an act or default committed by him in the performance of the duties of one of such offices will be imposed only on the sureties on the bond given in respect thereof.

Where the same person holds two distinct offices as sheriff and constable, or sheriff and collector, and gives an official bond for each office, liability for an act or default committed by him in the performance of the duties of one of such offices will be imposed only on the sureties on the bond given in respect thereof, and not on the sureties on the bond given in respect of the other office.[30]

d. Liability on Bond Voluntarily Given in Addition to Required Bond

The sureties on an official bond voluntarily given by a sheriff or constable in addition to the required one will be liable for his neglect or improper conduct.

Although a sheriff or constable has been already inducted into office and is acting under an official bond duly accepted and approved, there is nothing to prevent him from voluntarily executing another official bond, and, if the latter bond is in proper form and is accepted and duly approved, he and his sureties will be liable on it for any neglect or other improper conduct.[31]

e. Defaults Prior to Execution or Approval of Bond

Except where otherwise provided by statute or by the terms of the bond, the sureties on the official bond of a sheriff or constable are not liable for a default which occurred before the bond was executed or approved.

Except where otherwise provided by statute[32] or by the terms of the bond, the sureties on the official bond of a sheriff or constable are not liable for a default which occurred before the bond was executed;[33] and where, under the statute, the bond takes effect only from its approval, there can be no recovery thereon for any act of the officer prior to such approval.[34] It has been held that the sureties of a sheriff are not responsible for money collected by him on an execution which came into his hands as deputy of a former sheriff, although the money was received after they become sureties.[35] The fact, however, that process was delivered to an officer before his bond was executed does not re-

25. Ark.—Briggs v. Manning, 97 S. W. 289, 80 Ark. 304.
57 C J. p 1012 note 38.
Liabilities on special bond of sheriff as tax collector see infra § 189

26. Ark—Briggs v. Manning, supra

27. Ill—Hughes v. People, 82 Ill 78
57 C J p 1012 note 40.

28. Tex.—American Bonding, etc., Co v Garrett, 129 S.W 398, 61 Tex. Civ App. 454.
57 C.J p 1012 note 41.

29. Okl—National Surety Co. v. Bounds, 50 P.2d 185, 174 Okl 111

30. Ark.—State, to Use of Union County, v Harman, 80 S.W.2d 619, 190 Ark. 621.
57 C.J p 1012 note 43.

Where officer is special deputy sheriff and also constable of fair association district, officer arresting person on fair grounds without warrant, for misdemeanor, acts as constable unless contrary is shown—Pickle v Brooks, 137 So. 89, 162 Miss. 87

Apportionment of liability

In suits against sheriff and sureties on his separate bonds given as sheriff and as ex officio collector, for fees received and unaccounted for in both capacities, in determining the question of liability, entire salary of sheriff should be distributed between the two offices in proportion to amount of fees collected in each—State, to Use of Union County, v. Harman, 80 S W.2d 619, 190 Ark 621.

31. Ala—Johnson v. Caffey, 59 Ala. 331.
Giving additional bond not required by statute as not releasing sureties on prior bond see infra § 182.

32. Ky—Burton v American Bonding, etc., Co., 206 S.W. 884, 182 Ky. 637—Fidelity, etc, Co. v. Commonwealth, 47 S W. 579, 104 Ky 579, 20 Ky L 788, 49 S W. 467, 20 Ky.L. 1402.

33. W.Va—State v Turner, 100 S.E. 294, 84 W Va. 485.
57 C J p 1013 note 47.
Liabilities as between sureties on successive bonds see supra subdivision b (1) of this section.

34. Ala—Bryan v. Kelly, 5 So. 346, 85 Ala. 569.
Md—Bruce v State, 11 Gill & J 382
Approval of bond in general see supra §§ 7, 15
Lack of approval as affecting enforceability of bond see infra subdivision i of this section.

35. N.Y.—People v. McHenry, 19 Wend. 482.

lieve his sureties from liability for his failure, after they became bound, to execute and return it.[36]

f. Duties Imposed on Officer after Execution of Bond

The official bond of a sheriff or constable refers to his duties as prescribed by law at the time of its execution and does not cover new duties thereafter imposed unless the words of the bond or the law in force at its date bring such subsequently imposed duties within its provisions.

The official bond of a sheriff or constable refers to the duties of the officer prescribed by law at the time of its execution[37] and does not cover new duties thereafter imposed on the officer by law,[38] unless the words of the bond or the law in force at its date, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions.[39] Where duties existed at the time a bond was executed, however, the sureties cannot avoid liability with respect thereto on the ground that such duties were created by a statute enacted after that under provisions of which the bond was given.[40] Where a particular duty is a function of the office of sheriff unless some other officer is designated by law to perform it, the surety on the official bond of the sheriff is liable for defaults of the officer in the performance of such duty notwithstanding the sheriff was designated to perform that duty after the execution of the official bond.[41]

g. Unofficial Acts

Generally the official bond of a sheriff or constable imposes liability only for what the officer unlawfully does or omits to do in the execution of his office or of some official duty imposed by law, and does not cover any omission or act done without authority of law or in his private or personal capacity as a man or citizen.

As a general rule, the official bond of a sheriff or constable imposes liability only for what the officer unlawfully does or omits to do in the execution of his office or of some official duty imposed by law,[42] and does not cover any omission or act done without authority of law or in his private or personal capacity as a man or citizen,[43] or an act constituting a mere abuse or usurpation of power[44] and done without process of any kind.[45] Whether the

36. Ark—Faulkner v State, 9 Ark 14.

37. N.Y.—People v. Brush, 6 Wend 454

Change in law imposing additional duties as discharging sureties see infra § 182

38. Ohio—King v. Nichols, 16 Ohio St. 80

57 C J p 1013 note 53.

39. Ohio—King v. Nichols, supra.

57 C.J. p 1013 note 54

40. N Y—People v Brush, 6 Wend. 454

41. Ky—Fidelity & Deposit Co of Maryland v Board of Trustees of Elkton Graded Common School Dist., 57 S W 2d 457, 247 Ky. 535.

42. Ariz—**Corpus Juris quoted in** Truog v American Bonding Co. of Baltimore, 107 P 2d 203, 205, 56 Ariz 269

Fla—**Corpus Juris quoted in** Roberts v. Dean, 187 So. 571, 575, 133 Fla 47, 136 Fla. 421

Ga.—Culpepper v U. S. Fidelity & Guaranty Co., 33 S.E 2d 168, 199 Ga 56, conformed to 33 S.E 2d 526, 72 Ga App. 171—Goforth v. Fidelity & Cas. Co. of N. Y., 55 S E.2d 656, 80 Ga App 121.

Ind—State ex rel Penrod v. French, 51 N E.2d 858, 222 Ind. 145, 149 A.L. R 1084

Kan—**Corpus Juris cited in** Hitsman v. Kennedy, 27 P 2d 218, 220, 138 Kan 564

Ky—McMahan's Adm'x v. Draffen, 47 S W 2d 716, 242 Ky. 785

Tenn—**Corpus Juris quoted in** State for Use of Rosser v. Freeman, 61 S. W 2d 459, 166 Tenn 296—State ex rel Key v. Cron, 12 Tenn App 615

Tex—Continental Cas Co v. Miller, Civ App, 135 S W 2d 501

57 C J p 1013 note 57

Liability of sureties on officer's bond for unauthorized acts of deputies see infra § 179

Test of surety's liability

(1) Test of surety's liability for principal's acts is whether principal would have acted if he had not been clothed with official character.

Ind—State ex rel Penrod v French, 51 N E 2d 858, 222 Ind. 145, 149 A L R 1084.

Mich—Stark Hickey, Inc. v. Standard Acc Ins. Co, 289 N.W. 172, 291 Mich. 350.

Mo—State ex rel and to Use of Kaercher v. Roth, 49 S W 2d 109, 330 Mo 105—State ex rel. Karnes v. Poole, App, 72 S W 2d 803.

(2) The surety is liable for acts of principal if he assumed to act as an officer whether under valid or void process or under no process whatever.

Mich.—Stark Hickey, Inc, v. Standard Acc. Ins Co., 289 N.W. 172, 291 Mich 350.

Mo—State ex rel. and to Use of Kaercher v Roth, 49 S.W 2d 109, 330 Mo 105—State ex rel. Karnes v. Poole, App., 72 S.W.2d 803

43. Ala—Culverhouse v. National Sur. Corp., 171 So 916, 27 Ala App. 318.

Fla—**Corpus Juris quoted in** Roberts v. Dean, 187 So 571, 575, 133 Fla. 47, 136 Fla. 421.

Ind—State ex rel Penrod v. French, 51 N E 2d 858, 222 Ind 145, 149 A L R 1084

Kan—Estell v New Amsterdam Cas Co, 192 P 2d 194, 164 Kan 712—**Corpus Juris cited in** Hitsman v Kennedy, 27 P.2d 218, 220, 138 Kan 564.

Ky—McMahan's Adm'x v. Draffen, 47 S W 2d 716, 242 Ky. 785.

Pa—Commonwealth v. Keller, 162 A 474, 106 Pa Super 458—Sopko v. Esslinger, 47 Pa Dist & Co. 155, 44 Lack Jur 221—Commonwealth, to Use, v. Howell, 25 Pa Dist. & Co. 28, 83 Pittsb Leg J. 610.

Tex—Republic Underwriters v. Norman, Civ.App, 97 S W 2d 976—Citizens' State Bank of Wheeler v. American Surety Co, Civ.App., 65 S W 2d 778, error refused.

57 C.J. p 1013 note 58.

Acts held not within bond

(1) Taking and holding possession of stolen automobile on instructions of police chief in sister state until some one could call therefor—State for Use of Rosser v. Freeman, 61 S. W 2d 459, 166 Tenn. 296.

(2) Going hunting or fishing.—Truog v. American Bonding Co of Baltimore, 107 P 2d 203, 56 Ariz. 269.

(3) Other acts held not within bond see 57 C J p 1013 note 58 [a].

44. Fla—**Corpus Juris quoted in** Roberts v. Dean, 187 So. 571, 575, 133 Fla. 47, 136 Fla. 421.

Tenn—**Corpus Juris quoted in** State for Use of Rosser v. Freeman, 61 S.W.2d 459, 166 Tenn. 296.

57 C.J. p 1014 note 59.

45. U S.—Allen v. Clark, D.C.Cal., 22 F.Supp. 898.

officer was acting in his official capacity must be judged from what he said and did.[46] It is ordinarily held that the sureties are liable for a wrongful act done by an officer under color of office, although not by virtue thereof,[47] and so it is held that an officer assuming to act as such, who acts illegally, cannot escape liability therefor under his official bond on the ground of lack of legal authority to commit the act for which liability is asserted;[48] but there is authority for the view that the liability of the sureties extends only to acts done by virtue of the office and not to acts done merely under color of office.[49]

Acts as agent of party. Sureties on the bond of a sheriff or constable are not liable for acts done by him as agent of a party, and not as such officer;[50] and, where plaintiff in a writ interferes in the execution thereof by directing an officer to proceed in some way other than that prescribed by law, and so makes the officer his agent, the sureties are not liable for such acts.[51] The mere fact, however, that the judgment or order under which process issued was wrongfully procured by plaintiff does not make the officer his agent so as to relieve the sureties on his bond.[52] Similarly, the mere fact that the deputy of an officer is directed by the latter to levy a writ on particular property does not make him the officer's agent or servant or make the acts of such deputy so far unofficial or unauthorized as to render the sureties on his official bond not liable to the principal officer if the latter is subjected to damages in consequence of the deputy's acts.[53]

h. Acts of Sheriff outside State or of Constable outside Precinct or District

The surety on the official bond of a sheriff is not liable for acts of the sheriff outside the state, but, where the authority of a constable extends over the whole county, the sureties on his official bond are liable for his official acts within the county, although outside of his own precinct or district.

The surety on the official bond of a sheriff is not liable for acts of the sheriff outside the state, since with respect to such acts the sheriff had neither office nor color of office as a sheriff.[54] Where the authority of a constable extends over the whole county, the sureties on his official bond are liable for his official acts within the county, although outside of

Cal.—Best v. Johnson, 29 P. 415, 78 Cal. 217, 3 L.R.A. 168, 12 Am.S.R. 41.

Fla.—**Corpus Juris quoted in** Roberts v. Dean, 187 So. 571, 575, 138 Fla. 47, 136 Fla. 421.

Kan.—**Corpus Juris cited in** Hitsman v. Kennedy, 27 P.2d 218, 220, 138 Kan. 564.

Tenn.—**Corpus Juris quoted in** State for Use of Rosser v. Freeman, 61 S.W.2d 459, 166 Tenn. 296.

57 C.J. p. 1014 note 60.

46. Miss.—Maryland Cas. Co. v. Eaves, 196 So. 513, 188 Miss. 872.

47. U.S.—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Cas. Co. of New York, C.C.A.Mo., 107 F.2d 343.

Ala.—Jones v. Buckelew, 25 So.2d 23, 247 Ala. 475.

Cal.—Abbott v. Cooper, 23 P.2d 1027, 218 Cal. 425.

Ga.—Goforth v. Fidelity & Cas. Co. of N.Y., 55 S.E.2d 656, 80 Ga.App. 121—Richards v. American Surety Co. of New York, 171 S.E. 924, 48 Ga.App. 102.

Idaho.—Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667, overruling Haffner v. U.S. Fidelity & Guaranty Co., 207 P. 716, 35 Idaho 517, and Federal Reserve Bank of San Francisco v. Smith, 244 P. 1102, 42 Idaho 224.

Mich.—Stark Hickey, Inc., v. Standard Acc. Ins. Co., 289 N.W. 172, 291 Mich. 350.

Miss.—Maryland Cas. Co. v. Eaves, 196 So. 513, 188 Miss. 872.

Tenn.—Marable v. State ex rel. Wackernie, 222 S.W.2d 234, 32 Tenn.App. 238.

Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465.

57 C.J. p. 1014 note 61.

Acts held done under color of office where sheriff and deputy entered and searched the home of husband and wife without a search warrant or their consent and while engaged in making such unlawful search beat husband without cause.—Glens Falls Indemnity Co. v. Dempsey, 23 S.E.2d 497, 68 Ga.App. 612—Glens Falls Indemnity Co. v. Dempsey, 23 S.E.2d 493, 68 Ga.App. 607.

Under a statute providing that the officer and his sureties shall be liable for all acts done by the officer "by virtue and under color of his office," an officer's sureties are liable for an act done by him under color of his office, although not by virtue of it.—**Corpus Juris cited in** Price v. Honeycutt, 4 S.E.2d 611, 614, 216 N.C. 270—57 C.J. p. 1014 note 61 [a].

In Florida

(1) "The law appears to be well settled that for improper acts performed by an officer under color of his office the sureties upon his bond can be held liable."—Walling v. Carlton, 147 So. 236, 239, 109 Fla. 97.

(2) But it has been said that the acts for which a sheriff or his sureties may be held liable are termed acts done "virtute officii," and those for which they cannot be held liable are termed "colore officii," the distinction being that acts are done "virtute officii" when they are within the authority of the officer, but done in an improper exercise of his authority or in abuse of the law, while acts are done "colore officii" where they are of such nature that office gives him no authority to do them.—Malone v. Howell, 192 So. 224, 140 Fla. 693.

48. W.Va.—Booten v. Napier, 5 S.E.2d 441, 121 W.Va. 548.

49. U.S.—Bassinger v. U.S. Fidelity & Guaranty Co., C.C.A.Neb., 58 F.2d 573, certiorari denied U.S. Fidelity & Guaranty Co. v. Bassinger, 53 S.Ct. 21, 287 U.S. 622, 77 L.Ed. 540.

Okl.—**Corpus Juris quoted in** McCorcle v. Morton, 44 P.2d 9, 10, 171 Okl. 632.

57 C.J. p. 1014 note 62.

50. Ga.—Collier v. Stoddard, 19 Ga. 274.

Pa.—Commonwealth v. Abrams, 94 Pa.Super. 556.

51. Mo.—Rollins v. State, 13 Mo. 314, 53 Am.D. 151.

52. Mo.—Rollins v. State, supra.

53. N.Y.—Tuttle v. Cook, 15 Wend. 274.

54. U.S.—McLean v. State of Mississippi ex rel. Roy, C.C.A.Miss., 96 F.2d 741, 119 A.L.R. 670, certiorari denied State of Mississippi ex rel. Roy v. McLean, 59 S.Ct. 84, 305 U.S. 623, 83 L.Ed. 399—Kirkes v. Askew, D.C.Okl., 32 F.Supp. 802.

his own precinct or district,[55] unless the condition of the bond is such that it must be construed to apply only to acts within his own district.[56]

i. Irregularities or Informalities in Bond

The sureties on the official bond of a sheriff or constable are ordinarily not relieved of liability because of irregularities or informalities in the bond not rendering it defective in substance, or because of erroneous recitals therein.

The sureties on the official bond of a sheriff or constable are ordinarily not relieved of liability thereon because of irregularities or informalities in the bond not rendering it defective in substance,[57] or because of erroneous recitals therein.[58] Similarly, failure to give a bond at the proper time does not affect its validity or the liabilities of the sureties thereon for defaults occurring after its execution,[59] and the validity of a bond otherwise regular is not affected by the fact that the penalty in which it should be given has not been fixed by the authority designated by law.[60] It is the more general rule that a bond given as an official bond by an officer, which is not valid as a statutory bond because not conforming to statute, may be enforced as a common-law bond,[61] but there is authority for the view that a bond containing a condition not authorized or required by law is void and unenforceable against the sureties.[62]

Excessive penalty. Where a bond is voluntarily given by a sheriff or constable, the fact that the penalty is larger than the statute prescribes does not relieve the sureties from liability for a breach.[63]

Lack of approval. According to some authorities the purpose of a statute requiring the approval of the official bond of a sheriff or constable is merely to insure greater security to the public,[64] and so such a bond may be enforced although it has been not approved,[65] or although the approval is defective.[66] According to other authorities, however, a bond not properly approved may not be enforced as a statutory bond.[67]

Lack of filing or recordation. Since statutory requirements of the filing or recordation of official bonds of sheriffs and constables are for the benefit of the public, such a bond may be enforced against the sureties although it has not been filed[68] at the time required by law,[69] or has not been recorded.[70]

Surety prohibited by statute from becoming such. An official bond of a sheriff or constable which is signed as surety by one who is prohibited by statute from becoming a surety on such bonds is nevertheless valid and binding as against him.[71]

Curative acts. An official bond of a sheriff or constable which is defective in that it purports to have been accepted by a person or authority who had no authority so to do is made valid ab initio by a subsequent statute declaring that such bonds shall be deemed to have been legally delivered;[72] but a bond failing to show which of two or more obligors is the officer and which sureties is not validated by a statute curing irregularities in the condition or penalty of such bonds.[73] A statute providing that any bonds which have been or may thereafter be given by any sheriff shall be held and deemed to be valid, notwithstanding any defect in the election or appointment of such person to office, applies to

55. N.J.—Town of Irvington v. Dubrow, 161 A. 351, 10 N.J.Misc. 804
Va.—McNeale v. Governor, 3 Gratt. 299, 44 Va. 299
Territorial extent of authority of constable see supra § 36

56. N.C.—Governor v. Morris, 7 N.C. 146
57 C.J. p. 1014 note 69.

57. Iowa.—Charles v. Haskins, 11 Iowa 329, 77 Am.D. 148.
57 C.J. p. 1016 note 82

Bond not signed by officer
Constable and sureties are liable on his bond for acts of deputy, although constable did not sign the bond, since by filing it and assuming duties of office he adopted it and was estopped to deny its validity.—Whitlock v. Wood, 101 S.W.2d 950, 193 Ark. 695, 110 A.L.R. 955

58. Idaho.—State v. McDonald, 40 P. 312, 4 Idaho 468, 93 Am.S.R. 136
57 C.J. p. 1016 note 83.

59. Miss.—Harris v. State, 55 Miss. 50

60. Ind.—State v. Lynch, 6 Blackf. 395

61. Tex.—Bordelon v. Philbrick, 84 S.W.2d 710, 125 Tex. 460.
57 C.J. p. 1016 note 86

62. N.J.—Middleton v. McCormick, 3 N.J.Law 92—Nottingham v. Giles, 2 N.J.Law 111.

63. Ky.—Johnston v. Gwathney, 2 Bibb 186, 4 Am.D. 694.
57 C.J. p. 1016 note 88

64. Ala.—Disheroon v. Brock, 105 So. 899, 213 Ala. 637
57 C.J. p. 1016 note 90
Necessity for approval of bond of:
Constable see supra § 15.
Sheriff see supra § 7.

65. Ala.—Disheroon v. Brock, supra
57 C.J. p. 1016 note 91

66. Cal.—People v. Edwards, 9 Cal. 286.

S.C.—Treasurers v. Stevens, 13 S.C.L. 107.

67. Ga.—Crawford v. Meredith, 6 Ga. 252
57 C.J. p. 1017 note 93

68. Ala.—Disheroon v. Brock, 106 So. 899, 213 Ala. 637.
Pa.—Musselman v. Commonwealth, 7 Pa. 240
Necessity of filing or recording bond of.
Constable see supra § 15.
Sheriff see supra § 7.

69. N.Y.—Dutton v. Kelsey, 2 Wend. 615.

70. Cal.—Hill v. New Amsterdam Casualty Co., 286 P. 1103, 105 Cal. App. 156.
La.—Whitehurst v. Hickey, 3 Mart., N.S., 589, 15 Am.D. 167.

71. Ky.—Leslie County v. Eversole, 2 S.W.2d 644, 222 Ky. 793.

72. N.C.—Jordan v. Pool, 27 N.C. 105

73. N.C.—Grier v. Hill, 51 N.C. 572

bonds made before its passage, as well as those made after it.[74]

j. Bond Procured by Misrepresentation

Sureties have been held not liable on the official bond of a sheriff or constable procured by false statements or misrepresentations of material fact.

Sureties on an official bond of a sheriff or constable have been held not liable thereon where the bond was procured by false statements or misrepresentations of material facts.[75] On the other hand, it has also been held that the fact that the officer may have misrepresented the facts to the surety company in obtaining the bond is immaterial as to the rights of an execution creditor against the surety, the remedy for the surety being an action against the person who made the false representations.[76]

k. Acts or Instructions of Complaining Party

Where an alleged default on the part of a sheriff or constable has been occasioned by the act or instructions of the party complaining thereof or his attorney, there can be no recovery therefor from the sureties on the official bond.

Where an alleged default on the part of a sheriff or constable has been occasioned by the act of the party complaining thereof, there can be no recovery therefor from the sureties on the officer's official bond;[77] nor can a plaintiff in process set up as a breach of the officer's bond acts done pursuant to his own instructions,[78] or the instructions[79] or advice[80] of his attorney, provided the attorney represented plaintiff in giving such instruction or advice,[81] and provided the officer in fact relied thereon.[82] Similarly, where plaintiff or his attorney is informed by the officer of what he proposes to do, and acquiesces therein, he cannot set up what is done as a breach of the bond;[83] nor can one who has ratified what has been done in his behalf subsequently hold the sureties liable for such acts.[84] Where a sheriff gives his deputy binding instructions as to what he shall do in connection with certain matters, and the sheriff is subjected to liability because of the deputy following such directions, he cannot resort to the deputy's bond for indemnity;[85] but a deputy's sureties cannot escape liability on the ground that his acts were pursuant to directions of the sheriff, where such directions were merely in the nature of information and advice, leaving the deputy at liberty to act according to his own judgment, and not binding instructions to be followed at all events,[86] nor is it a defense that the deputy's acts were done by leave of the sheriff.[87]

l. Lien Arising from Bond

Under statutes in some jurisdictions the execution of official bonds of sheriffs and constables creates a lien on the real estate of the officer and his sureties from the date of the bond or of its registry; and, where a judgment is obtained on the bond, there is a lien on all of the estate of the defendants from the time of the commencement of the action.

In some jurisdictions, under the statutes relating to the official bonds of sheriffs and constables, the execution of such a bond creates a lien on the real estate of the officer and his sureties[88] from the date of the bond[89] or of its registry,[90] whether such property was owned at the time of the execution of the bond[91] or is subsequently acquired,[92] and, where a judgment is obtained on the bond against the officer and his sureties, there is a lien on all of the estate of defendants from the time of the commencement of the action.[93] Such a lien operates for the protection of private individuals who may be injured by the acts of the officer as well as the state.[94] The lien does not expire with the officer's term of office,[95] but continues until he obtains his his deputies,[4] and this rule applies even though

74. N.C.—Murray v. Jones, 29 N.C. 359.

75. Ky.—U. S. Fidelity, etc., Co. v. Stambaugh, 292 S.W. 495, 219 Ky. 35.
57 C.J. p. 1017 note 5.

76. N.J.—Bachmeier & Co. v. Semel, 163 A. 126, 10 N.J.Misc. 1172

77. Ark.—Moore v. Rooks, 76 S.W. 548, 71 Ark. 562.
57 C.J. p. 1017 note 7.
Effect of directions or interference of party or attorney on liability of officer see supra § 54.

78. Ind.—State v. Hawkins, 81 Ind. 486
57 C.J. p. 1017 note 8

79. Ill.—People v. Offerman, 84 Ill. App. 132
Ind.—State v. Boyd, 63 Ind. 428.

80. Ala.—McClure v. Colclough, 5 Ala. 65
57 C.J. p. 1017 note 10.

81. Ala.—Williams v. Ragan, 45 So. 185, 153 Ala. 397.

82. Ala.—Williams v. Ragan, supra

83. Del.—Cake v. Cannon, 7 Del. 427.

84. U.S.—Teague v. Maddox, Mont., 14 S.Ct. 46, 150 U.S. 128, 37 L.Ed. 1025.

85. N.Y.—Tuttle v. Cook, 15 Wend. 274.

86. N.Y.—Tuttle v. Cook, supra.

87. N.Y.—Thomas v. Hubbell, 18 Barb. 9, reversed on other grounds 15 N.Y. 405, 69 Am.D. 619—Hart v. Brady, 3 N.Y. Super. 626.

88. Ky.—Hall v. Commonwealth, 8 Bush 378
57 C.J. p. 1023 note 21.

89. Ky.—Hall v. Commonwealth, supra

90. La.—Succession of Gale, 30 La. Ann. 351
57 C.J. p. 1023 note 23.

91. Ky.—Hall v. Commonwealth, 8 Bush 378.

92. Ky.—Hall v. Commonwealth, supra

93. Ky.—Hall v. Commonwealth, supra
57 C.J. p. 1023 note 26

94. La.—Succession of David, 14 La. Ann. 730—Fluker v. Bobo, 11 La. Ann. 609.
Persons protected by official bond in general see supra § 177.

95. Ky.—Hall v. Commonwealth, 8 Bush 378.
La.—Fluker v. Bobo, 11 La. Ann. 609.

which he is bound.[96] It has been held that the legal mortgage resulting from the registry of an official bond is extinguished by prescription, unless the bond is reinscribed within ten years from the date of registry;[97] but there is also authority, to the contrary that the lien is unlimited both in duration and extent[98]

m. Effect of Action Brought against Officer

The fact that a person injured by the official misconduct of a sheriff or constable has brought an action directly against the officer therefor does not bar another action on his official bond for the same cause.

The fact that a person injured by the official misconduct or default of a sheriff or constable has brought an action directly against the officer therefor does not bar another action on his official bond for the same cause, whether the judgment in the action against the officer alone has been in favor of plaintiff[99] or defendant.[1]

§ 179. —— Acts of Deputies and Assistants

One who is aggrieved by the official misconduct of a deputy sheriff may at his option sue either on the sheriff's bond or on the deputy's bond; and the sureties on the sheriff's bond may be held liable to answer for the official defaults or misconduct of the deputies; but such sureties are not liable for acts of a deputy outside the scope of his powers and duties, and not done in the performance of an official act, or for acts for which the sheriff was not personally liable.

One who is aggrieved by the official misconduct of a deputy sheriff may at his option sue either on the sheriff's bond or on the deputy's bond.[2] Where it is sought to hold the sureties on the sheriff's bond for acts of the deputies as officials and as acts of the sheriff himself, the rule that for many purposes a sheriff and his deputies are regarded in the law as one officer applies,[3] and so the sureties on the official bond of a sheriff or constable are ordinarily liable to answer for the official defaults or misconduct of his deputies,[4] according to the authorities on the

Termination of officer's incumbency as affecting liability of sureties on bond see infra § 180

96. Ky—Hall v Commonwealth, 8 Bush 378

97. La—Succession of Gale, 30 La Ann 351

98. Pa—Snyder v Commonwealth, 3 Penr & W 286

99. S C.—Treasurers of the State v. Bates, 18 S C L 362.
57 C J p 1024 note 33

Unsatisfied judgment against sheriff alone is no bar to a subsequent joint action on his bond against himself and his sureties for the same default.—Treasurers of the State v. Bates, supra

1. S C—State v. Goettie, 41 S C L 126
57 C.J p 1024 note 34

2. Ga.—Aldridge v. Wooten, 24 S E 2d 700, 68 Ga App. 887—Copeland v Dunehoo, 138 S E 267, 36 Ga App 817

3. U S.—State of Missouri ex rel and to Use of De Vault v Fidelity & Cas Co of New York, C C A.Mo, 107 F 2d 343

4. U S—State of Missouri ex rel and to Use of De Vault v Fidelity & Cas Co of New York, supra—Chambers v Anderson, C C A Tenn, 58 F 2d 151—Bracken v. Cato, C.C. A Tex, 54 F.2d 457—Trammell v Fidelity & Cas Co. of New York, D C.S C, 45 F Supp 366
Ala.—Harwell v. Morris, 51 So.2d 511, 255 Ala 344—National Surety Co v. Boone, 151 So. 447, 227 Ala. 599.
Ark—Whitlock v Wood, 101 S.W 2d 950, 193 Ark 695, 110 A L R 955
Cal.—Abbott v. Cooper, 23 P.2d 1027, 218 Cal. 425.
Fla—Roberts v Dean, 187 So 571, 133 Fla 47, 136 Fla 421
Ga—Standard Sur & Cas Co of N Y v. Johnson, 41 S E 2d 576, 74 Ga App 823—Hawkins v National Sur. Corp, 11 S E 2d 250, 63 Ga App 367—Richards v. American Surety Co. of New York, 171 S E 924, 48 Ga App. 102
Idaho—Helgeson v Powell, 34 P 2d 957, 54 Idaho 667—Price v. Pace, 296 P 189, 50 Idaho 353.
Ky—West v. Nantz' Adm'r, 101 S.W. 2d 673, 267 Ky. 113
La—Britt v Merritt, 53 So 2d 121, 219 La 333—Davis v McDowell, App, 185 So 634—Gray v. De Bretton, App, 184 So 390, affirmed 188 So. 722, 192 La 628
Miss—Hinton v. Sims, 158 So. 141, 171 Miss 741, suggestion of error overruled 158 So 778, 171 Miss 741
N C—State ex rel Cain v. Corbett, 69 S E 2d 20, 235 N C 33.
Ohio.—Hanratty v. Godfrey, 184 N E 842, 44 Ohio App 360.
Tex—Ætna Casualty & Surety Co v Clark, 150 S W 2d 78, 136 Tex. 238—Rich v Graybar Electric Co, 84 S W.2d 708, 125 Tex. 470, 102 A. L R 171
57 C J. p 1015 note 71.

Acts done colore officii or virtute officii

(1) There is some authority to the effect that the surety of a sheriff is liable for the consequences of a wrongful act of a deputy only when such act is done by virtue of the deputy's office, as distinguished from an act done under color of office merely.—State v. National Surety Co., 39 S W.2d 581, 162 Tenn 547.

(2) Thus, sureties on official bond of sheriff are liable for the act of a deputy done by virtue of his office, which means that the act must be done in an attempt to serve or execute a process or under a statute giving deputy the right to arrest without a warrant—State ex rel Blanchard v Fisher, Tenn, 245 S.W.2d 179

(3) Other authority holds that the sheriff's surety is liable for wrongful acts done either colore officii or virtute officii by deputy.—Biehn v Bannick, 7 P 2d 567, 166 Wash 465

(4) Fact that deputy imprisoned injured automobilist, arrested for public drunkenness, without commitment by magistrate, did not make deputy's custody illegal, even if imprisonment were unlawful, as regards liability on sheriff's official bond—State v National Surety Co, 39 S.W. 2d 581, 162 Tenn. 547.

(5) Unlawful treatment by deputy of prisoner whom he has lawfully arrested, whereby prisoner is injured, is wrong done by virtue of office, authorizing recovery on sheriff's official bond—State v. National Surety Co, supra

(6) Under statute providing that sheriffs and deputies shall be liable on their official bonds for the damage done by the unlawful or careless use of any pistol or revolver, whether or not such bond is so conditioned, unlawful use of weapon by tax collecting deputy sheriff creates liability on bond regardless of whether officer was acting colore officii.—Hatfield v. Hutton, 148 S.E. 2, 107 W.Va. 230.

Joint and several liability

Where deputy sheriff unlawfully spirited arrested prisoner out of county of prisoner's residence and secreted prisoner in distant jail, sureties on official bond of sheriff were jointly and severally liable with

the deputies are deputies de facto,[5] to the same extent as the surety is liable for the official acts or omissions of the sheriff himself,[6] even though the county could not be held.[7] The surety on the sheriff's bond is not liable, however, for acts of a deputy outside the scope of his powers or duties and not done in the performance of an official act,[8] or for damages for acts of the deputies for which the sheriff was not personally liable,[9] even though the bond expressly covers the acts of the sheriff's deputies,[10] and a surety on the sheriff's bond is not liable for negligent or unlawful acts of deputy sheriffs while discharging their official duties unless such acts involved improper and unfaithful discharge of such duties.[11] Rural policemen who are statutory officers appointed by the sheriff have been held not deputy sheriffs with respect to liability of the sheriff's bond for their improper

sheriff for unlawful trespass committed by deputy.—Moody v Kimball, Tex Civ.App, 173 S W 2d 270.

Pursuit across county line

Fact that deputy constable in attempting to make arrest for misdemeanor pursued fleeing car across county line and there shot passenger therein did not relieve constable's surety of liability.—State ex rel. and to Use of Kaercher v. Roth, 49 S.W. 2d 109, 330 Mo 105.

Assault on prisoner

Where deputy sheriffs struck prisoner when there was no need for doing so, their conduct is a violation of an official duty for which the surety of the sheriff is liable.—Dufrene v. Rodrigue, La App, 38 So 2d 511

Trespass and assault in executing writ

Surety on official bond of constable is liable for acts of trespass and assault committed by deputies in executing writ of sequestration.—Mendoza v Singer Sewing Mach. Co, 84 S.W.2d 715, 125 Tex 639.

5. Ga.—Powell v Fidelity & Deposit Co of Maryland, 163 S E 239, 45 Ga App. 88.
57 C J p 1015 note 71 [c]
De facto deputies in general see supra § 28.

6. La.—Gray v. De Bretton, 188 So. 722, 192 La 628
Extent of liability generally see infra § 181.

7. Ohio.—Hanratty v. Godfrey, 184 N E 842, 44 Ohio App 360.

8. Fla.—Roberts v Dean, 187 So 571, 133 Fla. 47, 136 Fla. 421
Kan.—Hitsman v. Kennedy, 27 P.2d 218, 138 Kan 564
Ky.—Commonwealth, for Use and Benefit of Coombs, v Vincent, 137 S W 2d 1091, 282 Ky. 95.
La.—Britt v. Merritt, 53 So.2d 121, 219 La. 333—Robertson v. Palmer, App, 55 So 2d 68—Britt v Merritt, App, 35 So 2d 281—Simoneaux v. Gonzales, App., 4 So 2d 35
Tex.—Sheppard v. Gill, Civ App, 58 S.W.2d 168, affirmed 90 S.W.2d 563, 126 Tex. 603.
57 C.J p 1015 note 72.
Liability of sureties for unofficial acts of officer see supra § 178.

Negligent operation of motor vehicle

(1) Driving of sheriff's automobile by deputy sheriff is not sheriff's official act, so as to render surety on his bond liable for injuries resulting from deputy's negligence therein, unless it directly involves discharge of official duty.—Gray v De Bretton, App, 184 So 390, affirmed 188 So 722, 192 La 628

(2) Surety on official bond of sheriff was not liable for injuries to person struck by motor vehicle as result of deputy sheriff's alleged negligent operation of vehicle while conveying a prisoner to jail.
La.—Gray v De Bretton, 188 So 722, 192 La. 628.
Tex.—Ætna Casualty & Surety Co v Clark, 150 S W 2d 78, 136 Tex. 238

(3) The same rule has been applied where the injured person was struck by a vehicle driven by a deputy sheriff while returning from serving subpoenas in a criminal case, and the doctrine of respondeat superior is in no way involved in the determination.—Nelson v Bartell, 103 P.2d 30, 4 Wash 2d 174.

Acts in furtherance of unlawful conspiracy

Where deputy sheriff and others conspired to get a wife to return to her husband by having deputy, who was commissioned in another parish, serve a false warrant for her arrest, and while carrying out the conspiracy, one of the conspirators shot and killed a third person, surety on sheriff's bond was not liable to third person's widow for his death, since deputy was not acting with official authority.—Davis v McDowell, La. App, 185 So 634

Arrest

(1) The restraint of a person's liberty by a deputy sheriff to constitute an "arrest," so as to render surety liable for injuries inflicted on third person by deputy, must have been done for the actual or purported purpose of bringing restrained person before a court or otherwise securing the administration of the law.—State, for Use of Dew, v. Lightcap, 179 So. 880, 181 Miss 893.

(2) Surety was not liable for injuries sustained when deputy allegedly shot plaintiff because he insisted on being present while deputy talked to a third person, under evidence that deputy had no warrant for third person's arrest, that no circumstances appeared permitting arrest without a warrant, and that deputy told plaintiff that he did not have third person under arrest, since evidence showed as a matter of law that deputy was not acting under color of his office.—State, for Use of Dew, v. Lightcap, supra.

(3) Sureties on sheriff's official bond were only answerable for faithful performance of official duty, and were not liable for tort of deputies in making an arrest without a warrant.—Stephens v. Hinds, 194 S.W 2d 483, 183 Tenn 652

Tort unconnected with execution and return of process

(1) A sheriff's bond for due execution and return of process and faithful execution of his office does not impose liability on surety for deputy sheriff's negligent act unconnected with execution and return of process.—Davis v. Moore, 2 S E 2d 366, 215 N C. 449

(2) Accordingly, bond did not impose liability on surety for damages for injuries to a prisoner allegedly resulting from an assault on prisoner by deputy sheriff.—Hampton v. Williams, 4 S E 2d 446, 216 N.C. 796

Malicious prosecution

The surety of the sheriff is not liable for damages caused by a deputy's malicious prosecution not authorized by the sheriff.—Biehn v. Bannick, 7 P 2d 567, 166 Wash 465.

9. Cal.—Lorah v. Biscailuz, 54 P.2d 1125, 12 Cal App 2d 100.
Liability of officer for acts or omissions of his deputies see supra § 55.

10. Cal.—Lorah v Biscailuz, supra.

Provision held mere surplusage

Bond wherein surety had agreed to assume liability for acts of sheriff's deputies was held executed without consideration as to such provision so that such provision of bond was mere surplusage.—Lorah v Biscailuz, supra.

11. La.—Gray v De Bretton, App, 184 So 390, affirmed 188 So 722, 192 La. 628.

acts[12]

Although there is authority holding the sureties of the sheriff liable for the act of the deputy resulting in wrongful death,[13] the surety is not liable where the wrongful act of the deputy resulting in death was not strictly an act of misfeasance in office or wrongful performance of some official duty as deputy,[14] and, under a statute authorizing recovery for wrongful death resulting from the omission of an agent or servant, it has been held that the surety on the bond of a sheriff is not liable for damages for the wrongful act or omission of a deputy sheriff resulting in death,[15] unless the sheriff and his bondsman were present and aided and abetted in the offense complained of.[16]

Assistants Sureties on the official bond of a sheriff or constable are not liable for defaults or misfeasances of subordinate assistants of the officer, in the absence of any negligence in the selection or appointment of such assistants or of failure properly to supervise their acts.[17]

Acts of another sheriff. Sureties on the official bond of a sheriff are not liable for the wrongful acts of the sheriff of another county who arrested a person without a warrant pursuant to a request of their principal[18]

§ 180. —— Duration of Liability

The sureties on the official bond of a sheriff or constable are liable thereon for such defaults only as occur within the period or term covered by the bond, that is, for the period of time specified in the bond, unless liability is sooner released or the sureties discharged.

The sureties on the official bond of a sheriff or constable are liable thereon for such defaults only as occur within the period or term covered by the bond,[19] and, where a bond is conditioned only for a specified time, it cannot be enlarged to embrace a default occurring after that time on the ground that the law requires a bond for the whole term of office[20] A bond remains valid and effective, and liability thereon continues, for its full term or the full period of time by it specified unless such liability is sooner released or the sureties discharged.[21]

12. U S—Trammell v. Fidelity & Cas Co of New York, D C S C, 45 F Supp 366

13. Ga—Powell v. Fidelity & Deposit Co of Maryland, 173 S E 196, 48 Ga App. 529

Ky—Johnson v Williams, 63 S W 759, 111 Ky 289, 23 Ky L 658, 54 L R A. 220

Miss—Hinton v Sims, 158 So 141, 171 Miss 741, suggestion of error overruled 158 So 778, 171 Miss 741.

Tenn—State v National Surety Co, 39 S W 2d 581, 162 Tenn. 547.

57 C J p 1015 note 71.

Act held colore officii

Deputy sheriff's shooting of deceased to prevent escape from arrest after raid on still was act colore officii as regards recovery on sheriff's bond.—Richards v. American Surety Co. of New York, 171 S E 924, 48 Ga App 102

Violation of duty

Where act of deputy violates official duty or where he unfaithfully or improperly performs an official act in order to accomplish a desired end, and death or injury results, the surety on the sheriff's bond is responsible in damages therefor—Britt v Merritt, App, 45 So 2d 902, affirmed in part and reversed in part on other grounds 53 So 2d 121, 219 La 333.

14. La—Simoneaux v. Gonzales, App., 4 So 2d 35—Davis v. McDowell, App, 185 So. 634.

57 C J. p 1015 note 72

15. Ky—Casey v Fidelity & Cas Co. of New York, 128 S W 2d 939, 278 Ky 426—Howard v Caudill, 15 S.W 2d 245, 228 Ky. 403.

Reason for rule

The right of action for wrongful death is purely statutory, being based on a statute in derogation of common law which will not be extended by construction beyond the reasonable import of its language, and the doctrine of respondeat superior does not apply to sheriff and deputy—Giles v. Parker, 159 So 826, 230 Ala 119.

16. Ky—Casey v Fidelity & Cas Co of New York, 128 S W 2d 939, 278 Ky 426

17. Ala—Langis v. Byrne, 131 So 444, 222 Ala 183.

18. Fla—Roberts v Dean, 187 So 571, 133 Fla 47, 136 Fla 421

Relationship held not that of agency

Fla—Roberts v Dean, supra

Invasion of right of privacy

Action of sheriff in requesting sheriff of another county to arrest named person did not give rise to a cause of action against sheriff making such request or surety on his official bond for breach of bond predicated on alleged invasion of right of privacy of arrested person's wife, although no warrant for such arrest had been issued at time request was made or at time of arrest, since sheriff in making such request did not counsel any wrongful act and could not reasonably foresee that an illegal arrest would in fact be made—Walker v Whittle, 64 S E 2d 87, 83 Ga App 445.

19. Ala—Cuthbert v. Higgins, 21 Ala 349.

N C.—Keck v Coble, 13 N C. 489

Release or discharge of sureties see infra § 182

Withdrawal of sureties see infra § 182

Commencement of liability

Where bond of deputy sheriff was conditioned on faithful performance of duty honestly to account for all money that might come into his hands in his official capacity "during the term," the quoted phrase referred to the words immediately preceding it, and was not intended to fix the time when the deputy was required to account for the funds—Zurbuckeen v. Glens Falls Indemnity Co., 149 P 2d 617, 158 Kan. 599.

20. N C—Prince v McNeill, 77 N.C 398

Liability as limited by terms of bond in general see supra § 178.

21. Ky.—Cotton v. Walton-Verona Independent Graded School Dist, 174 S W 2d 712, 295 Ky. 478

57 C J p 1018 note 21.

Bond given at beginning of term

(1) A bond given by a sheriff at the beginning of his term covers the whole term, and any bond subsequently given is merely additional security—Cotton v. Walton-Verona Independent Graded School Dist, 174 S W.2d 712, 295 Ky. 478—57 C J. p 1018 note 21 [a]

(2) The provisions of amendatory statute that sureties on sheriff's bond shall be liable only for sheriff's defalcations during year in which bond is executed and only if notice of sheriff's unlawful act or default is given sureties within following year are unconstitutional with respect to sheriff's prior bonds covering his entire term under law in effect at time of their execution—Cotton v. Wal-

Where the condition of the bond does not specify the period covered by the bond, recourse may be had to a recital of the bond which states the officer's term of office in order to show the intention of the parties that the bond was to cover the stated term of office [22]

Effect of termination of officer's incumbency As a general rule, the sureties on the official bond of a sheriff or constable are not liable for his acts or defaults after he has gone out of office [23] So, where an officer goes out of office before commencing to execute process and before the return day thereof, his sureties cannot be held liable for his failure to execute or return it,[24] or for any of his acts with relation to the execution of such process after he has gone out of office;[25] and the surety is not liable for failure of the officer to make the return where the officer was not required to make the return before the return day and he resigned from his office before that day.[26] Where, however, an officer has commenced the execution of process while in office, and it is his right or duty to complete the execution thereof after his term expires, his sureties are liable for his defaults with respect thereto, although such defaults do not occur until after he has gone out of office.[27] Where an officer has received money by virtue of his office, the expiration of his term does not release his sureties from liability therefor;[28] and, in general, where the officer has been guilty of official default or misfeasances while in office, his sureties remain liable therefor notwithstanding the termination of his incumbency,[29] even though no action is commenced while he is in office [30] The sureties of an officer are also liable for money properly paid to him as such officer after he is out of office;[31] but they are not liable for his failure to pay over money voluntarily paid to him, or collected or received by him without authority, after the expiration of his term [32] Where a constable forfeits his office by removing from the town or county in respect of which he was elected or appointed, but continues to act as constable, the sureties on his bond are still liable for his acts as for those of a de facto officer.[33]

Holding over by officer. Where an officer's official bond is conditioned for the discharge of his duties until a successor shall be elected and qualified, the liability of his sureties continues until that event,[34] and it has been held that, where such officer is reelected and enters on his new term without giving a new bond, he may, with respect to the sureties on his old bond, be regarded as holding over so that they remain liable for his acts or defaults,[35] although on this point there is also authority to the contrary.[36] Where, however, the bond of an officer covers merely his term of office, and it is limited by statute, his sureties are not responsible for his defaults with respect to process coming into his hands after the expiration of his term and while he is acting merely de facto [37]

Deputy serving through successive terms. It has been held that, where a deputy sheriff or constable continues to be such without interruption during successive terms of office of his principal, an official bond given by such deputy does not expire on the expiration of the principal's term but continues as security for defaults occurring in a subsequent term,[38] but there is also authority for the view that, where an officer takes a bond from his deputy to indemnify him during his continuance in office, such bond refers only to the term of the principal's office then current, and cannot be held to embrace defaults which occur during a succeeding

ton-Verona Independent Graded School Dist., supra

22. N.Y.—McCollom v. Ætna Cas & Sur Co., 20 N.Y.S.2d 287, 260 App Div 1.

23. Ark.—State v. Atkinson, 13 S.W 415, 53 Ark 98
57 C.J. p 1018 note 23
Where officer serves successive terms see supra § 178.

24. N.C.—Ringold v. McGowan, 34 N.C. 44
57 C.J. p 1018 note 24.

25. N.C.—Ringold v. McGowan, supra.
57 C.J. p 1018 note 25.

26. Miss.—W. T. Rawleigh Co. v. Hester, 200 So. 250, 190 Miss. 329.
Reason for rule
The duty imposed on the officer by the statute was not violated while he remained in office.—W. T. Rawleigh Co. v. Hester, supra

27. Ala.—Dixon v. Caskey, 18 Ala 97.
57 C.J. p 1018 note 27
Right or duty of retiring officer to complete execution of process see supra § 50.

28. Ala.—Pearce v. Hall, 21 So. 250, 113 Ala. 245
57 C.J. p 1018 note 28.

29. Ga.—Wyche v. Myrick, 14 Ga 584
Time to sue on official bond, and limitations see infra § 200.

30. Ga.—Wyche v. Myrick, supra.

31. Ill.—Elkin v. People, 4 Ill. 207, 36 Am.D. 541.
Wash.—King County v. Stringer, 227 P. 17, 130 Wash. 287.

32. Ga.—McDonald v. Bradshaw, 2 Ga. 248, 46 Am.D. 385.
57 C.J. p 1018 note 32.

33. Ind.—Case v. State, 69 Ind. 46.

34. Ind.—Akers v. State, 8 Ind. 484
Va.—Commonwealth v. Drewry, 15 Gratt. 1, 56 Va. 1.
Holding over by:
Constable see supra § 16.
Sheriff see supra § 8

35. Ind.—Butler v. State, 20 Ind. 169

36. Ohio.—State v. Crooks, 7 Ohio Pt. II, 221
Va.—Monteith v. Commonwealth, 15 Gratt. 172, 56 Va. 172.

37. Ala.—Cuthbert v. Huggins, 21 Ala. 349

38. N.Y.—Hughes v. Smith, 5 Johns. 168.

term.[39] Although the death of the sheriff would ordinarily terminate the liability of the surety on the bond of the deceased's deputy which was conditioned for a term of years,[40] where the deputy continued uninterruptedly to serve as such, under appointment by the successor of the deceased sheriff, the surety could, for a valuable consideration, waive the termination of its liability, so as to permit the bond to continue according to its terms[41]

Legislative extension of officer's term. When the term of office of a sheriff or constable is extended by an act of the legislature, he becomes his own successor, and the liability of his bondsmen continues until he qualifies as such or is displaced by a successor.[42]

Failure to renew bond. Where a sheriff or constable required by law to renew his official bond at periodic intervals fails to effect such renewal, but continues in office and remains such officer de facto, the sureties on his original bond have been held liable for any subsequent breach of his official duty.[43] Where the failure to renew the bond ipso facto vacates or forfeits the office, the sureties on the original bond are not liable for any defaults occurring after the occurrence of the vacancy.[44]

Death of officer. Where an action is pending against an officer and his sureties at the time of his death, it survives as against the sureties,[45] but, where at the time of the death of an officer he is in no default for which his sureties are liable, subsequent events cannot subject them to any liability on the bond.[46]

§ 181. —— Extent of Liability

The extent of the liability of a surety on the bond of a sheriff or constable is to be ascertained from the terms of the bond strictly and reasonably construed; and a surety is not to be held liable beyond the clear scope and purpose of his undertaking.

The extent of the liability of a surety on the bond of a sheriff or constable is to be ascertained from the terms of the bond,[47] strictly construed so as not to extend the liability by implication beyond its terms,[48] but also reasonably construed so as not to defeat the purpose of requiring sureties for the protection of the public against official misconduct,[49] and a surety is not to be held liable beyond the clear scope and purpose of his undertaking.[50] The statutes relating to sheriffs' bonds and official bonds generally have been held not to permit forfeiture of a sheriff's bond in its entirety without reference to any definite pleaded or proved amount of defalcation or fraudulent overcharge by, or damage for misconduct of, the principal.[51] Where an officer has paid over amounts collected as taxes, directing them to be applied to the taxes of a particular year, to which they are properly applicable, his sureties for that year are entitled to credit for the full amounts

39. N C—Thomas v Summey, 46 N C 554
57 C J. p 1019 note 41.

40. Ala—McMullen v. Daniel, 155 So 687, 229 Ala 194.

41. Ala—McMullen v Daniel, supra

Collecting premium on bond after reappointment

Surety, whose general agent rendered bill for and collected premium on deputy sheriff's bond after principal's reappointment by deceased sheriff's successor, validated and continued bond, so as to authorize recovery from surety for malicious prosecution by principal executing search warrant after sheriff's death —McMullen v. Daniel, supra

42. Mo—State v. Kurtzeborn, 9 Mo App 245

43. Mich—Dunphy v. Whipple, 25 Mich 10
57 C.J p 1019 note 44
Duty to renew bond in general see supra § 7.

In Virginia

(1) There is authority supporting the rule of the text.—Coplin v McCalley, 1 Leigh 280, 28 Va 280, 19 Am D. 748

(2) The contrary has also been held.—Commonwealth v Fairfax, 4 Hen & M. 208, 14 Va. 208.

44. Miss—Bennett v. State, 58 Miss 556.

45. Ala—Camp v Watt, 14 Ala 616

46. Ala—Clark v. Lamb, 76 Ala 406
57 C J. p 1019 note 49.

47. Iowa—State ex rel. Switzer v Overturff, 33 N W 2d 405, 239 Iowa 1039, 4 A L R 2d 1343.
57 C J. p 1019 note 51
Liability for particular defaults see infra §§ 183–189.
Terms of bond as limiting liability thereon in general see supra § 178

48. S C—Wieters v. May, 50 S E 547, 71 S C 9.

Costs of unsuccessful suit

Where sheriff redelivered attached property without taking statutory forthcoming bond, sheriff and surety were not liable for expenses of plaintiff in attachment, consisting of attorney's fees and costs, in unsuccessful suit on bond taken by sheriff —Campbell v. Tucker, 154 So. 821, 23 Ala.App. 100, certiorari denied 154 So 825, 228 Ala. 658.

49. S.C.—Wieters v. May, 50 S.E 547, 71 S C. 9

50. Ill—Casper v. People, 6 Ill App 28.
Iowa—State ex rel. Switzer v. Overturff, 33 N W 2d 405, 239 Iowa 1039, 4 A L R 2d 1343.

51. Iowa—State ex rel. Switzer v. Overturff, supra.

Reasons for rule

(1) Bond is for purpose of indemnifying obligee or any person suffering injury or loss because of official malfeasance, misfeasance, or nonfeasance—State ex rel. Switzer v. Overturff, supra.

(2) The statutes fixing minimum amount as penalty of sheriff's bond, but permitting county boards of supervisors to fix larger amounts without limit, do not authorize such boards to fix penalties for official wrongdoing, but merely permit them to fix larger indemnities in counties wherein larger amounts seem necessary or desirable because of size of other circumstance.—State ex rel. Switzer v. Overturff, supra.

(3) The term "penalty" means any extraordinary legal liability of wrongdoer to person wronged, not limited to damages, and may merely connote security for damage actually caused by breach, with recovery limited to compensatory amount, unless stipulated or liquidated damages are clearly intended—State ex rel. Switzer v. Overturff, supra.

on their liability for the taxes of such year,[52] and the officer's sureties are entitled to credit for an amount due to such officer,[53] as where warrants have been issued by the county and are unpaid,[54] provided they produce and surrender such warrants or show that the officer is still the holder thereof;[55] but, where judgment has been entered against an officer and his sureties on his bond, the sureties are not to be credited with payments made by the officer, or obtained by process out of his property, on account of the official debt or default for which the judgment was obtained,[56] and they remain liable for his defalcations, to the extent of their aliquot parts of the penalty, after all his means are exhausted.[57] Where a fine or penalty imposed on an officer for an official default is paid by his sureties, in any subsequent proceeding against them founded on the same default they are entitled to a credit on the amount for which they are liable to the extent of the fine or penalty so paid.[58] Where additional sureties are given on an officer's bond, in place of those who have died, removed, or become insolvent, all the sureties are liable to the officer's creditors for their aliquot proportions of the penalty, according to the number in the original bond.[59] Sureties are not entitled to any credit, on the amount for which they are liable to a creditor of the officer, for payments made to extinguish interest on the creditor's demand during the pendency of the suit to determine their liability, or for costs of such suit paid by them.[60]

Extent of liability as affected by penal sum named in bond. While the penalty named in the official bond cannot be treated as liquidated damages for the officer's breach of the conditions thereof,[61] in general, the liability of the sureties on the official bond of a sheriff or constable is limited to the penal sum named therein[62] or to the minimum penal sum required by statute where that sum is greater than the sum named in the bond,[63] and a recovery for the full amount of the bond prevents a recovery from the sureties for any other defaults,[64] even though actions therefor are then pending.[65] The recovery of interest on the amount for which the officer's misconduct or default has rendered the sureties liable is not, however, precluded by the fact that the addition thereof raises their liability to an amount exceeding the penal sum of the bond.[66]

Liability for fine or penalty. Sureties on the official bond of a sheriff or constable are not liable for a statutory penalty or fine for which the offi-

52. W Va —State v. Wade, 15 W.Va. 524

Application of payments

Where the same person was sheriff in 1871 and in 1872, with different sureties on his bonds, and a balance due from him in 1871 was carried over into his settlement for the levy of 1872, and between the two settlements he paid over more than the amount of this balance, it was held that, in the absence of any appropriation for payment, it should be applied, as between the sureties, to the prior indebtedness of 1871, where it did not appear that any part of it was paid from taxes collected in 1872 —Helm v. Commonwealth, 79 Ky 67, 1 Ky L. 355.

53. Idaho —Bingham County v Fidelity, etc, Co, 88 P. 829, 13 Idaho 34.

Action by sheriff against sureties of deputy

Where deputy sheriff admitted that he had not remitted to sheriff a certain amount of taxes collected by him in a specified year, but also established that he was entitled to certain unpaid commissions on taxes collected, sheriff was entitled to recover difference between taxes withheld by deputy and commissions earned by deputy from deputy and surety on his bond —Daniel v. Standard Accident Ins. Co., 192 S W.2d 483, 301 Ky. 536.

54. Idaho.—Bingham County v. Fidelity, etc, Co, 88 P. 829, 13 Idaho 34.

55. Idaho —Bingham County v Fidelity, etc, Co., 88 P. 829, 13 Idaho 34

56. S C.—State Treasurers v. Harris, 18 S C L. 621

57. S.C —State Treasurers v. Harris, supra

58. Va —Grandstaff v. Ridgely, 30 Gratt 1, 71 Va. 1.

59. S C.—State Treasurers v. Harris, 19 S C L 282, distinguishing Harris v Ferguson, 18 S C.L. 397

60. S.C —McKenna v. Secrest, 23 S C Eq. 160

61. Iowa —State ex rel Switzer v. Overturff, 33 N.W 2d 405, 239 Iowa 1039, 4 A L R 2d 1343.

62. Idaho —Lorang v. Hays, 209 P. 2d 733, 69 Idaho 440.
Miss —Maryland Cas. Co. v. Eaves, 196 So 513, 188 Miss 872.
S.C —**Corpus Juris quoted in** Brown v. National Surety Corporation, 36 S E 2d 588, 589, 207 S.C. 472.
57 C J. p 1020 note 65.

Continuing bond

Bond conditioned on faithful discharge of duties of deputy sheriff and stating in recital that deputy was appointed for term from March 1, 1936, to Dec 31, 1937, was a continuing bond imposing maximum liability of face amount of bond for the whole term of office, and was not a bond for one year with a cumulative liability created on renewal so as to render surety liable for deputy's embezzlement in excess of face amount of bond, where amount embezzled during first year and during remaining ten months of term of office was, in each period, less than face amount. —McCollom v. Ætna Cas. & Sur Co, 20 N Y.S 2d 287, 260 App Div 1.

63. Tex.—Grimes v. Bosque County, Civ App, 240 S W.2d 511, error refused no reversible error.

Reason for rule

Although sheriff made official bond in amount of three thousand dollars, statute providing that sheriff's bond shall not be less than five thousand dollars would be part of bonding contract —Grimes v. Bosque County, supra.

64. S C —**Corpus Juris quoted in** Brown v. National Surety Corporation, 36 S E 2d 588, 589, 207 S.C. 472.
57 C.J p 1020 note 66.

65. S.C —**Corpus Juris quoted in** Brown v. National Surety Corporation, 36 S E 2d 588, 589, 207 S.C. 472
57 C.J. p 1020 note 67.

66. Mont —Maddox v. Rader, 22 P. 386, 9 Mont. 126, reversed on other grounds 14 S Ct. 46, 150 U.S 128, 37 L Ed. 1025.

cer has become liable or which has been imposed on him for an official default,[67] except where such liability is imposed on them by statute.[68] Where the sureties are so made liable therefor, however, their liability is not affected by the fact that the complaining party has suffered no loss or damage from the default in respect of which the penalty has been imposed.[69]

§ 182. —— Discharge, Release, or Withdrawal of Sureties

General rules relating to the release and discharge of sureties have been applied to sureties on the official bond of a sheriff or constable, and, accordingly, under the circumstances of the particular case, it has been held that such sureties may or may not be discharged or released by acts of the court, governor, legislature, or the plaintiff, by giving new or additional bond, by alteration of the bond, by forfeiture of office, or by withdrawal of the sureties.

The rules relating to the release and discharge of sureties generally, which are discussed in Principal and Surety §§ 116-244, have been applied to sureties on the official bond of a sheriff or constable.[70] Sureties of an officer who, being insolvent and liable for defaults of his deputy, has delivered to them the official bond of his deputy have no authority to discharge the bond or the sureties thereon, but only to resort thereto as far as may be necessary for their own indemnity.[71]

Release or discharge by court. A court by which the official bond of a sheriff or constable has been approved, or the justices thereof, have no authority to discharge the obligation of the sureties thereon by authorizing or permitting the substitution of another bond,[72] except where authority so to do is given by statute.[73] Where such a statute exists, an application for such a discharge must be made on notice to the officer,[74] stating why the discharge is asked;[75] and, where the officer denies the matters assigned as cause for seeking the release, such matters must be proved on the trial or hearing.[76] When the principal fails to execute a new bond, the surety cannot be relieved of liability unless and until the court makes such orders as will protect the trust or estate which has been confided to the fiduciary or officer.[77] Under a statute allowing the discharge of the sureties "for good cause," any reasonable cause, whether it relates to the surety or to the officer alone, or to both, may be deemed sufficient;[78] and the court judging of the cause must be allowed a considerable discretion,[79] and its conclusion as to the sufficiency of the cause will not be disturbed by a higher court unless for a palpable mistake of judgment.[80]

Action of governor. Under a statute providing that the governor may erase and annul all bonds and all mortgages furnished by any public officer, the cancellation by the governor of the official bond of a sheriff or constable and the erasure of the mortgage discharge the sureties from liability on such bond.[81] Where an officer is released by proclamation of the governor, acting under statutory authority, from liability for state funds deposited in a bank which subsequently failed, his sureties are discharged from liability for such funds.[82]

Legislative release. Where a judgment has been rendered in favor of the state on a sheriff's bond for the amount thereof, and an assessment of damages for the breaches assigned has been made, an

67. S.C.—Posey v. Ramey, 35 S.C.L. 20.
57 C.J. p. 1020 note 71
Exemplary or punitive damages not recoverable generally see infra § 207.
Fines, penalties, and amercement of officers see supra §§ 173-176.

68. S.C.—Posey v. Ramey, supra
57 C.J. p. 1020 note 72
State bonding fund may be held liable with sheriff in amercement proceeding to same extent as private or corporate surety.—Farmers' State Bank of Van Hook v. Crandell, 236 N.W. 264, 60 N.D. 619.

69. Ark.—Wilson v. Young, 25 S.W. 870, 58 Ark. 593
57 C.J. p. 1021 note 73.
Liability of officer for penalty as affected by absence of injury see supra § 175

70. Pa.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa. Super. 451
57 C.J. p. 1021 note 76.
Sentence of principal on criminal charge
Where constable had violated obligation of statutory bond for faithful discharge of duties of his office by obtaining money from county by false pretenses, constable's sentence on criminal charge based on such act did not relieve surety of liability on bond.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, supra.

71. Me.—Adams v. Gould, 8 Me. 438

72. Ga.—Towns v. Stephens, 9 Ga. 589.

73. Ala.—Bruner v. Bryan, 50 Ala. 522
Tenn.—McGhee v. Anderson, 11 Humphr. 595.
57 C.J. p. 1021 note 80.

74. Ky.—Lemon v. Peck, 13 B.Mon. 393.

75. Ky.—Lemon v. Peck, supra.

76. Ky.—Lemon v. Peck, supra

77. Ky.—Fidelity & Deposit Co. of Maryland v. Logan, 36 S.W.2d 10, 237 Ky. 565
Mandate of appellate court
Sheriff's surety was held entitled under statute to be released from future liability as of date of mandate from appellate court, rather than date of lower court's erroneous order denying motion for release.—Fidelity & Deposit Co. of Maryland v. Logan, supra.

78. Ky.—Lemon v. Peck, 13 B.Mon. 393.

79. Ky.—Lemon v. Peck, supra.

80. Ky.—Lemon v. Peck, supra.

81. La.—Lockwood v. Penn, 22 La. Ann. 29.

82. Ark.—State v. Davis, 10 S.W.2d 513, 178 Ark. 153.

act of the legislature releasing, on specified conditions, defendant's liability on the judgment has been held to be construable as a release only of the judgment so fixed and determined, and not of any liability thereafter to be established.[83]

Change in law. The mere enactment of a new law or a change in existing law with respect to sheriffs and constables, or their office, after the execution of an official bond of such an officer does not discharge or release the sureties on such bond where no change is made which operates to their prejudice.[84] It has been held that, where the change increases the risk of the sureties, it operates to release them,[85] but there is also authority, to the contrary, that the sureties are not discharged by such a change [86]

Acts or instructions of plaintiff. The sureties on the official bond of a sheriff or constable are discharged from liability for the acts or defaults of the officer in connection with the execution of process by the voluntary dismissal by plaintiff of the suit in which such process issued,[87] even though the motion to dismiss is made because of the officer's irregularities.[88] Where an execution plaintiff authorizes an officer who has collected money on the writ to retain it in his possession, the sureties are discharged from liability for its proper payment;[89] but permission given by a clerk of court to an officer to postpone the payment over of the clerk's fees collected on execution as part of the costs has been held not to discharge the officer's sureties.[90] An officer's sureties are not released from liability by the consent of plaintiff to the discharge of a prisoner in the officer's custody, on giving security, where it appears that such consent was given in reliance on the officer's liability [91] The negligence of a county board in not investigating an officer's accounts and ascertaining the amount of his earnings does not relieve the sureties on his bond of liability for money erroneously paid to such officer by the county for a supposed deficit in his compensation where such deficit was made to appear by his failure to report to the board all the earnings of his office.[92] Where a bond is joint and several, the sureties are not discharged by striking the officer as a party defendant in a suit on the bond, or dismissing the suit as to him.[93]

Discharge by giving new bond Unless otherwise provided by statute, the giving of a new official bond by a sheriff or constable does not release or discharge the sureties on an earlier bond, and the new bond is merely cumulative or additional security.[94] Under a statute providing for the discharge of sureties on official bonds after the giving of a new bond as therein provided for, the sureties on an officer's official bond are not released by the erasure of their names and the substitution of the names of others by direction of the county board of supervisors [95]

Giving additional bond not required by statute. The fact that a sheriff or constable gives a voluntary bond in addition to the official bond required by statute does not release the sureties on the official bond,[96] even with respect to the particular defaults to which the additional bond relates [97]

Alteration of the bond by the county judges by reducing the amount of the penalty therein renders the bond void as to sureties who executed it prior to its alteration.[98]

Forfeiture of office. The sureties on an official bond of a sheriff or constable are not relieved from liability for the officer's failure to pay over money collected by him by the fact that he has forfeited his office.[99]

Withdrawal of sureties. In the absence of statute otherwise providing, a surety on the official bond of a deputy sheriff or constable cannot dis-

83. Ill—People v. Compher, 14 Ill 447

84. Ill—People v. Leet, 13 Ill. 261
57 C.J p 1022 note 98

85. La—Roman v Peters, 2 Rob 479, 38 Am D 222.
Mich—White v East Saginaw, 6 N W 86, 43 Mich 567.
Liability of sureties for officer's defaults in performance of duties imposed after execution of bond see supra § 178

86. N.Y—New York v. Ryan, 4 Transcr A. 363, 35 How.Pr. 408.
57 C.J. p 1022 note 1

87. Ga.—Richmond County v. Barr, Dudl 32.

88. Ga—Richmond County v. Barr, supra.

89. Tenn—Wells v. Gant, 4 Yerg 491

90. Tenn—McNairy v. Marshall, 7 Humphr 229.

91. S C—Treasurers v McDowell, 19 S C L 184, 26 Am D. 166

92. Ill.—People v. Foster, 23 N.E. 615, 133 Ill. 496

93. Ga—Cone v. American Surety Co, 116 S E 648, 29 Ga App. 676

94. Ky—Cotton v Walton-Verona Independent Graded School Dist, 174 S W 2d 712, 295 Ky. 478.
57 C J. p 1022 note 91.

95. Miss—State v. Matthews, 57 Miss. 1.

96. Miss.—State v Matthews, supra.

Mo—Sheeley v Wiggs, 32 Mo 398
Liability on voluntary bond see supra § 178.

97. Miss—State v. Matthews, 57 Miss. 1.
57 C.J p 1022 note 95.

98. Mich—People v. Brown, 2 Dougl 9, 12.
Reason for rule
"This was certainly a material alteration of it, and it cannot be said that a bond with a condition in the penalty of $20,000 is the same with a bond in the penalty of $25,000. The alteration made it another and a different bond."—People v. Brown, supra.

99. Mo—State v. Muir, 20 Mo. 303

charge himself from liability on his bond by giving notice to the officer that he will no longer be bound for the deputy,[1] or by giving notice to the officer of the deputy's unfitness for office and requesting his removal.[2] Where, however, provision is made therefor by statute, a surety may, on the breach of the bond by the sheriff or constable, seek release from future liability[3] by serving on the proper officer whose duty it is to approve the bond a written notice that he desires to be relieved from his suretyship,[4] and presenting, with his demand for release, the grounds on which he bases that demand,[5] and the surety of a deputy may withdraw as such by serving on the officer a notice that he will not be further bound,[6] although such a notice does not operate to discharge the surety until a reasonable time has elapsed, sufficient to enable the officer to give notice to the deputy and the other sureties and to permit a new bond to be given.[7] Where the procedure for withdrawal is properly pursued by all the parties if more than one, and a new bond is given and accepted, the sureties on the old bond are discharged from further liability.[8]

§ 183. Matters Giving Rise to Liability

Sureties on the official bond of a sheriff or constable are answerable for any official misconduct or neglect on his part which proximately causes injury or damage to another; but, where the officer has acted in accordance with the law, his sureties cannot be held liable in damages.

The general rule is that the sureties on the official bond of a sheriff or constable are answerable for any official misconduct or neglect on his part which causes injury or damage to another,[9] provided such misconduct or neglect is the proximate cause of such injury or damage.[10] No liability can be founded on a failure or refusal of an officer to do an act not required of him by law.[11] So, where the officer has acted in accordance with the law, his sureties cannot be held liable in damages,[12] and, where there is no theory on which the officer could be held liable for a particular act or omission, his sureties are not liable therefor.[13]

1. Ala.—McGehee v. Gewin, 25 Ala 176.
N Y—Barnard v. Darling, 11 Wend 28
2. Mass—Crane v. Newell, 2 Pick 612, 13 Am D 461.
3. S C—Spivey v. Fidelity & Deposit Co of Maryland, 160 S.E. 275, 162 S.C. 146.
4. S C—Spivey v. Fidelity & Deposit Co of Maryland, supra
5. S.C—Spivey v. Fidelity & Deposit Co. of Maryland, supra
6. N Y—Reilly v. Dodge, 29 N.E. 1011, 131 N.Y 153.
57 C J. p 1023 note 14
7. N Y.—Reilly v Dodge, supra.
57 C J p 1023 note 15.
8. N Y—Reilly v Dodge, 14 N Y S 129, 59 N.Y Super. 199, affirmed 29 N E 1011, 131 N.Y 153.
9. U S—State of Missouri ex rel and to Use of De Vault v. Fidelity & Cas. Co of New York, C.C A Mo., 107 F 2d 343
Ala—Harwell v. Morris, 51 So 2d 511, 255 Ala 314
Ga—Goforth v Fidelity & Cas Co of N Y, 55 S E 2d 656, 80 Ga.App 121
Ill—Maxwell, for Use of Maxwell v. Nieft, 40 N E 2d 554, 313 Ill App 354
Tex—Citizens' State Bank of Wheeler v. American Surety Co., Civ App., 65 S.W 2d 778, error refused
W Va—State v. Cunningham, 167 S E. 595, 113 W Va 244.
57 C.J. p 1024 note 35.
Extent of liability see supra § 181
Liability as limited by terms of bond see supra § 178.
Liability as to particular matters see infra §§ 184–189.

Negligence

Sheriff's bondsman may be required to respond in damages for the negligence of the sheriff
Fla—Holland, for Use and Benefit of Williams v. Mayes, 19 So 2d 709, 155 Fla. 129.
N C—Dunn v Swanson, 7 S E.2d 563, 217 N C 279.

"Neglect"

Liability is not confined to injuries from negligent performance of duty, since word "neglect" means failure to perform or discharge a duty and covers positive official misdoing or official misconduct as well as negligence—Commonwealth ex rel and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa Super. 451.

Statutory rule entering into contract

A surety on sheriff's general official bond is presumed to have contracted with knowledge of statute declaring sheriff and surety on his bond liable to persons injured by sheriff's neglect, misconduct, or misbehavior in office, and such act enters into contract—Price v. Honeycutt, 4 S.E 2d 611, 216 N C 270.

10. Idaho—Jacobson v. McMillan, 132 P 2d 773, 64 Idaho 351.
Mich—Chalker v. Fidelity & Deposit Co of Maryland, 256 N W. 343, 268 Mich 333.
Minn—Nemec v Brown, 184 N W. 956, 150 Minn. 252
Or—Skulason v. Pratt, 130 P.2d 17, 169 Or 617
11. Ala—Carroll v. Burgin, 48 So 667, 159 Ala 406
57 C J. p 1024 note 39.

Failure to require rural policemen to give bond

Where statute authorizing sheriff to appoint rural policemen and requiring the rural policemen to give bond does not require the sheriff to see that such a bond is given and filed, the failure of sheriff to require rural policemen to give bond does not render surety on sheriff's official bond liable for damages caused by assault committed by rural policemen—Trammell v Fidelity & Cas. Co. of New York, D C S.C., 45 F.Supp. 366.

12. Tex—Hubacek v Manufacturers Cas Ins Co, Civ App, 247 S W.2d 173, error refused no reversible error—Choate v. Renfro, Civ App., 126 S W 2d 718.
13. Idaho—Jacobson v. McMillan, 132 P 2d 773, 64 Idaho 351.
Wis—Porter v Burtis, 221 N W. 741, 197 Wis 227.

Character of appointees

Sureties on official bond of sheriff are not responsible for the character of the men he appointed as rural policemen—Trammell v. Fidelity & Cas. Co of New York, D.C.S.C., 45 F. Supp. 366

Loss of right to support

Dependent wife of decedent was held to have no cause of action for wrongful death of decedent who was killed by sheriff and his assistants, right to support not being property right so as to give rise to common-law action and case not being within death statute, and, hence, wife could not recover on sheriff's official bond. —People ex rel. Putnum v. U. S. Fi-

§ 184. —— Defaults or Improprieties with Respect to Execution of Process

a Defaults
b Improprieties

a. Defaults

(1) In general
(2) Particular matters affecting liability
(3) Extent of liability

(1) In General

Sureties on the official bond of a sheriff or constable are liable for his neglect of duties or for a breach of its condition in connection with the service or execution of process, as where there is a failure to serve or delay in serving, failure to index, an improper preference to a junior writ, an improper stay of execution, or an insufficient levy.

The official bond of a sheriff or constable is liable for his neglect of duties in connection with the service of process[14] Thus, in the absence of any legal excuse for such failure, sureties on the official bond of a sheriff or constable are liable for a breach of its condition by the officer's failure to serve process,[15] or to deliver personalty for sale in accordance with a foreclosure decree,[16] or to levy an attachment or execution.[17] The quashal of a levy as invalid does not, however, of itself show such a failure to make proper levy as to impose liability on the officer's sureties.[18]

Delay. An unreasonable delay in executing process placed in his hands constitutes a breach of the official bond of a sheriff or constable,[19] but a delay which under the circumstances is not unreasonable gives rise to no liability;[20] and as respects liability of the surety, the sheriff is justified in relying upon the judge's oral direction to withhold execution until a certain date.[21]

Failure to index. Where the sheriff to whom a foreign execution is directed levies on the judgment debtor's realty but fails to index the execution and levy in the debtor's name, and the lien of the execution is lost because of the debtor's sale of the realty to an innocent purchaser, the judgment creditor damaged thereby may recover from the bondsmen of the sheriff for negligence in failing to index in the foreign execution docket, in the name of the judgment debtor, the case in which the execution is issued, as required by statute.[22]

Giving preference to junior writ. A sheriff or constable who knowingly or negligently gives preference to a junior execution instead of levying first under the writ which first came to his hands is liable on his official bond to the senior execution creditor.[23] It has also been held that, where a constable, at different times, levies a number of writs in his hands without regard to, or mention of, an intermediate levy made by a sheriff, and such intermediate levy is, in consequence, ignored in the application of the proceeds of the property, the sureties on the constable's bond are liable.[24]

Improperly staying execution. Where the statute provides that, whenever any goods and chattels liable for the payment of rent shall be seized in execution, the proceedings on such execution shall not be stayed by plaintiff therein without the consent of the landlord, a sheriff or constable who returns an execution stayed after notice of the landlord's claim and without the consent of the latter is liable therefor on his official bond.[25]

Insufficient levy Where a sheriff or constable makes an insufficient levy under an execution against a defendant who has sufficient property available to satisfy the entire debt, the sureties on his official bond are liable for his default[26]

(2) Particular Matters Affecting Liability

Various matters have been held to affect, or not to affect, the liability of the surety on the official bond of a sheriff or constable for default of the latter with respect to the execution of process.

Where the failure of a sheriff or constable to execute process is caused by plaintiff therein, no liability on his official bond arises because of such failure[27] A plaintiff or his attorney is not guilty of such negligence as will prevent a recovery on the bond for the officer's failure to serve process on

delity & Guaranty Co., 59 P.2d 796, 99 Colo. 64.

14. Pa.—Commonwealth ex rel and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa. Super. 451

15. Ariz.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 114.
57 C.J. p. 1024 note 41.

16. Fla.—Cassady v. Sholtz, for Use and Benefit of Edwards, 169 So. 487, 124 Fla. 718.

17. Ariz.—Schuster v. Merrill, 106 P.2d 192, 56 Ariz. 114.
57 C.J. p. 1024 note 42.

18. Ky.—Demint v. Thompson, 80 Ky. 255.

19. Or.—**Corpus Juris** cited in Skulason v. Pratt, 130 P.2d 17, 19, 169 Or. 617
57 C.J. p. 1024 note 45.

20. Ill.—Sarelas v. Fagerburg, 45 N.E.2d 690, 316 Ill. App. 606
57 C.J. p. 1024 note 46

21. Or.—Skulason v. Pratt, 130 P.2d 17, 169 Or. 617.

22. Ohio.—First Nat. Bank v. Hassinger, 196 N.E. 425, 129 Ohio St. 642.

23. Ky.—Commonwealth v. Straton, 7 J.J. Marsh. 90
N.C.—Boddie v. Vick, 25 N.C. 488

24. Mo.—State v. Curran, 45 Mo. App. 142.

25. Pa.—Borlin v. Commonwealth, 1 A. 404, 110 Pa. 454

26. Ky.—Commonwealth v. Lightfoot, 7 B. Mon. 298.
N.Y.—Sutherland v. McKinney, 10 N.Y.S. 876, 18 N.Y. Civ. Proc. 216

27. Ark.—McIlroy Banking Co. v. Mills, 11 S.W.2d 481, 178 Ark. 741.

a defendant, because he did not see to it, by examining the papers, that defendant was served [28]

Authority or duty to execute process. Where a sheriff or constable has no legal authority to serve or execute process delivered to him, his failure to do so cannot constitute a breach of his official bond or render the sureties thereon liable.[29] It has been held that the sureties of a sheriff or constable are not liable for his failure to levy a writ where no order or direction to levy has been given by plaintiff therein,[30] or where such an order or direction is afterward withdrawn.[31] It has also been held that the failure or refusal of a constable to levy an execution which, under a statute requiring executions to be directed to constables of particular districts or townships, should not have been directed to him gives rise to no cause of action on his bond [32]

Depreciation of property after levy Where a sheriff or constable levies on sufficient property to satisfy an execution, but before he can sell it the property depreciates in value by reason of casualties over which he has no control, and fails to sell for enough to satisfy the execution, no liability arises on his official bond as for an insufficient levy.[33]

Existence or validity of judgment on which process based The failure of a sheriff or constable to execute final process is none the less a breach of his official bond, for which the sureties thereon are liable, because the judgment on which such process is based is irregular, if it is not void,[34] but a plea denying the existence of such a judgment as the one on which it is alleged the execution issued presents a sufficient defense,[35] and, similarly, no liability arises for failure of the officer to levy on the property of a replevin bail where the latter's undertaking is void [36] No attack on the merits of the judgment, however, can be made in an action to hold the sureties liable [37]

Impossibility of executing process. The failure of a sheriff or constable to execute process cannot constitute a breach of his official bond, or give rise to liability on the part of the sureties thereon, where the circumstances are such that he could not lawfully execute it,[38] or where he has made diligent effort to execute the process and has been unable to do so [39]

Insolvency of defendant. No liability can be imposed on the sureties in the official bond of a sheriff or constable for his failure to levy an execution, where it appears that at the time he received the execution, and continuously thereafter during his term of office, the execution debtor was insolvent,[40] or that a levy under the writ would have precipitated an immediate proceeding in bankruptcy,[41] but the mere fact that the debtor is reputed to be insolvent will not release the officer from liability on his official bond for failure to use due diligence in endeavoring to collect the debt.[42]

Invalidity or irregularity of process. If the process is not void, the fact that it is irregular does not preclude liability on the bond of a sheriff or constable for the officer's failure to execute it,[43] or for his failure to index the case as required under the circumstances,[44] although it has been held that the irregularity may be shown in mitigation of damages;[45] but the sureties cannot be held to re-

28. Ga.—Ivey v Colquitt, 63 Ga 509
57 C J p 1026 note 87

29. Ark.—State v Atkinson, 13 S W 415, 53 Ark 98
57 C J p 1025 note 59

30. Ga.—Smith v Banks, 60 Ga 642

31. Ga.—Smith v. Banks, supra

32. Pa.—Commonwealth v. Lentz, 106 Pa 613

33. Ark.—Lawson v State, 10 Ark 28, 50 Am D 238
Liability where officer makes insufficient levy see supra subdivision a (1) of this section

34. Ala.—Couch v Atkinson, 32 Ala 633
Mich.—People v. Dumpley, 2 Mich N P 197.

35. Ark.—State v Saddler, 6 Ark. 235

36. Ind.—Hougland v State, 43 Ind 537

37. Mo.—State v. Harrington, 44 Mo App 297.

38. Pa.—Commonwealth v. Straub, 35 Pa 137
57 C J p 1026 note 82

39. Ga.—Kelly v Edwards, 142 S E 906, 38 Ga App 150

40. Ind.—State v. Neff, 74 Ind. 146
57 C J p 1026 note 73.

41. Tex.—Valley Plumbing, etc, Co v B F. Goodrich Rubber Co, Civ App., 296 S W 661

42. N C.—Howell v. Edwards, 32 N C 242

43. Ala.—Couch v. Atkinson, 32 Ala 633.
Ky.—Commonwealth v O'Cull, 7 J J Marsh 149, 23 Am D. 393

Irregularities not affecting liability

(1) Where execution issued some six and one half years after entry of judgment showed that judgment was one for alimony or support money, or both, surety could not escape liability for failure of sheriff to serve execution on ground that it was not regular on its face, in that statute provides that no execution shall be issued on a judgment after expiration of five years from date of its entry unless such judgment is revived, since a judgment for support does not become dormant as a whole and statute would apply to each installment as it became due.—Schuster v. Merrill, 106 P 2d 192, 56 Ariz. 114.

(2) Surety could not escape liability for failure to carry out the commands of a writ of execution on ground that execution was uncertain in its direction as to the amount of the judgment, interest, and costs required to be collected from judgment debtor, where principal of the judgment was named and the interest due could be easily ascertained.—Schuster v. Merrill, supra

44. Ohio.—First Nat. Bank v. Hassinger, 196 N E 425, 129 Ohio St. 642.

45. Ky.—Commonwealth v. O'Cull, 7 J.J Marsh 149, 23 Am D 393.

spond for the officer's failure to execute process which is void on its face,[46] and, where the officer was justified in refusing to execute a writ because of its irregularity, his sureties are not liable for his failure to execute it.[47]

Levy on sufficient property. No liability arises on the official bond of a sheriff or constable for his failure to levy an execution on particular property pointed out to him by the execution plaintiff where he levies on other property of defendant sufficient to satisfy the writ.[48]

Liability of property to seizure The failure of a sheriff or constable to levy on property which he cannot lawfully seize under the process in his hands,[49] such as property which is exempt,[50] cannot constitute a breach of his official bond or give rise to any liability on the part of his sureties. A mistaken belief of the officer, however, that the property is exempt will not relieve his sureties from liability for his failure to levy[51] or for his release of the property after having levied on it[52] A mere suspicion that there may be some difficulty with regard to the title to property pointed out to a sheriff or constable does not relieve him from liability on his official bond for refusing to seize it under an execution,[53] and in the absence of anything to rebut the presumption of ownership of goods in defendant's possession the officer is not justified in failing to levy thereon,[54] but in an action for failure to levy on property after being indemnified, it may be shown in mitigation of damages that the property belonged to a person other than the execution defendant and was, therefore, not subject to levy.[55]

Pressure of other official business. A failure on the part of a sheriff or constable to execute process placed in his hands for execution is not excused, nor are the sureties on his official bond relieved of liability, by the fact that the officer was engaged in other duties pertaining to his office,[56] but the extent and urgency of an officer's business and duties during the period between his receipt of process and his execution thereof may be shown as bearing on his good faith and diligence with respect thereto.[57]

Prior liens on property. The sureties of a sheriff or constable are not relieved from liability on his official bond for his failure or refusal to levy on particular property by the fact that such property was subject to mortgage, and, therefore, the levy might have been valueless.[58]

Prior writs against same defendant. The sureties on the official bond of a sheriff or constable are not relieved from liability for his failure to levy an execution by the fact that he had a prior execution against the same defendant in his hands, unless it was actually levied,[59] and it has been held that, where an officer holds property under an attachment, and another writ is placed in his hands, it is his duty to execute the process subject to the prior attachment, and he will be liable on his bond for a failure so to do.[60]

Want of indemnity. The fact that indemnity has not been furnished to a sheriff or constable will not absolve him or his sureties from liability on his official bond for his defaults in the execution of a writ where he commenced the execution thereof without demanding such indemnity,[61] and the failure of an officer to execute process cannot be excused on the ground that the sureties on the bond of indemnity furnished to him were insolvent or insufficient, where he accepted the bond[62] Where, however, an officer is entitled to indemnity and demands it, and it is not furnished, no liability arises on his bond for a failure to execute the process[63]

46. Ill—Vogel v. People, 37 Ill App 388
Ky—Hawkins v. Commonwealth, 1 T B Mon 144.

47. Tex—Merrill v Rose Mfg. Co., Civ App, 78 S W.2d 1075.

48. Ark—Lawson v. State, 10 Ark 28, 50 Am D 238
Duty of officer to levy on property pointed out by plaintiff see supra § 45.

49. Miss.—State v. Marshall, 13 So 668, 69 Miss 486.
57 C.J. p 1025 note 63.

50. Ind.—State v. Harper, 22 N.E 80, 120 Ind. 23.
Miss.—Redus v. State, 54 Miss. 712.

51. Ala.—Abbott v. Gillespy, 75 Ala. 180
57 C J p 1025 note 65

52. Va—Sage v. Dickinson, 33 Gratt 361, 74 Va 361

53. La—Marshall v. Simpson, 13 La Ann. 437

54. Ala.—Planters' Chemical, etc, Co v Daniel, 96 So 424, 209 Ala 363.

55. Ky.—Snoddy v. Foster, 1 Metc 160.

56. Ala—Planters' Chemical, etc., Co v. Daniel, 96 So. 424, 209 Ala. 363.

57. Ala.—Planters' Chemical, etc, Co. v. Daniel, supra.

58. Ark—Lawson v. State, 10 Ark. 228, 50 Am.D. 238

59. Ala—Abbott v. Gillespy, 75 Ala. 180.

60. Wis.—Halpin v. Hall, 42 Wis. 176.

61. Pa—Miller v. Commonwealth, 5 Pa 294—Commonwealth v. Lelar, 1 Phila. 173.
Indemnity to officer in general see supra §§ 128–145

62. Tex—Sharp v Morgan, Civ. App., 192 S.W. 599.

63. Tex—Head v. Carlin, Civ.App, 240 S W. 1051.
Effect of refusal of indemnity in general see supra § 136.

(3) Extent of Liability

Sureties on the official bond of a sheriff or constable are ordinarily liable for the officer's failure properly to serve or execute process to the extent of the loss sustained by reason of such failure.

Sureties on the official bond of a sheriff or constable are ordinarily liable for the officer's failure properly to serve or execute process to the full extent of the loss sustained by the complaining party by reason of such failure[64] Prima facie the liability is for the amount of the debt for the collection of which the process issued,[65] together with interest and costs;[66] but in an action founded on an insufficient levy, the actual injury, and not necessarily the amount of the execution, is the measure of damages.[67]

b. Improprieties

Recovery may be had on the official bond of a sheriff or constable for any official misconduct in connection with the execution of process.

In general, recovery may be had on the official bond of a sheriff or constable for any official misconduct in connection with the execution of process,[68] even though the act in question was malicious,[69] and even though the process is not based on the judgment of a competent court, if it is regular on its face.[70] Thus the sureties on the bond may be held liable for the officer's failure to note on an execution the time of its delivery to him, where that is required by statute,[71] for a levy which would not have been necessary except that the officer had wasted property of the principal debtor previously levied on,[72] or for oppressive acts on the part of the officer, such as cause unnecessary hardship to defendant in the writ,[73] but the mere fact that the property seized was intended for a special purpose and that on the sale it does not realize the amount it would have brought to the execution defendant if used for such intended purpose does not of itself show that the levy was oppressive.[74] Where a sheriff or constable breaks into a dwelling while executing civil process, he is guilty of unlawful conduct in the actual discharge of his duties, and is not acting merely by color of his office, and the sureties on his bond are, therefore, liable for his acts.[75]

Acts done in further execution of partially executed writ are properly regarded as done while executing such writ, so as to render the sureties liable for them if wrongful or improper.[76]

Effect of invalidity of process. It has been held that sureties on the official bond of a sheriff or constable are not relieved from liability for wrongful acts by such officer in connection with the execution of process by the fact that such process is invalid.[77]

§ 185. —— Wrongful Levy on, or Other Taking of, Property

a. In general
b. Particular matters affecting liability
c. Extent of liability

a. In General

The official bond of an officer is liable for his neglect of duties or official misconduct in connection with the making of levies, and, accordingly, the act of a sheriff or constable in seizing under process property not subject to levy is a breach of his official bond for which the sureties thereon are liable.

The official bond of an officer is liable for his neglect of duties or official misconduct in connection with the making of levies.[78] Thus the act of a sheriff or constable in seizing under process property not subject to levy is a breach of his official

64. Tex.—Fant Mill Co v May, Civ.App., 240 S.W.2d 445, error refused no reversible error
57 C.J. p 1027 note 89
Extent of liability in general see supra § 181.

Value of property which might have been levied on, with interest, not exceeding the amount of the debt, is the measure of the recovery in an action for failure to make a levy as required by an execution plaintiff.
Miss.—Redus v. State, 54 Miss 712
Tex.—Fant Mill. Co v May, Civ.App., 240 S.W.2d 445, error refused no reversible error.

65. Tex.—B. F. Goodrich Rubber Co. v Valley Plumbing, etc., Co., Civ. App., 267 S.W. 1036.
57 C.J. p 1027 note 91.

66. Tex.—B. F. Goodrich Rubber Co. v. Valley Plumbing, etc., Co., supra.

67. Ky.—Commonwealth v. Lightfoot, 7 B Mon. 298.

68. Cal.—Security First Nat. Bank of Los Angeles v Sartori, 93 P.2d 863, 34 Cal App 2d 408.
Pa.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa Super. 451.
57 C.J. p 1027 note 94.

Levy under writ of execution was held part of official duties of constable of town, within protection of constable's bond.—Town of Irvington v. Dubrow, 161 A. 351, 10 N.J. Misc. 804.

69. Ill.—Greenberg v People, 125 Ill. App. 626, affirmed 80 N.E. 100, 225 Ill 174, 116 Am S.R. 127, 8 L.R.A., N.S., 1223.

70. Ark.—State v Crow, 11 Ark. 642.

71. Ala.—Chandler v. Henry, 8 So 96, 90 Ala 271.

72. Ind.—State v. Druly, 3 Ind 431.

73. Mo.—State v. Dickman, 102 S.W. 44, 124 Mo App 653.
57 C.J. p 1027 note 99.

74. Iowa.—Coffey v. Wilson, 21 N.W. 602, 65 Iowa 270.

75. Ind.—State v. Beckner, 31 N.E. 950, 132 Ind 371, 32 Am S.R. 257.
Ky.—Jewell v Mills, 3 Bush 62.

76. W.Va.—State v. Miller, 139 S.E. 711, 104 W.Va. 226.

77. Wyo.—Shomo v. Burgoss, 273 P. 695, 40 Wyo. 43.—Lynch v. Burgess, 273 P. 691, 40 Wyo. 30, 62 A.L.R. 849.

78. Pa.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa.Super. 451.

bond for which the sureties thereon are liable,[79] as where he levies on property subject to a landlord's lien, with notice thereof,[80] or where he levies on and removes mortgaged property after notice of the mortgagee's right of possession.[81] So there is a breach of the official bond of a sheriff or constable, which renders the sureties thereon liable, when the officer levies on exempt property[82] or refuses to restore exempt property levied on when a proper claim therefor is made;[83] and, where a levying officer is required by statute to apprise the execution defendant of his exemption rights, a failure so to do renders his sureties liable[84] except where it appears that such defendant knew of his rights and claimed his exemptions at the proper time.[85] A debtor cannot, however, predicate liability on a failure to set off his exemptions out of property levied on where it does not belong to such debtor.[86]

Levy on property not belonging to defendant in writ. The seizure by a sheriff or constable of property of one person under process against another has been held to be a breach of his official bond, for which his sureties are liable,[87] notwithstanding it is an excess of the officer's authority and a trespass,[88] but there is also authority to the contrary.[89]

b. Particular Matters Affecting Liability

The liability of the sureties on the official bond of a sheriff or constable for a wrongful seizure of property by the officer is not affected by absence of malice, the subsequent disposition of the property seized, or by want of the officer's authority, and, although there is some authority to the contrary, it has been held that the sureties may be liable although the property was seized under void or voidable process.

The liability of the sureties on the official bond of a sheriff or constable for a wrongful seizure of property by the officer is not affected by the absence of malice on the part of a sheriff or constable in making the wrongful levy or seizure,[90] by the subsequent disposition of the property seized or its proceeds,[91] or by the fact that the process was one which the officer had no authority to execute.[92]

Validity of process. According to some authorities, a wrongful levy on, or seizure of, property by a sheriff or constable under process which is void on its face is not a breach of his official bond and does not give rise to any liability on the part of his sureties,[93] but under the rule, discussed supra § 178 g, that sureties are liable for acts done by an officer under color of office although without authority the contrary view has also been taken.[94] The sureties may be compelled to respond for a

79. Ind.—Butler v. State, 20 Ind 169
Utah.—Johnson v. Durnell, 93 P.2d 914, 98 Utah 487.

Wrongful execution of distress warrant

An action could be maintained on an officer's bond for wrongful execution of distress warrant.—State ex rel. Myers v. Hodge, 42 S.E.2d 23, 129 W.Va. 820.

80. Ala.—Burton v. Dangerfield, 37 So 350, 141 Ala. 285
57 C.J. p 1028 note 19.

81. Colo.—Newman v People, 34 P. 1006, 4 Colo App. 46.

Wrongful seizure under search warrant

Mortgagee could maintain suit on constable's bond for alleged wrongful seizure under search warrant and forfeiture of automobile where mortgagee had no notice or knowledge of proceeding before consummation.—People, to Use of Protective Finance Corporation, v. Kinnison, 30 P.2d 249, 94 Colo. 350.

82. Minn.—Hursey v. Marty, 63 N.W. 1090, 61 Minn 430.
57 C.J. p 1028 note 11.

83. W.Va.—Hatfield ex rel Rose v Cruise, 197 S.E. 23, 120 W.Va 16.
57 C.J. p 1028 note 12.

Official bond held not liable under facts

Where execution lien debtor's property consisted of wages due or to become due from debtor's employer before return date of execution, and notice of execution was given to employer by judgment creditor, and judgment debtor demanded full release of future wages earned during life of lien on basis of exemption of accrued wages theretofore listed in schedule lodged with officer, and not on delivery to officer of new schedule covering wages earned since filing of first schedule, recovery of statutory penalty for alleged wrongful detention of debtor's property under execution lien could not be had on official bond of officer holding execution and judgment rendered by justice of peace, for failure of officer to give full release of future wages earned during life of lien.—Hatfield ex rel Rose v. Cruise, 6 S.E.2d 243, 121 W.Va. 742.

84. Mo.—Parketon v Pugsley, 121 S.W. 789, 142 Mo App. 537.
57 C.J. p 1028 note 13.

85. Mo.—State v. Brooke, 29 Mo.App. 286.

86. Mo.—State v. Springate, 51 Mo App. 619.

87. Mo.—**Corpus Juris cited in** State ex rel Webb v. King, App., 73 S.W.2d 460, 462.
Okl.—McCorcle v. Morton, 44 P.2d 9, 171 Okl 632.
Utah.—Johnson v. Durnell, 93 P.2d 914, 98 Utah 487.
57 C.J. p 1027 note 7.

88. Mo.—**Corpus Juris cited in** State ex rel Webb v. King, App., 73 S.W.2d 460, 461.
N.Y.—Berry v Schaad, 63 N.Y.S. 349, 50 App.Div. 132.

89. Md.—State v. Brown, 54 Md 318.
57 C.J. p 1028 note 9.
Liability of sureties for unauthorized or unofficial acts of officer in general see supra § 178.

90. Mo.—State v. Dickmann, 102 S.W. 44, 124 Mo App 653

91. Mo.—**Corpus Juris cited in** State ex rel Webb v. King, App., 73 S.W.2d 460, 462.
57 C.J. p 1029 note 29.

92. Mass.—Turner v. Sisson, 137 Mass. 191.—Lowell v Parker, 10 Metc 309, 43 Am.D 436

93. U.S.—Allen v. Clark, D.C.Cal., 22 F.Supp. 898.
Cal.—Best v Johnson, 29 P. 415, 78 Cal. 217, 12 Am.S.R. 41, 3 L.R.A. 168
57 C.J. p 1028 note 20.

Search or seizure

If search or seizure was made by officer under color of office without search warrant or under void search warrant his bondsman is not liable for compensatory damages.—McMahan's Adm'x v Draffen, 47 S.W.2d 716, 242 Ky. 785.

94. Ala.—Couch v. Davidson, 19 So. 507, 109 Ala. 313.
57 C.J. p 1028 note 22.

wrongful seizure under process which is voidable merely.[95]

The fact that a wrongful seizure of, or levy on, property was made by a sheriff or constable under the mistaken belief that a writing was valid as process does not render it any the less an official act and so a breach of his bond.[96]

Fraudulent disposal of property by defendant in writ A sheriff or constable cannot escape liability on his official bond for seizing and selling exempt property under execution by setting up that at the time of the seizure the execution defendant was fraudulently selling and disposing of such property.[97]

Title to property. In an action on the official bond of a sheriff or constable by one claiming property levied on under a writ directed against a third person, the right or title of plaintiff is subject to attack.[98]

c. Extent of Liability

Within the limits of the penal sum named in the bond, the sureties on the bond of a sheriff or constable are liable for the full value of property wrongfully seized by him and not recovered or restored to the owner thereof or for the depreciation in its value while withheld, if recovered or restored, together with damages for loss of use.

Subject to the rule stated supra § 181 that the amount of the liability may not exceed the penal sum named in the bond, where property wrongfully levied on, or seized by, a sheriff or constable is not recovered by, or restored to, the owner thereof, the sureties on the officer's official bond are liable for the full value of the property,[99] and if the property is so recovered or restored the sureties must respond for any depreciation in its value while it was withheld,[1] together with such damages as may have accrued to the owner by reason of the loss of use of the property.[2] The fact that property wrongfully seized or levied on is subsequently purchased by the owner at the sale does not affect the liability of the sureties or the measure of the owner's damages.[3] Where the goods of a tenant subject to a landlord's lien are wrongfully levied on, whereby the landlord is prevented from enforcing his lien for rent under the lease, the landlord's measure of damages is the amount of his lien and not the value of the property levied on where such value exceeds the amount of the lien.[4]

§ 186. —— Defaults with Respect to Custody of Property

a. In general
b. Particular matters affecting liability
c Extent of liability

a. In General

The sureties on the official bond of a sheriff or constable are liable where, as the result of negligence or wrongful acts of such officer, property in his custody is damaged or lost, whether the property is lost outright or merely lost to the party.

The sureties on the official bond of a sheriff or constable are liable where, as the result of negligence or wrongful acts of such officer, property in his custody is damaged[5] or lost,[6] whether the property is lost outright or merely lost to the creditor under whose process it was seized,[7] and where a sheriff or constable, having seized property in detinue, delivers it to plaintiff in the suit before the expiration of the statutory period within which defendant has a right to recover its possession by furnishing a bond, whereby the property is lost to defendant, the sureties on his official bond are liable for such wrongful act.[8] So the sheriff is answerable on his official bond for damage resulting from hiring out, in violation of statute, without the consent of both parties and the court, personalty he holds under seizure.[9] The mere fact, however, that property levied on is left in custody of defendant in the writ does not of itself make the officer liable on his bond for a subsequent loss.[10]

Failure to deliver property to person entitled thereto. Where it becomes the duty of a sheriff or constable to deliver property in his official custody

95. Ala.—Couch v Davidson, supra
96. Mo.—State v. Edmundson, 71 Mo. App 172.
97. Mo—State v. Samuels, 28 Mo. App 649.
98. Mo—State v. McBride, 81 Mo 349
57 C J p 1029 note 31.
99. Mo—**Corpus Juris cited in** State ex rel. Webb v. King, App., 73 S.W 2d 460, 462.
57 C J. p 1029 note 32.
1. Ill.—People v. Crowe, 130 Ill.App 349.
2. Ill—People v Crowe, supra
3. Tex—Hart v. Blum, 13 S W. 181, 76 Tex. 113.
4. Ala—Burton v Dangerfield, 37 So 350, 141 Ala 285
5. Cal—Witkowski v. Hern, 23 P. 132, 82 Cal 604
Miss—Kersh v. Dufore, 38 So 2d 474, 205 Miss 144.
Okl—Chase v MacDonell, 7 P.2d 465, 154 Okl. 165
6. Miss—Kersh v. Dufore, 38 So.2d 474, 205 Miss 144.
Pa—Commonwealth v. Weglein, 21 Pa Dist & Co. 509.
57 C J. p 1029 note 38
7. Wis—Halpin v Hall, 42 Wis. 176.
57 C J p 1029 note 39.
8. Ala—Carmichael v U. S. Fidelity, etc, Co., 50 So. 1003, 163 Ala. 320
9. La—Jones v Robeline Garage, 135 So 120, 16 La App. 601
10. Ind—State v. Nelson, 1 Ind. 522, Smith 401.

to the owner or another particular person, his failure or refusal to do so is a breach of his official bond[11]

Failure to have property forthcoming. The sureties on the official bond of a sheriff or constable are liable for his failure to deliver attached property in order to satisfy the judgment in the attachment suit[12] except, it has been held, where other property sufficient to satisfy the judgment is offered[13] A demand on an officer ordinarily is necessary to render his sureties liable for a failure on his part to have property forthcoming[14] unless facts exist which supersede the necessity for a demand.[15]

Incurrence of unnecessary expense in custody of property. The sureties on the official bond of a sheriff or constable have been held liable to one subjected by the acts of the officer to unnecessary expense in connection with the custody of property seized or levied on by him for the amount of such expense.[16]

Release of property from levy. An unauthorized release by a sheriff or constable of property theretofore seized or levied on by him is a breach of his official bond for which the sureties thereon are liable;[17] and the fact that a levy was excessive will not affect the liability for a release of the whole levy without authority.[18] It has been held, however, that where the special property acquired by an officer in goods levied on is not, under the statute, terminated by the expiration of his term, and his duty with respect thereto is not at an end on the delivery of such goods to his successor, the sureties of a successor officer are not liable for his act in releasing goods delivered to him by his predecessor, since he is only the agent or bailee of the latter with respect to such goods.[19] The fact that the sheriff accepted an insolvent surety on a replevy bond will not authorize recovery on the sheriff's bond where the sheriff exercised due care.[20]

b. Particular Matters Affecting Liability

Various matters have been held to affect, or not to affect, the liability of the sureties on the official bond of a sheriff or constable for defaults of the officer with respect to the custody of property.

The fact that the process under which property was seized by a sheriff or constable is irregular does not relieve the sureties on his official bond from liability for his neglect or misconduct with respect to the care and custody of such property,[21] nor can the legality of the levy be attacked in an action on the bond of an officer for releasing property levied

11. Kan —Flint v. Grimes, 293 P 953, 131 Kan 814
57 C J. p 1030 note 49.

Delivery to successor

The failure of a sheriff or other public officer to deliver to his successor property coming into his hands as such officer is violative of statute and a breach of the contract evidenced by the officer's official bond — State, for Use of Glover, v. McIlroy, 116 S W 2d 601, 196 Ark. 63.

12. Conn —Baker v. Baldwin, 48 Conn 131.

Materiality or pertinency of particular circumstances

(1) In action on bond of former sheriff for nonforthcoming of ponderous property levied on, where there was nothing in record to suggest the existence of statutes relating to permission to be issued by state highway department and local authorities for operation over public highways of vehicles exceeding certain maximum in size and weight was considered by sheriff, statutes had no pertinency, since they were enacted in general public interest and not for protection of sheriffs in discharge of duties relating to care of property under levy.—State, to Use of Henderson, v Clark, 20 A 2d 127, 2 Terry, Del , 246, 138 A L R 704.

(2) It was not duty of plaintiff to request sheriff to place watchman on premises, and it was likewise immaterial that there is no statutory duty imposed on sheriffs to employ watchman to safeguard property taken in execution —State, to Use of Henderson v Clark, supra.

13. Vt —Hoit v. Barron, Brayt. p. 117.

14. Okl —Independent Oil, etc., Co. v. Woolley, 232 P 77, 105 Okl 235.

15. Okl —Independent Oil, etc., Co v Woolley, supra.

16. N Y —Gorman v. Finn, 67 N.Y S 546, 56 App Div 155, affirmed 63 N E. 1117, 171 N Y 628.
57 C J p 1030 note 51.

17. Ala —Campbell v. Tucker, 154 So 821, 23 Ala App 100, certiorari denied 154 So 825, 228 Ala 658
57 C J p 1029 note 42.

Release without taking proper bond

(1) Where attachment was levied creating actual lien not subject to defeat by bankruptcy adjudication, sheriff and his general bondsman were liable for loss sustained by judgment creditor due to sheriff's release of attached property, without obtaining proper bond, notwithstanding bankruptcy of judgment debtor —Sparks v Buckner, 57 P.2d 1395, 14 Cal App 2d 213

(2) Where sheriff levied justice court fieri facias without having demanded of plaintiff additional cost which he was entitled on demand to receive, and thereafter released property without taking required bond, and damage resulted to plaintiff, it was no defense in action against surety that additional fee to which sheriff was entitled had not been paid in advance —Eslinger v. Land, 163 S E 522, 45 Ga App 96

Inadequacy of release bond

Bond, obtained by sheriff who released attached property, which indemnified sheriff against claims of third-person claimants to the property, was inadequate to charge surety with obligation to pay amount of judgment, when property was released, and was not valid as a common-law release bond, with respect to liability of sheriff and his general bondsman for loss sustained by judgment creditor —Sparks v Buckner, 57 P 2d 1395, 14 Cal.App.2d 213

18. Iowa —Wadsworth v. Walliker, 2 N.W 420, 51 Iowa 605.

19. Ala —Bruister v. Gavin, 28 So 410, 127 Ala 317.

20. Ga —Dunn v. U. S. Fidelity & Guaranty Co., 164 S E 480, 45 Ga App 249

21. Iowa —Dean v. Goddard, 13 Iowa 292, 81 Am D 433
Tex —Cleveland v Tittle, 22 S.W. 8, 3 Tex Civ App. 191.

on, or seized by, his deputy [22] The fact that a sheriff or constable has made a return of process executed by his deputy does not amount to an adoption of the acts of the deputy so as to preclude a suit by the officer on the deputy's official bond for the loss of property seized under such process [23] The liability for sureties on the official bond of a sheriff or constable for the wrongful release by him of property in his custody is not affected by the fact that such property might subsequently have been seized and sold under final process in the suit unless the failure to effectuate such subsequent seizure is caused by plaintiff's willful default.[24] The discharge of sureties on an attachment bond by a person to whom attached property should have been delivered by a sheriff or constable does not relieve the sureties on the officer's official bond of liability for his failure to make such delivery.[25]

The sureties on the official bond of a sheriff or constable are relieved of liability for his failure to return a note delivered to, and received by, him for collection, where the officer has obtained judgment on the note, since it is thereby merged in the judgment.[26] Sureties on the official bond of a sheriff or constable are not liable to one for the loss of property, or of his lien thereon, while such property is in custody of the officer, where such loss is caused by the act or negligence of the complaining party.[27] Where property in the possession of a sheriff under an attachment is taken out of his possession by the coroner by virtue of a writ of detinue, the sureties on the sheriff's official bond cannot be held liable for his failure to deliver up the property to satisfy the judgment in the attachment suit [28]

Reversal of decision holding property not exempt Where property levied on, or seized by, a sheriff or constable has been held by the court not to be exempt, the sureties on his official bond are not rendered liable for his refusal to release or return such property to defendant by the fact that on appeal such property is subsequently held to be exempt.[29]

Tender and refusal. The sureties on the official bond of a sheriff or constable cannot be held liable for his failure to deliver property to the party entitled thereto where defendant, in whose possession such property was left, tenders it to such party and the tender is refused;[30] but a tender to the attorney of the party entitled to the property does not relieve the sureties of liability.[31]

c. Extent of Liability

Within the limits of the penal sum named in the bond, sureties on the official bond of a sheriff or constable must respond for property lost by the neglect or wrongful acts of the officer to the extent of the value of the property or to the amount of the creditor's debt if the value exceeds the amount of the debt.

Subject to the rule, discussed supra § 181, that sureties on the official bond of a sheriff or constable are not liable for an amount greater than the penal sum named in their bond, they must respond for property lost by the neglect or wrongful acts of the officer to the extent of the full value of such property[32] except where its value exceeds the amount of the creditor's debt, in which case the latter sum is the measure of their liability to him.[33] An officer's failure or refusal to deliver property to the person entitled thereto cannot impose liability on his sureties for the full value of such property, where it was afterward duly delivered [34]

§ 187. —— Matters Relating to Sales

a. In general
b. Particular matters affecting liability
c. Extent of liability

a. In General

The sureties on the official bond of a sheriff or constable are liable for his neglect of duties or official misconduct with respect to sales under process.

The official bond of an officer is liable for his neglect of duties or official misconduct with respect to the sale of goods seized under execution process [35] Thus there is a breach of the official bond of a sheriff or constable for which the sureties are liable where the officer, acting under process, sells

22. Ga.—Hightower v. Hodges, 63 S. E 541, 5 Ga App. 408.

23. N Y —Thomas v. Hubbell, 35 N Y. 120.

24. Ala.—Bagby v. Harris, 9 Ala 173.

25. Cal —Algeltinger v. Whelan, 65 P 125, 133 Cal 110.

26. N.C.—Miller v. Pharr, 87 N.C 396

27. Tenn —Snell v. Allen, 1 Swan 208.
57 C.J. p 1030 note 54.

28. Ala —Governor v. Gibson, 14 Ala 326.

29. Mo —State v. Bridges, App , 206 S W. 598.

30. Ala —Carroll v. Burgin, 48 So 667, 159 Ala. 406.

31. Ala.—Carroll v. Burgin, supra.

32. La.—Sandridge v. Jones, 2 La. Ann. 933
57 C.J. p 1031 note 64.

33. Ga —Hightower v. Hodges, 63 S E. 541, 5 Ga.App. 408.
57 C J. p 1031 note 65.

34. Mo.—State v. Bridges, App., 206 S W. 598.

35. Pa —Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa.Super. 451.

property which is exempt from execution,[36] or where he sells mortgaged chattels under a writ and delivers them to the purchaser without requiring him to comply with the conditions of the mortgage,[37] or where, in violation of statute, the officer sells mortgaged realty in fee, although the rents and profits have been appraised at a sum more than sufficient to satisfy the execution and costs,[38] or where he sells property subject to a landlord's lien, with notice that rent is in arrears, and without satisfying the landlord,[39] or where he substitutes and sells, under a writ, property of the debtor other than that levied on and advertised for sale, under an agreement with the debtor;[40] but the sureties are not liable for an officer's act in selling exempt property where he acts under a chattel mortgage containing a power of sale, and not in his official capacity.[41] So the sureties may be compelled to respond for the officer's breach of duty in selling property without giving the notice of sale required by statute,[42] in selling at a private, rather than public, sale property levied on, or seized by, him,[43] or in fraudulently executing and signing in his official capacity a bill of sale of stolen property which sale purported to be based on the foreclosure of a lien.[44]

Sale of property not belonging to defendant in process. A sale by a sheriff or constable of property not belonging to defendant in the process under which the sale is made is a breach of his official bond for which the sureties thereon may be compelled to respond,[45] and sureties of an officer who sells, under an execution against the holder, property held by virtue of a contract of conditional sale, and delivers it to the purchaser without requiring him to fulfill the conditions of the contract, are liable on his official bond to the real owner of the property.[46] The silence of the owner, although he is cognizant that the sale is being or about to be made, does not preclude a recovery by him on the bond.[47]

Failure to make known defect in title to property sold. Where a sheriff or constable on offering property for sale under execution fails to make known a defect of title which is within his knowledge, he and the sureties on his official bond are responsible to the purchaser to the extent of the injury resulting from such failure of duty.[48]

Ineffective sale. Where a sheriff or constable acts in good faith in selling property under an execution, there is no breach of his official bond because by reason of his mistake or oversight the purchaser obtains no title.[49]

Failure to sell The failure of a sheriff or constable to sell property which he has levied on under execution or which it has in any other manner become his duty to sell ordinarily is a breach of his official bond, rendering the sureties thereon liable;[50] but a breach of the bond cannot be predicated on a failure to make a sale which the officer could not have legally made,[51] as where the execution was void,[52] or where the property is exempt[53] or does not belong to defendant in the process under which it was seized,[54] nor can any liability be founded on a failure to sell which was due to a lack of bidders[55] or to an injunction against the sale.[56] It has also been held that an officer is not guilty of a breach of his bond in failing to sell attached property in his possession under an order of condemnation directing such sale unless a legal demand has been made on him for an execution of the order.[57]

36. Neb.—Kriesel v. Eddy, 55 N.W 224, 37 Neb. 63
57 C J. p 1031 note 72

37. Ind.—McDaniel v. State, 20 N.E 739, 118 Ind 239
57 C J. p 1031 note 75

38. Ind.—State v Leach, 10 Ind. 308

39. Ala.—Couch v. Davidson, 19 So. 507, 109 Ala 313
57 C.J. p 1032 note 78.

40. Ohio—State v Fuller, 14 Ohio 545.

41. Tex.—Baughn v. Allen, Civ.App., 73 S W. 1063.

42. Mont.—Brittania Min Co. v. U. S. Fidelity, etc., Co, 115 P. 46, 43 Mont. 93.

43. Kan.—Holdredge v McCombs, 56 P. 536, 8 Kan.App. 663
Ky.—Powell v. Barley, 2 Ky.Op. 622

44. Mich.—Stark Hickey, Inc., v. Standard Accident Ins. Co., 289 N.W. 172, 291 Mich. 350.
Color of office
Where constable in his official capacity fraudulently signed bill of sale of stolen motor vehicle, which sale purported to be based on foreclosure of garageman's lien, bondsman of constable was liable for constable's misfeasance since act of constable was under color of his office even though such sale could have been conducted by party other than constable.—Stark Hickey, Inc, v Standard Accident Ins. Co, supra

45. Mo.—**Corpus Juris cited in** State ex rel. Webb v. King, App., 73 S W.2d 460, 462.
57 C.J. p 1031 note 68.

46. Ind.—Keck v. State, 39 N.E. 899, 12 Ind App 119.

47. Kan.—Schilling v. Black, 31 P. 143, 49 Kan 552

48. Ky.—Commonwealth v. Dickinson, 5 B.Mon. 506, 43 Am.D. 139.

49. Ind.—State v. Prime, 54 Ind. 450

50. Tex.—Hahn v. Graybar Electric Co., Civ.App., 60 S W 2d 1065, affirmed Rich v Graybar Electric Co., 84 S W.2d 708, 125 Tex 470, 102 A L.R 171
57 C J. p 1032 note 85

51. Miss.—Puckett v Crystal Oil Co., 137 So 486, 161 Miss. 554
57 C.J. p 1032 notes 86–88

52. Miss.—Puckett v Crystal Oil Co., supra.

53. Ind.—State v. Boyd, 63 Ind 428

54. U S.—Chapman v. Smith, Ala, 16 How. 114, 14 L Ed 868.
57 C J p 1032 note 88

55. Ky.—Commonwealth v. Fuqua, 3 Litt. 41.

56. Ala.—Easley v Walker, 10 Ala. 671.

57. Ark.—Cotton v Atkinson, 13 S. W. 415, 53 Ark 98.

Failure to execute deed The failure of a sheriff or constable who has sold real estate under execution to make and tender a deed to the vendee is a breach of his official bond, and his sureties are liable therefor, whether such failure is the result of a corrupt intention[58] or mere neglect[59]

b. Particular Matters Affecting Liability

The liability of sureties on the official bond of a sheriff or constable for neglect of duties or misconduct in connection with the sale of property under process is not affected by the irregularity or invalidity of the order under which such process issued or by the absence of malice on the part of the officer, but the sureties have been held not liable for failure to sell property where the process was withdrawn by the plaintiff; and want of authority to execute the process has been held to relieve the sureties.

The liability of sureties on the official bond of a sheriff or constable for the officer's wrongful sale of property under process is not affected by the irregularity or invalidity of the order or judgment under which such process issued,[60] and absence of malice on the part of a sheriff or constable in making a wrongful sale of property is no protection to the sureties.[61] The sureties are not liable, however, for the officer's failure to sell property levied on, or seized by, him where the execution or other process under which the levy was made is withdrawn by plaintiff therein.[62]

Want of authority to execute process. The sureties on the official bond of a sheriff or constable have been held not liable as for a breach of his bond for the sale of property by him under process which he was not authorized to execute;[63] but a view to the contrary has also been taken.[64]

c. Extent of Liability

The liability of the surety on the official bond of a sheriff or constable for the officer's unlawful sale or wrongful failure to sell property under process is the actual loss, which is usually measured by the value of the property.

The liability of the surety on an official bond for an unlawful sale is limited to actual losses.[65] Thus the sureties on his official bond are liable for the value of the property, provided it does not exceed the penal sum named in the bond, where a sheriff or constable sells property not belonging to defendant in the process under which he acts,[66] or property which is exempt,[67] except, as to exempt property, where the sale is regarded as absolutely void, in which case the value of the property cannot be recovered, but only actual damages and costs[68] Where an officer fails to sell property of which it was his duty to make sale, the liability of his sureties is limited to the value of such property where it is less than the amount of the debt or judgment.[69] Although a sale is declared a nullity because of the officer's default, taxes and insurance premiums paid by the purchaser cannot be recovered by him in an action on the officer's bond.[70] The liability of the sheriff on his official bond for his wrongful act extends not only to resultant losses which are direct and immediate, but to such consequential damages as, according to the common experiences of men, are likely to result from such act.[71]

§ 188. —— Matters Relating to Collection, Custody, or Disposition of Money

a. In general
b. Particular matters affecting liability
c. Extent of liability

a. In General

The sureties on the official bond of a sheriff or constable are liable thereon for the failure of the officer to account for, or pay over to the person entitled thereto, money coming into his official custody, or for his misapplication, improper distribution, conversion, or embezzlement thereof, as well as for his exaction of excessive payment, or failure to collect money which it was his duty to collect and which he might have collected if he had acted with reasonable diligence.

The sureties on the official bond of a sheriff or

58. Ind.—State v. Lines, 4 Ind. 351.
59. Ind.—State v. Lines, supra.
60. Mo.—Rollins v. State, 13 Mo. 437, 53 Am.D. 151.
61. Mo.—State v. Dickman, 102 S.W. 44, 124 Mo.App. 653.
62. Ark.—Mayfield Woolen Mills v. Lewis, 133 S.W. 590, 97 Ark. 149
63. Mo.—State v. Hendricks, 88 Mo.App. 560.
57 C.J. p. 1032 note 95.
Levy of process by officer lacking authority see supra § 185 b
64. Mass.—Turner v. Sisson, 137 Mass. 191.
65. Tex.—Dallas Joint Stock Land Bank of Dallas v. Randerson, Civ. App., 127 S.W.2d 593, reversed on other grounds Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S.W.2d 769, 136 Tex. 91.
W.Va.—State ex rel. Myers v. Hodge, 42 S.E.2d 23, 129 W.Va. 820
66. Neb.—Noble v. Himeo, 10 N.W. 499, 12 Neb. 193.
67. Mo.—State v. Dickman, 102 S.W. 44, 124 Mo.App. 653
Neb.—Kriesel v. Eddy, 55 N.W. 224, 37 Neb. 63.
68. N.C.—McCracken v. Adler, 4 S.E. 138, 98 N.C. 400, 2 Am.S.R. 340.
69. Ohio.—State v. Meyers, 14 Ohio 538.
57 C.J. p. 1033 note 5.
Extent of liability for loss of property levied on see supra § 186 c.
70. La.—Friedlander v. Bell, 17 La.Ann. 42.
71. Tex.—Dallas Joint Stock Land Bank of Dallas v. Randerson, Civ.App., 127 S.W.2d 593, reversed on other grounds Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S.W.2d 769, 136 Tex. 91.
Expenses incident to bankruptcy proceedings
Tex.—Dallas Joint Stock Land Bank of Dallas v. Randerson, Civ.App., 127 S.W.2d 593, reversed on other grounds Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S.W.2d 769, 136 Tex. 91.

constable are liable thereon for the failure of the officer to account for, or pay over to the person entitled thereto, money collected by him under process or otherwise coming into his official custody[72] except where the person so entitled permits the officer to retain such money, in which case it becomes a loan to the officer, for which the sureties are not liable[73] There is a breach of the official bond of a sheriff or constable, rendering the sureties thereon liable, where he misapplies or improperly distributes or disposes of the proceeds of a sale made by him[74] or other money coming into his hands in his official capacity,[75] or where he converts or embezzles money received by virtue of his office,[76] unless, it has been held, he has other money to the same amount ready to be paid to the person entitled thereto.[77] Where an officer who has sold property so mingles and mixes the proceeds with his own funds that after his death his administrator cannot distinguish the one from the other, such disposition of the money is equivalent to a conversion, and a breach of his official bond, for which his sureties are liable,[78] but where the parties have by agreement taken attached property out of the custody of the law, and authorized the officer to sell it without reference to the legal proceedings, an appropriation by him of the funds arising from the sale is a breach of private trust, and not an act of official misconduct giving rise to a liability on his official bond[79] The fact that money was collected or received before the execution of the bond does not affect the liability of the sureties for a subsequent or continuing refusal to pay it over to the person entitled to receive it;[80] and, a fortiori, the fact that an execution was delivered to an officer before his bond was executed does not relieve his sureties of liability for money afterward received thereon[81]

Exaction of excessive payment. Where a sheriff or constable authorized to collect or receive money exacts from the debtor a greater sum than is lawfully required, there is such a breach of his duty as to render liable the sureties on his official bond[82]

Failure to collect. The sureties on the official bond of a sheriff or constable are liable for the failure of such officer to collect money which it was his duty to collect and which he might have collected if he had acted with reasonable diligence,[83] but such sureties are not liable for an officer's failure to make a collection where it was not his official duty so to do[84]

b. Particular Matters Affecting Liability

Under the circumstances of the particular case, the liability of the surety on the official bond of a sheriff or constable for default of the officer with respect to the collection, custody, or disposition of money has been held affected, or not affected, by the officer's authority to collect or receive payment, and by various other matters.

The sureties on the official bond of a sheriff or constable are not responsible for the officer's misapplication or conversion of money which he had no official authority to receive.[85] Thus, where an

72. Ark.—State, to Use of Union County, v Harman, 80 S W 2d 619, 190 Ark 621.
Fla.—Walling v. Carlton, 147 So 236, 109 Fla 97.
Mo.—State ex rel. Karnes v. Poole, App., 72 S W 2d 803.
57 C.J. p 1033 note 8.

Sheriff's clerk
Bond conditioned for faithful performance of duties of sheriff's clerk was breached by failure of duty which occasioned loss to sheriff, even though clerk did not misappropriate any of sheriff's funds which actually came into his hands.—Detroit Fidelity & Surety Co. v. Kidd, 182 S.E. 113, 116 W Va 511

Payment over to successor
The failure of a sheriff or other public officer to deliver to his successor money coming into his hands as such officer is violative of statute and a breach of the contract evidenced by the officer's official bond
Ala.—Jefferson County v Downs, 147 So 626, 226 Ala. 427.
Ark.—State, for Use of Glover, v. McIlroy, 116 S W.2d 601, 196 Ark. 63
57 C.J. p 1033 note 8 [d].

73. Cal.—Hill v. Kemble, 9 Cal. 71
57 C J p 1034 note 9.

74. Mo.—State ex rel. and to Use of Dietrich v Schade, App., 167 S W. 2d 135—State ex rel Adkins v Grugett, 63 S W 2d 413, 228 Mo App. 8—State ex rel. Karnes v. Poole, App., 72 S W 2d 803.
57 C J. p 1034 note 16—41 C J p 383 notes 99, 1

75. Ark.—State, to Use of Union County, v. Harman, 80 S W.2d 619, 190 Ark 621.
Ill.—Greene v Toman, 54 N.E.2d 230, 322 Ill.App 179.
57 C J. p 1035 note 17.

76. Ala.—Jefferson County v. Downs, 147 So 626, 226 Ala 427.
57 C.J p 1034 note 12

Deposit in bank not lawful depositary
The sheriff's deposit of county funds in a bank not a lawful depositary was a conversion of the funds rendering the surety on his official bond liable.—Jefferson County v Downs, supra.

77. Ala.—Dumas v. Patterson, 9 Ala. 484.

78. Ark.—State v. Roberts, 21 Ark. 260.

79. Tex.—Brent v. Hohorst, 1 Tex.A. Civ.Cas § 343.

80. La.—Wentz v. Ledoux, 24 La. Ann 131
S.C.—State Treasurers v. Taylor, 18 S C L 524

81. Ark.—Faulkner v. State, 9 Ark 14.
57 C J. p 1034 note 11.

82. Ind.—Snell v. State, 43 Ind 359
57 C J p 1035 note 20.

83. Cal.—Meherin v. Saunders, 42 P. 966, 110 Cal 463
57 C J. p 1035 note 18.

84. N.C.—State v Long, 29 N C 379
Tenn.—State v McCallum, 2 Baxt 101.
Failure of officer to do act not required by law as imposing liability on sureties in general see supra § 183

85. U.S.—People v. Hilton, C.C. Mich., 36 F. 172
57 C.J. p 1035 note 22.

officer collects money without legal process of any kind, his sureties are not liable therefor[86] unless the statute subjects them to such liability,[87] and where an officer sells property taken on attachment by agreement between plaintiff and defendant, and without an order of court, his sureties are not liable on their bond for his failure to pay over the money.[88] Similarly, the sureties are not liable for the loss or misapplication of anything other than lawful money received by an officer as payment of a debt or claim, in the absence of any authority from the creditor to receive payment in a medium other than money.[89] In view of the rule stated supra § 178 that sureties are liable for a wrongful act done by an officer under color of office, it has been held that the surety is liable for moneys collected by the officer under color of his office, and for which he failed to account, even though he was not in fact authorized to collect the money.[90]

Sureties on the official bond of an officer are not liable for his failure to pay over or account for money paid to him by an execution debtor after the return day of the execution[91] except where by statute their liability has been extended to cover such a default[92] and except where such money is paid to release property which was levied on before the return day and is in the officer's possession,[93] or where the money is realized by a sale after the return day of property levied on before that time[94]

Duty to pay over money. A breach of the official bond of a sheriff or constable cannot be predicated on his failure to pay over money unless it was his official duty to make such payment.[95]

Efforts of plaintiff to collect. The fact that, after the failure of a sheriff or constable to collect a claim put into his hands for collection, plaintiff unsuccessfully endeavors to collect it himself does not operate as a waiver of his right of action on the officer's official bond for such default.[96]

Necessity for demand. It has been held that the failure of a sheriff or constable to pay over money to the person entitled thereto does not constitute a breach of his official bond unless the person entitled has demanded the money or offered a reasonable opportunity for payment,[97] but that a demand is not necessary before the bringing of an action founded on an officer's failure to account for money collected for public purposes.[98]

Nonenforcement of officer's liability for deputy's default. The fact that a sheriff or constable has not paid or been compelled to pay the amount collected by his deputy on execution to the person entitled thereto does not relieve the sureties on the deputy's official bond from liability for a failure or refusal of such deputy to pay over such money to the officer.[99]

Nonreceipt of money. Where a sheriff or constable has sold property under an execution or order of court, neither he nor his sureties can be allowed to show, in an action on his official bond for failure to pay over the money raised by such sale, that he has not received the purchase money, since it was his duty to receive it when the sale was made.[1] In an action on the bond of an officer for his conversion of a bank draft or check given him in payment of a debt for the collection of which process had been levied by him, it is no defense that he was not paid in money, since the injured person is entitled to treat the draft or check as money after its acceptance as such by the officer.[2]

Order to bring money into court. An order directing a sheriff or constable who has money in his custody to bring it into court furnishes no defense to an action on his official bond for such money unless it has been brought into court pursuant to such order;[3] but where an officer properly brings money into court, pursuant to its direction, no liability can be imposed on him or his sureties for failing to pay

86. Ohio—Bradt v Skillen, 2 Ohio Dec, Reprint, 727, 5 West L.Month 72.
57 C.J p 1035 note 23.

87. Ky.—Jones v. Commonwealth, 2 Litt 357
57 C.J. p 1035 note 24.

88. Ala—Governor v. Perrine, 23 Ala. 807.

89. Miss.—Brown v. Moseley, 19 Miss. 354
57 C.J. p 1035 note 26.

90. Fla—Walling v. Carlton, 147 So 236, 109 Fla. 97.

91. Ala—Fitzpatrick v. Montgomery Branch Bank, 14 Ala. 533.
57 C.J. p 1036 note 28.

92. Ky.—James v. Yates, 3 Metc 343, distinguishing Stephens v Boswell, 2 J.J Marsh 29 and Rudd v Johnson, 5 Litt. 19.

93. Ala.—Evans v. Governor, 18 Ala. 659, 54 Am D. 172
Pa—Beale v. Commonwealth, 7 Watts 183.

94. Ala—Dennis v Chapman, 19 Ala. 29, 54 Am.D 186.
Nev—Nash v Muldoon, 16 Nev 404

95. Ga—Maryland Casualty Co. v. Salmon, 163 S E 285, 28 Ga App 45
Pa—Commonwealth v. Keller, 162 A. 474, 106 Pa.Super 458
57 C.J. p 1036 note 41, p 1037 note 42.

96. N.C.—Quin v. Roane, 24 N.C. 144.

97. Ohio—Woolard v. Favorite, 17 Ohio Cir Ct 72, 9 Ohio Cir Dec. 686

98. N C—Moore County v. McIntosh, 31 N.C. 307

99. N Y—Willet v. Stewart, 43 Barb 98.
57 C J. p 1037 note 52
Liability of officer for defaults of deputy in general see supra § 55.

1. Ga.—Prince v Wood, 97 S.E. 457, 23 Ga App 56.
Kan—Ferguson v Tutt, 8 Kan. 370.
Duty of officer to receive purchase money for property sold see supra § 47.

2. Iowa.—Gutschenritter v. Whitmore, 139 N.W. 567, 158 Iowa 252.

3. Del.—State v. Willard, 7 Del. 11.

it over to plaintiff pending the further order of the court.[4]

Order to lend money. It has been held that where a court orders a sheriff or constable, as its agent, to lend money in his custody, the sureties on the official bond of such officer are not responsible for the faithful execution of the personal trust thus imposed[5] unless he does not comply with the provisions of such order as to the person to whom or mode in which the loan shall be made.[6]

Ownership of property from which money realized In an action on the official bond of a sheriff or constable for his failure to pay over or account for the proceeds of property sold under execution, the officer or his sureties cannot be heard to deny that such property belonged to the execution defendant.[7]

Payment of debt. In an action on the official bond of a sheriff or constable who has collected money on an execution, the right of plaintiff to the money cannot be disputed on the ground that the judgment was satisfied by a recovery and satisfaction in another case founded on the same cause of action;[8] but payments by the debtor to execution creditors are a defense pro tanto to an action on an officer's bond for failure to collect the execution.[9] If an officer pays to plaintiff the amount of an execution then in force in his deputy's hands, and the latter afterward collects it from defendant in execution, the deputy's sureties are liable on their bond if he fails to account for it;[10] and, where a deputy has neglected to pay over money collected on an execution, the sureties on his official bond are not relieved from liability to the officer by the fact that, on being sued, the latter paid the money voluntarily without defending the suit.[11]

Proper application of money. There is no liability on the official bond of a sheriff or constable as to money which has been properly applied or disposed of by him.[12]

Receipt or custody of money in private capacity. Where the receipt and custody of money by a sheriff or constable are in his private, rather than his official, capacity, the sureties on his official bond are not responsible for his disposition thereof.[13] The mere fact, however, that an officer authorized to receive or collect a sum of money does so at a time prior to that at which such payment is required to be made does not make the transaction a personal one or relieve the sureties from liability for his wrongful disposition of the money received.[14]

Tender and refusal. It has been held that the sureties on the official bond of a sheriff or constable are relieved from such liability for the disposition of money in his custody where the officer tenders payment to a person entitled to receive money and such person refuses to receive it;[15] but there is also authority to the contrary.[16]

Validity of judgment or process. The sureties on the official bond of a sheriff or constable are not relieved of liability for the loss or wrongful disposition of money received or collected by the officer under process because of an irregularity in such process or its issuance[17] or because of an error or irregularity in the rendition of the judgment on which such process is based.[18] Accordingly, although it has been said that a sheriff's sureties are not liable for the wrongful seizure or detention of money where he did not act under valid process,[19] there is authority to the effect that the validity of the process[20] or judgment[21] is not subject to attack in an action on the bond.

Validity of sale by which money realized. In an action on the official bond of a sheriff or constable

4. Ark.—Cooley v. Lovewell, 130 S.W. 574, 95 Ark. 567.

5. Ky.—Sanders v. Parrott, 1 Duv. 292.

6. Ohio.—Hubbard v. Elden, 2 N.E. 434, 43 Ohio St. 380.
57 C.J. p. 1037 note 55.

7. Mo.—Smithers v. State, 7 Mo. 342.
N.Y.—People v. Reeder, 25 N.Y. 302.

8. Ala.—Hill v. Fitzpatrick, 6 Ala. 314.

9. Ky.—Commonwealth v. Bosley, 5 Bush 221.

10. Ala.—McGehee v. Gewin, 25 Ala. 176.

11. N.Y.—Andrus v. Bealls, 9 Cow. 693.

12. Ill.—People v. Foster, 23 N.E. 615, 133 Ill. 496.
Pa.—Lancaster County Nat. Bank v. Commissioners of Lancaster County, Com. Pl., 49 Lanc. Rev. 345.
57 C.J. p. 1037 note 53.
Nonliability of sureties where officer not liable in general see supra § 183.

13. Ga.—Maryland Casualty Co. v. Salmon, 163 S.E. 285, 28 Ga. App. 45.
57 C.J. p. 1036 note 33.

14. Mo.—State v. Cayce, 85 Mo. 456.
57 C.J. p. 1036 note 34.

15. Minn.—Hull v. Chapel, 79 N.W. 669, 77 Minn. 159, 77 Am. S.R. 666.
57 C.J. p. 1037 note 45.

16. Ohio.—State v. Alden, 12 Ohio 59.

17. Ark.—State v. Norris, 19 Ark. 247.
57 C.J. p. 1036 note 35.

18. W.Va.—State v. Citizens' Trust, etc., Co., 77 S.E. 902, 72 W.Va. 181.
57 C.J. p. 1036 note 36.

19. U.S.—Allen v. Clark, D.C.Cal., 22 F.Supp. 898.
Cal.—Best v. Johnson, 29 P. 415, 78 Cal. 217, 12 Am.S.R. 41, 3 L.R.A. 168.

20. Ga.—Watts v. Colquitt, 66 Ga. 492.—Prince v. Wood, 97 S.E. 457, 23 Ga. App. 56.

21. Ind.—Nutzenholster v. State, 37 Ind. 457.
Actions on bonds of sheriffs and constables in general see infra §§ 193–208.

for his failure to pay over the proceeds of an execution sale of land, it may be shown in defense that the execution defendant had but an equitable title to the land which could not be sold under execution at law.[22]

c. Extent of Liability

The sureties on the official bond of a sheriff or constable are liable for his failure to pay over or account for money to the full extent thereof with interest from the time of demand, provided such amount does not exceed the penal sum of the bond.

Provided such amount does not exceed the penal sum of the bond, the sureties on the official bond of a sheriff or constable are liable for his failure to pay over or account for money to the full amount thereof, with interest from the time of demand.[23]

Liability of deputy's sureties to officer. A sheriff or constable who has been held liable for a default of his deputy in failing to pay over money collected or received by him is entitled to recover from such deputy's sureties only the amount of the judgment rendered against the officer, and not the amount of interest or costs which he may have been compelled to pay in addition thereto;[24] nor are the deputy's sureties liable for more than the amount of money which the deputy has received and failed to pay over, although judgment for a greater sum has been recovered against the officer.[25]

§ 189. —— Other Defaults

a. Abuse or excess of authority
b Acts with respect to indemnity
c. Assault and battery
d. Costs and expenses of litigation
e. Criminal acts of officer
f. Defaults in connection with taking bond or security
g. Defaults with respect to return of process
h. Escape
i. Failure to commit prisoner
j. Failure to deliver unexecuted process to successor
k. Injury caused by negligent operation of motor vehicle
l. Injury to prisoner
m. Matters relating to collection of taxes
n. Matters relating to fees or compensation
o. Personal contracts of officer
p. Wrongful arrest or imprisonment

a. Abuse or Excess of Authority

The sureties on the official bond of a sheriff or constable are liable for injuries resulting from his acts in abuse or excess of authority while attempting to execute some official duty.

If a sheriff or constable, while attempting to execute some duty of his office, abuses or exceeds his authority, or executes it in an unlawful manner, to the injury of another, the sureties on his official bond are liable therefor.[26]

b. Acts with Respect to Indemnity

Sureties on the official bond of a sheriff or constable are liable for the failure of the officer to preserve and account for money deposited with him as indemnity except under some circumstances where the statute permitting indemnity to be taken requires it to be in the form of a bond or other prescribed security.

Sureties on the official bond of a sheriff or constable are liable for the failure of the officer to preserve and account for money deposited with him as indemnity[27] except where the statute permitting indemnity to be taken requires it to be in form of a bond or other prescribed security, in which case it has been held, under the rule, recognized in some jurisdictions, as discussed supra § 178 g, that an officer's sureties are liable only for acts done by him virtute officii and not for those done merely colore officii, that the taking of a deposit of money as indemnity imposes no liability on the sureties for its safekeeping or return.[28]

c. Assault and Battery

A liability arises on the official bond of a sheriff or constable where, in connection with the discharge of a duty of his office, he commits an assault and battery, but not where the assault is a personal tort.

22. Ala.—Kelly v. Governor, 14 Ala 541.

23. Ky—Champion v Le Van, 109 S.W 2d 404, 270 Ky 139
57 C J. p 1038 note 64
Liability as limited to penal sum named in bond see supra § 181.

24. Va.—Weaver v Skinker, 4 Gratt 160, 45 Va 160
Liability of officer for defaults of deputy see supra § 55

25. Va—Drew v. Anderson, 1 Call 51, 5 Va. 51.

26. N C—**Corpus Juris** cited in Price v. Honeycutt, 4 S.E 2d 611, 614, 216 N C 270.
57 C J. p 1042 note 46
Liability for unauthorized or unofficial acts of officer in general see supra § 178.
Execution of search warrant
Where officer executing valid search warrant exceeds or abuses authority, thereby infringing on owner's or occupant's constitutional rights, bondsmen are liable in trespass for damages to such occupant.—McMahan's Adm'x v Draffen, 47 S W.2d 716, 242 Ky 785

27. Neb—Comstock-Castle Stove Co v. Caulfield, 95 N W. 783, 1 Neb., Unoff, 542.
Indemnity to officer see supra §§ 128-145
Liability for defaults in connection with custody and disposition of money in officer's hands in general see supra § 188.

28. Neb—Comstock-Castle Stove Co. v. Caulfield, supra.

A liability arises on the official bond of a sheriff or constable where, in connection with the discharge of a duty of his office, he commits an assault and battery[29] or where in overcoming resistance to the exercise of his duty he so exceeds his authority as to become the aggressor in an assault and battery, to the injury of another[30] An officer is guilty of a personal tort, however, for which his sureties are not liable where, without necessity or provocation, he assaults a person not a party to the process he is serving or about to serve[31] or where he had no process to execute and was not attempting to make an arrest at the time of the assault.[32] Where the condition in the bond requiring faithful execution of the office is limited to specific duties enumerated in the bond relative to the execution of process and payment of fees, the bond affords no basis for recovery by one whom the sheriff wounded while acting in his official capacity.[33]

Unlawful or careless use of weapons. A deputy sheriff selected for police duty is not a deputy who actually collects taxes within the meaning of a statute making the bondsman of such deputy liable for the unlawful or careless use of certain weapons, even though he has served court papers and assisted with finances in the sheriff's office;[34] but the fact that a deputy was not a tax collecting deputy within the meaning of such statute does not preclude the maintenance of a suit on his bond because it does not expressly cover the careless or unlawful use of a weapon[35] Where the condition imposed by statute upon the official bond of a constable, subjecting him and his sureties to liability for the unlawful or careless use of weapons, is not restricted in its operation to the county of the officer's appointment, recovery thereunder does not depend on whether the unlawful or careless use of such weapon was in the course of official duty.[36]

d. Costs and Expenses of Litigation

It has been held that the sureties on the official bond of a sheriff, constable, or deputy may be compelled to respond for the costs and expenses of litigation which has resulted from the default of the officer.

The sureties on the official bond of a sheriff or constable may be compelled to respond for the costs and expenses of litigation which has resulted from the default of the officer,[37] but there is also authority, to the contrary, that they cannot be held liable for the costs of an action against the officer

29. Kan —Farmer v. Rutherford, 15 P 2d 474, 136 Kan 298.
57 C.J p 1043 note 57.
Criminal acts of officer see infra subdivision e of this section
Negligent injury to prisoner in officer's custody see infra subdivision l of this section
Making arrest
(1) If in effecting an arrest an officer, carelessly or in bad faith, under existing circumstances, harms another by the use of force apparently unjustified, this amounts to a breach of duty for which the sureties on his official bond are liable.
N C —Price v. Honeycutt, 4 S E 2d 611, 216 N C. 270.
W.Va —State ex rel. Mullins v. McClung, 17 S E 2d 621, 123 W.Va. 682
57 C J. p 1043 note 57 [b] (1).

(2) So the sureties of an officer who in making an arrest commits an unjustifiable homicide are liable for damages for the wrongful death —Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667—57 C.J p 1043 note 57 [b] (2)

(3) With respect to liability on official bond, officer may use no greater force in arresting suspected felon than in arresting suspected misdemeanant —Tabor v. McKenzie, Tex Civ App , 49 S W.2d 874

(4) Sureties on official bond of sheriff are liable for damages arising from intentional or negligent shooting of a misdemeanant who flees to avoid arrest —Holland v Martin, Miss , 56 So 2d 398, suggestion of error overruled 58 So 2d 62

(5) Liability on sheriff's bond for sheriff's shooting one merely running to escape arrest arises when shooting is either intentional or negligent.— Tabor v. McKenzie, Tex Civ App , 49 S W 2d 874

(6) Where, in endeavoring to arrest one person, an officer, such as a constable, mistakes another for the person wanted, and, in attempting the arrest, injures him, such action constitutes a breach of the officer's official bond, whether injured person was mistaken for a felon or a misdemeanant —State ex rel. Ratliff v Day, 198 S E 609, 120 W Va 412—State v Cunningham, 167 S.E. 595, 113 W Va 244.

(7) Where, assuming to act as such, a deputy sheriff makes an illegal arrest, and the person arrested attempts to escape, to prevent which he is shot and injured by the officer, such arrest and subsequent act of shooting constitute acts colore officii, amounting to a breach of the officer's bond, for which the surety on such bond may be held liable —Booten v Napier, 5 S E 2d 441, 121 W.Va 548

(8) Whether sheriff used excessive force in making arrest, with respect to surety's liability, depends on reasonable appearance of situation to sheriff at time —Bassinger v. U. S Fidelity & Guaranty Co , C.C.A Neb., 58 F.2d 573, certiorari denied U. S. Fidelity & Guaranty Co. v Bassinger, 53 S Ct 21, 287 U S. 622, 77 L Ed 540.

(9) Excessive force held not used —Moran v Lumbermens Mut Casualty Co , D C Mich , 92 F Supp 267

(10) Wrongful arrest or imprisonment see infra subdivision p of this section.

30. S C —Wieters v. May, 50 S E. 547, 71 S C. 9

31. Mo —**Corpus Juris cited in** Humphrey v Ownby, App , 104 S. W.2d 398, 404
Wash —**Corpus Juris cited in** Nelson v Bartell, 103 P.2d 30, 34, 4 Wash 2d 174
57 C.J p 1043 note 59
Liability of sureties for acts of officer in personal capacity in general see supra § 178 g.

32. Ala.—Culverhouse v. National Sur Corp , 171 So 916, 27 Ala App. 318

33. U S —State of North Carolina ex rel. Wimmer v. Leonard, C C.A. N.C., 68 F 2d 228.
Liability as limited by terms of bond generally see supra § 178

34. W.Va —State v Belcher, 160 S E. 565, 111 W Va 97.

35. W.Va —Booten v Napier, 5 S E. 2d 441, 121 W Va 548.

36. W.Va.—State ex rel Ashworth v. Bibb, 171 S E. 414, 114 W Va 215.

37. Ala.—Pruett v Williams, 47 So. 318, 156 Ala. 346.
57 C J p 1044 note 76.

to which they were not parties.[38] Similarly, sureties on the official bond of a deputy have been held liable to his principal for expenses incurred by the officer in defending an action brought against him for an alleged default of the deputy,[39] although in at least one jurisdiction this rule has been restricted to the costs of actions in which a default on the part of the deputy was found and the officer was held liable, and not to apply where the officer was successful,[40] but it seems that the liability of the deputy's sureties does not extend to the expenses of appeals taken by the officer from a judgment against him without the consent of the deputy.[41]

e. Criminal Acts of Officer

Sureties on the official bond of a sheriff or constable are not liable for the consequences of a criminal act, as such, of the officer, although they may be liable if the act renders the officer civilly liable.

Sureties on the official bond of a sheriff or constable are not liable to suffer in his place for a criminal offense committed by him[42] or to indemnify individuals for consequence of a criminal act, as such.[43] Where an act of an officer renders him civilly liable, however, his sureties are not relieved of liability on the bond by the fact that such act also constitutes a crime.[44]

f. Defaults in Connection with Taking Bond or Security

Where it is the duty of a sheriff or constable to take a bond or other security, the sureties on his official bond ordinarily are liable for his failure to take a bond, or his acceptance of a bond with insufficient sureties or for an inadequate penal sum, or a bond which is informal, defective, or void.

Where it is the duty of a sheriff or constable to take a bond or other security, the sureties on his official bond ordinarily are liable for his failure to take a bond,[45] or his acceptance of a bond with insufficient sureties[46] or for an inadequate penal sum,[47] or a bond which is informal,[48] or does not contain conditions required by statute,[49] or is otherwise defective,[50] or a void bond.[51] Where, however, a statute makes an officer who fails to take bail, or takes insufficient bail, liable as special bail, it has been held that the officer does not become liable on his official bond for his failure to take bail, but is liable only as bail, and it is not until he has failed in his obligation as bail that the sureties on his official bond may be looked to;[52] but when he fails to perform his obligations as bail he becomes liable on his official bond.[53] An attempt to enforce an insufficient bond taken by an officer does not bar the remedy on his official bond for the default,[54] but in an action by attachment creditors on the official bond of the attaching officer for taking an insufficient bond in replevin for the attached property, where the replevin was not decided on the merits, but on a voluntary discontinuance of the attachment, defendant may show that the attached property was exempt.[55]

Failure to return a replevin bond has been held to constitute a breach of the officer's official bond, for which the sureties thereon are liable.[56]

Extent of liability. The measure of the amount for which sureties may be held liable for the taking of an insufficient or defective bond is the injury suffered by the person for whose benefit the bond is required, provided it does not exceed the penal sum named in the bond,[57] and their liability is not necessarily confined to the value of the property to the taking of which the bond relates.[58] No damages can be recovered against an officer's sureties for his failure to take a proper forthcoming bond where the party from whom he should have taken it was afterward discharged from liability.[59]

g. Defaults with Respect to Return of Process

(1) In general

38. N.Y.—Berry v. Schaad, 63 N.Y.S. 349, 50 App.Div. 132
39. N.H.—Hoitt v. Holcomb, 32 N.H. 185
57 C.J. p. 1044 note 78
Liability of officer for defaults of deputies see supra § 55
40. N.Y.—Franklin v. Hunt, 2 Hill 671.
41. N.Y.—Conner v. Keese, 32 Hun 98.
42. U.S.—South v. Maryland, Md., 18 How. 396, 15 L.Ed. 433.
43. U.S.—South v. Maryland, supra.
44. U.S.—Indiana v. Gobin, C.C.Ind., 94 F. 48.
45. N.Y.—People v. Dikeman, 3 Abb. Dec. 520, 4 Keyes 93.
57 C.J. p. 1038 note 70.
46. Cal.—Noble v. Desmond, 14 P. 16, 72 Cal. 330
57 C.J. p. 1038 note 71.
47. Ill.—Mayer v. People, 60 N.E. 96, 190 Ill. 109
57 C.J. p. 1038 note 72.
48. Tex.—Lipscomb v. Mensing, 2 Tex.A.Civ.Cas. § 535
49. Ala.—Traweek v. Heard, 12 So. 166, 97 Ala. 715.
50. Ill.—Love v. People, 94 Ill.App. 237.
51. S.C.—Treasurers v. Barksdale, 19 S.C.L. 272.
52. N.C.—Governor v. Jones, 9 N.C. 359.
53. N.Y.—People v. Dikeman, 3 Abb. Dec. 520, 4 Keyes 93
57 C.J. p. 1038 note 78
54. Ala.—Williams v. Ragan, 45 So. 185, 153 Ala. 397.
55. Mich.—People v. Lee, 39 N.W. 731, 71 Mich. 493.
56. Ill.—People v. Robinson, 89 Ill. 159
57 C.J. p. 1039 note 82.
57. Ill.—Love v. People, 94 Ill.App. 237.
Liability as limited to penal sum of bond see supra § 181.
58. Ill.—Love v. People, supra
59. Ga.—Griner v. Smith, 106 S.E. 20, 26 Ga.App. 319.

(2) Particular matters affecting liability
(3) Extent of liability

(1) In General

Sureties on the official bond of a sheriff or constable may be compelled to respond for the failure of such officer to return process within the time allowed by law therefor or the making of a false or defective return; and the officer is liable on his bond for making a false return.

Sureties on the official bond of a sheriff or constable may be compelled to respond for the failure of such officer to return process[60] within the time allowed by law therefor,[61] or for the making of a false return[62] or a defective one,[63] and the officer is liable on his bond for making a false return,[64] but there can be no recovery of damages not proximately resulting from such default.[65]

(2) Particular Matters Affecting Liability

Under the circumstances of the particular case, the liability of the surety on the official bond of a sheriff or constable for default of the officer with respect to the return of process has been held affected, or not affected, by the capacity in which the writ was delivered to the officer, his authority to execute it, the cause of his failure to return the process, the time of the receipt of the process, and by various other matters.

Sureties on the official bond of a sheriff or constable are not liable for a failure on the part of such officer to return process not delivered to him in his official capacity,[66] or to return process which he was not authorized to execute,[67] or where the failure to return process was due to a providential cause beyond the officer's control[68] or to the accidental loss or misplacement thereof;[69] but the sureties on the bond are liable for the officer's failure to execute process which he was not obliged to receive, if in fact he did receive it,[70] and the fact that process was received by a sheriff or constable too late to permit its full execution before the return-day does not relieve the sureties on his official bond of liability for his failure to make a return.[71]

Abandonment of office by justice issuing process. Where, before the return-day of an execution, the justice by whom it was issued removed from the town and delivered his official docket and papers to the town clerk, and before the return-day the constable to whom the execution was delivered returned it to the town clerk, it was held that the constable and the sureties on his official bond could not be held liable for failure to return the writ to the justice.[72]

Acts of plaintiff. Where the damages suffered by plaintiff in an action for a false return of process by a sheriff or constable have resulted from his own act rather than from the false return, he cannot recover on the official bond of the officer;[73] but it is no defense to an action on the official bond of a sheriff or constable for his failure to return a writ that, at the instance and request of plaintiff, the officer returned it to a county other than the one to which it was returnable on its face.[74]

Insolvency of defendant in process. Sureties on the official bond of a sheriff or constable are not relieved from liability for the officer's failure to return an execution by the fact that when the execution came to his hands the execution defendant had no property, but was then and still continued to be insolvent;[75] but the insolvency or poverty of defendant may go in mitigation of damages[76] except where absolute liability for the amount of the debt is imposed by statute on the sureties in case of failure to return a writ.[77]

Issuance of alias writ. Where a sheriff or constable fails to return process, plaintiff therein does not relinquish his right of action on the officer's

60. Va.—Grandstaff v. Ridgely, 30 Gratt 1, 71 Va 1
57 C.J. p 1039 note 87.

61. Miss.—W. T. Rawleigh Co. v. Hester, 200 So. 250, 190 Miss. 329
57 C.J. p 1039 note 88
Effect of termination of officer's incumbency prior to return-day see supra § 180.

62. Mo.—Majewski v. Bender, App., 237 S.W.2d 235
57 C.J. p 1039 note 89

63. Mo.—State v. Johnson, 78 Mo. App. 569

64. Mo.—Majewski v. Bender, App., 237 S.W.2d 235—Anthony v. Downs Amusement Co., 205 S.W.2d 925, 239 Mo.App. 1136.

65. Mich.—Chalker v. Fidelity & Deposit Co. of Maryland, 256 N.W. 343, 268 Mich. 333

66. Pa.—Snapp v. Commonwealth, 2 Pa. 49.
57 C.J. p 1040 note 98.

67. Ala.—Johnson v. McLaughlin, 9 Ala. 551.
57 C.J. p 1039 note 96.

68. Ala.—Harris v. Bradford, 4 Ala. 214
57 C.J. p 1040 note 4.

69. Ky.—Shippen v. Curry, 3 Metc. 184.

70. Tenn.—Kinzer v. Helm, 7 Heisk. 672.
Pa.—Rogers v. Metropolitan Life Ins. Co., 99 Pa. Super. 505.

71. Tenn.—Chaffin v. Stuart, 1 Baxt. 296—Smith v. Gilmore, 3 Sneed 481.

72. N.Y.—Hampton v. Boylan, 46 Hun 151.

73. N.Y.—Walter v. Middleton, 68 N.Y. 605
57 C.J. p 1040 note 8.

74. Ark.—State v. Saddler, 6 Ark. 235

75. Ky.—Goodrum v. Root, 2 Metc. 427
57 C.J. p 1040 note 1

76. Ga.—Dobbs v. Murray County, 17 Ga. 624.
S.C.—State Treasurers v. Hilliard, 42 S.C.L. 412

77. Ill.—Robertson v. Marshall County, 10 Ill. 559.
Ky.—Goodrum v. Root, 2 Metc. 427.

official bond by procuring the issuance of an alias writ.[78]

Nonpossession of property described in venditioni exponas. The fact that the property never came to the hands of a sheriff or constable does not excuse him from liability on his official bond for neglect to return a venditioni exponas or for making a false return thereof.[79]

Participation in making of return. Where a return of process is prepared by a sheriff or constable but signed by his deputy, the officer cannot, on being held liable for an insufficient return, recover against the deputy and the sureties on his official bond;[80] and, similarly, where an officer sees the return indorsed on process by a deputy before it is delivered into the clerk's office, and with knowledge of facts showing its falsity allows the return to be made, it is in law and fact his return, and he cannot recover on the deputy's official bond.[81] Knowledge on the part of an undersheriff, however, that a return made by a deputy is false has been held not to be imputable to the sheriff so as to preclude a recovery by him from the sureties on the deputy's bond,[82] and an officer by whom a return is signed may recover against his deputy and the sureties on the latter's bond for damage suffered by him because of the falsity of the return, where it was prepared by the deputy or in accordance with his direction and the officer did not know of its falsity.[83]

Payment to plaintiff. The maintenance of an action on the official bond of a sheriff or constable for his failure to return an execution is not barred by the fact that the execution defendant has paid the amount of the execution to plaintiff.[84]

Validity of judgment. Liability has been held not to arise on the bond of a sheriff or constable for his failure to return an execution issued on a void judgment,[85] but there is also authority for the view that the sureties cannot be permitted to show, in order to escape liability for a defective return by the officer, that the judgment was void.[86] Mere irregularities in the judgment do not relieve the sureties of liability.[87]

Validity of process. Failure on the part of a sheriff or constable to return process which is on its face void is not a breach of his official bond,[88] but the sureties on the bond are liable for a failure to return process which is merely irregular.[89]

(3) Extent of Liability

Within the limits of the penal sum named in the bond, sureties on the official bond of a sheriff or constable are liable to the extent of the injury sustained as a result of defaults of the officer with respect to the return of process.

Subject to the rule, discussed supra § 181, that sureties on the official bond of a sheriff or constable may not be compelled to respond in an amount larger than the penal sum named in the bond, they are prima facie liable for a failure of the officer to return final process to the extent of the amount named in the writ,[90] or, for failure to return an attachment, to the extent of plaintiff's demand,[91] or, for failure to return a venditioni exponas, to the extent of the value of the property which was directed to be exposed to sale.[92] A recovery may be had, however, only to the extent of the injury, if any, resulting from such failure,[93] so, where the amount of an execution has been paid to plaintiff by defendant therein, no recovery of such amount can be had against the officer's sureties,[94] but where a penalty is imposed by statute for failure to make a return the sureties are liable therefor notwithstanding such payment.[95] A false return warrants a recovery on the bond of the damages proximately resulting therefrom.[96] No recovery can be had for a loss not resulting from the officer's default.[97]

h. Escape

The escape of a prisoner from the custody of a sher-

78. Pa.—Myers v Commonwealth, 2 Watts & S 60

79. Ind.—State v Youmans, 1 Ind 90.

80. Tenn.—Cate v. Howard, 1 Swan 15.
57 C.J. p 1040 note 9.

81. N.C.—Wasson v Linster, 83 N.C. 575

82. N.Y.—Walter v. Middleton, 68 N.Y. 605.

83. Md.—Naylor v Semmes, 4 Gill & J. 273.

84. Ky.—Commonwealth v. Bradley, 4 J.J.Marsh 209
Recovery limited to injury sustained by plaintiff see infra subdivision g (3) of this section.

85. Miss.—Union Motor Car Co v Cartledge, 97 So 801, 133 Miss 318—Dailey v. State, 56 Miss 475

86. Tenn.—Perdue v. Dodd, 1 Lea 710

87. N.Y.—Germon v. Swartwout, 3 Wend 282.
Tenn.—Cowan v Sloan, 32 S.W. 388, 95 Tenn. 424.

88. Ky.—Hawkins v. Commonwealth, 1 T.B.Mon 144.

89. Mo.—Alexander v. Eberhardt, 35 Mo 475
57 C.J. p 1039 note 92.

90. Ky.—Goodrum v. Root, 2 Metc 427
57 C.J. p 1041 note 19.

91. Tex.—Smith v. Tooke, 20 Tex 750

92. Ky.—Johnston v. Governor, 2 Bibb 186, 4 Am.D. 694.

93. Ky.—Commonwealth v. Bradley, 4 J.J.Marsh. 209.

94. Ky.—Sanders v Commonwealth Bank, 2 Metc 327—Commonwealth v Bradley, 4 J.J.Marsh 209.

95. Ky.—Sanders v. Commonwealth Bank, 2 Metc 327.

96. Ark.—Hearn v. Ayers, 92 S.W. 768, 77 Ark. 497.
57 C.J. p 1041 note 25.

97. Ky.—Hill v. Turner, 3 Bush 27.

iff or constable works a breach of the condition of the officer's official bond and ordinarily renders the sureties thereon liable for the actual injury which has resulted from the default.

The escape of a prisoner from the custody of a sheriff or constable works a breach of a condition of the officer's official bond that he shall faithfully perform the duties of his office.[98] The sureties are prima facie liable, in a case of civil arrest, for the amount of the debt for which the arrest was made,[99] but ordinarily their liability is limited to the actual injury which has resulted from the default,[1] although by some authorities this rule has been restricted to cases of the escape of one arrested on mesne process, and held not to apply to escape from an arrest on final process.[2] Accordingly it may be shown in mitigation of damages that the person arrested was insolvent or unable to pay all his debts,[3] or that after the escape the officer rearrested the debtor and committed him to jail,[4] except where actual injury is not the measure of damages.[5] Where the sheriff releases the prisoner on the judgment creditor's refusal to pay the debtor's lodging as required by statute, the facts do not make out a cause of action against the sheriff and his bondsmen for the escape of the prisoner.[6] The requirement of a bond in a writ of capias ad satisfaciendum does not affect liability for the release of the prisoner where the prisoner was not released on bond although inclusion of such requirement in the writ was irregular.[7] Where an officer releases or permits the escape of one convicted of crime, the sureties on his bond have been held liable for the amount of the fine imposed on the convict and the costs assessed against him.[8]

Escape of prisoner at large within jail limits under jail-limits bond. The sureties of a sheriff are not liable to a judgment creditor for the escape of an imprisoned debtor who was at large within the jail limits under a jail-limits bond where the only breach of duty was that inferred from a statute imposing absolute liability on the sheriff for what the statute deems an escape.[9]

i. Failure to Commit Prisoner

The failure or neglect of a sheriff or constable to commit one to jail in accordance with an order of commitment made in a civil or criminal proceeding renders the sureties on the officer's official bond liable to one injured by such default.

The failure or neglect of a sheriff or constable to commit one to jail in accordance with an order for commitment made in a civil proceeding renders the sureties on the officer's official bond liable to one injured by such default,[10] and a failure to commit one convicted of crime renders the officer's sureties liable for the amount of the fine and costs assessed against the convict.[11]

j. Failure to Deliver Unexecuted Process to Successor

The failure of a sheriff or constable to deliver unexecuted process to his successor has been held not to constitute a breach of his official bond.

The failure of a sheriff or constable to deliver over to his successor in office process which he has not commenced to execute has been held not to

98. Tex.—Spradley v. State, 56 S.W. 114, 442, 23 Tex. Civ. App. 20.
57 C. J. p. 1043 note 61

99. Ind.—Lakin v. State, 89 Ind. 68
57 C. J. p. 1043 note 62

1. Ga.—Crawford v. Andrews, 6 Ga. 244
57 C. J. p. 1043 note 63.

2. Ind.—Lakin v. State, 89 Ind. 68
57 C. J. p. 1043 note 64.

3. Ga.—Crawford v. Andrews, 6 Ga. 244.
57 C. J. p. 1043 note 65

4. Ind.—State v. Caldwell, 17 N.E. 185, 115 Ind. 6.

5. Ind.—Lakin v. State, 89 Ind. 68—Lines v. State, 6 Blackf. 464.

6. Mich.—Butcher v. Lovitt, 273 N. W. 734, 280 Mich. 369.

7. Pa.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa. Super. 280

8. Tex.—Spradley v. State, 56 S.W. 114, 442, 23 Tex. Civ. App. 20.

9. U.S.—American Surety Co. of New York v. Van Gilder, C.C.A. Mich., 115 F.2d 200, certiorari denied Van Gilder v. American Surety Co. of New York, 61 S.Ct. 621, 312 U.S. 690, 85 L.Ed. 1127.

Reasons for rule

(1) Surety on sheriff's official bond did not contract to indemnify any one for an escape except as such escape might be due to some breach of sheriff's obligation well and faithfully to perform and execute the duties of his office.—American Surety Co. of New York v. Van Gilder, C.C.A. Mich., 115 F.2d 200, certiorari denied Van Gilder v. American Surety Co. of New York, 61 S.Ct. 621, 312 U.S. 690, 85 L.Ed. 1127.

(2) It cannot be said that compliance with law which requires the sheriff to permit a prisoner to be at large on a jail-limits bond is a breach of the covenant of the official bond.—American Surety Co. of New York v. Van Gilder, C.C.A. Mich., 115 F.2d 200, certiorari denied Van Gilder v. American Surety Co. of New York, 61 S.Ct. 621, 312 U.S. 690, 85 L.Ed. 1127.

(3) Statute making sheriff liable for debt for which prisoner was committed to jail, if prisoner shall go or be at large without jail limits, is not to be read into sheriff's official bond.—American Surety Co. of New York v. Van Gilder, C.C.A. Mich., 115 F.2d 200, certiorari denied Van Gilder v. American Surety Co. of New York, 61 S.Ct. 621, 312 U.S. 690, 85 L.Ed. 1127.

(4) Custody of prisoner within jail limits is not custody of sheriff, but custody of prisoner's sureties, with respect to liability of sheriff's sureties to judgment creditor.—American Surety Co. of New York v. Van Gilder, C.C.A. Mich., 115 F.2d 200, certiorari denied Van Gilder v. American Surety Co. of New York, 61 S.Ct. 621, 312 U.S. 690, 85 L.Ed. 1127.

10. Pa.—Snyder v. Commonwealth, 1 Penr. & W. 94.
57 C. J. p. 1044 note 70.

11. Tex.—Wynne v. State, Civ. App., 158 S.W. 783.

constitute a breach of his official bond for which his sureties are liable;[12] but there is also authority to the contrary.[13]

k. Injury Caused by Negligent Operation of Motor Vehicle

Although there is authority holding otherwise, the sureties on the official bond of a sheriff or constable have been held liable for an injury inflicted by the officer while using a motor vehicle in the performance, or pretended performance, of a duty imposed by law.

According to some authority the liability of the sureties on the official bond of a sheriff or constable for injuries inflicted by the officer while using a motor vehicle depends on whether the officer at the time was acting by virtue of his office or under color of his office,[14] rather than whether he was acting in an official capacity.[15] Thus the fact that the officer was on an official mission at the time of running his vehicle against another did not convert such act into the performance of an official duty by virtue or under color of his office,[16] and therefore it did not constitute a breach of his bond to discharge the duties of his office faithfully,[17] even though he committed a tort in negligently operating his vehicle and violating traffic regulations.[18] On the other hand, it has been held that where the officer discharged his legal duty in such negligent manner as to cause injury to another it was an official wrong for which his bond is liable,[19] and that where the officer was using a vehicle furnished by the county for the purpose of going to a place where he had reason to believe information as to a crime to be available he was engaged in a duty imposed by law.[20] With respect to liability on the bond, whether the officer was in fact performing a duty imposed by law is immaterial if he was pretending to do so.[21] If the course of the official conduct is interrupted on any account not official in its nature and during such interruption the officer wrongfully causes injury to another, it is not official misconduct for which his bond is liable,[22] but he is on official business as long as he continuously pursues a course of conduct required of him by law with respect to his office.[23]

l. Injury to Prisoner

Sureties on the official bond of a sheriff or constable are liable for injuries to a prisoner in the custody of the officer resulting from the latter's negligence or unlawful act, but malice in performing the duties required by law affords no ground for recovery.

Sureties on the official bond of a sheriff or constable are liable for injuries to a prisoner in the custody of the officer resulting from the latter's negligence,[24] or for his unlawful act in killing a prisoner,[25] but the mere fact that the sheriff maliciously performs the duties required of him by law and enforces the law with malice against the prisoner affords no ground for recovery on his official bond.[26]

12. Tenn.—State v. Parchmen, 3 Head 609

13. Mo.—Governor v. McNair, 1 Mo. 302
57 C.J. p. 1044 note 75.

14. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., 33 S.E.2d 168, 199 Ga. 56, conformed to 33 S.E.2d 526, 72 Ga.App. 171.
Liability of surety on officer's bond for injury resulting from negligent operation of officer's motor vehicle by deputy see supra § 179.
Persons liable for injuries resulting from operation of motor vehicles generally see Motor Vehicles §§ 425-455

15. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., supra.

16. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., supra—New Amsterdam Casualty Co. v. Mathis, 61 S.E.2d 422, 82 Ga.App. 421.

17. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., 33 S.E.2d 168, 199 Ga. 56, conformed to 33 S.E.2d 526, 72 Ga.App. 171—New Amsterdam Casualty Co. v. Mathis, 61 S.E.2d 422, 82 Ga.App. 421.

18. Ga.—Culpepper v. U. S. Fidelity & Guaranty Co., 33 S.E.2d 168, 199 Ga. 56, conformed to 33 S.E.2d 526, 72 Ga.App. 171—New Amsterdam Casualty Co. v. Mathis, 61 S.E.2d 422, 82 Ga.App. 421.

19. Ala.—Jones v. Buckelew, 25 So.2d 23, 247 Ala. 475.

20. Ala.—Jones v. Buckelew, supra.

21. Ala.—Jones v. Buckelew, supra.

22. Ala.—Jones v. Buckelew, supra.

23. Ala.—Jones v. Buckelew, supra.

24. Ga.—**Corpus Juris cited in** Kendrick v. Adamson, 180 S.E. 647, 648, 51 Ga.App. 402
Kan.—Pfannenstiel v. Doerfler, 105 P.2d 886, 152 Kan. 479.
57 C.J. p. 1044 note 73
Liability of surety on official bond of sheriff for damages to person injured by breach of duty by sheriff as jailer generally see Prisons § 14.
Wrongful arrest or imprisonment see infra subdivision p of this section
Placing prisoner in cell with insane man
Surety on sheriff's bond was liable for death of prisoner who was negligently placed in cell with violently insane man who during night killed prisoner by beating him with table leg torn from table which had been left in cell by sheriff and jailer, since only by his color of office could sheriff direct that deceased be imprisoned.—Dunn v. Swanson, 7 S.E.2d 563, 217 N.C. 279.
Drunken prisoner
Action of deputy sheriff who was county jailer in incarcerating drunken prisoner in cell by himself without searching prisoner and removing objects with which prisoner might inflict injury, such as matches, and failure of deputy to respond to drunken cries of prisoner for help, were held not to authorize recovery on sheriff's bond for death of prisoner which occurred when prisoner, as result of drunkenness, set fire to himself.—Kendrick v. Adamson, 180 S.E. 647, 51 Ga.App. 402

25. Ga.—Powell v. Fidelity & Deposit Co. of Maryland, 163 S.E. 239, 44 Ga.App. 88
Assault and battery by officer see supra subdivision c of this section.
Act done by virtue of office
Arresting officer's act in holding an arrested person in custody was done by virtue of his office. Consequently, an arresting officer killing a prisoner under arrest without provocation committed a breach of his official bond.—Powell v. Fidelity & Deposit Co. of Maryland, supra.

26. Miss.—State ex rel. Trigg v. West, 157 So. 81, 171 Miss. 203.

m. Matters Relating to Collection of Taxes

Where it is a part of the official duty of a sheriff to act as collector of taxes, his official bond covers what is done or omitted by him in that capacity except where he is required to give a special bond as tax collector, in which case such bond rather than the general bond must respond.

Where it is a part of the official duty of a sheriff to act as collector of taxes, his official bond covers what is done or omitted by him in that capacity,[27] even though the duty is contingent on the failure to designate some other collector,[28] except where he is required to give a special bond as tax collector, in which case such bond, rather than the general bond, must respond.[29] Where the law does not require a special bond as tax collector, the fact that such a bond is actually given does not affect or relieve the liability of the sureties on the officer's general official bond.[30] The sureties on a bond relating or extending to the collection of taxes may be compelled to respond for the sheriff's failure to pay over or account for taxes collected by him in the performance of his duty and under authority of law;[31] but they are not liable for taxes collected by an officer without authority[32] or for a failure to collect taxes which the officer was unauthorized to collect.[33]

Bond of deputy sheriff. Where a sheriff is also collector of taxes, the sureties on the official bond of a deputy sheriff have been held liable for the defaults of such deputy in connection with the collection of taxes by him,[34] even though the sheriff is required by statute to give a special bond as collector of taxes,[35] but there is also authority for the view that the deputy's bond does not extend to his acts or defaults in collecting taxes.[36]

n. Matters Relating to Fees or Compensation

As a general rule the sureties on the official bond of a sheriff or constable are liable for fees improperly collected by him.

As a general rule the sureties on the official bond of a sheriff or constable are liable for fees improperly collected by him;[37] but the sureties on the bond of a de facto sheriff are not liable to the de jure sheriff, on his recovery of the office, for the fees, salary, or other emoluments of the office which were received by their principal while exercising the functions of the office.[38] The failure or refusal of a sheriff or constable to repay money voluntarily overpaid to him as fees or expenses or in settlement of his accounts is not a breach of his official bond and does not render the sureties thereon liable,[39] and the surety on the official bond of a sheriff is not liable to the county for the amount of illegal items of compensation which had been paid to the sheriff under a mistake of law honestly made by the county.[40] In an action on an officer's bond to recover for fees collected and not turned over to the county, payments made by the officer for deputy hire may be set up in defense.[41]

o. Personal Contracts of Officer

The sureties on the official bond of a sheriff or constable are not liable for obligations of the officer which rest merely on his personal contracts

The sureties on the official bond of a sheriff or constable are not liable for obligations of the officer which rest merely on his personal contracts.[42]

27. Ky.—Fidelity & Deposit Co. of Maryland v Board of Trustees of Elkton Graded Common School Dist, 57 S W 2d 457, 247 Ky 535.
57 C J. p 1041 note 28

28. Ky.—Fidelity & Deposit Co of Maryland v. Board of Trustees of Elkton Graded Common School Dist, supra

29. Ky.—Fidelity & Casualty Co of New York v. Breathitt County, 123 S W.2d 250, 276 Ky. 173.
57 C J. p 1041 note 29.
Liability as between general and special bonds in general see supra § 178.

Effect of statute relating to additional bonds

The statute providing that the county court may require the sheriff to give an additional bond or bonds, with good surety, and that the sureties on all bonds executed by the sheriff shall be jointly and severally liable for the sheriff's default, does not mean that the sureties on the sheriff's official bonds shall be jointly and severally liable with the surety on the revenue bonds for any default of the sheriff with respect to taxes collected.—Fidelity & Casualty Co of New York v Breathitt County, supra.

30. Miss.—State v. Matthews, 57 Miss 1

31. Idaho.—State v McDonald, 40 P 312, 4 Idaho 468, 95 Am S.R. 137
57 C J p 1042 note 31

32. Ky.—Greenwell v. Commonwealth, 78 Ky 320.
57 C J p 1042 note 32

33. Miss.—State v Harris, 52 Miss 686.

34. Ill.—Wood v. Cook, 31 Ill. 271.
57 C J. p 1042 note 34.

35. Ill.—Wood v. Cook, supra.

36. Md.—Amos v Johnson, 3 Harr & M 216

37. Pa.—Commonwealth ex rel. and to Use of Allegheny County v. De Luca, 200 A. 712, 131 Pa.Super. 451.
57 C.J. p 1042 note 38.
Compensation of sheriffs and constables in general see infra §§ 215–260

38. Tenn.—Curry v. Wright, 8 S.W. 593, 86 Tenn 636

39. Ga.—Maryland Casualty Co. v. Salmon, 163 S.E 285, 28 Ga.App. 45
Miss.—U S. Fidelity & Guaranty Co. v. Rice, 185 So. 563, 184 Miss 443, suggestion of error overruled 186 So. 620, 184 Miss. 443.
57 C.J p 1037 note 42.
Liability for failure of officer to pay over money generally see supra § 188

40. Mo.—Maxwell v. Andrew County, 146 S W 2d 621, 347 Mo 156

41. Ill.—Windmiller v. People, 78 Ill.App 273.

42. Pa.—Commonwealth v. Keller, 162 A. 474, 106 Pa.Super 458.
57 C J p 1044 note 81
Unofficial acts generally see supra § 178 f.

Sale of deficiency certificate to bank by sheriff was not official act constituting breach of official bond,

p. Wrongful Arrest or Imprisonment

Sureties on the official bond of a sheriff or constable may be compelled to respond for his wrongful act in arresting a person or for a wrongful imprisonment.

Sureties on the official bond of a sheriff or constable may be compelled to respond for his wrongful act in arresting a person,[43] where the arrest is an act virtute officii,[44] as in arresting one person under process against another,[45] or for a wrongful imprisonment.[46] Where an officer wrongfully makes an arrest without a warrant, the sureties are liable if the arrest is on a charge for which the officer is authorized to make an arrest without a warrant,[47] but not otherwise.[48] An arrest by a sheriff or constable under process void on its face is not a breach of his official bond,[49] but a mere irregularity in the process or in the complaint on which it was issued does not relieve the sureties of liability for a wrongful arrest.[50] The surety is not liable to a municipal prisoner who was received by the sheriff or his jailer outside of and beyond his mandatory authority.[51]

Justification of arrest. No liability arises on the bond of an officer for the arrest of one charged with an offense of which he was not guilty, where the officer at the time of the arrest had reasonable grounds to believe that the person arrested had committed the offense.[52] The sheriff's bondsman is not liable for damages resulting from wrongful imprisonment pursuant to an order of court directing the sheriff to take into custody and confine a person known by the sheriff to have served his full term and to have been discharged, since the sheriff was justified in obeying the order which was fair on its face.[53]

§ 190. Rights and Remedies of Sureties

A surety on a bond of a sheriff or constable is entitled to be indemnified against any liability, loss, or expense sustained in consequence of the execution of the bond where the surety and the officer have so agreed.

A surety on a bond of a sheriff or constable is entitled to be indemnified against any liability, loss, or expense sustained in consequence of the execution of the bond where an agreement between the surety and the officer to that effect is incorporated in the bond[54] or separately executed.[55] According-

since sheriff was not acting by virtue of office or under color of office but in private capacity—Citizens' State Bank of Wheeler v American Surety Co., Tex.Civ.App., 65 S.W.2d 778, error refused

43. Ariz.—Platt v Greenwood, 69 P.2d 1032, 50 Ariz. 158
Ga.—Hester v Shrouder, 13 S.E.2d 875, 64 Ga.App. 572
Miss.—Maryland Casualty Co. v. Eaves, 196 So. 513, 188 Miss. 872
Use of unjustified force in making arrest see supra subdivision c of this section

False or malicious arrest, while it may be a tort, is likewise a breach of a sheriff's official bond, where the arrest is done colore officii.—Jackson v. Norton, 44 S.E.2d 269, 75 Ga.App. 650.

Acts within official status
If sheriff, in attempting arrest in improper manner, acts with authority and within official status, official bond is responsible.—Bassinger v U.S. Fidelity & Guaranty Co., C.C.A. Neb., 58 F.2d 573, certiorari denied U.S. Fidelity & Guaranty Co v Bassinger, 53 S.Ct. 21, 287 U.S. 622, 77 L.Ed. 540.

Arrest beyond limits of county
Under statutes giving sheriff power to make arrest in certain cases beyond limits of his own county, sureties on sheriff's bond are liable for unlawful arrest made under color of office, even though arrest is made beyond boundaries of county.—State ex rel. Penrod v. French, 51 N.E.2d 858, 222 Ind. 145, 149 A.L.R. 1084.

Manner of attempting to make arrest without warrant held unlawful
Idaho.—Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667.

44. W.Va.—State ex rel. Verdis v. Fidelity & Casualty Co. of New York, 199 S.E. 884, 120 W.Va. 593.

45. Mass.—Cambridge v Foster, 81 N.E. 278, 195 Mass. 411
Tex.—Clark v. Winn, 46 S.W. 915, 19 Tex.Civ.App. 223
Personal liability of officer for wrongful arrest see supra § 121

46. Ga.—Jackson v Norton, 44 S.E.2d 269, 75 Ga.App. 650
Idaho.—Lorang v. Hays, 209 P.2d 733, 69 Idaho 440.
N.C.—**Corpus Juris cited in** Price v. Honeycutt, 4 S.E.2d 611, 614, 216 N.C. 270
Okl.—Ingles v Hotze, 130 P.2d 302, 191 Okl. 378.
57 C.J. p. 1042 note 49.

Preventing prisoner from giving bond
Tex.—King v. Roberts, 84 S.W.2d 718, 125 Tex. 623.

Taking prisoner to justice in distant town
Tex.—King v Roberts, supra.

47. Iowa.—Yount v Carney, 60 N.W. 114, 91 Iowa 559.—Clancy v. Kenworthy, 35 N.W. 427, 74 Iowa 740, 7 Am.S.R. 508.

48. Tex.—Continental Casualty Co. v Miller, Civ.App., 135 S.W.2d 501
57 C.J. p. 1043 note 51.

Neither officer nor surety held liable on bond
Tenn.—State ex rel. Key v Cron, 12 Tenn.App. 615

Damages resulting from confinement
Constable's bondsman who was not liable for unlawful arrest of accused was not liable for damages resulting from placing accused in confinement or for humiliation, since such elements were to be considered by jury only in connection with arrest, as pleaded, and not as separate cause of action or as grounds for exemplary damages growing out of arrest.—Republic Underwriters v. Norman, Tex.Civ.App., 97 S.W.2d 976

49. Colo.—Allison v People, 39 P. 903, 6 Colo.App. 80
Tenn.—McLendon v. State, 22 S.W. 200, 92 Tenn. 520, 21 L.R.A. 738

50. Tex.—Roberts v Brown, 94 S.W. 388, 43 Tex.Civ.App. 206.

51. Ga.—Tate v. National Surety Corp., 200 S.E. 314, 58 Ga.App. 874.

52. Ky.—Commonwealth v Reed, 271 S.W. 674, 208 Ky. 587.
Mo.—Motley v. Dugan, App., 191 S.W.2d 979.

53. Wash.—Cavitt v McCrite, 79 P.2d 637, 194 Wash. 684.

54. N.H.—Maryland Cas. Co. v. Gendron, 24 A.2d 625, 92 N.H. 72

55. U.S.—American Sur. Co. of N.Y. v Inmon, C.A.Miss., 187 F.2d 784.

Statute providing for joint and several liability
Statute providing that remedy on sheriff's bond shall be joint and several against all or any one or more

ly, the surety may, under such an agreement, maintain an action against the officer to recover payments made under or pursuant to the bond,[56] such as a payment of a judgment against the officer[57] or a payment in settlement of a claim against the officer.[58] Moreover, a surety on the general official bond of a sheriff or constable against whom liability has been asserted because of the officer's failure to pay over funds collected by him is entitled to maintain an action on a special revenue bond given by the officer, to compel the sureties on such special bond to pay as much of the officer's shortage as they are liable for under their bond.[59]

The right of action of an officer's surety who has been compelled to respond for a default of the officer's deputy to sue on the deputy's bond is discussed infra § 194.

§ 191. Admissibility and Conclusiveness on Sureties of Adjudication against Officer

The authorities are not in accord as to the admissibility and conclusiveness, in an action against the sureties on the official bond of a sheriff or constable, of an adjudication against the officer.

The authorities are not in accord as to the admissibility and conclusiveness, in an action against the sureties on the official bond of a sheriff or constable, of an adjudication against the officer.[60] Thus, while it has been held in some instances that an adjudication against the officer is not evidence against the sureties in an action on the bond,[61] the more general rule appears to be that it is admissible,[62] as at least some evidence of the officer's default and the extent of his liability,[63] and it has been held to be prima facie evidence against the sureties even though they had no notice of the action or proceeding in which it was rendered.[64]

While various authorities have broadly stated as a general rule that such a judgment is,[65] or that

obligors, but that, in all suits thereon against surety, liability of sheriff shall be first fixed, except when sheriff is a party to suit or has died or is not found, did not have effect of nullifying written agreement executed by sheriff in connection with, and in consideration of, plaintiff's execution as surety of sheriff's bond, whereunder sheriff indemnified plaintiff against liability under bond and authorized plaintiff to pay or compromise claims or charges —American Sur. Co. of N. Y. v. Inmon, supra.

56. U S —American Sur. Co of N Y. v. Inmon, supra.

Deposit of fees in insolvent bank

Failure of county and surety on sheriff's bond to compel preference of sheriff's illegal deposit of fees in insolvent bank did not relieve sheriff from liability to reimburse surety for money paid county as balance of deposit, where sheriff asserted no preference on filing claim with bank's receiver after he was in default to county —Fidelity & Deposit Co of Maryland v. Mason, 42 P.2d 486, 55 Idaho 397.

Assumpsit held proper remedy

N.H —Maryland Cas Co. v. Gendron, 24 A.2d 625, 92 N H. 72.

57. N H —Maryland Cas. Co v. Gendron, supra.

Establishment of liability by judgment

(1) In absence of a situation wherein principal under bond, knowing of some possible method of escaping payment of a judgment against principal, warned surety not to voluntarily pay judgment, the judgment established surety's liability until he showed the contrary — Maryland Cas. Co v Gendron, supra

(2) Where a deputy sheriff's official bond provided that, if surety incurred any liability on deputy's account, deputy would repay surety the amount incurred, and surety paid a judgment which was recovered against deputy for damages as a result of deputy's wrongful acts with respect to a replevin action, judgment creditor was entitled to hold money paid by surety, and deputy was bound to reimburse surety and to look to creditor for his own reimbursement, if any, and vacating judgments in replevin and damage actions would not be a defense to surety's action in assumpsit against deputy to recover sums paid to creditor —Maryland Cas Co. v. Gendron, supra.

58. U S —American Sur. Co of N Y v. Inmon, C.A Miss , 187 F 2d 784

Consent of officer to settlement or compromise

(1) Judgment dismissing action against sheriff, and entered as part of and in accordance with settlement agreement entered into by sheriff's surety under authority of agreement whereunder sheriff indemnified surety against liability under bond and authorized surety to pay or compromise claims or charges, did not bar surety from maintaining action against sheriff under indemnity agreement, although settlement was without defendant's consent —American Sur. Co. of N Y. v. Inmon, supra.

(2) Statutory provision that a surety shall not suffer judgment to be entered against him by confession or default, without consent of principal debtor, was not applicable to bar action by surety against sheriff to recover for sum paid in settlement of claim without defendant's consent —American Sur Co. of N Y. v. Inmon, supra

59. Ky —Leslie County v Maggard, 13 S W 2d 766, 227 Ky 583

Liability as between sureties or general and special bonds of officer see supra § 178.

60. S D —Connor v. Corson, 83 N.W. 588, 13 S D 550.

Persons responsible over to another as concluded by judgment against latter generally see Judgments §§ 811, 812

61. Ariz —Gray v. Noonan, 50 P. 116, 5 Ariz. 167.

57 C.J p 1045 note 86

62. Ky.—Grayham v. Washington County Ct, 9 Dana 182.

57 C J. p 1045 note 87.

63. Ky —Grayham v. Washington County Ct., supra.

64. S C —State v. Cason, 11 S C. 392.

57 C J. p 1045 note 96.

65. Ill —People, for Use of Costopolus v Maxwell, 15 N.E 2d 883, 296 Ill.App 651

57 C J. p 1045 note 89.

Failure to describe officer as such in prior action

(1) The judgment has been held conclusive on the sureties even though the declaration in the action against the officer did not in terms

such a judgment is not,[66] conclusive on the sureties on the official bond, it has more specifically been held that the judgment against the officer is conclusive against the sureties where they were notified of the action in which it was rendered,[67] and not conclusive where they were not notified or afforded an opportunity to defend the action,[68] unless on a fair construction of the bond the sureties may be deemed to have undertaken to be responsible for the result of a suit against the officer.[69] It has also been held that a judgment or other adjudication against an officer is only prima facie evidence against the sureties on his bond,[70] at least where they had no notice of the action or proceeding in which it was rendered,[71] and that, at least where the sureties had no such notice, they may defend on the ground that such judgment is erroneous on the merits,[72] or that it was obtained through fraud or collusion,[73] or that the court by which it was rendered was without jurisdiction.[74]

Sureties of deputy While a judgment against a sheriff or constable for an official default of his deputy has been held not to be evidence against the sureties on the official bond of such deputy,[75] the more generally accepted rule would seem to be that such a judgment is prima facie evidence against the deputy's sureties,[76] even though they had no notice of the action in which the judgment was rendered,[77] but that it is not conclusive on them[78] except, as has been held, where they had notice of the action in which such judgment was rendered, and the deputy defended it.[79]

§ 192. Summary Proceedings on Official Bonds

a. In general
b. Considerations affecting availability of summary remedy
c Procedure

a. In General

Summary remedies for enforcing the liability of sureties on the official bond of a sheriff or constable are available only in conformity to the statutes creating them, which statutes, being penal in nature, must be strictly construed and applied.

In accordance with statutory provisions in some jurisdictions, the liability of sureties on the official bond of a sheriff or constable may be enforced by summary proceedings.[80] Such summary remedies may be taken and pursued only in strict conformity to the statutes creating them,[81] which statutes, being penal in their nature,[82] must be strictly construed[83] They will not be extended beyond their terms,[84] and they will not be held to apply to de-

describe him as being such officer—Dennie v Smith, 129 Mass 143

(2) On the other hand, it has been held that, while a judgment recovered against a constable for misconduct of his official duties is conclusive against the sureties, an action against a constable and his sureties cannot be maintained on a judgment entered against the constable in proceedings to recover damages for assault and battery where the record of the first action fails to disclose that the assault and battery was committed in the course of his official duties and where it was instituted against him alone as an individual—Sopko v Esslinger, 47 Pa Dist. & Co. 155, 44 Lack Jur 221

66. U S—Downer v United States Fidelity & Guaranty Co., C C.A Pa., 46 F 2d 733
57 C J. p 1045 note 91.

67. Ohio.—State v. Colerick, 3 Ohio 487.
57 C J. p 1045 note 92

68. Ohio.—State v. Colerick, 3 Ohio 487.
57 C.J. p 1045 note 93.

Amount of damages

Since judgment recovered against sheriff for permitting escape was not binding on surety on sheriff's bond conditioned on faithful performance of official duties, where surety was not made party to action or served with notice therein, surety was still entitled to litigate amount of plaintiff's damages—Slagle v. New Amsterdam Casualty Co., 276 N Y S 162, 243 App Div. 79.

69. Kan—Graves v Bulkley, 25 Kan. 249, 37 Am.R 249.
57 C J p 1045 note 94.

70. S.D—Connor v. Corson, 83 N.W. 588, 13 S D 550
57 C J p 1045 note 95

71. Ohio—State v Jennings, 14 Ohio St 73
57 C J. p 1045 note 96

72. Kan—Fay v Edmiston, 25 Kan. 439
57 C J. p 1045 note 97.

73. Me.—Dane v Gilmore, 51 Me 544
57 C J p 1045 note 98

74. Mass—Fall River v Riley, 5 N. E 481, 140 Mass. 488

75. Ky.—Johnson v. Thompson, 4 Bibb 294

76. Va—Cox v Thomas, 9 Gratt 323, 50 Va. 323
57 C J. p 1045 note 3

77. N Y—Westervelt v. Smith, 9 N Y Super. 449.

78. N Y—Thomas v. Hubbell, 35 N Y 120
57 C J p 1046 note 5.

79. Vt—Chamberlain v. Godfrey, 36 Vt. 380, 84 Am D 690.

80. Tex—Hackler v. H. Kohnstamm & Co of Texas, Civ.App., 227 S W. 2d 347.
Summary proceedings against sheriff or constable see supra §§ 168-172.

81. Tex—Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S W 2d 769, 136 Tex 91—Hackler v. H Kohnstamm & Co of Texas, Civ. App., 227 S W 2d 347.
57 C J p 1046 note 9.

82. Miss—W. T. Rawleigh Co. v. Causey, 16 So.2d 397, 195 Miss 842—W. T. Rawleigh Co. v Hester, 200 So 250, 190 Miss 329—Union Motor Car Co. v Farmer, 138 So. 579, 161 Miss 847.
Tex—Hackler v H. Kohnstamm & Co. of Texas, Civ.App., 227 S W.2d 347.
57 C J p 1046 note 10.

83. Miss—Union Motor Car Co. v. Farmer, 138 So. 579, 161 Miss 847.
Tex—Randerson v Dallas Joint Stock Land Bank of Dallas, 147 S W 2d 769, 136 Tex. 91.
57 C J. p 1046 note 11

84. Miss—W. T Rawleigh Co v. Causey, 16 So.2d 397, 195 Miss. 842—W T Rawleigh Co v. Hester, 200 So 250, 190 Miss 329.
57 C J. p 1046 note 12.

Possession at expiration of term

A statute providing for summary proceedings for a sheriff's failure to

faults which are not clearly provided for[85] or which were not committed by the officer in his official capacity.[86] A fortiori there can be no summary remedy against the sureties unless given by statute;[87] and a statute giving a summary remedy against an officer does not include, and will not be extended by implication to include, the right to proceed summarily against the sureties on his bond.[88] A summary remedy against sureties is cumulative merely, and does not supersede the remedy by action on the bond.[89]

Who may proceed summarily. A statute giving a summary remedy against the sureties on the official bond of a sheriff or constable for such officer's failure to pay over money which he has collected on execution "on demand of plaintiff" refers to the execution plaintiff and not to plaintiff in the original action, and hence is available to a defendant in whose favor judgment has been rendered.[90] An officer against whom judgment has been obtained because of the misconduct or default of his deputy may have his remedy by motion against the deputy's sureties[91] even though he has not yet paid the judgment against him.[92] The state is entitled to the benefit of the statutory remedy on the official bond of an officer for a default with respect to process issued on behalf of the state.[93]

Defaults for which summary remedies available Summary proceedings to enforce the liability of sureties on the official bond of a sheriff or constable have been held to be available, under statutes providing for such proceedings, for such officer's failure to serve process,[94] failure to pay a county order,[95] failure to collect money which might have been collected by the use of reasonable diligence,[96] failure to pay over money collected[97] or to account for money in his official custody,[98] failure to turn over goods in his possession to his successor,[99] loss of property in his official custody,[1] failure to settle his accounts with the county fiscal authorities,[2] failure to note on an execution the time of its delivery to him,[3] failure to return process[4] within the time prescribed by law,[5] or making a false[6] or insufficient[7] return. A summary remedy provided by statute against an officer's sureties has also been held to be available for a default of such officer's deputy.[8] However, a summary remedy is not available against an officer's sureties for his defaults occurring prior to the enactment of the statute giving such remedy.[9]

b. Considerations Affecting Availability of Summary Remedy

Particular considerations or circumstances which have been held to affect or not to affect the availability of a summary remedy against the sureties on the official bond of a sheriff or constable include the sufficiency of the bond, validity of the judgment or process, want of injury to the complainant, issuance of an alias writ, and the death or absence of the officer.

The effect of various circumstances on the availability of a summary remedy against the sureties on the official bond of a sheriff or constable has been adjudicated.[10] Sureties on the official bond of

turn over to his successor in office seized goods and chattels in his possession at the expiration of his term of office has been held to be inapplicable where sheriff seizing a motor vehicle had delivered it in replevin proceeding before he went out of office—Union Motor Car Co v. Farmer, 138 So. 579, 161 Miss 847.

85. Miss.—Tapp v. Bonds, 57 Miss 281.
57 C J p 1046 note 13

86. Miss—Radford v. Hull, 30 Miss. 712.
57 C J. p 1046 note 14

87. La—Hernandez v. Hugh, 22 La. Ann 245
57 C J. p 1046 note 15

88. La—Soule v. Worsham, 22 La. Ann 78.
57 C.J. p 1046 note 17.

89. Ark—Levy v Lawson, 5 Ark 212
57 C J. p 1046 note 18.

90. Ala.—Chandler v. Reid, 21 So. 475, 114 Ala. 390.

91. Va—Weaver v. Skinker, 4 Gratt. 160, 45 Va. 160—Shelton v. Ward, 1 Call 538, 5 Va. 538.

92. Va—Weaver v. Skinker, 4 Gratt 160, 45 Va 160.

93. Miss—State v. Nichols, 39 Miss 318

94. Ark—Atkinson v Hulse, 30 Ark. 760.

95. Va.—State v. Keadle, 29 S E 976, 44 W.Va. 594.

96. Tex.—Hackler v H Kohnstamm & Co of Texas, Civ.App., 227 S W 2d 347.
57 C J p 1047 note 31.

97. Va.—Carr v. Meade, 77 Va 142.
57 C J p 1047 note 32

98. Ala—Dane v McArthur, 57 Ala. 448.
57 C J p 1047 note 33.

99. Mass—Union Motor Car Co. v. Farmer, 138 So. 579, 161 Mass 847.

1. Tex—Cleveland v. Tittle, 22 S. W. 8, 3 Tex Civ App. 191

2. Ga—U S Fidelity & Guaranty Co. v Toombs County, 1 S.E 2d 411, 187 Ga. 544
N C.—Jenkens v Howell, 65 N.C. 61.

3. Ala.—Chandler v. Henry, 8 So. 96, 90 Ala. 271.

4. Miss.—Cox v Ross, 56 Miss. 481.
57 C J p 1047 note 37.

5. Ala—Wofford v. Robinson, 7 Ala. 489
57 C J p 1047 note 38.

6. Tex.—Hackler v. H Kohnstamm & Co of Texas, Civ App., 227 S W 2d 347
57 C.J p 1047 note 39.

7. Tenn—Perdue v Dodd, 1 Lea 710.
57 C J p 1047 note 40.

8. Tex—Rich v Graybar Electric Co, 84 S W 2d 708, 125 Tex. 470, 102 A.L R. 171.
57 C J. p 1047 note 41.

9. Tenn.—Wood v. Orr, 10 Yerg. 505

10. **Judgment against officer**
The recovery of a judgment against a sheriff or constable for an official default does not bar summary proceedings for the same default against the sureties on his official bond, where such judgment is unavailing—Grayham v Washington County Ct, 9 Dana, Ky., 182.
Pendency of action
The pendency of an ordinary action against a sheriff or constable and the

a sheriff or constable cannot be held liable in summary proceedings thereon where the bond is invalid or void,[11] and ordinarily a remedy by such proceedings is not available where the bond is not good as a statutory bond, the remedy, if any, in such case being by ordinary action.[12] Where a statute expressly provides, however, that a bond shall be valid and binding, although not in the statutory form, the summary remedy is available against the sureties [13] It has been held that a summary proceeding on a bond is not precluded by the fact that the bond was not registered or recorded as required by statute,[14] or that, although duly registered, it does not appear to have been accepted by the proper officers and registered by their order.[15]

Doubt as to duty. A summary remedy against a sheriff or constable and the sureties on his official bond may be available only in cases of intentional delinquency on the part of the officer,[16] and it has been held that it cannot be pursued for a failure to pay over money which was due to a well-founded doubt as to the right of the party to receive it [17]

Validity of judgment or process. On motion against a sheriff or constable and the sureties on his official bond for a neglect on the part of such officer to pay over the proceeds of sales of property, the sureties cannot object to the sufficiency of the judgment[18] or execution[19] under which the sales were made and the money received; and the fact that an execution was irregular and voidable is not any defense to a motion against an officer and his sureties for an illegal return of the same "not satisfied."[20] However, a summary proceeding for the officer's failure to proceed under execution will not lie where it appears that, prior to the proceeding, execution had been quashed and the judgment satisfied.[21]

Want of injury; receipt of money. It has been held that, since the statute authorizing summary proceedings against the officer's sureties has as its primary object a method of affording a redress for injuries,[22] one who has suffered no injury from the officer's act or omission is not entitled to recover under such statute [23] However, the fact that an execution plaintiff has suffered no injury through the official default of a sheriff or constable in connection with the execution or return of the writ does not bar summary proceedings against the officer and the sureties on his official bond for a statutory penalty for such default [24] Where plaintiff in an execution has received the money or property thereon either before or after the return of the execution, he cannot recover by motion against the sheriff or constable or the sureties on his official bond for the officer's failure to return the execution within the time prescribed,[25] but the receipt of part of the money due on an execution after the officer levying it has rendered himself liable by making an insufficient return does not preclude plaintiff from proceeding summarily against such officer and his sureties for the balance of the debt[26] and a penalty or damages given by statute.[27]

Issuance of alias writ. The mere issuance of an alias execution is not a forfeiture of the right of plaintiff therein to proceed summarily against a sheriff or constable and the sureties on his official bond for a failure to return the original execution[28] or the making of an insufficient return.[29]

sureties on his official bond for an official default on the part of such officer is no bar to the prosecution of a summary remedy for another and different default, although both occurred in connection with the same process —Sanders v Commonwealth Bank, 2 Metc, Ky., 327—57 C.J. p 1048 note 48.

Liability of property to seizure and sale

On a motion under a statute against a sheriff or constable and the sureties on his official bond for the failure of such officer to make the money on an execution, it is competent for the sureties to show that property in the execution defendant's possession was not subject to levy and sale to satisfy the writ
Ala.—Leavitt v Smith, 7 Ala 175
Kan.—**Corpus Juris cited in** Brooks v. Marquess, 139 P.2d 395, 397, 157 Kan. 244

11. Miss —Paddleford v. Moore, 32 Miss. 622.

Considerations affecting availability of summary remedies against sheriff or constable see supra § 168
Defenses in summary proceedings against officer's sureties see infra subdivision c (3) of this section

12. N C —State Bank v. Twitty, 9 N.C 5
57 C J p 1046 note 24
Irregularities or informalities in bond as affecting liability of sureties see supra § 178

13. Miss —Cox v Ross, 56 Miss. 481
57 C J p 1047 note 26

14. Tenn —Barnes v White, 2 Swan 442.

15. N C —Jenkins v. Howell, 65 N C 61.

16. Cal —Wilson v. Broder, 10 Cal 486.

17. Cal —Wilson v. Broder, supra.

18. Ill —People v McHatton, 7 Ill 731.

19. Ill —People v McHatton, supra

20. Tenn —Stevenson v. McLean, 5 Humphr 332, 42 Am D 434

21. Ky —Matthews v Fork Ridge Bus Line, 79 S.W.2d 196, 257 Ky. 757.

22. Tex —Chernosky v. Abney, Civ. App , 130 S W 2d 904, error refused.

23. Tex —Chernosky v. Abney, supra
Want of injury as defense see infra subdivision c (3) of this section.

24. Miss —Cox v. Ross, 56 Miss 481 —Morehead v. Holliday, 9 Miss 625

25. Ky.—Sharp v. Trover, 7 J J Marsh 275

26. Tenn —Barnes v. White, 2 Swan 442

27. Tenn —Barnes v White, supra

28. Ky —Kennedy v. Coleman, 2 Litt 6.
Tenn —Doyle v. Glenn, 4 Humphr. 309

29. Tenn.—Barnes v. White, 2 Swan 442.

Legality of tax levy. In summary proceedings against a sheriff, acting as tax collector, and the sureties on his official bond for moneys collected or received by such officer as taxes, defendants cannot be heard to object that the tax was not lawfully levied.[30]

Death or absence of officer. Where the rule obtains that a summary proceeding cannot be maintained against the sureties on the official bond of a sheriff or constable without joining the officer as a party defendant, it has been held that no summary remedy is available against the sureties of an officer who is dead[31] or who is absent from the state or beyond the reach of process,[32] an injured party being left in such case to his common-law remedy on the bond,[33] but in the absence of such rule the death of the officer does not prevent the maintenance of summary proceedings against the sureties.[34]

c. Procedure

(1) In general
(2) Conditions precedent
(3) Defenses
(4) Jurisdiction and venue
(5) Time for proceeding, and limitations
(6) Notice
(7) Parties
(8) Pleading
(9) Evidence
(10) Trial, judgment, and review

(1) In General

Summary proceedings against sureties on the official bond of a sheriff or constable ordinarily are instituted by motion for judgment.

The method of proceeding summarily against the sureties on the official bond of a sheriff or constable is dependent on statute.[35] Ordinarily, in accordance with statutory provisions, such proceedings are to be instituted by motion for judgment for the amount of their liability,[36] but a rule to show cause why such a judgment should not be entered has also been treated as proper.[37] Under a statute so providing, the fiscal authority of the county may issue summary execution, without serving citation or notice, against the officer and his sureties, for money collected and not accounted for by the officer,[38] and thereafter the surety may proceed in equity or by affidavit of illegality to cancel or arrest the enforcement of such execution.[39]

(2) Conditions Precedent

It may be a condition precedent to summary proceedings on the bond of a sheriff or constable that a demand be made for money in his hands, or that the liability of the officer be judicially ascertained.

A demand on a sheriff or constable for money in his hands may be a prerequisite to summary proceedings against him and his sureties on his official bond for his failure to pay over such money,[40] but where a judgment is rendered in favor of plaintiff, on a motion against an officer and his sureties, for an omission to levy an execution, the statutory penal interest from the date of the return of the process follows as of course, without a previous demand.[41] A return by a sheriff or constable admitting the receipt of money is not a condition precedent to the institution of summary proceedings against the officer and the sureties on his official bond for his failure or refusal to pay over money.[42]

Judicial ascertainment of default. It has been held that, in order to entitle a sheriff or constable to proceed summarily against a deputy and the surety on his official bond for the deputy's default, the existence of such default and the officer's liability therefor must first have been judicially ascertained,[43] and, similarly, that summary proceedings cannot be maintained against the sureties on the bond of a deceased officer until the extent of the liability of the officer's estate has become fixed by an allowance against it for the damage sustained by reason of the official misconduct of which complaint is made,[44] even though such estate is entirely insolvent.[45]

(3) Defenses

In general, a defense to summary proceedings against

30. Va.—Cook v. Hays, 9 Gratt. 142, 50 Va. 142
57 C.J. p. 1048 note 58.

31. Ala.—James v. Auld, 9 Ala. 462
Parties to summary proceedings see infra subdivision c (7) of this section.

32. Ala.—Orr v. Duvall, 1 Ala. 262

33. Ala.—James v. Auld, 9 Ala. 462—Orr v. Duval, 1 Ala. 262.

34. Ala.—Maxwell v. Pounds, 23 So. 730, 116 Ala. 551—Camp v. Watt, 14 Ala. 616.

35. Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga. 544.

36. Tenn.—Morgan v. Betterton, 69 S.W. 969, 109 Tenn. 84
57 C.J. p. 1048 note 67.

37. Tex.—Haley v. Greenwood, 28 Tex. 680

38. Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga. 544.

39. Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, supra.

40. Ky.—Thompson v. Healy, 4 Metc. 257
57 C.J. p. 1049 note 69.
Conditions precedent to ordinary actions on official bond of sheriff or constable see infra § 197

41. Miss.—Garrett v. Hamblin, 19 Miss. 219, 49 Am.D. 53.

42. Nev.—Nash v. Muldoon, 16 Nev. 404

43. Tenn.—Patterson v. Coleman, 4 Humphr. 64

44. Vt.—Tute v. James, 46 Vt. 60.

45. Vt.—Tute v. James, supra.

the sureties on the official bond of a sheriff or constable may be made in the same manner and to the same extent as in an action at law.

In general, a defense to a summary proceeding against a sheriff or constable and the sureties on his official bond may be made in the same manner and to the same extent as in an action at law.[46] Thus parties sought to be charged on motion as the sureties of an officer may contest the fact of their suretyship, and introduce proof to show that they were not his securities at the time of the supposed default.[47] It is a defense to a summary proceeding to collect a debt from the officer, or his surety, for failure to return execution or for making a false return, that the judgment creditor did not suffer any injury as a result of the acts of the officer,[48] as where no money could have been collected by the officer on execution and levy by the use of proper diligence.[49] On motion against an officer and his sureties for failing to pay over money made on execution where the return shows satisfaction, a plea by a surety, which attempts on behalf and in the name of the surety, to deny the liability of the principal is bad, as such defense can be made only by the officer.[50]

Tender of amount due. In summary proceedings against a sheriff or constable on his official bond for failure to return an execution, a tender by him of the amount thereof after notice and before judgment is no defense, where a tender is not deemed a discharge of the liability.[51]

(4) Jurisdiction and Venue

Ordinarily, except where some other court is designated by statute, the court by which a judgment was rendered or process issued is the proper court in which summary proceedings should be instituted against a sheriff or constable and the sureties on his official bond for defaults in connection with such process or process issued under such judgment.

Ordinarily the court by which a judgment was rendered or process issued is the proper court in which summary proceedings should be instituted against a sheriff or constable and the sureties on his official bond for defaults in connection with such process or process issued under such judgment,[52] except where some other court is designated by the statute providing for such proceedings.[53] Two or more distinct defaults cannot be consolidated in a single proceeding for the purpose of so raising the amount in controversy as to enable the proceeding to be brought in a court which could not take cognizance of the amount involved in any one of the defaults standing alone;[54] but the court otherwise properly having jurisdiction is not deprived thereof by the fact that after affirmance on appeal the judgment aggregates a sum beyond the jurisdiction of such court.[55] It has been held that a proceeding founded on an officer's failure to return process issued by a justice of the peace who has gone out of office may be instituted before his successor.[56]

Venue. In the absence of statute providing otherwise, summary proceedings against a sheriff or constable and the sureties on his official bond should be brought in such officer's own county,[57] although the process with reference to which the default occurred was issued to him from another county.[58] Where, however, the statute requires such proceedings to be brought in the court from which the process issued, they must be brought in such court even though it is not in the county in and for which the officer acts.[59]

(5) Time for Proceeding, and Limitations

Except where provided otherwise by statute, summary proceedings against the surety on the official bond of a sheriff or constable may be brought at any time before the claim is barred by a statute of limitations.

Except where provided otherwise by statute, it is not necessary that summary proceedings against a sheriff or constable and the sureties on his official bond shall be brought at the first term of court after the default[60] or after a demand on the officer,[61] but, unless specially limited, such proceedings may be brought at any time before the claim is barred by a statute of limitations.[62] Where, however, the

46. Va.—State v. Keadle, 29 S.E 976, 44 W.Va. 594
Defenses in action on officer's bond see infra § 198.
47. Ala.—Dixon v. Caskey, 18 Ala 97.
48. Tex.—Chernosky v. Abney, Civ App., 130 S.W.2d 904. Error refused.
49. Tex.—Hackler v H Kohnstamm & Co of Texas, Civ App., 227 S W 2d 347.
50. Ala.—Price v. Cloud, 6 Ala 248.
51. Tenn.—Chaffin v. Crutcher, 2 Sneed 360.
Tender and refusal as affecting liability of sureties for money in officer's custody see supra § 188.
52. Ky.—Mitcheson v. Foster, 3 Metc. 324
57 C J. p 1049 note 79.
53. Va.—Carr v Meade, 77 Va. 142
57 C J. p 1049 note 80.
54. Ky.—Partlow v. Lawson, 2 B. Mon. 46—Harris v. Smith, 7 T.B. Mon 310
55. Tex.—Banner v. Henry, Civ.App., 31 S W. 1098
56. Ala.—McMahan v. Kyle, 9 Port. 507.
57. Ark.—Milor v. Farrelly, 25 Ark. 353.
58. Ark.—Milor v. Farrelly, supra.
59. Miss.—Cox v. Ross, 56 Miss. 481.
Tex.—Griswold v. Chandler, 22 Tex. 637.
60. Va.—Hogue v Cottle, 2 Va.Cas. 229, 4 Va. 229.
61. Ala.—Evans v. State Bank, 13 Ala. 787.
62. Ala.—Evans v. State Bank, 13 Ala. 787—McRae v. Colclough, 2 Ala. 74.

statute expressly limits the time within which such proceedings must be brought they cannot be instituted thereafter.[63] A motion against an officer and his sureties for his failure to return process may be made after such officer's term of office has expired.[64]

Summary proceedings are governed by the statute of limitations applicable to ordinary actions on the bond, in the absence of any other statutory provision;[65] and a statute limiting the time within which fines or penalties may be recovered does not apply[66] even though the damages recoverable by the summary remedy are specified or fixed by statute.[67]

(6) Notice

In accordance with statutory provisions notice must be given to the defendants in a summary proceeding against a sheriff or constable and the sureties on his bond; such notice must be in writing and must inform defendants with reasonable certainty of the demand to be set up and the time and place of making of the motion.

While it has been held that where the statute providing for summary proceedings against a sheriff or constable and the sureties on his official bond does not require notice, none need be given,[68] it has also been held that notice is necessary unless it is expressly dispensed with by statute.[69] Such notice as the statute requires, unless it has been waived, is essential to the jurisdiction of the court to entertain the proceedings,[70] but where an officer or surety appears in court or otherwise submits himself to its jurisdiction any want of or objection to the notice is waived by such party.[71] A notice of summary proceedings against a sheriff or constable and the sureties on his official bond, where it is required, takes the place and performs the functions of a summons or capias in an ordinary action;[72] and in accordance with the provisions of some statutes, it also performs the functions of a petition or declaration.[73]

It has been held that a motion is to be deemed abandoned unless it is made at the term indicated in the notice or some other proceeding is had at such term to keep it alive,[74] and that a judgment rendered on a motion made at a term of court subsequent to that designated in the notice is void,[75] although on the latter point there is also authority to the contrary;[76] but a motion duly made is not discontinued by the omission of plaintiff to have it formally continued to a later term.[77] Where a notice of summary proceedings against a sheriff or constable and the sureties on his official bond sets forth two or more defaults on the part of such officer but gives notice of intention to move on account of only a specified one or ones of them, it will be limited in effect to the grounds so specified.[78]

To whom notice must be given. As a general rule the notice of summary proceedings against an officer and his sureties must be given to all defendants[79] However, under a statute providing for notice to the officer "or" his sureties, notice to either has been held sufficient,[80] so that where notice is given to the officer none is necessary to the sureties,[81] or where notice is given to the sureties the officer need not be notified[82] Where the notice has not been served on all the obligors, plaintiff in the motion may discontinue the proceeding as against those not served and prosecute his motion to judgment against the other or others.[83]

Form and requisites in general. In accordance with statutory provisions, a notice of a summary proceeding against a sheriff or constable and the sureties on his official bond must be in writing[84]

63. Ga.—U. S Fidelity & Guaranty Co v Toombs County, 1 S E.2d 411, 187 Ga 544.
Ky.—Mars v. Buckler, 1 Bibb 267.

64. Miss.—Tapp v. Bonds, 57 Miss 281
Tex.—Earl v Smith, 26 Tex 522

65. N C.—Wilson v. Coffield, 27 N. C. 513.

66. Ala.—Tippitt v. Hardy, 89 So 493, 206 Ala. 309—McRae v. Colclough, 2 Ala. 74.

67. Ala.—Tippitt v. Hardy, 89 So. 493, 206 Ala. 309.

68. Ga.—U S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga 544.
57 C.J p 1050 note 3.

69. Miss.—Demoss v. Camp, 6 Miss. 516.
57 C.J. p 1050 note 4.

70. Ala.—Allums v Hawley, 8 Ala 584
57 C J p 1050 note 9.

71. Ala.—Morgan v. Billings, 3 Ala 172
57 C J p 1051 note 11.

72. Ark.—Milor v. Farrelly, 25 Ark 353
57 C.J. p 1051 note 17.

73. Ark.—Milor v Farrelly, 25 Ark 353.
Miss.—Hamblin v. Foster, 12 Miss. 139

74. Ala.—Garey v Edwards, 15 Ala. 105.

75. Tenn.—Thomison v. Douglass, 3 Baxt. 74.

76. Ala.—Chandler v. Reid, 21 So. 475, 114 Ala 390

77. Ala.—Russell v. Rolfe, 50 Ala 56.

78. Ala.—Bondurant v. Woods, 1 Ala. 543

79. Ala.—Maxwell v. Pounds, 23 So. 730, 116 Ala 551
57 C J. p 1050 note 5
Notice to officer in summary proceedings against him alone see supra § 172

80. Ala.—McRae v. Colclough, 2 Ala. 74.
57 C.J p 1050 note 6

81. Ala.—Hughes v. Hale, 5 Ala. 63.
57 C.J. p 1050 note 7.

82. Ala.—Bondurant v. State Bank, 5 Ala 171—Williamson v Montgomery Branch Bank, 3 Ala 504.

83. Miss.—McCrosky v. Riggs, 20 Miss 712.

84. Ark.—Milor v. Farrelly, 25 Ark. 353.

and be personally served.[85] It must inform defendants as to the matters for which they are sought to be held liable,[86] but only reasonable certainty is necessary in apprising defendants of the demand intended to be set up[87] and the time when and place where the motion will be made,[88] and, in general, any notice, however informal, which informs defendants of the nature and object of the proceeding is sufficient.[89] It is not essential that the notice be dated,[90] and the notice to an officer of a summary proceeding against him and the sureties on his official bond need not state the names of the sureties.[91] The notice may be in the name of plaintiff in the motion, and need not be in the name of the state for the use of such plaintiff,[92] and it may be subscribed by plaintiff's attorney.[93] Mere surplusage in the notice or suggestion will not vitiate the proceeding.[94] One joint notice of a motion for judgment on the officer's defaults in two or more cases has been held sufficient.[95]

Sufficiency as petition or declaration. Where a notice of summary proceedings against a sheriff or constable and the sureties on his official bond performs the functions of a petition or declaration in an ordinary action, it must contain all the requisites of a declaration or petition[96] and aver every fact necessary to support a recovery.[97] Thus, where the motion is for failure to serve process, the notice must show that it was the duty of the officer to serve it,[98] and where a demand is a condition precedent to the maintenance of the proceedings the notice should aver the making thereof.[99] It is also necessary that the notice should show that plaintiff is entitled to the remedy which he seeks to enforce.[1] A notice of a motion for failure to pay over money should negative any lawful disposition thereof.[2]

A notice stating that the officer has failed to return an execution is sufficient, without an allegation that he failed to return it at the proper time,[3] and an allegaion that the execution was received by the officer in sufficient time to return it to the next succeeding term is sufficient to charge him with liability for failure to return it at such time.[4] A notice to designated persons, as sureties of an officer, of a motion against them for his failure to return an execution, is sufficient, without averring that they are in fact the sureties of such officer,[5] and a notice to one as sheriff or constable need not aver that he is such officer,[6] or, where the proceeding is founded on the default of his deputy, aver that the deputy is his deputy.[7] It has been held that a notice of a motion against an officer and his sureties for default as to certain taxes of a specified year need not state on which one of two or more bonds executed by him the motion is to be made.[8] The joinder in a notice of two distinct grounds of recovery is not a demurrable defect.[9]

(7) Parties

Summary proceedings against a sheriff or constable and the sureties on his bond ordinarily may be maintained in the name of the person injured by the officer, with the officer and all the sureties joined as defendants.

Summary proceedings against a sheriff or constable and the sureties on his official bond ordinarily may be maintained in the name of the person injured by the default of the officer, although the bond is made payable to the state.[10] It has been held that proceedings for the failure of an officer to return an order for sale and to pay over the proceeds of the property sold should be at the instance of the clerk of the court to which such order of sale was returnable, rather than that of the judge of such court,[11] but that a justice of the peace may

85. Ark.—Milor v Farrelly, supra.
86. Ala—Johnson v Gray, 6 Ala 276
57 C J. p 1051 note 22.
87. Ky—Martin v. Hardin Justices, 6 J J Marsh 7
57 C J p 1051 note 23
88. Ala—Welch v. Fourier, 6 Ala 516
57 C J p 1051 note 24.
89. W.Va—Shepherd v Brown, 3 S E. 186, 30 W Va 13
57 C.J p 1051 note 25
90. Ala—McRae v. Colclough, 2 Ala. 74.
91. Ala—McRae v. Colclough, supra
92. W Va—Lyon v. Horner, 9 S E 875, 32 W Va 432.
93. Ala—McRae v. Colclough, 2 Ala. 74.
94. Ala—Garey v Edwards, 15 Ala 105
95. Va—Hendricks v Shoemaker, 3 Gratt 197, 44 Va. 197.
96. Ind—Dawson v. Shaver, 1 Blackf 204
57 C J. p 1051 note 34.
97. W Va—State v. Keadle, 60 S.E 798, 63 W Va 645
57 C J p 1051 note 35
98. Ark—Atkinson v. Hulse, 30 Ark 760
57 C J. p 1052 note 36
99. Ala—Wallace v. Taylor, 7 Ala 668
Ky—Terrill v. Cecil, 3 Metc 347.
1. Ky—Terrill v Cecil, supra.
57 C.J. p 1052 note 39.
2. Ind—Dawson v Shaver, 1 Blackf 204
57 C.J. p 1052 note 40.
3. Ala—Caskey v. Nitcher, 8 Ala 622
4. Ala.—Mobile Branch Bank v. Broughton, 10 Ala. 147.
57 C J p 1052 note 42
5. Miss—Hamblin v. Foster, 12 Miss. 139
57 C J. p 1052 note 43.
6. Ky—Murry v. Askew, 6 J J. Marsh 27.
57 C J. p 1052 note 44.
7. Ky—Murry v Askew, supra.
8. Va—Monteith v Commonwealth, 15 Gratt 172, 56 Va 172.
9. W Va.—Tucker County Ct v. Miller, 12 S E. 1078, 34 W Va. 791
57 C J p 1052 note 47.
10. Tenn—Dawson v. Clark, 3 Sneed 438.
57 C J. p 1052 note 50
11. Ala—Reid v. Bibb, 5 Ala. 281.

proceed in his own name against a constable and his sureties for fees collected by the constable and not paid over.[12]

There is authority for the view that a summary proceeding to compel the payment of money collected by execution must be in the name of the execution plaintiff, and not of his assignee;[13] but, where a statute renders the officer and his sureties liable for money to the party entitled thereto, an assignee of a judgment under which money has been received or collected is the proper party to institute summary proceedings,[14] and the assignor of such judgment, having no interest in it after the assignment, is not a proper party[15]

Defendants. Ordinarily it is proper to join the sureties with the officer as defendants,[16] and it has been held that, except in so far as it is provided otherwise by statute,[17] a summary proceeding cannot be maintained against the sureties without joining the officer.[18] However, it has also been held that where the statute authorizes proceedings against the officer "or" his sureties a proceeding cannot be maintained against the officer and his sureties jointly.[19] As a general rule all the sureties must be joined as parties defendant,[20] but where one of the sureties is dead the proceedings may be brought against the officer and the remaining sureties,[21] without including the representatives of the deceased surety,[22] and, where a statute permits it, the proceeding may be instituted against such of the sureties as may have been served without joining the other or others.[23] If one of several sureties dies after the institution of the proceeding it may be discontinued as to him and maintained against the remainder,[24] and if one or more of them, having been joined, are shown to be nonresidents the proceeding may be prosecuted against the other or others only.[25]

(8) Pleading

Where the proceeding is by motion, the motion takes the place of a formal pleading; and while technical precision is not required, the motion must be tested by its sufficiency to invoke the summary proceeding.

Where the notice of summary proceedings against a sheriff or constable and the sureties on his official bond takes the place and performs the functions of a petition or declaration, no declaration is necessary,[26] and, where the proceeding is by motion, the motion takes the place of a formal pleading.[27] The fact, however, that the moving paper is in form a petition in an ordinary action, rather than a motion, as contemplated by statute, or that it is denominated a petition by the complainant, does not impair its sufficiency.[28] Technical precision and completeness in the motion are not required,[29] and an averment fairly importing an essential fact ordinarily is sufficient,[30] but it has been held that a somewhat strict construction of the allegations of the motion is justified, on the ground that the proceeding is special and summary.[31] The sufficiency of the motion or pleading must be tested by its sufficiency to invoke the summary statutory proceeding,[32] and not by its sufficiency as a pleading in an ordinary suit for damages.[33] The sufficiency of a motion as against a general demurrer is not affected by allegations set up in the answer to the motion.[34] The motion need not state the amount for which judgment is sought where, under the statute, such amount is to be fixed by a jury, within specified limits.[35] Where complainant's pleading shows that he has been perpetually enjoined from proceeding on the officer's bond, a demurrer thereto is properly sustained.[36]

12. Mo.—Rose v. Cobb, 64 Mo 464
13. Cal—Wilson v. Broder, 10 Cal 486.
14. Tex—Ranken v. Jones, Civ App., 53 S W. 583.
15. Tex.—Ranken v. Jones, supra
16. Ala—Higdon v. Fields, 60 So 594, 6 Ala App 281.
17. Ala—Maxwell v. Pounds, 23 So 730, 116 Ala. 551.
57 C.J. p 1053 note 64.
18. Ala—Peck v Colby, 31 Ala 252.
57 C.J. p 1053 note 65
19. Ky—Martin v. Hardin Justices, 6 J.J Marsh. 7—Wood v. Sayre, 7 T B Mon. 663
20. Tenn—Hearn v. Ewin, 3 Coldw. 399.
57 C J. p 1053 note 58.
21. Va—Chapman v. Chevis, 9 Leigh 297, 36 Va. 297.
57 C.J. p 1053 note 61.
22. Va—Chapman v. Chevis, supra
57 C.J. p 1053 note 62
23. Ala.—Maxwell v. Pounds, 23 So. 730, 116 Ala. 551.
24. Ala—Ex parte Wilson, 54 Ala. 296.
25. Ky.—Grayham v. Washington County Ct, 9 Dana 182—Commonwealth Bank v. Cravens, 5 J J. Marsh. 383
26. Ala—Henderson v. Plumb, 18 Ala 74—Condry v Henley, 4 Stew & P. 9
27. Tex.—Wright v. McKenney, 34 Tex. 568.
28. Tex—Buckholts State Bank v. Thallman, Civ App, 196 S W. 687
29. Ala—Higdon v. Fields, 60 So. 594, 6 Ala App 281
30. Ala.—Higdon v. Fields, supra.
31. Tex—Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S. W 2d 769, 136 Tex. 91.
32. Tex—Randerson v Dallas Joint Stock Land Bank of Dallas, supra.

Motion or pleading held sufficient

Tex—Holterman v. Caffall, Civ.App, 79 S.W 2d 178.

Motion or pleading held insufficient

Tex.—Randerson v. Dallas Joint Stock Land Bank of Dallas, 147 S. W.2d 769, 136 Tex 91

33. Tex—Randerson v Dallas Joint Stock Land Bank of Dallas, supra
34. Tex—Holterman v. Caffall, Civ. App, 79 S W.2d 178.
35. Ala—Higdon v. Fields, 60 So 594, 6 Ala App. 281.
36. Tex—Peck v. Murphy, Civ.App., 184 S W. 542.

Defendant's pleadings. Where a plea to a motion against an officer and his sureties goes to the default, and it is not stated by whom pleaded, it will be considered as the plea of the officer.[37] In proceedings founded on an officer's failure to return an execution, a plea that the money made thereunder was paid before notice issued has been held good, without setting forth by or to whom the payment was made;[38] and a plea of "not guilty," although said not to be the most appropriate, has been held sufficient to throw on plaintiff the burden of supporting his right to recover.[39] A plea by sureties setting up the invalidity of the bond in that it is made payable to the governor and his successors in office instead of to the state as required by statute should expressly negative the execution by them of any official bond payable to the state.[40] Unless provided otherwise by statute, it is not essential that a plea be verified.[41]

Issues, proof, and variance. In a summary proceeding against a sheriff or constable and his sureties for an official default on the part of the officer, an issue, without regard to technicality, may be made up under the direction of the court.[42] The sureties, in a proceeding against them and the officer, may litigate the question of the latter's liability.[43] A variance between the judgment stated in the notice and that proved on the trial is not fatal where not such as to mislead defendants to their prejudice;[44] but there can be no recovery where the proof adduced shows a default different from that alleged in the notice.[45] In a proceeding for the failure of an officer to pay over on demand money collected under execution, plaintiff is not required to prove that the demand was made at the time stated in the notice, but proof of a demand at any time after the official receipt of the money and before the institution of the proceeding is sufficient.[46]

(9) Evidence

General rules of evidence in civil actions are applicable in summary proceedings against a sheriff or constable and the sureties on his bond.

Rules governing presumptions and burden of proof in civil actions generally have been applied in summary proceedings against a sheriff or constable and the sureties on his bond.[47] The moving party must prove all facts necessary to support a recovery,[48] such as the fact of suretyship,[49] at least whenever it is contested,[50] but it has been held that where the sureties appear and plead it is not necessary to prove the fact of suretyship unless it is put in issue by a plea denying the execution of the bond,[51] since otherwise the appearance and defense amounts to an admission of the suretyship.[52]

Where defendants set up an affirmative defense they must prove the matters relied on.[53] It has been held that the failure of the officer to levy on property subject to execution renders him and his sure-

37. Ala.—Glover v. Chandler, 11 Ala. 161

38. Ala.—Glover v. Chandler, supra

39. Ala.—Shute v. McRae, 9 Ala. 931

40. Miss.—Paddleford v. Moore, 32 Miss. 622.

41. Ala.—Glover v. Chandler, 11 Ala. 161

42. Ala.—Shute v. McRae, 9 Ala. 931.

43. Ala.—Robertson v. Coker, 11 Ala. 466.

44. Tenn.—Hix v. Cornelison, 7 Coldw. 299
57 C. J. p. 1054 note 85.

45. Ala.—Johnson v. Petty, 5 Ala. 528
57 C. J. p. 1054 note 86.

46. Ala.—Evans v. State Bank, 15 Ala. 81.

47. Miss.—W. T. Rawleigh Co. v. Causey, 16 So.2d 397, 195 Miss. 842

Conflicting presumptions

On statutory motion to recover damages for sheriff's failure to return execution before return date, presumption that circuit clerk delivered writ to sheriff with reasonable promptness was held to be neutralized by presumption that, had sheriff received writ before return-day, he would have returned it within time required, and in absence of evidence showing when writ was delivered to sheriff movant was not entitled to judgment.—W. T. Rawleigh Co. v. Causey, supra.—W. T. Rawleigh Co. v. Hester, 200 So. 250, 190 Miss. 329

48. Miss.—Cox v. Ross, 56 Miss. 481.
57 C. J. p. 1054 note 89

Delivery of execution to sheriff

Movant, seeking judgment against sheriff and surety for sheriff's failure to make timely return of execution, must show prima facie delivery in fact of the execution to the sheriff before its return date.—W. T. Rawleigh Co. v. Causey, 16 So.2d 395, 195 Miss. 835.

49. Va.—Monteith v. Commonwealth, 15 Gratt. 192, 56 Va. 192
57 C. J. p. 1054 note 90

50. Ky.—Tilford v. Creel, 1 A. K. Marsh. 568

51. Ala.—Harris v. Bradford, 4 Ala. 214
57 C. J. p. 1054 note 92

52. Miss.—Hamblin v. Foster, 12 Miss. 139.

53. Ky.—Mitcheson v. Foster, 3 Metc. 324
57 C. J. p. 1054 note 94

Default in return of execution

In proceeding against sheriff for failure to return execution on its return-day, sheriff has burden of proving that judgment creditor directed withholding of execution until after return-day, and, if sheriff does not comply with established method of returning execution, sheriff has burden of establishing his excuse for such withholding.—Everett v. Duckworth, 176 So. 387, 179 Miss. 516

Statute imposing burden of proof

Statutory provision that when a fieri facias issued against a sheriff and his surety for public moneys collected and not paid over the burden is on defendants to show that the fieri facias is invalid in whole or in part, was not changed by statute providing that on trial of case, whether in equity or on an affidavit of illegality, burden of proof shall be on the official issuing execution, but that such execution shall be prima facie evidence of the facts therein recited.—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S. E. 2d 411, 187 Ga. 544.

ties prima facie liable to the execution creditor for the full amount of his debt, interest, and costs,[54] and the burden is on defendants to overcome such prima facie liability[55] by showing justification for failure to enforce the execution or that no injury resulted to the judgment creditor by reason of such default,[56] such as by showing that nothing could have been collected on such execution by proper official diligence.[57]

The general rules with respect to the admissibility[58] and the weight and sufficiency[59] of evidence are applicable in summary proceedings on the bond of a sheriff or constable.

(10) Trial, Judgment, and Review

There is no right to a jury trial in summary proceedings on the official bond of a sheriff or constable, except in so far as provided by statute. General rules governing judgments and the review thereof in civil actions are applicable.

Sureties on the official bond of a sheriff or constable are not, as a matter of constitutional right, entitled to a jury trial before judgment may be rendered against them in summary proceedings,[60] and a statute authorizing such proceedings is therefore not invalid because it fails to provide for a trial of the issues by jury.[61] Where, however, the statute provides for a jury trial, the court is without authority to hear and decide the proceeding without a jury.[62] Where trial is had to a jury, the general rules respecting the necessity and propriety of instructions are applicable.[63] General rules as to instructions apply also in a proceeding in equity by the officer's surety to cancel a summary execution against the officer and his surety for public money collected and not accounted for.[64] A motion against an officer and his sureties for an official default may be tried and judgment rendered on a day of the term subsequent to that for which it was docketed for trial.[65]

Verdict and findings. In order to support a judgment against defendants in summary proceedings on the official bond of a sheriff or constable the verdict should not only find the officer's default, but also negative any defense interposed by plea.[66] In proceedings founded on an officer's failure to pay over money, a finding that such money was received by the officer is necessary to support a judgment against defendants[67] unless such receipt is a matter of record.[68]

Judgment. In accordance with general rules governing judgments in civil actions, a judgment cannot be rendered in summary proceedings on the official bond of a sheriff or constable for a default other than that specified in the motion or notice.[69] A judgment for not returning an execution must show in whose favor the execution issued,[70] and in at least one jurisdiction it is held that in all cases the judgment must set forth the existence of

54. Tex.—Hackler v. H. Kohnstamm & Co. of Texas, Civ.App., 227 S.W. 2d 347—Holterman v. Caffall, Civ. App., 79 S.W.2d 178.

Testimony aided by presumption

In proceeding for judgment on sheriff's bond for failure to return execution before return date, circuit clerk's testimony, although not definite as to date of delivery of execution to sheriff, when supported by presumption that clerk did his duty and fact that return was not made until after its return date, was held to establish a prima facie case that execution was actually delivered to sheriff before return date.—W. T. Rawleigh Co. v. Causey, 16 So.2d 395, 195 Miss. 835.

55. Tex.—Hackler v. H. Kohnstamm & Co. of Texas, Civ.App., 227 S.W. 2d 347—Holterman v. Caffall, Civ. App., 79 S.W.2d 178.

56. Tex.—Holterman v. Caffall, supra.

57. Tex.—Hackler v. H. Kohnstamm & Co. of Texas, Civ.App., 227 S.W. 2d 347.

58. Ala.—Higdon v. Fields, 60 So. 594, 6 Ala.App. 281.
57 C.J. p. 1054 note 95
Admissibility and conclusiveness on sureties of adjudication against officer see supra § 191.

Proceeding to cancel summary execution

On equitable petition by sheriff's surety for cancellation of execution, admission in evidence of order of execution reciting that it was made on consideration of audit theretofore made and the account of county and other records and evidence in relation thereto was held proper.—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga. 544.

59. Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, supra.
Miss.—Everett v. Duckworth, 176 So. 387, 179 Miss. 516.
Tex.—Burkett v. Simmons Hardware Co., Civ.App., 52 S.W.2d 675.
57 C.J. p. 1054 note 96

Preponderance of proof required

Miss.—Everett v. Duckworth, 176 So. 387, 179 Miss. 516.
57 C.J. p. 1054 note 96 [a].

60. Miss.—McCrosky v. Riggs, 20 Miss. 712.
57 C.J. p. 1055 note 98.

61. Ky.—Murry v. Askew, 6 J.J. Marsh. 27.
57 C.J. p. 1055 note 98.

62. Ala.—Mason v. Brazier, 1 Ala. 635.

63. Ala.—Higdon v. Fields, 60 So. 594, 6 Ala.App. 281.
57 C.J. p. 1055 note 3

64. Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga. 544.

Instructions held proper or not erroneous

Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, supra.

Requested instructions held properly refused

Ga.—U. S. Fidelity & Guaranty Co. v. Toombs County, supra.

65. Ky.—Mershon v. Commonwealth, 2 Metc. 371.

66. Ala.—Mason v. Parker, 1 Ala. 684.

67. Ala.—Mason v. Brazier, 1 Ala. 635.

68. Ala.—Mason v. Brazier, supra.

69. Tenn.—Morgan v. Betterton, 69 S.W. 969, 109 Tenn. 84.
57 C.J. p. 1055 note 10

70. Tenn.—Marshal v. Hill, 8 Yerg. 101.

a state of facts authorizing the exercise of the jurisdiction of the court[71] except in the case of judgments rendered in the supreme court on appeal.[72] Where two or more defaults are involved in the same proceeding, a separate judgment should be rendered for each.[73] A judgment against an officer and his sureties is valid as to the officer although void as to the sureties because their liability had terminated at the time of the default on which the judgment is based[74] The fact that a judgment is in favor of a firm or partnership instead of the individual members thereof is only matter in abatement and not cause for error.[75]

A judgment by default must show affirmatively every fact necessary to give the court summary jurisdiction,[76] and must also show the facts on which the liability of defendants depends,[77] and that every material averment of the moving papers was proved.[78]

Judgment should be entered in summary proceedings against a sheriff or constable and the sureties on his official bond for the amount for which they have become liable by reason of the act or misconduct on which the proceedings are based.[79] It has been held that interest cannot be allowed in summary proceedings on the amount for which an officer and his sureties have become liable[80] except where the statute expressly provides therefor,[81] but the contrary rule has also been applied.[82] Under some statutes the officer's failure to levy execution for a judgment debt or his making of a false return thereon warrants recovery against him and his sureties in the full amount of the debt, interest, and costs.[83]

In computing the penalty or additional damages under statutes which provide for the recovery of a prescribed per cent of the amount for which the officer and his sureties have otherwise become liable as a penalty or additional damages, only the amount for which the officer's default has rendered defendants liable is to be included, and not any interest on such amount accrued since the date of the default,[84] but, on the other hand, the statutory per cent is to be taken of the whole amount of the liability arising out of the default, undiminished by any payments subsequently made on account thereof[85] It has been held that damages provided for by statute at the rate of a specified per cent per month cannot be recovered where, without excuse for delay, an unreasonable period of time is allowed to pass before instituting proceedings therefor.[86] Where the statute prescribes one penalty for a failure to return process within a specified time after the return day, and a greater penalty for a further delay, judgment may be rendered only for the lesser penalty where the moving papers do not show how long the return was delayed.[87]

Review. Rules governing the review of judgments in civil actions generally have been applied to the review of judgments in summary proceedings against a sheriff or constable and the sureties on his official bond[88] Thus, on appeal from a judgment rendered in summary proceedings against a sheriff or constable and the sureties on his official bond, it will be presumed, in the absence of a bill of exceptions, that all the necessary facts recited in the judgment were supported by sufficient evidence.[89] The admission of incompetent evidence will not cause the reversal of a judgment supported by competent evidence, where the trial court decided matters both of fact and of law without the intervention of a jury[90] Where the officer alone has appealed from a judgment against him and his sureties, he cannot object that there is no evidence of the execution of a bond with his codefendants as sureties.[91] On appeal from a judgment entered by default, the objection that the sureties were not served with proper notice is available where the

71. Tenn.—Ex parte Savage, 4 Baxt. 337.
57 C J p 1055 note 12

72. Tenn.—Bittick v. McEwen, 7 Heisk 1

73. Va.—Hendricks v Shoemaker, 3 Gratt 197, 44 Va 197.

74. Tenn.—Sherrell v. Goodrum, 3 Humphr. 419.

75. Tenn.—Marshal v Hill, 8 Yerg 101.

76. Ala.—Morgan v. Billings, 3 Ala 172—Yancey v. Hankins, Minor 171

77. Ala.—Chandler v. Reid, 21 So 475, 114 Ala 390.
57 C J. p 1056 note 18.

78. Ala.—Warwick v. Brooks, 70 Ala 412
57 C.J. p 1056 note 19.

79. W.Va.—Shepherd v. Brown, 3 S E 186, 30 W Va 13.
57 C J p 1056 note 20.

80. Ky.—Pitman v. Couts, 6 J.J. Marsh. 90
57 C.J p 1056 note 22.

81. Ky.—Mershon v. Commonwealth, 2 Metc 371.

82. Ky.—Williams v. Hall, 2 Dana 97.

83. Tex.—Hackler v. H. Kohnstamm & Co of Texas, Civ App., 227 S W 2d 347.

84. Ala.—Chandler v. Henry, 8 So 96, 90 Ala 271.
57 C.J p 1056 note 26.

85. Ky.—Mershon v. Commonwealth, 2 Metc 371.
57 C.J. p 1056 note 27.

86. Tex.—Donley v. Wiggins, 52 Tex 301—Scogins v. Perry, 46 Tex. 111

87. Ky.—Judy v. Howard, 2 Metc 44.

88. Tenn.—Cowan v. Lay, Ch.A., 42 S.W 68.

89. Tenn.—Cowan v. Lay, supra.

90. Ky.—Johnson v. Thompson, 4 Bibb 294.

91. Tenn.—Cowan v. Lay, Ch A., 42 S W. 68.

contrary does not appear of record,[92] but under a statute which does not provide for notice, a recital in the judgment that due notice was given of the motion is sufficient on appeal to show a determination by the court that a reasonable notice had been given, and to sustain the court's jurisdiction and the validity of the judgment.[93]

§ 193. Actions on Official Bonds

Statutes relating to actions on the bond or on the recognizance of a sheriff or constable must be complied with.

Statutes relating to the prosecution of an action on the bond or on the recognizance of a sheriff or constable must be complied with.[94] It has been held that the statutes of the state in which the officer's bond was given, prescribing the method in which the rights of an injured party may be enforced on the bond, create substantive and not remedial rights,[95] so that compliance with the provisions of such statutes is a prerequisite to the maintenance of an action on the bond in another state.[96]

§ 194. —— Right and Grounds of Action

As a general rule, any person injured or affected by an act or omission of a sheriff or constable for which the sureties on his official bond are liable is entitled to maintain an action on the bond; but, ordinarily, only a sheriff or constable has a right of action on the bond of such officer's deputy.

As a general rule, any person injured or affected by an act or omission of a sheriff or constable for which the sureties on his official bond are liable is entitled to maintain an action on the bond,[97] provided damage has resulted to him from the breach.[98] An action for a mere default or omission, however, as distinguished from active misconduct, cannot be maintained by one to whom the officer owed no duty with respect to the matter in connection with which the default occurred.[99] Each individual who is injured must sue separately,[1] and there cannot be a recovery by a plaintiff for himself and also for another in whose right or injury he has no

92. Tex.—Haley v. Greenwood, 28 Tex. 680.

93. Ala.—Arthur v. State, 22 Ala. 61.

94. Pa.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa. Super. 280.

Actions against sheriffs or constables and indemnitors see supra §§ 146–167.

Statutes held inapplicable to recognizances

Statutes providing for prosecution of action on every bond and obligation given to commonwealth by public officer were held intended to regulate actions on official bonds only, and not to include sheriffs' recognizances or to affect statute relating to proceedings on recognizance given by sheriff.—Commonwealth, to Use of Blystone v. Davis, supra.

95. Ala.—Scott v. U. S. Fidelity & Guaranty Co., 41 So.2d 298, 252 Ala. 373.

96. Ala.—Scott v. U. S. Fidelity & Guaranty Co., supra.

97. Fla.—Cassady v. Sholtz, for Use and Benefit of Edwards, 169 So. 487, 124 Fla. 718.

Pa.—Commonwealth ex rel. v. Edmundson, Com. Pl., 88 Pittsb. Leg. J. 163.

Tex.—Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 125 Tex. 639—Bordelon v. Philbrick, 84 S.W. 2d 710, 125 Tex. 460—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ. App., 88 S.W.2d 605, error refused.

Wash.—Nelson v. Bartell, 103 P.2d 30, 4 Wash.2d 174.

57 C.J. p. 1057 note 39.

Parties in action on bond see infra § 201.

Persons protected by bond see supra § 177.

Commonwealth or individual aggrieved by misconduct of sheriff may institute action on recognizance against sheriff and his surety and obtain judgment thereon.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa. Super. 280.

Persons held entitled to maintain action

(1) Under a statute so providing, a right of action may arise in favor of an execution plaintiff against a sheriff and the sureties on his official bond for a breach of duty by the officer in surrendering to a claimant property levied on under the execution without requiring a forthcoming bond.—Trulock v. Lamb, 157 S.E. 100, 42 Ga. App. 601.

(2) Mortgagee under chattel mortgage on truck who had taken possession of truck and stored it with motor company had sufficient interest in truck to maintain conversion action against sheriff and sheriff's surety for wrongful taking of truck from motor company's possession.—Universal Credit Co. v. Gosney, 46 N.E. 2d 305, 70 Ohio App. 379.

(3) Corporation, although having registered office outside town, was held entitled to enforce bond of town constable running to inhabitants of town.—Town of Irvington v. Dubrow, 161 A. 351, 10 N.J. Misc. 804.

Persons held not entitled to maintain action

(1) One who brought statutory actions to foreclose liens on chattels, and obtained judgments declaring that he had liens, was not the "owner" and could not maintain action against sheriff and surety for wrongful taking of the chattels.—Stauble v. McCloskey, 59 N.Y.S.2d 811, affirmed 59 N.Y.S.2d 900, 269 App. Div. 1048.

(2) Person whose only interest in property was based on claim arising out of alleged agreement that owner was to pay him rent for being allowed to leave articles in building rented by party was held not to have sufficient interest in property to entitle him to maintain action against constable and sureties on his bond for value of property sequestered on constable's failure to return property on dismissal of owner's suits.—Bordelon v. Philbrick, 84 S.W.2d 710, 125 Tex. 460.

98. Tenn.—Galbraith v. Kirby, 109 S.W.2d 1168, 21 Tenn. App. 303.

57 C.J. p. 1057 note 40.

Causal connection

There must be some causal connection between the breach of official duty and the damages sustained in order to sustain an action against constable and his sureties for wrongful seizure of property.—Industrial Chrome Plating Co. v. North, 153 P.2d 835, 175 Or. 351, 156 A.L.R. 250.

99. Wash.—McPhee v. U. S. Fidelity etc., Co., 100 P. 174, 52 Wash. 154, 132 Am.S.R. 958, 21 L.R.A.,N.S., 535.

57 C.J. p. 1057 note 41.

1. Pa.—Lynch v. Commonwealth, 16 Serg. & R. 368, 16 Am.D. 582.

S.C.—State v. Yongue, 40 S.C.L. 323.

interest.[2] Where a bond is payable to the governor for the time being and his successors, the right to sue vests in the successor, and not in the personal representatives of a deceased governor,[3] but, where the bond runs to a designated person in his individual capacity and not as governor, an action may be maintained by the obligee's personal representative.[4] The mere fact that an action on an officer's bond for failure to make the money on an execution is brought for the use of one other than the judgment creditor does not defeat the action as showing an illegal transfer of the right of action.[5]

In some jurisdictions the right to sue on a sheriff's bond is derived from express statutory authority only,[6] and the action can be maintained by third persons only for the defaults specified in the statute.[7] It has been held that, where the statute provides a remedy for the county's recovery of fees collected by the sheriff and not paid over to the county, an action at common law cannot be maintained.[8]

In general, an action may be brought and maintained against the sureties on the official bond of a sheriff or constable for such default only on the part of the officer as would entitle plaintiff to recover against the officer in an action on the case,[9] but whenever there has been such an official misfeasance or default as constitutes a breach of the condition of the bond, an action thereon will lie.[10] In the absence of statute otherwise providing, one injured by an act or default of a sheriff or constable by whom a bond of indemnity has been taken is not restricted to his remedy on such bond, or precluded by the giving of such indemnity from resorting to the officer's official bond.[11] Where a claim against a sheriff's sureties is based on the ownership of property which was attached in connection with a suit to which claimant was a party, claimant must assert such claim to the property in such suit, rather than by independent action on the sheriff's bond.[12]

Sufficiency of bond An action on the official bond of a sheriff or constable is not precluded by the fact that the bond does not contain all the specific conditions required by statute, where the condition inserted in the bond, and to which the breach is assigned, is broad enough to cover them all, or at least the act of malfeasance complained of.[13]

Assignment of right of action While a right of action of an execution plaintiff against a sheriff and the sureties on his official bond for surrendering seized property without requiring a forthcoming bond may be assignable,[14] a right of action thus arising does not pass by a mere subsequent assignment of the execution itself.[15] Where an officer pays over only a part of the money collected by him on an execution, and a surety of the judgment debtor, not knowing that there is any more money in the officer's hands, pays the balance, such payment does not impair the creditor's remedy against the officer, but operates as an equitable assignment of the claim to the debtor's surety, for which he may pursue the officer on his official bond.[16]

Waiver of right of action. A right of action on the official bond of a sheriff or constable may be waived by conduct inconsistent with an intention to assert it.[17]

Bond of deputy. Except as statutes may otherwise provide,[18] no one other than a sheriff or con-

2. Pa.—Lynch v Commonwealth, 16 Serg & R 368, 16 Am D. 582.
S C.—State v Yongue, 40 S C L. 323

3. Tenn.—Cannon v. Snowden, 4 Humphr 360

4. Tenn.—Cannon v. Hollis, 4 Humphr. 334.
57 C J p 1058 note 45.

5. Ala.—Governor v Powell, 10 Ala 544

6. Cal.—Lorah v. Biscailuz, 54 P.2d 1125, 12 Cal.App 2d 100

7. Cal.—Lorah v. Biscailuz, supra.

Defaults of deputies

(1) Under statute authorizing suit on sheriff's bond by third persons for wrongful act or default of officer in official capacity, third person was held not entitled to maintain suit on sheriff's bond for acts or defaults of deputies.—Lorah v. Biscailuz, supra.

(2) Liability of sureties of sheriff or constable for acts of deputies and assistants see supra § 179.

8. Pa.—Delaware County v. Cain, 19 Pa Dist. & Co 577

9. U S.—South v. Maryland, Md., 18 How. 396, 15 L Ed 433.

10. Ky.—Hill v. Ragland, 70 S W. 634, 114 Ky. 209, 24 Ky L. 1053.
57 C J p 1059 note 60.

11. Ky.—Hill v Ragland, supra.
57 C J p 1059 note 57.
Indemnity to officer in general see supra §§ 128–145

12. Ky.—Crook v Blackburn, 71 S W 2d 986, 254 Ky 405.

13. Tex.—Lasater v. Waites, Civ. App., 67 S W 518, reversed on other grounds 68 S W. 500, 95 Tex. 553.

14. Ga.—Trulock v. Lamb, 157 S.E. 100, 42 Ga App 601

15. Ga.—Trulock v. Lamb, supra.

16. Md.—Merryman v. State, 5 Harr. & J. 423

17. Tenn.—Wright v. Johnson, 3 Sneed 407
57 C J. p 1059 note 58.

Rights under Soldiers' and Sailors' Relief Act

Where neither landlord nor anyone connected with issuance and levy of a writ of distress or purported sale thereunder was informed of tenant's enlistment until several years after purported sale, and tenant left his furniture in apartment during his enlistment, and did nothing until he returned from service, tenant waived his rights under Soldiers' and Sailors' Relief Act and could not maintain an action on the constable's bond for the wrongful distress.—State ex rel. Myers v. Hodge, 42 S.E.2d 23, 129 W.Va. 820.

18. Ga.—Goforth v. Fidelity & Cas. Co. of N. Y., 55 S E.2d 656, 80 Ga. App. 121.

stable,[19] or his personal representatives,[20] has a right of action on the official bond of his deputy, except that a surety of the principal officer who has been compelled to respond for a default of the deputy may sue on the latter's bond.[21] The fact that a judgment rendered against an officer for his deputy's default has been paid by the officer's sureties rather than by him does not preclude him from maintaining an action on the deputy's bond.[22]

§ 195. —— Nature and Form of Action in General

As a general rule, an action to enforce the liability of a surety on the official bond of a sheriff or constable is ex contractu and not ex delicto.

As a general rule, the liability of a surety on the official bond of a sheriff or constable, and an action to enforce such liability, is ex contractu and not ex delicto,[23] although the default on which the liability is founded may constitute a tort.[24] An action on the bond against the officer and the surety jointly,[25] and even an action on the bond against the officer himself,[26] is in contract, but an action directly against the officer for damages resulting from his trespass or other tort, in which the surety on the bond is joined, may be in tort, even though the liability of the surety is based on contract.[27]

Apart from any summary remedies given by statute, as discussed supra § 192, the liability of the sureties can ordinarily be enforced only by an action on the bond itself;[28] and the proper form of action has been held to be debt on the penalty, where the action is brought in the name of the obligee,[29] although assumpsit has also been regarded as proper in such case;[30] and covenant has been held proper where the action is brought in the name of the person injured by the breach.[31] The liability of the sureties on the recognizance of an officer may be enforced either by an action of debt or assumpsit, or a scire facias sur recognizance.[32]

A suit in equity may be brought where the facts present the elements of equity jurisdiction.[33] So, a suit in equity may be maintained on the ground of discovery and accounting, against an officer and two or more sets of sureties on different bonds where, from the manner in which the officer's business has been carried on and his accounts kept, it is difficult to determine the liabilities as between the respective bonds.[34] However, the facts that an officer, after collecting money on execution, has died insolvent without paying it over, and that there has been no administration on his estate, do not give equity jurisdiction of a suit against his sureties;[35] and in an action founded on an officer's

Unlawful use of pistol or revolver
Under a statute providing that sheriffs, constables, and their deputies shall be liable on their official bonds for all costs and damages accruing to anyone because of their careless or unlawful use of a pistol or revolver, a person injured by a deputy's unlawful use of such weapon has a right of action on the bond given by such deputy to his principal officer—Hatfield v. Wyatt, 130 S.E. 129, 99 W.Va. 604.

19. N.Y.—Norcross v. Hollingsworth, 31 N.Y.S. 627, 83 Hun 127.
57 C.J. p. 1058 note 49.
Persons protected by deputy's official bond see supra § 177

General statute held inapplicable
The statute providing for bringing of action on covenant of bond required by law for discharge of public office or trust does not relate to bond which sheriff may require of his deputy—Casey v. Fidelity & Cas. Co. of New York, 128 S.W.2d 939, 278 Ky. 426.

20. Ky.—Robertson v. Morgan, 3 B. Mon. 307.
57 C.J. p. 1058 note 50.

21. W.Va.—Nebergall v. Tyree, 2 W.Va. 474.
Rights and remedies of sureties generally see supra § 190.

22. Ky.—Robertson v. Morgan, 3 B. Mon. 307.

23. Ala.—Scott v. U.S. Fidelity & Guaranty Co., 41 So.2d 298, 252 Ala. 373.
Ga.—Carlan v. Fidelity & Cas. Co. of New York, 190 S.E. 47, 55 Ga.App. 271.
La.—**Corpus Juris quoted in** Leche v. United States Fidelity & Guaranty Co., App., 188 So. 197, 198.
57 C.J. p. 1059 note 62.

24. Ala.—Scott v. U.S. Fidelity & Guaranty Co., 41 So.2d 298, 252 Ala. 373.
Ga.—Carlan v. Fidelity & Cas. Co. of New York, 190 S.E. 47, 55 Ga.App. 271.
La.—**Corpus Juris quoted in** Leche v. United States Fidelity & Guaranty Co., La.App., 188 So. 197, 198.
57 C.J. p. 1059 note 63.

25. Ga.—Carlan v. Fidelity & Cas. Co. of New York, 190 S.E. 47, 55 Ga.App. 271.

26. Ark.—Wilson v. Young, 25 S.W. 870, 58 Ark. 593.
57 C.J. p. 1059 note 64.

27. Ala.—Leath v. Smith, 200 So. 623, 240 Ala. 639—Holland v. Fidelity & Deposit Co. of Maryland, 145 So. 131, 225 Ala. 669—Hill v. Hyde, 121 So. 510, 219 Ala. 155—Williams v. Ragan, 45 So. 185, 153 Ala. 397.

28. N.J.—Lewis v. Little, 5 N.J.Law 685.
57 C.J. p. 1059 note 66.

29. S.C.—State v. Staggers, 46 S.C.L. 286.
Proper parties plaintiff in actions on official bond of sheriff or constable see infra § 201 a.

30. Pa.—Commonwealth v. Ostendorf, 19 Pa.Dist. 18.
W.Va.—State ex rel. County Court of Preston County v. Williams, 174 S.E. 873, 115 W.Va. 204.

31. N.Y.—Lawton v. Erwin, 9 Wend. 233.

32. Pa.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa.Super. 280.

33. Ark.—State, to Use of Union County, v. Harman, 80 S.W.2d 619, 190 Ark. 621.

Legal fraud
Sheriff's failure to account for fees received as sheriff and ex officio collector, although resulting from good faith belief that county had no interest therein, constituted legal fraud because of which equity jurisdiction attached in suits against sheriff and his sureties—State, to Use of Union County, v. Harman, supra.

34. W.Va.—Raleigh County Ct. v. Cottle, 94 S.E. 948, 81 W.Va. 469, Ann.Cas.1918D 510.

35. N.Y.—Utica Bank v. Dill, 1 Paige 466.

refusal to sell land claimed to have been fraudulently conveyed by the judgment debtor, the tendering of an issue as to the title to the land does not make the matter one solely of equitable cognizance, since, if the conveyance was fraudulent, it passed nothing.[36]

Election of remedy. Where a sheriff or constable has taken an insufficient bail bond, and plaintiff has elected to hold the officer and his sureties liable as bail, he is concluded by the remedy so chosen and cannot resort to the officer's official bond.[37] Under a statute so providing, an injured person who claims damages from a sheriff for the acts of his deputy may, at his option, bring suit on the deputy's bond instead of the sheriff's bond,[38] but he may not sue on both.[39] It has been held that, when one damaged by an officer's default elects to avail himself of any other remedy before proceeding on the bond, he must proceed therein to final judgment and execution before he can maintain an action on the bond.[40]

§ 196. —— Single or Successive Actions

Whether successive actions by different persons or for different defaults may be maintained on the bond of a sheriff or constable until the penalty of the bond is exhausted, or whether there may be only one action, is ordinarily dependent on statute.

Where a person injured by an official default of a sheriff or constable is authorized by statute to institute an action against such officer on his official bond for the amount of his damage, each injured person may maintain a separate action for his own benefit,[41] so that successive actions for different defaults or by different persons may be maintained on an officer's bonds, and recovery had therein, until the penalty of the bond is exhausted.[42] Under a statute, however, providing, either expressly,[43] or by implication,[44] that judgment shall be entered for the full penalty of the bond, or, it has been held, in the absence of statute otherwise providing,[45] only one action may be brought on a bond; and in such case judgment for the full amount of the penalty may be entered for the benefit of all parties interested in the enforcement of the bond, as considered infra § 206.

§ 197. —— Conditions Precedent

a. In general
b. Proceedings as to officer's liability
c. Demand
d Leave of court

a. In General

Conditions precedent to the bringing of an action on the official bond of a sheriff or constable must be performed.

In accordance with rules relating to conditions precedent to the right to maintain an action generally, as discussed in Actions § 25, conditions precedent to the bringing of an action on the official bond of a sheriff or constable must be performed.[46] Notice to the sureties on the official bond of a sheriff or constable of a default on the part of such officer is not a prerequisite to the maintenance of an action on the bond therefor,[47] except where it is required by statute.[48] Where a sheriff or constable takes an insufficient bond in an action of replevin,

36. Mo—State v Tucker, 229 S.W. 163, 286 Mo 466.

37. Ga—Mosely v. Lyon, 48 Ga 398.
Liability of officer and sureties as bail where proper bail not taken see supra § 189

38. Ga—Goforth v. Fidelity & Cas Co. of N Y, 55 S E 2d 656, 80 Ga. App 121
The word "option" as used in such statute means the exercise of the power of choice, the power of choosing, the right of choice or an alternative—Goforth v. Fidelity & Cas Co of N. Y, supra.

39. Ga—Goforth v Fidelity & Cas Co of N Y, supra.

40. Pa—Commonwealth v. Rees, 1 Miles 330.
Necessity of exhausting other remedies before proceeding on bond see infra § 197 b

41. Me—White v Wilkins, 24 Me 299
57 C.J. p 1060 note 75.

42. Pa—McMicken v. Commonwealth, 58 Pa 213.
57 C J p 1060 note 77.
Penal sum of bond as limit of sureties' liability see supra § 181

43. Colo.—Taylor v. Blyth, 47 P 662, 9 Colo App. 81.

44. N.Y—New York v. Ryan, 9 Daly 316.
57 C.J p 1060 note 79.

45. N.C—Branch v Elliot, 14 N C. 86

46. Ky—Russell County Board of Education v Leach, 157 S W 2d 70, 288 Ky. 769
Quashal of levy or sale
Where an illegal levy of an execution and sale thereunder have been made by a sheriff or constable, plaintiff purchasing the property for the amount thereof and the execution being returned satisfied, he should have the levy and sale quashed before he proceeds to enforce the liability of the officer by an action on his official bond for such illegal levy.—Hamilton v Vail, 2 Metc, Ky., 511—57 C J. p 1062 note 10.

47. Me—Cony v. Barrows, 46 Me. 497.
57 C J p 1062 note 11.

48. N D—Felch v Olsness, 204 N. W 848, 53 N D 18.
57 C J. p 1062 note 12
Bond executed prior to enactment of statute is not within the statutory requirement.—Mt. Vernon Independent Graded School Dist v. Clark, 135 S W 2d 892, 281 Ky 230
Constructive notice
The statutory provision as amended that neither sheriff nor sureties on sheriff's bond shall be liable for sheriff's default unless notice of default giving rise to a claim on such bond should have been given to the sureties within certain time manifests legislative intent that constructive notice is not sufficient, and, hence, the filing and recording of settlement showing that sheriff owed a certain balance were not "notice" to

plaintiff therein is not obliged to quash such bond before he may have recourse to the official bond of such officer for taking the insufficient security.[49]

It has been held that, where authority is given by statute to one injured by the official default of a sheriff or constable to sue on his official bond in the name of the public officer who is the nominal obligee thereof, the authority or consent of such obligee is not a prerequisite to the institution of such a suit,[50] and the same rule has been held to apply where the municipality is named as the obligee,[51] but under a statute providing that on a breach of the condition of the official bond of a sheriff or constable it "shall be assigned by the governor to the party or parties injured, who may maintain an action thereon in their own name," no action can be instituted on the officer's bond, in the name of the governor, for another's use, without an assignment of the bond by the governor to the person injured.[52]

b. Proceedings as to Officer's Liability

As a general rule, in the absence of a statute otherwise providing, it is not a prerequisite to the maintenance of an action on the official bond of a sheriff or constable that the default or misconduct relied on as a breach, and the liability of the officer therefor, shall first be established in a separate action or proceeding against the officer alone.

Except where otherwise provided by statute, either expressly or by implication,[53] it is not a prerequisite to the maintenance of an action on the official bond of a sheriff or constable that the default or misconduct relied on as a breach, and the liability of the officer therefor, shall first be established in a separate action or proceeding against the officer alone, or adjudicated against him,[54] and the injured person may, at his option, either sue directly on the bond or proceed first against the officer.[55] It has been held, however, that even in the absence of statute relating thereto, a court has the power to stay the prosecution of an action against the officer's surety pending a determination of a tort action against the officer.[56] Where the liability of the officer is required to be fixed before proceeding against the sureties, a judgment against him in an action to which he was a party is necessary.[57] A judgment for nominal damages and costs in an action of replevin for goods seized establishes the officer's misfeasance;[58] but a judgment against an officer in assumpsit does not establish his official delinquency so as to permit recovery against his sureties.[59]

Ascertainment of amount of liability. The ascertainment of the amount of the liability of a sheriff or constable for an official default is not a condition precedent to an action therefor on his official bond,[60] except where the statute otherwise provides.[61] Where such ascertainment is required, a judgment by default in an action of trover against an officer for the value of goods taken by him is sufficient.[62]

Suit against officer on notice from surety. Under a statute so providing, claimant, on written notice to that effect from the officer's surety, is required to commence and prosecute legal proceedings against the officer within a period specified in the statute,[63] and, if claimant fails to do so, the surety is discharged from liability.[64]

Exhaustion of other remedies. In some jurisdic-

sureties that sheriff owed such balance.—Russell County Board of Education v. Leach, 157 S.W.2d 70, 288 Ky. 769.

49. Ky.—Miller v. Commonwealth, 4 B. Mon. 304.

50. Mass.—Crocker v. Buttrick, 73 N.E. 650, 187 Mass. 461.

51. Hawaii.—County of Hawaii v. Martin, 33 Hawaii 677.

52. Tenn.—Governor v. Hunt, 3 Yerg. 479.
Right of successor of nominal obligee to sue without assignment of bond see infra § 201 a.

53. Mass.—Tracy v. Warren, 104 Mass. 376.
57 C.J. p. 1060 note 92.
Statute of state where bond given
(1) Action against surety on sheriff's surety bond for alleged assault and battery of plaintiff committed by Mississippi sheriff while acting under color of office could not be maintained in Alabama, where liability of sheriff was not first fixed as required by statute of Mississippi where bond was given.—Scott v. U. S. Fidelity & Guaranty Co., 41 So. 2d 298, 252 Ala. 373.
(2) Statute of state where bond is given as creating substantive rights see supra § 193.

54. U. S.—Downer v. U. S. Fidelity & Guaranty Co. of Maryland, C.C.A. Pa., 46 F.2d 733.
57 C.J. p. 1060 note 93.

55. Pa.—Palmer v. Commonwealth, 6 Serg. & R. 245.

56. N.Y.—Kress v. Neer, 269 N.Y.S. 569, 239 App. Div. 747.

57. Miss.—State v. U. S. Fidelity, etc., Co., 128 So. 503, 157 Miss. 740.

58. Mass.—Tracy v. Warren, 104 Mass. 376.

59. Me.—Bailey v. Butterfield, 14 Me. 112.

60. Colo.—Newman v. People, 34 P. 1006, 4 Colo. App. 46.
57 C.J. p. 1061 note 98.
Settlement of accounts
A county could maintain suit against sheriff and tax collector, and his surety, for failure to account for excess official fees, without necessity that sheriff's accounts be first settled and audited by commissioners' court, since claim for expenses incurred was not a claim against the county and sheriff had burden of presenting such claim.—Taylor v. Brewster County, Tex. Civ. App., 144 S.W.2d 314, error dismissed, judgment correct.

61. Me.—Dane v. Gilmore, 49 Me. 173.
57 C.J. p. 1061 note 99.

62. Me.—Dane v. Gilmore, supra.

63. Ala.—Scott v. U. S. Fidelity & Guaranty Co., 41 So. 2d 298, 252 Ala. 373, applying law of Mississippi.

64. Ala.—Scott v. U. S. Fidelity & Guaranty Co., supra.

tions, under statutes so providing, one damaged by the official misconduct or default of a sheriff or constable must exhaust his remedy against the officer before proceeding against the sureties on his official bond;[65] but in the absence of any such statute the exhaustion of any other remedies which a party may have is not a condition precedent to an action on the officer's bond,[66] although, if such party does institute or prosecute another remedy, he must proceed to final judgment and execution therein before he can resort to the bond.[67] However, it has been held to be a principle of law, apart from statute, that one does not have a right of action against a constable's surety until after he has used reasonable diligence to collect his damages from the principal by legal process.[68] It has been held that, where the remedy against the officer is required to be exhausted, the return nulla bona of an execution against an officer,[69] or against the personal representative of a deceased officer,[70] is sufficient to entitle plaintiff therein to proceed against the sureties; but there is also authority, to the contrary, that such return does not of itself establish the insufficiency of the officer's property so as to authorize an action on his bond.[71] Under a statute providing that action on the officer's bond may be brought if judgment is recovered against the officer and execution thereon is returned wholly or partly unsatisfied, it has been held that a return of execution unsatisfied is a condition precedent to the surety's liability,[72] and that an action brought prior to such return is premature.[73]

c. Demand

A demand on a sheriff or constable for the payment over of or accounting for money collected or received by him is ordinarily a condition precedent to a right of action on his official bond.

A demand on a sheriff or constable for the payment over of or accounting for money collected or received by him is ordinarily a condition precedent to a right of action on his official bond,[74] except where the officer is dead,[75] or out of the state,[76] or has been ascertained to be insolvent,[77] or where it was his duty to pay the money into court,[78] or he has been ordered by the court to pay it over to a designated person,[79] and, except, it has been held, in the case of money collected for public purposes.[80] A demand on a deputy who has collected money will sustain an action on the bond of his principal for failure to pay over the same.[81] An action founded on a failure to collect may be maintained against an officer on his bond without a previous demand.[82]

For payment by sureties A demand for payment of the amount claimed need not be made on all the sureties on a constable's bond before suit is filed thereon.[83]

For property. A demand on a sheriff or constable for the return of property wrongfully levied on or seized,[84] or wrongfully withheld,[85] by him is not a prerequisite to an action against the sureties on his official bond for such misconduct or default; and the right to maintain an action on the officer's bond for the wrongful release of property seized or levied on is not dependent on a previous demand for such property.[86] However, it has been held that, where the officer did not know that an attachment by him was wrongful, as where he did not know that the property attached was not subject to attachment, claimant's cause of action does not accrue until he makes a demand for the possession of the property and the sheriff refuses to comply with the demand.[87]

For execution of process. It has been held that no action may be maintained on the official bond of

65. S.C.—State Treasurer v. McGuire, 16 S.C.L. 474.
57 C.J. p. 1061 note 3.

66. Ala.—Burton v. Dangerfield, 37 So. 350, 141 Ala. 285.
57 C.J. p. 1061 note 4.

67. Pa.—Commonwealth v. Rees, 1 Miles 330.
Election of remedy in general see supra § 195.

68. Pa.—Commonwealth ex rel. Hughes v. Maryland Cas. Co., 74 A.2d 683, 167 Pa.Super. 101

69. Pa.—Kirkpatrick v. White, 29 Pa. 176.

70. S.C.—State Treasurer v. McGuire, 16 S.C.L. 474.

71. Va.—Preston v. Auditor of Public Accounts, 1 Call 471, 5 Va. 471

72. N.Y.—Slagle v. New Amsterdam Casualty Co., 276 N.Y.S. 162, 243 App.Div. 79.

73. N.Y.—Slagle v. New Amsterdam Casualty Co., supra

74. N.C.—Governor v. Miller, 20 N.C. 50
57 C.J. p. 1062 note 14

75. S.C.—State v. Easterling, 30 S.C.L. 310

76. Mass.—Fall River v. Riley, 138 Mass. 336
S.C.—State Treasurers v. Gibson, 21 S.C.L. 339.

77. S.C.—State v. Easterling, 30 S.C.L. 310.

78. N.C.—Governor v. Miller, 20 N.C. 50.

79. Ohio.—King v. Nichols, 2 Ohio Dec., Reprint, 564, 4 West L. Month. 25.

80. N.C.—State v. Woodside, 31 N.C. 496—State v. McIntosh, 31 N.C. 307

81. Ala.—Hill v. Fitzpatrick, 6 Ala. 314.
Ky.—Coulter v. Commonwealth Bank, 3 B.Mon. 299

82. N.C.—Nixon v. Bagby, 52 N.C. 4

83. Mo.—State ex rel. Karnes v. Poole, App., 72 S.W.2d 803

84. Wis.—Dishneau v. Newton, 64 N.W. 879, 91 Wis. 199

85. Ala.—Williams v. Ragan, 45 So. 185, 153 Ala. 397.

86. Iowa.—Gutschenritter v. Whitmore, 139 N.W. 567, 158 Iowa 252
57 C.J. p. 1062 note 25.

87. Idaho.—Oakes v. American Sur. Co. of New York, 76 P.2d 932, 58 Idaho 482.

a sheriff or constable for his failure to execute process unless a demand has been made on him for its execution [88]

For copy of process. Under a statute providing that no action shall be brought against a sheriff or constable for anything done under process until demand has been made and refused for a copy thereof, such demand is a condition precedent to the right of action.[89]

For return of process. A demand for the return of process placed in the hands of a sheriff or constable for execution is not a prerequisite to an action on his official bond after the return day for failure to make a return,[90] but under a statute making a sheriff or constable liable for a failure to return a fee bill, on demand, to the person entitled thereto, a demand is a condition precedent to an action on his official bond for failing to make such return [91]

d. Leave of Court

Under statutes so providing, leave of court must be obtained before action on the official bond of a sheriff or constable may be brought; and the grant of such leave is discretionary with the court and may be made subject to conditions.

In the absence of a statute otherwise providing, an action may be instituted and maintained on the official bond of a sheriff or constable without applying for or obtaining leave from any court so to do,[92] but, where required by statute, leave of court must be obtained before such action may be brought [93] Leave to sue may be granted on an ex parte application,[94] and notice to the officer or his sureties is not essential.[95] The application must show affirmatively that the officer has been guilty of some default or misconduct[96] in his official capacity,[97] and that any conditions precedent to a right of action have been complied with [98]

Discretion of court. The granting or refusing of leave to sue on a bond, where such leave is required, is discretionary with the court,[99] and the court may grant leave to sue provided certain terms or conditions are met [1] It has been held, in the exercise of such discretion, that leave should not be granted until it is shown that the officer is individually unable to respond in damages for the default complained of, even though a prior recovery against the officer or the exhaustion of remedies against him is not a statutory prerequisite to the institution of an action on his bond.[2] In accordance with statutory provisions, the court on proper facts may exercise a discretionary power to vacate an ex parte order permitting such action to be maintained,[3] and the court may provide that the order granting leave to sue shall be vacated unless plaintiff agrees to certain conditions.[4]

§ 198. —— Defenses

Where the act or default on which an action on the bond of a sheriff or constable is based is within the terms of the bond, the availability of a defense in such action is determined by the availability of such defense in an action against the officer alone.

Any defense which would be available to a sheriff or constable in an action against him alone is available to his sureties in an action on his official bond;[5] and, conversely, where the act or default on which the action is founded is within the terms of the bond, the sureties can make no defense which the officer could not make in an action against

88. Tex.—Lyendecker v. Martin, 38 Tex. 287

89. Pa.—Commonwealth v. Warfel, 27 A. 763, 157 Pa. 444.

90. Ill.—People v. Title Guaranty, etc., Co., 156 Ill.App. 488

91. Ky.—Walters v. Chinn, 1 Metc. 499.

92. S.C.—State v. Cason, 11 S.C. 392. 57 C.J. p. 1062 note 30

93. N.Y.—Kress v. Neer, 269 N.Y.S. 569, 239 App.Div. 747.

94. N.Y.—Kress v. Neer, supra. Wis.—State v. Mann, 21 Wis. 684.

95. N.Y.—Kress v. Neer, 269 N.Y.S. 569, 239 App.Div. 747. Wis.—State v. Mann, 21 Wis. 684.

96. N.Y.—Ex parte Reed, 4 Hill 572. 57 C.J. p. 1063 note 34

97. Wis.—State v. Mann, 21 Wis. 684.

98. N.Y.—Rhinelander v. Mather, 5 Wend. 102. 57 C.J. p. 1063 note 36.

99. N.Y.—Kress v. Neer, 269 N.Y.S. 569, 239 App.Div. 747. 57 C.J. p. 1063 note 37

1. N.Y.—Kress v. Neer, supra.

2. N.Y.—Anderson v. Hitchcock, 2 Wend. 299. 57 C.J. p. 1063 note 38

3. N.Y.—Kress v. Neer, 269 N.Y.S. 569, 239 App.Div. 747.

Vacation of order held justified

N.Y.—Kress v. Neer, supra.

4. N.Y.—Kress v. Neer, supra.

5. Colo.—Blyth v. People, 66 P. 680, 16 Colo.App. 526. 57 C.J. p. 1063 note 43. Defenses in action against officer see supra § 149.

Particular matter held defense

In action by execution creditor against sheriff and the surety on his official bond to recover damages for sheriff's failure to sell property levied on under the execution, it was a good defense that the execution creditor failed to advance moneys sufficient to discharge the fees of the printer for publishing the notice of sale on demand therefor by the sheriff.—Smith v. Hanson, 293 N.W. 551, 70 N.D. 241, 129 A.L.R. 1356.

Credit allowance

In action against sheriff and his sureties for amount sheriff, without authority, paid to claimants against estate from money obtained on execution, sheriff and sureties were held entitled to credit for amount sheriff was prevented from paying to estate by an attachment of the money, by estate's creditor, as against contention that credit should have been allowed only as of date sheriff paid such money into court.—Dunn v. Champion, 99 S.W.2d 813, 266 Ky. 757.

him [6] The mere fact that the officer was the holder of a void process would be no protection to his surety if, acting under color of office, he disposed of property in a manner different from that directed by the law in cases of possessory warrants.[7]

§ 199. —— Jurisdiction and Venue

The jurisdiction and venue of actions on the official bond of a sheriff or constable are dependent on statute

Jurisdiction of actions on the official bond of a sheriff or constable belongs to such courts, and such only, as may have been given it by statute [8] A statutory provision that like proceedings shall be had in such actions as in other actions of a designated character has been held not to give exclusive jurisdiction thereof to the court having jurisdiction of such other actions, but merely to prescribe the form of the proceedings,[9] but there is also authority for the view that the court having jurisdiction of such other actions is, by such a provision, given jurisdiction of an action on an officer's bond.[10]

Venue. As is the rule generally, the venue of an action on the official bond or a sheriff or constable is dependent on statute [11] Under a statute providing that an action against a public officer, or an action on his official bond, shall be brought in the county where the cause or some part thereof arose, an action on the bond of a sheriff or constable for an official default must be brought in the county in which the default occurred.[12] Within this rule, the liability of sureties for an officer's failure to execute process issued from another county than that in which he officiates is properly brought in the latter county, rather than in the county from which the process issued.[13] An action founded on the failure of an officer to pay over money collected by him under process issued from another county has been held to be properly brought in the county of which he is officer, and not that from which the process issued,[14] and it has been held that an action based on the failure of an officer to return process to another county, from which it issued, should be brought in the county of which he is an officer, rather than that from which the process issued and to which it should have been returned,[15] but under some statutes the action may properly be brought in the county from which the process issued [16]

Under a statute so providing, the venue of a suit against the surety is in the county in which the surety bond is filed.[17] Where the statute permits nonlocal actions to be brought in the county in which either plaintiff or defendant resides, an action on a bond in the name of the state to the use or on the relation of one injured by the officer's default may be brought in the county in which the relator resides, although none of defendants resides therein.[18] Under a statute requiring actions to be brought in the county of defendant's domicile, except where it is founded on a trespass, in which case the action may be brought in the county where the trespass occurred, it has been held that an action against the sureties on an officer's bond, in which action the officer is not joined, may be brought only in the county of their domicile, and not in another county where the trespass occurred [19] Where the place is not otherwise fixed or restricted by statute, it has been held that such an action, not

6. Ga.—Prince v. Wood, 97 S.E. 457, 23 Ga.App. 56
Liability of sureties as limited to defaults within terms of bond see supra § 181.

Particular matters held not defenses
(1) The fact that public funds were stolen from sheriff by unknown persons, while funds were being conveyed by sheriff to bank of deposit.—State ex rel. County Court of Preston County v. Williams, 174 S.E. 873, 115 W.Va. 204.

(2) The fact that acts of sheriff who did not follow procedure outlined by statutes in conducting execution sale were in no manner concealed or tainted with fraud in any degree, and there was no suggestion that sheriff profited personally from any of the transactions.—State ex rel. and to Use of Dietrich v. Schade, Mo.App., 167 S.W.2d 135.

(3) Other matters
Fla.—Walling v. Carlton, 147 So. 236, 109 Fla. 97.
Mich.—Reinert v. Fidelity & Casualty Co. of New York, 259 N.W. 340, 270 Mich. 607
Mo.—State ex rel. Adkins v. Grugett, 63 S.W.2d 413, 228 Mo.App. 8.
Tenn.—Marable v. State ex rel. Wackernie, 222 S.W.2d 234, 32 Tenn. App. 238

7. Ga.—Goforth v. Fidelity & Cas. Co. of N.Y., 55 S.E.2d 656, 80 Ga.App. 121

8. N.Y.—Levin v. Robie, 25 N.Y.S. 982, 5 Misc. 529
57 C.J. p. 1063 note 48.

9. Mass.—Greenfield v. Wilson, 13 Gray 384.

10. Pa.—Campbell v. Commonwealth, 8 Serg. & R. 414.

11. Tex.—Bachus v. Foster, 122 S.W.2d 1058, 132 Tex. 183, answer to certified questions conformed to, Civ.App., 125 S.W.2d 641.

12. Kan.—Fay v. Edmiston, 28 Kan. 105
Neb.—McNee v. Sewell, 16 N.W. 827, 14 Neb. 532.

13. Kan.—Fay v. Edmiston, 28 Kan. 105.

14. Ky.—Foster v. Wade, 4 Bush 628.

15. Ky.—Commonwealth Bank v. Harrison, 1 Bush 384

16. Neb.—McNee v. Sewell, 16 N.W. 827, 14 Neb. 532

Neglect in executing extent
An action on a sheriff's official bond for his neglect in executing a state treasurer's extent against a delinquent constable is properly brought in the county of the treasurer's residence, although different from that in which the sheriff officiates.—State Treasurer v. Kelsey, 4 Vt. 371.

17. Tex.—Bachus v. Foster, 122 S.W.2d 1058, 132 Tex. 183, answer to certified question conformed to, Civ.App., 125 S.W.2d 641.

18. N.C.—State v. McGee, 24 N.C. 209.

19. Tex.—Lasater v. Waits, 68 S.W. 500, 95 Tex. 553.

being local, may be brought in any county of the state.[20]

§ 200. —— Time to Sue, and Limitations

a. Time to sue
b. Limitations

a. Time to Sue

Action may be commenced on the official bond of a sheriff or constable as soon as a cause of action accrues.

In accordance with general rules as to the accrual of a cause of action, as stated in Actions § 124, an action may be commenced on the official bond of a sheriff or constable as soon as a cause of action accrues.[21] Thus, where an officer has refused to levy an execution on property pointed out to him by plaintiff, an action on his bond therefor, although instituted before the return of the execution, is not premature,[22] and, similarly, an action on an officer's bond may be commenced at once after a judgment has been recovered against him for a wrongful levy, although the return day of the process has not arrived.[23]

b. Limitations

Action on the official bond of a sheriff or constable must be brought within the period prescribed by statute for such actions.

An action on the official bond of a sheriff or constable may be brought only within such time as may be prescribed by statute for such actions, and not after the expiration thereof.[24] Thus, where the statute limits the time within which an action on the bond may be brought to a specified period after the date of the bond, such action is barred on the expiration of such period, notwithstanding the officer's term of office is extended;[25] but it has been held that the statute does not bar an action for a default occurring after the expiration of such period, on the part of an officer whose term is greater than that specified by the statute, where the sureties on the bond have voluntarily bound themselves as sureties during the officer's continuance in such office.[26] Apart from any statutory limitation mere delay in bringing suit on an officer's bond will not bar an action,[27] provided no contract, consideration, or motive inducing the delay is shown,[28] unless sufficient time has elapsed to raise a presumption of performance of the condition of the bond.[29]

A statute prescribing the period within which action must be brought on a constable's bond has been held not to be a general statute of limitation, but rather a special statutory limitation,[30] which is in the nature of a condition put on the right of action and qualifying the right,[31] and which, therefore, may not be waived by the surety.[32] A statute limiting the time within which actions against sureties on bonds or recognizances of sheriffs may be brought has been held to be applicable only to official bonds given to the state,[33] and to be inapplicable to a bond given to a sheriff by his deputy.[34] A general statute of limitation of actions on officers' bonds is limited or superseded pro tanto by another statutory provision prescribing a shorter period of limitation as to particular actions.[35]

20. Del.—State v Green, 5 Del 270

21. Mass—Treasurer v. Schapero, 104 N E 440, 217 Mass 71, Ann Cas 1915D 399
Pa—Shannon v Commonwealth, 8 Serg & R 444.

22. Pa—Shannon v. Commonwealth, supra.

23. Mass.—Treasurer v Schapero, 104 N E 440, 217 Mass. 71, Ann Cas 1915D 399.

24. Ala.—State, for Use of Houston County, v U S Fidelity & Guaranty Co, 195 So 426, 239 Ala. 445.
Ark—Elmore v Bishop, 42 S.W 2d 399, 184 Ark. 243—State v Landers, 40 S W 2d 432, 183 Ark. 1138.
Pa.—Commonwealth ex rel. Hughes v. Maryland Cas Co, 74 A 2d 683, 167 Pa.Super 101—Commonwealth ex rel. v Edmundson, Com.Pl, 88 Pittsb Leg J 163.
57 C J. p 1064 note 67.

Bond under seal

The fact that a constable's bond was under seal did not in itself extend right of action on bond beyond five years from date of bond, since a bond is a "specialty" or "sealed instrument" to which the five-year statute of limitations applied.—Commonwealth ex rel. Fenton Storage Co v. McClane, 35 A 2d 745, 154 Pa. Super 246.

25. Pa—Commonwealth ex rel. Fenton Storage Co v McClane, supra—Commonwealth v. Curtin, 6 Pa Dist 589

26. Pa—Commonwealth ex rel Hughes v Maryland Cas. Co, 74 A 2d 683, 167 Pa Super 101—Commonwealth v Clipsham, 16 Pa Super 50.

27. Me—Cony v Barrows, 46 Me. 497
57 C J. p 1065 note 78

28. Me—Cony v. Barrows, supra.

29. S C—Treasurers v. McPherson, 27 S.C L 69
57 C J. p 1065 note 80.

30. Pa—Commonwealth ex rel Hughes v Maryland Cas Co, 74 A.2d 683, 167 Pa Super. 101.

31. Pa—Commonwealth ex rel Hughes v. Maryland Cas Co., supra—Commonwealth v. McClane, 47 Pa Dist & Co 604, affirmed 35 A 2d 745, 154 Pa Super 246.

32. Pa—Commonwealth ex rel Hughes v. Maryland Cas Co, 74 A 2d 683, 167 Pa Super 101.

Stipulation discontinuing action without prejudice

Where relator brought assault action against constable and joined surety on constable's bond as defendant, and surety entered into stipulation with relator discontinuing action as to surety without prejudice to relator to proceed against constable and on his bond should relator secure verdict, stipulation did not effect any change in the legal relationship of the parties and the surety could defend subsequent action on bond on ground that suit was barred by statute requiring action on constable's bond to be instituted within five years of date of bond—Commonwealth ex rel. Hughes v. Maryland Cas Co., supra.

33. Pa—Shively v McDonnell, 162 A 287, 308 Pa. 298.

34. Pa—Shively v. McDonnell, supra.

35. Kan—Ryus v. Gruble, 3 P. 518, 31 Kan. 767.

A statute limiting the time within which actions for particular classes of defaults or misconduct may be brought is not applicable to actions for other official wrongs.[36] A statute relating to the time of commencing actions on a sheriff's bond does not embrace an action on the bond of a constable,[37] and a statute prescribing the time within which motions must be made against an officer for a statutory penalty does not apply to an action on his bond.[38] Similarly, a statute limiting the time for bringing action against an officer personally for damages does not restrict the time within which an action may be brought against him and the sureties on his bond,[39] or against the sureties after judgment has been recovered against the officer,[40] but a statute limiting the time for commencing an action against a sheriff on a liability incurred by the doing of an act in his official capacity has been held to limit the time for action on his official bond, in the absence of any other provision as to the sureties.[41]

The application of general statutes of limitation and of general principles relating to the application of statutes of limitation is discussed in appropriate sections in Limitations of Actions. Thus, the question whether an action on an officer's bond is barred by the fact that an action against the officer is barred is discussed in Limitations of Actions § 10 b, and questions relating to the accrual of an action on the bond of a sheriff or constable, or such officer's deputy, with respect to the computation of the statutory period, are discussed in § 148 a (2) of that title.

Commencement of period. Under the provisions of various statutes to that effect, the period prescribed for the bringing of an action on the bond of a sheriff or constable begins to run from the date of the accrual of the cause of action,[42] or from the date of the act done or omitted by the officer which fixes the liability of the surety,[43] or from the date of the bond.[44] Where an omission or neglect of a sheriff or constable constitutes a continuing breach of his official bond, a period prescribed by a statute of limitations, after which action for such breach cannot be brought, commences to run only at the expiration of his term of office.[45] It has been held that, under a statute barring actions at a specified time after the expiration of the officer's term, the resignation of an officer before his term expires does not set the statutory period to running.[46]

Extension of period. A statute enlarging the period within which actions on the official bonds of constables may be commenced is not applicable to an action on a bond executed prior to the passage of such statute.[47]

§ 201. —— Parties

a. Plaintiffs
b Defendants
c. Intervention and new parties

36. La—Succession of McCloskey, 32 La Ann 146.
Tenn—Stanly v. Daily, 4 Humphr. 55.

Malfeasance held not within statute
Action by state against former sheriff and surety to recover money allegedly misappropriated from sheriff's salary fund was not barred by prescription of two years as to acts of misfeasance and nonfeasance, although all alleged irregularities occurred more than two years prior to filing of action, since wrongful acts, if any, constituted "malfeasance" as to which the two-year prescription was inapplicable—State ex rel Jones v. Doucet, 14 So.2d 622, 203 La. 743.

In Michigan
(1) Under statutes so providing, a ten-year period of limitation applies to actions on the bonds of public officers generally, while a two-year period applies to actions for the misconduct or neglect of sheriffs or their deputies and for certain specified acts—Hurst v Charron, 255 N W 419, 267 Mich 210—Lenawee County v. Nutten, 208 N W. 613, 234 Mich 391.

(2) The reason for the two-year period of limitation is that in all of those actions plaintiff will have notice of the wrong or injury done to him at the time it is committed, and it is deemed no hardship to require him to begin his action therefor within the short period of limitation—Lenawee County v. Nutten, supra.

(3) Ten-year limitation, not two-year limitation, was held applicable to action on sheriff's bond for failure to pay over fees collected by him—Lenawee County v. Nutten, supra.

(4) But two-year limitation was held applicable to action on bond for false imprisonment, which offense is specifically included in the two-year statute—Hurst v. Charron, 255 N W 419, 267 Mich 210.

37. Pa.—Owings v. Commonwealth, 8 Serg & R 530.

38. Ky.—Chamberlin v. Brewer, 3 Bush 561.
Penalties and amercement of officers see supra §§ 173–176.

39. La—Kohler v. Walden, 23 La Ann 299.

40. S D—Connor v. Corson, 83 N.W 588, 13 S D. 550.

41. Cal.—Paige v. Carroll, 61 Cal. 211.
Mont—Wingate v Davis, 252 P 307, 77 Mont. 572

42. Ark.—State v. Landers, 40 S W. 2d 432, 183 Ark 1138.

43. Ala.—State, for Use of Houston County, v. U S. Fidelity & Guaranty Co, 195 So 426, 239 Ala 445.

44. Pa—Commonwealth ex rel. Hughes v. Maryland Cas. Co, 74 A.2d 683, 167 Pa Super 101—Commonwealth ex rel Fenton Storage Co v McClane, 35 A 2d 745, 154 Pa Super. 246.

Date of execution of bond
Where the statutory period of limitation is fixed with respect to the "date" of the bond, the date of its execution and not the date of its approval as required by law is the commencement of the period—Wilson v. Commonwealth, 7 Watts & S. (Pa.) 181.

45. N C.—State v. Patton, 35 N.C. 421.
57 C J p 1065 note 82

46. Mo—State v. Ferguson, 9 Mo. 288

47. Pa.—Commonwealth v Geary, 7 Pa Dist. 541, 21 Pa Co 217.

a. Plaintiffs

Except where suit is in equity, or statutes otherwise provide, it is generally held that an action on the official bond of a sheriff or constable naming a governmental body or officer as obligee must be brought in the name of such obligee for the use of the person injured by the default on which the action is founded.

In accordance with the rules governing parties to actions on official bonds generally, as discussed in Officers § 174, it is generally held that, except where the suit is in equity, or where statutes otherwise provide, an action on the official bond of a sheriff or constable which names as obligee the state,[48] the people,[49] the municipality or county,[50] or a designated public officer[51] or court,[52] may be brought only in the name of the nominal obligee, for the use and benefit,[53] or on the relation,[54] of the person injured by the default on which the action is founded. However, in a jurisdiction in which a statutory provision granting the right to the injured person to sue on the official bond in his own name was omitted in the revision of the statute and subsequently restored, it was held that the injured person had the right to sue in his own name during the interim when the statute did not expressly so provide,[55] and another statute providing that suit may be brought in the name of the state for the benefit of all parties interested was held permissive only and not to change the rule[56]

Where the nominal obligee is also the person injured, he may maintain an action for his own use,[57] but, where not he, but another, has been injured by the default constituting the cause of action, he cannot, merely as obligee, maintain an action on the bond,[58] except where the statute authorizes the trustee of an express trust,[59] or one in whose name a contract is made for the benefit of another,[60] to maintain an action in his own name, in which case suit may be brought by the nominal obligee Where a bond names no obligee, but is conditioned for the payment of sums due to any person to whom the officer may become liable, or for the payment of money to the person entitled thereto, an action on the bond is properly brought in the name of the injured person[61] A suit in equity on an officer's bond must be brought in the name of the person injured by the breach of its conditions.[62]

Where, by statute, actions are authorized or required to be brought in the name of the real party in interest,[63] or actions on official bonds are authorized or required to be brought in the name of the party aggrieved by a default of the officer,[64] the person injured or damaged by a default of a sheriff or constable is, unless otherwise specifically provided by statute,[65] the proper party plaintiff in an action on the officer's bond, even though he is

48. Ala.—Scott v. U. S. Fidelity & Guaranty Co., 41 So.2d 298, 252 Ala. 373.
Tenn.—Stephens v. Hinds, 194 S.W. 2d 483, 183 Tenn. 652.
57 C.J. p. 1066 note 7.

49. N.J.—Lewis v. Little, 5 N.J.Law 802.
57 C.J. p. 1066 note 8.

50. Ala.—Jefferson County v. Downs, 147 So. 626, 226 Ala. 427
Hawaii.—County of Hawaii v. Martin, 33 Hawaii 677.

Action in name of state

Action on official bond of sheriff payable to county was held not maintainable in name of state on relation of county court.—State ex rel. County Court of Preston County v. Williams, 174 S.E. 873, 115 W.Va. 204

51. Miss.—James v. State, 49 Miss. 420
57 C.J. p. 1066 note 9.

52. Ill.—Long v. Scott County Ct., 27 Ill. 384.

53. Ala.—Scott v. U. S. Fidelity & Guaranty Co., 41 So.2d 298, 252 Ala. 373.
Hawaii.—County of Hawaii v. Martin, 33 Hawaii 677.
Tenn.—Stephens v. Hinds, 194 S.W. 2d 483, 183 Tenn. 652.
57 C.J. p. 1066 note 12.

For use of sheriff against predecessor and surety

Action against sheriff's predecessor and predecessor's surety for fund provided by county for transport of prisoners and fugitives was held properly instituted by county for use of sheriff in his official capacity.—Jefferson County v. Downs, 147 So. 626, 226 Ala. 427.

54. N.C.—Stokes County v. Wall, 23 S.E. 358, 117 N.C. 382.
57 C.J. p. 1066 note 13.

55. Tex.—Bordelon v. Philbrick, 84 S.W.2d 710, 125 Tex. 460—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ.App., 88 S.W.2d 605, error refused

56. U.S.—Bracken v. Cato, C.C.A. Tex., 54 F.2d 457
Tex.—Tabor v. McKenzie, Civ.App., 49 S.W.2d 874

57. Ky.—Commonwealth v. Reed, 2 Bush 618
57 C.J. p. 1067 note 14.

58. Pa.—Dunn v. Commonwealth, 14 Serg. & R. 431
57 C.J. p. 1067 note 15.

59. Mo.—State v. Moore, 19 Mo. 369, 61 Am.D. 563
57 C.J. p. 1067 note 16.

60. Okl.—State v. Rader, 125 P. 726, 33 Okl. 350.

61. N.Y.—Levin v. Robie, 25 N.Y.S. 982, 5 Misc. 529
57 C.J. p. 1068 note 39.

62. W.Va.—Raleigh County Ct. v. Cottle, 94 S.E. 948, 81 W.Va. 469, Ann.Cas.1918D 510—State v. Flanagan, 87 S.E. 878, 77 W.Va. 505.

63. S.D.—Guernsey v. Tuthill, 82 N.W. 190, 12 S.D. 584.

64. Ga.—Harris v. Black, 85 S.E. 742, 143 Ga. 497.
57 C.J. p. 1067 note 33.

Action by sheriff on bond of coroner acting as sheriff

Where a sheriff obtained judgment on a forthcoming bond and, being disqualified to make a levy of the same, turned over the fieri facias to the coroner, acting as sheriff, it was held that the sheriff, as the party aggrieved, even after he had gone out of office, could bring action on the official bond of the coroner for the coroner's neglect of duty in connection therewith, either in his own name or for the use of anyone he might designate as usee.—Harrell v. Emanuel, 109 S.E. 294, 27 Ga.App. 546

65. N.C.—Carmichael v. Moore, 88 N.C. 29
57 C.J. p. 1067 note 34.

a stranger to the process with respect to which the default occurred.[66] The owner of a judgment, whether or not it was rendered in his favor, is the party entitled to sue for the failure of an officer to make the money on an execution issued thereon or to pay over the money collected.[67] Thus, an assignee of a judgment rendered against an officer for damages arising from his misconduct in office may maintain an action in his own name on the officer's official bond to recover the amount of the damages,[68] and an action cannot be maintained in the name of one who, before its commencement, assigned the judgment to another.[69] Where plaintiff leased property in his own name as landlord, the fact that he listed the property for taxation for certain years as trustee of another does not prevent him from maintaining a suit in his own name on an officer's bond to recover damages for misconduct causing the loss of his landlord's lien.[70]

Single action for full penalty. Where only a single action may be brought on the official bond of a sheriff or constable, for the full penalty thereof, it must be in the name of the nominal obligee;[71] and even a statutory provision that every action shall be brought in the name of the real party in interest will not enable one injured by the officer's default to maintain the action in his own name.[72]

Assignment by obligee to successor in office. Where the bond of a sheriff or constable runs to a named officer and his successors in office, an action may be brought thereon in the name of a subsequent incumbent of the office without any assignment of the bond,[73] provided it is good as a statutory bond,[74] but it has also been held that an action on such a bond may be brought in the name of the person who was the incumbent of the office at the time when the bond was executed and need not be brought in the name of his successor.[75]

Style of action by public officer as obligee. Where the obligee is a public officer, it has been held that, as plaintiff, he may be designated by his official title only, without the addition of his name,[76] although there is also authority to the contrary,[77] but he cannot properly be designated merely by his name without his official title,[78] or be made plaintiff in his personal rather than his official capacity,[79] since his right as obligee is in his official capacity.[80] A fortiori, a suit in the individual name of one who was incumbent of the office when the bond was given but has since gone out of office is unauthorized.[81] An action cannot be brought in the name of the personal representatives of a deceased officer, but must be brought in the name of his successor in office.[82]

Action on bond of deputy. An action on the official bond of a deputy sheriff or constable for a default of such deputy imposing liability on his principal is properly brought in the name of the principal officer individually, and not in his official capacity.[83] Under a statute providing for liability on the official bond of an officer for damages accruing from his unlawful or careless use of a pistol or revolver, an action on the bond of a deputy payable to his principal officer may be maintained in the name of such principal at the relation of the person injured.[84]

Joinder. Under the general rule that all persons having a material interest in the subject matter of a suit must be made parties thereto, as discussed in Parties § 1 f, it has been held that one entitled, under a contract with the owner of property, to a portion of the proceeds thereof is a proper party plaintiff to a suit on the bond of an officer wrongfully seizing such property while the contract remained executory,[85] but there is authority for the view that an action on an officer's bond for his failure to return property levied on when it became his duty to do so may be maintained by one joint

66. Ga.—Jefferson v. Hartley, 9 S E 174, 81 Ga. 716

67. Ala.—Burns v George, 45 So. 421, 154 Ala 626
57 C J p 1068 note 42

68. Iowa—Charles v Haskins, 11 Iowa 329, 77 Am.D. 148

69. Mo—Milliken v. McBroom, 38 Mo 342

70. Ala.—Burton v Dangerfield, 37 So 350, 141 Ala 285.

71. Colo—Taylor v. Blyth, 47 P 662, 9 Colo App 81.
N Y—Davis v. Haffner, 2 Abb Pr. 187
Single or successive actions on bond see supra § 196.

72. Colo—Taylor v. Blyth, 47 P 662, 9 Colo App 81

73. N C—Governor v. Montfort, 23 N C 155.
57 C.J. p 1067 note 22

74. N C—State Bank v Twitty, 12 N C 153
57 C J. p 1067 note 23

75. Va—Governor v. McCulloch, 2 Gratt 175, 43 Va. 175.
57 C.J. p 1067 note 24

76. Ala.—Bagby v. Chandler, 8 Ala 230.
57 C J p 1067 note 25.

77. Ind.—Pegg v Fountain County Treasurer, 3 Blackf 255

78. Ala.—Bagby v. Baker, 18 Ala 653.

79. Ga.—Hopkins v Watts, 80 S E 1001, 141 Ga 345.

80. Ala.—Bagby v. Baker, 18 Ala 653.
Ga—Hopkins v. Watts, 80 S E 1001, 141 Ga 345

81. Ala—Bagby v. Baker, 18 Ala. 653.

82. Tenn.—Cannon v. Snowdon, 4 Humphr. 360.

83. Cal—Hill v New Amsterdam Casualty Co., 286 P. 1103, 105 Cal App 156.

84. W Va—Hatfield v. Wyatt, 130 S E 129, 99 W Va 604.

85. Tex—Brackett v. Hinsdale, 2 Tex.Unrep Cas. 468.

owner of such property without making the other joint owner a party.[86] Under statutes providing that action on the official bond must be brought in the name of the real party in interest or the party aggrieved, the nominal obligee of the bond is not a necessary party plaintiff,[87] unless injured by the default, or in some manner entitled to something that may be recovered on the bond.[88]

b. Defendants

Ordinarily, an action on the official bond of a sheriff or constable should be brought against the officer and his sureties as codefendants.

Ordinarily, an action on the official bond of a sheriff or constable may and should properly be brought against the officer and his sureties as codefendants,[89] and it has been held that the surety cannot be sued without joinder of the officer if the latter has not been sued, is solvent, and is accessible to suit.[90] However, it has also been held that suit may be brought against the surety on the bond without joining the officer;[91] and where, after a default, an officer dies, an action may be brought against his sureties without joining his personal representatives.[92] Where the bond is in terms joint and several, or the statute requires that it be so construed or allows it to be so treated, an action thereon may be maintained against all the sureties jointly,[93] or against one or more of them severally,[94] without joining the officer,[95] or against the officer or his representatives alone,[96] or against the officer and any or all of the sureties.[97]

Where an action on an officer's bond to recover the proceeds of attached property sold by him is brought by one who was not a party to the attachment suit, but who claims to have been a joint owner of the property sold, defendant in the attachment suit is a necessary party.[98] In an action on a sheriff's official bond for the sheriff's improper conduct with respect to attached property, the surety on the bond given to the sheriff to indemnify him against claims of third-party claimants to the attached property is not a necessary or proper party.[99] In an action by an execution creditor, against an officer and the sureties on his bond to recover money alleged to have been collected by the officer on such execution, and converted by him to his own use, an attorney to whom defendants allege the money was paid by the creditor's direction is not a proper party defendant.[1]

Several bonds. Where there is doubt on which of two or more bonds a liability falls,[2] or as to the extent of the liability on each of several bonds,[3] the sureties on both or all of such bonds may and should be made parties defendant.

In action on officer's bond for deputy's default the deputy is not a necessary party defendant,[4] but he may properly be joined, if the case is one in which he is liable to plaintiff,[5] provided, where his liability is in tort, it is permissible to join a cause of action therefor with the contract action on the bond, as discussed in Actions § 93.

86. Ala.—Williams v. Ragan, 45 So. 185, 153 Ala. 397.
57 C.J. p. 1068 note 49.

87. S.D.—Hollister v. Hubbard, 78 N.W. 949, 11 S.D. 461.

88. S.D.—Hollister v. Hubbard, supra.

89. U.S.—Atchison v. Gulf Refining Co., C.A.La., 174 F.2d 476.
Ala.—Turner v. Townes, 141 So. 239, 224 Ala. 562.
Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.
Idaho.—Lorang v. Hays, 209 P.2d 733, 69 Idaho 440.
Mo.—**Corpus Juris cited in** State ex rel. Patterson v. Collins, App., 172 S.W.2d 284, 289.
N.C.—State ex rel. Cain v. Corbett, 69 S.E.2d 20, 235 N.C. 33.
57 C.J. p. 1068 note 51.

90. U.S.—Atchison v. Gulf Refining Co., C.A.La., 174 F.2d 476.

91. Ala.—American Surety Co. of New York v. O'Hara, 169 So. 229, 232 Ala. 616.

92. Ala.—Union Indemnity Co. v. Webster, 118 So. 794, 218 Ala. 468.
57 C.J. p. 1068 note 52.

93. U.S.—McAlister v. Fidelity & Deposit Co. of Maryland, D.C.S.C., 37 F.Supp. 956.
57 C.J. p. 1068 note 53.

94. U.S.—McAlister v. Fidelity & Deposit Co. of Maryland, supra.
57 C.J. p. 1068 note 54.

95. U.S.—Downer v. U.S. Fidelity & Guaranty Co., C.C.A.Pa., 46 F.2d 733.—Cohen v. Maryland Casualty Co., D.C.S.C., 4 F.2d 564.

A sheriff and his deputy were not "necessary parties" and "proper parties" to an action against surety on sheriff's joint and several bond.—McAlister v. Fidelity & Deposit Co. of Maryland, D.C.S.C., 37 F.Supp. 956.

96. U.S.—McAlister v. Fidelity & Deposit Co. of Maryland, supra.
57 C.J. p. 1069 note 56.

97. U.S.—Cohen v. Maryland Casualty Co., D.C.S.C., 4 F.2d 564.—McAlister v. Fidelity & Deposit Co. of Maryland, D.C.S.C., 37 F.Supp. 956.

98. Tex.—Rodrigues v. Trevino, 54 Tex. 198.
57 C.J. p. 1069 note 59.

99. Cal.—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213.

1. Ind.—Wilstach v. State, 58 Ind. 200.

2. S.C.—State v. Bowen, 98 S.E. 864, 112 S.C. 165.
Liability as between two or more bonds see supra § 178.

3. Mich.—Cass County v. Shattuck, 285 N.W. 454, 288 Mich. 555.

Bonds for successive terms

County's bill for an accounting against sheriff was not subject to objection of misjoinder of parties because two different sureties on two different bonds were joined with sheriff as defendant, notwithstanding sureties were not jointly liable for matters complained of but one surety was liable for any defalcation on part of sheriff during first four years of his incumbency and other surety was liable for any defalcation occurring during the succeeding years, since to avoid multiplicity of suits, it was entirely proper to join the parties in one action.—Cass County v. Shattuck, supra.

4. Tex.—Fox v. Cone, 13 S.W.2d 65, 118 Tex. 212.

5. Tex.—Fox v. Cone, supra.

Principal as party to suit on deputy's bond In an action on a deputy's bond by a third person for a default of such deputy for which he is liable to plaintiff, his principal is not a necessary party defendant;[6] but it has also been held that since the principal and the surety on his bond may be liable for the misconduct of the deputy, such principal and his surety are proper and necessary parties to an action against the deputy.[7]

Persons not parties to bond. Since an action against a sheriff or constable and the sureties on his official bond is ex contractu in nature, as discussed supra § 195, one who was not a party to the bond may not properly be joined as a party defendant,[8] and, if joined, should be stricken on proper and timely objection of misjoinder of parties.[9]

c. Intervention and New Parties

Rules governing intervention and bringing in of new parties in civil actions generally apply in actions on the official bond of a sheriff or constable.

Rules governing intervention and bringing in of new parties in civil actions generally, as discussed in Parties §§ 53-84, have been applied in actions on the official bond of a sheriff or constable.[10] Thus, it has been held that, in an action on the official bond of a sheriff or constable against the sureties alone, it is an abuse of the court's discretion to refuse to permit the officer to become a party, on his application to intervene and the motion of the sureties,[11] and in an action by a mortgagee on an officer's bond for his misconduct in a sale under the mortgage, the holder of a note secured by the same mortgage may intervene, under a statute authorizing the intervention in actions of persons who have an interest in the matter in litigation.[12] In an action on the official bond of a sheriff or constable, the court has power to bring in new parties whose presence is necessary to the determination of the case,[13] but new parties cannot be brought in where their joinder would introduce a new and different cause of action or defense.[14] An irregularity in an intervention in an action on a sheriff's official bond may be waived by the failure of defendants to raise a timely objection thereto.[15]

§ 202. —— Process and Appearance

Rules relating to process in civil actions generally apply in actions on the official bond of a sheriff or constable.

In accordance with rules relating to process and the issuance and service thereof in civil actions generally, it has been held that the omission or neglect to comply with a statute requiring the clerk, before issuance of the writ in an action on the official bond of a sheriff, to indorse thereon the name of the party at whose instance and for whose use the suit is instituted does not render the writ illegal, and such omission on any renewed writ does not work a discontinuance of the action.[16] Where, in an action against a sheriff and his surety, the verdict has been directed for the sheriff, it is immaterial that the surety was never served with summons, since the surety could only be liable in the event that liability was established against the sheriff.[17]

§ 203. —— Pleading

a. Complaint, declaration, or petition
b Plea, answer, or affidavit of defense
c. Replication or reply and subsequent pleadings
d. Demurrers
e. Amendment of pleadings
f. Issues, proof, and variance

a. Complaint, Declaration, or Petition

(1) In general
(2) Allegations as to particular matters

(1) In General

In order to state a cause of action in a suit on the official bond of a sheriff or constable, plaintiff's pleading must allege some right in him from which he has been restrained by the malicious act of the officer, or malfeasance or neglect by the officer in the execution of some process in which plaintiff was concerned.

6. Ga.—Griner v Smith, 106 S E 20, 26 Ga App 319

7. N.C.—State ex rel Cain v Corbett, 69 S E 2d 20, 235 N C 33

8. Ga.—Jackson v Norton, 44 S E. 2d 269, 75 Ga App. 650

9. Ga.—Jackson v Norton, supra.

10. Wis.—Williams v. Thrall, 167 N W. 825, 167 Wis 410.

11. S C.—Miller v Gulf, etc., Ins Co, 129 S E. 131, 132 S C 78.

12. Mont.—Maddox v Teague, 47 P 209, 18 Mont. 593.—Maddox v. Radder, 22 P. 386, 9 Mont. 126, reversed on other grounds 14 S Ct. 46, 150 U S 128, 37 L Ed 1025

13. Wis.—Williams v. Thrall, 167 N W 825, 167 Wis 410 57 C J p 1069 note 69.

14. Tex.—U S Fidelity, etc, Co. v. Fossati, 80 S W. 74, 97 Tex 497.

15. Pa.—Commonwealth to Use of Blystone v Davis, 186 A. 382, 122 Pa Super 280

Intervention by party suing on recognizance

Irregularity in intervention of plaintiff alleging cause of action on sheriff's recognizance, because of sheriff's unauthorized release of prisoner taken on writ of capias ad satisfaciendum, in action of assumpsit commenced originally on sheriff's bond, was held not to preclude recovery on recognizance, where question of right to maintain action was not raised in affidavit of defense.—Commonwealth to Use of Blystone v Davis, supra.

16. Md.—Logan v. State, 39 Md. 177.

17. Ark.—Bridwell v. Anderson, 156 S.W.2d 231, 203 Ark. 69.

In order to state a cause of action in a suit on the official bond of a sheriff or constable, the complaint, declaration, or petition must allege some right in plaintiff from the exercise of which he has been restrained by the malicious act of the officer,[18] or it must charge the officer with malfeasance or neglect in his ministerial capacity in the execution of some process in which plaintiff was concerned.[19] The pleading must allege facts, not mere conclusions,[20] but the fact that a declaration pleads matter of evidence does not make it fatally defective.[21] It is not vitiated by a failure to allege the cause of action clearly or in proper form, where it sets forth facts sufficient to support a judgment.[22]

A petition in an action against an officer and a surety on his official bond which alleges that the officer wrongfully attached plaintiff's property under a process against a third person alone, and that the covenants of the official bond, a copy of which is made part of the petition, were thereby broken has been held to show sufficiently that plaintiff intends to assert a cause of action on the officer's official bond for his official misconduct.[23] Where an execution is set out by way of inducement in an action on a bond, a substantial description thereof is sufficient.[24] Where a bond is joint and several, and action is brought thereon after the death of the officer, it is not necessary to notice his death in the declaration.[25] In an action in the name of the nominal obligee of a bond, where that is proper, it has been held unnecessary to aver for whose use the action is brought,[26] although the pleading may also name the use beneficiary.[27]

Conspiracy. Where the complaint alleges that the officer and others were engaged in a conspiracy with respect to plaintiff, facts must be alleged showing concerted action and disclosing the scheme or conspiracy.[28]

Prayer for relief. A declaration in an action on the official bond of a sheriff or constable is not subject to demurrer because the damages prayed are larger than the penalty of the bond.[29] The fact that plaintiff asks judgment for a statutory penalty which cannot be recovered in an action, but only in summary proceedings, does not render the declaration bad on general demurrer.[30]

(2) Allegations as to Particular Matters
- (a) In general
- (b) Breach of condition of bond

(a) In General

As a general rule, in an action on the official bond of a sheriff or constable, the complaint, declaration, or petition should show compliance with all conditions precedent to the right of recovery, the plaintiff's interest in the subject matter of the action, the provisions or conditions of the bond, the fact that the officer acted in his official capacity, and that the plaintiff has suffered some injury or damage as a result of the officer's default or misconduct.

In an action on the official bond of a sheriff or constable the complaint, declaration, or petition should show compliance with all conditions precedent to the right of recovery;[31] but it has been held that a failure to show that leave of court to bring action has been obtained, where such leave is required, is waived by defendants unless prompt objection is made.[32] Plaintiff's pleading must also show his interest in the subject matter of the action,[33] although in an action for misfeasance preventing the collection of a judgment originally rendered in favor of another, plaintiff may allege his ownership of such judgment in general terms without stating how it was acquired.[34] Under a statute providing that pending removal proceedings of an officer another person may be appointed to the office for the time being and that such person shall execute a bond conditioned to pay the suspended officer all damages and costs that he may have sustained by reason of such suspension if it should ap-

18. U.S.—South v. Maryland, Md., 18 How. 396, 15 L.Ed. 433.

19. U.S.—South v. Maryland, supra
57 C.J. p. 1069 note 75

20. La.—Bolton v. Severio, App., 25 So.2d 115.

21. Mo.—State v. Baird, App., 186 S.W. 587.

22. Mo.—State v. Owens, 207 S.W. 241, 200 Mo.App. 468—State v. Baird, App., 186 S.W. 587

23. Ky.—Hill v. Ragland, 70 S.W. 634, 114 Ky. 209, 24 Ky.L. 1053.

24. Ark.—Adams v. State, 14 Ark. 17

25. Ky.—Commonwealth v. Hughes, 10 B.Mon. 461.

26. Ill.—People v. Jamison, 157 Ill. App. 546.

27. Tex.—Bordelon v. Philbrick, 84 S.W.2d 710, 125 Tex. 460.

28. U.S.—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Casualty Co. of New York, C.C.A.Mo., 107 F.2d 343.

29. Pa.—Commonwealth v. Lynd, 9 Wkly.N.Cas. 510

Liability on bond as limited to penal sum see supra § 181.

30. Ky.—Commonwealth v. Bradley, 1 Litt. 48

31. N.D.—Felch v. Olsness, 204 N.W. 848, 53 N.D. 18.
57 C.J. p. 1073 note 30.

Notice and demand

An action against a constable and his sureties is fatally defective if it fails to show that the notice and demand required by statute were given.—Sopko v. Esslinger, 47 Pa.Dist. & Co. 155, 44 Lack.Jur. 221.

32. Wash.—Eberhart v. Murphy, 188 P. 17, 110 Wash. 158, 194 P. 415, 113 Wash. 449.
57 C.J. p. 1073 note 32.

33. Or.—Davis v. Hall, 143 P. 893, 72 Or. 220, Ann.Cas.1916D 922.
57 C.J. p. 1070 note 4.

34. Ala.—Burns v. George, 24 So. 718, 119 Ala. 504.

pear that the cause or causes of removal are insufficient or untrue, a suspended constable, in an action on the bond executed by the person temporarily appointed constable, must allege that the causes of removal were insufficient or untrue.[35]

Validity and provisions of bond. Although there is some authority to the contrary,[36] it is generally held that the complaint, declaration, or petition in an action on the official bond of a sheriff or constable should set out the provisions or condition,[37] and state the penalty,[38] of the bond, or, where required by statute or rule of court, attach a copy thereof;[39] and it should allege distinctly that it is the official bond of the officer as such,[40] or should allege in effect that the suit is on the bond as a common-law undertaking.[41] It must also be averred that the persons sued as sureties executed the bond,[42] and that they were such sureties at the time of the breach complained of;[43] but it need not be alleged that a foreign surety company was authorized to do business in the state,[44] the contrary fact being a matter of defense.[45] In a declaration on a bond given in pursuance of an order of a court or other agency, it is not necessary to set out such order;[46] and in an action on a bond given as additional security, under a statute providing therefor, plaintiff need not show how the necessity for such additional security arose, or state that it was given in pursuance of a requisition of the officers having a right to require it.[47] A profert of a certified copy of the bond has been held to be requisite.[48]

It has been held that, where the complaint alleges in express terms the execution of the bond, it comprehends every act essential to a complete making and delivery of the bond,[49] and that it need not allege that conditions precedent to the bond becoming a valid obligation were performed,[50] or expressly allege the approval and filing of the bond.[51] Where express approval is not requisite it need not be averred,[52] and it is not necessary that any disapproval be expressly negatived by the complaint,[53] but, where approval of the bond is necessary to its effectiveness or sufficiency, the complaint must show an approval thereof by the proper officer or authority,[54] or state facts showing a waiver of the approval,[55] or facts which estop the sureties from urging its nonapproval.[56]

Nonpayment of penalty. In a declaration on the official bond of a sheriff or constable it has been held not to be necessary to allege the nonpayment of the penalty of the bond by the obligors, but to be sufficient for the assignment of the breach to allege the nonpayment of the sum due from the officer whose duty it was to pay it;[57] but there is authority to the contrary that the omission of an averment of the failure of defendants to pay the penalty of the bond is fatal.[58] Where the bond is joint and several and the action is brought after the death of the officer, it is not necessary to allege nonpayment of the penalty by the officer's representatives.[59]

Official capacity of officer. A complaint, declaration, or petition, in an action on the official bond of a sheriff or constable, must allege facts which establish that the action is against the officer in his official capacity.[60] However, the complaint need not allege that the sheriff had performed the acts necessary to qualify for sheriff,[61] it being sufficient that

35. Tex.—Ormes v. Quinn, Civ. App., 113 S.W.2d 242.

36. Ala.—Deason v. Gray, 66 So. 646, 189 Ala. 672.
57 C.J. p. 1070 note 84

37. Ky.—Hill v. Ragland, 70 S.W. 634, 114 Ky. 209, 24 Ky.L. 1053.
57 C.J. p. 1070 note 85
Petition held sufficient
Ky.—Mullins v. County Court, 13 Ky. Op. 273.

38. Mo.—State v. Johnson, 78 Mo. App. 569.

39. Pa.—Commonwealth v. Ostendorf, 19 Pa. Dist. 18

40. Cal.—Ghiradelli v. Bourland, 32 Cal. 585
57 C.J. p. 1070 note 88

41. Tex.—Bordelon v. Philbrick, 84 S.W.2d 710, 125 Tex. 460
Pleading held sufficient
Tex.—Bordelon v. Philbrick, supra.

42. Neb.—Philadelphia Fire Assoc. v. Ruby, 79 N.W. 723, 58 Neb. 730
57 C.J. p. 1070 note 89.

43. Mont.—Ferrat v. Adamson, 163 P. 112, 53 Mont. 172
57 C.J. p. 1070 note 90

44. S.D.—Gray v. Sanderson, 238 N.W. 137, 59 S.D. 41

45. S.D.—Gray v. Sanderson, supra.

46. Ill.—McElhanon v. Washington County Ct., 54 Ill. 163
57 C.J. p. 1070 note 98

47. S.C.—State Treasurers v. Taylor, 18 S.C.L. 524

48. Ark.—Adams v. State, 6 Ark. 497.

49. S.D.—Gray v. Sanderson, 238 N.W. 137, 59 S.D. 41.

50. S.D.—Gray v. Sanderson, supra

51. S.D.—Gray v. Sanderson, supra
Registration or recording
The complaint need not show the registration or recording of the bond
Ind.—State v. Cromwell, 7 Blackf. 70
N.C.—State v. Boyd, 26 S.E. 700, 120 N.C. 56.

52. Ill.—Davis v. Haydon, 4 Ill. 35.
57 C.J. p. 1070 note 95

53. Ill.—Davis v. Haydon, supra.

54. Ky.—Hill v. Ragland, 70 S.W. 634, 114 Ky. 209, 24 Ky.L. 1053.
57 C.J. p. 1070 note 92
Want of approval as affecting liability of sureties see supra § 178.

55. Neb.—Philadelphia Fire Assoc. v. Ruby, 79 N.W. 723, 58 Neb. 730

56. Neb.—Philadelphia Fire Assoc. v. Ruby, supra.

57. W.Va.—State v. Phares, 24 W. Va. 657

58. Ky.—Wells v. Commonwealth, 8 B.Mon. 459.

59. Ky.—Commonwealth v. Hughes, 10 B.Mon. 461.

60. Ariz.—McFadden v. Miller, 42 P. 2d 1101, 45 Ariz. 324.
Pleading held sufficient
Ariz.—McFadden v. Miller, supra.

61. S.D.—Gray v. Sanderson, 238 N.W. 137, 59 S.D. 41.

it alleged that defendant was the sheriff;[62] and a pleading which states facts sufficient to show that the officer is such de facto is not insufficient because it fails to show that he is such officer de jure.[63]

Official character of act or default. In order to charge the sureties on the official bond of a sheriff or constable, in an action thereon, facts must be averred in the complaint, declaration, or petition which show that the act or default complained of was committed by the officer in his official capacity.[64] Where facts are set forth which contradict an allegation that the officer acted in his official capacity, the complaint is demurrable.[65] An allegation that the injuries complained of were inflicted on a day subsequent to the execution of the process is not fatally inconsistent with an allegation that such injuries occurred in the execution thereof, where it is shown that the process was only partially executed on the first day.[66]

Default of deputy. In an action on an officer's bond for default of a deputy the complaint need not allege in terms that the officer is liable for the wrongful act or omission of the deputy on which the action is founded, since his liability is a question of law,[67] but the complaint must allege facts showing that the alleged deputy was in fact such,[68] and was acting under color of office or in performance of an official duty,[69] and was guilty of some default or misconduct therein.[70]

Damage. In an action on the official bond of a sheriff or constable, the complaint, declaration, or petition must show that plaintiff has suffered some injury or damage as a result of the default or misconduct complained of,[71] the manner of such damage,[72] that it was fairly and legally consequent on such default or misconduct,[73] the amount thereof,[74] and that such damage has not yet been paid.[75] However, where the act or misconduct on which the action is founded constitutes a criminal offense, it is not necessary to allege any pecuniary loss or actual injury.[76] In an action for a wrongful seizure an averment that the goods seized and still held

62. S.D.—Gray v. Sanderson, supra

63. Minn—Ramsey County v Brisbin, 17 Minn 451.

64. U S—Kilkes v. Askew, D.C Okl., 32 F Supp 802
57 C J p 1072 note 27.

Lawful process or authority
In order to recover of sureties on sheriff's bond for trespass committed by sheriff, claimant has burden to allege that acts complained of were done under and by virtue of lawful process or authority and not done under pretense or color of authority —Bailey v. Moseley, Tex Civ App, 77 S W 2d 603, error dismissed.

Arrest without warrant
In order to hold sheriff's surety for injury received during attempt to arrest plaintiff without warrant in mistaken belief that plaintiff committed felony, plaintiff must allege in effect that sheriff honestly acted on reasonable belief that plaintiff committed felony.—Bassinger v. U S. Fidelity & Guaranty Co, C C.A Neb, 58 F 2d 573, certiorari denied U. S Fidelity & Guaranty Co v. Bassinger, 53 S.Ct. 21, 287 U S 622, 77 L. Ed. 540.

Pleadings held sufficient
U S—Bassinger v. U S. Fidelity & Guaranty Co, C.C A Neb, 58 F 2d 573, certiorari denied U. S Fidelity & Guaranty Co v. Bassinger, 53 S.Ct. 21, 287 U S. 622, 77 L Ed 540
Ga.—Goforth v. Fidelity & Casualty Co of N. Y., 55 S E.2d 656, 80 Ga App. 121—Smith v. Glens Falls Indemnity Co, 32 S.E 2d 105, 71 Ga App. 697.
Ind—State ex rel. Penrod v. French, 51 N.E 2d 858, 222 Ind. 145, 149 A. L.R. 1084.
Kan—Estell v. New Amsterdam Cas Co., 192 P.2d 194, 164 Kan 712
Tenn—State v. National Surety Co, 39 S W 2d 581, 162 Tenn. 547.
57 C J. p 1072 note 27 [c].

Pleadings held insufficient
Ga—Culpepper v. U S Fidelity & Guaranty Co, 33 S E 2d 526, 72 Ga App. 171
Tex—Bailey v Moseley, Civ App, 77 S W 2d 603, error dismissed.
57 C J. p 1072 note 27 [d]

65. Ky—Hogg v. Lorenz, 29 S.W.2d 17, 234 Ky. 751.
57 C J. p 1073 note 28.

66. W Va—State v. Miller, 139 S E. 711, 104 W.Va. 226.

67. Ala—Deason v. Gray, 66 So 646, 189 Ala. 672.

68. U S—Trammell v. Fidelity & Cas Co of New York, D.C S C, 45 F Supp. 366

69. La—Gray v. De Bretton, 188 So 722, 192 La 628.

Pleadings held sufficient
Ala—Harwell v. Morris, 51 So 2d 511, 255 Ala 344—Leath v. Smith, 200 So. 623, 240 Ala. 639
La—Robertson v. Palmer, App, 55 So.2d 68—Britt v. Merritt, App, 35 So 2d 281.

Pleadings held insufficient
Cal—Clement v Dunn, 299 P. 545, 114 Cal App. 60.
La—Bolton v. Sevario, App., 25 So. 2d 115.
Wash—Nelson v. Bartell, 103 P.2d 30, 4 Wash 2d 174.

70. Cal—Clement v Dunn, 299 P. 545, 114 Cal App 60.
La—Gray v De Bretton, 188 So. 722, 192 La 628—Bolton v. Sevario, App, 25 So 2d 115.
Wash—Nelson v. Bartell, 103 P 2d 30, 4 Wash.2d 174

Pleadings held sufficient
Ga—Richards v American Surety Co of New York, 171 S.E. 924, 48 Ga App. 102.
Ill—Greene v Toman, 48 N.E 2d 760, 319 Ill App 252
La—Britt v. Merritt, App., 35 So.2d 281.
Tenn—State v National Surety Co., 39 S W.2d 581, 162 Tenn. 547

71. U.S.—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Casualty Co of New York, C.C. A.Mo., 107 F.2d 343.
Ky—Barnett v. Gilbert, 133 S W 2d 529, 280 Ky. 402
57 C J. p 1073 note 33.

72. Ark.—State v Kirby, 6 Ark 453
Pa—Withrow v. Commonwealth, 10 Serg. & R 231.

73. U S.—Trammell v. Fidelity & Casualty Co of New York, D C.S C., 45 F Supp 366.
Ga—Trulock v. Lamb, 157 S E. 100, 42 Ga.App. 601
57 C J. p 1073 note 35.

74. Cal.—Sparks v. Buckner, 57 P. 2d 1395, 14 Cal App 2d 213.

Complaint held sufficient
Cal—Sparks v. Buckner, supra.

75. Mo—State ex rel. Schwettman v Oberheide, App., 39 S W.2d 395.

Omission cured by verdict
In suit on constable's bond, failure to allege nonpayment of damages sustained would be cured by verdict for plaintiff—State ex rel. Schwettman v. Oberheide, supra.

76. Ga.—Copeland v. Dunehoo, 138 S.E. 267, 36 Ga.App. 817.

by the officer belong to plaintiff and are of a specified value lays a sufficient foundation for a measure of damages.[77]

(b) Breach of Condition of Bond

Plaintiff's pleading must allege facts showing a breach of the condition of the bond, and it must show that the default on which the action is based occurred within the period covered by the bond.

Recovery may be had in an action on the official bond of a sheriff or constable for such breaches only as are set out and relied on in the declaration, petition, or complaint,[78] which must accordingly allege with certainty and precision facts showing a breach of the condition of the bond.[79] A particular breach must be alleged,[80] and it is not sufficient to allege in general terms that the officer did not properly perform his duties,[81] or to aver a breach which is in the alternative.[82] Where the allegations concerning the default or misconduct on which the breach is predicated are such as would be sufficient as to the officer himself, they are sufficient as to his sureties,[83] but it has been held that, where a petition sets out a cause of action in tort against the sheriff, it does not establish a cause of action against the sureties on the bond for the reason that their liability is based on contract.[84] Assignments of breaches of an officer's bond are to be construed strictly against the pleader.[85]

The complaint, petition, or declaration should show that the default on which the action is founded occurred after the execution of the bond,[86] and it must ordinarily be alleged that the default occurred during the officer's term, for which the sureties were bound,[87] or, if it occurred after the expiration of the officer's term, the complaint must show, as against the sureties, that a successor had not been elected and qualified.[88]

It has been held that, where the declaration contains several assignments of breaches, some of which are sufficiently averred and others not, the judgment on demurrer must be for plaintiff.[89] Where the breach alleged is not within the reasonable meaning of the condition of the bond, the declaration is demurrable,[90] and a judgment rendered on a declaration in which any breaches are alleged which are not within the condition of the bond is bad.[91] Similarly, a complaint claiming more than the amount of the penalty named in the bond is demurrable as to the excess.[92] Where the causes of action which may be joined are classified by the statute, it has been held that the assignment in one count of two or more breaches of an officer's bond does not render the declaration demurrable under a statute making the improper uniting of causes of action a cause for demurrer on the ground that such provision refers only to the union of actions of different classes.[93]

Charging excessive fees. A complaint, declaration, or petition on the official bond of a sheriff or constable assigning as a breach that the officer unlawfully demanded and received a specified sum beyond his legal fees, for certain services specified, is good on general demurrer.[94]

Failure to execute process. In an action on the official bond of a sheriff or constable for his failure to levy an execution, plaintiff must allege in his complaint, declaration, or petition that defendant in the execution had property which could have been found by the officer,[95] and on which the levy

77. Kan.—Richardson v. Samuelson, 26 P. 12, 45 Kan. 589.

78. Minn.—Manter v. Petrie, 143 N. W. 907, 123 Minn. 333.
57 C.J. p 1071 note 6.

79. Ga.—Berrie v. Taylor, 43 S.E. 411, 117 Ga. 56.
57 C.J. p 1071 note 7.
Pleadings held sufficient
(1) For action based on malicious prosecution by the officer.
Ala.—Pittman v. Johnson, 140 So. 371, 224 Ala. 291.
N.C.—Hedgepeth v. Swanson, 27 S.E. 2d 122, 223 N.C. 442
(2) For action based on careless or unlawful use of a pistol or revolver by the officer.—Hatfield v. Hutton, 148 S.E. 2, 107 W.Va. 230.

80. N.Y.—People v. Brush, 6 Wend. 454.

81. N.C.—Governor v. Harrison, 20 N.C. 599.
57 C.J. p 1071 note 9.

82. U.S.—Hazel v. Waters, D.C., 11 F.Cas.No. 6,283, 3 Cranch C.C. 420.
57 C.J. p 1071 note 10.

83. Kan.—Pfannenstiel v. Doerfler, 105 P.2d 886, 152 Kan. 479.
N.C.—Hedgepeth v. Swanson, 27 S.E. 2d 122, 223 N.C. 442.
S.D.—Guernsey v. Tuthill, 82 N.W. 190, 12 S.D. 584.
Sufficiency of allegations as to default in action against officer alone see supra § 155.

84. Ga.—Jackson v. Norton, 44 S.E. 2d 269, 75 Ga.App. 650.

85. Ill.—People v. Jamison, 157 Ill. App. 546.

86. N.J.—State v. Roberts, 12 N.J. Law 114, 21 Am.D. 62.
57 C.J. p 1071 note 19.
Liability for defaults occurring prior to execution of bond see supra § 178.

87. Ky.—Commonwealth v. Hughes, 10 B.Mon. 461.
Miss.—Carmichael v. Governor, 4 Miss. 236.
Duration of liability on bond see supra § 180.

88. Ind.—Urmston v. State, 73 Ind. 175.

89. Ark.—Adams v. State, 6 Ark. 497.

90. Fla.—Jennings v. Bobe, 40 So. 194, 51 Fla. 229.

91. Pa.—Brownfield v. Commonwealth, 13 Serg. & R. 236.

92. Ark.—Albie v. Jones, 102 S.W. 222, 82 Ark. 414.

93. Mo.—State v. Davis, 35 Mo. 406.

94. Ind.—State v. Gresham, Smith 94.

95. Ind.—Montgomery v. State, 53 Ind. 108.
N.Y.—Lawton v. Erwin, 9 Wend. 233.

might have been made,[96] and that such property was of some value,[97] and, where the statute makes it the duty of an officer to levy unless otherwise directed by plaintiff, it has been held necessary to allege that the officer was not directed by plaintiff or his agent not to make a levy.[98] Similarly, in an action for failure to execute a capias ad satisfaciendum, the declaration must aver that, while the officer held the execution, defendants therein, or some of them, were within his bailiwick, and might have been arrested.[99]

In an action for failure to make the money on an execution, a complaint alleging that property was levied on by the officer and advertised for sale as property of the execution debtor is sufficient, without alleging that it was his property.[1] Where the action is for failure to levy an attachment, the petition must allege that plaintiff prosecuted his attachment suit to final judgment,[2] since otherwise no injury to plaintiff is shown.[3] It has been held that a petition in an action based on the officer's neglect of duty in carrying into effect an execution issued by a justice of the peace should specifically state the facts necessary to give jurisdiction to the justice.[4] In debt against an officer on his official bond for not making the money on an execution, it is not a sufficient breach to allege merely that he did not sell property taken on execution, but it should also be alleged that he did not have the money before the court at the return day.[5] Where the action is for failure to execute a writ of replevin, the tender of a sufficient bond must be averred.[6]

Wrongful seizure. A complaint, in an action on the official bond of a sheriff or constable, alleging that the officer wrongfully took and carried away designated property belonging to plaintiff,[7] or that he levied execution issued on a judgment which he knew had become dormant, so that no execution could rightfully issue or sale be had thereon,[8] sufficiently states a cause of action for a wrongful seizure. The failure of the complaint to describe the property seized is not fatal, as amounting to a failure to state a cause of action,[9] and the defect may be reached only by the remedy for indefiniteness and uncertainty.[10] Where the action is based on a seizure of exempt property, the declaration must state facts showing the right to the exemption,[11] but where, under the statute, property up to a prescribed value may be claimed as exempt in lieu of that specifically exempted by statute, it has been held that plaintiff need not allege that he did not possess property of the character specifically exempted,[12] or that his entire property, including that levied on, did not exceed in value the statutory amount.[13] The pleading must sufficiently allege that plaintiff is entitled to possession of the seized property.[14]

Loss of property. A complaint in an action on the official bond of a sheriff or constable by a plaintiff in replevin for the loss of the property is defective where it does not state that the replevin action had been prosecuted to final judgment.[15] Where the action is for failure safely to keep attached property to satisfy the execution in the attachment

96. Ark.—State v. Kirby, 6 Ark. 453
57 C.J. p 1073 note 41.

Omission of statutory allegation

Motion against sheriff and sureties on official bond based on failure or refusal to levy on or sell property under execution, although omitting statutory allegation "when same might have been done," was held sufficient, in view of other allegations.—Blanscet v. Palo Duro Furniture Co., Tex.Civ.App., 68 S.W.2d 527.

97. W.Va.—Commonwealth v. Fry, 4 W.Va. 721.

98. Ind.—State v. Emmons, 88 Ind. 279—Montgomery v. State, 53 Ind. 108.

99. Ind.—Jones v. State, 5 Blackf. 492.
N.Y.—Lawton v. Erwin, 9 Wend. 233.

1. Ala.—Smith v. Castellow, 6 So. 750, 88 Ala. 355.

2. Mo.—Shanklin v. Francis, 59 Mo. App. 178.
W.Va.—Commonwealth v. Fry, 4 W. Va. 721.

3. Mo.—Shanklin v. Francis, 59 Mo. App. 178.

4. N.Y.—Lawton v. Erwin, 9 Wend. 233.
57 C.J. p 1074 note 48.

5. Ark.—State v. Holleman, 21 Ark. 413—State v. Engles, 5 Ark. 26

6. Ark.—State v. Stephens, 14 Ark. 264

7. Ala.—Matlock v. Johnson, 88 So. 182, 17 Ala.App. 669.
Ga.—Jenkins v. Dunlop Tire & Rubber Corp., 30 S.E.2d 498, 71 Ga. App. 255.

8. Ga.—Harris v. Black, 85 S.E. 742, 143 Ga. 497.

9. Ala.—Rasco v. Jefferson, 38 So. 246, 142 Ala. 705

10. Ala.—Rasco v. Jefferson, supra

11. Ill.—People v. Zingraf, 43 Ill. App. 337.
57 C.J. p 1074 note 58.

12. Mo.—State v. Brady, 53 Mo.App. 202.

13. Mo.—State v. Brady, supra.

14. S.D.—Gray v. Sanderson, 238 N.W. 137, 59 S.D. 41.

Pleading held sufficient

(1) Complaint alleging sheriff's unlawful seizure and holding of possession of plaintiff's dwelling against plaintiff has been held a sufficient allegation of plaintiff's right to possession and ownership.—Gray v. Sanderson, supra.

(2) An allegation in a petition that the officer seized certain property while in plaintiff's possession and by force removed it from his possession and refused to deliver it to him is a sufficient averment of plaintiff's possession and the officer's interference therewith.—Richardson v. Samuelson, 26 P. 12, 45 Kan. 589

(3) A petition alleging that plaintiff was in possession of certain property by virtue of a chattel mortgage and that by reason of the officer's seizing and holding the property a right of action accrued to plaintiff has been held sufficient after judgment as to the ownership of plaintiff.—Richardson v. Samuelson, supra.

15. Ark.—Southern Orchard Planting Co. v. Gore, 102 S.W. 709, 83 Ark. 78.

suit, an allegation that plaintiff lost his debt by reason of such neglect is not essential.[16] In an action for negligence in suffering attached property to be wasted, a petition which alleges that the property has been attached as the property of the debtor, and that the attachment lien had been foreclosed, and an order for the sale of the property issued, is sufficient, although it does not aver that the attached property actually belonged to the debtor or was subject to attachment.[17]

Failure or refusal to deliver property A complaint in an action on the official bond of a sheriff or constable for the officer's failure to deliver property must show plaintiff's right to have it delivered to him.[18] A complaint alleging as a breach of the bond that the officer refused to deliver possession of property taken in an action of detinue on a defendant in such action tendering him a bond need not set out either the writ of detinue[19] or the bond tendered;[20] and it is not demurrable because it shows on its face that the property was in the custody of the law.[21]

Wrongful sale. In an action on the official bond of a sheriff or constable for wrongfully selling property which it was the duty of the officer to reserve from sale, an allegation that the owner requested him to reserve it is mere surplusage [22] Where the action is for selling mortgaged property, an allegation in the complaint that the officer levied on and sold the property sufficiently charges that he levied on and sold all of it [23] In an action for selling plaintiff's property under process against another person who was in possession thereof, it is not necessary to allege specifically that the property was not subject to sale on execution against the holder, but an averment of title in plaintiff is sufficient.[24] A complaint alleging that plaintiff demanded his personal property exemptions in time, but that the officer failed and refused to allot such exemptions to him, and afterward sold the property and applied the money to executions in his hands, sufficiently alleges a breach of the bond [25]

Failure to sell; sale at inadequate price. A declaration in an action on the official bond of a sheriff or constable which alleges that the officer neglected to sell property levied on under execution issued under a judgment, whereby plaintiff lost his debt, states a cause of action for such failure to sell,[26] except that, where the property was such as might have been relieved by giving a forthcoming bond, it should be alleged that no such bond was given [27] It is not essential to the statement of a cause of action that plaintiff allege anything more as to the execution debtor's interest in the property than that the officer had levied on and seized all his right, title, and interest therein,[28] and it is not necessary that the value of such interest be stated,[29] but a petition which fails to set forth the value of the property levied on or to aver that it would have been sufficient, if sold, to satisfy plaintiff's claim is insufficient to authorize the entry of a judgment by default for the amount of such claim.[30] A specific allegation that the failure or refusal to sell was wrongful is not necessary.[31]

In an action on a sheriff's or constable's official bond for damages caused by the illegal and fraudulent conduct of the officer in selling property of plaintiff on execution, by reason of which the property was sold for much less than its value, it is not necessary to specify the illegal and fraudulent acts.[32]

Failure to convey property sold. In an action on the official bond of a sheriff or constable for failure to convey to the purchaser property alleged to have been sold by the officer under execution, the declaration should state that the execution was levied on the property,[33] and that the property belonged to

16. Ark —Cotton v. Atkinson, 13 S W. 415, 53 Ark 98

Loss of property during interpleader proceedings

In action for damages against former sheriff and surety on his bond, complaint alleging that sheriff levied on property under execution, that third party claims were filed, that sheriff instituted interpleader proceedings which were determined in favor of the execution plaintiff, and that a goodly portion of property had slipped from sheriff's control but not because he considered himself not further bound to keep property for failure of execution plaintiff to give an indemnity bond, was sufficient as against general demurrer —Aker v Coleman, 88 P 2d 869, 60 Idaho 118.

17. Tex —Casey v. Douglass, App., 16 S W. 172

18. Ark —Southern Orchard Planting Co v. Gore, 102 S.W. 709, 83 Ark 78.
57 C J. p 1075 note 68.

19. Ala —Pruett v. Williams, 47 So. 318, 156 Ala. 346.

20. Ala —Pruett v. Williams, supra.

21. Ala —Pruett v Williams, supra.

22. Ark —Crow v. State, 23 Ark 684

23. Ind —McDaniel v State, 20 N. E 739, 118 Ind. 239.

24. Ind —Keck v. State, 39 N.E 899, 12 Ind App. 119.

25. N C —State v. Kenan, 94 N C 296

26. Ark —Mayfield Woolen Mills v. Lewis, 117 S.W. 558, 89 Ark. 488, 16 Ann Cas. 1041.

27. Ark —State v. Hammett, 7 Ark. 492.

28. Mo —State v. Nolte, App., 187 S. W 896, reversed on other grounds, Sup, 203 S W. 956

29. Mo —State v. Nolte, supra

30. Pa.—Baer v. Kuhl, 8 Pa.Dist. 389.

31. Mo —State v. Nolte, App, 187 S W. 896, reversed on other grounds, Sup., 203 S.W. 956.

32. Ind —State v. Gresham, 1 Ind. 190, Smith 94
57 C.J. p 1075 note 77.

33. U S —Hazel v Waters, D C., 11 F.Cas No 6,283, 3 Cranch C C. 420.

defendant in the execution;[34] and it should describe such property with certainty.[35]

Failure to collect. In declaring on the official bond of a sheriff or constable for his failure to collect an account for fee bills, it must be alleged that the fees were due and owing to the relator.[36] An averment that, if the officer did not collect the money on a fee bill placed in his hands, it was his own neglect and fault is not sufficient to make him liable under a statute declaring him responsible for any injury resulting from a failure to collect such a bill when by proper diligence it might have been collected.[37] In an action of debt against an officer and his sureties for his failure to collect and pay over militia fines, the declaration must set forth the names of the persons against whom the fines were assessed, and the several amounts of the fines, as stated in the certificate of the president of the court-martial.[38]

Failure to pay over money. Where an action is brought on the official bond of a sheriff or constable for failure to pay over money, the collection or receipt thereof by the officer must be positively averred in the complaint, declaration, or petition,[39] and there must also be alleged the right of plaintiff to receive the money,[40] the officer's duty to pay it over,[41] and his failure to make such payment.[42] In an action for failure to pay over various moneys, however, a general averment of the receipt of the aggregate amount and failure to pay it over is sufficient without specifying each particular item received or each item of defalcation.[43] The fact that the sum alleged to have been collected or received by the officer is greater than that which was due on the execution in his hands does not vitiate a declaration.[44] Where a demand is necessary to render the officer liable for failing to pay over money or to constitute such failure a breach of his bond, a demand and refusal must be alleged,[45] although it has been held not necessary to set out the particular time at which and manner in which the demand was made;[46] but, where a demand is not necessary, a failure to allege its making is immaterial.[47]

An express averment that the process under which the officer collected the money was directed to him is not essential if that fact can be implied from the other facts alleged.[48] In an action for failure to pay over money collected on a county levy it is not necessary to allege that the levy was made by a majority of the justices of the county, or that they had all been summoned to attend the court.[49] It has been held that a declaration for failure to pay over money collected under execution is not fatally defective when it does not allege any judgment to warrant the execution.[50] Where a sheriff, acting as tax collector, has rendered an account of the taxes collected by him in a settlement with the county treasurer, which account is not itemized, it is not necessary, in an action on his bond for failure to pay over part of the money, for the complaint to specify any errors in such settlement.[51]

Taking insufficient bond. A pleading in an action for breach of the sheriff's bond by reason of his redelivery of attached property without taking a sufficient statutory forthcoming bond or replevin bond must state all the facts essential to such a cause of action.[52] Thus, a declaration or petition which does not allege negligence on the part of the officer in taking or approving an insufficient bond is fatally defective.[53] A declaration alleging that the officer did not well and faithfully perform his official duty in the premises, and under this allegation making the necessary specifications, suffi-

34. U S —Hazel v. Waters, supra
35. U S —Hazel v. Waters, supra.
36. Ky —Cobb v. Commonwealth, 3 T.B Mon 391
37. Ky —Walters v. Chinn, 1 Metc 499.
38. Ala —Chapman v. Weaver, 19 Ala 626.
39. Ky —Walters v. Chinn, 1 Metc 499
57 C J. p 1076 note 94.
40. Ind —Meriam v. State, 7 Blackf. 245.
57 C.J. p 1076 note 95.
41. Ohio —Lavery v. Bollinger, App, 44 N.E 2d 479
57 C.J. p 1076 note 96.
42. Ohio.—Lavery v. Bollinger, supra
57 C J. p 1076 note 97—48 C.J. p 665 note 18 [a] (10).
43. Idaho.—State v. McDonald, 40 P. 312, 4 Idaho 468, 95 Am.S R 137
57 C J. p 1076 note 98.
44. W Va —State v Citizens' Trust, etc, Co, 77 S E. 902, 72 W Va 181.
45. Ky —Harris v. Perry, 2 Bush 101.
57 C J p 1076 note 2
Necessity for demand see supra § 188
46. Ky —Harris v. Perry, supra.
57 C J p 1077 note 3
47. Ky —Commonwealth v. Hughes, 10 B Mon 461
57 C J. p 1077 note 4.
48. Ky —Commonwealth v. Hughes, supra
49. W.Va.—State v. Phares, 24 W. Va. 657.
50. Pa —Ricketson v. Commonwealth, 51 Pa 155.
57 C.J p 1077 note 8
Misapplication of proceeds of sale
In an action on the official bond of a sheriff or constable for the improper application of the proceeds of an execution sale, it is not necessary that the complaint should set out the judgment on which the execution issued.—State v. Hamilton, 32 Ind. 104.
51. N.C.—Greene County v. Taylor, 77 N C 404
52. Ala —Campbell v. Tucker, 154 So. 821, 23 Ala App. 100, certiorari denied 154 So 825, 228 Ala 658.
Pleading held sufficient
Ala —Campbell v. Tucker, supra.
53. Okl.—National Surety Co. v. Morand, 217 P. 870, 92 Okl. 60.

ciently alleges a breach of the bond,[54] and it is not necessary to set forth the suit on the replevin bond and the failure of plaintiff to obtain satisfaction thereby.[55] It is not necessary in such an action to allege the residence of either the principal or the sureties on the replevin bond,[56] or to aver, for the purpose of showing its insufficiency, that the obligors had no property outside of the state,[57] but it is sufficient to state that they had no property within the state.[58]

Failure to return process. The complaint in an action on the official bond of a sheriff or constable for his failure to return an execution should set out the judgment on which the execution issued;[59] and, where the execution was issued by a justice of the peace, it has been held necessary to state facts showing that the justice had jurisdiction.[60] An allegation in merely general terms that the officer did not make legal service and return of an execution placed in his hands is insufficient as an averment of failure to return the writ,[61] but a charge that the officer did not return an execution within the time limited by law is a good assignment of a breach of the bond.[62] Where the action is under a statute making the sheriff and his sureties liable for the amount of an execution and damages if the sheriff neglects, "without reasonable excuse," to return the execution within a certain time, it has been held that the petition must allege that the delay to make the return was without reasonable excuse.[63]

False return. In an action on the official bond of a sheriff or constable for a false return, the pleading must allege all facts essential to such a cause of action.[64] Thus, it is not sufficient for plaintiff to allege merely that a false return was made,[65] but the declaration should state the nature of the return made,[66] and allege facts which if true show that the return is false.[67] In an action for making a false return of nulla bona on an execution in favor of plaintiff, it is not necessary to allege that the judgment is unsatisfied.[68]

Illegal or insufficient return. In an action on the official bond of a sheriff or constable based on the illegality and insufficiency of the officer's return to an execution, the declaration should show what the return actually made was [69]

Wrongful arrest or imprisonment. It is sufficient to allege, in the complaint in an action on the official bond of a sheriff or constable for a wrongful arrest, that the arrest was made wholly without warrant of law, and maliciously and wantonly,[70] or, it has been held, merely that the officer wrongfully arrested plaintiff,[71] or to set forth facts which show that the arrest was wrongful, although it is not in terms alleged to be such [72] Where the complaint shows that the arrest was made under a warrant, it must be alleged that the warrant was irregular on its face.[73] A complaint which fails to allege that the arrest was made without warrant, or that it was unlawful, is insufficient, even though it negatives the conditions on which a lawful arrest could have been made without a warrant.[74] In an action based on the officer's misconduct in the manner of making the arrest or in the treatment of the prisoner, plaintiff's pleading must allege the facts constituting the misconduct,[75] but it has been held not

54. Mich.—People v. Lee, 32 N.W 817, 65 Mich 557

55. Neb—Adams v Weisberger, 87 N W. 16, 62 Neb. 325.
57 C J. p 1077 note 15

56. Ga—Hartford Accident, etc, Co v Young, 151 S E 680, 40 Ga App 843

57. Ga—Hartford Accident, etc., Co v Young, supra.

58. Ga.—Hartford Accident, etc., Co. v. Young, supra

59. Ind.—State v. Spencer, 4 Blackf. 310.

60. N.Y.—Cornell v Barnes, 7 Hill 35.

61. Ind—Major v. State, 8 Blackf. 71.

62. N.Y.—Lawton v Erwin, 9 Wend 233.

63. Ky.—Ridgway v. Moody, 16 S W 526, 91 Ky 581, 13 Ky L 188—Bailer v. Leathers, 9 Ky L. 971.

Allegation held unnecessary
Ky—Dugan v. Commonwealth, 3 Ky Op. 287.

64. Tex—Willis v Victoria Bank & Trust Co, Civ App, 76 S W 2d 532.

Pleading held sufficient
Tex—Willis v Victoria Bank & Trust Co, supra.

65. Ky—Commonwealth v Booker, 6 Dana 441—Commonwealth v Bartlett, 7 J J Marsh 161.

66. Ky—Commonwealth v. Bartlett, supra

67. Ky—Commonwealth v. Booker, 6 Dana 441—Commonwealth v. Bartlett, 7 J J Marsh. 161

68. Ala.—Lucas v. Governor, 6 Ala 826.

69. Ind.—Graham v. State, 6 Blackf 32

70. Minn.—Hall v. Tierney, 95 N W 219, 89 Minn. 407.

71. Ind—State ex rel Penrod v. French, 51 N E 2d 858, 222 Ind. 145, 149 A.L.R 1084.
57 C J p 1078 note 36.

72. U.S.—Fidelity, etc, Co. v. Bardsley, C C A.Idaho, 22 F.2d 603.

Ala—Deason v. Gray, 69 So. 15, 192 Ala. 611

Complaint held sufficient
U.S—State of Missouri ex rel and to Use of De Vault v. Fidelity & Casualty Co. of New York, C C.A Mo., 107 F 2d 343.

73. Cal—Pankewicz v. Jess, 149 P. 997, 27 Cal App 340.

74. Ariz—Bonebrake v. Hunt, 89 P. 544, 11 Ariz 98.

75. Miss—State ex rel. Trigg v. West, 157 So 81, 171 Miss. 203.

Pleading held sufficient
Allegations that deputy sheriff acting by virtue of office willfully and intentionally shot and killed plaintiff's intestate when deputy saw him fleeing from an illegal still site stated a cause of action against sheriff and surety on his official bond for death of plaintiff's intestate—State ex rel Blanchard v. Fisher, Tenn., 245 S W.2d 179.

Pleading held insufficient
Declaration against sheriff and surety for maltreatment of prisoner

essential that the complaint allege fraud, deceit, or oppression.[76]

Escape. A declaration in an action against a sheriff or constable for an escape of plaintiff's debtor must show that plaintiff had recovered a judgment.[77] In an action for an alleged escape of a debtor in custody under bail process an allegation in the declaration that the capias was "marked and indorsed for bail" is sufficient to show that the officer was required by the process in his hands to hold defendant therein to bail.[78] In an action for injuries allegedly resulting from the negligence of a sheriff in permitting a prisoner to escape, the complaint must allege facts showing the requisite negligence.[79]

b. Plea, Answer, or Affidavit of Defense

(1) In general
(2) Pleading specially; pleas as to particular matters

(1) In General

A plea which is not responsive to the breaches assigned in the declaration or to the allegations thereof, or which sets up facts which, even if true, would not relieve the officer or his sureties of liability is bad on demurrer.

A plea which is not responsive to the breaches assigned in the declaration or to the allegations thereof,[80] or which sets up facts which, even if true, would not relieve the officer or his sureties of liability,[81] is bad on demurrer, as is also an answer which is indefinite or uncertain.[82] However, a plea denying a material and traversable allegation of the complaint is not demurrable;[83] and a plea setting up facts which, if true, relieve the defendants from liability is sufficient.[84] A general denial of all the material allegations of a complaint is qualified and superseded by an affirmative averment in the answer which in legal effect admits the cause of action.[85]

A plea of nil debet[86] or non damnificatus[87] has been held not proper in an action on the official bond of a sheriff or constable, although as to the latter plea there is also authority to the contrary;[88] and, where the breach assigned is a failure to return an execution issued from a court not of record, a plea that there is no record of such judgment and execution is bad.[89] A plea of performance of covenants has been considered proper,[90] although as to this there is also authority to the contrary.[91] The penal sum named in the bond need not be pleaded by the sureties in order to prevent a judgment from being rendered against them for any greater sum.[92]

Affidavit of defense. Statutes and rules of court requiring the filing of an affidavit of defense to prevent summary judgment from being taken in actions on obligations or recognizances have been held not to apply to actions on the official bond of a sheriff or constable,[93] at least where there is no allegation in plaintiff's pleading on which damages could be liquidated,[94] as where the action is founded on a tort on the part of the officer;[95] but such requirement has been held to be applicable where the action is founded on a failure to pay over money[96] or a failure to levy on and sell property under an execution.[97] Where no such affidavit is required,

resulting in prisoner's death, in that sheriff took deceased into custody knowing he was ill and placed him at work on public roads, was held insufficient in not sufficiently charging that prevention of deceased's wife from giving him food and medicine while in jail caused death and in not charging he did not have medical attention and wholesome food.—State ex rel Trigg v. West, 157 So. 81, 171 Miss. 203

76. Kan.—Pfannenstiel v. Doerfler, 105 P.2d 886, 152 Kan. 479.

77. Ky.—Brown v. Price, 6 T.B.Mon. 621.

78. Ala.—Hutchison v. Governor, 23 Ala. 809.

79. Idaho.—Jacobson v. McMillan, 132 P.2d 773, 64 Idaho 351.

80. Md.—Bramble v. State, 41 Md. 435
57 C.J. p. 1078 note 53.

81. Ala.—Williams v. Ragan, 45 So. 185, 153 Ala. 397
57 C.J. p. 1079 note 54.

82. Ind.—State v. Daugherty, 32 Ind. 350
57 C.J. p. 1079 note 55

83. Ark.—Crow v. State, 23 Ark. 684
57 C.J. p. 1079 note 56.

84. Wash.—Larson v. Deering, 166 P. 1119, 97 Wash. 616.

85. Cal.—People v. Otto, 18 P. 869, 77 Cal. 45
57 C.J. p. 1079 note 58

86. N.J.—Richman v. Powell, 7 N.J.L.J. 45.
N.Y.—Hart v. Brady, 1 N.Y.Super. 626

87. Ark.—Martin v. Royster, 8 Ark. 74
57 C.J. p. 1078 note 48.

88. Pa.—Rees v. Tichenor, 1 Miles 183

89. Ark.—Faulkner v. State, 9 Ark. 14.

90. Pa.—Rees v. Tichenor, 1 Miles 183.
57 C.J. p. 1078 note 51

91. Ark.—Martin v. Royster, 8 Ark. 74

92. Wash.—Coles v. McNamara, 230 P. 430, 131 Wash. 377.

93. Pa.—Borlin v. Commonwealth, 99 Pa. 42.
57 C.J. p. 1080 note 75.

Rule for judgment, for want of sufficient affidavit, dismissed
Pa.—Sandt v. Serfass, Com.Pl., 4 Monroe L.R. 110, 56 York Leg.Rec. 154.

94. Pa.—Baer v. Kuhl, 8 Pa.Dist. 389

95. Pa.—Commonwealth v. Milnor, 23 Pa.Super. 1—Commonwealth v. Yeisley, 6 Pa.Super. 273

96. Pa.—Hood Motor Sales Co. v. Allison, 9 Pa.Dist. & Co. 337.

97. Pa.—Commonwealth v. Yeisley, 6 Pa.Super. 273.

the filing of one, whether or not it is good, is immaterial.[98]

Cross complaint. A pleading filed by a sheriff or constable and the sureties on his official bond, in an action brought against them thereon, which shows an intention to bring into the cause as defendants the sureties on a bond of indemnity given to the officer, but in which no allegation of fact is made on which judgment might be rendered against such indemnitors, and no relief is prayed against them, is insufficient to support a judgment over against the indemnitors.[99]

(2) Pleading Specially; Pleas as to Particular Matters

In an action on the official bond of a sheriff or constable, matters of affirmative defense and matters in confession and avoidance must be specially pleaded.

While defendant in an action on the official bond of a sheriff or constable may, if he so desires, plead matter specially, even though it could be proved under the general issue,[1] matters of affirmative defense must be specially pleaded.[2] Accordingly, matter in avoidance of the right of action must be specially pleaded,[3] and a plea in confession and avoidance should allege facts sufficient to afford a complete justification.[4] Where the statute of limitations is regarded as an absolute limitation on suit and is a statute of repose, it may be invoked either by demurrer or by an affidavit of defense raising questions of law,[5] and need not be raised by an affirmative plea in the affidavit of defense.[6] A plea of non est factum,[7] and not nul tiel record,[8] is the proper plea, in an action on the official bond of a sheriff or constable, to put in issue the execution of the bond. An allegation which denies the validity of the bond sued on but does not allege facts sufficient to show the correctness of such conclusion is demurrable.[9] Where the defense of a sheriff or constable to an action on his official bond for moneys alleged or found to be due from him is a refusal of credits to which he claims he is entitled, he must set out such credits specifically in his answer.[10]

In an action for the officer's failure to execute final process, a plea denying in the very language of the declaration the existence of such a judgment as the one on which it is alleged the execution issued may be sufficient, although it is not in the technical form of a plea of nul tiel record, and does not conclude with a prayer for judgment.[11] In an action for failure to levy and return an execution, a plea that the execution was not issued in conformity with the judgment, without showing in what respect it differs from the judgment, is bad on demurrer.[12] It has been held, on an action for the officer's failure to make the money on an execution, that a plea that the debt was paid to plaintiff is bad where it does not allege that the payment was made after the breach of duty by the officer.[13] Where a statute providing for the appointment of a county treasurer is not mandatory, a sheriff who is sued on his bond for county revenue collected must, if a treasurer has been appointed, and the revenue paid to him, plead these facts.[14]

c. Replication or Reply and Subsequent Pleadings

In an action on the official bond of a sheriff or constable, a replication or reply should traverse the allegations of defendants' plea which are intended to be denied. Where the replication shows a breach of the condition of the bond, a rejoinder which does not legally avoid or deny such breach is bad on demurrer.

A replication or reply, in an action on the official bond of a sheriff or constable, should traverse the

98. Pa.—Commonwealth v. Milnor, 23 Pa.Super. 1

99. Tex.—Kindell-Clark Drug Co. v. Myers, Civ.App., 140 S.W. 463.
Indemnity bond as protection to officer and sureties on his official bond see supra § 133.

1. W.Va.—State v. Turner, 100 S.E. 294, 84 W.Va. 485.
57 C.J. p. 1079 note 60

2. Tex.—Roos v. Garner, Civ.App., 45 S.W.2d 633, error dismissed.

Absence of injury
Where judgment creditor made out prima facie case under statute imposing liability on sheriff and his sureties for failure or refusal to levy on or sell property under execution, sheriff has burden to plead that his conduct did not result in injury to judgment creditor.—Blanscet v. Palo Duro Furniture Co., Tex.Civ.App., 68 S.W.2d 527.

Amount recoverable by diligent levy
If a sheriff is liable on his official bond for failure to levy on a judgment debtor's property, sheriff has burden of pleading that less than full amount of debt, interest, and costs could have been recovered by diligence in executing writ, in order to escape liability for entire amount.—Fant Mill Co. v. May, Tex.Civ.App., 240 S.W.2d 445, error refused no reversible error

Contributory negligence held properly pleaded
Tex.—Baker v. Walston, Civ.App., 141 S.W.2d 409, error dismissed, judgment correct.

3. Mo.—State v. Clark, 42 Mo. 519.
57 C.J. p. 1080 note 72.

4. Ala.—Adkins v. Camp, 105 So. 877, 213 Ala. 642
57 C.J. p. 1080 note 73.

5. Pa.—Commonwealth v. McClane, 47 Pa.Dist. & Co. 604, affirmed 35 A.2d 745, 154 Pa.Super. 246

6. Pa.—Commonwealth v. McClane, supra.

7. Pa.—Brownfield v. Commonwealth, 13 Serg. & R. 236

8. Pa.—Brownfield v. Commonwealth, supra.

9. Ind.—Winningham v. State, 56 Ind. 243.
57 C.J. p. 1079 note 63.

10. N.C.—Williamson v. Jones, 37 S.E. 202, 127 N.C. 178.

11. Ark.—State v. Saddler, 6 Ark. 235

12. Ark.—State v. Saddler, supra

13. Ala.—Governor v. Powell, 10 Ala. 544.

14. Ky.—Catron v. Commonwealth, 52 S.W. 929, 21 Ky.L. 650.

allegations of defendants' plea which are intended to be denied;[15] and a replication is bad where it does not meet defendants' averments of matter of affirmative defense,[16] or where it is argumentative and indefinite,[17] or where, even though the allegations of the replication are true, a bar to plaintiff's action is shown by defendants' plea.[18] Where defendants have pleaded performance, the replication should allege a breach,[19] but it should not contain, as one ground of reply, an averment of two or more breaches.[20]

Rejoinder. Where the replication shows a breach of the condition of the bond, a rejoinder which does not legally avoid or deny such breach is bad on demurrer;[21] but nevertheless plaintiff may put the facts in issue by surrejoinder instead of demurring.[22] A defendant who has pleaded that plaintiff was not damnified by the breach cannot by rejoinder set up matter in confession and avoidance.[23]

d. Demurrers

The proper method of disputing the legal sufficiency of pleadings in actions on the official bond of a sheriff or constable is by demurrer.

As in civil actions generally, the proper method of disputing the legal sufficiency of the pleadings in an action on the official bond of a sheriff or constable is by demurrer.[24] Thus, the proper method of disputing the legal sufficiency of defendants' plea is by demurrer thereto, and not by replication.[25] Similarly, defects in a replication must be taken advantage of by demurrer.[26] Both a demurrer and a traverse cannot be interposed to the same portion of a pleading.[27] The propriety of the prosecution of such an action by a district attorney, as attorney for a municipality damaged by the breach on which the action is founded, cannot be raised by demurrer.[28]

e. Amendment of Pleadings

The rules respecting the amendment of pleadings in civil actions generally apply in actions on the official bond of a sheriff or constable

The rules respecting the amendment of pleadings in civil actions generally are applicable in an action on the official bond of a sheriff or constable.[29] A petition which shows no right to maintain the action cannot be made effective by amendment.[30]

f. Issues, Proof, and Variance

In an action on the official bond of a sheriff or constable all material allegations of the declaration or complaint, or of a special or affirmative defense, must be proved. The proof must be within the issues made by the pleadings, and a material variance between pleading and proof is fatal.

In accordance with the rules applicable in civil actions generally, in an action on the official bond of a sheriff or constable all material allegations of the declaration or complaint,[31] or of a special or affirmative defense,[32] must be proved, even though they are matters of inducement;[33] but a failure to prove allegations which are merely cumulative and not an essential part of the matters set out is not fatal.[34] In an action by an officer on his deputy's bond for a false return for which a judgment has been rendered against the officer, the proper issue is one in which is involved only the falsity of that part of the return on which the judgment in the former action against the officer was based, and it is proper to exclude an issue involving the falsity of the return generally.[35] Where the declaration in an action on the official bond of a sheriff or constable for a false return on a replevin writ avers that the property belonged to plaintiff, a plea that the officer did not make a false return does not put the right of property in issue.[36]

The proof must be within the issues made by the

15. Md.—Robey v. State, 50 A. 411, 94 Md. 61, 89 Am. S. R. 405.

16. Md.—Robey v. State, supra.

17. Md.—Robey v. State, supra.
Mass.—Austin v. Parker, 13 Pick. 222.
57 C. J. p. 1081 note 84.

18. U. S.—Sedam v. Taylor, C. C. Ind., 21 F. Cas. No. 12,608, 3 McLean 547.
57 C. J. p. 1081 note 85.

19. S. C.—State Treasurers v. Wiggins, 12 S. C. L. 568.
57 C. J. p. 1081 note 86.

20. Mass.—Austin v. Parker, 13 Pick. 222.
57 C. J. p. 1081 note 87.

21. Mass.—Cooper v. Mowry, 16 Mass. 5.
57 C. J. p. 1081 note 88.

22. N. Y.—Andrus v. Waring, 20 Johns. 153.

23. N. Y.—Andrus v. Waring, supra.

24. Md.—Robey v. State, 50 A. 411, 94 Md. 61, 89 Am. S. R. 405.

25. Md.—Robey v. State, supra.

26. S. C.—State Treasurers v. Wiggins, 12 S. C. L. 56.

27. S. C.—Treasurers v. Buckner, 27 S. C. L. 323.

28. Ill.—People v. Jamison, 157 Ill. App. 546.

29. Ala.—Albright v. Mills, 5 So. 591, 86 Ala. 324.
57 C. J. p. 1081 note 96.

30. Pa.—Dunn v. Commonwealth, 14 Serg. & R. 431.
57 C. J. p. 1082 note 97.

31. Ky.—Barnett v. Gilbert, 133 S. W. 2d 529, 280 Ky. 402.
Tex.—Bailey v. Moseley, Civ. App., 77 S. W. 2d 603, error dismissed.
57 C. J. p. 1082 note 2.

32. Tex.—Fant Mill. Co. v. May, Civ. App., 240 S. W. 2d 445, error refused no reversible error—Blanscet v. Palo Duro Furniture Co., Civ. App., 68 S. W. 2d 527—Roos v. Garner, Civ. App., 45 S. W. 2d 633, error dismissed.

33. Ark.—State v. Crow, 11 Ark. 642.
57 C. J. p. 1082 note 3.

34. N. H.—Hoitt v. Holcomb, 32 N. H. 185.

35. N. C.—Wasson v. Linster, 83 N. C. 575.

36. Ind.—State v. Youmans, Smith 172.

pleadings,[37] and must conform to the pleadings of the party by whom it is adduced,[38] and tend to support their allegations.[39] Proof for which no basis has been laid in the pleadings cannot be received;[40] and, where the petition or complaint fails to make out a case against the sureties, the defect cannot be supplied by proof.[41] A variance between pleading and proof which is slight and not of a character to mislead the adverse party to his prejudice is immaterial;[42] but a variance by which the adverse party might be prejudiced is fatal.[43]

§ 204. —— Evidence

a. Presumptions
b. Burden of proof
c. Admissibility
d. Weight and sufficiency

a. Presumptions

In actions on the official bond of a sheriff or constable various presumptions have been indulged, including the presumptions that a public officer has properly performed his duty, and that plaintiff has been damaged by the officer's failure to execute or to return process.

The usual presumption that a public officer has properly performed his duty, as discussed in Evidence § 146, obtains in an action on the official bond of a sheriff or constable,[44] except where contradicted or overcome by evidence.[45] Thus, where the same person holds two offices of the same nature in different territorial jurisdictions, it will be presumed that in an act done by him in one of such jurisdictions he was acting as officer thereof rather than as officer of the other.[46] The acceptance of the officer's bond by the officer or tribunal to which it is required to be given is presumed when the bond is found on file with nothing to show that it has been rejected, and the officer has entered on the duties of his office;[47] and, where the bond is duly approved, its delivery is implied.[48] In an action for the money which the officer was ordered to pay plaintiff, it will be presumed that the officer received such money before the order was made.[49]

Where an officer has levied on property under a writ, and in his return did not specify its value, it will be presumed that it was of sufficient value to satisfy plaintiff's claim.[50] Where the officer and his sureties claim that an execution debtor had no property which could be levied on, and the latter testifies that he had no such property, his admission on cross-examination that he owned a particular article which might be exempt raises the presumption, in the absence of contrary proof, that it was exempt.[51] It has been held that, where a writ or claim is placed in the hands of a sheriff or constable, it will be presumed, in an action on his bond, to have been delivered to him in his official capacity, unless the contrary appear, even though a receipt given by him therefor is signed with his individual name without the addition of his title or office.[52] The failure of a plaintiff in a capias ad satisfaciendum to call on the officer at the return of the writ to produce the body of defendant in court does not furnish ground for a presumption, in an action on the officer's bond for an escape, that defendant was discharged from custody by plaintiff's consent.[53]

Time of default. In an action for a shortage in the accounts of an officer who has held two or more successive terms of office, it will be presumed, in the absence of evidence to the contrary, that the default occurred during the last term held by him,[54] but such presumption may be rebutted.[55] Where the complaint shows that the default on which the action is founded occurred after the expiration of the term for which the officer was elected or appointed, it will be presumed that he had gone out of office, in the absence of any allegation

37. Mont.—Cline v. Tait, 129 P. 2d 89, 113 Mont. 475.
57 C.J. p. 1082 note 5.

38. Ala.—Forward v. Marsh, 18 Ala. 645.
57 C.J. p. 1082 note 6.

39. Ala.—Kemp v. Wilson, 84 So. 636, 17 Ala. App. 224
57 C.J. p. 1082 note 7.

40. Wash.—Jahns v. Clark, 244 P. 729, 138 Wash. 288
57 C.J. p. 1082 note 8

41. Tex.—Cole v. Crawford, 5 S.W. 646, 69 Tex. 124.

42. Neb.—Kopplekom v. Huffman, 10 N.W. 577, 12 Neb. 95.
57 C.J. p. 1083 note 10.

43. Colo.—People for Use of New Mexico Lumber Mfg. Co. v. U. S. Fidelity & Guaranty Co., 52 P.2d 1146, 98 Colo. 41.
57 C.J. p. 1083 note 11.

44. Ind.—State v. Harper, 22 N.E. 80, 120 Ind. 23.
Pa.—Lancaster County Nat. Bank v. Commissioners of Lancaster County, Com.Pl., 49 Lanc.Rev. 345.

45. Mo.—State v. Hope, 88 Mo. 430.
57 C.J. p. 1083 note 15.

46. Wash.—Greenius v. Moore, 169 P. 976, 99 Wash. 467.

47. Ala.—McClure v. Colclough, 5 Ala. 65.
57 C.J. p. 1083 note 17.

48. Minn.—Ramsey County v. Brisbin, 17 Minn. 451.

49. Ala.—Chandler v. Riddle, 24 So. 498, 119 Ala. 507.

50. Idaho.—Roth v. Duvall, 1 Idaho 149.
57 C.J. p. 1083 note 28.

51. Miss.—Dailey v. State, 56 Miss. 475.

52. N.C.—Dunton v. Doxey, 52 N.C. 222.
57 C.J. p. 1084 note 31.

53. Md.—State v. Lawson, 2 Gill 62.

54. S.C.—State v. Bowen, 98 S.E. 864, 112 S.C. 165.

55. S.C.—State v. Bowen, supra.

negativing the election or qualification of a successor in office.[56]

Damage or loss. Where the action is based on the officer's failure to execute[57] or return[58] final process, it will be presumed that plaintiff was damaged in an amount equal to that for the collection of which the process was issued;[59] but there is no presumption of damage resulting from a failure to execute mesne process.[60] Plaintiff prima facie suffers a loss where the officer fails to take a proper bond on releasing property on which he has levied and the property disappears.[61]

b. Burden of Proof

In general, the burden is on plaintiff to prove all matters essential to his right to recover which are not admitted by defendants, and the burden is on defendants to establish facts relied on as justifying or obviating the effect of the act or omission on which the action is based

It is incumbent on plaintiff, in an action on the official bond of a sheriff or constable, to establish by proof all matters which are essential to his right to recover and are not admitted by defendants.[62] Accordingly, plaintiff must prove, unless admitted by defendants,[63] the execution of the bond,[64] its delivery[65] and acceptance,[66] and that there has been a breach of its conditions.[67] Where approval of the bond is necessary to its validity and completeness, plaintiff must prove such approval.[68] Where it appears that the officer was appointed by an agency having authority to make such appointment only under particular circumstances, it is incumbent on plaintiff to show that such circumstances existed;[69] but it has been held that plaintiff is not obliged to prove that the officer was commissioned, where that has not been denied by defendants.[70] Plaintiff must also prove that in the matter complained of the officer was acting in his official capacity,[71] and it rests on plaintiff to overcome by proof the presumption that the officer has done his duty.[72]

In an action based on default with respect to an execution, plaintiff must prove the existence of the judgment,[73] and execution thereon,[74] and a delivery of the execution to the officer.[75] In an action for failure to pay over money, plaintiff must prove the collection of the money by the officer,[76] a demand on him therefor by plaintiff,[77] and a failure by the officer to pay over the money,[78] or such a misapplication of the money received or such misconduct on the part of the officer as establishes unfaithfulness in accounting with plaintiff and paying over to him what he was entitled to receive.[79] In an action for failure to collect claims put into the officer's hands for collection, it is not necessary for plaintiff to show in the first instance the validity of the claims.[80] In an action based on the misconduct of a deputy, plaintiff must prove that the misconduct of the deputy occurred while the deputy was engaged in the performance of an official duty as such officer,[81] and not while he was acting as a

56. Ind.—Urmston v. State, 73 Ind. 175.

57. Ga.—Beck, etc., Hardware Co. v. Knight, 48 S.E. 930, 121 Ga. 287, 3 L.R.A.,N.S., 420
57 C.J. p. 1083 note 22.

58. Ga.—Beck, etc., Hardware Co. v. Knight, supra
Tex.—Smith v. Tooke, 20 Tex. 750.

59. Ga.—Beck, etc., Hardware Co. v. Knight, 48 S.E. 930, 121 Ga. 287, 3 L.R.A.,N.S., 420.

60. Ga.—Beck, etc., Hardware Co. v. Knight, supra.

61. Ga.—Eslinger v. Land, 163 S.E. 522, 45 Ga.App. 96.

62. La.—Britt v. Merritt, 53 So.2d 121, 219 La. 333
57 C.J. p. 1084 note 32.
Action by suspended officer on bond of temporary officer
In suit on bond, given by constable who was temporarily appointed in suit for removal of incumbent constable, conditioned on payment of damages allegedly sustained by incumbent "in case it should appear that the cause or causes of removal are insufficient or untrue," incumbent had burden of showing liability on the bond.—Ormes v. Quinn, Tex.Civ.App., 113 S.W.2d 242.
Excessive force in making arrest
In action against sheriff and his surety for unprovoked assault and arrest, burden of proof on issue as to whether sheriff used more force than was reasonably necessary was properly placed on plaintiff.—Claffin v. Drane, Tex.Civ.App., 131 S.W.2d 672.

63. Tex.—Poer v. Brown, 24 Tex. 34.
57 C.J. p. 1084 note 33.

64. Or.—Baker County v. Huntington, 79 P. 187, 46 Or. 275.
57 C.J. p. 1084 note 34

65. Or.—Baker v. County v. Huntington, supra

66. Ala.—McClure v. Colclough, 5 Ala. 65.
57 C.J. p. 1084 note 36

67. Ala.—Thorn v. Kemp, 13 So. 749, 98 Ala. 417
57 C.J. p. 1084 note 39.

68. Ala.—McClure v. Colclough, 5 Ala. 65.

69. N.C.—Sumney v. Magness, 26 N.C. 217.

70. Pa.—Brownfield v. Commonwealth, 13 Serg. & R. 236

71. Tex.—Bailey v. Moseley, Civ.App., 77 S.W.2d 603, error dismissed.
57 C.J. p. 1084 note 42.

72. Ind.—State v. Harper, 22 N.E. 80, 120 Ind. 23.
57 C.J. p. 1084 note 43.

73. Idaho.—Robinson v. Kinney, 31 P. 815, 3 Idaho 479.
57 C.J. p. 1084 note 44.

74. Idaho.—Robinson v. Kinney, supra

75. Idaho.—Robinson v. Kinney, supra
Mo.—Dubreuil v. State, 10 Mo. 435

76. Idaho.—Robinson v. Kinney, 31 P. 815, 3 Idaho 479.
57 C.J. p. 1084 note 47.

77. Idaho.—Robinson v. Kinney, supra.
N.C.—White v. Miller, 20 N.C. 50.

78. Idaho.—Robinson v. Kinney, 31 P. 815, 3 Idaho 479.

79. N.C.—White v. Miller, 20 N.C. 50.

80. Md.—Burtles v. State, 4 Md. 273.

81. La.—Britt v. Merritt, 53 So.2d 121, 219 La. 333.

private individual,[82] or in some other capacity.[83]

Matter of defense. Where defendants seek to justify or obviate the effect of the act or omission on which the action is based, the burden is on them to establish the facts on which they rely.[84] Similarly, where the sureties rely on the defense that the default complained of is not covered by the bond, they assume the burden of proof,[85] and, where defendants deny that the bond is binding on them, by reason of some illegality, the burden of proof is on them.[86] Where, however, in an action for failure to levy on certain property, defendants have denied that the execution debtor owned the property and also alleged ownership of other persons as to particular articles, the latter allegations need not be proved[87] It has been held that in an action on a sheriff's bond for failure to pay over taxes, the sheriff is chargeable with the amount of the tax list, and has the burden of showing a discharge of any part thereof.[88]

Damage. The burden is on plaintiff to show that he has been damaged by reason of the matters complained of,[89] unless the default is such that the law presumes damage, as discussed supra subdivision a of this section, in which case the burden is on defendants to show that plaintiff was not damaged,[90] or that the extent of the injury is less than that which the law presumes,[91] but, where defendant has introduced evidence to rebut the inference of damage, plaintiff has the burden of showing damage[92] Where there is evidence to show damage, the burden is on defendants to show that the damage is less than that shown[93]

Leave to sue. It has been held that, even where leave of court to sue is necessary, it is not essential to a recovery that plaintiff give any proof of such leave obtained.[94]

c. Admissibility

In accordance with, and subject to, the rules of evidence in civil actions generally, in an action on the official bond of a sheriff or constable, any evidence which bears on the right of recovery, and properly tends to establish or refute the contentions of the parties, or to furnish a means of estimating damage suffered, is admissible.

In accordance with, and subject to, the rules governing the admissibility of evidence in civil actions generally, any evidence is admissible in an action on the official bond of a sheriff or constable which bears on the right of recovery, and properly tends to establish the contentions of the party by whom it is offered or to refute the contentions of the adverse party,[95] or to furnish a means of esti-

Miss.—Pickle v. Brooks, 137 So. 89, 162 Miss. 89.

82. La.—Britt v. Merritt, 53 So.2d 121, 219 La. 333.

83. Miss.—Pickle v. Brooks, 137 So. 89, 162 Miss. 89.

Constable or deputy sheriff

Plaintiff suing on sheriff's bond for false arrest has burden to show that officer, also constable, was acting in capacity as deputy sheriff.—Pickle v. Brooks, supra

84. Tex.—Fant Mill Co. v. May, Civ. App., 240 S.W.2d 445, error refused no reversible error—Blanscet v. Palo Duro Furniture Co., Civ.App., 68 S.W.2d 527—Roos v. Garner, Civ. App., 45 S.W.2d 633, error dismissed.

57 C.J. p. 1085 note 59

Defense for failure to levy

Ala.—Davis v. Griffin, 150 So. 326, 227 Ala. 390.

Tex.—Webb v. First Texas Chemical Mfg. Co., Civ.App., 86 S.W.2d 818

57 C.J. p. 1085 note 59 [a]

85. S.C.—State v. Bowen, 98 S.E. 864, 112 S.C. 165

57 C.J. p. 1085 note 60.

86. Ga.—Dobbs v. Justices Murray County Inferior Ct., 17 Ga. 624.

87. Iowa.—Crosby v. Hungerford, 12 N.W. 582, 59 Iowa 712.

88. N.C.—Stokes County v. Wall, 23 S.E. 358, 117 N.C. 377.

89. Ky.—Barnett v. Gilbert, 133 S.W.2d 529, 280 Ky. 402.

Pa.—Sandt v. Serfass, Com.Pl., 4 Monroe L.R. 110, 56 York Leg.Rec. 154

57 C.J. p. 1084 note 52.

90. Ga.—Beck, etc., Hardware Co. v. Knight, 48 S.E. 930, 121 Ga. 287

57 C.J. p. 1084 note 54

91. Ga.—Beck, etc., Hardware Co. v. Knight, supra—Sutton v. Griner, 95 S.E. 1004, 22 Ga.App. 307

92. Ga.—Wittern v. American Surety Co., 168 S.E. 74, 46 Ga.App. 467.

93. Ala.—Campbell v. Tucker, 154 So. 821, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658.

Value of property

In action against sheriff, defective forthcoming bond taken by sheriff in attachment suit, in absence of proof to contrary, was sufficient on which to fix valuation of property in excess of amount of debt and costs, and cast on sheriff burden of showing property was of less value.—Campbell v. Tucker, supra.

94. N.Y.—New York v. Brett, 2 Hilt. 560

Necessity for obtaining leave of court to sue see supra § 197

95. Ga.—Hall v. National Surety Corp., 34 S.E.2d 628, 72 Ga.App. 644

N.D.—Janssen v. Kohler, 299 N.W. 900, 71 N.D. 247.

57 C.J. p. 1085 note 66.

Admissibility as against sureties of adjudication against officer see supra § 191

Action for false or wrongful arrest

(1) Evidence that plaintiff had reputation of being a common thief was admissible on question of probable cause for the arrest, notwithstanding plaintiff withdrew from his complaint all claim for damages because of injury to his reputation and character.—State of Missouri ex rel., and to Use of Ward v. Fidelity & Deposit Co. of Md., C.A.Mo., 179 F.2d 327.

(2) Evidence that the sheriff acted under the advice of counsel in arresting plaintiff and placing him in jail on Sunday, pursuant to warrant of arrest issued on such day, was held admissible.—Robinson v. Lovell, Tex.Civ.App., 238 S.W.2d 294, error refused no reversible error

(3) Other evidence held admissible.—O'Neill v. Keeling, 288 N.W. 887, 227 Iowa 754, 127 A.L.R. 1050—57 C.J. p. 1085 note 66 [s]

Action for misconduct of deputy

(1) In action against sheriff and surety for deputy's misconduct in office, evidence that binding over by justice of peace for trial was secured by deputy's perjury was held competent.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465.

(2) In suit for assault and unlawful imprisonment, officer, although

mating correctly the injury which plaintiff has suffered because of the default or misconduct complained of and the amount of damages which should be awarded to him if he succeeds.[96] Evidence which is incompetent,[97] irrelevant,[98] or immaterial,[99] or tends only to arouse the sympathies of the jury,[1] or is for any other reason objectionable under the general rules of evidence,[2] should be excluded

d. Weight and Sufficiency

The general rules by which the weight and sufficiency of evidence are determined in civil actions are applicable in actions on the official bond of a sheriff or constable.

The general rules by which the weight and sufficiency of evidence are determined in civil actions are applicable in actions on the official bond of a sheriff or constable.[3] The rules have been applied in determining the sufficiency of the evidence with respect to the existence[4] and execution[5] of the bond, the official character of the act complained of,[6] the service of summons in a particular action,[7] the existence of a judgment to support certain process,[8] the issuance of a valid execution,[9] the exemption of an execution debtor from arrest,[10] the amount of a debt or its being due,[11] the validity of claims placed in an officer's hands for collection,[12] the levy or refusal to levy execution,[13] the availability or want of property on which to levy,[14]

also special deputy sheriff, may testify that he was acting as constable at time—Pickle v Brooks, 137 So 89, 162 Miss 89.

96. Mo—State v. Stone, 85 S.W. 950, 111 Mo App 364.
57 C J p 1087 note 67

Encumbrance on attached property
Where surety on sheriff's official bond was liable to attachment creditor for value of property surrendered by sheriff on acceptance of replevy bond signed by insolvent sureties, surety in reduction of damages could show that attachment creditor had constructive notice that attached property was encumbered by valid mortgage in excess of value of property—Fidelity & Deposit Co of Maryland v First Nat Bank, Tex Civ App., 88 S W.2d 605, error refused.

97. Tex.—B F Goodrich Rubber Co v. Valley Plumbing, etc, Co, Civ App, 267 S.W 1036.
57 C J p 1087 note 68

98. Mont—Cline v. Tait, 155 P 2d 752, 116 Mont. 571.
Tex—Barton v. Lary, Civ App, 283 S W 920
W Va—Reynolds v Griffith, 30 S.E 2d 81, 126 W.Va 766.
57 C J p 1087 note 69

99. Ga.—Hester v Shrouder, 13 S E 2d 875, 64 Ga App 572
Ill—Sarelas v Fagerburg, 45 N E 2d 690, 316 Ill App 600
Miss.—Pickle v. Brooks, 137 So 89, 162 Miss 89.
Tex—Grimes v Bosque County, Civ App, 240 S W 2d 511, error refused no reversible error—Robinson v Lovell, Civ.App., 238 S W.2d 294, error refused no reversible error
57 C.J. p 1087 note 70

1. Ala—Rasco v. Jefferson, 38 So 246, 142 Ala. 705
57 C J. p 1087 note 71.

2. Cal.—Sam Yuen v McMann, 34 P. 80, 99 Cal. 497
57 C.J. p 1087 note 72

Care of ponderous property
(1) Evidence, in action on sheriff's bond for nonforthcoming of crane after levy, concerning care customarily exercised by sheriffs of the county over ponderous property under levy, should not have been received, since to take the conduct of others as furnishing a sufficient legal standard of negligence would be to abandon standard set up by the substantive law—State, to Use of Henderson v Clark, 20 A 2d 127, 2 Terry, Del, 246, 138 A L R 704

(2) Testimony with respect to custom of having ponderous property guarded only if attorney for plaintiff in the writ so directed after being notified should not have been considered where there was no proof that attorney for plaintiff in the writ was notified—State, to Use of Henderson, v. Clark, supra.

3. La—Britt v Merritt, 53 So 2d 121, 219 La. 333
57 C.J. p 1088 note 75
Conclusiveness on sureties of adjudication against officer see supra § 191.

Preponderance of evidence
Plaintiff must establish his case by a preponderance of the evidence and with legal certainty.—Britt v. Merritt, supra.

Evidence held sufficient to warrant recovery
Pa—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa Super. 280
57 C J p 1088 note 75 [a]

4. S C—Treasurers v. Witsall, 28 S C L 220
57 C J. p 1088 note 76.

5. La—Iberville Police Jury v. Sherburne, 17 La 342.
57 C.J. p 1088 note 77.

6. Colo—Corder v People, 287 P. 85, 87 Colo. 251.
57 C J p 1088 note 78.

7. Wis.—Phillips v. Eggert, 113 N. W 686, 133 Wis 318, 126 Am S.R. 963.
57 C J. p 1088 note 79.

8. Ala—Hill v Fitzpatrick, 6 Ala. 214
57 C.J. p 1088 note 80.

9. Ill.—Kantzler v. People, 11 Ill. App 610
57 C J. p 1088 note 81

10. Mo.—State v. Hamilton, 9 Mo 794.
57 C J p 1088 note 82.

11. N.C—Hutchins v. Holcombe, 24 N C. 211
57 C J p 1088 note 83

12. Md—Burtles v. State, 4 Md. 273.
57 C J p 1088 note 84.

13. Tex—Hackler v. H Kohnstamm & Co of Texas, Civ App, 227 S.W. 2d 347.

Evidence held sufficient
(1) To sustain finding that sheriff acted in good faith in refusing to levy execution without indemnifying bond—Endicott-Johnson Corporation v. Davis, 56 S.W 2d 178, 186 Ark. 788

(2) To show that sheriff was negligent in failing to collect judgment before debtor's bankruptcy, proximately damaging creditor to extent of unpaid portion of judgment plus interest and costs—Roos v Garner, Tex Civ App., 45 S.W 2d 633, error dismissed

(3) To support finding that assets of laundry operated by judgment debtor and wife were not wholly exempt and that sheriff failed to exercise due diligence relative to execution of the process in his hands—Hackler v. H. Kohnstamm & Co of Texas, Tex Civ.App., 227 S W 2d 347

14. Mich—Dunphy v. Whipple, 25 Mich 10.
57 C J p 1088 note 85.

Evidence held sufficient
(1) To sustain finding that wife of attachment defendant had title to property—Jolley v. Begeman, 256 N. W. 912, 65 N D. 205

(2) To support implied finding that sheriff could have found property subject to execution by exercise of due diligence, and that his failure to find property constituted dereliction

the insolvency of an execution debtor or other party,[15] the receipt of money by the officer[16] and a failure to pay it over to the party entitled thereto,[17] and the value of a particular party's interest in particular property.[18]

General rules have also been applied in determining the sufficiency of the evidence with respect to the unlawfulness of a seizure of property,[19] the loss of property,[20] the taking of a proper bond or security,[21] the falsity of a return,[22] a delay in the return of execution,[23] the unlawfulness of an arrest and imprisonment,[24] misconduct in connection with arrest or imprisonment[25] or with making a search,[26] the obligations, or a settlement thereof, between an officer and his deputy,[27] the liability of the sheriff's surety for the act of the sheriff's deputy,[28] an officer's receipt of notice of a landlord's claim for rent,[29] or any matter bearing on the amount for which defendants should be held liable because of the official misconduct or default of which plaintiff complains.[30]

Conclusiveness of officer's return. In an action on the official bond of a sheriff or constable the officer's return on process is conclusive as against the officer and his sureties[31] It is prima facie evidence in their favor,[32] but it is subject to be impeached or contradicted by plaintiff.[33]

§ 205. —— Trial, Reference, and New Trial

In actions on the official bond of a sheriff or constable general rules apply with respect to the trial, including questions of law and fact, instructions, and verdict and findings, and with respect to references and new trials.

The rules relating to the trial of civil actions generally are applicable to actions on the official bond of a sheriff or constable[34] Thus, where a demurrer to the declaration in such an action is overruled, and defendant stands thereon, the order for the jury should be to inquire into the truth of the

of duty, rendering him liable to judgment creditor —Blanscet v Palo Duro Furniture Co, Tex Civ.App, 68 S W 2d 527.

(3) To establish that sheriff had doubt as to title to property.—Fant Mill. Co v. May, Civ App., 240 S.W. 2d 445, error refused no reversible error.

15. Tex—B F. Goodrich Rubber Co v. Valley Plumbing, etc., Co, Civ. App., 267 S W. 1036.
57 C.J p 1088 note 86

16. S C—Treasurers v. McGuire, 16 S.C.L. 474.
57 C.J. p 1088 note 87.

17. W.Va.—State v. Citizens' Trust, etc., Co, 77 S.E. 902, 72 W.Va 181
57 C.J. p 1088 note 88

18. Wis.—Phillips v Eggert, 113 N W 686, 133 Wis 318, 126 Am S.R 963.
57 C.J p 1089 note 89.

19. N D—Janssen v. Kohler, 299 N W. 900, 71 N D. 247.
57 C J. p 1089 note 90

20. Pa.—Commonwealth, to Use of French, v. Weglein, 24 A 2d 633, 147 Pa Super. 257.

21. Ala—Carmichael v U S. Fidelity, etc., Co, 50 So 1003, 163 Ala. 320.
57 C J. p 1089 note 91.

22. Tex—Willis v Victoria Bank & Trust Co, Civ App, 76 S W.2d 532
57 C.J. p 1089 note 92.

Summons in workmen's compensation proceeding

In action by widow to recover from sheriff for misfeasance and malfeasance in making false and fraudulent return of summons in workmen's compensation proceeding and thereby allegedly causing widow to lose her right to participate in workmen's insurance fund, evidence established that sheriff had negligently failed to perform statutory duty imposed on him, but failed to establish that decedent's death was result of injury which he had sustained in course of and arising out of his employment —Colello v Bates, 100 N.E 2d 258, 88 Ohio App 313.

23. Ark—State v Warner, 48 S W.2d 246, 185 Ark 610.

24. Mont—Cline v. Tait, 129 P 2d 89, 113 Mont 475.
Okl—Ingles v Hotze, 130 P 2d 302, 191 Okl 378.

Evidence held sufficient to show illegal arrest and imprisonment

Ga.—Standard Surety & Casualty Co of N. Y v. Johnson, 41 S E 2d 576, 74 Ga App 823—Hester v Shrouder, 13 S.E 2d 875, 64 Ga App. 572

25. La—Dufrene v. Rodrigue, App, 38 So 2d 511.

Evidence held sufficient

(1) To support judgment denying recovery on sheriff's bond on ground that no more force than necessary was used.
Ga—Hall v. National Sur Corp, 34 S.E 2d 628, 72 Ga App. 644
Tex—Locke v Bralley, Civ App, 50 S W.2d 410.

(2) To show no necessity for officer to shoot in self-defense—Reynolds v. Griffith, 30 S E 2d 81, 126 W. Va 766

(3) To establish that destruction of plaintiff's eye and other injuries were inflicted by officers during arrest of plaintiff, rather than as a result of plaintiff falling on cement block while resisting arrest.—Dufrene v. Rodrigue, La.App, 38 So 2d 511.

26. Ga—Maryland Casualty Co. v Salmon, 164 S E 80, 45 Ga App 173

27. Ga—Maryland Cas Co v Smith, 192 S E. 449, 56 Ga App. 154
Wash—Faulkner v. Jackson, 48 P.2d 608, 183 Wash 699.
57 C J. p 1089 note 93.

28. La.—Britt v Merritt, 53 So 2d 121, 219 La. 333
N.C—Davis v. Moore, 2 S E 2d 366, 215 N C. 449.
S.D—Island v. Helmer, 258 N.W. 812, 63 S.D 362.

29. Pa—Borlin v. Commonwealth, 1 A 404, 110 Pa 454.
57 C.J p 1089 note 94

30. Cal.—Missouri State Life Ins Co. v. Gillette, 12 P 2d 955, 215 Cal 709.
Ga—Glens Falls Indemnity Co v. Dempsey, 23 S E 2d 493, 68 Ga App 607—Wittern v. American Surety Co, 168 S E 74, 46 Ga App 467.
Mo—State ex rel and to Use of Donelon v Deuser, 134 S W 2d 132, 345 Mo. 628.
57 C.J p 1089 note 95.

31. Kan—Studebaker v. Johnson, 21 P. 271, 41 Kan 326, 13 Am S R. 287
57 C J. p 1089 note 97.
Conclusiveness of return in action against officer alone see supra § 161

32. Ark—Hearn v. Ayres, 92 S W 768, 77 Ark. 497.
57 C J p 1089 note 98.

33. Tex—Barton v Lary, Civ App, 283 S.W. 920
57 C J p 1089 note 99

34. Mo—State v Stone, 85 S.W. 950, 111 Mo App. 364.
57 C.J. p 1089 note 2.

breaches, as well as to assess damages, and the jury should be so sworn.[35] With respect to the liability of the surety on an officer's bond for the acts of the officer's deputies, it is error, as permitting double recovery, for the court to permit the jury to charge all the injury caused by the joint entry of the deputies against each deputy, and to charge the total thereof against the officer and his surety.[36] In an action for the loss of property seized under legal process, plaintiff may read the record of the case in which the writ was issued, including the writ itself without reading the return of the officer.[37] Where the court has ordered two or more actions against an officer and his sureties consolidated, and a creditor has submitted his claim to the jury, another creditor has not the right to offer evidence to lessen the amount of such claim;[38] but, when a motion is made to distribute the money, an issue may be made to try the question of fraud in any of the claims.[39] It is not misconduct on the part of plaintiff's attorney for him to refer to the fact that the officer is secured by a surety bond.[40]

Questions of law and fact. Questions of fact arising on the trial of an action on the official bond of a sheriff or constable are properly left to the determination of the jury,[41] provided the evidence is sufficient to warrant such submission,[42] and, where a finding on an issue of fact is or must be in favor of plaintiff, the assessment of his damages is a matter for the jury.[43] Questions of law are for the court,[44] and, where the facts as to a particular question are undisputed and only one reasonable conclusion can be drawn therefrom, the question becomes one of law for the court.[45] Accordingly, where there are no facts in evidence or admitted in an action on the official bond of a sheriff or constable which would justify a verdict against an officer or his sureties,[46] or the uncontradicted evidence shows as a matter of law that they are not

35. Ark.—Adams v. State, 6 Ark. 497

36. Tex.—Singer Sewing Mach. Co. v. Mendoza, Civ. App., 62 S.W.2d 656, modified on other grounds Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 125 Tex. 639.

37. Ark.—State v. Lawson, 8 Ark. 380, 47 Am. D. 728

38. S.C.—State Treasurers v. Bates, 19 S.C.L. 409.

39. S.C.—State Treasurers v. Bates, supra

40. Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465

Distinction where surety not party

A distinction must be drawn between actions in which the surety is a party and actions in which the surety or insurance companies are not directly involved and it is sought to show indirectly that such companies would stand the losses.—Biehn v. Bannick, supra.

41. Ala.—Davis v. Griffin, 150 So. 326, 227 Ala. 390
Ga.—John Hancock Mut. Life Ins. Co. v. Rowland, 173 S.E. 417, 178 Ga. 494
Iowa.—O'Neill v. Keeling, 288 N.W. 887, 227 Iowa 754, 127 A.L.R. 1050.
Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475
Tex.—Robinson v. Lovell, Civ.App., 238 S.W.2d 294, error refused no reversible error—Clark v. West, Civ. App., 126 S.W.2d 569, reversed on other grounds Aetna Casualty & Surety Co. v. Clark, 150 S.W.2d 78, 136 Tex. 238
57 C.J. p. 1090, note 7.

Particular questions properly submitted to jury.

(1) Whether deputy sheriff made disclosure of sufficient material facts to establish probable cause for issuing search warrant.—Ladd v. Miles, 17 P.2d 875, 171 Wash. 44

(2) Whether there was reasonable cause for arrest
Idaho.—Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667
Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465

(3) Whether officer was negligent.—Allen v. Cavin, 66 P.2d 40, 179 Okl. 460—57 C.J. p. 1090, note 7 [b]

(4) Whether officer acted in self-defense.
Ky.—Melton's Adm'x v. Robinson, 110 S.W.2d 428, 270 Ky. 621
Tex.—Smith v. Bryson, Civ. App., 33 S.W.2d 268, error dismissed

(5) Whether deputy's act was done in line and scope of authority.
Ala.—National Surety Co. v. Boone, 151 So. 447, 227 Ala. 599
Ga.—Aldridge v. Wooten, 24 S.E.2d 700, 68 Ga.App. 887

(6) Whether plaintiff suffered "little or no damage" so as to be entitled to recover smart money under statute defining measure of damages in actions on official bonds.—Glens Falls Indemnity Co. v. Dempsey, 23 S.E.2d 497, 68 Ga.App. 612.

42. Wash.—Hessler v. Moore, 61 P.2d 1001, 188 Wash. 80.

Evidence held sufficient for jury

Ala.—National Surety Co. v. Boone, 151 So. 447, 227 Ala. 599—Davis v. Griffin, 150 So. 326, 227 Ala. 390
Ga.—Hawkins v. National Surety Corp., 11 S.E.2d 250, 63 Ga.App. 367—Dunn v. U. S. Fidelity & Guaranty Co., 164 S.E. 480, 45 Ga.App. 249
Ky.—Commonwealth, for Use and Benefit of Eversole v. West, 97 S.W.2d 405, 265 Ky. 550
Miss.—Maryland Casualty Co. v. Eaves, 196 So. 513, 188 Miss. 872
Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.
Tenn.—Marable v. State ex rel. Wackernie, 222 S.W.2d 234, 32 Tenn.App. 238
Tex.—Gregg v. First State Bank of Bishop, Civ.App., 125 S.W.2d 319, error dismissed, judgment correct

Evidence held insufficient for jury

Wash.—Hessler v. Moore, 61 P.2d 1001, 188 Wash. 80

43. S.C.—State Treasurers v. Wiggins, 12 S.C.L. 568

Only question for jury

In action against sheriff and sureties on official bond for damages for failure of sheriff to execute writ of assistance as ordered, only question presented for determination of jury was amount of damages which plaintiff sustained.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.

44. La.—Gray v. De Bretton, 188 So. 722, 192 La. 628

Question held for court

It is for court to determine whether act of deputy sheriff complained of constitutes misfeasance, malfeasance, or nonfeasance, so as to operate as breaches of sheriff's official bond.—Gray v. De Bretton, supra

45. Idaho.—Price v. Pace, 296 P. 189, 50 Idaho 353.

46. Ga.—Braselton v. Patrick, 65 S.E. 402, 133 Ga. 167.
Tex.—McBeath v. Campbell, Com. App., 12 S.W.2d 118.

liable,[47] a peremptory instruction, a nonsuit, or the direction of a verdict in their favor is proper. Where, however, a breach of the bond is shown, plaintiff may not be nonsuited although the special damages alleged are not recoverable;[48] and in a proper case plaintiff may be entitled to a peremptory instruction on the issue of the liability of the surety on the officer's bond.[49]

Instructions. As in other civil actions, it is incumbent on the court, in an action on the official bond of a sheriff or constable, to instruct the jury as to the law governing the case as presented by the pleadings and evidence,[50] and the questions which are presented for their determination.[51] An instruction which incorrectly states the law,[52] or submits questions of law to the jury,[53] or which is misleading,[54] inconsistent,[55] or inapplicable to the issues or evidence,[56] or which unduly emphasizes particular phases of the evidence,[57] or ignores part of the evidence,[58] should not be given; but, where an instruction is not erroneous when considered with the whole charge, no objection can be founded thereon.[59] There is no error in refusing an instruction as to a matter covered by an instruction already given.[60] In an action for the wrongful seizure of chattels, it is proper to submit the question as to the total value of all the property rather than the specific value of each item thereof.[61]

Verdict and findings. In accordance with general rules as to verdicts and findings, the jury's findings on issues submitted to it must be consistent and not conflicting,[62] and, where a verdict is rendered in favor of an officer, verdict must also be given in favor of his sureties.[63] A verdict, in an action on the official bond of a sheriff or constable, which states that the jury "find for the plaintiff, that the condition of the bond is broken, and assess his damages at" a specified amount, is proper.[64] Where two or more actions against an officer and his sureties have been consolidated, and the amount of the several claims exceeds the penalty of the bond, the jury should find such fact in a general verdict, and assess separately the claims of each creditor.[65] An omission to swear the jury to inquire into the truth of the breaches assigned is not cured by a verdict finding that the assignments are true, and a judgment on such verdict is unauthorized.[66]

Reference. An action on the official bond of a sheriff or constable is within a statute providing for references in civil suits and actions,[67] but a statute authorizing a reference in a suit on the bond of a sheriff or other public officer has been

47. Ala.—Burge v. Scarbrough, 100 So. 653, 211 Ala. 377.
57 C.J. p. 1090 note 10.

48. Ga.—Harris v. Black, 85 S.E. 742, 143 Ga. 497.

49. Miss.—Laster v. Chaney, 177 So. 524, 180 Miss. 110.

50. Ala.—Thorn v. Kemp, 13 So. 749, 98 Ala. 417.
57 C.J. p. 1090 note 16.

51. Miss.—Laster v. Chaney, 177 So. 524, 180 Miss. 110.
57 C.J. p. 1091 note 17.

52. Ala.—National Surety Co. v. Boone, 151 So. 447, 227 Ala. 599.
W.Va.—State ex rel. Ratliff v. Day, 198 S.E. 609, 120 W.Va. 412.
57 C.J. p. 1091 note 18.

Instructions held proper or not erroneous

Ga.—Hall v. National Surety Corp., 34 S.E.2d 628, 72 Ga.App. 644—American Surety Co. v. Smith, 191 S.E. 137, 55 Ga.App. 633.
Mo.—State ex rel. and to Use of Donelon v. Deuser, 134 S.W.2d 132, 345 Mo. 628.
Pa.—Commonwealth, to Use of Blystone v. Davis, 186 A. 382, 122 Pa. Super. 280.

53. Ky.—Commonwealth v. Reed, 271 S.W. 674, 208 Ky. 587.
57 C.J. p. 1091 note 19.

54. Ala.—Burge v. Forbes, 120 So. 577, 23 Ala.App. 67, certiorari denied 121 So. 915, 219 Ala. 700.

Instructions held not misleading

Ga.—Hall v. National Surety Corp., 34 S.E.2d 628, 72 Ga.App. 644—American Surety Co. v. Smith, 191 S.E. 137, 55 Ga.App. 633.

55. Mo.—State ex rel. and to Use of Donelon v. Deuser, 134 S.W.2d 132, 345 Mo. 628.

Instructions held not inconsistent

Mo.—State ex rel. and to Use of Donelon v. Deuser, supra.

56. U.S.—State of Missouri ex rel., and to Use of Ward v. Fidelity & Deposit Co. of Md., C.A.Mo., 179 F. 2d 327.
Ala.—Turner v. Townes, 141 So. 239, 224 Ala. 562.
Ky.—Commonwealth, for Use and Benefit of Eversole v. West, 87 S.W.2d 385, 261 Ky. 204.
Mo.—State ex rel. Wolf v. Pumphrey, App., 104 S.W.2d 396.
57 C.J. p. 1091 note 21.

Instructions held proper

Ga.—Hall v. National Surety Corp., 34 S.E.2d 628, 72 Ga.App. 644—American Surety Co. v. Smallon, 194 S.E. 35, 56 Ga.App. 746.
S.D.—Island v. Helmer, 258 N.W. 812, 63 S.D. 362.
Tenn.—Marable v. State ex rel. Wackernie, 222 S.W.2d 234, 32 Tenn.App. 238.
Wash.—Biehn v. Bannick, 7 P.2d 567, 166 Wash. 465.

57. Ala.—Union Indemnity Co. v. Webster, 118 So. 794, 218 Ala. 468.

58. U.S.—Missouri v. Hencken, Mo., 174 F. 624, 98 C.C.A. 378.

59. Ala.—Union Indemnity Co. v. Webster, 118 So. 794, 218 Ala. 468.

60. Ga.—Hall v. National Surety Corp., 34 S.E.2d 628, 72 Ga.App. 644.
Okl.—Hodgson v. Hatfield, 240 P. 69, 112 Okl. 134.

61. Tex.—Cole v. Crawford, 5 S.W. 646, 69 Tex. 124.

62. Tex.—Claffin v. Drane, Civ.App., 131 S.W.2d 672.

Findings held not conflicting

Tex.—Claffin v. Drane, Civ.App., 131 S.W.2d 672.

63. Tex.—McBeath v. Campbell, Com.App., 12 S.W.2d 118.
Liability of sureties as dependent on that of officer see supra § 183.

64. Wis.—Bartlett v. Hunt, 17 Wis. 214.

65. S.C.—State Treasurers v. Bates, 19 S.C.L. 409.

66. Ark.—Adams v. State, 6 Ark. 497.

67. Pa.—Gordon v. Commonwealth, 10 Watts 443.

held not to apply to a suit by a sheriff on the bond of his deputy.[68]

New trial. The failure of plaintiff, in an action on the official bond of a sheriff or constable, to introduce in evidence the bond on which the action is based is ground for a new trial, where there has been a verdict for plaintiff notwithstanding such omission [69]

§ 206. —— Judgment and Subsequent Proceedings

Rules governing judgments in civil actions generally are applicable in actions on the official bond of a sheriff or constable.

Rules governing judgments in civil actions generally are applicable in actions on the official bond of a sheriff or constable.[70] In an action against a sheriff or constable and the sureties on his official bond, plaintiff may dismiss as to the sureties and take judgment against the officer alone,[71] or judgment may be entered against the officer alone where it appears that he is liable for the default but his sureties are not,[72] and, where the petition or complaint does not state a cause of action as against the sureties, it is error to render judgment against them[73] or a joint judgment against them and the officer.[74] Where the sureties are severally liable on the bond for distinct sums, the judgment should be against each for or up to the amount for which he has bound himself,[75] and a joint judgment against all of them is improper.[76] Where a judgment is given against the surety for the amount of the bond and against the officer for a greater amount than the bond, the judgment should state that the judgment on the bond is a part of, and not in addition to, the other award.[77]

Where only a single action may be brought on the bond,[78] or where the statute so provides,[79] judgment should be entered for the full amount of the penalty, which judgment is for the benefit not only of the person for whose benefit the action is instituted, but of all others who are or may become interested in the enforcement of the bond.[80] On the other hand, where separate and successive actions on an officer's bond are maintainable by persons injured by a breach of its condition, it has been held that a judgment for plaintiff should be for the amount of the damage sustained by him, and not for the penalty of the bond;[81] but there is some authority to the contrary.[82]

Time of taking effect of judgment. A judgment on an officer's bond ordinarily takes precedence only from the date of its entry,[83] but it has been held that, where the giving or filing of the bond creates a lien, a judgment relates back to the date thereof.[84]

Judgment in amercement proceedings. Under a statute so providing, the surety on the bond of a sheriff or constable may be made a party to the judgment rendered against the officer in amercement proceedings.[85] Such a statute has been held to apply to the state bonding fund when it is the surety.[86]

Assessment of damages. Where judgment is rendered in favor of plaintiff in an action on the official bond of a sheriff or constable, and a writ of inquiry is awarded, the quantum of the damages caused by the breach is the only subject of inquiry at the execution of the writ.[87] After judgment by default on an officer's bond, it is not necessary to assign breaches on the record before an assessment of damages may be had under the judgment.[88] A notice of motion for leave to assess damages may be given by any attorney selected by the parties in-

68. N.C.—Willis v Melvin, 53 N C. 62

69. Ind—Bowers v. State, 69 Ind. 60

70. Tex.—Dodd v. Gaines, 18 S W. 618, 82 Tex 429

Conformance to verdict

A judgment entered after a trial by jury must conform to the verdict—Dodd v. Gaines, supra—57 C. J p 1091 note 44.

71. Tex.—Dewitt v Oppenheimer, 51 Tex. 103.

72. Kan.—Studebaker v. Johnson, 21 P. 271, 41 Kan. 326, 13 Am S R 287

73. Ky.—Ridgway v. Moody, 16 S. W. 526, 91 Ky. 581, 13 Ky.L 478.

74. Cal.—Felonicher v. Stingley, 76 P. 504, 142 Cal. 630.

75. La—New Orleans v. Waggaman, 31 La Ann 299

76. S C—Treasurers v. Munday, 21 S C L 167

77. Wash—Maciejczak v. Bartell, 60 P 2d 31, 187 Wash. 113

78. N C—Branch v. Elliott, 14 N.C. 86

Single or successive actions on bond see supra § 196.

79. Colo—Taylor v Blyth, 47 P 662, 9 Colo App. 81

57 C J. p 1060 note 82, p 1092 note 48.

80. Colo—Taylor v. Blyth, supra.

81. Pa—McMicken v. Commonwealth, 58 Pa. 213

57 C.J. p 1092 note 46.

82. Mo.—State v. Horn, 7 S.W. 116, 94 Mo. 162

57 C.J. p 1092 note 47.

83. Pa—In re Morris, 4 Pa 162

84. Pa—In re Morris, supra.

Lien arising from bond see supra § 178

85. N D—Farmers' State Bank of Van Hook v Crandell, 236 N W 264, 60 N D. 619.

Amercement proceedings generally see supra § 176.

Liability of surety for fine or penalty generally see supra § 181.

86. N D—Farmers' State Bank of Van Hook v. Crandell, supra.

87. Ind—Clark v. State, 7 Blackf. 570

Proceedings for assessment of damages in civil actions generally see Damages §§ 163-195.

88. N.J.—State v. Hamilton, 10 N J Law 190.

terested in obtaining the assessment,[89] and such notice is properly served on the officer and his sureties, and need not be served on the attorney who appeared for defendants in the action on the bond.[90] On an application to assess damages after a judgment, the officer will not be allowed to set off a claim for fees on an execution in a different case which had been placed in his hands in favor of applicant.[91] Where damages are claimed in behalf of a person other than the original prosecutor, on a special notice before the issuance of the writ of inquiry for the assessment, such damages may be assessed by the same jury.[92] In an action on a bond for the damages resulting from two acts of misconduct by the officer, judgment for the full amount of the bond is proper, although the surety is not liable for one of the acts, where damages resulting from the other act are as great as the amount of the bond.[93]

Execution. Where it is held that judgment must be entered for the full penalty of the bond, execution issues, not for the amount of the judgment, but for the amount of the damages to which the complaining party shows himself to be entitled,[94] and for other official defaults of the officer the persons injured may in proper proceedings procure executions on the same judgment for the respective amounts due them, until the judgment is exhausted.[95] A statute providing that the property of sureties on the official bond of a sheriff or constable shall not be levied on to satisfy a judgment on the bond until execution against the officer shall prove unavailing has been held not to apply where there is no judgment against the officer.[96] Where plaintiff obtains a judgment in an action on the bond of a sheriff or constable, he may have an execution issued without previous notice to the officer or the sureties,[97] but another person who has also obtained a judgment against the officer is not entitled to have the amount thereof levied on the execution to be issued on the judgment recovered on the bond without proper notice.[98]

§ 207. —— Damages

As a general rule, except as otherwise provided by statute, plaintiff in an action on the official bond of a sheriff or constable is entitled to recover only such sum as will indemnify him for injury sustained by reason of the breach of the condition of the bond.

As a general rule, except as otherwise provided by statute, plaintiff in an action on the official bond of a sheriff or constable is entitled to recover such sum, and such sum only, as will indemnify him for the injury he has sustained by reason of the breach of the condition of the bond,[99] provided such sum does not exceed the amount for which the sureties are liable under the terms of the bond.[1] Damages cannot be allowed for a loss which was not proximately caused by the misconduct or default on which the action is based,[2] or for a mere speculative loss.[3] Damages for mental pain and suffering are in large measure discretionary within reasonable bounds.[4] The owner of property wrongfully seized by the officer is entitled to recover the market value of such property,[5] and he is entitled to damages up to the time of trial where the extent of damages cannot be determined at the time of seizure.[6]

In an action for wrongfully attaching certain enumerated goods and others not enumerated, the goods not enumerated are not to be taken into considera-

89. N.J.—State v. Hamilton, supra
57 C.J. p 1092 note 57.

90. N.J.—State v. Hamilton, supra

91. N.J.—State v. Welsted, 11 N.J. Law 397.

92. N.J.—Jersey City v. Chase, 30 N.J.Law 233.

93. Tex.—Modesett v. Emmons, Civ. App., 286 S.W. 276, reversed on other grounds, Com.App., 292 S.W. 855.

94. Ohio—Smith v. Licking County, 2 Ohio 312.
57 C.J. p 1060 note 84, p 1092 note 66.

95. Colo.—Taylor v. Blyth, 47 P. 662, 9 Colo.App. 81.
57 C.J. p 1060 note 85.

96. Ill.—Babka v. People, 73 Ill.App. 246.

97. N.Y.—People v. Matthewson, 20 Johns 300, distinguished from People v. Birdsall, 20 Johns. 297.

98. N.Y.—Lewis v. Ball, 6 Cow. 583
—People v. Birdsall, 20 Johns 297

99. Ala.—Walker v. Graham, 172 So. 655, 233 Ala. 539.

Kan.—**Corpus Juris cited in** Farmer v. Rutherford, 15 P.2d 474, 478, 136 Kan. 298.

Miss.—Maryland Casualty Co. v. Eaves, 196 So. 513, 188 Miss. 872.
57 C.J. p 1093 note 72

Delay in executing writ

Sheriff and sureties on his official bond become liable for all damages sustained by reason of unreasonable delay of sheriff in executing writ of assistance to place purchaser at foreclosure sale in possession.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.

Award held excessive

Ala.—American Surety Co. of New York v. O'Hara, 169 So. 229, 232 Ala. 616.

Award held not excessive

Ga.—Hester v. Shrouder, 13 S.E.2d 875, 64 Ga.App. 572.

1. Miss.—Maryland Casualty Co. v. Eaves, 196 So. 513, 188 Miss. 872

2. Mo.—State v. Springer, 45 Mo. App. 252.
57 C.J. p 1093 note 74.

3. Tex.—Reynolds v. Weinman, Civ. App., 25 S.W. 33.
57 C.J. p 1093 note 75.

Supposed profits on unplanted crops

Miss.—Gilbert v. Crosby, 135 So. 201, 160 Miss. 711, motion overruled 142 So. 507.

4. Ala.—American Surety Co. of New York v. O'Hara, 169 So. 229, 232 Ala. 616.

5. Miss.—Gilbert v. Crosby, 135 So. 201, 160 Miss. 711, motion overruled 142 So. 507.

6. Or.—Industrial Chrome Plating Co. v. North, 153 P.2d 835, 175 Or. 351, 156 A.L.R. 250

tion in assessing the damages,[7] and under a claim of special damages for loss of the possession and use of property, it is error to allow the jury to assess damages according to the value of the property as though the claim were for the loss thereof.[8] In an action by plaintiff in a judgment against the sureties of an officer to recover the moneys collected on an execution, the fees of the officer are not recoverable,[9] except where they have previously been advanced by plaintiff.[10] It has been held that, where a bond is erroneously made to a municipal treasurer instead of to the municipality, it is to be treated as held in trust for the latter, so that the damages in an action thereon are measured by the interests of the municipality and not by those of the treasurer.[11] In an action on an officer's bond for the joint misconduct of two deputies, the allowance of damages for the entire injury caused as to each deputy is improper as allowing a double recovery.[12] In an action by a sheriff or constable on the bond of his deputy the damages to be recovered include the amount of a liability incurred by the officer before bringing the action, although he did not in fact make payment thereof until afterward.[13]

Release of property without sufficient bond. An attachment creditor, damaged by a sheriff's release of the attached property without a proper or sufficient replevy or forthcoming bond, may recover as damages, on the sheriff's bond, the amount of his debt and costs where the value of the released property is greater than such amount,[14] or the value of the property released where such value is less than the amount of the debt and costs.[15]

Mitigation of damages. In an action on the official bond of a sheriff or constable it may be shown, in mitigation of damages, that plaintiff has suffered little or nothing by the officer's default or breach of duty,[16] and in an action by the purchaser of property wrongfully sold by an officer the amount of an unsatisfied lien against such property should be credited on the value thereof.[17] Where the action is based on unreasonable delay in bringing plaintiff before the magistrate after his arrest, the fact that plaintiff was convicted of the crime for which he was arrested can be considered in mitigation of damages.[18] Where there has been a breach of duty with respect to the same matter in successive years for which the officer has given different bonds, the fact that the injured party might recover on the bond for the second year cannot mitigate the damages in an action on the bond for the first year,[19] and in an action for neglect to execute a capias ad satisfaciendum, the fact that the debtor against whom plaintiff held a claim might, even after being imprisoned, have paid other bona fide debts, to plaintiff's disappointment, cannot be considered on the question of damages.[20]

Nominal damages. An award of nominal damages, and no more, is proper, in an action on the official bond of a sheriff or constable, where it appears that, although the officer has been guilty of an official misfeasance or default, plaintiff has suffered no real injury therefrom,[21] or where actual injury is not averred and proved.[22] The recovery cannot be limited to nominal damages, however, where the action is for a failure to arrest a debtor whose arrest might have resulted in payment of the debt,[23] or for the escape of a debtor imprisoned under a statute providing for imprisonment as a coercive

7. Mass.—Lowell v. Parker, 10 Metc 309, 43 Am D 436

8. Ala.—Pruett v. Williams, 47 So 318, 156 Ala 346.

9. Pa.—Commonwealth v McCoy, 8 Watts 153, 34 Am D 445.

10. Pa.—Commonwealth v McCoy, supra.

11. Mass.—Farr v. Rouillard, 52 N E. 443, 172 Mass 303.

12. Tex.—Singer Sewing Mach. Co v. Mendoza, Civ App., 62 S.W.2d 656, modified on other grounds Mendoza v Singer Sewing Mach Co, 84 S.W.2d 715, 125 Tex. 639

13. Me.—Smith v. Berry, 37 Me. 298.

14. Ala.—Campbell v. Tucker, 154 So. 821, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala. 658.

Tex.—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ App., 88 S W 2d 605, error refused.

Property value fixed by sheriff

Sheriff who, in releasing attached property, took common-law replevy bond instead of required statutory bond, and approved bond taken after fixing value of property in excess of judgment and costs in attachment suit, prima facie admitted value of property so fixed, entitling plaintiff in action on sheriff's bond to amount of judgment and costs.—Campbell v. Tucker, 154 So 825, 228 Ala. 658

15. Ala.—Campbell v. Tucker, 154 So. 821, 23 Ala.App. 100, certiorari denied 154 So. 825, 228 Ala 658.

Insolvent sureties on replevy bond

Where sheriff in exercise of ordinary care could have ascertained that sureties on replevy bond were insolvent, attachment creditor could recover from sheriff value of property released under such bond, where value of property was less than debt, since reviewing court could not assume that sufficient bond would have been filed had sheriff not accepted bond signed by insolvent sureties.—Fidelity & Deposit Co. of Maryland v First Nat. Bank, Tex.Civ.App., 88 S W.2d 605, error refused.

16. Md.—State v. Tabler, 41 Md. 236. 57 C J. p 1093 note 82

17. Tex.—Barton v. Lary, Civ.App., 283 S W. 920.

18. Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont 571

19. N C.—Hubbard v. Wall, 31 N.C. 20.

Liabilities as between sureties on successive bonds see supra § 178.

20. N C.—Sherrill v. Shuford, 32 N. C. 200.

21. Mo.—State v. Miles, 129 S.W. 731, 149 Mo App. 638.
57 C J. p 1094 note 86.

22. Ala.—Higdon v Fields, 60 So 594, 6 Ala App 281

23. N.C.—Murphy v. Troutman, 50 N.C. 379
57 C.J. p 1094 note 88.

remedy to compel payment of the debt.[24]

Exemplary and penal damages. In accordance with the general rules relating to the recovery of exemplary or punitive damages or smart money against sureties, as applied in actions on official bonds, such damages are not recoverable against the sureties on the official bond of a sheriff or constable[25] except where authorized by statute.[26] Where a statute makes an officer's sureties liable for a penalty, to be recovered in summary proceedings, such penalty cannot be recovered in a common-law action on the bond,[27] but, where a statute provides for the addition to the amount of plaintiff's injury of a specified percentage thereof as statutory damages, such percentage is properly included in the judgment.[28]

Expenses; attorney's fees. Under or apart from statutes so providing, the successful plaintiff in an action on the bond of a sheriff or constable has been held entitled to recover, in addition to court costs, the reasonable expenses of the suit,[29] which may include attorney's fees;[30] and reasonable expenses, including counsel fees, have been allowed in an action by a sheriff on the bond of his deputy.[31] However, it has been held that attorney's fees cannot be recovered in addition to the face amount of the bond.[32]

Interest. Although there is some authority to the contrary,[33] it appears to be settled law that, in an action on the official bond of a sheriff or constable, interest may be allowed on the amount for which the officer's wrongful act has rendered defendants liable.[34] The allowance of interest has been held to be within the discretion of the jury, so that it is error to instruct that it must be allowed.[35]

§ 208. —— Review

Rules relating to appeals and the review of civil

24. Ill.—Gruer v. People, 60 Ill App. 123.

25. Ala.—American Surety Co of New York v. O'Hara, 169 So 229, 232 Ala. 616—Holland v Fidelity & Deposit Co of Maryland, 145 So. 131, 225 Ala 669
Ark.—Arnold v. State ex rel. Burton, 245 S W 2d 818.
Kan.—**Corpus Juris cited in** Farmer v Rutherford, 15 P 2d 474, 478, 136 Kan. 298
Miss.—Maryland Casualty Co v. Eaves, 196 So. 513, 188 Miss 872
57 C J p 1094 note 92
Recovery of punitive damages in actions on official bonds in general see Officers § 177 b (2).

26. Ga.—Copeland v Dunehoo, 138 S E 267, 36 Ga.App. 817.
Lack of good faith
Under a statute providing that in all cases when little or no damage is actually sustained, and the officer has not acted in good faith, smart money, which shall not be oppressive or excessive under the circumstances, may be awarded, in suit on arresting officers' bond for "smart" money based on misconduct in shooting at occupant of automobile, it was not essential to establishment of fact that officers did not act in good faith, that their acts in inflicting injuries were wanton and malicious, and were performed recklessly in a spirit of mischief toward occupant, and with criminal indifference to occupant's rights.—American Surety Co v Smallon, 194 S E. 35, 56 Ga App 746
Misconduct of deputy
(1) "Officer," within statute establishing measure of damages recoverable in actions on official bonds for misconduct of officer and authorizing recovery of smart money, was held to include not only sheriff but his deputies.—American Surety Co. v. Smallon, supra.
(2) "Smart" money can be recovered on sheriff's bond for misconduct of deputy sheriff.—American Surety Co. v Smith, 191 S E. 137, 55 Ga App. 633—American Surety Co v. Smallon, supra.
Awards held not excessive
(1) In action on sheriff's official bond for misconduct in searching plaintiff's home without a search warrant and while engaged in such unlawful search beating plaintiff resulting in pain and loss of a week's work, an award of $450 smart money was not excessive.—Glens Falls Indemnity Co v Dempsey, 23 S E 2d 497, 68 Ga App. 612
(2) In action on official bond for misconduct of sheriff and his deputy in searching the home of plaintiff and her husband without search warrant or their consent and while engaged in such unlawful search beating plaintiff's husband without cause resulting in some physical injury to plaintiff who fainted while attempting to assist husband, award of $500 smart money was not excessive.—Glens Falls Indemnity Co v Dempsey, supra.
(3) $500 to plaintiff suing on arresting officers' bond for "smart" money based on officers' misconduct in shooting at plaintiff while riding in an automobile was not excessive, or the result of prejudice or bias.—American Surety Co v Smallon, 194 S E. 35, 56 Ga App. 746.

27. Ala.—Marcum v. Burgess, 67 Ala. 556
57 C J. p 1094 note 95.
Liability of sureties for fine or penalty see supra § 181.

28. Tex.—Hughes v. Willis, Civ. App., 191 S W. 584.

29. Ga.—Glens Falls Indemnity Co v. Dempsey, 23 S E 2d 497, 68 Ga. App 612—Glens Falls Indemnity Co v. Dempsey, 23 S E 2d 493, 68 Ga.App 607.
57 C.J p 1093 note 71 [a] (1).

30. Ga.—Glens Falls Indemnity Co. v. Dempsey, 23 S.E.2d 497, 68 Ga. App. 612.
57 C J. p 1093 note 71 [a] (2).
Contractual provision
Counsel fees other than statutory costs may be allowed where contract provides for their payment.—Guay v Brotherhood Bldg Ass'n, 177 A. 409, 87 N H. 216, 97 A L.R 1053
Allowance of attorney's fees held not excessive
Ga.—Glens Falls Indemnity Co. v. Dempsey, 23 S E 2d 497, 68 Ga App 612—Glens Falls Indemnity Co v. Dempsey, 23 S E.2d 493, 68 Ga.App. 607.

31. N H.—Hoitt v. Holcomb, 32 N H. 185.

32. Ga.—Hall v. National Surety Corp., 34 S E 2d 628, 72 Ga App 644

33. Va.—Gibson v. Governor, 11 Leigh 600, 38 Va 600

34. Ga.—Morrison v Slaton, 96 S E 422, 148 Ga 294, answers to certified questions conformed to 96 S. E. 706, 22 Ga.App 602
57 C J. p 1094 note 99
Limitation of sureties' liability to penal amount of bond as affecting liability for interest see supra § 181.

35. Ark.—Crow v. State, 23 Ark. 684

actions generally have been applied to actions on the official bond of a sheriff or constable.

Rules relating to appeals and the review of civil actions generally have been applied to actions on the official bond of a sheriff or constable.[36] In an action on a bond, the execution and delivery of which are denied by the sureties, the refusal of the court to permit a full cross-examination of plaintiff's witnesses relative to the issue under the pleadings is sufficient ground, when assigned for error, to present for review the sufficiency of defects on the face of the bond to charge the obligee with notice of the officer's want of authority to deliver it on behalf of the sureties.[37] On an appeal from an order dismissing a petition to forfeit the officer's bond, the terms of the bond need not be set out, since all statutory requirements will be considered as included and nonstatutory provisions read out.[38] Where the reviewing court regards the award of damages as excessive, it may grant an affirmance conditioned on plaintiff's remittitur of the amount deemed excessive, and provide for reversal if such remission is not made.[39]

X. CRIMINAL RESPONSIBILITY

§ 209. Offenses

A sheriff or constable is liable to the same extent as any other person for the commission of any act constituting a crime under the general law, and he is also subject to criminal prosecution for any official defaults or misfeasances which are made offenses by statute.

A sheriff or constable is liable to the same extent as any other person for the commission of any act constituting a crime under the general law.[40] It has been held that in the absence of statute it is not an indictable offense for a constable to fail or neglect to return a warrant issued by a justice.[41]

In addition to his ordinary civil liabilities, as discussed supra §§ 52-127, and to his liability to a civil penalty or amercement, as considered supra §§ 173-176, a sheriff or constable is also subject to criminal prosecution for any official defaults or misfeasances which are by statute made offenses or for which punishment as for crime is prescribed,[42] including, under particular statutes, a refusal to execute a warrant delivered to him to be executed,[43] forcibly entering a dwelling house to serve civil process,[44] levying on exempt property,[45] refusing, on demand, to lay off a debtor's personal property exemption out of property levied on,[46] selling exempt property under execution,[47] bidding at his own sale[48] or becoming the purchaser thereat,[49] refusing to sell property because there is but one bidder at the sale,[50] wantonly sacrificing property taken and sold under execution,[51] failing to pay over money collected by him[52] or failing to deliver prop-

36. Cal.—Elliott v Haskins, 67 P.2d 698, 20 Cal.App.2d 591.

Necessity of reference to record

In action for false imprisonment against sheriff and bondsmen, contention that warrant was illegal because it lacked indorsement for execution in county where plaintiff was arrested would not be considered where plaintiff did not cite evidence in record that anyone executed the warrant in that county, since it was not court's duty on appeal to search for such evidence.—Elliott v. Haskins, supra.

Parties to bill of exceptions

In action against surety on deputy sheriff's bond, where surety vouched deputy sheriff into court and surety alone moved for new trial, deputy sheriff was not necessary party to surety's bill of exceptions.—Maryland Casualty Co. v. Salmon, 164 S E 80, 45 Ga App 173.

37. Or.—Baker County v. Huntington, 79 P 187, 46 Or. 275.

38. Iowa.—State ex rel. Switzer v. Overturff, 33 N W 2d 405, 239 Iowa 1039, 4 A.L R 2d 1343.

39. Ala.—American Surety Co. of New York v O'Hara, 169 So. 229, 232 Ala. 616.

40. Ga.—Duckett v. State, 21 S E. 73, 93 Ga 415.

Criminal responsibility of:

Public officers in general see Officers §§ 133, 134.

Sheriff as jailer see Prisons § 15

41. Tenn.—State v. White, 5 Sneed 620

Criminal responsibility of officers at common law generally see Officers § 133 b.

42. **Misfeasance or malfeasance in office**

Ky.—Castle v. Commonwealth, 24 S. W 2d 298, 232 Ky. 561.

Willful neglect in discharge of official duties

Ky.—Castle v. Commonwealth, supra.

Wis.—Liskowitz v. State, 282 N.W 103, 229 Wis 636.

43. Ga.—Newkirk v. State, 196 S E 911, 57 Ga App. 803.

57 C.J. p 1095 note 17

44. N C.—State v. Armfield, 9 N.C 246, 11 Am D 762.

57 C.J. p 1095 note 18.

45. Tex.—Pippin v State, 36 Tex 696

46. N C.—State v. Carr, 71 N C. 106.

47. Tex.—Pippin v. State, 36 Tex 696

57 C.J. p 1095 note 21.

48. Tenn.—Chambers v. State, 3 Humphr. 237

57 C.J p 1095 note 22

49. Ind.—State v Williams, 4 Ind. 393

50. N C.—State v. Johnston, 2 N.C 293.—State v. Joyce, 2 N.C. 43.

51. U S.—U S. v Bill, D C., 24 F. Cas No.14,593, 2 Cranch C C. 202.

57 C J. p 1096 note 25.

52. Ark.—Mahar v. State, 28 Ark 207

Ind.—State v. Longley, 10 Ind 482

Failure to pay over to proper person

Sheriff who delivered collected taxes to county treasurer instead of person entitled thereto was merely guilty of a misdemeanor, under Revisal, 1905, § 3576, and not of a felony, under § 3408, denouncing as a felony failure to turn over to person entitled thereto "all such moneys, funds," etc., latter statute referring to money held in trust for any per-

erty seized to the proper person,[53] failing or neglecting to return process delivered to him[54] or making a false return thereof,[55] neglecting his duty in the prevention of a public offense of which he had notice,[56] failing to fingerprint persons arrested on indictable offenses,[57] allowing the escape of a prisoner,[58] acting as constable without giving bond,[59] or failing to render a sworn statement of moneys collected for the county[60]

A levy of process on property exempt from seizure or sale may render the officer criminally liable under a statute providing for the punishment of unjust or oppressive conduct in his official capacity;[61] but such a statute is not violated by a levy on property of value not unreasonably in excess of the amount of the demand,[62] or by a levy on property belonging to and in the possession of a stranger to the writ, where the officer acts in good faith under a bond of indemnity.[63] A sheriff or constable is within a statute providing that every officer who fails or refuses to perform any duty imposed on him by law shall be guilty of a misdemeanor,[64] and a deputy has also been held to be within such a statute;[65] but a deputy is not subject to prosecution for an act or default under a statute making his principal criminally liable therefor.[66]

Liability for act or omission of deputy. A sheriff or constable is not criminally responsible for a default or a misfeasance of his deputy,[67] except where it is done by the deputy in the officer's name and as his act,[68] and, on the other hand, a sheriff or constable cannot escape criminal liability for an act or omission on the ground of a default of his deputy in connection therewith.[69]

§ 210. Prosecution and Punishment

The general rules governing criminal prosecutions ordinarily are applicable in criminal prosecutions against a sheriff or constable.

The general rules governing criminal prosecutions ordinarily are applicable in criminal prosecutions against a sheriff or constable,[70] including the general rules regulating indictments and informations.[71] Accordingly, the indictment, in a criminal proceeding against a sheriff or constable, must fully and certainly describe and identify the offense and allege the essential elements thereof[72] Each count in the indictment must be sufficient in

son or corporation, in view of preceding provision thereof relating to embezzlement of such trust funds — State v Windley, 100 S.E. 116, 178 N C. 670.

53. Failure of constable, etc., to deliver liquor to sheriff

Tenn.—State v Yearwood, 83 S W 2d 894, 169 Tenn. 181—Mathis v. State, 46 S W.2d 44, 164 Tenn 81.

54. N C.—State v. Berry, 85 S E 387, 169 N.C. 371.
57 C J. p 1096 note 27.

55. N C.—State v. Johnston, 2 N.C. 293—State v. Joyce, 2 N.C. 43.

56. Tenn.—State v Reichman, 188 S W 225, 135 Tenn. 653, 188 S W. 597, 135 Tenn 685.
57 C J. p 1096 note 29.

57. N J —State v McGovern, 54 A 2d 812, 136 N.J.Law 115

58. Pa —Commonwealth v. Medland, 5 Pa Co. 233
57 C.J. p 1096 note 30.

59. U S.—U. S. v. Evans, D C, 25 F Cas No 15,064, 1 Cranch C.C. 149

60. Ala.—Doyle v. State, 49 Ala 28

61. Tex —Pippin v State, 36 Tex. 696

62. Tex —Pippin v State, supra.

63. N C —State v. Tatom, 69 N C 35.

64. N C —State v. Berry, 85 S E 387, 169 N C. 371
57 C J p 1096 note 36.

65. Ind —State v. Berkshire, 2 Ind 207.

66. La —State v Kirby, 6 So. 578, 41 La Ann. 298

67. Fla —Holland, for Use and Benefit of Williams, v Mayes, 19 So 2d 709, 155 Fla 129—Malone v Howell, 192 So 224, 140 Fla 693
57 C.J. p 1096 note 39.

68. N C —State v. Johnston, 2 N.C. 293
Pa —Commonwealth v. Shields, 50 Pa Super. 1.

69. Pa —Commonwealth v. Shields, supra.

70. Ark —State v Williams, 161 S W 159, 109 Ark. 465.

Defenses

In prosecution against constable for misbehavior in office, based on illegal arrests and improper institution of criminal proceedings in which costs were obtained from defendants, the failure to comply with statute providing that no action should be brought against a constable for anything done in obedience to a warrant until warrant has been demanded constituted no defense, since statute applied to civil actions only — Commonwealth v. Dempsey, 22 A 2d 76, 146 Pa Super. 124.

71. Fla —Sullivan v. Leatherman, 48 So.2d 836.

72. Fla.—Sullivan v. Leatherman, supra.
57 C J. p 1096 note 44.

Indictments held sufficient

(1) In general —State v. Lombardo, 87 A 2d 375, 18 N.J Super. 511.

(2) Where indictment of sheriff for failure to perform his duty to fingerprint certain persons arrested for an indictable offense was laid in language of statute and elements were made clear, failure to allege that the fingerprint system of identification had been in fact established by superintendent of state police, which system statute required sheriff to follow, was not a fatal defect —State v McGovern, 54 A 2d 812, 136 N.J. Law 115.

(3) In indictment of sheriff for willful neglect of duty, count alleging that, when citizen made complaint of illegal operation of slot machines within the county, sheriff directed deputy to arrest the guilty person but informed guilty person that deputy was on the way to seize machines and arrest him, sufficiently charged an offense.—Liskowitz v. State, 282 N W. 103, 229 Wis 636.

(4) Indictment charging that constable took money from unknown persons to prevent their prosecution was sufficiently certain —Castle v. Commonwealth, 24 S.W 2d 298, 232 Ky. 561.

Indictments held insufficient

(1) Counts in indictment of sheriff for willful neglect of duty, alleging that at different times sheriff neglected to perform his duties by failing to try to stop gambling and operation of slot machines, but not charging any specific act or omission or describing the operation of slot machines, specifically were insuffi-

itself,[73] and averments in one count cannot aid defects in another.[74]

In an indictment charging official misconduct or failure of official conduct in any respect, whether common-law or statutory, the offense must be charged in direct and specific terms and that it was willfully or corruptly done or omitted.[75] It has been held that an indictment for neglecting to execute a warrant is sufficient if it sets out a warrant legal on its face,[76] and avers that the offense was an injury to the state,[77] without setting out facts showing authority for its issuance; but there is also authority for the view that the indictment must allege the truth of the recitals of the warrant as to the authority to issue it.[78] An indictment for failing to return an execution must set forth at least the substance of the execution.[79] An indictment for failing to pay over fines, penalties, and forfeitures collected by the officer as a part of the school fund need not allege that they were withheld willfully or with a fraudulent intent,[80] nor need the money be denominated as a part of the school fund.[81] Where a corrupt motive is an essential element of the offense, allegations with respect to such motive are not surplusage,[82] and an indictment is not bad because, if they are disregarded, it charges only acts which it was the duty or right of the officer to perform.[83]

Evidence. General rules governing evidence in criminal prosecutions ordinarily are applicable in prosecutions against a sheriff or constable[84] with respect to the admissibility[85] and the weight and sufficiency[86] of the evidence.

Questions for jury. Questions of fact involved in determining whether or not a sheriff or constable has committed an offense are for the jury, in a criminal proceeding against the officer.[87]

XI. LIABILITY OF PARTIES, RECEIPTORS, AND OTHERS TO OFFICER

§ 211. Parties

Where a sheriff or constable, on his official responsibility, and without any direction from the creditor, wrongfully levies on and sells exempt property of a debtor on execution, he cannot recover from the creditor the damages recovered against him by the debtor.

Where a sheriff or constable, on his official responsibility, and without any direction from the creditor, wrongfully levies on and sells exempt property of a debtor under execution, he cannot recover from the creditor the damages recovered against him by the debtor,[88] even though the execution creditor was present at the sale[89] and purchased some of the property,[90] or the proceeds of the sale were paid to such creditor.[91]

§ 212. Receiptors

A written contract to pay a specified sum of money or to redeliver on demand to a sheriff or constable specific articles of attachable property which he has taken on mesne process is a lawful contract.

A written contract to pay a specified sum of money or to redeliver on demand to a sheriff or constable specific articles of attachable property, which he has taken on mesne process, is a lawful contract,[92] and a recital of the attachment in such

cient—Liskowitz v. State, 282 N.W. 103, 229 Wis. 636

(2) Other indictments held insufficient see 57 C.J. p 1096 note 44 [a] (2).

Failure to deliver property seized to sheriff

Indictment under statute charging those accused with failure to report possession of intoxicating liquor and deliver it to sheriff must charge that they were officers—Mathis v. State, 46 S.W.2d 44, 164 Tenn 81.

73. Ind.—State v. Longley, 10 Ind. 482
57 C.J. p 1096 note 51

74. Ind.—State v. Longley, supra.

75. Fla.—Sullivan v. Leatherman, 48 So.2d 836.

76. Ind.—Stewart v. State, 4 Blackf. 171.
57 C.J. p. 1096 note 46.

77. Ind.—Stewart v. State, supra.

78. N.Y.—People v. Weston, 4 Park. Cr. 226.

79. Ind.—State v. Smith, 5 Blackf. 327.

80. Ark.—Mahar v. State, 28 Ark. 207.

81. Ark.—Mahar v. State, supra.

82. Md.—Mohler v. State, 87 A. 671, 120 Md. 325.

83. Md.—Mohler v. State, supra.

84. Pa.—Commonwealth v. Shields, 50 Pa. Super. 1.
Tenn.—Mathis v. State, 46 S.W.2d 44, 164 Tenn. 81

85. Pa.—Commonwealth v. Shields, 50 Pa. Super. 1
57 C.J. p. 1097 note 55 [a]

86. **Evidence held sufficient**
Tenn.—Mathis v. State, 46 S.W.2d 44, 164 Tenn. 81.
57 C.J. p. 1097 note 55 [b].
Evidence held insufficient
Fla.—Thomas v. State, 30 So.2d 921, 158 Fla. 845.

87. Ark.—State v. Williams, 161 S.W. 159, 109 Ark. 465.
57 C.J. p. 1097 note 56.

88. Mass.—Russell v. Walker, 23 N.E. 383, 150 Mass. 531, 15 Am.S.R. 239
Mo.—Kane v. Dauernheim, 60 Mo. App. 64.
Indemnity to officer see supra §§ 128-145
Liability of:
Officer and execution creditor for wrongful execution see Executions § 456 b.
Sheriff or constable for wrongful levy on property see supra §§ 63-77.

89. Mass.—Russell v. Walker, 23 N.E. 383, 150 Mass. 531, 15 Am.S.R. 239

90. Mass.—Russell v. Walker, supra

91. Mass.—Russell v. Walker, supra
Mo.—Kane v. Dauernheim, 60 Mo. App. 64.

92. Me.—Foss v. Norris, 70 Me. 117
N.Y.—Cornell v. Dakin, 38 N.Y. 253, 7 Transcr. A. 82

contract is sufficient evidence of a legal consideration therefor.[93] The liability of the maker of such a contract is ordinarily absolute, and dischargeable only by act of God or the public enemy.[94] After a legal demand[95] an action may be maintained on such a contract as long as the attaching officer is under a liability to the creditor or debtor for the property attached,[96] and the extent of that liability is the measure of damages.[97] The receiptor cannot be heard to say that the value of the property left with him is less than the sum stipulated to be paid in case of its nondelivery,[98] or that such property belongs to a third person other than the execution defendant.[99] An officer cannot hold the receiptor liable for failure to redeliver the property to him on demand unless the officer himself has become subject to some liability by reason of his failure to hold or sell the property.[1] The approval by a plaintiff in attachment of a person taken as receiptor for property attached does not exonerate the officer from the duty of bringing a suit on the receipt when the property is not produced.[2]

Where the receiptor of attached property refuses to deliver it to the officer, who demands it for the purpose of levying an execution on it, and such refusal is the only reason why the execution is not levied, such receiptor is estopped, in an action of assumpsit against him by the officer on the receipt, from taking any advantage of the fact that no levy has been actually made;[3] and, where the receiptor conceals from the levying officer his ownership of property and suffers it to be seized as the property of defendant in the process, thus preventing a possible levy on other property, he is estopped from claiming the goods as his own when sued on the receipt,[4] although, where the receipt does not admit that defendant in the process is the owner of the property, and the receiptor at the time asserts ownership in himself, he is not estopped to set up such ownership in an action on the receipt.[5] An officer who has delivered attached property to a third person, taking an accountable receipt therefor, is not deprived of his right of action on the receipt by the act of a creditor in executing to the receiptor a writing acknowledging the receipt of the net proceeds of the sale of the property.[6]

In an action by an officer on a receipt for property attached, irregularities in the proceedings in the original suit constitute no defense, provided the judgment was valid.[7] Even the reversal of the judgment on which an execution issued will not bar an action in favor of the officer on a receipt for property taken on such execution,[8] and, if the property receipted for has been restored to the original owner before the action is brought by the officer, the rule of damages is the amount of the officer's fees.[9]

§ 213. Other Persons

Other persons, such as the obligors on a jail limits bond or bail bond, may be liable to a sheriff or constable

In addition to parties and receiptors, as discussed supra §§ 211, 212, other persons may be liable to a sheriff or constable.[10] A sheriff or constable who is subjected to liability by reason of the escape of a prisoner who had given a jail limits bond is entitled to recover against the obligors on such bond for the injury which he has thus suffered,[11] unless the judgment against him was rendered in consequence of his failure to avail himself of a good defense known to him at the time.[12]

Obligors on bail bond. Where a sheriff or con-

Delivery of property to bailee or receiptor on
Attachment see Attachment §§ 296-302.
Execution see Executions § 115

93. Me.—Foss v. Norris, 70 Me. 117

94. N.Y.—Cornell v. Dakin, 38 N.Y. 253, 7 Transcr. A. 82

95. Me.—Foss v. Norris, 70 Me. 117
57 C.J. p. 1097 note 66.

96. Me.—Foss v. Norris, supra.

97. Me.—Foss v. Norris, supra

98. N.Y.—Cornell v. Dakin, 38 N.Y. 253.

99. N.Y.—Cornell v. Dakin, supra.

1. Me.—Fisher v. Bartlett, 8 Me. 122, 22 Am. D. 225
57 C.J. p. 1097 note 71

2. Me.—Allen v. Doyle, 33 Me. 420

3. Conn.—Parks v. Sheldon, 36 Conn. 466, 4 Am.R. 95.

4. Me.—Drew v. Livermore, 40 Me. 266.
57 C.J. p. 1098 note 74

5. Cal.—Bleven v. Freer, 10 Cal. 172.
57 C.J. p. 1098 note 75

6. Me.—Torrey v. Otis, 67 Me. 573
57 C.J. p. 1098 note 76.

7. Me.—Bean v. Ayers, 70 Me. 421.

8. Conn.—Phelps v. Landon, 2 Day 370.

9. Conn.—Phelps v. Landon, supra

10. **Third person obtaining seized property**
One who, by threats or promises to hold him harmless, induces a sheriff or constable to deliver to him property which he has levied on, is liable to the officer for the loss or damage sustained by him where he is subsequently compelled to pay to the execution plaintiff the value of the property so relinquished.—Turner v. Woodward, 51 S.E. 762, 123 Ga. 866

Person inducing sheriff to violate duty
Where a sheriff was induced by defendant's misrepresentations to accept a check instead of cash for property sold on execution and, on failure to pay over in cash, was imprisoned for contempt, he could not recover damages from defendant on the ground that the latter's fraudulent conduct induced him to violate his duty.—McLendon v. Harrell, 67 Ga. 440.

11. Conn.—Seymour v. Harvey, 8 Conn. 63
57 C.J. p. 1098 note 80.
Liability of sheriff or jailer for escape of prisoner see Prisons § 23 i

12. N.Y.—Ransom v. Keyes, 9 Cow. 128.

stable who has taken a bail bond omits to assign it, and is in consequence held as special bail, and compelled to pay the amount recovered in the action, he may sue on the bond as a common-law bond, and recover from the obligor the amount for which he has been held liable.[13] It has been held that the officer cannot recover in such case until he has paid the money,[14] or at least until a judgment has been recovered against him for it,[15] but there is authority for the view that, where one arrested does not appear and put in bail within the time prescribed by the bail bond, and the arresting officer is ruled against, and attachment against him ordered before bail is put in, he may recover on the bond for such default, although he has not actually paid the costs of the attachment or put in bail to the original suit, or been subjected to any further liability.[16]

§ 214. Actions by Officers

a. In general
b. Defenses
c. Parties; joinder of actions
d. Pleading and evidence
e. Judgment, damages, and review

a. In General

A sheriff or constable who is entitled to the custody and possession of property has a right of action to protect his possession and to shield himself from responsibility.

A sheriff or constable who is entitled to the custody and possession of property has a right of action in damages or otherwise to protect his possession and to shield himself from responsibility;[17] but his right of action is limited by the degree of liability to be entailed on him should he illegally part with the property which it is his duty to hold.[18] Where an officer who has reduced personal property to possession by a levy thereon is dispossessed, he may recover the value of his special interest in the property in an action of trover[19] or trespass,[20] but the mere fact that an officer has process in his hands, no levy having been made, gives him no such interest in defendant's property as entitles him to maintain trover[21] or replevin[22] in respect thereof, or to recover the proceeds of the property from an officer who has seized and sold it under a junior writ.[23] Likewise, an officer to whom an execution is delivered has no right of action in himself against the execution defendant.[24] Similarly, an officer who has taken a bond under an order of court for the purchase price of property sold cannot sue thereon in his individual name without showing by evidence dehors the instrument his ownership, or liability to pay its amount to the beneficiaries.[25]

An officer who has attached property can maintain an action for it only on the ground of his liability to the attaching creditor or the owner for its return,[26] and, hence, in an action by such officer it is competent to show that the property attached did not belong to the debtor.[27] A sheriff cannot maintain an action for other officers' fees placed in his hands for collection, unless he has paid the amounts to the officers to whom they were due.[28] After an officer has made a sale of property, executed the deed, delivered the notes of the purchaser to the person entitled to them, and returned the writ into court, he is without further interest in the matter and cannot maintain a rule against the purchaser to show cause why he should not comply with the terms and conditions of the sale as announced.[29]

An officer who has levied on a debt under an attachment may bring an action to recover the amount;[30] and, where a debtor has fraudulently assigned his property, and the assignee has converted it into money, which he has deposited with a third person, an officer who has attached such money while in the hands of such third person, as far as he could, may bring an action to have such assign-

13. N C—Higgins v. Glass, 47 N.C 353.

14. N.C—Pool v. Hunter, 49 N C. 144.

15. N C—Pool v. Hunter, supra

16. **Nominal damages**
Under such circumstances at least nominal damages may be recovered. —Rosenstein v. Sammons, 1 Hill, N. Y., 59.

17. Del—Short v. Landes, 39 A 2d 17, 3 Terry 510
57 C.J p 1098 note 88.
Actions by.
Levying officers generally see Attachment § 292, Executions § 114 b
Sheriffs or constables against indemnitors see supra § 145.

18. Del—Short v. Landes, supra.
La—Robins v. Brown, 32 La Ann 430

19. Del—**Corpus Juris cited in** Short v Landes, 39 A.2d 17, 20, 3 Terry 510
N.Y—Yokoyama v. San Carlos Operating Co, 259 N Y.S 471, 144 Misc. 733—Van Rensselaer v Quackenboss, 17 Wend 34.
57 C J p 1098 note 90

20. Del—Short v. Landes, 39 A.2d 17, 3 Terry 510
57 C J. p 1098 note 91.

21. Ill.—Mulheisen v. Lane, 82 Ill. 117.

22. Ill.—Mulheisen v. Lane, supra.

23. S C—Alexander v. Collins, 37 S C.L. 62.

24. N.J—Matlock v Stow, 3 N J Law 532.

25. La—Buisson v. Hyde, 17 La 19.
57 C.J. p 1099 note 96

26. Vt.—Collins v. Smith, 16 Vt. 9

27. Vt—Wheeler v. Selden, 20 A 197, 62 Vt 310.

28. Md—Goldsmith v. Pattison, 1 Harn & J. 205.

29. La.—Succession of Caldwell, 15 La Ann. 617.

30. N Y—Davidson v Chatham Nat. Bank, 5 N.Y.Civ Proc. 167.

ment set aside and the execution paid out of the money.[31] Where an undersheriff who had farmed the profits of the sheriff's office directed a person to whom he was indebted to receive quit rents, levies, and fees, and discount them, together with what such person owed on the same account, out of his own private debt, and give receipts, it has been held that on the undersheriff proving insolvent, so that the sheriff was compelled to pay the amount to the public officers, he can recover against the person receiving the quit rents.[32]

Actions by deputies. It has been held that a deputy sheriff or deputy constable cannot bring an action in his own name with relation to matters connected with his official duties,[33] although there is authority to the contrary;[34] but he may maintain an action on a promise made directly to him, although it relates to a matter connected with his official duties.[35]

b. Defenses

Various defenses have been sustained in actions by sheriffs and constables.

In actions by sheriffs and constables various defenses have been sustained.[36] Accordingly, where one arrested on execution in a civil action gives the officer a bond for the liberties of the jail, permission subsequently given him by the officer's deputy, who is also jailer, to leave the liberties, is a defense to an action by the officer against the sureties for an escape;[37] but it is not a sufficient plea in bar that the prisoner remains within the shrievalty and was at all times amenable to the original execution.[38] Where a judgment erroneously supposed to be a lien on property sold by an officer is paid by him out of the proceeds of the sale, it is a good defense to an action by the officer on the refunding receipt taken from the judgment creditor that the officer has purchased from the execution defendant the realty, on which the judgment is clearly a lien, and has agreed to pay it off as part of the consideration.[39]

Limitations. The right of action of a sheriff or constable against a receiptor who has undertaken to redeliver property on demand accrues on his making such demand, and the statute of limitations then begins to run.[40] Where an officer has become personally liable to lienholders by failure to make a proper return on a receipt given by a purchaser at an execution sale, the statutory period for commencing action on his claim against the person giving the receipt, by virtue of a promised indemnity, runs from the date when the receipt is given and not from the time when the prior liens are brought to the officer's attention.[41]

c. Parties; Joinder of Actions

In actions by sheriffs and constables the general rules governing parties in civil actions ordinarily are applicable. Where two officers levy on the same goods by virtue of separate executions, they cannot join in an action against a person who takes the goods away.

General rules governing parties in civil actions ordinarily are applicable in actions by sheriffs and constables.[42] Where an execution plaintiff has received more than the amount to which he is entitled from the proceeds of a sale made by a sheriff or constable, an action to recover the excess should be brought in the name of the officer;[43] and an action to recover excessive costs paid in an action brought against a sheriff is properly brought in his name, even though the payment was made by his deputy out of the latter's personal funds.[44]

Where two officers levy on the same goods by virtue of separate executions, they cannot join in an action against a person who takes the goods away;[45] but it has been held that an officer and his deputy may jointly maintain an action for the value of

31. N Y.—Kelly v. Lane, 42 Barb. 594, 18 Abb Pr. 229, 28 How Pr. 128

32. Va.—Morris v. Chamberlayne, Jeff 14.

33. N.C.—Hampton v. Brown, 35 N. C 18.
57 C J. p 1099 note 8.

34. Mass.—Polley v. Lenox Iron Works, 4 Allen 369
57 C.J. p 1099 note 9.

35. Vt.—Miller v Goold, 2 Tyler 439.
57 C J. p 1099 note 10.

36. **Subsequent illegal conduct**
In an action by a sheriff or constable against a plaintiff in attachment to recover the amount of a judgment rendered against the officer for serving the writ, defendant may show that the verdict against the officer was rendered because of his illegal conduct subsequent to the attachment.—Boynton v. Morrill, 111 Mass 4.

37. N Y.—Wemple v Glavin, 5 Abb N Cas. 360, 57 How.Pr 109.

38. Vt.—Warner v. Evens, 2 Tyler 121.

39. Pa.—Morrison v. Mullin, 34 Pa 12

40. Vt.—Page v. Thrall, 11 Vt. 230.

41. Pa.—Mark v. Osmer, 20 A. 841, 138 Pa. 1.

42. Pa.—Longenecker v. Zeigler, 1 Watts 252, 302.
Parties generally see Parties § 1 et seq.

Action for use of plaintiff in bail trover
Sheriff, who turned property seized in bail trover proceeding over to bank, whose agent signed worthless replevy bond and promised that bank would save sheriff harmless, could maintain attachment proceeding against bank for use of plaintiff in bail trover.—First Joint Stock Land Bank v. Pitts, 173 S.E 732, 48 Ga. App 805.

43. Pa.—Longenecker v. Zeigler, 1 Watts 252, 302
57 C J. p 1100 note 20.

44. N Y.—Britton v. Frink, 3 How. Pr. 102.

45. N J.—Warne v. Rose, 5 N.J.Law 809.

property levied on by the deputy, and taken from his possession.[46]

d. Pleading and Evidence

In actions by sheriffs and constables the general rules regulating pleading and evidence in civil actions usually are applicable.

General rules regulating pleading in civil actions usually apply in actions by sheriffs and constables [47] In an action brought by a sheriff as such, a complaint stating that plaintiff is sheriff of a named county, duly elected, qualified, and acting, is sufficient to show his capacity to maintain the action;[48] and, where the action is against a person having in his possession property belonging to a defendant in attachment, a general allegation that plaintiff has title to the property in question by virtue of a levy thereon under an attachment against the property of defendant in the attachment suit, to whom the property belongs, is ordinarily sufficient on demurrer.[49] An allegation that the action is brought by the direction of the court or judge is not necessary in an action by a sheriff to collect a chose in action seized under attachment,[50] or to recover possession of attached property.[51] In an action by an officer on a promise made to him by a third person to surrender the body of a debtor during the life of the execution, it is not necessary to allege in the declaration that there was an officer ready to receive the debtor at the expiration of such term.[52] Where a cautionary judgment has been entered in favor of an officer against an indemnitor, and a scire facias is issued thereon, a plea of non damnificatus is insufficient, since it is necessary that the plea state facts showing a discharge from liability.[53]

Variance. A complaint in an action by a sheriff or constable on a jail limits bond for an escape alleging a judgment and execution for a particular sum is not supported by a record of a judgment and execution for a different sum.[54]

Evidence. In actions by sheriffs and constables the general rules governing evidence in civil actions ordinarily apply.[55] Thus, a sheriff or constable who, in a suit brought by himself, makes title to property under process of a court or magistrate must show that the process was warranted by a regular judgment or regular proceedings.[56] In an action by an officer for the conversion of property of which he was in possession by virtue of a levy of process, he must identify the property converted as that subject to the lien of the writ,[57] and show when and in what manner it was converted.[58] In an action by one officer against another, to recover the price of goods sold on an execution by defendant, but which had been previously levied on by plaintiff, defendant may prove that the suit is being prosecuted for the use of plaintiff in the judgment on which the execution issued which was first levied, and that such judgment was given for the purpose of defrauding defendant's creditors, who are the real defendants in the action.[59]

Where an officer has paid the amount of an execution to plaintiff therein, such payment is not conclusive evidence, in an action by the officer against the execution debtor for such amount, that the officer received the money from defendant, but may be rebutted by opposing circumstances.[60] A judgment against an officer for the escape of a prisoner is conclusive in an action by him against the obligors on a bond for the prison limits, provided they had notice of the pendency of the action against the officer,[61] or appeared therein in season to make a defense [62]

e. Judgment, Damages, and Review

In actions by sheriffs and constables the general rules governing judgments, damages, and review ordinarily are applicable.

General rules governing judgments usually obtain in actions by sheriffs and constables.[63] Where a sheriff or constable shows a legal right to sue and recover in an action brought by him, judgment in his favor cannot be refused because he has not accounted for public funds received or collected by

46. Utah.—Burton v. Winsor Utah Silver Min Co., 2 Utah 240

47. **In pleading process of court of limited jurisdiction,** every jurisdictional fact must be plainly and explicitly averred.—Clark v. Norton, 6 Minn 412.

48. N.Y.—Kelly v. Breusing, 32 Barb 601, affirmed 33 Barb. 123. 57 C.J p 1100 note 25

49. N.Y.—Kelly v. Breusing, supra.

50. N.Y.—Davidson v. Chatham Nat Bank, 5 N.Y.Civ.Proc 167.

51. N.Y.—Kelly v. Breusing, 32 Barb 601, affirmed 33 Barb. 123.

52. Vt.—Miller v. Goold, 2 Tyler 439

53. Pa.—Neville v. Williams, 7 Watts 421

54. Conn.—Rossiter v. Downs, 4 Conn. 292.

55. Minn.—Clark v. Norton, 6 Minn 412.

56. Minn.—Clark v Norton, supra 57 C.J, p 1100 note 37.

57. Wis.—Tronson v. Robson, 37 Wis. 353.

58. Wis.—Tronson v. Robson, supra

59. Pa.—Reed v. Lawton, 2 Watts 50.

60. S.C.—Bellinger v Brown, 32 S. C L. 359

61. N.Y.—Riley v Seymour, 1 Wend. 143.
57 C.J. p 1101 note 43.

62. N.Y.—Riley v. Seymour, supra.

63. **Deputy taking judgment in name of principal**
A deputy who takes a judgment in the name of his principal against a purchaser at a sale and mixes up with such judgment a private demand due to himself cannot control the judgment, but it belongs to the officer.—Wilson v. Gale, 4 Wend, N. Y., 623.

him.[64] Under a statute providing that in an action brought by a sheriff on a bond for the jail liberties, if it appears to the court on a motion in the sheriff's behalf that judgment has been rendered against him for the escape, and that due notice of the pendency of the action against him was given to the prisoner and his sureties, the court must order a summary judgment for plaintiff, it must appear that due notice of the pendency of the action against him was given both to the prisoner and his sureties.[65]

Damages. In an action by a sheriff or constable against an execution plaintiff by following whose directions the officer has subjected himself to liability and loss, the officer can recover the amount of the actual loss sustained by him up to or at the time of the action,[66] but not more;[67] and so, where the claim against the officer remains unsatisfied, he is not entitled to recover.[68] In an action by an officer, on the security taken by him for the liberties of the prison, for an escape, the correct rule of damage is the debt and costs on the execution, with interest,[69] in addition to which the officer is entitled to recover the costs of defending the suit against him.[70]

Review. The usual rules governing appeal and error ordinarily are applicable in actions by sheriffs and constables.[71] Accordingly, objections not raised at the trial of an action brought by a sheriff or constable cannot be urged for the first time on appeal.[72]

XII. COMPENSATION AND REIMBURSEMENT

A. GENERAL CONSIDERATIONS

§ 215. Right to Compensation Generally

In the absence of constitutional or statutory provisions, a sheriff or constable is not entitled to compensation for the performance of his official duties.

At common law a sheriff is required to perform the duties of his office gratuitously and can recover no compensation therefor,[73] although, as discussed infra § 216, sheriffs now are usually allowed compensation under constitutional, statutory, or charter regulations. The right of a sheriff to be compensated for the performance of duties imposed on him by law does not rest on contract, express or implied.[74]

Constable. In the absence of statute or special contract,[75] a constable is not entitled to compensation for services rendered in the performance of his public duties.[76]

§ 216. Constitutional and Statutory Provisions

a. In general
b. Construction and operation of statutes generally
c. Pensions and benefits

a. In General

A sheriff or constable is entitled to such compensation as is authorized by constitutional, statutory, or charter provisions

In the absence of constitutional restrictions, the legislature may regulate the compensation of sheriffs[77] and especially may the legislature regulate such compensation when express authority to do so is conferred by the constitution.[78] In the absence of constitutional or statutory provisions, a sheriff

64. Ky.—Pemberton v. Brown, 5 Litt. 3.

65. N.Y.—Davidson v. Hertzbach, 15 Abb. N. Cas. 185 note.

66. Ill.—Nelson v. Cook, 19 Ill. 440.
57 C.J. p. 1101 note 50.

67. Kan.—Churchill v. Moore, 15 Kan. 255.

68. Kan.—Churchill v. Moore, supra.

69. Conn.—Seymour v. Harvey, 8 Conn. 63.

70. N.Y.—Kip v. Bringham, 7 Johns. 168.

71. Md.—Arnold v. Fowler, 51 A. 299, 94 Md. 497.

72. Md.—Arnold v. Fowler, supra.
57 C.J. p. 1101 note 57.

73. Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478.
Ky.—Shipp v. Rodes, 245 S.W. 157, 196 Ky. 523.
Neb.—Ehlers v. Gallagher, 22 N.W.2d 396, 147 Neb. 97.
N.Y.—Flying Tiger Line v. Spinetta, 76 N.Y.S.2d 67, 190 Misc. 886.
57 C.J. p. 1101 note 59.
Compensation of:
De facto sheriffs and constables, deputies, assistants, and substitutes see infra § 225.
Public officers generally see Officers §§ 83-101.
Sheriff as jailer see Prisons §§ 10, 24-29.

74. Minn.—Cahill v. Beltrami County, 29 N.W.2d 444, 224 Minn. 564.
Mo.—Maxwell v. Andrew County, 146 S.W.2d 621, 347 Mo. 156.
Agreements for compensation see infra § 219.

75. Mass.—Hartley v. Granville, 102 N.E. 942, 216 Mass. 38, 48 L.R.A., N.S., 392, Ann. Cas. 1915A, 725.

76. Mass.—Hartley v. Granville, supra.
57 C.J. p. 1103 note 74.
Right to compensation under constitutional or statutory provisions see infra § 216.

77. Ark.—House v. Brazil, 119 S.W.2d 397, 196 Ark. 602.
Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478.
N.C.—Borders v. Cline, 193 S.E. 826, 212 N.C. 472.

78. **Provision as to "any county officer"**
Sheriff is county officer within constitutional provision authorizing the legislature to fix, regulate, and alter the salaries to be received by any county officer.—In re Opinions of Justices, 143 So. 345, 225 Ala. 359.

or constable is not entitled to compensation for the performance of his official duties, as considered supra § 215, but, in the various jurisdictions, the compensation of sheriffs usually is provided for by constitutional, statutory, or charter provisions.[79] Statutes and charter provisions regulating the compensation of sheriffs have been held valid as against various objections,[80] although on certain grounds some statutes have been held invalid.[81]

A sheriff is entitled to such compensation as the statutes authorize.[82] His right to compensation is wholly derived from, and dependent on, statute.[83] He is not entitled to any compensation except such as is given him by law[84] and can recover no compensation for services, although within the line of his duties, for which no compensation is provided by law.[85] The commissions given by statute to sheriffs and other collecting officers are intended as compensation for services actually rendered,[86] and the officer can set up no claim to the commissions unless the services are rendered;[87] but compensation in the nature of salary and payable in any event is not dependent on the performance of duties imposed on, or services required of, the officer.[88]

Constable. In the absence of constitutional limitations, the legislature may regulate the compensation of constables,[89] and, in the various jurisdictions, provision is made by constitutional and statutory regulations for compensation of constables.[90] Such provisions have been held valid,[91] although some statutes have been held invalid on certain grounds.[92] Where a constable is precluded by statute, or by judicially established principles of public policy, from demanding and collecting from the

79. Ala.—Mosely v Kennedy, 17 So 2d 536, 245 Ala. 448
Ark.—Clay County v. Ruff, 90 S.W 2d 474, 192 Ark 150
Cal.—Niceley v Madera County, 296 P 306, 111 Cal App. 731.
Ga.—Ward v. Barnes, 22 S.E. 133, 95 Ga 103.
Ky.—Milliken v Harrod, 122 S.W.2d 148, 275 Ky 597
Okl.—Gordon v. Conner, 80 P.2d 322, 183 Okl 82, 118 A.L.R 783
57 C.J. p 1103 note 80.
"At the early common law, he was required to perform his duty gratuitously, but under later English statutes, and under the law generally, he is now allowed compensation." —Sweat v Waldon, 167 So. 363, 364, 123 Fla. 478

Act initiated by electors
Ark.—House v. Brazil, 119 S.W 2d 397, 196 Ark. 602.

Purpose or object of statute
Object of the statute relating to sheriffs' fees is to provide a general fee bill or bill of costs regulating and fixing fees and compensation allowed to sheriffs and to provide for the collection thereof.—Prudential Ins. Co. of America v. Flournoy, 7 So 2d 58, 199 La. 786.

80. Ark.—House v. Brazil, 119 S.W. 2d 397, 196 Ark. 602.
Minn.—Cahill v Beltrami County, 29 N.W 2d 444, 224 Minn 564
N.Y.—Stojowski v. Banque de France, 61 N.E 2d 414, 294 N.Y 135.
57 C.J. p 1103 note 80 [a], [b].

Act initiated by electors
Ark.—Baker v. State, to Use of Independence County, 197 S.W 2d 759, 210 Ark. 690—House v Brazil, 119 S.W.2d 397, 196 Ark. 602.

81. Pa.—Benson v. Bradford County, 192 A. 650, 326 Pa. 454.
Tenn.—Tipton County v Scott, 151 S.W 2d 167, 177 Tenn 507.
57 C.J. p 1103 note 80 [c].

82. Tex.—Bigham v. State, Civ.App., 275 S.W 147, reversed on other grounds, Com.App., 280 S.W 1062
Amount of compensation see infra § 218
Particular services see infra §§ 226–250
Salary or fees see infra § 217

Right to compensation as sheriff and collector
Where initiated salary act enacted by electors of county at general election provided for separation of the offices of sheriff and collector, and fixed certain salaries for each office, and at the same election a certain candidate was elected sheriff and collector and filled both offices until the next election, when he was re-elected sheriff only, he was not only the de facto collector but the de jure collector of county during the term following the first general election, and, hence, was entitled to the emoluments of both offices.—Baker v. Allen, 164 S.W 2d 1004, 204 Ark 818.

83. Mo.—Maxwell v. Andrew County, 146 S.W.2d 621, 347 Mo 156.
N.Y.—Stojowski v Banque de France, 61 N.E 2d 414, 294 N.Y. 135—Flying Tiger Line v Spinetta, 76 N.Y.S 2d 67, 190 Misc 886—Kern v Larsen, 251 N.Y.S 596, 140 Misc 802.
57 C.J. p 1102 note 65

84. Ga.—Hiatt v. Turner, 172 S.E 607, 48 Ga.App 255.
Neb.—Ehlers v Gallagher, 22 N.W. 2d 396, 147 Neb. 97.
57 C.J. p 1102 note 66.

Compensation for services as costs
Sheriff is not entitled to pay for any services as costs, unless payment therefor is expressly provided for by statute.—Clark v Clark, 73 S.E 15, 137 Ga. 189—Hiatt v Turner, 172 S.E 607, 48 Ga.App. 255—Walton County v Dean, 97 S.E 561, 23 Ga.App. 97.

85. Neb.—Ehlers v Gallagher, 22 N.W 2d 396, 147 Neb 97.
57 C.J. p 1102 note 67.

86. Tenn.—Barnes v. Jackson, 2 Sneed 416

87. Tenn.—Barnes v. Jackson, supra.

88. Ga.—Tucker v Shoemaker, 99 S.E 865, 149 Ga 250

89. Cal.—Johnston v. Los Angeles County, 47 P. 374, 5 Cal.Unrep.Cas 568.
Ky.—Commonwealth v Bartholomew, 97 S.W 2d 591, 265 Ky 703

90. Ala.—Sanders v. Young, 124 So. 225, 220 Ala 94.
Ky.—Jefferson County Fiscal Court v Thomas, 130 S.W 2d 60, 279 Ky 458—Shaw v Fox, 55 S.W 2d 11, 246 Ky. 342
Pa.—Clemens v Northampton County, Com.Pl., 26 North.Co. 109, 8 Som.Leg.J. 377, 51 York Leg.Rec. 134
Tex.—Garvey v Wood, Civ.App., 101 S.W.2d 288.

Purpose of statute
Ky.—Commonwealth v. Bartholomew, 97 S.W.2d 591, 265 Ky. 703.

91. Ky.—Jefferson County Fiscal Court v Thomas, 130 S.W 2d 60, 279 Ky. 458—Shaw v. Fox, 55 S.W. 2d 11, 246 Ky. 342.
N.J.—Ervolini v. Camden County, 23 A.2d 118, 127 N.J.Law 473
Tex.—Garvey v. Wood, Civ.App., 101 S.W 2d 288
57 C.J. p 1103 note 80 [a] (9).

92. Pa.—Edwards v McLean, 23 Pa. Super. 43.
57 C.J. p 1103 note 80 [c] (6).

county for his own use a fee for a particular service, he cannot demand and collect it for the use of the state.[93]

Amendment and repeal. General rules governing the amendment of statutes ordinarily apply to statutes fixing and regulating the compensation of sheriffs and constables,[94] as do the general rules governing the repeal of statutes.[95] A constable is not entitled to the compensation provided by a statute which was repealed before the commencement of his term of office.[96]

Acts performed by deputy. When sheriff's fees are given by statute, they are given to the sheriff, although the services may be rendered by a deputy;[97] but, where a writ of habeas corpus is served on the sheriff, the costs for such service belong to the officer by whom the writ is served and not to the sheriff.[98] Where the statute provides that a certain duty shall be performed by the police force of a city, and that deputy sheriffs shall not receive compensation for such service, the sheriff is not entitled to compensation for such service when performed by deputies;[99] and, where a sheriff is allowed compensation by the county for the services of a bailiff, he is not entitled to make a further claim against the county for fees earned by the bailiff.[1]

Services outside of official duties. A sheriff or constable is not entitled to pay for services not required by the court, and outside of his duty under the statute,[2] unless he shows an employment of, or contract with, him in his private capacity.[3] However, it is held that, where a statute, providing that expenses incurred shall be a county charge, requires a notice to be served, but does not designate the person or officer who shall perform the service, a constable who renders the service is entitled to compensation.[4]

Unnecessary services. A sheriff who in the performance of a duty does more than is necessary will not be allowed fees for the extra and superfluous services;[5] but a constable is entitled to compensation for each warrant that he executes, even though the magistrate unduly multiplies warrants.[6]

b. Construction and Operation of Statutes Generally

The general rules governing the construction and operation of statutes ordinarily are applicable to statutes regulating the compensation of sheriffs and constables

General rules governing the construction and operation of statutes ordinarily are applicable to statutes regulating the compensation of sheriffs and constables.[7] The courts will give effect to the legislative intent,[8] and adopt such a construction as will give effect to all the words of the provision in question.[9] Such statutes are, as a rule, prospective only in their operation,[10] and generally,[11] although

93. Pa.—Walsh v. Luzerne County, 36 Pa. Super. 425

94. Statutes held amended
Ala.—Mobile County v. State ex rel. Farmer, 3 So. 2d 435, 30 Ala. App. 245
Statutes held not amended
Ark.—Perry County v. House, 117 S. W.2d 342, 196 Ark. 317.

95. Statutes held repealed
Ark.—Clay County v. Ruff, 90 S. W. 2d 474, 192 Ark. 150
57 C. J. p. 1102 note 64 [a], p. 1103 note 77 [a]
Statutes held not repealed
Cal.—Niceley v. Madera County, 296 P. 306, 111 Cal. App. 731.
Okl.—Gordon v. Conner, 80 P.2d 322, 183 Okl. 82, 118 A. L. R. 783
Tex.—Garvey v. Wood, Civ.App., 101 S. W. 2d 288
57 C. J. p. 1102 note 64 [b].

96. Cal.—Hagerty v. Williams, 232 P. 1001, 70 Cal. App. 237.
57 C. J. p. 1103 note 77.

97. Ala.—Jefferson County v. Dockerty, 30 So. 2d 469, 32 Ala. App. 30, affirmed 30 So. 2d 474, 249 Ala. 196
57 C. J. p. 1109 note 84.
Right of deputy to compensation see infra § 225.

98. Pa.—Geissinger v. Huntingdon County, 3 Pa. Co. 106.

99. Mich.—Chipman v. Wayne County, 86 N. W. 1024, 127 Mich. 490.

1. Iowa.—State v. Welsh, 79 N.W. 369, 109 Iowa 19.

2. Ill.—St. Clair County v. Irwin, 15 Ill. 54
Duties of sheriff or constable see supra §§ 35–51.

3. Colo.—Colorado Mortg., etc., Co. v. Messemer, 55 P. 611, 12 Colo. App. 361.
Right to recover on contract see infra § 219.

4. Pa.—Early v. Luzerne County, 7 Kulp 512.

5. Ark.—Ft. Smith Sewer Dist. No. 1 v. Ft. Smith School Dist., 66 S.W. 152, 70 Ark. 59
57 C. J. p. 1110 note 92.

6. Pa.—Davison v. Franklin County, 18 Pa. Co. 374.
Fees for executing warrants generally see infra §§ 227, 228.

7. Ky.—Milliken v. Harrod, 122 S. W. 2d 148, 275 Ky. 597.
Tenn.—Vandergriff v. Seeber, 216 S. W.2d 311, 187 Tenn. 561.

8. Ky.—Commonwealth v. Bartholomew, 97 S. W. 2d 591, 265 Ky. 703.
Tenn.—Vandergriff v. Seeber, 216 S. W. 2d 311, 187 Tenn. 561.
57 C. J. p. 1103 note 81.

The word "fees," as used in statute providing that sheriff shall receive same fees for attendance, and for other services, as are allowed by law to clerk and to sheriffs for like duties in circuit and chancery courts, is to be interpreted, according to its common usage, as a charge fixed by law for services of a public officer.—Covington v. Quitman County, 17 So. 2d 597, 196 Miss. 416.

9. Iowa.—Bell v. Weddington, 6 N. W. 731, 54 Iowa 561.
Effect of proviso
A proviso will be construed to restrain or qualify the preceding general terms.—Muenninghoff v. Bartholomew, 106 S. W.2d 97, 269 Ky. 36.

10. Neb.—Kountze v. Train, 4 Neb. 291.
57 C.J. p. 1104 note 83.

11. Cal.—Smith v. Mathews, 103 P. 199, 155 Cal. 752
57 C. J. p. 1104 note 84.

not always,[12] apply only to officers subsequently elected or appointed, and not to present incumbents. Also, such statutes will be construed so to conform to, rather than to conflict with, the constitution,[13] where such a construction is proper and reasonable.[14]

One or more statutes. Where there is only one statute fixing the fees of constables, that is the only statute to be construed in determining the fees of a constable for services performed other than as a sheriff's officer.[15] While two statutes in respect of the compensation of sheriffs will be construed so as to give effect to both, if possible,[16] in so far as they may be in conflict, a subsequent local act will prevail over a general law[17] In ascertaining the intention of the legislature with respect to a statute establishing a fee bill a contemporaneous construction put on the same words of a previous fee bill should be taken into consideration;[18] but the fact that the words of a statute differ from the words of a prior statute on the same subject is indicative of a legislative intent that they shall have a different meaning[19]

Liberal or strict construction. Statutes relating to the compensations of sheriffs are sometimes strictly construed by reason of the fact that they are in derogation of the common law,[20] or give costs in criminal prosecutions.[21]

c. Pensions and Benefits

Sheriffs and constables and their deputies and assistants are entitled to such pensions and benefits as may be provided for them by statute.

Sheriffs and constables and their deputies and assistants are entitled to pensions and benefits to the extent that provisions have been made for them by statute[22] A deputy sheriff who performs the usual duties of that office is a peace officer within a statute providing for disability benefits to peace officers.[23] On the other hand, it has been held that a deputy sheriff is not a county employee within a county employees' pension act[24] Where an officer, such as a deputy sheriff, has no right to benefits under the statute, he is entitled to a refund for the contributions made to the benefit fund.[25]

§ 217. Salary or Fees

According to the local statutes a sheriff or constable is compensated either by fees or commissions for particular services performed, or by a fixed salary or by both fees and salary.

According to the statute in force at the time in the county of which he is an officer, and the effect accorded thereto, a sheriff is variously compensated by fees or commissions for particular services performed,[26] by a fixed salary,[27] or by both fees and salary.[28] Statutes, changing the mode of compensating a sheriff from a fee system to a salary in lieu of fees, will be accorded effect,[29] as will also statutes authorizing the county board of a county to change the method of compensating the sheriff of that county[30]

Constables. According to the directions of the

12. Cal.—Crocket v Mathews, 106 P 575, 157 Cal 153.
57 C J p 1104 note 85.
13. N Y.—Davidson v New York, 13 Daly 252
14. Md.—Green v. State, 89 A. 608, 122 Md. 288
15. Pa.—Long v Northumberland County, 20 Pa Co 70
16. Ala.—McFountain v. State, 83 So 53, 203 Ala 329.
57 C.J. p 1104 note 89
17. Ala.—Henry v Wiggins, 92 So 108, 207 Ala. 251.
18. Pa.—Davison v Franklin, 18 Pa. Co. 374
19. Pa.—Humer v. Cumberland County, 4 Pa.Dist. 588, 16 Pa.Co. 552.
20. Fla.—Sweat v. Waldon, 167 So 363, 123 Fla. 478
57 C.J. p 1104 note 93.
21. Ala.—State v. Brewer, 59 Ala. 130
22. S.C.—Pulliam v. Board of Police Com'rs of Police Insurance and Annuity Fund, 24 S E 2d 745, 202 S C 324.
23. S C—Pulliam v. Board of Police Com'rs of Police Insurance and Annuity Fund, supra.
Status of deputy sheriff generally see supra § 2.
24. Ga.—Drost v. Robinson, 22 S E 2d 475, 194 Ga. 703.
25. Ga.—Drost v. Robinson, supra.
26. Ala.—Mosely v. Kennedy, 17 So. 2d 536, 245 Ala. 448.
Ky.—Shipp v Rodes, 245 S.W. 157, 196 Ky. 523
57 C J p 1104 note 97.
Amount of compensation see infra § 218
Amount allowed for furnishing evidence
Amount allowed by statute to sheriff or other officer furnishing evidence to support conviction for distilling prohibited liquors is not a fee. —Mosely v. Kennedy, 17 So 2d 536, 245 Ala. 448.
27. Ga.—MacNeill v. Bazemore, 21 S E 2d 414, 194 Ga. 406—Hicks v. Bibb County, 162 S E. 157, 44 Ga. App 538.
Pa.—Benson v Bradford County, 192 A. 650, 326 Pa 454—Keech v. York County, 90 Pa Super 486—Vollmer v. Willis, Com Pl, 20 Erie Co 41.
Tenn.—Allen v. Hickman, 53 S W.2d 383, 165 Tenn 136.
57 C J p 1104 note 98.
Accounting for, and payment of, receipts of office to county or state see infra § 260.
Act initiated by electors
Ark.—Baker v State, to Use of Independence County, 197 S W.2d 759, 210 Ark. 690—House v. Brazil, 119 S W 2d 397, 196 Ark. 602
28. N Y.—People v. Leech, 89 N Y.S 178, 43 Misc 435
29. N C.—Thompson v. Person County, 107 S E. 1, 181 N C. 265
S C.—Morris v. Buist, 82 S E 675, 98 S.C. 415.
30. Mich.—Toan v. McGinn, 260 N. W 108, 271 Mich. 28.
57 C J p 1104 note 3.
Placing on salary instead of salary and fee basis
Mich.—Toan v. McGinn, supra.

local statutes constables are compensated by fees[31] or are paid salaries.[32]

§ 218. Amount of Compensation

A sheriff or constable is entitled to the amount of compensation fixed by, or in pursuance of, law.

In the absence of constitutional restrictions, the legislature may fix and regulate the amount of compensation of sheriffs and constables[33] and in the various jurisdictions the amount of compensation of such officers usually is prescribed by statutory regulations, and such regulations control.[34] Where the office is one established by the constitution, the compensation may not be fixed at such a low sum that the duties of the office cannot be performed by the incumbent and the office is rendered useless.[35] Where a statute expressly allows compensation for certain services but fails to fix the amount, a reasonable compensation should be allowed,[36] and in fixing it the compensation fixed by another statute for the performance of a similar duty is properly taken as indicating the legislative measure.[37]

The officer is entitled to the amount of compensation fixed by law;[38] but he is entitled only to such amount,[39] and, if a salary is fixed, he cannot recover additional compensation for any service within the line of his official duty.[40] A statute providing for an additional allowance to sheriffs in counties wherein sheriff's fees are regulated by a general law is not available to a sheriff whose fees and compensation are regulated by a special act, rather than a general law,[41] and a statute entitling a sheriff to prescribed additional compensation annually where the county does not furnish him a residence does not apply where the county furnishes him a suitable and satisfactory residence.[42]

Where the salary or fees of a sheriff and the salary or fees of a constable are fixed and regulated by statute separately and specifically, the compensation prescribed for the one officer ordinarily does not apply to the other officer.[43] Under some statutes, however, it is expressly provided that a constable is entitled to such fees as are allowed sheriffs for like services.[44] Where the sheriff performs the duties of a constable, he is entitled to such

31. Fla.—Williams v. State, 131 So. 864, 100 Fla. 1570, followed in Kennedy v. Watson, 131 So. 866, 100 Fla. 1576.

32. Iowa.—Broyles v. Mahaska County, 239 N.W. 1, 213 Iowa 345.
Ky.—Muenninghoff v. Bartholomew, 106 S.W.2d 97, 269 Ky. 36—Commonwealth v. Bartholomew, 97 S.W.2d 591, 265 Ky. 703.
N.J.—Ervolini v. Camden County, 23 A.2d 118, 127 N.J.Law 473.
57 C.J. p. 1105 note 6.
Salary is liquidated claim when fixed by statute.—Broyles v. Mahaska County, 239 N.W. 1, 213 Iowa 345.

33. Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478.
Ky.—Jefferson County Fiscal Court v. Thomas, 130 S.W.2d 60, 279 Ky. 458.
57 C.J. p. 1103 note 80 [a] (1), (5).
Change of compensation see Officers § 95.
Liability of county for deficit where fees do not reach amount allowed as salary see infra § 253.

34. Ark.—State v. Landers, 40 S.W.2d 432, 183 Ark. 1138.
Iowa.—Broyles v. Mahaska County, 239 N.W. 1, 213 Iowa 345.
Ky.—Milliken v. Harrod, 122 S.W.2d 148, 275 Ky. 597—Muenninghoff v. Bartholomew, 106 S.W.2d 97, 269 Ky. 36—Shipp v. Rodes, 245 S.W. 157, 196 Ky. 523.
Miss.—Forrest County v. Thompson, 37 So.2d 787, 204 Miss. 628.
N.Y.—Hanley v. City of New York, 295 N.Y.S. 1002, 250 App.Div. 552, motion denied 296 N.Y.S. 824, 250 App.Div. 852, affirmed 11 N.E.2d 308, 275 N.Y. 482.
Pa.—Vollmer v. Willis, Com.Pl., 20 Erie Co. 41.
57 C.J. p. 1105 note 8.
Act initiated by electors
Ark.—House v. Brazil, 119 S.W.2d 397, 196 Ark. 602.
Fees of high constable
Pa.—Bovee v. Willis, 31 Pa.Dist. & Co. 119, 19 Erie Co. 446, 51 York Leg.Rec. 162—Wingard v. Armstrong County, 18 Pa.Dist. & Co. 743.

35. **Compensation held not too small**
Sheriff's salary fixed at one thousand eight hundred dollars by act of county which also limited the expenses of the sheriff's office to ninety per cent of the gross receipts of the office was not so small as to cripple or render useless the office of sheriff and collector of county.—House v. Brazil, 119 S.W.2d 397, 196 Ark. 602.

36. Iowa.—Garber v. Clayton County, 19 Iowa 29.

37. Wis.—Northern Trust Co. v. Snyder, 89 N.W. 460, 113 Wis. 516, 90 Am.S.R. 867.

38. Ky.—Hodges v. Daviess County, 148 S.W.2d 697, 285 Ky. 508.

39. Ark.—House v. Brazil, 119 S.W.2d 397, 196 Ark. 602.
Colo.—Hillman v. Chmelka, 195 P.2d 945, 118 Colo. 252.
Ga.—Hiatt v. Turner, 172 S.E. 607, 48 Ga.App. 255.
Miss.—Forrest County v. Thompson, 37 So.2d 787, 204 Miss. 628.
Tenn.—Vandergriff v. Seeber, 216 S.W.2d 311, 187 Tenn. 561.
57 C.J. p. 1105 note 11.
Sheriff as ex officio tax collector
Sheriff performing duties both of sheriff and ex officio tax collector is entitled only to net compensation fixed by constitution for one officer.—State v. Landers, 40 S.W.2d 432, 183 Ark. 1138.
Value of services
The integrity, judgment, and responsibility required of sheriff, as elected public officer, are elements to be considered in determining value of his services, and such value should not be limited to the sum for which a competent clerk could have been hired.—Wells v. Board of Education of Menifee County, Ky., 244 S.W.2d 160.

40. Ark.—Baker v. State, to Use of Independence County, 197 S.W.2d 759, 210 Ark. 690—House v. Brazil, 119 S.W.2d 397, 196 Ark. 602.
Pa.—Benson v. Bradford County, 192 A. 650, 326 Pa. 454—In re Borough High Constables, Quar.Sess., 32 Del.Co. 335.
57 C.J. p. 1105 note 12.

41. Kan.—Atchison County v. Smith, 105 P. 37, 81 Kan. 91.

42. Iowa.—Jones v. Woodbury County, 202 N.W. 884, 199 Iowa 773.

43. Ala.—White v. Lyon, 20 So.2d 523, 246 Ala. 279.
Ohio.—State v. Cooper, 27 O.C.A. 462.

44. **Scope of enactment**
Statutory provision allowing constables fees "allowed sheriffs for like

compensation as the statute authorizes[45] which may, under the local statute, be fees for services of a sheriff.[46] On the other hand, where the statute restricts the sheriff to the same compensation which the constable would be entitled to for the same service, the compensation of the sheriff in performing the duties of a constable is measured by the allowance to which the constable would be entitled for discharging the same duties.[47] A constable who performs the duties of a sheriff is entitled to the allowance fixed by the statute,[48] which may, under the local statute, be the same compensation to which the sheriff would be entitled.[49] Furthermore, it has been held that a constable who renders services which pertain to the office of sheriff acts as a sheriff's officer and not as a constable, and is entitled to compensation according to the sheriff's fee bill.[50]

Amount fixed by county board. Some statutes confer power on the county board to fix the amount of compensation of sheriffs and constables.[51] The statutes sometimes provide that in case of the board's failure to fix the compensation of such officers, their compensation shall be the same as that received by their immediate predecessor in office.[52] A statute giving to the sheriff for services not otherwise provided for such sums as the board of supervisors may allow does not apply to services performed by the sheriff when not acting in his official capacity.[53]

Under some statutes the decision of the county board in fixing the amount of a sheriff's salary may be reviewed on appeal to a court and the court, on hearing such appeal, summarily determines the amount of salary to be paid to the sheriff.[54] In determining the amount of a sheriff's salary on appeal the court is necessarily vested with wide discretion,[55] and the court may fix the salary in an amount greater than that suggested by the sheriff to the county board in his request for a salary adjustment.[56]

Statutory limitations. Some statutes limit the amount of the salary, fees, or other compensation which a sheriff or constable may be allowed or receive, and such statutes will be given effect when applicable.[57] Thus, under various statutes, the compensation is to be fixed according to population,[58] or in a given amount but in any month not to exceed

services" refers only to fees allowed sheriffs by same general enactment —Williams v State, 131 So 864, 100 Fla. 1570, followed in Kennedy v Watson, 131 So 866, 100 Fla. 1576.

45. Ala —White v. Lyon, 20 So.2d 523, 246 Ala. 279.

46. Ala —White v. Lyon, supra—Trapp v. State, 25 So 194, 122 Ala 394.

47. S C —Mullins v Marion County, 51 S E 535, 72 S C 84
57 C J p 1106 notes 19, 20.

48. Wis —Cutts v Rock County, 17 N.W 636, 58 Wis. 641.

49. Wis —Cutts v. Rock County, supra.

50. Pa —Kottcamp v. York County, 28 Pa Super. 96.
57 C.J. p 1106 note 18.

51. Minn —Cahill v. Beltrami County, 29 N W.2d 444, 224 Minn. 564.
N Y —Konz v. Bedell, 75 N Y S 2d 18, 273 App Div 777, appeal denied 76 N Y S 2d 258, 273 App.Div 811, affirmed 81 N E.2d 322, 298 N Y. 585
57 C J p 1105 note 9.

Statute held valid

Nev.—Cawley v Pershing County, 255 P. 1073, 50 Nev. 237.

Statute as mandatory or directory

Under statute providing that salaries of constables assigned to mentioned courts in designated counties shall be fixed by board of chosen freeholders on recommendation of judge of court of common pleas of any such county and shall be paid semimonthly, the recommendation of judge is a prerequisite to the fixing of salaries and is entirely discretionary but, when given, it becomes mandatory on the board to act in accordance with the recommendation — Ervolini v Camden County, 23 A.2d 118, 127 N.J Law 473

Revocation of resolution fixing salary

Where, by resolution of board of chosen freeholders of county on recommendation of judge of court of common pleas, salaries of constables were fixed at a certain sum per annum, the resolution was binding and irrevocable as far as the board was concerned, except that the salaries might be increased, and, therefore, subsequent resolution revoking the resolution fixing the salaries was void —Ervolini v. Camden County, supra.

Allowances for ex officio services

Under conditions provided in statute, relating to allowances for ex officio services, commissioners' court may authorize payment of ex officio compensation to sheriff in its discretion.—Taylor v. Brewster County, Tex Civ App , 144 S W 2d 314, error dismissed, judgment correct.

52. Nev —Cawley v. Pershing County, 264 P. 696, 50 Nev. 411.
57 C J p 1105 note 10.

53. Mich —Follensbee v. St. Clair County, 35 N.W. 257, 67 Mich. 614.

54. Minn —Cahill v. Beltrami County, 29 N W.2d 444, 224 Minn. 564.

Effect of appeal

Appeal from order of county board fixing sheriff's salary vacated board's decision so that the subject matter of appeal was before district court for determination de novo as if county board had taken no action in the premises.—Cahill v. Beltrami County, supra.

Statute held valid

Minn —Cahill v. Beltrami County, supra.

55. Minn —Cahill v Beltrami County, supra.

Discretion held not abused

Minn —Cahill v. Beltrami County, supra.

Duty of auditor to draw warrant

Where district court fixes sheriff's salary by order which is served on county auditor, auditor must draw warrants for sheriff's salary in accordance therewith as it comes due without auditing and allowance thereof by county board —Cahill v. Beltrami County, supra

56. Minn.—Cahill v. Beltrami County, supra.

57. Ark.—State v. Landers, 40 S W. 2d 432, 183 Ark 1138
Ky —Milliken v. Harrod, 122 S W.2d 148, 275 Ky 597—Shipp v Rodes, 245 S.W. 157, 196 Ky 523.
57 C.J. p 1106 note 23.

58. Miss —Hester v. Copiah County, 191 So 496, 186 Miss 716
Tex —Garvey v. Wood, Civ App., 101 S.W 2d 288.
57 C J p 1106 note 23 [d].

the amount paid into the general fund of the county by the officer,[59] or in excess of a certain percentage of the gross receipts of the office.[60] The sums received by a sheriff for the boarding of prisoners are not "fees" to be taken into consideration in applying a statutory limitation of the amount of the fees which he may receive for any one year.[61]

Per diem compensation Where the compensation for certain services is fixed at a certain amount per day, a day's time in the performance of such duties includes all the time in which the sheriff may be so engaged in the single calendar day.[62]

Excessive fees or charges. A sheriff or constable will not be allowed to make excessive charges or to collect excessive fees;[63] but, although the unlawful excess of fees charged by an officer for serving the writ of a prior attaching creditor, and taxed in the bill of costs, has absorbed the debtor's property to the injury of a subsequent attaching creditor, the latter can maintain no action against the officer for the injury.[64]

§ 219. —— Agreements

Where the compensation of a sheriff or constable for services which it is his duty to perform is fixed by statute, he may not recover on a contract for a greater compensation or on quantum meruit for such services a sum in excess of that allowed by statute.

Where the compensation of the sheriff for certain services which it is his duty to perform is fixed by statute, the sheriff cannot recover on a contract for a greater compensation;[65] nor can be recover on a quantum meruit for such services a sum in excess of that allowed by the statute.[66] Where the compensation of the officer is fixed by law, he cannot be required to accept a smaller amount even by agreement.[67] When such an officer performs services which it is not his duty to perform, although of such character as appertain to his office, he may recover compensation contracted for,[68] or a reasonable compensation, where there is a general promise to pay and no express contract as to amount;[69] and it has been held that, where no question as to the legality of the agreement is presented, a sheriff who entered into an agreement with the county which clearly comprehended and embraced his compensation for the discharge of his official duties, and thereafter collected, accepted, and retained the full amount of the agreed compensation, may not recover additional compensation.[70]

§ 220. —— Estoppel

A sheriff or constable may be estopped to claim the compensation to which he otherwise would be entitled.

A sheriff or constable may be estopped to claim the compensation to which he otherwise would be entitled.[71] In some jurisdictions, in the absence of a statute otherwise providing, the acceptance by an

Current federal census is exclusive evidence of population of county for purpose of determining amount of compensation of sheriff—Hester v. Copiah County, 191 So. 496, 186 Miss. 716.

59. Ky—Jefferson County Fiscal Court v. Thomas, 130 S.W.2d 60, 279 Ky. 458—Muenninghoff v Bartholomew, 106 S.W.2d 97, 269 Ky. 36—Commonwealth v. Bartholomew, 97 S W 2d 591, 265 Ky 703.

Computation of salary

Ky—Muenninghoff v Bartholomew, supra.

Surplus in other months

Any deficit between the officer's earnings and the amount of salary in any month may not be made up out of a surplus accumulated in other months of the year—Muenninghoff v Bartholomew, supra.

60. **Act initiated by electors**

Ark.—House v. Brazil, 119 S.W 2d 397, 196 Ark 602.

61. Mo—State v. Price, 246 S.W 572, 296 Mo 121

62. Wis—Northern Trust Co. v. Snyder, 89 N W. 460, 113 Wis. 516, 90 Am S.R 867.

63. Ill.—Chase v. De Wolf, 69 Ill 47.

57 C J. p 1107 note 40.

Penalties or forfeitures for claiming or exacting excessive fees see infra § 224.

Recovery back of excessive payments see infra §§ 258, 259.

64. Me.—Turner v. Norris, 35 Me 112.

57 C J p 1107 note 41.

65. Minn—**Corpus Juris cited in** Cahill v. Beltrami County, 29 N W. 2d 444, 448, 224 Minn 564

57 C.J. p 1107 note 34

Illegality of contract see Contracts § 220

66. Mich—Wilcoxson v. Andrews, 33 N W. 533, 66 Mich. 553.

67. Ky—Hodges v Daviess County, 148 S W 2d 697, 285 Ky 508.

68. Tenn—**Corpus Juris cited in** Draughton v. Fox-Pelletier Corp, 126 S W 2d 329, 333, 174 Tenn. 457.

57 C J. p 1107 note 36

69. N H.—Waldron v. Tuttle, 4 N H. 149.

70. N M—Baca v. Torrance County, 214 P. 757, 28 N.M. 458.

71. **Officer held estopped**

Where the sheriff has procured an order of court fixing the wages of a keeper of malefactors with a stipulation that such compensation covers all fees to the sheriff or the keeper on the commitment of vagrants, the sheriff is estopped to claim the fee allowed by the fee bill "on commitment for any criminal matter."—Dougherty v. Cumberland, 26 Pa Super. 610.

Officer held not estopped

Constable was not estopped to demand specific compensation because he collected and retained fees under old system, where no one knew, because of lack of official announcement, that, because of increase in population, township passed from fee to compensation basis.—Broyles v. Mahaska County, 239 N W. 1, 213 Iowa 345.

Failure to claim fees

(1) Where a sheriff files his account for fees for a certain service, and accepts the amount allowed by the county board, he may not afterward recover additional fees for the same service which he omitted to claim in his first account—Gila County v. Thompson, 37 P. 22, 4 Ariz. 180.

(2) Where a sheriff who has performed services in redeeming from a foreclosure sale states, without any intention to deceive and on the advice of the persons interested in making the redemption, that his fees are a certain amount, and settles for

officer of an amount less than the salary fixed by statute does not constitute a waiver or estoppel as to the balance.[72] Under some statutes, however, it is expressly provided that an officer who signs on a pay roll a receipt for moneys paid for official services and who does not at the same time write that the amount received is received under protest is barred from recovering any additional compensation to which he might otherwise be entitled.[73] An officer's acceptance under an invalid special law of compensation in a lesser amount than that to which he was actually entitled under the general law does not constitute a waiver or estoppel of the officer's right to claim compensation under the general law.[74]

§ 221. Particular Matters Affecting Compensation or Right Thereto

a. In general
b. Settlement between parties

a. In General

The compensation of a sheriff or constable or his right thereto may be affected by various matters, such as his residence or the place of performing his services.

Various matters may or may not affect the compensation of a sheriff or constable or his right thereto.[75] An unauthorized appointment of a special sheriff, and the execution of process wrongfully issued to him, will not deprive the sheriff of the emoluments attached by law to his office;[76] and he will be entitled to recover from the county the compensation fixed by law for the service of such process, if it has not already been paid by the county to the special officer.[77]

Place of performing services. All fees prescribed by law for the compensation of a sheriff relate to duties performed within the state,[78] and, where compensation for services rendered beyond the state is not allowed him by statute, he is not lawfully entitled to collect therefor.[79] A constable is without remedy for the collection of fees for the performance of duties in a precinct without his jurisdiction.[80]

b. Settlement between Parties

The sheriff generally is entitled to his fees or commissions where the parties compromise or settle the debt without a sale after the service or levy of an execution or attachment.

The sheriff is not entitled to any commissions on money paid to a judgment creditor before execution is issued,[81] and even after execution is issued payment to or settlement or compromise with the execution creditor before the execution is served or levied defeats the sheriff's right to commissions.[82] Except in some jurisdictions,[83] however, if a debt is compromised or settled between the parties after the levy of an execution, the sheriff is entitled to his fees or commissions,[84] and, in order to make them, he may sell as much as is necessary of the property levied on.[85] The general rule in such case is that the sheriff shall receive the same compensa-

such amount, he is not estopped from claiming more fees on discovering that he is entitled to more than he stated—Sharvey v. Rust, 52 N.W. 277, 50 Minn. 97.

72. Iowa—Broyles v Mahaska County, 239 N.W. 1, 213 Iowa 345.
N.Y.—Quayle v. City of New York, 14 N.E.2d 835, 278 N.Y. 19, reargument denied 16 N.E.2d 117, 278 N.Y. 598.
Acceptance by officer of less than legal compensation as waiver or estoppel generally see Officers § 98

In the absence of resulting detriment or loss to the county or mutual agreement to accept a smaller salary, a sheriff was not estopped from recovering the difference between salary lawfully due and amount actually paid, by having accepted less than his lawful salary during a prior period.—Crater v. Somerset County, 4 A.2d 19, 17 N.J.Misc. 133, reversed on other grounds 8 A.2d 691, 123 N.J.L. 407—Vail v. Somerset County, 4 A.2d 19, 17 N.J.Misc. 133, reversed on other grounds 8 A.2d 696, 123 N.J.L. 415, certiorari denied 60 S.Ct. 616, 309 U.S. 673, 84 L.Ed. 1018—Sutphen v. Somerset County, 4 A.2d 19, 17 N.J.Misc. 133, reversed on other grounds 8 A.2d 697, 123 N.J.Law 414.

73. N.Y.—Quayle v City of New York, 14 N.E.2d 835, 278 N.Y. 19, reargument denied 16 N.E.2d 117, 278 N.Y. 598.

74. S.C.—Williamsburg County v. Graham, 196 S.E. 547, 190 S.C. 233

75. **Residence of sheriff**
The right of a sheriff to fees and charges for his services is not defeated because he did not reside in the state during the time when the services were rendered—Morgan v. Mitchell, 3 Mart., N.S., La., 576

76. Kan.—Skinner v. Cowley County, 66 P. 635, 63 Kan. 557

77. Kan.—Skinner v. Cowley County, supra.

78. Wis.—Northern Trust Co. v Snyder, 89 N.W. 460, 113 Wis. 516, 90 Am.S.R. 867
Fees of sheriff as agent to receive fugitive see Extradition § 23.
Mileage for travel outside state or county see infra § 251.
Territorial extent of sheriff's or constable's authority see supra § 36.

79. Mont.—Brannin v Sweet Grass County, 293 P. 970, 88 Mont. 412.
57 C.J. p. 1107 note 49.

80. Ala.—Waldrop v. Courson, 89 So. 714, 206 Ala. 189
High constable of borough
Pa.—Carney v. Luzerne County, 18 Pa.Dist. & Co. 624, 27 Luz.Leg.Reg. 49.

81. N.J.—**Corpus Juris quoted in** Morris Plan Co. of New York v. Ashdown, 190 A. 303, 304, 15 N.J. Misc. 185.
57 C.J. p. 1108 note 56.
Commissions on collection and payment of money generally see infra § 240.

82. N.J.—Morris Plan Co. of New York v. Ashdown, 190 A. 303, 15 N.J.Misc. 185.
57 C.J. p. 1108 note 57.

83. Neb.—O'Shea v. Kavanaugh, 91 N.W. 578, 65 Neb. 639.
57 C.J. p. 1108 note 58.

84. N.J.—Morris Plan Co. of New York v. Ashdown, 190 A. 303, 15 N.J.Misc. 185.
57 C.J. p. 1108 note 59.

85. Md.—Howard v. Levy Court, 1 Harr. & J. 558.

tion as though the service begun had been actually consummated.[86] So, also, where the debt is settled between the parties after the service or levy of an attachment, the sheriff is entitled to commissions[87] at the rate allowed on executions,[88] on the value of the property attached,[89] not exceeding the sum at which the settlement is made,[90] and also to be repaid his necessary disbursements;[91] and the statutes sometimes permit him to retain the property levied on until his fees and commissions are paid.[92] In order to entitle the sheriff to compensation on the ground that the debt has been settled, although the money has not passed through his hands, it is necessary that the debt should be paid by or for defendant.[93] Where the amount of an execution is paid by the debtor to the execution plaintiff after the return day of the writ, the sheriff is not entitled to commissions, since the money was not made by him.[94]

One half of commission. Statutes providing that, when an attachment or execution which has been levied is settled between the parties without a sale, the sheriff is entitled to one half of the commission allowed in case of a sale will be given effect.[95] Where such half commission is allowed in case of an attachment on the demand sued on it must be computed on the amount really due and paid and accepted on the settlement,[96] rather than the amount for which the attachment was sued out,[97] but, where the levy was sufficient to satisfy the claim of plaintiff in full, he cannot deprive the sheriff of all or a part of his commission by remitting all or part of the amount really due him from defendant.[98]

Where property is sold in foreclosure proceedings to the second mortgagee, but under an arrangement between him and the first mortgagee their claims are to be satisfied of record without any money being collected and paid by the sheriff, the latter is not entitled to poundage.[99]

Lack of consideration. The sheriff is not entitled to poundage where no sum is paid in settlement, and no consideration passes from defendant to plaintiff for the discontinuance of the action[1] or the making of a stipulation that plaintiff has no cause of action under the complaint.[2]

Statutory fees for services rendered. A settlement between the parties cannot deprive the sheriff of his right to the statutory fees for the services actually rendered by him.[3]

§ 222. —— Expiration of Term of Office

After the expiration of his term of office a sheriff may sue for fees and commissions in an attachment concluded during his term.

A sheriff, after expiration of his term of office, may sue for fees and commissions in an attachment concluded during his term,[4] but, where an attachment is levied by a sheriff and the property released on a forthcoming bond, and, the attachment being sustained, the proceeds of the property are paid to, and disbursed by, the successor of the sheriff who levied the attachment, such successor, and not the former sheriff, is entitled to the commissions.[5] Where, after a jury have been summoned, but before the return day of the venire, the sheriff goes out of office, he is entitled to the fees for summoning the jury,[6] but not for returning the venire.[7]

§ 223. —— Interest

A sheriff cannot be allowed interest on a claim against the county for services until his account has been presented to the county board for allowance.

A sheriff cannot be allowed interest on a claim against the county for services until his account

86. N J—Morris Plan Co. of New York v. Ashdown, 190 A 303, 15 N J Misc 185
57 C J. p 1108 note 61.

87. N J—Morris Plan Co. of New York v Ashdown, 190 A. 303, 15 N J Misc 185
57 C J. p 1108 note 62

88. N Y.—Muller v. Santler, 18 Abb Pr 450, 28 How Pr 87—Jellinghaus v. Scheidt, 18 Abb Pr. 452

89. N J.—Morris Plan Co of New York v. Ashdown, 190 A. 303, 15 N J.Misc. 185.
57 C J. p 1108 note 64

90. N J.—Morris Plan Co. of New York v. Ashdown, 190 A 303, 15 N J Misc. 185
57 C J. p 1108 note 65

91. N Y—Trenor v Fachin, 12 Abb Pr. 136, 20 How.Pr. 405.

92. N.Y—O'Brien v National Conduit, etc., Co, 87 N Y S 131, 43 Misc. 327.

93. Pa—Larzelere v. Fisher, 24 Pa Super 194.
57 C.J p 1109 note 68.

94. Del—Lofland v. Jefferson, 4 Del 303

95. Ala—Morrow v Rosentihl, 17 So 608, 106 Ala 198
57 C J p 1109 notes 70, 71.

96. Ala—U. S Rolling Stock Co. v. Clark, 10 So 917, 95 Ala 322, approved in Morrow v Rosentihl, 17 So. 608, 106 Ala. 198.

97. Ala—U S Rolling Stock Co v. Clark, 10 So. 917, 95 Ala 322, approved in Morrow v. Rosentihl, 17 So 608, 106 Ala. 198.

98. Ala—Morrow v Rosentihl, 17 So. 608, 106 Ala 198

99. Ohio—Trumbull Sav, etc, Co. v. Jones, 27 Ohio N P, N S, 469.

1. N Y—French v Bankverein Suisse, 165 N Y.S 86, 179 App Div. 371

2. N Y.—French v. Bankverein Suisse, supra.

3. N J—**Corpus Juris quoted in** Morris Plan Co of New York v. Ashdown, 190 A 303, 304, 15 N J. Misc. 185.
57 C J p 1109 note 78.

4. N.Y.—O'Brien v Obel, 92 N Y.S. 333, 46 Misc. 449.

5. Mo—Ring v. Vogel Paint, etc., Co., 46 Mo App. 374.

6. N.Y.—Woods v. Gibson, 6 Johns. 125.

7. N.Y.—Woods v. Gibson, supra.

has been presented to the board of supervisors for allowance,[8] and no interest whatever will be allowed on a sheriff's claim for costs due him for services in a litigated cause.[9]

§ 224. Penalties and Forfeitures

Under statutory regulation a sheriff or constable who claims or exacts illegal or excessive fees forfeits his fees or subjects himself to a penalty.

Under some statutes a sheriff or constable who claims or exacts illegal or excessive fees forfeits his fees[10] or subjects himself to a penalty.[11] Some statutes provide for the forfeiture of the fees of a sheriff whenever he returns a paper or process into court without indorsement thereon of the fees claimed by him.[12] There may be cases to which the foregoing statutes are inapplicable;[13] and the fact that an officer has been guilty of an impropriety in connection with the discharge of an official duty does not necessarily deprive him of his right to his fees.[14] A willful intent to violate the statute has been held necessary.[15]

Proceedings. The general rules governing proceedings to recover statutory penalties usually apply[16] with respect to pleading[17] and evidence[18] Clear proof of an overcharge is necessary to warrant a forfeiture of the entire bill containing the alleged overcharge.[19] The right of action for the statutory penalty for charging excessive fees is usually limited to the person against whom such fees were charged[20] An officer is charged with knowledge of the statutory fees for his office and ignorance thereof is no excuse in a proceeding under the statute for a penalty.[21]

§ 225. Rights of De Facto Officers, Deputies, Assistants, and Substitutes

a. De facto officers
b. Deputies, assistants, and substitutes

a. De Facto Officers

A sheriff de facto has no right to the emoluments of the office for the time he occupies the office, as against one who during such period was the sheriff de jure.

One who is only a sheriff de facto has no right to the emoluments of the office for the time he occupies the office, as against one who during such period was the sheriff de jure;[22] and one who assumes the office of sheriff, being constitutionally ineligible, cannot recover compensation from the county for his services, although he was apparently well elected, and was permitted to serve without any proceedings of ouster.[23] A de facto constable is without right to collect compensation for his services.[24]

b. Deputies, Assistants, and Substitutes

(1) Deputy sheriff
(2) Other deputies, assistants, and substitutes

(1) Deputy Sheriff

A deputy sheriff is entitled to such compensation for his services as may be fixed by statute or by agreement with the sheriff.

The compensation of a deputy sheriff is for public

8. N.Y.—People v. Clinton County, 19 N Y S 642, 64 Hun 636, motion denied and modified on other grounds 20 N Y.S. 273, 65 Hun 622
57 C J. p 1107 note 43.

9. Pa—Galbraith v. Walker, 95 Pa 481.

10. La—Ware v. Wilson, 22 La.Ann 102
Amercement of sheriff or constable generally see supra §§ 173-176

11. Colo—Hillman v Chmelka, 195 P 2d 945, 118 Colo 252.
Tex—Cook v. Nacogdoches County, Civ App, 147 S W.2d 943, error dismissed, judgment correct.
57 C J. p 1110 note 96.

12. La—Smardon v. Green, 10 La Ann 701.

13. Tenn.—Kerr v Raines, 256 S.W 246, 148 Tenn. 501.
57 C.J. p 1110 note 98.

14. Me—Thompson v. Wiley, 20 Me 479.
57 C J. p 1110 note 99.

15. Tex.—Cook v. Nacogdoches County, Civ App, 147 S W 2d 943, error dismissed, judgment correct

16. Colo—Hillman v Chmelka, 195 P 2d 945, 118 Colo 252.

17. **Sufficiency of complaint**
Where, in an action against an officer to recover a statutory penalty because of illegal fees charged, the complaint alleged that several writs were served at the same time, the fees charged for each service being illegal, and that defendant received in payment of his fees a certain sum, it was not demurrable, as stating several causes of action in one count. —Littlefield v. Cowles, 50 A. 737, 74 Conn 241.

18. **Evidence held sufficient**
To show that demand for excess fees was made willfully and knowingly—Hillman v. Chmelka, 195 P.2d 945, 118 Colo. 252.

19. La—Gulf Motor Truck Co v. Scott, 6 La App 64.

20. Conn—Littlefield v. Cowles, 50 A. 737, 74 Conn. 241.
57 C.J p 1110 note 1.

21. Colo—Hillman v Chmelka, 195 P 2d 945, 118 Colo 252.

22. Iowa—McCue v Wapello County, 10 N W 248, 56 Iowa 698, 41 Am R 134
57 C J. p 1110 note 4
De facto sheriffs generally see supra § 12.
Rightful officer is entitled to the compensation attached to the office, and he may recover from the de facto officer the compensation received by him—Israel v Wood, 56 P.2d 1324, 98 Colo 495—57 C J. p 1110 note 4 [a]
Recovery from de facto officer or usurper generally see Officers § 100.

23. Miss—Matthews v. Copiah County, 53 Miss 715, 24 Am R. 715.

24. Cal—Lopez v Payne, 196 P 919, 51 Cal.App 447
Pa.—Comfort v Cumberland County, 23 Pa.Co 414.
De facto constables generally see supra § 20.

service.[25] Where the statute gives the sheriff no fee for a particular service, a deputy who performs such service can claim no compensation.[26] In the absence of constitutional restrictions the legislature has power to provide for the compensation of deputy sheriffs.[27] In various jurisdictions the constitutions and statutes make provision for the compensation of deputy sheriffs,[28] and they are compensated by salary or fees as such provisions may direct.[29] Where a deputy sheriff is regarded as a public officer, he is subject to the same general limitations as any other public officer in the matter of salary and fees.[30] A deputy sheriff who has levied on goods and retains them in his custody after his principal's term of office has expired is entitled to the fees for such custody, until he surrenders the goods to the new sheriff.[31] A person is not entitled to draw pay from the county as riding bailiff for a circuit court and also as an emergency deputy sheriff,[32] and a deputy sheriff has no legal right to receive money paid as a gratuity by a litigant or his representative.[33]

Amount of compensation. The constitutions or statutes sometimes fix the amount of compensation of deputy sheriffs[34] or provide for its determination by the county board[35] or by a salary board[36]

25. N C.—Towe v. Yancey County, 31 S.E.2d 754, 224 N C. 579.

26. N.Y.—Day v. New York, 66 N Y 592.

27. N.C —Towe v. Yancey County, 31 S E 2d 754, 224 N C 579

28. Ark.—Clay County v Ruff, 90 S W.2d 474, 192 Ark 150
Ga —MacNeill v. Bazemore, 21 S E 2d 414, 194 Ga 406.
La —State ex rel. McKay v. City of New Orleans, 131 So. 843, 171 La 670.
Mich.—Toan v. McGinn, 260 N W 108, 271 Mich. 28.
Mont.—State ex rel. Rusch v Board of Com'rs of Yellowstone County, 191 P 2d 670, 121 Mont 162
N C —Towe v Yancey County, 31 S E 2d 754, 224 N C 579—Borders v Cline, 193 S E. 826, 212 N C 472
Okl.—Cavin v Board of Com'rs of Garfield County, 33 P 2d 477, 168 Okl 267.
Pa —McClain v. Northumberland County, 46 Pa Dist & Co. 705, 15 Northumb Leg.J 363—Vollmer v. Willis, Com.Pl, 20 Erie Co. 41.
57 C J. p 1111 note 8.

29. **Salary**
La —State ex rel. McKay v. City of New Orleans, 131 So. 843, 171 La 670.
Okl —Cavin v Board of Com'rs of Garfield County, 33 P 2d 477, 168 Okl 267.
Pa —Keech v. York County, 90 Pa Super. 486.

Statute held repealed
Ark —Clay County v Ruff, 90 S.W. 2d 474, 192 Ark 150.

County board of supervisors had right to place deputy sheriff on salary instead of salary and fee basis.—Toan v. McGinn, 260 N.W 108, 271 Mich 28

In Georgia
(1) Under L 1924 p 89 § 5 provision is made for salaries to be paid to deputies of the sheriff to be fixed by the county board —MacNeill v Bazemore, 21 S E 2d 414, 194 Ga. 406.

(2) Prior to enactment of such statute a sheriff's deputy had no certain compensation except for past services, and then only such compensation as may have been agreed on between him and the sheriff —MacNeill v Bazemore, supra

30. Mo —Scott v Endicott, 38 S W 2d 67, 225 Mo App. 426
Deputy sheriff as public officer see supra § 2.

31. R I —Doliver v. Collingwood, 8 A. 711, 15 R I 510

32. Ind —Mathena v. Losey, 165 N. E. 253, 88 Ind App. 634

33. N Y.—Wendt v. McCarrier, 163 N.Y.S 767, 176 App Div. 695.

34. Ga —Floyd County v. Johnson, 57 S E 2d 502, 80 Ga App. 785.
Pa —Vollmer v. Willis, Com Pl, 20 Erie Co. 41
57 C J p 1111 note 9
Change of compensation see Officers § 95.

Minimum fixed by constitution
La —State ex rel McKay v. City of New Orleans, 131 So. 843, 171 La. 670.

35. Ga —MacNeill v Bazemore, 21 S.E.2d 414, 194 Ga. 406.
Ind —Mathena v. Losey, 165 N E. 253, 88 Ind App. 634.
Mont —State ex rel. Rusch v. Board of Com'rs of Yellowstone County, 191 P 2d 670, 121 Mont. 162
Okl.—Cavin v. Board of Com'rs of Garfield County, 33 P 2d 477, 168 Okl. 267.
57 C.J. p 1111 note 10.

County board and not sheriff
Okl.—Cavin v Board of Com'rs of Garfield County, supra.

Provision held mandatory
Constitutional provision that deputy sheriffs shall have their compensation determined by the county commissioners is mandatory —People ex rel Meyering v. Whealan, 190 N E 693, 356 Ill 402.

The words "shall fix" in statutory provision that county commissioners shall fix salaries of deputy sheriffs on furnishing of statement as to number of deputies required, with recommendation as to their salaries, by sheriff, do not mean "shall establish"—MacNeill v Bazemore, 21 S. E 2d 414, 194 Ga 406

County commissioners must appropriate for, and pay reasonable compensation to, the number of deputies to county officers that is allowed by circuit court rule —People ex rel Meyering v. Whealan, 190 N E 693, 356 Ill 402.

Amount fixed during preceding year
Board of county commissioners, in estimating needs for current fiscal year, was authorized to fix salaries for deputies appointed by sheriff, without regard to amount fixed therefor during preceding fiscal year.—Cavin v. Board of Com'rs of Garfield County, 33 P.2d 477, 168 Okl. 267.

Discontinuance of allowance after services performed
Deputy sheriff appointed under statute was entitled to recover from county reasonable compensation for services rendered in good faith, with full knowledge of officials concerned, before commissioners' court passed order discontinuing allowances for deputies, although commissioners' court could terminate arrangement whereby county was paying monthly salary of deputy or decline to renew arrangement whereby county would do so —Harris County v. Neville, Tex Civ App., 84 S.W 2d 834, followed in Harris County v Hill, 84 S.W 2d 835 and Harris County v. Ogden, 84 S.W.2d 835.

36. Pa —Keech v York County, 90 Pa.Super. 486—McClain v. Northumberland County, 46 Pa Dist & Co. 705, 15 Northumb.Leg J 363—Vollmer v. Willis, Com.Pl., 20 Erie Co. 41.

Review of decision of board
Superior court would not be justified in disturbing order of court of common pleas affirming decision of county salary board refusing to fix compensation of deputy sheriff, in absence of abuse of discretion or irregularity in action of salary board or lower court.—Appeal of Ludwick, 178 A. 339, 117 Pa.Super. 471.

or court,[37] or by the sheriff.[38]

A statutory limitation of amount of the compensation of a deputy sheriff which may be fixed by the sheriff or county board will be given effect;[39] but a limitation of the salary of a sheriff to the amount of the fees, charges, and commissions earned and collected by him, less the cost of the conduct and operation of the office, does not apply to the compensation of deputies.[40]

Agreement for compensation. Provided it is not illegal, and in the absence of statute otherwise providing for the compensation of deputy sheriffs, a private contract between a sheriff and his deputy which fixes the compensation of the latter will be given effect.[41] A sheriff may contract with his deputy either for a specific compensation or for a reasonable portion of the fees and emoluments of the office,[42] and under the express provisions of some statutes the sheriff may employ deputies at such salaries as he may fix and agree on to be paid by the sheriff out of the salary and fees allowed to him for his services.[43] Where a deputy is discharged by the sheriff before the expiration of the contract term, he may recover compensation up to the time of discharge, but is not entitled to recover for services rendered thereafter.[44]

Estoppel. A deputy sheriff may be estopped from claiming compensation to which he otherwise might be entitled.[45] In the absence of statute otherwise providing, it has been held that the acceptance by a deputy sheriff of an amount less than the salary fixed does not constitute an estoppel to claim the balance.[46]

Per diem compensation. Where the statute provides that a deputy sheriff shall be paid a certain sum per day for the time actually employed, he is entitled only to one day's pay for a day's work,[47] even though he works more than eight hours.[48] Under some statutes, however, an unsalaried special deputy sheriff is entitled to a certain sum for an eight-hour day.[49]

Bond for fees. Where the statute limits the portion of the fees for travel and services which a sheriff may demand and receive from his deputies, a bond from the deputy to the sheriff, conditioned to pay over a larger amount of such fees, is void;[50] but under such a statute a sheriff may take the bond from his deputy, conditioned to pay over the portion allowed by law of all fees that he shall receive.[51]

(2) Other Deputies, Assistants, and Substitutes

Assistants of, and substitutes for, the sheriff and deputy constables are to be compensated for their services in accordance with statutory regulations.

Other assistants of,[52] and substitutes for,[53] the sheriff are to be compensated for their services in accordance with statutory regulations. Thus, under particular statutes a coroner may be entitled to the fees provided by statute and not to the fixed salary of the sheriff.[54] An elisor is entitled to the

37. Or.—Henry v. Yamhill County, 62 P 375, 37 Or 562
57 C J. p 1111 note 11
Commissioners' court
Tex.—Wood v. Anderson, Civ.App., 143 S W 2d 96, reversed on other grounds Anderson v Wood, 152 S W 2d 1084, 137 Tex 201—Harris County v Neville, Civ App, 84 S W. 2d 834—Tarrant County v Smith, Civ App, 81 S W 2d 537, error refused.

38. Mo—State v. Nolte, 285 S.W 501, 315 Mo. 84.
Ohio—State ex rel. Geyer v Griffin, 76 N.E.2d 294, 80 Ohio App 447

39. Mont—Hogan v Cascade County, 92 P. 529, 36 Mont. 183.
57 C.J. p 1111 note 19.

40. Ala.—Henry v. Wiggins, 92 So 108, 207 Ala 251

41. Ala—Mosely v. Kennedy, 17 So 2d 536, 245 Ala. 448.
Ga—Beaty v. Burch, 160 S.E. 654, 43 Ga App 832
Ky.—Hodges v. Daviess County, 148 S W.2d 697, 285 Ky 508.
57 C.J. p 1111 note 14.
Agreements as to compensation of sheriff see supra § 219
Legality or illegality of contract see Contracts § 220.

42. Ga—Beaty v. Burch, 160 S.E 654, 43 Ga App. 832
57 C.J. p 1111 note 14 [a].

43. Ark—Clay County v Ruff, 90 S W 2d 474, 192 Ark 150

44. Ga—Beaty v. Burch, 160 S E. 654, 43 Ga App 832.

45. Ky—Hodges v Daviess County, 148 S W 2d 697, 285 Ky. 508

46. Tex—Hausser v. Mulligan, 107 S W 2d 870, 130 Tex. 117.
Acceptance by officer of less than legal compensation as waiver or estoppel generally see Officers § 98

47. Ill.—Christian County v Merrigan, 61 N.E 479, 191 Ill. 484

48. Ill—Christian County v. Merrigan, supra
57 C.J p 1111 note 22.

49. Pa.—McClain v. Northumberland County, 46 Pa.Dist. & Co. 705, 15 Northumb.Leg J 363.

50. Mass—Farrar v Barton, 5 Mass. 395.

51. Mass—Mattoon v. Kidd, 7 Mass. 33

52. Chief clerk in sheriff's office
Ala—Mobile County v State ex rel. Farmer, 3 So 2d 435, 30 Ala.App. 245

Sheriff's process server, receiving temporary appointment, limited by statute to two months, was not entitled to pay for services after two months—Morris v. Civil Service Commission, 153 A. 635, 9 N J Misc 309

Limitation as to amount
Limitation of salary of a sheriff to the amount of the fees, charges, and commissions earned and collected by him, less the cost of the conduct and operation of the office, does not apply to the compensation of assistants to the sheriff—Henry v Wiggins, 92 So 108, 207 Ala. 251

53. Tenn—Allen v. Hickman, 53 S W.2d 383, 165 Tenn 136.
Substitutes for sheriff generally see supra §§ 31–33.

54. Tenn.—Allen v. Hickman, supra.

compensation allowed the sheriff for performing the same duties.[55]

Deputy constable. The statutes usually make provision for compensation of deputy constables.[56] The compensation is to be paid by way of salary or fees[57] and in such amount[58] as the local statutes may direct.

Person serving process in private capacity. Where a person executes a warrant or serves a subpœna issued by an alderman to him in his individual capacity as a private citizen, he is entitled to the same fees as a constable would have been entitled to receive for executing the same process,[59] and this is true, even though the person executing or serving the process has been commissioned generally as a deputy sheriff without salary.[60]

B. SUBJECTS OF COMPENSATION OR REIMBURSEMENT

§ 226. Service of Process, Notices, Etc., in General

A sheriff or constable generally is allowed compensation for the service and return of process and notices

Generally,[61] although not always,[62] a sheriff or constable is allowed compensation for the service and return of process, notices, and the like.

Service of same process or writ on several persons. Where a sheriff is required to serve the same process or writ on a number of persons, he is entitled to his statutory fee for each individual served,[63] and not merely to one fee for service on all,[64] and the fact that he is unable to serve all does not deprive him of his right to his fees for the services which he has made.[65]

Unsuccessful attempts to serve process. In the absence of a statutory provision allowing a sheriff compensation for endeavoring to serve process, although he is unable to find and serve the party, a sheriff is entitled to no fees for unsuccessful attempts to serve process.[66]

§ 227. Arrest, Keeping, and Transportation of Prisoners in Civil Proceedings

A sheriff or constable usually is allowed compensation for arresting a debtor and committing him under a body execution.

A sheriff or constable usually is allowed compensation for his official services in arresting a debtor and committing him to prison under a body execution[67] or in making an arrest under an attachment issued against a person charged with contempt,[68] but a sheriff is not entitled to a fee for arresting on a capias ad satisfaciendum a person who is privileged from arrest;[69] and the sheriff may be held not entitled to poundage in a body execution.[70]

55. Idaho—Griffith v Montandon, 35 P. 704, 4 Idaho 75.

56. Ky.—Commonwealth v. Bartholomew, 97 S.W.2d 591, 265 Ky. 703.

57. **Salary**
Ky.—Commonwealth v. Bartholomew, supra

Allocation of fees
Legislature could allocate all fees earned by office of constable through deputy constables to payment of salaries of deputy constables alone.—Jefferson County Fiscal Court v. Thomas, 130 S.W.2d 60, 279 Ky. 458.

58. Ky—Muenninghoff v Bartholomew, 106 S W.2d 97, 269 Ky. 36—Commonwealth v Bartholomew, 97 S W 2d 591, 265 Ky. 703.

Purpose of statute
Ky—Commonwealth v. Bartholomew, supra.

59. Pa—Keech v. York County, 90 Pa Super. 486

60. Pa—Keech v. York County, supra.

61. Minn—Russ v. Kane, 285 N.W 472, 205 Minn 187
Pa.—Ehrhardt v Kaplan Bros & Co, Com Pl, 42 Lack Jur. 7.
57 C J. p 1112 note 28.

Compensation as sheriff and constable in same case
Statute authorizing sheriff to execute all mesne and final process required of constables and authorizing receipt of same fees except in stated cases, did not intend that sheriff be compensated in same case in his capacity as sheriff for some of the service and as constable for other features of it—State, for Use and Benefit of Morgan County v Norwood, 26 So 2d 577, 248 Ala. 128.

Executing search warrant
(1) Sheriff was entitled to statutory fee for executing search warrant in liquor prosecution.—State ex rel Holcombe v. Stone, 171 So. 366, 233 Ala 243.

(2) Sheriff, who received statutory fee for his seizure of contraband liquor under each search warrant and prosecution of condemnation proceedings was not also entitled to additional statutory fee for executing each search warrant—State ex rel Holcombe v. Stone, 155 So. 636, 26 Ala App 187, certiorari denied 155 So. 637, 229 Ala. 88.

62. Wis.—Zielica v Worzalla, 156 N.W 623, 162 Wis. 603
57 C.J. p 1112 note 29

No fee in addition to attendance fee
(1) Sheriff who is paid statutory fee for attending and prosecuting liquor condemnation proceeding may not collect from county additional fees for service of notices in such proceeding.—Stone v. State ex rel Holcombe, 173 So 63, 233 Ala 583—State ex rel. Holcombe v. Stone, 171 So 366, 233 Ala. 243.

(2) Attendance at court generally see infra § 241.

63. Tex.—Moore v. McClure, 64 S.W. 810, 26 Tex Civ.App 459.
57 C J. p 1112 note 30.

64. Tex.—Moore v. McClure, supra.

65. Tex.—Moore v. McClure, supra.

66. Minn—Wagener v Ramsey County, 79 N.W. 166, 76 Minn. 368

67. Md—Stewart v. Dorsey, 3 Harr & M. 401.
57 C J. p 1112 note 35.

68. N Y.—Smith v. Birdsall, 9 Johns. 328
Attachment against witness see infra § 233

69. N.Y.—Wragg v. Swart, 10 Johns. 93.

70. N.Y.—O'Brien v. American Sure-

Erroneous detention of prisoner. Where defendant in an action of scire facias against him as bail has procured a constable to attend the court to receive the principal surrender by the bail, errors on the part of the officer in detaining the principal will not deprive him of his right to legal fees.[71]

Arrest or commitment of several persons on same process. A sheriff or constable has been held entitled to but a single fee for executing a warrant of arrest, although two or more persons are named therein,[72] but entitled to the statutory fee for each person committed where more than one is named in the commitment.[73] Where several persons are named in an attachment, the sheriff is entitled to his fee for each person attached.[74]

§ 228. Services in Criminal Proceedings

A sheriff or constable is entitled to compensation only for such services, in criminal proceedings, as the statutes provide compensation for.

A sheriff or constable is entitled to compensation for such,[75] and only such,[76] services in criminal proceedings as the statutes provide compensation for. Where the statute allows sheriffs a sum not exceeding a certain amount per annum from the county for services in criminal cases of a certain class, they are not entitled to any other compensation in such cases;[77] and where the fees of a sheriff for services in liquor law cases are otherwise provided for by statute he may not be entitled to a portion of the fines as additional compensation.[78] The failure of a prosecution because the law under which it was instituted had expired or been repealed before the prosecution was commenced cannot affect the right of the sheriff to his costs.[79]

Executing death sentence. A sheriff is entitled only to his statutory fee for executing a death sentence.[80]

§ 229. —— Search for, or Arrest or Pursuit of, Persons Charged with Crime

A sheriff or constable ordinarily is allowed compensation for making arrests, although an officer otherwise compensated is, in the absence of statutory provision, denied extra compensation for serving a warrant of arrest.

The making of arrests or the execution of warrants therefor, is a service for which sheriffs and constables ordinarily are allowed compensation;[81] but an officer who is otherwise compensated by an annual salary or per diem compensation is not entitled, in the absence of statutory provision therefor, to extra compensation for service of a warrant of arrest,[82] and some statutes are construed to authorize the county commissioners, in their discretion, to disallow fees for serving a warrant of arrest for a preliminary examination.[83] If a warrant of arrest in a criminal action is regular and valid on its face, the sheriff or constable may collect his fees from the county for serving it,[84] notwithstanding any knowledge of his own as to matters affecting the validity of the proceedings,[85] but such an officer is not entitled to fees for making an arrest under a criminal process which states no offense and is therefore void on its face,[86] or for making an arrest in another state,[87] or for the execution of a warrant

ty Co., 85 N.Y.S. 316, 88 App.Div. 526
57 C.J. p. 1112 note 38.

71. Me.—Thompson v. Wiley, 20 Me. 479.

72. Pa.—McCallister v. Armstrong County, 9 Pa.Super. 423, distinguishing Price v. Lancaster County, 7 Pa.Super. 119, and affirmed in 41 A. 987, 189 Pa. 95.
57 C.J. p. 1113 note 41

73. Pa.—Wilhelm v. Fayette County, 31 A. 1009, 168 Pa. 462.
57 C.J. p. 1113 note 42

74. Pa.—Crippen v. Lackawanna County, 3 Lack.Leg.N. 138.

75. Fla.—Gray v. Leon County, 118 So. 305, 96 Fla. 476.
57 C.J. p. 1113 note 45
Liability of county for sheriff's fees in criminal cases see infra § 253

Services outside county in felony cases
Ga.—Floyd County v. Johnson, 57 S.E.2d 502, 80 Ga.App. 785.

76. Fla.—Bradford v. Stoutamire, 38 So.2d 684.

Mo.—**Corpus Juris cited in** Dunklin County v. Donaldson, 164 S.W.2d 367, 369.
57 C.J. p. 1113 note 46

Destruction of still
Under statute, sheriff is not entitled to fee from county for destruction of still found in woods and destroyed, where found and destroyed without order of court for its destruction.—Calhoun County v. Liddon, 138 So. 389, 103 Fla. 833

77. Iowa.—Culbertson v. Jefferson County, 1 Greene 416.
57 C.J. p. 1113 note 47.

78. Miss.—Hancock County v. Vairin, 80 So. 780, 119 Miss. 315.

79. S.C.—Rogers v. Marlboro County, 11 S.E. 383, 32 S.C. 555.

80. Mo.—Ford v. Howard County Cir. Ct., 3 Mo. 309.

81. Ala.—State, for Use and Benefit of Morgan County, v. Norwood, 26 So.2d 577, 248 Ala. 128
Fla.—State ex rel. Farrior v. Faulk, 136 So. 601, 102 Fla. 886.
57 C.J. p. 1113 note 51.

Statute held unconstitutional as depriving sheriff of fee for arrest.—Webster County v. Overby, 42 S.W.2d 707, 240 Ky. 461

Warrant held not improperly issued so as to excuse county from paying constable his fees for executing it.—Osceola County v. State ex rel. Newton, 155 So. 119, 115 Fla. 5.

82. W.Va.—Tyler County Ct. v. Long, 77 S.E. 328, 72 W.Va. 8, Ann.Cas.1915B 808.
57 C.J. p. 1113 note 52.

83. Colo.—Weld County v. Camp, 108 P. 972, 48 Colo. 61.

84. Fla.—Osceola County v. State ex rel. Newton, 155 So. 119, 115 Fla. 5.
Minn.—Dean v. Renville County, 52 N.W. 650, 50 Minn. 232

85. Minn.—Dean v. Renville County, supra

86. Minn.—Dean v. Renville County, supra

87. Ohio.—Smith v. Portage County, 9 Ohio 25.
57 C.J. p. 1113 note 57.

of arrest with respect to a person already under arrest.[88] Constables have been held not entitled to fees for arresting vagrants, disorderly persons, or incorrigible children, where the persons arrested were not committed.[89]

Arrest of person against whom several warrants issued. Where a sheriff arrests a person against whom he holds several warrants, he is entitled to but a single fee and not to a fee for each warrant.[90]

Arrest of several persons under one warrant. Under a statute allowing a certain fee for executing a warrant on behalf of the state, a constable is entitled to but a single fee for executing a warrant of arrest regardless of the number of persons named therein.[91]

Search for person not found. A sheriff is not entitled to a fee for an unsuccessful search for a person charged with crime under a warrant of arrest lodged in his office.[92]

Unsuccessful pursuit of fugitive. The county board should not allow a sheriff compensation for services in the unsuccessful pursuit of a fugitive from justice within the state, and outside the county, without the certificate of the district attorney required by statute and proof that the escape from custody or pursuit was not the result of the sheriff's carelessness or negligence.[93]

§ 230. —— Transportation of Prisoners

Compensation usually is allowed a sheriff or constable for transporting prisoners to the place of confinement or into court for trial.

Compensation is usually allowed a sheriff or constable for transporting prisoners to the place where they are to be confined,[94] and, in the absence of fraud, county commissioners cannot, on the presentation of a sheriff's bill for services, question his exercise of discretion in taking prisoners separately to the reformatory.[95] Also a sheriff may be allowed compensation for his official services in bringing a prisoner who is confined in jail into court for trial[96] and returning him,[97] but he is not entitled to a fee for each time he may conduct the prisoner to and from jail pending his trial;[98] and in some jurisdictions a sheriff is not entitled to any fees for bringing accused in a criminal case into court during the trial.[99] Where the statutes do not provide compensation therefor, a sheriff is not entitled to compensation for bringing convict witnesses to court.[1] A fee may be recovered for services in bringing back a prisoner from another state.[2]

§ 231. —— Commitment, Custody, and Discharge of Prisoners

Sheriffs and constables usually are entitled to fees for committing persons under arrest and for discharging prisoners from jail.

Sheriffs and constables usually are entitled to fees for the commitment of persons placed under arrest[3] and for discharging prisoners from the jail;[4] but, in the absence of a statutory provision there-

88. N.Y.—Village of Solvay v. Town of Geddes, 286 N.Y.S. 925, 247 App. Div. 89.

89. Pa.—Price v. Lancaster County, 24 Pa.Co. 225.

90. Ark.—McHenry v. Hot Spring County, 22 S.W. 175, 57 Ark. 565.
57 C.J. p. 1114 note 59.

91. Pa.—McCallister v. Armstrong County, 9 Pa. Super. 423.
57 C.J. p. 1114 note 60.

92. S.C.—Whittle v. Saluda County, 35 S.E. 203, 56 S.C. 505.
57 C.J. p. 1114 note 61.

93. Wis.—Douglas County v. Sommer, 98 N.W. 249, 120 Wis. 424.

94. Cal.—Dyer v. Placer County, 27 P. 197, 90 Cal. 276.
57 C.J. p. 1114 note 64.
Expenses see infra § 248.
Mileage see infra § 251.

Return of escaped prisoner
Fla.—State ex rel. Farrior v. Faulk, 136 So. 601, 102 Fla. 886.

City officer acting as constable
Order of city council against paying city employees for arrest or commitment of persons to state institutions, except actual expense, merely prevented payment from city treasury and did not prevent city police officer, acting as constable, from recovering statutory fees from county commissioners for delivering prisoners.—Cushing v. Babcock, 38 A.2d 137, 141 Me. 14.

Necessary finding of fact held absent, necessitating new trial.—Patterson v. Swain County, 181 S.E. 329, 208 N.C. 453.

95. Colo.—Rio Grande County v. Hobkirk, 56 P. 993, 13 Colo. App. 180.

96. Mich.—Chipman v. Wayne County Auditors, 86 N.W. 1024, 127 Mich. 490.
57 C.J. p. 1114 note 66.

97. Ga.—Clark v. Clark, 73 S.E. 15, 137 Ga. 189.—Sapp v. Rozar, 70 Ga. 722.

98. Pa.—Commonwealth v. Goudon, 2 Leg. Op. 21.
57 C.J. p. 1114 note 68.

99. Nev.—Washoe County v. Humboldt County, 14 Nev. 123.
57 C.J. p. 1114 note 69.

1. Ga.—Clark v. Clark, 73 S.E. 15, 137 Ga. 189.

2. Fla.—Foley v. State ex rel. Gordon, 50 So.2d 179.

3. Tenn.—Lynch v. Jackson County, 173 S.W. 440, 131 Tenn. 72.
57 C.J. p. 1114 note 71.

"Committing a prisoner to jail," as used in a statute entitling a sheriff to a fee for so doing, means receiving into the jail under commitment.—Richter v. St. Paul, 12 N.W. 532, 29 Minn. 198.

"Committing any person to jail," as used in a statute relating to sheriff's fees for such act, relates to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions, and not to imprisonment for protection of the officer pending bail, commitment, or discharge of the prisoner.—State v. Clark, 70 S.W. 489, 170 Mo. 67.—Thomas v. St. Louis County, 61 Mo. 547.

4. Ind.—Hawthorne v. Randolph

for at the time in question, they are not entitled to fees for the discharge of prisoners from jail;[5] a statute providing a fee for each commitment and discharge in a criminal matter obviously does not apply to a commitment or discharge in a noncriminal matter,[6] a sheriff is not entitled to a fee for merely arraigning prisoners;[7] and a constable is not entitled to a commitment fee where the hearing is merely adjourned, and accused is detained in custody.[8] Where the statute allows compensation to a sheriff for assistance in executing a commitment to the state prison only when he has a certificate of necessity therefor, a county board has no authority to make such allowance otherwise.[9]

Where several are committed on same charge or commitment paper, the sheriff is entitled to a fee for each person so committed.[10]

Custody; attending jail. A constable is entitled to compensation for holding a prisoner in custody where the case is within a statute allowing him a certain sum per day for keeping a prisoner in custody under the direction of a justice of the peace.[11] However, particular statutes have been construed as not providing for payment to a sheriff of fees for the arrest of persons by highway patrolmen and turning them over to the sheriff.[12]

Under particular governing statutes, a county board has been held empowered to reduce a sheriff's fee for attending jail when occupied by a prisoner or prisoners,[13] without the adoption of a formal resolution,[14] and a turnkey fee claimed by a sheriff for guarding a prisoner committed to jail on a misdemeanor charge, where there was no indictment or conviction, has been held not a lawful charge against the county fine and forfeiture fund.[15]

§ 232. Conveying Lunatics to Asylum

Where a statute so provides, a sheriff is entitled to compensation for conveying insane persons to the asylum.

Under particular statutes and the construction placed thereon, a sheriff has been held entitled to compensation for conveying insane persons to the asylum;[16] but at least one statute has been construed as not entitling a sheriff to per diem compensation for this service.[17]

§ 233. Serving Subpœnas or Attachments for, and Procuring Attendance of, Witnesses

a. In general
b. Amount of fees

a. In General

Sheriffs and constables generally are allowed fees for serving subpœnas on witnesses.

Sheriffs and constables are, as a general rule, allowed fees for their official services in serving subpœnas on witnesses,[18] or executing attachments against them,[19] and procuring their attendance at court.[20] A sheriff is not entitled to compensation for serving an ineffective subpœna which he was not bound to serve[21] or for serving subpœnas in a special grand jury inquiry, authorized by the court,

County, 30 N.E. 16, 31 N.E. 1124, 5 Ind.App. 280
57 C.J. p. 1114 note 72.

5. Pa.—McNees v. Armstrong County, 20 Pa.Co. 105.

6. Pa.—Mayer v. Franklin County, 85 Pa.Super. 463.
57 C.J. p. 1114 note 74.

7. N.Y.—People v. Saratoga County, 60 N.Y.S. 1122, 45 App.Div. 42

8. Pa.—Winters v. Dauphin County, 18 Pa.Co. 151.

9. Wis.—Northern Trust Co. v. Snyder, 89 N.W. 460, 113 Wis. 516, 90 Am.St.R. 867.

10. Pa.—Wilhelm v. Fayette County, 31 A. 1009, 168 Pa. 462.
57 C.J. p. 1115 note 78.

11. N.Y.—People v. Rockland County Board of Suprs., 151 N.Y.S. 671, 166 App.Div. 22.
57 C.J. p. 1115 note 80.
Compensation and reimbursement of sheriff, deputy, or subordinate for care and maintenance of prisoners see Prisons §§ 24-29.

12. Fla.—Bradford v. Stoutamire, 38 So.2d 684.
No fees prior to delivery to sheriff
Fla.—Bradford v. Stoutamire, supra

13. Kan.—Foster v. Board of Com'rs of Harper County, 55 P.2d 349, 143 Kan. 361.
"May" as not meaning "must"
Emergency fee and salary act, providing that sheriffs "may" be allowed one dollar per day for attending jail, did not require payment of such amount, word "may" not meaning "shall" or "must."—Foster v. Board of Com'rs of Harper County, supra.

14. Kan.—Foster v. Board of Com'rs of Harper County, supra

15. Ala.—Kilgore v. Swindle, 122 So. 333, 219 Ala. 378.

16. Ill.—La Salle County v. Milligan, 32 N.E. 196, 143 Ill. 321.
57 C.J. p. 1115 note 83.
Expenses see infra § 248.

17. Pa.—Andrews v. Lawrence County, 38 Pa.Super. 293.

18. Ala.—State, for Use and Benefit of Morgan County, v. Norwood, 26 So.2d 577, 248 Ala. 128.
57 C.J. p. 1115 note 85.
Serving duplicate subpœnas
Where witnesses under subpœna were excused by court, but subsequently court directed issuance of additional subpœnas for same witnesses and sheriff summoned them, sheriff was entitled to fees for serving duplicate subpœnas.—Burttschell v. Sheppard, 69 S.W.2d 402, 123 Tex. 113.
Summoning witnesses before grand or petit jury
Ga.—Floyd County v. Johnson, 57 S.E.2d 502, 80 Ga.App. 785

19. Pa.—Commonwealth v. Goudon, 2 Leg.Op. 21.

20. Ariz.—Yavapai County v. O'Neill, 29 P. 430, 3 Ariz. 363.
57 C.J. p. 1115 note 87.

21. Ariz.—Yavapai County v. O'Neill, supra
57 C.J. p. 1115 note 88.

which does not result in any prosecutions;[22] and a sheriff or deputy sheriff who serves a subpœna in his own cause is not entitled to any fee therefor;[23] nor may a constable serve himself with a subpœna to appear as a witness and charge a fee for making such service.[24] Where a sheriff is otherwise compensated, he is not entitled to a fee for serving a subpœna.[25]

Necessity of actual service. As a general rule, a sheriff must actually serve subpœnas in order to be entitled to fees therefor,[26] and a mere offer to serve them is not sufficient;[27] but under at least one statute a sheriff is allowed a fee for diligent search, inquiry, and return not found on a subpœna.[28]

Two attachments for same witnesses. Where, on the same date, two attachments, in different suits, issued to the sheriff, each for the same persons, who had neglected to appear as witnesses, and separate returns were made thereon, they having been served at different dates, and the witnesses produced at different times, the sheriff is entitled to his fees in each case for attaching each person named in the attachment.[29]

Who entitled to fees. A statute fixing the fees to be charged by the sheriff for serving a subpœna confers on the sheriff no exclusive right to serve subpœnas in criminal cases,[30] and, where the district attorney employs a constable to make the service, the constable, and not the sheriff, is entitled to the fees.[31] A sheriff who has appointed a deputy to serve a subpœna has the same right to a fee for service by the deputy as though he had made the service in person[32]

b. Amount of Fees

The amount of fees for serving subpœnas is only such as is fixed by statute.

The amount of fees for serving subpœnas is such, and only such, as is fixed by statute[33] A constable or deputy constable who serves subpœnas issued out of court is entitled to the same compensation as the sheriff for serving subpœnas,[34] and, if the sheriff serves subpœnas issued by a magistrate, he may charge the fees allowed by the constable's fee bill.[35]

Several witnesses named in one process. It has been held that a sheriff or constable is entitled to a fee for each person named in a subpœna and actually served,[36] but it has also been held that a sheriff can charge only a single fee for arresting all witnesses whose names are contained in one warrant.[37]

§ 234. Service or Levy and Return of Process against Property

A sheriff cannot collect costs for executing a void process against property.

A sheriff cannot collect costs for executing a void process against property.[38]

§ 235. —— Attachment and Execution

a. Attachment
b. Execution

a. Attachment

A sheriff or constable is generally entitled to a fee for making the levy and return of an attachment, even where the attachment is discharged, annulled, or vacated.

A sheriff or constable is, as a general rule, entitled to a fee for his official services in making the levy[39] and return[40] of an attachment; but he can demand for an attachment no other compensation than the statute prescribes.[41] While it was held in early cases that, if the attached property was not

22. Pa.—In re Inquiry by Grand Jury, 15 Pa Dist. 465.

23. Ill.—Chicago, etc., R. Co. v. Dunning, 18 Ill. 494

24. Pa.—Commonwealth v. Pflaumer, 16 Pa Dist & Co 193.

25. Ala.—Stone v. State ex rel. Holcombe, 173 So 63, 233 Ala. 583—State ex rel Holcombe v. Stone, 171 So. 366, 233 Ala 243

26. Pa.—Deitrick v Northumberland County, 24 Pa Super 22—In re Inquiry by Grand Jury, 15 Pa.Dist 465

27. Pa.—Deitrick v. Northumberland County, 24 Pa.Super. 22

28. Minn.—Barman v. Miller, 23 Minn. 458

29. Pa.—Crippen v. Lackawanna County, 3 Lack Leg N. 138.

30. Pa.—O'Leary v Northumberland County, 24 Pa Super. 24

31. Pa.—O'Leary v. Northumberland County, supra.

32. Ill.—Chicago, etc, R. Co. v Dunning, 18 Ill. 494.

33. Pa.—Kerr v. Sun Co., 32 Pa.Super. 239.
57 C J. p 1115 note 91.

34. Pa.—Hornberger v. Wise, 72 Pa. Dist & Co 467, 2 Lycoming 38.
57 C J p 1115 note 92.

35. Pa.—Commonwealth v. Neeley, 1 Del.Co. 532.

36. Pa.—Price v. Lancaster County, 41 A 987, 189 Pa 95.
57 C J. p 1116 note 97.

37. S C.—Whittle v. Saluda County, 35 S E. 203, 56 S.C 505—Lancaster v. Barnwell County, 19 S.E 74, 40 S C 445

38. Miss.—Wingate v. Wallis, 13 Miss. 249

39. N Y.—Stojowski v. Banque de France, 61 N.E 2d 414, 294 N.Y 135.
57 C.J. p 1116 note 7.

40. N Y.—Calhoun v. Lee, 29 How. Pr. 1.

41. N.H.—Burnham v. Strafford County Sav Bank, 5 N H. 446.
57 C J p 1116 notes 10–12.

Part of legislative purpose of statute fixing fees of constable in proceeding wherein attachment, garnishment, or suggestion order is issued against wages of a defendant was to prevent unnecessary hardships against class of people having insuf-

sold, the sheriff was not entitled as matter of right to poundage or commissions,[42] under statute the sheriff may be entitled to fees and poundage on the value of the property where the attachment is discharged, annulled, or vacated,[43] provided there is sufficient proof of the amount or value of the property attached to warrant the taxation of fees and poundage;[44] and he is not to be denied poundage where he has done all that entitles him to it and has done nothing to forfeit his right thereto.[45] Where land attached by a sheriff in a suit to enforce a vendor's lien is afterward sold by the clerk and master under a decree, the sheriff is entitled only to his fee for the levy.[46]

Attachments in different counties. Where, in the same action, attachments are levied or served in different counties, there can be but one allowance of poundage,[47] which is to be apportioned among the several attaching officers according to the proportionate values of the property attached by them.[48]

Two or more defendants or parcels of property. Where there is more than one defendant in an attachment suit, a levy on the property of each defendant is a separate levy for which the sheriff is entitled to a separate fee.[49] Where a sheriff levies an attachment against a single defendant, although on several separate parcels of property, he has been held entitled only to a single fee,[50] but there is also authority to the contrary.[51]

Inventory and appraisement. The making of an inventory of attached property is not a matter for which the sheriff is entitled to costs in addition to the statutory fees for serving and otherwise executing attachment writs,[52] although his failure to file an inventory does not affect his right to poundage fees.[53] Also, in the absence of statute the sheriff is not entitled to charge as costs the expense of an appraisement of goods seized under a writ of attachment.[54]

b. Execution

(1) In general
(2) Several defendants or executions
(3) Stay or setting aside of writ
(4) Necessity of sale

(1) In General

A sheriff generally is entitled to compensation for levying and returning an execution.

A sheriff generally is entitled to compensation for levying and returning an execution;[55] but the rule has been held not to be applicable unless the sheriff has made an actual levy[56] on property belonging to defendant,[57] although there is also authority to

ficient property in their own names, from which justice's judgment could be satisfied.—Harshbarger v. Cowgill, 17 S.E.2d 325, 123 W.Va. 667.

Statute applied to pending actions and held valid

N.Y.—Stojowski v. Banque de France, 61 N.E.2d 414, 294 N.Y. 135.

42. N.Y.—Calhoun v. Lee, 29 How. Pr. 1.
57 C.J. p. 1116 note 13.
Commission on money collected see infra § 240.

43. N.Y.—Bruskin v. Diamond Trading Co., 44 N.Y.S.2d 502, 182 Misc. 444—Dempsey v. John A. Lynch Co., 25 N.Y.S.2d 164, 175 Misc. 710, affirmed 25 N.Y.S.2d 166, 261 App. Div. 829.
57 C.J. p. 1116 note 14.

44. N.Y.—Tribune Assoc. v. Eisner, etc., Co., 63 N.Y.S. 94, 49 App.Div. 141.

Mistake of holder of property as to amount or value of property on which levy was impressed does not affect right of sheriff to poundage fees legally assessable on larger sum.—Buxbaum v. Assicurazioni Generali, 25 N.Y.S.2d 357, 175 Misc. 785.

45. N.Y.—Martin v. Berwick, 142 N.Y.S. 470.

Mere service of copy of warrant

In action in which warrant of attachment against property of defendant was issued to sheriff, who levied on bank accounts of defendant and merely served copy of warrant on company in which defendant had safe-deposit box, order granting defendant's motion to direct sheriff to refund part of sum demanded by him as poundage, on releasing defendant's property, which was discharged from attachment by giving of undertaking, was affirmed.—Press v. Vose, 13 N.Y.S.2d 697, 257 App.Div. 1010.

46. Tenn.—Harris v. Petigrew, 5 Lea 596.

47. R.I.—Tilley v. De Wolf, 12 R.I. 347.

Reason for rule

To hold that the sheriff of each county where a levy had been made would be entitled to full poundage would undoubtedly lead to great injustice.—Smith v. Maico Co., 57 N.Y.S.2d 682, 185 Misc. 871.

48. N.Y.—Smith v. Maico Co., supra.
R.I.—Tilley v. De Wolf, 12 R.I. 347.

49. Mo.—Miller v. Muegge, 27 Mo. App. 670.

50. Mass.—Washington Bank v. Boston Glass Mfg. Co., 6 Pick. 375.
57 C.J. p. 1117 note 22.

51. Cal.—Young v. Miller, 63 Cal. 302.

52. Colo.—Cramer v. Oppenstein, 27 P. 713, 16 Colo. 495.
N.H.—Eastman v. Coos Bank, 1 N.H. 23.

53. N.Y.—Buxbaum v. Assicurazioni Generali, 25 N.Y.S.2d 357, 175 Misc. 785—Prall Construction Co. v. Jeffs, 215 N.Y.S. 812, 126 Misc. 802.

54. Mo.—Ring v. Charles Vogel Paint, etc., Co., 46 Mo.App. 374.

55. Neb.—**Corpus Juris quoted in** Ehlers v. Gallagher, 22 N.W.2d 396, 400, 147 Neb. 97.
N.J.—**Corpus Juris quoted in** Morris Plan Co. of New York v. Ashdown, 190 A. 302, 304, 15 N.J.Misc. 185.
57 C.J. p. 1117 note 26.
Commission on money collected on execution see infra § 240.

56. Neb.—**Corpus Juris quoted in** Ehlers v. Gallagher, 22 N.W.2d 396, 400, 147 Neb. 97.
N.J.—**Corpus Juris quoted in** Morris Plan Co. of New York v. Ashdown, 190 A. 302, 304, 15 N.J.Misc. 185.
57 C.J. p. 1117 note 27.

57. Neb.—**Corpus Juris quoted in** Ehlers v. Gallagher, 22 N.W.2d 396, 400, 147 Neb. 97.
N.J.—**Corpus Juris quoted in** Morris Plan Co. of New York v. Ashdown, 190 A. 302, 304, 15 N.J.Misc. 185.
57 C.J. p. 1117 note 28.

other effect.[58] It has been required, for compensation, that the levy made be valid;[59] and he cannot claim compensation for levying an execution which plaintiff has instructed him not to levy or merely to hold to bind the debtor's property,[60] nor, where such instructions have been given and he makes levy, can he charge a fee merely for making a return.[61] A sheriff is not entitled to the fees of an appraiser for assisting in appraising real estate levied on,[62] nor is he entitled to recover from the county for services rendered in executing judgments and decrees of a court which is not mentioned in the statute naming other courts in that connection.[63]

(2) Several Defendants or Executions

A sheriff levying execution against several defendants is entitled to a fee for each; but where he makes one levy against a defendant on several executions, he can charge for only one levy. Where executions go to different counties, the sheriffs thereof must divide the poundage fee on the real debt.

Where an execution is issued against several defendants, the sheriff is entitled to a levying fee for each;[64] but where there are several executions against several defendants for the same debt the sheriff is entitled to poundage fees only on the sum actually due,[65] and where a sheriff has several executions against a defendant, and makes one levy on his property, and enters the property on each execution, he is entitled to charge only for one levy, and not for a levy on each execution.[66]

Executions in different counties. Where executions go to different counties, on either a joint judgment or on several judgments for the same debt, the sheriffs of such counties must divide among them the poundage fee on the real debt.[67] So, where each sheriff makes a levy on property, and by reason of an arrangement between the parties no sale takes place, each sheriff is not entitled to his commission on the amount of the execution,[68] but only to a commission on the value of the goods levied on by him,[69] or, if the total levies exceed in value the amount of the execution, a pro rata commission based on the value of the goods which he seized.[70]

(3) Stay or Setting Aside of Writ

A sheriff is entitled to poundage where, after he has levied under an execution, the writ is set aside, vacated, or superseded. Authorities differ as to whether a sheriff is entitled to commissions where an execution is stayed after a levy.

A sheriff is entitled to poundage where, after he has made a levy under an execution, the writ is set aside, vacated, or superseded.[71] It has been both affirmed[72] and denied[73] that a sheriff is entitled to commissions where an execution is stayed after a levy; and, with respect to the right to constable's fees, a levy has been held valid and effective notwithstanding the operation thereof was suspended by virtue of a prior execution.[74]

(4) Necessity of Sale

A sheriff has been held not entitled to commissions on property taken on execution unless a sale is actually made; under other authority, he does not lose his right to commissions when a sale is prevented without his fault.

A sheriff has been held not entitled to commissions on property taken on execution unless a sale

58. **In New York**
(1) A sheriff receiving an execution, but withholding levy at the request of the debtor's attorney, who promises that the judgment will be paid in full and the sheriff's fees satisfied has been held entitled to poundage—Gimenez v. Great Atlantic & Pacific Tea Co, 275 N.Y.S. 948, 242 App Div. 485

(2) It has also been held that where, after execution issued, the judgment is set aside on motion of the judgment debtor, and the sheriff does not actually levy thereon, he is not entitled to poundage on the execution, although the judgment debtor has property sufficient to satisfy the judgment—U. S Fidelity, etc., Co v Lentilhon, 119 N Y S 82, 64 Misc. 299.

59. Ala.—Northern Alabama R Co v. Lowery, 57 So. 260, 3 Ala App 511.
N J.—**Corpus Juris quoted in** Morris Plan Co. of New York v. Ashdown, 190 A. 302, 304, 15 N.J.Misc. 185.
Setting aside of writ see infra subdivision b (3) of this section.

60. Ala.—Oswitchee Co v. Hope, 5 Ala. 629.
Neb.—**Corpus Juris quoted in** Ehlers v. Gallagher, 22 N.W 2d 396, 400, 147 Neb 97

61. Neb.—Ehlers v. Gallagher, supra.

62. Neb.—Phœnix Ins. Co v. McEvony, 72 N.W. 956, 52 Neb. 566

63. Miss.—Forrest County v. Thompson, 37 So.2d 787, 204 Miss. 628.

64. Del.—State v Burton, 4 Del. 457.

65. Md.—Howard v. Levy Ct., 1 Harr & J 558

66. S C.—Thrower v. Vaughan, 30 S. C.L 18.

67. Md.—Howard v. Levy Ct, 1 Harr. & J. 558.

68. N.J.—Sturges v. Lackawanna, etc, R. Co, 27 N J Law 424.

69. N J.—Sturges v. Lackawanna, supra.

70. N J.—Sturges v. Lackawanna, etc, R. Co, supra.

71. N J.—**Corpus Juris cited in** Morris Plan Co of New York v Ashdown, 190 A 302, 304, 15 N.J. Misc. 185.
N Y.—Rothstein v Marx, 103 N.Y S. 2d 758, 199 Misc 456.
57 C J. p 1117 note 40.

72. N Y.—Benedict v. Wright, 19 Hun 27.

73. Pa.—Smith v. Morrison, 1 Chest Co. 291.
57 C J. p 1118 note 43.
Transfer of judgment by plaintiff to third person
Pa.—Union Nat. Bank of Mount Joy v Saylor, 26 Pa Dist. & Co. 204, 45 Lanc.L.Rev. 68, 84 Pittsb Leg J 506, 8 Som. 21, 50 York Leg.Rec. 27.

74. N.J.—Morris Plan Co. of New York v. Ashdown, 190 A. 302, 15 N.J Misc. 185.

is actually made,[75] or, as discussed infra § 240, the money is actually collected; but there is also authority for the view that the sheriff does not lose his right to commissions when a sale is prevented without his fault.[76]

Stay of sale. Under a statute providing that the sheriff is entitled to a fee where, after the levy of an execution, the sale thereunder is stayed, he cannot, under the same execution, be entitled both to this fee and to a fee for making money on the execution.[77] A statute providing that for levying execution when a sale is stayed by a restraining order, after levy, a sheriff shall receive one half the commission for selling under execution does not apply where an execution sale is stayed by a supersedeas bond on appeal.[78]

§ 236. —— Writ of Possession

A sheriff is allowed only his statutory fee, without allowance for extra time and trouble, for serving a writ of seizin and possession in a real action.

A sheriff is allowed compensation for serving a writ of seizin and possession in a real action,[79] but is limited to his statutory fee,[80] and is not entitled to an allowance for extra time and trouble.[81]

§ 237. —— Distress Warrant

A sheriff or constable is entitled to a fee for levying a distress warrant.

A sheriff or constable is entitled to charge a fee for the levy of a distress warrant,[82] but not for a return on the warrant of "no property found,"[83] and he is not entitled to unearned commissions.[84]

§ 238. Custody and Care of Property

A sheriff commonly is allowed compensation for the care and custody of property of which he has taken possession under an attachment, execution, or other writ or order. Apart from statute, the amount of the allowance rests in the discretion of the court.

A sheriff commonly is allowed charges or compensation for the care and custody of property of which he has taken possession under an attachment,[85] execution,[86] writ of sequestration,[87] or order, writ, or requisition of replevin.[88] However, in the absence of statutory provision therefor, a sheriff is not entitled to fees for the care and custody of real estate under levy of an execution.[89]

In order to warrant an allowance, the services must have been actually rendered.[90] Ordinarily an allowance to a sheriff for the care and custody of property can be made for only such period as the property was in his possession,[91] and he cannot recover any compensation for the custody of property where he has never had actual possession thereof;[92] but a statutory provision allowing a sheriff a reasonable sum for securing attached property has been held applicable where the attachment is by lodging a copy in the town clerk's office.[93] A sheriff or constable is not entitled to any compensation for receiving and keeping property levied on where the amount of the execution was paid as soon as the levy was made,[94] and it is not an abuse of discretion for the court to refuse an allowance for the custody of attached property where the officer unjustifiably refused to accept a bond.[95] The risk incurred by the sheriff from the possession of attached property is no ground for a claim of poundage.[96]

Indorsement of charges on writ. A sheriff's

75. Va.—Commonwealth v. Brown, 5 Call 569, 9 Va. 569.
57 C J. p 1118 note 46.

76. Vt.—Baldwin v. Shaw, 35 Vt. 273.
57 C.J. p 1118 note 48

77. Ala.—Mastin v. Cullom, 28 Ala 670.

78. Ala.—Cooke v. Wilbanks, 140 So 745, 224 Ala. 479.

79. Mass.—Weston v. Weston, 102 Mass 514.

80. Mass.—Weston v. Weston, supra.

81. Mass.—Weston v. Weston, supra.
57 C J. p 1118 note 58.
Allowance for help or assistance see infra § 250

82. Pa.—Harvey v. Hager, 18 Pa. Dist. & Co. 420.

83. Neb.—Red Willow County v. Smith, 98 N.W. 151, 67 Neb. 213.

84. U S.—In re Hageman, D C.Pa., 218 F 708.

85. Ariz.—Southwestern Commercial Co v. Owesney, 85 P. 724, 10 Ariz 49
57 C J. p 1118 note 59
Charges for care and preservation of attached property generally see Attachment § 293.
Additional compensation over and above the prescribed fees cannot be allowed unless the sheriff is put to trouble, or incurs expenses, in taking or preserving attached property. —Calhoun v. Lee, 29 How.Pr., N.Y., 1—57 C J. p 1118 note 59 [a]—6 C J p 870 note 95

86. Ind.—State v. Hitchens, 57 N E 935, 25 Ind App. 244, 81 Am S R. 90.
57 C.J. p 1118 note 60

87. La.—Crusel v. Brooks, 46 So 224, 121 La. 243
57 C.J. p 1118 note 61.

88. N Y.—Stewart v. Fidelity Loan Assoc., 42 N.Y S. 705, 19 Misc. 49.
Okl.—Dudley v. Clevenger, 91 P. 908, 19 Okl. 208.

89. N.M.—Retsch v. Renehan, 120 P. 897, 16 N.M 541

90. Ala.—Spence v. Thompson, 11 Ala 746.
57 C J p 1119 note 64.

91. Okl.—Dudley v. Clevenger, 91 P. 908, 19 Okl. 208
57 C J p 1119 note 65.

92. La.—Ledoux v Rucker, 4 La Ann 218.

93. Vt.—Willey v Laraway, 25 A. 435, 64 Vt. 566.
57 C J. p 1119 note 67.

94. Mo.—State v Stinebaker, 90 Mo. App. 280
57 C J p 1119 note 68

95. R I.—Superior Glass Co v Sixth Judicial Dist. Ct., 135 A 50, 48 R I. 4

96. N Y.—Haase v Levering, 38 N. Y.S 432, 1 N.Y.Ann Cas 404.

charges for securing attached property subsequent to the completion of the service and return of the writ may be recovered without having been indorsed thereon.[97]

In absence of proof, compensation is not allowable to the sheriff for trouble in taking and preserving property.[98]

Amount of allowance. In the absence of a statute fixing fees for the care of property by sheriffs,[99] the sheriff's charges must be reasonable.[1] The amount of the allowance which should be made generally rests in the discretion of the court.[2]

§ 239. Sales

A sheriff usually is allowed compensation for selling property under execution or court order.

Compensation usually is allowed a sheriff for selling property levied on under execution[3] or ordered by the court to be sold;[4] but a sheriff is not entitled to commissions on a sale not conducted by him,[5] nor can he be allowed a commission on a sale unless the statute authorizes such a charge.[6] A sheriff who levied on property under a writ of attachment has been held not entitled to a fee for an application by him to the court for the sale of such property.[7]

Sale under void judgment. A sheriff who has sold property under a fieri facias regular on its face, but issued on a judgment which was void because the judge was incompetent to try the case, is not, as against the execution defendant, entitled to commissions.[8]

Failure to consummate, or quashal of, sale. The sheriff is entitled to his fee or commission on the sale of land where he is enjoined from executing a deed or receiving the money.[9] Also the sheriff's right to a full commission on a sale under a fieri facias is not affected by the creditor's subsequent quashal of the sale.[10]

Purchase by judgment creditor. According to some authorities, a sheriff who makes a sale is entitled to his commission even though the property is bid in by the judgment creditor for an amount not exceeding what is due him under the judgment, and the price is merely credited on the judgment without any money passing,[11] but other authorities deny the right of the sheriff to a commission under such circumstances.[12]

Amount and computation of fees or commissions. The amount of a sheriff's fee or commission for making a sale is such, and only such, as is fixed by statute,[13] unless in making the sale he did not act in his official capacity as sheriff, but rather as agent or commissioner,[14] in which case he is entitled to such compensation as is fair and reasonable under the circumstances of the case.[15] Where property is sold in parcels, the sheriff is entitled to but a single fee and not to a fee for each parcel.[16] Also, a sheriff who has sold property under execution and collected the per cent allowed him by law for the sale cannot, on redemption of the property, charge such per cent again.[17]

Advertisement or notice of sale. When it is so provided by statute,[18] but not otherwise,[19] a sher-

97. Vt.—Templeton v. Capital Sav Bank, etc, Co, 57 A. 818, 76 Vt 345

98. N.Y.—Haase v. Levering, 38 N. Y S 432, 1 N Y Ann Cas 404

99. Tex—Hussey & Whelan v Dempsey Oil Co, Civ App, 243 S W. 1116.

1. Tex.—Hussey & Whelan v. Dempsey Oil Co, supra.
57 C J. p 1119 note 73.

Allowance of amount actually paid out by sheriff to watchman to look after property while it was in sheriff's custody was held not excessive —Hussey & Whelan v. Dempsey Oil Co, supra.

2. Or—Schneider v Sears, 8 P. 841, 13 Or. 69.
57 C.J p 1119 note 74

3. N J.—Harrison v Maroney, 35 N. J.Eq. 41.
57 C J p 1119 note 76.
Commissions on money collected by sale see infra § 240
Effect of settlement between parties see supra § 221
Expenses see infra § 247.

4. Minn—Thompson v. First Div St. Paul, etc, R. Co., 4 N W 603, 26 Minn. 353.
Tex—McLennan County v. Graves, 64 S.W 861, 94 Tex. 635.

5. Ill.—Whitlock v. Webster, 123 Ill. App. 78
Tenn—Harris v. Petigrew, 5 Lea 596.

6. Tex—Bonough v. Brown, Civ. App., 185 S W. 47
57 C J p 1119 note 79.

7. Mo—Ring v. Charles Vogel Paint, etc., Co, 46 Mo.App. 374.

8. Ala—Wilson v. Sawyer, 37 Ala. 631.

9. Ga.—Cherry v. Planters' Warehouse Co, 65 Ga. 535.

10. Ky.—Boyd v. Harper, 3 Bush 142.

11. Wyo—Lyman v Thorn, 157 P. 887, 24 Wyo. 326, Ann Cas.1918A 368.
57 C.J p 1120 note 85.

12. Wash.—State v. Prince, 37 P. 291, 9 Wash. 107.
57 C.J. p 1120 note 86.

13. Minn—Thompson v. First Div St Paul, etc, R. Co., 4 N.W. 603, 26 Minn. 353.
57 C.J. p 1120 note 87.

14. Conn—Blake v. Baldwin, 5 A 299, 54 Conn 5.
Mo—Northern Finance Corp v. Forked Leaf White Oak Lumber Co, App., 262 S.W. 437.

15. Conn—Blake v. Baldwin, 5 A 299, 54 Conn 5.
Mo—Northern Finance Corp. v. Forked Leaf White Oak Lumber Co, App., 262 S W. 437.

16. Kan.—Wooden v. Allen County, 22 Kan 532.
Tex—McLennan v. Graves, 64 S.W. 861, 94 Tex. 635.

17. Idaho—Coeur D'Alene Hardware Co. v. Cameron, 42 P. 509, 4 Idaho 494.

18. Miss.—Darnell v. Smith, 76 So 547, 115 Miss 547.
57 C J p 1120 note 92.

19. Mass.—Rogers v. Simmons, 29 N.E. 580, 155 Mass. 259.

iff or constable may be entitled to a fee for advertising a sale. A fee for advertising cannot be claimed unless there has been an actual advertisement.[20] A sheriff has been held not entitled to compensation for service of notices of the sale of property for delinquent city taxes on parties and their attorneys;[21] but in at least one jurisdiction compensation has been allowed for services in writing notices of the sale of property seized under execution.[22]

§ 240. Collection and Payment of Money

A sheriff usually is allowed compensation for collecting money under legal process and paying it out. Ordinarily he is not entitled to commissions unless he makes the money, and he is entitled to commissions only on the amount which he collects and pays over.

A sheriff usually is allowed compensation in the form of a commission for collecting, and paying out, money under legal process,[23] such as an execution,[24] and where money is collected by a sale of property the sheriff usually is entitled to a per cent of the proceeds of sale;[25] but a particular statute has been construed as not allowing commissions to a sheriff for receiving and paying over money on a sale of real property made in pursuance of a decree and order of sale in a foreclosure suit[26] or on an appropriation award deposited with him pending an appeal;[27] and where, merely for convenience, he receives and pays over costs for which the county is liable and which it is the duty of the county commissioners to pay, he is not entitled to a commission.[28] An officer has been held entitled to poundage or commissions on money made or collected under an attachment.[29]

Ordinarily a sheriff is not entitled to commissions or poundage unless he makes the money,[30] or is pre-

20. Del.—State v. Burton, 4 Del 457.

21. Tex.—San Antonio v. Campbell, Civ.App., 56 S.W. 130.

22. La.—Dwight v. Curtis, 2 La.Ann 752

23. Neb.—O'Shea v. Kavanaugh, 91 N.W. 578, 65 Neb. 639.
57 C.J. p 1121 note 98.
Compensation of sheriff or other officer for collection of taxes see Schools and School Districts § 391; Taxation § 655

24. Mich.—Peck v. Grand Rapids City Nat Bank, 16 N.W. 681, 51 Mich. 353, 47 Am.R. 577.
57 C.J. p 1121 note 99.
Settlement between parties
(1) Under statute providing that sheriff's poundage fees shall be based on value of property levied on, not exceeding sum at which settlement was made, fact that parties to execution proceeding agreed on settlement of their differences by stipulation, pursuant to which judgment debtor paid creditor specified sum, did not affect sheriff's right to collect poundage on value of property levied on —Nostdahl v. Finnegan, 68 N.Y.S.2d 466.

(2) Under such statute, settlement was held to have been made where, after sheriff's levy of execution, involuntary petition in bankruptcy was filed against judgment debtor—In re Standard Wholesale Grocers, C.A.N.Y., 174 F.2d 594.

(3) Under such statute, where settlement was entered into after garnishment execution had been issued to sheriff, he was entitled to poundage on basis of full amount of settlement, and not on basis of amount collected under garnishee order prior to the settlement.—South Orange Trust Co. v. Paluch, 51 N.Y.S.2d 198, 183 Misc. 681.

25. Tex.—McLennan County v. Graves, 64 S.W. 861, 94 Tex. 635
57 C.J. p 1121 note 2

26. Nev.—Clover Valley Land, etc., Co. v. Lamb, 187 P. 723, 43 Nev 375.
57 C.J. p 1121 note 3.

27. La.—New Orleans v. Reatz, 5 La.App. 353.
57 C.J. p 1121 note 4.

28. Pa.—Commonwealth v. Goudon, 2 Leg.Op. 21.

29. N.Y.—White v. Griffenhagen, 160 N.Y.S. 187, 95 Misc 84—Jellinghaus v. Scheidt, 13 Abb.Pr. 452.
Right to poundage held purely statutory
N.Y.—Morowitz v. Dadourian Export Corp., 39 N.Y.S.2d 39, 179 Misc. 373
Lack of physical custody of property does not deprive the sheriff of his right to poundage
U.S.—McCloskey v. McGrath, N.Y., 71 S.Ct. 848, 341 U.S. 475, 95 L.Ed. 1115.
N.Y.—Distillers Factors Corp. v. Country Distillers Products, 81 N.Y.S.2d 857.
Settlement between parties
(1) As used in statute providing that if action is settled before or after judgment, sheriff is entitled to poundage on value of property attached, not exceeding sum at which settlement is made, words "sum at which settlement is made" refer only to money or other benefit received as result of parties' agreement determining controversy between them, where actions were discontinued and attachments vacated by court orders on attorneys' stipulation and sheriff's consent, actions were not "settled" within such statute, and value of gold involved was not "sum at which settlement is made."—Stojowski v. Banque de France, 61 N.E.2d 414, 418, 294 N.Y. 135.

(2) Under such statute, where one of codefendants paid sheriff poundage of two hundred twelve dollars and fifty cents on filing a bond in sum of seven thousand five hundred dollars to discharge attachment against his property, thereafter, on entry of stipulation, settling action in sum of seven thousand six hundred sixty-four dollars and thirty cents, other codefendant was entitled to release of his attached goods upon paying poundage only on the difference between seven thousand five hundred dollars and seven thousand six hundred sixty-four and thirty cents—Martin v. Huber, 71 N.Y.S.2d 195, 189 Misc 405.

(3) Under such statute, where consideration for settlement of attachment proceeding, wherein parties had causes of action against each other, was agreement to offset and cancel their respective claims, the sheriff was entitled to poundage on value of property attached—Morowitz v. Dadourian Export Corp., 39 N.Y.S.2d 39, 179 Misc. 373

(4) Under statute providing that where levy has been made under warrant of attachment and warrant is vacated or set aside by order of court, sheriff is entitled to poundage on value of property attached, not exceeding amount specified in the warrant, where suit was settled for less than amount to which warrant of attachment was limited, but warrant was vacated prior to settlement, poundage due sheriffs who made levies under warrant was required to be computed on figure to which warrant was limited—Smith v. Maico Co., 57 N.Y.S.2d 682, 185 Misc 871

30. N.J.—**Corpus Juris cited in** Morris Plan Co. of New York v. Ashdown, 190 A. 302, 304, 15 N.J. Misc 185.
Ohio.—Union Joint Stock Land Bank

vented from so doing by reason of some act or interference of plaintiff[31] which in law is deemed to be the equivalent of collection,[32] he is entitled to commissions only on the amount which he collects[33] and pays over.[34] Where the proceeds of a sale exceed the amount of the debt, the sheriff is entitled to a commission on the latter amount only[35] unless he applied the proceeds or surplus to other mortgages, judgments, or executions;[36] and under a particular statute a sheriff has been held entitled to no poundage where there is no amount over and above the claim of a purchaser who is entitled to a part of the proceeds of the sale.[37] Where a check has been received and used by the sheriff with the assent of all parties concerned, the commission of the sheriff will not be denied simply because, technically speaking, no money was received or disbursed by him;[38] and, as discussed supra § 239, there is a conflict of authority on the question whether a sheriff is entitled to commissions where property sold by him is purchased by the judgment creditor and the purchase price is credited on the judgment.

Where, before the issue of an execution, the sheriff agreed with plaintiff to charge commissions only on the amount of the judgment after deducting a set-off, to be ascertained in a pending chancery suit, and thereupon plaintiff caused the issuance of the execution, the sheriff is entitled to commissions only on the amount of the judgment after deducting the set-off, and not on the nominal amount thereof.[39]

v. Selden, 28 N.E.2d 567, 64 Ohio App. 182
57 C.J. p. 1121 note 8.

Levy as effective cause of payment or settlement

Where valid and subsisting levy is made, allowance of constable's fees depends on whether or not levy was effective cause in producing payment of judgment or a settlement, where garnishment against defendant's wages was inducing and effective cause which impelled him to seek adjustment and ultimate settlement, sergeant at arms of court was entitled to dollarage fee on levy of wage execution, notwithstanding operation of levy was suspended by virtue of prior execution.—Morris Plan Co. of New York v. Ashdown, 190 A. 302, 15 N.J.Misc. 185.

Notice to tax fees

Where money was substituted for property attached, and later ordered released on filing of an undertaking, there was no collection of an execution or settlement of the action, entitling the sheriff to his fees under a statute providing for notice to him to tax fees in that event.—Philippine Vegetable Oil Co. v. Pitou, 173 N.Y.S. 812, 105 Misc. 634, affirmed 178 N.Y.S. 912, 9 App.Div. 899.

31. N.Y.—Zarski v. Wohl & Cie, 61 N.Y.S.2d 115, 186 Misc. 824.
57 C.J. p. 1121 note 9.

Plaintiff's failure to secure extension of time

N.Y.—Zarski v. Wohl & Cie, supra

32. N.Y.—Flack v. State, 95 N.Y. 461.
57 C.J. p. 1121 note 9.

33. Pa.—Farmers & Merchants Trust Co. v. Brumback, 18 Pa. Dist. & Co. 656, 81 Pittsb.Leg.J. 427, 47 York Leg. Rec. 119.
57 C.J. p. 1121 note 10

"There is no provision of statute, and there is no justification in reason, for permitting the sheriff to demand fees upon money received by the judgment creditor through other processes of law."—Federal Deposit Ins. Corporation v. Harmonay, 32 N.Y.S.2d 968, 969, 177 Misc. 1069.

Unfilled orders for merchandise do not represent a debt past due or to become due, and hence are not subject to poundage by sheriff who, pursuant to attachment warrants, levied on persons who were to fill the orders.—Reethof-Fischmann Corp. v. Limoges China Co., 55 N.Y.S.2d 326, 184 Misc. 984.

Garnishee execution

(1) Under statute entitling sheriff to poundage "upon the value of property levied upon," not exceeding sum at which settlement is made, quoted phrase relates only to tangible property, and where, after garnishee execution was issued on wages of judgment debtor, settlement was made, "levy" included only amount of wages due debtor actually collected, and sheriff was entitled to poundage only on amount collected, and not on full amount of garnishee execution.—Flying Tiger Line v. Spinetta, 76 N.Y.S.2d 67, 190 Misc. 886

(2) Where large part of money necessary to satisfy judgment on which garnishment execution was issued to sheriff was collected by receiver in supplementary proceedings and by means of third-party subpoena on bank deposit, sheriff was entitled to poundage, as provided by such statute, only on amount actually collected by him.—Federal Deposit Ins. Corp. v. Harmonay, 32 N.Y.S.2d 968, 177 Misc. 1069

34. Pa.—Farmers & Merchants Trust Co. v. Brumback, 18 Pa. Dist. & Co. 656, 81 Pittsb.Leg.J. 427, 47 York Leg. Rec. 119.
57 C.J. p. 1121 note 11.

In Louisiana

(1) Under former statute, sheriff was held entitled to his commission only on amount actually collected by him from purchaser and paid over to seizing creditor, and was not entitled to collect any fee or commission on amount retained by adjudicatee to liquidate first and second mortgages resting on property.—Investors' Mortgage Co. v. Theriot, 7 La.App. 397.

(2) Act of 1928 amending such statute was enacted for purpose of allowing sheriff commission not authorized under prior statute, that is, on amount of ranking mortgages which under code of practice, adjudicatee is not only authorized to retain but sheriff is without right to exact, where mortgaged property was sold free of mortgages for cash and was adjudicated to mortgagee at sheriff's sale, and writ of seizure and judgment obtained by mortgagee were credited to extent of amount of bid, sheriff was entitled to commission on any excess of that amount on price of adjudication of property, as provided by general provision of act relating to sheriffs' fees, notwithstanding mortgagee was not called on to pay sheriff amount actually bid in cash for property.—Prudential Ins. Co. of America v. Flournoy, 7 So.2d 58, 199 La. 786

35. Colo.—Cramer v. Oppenstein, 27 P. 713, 16 Colo. 495.
57 C.J. p. 1122 note 12.

36. Pa.—Petry v. Beauvarlet, 1 Binn. 97.—Evans v. Elmes, 2 Pa.L.J. 216.

37. Ohio.—Union Joint Stock Land Bank v. Selden, 28 N.E.2d 567, 64 Ohio App. 182.

38. Neb.—Kent v. Shickle, etc., Iron Co., 60 N.W. 563, 42 Neb. 274.

39. Ala.—Brainard v. Harrison, 53 Ala. 360
Agreements as to compensation generally see supra § 219.

Fines. A sheriff has been held not to be entitled to a commission on fines collected,[40] but he has also been held to be entitled to such a commission.[41] It has been held that the money must actually pass through the sheriff's hands in order for him to be entitled to such a commission,[42] but there is also authority to the contrary.[43]

Automobile license fee or tax. Under a statute allowing a sheriff a fee for collecting an automobile license fee or tax, a sheriff has been held entitled to the entire fee whether the license is for a year, half-year, or quarter-year,[44] but not to the entire fee for each installment paid on one license.[45]

§ 241. Attendance at Court

a. In general
b. Double or multiple compensation

a. In General

A sheriff or constable is entitled to compensation for attending court only when such attendance is in compliance with statute; he is not entitled to compensation for attending courts other than those named in the statute, or for a mere nominal or constructive attendance.

A sheriff, deputy sheriff, or constable is entitled, as a matter of right, to compensation for attending court when,[46] and only when,[47] compensation is provided for by statute. It has been held, however, that where the statute imposes on the sheriff the duty of attending court if required by the judge, but provides no fees for such attendance, it is within the power of the board of county auditors to allow reasonable compensation therefor.[48] Where a fee is provided only for attending certain courts, the sheriff cannot claim such fee for attending other courts;[49] in order to entitle a sheriff to compensation for attendance at court, his attendance must have been required;[50] a constable is entitled to fees for attendance on the sitting of a court only when the court was actually sitting,[51] and, under a statute allowing constables a fee for attending each trial in a criminal case, a constable is not entitled to such fee where there was a plea of guilty, and judgment thereon, and no evidence was introduced.[52]

Regular term or session. Attendance on a day not in the regular term has been held compensable, under statute,[53] but it has also been said that it is only when a regular session of the court, presided over by the judge for the transaction of business, is held that the allowance should be made.[54]

Character of attendance. A sheriff is not entitled to fees for a mere nominal, colorable, or constructive attendance at court;[55] but he is entitled to a fee for attendance, although he may have been absent from the court room several times during the hearing of a case, where it appears that he was within calling distance all the time, and ready to respond to any request, direction, or order made to or on him by the court or counsel;[56] and a constable who was summoned, actually attended court, and was ready to perform his duties as a constable if called on, is entitled to his fees, although he did not actually perform any of the duties of a constable.[57] Where it is a sheriff's duty to be present to carry out whatever orders the court may make, the mere fact that the sheriff may have done no more than to call order in court, guard prisoners, and carry them back and forth to jail does not affect his rights to a fee for his attendance on court.[58] Where a constable is in court to return a subpœna

40. S.C.—State v. Charleston Dist., 12 S.C.L. 419.

Commissions held to belong to county and not to sheriff—Baker v. State, to Use of Independence County, 197 S.W.2d 759, 210 Ark. 690.

41. Fla.—Hanchey v. State ex rel. Roberts, 52 So.2d 429.
Pa.—Commonwealth v. DeGolia, 16 Pa.Dist. 337, 33 Pa.Co. 385.
57 C.J. p. 1122 note 18.

42. Pa.—Commonwealth v. DeGolia, supra.

43. Fla.—Hanchey v. State ex rel. Roberts, 52 So.2d 429.

Fines seized by elisor
Fla.—Hanchey v. State ex rel. supra.

44. Ark.—Albright v. State ex rel. Attorney General, 68 S.W.2d 90, 188 Ark. 879.

45. Ark.—Albright v. State ex rel. Attorney General, supra.

46. Tenn.—Taylor v. Wilson County, 216 S.W.2d 717, 188 Tenn. 39.
57 C.J. p. 1122 note 21.

County judge's court constitutes court within statute fixing fees chargeable by sheriff for attendance on courts.—Calhoun County v. Liddon, 138 So. 389, 103 Fla. 833.

47. Mo.—State v. Brown, 47 S.W. 504, 146 Mo. 401.
57 C.J. p. 1122 note 22.

Constables held not court attendants so as to be entitled to salary as such.—Sawyer v. Camden County, 4 A.2d 76, 122 N.J.Law 119.

48. Mich.—Chipman v. Wayne County Auditors, 86 N.W. 1024, 127 Mich. 490.

49. Ky.—Perry County v. McIntosh, 133 S.W.2d 90, 280 Ky. 223.
57 C.J. p. 1122 note 24.

50. Kan.—Robson v. Dickinson County, 55 P. 520, 8 Kan.App. 374.
57 C.J. p. 1122 note 25.

51. N.J.—Lewis v. Hoboken, 42 N.J.Law 377.

52. Iowa.—Wheeler v. Clinton County, 60 N.W. 207, 92 Iowa 44.

53. Fla.—Calhoun County v. Liddon, 138 So. 389, 103 Fla. 833.

54. Ky.—Perry County v. McIntosh, 133 S.W.2d 90, 280 Ky. 223.

Entry of routine orders
Attendance at sessions at which only routine orders are entered on the order book is not compensable.—Perry County v. McIntosh, supra.

55. Mich.—Vincent v. Mecosta County, 17 N.W. 938, 52 Mich. 340.
57 C.J. p. 1122 note 28.

56. Kan.—Simms v. Norton, 118 P. 1071, 85 Kan. 822.

57. N.Y.—People v. Green, 64 Barb. 493.—People v. Columbia County, 4 Cow. 146.

58. Fla.—Calhoun County v. Liddon, 138 So. 389, 103 Fla. 833.

previously issued to him for service, he will not be allowed a witness fee for attendance at court.[59]

b. Double or Multiple Compensation

Under some circumstances or statutes the compensation of a sheriff or constable for attending court may be such as to constitute double or multiple compensation; but under other circumstances or statutes this has not been permitted.

Where the fee bill authorizes the sheriff to charge a certain amount for one day's attendance on the court, he cannot charge an additional sum for attendance at a night session,[60] where the statute allows the sheriff a certain per diem for attendance by himself or deputy, he cannot recover pay for two deputies attending the court;[61] it is not proper for both the sheriff and his deputy to claim per diem or other compensation for attendance on the same court,[62] at least where the attendance of only one officer is required,[63] and a constable cannot recover the salary of a sergeant at arms for attending the sessions of a court where the salary has been received by a regularly appointed sergeant at arms.[64] On the other hand, where there are two judges holding court at the same time in the county, and it is the duty of the sheriff to attend on each, he is entitled to an allowance for attendance before each judge;[65] and where a statute gives the sheriff a per diem for attendance on a circuit or municipal court, and the same statute also contains a provision allowing him a certain amount per day for attending any court or officer with a prisoner, a sheriff is not precluded from recovering the fee for attending a municipal court with a prisoner by the fact that he has charged and received his per diem for attending on the same court on the same days.[66]

Several cases on same day. Under appropriate statutory language, a sheriff may be entitled to a charge for attending court and looking after the prosecution in each case where more than one case is set for, or tried on, the same date,[67] regardless of the number heard in one day.[68]

§ 242. Services in Connection with Juries or Jurors

A sheriff is entitled to compensation for services in connection with juries or jurors only where a statute provides therefor.

While a statute may allow a sheriff compensation for attendance on, or custody of, juries,[69] he can claim no compensation for such service in the absence of any statute providing therefor;[70] and a sheriff who receives an annual salary is not entitled to additional compensation for services in connection with juries.[71]

A sheriff is entitled to a fee for drawing or summoning jurors when,[72] and only when,[73] such services are within the application of a statute providing for a fee. A sheriff receiving a salary may not be personally entitled to fees for such services in addition to his salary;[74] and it has been held that a sheriff is not entitled to a fee for each jury called by a bailiff in addition to the per diem paid by the county for the latter.[75] Where a juror could not be found within the county, and hence was not actually summoned, a fee for summoning him cannot properly be claimed.[76]

Under a statute providing that the sheriff shall receive a certain amount for each juror summoned to attend court, the sheriff is not entitled to receive additional compensation for preparing notices to the jurors,[77] and, where the law requires the clerk to issue venires which the sheriff may serve by reading or delivering a copy, a sheriff cannot be allowed compensation for making copies in addition to the compensation specifically provided for summoning jurors.[78]

59. Pa.—Commonwealth v. Pflaumer, 16 Pa Dist & Co 193

60. Nev.—Washoe County v. Humboldt County, 14 Nev. 123

61. Tex.—Ledbetter v. Dallas County, 111 S.W. 193, 51 Civ App 140

62. Mo.—Crouch v. Plummer, 17 Mo 420.
57 C.J. p 1123 note 33.

63. Pa.—Caldwell v. Butler County, 21 Pa Dist 20.
57 C.J. p 1123 note 34

64. N.J.—Sturtevant v. Bergen County, 143 A 360, 105 N.J.Law 129

65. Ill.—La Salle County v. Milligan, 32 N.E. 196, 143 Ill. 321.

66. Wis.—Holzhauer v. Milwaukee County, 41 Wis. 639.

67. Ala.—State ex rel. Holcombe v. Stone, 171 So. 366, 233 Ala 243—State ex rel. Holcombe v. Stone, 157 So. 454, 229 Ala 357

68. Ala.—State ex rel Holcombe v. Stone, 171 So 366, 233 Ala 243

69. Tenn.—Connors v Shelby County, 81 S.W. 598, 113 Tenn. 177.
57 C.J. p 1123 note 38.

70. Ark.—McHenry v Hot springs County, 22 S.W. 175, 57 Ark 565.
57 C.J. p 1123 note 39.

71. Mass.—Briggs v. Taunton, 110 Mass 423.
57 C.J. p 1123 note 40

72. S.D.—Remer v Lawrence County, 83 N.W. 554, 13 S.D. 418.
57 C.J. p 1123 note 43
Mileage see infra § 251.

73. Ga.—Baggett v. Barrow, 144 S.E. 251, 166 Ga. 700.
57 C.J. p 1123 note 44.

74. Tex.—Tarrant County v. Smith, Civ App., 81 S.W.2d 537, error refused.
57 C.J. p 1124 note 45.

75. Iowa.—Bringolf v. Polk County, 41 Iowa 554.

76. Pa.—Meyers v. Northampton County, 22 Pa Dist. 757.

77. Pa.—Marberry v. Lehigh County, 13 A. 196, 10 Pa Cas. 6—Chester County v. Hoopes, 6 Pa Co 51.

78. S.D.—Remer v. Lawrence County, 83 N.W. 554, 13 S.D. 418
Charge for copies of writs and processes generally see infra § 245.

The amount of the fees to which a sheriff is entitled for summoning jurors is such, and only such, as is fixed by statute.[79] A sheriff has been held entitled to but a single fee for summoning a jury to serve in several matters.[80]

§ 243. Services in Connection with Elections

A sheriff or constable may recover compensation for services in connection with elections only as provided for by statute and in the amount allowed thereby.

A sheriff or constable may recover compensation for,[81] and only for,[82] such services in connection with elections as compensation is provided for by statute. The compensation is limited to the statutory allowance.[83]

§ 244. Services in Connection with Bonds

A sheriff is entitled to a fee for services connected with a bond only where a statute provides therefor.

A sheriff is entitled to a fee for preparing, taking, approving, or returning a bond where provision is made by statute for a fee for such services,[84] but not otherwise.[85]

§ 245. Copies of Writs and Processes

When authorized by statute, a sheriff may charge for copies of writs and processes and for attesting them.

When authorized to do so by statute, a sheriff may make a charge for copies of writs and processes[86] and demand a fee for attesting them.[87]

§ 246. Making Quarterly Returns

In Pennsylvania, a constable is no longer entitled to fees for making his quarterly returns to court.

In Pennsylvania, by reason of statutory changes, a constable is no longer entitled to fees for making his quarterly returns to court.[88]

§ 247. Disbursements and Expenses

a. In General
b. For care, keeping, or removal of property
c. In connection with sale
d. Attorney's fees and expenses of suits

a. In General

The general rule is that a sheriff or constable is entitled to reimbursement for necessary disbursements or expenses in performing his duties only when such disbursements and expenses are within a statute providing for reimbursement.

The general rule is that a sheriff or constable is entitled to reimbursement for disbursements necessarily made, or expenses necessarily incurred, by him in the performance of his official duties when,[89] and only when,[90] there is a statute providing for re-

79. S D.—Neher v. McCook County, 78 N.W. 998, 11 S D. 422.
57 C J. p 1124 note 51.

80. Iowa —Robb v. A. K. & D. M. R Co., 44 Iowa 440.
Mass —Wilmarth v. Knight, 14 Gray 112.

81. Ark —Ft Smith School Dist. v. Williams, 31 S.W. 980, 61 Ark 71.
57 C.J p 1124 note 54.

Extra compensation for services of deputies
Pa.—McBride v. Berryman, 31 Pa Dist & Co. 451.

82. Pa —McCallister v. Armstrong County, 9 Pa.Super 423
57 C.J. p 1124 note 55

83. Neb.—Logan v. County v. Doan, 51 N.W. 598, 34 Neb. 104.
57 C.J. p 1124 note 56.

84. Ala —McFountain v. State, 83 So. 53, 203 Ala 329
57 C.J. p 1124 note 57.

85. Ala —State v. Smith, 64 So. 364, 185 Ala. 384.
57 C.J p 1124 note 58.

86. Neb.—Dodge County v. Gregg, 15 N.W. 741, 14 Neb. 305.
57 C.J. p 1124 note 59.

87. N.H.—Edgerly v. Hale, 51 A. 679, 71 N H. 138.

88. Pa —McCallister v. Armstrong County, 9 Pa Super. 423.
57 C J. p 1124 note 61

89. N Y.—Dos Passos v. New York, 90 N.Y S 398, 45 Misc. 394
57 C.J. p 1124 note 63.
Maintenance and care of prisoners see Prisons §§ 24–29.

Actual expenses for services outside county in felony cases
Ga —Floyd County v. Johnson, 57 S E 2d 502, 80 Ga App. 785.

Sufficiency of excess fees to pay expenses
Sheriff was not required personally to pay actual and necessary expenses of office, except deputies' and assistants' salaries and surety bond premium, even though so-called excess fees remaining after deducting such salaries and premium were insufficient to pay such expenses, and hence allowance of other actual, necessary, and lawful expenses was not void.—Hardy v. Lubbock County, Tex Civ App., 89 S.W 2d 240

90. Mo —**Corpus Juris cited in** Dunklin County v. Donaldson, 164 S W 2d 367, 369.
57 C.J p 1125 note 64.

Expenses payable out of fees of office
The expenses enumerated by statute fix the grade and character of expenses of the sheriff's office which may be paid for out of the fees of office —Hood v. State, Tex Civ.App , 73 S W.2d 611, error refused.

Premiums on official bond
(1) Premiums held not allowable. —Land v. Fayette County, 108 S.W. 2d 429, 269 Ky. 543—Commonwealth v. Nunnelley, 277 S W. 506, 211 Ky. 409.

(2) Act giving sheriff claim against commonwealth for premiums paid by him on bonds executed by corporate surety company is not retroactive, and commonwealth was not required to reimburse him for any part of premiums paid by him prior to effective date of act —Miller v. Sturgill, 202 S.W.2d 632, 304 Ky 823.

(3) Bond required by statute of deputy sheriff or other appointive county officer or employee was held "official bond" within statute providing for reimbursement of premium charged such officer or employee.—Vogler v. Board of Com'rs of Ohio County, 185 S E. 841, 117 W.Va 370

Moneys borrowed; interest
Neither interest on moneys borrowed by sheriff to run office, pending payment of state warrants earned and pledged to secure loan, nor the moneys lent are proper expenses

imbursement and the expenses or disbursements in question are within it; but it has also been held that a sheriff, in making a levy, sale, and delivery of personalty, in addition to his own compensation or costs expressly fixed by law, is entitled to his reasonable expenses, as distinguished from compensation, necessarily incurred in the performance of his official duties,[91] and that if there does exist a quasi-contractual right, not based on statute, under which a sheriff may be reimbursed for expenses, such right would be limited to the recovery of money actually paid out by him in the purchase of equipment reasonably essential for the performance of his duties[92]

A sheriff may not impose on litigants any expense of litigation which is not expressly provided for by law.[93]

The building of equipment by a sheriff to carry out a death sentence, without first requesting the county to do so, or obtaining from the county authority to do so and an agreement to pay, has been held not the proper course to charge the county with liability for the cost.[94]

b. For Care, Keeping, or Removal of Property

A sheriff may be held entitled to reimbursement for necessary and reasonable expenses incurred in keeping and caring for property in his custody.

Except where it has been held otherwise as to property taken on an execution which was not stayed,[95] an allowance may be made to a sheriff for expenses or expenditures in keeping and caring for property of which he took possession under process,[96] such as cattle or horses,[97] or other animals,[98] provided the expenses or disbursements in question were necessary[99] and reasonable[1] and were actually incurred or made[2] However, the expense of keeping and caring for property for the time between the entry of a writ and the judgment cannot be allowed as part of the expense for serving the writ,[3] but should be presented to the court by way of an additional return on the writ before the final judgment, so that it may be taxed in the costs of the suit and included in the judgment, as discussed infra § 254. A sheriff is entitled to reimbursement for the expense of the removal of personal property from the premises in executing a writ of restitution;[4] and in some,[5] but not other,[6] jurisdictions he has also been held entitled to be allowed the expense of a removal of property in his custody from one place to another for safe-keeping.

Particular items for which the sheriff may receive an allowance include the storage of goods[7] and a lock for the room in which goods were stored;[8] but he is not entitled to an allowance for insurance on property in his possession,[9] nor is he entitled to be reimbursed for money paid to recover stolen property as for expenses incurred in the preservation of the property.[10]

c. In Connection with Sale

A sheriff or constable may be entitled to reimbursement for legitimate expenses incurred in connection with a sale conducted by him in his official capacity.

of office, in absence of statutory provisions authorizing such expenditures.—Hood v State, Tex Civ App, 73 S W 2d 611, error refused

91. Ga—Hiatt v Turner, 172 S.E 607, 48 Ga App. 255.
Expenses in connection with sale see infra subdivision c of this section

92. Mo.—Maxwell v Andrew County, 146 S W 2d 621, 347 Mo. 156

93. N Y—Di Palma v Carraro, 45 N.Y S 2d 206, 180 Misc. 998.

94. Mo—Dunklin County v. Donaldson, 164 S W 2d 367

95. N Y—Crofut v Brandt, 58 N Y 106, 17 Am R 213, 47 How Pr 263
Liability of party or assets see infra § 252
Pay of keeper or watchman see infra § 250.

96. Ga.—Hiatt v. Turner, 172 S E 607, 48 Ga App 255
57 C.J p 1126 note 96.
Necessity of allowance by court see infra § 254.

97. Mo—Johnson v. Sunnymede Farms, App, 80 S W.2d 904.
57 C J. p 1126 note 97.

Allowance limited and prescribed by statute
Ga—Hiatt v Turner, 172 S E 607, 48 Ga App. 255.

98. Ga—Hiatt v Turner, supra

99. Ga.—Hiatt v. Turner, supra.
57 C J p 1126 note 98—6 C.J p 372 note 17.

Effect of tender of claim of ownership
Sheriff seizing cattle on execution was entitled to nothing for guarding cattle after tender of claim of ownership to deputy in charge of cattle. —Johnson v Sunnymede Farms, Mo App., 80 S.W 2d 904

1. Ga—Hiatt v. Turner, 172 S E 607, 48 Ga App 255

Allowance for guarding cattle
Allowance of five dollars per day for each deputy, working in twelve hour shift, for guarding cattle seized on execution was reasonable—Johnson v Sunnymede Farms, Mo.App., 80 S W 2d 904.

2. Colo—Cramer v. Oppenstein, 27 P. 713, 16 Colo 495.
57 C.J p 1126 note 1.

3. Mass.—Rogers v. Simmons, 29 N. E 580, 155 Mass. 259.

4. Wis—American Wrecking Co v. McManus, 181 N W 235, 183 N.W. 250, 174 Wis. 300

5. Colo—Cramer v Oppenstein, 27 P 713, 16 Colo 495.
Ill—Olds v. Loomis, 10 Ill App 498.
Pa—Armstrong v. Baylin, Com Pl., 33 Del Co 6.

6. N J—Curtis v. Hulsizer, 5 N.J. Law 496.
N.Y.—Crofut v. Brandt, 58 N Y. 106, 17 Am.R. 213.

7. Mass—Rogers v. Simmons, 29 N. E 580, 155 Mass 259.
57 C J. p 1126 note 7.

8. Ind—State v. Hitchens, 57 N E. 935, 25 Ind.App. 244, 81 Am S.R. 90.

9. Ala.—Smith v. Huddleston, 15 So. 521, 103 Ala 223.
57 C J. p 1126 note 9.

10. Ark.—Worthen v. Thompson, 15 S W. 192, 54 Ark. 151.

A sheriff or constable may not charge for expenses attending a sale a greater amount than he actually paid out.[11] A sheriff has been held entitled to be reimbursed for lighting the room where the goods sold were during the evenings while he was conducting the sale,[12] and under some,[13] but not other,[14] circumstances reimbursement of the amount expended for advertising a sale has been held proper.

Particular matters held not to be legitimate expenses for which a sheriff or constable may charge include the making and typewriting of an inventory of the goods to be sold,[15] an arrangement of the goods for sale with a view of making them bring a better price,[16] a flag used at an auction sale of property under an execution,[17] and appraisers' fees.[18]

d. Attorney's Fees and Expenses of Suits

A sheriff is generally not entitled, as of right, to attorney's fees incurred by him in connection with his functions; and recovery of particular expenses of suit has likewise been denied a sheriff or constable.

As a general rule, a sheriff is not entitled, as a matter of right, to an allowance of attorney's fees incurred or paid by him for legal advice or services in connection with the discharge of his functions;[19] but, under a statute entitling a sheriff to be reimbursed by the county for any expenses incurred in the performance of his duty, a sheriff has been held entitled to reimbursement for reasonable and fair compensation paid by him to an attorney whose advice, counsel, and assistance were necessary to the sheriff in the performance of his duty,[20] and such a charge may be allowed where the sheriff has discharged duties which formerly devolved on trustees[21] or has rendered services in the nature of those usually rendered by a receiver.[22] A sheriff taking property under execution cannot charge for expenses incurred by reason of an adverse claim to the property,[23] nor can a constable recover the expenses of a suit brought against him for executing a writ of attachment improperly.[24]

§ 248. —— Transportation or Traveling Expenses

a. In general
b. Where mileage allowed

a. In General

In some jurisdictions a sheriff is entitled to be reimbursed for necessary traveling expenses in transporting prisoners or insane persons.

In a number of jurisdictions a sheriff is entitled to be reimbursed for traveling expenses in transporting prisoners[25] or insane persons,[26] or in the safe-keeping and transportation of a debtor arrested under an execution,[27] but it may be otherwise where he made unnecessary trips,[28] where the transportation was wholly within the county and he receives a fixed salary in lieu of all fees and compensation for services within the county,[29] where he acted without authority in apprehending a fugitive from justice outside the state and bringing him back into the state without extradition,[30] or, according to the rule

11. Neb.—Phœnix Ins Co v McEvony, 72 N.W. 956, 52 Neb. 566
Pay of clerk and auctioneer see infra § 250

12. Ind.—State v Hitchens, 57 N.E. 935, 25 Ind.App. 244, 81 Am.S.R. 90.

13. Neb.—Phœnix Ins Co v McEvony, 72 N.W. 956, 52 Neb. 566.
57 C.J. p. 1127 note 17.

14. Ky.—Petty v Coleman, 45 S.W. 2d 1041, 242 Ky. 187
57 C.J. p. 1127 note 18

Direct payment by complainant to newspaper
A complainant need not deposit with sheriff money to secure expense of advertising and printing fees, and can insist on paying all advertising and printing fees directly to the newspaper.—Monmouth County Pub. Co. v. Monmouth County, 6 A.2d 487, 17 N.J.Misc. 147, affirmed 11 A.2d 95, 124 N.J.Law 105

15. Ala.—Brock v. Berry, 31 So. 517, 132 Ala. 95, 90 Am.S.R. 896.
57 C.J. p. 1126 note 13.

16. Pa.—Miles v. Huber, 1 Pa.L.J. 483.

17. Mass.—Rogers v. Simmons, 29 N.E. 580, 155 Mass. 259

18. Ky.—Petty v. Coleman, 45 S.W. 2d 1041, 242 Ky. 187.

No obligation on sheriff to pay
Ky.—Petty v. Coleman, supra

19. Ga.—Little v. Madison Supply, etc., Co., 90 S.E. 713, 146 Ga. 95
57 C.J. p. 1127 note 19.

Employment of attorney for year
Allowance to sheriff, in settling his accounts, of amount paid by him to attorney whom he had employed for a year, was error, since sheriff had no authority to employ attorney for a year and pay him from fees of office.—Hood v. State, Tex.Civ.App., 73 S.W.2d 611, error refused.

20. Pa.—Appeal of Duck, 29 Pa.Dist. & Co. 155.

21. N.Y.—Mayhew v. Duncan, 31 Barb. 87.

22. La.—Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 42 So. 930, 118 La.Ann. 262

23. N.Y.—Crofut v. Brandt, 58 N.Y. 106, 17 Am.R. 213.
57 C.J. p. 1127 note 22.

24. N.J.—Curtis v. Hulsizer, 5 N.J.Law 496

25. Colo.—Sargent v. La Plata County Comrs., 40 P. 366, 21 Colo. 158.
57 C.J. p. 1125 note 65.

Meals
(1) Cost of meals allowed.—Shrope v. Northampton, Pa., 3 Lanc.L.Rev. 123.

(2) Cost of meals not allowed.—McCallister v. Armstrong County, 9 Pa.Super. 423.

26. Mont.—Scharrenbroich v. Lewis, etc., County, 83 P. 482, 33 Mont. 250
Pa.—Lenhart v. Cambria County, 29 Pa.Super. 350, affirmed 64 A. 876, 216 Pa. 25.

27. N.H.—Burnham v. Strafford County Sav. Bank, 5 N.H. 446

28. Colo.—Lake County v. Campbell, 123 P. 317, 52 Colo. 440.

29. Wis.—Douglas County v. Sommer, 98 N.W. 249, 120 Wis. 424.
57 C.J. p. 1125 note 68.

30. S.D.—Wangsness v. Minnehaha County, 178 N.W. 933, 43 S.D. 260.

obtaining in some jurisdictions, where he is entitled to mileage, as discussed infra subdivision b of this section. In some jurisdictions a sheriff is entitled to reimbursement for actual traveling expenses in the service of papers in civil[31] or criminal[32] actions.

Particular items. The traveling expenses for which a sheriff or constable may be entitled to reimbursement include railroad or street railroad fare,[33] sleeping car tickets under proper circumstances,[34] automobile hire,[35] and horse and carriage hire,[36] provided, in the case of a conveyance, that it was necessary[37] and actually used,[38] which facts may be required to be set forth in a certificate.[39] The purchase price of an automobile for use by the sheriff in enforcing a prohibition law has been held a proper charge,[40] depreciation on automobiles and the expense of operating them have been held necessary costs incident to the arrest of criminals which a sheriff is authorized to include as part of the expenses of his office without application to the court for authority to make such expenditures;[41] and the cost of operating and maintaining a sheriff's automobile has been held an expense within the contemplation of a statute authorizing a court to pay the expenses of his office up to a certain amount.[42] The maintenance,[43] but not the purchase price,[44] of horses and vehicles necessary to the administration of the duties of the office of sheriff has been held allowable; but it has also been held that the cost of gasoline,[45] oil,[46] or automobile repairs[47] is not allowable. A part of the purchase price of an automobile which is to belong to the sheriff and not to the county has also been held not to be allowable.[48]

A sheriff has been held entitled to reimbursement for hotel bills while traveling for the purpose of serving criminal process;[49] and if the amount paid for meals of a deputy while serving a venire was a necessary part of the traveling expenses paid it should be allowed.[50] However, a sheriff has been held not entitled to reimbursement of hotel bills incurred in another county or state while there for the purpose of serving a subpœna in a criminal case.[51]

b. Where Mileage Allowed

Authorities differ as to whether a sheriff or constable entitled to mileage is also entitled to reimbursement for expenses incurred for transportation or travel.

Where a sheriff is entitled to mileage, as discussed infra § 251, it has been held that he is entitled, in addition to mileage, to reimbursement for actual expenses necessarily incurred for transportation or travel,[52] but it has also been held that he is not entitled to such reimbursement in addition to mileage,[53] and according to still other authority he is entitled to reimbursement for the traveling expenses of prisoners and insane persons transported in his custody,[54] but not his own traveling expenses.[55] Where the fees and mileage allowed by law for conveying insane persons to the insane hospitals do not belong to the sheriff, but must be accounted for by him to the county, he is entitled to reimbursement for expenses incurred by him in conveying such persons.[56]

31. Or.—State v. Schanepp, 204 P. 612, 103 Or. 240

32. Iowa—Bybee v. Marion County, 105 N.W 118, 128 Iowa 610.
57 C J. p 1125 note 72

33. Iowa—Bybee v. Marion County, supra.
57 C J. p 1125 note 80.

34. Colo.—Sargent v. La Plata County, 40 P 366, 21 Colo 158
57 C.J p 1125 note 81.

35. Ohio—State v. Sayre, 12 Ohio N P,N S, 61
Or—State v Schanepp, 204 P 612, 103 Or. 240.
38 C.J. p 73 note 4 [b].

36. Pa—Peeling v York County, 61 A 911, 212 Pa 245
57 C.J. p 1125 note 83.

37. Mass—Weston v. Weston, 102 Mass 514.

38. Mass—Weston v. Weston, supra

39. Mass—Weston v. Weston, supra.

40. Wash—State v Graham, 240 P 560, 136 Wash 403
57 C.J p 1126 note 87

41. Tenn—State ex rel Doty v. Styke, 199 S W 2d 468, 29 Tenn App 620

42. **In Kentucky**
(1) The text rule has been followed—Thompson v. Shipp, 184 S W 2d 245, 298 Ky 805

(2) However, it has also been held that neither the purchase price nor the maintenance of a horse or automobile for a sheriff is allowable—Commonwealth v Nunnelley, 277 S. W 506, 211 Ky. 409

43. Ohio—Boes v. Montgomery County, 7 Ohio N P,N S, 76

44. Ohio—State v Mahoning County, 10 Ohio Cir Ct,N S., 398.

45. Miss—Holmes County v Ellis, 13 So 2d 635, 195 Miss. 124.
57 C.J p 1126 note 88 [a].

46. Miss—Holmes County v. Ellis, supra

47. Tex.—Hammond v. Harris County, Civ App, 243 S W. 1002—Harris County v Hammond, Civ App, 203 S W. 445

48. Tex—State v. Carnes, Civ App, 106 S W.2d 397

49. Iowa.—Bybee v. Marion County, 105 N W. 118, 128 Iowa 610

50. Colo.—Sargent v. La Plata County, 40 P. 366, 21 Colo 158

51. Idaho—Clyne v Bingham County, 60 P 76, 7 Idaho 75.

52. Colo.—Sargent v. La Plata County, 40 P 366, 21 Colo. 158
57 C J p 1125 note 74.

53. Tex.—Hammond v Harris County, Civ.App, 243 S W. 1002.
57 C J p 1125 note 75.

54. Pa—Commonwealth v. Hall, 22 Pa Dist 1061.
57 C J p 1125 note 76.

55. Iowa.—Wheeler v. Clinton County, 60 N.W. 207, 92 Iowa 44
57 C.J. p 1125 note 77.

56. Ill.—La Salle County v. Milligan, 32 N E. 196, 143 Ill. 321.
57 C J. p 1125 note 78.

§ 249. —— Office Expenses and Supplies

Whether or not a sheriff is entitled to an allowance for office expenses and supplies depends on constitutional and statutory provisions.

Whether or not a sheriff is entitled to an allowance for furniture, books, stationery, stamps, light, fuel, and office or telephone rent depends on the constitutional and statutory provisions in force at the time in the particular jurisdiction.[57] Under one such constitutional provision, "necessary office expenses" has been held to refer to expenses incident and necessary to the proper conduct of the duties of the office of sheriff other than the salary of deputies.[58]

§ 250. —— Pay of Clerks, Deputies, and Assistants

Under varying statutes and circumstances, sheriffs have been held, or held not, entitled to allowance or reimbursement for the compensation of clerks, deputies, and assistants.

Some statutes are construed as entitling a sheriff to be reimbursed the sums paid out to persons employed by him to procure evidence of violations of statutes or ordinances against the unlawful sale or keeping of intoxicating liquors, where the county board authorized the employment and made the necessary appropriation,[59] and the purpose of a statute relating to assistants of sheriffs has been held to be to provide, among other things, for the fixing of the aggregate amounts necessary for the salaries of such assistants.[60] A sheriff has been allowed for guards necessarily employed,[61] but reimbursement for the expense of hiring an armed force to prevent a riot has been denied;[62] a sheriff is not entitled to an allowance for help or assistance in serving or executing a writ of seizin and possession in a real action[63] unless the assistance comes within the meaning of a statute authorizing an allowance therefor,[64] and a sheriff or constable is not, as a rule, entitled to the expense of procuring an auctioneer[65] and clerk[66] to make a sale.

Deputies generally. When it is so provided by statute,[67] but not otherwise,[68] a sheriff on a fee basis is entitled to an allowance or reimbursement for the compensation of a deputy or deputies A sheriff who is paid by a salary may be entitled to deputy hire in addition thereto[69] unless it appears that such salary was intended not merely as personal compensation, but as including expenses,[70] or unless the county board has not by resolution fixed the number and compensation of deputies as provided by statute.[71] The purpose of a statute relating to deputies has been held to be to provide, among other things, for the fixing of the aggregate amounts necessary for the salaries of such deputies,[72] and where the maximum amount that a sheriff may pay his deputies is mandatorily fixed by statute, payment by the sheriff to a deputy, above such maximum salary, for extra work cannot be allowed as an expense.[73] Where the commissioners' court has authorized or approved the expenditure, a finding that the sheriff's expenditures for deputies were necessary, and properly claimed by him as a deduction, is proper, even though he did not comply strictly with the statute regulating the appointment of deputies and fixing their compensation.[74]

57. Mo.—Harkreader v. Vernon County, 116 S.W. 523, 216 Mo. 696
57 C.J. p. 1127 note 25

Telephone

(1) Cost of telephone, paid by sheriff, was recoverable as necessary for proper and efficient functioning of his office.—Lumpkin County v. Davis, 195 S.E. 169, 185 Ga. 393.—57 C.J. p. 1127 note 25 [b]

(2) Fiscal court was liable for long-distance telephone calls made by sheriffs over telephone in office on official business for the purpose of the apprehension of criminals.—Barkley v. Gatewood, 147 S.W.2d 373, 285 Ky. 179

58. Ky.—Connors v. Jefferson County Fiscal Court, 125 S.W.2d 206, 277 Ky. 23.

59. Miss.—Hancock County v. Vairin, 80 So. 780, 119 Miss. 315.

60. W.Va.—Raleigh County Court v. Painter, 15 S.E.2d 396, 123 W.Va. 415.

61. Tex.—Ledbetter v. Dallas County, 111 S.W. 193, 51 Tex. Civ. App. 140
57 C.J. p. 1127 note 28.
Jailer, turnkey, or jail guard see Prisons § 25 b (2)

62. Pa.—Curtis v. Alleghany County, 1 Phila. 237

63. Mass.—Weston v. Weston, 102 Mass. 514

64. Pa.—Hornberger v. Henry, 2 Pa. Dist. & Co. 76
57 C.J. p. 1128 note 31.

65. U.S.—Wallis v. Shelly, C.C.N.Y., 30 F. 747
57 C.J. p. 1128 note 32

66. Ind.—State v. Hitchens, 57 N.E. 935, 25 Ind. App. 244, 81 Am. S.R. 90.

67. Iowa.—Mentzner v. Marion County, 87 N.W. 440, 114 Iowa 478

Amount allowed held insufficient in view of population of county.—Forrest County v. Thompson, 37 So. 2d 787, 204 Miss. 628.

68. Kan.—Decatur County v. Leaman, 85 P. 590, 73 Kan. 785.
57 C.J. p. 1128 note 35.

Statute as to presence of army camp in county was held not to entitle sheriff to such allowance.—Forrest County v. Thompson, 37 So. 2d 787, 204 Miss. 628.

69. N.M.—State v. Rio Arriba County, 157 P. 656, 21 N.M. 632.
57 C.J. p. 1128 note 36.

70. Ill.—People v. Darrah, 84 Ill. App. 515.—Windmiller v. People, 78 Ill. App. 273.

71. S.D.—Anderson v. Beadle County, 211 N.W. 968, 51 S.D. 6.

72. W.Va.—Raleigh County Court v. Painter, 15 S.E.2d 396, 123 W.Va. 415.

73. Tex.—Hood v. State, Civ. App., 73 S.W.2d 611, error refused.

74. Tex.—State v. Carnes, Civ. App., 106 S.W.2d 397.

Clerks generally Where a sheriff's compensation consists of fees or commissions fixed by statute, it has been held that he is not entitled to an extra allowance for clerk hire,[75] and an allowance for a stenographer has been denied where the stenographer was employed without the authorization of the county board;[76] but a sheriff who receives a salary as compensation for his personal services merely may be entitled to reimbursement, out of the fees collected by him, for such reasonable sums as he has necessarily paid out for clerk hire.[77]

Janitor. Where the county court refused to provide janitor service for the office of the sheriff, it has been held that he is entitled to reimbursement for expense on that account.[78]

In connection with care or keeping of property. A sheriff or constable is properly allowed charges for the wages of a person whom he has placed in charge of property which is in his custody[79] or necessarily employed to look after it,[80] a watchman to guard and protect goods[81] except where they are in a place of safety,[82] keepers, watchers, and gaugers employed about oil wells,[83] a bookkeeper to keep the records of the products of oil wells,[84] clerk hire which is shown to be necessary in connection with the keeping of attached property,[85] and the hire of help to assist in husking standing corn attached.[86]

§ 251. Mileage

a. In general
b. Travel in unsuccessful attempts to perform duty
c. Travel outside state or county
d. Amount and computation

a. In General

Where a statute so provides, but not otherwise, a sheriff or constable is entitled to mileage for actual and necessary travel in performing his duties.

In jurisdictions wherein it is so provided by statute, a sheriff or constable is entitled to mileage for actual and necessary travel in serving or executing process,[87] serving notices,[88] summoning jurors,[89] making returns to court,[90] taking prisoners before magistrates[91] or to the place where they are to be tried[92] or to their place of confinement,[93] producing in court as witnesses prisoners confined in the penitentiary,[94] taking insane persons to the insane asylum[95] or paupers to the poorhouse,[96] posting election notices,[97] and making election returns.[98]

The right to mileage, however, is purely statutory;[99] for services in connection with which no

75. Ala.—Kahn v. Locke, 75 Ala. 332

76. Neb.—Drexel v. Douglas County, 87 N.W. 1053, 62 Neb. 862.

77. Ill.—Hodge v. People, 8 Ill.App. 193

Retention of fees see infra § 254.

78. Mo.—Harkreader v. Vernon County, 116 S.W. 523, 216 Mo. 696.

79. Mont.—McDermott v. Murphy, 27 P. 334, 11 Mont. 122.

57 C.J. p. 1128 note 44.

Expenses for care, keeping, or removal of property generally see supra § 247 b

Deputies

Mo.—Johnson v. Sunnymede Farms, App., 80 S.W.2d 904.

80. Mo.—State v. Stinebaker, 90 Mo. App. 280.

57 C.J. p. 1128 note 45.

81. Ind.—State v. Hitchens, 57 N.E. 935, 25 Ind.App. 244, 81 Am.S.R. 90.

57 C.J. p. 1128 note 46.

82. Pa.—Harvey v. Hager, 18 Pa. Dist. & Co. 420.

Public garage

Pa.—Harvey v. Hager, supra.

83. La.—Crusel v. Brooks, 46 So. 224, 121 La. 243.

84. La.—Crusel v. Brooks, supra.

85. Mo.—Ring v. Charles Vogel Paint, etc., Co., 46 Mo.App. 374.

86. Neb.—Deering v. Wisherd, 65 N.W. 788, 46 Neb. 720.

87. Kan.—Norton v. Simms, 118 P. 1071, 85 Kan. 822.

57 C.J. p. 1129 note 53.

Mileage fees as belonging to county see infra § 260.

Traveling expenses in addition to mileage see supra § 248 b.

Warrants of arrest

Fla.—Foley v. State ex rel. Gordon, 50 So.2d 179

57 C.J. p. 1129 note 53 [a].

Use of conveyance furnished by sheriff or deputy

Ind.—Holley v. Board of Com'rs of Lake County, 199 N.E. 433, 101 Ind.App. 396.

Such mileage is a "fee" within statute fixing allowable statutory fees for constables and discharge of their official duties, and is included in maximum allowance to constables—Hillman v. Chmelka, 195 P.2d 945, 118 Colo. 252.

88. Ark.—Ouachita County v. Chidester, 137 S.W. 811, 99 Ark. 206.

Minn.—State v. Ward, 82 N.W. 686, 79 Minn. 362.

89. S.D.—Remer v. Lawrence County, 83 N.W. 554, 13 S.D. 418.

57 C.J. p. 1129 note 55.

90. Pa.—Ritchey v. Bedford County, 22 Pa.Dist. 328.

57 C.J. p. 1129 note 56.

91. Idaho.—Warner v. Fremont County, 43 P. 327, 4 Idaho 591.

57 C.J. p. 1129 note 57.

92. Colo.—Sargent v. La Plata County, 40 P. 366, 21 Colo. 158.

93. N.M.—State ex rel. Peck v. Velarde, 43 P.2d 377, 39 N.M. 179.

57 C.J. p. 1129 note 59.

Return of prisoner after arrest in another county

Fla.—Traylor v. State ex rel. Coleman, 9 So.2d 417, 151 Fla. 322.

94. Iowa.—Bringolf v. Polk County, 41 Iowa 554.

N.Y.—Utica Bank v. Kibbe, 7 Cow. 424.

95. Neb.—Porter v. Merrick County, 60 N.W. 588, 42 Neb. 397, followed in Smith v. Franklin County, 68 N.W. 381, 49 Neb. 164.

57 C.J. p. 1129 note 61

96. Pa.—Berks County Directors of Poor v. Shingle, 84 Pa. 37.

97. Neb.—Logan County v. Doan, 51 N.W. 598, 34 Neb. 104

98. Pa.—Eckerd v. Perry County, 6 Pa.Dist. 284.

99. Ohio.—Ward v. Russell, 48 N.E. 666, 57 Ohio St. 144.

57 C.J. p. 1129 note 65.

Where county bought and furnished automobile to sheriff, and paid all operating expenses, sheriff had no right to claim and collect mileage

mileage is allowed by statute a sheriff or constable is entitled to none.[1] The specification in a statute of instances in which mileage is to be paid constitutes an implied prohibition on its collection in other instances;[2] under this principle a sheriff has been denied mileage for the use of his own automobile in investigating alleged violations of the criminal law[3] and in investigating and reporting on automobile and other accidents,[4] and for delivering election ballots and notices.[5] A sheriff or constable who receives a salary "in lieu of all costs and fees in criminal cases" is not entitled to mileage fees for services in such cases;[6] and mileage charges have been considered as "fees" within a statute providing that fees earned by the sheriff and uncollected at the end of each year shall belong to the county.[7]

Actual travel is necessary to entitle a sheriff or constable to mileage,[8] the courts have refused to allow any mileage where the entire distance traveled was less than a mile,[9] and no mileage is properly chargeable for travel which was wholly unnecessary by reason of the fact that the process in question could have been served without travel by another officer who was on the spot.[10] A constable cannot serve himself with a subpœna to appear as a witness and charge mileage for so doing;[11] and where a constable is present in court to return a subpœna previously issued to him for the purpose of service he will not be allowed mileage for attendance at court[12]

With respect to reimbursement for mileage, it has been held that county commissioners cannot control the sheriff's method of transportation by compelling him to use an automobile supplied by the county[13] or dictate petty details such as the type of oil and tires to be used.[14]

Additional mileage for transporting person. In the absence of statutory provision, a sheriff has been held not entitled to extra mileage, as such, in addition to mileage for his own travel, for conveying a witness under arrest to a magistrate's office, and from thence to jail.[15]

Indorsement of mileage on return. A sheriff is not deprived of his right to claim mileage for summoning jurymen by the fact that he has omitted to indorse such mileage on the venire as part of his return, where the statute provides that sheriffs' returns may, in the discretion of the court, be amended even after judgment.[16]

Travel by deputy. The sheriff,[17] and in some jurisdictions the deputy,[18] have been held entitled to mileage for travel by the deputy.

b. Travel in Unsuccessful Attempts to Perform Duty

In most jurisdictions a sheriff is not entitled, as of right, to mileage for travel in an unsuccessful attempt to serve process or make an arrest, although the county board may, in its discretion, make such an allowance

In a majority of jurisdictions a sheriff is not entitled to, as a matter of right, and cannot recover, mileage for travel in attempting to serve process or make an arrest which was not actually or lawfully served or made,[19] and even though he ultimately served the process or made the arrest he cannot charge mileage for previous unsuccessful attempts;[20] but in some of these jurisdictions the county board may, in its discretion, make an allowance where the unsuccessful attempt was made in a criminal case,[21] at least where a felony was

fees at rate which statute provides shall be paid to sheriffs furnishing their own automobiles.—Grimes v. Bosque County, Tex Civ App, 240 S W 2d 511, error refused no reversible error.

1. Ind—Board of Com'rs of Hamilton County v. Baker, 19 N E 2d 250, 215 Ind. 163.
57 C.J. p 1129 note 66.

Destroying still

Under statute, sheriff is not entitled to recover mileage charge for services in going from courthouse and destroying still in woods where found, without court order for seizure or destruction—Calhoun County v. Liddon, 138 So. 389, 103 Fla. 833

2. Mo—Maxwell v. Andrew County, 146 S.W 2d 621, 347 Mo 156

3. Mo—Maxwell v. Andrew County, supra.

4. Mo—Maxwell v. Andrew County, supra.

5. Mo—Maxwell v. Andrew County, supra.

6. S C—Hightower v Bamberg County, 32 S E 576, 54 S C 536

7. Iowa—Cremer v Wapello County, 117 N W 954, 139 Iowa 580

8. Minn—Grundysen v. Polk County, 58 N W 864, 57 Minn. 212.
57 C.J. p 1129 note 69.

9. Pa—Doran v. Northampton County, 19 Pa Dist. 515—Fleck v. Dauphin County, 1 Pearson 220.

10. Fla.—State v. Johnson, 17 So 650, 35 Fla 539

11. Pa—Commonwealth v. Pflaumer, 16 Pa Dist & Co 193.

12. Pa—Commonwealth v Pflaumer, supra

13. Pa—Benson v. Bradford County, 192 A. 650, 326 Pa 454.

14. Pa—Benson v. Bradford County, supra.

15. Pa—Boyle v Luzerne County, 17 Pa.Co 214

16. Ill—La Salle County v. Milligan, 32 N E 196, 143 Ill 321.

17. Colo—Sargent v La Plata County, 40 P 366, 21 Colo. 158.

18. N D—Scofield v Wilcox, 156 N W. 918, 33 N.D 239, Ann.Cas.1918A 836.
57 C.J p 1130 note 86.

19. Cal—Broughton v. Santa Barbara County, 3 P. 877, 65 Cal 257, followed in Overall v Tulare County, 34 P. 519, 100 Cal 61.
57 C.J p 1130 note 75.

20. Pa.—Shrope v. Northampton County, 3 Lanc L Rev. 123.

21. Mich.—People v Ingham County, 38 Mich. 658.

charged[22] In a few jurisdictions a sheriff or constable is entitled to mileage for travel in an unsuccessful attempt to perform his duty,[23] at least where the failure was not due to his fault.[24]

c. Travel Outside State or County

A sheriff or constable may be entitled to mileage for travel outside the county, but, it has been held, not outside the state, except for the reception and return of an extradited person.

A sheriff or constable may be entitled to mileage for travel outside the county,[25] but has been held not so entitled for travel outside the state.[26] However, a sheriff has been held entitled to mileage for travel in connection with the reception and return of an extradited person,[27] although not for travel in connection with the apprehension without, and return to, the state, without requisition, of a person accused of crime.[28]

d. Amount and Computation

Statutes fixing the rate or amount of mileage and the mode or basis of its computation control. Ordinarily mileage is allowable only for the distance actually and necessarily traveled.

Statutes fixing or designating the rate or amount of mileage for travel by a sheriff or constable[29] and the mode or basis of its computation[30] are controlling. Ordinarily mileage is allowable only for the distance actually[31] and necessarily[32] traveled.

Circular or one-way mileage. Although there is some authority to the contrary,[33] statutes relating to the mileage of sheriffs and constables are generally construed to allow mileage on a circular or round-trip basis, or, in other words, for each mile traveled on the journey, not only going but also returning,[34] and even in jurisdictions wherein the statutes provide that mileage for executing a warrant of arrest shall be "one way" or "in going" only, the officer may be entitled to mileage for travel not only in going to make the arrest, but also in taking the prisoner from the place of arrest to a prison or place of holding court, or before a magistrate, as where, under the construction placed on the statute by the courts, the warrant of arrest is not completely executed until the prisoner is taken to the place designated in the writ,[35] or the statute providing for mileage mentions the execution of a warrant of arrest and the taking of a prisoner before a magistrate as separate and distinct acts.[36]

Performance of more than one service on single trip. Where a sheriff or constable conveys or removes two or more persons, serves process on several persons or in several cases, or otherwise performs more than one service, on a single trip, he is, under the construction placed on some statutes, entitled to full mileage for each service;[37] but under the construction placed on other statutes he is entitled to mileage only for the distance actually traveled on the trip.[38]

22. Wis.—Schneider v. Waukesha County, 79 N.W. 228, 103 Wis. 266, followed in Northern Trust Co v Snyder, 89 N.W. 460, 113 Wis. 516, 90 Am.S.R. 867.

23. Minn.—Grundysen v Polk County, 58 N.W. 864, 57 Minn. 212
Nev.—Washoe County v Humboldt County, 14 Nev. 123

24. Minn.—Davis v Le Sueur County, 35 N.W. 364, 37 Minn. 491.

25. Cal.—Cunningham v San Joaquin County, 49 Cal. 323
57 C.J. p. 1130 note 81.

26. Ariz.—Yavapai County v. O'Neill, 29 P. 430, 3 Ariz. 363
Pa.—Ginter v. York County, 3 Pa.Co. 111.

27. Kan.—Franklin County v. Bell, 29 P. 392, 48 Kan. 131.

28. Kan.—State v Martin, 131 P. 1190, 89 Kan. 678.

29. N.M.—State ex rel Peck v Velarde, 43 P.2d 377, 39 N.M. 179
57 C.J. p. 1130 note 87.

Special act held not repealed by general one
Okl.—Gordon v Conner, 80 P.2d 322, 183 Okl. 82, 118 A.L.R. 783

Statute held not amended or changed
Ark.—Perry County v House, 117 S.W.2d 342, 196 Ark. 317

Magistrate held "examining court" within statute restricting amount of mileage.—Cook v Sheppard, 45 S.W.2d 554, 121 Tex. 117.

Statutory amounts held reasonable
S.D.—Swartz v Kingsbury County, 267 N.W. 140, 64 S.D. 422

30. Ark.—Perry County v House, 117 S.W.2d 342, 196 Ark. 317.
57 C.J. p. 1130 note 88

Special deputy sheriff was not entitled to circular mileage allowed by statute to sheriff, but only to amount of mileage arrived at as actual expense.—McClain v Northumberland County, 46 Pa.Dist. & Co. 705, 15 Northumb.Leg.J. 363.

31. Ind.—Ross v Chinworth, 83 Ind. 598.
57 C.J. p. 1130 note 89.

32. Pa.—Loughead v. Clearfield County, 16 Pa.Dist. 935, 33 Pa.Co. 315
57 C.J. p. 1131 note 90.

33. Miss.—Bordeaux v Warren County, 5 So. 227, 66 Miss. 231

34. Kan.—Simms v Norton, 118 P. 1071, 85 Kan. 822
57 C.J. p. 1131 note 93.

35. Ariz.—Coconino County v Coconino County, 89 P. 543, 11 Ariz. 198
57 C.J. p. 1131 note 95.

36. Cal.—Cunningham v. San Joaquin County, 49 Cal. 323.
57 C.J. p. 1131 note 96.

37. S.C.—Green v Anderson County, 34 S.E. 691, 56 S.C. 411.
57 C.J. p. 1131 note 97.

38. Kan.—Wire v Edwards County, 293 P. 753, 131 Kan. 725.
57 C.J. p. 1131 note 98.

C. LIABILITY FOR FEES, EXPENSES, AND DISBURSEMENTS

§ 252. In General

a. In general
b. Plaintiff
c. Defendant
d. Property or assets
e. Compensation of deputies and employees

a. In General

In the absence of a statute providing otherwise, the party at whose instance services have been performed is primarily liable to the sheriff or constable for his compensation therefor.

In the absence of a statute casting the primary liability for costs on the unsuccessful party, as discussed in Costs § 109, the rule is that the party at whose instance services have been performed is primarily liable to the sheriff or constable for his compensation therefor,[39] and reimbursement for his expenses,[40] even though judgment has been rendered in favor of such party and the ultimate liability for the costs, as between the parties, has been cast on the adverse party.[41] A sheriff has been held entitled to recover from a railroad company for money paid to men sworn in as deputy sheriffs at its request and on its promise to pay therefor, in order to prevent apprehended injury to its property from strikers.[42] A statutory right of the sheriff, on the discharge of an attachment, to retain the property levied on until his fees and poundage are paid gives him no cause of action for poundage against one indebted to the attachment debtor.[43]

Statute providing for adjustment. A statute providing that the sheriff's fees and expenses in executing a warrant of attachment are to be adjusted by the judge issuing the warrant gives such judge no power to order who shall pay such fees and expenses.[44]

Plaintiff's attorney. In the absence of notice to the contrary an attorney is personally liable to a sheriff or constable for his fees on process or writs which he commits to the officer for service or execution;[45] but the officer may, if he elects to do so, waive his right against the attorney and look to the client for his fees,[46] and, when he has made his election to look to either the attorney[47] or the client[48] for payment, he must abide by it, and cannot afterward resort to the other.

Prisoner brought up on habeas corpus. Where, at his instance and for his benefit alone, a prisoner under habeas corpus is conveyed from one district to another, he must pay all legal and proper charges of the sheriff for such conveyance.[49]

b. Plaintiff

Where a statute so provides, a plaintiff who procures a sheriff's sale is, in the first instance, liable for the sheriff's fees and costs. The plaintiff in attachment or execution may be liable for the sheriff's fees and expenses in connection with the seizure and detention of the property, as where the attachment or execution is subsequently annulled or vacated

Under some statutes plaintiff, in the first instance, is liable for the sheriff's fees and costs in making a sale,[50] and not the purchaser of land sold by the sheriff,[51] although, as discussed infra subdivision d of this section, the proceeds of the sale may also be liable therefor. The facts that a sheriff has erroneously charged a fee to which he is not entitled and that it has been included in the judgment do not entitle the sheriff to recover the amount from plaintiff,[52] even though the amount has been collected from defendant.[53]

Plaintiff in attachment may be liable to the sheriff for his fees and expenses in connection with the seizure and detention of the property,[54] as where the attachment is annulled, vacated, dissolved, or released,[55] the judgment in the action is in favor of

39. Pa.—Ehrhardt v. Gothic Optical Co., Com.Pl., 43 Lack.Jur. 2
R.I.—McCarthy v. Hughes, 88 A. 984, 36 R.I. 66, Ann.Cas.1915D 26.
57 C.J. p. 1132 note 1.

40. Wis.—American Wrecking Co. v. McManus, 181 N.W. 235, 183 N.W. 250, 174 Wis. 300

41. La.—Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 40 So. 727, 116 La. 347

42. Mont.—Sullivan v. Utah, etc., R. Co., 28 P. 307, 11 Mont. 236.

43. N.Y.—O'Brien v. Manhattan R. Co., 91 N.Y.S. 69, 45 Misc. 643.

44. N.Y.—Hall v. U. S. Reflector Co., 31 Hun 609, affirmed 96 N.Y. 629.

45. N.H.—Joyce v. Morgan, 23 A. 78, 66 N.H. 487.
57 C.J. p. 1133 note 23.

46. N.H.—Joyce v. Morgan, supra—Eastman v. Coos Bank, 1 N.H. 23

47. N.Y.—Ousterhout v. Day, 9 Johns. 114.

48. N.H.—Joyce v. Morgan, 23 A. 78, 66 N.H. 487—Eastman v. Coos Bank, 1 N.H. 23.

49. S.C.—Taggart v. Hutson, 24 S.C.L. 300.

50. Pa.—Peoples Nat. Bank of Shippensburg v. Baker, 30 Pa.Dist. & Co. 679.

51. Pa.—Peoples Nat. Bank of Shippensburg v. Baker, supra.

52. Minn.—Miesen v. Ramsey County, 112 N.W. 874, 101 Minn. 516

53. Minn.—Steenerson v. Polk County, 71 N.W. 687, 68 Minn. 509.
57 C.J. p. 1132 note 9.

54. Nev.—Allen v. Ingalls, 111 P. 34, 33 Nev. 281, Ann.Cas.1913E 755, rehearing denied 114 P. 758, 33 Nev. 281, Ann.Cas.1913E 755.
57 C.J. p. 1132 note 10—6 C.J. p. 370 note 91 [c]

55. Vt.—Templeton v. Capital Sav. Bank, etc., Co., 57 A. 818, 76 Vt. 345.
57 C.J. p. 1132 note 11.

defendant,[56] or, regardless of the result of the attachment proceedings, where the sheriff has placed a person in charge of the property at plaintiff's request and without an order of court.[57] The attachment plaintiff is also responsible for the legal costs of the sheriff or constable in executing the writ, where defendant has no property.[58] However, a sheriff who has attached property at the instance of plaintiff in the suit cannot charge him with the expenses incurred in holding the property after he has been notified that plaintiff has released his claim;[59] and, where the sheriff uses a horse attached by him sufficiently to pay for the keeping, he cannot recover of the attaching creditor for the pay for such keeping.[60]

Plaintiff in execution is liable for the sheriff's compensation where the sheriff has made a levy under an execution which is regular and valid on its face, but has been subsequently vacated.[61] A statute providing for a sheriff's fees for collecting money by virtue of an execution has been held to impose no liability for such fees on plaintiff in execution except those for receiving and returning the execution[62] for which he is liable, in the first instance [63]

In detinue suit. Where the sheriff has, under the statute, no authority to retain possession of property seized by him under an order in a detinue suit, for a term longer than ten days, plaintiff does not make himself liable to the sheriff for expense incurred in keeping the property for a longer time, by insisting through his attorney on such further detention by the officer, on the ground of its being his legal duty to retain the property, where he carefully abstains from making any personal request.[64]

c. Defendant

The defendant is liable for the fees of a sheriff who, on demand, delivers a bench warrant; and the defendant in attachment or execution may also be liable for the sheriff's fees, charges, and expenses in those proceedings.

Where, on demand, a sheriff delivers a copy of a bench warrant to the party named therein, he must collect his fees therefor from defendant.[65]

Attachment. The burden of paying a sheriff's charges for the expense of keeping and selling property attached may rest on the debtor,[66] but not where the sheriff acquired illegal possession of property under color of an attachment.[67]

Execution. Defendant is as a general rule liable for fees and commissions or poundage where money is collected on execution;[68] and this is so notwithstanding execution is stayed by injunction[69] and notwithstanding no levy is actually made [70] However, under an agreement whereby the sheriff waives his fees, an execution debtor, who pays a judgment in full, without levy, is not obligated to pay such fees.[71] Where the levy is dismissed and the execution quashed for invalidity of the judgment, the sheriff cannot recover from defendant the necessary expense of keeping the goods levied on;[72] a sheriff cannot execute against defendant for his poundage fees when the writ of venditioni exponas is countermanded before execution;[73] and it has been held that, where the execution creditor accepts payment or a composition after levy of the execution, the execution debtor is not liable for the sheriff's fees, commissions, and expenses.[74] On the other hand, under a statute entitling the sheriff to poundage and additional compensation where settlement is made after levy by virtue of an execution, it has been held that, after such settlement, the execution debtor is liable to the sheriff for his fees in levying the execution,[75] including poundage[76] and mileage.[77]

56. Mass.—Phelps v. Campbell, 1 Pick. 59.
57 C J. p 1132 note 12.

57. Ariz.—Southwestern Commercial Co. v. Owesney, 85 P. 724, 10 Ariz. 49.

58. N J.—Curtis v. Hulsizer, 5 N.J. Law 496.

59. N.Y.—Hall v. U. S. Reflector Co., 34 Hun 467.

60. Vt.—Dean v. Bailey, 12 Vt. 142

61. Md.—Gurley v. Lee, 11 Gill & J. 395.
N.Y.—Bradley v Blue Ridge Hosiery Mill, 106 N.Y.S. 1107, 56 Misc. 125.

62. N.Y.—Gimenez v Great Atlantic & Pacific Tea Co., 275 N.Y.S. 948, 242 App.Div. 485.

63. N.Y.—Giminez v. Great Atlantic & Pacific Tea Co., supra.

64. Ala.—Hall v. Perryman, 42 Ala. 122

65. Minn.—Steenerson v. Polk County, 71 N.W. 687, 68 Minn. 509.

66. Me.—Baldwin v. Match, 54 Me. 167

67. S.C.—Gardner v. Hust, 31 S.C.L. 601

68. N.Y.—Giminez v. Great Atlantic & Pacific Tea Co., 275 N.Y.S. 948, 242 App.Div. 485—Teed v. Sidney Nat. Bank, 285 N.Y.S. 140, 158 Misc. 561.
57 C.J. p 1133 note 31.

69. Md.—Gurley v. Lee, 11 Gill & J. 395.

70. N.Y.—Giminez v. Great Atlantic & Pacific Tea Co., 275 N.Y.S. 948, 242 App.Div. 485.

71. N.Y.—Sorge v. Honigsbaum, 245 N.Y.S. 34, 137 Misc. 824.

72. Ga.—Ward v. Barnes, 22 S.E. 133, 95 Ga. 103.

73. Md.—Fisher v. Beatty, 3 Harr & M. 148

74. Mo.—Gordons v. Maupin, 10 Mo. 352, 354, 47 Am.D. 118, followed in Irwin v. Milburn, 10 Mo. 456.

75. N.Y.—Teed v. Sidney Nat. Bank, 285 N.Y.S. 140, 158 Misc. 561.
Assignment of mortgage
An execution debtor who, after levy, assigned to the execution creditor a mortgage on the property levied on, in satisfaction of the judgment, was held liable for the sheriff's fees.—Teed v. Sidney Nat. Bank, supra.

76. N.Y.—Teed v. Sidney Nat. Bank, supra.

77. N.Y.—Teed v. Sidney Nat. Bank, supra.

d. Property or Assets

The expense of caring for and preserving attached property may, under certain conditions, constitute a charge on the attached property or assets.

It has been asserted that the expenses of taking care of and preserving attached property are a charge on the property or assets,[78] provided the court has made an order for a keeper.[79] Some statutes are construed to contemplate that, for his fees in connection with an execution, the sheriff shall look to the property of the judgment debtor which is held under the execution;[80] and, under a statute imposing liability for the sheriff's fees and costs, in the first instance, on plaintiff rather than on the purchaser of land sold by the sheriff, as considered supra subdivision b, the proceeds of such sale are ultimately liable for such fees and costs.[81] Where plaintiff has given a license to the sheriff to apply the proceeds of the judgment to the extinguishment of costs due from plaintiff to the sheriff in other cases, the sheriff has no interest in the money or judgment until collected,[82] and no right at all as against an assignee of the judgment without notice of the sheriff's claim.[83]

e. Compensation of Deputies and Employees

Under some statutes the sheriff must compensate his deputies out of the fees and emoluments of his office, and a sheriff who employs a person as keeper or guard of property in his custody is directly liable to such person for his services.

Under some statutes the sheriff must compensate his deputies,[84] or his chief deputy,[85] out of the fees and emoluments of his office; but persons summoned by the sheriff under his authority to summon the power of the county may not recover compensation from the sheriff.[86] A sheriff who employs a person as keeper or guard of property in his custody is directly liable to such person for his services,[87] and he may[88] or may not[89] be liable for the services of a keeper, watchman, or other person employed by a deputy, accordingly as the deputy had[90] or did not have[91] authority to bind his principal by such a contract of employment, or according as the sheriff has[92] or has not[93] ratified the employment.

A deputy constable is to be paid by the constable who appointed him.[94]

§ 253. County or State

a. In general
b. In civil cases
c. In criminal cases

a. In General

A county is not liable for expenses incurred by the sheriff without authority; the state rather than the county may be liable for his expenses under a statute requiring that they be paid out of a state fund.

A county is not liable for expenses incurred by the sheriff without authority, although in connection with the performance of his duties.[95] Under a statute requiring that the expenses of a sheriff be paid out of a state fund, the state,[96] and not the county,[97] is liable, and the county is not required to reimburse him for payment of such expenses.[98] The county may, however, be liable in the sense that it is chargeable with the administration of such fund.[99] A county has been held not to be liable for the compensation of a high constable.[1]

Summoning jurors. Where the statute charges

78. Or.—Schneider v. Sears, 8 P. 841, 13 Or. 69.

79. Mont—Noel v Cowan, 260 P. 116, 80 Mont 258.

80. Nev—Roberts v Ingalls, 135 P. 927, 36 Nev 325, 48 L R A.,N.S., 542, Ann.Cas.1915C 1119.

81. Pa—Peoples Nat Bank of Shippensburg v Baker, 30 Pa.Dist. & Co. 679.

82. Ala.—Bain v. Lusk, 109 So 187, 21 Ala.App. 442.

83. Ala.—Bain v. Lusk, supra.

84. Ark.—Clay County v Ruff, 90 S W 2d 474, 192 Ark 150.
57 C.J. p 1135 note 78.

85. Iowa—Culver v. Fayette County, 120 N.W. 627, 142 Iowa 269.

86. Neb.—Power v. Douglas County, 106 N W. 782, 75 Neb 734.
Power of sheriff to summon posse comitatus see supra § 34.

87. Iowa—Rowley v Painter, 29 N W. 401, 69 Iowa 432.
57 C.J p 1135 note 82.

88. Mont—Daly v. Kelley, 187 P 1022, 57 Mont 306.
57 C.J. p 1135 note 83.

89. Cal—Krum v. King, 12 Cal. 412
57 C J p 1135 note 84.

90. Mont—Daly v. Kelley, 187 P 1022, 57 Mont 306
Wis—American Wrecking Co. v McManus, 181 N.W. 235, 183 N.W. 250, 174 Wis 300.

91. Cal.—Krum v. King, 12 Cal. 412.
57 C.J. p 1136 note 86.

92. Idaho.—Chenowith v Cameron, 42 P 503, 4 Idaho 515.
Nev.—Allen v. Ingalls, 111 P. 34, 114 P. 758, 33 Nev. 281, Ann.Cas 1913E 755

93. Pa.—Miller v. Bruff, 64 Pa.Super 177—Munis v. Oliver, 24 Pa.Super 64.

94. Pa.—Newton v. Luzerne County, 12 Pa.Dist. 695

95. Ga—Hutcherson v. Robinson, 9 S E 722, 82 Ga 783.
N.J—**Corpus Juris quoted in** Monmouth County Pub Co v Monmouth County, 11 A.2d 95, 97, 124 N J Law 105—**Corpus Juris quoted in** Monmouth County Pub. Co. v. Monmouth County, 6 A.2d 487, 488, 17 N J Misc. 147.

96. Ala.—White v. Lyon, 20 So.2d 523, 246 Ala. 279.
Md.—Harrison v. Carroll, 191 A. 574, 172 Md. 386.

97. Ala.—White v. Lyon, 20 So.2d 523, 246 Ala. 279
Md.—Harrison v Carroll, 191 A. 574, 172 Md 386.

98. Md—Harrison v. Carroll, supra

99. Wash—Revelare International Secret Service v. Whatcom County, 234 P. 10, 133 Wash 535

1. Pa.—Hinkel v Cumberland County, 9 Pa.Dist. 550.

the county with the duty of providing and paying grand and petit jurors, the sheriff's fees for summoning such jurors are payable by the county [2] A constable has been held not entitled to a fee from the county for summoning a coroner's jury.[3]

Attendance at sessions of court or board. The county is generally liable to the sheriff for his compensation for attending and preserving order in the courts,[4] and it may and should compensate him for attending the meetings or sessions of the county board of supervisors[5] or the county board of review[6] where the board had power to, and did, require his attendance.

Serving notice The county may be liable to the sheriff for his fee and mileage in connection with his service of notice of their appointment on election judges.[7]

Compensation of deputies. A county may be liable for the compensation of deputy sheriffs,[8] but not in the absence of a statute so providing [9] Under some statutes an appropriation by the county board of commissioners is necessary before the salaries of deputy sheriffs become a charge on the county imposed by law [10] Where a statute charges the county with liability for the compensation of all deputies other than the chief deputy, and only one deputy is appointed, the county is not liable [11] A county has been held not to be liable for the compensation of a deputy constable [12]

Where fees do not amount to fixed compensation. Under some statutes where the fees and commissions received by a sheriff in a year do not reach a specified amount fixed as the compensation to which he is entitled, the county is required to make up the deficit;[13] but under other statutes the sheriff must look alone to the fees of his office for the salaries of himself and deputies, and the expenses of the office,[14] and, if such fees are insufficient to pay them in full, he cannot recover the deficit from the county.[15]

Duties and liabilities of county boards or officers. Statutes relating to the payment of expenses incurred by sheriffs, and contemplating some action of approval by a board or officers, may impose a mandatory duty to take such action provided such expenses are legal.[16] Where the statute makes it the duty of the county auditor on presentation to him of a transcript of proceedings containing a bill of constable's costs to examine it, correct the errors, if any, in the charges, and draw on the treasurer for the amount allowed, the auditor's refusal to perform his duty does not subject the county commissioners to liability.[17]

b. In Civil Cases

The county is not liable for sheriff's fees in a civil action.

The county is not liable for sheriff's fees in a civil action,[18] and cannot be made liable merely because he is unable to collect them from any other source.[19] Also, a sheriff who receives an annual salary or allowance is not entitled to extra compensation for services rendered the county in civil causes.[20] However, mileage earned by the sheriff in the service of civil process constitutes a valid charge against the county where it has been collected as costs by the clerk of court and transmitted by him to the county treasurer.[21]

2. Ill.—La Salle County v. Milligan, 32 N.E 196, 143 Ill 321.

3. Pa.—In re Coroner's Inquests, 1 Pa Co 14.

4. Ind —Miller v Boone County, 31 N.E 1123, 5 Ind App 225.

5. Ill.—La Salle County v Milligan, 32 N E 196, 143 Ill 321.

6. Ind —Boone County v Lewis, 144 N E. 623, 81 Ind App 601.

7. Ark —Ouachita County v. Chidester, 137 S W. 811, 99 Ark 206.

8. Fla —State ex rel. Rauscher v Gandy, 178 So 166, 130 Fla 407
Idaho —Taylor v. Canyon County, 61 P 521, 7 Idaho 171.
Pa —Vollmer v. Willis, Com Pl, 20 Erie Co 41

Deputy sheriff employed as county traffic officer

Fla —State ex rel Rauscher v. Gandy, 178 So. 166, 130 Fla. 407.

9. Ga —Floyd County v. Johnson, 57 S E 2d 502, 80 Ga.App. 785.
57 C J. p 1134 note 54.

10. Ill.—People ex rel. Meyering v Whealan, 190 N E. 693, 356 Ill. 402

11. Iowa —Culver v. Fayette County, 120 N.W 627, 142 Iowa 269

12. Pa —Newton v Luzerne County, 12 Pa Dist 695.

13. Idaho —Campbell v. Logan County, 37 P. 329, 4 Idaho 181

14. Ill —Coles County v. Messer, 63 N E 391, 195 Ill 540.
57 C J p 1134 note 59.

15. Ill —Coles County v. Messer, supra.
57 C J p 1134 note 59.

16. Wash —Revelare International Secret Service v Whatcom County, 234 P 10, 133 Wash. 535.

Fuel and supplies for automobiles

A statute directing a county board to purchase gasoline and oils necessary in the operation and maintenance of automobiles requisitioned by the sheriff for the use of patrolmen has been held to impose a mandatory duty on such board —State ex rel Holcombe v. Mobile County, 193 So 315, 238 Ala 656

17. Ohio —Smith v. Portage County, 9 Ohio 25.

18. Pa —Irwin v Northumberland County, 1 Serg. & R. 505—Commonwealth v. Truxtun, 1 Ashm. 34.

Lunacy proceedings

Ga —Floyd County v. Johnson, 57 S E 2d 502, 80 Ga App 785

19. Kan.—Gleason v. McPherson County, 2 P. 644, 30 Kan 492.

20. W.Va —Tyler County Ct v. Long, 77 S E 328, 72 W.Va. 8, Ann Cas.1915B 808.

21. Okl —Anderson v Pittsburg County, 273 P. 222, 134 Okl. 299.

c. In Criminal Cases

A county is liable for the fees and expenses of a sheriff, deputy, or constable when, and only when, there exists a statute so providing. Under statute the state may be liable for the sheriff's compensation or expenses connected with the removal or conveyance of convicted persons to a state prison.

A county is liable to a sheriff, constable, or deputy sheriff for his fees and expenses in connection with enforcement and execution of criminal or penal laws when,[22] and only when,[23] there is a statute so providing; and, where the case is within a statute imposing liability on the county, but there is a statutory limitation of the amount of liability, the county will be held liable within,[24] although not beyond,[25] the prescribed limitation.

State. Under a statute so providing, a state is liable for the compensation or expenses of a sheriff in connection with the removal or conveyance to a state prison of a person convicted of crime,[26] or at least of an offense of a high grade;[27] but in the absence of a statute making it liable, a state is not liable to a sheriff for the cost of transporting to another county a witness in a criminal case charged with contempt,[28] or for his fees for subpœnaing witnesses to appear before a grand jury in cases wherein no indictment is found.[29] Under a statute imposing liability on the state for the payment of expenses in cases of extradition, and in all other cases of felony on the county wherein the crime is alleged to have been committed, the state is not liable for the expenses of a sheriff in returning an accused person from another state where he waives extradition and returns voluntarily.[30] Also, under a statute so providing, on conviction, sentence, and delivery of a person accused of crime, the state is liable for the fees of a sheriff for services in a preliminary trial before a committing magistrate on a felony charge.[31]

D. TAXATION, PAYMENT, AND COLLECTION

§ 254. In General

a. General considerations
b. Allowance or certification by court
c. Review of allowance or disallowance
d. Services outside official duty
e. Fund out of which payment made
f. Retention by officers of fees and expenses

a. General Considerations

Usually under the statutes an allowance to a sheriff or his deputy for the expense of taking and keeping property or for other charges and expenditures is dependent on his presenting in a proper manner an itemized statement of his claim. Effect will be given a statute requiring such a claim to be audited.

Under some statutes an allowance for the expense of taking and keeping property or other charges and expenditures is based on an affidavit of the sheriff or deputy,[32] or on a sworn[33] statement of claim,[34] or of costs,[35] or on a sworn account,[36] showing in detail all items of expense incurred;[37] and a sheriff may present, by a mo-

22. Ala.—State ex rel Holcombe v. Stone, 157 So 452, 26 Ala.App. 226, certiorari denied 157 So. 454, 229 Ala. 357.
Cal.—Niceley v. Madera County, 296 P 306, 111 Cal App 731
N.C.—State v. Patterson, 31 S.E 2d 380, 224 N C. 471.
57 C.J. p 1134 note 65.

County held liable for fees and expenses

(1) In connection with seizure of contraband liquor under search warrants and prosecution of condemnation proceedings.—State ex rel Holcombe v. Stone, 157 So. 452, 26 Ala App. 226, certiorari denied 157 So. 454, 229 Ala. 357.

(2) In connection with return of an accused person from another state.—State v. Patterson, 31 S.E 2d 380, 224 N.C. 471.

(3) In connection with other particular matters see 57 C.J. p 1134 note 65 [e].

23. Ala.—Kilgore v. Swindle, 122 So. 333, 219 Ala. 378.
Ga.—Hubbard v. Henderson, 54 S E 2d 271, 205 Ga. 438.
57 C J. p 1135 note 66

County held not liable for fees and expenses

(1) In connection with summoning of a witness to appear before the grand jury in a case wherein no indictment is found.—Kilgore v Swindle, 122 So. 333, 219 Ala 378—57 C.J p 1135 note 66 [e] (1), (2).

(2) In connection with arresting of an operator of moonshine still.—Taylor, for Use and Benefit of Laurel County v. Scoville, 68 S.W.2d 423, 252 Ky 809.

(3) In connection with other particular matters see 57 C.J. p 1135 note 66 [e].

24. Miss.—Norsworthy v. Forrest County, 111 So 144, 145 Miss 55.
57 C J p 1135 note 67.

25. Ala.—State v. Brandon, 95 So 41, 208 Ala 647.
57 C.J p 1135 note 68

26. Mich.—Hursley v Stone, 51 N W 530, 90 Mich 439.

27. Pa.—Stephens v. Bradford County, 7 Watts & S 438

28. Ky.—Suter v. Stone, 56 S W 971, 108 Ky. 518, 22 Ky.L. 224.

29. Ala.—State v. Smith, 64 So. 364, 185 Ala 384

30. N.C.—State v. Patterson, 31 S E 2d 380, 224 N C 471.

31. Ala.—White v. Lyon, 20 So 2d 523, 246 Ala 279

32. Wyo.—Beeman, etc, Mercantile Co v. Sorenson, 89 P. 745, 15 Wyo 450
57 C J. p 1136 note 91.

33. Miss.—Forrest County v Thompson, 37 So 2d 787, 204 Miss 628
57 C J. p 1136 note 92 [a].

34. Miss.—Forrest County v. Thompson, supra.

35. Ga.—Cooper v. Lunsford, 45 S E 2d 395, 203 Ga. 166.

36. Idaho.—Ellis v. Bingham County, 60 P. 79, 7 Idaho 86
57 C.J. p 1136 note 92.

37. Miss.—Forrest County v.

tion to tax costs, his claim for expenses incurred in guarding and keeping intact property levied on, at least where the property seized was returned to the execution defendant under a forthcoming bond and no effort was made to collect such costs under the execution.[38] It has been held that a charge for storage of property levied on should be presented as an additional return on the writ.[39] Further, under some statutes, in the absence of a waiver,[40] a sheriff cannot recover fees if he neglects or refuses, when required, to furnish a bill of particulars,[41] or the officer's right to fees on mesne or final process may depend on his returning on the process the particular items of his charges.[42] A claim of a sheriff against a town for services in a criminal case should make it appear that the crime was committed in the town.[43]

Fee book. In jurisdictions wherein the sheriff is required to keep a fee book and enter all his fees therein, if he keeps no book he is entitled to no fees,[44] while if he does keep the book he is not entitled to fees which he has failed to enter therein.[45]

Audit. Effect will be given to statutes requiring a claim by a sheriff for compensation for services rendered to the county,[46] in the care of insane persons,[47] to be audited by a prescribed officer; and in order that it may be audited, the statement of claim must be in proper form.[48]

b. Allowance or Certification by Court

An allowance or certification by the court may be required in order to entitle a sheriff to compensation for his fees, charges, and expenses.

An allowance to a sheriff for his fees, charges and expenses incurred in an action, or a certification of their justness and reasonableness, may and must be made by the court,[49] at least where the statutes do not specify the amount.[50] Under a statute entitling a sheriff, levying an attachment on property, to compensation for his services when the action is settled or the attachment dissolved, an allowance for such compensation may be proper on the occurrence of either event.[51] Where the allowance is claimed in respect of the execution of process or writs, it is to be made by the court from which such process or writs issued,[52] and, where the allowance is claimed in respect of the seizure of property, it may and should be made in the suit wherein the property was seized,[53] in which case the same objections are open to the party sought to be charged as though a separate suit had been brought.[54] A statute authorizing a particular court to tax fees and disbursements on the application of the person liable to pay them does not warrant a taxation by such court on the application of the sheriff.[55] However, if the sheriff would make the

Thompson, 37 So 2d 787, 204 Miss 628.
Mo.—Johnson v. Sunnymede Farms, App, 80 S.W 2d 904
57 C.J. p 1136 note 93.

Itemization held sufficient
Ga.—Cooper v Lunsford, 45 S.E.2d 395, 203 Ga. 166
Miss—Board of Sup'rs of Lafayette County v. Jones, 24 So 2d 844, 199 Miss. 373.
Tex—Harris County v. Hammond, Civ App, 203 S.W. 451.

38. Mo—Johnson v. Sunnymede Farms, App, 80 S.W.2d 904.
39. Mass—Rogers v Simmons, 29 N E 580, 155 Mass 259.
Neb—Deering v Wisherd, 65 N W. 738, 46 Neb. 720
40. Neb—Van Etten v. Selden, 54 N.W. 261, 36 Neb. 209
41. Neb.—Van Etten v. Selden, supra.
42. Neb.—Van Etten v. Selden, supra.
43. N.Y.—People v Champlain, 37 N Y.S. 633, 16 Misc 92.
44. Ala.—Bilbro v. Drakeford, 78 Ala. 318, followed in McDonald v. Cox, 16 So. 113, 104 Ala. 379.
45. Ala.—Bilbro v. Drakeford, 78 Ala 318
57 C.J. p 1136 note 99.
46. Okl—Johnson v. Cameron, 37 P 1055, 2 Okl. 266.
47. Okl—Johnson v. Cameron, supra.
48. Miss—Forrest County v Thompson, 37 So 2d 787, 204 Miss. 628

Noncompliance with statute
Where a statement of claim for transportation by sheriff and deputy of patients to state hospital or prisoners to penitentiary did not comply with statute, in that it was not sworn to, and contained no itemized statement of actual expenditures for expenses or actual expenses incurred, board of supervisors of county properly refused to audit it—Forrest County v. Thompson, supra.

49. Mont—Noel v. Cowan, 260 P. 116, 80 Mont 258.
Tenn—State ex rel. Biggs v. Barclay, 216 S.W 2d 711, 188 Tenn. 26.
57 C.J p 1136 note 6.
50. Ind.—Gardner v. Brown, 22 Ind 447.
Mich—Fletcher v. Morrell, 44 N.W 133, 78 Mich 176.
51. N Y—Bruskin v Diamond Trading Co, 44 N.Y S 2d 502, 182 Misc 444—Distillers Factors Corp v Country Distillers Products, 81 N. Y.S 2d 857.

Success of plaintiff in gaining what he sought
Where stipulation of settlement indicated that plaintiff was successful in gaining what he sought by action, on plaintiff's motion to annul and vacate warrant of attachment an allowance requiring him to pay sheriff poundage computed on value of property attached was proper.—Bruskin v Diamond Trading Co., 44 N Y. S 2d 502, 182 Misc 444.

Defendant substituting security for property
Where attachment secured by plaintiff was discharged by court order at instance of defendant who substituted security for property attached, an allowance requiring defendant to pay sheriff for his fees and poundage was appropriate—Distillers Factors Corp. v Country Distillers Products, 81 N Y S 2d 857
52. N Y.—Matter of Tamsen, 48 N. Y S 313, 23 App Div 389
57 C J. p 1137 note 10
53. Cal.—Shumway v. Leakey, 14 P. 841, 73 Cal. 260
Wyo—Beeman, etc, Mercantile Co v. Sorenson, 89 P 745, 15 Wyo 450.
54. Wyo—Beeman, etc., Mercantile Co. v. Sorenson, supra.
55. N.Y—Matter of Tamsen, 48 N.Y. S 313, 23 App Div. 389.

payment of his compensation for taking care of property a condition precedent to returning a bond forfeited, he must move the court to have the amount fixed by judicial order.[56]

Time for allowance. The court cannot make an order directing either party to pay the sheriff's fees until there is some final determination as to which party is liable to pay them.[57]

Notice of motion for allowance. A motion to the court to adjudge to the sheriff commissions on an alleged levy under a fieri facias,[58] or an application for the allowance of charges for the custody of property,[59] should be on notice to the parties interested.

Sufficiency and conclusiveness. A judge's indorsement, as correct, of a sheriff's account for expenses and fees, not purporting to be an act of court, but merely recommending that the account be allowed, is not an allowance, within a statute providing for the payment by the county of expenses "audited and allowed by the court trying the case,"[60] a statement by a judge in a conversation with the sheriff on the street is not an order of allowance;[61] and a certificate, by a probate judge, directed to the county auditor, stating merely that a person named has served as sheriff in removing a lunatic under a proper warrant and is entitled to a certain sum has been held insufficient in failing to show that the probate judge has ascertained the amount and that he has declared and ordered such amount fixed.[62] Where the statute makes the settlement of a city sheriff's account by the circuit court final and conclusive against the city and binding on all its officers, the auditor has no authority to inquire into the correctness of the settlement,[63] but must issue his warrant for the amount shown by the settlement to be due the sheriff.[64]

In at least one state it has been held that the approval by the clerk and judge of the criminal court of the criminal sheriff's account for fees and expenses of his office does not preclude the city from contesting the correctness of the account,[65] since such approval does not amount to a judicial decree in his favor for the amount of the account;[66] but it has also been held that such approval is conclusive on the city.[67]

Waiver of right to taxation. An execution plaintiff does not waive his right to insist on taxation of the sheriff's fees according to law by signing, after execution sale, an account prepared by the sheriff.[68]

c. Review of Allowance or Disallowance

The discretion of the court or county commissioners in fixing the amount of an allowance to a sheriff will not be reviewed unless an abuse of such discretion plainly appears

The general rule is that the discretion of a court or the county commissioners in fixing the amount of the allowance to a sheriff for compensation or reimbursement will not be reviewed[69] unless an abuse of discretion plainly appears.[70] Under a permissive statute a sheriff, as claimant, may appeal to a specified court from the action of the county authorities in disallowing his claim.[71]

d. Services Outside Official Duty

The remedy of a sheriff, on a claim for services performed outside his official duty, is by action against the person at whose request such services were performed.

If any claim arises in favor of a sheriff for extra services or expenses rendered or incurred on special request, outside the scope of his official duty, his remedy therefor is by action against the person at whose request they were performed or incurred.[72] No allowance therefor can be made on taxation of costs.[73]

e. Fund Out of Which Payment Made

Effect will be given to statutes designating a par-

56. Ala.—Garrett v. Cobb, 74 So 226, 199 Ala. 80

57. N.Y.—Jones v. Gould, 104 N.Y.S 935, 119 App Div 817—Upton v Electric Constr, etc., Co, 35 N.Y S 426, 89 Hun 502

58. Ala.—Oswitchee Co. v. Hope, 5 Ala 629.

59. Mich.—Fletcher v. Morrell, 44 N. W. 133, 78 Mich. 176.

60. Iowa.—Barnes v. Marion County, 6 N.W. 697, 54 Iowa 482.

61. Cal.—Shumway v. Leakey, 14 P. 841, 73 Cal. 260.

62. Ohio.—State v. High, 7 Ohio Cir Ct. 128, 3 Ohio Cir.Dec. 694.

63. Mo.—State v Brown, 72 Mo.App. 651.

64. Mo.—State v. Brown, supra

65. La.—State v. New Orleans, 30 La Ann. 82

66. La.—State v. New Orleans, supra.

67. La.—New Orleans v. Patton, 27 La Ann. 168.

68. N.Y.—O'Connor v. O'Connor, 47 N.Y Super. 498.

69. Iowa.—Toledo Sav. Bank v Johnston, 57 N.W 622, 90 Iowa 749. 57 C.J. p 1139 note 50.

70. N.Y.—Stewart v. Fidelity Loan Assoc., 42 N.Y.S 705, 19 Misc 49 Ohio.—Avery v. Ruffin, 4 Ohio 420.

71. Miss.—Board of Sup'rs of Lafayette County v. Jones, 24 So 2d 844, 199 Miss 373.

72. N.Y.—O'Connor v O'Connor, 47 N.Y Super. 498—Crofut v. Brandt, 13 Abb Pr.,N.S., 128, affirmed 58 N.Y 106, 17 Am R. 213

Tenn.—**Corpus Juris cited in** Draughon v. Fox-Pelletier Corp., 126 S.W. 2d 329, 333, 174 Tenn. 457.

Agreements as to amount of compensation see supra § 219.

Persons liable for fees and expenses in general see supra § 252.

73. N.Y.—Crofut v. Brandt, 13 Abb. Pr.,N.S., 128, affirmed 58 N.Y. 106, 17 Am.R. 213.

ticular fund out of which sheriff's fees or expenses must be paid.

Effect will be given to statutes designating a particular fund out of which the sheriff's fees or expenses, payable by the county, are to be paid,[74] and under a statute requiring that his fees or expenses be paid out of a state fund they cannot be paid out of a county fund,[75] except as the statute may provide that any balance remaining unpaid may be paid out of a county fund.[76] The fact that the designated fund is insufficient to pay the sheriff's claims in full is no reason for not applying thereto as much as is available.[77] Under constitutional provisions requiring that sheriffs' fees be paid out of county revenue for the years when the services are performed, a sheriff who does not try to enforce payment of his fees until the revenue for such years has been consumed in payment of other claims cannot enforce payment out of revenue collected in subsequent years.[78] Where a special fund is consolidated with a general fund, claims which were payable out of the special fund are thereafter payable out of the general or consolidated fund.[79] Some statutes are construed not to authorize the payment of insolvent criminal costs to a sheriff out of funds in the county treasury derived from taxation.[80] A state general appropriation bill appropriating money "for prosecuting delinquents for infraction of revenue laws, to be expended under the direction of the controller," does not create a fund available for the payment of sheriff's fees in a suit by the state against the estate of a delinquent state treasurer and the sureties on his official bond.[81]

f. Retention by Officers of Fees and Expenses

Ordinarily, a sheriff may retain his costs, fees, and expenses from the proceeds of property which he has seized and sold.

Ordinarily, a sheriff or constable may retain from the proceeds of a sale of property seized by him his costs or fees in the suit and the expenses of the sale;[82] but it is otherwise as to fees which he has failed to itemize on the return, as required by statute,[83] and counsel fees for defending an action of trover brought against him by a third person,[84] and it is also otherwise where the property seized did not belong to the judgment debtor,[85] or where the sale was made without the consent of defendant and he prevailed in the action.[86] Where the property is covered by prior liens, these must be satisfied before the sheriff's fees can be deducted from the fund realized.[87] It has been held that a sheriff who collects the full amount of an execution has no legal right to retain his commissions out of the amount to which the creditor is entitled by his judgment.[88] Authority to retain moneys collected by him is not conferred on a sheriff by an unconstitutional statute.[89]

Clerk or deputy hire. Where a county board fixes the personal salary of a sheriff, but omits to fix the amount of his deputy hire, he has the legal right to retain out of the fees collected by him the reasonable amount which he has paid for his necessary deputy hire.[90] Also, a sheriff who receives a salary as compensation for his personal services merely has been held entitled to retain out of the fees collected by him such reasonable sums as he has necessarily paid out for clerk hire.[91]

§ 255. Actions for Fees and Expenses

Ordinarily, a sheriff, deputy, or constable may maintain an action to recover fees which he has earned.

Ordinarily, a sheriff, deputy, or constable may maintain an action to recover fees which he has earned from the person or governmental subdivision liable therefor,[92] provided the action is in proper

74. Ga.—Floyd County v. Johnson, 57 S.E.2d 502, 80 Ga.App. 785.
Md.—Harrison v. Carroll, 191 A. 574, 172 Md. 386.
Wash.—Revelare International Secret Service v. Whatcom County, 234 P. 10, 133 Wash. 535.
57 C.J. p. 1140 note 72.

75. Ala.—White v. Lyon, 20 So.2d 523, 246 Ala. 279.
Md.—Harrison v. Carroll, 191 A. 574, 172 Md. 386.

76. Ala.—White v. Lyon, 20 So.2d 523, 246 Ala. 279.

77. Ala.—Stone v. Ames, 8 So. 421, 91 Ala. 644.

78. Ark.—Crawford County v. Maxey, 118 S.W.2d 257, 196 Ark. 361.

79. Ala.—Henry v. Wiggins, 92 So. 198, 207 Ala. 251.
57 C.J. p. 1140 note 74.

80. Ga.—Clark v. Clark, 73 S.E. 16, 137 Ga. 185.

81. Nev.—Swift v. Doron, 6 Nev. 125.

82. Ind.—State v. Hitchens, 57 N.E. 935, 25 Ind.App. 244, 81 Am.S.R. 90.
57 C.J. p. 1140 note 77.

83. Vt.—Harrington v. Hill, 51 Vt. 44.

84. Colo.—Cramer v. Brasher, 25 P. 180, 15 Colo. 216.

85. N.Y.—Brand v. Brown, 24 N.Y.S. 262, 70 Hun 388.

86. N.H.—York v. Sanborn, 47 N.H. 403.

87. N.Y.—Brand v. Brown, 24 N.Y.S. 262, 70 Hun 388.

88. Ky.—Snell v. Woodford, 9 Dana 128.

89. La.—Iberia Parish Police Jury v. Henderson, 59 So. 110, 131 La. 169.

90. Ill.—People v. Darrah, 84 Ill.App. 515.

91. Ill.—Hodge v. People, 8 Ill.App. 193.

92. La.—Asadie v. Hebert, App., 15 So.2d 392.
Pa.—Erhardt v. Salwen, 48 Pa.Dist. & Co. 151, 44 Lack.Jur. 137—Ehrhardt v. Kaplan Bros. & Co., Com.Pl., 42 Lack.Jur. 7—Erhardt v. Kaplan Furniture Co., Com.Pl., 41 Lack.Jur. 92.
57 C.J. p. 1137 note 25.

Attachment plaintiff

If attachment plaintiff is liable for the expenses incurred by reason of his order to the sheriff to levy the

form,[93] is brought by[94] and against[95] proper parties, and is instituted at the proper time.[96] A demand is not a prerequisite to the maintenance of the action,[97] unless the action is against the county;[98] and, if it is a prerequisite to recovery by a sheriff of the expenses of preserving attached property at the request of plaintiff in attachment that the sheriff shall have paid the watchman placed in charge by him, it is enough that he has paid with his note[99]

Additional compensation. Under a statute entitling a sheriff to additional compensation where the population of the county is greater than that on which compensation has been allowed, he is entitled to recover such additional compensation in an action against the county,[1] and allowances previously made are not res judicata of his claim for such additional allowances in such action.[2]

Defenses. In an action by a constable for fees for services rendered on behalf of defendant, as plaintiff in another action, it is a complete defense that such action was unauthorized by him and was instituted without his knowledge.[3] Where after a levy under execution by a sheriff the property is taken out of his hands by replevin, the fact that the writ of replevin was served on him by one of his own deputies, and that the latter was guilty of official default in not returning the replevin writ or bond into court, furnishes no defense, on the ground of failure of consideration, to the sheriff's action for his fees on the levy of the execution.[4] The facts that the county, in an action by a sheriff to recover the balance of his salary, if compelled to pay would exceed its budgets and appropriations,[5] and that the sheriff is under a duty to co-operate with the county to reduce expenses,[6] have been held to constitute no defense. In a sheriff's action against a county to recover fees and costs, retained by the county under an unconstitutional statute, an allegation that the sheriff is a county officer and during the period for which such fees and costs were retained was paid all the legal compensation to which he was entitled states no defense;[7] but the county may be permitted to offset salary which he accepted with full knowledge that it was tendered in full payment for his services.[8] In an action by an undersheriff, deputy sheriffs, and certain assistants in the office of the sheriff against a city for alleged unlawful reduction in salaries, the city has been permitted to counterclaim for voluntary overpayments out of public funds to such undersheriff and deputies, to be set off against their recoveries for deductions,[9] but has not been permitted to counterclaim for voluntary overpayments, to the assistants, made from moneys lawfully raised by taxation for the purpose of paying their salaries, at least where they

writ, the latter may recover them in an action against such plaintiff
Ariz.—Southwestern Commercial Co v. Owesney, 85 P 724, 10 Ariz 49
Mass.—Phelps v. Campbell, 1 Pick 59.

Action against county
Ark.—Poinsett County v Lady, 135 S.W.2d 665, 199 Ark 657

93. Mich.—Peck v. Grand Rapids City Nat. Bank, 16 N.W. 681, 51 Mich 353, 47 Am R. 577.
57 C J. p 1137 note 26

94. **Sheriff suing for salary of deputy**
Where the statute makes the demand of a deputy sheriff for his salary a personal right, the sheriff cannot sue therefor unless it has been assigned to him.—Henry v. Yamhill County, 62 P. 375, 37 Or. 562.

95. **Incumbent sheriff**
Under a statute making a fund, to which the incumbent sheriff is required to pay the collected fees of his office, subject to his warrant for his own salary and expenses only, no action can be maintained against him alone by his predecessor for salary.—Perkins v. Nugent, La.App., 151 So. 819.

Supervisor of public funds
Where, under statute authorizing such action, the supervisor of public funds has taken possession of the sheriff's salary fund, such supervisor is not only a proper but a necessary party defendant to an action by a deputy sheriff to recover his salary.—Asadie v. Hebert, La.App., 15 So.2d 392.

96. Ark.—Poinsett County v. Lady, 135 S.W.2d 665, 199 Ark. 657.
La.—Meyer v. Parish of Plaquemines, App., 11 So.2d 291.
57 C.J. p 1137 note 27.

Felony cases
Under statute a right of action against county on claims by deputy sheriff for services rendered in felony cases did not accrue until such cases were finally disposed of by nolle prosequi, acquittal, or conviction.—Poinsett County v. Lady, 135 S.W.2d 665, 199 Ark. 657.

Poundage
Ordinarily, the amount of the sheriff's poundage arising from his services in connection with an attachment, and the source from which or by whom to be paid, cannot be determined until termination of litigation by the parties in the main suit, by settlement between parties, discontinuance of action, operation of law, judgment, or vacatur of attachment.—In re Groom's Estate, 85 N.Y.S.2d 862.

97. Cal.—Lane v. McElhany, 49 Cal. 421

98. Iowa.—McCord v. Page County, 162 N.W. 242, 179 Iowa 1032.

99. Ariz.—Southwestern Commercial Co v. Owesney, 85 P. 724, 10 Ariz. 49

1. Miss.—Forrest County v. Thompson, 37 So.2d 787, 204 Miss. 628—Holmes County v. Ellis, 13 So.2d 635, 195 Miss. 124

2. Miss.—Forrest County v. Thompson, 37 So.2d 787, 204 Miss. 628—Holmes County v. Ellis, 13 So.2d 635, 195 Miss. 124.

3. Pa.—Erhardt v. Salwen, 48 Pa. Dist. & Co. 151, 44 Lack. Jur. 137

4. Vt.—Baldwin v. Shaw, 35 Vt. 273.

5. N.J.—Vail v. Somerset County, 4 A.2d 19, 17 N.J.Misc. 133, reversed on other grounds 8 A.2d 696, 123 N.J.Law 415, certiorari denied 60 S.Ct. 616, 309 U.S. 673, 84 L.Ed. 1018.

6. N.J.—Vail v. Somerset County, supra

7. S.C.—Gamble v. Clarendon County, 198 S.E. 857, 188 S.C. 250

8. S.C.—Gamble v. Clarendon County, supra.

9. N.Y.—Broschart v. City of New York, 3 N.Y.S.2d 18, 166 Misc. 515, affirmed 7 N.Y.S.2d 646, 255 App. Div. 776.

have not been allowed a recovery for their salary deductions.[10]

Pleading. General rules, requiring that plaintiff's pleading must allege facts sufficient to constitute a cause of action, apply in actions by a sheriff or his deputy to recover compensation.[11] So, in an action by a sheriff to recover compensation from the county, he must allege facts sufficient to show an enforceable demand against the county;[12] but he need not plead matters which are fixed by law;[13] nor need he separate the petition into counts where the services rendered were continuous and of the same kind.[14] Where the action is to recover compensation in addition to salary, a paragraph of the complaint containing an invalid claim to fees for receiving prisoners into, and discharging them from, the county jail may nevertheless be held good where it also contains a valid claim to per diem compensation for attendance on the sessions of courts.[15] Offsets, such as those based on the salary paid the officer, must be pleaded.[16]

Where, in an action by a sheriff for official services in levying an execution, there is an allegation of a special request that plaintiff should perform the services, it is not necessary to aver that the sums due the sheriff were not collected by a sale of the property levied on.[17] Also, in such an action it is not necessary to allege the value of the services;[18] but in an action to recover for services in keeping property levied on, a complaint is insufficient which avers neither what the services were reasonably worth, nor that the court from which the execution issued had certified that the amount was just and reasonable.[19]

In an action by a constable to recover his fee for executing in another county a warrant issued by a justice of the peace, it is not essential that the complaint should allege that the warrant was indorsed by a magistrate of the county in which it was executed.[20]

Evidence. General rules are applicable in determining the admissibility[21] and sufficiency[22] of evidence in an action by a sheriff or deputy sheriff to recover compensation or reimbursement for expenses. It has been held that the judge may act without evidence where there is no answer and he has sufficient knowledge of the facts.[23]

§ 256. Time for Payment

Although it has been held that a sheriff may demand prepayment of his fees, it has also been held that in the absence of statute he has no such right.

It has been held that a sheriff may demand that his fees be paid or secured before he performs the duties for which such fees are payable,[24] particularly under a statute authorizing him to do so;[25] but it has also been held that, in the absence of statute, he has no such right,[26] and that he is obligated to perform the duties of his office when required,[27] and to rely on the ordinary legal remedies for obtaining payment therefor.[28] Even where a sheriff has a right to demand prepayment, if he undertakes the service without making such demand, he cannot refuse to complete it until his fees are paid;[29]

10. N.Y.—Broschart v. City of New York, supra.

11. La.—Asadie v. Hebert, App., 15 So.2d 392.
57 C.J. p. 1138 note 37.

Pleading held sufficient
Under statute authorizing a supervisor of public funds to assume control of a sheriff's salary fund, a petition, in action against sheriff and supervisor of public funds to recover back salary due deputy sheriff, alleging that sheriff was in sole possession of sheriff's salary fund, but further alleging that supervisor of public funds assumed control of sheriff's salary fund, and that it was on his order that the salary payments were denied, has been held to be sufficient to state a cause of action against such supervisor.—Asadie v. Hebert, supra.

12. Tex.—Coak v. Nacogdoches County, Civ.App., 147 S.W.2d 943, error dismissed, judgment correct.
57 C.J. p. 1138 note 37.

13. **Time of each term of office**
Iowa.—McCord v. Page County, 162 N.W. 242, 179 Iowa 1032.

14. Iowa.—McCord v. Page County, supra.

15. Ind.—Daviess County v. Fitzgerald, 79 N.E. 393, 40 Ind.App. 24

16. S.C.—Hurst v. Sumter County, 1 S.E.2d 238, 189 S.C. 376.—Gamble v. Clarendon County, 198 S.E. 857, 188 S.C. 250.

17. Cal.—Lane v. McElhany, 49 Cal. 421.

18. Cal.—Lane v. McElhany, supra.

19. Cal.—Lane v. McElhany, supra.

20. Cal.—Allen v. Napa County, 23 P. 43, 82 Cal. 187
57 C.J. p. 1138 note 44.

21. **Evidence held admissible**
Ga.—Bynum v. Knighton, 73 S.E. 400, 137 Ga. 250, Ann.Cas.1913A. 903.
57 C.J. p. 1138 note 47 [a].

22. **Evidence held sufficient**
(1) In general.—Herbert v. Dufur, 32 P. 302, 23 Or. 462.—57 C.J. p. 1138 note 48 [a].

(2) To support recovery by sheriff.—Cook v. Nacogdoches County, Tex.Civ.App., 147 S.W.2d 943, error dismissed, judgment correct.

(3) To establish that ex-sheriff received no payments under statute entitling sheriff to allowance for entering, serving, and recording overseer's commissions, etc.—Holmes County v. Ellis, 13 So.2d 635, 195 Miss. 124.

Evidence held insufficient
To sustain decision for plaintiff.—Mathena v. Losey, 165 N.E. 253, 88 Ind.App. 634.

23. La.—Avart v. King, 14 La. 62

24. Or.—Hawley v. Dawson, 18 P. 592, 16 Or. 344.

25. Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478.
57 C.J. p. 1139 note 64.

26. Ind.—McFarlan v. State, 48 N.E. 625, 149 Ind. 149
57 C.J. p. 1139 note 65.

27. Ind.—McFarlan v. State, supra.

28. Ind.—McFarlan v. State, supra.

29. N.Y.—Wait v. Schoonmaker, 15 How.Pr. 460.
Vt.—Carlisle v. Soule, 44 Vt. 265.
57 C.J. p. 1139 note 68.

nor can he in such case avoid liability for neglect of duty on the ground of nonpayment of his fees.[30] It has also been held that the right of a sheriff to refuse to execute process until his fees are paid or tendered does not excuse him for a failure to make a return of the process.[31] The fact that a sheriff has waived prepayment of his fees does not defeat his right to recover them.[32]

§ 257. Lien

A sheriff may have a lien for his fees and charges on property seized under valid process, but he is not entitled to a lien on property wrongfully seized.

Where an execution against defendant has been returned "no property found," no lien on the property of plaintiff arises in favor of the sheriff until an execution against plaintiff for the costs created by him has actually been issued and placed in the hands of the sheriff.[33] The sheriff does not have a lien, for his claim against the county, on funds which he receives as an agent or trustee to pay over to the county.[34]

On property rightfully seized. In some jurisdictions a sheriff who has seized property under a valid attachment or execution has a lien thereon, and the right to retain it until his fees and charges are paid,[35] although the attachment is discharged by the giving of a statutory bond,[36] or the execution is superseded by the giving of a stay bond,[37] or according to some,[38] but not other,[39] authorities, where, after the levy of an attachment or execution, the debt or claim is compromised or settled between the parties. It is, however, the duty of the sheriff to inform the owner of the property of the amount of his fees,[40] and, when demand for the property is made, to offer to return it on payment of his fees.[41]

On property wrongfully seized. Where the process or writ under which property has been seized is set aside or quashed, the sheriff has no lien on the property for his fees and charges;[42] nor can he sell such property in order to compensate or reimburse himself;[43] and a fortiori a sheriff who has seized property not belonging to defendant acquires no lien thereon.[44]

Waiver. A sheriff or constable who relinquishes possession of property seized by him under legal process waives any lien on such property for his fees and charges.[45]

E. RECOVERY BACK OF MONEY PAID TO, OR COLLECTED BY, OFFICER, AND ACCOUNTING FOR RECEIPTS OF OFFICE

§ 258. Right of County to Recover Back

A county may recover back from a sheriff or constable money paid to him in excess of what he was lawfully entitled to receive.

A county may recover from a sheriff or constable money paid him by it in excess of what he was lawfully entitled to receive,[46] or compensation which he drew without complying with the statute in relating to the allowance thereof.[47] Recovery may be had, according to some,[48] although not other,[49] authorities, even though the payment was made under a misapprehension of law, and according to some,[50]

30. Ga.—Cooper v Stonecypher, 35 S.E 675, 111 Ga 818
57 C J p 1140 note 69

31. Ala —McRae v. Colclough, 2 Ala 74
57 C.J. p 1140 note 70.

32. Idaho —Naylor v Vermont Loan, etc, Co., 55 P 297, 6 Idaho 251

33. Ala —Bain v. Lusk, 109 So 187, 21 Ala.App. 442

34. S C —Sumter County v. Hurst, 1 S E.2d 242, 189 S C 316.

35. Idaho —Price v. Pace, 296 P. 189, 50 Idaho 353.
57 C.J. p 1140 note 89

36. N.Y —Jones v Gould, 104 N.Y S 935, 119 App.Div. 817.
57 C J. p 1140 note 90

37. Cal —Sam Yuen v McMann, 34 P. 80, 99 Cal 497.

38. Cal —Perrin v. McMann, 31 P 837, 97 Cal. 52.

39. N.Y.—Jackson v. Anderson, 4 Wend. 474
57 C J p 1141 note 93.

40. Cal —Sam Yuen v. McMann, 34 P 80, 99 Cal 497.

41. Cal —Sam Yuen v McMann, supra.

42. Ga.—Ward v. Barnes, 22 S E 133, 95 Ga 103, followed in Read v Williams, 22 S E 213, 95 Ga 108
57 C.J. p 1141 note 96.

43. Ga —Read v Williams, 22 S E 213, 95 Ga 108—Ward v Barnes, 22 S E 133, 95 Ga. 103

44. Colo —Longnecker v Shields, 28 P 659, 1 Colo App. 264
Me —Morton v Hodgdon, 32 Me 127.

45. Mich —Citizens' Sav. Bank v. Kock, 75 N W. 444, 117 Mich 118.
N Y —Miller v. Miller, 95 N Y S. 763, 108 App Div. 310.

46. Ga.—Sanders v. Wilkinson County, 26 S E 2d 467, 69 Ga App 676.
Idaho —Nez Perce County v Dent, 27 P 2d 979, 53 Idaho 787.
Mo —Dunklin County v. Donaldson, 164 S.W 2d 367.
57 C J p 1141 note 3.

Pleading
Copies of county warrants on which suit was based were not required to be set out in the county's pleading —Sanders v. Wilkinson County, 26 S E 2d 467, 69 Ga.App. 676.

Evidence
In suit by county for recovery of allegedly illegal payments to sheriff, the burden rested on sheriff to show authority of law for the payments — Sanders v Wilkinson County, supra

47. Wis —Douglas County v Sommer, 98 N.W. 249, 120 Wis. 424.

48. W.Va —Tyler County Ct., v Long, 77 S E 328, 72 W.Va 8, Ann Cas 1915B 808
Wis.—Douglas County v Sommer, 98 N W. 249, 120 Wis 424

49. Iowa —Painter v. Polk County, 47 N W 65, 81 Iowa 242, 25 Am.S R. 489

50. Ga.—Sanders v Wilkinson County, 26 S E 2d 467, 69 Ga.App. 676.
57 C.J. p 1141 note 7.

but not other,[51] authorities, even though the payment was made on the order of the county's governing body, with full knowledge of the facts and without fraud. There may, of course, be payments which are not recoverable from the sheriff by the county,[52] and in equity an estoppel on the part of the county may prevent recovery.[53] The mere fact, however, that a deputy sheriff is, without authority of law, appointed at the request of certain members of the commissioners' court does not preclude the county from recovering back from the sheriff money paid to such unauthorized deputy.[54] It is no defense to an action by a county to recover back money from a sheriff that he has furnished a bond[55] or that the money has been wrongfully taken from the state.[56]

§ 259. Right of Private Individual to Recover Back

A private individual is not entitled to recover back from a sheriff money paid for his services, with full knowledge of the facts and without legal compulsion.

A private individual who has paid money to a sheriff for his services, with full knowledge of the facts and without legal compulsion, cannot recover back such payment;[57] and, where the money collected under an execution is not enough to satisfy the debt and lawful costs, and the sheriff retains more than his lawful fees, defendant in execution cannot, after paying to plaintiff the balance of his debt, allowing the sum appropriated by the sheriff, recover from the sheriff the amount unlawfully retained by him.[58] On the other hand, one who has, in order to release his property from an execution, paid the sheriff commissions to which he is entitled if the execution is legal, may recover such payment if the execution is in fact illegal;[59] an action will lie to recover commissions received and retained by a sheriff on an unauthorized sale which has been set aside;[60] the excessive portion of a compulsory payment to a sheriff for the services of a caretaker may be recovered back,[61] and under permissive statute a private individual may be entitled to recover back from constables fees illegally collected,[62] including the statutory penalty prescribed for such collection.[63] So, also, a person who entered into a recognizance for the appearance of certain defendants may recover back money paid by him to a sheriff for their return from another state, where the sheriff returned defendants by virtue of a requisition obtained from the governor and received the compensation therefor allowed by law.[64] The wrongful act of plaintiff's attorney in entering judgment and issuing execution when he did is not material on the question of the liability of the sheriff to refund poundage and keeper's fees, where he is not charged with complicity in anything which plaintiff's attorney may have done before the issuance of the execution.[65]

§ 260. Accounting for, and Payment of, Receipts of Office to County or State

A sheriff or constable may be required to report, account for, and pay over, to the county or state, receipts of his office, or at least the excess over the amount allowed for salary, deputy hire, or other expenses.

Even where he is paid a salary the sheriff usually receives fees for his services,[66] but, as a general rule under the statutes, such fees,[67] or at least the excess thereof over the amount allowed for salary, deputy hire, and other expenses,[68] belong to the county, and must be reported, accounted for, and paid into the county treasury by the sheriff.[69] A

51. Miss.—Holmes County v. Ellis, 13 So 2d 635, 195 Miss. 124.
Nev.—Randall v. Lyon County, 14 P. 583, 20 Nev 35

52. Tex.—State v. Carnes, Civ.App., 106 S.W 2d 397
57 C J. p 1141 note 9.
Money paid in compliance with statute
Tex.—State v. Carnes, supra.

53. Tenn.—Roberts v. Roane County, 23 S.W.2d 239, 160 Tenn. 109.

54. Tex.—Tarrant County v Smith, Civ.App., 81 S W 2d 537, error refused

55. Tex.—Tarrant County v. Smith, supra.

56. Idaho—Nez Perce County v Dent, 27 P 2d 979, 53 Idaho 787.

57. Neb.—Ehlers v. Gallagher, 22 N W 2d 396, 147 Neb 97.
57 C J p 1141 note 11.

58. Ala.—Chenault v. Walker, 22 Ala 275.

59. S C.—Cleveland v McCravy, 24 S E. 175, 46 S.C 252.

60. Ky.—Shropshire v. Pullen, 3 Bush 512.
57 C J. p 1142 note 14

61. Wash.—Schafer v Giese, 238 P 3, 135 Wash 464.

62. Colo.—Hillman v. Chmelka, 195 P 2d 945, 118 Colo. 252.

63. Colo.—Hillman v. Chmelka, supra
Evidence held sufficient
Colo.—Hillman v. Chmelka, supra.

64. Ill.—Sallee v. Werner, 171 Ill App. 96.

65. N Y.—In re Kupfer, 150 N Y S 1037, 165 App Div. 570.

66. Ky.—Shipp v Rodes, 245 S W. 157, 196 Ky. 523.
57 C J. p 1142 note 19.

67. Ky.—Shipp v Rodes, supra.
Mich.—Cass County v. Shattuck, 285 N.W 454, 288 Mich. 555.
57 C J p 1142 note 20

68. Ky.—Shipp v Bradley, 275 S W 1, 210 Ky. 51—Shipp v Rodes, 245 S W 157, 196 Ky. 523.
57 C J. p 1142 note 21.

69. Ala.—Jefferson County v Dockerty, 30 So 2d 474, 249 Ala 196.
Ky.—Shipp v. Bradley, 275 S W 1, 210 Ky 51—Shipp v. Rodes, 245 S. W. 157, 196 Ky 523
Mich.—Cass County v Shattuck, 285 N W 454, 288 Mich. 555
N J.—Passaic County v. Manly, 186 A. 33, 14 N J Misc 509.
57 C J p 1142 note 22.
Accounting for money received for maintenance of prisoners see Prisons § 28.

statute requiring that the sheriff keep a record of fees received and pay them into the county treasury must be followed,[70] and noncompliance cannot be excused for trivial reasons.[71] Failure of a sheriff to pay over, to the county, fees which he has received is not excused by the fact that he holds office only for the latter part of the term during which the fees have been received;[72] or by the fact that he has paid out such money to settle the debts of the former incumbent of the office.[73] So, also, under a statute requiring a sheriff to account for, and turn over to the county, fees collected by him, it is no excuse for his failure to do so that he has not used such fees for his own personal benefit,[74] or that without complying with a statute he has paid out the money for services in connection with the transactions in which the fees have been collected,[75] and has told the county board of such payment[76]

Under a statute providing that the sheriff shall not perform any official service except on prepayment of his fees, the sheriff must account for all fees earned, whether or not collected[77] With respect to fees as to which payment in advance is not demandable, where services are rendered, he is obligated to exercise the highest degree of diligence to effect collection;[78] and, if they remain unpaid, he can escape liability only by showing that his efforts to collect have measured up to the required care,[79] and the burden is on him to make such a showing[80] This burden is not met by a custom of his office to serve papers, without collecting fees in advance and merely to hold the originals pending payment of such fees;[81] and this is so notwithstanding acquiescence in the custom by other public officials.[82] Under a statute requiring payments into a salary fund, the sheriff is not required to pay into such fund amounts assessed as fines but not in fact collected due to no fault of his[83]

Constable. A constable may, under statute, be required to account to the county for all fees collected and to turn them into the county treasury.[84]

Mistake. Money collected, reported, accounted for, and paid over to the county by a sheriff under a mutual mistake of law cannot be recovered back by him.[85] A sheriff, in accounting with the county for the receipts of his office, will be given the benefit of a statute governing the relief of officers from innocent mistake.[86]

Particular amounts for which a sheriff has been held accountable include amounts received for the transportation of prisoners to the state prison[87] or insane persons to an insane asylum,[88] fees received for committing prisoners to, and discharging them from, the county jail;[89] fees earned in misdemeanor cases,[90] fees received in levying an attachment;[91] fees for serving out-of-the-county proc-

Fees and compensation received by deputy

Ala.—Jefferson County v. Dockerty, 30 So.2d 474, 249 Ala. 196

70. Kan.—State ex rel. Boynton v. Jackson, 33 P.2d 118, 139 Kan. 744, 100 A.L.R. 1394

71. Kan.—State ex rel. Boynton v. Jackson, supra.

Particular excuses or reasons

Lack of harmony between the office of the sheriff and that of the clerk of the district court, fact that a justice of the peace had become aggrieved at the sheriff, fact that frequently he was busy and lacked time to make his record, and a delay in making a requested audit have been held to lack merit under the text rule.—State ex rel. Boynton v. Jackson, supra.

72. Tex.—Seale v. State, Civ.App., 67 S.W.2d 1060

73. Tex.—Seale v. State, supra.

74. N.J.—Passaic County v. Manly, 186 A. 33, 14 N.J.Misc. 509

75. N.J.—Passaic County v. Manly, supra.

Payment of attorney's fees for preparing sheriff's deeds

N.J.—Passaic County v. Manly, supra.

76. N.J.—Passaic County v. Manly, supra.

77. Idaho.—Naylor v. Vermont Loan, etc., Co., 55 P. 297, 6 Idaho 251

Minn.—St. Louis County v. Magie, 269 N.W. 105, 108, 198 Minn. 127

Prepayment of fees generally see supra § 256

"In practical application, that means that in all cases where payment is demandable in advance, the sheriff is liable absolutely for uncollected fees."—St. Louis County v. Magie, supra.

78. Minn.—St. Louis County v. Magie, supra.

79. Minn.—St. Louis County v. Magie, supra.

80. Minn.—St. Louis County v. Magie, supra.

81. Minn.—St. Louis County v. Magie, supra.

82. Minn.—St. Louis County v. Magie, supra.

Action of public examiners or auditing officials in acquiescing in such custom did not create an estoppel against the county.—St. Louis County v. Magie, supra.

83. Ark.—Baker v. State, to Use of Independence County, 197 S.W.2d 759, 210 Ark. 690.

84. Iowa.—Broyles v. Mahaska County, 239 N.W. 1, 213 Iowa 345.

85. Tex.—Stegall v. McLennon County, Civ.App., 144 S.W.2d 1111, error dismissed, judgment correct

Money collected from state by mistake and accounted for and paid over to the county by mistake was held to constitute such mutual mistake of law as to preclude the sheriff from recovering back the money from the county.—Stegall v. McLennan County, supra.

86. Tenn.—State ex rel. Doty v. Styke, 199 S.W.2d 468, 29 Tenn. App. 620

87. Neb.—Drexel v. Douglas County, 87 N.W. 1053, 62 Neb. 862.
57 C.J. p. 1142 note 24

88. Cal.—Adams v. San Francisco, 50 Cal. 117, followed in Santa Clara County v. Branham, 20 P. 75, 77 Cal. 592.—Los Angeles County v. Cline, 174 P. 73, 37 Cal.App. 607.

89. Ind.—Smith v. State, 82 N.E. 450, 169 Ind. 260
57 C.J. p. 1142 note 26

90. Ark.—Miller County v. Sewell, 94 S.W.2d 1042, 192 Ark. 808

91. **In the City of New York, fees**

ess;[92] fees for drawing and making sheriff's deeds for conveyance of land;[93] and fees paid for the seizure of prohibited liquor.[94] On the other hand, it has been held that he need not account for his per diem for attendance at court,[95] money paid him to defray expenses of advertising[96] and printing;[97] amounts received for services rendered otherwise than in his official capacity as sheriff;[98] unclaimed moneys deposited as costs;[99] and the fees allowed to guards and assistants in conveying prisoners to the penitentiary.[1] Also, he need not report money received in payment of a judgment which he has recovered against the county for fees previously earned.[2] Under the construction placed on the constitution and statutes of some,[3] but not other,[4] jurisdictions, mileage fees belong, and must be paid over, to the county.

Accounting to state. Under some constitutional or statutory provisions a sheriff is required to pay to the state treasurer the excess of the amount received by him over the sum which he is entitled by law to retain for his salary and office expenses.[5] Such fees are regarded as charges which the state makes for services which it renders through the sheriff,[6] and the sheriff is considered as a trustee of the state to collect such fees and properly to account for them.[7] Under some,[8] although not other,[9] circumstances he is liable for interest; but he is not required to account to the state for fees and commissions illegally charged and collected by him.[10]

Examination of account; charges and credits. The county has the right to examine the account of the sheriff in order to determine its liability to him.[11] Where it is brought to his attention that among the fees for which he has accounted to the county are illegal fees collected from the state, it is his duty to report such fact to the county authorities[12] within a reasonable time[13] in order that the county can use such means as it has at its command to determine, if it so desires, what offsets or claims, if any, it has.[14] The sheriff should be charged with all moneys and fees which he has, or should have, received,[15] and his account should be surcharged to correct omissions in this respect.[16] On the other hand, in accounting for tax collections he should receive credit for tax exonerations.[17] The sheriff should also receive credit for all authorized expenses;[18] and it has been held that fees improperly retained in one year may be credited in a subsequent

payable to a sheriff in levying attachment belong to the city as a governmental agency—Stojowski v. Banque de France, 61 N.E 2d 414, 294 N Y. 135

92. Tex—Hood v State, Civ App., 73 S W 2d 611, error refused.

93. N J.—Passaic County v Manly, 186 A. 33, 14 N J Misc 509.

94. Ala—Jefferson County v. Dockerty, 30 So 2d 474, 249 Ala. 196.

95. Ind.—State v. Flynn, 69 N E 159, 161 Ind. 554
57 C.J. p 1142 note 27.

96. N J.—Monmouth County Pub Co. v. Monmouth County, 6 A 2d 487, 17 N J.Misc. 147, affirmed 11 A. 2d 95, 124 N J.Law 105.
Pa—Philadelphia v. Wright, 12 Phila 467.

97. N J—Monmouth County Pub Co v Monmouth County, 6 A 2d 487, 17 N.J.Misc 147, affirmed 11 A.2d 95, 124 N J Law 105

98. Ala—Dallas County v. Kennedy, 21 So 2d 678, 246 Ala 558
Tex—McKinney v Collingsworth County, Civ.App, 159 S W 2d 234
57 C.J. p 1142 note 29

Rewards

The sheriff need not account for statutory rewards paid for individually bringing about convictions of manufacturing prohibited liquors—Dallas County v. Kennedy, 21 So 2d 678, 246 Ala. 558.

99. Pa—Commonwealth ex rel. Margiotti v. Cunningham, 10 A 2d 559, 337 Pa. 289.

Unconstitutional statute

Statute requiring a sheriff to pay over to county treasurer unclaimed moneys deposited as costs and providing for payment of such moneys to claimants has been held to be unconstitutional—Commonwealth ex rel Margiotti v Cunningham, 10 A. 2d 559, 337 Pa. 289

1. Neb—Drexel v Douglas County, 87 N W 1053, 62 Neb 862

2. Ill—Macon County v. Mauzy, 38 Ill App. 129.

3. Pa—Benson v. Bradford County, 192 A 650, 326 Pa 454.
57 C J p 1142 note 32.

Statute held invalid

Statute providing for the retention of mileage fees by the sheriff has been held invalid as violative of a constitutional requirement that such fees be paid over to the county.—Benson v. Bradford County, supra.

4. Neb—Red Willow County v. Peterson, 137 N W. 987, 91 Neb. 750

5. Fla—Sweat v Waldon, 167 So. 363, 123 Fla. 478.
Md—Green v. State, 89 A. 608, 122 Md. 288.

6. Fla—Sweat v. Waldon, 167 So 363, 123 Fla 478

7. Fla.—Sweat v. Waldon, supra.

8. Md—Green v. State, 89 A. 608, 122 Md 288
57 C J p 1143 note 35.

9. Pa—Commonwealth v. Fitler, 12 Serg & R 277.
57 C J. p 1143 note 36

10. Md—State v Green, 87 A. 1101, 120 Md 681

11. Tex—Stegall v McLennan County, Civ App., 144 S W 2d 1111, error dismissed, judgment correct.

12. Tex—Stegall v. McLennan County, supra

13. Tex—Stegall v. McLennan County, supra.

14. Tex—Stegall v. McLennan County, supra.

15. Ark—Magee v State, 54 S.W.2d 984, 186 Ark 1013

16. Ark—Magee v State, supra.

Automobile license fees

The sheriff's account should be surcharged with automobile license fees retained and not reported by him.—Magee v. State, supra.

17. Ky.—Livingston County v. Dunn, 190 S W 2d 328, 300 Ky. 367.

18. Tex—State ex rel. Doty v. Styke, 199 S.W.2d 468, 29 Tenn. App 620.

Deputy and clerk hire

Expenses incurred by the sheriff which are necessary for the discharge of his duties and in the necessary operation of his office, such as expenses for the hire of deputies and

year in which they are reported.[19] The sheriff is not, however, entitled to credit for unauthorized expenditures,[20] or for uncollected salary warrants, which are not collected when due because of his own delinquency and obstinacy.[21]

Actions for accounting. Equity has jurisdiction of a suit brought by a county to compel a sheriff to account for moneys received,[22] particularly where the items are numerous and complicated.[23] In an action to compel him to account and pay over to the county fees which he has received, a counterclaim on the ground that he has paid out the money for the benefit of the county is not available where such payments are unauthorized.[24] Actions against a sheriff for an accounting for fees will be dismissed where the emoluments of his office do not exceed the allowance of amounts to which he is entitled as credits.[25] An action to compel accounting by the sheriff to the county must be prosecuted by the county as party plaintiff,[26] and not by a taxpayer,[27] unless the proper county officers refuse to prosecute.[28] General rules govern with respect to evidence in actions to require a sheriff to account.[29]

SHERIFFWICK. The jurisdiction of the sheriff, called in modern law the "bailiwick"; also the office of a sheriff.[1]

SHERMAN ANTI-TRUST ACT. See Monopolies §§ 17–25.

SHEWAGE. See Scavage or Shewage 78 C.J.S. p 589 note 41.

SHEWER. In the practice of the English high court, when a view by a jury is ordered, persons are named by the court to show the property to be viewed, and are hence called "shewers." There is usually a shewer on behalf of each party.[2]

SHIELD. To cover from danger with or as with a shield; protect from injury, assault, or punishment; as, to shield the guilty.[3] It has been held synonymous with "conserve" see 15 C.J.S. p 984 note 18.1, and "protect" see 73 C.J.S. p 263 note 12.

SHIFT. The noun "shift" is defined generally as meaning change; alteration or variation in kind, character, place, position, direction, or the like; the substitution of one thing, kind, position, direction, or the like, for another.[4] The term is sometimes used to indicate a set of workmen who work in turn with other sets,[5] and also the time during which a particular set of men works.[6]

As a verb, "shift," in its ordinary use, means to change;[7] to displace or be displaced; to move around.[8]

"Shifting" in railroad terminology is the cutting out and putting in cars of in the making up of a train before it is dispatched on its journey as stated in Railroads § 1 r.

Phrases employing the term in its various forms are set out in the note.[9]

clerks, should be credited to him—State ex rel Doty v. Styke, supra.

19. Ark—Magee v State, 54 S.W 2d 984, 186 Ark 1013.

Automobile license fees
A sheriff was properly given credit on his second year's salary for automobile license fees retained on settlement for first year, in which he collected them—Magee v. State, supra.

20. Ark.—Magee v State, supra.

21. Ark.—Baker v. State to Use of Independence County, 197 S W.2d 759, 210 Ark 690.

Refusal to comply with salary act
Ark—Baker v. State, supra

22. Mich—Cass County v Shattuck, 285 N W. 454, 288 Mich. 555.

23. Mich.—Cass County v Shattuck, supra

24. N J.—Passaic County v Manly, 186 A. 33, 14 N.J.Misc 509.

Payments to lawyer employed without authority
N J—Passaic County v Manly, supra.

25. Tenn—State ex rel Doty v. Styke, 199 S.W 2d 468, 29 Tenn App 620

26. Cal—Keith v Hammel, 154 P. 871, 29 Cal App 131.

District or prosecuting attorney may bring the action without an order of the county court directing him to do so—State v Pollard, 286 S W 811, 171 Ark. 607.

27. Cal—Keith v. Hammel, 154 P 871, 29 Cal.App 131.

28. Cal.—Keith v. Hammel, supra.

29. **Evidence held sufficient**
To sustain a decree requiring sheriff to pay county amounts surcharged against his accounts.—Baker v State, to Use of Independence County, 197 S.W 2d 759, 210 Ark. 690.

1. Black L.D.

2. Black L D.

3. New Standard D.

4. Century D

5. Mont—Johnson v Butte, etc, Copper Co, 108 P 1057, 1060, 41 Mont 158, 48 L R A,N S, 938.

6. Mont—Johnson v Butte, etc, Copper Co, supra

7. Ind—Cunningham v Hoff, 20 N. E 756, 757, 118 Ind. 263.

To change place
Eng—Phœnix Assur. Co v. Letellier, 40 Que K B 254, 258

8. Eng—Phœnix Assur. Co. v. Letellier, supra
57 C J. p 1144 note 32.

9. **Phrases**
(1) "Shifted land warrant" see Public Lands § 240.

(2) "Shifting future interest" see Estates § 120.

(3) "Shifting inheritance" see Descent and Distribution §§ 24, 35 a

(4) "Shifting of burden of proof" see Criminal Law §§ 566, 573, and Evidence § 104 a.

SHIFTER. A lever used to move belts from fixed to loose pulleys, or vice versa.[10]

SHIM. As a railroad term see Railroads § 1 r.

SHINGLE. In the works of modern lexicographers,[11] the word "shingle" is defined as meaning an oblong piece of wood, thinner at one end than at the other, used instead of slates or tiles for covering roofs;[12] a piece of wood sawed or rived thin and small, with one end thinner than the other, for covering roofs, etc., the thick ends of one row overlapping the thin ends of the next;[13] a thin piece of wood, having parallel sides and being thicker at one end than the other, used like a tile or a slate in covering the sides and roofs of houses;[14] a thin piece of wood, usually eighteen inches long and four or more wide, half an inch thick at one end, and tapering to less than an eighth of an inch at the other end, used like a tile or slate in covering roofs and sometimes the sides of buildings, the thick ends of one course lapping over the thin ends of the rows next below;[15] a wooden tile.[16] The word is said to import a manufacture of wood;[17] and hence not to be a generic term so as to include any article which could be used as a roof covering and which might arbitrarily be called a certain kind of shingle.[18]

SHINGLES. A term medically defined as "Herpes Zoster."[19]

SHINNEY or SHINNY. In certain localities another name for home-made intoxicating whisky as stated in Intoxicating Liquors § 13. Judicial notice of the meaning of the term see Criminal Law §§ 535, 537.

SHINPLASTERS. Certain bills and notes, so called because they were for a small sum of money; also commonly denominated "change tickets."[20]

SHIP.

As a noun. The noun "ship" is defined generally in Collision § 2 a.

As a verb. The primary idea of the verb "to ship"[21] is to put for transport aboard a vessel;[22] to place on board a ship or vessel for transportation,[23] and, advancing on this, it has come to express the idea of to convey by ship or water;[24] to send by water.[25] However, the word is not confined to transportation in a vessel, or to transportation by water, but may have reference to any conveyance,[26] or to transportation by land, water, or both,[27] since common usage has long sanctioned its use in connection with shipment by rail, by air, or by truck.[28]

(5) "Shifting risk," "shifting location," as used in fire insurance law, see Insurance §§ 321, 322.

(6) "Shifting stock of merchandise" see Merchandise 57 C.J.S. p 1060 note 94.

(7) "Shifting trust" defined see the C.J.S. title Trusts § 21, also 65 C.J. p 230 note 48.

(8) "Shifting use" defined see Estates § 120 d. See also the C.J.S. titles Deeds § 113, and Wills § 919, also 69 C.J. p 589 notes 18–22.

(9) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 1143 note 28, p 1144 notes 33–36, 41, 58–61, 63–65.

10. Iowa—Young v. Burlington Wire Mattress Co., 44 N.W. 693, 694, 79 Iowa 415.

Phrases as to which more recent adjudications have not been found see 57 C.J. p 1145 note 69

11. U.S.—Hampton v. U. S., 12 Ct. Cust. App. 490, 493, 494.

12. U.S.—Hampton v. U. S., supra

Phrases

(1) "Asbestos shingles" see the definition Asbestos.

(2) "Shingle sawdust" see 78 C.J.S. p 585 note 61

(3) "Shingle shavings" see ante p 142 note 16.

(4) Other phrases as to which more recent adjudications have not been found see 57 C.J. p 1145 notes 96, 97, p 1146 notes 5–7.

13. U.S.—Hampton v. U. S., 12 Ct. Cust. App. 490, 493, 494, 495.

14. U.S.—Hampton v. U. S., supra 57 C.J. p 1145 note 85.

15. U.S.—Hampton v. U. S., supra

In computation, a width of four inches is considered one shingle—Hampton v. U. S., supra

Shingles are laid with one third of their lengths to the weather, and are usually eighteen inches long, and so have six inches of margin—Hampton v. U. S., supra—57 C.J. p 1145 note 89 [a] (6).

16. U.S.—Hampton v. U. S., supra

17. U.S.—Hampton v. U. S., supra 57 C.J. p 1145 note 90.

18. U.S.—Hampton v. U. S., supra 57 C.J. p 1145 note 92

19. La.—Glover v. Fidelity & Casualty Co., App., 10 So. 2d 255, 257. "Herpes Zoster" see 39 C.J.S. p 897 notes 70, 71.

20. Ark.—Martin-Alexander Lumber Co. v. Johnson, 66 S.W. 924, 925, 70 Ark. 215.

21. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 526—Chicago, R. I. & P. R. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630.

22. U.S.—Chicago, R. I. & P. R. Co. v. Petroleum Refining Co., supra.

23. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 526.

Similarly stated

To put or receive on board a ship or other vessel for transportation—Bird v. State, 175 S.W. 554, 557, 131 Tenn. 518, Ann. Cas. 1917A 634.

24. U.S.—Chicago, R. I. & P. R. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630.

25. Tenn.—Bird v. State, 175 S.W. 554, 557, 131 Tenn. 518, Ann. Cas. 1917A 634

26. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 526

Tenn.—Bird v. State, 175 S.W. 554, 556, 131 Tenn. 518, Ann. Cas. 1917A 634.

27. Ohio—State v. Bayer, 112 N.E. 197, 198, 93 Ohio St. 72.

In its commercial sense, the word "ship" means the delivery of goods to a common carrier for transportation, whether by land or water, or both, and does not include the subsequent carriage of the goods—State v. Bayer, supra.

28. U.S.—Lenroot v. Western Union Tel. Co., D.C.N.Y., 52 F.Supp. 142, 149.

Similarly stated

Finally it has come to mean, ac-

Thus the ordinary meaning of the term is to load for transportation;[29] to put on board the vehicle which is to transport;[30] to commit to any conveyance for transportation;[31] to deliver for shipment.[32]

The word "ship" is commonly used to signify the act of delivering to a carrier for shipment,[33] and ordinarily means to deliver to a carrier for transportation;[34] to deliver to a common carrier, forwarder, express company, etc., for tranportation, whether by land or water or both.[35] It generally expresses the idea of goods delivered to carriers for the purpose of being transported from one place to another,[36] and this signification is given the term by lexicographers generally,[37] and the adjudicated cases are in general accord on the question.[38]

It has been said that the word "ship" is susceptible of meaning to carry or transport, but that is neither its primary nor ordinary meaning.[39]

The term "ship" is sometimes defined to mean to send away; to get rid of;[40] and it may be employed in the sense of to receive and carry.[41]

"Ship" has been held equivalent to, or synonymous with, "bill" see 10 C.J.S. p 386 note 20, "carry" see 13 C.J.S. p 1763 note 14, "convey" see 18 C.J.S. p 87 note 40, and "transport."[42]

Shipped. Although the verb "shipped" is derived from the noun "ship," its connotation is not necessarily limited to transportation by water,[43] and the word is frequently used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, over land as well as over water.[44]

The word "shipped" is defined as meaning put on board;[45] and in common maritime and mercantile usage, it means placed on board of a vessel, for the purchaser or consignee, to be transported at his risk.[46] It has been said that the word "shipped," according to its natural and ordinary meaning and signification,[47] as well as its meaning in the mercantile community,[48] has reference to the putting of goods on board a vessel and taking a bill of lading therefor;[49] and, with reference to transportation by land, it implies a completed act, irrespective of the time or mode of transportation.[50] The term implies a past fact, in the sense of "placed," "separated," or "set apart,"[51] but it is sometimes defined as mean-

cording to common use, to send by an established mode of transportation, as to ship goods by rail or express —Chicago, R. I. & P. R. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 631—57 C.J. p. 1150 note 97

29. Iowa —State v. Carson, 126 N.W. 698, 699, 147 Iowa 561, 140 Am.S.R. 330.

30. U.S.—U. S. v. Alaska Cons. Canneries, D.C.Wash., 2 F.2d 614, 616

31. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 526
Tenn.—Bird v. State, 175 S.W. 554, 556, 131 Tenn. 518, Ann.Cas.1917A. 634.

32. La.—State v. Lieber, 78 So. 431, 432, 143 La. 158.
57 C.J. p. 1150 note 90.

33. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 526
Change of custody implied
Tenn.—Bird v. State, 175 S.W. 554, 556, 131 Tenn. 518, 527, Ann.Cas. 1917A. 634.
57 C.J. p. 1150 note 89 [a]

34. N.M.—State v. Martinez, 149 P. 2d 124, 125, 126, 48 N.M. 232.

35. La.—State v. Lieber, 78 So. 431, 432, 143 La. 158.
Ordinarily applies to transportation by common carrier.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527.

36. U.S.—Arnold v. U. S., supra.
Iowa.—State v. Carson, 126 N.W. 698, 699, 147 Iowa 561, 140 Am.S.R. 330.

37. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527.
Iowa.—State v. Carson, 126 N.W. 698, 699, 147 Iowa 561, 140 Am.S.R. 330.
Law dictionaries give substantially the same meaning
U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527.
Iowa.—State v. Carson, 126 N.W. 698, 699, 147 Iowa 561, 140 Am.S.R. 330

38. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527.
Iowa.—State v. Carson, 126 N.W. 698, 699, 147 Iowa 561, 140 Am.S.R. 330

39. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527.

40. Tenn.—Bird v. State, 175 S.W. 554, 557, 131 Tenn. 518, Ann.Cas. 1917A. 634.

41. Ind.—Louisville, etc., R. Co. v. Godman, 4 N.E. 163, 165, 104 Ind. 490
57 C.J. p. 1150 note 3.

42. U.S.—Lenroot v. Western Union Tel. Co., D.C.N.Y., 52 F.Supp. 142, 149.
57 C.J. p. 1150 note 98

43. U.S.—Lenroot v. Western Union Tel. Co., supra.

44. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 631
Ind.—Horner v. Dailey, 133 N.E. 585, 587, 77 Ind.App. 378
Mont.—Clark v. Lindsay, 47 P. 102, 103, 19 Mont. 1, 61 Am.S.R. 479.
N.M.—State v. Martinez, 149 P.2d 124, 125, 48 N.M. 232.
N.Y.—Ledon v. Havemeyer, 24 N.E. 297, 299, 121 N.Y. 179, 8 L.R.A. 245.

The same signification has uniformly been given to the term by lexicographers when applied to transportation either by land or water.—Ledon v. Havemeyer, supra.

45. U.S.—Lamborn v. Log Cabin Products Co., D.C.Minn., 291 F. 435, 438
57 C.J. p. 1151 note 25

46. Mass.—Fisher v. Minot, 10 Gray 260, 262.
N.Y.—Ledon v. Havemeyer, 24 N.E. 297, 299, 121 N.Y. 179, 8 L.R.A. 245.
Such a delivery is a constructive delivery to the purchaser
Mass.—Fisher v. Minot, 10 Gray 260, 262.
N.Y.—Ledon v. Havemeyer, 24 N.E. 297, 299, 121 N.Y. 179, 8 L.R.A. 245

47. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527
57 C.J. p. 1150 note 20

48. N.Y.—Ledon v. Havemeyer, 24 N.E. 297, 299, 121 N.Y. 179, 8 L.R.A. 245.

49. U.S.—Arnold v. U. S., C.C.A.Mo., 115 F.2d 523, 527
57 C.J. p. 1151 note 27.

50. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 631.
Ind.—Horner v. Dailey, 133 N.E. 585, 587, 77 Ind.App. 378.
Mont.—Clark v. Lindsay, 47 P. 102, 103, 19 Mont. 1, 61 Am.S.R. 479
N.Y.—Ledon v. Havemeyer, 24 N.E. 297, 299, 121 N.Y. 179, 8 L.R.A. 245.

51. Mass.—Fisher v. Minot, 10 Gray 260, 262.

ing to load for transportation.[52]

Shipping. The present participle and verbal noun of "ship."[53]

The word "shipping" is defined in a nautical sense as meaning ships of all kinds, or of some particular kind, collectively; the body of vessels belonging to a country or port; also, tonnage.[54] In this connection see the title Shipping which treats the building, regulation, ownership, and employment of vessels of every kind; rights of property therein; rights, duties, and liabilities of owners, mortgagees, charterers, and masters of vessels in general; and rights and liabilities of shippers and consignees of goods and of passengers, so far as they are peculiar to transportation by water.

As used in commerce, the word "shipping" means the act or business of delivering to a common carrier for tranportation, or of forwarding;[55] and the term, as used among shippers and wharfingers, means putting the cargo into a vessel, either with or without the intervention of the wharf.[56]

"Shipping" has been distinguished from "landing" see 51 C.J.S. p 487 note 88.

Phrases employing various forms of the term are set out in the note.[57]

SHIPBUILDING. Naval architecture or construction; the art of constructing ships and other vessels.[58]

SHIPMASTER. The captain or master of a merchant ship, appointed and put in command by the owner, and having general control of the vessel and cargo, with power to bind the owner by his lawful acts and engagements in the management of the ship.[59]

SHIPMENT. Although the word "shipment" is said to have a well-established,[60] well-understood ordinary,[61] meaning, and a uniform signification,[62] the term, in fact, is used to indicate property which is the subject of transportation as well as the transportation itself,[63] and it is treated in these two senses in the following paragraphs.

The word "shipment" is generally used to express the idea of goods delivered to carriers for the purpose of being transported from one place to an-

52. Iowa—State v. Carson, 126 N W 698, 699, 147 Iowa 561, 140 Am S.R. 330.

53. Webster New Int D.

54. New Standard D.

55. New Standard D.

56. Ga—Robertson v Wilder, 69 Ga 340, 345.

Where a cargo is transferred from one vessel into another, both lying abreast at the same wharf, there is both a "landing" and a "shipping."—Robertson v. Wilder, supra.

57. **Phrases**

(1) "Cause to be shipped" ordinarily applies to transportation by common carrier—Arnold v. U. S, C. C.A Mo., 115 F.2d 523, 527.

(2) "Ship broker" consult title index to Brokers.

(3) "Ship carpenter or builder" defined generally see 12 C J S p 1151 note 95; as a seaman or sailor see Seamen §§ 1, 2

(4) "Ship carpentry" see 12 C.J S p 1152 note 1

(5) "Ship chandler" defined as one who deals in cordage, canvas, and other furniture of ships—Weaver v. The S G. Owens, C.C Pa, 29 F Cas. No.17,310, 1 Wall Jr. 359

(6) "Ship channel" defined generally see Collision § 2 a; as used in statute relating to municipal boundary see Municipal Corporations § 39

(7) "Ship keeper" see 51 C.J.S. p 428 note 71.

(8) "Ship receipt" see 75 C J S. p 642 note 74.

(9) "Ship timber" is, among those who deal in the article, a term which has a somewhat definite meaning, as much so as "cord wood," "merchantable boards," or the like—Pillsbury v. Locke, 33 N H. 96, 102, 66 Am D. 711.

(10) "Shipping articles" see Seamen §§ 18–21.

(11) "Shipping asparagus" is of the same quality as "bunch asparagus," but it may be either loose pack or tied in bunches—Rothstein v Edwards, C C A Cal, 94 F 2d 488, 490

(12) "Shipping business" see 12 C. J S p 781 notes 19–22

(13) "Shipping commissioner" see Seamen §§ 243–249.

(14) "Shipping cotton" see 20 C J. S. p 713 note 39.

(15) "Shipping directions," duty of carrier to follow, see Carriers § 44.

(16) "Shipping fever" see Fever, 36 C J S. p 735.

(17) "Shipping price" see 72 C.J.S. p 499 note 16.

(18) "Ship's bill" defined see Shipping § 111.

(19) "Ship's company" see Seamen § 3.

(20) "Ship's husband" see Shipping § 17.

(21) "Ship's sweat" defined as excessive moisture in the hold of a ship which condenses into water unless the air is frequently changed.—The Rita Sister, D C Pa., 69 F Supp. 480, 481.

(22) "To ship by" means to put on board, and does not include the subsequent carriage—Arnold v U S, C C A Mo, 115 F 2d 523, 527—57 C J p 1150 note 17 [a]

(23) Other phrases employing the term and as to which more recent adjudications have not been found see 57 C J p 1148 note 50–p 1149 note 73, p 1150 notes 5–17, p 1151 notes 32–42, p 1153 notes 3–10.

58. Webster New Int D.
Shipbuilding contracts as subject to admiralty jurisdiction see Admiralty § 38

59. Black L D.
See Shipping §§ 57–71.

60. U S—Lamborn v. Log Cabin Products Co, D C Minn., 291 F 435, 439.

61. Cal—Young v. Flickinger, 242 P. 516, 517, 75 Cal App 171.

62. Mont—Clark v Lindsay, 47 P. 102, 103, 19 Mont. 1, 61 Am S.R. 479.

63. U S—Pennsylvania R. Co. v. Carolina Portland Cement Co., C C. A S C, 16 F.2d 760, 761

Phrases as to which more recent adjudications have not been found see 57 C.J p 1155 note 72–p 1156 note 96, p 1156 notes 10–17.

other,[64] over land as well as water,[65] and it has been said that such signification is given the word by lexicographers generally[66] as well as by law dictionaries,[67] and that the adjudicated cases are in general accord on the question.[68]

"Shipment" is defined as meaning the act or process of shipping;[69] the act of dispatching or shipping;[70] the act or process of dispatching goods by vessel or other means of transportation;[71] the act of shipping anything,[72] the act or process of having goods transported to a designated place;[73] the act of dispatching or delivery on board of a carrier.[74]

In terms of "delivery," the word "shipment" is defined as meaning delivery of goods to a carrier for transportation;[75] delivery of goods to a forwarding agent for conveyance by means of an established channel of transportation;[76] delivery on board.[77]

Although the word "shipment" is applicable especially to the putting of goods or passengers on board ship for transportation by water,[78] and is sometimes defined as meaning loaded on board ship,[79] the act of shipping or putting on board a ship,[80] the act of putting anything on board of a ship or other vessel,[81] the same signification is given the term by lexicographers when applied to transportation either by land or by water.[82]

"Shipment" also means to take on,[83] and this is said to be the ordinary meaning when used in connection with transportation by vessel[84]

It has been said supra p 560 note 63 that the word "shipment" may be used to include the property which is the subject of transportation, as well as the transportation itself, and in terms of property which is the subject of transportation the word "shipment" is defined as meaning that which is shipped,[85] as a shipment of cattle;[86] a consignment;[87] a consignment of goods delivered for transportation,[88] a consignment as delivered by a railroad company;[89] a quantity of goods delivered at one time for transportation, whether by sea or by land.[90]

64. U S —Arnold v U S, C.C A Mo, 115 F 2d 523, 527—Chicago, R I & P Ry Co. v. Petroleum Refining Co, D C Ky, 39 F 2d 629, 631.
Iowa —State v. Carson, 126 N W 698, 699, 147 Iowa 561, 140 Am S R 330
Mont —Clark v. Lindsay, 47 P 102, 103, 19 Mont 1, 61 Am S R 479
N M —State v Martinez, 149 P 2d 124, 125, 48 N.M. 232
N Y —Ledon v Havemeyer, 24 N E 297, 299, 121 N Y 179, 8 L R A 245.
57 C J p 1155 note 69

65. N M —State v Martinez, 149 P 2d 124, 125, 48 N.M 232
57 C J. p 1155 note 70

66. U S.—Arnold v. U S, C C A Mo., 115 F 2d 523, 527
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67. U S —Arnold v. U. S, C C A Mo, 115 F 2d 523, 527
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68. U.S —Arnold v U S, C C A Mo, 115 F.2d 523, 527.
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69. Me —State v Chadbourne, 164 A. 630, 631, 132 Me. 5

70. Mont —Clark v. Lindsay, 47 P 102, 103, 19 Mont 1, 61 Am S R 479

71. Me —State v Chadbourne, 164 A 630, 631, 132 Me. 5.

72. N Y —National Blouse Corp v Felson, 79 N Y S 2d 765, 767, 274 App Div. 164

73. U S —Chicago, R I & P R Co v. Petroleum Refining Co., D.C Ky., 39 F 2d 629, 631.

74. U S —Campbell River Mills Co v Chicago, M & St P R Co, D C. Wash, 42 F 2d 775, 777.

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The act of delivering to a common carrier for transportation or forwarding —Bentley v. Levy, 61 Que. Super. 322, 324

75. Me —State v Chadbourne, 164 A 630, 631, 132 Me 5

76. U S —Chicago, R I & P R Co. v Petroleum Refining Co., D C Ky., 39 F 2d 629, 631.

77. Mass —Fisher v Minot, 10 Gray 260, 262.

78. Mont —Clark v Lindsay, 47 P 102, 103, 19 Mont 1, 61 Am S R 479

79. U S —Lamborn v Log Cabin Products Co, D C Minn, 291 F 435, 439.
57 C J p 1154 note 43

80. N Y —Ledon v Havemeyer, 24 N E 297, 299, 121 N Y 179, 8 L R A 245
57 C J p 1154 note 40

81. N Y.—Ledon v. Havemeyer, supra

82. N.Y.—Ledon v Havemeyer, supra.

83. U S —Lamborn v Log Cabin Products Co, D C Minn, 291 F. 435, 439

84. U S —Lamborn v Log Cabin Products Co, supra

85. U S.—Chicago, R I. & P. R Co v Petroleum Refining Co, D C Ky, 39 F 2d 629, 631.
N Y —National Blouse Corp v Felson, 79 N Y S 2d 765, 767, 274 App Div 164

"If any of its synonyms are substituted for the word 'shipped' in this definition, we have, 'That which is carried,' or 'That which is conveyed,' or 'that which is transported,' or 'That which is borne' It is impossible for one thinking straight, to substitute therefor the words 'pulled' or 'drawn,' so as to have, 'That which is pulled,' or 'That which is drawn' "—Chicago, R I & P. R. Co v Petroleum Refining Co, D C Ky, 39 F 2d 629, 631

86. N Y —National Blouse Corp v. Felson, 79 N Y S 2d 765, 767, 274 App Div 164

The example given of a shipment of cattle, following mention of "consignment" as a synonym, indicates that each animal was not considered as a separate shipment, but that a consignment of a number of cattle pursuant to one contract or shipping document is deemed to be a shipment —National Blouse Corp v. Felson, supra

87. U S —Chicago, R I & P. R Co. v. Petroleum Refining Co, D C Ky, 39 F 2d 629, 631.
N Y —National Blouse Corp v Felson, 79 N Y S 2d 765, 767, 274 App. Div 164.

88. U S —Chicago, R I & P R Co. v Petroleum Refining Co., D C Ky., 39 F 2d 629, 631

89. Pa —Pennsylvania R Co. v Kittanning Iron, etc, Mfg Co., 106 A. 207, 208, 263 Pa. 205
57 C J p 1156 note 3

90. Mont —Clark v Lindsay, 47 P 102, 103, 19 Mont 1, 61 Am S R 479.

The statement has been frequently made that, with respect to carriage by land, the word "shipment" implies a completed act, irrespective of the time or mode of transportation.[91] Other statements to the same effect, but without being restricted to carriage by land, have been made, and thus it has been said that loading, alone, is not shipment.[92] Shipment consists in the complete delivery of goods by the shipper to a carrier for transportation,[93] and the shipment is not made until the shipper has parted with all control over the goods and nothing remains to be done by him to complete the delivery,[94] and the term means that the goods have been delivered to the carrier and his bill of lading issued therefor.[95] However, the word "shipment" does include the whole movement of the goods,[96] and does not refer to the departure of the vehicle of transportation[97] or the clearance of the vessel,[98] and it does not mean that the goods are to be transported by a certain day.[99]

"Shipment" has been held synonymous with "order" see 67 C.J.S. p 520 note 64, and it has been distinguished from "delivery" see 26 C J.S. p 697 note 59.2, and "transportation."[1]

SHIPPER. One who ships goods; broadly, one who sends goods by any form of conveyance.[2] It has been distinguished from "dealer" see 25 C J.S. p 1043 note 9.

References to the term "shipper" in connection with the carriage of goods by land are made in the title index to Carriers. Remedies of shippers against carriers by water for damages arising out of breach of the duty to transport and deliver goods are discussed in Shipping § 124.

The regulation of shippers by the interstate commerce commission is treated in Commerce § 142 b.

91. N.Y.—Ledon v. Havemeyer, 24 N E 297, 299, 121 N Y. 179, 8 L R A 245.
57 C J. p 1155 note 71.

92. Ill.—National Importing, etc, Co v. Bear, 155 N.E. 343, 346, 324 Ill 346.

93. Ill.—National Importing, etc, Co v Bear, supra.
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94. Ill.—National Importing, etc, Co v. Bear, 155 N E 343, 346, 324 Ill. 346
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Delivery in installments

Where goods to be shipped are delivered to a carrier in installments, the shipment is not made until the delivery is complete, and until such time the relation of the carrier to the installments delivered is that of warehouseman and not carrier.—National Importing, etc, Co v. Bear, 155 N E 343, 346, 324 Ill. 346

95. N.Y.—National Blouse Corp v Felson, 79 N Y S 2d 765, 767, 274 App Div. 164—Goldenberg v. Cutler, 178 N.Y S 522, 523, 189 App Div 489.

The term "shipment" is closer akin to the idea of a consignment of goods for which a shipping document has been issued than it is to the kind of property or the manner in which it has been packaged.—National Blouse Corp v. Felson, 79 N Y S 2d 765, 767, 274 App Div. 164

96. Ohio.—State v Bayer, 112 N E 197, 198, 93 Ohio St 72.
57 C.J. p 1154 note 62.

97. Mont.—Clark v Lindsay, 47 P 102, 103, 19 Mont 1, 61 Am S R 479

98. U S.—Bank of Taiwan v. Union Nat Bank of Philadelphia, C C A. Pa, 1 F 2d 65, 67
57 C J p 1154 note 59.

99. U S.—Bank of Taiwan v Union Nat Bank of Philadelphia, supra.
57 C J p 1154 note 61

1. U S.—Pennsylvania R Co v Carolina Portland Cement Co, C C. A S C, 16 F 2d 760, 761.
57 C J p 1154 note 53.

2. Webster New Int.D.

Phrases as to which more recent adjudications have not been found see 57 C J p 1157 notes 26–34.

SHIPPING

This Title includes the building, regulation, ownership, and employment of vessels of every kind; rights of property therein; rights, duties, and liabilities of owners, mortgagees, charterers, and masters of vessels in general; and rights and liabilities of shippers and consignees of goods and of passengers, so far as the same are peculiar to transportation by water.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. NATIONALITY OF VESSEL AND REGULATION

§ 1. National Character of Vessel

In general the ownership of a vessel determines its national character, and the sale of an American vessel to an alien results in a loss or divestiture of nationality.

In general the ownership of a vessel determines its national character.[1] The fact that a vessel is not a "vessel of the United States" within the meaning of the registry and enrollment laws does not prevent her being an American vessel where her owner is a citizen of the United States,[2] and the nationality of a vessel not duly registered is that of her owner.[3]

Loss of nationality. A sale of an American vessel to a citizen of the United States does not result in a loss or divestiture of nationality.[4] On the other hand, a sale of a vessel to an alien results in a loss or divestiture of nationality,[5] as, for example, a sale in a foreign jurisdiction under admiralty process.[6]

Evidence. While it has been laid down in general terms that the documents a vessel carries furnish the only evidence of nationality,[7] it has been

1. U.S.—The Alta, Wash., 136 F. 513, 69 C.C.A. 289
58 C.J p 30 note 2.

2. U.S.—The Alta, supra.

3. U.S.—The Chiquita, C.C.A.La., 19 F.2d 417

4. Me.—Chadwick v. Baker, 54 Me. 9.

5. Me.—Chadwick v. Baker, supra

6. U.S.—The Chiquita, C.C.A.La., 19 F.2d 417.
58 C.J p 30 note 7.

7. U.S.—The Merritt, Wis., 17 Wall. 582, 21 L.Ed. 682.

held that the ownership of a vessel, as determining her nationality, may be proved in the same manner as that of any other chattel.[8] A certificate of registry under the laws of the United States and proof that the vessel carries the American flag are prima facie sufficient to establish her nationality, without direct proof of the citizenship of her owners;[9] but the register of a vessel, while proper evidence of nationality, is not necessarily indispensable, and the flag and ownership of the vessel may be proved by parol or by any other competent evidence.[10] It has been stated as a general rule that the flag under which a merchant ship sails is prima facie proof of her nationality.[11]

The national character of a vessel, as determined by ownership, is presumed to continue until a change is shown to have occurred,[12] and the burden of proving a change is on the party who relies on such change.[13] In order to show loss of nationality of an American vessel by a sale abroad it must appear that she was sold to a foreigner.[14]

§ 2. Regulation in General

A sovereign has power to regulate the vessels under its flag on the high seas, and accordingly congress has the power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign. A vessel subject to regulation includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water.

The power of a sovereign to regulate the vessels under its flag on the high seas[15] and the conduct of its citizens while on such vessels[16] has been asserted. However, a private ship is subject to the laws of the country visited, in the absence of treaties to the contrary,[17] and the jurisdiction of a country over a ship flying its flag partakes more of the characteristics of personal than of territorial sovereignty, and has little application in foreign territorial waters beyond what is affirmatively or tacitly permitted by the local sovereign.[18] In accordance with the foregoing rules, congress has the power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign,[19] and congress also has power to regulate matters affecting foreign vessels when within the ports of the United States, by making their entrance subject to such conditions as it may impose, or wholly withdrawing its consent to permit them to enter.[20] The operation of vessels in intra-state commerce may be subject to state regulation.[21]

The subject of shipping is largely regulated by the Shipping Act of 1916, and amendments thereto, 46 U S C A. § 801 et seq, which is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land,[22] and in view of the fact that the

8. U S—U S v Jenkins, C C N Y, 26 F Cas No 15,473
58 C J p 30 note 10.

9. U S—St Clair v U S, Cal, 14 S Ct 1002, 154 U S 134, 38 L Ed 936

10. U S—U S v Seagrist, C C N Y, 27 F Cas No 16,245, 4 Blatchf 420
16 C J. p 170 note 20 [a]

11. U S—The Chiquita, C.C A La, 19 F 2d 417

12. U.S—U S v. Gordon, C C N Y, 25 F Cas No 15,231, 5 Blatchf. 18

13. U S—U S v Gordon, supra

14. U.S—U S v Gordon, supra

15. U S—Cunard S S Co v Mellon, N.Y, 43 S Ct 504, 262 U S. 100, 67 L Ed. 894, 27 A.L R. 1306.
58 C.J p 31 note 17.

Subjection to laws and treaties

(1) Vessels generally are subject to jurisdiction and laws of country whose flag they fly—**Corpus Juris cited in** Delany v Moraitis, C.C A Md, 136 F 2d 129, 133—The Navemar, C C.A.N Y., 90 F 2d 673, reversed on other grounds 58 S Ct 432, 303 U S. 68, 82 L Ed 667—25 C J. p 319 note 58.

(2) Vessels on high seas are subject to laws of their own country and to treaties made by sovereign or government of their country—The Pictonian, D C N Y, 3 F 2d 145, reversed on other grounds, C C A, 20 F 2d 353

Allegiance to United States

American ship on high seas retains her allegiance to sovereignty of United States—The Underwriter, C C A Conn, 13 F 2d 433, affirmed Maul v U S, 47 S Ct 735, 274 U.S. 501, 71 L Ed 1171.

16. U S—Wilson v McNamee, N Y, 102 U S 572, 26 L Ed 234—U S v Bowman, D C N Y, 287 F. 588, reversed on other grounds 43 S Ct 39, 260 U S 94, 67 L.Ed. 149

17. Tex—Ex parte Ponzi, 290 S W 170, 106 Tex Cr. 58.

18. U S—Cunard S. S Co v. Mellon, N Y., 43 S Ct. 504, 262 U S. 100, 67 L Ed 894, 27 A L R. 1306.

Law regulating loading

British law that ship shall not be loaded so as to submerge load-line mark has been held inapplicable to British vessel on voyage from New York to South American ports—The Vestris, D C N Y, 53 F 2d 847.

19. U S.—Cunard S S. Co. v. Mellon, N.Y, 43 S Ct 504, 262 U S. 100, 67 L Ed 894, 27 A L R 1306

20. U.S—The Ester, D C S C, 190 F. 216

21. Wash—State v Department of Public Works, 297 P. 795, 161 Wash 622

Competing operators for through traffic

Certificate permitting steamboat service between stated points, contemplating calls at intermediate points, empowered carrier to carry through traffic, hence operators of steamboat service partly over same route were "competing" operators for through traffic within state public service law, even though one made intermediate calls—State v. Department of Public Works, supra.

Determination of controversy between operators

On petition of certificate holder for permission to improve steamboat service and protest of competing carrier, state department could determine controversy as though protest were complaint.—State v. Department of Public Works, supra.

22. U S—Inter-Island Steam Nav. Co. v. Territory of Hawaii by Pub-

Shipping Act so closely parallels the Interstate Commerce Act in general scope and purpose, and as well as in terms, it manifests an intent that the two acts, each in its own field, should have a like interpretation, application, and effect.[23] A statute providing that a towboat operator operating as a common carrier may not at the same time rent barges indiscriminately except when specially permitted is not invalid.[24] A statute of Hawaii providing for the investigation of public utilities, including water carriers, and for the collection of fees to meet the cost of investigations is valid as to intra-state commerce within the territory of Hawaii.[25]

Federal regulation of motor boats relating to the equipment of such boats and the manner of their operation does not constitute an assertion of exclusive federal jurisdiction with respect to such boats so as to preclude control by the state courts of the use of such boats for picketing in a labor dispute.[26] Under some statutes, with some exceptions, only domestic-built and documented vessels are entitled to participate in coastwise trade, and foreign vessels are excluded therefrom;[27] and vessels are not "owned by persons who are citizens" so as to permit coastwise trade notwithstanding ownership is in a domestic corporation, where a proportion of stock in excess of that specified in the statute is owned or controlled by aliens.[28] Vessels are subject to the scrutiny of the Coast Guard and customs officials within the jurisdiction, without probable cause or search warrant, for any violation of the navigation or other laws.[29]

Vessels subject to regulation. Within the scope of regulations concerning shipping generally, the word "vessel" is defined by federal statute, 1 U.S. C.A. § 3, as including every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water.[30] Generally speaking, "barge" is a word of somewhat comprehensive signification and may

lic Utilities Commission of Hawaii, Hawaii, 59 S Ct 202, 305 U S 306, 83 L Ed. 189—U. S. Navigation Co v. Cunard S S Co, N Y., 52 S Ct 247, 284 U S 474, 76 L Ed 408

23. U S—Inter-Island Steam Nav Co v Territory of Hawaii, by Public Utilities Commission of Hawaii, Hawaii, 59 S Ct. 202, 305 U S 306, 83 L Ed 189—U. S Navigation Co v Cunard S S Co, N Y, 52 S.Ct 247, 284 U S 474, 76 L Ed 408.

24. U S—Portland Tug & Barge Co v U. S., D C Or, 55 F Supp 723

25. U S—Inter-Island Steam Nav Co v Territory of Hawaii, C.C A Hawaii, 96 F 2d 412, affirmed Inter-Island Steam Nav. Co v Territory of Hawaii, by Public Utilities Commission of Hawaii, 59 S Ct 202, 305 U.S 306, 83 L Ed 189.

Fees held not so unreasonable as to be invalid

U S—Inter-Island Steam Nav Co v. Territory of Hawaii, C C A Hawaii, 96 F 2d 412, affirmed Inter-Island Steam Nav. Co. v Territory of Hawaii, by Public Utilities Commission of Hawaii, 59 S.Ct 202, 305 U S. 306, 83 L Ed. 189.

26. Cal.—Oil Workers Intern. Union, CIO v. Superior Court, Contra Costa County, 230 P 2d 71, 103 Cal App 2d 512

27. U S—Central Vermont Transp Co. v. Durning, C.C A N Y, 71 F 2d 273, affirmed 55 S Ct 306, 294 U.S. 33, 79 L Ed. 741

Penalties and forfeitures for engaging in coastwise trade in violation of law see infra § 11.

Validity

Statute prohibiting foreign owned or controlled vessels from engaging in domestic coastwise traffic has been held not violative of federal Constitution as to Canadian controlled steamship line operating on through route recognized by Interstate Commerce Commission, though statute compelled discontinuance of part of line's business—Central Vermont Transp Co v Durning, N Y, 55 S Ct 306, 294 U S 33, 79 L Ed 741

Route established by Interstate Commerce Commission

Statute authorizing Interstate Commerce Commission to establish through routes for rail and water lines did not render statutory prohibition against foreign vessels engaging in coastwise trade inapplicable to vessels operated as part of through route recognized by commission—Central Vermont Transp Co v Durning, N Y, 55 S Ct. 306, 294 U S 33, 79 L Ed 741.

"Between points in the United States"

Under provisions in substance prohibiting the transportation of merchandise, by water, "between points in the United States" in vessels other than vessels built in and documented under laws of the United States and owned by United States citizens, the quoted words refer to definite, fixed, and permanent physical places, points, or locations, and were not intended to include such constantly changing and figurative points or places as United States ships on the high seas and in the territorial waters of other nations—U S v 12536 Gross Tons of Whale Oil Ex The Charles Racine, D C Va, 29 F Supp 262.

Transportation of passengers

The statute prohibiting foreign vessels from transporting passengers between ports in the United States, either directly or by way of a foreign port, under a penalty of a fixed sum of money for each passenger transported, is designed to exclude ships of foreign registry from carrying on coastwise or other domestic traffic by direct or indirect carriage of passengers from one United States port to another—The Granada, D.C. Pa, 35 F Supp. 892.

28. U S.—Central Vermont Transp. Co v. Durning, N Y., 55 S.Ct. 306, 294 U S 33, 79 L Ed. 741.

Indirect ownership

Vessels of steamship line were held not "owned by persons who are citizens" where stock of steamship line, except directors' qualifying shares, was owned by domestic railroad company, whose stock in turn, except qualifying shares, was owned by Canadian corporation—Central Vermont Transp. Co. v Durning, N. Y, 55 S Ct 306, 294 U S. 33, 79 L Ed 741.

29. U.S—U. S. v. Hayes, D.C.N.Y., 52 F 2d 977.

30. N J—Johnson v. C F. Harms Co, 55 A.2d 165, 167, 25 N.J.Misc 457.

Steam tugboat

A foreign-built steam tugboat, used in towing and docking ships, has been held a vessel within the meaning of the statute—U. S v Puerto Rico Coal Co, 17 C.C P.A.(Customs) 288

Seaplane

Seaplane flying through air is not "vessel" within statute defining "vessel" as including every artificial contrivance used or capable of being used for transportation on water—Noakes v Imperial Airways, D C.N. Y., 29 F Supp 412.

cover craft of any kind;[31] and it is a "vessel"[32] within the intendment of the federal statute defining that term.[33] The word "motorboat" as used in a federal regulation concerning shipping includes every vessel propelled by machinery and not more than sixty five feet in length except tugs and towboats propelled by steam.[34] The operator of a motor boat towing a pilotless balloon is bound by the laws and regulations governing the navigation of watercraft.[35]

§ 3. Registry, Enrollment, and License

a. In general
b. Port of registry or enrollment
c. Nature, necessity, purpose, requisites, and effect
d. Reciprocal exchanges

a. In General

The federal statutes providing a system of registry and enrollment of vessels have distinguished between vessels engaged in foreign trade and those engaged in the coasting trade and fisheries and employ the words "register" or "registry" with reference to vessels in the first class and "enroll" or "enrollment" with reference to vessels in the other class.

The federal statutes providing a system of registry and enrollment of vessels have distinguished between vessels engaged in foreign trade and those engaged in the coasting trade and fisheries and employ the words "register" or "registry" with reference to vessels in the first class and "enroll" or "enrollment" with reference to vessels in the other class.[36] It has been broadly held that every vessel of the United States must have a register or an enrollment, the former for foreign trade and the latter for domestic commerce, and without them or without the right one with respect to the trade she is engaged in, or the place where she is found, the vessel is entitled to no protection under the laws of the United States, and is liable to seizure for such violation of law.[37]

"Vessel of the United States." The phrase "vessel of the United States" is made, by the legislation of congress, a legal technical term,[38] and the requirements as to registration, enrollment, or license, a compliance with which entitles a vessel to that designation, have expressly been laid down.[39] By a compliance with such requisites a vessel becomes a "vessel of the United States,"[40] with the resultant privileges and right to protection to which a "vessel of the United States" is entitled,[41] otherwise not.[42] "A vessel of the United States," as defined in the statute, means more than a vessel whose nationality is American.[43]

Liability of officers in respect of registry or enrollment. A collector who wrongfully refuses to re-register a vessel after a sale is not personally liable in damages when his refusal is based on an honest mistake in the construction of the law.[44] After an exchange of a register for an enrollment, in no event has the collector the right to keep both the register and enrollment, and if he does so he is liable for the resulting damage.[45]

b. Port of Registry or Enrollment

Under the federal statutes vessels are required to be registered or enrolled in the collection district which comprehends the port to which they belong.

31. Particular craft
Word "barge" may cover pleasure boats or boats of state, used by officers or magistrates, and a flat-bottomed vessel of burden for loading and unloading of ships.—The Sakito Maru, D.C.Cal., 41 F.Supp. 769, affirmed in part and reversed in part on other grounds, C.C.A., Carr v. Hermosa Amusement Corp., 137 F.2d 983, certiorari denied Hermosa Amusement Corp. v. Carr, 64 S.Ct. 520, 321 U.S. 764, 88 L.Ed. 1060.

32. Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.

33. N.J.—Johnson v. C. F. Harms Co., 55 A.2d 165, 25 N.J.Misc. 457.

34. Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 324, 6 Wash.2d 491.

Vessel propelled by diesel engine
Vessel only sixty-two and two tenths feet in length and propelled by a diesel engine was "motorboat" within statute.—National Grocery Co. v. Olsen, supra.

35. N.Y.—People, on Complaint of McWilliams, v. Harrow, 76 N.Y.S.2d 891, 191 Misc. 216.

36. U.S.—Anderson v. Pacific Coast S.S. Co., 32 S.Ct. 626, 225 U.S. 187, 56 L.Ed. 1047.
58 C.J. p. 31 note 23.

37. U.S.—Badger v. Gutierez, La., 4 S.Ct. 563, 111 U.S. 734, 28 L.Ed. 581.
Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666.

Foreign trade and whale fishery
It clearly appears that the foreign trade and the whale fishery, from a legal standpoint and otherwise, are essentially different employments, and that the intention of congress down through the years has been that the employment of vessels should be indicated by the documents possessed by them.—U. S. v. Western Operating Corp., 35 C.C.P.A.(Customs) 71.

38. Cal.—Davidson v. Gorham, 6 Cal. 343.

Statute held not repealed by Ship Mortgage Act
U.S.—The Lincoln Land, D.C.Mass., 295 F. 358.
58 C.J. p. 31 note 24 [a].

39. Cal.—Davidson v. Gorham, 6 Cal. 343.
N.Y.—Best v. Staple, 61 N.Y. 71.

40. Mich.—Fleming v. Philadelphia Fire Assoc., 110 N.W. 933, 147 Mich. 404.
58 C.J. p. 31 note 27.

41. R.I.—Sprague v. Thurber, 22 A. 1057, 17 R.I. 454.
58 C.J. p. 32 note 29.

42. Mass.—Braga v. Braga, 51 N.E. 2d 429, 314 Mass. 666.
58 C.J. p. 32 note 29.

43. U.S.—The Alta, Wash., 136 F. 513, 69 C.C.A. 289.

44. U.S.—Smith v. Hammond, C.C. Cal., 22 F.Cas.No.13,053.

45. U.S.—Badger v. Gutierez, La., 4 S.Ct. 563, 111 U.S. 734, 28 L.Ed. 581.

Under the federal statutes vessels are required to be registered or enrolled in the collection district which comprehends the port to which they belong, which port is deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides.[46] The term "home port" has been defined as any place or port where the owner happens to be with his vessel,[47] the port at or nearest to which the owner of a vessel, if there is but one, or, if more than one, the managing owner usually resides;[48] the port where the vessel is enrolled[49]

Vessel owned by corporation While there is authority for the view that a corporation may enroll a vessel in a state other than that of its incorporation, where it does business with the vessel in such other state and has an office there,[50] the federal courts have held that, for purposes of registration, the corporation is deemed to reside in the state in which it is incorporated.[51]

Registration in district other than that to which vessel belongs. Provision has been made for registration by the collector of the port where at the time the registry is effected the vessel may be.[52] If, however, a vessel is registered at a port other than that to which she belongs, and she afterward arrives at her home port, she is to be there registered anew, and her former certificate given up.[53] In this connection registers have been classified as either permanent[54] or temporary;[55] but a vessel cannot have more than one register at the same time, the "temporary," being superseded by the "permanent," register.[56]

Evidence. While the port of registry or enrollment is prima facie the home port of a vessel,[57] according to some cases the presumption so arising must be overcome by clear proof before any other port is taken as the home port.[58] This presumption is not, however, conclusive in all cases.[59]

c. Nature, Necessity, Purpose, Requisites, and Effect

(1) Registry
(2) Enrollment, license, and number

(1) Registry

(a) In general
(b) What vessels to be registered, and persons entitled to register
(c) Procedure
(d) Effect of sale or other transfer of vessel
(e) Deposit of register with consul

(a) In General

Registry of a vessel is in the nature of a continuing license entitling the vessel to the protection of the laws of the United States to which a duly registered vessel is entitled while she is engaged in a trade for which registry is required; but registration is not compulsory, it being a privilege and advantage of which the owners may or may not avail themselves as they choose.

Registry under the federal statutes is in the nature of a continuing license,[60] and secures to the owners of the registered vessel the privilege involved as long as the registry continues in force, and no longer.[61] It has been stated in general terms that the registry continues in force only as long as the legal status of the vessel remains unchanged,[62] and that the protection afforded by the registry is lost where the vessel engages in a trade which contravenes the laws of the United States.[63] The registration of vessels is not compulsory, it being a privilege and advantage of which the owners may or may not avail themselves as they choose;[64] but a vessel which is not registered is not entitled to the protection of the laws of the United States, to which a duly registered vessel is entitled while she is engaged in a trade for which registry is required.[65]

46. R I—Sprague v. Thurber, 22 A. 1057, 17 R I 454.
58 C.J p 32 note 32
"Port of documentation" as used in Ship Mortgage Act see infra § 24

47. U.S—The St. Jago de Cuba, Md., 9 Wheat. 409, 6 L Ed. 122.
29 C J. p 769 note 36.

48. U.S—White's Bank v. Smith, N Y., 7 Wall. 646, 19 L Ed 211.
29 C.J p 769 note 37.

49. U S—The Favorite, D C Or., 8 F.Cas.No 4,699, 3 Sawy 405, 411

50. Pa—Moore v. Lincoln Park, etc, Consol. Co., 46 A. 857, 196 Pa. 519.

51. U.S—The Underwriter, D.C.N.Y., 3 F 2d 483—The Susana, C C.A Va., 2 F 2d 410.

52. Me.—Chadwick v Baker, 54 Me 9.

53. Me—Chadwick v. Baker, supra

54. U S—Blanchard v. The Martha Washington, C.C Me, 3 F.Cas.No 1,513, 1 Cliff. 463.
58 C J. p 32 note 38.

55. U S—Blanchard v. The Martha Washington, supra.
58 C J. p 32 note 39.

56. Me.—Chadwick v Baker, 54 Me. 9.
58 C.J. p 32 note 40.

57. U S.—The Jennie B. Gilkey, C.C. Mass, 19 F. 127.

58. U.S.—The Jennie B. Gilkey, supra

59. U.S—The Lotus No 2, D.C.Ala., 26 F 637—The Thomas Fletcher, C C Ga., 24 F 375.

60. Me—Chadwick v. Baker, 54 Me 9

61. Me—Chadwick v. Baker, supra.

62. Me.—Chadwick v. Baker, supra.

63. U.S.—Ford v. Kline, D.C.Fla, 42 F.2d 558

64. U.S.—Gaston v Warner, C C A. N Y., 272 F. 56, affirmed 43 S Ct. 18, 260 U.S 201, 67 L Ed 210
Cal—Davidson v. Gorham, 6 Cal. 343.

65. U S—Badger v Gutierez, La., 4 S Ct 563, 111 U.S. 734, 28 L.Ed. 581.

The registration of a vessel is presumed to meet the requirements of law under which it was granted.[66]

Approval of shipping board to surrender of registry. The statutory provision that any vessel registered under the laws of the United States shall be deemed to continue to be documented under the laws of the United States within the meaning of the statute requiring the approval of the shipping board of the sale, when the United States is at war or during any national emergency, of any vessel documented under the laws of the United States, until such registry is surrendered with the approval of the board, applies only to vessels engaged in commerce or for pleasure,[67] and does not apply to a vessel owned by the United States for the naval service.[68]

Purpose. Among the purposes of the registry laws of the United States and of registration thereunder are: To encourage American enterprise,[69] to give certain advantages to the vessels which are entitled to registry;[70] to declare the nationality of a vessel engaged in trade with foreign nations;[71] to enable such vessel to assert her nationality wherever found;[72] to protect the public revenue against fraud;[73] and to facilitate the collection of certain public dues.[74]

(b) What Vessels To Be Registered, and Persons Entitled to Register

Generally, such vessels only as are within the specific provisions of the federal statute as to registration are entitled to be registered, and under such statutes only citizens of the United States may register their vessels.

Generally, such vessels only as are within the specific provisions of the federal statute as to registration are entitled to be registered.[75] The policy of the law is to assure that at all times vessels shall be registered in the names of their owners.[76] Only citizens of the United States are entitled to have their vessels registered.[77] A domestic corporation has been recognized as a citizen of the United States and, as such, entitled to register a vessel owned by it,[78] notwithstanding some of the corporate stock belongs, directly or indirectly, to aliens.[79] The statutory provisions for the issuance of a register of a vessel owned by a corporation in the name of the president or secretary are permissive and not mandatory.[80]

Wrecked vessel. A vessel wrecked at sea and then brought into the United States is not entitled to an American registry under the statute providing for such registry in the case of vessels wrecked in the United States under certain circumstances where the cost of the repairs equal a certain amount relative to the value of the vessel.[81]

Vessels in military and naval service. By virtue of statute it has been laid down that all vessels in the military or naval service of the United States are exempt from registry.[82]

(c) Procedure

In order to entitle a vessel to registry her owner must, pursuant to federal statute, make application under oath, setting forth certain matters involving a description of the vessel and the right to have her registered.

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Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666.

66. U.S.—Gerradin v. United Fruit Co., D.C.N.Y., 51 F.2d 417, affirmed, C.C.A., 60 F.2d 927, certiorari denied United Fruit Co. v. Gerradin, 53 S.Ct. 92, 287 U.S. 642, 77 L.Ed. 556.

67. U.S.—The Helori, D.C.Wash., 24 F.2d 710.

68. U.S.—The Helori, supra.

69. U.S.—U. S. v. The Forrester, D.C.Mich., 25 F.Cas.No. 15,132, Newb. Adm. 81.

70. U.S.—Smith v. Hammond, C.C.Cal., 22 F.Cas.No. 13,053.

71. U.S.—St. Clair v. U. S., Cal., 14 S.Ct. 1002, 154 U.S. 134, 38 L.Ed. 936.
58 C.J. p. 33 note 61.

72. U.S.—St. Clair v. U. S., supra—The Mohawk, Mich., 3 Wall. 566, 18 L.Ed. 67.

73. U.S.—U. S. v. The Forrester, D.C.Mich., 25 F.Cas.No. 15,132, Newb. Adm. 81.

74. U.S.—U. S. v. The Forrester, supra.

75. U.S.—Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest v. Woodman, D.C.Pa., 2 F.Supp. 303, reversed on other grounds, C.C.A., Woodman v. Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest, 61 F.2d 1047.
58 C.J. p. 33 note 66 [a].

76. U.S.—The Susana, C.C.A.Va., 2 F.2d 410.
58 C.J. p. 33 note 67.

77. Me.—Chadwick v. Baker, 54 Me. 9.
58 C.J. p. 33 note 68.

78. U.S.—Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest v. Woodman, D.C.Pa., 2 F.Supp. 303, reversed on other grounds, C.C.A., Woodman v. Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest, 61 F.2d 1047.

79. U.S.—Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest v. Woodman, D.C.Pa., 2 F.Supp. 303, reversed on other grounds, C.C.A., Woodman v. Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest, 61 F.2d 1047.
58 C.J. p. 33 note 70.

80. Pa.—Moore v. Lincoln Park, etc., Cons. Co., 46 A. 857, 196 Pa. 519.

81. U.S.—U. S. v. The Victoria Perez, D.C.N.Y., 28 F.Cas.No. 16,620, 8 Ben. 109.
58 C.J. p. 34 note 76.

82. U.S.—The Helori, D.C.Wash., 24 F.2d 710.

83. U.S.—U. S. v. Gilbert, C.C.A.Fla., 126 F.2d 206.
58 C.J. p. 34 notes 79, 80.

registered;[84] and a vessel may not be registered until proof of the citizenship of all her owners is placed on record.[85] It is not necessary, however, that there should be a disclosure of an equitable title unless such title is in the subject of a foreign state.[86] The registry statute was construed in an early case as requiring, in all cases, a specific declaration that no subject of a foreign state was interested directly or indirectly, by way of trust or confidence or otherwise, in the vessel or her profits,[87] but the interest referred to is interest by way of ownership,[88] and does not include the interest of a stockholder of a corporation which owns the vessel in question,[89] and it has been held that the statute does not, in the case of registration by a corporation, require an oath that there is no foreign interest in the vessel.[90] Where a registry is obtained by a false oath as to the citizenship of the owner, as against the United States, the vessel cannot be deemed a vessel of the United States,[91] and she is not entitled to the benefits or privileges appertaining to such vessels.[92]

(d) Effect of Sale or Other Transfer of Vessel

Sale to an alien of a "vessel of the United States" renders her registry inoperative, and terminates the privilege of registry under the laws of the country of her former nationality. The sale of a registered vessel to a citizen of the United States likewise renders the registry inoperative and void, but in such case the vessel may be registered anew on proof that the new owner is a citizen of the United States.

In the case of a "vessel of the United States," a sale to an alien divests her nationality, as discussed supra § 1, renders her registry inoperative,[93] and terminates the privilege of registry under the laws of the country of her former nationality[94] and also her privileges as a "vessel of the United States."[95] However, the right of an American citizen to register a vessel bought by him from an alien who had himself bought such vessel from an American citizen at a time when such vessel was registered under the registration laws of the United States has been upheld.[96] A sale of a vessel registered under the laws of the United States to a citizen of the United States renders the registry inoperative and void,[97] but such sale does not denationalize her, as discussed supra § 1; and under the statute she may be registered anew[98] on proof that the new owner is a citizen of the United States.[99]

The statutory provision that, if there is a failure to register anew a vessel sold or transferred to a citizen of the United States, she ceases to be a vessel of the United States has been given effect under various circumstances.[1] The necessity for compliance with the statutory requirement that, in order to permit registry anew after sale or other transfer to a citizen of the United States, the sale or transfer shall be made by an instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of registry, has been asserted or recognized.[2] A failure to comply with such requirement prevents the enjoyment of privileges to which a "vessel of the United States" is entitled,[3] and, in so far as such privileges are concerned, has the effect of having the vessel regarded as an alien or a foreign vessel,[4] but does not render the sale illegal and void, as discussed infra § 20. The transfer of a vessel owned by a corporation of a neutral power to the American flag after beginning of war has been held not a violation of international law or American neutrality, although made to conceal ownership of the transferor corporation's stock by a citizen of one of the belligerent powers.[5]

84. R.I.—Sprague v. Thurber, 22 A. 1057, 17 R.I. 454.

85. Me.—Chadwick v. Baker, 54 Me. 9.

Details to be included

The oath for registry of a vessel, as prescribed by statute, includes a detail of the name, place of abode, and citizenship of coowners, and the proportion owned by each.—U.S. v. Gilbert, C.C.A. Fla., 126 F.2d 206.

86. U.S.—Scudder v. Calais Steamboat Co., C.C. Me., 21 F.Cas.No.12,566.
58 C.J. p. 34 note 83.

87. U.S.—Scudder v. Calais Steamboat Co., supra.

88. 29 Opinion Attorney General p. 188.

89. 29 Opinion Attorney General p. 188.

90. U.S.—Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest v. Woodman, D.C. Pa., 2 F.Supp. 303, reversed on other grounds, C.C.A., Woodman v. Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest, 61 F.2d 1047.

91. 14 Opinion Attorney General p. 340.

92. 14 Opinion Attorney General p. 340.

93. Me.—Chadwick v. Baker, 54 Me. 9.

94. Cal.—Davidson v. Gorham, 6 Cal. 343.
Me.—Chadwick v. Baker, 54 Me. 9.

95. Cal.—Davidson v. Gorham, 6 Cal. 343.
58 C.J. p. 34 note 93.

96. U.S.—Smith v. Hammond, C.C. Cal., 22 F.Cas.No.13,053.
58 C.J. p. 34 note 94.

97. U.S.—The Enos, D.C. Wash., 24 F.Supp. 387.
58 C.J. p. 34 note 95.

98. Me.—Chadwick v. Baker, 54 Me. 9.

99. Me.—Chadwick v. Baker, supra.

1. U.S.—The Susana, C.C.A. Va., 2 F.2d 410.
58 C.J. p. 34 note 1.

2. R.I.—Sprague v. Thurber, 22 A. 1057, 17 R.I. 454.
58 C.J. p. 35 note 3.

3. R.I.—Sprague v. Thurber, supra.
58 C.J. p. 35 note 4.

4. U.S.—Weston v. Penniman, C.C. Mass., 29 F.Cas.No. 17,455, 1 Mason 306.
R.I.—Sprague v. Thurber, 22 A. 1057, 17 R.I. 454.

5. U.S.—Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest v. Woodman,

(e) Deposit of Register with Consul

The statutory requirement that masters on arriving at a foreign port shall deposit their registers with the consul or vice consul, if any, at that port, refers ordinarily, at least, to an arrival for purposes of business, that is, one requiring an entry and clearance and stay at the port sufficiently long to require some of the acts connected with business.

The statutory requirement that masters on arriving at a foreign port shall deposit their registers with the consul or vice consul, if any, at that port, for a noncompliance with which a penalty has been provided, has been construed as referring ordinarily, at least, to an arrival for purposes of business, that is, one requiring an entry and clearance and stay at the port sufficiently long to require some of the acts connected with business,[6] and not to include touching at a port to obtain information,[7] or to ascertain the state of the market,[8] or because of the stress of weather.[9] However, there is authority for the view that if a vessel makes an entry, or is required by law or usage to make an entry, on coming to port, there is an "arrival" within the meaning of the statute.[10] There must, of course, be a consular officer at the port of arrival in order to render the statute applicable.[11] The statutory requirement includes every foreign port where the designated officer is present.[12]

(2) Enrollment, License, and Number

(a) In general
(b) Meaning and effect of license
(c) What vessels may be enrolled, and persons entitled to enroll
(d) Procedure
(e) Effect of sale

(a) In General

Enrollment is the recording and certification of a vessel employed in coastwise or inland navigation, and in order to be entitled thereto the vessel must possess the same qualifications, and the same requirements in all respects must be complied with, as are required before registering a vessel. A vessel which is not enrolled is not entitled to the protection of the laws of the United States, to which a duly enrolled vessel is entitled while engaged in a trade for which enrollment is required.

The term "enrollment of vessels" signifies, in the laws of the United States on the subject of merchant shipping, the recording and certification of vessels employed in coastwise or inland navigation,[13] as distinguished from the "registration" of vessels employed in foreign commerce.[14] Under the provision of the statute, in order to entitle a vessel to enrollment she must possess the same qualifications, and the same requirements in all respects must be complied with, as are required before registering a vessel.[15] While in general the purpose of an enrollment is to evidence the national character of a vessel engaged in the coasting trade or home traffic and to enable such vessel to procure a coasting license,[16] a statute permits a vessel navigating the waters on the northern, northeastern, or northwestern frontiers to engage both in domestic and foreign commerce under an enrollment and license.[17] A vessel not registered, enrolled, or licensed, but which has only a number allotted pursuant to statute, is not authorized to be employed in trade, foreign or coasting.[18] Enrollment does not affect title but confers the character and privileges of an American vessel.[19] On an incidental question not affecting the title of the parties, an enrollment is competent evidence,[20] and is conclusive as to the character of the vessel, whether foreign or domestic, unless contradicted by clear evidence of the notorious residence of the owner at a place or port other than that named in the enrollment.[21]

Necessity. A vessel which is not enrolled is not entitled to the protection of the laws of the United States, to which a duly enrolled vessel is entitled while engaged in a trade for which enrollment is required.[22] The acts of congress providing for

D C Pa., 2 F Supp 303, reversed on other grounds, C C A., Woodman v. Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest, 61 F 2d 1047

6. U.S.—Harrison v. Vose, Me., 9 How. 372, 13 L Ed. 179—Toler v White, D C Me., 24 F Cas No. 14,079, 1 Ware 280.

7. U.S.—Harrison v Vose, Me., 9 How. 372, 13 L.Ed. 179.
58 C J. p 35 note 10.

8. U.S.—Harrison v. Vose, supra—Toler v. White, D.C Me., 24 F.Cas. No.14,079, 1 Ware 280

9. U.S.—Harrison v. Vose, Me. 9 How. 372, 13 L.Ed. 179.

10. 11 Opinion Attorney General pp 72, 237.

11. U S—Gould v Staples, C.C.Me., 9 F. 159
58 C J. p 35 note 14.

12. U S—Gould v. Staples, supra.
58 C J. p 35 note 15.

13. U.S—The Mohawk, Mich., 3 Wall. 566, 18 L Ed. 67.

14. U.S—The Mohawk, supra.

15. U.S—The Mohawk, supra.
58 C.J. p 35 note 17.

16. U S.—The Mohawk, supra.

Ownership and national character

The enrollment of a vessel ascertains her ownership and gives her national character.—Shannon v. Streckfus Steamers, 131 S W 2d 833, 279 Ky. 649.

17. U S—U. S. v The Forrester, D C Mich, 25 F Cas No.15,132, 1 Newb.Adm. 81, 93.
58 C J. p 35 note 19.

18. U.S.—Stephens v. U. S., C C A Ala., 30 F.2d 286.

19. U S—Hozey v. Buchanan, La., 16 Pet 215, 10 L Ed 941.
Mass—Scola v. Scola, 59 N E 2d 769, 318 Mass. 1.

20. U S—Dudley v. The Superior, D. C Ohio, 7 F Cas No.4,115, Newb Adm. 176.

21. U.S—Dudley v. The Superior, supra

22. U.S—Badger v. Gutierez, La., 4

the enrollment and license of vessels do not apply to vessels employed on the interior waters of the country unless such waters are public navigable waters of the United States.[23]

What constitutes coasting trade. A vessel engaged in navigation between two states over interior waters has been regarded as engaged in the coasting trade,[24] but a different rule has been recognized in respect of ferrying across a river at a point wholly within the limits of a state.[25] It seems that, although a vessel navigates only from port to port in the same state, if her employment constitutes a link in a chain of commerce among the states she will be regarded as being in the coasting trade.[26] The coasting trade includes trade between Puerto Rico and the United States.[27]

(b) Meaning and Effect of License

Generally, the purpose of a license is not to confer the status of a vessel of the United States, but to give permission to such vessel to carry on the contemplated trade.

In respect of a vessel of twenty tons and upward which is enrolled, the purpose of a license is not to confer the status of a vessel of the United States,[28] but is to give permission to such vessel to carry on the contemplated trade,[29] that is, the coasting trade.[30] A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States,[31] and gives no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a state,[32] or the watercourses partaking of the character of canals exclusively within the interior of a state, and made practicable for navigation by the funds of the state or by privileges she may have conferred for the accomplishment of the same end;[33] but it does permit navigation, between states, of a public navigable water.[34] Certain officers are authorized by statute to board and inspect a vessel in order to inspect her license, and such power extends to a search of the vessel to ascertain whether she was engaged in activity outside the scope of the license.[35]

(c) What Vessels May Be Enrolled, and Persons Entitled to Enroll

No vessel is a vessel of the United States for purposes of enrollment unless she belongs to a citizen of the United States. A domestic corporation is entitled to enroll a vessel owned by it, notwithstanding some of the corporate stock belongs to aliens.

It is generally the policy of the law that no vessel is a vessel of the United States for purposes of enrollment unless she belongs to a citizen of the United States.[36] A statute authorizing foreign-built vessels admitted to American registry and owned on a certain date by United States citizens to engage in the coastwise trade, as long as they continue in such ownership, is required to be interpreted in the light of national policy limiting coastwise trade to American-built and owned vessels,[37] and, accordingly, foreign-built vessels which on the specified date were of American registry and owned by United States citizens, but which for a period subsequent thereto had not been owned by United States citizens, although they were so owned at the time of attempted enrollment, are not entitled, under the statute, to certificates of enrollment for the coastwise trade.[38]

A domestic corporation has been recognized as entitled to enroll a vessel owned by it,[39] notwithstanding some of the corporate stock belongs to aliens;[40] but under a specific provision of law a majority of the stock of the corporation must be owned by citizens of the United States in order to

S Ct 563, 111 U S 734, 28 L Ed 581.

Mass—Braga v. Braga, 51 N E.2d 429, 314 Mass 666

Dredge boat which was vessel of character that might be enrolled by laws of United States did not become vessel of the United States until it was in fact enrolled, even though built and owned by citizens of United States,—In re Penglase Sand & Gravel Co, C.C.A.Ill., 76 F 2d 593.

23. U S.—The Montello, Wis., 11 Wall. 411, 20 L.Ed 191.
58 C J. p 35 note 22.

24. U.S.—Gibbons v. Ogden, N.Y., 9 Wheat. 1, 6 L Ed. 23.
58 C.J. p 36 note 30.

25. U.S.—U. S. v. The James Morrison, D.C.Mo., 26 F.Cas.No.15,465, Newb.Adm 241.

26. U S—U. S. v. The James Morrison, supra.

27. U S—Huus v. New York, etc, SS Co, N Y, 21 S.Ct 827, 182 U S 392, 45 L Ed 1146—Bigley v. New York, etc, SS. Co, D C N Y., 105 F. 74

28. U S—Gibbons v Ogden, N.Y., 9 Wheat. 1, 6 L Ed 23.

29. U S—Gibbons v Ogden, supra
Ky—Shannon v. Streckfus Steamers, 131 S W 2d 833, 279 Ky 649

30. Ky—Shannon v. Streckfus Steamers, supra.

31. U S—Veazie v. Moor, Me, 14 How. 568, 14 L Ed 545.

32. U S.—Veazie v. Moor, supra

33. U.S.—Veazie v. Moor, supra.

34. U S—Gibbons v Ogden, N.Y., 9 Wheat 1, 6 L Ed 23.
58 C.J. p 36 note 29.

35. U S—U. S v Wiscerth, C C.A. N.Y., 68 F.2d 161.

36. Mass—Braga v. Braga, 51 N.E. 2d 429, 314 Mass 666

Equitable interest
An alien's ownership of an equitable interest in a fishing vessel is repugnant to federal statutes, under which individually owned coasting vessels, enrolled and licensed, can retain status of vessels of United States only as long as their owners are American citizens—Scola v Scola, 59 N E.2d 769, 318 Mass. 1.

37. U S—The Tanamo, C C.A.N.Y., 83 F.2d 161.

38. U.S—The Tanamo, supra.

39. U.S.—The Fort Orange, D C N. Y., 5 F Supp. 833.

40. U S—The Scandanavia II, D.C. Md., 258 F. 144.

permit the vessel to be enrolled or licensed.[41] The statutory provision for the issuance of enrollment and license of a vessel owned by a corporation in the name of the president or secretary is permissive, and not mandatory.[42]

Prior to the independence of the Philippine Islands, provision was made for the issuance of certificates for coasting trade to citizens of the United States resident in the Islands, to natives on taking the oath of allegiance, or to Spanish subjects who took the oath of abjuration and of allegiance to the United States.[43]

A canal boat is not a ship or vessel within the meaning of statutes here under consideration.[44]

(d) Procedure

In order to obtain the enrollment of a vessel, it is necessary to comply with the same requirements in all respects as are necessary before registering a vessel.

Under the statute, it is necessary, in order to obtain the enrollment of a vessel, to comply with the same requirements in all respects as are necessary before registering a vessel.[45] Accordingly, an oath[46] setting forth certain particulars, such as the age, measurement, tonnage, etc, of the vessel, and the names and place of abode of the owner,[47] must be executed by the owner of the vessel,[48] and a failure to comply with the requirement as to execution by the owner renders an attempted enrollment ineffective.[49] The statute was construed in an early case as requiring, in all cases, a specific declaration that no subject of a foreign state was interested directly or indirectly, by way of trust or confidence or otherwise, in the vessel or her profits,[50] but the interest referred to is an interest by way of ownership,[51] and does not include the interest of a stockholder of a corporation which owns the vessel in question.[52] The effective date of the license of a vessel is the date of application for the license and not the date of the clerical act of issuing the license.[53]

(e) Effect of Sale

Where a vessel enrolled as a vessel of the United States is sold to a citizen, it ceases to be a "vessel of the United States" unless it is registered, enrolled, or licensed anew.

According to some cases, where a vessel enrolled as a vessel of the United States is sold to a citizen, it ceases to be a "vessel of the United States" unless it is registered, enrolled, or licensed anew,[54] and an enrolled vessel transferred by an instrument which does not contain a recital of the certificate of enrollment is not entitled to a new enrollment.[55] The view has been expressed, however, that an enrolled vessel sold to a citizen of the United States does not cease to be a "vessel of the United States" because of the lack of a new registry or enrollment.[56] The provision of the statute requiring a vessel on sale to a citizen to be registered anew "by her former name" has been regarded as not controlling in the case of an enrolled and licensed vessel rather than a registered one.[57]

d. Reciprocal Exchanges

Registry may be exchanged for enrollment, and vice versa, but compliance must be had with the statutory provisions relating thereto.

41. U S—The Scandanavia II, supra 58 C J p 36 note 37 [a].

42. U S—The Fort Orange, D C N Y, 5 F Supp 833.
Pa—Moore v. Lincoln Park, etc, Cons Co, 46 A 857, 196 Pa. 519

43. Philippine—Perez v. Herranz, 7 Philippine 693
58 C.J p 36 note 40.

44. U S—U S v The Ohio, D C Pa, 26 F Cas No 15 915 9 Phila 448—U S v The Pennsylvania Canal Boats Nos 68 and 69, D C Md, 27 F Cas No 16,027

45. U.S—U S. v. Gilbert, C C A.Fla., 126 F 2d 206.

46. U S—U. S v Gilbert, supra 58 C.J p 36 note 43

47. U.S—U S. v. Gilbert, supra.
Mass.—Braga v. Braga, 51 N.E 2d 429, 314 Mass 666
58 C.J p 36 note 44.

48. U.S—U S. v. Gilbert, C.C A.Fla., 126 F 2d 206
58 C.J. p 36 note 45.

Enrollment by president of corporation
Enrollment of vessel belonging to corporation is not defective because of the absence of an instrument under corporate seal authorizing president of corporation to take oath of ownership, for the statutory requirement of such an instrument is applicable only to "other officer or agent thereof"—The Fort Orange, D. C N Y, 5 F Supp. 833

49. U S—U S v Bartlett, D C Me., 24 F Cas No.14,532, 2 Ware 17
Hawaii.—Lawelulii v. Hind, 3 Hawaii Fed 182.

50. U S—Scudder v Calais Steamboat Co, C C Me, 21 F Cas.No 12,565, 1 Cliff 370.

51. 29 Opinion Attorney General p 188

52. 29 Opinion Attorney General p 188.

53. U S—The Enos, D C Wash, 24 F Supp 387.

54. U.S—The Lincoln Land, D.C. Mass., 295 F. 358.
R I—Sprague v. Thurber, 22 A. 1057, 17 R I 454.

Status regained by application for license
U S—The Enos, D C Wash., 24 F. Supp 387

55. Me.—Mitchell v. Taylor, 32 Me 434.

56. U S—U S. v. The Forrester, D C Mich, 25 F.Cas No 15,132, Newb Adm 81.

57. U S—Collier Advertising Service v. Hudson River Day Line, D.C N. Y., 14 F Supp 335.

Authorization for change of name
Where vessel sold to a citizen was an enrolled and licensed one, and change of name was authorized by commissioner of navigation and enrollment under new name allowed, enrollment could not be collaterally attacked by lienors claiming invalidity of mortgage because of mortgagor's noncompliance with statute requiring registered vessel on sale to citizen to be registered by her former name—Collier Advertising Service v. Hudson River Day Line, supra.

Under the statute, collectors of the several districts are authorized to enroll and license any ship or vessel that may be registered, on such registry being given up, or to register any ship or vessel that may be enrolled, on the enrollment and license being given up as required.[58] Where the vessel is in a district other than that to which she belongs, the application for the exchange may be made by the master, but compliance must be had with the statutory provision for an oath by him that, according to his best knowledge and belief, the property remains as expressed in the register or enrollment.[59] Under a provision that the register or enrollment granted in lieu of the one given up shall within ten days after the arrival of the ship or vessel within the district to which she belongs be delivered to the collector of such district, and be canceled by him, the term "arrival" means an arrival with the intention to return to the home port as the terminus or one of the termini of the voyage and in the course of prosecuting the voyage,[60] and does not include a mere touching or staying at such port for accidental and transitory purposes, having no connection with the original enterprise.[61]

Improper issuance. Where an enrollment has improperly been issued in exchange for a register, the owner is entitled either to obtain a proper enrollment or to the return of his register.[62]

§ 4. Taxes, Duties, Dues, and Port Charges

a. In general
b. Subject matter of tax or duty; vessels included
c. Enforcement; remedies of taxpayer

a. In General

In accordance with provisions of federal statutes, a tonnage tax and a duty denominated "light money" are imposed on certain vessels. Pleasure boats and boat and packet lines used as public utilities may be subject to a license fee or tax imposed by the state.

In accordance with provisions of federal statutes, a tonnage tax is imposed on certain vessels,[63] and a duty of a specified amount per ton, denominated "light money," is levied and collected, in the same manner and under the same regulations as tonnage duties, on all vessels not of the United States, which may enter the ports of the United States.[64] In general a tonnage tax or duty is a tax on entry.[65]

A statute, no longer in effect, providing for the levy and collection annually on the first day of September of a sum equivalent to a tonnage tax of a specific amount per ton on the use of every foreign-built yacht, pleasure boat, or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, was held to impose an excise tax,[66] and its validity was upheld.[67]

Pleasure boats may be subject to a state license fee,[68] and boat and packet lines may be subject to a license tax on public utilities extending to such lines.[69]

Under the Organic Act applicable to Hawaii, the board of harbor commissioners may impose tolls and tonnage charges on freight passing over territorial wharves,[70] and under a Hawaiian statute, not superseded by the Shipping Act of 1916, 46 U.S.C.A. § 801 et seq, the territorial public utilities commisson has power to collect taxes from water carriers to pay the costs of investigation of such carriers.[71]

58. Mass.—Braga v Braga, 51 N.E 2d 429, 314 Mass 666.
58 C.J. p 37 note 55.

59. U.S.—Blanchard v. The Martha Washington, C.C.Me., 3 F.Cas.No 1,513, 1 Cliff 463.

60. U.S.—U. S. v. Shackford, C.C. Me., 27 F.Cas.No 16,262, 5 Mason 445.

61. U.S.—U. S. v. Shackford, supra

62. U.S.—Badger v. Gutierez, La., 4 S.Ct. 563, 111 U.S. 734, 28 L.Ed. 581.

63. U.S.—Bryan v. Union Oil Co of Cal., C.C.A.Cal., 155 F.2d 625—Standard Oil Co. v U. S., Ct.Cl., 2 F.Supp. 922, certiorari denied 54 S.Ct. 51, 290 U.S. 632, 78 L.Ed. 550

Statute held not impliedly repealed

U.S.—The Sophie Rickmers, D.C.N.Y., 45 F.2d 413.

64. U.S.—U. S. v. The Miranda, N.Y., 51 F. 523, 2 C.C.A. 362.

65. N.Y.—Ripley v Gelston, 9 Johns 201, 6 Am.D. 271

66. U.S.—Billings v U. S., N.Y., 34 S.Ct. 421, 232 U.S. 261, 58 L.Ed 596
58 C.J. p 37 note 74.

67. U.S.—Billings v. U. S., supra
58 C.J. p 38 note 75.

68. Or.—Henderson v State Tax Commission, 188 P.2d 630, 182 Or. 519.

In lieu of other taxes

Under statute imposing on pleasure boats a license fee "in lieu of all other taxes and licenses to which such boats may be subject," quoted clause was intended, in absence of contrary statement, to embrace only taxes for security of which, at time of payment of license, no lien had been impressed on the boat.—Henderson v. State Tax Commission, supra.

69. La.—State v. El Rito Transp. Co., 190 So. 803, 193 La. 548.

Remission of taxes by amendment to statute

Where original act imposed a license tax on public utilities including boat and packet lines, based on a per cent of gross receipts, an amendment exempting from the tax gross receipts derived from any business conducted on navigable waters was not intended to have a retroactive effect or to remit any license tax that might have been due when amendment was enacted.—State v. El Rito Transp. Co., supra.

70. Hawaii.—Munro v. Bigelow, 31 Hawaii 372.

71. U.S.—Inter-Island Steam Nav. Co. v Territory of Hawaii, by Public Utilities Commission of Hawaii, Hawaii, 59 S.Ct. 202, 305 U.S. 306, 83 L.Ed 189.

Questions as to the taxation of vessels as personal property are treated in the C J.S. title Taxation §§ 87, 115, also 61 C.J. p 201 notes 74–77, p 224 note 25–p 226 note 46.

Computation and amount. Tax or duty may be exacted only at the rate per ton set forth in the statute[72] or provided for by treaty.[73]

b. Subject Matter of Tax or Duty; Vessels Included

Statutes imposing tonnage duties generally are applicable only to a "vessel" entering a port, and, in the case of certain specified duties, to a "vessel not of the United States" when it arrives from a foreign port or place.

Statutes imposing tonnage duties generally apply only to a "vessel" entering a port of the United States.[74] A "vessel not of the United States" on which, under certain circumstances, a tonnage duty or tax is imposed by statute[75] includes a vessel owned by citizens which is not entitled to registry or enrollment so as to obtain the status of "a vessel of the United States,"[76] and such vessel is subject to the tax or duty when it arrives from a foreign port or place,[77] but prior to the independence of the Philippine Islands it was held that such vessel was not liable for the tonnage duty where it entered from the port of Manila, P. I.[78] A vessel "enters" the United States from that foreign port from which she last cleared within the contemplation of a provision of the statute imposing duties at a certain rate on vessels "entering" from ports in certain areas and a different rate on vessels entering from all other foreign ports;[79] and this rule applies regardless of whether the vessel enters a port in the United States in ballast or with freight loaded at the second foreign port.[80] Where, however, a vessel incidentally stops at a foreign intermediate port to secure ship supplies, the vessel has not "entered" such port, and such port cannot be considered in determining the tonnage tax applicable to the vessel on its entry into a port in the United States.[81]

The provision of the statute imposing a tonnage duty on any vessel not of the United States, which shall be entered in one district from another, having, on board, goods, wares, or merchandise taken in one district to be delivered in another, does not authorize the enaction of a tonnage tax on a foreign vessel which goes from one district to another with cargo brought from a foreign port, where there has not been an actual physical removal of cargo from or to the vessel.[82] Under an early statute it was held that a vessel which was forced to go into port in distress, because of bad weather, was not liable for tonnage or light duties.[83] Statutory provision has been made for the preservation of rights acquired under treaties, in respect of the tonnage or light duties.[84]

72. U S.—Bryan v. Union Oil Co of Cal, C.C A.Cal., 155 F.2d 625.

Foreign-built vessel not used for trade

The amount of the first tax or duty due under a statute no longer in effect imposing a tax or duty, based on tonnage, on foreign-built vessels, not used or intended to be used for trade, owned or chartered by citizens of the United States, was held to be the entire amount of the annual tax or duty imposed by the statute, and not merely a proportionate amount determined by the time the statute had been in force when the first tax or duty became due—U S. v. Bennett, N Y., 34 S Ct 433, 232 U S. 299, 58 L Ed. 612—58 C J. p 39 notes 96, 97.

73. U S.—The Sophie Rickmers, D. C N.Y., 45 F.2d 413.

74. U.S—Hitner Sons Co. v. U. S., 13 Ct.Cust.App. 216

The test whether a thing is a "vessel" subject to tonnage duty is its actual status as engaged in, or suitable for, commerce or navigation and means of water transportation.—Hitner Sons Co. v. U. S., supra.

75. U.S—The Alta, Wash., 148 F. 663, 78 C.C.A. 415

76. U.S.—The Alta, supra.

77. U.S—The Alta, supra.

78. U S—The Alta, supra. 58 C.J. p 38 note 79.

79. U.S—Bryan v. Union Oil Co of Cal., C C A Cal., 155 F 2d 625.

Oath of entry by master

Where collector arbitrarily determined the foreign port from which vessel entered United States as Talara, Peru, and refused to accept master's oath on form which showed vessel as arriving from Vancouver, Canada, government could not rely on master's subsequent oath of entry of vessel from foreign port as disclosing entry from Talara, Peru, for purpose of determining rate of tonnage tax—Union Oil Co. of California v. Bryan, D C Cal, 52 F.Supp. 256, affirmed, C C.A., Bryan v. Union Oil Co of Cal., 155 F 2d 625.

Application of last port and continuous voyage doctrine for purpose of determining rate of tonnage tax is flexible and must be confined to peculiar facts submitted—Union Oil Co. of California v. Bryan, D C.Cal, 52 F.Supp. 256, affirmed, C C A., Bryan v. Union Oil Co. of Cal., 155 F 2d 625.

80. U.S.—Union Oil Co. of California v. Bryan, D.C.Cal., 52 F.Supp. 256, affirmed, C.C.A., Bryan v Union Oil Co. of Cal, 155 F 2d 625.

Discharge of cargo at intermediate port

Where vessel sailed from Talara, Peru, to Vancouver, British Columbia, where she discharged her entire cargo and then proceeded in ballast to Port San Luis, California, vessel entered United States from Vancouver, rather than from Talara and was subject to a tonnage duty of two cents rather than six cents—Bryan v. Union Oil Co of Cal, C C.A. Cal., 155 F 2d 625.

81. U.S.—Union Oil Co. of California v. Bryan, D.C Cal., 52 F.Supp, 256, affirmed, C C A, Bryan v. Union Oil Co of Cal, 155 F.2d 625.

82. U.S.—Laidlaw v. Abraham, C.C. Or., 43 F. 297—In re Laidlaw, C.C., 42 F. 401.

83. N.Y—Ripley v. Gelston, 9 Johns. 201, 6 Am D. 271.

84. U S—Flensburger Dampfercompagnie v. U. S, Ct Cl., 59 F.2d 464, certiorari denied U. S. v. Flensburger Dampfercompagnie, 52 S. Ct. 645, 286 U.S. 564, 76 L.Ed 1296. 58 C J. p 38 note 82.

Vessels of Prussia

(1) Statutes providing that no higher rate of duties should be im-

A statute imposing an annual license tax or fee, based on the tonnage of vessels involved, in respect of certain freight and transportation lines, propelled by mechanical power, has been construed as applying to barges [85] The statute has been held not to exempt from the payment of the license fee, in respect of a vessel operating between Alaska and Canada, although such vessel was compelled to pay a tax in Canada.[86]

Under a statute no longer in effect imposing a tax or duties in respect of foreign-built vessels not used or intended to be used for trade, which were owned or chartered by citizens of the United States, the "use" which was taxed was not the mere potential use, or privilege of use, which the owner enjoyed, but was the actual exercise of the right to use, which ownership conferred.[87]

Exemption from payment of duties or tax. In accordance with statutory provisions, vessels of a foreign nation may be exempted from tonnage and impost duties on a showing satisfactory to the president that no discriminating duties are imposed by such foreign nation against domestic vessels [88] A statutory provision exempting from tonnage dues "a vessel belonging to or employed in the service of the government of the United States" does not relieve a vessel from the payment of such dues merely because such vessel carries cargo for the United States, where such vessel is not under the control of the United States.[89] The statute requiring the payment of light money does not apply to an unregistered vessel of the United States, carrying a sea letter or other regular document issued from a customhouse of the United States proving that the vessel is American property.[90] Under a provision exempting vessels navigating otherwise than by sea from payment of clearance and entrance fees, the term "sea" is not restricted to open sea or ocean so as to exempt from such fees a vessel plying waters which are partially landlocked.[91]

c. Enforcement; Remedies of Taxpayer

The collector may refuse to enter as well as to clear a vessel which has not paid her tonnage or light duties, but if he fails to do so the United States may maintain an action for the duties. A person from whom tonnage or light duties have wrongfully been exacted may recover back by action, from the collector of customs, the amount so wrongfully exacted.

The collector may refuse to enter as well as to clear a vessel which has not paid her tonnage or light duties.[92] If he fails to do so the United States has an action for the duties against the owner,[93] and, it has been intimated, against the master,[94] and also against the ship,[95] but not against a mere consignee of the vessel, for he has no interest or special property in the vessel.[96]

The tax for the use of foreign-built vessels, not used or intended to be used for trade, based on tonnage, imposed by a statute, now repealed, was collectable by an action in personam against the owner.[97]

posed on vessels of Prussia than payable on vessels of United States were held not to survive formation of German Empire or Republic—The Sophie Rickmers, D C N Y., 45 F 2d 413

(2) It has been held, however, that Prussian ships entering ports of United States between July 14, 1919, and Nov. 11, 1921, were exempt from payment of tonnage taxes—Flensburger Dampfercompagnie v. U. S, Ct Cl, 59 F 2d 464, certiorari denied U. S. v Flensburger Dampfercompagnie, 52 S Ct. 645, 286 U S. 564, 76 L Ed. 1296.

85. U.S.—Northern Commercial Co v. U. S, Alaska, 217 F. 33, 133 C.C A. 143.

86. U S—Northern Commercial Co v U S., supra.
58 C.J. p 39 note 89.

87. U S.—Pierce v. U. S, N.Y., 34 S. Ct. 427, 232 U.S. 292, 58 L.Ed. 610
58 C.J. p 38 notes 83, 84

88. U S.—Standard Oil Co v U. S., Ct.Cl., 2 F Supp 922, certiorari denied 54 S Ct. 51, 290 U S. 632, 78 L.Ed. 550.

Furnishing of satisfactory proof to president that foreign country is not imposing discriminating duties on domestic vessels is a condition precedent to authority of president to issue proclamation suspending tonnage taxes and imposts on vessels of such foreign country.—Standard Oil Co. v. U. S, supra.

Controlling date as to suspension of tonnage taxes and imposts on foreign vessels is the effective date of proclamation of president that satisfactory proof has been furnished that particular foreign country is not imposing discriminatory duties of tonnage or imposts on domestic vessels or cargoes—Standard Oil Co. v U. S., supra.

89. U.S.—Ackerlind v. U. S, Ct Cl, 36 S Ct. 438, 240 U S. 531, 60 L Ed 783
17 C.J. p 599 note 59 [a].

90. U.S.—U. S. v. The Miranda, N.Y, 51 F. 523, 2 C C.A. 362.
58 C.J. p 38 note 87.

91. U S.—Border Line Transp Co v Haas, C C.A.Wash, 128 F 2d 192, certiorari denied 63 S.Ct. 662, 318 U.S. 763, 87 L Ed. 1134.

Puget Sound

Ships navigating between ports on Puget Sound and ports on eastern and southern shores of Vancouver Island and Western Shore of the British Columbia mainland traverse the "sea" and hence are not exempted from payment of entrance and clearance fees—Border Line Transp. Co. v Haas, supra.

92. U S.—The George T. Kemp, D.C. Mass, 10 F Cas No 5,341, 2 Lowell 477.

93. U.S—The George T. Kemp, supra—U S. v Hathaway, C.C Me, 26 F Cas No.15,326, 3 Mason 324.
58 C J. p 39 note 99.

94. U.S—The George T. Kemp, D.C. Mass., 10 F.Cas.No 5,341, 2 Lowell 477.

95. U.S—The George T. Kemp, supra

96. U.S—Knox v. Devens, C.C Mass, 14 F.Cas No 7,905, 5 Mason 380—U S. v. Hathaway, C C Me, 26 F. Cas No 15,326, 3 Mason, 324.

97. U.S—Rainey v. U S, N.Y., 34 S.Ct. 429, 232 U.S. 310, 58 L.Ed 617.

Remedies of taxpayer. A person from whom tonnage or light duties have wrongfully been exacted may recover back by action, from the collector of customs, the amount so wrongfully exacted,[98] notwithstanding the taxes so collected have been deposited by the collector in the treasury,[99] and notwithstanding certain remedies in the treasury department may be pursued under statute.[1] A person from whom a tax or duty has been wrongfully exacted may pursue his remedy in the district court of the United States,[2] but not in the customs court.[3]

§ 5. Inspection, Equipment, Personnel, and Rules of Inspectors

a. In general
b. Vessels or equipment included

a. In General

Congress has by various enactments created a comprehensive scheme for the inspection of vessels. Compliance must be had with such provisions and with provisions pertaining to personnel of vessels.

Congress has by various enactments created a comprehensive scheme for the inspection of vessels,[4] including periodic inspection of hulls and boilers,[5] and compliance must be had with the requirements of the statutes.[6] In accordance with statutory provisions, inspectors must be satisfied that a vessel is in a condition to warrant the belief that she may be used in navigation with safety to life, and that all the requirements of law with respect to fires, boats, life preservers, etc., are faithfully complied with.[7] Ordinarily only federal local inspectors can perform duties of inspection imposed by statute.[8]

Compliance must be had with provisions pertaining to personnel of vessels,[9] as with respect to the necessary complement of officers of a vessel[10] and their standing watches of a certain duration.[11]

98. U.S.—Bryan v. Union Oil Co of California, C C A Cal., 155 F.2d 625 58 C J p 39 note 6.

Basis of rule

Under the rule that, when a person by a compulsion of the color of legal process or of seizure of his persons or goods pays money unlawfully demanded, he may recover it back, an action lies against collector of customs to recover overpayment of tonnage taxes paid under threat of forfeiture of vessel—Union Oil Co of California v. Bryan, D C Cal, 52 F. Supp 256, affirmed, C C A, Bryan v. Union Oil Co. of California, 155 F.2d 625.

Formal protest

Where master's tendered oath that vessel cleared from Canadian port, which would have subjected vessel to lower tonnage tax, was refused by collector of customs, facts that second oath was ultimately executed showing voyage to be Talara, Peru, and higher tax paid did not warrant defense that action would not lie for want of a formal protest—Bryan v. Union Oil Co. of Cal, C C A Cal, 155 F.2d 625

99. U S.—Bryan v. Union Oil Co of Cal., C.C.A Cal, 155 F 2d 625

1. U S.—Laidlaw v. Abraham, C.C. Or, 43 F. 297.

Effect of decision of commissioner of navigation

Word "final," as used in statute making final the decision of commissioner of navigation on questions relating to collection and refund of tonnage tax, contemplates that decision shall be final in the department so that secretary of treasury shall not be burdened with duty of reviewing it and does not take away taxpayer's right of redress in the courts—Bryan v. Union Oil Co. of Cal, C C A.Cal, 155 F.2d 625—58 C.J. p 39 note 7 [a].

2. U S.—Bryan v. Union Oil Co. of Cal, supra

3. U S.—Puget Sound Freight Lines v. U. S., 173 F 2d 578, 36 C C P A Customs 70

4. U S—Ace Waterways v Fleming, D C.N Y, 98 F.Supp 666

Regulations as to passenger vessels see infra § 179

Purpose of legislation

The purpose of the chapter of the United States Code dealing with inspection of steam vessels is largely to protect life and property and to minimize disaster at sea.—Ace Waterways v. Fleming, supra.

Liberal construction

The chapter of the United States Code dealing with inspection of steam vessels should receive a liberal construction in the public interest—Ace Waterways v. Fleming, supra.

Compensation of local inspectors

U S—Glavey v. U. S, Ct Cl, 21 S Ct 891, 182 U.S 595, 45 L Ed. 1247 58 C J. p 40 note 22 [a]

5. U S—The Oyster Police Steamers, D C Md, 31 F. 763, affirmed, C C, The Governor Robert McLane v. U S, 35 F. 926.

58 C J. p 40 note 12

6. U S—Ace Waterways v. Fleming, D.C N Y., 98 F Supp 666

7. U S—Ace Waterways v. Fleming, supra.

Certificate of inspection

An appropriate inspection officer may refuse to issue a certificate of inspection unless a vessel is equipped with a lifeboat and certain lifesaving equipment—Ace Waterways v. Fleming, supra

8. U S—Carr v. Hermosa Amusement Corp, C.C A Cal, 137 F 2d 983, certiorari denied Hermosa Amusement Corp v Carr, 64 S Ct 520, 321 U.S 764, 88 L Ed 1060.

9. U S—The Denali, C.C A Wash, 105 F 2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S S. Co v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U S 687, 85 L Ed 444.

10. U S—The Denali, C C A Wash, 105 F.2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S S. Co v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U S. 687, 85 L Ed 444.

Requirement of three licensed mates

The plain intent of a statute requiring every vessel of one thousand gross tons and over to have in her service and on board three licensed mates was that for a steamer of over one thousand gross tons there should be at least four officers, the captain and the three mates, who should share the burden of navigating her whenever any risk to the vessel was involved—The Denali, C C A Wash, 105 F 2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S S Co v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U.S 687, 85 L Ed 444

11. U.S.—The Denali, C C A Wash, 112 F 2d 952, certiorari denied Alaska S S. Co v Pacific Coast Coal Co, 61 S Ct. 65, 311 U.S 687, 85 L.Ed 444.

"Watch"

The word "watch," in maritime parlance, has two meanings and refers to the division of the day into time periods of service of the officers and crew, and also to the division of such persons for that service, and, by

The fact that a duly licensed master leaves an experienced wheelman in charge of the wheel of a vessel to which a statute, requiring that certain vessels shall not be navigated without a licensed engineer and a licensed pilot applies, is not a violation of such statute.[12] The maritime safety laws are paramount to the National Labor Relations Act to the extent that any proposed order of the National Labor Relations Board may increase the danger which the safety legislation seeks to prevent or lessen.[13]

State regulation. A canal regulation requiring every barge to be manned by at least one man for each boat requires a man on each barge in a tow.[14] The fact that a state law relating to the inspection and regulation of vessels has remained unenforced for a long period does not render it inoperative.[15]

Rules promulgated by inspectors. The supervising inspectors are authorized to establish rules necessary to carry out the statutory provisions as to vessels, which rules have the force of law,[16] but they have no authority to establish regulations except such as relate to carrying out such provisions.[17]

Appeal from, and review of, decisions of inspectors. The courts have no authority to review findings of inspectors by appeal, or writ of error,[18] or by certiorari.[19] In the absence of any regulation governing the action of a supervising inspector in the exercise of his power to review on his own motion, under the statute, a decision of a board of local inspectors, the supervising inspector should follow, by analogy, the proceeding prescribed for appeals from decisions of the local board.[20]

b. Vessels or Equipment Included

Generally, statutory provisions relating to inspection of certain vessels, or regulating matters as to personnel or equipment, are applicable to vessels of the kind specified, and only to such vessels.

Generally, statutory provisions relating to inspection of certain vessels, or regulating matters as to personnel or equipment, are applicable to vessels of the kind specified, and only to such vessels.[21] Since steam was the only power used for mechanically propelled vessels at the time when the federal statutes pertaining to their regulation and inspection were originally enacted, the statutes referred

immemorial Anglo-Saxon maritime custom, the time period of a watch never exceeds four hours—The Denali, C C A Wash, 105 F 2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S S. Co. v Pacific Coast Coal Co., 61 S Ct 65, 311 U S 687, 85 L.Ed. 444.

Intent of statute

(1) The statutory three-watch requirement for mates on vessels of over one thousand gross tons is safety legislation designed to minimize the danger to human beings from hazards created by fatigue of the mates, as well as to prevent loss of cargo—The Denali, C C A Wash, 112 F 2d 952, certiorari denied Alaska S S Co. v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U S 687, 85 L.Ed 444.

(2) The congressional intent disclosed by statute relating to division of mates into watches was to make impossible the former "watch and watch" system in which the crew was divided into two watches, starboard and port—The Denali, C C A Wash, 105 F 2d 413, adhered to 112 F 2d 952, certiorari denied Alaska S. S Co. v Pacific Coast Coal Co, 61 S. Ct. 65, 311 U.S 687, 85 L Ed. 444.

What constitutes compliance

(1) The statutory three-watch requirement for mates on vessel of over one thousand gross tons is not satisfied by having a complement of mates sufficient in number but who are required by the owner to stand on a two-watch instead of a three-watch division when the vessel is being navigated.—The Denali, C C A. Wash, 105 F 2d 413, adhered to 112 F 2d 952, certiorari denied Alaska S. S. Co v. Pacific Coast Coal Co, 61 S Ct 65, 311 U S 687, 85 L Ed. 444

(2) Where a mate stands a twelve-hour watch in two six-hour watches per day instead of but eight hours per day in alternating with two mates, there is a violation of the three-watch provision for mates—The Denali, C C A Wash, 112 F.2d 952, certiorari denied Alaska S S Co v Pacific Coast Coal Co, 61 S Ct 65, 311 U S 687, 85 L Ed 444.

12. Ill—Kennedy v Great Lakes Dredge, etc, Co, 191 Ill.App 585, 588

13. U S—Texas Co. v National Labor Relations Board, C C A 9, 120 F 2d 186.

Retention of drunkard as boatswain

Order of the National Labor Relations Board would not be enforced in so far as order purported to hold that habitual drunkard who had been elected as a labor leader should have been retained as boatswain of gas and oil tanker and in so far as employer was directed to make good to him any back pay—Texas Co v National Labor Relations Board, supra.

14. U S—In re O'Donnell, C C.A N Y, 34 F 2d 925

15. U S—Kelly v. State of Washington ex rel. Foss Co, Wash, 58 S.Ct. 87, 302 U S. 1, 82 L Ed 3.

16. U S.—Leathem Smith-Putnam Nav Co v National Union Fire Ins Co, C C.A.Wis, 96 F.2d 923.
58 C J p 40 note 15.

Bulkheads

A seagoing ocean barge of more than one hundred gross tons carrying passengers is subject to the jurisdiction of local federal inspectors who have power to require sufficient transverse watertight bulkheads fitted so that barge will remain afloat with positive stability if any one main compartment is flooded—Carr v. Hermosa Amusement Corporation, C C A Cal, 137 F 2d 983, certiorari denied Hermosa Amusement Corp v Carr, 64 S Ct 520, 321 U S 764, 88 L Ed 1060

17. U S—U. S. v Miller, D.C N Y, 26 F 95
58 C J p 40 note 16.

18. U S—Williams v Potter, N.Y, 223 F. 423, 139 C C A. 17

19. U S—Fredenberg v. Whitney, D C Wash, 240 F. 819

20. U S—Fisher v. Alwen, C C.A. Wash, 290 F. 8.

21. U S—Carr v Hermosa Amusement Corp, C C.A.Cal., 137 F 2d 983, certiorari denied Hermosa Amusement Corp v. Carr, 64 S Ct. 520, 321 U S 764, 88 L.Ed. 1060.

State regulation

A canal regulation requiring all boats to be equipped with a rudder and a wheelsman except such as are equipped to tow safely with two hawsers or use other suitable steering equipment does not require a wheelsman on a boat which does not have a wheel or tiller—In re O'Donnell, C.C A N.Y, 34 F.2d 925.

only to steam vessels,[22] and accordingly it was held that a watercraft which was neither a steam vessel nor a sailing vessel within the general statute providing for periodic inspection of hulls, and the inspection of which was not otherwise provided for, was not subject to inspection.[23] By reason of an amendment to the statutes in 1933, the provisions of the statutes were extended to vessels propelled in whole or in part by steam or by any other form of mechanical or electrical power.[24]

Under some statutes pertaining to small craft, inspection requirements are imposed on various types of small steam craft,[25] or to vessels above a certain tonnage, operated for hire, propelled by gas, fluid, naphtha, or electricity,[26] or to vessels of such a nature without regard to tonnage or use.[27] In accordance with statutory provisions, the hull and equipment of "seagoing" barges of one hundred gross tons or over are subject to inspection and regulation,[28] and such a provision has been construed to include watercraft, otherwise within the statute, which have no means of self-propulsion, but which may be taken as tows.[29] The appliances enumerated in the statute as necessary equipment of the barge are not the only equipment to which the requirement of inspection extends.[30]

Inspection of repairs to boiler or of unfinished vessel. The requirement as to inspection of a boiler before use applies where substantial repairs have been made on such boiler,[31] but it has been held that an unfinished vessel need not be inspected before being removed from one place to another in the course of her construction.[32]

Foreign, interstate, or intra-state commerce. While certain earlier statutes as to inspection did not apply to vessels which were not engaged in interstate or foreign commerce,[33] and some of the earlier cases construed the statutes under consideration as excluding vessels which were not engaged in interstate or foreign commerce,[34] certain statutes have been regarded as extending the operation of the inspection laws to vessels navigating waters of the United States which are common highways of commerce, or open to general or competitive navigation, even though such vessels are not engaged in interstate or foreign commerce.[35] Under a statute relating to the establishment of load lines on certain vessels and inspection of vessels with respect thereto, a "merchant ship" or "merchant vessel" within the statute and regulations thereunder is a ship employed in commerce.[36]

Foreign vessels. The statutory provision that

22. U.S.—Ace Waterways v. Fleming, D.C.N.Y., 98 F.Supp. 666.

23. U.S.—Ringler v. Laing, D.C. Wash., 21 F.2d 794.
58 C.J. p. 40 note 26.

24. U.S.—Ace Waterways v. Fleming, D.C.N.Y., 98 F.Supp. 666.

25. U.S.—Hartranft v. Du Pont, Pa., 6 S.Ct. 1188, 118 U.S. 223, 30 L.Ed. 205.
58 C.J. p. 41 note 27.

Vessel or craft not included
U.S.—U.S. v. The Mollie, C.C.Tex., 26 F.Cas.No. 15,795, 2 Woods 318.
58 C.J. p. 41 note 27 [b].

26. **Vessel of less than specified tonnage held not within regulation**
U.S.—The Messenger, Ind., 168 F. 908, 94 C.C.A. 312.
58 C.J. p. 41 note 28.

27. U.S.—Beck v. Johnson, C.C.Ky., 169 F. 154.
58 C.J. p. 41 note 29.

28. U.S.—The Sakito Maru, D.C.Cal., 41 F.Supp. 769, affirmed in part and reversed in part on other grounds, C.C.A., Carr v. Hermosa Amusement Corp., 137 F.2d 983, certiorari denied Hermosa Amusement Corp. v. Carr, 64 S.Ct. 520, 321 U.S. 764, 88 L.Ed. 1060.
58 C.J. p. 41 note 30.

Barge carrying fishermen

(1) An ocean-going barge of more than one hundred tons navigating the Pacific Ocean and carrying fishermen and others is required to comply with requirements of federal local inspectors as to structure, her command by a licensed master, and other matters.—Carr v. Hermosa Amusement Corp., C.C.A.Cal., 137 F.2d 983, certiorari denied Hermosa Amusement Corp. v. Carr, 64 S.Ct. 520, 321 U.S. 764, 88 L.Ed. 1060.

(2) A navigable seagoing barge, having been converted from a self-propelling vessel to a barge carrying fishermen, but retaining her steering apparatus and her hull lines, which had been anchored at a bay for period of upward of two years for use by fishermen, is "at sea" and with her movements through the tidal and other currents and in the rise and fall of the tide and in the surge of swell or sea, controlled by her anchor chains, is being "navigated," so as to require a certificate of inspection of local inspectors of steamboats.—U.S. v. Monstad, C.C.A.Cal., 134 F.2d 986.

Water-tight bulkheads

The requirement that a seagoing barge of one hundred gross tons or more carrying passengers shall have sufficient number of transverse water-tight bulkheads fitted so that barge will remain afloat with positive stability if any one main compartment is flooded is not arbitrary but is a valid regulation.—Carr v. Hermosa Amusement Corporation, C.C.A. Cal., 137 F.2d 983, certiorari denied Hermosa Amusement Corp. v. Carr, 64 S.Ct. 520, 321 U.S. 764, 88 L.Ed. 1060.

29. U.S.—Los Angeles v. United Dredging Co., C.C.A.Cal., 14 F.2d 364
58 C.J. p. 41 note 31.

30. Mass.—Commonwealth v. Breakwater Co., 100 N.E. 1034, 214 Mass. 10
58 C.J. p. 41 note 33.

31. U.S.—The Annie Faxon, Wash., 75 F. 312, 21 C.C.A. 366—Posey v. Scoville, C.C.La., 10 F. 140.

32. U.S.—The Joshua Leviness, D.C. N.Y., 13 F.Cas.No. 7,549, 9 Ben. 339.

33. U.S.—The Bright Star, C.C.Mo., 4 F.Cas.No. 1,880, Woolw. 266—The Farragut, C.C.Conn., 8 F.Cas.No. 4,677, 6 Blatchf. 207.

34. U.S.—The Oconto, D.C.Wis., 18 F.Cas.No. 10,421, 5 Biss. 460, affirmed, C.C., The May, 16 F.Cas.No. 9,330, 6 Biss. 243.
58 C.J. p. 41 note 38

35. U.S.—The Oyster Police Steamers, D.C.Md., 31 F. 763, affirmed, C.C., The Governor Robert McLane v. U.S., 35 F. 926.

36. U.S.—U.S. v. The Reefer King, D.C.Wash., 90 F.Supp. 236.

A chartered vessel carrying cargo of meat and fish, sold and shipped by charterer, was engaged in commerce and hence a "merchant vessel" with-

certain vessels shall not be permitted to depart from a port of the United States unless a certain per cent of the crew are able to understand the orders of the officers, and unless a certain per cent are of a rating not less than able seamen, although not expressly exempting foreign vessels, does not apply to such vessels.[37] Similarly, the statutory provision that every coastwise sea-going vessel shall, when under way, except on the high seas, be under control and direction of pilots licensed by the inspector of steamboats does not apply to a foreign vessel.[38]

§ 6. Licensing and Discipline of Personnel

Statutes providing for the licensing of certain officers of vessels, by the board of local inspectors, after an examination as to character, experience, and habits, have been construed and given effect. Under provisions for the suspension and revocation of licenses, the proceedings must, in substance, conform to requirements as to notice and hearing.

A statute providing for the licensing of certain officers of vessels, by the board of local inspectors, after an examination as to character, experience, and habits, has been construed and given effect.[39]

Suspension and revocation. Statutory provisions for the suspension and revocation of licenses have been treated as penal, and, therefore, have been strictly construed in favor of the licensed officer concerned.[40] Original jurisdiction in this regard is, under statute, vested solely in the board of local inspectors,[41] and, since the jurisdiction of supervising inspectors and of the supervising inspector general is appellate and revisory only,[42] an attempt by the supervising inspector to exercise original jurisdiction in respect of suspension or revocation is ineffectual.[43] The proceedings before the board of local inspectors must, in substance, conform to requirements as to notice and hearing,[44] and a mere general investigation in which no charges are preferred against the particular officer concerned is not a compliance with the statute[45] and is not sufficient to authorize a suspension or revocation of a license.[46] The supervising inspector by a review of the conclusion of the local board in such general investigation may not invest himself with authority to suspend or revoke a license.[47]

The authority of the Coast Guard commandant to make rules and regulations does not include the right to suspend a seaman's certificate of service without a hearing in violation of statutory provision,[48] and the examiner presiding in disciplinary proceedings does not have authority to suspend the certificate of service of the accused seaman before final determination in the proceeding.[49]

Production or impounding of certificate of service. An examiner appointed by the Coast Guard commandant to preside at hearings in the adjudication of disciplinary actions against seamen under a statute providing for investigation of marine casualties has authority to issue subpœnas requiring seamen to present their licenses, if needed as evidence, and the district court has jurisdiction to compel obedience to such subpœnas.[50] However, the court will not require the production of such documents where not authorized by law,[51] and the impounding of the certificate of service of a seaman pending final disposition of disciplinary action against him is improper since it would deprive him of the right to follow his vocation while the charges are pending, the production of the certificate being necessary to obtain employment.[52]

Appeal or review. Appellate and revisory jurisdiction in respect of decisions as to the suspension or revocation of licenses of officers of vessels is vested in the supervising inspectors[53] and the supervising inspector general.[54] While proceedings before the supervising inspectors in respect of the suspension or revocation of a license are more or

in Load Line Act—U. S. v. The Reefer King, supra.

37. U.S.—Petition of Canadian Pac. R. Co., D.C.Wash., 278 F. 180.

38. U.S.—Petition of Canadian Pac. R. Co., supra.

39. U.S.—Joyce v. Bulger, D.C.N.D., 240 F. 817.

40. U.S.—Fredenberg v. Whitney, D.C.Wash., 240 F. 819.

41. U.S.—Fisher v. Alwen, C.C.A. Wash., 290 F. 8.

42. U.S.—Fisher v. Alwen, supra.

43. U.S.—Fisher v. Alwen, supra.
58 C.J. p. 42 note 59

44. U.S.—Joyce v. Bulger, D.C.N.D., 240 F. 817.
58 C.J. p. 42 note 60.

45. U.S.—Fisher v. Alwen, C.C.A. Wash., 290 F. 8.

46. U.S.—Fisher v. Alwen, supra.

47. U.S.—Fisher v. Alwen, supra.

48. U.S.—In re Merchant Mariners Documents Issued to Dimitratos, D.C.Cal., 91 F.Supp. 426

49. U.S.—In re Merchant Mariners Documents Issued to Dimitratos, supra.

50. U.S.—In re Merchant Mariners Documents Issued to Dimitratos, supra.

Certificates not needed as evidence

Where seamen against whom disciplinary actions were pending under statute providing for investigation of marine casualties admitted that they held certificates of service and no question was raised as to such certificates being delivered to, and held by, them, requiring them to produce and deliver such certificates to presiding examiner was not justified on ground that they were needed as evidence in the case—In re Merchant Mariners Documents Issued to Dimitratos, supra.

51. U.S.—In re Merchant Mariners Documents Issued to Dimitratos, supra.

52. U.S.—In re Merchant Mariners Documents Issued to Dimitratos, supra.

53. U.S.—Fisher v. Alwen, C.C.A. Wash., 290 F. 8.

54. U.S.—Fisher v. Alwen, supra.

less summary, and technical requirements should not be insisted on,[55] there should, at least, be a substantial compliance with the governing law.[56] The right of a stranger to the proceeding to appeal to the supervising inspector from a decision of the local inspectors granting a license has been denied,[57] and the act of the supervising inspector who directs the revocation of a license, in such an appeal by a stranger, is ineffective.[58] In the absence of any regulation governing the action of supervising inspectors in the exercise of their revisory power over the local boards of inspection in respect of suspension or revocation of licenses, they should follow by analogy the practice prescribed for appeal from the local boards, and require that the record of proceeding before the local board shall be certified by the supervising inspector.[59]

Where judicial review of the decision of the commandant of the Coast Guard relative to certificates of service and merchant mariners' documents in an investigation of marine casualties is sought, and the commandant is not served with notice, such review will be denied for lack of jurisdiction.[60] It has further been held that it is doubtful whether the court has authority to interfere with the commandant's order, it being final and binding on the parties for all purposes;[61] and even where the court has jurisdiction to review the order, in the absence of a finding that was clearly erroneous and in the absence of a showing of arbitrary or like misconduct, the findings and order of the commandant will be affirmed.[62]

§ 7. Filing Manifest and Obtaining Clearance of Vessels

Clearance is in effect a vessel's passport granted to it when sailing to a foreign port, and, since congress has power to control the manner and terms on which clearance shall be granted or withheld, compliance must be had with the requirements of the statute specifying how a clearance may be obtained.

Clearances have a history in the maritime law extending over hundreds of years.[63] A clearance is in effect a vessel's passport,[64] and it is granted to vessels sailing to a foreign port.[65] Congress has power to control the manner and terms on which clearance shall be granted or withheld,[66] and the requirements as to how a clearance may be obtained, specified in the statute, should be complied with,[67] including provisions as to matters to be contained in the oaths of the master[68] and of the shipper.[69] So also, the collector is neither bound[70] nor authorized[71] to grant a clearance until a proper manifest is presented to him. In this respect, a "manifest" is defined as a written instrument containing a true account of the cargo of a ship or commercial vessel and which must contain a list of all the packages or separate items of freight with their distinct marks.[72] A place fixed by longitude and latitude on the high seas, where vessels were to be met and provisioned, is not "port" within

55. U.S.—Fisher v Alwen, supra.

56. U S —Fisher v. Alwen, supra

57. U S.—Joyce v Bulger, D C Md., 240 F 817.

58. U S.—Joyce v. Bulger, supra.

59. U S —Fisher v. Alwen, C C A. Wash., 290 F 8
58 C J p 42 note 73.

60. U.S —In re Certificates of Service and Merchant Mariners' Documents Issued to Soto, D C.N Y, 73 F.Supp 725.

61. U S.—In re Certificates of Service and Merchant Mariners' Documents Issued to Soto, supra

62. U S —In re Certificates of Service and Merchant Mariners' Documents Issued to Soto, supra.

63. U S.—Hamburg-American Steam Packet Co. v U. S, N.Y, 250 F. 747, 163 C C A 79, certiorari denied 38 S.Ct. 333, 246 U.S 622, 62 L Ed 927

64. U S.—Hamburg-American Steam Packet Co v. U. S, supra.

"Clearance"

(1) In maritime law "clearance" is a document in the nature of a certificate given by the collector of customs to an outwardbound vessel to the effect that she has complied with the law, and is duly authorized to depart —Black L.D.—11 C.J. p 835 note 75.

(2) Other definitions see 11 C J. p 836 notes 76–78.

"Clear"

In maritime law, the term "clear" means to satisfy the customs, harbor dues, and the like, and to obtain from the governmental authority of the port leave to depart —International Mercantile Marine Co. v Stranahan, C C N Y., 155 F 428, affirmed 29 S Ct 671, 214 U.S 320, 53 L Ed 1013, followed in 29 S.Ct. 678, 213 U S. 344, 53 L Ed 1024.

"Clearing" is the departure of a vessel from port, after complying with the customs and health laws and like local regulations —Black L. D.

Contents of clearance

The clearance contains, among other items, the name of the master, of the vessel, and of the port to which the vessel is going —Hamburg-American Steam Packet Co. v U S., N Y., 250 F. 747, 163 C.C A 79, certiorari denied 38 S.Ct. 333, 246 U.S. 622, 62 L.Ed. 927.

65. U S —Taber v U. S, C C Mass, 23 F Cas No 13,722, 1 Story 1.
58 C J. p 43 note 80.

66. U S —Lancashire Shipping Co. v Durning, C.C.A N Y., 98 F 2d 751, followed in Atlantic Transport Co v. Durning, 98 F 2d 753, certiorari denied Lancashire Shipping Co. v Durning, 59 S Ct. 102, 305 U S. 635, 83 L.Ed. 408.

67. U.S —Hamburg-American Steam Packet Co. v U S, N.Y., 250 F. 747, 163 C C A 79, certiorari denied 38 S.Ct 333, 246 U S. 622, 62 L.Ed. 927

68. U.S —Hamburg-American Steam Packet Co. v. U S, supra.

69. U.S —Hamburg-American Steam Packet Co. v. U. S, supra.

70. U S —Bas v Steele, Pa., 2 F.Cas No 1,088, 3 Wash.C.C 381.

71. U S —Hamburg-American Steam Packet Co v U. S, N Y., 250 F. 747, 163 C C A 79, certiorari denied 38 S Ct. 333, 246 U.S. 622, 62 L.Ed. 927.

72. Tex —Worbes v. State, 71 S W. 2d 872, 873, 126 Tex Cr. 379.

the statutory meaning of the statutory provisions as to clearance.[73]

While the circumstances may be such as to support a refusal of a clearance, even though the documents presented are regular on their face,[74] where there has been a compliance with the statutory requirements, it is in general the duty of the collector to grant a clearance,[75] and for a breach of duty in this regard he is liable for damages,[76] notwithstanding he acted under instructions from the secretary of the treasury in refusing a clearance.[77] Under a statute providing that no vessel shall be granted clearance while a fine remains unpaid, except that clearance may be granted prior to determination of such question on deposit of a bond with sufficient surety to secure payment thereof, the word "determine" in the context of the statute means administratively determined,[78] and the collector of customs may lawfully refuse clearance until payment of the fine, where such refusal occurred after administrative determination of the question, notwithstanding posting of bond.[79]

§ 8. Port Wardens Appointed under State Statutes

Under various state statutes whose operative force has substantially been narrowed, the office of port warden has been established, with certain duties as to the survey and sale of vessels and cargo.

Under various state statutes the office of port warden has been established,[80] with certain duties as to the survey and sale of vessels and cargo;[81] but the operative force of such statutes has substantially been narrowed.[82]

§ 9. War-Time or Emergency Control

- a. In general
- b. Requisition of vessels in general
- c. War risk insurance
- d. Compensation for requisition or loss by war risk
- e. Claims against requisitioned vessel or compensation fund
- f. Operation of vessels by director general of railroads

a. In General

Governmental regulations and controls affecting the sale, chartering, use and operation of vessels during wartime have been held valid.

Governmental regulations and controls affecting the sale, chartering, use and operation of vessels during wartime have been held valid.[83] The United States, by taking protective custody of a foreign ship in an American port to prevent her destruction and loss by sabotage, does not assume to pay or discharge prior debts and liens against the vessel for coal, foodstuffs, and supplies furnished the vessel.[84]

b. Requisition of Vessels in General

Under some statutes the requisitioning of vessels owned by citizens of the United States, or of foreign owned vessels within the jurisdiction of the United States, for national defense, during a national emergency, is authorized.

Under some statutes, the requisitioning of vessels owned by citizens of the United States,[85] or of foreign-owned vessels within the jurisdiction of the United States,[86] for national defense, during a

73. U.S.—Hamburg-American Steam Packet Co. v. U. S., N.Y., 250 F. 747, 163 C.C.A. 79, certiorari denied 38 S.Ct. 333, 246 U.S. 622, 62 L.Ed. 927

74. U.S.—Bas v. Steele, Pa., 2 F.Cas. No. 1,088, 3 Wash.C.C. 381.

75. U.S.—Hendricks v. Gonzalez, N.Y., 67 F. 351, 14 C.C.A. 659

76. U.S.—Hendricks v. Gonzalez, supra.

77. U.S.—Hendricks v. Gonzalez, supra.

78. U.S.—Papaliolios v. Durning, D.C.N.Y., 90 F.Supp. 496, affirmed, C.A., 186 F.2d 308, certiorari denied 71 S.Ct. 1001, 341 U.S. 940, 95 L.Ed. 1367.

79. U.S.—Papaliolios v. Durning, supra.

80. Cal.—People v. Nickel, 100 P. 1075, 9 Cal.App. 783.
58 C.J. p. 43 note 99

"Port warden" is defined as an officer maintained in some ports to oversee the administration of the local regulations, a sort of harbor master.—Black L.D.

81. N.Y.—Neal v. Burling, 177 N.Y.S. 902, 107 Misc. 617.
58 C.J. p. 43 note 1.

82. N.Y.—Neal v. Burling, supra.

83. U.S.—American-Hawaiian S.S. Co. v. U.S., D.C.N.Y., 85 F.Supp. 815, affirmed, C.A., 191 F.2d 26, certiorari denied 72 S.Ct. 553, 342 U.S. 941, 96 L.Ed. ——.

84. U.S.—Durant v. U.S., D.C.N.C., 53 F.Supp. 1003.

85. U.S.—The Sonora, D.C.Tex., 50 F.Supp. 687

Statute held valid

U.S.—The Sonora, supra.

Intervention to obtain requisition of vessel

In proceeding by private person in admiralty against vessel and her owners for damage to cargo, etc., wherein the government intervened to obtain recognition of right to requisition the vessel during national emergency, admiralty court could not fix amount of compensation to be paid by government for vessel but the government as between the parties would be bound by the final judgment in the proceedings with respect to whom such compensation should be paid, and the court might so provide in order for delivery of vessel to war shipping administrator.—The Sonora, supra.

86. U.S.—The Pietro Campanella, D.C.Md., 41 F.Supp. 656.

Waters within jurisdiction of United States

Under act authorizing president to requisition idle foreign merchant vessels in waters within jurisdiction of United States including Philippine Islands and Canal Zone for purposes of national defense, inclusion of Philippine Islands and Canal Zone was not by way of limitation on powers of the president but by way of their enlargement.—The Maret, C.C.A.Virgin Islands, 145 F.2d 431.

Statutes held not conflicting

The statute relating to the requisitioning of foreign-owned vessels within the jurisdiction of the United States has been held not to be in conflict with a statute relating to forfei-

national emergency, is authorized; but compensation must be paid in accordance with the provisions of law, as discussed infra subdivision d of this section. The statutory right to requisition a vessel owned by an American citizen during the national emergency is not affected by the fact that the vessel is in the custody of a court of admiralty,[87] and in the case of a foreign-owned vessel, also, it is immaterial to the application of the statute whether or not the vessel is subject to litigation.[88] The requisitioning of foreign ships permits them to be used for purposes vital to the prosecution of the war but does not take them from the custody of the courts,[89] and where a court has prior custody and jurisdiction of the vessel in forfeiture proceedings it may, notwithstanding the requisition, continue its technical custody and jurisdiction and provide for restoration of the vessel to the custody of the court marshal on release by the government agency requisitioning the vessel.[90] In requisitioning foreign ships, the United States merely takes over whatever rights the claimants may have, and there is nothing inconsistent in such requisitioning and in the forfeiture of such ships for sabotage.[91]

Under the statute the power to requisition vessels under conditions fixed by the statute is intrusted to a designated administrative agency,[92] and when to requisition rests in the sound discretion of such agency.[93] The motive of a public officer in ordering the requisition of a domestic vessel is not open to judicial inquiry.[94]

c. War Risk Insurance

The liability of the United States on a war risk insurance policy issued under statutes authorizing the issuance of policies of war risk insurance on certain vessels and their cargo is to be determined in accordance with the provisions of the policy.

The liability of the United States on a war risk

ture of a foreign vessel for sabotage —U. S. v The Antoinetta, C C A N.J & Pa, 153 F 2d 138, certiorari denied Lorenzo v U. S, 66 S.Ct. 1368, 328 U.S 863, 90 L Ed. 1633, and Rosasco v. U. S, 66 S Ct 1368, 328 U S 863, 90 L Ed 1633, rehearing denied 67 S. Ct. 31, two cases, 329 U S. 820, 91 L Ed. 698, certiorari denied Mariano Maresca & Co. v. U S, 66 S.Ct 1369, 328 U S. 864, 90 L.Ed 1634, and Italia-Societa Anonima Di Navigazione v. U. S, 66 S Ct. 1369, three cases, 328 U.S. 864, 90 L Ed 1634, rehearing denied 67 S Ct. 32, two cases, 329 U.S. 820, 821, 91 L Ed. 698, certiorari denied Italia-Societa Anonima Di Navigazione v. U. S., 66 S.Ct 1369, 328 U S. 864, 90 L Ed. 1634, and Societa Anonima Coop Di Navigazione Garibaldi v. U S. 66 S.Ct. 1369, 328 U S 864, 90 L Ed 1634, rehearing denied 67 S Ct 32, two cases, 329 U S. 821, 91 L Ed 698; certiorari denied Italia-Societa Anonima Di Navigazione v U. S, 66 S Ct 1370, two cases, 328 U S 864, 90 L Ed 1634, 1635, rehearing denied 67 S Ct 33, two cases, 329 U S. 821, 91 L.Ed. 699, certiorari denied Loomis v U. S, 66 S. Ct 1375, 328 U S 864, 90 L Ed 1635, rehearing denied 67 S Ct 34, 329 U S 821, 91 L Ed 699—The Villarperosa, D C.N.Y, 43 F Supp 140

Order to marshal and collector of customs

An order granting petitions of the government alleging that the maritime commission had taken possession of two foreign vessels for purposes of national defense under statutory authority and praying that the marshal and collector of customs be directed to comply with commission's notice of taking was granted with understanding that in accordance with statute the government assume the obligation not only to pay just compensation for use of vessels, but also to pay just compensation to proper owners as their claims might be established for any uninsured loss, damage, or injury to vessels while in the government's possession, ordinary wear and tear from use excepted—The Pietro Campanella, D. C Md, 41 F.Supp. 656.

87. U S—The Sonora, D C.Tex, 50 F.Supp 687.

88. U S—The Villarperosa, D C N Y., 43 F.Supp. 140.

89. U S—U. S. v The Antoinetta, C C A.N J. & Pa, 153 F 2d 138, certiorari denied Lorenzo v. U S, 66 S Ct 1368, 328 U.S 863, 90 L Ed 1633, and Rosasco v U. S, 66 S Ct 1368, 328 U.S. 863, 90 L Ed. 1633, rehearing denied 67 S Ct. 31, two cases, 329 U.S. 820, 91 L Ed 698; certiorari denied Mariano Maresca & Co v. U S, 66 S Ct 1369, 328 U.S. 864, 90 L Ed. 1634, and Italia-Societa Anonima Di Navigazione v. U. S, 66 S.Ct. 1369, three cases, 328 U S 864, 90 L Ed 1634, rehearing denied 67 S Ct. 32, two cases, 329 U S. 820, 821, 91 L Ed 698; certiorari denied Italia-Societa Anonima Di Navigazione v U. S, 66 S.Ct. 1369, 328 U S. 864, 90 L Ed 1634, and Societa Anonima Coop Di Navigazione Garibaldi v. U S, 66 S Ct. 1369, 328 U S. 864, 90 L Ed 1634, rehearing denied 67 S.Ct. 32, two cases, 329 U.S 821, 91 L Ed 698; certiorari denied Italia-Societa Anonima Di Navigazione v. U. S., 66 S Ct. 1370, two cases, 328 U S 864, 90 L Ed 1634, 1635, rehearing denied 67 S Ct. 33, two cases, 329 U S 821, 91 L Ed 699; certiorari denied Loomis v. U S., 66 S Ct. 1375, 328 U S. 864, 90 L Ed 1635, rehearing denied 67 S Ct. 34, 329 U.S. 821, 91 L Ed. 699

90. U S.—The Pietro Campanella, D. C Md., 41 F Supp. 656.

91. U S—U. S v. The Antoinetta, C. C A N.J. & Pa, 153 F 2d 138, certiorari denied Lorenzo v. U. S, 66 S Ct. 1368, 328 U S 863, 90 L Ed 1633, and Rosasco v. U S, 66 S Ct 1368, 328 U.S 863, 90 L Ed 1633, rehearing denied 67 S Ct. 31, two cases, 329 U.S. 820, 91 L Ed 698; certiorari denied Mariano Maresca & Co. v. U. S, 66 S Ct. 1369, 328 U. S. 864, 90 L Ed 1634, and Italia-Societa Anonima Di Navigazione v. U S, 66 S Ct 1369, three cases, 328 U S 864, 90 L Ed 1634, rehearing denied 67 S Ct. 32, two cases, 329 U S. 820, 821, 91 L Ed 698; certiorari denied Italia-Societa Anonima Di Navigazione v U. S, 66 S. Ct 1370, two cases, 328 U.S. 864, 90 L Ed. 1634, 1635, rehearing denied 67 S Ct. 33, two cases, 329 U S. 821, 91 L Ed 699; certiorari denied Loomis v U S, 66 S Ct 1375, 328 U S. 864, 90 L Ed. 1635, rehearing denied 67 S Ct. 34, 329 U S 821, 91 L Ed. 699.

92. U S—American-Hawaiian S S. Co. v. U S, D C N.Y, 85 F Supp. 815, affirmed, C A, 191 F 2d 26, certiorari denied 72 S Ct 553, 342 U.S. 941, 96 L Ed. ——.

93. U.S.—American-Hawaiian S. S. Co. v. U. S, supra.

94. N.Y.—Henjes Marine, Inc., v. White Const. Co., 58 N.Y S.2d 384.

insurance policy issued under statutes authorizing the issuance of policies of war risk insurance on certain vessels and their cargo is to be determined in accordance with the provisions of the policy.[95] General rules apply with respect to the validity of issuance and delivery of the policy.[96] The delivery of a war risk insurance binder after known loss of the vessel may be valid,[97] and, where the government was under statutory obligation to furnish war risk insurance at the time of requisition of use of a vessel, the fact that the vessel requisitioned was lost through enemy action some time before the actual execution of the charter and insurance binder was held not to render such insurance ultra vires.[98]

No liability exists under a war risk insurance policy except for a loss covered thereby,[99] and the intention of the parties to the policy is controlling in determining whether a particular loss is within the coverage of the policy.[1] Generally, war risk insurance covers losses due to perils superimposed on usual marine perils by war,[2] and, under the terms of the policy, losses for which liability exists are those only which are "consequences of hostilities or warlike operations."[3] So the coverage of such a policy extends only to perils due directly to some hostile action, military maneuver, or operational war danger, and does not include aggravation or increase of maritime risk because of war operations.[4] There must be a causal connection between the warlike operation and the occurrence which resulted in the loss,[5] and the existence or nonexistence of causal connection between the peril insured against by the policy and the loss is determined by looking to the factual situation in each case and applying the concept of proximate cause.[6]

95. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds C.A., 198 F.2d 182.

Amount of recovery under policy as measured by "just compensation" see infra subdivision d of this section.

Application of normal business standards

United States was engaged in business in so far as war risk insurance on requisitioned vessel was concerned, and its actions and obligations were to be judged by normal business standards.—De La Rama S.S. Co. v. U.S., supra.

96. U.S.—National Bulk Carriers v. U.S., D.C.Del., 56 F.Supp. 765

A charter and war risk binder issued by the government and covering a requisitioned vessel, which created new rights and liabilities and was a substitute for the shipowner's right to receive full compensation, created a valid contract of insurance and was not merely a restatement of a preexisting obligation.—National Bulk Carriers v. U.S., supra.

97. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds C.A., 198 F.2d 182—National Bulk Carriers v. U.S., D.C.Del., 56 F.Supp. 765

98. U.S.—U.S. v. Leahy, C.C.A.Del., 148 F.2d 462.

99. U.S.—Loyal Fur Mfg. Co. v. U.S., D.C.N.Y., 87 F.Supp. 116.

Cargo war risk policy

U.S.—Loyal Fur Mfg. Co. v. U.S., supra.

Breach of warranty by insured held not waived

U.S.—Loyal Fur Mfg. Co. v. U.S., supra.

1. U.S.—Standard Oil Co. of N.J. v. U.S., N.Y., 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86

2. U.S.—Standard Oil Co. of N.J. v. U.S., N.Y., 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

3. U.S.—U.S. v. Standard Oil Co. of N.J., C.A.N.Y., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86

Question of fact

Whether a vessel is engaged in warlike operation at time of loss is essentially a question of fact.—U.S. v. Standard Oil Co. of N.J., D.C.N.Y., 81 F.Supp. 183, reversed on other grounds, C.A., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

Creation of peril

A loss will be held to be a "consequence of hostilities" and to come within limits of war risk policy where one of the vessels party to the loss is both engaged in warlike operation and so navigating as result of the war that it creates a peril.—U.S. v. Standard Oil Co. of N.J., C.A.N.Y., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86

Defensive operations

Warlike operations include and cover operations defensive as well as offensive in character.—U.S. v. Standard Oil Co. of N.J., D.C.N.Y., 81 F.Supp. 183, reversed on other grounds, C.A., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

Loss held not within risk insured

(1) In general.—U.S. v. Standard Oil Co. of N.J., C.A.N.Y., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

(2) Where there was no causal connection between stranding of vessel when inexperienced helmsman made mistake in steering and vessel's warlike operation of transporting military supplies and personnel between war bases, the stranding was not "consequence of warlike operations" within policy insuring vessel against war risks, including all consequences of warlike operations.—Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

4. U.S.—U.S. v. Standard Oil Co. of N.J., C.A.N.Y., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

5. U.S.—Standard Oil Co. of N.J. v. U.S., N.Y., 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

Peril common to all vessels

Where a vessel engaged in a warlike operation suffers damage because of a peril common to war vessels and nonwar vessels alike, the marine underwriters, rather than war risk underwriters, will be held liable.—U.S. v. Standard Oil Co. of N.J., C.A.N.Y., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

6. U.S.—Standard Oil Co. of N.J. v. U.S., N.Y., 71 S.Ct. 135, 340 U.S.

Suit to enforce liability on a war risk insurance policy may be brought in the court specified by statute.[7] In accordance with the terms of the statute, suit may be instituted where there is a disagreement between insurer and insured as to a claim for loss on account of such insurance,[8] and an administrative determination of just compensation for the loss is not required as a condition precedent to commencement of the action.[9] Even if such a determination were required as a condition precedent to suit, the condition is one which could be waived,[10] and the refusal of the proper board or officer to act within a reasonable time after known loss of the vessel constitutes a determination that no amount was payable on the insurance or an election waiving its right to make one.[11] There is no obligation on the part of insured to bring a proceeding to compel the making of such administrative determination.[12] The owner claiming that the loss resulted from a war risk, rather than a marine risk, so as to be within the coverage of the policy, has the burden of proof.[13]

d. Compensation for Requisition or Loss by War Risk

Generally, under the statutes authorizing the requisition of certain vessels for use by the federal government, the government is obliged to pay just compensation for the taking or use, and a similar liability for just compensation exists where there has been a loss of a vessel under a policy of war risk insurance issued by the United States.

Generally, under the statutes authorizing the requisition of certain vessels for use by the federal government, the government is obliged to pay "just compensation" for the taking or use,[14] and a similar liability for "just compensation" exists where there has been a loss of a vessel under a policy of war risk insurance issued by the United States or an agency thereof, fixing the amount of insurance as "just compensation" to be determined under the provisions of the Merchant Marine Act.[15] The term "just compensation" as used in the statute authorizing payment of just compensation to the own-

54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U. S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

Collision with moving warship

The proximate cause method of determining on the facts of each case whether a loss is consequence of warlike operations and therefore a war insurance risk will be applied rather than English decisions purportedly announcing the rule that the mere showing of loss from collision with moving warship establishes liability under war risk policy as a matter of law.—Standard Oil Co. of N. J. v. U. S., N.Y., 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U. S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

7. U.S.—De La Rama S. S. Co. v. U. S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds C.A., 198 F.2d 182.

Effect of repeal of statute

Although United States incurred war risk insurance liability through loss of requisitioned motor vessel and libel on claim was commenced and pending in federal district court prior to repeal of statutory provision giving district court jurisdiction to hear such claim, after the repeal district court no longer had jurisdiction of libel.—De La Rama S.S. Co. v. U. S., C.A.N.Y., 198 F.2d 182.

Petition to court of claims

Where libelant, which had already initiated proceeding on claim for war risk insurance, filed petition for just compensation in United States court of claims shortly before expiration of statute of limitations for such claim, such filing was not determinative of jurisdiction of district court to hear pending claim for war risk insurance.—De La Rama S.S. Co. v. U. S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds, C.A., 198 F.2d 182.

8. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds, C.A., 198 F.2d 182.

Impossibility of adjusting claim before running of limitations

Failure of War Shipping Administration to adjust claim for loss on account of war risk insurance and its statement that it would be impossible to dispose of matter by time the statute of limitations would have afforded it complete defense constituted disagreement as to insurance claim sufficient to authorize owner of lost vessel to bring libel.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds, C.A., 198 F.2d 182.

9. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds, C.A., 198 F.2d 182.

10. U.S.—National Bulk Carriers v. U.S., D.C.Del., 56 F.Supp. 765.

11. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds, C.A., 198 F.2d 182.

12. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 98 F.Supp. 514, reversed on other grounds, C.A., 198 F.2d 182.

13. U.S.—U.S. v. Standard Oil Co. of N.J., C.A.N.Y., 178 F.2d 488, affirmed 71 S.Ct. 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U.S., Ct.Cl., 71 S.Ct. 144, 340 U.S. 71, 95 L.Ed. 86.

14. U.S.—De La Rama S.S. Co. v. U.S., D.C.N.Y., 92 F.Supp. 243—National Bulk Carriers v. U.S., D.C.Del., 82 F.Supp. 495—Copper River Packing Co. v. U.S., 118 Ct.Cl. 561—Nicholson Transit Co. v. U.S., 118 Ct.Cl. 344—Jacobson v. U.S., 118 Ct.Cl. 327.

15. U.S.—American-Hawaiian S.S. Co. v. U.S., D.C.N.Y., 85 F.Supp. 815, affirmed, C.A., 191 F.2d 26, certiorari denied 72 S.Ct. 553, 342 U.S. 941, 96 L.Ed. —.

Requisition on time charter basis

Where the government requisitioned a vessel on a time-charter basis and issued a war risk binder defining the amount of insurance as "just compensation" to be determined under the Merchant Marine Act, the amount of damages to be awarded the owner for total loss of the vessel was the sum that would be considered just compensation for the vessel as though, at the time of such loss, the vessel had been requisitioned as to title by the government.—The Virginia, D.C.Del., 73 F.Supp. 622, affirmed, C.A., National Bulk Carriers v. U.S., 169 F.2d 943.

Vessel rebuilt after constructive total loss

Where government requisitioned vessel on time-charter basis and vessel was torpedoed but remained afloat and was subsequently rebuilt after having been found a constructive total loss, amount of award in action by owner to recover just compensation was to be determined as though vessel had actually been sunk and thereby became a complete and total loss to her owner.—National Bulk Carriers v. U.S., D.C.Del., 82 F.Supp. 495.

er of a vessel requisitioned or purchased by the government in time of emergency means the same as "just compensation" in the Fifth Amendment to the federal Constitution, and is subject to general principles announced by the courts in awarding just compensation under the Fifth Amendment[16] The determination as to what constitutes just compensation is a matter for the courts,[17] and while they are not necessarily bound by the terms of the statute authorizing the requisition of vessels, since provision for just compensation is specifically a constitutional matter, they may, in arriving at what compensation is just, consider the factors impelling congress to enact certain provisions as to compensation.[18] Rules formulated for the guidance of an administrative body administering the Merchant Marine Act, with respect to what constitutes just compensation, are entitled to great respect, but such rules may not run counter to provisions of the statute.[19]

Generally speaking, just compensation for a vessel requisitioned or lost under a policy of war risk insurance is the value of the property taken at the time of the taking,[20] or, as otherwise stated, the fair and reasonable value of the vessel,[21] and not necessarily the cost of the vessel to the owner,[22] or reproduction cost,[23] less depreciation. The determination of value of a ship cannot be reduced to inexorable rules,[24] that is, ascertainment of value is not controlled by artificial rules, but must be a reasonable judgment having its basis in a proper consideration of all relevant facts[25] The court will consider each vessel as an individual thing, and its value at the time of taking will be determined from all evidence in the record and in the light of conditions then existing,[26] value must be determined in the light of all the circumstances which properly go into an appraisal of value[27] In accordance with these rules, particular awards have been held to constitute just compensation for the requisition of a vessel or for its loss under a policy of war risk insurance.[28] An award may include interest to

16. U S —The Virginia, D C Del, 73 F Supp 622, affirmed, C A, National Bulk Carriers v. U. S., 169 F 2d 943.

17. U S —Cors v U S, 75 F Supp. 235, 110 Ct Cl 66, reversed on other grounds 69 S Ct. 1086, 337 U S 325, 93 L Ed 1392

18. U S.—Baltimore Steam Packet Co v U. S, 81 F Supp 707, 112 Ct. Cl. 433.

19. U.S —Cors v U. S, 75 F.Supp 235, 110 Ct Cl. 66, reversed on other grounds 69 S Ct 1086, 337 U.S 325, 93 L Ed 1392

20. U.S.—U S v. Toronto, Hamilton & Buffalo Nav Co, Ct.Cl, 70 S Ct. 217, 338 U S 396, 94 L Ed 195—National Bulk Carriers v U. S, D.C Del, 82 F.Supp 495—Baltimore Steam Packet Co v U. S, 81 F Supp 707, 112 Ct Cl 433—Wilson Line v. U. S, 78 F.Supp 821, 111 Ct Cl. 764—The Virginia, D C Del, 73 F.Supp 622, affirmed, C A., National Bulk Carriers v. U. S., 169 F 2d 943.

Vessels held to have potential value
U S —Jacobson v. U. S, 118 Ct Cl. 327.

Limitation of recovery by original demand
Fact that during negotiations for settlement of its claim for war risk insurance valuation, shipowner demanded a certain sum from War Shipping Administration was not binding on shipowner and commissioner did not err in placing a valuation in excess of sum originally demanded —De La Rama S. S Co. v. U. S., D.C.N.Y., 92 F.Supp. 243.

21. U S.—Seven-Up Bottling Co. of Los Angeles v U. S, 68 F.Supp 735, 107 Ct.Cl. 402, certiorari denied 68 S Ct. 56, 332 U.S. 757, 92 L Ed 343.

22. U S —U S v. Toronto, Hamilton & Buffalo Nav Co., Ct Cl, 70 S Ct. 217, 338 U.S 396, 94 L Ed 195—McDonald v. U S., 90 F Supp 703, 116 Ct Cl 734.

23. U.S —U. S v. Toronto, Hamilton & Buffalo Nav Co., Ct Cl., 70 S Ct. 217, 338 U S 396, 94 L Ed 195—McDonald v. U S, 90 F Supp 703, 116 Ct Cl 734—Smith-Douglass Co. v U S., Ct Cl., 81 F Supp. 215

24. U S —U. S. v. Toronto, Hamilton & Buffalo Nav Co., Ct Cl., 70 S Ct. 217, 338 U S 396, 94 L Ed 195—De La Rama S S Co. v. U. S, D C. N Y., 92 F Supp. 243.

25. U S —Baltimore Steam Packet Co v. U S, 81 F.Supp. 707, 112 Ct. Cl. 433.

Government not an insurer
Where United States requisitioned vessel in wartime, government did not stand in place of insurer having contract of indemnity with owner.—Baltimore Steam Packet Co. v. U. S, 81 F Supp 707, 112 Ct Cl 433.

26. U.S —U S v Toronto, Hamilton & Buffalo Nav Co, Ct Cl, 70 S Ct 217, 338 U S 396, 94 L Ed. 195—Baltimore Steam Packet Co v. U. S., 81 F Supp 707, 112 Ct.Cl. 433.

27. U S —Henjes v. U. S, 87 F Supp. 780, 115 Ct Cl. 264, certiorari denied 70 S Ct. 1022, 339 U.S. 978, 94 L Ed. 1382.

28. U.S —American-Hawaiian S. S Co. v. U. S, C A N.Y., 191 F.2d 26, certiorari denied U S v. American-Hawaiian S S Co, 72 S Ct 553, 342 U S 941, 96 L Ed. —— —National Bulk Carriers v. U. S, C A Del, 169 F 2d 943—Daniel C Robinson, Inc. v U S., 95 F.Supp 236, 118 Ct. Cl. 414—De La Rama S S. Co v. U. S, D C N.Y., 92 F Supp. 243—McDonald v. U. S, 90 F Supp. 703, 116 Ct Cl. 734—Ramselius v. U. S, 90 F Supp 547, 116 Ct.Cl. 734—Pontin Boat Corp v U. S, 89 F Supp 685, 116 Ct.Cl. 488—Toronto, Hamilton & Buffalo Nav Co v U. S, 88 F.Supp 1016, 116 Ct Cl 184—Henjes v. U. S, 87 F Supp. 780, 115 Ct.Cl. 264, certiorari denied 70 S Ct 1022, 339 U S. 978, 94 L.Ed 1382—National Bulk Carriers v. U. S, D C.Del, 82 F Supp. 495—Broadfoot v. U S, 82 F.Supp. 514, 113 Ct Cl 280—Baltimore Steam Packet Co. v U S, 81 F Supp 715, 112 Ct Cl 458—Baltimore Steam Packet Co. v. U. S, 81 F.Supp 713, 112 Ct Cl. 469—Baltimore Steam Packet Co v U S., 81 F Supp. 711, 112 Ct Cl 448—Baltimore Steam Packet Co v. U. S., 81 F Supp. 707, 112 Ct Cl. 433—Smith-Douglass Co. v U S, Ct.Cl, 81 F.Supp. 215—Wilson Line v. U. S, 78 F.Supp 821, 111 Ct Cl. 764—Turkington v U. S., 71 F Supp 352, 108 Ct.Cl. 571—Kendall v. U. S, 71 F Supp 348, 108 Ct Cl. 497—Seven-Up Bottling Co of Los Angeles v. U. S, 68 F Supp 735, 107 Ct.Cl. 402, certiorari denied 68 S Ct 56, 332 U.S 757, 92 L Ed 343—Trailerships v U S., 66 F.Supp. 595, 106 Ct Cl. 215—Copper River Packing Co. v. U. S, 118 Ct. Cl. 561—Nicholson Transit Co. v. U S, 118 Ct Cl. 344—Jacobson v. U. S., 118 Ct Cl. 327.

the extent permitted by law.[29]

Where insurance was issued by the government in connection with its requisition time charter of the vessel, the date of valuation has been said to be fixed as of the time of requisition, that is, the value as of the date of beginning of the risk under the policy,[30] rather than as of the date of loss.[31] It has also been held, however, that if a ship is sunk or otherwise reduced to a total loss due to a war risk while in government use under requisition the date of loss is considered to be the date on which the government finally completely took the ship for all purposes rather than just for use, and it must pay just compensation as of that date,[32] rather than as of the date of requisition.[33]

Measurement of value; factors considered. Ordinarily, just compensation for the loss or taking of a vessel is measured by fair market value where a market is shown to exist.[34] In determining market value, resort may be had to evidence of sales of comparable vessels on or near the date of loss,[35] and if there are no sales of like ships, then resort may be had to other evidence.[36] Sales of comparable vessels by the maritime commission ordi-

29. Interest recoverable by owner of vessel

U.S.—National Bulk Carriers v. U. S., C.A.Del., 169 F.2d 943—Gartland S. S. Co. v. U. S., Ct.Cl., 98 F. Supp. 587—Daniel C. Robinson, Inc. v. U. S., 95 F.Supp. 236, 118 Ct.Cl. 414—De La Rama S. S. Co. v. U. S., D.C.N.Y., 92 F.Supp. 243—Ramselius v. U. S., 90 F.Supp. 547, 116 Ct.Cl. 612—Henjes v. U. S., 87 F.Supp. 780, 115 Ct.Cl. 264, certiorari denied 70 S.Ct. 1022, 339 U.S. 978, 94 L.Ed. 1382—American-Hawaiian S. S. Co. v. U. S., D.C.N.Y., 85 F.Supp. 815—National Bulk Carriers v. U. S., D.C.Del., 82 F.Supp. 495—Baltimore Steam Packet Co. v. U. S., 81 F.Supp. 707, 112 Ct.Cl. 433—Smith-Douglass Co. v. U. S., Ct.Cl., 81 F.Supp. 215—Wilson Line v. U. S., 78 F.Supp. 821, 111 Ct.Cl. 764—The Virginia, D.C.Del., 73 F. Supp. 622, affirmed, C.A., National Bulk Carriers v. U. S., 169 F.2d 943—Kendall v. U. S., 71 F.Supp. 348, 108 Ct.Cl. 497—Seven-Up Bottling Co. of Los Angeles v. U. S., 68 F. Supp. 735, 107 Ct.Cl. 402, certiorari denied 68 S.Ct. 56, 332 U.S. 757, 92 L.Ed. 343—Trailerships v. U. S., 66 F.Supp. 595, 106 Ct.Cl. 215—Copper River Packing Co. v. U. S., 118 Ct.Cl. 561—Nicholson Transit Co. v. U. S., 118 Ct.Cl. 344—Jacobson v. U. S., 118 Ct.Cl. 327.

Interest recoverable on counterclaim by government

U.S.—Daniel C. Robinson, Inc. v. U. S., 95 F.Supp. 236, 118 Ct.Cl. 414.

30. U.S.—American-Hawaiian S. S. Co. v. U. S., D.C.N.Y., 85 F.Supp. 815, affirmed, C.A., 191 F.2d 26, certiorari denied 72 S.Ct. 553, 342 U.S. 941, 96 L.Ed. —.

31. U.S.—American-Hawaiian S. S. Co. v. U. S., supra.

32. U.S.—National Bulk Carriers v. U. S., C.A.Del., 169 F.2d 943—De La Rama S. S. Co. v. U. S., D.C.N.Y., 92 F.Supp. 243.

33. U.S.—De La Rama S. S. Co. v. U. S., supra.

34. U.S.—National Bulk Carriers v. U. S., C.A.Del., 169 F.2d 943—De La Rama S. S. Co. v. U. S., D.C.N.Y., 92 F.Supp. 243—National Bulk Carriers v. U. S., D.C.Del., 82 F.Supp. 495—Cors v. U. S., 75 F.Supp. 235, 110 Ct.Cl. 66, reversed on other grounds 69 S.Ct. 1086, 337 U.S. 325, 93 L.Ed. 1392.

What constitutes "market value"

"Market value" at time of requisition of purchase of vessel by government in time of emergency is sum that would in all probability result from fair negotiations between owner willing to sell and buyer desiring to buy and ship can have "market value," notwithstanding no one ship is precisely like another and is not subject to daily quotation on some exchange.—U. S. v. Buxton Lines, C.C.A.Va., 165 F.2d 993—The Virginia, D.C.Del., 73 F.Supp. 622, affirmed, C.A., National Bulk Carriers v. U. S., 169 F.2d 943.

Free market

The market to be considered in ascertaining market value as a measure of just compensation for loss of a steamship is a free market, if such exists, at time and place of taking, even though market itself may be considered abnormal due to state of economy at time, either because of war, depression, or other factors.—De La Rama S. S. Co. v. U. S., D.C.N.Y., 92 F.Supp. 243.

Place of market

Price at the market nearest the taking is neither practical nor fair in determining value of vessel requisitioned for public use, since owners would, if possible, sell without geographic restriction.—U. S. v. Toronto, Hamilton & Buffalo Nav. Co., Ct.Cl., 70 S.Ct. 217, 338 U.S. 396, 94 L.Ed. 195.

Market value held sufficiently established

U.S.—The Virginia, D.C.Del., 73 F. Supp. 622, affirmed, C.A., National Bulk Carriers v. U. S., 169 F.2d 943.

Evidence held insufficient to establish market value

U.S.—U. S. v. Toronto, Hamilton & Buffalo Nav. Co., Ct.Cl., 70 S.Ct. 217, 338 U.S. 396, 94 L.Ed. 195—Kendall v. U. S., 71 F.Supp. 348, 108 Ct.Cl. 497—Nicholson Transit Co. v. U. S., 118 Ct.Cl. 344

Projection of former market

In order to avoid purely capricious valuations having no relation to true value, every effort should be made to bridge gap during which there was no market for a ship requisitioned by the government by projecting the former market, if not too remote, on the trend shown by the evidence, or of which the court is judicially aware, thus reaching as nearly as the court can, the figure that the court thinks a willing buyer would have given a willing seller for the ship.—Ramselius v. U. S., 90 F.Supp. 547, 116 Ct.Cl. 612—Smith-Douglass Co. v. U. S., Ct.Cl., 81 F.Supp. 215.

35. U.S.—The Virginia, D.C.Del., 73 F.Supp. 622, affirmed, C.A., National Bulk Carriers v. U. S., 169 F.2d 943.

Number of sales

(1) Sales of other vessels may be considered although insufficient in number to constitute a market.—De La Rama S. S. Co. v. U. S., D.C.N.Y., 92 F.Supp. 243.

(2) Year in which sufficient sales occurred may be used as basis for computing market value rather than year in which no sales took place.—American-Hawaiian S. S. Co. v. U. S., D.C.N.Y., 85 F.Supp. 815, affirmed, C.A., 191 F.2d 26, certiorari denied 72 S.Ct. 553, 342 U.S. 941, 96 L.Ed. —.

(3) Evidence held to show sufficient sales of comparable vessels to constitute market which could be used as basis for valuation.—The Virginia, D.C.Del., 73 F.Supp. 622, affirmed, C.A., National Bulk Carriers v. U. S., 169 F.2d 943.

Sales of dissimilar vessels held insufficient to establish market

U.S.—U. S. v. Toronto, Hamilton & Buffalo Nav. Co., Ct.Cl., 70 S.Ct. 217, 338 U.S. 396, 94 L.Ed. 195—National Bulk Carriers v. U. S., D.C.Del., 82 F.Supp. 495

36. U.S.—The Virginia, D.C.Del., 73 F.Supp. 622, affirmed, C.A., National Bulk Carriers v. U. S., 169 F.2d 943.

narily may be considered, even though such sales were made at cost and without competition,[37] but sales by such commission may, in certain circumstances, be insufficient to constitute a market on which valuation of a lost vessel may be based,[38] as where the sales were subject to unusual conditions and restrictions.[39]

Where the market value of a vessel cannot be ascertained because of the absence of a market, resort must be had to other data in order to ascertain the value of the vessel for purposes of compensating the owner,[40] even though the inquiry may involve what is, at best, a guess by informed persons.[41] In the absence of a free market, the basis of valuation must be a composite one, based on such factors as reconstruction cost less depreciation, the manner in which the vessel had been kept up, appraisals for insurance purposes, earning capacity, original cost where appropriate, the extent of demand compared to supply, the amount of war risk insurance obtainable, restrictions to which ships were subject, and other relevant factors.[42]

37. U S —National Bulk Carriers v. U. S, C A Del., 169 F 2d 943.

Differences between two types of ships held not radical

U S —National Bulk Carriers v. U S., supra.

38. U S —De La Rama S S. Co. v. U. S., D C N Y, 92 F Supp. 243.

39. U S —De La Rama S S Co v U S, supra.

40. U S —Pontin Boat Corp. v. U. S, 89 F Supp. 685, 116 Ct Cl. 488.

Probable market value

Where there is no market value of requisitioned vessel, other evidence may be resorted to, and value of vessel at time of loss may be taken to be the sum which, considering all circumstances, probably could have been obtained for her on the date of the loss, which is a sum that in all probability would result from fair negotiations between an owner willing to buy or sell and a purchaser desiring to buy —National Bulk Carriers v. U. S, C A.Del., 169 F.2d 943

41. U S.—U. S. v. Buxton Lines, C.C A.Va., 165 F.2d 993.

42. U S —De La Rama S. S Co v U S., D C N Y, 92 F Supp 243—American-Hawaiian S S Co. v. U. S., D. C.N.Y, 85 F Supp 815, affirmed, C A, 191 F 2d 26, certiorari denied 72 S Ct. 553, 342 U S. 941, 96 L Ed — —National Bulk Carriers v. U. S., D C Del, 82 F Supp 495—Baltimore Steam Packet Co v. U. S, 81 F.Supp. 707, 112 Ct.Cl. 433—Wilson Line v U. S, 78 F Supp 821, 111 Ct.Cl 764—Nicholson Transit Co. v. U. S., 118 Ct Cl 344.

Individual factors held entitled to consideration under circumstances

(1) Earning power of vessel — American-Hawaiian S. S. Co. v. U. S, D C.N.Y., 85 F.Supp. 815, affirmed, C.A., 191 F.2d 26, certiorari denied 72 S Ct 553, 342 U.S 941, 96 L Ed — —Wilson Line v U. S., 78 F. Supp 821, 111 Ct Cl. 764—Nicholson Transit Co. v. U. S, 118 Ct Cl. 344.

(2) Earnings of sister ship.—National Bulk Carriers v. U. S, D.C Del., 82 F.Supp. 495.

(3) Prevailing conditions and intrinsic value of vessel.—Seven-Up Bottling Co. of Los Angeles v. U. S, 68 F Supp 735, 107 Ct Cl. 402, certiorari denied 68 S Ct. 56, 332 U.S. 757, 92 L Ed 343

(4) Governmental regulations and controls affecting sale, chartering, use and operation of vessels during wartime —American-Hawaiian S S Co v U S, D C.N Y, 85 F Supp 815, affirmed, C A, 191 F 2d 26, certiorari denied 72 S Ct 553, 342 U S 941, 96 L Ed. —

(5) Cost of vessel to owner —McDonald v. U. S, 90 F Supp. 703, 116 Ct.Cl 734

(6) Cost of construction —National Bulk Carriers v. U. S, D C Del, 82 F.Supp 495

(7) Original cost of equipment of vessel, less depreciation —Baltimore Steam Packet Co. v U. S, 81 F.Supp 715, 112 Ct Cl. 458—Baltimore Steam Packet Co. v. U. S, 81 F Supp 713, 112 Ct Cl 469—Baltimore Steam Packet Co. v U. S, 81 F Supp. 711, 112 Ct Cl. 448—Baltimore Steam Packet Co. v. U. S, 81 F.Supp 707, 112 Ct.Cl 433.

(8) Reproduction or replacement cost less depreciation —National Bulk Carriers v. U S, C A.Del, 169 F 2d 943—Gartland S. S Co v U S, Ct.Cl., 98 F Supp 587—De La Rama S. S Co v U. S, D C N.Y., 92 F Supp 243—McDonald v. U S., 90 F. Supp 703, 116 Ct Cl. 734—American-Hawaiian S. S Co v. U. S, D C N Y, 85 F Supp 815, affirmed, C A, 191 F 2d 26, certiorari denied 72 S Ct. 553, 342 U S. 941, 96 L Ed. — —National Bulk Carriers v U S, D C Del., 82 F.Supp 495—Wilson Line v U S., 78 F.Supp 821, 111 Ct Cl 764—Nicholson Transit Co. v. U S., 118 Ct Cl. 344.

(9) Insurance valuations and appraisals —De La Rama S S Co. v U. S, D.C N Y, 92 F Supp 243—Toronto, Hamilton & Buffalo Nav Co v U. S, 88 F Supp 1016, 116 Ct Cl. 184.

(10) Favorable conditions under which vessel had operated in the past and its better-than-average condition when requisitioned.—Wilson Line v U. S., 78 F.Supp. 821, 111 Ct Cl. 764.

(11) Value of special equipment — Gartland S S Co. v U. S, Ct.Cl, 98 F Supp. 587

(12) Improvements to vessel —U S v Cors, Ct Cl, 69 S Ct. 1086, 337 U.S 325, 93 L Ed 1392—Wilson Line v U. S., 78 F Supp. 821, 111 Ct Cl. 764

Particular factors held not entitled to consideration under circumstances

(1) Amount of insurance on vessel —De La Rama S. S. Co v U S, D C N.Y, 92 F Supp 243—Wilson Line v U S, 78 F.Supp 821, 111 Ct. Cl 764

(2) Original cost —National Bulk Carriers v U. S., C.A Del., 169 F 2d 943—De La Rama S. S Co v. U. S, supra.

(3) Rental paid for use of vessel —Turkington v. U S, 71 F Supp. 352, 108 Ct Cl 571.

(4) Valuation placed by owner on the vessel for tax purposes a year before it was requisitioned —U S v. Buxton Lines, C C A Va, 165 F 2d 993

(5) Amount paid by government for requisition of a similar vessel — Turkington v U. S., supra.

(6) Earnings of vessel during past years it had been in operation where it was not used for several years before it was requisitioned —U. S. Toronto, Hamilton & Buffalo Nav. Co., Ct Cl, 70 S Ct 217, 338 U S. 396, 94 L Ed. 195—Toronto, Hamilton & Buffalo Nav Co v. U. S., 88 F Supp 1016, 116 Ct Cl. 184.

(7) Offers received by owner for vessel —Turkington v. U. S, 71 F. Supp 352, 108 Ct Cl 571

(8) Additional cost of features not present in vessel to make it comply with safety features required of newly constructed ships —Baltimore Steam Packet Co. v U. S, 81 F.Supp 707, 112 Ct Cl. 433

(9) Immediate availability of vessel for service due to excellent condition at time of taking, where good condition of vessel had already been taken into consideration in determining the proper rate of depreciation — Baltimore Steam Packet Co v. U. S, 81 F.Supp. 707, 112 Ct Cl. 433.

Under the provisions of the statute, the value of the vessel taken or used is not to be deemed enhanced by the causes necessitating the taking or use;[43] and accordingly, in determining just compensation, the fact that the government may need the vessel for prosecution of the war should not be permitted to act as an inflationary force on the value of the vessel.[44] However, the government is not to be placed in a more advantageous position than other purchasers, and it takes the vessel subject to the enhancement arising out of the high prices[45] and increased business[46] of a war-time economy; and the owner is not restricted to nominal compensation merely because he would not have been able to sell or charter the vessel or to realize any income from it because of war-time conditions and restrictions.[47] No deduction from the fair value of the vessel because of the war situation is justified without proof, first, that there was a known program to condemn all vessels similar to the one involved, and, second, that the amount sought to be deducted accrued as a result of speculation because of imminent prospective condemnation of the vessel which was part of the program.[48] Further, in order for the enhancement of value to be deductible under the statute, as resulting from the government's need of vessels necessitating the taking, the need must be shown to be a need for the precise ship taken, for the type or class of ship taken, or for ships which perform the same or related functions[49]

In ascertaining just compensation, the valuation may be fixed at a certain amount per dead-weight ton, such amount being then multiplied by the number of dead-weight tons, instead of fixing the value of the ship as a whole.[50] In determining the value of the government's use of a vessel for which compensation must be paid, the court may employ a formula based on a yearly payment of a certain per cent of the value of the vessel, depending on the length of the charter.[51] In the case of compensation sought for the requisitioning of use of a vessel, the owner is entitled to recover for repairs to the vessel found to be necessary at the time of rede-

(10) Proof of reproduction cost in absence of proof as to depreciation — Turkington v U. S, 71 F.Supp 352, 108 Ct Cl. 571.

(11) Cost of replacing parts which showed effects of age and wear but which had not caused trouble and which a prudent owner would not have dismantled vessel to get at.— Gartland S S. Co. v. U. S., Ct.Cl, 98 F Supp. 587.

Measurement of reproduction cost

U.S.—De La Rama S S Co. v. U. S, D.C N Y., 92 F Supp 243—National Bulk Carriers v U S, D.C.Del, 82 F Supp 495—Baltimore Steam Packet Co v. U. S, 81 F.Supp. 707, 112 Ct.Cl. 433

Measurement of depreciation

U.S.—De La Rama S. S Co v. U S, D C N Y, 92 F Supp. 243—Wilson Line v. U. S, 78 F Supp 821, 111 Ct Cl. 764

43. U S—U. S. v. Cors, Ct.Cl, 69 S Ct 1086, 337 U S 325, 93 L Ed 1392

Need before or after declaration of emergency

The enhancement of the value of a vessel requisitioned by the government, in order to be excluded under the statute in fixing just compensation for the vessel when that enhancement is due to the government's needs, is that which arises before, as well as after, declaration of a national emergency —U. S. v. Cors, supra.

Shortage due to requisitioning program

Where, at time of requisition of tug by government, there was a rising market and strong demand for tugs of all types, due in part at least to shortage of tugs resulting from government's requisitioning program, the enhanced value reflected speculation as to what government could be compelled to pay and was not a fair "market value" which could be used as criterion in fixing just compensation for vessel requisitioned — U. S v. Cors, supra.

Evidence held to establish no deductible enhancement

U S.—National Bulk Carriers v. U S, C A Del, 169 F 2d 943—American-Hawaiian S S. Co v. U. S, D C N Y, 92 F.Supp 785, affirmed, C A., 191 F.2d 26, certiorari denied U. S. v. American-Hawaiian S S. Co, 72 S Ct 553, 342 U S. 941, 96 L Ed — —Cors v. U. S., 96 F Supp. 460, 119 Ct Cl. 296.

Reduction of award not required

Where commissioner stated and found that no part of valuation of ship computed by him represented enhancement by reason of causes necessitating taking or using of vessel by United States, there was no need to reduce award by any forbidden enhancement —De La Rama S. S Co. v. U S, D C N.Y., 92 F Supp 243.

44. U S—U. S. v Cors, Ct Cl, 69 S Ct. 1086, 337 U S 325, 93 L Ed. 1392 —De La Rama S. S Co. v. U. S, D C N Y, 92 F Supp. 243.

45. U.S.—De La Rama S. S. Co. v U. S., supra

46. U S—Cors v. U. S, 96 F.Supp 460, 119 Ct Cl. 296.

47. U.S—U. S. v Buxton Lines, C C A Va., 165 F.2d 993.

48. U S—Wilson Line v. U. S., 78 F. Supp. 821, 111 Ct.Cl. 764.

Evidence as to probability of taking

(1) Under rule that if taking of vessel was within reasonably probable scope of a program for the condemnation of vessels, known to have been initiated by the government, any increase in value incident to speculation as to what the government might be required to pay is to be eliminated, the fact that the taking was within the scope of the program may be evidenced by the taking of similar vessels or anything else that might show that the taking of the vessel in question was reasonably probable —Cors v. U. S., 75 F Supp. 235, 110 Ct.Cl 66, reversed on other grounds 69 S Ct. 1086, 337 U S 325, 93 L Ed. 1392.

(2) Evidence held to show that taking of vessel was not within any program adopted by government.— Wilson Line v. U. S., 78 F.Supp 821, 111 Ct.Cl. 764.

49. U S.—U. S. v. Cors, Ct Cl., 69 S.Ct 1086, 337 U S. 325, 93 L Ed. 1392—Cors v. U. S, 96 F Supp 460, 119 Ct Cl. 296.

50. U.S.—American-Hawaiian S. S Co. v. U. S, D C N Y, 85 F Supp 815, affirmed, C A, 191 F.2d 26, certiorari denied 72 S Ct. 553, 342 U S 941, 96 L.Ed. —.

Evidence held to establish certain dead-weight tonnage

U.S.—Ramselius v. U. S., 90 F.Supp 547, 116 Ct.Cl. 612.

51. U.S.—U. S. v. Buxton Lines, C. C A.Va., 165 F.2d 993.

livery,[52] and the United States is entitled to the amount by which the fair value of unbroached consumable stores, fuel, water, expendable equipment, and spare parts on vessels when they were redelivered to the owner exceeded the fair value of such stores, fuel, water, equipment, and parts on the vessels when they were delivered under requisition.[53] The United States may not be held liable to the owner for the expense of maintaining crews on the vessel prior to the requisitioning of title by the government on the ground that he did so at the direction of a government official, in the absence of showing that the official had authority to bind the United States.[54] Where the government, instead of exercising the option to purchase contained in a charter agreement, requisitions the vessel, the owner has no right to recover any rental or lease moneys after the actual requisition and any damages sustained by him are damages of frustration and not of appropriation.[55]

Right of appeal to courts. Under the provision of the statute that just compensation for the taking of a vessel shall be determined and paid by the appropriate government agency, and providing for suit if compensation so determined is unsatisfactory, the owner of requisitioned property has the right to appeal to the courts to determine just compensation,[56] and such right cannot be taken away by refusal of the government agency to act or by unreasonable delay in acting[57]

e. Claims against Requisitioned Vessel or Compensation Fund

The statute authorizing the requisition of vessels for national defense does not abolish lien claims against the requisitioned vessel, or claimant's available remedies which may be pursued as before in any court of competent jurisdiction; but under such statute the lienholder may or should assert his claim against the fund deposited by the government as compensation for the taking or use of the vessel by suit in admiralty.

The statute authorizing the requisition of vessels for national defense does not abolish lien claims against the requisitioned vessel or claimant's available remedies which may be pursued as before in any court of competent jurisdiction.[58] Under such statute the holder of a lien claim against the vessel may or should assert his claim against the fund deposited by the government as compensation for the taking or use of the vessel,[59] and he is authorized to bring suit in admiralty against the fund according to the principles of libels in rem;[60] but he cannot maintain a libel against and attach the vessel itself, in view of the statutory provision exempting vessels of the United States and their cargoes from arrest or seizure,[61] and the court will not retain jurisdiction of such an action pending deposit with the United States Treasury of the compensation fund against which libellant may proceed under

52. U S.—Copper River Packing Co v U. S., 118 Ct.Cl 561.

53. U S—Daniel C Robinson, Inc v. U. S., 95 F Supp. 236, 118 Ct Cl 414

54. U S—U. S. v. Willis, C.C A.Va., 164 F 2d 453.

55. U.S—Henjes v. U. S, 87 F Supp. 780, 115 Ct Cl. 264, certiorari denied 70 S Ct. 1022, 339 U S 978, 94 L Ed. 1382.

56. U.S—Latvian State Cargo & Passenger S S. Line v U. S., 88 F. Supp. 290, 115 Ct Cl. 811.

57. U.S—Latvian State Cargo & Passenger S. S. Line v. U. S, supra

Allegation of exhaustion of administrative remedy has been held not required under the circumstances of the case—Latvian State Cargo & Passenger S. S Line v. U S, supra.

58. U.S—W. H. Stott & Co. v. A/S D/S Vesterhavet, D C N.J., 40 F. Supp 637

59. U.S—The Advance, D.C Pa, 45 F.Supp. 547—The Pietro Campanella, D.C.Md., 41 F.Supp. 656

Liens in favor of cargo underwriters

Attachment liens against foreign owners' vessel at time she was requisitioned by the United States, which liens arose in favor of cargo underwriters against another vessel of same owners, were required to be satisfied from fund deposited with treasurer of the United States as compensation for the vessel requisitioned in absence of any superior claims or liens appearing.—U S v Insurance Co of North America, C. C A Md, 143 F 2d 53.

Salvage lien

Where vessel subject to salvage lien was requisitioned by maritime commission, fund required to be deposited in treasury by commission was subject to be applied to payment of vessel's proportional contribution to salvage award—Hamburg-American Line v. U S, C C A. Puerto Rico, 168 F.2d 47.

60. U.S—The Maret, C.C A.Virgin Islands, 145 F 2d 431

Jurisdiction of court

(1) The statute authorizing a claimant to bring suit in the "United States District Court" from whose custody vessel was taken under act authorizing the president to requisition idle foreign merchant vessels for purposes of national defense, uses quoted phrase as including the district court of the Virgin Islands and in sense of a United States court having admiralty jurisdiction—The Maret, supra

(2) Provision that suit to enforce lien claim against compensation fund deposited with United States treasurer shall be commenced in manner provided by Suits in Admiralty Act is procedural, not jurisdictional, requirement and does not affect district court's right to hear and determine issues in admiralty suit against owner of attached ship, seizure of which respondent claims to have divested court of jurisdiction.—W. H. Stott & Co. v A/S D/S Vesterhavet, D C.N J, 40 F Supp. 637

Suit by corporation controlled by foreign government held authorized

U.S—The Maret, C.C A Virgin Islands, 145 F 2d 431.

61. U.S—The Advance, D.C.Pa, 45 F Supp. 547

Strict construction of statute

Act exempting United States vessels from arrest or seizure should be construed strictly as intended to prevent interference with government-owned vessels by filing of libels and to substitute actions in personam, whether cause of action on which libel is grounded arose before or after United States acquired vessel—The Advance, supra.

the statute[62] The statute authorizes suit against the compensation fund only in the case of lien claims, and other creditors of the owner of the vessel have no rights therein.[63]

A suit to enforce a lien claim against the compensation fund cannot be commenced until after the fund is deposited, and, when instituted, must be commenced within a specified time after the deposit has been made.[64] The court in such suit may in a proper case enter a decree in favor of claimant for the amount of his claim,[65] together with interest and costs authorized by law,[66] subject to prior payment of senior claims against the fund.[67] The length of time the fund deposited as compensation should be held and the disposition thereof are largely within the discretion of the trial court, which will not be interfered with in the absence of abuse.[68] The court will not, except for good cause shown, postpone a decree enforcing a valid claim against the fund;[69] and it may provide for the payment of a valid prior claim against the fund without first determining the exact amount to which the owner of the vessel is entitled as just compensation, and without first adjudicating the extent of any other valid claims against the fund.[70]

Claim for forfeiture of vessel. The requisitioning of a vessel by a government agency pursuant to the statute does not necessitate abandonment by the government of its claim for forfeiture of the vessel for violation of law.[71]

f. Operation of Vessels by Director General of Railroads

The relation of the director general to a vessel taken over by him during World War I as part of the line of a railroad system was in the nature of a charterer, and in respect of his operation of vessels as common carriers the director was subject to the federal act to regulate commerce. The right to prosecute a suit in admiralty against the director general in respect of the use and operation of vessels was recognized or upheld.

It has been held that the relation of the director general to a vessel taken over by him during World War I as part of the line of a railroad system was in the nature of a charterer.[72] The own-

62. U.S.—The Advance, supra.

63. U.S.—U. S. v Knauth, C.A.Fla., 183 F.2d 874, certiorari denied Knauth v. U. S., 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 646.

Proctor's fee

Where libelant was retained by the owner of a foreign vessel as proctor for the defense of libels in personam filed against the owner of the vessel in the district court, with prayers for writs of foreign attachment against the vessel, and the vessel was subsequently requisitioned by the United States for national defense, libelant acquired no maritime lien rights for his proctor's fee against the fund deposited by a government agency with the treasurer of the United States for just compensation, or against the vessel.—U. S. v. Knauth, C.A.Fla., 183 F.2d 874, certiorari denied Knauth v. U. S., 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 646.

64. U.S.—Grain Importers (Eire) v. U. S., D.C.Mass., 44 F.Supp. 569.

Intent to expedite distribution of fund

The statute authorizing holder of a valid claim on a foreign merchant vessel requisitioned by the United States to maintain suit against the fund deposited by the United States, and fixing a short and absolute limit on the time within which all claims against the fund must be represented, manifested congressional intent to expedite distribution of the fund to those who could make timely claims against it, relegating those who could not make timely claims to their rights in personam against the owner.—U. S. v. Grain Importers (Eire), C.C.A.Mass., 144 F.2d 921.

Libel held premature

U.S.—Grain Importers (Eire) v. U. S., D.C.Mass., 44 F.Supp. 569.

Suit held timely

U.S.—The Rita Maersk, D.C.Mass., 52 F.Supp. 56, affirmed, C.C.A., U. S. v. Grain Importers (Eire), 144 F.2d 921.

65. U.S.—Sitnek v. Fund Deposited with Treasurer of U. S., D.C.Md., 49 F.Supp. 72.

Objection by United States

(1) Where proctors representing foreign owners of vessel requisitioned by the United States consented to payment of attachment liens against such vessel from fund deposited with the treasurer of the United States, and objection to payment of liens was made by the United States which was a mere stakeholder, district court did not abuse its discretion in requiring such liens to be satisfied from the fund.—U. S. v. Insurance Co. of North America, C.C.A.Md., 143 F.2d 53.

(2) Any delay in paying out to claimant any portion of funds deposited by the United States as compensation for vessel requisitioned should be at request of proctors for the alien enemy libelee as owner of the vessel, and not at request of the United States, which is a mere stakeholder having duty to safeguard the fund and pay it out as directed by a court of competent jurisdiction.—U. S. v. Grain Importers (Eire), C.C.A.Mass., 144 F.2d 921.

66. **Discretion of court**

The allowance of costs and interest on claim against fund deposited with United States treasurer on account of just compensation for the taking of a vessel requisitioned by United States Maritime Commission is a matter within discretion of trial court to be determined on particular facts of each case, and neither costs nor interest should be allowed where it would be unreasonable or inappropriate to do so.—Sitnek v. Fund Deposited with Treasurer of U. S., D.C.Md., 49 F.Supp. 72.

67. U.S.—North American Shipping Co. v. Fund Deposited with Treasurer of U. S., D.C.Del., 66 F.Supp. 502.

68. U.S.—U. S. v. Insurance Co. of North America, C.C.A.Md., 143 F.2d 53.

69. U.S.—U. S. v. Grain Importers (Eire), C.C.A.Mass., 144 F.2d 921.

Tangible evidence of harm

In order to justify postponement of decree against fund deposited by United States for value of requisitioned foreign merchant vessel, there must be some tangible evidence of harm to some actual person, and mere surmises of harm to unknown persons who may not even exist are not enough.—U. S. v. Grain Importers (Eire), C.C.A.Mass., 144 F.2d 921.

70. U.S.—Sitnek v. Fund Deposited with Treasurer of U. S., D.C.Md., 49 F.Supp. 72.

71. U.S.—The Pietro Campanella, D.C.Md., 41 F.Supp. 656.

72. U.S.—The Virginia, D.C.Md., 264 F. 986, affirmed, C.C.A., 278 F. 877,

er of a vessel duly requisitioned by the director general had at least a reversionary interest in the vessel,[73] and this was a sufficient interest to induce the execution of a general average bond by the owner as principal, or on his own behalf as against a claim that such owner executed the bond as agent for the director general.[74] A cargo owner could properly claim the benefits of a general average bond executed by the owner of the vessel so requisitioned to prevent process against such vessel, executed at a time when it was at least doubtful whether process of arrest could properly issue against such vessel.[75] The carriers' systems under the control of the director general were operated as separate systems, including vessels which were connected with various railroad systems.[76]

Interstate commerce regulations. In respect of his operation of vessels as common carriers, the director general was subject to the federal act to regulate commerce[77] and to all the rules and regulations of the Interstate Commerce Commission,[78] except in so far as there might be inconsistency with the Federal Control Act.[79] A general manager in respect of particular waterways, appointed by the director general for the acquisition and operation of equipment for use on waterways, as contemplated by the Federal Control Act, was authorized to enter into a special contract for the carriage of goods in respect of which there was no established tariff of rates.[80]

Suits or actions. The right to prosecute a suit in admiralty against the director general in respect of the use and operation of vessels or other property taken over as part of a railroad system was recognized or upheld,[81] but the director general could be held liable in respect of vessels taken over only to the extent, and under the conditions, prescribed by applicable statutes and orders duly issued under such statutes.[82] Suit could be maintained in a proper case, even though the property of the railroad company was not at the time of the alleged wrong being used for common carrier purposes[83] So the director general or the agent designated by the president was liable to a suit for a maritime tort, resulting in injury to the vessel of a third person, of a vessel taken over in connection with the carrier's railroad system,[84] even though the service which was being performed by such vessel at the time of the commission of the tort was not that of a common carrier.[85]

The director general could not, however, be held liable in tort to the carrier as owner of a vessel taken over under the statute, for the loss of such vessel,[86] and settlement with the government on the part of such owner, for the loss of the vessel, did not discharge the owner of another vessel jointly liable for the loss.[87] It was held that the provision of the statute, applicable to property of carriers taken over by the government, that no process mesne or final should be levied on any property under federal control, prevented a proceeding in rem against a vessel operated by the director general;[88] but the contrary view was also taken,[89] and it was held that, where the carrier had itself invoked the jurisdiction of the court by filing an original libel, it could be required to furnish security in respect of a cross libel filed against a vessel owned by such carrier but operated by the director general.[90]

The rule that each railroad system, including the vessels which were part of such system, was to be treated as a separate entity applied in respect of liability for a maritime tort.[91] So the director general in court as defendant in connection with the operation of a vessel taken over as part of the system of one railroad could not be held liable for a tort committed in the operation of another vessel as part of another railroad system.[92] After a vessel had been returned to the carrier by the gov-

certiorari denied 42 S.Ct 185, 257 U S. 659, 66 L Ed 421.

73. U.S —Mather v. Clyde SS. Co., C.C A.N.Y, 37 F.2d 49.

74. U.S —Mather v. Clyde SS. Co., supra.

75. U.S —Mather v. Clyde, SS. Co, supra.

76. U.S.—Davis v. Donovan, N Y., 44 S Ct 513, 265 U.S. 257, 68 L Ed. 1008.

77. Ala —Payne v. Zimmern, 92 So. 433, 207 Ala. 155.

78. Ala.—Payne v. Zimmern, supra

79. Ala —Payne v. Zimmern, supra.

80. Ala.—Payne v. Zimmern, supra.

81. U S —Hines v Sangstad SS Co, C C A Mass, 266 F 502—Dampskibs Actieselskabet Sangstad v. Hustis, D C.Mass., 257 F 862

82. U S —Davis v. Donovan, N.Y., 44 S Ct. 513, 265 U S. 257, 68 L.Ed 1008.
58 C.J. p 44 note 17.

83. U S.—Hines v Sangstad SS Co., C C A.Mass, 266 F 502

84. U.S.—New Jersey Shipbuilding, etc, Co. v. Davis, D.C.N Y., 11 F. 2d 994
58 C J. p 44 note 19.

85. U.S —New Jersey Shipbuilding, etc., Co. v. Davis, supra.
58 C.J. p 44 note 20.

86. U S.—Standard Oil Co. v Southern Pac Co, N Y., 44 S.Ct 458, 265 U S. 569, 68 L Ed. 1184.

87. U S —Standard Oil Co. v. Southern Pac. Co., supra

88. U S.—The City of Philadelphia, D.C.Pa, 263 F 234.

89. U S —The Catawissa, D.C Mass., 257 F. 863.
58 C J. p 44 note 25.

90. U S.—The Catawissa, supra

91. U.S —The Fred B. Dalzell, Jr., C C A.N.Y., 1 F 2d 259
58 C.J p 44 note 28

92. U.S —Davis v. Donovan, N.Y., 44 S.Ct. 513, 265 U.S. 257, 68 L Ed. 1008.

ernment the right to proceed in rem against such vessel has been upheld where the claim was one for which the government was not responsible,[93] notwithstanding the provision of the Transportation Act of 1920, under which carriers' property was returned by the government, that no execution or process shall be levied on the property of any carrier where the cause of action grew out of the possession, use, control, or operation of any railroad or system of transportation by the president, under federal control.[94]

Service on an agent of the director general of railroads, then operating the vessel involved in the action, was not a service on the business agent of the company which was the owner of the vessel so as to be effective against such company within the meaning of a state statute providing for service on a corporation by service on its business agent,[95] even though the person on whom service was attempted had, before the taking over of the vessel by the government, been an agent of the owner.[96]

§ 10. Status, Powers, and Duties of Administrative Officers

Under various statutes, federal administrative officers or bodies have been intrusted with certain powers and duties with respect to the regulation of shipping, but the government is not bound by any declaration or act of such a body unless it acts within the scope of its authority.

Under various statutes, federal administrative officers or bodies have been intrusted with certain powers and duties with respect to the regulation of shipping.[97] A body of this kind, such as a shipping board, is a governmental agency,[98] and a transfer to the board, by statute, of vessels acquired by the United States under certain emergency shipping statutes has been held not to divest the title of the United States.[99] As in the case of an agent of the United States generally, the government is not bound by any declaration or act of the administrative board unless such board acted within the scope of its authority,[1] and a person who deals with the board or with any of its employees is bound to take notice of the extent of the authority conferred by the law on the board or any of its employees.[2] In the absence of statutory authorization the administrative board cannot delegate its authority.[3] An order of the maritime commission is not self-executing but requires the sanction of a court of law in order to become effectual.[4]

§ 11. Penalties and Forfeitures for Violations of Regulations

a. In general
b. Particular grounds
c. When forfeiture occurs; rights of third persons
d. Enforcement
e. Remission or restoration and protection of owners or lienors

a. In General

Penalties and forfeitures provided for by the registration laws are not necessarily applicable to enrolled vessels. While a forfeiture statute is to be given a reasonable construction, a statute imposing a penalty in respect of a vessel should be strictly construed against the United States.

The statutory provision that in order for enrollment the vessel shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are necessary for registering vessels does not make applicable to enrolled vessels the same penalties and forfeitures as are provided for by the registration laws.[5] While a forfeiture statute of the type here considered is to be given a

93. U S—The Arizona, D.C.N.Y., 267 F 598

94. U.S—The Arizona, supra.

95. U S—Wood v Clyde SS Co., D C Fla, 257 F 879.

96. U S—Wood v. Clyde SS Co, supra

97. U S—Holt Motor Co. v Nicholson Universal S. S. Co, D C Minn, 56 F Supp. 585

The Maritime Commission, as successor to the Shipping Board, has substantially the same authority to pass on administrative questions which affect the public at large as was vested in the Interstate Commerce Commission in its field—Holt Motor Co v. Nicholson Universal S S. Co., supra.

Operation of vessels

The Merchant Marine Act of 1920 authorized the shipping board to operate such vessels as could not be sold, even though such vessels were formerly operated by the Emergency Fleet Corporation—Lembeck v. U S Shipping Bd Emergency Fleet Corp, C C A N Y, 9 F 2d 558—58 C J. p 45 notes 40, 41.

98. U S—Underwood v. U. S, 62 Ct Cl. 378

99. U.S—The Coldwater, D C.Fla, 283 F. 146

1. U S—Underwood v. U. S, 62 Ct Cl. 378

2. U S—Underwood v. U. S, supra.

3. U.S—Underwood v. U. S, supra

Sale of vessels

Under the Shipping Act of 1916, in respect of the sale of vessels, the shipping board had no power to delegate its authority to private persons or to make effective agreements to pay commissions to such persons for sales—Underwood v. U. S, supra.

4. U S—New York & Porto Rico S S Co v. U S, D C N.Y., 32 F Supp. 538, reheard 36 F Supp 190

5. U S—The Mohawk, Mich., 3 Wall. 566, 18 L Ed 67
58 C J. p 45 note 50
Penalties and forfeitures under:
Customs laws see Customs Duties §§ 255–265
Liquor laws see Intoxicating Liquors § 388
Particular shipping regulations as to carriage of passengers see infra § 180.

reasonable construction,[6] it is not to be given the harsher of two equally reasonable constructions,[7] and a doubt as to whether a forfeiture statute applies to the particular facts under consideration has been resolved against the United States.[8] So it has been held that a statute imposing a penalty in respect of a vessel should be strictly construed against the United States.[9]

Forfeiture for breach of the navigation laws is strictly in rem,[10] and is not dependent on a preliminary adjudication of personal guilt,[11] the vessel and not the owner is the offender under these laws, and the penalty is limited to forfeiture.[12] Generally a vessel may be subject to forfeiture in cases coming within the terms of the statutes even as against an innocent owner,[13] so that the innocence, or want of knowledge of a violation of law, on the part of the owner of the vessel is, in general, no defense to forfeiture in rem incurred under the navigation laws.[14] The rights of lienholders and other persons interested in the vessel are considered infra subdivision c of this section.

Effect of illegal seizure. The fact that the original seizure of the vessel proceeded against was illegal does not affect the government's right to claim a forfeiture where it subsequently adopted the seizure.[15]

Liability of officer. Generally an illegal seizure may render the responsible officer liable in damages.[16] However, under statutory provision for the granting of a certificate of reasonable cause for seizure, the officer who made the seizure is relieved from liability therefor when a libel for forfeiture is dismissed.[17]

b. Particular Grounds

(1) In general
(2) Violation of provisions as to inspection and personnel
(3) Failure to surrender enrollment and license and to procure registry for foreign voyage
(4) Wrongful procurement or use of register, enrollment, license, or number
(5) Prohibited sale or other transfer of vessel
(6) Unauthorized or unlicensed trade or use
(7) Importation or coastwise transportation of goods on other than vessels of United States
(8) Violation of Espionage Act

(1) In General

Recovery of penalties and forfeitures under statutes promulgating certain regulations with respect to vessels and providing sanctions may be had only in cases coming within their terms, as in the case of regulations concerning boarding of vessels by officers, running lights, transportation by foreign vessels of passengers between ports in the United States, and change of, or deception as to, the name of a vessel.

The particular grounds for recovery of penalties and forfeitures are fixed by the statutes promulgating certain regulations with respect to vessels and providing sanctions for their violation, and recovery may be had only in cases coming within their terms.[18] This rule applies with respect to statutes providing penalties for obstruction or hindrance to a revenue officer in lawfully going on board a vessel,[19] for running at night without

6. U.S.—The Fredericka Schepp, D.C.R.I., 195 F. 623.

7. U.S.—The Fredericka Schepp, supra.

8. U.S.—The Scandanavia II, D.C. Md., 258 F. 144

9. U.S.—The African Prince, D.C. Mass., 212 F. 552.

10. U.S.—U.S. v. The Ruth Mildred, N.Y., 52 S.Ct. 473, 286 U.S. 67, 76 L.Ed. 981, followed in General Import & Export Co. v. U.S., 52 S.Ct. 474, 286 U.S. 70, 76 L.Ed. 983.

11. U.S.—U.S. v. The Ruth Mildred, N.Y., 52 S.Ct. 473, 286 U.S. 67, 76 L.Ed. 981, followed in General Import & Export Co., 52 S.Ct. 474, 286 U.S. 70, 76 L.Ed. 983.

12. Mass.—Braga v. Braga, 51 N.E. 2d 429, 314 Mass. 666

13. U.S.—Bard v. The Silver Wave, D.C.Md., 98 F.Supp. 271.

14. U.S.—The Julia Davis, C.C.A.N.J., 72 F.2d 370—U.S. v. American Motor Boat K-1231, C.C.A.N.Y., 54 F.2d 502
Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666
58 C.J. p. 46 note 55.

15. U.S.—U.S. v. 1,572 Cases of Assorted Liquors, D.C.N.Y., 4 F.Supp. 1017—The Elizabeth S., D.C.N.Y., 2 F.Supp. 270
58 C.J. p. 46 note 56.

16. U.S.—The Apollon, Ga., 9 Wheat. 362, 6 L.Ed. 111.

Measure of damages
U.S.—The Apollon, supra.

17. U.S.—U.S. v. The Reindeer, C.C.R.I., 27 F.Cas.No. 16,145.

18. U.S.—The Harpoon II, D.C. Mass., 71 F.Supp. 1022.

Contraband firearms
The government was not precluded from obtaining forfeiture of boats for possessing contraband firearms on ground that the owner of boats on date when contraband was seized had not brought the contraband aboard, where the owner had knowledge and was privy to fact that guns were aboard both vessels.—The Harpoon II, supra

Regulations of secretary of treasury
Forfeiture of a vessel is not authorized under sections of a statute subjecting vessels in territorial waters to seizure and forfeiture if those in charge of the vessels failed to comply with regulations of the secretary of the treasury governing anchorage and movement of vessels in territorial waters where no regulations have been made by the secretary.—The Pietro Campanella, D.C. Md., 73 F.Supp. 18

19. U.S.—The Gander, C.C.A.Conn., 54 F.2d 505.

lights,[20] for violation of the Load Line Act,[21] for violation of a statute prohibiting foreign vessels from transporting passengers between ports in the United States,[22] and for failure to deposit the ship's register with the consul or vice consul on arrival in a foreign port.[23]

Change of, or deception as to, name. Under a statute so providing, a vessel may be subject to forfeiture because of a change in the name of a vessel or because of deception, or attempt to deceive, in respect of the name;[24] but such statute does not apply to the registration of a new vessel in a name different from the name borne by an older vessel, although timber from the older vessel was used in the construction of the new vessel, where all such timber was taken up, refitted, and reset.[25] A change of name made after the sale of a vessel formerly licensed under the law of the United States, under admiralty process in a foreign court, does not render the vessel subject to forfeiture in a proceeding by the United States.[26] The statute does not apply to a vessel which is not documented.[27]

Failure to exhibit enrollment or license. The statutory provision, imposing a penalty on the master of a vessel for failure to exhibit enrollment or license to a revenue officer, when required, does not apply where the vessel has not been enrolled or licensed.[28]

Failure to file manifest and obtain clearance. The statute imposing a penalty on the master or other person in charge of a vessel for failure to file a manifest and obtain a clearance does not apply, it seems, where the vessel does not carry cargo or exports.[29]

Violation of rules of navigation. A statute may impose a penalty on the vessel for a violation of regulations preventing collisions on certain inland waters,[30] and such statute applies where the fault is solely that of the master,[31] even though, under the statute, the master is also liable for a penalty.[32] This provision imposing a penalty on the vessel does not render the vessel liable where the regulation violated was one established by the board of supervising inspectors, authorized by statute.[33]

Failure to obtain bill of health. In order to render applicable the statutory provision for a penalty against a vessel clearing and sailing from a foreign port to a port of the United States without the required bill of health, there must actually have been a clearance for a port of the United States.[34]

(2) Violation of Provisions as to Inspection and Personnel

Under a statute so providing, penalties are imposed against the owner of a steam vessel which is navigated in violation of statutory provisions in respect of inspection and related matters.

Under a statute so providing, penalties are imposed against the owner of a steam vessel which is navigated in violation of statutory provisions in respect of inspection and related matters.[35] Before the definition of steam vessels was broadened by the amendment of 1933 to include vessels propelled by any form of mechanical or electrical power, the statute did not apply to vessels propelled by gas, fluid, naphtha, or electric motors, although such vessels were by statute subject to provisions requiring inspection and licensed engineers and pilots.[36] It has been held that there is no liability under the statute imposing penalties in respect of noninspection where the vessel in question was navigated without inspection in connection with construction, while such vessel was in an unfinished

20. U S.—The Gander, supra.

Length of vessel

Statute authorizing imposition of penalties against motorboats for running without lights has been held inapplicable to motorboat over sixty-five feet long, but fine of seventy-five dollars was held properly imposed on motorboat, less than sixty-five feet long, for failure to carry necessary lights—The Pueblos, C.C.A.Conn., 77 F.2d 618.

21. **"Merchant vessel"**

Chartered vessel carrying cargo of meat and fish, sold and shipped by charterer, was engaged in commerce and hence a "merchant vessel" within Load Line Act, so as to entitle United States to recover statutory penalty from vessel for violation of such act and regulations thereunder at time of leaving port.—U. S. v. The Reefer King, D.C.Wash., 90 F.Supp. 236.

22. U S.—The Granada, D.C.Pa., 35 F.Supp. 892

23. U S.—Harrison v. Vose, Me., 9 How. 372, 13 L.Ed. 179.
Necessity for deposit in general see supra § 3.

24. U S.—U. S. v. Blair, C.C.N.Y., 190 F. 372, reversed on other grounds 214 F. 67, 130 C.C.A. 507.
58 C.J. p. 46 note 57.

25. U S.—U. S. v. The Grace Meade, D.C.Va., 25 F.Cas.No.15,243, 2 Hughes 83
58 C.J. p. 46 note 58.

26. U S.—The Chiquita, C.C.A.La., 19 F.2d 417.

27. U S.—The Kathryn, D.C.N.Y., 50 F.2d 193.

28. U S.—The John J. Wiltsie, D.C.N.Y., 13 F.Cas.No.7,353, 3 Ben. 251

29. U S.—The Pilot, D.C.Me., 36 F.2d 250.

30. U S.—The Confidence, N.Y., 201 F. 340, 119 C.C.A. 578.
58 C.J. p. 50 note 63

31. U.S.—The Confidence, supra.

32. U S.—The Confidence, supra

33. U S.—The Geneva, N.Y., 187 F. 115, 109 C.C.A. 35.

34. U.S.—The African Prince, D.C.Mass., 212 F. 552.
58 C.J. p. 50 note 69.

35. U.S.—The Idaho, D.C.Or., 29 F. 187.
58 C.J. p. 46 note 60.

36. U S.—The Ben R., Ky., 134 F. 784, 67 C.C.A. 290.

state.[37] The owner of a vessel was not liable for the penalty for noninspection where, when the term covered by an inspection expired, she was in the hands of the federal government under military impressment.[38] In order to recover penalties for failure of a vessel to have a certificate of inspection on board at the time of leaving port, it must be established that the vessel was engaged in the carriage of freight or passengers for hire within the statute relating to inspection of vessels, at the time when the alleged penalties accrued.[39] Early state statutes as to penalties for failure to employ an engineer holding a certificate of competency have been construed and applied.[40]

(3) Failure to Surrender Enrollment and License and to Procure Registry for Foreign Voyage

In accordance with statutory provisions, a vessel may be subject to forfeiture for proceeding on a foreign voyage without giving up the vessel's enrollment and license, and without being registered. The term "foreign voyage" within the statute is one involving the departure from the United States for a foreign port with an intention there to engage in trade.

In accordance with statutory provisions, a vessel may be subject to forfeiture for proceeding on a foreign voyage without giving up the vessel's enrollment and license, and without being registered.[41] An enrolled vessel is liable to seizure and forfeiture for proceeding on a foreign voyage without registry,[42] although the enrollment and license have been surrendered.[43] It has been laid down in general terms that a "foreign voyage" within the statute is one involving the departure from the United States for a foreign port with an intention there to engage in trade,[44] and that it does not include a voyage of a fishing vessel to a foreign port on waters within the usual scope of the voyage of vessels licensed for the fisheries.[45]

The forfeiture does not attach until the vessel has left port with intent to proceed on a foreign voyage,[46] and, when there was an intention to stop at an intermediate port in the United States before the actual foreign part of the voyage was commenced, it was held that there was no ground for forfeiture under the statute in question.[47] It is not necessary that the vessel shall have performed a foreign voyage and returned to the United States.[48] It has been held that the destination, in order to constitute a foreign voyage, may be contact with another vessel at any point on the high seas,[49] but there is other authority which holds that the destination, in order to constitute a foreign voyage, is not any place on the high seas but must be a port or place exclusively within the sovereignty of a foreign nation.[50] A destination which is a point at sea within the territorial jurisdiction of the United States does not constitute a foreign voyage.[51] The provision of the statute permitting the forfeiture of merchandise "imported" in the vessel in question, does not include, and therefore does not, it has been held, authorize the forfeiture of, liquor seized on board the vessel on the high seas.[52]

(4) Wrongful Procurement or Use of Register, Enrollment, License, or Number

Under some statutes forfeiture of a vessel or its value may be had for knowingly making a false oath to obtain registration, or for knowingly and fraudulently obtaining or using a certificate of registry, enroll-

37. U.S.—The Joshua Levinness, D. C N.Y., 13 F Cas.No.7,549, 9 Ben 339

38. U S—U S v Moore, D.C Ohio, 26 F.Cas No 15,801, 2 Bond 34

39. U S—U S v. The Reefer King, D.C.Wash., 90 F.Supp. 236

Chartered vessel, carrying charterer's cargo for lump-sum charter hire under bareboat charter providing for charterer's payment of vessel rental regardless of whether vessel carried any cargo and prohibiting carriage of cargo belonging to others than charterer, was not engaged in carriage of freight or passengers for hire at time of alleged accrual of penalties under statute for failure to have certificate of inspection on board when vessel left port, and hence was not liable to United States for such penalties—U. S. v. The Reefer King, supra.

40. Ala.—Leonard v. Board of Engineers, 10 Ala. 52
58 C.J. p 46 note 65.

41. U S—The Winnie, C.C.A Pa., 65 F.2d 706
58 C.J. p 46 note 69.

Statute held inapplicable under circumstances
U.S—U S v 1,197 Sacks of Intoxicating Liquor, D C Conn, 47 F.2d 284.

42. Mass—Braga v Braga, 51 N E. 2d 429, 314 Mass. 666.

43. U.S.—The Friendship, C.C Mass., 9 F Cas No 5,124, 1 Gall. 45.

44. U.S—The Three Brothers, C C Mass., 23 F Cas No.14,009, 1 Gall 142.

Distance from shore
As long as vessel is passing from one port of United States to another, she may keep as far from shore as she pleases without incurring penalty for proceeding on "foreign voyage" without first giving up her enrollment and license—The Winnie, C.C A.Pa., 65 F.2d 706.

45. U.S—Taber v U. S., C.C Mass., 23 F.Cas No.13,722, 1 Story 1.
58 C J. p 47 note 72.

46. U S—The Friendship, C C.Mass, 9 F.Cas No 5,124, 1 Gall. 45—The Julia, C C Mass., 14 F Cas.No 7,573, 1 Gall. 43.

47. U S.—The Pilot, D C.Me., 36 F 2d 250

48. U S—The Friendship, C.C.Mass, 9 F Cas No 5,124, 1 Gall. 45

49. U.S.—The Alex Clark, D C.N.Y, 294 F. 904, 905
58 C J. p 47 note 76.

50. U S—The Winnie, C.C A.Pa., 65 F 2d 706
58 C J. p 47 note 75

51. U S.—The Lark, C.C Mass., 14 F.Cas No 8,090, 1 Gall. 55.

52. U S—U S. v 1,197 Sacks of Intoxicating Liquors, D C.Conn., 38 F. 2d 822.

ment, or other record or document granted in lieu thereof, for any vessel not entitled to the benefit thereof.

Under a statute so providing, a vessel or its value may be forfeited where the owner knowingly makes a false oath in order to obtain registration.[53] It has been held that the statute does not apply to an oath containing allegations as to ownership based on legal title, although the beneficial ownership was in another.[54] So also, the statute does not apply to an oath for the enrollment of a vessel.[55]

Forfeiture has also been provided for knowingly and fraudulently[56] obtaining[57] or using[58] a certificate of registry, enrollment, or other record or document granted in lieu thereof, for any vessel not entitled to the benefit thereof. The number allotted to a vessel is a "record or document" granted in lieu of a certificate of registry, enrollment, or license, within the meaning of the statute regarding forfeiture for fraudulent obtaining or use.[59] Because of the highly penal character of the statute as to fraudulently obtaining a certificate of register, enrollment, or license, the statute cannot be liberally construed,[60] and a doubt as to whether the statute was applicable to the particular facts under consideration may properly be resolved against the United States.[61] The use of a vessel in an occupation not permitted by its registry does not warrant forfeiture of the vessel under the statute since such use of the vessel is not necessarily a fraudulent obtaining or use of a certificate of registry.[62]

The collector of a port has been held not to have abandoned the seizure of a vessel for fraudulent registry, notwithstanding delay in prosecuting the proceedings for forfeiture.[63]

(5) Prohibited Sale or Other Transfer of Vessel

Forfeiture may be proper, under some statutes, on failure to make known the sale or transfer, by way of trust, confidence, or otherwise, of a registered vessel to a foreigner; and transfer of a licensed vessel to an alien may be ground for forfeiture of the vessel and of the cargo found on board at the time of seizure.

In accordance with statute, failure to make known the sale or transfer, by way of trust, confidence, or otherwise, of a registered vessel to a foreigner is a ground for forfeiture.[64] It is not necessary that there should be a beneficial or bona fide sale in order to render the statute applicable.[65] So a sale on credit, with a provision for reclamation of the property in case of nonpayment, is a sale within the meaning of the statute,[66] as is a sale to a corporation existing under, and by virtue of, the laws of a foreign country,[67] especially if some of the stockholders are subjects of such foreign country.[68] This statute does not apply, however, to the sale of an enrolled or licensed vessel,[69] or, it has been held, to a vessel originally enrolled under the statute applicable to vessels engaged in trade on the northern, northeastern, or northwestern frontiers of the United States, where she had lost her status as a licensed vessel by reason of her previous sale.[70]

53. U.S.—The Mariam, D.C.Cal., 58 F.2d 416, remanded on other grounds, C.C.A., 66 F.2d 899.
58 C.J. p 47 notes 80, 81.

54. U.S.—U. S. v. Fideliter, D.C.Cal., 25 F.Cas.No.15,088.
Contra The Fideliter, D.C.Or., 8 F.Cas.No.4,756, Deady 620, reversed on other grounds, C.C., 8 F.Cas.No. 4,755.

55. Mass.—Braga v. Braga, 51 N.E. 2d 429, 314 Mass. 666.
58 C.J. p 47 note 83.

56. Mass.—Braga v. Braga, supra
Perception of facts
A citizen permitting enrollment and licensing in his name of fishing vessels owned wholly or in part by an alien acted knowingly and fraudulently within federal forfeiture statute, because he had a perception of facts requisite to prohibited acts, and intentionally used false enrollments and licenses.—Scola v. Scola, 59 N.E. 2d 769, 318 Mass. 1.

57. U.S.—The Mariam, D.C.Cal., 58 F.2d 416, remanded on other grounds, C.C.A., 66 F.2d 899.
Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666.
58 C.J. p 47 note 84.
Registration in another name
Registration of vessel was held not fraudulently obtained so as to subject vessel to forfeiture because owner whose true name was "Art Benson," but who on occasions had transacted business as "L. A. Bennett," obtained such registration in name of "L. A. Bennett"—The Nana, D.C. Tex., 14 F.Supp. 806.

58. U.S.—The Kathryn, D.C.N.Y., 50 F.2d 193
Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666.
58 C.J. p 47 note 85
Probable cause justifying forfeiture proceedings
Evidence of charges that registered owner of vessel had unlawfully sold vessel to Canadian subject, that certificate of registry had not been surrendered, and that vessel had thereafter unlawfully engaged in foreign trade under United States registration, was held to warrant finding of probable cause, meaning merely present circumstances creating suspicion, justifying institution of forfeiture proceedings.—The Tahoma, 8 Alaska 558

59. U.S.—The Nana, D.C.Tex., 14 F. Supp. 806
58 C.J. p 47 note 86.

60. U.S.—U. S. v. Worthington, Inc., C.C.A.Cal., 117 F.2d 936

61. U.S.—The Scandanavia II, D.C. Cal., 258 F. 144
58 C.J. p 47 note 87.

62. U.S.—U. S. v. Worthington, Inc., C.C.A.Cal., 117 F.2d 936

63. U.S.—The Kathryn, D.C.N.Y., 50 F.2d 193.

64. Mass.—Braga v. Braga, 51 N.E. 2d 429, 314 Mass. 666

65. U.S.—The Margaret, Md., 9 Wheat. 421, 6 L.Ed. 125.
58 C.J. p 48 note 91

66. U.S.—The Maria, D.C.Or., 16 F. Cas.No.9,075, Deady 89

67. U.S.—The Maria, supra.

68. U.S.—The Maria, supra.

69. U.S.—U. S. v. Sciota, D.C.N.Y., 27 F.Cas.No.16,240.
Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666.

70. U.S.—U. S. v. Sciota, D.C.N.Y., 27 F.Cas.No.16,240.

The saving clause of such statute, protecting from forfeiture the interest of a citizen of the United States who was ignorant of the sale or transfer to an alien, applies only to a part owner, and not to a sole owner.[71] So also, in order to entitle a person to the protection of this saving clause, he must be a part owner at the time of the commission of the act on which the forfeiture is founded.[72]

Sale of licensed vessel to alien. Forfeiture has been provided for the transfer of a licensed vessel to an alien,[73] whether or not there was a formal delivery of the vessel to the transferee;[74] and under the statute the cargo found on board at the time of seizure is also subject to forfeiture.[75] The statute applies to the sale of a licensed vessel, although because of such sale the license is no longer in force.[76] The statute does not apply, however, to the sale or transfer of an interest in a vessel which is not licensed,[77] such as an enrolled but unlicensed vessel.[78] So, it has been held, the statute does not apply to the sale of a vessel whose license has become void by reason of a previous sale so that she is no longer a licensed and enrolled vessel[79]

Failure to obtain approval of shipping board The phrase "documented under the laws of the United States," as used in the statutory provision for a forfeiture for selling a vessel "documented under the laws of the United States" to an alien without the approval of the shipping board, means "registered, enrolled, or licensed under the laws of the United States."[80] A vessel sold to the United States for use by the United States navy is not a "documented vessel of the United States" within the meaning of such statute,[81] and it has been held that, where such vessel is sold to a citizen by the secretary of the navy, pursuant to statutory authority, a subsequent sale by such citizen to an alien without the consent of the shipping board does not render the vessel subject to forfeiture.[82] So also, the statute requiring the approval of the shipping board does not apply so as to render subject to forfeiture, for failure to obtain such approval, a vessel sold to an alien under admiralty process in the court of a foreign country.[83]

(6) Unauthorized or Unlicensed Trade or Use

(a) In general

(b) What constitutes "trade"

(c) Illegal or prohibited trade

(a) In General

Employment of a vessel in a trade other than that for which she is licensed may render the vessel and her cargo subject to forfeiture regardless of innocence or want of knowledge of the owner of her unauthorized employment. In determining whether a vessel is engaging in unauthorized or unlicensed trade or use, the intention at the inception of a voyage determines its character.

Forfeiture may be had, in accordance with the statute, for employing a vessel in a trade other than that for which she is licensed.[84] A provision to this effect, being unambiguous, should not be extended by construction,[85] and, being highly penal, it must be strictly construed[86] The applicability of this statute has been recognized or upheld in the case of a vessel licensed for the coastwise trade,[87] for the fisheries,[88] for party and work,[89] and as a pleasure boat;[90] and by specific provision of another statute, in the case of a vessel licensed as

71. U S —The Margaret, Md, 9 Wheat. 421, 6 L Ed 125—The Florenzo, D C N Y., 9 F.Cas No 4,886, Blatchf & H 52

72. U S —The Florenzo, supra.

73. Mass —Braga v. Braga, 51 N E 2d 429, 314 Mass 666.
58 C J. p 48 note 1.

74. U S —U. S v. The Vermont, D C Conn, 28 F.Cas.No 16,618a.

75. U S —The Two Friends, C C Mass, 24 F.Cas.No.14,289, 1 Gall 118.

76. U.S —The Two Friends, supra
Mass —Braga v Braga, 51 N.E 2d 429, 314 Mass. 666

77. **Vessel in process of construction**
Purchase by alien of interest in fishing schooner, subsequently enrolled, while in process of construction in shipyard, taking title in name of son who was born in United States, did not render vessel liable to forfeiture even assuming that ownership by alien of equitable interest would offend the statute as much as ownership of a legal interest —Braga v. Braga, supra.

78. N Y.—Wilkes v. People's Fire Ins Co, 19 N Y. 184.
58 C J p 48 note 4

79. U S —U S v Sciota, D C.N.Y., 27 F Cas No 16,240.

80. U S —The Helori, D.C.Wash, 24 F 2d 710.

81. U S —The Helori, supra

82. U S —The Helori, supra

83. U.S —The Chiquita, C C A La, 19 F.2d 417.

84. U S —U. S v. Wischerth, C C A. N.Y, 68 F.2d 161—Corriveau v. U S, C C A R.I, 53 F 2d 735
Mass —Braga v Braga, 51 N.E 2d 429, 314 Mass 666.
58 C J. p 48 note 13

Violation prior to seizure
Statute authorizes forfeiture of trading vessels for previously trading outside of their licenses, even though vessels were not violating licenses at time of seizure —The Sterling, C C A.La, 65 F.2d 439

85. U.S —Kirk v. U. S, C C A Cal, 64 F 2d 82.

86. U S —The Snapper King, C.C A. Miss, 127 F 2d 490.

87. U S —U. S. v. Picou, C C A Ala, 71 F 2d 854.
58 C J p 48 note 14.

88. U S.—The Mineola, C C A Mass, 16 F 2d 844.
58 C J p 49 note 15

89. U S —The K-3696, D C N Y., 36 F 2d 430
58 C J. p 49 note 16

90. U S —The Winnie, D.C Pa, 58 F 2d 653, affirmed, C C A, 65 F 2d 706—Jackman v U S, C C A Mass, 56 F.2d 358—U S v American Motor Boat K-1231, C C.A N Y, 54 F. 2d 502
58 C.J. p 49 note 17.

a pleasure yacht, forfeiture may be had where such yacht transports merchandise for pay.[91]

In determining whether a vessel is engaging in unauthorized or unlicensed trade or use, the intention at the inception of a voyage determines its character and it is not necessary that the voyage should be completed before an offense denounced by the statute is committed so as to subject the vessel to forfeiture.[92] Innocence[93] or want of knowledge[94] on the part of the owner is not a defense in a proceeding for forfeiture. Necessity for violation of the law, if ever a defense, must be urgent.[95] The statute does not apply to a vessel which has only a number and is unlicensed,[96] and it does not apply to a vessel which has surrendered her license and has subsequently been sold under admiralty process in the courts of a foreign country.[97]

Forfeiture of cargo. While under the terms of the statute the forfeiture may include the cargo found on the forfeited vessel,[98] the statute exempts the cargo from forfeiture, where it belongs to persons other than the master, owner, or mariners on the vessel.[99] Such exemption has no application where the duties have not been paid or secured[1] or where the owners of the cargo participated in the vessel's unlawful trade.[2]

Trading without enrollment or license. The statute providing for forfeiture if certain vessels, not licensed or enrolled, have on board any article of foreign growth or manufacture, other than sea stores, applies only to vessels engaged in domestic trade,[3] and does not apply to a vessel licensed for the fisheries.[4]

(b) What Constitutes "Trade"

The term "trade" as used in the statute providing for forfeiture of a vessel employed in a trade other than that for which she is licensed is equivalent to "occupation," "employment," or "business."

The term "trade" as used in the statute providing for forfeiture of a vessel employed in a trade other than that for which she is licensed is equivalent to "occupation," "employment," or "business,"[5] or, according to some cases, to "occupation," "employment," or "activity,"[6] for gain or profit.[7] While it has been held that "trade" within the statute implies a regular occupation and not a temporary turning aside from some other trade,[8] it has also been held that a single act of unauthorized or unlicensed trade may work a forfeiture under the statute,[9] although the vessel continues her licensed busi-

91. U S.—U. S. v. Davidson, C C A R.I., 50 F.2d 517, certiorari denied Davidson v. U. S., 52 S Ct. 36, 284 U.S 660, 76 L Ed 559.
58 C.J. p 49 note 27.

Liquor

(1) Statute applies to transportation of liquor for pay—The Marge, D C.Mass., 48 F.2d 649, affirmed, C C A., Jackman v. U. S., 56 F 2d 358—The Rosemary, D C.N.J., 23 F.2d 103, reversed on other grounds, C.C.A., 26 F 2d 354, certiorari denied Sound Motor Boat Service v. U. S., 49 S.Ct 23, 278 U S 619, 73 L Ed. 542—58 C. J. p 49 note 27 [a]

(2) It is immaterial whether liquor carried by boat is of foreign origin.—The Marge, D C.Mass., 48 F.2d 649, affirmed, C.C.A., Jackman v. U. S, 56 F.2d 358.

92. U S.—U S. v. Picou, C C.A.Ala., 71 F 2d 854.

93. U S.—The Julia Davis, C.C.A N. J, 72 F.2d 370.
58 C J. p 49 note 19.

Stolen vessel

Vessel licensed for fishing only and seized with cargo of foreign liquor was held subject to statute directing forfeiture of vessel employed in trade other than that for which she is licensed, notwithstanding vessel had been stolen and used without claimant's knowledge or consent.—The Julia Davis, supra.

94. U.S.—The Julia Davis, supra—U S. v. American Motor Boat K-1231, C.C A.N.Y., 54 F.2d 502
Mass.—Braga v Braga, 51 N E.2d 429, 314 Mass. 666
58 C.J. p 49 note 20

95. U S.—Alksne v. U S, C C.A Mass, 39 F.2d 62, certiorari denied 50 S.Ct. 467, 281 U S. 768, 74 L Ed 1175.

96. U S.—Kirk v. U. S., C.C A.Cal, 64 F.2d 82.

97. U S.—The Chiquita, C.C A.La, 19 F.2d 417.

98. U S.—Alksne v. U. S., C.C.A Mass, 39 F.2d 62.

99. U S.—U. S. v. 1,197 Sacks of Intoxicating Liquor, D C Conn., 47 F 2d 284
58 C.J. p 49 note 23.

Absence of manifest

In proceeding to forfeit liquor cargo taken from vessel in distress, master was not considered consignee merely because of absence of manifest.—U S v. 1,197 Sacks of Intoxicating Liquor, supra

1. U S.—Alksne v. U. S., C.C.A.Mass, 39 F 2d 62.

2. U S.—Alksne v. U. S, supra.

3. U S.—U. S v. The Margaret Yates, D C., 26 F.Cas No 15,720, 22 Vt. 663

4. U S.—The Eliza, C.C.Mass., 8 F. Cas No.4,346, 2 Gall. 4.

5. U S.—The Nymph, C C.Me., 18 F. Cas.No.10,388, 1 Sumn. 516.

Synonymous with "business"

U S.—The Snapper King, C.C.A Mass, 127 F.2d 490—U S. v. Picou, C.C. A.Ala., 71 F 2d 854.

Coastwise trade

The "trade" or "business" of a vessel licensed for coastwise trade is the transportation of freight and passengers for hire between ports of the United States.—U. S. v. Picou, supra

6. U S.—The Rosemary, D C.N J, 23 F.2d 103, reversed on other grounds, C.C.A, 26 F 2d 354, certiorari denied Sound Motor Boat Service v. U. S., 49 S Ct. 23, 278 U. S. 619, 73 L Ed. 542.

7. U S.—The Nymph, C.C.Me., 18 F. Cas No 10,388, 1 Sumn. 516.
58 C J p 49 note 34.

8. U.S.—The Snapper King, C.C.A. Miss, 127 F 2d 490.

Carrying passengers

A fifteen thousand dollar vessel licensed for mackerel fisheries was not subject to forfeiture for carrying passengers on two separate and unconnected occasions on ground that vessel was employed in a "trade" other than that for which she was licensed, where vessel had been hired under charters by parties of young men to take them to an island for fishing and bathing.—The Snapper King, supra.

9. U.S.—The Ocean Bride, D.C.Me, 18 F.Cas.No.10,404, 1 Hask. 331.

ness,[10] and that the statute may apply even though the vessel is not exclusively employed in the unauthorized trade.[11] The coasting trade,[12] mackerel fisheries,[13] and cod fisheries[14] are each a "trade" within the meaning of the statute; and it has been held that a vessel licensed for the cod fishery is not authorized, by her license, to engage in the mackerel fishery.[15] It seems, however, that a vessel licensed for the cod fishery is not subject to forfeiture for catching mackerel as a mere incident and not as one of the main objects of her pursuit.[16]

(c) Illegal or Prohibited Trade

The statute providing for forfeiture of a vessel for engaging in trade other than that for which it is licensed applies where a vessel, otherwise within the statute, is engaged in an illegal or prohibited trade.

The statute providing for forfeiture of a vessel for engaging in trade other than that for which it is licensed applies where a vessel, otherwise within the statute, is engaged in an illegal or prohibited trade,[17] as in the case of a vessel licensed for the coastwise trade,[18] or a vessel licensed for the fisheries.[19] The statute may apply to a vessel carrying goods on which no tax has been paid in violation of the internal revenue laws,[20] and the forfeiture proceeding need not be brought under another statute governing violations of the internal revenue laws.[21] In like manner the statute has been applied or recognized in respect of vessels engaged in the violation of the federal prohibition laws,[22] and it was held that forfeiture might be had under the statute here under consideration and that the government was not obliged to proceed to forfeit under the National Prohibition Act;[23] since repeal of the prohibition amendment a vessel licensed to engage in the coasting trade is not subject to forfeiture for carrying intoxicating liquors, since the license entitles the vessel to carry any lawful merchandise in such trade.[24]

10. U S—The Ocean Bride, supra.

11. U.S.—The Ocean Bride, supra.

12. U S—The Nymph, C C Me, 18 F.Cas No 10,388, 1 Sumn 516.

13. U.S.—The Nymph, supra.

14. U S.—The Nymph, supra.

15. U S—The Nymph, supra—U. S v. The Paryntha Davis, D C Me, 27 F Cas.No 16,004, 3 Ware 159, affirmed, C C., 27 F.Cas No 16,003, 1 Cliff 532.

16. U.S.—U. S. v. The Paryntha Davis, supra—U. S. v The Reindeer, C.C.R.I., 27 F Cas.No.16,145

17. U.S—The Ulster, C.C A.N J, 91 F.2d 490—Bush v. The Conejo, D. C Mass., 10 F.2d 256, affirmed, C.C A., The Conejo, 16 F.2d 264.
58 C J. p 49 note 45.

18. U.S.—The Ulster, C.C.A N.J., 91 F.2d 490—U. S. v. Picou, C C A.Ala., 71 F.2d 854
58 C.J. p 49 note 46.

19. U.S.—The Pilot, C.C A.N.C., 43 F.2d 491.

20. U.S.—The Ulster, C.C.A N.J., 91 F.2d 490.

21. U.S.—The Ulster, supra

22. U.S.—U. S. v. The Ruth Mildred, N.Y., 52 S.Ct. 473, 286 U.S. 67, 76 L.Ed. 981—U. S. v. Picou, C.C A Ala., 71 F 2d 854—The Mary, C.C.A Mass., 63 F 2d 18—The Patricia, C. C.A.N.Y., 62 F.2d 1054, certiorari denied The Liberty v U S, 53 S Ct. 690, 289 U S. 747, 77 L Ed. 1493—The Felicia, D.C N.Y, 13 F.Supp. 959—The Isabel H., D.C.N.Y, 2 F Supp. 896, affirmed, C C A, U. S v. 3190 Bags, 223 Cases & 17 Kegs Containing Rye Whiskey and Scotch Whiskey, 70 F.2d 246—The Elizabeth S, D.C N.Y., 2 F.Supp 270
58 C J. p 50 note 48.

Past offenses

Vessel, although not engaged in smuggling operations or in violation of law when seized, was subject to forfeiture for past offenses for smuggling intoxicating liquor.—The Sea Hawk, D C.Tex, 45 F.2d 437.

Search

(1) Government officers, in exercise of power to board and inspect ship's license, having discovered liquors thereon, had right to search completely and seize contraband cargo—U. S v. Wischerth, C C.A.N Y, 68 F 2d 161.

(2) In proceedings for forfeiture of vessel for employment in unlicensed trade, it was held that decided listing of vessel at dock, and fact that vessel was unattended, afforded probable cause for search, cutting through floor of vessel's engine room in course of search was held not unreasonable, where nothing visible accounted for vessel's decided list.—The America, D C N.Y., 4 F Supp. 774.

(3) To justify search and seizure of vessel and liquors found thereon by Coast Guard, within twelve-mile limit, probable cause for believing that vessel was engaged in violation of law was not required to be shown.—U. S. v. 1,572 Cases of Assorted Liquors, D C.N.Y., 4 F.Supp. 1017.

(4) Proceedings for forfeiture of cargo of vessel engaged in trade other than that for which she was licensed might be obtained, notwithstanding there was illegal search and seizure which barred criminal prosecution under liquor laws—U. S. v. 1,572 Cases of Assorted Liquors, supra—The Elizabeth S., D C N Y., 2 F. Supp. 270.

(5) Where fishing vessel was seized within territorial limits of Eastern district of New York, fact that Coast Guard completed search outside limits of such district was held not to defeat jurisdiction of court of that district in proceedings for forfeiture of cargo on ground that vessel violated license—U. S v 1,572 Cases of Assorted Liquors, supra.

23. U.S.—U. S. v. Corriveau, R.I., 52 S Ct. 578, 286 U S. 530, 76 L.Ed. 1271—U. S v. The Ruth Mildred, N Y, 52 S Ct. 473, 286 U S. 67, 76 L Ed. 981, followed in General Import & Export Co v. U. S, 52 S Ct. 474, 286 U S 70, 76 L.Ed 983—U. S. v Hamilton, C C A Va, 62 F 2d 29—The Fidelia, C C A La, 58 F 2d 744—U. S. v. American Motor Boat K-1231, C.C A N.Y, 54 F 2d 502—The Felicia, D C N Y., 13 F Supp. 959.
58 C J. p 50 note 49

Election of remedies

Institution of criminal proceeding for conspiracy to violate Tariff Act and National Prohibition Act was held not to constitute election precluding government from maintaining forfeiture proceeding under navigation laws—The Felicia, supra.

Dismissal of indictment against the crew for conspiracy to violate the prohibition laws is not a bar to a libel seeking forfeiture of the vessel for engaging in unlicensed trade.—The K-5691, D C.N Y, 50 F 2d 180.

24. U.S.—The Pueblos, 77 F.2d 618.

(7) Importation or Coastwise Transportation of Goods on Other than Vessels of United States

Statutory provisions for forfeiture of a vessel for violation of a provision for importation of goods in vessels of the United States or in vessels of the country of origin of the goods have been construed and given effect. The cargo of a vessel may be subject to forfeiture for violation of a statute prohibiting the transportation of merchandise by water between points in the United States in other than vessels built in and documented under the laws of the United States.

Provision has been made for the forfeiture of vessels and their cargo for violation of the statutory provision for importation of goods, wares, or merchandise in vessels of the United States or in vessels of the country of which such goods, wares, or merchandise are the growth, production, or manufacture, or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation, with the exemption of vessels of a foreign nation which does not maintain a similar regulation against the United States and of a vessel owned by the citizens of the United States but not "a vessel of the United States;" and such statute, or an earlier provision of a similar nature, has been construed and given effect.[25] Goods shipped from one to another port of the United States are not imported within the meaning of such a statute, although the vessel makes an intermediate stop at a foreign port for passengers and freight.[26] The benefit of the exemption as to vessels of a foreign nation which does not maintain a similar regulation may not, of course, be claimed for a vessel which may not be regarded as a vessel of such a foreign nation [27]

The cargo of a vessel may be subject to forfeiture for violation of a statute prohibiting transportation of merchandise, by water, between points in the United States in vessels other than vessels built in and documented under the laws of the United States and owned by United States citizens.[28]

(8) Violation of Espionage Act

Under provisions of the Espionage Act, it may be a proper ground for forfeiture of a vessel that the owner or person in command has, within territorial waters, willfully caused or permitted the destruction or injury of the vessel, or knowingly permitted the vessel to be used as a place of resort for persons conspiring or preparing to commit an offense against the United States.

Under provisions of the Espionage Act, it may be a proper ground for forfeiture of a vessel that the owner, master, or other person in command has, within territorial waters of the United States, willfully caused or permitted the destruction or injury of the vessel,[29] or has knowingly permitted the vessel to be used as a place of resort for persons conspiring or preparing to commit an offense against the United States.[30] There is no con-

25. U S—The Merritt, Wis., 17 Wall. 582, 21 L Ed. 682.
58 C J. p 50 notes 57–59.

26. U S—U. S v. The Forrester, D C Mich, 25 F.Cas No 15,132, Newb Adm 81.
58 C J. p 50 note 60.

27. U S—The Merritt, Wis., 17 Wall 582, 21 L.Ed. 682.

28. U S—Central Vermont Transp Co v Durning, C C A N.Y, 71 F 2d 273, affirmed 55 S.Ct. 306, 294 U S. 33, 79 L Ed 741
Construction of statute generally see supra § 2.

Shipment in part over rail route
Merchandise shipped on vessel operated in coastwise trade between ports within United States by corporation which was not citizen of United States within meaning of statute, where movement of merchandise over part of through route of Canadian railroad began in Vermont and ended in New York, and did not move over through route that was in part over Canadian rail lines and their own or other connecting water facilities, was held subject to forfeiture.—Central Vermont Transp. Co v. Durning, supra.

Transport from American ship
A cargo of whale oil transported by a Norwegian ship from an American factory ship located in Shark Bay in the territorial waters of the Commonwealth of Australia to Norfolk, Va, was not subject to forfeiture on ground that oil was transported "between points in the United States" in violation of Merchant Marine Act of 1920—U. S v 12536 Gross Tons of Whale Oil Ex The Charles Racine, D C.Va., 29 F.Supp 262.

29. U.S—U S. v. The Pietro Campanella, D.C.Md, 44 F Supp. 348
Violation of Espionage Act as offense see infra § 12 c.

Proclamation of emergency
The statute authorizing forfeiture of foreign vessels for alleged willful injury to them and their machinery and equipment is in force without a presidential proclamation of an emergency, and so was operative on March 19, 1941, when an alleged sabotage by masters of foreign vessels in United States port was committed—The Pietro Campanella, D.C Md, 73 F Supp 18—U. S. v. The Pietro Campanella, D.C Md, 44 F.Supp. 348.

"Proceeding in rem"
A suit for forfeiture of vessels because of destruction of, injury to, or improper use of, them is a "proceeding in rem" against the vessel and adjudicates rights as against the world—U S v. The Antoinetta, C C A N J, 153 F.2d 138, certiorari denied Lorenzo v. U S, 66 S Ct 1368, 328 U.S. 863, 90 L Ed 1633, and Rosasco v. U. S, 66 S.Ct. 1368, 328 U S. 863, 90 L Ed 1633, rehearing denied 67 S Ct. 31, two cases, 329 U S 820, 91 L Ed. 698, certiorari denied Mariano Maresca & Co v. U. S., 66 S Ct. 1369, 328 U S. 864, 90 L Ed 1634, and Italia-Societa Anonima Di Navigazione v U S, 66 S Ct 1369, three cases, 328 U S. 864, 90 L Ed 1634, rehearing denied 67 S Ct. 32, two cases, 329 U.S. 820, 821, 91 L Ed 698, certiorari denied Italia-Societa Anonima Di Navigazione v U S, 66 S. Ct. 1369, 328 U S 864, 90 L.Ed 1634, and Societa Anonima Coop. Di Navigazione Garibaldi v. U S., 66 S Ct 1369, 328 U S 864, 90 L Ed. 1634, rehearing denied 67 S Ct 32, two cases, 329 U S. 821, 91 L Ed 698, certiorari denied Italia-Societa Anonima Di Navigazione v. U. S, 66 S.Ct 1370, two cases, 328 U S. 864, 90 L Ed 1634, 1635, rehearing denied 67 S Ct. 33, two cases, 329 U S 821, 91 L Ed 699, certiorari denied Loomis v. U S., 66 S. Ct. 1375, 328 U.S. 864, 90 L.Ed 1635, rehearing denied 67 S.Ct 34, 329 U.S. 821, 91 L Ed. 699.

30. U.S—The Pietro Campanella, D.C Md, 73 F.Supp. 18.

flict between the statute prescribing forfeiture for sabotage of a vessel and another statute authorizing the requisition of use of certain foreign vessels,[31] but they should be construed together so as to carry out the intent of congress.[32] In a libel by the government to forfeit a foreign vessel because of sabotage by its officers and crew, the court's jurisdiction of the vessel remains even if it should lose possession of the vessel without its consent,[33] and hence jurisdiction of the vessel is not relinquished by the granting of the government's motion for an order directing compliance with a notice of taking issued by the Maritime Commission under a statute authorizing the requisition of an idle foreign merchant vessel for the purposes of national defense.[34] Such requisition is not an abandonment of the government's proceeding to forfeit the vessel since the forfeiture proceeding deals with ownership and title, and the requisition only with possession and use.[35] While the claimant's right to compensation on requisition of the vessel should be fully protected, the admiralty court in which the forfeiture proceeding is pending may not determine such right.[36]

c. When Forfeiture Occurs; Rights of Third Persons

Where absolute forfeiture of a vessel is provided for by law, title of the government dates from the time the act aimed at is committed, and all rights or claims to the vessel arising thereafter, such as by a sale of the vessel to an innocent purchaser, are cut off. Except as otherwise provided by statute, forfeiture likewise cuts off such preëxisting interests in the vessel as that of a conditional vendor or mortgage lienholder, but a maritime lien for labor and supplies may be enforced notwithstanding the forfeiture.

Where absolute forfeiture of a vessel is provided for by law, title in the United States dates from the time the act aimed at is committed[37] In other words, while judgment of forfeiture is necessary to effectuate the title of the government, when it is declared, title dates back, by relation, to the time of commission of the prohibited act,[38] forfeiture does not depend on seizure, and the doing of the forbidden act itself effects forfeiture[39] It follows that all rights or claims to the vessel arising after the commission of the act warranting forfeiture, although acquired in good faith, are cut off,[40] and the forfeiture is not defeated by a sale of the vessel after the right to forfeiture arises, however innocent the purchaser may be[41] On the

Acts of officers and crew

(1) Act of captain, officers, and crew of Italian vessel which had been attached by a United States marshal in destroying machinery and equipment of vessel pursuant to agreement among themselves on eve of war between United States and Italy was a "use" of the vessel as a "place of resort" for a conspiracy against the United States within Espionage Act, justifying forfeiture of vessel.—The Leme, D C Or, 77 F Supp. 773

(2) It has been held, on the other hand, that the statute refers to permission to outsiders and not to the crew of the ship, and that Italian masters who allowed Italian Naval Attaché to come on the ships and permitted the crews to destroy the motive power did not thus permit the vessels to be used as a "place of resort" for conspiracy and preparation to commit an offense against the United States—The Pietro Campanella, D.C Md., 73 F Supp. 18.

A "place of resort" within the statute respecting commission of offense against the United States is not the same as a place of abode and the idea of a place of resort connotes frequent or repetitive visits to the place, and one's residence or home cannot fairly be classed as a place of resort by the owner or resident—The Pietro Campanella, supra.

31. U.S.—U S. v. The Antoinetta, C. C.A.N J, 153 F.2d 138, certiorari denied Lorenzo v. U. S, 66 S Ct. 1368, 328 U.S. 863, 90 L Ed 1633, and Rosasco v U S, 66 S Ct 1368, 328 U S 863, 90 L Ed 1633, rehearing denied 67 S Ct 31, two cases, 329 U S 820, 91 L Ed 698, certiorari denied Mariano Maresca & Co v. U S, 66 S Ct. 1369, 328 U S 864, 90 L Ed 1634, and Italia-Societa Anonima Di Navigazione v U S, 66 S Ct 1369, three cases, 328 U S 864, 90 L Ed 1634, rehearing denied 67 S Ct 32, two cases, 329 U.S 820, 821, 91 L Ed 698, certiorari denied Italia-Societa Anonima Di Navigazione v U S, 66 S Ct 1369, 328 U S 864, 90 L Ed 1634, and Societa Anonima Coóp Di Navigazione Garibaldi v U S, 66 S. Ct 1369, 328 U S 864, 90 L Ed 1634, rehearing denied 67 S Ct 32, two cases, 329 U S 821, 91 L Ed. 698, certiorari denied Italia-Societa Anonima Di Navigazione v U. S, 66 S Ct 1370, two cases, 328 U.S 864, 90 L.Ed 1634, 1635, rehearing denied 67 S Ct 33, two cases, 329 U S 821, 91 L Ed 699, certiorari denied Loomis v. U S, 66 S Ct 1375, 328 U S. 864, 90 L Ed. 1635, rehearing denied 67 S Ct 34, 329 U S 821, 91 L Ed 699—The Villarperosa, D.C N. Y., 43 F.Supp 140

32. U S.—The Villarperosa, supra.

33. U S—The Villarperosa, supra

34. U S.—The Villarperosa, supra.

35. U S.—The Pietro Campanella, D C.Md., 73 F Supp. 18—The Villarperosa, D.C N Y, 43 F Supp 140.

36. N Y.—The Villarperosa, supra.

Enemy alien

In proceeding for forfeiture of Italian vessel because of willful and wrongful damage to vessel by its officers and crew, claimant, which was an enemy alien, was not entitled to payment of any compensation for use of vessel by the Maritime Commission which had requisitioned vessel under statute for purposes of national defense, since an enemy alien may defend against a proceeding for forfeiture but may not sue either directly or indirectly for compensation —The Villarperosa, supra.

37. U S—The Rethalulew, Official No 227860, C C A Cal, 51 F 2d 646 —The Harpoon II, D C Mass, 71 F. Supp 1022
58 C J. p 51 note 72.

38. U S—The Florenzo, D C N.Y, 9 F Cas No 4,886, Blatchf. & H 52

39. U S.—The Sterling, C C A.La, 65 F 2d 439

40. U S.—The Rethalulew, Official No. 227860, C.C A Cal, 51 F.2d 646.

41. U.S—The Harpoon II, D.C. Mass., 71 F Supp. 1022.
58 C J p 51 note 73.

Proceeds of sale

Where boat subject to forfeiture was sold in another proceeding after seizure in present proceeding but before marshal's notice of arrest and forfeiture was published, balance remaining from proceeds of sale was held considered to be that which was left of res sought to be forfeited—The Kathryn, D C N Y., 50 F 2d 193.

other hand, if the forfeiture is alternative, property or its value, the title does not vest until the election is made;[42] meanwhile an innocent purchaser may acquire a title not subject to forfeiture by subsequent seizure.[43]

In this connection, in construing forfeiture statutes which contain no alternative provision, it is generally recognized or held that, where the statute uses the words "shall be forfeited" or the like, the forfeiture is absolute and takes effect at the time the act aimed at is committed.[44] On the other hand, it has been said that there is a conflict of authority where the words used are "shall be liable to forfeiture."[45] In some cases it has been held that in such case forfeiture is not absolute,[46] that the forfeiture dates from the seizure,[47] and that the rights of innocent purchasers for value prior to seizure are protected;[48] but the contrary view has also been taken.[49]

Except as otherwise provided by the statute, a vessel may be forfeited to the government as against such preëxisting interests in the vessel as that of a conditional vendor[50] or mortgage lienholder,[51] even though they are innocent with respect to knowledge of, or participation in, the violations of law giving rise to the forfeiture; but under a provision of the Ship Mortgage Act that the mortgagee's interest in the vessel shall not be terminated by forfeiture of the vessel for violation of law, where the mortgagee had no knowledge thereof and did not participate therein, the interest of a mortgagee within the terms of the act prevails as against the right of forfeiture, and such rule is applicable not only to preferred ship mortgages, but also to a mortgage on a vessel under two hundred tons, which could not be preferred.[52] Also, notwithstanding forfeiture of a vessel for violation of certain statutes, a maritime lien for labor and supplies furnished the vessel before the violation may be enforced,[53] and the holder of such a lien who did not knowingly participate in the illegal acts is entitled to recover the principal sum of his claim, but not costs or counsel fees.[54] Where a decree forfeited a vessel for violation of the National Prohibition Act, although the libel was based on the statutory provisions for forfeiture for employment in a trade other than that for which the vessel was licensed, an innocent lienor was held entitled to the rights reserved by the prohibition act.[55]

d. Enforcement

(1) In general
(2) Pleading
(3) Evidence
(4) Decree, review, and costs

(1) In General

Under a provision of the Shipping Act that forfeitures thereunder may be prosecuted in the same court and disposed of in the same manner as provided in the Customs Act, the remedies and procedure applicable to forfeitures under the Customs Act are applicable to the enforcement of forfeitures under the Shipping Act.

Under a provision of the Shipping Act that forfeitures thereunder may be prosecuted in the same court and disposed of in the same manner as provided in the Customs Act, congress intended to prescribe for the enforcement of forfeitures under the Shipping Act the remedies and procedure applicable to forfeitures under the Customs Act.[56]

42. U.S.—The Fredericka Schepp, D.C.R.I., 195 F. 623
58 C.J. p. 51 note 74.

43. U.S.—The Mary Celeste, D.C. Mass., 16 F.Cas.No.9,202, 2 Lowell 354.
58 C.J. p. 51 note 75

44. U.S.—The Sterling, C.C.A.La., 65 F.2d 439.
Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass. 666.
58 C.J. p. 51 note 76.

45. U.S.—The Fredericka Schepp, D.C.R.I., 195 F. 623

46. U.S.—The Fredericka Schepp, supra.
58 C.J. p. 51 note 78

47. U.S.—The Kathryn, D.C.N.Y., 50 F.2d 193—The Fredericka Schepp, D.C.R.I., 195 F. 623.

48. U.S.—The Fredericka Schepp, supra—The Kate Heron, D.C.Or., 14 F.Cas.No.7,619, 6 Sawy. 106

False registry

(1) In a prosecution for false registry, the forfeiture dates from the time of seizure and not from the date of the illegal act, in view of the wording of the statute that the vessel "shall be liable" to forfeiture—The Fredericka Schepp, D.C.R.I., 195 F. 623.

(2) However, in government's proceeding to forfeit vessel for allegedly false oath that person obtaining registry was owner of vessel, mortgage executed after alleged false registry, if not executed by owner of vessel, was held not valid as against government—The Mariam, C.C.A.Cal., 66 F.2d 899.

49. U.S.—The Mary Celeste, D.C. Mass., 16 F.Cas.No.9,202, 2 Lowell 354.

50. U.S.—The Olympia, D.C.Conn., 58 F.2d 638—Bard v. The Silver Wave, D.C.Md., 98 F.Supp. 271.

51. U.S.—The Hammitt L. Robbins, D.C.Va., 50 F.2d 182.

52. U.S.—The Mariam, C.C.A.Cal., 66 F.2d 899.

53. U.S.—The Olympia, D.C.Conn., 58 F.2d 638—Jackman v. U.S., C.C.A.R.I., 54 F.2d 227.

54. Alaska—The Tahoma, 8 Alaska 558.

Interest

Claimant entitled to maritime lien against vessel sought to be forfeited for engaging in unlicensed trade was held entitled to interest from time of intervention in libel—The Olympia, D.C.Conn., 58 F.2d 638.

55. U.S.—The Antigostine, D.C.N.Y., 44 F.2d 170
Right of lienor to vacate forfeiture see infra subdivision e of this section.

56. U.S.—The Brazil, C.C.A.Ill., 134 F.2d 929.

Identical procedure and disposition

Provision of Shipping Act that all forfeitures incurred thereunder may be "prosecuted" in the same court

Under such provision, reference is to be had to the Customs Act for both the method of prosecution and the method of disposition of the forfeiture proceeding.[57] In the absence of statutory provision for a lien, a statute imposing a penalty against vessels or their owners for the violation of shipping regulations does not give the United States a lien therefor.[58]

Who may sue; parties. Penalties incurred by a vessel for violation of the navigation rules applicable to certain inland waters are recoverable by action brought by the United States, although the offense may have been committed on waters within a district having jurisdiction to prescribe local rules.[59] A suit against a master for failure to deposit the register of his vessel with the consul or vice consul of the United States in a foreign port should be brought in the name of the consul or vice consul for the benefit of the United States.[60]

An admiralty court has power to bring into the proceeding all parties claiming an interest in the vessel and adjudicate their claims.[61] According to some authority, in a libel to forfeit a vessel for willful damage thereto contrary to statute, the alien property custodian claiming title to any rights or interests of the owners will not be substituted for the owners as claimant, because it would leave no "adverse interests" before the court, but the alien property custodian may be made a party with the right to receive any interest in the vessels that the claimants had at the time of the order vesting their interests in the alien property custodian.[62] It has also been held, however, that under such circumstances the custodian is entitled to be substituted as a party to the forfeiture proceeding in place of claimant, since by the custodian's order claimant was denuded of all interest in the vessel.[63]

Time to sue Under a provision that forfeitures under the Shipping Act shall be prosecuted and disposed of in the same manner as provided in the Customs Act, the applicable period of limitation is that provided in the Customs Act rather than that provided by the general limitation act which is applicable except in cases where it is otherwise "specially" provided.[64] An earlier statute of limitations has been construed and applied.[65]

(2) Pleading

General rules as to libels in admiralty apply in proceedings for forfeiture or for penalties, and no unusual particularity in the allegations is required.

General rules as to libels in admiralty apply in proceedings for forfeiture[66] and such general rules,

and "disposed of" in the same manner as provided in the Customs Act connotes that the causes of action under the two acts, the venue, the method of recovery, the procedure, and the court's disposition shall be identical.—The Brazil, supra.

57. U.S.—The Brazil, supra.

58. U S —The Ranier, D.C Or, 20 F Cas No 11,565, Deady 438—The Laurel, D C Mo, 26 F Cas No.15,569, Newb Adm 269.

59. U S.—The Stella B, D C N.Y., 183 F. 507.

60. U S —Parsons v. Hunter, C C N H, 18 F Cas No 10,778, 2 Sumn 419 58 C.J. p 51 note 88

61. U S.—The Olympia, D C Conn, 58 F.2d 638.

62. U.S.—The Pietro Campanella, D C.Md., 47 F.Supp 374.

63. U S.—The Antoinetta, D C Pa., 49 F.Supp 148, affirmed, C.C A., U S. v The Antoinetta, 153 F 2d 138, certiorari denied Lorenzo v. U S, 66 S.Ct 1368, 328 U.S 863, 90 L Ed. 1633, rehearing denied 67 S Ct. 31, 329 U.S. 820, 91 L.Ed. 698.

"Dominus litis"

In libel by the United States for forfeiture of vessel claimed by enemy alien, the substitution of alien property custodian, who had declared vested in himself all right of claimant in vessel made the custodian "dominus litis"—The Antoinetta, D C Pa., 49 F Supp 148, affirmed, C C A., U S. v The Antoinetta, 153 F.2d 138, certiorari denied Lorenzo v U. S, 66 S Ct. 1368, 328 U S 863, 90 L Ed. 1633, rehearing denied 67 S.Ct 31, 329 U S 820, 91 L Ed. 698.

64. U.S —The Brazil, C.C A Ill, 134 F.2d 929

65. U S —Parsons v. Hunter, C C.N H, 18 F Cas No 10,778, 2 Sumn 419 58 C J. p 51 note 89.

66. U S —U S. v Gilbert, C C.A. Fla., 126 F 2d 206. 58 C J. p 51 note 91.

Pleading held sufficient

(1) In general —The Bunker Hill, D C Cal, 68 F Supp. 349—58 C J. p 51 note 91.

(2) Allegations, in libel to obtain forfeiture of vessel, that claimant fraudulently obtained and used certificates of enrollment or license of vessel by filing an oath, stating that vessel was wholly the property of himself, a citizen, whereas vessel was owned by claimant and other persons whose names and addresses were unknown to libelant, sufficiently charged that certificates of enrollment and license were knowingly and fraudulently obtained —U. S. v. Gilbert, C C A.Fla., 126 F.2d 206.

(3) Libels in words of applicable statute, clearly alleging that owner, master, or other person in charge or command of vessel willfully caused or permitted destruction of vessel and permitted vessel to be used as a place or resort for persons conspiring or preparing to commit offenses against the United States, sufficiently pleaded cause of forfeiture and gave district courts jurisdiction, where libels gave name which was registered under Italian law, libels were not insufficient for failure to allege that vessels were privately owned —U S v. The Antoinetta, C C.A N.J & Pa., 153 F.2d 138, certiorari denied Lorenzo v U. S, 66 S Ct 1368, 328 U S. 863, 90 L Ed 1633, and Rosasco v U. S, 66 S.Ct 1368, 328 U.S. 863, 90 L Ed. 1633, rehearing denied 67 S Ct. 31, two cases, 329 U S 820, 91 L Ed. 698, certiorari denied Mariano Maresca & Co. v. U. S, 66 S Ct 1369, 328 U S. 864, 90 L Ed 1634, and Italia-Societa Anonima Di Navigazione v. U S, 66 S Ct. 1369, three cases, 328 U S. 864, 90 L Ed 1634, rehearing denied 67 S.Ct 32, two cases, 329 U S. 820, 821, 91 L Ed 698, certiorari denied Italia-Societa Anonima Di Navigazione v. U S., 66 S Ct. 1369, 328 U.S 864, 90 L.Ed 1634, and Societa Anonima Coop. Di Navigazione Garibaldi v. U. S, 66 S Ct. 1369, 328 U.S 864, 90 L Ed. 1634, rehearing denied 67 S Ct 32, two cases, 329 U S. 821, 91 L Ed 698, certiorari denied Italia-Societa Anonima Di Naviga-

likewise, apply in proceedings for penalties.[67] No unusual particularity is required in the allegations of a libel for forfeiture,[68] so that the failure to allege the particular law violated in carrying on an illegal trade outside the license of the vessel proceeded against is not fatal.[69] Where it is charged that an intentionally false oath was made to obtain registration which suppressed the coownership of others in the vessel, the failure to name the coowners in the libel is excused by an allegation that the names and addresses thereof were unknown to libelant.[70] The provision in the statute relative to forfeiture for the failure to make known the transfer of a registered vessel to a foreigner, exempting the interest of a part owner who was ignorant of the transfer, need not be noticed in the libel;[71] the person who seeks the benefit of it should assert it in his claim as a matter of defense.[72] So, one claiming exemption from forfeiture of cargo seized on board a vessel engaged in a trade other than that for which licensed must plead by way of answer facts showing ground for exemption.[73]

Amendment. In a proceeding to forfeit a vessel for employment in a trade other than that for which licensed, the right of the government to amend the libel,[74] by inserting necessary averments of fact even after evidence has been offered,[75] has been recognized. An application to amend a libel for a penalty for an alleged failure to obtain a bill of health before clearing for a port in the United States made after the conclusion of arguments, has, however, been denied, where the violation charged was at most technical and had not in any way endangered health at the ports of the United States.[76]

(3) Evidence

Generally, the burden of proving facts entitling the United States to forfeiture is on the United States, but in suits for forfeiture because of employment in a trade other than that for which the vessel was licensed, on the due showing of probable cause for seizure, the burden of proof is on claimant of the vessel in question General rules as to admissibility and weight and sufficiency of evidence apply.

In general the burden of proving facts entitling the United States to forfeiture is on the United States.[77] While it has been laid down in general terms that, in a suit for forfeiture because of the employment of the vessel in a trade other than that for which licensed, the burden of proving that the vessel was engaged in carrying cargo in violation of her license is on the United States,[78] in view of the statutory provision that penalties and forfeitures which shall be incurred by virtue of the chapter relative to certain penalties and forfeitures, affecting enrolled or licensed vessels, shall be sued for, prosecuted, and incurred by virtue of the laws relating to the collection of duties, and the statutory provision as to the burden of proof in suits or actions for the forfeiture of vessels or merchandise seized under the provision of any law relating to the collection of duties on imports, the view has been taken, in suits for forfeiture because of employment in a trade other than that for which the vessel was licensed,[79] or because of use of a certificate of registration to which the vessel was not entitled,[80] that, on due showing of probable cause for seizure, the burden of proof is on claimant of the vessel in question.

The view has also been taken that, when, in a

zione v. U S, 66 S Ct. 1370, two cases, 328 U S. 864, 90 L Ed 1634, 1635, rehearing denied 67 S.Ct. 33, two cases, 329 U S 821, 91 L Ed 699, certiorari denied Loomis v U S, 66 S. Ct. 1375, 328 U S 864, 90 L Ed. 1635, rehearing denied 67 S Ct. 34, 329 U.S. 821, 91 L Ed. 699

Pleading held insufficient

(1) In general—U. S. v. 1,197 Sacks of Intoxicating Liquors, D C. Conn., 38 F.2d 822—58 C J. p 51 note 91.

(2) Libel seeking forfeiture of vessel for knowing and fraudulent use of number awarded by collector of customs when vessel was not entitled thereto was held not to state cause of action, in absence of allegation of fact to support conclusion that vessel was not entitled to benefit of identification number or that it was fraudulently used—The Patricia, No. 970-A, C C.A Cal, 81 F 2d 814.

67. U.S.—U. S. v. Independent Packet Co., Mo, 228 F. 673, 143 C.C.A. 195.
58 C.J. p 51 note 92.

68. U.S—U S. v. Gilbert, C.C.A.Fla, 126 F.2d 206.

69. U S—The Esther M. Rendle, C. C A Mass, 7 F 2d 545.
58 C J p 52 note 93.

70. U S.—U. S. v. Gilbert, C.C A.Fla, 126 F 2d 206.

71. U.S—The Margaret, Md., 9 Wheat. 421, 6 L Ed 125

72. U S.—The Margaret, supra.

73. U S—U S. v 1,197 Sacks of Intoxicating Liquors, D C Conn, 38 F. 2d 822.
58 C.J p 52 note 97.

74. U S—The Esther M. Rendle, C. C.A Mass, 13 F.2d 839, certiorari denied 47 S.Ct. 240, 273 U.S. 730, 71 L Ed 863.
58 C J p 52 note 98.

75. U S.—The Lorraine Rita, D.C. Pa, 16 F.2d 607.

76. U S.—The African Prince, D.C Mass, 212 F. 552.

77. U.S—The Pilot, D C Me, 36 F 2d 250—The Acorn, D C.Mich., 1 F Cas No 29, 2 Abb 434.

False oath

Government in forfeiture proceeding has burden of proving charge that false oath was made in connection with application for registry or license for vessel—The Winnie, D.C Pa, 58 F 2d 653, affirmed, C.C A, 65 F 2d 706.

Nationality of vessel

Burden of proving that liquor-laden vessel flying foreign flag was American vessel was held on government seeking forfeiture—The Chiquita, C C A La., 19 F 2d 417.

78. U S—The Pilot, D.C.Me., 36 F. 2d 250.

79. U.S—Jackman v. U. S., C C A Mass., 56 F 2d 358—The Chiquita, D C Cal., 41 F 2d 842, affirmed, C. C.A., 44 F.2d 302.

80. U S—The Tahoma, C.C.A Alaska, 87 F.2d 349.

proceeding for forfeiture of a vessel licensed for the fisheries for carrying merchandise from a foreign port, the importation is admitted or proved, the burden rests on claimant to establish his innocence.[81] The burden is on the person contending for a restricted meaning of the language of a penal statute to show some ground for the conclusion that the statute should not be construed in accordance with the terms used.[82]

Admissibility. In general, any evidence which is material and relevant is admissible;[83] otherwise it is not.[84] So, in general, any credible evidence, on behalf of the government, tending to show that the vessel charged was engaged in an unlawful trade is, in general, admissible in a proceeding to forfeit under the statute providing for forfeiture for engaging in trade other than that for which it was licensed.[85]

Weight and sufficiency. General rules as to the weight and sufficiency of evidence apply in proceedings for penalties[86] or forfeitures,[87] as for engaging in a trade other than that for which the vessel was licensed,[88] or for fraudulently obtaining or using registry for a vessel not entitled to the benefit thereof.[89] The weight to be given to the evidence is for the court to consider.[90] While in an early case in the supreme court it was laid down that the United States must prove a violation of the law as a ground for forfeiture beyond a reasonable doubt,[91] the view has been taken that, in a suit for forfeiture for engaging in a trade other than that for which the vessel was licensed, the United States is required to prove the allegations of the libel only by a preponderance of evidence,[92] and not beyond a reasonable doubt as in a criminal case,[93] and, where claimant fails to introduce any

81. U.S.—The Ocean Bride, D.C.Me., 18 F.Cas.No.10,404, 1 Hask. 331.

82. U.S.—The Confidence, N.Y., 201 F. 340, 119 C.C.A. 578.
58 C.J. p. 52 note 9.

83. U.S.—The Mary Celeste, D.C. Mass., 16 F.Cas.No.9,202, 2 Lowell 354.
58 C.J. p. 52 note 11.

84. U.S.—The Tahoma, C.C.A.Alaska, 87 F.2d 349.
58 C.J. p. 52 note 12

Letter from treasury department

In libel against vessel for using certificate of registration to which vessel was not entitled, letter written to claimant by treasury department that bureau of customs had no objection to consul's issuing free entry documents for fish taken by the vessel was held inadmissible as showing sanction of United States to method of operation of vessel, since United States cannot be bound by acts of its officers and agents.—The Tahoma, supra.

85. U.S.—The Chiquita, D.C.Cal., 41 F.2d 842, affirmed on other grounds, C.C.A., 44 F.2d 302
58 C.J. p. 52 note 14.

86. U.S.—The Gander, C.C.A.Conn., 54 F.2d 505.
58 C.J. p. 53 note 16.

87. Alaska.—The Tahoma, 8 Alaska 558
58 C.J. p. 53 note 17.

Evidence held sufficient

(1) To support decree directing forfeiture of requisitioned Italian vessel for sabotage—The Mongioia, D.C.Tex., 73 F.Supp. 17.

(2) To warrant finding that respondent vessel was vessel which brought liquor into certain harbor on certain night
U.S.—The Marge, D.C.Mass., 48 F.2d 649, affirmed, C.C.A., Jackman v. U.S., 56 F.2d 358.

Evidence held insufficient

(1) To sustain burden on government seeking forfeiture of liquor-laden vessel, of proving that it was American vessel—The Chiquita, C.C.A.La., 19 F.2d 417

(2) To establish that master of ship knowingly permitted it to be used in violation of the rights and obligations of the United States under the law of nations within statute authorizing forfeiture on such ground—The Pietro Campanella, D.C.Md., 73 F.Supp. 18

(3) To show that claimant was bona fide owner of seized alcohol—U.S. v. 146,157 Gallons of Alcohol, D.C.N.J., 3 F.Supp. 450, reversed on other grounds, C.C.A., The Helen, 72 F.2d 772, certiorari denied U.S. v. Matoil Service & Transport Co., 55 S.Ct. 125, 293 U.S. 605, 79 L.Ed. 697, followed in, C.C.A., Rizzo v. U.S., 73 F.2d 1010, certiorari denied U.S. v. Rizzo, 55 S.Ct. 406, 294 U.S. 709, 79 L.Ed. 1244.

88. U.S.—The Gander, C.C.A.Conn., 54 F.2d 505.
58 C.J. p. 53 note 17 [a].

Evidence held sufficient

(1) To support decree of forfeiture generally—The Winnie, C.C.A.Pa., 65 F.2d 706—Gaul v. U.S., C.C.A.R.I., 62 F.2d 559, certiorari denied 53 S.Ct. 507, 288 U.S. 616, 77 L.Ed. 989—Jackman v. U.S., C.C.A.Mass., 56 F.2d 358—The Rethalulew, Official No. 227860, C.C.A.Cal., 51 F.2d 646—U.S. v. Davidson, C.C.A.R.I., 50 F.2d 517, certiorari denied Davidson v. U.S., 52 S.Ct. 36, 284 U.S. 660, 76 L.Ed. 559—The Daisy T., D.C.Del., 48 F.2d 370.

(2) To warrant finding of probable cause for government's institution of proceeding to forfeit vessel for engaging in trade other than that for which she was licensed—Gaul v. U.S., C.C.A.R.I., 62 F.2d 559, certiorari denied 53 S.Ct. 507, 288 U.S. 616, 77 L.Ed. 989—The Hammitt L. Robbins, D.C.Va., 50 F.2d 182—The K-5691, D.C.N.Y., 50 F.2d 180.

(3) To establish probable cause for believing that fishing vessel was engaged in violation of law, as basis for boarding of vessel and search thereof by Coast Guard.—U.S. v. 1,572 Cases of Assorted Liquors, D.C.N.Y., 4 F.Supp. 1017.

(4) To warrant finding that vessel was carrying merchandise for hire in violation of license as pleasure vessel—Gaul v. U.S., C.C.A.R.I., 62 F.2d 559, certiorari denied 53 S.Ct. 507, 288 U.S. 616, 77 L.Ed. 989—Jackman v. U.S., C.C.A.Mass., 56 F.2d 358—U.S. v. Davidson, C.C.A.R.I., 50 F.2d 517, certiorari denied Davidson v. U.S., 52 S.Ct. 36, 284 U.S. 660, 76 L.Ed. 559—58 C.J. p. 53 note 17 [b]

89. U.S.—The Tahoma, C.C.A.Alaska, 87 F.2d 349.
58 C.J. p. 53 note 17 [d].

Identification number

Evidence that identification number awarded by collector of customs was painted on each bow of vessel was held insufficient to justify decree forfeiting vessel for knowing and fraudulent obtaining or use of identification number—The Patricia, No. 970-A, C.C.A.Cal., 81 F.2d 814.

90. U.S.—The Chiquita, D.C.Cal., 41 F.2d 842, affirmed, C.C.A., 44 F.2d 302.

91. U.S.—U.S. v. The Burdett, Md., 9 Pet. 682, 9 L.Ed. 273.

92. U.S.—The Pilot, D.C.Me., 36 F.2d 250—The Good Templar, D.C.Mass., 97 F. 651.

93. U.S.—The Good Templar, supra.

evidence, the government is required only to show probable cause for instituting the forfeiture proceeding.[94]

Even where the burden of proof is on claimant of the vessel in a suit for forfeiture for engaging in a trade other than that for which it was licensed, and a showing of cause for seizure has been made, claimant's proof, although not convincing, may render forfeiture unwarranted.[95] In a suit for forfeiture because of employment of a vessel in a trade other than that for which it was licensed, to support the defense of necessity for violation of law, the proof must be clear[96] Where, under the evidence, only two conclusions of fact may be drawn, either of which shows that the vessel was employed in a trade other than that for which she was licensed, it is sufficient to sustain the case of the government[97]

(4) Decree, Review, and Costs

On review of a decree in forfeiture proceedings, the trial court's findings ordinarily are entitled to great weight.

Decree for forfeiture of a pleasure yacht for transporting merchandise for pay is not subject to complaint because of an order for delivery at a certain place.[98]

Review. In accordance with the general rule in admiralty proceedings, the trial court's findings ordinarily are entitled to great weight,[99] and findings in a forfeiture proceeding, by a special master, approved by the trial court, will not be set aside or reversed on appeal except for manifest error given to the consideration of the evidence or in the application of the law.[1] Claimant appealing from a decree forfeiting a vessel and its cargo cannot complain of the admission of evidence admissible against the vessel but not against the cargo, where proper objections were not raised at the trial.[2]

Costs The statute authorizing the court to give a certificate of probable cause for the seizure, which will prevent an award of costs to claimant, has been given effect in a proceeding for forfeiture.[3] In a case in which probable cause for the seizure appeared, the costs have been divided between the United States and claimant[4] The allowance of fees to the attorney representing claimant of the vessel sought to be forfeited has in particular circumstances been denied[5]

e. Remission or Restoration and Protection of Owners or Lienors

Under the statutes, power to remit or mitigate penalties or forfeitures imposed under the federal statutes relating thereto is vested in the designated officer, and the court has no power to revise the decision of the officer or to inquire into the grounds on which it was made. If the remission of a forfeiture is made subject to certain conditions within the power of the remitting authority to impose, such conditions must be complied with.

Under the statutes, application may be made to a designated executive officer for remission or mitigation of penalties or forfeitures imposed under the federal statutes here under consideration.[6] The power of remission or mitigation belongs exclusively to the designated officer,[7] and the fact that a libel or information has been filed to enforce the penalty or forfeiture,[8] or that a decree has been

94. U.S.—Gaul v. U. S., C.C.A.R.I., 62 F.2d 559, certiorari denied 53 S.Ct. 507, 288 U.S. 616, 77 L.Ed. 989—U. S. v. Davidson, C.C.A.R.I., 50 F.2d 517, certiorari denied Davidson v. U. S., 52 S.Ct. 36, 284 U.S. 660, 76 L.Ed. 559

95. U.S.—The Chiquita, D.C.Cal., 41 F.2d 842, affirmed, C.C.A., 44 F.2d 302

Mere suspicion

Ship may not be declared forfeit on mere suspicion arising from frequent change of ownership—The Chiquita, C.C.A.La., 19 F.2d 417

96. U.S.—Alksne v. U. S., C.C.A. Mass., 39 F.2d 62, certiorari denied 50 S.Ct. 467, 281 U.S. 768, 74 L.Ed. 1175.

58 C.J. p. 53 note 23.

97. U.S.—The Lorraine Rita, D.C. Pa., 16 F.2d 607.

98. U.S.—The Conejo, C.C.A.Mass., 16 F.2d 264

99. Whether burden sustained

On appeal from decree in libel against vessel for using certificate of registration to which vessel was not entitled, wherein government showed probable cause, presumption of correctness of trial court's findings that claimant did not sustain burden because evidence was unsatisfactory and unconvincing and that claimant's witnesses were halting, evasive, and generally unsatisfactory, had great weight.—The Tahoma, C.C.A.Alaska, 87 F.2d 349.

1. U.S.—The Chiquita, C.C.A.Cal., 44 F.2d 302

2. U.S.—Alksne v. U. S., C.C.A.Mass., 39 F.2d 62, certiorari denied 50 S.Ct. 467, 281 U.S. 768, 74 L.Ed 1175.

3. U.S.—U. S. v. The Reindeer, C.C.R.I., 27 F.Cas.No.16,145.

4. U.S.—The Chiquita, D.C.Cal., 41 F.2d 842, affirmed, C.C.A., 44 F.2d 302.

5. U.S.—The Leme, D.C.Or., 77 F. Supp. 773

Equitable principle inapplicable

A proctor employed by Italian owners of vessels to defend forfeiture proceedings against vessels which were subsequently lawfully requisitioned by United States under statute providing for payment of just compensation to owners or claimants of vessels was not entitled to allowance of fees under equitable principle allowing litigant his counsel fees out of fund which litigant has at his personal expense and by his efforts succeeded in bringing into court to be shared by him and others in a common situation—U. S. v. The Pietro Campanella, D.C.Md., 81 F. Supp. 475.

6. U.S.—The Julia Davis, C.C.A.N.J., 72 F.2d 370.

7. U.S.—The Pilot, C.C.A.N.C., 43 F.2d 491—The Palo Alto, D.C.Me., 18 F.Cas.No.10,700, 2 Ware 344.

8. U.S.—Peacock v. U. S., Hawaii, 125 F. 583, 60 C.C.A. 389, appeal dismissed 25 S.Ct. 786, 195 U.S. 638, 49 L.Ed. 356.

entered by the court,[9] is immaterial; and an application for remission does not require the court to postpone the trial.[10] In such case the court has no power to revise the decision of the officer or to inquire into the grounds on which it was made,[11] at least in the absence of any showing that the action of the officer was illegal and beyond his power;[12] and, where a vessel has lawfully been forfeited, a court has no jurisdiction to entertain proceedings for restoration.[13]

Conditions precedent. If the remission of a forfeiture is made subject to certain conditions, which the authorized officer has power to impose, such conditions must be complied with.[14]

Effect of remission. If a remission of a forfeiture is granted before a libel or information is filed, such remission operates directly to revest the right of property and possession in the petitioner for remission,[15] and the collector in possession is bound to restore the property on such petitioner's presentation of the warrant of remission.[16] After the filing of a libel or information, however, the property is in the custody of the court, and the collector may not restore it without an order of court.[17]

Revocation. The authorized officer has the power, after a remission of a forfeiture has been granted and communicated to claimant, to revoke the warrant,[18] unless the remission is conditional and the condition has been performed without knowledge of the revocation.[19]

Relief in equity. The right of persons against whom penalties have been imposed by executive officers to appeal to a court of equity to prevent the enforcement of such penalties has been recognized.[20]

Protection of lienor. Where an innocent lienor was entitled to avail himself of the protection of the National Prohibition Act in a case in which, although the vessel was libeled because of engaging in a trade other than that for which she was licensed, she was condemned under the Prohibition Act, such lienor was held not barred by laches from the right to vacate forfeiture, where he proceeded with due diligence after notice of the seizure.[21] In a libel by the government for forfeiture of alcohol for violation of the navigation law, where the court of appeals ordered the sale of the alcohol free of any tax lien and the proceeds paid into the court registry pending outcome of the proceedings, it was proper for the government to petition the court sitting in admiralty for application of the proceeds toward satisfaction of the tax due on the alcohol.[22] The right to cut off the interest of a lienor by forfeiture of the vessel is discussed supra subdivision c of this section.

Showing as to ownership. A claimant of property, seized on board a vessel condemned for engaging in a trade other than that for which licensed, is not entitled to restoration unless he shows good title to such property.[23]

§ 12. Offenses against Shipping and Navigation Laws

a. In general
b. Boarding vessel without consent of master
c. Injuring, destroying, or casting away vessel

a. In General

Violations of various provisions of the shipping and navigation laws may, under their terms, constitute offenses rendering the violators liable to criminal prosecution.

Violations of various provisions of the shipping and navigation laws may, under their terms, constitute offenses rendering the violator liable to criminal prosecution.[24] The owner of an equitable interest

9. U.S.—Peacock v. U. S., supra.
Authority to make finding
District court, after decreeing forfeiture of vessel for engaging in unlicensed trade, was held without authority to make finding as basis for remission of forfeiture by secretary of commerce—The Olympia, D.C. Conn., 58 F.2d 638.

10. U.S.—Peacock v. U. S., Hawaii, 125 F. 583, 60 C.C.A. 389, appeal dismissed 25 S.Ct. 786, 195 U.S. 638, 49 L.Ed. 356.

11. U.S.—The Palo Alto, D.C.Me., 18 F.Cas.No.10,700, 2 Ware 344.

12. U.S.—The Palo Alto, supra.

13. U.S.—Ford v. Kline, D.C.Fla., 42 F.2d 558.

14. U.S.—The Palo Alto, D.C.Me., 18 F.Cas.No.10,700, 2 Ware 344.
58 C.J. p. 54 note 42.

15. U.S.—The Palo Alto, supra.

16. U.S.—The Palo Alto, supra.

17. U.S.—The Palo Alto, supra.

18. U.S.—The Palo Alto, supra.
58 C.J. p. 54 note 46.

19. U.S.—The Palo Alto, supra.
58 C.J. p. 54 note 47.

20. U.S.—Fredenberg v. Whitney, D.C.Wash., 240 F. 819.

21. U.S.—The Antigostine, D.C.N.Y., 44 F.2d 170.

22. U.S.—U. S. v. Rizzo, N.J., 56 S.Ct. 580, 297 U.S. 530, 80 L.Ed. 844.

23. U.S.—The Eliza, C.C.Mass., 8 F. Cas.No.4,346, 2 Gall. 4.
58 C.J. p. 54 note 52.

24. U.S.—Davis v. U. S., C.C.A.Cal., 185 F.2d 938, certiorari denied 71 S.Ct. 495, 340 U.S. 932, 95 L.Ed. 673.
Offenses incident to carriage of passengers see infra § 181.
Motorboat Act
(1) Federal district court had jurisdiction of prosecution for violation of Motorboat Act, if waters of Lake Tahoe where offense was alleged to have been committed were navigable waters of the United States notwith-

in a vessel is not punishable for any crime committed by one acting as her agent in procuring the enrollment and license of the vessel unless the equitable owner has participated in the agent's acts.[25] In a criminal prosecution for an offense against the navigation laws, the registry of a vessel is no evidence of ownership by a citizen of the United States.[26] The fact of ownership must be proved as any other fact by witnesses whom defendant may cross-examine.[27]

Navigating steam vessel without, or failure to employ, licensed engineer. Violations of the statutory provision that small craft, propelled by steam, which provision was extended to include craft of over fifteen tons burden operated for hire, propelled by gas, fluid, naphtha, or electric motors, shall not be navigated without a licensed engineer,[28] and the statutory provision that it shall be unlawful to employ any person as an engineer who is not licensed by the inspectors,[29] have been regarded as offenses punishable by indictment. Under the last mentioned statute knowledge on the part of the owner that the engineer was not licensed is unnecessary.[30]

Operating water craft without use of muffler or exhaust. Various state statutes have made the operation of certain water craft without a muffler or underwater exhaust an offense.[31] Under certain of these statutes the mere equipment of the craft with a muffler or underwater exhaust is not sufficient to avoid liability,[32] and, even though the craft is properly equipped in this respect, a failure to use the muffler may constitute the offense.[33]

b. Boarding Vessel without Consent of Master

It is made an offense by statute for any person not being in the United States service, and not being duly authorized by law, to go on board a vessel about to arrive at her place of destination before her actual arrival, and without the permission of the master.

It is made an offense by federal statute for any person not being in the United States service, and not being duly authorized by law, to go on board a vessel about to arrive at her place of destination before her actual arrival, without the permission of the master.[34] This statute is intended to protect foreign vessels as well as vessels of the United States.[35] The offense may be committed, although at the time of the boarding the vessel was temporarily at anchor in the harbor.[36] Climbing on the rail of the vessel without permission is within the prohibition of the statute.[37] Under a similar state statute the view was taken that the offense was complete on the offender's boarding the vessel without having obtained the leave which the statute required, and without regard to his motive and to the fact that permission was afterward given him by the captain to remain on board.[38]

Prosecution and punishment. The government need not prove that accused was not in the United States service or that he was not duly authorized by law to board the vessel.[39] In the absence of evidence showing permission by the master, proof that the master was not on board and that the mate in command did not give permission is sufficient to support a conviction where the other elements of the offense are present.[40] The punishment is fixed by the statute.[41]

c. Injuring, Destroying, or Casting Away Vessel

(1) In general
(2) Under Espionage Act

standing that Lake Tahoe had no outlet to the sea.—Davis v. U. S, supra.

(2) In prosecution for violation of Motorboat Act, where basic facts regarding natural features and use of Lake Tahoe where offense was alleged to have been committed were not seriously in controversy, and there were no questions of credibility between witnesses, trial court did not err in instructing jury that the waters were navigable waters of the United States instead of submitting that issue to jury as one of fact—Davis v. U. S., supra.

(3) In proceeding to subject motorboat to penalty for running at night without lights, evidence established prima facie case for government—The Gander, C.C.A.Conn., 54 F.2d 505.

25. Mass.—Braga v. Braga, 51 N.E. 2d 429, 314 Mass. 666

26. U.S.—U. S. v. Brune, C.C.Pa., 24 F.Cas.No.14,677, 2 Wall.Jr. 264.

27. U.S.—U. S. v. Brune, supra.

28. U.S.—U. S. v. Nash, D.C.Ky., 111 F. 525.
58 C.J. p. 56 note 84.

29. U.S.—U. S. v. Sims, D.C.Ohio, 9 F. 443

30. U.S.—U. S. v. Sims, supra.

31. R.I.—State v. Huxford, 87 A. 171, 35 R.I. 387, Ann.Cas.1915C 1135
58 C.J. p. 56 note 92.

32. R.I.—State v. Huxford, supra.

33. R.I.—State v. Huxford, supra.

34. U.S.—U. S. v. Anderson, C.C.N.Y., 24 F.Cas.No.14,447, 10 Blatchf. 226.

Persons included

A runner for a sailors' boarding house, employed by a person licensed under state law to operate such boarding house, is not exempt from the prohibition of the statute.—U. S. v. Anderson, supra.

35. U.S.—U. S. v. Sullivan, C.C.Or., 43 F. 602—U. S. v. Anderson, C.C.N.Y., 24 F.Cas.No.14,447, 10 Blatchf. 226

36. U.S.—U. S. v. Anderson, supra.

37. U.S.—U. S. v. Anderson, supra.

38. Mass.—Commonwealth v. Kennedy, 35 N.E. 1131, 160 Mass. 312.

39. U.S.—U. S. v. Anderson, C.C.N.Y., 24 F.Cas.No.14,447, 10 Blatchf. 226.

40. U.S.—U. S. v. Anderson, supra.

41. U.S.—U. S. v. Anderson, supra.
58 C.J. p. 55 note 64.

(1) In General

Under a statute so providing it is an offense for a person not being an owner willfully and corruptly to cast away or otherwise destroy any vessel to which he belongs, or willfully, with intent to destroy it, to set fire to such vessel, or otherwise attempt the destruction thereof.

Under a statute so providing, it is an offense for a person not being an owner willfully and corruptly to cast away or otherwise destroy any vessel to which he belongs, or willfully, with intent to destroy it, to set fire to any such vessel, or otherwise attempt the destruction thereof.[42] The act must be done willfully and feloniously.[43] While under the terms of the existing statute the offense may be committed on the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, formerly the statute required that the offense must be committed on the high seas.[44] The destruction of vessels on waters not within the maritime jurisdiction of the United States was made an offense by certain early state statutes.[45]

Acts included. The terms "destroy" and "cast away," as used in the federal statute, have received judicial construction.[46]

Persons liable and directions of owner. The act aimed at by the federal statute must be performed by a person not an owner,[47] and an owner incurs no penalty by casting away the vessel, or by directing others to do it, unless he intends to prejudice an insurer of the vessel or merchant having goods thereon or any other owner of the vessel.[48] However, the fact that the owner is on board and authorizes or commands the destruction of the vessel is not a defense to an indictment against the master for willfully destroying the vessel with intent to defraud the underwriters.[49] A minor who ships without the knowledge of his parents may be convicted under the statute.[50]

Prosecution. In prosecutions under the federal statutes, general rules as to indictments apply,[51] as do general rules as to the admissibility[52] or sufficiency[53] of evidence in criminal cases.

(2) Under Espionage Act

Under the Espionage Act, a portion of which constituted war legislation, and the remainder of which was adopted as an ordinary criminal statute applicable without regard to any state of national emergency, it is an offense, among other acts, for any person to tamper with the motive power or instrumentalities of navigation of certain vessels with intent to injure or endanger the safety of the vessels or of persons on board, and it is another independent offense for an owner, master, or member of the crew, without regard to intent, to injure or destroy a vessel within the territorial waters of the United States.

Certain offenses with respect to the injury or destruction of vessels have been denounced by the Espionage Act, later incorporated in the federal criminal code as 18 U.S.C.A. §§ 5, 2275, and 50 U.S.C.A. § 193,[54] a portion of which constituted war legislation, and the remainder of which was adopted as an ordinary criminal statute applicable without regard to any state of national emergency.[55] Under one portion of the statute, which has been held valid,[56] it is an offense, among other acts, for any

42. U.S.—U. S. v. Murphy, D.C.Ala., 50 F.2d 455.

43. U.S.—U. S. v. Wilson, C.C.N.Y., 28 F.Cas.No.16,731, 3 Blatchf. 435.

44. U.S.—U. S. v. Wilson, supra
58 C.J. p. 55 note 69.

45. Mass.—Commonwealth v. Francis, Thach.Cr.Cas. 240.
58 C.J. p. 55 note 71.

46. U.S.—U. S. v. Johns, Pa., 26 F.Cas.No.15,481, 1 Wash.C.C. 363, 4 Dall. 412, 1 L.Ed. 888.
58 C.J. p. 55 note 72.

47. U.S.—U. S. v. Murphy, D.C.Ala., 50 F.2d 455—U. S. v. Wilson, C.C.N.Y., 28 F.Cas.No.16,731, 3 Blatchf. 435.

48. U.S.—U. S. v. Murphy, D.C.Ala., 50 F.2d 455.

49. U.S.—U. S. v. Jacobson, C.C.N.Y., 26 F.Cas.No.15,461, Brunn.Col.Cas. 410—U. S. v. Vanranst, C.C.Pa., 28 F.Cas.No.16,608, 3 Wash.C.C. 146.

50. U.S.—U. S. v. Lockman, C.C.Mass., 26 F.Cas.No.15,620, Brunn.Col.Cas. 554.

51. U.S.—U. S. v. Murphy, D.C.Ala., 50 F.2d 455.
58 C.J. p. 55 note 77.

To charge offense against owner for casting away vessel, indictment must allege insurance, freight, or passengers on vessel, or fact showing that owner had no right to cast her away.—U. S. v. Murphy, supra

52. U.S.—U. S. v. Johns, Pa., 26 F.Cas.No.15,481, 1 Wash.C.C. 363, 4 Dall. 412, 1 L.Ed. 888.
58 C.J. p. 55 note 80 [a].

53. U.S.—Sturtevant v. U. S., C.C.A.Cal., 36 F.2d 562.
58 C.J. p. 55 note 80 [b].

54. U.S.—Giugni v. U. S., C.C.A.Puerto Rico, 127 F.2d 786—U. S. v. Martini, D.C.Ala., 42 F.Supp. 502.
Forfeiture of vessel for violation of Espionage Act see supra § 11 b.

Design of statute

The statute entitled "An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," was designed to protect the foreign commerce of the country and vessels usable as instrumentalities of that commerce, as well as to punish espionage and other crimes particularly harmful to the country in time of war.—Bersio v. U. S., C.C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S.Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—Schiaffino v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742

Crime against United States

The crime of injuring a vessel of foreign registry while within the jurisdiction of the United Sates is a crime against the United States which includes the Canal Zone.—U. S. ex rel. McDermott v. Jaeger, C.C.A.N.Y., 126 F.2d 1002, dismissing appeal 39 F.Supp. 307, certiorari denied 62 S.Ct. 1269, 316 U.S. 680, 86 L.Ed. 1754.

55. U.S.—Marchese v. U. S., C.C.A.Fla., 126 F.2d 671.

56. U.S.—Giugni v. U. S., C.C.A.

person to tamper with the motive power or instrumentalities of navigation of certain vessels with intent to injure or endanger the safety of the vessels or of persons on board,[57] and, under another portion of the statute, subsequently reënacted as 18 U.S.C.A. § 2274, it is unlawful for the owner, master, or member of the crew to injure or destroy a vessel within the territorial waters of the United States,[58] or to use the vessel as a place of resort of any person conspiring or preparing to commit any offense against the United States.[59] Although there is an overlapping of these two provisions, the two offenses are separate and distinct.[60]

The provision of the statute relating to tamper-

Puerto Rico, 127 F.2d 786—Marchese v. U. S, C C A.Fla., 126 F 2d 671.

Definiteness

The statute meets essential requirement of constitution that a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, and must be couched in terms that are not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application —Bersio v U. S, C.C. A.N.C, 124 F 2d 310, certiorari denied Bersia v. U. S, 62 S Ct. 1033, 316 U.S. 665, 86 L Ed. 1742—Pieraccini v. U. S, C C A Md, 124 F.2d 310, certiorari denied 62 S Ct. 1034, 316 U S 666, 86 L Ed. 1742—Schiaffino v U S., C C.A Md, 124 F 2d 310, certiorari denied 62 S.Ct. 1034, 316 U S 666, 86 L Ed. 1742.

57. U S.—Bersio v. U. S., C C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S Ct 1033, 316 U S. 665, 86 L Ed 1742—Pieraccini v U. S, C C A Md., 124 F.2d 310, certiorari denied 62 S.Ct 1034, 316 U S. 666, 86 L Ed. 1742—Schiaffino v. U S., C C A Md, 124 F.2d 310, certiorari denied 62 S.Ct 1034, 316 U. S 666, 86 L Ed. 1742.

Purpose

(1) The statute was enacted for the purpose of protecting all shipping engaged in commerce with foreign nations.—Polonio v. U. S, C.C.A. Or., 131 F 2d 679

(2) The purpose of statute was not to protect owners of vessels against malicious acts of others, but to protect vessels themselves, as instrumentalities usable in vital foreign commerce of the country from destruction or injury by any one.—Bersio v. U S, C C A N.C, 124 F 2d 310, certiorari denied Bersia v. U. S, 62 S.Ct 1033, 316 U S. 665, 86 L Ed 1742 —Pieraccini v U. S, C C A Md, 124 F.2d 310, certiorari denied 62 S Ct. 1034, 316 U S. 666, 86 L Ed 1742—Schiaffino v. U. S, C.C A Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L Ed. 1742.

58. U.S.—Polonio v. U. S., C.C.A Or., 131 F.2d 679.

Proclamation of emergency

(1) It has been held that such statute is applicable only after presidential proclamation of a national emergency.—Marchese v U S, C.C.A. Fla, Ga, La, Tex, 126 F 2d 671.

(2) It has also been held, however, that no such proclamation is required to render the statute effective, but that, even if required, certain presidential orders constituted a sufficient proclamation for this purpose —U S. v The Antoinetta, C.C A N J & Pa., 153 F 2d 138, certiorari denied Lorenzo v U S, 66 S.Ct. 1368, 328 U S 863, 90 L Ed 1633, and Rosasco v. U S, 66 S Ct 1368, 328 U S 863, 90 L Ed 1633, rehearing denied 67 S Ct. 31, two cases, 329 U S. 820, 91 L Ed 698, certiorari denied Mariano Maresca & Co v U S, 66 S Ct. 1369, 328 U S 864, 90 L Ed. 1634, and Italia-Societa Anonima Di Navigazione v. U. S, 66 S Ct. 1369, three cases, 328 U S 864, 90 L Ed. 1634, rehearing denied 67 S Ct 32, two cases, 329 U S 820, 821, 91 L Ed. 698, certiorari denied Italia-Societa Anonima Di Navigazione v. U S., 66 S.Ct 1369, 328 U.S 864, 90 L Ed. 1634, and Societa Anonima Coop Di Navigazione Garibaldi v. U S, 66 S Ct 1369, 328 U S. 864, 90 L.Ed. 1634, rehearing denied 67 S Ct. 32, two cases, 329 U.S. 821, 91 L Ed. 698, certiorari denied Italia-Societa Anonima Di Navigazione v. U. S., 66 S.Ct 1370, two cases, 328 U S. 864, 90 L.Ed. 1634, 1635, rehearing denied 67 S Ct 33, two cases, 329 U.S. 821, 91 L Ed 699, certiorari denied Loomis v. U S., 66 S Ct 1375, 328 U S. 864, 90 L Ed 1635, rehearing denied 67 S.Ct 34, 329 U. S. 821, 91 L Ed. 699.

59. U.S.—The Leme, D.C.Or., 77 F. Supp. 773

60. U.S —U. S. v. The Antoinetta, C. C.A N J. & Pa, 153 F.2d 138, certiorari denied Lorenzo v U. S, 66 S Ct. 1368, 328 U.S 863, 90 L.Ed 1633, and Rosasco v. U. S., 66 S Ct 1368, 328 U S 863, 90 L Ed 1633, rehearing denied 67 S.Ct 31, two cases, 329 U S. 820, 91 L Ed 698, certiorari denied Mariano Maresca & Co. v. U. S, 66 S Ct. 1369, 328 U. S 864, 90 L Ed 1634, and Italia-Societa Anonima Di Navigazione v. U. S, 66 S.Ct 1369, three cases, 328 U S 864, 90 L.Ed. 1634, rehearing denied 67 S Ct. 32, two cases, 329 U.S. 820, 821, 91 L Ed. 698, certiorari denied Italia-Societa Anonima Di Navigazione v. U. S, 66 S Ct. 1369, 328 U.S. 864, 90 L Ed. 1634, and Societa Anonima Coöp. Di Navigazione Garibaldi v. U. S., 66 S. Ct. 1369, 328 U S 864, 90 L Ed 1634, rehearing denied 67 S Ct 32, two cases, 329 U S 821, 91 L Ed 698, certiorari denied Italia-Societa Anonima Di Navigazione v U S., 66 S Ct 1370, two cases, 328 U S 864, 90 L Ed 1634, 1635, rehearing denied 67 S Ct 33, two cases, 329 U S 821, 91 L Ed 699, certiorari denied Loomis v. U. S, 66 S Ct. 1375, 328 U.S. 864, 90 L Ed 1635, rehearing denied 67 S Ct 34, 329 U S 821, 91 L Ed 699—Polonio v. U S, C.C A Or, 131 F 2d 679—Marchese v. U. S, C C.A.Fla, Ga., La, Tex, 126 F.2d 671—Bersio v. U. S, C C A N C, 124 F.2d 310, certiorari denied Bersia v U S, 62 S Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U S., C.C.A Md, 124 F 2d 310, certiorari denied 62 S Ct. 1034, 316 U.S 666, 86 L Ed 1742—Schiaffino v. U. S, C.C A Md, 124 F 2d 310, certiorari denied 62 S Ct 1034, 316 U S. 666, 86 L Ed. 1742

Basis of distinction

The Espionage Act, Title II, penalizing willful injury to, or destruction of, vessel by owner, master, or member of crew thereof and Title III, penalizing acts done with intent to injure or endanger safety of vessel engaged in foreign commerce, are independent, and by Title II congress provided for protection of private vessels, foreign or domestic, during and after the declaration of a national emergency without regard to the specific intent and by Title III provided for protection for similar vessel even before a national emergency has been declared to exist, provided the forbidden act was done with the specific intent required.—Giugni v. U. S., C.C.A.Puerto Rico, 127 F.2d 786

Different situations

Congress, in enacting statute which makes it unlawful for any person to tamper with the motive power or instrumentalities of navigation of a vessel with intent to injure or endanger the safety of the vessel or of persons on board, was dealing with a different situation and one which it considered more reprehensible and dangerous than that covered by statute making it unlawful for owner or master or any other person in charge or command of any private vessel, foreign or domestic, within territorial waters of the United States, willfully to cause or permit the destruc-

ing with the motive power or instrumentalities of navigation of certain vessels by its terms applies to two classes of ships, namely, vessels of foreign registry in American ports, and vessels of American registry entitled to engage in commerce with foreign nations whether in American ports or on the high sea.[61] As to the vessels of foreign registry there is no limitation regarding whether they are engaged in or usable in foreign commerce,[62] and notwithstanding the catchline of the statute indicative of its application to vessels engaged in foreign commerce, a vessel of foreign registry which has come into a port of the United States for the purpose of carrying on foreign commerce with foreign countries is within the scope of the statute, even though it is not actively engaged in commerce at the time of commission of the prohibited acts.[63]

Under the provisions of the statute relating to "tampering" with certain vessels applicable to "whoever" commits the prohibited acts, persons who may be liable thereunder include owners, officers, members of the crew,[64] or anyone else who may be in control of the vessel,[65] and the statute is not restricted to outsiders.[66] So, the fact that defendant's acts of destruction or injury were performed with the consent of the owner of the vessel does not render the statute inapplicable, or constitute a defense.[67] The statute renders unlawful any sort of improper interference with the machinery of the vessel, if the acts done are accompanied by the requisite intent;[68] it is not necessary to prove that there was actual destruction or even a serious injury following the tampering, and the amount of the damage done is not material.[69]

The intent with which acts are committed is a material element of the statutory offense of injuring vessels engaged in foreign commerce, as by tamper-

tion or injury of such vessel—U. S. v. Saglietto, D.C.Va., 41 F.Supp. 21

61. U.S.—Polonio v. U. S., C.C.A.Or., 131 F.2d 679

Availability for use

The act applies to all vessels available for use in foreign commerce, although not actively engaged therein, but tied up at wharves in United States ports at time of injuries thereto.—Marchese v. U. S., C.C.A.Fla., 126 F.2d 671.

62. U.S.—Giugni v. U. S., C.C.A.Puerto Rico, 127 F.2d 786.

Appropriateness of language used in statute

It was appropriate for congress to use the language "entitled to engage in commerce with foreign nations" only in limitation with the phrase "vessel of American registry" and leave the phrase "vessel of foreign registry" without limitation.—Giugni v. U. S., supra.

63. U.S.—Bersio v. U. S., C.C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S.Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—Schiaffino v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—U. S. v. Tomicich, D.C.Pa., 41 F.Supp. 33, affirmed 126 F.2d 1023.

64. U.S.—Giugni v. U. S., C.C.A. Puerto Rico, 127 F.2d 786—Bersio v. U. S., C.C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S.Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—Schiaffino v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—U. S. v. Saglietto, D.C.Va., 41 F.Supp. 21.

Friend or enemy

Under statute, relating to destruction of, injury to, or improper use of, vessels, no owner, whether friend or enemy, may destroy his ship in an American port.—U. S. v. Martini, D.C.Ala., 42 F.Supp. 502.

Subjects of foreign country

Although officers and crew of Italian vessel were subject to orders of their own government, they must accept the consequences of violating the laws of the United States in executing orders of the Italian government to do such damage to vessel which was in American port as would prevent her from being used in any service that might be helpful to enemies of Italy.—U. S. v. Martini, supra.

65. U.S.—U. S. v. Martini, supra.

66. U.S.—U. S. v. Tomicich, D.C.Pa., 41 F.Supp. 33, affirmed, C.C.A., 126 F.2d 1023.

Reference to owner and crew in another statute

Since the crime denounced by provision punishing whoever tampers with motive power or instrumentalities of navigation of a vessel engaged in foreign commerce is not the same as crime denounced by another provision prohibiting injury to, or destruction of, vessels in ports of the United States by owner, master, or crew member, the reference to owners and crew in latter provision does not limit the scope of the word "whoever" as used in former provision—Polonio v. U. S., C.C.A.Or., 131 F.2d 679.

"Tamper"

(1) In statute making it an offense to tamper with the motive power or instrumentalities of navigation of any vessel within jurisdiction of United States, the word "tamper" does not preclude the application of the statute to any person other than an outsider on the theory that tamper in its ordinary acceptance comprehends only acts of meddlesome interference by persons other than an owner or his agents—Giugni v. U. S., C.C.A.Puerto Rico, 127 F.2d 786—U. S. v. Tomicich, D.C.Pa., 41 F.Supp. 33, affirmed, C.C.A., 126 F.2d 1023

(2) The word "tamper," as used in statute, includes interfering with one's own property as well as with property of another—U. S. v. Polonio, D.C.Or., 77 F.Supp. 768.

67. U.S.—Marchese v. U. S., C.C.A. Fla., 126 F.2d 671—Bersio v. U. S., C.C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S.Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—Schiaffino v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—U. S. v. Saglietto, D.C.Va., 41 F.Supp. 21.

68. U.S.—Bersio v. U. S., C.C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S.Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742—Schiaffino v. U. S., C.C.A.Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742

69. U.S.—U. S. v. Martini, D.C.Ala., 42 F.Supp. 502.

ing with the motive power or instrumentalities of navigation of the vessel,[70] but in a prosecution under the other provision of the statute relating to the destruction of, injury to, or improper use of, vessels, it is not necessary to allege and prove the intent with which the act is done.[71] The intent required to be shown under the former provision is the intent either to injure, or endanger the safety of, the vessel, her cargo, or of persons on board,[72] and, where the forbidden acts were performed with such intent, no further showing of malice or intent to commit a wrong is required to authorize a conviction.[73] It is not required to be shown that in damaging the machinery of a vessel defendant knew that he was violating a law of the United States since ignorance of the law is no excuse for its violation.[74]

Under the provision as to "tampering" with certain vessels, it is immaterial whether the injury or danger is intended to take place while the vessel is in a port of the United States or after it has departed therefrom,[75] or whether the vessel involved was or was not in operation at the time of the alleged violation,[76] and liability may not be avoided on the theory that, as the particular vessel was tied up in port, its safety was not injured by acts which merely immobilized its machinery, and that no intent to inflict such injury could be inferred from defendant's acts.[77] It has been held that the requisite intent to injure the vessel may be satisfied by a finding of intent to injure integral parts thereof, such as the main engines,[78] but it has also been held that the prohibited intent must go further than a mere intent to injure the machinery of the vessel itself,[79] and that the statute is not directed at injury to a vessel that might result merely in making it unable to move under its power, but rather to injury done with intent to endanger the entire safety of the vessel or to encompass its destruction as a whole or as a unit of navigation, when it was being used or was capable of being used at the time of the commission of the offense, for the transportation of men and goods to foreign countries.[80]

In prosecutions for violation of such statute, decisions have adjudicated questions as to the sufficiency of the indictment,[81] the sufficiency of the evidence to present a question for the jury,[82] or to sustain a conviction,[83] and the propriety of par-

70. U S.—U. S. v. Martini, supra—U. S v. Saglietto, D.C Va., 41 F Supp. 21.

71. U.S—U S. v. Martini, D.C.Ala., 42 F.Supp 502

Willful injury to vessel

Under statute making it unlawful for owner or master or any other person in charge or command of any private vessel, foreign or domestic, within territorial waters of United States, willfully to cause or permit destruction or injury of such vessel, any willful injury to the vessel, regardless of intended consequences, is prohibited, although the word "willfully" means knowingly and designedly and would necessarily require the act to be intentional and not an accidental happening—U. S. v. Saglietto, D C Va, 41 F Supp 21.

72. U S.—Giugni v. U. S, C.C.A.Puerto Rico, 127 F 2d 786—Bersio v. U. S., C C.A N C, 124 F 2d 310, certiorari denied Bersia v. U. S, 62 S.Ct 1033, 316 U S 665, 86 L Ed. 1742—Pieraccini v. U. S, C C A Md, 124 F 2d 310, certiorari denied 62 S Ct 1034, 316 U.S. 666, 86 L Ed. 1742—Schiaffino v U S, C C A.Md, 124 F 2d 310, certiorari denied 62 S.Ct. 1034, 316 U S. 666, 86 L Ed. 1742.

The phrase "endanger the safety of," in section of Espionage Act providing for punishment of person doing any act to or on vessel engaged in foreign commerce "with intent to injure or endanger the safety of the vessel" was added to the act, not to restrict, but to broaden, application thereof, and did not put actual "injury" to vessel outside scope of the act—Marchese v. U. S., C.C.A Fla., 126 F.2d 671.

73. U.S—Bersio v. U. S., C C A N C., 124 F.2d 310, certiorari denied Bersia v. U. S., 62 S.Ct. 1033, 316 U.S. 665, 86 L.Ed. 1742—Pieraccini v. U. S., C.C.A.Md, 124 F.2d 310, certiorari denied 62 S Ct. 1034, 316 U.S. 666, 86 L Ed 1742—Schiaffino v. U S., C C.A.Md., 124 F 2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L Ed. 1742.

74. U.S—Giugni v. U. S., C.C.A Puerto Rico, 127 F.2d 786.

75. U S—U. S. v. Martini, D.C.Ala., 42 F.Supp. 502.

76. U S—U. S v. Martini, supra.

Right of seizure of vessel

The mere fact that vessel of Italian registry was tied up in port of United States, and, therefore, could have been seized under statute authorizing forfeitures of vessels for willful injury to them if it were proved that owner or master had done acts denounced in that statute, would not operate as a defense to criminal proceeding against officers and members of crew under statute making it an offense to tamper with motive power of vessel of foreign registry within jurisdiction of the United States—U. S. v. Polonio, D.C Or., 77 F.Supp 768.

77. U S—Bersio v. U. S, C.C.A.N.C., 124 F.2d 310, certiorari denied Bersia v. U. S, 62 S.Ct 1033, 316 U.S 665, 86 L Ed 1742—Pieraccini v U S, C.C A.Md, 124 F 2d 310, certiorari denied 62 S.Ct. 1034, 316 U S. 666, 86 L.Ed. 1742—Schiaffino v U S., C.C A Md., 124 F 2d 310, certiorari denied 62 S.Ct 1034, 316 U. S 666, 86 L Ed. 1742—U. S. v. Tomicich, D C Pa., 41 F.Supp. 33, affirmed 126 F.2d 1023.

78. U.S—U. S. v. Polonio, D.C.Or., 77 F.Supp. 768.

79. U.S—U S. v. Saglietto, D C.Va, 41 F.Supp 21.

80. U.S—U. S. v Martini, D.C.Ala., 42 F Supp. 502—U. S. v. Saglietto, D.C.Va, 41 F Supp 21.

81. U.S—Marchese v. U. S., C.C.A. Fla, 126 F.2d 671.

82. U S—U. S. v. Polonio, D.C.Or., 77 F Supp. 768.

83. **Evidence held sufficient**

(1) To sustain conviction generally.—Giugni v. U. S., C.C.A.Puerto Rico, 127 F.2d 786.

(2) To establish existence of requisite intent—Bersio v. U. S, C.C A N.C., 124 F 2d 310, certiorari denied Bersia v. U. S, 62 S Ct. 1033, 316 U.S. 665, 86 L Ed 1742—Pieraccini v. U. S., C.C.A Md., 124 F.2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S 666, 86 L.Ed. 1742—Schiaffino v. U S., C.C.A.Md., 124 F.2d 310, certio-

ticular instructions to the jury.[84] Since criminal liability under the statute does not depend on ownership of the vessel, such ownership does not have to be either alleged or proved in a prosecution for violation of the statute.[85]

II. TITLE AND OWNERSHIP

§ 13. In General

Ships are personal property, and title thereto ordinarily is controlled by the general rules with respect to title to personal property.

Ships[86] and other vessels[87] constitute personal property, and except as far as modified by statute, matters of title with respect to ships are to be tested by the common-law rules governing title to personal property.[88]

Right to possession. A corporation set up to protect the rights of owners of a ship of foreign registry as existing prior to an invasion of the foreign country and the setting up in such country of a government not recognized by the United States will be accorded the right to possession of the ship as against others claiming through the unrecognized government.[89]

The validity of title to a ship is not dependent on its registry.[90]

§ 14. Title under Contract for Building Vessel

Ordinarily, under a contract for building an entire vessel, no property vests in the purchaser until completion and delivery, but this rule may be varied by the contract between the parties.

Under a contract for building an entire vessel, as a general rule no property vests in the person for whom she is built until she is ready for delivery and has been accepted or approved by such person,[91] at least as against third persons.[92] There is, however, no arbitrary rule of construction controlling such agreements, but the question is one of intent, open in every case to be determined on the terms of the contract and the circumstances attending the transaction.[93] If the parties expressly so agree, title to the vessel or materials, as far as completed and paid for during the progress of the work, will pass to the purchaser,[94] without the execution of a bill of sale or other writing,[95] and this rule is not affected by the fact that the pur-

rari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L.Ed. 1742.

Evidence held insufficient to support conviction

U.S.—U. S. v. Saglietto, D.C.Va., 41 F.Supp. 21.

84. U.S.—U. S. v. Saglietto, supra.

85. U S—Giugni v. U. S, C C.A Puerto Rico, 127 F 2d 786—Bersio v. U. S, C.C A.N.C, 124 F 2d 310, certiorari denied Bersia v. U S, 62 S Ct. 1033, 316 U S 665, 86 L Ed. 1742—Pieraccini v. U S, C C A Md, 124 F.2d 310, certiorari denied 62 S Ct. 1034, 316 U.S. 666, 86 L Ed 1742—Schaffino v U. S, C C.A.Md., 124 F 2d 310, certiorari denied 62 S.Ct. 1034, 316 U.S. 666, 86 L Ed 1742.

86. Wash—Alaska S S Co. v. State, 196 P 2d 1001, 31 Wash. 328.

Always so regarded

"In law, ships have always been regarded as personal property and not real property."—Seafeldt v Port of Astoria, 16 P.2d 943, 944, 141 Or 418.

87. Mass.—Atlantic Maritime Co v. Gloucester, 117 N.E. 924, 228 Mass. 519.

Wis—Reynolds v. Nielson, 93 N.W. 455, 116 Wis. 483, 96 Am.S R 1000.

Dredge, while not a ship in the ordinary sense of the term, nevertheless partakes of the nature of a ship in that it floats and is used only on water, and, in contemplation of law, a dredge, like ordinary vessels, is personal property—Seafeldt v. Port of Astoria, 16 P 2d 943, 141 Or 418.

88. Mass.—Atlantic Transp. Co. v. Alexander Shipping Co, 157 N E 725, 261 Mass. 1.

58 C.J. p 56 note 1.

Title to personal property generally see Property § 15.

89. U S.—The Signe, D C La., 39 F. Supp. 810, affirmed, C.C A, The Florida, 133 F.2d 719, certiorari denied Tiedemann v Estoduras S S. Co., 63 S Ct. 1439, 319 U S. 774, 87 L Ed. 1721, rehearing denied 64 S. Ct. 31, 320 U S. 811, 88 L Ed. 490.

Estonian ship

Where Union of Soviet Socialist Republics invaded Republic of Estonia and set up government which was not recognized by United States and such government confiscated shipping enterprises in Estonia, corporation organized for purpose of protecting rights of owners of Estonian ship as those rights existed prior to invasion was entitled to possession of ship for that purpose, and neither former owner, who was under surveillance of government set up after invasion, nor corporation organized under laws of such government to take over ship and other similar property, could maintain libel to recover possession of ship—The Signe, D.C La, 39 F.Supp. 810, affirmed, C.C.A, The Florida, 133 F 2d 719, certiorari denied Tiedemann v. Estoduras S S Co., 63 S Ct. 1439, 319 U.S. 774, 87 L Ed 1721, rehearing denied 64 S Ct 31, 320 U.S 811, 88 L Ed. 490.

90. U S—Southern Bell Telephone & Telegraph Co v. Burke, C C.A.Ala., 62 F.2d 1015.

Registry as evidence of title see infra § 15.

91. U.S—De Wolf v. Tupper, D C N. Y., 24 F. 289.

58 C J. p 56 note 3.

Title under sale of chattel to be manufactured or produced generally see Sales § 254.

92. U S—The Sam Slick, D C Mass., 21 F Cas No 12,283, 1 Sprague 289.

93. Ala.—Navco Hardwood Co. v. Mobile, etc, Nav. Co., 106 So. 862, 214 Ala 176.

58 C.J. p 56 note 5.

94. Mass—Glover v. Austin, 6 Pick. 209.

58 C.J p 57 note 6.

95. U S—Peterson v Noots, Wash., 255 F 875, 167 C C.A. 195.

58 C J. p 57 note 7.

chaser, under other provisions of the contract, has the right to reject the vessel or parts thereof because of defects,[96] or to complete the vessel in the event of annulment of the contract,[97] or by the fact that the builder is required to give a bond for the faithful performance of his contract,[98] and is responsible for all liabilities for labor and material incurred in the prosecution of the work.[99] If the contract provides that the buyer shall have a lien on, and ownership in, the vessel as the building progresses up to the amount paid on the contract, the builder to keep the vessel protected by insurance against fire, making the policies payable to the buyer, the interest of the latter before delivery is not an absolute ownership but only an interest in the nature of a lien for the money advanced.[1]

Implied agreement as to passing of title. In the absence of an express agreement therefor, an agreement or intention that title to the unfinished vessel, or to material, shall pass to the purchaser at different stages of the work may be inferred from the language of the contract and the circumstances attending the transaction.[2] The prevailing rule in this country is that an intention that the property in the vessel shall vest in the purchaser at certain stages prior to final delivery will not be inferred from the mere fact that the purchase price of the vessel is to be paid in installments as the work progresses, and is so paid,[3] or from that fact and the further fact that the construction is to take place under the superintendence of an agent who is authorized to reject or approve any materials used in the construction or equipment of such vessel,[4] or that the builder executed a mortgage to secure his faithful performance, which mortgage is to be surrendered when the vessel is fully completed and accepted and the balance of the purchase price paid.[5] Some authorities in this country have, however, followed the English rule to the contrary to the effect that, except where the attendant circumstances point to a different conclusion, an intention or an agreement that at a particular stage in the construction of the vessel title thereto, as far as constructed, shall pass to the owner, will be inferred from a provision in the contract to the effect that an installment in the price shall be paid at such stage, coupled with the fact that such installment has been duly paid, and that the work has been regularly inspected by the purchaser or his agent.[6]

Where plaintiff seeks recovery in claim and detainer for a vessel built under a contract entitling him to ownership on proof that the earnings of the ship from operation after construction have been sufficient to pay off the money loaned by defendant, the courts will apply the usual rules in respect of evidence[7] and instructions,[8] and will compute net earnings under the contract in compliance with its provisions.[9]

§ 15. Evidence of Title

a. In general
b. Registry and enrollment
c. Bill of sale

a. In General

Under the general rules, which govern in respect of evidence of ownership of a vessel, the burden of proof rests on the party asserting title to the ship.

In accordance with general rules discussed in Property § 17, the burden of proving title to, or ownership of, a vessel is on the party who asserts that fact;[10] but, where a prima facie case of ownership is established, the burden is on the opposing party to show the contrary.[11]

Ordinarily it is not necessary to prove ownership by the register,[12] or by a bill of sale,[13] or other instrument in writing;[14] but parol evidence may be

96. U.S.—U. S. v. Ansonia Brass, etc, Co, Va, 31 S Ct. 49, 218 U.S. 452, 54 L Ed. 1107.

97. U S—U S v. Ansonia Brass, etc, Co., supra.

98. U.S.—U. S. v. Ansonia Brass, etc., Co, supra.

99. U.S—U. S. v. Ansonia Brass, etc., Co., supra.
58 C J. p 57 note 11.

1. N.Y—People v. New York Tax, etc. Comrs., 58 N.Y. 242

2. U.S.—The Pocoqoket, D.C.Pa., 67 F 262, affirmed 70 F. 640, 17 C C A. 309, affirmed 18 S.Ct. 939, 168 U. S 707, 42 L Ed. 1214.
58 C.J. p 57 note 13.

3. N Y.—Andrews v. Durant, 11 N. Y. 35, 45, 62 Am.D. 55
58 C J. p 57 note 16.

4. U S—The Revenue Cutter No. 2, D C.Or., 20 F Cas No.11,714, 4 Sawy. 143
58 C.J. p 58 note 17.

5. U S.—Clarkson v. Stevens, N.J., 1 S Ct. 200, 106 U.S 505, 27 L Ed. 139.

6. Ind.—Sandford v. Wiggins Ferry Co, 27 Ind. 522.
58 C J. p 58 notes 19–22.

7. U S—Hager v. Gordon, C.C.A. Alaska, 171 F 2d 90.

8. U S—Hager v. Gordon, supra.

9. U.S.—Hager v Gordon, supra.
Deduction of taxes
Where agreement was to effect that defendant should furnish money to build, equip, and operate boat and barge and that, when earnings paid off costs of construction and expenses, boat and barge would become property of plaintiff, income taxes ascribable to operation of boat and barge were legitimate deductions in ascertaining whether earnings had fully paid off cost of construction and expenses.—Hager v. Gordon, supra.

10. U.S.—National Oil Transp. Co. v. U. S, D C La., 18 F 2d 305.
58 C J. p 58 note 25.

11. U S.—Vincent v. Soper Lumber Co., 113 Ill.App 463.

12. Me—Lyman v. Redman, 23 Me. 289.

13. Me—Lyman v. Redman, supra.

14. Me.—Lyman v. Redman, supra.

received for this purpose.[15] The register or other documentary evidence is necessary only where the asserted ownership is contradicted and the participant is called on to produce such documents.[16] While parol evidence has been held inadmissible to contradict the ship's papers with respect to ownership,[17] other decisions have held it admissible in contradiction of the register and bill of sale,[18] and it has been held to be the law that it may be shown by a parol agreement or transfer that title to a vessel is actually in one although the ship's documents on their face show it to be in another.[19] It has also been held that statutes providing that no bill of sale or mortgage of any vessel shall be valid unless recorded where the vessel is registered or enrolled is a mere registry act and does not preclude admission of parol evidence of the ownership of a vessel in an action by the purchaser for conversion of machinery taken therefrom.[20]

The general rules as to the weight and sufficiency of evidence apply to the weight and sufficiency of evidence to establish ownership of a vessel[21] or to constitute prima facie evidence of ownership.[22] A certificate of the collector of customs, that the ownership of a named vessel had been transferred and the transfer recorded, is not sufficient to show ownership in the transferee,[23] and resolutions of a corporate conditional buyer of a vessel and of its subsidiary, showing an intent to transfer it to the subsidiary in the future, is insufficient to show that the subsidiary was a beneficial owner.[24]

Actual possession and control by the party in whom the interest is alleged to be, and acts of ownership by him, are in cases of vessels, as with other personal property, presumptive evidence of title.[25] On the other hand, possession and operation of a vessel by a subsidiary of a corporation to which it was conditionally sold is insufficient to prove that the subsidiary was the assignee of the parent corporation.[26]

A sea letter is a certificate of ownership granted unregistered vessels belonging to citizens of the United States.[27]

b. Registry and Enrollment

(1) Registry
(2) Enrollment

(1) Registry

The registry of a ship is neither the exclusive nor conclusive evidence of title, but is a circumstance for consideration in determining her ownership.

The registry of a vessel regulates only its national character, as discussed supra § 3, and is not regarded as a document of title or in itself necessarily evidence thereof.[28] While the register indicates record ownership,[29] and is a circumstance to be considered in the ascertainment of actual possession and control,[30] and, in case of loss of other papers, may be admissible as best evidence,[31] it is not the sole or exclusive evidence of the ownership of a vessel.[32] Unless the register is made evidence by statute, it furnishes evidence of ownership, as against the person sought to be charged as owner, only when it is confirmed by some auxiliary

15. Mo.—Carpenter v. Gruendler Mach. Co., 141 S.W. 1147, 162 Mo. App. 296.
58 C.J. p. 58 note 31.

16. N.Y.—Stacy v. Graham, 10 N.Y. Super. 444, affirmed 14 N.Y. 492.
58 C.J. p. 59 note 34

17. U.S.—Ohl v. Eagle Ins. Co., C.C. Mass., 18 F. Cas. Nos. 10,472, 10,473, 4 Mason 172, 390.

Joint or sole ownership

In an action on an insurance policy underwritten on the entirety of a ship, where the ship's papers on the voyage showed a joint ownership, parol evidence is not admissible to contradict the ship's papers and prove a sole ownership.—Ohl v. Eagle Ins. Co., supra.

18. N.Y.—Whiton v. Spring, 74 N.Y. 169.

Per cent owned

It was competent for one to show by parol that he owned one-eighth part of a ship although the registry of the vessel and bill of sale showed that he owned only one-thirty-second part thereof.—Whiton v. Spring, supra.

19. N.Y.—Whiton v. Spring, supra.
58 C.J. p. 58 note 32.

20. Mo.—Carpenter v. Gruendler Mach. Co., 141 S.W. 1147, 162 Mo. App. 296
58 C.J. p. 59 note 33.

21. U.S.—The Robert R. Kirkland, N.J., 153 F. 863, 83 C.C.A. 45.
58 C.J. p. 59 note 37.

Evidence held sufficient

To support finding that plaintiff owned a half-interest in the ship.—Scola v. Scola, 59 N.E.2d 769, 318 Mass. 1.

22. Wash.—Carlson v. White Star S.S. Co., 81 P. 838, 39 Wash. 394.
58 C.J. p. 59 note 38

23. Philippine.—Morey v. Layco, 10 Philippine 258.

24. U.S.—National Oil Transport Co. v. U.S., D.C.La., 18 F.2d 305.
58 C.J. p. 59 note 40.

25. Me.—McLellan v. Osborne, 51 Me. 85.
58 C.J. p. 59 note 42.

26. U.S.—National Oil Transport Co. v. U.S., D.C.La., 18 F.2d 305.

27. N.Y.—Sleght v. Hartshorne, 2 Johns. 531, 544.

28. U.S.—Card v. Hines, D.C.S.C., 35 F. 598
58 C.J. p. 59 note 46.
Official registers and documents as evidence generally see Evidence §§ 637–645.
Registry as evidence in criminal prosecution for offense against navigation laws see supra § 12.

29. N.Y.—Lonnberg v. Knox, 204 N.Y.S. 852, 123 Misc. 148.

30. Cal.—Brooks v. Minturn, 1 Cal. 481.
N.Y.—Lonnberg v. Knox, 204 N.Y.S. 852, 123 Misc. 148.

31. N.Y.—Ketchum v. Miln, Seld. 152.
58 C.J. p. 59 note 49.

32. U.S.—Southern Bell Telephone & Telegraph Co. v. Burke, C.C.A.Ala., 62 F.2d 1015.

circumstance showing that it was made on the oath of such person or by his authority or consent.[33] Without such connecting proof the register has been held not to be even prima facie evidence to charge a person as owner;[34] and even with such proof it is prima facie evidence only, and not conclusive evidence of ownership;[35] since an equitable title in one person may well consist with the documentary title, at the customhouse, in another.[36] Accordingly it has been held that the person in whose name a vessel is registered and to whom is issued a certificate of ownership is presumed to have the legal title thereto,[37] and that this presumption is not overcome by proof that another person exercised acts of ownership over the vessel.[38] In favor of the person claiming as owner, the registry is no evidence at all, since it is nothing more than his declaration.[39]

Incidental question. Where the question of ownership is merely incidental, the registry alone may be deemed sufficient prima facie evidence.[40]

(2) Enrollment

A certificate of enrollment may afford some evidence of ownership of a vessel, but stands on no higher footing than the registry.

A certificate of enrollment of a vessel pursuant to a federal statute is some evidence of ownership;[41] but the enrollment is not evidence of a higher nature than a registry.[42] It is not admissible, as evidence of property either in favor of or against persons named therein as part owners, who were not instrumental in procuring it to be made, and who have neither authorized nor assented to it.[43] Without such connecting proof, the enrollment has been held not to be even prima facie evidence to charge a person as owner,[44] and even with such proof it is not conclusive evidence of ownership,[45] but is prima facie evidence thereof,[46] and is sufficient in the absence of opposing proof.[47]

c. Bill of Sale

A bill of sale is the usual evidence by which title to a vessel is shown.

A bill of sale is the customary document by which the ownership of vessels is evidenced,[48] and therefore is competent evidence of title in the purchaser,[49] and when accompanied by possession is prima facie evidence of title or ownership,[50] but is not conclusive.[51] A bill of sale has been held not admissible as evidence of title where it is not recorded as required by statute.[52]

§ 16. Part Owners

a. Nature and extent of interest
b. Rights and liabilities
c. Remedies

a. Nature and Extent of Interest

Coowners of a ship ordinarily hold as tenants in common.

As a general rule, where there is no other relation between part owners of a vessel than that arising out of joint ownership, they hold their respective interests therein as tenants in common,[53] and, in the absence of a statute so providing, they do not hold as joint tenants.[54]

33. Me—Bradbury v. Johnson, 41 Me 582, 66 Am.D. 264.
58 C J p 60 notes 50-52.

34. Ala—Jones v Pitcher, 3 Stew & P 135, 24 Am D 716.
58 C J p 60 note 53—38 C J. p 1181 note 40

35. U S—The Kitty C, D.C Fla, 20 F.Supp 173
58 C J p 60 note 54.
Basis for estoppel
Registry of title to ship in names of mortgagees out of possession did not estop them to deny their ownership thereof in proceeding to recover damages for seaman's death.—The G W. Glenn, D C Del., 4 F Supp 727.

36. Me.—Bradbury v Johnson, 41 Me. 582, 66 Am.D 264.

37. Philippine—Lima v. Lim Chu Kao, 51 Philippine 476—Martinez v Martinez, 1 Philippine 647.

38. Philippine—Martinez v. Martinez, 11 Philippine 298—Martinez v. Martinez, 1 Philippine 647.

39. Me—Bradbury v. Johnson, 41 Me. 582, 66 Am.D. 264.
58 C J. p 60 note 58.

40. Ind—Moore v. Anderson, 8 Ind. 18
Me—Bradbury v. Johnson, 41 Me. 582, 66 Am D. 264.

41. Ark.—McClintock v. Lary, 23 Ark 215.
23 C J. p 57 note 61.

42. Me—Dyer v. Snow, 47 Me 254.

43. U S—The Nancy Dell, D C.Ill., 14 F 744
58 C.J. p 61 note 65.

44. U S—Dudley v The Superior, D. C Ohio, 7 F Cas No 4,115, Newb Adm 176.
Me—Dyer v. Snow, 47 Me. 254.

45. La—Gilmore v. Brenham, 3 La. Ann 32.
58 C J. p 61 note 67.

46. Pa—Hall v. Insurance Co., 3 Phila. 331.
58 C.J p 61 note 68.

47. Ark—McClintock v. Lary, 23 Ark 215
58 C J. p 61 note 69.

48. U.S.—La Conception, S.C., 6 Wheat 235, 5 L Ed. 249.
58 C J p 61 note 73.

49. Miss.—Johnson v. Martin, 8 So. 847, 68 Miss. 330.
58 C J p 61 note 74.

50. U.S.—Hozey v Buchanan, La., 16 Pet. 215, 10 L Ed 941.
58 C.J. p 61 note 75

51. U.S.—Hozey v Buchanan, supra.
Mass—Bixby v. Franklin Ins. Co., 8 Pick. 86.

52. U.S.—The Jean L., D.C Fla, 286 F. 727.

53. Cal—Higgins v. Eva, 267 P. 1081, 204 Cal 231.
58 C.J p 61 note 79.

54. N.Y—Nicoll v. Mumford, 4 Johns Ch 522, reversed on other grounds 20 Johns 611.
Pa—Knox v. Campbell, 1 Pa. 366, 44 Am.D 139.
58 C.J. p 61 notes 81, 82.

As partners. The several owners of a merchant vessel or steamboat ordinarily do not hold their respective interests therein as copartners,[55] although the relationship between them is analogous to that of a partnership.[56] A vessel or boat, however, like any other chattel, may be held by the part owners in actual partnership.[57] The fact of such partnership relation may arise either out of a special agreement by which the part owners constitute themselves partners,[58] as where it is built under a special agreement, whereby one of the owners is to be master and the other to be ship's husband, and the vessel is to be employed on joint account as a regular packet between certain stations;[59] or it may be implied from the circumstances of the particular case,[60] as from the nature and character of the business or adventure in which the owners are engaged,[61] or from the fact that partnership funds have been invested in the purchase of the vessel.[62] Since such a partnership relation is regarded as being by way of exception to the usual relation of tenancy in common,[63] in order to be effective it must be clearly shown,[64] and has been held to arise only by special contract.[65] The owners do not become partners with one who advances them money, on their personal promise to pay him a share of the proceeds of the voyage in proportion to the sum advanced by him.[66]

Whatever the relation of the owners as to the title to the vessel, they may, if the elements of partnership are present, become partners in the use and employment of her in the business of carrying freight and passengers for hire,[67] which partnership necessarily terminates when the vessel is lost or sold,[68] or in case of a special partnership for a voyage, on the termination of the voyage;[69] and every change in the owners while the vessel is so engaged constitutes a new partnership.[70] Under such circumstances, however, in the absence of an express stipulation to the contrary, the use only, and not the property, of the vessel is brought into the partnership,[71] and the vessel itself does not thereby become partnership property but continues the property of the coöwners, as tenants in common;[72] and in some jurisdictions this rule is declared by statute.[73]

Evidence as to nature and extent of interest. Joint owners of a vessel are presumed to be owners of equal parts;[74] but the presumption is subject to rebuttal, as by evidence of insurance by each in different proportions,[75] or by the production of the books and papers of the vessel;[76] and parol evidence of their contents, unless specially objected to as secondary, must receive the same consideration as the books and papers themselves.[77] The registry of two or more persons as owners does not prevent them from showing that their respective shares are different from those appearing in the registry.[78]

b. Rights and Liabilities

(1) In general

55. Md.—Wathen v. Pearce, 3 A.2d 486, 175 Md 651.
58 C J. p 62 note 85—47 C.J. p 651 notes 62, 63.

56. Md—Wathen v. Pearce, 3 A.2d 486, 175 Md. 651.

57. Pa.—Knox v. Campbell, 1 Pa. 366, 44 Am D 139
58 C.J p 62 note 86—47 C.J p 651 note 61.

58. U.S.—Fleming v. Lay, Ohio, 109 F. 952, 48 C C A. 748—The Swallow, D C N.Y., 23 F Cas No 13,665, Olcott 334
58 C.J. p 62 note 88.

59. Ala.—Jones v. Pitcher, 3 Stew. & P. 135, 24 Am.D. 716.
58 C J. p 62 note 89.

60. U.S—Newman v. Corbman, D C Pa, 47 F.Supp 1021.

Conclusive combination of circumstances

Where there was joint ownership of a vessel in specific shares, the setting aside of a portion of the gross receipts for labor and maintenance, the sharing of net profits and losses, and the operation of a transportation business for the mutual benefit of the owners with service held out incidentally as available to the public, there was clearly a partnership relation even though none of such circumstances by itself alone may have been sufficient to show a partnership. —Newman v Corbman, supra.

61. Fla—Allen v Hawley, 6 Fla. 142, 63 Am.D. 198
Me.—Harding v. Foxcroft, 6 Me. 76.

62. Fla—Allen v Hawley, 6 Fla. 142, 63 Am D 198.
Mo.—Ward v. Bodeman, 1 Mo App 272.

63. Me.—Harding v. Foxcroft, 6 Me 76.
58 C J p 62 note 92.

64. Mich.—Runnels v Moffat, 41 N W. 224, 73 Mich. 188.
58 C J. p 62 note 93.

65. Cal—Fischer v. Carey, 159 P. 577, 173 Cal 185, L R A 1917A 1100

66. Mass—Gallop v. Newman, 7 Pick. 282.

67. N Y.—Carver v. Miller, 201 N Y S 807, 808, 121 Misc 707, affirmed 206 N Y.S 890, 211 App.Div. 807.
58 C J. p 62 note 96.

68. Cal—Ferem v. Olson, 169 P. 386, 176 Cal. 652.

69. Cal—Ferem v. Olson, supra.
58 C J. p 63 note 98.

70. La.—Violett v. Fairchild, 6 La. Ann. 193

71. Cal—Hendy v. March, 17 P. 702, 75 Cal 566.
58 C J p 63 note 1.

72. U.S—The Daniel Kaine, D.C Pa., 35 F. 785
58 C.J. p 63 note 2.

73. Cal—Hendy v. March, 17 P. 702, 75 Cal. 566
58 C J p 63 note 3.

74. Mass.—Glover v. Austin, 6 Pick. 209
58 C J. p 63 note 6.

75. U S.—The Schooner Nantasket, 39 Ct Cl 119—The Ship Betsey, 23 Ct Cl. 277.

76. La—Jouanneau v. Shannon, 4 La.Ann. 330

77. La—Jouanneau v. Shannon, supra.

78. N Y.—Whiton v Spring, 74 N.Y. 169.
58 C J p 63 note 11.
Registry as evidence of title see supra § 15.

(2) Use and control of vessel
(3) Profits and expenses
(4) Loss of, or injury to, vessel or cargo
(5) Repairs and supplies

(1) In General

The rights and liabilities of coowners of a vessel generally are governed by the laws relating to tenancy in common, but where a partnership exists as between such coowners the laws relating to partnership will control.

The powers, rights, duties and liabilities of coowners of ships are in general essentially the same as in the case of other tenants in common in any other chattels,[79] and accordingly are generally determined and controlled by the laws relating to tenancy in common in general.[80] The power of one part owner as tenant in common to bind his coowner depends on the question of authority, which is generally a mere question of fact,[81] of which the fact of coownership is only prima facie evidence,[82] which may be rebutted by proof of the existence of any other fact wholly inconsistent with the existence of such authority.[83] Ordinarily an individual part owner has no power, merely by virtue of his relation as joint owner, to bind his coowners with respect to any matters beyond the necessary and regular use of the vessel.[84] Without their authority or consent he cannot sell the interest of his coowner, as discussed infra § 18, or mortgage it,[85] draw drafts or notes in the name of the vessel and owners,[86] apply the freight earned in payment of his individual debt,[87] or procure insurance for the other owners, as considered in Insurance § 219.

Where the relation between the several owners as to the ownership or operation of the vessel is that of partnership, the laws relating to partnership in general determine and control their rights and liabilities.[88] Each owner, as partner, may deal with the ship like any other chattel of the firm,[89] or he may sell the firm's interest, as discussed infra § 18, or mortgage it;[90] and the partners are bound in solido on all obligations growing out of the business of the partnership.[91]

(2) Use and Control of Vessel

As between coowners the right of control and use of the vessel ordinarily will be accorded to the majority in interest, provided, if required, they give security for the safe return of the vessel. A decree for a sale of the vessel may be obtained where coowners equal in interest cannot agree on her use.

As between part owners, those owning a majority in interest have the right to control the use of the vessel,[92] and, if necessary, may maintain a suit in admiralty to compel the dissenting part owners, if they are in possession of the ship, to yield the property to those who have thus the right to employ it in trade or commerce,[93] but they may recover possession only where it appears that it is their intention so to use it.[94] In the exercise of the right of control the majority owners may change the employment of the vessel from that in which it has been engaged to any other trade or business for which it is suitable.[95] The majority owners, however, must communicate their design as to employing the vessel to the minority,[96] and, as hereinafter discussed, if required, must give security for the safe return of the vessel; but, subject to this right of a minority owner, the majority owners have unlimited control over his interest.[97] If the minority owners do not dissent from the use to which the vessel is put and require security, they will be bound by all acts and contracts of the majority owners in the use of the vessel,[98] and, as discussed infra subdivision b (3)–(5) of this section, by all the liabilities incurred by the vessel in due course of trade.

79. Va.—Briggs v. Barnett, 61 S.E. 797, 108 Va. 404
Effect of limited liability act see infra § 241.
Liability for:
Destruction of vessel while in possession as charterer see infra § 52
Torts see infra § 79.
Rights and liabilities of:
Part owner as ship's husband see infra § 17
Purchaser of part interest see infra § 23.
Right of purchaser of master's share as part owner see infra § 57.

80. Cal.—Higgins v. Eva, 267 P. 1081, 204 Cal. 231.
58 C.J. p. 63 note 14.

81. N.Y.—Stedman v. Feidler, 25 Barb. 605, affirmed 20 N.Y. 437.
58 C.J. p. 63 note 16.

82. N.Y.—Stedman v. Feidler, supra.

83. N.Y.—Stedman v. Feidler, supra.

84. U.S.—Montell v. The William H. Rutan, D.C.N.Y., 17 F.Cas.No.9,724.

85. Ala.—Donald v. Hewitt, 33 Ala. 534, 73 Am.D. 431
58 C.J. p. 63 note 21

86. Ala.—Brooks v. Harris, 12 Ala. 555.
58 C.J. p. 64 note 22.

87. U.S.—Donovan v. Dymond, C.C. La., 7 F.Cas.No.3,993, 3 Woods 141.
58 C.J. p. 64 note 23.

88. N.Y.—Williams v. Lawrence, 47 N.Y. 462
58 C.J. p. 64 note 27.

89. Mass.—Patch v. Wheatland, 8 Allen 102.

90. Mass.—Patch v. Wheatland, supra—Milton v. Mosher, 7 Metc. 248.

91. La.—Burke v. Clarke, 11 La. 206.
58 C.J. p. 64 note 32.

92. U.S.—The Lycoming, D.C.Pa., 22 F.Supp. 958
58 C.J. p. 64 note 33.

93. U.S.—Diedman v. The Joseph Hume, D.C.N.Y., 7 F.Cas.No.3,901.
58 C.J. p. 64 note 35.

94. Conn.—Southworth v. Smith, 27 Conn. 355, 71 Am.D. 72.
58 C.J. p. 64 note 36.

95. Me.—Hall v. Thing, 23 Me. 461
58 C.J. p. 64 note 37

96. U.S.—Willings v. Blight, D.C. Pa., 30 F.Cas.No.17,765, 2 Pet.Adm. 288.

97. N.Y.—Stedman v. Feidler, 25 Barb. 605, affirmed 20 N.Y. 437.
58 C.J. p. 64 note 40.

98. Ga.—Swift v. Tatner, 15 S.E. 842, 89 Ga. 660, 32 Am.S.R. 101.

If the majority owners decline to employ the vessel at all, the minority owners have a right to take possession and employ the ship in the same manner as the majority could have employed it,[99] and in like manner may compel a surrender of the possession of the vessel for such purpose.[1]

Security for safe return. The minority owners, who dissent from a voyage or use of the vessel by the majority owners, are entitled to a bond or security from the latter, stipulating for the safe return of the vessel, or, in case of her loss, to pay to the minority owners the value of their shares,[2] and the right to such bond is conditioned merely on absence of consent to the contemplated use of the ship,[3] and not on existence of a cause for dissatisfaction.[4] The right to such security may be enforced in a court of admiralty.[5] On the giving of such security, the dissenting minority owners will not be entitled to share in the profits or be liable for the expenses of running the ship, as discussed infra subdivision b (3) of this section. The condition or stipulation of the bond must be fairly complied with,[6] and where it is for the safe return of the vessel to a named port it is not satisfied by her return to another port.[7] The condition of the bond usually applies only to the particular voyage named therein,[8] and under the Admiralty Rules there is no right to have the condition cover more than one voyage,[9] although the other owners may, if willing, give bond for other voyages.[10]

The usual practice in this country is to require a bond in double the estimated value of the dissenting minority owners' shares in the vessel.[11]

Sale on disagreement. An order of court decreeing a sale of the vessel and a division of the proceeds between the owners may be obtained on the application of either party where the owners of equal interests in a vessel cannot agree concerning her use and employment,[12] or where, under some laws, an offer to buy or sell has been submitted by the owners asking for the sale, and been refused.[13] In order to warrant such a sale the disagreement must relate not merely to the question of employment, but to the manner in which the vessel shall be employed,[14] and must be such as to prevent employment of the vessel;[15] and the owners asking for a sale must propose different employment for her,[16] or, if they merely object to the voyage proposed, they must give some reasonable ground therefor.[17] It has also been stated that a sale may be ordered where a minority do not wish to employ the vessel, but the majority who do wish to employ it cannot give a sufficient stipulation,[18] or where a majority in value, showing it to be for the general good, ask for a sale.[19] Such a sale will not be ordered at the instance of minority owners who cannot agree with the majority as to the employment of the vessel[20] except in case of an unreasonable refusal of the majority to employ the vessel.[21]

(3) Profits and Expenses

In the absence of dissent, a part owner of a ship shares in the profits and expenses of her use, in proportion to his interest.

Except where one or more of the part owners dissent from the voyage or employment of the vessel, each part owner is entitled to his proportionate share of the net profits or earnings of the vessel[22] Except where the necessary expenses are incurred in

99. U S —Tunno v. The Betsina, D C S.C, 24 F Cas No 14,236.
58 C J. p 65 note 44

1. Conn —Southworth v Smith, 27 Conn 355, 71 Am D 72.
Fla.—Hyer v. Caro, 17 Fla. 332

2. U S —Scull v Raymond, D C.N Y., 18 F. 547, 552.
58 C J. p 65 note 46

3. U S.—The Lycoming, D C Pa, 22 F Supp. 958

4. U.S —The Lycoming, supra.

5. U S —Bragdon v. The Kitty Simpson, D C.N.Y., 3 F.Cas.No.1,798.
58 C.J. p 65 note 47.

6. Me.—Rodick v. Hinckley, 8 Me. 274

7. U S.—The Susan E Voorhis, D C N Y., 23 F.Cas No 13,633, 10 Ben. 380
58 C J. p 65 note 51.

8. Me —Rodick v. Hinckley, 8 Me. 274.
58 C.J. p 65 note 50.

9. U S —The Lycoming, D C.Pa., 22 F Supp 958.

10. U S —The Lycoming, supra.

All future voyages

While the other owners may voluntarily give a bond conditioned as to all future voyages of the ship, there is no requirement that they do so on demand of the dissenting owner —The Lycoming, supra.

11. U S —Fox v Paine, D C Pa, 9 F Cas No 5,014, Crabbe 271—The Marengo, D.C Mass., 16 F Cas No 9,066, 1 Sprague 506.

12. U S —The Ellenora, D C.Wash., 252 F. 209
58 C.J p 65 note 55
Sale of a part owner's interest generally see infra § 18.

13. U S —The Katalla, D C.Wash, 17 F 2d 268, applying law of Scotland
58 C J. p 66 note 56.

14. U.S.—The Annie H. Smith, D.C. N Y, 1 F Cas No 420, 10 Ben. 110—Tunno v The Betsina, D C S.C, 24 F Cas No 14,236

15. U.S —The Annie H Smith, D.C. N Y, 1 F Cas No.420, 10 Ben 110.

16. U S —The Annie H. Smith, supra.

17. U S —The Annie H. Smith, supra.

18. U S —Tunno v The Betsina, D. C S C, 24 F Cas No 14,236.

19. N Y —Crane v Ford, Hopk 114.
58 C.J p 66 note 62.

20. U S —Tunno v The Betsina, D. C S C, 24 F Cas.No 14,236
58 C.J p 66 note 63.

21. U S —The Annie H Smith, D C. N Y, 1 F Cas No 420, 10 Ben. 110

22. Me —Call v. Houdlette, 70 Me. 308
58 C J p 66 notes 69–71.

a state or country where the law creates a solidary obligation therefor,[23] each part owner entitled to share in the profits of the ship is likewise liable for his proportionate share of the expenses incurred in obtaining such profits or earnings.[24] If one part owner has made advances for the adventure or paid claims arising out of it, he is entitled to contribution from his coowners for their shares thereof[25] unless the voyage was an illegal one.[26] On the other hand, he is not entitled to contribution for advances paid for expenses not incurred on behalf of the coowners or which they were not bound to pay,[27] or for money expended without the coowners' knowledge or consent, for repairs in a home port.[28]

Dissenting owners. Part owners who dissent from the voyage or use of the vessel and take security for its safe return, and refuse to bear or be responsible for any part of the expense or losses, are not entitled to share in the profits of the venture[29] or to any compensation for the use of their interest,[30] and are not liable for the expenses thereof,[31] and it has been held in this connection that, although a part owner dislikes the voyage, unless he expressly dissents, it will be regarded as a voyage with his consent.[32] A part owner who dissents from the authority of the managing coowner to bind him for supplies is no longer entitled to share the profits, or liable for the expenses,[33] whether or not the creditors have notice of his dissent.[34]

According to some decisions the taking of a bond as security for the safe return of the vessel is necessary in order to render a part owner's dissent effective for the purposes of the above rules,[35] but other authorities have held that, while it is the best evidence that the dissenting owner has abandoned all control and interest in the voyage and is exempt from any personal liability or charge for the voyage,[36] it is not the only evidence, and proof of actual dissent is sufficient.[37]

(4) Loss of, or Injury to, Vessel or Cargo

A part owner of a ship is not liable to his coowners as for conversion because of his acts of possession and control except where there is a wrongful destruction of the vessel resulting from his fault, nor will he be responsible to third persons for damage to cargo unless he is concerned in the navigation of the ship.

A part owner of a vessel is not liable to his coowners as for a conversion thereof because of his acts of possession and control of the vessel[38] except where, through his fault, there is a wrongful destruction of the vessel or something equivalent thereto, whereby the interests of the coowners are excluded, destroyed, or ignored.[39] A sale of the vessel by a part owner does not constitute a conversion thereof as against his coowners unless they are deprived of all beneficial interest therein.[40] It has been held that a part owner is not liable for injury to, or loss of, the vessel caused by his carelessness or negligence[41] except where he has absolute control and management of the vessel,[42] but that he is liable for damage caused by his wrongfully seizing the vessel and thereby interrupting a voyage for which she is under charter.[43]

As to third persons. If the owners of a vessel are not concerned in its navigation, they are not, on the ground of ownership, liable for the loss of goods shipped on board of it;[44] but if they are entitled to its earnings, and jointly liable for losses, they may be regarded as partners, and liable as such for all liabilities incurred for injuries to, or loss of, cargo, by reason of injury to, or loss of, the vessel.[45]

23. La.—Ferguson v. Flower, 4 Mart.,N S , 312.
58 C J. p 66 note 72.

24. Me—Hall v Thing, 23 Me. 461.
58 C J. p 66 notes 73, 74.
Liability for repairs and supplies see infra subdivision b (5) of this section

25. Me—Hill v. Crocker, 32 A. 878, 87 Me 208, 47 Am S R. 321.
58 C J. p 66 note 75

26. Conn.—Pond v. Smith, 4 Conn. 297.

27. Me.—Reed v. Bachelder, 34 Me 205.
58 C.J. p 67 note 78

28. Me—Benson v. Thompson, 27 Me. 470, 46 Am D. 617.

29. Minn—Swain v. Knapp, 25 N.W. 397, 34 Minn. 232.
58 C.J. p 67 note 83.

30. U.S—The Marengo, D C.Mass , 16 F.Cas No.9,065, 1 Lowell 52.
Minn—Swain v. Knapp, 25 N W. 397, 34 Minn 232.

31. Minn—Swain v. Knapp, supra.
58 C J. p 67 note 85

32. S.C.—Holmes v. Bigelow, 3 S.C. Eq. 497.

33. N.Y.—Stedman v. Feidler, 20 N. Y. 437.

34. N.Y.—Stedman v. Feidler, 25 Barb. 605, affirmed 20 N Y. 437.

35. La—Jouanneau v. Shannon, 4 La.Ann. 330.
58 C J p 67 note 91.

36. U S.—Scull v. Raymond, D C N. Y , 18 F. 547.

37. U S.—Scull v. Raymond, supra.
58 C.J. p 67 note 94.

38. N C.—Lowthorp v. Smith, 2 N.C. 255.
Wis.—Alderson v. Schulze, 24 N.W. 492, 64 Wis. 460.

39. Wis—Alderson v. Schulze, supra.
58 C.J. p 67 note 96.

40. N.Y—Dyckman v. Valiente, 42 N Y. 549
58 C J. p 68 note 99.

41. Fla—Hyer v. Caro, 17 Fla. 332.
58 C J. p 68 note 1.

42. N Y—Williams v. Hays, 38 N E 449, 143 N Y. 442, 26 L.R.A 153, 42 Am.S R 743, overruling Moody v. Buck, 3 N Y.Super. 304.
Powers and duties of managing owner in general see infra § 17.

43. N.Y.—Kellum v. Knechdt, 17 Hun 583, appeal dismissed 78 N Y. 483.

44. Ala.—Jones v. Sims, 6 Port. 138.

45. Va—Hadfield v. Jameson, 2 Munf. 53, 16 Va. 53.
58 C.J. p 68 note 6.

(5) Repairs and Supplies

The mere fact that one shares ownership of a vessel with another affords him no power to bind his coowner for repairs and supplies, but such power may exist where there is an express or implied agency relationship.

A part owner has no general authority, merely from the fact of his relationship as owner, to bind his coowners for necessary repairs and supplies for the vessel,[46] and, conversely, the personal liability of a part owner for such repairs or supplies does not necessarily attach as an incident to his naked legal ownership, but depends on the possession, use, and control of the vessel,[47] and hence a mere nominal owner, who holds title only for the benefit of another, and who takes no part or interest in the vessel's business, is not personally liable for repairs or supplies furnished.[48]

The question, in any case, is one of agency on the part of one part owner to act for the rest.[49] As a general rule, by reason of the common interest which ordinarily exists between persons sustaining such relation to each other,[50] one part owner may, as implied agent, purchase and bind his coowners for necessary supplies and repairs suitable and proper for the vessel,[51] particularly where he is the only owner residing at the port where the vessel is at the time the repairs are made or the supplies are furnished;[52] and coowners are liable for repairs and supplies furnished and charged to the vessel after they become owners, even though the contract therefor was made before they became owners.[53] Such agency, however, is not conclusively presumed,[54] but is subject to be modified, controlled, or negatived by other facts and circumstances;[55] and, unless, by some previous act, he has misled the party furnishing the necessaries into the belief that he was responsible,[56] a coowner will not be liable for such purchase where he has actually parted with his interest, although still a registered owner,[57] or has committed the vessel to the exclusive care and control of the other owners, and thereby disentitled himself to share in her earnings,[58] or has given them notice to incur no further expense on the vessel,[59] or has expressly dissented from the employment of the vessel, and communicated such dissent to the master or ship's husband.[60] The exemption of the owner or part owner in such cases does not depend on notice to the person supplying the necessaries or making the repairs of the facts exempting him from liability;[61] and, if a materialman has had no previous dealing with the dissenting owner, notice of such dissent need not be given to him.[62]

Contribution. Whether a part owner of vessels is obliged in law to contribute to the expense of preserving or repairing them can be dealt with only after such part owner has refused to make a contribution on demand.[63] The law does not authorize a suit for contribution by a coöwner of a vessel against the other part owners where such coöwner has paid a bill due from the vessel.[64] The managing owners are entitled to demand from their coowners a contribution to the necessary expense of future operations,[65] but are not entitled to withhold net profits from past operations which have already been allocated to them.[66]

At home or foreign port. The distinction has been made that a part owner may bind his coöwners for repairs or supplies in a foreign port, without consulting them,[67] but in a home port, where the owners reside, a part owner who has not the general legal authority of a master, as discussed infra §§ 60, 63, or the special authority of a ship's husband or agent, infra § 17, cannot bind his coöwners

46. Mass.—Atkins v. Lewis, 47 N.E. 507, 168 Mass. 534.
58 C.J. p. 68 note 8.

47. U.S.—Scull v. Raymond, D.C.N.Y., 18 F. 547.
58 C.J. p. 68 note 9.

48. U.S.—Borland v. Zittlosen, D.C.N.Y., 27 F. 132.
58 C.J. p. 68 note 10.

49. Me.—Elder v. Larrabee, 45 Me. 590, 71 Am.D. 567.
58 C.J. p. 68 note 11.

50. Me.—Elder v. Larrabee, supra.

51. Me.—Bowen v. Peters, 71 Me. 463.
58 C.J. p. 68 note 15.

52. N.Y.—McCready v. Thorn, 51 N.Y. 454.

53. U.S.—Scottin v. Stanley, Pa., 1 Dall. 129, 1 L.Ed. 67

54. Me.—Elder v. Larrabee, 45 Me. 570, 71 Am.D. 567.

55. Me.—Elder v. Larrabee, supra.
58 C.J. p. 69 note 19

56. U.S.—Scull v. Raymond, D.C.N.Y., 18 F. 547.—Gum v. Frost, D.C.N.Y., 4 F. 745.

57. Mass.—Hussey v. Allen, 6 Mass. 163.
58 C.J. p. 69 note 21.

58. U.S.—Gum v. Frost, D.C.N.Y., 4 F. 745.
N.Y.—Stedman v. Feidler, 25 Barb. 605, affirmed 20 N.Y. 437

59. Mass.—Atkins v. Lewis, 47 N.E. 507, 168 Mass. 534.

60. U.S.—Scull v. Raymond, D.C.N.Y., 18 F. 547
58 C.J. p. 69 note 24

61. U.S.—Gum v. Frost, D.C.N.Y., 4 F. 745.

62. Mass.—Atkins v. Lewis, 47 N.E. 507, 168 Mass. 534.
58 C.J. p. 69 note 26.

63. Md.—Wathen v. Pearce, 3 A.2d 486, 175 Md. 651.

64. Me.—Hardy v. Sprowl, 33 Me. 508

Reason for rule

If one of such coöwners can adopt such a measure, so could the others, and if such suits could be maintained for expenses they could be maintained for profits at the end of each trip, and the result might be a continued series of vexatious litigations, without any tendency to adjust the general accounts between the parties. —Hardy v. Sprowl, supra.

65. Md.—Wathen v. Pearce, 3 A.2d 486, 175 Md. 651.

66. Md.—Wathen v. Pearce, supra.

67. Me.—Bowen v. Peters, 71 Me. 463.
58 C.J. p. 69 note 27.

for repairs and supplies without their consent and orders[68] unless he has undisputed possession of the vessel.[69] If the person making the repairs or furnishing the supplies, in such a case, knows who the other owners are, and, having an opportunity to consult them, neglects to do so, unless he can show that they all assented, he must be presumed to have furnished the supplies or repairs on the credit of the part owner ordering them,[70] and, furthermore, if such a person knows that the part owner ordering the supplies has assumed control against the wishes of his coowners, he will be regarded as acting in collusion with the usurping part owner, and the others will not be liable.[71]

Acceptance of note. The mere fact that the person furnishing the repairs or supplies accepts a note from one of the joint owners has been held not to show that credit is given exclusively to such owner or that his coöwners are released[72] unless it is shown that the note was taken as payment and with the intent to discharge the other owners[73]

The majority in interest may bind all the owners in the purchase of suitable equipment and preparation of the vessel.[74]

c. Remedies

(1) Between coöwners
(2) By or against third persons

(1) Between Coöwners

A part owner of a ship may have a right to an accounting from his coowner enforceable in equity, or, in an otherwise proper case, may sue at law where no partnership is involved. A part owner may enjoin a sale or improper use of the ship.

A person owning an undivided interest in a vessel as a tenant in common has a right to an account of all the earnings and profits of the ship by all the other part owners;[75] and the ordinary remedy of part owners to obtain an adjustment of the ship's account among themselves is a suit in equity.[76] Equity will, however, deny an accounting for alleged partnership profits from the operation of a jointly owned vessel where it appears that the vessel was illegally registered in plaintiff's name to avoid the rule of law precluding registration of a vessel of her type in the name of defendant, who is an alien,[77] although equity may under such circumstances take cognizance of a suit to have plaintiff decreed half owner of the ship[78] The general rule that relief of this character should be obtained in equity proceedings is not absolute or unqualified;[79] it applies only to cases relating to earnings and disbursements, when no settlement has been made or account stated between the coöwners,[80] and in a proper case an action on account stated may be maintained by one coöwner against another.[81]

If no question of partnership is involved, an action is maintainable at law,[82] such as an action by one part owner to recover his share of the earnings of the vessel.[83] If the joint interest between them has been determined, or, in case of a partnership, it has been dissolved, and on a settlement and discharge of accounts and liabilities a balance remains due to one part owner, it may be recovered in an action of assumpsit.[84] Where the exact interest of one of several coöwners in the vessel and the exact amount which he is entitled to recover from his coöwners can be ascertained without an accounting, the appropriate remedy of a part owner against his coöwners, after a sale by them of the ship as their own exclusive property, ignoring his right to it, is by an action at law.[85] An action at law may also be maintained by a part owner for a breach by his coöwner of an agreement for the building of the vessel.[86]

Recovery for repairs and supplies. A part owner who has made expenditures for necessary repairs

68. Md.—Pentz v. Clarke, 41 Md 327.
58 C.J p 69 note 30.
69. Me.—Bowen v. Peters, 71 Me. 463
58 C J. p 69 note 31.
70. Me—Elder v Larrabee, 45 Me 590, 71 Am D. 527
71. N Y.—King v. Lowry, 20 Barb. 532.
72. Ky.—Bentley v. Clark, 3 Dana 564.
58 C J. p 69 note 36.
73. N.Y—King v. Lowry, 20 Barb 532—Snelling v. Howard, 30 N Y. Super. 400, affirmed 51 N.Y. 373.
74. Me.—Hall v Thing, 23 Me. 461.
58 C.J. p 70 note 38.
75. N Y—Misner v Strong, 73 N E. 965, 181 N Y. 163.
76. N Y.—Carver v. Miller, 201 N.Y. S 807, 121 Misc. 707, affirmed 206 N.Y S. 890, 211 App.Div. 807.
58 C J. p 70 note 41—1 C.J. p 616 note 90, p 626 note 98.
77. Mass.—Scola v. Scola, 59 N E 2d 769, 318 Mass. 1.
78. Mass.—Scola v. Scola, supra.
79. Me.—Ripley v. Crooker, 47 Me. 370, 74 Am.D. 491.
N.Y.—Sturges v. Judson, 1 N Y.City Ct. 256.
80. Me—Ripley v. Crooker, 47 Me. 370, 74 Am D. 491.
58 C.J p 70 note 43.
81. Md—Wathen v. Pearce, 3 A.2d 486, 175 Md. 651.
82. N.Y—Sturges v. Judson, 1 N.Y. City Ct. 256.
58 C.J. p 70 note 44.
83. U.S.—Magruder v. Bowie, D C., 16 F.Cas No 8,964, 2 Cranch C C. 577.
58 C J. p 70 note 45.
84. Hawaii.—Wilcox v. Marshall, 2 Hawaii 296.
58 C J. p 70 note 46
85. N.Y.—Dyckman v. Valiente, 42 N.Y. 549.
86. Me.—Ripley v. Crooker, 47 Me. 370, 74 Am D. 491.
58 C.J. p 71 note 48.

and supplies may maintain an action at law against a coowner, to recover the latter's share thereof.[87] Where the repairs were made in a home port, it has been held that a joint owner who assents to or authorizes repairs or improvements to be made is answerable therefor, and that a lien exists against his property for the amount thereof,[88] and that the joint owner in possession may deduct from the profits received the costs of all proper expenditure,[89] but that one joint owner cannot recover a personal judgment against his coowner for the latter's share of such repairs, in the absence of a contract to that effect,[90] and that mere silence on the part of the coöwner in such a case, coupled with knowledge of the fact of the repairs and improvements, does not bind him to a contract on which recovery can be had by way of a personal judgment for money in excess of the profits earned.[91]

Recovery for services. Ordinarily a part owner of a vessel cannot acquire a lien thereon for services rendered while he is such owner,[92] and, if he has a statutory right to proceed against the vessel for such services, he can do so only in the manner prescribed by the statute.[93]

Enjoining use or sale of ship. An owner of an unequal moiety of a vessel will be restrained by injunction from employing the vessel contrary to the wish of the other owner;[94] but where the majority owners have given bond to account for the shares of the minority owners an injunction will not issue to restrain the majority from running the ship[95] One part owner of a vessel may maintain a bill in equity to enjoin the other from selling his share and to subject it to other claims for which complainant is liable.[96]

(2) By or against Third Persons

As a general rule an action by part owners of a vessel must be joint, in the names of all the joint owners, where it is brought on a contract with a third person, which is joint in its nature.

Except where by statute suit may be brought in the name of the vessel,[97] an action by part owners must be joint, in the names of all the part owners, where it is brought on a contract with a third person, which is joint in its nature,[98] as in the case of an action for the recovery of freight.[99] Where, however, the language of the contract is several, and the interests of the parties are several, the action must be several,[1] and accordingly a part owner may sue alone where all the contracts and transactions of a vessel are carried on in his name.[2] He may also sue for his share of a demand due the owners, without joining his coöwner, whose share has already been paid;[3] and it has been held that a part owner may sustain a petitory suit against a merely fraudulent possessor without joining the other part owners.[4]

Action for proceeds of sale. If part owners give a joint authority to an agent to sell the entire ship, they cannot maintain separate actions against him for their respective shares of the money,[5] but may do so if they separately authorize the agent to sell their respective shares of the ship.[6] A part owner may also sue alone for his share of the surplus proceeds of a sale on execution against him and other owners[7]

Effect of death. In the absence of statute, if one of the part owners, who have been joined as plaintiffs, dies, the right of action survives to the surviving part owners,[8] who may afterward be compelled to pay to the personal representatives of deceased the value of his share;[9] and if they have been joined as defendants the executor or personal representative of the one so dying cannot be sued or joined with the survivors.[10]

87. Mich.—Sheehan v. Dalrymple, 19 Mich. 239.
58 C.J. p 71 note 51.

88. Cal.—Higgins v. Eva, 267 P. 1081, 204 Cal. 231.

89. Cal.—Higgins v Eva, supra.

90. Del.—The William Thomas v. Ellis, 4 Del. 309.
58 C J. p 71 note 54.

91. Cal.—Higgins v. Eva, 267 P. 1081, 204 Cal. 231.

92. Mo.—The Raritan v. McCloy, 10 Mo. 534.

93. Mo.—The Raritan v. McCloy, supra.
58 C.J. p 71 note 57.

94. Pa.—Paynter v. Paynter, 7 Phila. 336.

95. N.Y.—Dunham v. Jarvis, 8 Barb 88, 2 Edm Sel Cas. 145
58 C J. p 71 note 61.

96. Ky.—Thoms v Southard, 2 Dana 475, 26 Am D. 467.

97. Mo.—The Beardstown v. Goodrich, 16 Mo 153
58 C.J. p 72 note 70.

98. Me.—White v. Curtis, 35 Me. 534.
58 C J p 72 note 71.

99. Me.—Robinson v. Cushing, 11 Me. 480.
58 C.J. p 72 note 72.

1. Me.—Gray v. Buck, 7 A. 16, 78 Me 477.
58 C J. p 72 note 73.

2. Ark.—Phillips v. Pennywit, 1 Ark 59
58 C.J. p 72 note 74.

3. N.H.—Gilman v. Leavitt, Smith 304.
N.Y.—Bishop v Edmiston, 16 Abb. Pr. 466.

4. U.S.—The Friendship, C.C.Me., 9 F.Cas No 5,123, 2 Curt. 426.

5. Md.—Milburn v. Guyther, 8 Gill 92, 50 Am D. 681.
58 C J. p 72 note 77.

6. Md.—Milburn v. Guyther, supra.

7. Pa.—Hopkins v. Forsyth, 14 Pa. 34, 53 Am.D 513.

8. N.Y.—Wright v. Marshall, 3 Daly 331—Bucknam v. Brett, 13 Abb.Pr. 119.

9. N.Y.—Wright v. Marshall, 3 Daly 331.

10. N.Y.—Wright v. Marshall, supra
58 C.J p 72 note 82.

§ 17. Managing Owner or Ship's Husband

a. In general
b Powers, duties, and liabilities
c. Remuneration and reimbursement

a. In General

A "ship's husband" is ordinarily defined as the general agent of the owner for all affairs of the ship in her home port, and a managing owner or ship's husband acts for all purposes within his powers as agent of the owners.

"Ship's husband" is an expressive maritime phrase,[11] to designate a class of agents, whose chief employment it is, among other things, to purchase the ship's stores for her voyage, and to make disbursements for the ship's use, and to make out an account of these transactions for their employers, the owners of the ship.[12] The "ship's husband" has been variously defined as an agent of the owner of the ship;[13] the general agent of the owner with respect to all the affairs of the ship in the home port;[14] the person who in the home port, where the vessel belongs, does what the owner would otherwise do;[15] a steward on land to the owner of the ship, as the officer bearing that name is on board when the ship is at sea;[16] and sometimes merely an agent for conducting the necessary measures on the return of the ship to port.[17]

A managing owner or ship's husband for all purposes within the scope of his powers acts as the agent of the owners of the vessel or of those of them who join in the adventure.[18] He may be appointed either by a written instrument or orally,[19] or his appointment may be inferred from his exercising the duties of his office with the knowledge and consent of the owners.[20] A ship's husband has been held not to be the owner of the ship pro hac vice,[21] although, where a corporation managing a ship under a general agency contract with the War Shipping Administration of the federal government remains the employer sufficiently to be liable to members of the crew under the Jones Act, it has been said that such managing corporation cannot escape the duties of an owner pro hac vice in other respects.[22]

Liability of shipping agent. Where a shipping agent acts as such and not as principal in booking a cargo, and the shipper is chargeable with knowledge of the facts, the agent is not liable to the shipper for the failure of the ship to transport the cargo.[23]

b. Powers, Duties, and Liabilities

(1) In general
(2) Borrowing money
(3) Repairs and supplies

(1) In General

As a general rule it is the duty of a ship's husband to conduct all the affairs and incidental arrangements for the due employment of the ship in commerce and navigation, and to do whatever is necessary to enable the ship to prosecute her voyage and earn freight.

The powers and duties of a ship's husband or managing owner are determined mainly by usage,[24] and, in the absence of a special agreement, are, in general, to provide for the complete seaworthiness of the ship;[25] to see that she has on board all nec-

11. N.Y.—Gillespie v. Winberg, 4 Daly 318, 322.

12. N.Y.—Muldon v. Whitlock, 1 Cow 290, 307, 13 Am.D. 533.

13. N.Y.—Chase v. McLean, 29 N.E. 986, 130 N.Y. 529, 534.
57 C.J. p 1153 note 93

14. U.S.—Aird v. Weyerhaeuser S. S. Co., C.A.Pa., 169 F.2d 606, 608
Mich.—Mitchell v. Chambers, 5 N.W. 57, 43 Mich 150, 38 Am.R. 167.

15. N.Y.—Gillespie v. Winberg, 4 Daly 318
57 C.J. p 1153 note 96.

16. N.Y.—Gillespie v. Winberg, supra
57 C.J. p 1153 note 98.

17. Mich.—Mitchell v. Chambers, 5 N.W. 57, 43 Mich 150, 38 Am.R. 167.
57 C.J. p 1153 note 99.

18. Me.—Hall v. Thing, 23 Me. 461.
58 C.J. p 72 notes 86, 87.

19. N.Y.—McCready v. Thorn, 51 N.Y. 454.

20. N.Y.—McCready v. Thorn, supra.

21. U.S.—Caldarola v. Eckert, N.Y., 67 S.Ct. 1569, 332 U.S. 155, 91 L.Ed. 1968, rehearing denied 68 S.Ct. 30, 332 U.S. 784, 92 L.Ed 367—Palardy v. American-Hawaiian S. S. Co., C.A.Pa., 169 F.2d 619, certiorari denied 69 S.Ct. 1521, 337 U.S. 959, 93 L.Ed 1758—Aird v. Weyerhaeuser S. S. Co., C.A.Pa., 169 F.2d 606, certiorari denied 69 S.Ct. 1521, 337 U.S. 959, 93 L.Ed 1758
N.J.—Lynch v. United Fruit Co., 71 A.2d 344, 4 N.J. 24.

Under general agency service agreement, steamship company's authority as United States' agent to conduct business of vessels assigned to company did not include control of navigation and management of vessel, but company's responsibility was limited to that of "ship's husband" so that it was not the owner pro hac vice.—Aird v. Weyerhaeuser S. S. Co., C.A.Pa., 169 F.2d 606, certiorari denied 69 S.Ct. 1521, 337 U.S. 959, 93 L.Ed. 1758.

22. U.S.—Militano v. U. S., C.C.A.N.Y., 156 F.2d 599, certiorari dismissed State Marine Corp. v. Militano, 67 S.Ct. 193, 329 U.S. 682, 91 L.Ed 600.

23. N.Y.—L. N. Jackson & Co. v. Seas Shipping Co., 56 N.Y.S.2d 501, 185 Misc 94, affirmed 61 N.Y.S.2d 371, 270 App.Div. 830, affirmed 68 N.E.2d 605, 296 N.Y. 529, motion denied 69 N.E.2d 483, 296 N.Y. 635

Sufficiency of evidence
In shipper's action against shipping agent for failure to ship a cargo, evidence warranted finding that agent acted as an agent and not as a principal.—L. N. Jackson & Co. v. Seas Shipping Co., supra.

24. N.Y.—Chase v. McLean, 29 N.E. 986, 130 N.Y. 529.
58 C.J. p 73 note 91.
Liability of general agent:
For injuries to stevedores see infra § 85.
For personal injuries to passengers see infra § 192.

25. N.Y.—Chase v. McLean, supra.
58 C.J. p 73 note 92.

essary and proper papers;[26] to procure and enter into charter parties and contracts for freight;[27] to appoint the officers and mariners;[28] to make a general average loss adjustment or cause it to be made;[29] and generally to conduct all the affairs and incidental arrangements for the due employment of the ship in commerce and navigation,[30] and do whatever is necessary to enable the ship to prosecute her voyage and earn freight.[31] Within the scope of his powers, the managing owner or ship's husband acts at the expense and risk of all coöwners who do not dissent,[32] and, accordingly, to such extent he may bind the owners, or such of them as join in the adventure, by his contracts.[33] Where the ship's husband is not a part owner of the ship, all the owners are responsible in solido for his just expenditures and charges,[34] but, where he is part owner, each is liable only for his share thereof.[35]

Limitations of powers. It has been said that the statement that a managing owner or ship's husband may do whatever is necessary to enable the ship to prosecute her voyage cannot be taken literally, but must be restricted by the state of facts in the particular case,[36] and that he is not warranted in assuming extraordinary powers without obtaining authority from the owners if they are readily available for communication.[37] He cannot without special authority purchase a cargo for the owners,[38] or give up a lien for freight,[39] or bind the owners for the expenses of a criminal prosecution,[40] or sell and transfer claims due to the vessel and owners.[41] When forbidden to do so, a managing owner cannot bind his coöwners for expenses,[42] and such expenses may be charged to his own share.[43]

Termination of powers. The implied authority of a managing owner or ship's husband to do whatever is necessary for the employment of the vessel ceases when it is revoked,[44] such as by the death of his coöwner,[45] or when anything is done which has the effect of rebutting the presumption which ordinarily arises as to such implied authority.[46] A managing owner's authority to bind minority owners for subsequent costs, disbursements, and expenses, is also terminated by a libel of the vessel.[47]

Bail of vessel. A managing owner or ship's husband may bind the coöwners for bail procured to release the vessel from arrest, unless it has been seized in a case in which there is no personal responsibility on the owners, and they have not authorized or sanctioned the bail, and there is no such emergency as would call for the assumption of personal responsibility.[48]

Duty to account. It is the duty of a managing owner or ship's husband to account to the coöwners or owners, within a reasonable time, for all moneys and profits received by him in the execution of his agency for them,[49] and he is not entitled to hold any profits which he incidentally obtains in the execution of his duty,[50] even though it is sanctioned by usage.[51] In rendering his account, he is entitled to credit for any due and proper application of earnings received by him,[52] including the payment of a valid and subsisting indebtedness, no matter when contracted.[53]

Duty to indemnify. A managing agent is not liable to indemnify the shipowner against the consequences of careless navigation of the ship by a

26. U.S.—The Ole Oleson, C.C.Wis. 20 F. 384.
58 C.J. p 73 note 93.

27. N.Y.—Chase v. McLean, 29 N.E. 986, 130 N.Y. 529.
58 C.J. p 73 note 94.

28. N.Y.—Chase v. McLean, supra—McCready v. Thorn, 51 N.Y. 454

29. Cal.—Ferem v. Olson, 169 P. 386, 176 Cal. 652.

30. N.Y.—McCready v. Thorn, 51 N.Y. 454.
58 C.J. p 73 note 98.

31. Me.—Hall v. Thing, 23 Me. 461
58 C.J. p 73 note 99

32. Me.—Hall v. Thing, supra.

33. N.Y.—Chase v. McLean, 29 N.E. 986, 130 N.Y. 529.
58 C.J. p 73 note 2.

34. Va.—Briggs v. Barnett, 61 S.E. 797, 108 Va. 404.
Liabilities of vessels and owners in general see infra §§ 72–80.

35. Va.—Briggs v. Barnett, supra.

36. Mich.—Mitchell v. Chambers, 5 N.W. 57, 43 Mich. 151, 38 Am.R. 167.

37. Mich.—Mitchell v. Chambers, supra

38. U.S.—The Ole Oleson, C.C.Wis., 20 F. 384
Me.—Hewett v. Buck, 17 Me. 147, 35 Am.D. 243.

39. U.S.—The Ole Oleson, C.C.Wis., 20 F. 384

40. Pa.—Croasdale v. Von Boyneburgk, 27 Pa.Co. 373.
58 C.J. p 73 note 12.

41. U.S.—Ely v. U. S., 19 Ct.Cl. 658

42. U.S.—Revens v. Lewis, C.C.N.Y., 20 F.Cas.No. 11,711, 2 Paine 202.

43. U.S.—Revens v. Lewis, supra.

44. U.S.—Revens v. Lewis, supra.
Mass.—Atkins v. Lewis, 47 N.E. 507, 168 Mass. 534.

45. N.Y.—Stedman v. Feidler, 20 N.Y. 437.
58 C.J. p 74 note 20.

46. U.S.—Scull v. Raymond, D.C.N.Y., 18 F. 547—Revens v. Lewis, C.C.N.Y., 20 F.Cas.No. 11,711, 2 Paine 202.

47. Cal.—Ferem v. Olson, 169 P. 386, 176 Cal. 652.

48. Mich.—Mitchell v. Chambers, 5 N.W. 573, 43 Mich. 151, 38 Am.R. 167.
58 C.J. p 74 notes 36, 37.

49. N.Y.—Carver v. Miller, 201 N.Y.S. 807, 121 Misc. 707, affirmed 206 N.Y.S. 890, 211 App.Div. 807.
58 C.J. p 75 notes 56, 57.

50. Hawaii.—Wilcox v. Marshall, 2 Hawaii 296.

51. Hawaii.—Wilcox v. Marshall, supra.

52. Pa.—Croasdale v. Von Boyneburgk, 27 Pa.Co. 373.

53. Pa.—Croasdale v. Von Boyneburgk, supra.

compulsory pilot,[54] unless he has assumed such liability by agreement.[55]

Insurance. The power of a part owner or a ship's husband to effect insurance on the interests of others in the ship or cargo is discussed in Insurance § 219.

(2) Borrowing Money

In the absence of official authority, a managing owner or ship's husband ordinarily lacks power to bind the coöwners for money borrowed on the vessel's account.

A managing owner or ship's husband, without official authority therefor, ordinarily has no power to bind the coowners for money borrowed on the vessel's account,[56] especially where it is not connected with the present necessities of the vessel or its preparation for a voyage;[57] nor can the owners be held to have impliedly ratified such borrowing from the mere fact that they received the benefits therefrom in repairs made on the vessl.[58] It has been held, however, that, where the circumstances are such as to justify his purchasing on the credit of the owners, he will be justified, even in a home port, in borrowing money to pay for the required articles,[59] but in order to charge the owners, in such a case, it must appear that the money not only was borrowed for a proper purpose, connected with the ship or her navigation, but that it was so applied.[60]

(3) Repairs and Supplies

A managing owner or ship's husband ordinarily has power to bind the owners or coowners for repairs and supplies.

As a general rule, a managing owner or ship's husband has implied authority to bind the owners or coowners for necessary repairs[61] and equipment and supplies.[62] Where the repairs are made or the supplies furnished exclusively on the credit of the ship's husband who ordered them, no one part owner may be held liable therefor, where he has neither authorized nor ratified the purchases, but has dissented from them.[63]

In the home port, where all the owners reside, the managing owner, although registered as such at the customhouse, has been held to have no power, merely by virtue of that relation, to order repairs and supplies, and bind coowners to a personal liability therefor;[64] nor do they become liable merely because the creditor, on his books, charges the supplies against the vessel and owners.[65] On the other hand, it has been held that a ship's husband has power to contract even in a home port for repairs which are absolutely necessary.[66]

c. Remuneration and Reimbursement

A managing owner or ship's husband is ordinarily entitled to remuneration for services and to reimbursement for expenditures performed and incurred for the general benefit of the ship and her owners.

Where the remuneration of a managing owner or ship's husband for services performed by him for the general benefit of the vessel and owners is fixed by agreement among the part owners, he is entitled to the amount agreed on.[67] In the absence of such agreement, he is entitled to reasonable compensation for his proper services.[68] He is also entitled to reimbursement for proper expenditures within the scope of his agency, but not for expenditures or advances, made without the owners' consent, in respect of matters which were not within the scope of his authority.[69] A ship's agent engaged to attend to the discharge and booking of cargo has been held an independent contractor with respect to reimbursement for expenses of litigation in successfully defending a suit brought against him for alleged negligence.[70]

Liability of nonconsenting owner for salary. One part owner cannot be required to contribute to the payment of a salary to the managing owner or ship's husband, which has been agreed on without his knowledge or consent.[71]

54. U S—The West Nohno, D.C N Y., 29 F 2d 950.

55. U S—The West Nohno, supra.

56. U.S—The Ole Oleson, C.C.Wis., 20 F. 384.
Me—Arey v Hall, 16 A. 302, 81 Me 17, 10 Am.S R. 232.

57. N Y—Chase v. McLean, 29 N.E 986, 130 N Y 529.
58 C.J. p 74 note 25

58. Me—Arey v Hall, 16 A 302, 81 Me 17, 10 Am.S.R. 232.

59. N.Y.—McCready v. Thorn, 51 N. Y. 454.

60. N.Y—McCready v. Thorn, supra.

61. Me.—Hill v. Crocker, 32 A. 878, 87 Me. 208, 47 Am S R. 321
58 C J p 75 note 39.

62. N.Y.—McCready v. Thorn, 51 N. Y. 454.
58 C J. p 75 note 40.

63. U.S.—Scull v. Raymond, D.C.N. Y., 18 F. 547
58 C.J p 75 note 43.

64. U S—Woodall v. Dempsey, D C. Pa., 100 F. 653.
58 C.J. p 75 note 45.

65. U.S.—Spedden v Koenig, Md., 78 F. 504, 24 C.C A. 189.

66. N Y.—Chase v. McLean, 29 N.E. 986, 130 N Y. 529—Provost v. Patchin, 9 N.Y. 235

67. Hawaii—Wilcox v. Marshall, 2 Hawaii 296
58 C.J p 76 notes 65, 66.

68. U.S—Besse v. Hecht, D.C.N.Y., 85 F. 677
58 C J. p 76 notes 68, 69.

69. Pa—Croasdale v. Von Boyneburgk, 27 Pa Co. 373.
58 C J. p 76 note 76

70. U S—Cory Bros. & Co. v. U. S., C.C.A.N.Y., 51 F.2d 1010.
Vessels, cargo, and persons liable for collision see Collision § 161.

71. Pa.—Croasdale v. Von Boyneburgk, 27 Pa.Co. 373.

§ 18. Sales

a. In general
b Evidence of sale
c Modification or rescission
d. Conditional sales

a. In General

Where part owners are not partners, none may sell the interest of a coowner without the latter's consent; but, where a partnership exists, it has been held that one partner may sell the whole ship. A part owner may sell his own interest in the vessel.

Where the part owners of a vessel are not partners in such ownership, any one of them may sell his own interest at his pleasure;[72] but he cannot sell the interest of a coöwner without the latter's consent,[73] even though he is the ship's husband.[74] On the other hand, where the part owners hold the ship as partners, each partner generally has authority to sell the whole ship;[75] but as to this, there is also authority to the contrary.[76]

In the absence of a statute providing otherwise, a foreigner may become a purchaser of a vessel or of a share therein,[77] but, as discussed supra § 3, the vessel may thereby lose its national character under the registry laws, or, in case of a licensed vessel, become liable to forfeiture, under enrollment and license laws, as considered supra § 11.

What law governs. In accordance with general rules with respect to sales, the validity of a contract of sale of a vessel is governed by the laws of the state where it is made and performed,[78] and this rule applies to the sale or transfer of a vessel which at the time is at sea.[79]

b. Evidence of Sale

The bill of sale and enrollment of a ship may afford prima facie evidence of her sale; a contract of sale may be proved by parol.

The rules of evidence as to sales in general, as discussed in Sales § 55, apply with respect to evidence as to the sale and delivery of a vessel.[80] The bill of sale and enrollment are prima facie evidence of a bona fide sale;[81] but it is not required that the contract should be proved to have been made in express terms, and it may be inferred from conversations and acts of the parties like other contracts,[82] and may be proved by parol.[83]

c. Modification or Rescission

A contract for the sale of a vessel may be rescinded for fraud or other sufficient cause in compliance with the general rules governing rescission of sales.

A contract of sale of a vessel may be rescinded by either party for fraud or misrepresentation of the other as an inducement to the sale;[84] and the fact that the seller resells the vessel, without notice to the buyer, who has paid part of the purchase price, and without compensating him, amounts to a rescission and abandonment of the contract.[85] Such a contract may also be canceled on the ground of impossibility of performance,[86] but not on the ground of mere hardship,[87] such as a mere provisional restraint by the government.[88] A buyer cannot rescind because of the vessel's failure to conform to a warranty given by an agent without the seller's authority.[89] A contract for the sale of a vessel, then under construction, is not changed in its nature as a sale by a supplementary contract which expressly recognizes the buyer's equity in the vessel and his obligation to take and pay for it with notes and mortgages in reimbursement of advances made by the seller;[90] nor is it abandoned or rescinded by the seller's seizure of the vessel and materials, in accordance with the terms of the contract, on the buyer's default.[91]

72. Pa.—Croasdale v. Von Boyneburgk, 46 A. 6, 195 Pa. 377.
58 C.J. p 76 note 84.
Sale of ship on disagreement among coöwners with respect to her use see supra § 16.

73. La.—Byrne v. Hooper, 2 Rob. 229.
58 C.J. p 76 note 86.

74. N.Y.—Whiton v. Spring, 74 N.Y. 169.

75. Mass.—Lamb v. Durant, 12 Mass. 54, 7 Am.D. 31.
58 C.J. p 76 note 89.

76. Ky.—Hewitt v. Sturdevant, 4 B. Mon. 453
58 C.J. p 77 note 90.

77. U.S.—Philips v. Ledley, Pa., 19 F.Cas.No.11,096, 1 Wash.C.C. 226.
58 C.J. p 77 note 93.

78. U.S.—Bulkley v. Honold, La., 19 How. 390, 15 L.Ed. 663
58 C.J. p 78 note 13.

79. La.—Thuret v. Jenkins, 7 Mart. 318, 12 Am.D. 508
58 C.J. p 78 note 14.

80. Me.—Badger v. Cumberland Bank, 26 Me. 428
58 C.J. p 78 note 19.

81. U.S.—Seaman v. Enterprise Fire, etc., Ins. Co., C.C.Mo., 21 F. 778

82. Me.—Badger v. Cumberland Bank, 26 Me. 428

83. Me.—Chadbourne v. Duncan, 36 Me. 89.

84. U.S.—Donnell v. C. R. Disharoon Co., C.C.A.Md., 32 F.2d 151
58 C.J. p 81 note 64
Modification or rescission of sales generally see Sales §§ 83–118.

85. Cal.—Anderson v. Van Camp Sea Food Co., 277 P. 1099, 98 Cal. App. 787.

86. N.Y.—American Union Line v. Oriental Nav. Corp., 192 N.Y.S. 154, 199 App.Div. 513.

87. N.Y.—American Union Line v. Oriental Nav. Corp., supra.

88. N.Y.—American Union Line v. Oriental Nav. Corp., supra.
58 C.J. p 81 note 68.

89. N.Y.—Harriss v. Tams, 244 N.Y.S. 36, 137 Misc. 879.

90. U.S.—Virginia Shipbuilding Corp. v. U.S., C.C.A.Va., 22 F.2d 38, certiorari denied 48 S.Ct. 305, 276 U.S. 625, 72 L.Ed. 738

91. U.S.—Virginia Shipbuilding Corp. v. U.S., supra.

d. Conditional Sales

Ships are goods and chattels subject to conditional sales.

Vessels are goods and chattels subject to conditional sales as such,[92] and within the general rules of law and statutory provisions relating to such sales.[93] A conditional sale of a vessel, therefore, is within the scope of a statutory provision requiring the seller, on retaking possession, to retain the property for a limited period, during which time the buyer may comply with the terms of the contract and receive the property,[94] and rendering the seller liable, if he does not make a sale of the vessel, to repay to the buyer the amount he has paid,[95] and the seller, in such a case, cannot retain any of the amount paid, as rental for the use of the vessel,[96] but he may recover or set off amounts paid at the buyer's request and as his agent for insurance, repairs, and other expenses which, under the contract, should have been paid by the buyer.[97] Such a statutory provision is not invalid by reason of the fact that it is interpreted as requiring a vessel retaken by the conditional seller to be withdrawn from service for such period,[98] nor, as so interpreted, does it conflict with the Enrollment Act,[99] nor does it conflict with a recording act which expressly declares that it does not affect the title to a vessel as between the parties.[1]

As to application of insurance. Where title to vessels sold under a conditional bill of sale does not pass, the seller, on damage to the vessels, is entitled to have the proceeds of an insurance policy, payable to him as his interest might appear, paid to repairmen, and applied in payment of a claim against such vessels, rather than to payment of other indebtedness of the buyer to repairmen, who knew that the payment represented proceeds of policies and belonged to the seller.[2]

§ 19. —— Requisites and Validity in General

The general rules governing the sale of personal property ordinarily govern in respect of the requisites and validity of a sale of a vessel.

The general rules governing a sale and transfer of personal property or chattels are ordinarily applicable to the sale of a vessel in respect of the requisites and validity of the sale,[3] and as to whether the sale is executed or merely executory.[4] In accordance with such rules, except where the sale is required to be made by bill of sale or other writing, as discussed infra § 20, it may be made orally,[5] or it may be implied from the acts, words, or conduct of the parties which show a mutual intention to effect a sale;[6] and the fact that the contracting parties subsequently agree to have the oral contract reduced to writing does not impair it.[7] The sale is

92. U.S.—Winsor v. McLellan, C.C. Mass., 30 F.Cas.No. 17,887, 2 Story 492.
58 C.J. p. 90 note 46.

Held to be conditional sale contract
Contract between engineering company and contractor entered into contemporaneously with contract between contractor and boat builder whereby boat builder was to build dredge boat taking as part payment a boat owned by engineering company with contractor paying remainder of purchase price and taking title to boat and engineering company giving contractor note to secure purchase price was a valid conditional sale contract, character of which was not changed by giving of new notes in lieu of those described in contract by company organized in place of engineering company.—In re Penglase Sand & Gravel Co., C.C.A. Ill., 76 F.2d 593.

93. N.Y.—Rivara v. Stewart, 195 N.Y.S. 841, 119 Misc. 73, affirmed 197 N.Y.S. 943, 204 App.Div. 890, affirmed 142 N.E. 300, 236 N.Y. 601.
58 C.J. p. 90 notes 47, 48
Conditional sales generally see Sales §§ 553–650.

Lack of title
Conditional sale contract reserving title to fishing boat owned by buyers of engine, to which seller never had title, was ineffective.—The Henry S., D.C.Va., 4 F.Supp. 953.

94. N.Y.—Rivara v. Stewart, 149 N.E. 851, 241 N.Y. 259, affirmed Stewart v. Rivara, 47 S.Ct. 718, 274 U.S. 614, 71 L.Ed. 1234.

95. N.Y.—Rivara v. Stewart, 149 N.E. 851, 241 N.Y. 259, affirmed Stewart v. Rivara, 47 S.Ct. 718, 274 U.S. 614, 71 L.Ed. 1234.—Rivara v. Stewart, 195 N.Y.S. 841, 119 Misc. 73, affirmed 197 N.Y.S. 943, 204 App. Div. 890, affirmed 142 N.E. 300, 236 N.Y. 601.

96. N.Y.—Rivara v. Stewart, 195 N.Y.S. 841, 119 Misc. 73, affirmed 197 N.Y.S. 943, 204 App.Div. 890, affirmed 142 N.E. 300, 236 N.Y. 601.

97. N.Y.—Rivara v. Stewart, 195 N.Y.S. 841, 119 Misc. 73, affirmed 197 N.Y.S. 943, 204 App.Div. 890, affirmed 142 N.E. 300, 236 N.Y. 601.
58 C.J. p. 90 note 52.

98. U.S.—Stewart v. Rivara, N.Y., 47 S.Ct. 718, 274 U.S. 614, 71 L.Ed. 1234.
58 C.J. p. 90 note 53.

99. U.S.—Stewart v. Rivara, supra.

1. U.S.—Stewart v. Rivara, supra.

2. U.S.—The Eddie, D.C.N.Y., 8 F.2d 63, affirmed, C.C.A., 8 F.2d 65

3. U.S.—Peterson v. U.S., Pa., 19 F.Cas.No. 11,036, 2 Wash.C.C. 36.
58 C.J. p. 77 note 97
Requisites and validity of contract of sale in general see Sales §§ 5–69.

One lacking title to a ship may not make a valid sale thereof.—Munson Line v. Vervliet, D.C.N.Y., 39 F.Supp. 945.

Subject to sale as personalty
Seagoing vessels are personal property and subject to sale as are other articles of commerce subject to federal laws concerning registry, sale, and the like.—Alaska S.S. Co. v. State, 196 P.2d 1001, 31 Wash.2d 328.

4. U.S.—Robinson v. Alger, N.Y., 167 F. 968, 93 C.C.A. 368.
58 C.J. p. 77 note 98
Executed or executory sale in general see Sales § 1 c.

5. N.Y.—Misner v. Strong, 73 N.E. 965, 181 N.Y. 163.
Pa.—In re Derbyshire, 81 Pa. 18.
58 C.J. p. 77 note 2.

6. Me.—Badger v. Cumberland Bank, 26 Me. 428.
58 C.J. p. 77 note 3.

7. La.—Walle v. Douglas, 66 So. 542, 136 La. 70.

not an absolute one as long as any condition remains to be performed before title passes.[8]

Possession. A good title cannot be transferred by one who has neither actual nor constructive possession of a vessel or the right of possession.[9]

Options. An agreement between the owner of a vessel and a prospective buyer to sell to the latter, "subject to final inspection," is an option to the buyer to buy if satisfied on inspection, and is not binding on him.[10] Where, after operating a vessel under a charter containing an option to purchase, a sale contract is prepared and signed by the owner, and the charterer, while not signing it because of objection to its provisions, which are afterward modified, pays the initial installment of the purchase price and continues to operate the vessel, such operation is under the sale contract, which supersedes the charter agreement.[11]

§ 20. —— Bill of Sale or Other Writing

a. In general
b. Requisites and validity
c. Construction and operation

a. In General

While a bill of sale has been said to be essential to passage of title to a ship under the general maritime law, it is ordinarily held that in the United States title may pass as between buyer and seller without bill of sale or other writing.

While a bill of sale is the usual evidence of title under admiralty practice,[12] and has been said to be essential under the general maritime law,[13] in the United States it is generally held that as between the buyer and seller the sale of a ship is complete and title passes on the making of the contract of sale accompanied by a delivery of the possession of the vessel,[14] or by payment and acceptance of the price.[15] In this connection it has been said that in the United States documentation is merely for the purpose of fixing the nationality of a vessel and that bills of sale and registration are designed to give notice to purchasers and mortgagees of the record of title,[16] and that a bill of sale or other instrument of writing is not necessary for passage of title as between the parties,[17] unless required by the provisions of a contract[18] or statute.[19] Such a transfer ordinarily is subject to the rights of creditors;[20] but even as against creditors the seller of an interest in a vessel is not bound to deliver a bill of sale thereof, where the sale has been made with the assent of the purchaser and all the other owners, by creditors having liens thereon, and the proceeds applied in payment of their debts.[21]

b. Requisites and Validity

An instrument tendered as a bill of sale of a ship should comply with the requirements essential to constitute it a bill of sale, and ordinarily should express the matter included in the transfer of title; but such a document is not invalidated by failure to recite the certificate of registry or enrollment of the vessel.

Where a written instrument is required or given, it should comply with the requirements essential to constitute it a bill of sale,[22] and ordinarily should express the matter to be included in the transfer of title,[23] but general terms, such as appurtenances and necessaries, which have a fixed and technical meaning, may be employed.[24]

Recitals. A transfer of a vessel is not rendered invalid by the fact that the bill of sale does not recite the certificate of her registry or enrollment prescribed by the registry act,[25] or that it makes an inaccurate recital thereof,[26] as the only penalty of a nonrecital or inaccurate recital of the register, and a corresponding change of papers, is that the vessel ceases to enjoy the privileges obtained by registration.[27] Blanks for such recitals in a bill of sale

8. N.Y.—Harriss v. Tams, 244 N Y S. 36, 137 Misc 879.
58 C.J. p 77 note 5.

9. U S.—Burckle v The Tapperheten, D.C.N.Y , 4 F Cas No 2,141.
58 C J. p 78 note 7.

10. Me —Damers v Trident Fisheries Co., 111 A. 418, 119 Me. 343.

11. U S.—U. S. v Robins Dry Dock, etc, Co , C.C A.Mass., 13 F.2d 808

12. Mass.—Taggard v. Loring, 16 Mass. 336, 8 Am.D 140

13. U.S —Weston v. Penniman, C C Mass., 29 F.Cas No.17,455, 1 Mason, 306
Hawaii —McFarlane v. Gilmore, 1 Hawaii 71.
58 C.J. p 79 note 35

14. U.S.—The Augustine, D.C.N.Y , 8 F 2d 287—The Amable, D.C.N.Y., 32 F Supp 451
58 C J. p 78 note 28.

15. Me.—Metcalf v. Taylor, 36 Me 28
58 C J. p 78 note 29.

16. U.S —The Augustine, D.C.N.Y., 8 F 2d 287.

17. Cal.—Lund v. Ganahl, 133 P. 501, 22 Cal App. 103
58 C J p 79 note 30.

18. Cal —Fowler v. Fisk, 12 Cal 112
58 C J. p 79 note 31.

19. Or —Yarnberg v. Watson, 4 P. 296, 13 Or 11.
58 C J. p 79 note 32

20. S C.—Gonzales v. Terry, 86 S E 207, 102 S C 86.

21. Mass —Wilson v. Almy, 105 Mass 436.

22. U S —The Amable, D C.N Y., 32 F Supp 451

23. Me.—Richardson v. Clark, 15 Me. 421

24. Me —Richardson v. Clark, supra.

25. U S.—De Wolf v. Harris, C.C. Mass , 8 F Cas No.4,221, 4 Mason 515, affirmed 4 Pet. 147, 7 L Ed 811.
Me —Mitchell v. Taylor, 32 Me. 434
English and Canadian rule see 58 C.J p 79 note 47 [a], [b]

26. U S.—Philips v. Ledley, C C Pa., 19 F Cas.No 11,096, 1 Wash C C. 226.

27. U S —Philips v. Ledley, supra.
58 C J. p 80 note 49.

may be filled up, with the consent of the seller and buyer, after its execution and delivery.[28]

Enrollment. It is not necessary to the validity of a bill of sale of a vessel that it shall be enrolled in the customhouse,[29] enrollment being essential only to entitle the vessel to the character and privileges of an American vessel.[30]

c. Construction and Operation

A bill of sale or similar transfer of a vessel should be construed to effectuate the intention of the parties as revealed by the terms of the instrument

A bill of sale or other instrument of transfer of a vessel should be construed according to the intention of the parties as ascertained from the terms of the instrument,[31] as in respect of what property is included in the transfer;[32] and, where it includes, either expressly or impliedly, appurtenances or necessaries, only those things will be regarded as passing as are really necessary to the vessel in carrying on its accepted business,[33] and there is no implied warranty that duplicates shall be furnished.[34]

§ 21. —— Delivery of Vessel

Delivery of possession is ordinarily not essential to passing of title as between buyer and seller, but it is generally necessary in order to bar the rights of third persons.

Except where it is understood and intended, by the parties at the time of making the contract, that a formal delivery shall be made to complete the sale,[35] delivery of possession of the vessel ordinarily is not necessary, as between the seller and buyer, to the transfer of a complete and effectual title,[36] especially where there is a general statutory provision to that effect.[37] On the other hand, as against a subsequent buyer or creditor having no notice, a delivery is necessary[38] Delivery of possession to the purchaser of a share of a vessel ordinarily is not necessary, where the vessel is in possession of the owner or owners of the other shares.[39]

If the vessel is in port at the time of sale, actual delivery is usually held necessary to perfect the title against subsequent buyers and creditors,[40] unless the seller has only constructive possession and the vessel is so situated that actual delivery cannot be made, in which case a symbolical delivery is sufficient.[41] If the vessel is at sea, a delivery of such evidence of title as the seller possesses is sufficient as against creditors and subsequent purchasers to pass title to the buyer,[42] without immediate delivery of the vessel itself,[43] provided the buyer takes possession of the vessel within a reasonable time after she returns within his reach or control;[44] and it has been intimated that, if notice of the sale is forwarded by the buyer to the captain, on the vessel's arrival at another port, it would be equivalent to taking possession[45] However, in order to defeat his title, as against creditors, the buyer's negligence in failing to take possession within a reasonable time must be such as to afford ground for a presumption of fraud.[46]

Place. Where, according to the terms of the contract of sale, delivery of the vessel is to be made at a specified place, the sale is not complete until delivery is made at that place;[47] but, where the place of delivery is not designated in the contract of sale, and there is nothing in the condition or situation of the parties to determine it, it is the privilege of the buyer to name the place, provided it is a reasonable and suitable one;[48] and, if he refuses or fails to provide such place, a delivery may be tendered at a safe and usual anchorage in the harbor.[49] In offering delivery, the seller

28. N Y—Wooley v. Constant, 4 Johns 54, 4 Am D 246
29. U S—Hozey v Buchanan, La., 16 Pet. 215, 10 L.Ed 941.
30. U S.—Hozey v Buchanan, supra
31. U S—The Augusta W Snow, D C Mass, 41 F 2d 377, affirmed, C C A, 46 F 2d 992
58 C J. p 80 note 57.
32. La—Louisiana Contracting Co v. New Orleans Board of Comrs, 91 So. 43, 150 La. 559
58 C.J p 80 note 58
33. Wash—Gazzam v. Moe, 82 P. 912, 40 Wash. 593, 8 L R A,N.S, 793
58 C.J p 80 note 59.
34. Wash.—Gazzam v. Moe, supra
35. U.S.—Robinson v. Alger, N.Y., 167 F 968, 93 C.C.A. 368.
58 C J. p 81 note 73.
36. U S—Winsor v McLellan, C C Mass, 30 F Cas No 17,887, 2 Story 492
Me.—Ludwig v. Fuller, 17 Me 162, 35 Am D. 245
37. Wis—Delaney v. Globe Shipbuilding Co., 184 N.W 696, 175 Wis. 167.
58 C J. p 81 note 75
38. U S—Burckle v The Tapperheten, D.C N Y, 4 F Cas.No 2,141.
58 C J. p 81 note 76.
39. U S—Winsor v McLellan, C.C. Mass, 30 F.Cas No.17,887, 2 Story 492
58 C J. p 81 note 77.
40. La—Price v. Morgan, 7 Mart. 707
58 C.J p 82 note 79.
41. Me—Ludwig v. Fuller, 17 Me 162, 35 Am D 245.
58 C J p 82 note 80.
42. La—Thuret v. Jenkins, 7 Mart. 318, 12 Am D 508
58 C.J p 82 note 81.
43. Mass—Portland Bank v Stacey, 4 Mass. 661, 3 Am D. 253.
58 C.J. p 82 note 82
44. Pa.—Morgan v. Biddle, 1 Yeates 3
58 C.J. p 82 note 83
45. Me.—Brinley v. Spring, 7 Me. 241.
46. Me.—Brinley v. Spring, supra.
58 C.J. p 82 note 85
47. U S.—The Pilot, D C Me., 42 F. 2d 290—Robinson v Alger, N.Y., 167 F 968, 93 C C A. 368
48. Me.—Lincoln v Gallagher, 8 A. 883, 79 Me 189.
49. Me—Lincoln v. Gallagher, supra.

must afford an opportunity to the buyer to make an examination,[50] but he is under no obligation to incur any such unusual expense as would be involved in hauling the vessel into dry dock, and making a delivery there.[51]

Delay in delivery. Where a vessel is bought by a contract under which it is to be built, a provision for delay caused by "force majeure" does not apply to a delay caused by the breaking of the ways when the vessel is launched.[52]

§ 22. —— Warranties

In the absence of an express warranty, the rule of caveat emptor applies to the sale of a vessel.

The usual rules as to warranties in sales of goods and chattels, as discussed in Sales §§ 301-386, apply in case of sale of a vessel, such as in respect of the creation or existence of a warranty,[53] and that the buyer's acceptance of the vessel does not discharge the seller from liability for breach of warranty.[54] The rule of caveat emptor applies to the sale of a vessel,[55] in the absence of an express warranty,[56] and a simple bargain and sale of the vessel do not imply a warranty that it is seaworthy or in a serviceable condition, where the buyer acts on the report of a surveyor employed by him and does not demand an express warranty.[57] An express warranty in a bill of sale of a ship and her freight that the ship is free from encumbrance does not exclude an implied warranty that the freight is also unencumbered,[58] and, therefore, does not defeat liability for an implied misrepresentation by concealment of the fact that the freight is encumbered.[59] A statutory provision which imposes on a seller the obligation of warranting a thing sold against its hidden defects has been held applicable to the sale of a vessel,[60] and, in case of breach of such warranty, the buyer may retain the vessel and maintain an action for reduction of the price by reason of the difference in value between the vessel as warranted and as it was in fact.[61]

Effect of waiver of inspection. Waiver of a dry dock inspection, as provided for in the contract for sale, for which allowance is made to the buyer, inures to the latter's benefit to the extent of the allowance,[62] but does not relieve the seller from his warranty of fitness of the vessel.[63] On the other hand, where the buyer agrees to a modification of the contract waiving dry dock inspection, in consideration of a reduction in price, he does not rely on the seller's implied warranty of fitness and cannot recover for breach thereof.[64]

Sale "with all faults" or "as is." Where the vessel is sold "with all faults without any allowance for any defect or error whatever," there is no warranty,[65] and the fact that the sale is "with all faults" puts the buyer on his guard to use his senses to discover any defects or faults therein,[66] and the seller is not liable for defects in the vessel whether or not he knew of them,[67] unless he used some artifice to conceal them from the buyer.[68] On the other hand, the use of such phrase does not relieve the seller from liability for breach of warranty as to the character or method of construction of the vessel,[69] or from liability for deceit as to the age of the vessel.[70] The term "as is" should be construed in

50. Me.—Lincoln v. Gallagher, supra.

51. Me.—Lincoln v. Gallagher, supra.

52. U.S.—Peterson v. Noots, Wash., 255 F. 875, 167 C.C.A. 195.

53. U.S.—Job v. Heidritter Lumber Co., N.Y., 255 F. 311, 166 C.C.A. 481, 3 A.L.R. 619.
58 C.J. p. 83 notes 1, 2.

54. U.S.—Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co., D.C.N.Y., 29 F.2d 744.
58 C.J. p. 83 note 3.

55. U.S.—The Marsodak, C.C.A.Va., 94 F.2d 339—Job v. Heidritter Lumber Co., N.Y., 255 F. 311, 166 C.C.A. 481, 3 A.L.R. 619.

56. U.S.—Owens v. Anderson, D.C. Alaska, 101 F.Supp. 32, applying Washington law

Sufficiency of evidence

(1) Evidence held sufficient to show that sellers warranted vessel to be in fair condition, that warranty was made with intent that buyers would rely thereon, and that buyers did rely thereon to their injury.—Owens v. Anderson, supra

(2) Evidence held sufficient to show that it was not necessary for buyers to make four trips to place where repairs were being made, but insufficient to show that damages claimed for services of buyers' crew in assisting and making repairs resulted from the breach of warranty.—Owens v. Anderson, supra.

Damages

U.S.—Owens v. Anderson, supra.

57. U.S.—Job v. Heidritter Lumber Co., N.Y., 255 F. 311, 166 C.C.A. 481, 3 A.L.R. 619.

58. Ala.—Corry v. Sylvia, 68 So. 891, 192 Ala. 550, Ann.Cas.1917E 1052.

59. Ala.—Corry v. Sylvia, supra

60. U.S.—Bulkley v. Honold, La., 19 How. 390, 15 L.Ed. 663.
58 C.J. p. 83 note 11

61. U.S.—Bulkley v. Honold, supra.

62. U.S.—Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co., D.C.N.Y., 29 F.2d 744.

63. U.S.—Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co., supra.

64. U.S.—Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co., C.C.A.N.Y., 43 F.2d 683.

65. Eng.—Taylor v. Bullen, 5 Exch. 779, 155 Reprint 341.

66. Eng.—Baglehole v. Walters, 3 Camp. 152, 170 Reprint 1338.
58 C.J. p. 83 note 18.

67. Eng.—Baglehole v. Walters, supra—Pickering v. Dowson, 4 Taunt. 779, 128 Reprint 537.

68. Eng.—Baglehole v. Walters, 3 Camp. 152, 170 Reprint 1338.

69. Eng.—Shepherd v. Kain, 5 B. & Ald. 240, 7 E.C.L. 82, 106 Reprint 1180
58 C.J. p. 83 note 21

70. Eng.—Fletcher v. Bowsher, 2 Stark. 561, 3 E.C.L. 530, 171 Reprint 736.
58 C.J. p. 83 note 22.

connection with its context, and does not necessarily negative the existence of a warranty.[71]

§ 23. —— Rights and Liabilities of Parties

a. In general
b. Of seller
c. Of buyer

a. In General

The general rules governing the rights and liabilities of a buyer and seller ordinarily control with respect to the rights of the buyer and seller of a vessel. The buyer is usually entitled to freights accruing when he takes possession of the vessel.

The general rules of law and statutory provisions pertaining to sales of personalty ordinarily control in determining and enforcing the rights and liabilities of the parties to a contract of sale of a vessel.[72]

Right to freights. As between a buyer and seller, pending freight is regarded as an incident of the ship,[73] and, therefore, unless it is otherwise provided by the contract of sale, the buyer, on taking possession, has the right to all freights then accruing,[74] and succeeds to any liens which the seller had to enforce payment of such freight.[75] The buyer is also entitled to all freights which are fully earned while he is in possession, under an executory contract of sale.[76] On the other hand, freight earned after the seller retakes the ship for breach of the contract of sale belongs to him,[77] including pending freight which is not due until delivery of the cargo, after possession is retaken;[78] and ordinarily this right of the seller cannot be defeated by the buyer's assignment of the freight moneys to a third person.[79] Where, however, the seller has estopped himself from claiming ownership of the vessel, he cannot set up any right to freights as against the buyer's assignee thereof.[80] So, also, where, under such assignment, charter party commitments are carried out under the supervision and management of a trustee, and an assignor is not put in default, and no attempt is made by the seller to terminate the contract and retake the vessel, the seller cannot claim freight earned under the trustee's management as against the buyer's assignee.[81] The seller's lien for advancements and disbursements, in performance of a charter party under which freights are earned, constitutes a claim to freight moneys prior to that of an assignee of the agreed buyer, where the freights are earned under the management of the trustee after the buyer became insolvent,[82] and the seller's rights in such case, with relation to freight moneys and disbursements made in earning them, are the same as those of a mortgagee.[83]

b. Of Seller

(1) In general
(2) Seller's remedies

(1) In General

The responsibility of the owner of a ship as such ceases on completion of his sale of the vessel, and, even though the seller retains title as security for the purchase price, he will not be liable for contracts made in behalf of the ship by a buyer in possession.

On the completion of the sale of a vessel, the responsibility of the seller, as owner, ceases.[84] One having title only for security is not personally liable for contracts with respect to the ship made by his conditional buyer while in possession,[85] and one holding legal title simply as security for the sum due him on a sale thereof, but having neither possession nor control, is not an owner within the

71. U.S.—Owens v. Anderson, D.C. Alaska, 101 F. Supp. 32, applying Washington law.

Condition as earlier warranted

Where sellers had warranted tug to be tight and in fair condition with certain exceptions even if sellers, a few days later, in answer to inquiry from buyers, stated that price was "as is," the term "as is" meant the condition of the tug as earlier warranted and such term would not avoid the effect of the warranty—Owens v. Anderson, supra.

72. Cal.—Anderson v. Van Camp Sea Food Co., 277 P. 1099, 98 Cal. App. 787.

La.—Oil Transport Co. v. Whiteman, 42 So. 2d 758, 215 La. 1070.

Contract of sale construed

U.S.—Fischbach v. Thornley, D.C. Conn., 52 F. Supp. 964.

Exercise of option

Where third person had exercised option to take interest in boat in satisfaction of owner's indebtedness, there remained no debt in respect of such person, notwithstanding owner's refusal to convey.—Ambrose v. Alioto, 150 P. 2d 502, 65 Cal. App. 2d 362.

73. U.S.—U. S. v. Robins Dry Dock, etc., Co., C.C.A.Mass., 13 F.2d 808—Jackson v. 36 Blocks Marble, etc., C.C.A.N.Y., 266 F. 58.

74. Me.—Donnell v. G. G. Deering Co., 97 A. 130, 115 Me. 32.
58 C.J. p. 84 note 29.

75. Me.—Donnell v. G. G. Deering Co., supra.

76. U.S.—U. S. v. Sterling, D.C.N.Y., 22 F.2d 323.

77. U.S.—U. S. v. Sterling, supra—U. S. v. Robins Dry Dock, etc., Co., C.C.A.Mass., 13 F.2d 808.

78. U.S.—Jackson v. 36 Blocks Marble, etc., C.C.A.N.Y., 266 F. 58.
58 C.J. p. 84 note 33.

79. U.S.—U. S. v. Sterling, D.C.N.Y., 22 F.2d 323.

80. N.Y.—Harris v. Burdett, 43 N.Y. Super. 57, affirmed 76 N.Y. 582.
58 C.J. p. 84 note 35.

81. U.S.—U. S. v. Sterling, D.C.N.Y., 22 F.2d 323.

82. U.S.—U. S. v. Sterling, supra.

83. U.S.—U. S. v. Sterling, supra.

84. N.Y.—Thorn v. Hicks, 7 Cow. 697.
58 C.J. p. 84 note 41.

85. U.S.—The John E. Berwind, C.C.A.N.Y., 56 F.2d 13.

meaning of statutory provisions imposing liability on the "owner" of a watercraft for material furnished it.[86]

Repairs and supplies. After the contract of sale is completed and the vessel is delivered into the possession and use of the buyer, the seller is not liable for repairs or supplies furnished to the vessel on the order or direction of the buyer,[87] and this rule applies, although the repairs or supplies are furnished in the belief that the original owner is liable,[88] and although the contract therefor is made prior to a legal transfer of the vessel,[89] as where by the express terms of the contract the seller retains the legal title in himself, for the purpose of securing the consideration money, until it is paid.[90] The original owner is not liable to pay for supplies furnished a vessel at sea, after he has sold all his interest in the vessel, although neither the master nor the merchant furnishing the supplies had any knowledge of the sale.[91]

Waiver of rights. Where a vessel is already in possession of the buyer at the time of the signing of a contract for its sale to him calling for a cash payment, the buyer may not properly claim that the seller waived the condition of cash payment by a subsequent delivery to him, since the delivery was in fact prior to the execution of the sales contract,[92] nor does the seller's acceptance of the buyer's checks constitute a waiver of the requirement of cash payment until the seller is able to determine their worth and negotiability.[93]

(2) Seller's Remedies

The seller of a ship may in a proper case sue for repossession, for damages for breach of contract, or for the price or value of the vessel.

The seller of a ship may sue to recover possession of the vessel from the buyer where the latter fails to perform a condition on the performance of which title was to vest in him;[94] or he may sue for damages where the buyer breaches the contract of sale,[95] except where he retakes the property, and, under the terms of the contract, retains amounts which have already been paid, as liquidated damages.[96] Under a statute making unenforceable any provision in a contract by which damage or compensation for a breach is determined in advance, except where the fixing of actual damages is extremely difficult or impracticable, the seller cannot, on breach of the contract of sale, recover a deposit in escrow made by the buyer under the guise of a penalty, liquidated damages, or forfeiture.[97]

Suit for price or value. If the seller has substantially performed his part of the contract of sale, he may maintain an action for the balance of the purchase price if the buyer fails or refuses to perform the contract and pay as agreed;[98] and, where the action is on a constructive contract, since the buyer by accepting delivery and retaining possession of the vessel becomes liable for the purchase price, notwithstanding failure of the builders to comply with their contract, it is unnecessary, in an action for such purchase price, to allege a waiver on the part of defendant of provisions of the contract;[99] but such an action cannot be maintained where the buyer repudiates the contract without having signed a memorandum in writing or without having accepted the vessel, as required by statute.[1] Where, under the contract, a certain percentage of the pur-

86. Ohio—Hemm v. Williamson, 25 N.E. 1, 47 Ohio St. 493.

87. Mass.—Brooks v. Bondsey, 17 Pick. 441, 28 Am.D. 313
58 C.J. p. 85 note 43.

88. Me.—Cutler v. Thurlo, 20 Me. 213.

89. U.S.—Heppard v. The General Cadwalader, D.C., 11 F.Cas.No.6,390, 6 Pa.L.J. 473.
58 C.J. p. 85 note 45.

90. Mass.—Brooks v. Bondsey, 17 Pick. 441, 28 Am.D. 313
Ohio—Hemm v. Williamson, 25 N.E. 1, 47 Ohio St. 493.

91. Mass.—Hussey v. Allen, 6 Mass. 163

92. U.S.—The Tietjen & Lang No. 2, D.C.N.J., 53 F.Supp. 459, motion denied, C.C.A., 143 F.2d 711.

93. U.S.—The Tietjen & Lang No. 2, supra.

94. U.S.—The Oriole, D.C.Mass., 18 F.Cas.No.10,574, 1 Sprague 31.

Retention of possession after retaking

United States marshal's possession of boats, pending libel proceedings by conditional seller to recover possession, was not possession of seller, with respect to statutory requirement that seller retain property for thirty days after retaking.—W. F. & R. Boat Builders v. Hammond, 253 N.Y.S. 706, 142 Misc. 323.

95. U.S.—In re Atlantic Gulf, etc., SS. Co., D.C.Md., 289 F. 145, affirmed and petition dismissed, C.C.A., Standard Oil Co. v. Miller, 3 F.2d 438

Payment

Where contract for sale of a derrick lighter provided that payment was a condition to passing of title, and checks issued in payment were made in such form that they were not negotiable and were not honored by bank, and seller was free from fault in the transaction, seller was entitled to recover possession of the lighter, even though it would result in loss to purchaser.—The Tietjen & Lang No. 2, D.C.N.J., 53 F.Supp. 459, motion denied, C.C.A., 143 F.2d 711.

96. U.S.—In re Atlantic Gulf, etc., SS. Co., D.C.Md., 289 F. 145, affirmed and petition dismissed, C.C.A., Standard Oil Co. v. Miller, 3 F.2d 438
58 C.J. p. 85 note 53.

97. U.S.—Hanna Nielsen SS. Co. v. Hammond SS. Co., C.C.A.Cal., 32 F.2d 31
58 C.J. p. 85 note 55.

98. Ark.—Brierton v. Anderson, 20 S.W.2d 313, 180 Ark. 12.
58 C.J. p. 85 note 57.

99. N.Y.—Mississippi Shipbuilding Corp. v. Lever Bros. Co., 142 N.E. 332, 237 N.Y. 1.

1. Pa.—Dodd v. Stewart, 120 A. 121, 276 Pa. 225
58 C.J. p. 86 note 59.

chase money is deposited with a stakeholder to be paid to the seller on tendering a bill of sale and delivery of the vessel, and to be forfeited to the seller in case of the buyer's breach, the seller can recover the amount of such deposit from the stakeholder, even though the latter has made no promise to pay it to the seller.[2]

Actions. In suits by the seller of a ship the general rules ordinarily control in respect of matters of defense,[3] pleading,[4] evidence,[5] trial,[6] and amount of recovery.[7]

Lien generally. Under and subject to the rules governing a seller's lien generally, as discussed in Sales §§ 390–402, the seller of a vessel has a lien thereon for the balance of the purchase money,[8] and some statutes expressly provide for such a lien.[9] The seller's lien is entitled to priority over claims for supplies furnished to the vessel by the direction of the buyer,[10] but the seller is not entitled to such priority for disbursements made by him on the vessel after retaking it from the buyer.[11] The lien for purchase money has been held to be lost or waived by the acceptance of a note as cash, as part of the purchase price.[12] There must be due compliance with a statutory provision prescribing the time within which such a lien may be enforced.[13] A seller cannot assert a lien against a vessel for services performed on her before sale.[14]

Where the contract of sale authorizes the seller, on the buyer's default, to resell the vessel and recover the deficiency from the buyer, the seller has a lien on an escrow purchase-money deposit to the extent of his damage or loss,[15] and the fact that the seller fails to resell on the buyer's default does not affect the lien, since such resale is not indispensable to measure the seller's damage.[16] Equity has jurisdiction of such a lien,[17] notwithstanding the action involves damages for a breach of contract for which the law provides a remedy;[18] but it cannot decree the lien under a contract which provides that the sale is to become absolute only on acceptance by the buyer after inspection, where he never makes such acceptance.[19]

c. Of Buyer

(1) In general
(2) Buyer from part owner
(3) Bona fide purchaser
(4) Buyer's remedies

(1) In General

On completion of the purchase, the buyer becomes vested with all the seller's rights in the ship, and takes her subject to existing liabilities of which he has actual or constructive notice.

On completion of the sale of a vessel, the buyer becomes vested with all of the seller's rights of ownership and possession,[20] and takes the vessel subject to all existing rights, liens, and equities against

2. N Y —Muskegon SS. Corp. v Fisk, 193 N Y S. 463, 200 App Div. 621

3. U.S —Munson Line v. Vervliet, D C.N Y , 39 F Supp 945.
58 C J p 86 note 59 [b].

Estoppel

An oral agreement that purchaser of vessel would pay for supplies on board and for insurance premiums for insurance protecting purchaser pending transfer, and that seller should have a maritime lien therefor, constituted a new promise, and seller was not estopped to recover for supplies and insurance premiums by provisions in the written agreement of sale, also a written declaration by seller of vessel that vessel was free of any obligations whatsoever against others did not estop seller from enforcing purchaser's oral agreement to pay for supplies on vessel, cost of moving vessel and insurance premiums, since declaration related to obligations from seller to others, and seller could have no lien against vessel or claim against purchaser until after vessel had been conveyed to purchaser.—Munson Line v. Vervliet, supra.

Merger of prior agreements held not shown

U S —Munson Line v. Vervliet, supra

4. N.Y —W. F & R. Boat Builders v Hammond, 253 N.Y.S. 706, 142 Misc 323
58 C.J. p 85 note 57 [a].

5. U S —Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corp , D C Mass , 38 F 2d 674.
Mo —Carden v. Thompson, 62 S.W 2d 882, 333 Mo 218
58 C.J. p 85 note 57 [b], [c].

6. Fla —Seaver v. Stratton, 183 So 335, 133 Fla. 183
58 C J p 85 note 57 [d]

Questions of fact should be submitted to the jury —Seaver v. Stratton, supra.

7. U S —Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S S Corporation, D. C Mass , 38 F 2d 674.

8. U S —The St Mary, C.C.N.Y., 21 F Cas.No.12,242, 2 Blatchf. 329.
La —Bell v. Western Marine & Fire Ins Co., 5 Rob 423, 39 Am.D. 542

9. La.—Buckmaster v. Durham, 10 La A., Orleans, 230.
58 C J. p 86 note 66.

10. U.S —The St Mary, C C.N.Y., 21 F Cas.No 12,242, 2 Blatchf. 329
58 C J p 86 note 67.

11. U.S —The St Mary, supra.

12. La —In re Red River Line, 40 So 250, 115 La 867—Violett v Fairchild, 6 La Ann. 193

13. La —In re Red River Line, 40 So 250, 115 La 867.
58 C J. p 86 note 71.

14. U S —Ullery v The Mayflower, D C.Pa , 75 F 842.
58 C.J p 86 note 72.

15. U S —Hanna Nielsen SS Co v. Hammond SS. Co , C.C A Cal., 32 F. 2d 31.

16. U.S —Hanna Nielsen SS Co. v. Hammond SS Co., supra

17. U.S.—Hanna Nielsen SS Co. v. Hammond SS. Co., supra.

18. U.S —Hanna Nielsen SS. Co. v Hammond SS. Co., supra

19. U.S.—Hanna Nielsen SS. Co. v. Hammond SS. Co., supra.

20. Me —Tyler v. Holmes, 38 Me 258.
58 C.J. p 87 note 81.

it, of which he has actual or constructive notice [21] He is also liable for prior contracts or liabilities of the seller, which he has assumed or agreed to pay.[22] Where the purchaser assumes the "indebtedness" of the ship, this comprises only existing claims for which she could be libeled and sold under decree in admiralty,[23] and the purchaser's agreement to save the vendor harmless from future claims which may arise against the "vessel interests" will not include any claim failing to fall within the true meaning of such agreement.[24] A purchaser under a contract for installment purchase of a ship may make alterations after acquiring possession where the contract provides that he may make repairs, etc, provided he does not injure her, and where the alteration does not make the vessel less valuable to the seller and owner.[25] Recovery of down payment will generally be allowed the buyer where the seller arbitrarily calls off the contemplated sale.[26]

Sale subject to requisition. A term of the contract of sale that the buyer takes the risk of the vessel being requisitioned does not imply that the vessel is at the time a free ship, and the fact that it is requisitioned but has been temporarily released does not, in the absence of fraud, give the buyer a right of action against the seller for damages for breach of contract.[27] Where the contract expressly states that the title to the vessel sold is subject to the general order of requisition by the government, the buyer is presumed to know what that requisition is, and he cannot avoid liability for breach of his contract by claiming that he understood he would have the vessel for several voyages before it was taken under that requisition, where no misrepresentations were made by the seller in that respect.[28]

Repairs and supplies. Where the sale is an absolute one, the buyer is liable for supplies subsequently furnished, even though he has never taken possession of the vessel,[29] and although neither the master nor the merchant furnishing the supplies had any knowledge of the sale,[30] unless it appears that credit was given to another,[31] or that the seller had not divested himself of his right, as owner, to the control and possession of the vessel and its earnings.[32] Although the title is not actually transferred, if the buyer is in possession, under the contract, he may be held liable for supplies furnished during his possession,[33] even though he refuses to carry out the contract of sale,[34] but this does not apply to a buyer who is in possession merely under an agreement for sale.[35] The buyer, however, is not liable for repairs made and supplies furnished before the sale,[36] unless he has specially agreed to that effect,[37] or unless the vessel was at sea at the time of the sale, in which case the buyer takes her subject to all encumbrances on her,[38] and to all lawful contracts made by the master before notice of the sale.[39]

Liability for price. Where the contract of sale is an executed one, with the title retained by the seller only to secure advances, the seller's failure to deliver a bill of sale conveying title does not relieve the buyer of his obligation to pay, where the

21. U.S.—The Dana, D.C.N.Y., 190 F 650
58 C J p 87 note 82

22. Ala.—Birmingham, etc, R, etc, Co v. Jackson, 54 So. 512, 170 Ala 496
58 C J. p 87 note 83.

23. Mass.—Fidelity & Deposit Co. of Maryland v Crowell & Thurlow, 189 N E 802, 286 Mass. 124

Indemnity claim

Claim of bonding company which stipulated to perform final decree to secure release of libeled schooner in admiralty proceeding for indemnity against owners was not indebtedness of schooner so as to make corporation which purchased schooner before final decree and which assumed indebtedness of schooner liable for indemnity claim.—Fidelity & Deposit Co of Maryland v. Crowell & Thurlow, supra

24. Mass.—Fidelity & Deposit Co of Maryland v. Crowell & Thurlow, supra.

25. U.S.—The Ferax, D.C.Mass, 8 F.Cas.No.4,737, 1 Sprague 180.

Meaning of "injure"

The word "injure," as used in a contract for the sale of a certain ship, to be paid for by installments, by which, after the first payment, the purchaser should take possession of the ship, with liberty to make such repairs as he might wish, to load the ship, or to secure passengers for her, provided nothing was done to injure the vessel, means something which makes the vessel less valuable to the owners, and does not prevent him making an alteration therein which does not produce such an effect.—The Ferax, supra.

26. La.—Martin v. Terrebonne, App., 43 So 2d 925.

27. N Y.—Muskegon SS Corp. v. Fisk, 193 N Y S. 463, 200 App.Div 621.
58 C J. p 87 notes 90, 91.

28. N.Y.—Muskegon SS. Corp. v. Fisk, supra.

29. N H.—Lord v. Ferguson, 9 N.H. 380.
N Y.—Flanders v. Merritt, 3 Barb. 201.

30. N.H.—Lord v. Ferguson, 9 N H. 380.

31. N.Y.—Flanders v. Merritt, 3 Barb 201

32. N.Y.—Flanders v. Merritt, supra.

33. N Y.—Macy v. Wheeler, 30 N.Y. 231, 18 Abb.Pr 73.
58 C J. p 88 note 99.

34. U.S.—The Julia Smith, D.C Mich, 13 F Cas No.7,136, 6 McLean 484, Newb.Adm 61.
58 C.J. p 88 note 1.

35. U S.—The H. C. Grady, D C.Cal., 87 F. 232.
58 C.J. p 88 note 3.

36. N.Y.—Higgins v. Packard, 2 N. Y Super. 226
58 C J p 88 note 4.

37. Mass.—Rennell v. Kimball, 5 Allen 356.

38. Mass.—Badlam v. Tucker, 1 Pick. 389, 11 Am D. 202—Portland Bank v. Stubbs, 6 Mass. 422, 4 Am. D. 151.

39. Mass.—Portland Bank v. Stubbs, supra.

legal title is not conveyed because the buyer does not comply with the conditions entitling him to a conveyance.[40] Where the vessel is sold, under a construction contract, the buyer, by accepting the vessel and retaining possession, becomes liable for the contract price,[41] notwithstanding the builders have failed to comply with the contract of sale,[42] although, in such event, he may be entitled to damages for their breach.[43] Where, after the making of the contract of sale, the parties agree to an allowance or deduction of the contract price of a certain sum to cover all deficiencies or repairs of equipment, the buyer is not entitled to a further deduction to cover expenses incurred by reason of a deficiency of equipment caused by ordinary wear and tear.[44]

An option to purchase conveys no title to the optionee.[45]

Purchase through attorney in fact. Where the purchaser of a vessel executes a power of attorney reciting that an attorney in fact is given authority to represent him and to sign all documents necessary in connection with the transfer of title, such document is sufficient to clothe the attorney with power to execute an agreement of sale,[46] and to authorize the attorney to extend the seller's policy of insurance to protect the purchaser pending transfer of title,[47] and to bind the purchaser to pay for supplies aboard the ship,[48] and, even if the agreement of the attorney to pay for the cost of moving the vessel is unauthorized, it may be ratified by the purchaser's making a payment on account.[49] A purchaser's direction to his attorney in fact to turn over the papers relating to the purchase of a ship to her captain constitutes a ratification of the attorney's acts in connection with the purchase of the vessel.[50]

Purchaser attempting to repudiate rescission of contract. Where a seller has rescinded the contract for the purchaser's default, the latter or his representatives having received the benefits of rescission may not thereafter repudiate the rescission or reaffirm the contract after being sued for damages based on rescission.[51]

(2) Buyer from Part Owner

A buyer from a part owner may become vested with the latter's entire interest, but can take no more than the seller's share in the ship and her earnings.

A buyer from a part owner may become vested with his entire right and title,[52] but he takes only the interest or share which the seller has in the vessel or its earnings.[53] It has been held that a sale of an undivided interest in a vessel does not put the buyer in the seller's position as partner in the operation of the vessel.[54] A buyer is not liable for the purchase price of such interest where, before the sale is consummated, the vessel is lost;[55] nor, in the absence of special agreement, is he liable for expenditures, expenses, or liabilities incurred before that time.[56]

(3) Bona fide purchaser

The rights of buyers of vessels as bona fide purchasers are determined by the general rules.

The usual rules as to bona fide purchasers, as discussed in Sales §§ 288–300, apply in determining whether a purchaser of a vessel is a bona fide purchaser, and his rights and title.[57] It has been held that a purchaser from the owner of record is entitled to protection as a bona fide purchaser as against a prior unrecorded sale,[58] unless it appears that the sale to such purchaser is colorable and with-

40. U.S.—Virginia Shipbuilding Corp v U. S, C C A.Va., 22 F 2d 38, certiorari denied 48 S.Ct. 305, 276 U S 625, 72 L Ed 738.

41. N.Y.—Mississippi Shipbuilding Corp v. Lever Bros Co, 142 N.E 332, 237 N Y. 1, reargument denied 143 N E 744, 237 N.Y 565

42. N Y.—Mississippi Shipbuilding Corp. v. Lever Bros Co, supra

43. N Y.—Mississippi Shipbuilding Corp v. Lever Bros. Co., supra

44. Del.—Cromwell v. Granfield, 76 A. 602, 23 Del. 333.

45. Cal.—The Astorian, 2 P.2d 1004, 116 Cal.App. 563.

46. U S.—Munson Line v. Vervliet, D.C N.Y., 39 F.Supp 945.

47. U S.—Munson Line v. Vervliet, supra.

48. U S.—Munson Line v. Vervliet, supra

49. U.S.—Munson Line v. Vervliet, supra.

50. U S.—Munson Line v Vervliet, supra

51. Mo.—Carden v. Thompson, 62 S. W 2d 882, 333 Mo 218.

52. U S.—Bradshaw v The Sylph, D. C N Y, 3 F Cas No 1,791
58 C J p 88 note 14

53. N Y.—Williams v. Lawrence, 47 N.Y. 462
58 C J. p 88 note 15.

54. N.Y.—Hudson Nav. Co. v. Murray, 167 N Y S. 524, 180 App Div. 271
58 C.J. p 88 note 16.

55. U.S.—El Cambio Gold Min. Co v. Cucharas Min Co., Cal., 172 F. 366, 97 C C A 64.
58 C J p 88 note 17.

56. Mass.—Rennell v. Kimball, 5 Allen 356.
58 C.J. p 88 note 18.

57. U S.—The Nancy Dell, D C Ill., 14 F. 744.
58 C J p 89 note 21.

Payment after notice
Where buyer of one-half interest in vessel paid no part of consideration until after he was served with notice of libel because of wrongful conversion of half interest in vessel, buyer paid consideration at his peril, and was not a bona fide purchaser—The J. Oswald Boyd, D.C.Mich, 53 F Supp. 103.

58. U S.—The Superior, D C Cal., 23 F.Cas No.13,626, 5 Sawy. 83.

out consideration[59] An authorized but long continued possession does not estop the owner of a vessel from claiming title against a bona fide purchaser under an unauthorized sale.[60]

(4) Buyer's Remedies

The buyer of a vessel may in a proper case maintain an action against the seller for damages arising from the latter's breach of the contract to sell or for recovery of the purchase price paid.

A buyer of a vessel, or of an interest therein, may maintain an action for damages against the seller for breach of the contract to sell or of sale,[61] which damages may be recovered either in a separate action,[62] or by way of counterclaim in an action for the purchase price,[63] provided the buyer has given notice of his claim within a reasonable time, as required by statute.[64] For example, the purchaser of a vessel may be entitled to recover damages for loss resulting from her faulty construction by the seller,[65] the items recoverable depending on the facts involved as considered in the light of the usual rules governing an award of damages.[66]

Recovery of purchase price paid. The buyer may maintain an action to recover an overpayment induced by the seller's fraud,[67] and he may also maintain an action to recover purchase money which he has already paid, and which is wrongfully retained by the seller after a breach by him of the contract of sale,[68] for example, after the seller has rescinded and abandoned the contract,[69] or where the buyer has rescinded the contract because of the seller's fraud or misrepresentation,[70] or where, as provided in the contract, consummation thereof is prevented by causes beyond the control of the parties,[71] or where the buyer rejects the vessel because of its not complying with the specifications of the contract,[72] provided he has notified the seller within a reasonable time.[73] Where, however, the seller has resold the vessel and is, therefore, unable to deliver it to the buyer, creating a failure of consideration, it is unnecessary for the buyer, as a prerequisite to suing to recover purchase money which has been paid, to make a formal rescission on his part,[74] or to make a demand for performance.[75]

Actions. In suits by the buyer of a ship the usual rules govern in respect of pleading,[76] evi-

59. U.S.—The Superior, supra.

60. U.S.—Diebolt v. The Chester Hair, D.C.N.Y., 4 F. 571.
58 C.J. p. 89 note 26.

61. U.S.—Jackson v. 36 Blocks of Marble, etc., C.C.A.N.Y., 266 F. 58.
58 C.J. p. 89 note 29.

62. N.Y.—Mississippi Shipbuilding Corp. v. Lever Bros. Co., 142 N.E. 332, 237 N.Y. 1.

63. N.Y.—Mississippi Shipbuilding Corp. v. Lever Bros. Co., supra.

64. N.Y.—Mississippi Shipbuilding Corp. v. Lever Bros. Co., supra.
58 C.J. p. 89 note 32

Sufficiency of notice

Telegram, in answer to request for balance due and letter after fishing season closed, was sufficient notice within reasonable time of defective construction of fishing boat.—Suryan v. Lake Washington Shipyards, 300 P. 941, 163 Wash. 164

65. Wash.—Suryan v. Lake Washington Shipyards, 300 P. 941, 163 Wash. 164

General damages

Where fishing boat was defective because built of green lumber and because of uncaulked seams, buyer was entitled to general damages.—Suryan v. Lake Washington Shipyards, supra.

66. Wash.—Suryan v. Lake Washington Shipyards, supra.

Jettisoned cargo

Buyer of defectively constructed fishing boat could recover loss on fish which buyer was compelled to throw overboard when boat swamped.—Suryan v. Lake Washington Shipyards, supra.

Lost profits

(1) Buyer suing for breach of implied warranty could recover for loss of profits during time fishing boat was laid up for necessary repairs.—Suryan v. Lake Washington Shipyards, supra.

(2) Seller which merely agreed to obtain as much work for tug as possible was not liable for prospective profits lost by shipper's forwarding oil by rail.—Olsen v. Marine Transit Corporation, 257 N.Y.S. 794, 235 App. Div. 535.

Salvage paid

Buyer of defective fishing boat could recover amount paid to salvors for rescuing fishing seine thrown overboard when boat swamped.—Suryan v. Lake Washington Shipyards, 300 P. 941, 163 Wash. 164.

67. D.C.—Furness v. Sutherland, 26 F.2d 1004, 58 App.D.C. 226, certiorari denied 49 S.Ct. 24, 278 U.S. 622, 73 L.Ed. 543.
58 C.J. p. 89 note 37.

68. Cal.—Anderson v. Van Camp Sea Food Co., 277 P. 1099, 98 Cal.App. 787.
N.Y.—American Union Line v. Oriental Nav. Corp., 192 N.Y.S. 154, 199 App.Div. 513.

69. Cal.—Anderson v. Van Camp Sea Food Co., 277 P. 1099, 98 Cal.App. 787.

70. N.Y.—American Union Line v. Oriental Nav. Corp., 146 N.E. 338, 239 N.Y. 207.

Necessity of rescission

Buyer of motorboat, speed of which was falsely represented by seller's agent, cannot reject it and recover price without rescinding contract, even if such representations were authorized by seller and constituted warranty.—Harriss v. Tams, Lemoine & Crane, 179 N.E. 476, 258 N.Y. 229.

71. N.Y.—American Union Line v. Oriental Nav. Corp., 146 N.E. 338, 239 N.Y. 207
58 C.J. p. 90 note 41.

72. Wis.—Buck v. Racine Boat Co., 192 N.W. 998, 180 Wis. 245.

73. Wis.—Buck v. Racine Boat Co., supra.
58 C.J. p. 90 note 43.

74. Cal.—Anderson v. Van Camp Sea Food Co., 277 P. 1099, 98 Cal.App. 787.

75. Cal.—Anderson v. Van Camp Sea Food Co., supra.

76. Ill.—Regnery v. Chris-Craft Boat Sales, 27 N.E.2d 562, 305 Ill. App. 624.
Ky.—Porter's Admr. v. Castleman, 8 Ky.Op. 19.
58 C.J. p. 89 note 40 [a].

Complaint held sufficient

Ill.—Regnery v. Chris-Craft Boat Sales, 27 N.E.2d 562, 305 Ill.App. 624.

Complaint held insufficient

N.Y.—American Union Line v. Orien-

dence,[77] and trial.[78]

§ 24. Mortgages and Hypothecations

a. In general
b. Requisites and validity in general
c. Delivery or possession
d. Construction and operation
e. Priorities
f. Rights and liabilities of mortgagee and mortgagor

a. In General

In the absence of a statute providing otherwise, a mortgage on a ship is regarded as a mere common-law lien similar to other mortgages on chattels and without maritime incidents. The federal Ship Mortgage Act is designed to improve the investment status of ship's mortgages, and should be liberally construed in the light of its purpose.

A mortgage of a vessel is regarded as a chattel mortgage,[79] and generally has no maritime incidents,[80] and none of the characteristics of a maritime contract or loan,[81] and, therefore, except in jurisdictions in which a chattel mortgage passes the legal title, as discussed in Chattel Mortgages § 1, it has the status only of a common-law lien,[82] and, as discussed in Maritime Liens § 5, does not constitute a maritime lien, except where it is made so by statute.

Hypothecation, when applied to maritime transactions, is about the same as bottomry or respondentia,[83] although it is usually predicated of a loan by the master on the vessel, freight, or cargo, in order to raise money for the necessities of the voyage.[84] In a more general sense it is a pledge to secure a debt or engagement without a delivery or possession.[85] Such hypothecations had their origin in the necessities of commerce,[86] are of a high and privileged character, and are held in great sanctity by maritime courts.[87]

Port of documentation within the federal Ship Mortgage Act is the port at which a vessel is documented, that is, registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily.[88]

Character of particular transaction. The question whether a particular transaction, although in the form of a sale of a vessel, constitutes a mortgage thereof is one of the intention of the parties as shown by the facts and circumstances of the transaction,[89] which intention may be established by any form of proof.[90] Except where the rights of innocent third persons would be prejudiced thereby,[91]

tal Nav. Corp., 146 N.E. 338, 239 N.Y. 207

77. U.S.—Fischbach v. Thornley, D.C.Conn., 52 F.Supp. 964.
Cal.—A. Paladini, Inc., v. Durchman, 13 P.2d 731, 216 Cal. 212—Goodman v. Morthrift Finance Corp., 85 P.2d 941, 30 Cal.App.2d 73
Wash.—Suryan v. Lake Washington Shipyards, 300 P. 941, 163 Wash. 164.
58 C.J. p. 89 note 38 [a].

Evidence held sufficient
U.S.—The Libbie Purdy, D.C.Mass., 32 F.Supp. 67.
Ala.—General Const. Co. v. Tennessee Val. Sand & Gravel Co., 169 So. 319, 232 Ala. 623
N.H.—Sandford v. Nickerson, 13 A.2d 723, 91 N.H. 71

Evidence held insufficient
Miss.—Skrmetta v. Clark, 177 So. 11, 180 Miss. 21
N.Y.—Olsen v. Marine Transit Corporation, 257 N.Y.S. 794, 235 App. Div. 535

78. Miss.—Skrmetta v. Clark, 177 So. 11, 180 Miss. 21.
58 C.J. p. 90 note 41 [b].

Questions for court or jury
Ordinarily, reasonableness of motor vessel purchaser's use of vessel in submitting it for acceptance by Coast Guard, as contemplated by sale contract, and time taken by him in seeking entrance of himself and vessel into Coast Guard service and returning vessel to seller after rejection for such service, are fact questions for jury; but, where there is no evidence on which jury could properly find that purchaser acted within reasonable time, court must decide question as matter of law.—Fischbach v. Thornley, D.C.Conn., 52 F.Supp. 964.

79. U.S.—Gilchrist Transp. Co. v. Phenix Ins. Co., Ohio, 170 F. 279, 95 C.C.A. 475.

80. U.S.—The Ocean View, D.C.Md., 21 F.2d 875.

81. U.S.—Bogart v. The John Jay, N.Y., 17 How. 399, 15 L.Ed. 95.
58 C.J. p. 91 note 65

82. U.S.—The Ocean View, D.C.Md., 21 F.2d 875.

Mere security for debt
Mortgage on ship was mere lien to secure debt evidenced by note.—Pausina v. Vodopija, 134 So. 107, 172 La. 325

Provision not effecting ownership
A provision in nonmaritime chattel mortgage on barge, that mortgagor "will not use, or lease, or charter or allow any one else to use" the barge except with mortgagee's written consent, was at most a personal covenant between mortgagor and mortgagee, giving mortgagee right of action for breach thereof, and did not operate to convert the mortgage lien into ownership.—Jones v. Horton & Horton, C.C.A.Tex., 100 F.2d 345

83. U.S.—Portland Flouring Mills Co. v. Portland, etc., SS. Co., D.C.Or., 145 F. 687.
58 C.J. p. 91 note 71.
Bottomry and respondentia see infra §§ 88–100

84. U.S.—Portland Flouring Mills Co. v. Portland, etc., SS. Co., supra
N.Y.—White v. Cole, 24 Wend. 116, reversed on other grounds 26 Wend. 511.

85. U.S.—Portland Flouring Mills Co. v. Portland, etc., SS. Co., D.C.Or., 145 F. 687.
58 C.J. p. 91 note 73

86. U.S.—Burke v. The M. P. Rich, C.C.Mass., 4 F.Cas.No.2,161.

87. U.S.—Burke v. The M. P. Rich, supra.

88. U.S.—In re The Lincoln Land, D.C.Mass., 295 F. 358.

89. U.S.—Davidson v. Baldwin, Mich., 79 F. 95, 24 C.C.A. 453.
58 C.J. p. 91 note 77.

90. N.Y.—Birkbeck v. Tucker, 2 N.Y.Super. 139.

91. U.S.—Morgan's Assignees v. Shinn, D.C., 15 Wall. 105, 21 L.Ed. 87.
58 C.J. p. 91 note 80.

a bill of sale of a vessel, although absolute in its terms, may be shown by parol evidence to be intended only as a mortgage,[92] as for the purpose of negativing any authority to procure supplies or repairs on the credit of its holder.[93] Positive evidence that the bill of sale was taken merely as security is not overcome by the fact that the bill has been recorded,[94] that the vessel was enrolled in the name of the transferee,[95] that he ratified the act of a coowner in taking out a policy of insurance in his own name for the benefit of all concerned,[96] or that no note or bond was taken by him.[97]

What law governs. Except to the extent that the mortgage of a vessel is regulated by federal statute, the validity and construction of such a mortgage are determined by the law of the state where it was made,[98] and it is competent for the state courts to decide what were the laws and usages of commerce which would justify the execution of such a mortgage.[99] The matter of such mortgages, however, particularly as to their recordation, as discussed infra § 25, has been regulated by acts of congress, and, to the extent that such acts have established regulations different from those recognized by the state courts, the rules of the state courts are superseded,[1] and a mortgage of a vessel according to such statute is good, although not according to state law.[2]

Federal Ship Mortgage Act. The federal Ship Mortgage Act, 46 U.S.C.A. §§ 911–1014, which has been held valid,[3] has been said to make a profound change in the maritime law.[4] The purpose of the act is to benefit the merchant marine by encouraging investment of mortgage capital in ships through the device of according a generally preferred claim status to mortgages on ships.[5] In other words, the object of the act was to enable the owners of vessels to use the vast capital invested in them with at least a part of the facility enjoyed by investors in structures on land,[6] and to that end the statute is remedial and should be liberally construed,[7] in the light of its purpose,[8] although all of its provisions as to registry and indorsement on the ship's papers should be complied with,[9] and the act should be strictly construed with respect to the protection of creditors and lienholders from fraud and the like.[10] A provision of such act to the effect that a vessel lawfully documented shall be held to continue to be so documented until its documents are surrendered with the approval of the shipping board applies only to a vessel which, when conveyed, is subject to a valid preferred mortgage and for the purposes of such mortgage.[11] The act applies to mortgages on ships of United States registry irrespective of the maritime or nonmaritime purpose to which the funds raised by the mortgage are devoted.[12] A vessel of the United States licensed at a port within

92. Mass.—Blanchard v. Fearing, 4 Allen 118
58 C.J. p. 91 note 81.

93. Mass.—Howard v. Odell, 1 Allen 85
58 C.J. p. 92 note 82.

94. U.S.—Morgan's Assignees v. Shinn, D.C., 15 Wall. 105, 21 L.Ed. 87.

95. U.S.—Morgan's Assignees v. Shinn, supra.

96. U.S.—Morgan's Assignees v. Shinn, supra.

97. U.S.—Morgan's Assignees v. Shinn, supra.

98. N.Y.—Wattson v. Campbell, 38 N.Y. 153, 6 Transcr.A. 340.
58 C.J. p. 92 note 89.

99. Miss.—Shaw v. McCandless, 36 Miss. 296

1. U.S.—Aldrich v. Ætna Ins. Co., N.Y., 8 Wall. 491, 19 L.Ed. 473.
58 C.J. p. 92 note 92.

2. Miss.—Shaw v. McCandless, 36 Miss. 296.
58 C.J. p. 92 note 93.

3. U.S.—Detroit Trust Co. v. Barlum S. S. Co., D.C.N.Y., 56 F.2d 455

4. U.S.—The R. Lenahan, D.C.Pa., 10 F.Supp. 497.

5. U.S.—The Thomas Barlum, N.Y., 55 S.Ct. 31, 293 U.S. 21, 79 L.Ed. 176—The R. Lenahan, D.C.Pa., 10 F.Supp. 497.
La.—Brock v. Angeron, App., 16 So. 2d 93.
Preferred status of mortgage under act see infra subdivision e of this section.

Attraction of capital

(1) The main purpose of the Ship Mortgage Act as a whole is to attract capital to domestic shipping by affording better mortgage security.—The Emma Giles, D.C.Md., 15 F.Supp. 502.

(2) The Ship Mortgage Act was designed to make ships' mortgages desirable investments, and purpose of act was to make such mortgages as available for investment as other securities with which the public is accustomed to deal, and to render that class of securities attractive which had been unmarketable before.—The Favorite, C.C.A.N.Y., 120 F.2d 899.

Promoting public confidence

Object of congress in enacting Ship Mortgage Act was to encourage investment of capital in American shipping, to improve security of investments by way of mortgage on vessels, and to promote public confidence in such investments.—Collier Advertising Service v. Hudson River Day Line, D.C.N.Y., 14 F.Supp. 335.

6. U.S.—The Owego, D.C.La., 292 F. 403.

7. U.S.—The Nan B, D.C.Alaska, 78 F.Supp. 748—The Owego, D.C.La., 292 F. 403.

8. U.S.—The Emma Giles, D.C.Md., 15 F.Supp. 502

9. U.S.—The Owego, D.C.La., 292 F. 403.

10. U.S.—The Nan B, D.C.Alaska, 78 F.Supp. 748

Requiring bond in creditor's suit

Order denying application of trustee under admiralty mortgage to require petitioning creditor in creditor's suit to give bond was held not abuse of discretion, where court had operated mortgagor corporation's boats for year through receivers.—First Union Trust & Savings Bank v. Consumers' Co., C.C.A.Ill., 63 F.2d 273, reversed as moot 54 S.Ct. 61, 290 U.S. 585, 78 L.Ed. 517.

11. U.S.—The Lincoln Land, D.C.Mass., 295 F. 358.

12. U.S.—The Thomas Barlum, N.Y., 55 S.Ct. 31, 293 U.S. 21, 79 L.Ed. 176—The John J. Barlum, N.Y., 55 S.Ct. 31, 293 U.S. 21, 79 L.Ed. 176.

the United States is a proper subject of mortgage under the act.[13] Where there are several vessels and properties covered by a mortgage issued under the act, the mortgage constitutes a lien for its full amount on each piece of property.[14]

Forfeiture of the ship pursuant to the provisions of a state statute destroys an ordinary mortgage not shown to be preferred.[15]

b. Requisites and Validity in General

It is ordinarily essential to the validity of a mortgage on a ship that her mortgagor have some title or interest in the ship at the time of execution of the mortgage; a mortgage executed under the federal Ship Mortgage Act should comply with the requirements of the act.

In accordance with general rules discussed in Chattel Mortgages §§ 23–27, it is ordinarily essential to the validity of a mortgage on a ship that the mortgagor have some title or interest in the vessel at the time of its execution,[16] and, in the absence of statute, a mortgage covering all vessels then owned by the mortgagor and all he should afterward acquire is invalid as to after-acquired vessels as against intervening equities of third persons.[17] The failure of an instrument to comply with the legal requirements for execution of a chattel mortgage has been held immaterial as between the parties thereto,[18] and a misdescription of the vessel is immaterial if her identity is clear and a purchaser of the ship is not misled.[19]

Under the federal Ship Mortgage Act, 46 U.S. C.A. §§ 911–1014, a mortgage, executed thereafter, in the form of a preferred mortgage, is valid as such,[20] provided there is due compliance with all the statutory requirements.[21] Such a mortgage is valid as a mortgage as soon as it is executed and recorded, although it is not immediately indorsed on the ship's papers as required by the statute,[22] but its priority over liens which attach in the meantime may be affected thereby, as discussed infra subdivision e of this section. Irregularity in repect of the enrollment of a ship will not invalidate a mortgage on the vessel.[23] Where a mortgage on a ship covers property other than a vessel, the statute mandatorily requires that the mortgage provide for the separate discharge of such property by payment of a specified portion of the mortgage indebtedness.[24] Where the mortgage covers more than one vessel, it is not required that the mortgage

13. La.—Brock v. Angeron, App., 16 So 2d 93.

14. U.S.—Collier Advertising Service v. Hudson River Day Line, D.C. N.Y., 14 F.Supp. 335.

15. U.S.—Bard v. The Silver Wave, D.C.Md., 98 F.Supp. 271

16. Ga.—Bertha Mineral Co. v. Buie, 109 S.E. 539, 27 Ga.App. 660.
58 C.J. p. 93 note 15

17. U.S.—Berwind-White Coal Min. Co. v. Metropolitan SS. Co., C.C.Me., 166 F. 782, affirmed American Trust Co. v. W. & A. Fletcher Co., 173 F. 471, 97 C.C.A. 477, certiorari denied 30 S.Ct. 400, 215 U.S. 600, 54 L.Ed. 343.

18. Cal.—A. Paladini, Inc., v. Durchman, 13 P.2d 731, 216 Cal. 212.

19. Ill.—Mattingly v. Darwin, 23 Ill. 618.
58 C.J. p. 92 note 3 [a].

20. U.S.—The American Star, C.C.A. N.J., 11 F.2d 479.

21. U.S.—Morse Dry Dock, etc., Co. v. The Northern Star, N.Y., 46 S. Ct. 589, 271 U.S. 552, 70 L.Ed. 1082—The Enos, D.C.Wash., 24 F.Supp. 387.

Citizenship

Proof that mortgage trustee was New York corporation, that its president and all directors were United States citizens and that ninety-six per cent of shares of its stock was held by persons with addresses within United States, established that mortgagee was citizen of United States within requirements of Ship Mortgage Act.—Collier Advertising Service v. Hudson River Day Line, D.C.N.Y., 14 F.Supp. 335.

Effect as to strangers

Mortgages against vessel were not good as against strangers where statutory provisions were not complied with.—The Diane, D.C.Fla., 45 F. Supp. 510.

22. U.S.—Morse Dry Dock, etc., Co. v. The Northern Star, N.Y., 46 S.Ct. 589, 271 U.S. 552, 70 L.Ed. 1082—The Henry W. Breyer, D.C.Md., 17 F.2d 423.

23. U.S.—Collier Advertising Service v. Hudson River Day Line, D.C.N.Y., 14 F.Supp. 335.

As to oath

Irregularity in enrollment of vessels belonging to corporation, in that ownership oath was made by vice president and was without specific written authority attested by corporate seal as required by statute, was not such as to invalidate ship mortgage.—Collier Advertising Service v. Hudson River Day Line, supra.

Enrollment in corporate name

Fact that vessels belonging to corporation were enrolled in corporate name did not invalidate ship mortgage, as statute providing that enrollments and licenses for vessels owned by any incorporated company may be issued in name of president or secretary of company was permissive only.—Collier Advertising Service v. Hudson River Day Line, supra.

24. U.S.—The Emma Giles, D.C.Md., 15 F.Supp. 502.

Compliance not shown

Statute requiring mortgage covering vessel and other property to provide for separate discharge of such property by payment of specified "portion" of mortgage debt contemplated certain proportion of debt as it exists at particular time; and mortgage deed of trust securing bond issue amounting to one hundred seventy-five thousand dollars and covering three vessels, together with urban and rural lands, and conditionally authorizing release of vessels on paying seventy-five thousand dollars for one and ten thousand dollars for each of other two vessels and on paying one hundred thousand dollars for urban lands and thirty-five thousand dollars for rural lands, did not comply with statute requiring provision for separate discharge of nonmaritime property by payment of specified portion of mortgage debt, especially where debt had been reduced to ninety thousand dollars.—The Emma Giles, supra.

Protection of third persons

Statute requiring mortgage covering vessel and other property to provide for separate discharge of such property by payment of specified portion of mortgage debt was intended to insure validity of statutory extension of admiralty jurisdiction, and to protect third persons, such as prospective lienors.—The Emma Giles, supra.

Mortgage held not to include other property

Mortgages on vessels and all

provide for the separate discharge of each vessel by payment of a portion of the mortgage indebtedness, but, if the mortgage does so provide, the amount of the portion to be paid must be indorsed on the documents of the vessel.[25] The provision of the statute requiring the indorsement on the ship's documents of provisions of the mortgage relating to other property included therein is directory, and the failure to make such indorsement as to other property pledged for the mortgage debt does not render the mortgage void.[26] A ship mortgage is valid, although it is executed pursuant to a prior bill of sale providing for a standard form of mortgage, given before the enactment of the statute;[27] and the agreement in the bill of sale to give a mortgage is not sufficient to constitute an existing equitable mortgage so as to render the statute inapplicable, within the provision that it is not applicable to any existing mortgage.[28]

Statutes providing that on the sale or transfer of a vessel an instrument in the nature of a bill of sale shall recite at length the certificate of registry have been held inapplicable to a mortgage of a ship.[29] It has, however, been held essential to the validity of a mortgage executed by the purchaser of a ship that his bill of sale be recorded in the office of the collector of customs.[30]

Reregistry. Under an act of congress that, when a registered vessel is sold she shall be registered anew, and that no mortgage shall be valid against third persons without actual notice, unless recorded in the office of the collector where such vessel is registered, a mortgage given by a buyer without reregistering the vessel is invalid as against an attaching creditor.[31] Any defect in the documentation of a ship existing prior to its sale does not affect a preferred ship mortgage where before sale the ship was not covered by the mortgage and on transfer to the purchaser and mortgagor the ship was registered anew.[32]

c. Delivery or Possession

Unless required by statute, immediate delivery of the vessel to the mortgagee, or a change of possession, is not essential to the validity of a mortgage thereon.

Unless required by statute,[33] a mortgage of a vessel, although unaccompanied by an immediate delivery and not followed by an actual change of possession, is not void if it is made to appear on the part of the mortgagee that the mortgage was made in good faith and without any intent to defraud purchasers or creditors.[34] The want of change of possession subjects the instrument prima facie to an imputation of fraud, which may be rebutted by proof of good faith.[35] If the vessel is at sea or ready to go to sea, a mortgage thereof will be good as against creditors or assignees in bankruptcy, if the muniments of title are transferred,[36] and possession of the vessel is taken by the mortgage as soon as possible.[37] A failure to change possession will not affect the mortgage where there is a sufficient reason for such failure,[38] as where an undivided share in a vessel is mortgaged,[39] or where by agreement in the mortgage an immediate voyage by her is contemplated to be made by the owner.[40]

Vessel in process of construction. Where a shipbuilder, before he commences building the vessel, enters into a contract by which he hypothecates the vessel to be built for advances, it is a valid mortgage or hypothecation of the builder's interest,[41] and gives a lien which attaches as the vessel comes into existence.[42] Such a mortgage or hypotheca-

freight earnings were held not to include "property other than a vessel" within Ship Mortgage Act providing that mortgage including "property other than a vessel" shall not be preferred mortgage unless separate discharge for such property is provided for, since earned freight is part of vessel, and there was no proof that freights had been applied to mortgages or released to mortgagor—The R Lenahan, D C Pa, 10 F Supp 497

Discharge payment should be a fixed proportion of the debt as it exists at any time rather than a fixed sum of money, and the release clause of the mortgage should be drawn accordingly—The Emma Giles, D.C. Md, 15 F.Supp. 502.

25. U.S.—The Emma Giles, supra.

26. U.S.—The Nanking, D C Cal., 292 F. 642.

27. U S—The American Star, C C A. N J, 11 F 2d 479

28. U S—The American Star, supra

29. U S—Collier Advertising Service v Hudson River Day Line, D.C. N Y, 14 F Supp. 335—The Fort Orange, D C.N Y, 5 F Supp 833.

30. Wash—Whiting v. Rubinstein, 116 P 2d 305, 10 Wash 2d 5.

31. U S.—The Susana, C.C.A.Va, 2 F 2d 410

32. U S—The Fort Orange, D C N Y, 5 F Supp. 833.

33. N Y—Keller v. Paine, 13 N E. 635, 107 N Y. 83
58 C.J. p 93 note 21.

34. U S.—D'Wolf v. Harris, C C. Mass, 8 F.Cas No 4,221, 4 Mason 515
58 C J. p 93 note 22.

35. N Y—Cole v White, 26 Wend 511
58 C J p 93 note 23

36. Mass—Badlam v Tucker, 1 Pick 389, 11 Am D 202
Pa—Morgan v. Biddle, 1 Yeates 3.

37. Pa—Morgan v. Biddle, supra.
58 C J p 93 note 25.

38. U.S—Leland v. The Medora, C. C Mass, 15 F Cas.No 8,237, 2 Woodb. & M 92.

39. U S—Winsor v. McLellan, C.C. Mass, 30 F Cas.No 17,887, 2 Story 492

40. U S—Leland v The Medora, C.C. Mass, 15 F.Cas.No.8,237, 2 Woodb & M 92.

41. U.S—Hull of A New Ship, D C. Me., 12 F Cas.No 6,859, 2 Ware 203.
58 C J p 93 note 30.

42. U.S.—Hull of A New Ship, supra.

tion, without actual possession or delivery, is not available against a subsequent bona fide purchaser[43] or an attaching creditor.[44]

d. Construction and Operation

The rules governing construction of chattel mortgages ordinarily control in respect of a mortgage of a vessel.

The rules governing construction of chattel mortgages, as discussed in Chattel Mortgages §§ 104–129, ordinarily control in respect of the construction and operation of a mortgage of a vessel,[45] as with respect to the property covered by the terms of the mortgage.[46]

e. Priorities

In the absence of statutory provision according it a preferred status, a mortgage on a ship is postponed to maritime liens but comes ahead of the claims of general creditors. Under the provisions of the federal Ship Mortgage Act a mortgage on a vessel is accorded a preferred status.

Although, as discussed supra subdivision a of this section, a mortgage on a vessel is not a maritime contract, and although, as considered in Maritime Liens §§ 50–59, a mortgage must be postponed to maritime liens, even though subsequently created, such as liens for seamen's wages, as discussed in Seamen § 149, after the satisfaction of the maritime liens, a debt secured by a mortgage on the vessel will be paid before the debts of general creditors,[47] unless the mortgage is void by virtue of some statute.[48] A mortgage reciting that it is to secure a debt also secured by a bill of sale on another vessel is not necessarily inconsistent with the mortgagee's ownership of the other vessel,[49] and, where he conducts himself as owner, he cannot subsequently claim to be a mere lienholder as to moneys advanced for the purchase price and assert priority as such to insurance money on the vessel after its loss.[50] If the jurisdiction of admiralty has been properly invoked, a mortgage lacking the status of a preferred mortgage under the federal Ship Mortgage Act may nevertheless be given effect as a lien and accorded the legal priority to which it may be entitled.[51]

Under the federal Ship Mortage Act, 46 U.S.C.A. §§ 911–1014, a method is provided whereby a preferred status may be given to a mortgage on a vessel,[52] and the preferred mortgage is accorded the priority specified by the act,[53] the mortgage being accorded priority over all other claims against the vessel except preferred maritime liens enumerated by the statute, as discussed in Maritime Liens § 51 b. On the mortgagee's compliance with the requirements of the statute, a mortgage on a vessel has such preferred status,[54] even though the mortgagor may have failed to comply with certain statutory requirements,[55] and persons dealing with the vessel are affected with constructive notice thereof and are bound by its terms.[56] A provision of the act relating to priority of liens on the proceeds of a ship sold in admiralty in a suit to enforce a preferred mortgage is not limited to a suit brought expressly to enforce the mortgage, but applies as well to a suit brought by other lien claimants in which the mortgage also is enforced.[57] In order to enjoy a preferred status, the mortgage must comply with

43. Mass.—Bonsey v. Amee, 8 Pick. 236

44. Me.—Goodenow v. Dunn, 21 Me. 86

45. N.Y.—Hudson Nav. Co. v. Union Trust Co., 163 N.Y.S. 473, 99 Misc. 54

46. N.Y.—Hudson Nav. Co. v. Union Trust Co., supra.
58 C.J. p. 94 note 37.

Repairs and alterations
Mortgage covering properties of lumber company included steel barge and repairs or alterations thereto not amounting to change of identity.—Continental Nat. Bank & Trust Co. v. Fullerton, C.C.A.Ark., 48 F.2d 20.

Replacements
Under terms of preferred ship mortgage, articles installed at time vessel was converted for a new use as replacement of equipment vessel contained when mortgaged and which were necessary to the new use of vessel, and articles added to equipment to increase efficiency and safety of operation became part of the vessel subject to the mortgage as between the mortgagor and assignee of mortgagee.—The Huntington Sanford, D.C.Mass., 73 F.Supp. 67.

47. U.S.—The Avalon, D.C.W.Va., 169 F. 696.
58 C.J. p. 94 note 42.

Broker's commissions
Claim of ship broker for commissions for securing charter for owner of steamship was purely in personam and must yield to lien of mortgages, duly recorded in the county records, on steamship.—The Atlanta, D.C.Ga., 82 F.Supp. 218.

48. U.S.—The Allianca, N.Y., 73 F. 452, 19 C.C.A. 528
58 C.J. p. 94 note 43.

49. U.S.—Henslee v. West Kentucky Coal Co., Ky., 241 F. 609, 154 C.C.A. 367.

50. U.S.—Henslee v. West Kentucky Coal Co., supra.

51. U.S.—The Emma Giles, D.C.Md., 15 F.Supp. 502.

52. U.S.—The Oconee, D.C.Va., 280 F. 927.

53. U.S.—The Herbert L. Rawding, D.C.S.C., 55 F.Supp. 156.

54. U.S.—Libel of Pilgrim Trust Co. v. The Frances C. Denehy, Etc., D.C.Me., 94 F.Supp. 807.

55. U.S.—Libel of Pilgrim Trust Co. v. The Frances C. Denehy, Etc., supra.

Failure to place copy of mortgage aboard ship
Fact that mortgagor may not have fulfilled the requirements of Ship Mortgage Act in that he may not have used diligence to place a copy of mortgage on board the vessel would not prevent mortgage from qualifying as a preferred ship mortgage.—Libel of Pilgrim Trust Co. v. The Frances C. Denehy, Etc., supra.

56. U.S.—The Oconee, D.C.Va., 280 F. 927
58 C.J. p. 94 note 48—38 C.J. p. 1236 note 21.

57. U.S.—The Henry W. Breyer, D.C. Md., 17 F.2d 423.

the requirements and conditions specified in the act,[58] and it is essential that the mortgagee comply with all requirements applicable to him.[59] A mortgagee's interest as a preferred mortgagee to a subsequent claim may be terminated by a surrender of the documents of the vessel, with the mortgagee's consent, with the approval of the shipping board.[60] Inadequacy of consideration may bar the right to a preferred mortgage.[61]

As between mortgages. In accordance with general rules, discussed in Chattel Mortgages §§ 294–296, separate mortgages on a vessel are entitled to priority according to their respective dates of record,[62] unless special equities exist by virtue of which a subsequent mortgage becomes entitled to priority,[63] as where the holder of the mortgage subsequent in date acquires it by assignment through a bona fide purchaser for value without notice.[64] Under an act of congress which provides that no mortgage shall be valid unless recorded in the manner and place required by the statute, the recording of a mortgage gives it a preference over a subsequent mortgage,[65] irrespective of any formalities required by a state statute to give effect to chattel mortgages.[66] A subsequent mortgagee who acts on the assumption that the validity of a prior mortgage is unquestioned and recites in his own subsequent mortgage that it is a second preferred mortgage subject to the lien of a prior mortgage is estopped to attack the validity of the prior mortgage,[67] and in any event minor irregularities in respect of the record of the prior mortgage will not destroy its status as a prior preferred mortgage.[68] On the other hand, it has been held that, where the holder of a subsequent recorded mortgage has, at the time, notice of a prior unrecorded mortgage, the recorded mortgage is postponed to the unrecorded mortgage.[69]

Insurance premiums While premiums for insurance benefiting only the mortgagee of a libeled ship may be added to the mortgage debt in accordance with the terms of the mortgage, such premiums will not, it has been held, be accorded precedence over other liens having priority over the mortgage debt,[70] and, where the insurance was taken out without knowledge of the marshal, the premiums will not be regarded as part of the costs taxable by the marshal.[71]

Pledgees of a ship, its tackle, and earned freight have claims prior to those who have investments in vessel venture.[72]

Tax lien. The lien of the mortgage has been held superior to a tax lien, at least where both liens are held by the federal government.[73]

Towage lien. A lien for towage taken necessarily and as part of pilotage service has been held superior to a ship's mortgage claim,[74] although an ordinary towage claim has been held inferior to a mortgage on the towed ship [75]

58. U.S.—The Angler, D.C.N.Y., 23 F Supp 341.
La.—Brock v. Angeron, App., 16 So. 2d 93.

Omission of several requirements
Where mortgage on vessel was not designated as a preferred mortgage in mortgage itself, and was not indorsed on ship's documents carried on the ship and an affidavit was not filed with record of mortgage in office of collector of customs to the effect that it was a preferred mortgage, mortgage could not be treated as a preferred mortgage—Bard v The Silver Wave, D C Md., 98 F Supp 271.

Mortgage held to comply with statute
(1) In general—Libel of Pilgrim Trust Co v. The Frances C Denehy, etc., D C Me., 94 F Supp. 807.

(2) Where a mortgage on a vessel was delivered to the collector of customs accompanied by the statutory affidavit of good faith, although only a copy of the affidavit was attached to the record of the mortgage, there was a sufficient compliance with the statute—The Eastern Temple, C C A. Va., 94 F.2d 374

59. U.S—National Bank of Fayette County v Enterprise Marine Dock Co, C.C.A.W Va, 43 F.2d 547.

Failure to indorse ship's documents
Mortgage on vessel was not preferred mortgage, where mortgagee did not comply with statute and mortgage was not indorsed on vessel's documents—National Bank of Fayette County v. Enterprise Marine Dock Co, supra.

60. U S—The Smith & Terry No 3, D C N Y, 16 F 2d 613, affirmed, C.C. A, 26 F 2d 964
58 C.J. p 95 note 55.

61. U S—The R Lenahan, D.C Pa, 10 F Supp. 497

62. U S—The Atlanta, D C Ga., 82 F Supp. 218—Baumgartner v. The W. B. Cole, C C Ohio, 49 F 587, affirmed 59 F 182, 8 C C A. 78.

63. U S.—The Katie O'Neil, D.C.Cal, 65 F. 111.
58 C.J. p 95 note 59.

64. U.S—Baumgartner v. The W B Cole, C.C Ohio, 49 F 587, affirmed 59 F 182, 8 C C A. 78.

65. U S—White's Bank v. Smith, N. Y., 7 Wall. 646, 19 L.Ed. 211.

66. U.S—White's Bank v. Smith, supra.

67. U.S.—The Nan B, D C.Alaska, 78 F Supp. 748.

68. U S.—The Nan B, supra.

As to affidavit
Under statute preferring mortgage on certain vessels if an affidavit is filed with mortgage record to effect that mortgage is made in good faith and without design to hinder, delay, or defraud any "existing or future" creditor of the "mortgagor or lienor of the mortgaged vessel," omission of the quoted words did not render affidavits defective so as to entitle subsequent mortgage to priority, since word "creditor" as used in affidavits includes creditor of mortgagor or lienor of vessel, existing as well as future.—The Nan B, supra.

69. U.S—The John T Moore, C.C. La., 13 F Cas No.7,430, 3 Woods 61.

70. U S—The Herbert L. Rawding, D C S C., 55 F Supp 165.

71. U.S—The Herbert L. Rawding, supra.

72. U.S—The R. Lenahan, D C.Pa., 10 F.Supp. 497.

73. U.S—U S v The Pomare, D.C. Hawaii, 92 F.Supp. 185

74. U.S.—The Mystic, D.C.Ill., 30 F. 73.

75. U.S—The Smith & Terry No 3, C C A N Y, 26 F 2d 964.
63 C.J p 17 note 70.

Wharfage. A claim for wharfage is entitled to a lien having preference over preferred mortgages from the time that the vessel was libeled,[76] but lien claims for water and wharfage prior to such time should be disallowed.[77]

f. Rights and Liabilities of Mortgagee and Mortgagor

(1) In general
(2) Possession and right to possession
(3) Right to earnings
(4) Liability for supplies, repairs, and services
(5) Effect of sale or seizure of ship
(6) Foreclosure and sale
(7) Redemption

(1) In General

In some jurisdictions the mortgagee of a ship becomes vested with the legal title subject to the mortgagor's right of redemption, but in other jurisdictions title remains in the mortgagor and the mortgagee secures only a lien

In some jurisdictions, after the mortgage takes effect, the mortgagee of the vessel becomes the owner of the legal title to the vessel, subject to be defeated by the performance of the condition.[78] On default in the payment of the debt secured, the mortgagee's title becomes absolute as against the mortgagor,[79] and his right of possession perfect,[80] and the mortgagor has only an equity of redemption.[81]

In other jurisdictions, however, the legal title remains in the mortgagor, and the mortgagee does not become the owner of the vessel, but the mortgage is regarded as constituting a security only, and as merely creating a lien on the vessel.[82] The mortgagee has a beneficial interest in the vessel which may be attached by his creditors;[83] and, where the mortgagor and others interested are parties, the equity may be foreclosed, and the debt or interest subjected to the attaching creditor's claim.[84]

Right to sue for injury to ship. In some jurisdictions, if the mortgagor still retains his right of redemption, he may maintain an action for an injury to the vessel,[85] notwithstanding she is in the possession of the mortgagee who receives her earnings,[86] but it has also been held that the mortgagee, by virtue of his title, has, as between himself and the mortgagor, the right to receive and recover damages resulting from a collision to the mortgaged vessel,[87] although the mortgagor held the right to redeem at the time the collision occurred,[88] and that this rule is particularly applicable where the mortgagee's title has become absolute by foreclosure.[89] It has also been held that for the protection of his interest the mortgagee of a vessel may come in as colibelant in a libel filed by the owners against the offending vessel.[90]

Liability of titular owner. One in whose name title to a vessel stands, but who is not in possession of the vessel and does not control it, who executes a mortgage on it for the real owner and for the benefit of the vessel, merely because the title stands in his name, without any covenant personally to pay the mortgage debt, is not liable for the debt to the mortgagee.[91]

The assignee of a mortgage of a vessel takes it with all the rights and powers which were possessed by the mortgagee;[92] and no equities existing between several mortgagors will deprive the assignee of any of the usual remedies for the enforcement of the security.[93]

Withdrawal of trust fund. A mortgagor's right under a trust mortgage covering vessels under construction to withdraw collateral from a sinking fund to pay for new vessels or for permanent improvements to vessels does not give him authority to withdraw bonds to apply on the cost of a vessel mortgaged after it was completed and paid for.[94]

76. U.S.—The Herbert L. Rawding, D.C.S.C., 55 F.Supp. 156

77. U.S.—The Herbert L. Rawding, supra.

78. U.S.—North River Coal, etc., Co. v. McWilliams, D.C.N.Y., 37 F.2d 22.
Me.—Donnell v. G. G. Deering Co., 97 A. 130, 115 Me. 32.
Passing of title under chattel mortgage generally see Chattel Mortgages § 1.

79. N.Y.—Kimball v. Farmers', etc., Nat. Bank, 34 N.E. 337, 138 N.Y. 500, 20 L.R.A. 497.
58 C.J. p. 95 note 69.

80. N.Y.—Judson v. Easton, 58 N.Y. 664.

81. U.S.—North River Coal, etc., Co. v. McWilliams, D.C.N.Y., 37 F.2d 22.
Redemption generally see infra subdivision f (7) of this section

82. Pa.—Woods v. Klein, 72 A. 523, 223 Pa. 256
58 C.J. p. 95 notes 77, 78, p. 96 note 79.

83. Ky.—Lyon v. Johnson, 3 Dana 544.

84. Ky.—Lyon v. Johnson, supra.

85. U.S.—Wilson v. Knapp, 42 N.Y. Super. 25, affirmed 70 N.Y. 596

86. U.S.—Wilson v. Knapp, supra.

87. Me.—Donnell v. G. G. Deering Co., 97 A. 130, 115 Me. 32.

88. Me.—Donnell v. G. G. Deering Co., supra.

89. Me.—Donnell v. G. G. Deering Co., supra.

90. U.S.—The Grand Republic, D.C. N.Y., 10 F. 398

91. N.Y.—Jenkins v. Wheeler, 2 Abb.Dec. 445, 3 Keyes 659, 4 Transcr.A. 450.

92. Mich.—Dalrymple v. Sheehan, 20 Mich. 224.

93. Mich.—Dalrymple v. Sheehan, 20 Mich. 224.

94. N.Y.—Hudson Nav. Co. v. Union Trust Co., 163 N.Y.S. 473, 99 Misc. 54.

(2) Possession and Right to Possession

While in possession of his ship the mortgagor retains the rights and privileges of ownership, but, when the mortgagee takes possession, the latter is then regarded as the owner.

As long as the mortgagee of the ship does not take possession, even after default, the mortgagor, as the registered owner of the ship, retains all the rights and privileges of ownership,[95] and all transactions and contracts entered into by him are valid and binding so long as they do not impair the security of the mortgagee.[96] The mortgagor in possession may make any change, addition, or repairs on the vessel necessary and convenient for her preservation and use as a ship;[97] and, in such a case, old material, displaced by new, may be disposed of by the mortgagor as his property, unaffected by the mortgage;[98] but, if it is not disposed of, and is left on the vessel and passes into the possession of the mortgagee with the vessel, and is capable of being used in its ordinary navigation, it is within the operation of the mortgage and belongs to the mortgagee.[99] An unqualified sale by the mortgagor, not merely of his interest in the equity of redemption, but of the entire vessel for his own benefit, constitutes a wrongful conversion for which trover will lie by the mortgagee[1]

Where the mortgagee does take possession, he becomes the owner, and it is his duty to put the vessel, so far as may be, to some profitable use;[2] and on the other hand he may intervene and contest claims affecting his lien on the vessel.[3] The mortgagee is not personally liable for a contract made by the mortgagor, who is in possession operating the vessel,[4] even though the vessel is registered in the name of the mortgagee,[5] and the money received from the contract has been paid to the mortgagee in accordance with the terms of the mortgage,[6] and even though such money is procured by false representations, of which the mortgagee had no notice.[7]

Where a state statute precludes a mortgagee of a ship from taking possession of her on the mortgagor's breach of agreement unless such taking of possession is authorized by the express terms of the mortgage, a mere oral understanding of the parties is insufficient to constitute the essential authorization,[8] but nothing in such statute limits the right of the parties after execution of the mortgage to enter into an agreement, based on adequate consideration, relative to the mortgagee's taking possession of the ship in the event that the mortgagor fails to comply with his agreement, and under such a subsequent agreement the mortgagee may properly take possession on the mortgagor's failure to comply with his agreement.[9] By taking possession pursuant to a valid subsequent agreement the mortgagee does not waive its lien or right to foreclosure.[10]

(3) Right to Earnings

The mortgagor is entitled to all earnings of the ship which accrue while he is in possession and control, but on his taking possession the mortgagee becomes entitled to earnings then accruing.

If the mortgagee does not take possession of the vessel, he is not entitled to her earnings which accrue while the mortgagor is in possession and control;[11] but, if he takes possession, sufficient to terminate the mortgagor's possession and control of the vessel, and to assume the rights of ownership in himself,[12] he takes the right to all earnings then accruing,[13] and this right cannot be defeated or curtailed by an assignment of the freight by the shipowner.[14] The mortgagee in possession, however, is

95. N.Y.—Kimball v Farmers', etc., Nat Bank, 34 N.E. 337, 138 N.Y. 500, 20 L.R.A. 497.
58 C.J. p 96 note 89

96. U.S.—Merchants' Banking Co v The Afton, N.Y., 134 F. 727, 67 C.C.A. 618, certiorari denied 25 S.Ct. 794, 196 U.S. 639, 49 L.Ed. 630
Idaho—Eureka Min., etc., Co. v. Lewiston Nav. Co., 86 P. 49, 12 Idaho 472

97. U.S.—The Canada, D.C.Or., 7 F. 248, 7 Sawy. 180.

98. U.S.—The Canada, supra.

99. U.S.—The Canada, supra.

1. Conn.—Ashmead v. Kellogg, 23 Conn. 70.

2. Mass.—Clark v. Story, 94 N.E. 295, 208 Mass. 36.

3. U.S.—The Hendrik Hudson, D.C. N.Y., 11 F.Cas.No.6,358—Thomas v. Jamesson, D.C., 23 F.Cas.No.13,900, 1 Cranch C.C. 91.

4. U.S.—Calumet, etc., Min. Co. v Equitable Trust Co., D.C.N.Y., 275 F. 552

5. U.S.—Calumet, etc., Min. Co. v. Equitable Trust Co., supra

6. U.S.—Calumet, etc., Min. Co. v. Equitable Trust Co., supra

7. U.S.—Calumet, etc., Min. Co. v. Equitable Trust Co., supra
58 C.J. p 97 note 5.

8. Cal.—A. Paladini, Inc., v. Durchman, 13 P.2d 731, 216 Cal. 212

9. Cal.—A. Paladini, Inc., v. Durchman, 75 P.2d 553, 24 Cal.App.2d 440, distinguishing 13 P.2d 731, 216 Cal. 212

10. Cal.—A. Paladini, Inc. v Durchman, 75 P.2d 553, 24 Cal.App.2d 440.
Bill of sale construed as mortgage
Where owner of boat executed bill of sale thereof to creditor, under circumstances rendering bill of sale in effect a mortgage, and subsequently agreed that mortgagee might take possession in event of default, mortgagee did not waive his lien or right to foreclosure by taking possession of boat pursuant to agreement.—A. Paladini, Inc., v. Durchman, supra

11. N.Y.—Kimball v. Farmers', etc., Nat Bank, 34 N.E. 337, 138 N.Y. 500, 20 L.R.A. 497.
58 C.J. p 97 note 22.

12. U.S.—The Wexford, D.C.N.Y., 7 F. 674.

13. U.S.—Merchants' Banking Co. v The Afton, N.Y., 134 F. 727, 67 C.C.A. 618, certiorari denied 25 S.Ct. 794, 196 U.S. 639, 49 L.Ed. 630.
58 C.J. p 98 note 24.

14. U.S.—Merchants' Banking Co. v. The Afton, supra.
58 C.J. p 98 note 25.

not entitled to earnings which have been received by the mortgagor, although for the voyage then current.[15]

Duty to account. Where an attempted foreclosure is avoided and where the mortgagee has been in possession and control of the vessel, he is chargeable with the net amounts which he has received as her earnings,[16] or which, by the exercise of due diligence, he ought to have received[17] As against the amount of such earnings he is entitled to be credited with compensation for services rendered in producing successful voyages and earnings,[18] notwithstanding he fraudulently foreclosed the mortgage, which foreclosure has been set aside[19] On the other hand, he is not entitled to credit for expenditures made, which do not constitute a part of the mortgage debt,[20] or which were not authorized by the mortgage.[21]

(4) Liability for Supplies, Repairs, and Services

Where the mortgagee is not in possession of the ship, liability for supplies, repairs, and services ordinarily rests on the mortgagor and not on the mortgagee.

It is well settled that ordinarily, where the mortgagee of a vessel does not have her in his possession or control, liability for supplies and repairs furnished on the order or at the request of the master or mortgagor is on the mortgagor,[22] and the mortgagee is not liable therefor,[23] and this rule applies, although the mortgagee holds the legal title under a bill of sale absolute on its face,[24] or is vested with the property by the mortgage,[25] and the vessel is registered or enrolled in his name,[26] and although the mortgagee subsequently takes possession.[27] The mortgagee, however, is liable for repairs, supplies, or services furnished while he is in possession and control of the vessel,[28] although his relation to the vessel was unknown to the creditor at the time the demand arose.[29] He is also liable for repairs and supplies, even though not in possession of the vessel, where he has adopted the risks and expenses of the voyage,[30] or has held himself out as the real owner of the vessel in such way as to lead persons to believe that the master or mortgagor was his agent authorized to make contracts concerning the vessel,[31] or where the supplies are furnished, or the repairs made, at his request,[32] or by the direction of someone authorized to contract on his behalf;[33] but neither the master nor the mortgagor has implied authority to represent him in this respect, if he is not in possession of the vessel, and holds his title only as collateral security.[34]

Expense of reconditioning ships after return by government. Where the United States requisitions vessels under an agreement with the owners and mortgagee giving it a lien for transportation charges superior to the mortgage lien, the government is not liable to the mortgagee's assignee for the expense of reconditioning the vessels after their return if such expense is less than the amount due the government for transportation charges;[35] and an assignee of a mortgage and of construction liens for repairs before the government's requisition of the ships may not, as the lienor's assignee, recover from the government the expense of reconditioning the vessels after their return, where the time of assignment of the liens is not shown.[36]

(5) Effect of Sale or Seizure of Ship

The claim of a mortgagee against the ship is lost by her sale pursuant to suit to enforce superior claims, but in such case the mortgagee's claim is transferred to the proceeds of sale in its regular order of priority.

15. U S —Merchants' Banking Co v The Afton, supra.
58 C J p 98 note 27.

16. Mass.—Clark v. Story, 94 N E 295, 208 Mass 36.
Liability of chattel mortgagee generally to account for income, rents, and profits see Chattel Mortgages § 187 a

17. Mass —Clark v. Story, supra.

18. Mass —Clark v Story, supra.

19. Mass.—Clark v Story, supra.

20. Mass —Clark v. Story, supra.

21. Mass.—Clark v Story, supra.
58 C.J. p 98 note 37.

22. N.Y.—Kimball v Farmers', etc., Nat. Bank, 34 N E. 337, 138 N.Y. 500, 20 L.R A. 497.

23. U S.—Davidson v. Baldwin, Mich., 79 F. 95, 24 C.C A. 453.
58 C.J. p 99 note 40.

24. U S —Davidson v. Baldwin, supra.
58 C J p 99 note 41.

25. Mass —Flitner-Atwood Co. v. Fidelity Trust Co., 144 N E 218, 249 Mass 333.

26. Me —Cutler v Thurlo, 20 Me 213
58 C J p 99 note 43.

27. N Y.—Birkbeck v. Tucker, 2 N Y Super 139.
58 C J. p 99 note 44.

28. U.S.—Stalker v. The Henry Kneeland, D C.N Y., 22 F.Cas No 13,282.
58 C.J. p 99 note 45.

29. N Y.—Miln v. Spinola, 6 Hill 218.

30. N.Y.—Weston v. Wright, 24 N. Y.Super. 312.
58 C.J. p 99 note 47.

31. Mass —Howard v Odell, 1 Allen 85—Tucker v. Buffington, 15 Mass. 477.

32. N Y.—Baxter v. Wallace, 1 Daly 303.
58 C.J. p 99 note 49.

33. Mass —Flitner-Atwood Co. v Fidelity Trust Co, 144 N E. 218, 249 Mass. 333.
58 C.J. p 99 note 50.

34. U.S —Morgan's Assignees v. Shinn, D.C., 15 Wall. 105, 21 L Ed. 87.
Mass —Howard v. Odell, 1 Allen 85.

35. U.S.—U. S v Acme Operating Corporation, Ct.Cl, 53 S.Ct. 332, 288 U.S. 243, 77 L Ed. 725.

36. U S.—U S. v Acme Operating Corporation, supra.

The claims of a mortgagee against the vessel are extinguished by a decree and sale of the vessel in a suit brought to enforce a superior claim or lien,[37] although the mortgagee fails to appear or refuses to submit his claims and interests to the decision of the court or to be bound by its decree.[38] His rights after such sale exist only against the proceeds of the sale,[39] in the order of priority to which he is entitled, under the rules considered supra subdivision e of this section; and this rule applies where the vessel is sold at the instance of attachment or execution creditors of the mortgagor.[40] The mortgagee's claim to the proceeds is not extinguished by the fact that he has become the purchaser of the vessel at a forced sale.[41] Where a vessel owned by a club is pledged to one of the members, as security for a loan advanced to pay the purchase money, and the treasurer sells the vessel for more than enough to pay such debt, he must account to the pledgee for the sum received.[42]

Effect of seizure of vessel for violation of law. Under the provision of the Ship Mortgage Act that the interest of the mortgagee shall not be terminated by the forfeiture of the vessel for any violation of any law of the United States, unless he participated therein, the rights of a mortgagee are protected on seizure of the vessel for illegal transportation of liquor in violation of the Prohibition Act, unless he authorized, consented, or conspired to effect the illegal use.[43] Even though the lien of the mortgage on a ship is lost under such statutory provision, the mortgagee may still maintain a personal action on the secured note if the debt and mortgage were bona fide.[44]

(6) Foreclosure and Sale

Except as varied by statutory provisions, questions as to foreclosure and sale under a mortgage of a vessel are ordinarily determined by the rules applicable to chattel mortgages.

Except to the extent that such foreclosure or sale is governed by special statutory provisions,[45] the rules governing the foreclosure and sale under chattel mortgages control in respect of mortgages of vessels,[46] as in connection with matters of pleading,[47] evidence,[48] and trial.[49] Where such power is contained in the mortgage, the mortgagee may sell the vessel on a default, in the payment of the debt secured.[50]

Counsel fees may be allowed a successful mortgagee in foreclosure proceedings brought in admiralty under the Ship Mortgage Act.[51]

37. U S.—The Hendrik Hudson, D.C N.Y., 11 F.Cas No 6,358.

38. U S.—The Hendrik Hudson, supra.
58 C.J. p 100 note 53.

39. U S.—The Acme, C.C N.Y., 1 F. Cas No.28, 7 Blatchf. 366.
58 C J. p 100 note 54

40. La.—Garritson v His Creditors, 7 La. 551.
58 C J. p 100 note 56.

41. U.S.—The Syracuse, D C.N.Y., 23 F.Cas.No.13,716, 9 Ben 348.

42. Pa.—Loew v Austin, 21 A. 240, 140 Pa. 41.
58 C J. p 100 note 59

43. U S.—The Maberhex, D C R I., 6 F.2d 415.

44. La.—Pausina v. Vodopija, 134 So. 107, 172 La 325

45. **Suit in rem in admiralty**
(1) Suit in rem in admiralty was proper remedy to enforce mortgage lien under federal Ship Mortgage Act. —Consolidated Fisheries Co. v Fairbanks, Morse & Co., C.A.Pa., 193 F 2d 957.

(2) Under such statute a court of equity has no jurisdiction of such a suit.—The Fort Orange, D C.N Y., 5 F.Supp. 833.

(3) In libel in rem against vessel to foreclose preferred ship mortgage, interveners having liens inferior to lien of mortgage were not entitled to participate under Ship Mortgage Act in a fund set aside from sale proceeds for the payment of preferred maritime lien of another intervener for items of supplies furnished to the vessel prior to the recording of the mortgage —The Home, D.C.Wash., 65 F.Supp. 94.

46. U S —The Red Lion, D.C.N.Y., 22 F 2d 329
Ala.—Murphy v Merchants Nat Bank of Mobile, 200 So. 894, 240 Ala. 688.
58 C.J. p 100 notes 63–65.

47. U S —The Egeria, C C A.Or., 294 F. 791.
58 C J. p 100 note 63 [b].

48. U S —Bard v The Silver Wave, D C Md, 98 F.Supp. 271—The Enos, D C Wash., 24 F Supp. 387.

Burden of proof
In suit to foreclose preferred ship mortgage, burden of establishing mortgagor's ownership of property claimed to be covered by mortgage lien rests on mortgagee —The Fort Orange, D.C.N.Y., 5 F.Supp 833.

Presumptions
In libel in rem against vessel to foreclose preferred ship mortgage, it was presumed, in absence of proof to contrary that intervener which had two claims for debt and maritime liens for ship's supplies, one secured by a first rank security and the other by a lower rank security, intended to allocate part payments received by him from owners of vessel to payment of claim with lower rank security rather than to oldest items of the account —The Home, D C Wash., 65 F Supp 94.

49. Mich.—Hartzler v. Radeka, 251 N W. 554, 265 Mich 451

50. Mass —Murray v Erskine, 109 Mass. 597.
58 C J p 101 notes 67–70.

51. U.S —The John Jay, D.C.Pa., 15 F Supp 937.

Reasonable allowance
Indebtedness secured by preferred ship mortgage included a reasonable sum to be fixed by court as an attorney's fee for libelant's proctor in libel in rem against vessel to foreclose mortgage; and an attorney's fee of three hundred fifty dollars was reasonable, where amount of judgment was three thousand fifteen dollars and sixty-seven cents —The Home, D C.Wash., 65 F.Supp. 94.

Validity of provision for fees
Provisions of preferred ship mortgage were held to entitle mortgagee to allowance of fees of counsel in foreclosure proceedings from proceeds of foreclosure sales Such provision was valid and enforceable where it had been held valid in state of home port of vessel and place of delivery of mortgage and in state where suit was brought, in absence of definitely established rule of admiralty law to contrary —The John Jay, D.C Pa., 15 F.Supp. 937.

Discharge of mortgage. A judicial sale of the vessel free of lien effects a transfer of the lien from the ship to the proceeds of sale,[52] but, where such sale is for a price less than the discharge figure recited in the mortgage, it does not effect a discharge of such mortgage.[53]

Purchase and resale by mortgagee. Where the mortgagee purchased the vessel at the foreclosure sale and occupied the position of a trustee for the mortgagor in making a resale of it, in settling the accounts between the parties the mortgagor should be credited on his indebtedness with the full purchase price received on the resale, less necessary expenses and reasonable attorney's fees.[54]

Appointment of receiver Under the federal Ship Mortgage Act empowering the court to appoint a receiver and, in its discretion, to authorize him to operate the vessel, the court may do so on request of the United States as mortgagee, on the promise of the United States maritime commission to pay resultant losses, even though the court might have refused such a request if it had been made by a private enterprise as mortgagee.[55] Where receivers appointed by a court of equity validly possess a mortgaged ship and are operating her, and have issued and sold receiver's certificates, the consent of the equity court has been held essential to foreclosure of a preferred ship's mortgage under the federal Ship Mortgage Act [56]

Waiver and laches Any irregularities in a mortgage sale of a ship are waived by the mortgagor, where he confirms the sale and takes an option from the mortgagee, who has purchased at the sale, to repurchase [57] In order to determine whether the preferred status of a mortgage under the federal Ship Mortgage Act has been lost by waiver or laches, the court must look to the provisions of the act itself,[58] and the preferred status of the mortgage remains as long as the mortgage is unpaid unless lost by reason of provisions of the act itself [59] Failure of a mortgagee promptly to foreclose on maturity of the mortgage debt will not defeat his lien on the ship,[60] and, where the mortgagor keeps up payment of interest, even prolonged delay in instituting foreclosure proceedings after maturity of the debt will not constitute laches barring recovery.[61] Statutory provisions requiring the date of maturity of a ship mortgage to be entered on the records do not limit the time within which the security may be enforced.[62]

52. U S—Collier Advertising Service v. Hudson River Day Line, D.C. N.Y., 14 F.Supp 335.

53. U S.—Collier Advertising Service v. Hudson River Day Line, supra.

54. Ala—Murphy v. Merchants Nat. Bank of Mobile, 200 So. 894, 240 Ala. 688.

Conversion

A mortgagee bank in foreclosing under its first mortgage on a vessel rather than in making a private sale under a blank bill of sale given to bank by mortgagor did not commit a breach of trust, where bank found that the federal government had a judgment against mortgagor and that it had been recorded under state statutes, and sale of vessel by bank in a federal court, its purchase of vessel, and its resale thereof did not constitute conversion—Murphy v. Merchants Nat. Bank of Mobile, supra.

Interest in purchaser's business

Mortgagee was required to account to mortgagor for a sum received by him in addition to the resale price, which additional sum was in the nature of an interest in the purchaser's business, and mortgagee's acceptance of a less sum than the agreed value of such interest, without the consent of mortgagor, did not entitle mortgagee to a corresponding reduction in the credit which was allowable on mortgagor's indebtedness—Murphy v. Merchants Nat Bank of Mobile, supra.

Liability for interest

(1) Where mortgagee bank bought mortgaged vessel at foreclosure sale and resold vessel on credit, resale was at bank's risk, and, hence, interest charges after sale were not chargeable to mortgagor—Murphy v. Merchants Nat. Bank of Mobile, supra.

(2) "Delivery" of vessel to purchaser from mortgagee bank which had purchased vessel at foreclosure sale did not occur when vessel was required to be retained for improvements and repairs to make it seaworthy, but occurred when it was capable of being used in the shipping business, and it was from the date when the latter event occurred that interest should be calculated on purchase price as affecting mortgagor's indebtedness to bank—Murphy v Merchants Nat. Bank of Mobile, supra.

Rentals

Where conditioning of the foreclosed vessel postponed the time of actual delivery to the purchaser, the mortgagor was not entitled to credit on his indebtedness as for rentals before the date of actual delivery.—Murphy v. Merchants Nat. Bank of Mobile, supra.

55. U.S—The Southern Cross, D.C N Y, 23 F Supp 613.

56. U.S—Consumers' Co. v. Goodrich Transit Co, C.C A Ill, 53 F 2d 972, certiorari denied First Union Trust & Savings Bank v. Consumers Co., 52 S.Ct. 500, 286 U S. 548, 76 L Ed 1284.

Payment of receivers' certificates

Mortgagee of steamship was not entitled, by segregating its earnings, to avoid payment of receivers' certificates sold with mortgagee's knowledge—Consumers' Co v. Goodrich Transit Co, C C A Ill, 53 F 2d 972, certiorari denied First Union Trust & Savings Bank v. Consumers Co, 52 S.Ct. 500, 286 U S 548, 76 L Ed. 1284.

57. Pa.—Woods v. Klein, 72 A 523, 223 Pa. 256.

58. U S—The Favorite, D C N Y, 34 F.Supp 324, affirmed, C C.A., 120 F.2d 899.

59. U S—The Favorite, supra.

60. U S—The Portchester, C C.A N Y, 56 F 2d 579—The Seguranca, D C N.Y., 70 F. 258.

61. U S.—The Favorite, C C.A N Y. 120 F.2d 899.

Nine years

U S—The Favorite, supra.

62. U.S—The Favorite, supra.

The purpose of such requirement is to enable persons making advances or furnishing repairs to vessels to know when mortgage matures in order that they may determine whether it is safe for them to risk taking

(7) Redemption

Where, on default in payment, legal title to the mortgaged vessel has become vested in the mortgagee, thereafter the mortgagor has only the equitable right of redemption.

Where, on default in the payment of the debt secured by a mortgage on a vessel, the legal title to the vessel becomes vested in the mortgagee, thereafter the mortgagor, or anyone holding his title, has only the equitable right of redemption,[63] and the usual rules governing chattel mortgages apply with respect to the amount required to be paid in order to redeem.[64]

§ 25. Recording Conveyances and Mortgages

a. In general
b. As against creditors and purchasers
c Effect of recording
d. Renewal and refiling

a. In General

A conveyance or mortgage of a ship may be good as between the parties even though not recorded

As between the parties to the instrument, a sale of a vessel is ordinarily sufficient to pass title, although it is not recorded.[65] A mortgage also, although not recorded, is good as between the parties,[66] and against their assigns under bankrupt and insolvent systems, although not recorded until after their appointment.[67] These rules apply to cases arising under the federal recording acts.[68] Under the provisions of some statutes recordation is not essential to the validity of a mortgage of a ship or cargo at sea or abroad, if the mortgagee takes possession as soon as may be after its arrival in port.[69]

b. As against Creditors and Purchasers

(1) In general
(2) Under federal statutes
(3) Under state statutes

(1) In General

An unrecorded mortgage on a vessel is generally invalid as against creditors and bona fide purchasers from a mortgagor in possession.

As a general rule, an unrecorded mortgage is invalid as against creditors of the mortgagor,[70] or as against bona fide purchasers from the mortgagor in possession,[71] but this does not include one who purchases with notice of the prior mortgage,[72] unless he purchases from one who was a bona fide purchaser without notice.[73]

(2) Under Federal Statutes

(a) In general
(b) Vessels within statutes
(c) Place of record

(a) In General

Under the federal recording acts a conveyance or mortgage of a vessel must be recorded in order to be valid against any person other than the parties, their heirs and devisees, and persons having actual notice thereof.

Under statutory provisions sometimes referred to as the federal recording acts,[74] unless a conveyance or mortgage of a vessel subject to the acts is recorded as required by the laws of the United States, it will not be valid against any person other than the parties, their heirs and devisees, and persons having actual notice thereof;[75] but, where a conveyance or mortgage of such a vessel is recorded in compliance with the federal statutes, it is valid, even though not recorded as required by state laws.[76] The validity of the federal recording acts has been upheld,[77] and such acts are not repealed or modified by the subsequently enacted federal Ship

a junior security.—The Favorite, supra.

63. N.Y.—Kimball v. Farmers', etc, Nat Bank, 34 N E 337, 138 N Y. 500, 20 L R A. 497.
Redemption of chattel mortgages generally see Chattel Mortgages §§ 432–439.

64. Mass.—Carr v Hodge, 130 Mass 55.
58 C.J. p 101 note 76.

65. N.Y.—Niles v White, 148 N.Y S. 33, 163 App Div 959.
58 C J. p 101 note 79.

66. U.S.—Leland v Medora, C C. Mass., 15 F Cas.No 8,237, 2 Woodb. & M. 92.
58 C.J. p 101 note 81.

67. U.S.—Leland v. Medora, supra.
58 C.J. p 101 note 82.

68. U S—Moore v. Simonds, La., 100 U S 145, 25 L Ed. 590.
N Y.—Rivara v Stewart, 195 N Y S. 841, 119 Misc. 73, affirmed 197 N. Y S 943, 204 App Div. 890, affirmed 142 N E 300, 236 N.Y. 601.

69. U S—Pollard v. Saltonstall, C C Mass., 56 F. 861, reversed on other grounds 65 F 848, 13 C.C.A. 171.
Mass.—Taber v. Hamlin, 97 Mass 489, 93 Am D 113.
11 C.J. p 511 note 81.

70. La.—Zacharie v. O'Beirne, 6 La 398.

71. U.S—The Romp, D.C.N.Y, 20 Cas.No 12,030, Olcott 196.
58 C.J. p 102 note 91.

72. U.S—Baumgartner v. The W. B. Cole, C.C Ohio, 49 F. 587.
58 C.J p 102 note 92.

73. U S—Baumgartner v. The W. B. Cole, supra.

74. U S.—North River Coal, etc, Co. v. McWilliams, D.C N.Y., 28 F 2d 513

75. Me.—Perkins v. Emerson, 59 Me. 319.
58 C J. p 103 note 8.

76. U S—The Gordon Campbell, D. C N.Y, 131 F. 963—The Vigilancia, N.Y, 73 F. 452, 19 C C A. 528.
Mich—Fleming v. Philadelphia F. Assoc, 110 N.W. 933, 147 Mich 404.

77. U.S—White's Bank v. Smith, N. Y., 7 Wall. 646, 19 L Ed. 211—Blanchard v The Martha Washington, C C Me., 3 F.Cas.No.1,513, 1 Cliff. 463.

Mortgage Act.[78] Under the federal acts a subsequent bona fide purchaser or creditor of the original owner of the vessel is entitled to protection as against a prior sale,[79] an assignment for the benefit of creditors,[80] a gift,[81] or a mortgage[82] of the vessel, unless it has been recorded in compliance with the statute,[83] or unless such creditor or purchaser had actual notice of the transfer. A charter party is not a conveyance within the meaning of such statute and need not be recorded thereunder.[84] The statute, also, does not apply to conditional sales whereby the seller retains title until full payment[85]

As to persons with notice. The fact that the conveyance or mortgage has not been recorded as required by these statutes does not affect its validity as against a person who has actual notice thereof,[86] and it has been held that possession of the vessel by the prior transferee is sufficient notice of the mortgage or conveyance to him;[87] and, accordingly, the rights of one having a prior unrecorded conveyance of the vessel accompanied by possession have been held superior to those of one who derives his title through a subsequent unrecorded conveyance.[88]

Preferred status. A mortgage on a ship will not be accorded a preferred status under the federal Ship Mortgage Act if it is not recorded in compliance with statutory requirements.[89]

(b) Vessels within Statutes

The federal recording statutes are applicable only to vessels of the United States.

The federal recording acts apply only to vessels of the United States, that is, vessels which have been registered or enrolled under the laws of the United States at the time when the instrument is made.[90] If the vessel has been so registered or enrolled, it is subject to the recording laws of the United States,[91] which supersede any state law, pertaining to the recordation of such conveyance or mortgage, as far as it is inconsistent, therewith.[92] Without such registration or enrollment the vessel is not a vessel of the United States within the meaning of the statute,[93] and is governed, as to the recordation of a transfer of it, by state laws discussed infra subdivision b (3) of this section; and, accordingly, the recording of a conveyance or mortgage of such a vessel, under the federal statute, does not constitute constructive notice of the existence of such conveyance or mortgage,[94] and is of no effect against a person who is not a party to, or does not claim under, such conveyance or mortgage,[95] nor will recording a mortgage on an undocumented vessel, not a vessel of the United States, confer on such mortgage a preferred status.[96] A vessel which is enrolled, athough it is not required to be so, becomes a vessel of the United States within the meaning of the recording acts.[97]

A vessel in course of construction, and not yet registered or enrolled, is not a vessel within the meaning of the recording acts,[98] and a mortgage on such structure some time before its completion is not recordable,[99] even after it has been completed as a vessel and enrolled.[1]

The word "vessel," as used in the federal recording acts, includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.[2]

Effect of sale of mortgaged vessel; new registra-

78. U S —The Underwriter, D.C N.Y., 3 F 2d 483

79. Wash.—Benner v. Scandinavian American Bank, 131 P. 1149, 73 Wash 488, Ann Cas 1914D 702.
58 C J p 103 note 9.

80. Mich —Haug v Detroit Third Nat Bank, 43 N.W. 939, 77 Mich 474

81. Mich —Palmer v. Smith, 85 N W. 870, 126 Mich 352.
58 C J. p 103 note 11

82. Mass —Atlantic Transp Co. v Alexander Shipping Co, 157 N.E 725, 261 Mass. 1.
58 C.J p 103 note 12

83. U S —The Underwriter, D C.N Y., 3 F 2d 483
58 C J. p 103 note 13

84. U S.—Mott v. Ruckman, C C N Y., 17 F.Cas.No 9,881, 3 Blatchf. 71

85. U S.—In re Empire Shipbuilding Co, N Y, 221 F 223, 136 C.C.A. 633, certiorari denied 35 S.Ct. 938, 238 U S. 634, 59 L Ed. 1494.
N Y —Rivara v Stewart, 195 N Y S 841, 119 Misc 73, affirmed 197 N Y S 943, 204 App Div 890, affirmed 142 N E 300, 236 N Y. 601.

86. W.Va —Hobbs v. The Interchange, 1 W Va 57.
58 C.J p 103 note 17.

87. W Va —Hobbs v. The Interchange, supra.

88. U S —Bofinger v. U. S., 18 Ct Cl. 148

89. U.S.—The Angler, D C N Y., 23 F Supp. 341.

90. U S.—The Susana, C.C.A Va., 2 F 2d 410.
58 C J p 103 note 21.

91. N C —Lawrence v. Hodges, 92 N. C 672, 53 Am R 436.
58 C.J. p 103 note 22.

92. N.Y.—Best v Staple, 61 N.Y. 71
58 C J p 103 note 23

93. U.S —North River Coal, etc., Co. v McWilliams, D C N.Y., 28 F 2d 513
58 C J p 103 note 25

94. U S.—The Fort Orange, D.C N. Y, 5 F Supp 833
58 C J p 104 note 27.

95. Mass —Johnson v. Merrill, 122 Mass 153.
58 C.J. p 104 note 28

96. U.S.—The Fort Orange, D.C.N. Y., 5 F Supp. 833

97. N.C.—Lawrence v. Hodges, 92 N. C. 672, 53 Am.R 436.

98. U S.—In re Empire Shipbuilding Co., N.Y, 221 F. 223, 136 C.C A. 633, certiorari denied 35 S Ct. 938, 238 U S. 634, 59 L.Ed 1494

99. U.S —In re Empire Shipbuilding Co., supra.

1. U.S.—In re Empire Shipbuilding Co., supra.

2. Ky.—Arnold v. Eastin, 76 S W. 855, 116 Ky 686, 25 Ky.L. 895.
58 C.J. p 104 note 33.

tion. The provisions of the Ship Mortgage Act, to the effect that the documents of a vessel covered by a preferred mortgage cannot be surrendered without the approval of the shipping board and that the board shall refuse approval unless the mortgagee consents thereto, indicate an intention to protect a mortgagee if the mortgage has once been registered on a United States vessel, and to prevent a transfer of the vessel thereafter without the consent of the board,[3] and the mortgage does not lose its priority because of the fact that the vessel is thereafter resold and not redocumented in the new home port.[4] On the other hand, if the vessel is sold and title changed before the mortgage is made, there must be a new registration of the vessel before a valid mortgage can be properly made and recorded under the statute.[5]

Failure to record documents in proper sequence has been held not to invalidate preferred ship mortgages otherwise sufficient, as against the contention that the ships were not "vessels of the United States" when the mortgages were made because the mortgages were executed a few hours before the vessels were documented.[6]

(c) Place of Record

Under the federal statutes the recording of a conveyance or mortgage of a ship should be at her home port.

Under the federal Ship Mortgage Act, 46 U.S. C.A. § 921, providing for the recordation of the conveyance or mortgage "in the office of the collector of customs of the port of documentation of such vessel," as construed with the statute, 46 U.S. C.A. § 17, requiring all vessels to be registered at the port nearest to which the owner resides, the recording must be made in the district in which is the home port of the vessel, that is, the port nearest the owner's residence, in which the vessel has her permanent registry or enrollment,[7] and not at the port of the last temporary registry or enrollment when not such home port.[8] When, however, a registered vessel is sold to a resident of another state, and registered anew at the port of the new owner, and a mortgage taken for the purchase money, it, in order to have the status of a valid preferred mortgage, must be recorded in the office of the collector at the new port of registry.[9] The recording of the conveyance or mortgage elsewhere than at such home port is ineffectual as far as it constitutes notice to creditors or purchasers.[10]

Approval of commissioner of navigation. It has been held that the home port of a vessel can be designated only with the approval of the commissioner of navigation,[11] and that the recording of a mortgage in a port not so approved is insufficient to afford it a preferred status, even though the approval is subsequently secured and such port then becomes the home port of the vessel.[12] Other authority has held that, under the Home Port Act, 46 U.S C.A. § 1012, the owner of a ship may choose the home port of his vessel,[13] subject to approval of the commissioner of navigation as a condition subsequent rather than precedent,[14] and that a record of a bill of sale or mortgage in a home port as selected by the owner is valid notwithstanding the approval of the commissioner was not secured until a date subsequent to the recording.[15]

(3) Under State Statutes

A ship not registered or enrolled as a vessel of the United States is subject to state laws with respect to the registration of a conveyance or mortgage thereof.

Where a ship has not been registered or enrolled as a vessel of the United States, it is subject to state laws,[16] and a conveyance or mortgage thereof must be recorded in accordance with state laws;[17] and if, before the vessel is registered or enrolled, a mortgage is recorded agreeably to the laws of the state, such mortgage is valid as against creditors and a bona fide purchaser,[18] even after the vessel has been registered and enrolled.[19] After the vessel is registered or enrolled as a vessel of the United States, however, it becomes subject to the laws of the United States, as discussed supra subdivision b (2) of this section, and not to the registry laws of

3. U.S.—The Smith & Terry No. 3, C.C.A.N.Y., 26 F.2d 964.
58 C.J. p 104 note 35.

4. U.S.—The Smith & Terry No. 3, C.C.A.N.Y., 26 F.2d 964.

5. U.S.—The Susana, C.C.A.Va., 2 F 2d 410.
58 C.J p 104 note 37.

6. U.S.—The Fort Orange, D.C.N.Y., 5 F.Supp 833.

7. U.S.—The Jean L., D.C.Fla., 286 F. 727.
58 C.J. p 104 note 40.

8. U S —White's Bank v. Smith, N. Y., 7 Wall 646, 19 L.Ed. 211.
58 C J. p 104 note 41.

9. U S.—The Lincoln Land, D.C. Mass, 295 F 358

10. Ky —Arnold v. Eastin, 76 S.W 855, 116 Ky. 686, 25 Ky.L. 895
58 C.J. p 104 note 43.

11. U.S —The R. Lenahan, D C Pa, 10 F Supp 497.

12. U.S.—The R. Lenahan, supra.

13. U S —The Fort Orange, D.C.N.Y., 5 F.Supp. 833.

14. U S —The Fort Orange, supra.

15. U S —The Fort Orange, supra.

16. Me —Perkins v. Emerson, 59 Me. 319

17. U.S —North River Coal, etc, Co. v. McWilliams, D C.N.Y., 28 F.2d 513
58 C J. p 104 note 48.

18. Me —Perkins v Emerson, 59 Me 319
58 C.J. p 105 note 49.

19. Ind —Stinson v. Minor, 34 Ind 89.

the state,[20] and a recording of a conveyance or mortgage thereof in accordance with the state laws is ineffectual to give it validity as against a bona fide purchaser or creditor.[21] A state statute as to filing of chattel mortgages is inapplicable to the mortgage of a vessel which has been recorded pursuant to the laws of the United States.[22]

Filing. Where a mortgagor's home and boat when in the water are in one township, but when his boat is in his boathouse, it is in a different township, a mortgage on the boat is properly filed in each township.[23]

c. Effect of Recording

A recording under the federal Ship Mortgage Act, as construed in the light of other provisions, is intended as notice to the whole world, and one proceeding without ascertaining whether or not there is a recorded encumbrance on the ship does so at his peril. Enrollment of a ship pursuant to the provisions of the federal Home Port Act nullifies all purported encumbrances theretofore executed except as provided in such act.

Under the recording provisions of the Ship Mortgage Act, as construed with the further provisions of such act, a recording pursuant to such statute is intended as notice to the entire world, and one dealing with the ship has the duty to ascertain whether there is any encumbrance, and, if he fails to do so, he proceeds at his peril.[24] Where, in compliance with the statute, a mortgage on a vessel is properly recorded in the customhouse, and a certified copy is placed among the ship's papers, ample notice is given to persons dealing with the vessel that there is a preferred mortgage on it,[25] and the mortgage, considered as a whole, is not invalidated as a preferred mortgage by failure of the collector to indorse it on the ship's papers, as provided by the statute.[26]

The enrollment of a vessel pursuant to the provisions of the Home Port Act, 46 U.S.C.A. § 1012, has the effect of nullifying all purported encumbrances executed prior to such enrollment except as provided in such act,[27] and the records of the collector of customs at the home port of the ship are both inclusive and exclusive,[28] so that one without actual knowledge of a prior mortgage recorded only under state laws is protected by his subsequently executed and recorded mortgage where the latter was recorded under the provisions of the federal statutes.[29] State statutes containing provisions for executing mortgages on personal property without a change of possession have been construed as designed to give the rules stated in the federal Home Port Act full operation and effect.[30]

Earlier statute. The earlier act of congress requiring the recordation of conveyances and mortgages of vessels, which preceded the recording provisions of the Ship Mortgage Act, was a mere registry act,[31] and a recording thereunder gave no more lien or other priority to mortgages and conveyances than they had before the passage of the act,[32] except a priority to recorded conveyances and mortgages, over mortgages and conveyances not recorded.[33] The recording did not affect the per-

20. U.S.—The Jean L., D.C.Fla., 286 F. 727.
Me.—Wood v. Stockwell, 55 Me. 76.

21. N.Y.—Ellis v. Rickett, 164 N.Y.S. 243, 177 App.Div. 411.
58 C.J. p. 105 note 53.

22. U.S.—The Alliance, N.Y., 73 F. 452, 19 C.C.A. 528.
58 C.J. p. 105 note 54.

23. Mich.—Hartzler v. Radeka, 251 N.W. 554, 265 Mich. 451.

24. U.S.—The Favorite, D.C.N.Y., 34 F.Supp. 324, affirmed, C.C.A., 120 F.2d 899.

25. U.S.—The Northern Star, C.C.A.N.Y., 7 F.2d 505, reversed on other grounds Morse Dry Dock & Repair Co. v. The Northern Star, 46 S.Ct. 589, 271 U.S. 552, 70 L.Ed. 1082.

26. U.S.—The Northern Star, C.C.A.N.Y., 7 F.2d 505, reversed on other grounds Morse Dry Dock & Repair Co. v. The Northern Star, 46 S.Ct. 589, 271 U.S. 552, 70 L.Ed. 1082.

27. Cal.—Atlas Imperial Diesel Engine Co. v. Criscuolo, 89 P.2d 674, 32 Cal.App.2d 244, certiorari denied Criscuolo v. Sweins, 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 517, rehearing denied 60 S.Ct. 382, 308 U.S. 639, 84 L.Ed. 531.

28. Cal.—Atlas Imperial Diesel Engine Co. v. Criscuolo, 89 P.2d 674, 32 Cal.App.2d 244, certiorari denied Criscuolo v. Sweins, 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 517, rehearing denied 60 S.Ct. 382, 308 U.S. 639, 84 L.Ed. 531.

29. Cal.—Atlas Imperial Diesel Engine Co. v. Criscuolo, 89 P.2d 674, 32 Cal.App.2d 244, certiorari denied Criscuolo v. Sweins, 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 517, rehearing denied 60 S.Ct. 382, 308 U.S. 639, 84 L.Ed. 531.

Termination of lien of prior mortgage

Where chattel mortgage covering motorboat being constructed was recorded under state laws, but was not recorded in office of collector of customs of home port of vessel, and where, after motorboat had been enrolled and duly licensed, another, who had no actual knowledge of existence of prior mortgage, took a chattel mortgage which was recorded in office of collector of customs of home port of motorboat in accordance with federal statute, the rights of the subsequent mortgagee and his vendee were superior to rights of prior mortgagee, since the enrollment and licensing of the motorboat terminated as to the subsequent mortgagee the mortgage lien of the prior mortgagee.—Atlas Imperial Diesel Engine Co. v. Criscuolo, 89 P.2d 674, 32 Cal.App.2d 244, certiorari denied Criscuolo v. Sweins, 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 517, rehearing denied 60 S.Ct. 382, 308 U.S. 639, 84 L.Ed. 531.

30. Cal.—Atlas Imperial Diesel Engine Co. v. Criscuolo, 89 P.2d 674, 32 Cal.App.2d 244, certiorari denied Criscuolo v. Sweins, 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 517, rehearing denied 60 S.Ct. 382, 308 U.S. 639, 84 L.Ed. 531.

31. U.S.—The Madrid, C.C.La., 40 F. 677.
58 C.J. p. 105 note 56.

32. U.S.—The Madrid, supra.
58 C.J. p. 105 note 57.

33. U.S.—White's Bank v. Smith, N.Y., 7 Wall. 646, 19 L.Ed. 211.—The De Smet, C.C.La., 10 F. 483.

sonal liability of the owner,[34] or give a force or validity to a conveyance or mortgage which it had not by the law of the place where it was made and executed.[35] The recording act charged every person taking title with notice of all recorded conveyances or mortgages made by anyone in the chain of title while he held title, whether or not the recording of such conveyances then occurred.[36] The statute was no less effective in favor of an attaching creditor without notice than it was in favor of a purchaser.[37]

d. Renewal and Refiling

Under some statutes a ship mortgage must be refiled after a specified lapse of time in order to retain its validity against third persons.

Under some statutes a mortgage on certain vessels, in order to continue valid against creditors and subsequent purchasers, must be refiled before the expiration of a specified period of time,[38] and, if it is not so refiled, the mortgage ceases to be a lien as against a subsequent bona fide purchaser.[39] If it is refiled after the expiration of the specified period, the mortgage is revived as against subsequent creditors, purchasers, or mortgagees,[40] but is subject to the claims of purchasers and mortgagees whose rights accrued during the default,[41] and to the rights of creditors whose debts were contracted before the refiling,[42] and it is not necessary that such debts should have become liens by judgment or attachment before the refiling, if they have been made liens before the question arises.[43]

A reregistry of a vessel at a different port has been held not to require a rerecording of a mortgage which was duly recorded when made at the former port.[44]

III. CHARTERS

§ 26. Definitions and Distinctions

A charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his.

A charter party is a specific form of contract which relates to vessels,[45] and it has often been called a "mercantile lease."[46] More fully defined, a charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his.[47] It may be either an agreement by which the owner is to carry a cargo which the charterer agrees to provide or an agreement for the entire surrender of the vessel, by the owner to the charterer who hires it.[48]

Distinctions. A charter party has been held to

34. U.S.—Hurd v. Reeve, D.C.N.Y., 12 F.Cas.No.6,917—Mott v. Ruckman, C.C.N.Y., 17 F.Cas.No.9,881, 3 Blatchf. 71.

35. U.S.—Srodes v. The Collier, C.C. Pa., 22 F.Cas.No.13,272a.
La.—Succession of Broderick, 12 La. Ann. 521.

36. U.S.—The W. B. Cole, Ohio, 59 F. 182, 8 C.C.A. 78.

37. Mass.—Potter v. Irish, 10 Gray 416.
58 C.J. p. 105 note 62.

38. N.Y.—Marsden v. Cornell, 62 N.Y. 215.
58 C.J. p. 105 note 67.

39. N.Y.—Marsden v. Cornell, supra.

40. N.J.—Herrick v. King, 19 N.J. Eq. 80.

41. N.J.—Herrick v. King, supra.

42. N.J.—Herrick v. King, supra.

43. N.J.—Herrick v. King, supra.

44. U.S.—The Avalon, D.C.W.Va., 169 F. 696.

45. U.S.—Phoenix Const. Associates v. City of New York, D.C.N.Y., 33 F.Supp. 666, 667.

46. U.S.—The New York, D.C.N.Y., 93 F. 495.

47. U.S.—The New York, supra.
58 C.J. p. 106 note 75.

Similar definitions

(1) A charter party is a specific and express contract by which the owner lets a vessel or some particular part thereof to another person for a specified time or use—The Severance, C.C.A.N.C., 152 F.2d 916, 921—Jones & Laughlin Steel Corporation v. Vang, C.C.A.Pa., 73 F.2d 88, 91, certiorari dismissed 55 S.Ct. 406, 294 U.S. 735, 79 L.Ed. 1263.

(2) Other similar definitions see 58 C.J. p. 106 note 75 [a].

Contracts held charter parties

(1) A contract under which libelant delivered two steamships for a term of years into the exclusive possession of respondent, which was to operate them between designated ports, pay to libelant a stated sum per month, and one half their net earnings after deducting such payments, and return them on termination of the contract in good repair and with an equal amount of apparel and furniture on board, was held a charter party—Metropolitan S.S. Co. v. Pacific-Alaska Nav. Co., D.C.Me., 260 F. 973.

(2) A contract, whereby towing company agreed to lease barges to oil company at certain rate per month and to furnish tug to tow barges at certain rate for each trip, and whereby no receipt or bill of lading was issued by towing company and oil company retained custody and control of oil until it was delivered to its customer, was one of "charter" of barges and a separate contract for towing whenever called on to do so—The Independent, C.C.A. La., 122 F.2d 141.

(3) Under provisions of Suits in Admiralty Act giving district court jurisdiction over all claims arising out of charter, charter to United States of ship for trading for one round voyage which provided that vessel should be operated by owner and not charterer, and that charterer was to have total exclusive use of vessel's carrying capacity, was time or voyage charter and not actual demise of vessel—Calmar S.S. Corp. v. U.S., D.C.N.Y., 103 F.Supp. 243

48. La.—Fish v. Sullivan, 3 So. 730. 40 La.Ann. 193
58 C.J. p. 106 note 77.

be different from a contract of towage;[49] from an account concerning the trade of merchandise;[50] from a contract for a partnership in the business of transporting freight and passengers;[51] from a contract of hypothecation or mortgage;[52] and from a bill of lading or shipping document.[53]

§ 27. Who May Make Charter

A charter party may be closed directly by the principals, and the master has power to make a charter party in a foreign port where the vessel owners have no agent.

A charter party may be closed directly by the principals.[54] The master has power to make a charter party in a foreign port where the vessel owners have no agent,[55] if he cannot communicate readily with the owners,[56] but he may not do so to secure a creditor of the owner of the vessel.[57] A master, in the home port, cannot bind the owners personally, by a charter party, without authority for that purpose,[58] even though he is sailing the vessel on shares,[59] in the absence of such authority, it is essential to the validity of the charter party that the managing owner should ratify.[60]

The master cannot, by mere virtue of his office, bind his owners by a charter party under seal, so as to subject them to an action of covenant thereon,[61] even though he may have acted under previous parol authority[62] or the charter has been ratified by parol.[63]

Furthermore, it has been held that a master cannot confer on a ship broker as agent authority to make a charter, under circumstances such that, if the agreement were made by the master himself, it would not be a valid charter party.[64]

Part owner. The owners of the majority interest, in the legal control and possession of a vessel, may make a valid charter binding it and the charterer[65] and also minority owners,[66] at least where they owned their respective interests before and at the time of the execution of the contract.[67]

§ 28. Validity and Formation of Contract Generally

a. In general
b. Offer and acceptance

a. In General

General rules control with respect to the requisites and validity of a charter as a contract.

General rules control with respect to the validity of a charter as a contract,[68] its validity resting on its contents and the circumstances under which it was executed,[69] and the parties may insert therein any provisions which are not violative of public policy or the law.[70] The charter, in order to be valid, must be supported by sufficient consideration,[71] must be mutual as to obligation,[72] the parties must have been competent to contract,[73] it must not have been tainted by fraud,[74] and it must be

49. Wash.—Parker v. Washington Tug, etc., Co., 148 P. 896, 85 Wash 575.
Demise charter and contract of afreightment distinguished see infra § 34

50. U.S.—Spring v. Gray, Me., 6 Pet. 151, 8 L.Ed 352.

51. U.S.—Ward v Thompson, Mich., 22 How 330, 16 L.Ed. 249.
58 C.J. p 106 note 80.

52. U.S.—Stalker v. The Henry Kneeland, D.C.N.Y., 22 F.Cas.No 13,282.

53. U.S.—The G. R Crowe, C.C.A.N.Y., 294 F 506, certiorari denied 44 S.Ct. 335, 264 U.S. 586, 68 L.Ed 862

54. Mass.—Metropolitan Coal Co v Boutell Transp., etc., Co., 81 N.E 645, 196 Mass 72
58 C.J. p 106 note 84.

55. U.S.—The Director, D.C.Or., 26 F 708.
58 C.J. p 107 note 86.

56. U.S.—Richichi v. Drake, D.C.Me., 280 F. 421.
58 C.J. p 107 note 87.

57. U.S.—Hurry v Hurry, Pa., 12 F. Cas.No.6,922, 2 Wash.C.C. 145.

58. N.Y.—Swan v. Ruckman, 25 How.Pr. 468.
58 C.J. p 107 note 89.

59. N.Y.—Swan v. Ruckman, supra.

60. U.S.—Craig v. Magee, C.C.Pa., 11 F. 175

61. Me.—Pickering v. Holt, 6 Me. 160.

62. Me.—Pickering v. Holt, supra.

63. Me.—Pickering v. Holt, supra.

64. U.S.—Craig v. Magee, C.C.Pa., 11 F. 175.

65. U.S.—Bangs v. Lowber, C.C. Mass., 2 F.Cas.No 840, 2 Cliff. 157, reversed on other grounds 2 Wall. 728, 17 L.Ed. 768.
Ga.—Swift v. Tatner, 15 S.E. 842, 89 Ga. 660, 32 Am.S.R. 101.

66. Ga.—Swift v. Tatner, supra.

67. Ga.—Swift v. Tatner, supra.

68. U.S.—The Interports No. 767, D.C.N.Y., 18 F.Supp. 396, affirmed, C.C.A., 92 F.2d 601.

69. U.S.—Adler v. Galbraith, etc., Co., D.C.Wash., 156 F. 259.

70. U.S.—Goldhill Trading & Shipping Co., S. A. Panama, v. Caribbean Shipping Co., D.C.N.Y., 56 F. Supp 31
58 C.J. p 107 note 3.
Liability for negligence
Where charter party does not involve any question of public policy, parties thereto may provide against liability for negligence.—The Interports No. 767, D.C.N.Y., 18 F.Supp. 396, affirmed, C.C.A., 92 F.2d 601.

71. Ala.—Scott v. Moragues Lumber Co., 80 So. 394, 202 Ala. 312.
58 C.J. p 107 note 4.

72. U.S.—The Gleaner, D.C.Cal., 240 F. 163.
58 C.J. p 107 note 5.

73. Mass.—Thompson v. Hamilton, 12 Pick. 425, 23 Am.D. 619.
58 C.J. p 108 note 6.

74. U.S.—New Orleans Coal & Bisso Towboat Co v. U. S., C.C.A.La., 86 F.2d 53, rehearing denied 86 F. 2d 1008, certiorari denied St Paul Fire & Marine Ins. Co. v. New Orleans Coal & Bisso Towboat Co. 57 S.Ct. 669, 300 U.S. 676, 81 L.Ed. 881, and Louisiana Nat. Bank of Baton Rouge v. New Orleans Coal & Bisso Towboat Co., 57 S.Ct. 669, 300 U.S. 676, 81 L.Ed. 881, amended

sufficiently definite and certain.[75] An agreement, however, is not invalidated by the fact that it is terminable at will.[76]

Formal requisites. A charter party does not require any particular form for its validity.[77] So, letters[78] or telegrams[79] exchanged between the parties may be equivalent to a charter party. The circumstance of the parties having named their agreement, a charter party does not make it one where it does not contain the essentials of such a contract.[80] No precise technical words are required[81]

Necessity of writing. A charter need not be in writing,[82] and it is held that it may be by parol,[83] or at least that provisions of a parol agreement of the same character may be valid and operate in the same manner as the provisions of a written charter party.[84] A government agency may enter into an agreement for the approval of a charter party[85]

b. Offer and Acceptance

The expressed intentions of the parties govern in determining whether there is a charter party, and the minds of the parties must meet without variance on any material point between the offer and acceptance.

The expressed intentions of the parties govern in determining whether there is a charter party,[86] and they are not allowed to be defeated by their unexpressed intentions or understandings.[87] As in other contracts, the minds of the parties must meet without variance on any material point between the offer and acceptance[88] If there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses[89] Thus, an acceptance that varies from the offer cannot be deemed an assent to the proposition for a charter party to which it is sent in reply,[90] but it is to be classed as an independent proposal,[91] which counterproposal, in turn, in order to become a contract of charter party, would have to be accepted by the first offerer[92]

Where the attempted acceptance is ineffectual to give rise to a valid charter because it varies from the terms proposed in the offer, such a defective acceptance, not amounting to, or designed as, a counteroffer, does not destroy the existence of the offer so as to render it thereafter unavailable as the basis of a charter party on a further acceptance which corresponds with the offer,[93] at least where the inoperative acceptance was designed by the offeree to accord with, and be an agreement to, the offer,[94] and if, after an invalid acceptance but before the termination or withdrawal of the offer, the offeree expresses his assent by an acceptance complying with the terms of the offer, there is a sufficient manifestation of assent for the existence of a valid charter party.[95] Such sub-

on other grounds, C.C.A., 89 F.2d 967.
58 C.J. p 108 note 8.

Fraud held not shown
U.S.—New Orleans Coal & Bisso Towboat Co. v. U. S., C.C.A.La., 86 F.2d 53, rehearing denied 86 F.2d 1008, certiorari denied St Paul Fire & Marine Ins. Co. v. New Orleans Coal & Bisso Towboat Co., 57 S.Ct. 669, 300 U.S. 676, 81 L.Ed. 881, and Louisiana Nat. Bank of Baton Rouge v. New Orleans Coal & Bisso Towboat Co., 57 S.Ct. 669, 300 U.S. 676, 81 L.Ed. 881, amended on other grounds, C.C.A., 89 F.2d 967.

75. Ala.—Scott v. Moragues Lumber Co., 80 So. 394, 202 Ala. 312.
58 C.J. p 108 note 9.

76. U.S.—Shamrock Towing Co. v. New York, C.C.A.N.Y., 16 F.2d 199
58 C.J. p 108 note 10

77. U.S.—American Hawaiian SS Co. v. Willfuehr, D.C.Md., 274 F. 214.
58 C.J. p 110 note 48.

78. N.Y.—Tweedie Trading Co. v. Craig, 144 N.Y.S. 68, 159 App.Div. 192.
58 C.J. p 110 note 49.

79. U.S.—Det Forenede Dampskibs-Selskab Aktieselkab v. C. F. & G. W. Eddy, Inc., D.C.Mass., 293 F. 82.
58 C.J. p 110 note 50

80. U.S.—Stalker v. The Henry Kneeland, D.C.N.Y., 22 F.Cas.No.13,282.

81. U.S.—Salmons Dredging Corp. v. Herma, C.A.S.C., 180 F.2d 233.

82. Mass.—Muggridge v. Eveleth, 9 Metc. 233
58 C.J. p 111 note 54

83. U.S.—Salmons Dredging Corp. v. Herma, C.A.S.C., 180 F.2d 233—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F. Supp. 272.
58 C.J. p 111 note 55

84. U.S.—Huron Barge Co. v. Turney, D.C.Ohio, 71 F. 972.
58 C.J. p 111 note 56.

85. U.S.—Sanguineti v. U. S., 83 Ct. Cl. 1.

Chartering committee of shipping board
U.S.—Sanguineti v. U. S., supra.

86. U.S.—The Alberto, C.C.La., 24 F. 379

87. N.Y.—Weber v. Kingsland, 21 N.Y.Super. 415.
58 C.J. p 108 note 13.

88. U.S.—The Fred E. Hasler, C.C.A.N.Y., 65 F.2d 589
58 C.J. p 108 note 15.

Subsequent communication
A positive and unequivocal telegram of vessel owner chartering vessel to charterer created an unconditional contract when acted on by the charterer, and a condition could not be imported into the contract by a subsequent letter seeking to make the charter conditional on the owner's communication with vessel—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., C.C.A.Fla., 96 F.2d 233.

89. U.S.—La Compania, etc. v. Spanish-American Light, etc., Co., N.Y., 13 S.Ct. 142, 146 U.S. 483, 36 L.Ed. 1054.
58 C.J. p 108 note 16.

90. Mass.—Metropolitan Coal Co. v. Boutell Transp., etc., Co., 70 N.E. 421, 185 Mass. 391.

91. Mass.—Metropolitan Coal Co. v. Boutell Transp., etc., Co., supra

92. Mass.—Metropolitan Coal Co. v. Boutell Transp., etc., Co., supra.

93. Mass.—Walter v. Boutell Transp., etc., Co., 81 N.E. 650, 196 Mass. 90—Metropolitan Coal Co. v. Boutell Transp., etc., Co., 81 N.E. 645, 196 Mass. 72

94. Mass.—Metropolitan Coal Co. v. Boutell Transp., etc., Co., supra

95. Mass.—Walter v. Boutell Transp., etc., Co., 81 N.E. 650, 196 Mass. 90—Metropolitan Coal Co. v.

sequent acceptance is sufficient for this purpose, although it is made orally and although the offer and the invalid prior acceptance have both been in writing.[96] Insertion of a separable and independent clause, not of the essence of the contract, into a charter party by mistake has been held insufficient to sustain the contention that no valid charter party has in fact ever been entered into.[97]

Negotiations and preliminary transactions. Mere willingness of the parties to enter into a charter party is not enough to constitute such a contract.[98] With charter parties, as with other contracts, the test as to whether a paper is a contract or an agreement to make a contract depends on whether there is embodied within the paper everything which the parties may have agreed to do, the other requisites to a contract being present.[99] The fact that the parties intend to express their agreement in a more formal instrument will not preclude it from constituting a present charter[1] unless there is a definite understanding of the parties to the contrary.[2] So, the fact that the charter is executory in some of its requirements does not render it incomplete so as to preclude it from being a "contract" as distinguished from a "preliminary agreement."[3] When negotiations are by letters, whether they have resulted in a completed contract or are merely incidental to the making of a future contract is often a difficult question[4] and is to be determined by the intention of the parties.[5]

Conditional agreement. Where the assent of a party to a proposed charter party is conditional only, and the condition is never fulfilled and never waived, such imperfect assent is insufficient for the creation of a charter party.[6] Thus, where the assent of the owner is expressly conditioned on the responsibility of a guarantor furnished by the charterer, the charterer has no valid charter which he can enforce against the owner if the guarantor turns out to be irresponsible,[7] and, where the owner's consent is conditioned on the furnishing of a surety by the charterer, and no surety is furnished, no charter party results.[8] The mere fact, however, that the owner knows that the charterer intends to transfer his charter rights to third persons with whom he is bargaining does not make the charter conditional on the successful consummation of the intended transfer where it is not expressly so provided,[9] the agreement under such circumstances is a valid charter party from the time of execution, and not a mere memorandum conditioned on the success of another transaction.[10]

Where the contract for a charter party is conditional, and the specified condition occurs, the contract remains thereafter as if no condition had ever been stipulated;[11] if no time is stipulated within which the condition shall be satisfied, it is sufficient to make the charter party absolute that it happens within a reasonable time after the agreement is made.[12] Where the condition is not one which is precedent to the existence of a charter party but is only one which is precedent to the existence of any obligation on the part of one of the parties to a charter already agreed to, the failure of such a condition is not sufficient to prevent the existence of a valid charter party.[13]

Waiver and estoppel. In the absence of some statutory limitation or considerations of an accepted public policy, the parties to a charter may include such waiver provisions as may constitute their bargain.[14] The parties to a proposed charter party may, by their acts and conduct manifesting assent, bind themselves so that the objection of an absence of the assent requisite to the existence of a valid

Boutell Transp, etc., Co, 81 N.E. 645, 196 Mass. 72.

96. Mass.—Metropolitan Coal Co. v Boutell Transp., etc, Co., supra

97. U.S.—Ainesworth Coal, etc, Co v Trafikaktiedolaget Grangesberg Oxelosund, C.C.A.Md., 287 F. 291.
58 C.J. p 109 note 24

98. U.S.—Eastern Transp Co. v East Carolina Lumber Co, D.C. Pa, 262 F 195

99. U.S.—The Fred E. Hasler, C.C. A.N.Y, 65 F.2d 589.
58 C.J. p 109 note 28.

1. U.S.—American Hawaiian SS. Co v. Willfuehr, D.C.Md., 274 F 214
58 C.J. p 109 note 29.

2. U.S.—Eastern Transp Co v East Carolina Lumber Co., D.C.Pa, 262 F. 195.

N.Y.—Jewett v. Emson, 25 N.Y.Super. 165.

3. U.S.—Andersen v. Texas Co, C.C. A.N.Y, 279 F. 76.
58 C.J. p 109 note 31.

4. U.S.—Det Forenede Dampskibs-Selskab Aktieselkab v. C. F. & G. W. Eddy, Inc., D.C.Mass, 293 F 82.

5. U.S.—Det Forenede Dampskibs-Selskab Aktieselkab v. C. F. & G. W. Eddy, Inc, supra.
58 C.J. p 109 note 33.

6. U.S.—The H. W. Edye, D.C.N.Y., 12 F.Cas.No.6,964, 10 Ben. 238.

7. U.S.—Erlen v. The Brewer, C.C. N.Y, 8 F.Cas.No 4,519.

8. U.S.—The H. W. Edye, D.C.N.Y., 12 F.Cas.No.6,964, 10 Ben 238

9. U.S.—Chamberlain v. Pettit, D.C. Pa, 49 F 109.

10. U.S.—Chamberlain v. Pettit, supra.

11. Ala.—Scott v. Moragues Lumber Co, 80 So. 394, 202 Ala. 312.
58 C.J. p 110 note 39.

12. Ala.—Scott v. Moragues Lumber Co, supra

13. U.S.—Andersen v Texas Co, C.C.A.N.Y, 279 F 76—American Hawaiian SS Co v. Willfuehr, D.C. Md., 274 F. 214.

14. U.S.—Phoenix Const. Associates v. City of New York, D.C.N.Y., 33 F.Supp. 666.

Exemption from liability

The provision in a charter exempting city from liability for damages to equipment was valid if charter was made by city as principal.—Phoenix Const. Associates v. City of New York, supra.

charter party is no longer available to them;[15] thus the delivery of a vessel by the owner to the charterer may amount, in legal effect, to the adoption by the owner of the existing charter party,[16] and, conversely, the delivery and receipt of the ship have been held to constitute at least a technical acceptance by the charterer of the terms of the charter as they are expressed.[17] In order, however, for one of the parties to a proposed charter party to be held to have waived a variation, and agreed to a substitution proposed by the other party, it must appear that he knew of it.[18] Although the charter contract is not signed in behalf of the ship or her owners, it is binding on both parties, if it has been delivered to, and accepted by, them, and the ship has entered on its performance.[19] Where an agreement by the charterer to save the owner from any loss is conditional, but the owner refuses to recognize any right under the charter, the owner cannot recover on the conditional agreement.[20]

§ 29. Charters by Agents or Brokers

a. In general
b. Commissions or other compensation

a. In General

One may be bound by a charter party entered into by his agent within the scope of his authority. The general rules of agency apply with respect to the personal liability of the broker or agent.

In the absence of ratification, one person is not bound by a charter party entered into by another without authority from him,[21] or in excess of his authority.[22] Conversely, one may be bound by a contract entered into by his agent within the scope of his authority.[23] A broker's authority to effect charters depends on his special instructions at that particular time,[24] and may be at any moment withdrawn.[25] Authority to enter into a charter party need not be conferred by a specialty,[26] or by any other particular form of instrument.[27]

Where no limitation is placed on the manner in which the agent's authority to charter is to be exercised, it may be exercised in any way appropriate to carrying the authority into effect.[28] An agent to whom only limited and special authority to enter into a charter party is given cannot confer on a subagent for that purpose a broad discretionary power so as to bind the principal to a charter or other contract which the agent himself was not authorized to enter into.[29] Matters with respect to the agent's authority,[30] and those with respect to ratification by the principal,[31] are governed by the law of the place where the authority has been conferred or where the conduct asserted as a ratification took place rather than by the law of the place where the charter party agreement, if any, was executed. Under the particular circumstances, a cargo owner may act as an agent.[32]

Ratification of unauthorized charter. An unauthorized charter may be ratified by the person whom it is sought to bind,[33] as by failure to disaffirm it within a reasonable time after knowledge,[34] and in order that there may be ratification, it must be with full and correct information as to the facts.[35]

Personal liability of agent or broker on charter party. The general rules of agency apply with respect to the personal liability of the broker or agent on the charter party, as, for example, in the

15. U.S.—Petition of Howard, D.C N.Y., 53 F.Supp. 556.
58 C.J. p. 110 note 43

16. U.S.—La Compania, etc., v. Spanish-American Light, etc., Co., N.Y., 13 S.Ct. 143, 146 U.S. 483, 36 L.Ed. 1054.

17. U.S.—Shamrock Towing Co. v. New York, C.C.A.N.Y., 16 F.2d 199
58 C.J. p. 110 note 45.

18. Mass.—Metropolitan Coal Co. v. Boutell Transp., etc., Co., 70 N.E. 421, 185 Mass. 391.
58 C.J. p. 110 note 46

19. U.S.—James v. Brophy, Mass., 71 F. 310, 18 C.C.A. 49.
58 C.J. p. 110 note 47.

20. Tex.—Prince Line Limited v. Steger, Civ.App., 210 S.W. 223, error refused.

21. U.S.—The Rakel, C.C.A.Fla., 286 F. 325
58 C.J. p. 111 note 57.

22. U.S.—Adler v. Galbraith, etc., Co., D.C.Wash., 156 F. 259—Starr v. Galgate Ship Co., Cal., 68 F. 234, 15 C.C.A. 366.

23. U.S.—The Atlanta, D.C.Ga., 82 F.Supp. 218
58 C.J. p. 111 note 60.

24. U.S.—The Atlanta, supra.

25. U.S.—The Atlanta, supra.

26. U.S.—Quirk v. Clinton, D.C.N.Y., 20 F.Cas.No. 11,518.

27. U.S.—Quirk v. Clinton, supra.

28. U.S.—Quirk v. Clinton, supra.

29. U.S.—Adler v. Galbraith, etc., Co., D.C.Wash., 156 F. 259

30. U.S.—Adler v. Galbraith, etc., Co., supra.

31. U.S.—Adler v. Galbraith, etc., Co., supra

32. U.S.—Linea Sud-Americana v. 7,295 40 Tons of Linseed, D.C.N.Y., 29 F.Supp. 210, affirmed, C.C.A., 108 F.2d 755, certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1018.

Expropriation by foreign government
Where Spanish Loyalist Government expropriated ship en route to New York, subrogating itself to the vessel's obligations, cargo owner who, pursuant to arrangement with the Spanish Government, chartered other ships to transship the cargo to New York, acted as the Spanish Government's agent.—Linea Sud-Americana v. 7,295 40 Tons of Linseed, supra.

33. U.S.—Morris v. The Alvah, D.C. N.Y., 59 F. 630, affirmed 77 F. 315, 23 C.C.A. 181.
58 C.J. p. 112 note 68.

34. Wis.—Saveland v. Green, 40 Wis. 431.
58 C.J. p. 112 note 69

35. U.S.—Adler v. Galbraith, etc., Co., D.C.Wash., 156 F. 259.
58 C.J. p. 112 note 70.

case of the absence of a real principal,[36] or in the case of an undisclosed agency or principal.[37] So the general rules apply in the determination of whether a charter is so executed by a broker or agent as to impose personal liability on him.[38]

b. Commissions or Other Compensation

In the absence of an agreement to the contrary commissions of a ship broker for procuring a charter are payable as soon as the charter is effected.

In the absence of an agreement to the contrary, commissions of a ship broker for procuring a charter are payable as soon as the charter is effected,[39] and his rights thereto do not depend on the performance of the contract,[40] or his right to a commission is not defeated by the loss of the ship,[41] by the fact that the charter is annulled by reason of war,[42] or by the fact that the original charter is canceled by the parties thereto.[43] Unless there is a valid and binding custom to the contrary, the fact that a charter is not in fact executed will not preclude recovery by the broker of his compensation where he has performed his duties in bringing the parties together and they have agreed on the terms of the contract,[44] but he is not entitled to such a recovery where the transactions between the owners and charterer are merely negotiations looking to a contract.[45] An agreement by an owner to pay a broker commissions for obtaining a charter for his vessel from the government is not void as being a contract against public policy.[46]

A broker cannot act as agent for both parties to the transaction so as to be entitled to pay for his services from each one unless both parties understand his position and expressly agree to such payments,[47] except that in some ports by usage when negotiation is closed the shipowners are liable to the broker for a fixed commission for bringing the parties together, although the broker, in initiating action looking to a charter party, was to be regarded as the agent of the charterer rather than of the owner.[48] A shipping broker has no lien on a vessel, in admiralty, for services in procuring a charter party.[49]

Since he is not a party to the contract, the extent of the broker's compensation is not to be determined by the stipulations in the charter party with respect thereto.[50] If the broker's contract with his principal entitles him to perform certain services and collect certain compensation in addition to the commission for procuring the charter, the failure to set out the full terms of their agreement in the charter party does not defeat the broker's right to claim under the agreement actually made by him with the principal,[51] and this is true, even though there are stipulations in the charter party with respect to the services and the compensation of the broker.[52] Where brokerage is to be determined by the amount of the vessel's earnings, the whole earnings of the vessel under the charter should form the basis for estimating the broker's compensation.[53] Where the amount of commission is determinable on the basis of a percentage of the freight to be earned, or the cargo to be carried in a charter for a specific voyage, the commissions are to be estimated not by the ultimate profits actually derived from the adventure, but by what they might be if it should prove successful,[54] that is, if the contemplated voyage were performed with the full contemplated cargo.[55]

The mere fact that the charter party recites that the broker procuring the original charter shall be

36. U S—New York, etc, SS Co v Harbison, C.C Conn, 16 F. 688, 21 Blatchf 332.

37. Cal—Kerry v Pacific Mar. Co, 54 P 89, 121 Cal 564, 66 Am.S.R 65
58 C J p 112 note 74

38. U S—Hudson Trading Co v Hasler, D C N Y, 11 F 2d 666.
58 C J p 112 note 76.

39. U S—Quirk v Clinton, D C.N Y., 20 F Cas.No 11,518.
N Y.—Brown v. Post, 29 N Y Super 111

40. U S—Quirk v. Clinton, D C N. Y., 20 F.Cas No 11,518
N Y—Brown v. Post, 29 N Y.Super 111.

41. Pa—Hagar v. Donaldson, 25 A. 824, 154 Pa. 242.
58 C J. p 113 note 90.

42. U S—Vellore S S Co v Steengrafe, N Y, 229 F. 394, 143 C C A. 514

43. N Y.—Kane v. Neptune Shipping, 79 N.Y S 2d 396, 274 App Div. 28

44. Mass—Cook v. Fiske, 12 Gray 491
58 C J. p 113 note 96.

45. N Y.—Jewett v Emson, 25 N.Y Super 165.
58 C.J. p 114 note 97.

46. N Y.—Howland v. Coffin, 47 Barb 653.
58 C.J. p 113 note 95.

47. U.S—Robbins v Sears, C.C N.Y., 23 F 874.

48. N Y—Jewett v. Emson, 25 N.Y. Super. 165.
58 C J. p 115 note 23.

49. U S—The Thames, D C.N.Y., 10 F. 848
58 C J. p 115 note 24.

50. N Y—Notman v. Galveston SS. Co., 122 N Y S 598, 137 App Div 851
58 C.J p 115 note 29

51. N Y—Weber v. Kingsland, 21 N Y Super 415.
58 C J. p 116 note 34.

52. N Y—Weber v. Kingsland, supra.

53. N Y—Sturgis v. New Jersey Steamboat Co, 62 N.Y. 625.
58 C.J. p 116 note 36

54. N Y—Brown v. Post, 29 N.Y.Super. 111.

55. N Y.—Brown v. Post, supra.
58 C.J. p 116 note 38.

entitled to a commission in the event of any continuation or extension by the parties does not give him an enforceable right thereto, as he is no party to the contract,[56] and even should such a promise be made him, he would not be entitled to recover commissions for the extension of the charter unless the promise was made under such circumstances as to constitute a binding contract,[57] the absence of any mutuality of obligation being sufficient to prevent the broker from such recovery.[58] Furthermore, although a binding contract for commission in the event of the extension or continuation of the charter is made, the broker is not entitled to a commission on a new charter, incorporating new provisions and made directly between shipowner and charterer, without any acts whatever by the broker during the negotiations,[59] the contractual provision for commission in the event of extension or continuation is not operative where there is a new negotiation,[60] even though the parties, the subject matter, and the hire remain unchanged.[61] The broker's right to compensation is not affected by a modification of charter provisions by the agreement of the parties.[62]

Compensation of subagents or persons aiding broker. Rights as to commissions of subagents, employed by the brokers, for the chartering of a vessel, are controlled by the terms of the actual contract which the brokers had made with their principal.[63] A broker employed to procure a charter party may recover the whole commission in his own name, although he is bound to pay over a portion to others who have aided in procuring such charter.[64]

§ 30. Subcharters and Assignments of Charters

a. Subcharters
b Assignments of charters

a. Subcharters

In the absence of prohibitions in the original charter, a charterer may execute a subcharter which is an independent contract.

In the absence of prohibitions in the original charter party, a charterer may execute a subcharter.[65] A subcharter is not merely an equitable assignment of the first charter,[66] even though it recites that it is a recharter,[67] but it is an independent contract between the charterer and the subcharterer[68] and it is, in the absence of some specific reference, in no way connected with the original charter except as regards the determination of the charterer's right to subcharter.[69] It does not create any contractual relationship between the subcharterer and the owner,[70] even though on the same terms as the original charter,[71] and no liability, based on such a relationship, can be asserted against the subcharterer.[72] The subcharterer's knowledge that the charterers had chartered the vessel from the owners does not alter the status of the parties[73] or release the charterers from the obligations which, by their charter party with the subcharterers, they voluntarily assumed.[74] The expression in the subcharter of obligations which the law would otherwise imply does not destroy the rights of the subcharterer to enforce such obligations.[75] The relation of bailor and bailee may exist between the owner of the vessel and the subcharterer,[76] or the subcharterer may act as agent for the owner.[77]

56. N.Y.—Notman v. Galveston SS. Co, 122 N.Y.S 598, 137 App Div. 851

57. N.Y.—Notman v. Galveston SS. Co., supra.

58. N Y.—Notman v. Galveston SS Co., supra

59. N Y —Notman v. Galveston SS Co., supra
58 C.J. p 117 note 52.

60. N Y —Notman v Galveston SS Co, 22 N Y S. 598, 137 App Div 851.

61. N.Y —Notman v. Galveston SS Co., supra.

62. N.Y.—Kane v. Neptune Shipping, 79 N.Y.S 2d 396, 274 App Div. 28.
58 C.J. p 117 note 55.

63. La.—Brown, etc., Co. v. Haigh, 37 So 478, 113 La 563.
58 C.J. p 115 note 28.

64. Mass —Bruce v. Parsons, 12 Cush. 591.

65. U.S.—The Ely, D C N.Y., 110 F. 563, affirmed 122 F. 447, 58 C.C A 429
58 C J. p 117 note 56

66. N.Y —Swift v. Tross, 55 How Pr. 255.
58 C J p 117 note 57.

67. N.Y.—Swift v. Tross, supra.

68. N Y.—Swift v Tross, supra

69. N.Y.—Swift v. Tross, supra

70. U.S —Perez v. Cia Tropical Exportadora, Ltda, of Costa Rica, C. A.Fla, 182 F.2d 874—Flat-Top Fuel Co. v. Martin, C C A N.Y, 85 F 2d 39, certiorari denied 57 S.Ct 110, 299 U.S 585, 81 L Ed. 431.
58 C.J. p 117 note 62.

71. U S.—Phosphate Min. Co v. Unione Austriaca di Navagazione, etc., C C.A N Y, 3 F.2d 239—The Banes, N.Y., 221 F. 416, 137 C.C A 214.

72. U.S —Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., C.C.A N.Y., 281 F 740.
58 C J. p 117 note 64.

73. N Y —Swift v. Tross, 55 How Pr 255.

74. N Y —Swift v. Tross, supra.

75. N Y —Swift v. Tross, supra.

76. U S —Seaboard Sand & Gravel Corp v Moran Towing Corp, C C A N.Y., 154 F.2d 399.

77. U S —The Iristo, D C N Y., 43 F Supp 29, affirmed, C C A, Middleton & Co (Canada) Limited v. Ocean Dominion S S Corp, 137 F. 2d 619, certiorari denied 64 S.Ct. 432, 320 U.S. 802, 88 L.Ed. 484.

Liability under port bills of lading
A subcharterer has been held not liable under port bills of lading for loss of goods where the owner of the ship was the carrier and the bills of lading were signed by the subcharterer as agent for the owner —The Iristo, D C N.Y., 43 F Supp. 29, affirmed, C.C.A., Middleton & Co (Canada) Limited v Ocean Dominion S. S. Corp, 137 F.2d 619, certiorari denied 64 S Ct. 432, 320 U.S. 802, 88 L.Ed 484.

The owner owes the subcharterer the duty not to cause damage to the subcharterer's property by the negligent use of the vessel,[78] and he owes the duty of exercising reasonable care to have the vessel safe or seaworthy,[79] and will be responsible for the negligent failure of the master of the vessel to ascertain its seaworthiness.[80] The fact of suit by the subcharterer against the owner for unseaworthiness of the vessel has been held not a good defense to the charterer against a suit brought against him by the subcharterer on his agreement to furnish a seaworthy vessel,[81] at least where the claim is not shown to have been reduced to judgment.[82] The subcharterer, where in operation and control of the vessel, is primarily[83] liable for injuries resulting from the defective condition of the vessel[84] to an invitee of the subcharterer[85] but not to a mere licensee,[86] and is subjected to the same liability as though it were the owner of the vessel[87]

A repudiation of a subcharter contract does not constitute a breach of the subcharter unless the subcharterer elects to treat it as such.[88] Where the vessel is under separate charters for successive periods to different charterers, the breach of a subcharter, executed under one of such charters, may render the subcharterer primarily liable, and his charterer and the owner secondarily liable in the order stated.[89] When a subcharter is given, the master is the charterer's agent, in dealing with the subcharterer, only within the terms of the original charter;[90] as to any further dealings with the subcharterer respecting the vessel, he acts for the owner.[91] Where the master is employed and paid by the charterer, the charterer and not the subcharterer will be responsible for injuries resulting from the master's acts and negligence.[92]

Notice to, and assent of, owner to subcharter. Where the charter party gives the charterers the option of subletting the vessel on giving notice to the owner, it has been held that the mere fact that the subcharterer paid the first month's charter hire by its own check was not sufficient to amount to notice to the owner.[93] Such a provision in the charter party does not render it necessary for the charterer to give notice where it enters into a mere contract of affreightment not constituting a charter of the vessel,[94] and it has been held that a subcharter, for this purpose, must be such a charter as amounts to a demise of the vessel so as to make the subcharterer the owner pro hac vice[95] Where the charterer does give notice and the owner assents to the subcharter, the condition is fully met,[96] no particular form of assent to the subcharter is required where not stipulated for by contract,[97] mere silence being sufficient for the purpose if the circumstances are such that it indicates assent to the proposed subcharter.[98]

Operation and effect of original charter. The charterer cannot, by a variation in the terms of a

78. U S—Flat-Top Fuel Co. v. Martin, C.C.A.N.Y., 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S 585, 81 L Ed 431.
Liability to charterer or shipper for loss of, or injury to, cargo see infra § 50.

79. U S—Flat-Top Fuel Co. v. Martin, supra.
Warranty of seaworthiness see infra § 36.

80. U.S—Flat-Top Fuel Co. v. Martin, supra

81. N Y—Swift v. Tross, 55 How Pr. 255

82. N Y—Swift v Tross, supra

83. U S—Thibeault v Boston Towboat Co., D C Mass, 28 F Supp 152, affirmed, C C A, Mystic Terminal Co. v. Thibeault, 108 F.2d 813.

84. U S—Mystic Terminal Co v Thibeault, C.C A.Mass., 108 F 2d 813.

85. U S—Mystic Terminal Co v Thibeault, supra
Safe place to work
(1) Subcharterer with which towboat company orally contracted to tow freight car float furnished by subcharterer was required to keep roof over loading platform on float in reasonably safe condition for use by employee of towboat company, whose work required his presence on the roof, and it was held liable to employee for injuries sustained because of defective condition of roof —Thibeault v Boston Towboat Co, D C Mass, 28 F Supp 152, affirmed, C.C A, Mystic Terminal Co. v. Thibeault, 108 F.2d 813.

(2) Subcharterer, if it relied on inspections of the float made by the charterer, was bound by inadequacy of the inspections, in fulfilling the duty that it owed to the employee to exercise reasonable care to provide him a safe place in which to work—Thibeault v. Boston Towboat Co, D.C Mass, 28 F Supp. 152, affirmed, C C A., Mystic Terminal Co v. Thibeault, 108 F 2d 813.

86. U.S—Mystic Terminal Co. v Thibeault, C C A Mass., 108 F 2d 813.

87. U S—Thibeault v. Boston Towboat Co, D.C Mass, 28 F Supp 152, affirmed, C C A., Mystic Terminal Co. v Thibeault, 108 F 2d 813.

88. U S—The Tampico, C.C A Cal, 286 F. 482.

89. U S—Gans SS Line v. Wilhelmsen, C C A N.Y, 275 F 254, certiorari denied 42 S Ct. 97, 257 U.S 655, 66 L Ed 419.
58 C.J p 119 note 99.

90. N.Y.—Moss v Husted, 66 N Y. 539.

91. N.Y—Moss v. Husted, supra.
58 C.J. p 119 note 2.

92. U.S—The Martha R Grimes, D. C.N.Y., 49 F Supp. 591

93. U S—The Capitaine Faure, D.C N Y., 1 F 2d 406, modified on other grounds, C C A, 10 F 2d 950, certiorari denied Societe de Navigation a Vapeur France Indo-Chine v Cooper & Cooper, 46 S Ct. 634, 271 U S. 684, 70 L Ed 1150, and Societe de Navigation a Vapeur France Indo-Chine v. Harrison & Crossfield, 46 S Ct. 634, 271 U S 684, 70 L Ed. 1150.

94. U S.—The Tampico, C C A.Cal, 270 F. 537.

95. U S.—The Tampico, C C A Cal., 286 F. 482.

96. U.S.—The Tampico, C C A Cal., supra.

97. U.S.—The Tampico, C C A.Cal., supra.

98. U S.—The Tampico, C.C.A.Cal., supra.

subcharter, vary his preëxisting obligation to the owner[99] The subcharterer can get no greater title or control over the ship than the original charterer,[1] but the subcharter may give to a subcharterer against the charterer greater rights than the charterer possessed against the owner.[2] The fact that payment is arranged to be made by the subcharterer directly to the owner does not enlarge the rights of the former.[3] Such payment does not suffice to raise a waiver or estoppel against the owner so as to prevent his assertion of the limitations and conditions in the original charter party; for that purpose, the essentials required for estoppel or waiver generally must be present.[4]

Effect of reference to charter. Where a subcharter specifies its terms in part and provides that all other conditions shall be as per charter party, the charterer by that reference assumes, in favor of the subcharterer, to carry out all the covenants therein contained on the part of the owners.[5] Reference in the subcharter to the charter, for the purpose of showing the charterer's special title and authority to let the vessel to the subcharterers, does not afford a ground on which the charterers can avoid their liability for a failure to fulfill the covenants and conditions of their contract[6] A charterer who, having given a subcharter which was expressly made subject to the charter party, subsequently misinforms the subcharterer when the latter inquires as to the terms of the prior instrument, may, if the other elements of estoppel exist, estop himself to deny that the terms of the charter party are as he has represented them.[7]

Liability of vessel. Where the original charter is of such a character as to constitute the charterer the owner pro hac vice, a subcharter in the nature of a contract of affreightment binds the vessel to the obligations arising therefrom,[8] where a bill of lading for goods shipped under the subcharter is signed and delivered to the subcharterer by one having authority to do so,[9] and even where there is no bill of lading.[10] Furthermore, this is true, even though the charter party expressly forbids the charterer to subject the vessel to liens, at least where the subcharterer is not aware but that the charterer is the owner, although he has used due diligence to discover the ownership.[11] Even though the charter operates in the manner stated, however, the vessel is not liable to a subcharterer for loss or injury caused solely by the conduct of the charterer[12] The negligence of the master as agent of a bareboat charterer binds the vessel in rem for losses resulting to the subcharterer.[13] Where the negligence proximately causing the loss of a vessel is that of the subcharterer, the subcharterer is primarily liable and the vessel is secondarily liable in rem for the loss of cargo.[14]

b. Assignments of Charters

A charterer may assign the original charter, unless some restriction is stipulated.

A charterer may assign the original charter,[15] unless some restriction is stipulated.[16] The obligations and rights of the parties, in the event of an assignment of the charter, are as defined in the charter party and in the agreement for an assignment.[17] A valid assignment of an entire charter

99. U.S.—Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., C C A N Y., 281 F. 740.

1. U S.—Murphy v. Paine, D C.N.Y., 15 F.2d 570.
58 C J. p 118 note 75.

2. U S—Church Cooperage Co. v Pinkney, N.Y., 170 F. 266, 95 C C A 462.
58 C.J p 118 note 76.

3. U.S—Murphy v. Paine, D C.N Y., 15 F 2d 570

4. U S—Murphy v Paine, supra

5. U S—Schmidt v Smith, D C.N Y., 21 F.Cas No 12,466, 7 Ben. 361
58 C.J. p 118 note 81.

6. N Y.—Swift v. Tross, 55 How Pr 255.

7. U.S—The Tampico, C C A.Cal., 286 F. 482.
58 C.J p 118 note 83.

8. U S—Palmer, etc, Co. v. U. S., D C.Mass., 10 F 2d 214.
58 C.J. p 119 note 86.

9. U S—The Euripides, D C N.Y., 52 F 161, reversed on other grounds 71 F 728, 18 C C A 226.

10. U S—The Euripides, supra.

11. U S—Palmer, etc, Co v. U S, D C Mass, 10 F 2d 214.

12. U S—Palmer, etc., Co. v. U. S, supra.

13. U S—Perez v Cia Tropical Exportadora, Ltda, of Costa Rica, C A Fla., 182 F 2d 874

14. U S—The C. W Crane, D C N Y, 64 F Supp 627, affirmed, C C A., 155 F 2d 940

Determination in hull suit that subcharterer of scow was negligent was decisive of subcharterer's liability in cargo suit, and, hence, in cargo suit, subcharterer was properly held liable, and scow secondarily liable in rem for loss of cargo.—The C W Crane Co., C C.A N Y., 155 F.2d 940.

15. U S—Murphy v. Paine, D.C.N.Y., 15 F.2d 570.
58 C J. p 120 note 4.

16. Ala—Martin v Powell, 75 So. 358, 200 Ala 46
58 C J. p 120 note 5.

17. U S—U S v Palmer & Parker Co., C C A.Mass, 61 F.2d 455.
58 C J. p 120 note 6.

Bona fide holder

Bank not inquiring as to vessel's ownership, shown by four public records, or charterer's right to assign charter party, required to be among ship's papers, at time of taking assignment thereof, was held not bona fide holder for value without notice, although charter party was not recorded—U. S. v. Palmer & Parker Co., supra.

Reserved lien of owner

Charterer of vessel, with option to purchase on ten days' written notice, which was not given, was not "purchaser in possession," so as to entitle assignee of charter party to override owner's reserved lien on subfreights. —U. S. v. Palmer & Parker Co., supra.

renders the assignee the entire owner of the charter rights from the time of assignment.[18] The owner may withdraw the vessel from the service of the assignee of the charterer where the assignee has failed in the performance of duties regarding the vessel on which the charter rights are conditioned.[19] An attempted assignment incapable of operating as an assignment may, under some circumstances, give rise to a transaction in the nature of a subcharter.[20]

Consideration. Where a charter is assigned, in consideration of a certain sum of money, the assignment of the charter constitutes the consideration for the assignee's promise of payment on account of such assignment,[21] and the assignee's promise to pay constitutes a present liability on his part.[22] The fact that payment is to be postponed until after the clearance of the vessel does not make such payment a condition precedent to the assignee's obligation to pay,[23] and payment may be enforced, even though the vessel does not clear the port, after a reasonable time.[24] Furthermore, even should the circumstances be such that clearance was a condition precedent to payment, the assignee's waiver thereof by accepting a settlement with the owner in lieu of the voyage stipulated by the charter entitles the assignor to sue for and recover the sum appointed as the consideration for the assignment.[25]

Damages. Where the charterer's assignee refuses to accept delivery of the vessel or to perform his obligations, the charterer's recovery is limited to such damages as he himself has sustained by reason of the assignee's breach,[26] and he cannot recover damages for the injury sustained by the master or the owner unless their claim has been directly assigned to him or unless he has satisfied a judgment obtained by them against him based on the assignee's breach.[27]

§ 31. Modification and Termination of Charter

a. Modification
b. Cancellation or rescission
c. Frustration

a. Modification

A charter party may be modified by a subsequent agreement, the assent of the parties being necessary.

A charter party may be modified by a subsequent agreement,[28] the assent of the parties being necessary.[29] Except as modified, the provisions of the original charter continue,[30] but the original meaning and effect of the modified provisions become immaterial.[31] Custom cannot vary the terms of the contract.[32] The Harter Act, 46 U.S.C.A. § 190 et seq, does not affect the rights of parties under a time charter party.[33]

The validity of the modification does not depend on the charter's hire having been paid, where the charterer was under no duty to pay the hire prior to the modification.[34] Likewise, it has been held that the fact that, at the time of the chartering of a ship for a voyage, she was technically under a

Assent to reassignment

(1) Where reassignment of shipping charter canceled first assignment and reinstated original assignor as charterer, and owner was advised of the fact and thereafter rendered bills and invoices to, and accepted payment from, original assignor, the owner must be deemed to have assented to such reassignment.—Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., D. C Md, 84 F.Supp 948.

(2) Whether conduct of owner amounted to assent to reassignment of shipping charter must be determined according to law of the state wherein owner carried on his business.—Arnold Bernstein Shipping Co v. Tidewater Commercial Co, supra.

18. U S.—Murphy v. Paine, D.C.N.Y., 15 F.2d 570.

19. U S.—J. M. Guffey Petroleum Co v. Coastwise Transp. Co, D.C N.Y., 168 F. 379, modified on other grounds 180 F. 677, 103 C.C.A. 643

20. U S.—Marine Transp. Co. v. Shawmut SS. Co, D.C.Mass., 287 F. 547.

58 C.J. p 120 note 15.

21. Miss.—Piaggio v. Somerville, 80 So 342, 119 Miss. 6.

22. Miss.—Piaggio v. Somerville, supra

23. Miss.—Piaggio v. Somerville, supra

24. Miss.—Piaggio v. Somerville, supra

25. Miss.—Piaggio v. Somerville, supra.

26. U.S.—Baetjer v. Bors, D C.N Y., 2 F.Cas No.724, 7 Ben. 280.

27. U.S.—Baetjer v. Bors, supra.

28. U.S.—Boyd v. Moses, N.Y., 7 Wall. 316, 19 L.Ed. 192.

58 C J. p 120 note 19.

Effect of material alteration of charter party see Alteration of Instruments § 6.

29. U S.—Shamrock Towing Co. v. Tully & Di Napoli, D C.N.Y., 91 F Supp. 239, affirmed, C A., Anthony O'Boyle, Inc v. The Louis W Doyle, 187 F 2d 872.

58 C.J. p 120 note 20.

Intrusting vessel to another

Where deck scow was chartered by contractor for use in performing city contract to remove ashes and after scow was properly made fast dominion over scow in successive handling for purpose of making delivery of ashes was exercised by city, contractor, by intrusting scow to city, did not thereby substitute city for itself in its relation to owner of scow.—Shamrock Towing Co v Tully & Di Napoli, D.C N.Y., 91 F Supp. 239, affirmed, C A, Anthony O'Boyle, Inc. v. The Louis W. Doyle, 187 F 2d 872.

30. N.Y.—Solomon v. Higgins, 6 Wend 425

58 C.J. p 120 note 21.

31. Md.—Mactier v. Wirgman, 4 Harr. & J. 568.

32. U.S.—The Oregon v Pittsburgh, etc., Iron Co, Ohio, 55 F. 666, 5 C.C.A. 229.

33. U.S.—Lake Steam Shipping Co. v. Bacon, D.C N.Y., 129 F. 819.

34. U.S.—The Donald, D.C.Va., 115 F. 744.

58 C.J. p 121 note 23.

time charter to another charterer, does not preclude the owner from making an agreement with the second charterer for modification of the subsequent charter party, where the owner had the right to declare the time charter forfeited, and it was in fact so treated by all the parties,[35] particularly when the time charterers do in fact know of, and acquiesce in, the modification.[36] A modification of a charter, contingent on the determination of the validity of an attempted cancellation of the charter party and without prejudice to the rights of the parties, should the attempted cancellation be inoperative, is of no effect in the event that the determination is against the validity of the cancellation, in which case the rights of the parties remain as they were under the charter party without any change by reason of the altered terms in the contingent modification.[37]

Power to assent to modification. The master of the vessel cannot vary the terms of the charter.[38] Thus, where a ship has been chartered by the owners, the master cannot effectually agree to change her cargo[39] or to alter the amount of freight to be paid or the manner of payment,[40] or release the owner's rights to security for payment.[41]

A like rule has been applied to attempted modification by an agent of the charterer whose whole authority is to fulfill the terms of the charter in behalf of his principal.[42] The agent of a cargo owner, not representing or connected with the charterer, cannot assent to a variation of the ship's duties under the charter party so as to bind the charterer to the modification.[43] Where several unite as charterers to charter a ship in common, the owners may contract with the several shippers, varying or annulling the charter party in relation to their respective parts of the cargo.[44] A broker's authority to vary charters depends on his special instructions at that particular time,[45] and may be at any moment withdrawn.[46]

b. Cancellation or Rescission

(1) In general

(2) Exercise of right to cancel or rescind

(1) In General

The charter party may be canceled by a subsequent agreement of the parties, or it may be terminated by one party in accordance with an option so to terminate given by the charter or because of a breach of condition.

The charter party may be canceled by a subsequent agreement of the parties.[47] If the charterer voluntarily surrenders the vessel, and the owner assents to the surrender, the transaction amounts to a surrender of the charter party, and the charterer may not subsequently claim possession of the vessel thereunder.[48] It has been held that it is not within the power of a master to release the charterer from his contract to the owner, as long as the contract is in force;[49] and the same rule applies to an agent of the charterer whose whole authority is to fulfill the terms of the charter in behalf of his principal.[50] A broker who, as agent of the owner of the ship, has authority to charter the ship has no right to abrogate the charter without the consent of his principal.[51]

35. U.S.—The Donald, supra.

36. U.S.—The Donald, supra.

37. U.S.—Lloyd Adriatico Societa di Navagazione v. Consolidation Coal Co., C.C.A.Va., 23 F.2d 579—Fearing v. Cheeseman, C.C.Me., 8 F. Cas.No.4,710, 3 Cliff. 91

38. U.S.—**Corpus Juris cited in** The Atlanta, D.C.Ga., 82 F.Supp. 218, 232—Britain S.S. Co. v. George E. Warren Corp., D.C.Mass., 22 F. Supp. 197
58 C.J. p. 121 note 27.

39. U.S.—American Metal Transp. Co. v. Rederiakties Dragor, D.C.N.Y., 293 F. 817.

40. U.S.—Oneida Nav. Co. v. Arkell, D.C.N.Y., 290 F. 827.
58 C.J. p. 121 note 31.

41. U.S.—Gracie v. Palmer, Pa., 8 Wheat 605, 5 L.Ed. 696.

42. U.S.—**Corpus Juris cited in** The Atlanta, D.C.Ga., 82 F.Supp. 218, 232.
58 C.J. p. 122 note 33.

43. U.S.—American Asiatic Co. v. Dollar, C.C.A.Cal., 282 F. 743, certiorari denied 43 S.Ct. 361, 261 U.S. 615, 67 L.Ed. 828.

44. Md.—Mactier v. Wirgman, 4 Harr. & J. 568.

45. U.S.—The Atlanta, D.C.Ga., 82 F.Supp. 218.

46. U.S.—The Atlanta, supra.

47. U.S.—Marine Transp. Co. v. Shawmut SS. Co., D.C.Mass., 287 F. 547.
58 C.J. p. 122 note 47.

48. U.S.—Bergen v. The Tamimend, D.C.N.Y., 3 F.Cas.No.1,339.

49. U.S.—Gracie v. Palmer, Pa., 8 Wheat 605, 5 L.Ed. 696.
58 C.J. p. 122 note 51.

50. U.S.—Ye Seng Co. v. Corbitt, D.C.Or., 9 F. 423, 7 Sawy. 368
58 C.J. p. 123 note 52.

51. U.S.—The Atlanta, D.C.Ga., 82 F.Supp. 218.

Special instructions

A ship broker's authority to rescind charters depends on his special instructions at that particular time and may be at any moment withdrawn.—The Atlanta, supra.

Ratification of cancellation

(1) Where ship broker informed owner of steamship that broker was "dropping" the charter of the ship, and owner instructed broker to refuse to cancel the charter and that it wished to continue the charter, statements did not amount to ratification or authorization of the cancellation of the charter by the broker, although broker was authorized to do what the broker thought best.—The Atlanta, supra

(2) Knowledge of owner of ship that charterers had dropped the charter was not sufficient of itself for a ratification by the owner of ship broker's action in rescinding the charter.—The Atlanta, supra

(3) Where charterers of steamship, on condition of rescission of charter, offered to advance drydocking costs and to make certain advances to keep the ship moving, and owner of ship accepted such benefits from the charterers, owner of ship ratified ship

Assent to cancellation of the charter party by one of several joint charterers, it has been held, may be binding on the others.[52]

The commencement of war may excuse performance of the charter.[53] The terms and undertakings of the charter party may be such that a declaration of war will amount to a cancellation of the charter party,[54] in which case the release must be mutual and not optional with one party alone.[55]

Options in charter. The parties may, by provisions of the charter party, agree that, at discretion or for causes stipulated therein, the forfeiture of the charter may be declared,[56] and, when the party to whom the right to annul is given exercises the right in accordance with the charter provisions, such action terminates the charter.[57] In order that the right of cancellation by virtue of an option may be exercised, the option agreement providing for that right must be valid and enforceable.[58] The refusal to exercise prematurely an option to cancel the charter does not justify the other party in canceling it, and such an attempted repudiation is inoperative as a cancellation.[59]

The expession of a particular contingency in the charter party as affording an option of cancellation to the charterer, it has been held, indicates an intention of the parties that matters which would constitute conditions in the contract justifying repudiation, in the absence of any express declaration, are not to be so treated;[60] and, in such a situation, the charterer's option to repudiate has been confined to the contingency specifically provided for, and the right to cancel denied where its exercise was based on a disregard by the owner of an asserted condition precedent.[61] However, if the charterer is given an absolute option to terminate the charter party at any time on the giving of notice to that effect for a certain length of time beforehand, the operation of stipulations in the contract as conditions giving rise to a right of repudiation is not affected by such an option not dependent for its exercise on any contingency;[62] and the charterer may cancel the charter for default of the owner as to such conditions without giving the notice required for the exercise of the contractual option to cancel.[63]

Breach or failure of condition. A failure of a condition precedent may constitute good grounds for the cancellation of the contract.[64] Thus, if the owner of a vessel makes a warranty in certain particulars respecting the ship or the voyage, intended as a substantive part of the contract, the warranty constitutes a condition on the failure of which the charterers may repudiate the contract,[65] and, conversely, the failure of the hirer to fulfill his part of the agreement will justify the owner in disregarding the agreement and seeking other employ-

broker's unauthorized conduct in rescinding the charter.—The Atlanta, supra

52. N.Y.—Wheeler v. Curtis, 11 Wend 653.

53. Mass.—Brown v. Delano, 12 Mass. 370.

54. U.S.—Essex SS Co. v. Langbehn, Tex., 250 F. 98, 162 C.C.A. 270
58 C.J. p. 127 note 97.

55. U.S.—Essex SS. Co. v. Langbehn, supra

56. U.S.—The U. S. 219, D.C.Pa., 21 F.Supp. 466.
58 C.J. p. 123 note 58.

Option to purchase

(1) Where charterer exercised option to purchase barge under bare boat demise charter, relation between charterer and owner became that of debtor and creditor, and, where owner seized vessel by force without permitting charterer to unload cargo or equipment belonging to charterer, charterer was entitled to return of barge and to damages for unlawful conversion of cargo and equipment.—The U.S. 219, supra

(2) Under the terms of the charter, a failure to maintain insurance, and the failure to make payments on the exact days fixed in the charter, did not bar the right to exercise the option.—The U.S. 219, supra.

57. U.S.—Shamrock Towing Co. v. New York, C.C.A.N.Y., 16 F.2d 199
58 C.J. p. 123 note 59.

58. U.S.—Tweedie Trading Co. v. Laguna Co., D.C.N.Y., 178 F. 868.
58 C.J. p. 124 note 60.

59. U.S.—The Progreso, Pa., 50 F. 835, 2 C.C.A. 45.

60. U.S.—Rosasco v. Pitch Pine Lumber Co., N.Y., 138 F. 25, 70 C.C.A. 455, certiorari denied 25 S. Ct. 803, 198 U.S. 587, 49 L.Ed. 1174

61. U.S.—Rosasco v. Pitch Pine Lumber Co., supra

62. U.S.—The Ceres, N.Y., 72 F. 936, 19 C.C.A. 243, certiorari denied 16 S.Ct. 1199, 163 U.S. 706, 41 L.Ed. 319

63. U.S.—The Ceres, supra.

64. U.S.—The Nomad, D.C.N.J., 3 F.Supp. 535
58 C.J. p. 124 note 66.

Damages for breach of voyage charter party

A time charterer could not recover from voyage charter damages resulting from cancellation of time charter because of loss of subsequent cargo on ground that voyage charterer's failure to discharge vessel within a reasonable time caused loss of subsequent cargo, where captain failed to obtain a full crew for two weeks after discharge was completed, and charter was not canceled until four or five days after date when vessel could have left port had captain been able to obtain a full crew.—Continental Grain Co. v. Armour Fertilizer Works, D.C.N.Y., 22 F.Supp. 49

Absence of conditions from contract

A party to a charter party contract for a foreign vessel could not complain that the contract being contingent on approval of foreign government, such government was in effect a party to contract and that its withdrawal of approval of contract acted as a cancellation thereof, where contract did not contain conditions respecting such matter.—The Laurent Meeus, D.C.Cal., 43 F.Supp. 807, modified on other grounds, C.C.A., Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, 133 F.2d 552, certiorari denied 63 S.Ct. 858, 318 U.S. 781, 87 L.Ed. 1148

65. U.S.—Davison v. Von Lingen, Md., 5 S.Ct. 346, 113 U.S. 40, 28 L.Ed. 885
58 C.J. p. 124 note 67.

ment.[66] The charterer may cancel the charter for the failure on the part of the shipowner to tender the vessel or have it ready for loading at the time and place specified in the charter.[67] In order to justify the rescission or repudiation of a charter party for breach of a condition, the character of the breach must be such as to defeat the purpose of the contract;[68] the breach of an independent and separate covenant, in a charter party, going only to a part of the consideration and compensable in damages,[69] or a mere default which is not recognized by rules of law or by the particular agreement of the parties as constituting a cause for cancellation,[70] will not justify a repudiation of the charter by one of the parties without the assent of the other.

(2) Exercise of Right to Cancel or Rescind

The statements and conduct of a party, in order to amount to a cancellation of the contract and to be attended by the legal consequences proper to a cancellation, must amount to a refusal to accept the vessel or to treat the charter party as being in operation.

The statements and conduct of a party, in order to amount to a cancellation of the contract and to be attended by the legal consequences proper to a cancellation, must amount to a refusal to accept the vessel or to treat the charter party as being in operation.[71] A chartering of a vessel, by the owners, on the default of the charterer in not furnishing the cargo, which is for the benefit of all concerned, is not a rescission of the contract discharging the freighter from liability.[72] It has been held that, although a charter party is determinable at will, yet this right is subject to the qualification that it cannot be rescinded while the vessel is actually employed in business pursuant to the charter,[73] and that such a charter is an absolute and indefeasible hiring of the vessel for every voyage undertaken until notice given by the party at whose will the charter is to run of his intention to discontinue it.[74] Where a shipowner accedes to the repudiation of the charter party, he is not entitled to damages by reason of the charterer's failure to accept a vessel tendered thereafter.[75]

An attempted cancellation, under a charter provision giving an option to cancel, in order to be valid must be made in pursuance of the agreement on which the right to cancel rests.[76] If the option of cancellation is limited or conditioned by the charter party provisions creating it, the limitations and conditions placed on it must be satisfied by the party electing to cancel in order that his repudiation may be effective to terminate the charter.[77] Where the parties agree in the charter party that the giving of certain certificates shall be conclusive evidence that the contingency on which the option rests does not exist, the presentation of such certificates concludes the party to whom the option has been given in the absence of fraud.[78]

Where the party aggrieved by breach of the charter party gives no indication of any intention to treat the breach as a termination of the charter party, such party cannot at a subsequent time avail himself of that breach as a basis for cancellation.[79] An attempted cancellation, under a charter provision

68. U.S.—Kleine v. Catara, C.C. Mass., 14 F.Cas.No 7,869, 2 Gall 61.
58 C.J. p 125 note 68.

67. U.S.—Crow v Myers, D.C.Va., 41 F 806.
58 C.J. p 181 note 94.

68. U.S.—Aaby v. States Marine Corp, C.A.N.Y., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed 609—Hildebrand v Geneva Mill Co., D.C.Ala., 32 F.2d 343.

69. U.S.—Ainesworth Coal, etc., Co. v Trafikaktiedolaget Grangesberg Oxelosund, C.C.A.Md., 287 F. 291.
58 C.J. p 125 note 70.

70. U.S.—Aaby v. States Marine Corp, C.A.N.Y., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed 609
58 C.J. p 123 note 56.

Delay

Where minor breakdown of machinery of motor vessel within fifteen minutes of delivery to charterer caused two and one-half days delay in course of twelve-months time charter, delay was not so substantial as to frustrate purpose of charter or to justify charterer's repudiation, and alleged fact that, if vessel had not been tendered until an hour later, clause in charter authorizing cancellation would have become operative did not authorize cancellation by charterer.—Aaby v. States Marine Corp., supra.

71. U.S.—Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, N.Y., 250 F. 935, 163 C.C.A. 185, Ann.Cas 1918C 491, affirmed 40 S.Ct. 332, 252 U.S. 313, 64 L.Ed. 586
58 C.J. p 125 note 75

Elimination of obligations

Where charter of steamship was rescinded and settlement eliminated obligations of the charterers on subsequent trips, charterers were not chargeable with costs at ports on subsequent trips.—The Atlanta, D.C. Ga., 82 F.Supp. 218.

72. Md.—Benson v. Atwood, 13 Md 20, 71 Am.D 611
58 C.J. p 126 note 76.

73. Mass.—Cutler v. Winsor, 6 Pick. 335, 17 Am.D 385

74. U.S.—Webb v Peirce, C.C.Mass., 29 F.Cas.No 17,320, 1 Curt. 104
Mass.—Cutler v Winsor, 6 Pick 335, 17 Am.D. 385.

75. U.S.—Spanish American Line v. Baugh Chemical Co., D.C.Md., 47 F. 2d 261.

76. U.S.—Jones S.S. Co. v. Barnes-Ames Co., N.Y., 244 F. 116, 156 C.C.A. 544, certiorari denied 38 S.Ct. 14, 245 U.S. 658, 62 L.Ed 534
58 C.J. p 126 note 79.

77. U.S.—McNear v. Leblond, Cal., 123 F 384, 61 C.C.A. 564.
58 C.J. p 126 note 80.

78. U.S.—Jones S.S. Co. v. Barnes-Ames Co., N.Y., 244 F. 116, 156 C.C.A. 544, certiorari denied 38 S.Ct. 14, 245 U.S. 658, 62 L.Ed 534

79. U.S.—Marine Transp. Co v. Shawmut S.S. Co., D.C.Mass., 287 F. 547
Ala.—Bell v. A. MacKay & Co., 72 So. 83, 196 Ala. 408.

giving an option to cancel, must be declared promptly and within a reasonable time after cause arises in order to prevent a waiver.[80] Where the owner is given the option to rescind for default in payment of the charter hire, due periodically, his conduct in repeatedly accepting payment after the due date constitutes a waiver of his right of rescission so as to suspend its future operation,[81] except in the event of a general warning that strict payment will thereafter be insisted on,[82] or an actual demand followed by refusal or failure to pay,[83] but the owner's acceptance of the hire at a time subsequent to the time of demand and refusal does not affect his right of rescission,[84] in the absence of a waiver of his right to insist on cancellation.[85]

c. Frustration

The mere fact that performance of a charter party becomes impossible by reason of some occurrence subsequent to execution does not put an end to the agreement, but, where it appears from the charter that the parties contemplated that its fulfillment would be dependent on the continuing existence of certain things or conditions, the failure of the implied condition without the fault of either party terminates the charter party.

The mere fact that performance of a charter party becomes impossible by reason of some occurrence subsequent to execution does not put an end to the agreement,[86] but, if there is in the nature of the contract a condition relieving the parties from the obligation of performance, as where it appears from the charter that the parties contemplated that its fulfillment would be dependent on the continuing existence of certain things or conditions, the failure of the implied condition without the fault of either party terminates the charter party.[87] If the charter party is completely frustrated by requisition by the government, the rights and obligations of both parties are ended.[88] Whether the requisition frustrates the contract is a question depending on the extent of the interference considered in connection with the charter provisions[89]

A requisition for a definite time, materially less than the unexpired period of the charter, works a mere interruption and not a frustration,[90] a requisition for a definite time extending beyond the unexpired period of the charter contract works a complete frustration.[91] When the requisition is for an indefinite period, if a consideration of all the circumstances existing at the time of the requisition leads to the conclusion that it will probably continue beyond the charter period, then the charter is frustrated and the obligations under it terminated,[92] if, on the other hand, the circumstances indicate probable release of the vessel for a substantial time before the expiration of the charter period, the charter contract is not terminated.[93] In weighing this issue of probability the courts take into consideration not only the conditions existing at the time of the requisition, but the real duration of the requisition.[94]

The doctrine of termination by frustration is not confined to cases of requisition,[95] but similar principles have been held to prevail where the frustration of the adventure is caused by detention by a government.[96] The only substantial distinction between a voyage charter and a time charter, on the issue of frustration, is that in the former the embargo detention or requisition in most cases is certain to continue beyond the expected termination

80. Ala.—Bell v. A. MacKay & Co., supra.
58 C.J. p 126 note 85

81. Ala.—Bell v. A. MacKay & Co., supra.
58 C.J. p 127 note 87.

82. Ala.—Bell v. A. MacKay & Co., supra.

83. Ala.—Bell v. A. MacKay & Co., supra.
58 C.J. p 127 note 89

84. Ala.—Bell v. A. MacKay & Co., supra.
58 C.J. p 127 note 90.

85. Ala.—Bell v. A. MacKay & Co., supra.
58 C.J. p 127 note 91.

86. U.S.—Schoonmaker-Conners Co. v. Lambert Transp Co., C.C.A.N.Y., 269 F. 583
58 C.J. p 128 note 7.

87. U.S.—Texas Co. v. Hogarth Shipping Co., N.Y., 41 S.Ct. 612, 256 U.S. 619, 65 L.Ed. 1123.
58 C.J. p 128 note 8.

88. N.Y.—Henjes Marine, Inc. v. White Const. Co., 58 N.Y.S.2d 384
58 C.J. p 128 note 9.

89. U.S.—The Claveresk, C.C.A.N.Y., 264 F. 276.
58 C.J. p 128 note 10.

90. U.S.—The Frankmere, C.C.A.Va., 278 F. 139, certiorari denied Gans SS. Line v. Arnot, 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423—The Isle of Mull, C.C.A.Md., 278 F. 131, certiorari denied Gans SS. Line v. Isles Steam Shipping Co., 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.

91. U.S.—The Frankmere, C.C.A.Va., 278 F. 139, certiorari denied Gans SS. Line v. Arnot, 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423—The Isle of Mull, C.C.A.Md., 278 F. 131, certiorari denied Gans SS. Line v. Isles Steam Shipping Co., 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.

92. U.S.—The Frankmere, C.C.A.Va., 278 F. 139, certiorari denied Gans SS. Line v. Arnot, 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.
58 C.J. p 129 note 14

93. U.S.—The Frankmere, C.C.A.Va., 278 F. 139, certiorari denied Gans SS. Line v. Arnot, 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423—The Isle of Mull, C.C.A.Md., 278 F. 131, certiorari denied Gans SS. Line v. Isles Steam Shipping Co., 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.

94. U.S.—The Isle of Mull, C.C.A.Md., 278 F. 131, certiorari denied Gans SS. Line v. Isles Steam Shipping Co., 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.
58 C.J. p 129 note 16.

95. U.S.—Texas Co. v. Hogarth Shipping Co., D.C.N.Y., 265 F. 375, affirmed, C.C.A., 267 F. 1023, affirmed 41 S.Ct. 612, 256 U.S. 619, 65 L.Ed. 1123.

96. U.S.—Atlantic Fruit Co. v. Solari, D.C.N.Y., 238 F. 217.

of the voyage, while in the latter there is difficulty in ascertaining whether the requisition would probably extend beyond the period of the charter;[97] and the doctrine of frustration may suffice to put an end to the charter party, although it is a time charter.[98]

§ 32. Construction and Operation Generally

a What law governs
b. General rules of construction
c Dependent or independent covenants
d Condition or warranty or description
e. Exceptions clauses
f. Effect of written charter party on oral representations and agreements
g. Effect and construction in connection with bill of lading

a. What Law Governs

As a general rule, the intention of the parties controls as to the law governing the interpretation of charter parties.

As a general rule, the intention of the parties controls as to the law governing the interpretation of charter parties[99] The rights of the parties to a contract are to be judged by that law by which they intended to bind themselves.[1] Generally, the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted and which ought to prevail in the absence of circumstances indicating a different intention;[2] hence, in many cases the lex loci contractus has been applied or has been held to prevail,[3] except where the place of performance is in a foreign country.[4] There may, however, be circumstances existing which justify a presumption of an intention that some other law should govern, complying with which presumed intention the law of the flag has been applied in some cases, and in England, in the absence of sufficient circumstances to make out a contrary intention, such law has been held to prevail.[5] It must be determined, having regard to the nature of the contract, and the other circumstances of the case, by what law it will be governed.[6] There is some authority to the effect that charter parties must be considered as governed by the "general maritime law,"[7] and are not to be construed exclusively by the law of the forum,[8] or by the law of the place where the charter was executed.[9]

A federal court of admiralty is not bound to construe and enforce a charter party in the light of the local law prevailing in the state where the agreement is executed, but may consider the contract as governed by the generally prevailing principles of admiralty and maritime law in the absence of a contrary intention of the parties[10] A party who relies on foreign law for the determination of his rights and liabilities under a charter party is bound to bring such law properly before the court and establish it by proof;[11] and it will be considered to be the same as that of the forum, when it does not otherwise appear.[12]

b. General Rules of Construction

The general rules as to the construction of contracts are applicable to the construction of charter parties.

The general rules as to the construction of contracts are applicable to the construction of charter

97. U.S.—The Frankmere, C.C.A. Va., 278 F. 139, certiorari denied Gans SS. Line v. Arnot, 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423—The Isle of Mull, C.C.A. Md., 278 F. 131, certiorari denied Gans SS. Line v. Isles Steam Shipping Co., 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.

98. U.S.—The Claveresk, C.C.A.N.Y., 264 F. 276.
58 C.J. p. 129 note 22

99. U.S.—Manchester Liners v. Virginia-Carolina Chemical Co., D.C.N.C., 194 F. 463, affirmed 204 F. 564, 123 C.C.A. 90.
58 C.J. p. 130 note 39.

1. U.S.—Lind v. U. S., 44 Ct.Cl. 558.

2. U.S.—Manchester Liners v. Virginia-Carolina Chemical Co., D.C.N.C., 194 F. 463, affirmed 204 F. 564, 123 C.C.A. 90.
58 C.J. p. 131 note 42.

3. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., D.C.Md., 84 F.Supp. 948—Britain S. S. Co. v. George E. Warren Corp., D.C.Mass., 22 F.Supp. 197—The Rygja, D.C.N.Y., 7 F.Supp. 85.
58 C.J. p. 131 notes 43, 44.

Public policy of the United States is to be considered in enforcing in a federal court a charter agreement made in the United States to haul a cargo to a port in the United States.—The Monarch of Nassau, C.C.A.Fla., 155 F.2d 48

4. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283.

5. Eng.—The Express, L. R. 3 A. & E. 597.
58 C.J. p. 131 notes 45, 46.

6. U.S.—Manchester Liners v. Virginia-Carolina Chemical Co., D.C.N.C., 194 F. 463, affirmed 204 F. 564, 123 C.C.A. 90.
58 C.J. p. 131 note 48.

7. Philippine—Compagnie Franco-Indochinoise v. Deutsch-Australische Dampschiffs Gesellschaft, 39 Philippine 474.

8. Philippine—Compagnie Franco-Indochinoise v. Deutsch-Australische Dampschiffs Gesellschaft, supra.

9. Philippine—Compagnie Franco-Indochinoise v. Deutsch-Australische Dampschiffs Gesellschaft, supra.

10. U.S.—Watts v. Camors, C.C.La., 10 F. 145, affirmed 6 S.Ct. 91, 115 U.S. 353, 29 L.Ed. 406

11. U.S.—Manchester Liners v. Virginia-Carolina Chemical Co., D.C.N.C., 194 F. 463, affirmed 204 F. 546, 123 C.C.A. 90.

12. Mass.—Chase v. Alliance Ins. Co., 9 Allen 311.
58 C.J. p. 132 note 63.

parties.[13] Thus, the intention of the parties[14] at the time of making the contract,[15] as evidenced by the language which they have employed[16] and with respect to the controlling law,[17] is to be ascertained and given effect, if possible. The language of the charter should have a very liberal[18] and reasonable[19] construction in furtherance of the real intention of the parties[20] and usage of the trade,[21] and a practical construction from a commercial standpoint is to be preferred and prevails over possible technical uncertainties in the language used.[22] A construction will not be favored which gives one of the parties an undue advantage over the other.[23]

A term will not be implied which is inconsistent with the express provisions of the charter.[24] Neither party to the charter party can be presumed to have waived his own legal rights, but express words must exist in order to support a construction of the charter party resulting in such a way;[25] and still less can one be presumed, by the charter party, to have waived the rights and interests of others.[26]

Surrounding circumstances. Where the language of the charter is not clear, the meaning of its provisions may be construed in the light of the surrounding circumstances,[27] including, in proper cases, the negotiations between the parties leading up to the charter.[28] Evidence of such circumstances may be employed to aid in construction when it may assist in arriving at the true intent of the parties,[29] or when it may explain the meaning of ambiguous terms found in the written contract,[30] but never to alter or modify the plain words of the agreement.[31]

Customs or usages. Custom or usage may be resorted to in the interpretation of charter parties in the absence of express stipulations, or where the meaning of the parties is uncertain or doubtful on the language used, or where the usage may afford explanation or supply deficiencies in the instrument;[32] for a custom may, in a proper case, be one of the circumstances with respect to which the parties have contracted and which they must be presumed to have incorporated in their agreement.[33] In order to entitle such custom to be read into the charter, however, there must be no room to doubt its existence,[34] and it must be reasonable,[35] cer-

13. Tenn.—American Barge Line Co v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156.
58 C.J. p. 132 note 65.

Incorporation by reference
Where oral agreement referred to usual and customary terms of lease agreement for river craft made by the Red Cross, the usual and customary terms were incorporated by reference in the oral agreement.—American Barge Line Co. v. Jones & Laughlin Steel Corp., supra.

Divisible charter
A contract for hiring of barge at certain sum per day and hiring of tug at certain sum per hour while engaged in towing and certain sum per day for lay-over time was "divisible."—Friedland v. The Empress, D.C.Cal., 48 F.Supp. 348

Authority to contract on behalf of owners
The fact that the government in chartering vessel contracted with one who assumed to act as agent or trustee of owners evinced the absence of any oral or other authority to supplement the authority of time charter which granted no authority to contract on behalf of owners.—Epstein v. U. S., D.C.N.Y., 86 F.Supp. 740.

14. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.—The Driebergen, C.C.A. Fla., 60 F.2d 367
58 C.J. p. 132 note 66.

15. U.S.—Davison v. Von Lingen, Md., 5 S.Ct. 346, 113 U.S. 40, 28 L.Ed. 885
58 C.J. p. 133 note 67

16. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662.
58 C.J. p. 133 note 68.

17. U.S.—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780
58 C.J. p. 133 note 69

Words of Harter Act
When the parties to a private charter lift words out of the Harter Act, they must accept the interpretation which the courts have put on them.—Metropolitan Coal Co. v. Howard, supra.

18. Tenn.—American Barge Line Co v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156.
58 C.J. p. 133 note 70.

19. U.S.—Cureton Lumber Co. v. Hammond Lumber Co., C.C.A.Fla., 29 F.2d 973.
58 C.J. p. 134 note 71.

20. Tenn.—American Barge Line Co v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156.
58 C.J. p. 134 note 72.

21. U.S.—Raymond v. Tyson, Cal., 17 How. 53, 15 L.Ed. 47.
58 C.J. p. 134 note 73.

22. U.S.—Leary v. City of New York, D.C.N.Y., 52 F.Supp. 643.
58 C.J. p. 134 note 74.

23. U.S.—Leblond v. McNear, D.C. Cal., 104 F. 826, affirmed 123 F. 384, 61 C.C.A. 564.

24. U.S.—Wyman v. The Sprott, D.C. N.Y., 70 F. 327.

25. U.S.—The Erie, D.C.Mass., 8 F. Cas.No.4,512, 3 Ware 225, reversed on other grounds, C.C., Donahoe v. Kettell, 7 F.Cas.No.3,980, 1 Cliff. 135.

26. U.S.—The Erie, D.C.Mass., 8 F. Cas.No.4,512, 3 Ware 225, reversed on other grounds, C.C., Donahoe v. Kettell, 7 F.Cas.No.3,980, 1 Cliff. 135.

27. U.S.—Phoenix Const. Associates v. City of New York, D.C.N.Y., 33 F.Supp. 666.
58 C.J. p. 134 note 81.

28. U.S.—The Pensacola, C.C.A.Ala., 263 F. 661.
N.Y.—Flagler v. Hearst, 70 N.Y.S. 956, 62 App.Div. 18.

29. Tex.—Southern Surety Co. v. Seagraves, Civ.App., 196 S.W. 587.
58 C.J. p. 135 note 83.

30. U.S.—Bradley v. Washington, etc., Steam Packet Co., D.C., 13 Pet. 89, 10 L.Ed. 72.—The Addison E. Bullard, D.C.Fla., 252 F. 241, affirmed 258 F. 180, 169 C.C.A. 248.

31. U.S.—The Addison E. Bullard, supra

32. U.S.—Straits of Dover SS Co. v. Munson, D.C.N.Y., 95 F. 690
58 C.J. p. 135 note 88

33. U.S.—Continental Coal Co. v. Birdsall, Md., 108 F. 882, 48 C.C.A. 124.
58 C.J. p. 135 note 89.

34. U.S.—Continental Coal Co. v. Birdsall, supra.
58 C.J. p. 135 note 90.

35. U.S.—Turnbull v. Citizens' Bank, C.C.La., 16 F. 145, 4 Woods 193.
58 C.J. p. 135 note 91.

tain,[36] consistent with the contract,[37] uniformly acquiesced in,[38] and not contrary to law.[39] It must be so general and long established that the parties are conclusively presumed to have been acquainted with it and contracted with respect to it;[40] any usage of such doubtful authority as to be known only to a few has not this operation.[41]

In order to permit of its use as an aid to construction, a custom or usage must be notorious,[42] uniform,[43] and well defined.[44] Custom is not admissible to vary the terms of an unambiguous charter party,[45] or to alter the rights and obligations of the parties from those expressed in such an agreement;[46] and it is not permissible to incorporate a custom into an express charter in writing the terms of which are neither technical nor ambiguous.[47] An asserted change in the customary meaning of terms employed in charter parties must be made out clearly by one asserting it in order to prevent the application of the old and firmly settled custom,[48] and this requirement is even stronger in the case of such an instrument as a charter party where the clauses used are in the old forms, and where the meaning to be given particular clauses ought to continue the same, than in the case of contracts generally.[49] If otherwise sufficiently established, however, it need not affirmatively appear that the custom or usage was actually known by both of the parties to the charter party.[50]

Construction favoring operative effect. A construction is to be favored which will sustain the charter party rather than one which destroys its existence or operation;[51] and the same is true as regards a construction which will give effect to a part of a charter party as contrasted with one which will nullify it.[52] If possible, every word intentionally inserted in a charter must be given its full significance,[53] and every part of the charter accorded its due effect;[54] but in construing charter parties, made, as they almost always are, on prepared and printed forms, and into which terms and conditions are introduced to cover every case which might arise, it is impossible to give force and effect to every term so used in every case and still give the instrument a reasonable construction conformable to the intention of the parties;[55] and, where that is true, the latter consideration prevails.[56] If the parties employ ambiguous language, it is the duty of the court to give, if possible, such effect to it as will not destroy the effect of other clauses clearly phrased and free from any doubt as to their meaning.[57]

Construction of charter as whole. In determining the intention of the parties, the contract must be construed as a whole and all of the provisions of the charter taken into consideration,[58] and particular words are to be construed with respect to the connection in which they are used.[59] Where the provisions of the charter are inharmonious, the general intent, as evidenced by its written portions and

36. U S—Hart v Leach, D C Md., 21 F. 77.
58 C J p 135 note 92.

37. U.S—The Clintonia, D C N Y., 104 F 92
58 C.J. p 135 note 93.

38. U S—Continental Coal Co v Birdsall, Md, 108 F. 882, 48 C.C A 124.

39. U S—Continental Coal Co. v Birdsall, supra.
58 C J. p 136 note 95.

40. Ala—Wye Shipping Co. v. Hunter, etc, Co., 100 So. 475, 211 Ala 326
58 C.J p 136 note 96.

41. U S—Continental Coal Co. v Birdsall, Md, 108 F. 882, 48 C.C A 124

42. U.S—Continental Coal Co. v Birdsall, supra

43. U.S—Continental Coal Co. v Birdsall, supra—Hart v. Leach, D. C.Md., 21 F. 77.

44. U S—Continental Coal Co v Birdsall, Md, 108 F. 882, 48 C.C.A. 124.

45. U S.—The Sursum Corda, D.C.N. Y., 20 F.2d 212.
58 C.J. p 136 note 2.

46. U S—The Clintonia, D.C.N.Y, 104 F. 92
58 C.J. p 136 note 3.

47. U S—Blue Star SS Co. v. Keyser, D.C Fla., 81 F. 507.
58 C J. p 136 note 4.

48. U S—Macy v. Perry, N.Y., 99 F. 1004, 40 C C A. 217.

49. U S.—Macy v. Perry, supra.

50. Md—Barker v. Borzone, 48 Md. 474
58 C J. p 136 note 7.

51. U S—The Cogne, D C Va., 20 F. 2d 698, reversed on other grounds, C C A, Societa Commerciale di Navigazione v. Consolidation Coal Co, C C.A., 25 F 2d 590, certiorari denied Consolidation Coal Co v Societa Commerciale di Navigazione, 49 S Ct. 31, 278 U.S. 631, 73 L Ed 567
58 C.J. p 136 note 8.

52. U S—Emmons Coal Min. Corp. v. Ropner, C.C.A.Pa., 31 F 2d 948, certiorari denied 50 S.Ct. 31, 280 U S. 577, 74 L Ed. 628.
58 C.J. p 136 note 9.

53. U.S—The G R. Crowe, D.C N Y., 287 F. 426, affirmed, C.C.A., 294 F. 506, certiorari denied 44 S.Ct. 335, 264 U S. 586, 68 L Ed. 862.
58 C J. p 136 note 10.

54. Ala—Finnegan v. Frank, 67 Ala. 21
58 C J. p 137 note 11.

55. U.S—The India v. Donald, Miss., 49 F. 76, 1 C C A 174.

56. U S—W K. Niver Coal Co. v. Cheronea SS. Co, Mass., 142 F. 403, 73 C C.A. 502, 5 L.R A.,N S., 126.
58 C J. p 137 note 13

57. U S.—The Vale Royal, D.C Md., 51 F Supp. 412.

58. U.S—The Framlington Court, C C A Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co, 54 S Ct 860, 292 U.S. 651, 78 L Ed. 1500—The Driebergen, C C A. Fla, 60 F 2d 367.
58 C J. p 137 note 15.

59. U.S—The Raymond M White, D.C N Y., 290 F. 454, affirmed, C C. A., Simmons Transp. Co v Wright, etc., Lighterage Co, 296 F 1023—Mazza v. J G. White Engineering Co., D.C.N.Y., 274 F. 990.

its evident leading purpose, should control the minor provisions.[60] A broad general provision is not to be limited by an express stipulation where it appears from the circumstances that the latter was inserted for a special purpose and was not intended to import any limitation of the former.[61] The agreement must also be looked at in its entirety for the respective rights and duties of the parties.[62]

Written or typewritten and printed provisions. A written provision in a charter party is, it has been held, ordinarily controlling, as against an inconsistent printed provision thereof;[63] but it is an equally well settled rule applicable to such contracts, that, if possible, the written and printed provisions should be construed together and as far as possible harmonized.[64] Similar rules prevail as to typewritten provisions occurring in the same instrument with printed provisions.[65] In determining the intention of the parties, matter expunged from a printed form used in drawing up a charter party may be considered.[66] Moreover, an expression appearing in writing in the charter party may require that the charter be construed and applied in the light of such provision, even though the same provision, if it appeared in a printed form, might properly be disregarded as tautological.[67]

Construction of instruments together. If the rights and obligations of the parties to the charter are expressed in two instruments together constituting their contract, such instruments are to be construed together.[68]

Popular or technical meaning of words In the absence of qualifying language, or of other circumstances indicating a contrary intention, the parties to a charter party will be taken to have used words in their ordinary and popular sense,[69] or in their ordinary maritime sense, if they have one,[70] but if, by other expressions in the charter, they indicate an intention to use them in a different sense,[71] or if a consideration of the surrounding circumstances indicates such an intention,[72] the purpose of the parties to give to their words a different meaning will be respected. The actual understanding, being what a reasonable man in like circumstances could have understood a proposal to be, is the meaning which the law will impute to a proposition to which assent is given.[73] When words possessing a technical meaning are incorporated in a charter, the charter must be construed so as to give them the effect proper to this peculiar meaning,[74] and, for this purpose, extrinsic evidence as to the meaning of such expressions may be admitted.[75] If the parties employ an expression having a known legal meaning, it has been held that parol evidence that the parties intended to use it in some different or popular sense is to be rejected, unless the expression, if interpreted according to its legal acceptation, is wholly insensible with respect either to the context of the charter party or the extrinsic facts.[76]

Construction against party choosing terms. Where a charter is ambiguous, it is to be construed most strongly against the party preparing it or employing the words concerning which doubt arises.[77] Thus, where the charter party is on a form prepared by the charterers, its construction will be taken most strictly against them,[78] and particularly as to clauses inserted for their own benefit.[79] Similarly, excep-

60. U S—Pacific Impr. Co v Schubach-Hamilton SS. Co., D.C.Wash., 214 F 854
58 C J p 137 note 18.

61. U S—Menantic SS Co v. Peirce, D C N Y, 88 F 308.
58 C.J p 137 note 19

62. U S—Nicholson Transit Co v. Nicholson Universal S. S Co, C.C A Mich., 60 F 2d 90.

63. U S—The August, D C N Y, 5 F.Supp 463
58 C J. p 137 note 20.

64. U S—Manchester Liners v Virginia-Carolina Chemical Co., D C N. C, 194 F 463, affirmed 204 F. 564, 123 C C A. 90.
58 C J. p 138 note 21.

65. U.S—The August, D.C.N.Y., 5 F Supp. 463.
58 C.J. p 138 note 22.

Typed addendum to printed charter, prepared after negotiation ad hoc, could not be ignored as constituent part of ship's duties.—Denholm Shipping Co. v. W. E Hedger Co, C.C.A N Y., 47 F.2d 213

66. U S—One Thousand Bags of Sugar v Harrison, Pa., 53 F. 828, 4 C C A. 34
58 C.J. p 138 note 23

67. U.S—Mazza v. J G. White Engineering Co, D C N.Y., 274 F. 990.
58 C.J. p 138 note 24.

68. U.S—Sun Printing, etc., Assoc v. Moore, N Y., 22 S.Ct. 240, 183 U S. 642, 46 L Ed. 366.
58 C.J. p 138 note 26.

69. U S—The Emily S. Malcolm, C C A N.J., 278 F 943.
58 C.J p 138 note 27.

70. U S.—The John H. Pearson, Mass, 7 S Ct. 1008, 121 U S. 469, 30 L.Ed 979.
58 C J. p 138 note 28.

71. U.S—The Mary Adelaide Randall, D.C Conn, 93 F 222, affirmed 98 F. 895, 39 C C A. 335.
58 C.J. p 139 note 29.

72. U S—The Mary Adelaide Randall, supra

73. U S—U S. Navigation Co. v. Black Diamond Lines, C.C.A N Y., 147 F.2d 958.

74. U.S.—The John H Pearson, Mass, 7 S Ct 1008, 121 U.S 469, 30 L.Ed. 979.
58 C J p 139 note 31.

75. U S.—The John H. Pearson, supra.

76. U S—Blue Star SS Co. v. Keyser, D C Fla., 81 F 507, reversed on other grounds 91 F. 267, 33 C C. A. 496

77. U S.—Denholm Shipping Co. v. W E. Hedger Co, C.C A N.Y., 47 F.2d 213—The August, D.C.N.Y., 5 F Supp 463.
58 C J p 139 note 34

78. U S—Mignano v MacAndrews, N.Y, 53 F. 958, 4 C.C.A. 6.

79. U S—Mignano v. MacAndrews, supra.

tions in a charter party, inserted by the shipowner for his own benefit, are to be construed most strongly against him,[80] and exceptions put in by brokers for the benefit of the vessel are to be construed strictly against the vessel.[81] This rule of construction has been said, however, to be the last rule of interpretation to be resorted to when all others fail.[82]

Construction by subsequent conduct of parties. Where the parties to a charter party have given it a practical construction by their conduct, such conduct may be used to assist in the determination of the meaning of the provisions of the charter party.[83]

Construction as time charter. The mere fact that a charter calls itself a time charter and specifies that it is not to be construed as a demise of the vessel does not conclusively determine its character.[84]

Particular terms construed. In the footnote following are cited cases in which many words and phrases as employed in charter parties have been judicially construed.[85]

c. Dependent or Independent Covenants

Whether covenants in a charter are dependent, so that one covenant or its performance is a condition precedent to liability on another, or whether they are independent covenants giving rise to independent cross actions only, is a question of construction.

Whether covenants in a charter are dependent, so that one covenant or its performance is a condition precedent to liability on another, or whether they are independent covenants giving rise to independent cross actions only, is a question of construction,[86] to be determined in the light of the expressed intention of the parties.[87] Where one precedes the other in time of performance, or is concurrent therewith, and is necessary or proper to enable the other to perform, or relates to such performance, it has been held that it or its performance is a condition precedent.[88] When mutual covenants go to

80. U.S.—Compania de Navigacion la Flecha v. Brauer, N.Y., 18 S.Ct. 12, 168 U.S. 104, 42 L.Ed. 398—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S.S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

81. U.S.—The Helen Barnet Gring, D.C.Md., 48 F.2d 629.

82. U.S.—The Erie, D.C.Mass., 8 F.Cas.No. 4,512, 3 Ware 225, reversed on other grounds, C.C., Donahoe v. Kettell, 7 F.Cas.No. 3,980, 1 Cliff. 135.

83. U.S.—Kenny v. City of New York, D.C.N.Y., 28 F.Supp. 175, affirmed, C.C.A., 108 F.2d 958.
58 C.J. p. 139 note 39.

84. U.S.—Burkholder v. U.S., D.C.Pa., 56 F.Supp. 106.

Charters held time charters

(1) Hire of ship at named rate per ton of deadweight capacity for named period.—The Gibraltar, C.C.A.Pa., 52 F.2d 787.

(2) Charters of tugboats, under which they were bound to perform any towing services required by the charterer.—L. R. Connett & Co. v. The Republic No. 5, D.C.N.Y., 43 F.Supp. 245.

85. Particular terms and clauses construed

(1) "Calendar days."—Sherwood v. American Sugar Refining Co., C.C.A.N.Y., 8 F.2d 586.

(2) "Default" of the charterer.—Thacher v. Boston Gaslight Co., D.C.Mass., 23 F.Cas.No. 13,850, 2 Lowell 361—58 C.J. p. 139 note 40 [a] (31)—18 C.J. p. 455 notes 49 [a] (1)-(4).

(3) "From two to about five months in the trading limits."—U.S. Navigation Co. v. Black Diamond Lines, D.C.N.Y., 51 F.Supp. 717, affirmed, C.C.A., 147 F.2d 958.

(4) If barge owner "exercised due diligence to make . . . the Barge . . . seaworthy and properly manned, equipped, and supplied," he was not to be liable for "unseaworthiness . . . not discoverable by due diligence."—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780.

(5) "In case of any liability on the part of the charterer to the owners for any damage covered by insurance effected by or for the benefit of said owners, the charterer shall have the benefit of said insurance."—Port Johnston Towing Co. v. Pennsylvania R. Co., D.C.N.Y., 190 F. 409.

(6) "Light laden."—The Ceres, N.Y., 72 F. 936, 19 C.C.A. 243, certiorari denied 16 S.Ct. 1199, 163 U.S. 706, 41 L.Ed. 319—37 C.J. p. 659 note 20.

(7) "Manage and conduct the business of vessels assigned to it, maintain the vessels in such trade or service as the United States may direct," etc.—O'Maire, Inc., v. The Yaka, D.C.N.Y., 79 F.Supp. 659.

(8) Owner of barge to insure and pay cost of insurance on cargo out of freight rate, etc.—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D.C.N.Y., 15 F.Supp. 705, affirmed, C.C.A., 88 F.2d 1005, certiorari denied 58 S.Ct. 18, 302 U.S. 699, 82 L.Ed. 540.

(9) "Owner's guarantee that the steamer can proceed through all rivers and canals to reach Toronto with the above cargo."—The Older, D.C.N.Y., 1 F.Supp. 119, reversed on other grounds, C.C.A., 65 F.2d 359.

(10) "Owners to remain responsible for the navigation of the vessels, insurance, crew and all other matters, same as when trading for their own account."—The Vale Royal, D.C.Md., 51 F.Supp. 412—58 C.J. p. 139 note 40 [a] (77).

(11) "Port."—The Skomvaer, D.C.N.Y., 286 F. 711, modified on other grounds, C.C.A., 297 F. 746—49 C.J. p. 1085 note 57 [b].

(12) "Repairs."—Nicholson Transit Co. v. Nicholson-Universal S.S. Co., D.C.Mich., 43 F.2d 427, affirmed, C.C.A., 60 F.2d 90.

(13) "Subject to all regulations of general application in the trade issued by the United States with respect to cargoes" and other matters.—Schnell v. U.S., C.C.A.N.Y., 166 F.2d 479, certiorari denied 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760.

(14) "That the captain (although appointed by the owners) shall be under the orders and directions of the charterers."—The Vale Royal, D.C.Md., 51 F.Supp. 412.

(15) "Working day."—Sherwood v. American Sugar Refining Co., D.C.N.Y., 287 F. 721.

(16) Other particular terms and clauses construed see 58 C.J. p. 139 note 40.

86. U.S.—Simonetti v. Foster, D.C.Mass., 2 F. 415.
N.Y.—Merritt, etc., Derrick, etc., Co. v. Terry, etc., Co., 174 N.Y.S. 381, 106 Misc. 247.

87. U.S.—Lowber v. Bangs, Mass., 2 Wall. 728, 17 L.Ed. 768.
58 C.J. p. 142 note 42.

88. N.Y.—Merritt, etc., Wrecking Co. v. Terry, etc., Co., 174 N.Y.S. 381, 106 Misc. 247.
58 C.J. p. 142 note 43.

the whole consideration on both sides, they are mutual conditions, the one precedent to the other,[89] but all technical forms of expression must give way to the intention of the parties in determining whether covenants are dependent or independent.[90]

d. Condition or Warranty or Description

Whether a descriptive statement contained in a charter party is a mere representation, or whether it is a substantive part of the charter, is a question of construction.

Whether a descriptive statement contained in a charter party is a mere representation, or whether it is a substantive part of the charter, is a question of construction,[91] in determining which not only the language of the instrument but also the circumstances under which,[92] and the purposes for which,[93] the charter party was entered into may be considered. If a statement as to capacity, speed, or other qualities is such as to constitute a substantive part of the charter, it ought to be held a warranty or condition rather than a mere representation,[94] notwithstanding the failure to use the word "warranty."[95] Where, in the charter party, time is of the essence of the agreement, statements bearing on the matter of time are conditions precedent and not mere stipulations or representations.[96] Conditions precedent must be definite[97] and they are usually express.[98] Statements have been held to constitute mere representations, where the circumstances were insufficient to cause them to amount to warranties, although made with respect to the speed or capacity of the vessel,[99] its register measurements,[1] or location.[2] Representations as to measurement, capacity, or tonnage are taken as merely descriptive, when the contract taken as a whole shows that the real consideration was the actual carrying capacity of the vessel.[3]

In the absence of bad faith or grossly misleading statements, if the identification is fair, a wide margin may be allowed in description.[4] If, however, there is an actual warranty of the capacity, speed, or other qualities of the vessel, the owner is liable for any deficiency in this respect.[5] In the absence of a provision in the charter party that the vessel shall commence or complete loading by a certain time or that the cargo shall be shipped by a certain day, the owner has a reasonable time within which, by rearrangement of stowage and ballast, to enable the vessel to take the amount of cargo which

89. U S—Lowber v. Bangs, Mass., 2 Wall. 728, 17 L Ed 768.

90. U.S.—Lowber v. Bangs, supra

91. U.S.—The Atlanta, D.C.Ga., 82 F.Supp. 218
58 C J. p 142 note 47.

92. U S—Lovell v. Davis, La., 101 U S 541, 25 L.Ed 944
58 C.J. p 142 note 48

93. U S.—Watts v. Camors, La., 6 S Ct 91, 115 U.S. 353, 29 L.Ed. 406—Lowber v Bangs, Mass., 2 Wall 728, 17 L Ed. 768.

94. U.S—Metropolitan Coal Co v Howard, C C.A.N.Y., 155 F 2d 780—The Atlanta, D C Ga., 82 F.Supp 218
58 C J p 142 note 51.

95. U S—Romano v. West India Fruit & S S Co., C C A Fla, 151 F 2d 727—Denholm Shipping Co v W. E. Hedger Co, C C A.N.Y., 47 F 2d 213.

Test is whether the statement was positively and unequivocally made as a statement of fact and whether the natural tendency of its making was to induce the chartering of the ship.—Romano v. West India Fruit & S. S. Co, C C A.Fla, 151 F 2d 727.

96. U.S—Lowber v. Bangs, Mass., 2 Wall 728, 17 L.Ed. 768.
N.Y—Weisser v. Maitland, 5 N.Y. Super. 318

97. U S—Fearing v. Cheeseman, C. C Me., 8 F Cas.No.4,710, 3 Cliff. 91.

98. U S—Fearing v. Cheeseman, supra.

99. U.S.—The Hurstdale, D C.N.Y 169 F. 912, affirmed 179 F. 371, 102 C C A. 649
58 C J p 142 note 56.

Refusal to guarantee

Where the charter of a vessel stated that it would steam eight and one half knots per hour on about seventeen tons of best Welsh coal for twenty-four hours, but that the particulars "are not guaranteed," and coal of that quality was not furnished, in order to entitle the charterer to recover for deficiency in speed, he must show that the representations were designedly false, the refusal to guarantee being notice not to rely on the statement as to speed—The Hurstdale, D C N.Y, 169 F 912, affirmed 179 F. 371, 102 C C.A. 649.

1. U S—Watts v. Camors, La., 10 F. 145, affirmed 6 S.Ct. 91, 115 U S. 353, 29 L Ed. 406.
N Y—Ashburner v Balchen, 7 N.Y 262

2. U S—Lovell v Davis, La., 101 U S 541, 25 L Ed 944.

3. U S—The Emily S. Malcolm, C C A.N J, 278 F 943.
58 C J. p 143 note 59.

4. U.S—Dampskibs Aktieselskabet Jan v. Cargo of Jute Butts, Burlap and/or Shellac, etc, D.C N.Y., 298 F 164—Stray v. Trottier, etc., Co, D.C.Mass., 280 F. 249.

5. U S—Denholm Shipping Co v. W. E. Hedger Co, C C A N Y., 47 F 2d 213—The Atlanta, D C Ga., 82 F Supp 218—Steamship Rutherglen Co. v. Houlder, D C.N Y., 196 F 916, reversed on other grounds 203 F. 848, 122 C C A. 166.

Insulation and refrigeration

Where libelants were operating respondent's vessel under a time charter which contemplated a number of voyages and vessel was engaged for transportation of bananas, a highly perishable freight, parties intended that vessel would carry only a cargo of fresh green bananas and such was implied condition under which performance of respondent's warranty as to insulation and refrigeration of vessel was to be tested, therefore, breach of warranty which would justify rescission could not be determined solely on temperature records in absence of an affirmative showing that cargo for voyage was one fit for shipment and of kind that was intended, and inquiry was whether, when laden as intended, vessel was capable of maintaining hold temperature warranted.—Lucayan Transports v. McCormick Shipping Corp., C A Fla, 188 F.2d 202.

Warranties of speed construed

U.S.—Denholm Shipping Co v. W. E. Hedger Co, C C.A N.Y., 47 F.2d 213—Wessels v. The Ceres, N Y., 72 F. 936, 19 C C.A. 243, certiorari denied 16 S Ct. 1199, 163 U.S. 706, 41 L.Ed. 319.

it is agreed that it shall carry.[6] The operative words in a charter party will prevail over the descriptive recitals.[7]

e. Exceptions Clauses

It is a question of construction whether exceptions in a charter party are for the benefit of one party only or of both parties.

It is a question of construction whether exceptions in a charter party are for the benefit of one party only or of both parties.[8] There is authority declaring that such exceptions are intended to protect both owners and charterers, unless the context clearly shows an intention to protect the one or the other only,[9] whether or not the word "mutually" is inserted.[10] Assistance in determining the effect of exceptions may be had by reference to the position of the general exception in the document[11]

f. Effect of Written Charter Party on Oral Representations and Agreements

Representations prior to a charter, which are not embodied in the charter, are superseded by that instrument, in the absence of fraud or mutual mistake.

Representations prior to a charter, which are not embodied in the charter, are superseded by that instrument, in the absence of fraud or mutual mistake;[12] and, in the absence of fraud or misrepresentation in the inception of a charter party, the owner and charterers must be governed by its express terms.[13] The charter party determines and controls the rights and obligations of the parties.[14] However, oral agreements are not superseded by subsequently executed written charters, where the written charters are not a substitute for the oral agreements.[15] Where an oral charter party has been completely executed, a subsequent written charter party between the same parties and dealing with the same subject matter does not necessarily incorporate all of the terms of the contract available to the parties so as to render the terms of the oral agreement inoperative[16] In like manner, there may be a subsequent oral charter party as to the same vessel and between the same parties as are bound by a previous written charter party, and the oral charter party, when it is of that character, is valid and enforceable.[17]

g. Effect and Construction in Connection with Bill of Lading

As between the charterer and the owner, the charter party, and not the bill of lading, is the controlling document. As between the owner and third persons the language of bills of lading may prevail over that of the charter party.

As between the charterer and the owner, the charter party, and not the bill of lading, is the controlling document,[18] and this is true, although the charter party is not expressed in writing but was made in parol.[19] Bills of ladings which do not refer to the charter party do not, as between the shipowner and the charterer, operate as new contracts, and their stipulations do not supersede the provisions of the charter party on the same subject.[20] Where terms of the charter party are specifically incorporated by reference in the bill of

6. U S —Cullıford v. Gomila, La., 9 S Ct. 50, 128 U S 135, 32 L Ed 381
58 C J. p 175 note 78.

7. U S —Hooe v Groverman, Dist Cal , 1 Cranch 214, 2 L Ed. 86.

8. U S —The Queen Olga, D.C N Y., 162 F 490, affirmed Dunlop SS Co. v Tweedie Trading Co , 178 F. 673, 102 C C A. 173.

9. U S —Gans SS Line v. Wilhelmsen, C C A N.Y., 275 F. 254, certiorari denied 42 S Ct. 97, 257 U S 655, 66 L.Ed 419.
58 C J. p 143 note 64

10. U S —Gans SS Line v. Wilhelmsen, supra
58 C J. p 143 note 65.

11. U.S —Mazza v J G. White Engineering Co , D.C.N.Y., 274 F. 990.

12. U S.—Matthias v. Beeche, D.C N.Y., 111 F. 940.
58 C.J. p 144 note 74.

13. U.S.—The Laurent Meeus, D.C. Cal., 43 F Supp. 807, modified on other grounds, C C.A , Mitsubishi Shoji Kaisha, Limited v Societe Purfina Maritime, 133 F.2d 552, certiorari denied 63 S.Ct. 858, 318 U.S. 781, 87 L.Ed. 1148—Gronvold v Suryan, D C Wash , 12 F.Supp. 429
58 C J. p 144 note 75.

Assumption of purpose for provisions
Court would not assume that charter party provisions were not inserted in charter party for purpose —Venezuelan Meat Export Co. v. U S , D C Md , 12 F Supp. 379.

14. U S —American Creosoting Co. v Deutsche Petroleum Aktien Gesellschaft, D C.N J , 28 F 2d 356.
58 C J p 144 note 76

15. U S —U S. Navigation Co v. Black Diamond Lines, C C A N.Y., 124 F 2d 508, certiorari denied Black Diamond Lines v United States Navigation Co , 62 S Ct 805, 315 U S. 816, 86 L Ed. 1214.

Option granted by oral agreement
Where owner orally agreed to charter vessels for period of two to about five months, and when written charters were presented for execution owner insisted on limiting use of each vessel to one round voyage, and charterer signed the charters under protest and reservation of rights, execution of the charters did not signify an abandonment by charterer of option for two voyages granted by oral agreements, or effect more than an agreement to accept a charter for a single voyage and a promise to pay hire pro tanto for what was the minimum requirement of the earlier agreements —U S. Navigation Co. v. Black Diamond Lines, C.C A.N.Y., 124 F 2d 508, certiorari denied Black Diamond Lines v United States Navigation Co , 62 S.Ct. 805, 315 U S. 816, 86 L Ed 1214.

16. Ill —Webster v. Vogel, 62 Ill. 184.

17. U S —Monongahela, etc., Dredging Co v. Rodgers Sand Co., D C Pa , 296 F 916, affirmed, C.C A , 296 F. 919.
58 C J p 144 note 78.

18. U S —The Temple Bar, D C Md., 45 F Supp. 608, affirmed, C.C.A , 137 F.2d 293.
58 C.J. p 144 note 80.

19. U.S —Huron Barge Co. v. Turney, D.C Ohio, 71 F. 972

20. U S.—The Iona, Tex., 80 F. 933, 26 C.C A 261.
58 C J. p 145 note 82.

lading, the charter party terms alone are to be looked to for the contract of the parties.[21] A bill of lading referring to a charter party is never to be construed as intending to express the whole intent,[22] or to control the charter party in consequence of mere inharmonious provisions.[23] Where the intent of the charter is clear, a bill of lading given under it, and referring to it as between the ship and the charterer, does not supersede the express provisions of the charter party that are clearly intended to apply to the situation,[24] however inartificially the bill of lading may be framed.[25]

Unless there is sufficient evidence of a waiver of the provisions of the charter, or of some new contract, mere loose and inharmonious expressions in the bill of lading which refer to the charter will not supersede the latter, as respects matters which the charter was clearly designed to cover.[26] The bill of lading will never operate thus to annul or supersede the charter party, unless intended by the parties to have that effect.[27] Where, however, the bill of lading is intended as a modification of the charter party in certain particulars, effect is to be given to that intention even as between the owner and the charterer[28] In some cases it has been held that the bill of lading operated as a mere memorandum or receipt of shipments made in pursuance of the charter,[29] where the bill of lading specifically referred to the charter party,[30] or where it did not,[31] and that its provisions could not affect or modify the liability of the ship[32] The bill of lading may operate, however, in the event of ambiguity in the charter party, to assist in the construction of the latter by resolving doubts with reference thereto.[33] A provision in a charter party that bills of lading are to be binding on the master and the owner as proof of the quantity delivered to the ship makes the bill conclusive evidence on that point,[34] and such a provision is binding in any dispute between the charterer and the owner, arising under the charter party.[35]

As between the owner and third persons, the language of the bills of lading has been held to prevail over that of the charter party, where the two were inconsistent, in cases where third persons without notice whose rights were involved occupied the position of shippers under bills of lading issued by the master, at the instance of the charterer, when the owner retained control and possession of the vessel,[36] or of bona fide indorsees of the bills of lading[37]

It has been said that according to the weight of authority, the bills of lading govern whether or not notice of the charter party existed;[38] and there is authority to the effect that the shipowner cannot, as against strangers to the charter party, who have shipped goods,[39] or consignees[40] or indorsees of the bills of lading for value,[41] claim to set up rights, and that their duties and obligations are not to be measured, under the charter party, which rights or duties are inconsistent with the terms of those bills of lading, although notice of the existence of a charter party be given, even where it is given by the

21. U.S.—Manchester Liners v. Virginia-Carolina Chemical Co., D.C.N.C., 194 F. 463, affirmed 204 F. 564, 123 C.C.A. 90—The Ethel, D.C.N.Y., 8 F.Cas.No 4,540, 5 Ben 154.

In rem liability

Provision in charter that certain specified clauses should be incorporated in charterer's bills of lading was held relevant only to the in rem liability of vessel—Schnell v. U. S., C.C.A.N.Y., 166 F.2d 479, certiorari denied 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760

22. U.S.—The Chadwicke, D.C.N.Y., 29 F. 521

23. U.S.—Manchester Liners v. Virginia-Carolina Chemical Co., D.C.N.C., 194 F. 463, affirmed 204 F. 564, 123 C.C.A. 90—The Chadwicke, D.C.N.Y., 29 F. 521

24. U.S.—The Chadwicke, supra—Hart v. Leach, D.C.Md., 21 F. 77.

25. U.S.—The Chadwicke, D.C.N.Y., 29 F. 521.

26. U.S.—The Chadwicke, supra.

27. Mass.—Cobb v. Blanchard, 11 Allen 409.

28. U.S.—U. S. v. Fisher Flouring Mills Co., D.C.Wash., 295 F. 691.
58 C.J. p 145 note 91.

29. U.S.—Romano v. West India Fruit & S. S. Co., C.C.A.Fla., 151 F.2d 727—The Northern No 29, D.C.N.Y., 15 F.Supp. 543, reversed on other grounds, C.C.A., Flat-Top Fuel Co. v. Martin, 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.
58 C.J. p 145 note 92

30. U.S.—The Chadwicke, D.C.N.Y., 29 F. 521—The Ethel, D.C.N.Y., 8 F.Cas.No 4,540, 5 Ben. 154.

31. U.S.—Ardan SS Co. v. Theband, D.C.N.Y., 35 F. 620—Lamb v. Parkman, D.C.Mass., 14 F.Cas.No 8,020, 1 Sprague 343, affirmed, C.C., 14 F.Cas.No 8,019, 21 L.R. 589, 1 West. L.Month 159.

32. U.S.—Romano v. West India Fruit & S. S. Co., C.C.A.Fla., 151 F. 2d 727

33. U.S.—The Fri, N.Y., 154 F. 333, 83 C.C.A. 205, certiorari denied 28 S.Ct. 761, 210 U.S. 431, 52 L.Ed. 1135.

34. U.S.—Lightburne v. The Tongoy, D.C.Ala., 55 F. 329.

35. U.S.—Lightburne v. The Tongoy, supra.

36. U.S.—Field Line v. South Atlantic SS. Line, Ga., 201 F. 301, 119 C.C.A. 539
58 C.J. p 146 note 6.

37. U.S.—The Querini Stamphalia, C.C.N.Y., 19 F. 123
58 C.J. p 146 note 7.

38. Ga.—Robinson v. Holst, 23 S.E. 76, 96 Ga. 19.

39. U.S.—O'Connell v. One Thousand and Two Bales of Sisal Hemp, D.C. Ala., 75 F. 410
58 C.J. p 146 note 9.

40. U.S.—Yone Suzuki v. Central Argentine R. Co., C.C.A.N.Y., 27 F. 2d 795, certiorari denied Central Argentine Ry v. Yone Suzuki, 49 S.Ct. 178, 278 U.S. 652, 73 L.Ed. 563.
58 C.J. p 146 note 11.

41. U.S.—Four Hundred and Six Hogsheads of Molasses, C.C.N.Y., 9 F.Cas.No.4,988, 4 Blatchf 319.
58 C.J. p 146 note 12.

bills of lading themselves.[42] It has been held, however, that strangers to a charter party, who had notice of the existence of the charter party, cannot assert, against the owner's charter contract, their rights under bills of lading issued by the master without authority.[43]

Authority exists recognizing the controlling character of the bill of lading in determining the rights of the parties, despite specific reference to the existence of the charter party in the bill of lading,[44] and even, in proper cases, despite a bill of lading provision incorporating certain of the charter terms in the bill of lading.[45] Where the party whose rights are involved is one occupying such a position toward the owner that notice of the charter party is ineffective to render the charter party controlling, as to him, as against inconsistent terms in the bill of lading, a clause of reference in the bill of lading incorporating therein certain of the charter provisions affects his rights only to the extent to which the language of the charter party has adopted the charter provisions,[46] and the terms of the charter party, which, on a proper construction of the language of the bill of lading, are not specifically included in the latter instrument, do not measure or determine his rights.[47]

A bill of lading containing the words "freights and all other conditions as per charter party" brings into the contract not only all conditions of the charter party which relate to the payment of freight, but all that are referable to the subject matter of the receipt, the carriage, and the discharge of the cargo;[48] but, where an intention appears that the term "exceptions" employed in a bill of lading should include the deviation clause of a charter party, the latter is incorporated and regulates the rights of the parties.[49] However, as to a charter party provision which is sufficiently incorporated in a bill of lading, the rights of the parties, although the parties are strangers to the charter party, are governed and controlled by the charter provision.[50]

It has been held that shippers having notice or knowledge of the provisions of the charter party are bound thereby.[51]

Where, the provisions of bill of lading and charter party being inconsistent, the former instrument is held to govern and the owner is held liable to some stranger to the charter party, under the terms of the bill of lading, there is authority permitting recovery over against the charterer for the liability thus incurred by reason of the charterer's conduct in preparing incorrect bills of lading and securing their signature by the master, under a clause in the charter requiring the latter to sign bills of lading as presented without prejudice to the charter party.[52]

Requirement of master's signature of bills. Where the charter party requires the master to sign shippers' bills of lading as presented, without prejudice to the charter party, he is bound to sign any usual bill presented, describing goods actually delivered to the vessel,[53] and a refusal to do so is a breach of the charter party, which entitles the shipper to such damages as may be shown.[54] The master is not, however, required to sign erroneous bills;[55] and thus he cannot be required to sign the bills unless the goods have been delivered,[56] and he cannot be required to sign them in any form the charterers may choose.[57] He is required to sign only bills of lading lawfully and rightly presented under the charter provisions.[58] The charterer, under a charter party containing such a clause, is under a duty to present for signature only proper bills of lading.[59] Provision in the charter party for signature

42. U.S.—Yone Suzuki v. Central Argentine R. Co., C.C.A.N.Y., 27 F.2d 795, certiorari denied Central Argentine Ry v Yone Suzuki, 49 S. Ct. 178, 278 U.S 652, 73 L.Ed. 563.
58 C.J. p 147 note 14.

43. U.S.—The Salem's Cargo, D.C. Mass., 21 F.Cas.No.12,248, 1 Sprague 389.

44. U.S.—One Hundred and Twelve Sticks of Timber, D.C.N.Y., 18 F. Cas.No 10,524, 8 Ben. 214.
58 C.J. p 147 note 15.

45. U.S.—Yone Suzuki v. Central Argentine R Co C.C.A.N.Y., 27 F 2d 795, certiorari denied Central Argentine Ry. v. Yone Suzuki, 49 S. Ct 178, 278 U.S 652, 73 L.Ed 563

46. U.S.—Yone Suzuki v Central Argentine R Co., C.C.A.N.Y., 27 F 2d 795, certiorari denied Central Argentine Ry. v. Yone Suzuki, 49 S Ct. 178, 278 U.S. 652, 73 L.Ed. 563.

47. U.S.—Yone Suzuki v. Central Argentine R. Co., C.C.A.N.Y., 27 F 2d 795, certiorari denied Central Argentine Ry v Yone Suzuki, 49 S. Ct. 178, 278 U.S 652, 73 L.Ed. 563.
58 C.J. p 147 note 19.

48. U.S.—O'Connell v. One Thousand and Two Bales of Sisal Hemp, D.C. Ala., 75 F 408
58 C.J. p 148 note 21

49. U.S.—Centrosoyus-America v. U. S., D.C.N.Y., 31 F 2d 610.

50. U.S.—The Silverbrook, D.C.La., 18 F 2d 144.
58 C.J. p 148 note 26.

51. U.S.—O'Connell v One Thousand and Two Bales of Sisal Hemp, D. C.Ala., 75 F. 408—The Peer of the Realm, C.C.La., 19 F. 216.

52. U.S.—Field Line v. South Atlantic SS Line, Ga., 201 F. 301, 119 C.C.A. 539.

53. U.S.—The Mispah, C.C.Del., 17 F. Cas.No 9,648.
58 C.J. p 149 note 35.

54. U.S.—Lightburne v. The Tongoy, D.C.Ala., 55 F 329—The Mispah, C.C.Del., 17 F.Cas.No 9,648.

55. U.S.—The Peer of the Realm, C.C.La., 19 F 216.
58 C.J. p 149 note 37.

56. U.S.—Lightburne v. The Tongoy, D.C.Ala., 55 F. 329

57. U.S.—Wyman v. The Sprott, D.C.N.Y., 70 F. 327.
58 C.J. p 149 note 39

58. U.S.—Wyman v The Sprott, supra.
58 C.J. p 150 note 40.

59. U.S.—Field Line v. South At-

of bills of lading by the master "without prejudice to this charter" has been held to signify that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bill of lading, their charter agreement shall remain unaltered,[60] and to mean no more.[61]

§ 33. Operation of Arbitration Clauses

In the absence of statute, a clause in a charter that any dispute is to be submitted to arbitration is unenforceable, but, where appropriate statutory provisions exist, they operate to render arbitration agreements enforceable to the extent and under the circumstances contemplated and provided by statute.

In the absence of a statute binding the court wherein suit is brought, it has been held that a clause in a charter that any dispute is to be submitted to arbitration, the intended effect being to prevent proceedings in any court and substitute the decision of arbitrators, is unenforceable.[62] A breach of the agreement, while it is totally executory, gives rise to nominal damages only,[63] exceptions will be sustained to a libel claiming damages for breach of agreement to arbitrate and the libel will be dismissed.[64] The legal effect of an arbitration clause in a charter party is governed by the law of the place where the charter party was executed.[65]

Under statutes validating arbitration agreements, such agreements are binding and enforceable to the extent and under the circumstances contemplated and provided by statute,[66] but arbitration agreements which are not within the purview of the statutes are not enforceable.[67] A clause in the charter party, providing that it shall be construed according to the law of a jurisdiction wherein ar-

lantic SS. Line, Ga., 201 F. 301, 119 C.C.A. 539.

60. U.S.—Field Line v. South Atlantic SS. Line, supra.
58 C.J. p 150 note 43.

61. U.S.—Burrill v Crossman, D.C.N.Y., 65 F. 104, reversed on other grounds 91 F. 543, 69 F. 747, 33 C.C.A. 643, 16 C.C.A. 381, reversed on other grounds 21 S.Ct. 48, 179 U.S. 100, 4 L.Ed. 106.
58 C.J. p 150 note 44.

62. U.S.—Atlantic Fruit Co. v. Red Cross Line, C.C.A.N.Y., 5 F.2d 218.
58 C.J. p 150 note 53.

63. U.S.—Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, N.Y., 250 F. 935, 163 C.C.A. 185, Ann.Cas.1918C 491, affirmed 40 S.Ct. 332, 252 U.S. 313, 64 L.Ed. 586—Munson v. Straits of Dover SS. Co., D.C.N.Y., 99 F. 737, affirmed 102 F. 926, 43 C.C.A. 57.

64. U.S.—Munson v. Straits of Dover SS. Co., supra.

65. U.S.—Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., D.C.Md., 84 F.Supp. 948.

66. U.S.—La Nacional Platanera, S.C.L., v. North American Fruit & Steamship Corp., C.C.A.Ala., 84 F.2d 881—The Gerald A. Fagan, C.C.A.N.Y., 49 F.2d 215, affirmed 52 S.Ct. 166, 284 U.S. 263, 76 L.Ed. 282—Albatross S.S. Co. v. Manning Bros., D.C.N.Y., 95 F.Supp. 459—Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., D.C.Md., 84 F.Supp. 948—Goldhill Trading & Shipping Co., S.A. Panama, v. Caribbean Shipping Co., D.C.N.Y., 56 F.Supp. 31—The Belize, D.C.N.Y., 25 F.Supp. 663, appeal dismissed, C.C.A., 101 F.2d 1005—The Aakre, D.C.N.Y., 21 F.Supp. 540.
58 C.J. p 150 note 60.

Purpose of statutes

(1) United States Arbitration Act was intended to validate arbitration agreements as affirmative defenses in admiralty as well as in other courts.—In re Utility Oil Corporation, C.C.A.N.Y., 69 F.2d 524, certiorari denied Petroleum Nav. Co. v. Utility Oil Corporation, 54 S.Ct. 866, 292 U.S. 655, 78 L.Ed. 1504.

(2) The Arbitration Act was passed to provide for maintaining jurisdiction of court while at same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement.—American Sugar Refining Co. v. The Anaconda, C.C.A.Fla., 138 F.2d 765, affirmed 64 S.Ct. 863, 322 U.S. 42, 88 L.Ed. 1117.

(3) The purpose of the section of the Arbitration Act relative to a party's beginning an action in admiralty by proceeding by libel and seizure of property of other party is to give an aggrieved party in a maritime controversy the benefit of jurisdiction in rem or by foreign attachment and at same time to save his right to arbitration provided for in contract between the parties.—The Belize, D.C.N.Y., 25 F.Supp. 663, appeal dismissed, C.C.A., 101 F.2d 1005—The Sydfold, D.C.N.Y., 25 F.Supp. 662.

(4) The purpose of Arbitration Act § 8 is to make certain that rights conferred by § 4, which requires specific performance of an arbitration agreement, would be available as well in admiralty suits where property was seized as in those where it was not.—American Sugar Refining Co. v. The Anaconda, C.C.A.Fla., 138 F.2d 765, affirmed 64 S.Ct. 863, 322 U.S. 42, 88 L.Ed. 1117.

Arbitration in foreign state

Provision for arbitration outside the United States, embodied in charter agreement between international refugee organization and steamship company, was valid.—International Refugee Organization v. Republic S.S. Corp., D.C.Md., 93 F.Supp. 798, appeal dismissed and mandamus granted, C.A., 189 F.2d 858.

Maritime transaction or foreign commerce

(1) Under statute providing for enforcement of written arbitration clause "in any maritime transaction or a contract evidencing a transaction involving commerce," the word "or" denotes an alternative and court has jurisdiction to compel arbitration if either maritime transaction or foreign commerce is involved.—The Aakre, D.C.N.Y., 21 F.Supp. 540.

(2) A provision in charter party for trip of Norwegian ship from Canadian to South American ports, that disputes thereunder should be arbitrated in New York, involved a "maritime transaction."—The Aakre, supra.

(3) Disputes involving right of charterer to recover for loss attributable to bad fuel oil furnished by owner to charterer under collateral agreement, including loss of hire and additional expenses due to shipment of intended cargo by rail and right to obtain restitution of amount paid for substitution of vessel chartered for vessel originally chartered on representation that vessel chartered would be available at earlier date, were subject to arbitration as arising out of a "maritime transaction" within statute.—In re Canadian Gulf Line, C.C.A.N.Y., 98 F.2d 711.

67. U.S.—The Aakre, D.C.N.Y., 21 F.Supp. 540
58 C.J. p 150 note 54, p 151 note 61.

bitration agreements are by statute enforceable, does not bind the courts of another jurisdiction to recognize the enforceability of such agreements;[68] and, regardless of such a provision, it has been held that an arbitration agreement will not be enforced unless it is one enforceable by the law of the forum.[69] Likewise, where an arbitration clause appears in the charter party, providing for arbitration outside the jurisdiction, resort to arbitration is not a condition precedent to the existence of jurisdiction in a court wherein suit on the charter party is brought,[70] even though there are controlling statutes rendering arbitration clauses of the description therein set out enforceable;[71] even under such circumstances, a charter agreement for arbitration elsewhere does not oust the court of its jurisdiction,[72] but, at the most, provides grounds for a stay pending the perfection of what cannot be accomplished within the jurisdiction of the court.[73]

In construing the arbitration clause the whole clause should be considered.[74] The terms of the statutes and of the charter agreements as construed by the courts govern questions as to the right to compel arbitration in particular cases,[75] the jurisdiction and powers of the court,[76] the issues triable,[77] and matters of procedure generally,[78] the

68. U S—The Silverbrook, D.C La., 18 F 2d 144
58 C J p 151 note 63

69. U S—U S. Asphalt Refining Co v. Trinidad Lake Petroleum Co, D C N Y, 222 F 1006
58 C J p 151 note 64.

70. U.S—The Beechwood, D.C.N.Y., 35 F.2d 41.
58 C J p 151 note 65.

71. U S—Danielsen v Entre Rios R. Co, D C Md, 22 F.2d 326.
58 C J p 151 note 66.

72. U S—The Fredensbro, D C Pa, 18 F.2d 983.
58 C.J p 151 note 67.

73. U S—The Quarrington Court, D. C N Y, 25 F.Supp. 665.
58 C J p 151 note 68

74. U.S—In re Utility Oil Corporation, C.C A N.Y., 69 F 2d 524, certiorari denied Petroleum Nav. Co v. Utility Oil Corporation, 54 S Ct. 866, 292 U S. 655, 78 L.Ed 1504.

75. U S—American Sugar Refining Co. v. The Anaconda, C.C.A Fla, 138 F 2d 765, affirmed 64 S Ct 863, 322 U.S. 42, 88 L Ed. 1117—In re Canadian Gulf Line, C C A.N.Y, 98 F.2d 711—Montreal Shipping Co. v. 9,110 Tons of Steel Billets, D C Pa., 83 F Supp. 407.

Total nonperformance of charter agreement

In controversy between steamship company and charterer of vessel, fact that vessel never actually went into operation under charter due to refusal of steamship company to deliver vessel to charterer, although amounting to total nonperformance, would not nullify requirement for arbitration under terms of charter agreement—International Refugee Organization v. Republic S S Corp, D.C Md, 93 F.Supp 798, appeal dismissed and mandamus granted, C.A., 189 F. 2d 858.

Libel in tort or contract

Whether libel for loss of cargo sounded in tort or in contract was immaterial, as respected right to arbitration.—The Gerald A. Fagan, C. C A.N Y., 49 F.2d 215, affirmed 52 S Ct. 166, 284 U.S 263, 76 L Ed 282

Fraud

Where cause of action asserted by plaintiff in attachment suit in admiralty arose out of alleged fraud, which if established rendered charter party void, and cause of action did not arise under charter party, provision in charter party for arbitration did not preclude trial court from granting relief to plaintiff on ground of alleged fraud—International Refugee Organization v. Republic S. S Corp, C.A.4, 189 F.2d 858.

76. U.S—Marine Transit Corporation v. Dreyfus, N Y., 52 S.Ct. 166, 284 U.S. 263, 76 L Ed 282.

Right to preserve status quo

Where charter party agreement expressly provided that owner of vessel retained no control, possession, or command whatsoever of vessel during period of charter, proposed act of seizure by owner would deprive charterer of its right to possession pending arbitration, and would substantially change the status quo, and, therefore, in exercise of its equity power, court had the right to preserve the status quo, pending enforcement of arbitration provisions of charter agreement—Albatross S. S Co. v Manning Bros, D C N Y, 95 F.Supp 459

Provision to oust jurisdiction of court

(1) A libel setting out a cause of action within admiralty jurisdiction based on seizure of libeled vessel was not dismissible on ground that charter party containing a provision for arbitration, by providing that Arbitration Act § 8 should not apply to any arbitration thereunder, waived the right to invoke the in rem jurisdiction of admiralty, since a party cannot stipulate away such a jurisdiction which the act declares open as heretofore—The Anaconda v American Sugar Refining Co., Fla, 64 S.Ct. 863, 322 U.S. 42, 88 L.Ed 1117.

(2) Such provision was void to extent that it attempted to oust jurisdiction of admiralty court and nullify provisions of the act—American Sugar Refining Co v The Anaconda, C C A Fla., 138 F.2d 765, affirmed 64 S Ct. 863, 322 U.S. 42, 88 L Ed. 1117.

Provision as to residence of arbitrators

District court had jurisdiction to entertain demand for arbitration by plaintiff suing for breach of charter party contract containing arbitration clause, notwithstanding provision of contract that arbitrators should be selected from persons who did not live within territorial jurisdiction of such district court.—La Nacional Platanera, S. C. L v North American Fruit & Steamship Corp., C.C.A. Ala., 84 F.2d 881.

Order directing arbitration held proper

U.S—Marine Transit Corporation v. Dreyfus, N Y, 52 S Ct. 166, 284 U. S. 263, 76 L Ed 282.

77. U S.—Kulukundis Shipping Co, S/A, v Amtorg Trading Corp., C. C A N Y, 126 F 2d 978.

Existence of agreement

In libel for breach of charter party allegedly containing an arbitration clause, federal district court had jurisdiction, before sending issues to arbitrators, to determine whether the parties had made an agreement to arbitrate, and it would be improper to submit to arbitrators the issue of making the charter party.—Kulukundis Shipping Co, S/A, v. Amtorg Trading Corp, supra.

Validity of contract

In determining whether to compel arbitration of controversy in accordance with arbitration clause of charter party agreement, court was required to determine whether contract containing arbitration clause was valid.—Goldhill Trading & Shipping Co, S A. Panama, v. Caribbean Shipping Co, D C.N.Y., 56 F.Supp. 31.

78. **Pleading**

(1) Under the Arbitration Act an executory arbitration agreement is not basis for a plea in bar, but may

right to a stay of proceedings pending arbitration,[79] the designation of an arbitrator or umpire,[80] the proceedings by, and powers of, the arbitrators,[81] and their judgment and award.[82] Any award by arbitrators is inoperative as against a party to a charter who has refused to take any action at all under an arbitration clause therein and who has in no way brought about, participated in, or consented to any reference to arbitration.[83] In determining the amount of compensation to be allowed to the arbitrators, their earning capacity and expert knowledge of technical problems involved may be considered.[84]

Matters subject to arbitration. In proceedings to enforce an agreement for arbitration, the matters referred to arbitration, and determined by the arbitrators, must be within the terms of the arbitration agreement.[85] Repudiation of a charter party

be made the basis of a stay order—Kulukundis Shipping Co, S/A, v Amtorg Trading Corp, C C A N Y, 126 F 2d 978.

(2) In libel for breach of charter party, libelee was not precluded from pleading in alternative first denying existence of charter party and then alleging that, if it existed, there should be a stay pending arbitration of appropriate issues—Kulukundis Shipping Co, S/A, v. Amtorg Trading Corp, supra.

Taxation of costs

An order directing arbitration in accordance with an agreement is a "final order" so as to justify the taxation of costs, since a proceeding to compel arbitration is an independent proceeding resulting in an order which in substance is a decree for specific performance of the agreement to arbitrate—The Sydfold, D C.N.Y., 25 F Supp. 662.

79. Effect of denial

An order denying motion for stay of proceeding, under arbitration act, pending arbitration of dispute between owners and charterer was not "res judicata" of right to compel arbitration, or a bar to a motion to compel arbitration, under terms of the charter party.—In re Pahlberg Petition, C C.A.N Y., 131 F.2d 968—Richard Nathan Corp. v Diacon-Zadeh, D.C.N Y, 101 F Supp. 428.

Stay held warranted

U.S—Kulukundis Shipping Co, S/A, v. Amtorg Trading Corp., C C A.N. Y, 126 F.2d 978.

Stay held not warranted

U S—Mitsubishi Shoji Kaisha, Limited, v Nicolaou, D.C La., 38 F. Supp 156.

80. Lapse in naming arbitrator

Where owner refused to appoint arbitrator under charter party providing that on such refusal charterer's arbitrator could decide alone, and owner, after unsuccessfully litigating question whether arbitration clause governed controversy involved, promptly appointed its arbitrator after question was finally decided, statute authorizing court to appoint arbitrators where there has been lapse in naming them was inapplicable.—In re Utility Oil Corporation, D. C.N.Y., 10 F Supp. 678.

Arbitrators held not disqualified

U S—Albatross S S Co v Manning Bros, D C N Y, 95 F Supp 459—W E Hedger Transp Corp v. James Richardson & Sons, D C N. Y, 20 F Supp 909

81. Board of arbitrators

(1) Arbitration clause of charter party providing for submission of disputes to board of three arbitrators warranted inference that such arbitrators were intended to act as a board—Petrol Corp v. Groupement D'Achat Des Carburants, D C N Y, 84 F Supp 446

(2) Although charter party provided for a three-man board of arbitration, parties could mutually agree to let one arbitrator decide the issues, treating his as an umpire and the other arbitrators as advocates and agents of the parties designating them—Petrol Corp v. Groupement D'Achat Des Carburants, supra.

Delay in naming arbitrator

(1) Charter party authorizing arbitrator appointed by either party to decide alone if other party neglected or refused to appoint its arbitrator within a specified period of time after request was valid and was intended, under fair and equitable interpretation, to operate only where party unreasonably neglected or refused to appoint arbitrator within time limited—In re Utility Oil Corporation, D C N Y., 10 F.Supp. 678

(2) Fact that owner refused to appoint arbitrator within time limited in charter party did not entitle the charterer's arbitrator to proceed, where owner bona fide litigated question whether arbitration clause applied to controversy involved, and promptly appointed arbitrator when such question was finally decided adversely to owner's contention.—In re Utility Oil Corporation, supra

Misconduct or impropriety not shown

U S—Cities Service Oil Co v. American Mineral Spirits Co, D C.N.Y., 22 F.Supp. 373—The Guldborg, D C. N.Y, 1 F.Supp. 380.

82. Signature

All arbitrators need not sign the award where the agreement for arbitration does not require unanimity—Marine Transit Corporation v. Dreyfus, N Y, 52 S Ct. 166, 284 U S 263, 76 L Ed 282—Cities Service Oil Co. v. American Mineral Spirits Co., D C.N. Y, 22 F Supp 373

Confirming or setting aside

Court having authority to order arbitration of issues in libel against carrier had authority to confirm or set aside award of arbitrators—Marine Transit Corporation v. Dreyfus, N Y, 52 S Ct. 166, 284 U S 263, 76 L. Ed 282

Decree

Court properly entered decree on arbitration award in libel against carrier, where agreement for arbitration stipulated that award should be final and binding, although it failed to provide for entering judgment—Marine Transit Corporation v. Dreyfus, supra.

83. U S—Ross v. Compagnie Commerciale de Transportation de Vapeur, C C La, 45 F 207

84. U S—Cities Service Oil Co v. American Mineral Spirits Co, D C. N Y, 22 F Supp 373

Amount held not excessive

U.S—Cities Service Oil Co. v American Mineral Spirits Co, supra

85. U.S—In re Canadian Gulf Line, C C A N.Y., 98 F.2d 711—W. E. Hedger Transp Corp v. James Richardson & Sons, D C N.Y., 20 F. Supp. 909.

Particular matters held subject to arbitration under agreement

(1) Loss of cargo on barge—The Gerald A. Fagan, C C A.N.Y., 49 F 2d 215, affirmed 52 S Ct. 166, 284 U.S. 263, 76 L Ed. 282.

(2) Dispute relating to loss of hire and additional expenses due to shipment of intended cargo by rail caused by a delay attributable to unseaworthy condition of engines—In re Canadian Gulf Line, C C A N.Y., 98 F.2d 711.

(3) Dispute arising out of charterer's failure to hire ship as agreed after ship performed one voyage—Stathatos v Arnold Bernstein S. S. Corp., D C N.Y., 87 F.Supp 1007.

(4) Disputes as to warranty respecting vessel's speed and passenger capacity and fuel oil consumption, as to whether charterer had performed its obligation under charter and had right to cancel charter, and as to what extent, if any, either party was indebted to other.—Interna-

by the owner of the vessel by failure to deliver the vessel to the charterer,[86] or the issue of damages for breach of the charter party where one of the alleged parties to the contract denies its existence,[87] has been held to be a matter subject to arbitration under the arbitration clause of the contract, but under a particular agreement which was construed to contemplate arbitration of disputes arising after commencement of the voyage it was held that refusal of the owner of the vessel to proceed with the voyage before its commencement was not subject to arbitration.[88] A clause for arbitration of disputes "arising during performance" of the charter applies to any disputes arising after performance has begun,[89] even though performance on both sides has terminated.[90]

The arbitration clause of a charter party does not govern shipment, carriage, delivery, or the terms on which delivery is to be made or taken; it only governs the way of settling disputes arising out of conditions of the charter party, not disputes arising out of the bill of lading.[91] Where the arbitration clause in a charter party is not specifically mentioned in the bill of lading, it is not incorporated in, or made a part of, the terms and conditions of the bill of lading,[92] and, accordingly, disputes arising out of the bill of lading are not subject to arbitration under that clause.[93] A general statement of incorporation of the terms of the charter party in the bill of lading is insufficient to incorporate an arbitration clause of the charter party in the bill of lading.[94]

Waiver, abandonment, or rescission. Arbitration may be waived, abandoned, or rescinded by agreement or action of the parties.[95] The filing of a petition for exoneration from, or limitation of, liability does not waive the arbitration provision of the charter,[96] and a person who commences a suit in admiralty by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings does not repudiate an arbitration clause,[97] and is not foreclosed from later demanding an arbitration.[98] There is no waiver or abandonment where the party consistently insists on arbitration and properly brings the controverted point before the court.[99] Under the particular facts, a party has been held not precluded from compelling arbitration by laches,[1] or by a failure to file a motion to compel arbitration until after the other party had commenced a suit to recover damages for nondelivery.[2] Arbitration cannot be avoided where the agreement is not so indefinite or uncertain as to be unenforceable.[3] The participation by petitioner in an action between

tional Refugee Organization v Republic S. S Corp, D C Md, 93 F. Supp. 798, appeal dismissed and mandamus granted, C A, 189 F 2d 858.

(5) Whether delay in delivery of vessel according to terms of charter was so great as to frustrate adventure.—International Refugee Organization v. Republic S. S Corp., supra.

(6) Other particular matters held subject to arbitration under agreement.—Goldhill Trading & Shipping Co, S A. Panama, v. Caribbean Shipping Co, D.C.N.Y., 56 F Supp. 31.

86. U.S —In re Pahlberg Petition, C. C.A N.Y., 131 F.2d 968.

87. U.S —Kulukundis Shipping Co, S/A, v. Amtorg Trading Corp, C.C. A.N Y, 126 F 2d 978.

88. U S —The Atlanten, N Y, 40 S Ct. 332, 252 U S 313, 64 L.Ed. 586, Ann Cas.1918E 491.

89. U S —In re Utility Oil Corporation, C.C A.N.Y, 69 F.2d 524, certiorari denied Petroleum Nav. Co. v. Utility Oil Corporation, 54 S Ct. 866, 292 U S. 655, 78 L Ed 1504.

90. U.S —In re Utility Oil Corporation, C C.A.N.Y, 69 F 2d 524, certiorari denied Petroleum Nav. Co. v. Utility Oil Corporation, 54 S.Ct. 866, 292 U.S. 655, 78 L Ed. 1504.

91. U S —Son Shipping Co v DeFosse & Tanghe, D C N Y, 96 F. Supp 595—The Thrasyvoulos, D C. N Y., 28 F.Supp 434.

92. U.S —The Thrasyvoulos, supra.

93. U S —Petition of A/S Falkefjell, D C.N Y., 78 F Supp 282—The Thrasyvoulos, D.C N.Y., 28 F Supp 434.

94. U S.—Son Shipping Co. v. DeFosse & Tanghe, D.C.N.Y., 96 F. Supp. 595

Incorporation of "all the terms, conditions and exceptions"

A general statement, in a bill of lading issued by a shipowner, that "all the terms, conditions and exceptions of which charter party, including the negligence clause, are incorporated herewith," was held insufficient to incorporate an arbitration clause of the charter party in the bill of lading.—The Thrasyvoulos, D C N Y., 28 F.Supp 434.

95. U.S.—The Anaconda v. American Sugar Refining Co., Fla., 64 S Ct 863, 322 U S 42, 88 L Ed. 1117—La Nacional Platanera, S C. L., v. North American Fruit & Steamship Corp, C.C A Ala, 84 F 2d 881—The Belize, D C N.Y, 25 F.Supp. 663, appeal dismissed, C C.A, 101 F.2d 1005.

Issue joined on merits

Where libelant brought suit in admiralty against respondent in personam for breach of charter party containing an arbitration clause, and respondent answered libel on the merits and propounded interrogatories without demand for arbitration, libelant and respondent repudiated arbitration clause, and issue having been joined on merits controversy was submitted to court and libelant was not thereafter entitled to compel arbitration, even though libelant in the libel tried to reserve right to resort to arbitration at a later time.—The Belize, supra.

96. U S.—The Quarrington Court, D. C N.Y., 25 F Supp. 665.

97. U.S —The Belize, D.C N Y., 25 F. Supp. 663, appeal dismissed, C C. A, 101 F 2d 1005.

98. U.S —The Belize, supra.

99. U S —In re Utility Oil Corporation, D.C N Y., 10 F Supp. 678.

1. N.Y —W. E. Hedger Transp. Corp. v. Miller, 1 N.Y.S 2d 345, 166 Misc. 77.

2. U.S.—Petition of Pahlberg, D C N Y., 43 F Supp 761, appeal dismissed, C C.A, In re Pahlberg Petition, 131 F.2d 968

3. N.Y.—W. E. Hedger Transp. Corp v. Miller, 1 N.Y S.2d 345, 166 Misc. 77.

respondent and another has been held not an intentional relinquishment of petitioner's right to compel arbitration of disputes between it and respondent.[4]

A party may waive his right to object or be estopped from asserting that libelant was not entitled to invoke the arbitration clause.[5] The failure of a party to object to an arbitrator because of interest or bias at any time before the award may constitute a waiver of any objection to his participation,[6] and he may acquiesce in the submission of issues to an umpire through arbitrators nominated by the parties.[7]

§ 34. Charterer as Owner Pro Hac Vice

a. Existence of relation
b. Effect of charter's character on liability of owner and charterer

a. Existence of Relation

(1) In general
(2) Interpretation of charter provisions

(1) In General

If by the terms of a charter, or necessary intendment of the parties, the entire vessel is let to the charterer, with a transfer to him of its command and possession, and consequently of control over its navigation, he will generally be considered as owner pro hac vice, that is, as owner for the voyage or service stipulated.

Under some forms of a charter party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership.[8] Whether in any particular case such result follows must depend on the terms of the charter party[9] and the nature of the service rendered;[10] the question as to the character in which the charterer is to be treated is, in all cases, one of construction.[11] There is no difference of opinion in the cases as to the rule of law applicable when the construction of the particular charter party is settled,[12] all the cases agreeing that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned,[13] and that the retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer.[14] There are, however, some differences of opinion as to the effect to be given certain technical terms used in the charter party in determining whether the instrument parts with the entire possession and control of the vessel.[15]

If by the terms of a charter, or necessary intendment of the parties, the entire vessel is left to the

4. U.S.—Richard Nathan Corp v. Diacon-Zadeh, D.C.N.Y., 101 F. Supp. 428.

5. U.S.—Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., D.C.Md., 84 F.Supp. 948.

Owner's delay and equivocation with respect to advising charterer whether owner would be a party to a complete novation and acceptance without objection of all payments due under charter as if novation had been assented to constituted a waiver of right to object and estopped owner from denying such novation or asserting that pursuant thereto libelant was not entitled to invoke arbitration clause in the charter party.—Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., supra.

6. U.S.—Petrol Corp. v Groupement D'Achat Des Carburants, D.C.N.Y., 84 F.Supp. 446.

7. U.S.—Petrol Corp. v Groupement D'Achat Des Carburants, supra.

8. U.S.—The John E Berwind, C.C.A.N.Y., 56 F.2d 13—Moragnel v. Moore-McCormack Lines, D.C.Md., 75 F.Supp. 969.
N.Y.—Muscelli v. Frederick Starr Contracting Co., 73 N.E.2d 536, 296 N.Y. 330
58 C.J. p 152 note 76.

Change of relations between owner and charterer

(1) Where a charter party is a private contract and not a contract of common carriage, the relations between the owner and the charterer are not altered if the charterer chooses to put the ship on the berth and offer her to shippers as a common carrier, and the liability of the owner is not affected by notice that the charterer might put the vessel on berth as a general ship.—The Toledo, D.C.N.Y., 30 F.Supp. 93, affirmed, C.C.A., 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

(2) Where city chartered a scow as a floating platform on which to conduct fireworks display, the city assumed the ordinary duties of a bailee in connection with that undertaking, since the vessel did not cease to be such because of the nonmaritime use to which she was put, and the nature of the relation was not changed by referring to the scow as a floating platform.—Kenny v. City of New York, D.C.N.Y., 28 F.Supp. 175, affirmed, C.C.A., 108 F.2d 958.

9. U.S.—Santiago v. U. S., D.C.N.Y., 102 F.Supp. 425.
58 C.J. p 152 note 77.

10. Or.—Adams v. Carey, 118 P. 553, 60 Or. 153.
58 C.J. p 152 note 78

11. U.S.—Cornell Steamboat Co. v. U.S., 58 Ct.Cl. 497, affirmed 45 S.Ct. 239, 267 U.S. 281, 69 L.Ed. 613.
58 C.J. p 152 note 79.

12. U.S.—The Beaver, Cal., 219 F. 139, 135 C.C.A. 37.
58 C.J. p 152 note 80.

13. U.S.—Schnell v U.S., C.C.A.N.Y., 166 F.2d 479, certiorari denied 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760—Romano v West India Fruit & S.S. Co., C.C.A.Fla., 151 F.2d 727—**Corpus Juris cited in** The Norland, C.C.A.Alaska, 101 F.2d 967, 971—The Tubul, D.C.N.Y., 73 F.Supp. 757, affirmed, C.C.A., Schnell v U.S., 166 F.2d 479, certiorari denied Schnell v. U.S., 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760—Banks v. Chas Kurz Co., D.C.Pa., 69 F.Supp. 61, motion denied 69 F.Supp 1017.
Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.
58 C.J. p 152 note 81.

14. U.S.—U.S. v. Shea, Ct.Cl., 14 S.Ct. 519, 152 U.S. 178, 38 L.Ed. 403
58 C.J. p 153 note 82

15. U.S.—The Santona, D.C.N.Y., 152 F. 516.
58 C.J. p 153 note 83.

charterer, with a transfer to him of its command and possession, and consequently of control over its navigation, he will generally be considered as owner pro hac vice, that is, as owner for the voyage or service stipulated,[16] whether the letting is in writing or by parol;[17] and there are statutes in some jurisdictions in substance providing thus.[18] If the charter party lets only the use of the vessel, the owner at the time retaining the command and possession and control over its navigation, the charterer is regarded as a contractor for a designated service,[19] the duties and responsibilities of the owner are not changed,[20] and the charterer is not clothed with the character or responsibility of ownership.[21] In the former case, the general owner is not a common carrier, but a bailee to transport for hire,[22] and the charter is a contract for the lease[23] or demise[24] of the vessel, whereby the lessee assumes the duties and liabilities in a large measure, at least, of the owner;[25] in the latter it is a contract for a special service to be rendered by the owner of the vessel,[26] more specifically, a contract for affreightment,[27] or for the transportation of passengers.[28] In accordance with this distinction, a demise charter is often called a "bare boat charter."[29] Numerous clauses have been considered and referred to in this connection,[30] and, in the light of the principles announced, the provisions of various charter parties have been construed, and have been considered under the rules as constituting[31] or not

16. U S—Perez v. Cia Tropical Exportadora, Ltda., of Costa Rica, C. A Fla., 182 F 2d 874—Aird v. Weyerhaeuser S S. Co., C.A.Pa., 169 F. 2d 606, certiorari denied 69 S Ct. 1521, 337 U S 959, 93 L Ed 1758—Vitozi v Balboa Shipping Co, C C. A Mass, 163 F 2d 286—The Kongo, C C A Ky, 155 F 2d 492, certiorari denied Standard Oil Co. of La v. Kongo, 67 S Ct 99, 329 U S 735, 91 L Ed 635—McGahern v Koppers Coal Co, C C A Pa, 108 F 2d 652—**Corpus Juris cited in** The Doyle, C. C.A Pa, 105 F.2d 113, 114—The J. W. Hennessy, C C.A N Y, 57 F 2d 77—Santiago v. U. S, D C N Y., 102 F Supp 425—W. R. Grace & Co v. Charleston Lighterage & Transfer Co., D C S C., 98 F.Supp. 256, affirmed in part and reversed in part on other grounds, C A, 193 F.2d 539—Vitozi v Balboa Shipping Co, D C Mass, 69 F Supp. 286, affirmed, C C A, 163 F 2d 286—Banks v Chas Kurz Co, D C Pa, 69 F.Supp 61, motion denied 69 F Supp 1017.
Cal—Larson v Lewis-Simas-Jones Co, 84 P 2d 296, 29 Cal.App 2d 83
N Y.—Muscelli v. Frederick Starr Contracting Co., 73 N E 2d 536, 296 N Y. 330.
Or—Marstaller v Albina Dock Co, 229 P 2d 269, 191 Or 145
Tenn—American Barge Line Co v Jones & Laughlin Steel Corp, 163 S W.2d 502, 179 Tenn. 156.
58 C J. p 153 note 84

17. U.S.—The Beaver, Cal., 219 F. 139, 135 C C A 37.
58 C J. p 154 note 85.

18. U.S—The Barnstable, Mass, 21 S Ct. 684, 181 U S 464, 45 L Ed 954
58 C.J p 154 note 86.

19. U.S—Romano v. West Indian Fruit & S. S. Co, C.C.A Fla., 151 F. 2d 727.
Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal App 2d 83.
Tenn.—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S.W 2d 502, 179 Tenn. 156.
58 C.J. p 154 note 87.

20. Cal—Larson v Lewis-Simas-Jones Co., 84 P 2d 296, 29 Cal.App 2d 83
Tenn—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S W.2d 502, 179 Tenn. 156.
58 C J. p 154 note 88.

21. U S—U. S. v. Shea, Ct Cl., 14 S. Ct 519, 152 U S 178, 38 L.Ed. 403.
58 C J p 154 note 89.

22. U S—Banks v. Chas Kurz Co., D C Pa, 69 F Supp. 61, motion denied 69 F Supp. 1017—New England Foundation Co v. Rugo Const. Co, D C Mass., 60 F.Supp 143, affirmed, C.A., Rugo Const Co. v New England Foundation Co, 172 F.2d 964—Petition of Howard, D C N.Y, 53 F.Supp. 556.
Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.
58 C J. p 154 note 90.

23. U S.—The Kongo, C C.A Ky, 155 F 2d 492, certiorari denied Standard Oil Co. of La. v. Kongo, 67 S Ct. 99, 329 U S 735, 91 L Ed 635.
Tenn—American Barge Line Co. v Jones & Laughlin Steel Corp., 163 S W 2d 502, 179 Tenn. 156.
58 C J. p 154 note 91.

24. U S—Aird v. Weyerhaeuser S. S. Co, C.A Pa, 169 F.2d 606, certiorari denied 69 S Ct 1521, 337 U.S. 959, 93 L Ed 1758—Vitozi v. Balboa Shipping Co., C C A Mass, 163 F.2d 286—The Kongo, C C.A.Ky, 155 F 2d 492, certiorari denied Standard Oil Co. of La. v. Kongo, 67 S Ct 99, 329 U.S. 735, 91 L Ed 635—Romano v. West India Fruit & S. S Co, C.C.A Fla., 151 F.2d 727—The Steel Inventor, D C Md, 35 F Supp. 986.
18 C J p 483 note 19 [b] (2)—58 C J. p 154 note 92.

Title

A "demise charter" is only a hiring of the vessel, under which no title passes to the charterer but merely the right to possess and control it for a limited period, and such right to possession is not the equivalent of "title" and does not subject the vessel to the general debts of the charterer—McGahern v. Koppers Coal Co, C.C A.Pa., 108 F.2d 652.

25. Mo—Adams v. Homeyer, 45 Mo 545, 100 Am D 391.
Or.—Grimberg v Columbia Packers' Assoc, 83 P 194, 47 Or. 257, 114 Am.S R 927, 8 Ann.Cas. 491.

26. U S.—Banks v. Chas. Kurz Co., D C Pa., 69 F.Supp. 61, motion denied 69 F.Supp. 1017.
Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.
Tenn—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S W 2d 502, 179 Tenn. 156
58 C J. p 154 note 94.

27. U S—Aird v Weyerhaeuser S S. Co, C A Pa, 169 F 2d 606, certiorari denied 69 S Ct 1521, 337 U. S 959, 93 L Ed. 1758—The Framlington Court, C.C A Tex., 69 F 2d 300, certiorari denied United British S S. Co v. Newfoundland Export & Shipping Co, 54 S Ct 860, 292 U S 651, 78 L Ed. 1500—The Steel Inventor, D C.Md, 35 F Supp. 986
58 C J p 155 note 95.

28. N.Y.—Erie Beach Amusements v. Spirella Co., 173 N.Y.S 626, 105 Misc 170
58 C J. p 105 note 96.

29. U S.—The Steel Inventor, D C Md, 35 F Supp. 986.

30. U S—Posey v. Scoville, C.C La., 10 F. 140.
58 C J. p 155 note 97.

31. U S—Pan American Airways v Quilez, C.C.A Fla, 154 F.2d 496—Frontera Fruit Co. v Dowling, C C A Ala, 91 F 2d 293—Vitozi v Balboa Shipping Co., D.C.Mass, 69 F Supp. 286, affirmed, C.C A., 163 F 2d 286—Banks v. Chas. Kurz Co, D C.Pa, 69 F Supp. 61, motion denied 69 F Supp 1017—The Henry W. Card, D C N Y, 51 F Supp. 380, affirmed, C C A., Davison Chemical Corp. v The Henry W. Card, 144 F. 2d 705—Magistrelli v. Canuso, D C. Pa., 45 F.Supp. 539—The U. S. 219,

constituting[32] the charterer the owner pro hac vice.

Presumption against ownership pro hac vice. The inclination of courts is to construe a charter party as a contract of affreightment, charging the shipowners as carriers, and not as a demise of the vessel, unless its tenor clearly calls for the latter construction,[33] and the presumption to that effect is said to be so strong that if the end sought to be effected by the charter party can conveniently be accomplished without the transfer of the vessel to the charterers, courts are not inclined to regard the contract as a demise of the ship, although there may be express words of grant in the formal parts of the instrument.[34] However, if the nature of the service and the due attainment of the object sought to be accomplished by the charter party requires the vessel to be absolutely under the control, and subject to the orders and directions, of the charterer, courts of justice will, as a general rule, give effect to the contract as a demise of the ship[35] One claiming that the charterer has been constituted owner pro hac vice cannot prevail on any loose or vague provisions in the charter party,[36] and the general owner of a ship will be deemed owner for the voyage where the intention of the parties in that respect is indefinite on the face of the charter party.[37]

Subsequent conduct of parties as aid to determination. The conduct of the parties under the charter may be useful to aid in the construction of a charter party where it is uncertain from the terms employed whether it was intended as a demise or as a mere contract for affreightment.[38]

(2) Interpretation of Charter Provisions
- (a) In general
- (b) Language indicative of, or consistent with, retention of possession
- (c) Language indicative of, or consistent with, demise
- (d) Charter of whole or part of vessel
- (e) Omission of particular terms and expressions
- (f) Barges and similar boats without motive power

(a) In General

The presence of express words of letting or demise indicates that the charterer is, by the charter party, the owner pro hac vice.

The presence of express words of letting or demise indicates that the charterer is, by the charter party, the owner pro hac vice.[39] Language appropriate to the demise of the vessel is not conclusive,[40] but has considerable weight;[41] the effect to be given to such a provision essentially depends on all the terms of the instrument taken together.[42] Thus, a special ownership does not necessarily pass, although the terms of the instrument are "let and hired," and the hirer agrees to pay a gross sum.[43] The terms "charter,"[44] "let,"[45] "freighting,"[46]

D.C.Pa., 21 F.Supp. 466—The Lizzie Burt, D.C.Del., 16 F.Supp. 67—The Frank A. Smith, D.C.N.Y., 8 F.Supp. 134
N.Y.—Muscelli v. Frederick Starr Contracting Co., 73 N.E.2d 536, 296 N.Y. 330—Fleet Wing Corp. v. Oil Transfer Corp., 103 N.Y.S.2d 332, 278 App.Div. 745, appeal and reargument denied 105 N.Y.S.2d 1015, 278 App.Div. 1022.
58 C.J. p. 155 note 99.

32. U.S.—Stockton Sand & Crushed Rock Co. v. Bundensen, C.C.A.Cal., 148 F.2d 159—Davison Chemical Corp. v. The Henry W. Card, C.C.A.N.Y., 144 F.2d 705—The West Eldara, C.C.A.N.Y., 101 F.2d 45, modified on other grounds 104 F.2d 670, certiorari denied McAllister Towing & Transportation Co. v. American Diamond Lines, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507—The Terne, C.C.A.N.Y., 64 F.2d 502, certiorari denied Munson S.S. Line v. Bergen Lloyd, 54 S.Ct. 53, 290 U.S. 635, 78 L.Ed. 552, and Bergen Lloyd v. Munson S.S. Line, 54 S.Ct. 63, 290 U.S. 635, 78 L.Ed. 552—Scottish Nav. Co. v. Munson S.S. Line, D.C.N.Y., 60 F.2d 101, affirmed, C.C.A., 10 F.2d 708.
18 C.J. p. 483 note 19 [b] (1)—58 C.J. p. 156 note 1.

33. U.S.—Hansen v. Du Pont de Nemours, C.C.A., 33 F.2d 94, certiorari denied 50 S.Ct. 37, 280 U.S. 589, 74 L.Ed. 638.
58 C.J. p. 156 note 2.

34. Or.—Deniff v. McCormick, 210 P. 703, 105 Or. 697.
58 C.J. p. 156 note 3.

35. U.S.—Donahoe v. Kettell, C.C.Mass., 7 F.Cas.No. 3,980, 1 Cliff. 135

36. N.Y.—Hagar v. Clark, 78 N.Y. 45.
Or.—Grimberg v. Columbia Packers' Assoc., 83 P. 194, 47 Or. 257, 114 Am.S.R. 927, 8 Ann.Cas. 491.

37. U.S.—The Beaver, Cal., 219 F. 139, 135 C.C.A. 37.
58 C.J. p. 157 note 6.

38. U.S.—Santiago v. U.S., D.C.N.Y., 102 F.Supp. 425.
58 C.J. p. 163 note 26.

39. U.S.—American Steel Barge Co. v. Cargo of Coal, D.C.Mass., 107 F. 964, reversed on other grounds 115 F. 669, 53 C.C.A. 301, rehearing denied 116 F. 857, 54 C.C.A. 207.
58 C.J. p. 161 note 91

40. U.S.—The Charlotte, D.C.N.Y., 285 F. 84, affirmed, C.C.A., 299 F. 595, certiorari denied 45 S.Ct. 91, 266 U.S. 604, 69 L.Ed. 463.
58 C.J. p. 161 note 92.

41. U.S.—American Steel Barge Co. v. Cargo of Coal, D.C.Mass., 107 F. 964, reversed on other grounds 115 F. 669, 53 C.C.A. 301, rehearing denied 116 F. 857, 54 C.C.A. 207.
58 C.J. p. 161 note 93.

42. U.S.—In re Certain Logs of Mahogany, C.C.Mass., 5 F.Cas.No. 2,559, 2 Sumn. 589
58 C.J. p. 161 note 94.

43. U.S.—The Beaver, Cal., 219 F. 139, 135 C.C.A. 37.
58 C.J. p. 161 note 95

44. Or.—Adams v. Carey, 118 P. 553, 60 Or. 153—Grimberg v. Columbia Packers' Assoc., 83 P. 194, 47 Or. 257, 114 Am.S.R. 927, 8 Ann.Cas. 491.

45. Or.—Adams v. Carey, 118 P. 553, 60 Or. 153

46. Or.—Grimberg v. Columbia

"rent,"[47] and "hire"[48] have been held not to be words of demise, in this connection.

Stipulations as to "delivery." The charterer's agreement to deliver the vessel up to the owner after the performance of the voyage has been regarded as furnishing evidence of a demise,[49] but the use of such terms as "acceptance,"[50] "employ,"[51] and "delivery,"[52] in the charter party, although indicative of a demise of the vessel, is not absolutely irreconcilable with the contrary result. Such provisions are, for this purpose, to be construed in connection with the rest of the charter terms and given the effect appropriate to such construction.[53] A clause for the payment of freight on the delivery of the cargo has, by analogy of reasoning to the cases with respect to the delivery of the ship, been held to indicate that the charter party was not a demise of the vessel,[54] as have other undertakings and agreements of the owner referring to the delivery of the cargo.[55]

Provisions regarding compensation. Provision for compensation to be based on a fixed sum over and above the expenses of the vessel is not inconsistent with the interpretation of a charter party as being a contract for carriage only,[56] and, indeed, is more in accord with such a view than with a construction of the charter party as a demise;[57] and, likewise, a provision for compensation based on a proportionate share of the net earnings is consistent with a contract of affreightment merely.[58] On the other hand, the charter party has been construed as a demise of the vessel, although it was provided that the compensation of the owner should consist of a certain proportion of the net proceeds of the adventure.[59] It is insufficient to show an intention that the charter shall operate as a lease of the vessel, that the parties stipulate for compensation on a per diem basis,[60] although the renting of a vessel at a daily rate has been held to constitute a demise.[61] The payment of a gross sum for the hire of the chartered vessel is not inconsistent with retention of possession and control by the general owner.[62]

(b) Language Indicative of, or Consistent with, Retention of Possession

Where the general owners have by the terms of the charter party undertaken duties in respect of the vessel and obligations to the charterer which cannot be performed unless they remain owners of the vessel and have control over it, such terms are indicative of a charter for affreightment only rather than a demise.

It has been recognized as a general proposition that, where the owners have by the terms of the charter party undertaken duties in respect of the vessel and obligations to the charterer which cannot be performed unless they remain as owners of the vessel and have control over it, such clauses are indicative of a charter for affreightment only rather than a demise,[63] thus it has been held that stipulations that the owners shall keep the vessel in good condition during the existence of the charter would be inconsistent with the charter's being such a one as to amount to a demise of the vessel.[64] Stipulations expressly providing for the control of navigation by the owner,[65] or designating the mas-

Packers' Assoc, 83 P. 194, 47 Or 257, 114 Am S R 927.
58 C J. p 161 note 98.

47. U S.—Hansen v Du Pont de Nemours, C C A N Y, 33 F 2d 94, certiorari denied 50 S.Ct 37, 280 U.S 589, 74 L Ed. 638

48. Mo—Adams v Homeyer, 45 Mo. 545, 100 Am D 391.
58 C.J. p 161 note 1.

49. U.S—The Del Norte, Wash, 119 F. 118, 55 C C.A. 220.
58 C J. p 161 note 3.

50. Or—Grimberg v. Columbia Packers' Assoc, 83 P. 194, 47 Or 257, 114 Am.S.R. 927, 8 Ann.Cas 491.

51. Or—Grimberg v. Columbia Packers' Assoc, supra.

52. N.Y—Callahan v. Munson SS. Co, 130 N Y.S 869, 71 Misc. 525, affirmed 132 N Y S 1123, 147 App Div. 934, affirmed 103 N.E 1122, 209 N.Y. 546.
58 C J. p 162 note 7.

53. U S.—Clyde Commercial SS. Co. v West India SS Co, N.Y, 169 F. 275, 94 C.C A 551
Mo—Adams v. Homeyer, 45 Mo 545, 100 Am D 391.

54. Ga—Swift v. Tatner, 15 S E. 842, 89 Ga 660, 32 Am S R 101

55. U S.—Hooe v Groverman, D C, 1 Cranch 214, 2 L Ed 86
Cal—Kerry v Pacific Mar Co, 54 P. 89, 121 Cal. 564, 66 Am S R 65.

56. N.Y—Hagar v Clark, 78 N.Y 45.

57. N Y—Hagar v Clark, supra

58. Me—Emery v. Hersey, 4 Me 407, 16 Am D 268
58 C J. p 162 note 13

59. U S—Pan American Airways v Quilez, C.C A Fla, 154 F 2d 496.
58 C.J p 162 note 14

Absence of owner's right to control operation

Mere fact that owner of vessel chartered to another was to be compensated by a percentage of the profits, in absence of agreement to be responsible for losses occurring in its operation, did not make owner a co-partner or joint adventurer so as to be liable for lost cargo, and, in absence of showing that owner retained some right to control operation of vessel, such agreement should be held to be a demise—Pan American Airways v. Quilez, supra

60. Mo—Adams v Homeyer, 45 Mo 545, 100 Am D 391

61. Or—Marstaller v Albina Dock Co., 229 P 2d 269, 191 Or. 145

62. U S—Palmer v. Gracie, Pa, 18 F.Cas No 10,692, 4 Wash C C 110, reversed on other grounds Gracie v Palmer, 8 Wheat 605, 5 L Ed. 696
Ohio.—The Argyle v. Worthington, 17 Ohio 460.

63. N Y—Hagar v. Clark, 78 N.Y 45

64. U.S—Leary v. U. S., Ct.Cl, 14 Wall. 607, 20 L Ed. 756.
58 C J p 157 note 8.

65. U S—Davison Chemical Corp v The Henry W Card, C C A N Y., 144 F 2d 705.
N Y.—Barnevo v. Munson SS Line 147 N E 75, 239 N Y 486.

ter and mariners as servants of the owner,[66] are inconsistent with a construction of the charter party as a demise of the vessel; so, also, is an express declaration in the charter that it is not to be construed as a demise of the vessel.[67]

A stipulation that the owners shall receive certain goods on board at the direction of the charterer and refuse to receive other goods without its assent would be out of place, it has been held, in a charter giving entire possession and control to the charterer,[68] as have such stipulations as that the vessel shall be ready for the delivery of the cargo at a named date, which is subsequent to the date when the charter party takes effect,[69] that the cargo shall be received and delivered within reach of the vessel's tackles, at the ports of loading and discharging,[70] that lay days are to commence from the time the captain reports himself ready to receive or discharge cargo,[71] that the vessel shall proceed to certain ports for loading and shall return with all possible dispatch to the designated port of discharge where the master shall make true and faithful delivery of the cargo,[72] that the owners undertake that the captain shall prosecute voyages with dispatch,[73] that the captain or owners shall have an absolute lien on the cargo for sums due,[74] that the vessel shall carry, at certain times, certain cargo for the charterer free of charge,[75] or that the owner shall appoint a captain to command and run the vessel.[76]

Other language has been held indicative of, or consistent with, the retention of possession, such as that the charterer is to pay the expenses, not by himself disbursing the money, but by keeping a sufficient deposit with the clerk for that purpose,[77] that the charterer shall have the liberty of putting a passenger on board in the cabin[78] or shall have the privilege of sending a supercargo on the vessel's voyages,[79] that the owner shall discharge the cargo on the vessel's return to port,[80] that the owner may withdraw the chartered ship and substitute for it another ship of like design, capacity, etc.,[81] that the owner shall have the faculty of withdrawing the ship from the charterer in the event of stipulated defaults of the latter,[82] that the captain shall render all possible assistance with the ship's crew and boats,[83] or that, if the charterers are dissatisfied with the conduct of the officers or men, the owners engage to investigate any complaint, and, if necessary, make a change in the appointments.[84]

In addition, other charter party provisions have been considered and treated as compatible with, or indicative of, retention of control by the owner, as a provision that the whole of the vessel available for carriage shall be at the sole use and disposal of the charterer,[85] that the charterer assume all risk of the cargo,[86] that the charterer shall submit to the captain regarding the stowage and method of loading the cargo,[87] that the vessel is to perform such duties in accordance with the terms of the agreement as may be required of her by the charterers,[88] that there shall be a deduction from the demurrage if the vessel shall be detained by the owner or his agent for supplies or repairs or men,[89] that the charterer may load or discharge from on board such cargo, in the ports or places named in the charter, as by them shall be ordered,[90]

66. U S.—Pacific Impr. Co v. Schubach-Hamilton SS Co., D C Wash., 214 F. 854.
Or—**Corpus Juris cited in** Hust v Moore-McCormack Lines, 158 P 2d 275, 279, 176 Or. 662.

67. N.Y.—Barnevo v. Munson SS. Line, 147 N E. 75, 239 N.Y. 486.

68 Or—Grimberg v Columbia Packers' Assoc, 83 P 194, 47 Or. 257, 114 Am S R. 927, 8 Ann Cas. 491
58 C.J. p 157 note 9.

69. N Y.—Hagar v Clark, 78 N.Y. 45.
58 C J. p 157 note 10.

70. Cal—Kerry v Pacific Mar. Co., 54 P. 89, 121 Cal 564, 66 Am S R. 65.
58 C.J. p 157 note 11.

71. N.Y—Hagar v. Clark, 78 N.Y 45.

72. Ga—Swift v Tatner, 15 S E. 842, 89 Ga. 660, 32 Am S.R. 101.
58 C J. p 157 note 13.

73. U.S—Pacific Impr. Co v. Schubach-Hamilton SS. Co., D C.Wash., 214 F 854.
58 C J p 157 note 14.

74. Ga—Swift v. Tatner, 15 S E 842, 89 Ga 660, 32 Am S R. 101.
58 C.J p 157 note 15.

75. Ga.—Swift v Tatner, supra.
58 C J p 157 note 16.

76. Mo—Adams v Homeyer, 45 Mo. 545, 100 Am D. 391.
58 C J. p 157 note 17.

77. Mo—Adams v. Homeyer, supra.

78. U S—In re Certain Logs of Mahogany, C C Mass, 5 F.Cas No.2,-559, 2 Sumn. 589.
58 C J. p 158 note 19

79. U S.—Boston, etc, R. Co. v. Malley, D C Mass, 288 F. 864.
58 C J p 158 note 20.

80. U S—In re Certain Logs of Mahogany, C.C.Mass., 5 F.Cas.No.2,-559, 2 Sumn. 589.

81. U.S—Boston, etc, R. Co. v Malley, D C Mass, 288 F. 864.
58 C J p 158 note 22.

82. U.S—The Volund, N.Y., 181 F. 643, 104 C.C.A 373.

83. U S—Boston, etc, R Co. v. Malley, D C Mass., 288 F. 864.
58 C.J. p 158 note 25

84. U S—Boston, etc., R Co. v Malley, supra.

85. U S—Leary v U. S, Ct Cl., 14 Wall. 607, 20 L Ed 756.
58 C J p 158 note 37.

86. U S—Hansen v Du Pont de Nemours, C C A.N Y., 33 F.2d 94, certiorari denied 50 S.Ct. 37, 280 U S 589, 74 L Ed 638.

87. N Y—Barbaro v. Auditore Contracting Co, 214 N.Y S. 221, 215 App Div. 595.

88. Or.—Adams v. Carey, 118 P. 553, 60 Or. 153.

89. N.Y.—Wheeler v. Curtis, 11 Wend. 653

90. N Y.—Clarkson v. Edes, 4 Cow. 470.

that the vessel shall be employed in a specified manner or for such other service as the charterer might designate,[91] that the charterer shall pay the wages of the crew, or the expenses of the voyage,[92] that the master of a vessel, employed by the owner, shall be under the directions of the charterer, who may direct where cargo shall be taken and discharged,[93] or that the owner shall provide the vessel with the necessary men, supplies, and repairs,[94] or shall defray the expenses of the crew and the vessel[95]

(c) Language Indicative of, or Consistent with, Demise

Charter party provisions that the hirer shall have the same authority as the owner of the vessel as to her management and control, that the captain and officers shall be under the direction of the charterer, that the charterer shall select the officers and crew, that the charterer shall man and equip the vessel at his expense, and other similar provisions have been treated as operative to indicate a letting of the vessel.

Particular charter party provisions which have been treated as operative to indicate a letting of the vessel include a provision that the hirer shall have the same authority as the owner of the vessel as to her management and the control of the officers,[96] that the captain, although appointed by the owners, shall be under the orders and direction of the charterer as regards employment, agency, and other arrangements,[97] that the officers of the vessel, including those to be appointed by the owner, shall be in all respects under the order and direction of the charterer,[98] that the charterer shall select the officers and crew,[99] that the charterer shall man and equip the vessel at his expense[1] or shall pay for provisions, stores, supplies, etc.,[2] or that the charterer shall keep the vessel in repair[3] and dock and paint her at his own expense.[4]

In addition, other provisions of charter parties have been treated as operative to indicate a letting of the vessel, as that the charterer shall have full charge of the vessel,[5] that the charterers agree to indemnify the owners from all consequences arising from the captain's signing or complying with bills of lading,[6] that, in the event of the happening of certain contingencies, the master shall, on receiving notice thereof, take and hold possession of the vessel for and as the representative of the owner,[7] that the charterer shall insure the vessel,[8] that the charterer should have the absolute right of selection of the place for discharge of the cargo, provided the steamer shall lie safely afloat at any tide,[9] that it shall be lawful for the charterers or their agents to load the vessel,[10] that the charterer shall have the right to employ the vessel in any kind of lawful carriage anywhere between fixed limits,[11] that all of the earnings of the vessel during the term, of whatever character, shall belong to the charterer and inure to his sole benefit,[12] or that the charterer shall have a prior option to purchase the vessel at any time during the term of the charter.[13]

A charter party may amount to a demise of the vessel constituting the charterer the owner for the particular purpose or voyage despite the presence in the contract of clauses providing that the owner was to provide an efficient crew[14] and to pay their wages,[15] that the owner should assume responsibil-

91. U S—Leary v. U. S., Ct Cl, 14 Wall. 607, 20 L.Ed. 756.
92. N.Y—Brown v. Gray, 24 N Y.S. 61, 70 Hun 261.
58 C J. p 158 note 40.
93. Or.—Deniff v McCormick, 210 P. 703, 105 Or. 697.
94. U S—Boston, etc, R. Co. v. Malley, D C.Mass, 288 F. 864.
58 C.J. p 158 note 44.
95. N.Y.—Barbaro v Auditore Contracting Co., 214 N.Y.S. 221, 215 App Div 595.
58 C.J. p 159 note 45.
96. U S.—Hills v Leeds, D C Me, 149 F. 878, affirmed 158 F. 1020, 85 C C A. 489.
97. U.S.—The Thomas P. Beal, C C. A.N.J., 11 F 2d 49.
58 C.J. p 159 note 64.
98. U.S.—The Del Norte, D C.Wash., 119 F. 118, 55 C C.A. 220.
99. N.Y.—Lander v. Clark, 1 N.Y.Super. 355.
58 C.J. p 160 note 70.

1. Mich.—Marquette First Nat Bank v. Stewart, 26 Mich. 83.
58 C J. p 159 note 66.
2. U S—American Steel Barge Co v. Cargo of Coal, D C Mass, 107 F. 964, reversed on other grounds 115 F 669, 53 C C A. 301, rehearing denied 116 F 857, 54 C C.A. 207
58 C J. p 160 note 67.
3. U S—American Steel Barge Co v. Cargo of Coal, supra
4. U.S.—American Steel Barge Co. v. Cargo of Coal, supra.
5. U S.—The Del Norte, Wash., 119 F. 118, 55 C.C A. 220—Posey v. Scoville, C C La., 10 F. 140.
6. N Y—Rosenstein v. Vogemann, 77 N E 625, 184 N Y. 325, 6 Ann. Cas 13.
58 C J p 160 note 73
7. U.S.—The Del Norte, Wash, 119 F. 118, 55 C C A. 220
58 C J. p 160 note 74.
8. N.Y—Auten v. Bennett, 76 N.E 609, 183 N.Y. 496, 5 Ann.Cas. 620.
9. U S—Golcar SS. Co. v Tweedie Trading Co, D C.N.Y, 146 F. 563.
N Y—Rosenstein v. Vogemann, 77 N E 625, 184 N Y. 325, 6 Ann.Cas 13
10. U S—Drinkwater v The Spartan, D C Me, 7 F.Cas No 4,085, 1 Ware 145.
11. U S—American Steel Barge Co v. Cargo of Coal, D C.Mass, 107 F 964, reversed on other grounds 115 F 669, 53 C.C A. 301, rehearing denied 116 F 857, 54 C C.A 207
12. U S—The Del Norte, Wash, 119 F. 118, 55 C C.A 220
13. U S—American Steel Barge Co v Cargo of Coal, D.C Wash, 107 F. 964, reversed on other grounds 115 F 669, 53 C.C A 301, rehearing denied 116 F. 857, 54 C.C A 207.
14. U.S—U S. v. Shea, Ct Cl, 14 S Ct. 519, 152 U S. 178, 38 L Ed. 403—Hills v. Leeds, D.C Me, 149 F. 878, affirmed 158 F. 1020, 85 C C.A. 489
15. N.Y.—Auten v. Bennett, 76 N E 609, 183 N Y. 496, 5 Ann.Cas. 620.
58 C.J. p 159 note 50.

ity as to fire or marine risk,[16] that the owners shall insure the vessel[17] or pay for insurance on it,[18] that the charterer may discharge the officers or crew for disobedience and hire others,[19] that the captain should be appointed by the owner,[20] as should other of the officers or crew,[21] that the owner should provision and equip the ship during the voyage,[22] that disbursements in excess of a fixed sum cannot be made without the written consent of the owner,[23] that the owner shall keep the hull and machinery in efficient repair for the service,[24] that the owner shall have a lien on all cargoes and all subfreight for charter money due under the charter,[25] or that the general owner shall have the right to cancel and terminate the charter party by taking possession of the vessel at any time wherever the vessel might be found.[26]

(d) Charter of Whole or Part of Vessel

A charter of the whole ship is not conclusive of a demise, but the fact that the charterer does not charter the whole vessel has been treated as a circumstance indicating that the charterer is not to become owner pro hac vice.

A charter of the whole ship,[27] or the mere fact that the charter party contemplates that the charterer is to have the whole and exclusive use of the vessel,[28] is not conclusive of a demise, and a charter party will not be thus construed, unless the possession is transferred to the charterer, even where the whole capacity of the vessel is let.[29] That circumstance, however, coupled with a chartering for a voyage to be made by the charterers, has been treated as indicative of that result,[30] as it is where it is coupled with an agreement of the charterer to pay hire for the use of the vessel.[31] On the other hand, where the charter lets, not the whole vessel, but the whole tonnage to the charterers, that form of expression indicates that the charter is not a demise.[32]

The fact that the charterer does not charter the whole vessel has been treated as a circumstance indicating that the charterer is not to become owner pro hac vice.[33] A clause, reserving and excepting from the whole space of the vessel, granted to the charterer, such space as might be necessary for the officers or the crew, or for the supplies needed for the working of the vessel, has been treated as seemingly designed to exclude any intention of the general owner to give up the control of the vessel,[34] although such a provision has been said by other authority to be unimportant,[35] and charter parties have been construed as demises despite its presence.[36]

Status as private or common carrier. A ship chartered for a special cargo or to a special person is not a common carrier, but merely an ordinary bailee to transport for hire or a private contract carrier,[37] leaving the parties free to contract as

16. U.S.—Hills v. Leeds, D.C.Me., 149 F. 878, affirmed 158 F. 1020, 85 C.C.A. 489—Middlebrook v. U. S., 67 Ct.Cl. 294, certiorari denied 50 S.Ct. 24, 280 U.S. 564, 74 L.Ed. 618.

17. U.S.—Golcar SS. Co. v. Tweedie Trading Co., D.C.N.Y., 146 F. 563.

18. U.S.—The Barnstable, Mass., 21 S.Ct. 684, 181 U.S. 464, 45 L.Ed. 954.

19. U.S.—Hills v. Leeds, D.C.Me., 149 F. 878, affirmed 158 F. 1020, 85 C.C.A. 489

20. U.S.—The Del Norte, Wash., 111 F. 542, affirmed 189 F. 118, 55 C.C.A. 220.
58 C.J. p. 159 note 55.

21. U.S.—The Charlotte, D.C.N.Y., 285 F. 84, affirmed, C.C.A., 299 F. 595, certiorari denied 45 S.Ct. 91, 266 U.S. 604, 69 L.Ed. 463
58 C.J. p. 159 note 56.

22. U.S.—In re Certain Logs of Mahogany, C.C.Mass., 5 F.Cas.No.2,559, 2 Sumn. 589
58 C.J. p. 159 note 57.

23. U.S.—The Nat. E. Sutton, D.C.N.Y., 42 F.2d 229, modified on other grounds, C.C.A., The Nat. Sutton, 62 F.2d 787, amended on other grounds In re W. E. Hedger Co., 63 F.2d 1021.

24. U.S.—The Charlotte, D.C.N.Y., 285 F. 84, affirmed, C.C.A., 299 F. 595, certiorari denied 45 S.Ct. 91, 266 U.S. 604, 69 L.Ed. 463—Golcar SS. Co. v. Tweedie Trading Co., D.C.N.Y., 146 F. 563.

25. U.S.—Golcar SS. Co. v. Tweedie Trading Co., supra—American Steel Barge Co. v. Cargo of Coal, D.C.Wash., 107 F. 694, reversed on other grounds 115 F. 669, 53 C.C.A. 301, rehearing denied 116 F. 857, 54 C.C.A. 207.

26. Mass.—Rich v. Jordan, 41 N.E. 56, 164 Mass. 127.

27. U.S.—Drinkwater v. The Spartan, D.C.Me., 7 F.Cas.No.4,085, 1 Ware 145.

28. U.S.—The Arizonan, D.C.N.Y., 136 F. 1016, reversed on other grounds 144 F. 81, 75 C.C.A. 239.
58 C.J. p. 160 note 82.

29. U.S.—The Beaver, Cal., 219 F. 139, 135 C.C.A. 37.
58 C.J. p. 160 note 83.

30. U.S.—Drinkwater v. The Spartan, D.C.Me., 7 F.Cas.No.4,085, 1 Ware 145.
Mass.—Urann v. Fletcher, 1 Gray 125.

31. Me.—Husten v. Richards, 44 Me. 132.

32. U.S.—Hooe v. Groverman, Dist. Col., 1 Cranch 214, 2 L.Ed. 86
N.Y.—Wheeler v. Curtis, 11 Wend. 653.

33. U.S.—The Volunteer, C.C.Mass., 28 F.Cas.No.16,991, 1 Sumn. 551.
58 C.J. p. 161 note 87.

34. Ga.—Swift v. Tatner, 15 S.E. 842, 89 Ga. 660, 32 Am.S.R. 101.
58 C.J. p. 161 note 88.

35. U.S.—American Steel Barge Co. v. Cargo of Coal, D.C.Mass., 107 F. 964, reversed on other grounds 115 F. 669, 53 C.C.A. 301, rehearing denied 116 F. 857, 54 C.C.A. 207.

36. U.S.—Golcar SS. Co. v. Tweedie Trading Co., D.C.N.Y., 146 F. 563.
58 C.J. p. 161 note 90

37. U.S.—The Monarch of Nassau, C.C.A.Fla., 155 F.2d 48—**Corpus Juris cited in** The Doyle, C.C.A.Pa., 105 F.2d 113, 114—The Westmoreland, C.C.A.N.Y., 86 F.2d 96—The Joseph J. Hock, C.C.A.N.Y., 70 F.2d 259—The Robin Gray, C.C.A.N.Y., 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566—The Harry F. Hooper, D.C.N.Y., 42 F.2d 758—Petition of Howard, D.C.N.Y., 53 F.Supp.

they choose,[38] and the agreement they make is not subject to the considerations of public policy which limit the agreement of common carriers;[39] but, if a part of a ship is available to the public, although the other portion is taken up by a cargo shipped under special charter, the owner is still a common carrier.[40]

(e) Omission of Particular Terms and Expressions

It is not indispensable to constitute the charterer the owner for the voyage that express terms of demise and letting should appear on the face of the charter party, but it is sufficient that the language used shows an intent to transfer the possession, command, and control.

The omission of words of grant or demise,[41] or of express declarations imposing duties on the charterer, which are appropriate as incidents to the right of possession or control,[42] has been treated as significant to indicate that he did not become owner pro hac vice. It is not, however, indispensable to constitute the charterer the owner for the voyage that express terms of demise and letting should appear on the face of the charter party,[43] but is sufficient that the language used shows an intent to transfer the possession, command, and control.[44] The fact that the charter party contains no terms or expressions with regard to delivery of the vessel is significant as indicating that the charter is not a demise.[45]

The omission of words appropriate to a contract of affreightment merely, and the presence of terms peculiarly appropriate to a demise, indicate the latter to be the intended effect of a charter party.[46] The omission of any express declaration that it should be the owner's duty to man and equip the vessel has been said in at least one case to have some weight as indicating an intention to vest in the charterer the ownership for the voyage.[47] The fact that there is no provision for the duration or termination of the charter party is not sufficient to prevent a charter from constituting a demise of the vessel.[48] The omission of words expressly declaring the charter not to be a demise is not material in determining its character, where that sufficiently appears from the context of the whole instrument.[49]

(f) Barges and Similar Boats without Motive Power

Generally, charters of barges without motive power accompanied by a bargee paid by the owner are demises.

Generally, charters of barges without motive power accompanied by a bargee paid by the owner are demises,[50] even though the general owner is himself

556—The Toledo, D.C.N.Y., 30 F. Supp. 93, affirmed, C.C.A., 122 F.2d 255, certiorari denied Isbrandtsen Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551—The Bowling Green, D.C.N.Y., 11 F. Supp. 109, affirmed, C.C.A., Cyarnikow Rionda Co. v. Ellerman & Bucknall S. S. Co., 81 F.2d 1017

58 C.J. p. 160 note 83 [a], p. 340 note 9.

38. U.S.—The Westmoreland, C.C.A. N.Y., 86 F.2d 96—Petition of Howard, D.C.N.Y., 53 F.Supp. 556—The Toledo, D.C.N.Y., 30 F.Supp. 93, affirmed, C.C.A., 122 F.2d 255, certiorari denied Isbrandtsen Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

58 C.J. p. 160 note 83 [a].

39. U.S.—The Toledo, D.C.N.Y., 30 F. Supp. 93, affirmed, C.C.A., 122 F.2d 255, certiorari denied Isbrandtsen Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

40. Mass.—Gage v. Tirrell, 9 Allen 299.

41. Or.—Grimberg v. Columbia Packers' Assoc., 83 P. 194, 47 Or. 257, 114 Am.S.R. 927, 8 Ann.Cas. 491

58 C.J. p. 162 note 17.

42. N.Y.—Hagar v. Clark, 78 N.Y. 45.

58 C.J. p. 162 note 18.

43. U.S.—The Tubul, D.C.N.Y., 73 F.Supp. 757, affirmed, C.C.A., Schnell v. U.S., 166 F.2d 479, certiorari denied Schnell v. U.S., 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760.

58 C.J. p. 162 note 19.

Technical words are not necessary to create a "demise" of a vessel

U.S.—The Tubul, D.C.N.Y., 73 F.Supp. 757, affirmed, C.C.A., Schnell v. U.S., 166 F.2d 479, certiorari denied Schnell v. U.S., 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760—Magistrelli v. Canuso, D.C.Pa., 45 F.Supp. 539

Tenn.—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156

44. U.S.—The Tubul, D.C.N.Y., 73 F. Supp. 757, affirmed, C.C.A., Schnell v. U.S., 166 F.2d 479, certiorari denied Schnell v. U.S., 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760—Magistrelli v. Canuso, D.C.Pa., 45 F.Supp. 539.

Tenn.—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156

58 C.J. p. 162 note 20.

45. U.S.—Pacific Impr. Co. v. Schubach-Hamilton SS. Co., D.C.Wash., 214 F. 854.

46. U.S.—Winter v. Simonton, D.C., 30 F.Cas.No.17,894, 3 Cranch C.C. 104, reversed on other grounds Simonton v. Winter, 5 Peters 141, 8 L.Ed. 75.

47. U.S.—The Aberfoyle, D.C.N.Y., 1 F.Cas.No.16, Abb.Adm. 242, affirmed, C.C., 1 F.Cas.No.17, 1 Blatchf. 360

48. Mass.—Cutler v. Winsor, 6 Pick. 335, 17 Am.D. 385

49. N.Y.—Barbaro v. Auditore Contracting Co., 214 N.Y.S. 221, 215 App.Div. 595

50. U.S.—The Independent, C.C.A. La., 122 F.2d 141—**Corpus Juris cited in** The Doyle, C.C.A.Pa., 105 F.2d 113, 114—Calhoun v. Daly, D.C.N.Y., 18 F.Supp. 1005, affirmed, C.C.A., 89 F.2d 1004—Banks v. Chas. Kurz Co., D.C.Pa., 69 F.Supp. 61, motion denied 69 F.Supp. 1017—Leary v. City of New York, D.C.N.Y., 52 F.Supp. 643—Harbor Towboat Co. v. Lowe, D.C.N.Y., 47 F.Supp. 454—Conners Marine Co. v. Wathen, D.C.N.Y., 43 F.Supp. 283—L. R. Connett & Co. v. The Republic No. 5, D.C.N.Y., 43 F.Supp. 245

Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145

58 C.J. p. 163 note 27.

Oral charters of barges in local harbors constitute demises.—Marstaller v. Albina Dock Co., supra

Failure to collect insurance

The carrying of insurance on lighters by owners of lighters and their failure to collect on insurance because no bargees were aboard at time

the bargee;[51] and the same rule applies to all bare boat charters of boats without motive power.[52] Where, however, boats without motive power are chartered in conjunction with one having such power, to be used as a single flotilla, the charter is a mere contract of affreightment as to the whole group if the circumstances are such that it is so as to the vessel possessing motive power under the rules generally applicable;[53] and this is true, although the boats without motive power are first hired,[54] and although there is added to the flotilla a boat without motive power chartered from a third person by the charterer so as to constitute him, as to that boat, owner pro hac vice.[55] A charter of a barge will not amount to a demise where the alleged charterer has no control of it and cannot use it in his business[56]

b. Effect of Charter's Character on Liability of Owner and Charterer

(1) In general
(2) Liability for torts generally
(3) Liability for injury to, or nondelivery of, cargo
(4) Liability for supplies, repairs, and materials

(1) In General

Where a charter party is a mere contract for the service of affreightment, the master is the agent of the owner, but, as a general rule, under a charter amounting to a demise, the officers and crew are the agents of the charterer.

Where a charter party is a mere contract for the service of affreightment, the master is the agent of the owner,[57] and the crew are in the employment of the owner;[58] he is answerable for their conduct[59] and bound by contracts made by them as

of accident were not persuasive that owners understood the hire agreement to be a time charter and not the usual oral demise of lighters without motive power.—Banks v. Chas Kurz Co, D C Pa., 69 F Supp 1017.

Bargee or barge captain

(1) The barge captain remains the agent and servant of the owner—**Corpus Juris cited in** The Martha R Grimes, D C N.Y, 49 F Supp. 591, 594—Harbor Towboat Co v. Lowe, D C. N.Y., 47 F Supp. 454—Price v. Long Dock Co, D C.N.Y., 23 F Supp. 501—The Moran No 107, D C N Y., 1 F. Supp 785—58 C J. p 163 note 27 [d] (1).

(2) The rule that captain of chartered barge who was hired by owner of barge is employee of owner is controlling on New York Barge Canal as well as in New York Harbor—Harbor Towboat Co. v Lowe, D.C.N. Y, 47 F Supp. 454.

(3) Under the usual harbor charter by which the owner pays the wages of the bargee, the bargee is the agent of the owner with respect to tending lines—The Casleton, D C N.Y, 60 F. 2d 132, affirmed, C C A, 64 F 2d 11.

(4) Where owner's bargee went with the barge and his services were paid for by the owner except as to overtime, such bargee remained agent and representative of owner in so far as care of barge was concerned, notwithstanding bargee was required to report to the charterer where barge was when she was light—The Montezuma III, D.C.N.Y, 66 F.Supp. 562

51. N.Y—Graves v. Davis, 139 N E. 280, 235 N.Y. 315.

52. U.S—The Mercer, D C N.Y., 14 F.2d 488
58 C.J. p 163 note 29.

53. U S—Hansen v Du Pont de Nemours, C C A N Y, 33 F 2d 94, certiorari denied 50 S Ct. 37, 280 U S 589, 74 L Ed 638.
58 C.J. p 163 note 30.

54. U S—Hansen v Du Pont de Nemours, supra.

55. U S—Hansen v. Du Pont de Nemours, supra.

56. U S—The Pride, D C.N.Y, 41 F. Supp 326, reversed on other grounds, C C A, 135 F 2d 999

57. U S—The West Eldara, C C A N. Y., 104 F 2d 670, certiorari denied McAllister Towing & Transportation Co. v. American Diamond Lines, 60 S Ct 144, 308 U S 607, 84 L.Ed 507—The Framlington Court, C C A.Tex, 69 F.2d 300, certiorari denied United British SS Co, 54 S Ct 860, 292 U S 651, 78 L Ed 1500—The Terne, C C A N Y., 64 F 2d 502, certiorari denied Munson S. S. Line v. Bergen Lloyd, 54 S Ct 53, 290 U S. 635, 78 L Ed. 552, and Bergen Lloyd v. Munson SS. Line, 54 S Ct. 63, 290 U S. 635, 78 L Ed 552—The Gibraltar, C C A.Pa., 52 F. 2d 787.
58 C.J. p 163 note 34
Charterer's liability for injury to vessel as affected by nature of charter party see infra § 52.

Performance of acts prejudicial to owner

Where the master is the agent of the owner, he cannot be required to act for or assume duties in behalf of the charterer which might prejudice the interest of the owner—Hinckley v. Wilson Lumber Co, D C Me, 205 F. 974

58. U S.—The West Eldara, C C A N Y, 101 F 2d 45, modified on other grounds 104 F 2d 670, certiorari denied McAllister Towing & Transportation Co v. American Diamond Lines, 60 S Ct. 144, 308 U S. 607, 84 L Ed 507—The Framlington Court, C C A Tex, 69 F 2d 300, certiorari denied United British SS Co v. Newfoundland Export & Shipping Co., 54 S Ct. 860, 292 U.S 651, 78 L. Ed. 1500.
58 C.J p 164 note 35.

Instrumentalities used in navigation

Where navigation of chartered vessel remains in owner's hands, all instrumentalities used by owner in navigating vessel are instrumentalities of the owner, no matter from whom the instrumentalities are obtained—The West Eldara, C.C A N Y, 101 F.2d 45, modified on other grounds 104 F 2d 670, certiorari denied McAllister Towing & Transportation Co v. American Diamond Lines, 60 S Ct 144, 308 U.S. 607, 84 L Ed 507—The Volund, N.Y., 181 F. 643, 104 C C.A. 373.

59. U S—The West Eldara, C.C A N. Y, 101 F.2d 45, modified on other grounds 104 F.2d 670, certiorari denied McAllister Towing & Transportation Co. v. American Diamond Lines, 60 S.Ct. 144, 308 U S 607, 84 L Ed 507—The Trenton, C.C A N Y, 72 F 2d 283—The Terne, C C A. N Y., 64 F.2d 502, certiorari denied Munson SS. Line v Bergen Lloyd, 54 S Ct 53, 290 U S. 635, 78 L Ed. 552, and Bergen Lloyd v. Munson SS. Line, 54 S.Ct. 63, 290 U.S 635, 78 L Ed. 552—Conners Marine Co. v McClintic-Marshall Co, D C.N.Y, 59 F 2d 758—The Niels R Finsen, D C N Y., 52 F.2d 795—The Hurstdale, D C N.Y, 169 F 912—Smith v Heinlein, D C.N.Y, 132 F. 1001—The Halo, D C N.Y., 9 F.Supp. 963, affirmed, C.C A, Cities Service Transp Co. v. Gulf Refining Co., 79 F 2d 521.
58 C.J. p 164 note 36.

his agents within the scope of their authority.[60] Likewise, he, and not the charterer, can claim the benefits of any contracts made under such circumstances.[61]

As a general rule, under a charter amounting to a demise, the officers and crew are the agents of the charterer,[62] even though not appointed by him,[63] and not of the general owner,[64] and the latter is not responsible for their acts[65] or contracts,[66] save in the particulars provided for by the charter party,[67] at least where those claiming on the basis of such acts or contracts had notice of the charter party at the time of their execution.[68] The effect of the charterer's status as owner pro hac vice on his rights and obligations and those of the general owner operates from the time when he takes delivery of the vessel under the charter party.[69] Where a charter party, amounting to a letting of the possession of a vessel but terminable at the owner's option is entered into, the charterer is owner pro hac vice as to every voyage undertaken by him before he receives notice from the general owner of an intention to terminate the hiring.[70]

Status and duties as to winchmen. There is authority holding that, where the owner of a chartered ship, undertakes to supply winches and men to work them, and an accident is caused through the winchman's negligence to a stevedore employed by the charterer in loading or unloading cargo, the owner is to be held responsible, even though the charter stipulates that the winches shall be at the charterers' disposal during loading and discharging,[71] and further that the charterer, if held liable for such injuries, can recover over against the owner;[72] but there is other authority to the contrary, holding that such a charter clause, even though the charter is not a demise, makes the charterer liable for such negligence,[73] rather than the owner,[74] the duty of the owner being satisfied if he supplies a competent man to drive the winch.[75] Where there is such a charter, the owner, it has been held, is not liable to the charterer for the cost of a winchman supplied from shore because the ship's man, due to objection by labor unions or for any other reason, is persona non grata to the stevedores or charterers,[76] and the ship fulfills her entire duty in providing sober and competent winchmen from among the crew;[77] but, according to other authority, even under a charter constituting a demise, the owner must supply winchmen with whom the stevedores are willing to work if he has expressly agreed to provide men to work the winches.[78]

Validity and effect of special provisions. Where, under the charter, the officers of the vessel are agents of the owners as to certain matters, and of the charterers as to others, they will be regarded as agents of one party or the other according to the work on which they are engaged.[79] Although the charterer agrees to provide and pay all port charges, it has been held that the owner is liable for delay to the vessel or a fine imposed for failure of the master to secure a bill of health.[80] The mere

60. U S—Richardson v Winsor, C C Mass, 20 F Cas.No 11,795, 3 Cliff 395.
58 C J. p 164 note 37.

61. U.S—Kleine v. Catara, C C Mass, 14 F Cas.No.7,869, 2 Gall. 61.
58 C.J p 164 note 39

62. U S.—Schnell v. U S, C.C A.N Y., 166 F 2d 479, certiorari denied 68 S.Ct 1346, 334 U.S 833, 92 L Ed 1760—Epstein v. U. S, D C.N.Y., 86 F.Supp. 740.
Cal.—Johnson v. Goodwin, 229 P. 708, 68 Cal App. 363.
58 C.J. p 164 note 40.
Captain of barge as agent of owner see supra subdivision a (2) (f) of this section

63. U S—The Del Norte, D C.Wash, 111 F. 542, affirmed 119 F. 118, 55 C.C.A 220.
58 C J. p 164 note 41.

64. U S—Baccarat v. Andrew F. Mahoney Co, D C Cal., 4 F Supp 611.
58 C J. p 164 note 42.

65. U S.—The R. Lenahan, Jr., D.C N Y., 43 F 2d 858.
58 C.J. p 164 note 43.

66. Mich—Marquette First Nat. Bank v. Stewart, 26 Mich. 83.
58 C J. p 165 note 44.

67. U S—Hills v. Leeds, D C Me, 149 F 878, affirmed 158 F. 1020, 85 C.C A. 489
58 C J. p 165 note 45

68. U S—Devoe v. The Fashion, D. C N Y., 7 F Cas No 3,844.
58 C J. p 165 note 46

69. Me—Swanton v. Reed, 35 Me. 176—McLellan v. Reed, 35 Me. 172
58 C J. p 165 note 47.

70. Mass.—Cutler v. Winsor, 6 Pick 335, 17 Am D. 385

71. U S—The Thelma, D.C Pa., 194 F. 224.
58 C J. p 165 note 49.

72. U S—Munson SS Line v. Glasgow Nav Co., N Y., 235 F 64, 148 C.C A 558, certiorari denied 37 S. Ct 405, 243 U S 643, 61 L Ed. 944, and appeal dismissed 38 S Ct. 315, 246 U S. 647, 62 L Ed 916

73. N.Y—Callahan v. Munson SS. Co, 130 N.Y.S. 869, 71 Misc 525, affirmed 132 N Y S. 1123, 147 App Div. 934, affirmed 103 N E. 1122, 209 N Y. 546
58 C J p 165 note 51.

74. U S—Labbee v. Travenot SS Co, C C A N.Y, 37 F.2d 52, certiorari denied Labbee v Thavenot S S Co, 50 S.Ct. 408, 281 U S 754, 74 L Ed. 1164
58 C.J p 165 note 52.

75. U S—The Elton, Pa., 142 F 367, 73 C C A 467.

76. U S—Constantine, etc., SS Co v Tweedie Trading Co., N Y., 159 F 706, 86 C C A 574.
58 C J. p 165 note 54.

77. U S.—The Santona, D C.N Y, 152 F 516—British Maritime Trust, Ltd v Munson SS Line, D.C N.Y, 149 F 533.

78. U S—Golcar SS Co. v. Tweedie Trading Co, D C N Y., 146 F. 563.

79. U.S—Magnolia Petroleum Co v. National Oil Transp Co, D.C Tex, 281 F. 336, modified on other grounds, C.C A., 286 F. 40.
58 C.J. p 166 note 58

80. U.S—The Beaver, Cal., 219 F. 139, 135 C C.A 37.
58 C.J. p 166 note 60.

presence of a stipulation authorizing the charterer to nominate the persons to perform certain special services, who are, however, to be paid and employed by the owner, does not amount to a provision that those special services are to be performed for or by the charterer, or render those appointed for their performance his servants or agents.[81] An owner may rent his vessel to a charter party under a charter containing covenants as to time of departure, managership, and similar provisions, and he may specifically provide that the relationship of employer and employee does not exist without incurring the responsibilities or acquiring the immunities of a master with respect to the person controlled.[82]

Owner's liability for injury to charterer by acts of officers or crew The charterer, when owner pro hac vice, cannot ordinarily charge against the general owner losses occasioned to himself by the torts[83] or crimes[84] of the officers and crew; but, if the charter terms are such as to provide for retention of possession and control by the general owner, he is liable to respond to the charterer for the acts of the master or crew.[85]

Representation of general owner by owner pro hac vice. Where the charterer is owner pro hac vice, he is not the agent of the general owner[86] and the latter is not bound, by virtue of any such relationship, to shippers of bill of lading holders on contracts of carriage made by the charterer;[87] the general owner is not bound on contracts of the charterer for the purchase of goods to make up a cargo,[88] or on contracts for supplies, repairs, and materials,[89] and, furthermore, he is not liable for the negligence of the charterer, acting as master, in the navigation of the vessel.[90]

(2) Liability for Torts Generally

As a general rule, in the absence of a statute otherwise providing, a charterer under a demise charter, and not the actual owner, is liable for negligence in the navigation or running of the vessel. If the contract is one for services or affreightment merely, the owner, and not the charterer, is the one to be charged.

Whether the owner or charterer of a vessel is liable for negligence in the operation of the vessel may be dependent on whether the charter is a demise charter.[91] As a general rule, in the absence of a statute otherwise providing,[92] a charterer, under a demise charter, and not the actual owner, is liable for negligence in the navigation or running of the vessel[93] and also a charterer is liable

81. U.S.—Richardson v. Winsor, C.C.Mass., 20 F.Cas.No.11,795, 3 Cliff. 395.

82. Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal.App. 2d 83.

83. U.S.—The Del Norte, D.C.Wash., 111 F. 542, affirmed 119 F. 118, 55 C.C.A. 220.
58 C.J. p. 171 note 17.

84. U.S.—Golcar S.S. Co. v. Tweedie Trading Co., D.C.N.Y., 146 F. 563.
58 C.J. p. 171 note 18.

85. U.S.—The Nicaragua, Ala., 72 F. 207, 18 C.C.A. 511.
58 C.J. p. 172 note 20.

86. Mass.—Rich v. Jordan, 41 N.E. 56, 164 Mass. 127.
58 C.J. p. 172 note 21.

87. Mass.—Reynolds v. Toppan, 15 Mass. 370, 8 Am.D. 110.

88. Me.—Thompson v. Snow, 4 Me. 264, 16 Am.D. 263.

89. U.S.—The Kate, N.Y., 17 S.Ct. 135, 164 U.S. 458, 41 L.Ed. 512.
58 C.J. p. 172 note 24.

90. Me.—Somes v. White, 65 Me. 542, 543, 20 Am.R. 718.
58 C.J. p. 172 note 25.

91. U.S.—Santiago v. U.S., D.C.N.Y., 102 F.Supp. 425.

92. Ky.—Sparks v. The Kate French, 3 Metc. 533.
58 C.J. p. 168 note 84.

93. U.S.—Schnell v. U.S., C.C.A.N.Y., 166 F.2d 479, certiorari denied 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760—Moran Towing & Transportation Co. v. Sunset Lighterage Corporation, C.C.A.N.Y., 62 F.2d 761—In re New York Dock Co., C.C.A.N.Y., 61 F.2d 777—Hawn v. Pope & Talbot, D.C.Pa., 99 F.Supp. 226—The Samovar, D.C.Cal., 72 F.Supp. 574—Vitozi v. Balboa Shipping Co., D.C.Mass., 69 F.Supp. 286, affirmed, C.C.A., 163 F.2d 286—The Henry W. Card, D.C.N.Y., 51 F.Supp. 380, affirmed, C.C.A., Davison Chemical Corp. v. The Henry W. Card, 144 F.2d 705—Baccarat v. Andrew F. Mahoney Co., D.C.Cal., 4 F.Supp. 611.

N.Y.—Fleet Wing Corp. v. Oil Transfer Corp., 103 N.Y.S.2d 332, 278 App.Div. 745, appeal and reargument denied 105 N.Y.S.2d 1015, 278 App.Div. 1022—Kohrn v. Boyer Lighterage Corp., 27 N.Y.S.2d 635, 262 App.Div. 762, reargument denied 29 N.Y.S.2d 718, 262 App.Div. 863, appeal withdrawn 41 N.E.2d 178, 288 N.Y. 488.

Tenn.—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156.
58 C.J. p. 169 note 86.

Actions on charter parties see infra § 56.

Liability of vessel and owner for torts generally see infra §§ 76–80.

Liability in personam and in rem

(1) Where charter of vessel by owner to another is demise of entire vessel, vesting complete command, possession, and control of vessel in charterer, owner is not liable in personam for torts committed by charterer, even though vessel itself remains liable and subject to action in rem.—Santiago v. U.S., D.C.N.Y., 102 F.Supp. 425.

(2) Under demise charter ship is liable in rem and charterer is liable in personam to third parties injured by negligence of owner pro hac vice, and general or actual owner is not liable in personam to third party injured by negligence of demise charterer, since no relation of master and servant exists.—Vitozi v. Balboa Shipping Co., D.C.Mass., 69 F.Supp. 286, affirmed, C.C.A., 163 F.2d 286.

Vessel of foreign registry

The liability of a charterer of a vessel of foreign registry for injuries to a longshoreman engaged in loading vessel in territorial waters of the United States was governed by American maritime law rather than the law of England.—The Samovar, D.C.Cal., 72 F.Supp. 574.

Joint tort-feasor

Where evidence established that stevedore was negligent in method adopted for loading vessel and that such negligence, together with that of shipbuilder and of bare boat charterer, contributed to the injury of longshoreman employed by stevedore, charterer and builder had a several right to receive contribution

for negligence or other misconduct of the crew,[94] and the general owners are not liable for such negligence to the charterer,[95] but in a demise of a barge in which the captain of the barge remains the agent of the owner, the owner may be held liable for injuries resulting from the captain's negligence.[96] There is authority holding that the owner of a vessel who secretly charters her to another, concealing the fact from the officers and hands of the boat, will be liable to third persons for injuries caused by the negligence of the officers and hands in the management of the boat, if a sufficient legal excuse for the secrecy is not given, so as to remove the presumption of fraud, which renders the charter party void as against third persons.[97]

If the contract is one for services or affreightment merely, the owner and not the charterer is the one to be charged,[98] in the absence of some specific stipulation to the contrary in the charter.[99] As in other cases the presumption is against the charterer being owner pro hac vice.[1] Special charter provisions with respect to liability for injury will be enforced as between the parties, according to their terms, regardless of the character of the charter,[2] but the provisions in a charter purporting to limit or apportion liability of either party for tort claims are not effective against an injured third person if the character of the relationship or the laws of the United States impose liability in some other way.[3]

Condition of vessel and appliances. A charterer under a demise charter is under a duty to provide proper gear, equipment, and a safe place to work, including access to it, and he, rather than the actual owner, will be liable for a failure to do so[4] to an independent contractor,[5] or to a stevedore,[6] and under such circumstances the actual owner is not liable.[7] The charter may impose an obligation on the charterer, after the vessel is chartered, to keep

from stevedore as a joint tort-feasor to the extent of one half of longshoreman's recovery—The Samovar, supra.

Injured person held contributorily negligent

U S—Hawn v. Pope & Talbot, D C Pa, 99 F.Supp. 226.

94. N.Y—McDowell v Homer Ramsdell Transp Co, 28 N.Y S 821, 78 Hun 228.

58 C.J. p 169 note 87.

95. U.S.—Hills v Leeds, D C Me., 149 F. 878, affirmed 158 F 1020, 85 C.C A. 489.

58 C J. p 169 note 88.

96. U S—Price v Long Dock Co., D. C N Y, 23 F.Supp. 501.

97. Conn—New Haven Steamboat, etc., Co. v. Vanderbilt, 16 Conn 420.

98. U.S.—Davison Chemical Corp. v The Henry W Card, C C A.N.Y, 144 F.2d 705—The West Eldara, C C.A.N.Y, 104 F.2d 670, certiorari denied McAllister Towing & Transportation Co. v American Diamond Lines, 60 S Ct. 144, 308 U S. 607, 84 L Ed 507—The Niels R Finsen, D. C.N Y, 52 F.2d 795—Shannon v. Massachusetts Bonding & Ins. Co., D C.La., 62 F.Supp. 532—Burkholder v. U. S., D C.Pa, 56 F Supp 106—The Henry W. Card, D.C.N.Y, 51 F Supp. 380, affirmed, C.C.A., Davison Chemical Corp. v. The Henry W. Card, 144 F.2d 705.

Tenn.—American Barge Line Co. v. Jones & Laughlin Steel Corp., 163 S.W.2d 502, 179 Tenn. 156.

58 C.J. p 169 note 90.

The Suits in Admiralty Act does not change rule that charterer under time charter is not liable for negligence of owner's employees.—Burkholder v. U. S., D.C.Pa., 56 F.Supp. 106.

99. U S—The Henry W. Card, D C. N.Y, 51 F.Supp. 380, affirmed, C.C. A, Davison Chemical Corp v. The Henry W Card, 144 F.2d 705.

58 C J. p 169 note 91.

1. S C—Ross v Charleston, etc, Transp Co, 20 S E 285, 42 S C 447.

58 C J. p 169 note 93

2. U S—The Nat Sutton, C C A N Y., 62 F.2d 787, amended on other grounds In re W E Hedger Co, 63 F 2d 1021—Conners Marine Co. v. McClintic-Marshall Co., D.C.N. Y, 59 F 2d 758—The Nat E Sutton, D.C N Y, 42 F.2d 229—The Iossifoglu, D C Md., 32 F 2d 928—Burkholder v. U. S, D C Pa, 56 F.Supp 106—The Henry W. Card, D C.N.Y., 51 F.Supp. 380, affirmed, C.C.A., Davison Chemical Corp v. The Henry W. Card, 144 F 2d 705

N.Y—Haulenbeek v Hunt, 63 N.Y.S 405, 49 App Div. 47.

58 C J. p 169 note 94.

Strict construction

Charter party provisions attempting to excuse a private carrier's negligent breach of its contract, as by a failure to perform its obligation to make vessel seaworthy, must be strictly construed—U S. v Standard Oil Co. of Cal., C C A Cal, 156 F.2d 312.

Errors of navigation

(1) Charter provision relieving tug owner from liability for damage to barges in tow caused by "errors of navigation" used quoted words as meaning negligence or negligent navigation of tug.—The Henry W. Card, D.C N Y., 51 F.Supp. 380, affirmed, C. C A., Davison Chemical Corp. v. The Henry W. Card, 144 F.2d 705.

(2) Such provision relieved tug owner from liability for damage to barge and cargo due to standing as result of errors of navigation, although tug owner was in control of operation of tug—Davison Chemical Corp. v The Henry W. Card, C.C. A.N Y., 144 F.2d 705.

Doctrine that tugs are common carriers could not be invoked to impose liability on tug's owner for damage to barges in tow resulting from negligent navigation where owner of barges had expressly provided in charter party that errors of navigation were mutually excepted.—The Henry W. Card, D.C N Y., 51 F.Supp. 380, affirmed, C.C A., Davison Chemical Corp v. The Henry W. Card, 144 F 2d 705

3. U S—Burkholder v. U S., D C Pa, 56 F.Supp. 106

4. N.Y—Muscelli v Frederick Starr Contracting Co, 73 N E.2d 536, 296 N Y 330

Liability of owners generally see infra § 85

Foreseeability of exact harm, and of manner of its occurrence, was not ultimate criterion of liability of charterer—Gladden v. Stockard S S Co, C A Pa, 184 F.2d 507.

5. U.S—Gucciardi v Chisholm, C C A N.Y, 145 F 2d 514.

6. U.S.—Moragnel v. Moore-McCormack Lines, D.C Md, 75 F.Supp 969—The Martha R Grimes, D C.N Y., 49 F.Supp. 591.

Extent of duty

Charterer's duty extended only to the time when stevedore assumed control—Corrao v. Waterman S. S. Corp, D C.N Y., 75 F Supp. 482.

7. N Y.—Muscelli v. Frederick Starr Contracting Co, 73 N.E 2d 536, 296 N.Y. 330.

Under common-law rules, if applicable to a situation wherein an employee of the charterer of a derrick boat under a demise charter is in-

a vessel in reasonably safe condition for a third person lawfully thereon.[8] The owners are not liable for negligence with respect to hatches where the vessel was in the hands and under the control of a charterer,[9] unless, by the terms of the charter, the owner undertook the maintenance of the ship;[10] and a bare boat charterer will not be liable for injuries to the employee of an independent contractor because of the condition of the hatches where the independent contractor was warned of the defective condition.[11]

The charterers and others may be liable as joint tortfeasors for injuries to another as the result of the condition of the vessel or appliances.[12] Since the law implies a contract to indemnify one who is legally liable for a loss, where the negligence of the indemnitor gives rise to the liability, the charterer may be indemnified for any loss imposed on it by the negligence of another,[13] notwithstanding its own possible neglect in failing to discover the faulty conditions which allegedly entitled the representative of the injured party to recover,[14] and the charterer may bring in as a party a person who is liable to him.[15] The charterer, although liable as a joint tortfeasor with the owner, may be entitled to contribution.[16] The charterer under a demise charter is under an absolute,[17] nondelegable[18] duty to keep the vessel in a seaworthy condition,[19] and will be liable for its unseaworthiness rather than the actual owner for a failure to do so[20] to a longshoreman[21] or to a ship carpenter.[22] Where, however, after the vessel is chartered, it is still in the control and possession of the owner, the owner will be liable for its unseaworthy condition.[23] Where the shipowner is the party liable, the charterer may recover from the shipowner the full amount of any loss he is

jured because of the perilous condition of the boat, owner long out of possession would have no responsibility for the perilous condition.—Muscelli v Frederick Starr Contracting Co, supra.

8. N Y—Lloyd v. W E Hedger Transp Corp, 1 N E 2d 358, 270 N. Y. 617, certiorari denied W E Hedger Transp Corp v Lloyd, 58 S.Ct 408, 302 U S. 762, 82 L Ed 591.

9. U S.—Frazier v Luckenbach, D. C.Fla., 248 F. 1011

10. N Y—Smith v Luckenbach, 140 N.Y.S 292, 155 App Div 451

11. U S—Byars v. Moore-McCormack Lines, C.C A N.Y., 155 F.2d 587.

12. U.S—Gladden v. Stockard S. S Co, C A Pa, 184 F 2d 507—New York & Porto Rico S. S Co. of New York v. Lee's Lighters, D.C N.Y, 48 F 2d 372

N.Y.—Lloyd v W E Hedger Transp Corp., 1 N E.2d 358, 270 N Y 617, certiorari denied W. E Hedger Transp. Corp. v Lloyd, 58 S Ct. 408, 302 U S 762, 82 L Ed. 591.

13. U S.—Corrao v Waterman S S. Corp., D C N Y, 75 F.Supp. 482.

Stevedore's liability for death of intestate in a portion of ship under stevedore's control was primary in nature and could be relied on to support charterer's assertion of right to be indemnified for any loss imposed on it—Corrao v. Waterman S. S. Corp, supra.

14. U S.—Corrao v. Waterman S. S Corp., supra.

15. U.S—Corrao v Waterman S. S. Corp., supra.

Complaint held sufficient

U.S—Corrao v. Waterman S. S. Corp., supra.

16. U S—New York & Porto Rico S S Co of New York v. Lee's Lighters, D C N Y, 48 F 2d 372.

Contract with government agency

Where injury to longshoreman employed by stevedore resulted from defect of ship's gear, stevedore's contract with War Shipping Administration making stevedore responsible for all damage or injury to persons arising through fault of stevedore, its employees, gear or equipment did not make stevedore liable over to the bare boat charterer of vessel, because not arising from fault of stevedore's gear and because charterer was not beneficiary of contract—The Samovar, D C Cal, 72 F Supp. 574.

17. Or.—Marstaller v. Albina Dock Co, 229 P 2d 269, 191 Or 145.

18. U.S.—Hawn v Pope & Talbot, D C.Pa, 99 F Supp. 226.

Or—Marstaller v. Albina Dock Co, 229 P 2d 269, 191 Or. 145.

19. U.S.—Hawn v. Pope & Talbot, D C.Pa., 99 F.Supp 226.

20. N.Y.—Muscelli v. Frederick Starr Contracting Co, 73 N.E 2d 536, 296 N Y 330.

Unseaworthiness with respect to:

Cargo see infra subdivision b (4) of this section.

Owner generally see infra § 85.

Passengers see infra § 184

Lack of sufficient hatchway covers

Barge which had six hatchway openings but only one hatchway cover was "unseaworthy" so as to render one to whom the barge was demised liable for injuries sustained in fall through hatchway opening—Marstaller v. Albina Dock Co., 229 P. 2d 269, 191 Or. 145.

21. U.S.—Vitozi v. Balboa Shipping Co., C.C.A Mass., 163 F 2d 286—The Samovar, D C.Cal., 72 F Supp. 574

—Vitozi v Balboa Shipping Co, D. C.Mass, 69 F Supp 286, affirmed, C.C A, 163 F 2d 286.

Or—Marstaller v. Albina Dock Co, 229 P.2d 269, 191 Or. 145.

22. U S—Hawn v Pope & Talbot, D C Pa., 99 F Supp 226

Contributory negligence of ship carpenter did not wholly bar his right of recovery from owner of vessel for injuries sustained on vessel, and, where jury found that ship carpenter who brought action against owner of vessel to recover for injuries was contributorily negligent to the extent of seventeen and one-half per cent, court would give effect to that assessment and would not reduce recovery by carpenter to fifty per cent of jury's full verdict.—Hawn v Pope & Talbot, supra.

Time charter to army

Owner of vessel, pro hac vice, would be liable, although at time carpenter was injured ship was under time charter to the army, and though army had contracted for services of refitting company by which carpenter was employed.—Hawn v. Pope & Talbot, supra.

23. U S—Cannella v. Lykes Bros. S S. Co., C.A N Y., 174 F.2d 794, certiorari denied, 70 S Ct. 102, 338 U. S. 859, 94 L.Ed. 526.

Nature of proof

Where longshoreman's employer had been engaged to lade ship under bare boat charter to United States and in possession of owner as operating agent, and longshoreman was injured where rung of Jacob's ladder gave way, he was entitled to recover from owner on proof satisfactory to jury that ladder was unseaworthy when ship was delivered to the United States—Cannella v. Lykes Bros. S. S. Co, supra.

required to pay for injuries through unseaworthiness,[24] and a third party, where he is the primary tort-feasor, may be required to indemnify the bare boat charterer for such sums as the charterer might be required to pay,[25] or the charterer may be entitled to contribution.[26] It has been held that an alleged agreement by the owner and charterer that the owner would be responsible for its unseaworthiness is no defense to the demise charterer,[27] and any relief to which the charterer might be entitled can only be obtained in a separate action against the owner, and not in an action by a third party against the owner and charterer.[28]

(3) Liability for Injury to, or Nondelivery of, Cargo

When a charter party operates merely as a contract between the charterer and the shipowner for the conveyance by the latter of goods and merchandise, the owner, as between the charterer and owner, is liable for claims for damage to or shortage of cargo. When a charter party operates as a demise of the ship to the charterer, he is primarily liable for loss of, or injury to, goods shipped on board.

The shipper under an ordinary bill of lading has his remedy against the ship, whether the charter is one where the owner retains possession and command, or whether the control and navigation pass to the charterer;[29] but whether the owner or the charterer is ultimately liable depends on the terms of the charter party.[30] When the charter party operates merely as a contract between the charterer and the shipowner for the conveyance by the latter of goods and merchandise, the owner of the vessel is the carrier of the goods,[31] and the latter, as between the shipowner and charterer, is responsible for claims for damage to, or shortage of, cargo;[32] he will in general be responsible for the nonconveyance of them according to their contract,[33] and is in addition liable to the charterer for any damage to cargo by his servants.[34]

When a charter party operates as a demise or bailment of the ship to the charterer, he becomes the carrier of the goods shipped on board,[35] and is primarily liable for their loss or injury,[36] and

24. U S—W. E. Hedger Transp. Corp v. Gallotta, C C A.N Y., 145 F 2d 870.

25. U S—The Samovar, D C Cal., 72 F.Supp. 574.

26. U.S—The Samovar, supra.

27. Or—Marstaller v Albina Dock Co., 229 P 2d 269, 191 Or 145.

28. Or—Marstaller v Albina Dock Co, supra.

29. U S—American Tobacco Co. v. The Katingo Hadjipatera, D C N Y, 81 F Supp. 438, modified on other grounds, C A., 194 F 2d 449, certiorari denied 72 S.Ct. 1076, 343 U S 978, 96 L Ed. — —Pioneer Import Corp v. The Lafcomo, D C N Y, 49 F.Supp. 559, affirmed, C.C.A, 138 F 2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp, 64 S Ct. 523, 321 U S. 766, 88 L Ed 1063—The Steel Inventor, D C Md., 35 F Supp 986.
58 C.J. p 170 note 96

Loss of, or injury to, cargo generally see infra §§ 50, 51.

Liability in rem and in personam

A steamship was bound in rem and the charterer in personam for right delivery of cargo—Pioneer Import Corp v. The Lafcomo, D.C N.Y., 49 F. Supp. 559, affirmed, C C A., 138 F 2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp, 64 S Ct. 523, 321 U S. 766, 88 L Ed 1063.

30. U S.—Pioneer Import Corp. v The Lafcomo, C C A N.Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S Ct. 523, 321 U.S 766, 88 L Ed. 1063—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D.C.N. Y, 15 F.Supp. 705, affirmed, C C.A., 88 F 2d 1005, certiorari denied 58 S Ct 18, 302 U S 699, 82 L Ed 540.
58 C J. p 170 note 97

Additional payments by charterer

Liability of barge and owner for captain's failure to attend pumps was not affected by additional payments to captain by charterers for services as watchman—The Cary Brick Co. No 8, D C N.Y, 34 F 2d 981

Where charterer undertook burden of stowage under charter party and actually performed that duty, as between charterer and ship, charterer was required to bear loss resulting from improper stowage.—American Tobacco Co. v. The Katingo Hadjipatera, D C N.Y., 81 F Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S Ct. 1076, 343 U S 978, 96 L Ed. —

Delivery to terminal operator

Where cargo on scow was lost through negligence of terminal operator to whom charterer had made a proper delivery, charterer, although secondarily liable for damage to scow, was not secondarily liable for cargo lost and delivery freed charterer, as connecting carrier, from any liability to owner.—Roah Hook Brick Co v Erie R. Co., C.A N.Y., 179 F.2d 601.

31. U S—Luckenbach v. W J. McCann Sugar Refining Co, N Y, 39 S Ct 53, 248 U S. 139, 63 L Ed. 170, 1 A L R 1522.
58 C.J. p 170 note 98.

32. U.S—Pioneer Import Corp. v The Lafcomo, C.C.A N Y., 138 F 2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp, 64 S.Ct. 523, 321 U S 766, 88 L Ed 1063—S C. Loveland Co. v. Eastern States Farmer's Exchange, C C A Pa., 92 F.2d 180, certiorari denied Diamond Transp Co. v. Eastern State Farmer's Exchange, 58 S Ct 369, 302 U S 762, 82 L. Ed 591—The Castleton, D C.N Y., 60 F.2d 132, affirmed, C.C A., 64 F. 2d 11—Venezuelan Meat Export Co. v U S, D C.Md, 12 F Supp 379
58 C J p 170 note 99.

33. Me—Emery v Hersey, 4 Me. 407, 16 Am D. 268.
58 C J. p 170 note 1.

34. U S—The Craigallion, D C.Md, 20 F. 747.

35. U S—Epstein v. U S., D C N Y., 86 F Supp. 740.
58 C J. p 170 note 3

36. U S—American Tobacco Co. v. The Katingo Hadjipatera, C A N Y, 194 F 2d 449, certiorari denied 72 S. Ct. 1076, 343 U.S 978, 96 L Ed — —Pioneer Import Corp. v The Lafcomo, C.C A N Y, 138 F.2d 907, certiorari denied Black Diamond Lines v Pioneer Import Corp, 64 S Ct. 523, 321 U S 766, 88 L Ed. 1063—The Nat Sutton, C C.A.N.Y, 62 F. 2d 787, amended on other grounds In re W. E Hedger Co, 63 F 2d 1021—The Tubul, D.C N Y, 73 F Supp. 757, affirmed, C C A, Schnell v. U S, 166 F 2d 479, certiorari denied Schnell v. U S, 68 S Ct. 1386, 334 U S. 833, 92 L.Ed 1760.
58 C J. p 170 note 4.

Actual physical possession of cargo at time of loss and damage is not a prerequisite to establish charterer's liability for the loss.—Mackey v. U. S., D.C.N.Y., 83 F.Supp. 14.

in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master is his servant while procuring freight and contracting with third parties for the carriage of merchandise[37] and the general owner consequently cannot be made liable for matters arising out of, or founded on, such contracts.[38] Where the charterer becomes owner pro hac vice, he cannot recover from the owner for a shortage in delivery of, or damage to, the cargo.[39] He alone is personally liable for injury to, or nondelivery of, the cargo,[40] unless the owner has by his conduct induced a reasonable belief in the shipper that the vessel was to sail on his account, and under his direction and control;[41] and this is true, even though the cargo owner had no notice of the terms of the charter.[42] It is immaterial to the question of liability whether the owner receives for the use of the vessel a stipulated sum or a share of its earnings,[43] although it has been held that a party hiring a vessel to another at a specified price per day for the purpose of transporting the latter's own goods at his own charges is not responsible for the goods as carrier.[44]

The vessel or owner, where acting as bailee to transport for hire, is bound only to exercise reasonable care,[45] for the rules governing bailees' responsibility apply,[46] and negligence must be shown.[47] The owner and charterer may be jointly and severally liable for damage to the cargo,[48] as where the damage to the cargo would not have occurred but for their joint negligence.[49]

Unseaworthiness. Even under a charter party amounting to a demise, although the charterer is liable to a shipper for injury to goods, as between himself and the shipowner, the latter is ultimately liable where the injury arises from the vessel's unseaworthiness when furnished to the charterer, in the absence of any specific stipulation to the contrary in the charter party.[50] Where a vessel is unseaworthy on delivery to the charterer, the owner is primarily liable and the charterer secondarily liable for loss, of, or injury to, the cargo,[51] even though there is no privity between the owner and the cargo,[52] and the charterer is entitled to be exonerated by the owner.[53] Where, however, the vessel is seaworthy when delivered, but an accident happens because of unseaworthiness while the vessel is in the possession of the charterer, the charterer is liable,[54] or, according to some decisions

37. U.S.—The Alert, D.C.N.Y., 40 F. 836, affirmed 61 F. 113, 9 C.C.A. 390.
58 C.J. p. 170 note 5.

38. U.S.—Armour & Co. v. Ft. Morgan S. S. Co., C.C.A.La., 297 F. 813, affirmed 46 S.Ct. 212, 270 U.S. 253, 70 L.Ed. 571.
58 C.J. p. 170 note 6.

39. U.S.—Golcar SS. Co. v. Tweedie Trading Co., D.C.N.Y., 146 F. 563.
58 C.J. p. 171 note 7.

40. U.S.—The Thomas P. Beal, C.C.A.N.J., 11 F.2d 49.
58 C.J. p. 171 note 8.

41. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Société De Navigation A Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.
58 C.J. p. 171 note 9.

42. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Société De Navigation A Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.
Conn.—Pitkin v. Brainerd, 5 Conn. 451, 13 Am.D. 79.

43. Mass.—Thompson v. Hamilton, 12 Pick. 425, 23 Am.D. 619.
58 C.J. p. 171 note 14.

44. U.S.—Bashinsky Cotton Co. v. Sunset Lighterage Corp., D.C.N.Y., 272 F. 120, affirmed, C.C.A., 281 F. 1019.

45. U.S.—**Corpus Juris cited in** The Doyle, C.C.A.Pa., 105 F.2d 113, 114—Petition of Howard, D.C.N.Y., 53 F.Supp. 556.
58 C.J. p. 340 note 10.

Incorporation of provisions of statute

A vessel owner did not, by incorporating in charter party provisions of Carriage of Goods by Sea Act, convert the contract of carriage from that of a private to a "common carrier" in effect assuming obligation of an insurer, since all that owner did by agreeing to become subject to provisions of the act was to contract that his liability as private carrier might be different from that which the law would otherwise impose.—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

46. U.S.—The Joseph J. Hock, C.C.A.N.Y., 70 F.2d 259.

47. U.S.—The Bowling Green, D.C.N.Y., 11 F.Supp. 109, affirmed, C.C.A., Cyarnikow Rionda Co. v. Ellerman & Bucknall S. S. Co., 81 F.2d 1017.

48. U.S.—Pioneer Import Corp. v. The Lafcomo, D.C.N.Y., 49 F.Supp. 559, affirmed, C.C.A., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063.

49. U.S.—Pioneer Import Corp. v. The Lafcomo, D.C.N.Y., 49 F.Supp. 559, affirmed, C.C.A., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063.

50. U.S.—The Steel Inventor, D.C.Md., 35 F.Supp. 986.
58 C.J. p. 171 note 11.

51. U.S.—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272.—The Irving, D.C.N.Y., 16 F.Supp. 22, affirmed, C.C.A., Conners Marine Co. v. Manhattan Lighterage Co., 91 F.2d 1011.

Condition ascertainable only on close inspection

A charterer of private carrier barge was not liable for cargo lost when barge sprang a leak and had to be beached because of her unseaworthiness consisting of rotten planking where barge was loaded and showed no signs of leaking for about twenty hours before accident, and condition of planking was ascertainable only on close inspection.—The Doyle, C.C.A.Pa., 105 F.2d 113.

Charterer held liable to cargo owner

U.S.—The Cullen No. 32, C.C.A.N.Y., 62 F.2d 68, affirmed 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189.

52. U.S.—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272.

53. U.S.—Petition of Reliance Marine Transp. & Const. Corp., supra.

54. U.S.—The Harper No. 145, C.C.A.N.Y., 42 F.2d 161—Ætna Ins. Co. v.

on the question, at least primarily liable.[55] Under statute, the charterer may become liable for the loss of cargo because of lack of diligence in failing to ascertain whether the vessel was seaworthy or to make it seaworthy.[56]

(4) Liability for Supplies, Repairs, and Materials

If the charterer is owner pro hac vice, he is liable for repairs, materials, and supplies for the vessel, and the owner is absolved from liability therefor.

In the absence of specific stipulations in the charter party, the owner is liable as a general rule for all supplies furnished his ship,[57] and for repairs thereon;[58] but, if the charterer is owner pro hac vice, he is liable for repairs, materials, and supplies for the vessel,[59] and the owner is absolved from liability therefor,[60] although he has reserved the right to terminate the charter party at any time.[61]

Regardless of the nature of the charter party, the parties may specifically agree that certain specified supplies, materials, and repairs shall be furnished by the one party or the other, and, in such a case, as between the parties, the obligation to furnish them rests on the party whose performance in that particular is stipulated for by the contract;[62] but the liability with respect to supplies, repairs, and materials not included in the terms of the specific agreement remains subject to the general rules governing liability for items furnished to a chartered vessel.[63] A clause providing that the owner shall keep the vessel in good condition and tackled and appareled with all things necessary for the voyage extends no further than to make the general owner liable to the charterer by way of reimbursement for supplies and materials furnished to keep the vessel in proper condition,[64] and is not available to persons furnishing such materials and supplies to compel satisfaction of their claims by the owner of a demised vessel.[65]

The fact that the general owner has not given to the person furnishing the supplies any notice of the nature of the charterer's interest in the vessel does not extend his personal liability.[66] The person furnishing supplies which, by the charter, the charterer is to provide or pay for has no claim against the vessel or the owner, although he did not know the charter terms, at least, if by the exercise of reasonable diligence, he might have discovered them and has not exercised such diligence,[67] although, if there is no failure in this respect on his part, he may hold the vessel for items furnished,[68] and the vessel and the owners are subrogated in such a situation to a claim against the charterer for the materials furnished.[69]

§ 35. Nationality of Vessel

The time chartering of a foreign ship by an American corporation does not divest the ship of its nationality.

The time chartering of a foreign ship by an American corporation does not divest the ship of its nationality.[70]

§ 36. Seaworthiness, Fitness, and Capacity of Vessel

a. In general
b. Requisites and essentials
c. Time and maintenance of seaworthiness

Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.

55. U.S.—Taylor Bros. Lumber Co. v. Sunset Lighterage Co., C.C.A.N.Y., 43 F.2d 700.
58 C.J. p 170 note 4 [b].

56. U.S.—Petition of Reliance Marine Transp. & Const Corp., D.C. Conn, 89 F.Supp 272

57. U.S.—Reed v. U. S., Ct.Cl., 11 Wall 591, 20 L.Ed. 220.
58 C.J. p 167 note 63
Expenses see infra § 41
Liability as to supplies, repairs, services, and advances generally see infra § 74

58. U.S.—Reed v. U. S., supra.
Mass.—Urann v. Fletcher, 1 Gray 125.

59. U.S.—The Louis Dolive, D.C.La., 236 F. 279.
58 C.J. p 167 note 67.

60. U.S.—The U. S. 219, D.C.Pa., 21 F.Supp. 463—The Lizzie Burt, D.C.Del., 16 F.Supp. 67
58 C.J. p 167 note 68.

Repairs by charterer

(1) Charterer was not entitled to a lien on derrick lighter for repairs made by charterer of damage other than ordinary wear and tear sustained by lighter while under charter, in absence of showing of any agreement by owner to pay for such repairs or of what caused the damage and who was responsible therefor.—The St. Nicholas, D.C.N.Y., 67 F.Supp. 380.

(2) Demand on owner for payment for repairs made by charterer on chartered lighter or owner's failure to answer or deny bill for such repairs did not render owner liable therefor.—The St. Nicholas, supra.

61. Mass.—Rich v. Jordan, 41 N.E. 56, 164 Mass. 127.
58 C.J. p 167 note 69.

62. U.S.—Scottish Nav. Co. v. Munson S. S. Line, D.C.N.Y., 60 F.2d 101, affirmed, C.C.A., 10 F.2d 708.
58 C.J. p 167 note 71.

63. U.S.—The Louis Dolive, D.C.La., 236 F. 279

64. Mass.—Urann v. Fletcher, 1 Gray 125.

65. Mass.—Urann v. Fletcher, supra.

66. Me.—McLellan v. Reed, 35 Me 172.
58 C.J. p 168 note 75.

67. U.S.—The Valencia, 17 S.Ct. 323, 165 U.S. 264, 41 L.Ed. 710.
58 C.J. p 168 note 76.

68. U.S.—The Penza, C.C.A.N.Y., 9 F.2d 527.
58 C.J. p 168 note 77.

69. U.S.—The Louis Dolive, D.C.La., 236 F. 279.
58 C.J. p 168 note 78.

70. U.S.—The Lynghaug, D.C.Pa., 42 F.Supp. 713.

d Statutory exemption from liability
e. Contractual limitation or abrogation of owner's liability
f. Assumption of risk
g. Rejection of unseaworthy vessel
h. Damages

a. In General

Generally, everyone who offers a vessel for charter is bound to furnish one that is staunch, tight, and seaworthy, and a warranty of seaworthiness of the vessel, if it is not expressly affirmed or excluded, is implied in the charter.

Generally, everyone who offers a vessel for charter is bound to furnish one that is staunch, tight, and seaworthy, and a warranty of seaworthiness of the vessel, if it is not expressly affirmed or excluded, is implied in the charter,[71] and, where the charter is extended, the implied warranty applies to the extension thereof.[72] The warranty of seaworthiness extends to a lighterage contract,[73] to the rental of a lighter to act as part of the wharf for unloading a cargo[74] or for storage of goods to await the clearance of a wharf,[75] to the rental of barges for the storage of cargo pending repairs to a ship,[76] or to a charter of a crane for the purpose of lifting property from a dock to a vessel.[77] The duty to have the vessel seaworthy is a nondelegable duty of the owner,[78] and it applies whether a charter is executed by himself or by his agent.[79] The fact that the owner does not deal directly with the charterer, but makes the arrangement through a third person, does not alter his liability on an implied warranty of seaworthiness where he is aware of the use which is to be made of the vessel.[80]

Fitness for purpose. Where the owner of a vessel charters her, he is, in the absence of a stipulation to the contrary, bound to see that she is suitable for the service in which she is to be employed,[81] or the purpose for which she is intended,[82] and for the kind of cargo which she is chartered to carry.[83] Where the vessel owner is kept in ignorance of how

71. U S—Cullen Fuel Co. v W. E Hedger, Inc, N Y, 54 S Ct. 10, 290 U S 82, 78 L Ed 189—The Caledonia, Mass., 15 S Ct 537, 157 U.S. 124, 39 L Ed. 644—Shamrock Towing Co v. Fichter Steel Corp, C C. A.N Y., 155 F.2d 69—U S. Gypsum Co v Conners Marine Co, C C A N Y., 119 F.2d 689—The Doyle, C C A Pa., 105 F.2d 113—The Fred E Hasler, C C.A.N.Y., 55 F.2d 919—The Josephine, C C A.Pa., 49 F 2d 207—New York & Puerto Rico S. S Co. of New York v. Lee's Lighters, D C N.Y., 48 F.2d 372—New York, etc, Co. v. Delaware, etc., R. Co, C C A N Y., 23 F.2d 487—Kelly v. Overseas Shipping Co, D.C N.Y., 7 F 2d 732, affirmed, C.C.A., 7 F 2d 734—Petition of Reliance Marine Transp. & Const. Corp, D C Conn, 89 F Supp. 272—Atlantic Creosoting Co. v. Savannah Lighterage & Transfer Co., D.C Ga., 67 F Supp 383—Leary v City of New York, D. C N Y, 52 F.Supp. 643—Texas Gulf Sulphur Co. v. O'Donnell, D C N Y, 26 F Supp 70—The Westmoreland, D C.N.Y., 14 F.Supp. 762, affirmed, C.C A., 86 F 2d 96—The Emergency, D C N Y, 9 F Supp 484—The Medea, Cal, 179 F. 781, 103 C C A. 273—Bowring v. Thebaud, C C A.N.Y, 56 F. 520.
58 C.J. p 172 note 31.
Limitation of liability by contract see infra subdivision e of this section.
Liability of charterer for personal injuries resulting from unseaworthiness see supra § 34.
Seaworthiness with respect to liability for personal injuries to: Stevedores see infra § 85. Passengers see infra § 184. Seamen see Seamen §§ 46, 192–197.
Equivalent warranties
Clause of charter party that "vessel on her delivery to be tight, staunch, strong and in every way fitted for service" was equivalent to "warranty" of seaworthiness implied in all contracts concerning vessels in absence of an express and unambiguous stipulation to contrary.—Aaby v. States Marine Corp, C A N. Y, 181 F 2d 383, certiorari denied 71 S.Ct. 66, 340 U S 829, 95 L.Ed. 609.
Age
(1) Age alone is not sufficient to sustain claim of unseaworthiness—The G. G Post, D C.N.Y., 64 F Supp. 191.
(2) However, age is properly an element to be considered in determining whether a vessel is seaworthy.—New York, etc, Co. v. Delaware, etc., R. Co, C.C A.N Y., 23 F.2d 487.
Seaworthiness
U S—The G. G. Post, D.C N Y., 64 F Supp. 191

72. U S—Leiter v. Ronalds, C.C N. Y, 84 F. 894.
58 C.J. p 174 note 53.

73. U S—The Cullen No 32, C C A. N Y, 62 F 2d 68, affirmed 54 S.Ct. 10, 290 U S 82, 78 L.Ed 189.

74. U S—Wessel v. Charleston Lighterage, etc, Co., D C.S.C., 25 F. 2d 126.

75. U S.—The Jungshoved, C.C.A.N. Y., 290 F. 733, certiorari denied 44 S.Ct 35, 263 U S 707, 68 L Ed. 517.

76. U S.—Dempsey v. Downing, C.C. A.Va., 11 F.2d 15.

77. U S—Shamrock Towing Co. v Fichter Steel Corp, C.C.A.N.Y., 155 F.2d 69.

78. U S—The Framlington Court, C C.A.Tex, 69 F.2d 300, certiorari denied United British S S. Co. v. Newfoundland Export & Shipping Co, 54 S Ct. 860, 292 U.S 651, 78 L Ed 1500—The Etna Maru, D C Tex., 20 F 2d 143, affirmed, C C.A, Kokusai Kisen Kabushiki Kaisha v. Texas Gulf Sulphur Co., 33 F.2d 232, certiorari denied 50 S Ct. 85, 280 U S 603, 74 L Ed. 648.
Employment of competent captain
Owner's duty to use diligence to make vessel seaworthy may not be validly discharged merely by engaging competent captain and intrusting duty to him, but duty is nondelegable, and failure will be attributed to owner—Hockley v Eastern Transp. Co, D C Md, 10 F Supp. 908.

79. U.S—The Etna Maru, D C.Tex, 20 F.2d 143, affirmed, C C.A., Kokusai Kisen Kabushiki Kaisha v. Texas Gulf Sulphur Co., 33 F.2d 232, certiorari denied 50 S Ct. 85, 280 U S. 603, 74 L Ed. 648.

80. U S—Sun Co. v. Philadelphia Transp., etc, Co, D C.Pa., 224 F. 580.

81. U S.—W. R. Grace & Co. v Charleston Lighterage & Transfer Co., C.A.S C., 193 F 2d 539.
58 C.J. p 173 note 36.

82. U.S.—The Lawrence J. Tomlinson, C.C.A.N.Y., 48 F.2d 88.
58 C.J. p 173 note 37.

83. U.S—The Sagamore, C.C.A.N.Y., 300 F. 701, certiorari denied 45 S. Ct. 95, 266 U.S. 612, 69 L.Ed. 467.
58 C.J. p 173 note 38.

the vessel is to be employed or where it is to be sent, there can be no implied warranty of fitness for the particular service;[84] and there is no implied warranty of fitness where the charterer misrepresents the depth of the channel in which she is to navigate[85]

Known or unknown; latent or patent defects. The warranty of seaworthiness is absolute and not conditional,[86] and the owner, where there is no stipulation to the contrary, is bound whether the defects are known or unknown to him.[87] However, not every defect needing repair or causing damages amounts to a breach of the warranty,[88] and, where the defects are patent and the charterer has an opportunity to examine the vessel, it has been held that there is no implied warranty,[89] although the rule is otherwise as to defects which are not so open.[90] The charterer assumes the obligation that the vessel will continue to be capable to proceed on her voyage, so far as relates to all defects which can be ascertained by inspection, and the owner assumes the obligation that the vessel will continue to be able to proceed, so far as relates to latent defects; if an accident which interrupts the progress of the boat is the result of a defect which is ascertainable by inspection, then the owner can recover, but if of a defect which was latent, then the verdict must be for the charterers[91] Further, an injury to cargo for which the vessel may be liable need not be apparent before its delivery[92]

In the case of a subcharter, the warranty attaches in favor of the subcharterer as against the original charterer,[93] although the original charter places the risk of fitness on the charterer.[94] The owner of the ship who has no contract relation with the subcharterer does not expressly or impliedly warrant the seaworthiness of the ship,[95] and owes no absolute duty to the subcharterer to have the ship seaworthy,[96] but such owner may be liable to the subcharterer on the ground of negligence in furnishing an unseaworthy ship, as discussed supra § 30.

Private or common carrier. Although the fact that the charterer is to occupy the entire ship may prevent the vessel from being regarded as a common carrier, as discussed supra § 34, no distinction arises as far as the obligation of seaworthiness is concerned.[97]

Waiver. Acceptance of performance of a covenant to clean the vessel does not waive a general warranty of fitness,[98] and a release of known damages does not release owners for damages unknown at the time.[99]

Recovery of cargo. On a breach of warranty of seaworthiness, a charterer may maintain a suit to recover possession of the cargo, notwithstanding he may have sold it to arrive at the port of destination where the sale has been repudiated and the bill of lading returned to the charterer.[1]

b. Requisites and Essentials

In order that a vessel may be seaworthy, it must be staunch and fit to meet the perils of the sea, and reasonably fit for the receipt and the transportation of the particular cargo or for the performance of the particular service.

In order that a vessel may be seaworthy, it must be staunch and fit to meet the perils of the sea,[2] and, likewise, a vessel to be considered sea-

84. U.S.—Richardson v. U. S., 2 Ct. Cl. 483.
58 C.J. p. 173 note 39.

85. N.Y.—Donovan v. Sheridan, 24 N.Y.S. 116, 4 Misc. 433.
58 C.J. p. 173 note 40.

86. U.S.—Aaby v. States Marine Corp., C.A.N.Y., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed. 609—The Medea, Cal., 179 F. 781, 103 C.C.A. 273.

87. U.S.—Aaby v. States Marine Corp., C.A.N.Y., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed. 609.
58 C.J. p. 173 note 41.

Inspection

Charterer of lighter which dumped her cargo had right to rely on warranty of seaworthiness, and was not bound to make an inspection—The Irving, D.C.N.Y., 16 F.Supp. 22, affirmed, C.C.A., Conners Marine Co. v. Manhattan Lighterage Co., 91 F. 2d 1011.

88. U.S.—Aaby v. States Marine Corp., C.A.N.Y., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed. 609.

89. Wash.—Angeles Gravel & Supply Co. v. Crown Zellerbach Corp., 183 P.2d 482, 28 Wash.2d 428.
58 C.J. p. 173 note 42.

90. U.S.—The Jungshoved, D.C.N.Y., 272 F. 122, modified on other grounds, C.C.A., 290 F. 733, certiorari denied 44 S.Ct. 35, 263 U.S. 707, 68 L.Ed. 517.
58 C.J. p. 173 note 43.

91. U.S.—McCann v. Conery, D.C. La., 11 F. 747.

92. U.S.—Church Cooperage Co. v. Pinkney, N.Y., 170 F. 266, 95 C.C.A. 462.

93. N.Y.—Swift v. Tross, 55 How. Pr. 255.
58 C.J. p. 174 note 49.

94. U.S.—Church Cooperage Co. v. Pinkney, N.Y., 170 F. 266, 95 C.C.A. 462.

95. U.S.—Flat-Top Fuel Co. v. Martin, C.C.A.N.Y., 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.

96. U.S.—Flat-Top Fuel Co. v. Martin, supra.

97. U.S.—The Addison E. Bullard, C.C.A.N.Y., 287 F. 674—The G. R. Crowe, D.C.N.Y., 287 F. 426, affirmed, C.C.A., 294 F. 506, certiorari denied 44 S.Ct. 335, 264 U.S. 586, 68 L.Ed. 862.

98. U.S.—Church Cooperage Co. v. Pinkney, N.Y., 170 F. 266, 95 C.C.A. 462.

99. U.S.—Church Cooperage Co. v. Pinkney, supra.

1. U.S.—The Director, C.C.Or., 36 F. 335, 13 Sawy. 479.

2. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78

worthy must have proper equipment,[3] and it must be reasonably fit for the receipt[4] and the transportation[5] of the particular cargo or for the performance of the particular service.[6] "Seaworthiness" is a comparative or relative term[7] which takes into account the vessel, voyage, and the cargo,[8] and the requirements vary with the nature of the cargo,[9] the type of vessel,[10] and the character of the voyage,[11] and each case must be determined according to its own facts.[12] A vessel may be seaworthy as to one sort of cargo and unseaworthy as to another,[13] or may be seaworthy for harbor uses and not seaworthy for ocean carriage.[14] A vessel is unseaworthy where it is unable to withstand the ordinary strains of loading or discharge.[15] The warranty of seaworthiness is practically a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved as seaworthy in the judgment of impartial, competent, and experienced men versed in that business.[16]

Officers and crew. It is a requisite to the fulfillment of the obligation of the owner to keep his vessel seaworthy during the voyage that she shall be furnished with an adequate number of persons of competent skill and ability to navigate her.[17] The owner must supply a competent master[18] and crew,[19] adequate in number,[20] for the voyage with respect to its length and other particulars,[21] and,

L.Ed 1500—The Josephine, C.C.A. Pa., 49 F.2d 207

58 C.J. p. 174 note 57

Requisites of seaworthiness with respect to carriage of goods generally see infra § 140

"Seaworthiness" is due care under the circumstances of the sea, and means that ordinary and usual circumstances must be anticipated and provided against, and does not mean that the unusual and the exceptional should be foreseen and guarded against—The Doyle, C.C.A.Pa., 105 F.2d 113.

Small cracks in ceiling of wooden coastwise barge through which water came under stress of weather did not indicate unseaworthiness at commencement of voyage, with respect to barge owner's liability for damage to ammonia sulphate cargo stowed on skin of barge—The Westmoreland, D.C.N.Y., 14 F.Supp. 762, affirmed, C.C.A., 86 F.2d 96.

3. U.S.—The Josephine, C.C.A.Pa., 49 F.2d 207.

Diligence in use of equipment

Warranty of seaworthiness calls for due diligence on part of all owners' servants in use of equipment before commencement of voyage.—The Fred E. Hasler, D.C.N.Y., 51 F.2d 779, affirmed, C.C.A., 55 F.2d 919.

Anchor chain

(1) The owner is bound to furnish an anchor chain which is reasonably fit for the purpose of holding vessel at anchor under the conditions of wind and rain which might reasonably be expected at the time of year in the area where the vessel is anchored.—Petition of Howard, D.C.N.Y., 53 F.Supp 556.

(2) The owner of barges used for short voyages is not bound to have the anchor chain mechanically tested before each voyage, especially where the chain is visually inspected by experts, and has been used in anchoring a few days previously.—Petition of Howard, supra.

Ports or hatches

(1) Insecure ports or hatches which are believed to be secured so that nothing more is expected to be done will render vessel "unseaworthy."—The Fred E. Hasler, C.C.A. N.Y., 55 F.2d 919

(2) Where peak hatches of barge were loose and fact was unknown to man in charge, and after loading, but before it broke ground, waves swept over it and barge sank, barge was "unseaworthy" when loading began—The Fred E. Hasler, supra

(3) Other cases see 58 C.J. p. 174 note 58 [b], [c].

4. U.S.—The Fred E. Hasler, supra—Bowring v. Thebaud, C.C.A.N.Y., 56 F. 520.

5. U.S.—The Smyrna, C.C.A.Md., 62 F.2d 1048—The Fred E. Hasler, D.C.N.Y., 51 F.2d 779, affirmed, C.C.A., 55 F.2d 919—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D.C.N.Y., 15 F.Supp. 705, affirmed, C.C.A., 88 F.2d 1005, certiorari denied 58 S.Ct. 18, 302 U.S. 699, 82 L.Ed. 540

58 C.J. p. 174 note 58

6. U.S.—The Lawrence J. Tomlinson, C.C.A.N.Y., 48 F.2d 88.

58 C.J. p. 174 note 59.

7. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The Smyrna, C.C.A.Md., 62 F.2d 1048—The Westmoreland, D.C.N.Y., 14 F.Supp. 762, affirmed, C.C.A., 86 F.2d 96.

58 C.J. p. 175 note 60.

8. U.S.—The Westmoreland, supra

9. U.S.—The Smyrna, C.C.A.Md., 62 F.2d 1048.

10. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

11. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

12. U.S.—The Smyrna, C.C.A.Md., 62 F.2d 1048—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D.C.N.Y., 15 F.Supp. 705, affirmed, C.C.A., 88 F.2d 1005, certiorari denied 58 S.Ct. 18, 302 U.S. 699, 82 L.Ed. 540

13. U.S.—The Sagamore, C.C.A.N.Y., 300 F. 701, certiorari denied 45 S.Ct. 95, 266 U.S. 612, 69 L.Ed. 467—The Addison E. Bullard, C.C.A.N.Y., 287 F. 674.

14. U.S.—The Sagamore, C.C.A.N.Y., 300 F. 701, certiorari denied 45 S.Ct. 95, 266 U.S. 612, 69 L.Ed. 467

15. U.S.—The Cary Brick Co No. 8, D.C.N.Y., 34 F.2d 981.

16. U.S.—Premuda v. Goepel, D.C.N.Y., 23 F. 410.

Underwriter's certificates as evidence see infra § 56.

17. U.S.—The Director, D.C.Or., 34 F. 57, 13 Sawy. 172, affirmed, C.C.A., 36 F. 335.

58 C.J. p. 175 note 65.

18. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

58 C.J. p. 175 note 66

19. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The Vincennes, D.C.Mass., 28 F.Cas.No.16,945, 3 Ware 171.

20. U.S.—The Framington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

21. U.S.—The Framlington Court,

on a long voyage, the owners must provide for such a contingency as the death of a captain by employing a mate competent to take his place.[22] It has been stated that, where pilotage is customary at a port, a pilot is available, and the nature of the navigation requires one, it is required that a competent local pilot be on board the ship to render her seaworthy at the inception of the voyage;[23] but the absence of a pilot does not under all circumstances render the vessel unseaworthy,[24] and where it was shown that the pilot was not dropped until after the ship had been put on a proper course and that the master was familiar with the port, it was held that the vessel was not to be regarded as unseaworthy.[25]

Insurability; Lloyd's classification. The impossibility of obtaining insurance on the vessel or cargo is not sufficient in itself to establish a breach of the warranty of seaworthiness.[26] The classification of a vessel for the purposes of insurance does not make a vessel seaworthy,[27] and the absence of such a classification does not make her unseaworthy.[28] Unless the charter requires the owner to maintain the classification, the classification stated in the charter party is merely a matter of description which, if true at the beginning of the adventure, satisfies the owner's obligation in that respect.[29]

Capacity. A vessel which by reason of any weakness is unable to carry the full cargo which her measurements and tonnage entitle her to carry is to be deemed unseaworthy.[30] A steamer built on finer lines than usual, so as to render her more tender than other vessels of her class, is not liable to a time charterer for inability to take a weather deck cargo, although the charterer is entitled to "the whole reach of the vessel's holds, decks, and usual places of loading," unless she is allowed the necessary additional ballast.[31]

Ballasting. In the absence of a provision to the contrary in the charter, the duty is on the owner to supply the ballast necessary to enable his ship to proceed safely on the contemplated voyage.[32] A charter party which provides that the vessel shall in every way be fitted for the voyage includes the furnishing of necessary ballast,[33] and the proper ballasting of the vessel;[34] but, where a water-ballast ship is so described in the charter and delivered to the charterer, it is the duty of the charterer to furnish extra ballast, if necessary, to enable the vessel to carry a deck cargo.[35] Where the charterer is required to furnish free ballast to stiffen the ship to enable her to proceed to her loading port, the expense of removing such ballast, in the absence of a provision to the contrary in the charter, falls on the vessel as between it and the charterer,[36] unless the removal and consequent expense are necessitated by the unfit character of the material furnished by the charterer.[37]

Cleansing from former cargo. In the absence of an agreement to the contrary, the owner is bound to see that the vessel is so cleansed from the carriage of a previous cargo as to prevent damage to a cargo for the carriage of which it is chartered.[38] Where the charterer agrees to clean the vessel, the implied warranty of seaworthiness is only to the effect that it will be suitable for the contemplated use when properly cleaned,[39] and the vessel or owner is not responsible for inadequate cleaning.[40] The charterer may not complain that

C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

22. U.S.—The Giles Loring, D.C.Me., 48 F. 463

23. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

24. U.S.—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., 54 F.2d 1075.

25. U.S.—The Oritani, supra.

26. U.S.—Moore v. Cornwall, Cal., 144 F. 22, 75 C.C.A. 180.
58 C.J. p 175 note 70.
Refusal of insurance as evidence of unseaworthiness see infra § 56.

27. U.S.—The Negus, D.C.N.Y., 298 F. 749, affirmed, C.C.A., 298 F. 752

28. U.S.—The Negus, supra.

29. U.S.—The Negus, supra.

30. U.S.—The Sagamore, C.C.A.N.Y., 300 F. 701, certiorari denied 45 S. Ct. 95, 266 U.S. 612, 69 L.Ed. 467—The William Power, D.C.N.Y., 131 F. 136.
Warranty as to capacity of vessel see supra § 32.

Knowledge of safe capacity

With respect to liability of the owner of a box barge which was made unseaworthy by overloading and which sank after heavy seas had broken the hatchcovers, the owner of a cargo of coal, who as charterer loaded the barge with less than its represented carrying capacity, was not chargeable with knowledge of what the barge could safely carry in a certain month, although the cargo owner had previously, but always earlier in the year, shipped cargoes of coal on the barge larger than the amount thereon at the time of the sinking—Petition of Howard, D.C.N.Y., 53 F.Supp. 556.

31. U.S.—The Kaupanger, D.C.N.Y., 241 F. 702.

32. U.S.—The Kaupanger, supra.
58 C.J. p 175 note 80.

33. U.S.—Sumner v. Caswell, D.C.N.Y., 20 F. 249.

34. U.S.—Sumner v. Caswell, supra.

35. U.S.—The Hiram, D.C.Ala., 101 F. 138.

36. U.S.—The Geysir, D.C.Va., 267 F. 922.

37. U.S.—The Geysir, supra.
58 C.J. p 176 note 88.

38. U.S.—Church Cooperage Co. v. Pinkney, N.Y., 170 F. 266, 95 C.C.A. 462.
58 C.J. p 176 note 89.

39. U.S.—The Lawrence J. Tomlinson, C.C.A.N.Y., 48 F.2d 88.

40. U.S.—The Lawrence J. Tomlinson, supra.

he required more time to clean the vessel under the agreement than was allowed him by the charter.[41]

Stowage of cargo. The requirement of seaworthiness includes seaworthiness with respect to stowage of the cargo,[42] and, in the absence of special agreement, the vessel must supply proper fittings for the carriage of a lawful cargo,[43] such as proper shifting boards[44] or dunnage;[45] but the rule applies only to the ship and such equipment as is called for by the charter party,[46] and does not apply to cribbing constructed by the charterer for his own convenience for the purpose of securing a deck load, enlarging the ship's structural capacity for cargo beyond what she would otherwise naturally and reasonably take.[47] The rule that responsibility for the seaworthiness of a chartered ship is on the shipowner, as discussed supra subdivision a of this section, does not in all instances mean responsibility for her seaworthiness in respect of stowing cargo.[48] In the case of a time charter, where the charterer booked the freight, designated the places of stowage, did the stowing himself through his own stevedore, and assumed all responsibility therefor, as between the charterer and the ship, the charterer was held liable.[49] A charterer, who has relied on the owner's warranty with respect to the capacity of the vessel, is not chargeable with lack of care for overloading the vessel and rendering it unseaworthy, when the load is within the warranted capacity.[50] Where one half of the damages were imposed on the charterer for the loss of a deck cargo and the only question presented was whether the denial of the liability of the ship for the entire loss was correct, it was held that, whether or not the top-heaviness of the vessel contributed to the loss of the deck load, the collapse of cribbing which was constructed by the charterer was a contributing cause for which liability should be imposed on the charterer.[51]

c. Time and Maintenance of Seaworthiness

As a general rule, the warranty requires seaworthiness of the vessel when entering on the performance of the charter, or delivery into the charter service, and extends to the time when the vessel actually sails or breaks ground for the voyage. The owner is bound to keep the vessel in proper repair unless prevented by perils of the sea or unavoidable accident.

Although it has been held that the undertaking of the owner, in the absence of a stipulation to the contrary, is that the vessel is seaworthy at the date of the charter and the commencement of the loading,[52] or at the date of the charter and of delivery to the charterer,[53] as a general rule, the warranty requires seaworthiness of the vessel when entering on the performance of the charter,[54] or delivery into the charter service,[55] and the requirement of seaworthiness extends to the time when the vessel actually sails or breaks ground for the voyage,[56] and not merely to the time when she begins to take in cargo.[57] Where the charter stipulates that it shall begin when the vessel is ready to receive cargo at the place of loading, the warranty of seaworthiness does not attach until that time.[58] Gen-

41. U.S.—The Lawrence J. Tomlinson, D.C.N.Y., 29 F.2d 797, affirmed, C.C.A., 48 F.2d 88.

42. U.S.—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780—The Fred E. Hasler, D.C.N.Y., 51 F. 2d 779, affirmed, C.C.A., 55 F.2d 919—The Medea, Cal., 179 F. 781, 103 C.C.A. 273
58 C.J. p. 176 note 91.

Overloading of vessel renders it unseaworthy.—Hockley v. Eastern Transp. Co., D.C.Md., 10 F.Supp. 908—The Dana, D.C.N.Y., 190 F. 650—The Whitlieburn, D.C.N.Y., 89 F. 526

43. U.S.—Harloff v. Barber, D.C.N.Y., 150 F. 185
58 C.J. p. 176 note 92.

44. U.S.—Harloff v. Barber, supra.

45. U.S.—The Addison E. Bullard, C.C.A.N.Y., 287 F. 674—The Oakley C. Curtis, D.C.N.Y., 285 F. 612, modified on other grounds, C.C.A., 4 F.2d 979, certiorari denied 45 S.Ct. 354, 267 U.S. 599, 69 L.Ed. 807.

46. U.S.—Oxford Paper Co. v. The Nidarholm, Me., 51 S.Ct. 266, 282 U.S. 681, 75 L.Ed. 614.

47. U.S.—Oxford Paper Co. v. The Nidarholm, supra.

48. U.S.—The Thomas P. Beal, C.C.A.N.J., 11 F.2d 49.

49. U.S.—The Thomas P. Beal, supra.

50. U.S.—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780

51. U.S.—Oxford Paper Co. v. The Nidarholm, Me., 51 S.Ct. 266, 282 U.S. 681, 75 L.Ed. 614

52. U.S.—The Director, D.C.Or., 34 F. 57, 13 Sawy. 172, affirmed, C.C.A., 36 F. 335, 13 Sawy. 479.
58 C.J. p. 176 note 4.

53. U.S.—The Toledo, D.C.N.Y., 30 F.Supp. 93, affirmed, C.C.A., 122 F.2d 255

54. U.S.—The Reno, D.C.N.Y., 54 F. 2d 682, modified on other grounds, C.C.A., 61 F.2d 966.

55. U.S.—Atlantic Creosoting Co. v. Savannah Lighterage & Transfer Co., D.C.Ga., 67 F.Supp. 383—Texas Gulf Sulphur Co. v. O'Donnel, D.C.N.Y., 26 F.Supp. 70.

56. U.S.—Cullen Fuel Co. v. W. E. Hedger, Inc., N.Y., 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189—The Josephine, C.C.A.Pa., 49 F.2d 207—The Northern No. 29, D.C.N.Y., 15 F. Supp. 543, reversed on other grounds, C.C.A., Flat-Top Fuel Co. v. Martin, 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.
58 C.J. p. 177 note 5

Commencement of loading until breaking ground

Although it is stated that the warranty is a double one in that the ship shall be fit to receive cargo when receiving it, and shall be fit to sail at the time of sailing, the warranties are not so momentary but, on the contrary, there is a general warranty of seaworthiness which continues in operation from the commencement of loading operation until the breaking of ground.—The Fred E. Hasler, D.C.N.Y., 51 F.2d 779, affirmed, C.C.A., 55 F.2d 919.

57. U.S.—The Fred E. Hasler, supra.
58 C.J. p. 177 note 5.

58. U.S.—The Star of Hope, D.C.Me., 22 F.Cas.No.13,312, 1 Hask. 36, af-

erally, the fitness of the vessel under the warranty of seaworthiness does not cover conditions arising after the vessel breaks ground which are beyond the owner's control,[59] and the owner's duty with respect to seaworthiness does not involve a continuing warranty.[60] There is no implied warranty that the vessel will remain seaworthy during the charter term[61] or after the commencement of the voyage,[62] although, by express provision in the charter, the owner may extend the warranty of seaworthiness at the beginning of the voyage to seaworthiness throughout the voyage.[63]

Under a time charter, the charterer is entitled to rely on a warranty of seaworthiness at the beginning of each voyage.[64] So, where the owners are required to maintain the vessel in a thoroughly efficient manner in hull and machinery for and during the service, the maintenance clause imports a warranty of seaworthiness at the commencement of each voyage under the charter.[65] Under a charter providing that the vessel shall be tight, staunch, and strong, and shall in every way be fitted for the usual cargo service and be maintained in the same state and class by the owners during the duration of the service, the shipowner is liable for damages due to the vessel's unseaworthiness caused by his lack of diligence to make her fit.[66]

Repairs. The owner is bound to keep the vessel in proper repair unless prevented by perils of the sea or unavoidable accident.[67] Where the vessel is sufficient at the beginning of the voyage, although the hirer must not abandon the vessel while he can keep her afloat and suitably provide for the employment and destination for which she was hired, the owner must be ready to pay all expenses and damages necessarily incurred for the purpose of keeping her in fit condition.[68] Where a vessel becomes leaky or unfit for the sea after she sets sail, the shippers are obliged to wait a reasonable time until she is repaired at any intermediate port where she may call for that purpose unless another vessel is prepared to carry on the cargo to the port of destination.[69] Where a vessel chartered for a voyage becomes disabled by accident while taking in her cargo, the freighters will not be bound by the charter party unless she is repaired and rendered fit for the voyage within a reasonable time,[70] and it has been held that, where the goods are obliged to be put on shore by reason of the accident, they are not compelled to wait until the vessel is again made seaworthy at the risk of losing a foreign market.[71]

Under a charter requiring the owners to maintain the vessel in thoroughly efficient state in hull and machinery for and during the service, the owners, where no time is fixed within which repairs must be made, are required to exercise only ordinary and reasonable care to restore the vessel to a fairly efficient state for her service,[72] and are not responsible for delay prolonged by the negligence of an experienced reputable and fully equipped ship repair concern employed by them.[73] Such a covenant is fully performed if every defect and want of suitable repair are remedied as soon as by the use of due and reasonable diligence they could be discovered and proper opportunity had to repair and make the vessel seaworthy.[74] Where the owner is bound to maintain the vessel in a seaworthy condition by an express covenant in the charter party, he has the right and duty to make repairs needed to make the vessel seaworthy before she proceeds to sea again after the completion of a voyage.[75]

d. Statutory Exemption from Liability

Where the Harter Act or the Carriage of Goods by Sea Act has been expressly incorporated in the charter,

firmed, C C., Fearing v. Cheeseman, F.Cas.No 4,710, 3 Cliff. 91.

59. U.S.—Cullen Fuel Co. v. W. E Hedger, Inc, N.Y., 54 S Ct 10, 290 U.S. 82, 78 L Ed 189

60. U.S—The Reno, D.C.N.Y., 54 F 2d 682, modified on other grounds, C.C A., 61 F 2d 966.

61. U.S—O'Boyle v. U. S, C C.A.N Y., 47 F 2d 585, mandate recalled 49 F.2d 273—The Ice King, C C.A.N Y., 261 F. 897.

62. U.S—The Fred E. Hasler, D.C.N. Y, 51 F 2d 779, affirmed, C C A, 55 F.2d 919.

63. U S—The G. R. Crowe, D C.N Y., 287 F. 426.
58 C.J. p 177 note 7.

64. U.S—U S. v. Spearin, Ct.Cl, 39 S.Ct. 59, 248 U.S. 132, 63 L.Ed. 166 —The Fort Gaines, D C Md, 21 F. 2d 865

65. U.S—Luckenbach v. W. J McCahan Sugar Refining Co., N.Y, 39 S Ct 53, 248 U S. 139, 63 L Ed 170, 1 A.L R. 1522
58 C J. p 177 note 9

66. U S—Ore Steamship Corp. v D/S A/S Hassel, C.C.A N.Y., 137 F 2d 326

67. U S—Work v The Leathers, La., 97 U S 379, 24 L Ed. 1012
58 C.J. p 177 note 10.

68. Mass.—Kimball v. Tucker, 10 Mass. 192.

Generators

Where charterer hired vessel, owner's duty to charterer arose from contract between them, and measure of duty with respect to generators which failed at sea requiring charterer to incur towage was due diligence to maintain them in a seaworthy and workable condition.—Atlanta Refining Co v. U. S, D.C Pa, 82 F.Supp 201.

69. S C.—Purvis v. Tunno, 2 S C.L. 492

70. S C.—Purvis v. Tunno, 3 S C.L 260, 2 Am D. 664.

71. S C—Purvis v. Tunno, 2 S C L 492.

72. U.S—The Bjornefjord, C.C.A.N Y., 271 F. 682.

73. U S—The Bjornefjord, supra

74. Mass—Banes SS Co v. American Importing, etc., Co, 95 N.E. 107, 209 Mass. 96.

75. U S—The Negus, D.C N Y, 298 F. 749, affirmed, C.C A., 298 F. 752.

the otherwise absolute warranty of seaworthiness is reduced to an obligation to use due diligence only.

The provisions of the Harter Act or the Carriage of Goods by Sea Act, exempting owners or charterers from loss resulting from faults or errors in navigation or in the management of the vessel and from certain other designated causes, do not imply that because the owner is thus exempted when he has been duly diligent that the law also relieves him from the duty of furnishing a seaworthy vessel,[76] and such result does not follow from the provision of the statute allowing the owner, where he has used due diligence to furnish a seaworthy ship, to contract against the obligation of seaworthiness.[77] Where, however, the Harter Act or the Carriage of Goods by Sea Act has been expressly incorporated in the charter, the otherwise absolute warranty of seaworthiness is reduced to an obligation to use due diligence only,[78] and the shipowner is not liable for unseaworthiness, unless it results from lack of due diligence,[79] or for latent defects not discoverable by due diligence.[80]

The kind of diligence which is required is the making of an inspection or test which would ordinarily or customarily be made,[81] and it comprehends something more than a casual inspection.[82] If the owner is satisfied to rely on external appearances that the vessel and her appliances are in such good order that it is safe to take cargo aboard, instead of making tests and examination, the owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal.[83] However, it has been held that the inclusion of the statute in a charter party could not invalidate a stipulation that the duties of the ship should be different in a given particular from the duties under maritime law,[84] and that the specific clause will survive,[85] but it has also been held that a charter provision is inapplicable if it is inconsistent with the warranty of seaworthiness and the obligation to use due diligence to make the vessel seaworthy.[86]

Under the fire statute, which in terms protects an owner from loss by fire occurring on board a vessel, unless the fire was caused by design or neglect of the owner, a fire occasioned by reason of the fact that a vessel is not made seaworthy before the commencement of the voyage is to be regarded as occasioned by the owner's neglect so that he is not entitled to the exemption of the statute.[87]

76. U.S.—The Josephine, C.C.A.Pa., 49 F.2d 207
58 C.J. p 177 note 21.
Statutory exemption of carrier from liability generally see infra §§ 126–129.

77. U.S.—The Carib Prince, N.Y., 18 S.Ct. 753, 170 U.S. 655, 42 L.Ed. 1181.

78. U.S.—The Agwimoon, D.C.Md., 24 F.2d 864, affirmed, C.C.A., Atlantic Gulf & West Indies SS Lines v. Interocean Oil Co., 31 F.2d 1006, certiorari denied 49 S.Ct. 514, 279 U.S. 874, 73 L.Ed. 1009—Warner Sugar Refining Co. v. Munson S. S. Line Co., D.C.N.Y., 23 F.2d 194, affirmed, C.C.A., 32 F.2d 1021.

79. U.S.—The Toledo, D.C.N.Y., 30 F.Supp. 93, affirmed, C.C.A., 122 F.2d 255.

80. U.S.—The Toledo, supra.

81. U.S.—The Toledo, supra.

82. U.S.—Ore Steamship Corp. v. D/S A/S Hassel, C.C.A.N.Y., 137 F.2d 326—The Agwimoon, D.C.Md., 24 F.2d 864—Warner Sugar Refining Co. v. Munson S. S. Line Co., D.C.N.Y., 23 F.2d 194, affirmed, C.C.A., 32 F.2d 1021.

83. U.S.—Warner Sugar Refining Co. v. Munson S. S. Line Co., supra.

84. U.S.—The Westmoreland, C.C.A.N.Y., 86 F.2d 96.

85. U.S.—The Westmoreland, supra.

Exemption from liability for accidents of machinery

Reference in charter party to the Harter Act did not destroy effect of provision exempting owners from liability for accidents of machinery, particularly where evidence showed due diligence to make ship seaworthy.—The Toledo, D.C.N.Y., 30 F.Supp. 93, affirmed, C.C.A., 122 F.2d 255.

Risk of stowage

Under charter party for carriage of cargo of ammonia sulphate in which statute was incorporated and which made shipper responsible for loading and stowage and put risk of stowage on vessel's skin on shipper, private carrier was held not liable to shipper for damage to cargo stowed on skin of barge without dunnage, caused when ammonia sulphate sifted through small cracks of ceiling of the hold into bilge water, forming mixture which choked pumps so that water rose above ceiling and wet lower part of cargo.—The Westmoreland, C.C.A.N.Y., 86 F.2d 96.

86. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The Agwimoon, D.C.Md., 24 F.2d 864, affirmed, C.C.A., 31 F.2d 1006—The Smyrna, D.C.Md., 2 F.Supp. 351, affirmed, C.C.A., 62 F.2d 1048.

Private carrier

(1) Statute, incorporated by reference in charter, is controlling even though carrier is private carrier, and parties must take it with burdens and benefits.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The Ferncliff, D.C.Md., 22 F.Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862, affirmed, C.C.A., 105 F.2d 1021.

(2) Although private carrier, chartered vessel was as much bound by statute, incorporated in charter by reference, as if vessel had been common carrier.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

Provision to sail without pilots held inapplicable

U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

87. U.S.—The Etna Maru, D.C.Tex., 20 F.2d 143, affirmed, C.C.A., Kokusai Kisen Kabushiki Kaisha v. Texas Gulf Sulphur Co., 33 F.2d 232, certiorari denied 50 S.Ct. 85, 280 U.S. 603, 74 L.Ed. 648.

e. Contractual Limitation or Abrogation of Owner's Liability

A warranty of seaworthiness may be negatived only by express contract, and a provision in a charter contemplating the release of the owner from his implied warranty of seaworthiness for the service undertaken must be plain and unequivocal. Contractual provisions or exceptions exempting the owner from the general obligation of furnishing a seaworthy vessel will not be extended by construction to apply to a state of seaworthiness existing at the commencement of the voyage.

A warranty of seaworthiness may be negatived only by express contract,[88] and a provision in a charter contemplating the release of the owner from his implied warranty of seaworthiness for the service undertaken must be plain and unequivocal.[89] Contractual provisions or exceptions exempting the owner from the general obligation of furnishing a seaworthy vessel will not be extended by construction to apply to a state of unseaworthiness existing at the commencement of the voyage,[90] and, if the owner desires the exemption to cover a condition of unseaworthiness then existing, he must unequivocally so contract,[91] but it has been held, under a charter party exempting the shipowners from liability for accidents of machinery, that the ship and its owner are relieved from liability for accidents occuring to the machinery after making the charter party, even if the ship was unseaworthy at the time the charter party was made and the vessel delivered to the charterer.[92]

The implied warranty of seaworthiness is not done away with by a less comprehensive express warranty,[93] and the implied warranty of seaworthiness at the time the voyage begins is not varied by an express warranty that the vessel shall be staunch, strong, etc., for the voyage.[94] However, a charter provision, which warranted the vessel on delivery as seaworthy so far as due diligence can make her so, has been held a limited, not an absolute, warranty of seaworthiness,[95] and such a warranty relieves the owner from liability for latent defects unless there was a failure to use due diligence.[96] It has also been held that an agreement that the vessel shall be kept tight, staunch, well fitted, and tackled for a particular voyage excludes a warranty by the owners that she be seaworthy at the commencement of the charter party or that she should continue so during the term,[97] but if any defect or want of suitable repair is remedied as soon as by the use of due diligence it could be discovered and proper opportunity had to repair the vessel and make her seaworthy, such covenant is performed[98]

The provisions in a charter party that all damages and accidents of whatever nature should be mutually excepted during the currency of the present charter party, provided they did not result from lack of diligence of the owners or managers of the vessel, has been held to refer to a failure of diligence by those employed by the owners or managers to make the vessel seaworthy,[99] as well as to the failure of personal diligence of the owners or managers,[1] and, where the shipowners fail in their duty of using due diligence, they are liable to the charterer.[2] Where a provision requiring the vessel to be docked, bottom cleaned, and painted when the charterer deems necessary is stricken from the charter, the charterer cannot take the chance of

88. U.S.—Cullen Fuel Co v. W E. Hedger, Inc., N.Y, 54 S Ct. 10, 290 U S 82, 78 L Ed 189.

Scrutiny of exceptions

Warranty of seaworthiness is a favorite of admiralty and exceptions to it or limitations on it are narrowly scrutinized —Metropolitan Coal Co. v. Howard, C.C.A N.Y., 155 F 2d 780

89. U S —The Toledo, D C N Y, 30 F.Supp. 93, affirmed, C.C.A., 122 F. 2d 255

58 C J. p 178 note 27.

Contract limiting owner's liability as carrier generally see infra §§ 131–138

90. U.S.—The Carib Prince, N.Y., 18 S.Ct. 753, 170 U.S. 655, 42 L.Ed. 1181.

Wash.—Revett v. Globe Nav. Co., 123 P. 459, 68 Wash. 300.

Responsibility for damage between certain dates

Charter party imposing responsibility for damage to boat between certain dates did not relieve owner of obligation to furnish seaworthy boat. —The Virruth, D C N.Y., 25 F.Supp 904.

91. U.S —The Carib Prince, N Y, 18 S.Ct. 753, 170 U S 655, 42 L.Ed 1181

92. U S.—The Toledo, D.C N Y., 30 F Supp 93, affirmed, C C.A , 122 F. 2d 255.

Peril of machinery

The fracture of the web of crankshaft after commencement of charter, as result of a latent defect, was an excepted "peril of machinery" relieving vessel owners from agreement to deliver vessel to charterer in seaworthy condition —The Toledo, supra.

93. U.S.—Patton-Tully Transp Co v Barrett, C C A Ohio, 37 F.2d 516 58 C J. p 178 note 30.

94. U S.—The Smyrna, C C A Md , 62 F.2d 1048—Bowring v. Thebaud, N. Y., 56 F. 520, 5 C C A 640—Sumner v. Caswell, D C.N.Y., 20 F. 249.

95. U.S.—Alcoa S. S. Co. v. U. S , D.C.N.Y., 94 F.Supp. 406.

96. U S.—Alcoa S. S. Co. v. U. S., supra.

97. Mass.—Cook v. Gowan, 15 Gray 237.

98. Mass —Cook v. Gowan, supra.

99. U S —Ore Steamship Corp. v. D/S A/S Hassel, C.C.A N Y., 137 F. 2d 326

1. U S —Ore Steamship Corp. v. D/S A/S Hassel, supra.

2. U S —Ore Steamship Corp. v. D/S A/S Hassel, supra.

Relief from liability for damages in loading

Provision in charter party concerning stevedoring which declared that ship owners were not to be responsible for shortage or damage to cargo meant only that owners should not be responsible for damage to cargo in loading, and did not relieve owners of liability for damage resulting from failure to use due diligence to make ship seaworthy —Ore Steamship Corp. v. D/S A/S Hassel, supra

the bottom becoming foul if the vessel trades in tropical waters and then hold the owner liable therefor under a distinct provision of general fitness in the charter.[3]

f. Assumption of Risk

The existence of an implied warranty of seaworthiness does not necessarily exclude the doctrine of assumption of risk of unseaworthiness by the charterer.

The existence of an implied warranty of seaworthiness does not necessarily exclude the doctrine of assumption of risk of unseaworthiness by the charterer[4] and where, notwithstanding the unseaworthiness is apparent, the charterer, although he has power to prevent it, allows the loading of cargo to proceed and the vessel to depart in its unfit condition, he assumes the risk of loss through unseaworthiness.[5] The fact that the charterer agrees to assume full responsibility for the vessel and to return it in good working order and repair does not preclude him from the benefit of the implied warranty of seaworthiness.[6]

g. Rejection of Unseaworthy Vessel

Where a vessel is unfit to enter on the service for which it is chartered, the charterers are justified in returning it.

Where a vessel is unfit to enter on the service for which it is chartered, the charterers are justified in returning it;[7] so, where several impartial, competent, and experienced persons, agents of various underwriters, have, after examination of a vessel, expressed the belief that she is not seaworthy, and the owner has refused to dock the vessel and settle the question, the charterers are justified in rejecting her, notwithstanding the subsequent good performance of the ship.[8]

Provision for cancellation. Under a charter which warrants a vessel to be tight, staunch, and strong and in every way fit for the service, and which gives the charterer the right to cancel if she becomes defective for service, the vessel is not required to be perfect, but must be in good condition and efficient and reasonably safe for the service which is required of her.[9] Where a charter gives the charterers the option to cancel the charter on the vessel's failure to report for cargo on or before a specified date, unseaworthiness of the vessel at the time the charter was entered into is not a ground for cancellation of the charter, notwithstanding the warranty of seaworthiness, if the vessel is put in seaworthy condition before such date;[10] on the other hand, where a charter party gives the charterers the option to cancel the charter on the failure of a vessel chartered as an auxiliary schooner to report for cargo on or before a specified date, and on such date the auxiliary engines have not been connected with the oil tanks, or assembled, the charterers may cancel the charter under a provision of the charter warranting seaworthiness.[11]

h. Damages

All damages which flow naturally from a breach of warranty of seaworthiness may be recovered by the charterer.

All damages which flow naturally from a breach of warranty of seaworthiness may be recovered by the charterer.[12] If the speed of the vessel is not up to the charter requirements, and in consequence the cargo is injured, the charterer may recover damages measured by the deterioration of the cargo due to delay;[13] but damages are not recoverable for delay due to accidents excepted under a charter party.[14] Where, in the case of a shipment of cattle by reason of the unseaworthiness of the vessel, they were not delivered at the time when, and place where, they should have been, it was held that a recovery may be had for loss through shrinkage

3. U.S.—Dampskibselskabet Norden v. Isbrandtsen-Moller Co., D.C.N.Y., 43 F.2d 560

4. U.S.—Sun Co. v. Philadelphia Transp., etc., Co., D.C.Pa., 244 F. 580.
58 C.J. p. 178 note 38.

5. U.S.—Sun Co. v. Philadelphia Transp., etc., Co., supra.

6. U.S.—Patton-Tully Transp. Co. v. Barrett, C.A.Ohio, 37 F.2d 516

7. U.S.—McAdams v. Leverich, D.C.N.Y., 35 F. 305.

8. U.S.—Svendsen v. Stursberg, D.C.N.Y., 31 F. 86.

9. U.S.—McCaldin Co. v. Cargo of Lumber, D.C.Pa., 198 F. 328.

10. U.S.—Oneida Nav. Co. v. L. Richardson & Co., Inc., C.C.A.N.Y., 282 F. 241

11. U.S.—Oneida Nav. Co. v. L. Richardson & Co., Inc., supra.

12. U.S.—Aaby v. States Marine Corp., D.C.N.Y., 80 F.Supp. 328, affirmed, C.A., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed. 609—The Benefactor, D.C.Va., 242 F. 582, modified on other grounds Clinton v. Smith & Terry, 249 F. 119, 161 C.C.A. 171.
58 C.J. p. 180 note 79.

Limitation of liability by statute

(1) Recovery for damages resulting from unseaworthiness of chartered vessel at time of charter is not limited to damages allowable under Limitation of Liability Act.—W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., C.A.S.C., 193 F.2d 539.

(2) Where barge loaded with cotton sank while being towed by tug, and barge was unseaworthy at time of charter with respect to lack of proper inspection and rot, the owner of barge was liable to charterer for loss of cotton without limitation of liability to value of barge.—W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., supra.

13. U.S.—Wessels v. The Ceres, N.Y., 72 F. 936, 19 C.C.A. 243.
58 C.J. p. 181 note 80.

14. U.S.—The Curlew D.C.Md., 51 F. 246, affirmed 55 F. 1003, 5 C.C.A. 286.

in weight from the protracted voyage,[15] and through fall in market value during the delay in arriving.[16]

Where it is known to both of the parties that a cargo is of a perishable nature, the owner of a vessel which becomes unseaworthy on the voyage to the port of loading is liable to the charterer for damage resulting to the cargo from the inability of the vessel to take it or from delay in making repairs, where the disability of the vessel is not reported to the charterer on her arrival at the port of loading.[17] If a vessel proving unseaworthy after leaving port is obliged to return to the port and abandon the voyage, the charterer is entitled to recover the value of the fuel consumed on the uncompleted voyage.[18] There is no implied promise in a charter party for the owner to reimburse the hirer for casual profits lost by his advancing money to pay for necessary repairs on the vessel.[19]

Proximate cause. The owner cannot be charged with damages for delay in delivering the vessel to the charterer, which is not occasioned by its fault.[20]

Effect of insurance. The charterers may recover from the owners the whole amount of a loss occasioned by unseaworthiness, although the underwriters have already paid part of the loss[21] or have paid the full loss.[22]

Refusal of vessel. Where, by reason of the unfitness of the vessel, the charterers are justified in returning it to the owner, they are entitled to recover such actual damages as they may have sustained [23]

§ 37. Readiness and Dispatch of Vessel

a. In general
b. Delay in sailing for, or arrival at, port of loading
c. Dispatch money

a. In General

The vessel must be tendered and ready for loading at the time and place specified in the charter.

The vessel must be tendered[24] and ready for loading[25] at the time and place specified in the charter. If there is no express provision as to the time a chartered vessel shall be tendered at the designated port, the vessel must proceed to the port named in the charter and tender services within a reasonable time,[26] and for refusal to accept such services the charterer may be liable for a breach of his contract, as discussed infra § 48; but there is no breach of the charterer's contract to load until the lay days provided for therein have expired.[27] Provisions in a charter party that a vessel should be in readiness to receive cargo so that lay days would commence not later than a certain date are of the essence of the contract,[28] and, if the vessel is tendered so that lay days commence after such date, the charterer is not bound to receive the vessel [29] If necessary, the vessel must wait for cargo at the port of loading during all the agreed lay days,[30] but, where the charterer refuses to accept the vessel or provide a cargo, the owner need not keep her in readiness for delivery during all the lay days.[31]

The charterer's right to cancel, where the ship chartered is not ready to sail by a stipulated time, does not imply a promise by the owners to tender the ship on or before that day,[32] and the charterer, in addition to cancellation, cannot recover damages.[33] However, the shipowner is bound to send the ship to the loading port,[34] even though it is obvious that

15. U.S.—The Caledonia, Mass., 15 S. Ct. 537, 157 U.S. 124, 39 L.Ed. 644.

16. U.S.—The Caledonia, supra.

17. U.S.—The Ask, D.C.N.Y., 156 F. 678.

18. U.S.—U.S. v. Bedouin SS Co., D.C.N.Y., 196 F. 222.

19. Mass.—Kimball v. Tucker, 10 Mass. 192.

20. U.S.—Tweedie Trading Co. v. Dene Shipping Co., D.C.N.Y., 140 F. 779.
58 C.J. p. 181 note 87.

21. Pa.—Meyer v. Barker, 6 Binn. 228.

22. U.S.—Federal Forwarding Co. v. Lanasa, C.C.A.Md., 32 F.2d 154.

23. U.S.—McAdams v. Leverich, D.C.N.Y., 35 F. 305.

24. U.S.—Anderson v. Texas Co., C.C.A.N.Y., 279 F. 76
58 C.J. p. 181 note 92, p. 182 notes 96, 1.
Cancellation of charter for delay see supra § 31

25. U.S.—United Transp. Co. v. Berwind-White Coal-Min. Co., C.C.A.N.Y., 13 F.2d 282.
58 C.J. p. 181 note 93.

26. U.S.—U.S. Gypsum Transp. Co. v. Dampskibs Aktieselskabet Karmoy, D.C.N.Y., 48 F.2d 376, affirmed, C.C.A., 54 F.2d 1086.
58 C.J. p. 182 note 96.

27. U.S.—Steger v. Orth, N.Y., 258 F. 619, 170 C.C.A. 73, certiorari denied 40 S.Ct. 11, 250 U.S. 663, 63 L.Ed. 1196.

28. Md.—Barker v. Borzone, 48 Md. 474
58 C.J. p. 182 note 1.

29. Md.—Barker v. Borzone, supra

30. U.S.—Hall v. Hurlbut, C.C.Md., 11 F.Cas.No. 5,936, Taney 589.
58 C.J. p. 182 note 2

31. U.S.—Hall v. Hurlbut, supra.
58 C.J. p. 182 note 3.

32. U.S.—U.S. Gypsum Transp. Co. v. Dampskibs Aktieselskabet Karmoy, D.C.N.Y., 48 F.2d 376, affirmed, C.C.A., 54 F.2d 1086
58 C.J. p. 182 note 5.

33. U.S.—Sanday v. U. S. Shipping Board Emergency Fleet Corp., D.C.N.Y., 1 F.2d 390, affirmed, C.C.A., 6 F.2d 384, and certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409.
58 C.J. p. 182 note 6.

34. U.S.—Sanday v. U. S. Shipping Board Emergency Fleet Corp., supra.
58 C.J. p. 182 note 7.

she cannot arrive before the cancellation date,[35] and the charterer cannot be compelled to say how he will exercise his option until such date.[36]

b. Delay in Sailing for, or Arrival at, Port of Loading

The vessel must sail to enter on the charter at the port of loading at the time stipulated, such stipulation being construed as a condition precedent or warranty, which, if not fulfilled, entitles the charterer to reject the vessel.

The vessel must sail to enter on the charter at the port of loading at the time stipulated,[37] such stipulation being construed as a condition precedent or warranty which, if not fulfilled, entitles the charterer to reject the vessel,[38] or, in some cases to recover damages,[39] unless the delay was caused by the fault of the charterer,[40] or he has waived his right by failing to object[41] or by loading the cargo.[42] In the absence of an express stipulation as to the time a vessel will sail, one is implied,[43] and the vessel must proceed with reasonable dispatch to the port named in the charter.[44] The parties may be relieved from the contract when arrival of chartered ship is delayed by causes mutually excepted in the charter party,[45] as by inevitable accident,[46] perils of the sea,[47] or public enemy,[48] but the vessel is bound to proceed with reasonable diligence[49] on the contract as soon as the cause of delay is removed,[50] the charterer will be bound to accept if the master used reasonable diligence in bringing her to port,[51] and if the vessel is tendered within a reasonable time[52] A forcible detention will excuse from the performance of the obligation created by law,[53] and it seems that a charterer will be excused from performance if his object has been defeated by the vessel's delay.[54]

c. Dispatch Money

Dispatch money arises purely from contract, and is a premium paid the charterer by the vessel for days saved which may be used in completing the voyage.

Dispatch money arises purely from contract,[55] and is a premium paid the charterer by the vessel for days saved which may be used in completing the voyage;[56] it is a premium offered for hastening a definite task.[57] Under a charter party so providing, if the cargo shall be laden or discharged at an earlier date than is specified, the charterer shall be entitled to dispatch money,[58] which shall be com-

35. U S —Sanday v. U. S. Shipping Board Emergency Fleet Corp, supra.

36. U.S.—Sanday v U. S. Shipping Board Emergency Fleet Corp, supra.

37. U S —Gill v. Browne, Pa., 53 F. 394, 3 C C A. 573.
58 C.J p 182 note 12.

38. U S.—Giuseppe v. Manufacturers' Export Co., D C.Ala., 124 F. 663.
58 C.J. p 182 note 13.

39. U S —U. S. Gypsum Transp. Co. v Dampskibs Aktieselskabet Karmoy, D C N Y., 48 F.2d 376, affirmed, C C.A., 54 F.2d 1086.
58 C.J. p 183 note 14.

40. N.Y.—Woolsey v. Finke, 2 N.Y.S. 112, 49 Hun 609.
58 C.J. p 183 note 15.

41. U.S —U. S Gypsum Transp Co. v. Dampskibs Aktieselskabet Karmoy, D C N Y., 48 F.2d 376, affirmed, C C A., 54 F.2d 1086.

42. U.S —Schooner Mahukona Co. v Charles Nelson Co, D C Cal., 142 F 615—The Ekliptika, D C.Pa., 95 F 836.

43. U.S.—Heller v. Pendleton, D.C N. Y., 148 F. 1014.
58 C.J. p 183 note 17.

44. U.S.—Hildebrand v. Geneva Mill Co., D.C.Ala., 32 F.2d 343.
58 C.J. p 183 note 18.

45. U.S.—Pyman v. Von Singen, D.C Md., 3 F. 802, 5 Hughes 196.
58 C.J. p 183 notes 20, 21, p 184 note 22.

46. U S —The Star of Hope, D C Me., 22 F Cas No 13,312, 1 Hask. 36.

47. U S —Lewis v. Mowinckel, N.Y, 215 F. 710, 132 C C A. 88.
58 C.J. p 183 note 21

48. U.S —Fearing v Cheeseman, C C. Me, 8 F Cas No 4,710, 3 Cliff. 91.
58 C.J p 184 note 22.

49. N.Y.—Renard v. Sampson, 12 N Y. 561.

50. U.S.—Street v. The Progresso, D.C.Pa, 42 F 229, affirmed The Progreso, 50 F. 835, 2 C.C A. 45

51. U.S —Lovell v. Davis, La., 101 U.S. 541, 25 L.Ed 944.
58 C J. p 184 note 25.

52. U S —Thebideau v. Cairns, D.C. Me., 171 F. 233.
58 C.J. p 184 note 26.

53. U.S.—Street v. The Progresso, D. C.Pa., 42 F 229, affirmed The Progreso, 50 F. 835, 2 C.C.A. 45.
58 C.J. p 184 note 28.

54. U.S —Fearing v. Cheeseman, C C Me, 8 F Cas.No.4,710, 3 Cliff. 91.
58 C.J. p 184 note 29.

55. U.S —The Driebergen, C.C.A.Fla., 60 F.2d 367—Matlack Coal, etc., Co. v New York, etc., Extract Co., C C A N.Y, 30 F.2d 275.
Demurrage see infra §§ 203–223.

Waiver

Although the regulation of the joint committee of the United States Shipping Board and Food Administration authorized dispatch money, the charterer waived his right to such dispatch money by accepting a charter party prepared by the committee, which made no provision therefor.—Earn Line S S. Co. v. Manati Sugar Co, C.C.A.N.Y., 269 F. 774.

56. U S —The Driebergen, C.C.A.Fla., 60 F 2d 367.

57. U S.—Fargrove Nav Co., Ltd. v. Lavino, D.C.Pa., 191 F. 525.

Other statements

Dispatch money is in rebate of hire, since the ship was released for her business so much earlier —Matlack Coal, etc, Corp. v. New York, etc., Extract Co., C.C A.N.Y., 30 F.2d 275.

58. U.S —George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F 2d 283—The Driebergen, C C A. Fla., 60 F.2d 367—U. S. v. Gano-Moore Co, D C Pa., 35 F.2d 395—South American Metal Co. v. Kjoge, C C.A.Va, 12 F 2d 562—The Corvus, C.C.A.Md, 288 F. 973—Pool Shipping Co. v. Samuel, Pa., 200 F. 36, 118 C.C A. 264—West India S. S. Co. v. Field Line, D.C.N.Y., 196 F. 591—Fargrove Navigation Co. v. Lavino & Co, D.C.Pa, 191 F. 525—Holman v. Gans S. S Line, N.Y., 186 F. 96, 108 C.C.A. 208—Elder-Dempster S. S. Co. v. Earn Line S. Co., N Y., 168 F. 50, 93 C C.A. 472—Carbon State Co v. Ennis, Pa., 114 F. 260, 52 C.C.A. 146.
58 C.J. p 184 note 30.

Mistake in deduction from freight

Charterer could recover from owners balance of dispatch money which charterer's clerk, through careless mistake in computation of lay days, failed to deduct from freight, as such mistake in computation was not a

puted at a rate per diem or pro rata for any part of a day saved.[59] The time saved to the ship in loading or discharging depends on the charter provisions,[60] and, where time saved is not definitely defined in the charter party, the time saved must be left to a construction of the charter party,[61] which is to be determined by the lex loci contractus,[62] except where the place of performance is in a foreign country.[63] Thus, it has been stated in construing particular provisions that the time saved is only the time comprised between the time when the loading or discharging is actually completed and the time when the lay days expire,[64] or the lay days remaining unused,[65] or the time saved to the vessel from the time allowed for loading,[66] or all time saved to the ship, and not merely time saved in loading.[67]

In determining the time saved for which dispatch money is due, it may be necessary to determine or compute the time allowed for loading or discharging, namely, the lay days,[68] and, where the contract is express as to the time the lay days are to commence, it controls,[69] even though the loading or discharging may actually begin before the stipulated time.[70] Notice of readiness to load or discharge may be required before laying time begins,[71] but notice is unnecessary where the charterer has actual notice and loading begins,[72] or where the terms of the contract do not require it.[73] Provisions of the charter that the ship is to load in the usual and customary manner or according to the custom of the port apply only to the manner of loading and not to the time of loading,[74] especially where the charter party allows a specified number of running lay days, Sundays and holidays, even if used, excluded for loading.[75]

The method of computing lay days is subject to the control of contract provisions relative thereto.[76]

mistake of law—The West Nosska, D.C.N.Y., 2 F.Supp. 547.

59. U.S.—The Driebergen, C.C.A.Fla., 60 F.2d 367—Fargrove Navigation Co. v. Lavino & Co., D.C.Pa., 191 F. 525.

58 C.J. p 184 note 31.

60. U.S.—The Driebergen, C.C.A.Fla., 60 F.2d 367—The Corvus, D.C.Md., 282 F. 939, affirmed, C.C.A., 288 F. 973—Pool Shipping Co. v. Samuel, Pa., 200 F. 36, 118 C.C.A. 264—West India S. S. Co. v. Field Line, D.C.N.Y., 196 F. 591—Red "R" S. S. Co. v. North American Transport Co., N.Y., 91 F. 168, 33 C.C.A. 432.

61. U.S.—George E. Warren v. Britain S. S. Co., C.C.A.Mass., 100 F. 2d 283.

62. U.S.—George E. Warren Corp. v. Britain S. S. Co., supra.

63. U.S.—George E. Warren v. Britain S. S. Co., supra.

64. U.S.—Pool Shipping Co. v. Samuel, Pa., 200 F. 36, 118 C.C.A. 264.

65. U.S.—The Driebergen, C.C.A. Fla., 60 F.2d 367.

66. U.S.—Pool Shipping Co. v. Samuel, Pa., 200 F. 36, 118 C.C.A. 264—West India S. S. Co. v. Field Line, D.C.N.Y., 196 F. 591—Red "R" S. S. Co. v. North American Transport Co., N.Y., 91 F. 168, 33 C.C.A. 432.

67. U.S.—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562.

68. U.S.—The Driebergen, C.C.A.Fla., 60 F.2d 367—Pool Shipping Co. v. Samuel, Pa., 200 F. 36, 118 C.C.A. 264—Elder Dempster S. S. Co. v. Earn Line S. S. Co., N.Y., 168 F. 50, 93 C.C.A. 472—Red "R" S. S. Co. v. North American Transport Co., N.Y., 91 F. 168, 33 C.C.A. 432.

Lay days as to demurrage see infra § 217.

69. U.S.—The Driebergen, C.C.A.Fla., 60 F.2d 367—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562—Elder Dempster S. S. Co. v. Earn Line S. S. Co., N.Y., 168 F. 50, 93 C.C.A. 472.

Availability of cargo

Charterer's obligation to load commenced only when cargo became available, with respect to computation of dispatch money, where owners under charter party had privilege of canceling contract or waiting on owners' time in case of nonavailability of cargo.—The West Nosska, D.C.N.Y., 2 F.Supp. 547.

Free time

(1) Where charter party provided lay days for loading, if required by charterer, were not to commence before ninety-six hours, charterer was allowed free time only if required.—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

(2) Charter party providing for free time at discharging port was held to give free time at each unloading port.—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562.

(3) Under charter party providing for seventy-two-hour period before lay days begin to run, Saturday afternoon, Sunday, and Armistice Day will not be added to seventy-two-hour period in determining dispatch money, Sundays and legal holidays not being excepted from seventy-two-hour clause.—South American Metal Co. v. Kjoge, supra.

Port closed at night

Where lay days were to commence twenty-four hours after arrival at or off discharging port, lay days for unloading cargo on ship arriving at night do not commence to run until 7 o'clock on morning following, at port legally closed until 7 A.M.—South American Metal Co. v. Kjoge, supra.

Delay caused by custom of port does not postpone the commencement of lay days as provided for in the charter.—Carbon Slate Co. v. Ennis, C.C.A.Pa., 114 F. 260.

70. U.S.—The Driebergen, C.C.A. Fla., 60 F.2d 367—Elder-Dempster S. S. Co. v. Earn Line S. Co., N.Y., 168 F. 50, 93 C.C.A. 472.

58 C.J. p 184 note 30 [c].

71. U.S.—The Driebergen, C.C.A.Fla., 60 F.2d 367—The Unionist, D.C. Va., 48 F. 315.

Notice on holidays

Under charter providing that Sundays and holidays shall not count as lay days, and that charterer might cancel charter if vessel was not ready on or before a particular holiday, it has been held that, although the latter provision seemed to make the particular holiday available for the purpose of giving notice, a notice given on that day was inoperative and lay days commenced second day thereafter.—The Unionist, supra.

72. U.S.—The Driebergen, C.C.A.Fla., 60 F.2d 367.

Waiver

Written notice to charterer of vessel's arrival at each loading port was waived, with respect to computation of dispatch money, where charterer had actual notice, and loading began after arrival.—The Driebergen, supra.

73. U.S.—Holman v. Gans S. S. Line, N.Y., 186 F. 96, 108 C.C.A. 208.

74. U.S.—Holman v. Gans S. S. Line, supra—Carbon Slate Co. v. Ennis, Pa., 114 F. 260, 52 C.C.A. 146.

75. U.S.—Holman v. Gans S. S. Line, N.Y., 186 F. 96, 108 C.C.A. 208.

76. U.S.—The Driebergen, C.C.A.

Thus, it has been held, that where the charter specifies the number of days allowed for loading, exclusive of Sundays and holidays, and provides that dispatch is to be allowed the charterer for each running day or part of a day saved in loading, the dispatch is to be computed on the difference between the time when the loading was actually completed and the vessel turned over to the master for the purpose of the voyage, and the time when the lay days for loading would have expired under the charter, including Sundays and holidays occurring during such time;[77] but the charterer cannot have dispatch for any time elapsing after the vessel was loaded but unable to sail because the charterer withheld the clearance papers unjustifiably.[78]

Prima facie the presumption is that the object and intention of dispatch clauses are that the shipowner shall pay to the charterer for all time saved to the ship, calculated in the way in which, in the converse case, demurrage, would be calculated,[79] that is, taking no account of the lay-day exception,[80] but this presumption may be displaced,[81] and it is displaced where either lay days and time saved by dispatch are dealt with in the same clause and demurrage in another clause,[82] or lay days, time saved by dispatch, and demurrage are dealt with in the same clause.[83] Hence, where lay days, demurrage, and dispatch money are dealt with in different clauses,[84] or lay days are dealt with in one clause and dispatch and demurrage in another,[85] and nothing in the collocation of the words, or otherwise, indicates that the days saved are used in the same sense as the lay days, as described in the lay day clause,[86] dispatch money is payable for all time saved to the ship including Sundays and holidays.

Under particular provisions of the charter party it has been held that a loss of time at one port may be offset against a saving at another port.[87] Under a charter party providing that the time allowed for loading and discharging is to be reversible, a charterer electing to pool the lay days is only entitled to add to the lay days allowed for discharging the lay days saved in loading,[88] and not days saved other than lay days.[89]

Settlements of dispatch money made by the master of the ship in accordance with the rights of the parties will generally be held to be binding on the shipowner,[90] especially where it is shown that the

Fla., 60 F.2d 367—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562—The Corvus, C.C.A.Md., 288 F. 973—Pool Shipping Co. v. Samuel, C.C.A.Pa., 200 F. 36.

Bad weather

Under charter providing for loading and unloading of specified tons per day, during working days, Sundays and bad weather, etc., being excepted, term "bad weather" is construed to include weather not fit or reasonably safe for loading by reason of the state of the sea as well as of the atmosphere, and the days during which there was such weather must be deducted from the time taken in loading and discharging in computing the amount of dispatch money.—The Ocean Prince, D.C.N.Y., 50 F. 115.

Clearance day

Charter party providing that charterers might finish loading on day steamer was cleared without counting it as lay day used, "neither shall it count for dispatch money," requires that clearance days used for loading should be considered as lay days used, for purpose of computing dispatch money—The Driebergen, C.C.A.Fla., 60 F.2d 367—The Twilight, D.C.Ala., 194 F. 926—The Muirfield, D.C.Fla., 174 F. 75.

Holidays

(1) Whether Saturday was to be deemed a half holiday for purpose of calculating dispatch money under English charter party was to be decided by local law of port of discharge in Massachusetts—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283.

(2) Under charter provisions excluding Sundays and holidays, holiday time, as fixed by the statute of the port of loading, will not be included in the running days—Holman v. Gans S. S. Line, N.Y., 186 F. 96, 108 C.C.A. 208.

Weather working days

(1) Weather working day is a day otherwise a working day, according to the custom of the port, on which the weather permits loading—The Driebergen, C.C.A.Fla., 60 F.2d 367.

(2) Where lay days are weather working days, failure to show custom of port with respect to ordinary working hours, or effect of rain during morning, may prevent determination whether day was lay day within charter party.—The Driebergen, supra.

77. U.S.—West India S. S. Co. v. Field Line, D.C.N.Y., 196 F. 591—Red "R" S. S. Co. v. North American Transport Co., N.Y., 91 F. 168, 33 C.C.A. 432.

78. U.S.—Red "R" S. S. Co. v. North American Transport Co., supra.

79. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

80. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

81. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

82. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

83. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

84. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562.

85. U.S.—U. S. v. Gano-Moore Co., D.C.Pa., 35 F.2d 395.

86. U.S.—U. S. v. Gano-Moore Co., supra.

87. U.S.—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562.

88. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283.

The effect of the term "reversible," as used in a charter party providing that the time allowed for loading and discharging is to be "reversible" or settled at each end as required by the charterers, is that the time of loading and discharging is to be settled at the discharging ports—George E. Warren Corp. v. Britain S. S. Co., supra.

89. U.S.—George E. Warren Corp. v. Britain S. S. Co., supra.

90. U.S.—South American Metal

charterer and the shipowner ratified the settlement made between the charterer's agent and the master of the ship;[91] but a document signed by the master of the ship stating the time saved in loading and discharging, especially if signed under protest, cannot vary the provisions of the charter party as to the method of computing time saved for the purpose of calculating dispatch money,[92] and such a document signed by the master of a ship, unless for the purpose of effecting a settlement of the amount of the dispatch money, cannot be regarded as altering the rights of the parties under the charter party,[93] as the owner could not be bound by the action of the master to such an extent without authority.[94]

Right of consignee. As a consignee is liable for demurrage, his right to collect dispatch money is reciprocal.[95]

§ 38. Charterer's Duty to Furnish Cargo

In the absence of express stipulation, the duty of the charterer to furnish cargo is an absolute one. The cargo must be of the character described in the charter party and adapted to the character and capacity of the vessel.

In the absence of express stipulations,[96] the duty of the charterer to furnish cargo is an absolute one.[97] When the charterer so agrees, he is bound to furnish and load a full and complete cargo,[98] and for a failure on his part he may be liable for dead freight,[99] unless relieved by a clause in his contract,[1] and he cannot, without a valid reason, refuse to furnish cargo because of the stevedore employed by the master;[2] but where a charter party provides that the vessel is to carry a full load, and places loading under the master's direction, and provides that the charterer shall not be responsible for stowage, the latter is not liable for failure to take a full cargo resulting from defective stowage.[3] The charterer may not be liable for full damages if the shipowner makes no effort to load cargo in space left vacant by the charterer.[4]

The charterer must furnish cargo as required by the charter,[5] within the time specified in the charter,[6] and a charter party which has been rendered void by the charterer's failure to furnish cargo within such time cannot be revived by a subsequent tender.[7] Where no definite time is fixed in the charter party in which cargo is to be furnished for loading by the charterer, the law will presume that it was the intention of the parties that the vessel be loaded within a reasonable time.[8] Where the charterer consigns the vessel to the shipper for loading, he is responsible for the failure of the shipper to furnish a full cargo.[9]

Character of cargo to be furnished. The cargo must be of the character described in the charter party[10] and adapted to the character and capacity[11] of the vessel, although the contract to hire covers the entire vessel[12] and provides for the payment of

Co. v. Kjoge, C.C.A.Va., 12 F.2d 562.

91. U.S.—South American Metal Co. v. Kjoge, supra.

92. U.S.—George E. Warren Corp. v. Britain S. S. Co., C.C.A.Mass., 100 F.2d 283.

93. U.S.—George E. Warren Corp. v. Britain S. S. Co., supra.

94. U.S.—George E. Warren Corp. v. Britain S. S. Co., supra.

95. U.S.—The Corvus, D.C.Md., 282 F. 939, affirmed, C.C.A., 288 F. 973.

Estoppel of charterer

Where charterers were advised by their agent at the port of discharge that the consignee claimed dispatch money earned in discharging, but failed to instruct the agent for a month thereafter, when the agent directed the owner to pay the dispatch money to the consignee, the charterers were chargeable with laches, which estopped them to deny the agent's implied authority to give such direction.—The Sif, C.C.A.N.Y., 290 F. 361.

96. U.S.—Lind v. U. S., 44 Ct.Cl. 558.
58 C.J. p. 185 note 34.

97. U.S.—Lind v. U. S., supra.
58 C.J. p. 185 note 36.

98. U.S.—McQuade v. McNaughton, D.C.Pa., 49 F. 284.
58 C.J. p. 185 note 43, p. 191 note 21
Duty of charterer to load full cargo see infra § 40.

99. U.S.—The Rosemary, C.C.A.Miss., 277 F. 674.
58 C.J. p. 185 note 43 [j].

1. U.S.—Morse v. Lehigh, etc., Coal Co., C.C.N.Y., 36 F. 831.
58 C.J. p. 186 note 44.

Dead freight defined

(1) In maritime sense, the expression "dead freight" is used to denote compensation payable to the owner when the charterer has failed to ship a full cargo.—California & Eastern S. S. Co. v. 138,000 Feet of Lumber, D.C.Md., 23 F.2d 95, 97.

(2) Other definitions see 17 C.J. p. 1152 notes 8-14—58 C.J. p. 212 note 96 [a].

2. U.S.—Thompson v. Bush, D.C.Md., 60 F. 631, affirmed 65 F. 812, 13 C.C.A. 148

3. U.S.—Manchisa v. Card, D.C.S.C., 39 F. 492.

4. Ala.—Murrell v. Whiting, 32 Ala. 54.
58 C.J. p. 186 note 47.

5. **Request or demand by master**

Under charter party providing that cargo is to be furnished as "required" by the master, it is sufficient on the ship's part if the master gives notice that he is in want of more cargo.—Tyson v. Belmont, D.C.N.Y., 24 F.Cas.No.14,316, affirmed, C.C., Belmont v. Tyson, 3 F.Cas.No.1,281, 3 Blatchf. 530

6. U.S.—Societe Commerciale di Navigazione v. Consolidated Coal Co., C.C.A.Va., 25 F.2d 590, certiorari denied 49 S.Ct. 31, 278 U.S. 631, 73 L.Ed. 549.

7. U.S.—Societe Commerciale di Navigazione v. Consolidated Coal Co., supra.
58 C.J. p. 186 note 49.

8. U.S.—Lind v. U. S., 44 Ct.Cl. 558.

9. U.S.—Hinckley v. Wilson Lumber Co., D.C.Me., 205 F. 974
58 C.J. p. 186 note 55.

10. U.S.—The Aquarius, D.C.Md., 44 F.2d 805.
58 C.J. p. 186 note 56.

11. U.S.—Beecher v. Bechtel, C.C.N.Y., 3 F.Cas.No.1,221, 3 Blatchf. 40.
58 C.J. p. 187 note 58.

12. Me.—Husten v. Richards, 44 Me. 182
58 C.J. p. 187 note 59.

a fixed sum for its use.[13] The owner is not liable for property of a nature entirely different from the cargo specified, intrusted to the master and stolen by him.[14]

§ 39. Voyage

a. In general
b. Route; delay and deviation
c. Destination and port of discharge

a. In General

Except as its meaning may be restricted by other provisions of the charter party, the term "voyage" has reference to the whole time during which the vessel is engaged in performing the contract contained in the charter party.

Except as its meaning may be restricted by other provisions of the charter party, the term "voyage" has reference to the whole time during which the vessel is engaged in performing the contract contained in the charter party.[15] There is some conflict in the authorities as to whether the preliminary transit to the port of loading is a part of the voyage, it having been held to be so under the language of particular charters,[16] while under other charters it has been held that the voyage does not begin until the vessel is ready to load or the loading is completed.[17] Where a vessel actually and in fact leaves her port of loading with manifest intent to proceed to her port of destination, her voyage has begun,[18] although she may not have her full crew on board, where those on board are sufficient for the preliminary part of the voyage.[19]

Overlap and underlap. Where a vessel is chartered without any limitation of time, it is an absolute and indefeasible hiring of the vessel for every voyage she shall have undertaken until notice is given by the owner of his intention to discontinue it.[20] After the expiration of a time charter, the charterer has no right to begin a fresh voyage.[21] So, where a vessel is chartered for a series of voyages between specified dates, the charterer cannot enter on a voyage which cannot be completed within the time specified,[22] and he need not furnish a cargo for such a voyage;[23] but where as evidenced by a provision for continuance of hire the charter contemplates the detention of the vessel beyond the charter period, the charterer may, under custom or usage, dispatch the vessel on a voyage mentioned in the charter where any considerable period remains of the charter term, although the voyage cannot be completed within the term.[24] Where the charter contains an option for its extension by the charterer, it has been held that the extended period begins from the completion of a voyage under the original term, although there is an overlap.[25]

Redelivery of vessel. The charter may contain an option permitting the charterer to retain the vessel after the expiration of the original term.[26] Where the charter contains a stipulation for a redelivery of the vessel but no particular place is designated, the charterer is required only to return it to the place from which it is taken,[27] and if the owner has the option to require the vessel to be delivered at either one of two ports, the charterer, on failure of the owner to designate, may tender the vessel at either port.[28] Notice of readiness to deliver is equivalent to actual delivery where the owner does not see fit to come forward and accept the delivery.[29]

b. Route; Delay and Deviation

Where no time is specified in the charter for sailing, the implied obligation is that the vessel shall sail without unnecessary delay, and shall proceed with all reasonable dispatch to her destination, by the route specified in the charter. In the absence of an express provision in the charter, there is an implied warranty that the vessel will not deviate from the customary and usual route unless compelled to do so by necessity.

Where no time is specified in the charter for sailing, the implied obligation is that the vessel shall sail without unnecessary delay,[30] and shall proceed with all reasonable dispatch[31] to her desti-

13. Me.—Husten v. Richards, supra
14. U.S.—Hart v. Leach, D.C.Md., 21 F. 77.
58 C.J. p 187 note 62.
15. U.S.—The Buckingham, D.C.Pa., 129 F. 975
58 C.J. p 187 note 63.
16. U.S.—The Buckingham, supra.
58 C.J. p 187 note 64.
17. U.S.—Fearing v. Cheeseman, C.C.Me., 8 F.Cas.No.4,710, 3 Cliff. 91.
58 C.J. p 187 note 65.
18. U.S.—Wood v. Hubbard, Pa., 62 F. 753, 10 C.C.A. 623.
19. U.S.—Wood v. Hubbard, supra.
20. Mass.—Cutler v. Winsor, 6 Pick. 335, 17 Am.D. 385.
21. U.S.—Walsh v. Tweedie Trading Co., N.Y., 170 F. 60, 95 C.C.A. 336.
58 C.J. p 190 note 7.
22. U.S.—The Mary Adelaide Randall, Conn., 98 F. 895, 39 C.C.A. 335—Poland v. Maryland Coal Co., C.C.S.D., 19 F.Cas.No.11,245, 14 Blatchf. 519.
23. U.S.—Poland v. Maryland Coal Co., supra.
24. U.S.—Anderson v. Munson, D.C. N.Y., 104 F. 913
58 C.J. p 190 note 10.
25. U.S.—The Rygja, N.Y., 161 F. 106, 88 C.C.A. 270.
26. U.S.—Hunt v. Metcalf, D.C.Cal., 47 F. 73.
58 C.J. p 190 note 12.
27. Cal.—Albretson v. Hooker, 5 Cal. 176.
28. U.S.—Hunt v. Metcalf, D.C.Cal., 47 F. 73
29. Cal.—Albretson v. Hooker, 5 Cal. 176.
30. U.S.—The Success, C.C.Conn., 23 F.Cas.No.13,586, 7 Blatchf. 551.
58 C.J. p 187 note 68.
31. U.S.—The Success, supra.
58 C.J. p 187 note 69.

nation, by the route specified in the charter.[32] The conditions of the contract, nature of the cargo, and objects of the voyage may all be considered in determining what is reasonable dispatch.[33]

Deviation. In the absence of an express provision in the charter, there is an implied warranty that the vessel will not deviate from the customary and usual route unless compelled to do so by necessity,[34] and the effect of an unjustified deviation is to displace the contract between the charterer and the vessel owner,[35] a deviation strips a ship of all excuses in her charter party,[36] and imposes on her the liability of a common carrier,[37] which is the liability of an insurer.[38] A necessity occurring at the loading port prior to the inception of the voyage will not excuse a deviation.[39] A deviation is not justified for the purpose of obtaining fuel where the vessel sailed without sufficient fuel,[40] or to obtain more seamen where she sailed without a sufficient crew,[41] but deviation to assist vessels under permission contained in the charter does not subject the owner to any claim.[42] Such a permission must be construed, however, as limited to deviations which do not frustrate the object of the contract.[43] A charter party permitting deviation forced by stress of weather permits a deviation where the vessel is suffering from heavy labor in high seas.[44] The charterer cannot authorize a deviation by a subcharterer from the voyage stipulated in the original charter.[45]

A deviation may be waived by the charterer or he may be estopped to assert it.[46] In determining whether the charterer's inaction after discovering the deviation bars him relief, a distinction must be made between suing for damages arising from the deviation itself, that is for the resulting delay, and suing for a loss on the theory that the contract has ended and the ship is liable as a common carrier.[47] Thus, a charterer would not lose his action for damages due to delayed delivery where he ships with knowledge of the delay,[48] or his privilege of treating the ship as an insurer if he does not learn of the deviation until the goods arrive and he then accepts them.[49] However, if the charterer learns of the deviation while the voyage is in progress, and without protest or reservation of his rights, allows her to make good her fault, so far as she can, he waives the deviation, and cannot sue on the theory that the contract has ended and the ship is liable as a common carrier.[50]

c. Destination and Port of Discharge

A charterer has no right to employ the vessel on a voyage to a port forbidden by the charter, and, on a charter for a voyage to a particular port, he has no contractual right to order the vessel to another port for discharge, unless under an option in the charter party. The charterer, where he has an option to designate the port, must designate a physically safe port.

The charterer has no right to employ the vessel on a voyage to a port forbidden by the charter,[51] and, on a charter for a voyage to a particular port, he has no contractual right to order the vessel to another port for discharge,[52] unless under an option in the charter party.[53] In determining the place

32. U.S.—The John H Pearson, Mass, 7 S.Ct 1008, 121 U.S. 469, 30 L Ed. 979.
58 C.J. p 187 note 70.

33. U.S.—The Success, C.C.Conn., 23 F Cas.No.13,586, 7 Blatchf. 551.

34. U.S —The Henry W Cramp, C.C. A.Pa., 20 F 2d 320, certiorari denied McDonald v. Rosasco, 48 S.Ct. 120, 275 U.S. 561, 72 L Ed. 427.
58 C.J. p 188 note 73.
Authority of master to deviate from route in general see infra § 64.

Custom

(1) Barge owners were held not liable as insurer for cargo loss on ground of deviation from course to take other barges in tow, in view of general port custom to permit multiple tow unless single tow is expressly agreed on—Hockley v. Eastern Transp. Co., D C Md., 10 F.Supp. 908

(2) Where shipowner on trip from Cuba to Toronto had canal gear installed at Montreal in accordance with custom, there was no deviation resulting which would make owner liable as insurer for damage to cargo while installing canal gear.—The Older, D C N.Y., 1 F Supp 119, reversed on other grounds, C.C A., 65 F 2d 359.

35. U.S.—The Maine, D C.N.Y., 8 F. 2d 291.
58 C.J. p 188 note 74.

36. U S —Farr v Hain S S Co., C C.A N.Y, 121 F.2d 940.
58 C J p 188 note 74 [a].

37. U S.—Farr v. Hain S S. Co., supra.

38. U S.—Farr v. Hain S. S Co., supra.

39. U.S.—The Maine, D C N Y., 8 F 2d 291.
58 C.J. p 188 note 75.

40. U.S.—The Maine, supra.

41. U S.—The Henry W. Cramp, C C.A.Pa., 20 F.2d 320

42. U.S.—Velasco Terminal R Co. v The Brixham, D C.Va, 54 F. 539.

43. U.S —Ardan SS. Co. v. Theband, D C N.Y, 35 F. 620.
58 C J. p 188 note 82

44. U.S.—The Maria Luigia, C.C.N. Y., 28 F. 244.

45. N.Y —Moss v. Husted, 66 N.Y. 539
58 C J p 188 note 85.

46. U S —Farr v. Hain S S Co, C. C A N Y, 121 F.2d 940.

47. U.S —Farr v. Hain S. S. Co, supra.

48. U S —Farr v Hain S. S. Co, supra.

49. U S.—Farr v. Hain S. S. Co., supra

50. U S —Farr v. Hain S. S. Co, supra.

51. U S —Murphy v Paine, D.C N Y., 15 F 2d 570
58 C.J. p 188 note 87.

52. U.S.—Mitchell v. Cargo of Lumber, D.C N Y, 117 F. 189
58 C J. p 188 note 88.

53. U.S —George E Warren Corporation v. Picton S. S Co, C.C.A. Mass., 100 F 2d 212.
58 C J. p 189 note 89.

Exercise of option

Where charter party provided that charterers should "have the option of discharging at two safe ports" and

of discharge, the word "port" is taken to mean commercial area as it would be understood by business men in view of the nature of the charter party.[51]

Safe port. The charterer, even in the absence of an express stipulation, such as is ordinarily incorporated in the charter, must, where he has an option to designate the port, designate a physically safe port.[55] In order that a port may be safe, it must be one to which a vessel can get laden as she is and at which she can lie and discharge always afloat.[56] Under a charter requiring the charterers to order the vessel to a safe port, "or as near thereunto as she can safely get, and always lay and discharge afloat," she must be ordered to a port which she can safely enter with her cargo, or which at least has a safe anchorage outside where she can lie and discharge afloat.[57] A requirement in the charter that it must be possible for the vessel safely to lie afloat may be waived.[58] If the consignee and virtual charterer insists on delivery at an unsafe port the master may return with the cargo, if there is no place to store it at the adjacent port.[59] Where bills of lading are given by the master for delivery of the goods at the port named, the shipowner cannot afterward object that it is not a safe port, but must go where he has contracted to go.[60]

§ 40. Receiving and Discharging Cargo

a. Loading and stowage
b. Discharge
c. Employment of stevedore

a. Loading and Stowage

Although under a demise charter the owner is not liable for loss resultant from negligent or unskillful loading or stowage, under a charter party not constituting a demise, in the absence of any agreement or binding custom to the contrary, it is the duty of the owner to load a chartered ship, and he is liable for improper or negligent stowage of cargo, and for injury resulting from defective loading apparatus.

Although under a demise charter the owner is not liable for loss resultant from negligent or unskillful loading or stowage,[61] under a charter party not constituting a demise, in the absence of any agreement[62] or binding custom to the contrary, it is the duty of the owner to load a chartered ship,[63] and this duty applies whether the ships are on time charters or voyage charters.[64] Thus, under a charter party not constituting a demise, except where the responsibility is assumed by the charterer under the agreement,[65] the owner is liable for improper or negligent stowage of cargo,[66] and for injury resulting from defective loading apparatus.[67] Where it is the duty of the charterer under the agreement to load the cargo, the owner is not liable for damages arising from misrepresentations by the charterer to the master concerning the character of the cargo,[68] but it is the duty of the master, when fully cognizant of the facts, to determine when the vessel has taken on as much cargo as is prudent,[69] and the vessel[70] or the owners[71] may be

that orders for second port should be given not later than twenty-four hours after arrival at first port, and charterer named a second port, charterer's election became conclusive and owner was not obliged to send the ship to another port of discharge chosen by consignee of cargo within twenty-four hours after arrival at first port—George E Warren Corporation v Picton S S Co., supra.

54. U S—Manchester Liners v. Virginia-Carolina Chemical Co, N C., 204 F 564, 123 C.C.A. 90.
58 C J. p 189 note 90.

55. U.S—The Antonio Zambrana, D. C N.Y, 70 F. 320.
58 C J p 189 note 94.

56. U S—Mencke v. A Cargo of Sugar, 99 F. 298, reversed on other grounds 108 F. 89, 47 C.C A 222, and affirmed 23 S Ct. 86, 187 U.S. 248, 47 L Ed 163.
58 C J p 189 note 97

57. U.S—The Gazelle, Md, 9 S Ct. 139, 128 U.S 474, 32 L.Ed 496.
58 C.J. p 189 note 98.

58. U.S—Christophersen v. Donald SS. Co., N.Y., 187 F. 975, 110 C.C.A. 313.
58 C J. p 190 note 99.

59. U S—Mecke v. The Antonio Zambrana, D C N Y., 70 F. 320

60. U S.—The Maggie Moore, D C. Md, 8 F. 620, 5 Hughes 287.
58 C.J. p 190 note 2.

61. U.S—The South America, D C. Del, 27 F. 386.
58 C J. p 191 note 22.

62. U.S—Munson S. S. Line v. Glasgow Nav Co., N Y, 235 F. 64, 148 C C A. 558, certiorari denied 37 S Ct 405, 243 U S. 643, 61 L Ed. 944, and appeal dismissed 38 S Ct. 315, 246 U S. 647, 62 L Ed. 916.
58 C.J. p 191 note 17.

63. U S—Munson S. S. Line v. Glasgow Nav. Co., supra.
58 C.J. p 191 note 18.
Dispatch at loading see infra § 209

Dunnage

(1) Vessel under charter party was held to have had duty to furnish dunnage in accordance with request of shipper—The Helen Barnet Gring, D.C Md, 48 F.2d 629.

(2) Failure to provide proper dunnage is a breach of a charter to stow cargo properly, for which the ship is liable, although the cargo was loaded by stevedores who were appointed by the charterers.—Robinson v. Franklin Sugar Refining Co, D.C. Pa., 70 F. 792.

64. U S—Munson S S. Line v Glasgow Nav Co., N Y, 235 F. 64, 148 C C.A 558, certiorari denied 37 S Ct. 405, 243 U S. 643, 61 L Ed. 944, and appeal dismissed 38 S Ct. 315, 246 U S. 647, 62 L Ed 916.

65. U S.—The Thomas P. Beal, C.C. A N.J., 11 F.2d 49.

66. U.S.—The Seguranca, La, 250 F. 19, 162 C C A. 191.
58 C.J p 191 note 19.

67. U S—Anderson v. The Ashebrooke, C C Tex, 44 F. 124.
58 C J. p 191 note 20.

68. U S.—The Santa Clara, C.C.A.N. Y, 281 F. 725, certiorari denied Beer v. American, etc., SS. Line, 43 S.Ct 90, 260 U S. 728, 67 L Ed 484.
58 C J p 191 note 23.

69. U S.—The Giles Loring, D C Me., 48 F. 463—Burdge v. Two Hundred and Twenty Tons of Fish Scrap, D. C.Md, 2 F. 783, 5 Hughes 141
58 C.J. p 191 note 24.

70. U S—The Regulus, D C.N.Y., 18 F. 380.
58 C J. p 191 note 25.

71. U.S—The Giles Loring, D.C. Me., 48 F. 463.

liable for damage to cargo of which overloading is the proximate cause. When the charterer has taken the entire vessel, he is entitled to all cargo space,[72] except that reserved by the charter for the owner's use,[73] and if the master refuses to load a full cargo under the charter the charterer may recover damages.[74]

Apportionment and placing of cargo. As a general rule, it is for the master of the ship to determine where the articles offered shall be placed and how proportioned,[75] although the ship is loaded by the charterer,[76] and when the charterer offers to furnish goods in sufficient quantities and of the character required by the charter party, it is the master's duty to make known to him what quantity of the several articles is necessary to load the ship as required by the charter party.[77] However, under a charter party in which the charterer agreed to load and stow the cargo at his own expense under the supervision of the master, it has been held that, although the master's duty of supervision might, for some purposes and under some circumstances, be deemed to extend to the erection of cribbing as a means of stowing a deck load, where the vessel is not required to furnish the cribbing there is no duty of ship or master to prevent the charterer from loading the cargo in such manner as to expose it to the dangers ordinarily incident to the transportation on deck.[78]

Departure from charter by master. Although the master may not modify the owner's contract for a positive undertaking,[79] he may make necessary departures from the stipulations of the charter party for the safety of the voyage,[80] such as refusing to load a full cargo,[81] carrying more ballast than that stipulated,[82] and loading below decks instead of above decks,[83] but the charterer is entitled to an allowance for space he may have lost by such changes.[84]

Refusal of cargo in danger of injury. Notwithstanding a provision of the charter party requiring the ship to receive all such lawful cargo as the charterers may think proper to ship,[85] when the owners are responsible for proper stowage and safe carriage, the master is justified in refusing to load goods where there is danger that they will be injured by other cargo previously loaded,[86] and although a charter provides that the whole of a vessel shall be at the charterer's disposal, with the right to put a full cargo on board.[87]

Cargo latently defective. In general, where damage is caused by the stowage of cargo with latent defects, the master cannot be charged with negligence for receiving it.[88]

Time of completion. The charterer will be required to complete loading within the time stipulated.[89]

Loading port. The charterer may be required to designate the loading port[90] and when he does so the charter will be limited to the port designated.[91]

Usage of trade. A charter party for the transportation of a cargo of merchandise which does not prescribe the mode of stowage[92] tacitly refers to the established and known usage of the trade for the manner of stowing cargo [93]

72. U S —The Addison E Bullard, Fla., 258 F. 180, 169 C C.A. 248.
58 C.J. p 185 note 39.

73. U.S.—The Addison E. Bullard, supra
58 C J. p 185 note 40

74. U S —The Saigon Maru, D C Or, 267 F. 881, affirmed, C C A., 272 F. 799, reversed on other grounds Osaka Shosen Kaisha v. Pacific Export Lumber Co., 43 S Ct. 172, 260 U S 490, 67 L Ed. 364—The John A. Briggs, D.C.Pa, 113 F 948, modified on other grounds 120 F. 6, 57 C.C A. 26.

75. U S —The Addison E. Bullard, D C.Fla., 252 F. 241, affirmed 258 F. 180, 169 C C A 248.
58 C.J. p 191 note 27.

Responsibility and control

Where owner's guaranty of ship's capacity is at issue and charter party provided charterers were to load, stow, and trim cargo at their expense under supervision of the captain, the owner of the ship had a definite share of the responsibility and control as to the manner of loading the ship —The Atlanta, D C Ga., 82 F Supp 218

76. U.S —Olsen v. U. S. Shipping Co, N Y, 213 F. 18, 129 C.C.A. 607.
58 C J. p 192 note 28.

77. U S.—Rich v. Parrott, C.C Mass., 20 F.Cas No.11,760, 1 Cliff 55.

78. U S —Oxford Paper Co. v. The Nidarholm, Me, 51 S.Ct. 266, 282 U S. 681, 75 L Ed. 614.

79. U S —The Addison E Bullard, D. C Fla, 252 F. 241, affirmed 258 F 180, 169 C C A 248.

80. U S —Reynolds v The Joseph, C. C Va., 20 F Cas No 11,730, 2 Hughes 58.

81. U S —Tweedie Trading Co. v. Clan Line Steamers, N.Y, 207 F. 70, 124 C C A. 630.
58 C J p 192 note 34.

82. U S —Reynolds v. The Joseph, C.C Va., 20 F.Cas No.11,730, 2 Hughes 58.

83. U S —Reynolds v. The Joseph, supra

84. U S —Reynolds v. The Joseph, supra.

85. U S —Birt v. Hardie, D C.N.Y., 132 F. 61.

86. U S.—Birt v. Hardie, supra.

87. U S —The Giles Loring, D C.Me, 48 F. 463.

88. U S —The Keystone, D C.N Y, 31 F. 412
58 C J. p 192 note 42.

89. U.S —P. Dougherty Co. v. 2,471 Tons of Coal, D.C.Mass., 278 F. 799
58 C J. p 192 note 43
Demurrage see infra §§ 203–223.

90. U.S.—U. S. v. Russian Volunteer Fleet, D C.N.Y., 22 F.2d 187.

91. U.S —U. S v. Russian Volunteer Fleet, supra.
58 C J. p 192 note 46.

92. U.S —Lamb v. Parkman, D.C. Mass, 14 F.Cas No 8,020, 1 Sprague 343.

93. U.S.—Lamb v. Parkman, supra.

b. Discharge

Under a charter party not constituting a demise, in the absence of any agreement in the contract, or custom binding on the parties to the contrary, it is the duty of the owner to discharge a chartered ship.

Under a charter party not constituting a demise, in the absence of any agreement in the contract,[94] or custom binding on the parties to the contrary,[95] it is the duty of the owner to discharge a chartered ship,[96] whether the ship is on a time charter or a voyage charter,[97] at the berth selected by the charterer.[98] Where, however, a charterer with the right to name the place of discharge fails to do so within a reasonable time, the master may select one.[99] It is the duty of the charterer, in the absence of some specific stipulation to the contrary, to furnish a berth for the vessel,[1] and a delay due to the congested condition of the port is chargeable to the charterer and not to the vessel [2]

Time for discharge. When the obligation to discharge the cargo rests on the charterer[3] and no time is specified within which discharge shall be done, the law implies an agreement on his part to discharge within a reasonable time under the circumstances,[4] and he is liable for delay in failing to do so, as discussed infra § 210. However, under a charter which required the ship to be fitted in every way for service, and to have steam winches at the charterer's disposal, the charterer was held entitled to an allowance for delay in discharging due to defective winches or deficiency in steam power for operating them.[5]

Injury to cargo on wharf. Where the bill of lading provides for delivery from the ship's deck, when the ship's responsibility shall cease, the obligation to protect the cargo on the wharf is on the charterers, if reasonable opportunity to take delivery from the ship's deck has been furnished,[6] and although a ship as a common carrier, where she selects her wharf for discharging, is answerable for its sufficiency until the lapse of a reasonable time for removal of the goods by the consignee,[7] she is not responsible for the collapse of a wharf, apparently sound and in good condition, under the weight of cargo discharged onto it when the wharf was selected by the consignee in accordance with the terms of the charter,[8] and the collapse occurs through secret defects of which the ship had no notice, and the amount of cargo deposited on the wharf was not unusual or excessive for a sound wharf.[9]

Duty of consignee to receive and discharge cargo. Where the consignee is under the obligation to discharge cargo, he will be required to discharge with reasonable dispatch,[10] and when he refuses to receive the cargo in accordance with the provisions in the charter party, the master is authorized to land the cargo and store it at the nearest proper and convenient port, having reference to his own convenience and the apparent best interests of its owner, and acting prudently and in good faith.[11]

c. Employment of Stevedore

In the absence of any agreement to the contrary in the charter party, or any different custom of the port, the vessel is entitled to select and employ a competent stevedore to load the cargo furnished it by the charterer.

In the absence of any agreement to the contrary in the charter party,[12] or any different custom of the port,[13] the vessel is entitled to select and employ a competent stevedore to load the cargo furnished

94. U.S.—Munson SS. Line v. Glasgow Nav Co, N.Y, 235 F. 64, 148 C.C.A. 558, certiorari denied 37 S. Ct 405, 243 U.S 643, 61 L Ed. 944, and appeal dismissed 38 S.Ct. 315, 246 U S 647, 62 L Ed 916—Holman v. Gans SS Line, N Y., 186 F. 96, 108 C.C.A. 208.

95. U S.—Munson SS. Line v. Glasgow Nav Co, N Y., 235 F. 64, 148 C C A. 558, certiorari denied 37 S Ct. 405, 243 U.S. 643, 61 L Ed. 944, and appeal dismissed 38 S.Ct. 315, 246 U S. 647, 62 L Ed. 916.
58 C.J. p 193 note 51.

96. U.S.—Munson SS. Line v. Glasgow Nav. Co, supra.
58 C.J. p 193 note 52.

97. U.S.—Munson SS. Line v. Glasgow Nav. Co, supra.

98. U.S.—Christophersen v. Donald SS Co., N.Y., 187 F. 975, 110 C.C.A. 313.
58 C.J. p 193 note 53.

99. U S.—Steamship Rutherglen Co., Ltd. v. Howard Houlder & Partners, Inc., N.Y., 203 F. 848, 122 C C.A. 166
58 C J p 193 note 54.

1. U.S.—Hildebrand v. Geneva Mill Co., D C Ala., 32 F.2d 343.

2. U.S.—Hildebrand v. Geneva Mill Co., supra—P. Dougherty Co. v. 2471 Tons of Coal Ex Barge Annapolis, D.C.Mass, 278 F. 799.

3. U.S.—Steamship Rutherglen Co. Ltd. v. Howard Houlder & Partners, Inc, N.Y., 203 F. 848, 122 C. C.A. 166.
58 C.J. p 193 note 56.

4. N Y.—Steamship Rutherglen Co., Ltd. v Howard Houlder & Partners, Inc., supra.
58 C J. p 193 note 56.

5. U.S.—Munson SS Line v. Miramar SS. Co, D C N.Y., 150 F. 437, affirmed 166 F. 722, 92 C C.A. 412, 167 F. 960, 93 C.C A. 360, certiorari denied 29 S Ct. 704, 214 U.S. 526, 53 L Ed. 1008.

6. U S.—Lindsay v. Cusimano, D C. La, 10 F. 302, affirmed, C.C.A., 12 F. 503.

7. U.S.—Young v. Lehmann, D.C.N. Y, 27 F. 383.

8. U.S.—Young v. Lehmann, supra.
58 C.J. p 194 note 62.

9. U.S.—Young v. Lehmann, supra.

10. U.S.—Crowley v. Hurd, D.C. Mass., 172 F. 498.
58 C.J. p 194 note 64.

11. U.S.—Compagnie du Boleo v. The Scandinavia, D.C.Cal, 49 F. 658.

12. U.S.—George W. Bush, etc., Co. v. Thompson, Md, 65 F. 812, 13 C. C.A. 148
Costs of stevedoring see infra § 41.

13. U S.—George W. Bush, etc., Co. v. Thompson, supra.

it by the charterer.[14] A charter which provides that "the stevedore employed by the vessel to be approved by charterer" means that the appointment or nomination of a stevedore is to be made in the first instance by the vessel,[15] and submitted to the charterer for approval,[16] and although the charterer has wide discretion as to approval or disapproval,[17] he cannot arbitrarily or unreasonably withhold what is reasonable under the circumstances.[18] A stipulation that the ship is to employ the charterer's stevedore and clerk does not amount to a special agreement that the charterer shall perform the duty of lading and stowing, or make them responsible for the character of the stowage.[19] The charterer has been held not liable for damage to cargo by stevedores appointed by the charterer but paid by the ship, who separated bundles of cargo to make broken stowage, and thus put more cargo in the ship.[20]

§ 41. Expenses

a. In general
b. Lighterage
c. Wharfage
d. Stevedoring
e. Port charges
f. Agency fees

a. In General

Where a vessel is chartered, the costs of loading and discharging cargo will be apportioned in accordance with the terms of the charter party, although in the absence of any contractual provision on the subject the shipowner ordinarily must load and unload cargo at his own expense.

Where a vessel is chartered, the costs of loading and discharging cargo will be apportioned in accordance with the terms of the charter party.[21] In the absence of any provision on the subject in the contract the shipowner ordinarily must load[22] and unload[23] cargo at his own expense, but, if extra expense is incurred in loading simply to enable the charterer to carry a greater load, the extra expense must be borne by the charterer.[24] Depending on the provisions of the contract, the charterer has been held liable for wages and board of tallymen and checkers employed by him,[25] and also for assorting,[26] transferring,[27] piling,[28] placing in storage of,[29] and caring for,[30] the cargo, and for costs of screwing cargo in holds to enable him to carry a greater cargo.[31]

Where on bankruptcy of the charterers the cargo owner orders the cargo discharged in a manner not in accordance with the contract between him and the charterers, the owner of the vessel may recover the additional expense of so doing from the cargo owner.[32] Under a charter party which requires the charterer to load the cargo at his expense under the supervision of the master, the owner may be responsible for expense and loss caused by the master's neglect of his duty to see to the proper and safe loading of the vessel.[33] Where a ship was permitted to proceed on the own-

14. U.S.—George W. Bush, etc, Co. v. Thompson, supra.

15. U.S.—Pool Shipping Co v. Hanson Produce Co, D.C.Md, 296 F 235, affirmed, C.C.A, 299 F 1022.

16. U.S.—Pool Shipping Co v. Hanson Produce Co., supra.

17. U.S.—Pool Shipping Co. v. Hanson Produce Co, supra.

18. U.S.—Pool Shipping Co. v. Hanson Produce Co, supra.
58 C.J. p 194 note 73.

19. U.S.—Richardson v. Winsor, C.C. Mass, 20 F.Cas No 11,795, 3 Cliff. 395.

20. U.S.—Bethel v. Mellor, etc, Co, D.C.Pa., 131 F. 129.

21. U.S.—C F. Starita Co v Compagnie Havraise Peninsulaire De Navigation A Vapeur, C.C.A.N.Y., 52 F.2d 58—Matlack Coal, etc, Corp v. New York, etc, Extract Co., C.C.A.N.Y., 30 F.2d 275—Continental Grain Co. v. Armour Fertilizer Works, D.C.N.Y, 22 F Supp. 49—Dow v. Hare, D.C.Cal., 7 F.Cas. No 4,037a.
58 C.J. p 194 note 77.

Cranage

Charter party provision that ship should pay "cranage if shore cranes are employed" required ship to pay reasonable and customary charge for shore cranage services even where cranes used belonged to charterer, not only where charterer was required to pay others for cranage services, and charterer's failure to charge other ships for cranage in discharging cargoes did not preclude him from asserting ship's liability—The August, D.C.N.Y., 5 F Supp. 463.

22. U.S.—Holman v Gans SS. Line, N.Y., 186 F. 96, 108 C.C.A. 208

23. U.S.—Holman v. Gans SS Line, supra.

24. U.S.—Macy v. Perry, N.Y., 99 F. 1004, 40 C.C.A. 217.

25. U.S.—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F 2d 562

26. U.S.—Fili v. 13,986 Bales of Cork Shavings, D.C.N.Y., 28 F.2d 447.

27. U.S.—Fili v. 13,986 Bales of Cork Shavings, supra.

28. U.S.—Hammett v. Chase, D.C.N.Y, 158 F. 203, affirmed 165 F. 1005, 91 C.C.A. 663.
58 C.J. p 195 note 90.

29. U.S.—The Sursum Corda, D.C.N.Y., 20 F.2d 212.
58 C.J. p 195 note 91.

30. U.S.—Matlach Coal, etc, Corp. v New York Quebracho Extract Co, C.C.A.N.Y., 30 F 2d 275.
58 C.J. p 195 note 92.

31. U.S.—Macy v. Perry, D.C.N.Y, 91 F 671, affirmed 99 F. 1004, 40 C.C.A 217

32. U.S.—Connett v. New York, C.C. A.N.Y, 270 F. 197, certiorari denied 41 S.Ct 535, 256 U.S. 693, 65 L.Ed. 1175.
58 C.J. p 195 note 1.

33. U.S.—Mobile, Miami & Gulf S S. Co v. Lake Giltedge S. S. Co, C.C. A.Ala., 68 F.2d 370.

Loading in absence of master

Where charter party provided that charterer should load, stow, and trim cargo at its expense under master's supervision, and vessel was loaded during absence of master, for whom mate was acting, owner was liable to charterer for expense and loss due to delay necessitated by partial unloading and retrimming, where there was no proof that charterer loaded any cargo except with full knowledge of the mate or that charterer tolled master away or that he left ship except at his own volition—Mobile, Miami & Gulf S. S Co. v. Lake Giltedge S. S Co, supra.

er's agreement to return part of the cargo for action of a prize court, and through duress the charterer was compelled to pay storage on the goods in another country and for their return, it was held that the charterer was entitled to recover the amount from the owner.[34]

Sacks. Although a custom of the port imposes on the vessel a duty of making delivery in sacks, the vessel is not under an obligation to furnish sacks free of cost to the charterer,[35] and, where cargo is to be transported in sacks, the charterer may be liable for the costs of sewing them.[36]

Pilotage; costs of moving vessel. Under a charter party so providing, the charterer is obligated to furnish and pay for pilotage,[37] and the extent of his liability depends on the terms of the charter party.[38] In the absence of a provision imposing liability, the charterer is not liable for the costs of pilotage from one dock to another for the purpose of bunkering[39] or for costs of moving the vessel by order of a navigation commissioner.[40]

Ice breaking. A charterer is not liable to the owner for a sum paid for an icebreaker's services rendered at the request of the captain acting as the agent of the owner.[41]

b. Lighterage

The terms of the charter party control with respect to responsibility for the expense of lighterage.

The terms of the charter party control with respect to responsibility for the expense of lighterage,[42] and, where the charter party provides that the custom of a port is to be observed in all cases not especially expressed, a custom relative to the payment of lighterage, which is certain and general, although not so notorious or so acquiesced in as to have the force of law, will be carried out in the absence of an express stipulation on the subject in the charter party.[43]

Under a charter party stipulating that the charterer shall deliver a cargo on board at his expense of lighterage, it is necessarily implied that he will both lighter the cargo and pay for lighterage,[44] and his obligation is not fulfilled by depositing the cargo on a wharf.[45] It has been held that, when the vessel cannot reach the appointed dock because of an obstructing bridge, the charterer is liable for the cost of lighterage.[46] Where a vessel, in order to earn greater freight, gets the shipper to furnish, at a deeper anchorage, cargo in addition to what he had furnished at the agreed place of loading, the cost of lighterage must be borne by the vessel,[47] and delivery to the lighter is delivery to the vessel.[48] Where the charter party so stipulates, lighterage at the ports both of departure and destination must be at the expense of the merchant.[49]

c. Wharfage

The parties will be responsible for wharfage in accordance with the terms of their contract with respect both to loading and unloading, but usually the obligation of paying wharfage is on the vessel and the owners.

The parties will be responsible for wharfage in accordance with the terms of their contract,[50] with respect both to loading and unloading,[51] but usually the obligation of paying wharfage is on the vessel[52] and the owners.[53] Where a vessel, in order to make the delivery required by the terms of the charter, is compelled to enter a dock, and for this purpose enters the dock of the charterer, the vessel is liable to him for the ordinary charges for wharf-

34. U.S.—Furness Shipping, etc., Co. v. Barber, C.C.A.N.Y., 6 F.2d 779.
58 C.J. p. 195 note 99.

35. U.S.—South American Metal Co. v. Kjoge, C.C.A.Va., 12 F.2d 562

36. U.S.—Dampskibselskabet Dannebrog v. Randall, D.C.Md., 217 F. 902, affirmed 228 F. 1022, 142 C.C.A. 651.
58 C.J. p. 195 note 95.

37. U.S.—The Niels R. Finsen, D.C. N.Y., 52 F.2d 795.
As constituting port charge see infra subdivision e of this section.

38. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C.A.Tex., 10 F.2d 129

39. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra.

40. U.S.—Pool Shipping Co. v. Samuel, D.C.Pa., 200 F. 36, 118 C.C.A. 264.

41. U.S.—The Terne, C.C.A.N.Y., 64 F.2d 502, certiorari denied Munson S. S. Line v. Bergen Lloyd, 54 S.Ct. 53, 290 U.S. 635, 78 L.Ed. 552, and Bergen Lloyd v. Munson S. S. Line, 54 S.Ct. 63, 290 U.S. 635, 78 L.Ed. 552.

42. N.Y.—Nelson v. Odiorne, 45 N.Y. 489.

43. U.S.—Nordaas v. Hubbard, D.C. Ala., 48 F. 921.
58 C.J. p. 195 note 79.

44. N.Y.—Nelson v. Odiorne, 45 N.Y. 489.
58 C.J. p. 196 note 2.

45. N.Y.—Nelson v. Odiorne, supra.

46. U.S.—Mencke v. A Cargo of Java Sugar, N.Y., 23 S.Ct. 86, 187 U.S. 248, 47 L.Ed. 163.
58 C.J. p. 196 note 4.

47. U.S.—Nordaas v. Hubbard, D.C. Ala., 48 F. 921.

48. U.S.—Nordaas v. Hubbard, supra.

49. U.S.—Carr v. Austin, etc., R. Co., C.C.Tex., 14 F. 419, 4 Woods 327, appeal dismissed Post v. Carr, 122 U.S. 642, 30 L.Ed. 1244

50. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C.A.Tex., 10 F.2d 129
58 C.J. p. 196 note 11.
As constituting port charge see infra subdivision e of this section.

51. U.S.—Johnson v. Baugh, D.C.Pa., 58 F. 424.

52. U.S.—The Ioannis Vatis, D.C.N.Y., 16 F.2d 284—American Warehouse, etc., Co. v. Davison Lumber Co., N.Y., 240 F. 126, 153 C.C.A. 162, certiorari denied 37 S.Ct. 465, 243 U.S. 643, 61 L.Ed. 944.

53. U.S.—American Warehouse, etc., Co. v. Davison Lumber Co., supra
58 C.J. p. 196 note 14.

age in like manner as at any other wharf,[54] and where a vessel under the obligation to pay wharfage is sent by the charterer to a railroad wharf where, in consideration of loading the railroad company's goods, no wharfage is charged, the charterer has been held to be entitled to charge the vessel with the stipulated wharfage less credit due for rebate allowed the charterer by the stevedore.[55]

A charterer bound by the contract to furnish the vessel with a berth for discharging will be required to pay extra wharfage incurred through his failure to furnish a proper berth.[56] Where the charterer contracts with a third person for wharfage of the vessel without disclosing that he is acting for anyone else, the charterer may be liable therefor to such third person,[57] although by the terms of the charter, as between the owner and the charterer, the owner may be primarily liable for wharfage of the vessel.[58] The vessel will not ordinarily be required to pay wharfage for use of a pier designated by the charterer after her cargo has been discharged thereon,[59] and the owner of a vessel chartered to one who becomes owner pro hac vice is not responsible for wharfage incurred after the latter has chartered the vessel.[60]

Dockage. Wharfage chargeable to charterers under the charter party includes dockage,[61] which may be based on the tonnage of the ship.[62] Dockage should be apportioned between the parties according to their contract.[63]

d. Stevedoring

The expense of stevedoring should be borne by the party responsible therefor, in accordance with the provisions of the charter party.

The expense of stevedoring should be borne by the party responsible therefor, in accordance with the provisions of the charter party.[64] Under some charter provisions, only the charterer is liable for such expense,[65] and a charter providing for payment of a stevedore by the charterer is not affected by a usage, unknown to the master, for the master to pay the stevedore for unloading.[66] A charterer who, by the terms of the charter party, is bound to pay stevedoring charges cannot bind the owner to pay such charges;[67] in the absence of a grant of such authority to him, a charterer who is not the owner pro hac vice does not have authority to bind the vessel for claims of stevedores,[68] and the shipowner is not liable for stevedoring because the charterer made misrepresentations as to his authority.[69] A shipowner is not liable for stevedoring rendered the charterer under a charter party providing for the employment of a stevedore where such charter also requires the charterer to load and stow the cargo at a specified rate.[70]

Under some charter provisions the vessel may be responsible for the expense of stevedoring,[71] but a vessel under the obligation to pay the cost of stevedoring, not exceeding a certain rate,[72] and to discharge night and day if required,[73] cannot be required to pay in excess of the stipulated rate because of night work. If the charterer himself provides the stevedoring he is not entitled to more than the service would have cost the ship.[74]

Winchmen. Under a charter party requiring the vessel to provide winchmen, the obligation is fulfilled by tendering competent winchmen from the crew,[75] and, if their services are refused because stevedores employed by the charterer refuse to,

54. U.S.—Muller v. Spreckels, D.C. Pa., 48 F. 574.

55. U.S.—Lowry v. U. S. Shipping Co., D.C.N.Y., 84 F. 685.
58 C.J. p. 196 note 19

56. U.S.—Hammett v. Chase, etc., Co., D.C.N.Y., 158 F. 203, affirmed 165 F. 1005, 91 C.C.A. 663.

57. U.S.—American Warehouse, etc., Co. v. Davison Lumber Co., N.Y., 240 F. 126, 153 C.C.A. 162, certiorari denied 37 S.Ct. 405, 243 U.S. 643, 61 L.Ed. 944.

58. U.S.—American Warehouse, etc., Co. v. Davison Lumber Co., supra.

59. U.S.—The Vigo, D.C.N.Y., 257 F. 586

60. Pa.—Philadelphia v. Naglee, 1 Ashm. 37.

61. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C.A.Tex., 10 F.2d 129.

62. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra.
58 C.J. p. 197 note 26.

63. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra
58 C.J. p. 197 note 27.

64. U.S.—C. F. Starita Co. v. Compagnie Havraise Peninsulaire De Navigation A. Vapeur, C.C.A.N.Y., 52 F.2d 58.

65. U.S.—C. F. Starita Co. v. Compagnie Havraise Peninsulaire De Navigation A. Vapeur, supra.

Joint liability held not created by charter party

U.S.—C. F. Starita Co. v. Compagnie Havraise Peninsulaire De Navigation A. Vapeur, supra.

66. U.S.—Isaksson v. Williams, D.C. N.Y., 26 F. 642.

67. U.S.—C. F. Starita Co. v. Compagnie Havraise Peninsulaire De Navigation A. Vapeur, C.C.A.N.Y., 52 F.2d 58

68. U.S.—The Gul Djemal, D.C.N.Y., 11 F.2d 153, affirmed, C.C.A., 11 F.2d 156

69. U.S.—The Gul Djemal, supra.
58 C.J. p. 197 note 31

70. U.S.—Rothschild v. Robin Line SS. Co., C.C.A.Wash., 26 F.2d 343

71. U.S.—The Bencliff, D.C.Pa., 155 F. 242.

72. U.S.—The Bencliff, supra.
58 C.J. p. 197 note 33.

73. U.S.—The Bencliff, supra

74. U.S.—Lowry v. U. S. Shipping Co., D.C.N.Y., 84 F. 685.
58 C.J. p. 194 note 76.

75. U.S.—Constantine, etc., SS. Co. v. Tweedie Trading Co., N.Y., 159 F. 706, 86 C.C.A. 574.
58 C.J. p. 197 note 38.

work with them[76] or for other reason,[77] the cost of employing other winchmen cannot be charged against the vessel or owners. However, under some circumstances the charterers may be entitled to deduct from the charter hire sums paid to outside winchmen used with the consent of the master.[78]

e. Port Charges

Payment of port charges is usually regulated by the terms of the charter party, and in accordance therewith the parties will be liable only for such charges as they have agreed to pay.

Payment of port charges is usually regulated by the terms of the charter party,[79] and in accordance therewith the parties will be liable only for such charges as they have agreed to pay.[80] In order that a charge may constitute a port charge, it must be a lien on a ship, either maritime or statutory, which she has to pay before she is entitled to leave port,[81] so that a charge for the inspection of cargo by a maritime committee or a maritime branch of an exchange before loading is not a port charge, where such charge is not a lien on the ship.[82]

Port charges may include "berth"[83] or "towage,"[84] and, in accordance with the stipulations in a charter party for the charterers to pay certain "port charges," they have been held obligated to pay costs of "wharfage,"[85] "shed hire,"[86] "pilotage,"[87] "tonnage dues,"[88] "customhouse fees,"[89] "levee dues,"[90] "quarantine fees,"[91] and "cost of watching."[92] While under the terms of the charter party, the "cost of fumigating" may constitute a port charge for which the charterer is liable,[93] as where the necessity for fumigation grows out of the ship's service under the charter,[94] under some charter party provisions the charterer has been held not liable for such expense where fumigation is required for the contemplated voyage when the ship is delivered to him.[95]

f. Agency Fees

Liability for agents' fees ordinarily is determined by the provisions of the charter party.

Liability for agents' fees ordinarily is determined by the provisions of the charter party.[96] Where the owners are bound by the charter party to pay only the usual charge for charterer's agents' fees, and such agents refuse to act for less than a sum greater than such charge, the owners are not bound to employ them,[97] and, on paying the sum demanded, they are entitled to recover from the charterer any amount above the usual charge,[98] but, in the absence of proof as to what the usual charge is, nothing will be allowed them.[99] Where a charter party confines the duties of a ship's agent to "custom-house business," he is not the general representative of the ship, and is not entitled to an "attendance fee."[1]

§ 42. Charter Money and Other Compensation

a. In general
b. Persons liable
c. Retention or restoration of advance freight

76. U.S.—Constantine, etc., SS Co. v. Tweedie Trading Co., supra. 58 C.J. p 197 note 39.
77. U S—Constantine, etc., SS. Co. v. Tweedie Trading Co., supra. 58 C J. p 197 note 40.
78. U.S. — Dampskibsactiesselskabet Urania v. Barber & Co., Inc., D C.N. Y., 175 F 989 58 C.J. p 197 note 42.
79. U.S—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C. A.Tex., 10 F.2d 129.
80. U S.—Dow v. Hare, D C Cal., 7 F.Cas No 4,037a. 58 C.J p 197 note 45
81. U.S—Wilkens v Trafikaktiebolaget Grangesberg Okelosund, C.C. A.Tex., 10 F.2d 129.
82. U S—Wilkens v Trafikaktiebolaget Grangesberg Okelosund, supra.
83. U S.—The Vigo, D.C N.Y., 257 F. 586. 58 C.J. p 197 note 46.
84. U S—Christianssand Shipping Co. v. Marshall, D.C.Pa., 22 F.2d 192, reversed on other grounds, C. C A., 31 F 2d 686 58 C.J. p 197 note 48.
85. U S—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C. A.Tex., 10 F.2d 129.
86. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra. 58 C.J p 198 note 50.
87. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra. 58 C.J. p 198 note 51.
88. U.S.—The Muirfield, D.C.Fla., 174 F. 75. 58 C.J. p 198 note 52.
89. U S—Muller v. Spreckels, D.C. Pa., 48 F. 574. 58 C J. p 198 note 53.
90. U S—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C. A.Tex., 10 F.2d 129.
91. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra.
92. U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, supra.
93. U S—Wilkens v Trafikaktiebolaget Grangesberg Okelosund, supra.
94. U.S—Dampskibs, etc. v. Munson, S S Line, C.C.A.Va., 20 F.2d 345.
95. U.S—Britain S. S. Co. v. Munson S S. Line, C C A.N.Y., 31 F.2d 530, opinion conformed to, D C., 34 F 2d 980, certiorari denied 50 S.Ct. 29, 280 U S 574, 74 L Ed. 625.
96. U.S—Muller v. Spreckels, D.C. Pa., 48 F. 574.
97. U S—Steamship Rutherglen Co v. Howard Houlder & Partners, Inc, N.Y., 203 F. 848, 122 C.C.A. 166.
98. U.S.—Steamship Rutherglen Co. v. Howard Houlder & Partners, Inc, supra.
99. U.S.—Steamship Rutherglen Co. v. Howard Houlder & Partners, Inc., supra. 58 C.J. p 198 note 62.
1. U S.—Muller v. Spreckels, D.C. Pa., 48 F. 574.

a. In General

As a general rule, in order to be entitled to charter money or freight money, the owner of the vessel must perform his contract, and, where there has been no complete fulfillment on his part and no fault or waiver on the other part, no freight money can be recovered, notwithstanding the failure to perform is not due to his fault.

As a general rule, in order to be entitled to charter money or freight money, the owner of the vessel must perform his contract,[2] and, where there has been no complete fulfillment on his part and no fault or waiver on the other part, no freight money can be recovered,[3] notwithstanding the failure to perform is not due to his fault.[4] Thus, no freight is earned if there is no delivery of cargo because the vessel is wrecked[5] or captured,[6] or because of the intervention of war.[7] Ordinarily, there is no implied promise to pay a compensation for carrying goods part of a voyage,[8] notwithstanding difficulty or improbability of accomplishing the undertaking,[9] unless the goods are voluntarily accepted at a place short of the port of destination,[10] although where a chartered vessel is disabled at an intermediate port, the master should be allowed a reasonable time within which to reship or transship, so as to earn his freight.[11]

If the delivery of the cargo is prevented by the neglect or default of the hirer, the owner will be entitled to the hire as if on actual delivery,[12] and, where the charterers refuse to order the vessel to such a port as the charter party calls for, and insist on ordering her to a different one, the shipowner is prima facie entitled to the freight which he would have earned, less what it would have cost him to earn it.[13] Where a charter party is so worded as to constitute a divisible contract the shipowner may be entitled to a ratable freight for the part of the goods carried on failure to carry the whole because of the perils of the sea,[14] or pro rata freight may be allowed to the shipowner for damaged cargo voluntarily accepted at an intermediate port.[15] Under a charter party which provides that freight is to be payable on "right delivery of cargo," only a delivery of all that the ship is bound to deliver is required, excluding losses by excepted sea perils, in order that freight may be earned.[16] A provision for payment of a lump sum as freight by the charterers to the owners on "true delivery of the cargo" has no reference to the poor condition of the cargo at the time of delivery.[17]

A charter provision that freight is to be considered earned "steamer or goods lost or not lost" has been held to mean that freight shall be considered earned notwithstanding any frustration of the voyage not caused by the act of the owner,[18] including frustration due to governmental embargo before the bill of lading containing such clause has been executed,[19] and when the vessel has not broken ground.[20] So, it has been held that a governmental requisition of a vessel under an order prohibiting the vessel from entering into time charters and requiring contemplated voyages to be approved by the government does not affect liability for freight under a charter containing such a provision

2. U.S.—The Harriman, C.C.Cal., 11 F.Cas.No.6,104, 5 Sawy. 611, affirmed 9 Wall. 161, 19 L.Ed. 629.
58 C.J. p. 198 note 65.

Charter by government see infra § 53.

Demurrage see infra §§ 203–223.

Freight for carriage of goods see infra §§ 160–170.

"Freight pending" means the amount which the charterers of a ship have agreed to pay to the shipowners for the prolonged use of the vessel after the time limited by the charter.—The Giles Loring, D.C.Me., 48 F. 463.—27 C.J. p. 904 note 46.

3. U.S.—The George J. Goulandris, D.C.Me., 36 F.Supp. 827.
58 C.J. p. 198 note 66.

4. U.S.—The Harriman, C.C.Cal., 11 F.Cas.No.6,104, 5 Sawy. 611, affirmed 9 Wall. 161, 19 L.Ed. 629.
58 C.J. p. 198 note 67.

5. U.S.—Burn Line v. U. S., etc., SS. Co., N.Y., 162 F. 298, 89 C.C.A. 278, certiorari denied 29 S.Ct. 689, 212 U.S. 580, 53 L.Ed. 659.
58 C.J. p. 199 note 68

6. Pa.—Tittermary v. Gardiner, 4 Yeates 157.

7. N.Y.—Burrill v. Cleeman, 17 Johns. 72.
58 C.J. p. 199 note 70.

8. U.S.—The Harriman, Cal., 9 Wall. 161, 19 L.Ed. 629.
58 C.J. p. 200 note 81.

9. U.S.—The Harriman, supra.

10. La.—Vance v. Clark, 1 La. 324.
58 C.J. p. 200 note 82.

11. La.—Vance v. Clark, supra.
58 C.J. p. 200 note 83.

12. U.S.—Banks v. Chas. Kurz Co., D.C.Pa., 69 F.Supp. 61, motion denied 69 F.Supp. 1017.
58 C.J. p. 199 note 73.

Capsizing of seaworthy vessel

Where lighters were seaworthy when delivered to charterer, and cause of capsizing was damage during charter period, and charterer did not explain the damage or show that damage was not due to charterer's fault, charterer to whom lighters were demised was liable to owners for charter hire.—Banks v. Chas. Kurz Co., supra.

13. U.S.—The Gazelle, Md., 9 S.Ct. 139, 128 U.S. 474, 32 L.Ed. 496.

14. La.—Vance v. Clark, 1 La. 324.

15. La.—Vance v. Clark, supra.

16. U.S.—Christie v. Davis Coal, etc., Co., D.C.N.Y., 95 F. 837, affirmed 110 F. 1006, 49 C.C.A. 170.
58 C.J. p. 199 note 79 [b]

17. N.Y.—Roberts v. Societa Anonima, 53 N.Y.Super. 424.
58 C.J. p. 199 note 79 [c].

18. U.S.—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, C.C.A.Cal., 133 F.2d 552, certiorari denied 63 S.Ct. 858, 318 U.S. 781, 87 L.Ed. 1148

19. U.S.—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, supra.

20. U.S.—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, supra.

executed after the date of such requisition and before the date possession of the vessel is taken by the government,[21] even though there are minor defects in the engines of the vessel.[22] An owner is not precluded from recovering freight for a voyage frustrated by the act of a government, under a charter exempting him from responsibility for "restraints of princes, rulers, and people," where the voyage is delayed by continued temporary restraints culminating in the frustrating act when the vessel is taken over by the government.[23]

Time charter. Where a vessel is hired for a specified time and the charter money is earned at the expiration of specified intervals, although the vessel is lost before the voyage is completed, the stipulated compensation, due before the time of loss, is recoverable,[24] but an installment falling due after the loss of the vessel cannot be collected.[25]

Voyage out and return. Where a vessel is chartered for a voyage out and home, for a gross sum, the outward and homeward voyages are one, and the vessel's return is a condition precedent to the owner's right to freight,[26] and, even if freight is to be paid at a monthly rate, the contract may be indivisible and the return of the vessel a condition precedent to payment of freight.[27] However, if two voyages, one outward and one homeward, are contemplated, and the vessel is lost on the latter, freight may be recovered for the outward voyage.[28]

b. Persons Liable

The charterer of a vessel is primarily liable for the freight money. One who arranges for the services of a vessel either as principal or as agent for an undisclosed principal is a party to the charter so as to be liable for charter hire.

The charterer of a vessel is primarily liable for the freight money.[29] One who arranges for the service of a vessel either as principal[30] or as agent for an undisclosed principal,[31] and not as agent for a disclosed principal,[32] is a party to the charter so as to be liable for charter hire. Where, in consideration of the assignment of the hire due on a charter party, the assignee agrees to pay a stated sum and the assignor agrees that if the sum shall exceed the money due by the charterers he will refund, the assignee assumes the obligations of the charterers to pay.[33] One who receives and sells the cargo under an agreement with the charterer is not liable for the freight money on the theory that the contracts among the parties are so closely related as to make him a charter principal.[34]

c. Retention or Restoration of Advance Freight

Ordinarily, freight which has been paid in advance is to be refunded if, from any cause not attributable to the shipper, the goods are not carried, unless there is a stipulation in the charter to the contrary.

Ordinarily, freight which has been paid in advance is to be refunded if, from any cause not attributable to the shipper, the goods are not carried,[35] unless there is a stipulation in the charter to the contrary,[36] but such a stipulation, since it

21. U S—Mitsubishi Shoji Kaisha, Limited, v. Societe Purfina Maritime, supra.

Estoppel

The owner was not estopped to claim freight for voyage frustrated by government which took possession of vessel, on theory that government had an interest in unpaid moneys after they are earned making frustration of voyage an act of the owner, where owner did not act as agent for government.—Mitsubishi Shoji Kaisha, Limited, v. Societe Purfina Maritime, supra.

22. U S—Mitsubishi Shoji Kaisha, Limited v Societe Purfina Maritime, supra.

Proximate cause of loss

Where charter party for vessel provided for prepayment of freight on completion of loading and telegraphic notice of signing of bill of lading, and voyage was frustrated by government and not by any defects in vessel's engines, act of government was proximate cause of loss of voyage, warranting recovery of freight —Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, supra.

Valves in need of grinding

The fact that engine valves of vessel needed grinding did not constitute "unseaworthiness" so as to preclude recovery of freight for voyage frustrated by government under clause providing that freight was to be considered earned "ship and/or cargo lost or not lost"—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, supra.

23. U.S—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, supra.

24. U.S.—Brett v. Zachrissen, D C N. Y., 4 F.Cas.No 1,845.
58 C J. p 199 note 71.

25. U.S.—Burn Line v. U. S, etc, SS Co, N Y, 162 F 298, 89 C C A. 278, certiorari denied 29 S.Ct 689, 212 U S 580, 53 L Ed. 659

26. N Y—Penoyer v. Hallett, 15 Johns. 332, 8 Am D. 239.
58 C J. p 201 note 86.

27. Mass—Coffin v. Storer, 5 Mass. 252, 4 Am D. 54.
58 C J p 201 note 87.

28. Mass—Coffin v. Storer, 5 Mass 252, 4 Am D. 54.

29. Ala—Wye Shipping Co v. Hunter, 100 So 475, 211 Ala. 326.
58 C.J. p 201 note 89.

30. U.S—Banks v. Chas. Kurz Co., D C.Pa., 69 F Supp. 61, motion denied 69 F.Supp. 1017.

31. U S.—Banks v. Chas. Kurz Co., supra.

32. U.S.—Banks v. Chas Kurz Co, supra.

33. N.Y—Susquehanna SS. Co. v. Andersen, 146 N.E. 381, 239 N.Y. 285.

34. U.S—Zarati S. S. Co. v. Park Bridge Corp., C C A.N Y., 154 F.2d 377.

35. U.S—The Kimball, Mass, 3 Wall 37, 18 L Ed. 50
58 C J. p 208 note 59.

Under English law, it appears that a payment of freight in advance cannot be recovered back, unless it is shown affirmatively that it was intended by the parties merely as a loan.—Chase v. Alliance Ins Co, 9 Allen (Mass) 311—58 C.J. p 208 note 63–p 209 note 68.

36. Mass—Benner v. Equitable Safety Ins. Co, 6 Allen 222.

is intended to control the usual rule of law, must be expressed in terms so unambiguous as to leave no doubt that such was the intention of the parties.[37]

Under a charter providing that, in the event of loss of use of the vessel exceeding a specified time, payment of hire should cease for the time lost, a charterer having paid for hire in advance is entitled to recover for loss of use of the vessel while stranded, on proof that loss of use exceeded the time specified,[38] but the charterer is entitled to a return of only the unearned portion of the moneys prepaid by him where the ship's engine breaks down because of a latent defect therein.[39] Under a charter provision "freight earned, retained and irrevocable, vessel lost or not lost" it has been held that the vessel can retain prepaid freight where it is forced by injuries from storm to return to port and a second departure is rendered impossible by an embargo laid against sailing vessels bound for a war zone.[40]

§ 43. —— Amount and Rate

a. In general
b. Time charter hire
c. Claims, deductions, and offsets by charterer

a. In General

The terms of the charter party control with respect to the amount or rate of freight to be paid by the charterer of a vessel where such amount or rate is stipulated therein.

The terms of the charter party control with respect to the amount or rate of freight to be paid by the charterer of a vessel where such amount or rate is stipulated therein.[41] Thus, freight may be fixed according to the weight or measure of the cargo shipped,[42] payable for the whole amount, although part is damaged or lost.[43] If a specified load is contracted for, the owner usually is entitled to the full freight even though through the act of the charterer less is carried.[44]

An owner may be entitled to recover from a charterer a reasonable amount, in addition to the stated charter freight, for the carriage of a deck cargo not provided for by the charter,[45] and where a ship, chartered to carry a specified cargo, is loaded with another cargo it has been held that a promise is implied on the part of the charterer to pay at least as much as he would have been obliged to pay for the cargo specified.[46] However, under particular circumstances, such as where by reason of a mistake on the part of both the owner and the charterer an amount of cargo in excess of that specified in the contract was loaded, and the vessel was detained because of the additional weight, it has been held that the owner cannot recover more than the stipulated amount.[47]

Pro rata freight. Where a charterer, on acceptance of his goods at an intermediate port instead of at the port of destination, is required to pay pro rata freight, the amount he has to pay is measured by the benefit he has received,[48] based on the proportion in rates of freight between the port of shipment and the ports of acceptance and destination.[49]

37. Mass.—Benner v. Equitable Safety Ins Co., supra.

38. U.S.—The Henry W. Card, D.C. N.Y., 51 F.Supp 380, affirmed, C.C A., Davison Chemical Corp. v. The Henry W. Card, 144 F.2d 705

39. U.S.—The Toledo, C.C.A.N.Y., 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

Reason for rule

The stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable in such case for any of the charter money and if he uses her he must pay for the use to the extent to which it goes—The Toledo, C.C.A.N.Y., 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

40. U.S.—Allanwilde Corp. v. Vacuum Oil Co., N.J., 39 S.Ct. 147, 248 U.S. 377, 63 L.Ed. 312, 3 A.L.R. 15, answers to certified questions conformed to 256 F. 987, 167 C.C.A. 663.

41. U.S.—Southern States Towing Lines v. Lee Transit Corp., D.C.N.Y., 51 F.Supp. 112, affirmed, C.C.A., 144 F.2d 101.
58 C.J. p. 201 note 92.

Change in rate

By agreement, as part of the charter party or in modification of it, the rate may be changed—U.S. v. Cargo of Lumber on The Springfield, C.C.A.N.Y., 7 F.2d 306—58 C.J. p. 203 note 5.

42. U.S.—The Geneva, D.C.Fla., 9 F.2d 942
58 C.J. p. 202 note 93.

The term "intaken" as used in a charter party providing for a certain rate of freight on about a stated number of tons of ore intaken has been construed as of the same meaning as the term "delivered."—The Frogner, D.C.S.C., 49 F. 876.

43. U.S.—One Thousand Bags of Sugar v. Harrison, 53 F. 828, 4 C.C.A. 34.
58 C.J. p. 202 note 94.

44. U.S.—The Addison E. Bullard, D.C.Fla., 252 F. 241, affirmed 258 F. 180, 169 C.C.A. 248.
58 C.J. p. 202 note 96.

45. U.S.—Patagonia S.S. Co. v. Gans S.S. Line, N.Y., 243 F. 532, 156 C.C.A. 230.
58 C.J. p. 203 note 98.

46. U.S.—American Metal Transp. Co. v. Rederiakties Dragor, D.C.N.Y., 293 F. 817.
58 C.J. p. 203 note 1.

47. U.S.—Shaw v. Folsom, D.C.N.Y., 38 F. 356, affirmed, C.C., 40 F. 511.

48. Mass.—Coffin v. Storer, 5 Mass. 252, 4 Am.D. 54.
58 C.J. p. 203 note 3.

49. Mass.—Coffin v. Storer, supra.

b. Time Charter Hire

(1) In general
(2) Under off-hire clause

(1) In General

Under a time charter, the time when hire begins or ends generally depends on the provisions of the charter relative thereto, although, in a charter for an indefinite period, the stipulated hire usually continues until the end of at least one complete trip.

Under a time charter, the time when hire begins[50] or ends[51] generally depends on the provisions of the charter relative thereto, although, in a charter for an indefinite period, the stipulated hire usually continues until the end of at least one complete trip.[52] In the absence of a charter provision for the cessation of hire under certain conditions or circumstances,[53] hire ordinarily runs continuously.[54] However, charter hire may not be payable for a period during which the vessel cannot be used by the charterer because of its seizure under private legal process,[55] and, as a rule, no hire is payable for the time during which the ship is put into condition to carry the cargo for which she is chartered,[56] or for the time the ship is delayed in commencing[57] or during[58] her service under the charter because of the failure of the owner to perform his charter obligations.

In accordance with charter provisions, the charterer may be held liable for time spent by the vessel in obedience to governmental orders,[59] or in saving life and property,[60] notwithstanding the Carriage of Goods by Sea Act.[61] Where the vessel is damaged through fault of the charterer the owner has been held entitled to hire until the ship is fully repaired and he again has use of his property,[62] and, under a charter at a certain rate per day until the vessel is returned in as good a condition as when received by the charterer, the owner has been held entitled to charter hire until the vessel is returned to him in good condition.[63] The charter party may stipulate that charter money is not to cease under certain circumstances.[64]

Overlap. Where a time charter contemplates a possible overlap, unless the market rate in payment of overtime is stipulated for, the owner will be entitled to the charter rate only.[65] Where the charterer had the right to set out on an overlapping voyage, but did not, the owner was held entitled to hire only to the date when the vessel could be legally redelivered.[66]

(2) Under Off-Hire Clause

A provision in a time charter to the effect that charter money shall not be payable for time lost by reason of the occurrence of a specified contingency or contingencies should be construed and given effect according to the intent of the parties.

A provision in a time charter to the effect that charter money shall not be payable for time lost by reason of the occurrence of a specified contingency or contingencies should be construed and given effect according to the intent of the parties,[67] and should not be enlarged by implication.[68] So it has been held that, under the terms of a breakdown clause, a vessel is not off-hire when she is able to combat whatever adverse weather she encounters;[69] or when detained by ice, where such

50. U.S.—North Atlantic Dredging Co v. McAllister Steamboat Co, N. Y, 202 F. 181, 120 C.C.A. 395.
58 C.J. p 203 note 6

51. U.S.—International Contracting Co v. Walsh, D.C.N.Y., 115 F. 851.
58 C.J. p 203 note 7.

52. N.Y.—Leach v Hughes, 131 N. Y.S. 570, 74 Misc 69.
58 C.J. p 204 note 8.

53. U.S.—Schoonmaker-Conners Co v. New York Cent R. Co, D.C.N.Y., 12 F.2d 314, affirmed, C.C.A., 12 F. 2d 317
58 C.J. p 204 note 9.

54. U.S.—U. S. v. Shea, Ct.Cl, 14 S Ct. 519, 152 U.S 178, 38 L.Ed 403
58 C.J. p 204 note 11.

55. U.S.—Clarke S. S. Co. v. Munson S. S. Line, D.C.N.Y., 59 F.2d 423, affirmed, C.C.A., 64 F.2d 1011.

56. U.S.—La Compania Bilbaina de Navegacion del Bilbao v. Spanish-American Light, etc., Co., N.Y., 13 S.Ct. 142, 146 U.S. 483, 36 L.Ed. 1054
58 C.J. p 205 note 23.

57. U.S.—Lombard SS Co v. Lanasa, etc., SS. Co, D.C.Md., 163 F. 433.
58 C.J. p 205 note 24.

58. U.S.—Hine v. New York, etc, Co, D.C.N.Y, 68 F. 920, affirmed 73 F. 852, 20 C.C.A. 63.

59. U.S.—Alcoa S. S. Co v. Elmhurst Contracting Co., D.C.N.Y., 61 F.Supp. 6.

60. U.S.—Alcoa S. S. Co v. Elmhurst Contracting Co, supra.

61. U.S.—Alcoa S. S Co v. Elmhurst Contracting Co., supra.

62. Wash.—Angeles Gravel & Supply Co v Crown Zellerbach Corp, 153 P.2d 482, 28 Wash.2d 428.

63. U.S.—Cox v. Banks, D.C.Pa., 50 F.Supp. 871.

64. U.S.—Chesbrough v Boston El. R. Co, C.C.A.Mass., 263 F. 267.
58 C.J. p 205 note 26

65. U.S.—Straits of Dover SS Co v. Munson, D.C.N.Y, 95 F. 690.
58 C.J. p 206 note 36.

66. U.S.—Britain SS. Co v. Munson SS. Line, C.C.A.N.Y, 31 F.2d 530, opinion conformed to, D.C., 34 F.2d 980, and certiorari denied 50 S.Ct. 29, 280 U.S. 574, 74 L.Ed. 625.
58 C.J. p 206 note 34.

67. U.S.—The Terne, C.C.A.N.Y., 64 F.2d 502, certiorari denied Munson S. S Line v. Bergen Lloyd, 54 S.Ct. 53, 290 U.S 635, 78 L.Ed 552, and Bergen Lloyd v Munson S. S. Line, 54 S.Ct 63, 290 U.S. 635, 78 L.Ed. 552.
58 C.J. p 204 note 12 [a].

68. U.S.—Clyde Commercial Steamships v U. S Shipping Co., D.C.N.Y., 152 F. 516.

69. U.S.—The Terne, C.C.A.N.Y, 64 F.2d 502, certiorari denied Munson S. S. Line v. Bergen Lloyd, 54 S.Ct. 53, 290 U.S 635, 78 L.Ed. 552, and Bergen Lloyd v. Munson S. S Line, 54 S.Ct. 63, 290 U.S. 635, 78 L.Ed. 552.

detention is not caused by an accident but merely by adverse weather conditions,[70] or when her rudder is injured by ice, but the vessel loses no time because of such injury or the repair thereof,[71] although she has to be helped in order to reach port.[72] Under a provision permitting the vessel to be laid up for overhauling free of hire at a time designated by the charterer, if the charterer lays up the vessel merely as a subterfuge to evade payment of hire, the charter money must be paid as if the vessel were actually in commission.[73]

Where the contingency stipulated in the charter occurs charter money is not payable for the time lost by reason thereof,[74] as where damages prevent the working of the vessel,[75] where the vessel is unfit for use because of any defect in her outfit,[76] where the vessel's machinery breaks down,[77] where there is a deficiency of men on the vessel,[78] or where the vessel is detained by reason of the restraint of princes, rulers and people.[79] The right to off-hire, otherwise existing, is not lost by non-user of the vessel.[80]

Time when hire ceases or resumes. If, under the terms of an off-hire clause, hire is to cease after a specified contingency has lasted a certain number of hours, the charterer cannot tack together several lesser periods to make the requisite period.[81] Where hire is to cease in the event of damage preventing the working of the vessel until she be again in an efficient state to resume her service, hire is payable from the moment when the repairs are completed, and the ship is in efficient condition for working.[82] In determining the period during which a vessel is off-hire, the service of the vessel in carrying cargo is to be distinguished from her service in loading or unloading it.[83]

c. Claims, Deductions, and Offsets by Charterer

In general, a charterer of a vessel is entitled to such deductions or remittances from the charter hire or freight money as are called for under the terms of the charter party or other agreement.

In general, a charterer of a vessel is entitled to such deductions or remittances from the charter hire or freight money as are called for under the terms of the charter party or other agreement,[84] express[85] or implied.[86] Accordingly, a charterer may be entitled to a deduction from freight money, or to an offset against such money, for any loss sustained by him because of a breach of duty or obligation on the part of the owner,[87] such as a

70. U S —The Terne, C.C.A.N.Y., 64 F.2d 502, certiorari denied Munson S. S. Line v. Bergen Lloyd, 54 S Ct. 53, 290 U S. 635, 78 L Ed 552, and Bergen Lloyd v. Munson S. S. Line, 54 S Ct. 63, 290 U.S. 635, 78 L Ed. 552.

"Accident"

Detention of steamship in ice before injury to her rudder was held not an "accident" within break-down clause of charter providing for off-hire, but was due to adverse weather conditions which brought in drift ice which held the steamship —The Terne, C C.A.N.Y., 64 F 2d 502, certiorari denied Munson S S Line v. Bergen Lloyd, 54 S.Ct. 53, 290 U.S. 635, 78 L Ed. 552, and Bergen Lloyd v. Munson S S Line, 54 S.Ct. 63, 290 U.S. 635, 78 L Ed. 552.

71. U.S —The Terne, C C.A.N.Y., 64 F.2d 502, certiorari denied Munson S. S. Line v. Bergen Lloyd, 54 S Ct 53, 290 U S 635, 78 L Ed 552, and Bergen Lloyd v. Munson S. S Line, 54 S.Ct. 63, 290 U.S. 635, 78 L Ed. 552.

72. U.S.—The Terne, C C.A.N Y., 64 F.2d 502, certiorari denied Munson S. S. Line v. Bergen Lloyd, 54 S.Ct. 53, 290 U.S. 635, 78 L Ed. 552, and Bergen Lloyd v Munson S S. Line, 54 S.Ct. 63, 290 U.S. 635, 78 L Ed 552.

73. U.S —Wessels v. The Ceres, N. Y., 72 F. 936, 19 C.C A. 243, certiorari denied 16 S Ct. 1199, 163 U.S. 706, 41 L Ed 319.

74. U S —The Toledo, D C N.Y., 30 F Supp. 93, affirmed, C C A , 122 F. 2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S. Ct 302, 314 U S 689, 86 L Ed. 551.

75. U.S.—Steamship Knutsford Co v. Barber, C C.A.N Y., 261 F 866, certiorari denied 40 S Ct. 396, 252 U.S 586, 64 L Ed. 729.

58 C.J. p 204 note 13.

76. U.S —Hills v. Leeds, D C Me, 149 F. 878, affirmed 158 F. 1020, 85 C C A 489

58 C J. p 205 note 14.

77. U S —The Toledo, D C.N Y , 30 F. Supp 93, affirmed, C C A., 122 F 2d 255, certiorari denied Isbrandtsen-Moller Co v The Toledo, 62 S.Ct. 302, 314 U S. 689, 86 L Ed. 551

58 C.J. p 205 note 16

78. U S.—Tweedie Trading Co. v. Emery, N Y, 154 F. 472, 84 C.C. A. 253.

58 C J. p 205 note 17.

Illness of captain

Under a time charter providing that in the event of loss of time from deficiency of men and stores, the payment of hire shall cease during the time lost, the inability of the master to attend to his duties because of sickness constitutes a constructive deficiency of officers, and for the time lost the charterer is released from obligation to pay for use of the ship.

—Northern SS. Co v. Earn-Line SS Co., D C N Y , 169 F. 708, reversed on other grounds 175 F. 529, 99 C.C.A. 151

58 C J. p 205 note 17 [b].

79. U.S —Glasgow Steam Shipping Co v Tweedie Trading Co , D C.N. Y., 154 F. 84.

58 C J. p 205 note 19.

80. U.S —The Yaye Maru, C.C A.Md., 274 F. 195, certiorari denied 42 S. Ct. 50, 257 U S. 638, 66 L Ed. 410.

81. U S —Steamship Knutsford Co, Ltd. v. Barber, C.C.A.N.Y., 261 F. 866, certiorari denied 40 S.Ct. 396, 252 U.S. 586, 64 L Ed. 729.

82. U S —Steamship Knutsford Co., Ltd v. Barber, supra.

83. U S —Lake Steam Shipping Co, Ltd. v Bacon, D C N.Y., 129 F. 819, affirmed 145 F 1022, 74 C.C A. 476.

58 C J. p 206 note 31.

84. U S.—Durkee v. Workman, C C. Pa , 8 F.Cas.No 4,194

58 C J. p 206 note 37.

85. U S —Wall v Ninety-Five Thousand Feet of Lumber, D.C N.Y., 26 F. 716

58 C.J. p 206 note 38.

86. U S.—The Canadia, Pa., 241 F. 233, 154 C C.A. 153.

58 C.J. p 206 note 39.

87. U S.—Scottish Nav Co v Munson S. S. Line, D C.N Y., 60 F.2d 101, affirmed, C.C A , 10 F 2d 708— Southern States Towing Lines v.

breach of duty which results in damage to,[88] or loss of,[89] cargo; or a breach of duty causing a delay in the vessel's arrival,[90] departure,[91] or progress,[92] or causing a delay in the delivery,[93] or discharge,[94] of cargo.

The charterer may be entitled to a deduction or offset for a loss suffered by him by reason of the refusal of the owner to load a full cargo,[95] or because of the owner's failure to transport all the goods contracted for.[96] Moreover, although under a cesser or off-hire clause the charterer may not deduct expenses incidental to the vessel's being off-hire,[97] under some time charter provisions, the charterer may be entitled to a deduction from charter hire for a period during which the vessel is off-hire.[98]

In order that a charterer may be entitled to an offset against charter hire or freight money his claim must not be too remote,[99] and, furthermore, a charterer will not be entitled to a deduction or offset for a loss suffered by him as a result of his own or his agents' acts,[1] as where a delay or abandonment of the voyage is caused by the charterer's own action.[2] So too, a charterer will not be entitled to a deduction by reason of a delay or abandonment of the voyage because of ordinary perils of navigation, of which the charterer has assumed the risk.[3]

Commissions. Under the terms of the charter party the charterer may be entitled to commission,[4] although the ship is lost before delivery.[5]

§ 44. —— Time and Manner of Payment

Generally the time and manner of payment of charter hire or other compensation depend on the provisions of the charter party properly construed.

Generally the time and manner of payment of charter hire or other compensation depend on the provisions of the charter party properly construed.[6] Freight is not due from the charterer until he has had full user of the vessel for the purpose for which he chartered it,[7] particularly where the charter party expressly so stipulates.[8]

Payment in advance. Under some charter party provisions, a charterer may be required to pay charter hire in advance,[9] notwithstanding that the owner obtains from the charterer a satisfactory guarantee that the charterer will duly perform his contract with respect to payment,[10] and where, under the circumstances, payment of charter hire in advance is vital to the contract, strict compliance with such a charter requirement is necessary.[11] However, the obligation of a charterer to pay freight in advance is not necessarily absolute under some charter provisions,[12] and, furthermore, the right to insist on a prepayment of charter hire may be waived by the owner.[13]

Lee Transit Corp., D.C.N.Y., 51 F. Supp. 112, affirmed, C.C.A., 144 F.2d 101.
58 C.J. p 207 note 40.

88. U.S.—Dickie v. Wilson, D.C.N.Y., 49 F. 390.
58 C.J. p 207 note 42.

89. U.S.—The Tangier, D.C.N.Y., 32 F. 230.
58 C.J. p 207 note 43.

90. U.S.—Actiesselskabet Albis v. Arrue, D.C.N.Y., 174 F. 296.
58 C.J. p 207 note 44.

91. U.S.—The Disa, D.C.N.Y., 153 F. 322—The Giulio, D.C.N.Y., 34 F. 909.

92. U.S.—Haggett v. Bowman, D.C. Cal., 11 F. Cas. No. 5,900, 1 Sawy. 4
58 C.J. p 207 note 46.

93. U.S.—Tweedie Trading Co. v. George D. Emery Co., N.Y., 154 F. 472, 84 C.C.A. 253.
N.Y.—Hagar v. Clark, 78 N.Y. 45.

94. U.S.—Munson S.S. Line v. Miramar S.S. Co., D.C.N.Y., 150 F. 427, affirmed 166 F. 722, 92 C.C.A. 412, modified on other grounds 167 F. 960, 93 C.C.A. 360, certiorari denied 29 S.Ct. 704, 214 U.S. 526, 53 L.Ed. 1068.
58 C.J. p 207 note 48.

95. U.S.—Vaccarezza v. 567,000 Gallons of Molasses, D.C.N.Y., 149 F. 792, affirmed 161 F. 543, 88 C.C.A. 485.

96. U.S.—Myers v. The Unionist, D.C.Va., 48 F. 315.
Philippine—Behn, Meyer & Co., Ltd. v. El Banco Espanol-Filipino, 11 Philippine 253.

97. U.S.—Northern S.S. Co. v. Earn Line S.S. Co., N.Y., 175 F. 529, 99 C.C.A. 151.
58 C.J. p 208 note 55.

98. U.S.—The Knud II, C.C.A.N.Y., 285 F. 142.
58 C.J. p 207 note 54.

99. U.S.—McKay v. Ennis, D.C.N.Y., 37 F. 229.

1. U.S.—The Santona, D.C.N.Y., 152 F. 516.
Error of member of crew
Claims paid by charterers for short delivery of cargo, arising from an error of the mate or some other member of the crew in tallying cargo, cannot be deducted from the hire—The Santona, supra.

2. U.S.—Scottish Nav. Co. v. Munson S.S. Line, D.C.N.Y., 60 F.2d 101, affirmed, C.C.A., 10 F.2d 708—Southern States Towing Lines v. Lee Transit Corp., D.C.N.Y., 51 F. Supp. 112, affirmed, C.C.A., 144 F.2d 101
58 C.J. p 207 note 52.

3. U.S.—Nicolini v. Lutcher, etc., Lumber Co., Tex., 108 F. 550, 47 C.C.A. 482.

4. U.S.—Gow v. William W. Brauer S.S. Co., D.C.N.Y., 113 F. 672
58 C.J. p 208 note 57.

5. U.S.—Portland Flouring Mills Co. v. Weir, D.C.Or., 95 F. 997
58 C.J. p 208 note 58.

6. U.S.—Confederation of Switzerland v. Compania De Vapores Arauco Panamena, S.A., D.C.N.Y., 40 F.Supp. 330
58 C.J. p 209 note 69.

7. U.S.—The Albert F. Paul, C.C.N.Y., 1 F.2d 16.

8. U.S.—The Albert F. Paul, supra.

9. U.S.—Confederation of Switzerland v. Compania De Vapores Arauco Panamena, S.A., D.C.N.Y., 40 F. Supp. 330.

10. U.S.—Confederation of Switzerland v. Compania De Vapores Arauco Panamena, S.A., supra.

11. U.S.—Confederation of Switzerland v. Compania De Vapores Arauco Panamena, S.A., supra.

12. U.S.—Hoadley v. The Lizzie, C.C.La., 39 F. 44.
58 C.J. p 208 note 62.

13. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp.,

§ 45. —— Lien

a. Existence and extent
b Waiver, loss, or estoppel

a. Existence and Extent

As a general rule a shipowner whose vessel is chartered has a lien on the goods shipped for the freight due in the absence of an agreement to the contrary, except where the vessel itself is demised without an express reservation of such a lien in the charter.

Where, under the provisions of a charter party, the vessel itself is demised and the charterer thereby becomes her owner during the term of the contract, the general owner usually has no lien on the cargo for freight or charter hire, in the absence of an express reservation of such a lien in the charter.[14] However, as a general rule in other cases, in the absence of an agreement providing otherwise, a shipowner whose vessel is chartered has a lien on the goods shipped for the freight due,[15] regardless of the issuance of a bill of lading.[16] Accordingly, where, under the terms of the charter party, the shipowner is a bailee for the purpose of transportation as a private carrier, he has been held entitled to a lien on the cargo for charter hire;[17] and, where he merely lets the use of the vessel and retains possession and control of the navigation thereof with the master acting as his agent and the mariners remaining in his employment, the goods of the charterer are liable to the owner of the ship to the full extent of the freight due on the charter party.[18]

While the shipowner may, in a proper case, be entitled to a lien on goods shipped by subfreighters,[19] unless the bill of lading is subject to the charter party,[20] the lien of the owner extends to the goods of each subfreighter only for the amount of freight due on his shipment under the bill of lading.[21] Where a shipper's freight has been prepaid to the charterer it has been held that there is nothing on which a lien can operate.[22] The parties may, by an express clause in the charter party, bind the cargo for the payment of the freight,[23] whether or not the charterer becomes the owner pro hac vice under the terms of the contract.[24] A lien so reserved in favor of a shipowner ordinarily has priority over rights subsequently created,[25] and a provision creating such a lien ordinarily is binding not only on the parties to the charter party but on third persons as well,[26] provided they have knowledge,[27] either actual or constructive,[28] of its terms. Thus, such a provision has been held binding on third persons who ship under a bill of lading expressly accepting the condition of the charter party[29] or who impliedly assent to it,[30] but not on a shipper who has paid the charterer in good faith without notice of the shipowner's rights,[31] or on a subcharterer who has

C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct. 83, 320 U.S. 774, 88 L.Ed. 464.

14. U.S.—Drinkwater v. The Spartan, D.C.Me., 7 F.Cas.No.4,085, 1 Ware 145
58 C.J. p. 209 note 73.
Charterer as owner pro hac vice see supra § 34.

15. U.S.—The Albert F. Paul, C.C.A. N.Y., 1 F.2d 16
58 C.J. p. 209 note 74.

Provision for penalty
Charter binding vessel, freight, tackle, and appurtenances, and merchandise, each to other in penal sum of estimated amount of charter, although in itself mere penalty, has been held evidence of creation of lien. —The Albert F. Paul, supra.

Time when lien attaches
Shipowner's lien for charter hire or freight ordinarily attaches at time when goods are laden on board vessel.—Blowers v. One Wire Rope Cable, D.C.N.Y., 19 F. 444—58 C.J. p. 211 note 92.

16. U.S.—The Albert F. Paul, C.C.A. N.Y., 1 F.2d 16

17. U.S.—The Robin Gray, D.C.N.Y., 53 F.2d 1037, reversed in part on other grounds, C.C.A., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566

18. U.S.—Certain Logs of Mahogany, C.C.Mass., 5 F.Cas.No.2,559, 2 Sumn. 589.
58 C.J. p. 210 note 77.

19. U.S.—The Karo, D.C.Pa., 29 F. 652.

20. U.S.—The Karo, supra.
58 C.J. p. 210 note 80

21. U.S.—Webb v. Anderson, C.C. Md., 29 F.Cas.No.17,318, Taney 504.
58 C.J. p. 210 note 81

22. U.S.—The Albert F. Paul, C.C.A. N.Y., 1 F.2d 16.

23. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603
58 C.J. p. 211 note 83

24. U.S.—American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co., Mass., 115 F. 669, 53 C.C.A. 301, rehearing denied 116 F. 857, 54 C.C.A. 207
58 C.J. p. 211 note 84.

25. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603.

Time when lien attaches
Lien in favor of shipowner for freight or charter hire expressly reserved in charter party attaches when cargo is put on board vessel—Stepanovit v. Gillibrand, etc., D.C. Conn., 22 F.Cas.No.13,360—58 C.J. p. 211 note 92

26. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603—The Solhaug, D.C.N.Y., 2 F.Supp. 294.

27. U.S.—The Solhaug, supra.

28. U.S.—The Solhaug, supra.

29. La.—Gomila v. Adams, 36 La. Ann. 221.

30. La.—Leisy v. Buyers, 36 La. Ann. 705.
58 C.J. p. 211 note 86.

31. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603—Actieselskabet Dampsk. Thorbjorn v. Harrison & Co., D.C.N.Y., 260 F. 287—American Steel Barge Co. v. Chesapeake & O. Coal Agency Co., Mass., 115 F. 669, 53 C.C.A. 301, rehearing denied 116 F. 857, 54 C.C.A. 207.
58 C.J. p. 211 note 87.

paid the hire under its charter to the original charterer.[32]

Where provision is made in the original charter party for a shipowner's lien for the charter money such lien may be asserted as against a cargo owner to the extent of the freights due from him,[33] subject to proper set-offs or deductions on his part,[34] and where, as authorized by the charter party, the charterer fixes the freight to be paid by cargo shipped under bills of lading or by a subcharter, the shipowner may enforce his lien on the cargo for the freight due under the respective bills of lading or subcharter,[35] but for no more.[36] The rights of a shipowner under a charter party expressly giving him a lien on subfreights for any amounts due under the charter party and prohibiting the transfer of the charterer's rights without the shipowner's consent have been held not to be in abeyance pending repossession of the vessel by him.[37]

Dead freight. By the terms of the charter party, the owner may stipulate for a lien for dead freight,[38] binding not only on the parties, but on third persons who ship under bills of lading expressly accepting this condition of the charter party,[39] or who impliedly assent thereto.[40] A lien for dead freight, expressly reserved by the charter party, attaches the moment cargo is put on board.[41]

b. Waiver, Loss, or Estoppel

A shipowner who would otherwise be entitled to a lien for charter hire or freight on goods shipped under the provisions of a charter party may waive or lose his right to such lien by acts or conduct as well as by contract.

A shipowner who would otherwise be entitled to a lien for charter hire or freight on goods shipped under the provisions of a charter party may waive or lose his right to such lien by acts or conduct as well as by contract.[42] The owner of a ship, of which the charterer is not the lessee but the freighter only, will be held to have waived his lien on the cargo for freight, without express words to that effect, when it can be fairly inferred that he meant to trust to the personal responsibility of the charterer,[43] or, in the absence of a stipulation expressly reserving a lien in his favor,[44] where there are stipulations in the charter party inconsistent with the exercise of the lien,[45] such as a stipulation calling for unconditional delivery of the cargo,[46] for payment after delivery,[47] or for payment at a time and place other than the time and place of delivery.[48]

The lien of the owner of a ship on its cargo for freight is favored by the courts,[49] and the acts or conduct of the shipowner must be sufficient to constitute a waiver of the lien on his part.[50] Unless the special agreement is absolutely inconsistent with the retention of the goods, the right to a lien exists,[51] particularly where the charter expressly pledges the vessel and the cargo to each other for the performance of the contract;[52] and even if, under the original charter party, the right to a lien

32. U.S.—Actieselskabet Dampsk Thorbjorn v. Harrison, D.C.N.Y., 260 F. 287.
58 C.J. p 211 note 88.

33. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603—The Solhaug, D.C.N.Y., 2 F.Supp. 294.

34. U.S.—The Solhaug, supra.

Deductions held proper

(1) Dispatch earned at point of shipment and point of destination in view of charterer's agreement in subcharter—The Solhaug, supra.

(2) Amount advanced to master at point of shipment for various purposes connected with crew—The Solhaug, supra.

Set-off held improper

U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A.N.Y., 62 F.2d 603.

35. U.S.—Jebsen v. A Cargo of Hemp, D.C.Mass., 228 F. 143—The Albert Dumois, D.C.N.Y., 54 F. 529.

36. U.S.—Jebsen v. A Cargo of Hemp, D.C.Mass., 228 F. 143.
58 C.J. p 211 note 90.

37. U.S.—U. S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.

38. La.—Gomila v. Adams, 36 La. Ann. 221.
58 C.J. p 212 note 96.

Basis of lien is directly related to vessel's services—California & Eastern S. S. Co. v. 138,000 Feet of Lumber, D.C.Md., 23 F.2d 95.

39. La.—Gomila v. Adams, 36 La. Ann. 221.

40. La.—Leisy v. Buyers, 36 La.Ann. 705.

41. U.S.—Stepanovit v. Gillibrand, etc., D.C.Conn., 22 F.Cas.No.13,360.

42. U.S.—Shaw v. Thompson, D.C.N.Y., 21 F.Cas.No.12,726, Olcott 144.
58 C.J. p 213 note 19.

Unconditional parting with possession of goods will result in loss of lien by shipowner.—Sears v. 4,885 Bags of Linseed, Mass., 1 Black 108, 17 L.Ed. 35—58 C.J. p 213 note 15.

43. U.S.—Raymond v. Tyson, Cal., 17 How. 53, 15 L.Ed. 47.
58 C.J. p 212 note 3.

44. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603.
58 C.J. p 213 note 7.

45. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, supra.
58 C.J. p 212 note 4.

46. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662

47. U.S.—The Bird of Paradise, supra.
58 C.J. p 212 note 6.

48. U.S.—Raymond v. Tyson, Cal., 17 How. 53, 15 L.Ed. 47.
58 C.J. p 213 note 8.

49. U.S.—The Kimball, Mass., 3 Wall. 37, 18 L.Ed. 50.

50. U.S.—Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A. N.Y., 62 F.2d 603.

51. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662.
58 C.J. p 213 note 10.

52. U.S.—The Kimball, Mass., 3 Wall. 37, 18 L.Ed. 50.
58 C.J. p 213 note 11.

may have been waived, where the parties have modified their contract so that time and place of payment have been changed to time and place of delivery, the owner will have his lien for the freight.[53]

The shipowner's lien for freight is not lost by the acceptance of a bill of exchange or promissory note for freight, if before delivery of the shipment, the bill or note is not met,[54] unless it is agreed between the parties that such payment, by bill or note, is actual payment.[55] In like manner, the shipowner's lien for freight on the goods of the charterer is not lost, although shipper and charterer have agreed that no freight shall be due,[56] even though the master of the ship has assented to such agreement.[57]

Estoppel. The shipowner, by his acts or conduct, may estop himself to assert a lien on the cargo,[58] as by issuing negotiable bills of lading falsely asserting the prepayment of freight.[59]

§ 46. Breach of Charter

Breach of the charter by the owner or master of the vessel is discussed infra § 47, breach by the charterer is discussed infra § 48, and the right of the charterer to a lien is discussed infra § 49.

Examine Pocket Parts for later cases.

§ 47. —— By Owner or Master

a. In general
b. Excuse of performance
c. Damages

a. In General

A breach of the charter by the owner or his agents will give the charterer a cause of action for damages against the owner, unless the charterer has suffered no actual damage, and it may also justify the charterer in repudiating or rescinding the charter.

A breach of the charter by the owner or his agents will give the charterer a cause of action for damages against the owner,[60] unless the charterer has suffered no actual damage,[61] and it may also justify the charterer in repudiating or rescinding the charter.[62] What constitutes a breach of the charter by the owner or his agents warranting recovery of damages by the charterer or a repudiation of the charter by him depends on the terms of the charter properly construed.[63] A breach of

53. Mass.—Howard v. Macondray, 7 Gray 516

54. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662—The Kimball, Mass., 3 Wall. 37, 18 L. Ed. 50.

55. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed 662—The Kimball, Mass., 3 Wall. 37, 18 L Ed. 50.

56. U.S.—Gracie v. Palmer, Pa., 8 Wheat. 605, 5 L.Ed 696.

57. U.S.—Gracie v. Palmer, supra.

58. U.S.—The Robin Gray, C.C.A.N.Y., 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.

No estoppel shown

U.S.—The Solhaug, D.C.N.Y., 2 F. Supp 294.

59. U.S.—The Robin Gray, C.C.A.N.Y., 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.

60. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct. 83, 320 U.S. 774, 88 L.Ed 464—The Atlanta, D.C.Ga., 82 F.Supp. 218.

58 C.J. p 213 note 20.

Charterer need not reject vessel in order to claim damages for owner's failure to clean and paint it as agreed.—Clarke S. S. Co. v. Munson S. S. Line, D.C.N.Y., 59 F.2d 423, affirmed, C.C.A., 64 F.2d 1011

Oral charters

Where owner orally agreed to charter vessels to charterer for a period which would enable charterer to perform several voyages, and thereafter charterer under protest signed written charters which limited the term to a single round voyage, charterer could maintain libels for breach of oral charters, since written charters were required to be treated as a proper attempt to mitigate damages resulting from breach of oral charters, and written charters were not a substitute for oral agreements which remained in effect to extent that they were not included in written charters.—U. S. Navigation Co. v. Black Diamond Lines, C.C.A.N.Y., 124 F.2d 508, certiorari denied Black Diamond Lines v. United States Navigation Co., 62 S.Ct. 805, 315 U.S. 816, 86 L.Ed. 1214.

61. U.S.—The Habil, D.C.Ala., 100 F. 120.

58 C.J. p 213 note 21.

62. U.S.—The Atlanta, D.C.Ga., 82 F.Supp. 218—The Nomad, D.C.N.J., 3 F.Supp. 535.

58 C.J. p 214 note 22.

63. U.S.—Atlantic Refining Co. v. U. S., D.C.Pa., 82 F.Supp. 201—Von Lingen v. Davidson, D.C.Md., 1 F. 178, reversed on other grounds, C. C.A., 4 F. 346, 5 Hughes 221, and affirmed 5 S.Ct 346, 113 U.S. 40, 28 L.Ed. 885.

58 C.J. p 214 note 23.

Where warranty is not incorporated in charter, charterer cannot recover damages for breach thereof even though charterer was induced to enter into agreement by fraud and even if warranty was omitted from agreement by mistake.—Gronvold v Suryan, D.C.Wash., 12 F.Supp. 429.

Facts held to constitute breach by owner or master

(1) Delivery of vessel with clutch not in proper working order.—The Nomad, D.C.N.J., 3 F.Supp. 535.

(2) Failure of vessel to carry specified weight.—The Atlanta, D.C.Ga., 82 F.Supp 218—Wood v Sewall, D.C.Pa., 128 F. 141, affirmed 135 F. 12, 67 C.C.A. 580.

(3) Other facts held to constitute breach.—The Innerton, C.C.A.Tex., 141 F.2d 931—Polar Steamship Corp v Inland Overseas Steamship Corp., C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct 83, 320 U.S. 774, 88 L.Ed 464—The Atlanta, D.C.Ga., 82 F. Supp. 218—58 C.J. p 214 note 23 [c].

Breach held not shown

U.S.—Lucayan Transports v. McCormick Shipping Corp., C.A.Fla., 188 F.2d 202—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, C.C.A.Cal., 133 F.2d 552, certiorari denied 63 S.Ct. 858, 318 U.S. 781, 87 L.Ed. 1148—Alcoa S. S. Co. v. Elmhurst Contracting Co., D.C.N.Y., 61 F.Supp. 6—Leary v. City of New York, D.C.N.Y., 52 F.Supp. 643.

58 C.J. p 175 note 75, p 214 note 23.

the owner or master may be waived by the charterer,[64] as by a subsequent agreement of the parties,[65] or the charterer may be estopped to assert a breach of the owner or master.[66]

b. Excuse of Performance

Ordinarily, performance of the charter by the owner will not be excused by the occurrence of unforeseen difficulties but it may be excused where it is made impossible by operation of law, or by the occurrence of a contingency specified in the charter, or by reason of an act by the charterer or his failure to act.

Ordinarily, unforeseen difficulties will not excuse performance of the charter by the owner,[67] although performance may be excused where made impossible by law;[68] an act by the charterer or his failure to act may also excuse the failure of the master or owner to perform the obligations of the charter party.[69] Moreover, performance by the owner may be excused under the terms of a charter provision excusing performance on his part by reason of the occurrence of a specified contingency,[70] and, where a charter specifies certain contingencies which will excuse performance on the part of the owner, such provision will be given effect according to the intent of the parties.[71] The mere happening of an excepted peril before the time of the charter begins to run does not of itself terminate the obligation of the shipowner,[72] but it is the result of such happening that is the effective cause.[73]

"Restraint of princes, rulers, and people" clause or similar clause. In determining whether an owner is excused from performance under a charter containing a "restraint of princes, rulers, and people" clause, or a similar clause, the clause should be construed and given effect according to the intent of the parties,[74] and, under such a clause, in order that the owner may be excused from performance the restraint must emanate from recognized authority.[75] The restraint need not be by physical force,[76] but it must be actual,[77] and not merely patent or probable,[78] although a reasonable apprehension of capture or destruction of the ship or cargo will justify nonperformance by the owner,[79] so that where the degree of danger is beyond the rumored or fanciful and is actual and substantial, performance by the owner will be excused.[80] Under such a clause, the owner may not be required to carry contraband.[81] The arrest of the vessel under private legal process is not within the meaning of such a clause.[82]

64. U.S.—Clarke S. S. Co v. Munson S S Line, D C N.Y, 59 F 2d 423, affirmed, C.C A, 64 F 2d 1011—Labbee v Travenot SS. Co., C C.A. N.Y., 37 F 2d 52, certiorari denied Labbee v Thavenot S S. Co, 50 S Ct. 408, 281 U.S 754, 74 L Ed. 1164
58 C J. p 216 note 30

65. U S.—Clarke S. S Co. v. Munson S S Line, D C N Y., 59 F 2d 423, affirmed, C C A., 64 F 2d 1011.

66. U S.—The Laurent Meeus, D C. Cal., 43 F Supp 807, modified on other grounds, C C A, Mitsubishi Shoji Kaisha, Limited v Societe Purfina Maritime, 133 F.2d 552, certiorari denied 63 S Ct 858, 318 U S 781, 87 L Ed 1148
58 C J p 216 note 31

67. U S—The B. L. Harriman, Cal., 9 Wall 161, 19 L Ed 629.
58 C.J. p 215 note 27.

68. U.S.—The Isle of Mull, C C.A. Md, 278 F. 131, certiorari denied Gans SS. Line v. Isles Steam Shipping Co, 42 S Ct. 270, 257 U S 662, 66 L Ed 423
58 C J. p 215 note 28.

Performance held not excused
U.S.—The Innerton, C.C A Tex., 141 F.2d 931.

69. U.S.—The John A Briggs, Pa, 120 F. 6, 57 C.C A. 26.
58 C.J. p 216 note 29.

70. U.S—The George J. Goulandris, D.C Me., 36 F.Supp 827

71. U S.—U S v Standard Oil Co of Cal., C C A Cal, 156 F 2d 312—Mitsubishi Shoji Kaisha Limited v. Societe Purfina Maritime, C C A Cal, 133 F.2d 552, certiorari denied 63 S Ct 858, 318 U.S. 781, 87 L Ed. 1148—The Vale Royal, D.C Md., 51 F Supp 412
58 C J. p 215 note 24.

72. Del—Freiberg Lumber Co. v. Rosalie Mahoney SS. Corp, 111 A. 279, 31 Del. 44.

73. Del.—Freiberg Lumber Co. v. Rosalie Mahoney SS Corp., supra.
58 C J. p 215 note 26

74. U S.—The George J. Goulandris, D.C Me, 36 F.Supp 827
58 C J. p 215 note 24 [b].

75. U S.—The Athonasios, D C.N Y, 228 F 558
58 C.J p 215 note 24 [b] (2).

76. U.S.—The Athonasios, supra.
58 C.J. p 215 note 24 [b] (5).

77. U.S.—The Athonasios, supra.

78. U.S.—The Athonasios, supra.

79. U.S—The George J. Goulandris, D.C.Me., 36 F.Supp. 827.

80. U.S.—The George J Goulandris, supra.

Circumstances justifying reasonable apprehension
Whether apprehension of attack on a ship in time of war is to be considered reasonable and therefore a justification for not performing a contract of carriage depends on circumstances, especially on the degree of danger shown to be present, and shipowners and captains with protective clauses in contracts are not obliged to gamble with death to themselves or their ships, even if the chances are considerably in their favor, and if a real danger is present, apprehension of it cannot be said to be "unreasonable" because many vessels voluntarily take the risk and get through—The George J. Goulandris, supra.

81. U S.—The George J. Goulandris, supra.

Master's judgment
In determining rights and liabilities of parties to charter party on refusal of ship loaded with contraband to proceed following a declaration of war, it is immaterial whether captain used his sole judgment or whether he first used his own judgment in informing ship's agents he would not sign bills of lading and was afterwards supported by his owners—The George J. Goulandris, supra.

82. U.S.—Clarke S S. Co. v. Munson S S Line, D.C.N.Y., 59 F 2d 423, affirmed, C.C.A, 64 F.2d 1011.

c. Damages

In accordance with the rules applicable with respect to damages for breach of contract generally, the charterer, on breach of the charter party by the owner, is entitled to recover such damages as will, as nearly as possible, make him whole, or compensate him for the loss sustained because of the breach.

In accordance with the rules applicable with respect to damages for breach of contract generally, the charterer, on breach of the charter party by the owner, is entitled to recover such damages as will, as nearly as possible, make him whole,[83] or compensate him for the loss sustained because of the breach.[84] The charterer is entitled to recover the damages which arise naturally and directly from the breach,[85] or which may fairly be presumed to have been within the contemplation of the parties when the contract was made[86] Such damages should be assessed, as near as may be, on the basis of what the charterer's situation would have been had the terms of the charter party been carried out by the owner,[87] and the cargo delivered as agreed on.[88]

In allowing damages to the charterer, the court is not bound by any fixed or precise measure,[89] since the measure of damages recoverable by the charterer varies in accordance with the particular terms of the charter involved and the facts and circumstances of the case.[90] Thus, where recovery is sought because of the failure of the charterer to procure the transportation which he has contracted for, the measure of damages, if other transportation is obtainable, ordinarily is the difference between the cost of such transportation and the charter hire,[91] subject to the limitation that the substituted means of transportation shall be reasonable and not extravagant,[92] and, if there is a market price for such transportation, the measure of damages is the difference between the market price and the charter hire.[93]

Where no other transportation is obtainable by the exercise of reasonable diligence the charterer has been held entitled to recover what he could have got for the vessel had she been delivered,[94] or the difference in value of the cargo at the shipping point and the place of destination, less the cost of transportation,[95] or the reasonable profits of the voyage under the circumstances,[96] or the net profits or earnings which he would have made were it not for the breach,[97] provided that such profits are

83. U.S.—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., C.C.A.Fla., 96 F.2d 233.

Interest

Where the allowance of interest on unliquidated claims is discretionary with court or jury, whether or not it is allowed will depend on the circumstances of each case—Grace v. Luckenbach SS Co., D.C.Va., 258 F. 19, affirmed, C.C.A., 267 F. 676, certiorari denied 41 S.Ct. 14, 254 U.S. 644, 65 L.Ed. 454—58 C.J. p. 220 note 63.

84. U.S.—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., C.C.A.Fla., 96 F.2d 233.

85. U.S.—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., supra—The Maurice R. Shaw, D.C.Me., 46 F.Supp. 767.
58 C.J. p. 216 note 34.

Although charterer has cancelled charter party, damage incurred because of owner's breach thereof may be recovered—The Elmac, D.C.N.Y., 285 F. 665.

86. U.S.—Wessels v. The Ceres, N.Y., 72 F. 936, 939, 19 C.C.A. 243
58 C.J. p. 217 note 35.

Damages held not within parties' contemplation

U.S.—Aktieselskabet Stavangeren v. Hubbard-Zemurray S.S. Co., La., 250 F. 67, 162 C.C.A. 239, certiorari denied Hubbard-Zemurray S.S. Co. v. Aktieselskabet Stavangeren, 39 S.Ct. 6, 248 U.S. 558, 63 L.Ed. 420.

87. U.S.—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., C.C.A.Fla., 96 F.2d 233—The Henry W. Cramp, C.C.A.Pa., 20 F.2d 320, certiorari denied McDonald v. Rosasco, 48 S.Ct. 120, 275 U.S. 561, 72 L.Ed. 427

88. U.S.—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., C.C.A.Fla., 96 F.2d 233.

89. U.S.—Putnam Lumber Co. v. Ashcraft-Wilkinson Co., supra.

90. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct. 83, 320 U.S. 774, 88 L.Ed. 464—Aaby v. States Marine Corp., D.C.N.Y., 80 F.Supp. 328, affirmed, C.A., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed. 1376
58 C.J. p. 218 note 36.

91. U.S.—Sanders v. Munson, N.Y., 74 F. 649, 20 C.C.A. 581.
58 C.J. p. 219 note 37.

Pleasure craft

The measure of damages for the breach of a charter for a yacht is the extra expense of another vessel with the incidental expense of transfer from one to the other.—The Eros, N.Y., 251 F. 45, 163 C.C.A. 295, certiorari denied 38 S.Ct. 578, 247 U.S. 509, 62 L.Ed. 1242

92. U.S.—The Oregon, Ohio, 55 F. 666, 5 C.C.A. 229.
58 C.J. p. 219 note 38.

93. U.S.—The Oregon, supra.
58 C.J. p. 219 note 39.

94. U.S.—Gans S.S. Line v. Wilhelmsen, C.C.A.N.Y., 275 F. 254, certiorari denied 42 S.Ct. 97, 257 U.S. 655, 66 L.Ed. 419.
58 C.J. p. 219 note 41.

95. U.S.—The Innerton, C.C.A.Tex., 141 F.2d 931.
58 C.J. p. 219 note 42.

Sale on rising price level

Since damages for breach of charter party are based on difference between market value of merchandise at port of destination and market value at port of shipment, less transportation charges, where cargo, which was not shipped because of breach of charter party, was ultimately sold on domestic market on a rising price level, no loss could be attributable to any delay in marketing the cargo occasioned by breach.—The Innerton, supra.

96. U.S.—The Ada, D.C.N.Y., 239 F. 363, reversed on other grounds 250 F. 194, 162 C.C.A. 330.
58 C.J. p. 219 note 40.

97. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct. 83, 320 U.S. 774, 88 L.Ed. 464

Charterer's finances preventing other transportation

The text rule is applicable even though the fact that charterer was unable to obtain another vessel may have been due to his financial condition, of which the owner had knowledge at time charter party was exe-

susceptible of accurate estimation,[98] and the evidence with respect thereto is conclusive.[99] On the other hand, the charterer is not entitled to profits which are precluded by operation of law rather than by the failure of the owner to perform any duty imposed on him by the charter party.[1]

Duty to minimize damages. On breach of the charter party by the owner, it is the charterer's duty to use reasonable diligence to reduce his damage.[2] Accordingly, if by the exercise of reasonable diligence the charterer can procure another vessel in size, speed, and general qualities like that chartered, at a reasonable hire for the term of the voyage, it is his duty to do so.[3]

Damages due to act of charterer. The charterer cannot recover damages which arise because of his own voluntary act,[4] imprudence,[5] or inactivity.[6]

Remote or speculative damages. The charterer cannot recover damages which are speculative or uncertain,[7] or remote.[8]

Penalties or liquidated damages; nominal damages. In accordance with charter party provisions the owner may be bound to a penalty for a breach of the agreement on his part,[9] and although only damages actually suffered by the charterer because of the owner's breach may be recovered by him,[10] the actual damages suffered may be recovered even if they are in excess of the penal sum.[11] The charterer may recover the sum named in the charter if such sum may be regarded as liquidated damages.[12]

In the absence of evidence of actual damage for which recovery may be had, the charterer ordinarily can recover only nominal damages on breach of the charter party by the owner,[13] and this is true even where the charter binds the parties to a penalty for its breach.[14]

§ 48. —— By Charterer

a. In general
b. Damages

a. In General

The question of whether there has been a breach of the charter by the charterer depends primarily on the terms of the charter as properly construed.

The question of whether there has been a breach of the charter by the charterer depends primarily on the terms of the charter as properly construed.[15] In the absence of a stipulation providing

cuted.—Polar Steamship Corp v. Inland Overseas Steamship Corp, supra.

98. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp, supra.

99. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., supra.

1. U S—The Innerton, C.C.A.Tex., 141 F.2d 931.

2. U S—The Henry W Cramp, C.C. A.Pa, 20 F.2d 320, certiorari denied McDonald v Rosasco, 48 S.Ct. 120, 275 U S 561, 72 L Ed. 427.
58 C J. p 219 note 46.

3. U.S—Pendleton v Pearce, C.C.A. N.Y., 10 F.2d 692.
58 C.J. p 219 note 47.

4. U.S—The Quarrington Court, C. C.A.N Y., 122 F 2d 266.
58 C J. p 220 note 48.

5. U S—Sanders v Munson, N Y., 74 F. 649, 20 C C.A. 581.
58 C J. p 220 note 49

6. U S.—Sanders v. Munson, supra.
58 C.J. p 220 note 50.

7. U S—Polar Steamship Corp. v. Inland Steamship Corp., C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct. 83, 320 U.S. 774, 88 L.Ed. 464.
58 C.J. p 220 note 51.

Future profits

In determining damages recoverable for owner's breach of charter, future profits to be derived by charterer in engaging in given trade were too uncertain to furnish basis for an award, where there was no established business and no contracts on which such profits could be based, and the boat was small vessel unsuited for such trade and not in position to compete for certain types of cargoes carried by regular lines.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., supra.

8. Philippine.—Behn Meyer & Co, Ltd. v El Banco Español-Filipino, 11 Philippine 253.
58 C.J. p 220 note 52.

9. U S.—Coronet Phosphate Co. v. U S. Shipping Co., D.C.N.Y., 260 F. 846.
58 C.J. p 220 note 56.

10. U.S.—Chadwick v. The Adelaide, D.C.Cal., 5 F.Cas No 2,571.

11. U S—Aktieselskabet Korn-og Foderstof Kompagniet v Rederiaktiebolaget Atlanten, D.C.N.Y., 250 F. 935, 163 C C.A. 185, Ann Cas. 1918E 491, affirmed 40 S Ct. 332, 252 U S. 313, 64 L.Ed. 586.
58 C.J. p 220 note 58.

12. U S—Nielson v. Read, D.C.Pa., 12 F. 441.
58 C.J. p 220 note 60.

13. U S.—The A. Denicke, Va., 138 F. 645, 71 C.C.A. 95.

14. U S—Chadwick v. The Adelaide, D.C Cal, 5 F.Cas.No.2,571.

15. U S—Park S. S. Co. v. Cities Service Oil Co, C.A.N.Y., 188 F.2d 804, certiorari denied Cities Service Oil Co. v. Park S S Co, 72 S.Ct. 87, 342 U S 862, 96 L Ed. ——.
58 C.J p 220 note 66.
Construction and operation of charters generally see supra § 32.

Although charter is invalid, the charterer may by subsequent negotiation be liable as on new contract to reimburse the shipowner for time spent and expenses incurred in attempting performance—Wilson v. Leroy, C.C Va., 30 F Cas.No 17,817, 1 Brock. 447.

Safe place for discharge of cargo

In clause of charter party requiring charterer to procure safe "place" for discharge of cargo, quoted word meant spot selected to drop anchor plus area over which tanker might swing on tide and charterer's duty was not fulfilled merely by selecting area containing both safe and unsafe berths since clause required charterer to select safe berth in such area—Park S. S Co. v. Cities Service Oil Co., C.A N Y., 188 F 2d 804, certiorari denied Cities Service Oil Co. v. Park S. S Co, 72 S Ct. 87, 342 U.S. 862, 96 L Ed. ——.

Repair of engine

(1) Where charter party provided that chartered vessel should be seaworthy and in good condition as far as due diligence could make it and that charterer should keep vessel in good condition except that he should not be responsible for reasonable

otherwise, where a charterer voluntarily enters into a charter party whereby he makes a positive agreement to do a lawful act he will not be absolved from liability for his failure to perform his part of the undertaking because of a subsequent impossibility of performance caused by an act of God,[16] or by an unavoidable accident,[17] and, where performance is possible and lawful, mere difficulty[18] or improbability[19] of accomplishing the undertaking will not ordinarily excuse performance on his part.

Where the charter party specifies certain contingencies which will excuse performance on the part of the charterer, such provision will be given effect according to the intent of the parties,[20] and performance by the charterer usually will not be excused, under such a provision, unless the occurrence of the contingency specified renders performance on his part impossible in a practical sense.[21] Thus, it is generally considered insufficient to excuse performance by the charterer that the happening of the contingency specified in the charter adds materially to the difficulties of the charterer,[22] or renders performance by him unprofitable.[23]

In the absence of a waiver by the owner of a breach on the part of the charterer of the terms of the charter party,[24] or acquiescence on the part of the owner in the charterer's default,[25] on a breach of agreement by the charterer, the shipowner ordinarily has an action for damages[26] and may be justified in refusing further compliance with the terms of the charter.[27] The owner's election to declare the breach or waive it is final.[28]

Right of withdrawal under charter. By the terms of the charter, the owner may have the right to withdraw the vessel for nonpayment of the charter hire,[29] and the charterer cannot deprive him of his right by any tender of the hire in arrear,[30] but, if there is any cargo on board, the owner cannot withdraw the vessel until the cargo is relanded, if the vessel is at the loading port,[31] or until it is discharged, if she is at sea or at destination.[32] A waiver by the owner of prompt payment of the

wear and tear, or for any repairs or damage caused by any latent defect, charterer was not liable for engine's breakdown due to a worn and defective condition not discovered until engine was taken down—The Maurice R Shaw, D C Me, 46 F.Supp. 767.

(2) Failure of charterer to disassemble generator and carry out elaborate inspection to detect dislocated spacer piece in armature which ultimately grounded generator at sea and physically damaged it requiring charterer to incur towage expenses was not lack of due diligence to discover defect constituting breach of the charter—Atlantic Refining Co v. U. S., D C.Pa., 82 F.Supp 201.

Contract to tow barge to pier

Subcharterer's bailment contract engaging charterer to tow barge to pier was properly and entirely performed when charterer's tug left barge safely moored at pier—The Reno, D.C.N.Y., 54 F 2d 682.

Charters held breached

U.S—U. S v. The Helen, C C.A N.Y., 164 F 2d 111—The Laurent Meeus, D.C.Cal, 43 F.Supp. 807, modified on other grounds, C C A., Mitsubushi Shoji Kaisha, Limited v Societe Purfina Maritime, 133 F 2d 552, certiorari denied 63 S Ct. 858, 318 U S 781, 87 L.Ed. 1148

58 C.J p 220 note 66 [a].

Anticipatory breach held shown

U S.—Smith v. Susquehanna SS. Co., D.C Md., 282 F. 881.

58 C.J. p 220 note 66 [d].

16. N.Y.—James Hughes, Inc, v. Browning, Wells & Co., 289 N.Y.S. 903, 160 Misc 214.

17. N Y—James Hughes, Inc., v. Browning, Wells & Co., supra.

18. U S.—Furness v. Muller, D.C Md, 232 F. 186

58 C.J p 221 note 67.

19. U S.—Det Forenede Dampskibs-Selskab Aktieselkab v. C. F & G. W Eddy, Inc., D C Mass, 293 F. 82.

20. U.S.—The Vale Royal, D C.Md, 51 F Supp 412.

58 C J. p 221 note 69.

21. U S—The Themis, D C N.Y, 244 F. 545, modified on other grounds, C C A, 275 F. 254, certiorari denied 42 S.Ct 97, 257 U.S. 655, 66 L Ed 419

58 C J p 221 note 70.

22. U S.—Hellenic Transport SS. Co. v McNeil, D C.Md, 273 F. 290.

58 C J. p 222 note 71.

23. U.S—The Themis, D C N.Y., 244 F 545, modified on other grounds, C C A., 275 F. 254, certiorari denied 42 S Ct. 97, 257 U.S. 655, 66 L Ed. 419.

With possible exception of strike provision, fact that performance by charterer is rendered unprofitable by happening of contingency specified in charter will not excuse performance on his part—The Themis, supra—

58 C.J. p 222 note 72.

24. U.S—Confederation of Switzerland v Compania De Vapores Arauco Panamena, S. A., D C N.C., 40 F. Supp. 330.

58 C.J p 222 note 77.

No waiver shown

U S—Confederation of Switzerland v. Compania De Vapores Arauco Panamena, S A, supra.

58 C.J. p 222 note 77 [b].

25. La.—Orr v. Wilson, 20 So. 724, 48 La Ann 1313.

Use of chartered vessel by owner, where vessel has been refused or abandoned by charterer, to reduce damage is not an acquiescence in charterer's default, defeating owner's right to recovery therefor.—Orr v. Wilson, supra—58 C J. p 222 note 78

26. U S—Wilhelmsen v Tweedie Trading Co, D C.N Y, 149 F 928.

58 C.J. p 222 note 75.

27. U.S—Eastern Transp. Co. v. East Carolina Lumber Co., D.C Pa., 262 F. 195.

58 C.J. p 222 note 76

28. U S.—Eastern Transp. Co. v. East Carolina Lumber Co, supra.

58 C.J. p 222 note 79.

29. U.S—Confederation of Switzerland v Compania De Vapores Arauco Panamena, S. A, D C N Y., 40 F. Supp. 330

58 C J p 222 note 80.

Effective date of notice

The time when notice of withdrawal of the vessel given by the owner takes effect depends on the facts and circumstances of the particular case—Confederation of Switzerland v Compania De Vapores Arauco Panamena, S. A., supra.

30. U.S.—Confederation of Switzerland v. Compania De Vapores Arauco Panamena, S A., supra—Luckenbach v. Pierson, N Y., 229 F. 130, 143 C C.A. 406.

31. U.S.—Luckenbach v. Pierson, supra.

32. U S—Luckenbach v. Pierson, supra.

hire due will not waive prompt payment of hire to become due, in so far as the owner's right to withdraw the vessel for nonpayment of hire is concerned,[33] and the mere payment of the charter hire past due will not reinstate a vessel withdrawn for the default, in the absence of any evidence that the parties intend thereby to reinstate her.[34] However, where the owner has given notice of withdrawal of the vessel he may, by his conduct, waive the effect of such notice.[35]

b. Damages

The measure of damages for a total breach of the charter party by the charterer, consisting in his failure to furnish a cargo or refusal of the vessel, is the net amount the vessel would have earned, less the net amount earned or less the net amount that might have been earned through the exercise of reasonable diligence. Damages recoverable for retention of the vessel after the expiration of the charter may be measured by the current rate of hire, the best going rate from the place of redelivery, or the rate stipulated for in the charter as liquidated damages.

The measure of damages for a total breach of the charter party by the charterer, consisting in his failure to furnish a cargo or refusal of the vessel, is the net amount the vessel would have earned,[36] less the net amount earned[37] or less the net amount that might have been earned, through the exercise of reasonable diligence, during the time required for performance,[38] or for making the voyage,[39] under the charter party. In estimating the damages recoverable by the owner, approximate accuracy usually is sufficient;[40] and, in the case of uncertainty and difficulty in determining the exact loss, it should fall as far as possible on the charterer.[41]

Equitable circumstances may be shown in mitigation of damages.[42] It is the duty of the owner or master in mitigation of the damages to secure another cargo by the exercise of reasonable diligence,[43] or to lease or use the vessel himself, if that can be done in the exercise of reasonable diligence,[44] but he is not obliged to go to another port for cargo,[45] to accept another cargo from the charterer on other terms than payment in advance, as under the charter,[46] or to treat an anticipatory breach as such.[47] Where the master does not show on what terms he has engaged with other parties, it has been held that he can recover only his primage and the excess of the freight in the charter party over the rates current when the contract was broken.[48] Should the owner sell the vessel before the expiration of the charter, he cannot recover for the rental of the vessel after the sale.[49]

Penalties. Where the charter binds the parties to a penalty for its breach, only damages actually suffered may be recovered.[50]

Breach not amounting to total breach. For the breach by the charterer of various provisions of the charter party, not amounting to a total breach, various measures of damage have been held to apply, and various items of damage have been held recoverable.[51] The measure of damages for dead freight is the gross freight on the cargo not shipped, less any expenses saved by the vessel because of not carrying it,[52] or the difference between the net freight for a full cargo of the goods contracted for, and what would have been netted by any other reasonable cargo which by due diligence could have been obtained.[53] Where goods are offered by a third person to make up the deficiency at reduced prices, which are current prices, it has been held that the master of the vessel must receive them and

33. U S—Marine Transp. Co v Shawmut SS. Co, D.C Mass, 287 F. 547.

34. U S—Marine Transp. Co. v. Shawmut SS Co, supra.

35. U S—Luckenbach v Pierson, N. Y, 229 F 130, 143 C C A. 406.
58 C J p 223 note 90

36. U S—Massari v Forest Lumber Co, D C Fla, 290 F. 470.
58 C J p 223 note 93

37. U.S—United Transp Co v Berwind-White Coal-Min Co, D.C N Y, 13 F 2d 282, affirmed, C C A., 13 F.2d 281.
58 C.J. p 223 note 94.

38. U S.—Hildebrand v Geneva Mill Co., D C.Ala., 32 F 2d 343—Smith v. Susquehanna SS. Co., D.C Md., 282 F. 881.

39. U.S.—Leblond v. McNear, D.C Cal, 104 F. 826, affirmed 123 F. 384, 61 C.C A. 564.
58 C J. p 223 note 96.

40. U.S.—Venus Shipping Co. v. Wilson, N.Y, 152 F. 170, 81 C C A. 368.
58 C J. p 223 notes 97, 98

41. U.S—Thebideau v. Cairns, D.C. Me, 171 F 233.

42. U S—Hall v. Hurlbut, C.C Md, 11 F.Cas No 5,936, Taney 589.
58 C J. p 224 note 1

43. Ala—Murrell v. Whiting, 32 Ala. 54
58 C J. p 224 note 2.

44. U S—William H Beard Dredging Co v Hughes, N.Y, 121 F. 808, 58 C C.A. 192.

45. N.Y.—Stone v. Woodruff, 28 Hun 534.
58 C.J. p 224 note 4.

46. U S—Steger v. Orth, N Y, 258 F. 619, 170 C.C.A 73, certiorari denied 40 S Ct. 11, 250 U.S. 663, 63 L Ed. 1196.

47. U S—Cornwall v Moore, D C. Cal, 132 F. 868, affirmed 144 F. 22, 75 C C A. 180.
58 C J p 224 note 6.

48. La—Wilson v. Cammack, 7 La. Ann 155

49. U S—William H. Beard Dredging Co. v. Hughes, N.Y., 121 F 808, 58 C.C A. 192

50. U S—Watts v Camors, La, 6 S Ct 91, 115 U.S. 353, 29 L Ed 406.
58 C.J p 224 notes 10, 11.

51. U S.—Matlack Coal, etc., Corp v. New York Quebracho Extract Co, C C A N.Y, 30 F 2d 275—Sugar Products Co. v. Mobile, etc, Navigation Co, C C.A Ala., 268 F. 815.
58 C.J. p 225 note 27.

52. U.S.—Steamship Co. of 1912 v. Pearson, etc, Hardwood Co., C C A N.Y., 30 F.2d 770.

53. U.S—Stepanovit v Gillibrand, D C.Conn., 22 F.Cas.No.13,360.

credit the original charterer with the earnings.[54] The charterer will not be allowed credit for time saved where it does not appear that the failure to load the amount stipulated enabled the vessel to start on its voyage sooner than it would have done.[55]

Failure to redeliver as agreed. Damages recoverable from a charterer for retention of the vessel after the expiration of the charter may be measured by the current rate of hire,[56] the best going rate from the place of redelivery,[57] or the rate stipulated for in the charter as liquidated damages,[58] but not by a higher rate than the charter hire, although the owner has notified the charterer that such would be the rate after the charter term, where the charterer has not consented and the detention was unavoidable.[59] Where the owner has entered on a new charter, he must minimize the damages by hiring a similar ship to carry out his obligation,[60] and he is then entitled to recover the difference between the hire he receives from the charterer of his own ship and the rate he has to pay in the market for the ship which he has substituted.[61]

The measure of damages for premature delivery has been held to be the difference between the rate of hire under the original charter and the amount paid under a later charter over the period within which the vessel should not have been redelivered.[62]

§ 49. —— Lien

Where the charterer loads the ship, under the charter party, he may have a lien on the ship for damages resulting to him from breach of the charter party on the part of the owner.

To a certain extent the engagements in charter parties are to be regarded as personal only, not affecting the vessel,[63] but where the charterer loads the ship, under the charter party, so that the owner has a lien on the goods on board for the freight, as discussed supra § 45, a reciprocal lien on the ship attaches in favor of the charterer[64] for the repayment of freight advanced, should the voyage be broken up by fault of the owner,[65] for freight due the charterer,[66] or for the charterer's damages because of breach of the charter party on the part of the owner.[67]

A wholly executory charter for the transportation of merchandise will not create a maritime lien on the vessel in favor of the charterer,[68] as where the vessel has never entered on performance[69] or where no goods have been put on board.[70] The receipt of part of the cargo called for by the charter party will not entitle the charterer to a lien on the vessel for damages caused by the refusal on the part of the owner to receive the rest of the cargo called for,[71] and the charterer will not be entitled to a lien on the vessel where the charter has been partly performed by the carriage and delivery of one or more, but not of all, of the cargoes to be carried.[72] However, the charterer may, on the breach of an executory charter party by the owner before the vessel has entered into performance of the contract, have a right to a lien on the vessel for provisions for the crew, where such provisions have been put aboard the ship by the charterer.[73]

54. N.Y.—Heckscher v. McCrea, 24 Wend 304

55. U.S.—The Rosemary, C.C.A. Miss., 277 F. 674.

56. U.S.—Atlantic Fruit Co. v. A Cargo of Sugar, N.Y., 249 F. 871, 162 C.C.A. 105

57. U.S.—Constantine, etc, SS Co v West India SS. Co., D.C.N.Y., 231 F. 472.
58 C.J. p 224 note 19.

58. U.S.—Richmond Dredging Co v Standard American Dredging Co., Cal, 208 F. 862, 126 C.C.A. 20.
58 C.J. p 224 note 20.

59. U.S.—Schoonmaker-Conners Co v Lambert Transp. Co, C.C.A.N.Y., 269 F. 583

60. U.S.—Orvig's Dampskibselskab Aktieselskab v Munson SS. Line, D.C.N.Y, 15 F.2d 99, affirmed, C.C.A., 16 F.2d 957.

61. U.S.—Orvig's Dampskibselskab Aktieselskab v. Munson SS. Line, supra.

62. U.S.—Britain SS. Co. v Munson SS. Line, C.C.A.N.Y, 34 F.2d 980, certiorari denied 50 S.Ct 29, 280 U.S. 574, 74 L.Ed. 625.

63. U.S.—The Panama, D.C.N.Y, 18 F.Cas.No 10,703, Olcott 343.
58 C.J. p 225 note 29

64. U.S.—The Seguranca, D.C.La, 230 F 1002, modified on other grounds 250 F. 19, 162 C.C.A. 191.
58 C.J. p 225 note 31.

65. U.S.—The Panama, D.C.N.Y, 18 F.Cas.No 10,703, Olcott 343.

66. U.S.—The Seguranca, La, 250 F. 19, 162 C.C.A. 191.
58 C.J. p 225 note 33.

67. U.S.—The Augustine Kobbe, D.C.Ala., 37 F. 696.
58 C.J. p 225 note 34.

68. U.S.—Osaka Shosen Kaisha v. Pacific Export Lumber Co, Or, 43 S.Ct. 172, 260 U.S. 490, 67 L.Ed. 364—Belvedere v. Compania Plomari De Vapores, S. A., C.A.Fla., 189 F.2d 148—The Valmar, D.C.Pa., 38 F.Supp. 618.
58 C.J. p 226 note 35.

69. U.S.—The Valmar, supra.
58 C.J. p 226 note 36.

70. U.S.—Osaka Shosen Kaisha v. Pacific Export Lumber Co, Or, 43 S.Ct 172, 260 U.S 490, 67 L.Ed. 364—Belvedere v Compania Plomari De Vapores, S. A., C.A.Fla., 189 F 2d 148—The Valmar, D.C.Pa., 38 F Supp. 618.
58 C.J p 226 note 37.

71. U.S.—Osaka Shosen Kaisha v. Pacific Export Lumber Co, Or, 43 S.Ct. 172, 260 U.S. 490, 67 L.Ed. 364.

72. U.S.—The Thomas P Sheldon, D.C.R.I., 113 F. 779, modified on other grounds 118 F. 945, 55 C.C.A. 439.

73. U.S.—The Valmar, D.C.Pa., 38 F. Supp. 618.

§ 50. Loss of, or Injury to, Cargo

a. In general
b. Exemptions from liability
c. Damages

a. In General

In general, a shipowner may be held liable to a charterer or shipper for loss of, or injury to, cargo due to negligence, unseaworthiness, deviation, or other wrongful act, and he may also incur liability for the breach of a warranty in the charter party.

In general, the shipowner or vessel may be held liable to the charterer or shipper for loss of, or injury to, the cargo due to negligence,[74] unseaworthiness,[75] deviation;[76] failure to keep the cargo worthy;[77] improper management,[78] loading,[79] stowage,[80] or dunnage;[81] or the carriage of injurious goods.[82] Neither vessel nor owner is liable to a charterer or shipper for the acts of the charterer's or shipper's servants or agents.[83] A barge owner is not responsible for contributing to the damage of a cargo as a result of the sinking of the vessel off a dock, on the ground that the owner knew that the vessel would not lie afloat at the dock, where it does not appear that the boat would not lie afloat or that the owner knew that the barge would be damaged if she did not float.[84]

It has been judicially observed that, with respect to liability for cargo damage, the obligations resting on a charterer differ from those of the vessel.[85] A charter provision that there would be sufficient

74. U S—Conners Marine Co. v. Pennsylvania R Co, D C N.Y, 66 F. Supp 396, reversed on other grounds, C C A, 159 F 2d 169, rehearing denied 160 F 2d 482—Krebs Pigment & Chemical Co v Sheridan, D C Pa, 12 F.Supp 254, affirmed, C C.A., 79 F.2d 479
58 C.J. p 229 note 86, p 230 note 87.

Negligent navigation
U S—The Fort Morgan, C C A.Md., 284 F. 1.

Conduct constituting negligence
Failure of captain of chartered lighter to notify owner of lighter and relieve situation on discovering lighter was listing and action of captain in allowing lighter to dump her cargo would constitute negligence for which lighter owner would be liable—The Irving, D C.N.Y., 16 F Supp 22, affirmed, C C A., Conners Marine Co. v Manhattan Lighterage Co, 91 F.2d 1011

Limitation of right to recovery against vessel
Owner of lost cargo could recover against barge, but not in personam against owner of chartered barge with whom it had no contract for carriage—The Castleton, D C N Y., 60 F 2d 132, affirmed, C C A, 64 F.2d 11.

75. U S—Metropolitan Coal Co v. Howard, C C A N Y., 155 F.2d 780—Petition of Reliance Marine Transp & Const Corp., D.C Conn, 89 F Supp 272—Atlantic Creosoting Co. v. Savannah Lighterage & Transfer Co., D C Ga, 67 F.Supp. 383—Petition of Howard, D C N.Y, 53 F Supp 556—Aetna Ins Co v Florida Towing Corp, D C.Fla, 37 F.Supp. 781—The Irving, D C N Y, 16 F.Supp. 22, affirmed, C C A., Conners Marine Co v Manhattan Lighterage Co., 91 F 2d 1011—The Emergency, D.C N.Y., 9 F Supp 484.
58 C.J. p 226 note 43, p 229 notes 84, 85, p 469 note 12.

Unseaworthiness not shown
Fact that chartered seagoing barge, which foundered because her seams opened below deck, was shorthanded, did not make barge unseaworthy, with respect to owner's liability for loss of cargo—Chateaugay Ore & Iron Co. v Eastern Transp. Co, D C. N Y., 15 F Supp 705, affirmed, C C A., 88 F 2d 1005, certiorari denied 58 S Ct. 18, 302 U.S. 699, 82 L Ed. 540.

76. U S—Romano v. West India Fruit & S S. Co, C.C A Fla., 151 F. 2d 727—Farr v. Hain S S Co., C. C.A.N.Y, 121 F.2d 940.

Deviation held unjustified
Where disturbance which allegedly caused master to deviate was a mild one, and were it not for master's ignorance of the real depth at designated discharge port he would not have made the deviation, such deviation was not a justifiable exercise of master's discretion—Romano v. West India Fruit & S. S. Co., C C.A. Fla., 151 F.2d 727.

Failure to protest deviation
Charterer's discovery of deviation a few hours after ship began to load and allowing ship to complete her lading without protest or reservation of any rights arising from deviation barred shippers from taking advantage of the deviation—Farr v. Hain S S. Co., C C.A.N.Y., 121 F.2d 940.

77. U S.—American Creosoting Co v. Deutsche Petroleum Aktien Gesellschaft, D C.N J, 28 F.2d 356.
58 C.J. p 226 note 44.

78. U S—Rodgers v. Bouker Contr. Co, D.C N.Y., 134 F. 702.
58 C J. p 226 note 45.

79. U.S—The Frederick W Starr No. 25, D.C N Y., 41 F.2d 528.
58 C J. p 226 note 47.

80. U.S.—Pioneer Import Corp. v. The Lafcomo, C C A.N.Y., 138 F 2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S Ct. 523, 321 U.S. 766, 88 L.Ed. 1063.
58 C.J. p 226 note 48.

81. U S—The Helen Barnet Gring, D.C Md, 48 F 2d 629
58 C J. p 227 note 49.

82. U S—Church Cooperage Co. v. Pinkney, N Y, 170 F. 266, 95 C C. A 462
58 C J. p 227 note 50
Warranty of fitness to carry cargo see supra § 36.

83. U S—Gronvold v Suryan, D.C. Wash, 12 F Supp. 429.
58 C J p 227 note 51

Supervision of loading
Where original written contract for hiring of barge and tug gave owners thereof right of supervision of loading of cargo, but the parties subsequently made oral agreement giving hirers right of supervision, and improper storage of cargo caused barge to capsize, tug and her master and owners were not liable for loss of cargo.—Friedland v. The Empress, D C Cal., 48 F Supp 348

Corporation operating both tug and barge under demise charter could not recover in rem against either for damage to cargo on barge caused by error in navigation—The John J. Grimes, D.C N Y., 57 F.2d 321.

Engineer of vessel
Appointment of engineer of vessel by owner pursuant to charter party did not make him agent of owner wrongfully to ignite vessel, which was insured, for purpose of destroying it for owner's benefit—Gronvold v. Suryan, D C Wash., 12 F Supp. 429.

84. U.S—The Mascot, D C N J., 28 F.Supp. 770.

85. U.S—The Terne, D.C N.Y., 1 F. Supp. 537.
Charterer as owner pro hac vice see supra § 34.

Effect of dismissal as against ship
That facts might warrant dismissal of libel as against ship for cargo damage would not preclude decree against charterer in personam.—The Terne, supra.

water for the vessel to lie afloat safely at all times has been held to put the charterer and a wharfinger on equal terms, and to make their duties correspond, as far as the rights of various interested parties to recover for damages to the cargo are concerned [86]

Special liability under charter. The shipowner or vessel may be held liable for the breach of a warranty in the charter party,[87] or for the breach of a stipulation as to special care of the cargo,[88] or, where so provided, for certain payment in the event of jettison.[89]

Charterer as agent or assignee of cargo owners. In an action by the charterer, as agent or assignee of the cargo owners, against the shipowner and the vessel, the charterer's rights are no greater than those of the cargo owners;[90] and whether there has been a breach of warranty contained in the charter party is immaterial in determining whether the charterer as assignee is entitled to recover.[91]

Liability of charterer to shipowner or vessel The charterer of a vessel put up as a general ship impliedly contracts with the owner that goods shipped shall not be injurious to other goods shipped [92] The charterer will be liable to the owner of a ship under an express agreement to pay any damage other shipments may be subjected to because of his shipment,[93] but not if the injury was due to the fact that the vessel was unseaworthy with respect to the carriage of cargo.[94] The charterer's liability to the ship as unloading and delivery agent is merely to exercise due care.[95]

Who may sue. A charterer may sue the shipowner for the loss of cargo, although the charterer owned none of it and the possession of the ship and cargo was always in the shipowner, where the charterer, according to its right under the charter, held itself out to the public as a common carrier and is answerable to the shippers for the loss.[96] A shipper who retains title as against the consignee, who is the charterer, may bring an action in his own name against the vessel for the loss of goods shipped;[97] but it is not always essential to a recovery for loss of cargo that the party seeking such recovery should have had title to the cargo.[98] Where the charterer has lost nothing by the damage, he cannot recover damages,[99] unless he has acted as trustee.[1]

b. Exemptions from Liability

Neither the vessel nor the owner ordinarily is liable for the loss of, or injury to, cargo which is caused by a peril of the sea or which is within a statutory exemption or an exemption of the charter party.

Neither vessel nor owner is liable for the loss of, or injury to, cargo caused by a peril of the sea[2] or for a loss or injury which is within an exemption of the charter party.[3] However, neither peril of

86. U.S.—The Mascot, D.C.N.J., 28 F.Supp. 770.

Charterer's unfamiliarity with dock

A charterer of barge which sunk off dock was responsible for damage to cargo where charterer, although totally unfamiliar with physical condition of dock, expressly guaranteed sufficient water to float barge safely —The Mascot, supra.

87. U.S.—Romano v. West India Fruit & S.S. Co., C.C.A.Fla., 151 F.2d 727

Speed

U.S.—Romano v. West India Fruit & S.S. Co., supra.

Refrigeration

U.S.—Lucayan Transports v. McCormick Shipping Corp., C.A.Fla., 188 F.2d 202

Carrying capacity

U.S.—Petition of Howard, D.C.N.Y., 53 F.Supp. 556.

88. U.S.—American Creosoting Co. v. Deutsche Petroleum Aktien Gesellschaft, D.C.N.J., 28 F.2d 356.
58 C.J. p. 228 note 62.

89. U.S.—The Bodo, D.C.N.Y., 156 F. 980.

90. U.S.—The Toledo, C.C.A.N.Y., 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

Tampering with logs

Where striking of something in river was not given serious consideration until some time later, after fracture of web of crankshaft was found, whereupon an entry in the log book was made with reference thereto, the subsequent entry in the log book was not a tampering with the logs as bearing on liability of shipowners to charterer as bailee and assignee of cargo—The Toledo, D.C.N.Y., 30 F.Supp. 93, affirmed, C.C.A., 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

91. U.S.—The Toledo, C.C.A.N.Y., 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S.Ct. 302, 314 U.S. 689, 86 L.Ed. 551.

92. U.S.—Pierce v. Winsor, C.C.Mass., 19 F.Cas.No.11,150, 2 Cliff. 18.
58 C.J. p. 228 note 66.

93. U.S.—Moses v. Boyd, C.C.N.Y., 17 F.Cas.No.9,871, 5 Blatchf. 357, affirmed 7 Wall. 316, 19 L.Ed. 192.

94. U.S.—Moses v. Boyd, supra.

95. U.S.—The Ella Pierce Thurlow, D.C.N.Y., 300 F. 103, affirmed, C.C.A., Drisko v. Barber SS. Lines, 300 F. 106.

96. U.S.—Pendleton v. Benner Line, N.Y., 38 S.Ct. 330, 246 U.S. 353, 62 L.Ed. 770.
58 C.J. p. 229 note 72.
Parties in actions on charter parties generally see infra § 56.

97. U.S.—Guerard v. The Lovspring, D.C.S.C., 42 F. 853.

98. U.S.—The Fred E. Hasler, D.C.N.Y., 55 F.2d 389.

Shipment on consignment

Buyer paying most of price of oil, incurring expense of transporting it from ship, and chartering barge, which sank with oil consigned to buyer, could recover from barge owner for loss, even if it did not have title to oil.—The Fred E. Hasler, supra.

99. U.S.—The Ask, D.C.N.Y., 156 F. 678
58 C.J. p. 229 note 74.

1. U.S.—The Ask, supra.

2. U.S.—The Casco, D.C.Mo., 5 F. Cas.No.2,486, 2 Ware 188
58 C.J. p. 227 note 52.

3. U.S.—The Monarch of Nassau, C.C.A.Fla., 155 F.2d 48—Farr v. Hain S.S. Co., C.C.A.N.Y., 121 F.2d 940 —The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari de-

the sea nor express exemption of the charter party, unless so stipulated, is an excuse if the owner is chargeable with any neglect or fault without which the injury would not have occurred.[4] A charter party requiring the charterer to furnish dunnage does not exonerate the vessel where the customary dunnage would not have prevented the damage which resulted to the cargo.[5] A clause in the charter party rendering freight payable in full without any deduction on delivery of the cargo does not bar the cargo owner from asserting a claim for damages to the cargo in an action brought against him for freight.[6]

On the occurrence of an excepted accident, the owner will be liable to the charterer because of injury to the cargo due to the owner's failure to give timely and reasonable notice of his inability to perform his contractual obligation.[7] A provision of a charter party absolving the vessel from liability for deterioration of the cargo is inapplicable where the charter party has been abrogated by a deviation.[8] The master's negligence in directing the discharge of cargo has been held to relate to the custody, care, and proper delivery of the cargo within the meaning of a statute which invalidates stipulations relieving the owner from liability for negligence in the loading, custody, care, and proper delivery of the cargo.[9]

Loading on vessel's skin at risk of charterer or shipper. A provision in the charter party that the cargo is to be loaded on the skin of the vessel at the risk of the charterer or shipper is valid,[10] but such a provision has been held not to relieve the vessel from liability for cargo damage caused by unseaworthiness,[11] or to exonerate a private carrier from liability for unexplained sea-water damage[12] or from liability for damage to the cargo not causally connected with stowage of the cargo on the vessel's skin.[13]

Statutory exemption A federal statute, exempting under certain conditions certain vessels and their owners from liability for damage or loss due to certain enumerated causes, has been held to apply to the liability of a vessel, chartered for her full capacity, and that of her owner;[14] however, it has been held that, although the parties may by express reference make such a statute part of their contract,[15] the statute will not apply of its own force.[16] Under the Harter Act, 46 U.S.C.A. § 190 et seq, the shipowner is not liable for loss of cargo caused by faults or errors of navigation if he has used due diligence to make the ship seaworthy[17] Where the fire statute, 46 U.S.C.A. § 182, has been incorporated in the charter party, the owner is not liable to the charterer for damage to the cargo resulting from fire unless the fire was caused by the owner's design or neglect.[18]

c. Damages

The general rules governing the recovery of damages for the loss of, or injury to, cargo apply to the re-

nied United British S. S Co. v. Newfoundland Export & Shipping Co., 54 S Ct 860, 292 U.S. 651, 78 L Ed. 1500—Mente & Co. v. Isthmian S S Co., D C N Y, 36 F Supp. 278, affirmed, C C A, The Quarrington Court, 122 F.2d 266—The Westmoreland, D.C N.Y, 14 F Supp. 762, affirmed, C C A., 86 F 2d 96.
58 C J. p 226 note 41, p 227 note 53

Errors of navigation

(1) Provision of charter of tug to tow barges mutually excepting errors of navigation relieved tug owner from liability for damage to cargo due to such errors, although tug owner was in control of operation of tug.—Davison Chemical Corp v. The Henry W. Card, C.C.A.N Y., 144 F 2d 705.

(2) Where there was nothing in charter party concerning navigation of any vessel other than barge, exception of liability from "errors of navigation" appearing in paragraph relating to return of unearned charter hire in event of loss of barge did not cover errors of navigation of some other boat, such as a tug.—The Vale Royal, D C Md., 51 F Supp. 412

Dirty tanks

Charterer agreeing to clean boat last used in carrying molasses could not recover for damage because of discoloration of gasoline caused by dirty tanks.—The Lawrence J. Tomlinson, C C.A.N.Y, 48 F 2d 88.

4. U S.—The Ft. Morgan, C.C A.Md, 284 F. 1.
58 C.J. p 228 notes 54, 55.

5. U S —The Joseph J. Hock, C.C.A. N Y., 70 F 2d 259.

6. U S.—Eastern Transp Co. v. U. S, C.C A.N.Y., 159 F 2d 349

7. U.S —The Ask, D C.N.Y., 156 F. 678—The Disa, D.C.N Y., 153 F. 322
58 C J. p 228 note 58.

8. U S —The Hermosa, C.C A.Cal, 57 F 2d 20.

9. U S.—The Joseph J Hock, C C.A. N Y, 70 F 2d 259.

10. U S.—The Westmoreland, D C N. Y., 14 F.Supp 762, affirmed, C.C A, 86 F.2d 96.

11. U S —The Chehaw, D C N.Y, 54 F.2d 645.

12. U S —The Joseph J Hock, C C. A.N Y., 70 F.2d 259.

13. U S —The Westmoreland, D C N. Y, 14 F Supp 762, affirmed, C C A, 86 F.2d 96.

14. U S —Sun Co. v Healy, N.Y, 163 F 48, 89 C C A. 300, certiorari denied 29 S Ct. 693, 212 U S. 583, 53 L Ed. 660
58 C J p 228 note 59.

15. U S —Warner Sugar Refining Co. v Munson SS. Line, D C N Y, 23 F. 2d 194, affirmed, C C A, 32 F.2d 1021—The Temple Bar, D.C Md, 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

16. U S.—The Temple Bar, supra.
58 C J. p 228 note 61.

17. U S —The Framlington Court, C. C.A Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co, 54 S.Ct 860, 292 U S 651, 78 L Ed. 1500—The John J. Grimes, D.C.N Y., 57 F.2d 321.

18. U.S —The Older, C C.A.N.Y., 65 F.2d 359

Knowledge of use of torches

Knowledge of owner's agent that oxyacetylene torches would be used in work on ship did not charge agent with neglect under fire statute so as to make owner liable for damage to cargo caused by sparks.—The Older, supra.

covery of damages for the loss of, or injury to, cargo where the vessel is under charter.

The general rules as to the damages recoverable for the loss of, or injury to, cargo, as discussed infra § 158, apply to the loss of, or injury to, cargo where the vessel is under charter.[19] Accordingly it is the duty of the charterer, shipper, or consignee claiming damages to minimize these by the exercise of due diligence.[20] A shipowner who is liable for damage to the cargo is entitled to a credit in the amount received by the injured party as salvage from a sale of the damaged cargo,[21] and, where the libelant has lumped the damaged goods with undamaged goods in making a sale thereof, so that it is impossible to show to what cargo the proceeds of the salvage sale are attributable, the shipowner is entitled to a credit in the total amount of the salvage sale.[22]

Special damages may be recovered against the owner and operator of the ship where there were special circumstances known to the parties.[23] In such cases the party sought to be held liable must have had notice of the special circumstances which gave rise to the damages,[24] although it is not necessary that the special facts should have been mentioned in the negotiations or made a part of the contract in express terms.[25] Attorneys' fees may be awarded where the charter party so provides.[26]

Damages recoverable by shipowner. A charterer of a vessel who puts her up as a general ship is liable to the owner for the damages which the latter has to pay other shippers for injury to their goods caused by goods put on board by the charterer, and for the extra expense of getting the goods out of the ship.[27]

§ 51. —— Lien

The shipper is entitled to a lien on the ship for loss of, or injury to, cargo caused by unseaworthiness of the ship or by a want of due diligence in the care and custody of goods received on board for transportation.

A chartered ship is, by operation of law, hypothecated to the shipper for any damage his goods may sustain from the insufficiency of the vessel or the fault of the master or crew,[28] even though the fact that the vessel was operated under a charter party was known to the shipper,[29] and the rights of the shipper are not affected by provisions of the charter party, of which he had no knowledge or notice.[30] Accordingly, the ship is liable in rem to the shipper or the shipper is entitled to a lien for loss of, or injury to, the cargo from unseaworthiness,[31] even though the charter be a demise;[32] he is also entitled to a lien for damages caused by a want of due diligence in the care and custody of goods received on board for transportation,[33] although the charterer, acting as bailee for transportation, consents to the act causing the damage[34]

Where the vessel was operated by a charterer, such a suit in rem cannot be defeated by showing that the suit might or might not have been brought

19. U.S.—The Ft. Morgan, C.C.A. Md., 284 F. 1.
58 C.J. p. 229 note 77.
Damages for breach of:
Charter by owner generally see supra § 47.
Warranty of seaworthiness see supra § 36.

20. U.S.—The Joseph J. Hock, C.C.A.N.Y., 88 F.2d 1.
58 C.J. p. 229 note 78.

21. U.S.—The Joseph J. Hock, supra.

22. U.S.—The Joseph J. Hock, supra.

23. U.S.—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312.

Likelihood of contamination

In absence of anything in charter party to contrary, to warrant recovery of special damages for contamination of oil and gasoline, it would only be necessary to find that at time carrier undertook to transport oil and gasoline it could be reasonably inferred from those circumstances that contaminated products might and would likely be pumped into tanks containing uncontaminated products.—Standard Oil Co. of Cal. v. U. S., supra.

Charterer's liability to cargo owner

In demise charterer's suit against shipowner for breach of warranty of seaworthiness, charterer's liability to cargo owner for loss of cargo was held proper element of damage.—The Cullen No. 32, C.C.A.N.Y., 62 F.2d 68, affirmed Cullen Fuel Co. v. W. E. Hedger, Inc., 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189

24. U.S.—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312.

25. U.S.—Standard Oil Co. of Cal. v. U. S., supra.

26. U.S.—U. S. v. Standard Oil Co. of Cal., C.C.A.Cal., 156 F.2d 312.

27. U.S.—Pierce v. Winsor, C.C. Mass., 19 F.Cas.No. 11,150, 2 Cliff. 18

28. U.S.—Pioneer Import Corp. v. The Lafcomo, C.C.A.N.Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063—The H. & S. No. 3, D.C.Wash. 243 F. 725.
58 C.J. p. 229 notes 82, 83.

Lien for:
Breach of charter by owner see supra § 49.
Loss of, or injury to, cargo generally see infra § 159.

29. U.S.—The Seaboard, D.C.N.Y., 119 F. 375.

30. U.S.—The H. & S. No. 3, D.C. Wash., 243 F. 725.

31. U.S.—The New York, D.C.N.Y., 93 F. 495.

Primary and secondary liability

Where scow becomes unseaworthy during the time she is being laden, a lien is created in favor of shipper making scow secondarily liable in rem, the primary liability resting on the party whose fault was the proximate cause of scow becoming unseaworthy.—The C. W. Crane, D.C.N.Y., 64 F.Supp. 627, affirmed, C.C.A., 155 F.2d 940

32. U.S.—The New York, D.C.N.Y., 93 F. 495.
58 C.J. p. 229 note 85.

33. U.S.—The T. A. Goddard, D.C. N.Y., 12 F. 174.
58 C.J. p. 229 note 86.

34. U.S.—The T. A. Goddard, supra.
58 C.J. p. 230 note 87.

against the charterer in person.[35] However, it has been held that the mere union of ship and cargo arising from the loading of the cargo on the ship gives no lien for damages from a delay in sailing, where the shipper knew he was dealing with the charterer and took the charterer's bill of lading[36]

Subrogation. Where, through the fault of the real owner, the ship is the offender, and the charterer, as apparent owner, is, as between himself and the ship, a mere surety, the charterer, on payment of the cargo owner's demand, succeeds to the latter's security, that is, the lien on the vessel.[37]

Loss of lien. The liability of a vessel as surety for damage resulting from her unseaworthiness for a shipment undertaken by the charterer is released by a compromise between the shipper and charterer, discharging the primary obligation of the latter.[38]

§ 52. Loss of, or Injury to, Vessel

a. Liability of charterer
b. Rights of charterer
c. Rights of owner as against third persons
d. Damages

a. Liability of Charterer

(1) In general
(2) Agreements to return or repair vessel
(3) Exceptions from, or limitations of, liability
(4) Breach of charter party
(5) Vessels without motive power

(1) In General

As a general rule, the charterer is required to return the vessel in the same condition as when received, ordinary wear and tear excepted, and he is liable for loss of, or injury to, the vessel due to his negligence or the negligence of anyone to whom he intrusts it.

As a general rule, the charterer is required to return the vessel in the same good order and condition as when received, ordinary wear and tear excepted,[39] and the failure of the owner to exact an express undertaking to return the vessel in good order does not exempt the charterer from such obligation.[40] He is under a duty to use reasonable care[41] and he cannot delegate that duty to others so as to exempt himself from liability.[42] In the absence of a contract providing otherwise, the charterer is liable for loss of, or injury to, the vessel due to his negligence, or that of his servants or agents,[43] or of anyone to whom he intrusts her.[44]

35. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation a Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.

36. U S—The Esrom, C C.A.N Y., 272 F 266, certiorari denied 42 S.Ct. 47, 257 U.S. 634, 66 L Ed. 408—The Ripon City, Ga., 102 F. 176, 42 C.C. A. 247.

37. U.S—The New York, D.C.N.Y., 93 F. 495.

38. U.S—Armour v. Ft. Morgan SS Co, La, 46 S Ct. 212, 270 U S. 253, 70 L Ed 750
58 C.J. p 230 note 89.

39. U S.—The A. F. Co. No 4, D C N Y., 54 F 2d 145—The Zeller No. 14, D.C N Y., 74 F.Supp. 538—Horan v. Pennsylvania R. Co, D C N. Y, 60 F Supp 138—Cox v. Banks, D C Pa, 50 F.Supp. 871.
Liability for loss of, or injury to, vessel caused by loading or discharging cargo see infra § 105

40. U S.—Shamrock Towing Co v. Tully & Di Napoli, D C.N.Y, 91 F. Supp. 239, affirmed, C A., Anthony O'Boyle, Inc. v. The Louis W Doyle, 187 F.2d 872.

41. U.S.—Seaboard Sand & Gravel Corp. v. Moran Towing Corp, C.C A.N.Y., 154 F.2d 399—The Cedar Cliff, C C A.N Y, 149 F 2d 964.
Or—Willamette Tug & Barge Co. v. Commercial Dispatching Corp., 178 P.2d 698, 180 Or. 657.

42. U S.—Seaboard Sand & Gravel Corp. v. Moran Towing Corp, C C A.N.Y, 154 F.2d 399—The Everett Fowler, C C.A.N Y, 151 F.2d 662, motion denied 152 F.2d 657, certiorari denied U. S. v. Petterson Lighterage & Towing Corp., 66 S Ct. 963, 327 U S. 804, 90 L Ed. 1029—C F. Harms Co. v. Erie R. Co., D.C.N Y, 71 F.Supp 934, affirmed in part and reversed in part on other grounds, C C.A., 167 F.2d 562.

Care by owners after notice by charterer

Owners did not recognize a duty to care for lighters by accepting responsibility of caring for them when notified of the difficulties by charterer, where owners had no other course in view of charterer's denial of responsibility.—Banks v. Chas. Kurz Co, D C.Pa., 69 F.Supp. 61, motion denied 69 F.Supp. 1017.

43. U.S.—The C. W. Crane, C.C.A. N.Y., 155 F 2d 940—Seaboard Sand & Gravel Corp. v. Moran Towing Corp., C C A N Y., 154 F 2d 399—Banks v. Chas. Kurz Co., D.C.Ga., 69 F.Supp. 61, motion denied 69 F. Supp. 1017—New England Foundation Co. v. Rugo Const. Co., D.C. Mass, 60 F.Supp. 143, affirmed, C. A., Rugo Const. Co. v. New England Foundation Co, 172 F 2d 964—Conners Marine Co. v. Wathen, D. C N Y, 43 F.Supp. 283.
58 C.J. p 230 note 91.

Use of tug for ice breaking

Where, after charterer of tug was notified that he would be held responsible for damages to tug caused by using it for breaking and plowing through ice, pilot placed in charge of tug as charterer's agent used tug to break heavy ice, over protest of master of tug, as result of which tug was damaged, master was relieved of responsibility for such damages and charterer became liable to owner for damages caused by pilot's negligence.—Southern States Towing Lines v. Lee Transit Corp., C.C A.N. Y., 144 F.2d 101.

44. U.S—New York Trap Rock Corp. v. Christie Scow Corp., C.C.A. N.Y., 165 F.2d 314—The Everett Fowler, C.C A.N.Y., 151 F.2d 662, motion denied 152 F.2d 657, certiorari denied 66 S.Ct. 963, 327 U. S. 804, 90 L Ed. 1029—New England Foundation Co. v. Rugo Const. Co., D.C.Mass., 60 F.Supp. 143, affirmed, C.A., Rugo Const. Co. v. New England Foundation Co., 172 F.2d 964—Cox v. Banks, D C.Pa., 50 F.Supp. 871.
58 C J. p 230 note 92.

As the rule is sometimes stated, the charterer is liable primarily for his own negligence and secondarily for the fault or negligence of another to whom he has intrusted the vessel.[45]

The charterer is not an insurer of the vessel,[46] and he is liable only because of negligence;[47] he is not liable for loss or injury attributable to the negligence of the owner, or of the owner's agents or employees,[48] or to inevitable accident,[49] or for damage caused by an unidentified vessel which did not belong to the charterer.[50]

Although the master of a chartered vessel is selected by the owner, if he is to take his orders from the charterer who has possession of the vessel with the right to direct its use, the charterer must take the risk of extraordinary hazards inhering in the task which he imposes;[51] but the owner may be held to have assumed the risk of loss resulting from a failure on the part of the master to exercise ordinary care and skill in performing work ordered by the charterer.[52] Failure of the shipowner to keep a man on board the chartered vessel, as required by the terms of the charter, has been held not to relieve a subcharterer of liability for his negligence where the sole proximate cause of damage to the vessel was the negligence of the subcharterer and the absence of a man had nothing to do with the loss that occurred.[53]

Unseaworthiness. A charterer is under no duty to return an unseaworthy vessel in good condition,[54] and he cannot be held liable for damage to the vessel which is due to its unseaworthiness rather than to any improper handling of the vessel.[55] The owner of a vessel has no recourse against the charterer to recover damages adjudged against her because of her unseaworthiness for the use to which she was put, where he knew of such use when the charter was made, and the charterer is not otherwise shown to have been negligent.[56] The unseaworthiness of a vessel due to its leaky condition

45. U S—Roah Hook Brick Co v. Erie R Co., C.A.N.Y, 179 F.2d 601—C. F. Harms Co. v. Erie R. Co, C.C.A.N.Y, 167 F 2d 562—New York Trap Rock Corp. v Christie Scow Corp., C.C.A.N.Y., 165 F.2d 314—New York Trap Rock Corp v. Christie Scow Corp., C C.A.N.Y., 162 F 2d 624—Seaboard Sand & Gravel Corp. v. Elmhurst Contracting Co, C C A.N.Y., 159 F.2d 860—O'Donnell Transp Co. v. M. & J. Tracy, Inc, C.C.A.N Y, 150 F.2d 735—New York Trap Rock Corp. v. Christie Scow Corp, D C.N.Y., 92 F.Supp 989—The Seaboard No 63, D.C.N.Y., 69 F Supp 246—Cox v. Banks, D.C.Pa., 50 F.Supp. 871—Century Indemnity Co. v. New York Tank Barge Co, D C N.Y., 6 F Supp. 280.
58 C.J p 234 note 28 [a].

46. U.S.—The Cedar Cliff, C C A N. Y., 149 F 2d 964—Banks v. Chas. Kurz Co, D C.Pa., 69 F.Supp 61, motion denied 69 F.Supp. 1017—The St. Nicholas, D.C.N.Y., 67 F. Supp. 380.

Absolute liability not implied
An agreement to return vessel in such good condition as would make charterer absolutely liable will not be implied.—Banks v. Chas Kurz Co, D C Ga, 69 F.Supp. 61, motion denied 69 F.Supp. 1017.

47. U.S.—The Roslyn, C.C A.N.Y, 93 F.2d 278—The Reno, C C.A.N.Y, 61 F.2d 966—Petition of Reliance Marine Transp. & Const Corp., D. C.Conn., 89 F Supp. 272—C. F. Harms Co. v. Erie R Co., D.C.N.Y, 71 F.Supp. 934; affirmed in part and reversed in part on other grounds, C.C.A., 167 F.2d 562—The St. Nicholas, D.C.N.Y., 67 F.Supp. 380—The Montezuma III, D.C N.Y, 66 F Supp. 562.
58 C.J p 230 note 93

Weather conditions
(1) With respect to the right of the owner of a boat, against those who rented it, for loss of the boat, where rented boat stalled during storm, bailee and other occupants of boat, who were in a panicky condition, were not required to exercise as high a degree of care in securing and fastening the boat when it was finally blown or drifted against the shore, as though the waters had been calm when they landed.—Bock v. Ellen, Mo.App., 211 S.W 2d 92.

(2) In determining liability for damages to tug allegedly due to negligence in putting out in bad weather, court would accept experienced judgment of tug captain as to expediency of putting out on a foggy night and proceeding after engine trouble developed.—The Maurice R Shaw, D C.Me, 46 F Supp. 767.

Negligence not shown
U S.—The Harry R, D.C N.Y., 58 F. 2d 1000.

48. U.S—The West Eldara, C C A N Y., 104 F 2d 670, certiorari denied McAllister Towing & Transportation Co v. American Diamond Lines, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507—Cleary Bros. v. Moran Towing Corp, D.C N.Y., 79 F Supp. 934—The Interports No. 767, D.C N.Y, 18 F.Supp. 396, affirmed, C.C. A., 92 F.2d 601.
58 C J. p 231 note 94.

Control of vessel
The charterer of a vessel is not necessarily liable for damage thereto because he is in absolute control and entitled to direct navigation and employment of vessel but ultimate determination rests on what constituted subject of the bailment; and, where the sole and proximate cause of the damage was that of the chartered vessel's captain who was in the employ and pay of the shipowner, the charterer could not be held liable.—The Cobalt, D.C.N.Y, 26 F Supp. 5, affirmed, C C A., C. W. Crane & Co. v. Charles Dreifus Co., 107 F 2d 1011.

49. U.S—Booth v. New York, D.C. N.Y., 127 F. 459.

50. U S—The Killarney, D.C.N.Y., 56 F Supp. 182.

51. U S—Dennis v. Roberts, C.C.A. Cal., 19 F 2d 1.
58 C J p 231 note 96.

52. U.S.—Dennis v. Roberts, supra. 58 C J. p 231 note 96.

53. U S—The Seaboard No. 25, D C. N Y, 68 F Supp. 169, affirmed, C.C. A, 159 F 2d 860.

54. U S.—Banks v. Chas. Kurz Co, D C Pa, 69 F Supp. 61, motion denied 69 F.Supp 1017—The Emergency, D C.N.Y., 9 F.Supp. 484.

55. U S.—O'Brien Bros. v. Moran Towing Corp., D.C N.Y, 66 F.Supp 614, affirmed, C C.A, Beard's Erie Basin v. O'Brien, 162 F 2d 176

Parting of port shrouds
Where port shrouds of chartered boat parted in a moderate breeze and there was no evidence of abnormal speed or improper handling but parting was apparent result of defect, owner was not entitled to recover for damage to boat—The Virruth, D C.N.Y., 25 F Supp. 904.

56. U.S.—The Willie, D.C.N.Y., 134 F. 759.

known to the charterer at the time of beginning of the voyage has been held not to be a defense where the vessel was injured by an explosion of a cargo of explosives due to the use of a gasoline pump.[57]

Loss by fire. In order to establish liability of a charterer for a fire loss, it is ordinarily necessary to prove some negligence which caused the fire,[58] and no liability will be imposed on him as an insurer against fire unless it be stated in the charter in clear and unambiguous language.[59]

Deviation; "safe port." A charterer's liability for damage to the vessel cannot be based on an alleged deviation from the course authorized where the charter makes negligence the test of the charterer's liability in any event.[60] A "safe port," within a charter provision giving the charterer the privilege of taking on additional cargo at a second safe port if the vessel did not obtain sufficient cargo at the port to which it was to be first taken, has been held to mean a port which a vessel can enter and depart from without legal restraint and without incurring more than the ordinary perils of the sea.[61]

Person chartering vessel for another. One who is acting for a principal in chartering a vessel has the duty at the time of the chartering to disclose the identity of his principal in order to relieve himself from liability for injury to the vessel,[62] and a subsequent discovery by the shipowner as to the identity of the principal does not relieve the hirer of liability.[63]

Vessel laid up. When a charter party is a demise, the charterer is liable for loss of, or injury to, the vessel, when the vessel is laid up equally as when on voyage.[64]

Character of cargo. Misrepresentations or failure to warn the owner of the character of the cargo to be loaded cannot be relied on as a ground for recovery for injury to the vessel where the owner is reasonably apprised of its dangerous nature.[65]

Under agreement to furnish insurance, the charterer is liable for an injury which, under the contract, he should have insured against.[66]

(2) Agreements to Return or Repair Vessel

The charterer may be held liable for damages to the vessel in violation of an express covenant to surrender the vessel in as good condition as when received; but the authorities are not in complete agreement as to whether such a covenant renders the charterer liable for damage which was not occasioned by his negligence.

A covenant on the part of the charterer to surrender the vessel at the expiration of the charter in as good condition as at the inception thereof, with the exception of wear and tear from reasonable and proper use, has been held to impose an absolute liability on the charterer for any and all loss and damage to the vessel,[67] at least where such a covenant is coupled with a covenant to keep the vessel in repair,[68] even though not occasioned by his negligence or fault.[69] Some authorities, however, do not give such an effect to a simple covenant to restore the vessel in as good condition as received, reasonable wear and tear excepted,[70] and

57. U S—Hansen v. Du Pont de Nemours, D C N Y, 8 F.2d 552, reversed on other grounds, C C A., 33 F 2d 94, certiorari denied 50 S.Ct. 37, 280 U.S 589, 74 L Ed. 638.

58. U S—Warren & Arthur Smadbeck, Inc, v. Heling Contracting Corporation, C C.A.N.Y., 50 F.2d 99, certiorari denied 52 S.Ct. 31, 284 U S. 651, 76 L Ed. 553.

59. U.S—Warren & Arthur Smadbeck, Inc., v. Heling Contracting Corporation, supra

Liability as insurer held not imposed

Charter which required charterer to maintain dredge in good operating condition, and provided that charter should continue in force in event of fire, has been held not to render charterer insurer against total fire loss.—Warren & Arthur Smadbeck, Inc., v. Heling Contracting Corporation, supra.

60. U.S—The Roslyn, C C.A.N.Y., 93 F.2d 278.

61. U S—Atkins v. Fibre Disintegrating Co, D C N.Y, 2 F Cas No 601, 2 Ben. 381, reversed on other grounds 18 Wall. 272, 21 L.Ed. 841.

62. U S—Banks v. Chas. Kurz Co., D C Pa., 69 F.Supp 61, motion denied 69 F.Supp. 1017

Or.—Willamette Tug & Barge Co. v. Commercial Dispatching Corp., 178 P.2d 698, 180 Or. 657.

63. Or.—Willamette Tug & Barge Co. v Commercial Dispatching Corp, supra.

64. La.—Ames v. New Orleans, etc, Transp. Co, 36 La Ann. 479

65. U.S.—Hansen v. Du Pont de Nemours, D.C N Y., 8 F.2d 552, reversed on other grounds, C C A., 33 F.2d 94, certiorari denied 50 S Ct. 37, 280 U S. 589, 74 L.Ed 638.
58 C.J. p 231 note 1

66. Wash.—Janovich v Northwestern Herring Co., 267 P. 37, 147 Wash. 619.

67. U.S.—P. Sanford Ross, Inc, v. Moran Towing & Transportation Co., C.C.A.N.Y., 55 F.2d 1052, certiorari denied Moran Towing & Transportation Co. v. P. Sanford Ross, Inc, 53 S.Ct 12, 287 U.S. 608, 77 L Ed. 529—Baldwin v. New York Cent. R. Co., D.C.N.Y., 87 F.Supp. 562.

68. U.S.—Sun Printing, etc, Assoc. v. Moore, N Y., 22 S Ct 240, 183 U. S 642, 46 L Ed. 366.
58 C J. p 231 note 3.

Total loss

Charterer's covenant to pay for repairs and owner's covenant to repay charterer from insurance moneys received were held to cover total loss, as well as partial destruction, of vessel.—Nicholson Transit Co. v. Nicholson Universal S. S. Co., C.C.A.Mich., 60 F.2d 90.

69. N.Y.—Sun Printing, etc., Assoc. v. Moore, N.Y., 22 S Ct. 240, 183 U. S. 642, 46 L.Ed. 366—P Sanford Ross, Inc., v. Moran Towing & Transportation Co, C.C.A.N.Y, 55 F.2d 1052, certiorari denied Moran Towing & Transportation Co. v. P. Sanford Ross, Inc., 53 S.Ct. 12, 287 U.S. 608, 77 L Ed 529.

70. N Y—Young v. Leary, 32 N.E. 607, 135 N Y 569.
58 C.J. p 231 note 5.

Continued existence of vessel

A mere promise to return in like condition does not impose an absolute obligation and is conditioned on

require a showing of negligence [71]

A stipulation in a contract for the hiring of a vessel for a specified time, binding the hirer to return her in as good condition as when taken, reasonable use, wear, and tear excepted, does not entitle the owner to refuse to accept the vessel when tendered back, and to recover her value, because of a breach of such stipulation, but only to recover the damages arising from the breach.[72] Where the charter is not a demise of the vessel but is merely a contract for her use as a carrier for cargo, a provision in the charter for redelivery of the vessel in good order and condition has been held not to have any real place therein.[73] The mere fact that the charterer of a vessel, in pursuance of the charter, has insured it for the benefit of the owner, does not constitute a defense to an action against the charterer for failure to return the vessel according to his contract, where it has been destroyed by act of God before the time for its return, unless it is also shown that the owner has received the insurance money.[74]

(3) Exceptions from, or Limitations of, Liability

A provision in a charter party granting the charterer an exemption from, or limitation of, liability for damages to the vessel will be given effect in accordance with its terms.

The charterer cannot be held liable for damages for injuries proximately due to risks which the owner expressly assumes in the charter.[75] A provision in the charter party that the charterer shall assume no responsibility for loss or damage may be sustained,[76] and is sufficiently specific to free the charterer from liability for negligence.[77] A clause in a demise charter under which the owner assumes the marine and all other risks relieves the charterer from damages due to negligence.[78] A provision in the agreement between the parties, which excepts the lessee of the vessel from liability for damages arising from causes such as tornadoes, acts of God, or ordinary wear and tear, does not evidence an intent to assume a greater obligation than that imposed by the common law,[79] and does not impose liability for all events other than those expressly excepted [80]

An exemption in a charter party for errors of navigation was held not to embrace errors of navigation of a vessel other than the one chartered, where there was nothing in the charter party concerning the navigation of any other vessel.[81] A charterer cannot, without authorization from the owner, release a towing company from liability for negligence, and an exemption so made is ineffective as against the owner.[82]

(4) Breach of Charter Party

The charterer is liable for injuries sustained by the vessel in a use other than one permitted by the charter, or in breach of the charter.

The charterer is liable for injuries sustained by the vessel in a use other than one permitted by the charter,[83] or in breach of the charter,[84] even without negligence on the part of the charterer[85] or those to whom he intrusts the vessel,[86] as, for example, when the vessel is used on a voyage not authorized by the charter,[87] or the charterer fails to provide a proper and suitable berth for the vessel [88] The charterers are justified in using the vessel with her masts and riggings for the purpose for

the continued existence of the vessel —Warren & Arthur Smadbeck, Inc, v. Heling Contracting Corporation, C C A N.Y., 50 F.2d 99, certiorari denied 52 S.Ct. 31, 284 U.S. 651, 76 L.Ed 553

71. U.S.—Nicholson Transit Co. v. Nicholson Universal S. S. Co., C C A.Mich., 60 F.2d 90—The Virruth, D.C N.Y., 25 F.Supp 904.

72. U.S —Detroit v. Grummond, Mich., 121 F. 963, 58 C C.A. 301.
58 C.J. p 232 note 6.

73. U S —Glasgow Shipowners' Co v. Munson SS. Line, D C.Pa., 44 F 2d 826, affirmed, C.C.A., The Gibraltar, 52 F.2d 787.
58 C.J. p 232 note 7.

74. Ill.—Steele v. Buck, 61 Ill. 343, 14 Am.R. 60.

75. U.S.—New Orleans-Belize Royal Mail, etc, SS. Co. v. U. S., Ct Cl., 36 S.Ct. 76, 239 U.S. 202, 60 L.Ed 227.
58 C J. p 232 note 9.

76. U S —McCormick v. Shippy, N. Y., 124 F 48, 59 C.C.A. 568.

77. U.S —McCormick v. Shippy, supra.

78. U.S.—Berwind-White Coal Min Co. v. U. S., C C.A N Y., 15 F.2d 366
58 C.J p 232 note 12.

79. Miss —Greenville Insulating Board Corporation v McMurray, 145 So. 730, 164 Miss. 809.

80. Miss.—Greenville Insulating Board Corporation v. McMurray, supra.

81. U S.—The Vale Royal, D.C Md., 51 F.Supp. 412.

82. U S —The West Eldara, C C A N. Y., 101 F 2d 45, reheard 104 F 2d 670, certiorari denied McAllister Towing & Transportation Co. v. American Diamond Lines, 60 S.Ct. 144, 308 U.S. 607, 84 L Ed. 507—The Niels R Finsen, D.C.N.Y., 52 F.2d 795

83. U.S.—Schoonmaker-Conners Co, Inc. v. New York Trap Rock Corp., D.C N.Y., 27 F.2d 988.
58 C J. p 232 note 16.

84. U S —Osterhoudt v. Hedger Transp. Co., D C N.Y., 42 F.2d 561.
58 C.J. p 232 note 17.

85. U.S —Schoonmaker-Conners Co, Inc v New York Trap Rock Corp, D C N Y, 27 F 2d 988—Sutcliff v Seligman, N.Y., 121 F. 803, 58 C.C. A. 251.

86. U.S —Schoonmaker-Conners Co., Inc. v New York Trap Rock Corp., D C.N Y, 27 F 2d 988.

87. U S —Latson v. Sturm, D.C N.Y, 14 F.Cas No.8,115, 2 Ben. 327.
58 C.J p 233 note 20.

88. U S —Merritt v. Sprague, D.C. Me, 191 F 627
58 C.J. p 233 note 21.

which she is chartered up to the limit of use prescribed and no more.[89]

(5) Vessels without Motive Power

The charterer of a vessel without motive power ordinarily is liable for damages to the vessel caused by his negligence or the negligence of anyone to whom he has intrusted it; but he will not be made an insurer except by clear and explicit language to that effect in the charter.

The charterer of a vessel without motive power ordinarily is required to return the vessel in the order and condition in which it was received, reasonable wear and tear excepted,[90] and he is liable for any damage to the vessel resulting from his own negligence,[91] or the negligence of anyone to whom he intrusts her;[92] and this is true notwithstanding the vessel is accompanied by an employee of the owner.[93] However, in the absence of express agreement,[94] the charterer generally is liable only for negligence,[95] and he will be made an insurer only by clear and explicit language to that effect in the charter.[96]

A covenant to return the vessel in the condition in which it is received, necessary or reasonable wear and tear excepted, does not render the charterer liable as an insurer,[97] and it has been held that he is liable only for negligence,[98] but there is other authority which holds that undisputed proof that the owner delivered the vessel in a good condition and that it was redelivered by the charterer in a damaged condition establishes a breach of the contract for which the charterer is liable.[99] The

89. U S—Glasgow Shipowners' Co v. Munson SS Line, D C Pa., 44 F 2d 826, affirmed, C C A., The Gibraltar, 52 F 2d 787.

90. U S—Dwyer Lighterage v Christie Scow Corp., D C N Y., 96 F Supp 900—Standard Towing Corp. v. Tidewater Coal Docks Corp., D C N.Y., 85 F Supp 659—Leary v City of New York, D C N Y., 52 F Supp 643
Wash—Angeles Gravel & Supply Co v. Crown Zellerbach Corp., 153 P 2d 482, 28 Wash 2d 428.

Owner not deprived of remedies
Provisions, in charter relating to claims for damage to dump scow while in tow, merely limited commissioner's authority to settle only such claims as were matters of record on log of city's dredge, and did not deprive owner of his legal remedies for other damages—Leary v. City of New York, D.C.N.Y., 52 F. Supp. 643.

91. U.S—The C. W. Crane, C C.A.N. Y., 155 F.2d 940—The Wyomissing, C C.A.N Y., 45 F.2d 160—The Seaboard No. 25, D.C.N.Y., 68 F Supp. 169, affirmed, C.C.A., 159 F.2d 860.
58 C.J. p 233 note 27.

Reasonable diligence
The duty which charterer of scow and owner of tug towing scow owed to owner of scow was to use reasonable diligence to ascertain conditions at stakeboat where scow was moored at time of injury to the end that the scow would have a safe berth—The Roslyn, C C.A.N Y., 93 F. 2d 278.

Scow going adrift
(1) A charterer, who failed to inquire about weather conditions as he was required to do and failed to have a tug at hand, and who left scow loaded with ammunition in exposed position to a then prevailing wind at 6 P M. to be unattended the whole of the next day, was guilty of negligence and liable for resulting damages when scow broke adrift—The Arthur R, D C N Y., 36 F Supp. 31

(2) Where city chartered a scow as a floating platform on which to conduct fireworks display and scow went adrift, causing damage thereto, the city failed in its duty as bailee and was liable for damages suffered by the scow while under charter to it—Kenny v. City of New York, D.C. N Y., 28 F.Supp. 175, affirmed, C.C A., 108 F 2d 958.

Liability of subcharterer and charterer
In libel by owner of damaged barge against charterer and his subcharterer, where tug was primarily liable, liability lay secondarily on subcharterer, and in third place on charterer. —The Reno, D.C.N Y., 54 F.2d 682.

92. U.S—New York Trap Rock Corp v. Christie Scow Corp., C C.A.N Y., 165 F.2d 314—The C W. Crane, C.C A.N Y., 155 F 2d 940—The Everett Fowler, C C A.N.Y., 151 F 2d 662, motion denied 152 F.2d 657, certiorari denied 66 S Ct. 963, 327 U. S 804, 90 L Ed 1029—Waldie v. Steers Sand & Gravel Corp., C.C.A. N.Y., 151 F.2d 129—O'Donnell Transp. Co v. M. & J. Tracy, Inc., C.C.A.N Y., 150 F.2d 735—The Henry E, D C N.Y., 60 F.Supp. 43, affirmed, C.C A., Exner Sand & Gravel Corp v. Gallagher Bros. Sand & Gravel Corp., 157 F.2d 291—White v. Upper Hudson Stone Co., N.Y., 248 F. 893, 160 C.C.A. 651, certiorari denied 38 S.Ct. 335, 246 U.S 665, 62 L.Ed 929.
58 C.J. p 234 note 28.

Theory of liability
Liability is imposed on charterers on the theory that they should at all times care for the barge while she is under charter to them and that they are under a duty which may not be delegated to others.—O'Donnell Transp. Co. v. M. & J. Tracy, Inc., C C.A.N.Y., 150 F.2d 735.

93. U S—The R. Lenahan, Jr., D.C. N Y., 43 F.2d 858, reversed on other grounds, C C A., 48 F.2d 110, certiorari denied Cowles v. Reddy, 52 S Ct. 13, 284 U S 629, 76 L.Ed. 536.
58 C J. p 234 note 29.

94. U S—C F Harms Co. v. Turner Constr Co, C.C.A.N.Y., 3 F.2d 591.
58 C J. p 233 note 24

95. U.S—The Roslyn, C.C A.N.Y., 93 F.2d 278—The Reno, C C.A.N Y., 61 F 2d 966—Petition of Reliance Marine Transp. & Const. Corp., D. C Conn., 89 F.Supp 272—C. F. Harms Co v. Erie R Co., D C.N. Y., 71 F Supp 934, affirmed in part and reversed in part on other grounds, C C A., 167 F 2d 562—The Montezuma III, D C N.Y., 66 F. Supp. 562—The Henry E, D C.N. Y., 60 F.Supp. 43, affirmed, C.C.A., Exner Sand & Gravel Corp. v. Gallagher Bros Sand & Gravel Corp., 157 F.2d 291.
58 C.J. p 233 note 25

96. U S.—Shamrock Towing Co. v. New York, C C A N.Y., 32 F.2d 684.
58 C.J. p 233 note 26.

No warranty of safety
Charterers do not warrant the safety of a barge.—O'Donnell Transp Co. v. M. & J. Tracy, Inc., C.C.A.N.Y., 150 F 2d 735.

97. U.S—Cowles Towing Co. v. American Constr., etc., Co., D.C.N. Y., 27 F.2d 622.
58 C.J. p 235 note 35.

98. U.S—Alpine Forwarding Co. v. Pennsylvania R. Co., C.C.A.N.Y., 60 F.2d 734, certiorari denied Pennsylvania R. Co. v. Alpine Forwarding Co., 53 S Ct. 93, 287 U.S. 647, 77 L Ed. 559

99. U.S—P. Sanford Ross, Inc., v. Moran Towing & Transportation Co., C C.A.N.Y., 55 F.2d 1052, certiorari denied Moran Towing & Transportation Co. v. P. Sanford Ross, Inc, 53 S.Ct. 12, 287 U S. 608, 77 L Ed. 529—Baldwin v. New York

charterer is not responsible for damage due to the negligence of a captain or master remaining on board and representing the owners,[1] or of another for whom the charterer is not responsible.[2]

Unseaworthiness or unfitness. In the absence of agreement, the charterer is not liable for loss due to unseaworthiness of the vessel without negligence on his part.[3] The charterer is not liable for loss or injury to a vessel not due to his negligence but due to its lack of general fitness for the known use for which it was chartered.[4] The hirer of a hinge barge may be liable for the sinking of one section on the ground of improper mooring, while not liable for the sinking of the other section, due to unseaworthiness.[5]

Limitation of liability. Where a vessel is insured by the owner, a charter thereof which is a demise of the vessel may lawfully limit the liability of the charterer to such loss or injury as is not covered by the policies of insurance, even though the vessel is without motive power and must be towed.[6] A provision in the charter party for the chartering of a barge, absolving the charterer from liability for errors of navigation, will relieve the charterer from liability for errors of navigation committed by the master of the barge or by anyone else engaged in navigating her,[7] or for negligence or negligent navigation of towing vessels.[8] Under a demise charter of a barge with a bargee in which the owner assumes the marine and all other risks, the charterer is not liable for injury to the barge through his negligence,[9] but the measure of the charterer's obligation is contained in a clause continuing the hire of the barge while laid up through his fault.[10]

Breach of charter. As in other cases, the charterer may be liable for injury to the vessel occasioned by its use in a manner not permitted by the charter,[11] even without negligence on the part of the charterer.[12]

b. Rights of Charterer

As a general rule, a charterer has no right of recovery against one who damages the chartered vessel.

As a general rule, a charterer has no cause of action against one who damages the chartered vessel,[13] and there has been held to be no right of subrogation, which would give the charterer a right to sue a party causing damage to the ship, to the extent of the charter hire paid.[14] A shipper by chartered lighters to a steamer, having no control over the lighters and merely contracting for their carrying capacity, is not responsible to the charterer for any damages to the boats.[15] Where a time charter provides that the vessel is to be docked at least once during certain specified periods and that payment of the hire is to be suspended until she is again in proper state for service, the charterers cannot recover against the dock owner for delay occasioned by the dock owner's negligent injury to the vessel while it is being docked under a contract between the dock owner and the vessel owner where the charterers are not parties to such contract and the dock owner has no notice of the charter until after the delay has begun.[16]

Cent. R. Co., D.C.N.Y., 87 F.Supp. 562.
58 C.J. p 235 note 35.

1. U.S.—The Junior, C.C.A.N.Y., 279 F. 407.
58 C.J. p 234 note 30.

Charter of scow with captain or scowman

(1) Where owner chartered scow with captain at agreed pay per day, determination of liability for damage to scow caused by captain's negligence depended on ascertaining for whom captain was acting when negligence was committed—The Cobalt, D.C.N.Y., 26 F.Supp. 5, affirmed, C.C.A., C. W. Crane & Co. v. Charles Dreifus Co., 107 F.2d 1011.

(2) Scowman was part of that which was subject of charter, and if scowman's departure from scow on afternoon when damage to scow occurred was to be criticized, as between owner and charterer, latter was not at fault.—The Maui, D.C.N.Y., 70 F.Supp. 772.

2. U.S.—The Maui, supra.
58 C.J. p 235 note 31.

3. U.S.—The Greenwich, C.C.A.N.Y., 270 F. 42.
58 C.J. p 235 note 32.

4. U.S.—Penn Builders, etc., Co. v. Braeburn Steel Co., C.C.A.Pa., 274 F. 794.
58 C.J. p 235 note 33

5. U.S.—Walling v. Porter Gildersleeve Co., D.C.Pa., 222 F. 1002.

6. U.S.—American-Hawaiian SS. Co. v. Bennett, Cal., 207 F. 510, 125 C.C.A. 172.

7. U.S.—The Interports No. 767, C.C.A.N.Y., 92 F.2d 601

8. U.S.—The Interports No. 767, supra.

9. U.S.—Berwind-White Coal Min. Co. v. U. S., C.C.A.N.Y., 15 F.2d 366

10. U.S.—Berwind-White Coal Min. Co. v. U. S., supra.

11. Wash.—Parker v. Washington Tug, etc., Co., 148 P. 896, 85 Wash. 575
58 C.J. p 236 note 39

12. U.S.—Schoonmaker-Conners Co., Inc. v. New York Trap Rock Corp., D.C.N.Y., 27 F.2d 988.

13. U.S.—The Agwidale, D.C.N.Y., 61 F.Supp. 191, affirmed, C.C.A., Agwilines, Inc. v. Eagle Oil & Shipping Co., 153 F.2d 869, certiorari denied Agwilines, Inc. v. The San Veronico, 66 S.Ct. 980, 328 U.S. 835, 90 L.Ed. 1611.

14. U.S.—The Agwidale, D.C.N.Y., 61 F.Supp. 191, affirmed, C.C.A., Agwilines, Inc. v. Eagle Oil & Shipping Co., 153 F.2d 869, certiorari denied Agwilines, Inc. v. The San Veronico, 66 S.Ct. 980, 328 U.S. 835, 90 L.Ed. 1611.

15. U.S.—Simmons Transp. Co. v. Alpha Portland Cement Co., D.C.N.Y., 286 F. 955.

16. U.S.—Robins Dry Dock, etc., Co. v. Flint, N.Y., 48 S.Ct. 134, 275 U.S. 303, 72 L.Ed. 290.

c. Rights of Owner as against Third Persons

The owner of a chartered vessel may recover from third persons for damages to the vessel caused by their negligence; and the relationship of bailor and bailee, stricti juris, is not necessary in order to impose a duty of reasonable care on a person with whom a vessel is left.

The owner of a chartered vessel is entitled to recover for damages to the vessel caused by the negligence of third persons.[17] He has a right in the vessel in the nature of a reversionary interest and has a right of action against a third person for injury to the reversionary interest.[18] The consignee of the cargo of a chartered vessel may be held liable to the owner for an injury to the vessel due to his negligence;[19] but a consignee who has no control over the movements of a barge is not liable for damage thereto negligently caused by a tug.[20] The relationship of bailor and bailee, stricti juris, is not necessary in order to impose on a consignee, or other person with whom a vessel may be left, the duty of reasonable care to protect her until the owner or charterer takes her back into possession.[21]

d. Damages

The general principles governing compensatory damages are applicable in determining the amount of recovery in an action for damages to, or loss of, a chartered vessel; and such principles apply with respect to such matters as repairs, interest, and the determination of the value of the vessel.

The principle of compensation applicable generally in the measurement of damages is applicable in the case of injury to a vessel under charter.[22] A shipowner's damages must be limited to the amount of his actual loss,[23] and he cannot be permitted to make a profit from the injury.[24] The owner may recover for the cost of repairs to the vessel,[25] and he need not repair in order to collect damages, but may establish his damages by expert testimony alone.[26] Where the chartered vessel is repaired, and some of the repairs were not necessitated by the charterer's negligence, he is not relieved from liability for incidental expenses made necessary by his negligence.[27]

Where there is a total loss,[28] as when a vessel is sunk in deep water and either cannot be raised at all or can only be raised at a cost clearly in excess of her value,[29] or when a vessel, although sunk in shallow water, is obviously so badly damaged that the cost of repairing her will clearly exceed her value at the time she sank,[30] the measure of recovery is the fair value of the vessel at the time of the loss. However, the mere fact that a damaged vessel is sunk does not necessarily establish that the vessel is a total loss,[31] and the owner of a vessel sunk in shallow water under circumstances indicating that she might readily and relatively inexpensively be raised and repaired cannot abandon his vessel and treat it as a total loss.[32]

17. U.S.—U. S. v. Carroll Towing Co., C.C.A.N.Y., 159 F.2d 169, rehearing denied 160 F.2d 482.

18. N.Y.—Graves v. Hines, 190 N.Y.S. 457, 116 Misc. 502, affirmed 194 N.Y.S. 940, 202 App.Div. 842, reversed on other grounds 139 N.E. 280, 235 N.Y. 315.

19. U.S.—Schoonmaker-Conners Co. v. New York Tidewater Gravel Co., C.C.A.N.Y., 11 F.2d 470.
58 C.J. p. 236 note 46.

20. U.S.—O'Donnell Transp. Co. v. M. & J. Tracy, Inc., C.C.A.N.Y., 150 F.2d 735

21. U.S.—Roah Hook Brick Co. v. Erie R. Co., C.A.N.Y., 179 F.2d 601—C. F. Harms Co. v. Erie R. Co., C.C.A.N.Y., 167 F.2d 562—New York Trap Rock Corp. v. Christie Scow Corp., C.C.A.N.Y., 162 F.2d 624.

22. U.S.—Gallagher Bros. Sand & Gravel Corp. v. Anthony O'Boyle, Inc., D.C.N.Y., 94 F.Supp. 788.
58 C.J. p. 236 note 50.

Insignificant damages

Where damages to scows were attributable to fault of charterer, charterer was liable for damages notwithstanding they were insignificant. —The Arthur R., D.C.N.Y., 36 F.Supp. 31.

23. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964.

24. U.S.—Galena Nav. Co. v. Sinclair Nav. Co., C.C.A.Tex., 17 F.2d 9.
58 C.J. p. 237 note 53.

25. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964.

Temporary repairs

(1) The making of temporary repairs by owner of vessel does not preclude him from recovering cost of permanent repairs from tort-feasor. —Rugo Const. Co. v. New England Foundation Co., supra.

(2) The fact that owners made only temporary repairs, rather than the full repairs called for in the joint survey, did not diminish the amount of recovery.—Banks v. Chas. Kurz Co., D.C.Pa., 69 F.Supp. 61, motion denied 69 F.Supp. 1017.

Delay incident to repairs

Where owner charters a boat to another, charterer must bear any loss resulting from delay incident to repairing damage to boat which occurred during her use by charterer.—Cox v. Banks, D.C.Pa., 50 F.Supp. 871.

26. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964.

27. U.S.—Galena Nav. Co. v. Sinclair Nav. Co., C.C.A.Tex., 17 F.2d 9

28. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964—Eastern S.S. Lines v. U.S., D.C.Mass., 74 F.Supp. 37, affirmed, C.A., 171 F.2d 589.

29. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964.

30. U.S.—Rugo Const. Co. v. New England Foundation Co., supra.

31. U.S.—Rugo Const. Co. v. New England Foundation Co., supra.

32. U.S.—Rugo Const. Co. v. New England Foundation Co., supra.

Raising vessel to determine extent of damage

Where damaged vessel is sunk in shallow water under circumstances indicating that she can easily be raised, but until that is done it cannot be determined whether combined costs of raising and repairing vessel will equal or exceed her value at time of sinking, owner must raise vessel and also remove her to some other place, if that be necessary to determine extent of damage, in which event he is entitled to recover his reasonable expenses of raising and removal in addition either to fair value of vessel, if she eventually

In the case of a probable partial loss the law requires the owner by reasonable exertions and the use of such nautical skill as the owners of vessels usually employ in such emergencies to mitigate his damages by raising his vessel and having it repaired,[33] and, in this event, the owner's damages include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight and for the damage to the cargo and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage.[34]

Under a charter party requiring the charterer to pay "just compensation" where there is a total loss, "just compensation" means the full and perfect equivalent in money of the vessel which was lost,[35] and requires that the owner be put in as good a position pecuniarily as he would have occupied if his property had not been lost.[36] Where the ship was a total loss and damages are awarded on such basis, a deduction should be made for the amount for which the wrecked ship was sold;[37] but one whose ship has been lost or damaged by the fault of another may recover his damages from the wrongdoer even though he has received compensation for his loss from his insurer.[38] The rule applied in marine insurance, as discussed in Insurance § 956, that the injury of a vessel constitutes a total loss where the cost of repair would exceed half her value, is not applicable to the case of injury to a vessel under lease, so as to entitle the owner to recover her full value as stipulated in the lease in the event of total loss, at least where there has been no abandonment to the lessees.[39]

Under a charter by which the charterer became liable for any loss or injury not recoverable under a policy of insurance held by the owner, where the vessel was stranded through fault of the charterer's servants, he was entitled to set off against his liability items of expenditures which could have been brought into general average and proved under the policy, and of which the owner was given timely notice.[40] A provision in the charter to the effect that any rights which the owner might have against an insurer should inure to the benefit of the charterer imposes no liability on the owner to keep insurance in force for the benefit of the charterer.[41]

In a suit on a charter party for breach of a covenant to return a vessel, she having been burned, the charter money for the time preceding the destruction of the vessel may be allowed as damages,[42] and, notwithstanding a provision in the charter party exempting the charterer for losses resulting from dangers of the sea, such damages will not be reduced because the vessel, when burned, was lying on a shoal on which she had stranded, unless it affirmatively appears that her value was thereby materially diminished.[43] A charterer may lessen the amount of damages for which he is responsible by showing negligence, or lack of diligence, on the part of her navigators.[44]

Determination of value of vessel. The fair market value of a vessel for which recovery may be had is the amount that a willing buyer would pay to a willing seller on the date of the loss.[45] Contemporaneous sales of comparable property on the market afford the best evidence of market value,[46] but when it is impossible to establish such value by reference to reasonably contemporaneous sales made in the course of ordinary business, resort may be had to other evidence of value,[47] such as actual[48] or reproduction[49] cost less depreciation. Large

proves to be a total loss, or to reasonable costs of repairing her, if she eventually proves to be only a partial loss.—Rugo Const. Co. v New England Foundation Co., supra.

33. U.S.—Rugo Const. Co. v. New England Foundation Co., supra.

34. U.S.—Rugo Const. Co. v. New England Foundation Co, supra

Insurer's payment for cost of raising

Where owner was compelled to raise ship for purpose of inspecting it in an effort to mitigate damages, and thereby to preserve its cause of action against tort-feasor, payment of such cost by insurance carrier was in interest of and on behalf of libelant, notwithstanding carrier may also have hoped to gain something for itself thereby, and, hence, did not preclude recovery of such cost in action by libelant against tort-feasor.—Rugo Const. Co. v New England Foundation Co., supra.

35. U.S.—Eastern S. S Lines v. U S, D.C.Mass, 74 F.Supp 37, affirmed, C.A., 171 F.2d 589

36. U.S.—Eastern S. S Lines v. U S, supra.

37. U.S.—Rugo Const Co. v. New England Foundation Co., C.A.Mass, 172 F.2d 964.

38. U.S.—Rugo Const. Co. v. New England Foundation Co., supra.

39. U.S.—Cotton v. Almy, Hawaii, 141 F. 358, 72 C.C.A. 506.
58 C.J. p 237 note 56.

40. U.S.—Hahlo v. Benedict, N.Y., 216 F. 303, 132 C.C.A. 447.

41. U.S.—Port Johnston Towing Co. v Pennsylvania R. Co., D.C.N.Y., 190 F. 409

42. U.S.—Merrill v. Arey, D.C.Me., 17 F.Cas.No 9,468, 3 Ware 215, affirmed, C.C., 1 F.Cas.No 115, 2 Curt. 8.

43. U.S.—Merrill v. Arey, supra.

44. U.S.—Constantine, etc., SS Co v. West India SS. Co, D.C.N.Y., 199 F. 964.

45. U.S.—Eastern S. S Lines v. U S, D.C.Mass, 74 F.Supp 37, affirmed, C.A., 171 F.2d 589.

46. U.S.—U. S. v. Eastern S. S Lines, C.A.Mass., 171 F.2d 589

47. U.S.—U. S. v. Eastern S. S Lines, supra.

48. U.S.—U. S. v. Eastern S. S. Lines, supra.

49. U.S.—U. S. v. Eastern S. S. Lines, supra.
58 C.J. p 236 note 50 [d].

Rate of depreciation

In applying reproduction cost theory in determining just compensation for loss of chartered merchant vessel, district court properly fixed depreciation at 5 per cent per annum —U. S. v. Eastern S. S. Lines, supra

earnings of the ship for a short period prior to the loss do not necessarily of themselves establish the value of the ship;[50] and the amount paid for chartering the ship is not necessarily a determining criterion for establishing its value where at the time the charter was executed the charterer was very much in need of such a ship and no other was available.[51] It is competent for the parties to a charter to fix the value of the vessel therein as a basis of damages in the event of her loss, and such valuation is conclusive on them in the absence of fraud or mutual mistake, especially where the vessel has no determinable market value.[52]

Interest. In a proper case, interest may be added to the award in order to afford complete indemnity.[53] However, in an action under the Suits in Admiralty Act for loss of a ship, interest may be awarded only as provided in the act.[54]

§ 53. Charter by Government

a. In general
b. Charter hire
c. Loss of, or injury to, vessel

a. In General

The charter of a vessel by the government is subject to the same rules as charters between private persons with respect to the existence or termination of a charter, the terms thereof, and their construction and effect.

Ordinarily, the hiring of a private vessel by the government, whatever the manner in which the vessel is obtained, is subject to the same rules, as to the existence or termination of a charter,[55] the terms thereof,[56] and their construction[57] and effect,[58] as are charters between private persons. They are to be construed in the light of the circumstances under which they are made and with reference to which the parties must be taken to have contracted,[59] so that the effect of language in a charter to the government, made and to be performed in time of war and in aid of its conduct, may be different from that given to like language in a peace-time charter between individuals.[60]

Charter by United States as owner. The liability of the United States under a charter party entered into by it as owner of the vessel depends on the terms of the charter party.[61] Such a charter may make the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 et seq., a part of the contract of carriage.[62] The charter party should be read as a whole to determine the proper construction thereof,[63] and, where it is prepared on a printed form required by a published order of a federal shipping agency, it should be strictly construed against the government.[64] A negligent breach of the agree-

50. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964.

51. La.—Poydras Fruit Co. v. Weinberger Banana Co., 181 So. 452, 189 La. 940.

52. U.S.—Moore v. Sun Printing, etc., Assoc., N.Y., 101 F. 591, 41 C.C.A. 506, affirmed 22 S.Ct. 240, 183 U.S. 642, 46 L.Ed. 366.
58 C.J. p. 236 note 51

53. U.S.—Rugo Const. Co. v. New England Foundation Co., C.A.Mass., 172 F.2d 964

54. U.S.—U. S. v. Eastern S. S. Lines, C.A.Mass., 171 F.2d 589.

Calculation of interest

Under provision of Suits in Admiralty Act that no interest should be allowed on any claim prior to time of suit on such claim, trial court in fixing just compensation for loss of chartered merchant vessel properly directed that interest should be calculated from date libel was brought rather than from date vessel was lost.—U. S. v. Eastern S. S. Lines, supra.

55. U.S.—Strong v. U. S., Ct.Cl., 14 S.Ct. 1182, 154 U.S. 632, 24 L.Ed. 664.
58 C.J. p. 237 note 61.

56. U.S.—Donald v. U. S., 39 Ct.Cl. 357.
58 C.J. p. 237 note 62.

57. U.S.—Strong v. U. S., Ct.Cl., 14 S.Ct. 1182, 154 U.S. 632, 24 L.Ed. 664.
58 C.J. p. 237 note 63.

58. U.S.—Matson Nav. Co. v. U. S., Ct.Cl., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336.
58 C.J. p. 238 note 64.

59. U.S.—Mott v. U. S., 9 Ct.Cl. 257—Reybold v. U. S., 5 Ct.Cl. 277, affirmed 15 Wall. 202, 21 L.Ed. 57
Collateral circumstances as aid to construction of charters generally see supra § 32.

60. U.S.—Reybold v. U. S., 5 Ct.Cl. 277, affirmed 15 Wall. 202, 21 L.Ed. 57.
58 C.J. p. 238 note 68.

61. U.S.—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312.

Power of War Shipping Administration

The War Shipping Administration did not exceed its power in executing charter party wherein it created a liability against the United States for all provable damages including attorney's fees resulting from damage to cargo, since the Administration has same authority as any private corporation to enter into contract and, hence, may bind the United States by terms of such contract.—Standard Oil Co. of Cal. v. U. S., supra.

Demise charter

Where steamship owned by the United States was chartered to a foreign government and was manned, supplied, and operated by a foreign line under a subcharter, and captain and crew were hired and paid by the foreign line which collected and retained freights, the charter was a demise, notwithstanding provisions in charter subjecting charter to all regulations of general application in the trade issued by the United States with respect to cargoes and other matters, and requiring that certain specified clauses be incorporated in charterer's bills of lading, and, hence, United States could not be held liable in personam for damage to cargo.—Schnell v. U. S., C.C.A.N.Y., 166 F.2d 479, certiorari denied 68 S.Ct. 1346, 334 U.S. 833, 92 L.Ed. 1760.

62. U.S.—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312.

63. U.S.—Standard Oil Co. of Cal. v. U. S., supra.

64. U.S.—Standard Oil Co. of Cal. v. U. S., supra.

ment by the government renders it liable for damages to the charterer.[65]

b. Charter Hire

The charter provisions measure and determine the rights and obligations of the owner and the government as to the compensation to be paid for the hiring of the vessel by the government.

The charter provisions measure and determine the rights and obligations of the owner and the government as to the compensation to be paid for vessel hire.[66] Hire is not recoverable for time lost for causes which the charter expressly provides shall operate to produce a cessation of hire.[67] If, under the charter, the government is not owner pro hac vice, it is not chargeable for the hire of the chartered vessel after the voyage is completely broken up,[68] except in case of a charter for a voyage out and return, in which case, if the vessel is lost on the return voyage, the government is liable for the charter hire up until the time when the return trip, if no disaster had occurred, would normally have been completed, and no further.[69]

No compensation is recoverable as hire after the valid and effective discharge of the vessel by the government,[70] but an attempted discharge, which is unauthorized and inoperative, does not prevent the continuation of liability for hire,[71] which remains in force until the discharge becomes valid;[72] and acceptance of payment until the time of the inoperative attempted discharge, coupled with the giving of a receipt in full, does not preclude the owner from claiming compensation until the discharge becomes effective.[73] A discharge may not be made to operate retroactively so as to cut off the right to compensation at and from a time prior to notice of discharge.[74]

In the absence of controlling provisions to the contrary in the charter, if the government takes complete possession and control of the chartered ship, it is bound to pay rent for the vessel until final return to the contractor in a fit condition for use,[75] including hire for time spent in making repairs for injuries received by the vessel while in the government service.[76] Even though the charter is not of the nature of a demise, the owner is entitled to the hire for the time spent in repairing injuries to the vessel for which the government is liable under the charter party,[77] and in returning her to service,[78] less the amount of the expenses which would have been incurred in running the vessel for such time,[79] but the government is not liable for compensation during retention of the vessel by a marshal incident to a marine risk, which the owner expressly assumed.[80]

The government cannot effectively alter or vary the charter terms as to hire without the assent of the owner,[81] and this principle has been announced as true, even though, under the charter party, the government could discharge the vessel and totally terminate the charter;[82] but the owner of a vessel chartered to the government may, by his conduct, effect a waiver or estoppel precluding him from claiming more than that proposed by the government in modification of the original terms.[83] Such waiver or estoppel, it is held, may even operate retroactively to defeat the right to compensation at the higher rate even as to time elapsing prior to the submission of the proposal for modification.[84]

65. U.S.—U. S. v. Standard Oil Co of Cal., C C A.Cal., 156 F.2d 312.

Pumping contaminated oil into tanks

A provision of charter party that cargo of gasoline and oil should be pumped out at vessel's expense, but at risk of vessel only as far as vessel's permanent hose connections, does not protect United States from liability for negligence in pumping contaminated oil and gasoline on vessel into shipper's receiving tanks which contained uncontaminated oil and gasoline.—U. S. v. Standard Oil Co. of Cal., supra.

66. U S.—Mitchell v. U. S, Ct Cl, 96 U S. 162, 24 L Ed. 702—The E. H. Blum, D.C Pa., 74 F.Supp. 516.
58 C.J. p 238 note 71.

Assumption of specified charges and costs

Government's assumption of port charges, pilotages, and other costs incident to use of vessel includes only items similar to those mentioned, and not owner's expenses in defending unfounded claim of lien for salvage —Luckenbach S S Co. v. U. S, C.C A N Y., 42 F.2d 156.

67. U.S.—Atlantic Refining Co v. U. S., D C Pa, 82 F Supp 201.
58 C.J. p 239 note 72.

68. U.S.—Reed v U. S., Ct.Cl., 11 Wall 591, 20 L Ed 220.
58 C.J. p 239 note 75.
Charter as demise or contract of affreightment generally see supra § 34.

69. U.S.—Reed v. U. S, supra

70. U S —Strong v. U. S, Ct.Cl., 14 S.Ct. 1182, 154 U S. 632, 24 L Ed 664.
58 C.J. p 239 note 78.

71. U.S —The Undaunted, D.C Mass, 24 F Cas.No 14,336, 2 Sprague 194.
58 C J. p 239 note 79.

72. U S.—Fogg v. U. S, 5 Ct.Cl. 264.
58 C J. p 239 note 79.

73. U.S.—Talbot v. U. S., 7 Ct Cl. 417.

74. U S —Terry v U S., 9 Ct Cl 233.
58 C J. p 240 note 82

75. U S —Cornell Steamboat Co. v. U. S., 58 Ct Cl 497, affirmed 45 S Ct 239, 267 U S 281, 69 L Ed 613.
58 C J. p 240 note 83

76. U S —U. S v. Shea, Ct.Cl., 14 S Ct 519, 152 U S. 178, 38 L Ed 403.
58 C J. p 240 note 84

77. U S —Clark v. U S, 9 Ct Cl 377.
58 C J p 240 note 85

78. U S —Clark v. U. S, supra.

79. U S.—Clark v. U. S, supra.

80. U S.—Goodwin v. U S., Ct Cl, 17 Wall. 515, 21 L Ed 669
58 C J p 240 note 88.

81. U S.—Pratt v U. S, 3 Ct Cl. 105
58 C J p 240 note 89

82. U S —Thorne v. U S, 5 Ct Cl. 242—Pratt v. U. S, 3 Ct Cl 105

83. U S —U. S v. Clyde, Ct Cl., 13 Wall. 35, 20 L Ed 479
58 C J. p 240 note 91

84. U.S.—U S. v Clyde, supra.
58 C.J. p 241 note 92.

Provisions in the charter calling for a reduction of charter hire under certain circumstances do not prevent a recovery of the full charter hire where the facts are not such as to render the reduction provisions applicable.[85] Under a charter party reducing the payment of hire for time lost by reason of the master's negligence, the master is not automatically charged with negligence merely because someone is found who would have done otherwise than the master did under the particular circumstances;[86] and it is not negligence if the master made an error, as long as his conduct was not unreasonable and unjustifiable under the circumstances at the time he was navigating.[87] Under some charter parties, there is no reduction of charter hire by reason of time lost as a result of stranding, regardless of the master's negligence, if the stranding was contributed to by war or warlike acts,[88] or if the stranding was caused by navigating in unbuoyed waters contrary to peacetime custom.[89]

Establishment of rate by commission. An agreement that the rate of hire should be established by a maritime commission carries with it an implied understanding that the rate established should be reasonable and not arbitrary.[90]

Cost of insurance. The owner cannot recover the cost of extra insurance premiums, under a clause in the charter requiring the charterer to pay the cost of extra insurance for voyages outside of certain territorial limits, where the voyage was not in fact beyond the permissible limits.[91]

Lien for charter hire. The owners of a vessel, let to the United States as a transport in time of war, have no lien for their charter money on goods the United States may put on board.[92]

c. Loss of, or Injury to, Vessel

(1) In general
(2) Damages

(1) In General

The government may by contract regulate its liability for loss of, or injury to, the vessel. In accordance with the rules applicable to charter parties generally, it is liable for losses sustained by a use of the vessel not authorized by the charter.

The government may, in like manner as a private person, regulate, by contract, its liability for loss of, or injury to, the vessel while in its employ.[93] Where the terms of the charter are such that it is a mere contract for affreightment, the owner retaining possession of command and navigation of the vessel, the government is not, as a general rule, liable for loss of, or injury to, the vessel, during the term of employment.[94] In accordance with the rules applicable to charter parties generally, discussed supra § 52, the government is liable for losses or injuries sustained by a use of the vessel not authorized by the charter and constituting a breach thereof.[95] The United States may be liable, as bailee under a contract implied in fact with a charterer, for damage sustained to a vessel while under its control and direction.[96]

85. U S—The E. H. Blum, D.C.Pa., 74 F Supp. 516.

86. U.S—The E. H. Blum, supra

87. U.S—The E. H. Blum, supra.

88. U.S—The E. H. Blum, supra

Absence of radio beacon stations

The stranding of vessel which, after being detached from convoy, was being navigated through dense fog, without the benefit of several radio beacon stations which had been removed because of the war, was contributed to by war or warlike acts within charter party provision reducing payment of hire for time lost by reason of stranding unless time lost was caused, or contributed to, by war or warlike acts—The E. H. Blum, supra.

89. U S.—The E. H Blum, supra.

"Unbuoyed waters," within charter party reducing payment of hire for time lost by reason of stranding unless stranding was caused by navigating in unbuoyed waters contrary to peacetime custom, did not include waters in which vessel merely did not have recourse to radio aids.—The E. H. Blum, supra.

90. U S—Ramselius v. U. S., 90 F Supp 547, 116 Ct.Cl 612.

Rate held unreasonable

Where, during the period, numerous vessels of similar characteristics were chartered at not less than three dollars a ton, rate of one dollar and twenty-five cents per ton was unreasonable, and owners were entitled to recover from the United States at the rate of three dollars per ton on the total dead-weight tonnage previously agreed on—Ramselius v. U. S, supra.

91. U.S—Seas Shipping Co. v. U. S War Shipping Administration, D C N.Y., 97 F.Supp. 129.

92. U S—The Undaunted, D.C Mass., 24 F Cas No 14,336, 2 Sprague 194.
58 C J. p 241 note 93
Liens for charter hire generally see supra § 45.

93. U.S—White v. U. S, Ct.Cl., 14 S. Ct. 1192, 154 U.S 661, 26 L.Ed. 178—Donald v. U. S, 39 Ct.Cl. 357.
58 C J. p 241 note 96.

Indemnity held not allowable

Where a vessel was under charter to the government, and the government engaged a company as berth agent under an agreement calling for indemnity, and also engaged the same company as stevedore without an indemnity agreement, the company was held not entitled to indemnity for counsel fees and other expenses incurred in connection with a claim for negligence in the stevedoring operation.—Compania De Vapores Arauco Panamena, S. A. v Moore-McCormack Lines, D.C.N.Y, 91 F.Supp. 545.

94. U.S—Shaw v. U S., Ct.Cl, 93 U.S. 235, 23 L Ed. 880.
Charter as demise or affreightment contract generally see supra § 34

95. U.S.—Clark v. U. S., 9 Ct.Cl. 377.
58 C J. p 243 note 15

96. U.S.—C. F. Harms Co. v. Erie R. Co., C.C.A.N.Y., 167 F.2d 562.

Primary liability

Where charterer of barge loaded with army equipment turned complete custody of barge over to United States, and barge was returned in a damaged condition, United States, as bailee under contract implied in fact with charterer, was primarily liable.—C. F. Harms Co. v. Erie R. Co., supra.

The very general agreement in government charters of private vessels for military purposes that the owner shall be compensated for losses due to war risks or arising from warlike operations, but shall himself remain liable for marine risks, is valid and will be enforced.[97] Under such an agreement the government is liable when the proximate cause of the loss or injury is determined to be of such a character as to constitute a war risk, or a consequence of warlike operations,[98] and this is true, even though a marine risk may be a remote cause of the loss or injury,[99] but, when the proximate cause in its character is a marine risk, such liability does not attach,[1] unless the loss, although caused by a marine risk, arises from the government agents' wrongful assumption of the control and navigation of the vessel and deprivation of the rights of the owner's agents in that respect.[2] However, where the owner's agents remain in charge of navigation, the fact that they act, in the navigation or management of the vessel, against their own judgment in compliance with government orders which are deemed imperative does not charge the government with the consequent loss.[3]

There may be risks which are neither war risks nor marine risks,[4] and where liability for those two classes of risks only is referred to in the charter, the government, when the charter amounts to a demise, is liable for loss for injury to the vessel by risks not included in either classification under a covenant for the return of the vessel in good condition.[5] If the government, in the charter party, assumes all risks, it is liable, at least in the absence of negligence of the officers and crew, for loss or injury from whatever cause sustained, including causes arising from marine risks.[6]

Marine risk as ordinary or extraordinary. Marine risk may be either ordinary or extraordinary, and the parties may contract with reference to their liability separately or as one.[7] If no distinction is made in the charter and the owner assumes the risk for marine loss as such, he, and not the government, must bear the loss whether it is occasioned by the one or the other kind of marine risk,[8] if the government assumes liability for extraordinary marine risks only, it is not answerable for the loss of, or injury to, the chartered ship by ordinary marine risks.[9]

Effect of insurance A contract limiting the liability of the government to such losses as are not adequately covered by insurance has been held not invalid on grounds of public policy or otherwise.[10] Where injuries to an impressed vessel were made good to the owners by insurers, the owners were held to have no right of action against the government for the same damages.[11]

(2) Damages

The extent of the government's liability for injury to a vessel chartered by it, and the damages recoverable therefor, are to be determined by the provisions of the charter party and the general principles of law governing liability for damages.

When, under the circumstances, the government is liable as charterer for loss of, or injury to, the vessel, the extent of its liability and the damages recoverable therefor are to be determined by the provisions of the charter party,[12] and by the rules of law generally applicable to such liability.[13] In

97. U.S.—U. S. v. Standard Oil Co of N. J., C.A.N.Y., 178 F.2d 488, affirmed 71 S Ct 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v U. S, 71 S.Ct 144, 340 U.S. 71, 95 L Ed. 86.
58 C J. p 241 note 99.

98. U.S.—Clyde v. U. S, 9 Ct Cl. 184
58 C.J. p 241 note 1.

99. U S —Baker v. U. S., 3 Ct.Cl 76.
58 C J. p 242 note 2

1. U.S.—U. S. v. Standard Oil Co. of N J., C.A.N.Y., 178 F.2d 488, affirmed 71 S Ct 135, 340 U.S. 54, 95 L.Ed. 68, followed in Libby, McNeill & Libby v. U S, 71 S.Ct. 144, 340 U S 71, 95 L.Ed. 86.
58 C.J. p 242 note 3.

2. U.S.—Talbot v. U. S., 7 Ct.Cl. 417.
58 C.J. p 242 note 4.

3. U.S.—New Orleans-Belize Royal Mail, etc., SS. Co. v. U. S., Ct Cl., 36 S Ct. 76, 239 U.S. 202, 60 L.Ed 227.
58 C.J. p 242 note 5.

4. U.S.—Middlebrook v. U. S., 67 Ct. Cl. 294, certiorari denied 50 S.Ct 24, 280 U S. 564, 74 L.Ed 618

5. U S.—Middlebrook v. U S, supra

6. U.S.—Clark v. U. S, 9 Ct Cl. 377

7. U S —Mott v U. S., 9 Ct.Cl. 257
58 C J. p 242 note 6.

8. U S —Mott v. U. S, supra.
58 C J. p 243 note 7.

9. U S.—Leary v. U. S., Ct.Cl., 14 Wall 607, 20 L Ed. 756.
58 C.J p 243 note 8.

10. U S —New Haven Trap Rock Co. v. U. S., D C Mass, 15 F.Supp. 619

Insurance for full value

Where provision of voyage charter of United States with shipowner required owner to procure war risk insurance for full value of vessel, payable to owner, intent was manifested that United States should not be liable under its charter for any insured losses —Calmar S. S Corp. v. U S, D C N Y, 103 F.Supp 243, reversed on other grounds, C A., Calmar S. S Corp. v. Scott, 197 F 2d 795.

11. U.S —Dozier v. U. S, 9 Ct Cl. 342.

12. U S —New Bedford, etc, Propeller Co v. U. S, Ct Cl, 14 Wall. 670, 20 L Ed 760.
58 C J. p 243 note 19.

13. N Y —O'Boyle v. U. S., D.C.N Y, 2 F Supp. 853
58 C J p 243 note 20.

Items held allowable

(1) In owner's suit against charterer for failure to return barge, which sank, allowable damages were held to include items for lines, stove, furniture, and gasoline engine lost, and also an amount expended for searching for the vessel.—O'Boyle v. U S., supra

(2) Where charter of vessel to army transport service required owner to carry insurance and provided that the amount of premiums should be added to the charter rate specified to be paid by the charterer, and vessel was sunk by enemy action, owner was entitled to recover in addition to

order to sustain a recovery, the extent of the injury and the amount of the damages must be shown, the existence of injury without any showing as to its extent being insufficient for this purpose.[14] The amount claimed by the shipowner for repairs to the ship will not be reduced merely because of a contention of the government that such amount exceeded the value of the ship, where there is no proper evidence of the market value of the ship.[15]

Expenses of saving or raising vessel. When liability for the loss or injury rests on the owner, voluntary payment by the government of the value of the vessel does not entitle the owner to recover further for expenses incurred in efforts to save the vessel.[16] Where a ship chartered by the government sinks as a result of the government's negligence, the government cannot, in an action brought against it by the shipowner, offset expenses incurred by it in raising the ship.[17]

Interest cannot properly be allowed on a claim against the government under a charter which provides against any liability for interest in the event of a delay in the payment of charter hire or any other sums accruing under the charter.[18]

§ 54. Rights and Liabilities of Third Persons

a. In general
b. Consignees

a. In General

The general owner of a chartered vessel who controls and mans the vessel may be bound for the safe carriage and proper delivery of goods received on board; but a warranty by him to the charterer cannot be availed of by a third person who has no privity with the owner.

The general owner of a vessel, who has given to another a charter for a voyage, but who retains control, equips, mans, victuals, and sails the vessel at his own expense, is liable for the safe carriage and proper delivery of goods received on board by the master under the contract by the owner with the charterer, although the master has not given a bill of lading.[19] The duty which the owner of a chartered ship owes to strangers is a duty not to cause damage negligently, rather than a duty to have the vessel seaworthy,[20] and a freighter who contracts with the charterer for repairing the vessel has no privity with the owner, and cannot claim the benefit of the owner's warranty to the charterer that the vessel was seaworthy.[21] It has been held that the owner of a chartered vessel of which the hirer has the whole control for the time, to victual and man her, and pay over a portion of the net proceeds to the owner for the use of the vessel, is not liable to the shippers of goods on board the vessel which have been embezzled or otherwise not accounted for by the master.[22]

In an ordinary case, damages caused to a shipper by a shipowner for failure to transport are fixed with sufficient certainty when commodities have been purchased, although not sold, where the evidence shows their market value at the time and place they should have been delivered,[23] and they are fixed with sufficient certainty where there is a firm contract for sale at the destination and the evidence shows that the commodity to be shipped is obtainable at a certain market price at the point of origin;[24] but the damages have been said to be speculative if there is no contract at either end.[25]

Rights against vessel in general. The fact that a vessel has been let by a charter party so that the charterer is to be deemed the special owner and have control of her does not deprive the shipper

the value of the vessel the cost of such insurance for six-month period covered by the charter.—Oliver J. Olson & Co. v. U. S., 71 F.Supp. 355, 108 Ct.Cl. 581.

14. U.S.—Strong v. U. S., Ct.Cl., 14 S.Ct. 1182, 154 U.S. appendix 632, 24 L.Ed. 664.
58 C.J. p. 244 note 22.

15. U.S.—O'Boyle v. U. S., D.C.N.Y., 2 F.Supp. 853.

16. U.S.—Reed v. U. S., Ct.Cl., 11 Wall. 591, 20 L.Ed. 220.
58 C.J. p. 244 note 21

17. U.S.—O'Boyle v. U. S., D.C.N.Y., 2 F.Supp. 853.

18. U.S.—Atlantic Refining Co. v. U. S., D.C.Pa., 82 F.Supp. 201.
58 C.J. p. 243 note 19 [c].

19. N.Y.—Robinson v. Chittenden, 69 N.Y. 525.

20. U.S.—The Cullen No. 32, C.C.A.N.Y., 62 F.2d 68, affirmed Cullen Fuel Co. v. W. E. Hedger, Inc., 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189.

Failure to test seams

Fact that scow owner did not test seams with trier before delivering scow to charterer, although otherwise examining seams, was held not to show negligence, as against strangers, in sending out unseaworthy vessel.—The Cullen No. 32, C.C.A.N.Y., 62 F.2d 68, affirmed Cullen Fuel Co. v. W. E. Hedger, Inc., 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189.

21. La.—Agricultural Bank v. The Jane, 19 La. 1.

22. Mass.—Reynolds v. Toppan, 15 Mass. 370, 8 Am.D. 110.
58 C.J. p. 244 note 27.

23. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., C.C.A.Va., 136 F.2d 835, certiorari denied 64 S.Ct. 83, 320 U.S. 774, 88 L.Ed. 464.

24. U.S.—Polar Steamship Corp v. Inland Overseas Steamship Corp., supra.

Knowledge of contract

Where both owner and charterer of vessel had knowledge of terms of firm contract between shipper and foreign government for sale of a product and must have known that special damages would necessarily result from breach of contract of carriage, the shipper could recover the profits which resulted from such breach which occurred by reason of owner's breach of bare boat charter.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., supra.

25. U.S.—Polar Steamship Corp v. Inland Overseas Steamship Corp., supra.

of his lien on the vessel for the execution of the contract of affreightment,[26] and the fact that a charter party existed, of which the shipper had no knowledge, cannot change the liability or relieve the vessel from the lien which the contract establishes,[27] and the master is chargeable with knowledge of the shipper's rights, and the vessel is liable in rem for damage to cargo from dangerous goods, although they were taken on at the request of the charterer.[28] The ship and the charterer have been held not to be freed from liability to shippers for pilfering from the cargo by the fact that the ship was in charge of a marshal on a libel in rem where he was only in technical possession thereof.[29]

Matters with reference to bills of lading. Where the owner of a vessel, notwithstanding the charter party, makes special contracts through the master in respect of freight, the bills of lading govern the rights of the parties.[30] The master cannot keep the goods delivered to him for shipment, and refuse to sign a bill of lading to the order of the shipper, irrespective of his orders from the charterers or the contract between the shipper and his vendee.[31] A shipper who delivers goods to a railroad company under a through bill of lading to a foreign seaport has been held not to be bound to accept from the forwarding vessel a bill of lading with the additional qualification, "Other conditions as per charter-party."[32] Where a vessel is chartered for a voyage out and return at a monthly rate, payable after her return, a shipper of a portion of the outward cargo, who takes a bill of lading providing for payment of freight "as per charter-party," is not liable to the vessel for freight, especially where, by a memorandum at the foot of the charter party, the hirer stipulates that the master may collect return freights toward payment of the charter money.[33]

Assignment of money accruing under charter party. An assignment by the charterer of all the money subsequently accruing to the charterer by virtue of the charter party is enforceable in equity as an agreement to assign as soon and as often as anything should come into being which was covered by it, even if it transfers no legal title.[34]

b. Consignees

A consignee may be charged with knowledge of the contents of the charter party and he may be held liable for freight, particularly on a promise to pay therefor, to the amount due on the charter party.

There is authority to the effect that the consignee of a charterer, who deals with him in that character, must be presumed to know the contents of the charter party;[35] that, where the consignee has notice that freight must be paid to the master, and not to the charterer, it imposes a like obligation on him as if so reserved in the bill of lading;[36] and that a consignee has no right to appropriate moneys due for freight to satisfy debts owing to him by the charterer, although the bill of lading directs the freight to be paid to the consignee.[37] However, a direction to the consignee by the master to pay a sum out of the freights to the charterer, it has been held, will be equivalent to a payment to the master.[38] Under a charter party giving the charterer the option of discharging at two safe ports, any right of a consignee of the cargo to choose a second port of discharge is derived from, and is no greater than, the charterer's right.[39]

The master, notwithstanding any interference or direction of the charterer, has been held to have

26. U.S.—The Coventina, D.C.N.Y., 52 F. 156.
58 C.J. p. 244 note 28.
Lien for injury to cargo generally see supra § 51.

27. U.S.—Sanders v. The Ellen Hardy, D.C.Minn., 21 F.Cas.No. 12,293.

28. U.S.—The T. A. Goddard, D.C. N.Y., 12 F. 174.

29. U.S.—The Poznan, D.C.N.Y., 276 F. 418.

30. U.S.—The Carlotta, D.C.N.Y., 5 F.Cas.No. 2,413, 9 Ben. 1, affirmed, C.C., 7 F.Cas.No. 2,413a.

31. U.S.—The M. K. Rawley, D.C. Mass., 17 F.Cas.No. 9,679, 2 Lowell 447.

32. U.S.—Chamberlain v. The Torgorm, D.C.S.C., 48 F. 584.

33. U.S.—Perkins v. Hill, C.C.Mass., 19 F.Cas.No. 10,987, 2 Woodb. & M. 158.

34. U.S.—Phillips v. Houston Nat. Bank, Houston, C.C.A.Tex., 108 F. 2d 934.

Money paid into court by owner
Where national bank loaned steamship company money to carry out charter party, and company assigned to bank "moneys of any kind or character collected" by, or accruing to, company "by virtue of said charter party" and on subsequent bankruptcy of company the vessel with approval of bankruptcy court and with consent of bank was released to its owners who paid certain funds under the settlement into court, bank was entitled to lien on funds paid into court, since the assignment included all moneys collected by reason of the charter party.—Phillips v. Houston Nat. Bank, Houston, supra.

35. U.S.—Shaw v. Thompson, D.C.N.Y., 21 F.Cas.No. 12,726, Olcott 144.

36. U.S.—Shaw v. Thompson, supra.

37. U.S.—Shaw v. Thompson, supra.

38. U.S.—Shaw v. Thompson, supra.

39. U.S.—George E. Warren Corporation v. Picton S. S. Co., C.C.A. Mass., 100 F. 2d 212.

Expense of going to additional port
Where charterer had selected a second port of discharge pursuant to option given by charter party, but consignee of cargo, knowing that vessel was under charter out of such port and would be required to go there, nevertheless insisted that vessel go to another place as second port of discharge, owner of vessel was entitled to recover from consignee the entire additional expense of going to the other place.—George E. Warren Corporation v. Picton S. S. Co., supra.

a right to retain the goods until his lien shall be satisfied,[40] and he may sue the consignees after delivery to them of the goods and recover the freight, at least to the amount due on the charter party.[41] This right is strengthened where the consignee, on receipt of the goods, promises the master to pay the freight,[42] and receipt of the goods alone by the consignee may, under some circumstances, constitute an implied assumpsit.[43]

If a charter party does not give the entire control of the vessel to the charterer or postpone the payment of the charter money beyond the delivery of the cargo, the general owner will not be divested of his lien for freight or his right to collect it;[44] and, under such a charter, the payment of the freight by the consignee to the general owner will be a defense to any claim for it by the charterer,[45] although he gives notice, before the payment, to the consignee, not to pay to the general owner.[46] A consignee, authorized by the charterer to furnish a cargo under a charter party, is not thereby authorized to change or waive any of its stipulations, or to make any agreement as to the manner in which the ship shall be loaded or ballasted.[47] Where the charter party is not proved, or where it makes no provision with respect to the consignee or mode of delivery, the bills of lading become the proper and controlling evidence, in whole or in part, of the contract.[48]

Effect of master's claim for demurrage. Where the charter stipulates that the master shall sign a draft on the consignees, in favor of the charterers, for the freight, he cannot refuse his signature on the ground that demurrage is due him,[49] especially where the charterers have claims against the vessel in excess of the demurrage claimed,[50] and the consignee is entitled to abandon the goods to the vessel and to recover from the vessel the value of the goods, less the lawful charges, where delay was caused by the wrongful acts of the master in making an extortionate demand for demurrage, and in not storing the goods in a warehouse instead of keeping them on board.[51]

Ship's right to know consignee. When, by bills of lading, cargo is consigned to order, it is the right of the ship to be informed, by an inspection of the indorsements on the bills of lading that have been signed and delivered by the master, as to who is entitled to receive the cargo,[52] and, if such information is not given and the cargo is placed in store after a survey, no owner appearing to receive the cargo, the consignee cannot thereafter object that there was no delivery.[53]

Vessel's liability for short delivery. The vessel is liable to the consignee of a bill of lading for a shortage in delivery occasioned by the negligence of the captain.[54]

§ 55. Letting Vessels on Shares

a. In general
b. Operation and effect

a. In General

A transaction whereby the master is put in charge of a vessel to manage and operate her, and to pay the owner a share of the profits, may constitute a chartering of the vessel to the master; and, where the charter constitutes a demise of the vessel, the charterer becomes the owner pro hac vice.

When the master is put in charge of a vessel, to manage and operate her and to pay the owner a share of the profits arising from such use, such a transaction may constitute a chartering of the vessel to the master;[55] it does not, however, necessarily operate thus,[56] and in order to do so, there must be an express agreement for the charter of the vessel,[57] or circumstances must appear properly forming the basis for an inference of such an agreement.[58] Where the owner hires the vessel to the master on shares by an agreement which, under the rules applicable to charter parties generally, constitutes a demise of the vessel, it will operate in its

40. U.S.—The Tangier, D.C.N.Y., 32 F. 230

41. U.S.—Shaw v. Thompson, D.C.N.Y., 21 F.Cas.No.12,726, Olcott 144.

42. U.S.—Ruggles v. Bucknor, C.C.N.Y., 20 F.Cas.No.12,115, 1 Paine 358.

43. U.S.—Certain Logs of Mahogany, C.C.Mass., 5 F.Cas.No.2,559, 2 Sumn. 589.
58 C.J. p. 245 note 45

44. N.Y.—Mactaggert v. Henry, 3 E. D.Smith 390.

45. N.Y.—Mactaggert v. Henry, supra.

46. N.Y.—Mactaggert v. Henry, supra.

47. U.S.—Rich v. Parrott, D.C.N.Y., 20 F.Cas.No.11,761, 1 Sprague 358, affirmed, C.C., 20 F.Cas.No.11,760.

48. U.S.—Strong v. Certain Quantity of Wheat, D.C.N.Y., 23 F.Cas.No. 13,541, affirmed 3 Wall. 225, 18 L. Ed. 194.

49. U.S.—Reynolds v. The Joseph, C.C.Va., 20 F.Cas.No.11,730, 2 Hughes 58.

50. U.S.—Reynolds v. The Joseph, supra.

51. U.S.—Hoxsie v. The Reuben Doud, D.C.Mich., 46 F. 800.

52. U.S.—The Adella S. Hills, D.C.N.Y., 47 F. 76.

53. U.S.—The Adella S. Hills, supra.

54. U.S.—The Nora, D.C.Pa., 14 F. 429.
58 C.J. p. 245 note 56.

55. U.S.—Mayo v. Snow, C.C.Mass., 16 F.Cas.No.9,356, 2 Curt. 102.

56. Me.—Lyman v. Redman, 23 Me. 289.
58 C.J. p. 246 note 58.

57. U.S.—Peters v. Rohrman, D.C.N.J., 272 F. 338.

58. U.S.—Peters v. Rohrman, supra.

usual manner to make the charterer owner pro hac vice.[59]

It has frequently been held that a charter party is to be inferred from such circumstances attending the transaction as that the master is given sole control of the navigation and management of the ship, hires her officers and crew, makes contracts for her cargo, determines her employment, equips and provisions the vessel, and collects her earnings;[60] but a combination of any or all of these circumstances is insufficient to constitute a chartering if the control and possession of the vessel are retained by the owner and not transferred to the master.[61] The primary consideration in determining whether the agreement for sailing on shares is a charter is whether the entire possession and control of the vessel have been surrendered to the master,[62] such a surrender of possession and control is essential to a charter arising from such a hiring on shares,[63] and, in the absence of circumstances to the contrary, is conclusive to the effect that such a charter exists.[64] In the absence of any express agreement constituting a demise, the question whether or not the circumstances are of such a character as to operate as a transfer of the possession and control to the master is one of fact rather than of law.[65]

Nature of charter. In view of the effect regularly given to charters whereby the entire possession and control are vested in the charterer, such charters, arising from hiring on shares, when recognized, have uniformly been held to operate as demises.[66] Such a hiring is valid as a charter, although by parol,[67] and although not made for any particular period or with any definite term,[68] and it has been held to be an indefeasible letting for hire for every voyage which the hirer shall have entered on anterior to notice from the general owner of his intention to put an end to the contract.[69]

Part owner taking vessel on shares. Where a joint owner, by an arrangement with the other owners, takes the vessel to sail on shares, he to manage her and furnish supplies and to have absolute control and management, his duties and obligations as to his coowners are such as arise from the relation created by his contract,[70] and he becomes the owner of the vessel pro hac vice, as charterer or lessee thereof,[71] and not the agent of the other owners.[72]

b. Operation and Effect

(1) In general
(2) Rights with respect to vessel's earnings

(1) In General

Under a hiring of a vessel on shares to the master which constitutes a demise and makes the master the owner of the vessel pro hac vice, the rights and obligations of the parties are the same as those resulting from other charters of demise.

Where a vessel is so let and hired on shares to the master that the transaction is a demise and the master owner pro hac vice, the effect on the rights and obligations of the parties under such charter is the same as that resulting from other charters of demise generally.[73] The master is not a partner of the vessel owner,[74] or the owner's agent,[75] except in so far as he may have been specially constituted as such,[76] and the owner is not liable on the master's contracts;[77] but, where the operation of the vessel on shares is not a demise, the general owners are liable as principals for the contracts of the master, acting as their agent, which are duly authorized or ratified.[78]

59. N.Y.—Hallet v. Columbian Ins Co., 8 Johns. 272.
Construction of instrument as demise of vessel see supra § 34.

60. Vt.—Tobias v. Blin, 21 Vt. 544.
58 C.J. p 246 note 63.

61. Me.—Lyman v. Redman, 23 Me. 289.

62. U.S.—Peters v. Rohrman, D.C. N.J., 272 F. 338.
58 C.J. p 246 note 65.

63. N.C.—Howard v. Ross, 3 N.C 333.
58 C.J. p 247 note 66.

64. Me.—Somes v. White, 65 Me. 542, 20 Am.R. 718
58 C.J. p 247 note 67.

65. N.Y.—Kenzel v. Kirk, 2 Abb.Dec 500, 32 How.Pr. 269.
58 C.J. p 247 note 69.

66. U.S.—Thorp v. Hammond, N.Y., 12 Wall 408, 20 L.Ed. 419
58 C.J. p 247 note 71.

67. U.S.—Thomas v. Osborn, Md., 19 How 22, 15 L.Ed 534.
58 C.J. p 247 note 73.

68. U.S.—Webb v. Peirce, C.C.Mass., 29 F.Cas.No.17,320, 1 Curt. 104
58 C.J. p 247 note 74.

69. U.S.—Webb v. Peirce, supra.
58 C.J. p 247 note 75.

70. N.Y.—Williams v. Hays, 38 N.E 449, 143 N.Y. 442, 42 Am.S.R 743, 26 L.R.A 153
Rights and obligations of coowners generally see supra § 16.

71. N.Y.—Williams v. Hays, supra.

72. N.Y.—Williams v. Hays, supra.
Managing owner in general see supra § 17.

73. Mass.—Taggard v. Loring, 16 Mass. 336, 8 Am.D. 140.
58 C.J. p 247 note 79.
Operation and effect of charters conferring ownership pro hac vice generally see supra § 34.

74. Me.—Bridges v. Sprague, 57 Me. 543, 99 Am.D. 788
58 C.J. p 247 note 80.

75. Mass.—Tucker v. Stimson, 12 Gray 487
58 C.J. p 247 note 81.

76. U.S.—Mayo v. Snow, C.C.Mass., 16 F.Cas.No.9,356, 2 Curt 102
Mass.—Rich v. Jordan, 41 N.E. 56, 164 Mass 127.

77. U.S.—Peters v. Rohrman, D.C.N.J., 272 F. 338.
58 C.J. p 248 note 83

78. Me.—Lyman v. Redman, 23 Me. 289.
58 C.J. p 248 note 84.

Liability for supplies, repairs, and materials. In accordance with the rules applicable to demises of vessels in general, where a master hires a vessel on shares under an agreement making him owner pro hac vice, he is responsible for necessary repairs, supplies, or materials,[79] including portions of the cargo used as fuel for the vessel,[80] and the general owner ordinarily is not personally liable for such items.[81] Where, however, the share agreement is not a charter, the general owner remains liable for supplies, repairs, and provisions furnished to the vessel.[82] Whatever the character of the transaction, if the owner or his agent specifically requests and obtains the furnishing of the supplies on his personal undertaking and credit, he is liable for them to the person who has supplied them.[83]

Liability for tortious management and navigation. In accordance with the rules applicable to charters constituting a demise in general, the master, chartering a vessel on shares so as to become owner pro hac vice, is liable for any injury to third persons from negligent management or navigation of the vessel,[84] and the general owner is absolved from liability therefor.[85] However, where the share arrangement is not a demise to the master, the owner remains liable for injuries caused by tortious conduct in the management and navigation of the vessel.[86] Where the conduct of the master is of a barratrous nature, but the master is, under a hiring of the vessel on shares, charterer of the vessel and owner pro hac vice, such wrongful conduct is not barratry.[87]

Liability for injury to, or nondelivery of, cargo. In accordance with the rules generally applicable to charters constituting the charterer owner pro hac vice, where the master charters a vessel on shares so as to become owner pro hac vice, he alone is personally liable for injury to, or nondelivery of, the cargo,[88] and the general owner is not subject to personal liability for such matters.[89] However, where the arrangement for sharing profits does not amount to a charter and demise to the master, the general owner is answerable for the nonfulfillment of the contract of carriage.[90]

(2) Rights with Respect to Vessel's Earnings

The agreement of the owner and a master operating the vessel on shares determines their respective rights to share in the proceeds of the vessel's employment.

The agreement of the owner and the master operating the vessel on shares controls the existence and enforceability of their several rights to share in the proceeds of the vessel's employment.[91] As to third persons generally, who are strangers to the charter, where a ship is chartered to the master to operate on shares as owner pro hac vice, the general owner's right to earnings of the vessel is a personal right against the master, dependent on the terms of the contract, and not a right against the proceeds arising from her use.[92] The general owner must, in such case, be content to take his place among the other general creditors of the master;[93] he cannot maintain any action against the freighter for the freight earned by the vessel during such an arrangement;[94] he cannot interpose his claim as owner to prevent the party liable for the freight money from offsetting against it any claim which he may have against the master;[95] and he has no such interest in the proceeds of the vessel's employment that he can interpose to prevent a personal creditor of the master from reaching them when they are in the hands of a third person to whom they have been transferred by the master,[96] or that he can prevent them from being held, while still in the hands of

79. Md.—Stirling v. Loud, 33 Md. 436.
58 C.J. p 249 note 12.
Liability of charterer as owner pro hac vice for supplies, repairs, and materials generally see supra § 34

80. Me.—Sproat v. Donnell, 26 Me 185, 45 Am.D. 103.

81. Mass.—Costa v. Gorton-Pew Vessels Co., 136 N.E. 100, 242 Mass 294
58 C.J. p 249 note 14.

82. N.Y.—Vose v. Cockroft, 44 N.Y. 415
58 C.J. p 250 note 15.

83. Mass.—Paine v. Silva, 47 N.E. 118, 168 Mass 432, 50 N.E. 1126, 171 Mass. 276.

84. U.S.—Thorp v. Hammond, N.Y., 12 Wall. 408, 20 L.Ed. 419
58 C.J. p 250 note 18.
Liability of charterer as owner pro hac vice for negligence generally see supra § 34

85. U.S.—Webster v. Disharoon, D.C. Md., 64 F. 143
58 C.J. p 250 note 19.

86. N.Y.—Scarff v. Metcalf, 13 N.E. 796, 107 N.Y. 211, 1 Am.S.R. 807
58 C.J. p 250 note 20.

87. Mass.—Taggard v. Loring, 16 Mass 336, 8 Am.D. 140
N.Y.—Hallet v. Columbian Ins. Co., 8 Johns 272.

88. Me.—Bonzey v. Hodgkins, 55 Me 98.
58 C.J. p 250 note 23.
Liability of charterer as owner pro hac vice for injury to, or nondelivery of, cargo generally see supra § 34.

89. Mass.—Thompson v. Hamilton, 12 Pick. 425, 23 Am.D. 619.
58 C.J. p 250 note 24.

90. Me.—Emery v. Hersey, 4 Me. 407, 16 Am.D. 268.
58 C.J. p 251 note 25.

91. Mass.—Coggeshall v. Read, 5 Pick. 454.
58 C.J. p 248 note 85.

92. Me.—Bridges v. Sprague, 57 Me. 543, 99 Am.D. 788.
58 C.J. p 248 note 86.

93. Me.—Bridges v. Sprague, supra.

94. Me.—Bridges v. Sprague, supra.
Mass.—Manter v. Holmes, 10 Metc. 402.

95. Me.—Bridges v. Sprague, 57 Me 543, 99 Am.D. 788.
Mass.—Manter v. Holmes, 10 Metc. 402.

96. Mass.—Adams v. Augustine, 81 N.E. 192, 195 Mass 289.
58 C.J. p 248 note 90.

the freighter, for any vigilant creditor of the master who makes a timely foreign attachment.[97]

According to some authority, even as between the owner and the master the effect of such an agreement is merely to make the latter the debtor of the former, bound by a personal contract to pay the owner as compensation a sum for the use of the vessel to be determined on the basis of her net earnings,[98] not constituting the master trustee for the owner,[99] or giving to the latter any direct interest in the funds earned by the vessel until the severance and payment of the agreed share to him.[1] However, according to other authority, as against the master himself, who has chartered the vessel, the right is not a mere personal right like that of any ordinary creditor,[2] but is a right to a share in the particular funds comprising the earning of the vessel;[3] and the same is true as against a third person who, with knowledge of all the facts, is authorized by the master to receive the earnings and who promises to pay the owner his share thereof.[4] As between such persons and the real owner, the earnings when collected are equally the money of the owner and the master,[5] and the latter, or his representative, becomes a trustee of the owner's share when received, and holds it for his use,[6] and may be sued by the owner therefor.[7]

Where, under such a demise, the master employs the vessel in several successive voyages, the owner's right to a share of the earnings, in the absence of anything to the contrary in the agreement, has been held to be a right to a proportionate part of the total earnings of the vessel, taken together, and not a number of separate rights to a proportionate share of the earnings of each particular voyage of the several which are made.[8] Where the master, under the arrangement for division of earnings, is not the charterer, the whole freight belongs to the owner, subject to the usual incidents appropriate to that right.[9] One party to the transaction may, by his conduct, estop himself from seeking a deduction, from the amount due the other, of a claim held against such other.[10]

Charter to shipper on shares. Where a third person, not the master and not in possession and control of the vessel, hires a ship's services on shares, by sending out a certain amount of money for investment, on an agreement that the owner should take a share in the profits of the venture as the hire of the vessel, there must be a profit on the whole adventure before the owner is entitled to claim anything,[11] and, if the vessel and part of the cargo are lost, the owner is not entitled to share in the profits on that portion of the cargo that has been saved, where there is a loss on the adventure as a whole.[12] The owner, where the ship is thus hired, cannot retain from the charterer's share an amount sufficient to pay for the loss and expenses or a pro rata portion thereof, occasioned by the vessel's unseaworthiness.[13]

Where the respective shares of the parties have once been determined and an effectual division and appropriation of the profits made, the owner may retain the amount thus set aside to him as his share of the earnings on the adventure,[14] without deduction by reason of the failure of the firm with whom the charterers' share was deposited, in the exercise of reasonable prudence and care, and the consequent loss to them.[15] Where a cargo is thus shipped, the profits are to be estimated on a sale at the destination of the vessel, and, if the voyage is broken up by an overwhelming calamity, it not being shown that independently of the accident the goods would ever have arrived, or that, if they had, any profit would have been made, the claim to a share in the profits, being for mere possibilities and contingencies, is incapable of being estimated.[16]

§ 56. Actions

a. In general
b. Parties
c. Pleadings
d. Evidence
e. Trial, judgment, and review

a. In General

In appropriate cases, actions on charters may be brought at law, in equity, or in admiralty; and they are

97. Me.—Bridges v. Sprague, 57 Me 543, 99 Am.D. 788.
98. Vt.—Tobias v. Blin, 21 Vt. 544. 58 C.J p 248 note 92.
99. Vt.—Tobias v. Blin, supra.
1. Vt.—Tobias v. Blin, supra.
2. Me.—Williams v. Williams, 23 Me. 17.
3. Me.—Williams v. Williams, supra
4. Me.—Williams v. Williams, supra. 58 C.J. p 248 note 97.
5. Me.—Williams v. Williams, supra.
6. Me.—Williams v Williams, supra.
7. Me.—Williams v. Williams, supra
8. Md.—Stirling v. Loud, 33 Md. 436. 58 C.J p 249 note 2.
9. Me.—Sims v. Howard, 40 Me. 276 58 C.J. p 249 note 3.
10. Vt.—Tobias v Blin, 21 Vt. 544. 58 C.J. p 249 note 4.
11. Mass.—Pearce v. Phillips, 4 Mass. 672.
12. Mass.—Pearce v. Phillips, supra.
13. Mass.—Putnam v Wood, 3 Mass 381, 3 Am.D. 179.
14. Mass.—Gilchrist v. Ward, 4 Mass 692.
15. Mass.—Gilchrist v. Ward, supra.
16. U.S.—The Nathaniel Hooper, C C.Mass., 17 F Cas.No 10,032, 3 Sumn 542.

governed by the general rules which apply to actions on maritime contracts.

Actions on charters, in addition to lying at law in the same manner as other actions on contracts,[17] or to forming the basis of suits in equity in appropriate cases,[18] come within the jurisdiction of admiralty,[19] and the general rules which apply to actions on maritime contracts apply to such actions.[20] In enforcing the obligations and liabilities of the government as charterer, the owner is limited to the use of actions and proceedings provided by statute for the enforcement of his claims [21]

In cases of breach of charter, a libel may lie jointly in rem against the vessel and in personam against the owner.[22] Under rules of general application in admiralty proceedings, admiralty ordinarily has no jurisdiction of a libel in rem for breach of an executory contract whereby a vessel is chartered to libelants for the transportation of merchandise,[23] but even as to such a contract the court of admiralty has been held to have jurisdiction in personam,[24] and, where an executory charter party is breached before the vessel has entered into the performance of the charter party, the charterer may maintain an action in rem to enforce a lien for supplies put aboard the vessel for the provisioning of the crew.[25]

Time of bringing action. The general rules as to the time of bringing suit, including those prevailing in admiralty if the action on the charter party is in admiralty, are applicable to actions on charter parties.[26] An action for charter money brought before the owner's right thereto under the charter party accrues is prematurely commenced.[27]

b. Parties

The general rules applicable to parties in civil actions or proceedings in admiralty are applicable in suits on charter parties.

The rules as to parties applicable in civil actions generally, and, where the proceeding is in admiralty, the principles with regard to parties prevailing in admiralty, apply to suits on charter parties.[28] Thus, only those persons are proper libelants or plaintiffs who are privy to the charter or in whose favor it creates such an obligation as will serve as a substitute for privity.[29] Likewise, only persons sustaining such a relation to the charter are proper respondents or defendants.[30]

A suit for damages, founded on a charter executed in the name of the managing owners, either without or together with the ship's husband, may be brought in the names of the owners expressed in the instrument,[31] and, similarly, a suit on a charter

17. Ala.—Burton v. May, 103 So. 46, 212 Ala. 435.
58 C.J. p 251 note 27.
Enforcement of arbitration clause in charter parties see supra § 33.

Action at law after award in admiralty

Where a time charterer had an option to purchase at any time during the charter period, the fact that a court of admiralty has awarded him damages for loss of use of the vessel under the charter by reason of its withdrawal by the owner has been held not a bar to an action at law to recover damages for deprivation of his right to purchase, which the admiralty court was without jurisdiction to award.—Universal Transp Co. v Rederiaktiebolaget Amie, D.C.N.Y., 263 F 243.

18. N.Y.—Coster v. New York, etc., R. Co, 13 N.Y Super 43, 12 N.Y Super 677, 3 Abb Pr. 332.
58 C.J. p 251 note 28.

19. U.S.—Adams v U. S, D.C.Mass., 101 F.Supp 956.
58 C.J. p 251 note 29.

20. U.S.—C. F Harms Co. v. Upper Hudson Stone Co, D.C.N.Y., 225 F 630, affirmed 234 F 859, 148 C.C.A. 457.
58 C.J. p 251 note 31.

21. U.S.—The Western Maid, Md, 42 S.Ct. 159, 257 U.S. 419, 66 L.Ed 299
58 C.J. p 238 note 70.

22. U.S.—The J F Warner, D.C Mich, 22 F. 342
58 C.J p 251 note 32.

Remedies of subcharterer

Subcharter, even on same terms as original charter, does not give rise to right of action in personam by subcharterer against general owner; but subcharterer has remedy against ship in rem for damage to, or loss of, cargo.—Perez v Cia Tropical Exportadora, Ltda, of Costa Rica, C.A Fla, 182 F 2d 874.

23. U.S.—The J. F. Warner, D.C. Mich, 22 F. 342.
58 C.J. p 251 note 34.

24. U.S.—The J. F Warner, supra.

25. U.S.—The Valmar, D.C.Pa., 38 F.Supp. 618

26. U.S.—Simpson v. One Hundred and Ten Sticks of Hewn Timber, D.C.N.Y, 7 F. 243.
58 C.J. p 252 note 38.

27. U.S.—Cargo of Salt, C.C.N.Y., 5 F.Cas.No 2,406, 4 Blatchf. 224.
58 C.J. p 252 note 39.

28. U.S.—Eastern Massachusetts St. R. Co. v. Transmarine Corp, C.C.A Mass., 42 F.2d 58, certiorari denied 51 S.Ct. 86, 282 U.S. 883, 75 L.Ed. 779.
58 C.J. p 252 note 42.

29. U.S.—La Scala v. Boughton, D.C. N.Y., 37 F 62.
58 C.J. p 252 note 43.

Filing of limitation of liability proceeding

Shipowner who files limitation of liability proceeding and either deposits sum equal to amount of value of his interest in vessel or gives security therefor retains his right of action for tortious destruction of vessel.—Pure Oil Co. v Geotechnical Corp. of Del., D.C La., 94 F Supp. 866, affirmed, C.A., Geotechnical Corp of Del. v. Pure Oil Co, 196 F 2d 199.

30. U.S.—Chiesa v. Conover, D.C. Ala, 40 F 496
58 C.J. p 252 note 44.

Suit against United States

Where the United States Shipping Board properly entered into an agreement for approval of the charter party and discharge of the cargo on deposit with it of the freight charges due, for their proper and lawful disposition, and where the freight charges so deposited were turned over to the Shipping Board and held by the United States Treasury to the credit of the board, the owner of the vessel was held entitled to recover in a suit therefor against the United States, but could not recover interest.—Sanguineti v. U. S., 83 Ct.Cl. 1.

31. U.S.—Bangs v. Lowber, C.C Mass, 2 F.Cas.No 840, 2 Cliff. 157, reversed on other grounds Lowber v Bangs, 2 Wall. 728, 17 L.Ed. 768.
58 C.J. p 252 note 45.

signed by the master, to whom the charter money is to be paid, is properly brought in his name alone,[32] and the owners need not be joined as libelants.[33] Where the vessel is chartered by agents of the owner without disclosing the agency, a suit on the charter may be brought by the undisclosed principal as plaintiff.[34] Suit may be brought on a charter party in their own names by the agents of the owners as trustees of an express trust.[35]

A charterer can maintain a libel for loss of, or injury to, cargo in his own name, although he has sold the goods to arrive, if it does not appear that he had parted with title or the right to possession at the time of the breach complained of;[36] or for the benefit of his insurer subrogated to his rights by payment, although he no longer has any interest in the cargo,[37] or for possession, after repudiation of a sale of the cargo and return of the bills of lading by the consignee, although he may intend to hold the purchaser liable for the repudiation.[38] The agents of a known principal, chartering the vessel for him in their own name, may institute a libel in their own name against the owner for breach of charter terms.[39]

Those having title to cargo shipped on a chartered vessel, as indorsees of bills of lading, may sue to libel the vessel in their own names.[40] An agreement by parol to sell an interest in a ship, without conveyance of the title, does not make the vendee a necessary party to an action commenced for freight carried on a charter party.[41] Dormant partners in the chartering whose interest as such is unknown to the owner at the time of suit brought for the charter hire are not necessary parties defendant.[42]

c. Pleadings

The pleadings in actions at law or in admiralty involving charter parties are governed by the general rules of pleading. The complaint or libel must set forth all the necessary facts, and the answer must comply with rules requiring it to be full and explicit.

The general rules of pleading apply to actions at law or in admiralty involving charter parties.[43] The complaint, declaration, or libel must set forth substantially all the necessary facts,[44] and must comport with the writing declared on.[45] The answer must comply with rules requiring that it be full and explicit.[46] An answer setting forth a charter provision that the quantities to be carried should be mutually arranged between the parties, merely in explanation of a failure to carry cargo before a declaration of war, has been held insufficient to raise a defense of invalidity of the charter for want of mutuality.[47] General rules apply as to the sufficiency of a petition whereby a charterer who is sought to be held liable for damage to the ship seeks to implead a subcharterer as the one primarily responsible for the damage.[48]

32. U.S.—Baker v. Ward, D C.N.Y., 2 F.Cas.No.785, 3 Ben. 499.
58 C J. p 253 note 46.

33. U S.—Baker v. Ward, supra.

34. Cal.—Brooks v. Minturn, 1 Cal 481

35. N.Y.—Funch v. Abenheim, 20 Hun 1.

36. U S.—The Carlotta, D.C N Y., 5 F.Cas.No.2,413, 9 Ben. 1, affirmed, C.C., 5 F.Cas No.2,413a

37. U.S.—Federal Forwarding Co. v. Lanasa, C.C A.Md, 32 F 2d 154.

38. U.S.—The Director, C.C.Or., 36 F. 335, 13 Sawy. 479.

39. U.S.—Robert Dollar Co. v. American Asiatic Co., C C.A Cal., 25 F 2d 791, certiorari denied 49 S.Ct. 34, 278 U.S. 639, 73 L Ed. 555.
58 C.J. p 253 note 53.

40. U S.—The Henry W. Cramp, C.C. A.Pa., 20 F.2d 320, certiorari denied McDonald v. Rosasco, 48 S Ct. 120, 275 U.S 561, 72 L Ed 427—The Nora, D.C.Pa., 14 F. 429

41. N.Y.—Ward v. Whitney, 8 N.Y. 442.

42. N.Y.—Woodhouse v. Duncan, 13 N E 334, 106 N.Y. 527.
58 C.J. p 253 note 58.

43. U.S.—Beard's Erie Basin v. O'Brien Bros., C.C.A.N.Y., 162 F 2d 176—Card v. Hines, D.C S.C., 35 F. 598.
58 C J. p 253 note 60, p 254 note 64.

Libel held not prematurely filed
U S —Hall Corporation of Canada v. Cargo Ex Steamer Mont Louis and Subfreights Thereon, C.C.A N Y, 62 F 2d 603.

44. N.Y —Coster v. New York, etc, R Co, 13 N.Y Super. 43, 12 N.Y. Super. 677, 3 Abb.Pr. 332.
58 C.J. p 253 note 61.

Ownership
In action to recover for breach of a contract to charter a vessel, ownership of vessel was required to be shown in plaintiffs by clear and definite allegations.—Poland v. Cooper, 197 So 446, 143 Fla. 729.

Negligence
Bailor of demised barge suing bailee for returning barge in bad condition, must plead negligence — Alpine Forwarding Co. v. Pennsylvania R Co, C.C.A.N Y., 60 F.2d 734, certiorari denied Pennsylvania R. Co v. Alpine Forwarding Co., 53 S.Ct 93, 287 U.S. 647, 77 L.Ed. 559.

Allegations held sufficient
(1) To state cause of action.—Northern Star S. S. Co. of Canada v. Kansas Milling Co, D.C.N.Y., 75 F. Supp 534—Gronvold v. Suryan, D. C.Wash, 12 F.Supp 429.

(2) To allege exclusive possession so as to give rise to presumption of negligence —Willamette Tug & Barge Co v Commercial Dispatching Corp, 178 P 2d 698, 180 Or 657.

45. Conn.—Stodard v. Gates, 2 Root 157.
58 C.J. p 172 note 31 [b].

46. U.S —The F Y. Robertson, D.C. N Y., 7 F Supp 38

Part of claim held admitted
U.S.—Parthenia Corporation v. Morse, D C N.Y, 41 F.2d 961, affirmed, C C.A., 46 F 2d 1018

Answer held sufficient
U.S —The Creek, D C.N Y., 8 F.R.D. 118.

47. U.S.—Luckenbach SS. Co. v Grace, C.C A.Va, 267 F. 676, certiorari denied 41 S Ct 14, 254 U S. 644, 65 L Ed. 454.

48. U.S —Metropolitan Sand & Gravel Corp. v. Petterson Lighterage & Towing Corp., D C.N.Y., 65 F.Supp. 735.

Allegations held sufficient
In libel for damage to scow while under charter, respondent's petition for permission to implead subchar-

Special damages will not be allowed in the absence of any pleading of facts forming a basis for such damages.[49]

Issues, proof, and variance. The rules as to issues, proof, and variance applicable to civil actions generally, or those adopted in admiralty, where the proceeding is by a suit in admiralty, apply to actions on charter parties.[50] So, in an admiralty action, although the proofs of each party must substantially correspond to his allegations, so as to prevent surprise, there are no technical rules of variance or departure in pleading, as at common law.[51] Facts admitted by the pleadings need not be proved.[52] A variance in order to be fatal must be substantial.[53]

d. Evidence

(1) In general
(2) Presumptions and burden of proof
(3) Admissibility
(4) Weight and sufficiency

(1) In General

The general rules of evidence apply in actions involving charter parties.

The general rules of evidence have been applied in actions involving charter parties.[54] In appropriate cases, judicial notice of facts with respect to the chartered vessel may take the place of evidence as to such facts.[55] Deposition testimony given by a person must be understood in the light of what such person has deposed as a witness on the stand.[56] The age of a vessel alone has been held not to be evidence of its unseaworthiness.[57]

(2) Presumptions and Burden of Proof

(a) In general
(b) Seaworthiness

(a) In General

In accordance with general rules, the burden of proof in actions involving charter parties is on the party having the affirmative of the issue, although in carrying such burden he may be aided by proper presumptions.

The general rules with respect to presumptions and burden of proof apply to actions on charter parties.[58] The burden of proof is on the party having the affirmative of the issue.[59] Thus, a party claiming that the case falls within an exception in

terer, which alleged that scow was delivered in good and seaworthy condition to subcharterer by charterer, and that, if scow was returned to libelant in a damaged condition, such damage occurred while scow was in control and possession of subcharterer, was sufficient, without an allegation of negligence of subcharterer.—Metropolitan Sand & Gravel Corp v. Petterson Lighterage & Towing Corp., supra.

49. U.S.—Orvig's Dampskibselskab Aktieselskab v Munson SS. Line, D.C.N.Y., 16 F.2d 957.

50. U.S.—Cleary Bros. v. Moran Towing Corp., D.C.N.Y., 79 F.Supp 934—Roah Hook Brick Co v. Erie R. Co., D.C.N.Y., 77 F.Supp 840, affirmed in part and reversed in part on other grounds, C.A., 179 F 2d 601

58 C.J. p 254 note 69–70

51. U.S.—The Gazelle, D.C.Md., 9 S.Ct. 139, 128 U.S. 474, 32 L.Ed. 496

58 C.J. p 254 note 71.

52. Cal.—Brooks v. Minturn, 1 Cal. 481.

58 C.J. p 254 note 72.

53. Cal.—Kerry v. Pacific Mar. Co., 54 P. 89, 121 Cal. 564, 66 Am.S.R. 65.

58 C.J. p 255 note 73.

54. **Failure to give notice of survey**

Where libelant's scow was in good condition when she passed under a usual harbor charter to respondent and was returned in damaged condition and during the interval she was under control of impleaded-respondent, failure of respondent to give notice of survey to the impleaded-respondent was some evidence that the latter's possible culpability was not apprehended by respondent promptly on the scow going off charter.—Gallagher Bros Sand & Gravel Corp. v. Anthony O'Boyle, Inc., D.C.N.Y., 94 F.Supp. 788.

55. U.S.—King v. Petterson, D.C.N.Y., 14 F.2d 532.

56. U.S.—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D.C.N.Y., 15 F.Supp. 705, affirmed, C.C.A., 88 F.2d 1005, certiorari denied 58 S. Ct. 18, 302 U.S. 699, 82 L.Ed. 540

57. U.S.—The Josephine, C.C.A.Pa., 49 F.2d 207.

58. U.S.—Dampskibs Aktieselskabet Jan v. Cargo of Jute Butts, Burlap and/or Shellac, etc., D.C.N.Y., 298 F. 164.

Presumption against demise see supra § 34.

Failure to carry cargo safely

In a libel against a shipowner for loss of a cargo, nonperformance on the part of the shipowner of his charter party in that he has failed safely to carry the cargo may raise an inference of negligence on his part.—Krebs Pigment & Chemical Co. v. Sheridan, D.C.Pa., 12 F.Supp. 254, affirmed, C.C.A., 79 F.2d 479.

59. U.S.—Rugo Const. Co v. New England Foundation Co., C.A.Mass., 172 F.2d 964—Cornwall v. Moore, D.C.Cal., 132 F. 868, affirmed 144 F. 22, 75 C.C.A. 180.

58 C.J. p 255 note 77.

Particular matters

(1) If vessel owner brings itself within clause of charter party exempting responsibility for "restraints of princes, rules and people" even where owner has failed in duty to make vessel seaworthy, burden falls on shipper or charterer to show that owner has caused loss of voyage.—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, C.C.A.Cal., 133 F.2d 552, certiorari denied 63 S. Ct. 858, 318 U.S. 781, 87 L.Ed. 1148

(2) Owner of ship claiming that damage to cargo was result of inadequate dunnage had burden of proof thereof.—The Helen Barnet Gring, D.C.Md., 48 F.2d 629.

(3) Owners of vessel in libel against charterers for loss resulting from buckling of steel mast had burden to prove that equipment was sufficient.—Scottish Nav. Co. v. Munson S. S. Line, D.C.N.Y., 60 F.2d 101, affirmed, C.C.A., 10 F.2d 708.

(4) Burden is on cargo owner, seeking to defeat lien against subfreights for charter hire, to prove that vessel owner waived lien.—The Solhaug, D.C.N.Y., 2 F.Supp. 294.

(5) Owner of lost cargo has burden of proving negligence of charterer, where charterer is bailee for hire and not common carrier.—The Castleton, D.C.N.Y., 60 F.2d 132, affirmed, C.C.A., 64 F.2d 11.

the charter party is charged with the burden of showing facts to bring the case within the exception.[60] In an action to recover for damage to cargo, where it appears that the cargo was delivered to the ship in apparent good condition and outturned damaged other than by fire, the shipowners and charterer have been held to have the burden of proving that the loss was not due to their negligence.[61]

Plaintiffs or libelants suing for breach of a charter are bound to show that they fulfilled the contract on their part.[62] The parties to a charter are to be presumed to know the law governing their rights and to act with respect thereto.[63] Failure of the owner of equipment, which broke down, to keep and produce such broken equipment creates a presumption that production of it would not be favorable.[64] The doctrine of res ipsa loquitur will not be applied in an action involving liability for damage to cargo where the circumstances of the accident do not identify the wrongdoer.[65]

Negligence in action for loss of, or injury to, vessel. In an action by the owner to recover for loss of, or injury to, the vessel by reason of negligence of the charterer, the ultimate burden of proof rests on the owner to show the charterer's negligence.[66] The necessary evidence of the charterer's negligence can be supplied by presumption, if the owner proves delivery of the vessel in a good or seaworthy condition and its return in a damaged condition,[67] and such proof makes out a prima facie case of negligence,[68] and, where such proof is adduced, the burden of introducing evidence in avoidance thereof, showing freedom from negli-

(6) A charterer, seeking to recover damages for refusal of owner to allow vessels to be used for a second voyage pursuant to alleged oral charters, had burden of showing what the oral charters were—U S Nav Co v Black Diamond Lines, C.C A N Y., 147 F 2d 958.

(7) Burden is on charterer to show owner's failure to tender ship with reasonable dispatch—U. S. Gypsum Transp Co. v. Dampskibs Aktieselskabet Karmoy, D C N.Y., 48 F.2d 376, affirmed, C.C A., 54 F 2d 1086.

(8) Burden to prove other matters—Lucayan Transports v McCormick Shipping Corp, C A Fla, 188 F 2d 202—The Frank A. Smith, D C.N. Y, 8 F.Supp 134.

60. U.S—The Aquarius, D C.Md, 44 F 2d 805.

61. U.S.—American Tobacco Co v. The Katingo Hadjipatera, C A N.Y, 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S 978, 96 L Ed —.

62. U.S.—Helm v. American Hawaiian SS. Co., C C A.Cal., 279 F. 72, certiorari denied 43 S Ct 93, 260 U S. 732, 67 L Ed. 486.
58 C J p 255 note 78

63. Cal—Frank v. Crescent Wharf, etc, Co., 195 P. 79, 50 Cal App. 272.

64. U S.—Scottish Nav. Co. v. Munson S. S Line, D C N Y, 60 F.2d 101, affirmed, C C A., 10 F.2d 708.
58 C.J. p 258 note 98 [d].

65. U.S.—Cruse v. Sabine Transp. Co, C.C A.Tex, 88 F.2d 298, certiorari denied 58 S Ct. 20, 302 U S 701, 82 L Ed. 541, rehearing denied 58 S.Ct. 134, 302 U.S 775, 82 L.Ed. 600.

66. U.S.—Seaboard Sand & Gravel Corp. v. American Stevedores, C C. A.N.Y., 151 F 2d 846—Waldie v Steers Sand & Gravel Corp., C C A. N.Y., 151 F.2d 129—The Irving, D C N Y., 16 F Supp 22, affirmed, C. C.A., Conners Marine Co. v Manhattan Lighterage Co, 91 F.2d 1011—Banks v Chas Kurz Co, D C Pa., 69 F Supp. 61, motion denied 69 F Supp 1017—New York Trap Rock Corp. v. Christie Scow Corp, D C. N Y, 68 F Supp 392, affirmed, C C A, 162 F 2d 624—New England Foundation Co v Rugo Const. Co, D C Mass., 60 F Supp 143, affirmed, C A, Rugo Construction Co v New England Foundation Co, 172 F.2d 964—Magistrelli v Canuso, D C Pa., 45 F Supp 539—The Pride, D C N Y, 41 F Supp 326, reversed on other grounds, C C A, 135 F 2d 999—The Match Light, D C N.Y., 39 F. Supp 908.
Mo.—Bock v. Eilen, App, 211 S.W.2d 92.
58 C J. p 255 note 81.

Recharter

Where charterer of vessel, acting as principal and not as agent for owner, rechartered it to another, there was no contractual relation between owner and second charterer, and there was no presumption of negligence on part of second charterer because the vessel was returned to owner in damaged condition—The Seaboard No 21, D C N.Y., 61 F.Supp 596, affirmed in part and reversed in part on other grounds, C C.A, 154 F 2d 399

67. U S—Seaboard Sand & Gravel Corp v American Stevedores, C C A N Y, 151 F.2d 846—Edward G. Murray Lighterage & Transp Co. v. Pennsylvania R R., C.C.A.N.Y, 130 F 2d 199—Alpine Forwarding Co v. Pennsylvania R Co, C C A. N.Y., 60 F 2d 734, certiorari denied Pennsylvania R. Co. v. Alpine Forwarding Co, 53 S Ct 93, 287 U.S. 647, 77 L Ed 559—The Reno, D.C. N.Y, 54 F 2d 682, modified on other grounds, C C A., 61 F.2d 966—C F. Harms Co. v. Erie R Co, D. C N.Y., 71 F Supp 934, affirmed in part and reversed in part on other grounds, C C A, 167 F.2d 562—The St. Nicholas, D C N.Y., 67 F.Supp. 380—New England Foundation Co. v Rugo Const Co, D.C Mass, 60 F Supp 143, affirmed, C A, Rugo Construction Co v. New England Foundation Co, 172 F 2d 964—Cox v. Banks, D C Pa, 50 F Supp. 871—Conners Marine Co v. Wathen, D. C N Y, 43 F.Supp 283—Texas Gulf Sulphur Co v O'Donnell, D C N Y, 26 F.Supp 70—The Moran No 107, D C N Y, 1 F Supp. 785.
Or.—Willamette Tug & Barge Co v. Commercial Dispatching Corp, 178 P 2d 698, 180 Or. 657.
58 C.J p 256 notes 82, 84.

Necessity of delivery in seaworthy condition

Owners were entitled to presumption of negligence of charterer only in the event of their delivery of vessel to charterer in a seaworthy condition—Banks v Chas. Kurz Co, D. C Pa, 69 F.Supp 61, motion denied 69 F.Supp. 1017.

68. U S.—The E T Halloran, C C.A. N.Y., 111 F 2d 571, certiorari denied Fuel Credit Corp. v. Howard, 61 S Ct 73, 311 U S 691, 85 L Ed. 447—The Reno, C C.A.N.Y., 61 F 2d 966—Banks v. Chas Kurz Co., D C.Pa, 69 F.Supp. 61, motion denied 69 F. Supp 1017—Conners Marine Co v. Petterson Lighterage & Towing Corp, D.C N Y., 60 F Supp. 960, affirmed in part and reversed in part on other grounds, C C A., The Everett Fowler, 151 F 2d 662, motion denied 152 F.2d 657, certiorari denied 66 S.Ct. 963, 327 U S 804, 90 L Ed. 1029, and certiorari denied 66 S Ct. 963, 327 U S 804, 90 L Ed 1029—The Killarney, D C N Y, 56 F Supp. 182—Magistrelli v Canuso, D C.Pa., 45 F Supp 539
58 C.J. p 256 note 84.

gence, is then on the charterer.[69] Proof by plaintiff owner of damage to the vessel and that it was moored by defendant charterer in an unsafe place makes out a prima facie case of negligence requiring defendant to show that the accident happened notwithstanding the exercise of reasonable care[70] When the vessel while demised is injured or destroyed by an accident which in the ordinary course of things does not occur when good care is exercised, a presumption of loss or injury by negligence arises.[71]

Where the charterer has expressly contracted in the charter against a presumption of negligence, the burden remains on the owner to show affirmatively the negligence of the charterer, and proof of delivery in a seaworthy condition does not make out a prima facie case against the charterer.[72] Where the charter is a mere contract of affreightment, there is no presumption of negligence against the charterer rendering him liable for unexplained injury to the vessel,[73] and the doctrine of res ipsa loquitur does not apply;[74] the burden is on the owner to prove the negligence asserted as the cause of the injury, not on the charterer to disprove it.[75]

The presumption of negligence arising from proof of delivery of the vessel in good condition and its return in a damaged condition is the equivalent of proof of negligence which will entitle libelant to a decree,[76] but it does not change the burden of proof which rests on libelant.[77] The presumption is a rebuttable one,[78] and it has been said to disappear when the facts appear.[79] In meeting the burden resting on him, the charterer must prove what he has done with respect to the vessel,[80] but he is not required to show how the damage occurred.[81]

No presumption of fault or negligence on the part of a charterer of a vessel arises from the fact

69. U S—O'Donnell Transp Co v. M & J Tracy, Inc, C C A N Y., 150 F.2d 735—Edward G. Murray Lighterage & Transp Co. v Pennsylvania R. R, C C A.N.Y, 130 F 2d 199—The E T Halloran, C C A.N Y., 111 F.2d 571, certiorari denied Fuel Credit Corp v. Howard, 61 S.Ct 73, 311 U S 691, 85 L Ed. 447—Kenny v City of New York, C.C. A.N.Y, 108 F 2d 958—The Reno, C C A.N.Y., 61 F 2d 966—Alpine Forwarding Co v. Pennsylvania R Co, C.C A N Y., 60 F.2d 734, certiorari denied Pennsylvania R Co. v. Alpine Forwarding Co, 53 S Ct. 93, 287 U S 647, 77 L Ed. 559—The Harry R, D C N Y., 58 F.2d 1000—The F G M No. 22, D.C N Y., 50 F 2d 269—O'Boyle v U. S, C C.A. N Y., 47 F 2d 585, mandate recalled 49 F 2d 273—The Maui, D C N Y., 70 F.Supp 772—Banks v. Chas Kurz Co, D C Pa, 69 F Supp 1017—New York Trap Rock Corp. v. Christie Scow Corp, D C N Y, 68 F. Supp. 392, affirmed, C C A, 162 F. 2d 624—The Seaboard No 21, D C. N Y, 61 F Supp 596, affirmed in part and reversed in part on other grounds, C.C A, 154 F 2d 399—New England Foundation Co v. Rugo Const. Co., D.C Mass., 60 F Supp. 143, affirmed, C A, Rugo Const. Co v. New England Foundation Co., 172 F 2d 964—The Killarney, D C. N Y., 56 F Supp 182—Leary v City of New York, D C N Y, 52 F Supp. 643—U. S Lighterage Corporation v. Petterson Lighterage & Towing Corp., D C N Y., 51 F Supp 96, affirmed, C C A., 142 F 2d 197—Cox v. Banks, D.C Pa, 50 F Supp 871—Conners Marine Co v. Wathen, D.C. N Y., 43 F.Supp. 283—The Francis V. Duffy, D C.N.Y., 32 F Supp 505—Texas Gulf Sulphur Co. v. O'Donnell, D C N Y, 26 F Supp. 70—The Lillian, D C N Y, 8 F Supp. 625, affirmed, C C A, De Mars v. Seaboard Sand & Gravel Corporation, 75 F 2d 1011
58 C J p 256 note 85

Inevitable accident

In order to escape liability to owner for damages to vessel on theory of inevitable accident, charterer has burden to establish by convincing proof that the disaster was brought about by causes beyond control of anyone—The Seaboard No 25, D C. N Y., 68 F Supp 169, affirmed, C.C.A., 159 F.2d 860

70. N.Y.—Neville v Morrison Coal, etc, Co, 207 N Y.S. 471, 211 App. Div 282
58 C J p 257 note 91.

71. U S—Hildebrandt v. Flower Lighterage Co, D C N Y., 277 F 436.
58 C.J. p 256 note 83.

72. N Y.—Fulton Lighterage Co. v. New York Cent R Co, 240 N Y S 88, 136 Misc 374.
58 C.J. p 257 note 86

73. U S—Glasgow Shipowners' Co. v. Munson SS Line, D C.Pa., 44 F 2d 826, affirmed, C C A, The Gibraltar, 52 F.2d 787
58 C J. p 257 note 87.

74. U.S—Glasgow Shipowners' Co. v Munson SS Line, supra.

75. U S.—Glasgow Shipowners' Co. v Munson SS. Line, supra.
58 C.J. p 257 note 89.

76. U.S—The Roslyn, C.C.A N.Y, 93 F.2d 278

77. U S—The Roslyn, supra.

78. U.S—The Maui, D C.N Y, 70 F. Supp. 772.

Circumstances rebutting presumption

In libel for damages to scow while being shifted across slip, proof offered by charterer as to the observable incidents of the manoeuver, and proof showing that shifting was not done by or at direction of charterer, was sufficient to rebut presumptive case against charterer arising from a failure to return scow in good order—The Maui, supra

79. U.S.—Seaboard Sand & Gravel Corp v. American Stevedores, C C. A N.Y, 151 F 2d 846—The Roslyn, C C A N Y, 93 F.2d 278—Alpine Forwarding Co. v. Pennsylvania R Co., C C A.N.Y., 60 F 2d 734, certiorari denied Pennsylvania R Co. v Alpine Forwarding Co, 53 S Ct. 93, 287 U.S. 647, 77 L Ed. 559.

Explanation of damage

In action for damage to barge subchartered by owner to a railroad wherein railroad explained why barge was damaged, there was no longer any inference in the case and railroad's negligence remained a question of due proof by the owner—The Montezuma III, D C.N.Y., 66 F Supp. 562.

80. U.S—Alpine Forwarding Co. v. Pennsylvania R Co, C C A.N Y, 60 F.2d 734, certiorari denied Pennsylvania R Co. v. Alpine Forwarding Co, 53 S.Ct. 93, 287 U S. 647, 77 L Ed 559

81. U.S.—The Reno, C C A N Y, 61 F.2d 966
58 C J p 256 note 85 [b].

Showing of nonculpability

In libel against charterer for damage to scow, burden on charterer to explain accident was discharged by proof that charterer did not intrust scow to tug which had scow in tow at time of damage, but was prevented by tug from performing its own duties as bailee of the scow.—The Maui, D.C.N.Y., 70 F Supp. 772.

itself that the vessel is destroyed by fire while in his charge.[82] Such a presumption may arise, however, if the circumstances surrounding the origin of the fire are such that it would have been impossible or highly improbable for the fire to have occurred without fault or negligence on the part of some one,[83] and, when such a presumption arises, it puts on the charterer the duty to go forward with evidence to show that there was no fault or negligence on his part.[84] Where the fire statute, 46 U.S. C.A. § 182, has been incorporated in the charter party, the burden has been held to be on the owner of the cargo to prove that fire which damaged the cargo was caused by the design or neglect of the owner's agent.[85]

Contributory fault or negligence. Where the contributory negligence or fault of the owner is relied on as a defense, the charterer, it has been held, has the burden of establishing it.[86]

(b) Seaworthiness

While there is ordinarily a general presumption of the seaworthiness of a chartered vessel, a presumption of unseaworthiness arises where a vessel sinks, or receives an injury, under such circumstances that no cause other than unseaworthiness can explain the accident.

There is a general presumption that a vessel is seaworthy when she undertakes a voyage,[87] particularly where the charter party declares that the vessel is in good order,[88] and, where particular equipment of the vessel is such that it does not deteriorate with use, the fact that it has done good service for a period of years raises a presumption of seaworthiness of the vessel with respect to it.[89] However, a defect which develops without any apparent cause will be presumed to have existed when the service began.[90] Thus, where no explanation is given of the leaky condition of a vessel at sea, and whether or not it was out of the ordinary, the vessel encountering no mishap, the inference must be drawn that she was unseaworthy before sailing;[91] and, where a vessel leaks so that she careens and dumps her cargo, the inference, in the absence of other cause, is that she is unseaworthy.[92]

Where a boat under charter, with an express or implied warranty of seaworthiness, receives an injury of which her unseaworthiness would be a sufficient producing cause, and no other cause is shown, a presumption arises that she was not seaworthy, which must be overcome before the owner can re-

82. U.S.—Warren & Arthur Smadbeck, Inc., v. Heling Contracting Corporation, C.C.A.N.Y., 50 F.2d 99, certiorari denied 52 S.Ct. 31, 284 U.S. 651, 76 L.Ed. 553.
La.—Poydras Fruit Co. v. Weinberger Banana Co., 181 So. 452, 189 La. 940.

Prima facie case
The mere happening of a fire without any showing that it resulted from negligence does not make out a prima facie case for recovery of damages against charterer of vessel damaged by fire.—U.S. Lighterage Corporation v. Petterson Lighterage & Towing Corp., D.C.N.Y., 51 F.Supp. 96, affirmed, C.C.A., 142 F.2d 197.

83. La.—Poydras Fruit Co. v. Weinberger Banana Co., 181 So. 452, 189 La. 940.

84. La.—Poydras Fruit Co. v. Weinberger Banana Co., supra.

Explosion caused by fireman
In owner's suit against charterer for loss of vessel destroyed by fire resulting from explosion occurring immediately after fireman had gone to engine room to light oil burner, circumstances indicated that explosion was caused by some act of fireman, and charterer, therefore, had burden of proving that there was no negligence on part of any officer or member of crew.—Poydras Fruit Co. v. Weinberger Banana Co., supra.

85. U.S.—The Older, C.C.A.N.Y., 65 F.2d 359.

86. U.S.—Adams v. Eastern Transp. Co., C.C.A.Mass., 291 F. 756.

Circumstances not raising presumption of negligence
Where respondent was using libelant's vessel as a shooting vessel in geophysical work under contract whereby libelant supplied navigating crew and respondent the geophysical crew, and libelant provided magazine storage for dynamite used in operations and when vessel departed on morning of explosion dynamite was properly stored in magazine and respondent had placed dynamite on deck for its own convenience, no presumption of negligence applied to libelant, and regulations regarding dynamite storage did not cover dynamite used in day's shooting operation.—Pure Oil Co. v. Geotechnical Corp. of Del., D.C.La., 94 F.Supp. 366, affirmed, C.A.; Geotechnical Corp. of Del. v. Pure Oil Co., 196 F.2d 199.

87. U.S.—Seminole Lumber, etc., Co. v. Bronx Barge Corp., D.C.Fla., 11 F.2d 982.
58 C.J. p. 179 note 48.

Failure of generator
Where owner brought suit for charter hire, and charterer claimed set-off for towing services required when generator failed at sea, burden of proof that owner did not exercise due diligence to maintain vessel in seaworthy condition and that failure to do so resulted in accident to the generator was on charterer.—Atlantic Refining Co. v. U.S., D.C.Pa., 82 F.Supp. 201.

88. U.S.—McCann v. Conery, D.C. La., 11 F. 747.
58 C.J. p. 179 note 49.

89. U.S.—The Rover, D.C.N.Y., 33 F. 515.

90. U.S.—Work v. Leathers, La., 97 U.S. 379, 24 L.Ed. 1012.
58 C.J. p. 179 note 51.

Breakdown occurring soon after delivery
Breakdown of small shaft belonging to lubricating oil pump of auxiliary motor, which occurred fifteen minutes after delivery under time charter, raised presumption that shaft was defective at time of delivery.—Aaby v. States Marine Corp., C.A.N.Y., 181 F.2d 383, certiorari denied 71 S.Ct. 66, 340 U.S. 829, 95 L.Ed. 1376.

91. U.S.—The John Twohy, C.C.A. Pa., 279 F. 343.

Relation back of presumption
The unexplained sinking of vessel raised a rebuttable presumption that it was unseaworthy, and such presumption related back to time of delivery of vessel to charterer.—Atlantic Creosoting Co. v. Savannah Lighterage & Transfer Co., D.C.Ga., 67 F. Supp. 383.

92. U.S.—The Cary Brick Co. No. 8, D.C.N.Y., 34 F.2d 981.—The Irving, D.C.N.Y., 16 F.Supp. 22, affirmed, C.C.A., Conners Marine Co. v. Manhattan Lighterage Co., 91 F.2d 1011.

cover from the charterer for the injury.[93] On the other hand, if the charterer is a bailee for hire, and under the duty of returning the boat in good condition, the burden rests on him to explain his default, and the owner may rest on the burden of evidence thus thrown on the bailee.[94] A presumption of unseaworthiness necessarily arises and is sufficient to sustain a recovery in cases where the vessel sinks or capsizes from an unknown cause under circumstances where she has been subjected to no external peril and nothing but her unseaworthiness can explain the accident,[95] and the burden of proving seaworthiness under such circumstances is on the owner,[96] but, where the circumstances attending the sinking of a vessel do not exclude all inferable causes except that of unseaworthiness, the presumption does not arise,[97] and this is more particularly true where the circumstances suggest another cause.[98]

In the absence of a statutory qualification of the rule in an action for damages to the cargo, where there is nothing in the charter party limiting the obligation of the shipowners to provide a seaworthy vessel, the burden of affirmatively proving the seaworthiness of the vessel at the commencement of the voyage is on the owner.[99] Under the Harter Act, which exempts a shipowner, who uses due diligence to see that his vessel is seaworthy from liability for loss arising by reason of faulty navigation, dangers of the sea, etc., a distinction has been drawn between the cases in which a vessel is a private carrier and in which it is a common carrier,[1] and in some cases in which, by reason of the fact that the entire cargo space of the vessel has been chartered, the vessel is regarded as being a private carrier; the mere fact of loss or injury to the cargo has been held not to throw on the vessel the burden of showing that she was seaworthy at the commencement of the voyage,[2] but the burden is on the shipper to establish that the vessel was unseaworthy.[3] However, in other cases the burden has been held to be on the vessel owner to prove affirmatively the seaworthiness of the vessel at the commencement of the voyage.[4]

Effect of survey. In the absence of any evidence of concealment of latent defect, bias, or fraud, a strong presumption of seaworthiness of a vessel arises when a preliminary survey has been held by the charterer and on such inspection the vessel has been found seaworthy.[5]

Underwriters' certificates of seaworthiness are presumptive evidence of such fact.[6]

(3) Admissibility

The general rules governing the admissibility of evidence in civil actions apply in actions based on charter parties.

93. U.S.—Bartley v. Borough Dev. Co., 214 F. 296.
58 C.J. p. 179 note 52.

94. U.S.—Bartley v. Borough Dev. Co., supra.

95. U.S.—Savannah Lighterage & Transfer Co. v. Atlantic Creosoting Co., C.C.A.Ga., 157 F.2d 796—The Doyle, C.C.A.Pa., 105 F.2d 113—Banks v. Chas. Kurz Co., D.C.Pa., 69 F.Supp. 61, motion denied 69 F.Supp. 1017—The Steel Inventor, D.C.Md., 35 F.Supp. 986—The Irving, D.C.N.Y., 16 F.Supp. 22, affirmed, C.C.A., Conners Marine Co. v. Manhattan Lighterage Co., 91 F.2d 1011—The Northern No. 29, D.C.N.Y., 15 F.Supp. 543, reversed on other grounds, C.C.A., Flat-Top Fuel Co. v. Martin, 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.
58 C.J. p. 179 note 54.

Prima facie case of negligence

Unexplained sinking of barge containing cargo which owner knew had been shipped thereon by subcharterer, with which owner had no contract relations, whereby he expressly or impliedly warranted seaworthiness of barge, established prima facie case of negligence of owner in not taking reasonable care to have barge safe for carriage of cargo.—Flat-Top Fuel Co. v. Martin, C.C.A.N.Y., 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.

96. U.S.—The Cullen No. 32, C.C.A.N.Y., 62 F.2d 68, affirmed 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189.

97. U.S.—The Transit, N.J., 250 F. 71, 162 C.C.A. 243.

98. U.S.—The Transit, supra.

Hole in vessel

Where sinking of vessel was attributable to a hole in its side, there was not an unexplained sinking so as to authorize application of presumption of unseaworthiness, and evidence as to what caused the hole should have been more fully developed.—Savannah Lighterage & Transfer Co. v. Atlantic Creosoting Co., C.C.A.Ga., 157 F.2d 796.

99. U.S.—O'Brien Bros. v. Moran Towing Corp., D.C.N.Y., 66 F.Supp. 614, affirmed, C.C.A., Beard's Erie Basin v. O'Brien Bros., 162 F.2d 176—Texas Gulf Sulphur Co. v. O'Donnell, D.C.N.Y., 26 F.Supp. 70—The Irving, D.C.N.Y., 16 F.Supp. 22, affirmed, C.C.A., Conners Marine Co. v. Manhattan Lighterage Co., 91 F.2d 1011.
58 C.J. p. 179 note 57.

1. U.S.—The Fort Gaines, D.C.Md., 21 F.2d 865.

2. U.S.—In re Steamship Co. Norden, D.C.Md., 6 F.2d 883.
Charter of entire cargo space as rendering vessel private carrier see supra § 34.

3. U.S.—Pillsbury Flour Mills Co. v. Becker S. S. Co., D.C.N.Y., 49 F.2d 648.
58 C.J. p. 180 note 62.

4. U.S.—Unterweser Reederei Aktiengesellschaft v. Potash Importing Corp., C.C.A.Ga., 36 F.2d 869—The John Twohy, C.C.A.Pa., 279 F. 343.

Extent of burden

In libel for damage to cargo shipped under charter party incorporating Harter Act, owner had burden of proving ship seaworthy, but was not bound to straighten out every kink in testimony of his witnesses.—The Westmoreland, C.C.A.N.Y., 86 F.2d 96.

5. U.S.—The Piskataqua, D.C.N.Y., 35 F. 622.

6. U.S.—The Maumee, D.C.N.C., 260 F. 862.

The rules with respect to admissibility of evidence in civil actions generally, and, more particularly, those applied in admiralty where suit on a charter party is brought as a proceeding in admiralty, apply to actions based on contracts of charter party.[7] Evidence of voyages performed either before or after the charter is admissible as far as a fair inference can be drawn from it as to the condition of the vessel at that time.[8] Evidence of facts and circumstances which in no way affect the rights and liabilities of the parties is immaterial and irrelevant.[9]

(4) Weight and Sufficiency

(a) In general

(b) Seaworthiness

(a) In General

In accordance with general rules governing the weight and sufficiency of evidence, the facts constituting an essential element of the cause of action or defense interposed in an action involving a charter party must be established by a preponderance of the evidence.

The general rules governing the weight and sufficiency of evidence apply to actions for breach of, or involving, charters.[10] As in civil actions gen-

7. U S—Barreda v. Silsbee, Md, 21 How 146, 16 L Ed 86.
58 C J p 257 note 95

Evidence held admissible

(1) Statements of master and chief officer in protest, contradicting their testimony and earlier statements regarding weather conditions, have been held admissible against shipowner.—The Framlington Court, C C A Tex., 69 F 2d 300, certiorari denied United British S S. Co. v. Newfoundland Export & Shipping Co., 54 S Ct 860, 292 U.S. 651, 78 L Ed. 1500

(2) In suit by subcharterer against owner for loss of shipment due to sinking of barge, bill of lading prepared by subcharterer, signed by representative of owner, was held admissible as proof of circumstances surrounding shipment—The Northern No 29, D C N Y, 15 F Supp 543, reversed on other grounds, C.C.A., Flat-Top Fuel Co. v Martin, 85 F 2d 39, certiorari denied 57 S.Ct 110, 299 U.S. 585, 81 L Ed. 431.

(3) Evidence of negligence and incompetence on part of fireman was admissible to explain coincidence that explosion occurred immediately after fireman went to light oil burner, where captain's report of origin of fire had indicated that it was caused by negligence of fireman.—Poydras Fruit Co. v. Weinberger Banana Co., 181 So. 452, 189 La. 940.

8. U.S.—The Vincennes, D C Mass., 28 F.Cas.No 16,945, 3 Ware 171.

9. U.S.—The Ira B. Ellems, La., 50 F. 934, 2 C.C.A 85.
58 C.J. p 260 note 6.

10. U.S.—New York, etc, R. Co v. Delaware, etc, R. Co., C.C.A.N.Y., 23 F.2d 487.
58 C.J. p 258 note 98.

Evidence held sufficient

(1) To establish cause of loss or damage in general or particular matters with respect to such cause.—Holcombe v Ferlita, C.A.Fla, 181 F. 2d 263—The Joseph J. Hock, C.C.A. N.Y., 88 F.2d 1—The Supreme, C.C. A.N.J., 61 F.2d 334—Dwyer Lighterage v. Christie Scow Corp., D C.N.Y., 96 F.Supp. 900—Mackey v. U. S., D.C. N.Y., 83 F Supp. 14, affirmed, C.A., 197 F 2d 241—The Killarney, D C N Y., 56 F Supp 182—The Maurice R Shaw, D C.Me, 46 F Supp 767—The Everett Fowler, D C.N Y., 7 F Supp 138—The Moran No. 107, D.C N.Y., 1 F.Supp. 785.

(2) To prove negligence.
U S.—U. S v. Carroll Towing Co., C C A.N.Y, 159 F.2d 169, rehearing denied 160 F.2d 482—McAllister Bros. v. Pennsylvania R. Co., C C A.N Y., 118 F 2d 45—The Joseph J Hock, C C.A.N Y., 70 F 2d 259—The Castleton, C C.A.N.Y., 64 F.2d 11—Pure Oil Co. v. Geotechnical Corp. of Del, D.C La., 94 F Supp 866, affirmed, C.A, Geotechnical Corp. of Del. v. Pure Oil Co, 196 F.2d 199—New York Trap Rock Corp v Christie Scow Corp, D C N Y, 68 F Supp 392, affirmed, C.C.A, 162 F. 2d 624—Magistrelli v. Canuso, D C. Pa, 45 F.Supp. 539—The Steel Inventor, D C.Md, 35 F Supp. 986.
La.—Poydras Fruit Co. v. Weinberger Banana Co., 181 So. 452, 189 La. 940.

(3) To make prima facie case of charterer's negligence in tying up barge to unsafe berth.—The A. F. Co. No. 4, D C N.Y, 54 F.2d 145.

(4) To show absence of negligence.—O'Donnell Transp. Co v. M. & J. Tracy, Inc., C C.A.N.Y, 150 F 2d 735—The Older, C.C.A.N.Y., 65 F 2d 359—U. S v. Dillon, C C A.N J., 64 F 2d 470—Friedland v. The Empress, D.C Cal., 48 F.Supp. 348.

(5) To show that owner suing to recover for damage to scow was without fault.—Leary v. City of New York, D C N.Y., 52 F Supp. 643.

(6) To establish that damage was not due to negligence on the part of the charterer, but rather to the negligence of a towing company.—Dwyer Lighterage v. Christie Scow Corp., D. C.N.Y., 96 F Supp. 900.

(7) To establish value of vessel, or cost of repairs, in a particular sum.
U.S—The Barryton, C C.A.N.Y., 54 F. 2d 282—Oliver J. Olson & Co v. U. S, Ct.Cl., 71 F.Supp. 355—Banks v. Chas. Kurz Co., D.C.Pa., 69 F.Supp 61, motion denied 69 F.Supp. 1017—Cox v. Banks, D C.Pa, 50 F Supp. 871.
La—Poydras Fruit Co v. Weinberger Banana Co, 181 So 452, 189 La. 940.

(8) To show market rate for charter hire.—Ramselius v. U. S, 90 F. Supp 547, 116 Ct Cl. 612.

(9) To show agreement of defendant to pay cost of repairs—Angeles Gravel & Supply Co. v. Crown Zellerbach Corp., 183 P.2d 482, 28 Wash. 2d 428.

(10) To show a deviation.—The Tregenna, D.C N.Y., 35 F.Supp. 118, reversed on other grounds, C.C.A, Farr v. Hain S. S Co, 121 F.2d 940.

(11) To establish that charterer knew, or should have known, that vessel was in peril.—Zeller Marine Corp. v. U. S., D C.N.Y., 66 F.Supp. 447.

(12) To establish that there was no waiver by charterers of warranty by owner.—The Atlanta, D.C.Ga, 82 F.Supp. 218

(13) To sustain finding that subcharterer was a corporation rather than a partnership.—Perez v. Cia Tropical Exportadora, Ltda., of Costa Rica, C A.Fla, 182 F 2d 874.

(14) To sustain a finding that fireman had been employed by libelant.—Stockton Sand & Crushed Rock Co. v. Bundensen, C.C.A.Cal., 148 F.2d 159.

(15) To sustain a finding that parties never entered into contract.—Strange & Co. v. Puget Sound Machinery Depot, 28 P.2d 111, 176 Wash. 90.

(16) To establish that owner and charterer of ship were entitled to exoneration from liability for damage to cargo through fire.—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C.C A.N.Y., 133 F.2d 781, affirmed 64 S.Ct. 15, 320 U.S. 249, 88 L Ed. 30.

(17) To establish other matters.
U.S—Seaboard Sand & Gravel Corp. v. Elmhurst Contracting Co., C.C.A. N.Y., 159 F.2d 860—Waldie v. Steers Sand & Gravel Corp., C C.A. N.Y., 151 F.2d 129—Pioneer Import

erally, and where the action is in admiralty, by virtue of the principles therein applied, every fact constituting an essential element of a cause of action or defense in an action on a charter party must be established by a preponderance of the evidence;[11] and where, on the whole evidence, the case is evenly balanced, judgment will be rendered against the party having the burden of proof.[12] Where a vessel is demised to the charterer, in the absence of special charter stipulations, there must be sufficient evidence to warrant a finding of negligence in order to fix liability on the charterer for her loss or injury.[13] Although the honest opinion of a competent master that he has taken on board all the cargo which his vessel will safely carry is not absolutely binding on the charterer, it is entitled to very great weight, and can be controlled only by decisive evidence of a mistake on his part.[14]

(b) Seaworthiness

General rules apply in determining the weight and sufficiency of the evidence to support a finding of seaworthiness or unseaworthiness.

General rules apply with respect to the weight and sufficiency of the evidence to support a finding of seaworthiness[15] or to support a finding of unsea-

Corp v. The Lafcomo, C C A N Y., 138 F 2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp, 64 S Ct. 523, 321 U S. 766, 88 L Ed 1063—O'Brien Bros v. Maloney Materials Corp., C C A.N Y, 136 F.2d 902—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, C C A Cal., 133 F.2d 552, certiorari denied 63 S Ct 858, 318 U S 781, 87 L Ed 1148—Gallagher Bros Sand & Gravel Corp. v. Anthony O'Boyle, Inc, D.C N Y, 94 F Supp. 788—Standard Towing Corp v. Tidewater Coal Docks Corp, D C.N.Y., 85 F.Supp 659—Mackey v U. S, D.C. N.Y., 83 F Supp. 14, affirmed, C A., 197 F.2d 241—The Montezuma III, D C N.Y., 66 F Supp 562—Leary v. City of New York, D.C N.Y., 52 F. Supp. 643—The George J. Goulandris, D C.Me, 36 F.Supp. 827—The Henry McNamee, D C N Y, 35 F. Supp 936—In re Rochester Shipbuilding Corp., D.C.N Y., 32 F Supp. 98

Or—Willamette Tug & Barge Co v. Commercial Dispatching Co., 178 P 2d 698, 180 Or 657.

Wash—Angeles Gravel & Supply Co. v Crown Zellerbach Corp., 183 P. 2d 482, 28 Wash.2d 428.

Evidence held insufficient

(1) To establish cause of loss or damage or particular matters as to such cause—Romano v West India Fruit & S. S Co, C C A.Fla, 151 F.2d 727—The Ruth Kellogg, C.C A Fla., 126 F 2d 18—The Doyle, C C A.Pa., 105 F.2d 113—O'Boyle v. U S., C C A. N Y, 47 F 2d 585, mandate recalled 49 F.2d 273—Gallagher Bros Sand & Gravel Corp. v. Anthony O'Boyle, Inc., D C.N Y., 94 F.Supp. 788—New York Trap Rock Corp v Christie Scow Corp., D C N.Y., 92 F Supp. 989—Petition of Howard, D.C N.Y, 53 F.Supp 556—Leary v. City of New York, D C.N.Y., 52 F.Supp. 643.

(2) To show negligence

U S.—Baldwin v. New York Cent. R Co., D C N.Y, 87 F Supp 562—The E. H. Blum, D.C.Pa., 74 F.Supp. 516.

Mo—Bock v Ellen, App, 211 S.W 2d 92.

(3) To rebut presumption of negligence—The E. T. Halloran, C C A.N. Y, 111 F.2d 571, certiorari denied Fuel Credit Corp. v Howard, 61 S Ct. 73, 311 U S 691, 85 L.Ed 447—Flat-Top Fuel Co. v Martin, C C A N Y, 85 F 2d 39, certiorari denied 57 S Ct. 110, 299 U S. 585, 81 L Ed. 431.

(4) To rebut owner's prima facie case—The Francis V. Duffy, D C N. Y., 32 F.Supp 505.

(5) To establish that dunnage was inadequate.—The Helen Barnet Gring, D C Md., 48 F.2d 629.

(6) To establish due care on the part of the charterer.—Kenny v. City of New York, C C.A.N.Y., 108 F.2d 958

(7) To establish that vessel was obsolete—U S. v Eastern S. S Lines, C A Mass., 171 F.2d 589.

(8) To establish contract by charterer with subcharterer to procure insurance—The Seaboard No. 25, D.C. N.Y., 68 F.Supp. 169, affirmed, C C A., 159 F.2d 860.

(9) To prove relationship of principal and agent between subcharterer and bare boat charterer—Perez v. Cia Tropical Exportadora, Ltda., of Costa Rica, C.A.Fla., 182 F.2d 874.

(10) To warrant conclusion that ship was worth more when she sank than cost of repairing her thereafter—Rugo Const. Co v. New England Foundation Co., C.A Mass., 172 F.2d 964.

(11) To show other matters.—Park S S Co v. Cities Service Oil Co, C. A.N.Y., 188 F.2d 804, certiorari denied Cities Service Oil Co. v Park S. S. Co., 72 S.Ct. 87, 342 U S 862, 96 L Ed. —— —Lucayan Transports v. McCormick Shipping Corp., C A.Fla., 188 F. 2d 202—U S v. Standard Oil Co. of Cal, C C.A.Cal, 156 F.2d 312—Romano v. West India Fruit & S S Co., C C A Fla., 151 F.2d 727—The Pride, C C A.N Y., 135 F 2d 999—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C.C A.N.Y., 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S Ct 15, 320 U S 249, 88 L Ed. 30—The Toledo, C C A N Y, 122 F 2d 255, certiorari denied Isbrandtsen-Moller Co v. The Toledo, 62 S Ct 302, 314 U S 689, 86 L Ed 551—The Reno, C C A.N Y, 61 F 2d 966—Clarke S. S Co v Munson S S Line, D C N Y, 59 F 2d 423, affirmed, C C A., 64 F 2d 1011—Mackey v U S, D C N Y, 83 F Supp 14, affirmed, C A., 197 F 2d 241—Texas Gulf Sulphur Co. v. O'Donnell, D C N Y., 26 F Supp 70—Hockley v Eastern Transp Co, D C Md, 10 F.Supp 908.

11. U.S—The C G.R-180, D C.Mich, 70 F Supp 975—The Montezuma III, D C N Y., 66 F Supp 562—The Principia, D C N.Y, 34 F. 667.

12. U.S.—Wheelwright v. Walsh, D. C N.Y, 42 F 862—The Principia, D C N Y., 34 F. 667.

13. U.S—Warren & Arthur Smadbeck, Inc, v. Heling Contracting Corporation, C C A.N Y, 50 F.2d 99, certiorari denied 52 S Ct. 31, 284 U.S. 651, 76 L Ed. 553.
58 C.J. p 255 note 80.

14. U.S.—Weston v. Foster, C.C. Mass., 29 F.Cas No 17,452, 2 Curt. 119
58 C.J. p 260 note 99.

15. **Evidence held sufficient**
(1) To show seaworthiness—The Reno, D C N.Y., 54 F 2d 682, modified on other grounds, C C.A., 61 F 2d 966—Leary v City of New York, D.C N Y., 52 F Supp. 643—Texas Gulf Sulphur Co. v. O'Donnell, D C.N.Y., 26 F.Supp. 70—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D C.N.Y, 15 F.Supp. 705, affirmed, C.C A, 88 F. 2d 1005, certiorari denied 58 S.Ct. 18, 302 U S. 699, 82 L.Ed. 540.
Wash.—Angeles Gravel & Supply Co. v. Crown Zellerbach Corp., 183 P. 2d 482, 28 Wash.2d 428.
58 C.J. p 180 note 67 [a].

(2) To show that owner failed to exercise due diligence to make vessel seaworthy.—Standard Oil Co. of Cal. v. U. S., D.C Cal, 59 F.Supp. 100, affirmed, C C.A., 156 F.2d 312—Petition of Howard, D.C.N.Y., 53 F.Supp. 556.

worthiness,[16] and, likewise, to overcome a presumption of seaworthiness[17] or unseaworthiness,[18] or to justify the charterer in canceling the charter for unseaworthiness.[19] The unexplained sinking of the vessel may be in itself sufficient to establish unseaworthiness.[20] Seaworthiness is not proved merely by the fact that the vessel carried cargo safely on occasions prior to the disaster,[21] particularly where the prior safe carriage may be explained on grounds other than that the vessel was seaworthy at that time.[22]

General evidence of thorough repair and caulking at a port is not conclusive that leakage was caused solely by extraordinary perils of the voyage, and that the vessel was seaworthy when she sailed.[23]

Underwriters' certificates of seaworthiness are strong, although not conclusive, evidence of the condition of the vessel.[24]

Refusal of insurance. The fact that certain insurance companies have refused insurance is not conclusive evidence that the ship is not seaworthy.[25]

e. Trial, Judgment, and Review

Matters pertaining to trial, judgment, and review in actions involving charter parties are governed by the usual rules as to such matters which obtain in civil actions generally, and, in so far as applicable, in cases in admiralty.

The general rules governing trials of civil actions and, in so far as applicable, the rules governing cases in admiralty apply to actions involving charter parties.[26]

Questions of law and fact. As in other cases, the general rule applies that questions of fact are to be submitted to the jury for their determination under proper instructions from the court;[27] and, in the absence of a jury, questions of fact are for the triers of facts.[28] Whether evidence, when offered, is admissible is a question for the court;[29] when ad-

(3) To show that the shipowner exercised due diligence to make particular vessel seaworthy.—Petition of Howard, D C N Y, 53 F Supp. 556—The Toledo, D C N.Y., 30 F.Supp 93, affirmed, C C A., 122 F.2d 255—Chateaugay Ore & Iron Co. v. Eastern Transp. Co., D.C N Y, 15 F Supp 705, affirmed, C.C A., 88 F 2d 1005, certiorari denied 58 S.Ct. 18, 302 U.S. 699, 82 L.Ed. 540.

Evidence held insufficient to show seaworthiness

U S.—Cleary Bros. v. Moran Towing Corp, D.C N.Y., 79 F.Supp. 934.
58 C J. p 180 note 67 [b].

16. U.S —Cowles Towing Co. v American Constr, etc., Co, D.C N. Y., 27 F.2d 622.
58 C.J. p 180 note 68.

Evidence held sufficient

(1) To show unseaworthiness in general —U. S Gypsum Co. v Conners Marine Co., C.C A.N.Y., 119 F 2d 689—The Doyle, C.C.A Pa, 105 F 2d 113—The Helen Barnet Gring, D. C.Md, 48 F.2d 629—The Steel Inventor, D C.Md., 35 F.Supp. 986—The Irving, D.C N.Y, 16 F Supp 22, affirmed, C C.A., Conners Marine Co. v Manhattan Lighterage Co, 91 F.2d 1011—Hockley v. Eastern Transp. Co, D C Md., 10 F.Supp 908
58 C J. p 180 note 68 [a].

(2) To show that barge was not unseaworthy because of failure to provide tarpaulins, or merely because tongue and groove white pine hatch covers were one and one half inches thick, but was unseaworthy because of overloading and because, in view of the overloading, the hatch covers were too thin to withstand the weight of the seas which, although heavy, were not unusual in that area in December —Petition of Howard, D.C N Y., 53 F Supp 556.

Evidence held insufficient to show unseaworthiness

U S.—Holcombe v. Ferlita, C A Fla., 181 F.2d 263—The Monarch of Nassau, C C A.Fla, 155 F 2d 48—Petition of Howard, D C.N.Y., 53 F. Supp 556—The Francis V. Duffy, D C.N.Y, 32 F Supp 505.
58 C.J. p 180 note 68 [b].

17. U S —The Rover, D C.N.Y., 33 F 515.
58 C.J. p 180 note 70

18. U S —Aaby v. States Marine Corp., D.C N.Y., 80 F Supp. 328, affirmed, C.C A., 181 F.2d 383, certiorari denied 71 S Ct. 66, 340 U.S 829, 95 L Ed 1376.
58 C J. p 180 note 71.

19. U S —McCaldin Co. v. Cargo of Lumber, D C Pa, 198 F. 328, affirmed 202 F. 735, 121 C.C.A. 197.
58 C J p 180 note 69.

20. U S —Taylor Bros. Lumber Co v Sunset Lighterage Co, C.C A.N Y., 43 F 2d 700—Sanbern v Wright, etc, Lighterage Co, D C N.Y, 171 F 449, affirmed 179 F. 1021, 102 C C.A. 666.
Presumption arising from unexplained sinking see supra subdivision d (2) (b) of this section

21. U.S.—Cleary Bros. v Moran Towing Corp., D C.N Y, 79 F Supp 934—The Irving, D.C N J, 16 F Supp 22, affirmed, C C.A, Conners Marine Co. v. Manhattan Lighterage Co., 91 F.2d 1011.

22. **Leak previously controlled or unaffected**

The fact that on three prior occasions scow had carried cargo safely did not establish seaworthiness at time scow was demised to respondent, where such carriage could be accounted for on hypothesis that the leaking area in the scow was never submerged or the leak was controlled —Cleary Bros v. Moran Towing Corp, D C N.Y., 79 F.Supp. 934.

23. U.S —Hubert v. Recknagel, D C. N.Y, 13 F 912.

24. U S —The Maumee, D.C N C., 260 F. 862.

25. U S —Moore v. Cornwall, C C.A Cal, 144 F. 22—Premuda v. Goepel, D.C N Y, 23 F. 410.

26. Mo —St. Louis, etc., River Packet Co. v. Nowland, 215 S W. 11, 279 Mo. 500.
58 C.J. p 261 note 9.

Reference to special commissioner

Where there was insufficient proof with respect to some items which time charterer was entitled to recover from voyage charterer for expenses incidental to discharging cargo which voyage charterer failed to discharge, and several items were disputed, claim was referred to special commissioner to determine amount and report it to admiralty court.—Continental Grain Co. v Armour Fertilizer Works, D.C N Y, 22 F Supp 49.

27. U S.—Alpine Forwarding Co. v. Pennsylvania R Co., C C A.N.Y., 60 F 2d 734, certiorari denied Pennsylvania R. Co. v. Alpine Forwarding Co., 53 S Ct. 93, 287 U.S 647, 77 L Ed. 559.
58 C.J. p 261 note 11.

28. U.S.—Rice v. Charles Dreifus Co., C.C.A.N.Y, 96 F 2d 80—The Westmoreland, C.C.A.N Y, 86 F.2d 96.

29. U S.—Barreda v. Silsbee, Md., 21 How. 146, 16 L.Ed. 86.

mitted, the question whether or not it is sufficient is for the jury,[30] whose province it is to draw from it all such inferences and conclusions as it conduces to prove, and which, in their judgment, it does prove.[31] Seaworthiness is a fact to be ascertained and determined like any other question of fact;[32] but the construction of a charter party is for the court and not for the jury.[33] A directed verdict may be granted in a proper case.[34]

Findings, judgment, or decree. The rules governing judgments and the sufficiency of findings to support the judgment in civil actions generally or, in appropriate cases, in admiralty, apply to actions involving charters.[35] The validity and effect of the decree rendered in disposing of a libel based on a charter party are determined by the general admiralty rules with respect to decrees.[36] Under a general prayer for relief, in a libel propounding with distinctness the substantive facts on which libelant relies, even if there is some inaccuracy in the statement of subordinate facts or of the legal effect of the facts propounded, an admiralty court may award any relief in an action on a charter which the law applicable to the case warrants.[37]

The court may dismiss a libel on exceptions to jurisdiction,[38] or may, in a proper case, allow the discontinuance of the action without prejudice to subsequent proceedings.[39] A stipulation as to the value of a cargo may prevent the court from awarding a recovery in any greater sum than that set forth in the stipulation.[40] A decree may be entered directly against the party ultimately responsible in order to avoid circuity of action and allow the whole matter to be determined in one suit.[41] A decree for loss by negligence may be made directly against the ship, and need not provide that collection shall first be made from the charterer, and only the deficiency, if any, from the ship.[42]

Costs. The costs properly taxed against the unsuccessful party may properly be included in the judgment rendered,[43] including expenses made necessary in order to defeat an attempt to defraud the court.[44]

Appeal and error. The rules with respect to appeal and error in civil proceedings generally or, in appropriate cases, the rules as to such matters generally applicable in admiralty proceedings are to be followed in actions based on charters.[45] In determining whether a decree in admiralty is one from which an appeal will lie, the courts are guided by the rules as to admiralty proceedings in general.[46]

30. U.S.—Barreda v. Silsbee, supra. 58 C J p 262 note 13.

31. U.S.—Barreda v. Silsbee, supra. 58 C.J. p 262 note 14.

32. Wash.—Angeles Gravel & Supply Co. v Crown Zellerbach Corp, 183 P.2d 432, 28 Wash.2d 428. 58 C J. p 179 note 47.

Ultimate fact inference

Seaworthiness of vessel carrying cargo under charter party contract is ultimate fact inference.—Krebs Pigment & Chemical Co. v. Sheridan, D C.Pa., 12 F Supp. 254, affirmed, C.C A., 79 F 2d 479.

33. N Y.—Flagler v. Hearst, 70 N.Y. S. 956, 62 App Div. 18.

34. U.S.—Alpine Forwarding Co. v. Pennsylvania R Co, C.C.A.N.Y., 60 F 2d 734, certiorari denied Pennsylvania R. Co. v. Alpine Forwarding Co., 53 S Ct. 93, 287 U.S 647, 77 L Ed. 559

35. Mass.—Amiro v. Crowley, 152 N. E. 78, 256 Mass 53.
Pa.—Lyons v. Fitzpatrick, Com.Pl., 93 Pitts'b Leg.J. 221.
58 C.J. p 262 note 17.

36. U.S.—The Gazelle, Md., 9 S.Ct 139, 128 U S. 474, 32 L.Ed. 496.
58 C.J. p 262 note 18.

Commissioner's report

In proceeding against barge owner for bilge water damage to cargo also damaged by rain, statement in commissioner's report that there was no way to distinguish between bilge water damage and rain water damage was held not equivalent to expression discrediting contrary testimony and report of underwriter's surveyor whose testimony was not adverted to in commissioner's report.—The Joseph J. Hock, C.C.A.N.Y., 88 F.2d 1.

37. U.S.—The Gazelle, Md., 9 S.Ct. 139, 128 U.S. 474, 32 L.Ed. 496.

38. U S.—The Pauline, D C.Wis., 19 F.Cas.No 10,848, 1 Biss. 390.

39. U S.—The Dan, D C.N.Y., 40 F. 691.

40. U.S.—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, C.C.A.Cal., 133 F.2d 552, certiorari denied 63 S.Ct. 858, 318 U. S. 781, 87 L.Ed. 1148.

41. U.S.—Polar Steamship Corp. v. Inland Overseas Steamship Corp., C.C.A.Va., 136 F 2d 835, 64 S.Ct. 83, 320 U S. 774, 88 L.Ed. 464.

Primary and secondary liability

Where charterer, being liable to owner without limitation for damage to scow caused by buckling of crane boom, after paying the owner, could indemnify itself from owner of crane, in admiralty such circuity of action would be avoided by single decree holding crane owner primarily liable, and scow and charterer secondarily liable, for damage to the scow.—Shamrock Towing Co. v. Fichter Steel Corp., C C.A.N.Y., 155 F.2d 69.

Liability in personam

Where charterer of barge which was unseaworthy and which was loaded with cotton, and which sank while being towed by tug, was liable to owners of cotton, and ultimate liability rested on owner of barge, and all such parties were properly before the court, owner of barge could be held liable in personam to owners of cotton—W. R Grace & Co. v. Charleston Lighterage & Transfer Co., C.A S.C, 193 F 2d 539.

42. U.S.—The Alert, N.Y., 61 F. 113, 9 C C.A. 390.
58 C.J. p 244 note 32.

43. U.S.—Simpson v. One Hundred and Ten Sticks of Hewn Timber, D.C.N Y., 7 F. 243.
58 C.J. p 262 note 22.

44. U.S.—Simpson v. One Hundred and Ten Sticks of Hewn Timber, supra.
58 C.J. p 263 note 23.

45. U.S.—Texas Co. v. Hogarth Shipping Corp., N.Y., 41 S.Ct. 612, 256 U.S. 619, 65 L.Ed. 1123.
58 C.J. p 263 note 26.

46. U.S—The Alert, N.Y., 61 F. 113, 9 C C.A. 390.
58 C.J. p 263 note 27.

An assignment of error cannot be based on matter which is not apparent of record.[47]

Subject to the rules applicable to civil actions generally, in actions at law on charters an appellate court will not review the findings of fact made by the jury,[48] and the facts as found must be assumed to be correct, in the further examination of the controversy,[49] except where the verdict is against the evidence.[50] Where the action on the charter is in admiralty, the conclusiveness on appeal of the findings is the same as in other admiralty actions.[51] Findings with respect to the charter terms and the conduct of the parties thereunder which are based on an application of the law to the facts are open to revision on appeal.[52]

IV. MASTER

§ 57. Definition; Employment or Appointment

a. Definition
b. Employment or appointment

a. Definition

The master is the commander of a merchant vessel; he to whom is committed the government, care, and direction of the vessel and cargo.

In the nautical sense of the word, the "master" is the commander of a merchant vessel, colloquially called "captain;"[53] the word refers to the captain of the ship.[54] The master of a ship is he to whom is committed the government, care, and direction of the vessel and cargo;[55] one who commands a ship on a voyage under an appointment from the owners;[56] one who for his knowledge of navigation and for his fidelity and discretion has the government of the ship committed to his care and management;[57] the commander or first officer of a ship, a captain, etc.[58]

Flag captain is a subordinate officer of a vessel who assumes the character and duties of captain only on special occasions.[59]

b. Employment or Appointment

(1) In general
(2) Who may employ or appoint
(3) Who may be employed or appointed
(4) Form or manner of employment or appointment
(5) Registration
(6) Terms of contract
(7) Succession to command
(8) Transfer of right to command

(1) In General

Subject to such restrictions as may be imposed by statute or by their contract, the appointment or employment of a master is within the discretion of the owners of the vessel.

Subject to such restrictions as may be imposed by statute or by their contract, the appointment or employment of a master is within the discretion of the owners of the vessel.[60] So, one person may be employed as master to superintend the loading and repairing of a vessel for sea, and another person employed to take command of her on the voyage.[61]

(2) Who May Employ or Appoint

The employment or appointment of a master is ordinarily vested in the owners, but, under some charters, it may be vested in the charterer, and in case of necessity the appointment of a master in a foreign port may be made by the resident consul of the country to which the vessel belongs.

The employment or appointment of a master is ordinarily vested in the owners,[62] and, where a vessel is owned in shares, the appointment may be made by a majority in interest of the owners, if they act in good faith.[63] It has been held that in case

47. U.S.—The Gazelle, Md., 9 S.Ct. 139, 128 U.S. 474, 32 L.Ed. 496.
58 C.J. p 263 note 28.

48. U.S.—Barreda v. Silsbee, Md., 21 How. 146, 16 L.Ed. 86
58 C.J. p 263 note 30.

49. U.S.—Barreda v. Silsbee, supra.

50. Conn.—Pitkin v. Brainerd, 5 Conn. 451, 13 Am.D. 79.

51. U.S.—The Gazelle, Md., 9 S.Ct. 139, 128 U.S. 474, 32 L.Ed. 496.
58 C.J. p 263 note 33.

52. U.S.—The Edwin I. Morrison, N. Y., 14 S.Ct. 823, 153 U.S. 199, 38 L.Ed. 688.

53. Webster New Int.D.
38 C.J. p 1385 note 60.

54. N.Y.—Burns v. U. S Shipping Board Emergency Fleet Corporation, 189 N.Y.S 267, 268.

55. La.—Millaudon v. Martin, 6 Rob. 534, 538.
38 C.J. p 1385 note 62.

56. N.Y.—Hubbell v. Denison, 20 Wend. 181, 182.

57. N.Y.—Martin v. Farnsworth, 33 N.Y.Super. 246, 260.
38 C.J. p 1385 note 64.

58. La.—Millaudon v. Martin, 6 Rob. 534, 538
38 C.J. p 1385 note 65.

59. Mass.—Arfridson v. Ladd, 12 Mass. 173, 175

60. U.S.—Burkholder v. U. S., D.C. Pa., 56 F.Supp. 106—Jones v. Davis, D.C.N.Y., 13 F.Cas.No.7,460, Abb.Adm. 446.
Contract as to term of employment see infra § 58.

61. U.S.—Jones v. Davis, supra.

62. U.S.—Burkholder v. U. S., D.C. Pa., 56 F.Supp 106.

63. N.Y.—McCready v. Thorn, 51 N. Y. 454
Part owner, as ship's husband, has authority to appoint a master.—McCready v. Thorn, supra.

of necessity, an appointment may be made by the resident consul of the country to which the vessel belongs,[64] as in the event of the death[65] or absconding[66] of the master in a foreign port.

Charterer. Under a charter amounting to such a demise of the vessel as places the charterer in complete control of it, the charterer may appoint a master during the term of the contract.[67] A clause in a war shipping charter, however, which provides that in the event that continued employment of the master appears to be prejudicial to the interests of the United States in the prosecution of the war, or if the United States is dissatisfied with his conduct the owner shall make changes necessary in the appointment does not make the master the charterer's man,[68] but, on the other hand, plainly recognizes the owner's right to hire.[69]

(3) Who May Be Employed or Appointed

Under a statute requiring the owner to make an oath that the master is a citizen of the United States, an alien cannot be regarded as a master de facto, and where there is only one American citizen among the crew, he may be made master as the only person entitled to command.

Under a statute with respect to the registration of vessels, requiring the owner to make an oath as to who is the master of the vessel and that he is a citizen of the United States, an alien, although in fact employed and actually serving as master, cannot be regarded as a master de facto.[70] So, where the only American citizen among the crew is the cook, he may be made master as the only person entitled to command.[71] Only sober persons should be placed in charge of vessels plying the seas or other navigable waters.[72]

(4) Form or Manner of Employment or Appointment

Except in so far as a master is required by statute to undergo an examination and to receive a license, the law does not interfere with respect to the mode of appointment of a master; no formalities are necessary, and the employment may be inferred from the circumstances.

While in some maritime countries the mode of a shipmaster's appointment is prescribed by law,[73] in this country, except in so far as a master is required by statute to undergo an examination before the local inspectors, as to his character, experience, and habits, and to receive a license, the law does not interfere with respect to the mode of appointment of a master.[74] No formalities are necessary to his employment,[75] and any mode of authorization competent to give power to one man to act for and bind another is sufficient to constitute him master of the vessel.[76] The employment of a master may be inferred from the circumstances,[77] but the inference should leave no reasonable cause to doubt the fact.[78]

(5) Registration

Provisions of a registration act have been held not to contemplate an inquiry into the legality or sufficiency of the master's authority, and where one is in fact acting as master, the fact that his name has not been entered on the registry and enrollment of the vessel does not affect his actual status.

Provisions of a registration act designed to secure the public revenue against the allowance to foreign vessels of privileges which only vessels of citizens of the United States are entitled to enjoy do not contemplate an inquiry into the legality or sufficiency of the master's authority,[79] and, while the person in whose name as master a vessel is registered must ordinarily be deemed her master for every legal intent and purpose,[80] where one is in fact acting as master, the fact that his name has not been entered on the registry and enrollment of the vessel does not affect his actual status.[81]

(6) Terms of Contract

The master's contract of employment may contain any stipulation that may be agreed on between the parties.

The master's contract of employment may contain any stipulation that may be agreed on between the

64. U.S.—The Giles Loring, D.C.Me., 48 F. 463
58 C.J. p 264 note 47.

65. U.S.—The Giles Loring, supra—Pickersgill v. Williams, D.C.N.Y., 19 F.Cas.No.11,123.

66. U.S.—The Jacmel Packet, D.C.N.Y., 13 F.Cas.No.7,154, 2 Ben. 107.

67. U.S.—Gibson v. Manetto Co., Fla., 194 F. 331, 114 C.C.A. 291
Charters generally see supra §§ 26–56.

68. U.S.—Burkholder v. U. S., D.C. Pa., 56 F.Supp. 106.

69. U.S.—Burkholder v. U. S., supra

70. U.S.—The Dubuque, D.C.Mich., 7 F.Cas.No.4,110, 2 Abb. 20
Registry, enrollment, and license of vessels generally see supra § 3.
Regulations and requirements as to licensing of officers of vessels see supra § 6.

71. Wash.—Knutson v. Hansen, 251 P. 852, 141 Wash. 623

72. U.S.—The Lauretta Speddin, Md., 184 F. 283, 106 C.C.A. 425.

73. U.S.—The Boston, D.C.N.Y., 3 F.Cas.No.1,669, 1 Blatchf. & H. 309.

74. U.S.—The Boston, supra.
License see supra § 6.

75. U.S.—The Boston, supra.

76. Conn.—Clark v. Richards, 1 Conn. 54.
58 C.J. p 264 note 61.

77. U.S.—Jones v. Davis, D.C.N.Y., 13 F.Cas.No.7,460, Abb.Adm. 446.

78. U.S.—Jones v. Davis, supra.

79. U.S.—The Boston, D.C.N.Y., 3 F.Cas.No.1,669, 1 Blatchf. & H. 309.
Registration of vessels see supra § 3.

80. U.S.—Adams v. Wyoming, D.C.N.J., 1 F.Cas.No.71.
58 C.J. p 264 note 66.

81. U.S.—Davidson v. Baldwin, Mich., 79 F. 95, 24 C.C.A. 453.
58 C.J. p 264 note 67.

parties,[82] even though a particular stipulation would be unreasonable if set up as a usage,[83] or oppressive if imposed on a member of the crew.[84] Where a contract of employment is made under which the wages are to be a certain sum per month and in which no definite time of continuance is specified, the hiring is a monthly hiring.[85]

(7) Succession to Command

The mate or a member of the crew who, by reason of his citizenship, is the only person entitled to the command, succeeds to the authority of the master on separation of the master from the vessel by death or casualty or in case of his sickness or such other cause as shall render him incapable of having the command; and on his succession to the command his authority is the same as that of the original master.

The mate succeeds to the authority of the master upon separation of the master from the vessel by death or casualty,[86] or in case of his sickness,[87] or such other cause as shall render him incapable of having the command,[88] and it has been said that this substitution is a contingency which is contemplated by his engagement and which cannot be declined by him but by a default of duty;[89] on his succession to command, his authority is the same as that of the original master,[90] until he is regularly displaced by the legal owner,[91] and he has the right to resort to all lawful means to aid him in the effectual establishment of his command.[92] A member of the crew who, being by reason of his citizenship the only person entitled to the command, is made master on the original master's giving up his command and leaving the vessel has the same status and authority as if originally commissioned as master.[93]

(8) Transfer of Right to Command

The contract of the master is, in the absence of an agreement, not transferable.

The contract of the master is in its nature personal, and, in the absence of an agreement, not transferable.[94] The sale of an interest in the vessel by a part owner who is also master carries no right to the command,[95] and a contract to sell the command, even by the owners of a majority interest, is incapable of enforcement.[96]

§ 58. —— Duration and Termination of Relationship

a. In general
b. Removal or discharge

a. In General

The term or duration of a master's employment ordinarily depends on the terms of the contract employing him, and, in the absence of an express limitation, is presumed to continue until the owners by some declaration or overt act remove him.

The term or duration of a master's employment ordinarily depends on the terms of the contract employing him,[97] and, in the absence of an express limitation, is presumed to continue until the owners by some declaration or overt act remove him.[98] The death of a part owner does not ipso facto revoke the authority of the master of a vessel as to such part owner's share.[99] The sequestration of a vessel by the government terminates the relationship existing between a master and the owners of the vessel.[1]

b. Removal or Discharge

The owner cannot, without incurring liability in dam-

82. U.S.—Bourne v. Smith, D.C. Mass., 3 F.Cas.No.1,701, 1 Lowell 547.
58 C.J. p. 265 note 68.

83. U.S.—Bourne v. Smith, supra

84. U.S.—Bourne v. Smith, supra

85. N.S.—Schooner Lavonia, Ltd. v Lowe, 54 N.S. 159

86. U.S.—The Boston, D.C.N.Y., 3 F.Cas.No.1,669, 1 Blatchf. & H. 309—Carrington v. The Ann C. Pratt, D.C.Me., 5 F.Cas.No.2,445, 10 N.Y.Leg.Obs. 193

87. Mass.—Copeland v. New England Marine Ins. Co., 2 Metc. 432.

88. U.S.—**Corpus Juris cited in** Escandon v. Pan American Foreign Corporation, D.C.Tex., 12 F.Supp. 1006, 1007.
Mass.—Copeland v. New England Marine Ins. Co., 2 Metc. 432.

89. U.S.—Carrington v. The Ann C. Pratt, D.C.Me., 5 F.Cas.No.2,445, 10 N.Y.Leg.Obs. 193.

90. U.S.—**Corpus Juris cited in** Escandon v. Pan American Foreign Corporation, D.C.Tex., 12 F.Supp. 1006, 1007—Carrington v. The Ann C. Pratt, D.C.Me., 5 F.Cas.No.2,445, 10 N.Y.Leg.Obs. 193.

91. U.S.—The Boston, D.C.N.Y., 3 F.Cas.No.1,669, 1 Blatchf. & H. 309

92. Mass.—Copeland v. New England Marine Ins. Co., 2 Metc. 432.

93. Wash.—Knutson v. Hansen, 251 P. 852, 141 Wash. 623

94. U.S.—The Lizzie Merry, D.C.N.Y., 15 F.Cas.No.8,423, 10 Ben. 140.
58 C.J. p. 265 note 82.

95. Pa.—Williams v. Ireland, 11 Phila. 273, 2 Wkly.N.C. 442.
58 C.J. p. 265 note 83.

96. Pa.—Williams v. Ireland, supra.

97. U.S.—Slocum v. Swift, D.C. Mass., 22 F.Cas.No.12,954, 2 Lowell 212.
58 C.J. p. 265 note 86.
Term for which wages can be collected see infra § 68.

98. U.S.—Fox v. Holt, D.C., 9 F.Cas. No.5,012, 4 Ben. 278, 36 Conn. 558.
58 C.J. p. 265 note 87.

Routine assignment
Where vessel master, hired at will, received letter of instructions informing him of next voyage, cargo, destination, and agents to contact, and giving him other general instructions, and letter ordered master to take vessel to another country but contained no mention of tenure of employment, letter was routine assignment, and not an offer of contract for duration of voyage.—Higbee v. American Foreign S.S. Corp., D.C.Pa., 94 F.Supp. 921.

99. Me.—Grant v. Carver, 75 Me. 524.

1. N.J.—Hill v. Stetson, 39 N.J.Law 84.

ages, dismiss before the end of the term one employed as master for a definite term except for sufficient cause, but in case of a general employment or a hiring at will the master may be discharged by the owner at any time without the necessity of assigning a cause therefor.

The owner cannot, without incurring liability in damages, dismiss before the end of the term one employed as master for a definite term,[2] as for a particular voyage[3] or for a particular time,[4] except for sufficient cause.[5] In case of a general employment, however, the master may be discharged by the owners[6] or a majority in interest thereof[7] at any time without the necessity of assigning a cause therefor,[8] although he is a part owner of the vessel.[9] So where the hiring of the master is no more than a hiring at will, the owner has the absolute right to discharge him with or without cause.[10]

Charterer. A clause in a war shipping charter which provides that, in the event that continued employment of the master appears to be prejudicial to the interests of the United States in the prosecution of the war, or if the United States is dissatisfied with his conduct, the owner shall make changes necessary in the appointment plainly recognizes the owner's right to discharge,[11] and gives the charterer no right to discharge objectionable personnel,[12] but only a contract right against the owner in this respect,[13] and has to do with potential disloyalty or treason in a vital war service,[14] and not with the skill, capacity, or experience of the ship's complement as seamen.[15]

§ 59. Authority and Duties

The court will seldom question the judgment of a master in making his decisions as to the proper handling of his vessel.

The court will seldom question the judgment of a shipmaster in making his decisions as to the proper handling of his vessel.[16]

§ 60. —— Scope and Extent in General

The master of a seagoing vessel has full control of the ship and all on board, and generally it is his right and duty, in the exercise of a sound discretion and in good faith, to do all things with respect to the equipment and conduct of the voyage which are reasonably necessary to the protection and preservation of the interests under his charge.

The master of a seagoing vessel has full control of the ship and all on board.[17] As a general rule, it is his right and duty, in the exercise of a sound discretion and in good faith, to do all things with respect to the equipment and conduct of the voyage which are reasonably necessary to the protection and preservation of the interest under his charge, whether that of owners, charterers, cargo owners, or underwriters,[18] and in case of necessity or calamity during the voyage, the master, in the absence of the parties concerned, is, by law, created their agent, and his acts done under such circumstances in the exercise of a sound discretion and in good faith are binding on such parties.[19] He may act as agent of the owners or consignees of the cargo, in their absence, to the extent that it may be reasonably necessary for him to act to protect or preserve the cargo in the course of the voyage;[20] but

2. U.S.—Clayton v. The Eliza B Emory, C.C.N.J., 4 F. 342.
58 C.J. p 265 notes 90-92.

3. U.S.—Montgomery v. Henry, Pa., 1 Dall. 49, 1 L.Ed. 32, 1 Am.D. 223.

4. Mass.—Moore v. Curry, 106 Mass. 409.

5. U.S.—Black v. People's Coal Co., D.C.Pa., 180 F. 318
58 C.J. p 265 note 93.

6. U.S.—Lombard SS. Co. v. Anderson, Md., 134 F. 568, 67 C.C.A. 432
58 C.J. p 266 note 95.

7. N.Y.—Ward v. Ruckman, 36 N.Y. 26, 93 Am.D. 479, 1 Transcr.A. 172
58 C.J. p 266 note 96

8. U.S.—Montgomery v. Henry, Pa., 1 Dall. 49, 1 Am.D. 223, 1 L.Ed. 32, —Higgins v. Jenks, C.C.Me., 12 F.Cas.No 6,468, 3 Ware 17.

9. U.S.—Clayton v. The Eliza B. Emory, C.C.N.J., 4 F. 342.
58 C.J. p 266 note 98.

10. U.S.—Higbee v. American Foreign S. S. Corp., D.C.Pa., 94 F.Supp. 921.
Discrepancy in master's account held sufficient cause for discharge
U.S.—Higbee v. American Foreign S. S. Corp., supra.

11. U.S.—Burkholder v. U. S., D.C. Pa., 56 F.Supp. 106.

12. U.S.—Burkholder v. U. S., supra.

13. U.S.—Burkholder v. U. S., supra.

14. U.S.—Burkholder v. U. S., supra.

15. U.S.—Burkholder v. U. S., supra.

16. U.S.—The Maurice R. Shaw, D.C. Me., 46 F.Supp. 767.
Power or authority of master to:
Arbitrate salvage claims see Salvage § 111.
Hypothecate vessel see infra § 91.
Make contract of towage see the C.J.S. title Towage § 6, also 63 C.J. p 8 note 23-p 9 note 33.
Make contracts of salvage see Salvage § 110.
Order general average act see infra § 225.

17. Wash.—Aquino v. Alaska S. S. Co., 91 P.2d 1014, 199 Wash. 490.
Officer of ship, whether master or mate, is in full charge of vessel when she is docked, and has supervision of deck and hatchways and coverings thereof.—Petersen v. Klitgaard, 299 P. 54, 212 Cal. 516, certiorari denied Peterson v. Naknek Packing Co., 52 S.Ct. 128, 284 U.S. 672, 76 L.Ed. 569.

18. U.S.—The Styria, N.Y., 22 S.Ct. 731, 186 U.S. 1, 46 L.Ed. 1027.
58 C.J. p 266 note 3.
Protection against trespassers
(1) Captain of vessel, as such, has the duty to protect and safeguard it and to keep trespassers from it.—The H. S. Inc., No. 72, C.C.A.N.J., 130 F.2d 341.

(2) A boy hanging to bumper of moored scow while swimming in river was a trespasser whom it was scow captain's duty to remove.—The H. S., Inc., No. 72, supra.

19. U.S.—Harrison v. Fortlage, Pa., 16 S.Ct. 488, 161 U.S. 57, 40 L.Ed. 616.
58 C.J. p 266 note 4.
Master as agent of owners or charterers generally see infra § 63.

20. U.S.—Spear v. Place, Tex., 11 How. 522, 13 L.Ed. 796.
Authority and duties as to cargo generally see infra § 63.

he cannot, without special authority, represent or act for any part of the cargo after it is delivered to the consignees.[21]

§ 61. —— Accounting to Owner or Charterer

It is the duty of the master of a vessel to render a full and satisfactory account to the owners or charterers of the vessel.

It is the duty of the master of a vessel to render a full and satisfactory account to the owners of the vessel of all moneys received,[22] or which should have been received,[23] and of the disbursements and expenditures of the vessel during a voyage,[24] before he is entitled to any wages[25]

Charterer. The master may be required to produce his accounts to the charterer[26] or his agents[27]

§ 62. —— As to Passengers and Crew

By maritime law the master has all the authority of command aboard a vessel, and matters pertaining to the crew and passengers, including the duty of protecting him from maltreatment while aboard his ship, are intrusted to him.

By the maritime law the master has all the authority of command aboard the vessel,[28] and matters pertaining to the crew are intrusted to the master or captain of the ship,[29] who, under the maritime law is the guardian of the seamen as wards of the admiralty.[30] He also has a necessary control over his passengers.[31] Further, the master has the duty of interposing his authority to protect both passenger and seaman from maltreatment while on board his ship.[32] With respect to passengers, the master owes a higher and more delicate duty than he owes to his crew;[33] it is his duty to protect his passengers from harm with the care, skill, and prudence which an exceedingly competent and cautious man would bring to the task in like circumstances[34] The master or agent of the vessel must make up at the expense of the owners the accounts between the ship and officers or seamen[35]

§ 63. —— As Agent for Owners or Charterers

a. In general
b Repairs, supplies, and other necessaries
c. Contracts of affreightment
d Authority and duties as to cargo in general
e. Authority as to purchase of cargo
f. Collection of freight or demurrage
g. Borrowing money
h. Execution of bonds, notes, and bills of exchange
i. Allowance or settlement of claims

a. In General

The master is deemed the agent of the owners or charterers for all details of navigation and care or management of the ship; consequently, they are bound

21. U S —Spear v. Place, supra.

22. U.S.—Higbee v. American Foreign S. S. Corp, D C Pa, 94 F.Supp. 921.
58 C.J p 266 note 7.

23. U.S.—Babcock v. Terry, D C. Mass., 1 F Cas No.702, 1 Lowell 66

24. U.S.—Robinson v Hinckley, C.C. N Y., 20 F.Cas.No 11,954, 2 Paine 457.

25. U.S —Robinson v. Hinckley, supra.

26. U S —Mauran v. Warren, D C. Mass., 16 F.Cas No.9,310, 2 Lowell 53.

27. U S —Mauran v. Warren, supra
58 C J. p 267 note 12

28. U.S.—Butler v. McClellan, D C. Me., 4 F.Cas No 2,242, 1 Ware 220.
Duty of inferior officers and common seamen to obey lawful commands of master see Seamen § 223

29. U.S.—The Marguerite W., D.C. Wis., 49 F.Supp 929, affirmed, C.C. A., 140 F.2d 491.

30. U.S.—Spellman v. American Barge Line Co., C.A.Pa., 176 F.2d 716.
Paternal responsibilities
(1) Relationship of a ship captain to his crew is traditionally paternal and he is the crew's legal guardian in sense that it is a part of his duty to look out for their safety and care whether or not they make a distinct request for it.—Monteiro v. Paco Tankers, D C.Pa, 93 F Supp. 93.

(2) A ship's master has paternal responsibilities to his crew but such duties come into being only after employment has begun and are not involved in the hiring of seamen.—Potter Title & Trust Co v Ohio Barge Line, C A Pa., 184 F 2d 432, certiorari denied 71 S.Ct. 567, 340 U S. 955, 95 L Ed. 689.

(3) The paternal responsibilities of a ship's captain do not include duty of requiring medical approval before hiring an apparently competent but previously hospitalized seaman who is seeking and accepts employment. —Potter Title & Trust Co. v. Ohio Barge Line, supra.
Duty to furnish medical care in general
(1) The captain of a vessel owes the duty of providing medical care to an injured member of his crew.—Rodgers v. U S. Lines Co., C.A.Va., 189 F.2d 226.

(2) Ship's master is not expected to exercise the skill of physician in recognizing the ailments of his crew and rendering suitable treatment therefor.—Potter Title & Trust Co. v Ohio Barge Line, C.A Pa., 184 F 2d 432, certiorari denied 71 S.Ct. 567, 340 U S. 955, 95 L Ed. 689.

(3) Maintenance and cure of disabled seamen see Seamen §§ 172–187

31. U S —Krauskopp v Ames, D C, 14 F Cas.No 7,931, 4 Pa L.J R. 100.
58 C J. p 267 note 17.

32. U S —The Lizzie Burril, D.C Ala., 115 F. 1015.
58 C.J. p 267 note 18.
Maltreatment of seamen generally see Seamen §§ 222–236.

33. U S —Smith v. Wilson, D C.Ala., 22 F Cas No 13,128, 31 How.Pr., N. Y, 272
58 C J. p 267 note 19.

34. U.S.—Voltmann v. United Fruit Co., C.C A N Y., 147 F 2d 514.

35. Hawaii.—Warren v. Rush, 2 Hawaii 468.
58 C.J. p 267 note 20.

by all acts done or contracts entered into by him within the scope of his authority relative to the regular business of the vessel.

In general the master is deemed the agent of the owners for all details of navigation and care or management of the ship;[36] and, where the vessel is under charter, he is deemed the agent of the charterer for such matters as relate to the receipt and delivery of cargo, and to the earnings of the vessel which go to the charterer,[37] and as to other matters within the scope of the authority, expressly or impliedly, vested in him by the charterer.[38] For some purposes he is deemed the agent of both the owner and the charterer,[39] consequently, they are bound by all acts done or contracts entered into by him within the scope of his authority relative to the regular business of the vessel,[40] but they are not bound by the acts or contracts of the master beyond the scope of his authority,[41] unless they assent to or ratify them.[42] A master's general powers as agent are so much a matter of law that persons dealing with him are bound to take notice of them at their peril.[43] As agent of the owner, knowledge of the master is knowledge of the owner.[44]

The master's power to bind his owners is but a branch of the general law of agency,[45] and is such as is conferred on him by the laws of the country to which his vessel belongs.[46] In many respects, however, the authority of a master is, from the necessities of the case, more extensive than that of an ordinary agent;[47] but in order that he may exercise extraordinary powers, exigencies must arise in which it is impossible for the owners or their general agent to be consulted and the necessities of the business require that he should act promptly.[48]

Delegation of authority. In general, the master cannot delegate all of his authority as agent;[49] but in an emergency[50] he may employ experienced agents to assist him,[51] and may request the ship's brokers to contract as his agent for outfitting the vessel.[52]

Good faith and loyalty. Like other agents, the master must act with entire good faith and loyalty to his employers' interests.[53] So the master of a ship cannot become a purchaser at a sale of property which is sold by his authority as agent of the owners.[54]

b. Repairs, Supplies, and Other Necessaries

The master has implied authority to bind the vessel or the owners for whatever necessaries are reasonably fit and proper for the safety of the vessel and the due performance of the voyage, where the owners are absent.

The master has implied authority to bind the ves-

36. U.S.—Higbee v. American Foreign S. S. Corp., D.C.Pa., 94 F.Supp. 921—The Drottning Sophia, D.C. N.Y., 153 F. 1017.
La.—Leefe v. Walker, 18 La. 1.
N.Y.—Moss v. Husted, 66 N.Y. 539
Va.—Morewitz v. Societe Nationale D'Affretements, 156 S.E. 376, 155 Va. 802.
58 C.J. p. 267 note 21, p. 268 note 30 [a].
Liability as between owner and charterer:
In general see supra § 34.
For negligence of master of harbor craft see supra § 52.

37. U.S.—The Santona, D.C.N.Y., 152 F. 516—The Brig Maria, 39 Ct.Cl. 39.
Charterer as owner pro hac vice see supra § 34.

38. N.Y.—Oldman-Magee Boiler Works v. Ocean, etc., Transp. Co., 205 N.Y.S. 550, 210 App.Div. 183.

39. U.S.—The Surprise, Mass., 129 F. 873, 64 C.C.A. 309.
58 C.J. p. 268 note 24.

40. Va.—Morewitz v. Societe Nationale D'Affretements, 156 S.E. 376, 155 Va. 802.
58 C.J. p. 268 note 25.
Intervention in legal proceedings; employment of attorney
Master of ship may intervene for defense of ship in legal proceedings against her, and he had apparent authority to employ attorney to perform services preventing restraint of ship; hence, shipowner was liable in contract for attorney's fees.—Morewitz v. Societe Nationale D'Affretements, supra.
Medical attention for mariners on ship
(1) The master of the vessel is agent of the owners with authority to furnish to all mariners on the ship medical attendance at the cost of the owners.—Scarff v. Metcalf, 13 N.E. 796, 107 N.Y. 211, 1 Am.S.R. 807 and note—2 C.J. p. 662 note 11.
(2) Authority of master with respect to matters pertaining to crew generally see supra § 62.
(3) Maintenance and cure of disabled seamen see Seamen §§ 172–187.

41. Mich.—Strong v. Saunders, 15 Mich. 339
58 C.J. p. 268 note 27.

42. Del.—Davis v. Marshall, 4 Del. 64.

43. Ind.—Holcroft v. Halbert, 16 Ind. 256.

44. U.S.—Stevens v. R. O'Brien & Co., C.C.A.Mass., 62 F.2d 632
58 C.J. p. 267 note 21 [b].

45. N.J.—May v. Hurley, 71 A. 913, 77 N.J.Law 611, 613, 134 Am.S.R. 796, 18 Ann.Cas. 874.
58 C.J. p. 268 note 34.

46. U.S.—Pope v. Nickerson, C.C. Mass., 19 F.Cas.No.11,274, 3 Story 465.
N.Y.—Hanschell v. Swan, 51 N.Y.S. 42, 23 Misc. 304.

47. N.Y.—Merritt v. Walsh, 32 N.Y. 685.

48. N.J.—May v. Hurley, 71 A. 913, 77 N.J.Law 611, 613, 134 Am.S.R. 796, 18 Ann.Cas. 874.
58 C.J. p. 269 note 37.

49. Hawaii.—Caplan v. Hoffschlaeger, 2 Hawaii 291.
N.Y.—Commercial Nat. Bank v. Sloman, 106 N.Y.S. 508, 121 App.Div. 874.

50. U.S.—The Ripon City, Ga., 102 F. 176, 42 C.C.A. 247.

51. U.S.—The Ripon City, supra.

52. N.Y.—Commercial Nat. Bank v. Sloman, 87 N.E. 811, 194 N.Y. 506.

53. U.S.—Higbee v. American Foreign S. S. Corp., D.C.Pa., 94 F.Supp. 921.
Duty to render a full and satisfactory account of all moneys received see supra § 61

54. U.S.—Barker v. Marine Ins. Co., C.C.R.I., 2 F.Cas.No.992, 2 Mason 369.
58 C.J. p. 269 note 43.

sel[55] or the owners[56] for whatever necessaries are reasonably fit and proper for the safety of the vessel and the due performance of the voyage, where the owners are absent. Accordingly, unless credit therefor is given exclusively to the master or to third persons,[57] or unless some other person has such authority in the particular instance and this is known to the creditor,[58] the master may bind the owners for necessary repairs,[59] equipment,[60] and other supplies,[61] services of seamen,[62] assistance in discharging cargo,[63] or necessary port charges.[64] Interested persons may assume that he has such authority, unless something appears to suggest the contrary, and put them on inquiry.[65] He cannot, however, bind the owners for items which are not necessaries unless he is specially authorized to do so;[66] nor can he purchase supplies or merchandise for third persons on the credit of the owner of the vessel.[67] Where the master is also the owner and by the terms of the charter party bound to make substantial repairs, he will, in ordering repairs, be deemed to have acted as principal, and not as agent for the charterer.[68]

Opportunity to communicate with owners or agents. While the rules under consideration appear to be well settled where the master acts in a foreign port from which communication cannot readily be had with the owners or their agents,[69] there is some conflict as to his power in a home port, or where the owners or agents may be communicated with. In some jurisdictions it is held that the master may bind the owner for necessaries, such as supplies or repairs, either in a foreign port, or even in the home port,[70] unless he in fact has no such authority and the persons dealing with him have knowledge of that fact,[71] or unless the supplies or repairs are furnished on the exclusive credit of the master.[72] In other jurisdictions, however, this authority is limited to a foreign port or a home port where the owners do not reside and are not within easy access of the master,[73] and where the owners or their agent are at the port of the vessel's anchorage or so near it that they can be readily consulted or can be reasonably expected to interfere personally, the master cannot, without consulting them, pledge the owners' credit for the ship's necessaries, and, hence, the owners will not be liable on such a contract,[74] unless the master has special authority for that purpose,[75] or the owners have held him out as having such authority,[76] or have ratified the contract after it was made.[77]

c. Contracts of Affreightment

The captain of a vessel is not the general agent of the owner with power to make general contracts as to shipments; and, where the vessel is loaded wholly by the owners and is not employed in carrying freight for hire, the master has no authority to enter into contracts of affreightment. The master of a vessel engaged in carrying freight may enter into binding contracts of affreightment on such terms as are authorized by the usual course of trade of his vessel.

As a general rule, the captain of a vessel is not

55. U.S.—The H. A. Baxter, D.C. Conn., 172 F. 260, affirmed 179 F. 1018, 102 C.C.A. 663.
Authority of master as to:
Binding cargo for repairs see infra § 66.
Borrowing of money for repairs see infra subdivision g of this section.
Employment of pilot see Pilots § 8
Giving of bottomry bond for repairs see infra § 91
Towage contracts see the C.J.S. title Towage § 6, also 63 C.J. p 8 note 23–p 9 note 33.

56. U.S.—Neset v. Christensen, D.C. N.Y., 92 F.Supp. 78.
Hawaii.—Spencer v. Bailey and Gilbert, 1 Hawaii 216.
58 C.J. p 269 note 46.

57. N.C.—Williams v. Windley, 86 N.C. 107.
58 C.J. p 269 note 48.

58. U.S.—The Joseph Cunard, D.C.N.Y., 13 F.Cas.No 7,535, Olcott 120—Philips v. Ledley, Pa., 19 F.Cas No. 11,096, 1 Wash.C.C. 226.

59. Md.—Stirling v. Nevassa Phosphate Co., 35 Md 128, 6 Am.R. 372
58 C.J. p 269 note 50.

60. U.S.—Schultz v. Bosman, D.C. Md., 21 F.Cas.No 12,488, 5 Hughes 97.
58 C.J. p 269 note 51.

61. Hawaii.—Spencer v. Bailey and Gilbert, 1 Hawaii 216.
58 C.J. p 270 note 52.

62. Mo.—Carr v. Burke, 32 Mo 233
N.Y.—Kohler v. Wright, 20 N.Y.Super. 318.

63. U.S.—Noyes v. Munson SS. Line, D.C.N.Y., 173 F 814
58 C.J. p 270 note 54

64. N.Y.—Chicago Commercial Nat. Bank v. Sloman, 106 N.Y.S. 508, 121 App.Div 874
58 C.J. p 270 note 55

65. U.S.—Black Diamond Coal-Min. Co. v. The H. C. Grady, D.C.Cal., 87 F. 232.

66. Me.—Whitten v. Tisdale, 43 Me 451.
58 C.J. p 270 note 57.
Apparent necessity sufficient
The furnisher of supplies is not bound to show that there was a positive necessity for such supplies; it is sufficient if there was an apparent necessity.—Spencer v. Bailey and Gilbert, 1 Hawaii 216.—58 C.J. p 270 note 57 [a].

67. La.—Calef v. The Bonaparte, 1 Rob 463, 38 Am.D 190.

68. N.Y.—Oldman-Magee Boiler Works v. Ocean, etc., Transp. Co., 205 N.Y.S. 550, 210 App.Div 183

69. U.S.—Black Diamond Coal-Min. Co. v. The H. C. Grady, D.C.Cal., 87 F. 232.
58 C.J. p 270 note 61.

70. Cal.—Crawford v. Roberts, 50 Cal 235.
58 C.J. p 270 note 63.

71. N.Y.—Provost v. Patchin, 9 N.Y. 235
58 C.J. p 271 note 64.

72. Pa.—Winsor v. Maddock, 64 Pa. 231.

73. U.S.—Schultz v. Bosman, D.C. Md., 21 F.Cas.No 12,488, 5 Hughes 97.
58 C.J. p 271 note 66.

74. U.S.—Schultz v. Bosman, supra.
58 C.J. p 271 note 67.

75. Md.—Pentz v. Clarke, 41 Md. 327.
58 C.J. p 271 note 68.

76. Md.—Pentz v. Clarke, supra.

77. Md.—Pentz v. Clarke, supra.

the general agent of the owner with power to make general contracts as to shipments,[78] and it has been said that the contracts of the master or other agent on the voyage or in foreign ports bind only the ship.[79] Where a vessel is loaded wholly by the owners and is not employed in carrying freight for hire, the master thereof has no authority to enter into contracts of affreightment,[80] unless the owners assent,[81] except where it is necessary in a foreign port to diminish the loss to the owners or charterers, by reason of the failure to obtain an expected cargo.[82] The master of a vessel engaged in carrying freight may enter into contracts of affreightment binding on the owners on such terms as are authorized by the usual course of trade of his vessel,[83] particularly at a foreign port,[84] unless the owner is on board attending exclusively to the shipment of the cargo,[85] or unless such authority is given to another.[86]

d. Authority and Duties as to Cargo in General

It is the duty of the master as such to see to the safekeeping and transportation of the cargo, and although he may be authorized to act as supercargo during the voyage, his acts as supercargo are not binding on the owners of the vessel or on the vessel.

It is the duty of the master to see to the safe transportation of the cargo,[87] and also, as discussed supra § 40, to see to the safe loading and stowage thereof; other than this he has no authority to exercise or duty to perform in respect of the cargo,[88] except as duties may arise with respect to its sale or disposition, as discussed infra § 66. As shown infra § 171, the supercargo, if there is one, represents the owners of the cargo. The master, however, may be authorized to act as supercargo during the voyage,[89] as where he is also the consignee of the cargo for sale;[90] and when he acts as supercargo, what he does relative to the safekeeping[91] and transportation of the cargo,[92] he does as master, and binds the owner of the vessel,[93] but what he does relative to its sale and disposition after reaching the port of destination, he does as supercargo,[94] and neither the owners[95] nor the vessel itself[96] is responsible therefor. The master of a vessel in a foreign port has not implied authority to bind the owners by an agreement with brokers, who are loading her for a voyage for a fixed commission, that she shall be consigned to them at the port of destination, with a right on their part to supply the wharf and stevedore for her discharge, and collect all freight and general average for an additional commission.[97]

e. Authority as to Purchase of Cargo

It is not within the general powers of a master to purchase a cargo on behalf of the owners.

As a general rule, it is not within the general powers of a master to purchase a cargo on behalf of the owners,[98] and the owners are not liable for such purchases by the master unless previously authorized[99] or subsequently ratified.[1] On the failure of the charterers of a vessel to furnish cargo at a certain port, the master is required to use reasonable efforts to diminish the charterer's loss,[2] but in order to do so he is not bound to purchase cargo at his own risk,[3] or to go to other ports to obtain it.[4]

f. Collection of Freight or Demurrage

The master has the authority and duty to collect freight due on goods carried on his vessel and demurrage.

As a general rule, the master has the authority

78. Ala.—Tennessee River Nav. Co. v Walls, 92 So. 202, 18 Ala.App. 305.

79. U.S.—The Fred E. Hasler, C.C.A. N.Y., 65 F.2d 589

80. Mass.—Walter v. Brewer, 11 Mass. 99
N.Y.—King v. Lenox, 19 Johns 235.

81. Mass.—Walter v. Brewer, 11 Mass. 99.

82. U.S.—Crabtree v. Clark, C.C. Ohio, 6 F.Cas.No.3,314, Sprague 217.

83. La.—Porter v. Curry, 7 La. 233.
58 C.J. p 271 note 75.

84. N.Y.—Ward v. Green, 6 Cow. 173, 16 Am.D. 437.
N.C.—Murfree v. Redding, 2 N.C. 276.

85. N.Y.—Ward v. Green, 6 Cow. 173, 16 Am.D. 437.

86. U.S.—Naylor v. Baltzell, C.C. Md., 17 F.Cas.No.10,061, Taney 55.

87. U.S.—The Oakley C. Curtis, C.C. A.N.Y., 4 F.2d 979, certiorari denied France, etc., SS Corp v. Midland Seed Products Co., 45 S.Ct. 354, 267 U.S. 599, 69 L.Ed. 807—Ross v. The Active, Pa., 20 F.Cas.No.12,071, 2 Wash.C.C. 226.

88. U.S.—Ross v. The Active, supra.

89. U.S.—Smedley v. Yeaton, D.C., 22 F.Cas.No.12,965, 3 Cranch C.C. 181.
58 C.J. p 271 note 89.

90. U.S.—Smedley v. Yeaton, supra.
58 C.J. p 272 note 90.

91. U.S.—The Waldo, D.C.Me., 28 F. Cas.No.17,056, 2 Ware 165.
58 C.J. p 272 note 91.

92. U.S.—The Maiden City, D.C.Ala., 33 F. 715—The Waldo, D.C.Me., 28 F.Cas.No.17,056, 2 Ware 165.

93. U.S.—The Maiden City, D.C.Ala., 33 F. 715—The Waldo, D.C.Me., 28 F.Cas.No.17,056, 2 Ware 165.

94. U.S.—The Waldo, supra.
58 C.J. p 272 note 94.

95. U.S.—The Waldo, supra.

96. U.S.—The Waldo, supra.
58 C.J. p 272 note 96.

97. Mass.—Warren v. Skolfield, 104 Mass. 503.

98. Me.—Hewett v. Buck, 17 Me. 147, 35 Am.D. 243.
58 C.J. p 272 note 98.

99. N.Y.—Bidenlac v. Smith, 31 N.Y. 259.
58 C.J. p 272 note 99.

1. Me.—Lyman v. Redman, 23 Me. 289.

2. U.S.—Crabtree v. Clark, C.C.Ohio, 6 F.Cas.No.3,314, 1 Sprague 217.

3. U.S.—Crabtree v. Clark, supra.

4. U.S.—Crabtree v. Clark, supra.

and duty to collect freight due on goods carried on his vessel,[5] and he has no authority to release a charterer from paying the freight reserved in the charter party,[6] or to vary the terms of the contract made by the owner with respect thereto.[7] If he acts as agent of the owners of a chartered vessel, it is his duty to collect the freight for the benefit of the charterer,[8] and if he neglects or refuses to pay over such freight, the owners will be liable therefor,[9] unless he is made the agent of the charterers for that purpose.[10]

Demurrage. The master of a vessel has authority to direct the collection of demurrage.[11]

g. Borrowing Money

Even though the necessity arose from his own misconduct, the master of a vessel, when without funds or the means of raising them in a foreign port, may bind the owner for money borrowed in good faith to pay for necessaries, such as repairs, wages, supplies, and the like, provided the vessel is in a port where he cannot readily communicate with the owners.

The master of a vessel, when without funds or the means of raising them in a foreign port, may, as a rule, bind the owners for money borrowed in good faith to pay for necessaries,[12] such, for example, as repairs,[13] wages,[14] supplies reasonably fit and proper to enable the vessel to continue on her voyage,[15] payments to obtain release from seizure,[16] customs charges,[17] compromise of claims for salvage,[18] or the services and commissions of brokers employed by the owners.[19] The authority exists although the necessity arose from the master's own misconduct;[20] but, where the vessel is in a port where the owners may be readily communicated with, the master ordinarily has no authority to pledge the owners' credit for money borrowed without consulting with them.[21] The owners are not liable, however, unless the money borrowed is required for purposes which are reasonably fit and proper under the circumstances under which the vessel is placed,[22] and it is the duty of the lender to see that the money is needed for such purposes,[23] nor are the owners liable for advances which are collusively made.[24] A master has no authority to borrow to pay a debt for services for which the owners of the vessel are already responsible,[25] unless the debt constitutes a lien on the vessel or cargo capable of immediate enforcement in a foreign port.[26]

h. Execution of Bonds, Notes, and Bills of Exchange

The master of a vessel has no power to execute, indorse, or accept bills of exchange or notes binding on the owners of his vessel, except in a foreign port for necessary repairs or supplies, or except where he is specially authorized to do so.

The master of a vessel has no power to execute, indorse, or accept bills of exchange or notes binding on the owners of his vessel,[27] except in a foreign port for necessary repairs or supplies,[28] or except where he is specially authorized to do so.[29] In a foreign port the master may bind the owners

5. U.S.—Keyser v. Blue Star S. S. Co., Fla., 91 F. 267, 33 C.C.A. 496.
La.—Leefe v. Walker, 18 La. 1.
58 C.J. p 272 note 5.

6. U.S.—Balcarres Brook SS. Co. v. Grace, N.Y., 75 F. 1017, 22 C.C.A. 7.

7. U.S.—Merchants' Banking Co. v. Cargo of The Afton, N.Y., 134 F. 727, 67 C.C.A. 618—Balcarres Brook SS. Co. v. Grace, N.Y., 75 F. 1017, 22 C.C.A. 7.
N.Y.—Randall v. Brodhead, 70 N.Y. S. 43, 60 App.Div. 567.
Waiver of lien.
The master has no authority by signing bills of lading to waive the lien of the shipowner on the goods of the charterer; and such bills of lading will not give a right to persons who take them with knowledge of the charter party to have the goods free from the lien.—The Salem's Cargo, D.C.Mass., 21 F.Cas.No. 12,248, 1 Sprague 389.

8. U.S.—The Maiden City, D.C.Ala., 33 F. 715.

9. U.S.—The Maiden City, supra.

10. U.S.—The Maiden City, supra.

11. U.S.—The Monkshaven, D.C.Pa., 250 F. 1000.

12. Pa.—Wainwright v. Crawford, 3 Yeates 131.
58 C.J. p 272 note 13.

13. Md.—Miller v. Palmer, 58 Md. 451.
58 C.J. p 272 note 14.

14. Mass.—Stearns v. Doe, 12 Gray 482, 74 Am.D. 608
58 C.J. p 273 note 15

15. Md.—Miller v. Palmer, 58 Md. 451.
58 C.J. p 273 note 16.

16. Conn.—Williams v. Kelly, 2 Conn 218 note.
La.—McGregor v. Brittingham, 12 La. 182.

17. Me.—Descadillas v. Harris, 8 Me. 298.

18. N.Y.—Lobach v. Hotchkiss, 17 Abb.Pr. 88.

19. N.Y.—Commercial Nat. Bank v. Sloman, 87 N.E. 811, 194 N.Y. 506.

20. Me.—Descadillas v. Harris, 8 Me. 298.

21. U.S.—George W. Bush & Sons Co. v. Fitzpatrick, D.C.Pa., 73 F. 501.
La.—Mississippi Agricultural Bank v. The Jane, 19 La. 1.

22. N.Y.—Hanschell v. Swan, 51 N.Y.S. 42, 23 Misc 304
58 C.J. p 273 note 24.

23. U.S.—George W. Bush & Sons Co. v. Fitzpatrick, D.C.Pa., 73 F. 501.
58 C.J. p 273 note 25.

24. Md.—Miller v. Palmer, 58 Md. 451.

25. N.Y.—Chase v. McLean, 29 N.E. 986, 130 N.Y. 529

26. Mass.—Stearns v. Doe, 12 Gray 482, 74 Am.D. 608.

27. Mass.—Bowen v. Stoddard, 10 Metc. 375.
58 C.J. p 273 note 32.
Authority of master to execute bottomry and respondentia bonds see infra § 91.

28. N.Y.—Commercial Nat. Bank v. Sloman, 87 N.E. 811, 194 N.Y. 506.
58 C.J. p 273 note 33.

29. U.S.—Pickersgill v. Williams, D.C.N.Y., 19 F.Cas.No.11,123—Wallace v. Agry, C.C.Me., 29 F.Cas.No. 17,096, 4 Mason 336.

by the execution of a bond to procure the release of his vessel,[30] but he has no such authority in the home port;[31] nor can he give an appeal bond in the home port of the vessel without consulting the owners.[32]

i. Allowance or Settlement of Claims

The master has no power to allow or settle claims against the vessel or owners, except such as are valid and accrue during the time he is master.

The master of a vessel has no power to allow or settle claims against the vessel[33] or against the owners,[34] except such as accrue during the time he is the master,[35] and he particularly has no such power where the claim is not a valid one against the owners.[36]

§ 64. —— Management and Navigation of Vessel

The master has full control of all departments of service on his ship, and full discretion as to its navigation; he is still in command notwithstanding the presence of a pilot, and it is his duty to use reasonable care to keep the ship in repair, and to follow instructions as to the course of his voyage.

The master has control of all departments of service on his ship,[37] and full discretion as to its navigation.[38] He must determine what is requisite for the safety of property[39] and lives[40] on his vessel. It is his duty personally to see to the course of his vessel,[41] and to see that the officers[42] and crew[43] under him properly perform their assigned duties with respect to the navigation of the vessel. This rule applies in harbors[44] or rivers,[45] when for the time being a pilot is in charge of navigation and the pilot or other officer so in charge of navigation does not supersede the master in command.[46] The master is still in command of the vessel, notwithstanding the presence of a pilot.[47]

30. N.Y.—Stedman v. Patchin, 34 Barb. 218.
58 C.J. p. 273 note 35

31. Mo.—Carr v. Burke, 32 Mo. 233.

32. N.Y.—Gager v. Babcock, 48 N.Y. 154, 8 Am.R. 532
58 C.J. p. 273 note 37.

33. Me.—Kelley v. Merrill, 14 Me. 228.

34. Me.—Kelley v. Merrill, supra.

35. Me.—Kelley v. Merrill, supra.
58 C.J. p. 274 note 40.

36. N.Y.—Merritt v. Walsh, 32 N.Y. 685
58 C.J. p. 274 note 41.

37. U.S.—Wandtke v. Anderson, C.C.A.Cal., 74 F.2d 381—The Balsa, C.C.A.Pa., 10 F.2d 408—**Corpus Juris quoted in** U. S. v. The Pomare, D.C. Hawaii, 92 F.Supp. 185, 192—The Vulcan, D.C.La., 60 F.Supp. 158.
Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.
58 C.J. p. 274 note 42.
Liability for negligence or misconduct generally see infra § 70 a.

Captain of scow chartered under customary New York Harbor charter was in charge of her lines—The Moran No. 107, D.C.N.Y., 1 F.Supp. 785

38. Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.
58 C.J. p. 274 note 43.

39. U.S.—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192.
58 C.J. p. 274 note 44.

Bargee

(1) Although not much is expected of a bargee, he has a definite duty to be something more than a mere automaton and cannot invite trouble to his own scow and cannot permit her to be operated when he knows she is in badly damaged condition.—The C. W. Crane, D.C.N.Y., 64 F.Supp. 627, affirmed, C.C.A., 155 F.2d 940.

(2) Bargee was bound to use reasonable care to protect barge from injury where the danger was reasonably apparent.—O'Donnell Transp. Co. v. Tidewater Iron & Steel Co., D.C.N.J., 90 F.Supp. 953, affirmed, C.C.A., 185 F.2d 675.

(3) Bargee was agent of owner charged with taking care of lines of vessel.—The Bartle Daly, D.C.N.Y., 45 F.2d 603, reversed on other grounds, C.C.A., 58 F.2d 179.

(4) So the captain of barge, which was chartered with the captain, had duty of tending the barge to see that it was kept seaworthy by replacing hatch covers, tending lines, and pumping.—Price v. Long Dock Co., D.C.N.Y., 23 F.Supp. 501.

(5) A bargee's absence during working hours is not necessarily excusable because he has properly made fast his barge to a pier, when he leaves her.—U. S. v. Carroll Towing Co., C.C.A.N.Y., 159 F.2d 169, rehearing denied 160 F.2d 482.

(6) Bargees have no implied authority to change a contract of towage by assuming risks of danger arising from threat of weather, and fact that bargees consented to, or requested, leaving barges in admittedly unsafe berth, does not exonerate tug from fault.—The B. B. No. 21, C.C.A.N.Y., 54 F.2d 532.

40. U.S.—The Smith Terry No. 1, D.C.Fla., 34 F.2d 570, affirmed, C.C.A., Hupper v. Hyde, 296 F. 862—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192.
Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396

41. U.S.—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192—Union Ins. Co. v. Dexter, D.C.N.Y., 52 F. 152.
Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396

42. Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.
58 C.J. p. 274 note 47
Liability of master for acts of subordinates see infra § 70.

43. U.S.—The Oregon, N.Y., 15 S.Ct. 804, 158 U.S. 186, 39 L.Ed. 943.
Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.

44. Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.
58 C.J. p. 274 note 49.

45. U.S.—The Oregon, N.Y., 15 S.Ct. 804, 158 U.S. 186, 39 L.Ed. 943.
Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.

46. Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 19 P.2d 25, 29, 171 Wash. 396
58 C.J. p. 274 note 51.
Liability of master for acts of pilot generally see infra § 70

47. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78

Repair of vessel. It is the duty of the master to use reasonable care,[48] diligence,[49] and skill[50] to keep the ship in such repair as to make its condition seaworthy in consideration of the interest of all concerned,[51] and, in case of damage to the ship, to do all that can be done to repair it if there be a reasonable prospect of doing so at an expense which is not ruinous[52]

Delay in, or deviation from, voyage. It is the duty of the master to follow his instructions as to the course of his voyage,[53] and if he deviates therefrom he will be responsible for the consequences to his owners,[54] unless such deviation is authorized by the owners' agent at an intermediate port[55] or unless the owners ratify his acts;[56] but only the owners,[57] the owners' agent,[58] or the master acting for the owner[59] can consent to a deviation from a specified course. The master, however, is not liable for a deviation caused by necessity,[60] such as stress of weather and for the safety of the vessel and crew,[61] or for the purpose of saving human lives,[62] and, while there is no obligation on the master to lie by or delay the progress of his voyage for the purpose of preserving property,[63] the maritime law and commercial usage do not prohibit him from deviating in the exercise of a sound discretion to save property which is in peril.[64]

§ 65. —— Sale or Other Disposition of Vessel

a. In general
b. Necessity in general
c. Ability to communicate with owner
d. Good faith

a. In General

Except in case of necessity, the master of a vessel as such has no power to sell or otherwise dispose of the vessel or any part thereof without special authority therefor from the owners.

Except in a case of necessity, the master of a vessel as such has no power to sell or otherwise dispose of the vessel or any part thereof without special authority therefor from the owners,[65] and, hence, the owners are ordinarily not bound by a fraudulent sale made by the master without such authority[66] or in excess of his special authority.[67]

Ratification. An unauthorized sale of the vessel by the master may be subsequently ratified by the owners,[68] as where with knowledge of the master's acts they accept the proceeds of the sale,[69]

L.Ed. 1500—City of Los Angeles v Standard Transp. Co., C.C.A.Cal., 32 F.2d 988.

Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 18 P.2d 25, 29, 171 Wash. 396.

48 C.J. p. 1199 note 14.

Authority not in complete abeyance

The authority of the master of a vessel is not in complete abeyance while a pilot is in the discharge of his functions.

U.S.—Jure v. United Fruit Co., C.C.A.La., 6 F.2d 6.

N.C.—State Highway & Public Works Commission v. Diamond S. S. Transp. Corp., 38 S.E.2d 214, 226 N.C. 371.

48. U.S.—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192.

58 C.J. p. 274 note 54.

49. U.S.—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192.

50. U.S.—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192.

51. U.S.—**Corpus Juris quoted in** U. S. v. The Pomare, D.C.Hawaii, 92 F.Supp. 185, 192.

52. U.S.—Walker v. Lykes Bros. S. S. Co., C.A.N.Y., 193 F.2d 772.

53. U.S.—Robinson v. Hinckley, C.C.N.Y., 20 F.Cas.No.11,954, 2 Paine 457.

Instruction to proceed to port and load

Where a charter entitling the charterer to the full capacity and burthen of the vessel required the vessel to proceed to a designated port and load rails, and was supplemented by oral instructions to the master to the same effect, it was his duty to follow such instructions until countermanded or modified, and the fact that he was given no written directions did not justify him in leaving the port without cargo, because of a delay in loading.—American Asiatic Co. v. Robert Dollar Co., C.C.A.Cal., 282 F. 743, certiorari denied Robert Dollar Co. v. American Asiatic Co., 43 S.Ct. 361, 261 U.S. 615, 67 L.Ed. 828

54. U.S.—Robinson v. Hinckley, C.C.N.Y., 20 F.Cas.No.11,954, 2 Paine 457.

Ala.—Mobile, etc., S. S. Co. v. Postal Tel.-Cable Co., 114 So. 181, 216 Ala. 576

Liability of vessel for injuries to cargo by reason of delay or deviation see infra §§ 144–145

55. U.S.—Robinson v. Hinckley, C.C.N.Y., 20 F.Cas.No.11,954, 2 Paine 457.

56. N.Y.—Codwise v. Hacker, 1 Cai. 526.

57. N.Y.—Moss v. Husted, 66 N.Y. 539.

58. U.S.—Robinson v. Hinckley, C.C.N.Y., 20 F.Cas.No.11,954, 2 Paine 457.

59. N.Y.—Moss v. Husted, 66 N.Y. 539

60. Ala.—Mobile, etc., S. S. Co. v. Postal Tel.-Cable Co., 114 So. 181, 216 Ala. 576.

61. Ala.—Mobile, etc. S. S. Co. v. Postal Tel.-Cable Co., supra.

62. U.S.—Sturtevant v. The George Nicholaus, D.C.La., 23 F.Cas.No. 13,578, Newb.Adm. 449.

58 C.J. p. 275 note 68.

63. U.S.—Sturtevant v. The George Nicholaus, supra.

64. U.S.—Romano v. West India Fruit & S. S. Co., C.C.A.Fla., 151 F.2d 727—Sturtevant v. The George Nicholaus, D.C.La., 23 F.Cas.No. 13,578, Newb.Adm. 449.

65. U.S.—The Henry, D.C.N.Y., 11 F.Cas.No. 6,372, Blatchf. & H. 465.

58 C.J. p. 275 note 77.

66. Ind.—Ingersoll v. Emmerson, 1 Ind. 76.

67. Me.—Johnson v. Wingate, 29 Me. 404.

68. U.S.—The Sarah Harris, D.C.N.Y., 21 F.Cas.No. 12,345, 7 Ben. 28.

58 C.J. p. 277 note 21.

69. N.Y.—Harris v. Burdett, 43 N.Y.Super. 57, affirmed 76 N.Y. 582.

or where with such knowledge they otherwise acquiesce in the master's act.[70]

b. Necessity in General

The master has implied authority, and it is his duty, in the interest of those concerned, and in order to protect them from greater loss, to sell the vessel in case of urgent necessity, as where it becomes impossible to continue the voyage because of the vessel having become disabled.

The master has not only the implied authority, but it is his duty, in the interest of those concerned and in order to protect them from greater loss, to sell the vessel in cases of urgent necessity[71] and in the exercise of due discretion,[72] as for example, where it becomes impossible to continue the voyage because of the vessel having become disabled[73] as by wreck,[74] stranding,[75] or injury from weather,[76] provided, as discussed infra subdivision c of this section, it is impossible or impracticable to communicate with the owners. Whether the necessity justifying the master in making the sale exists is a question of fact depending on the particular circumstances existing at the time of the sale;[77] and the mere fact that the vessel is subsequently rescued and repaired by the purchaser does not invalidate the sale.[78] It must be an apparent moral necessity,[79] and must be extreme or urgent.[80]

If the master acts in good faith and with due discretion, he is justified in selling the vessel where the circumstances are such that a person of prudent and sound mind, after carefully observing all the facts and weighing all the probabilities, could have no doubt as to the advisability of the sale,[81] as where the vessel is exposed to an actual[82] and impending[83] peril, or to a peril likely to ensue,[84] and from which it is probable, in the opinion of persons competent to judge, that it cannot be rescued;[85] or where the vessel has become so disabled that it cannot continue on its voyage without repairs,[86] and there are no means of getting repairs made in the place where the vessel is,[87] or where the injuries are so great that the cost of repairing would be greater than,[88] or disproportionate to,[89] the value of the vessel.

c. Ability to Communicate with Owner

A master's power to sell the vessel because of necessity, without consulting the owners, does not arise unless it is not reasonable or practicable to communicate with them. Where practicable, the owners should have the opportunity to decide whether the sale is necessary.

A master's power to sell the vessel because of necessity, without consulting the owners, does not arise unless it is not reasonable or practicable to communicate with them by reason of the distance at which he is from the owners,[90] or by reason of the pressing imminence of the peril to which the vessel is exposed.[91] Where practicable, the owners should have an opportunity to decide whether in their judgment the sale is necessary;[92] and if by ordinary means of conveying information of the situation of the vessel the master can obtain directions from them as to what he should do, he should resort to such means,[93] and if he sells without such communication where it is practicable, the sale is invalid.[94]

d. Good Faith

It is essential to the validity of the sale of the vessel by the master that a necessity therefor and the

70. Me.—Johnson v. Wingate, 29 Me 404.

71. U.S.—The Ann D. Richardson, D.C.N.Y., 1 F.Cas.No.410, Abb.Adm. 499.
58 C.J. p 275 note 80.

72. U.S.—The Lucinda Snow, D.C.N.Y., 15 F.Cas.No.8,591, Abb.Adm. 305.
Good faith in making sale see infra subdivision d of this section.

73. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806.
58 C.J. p 275 note 85, p 276 notes 86, 87.

74. U.S.—The Lucinda Snow, D.C.N.Y., 15 F.Cas.No.8,591, Abb.Adm. 305.
Mass.—Woods v. Clark, 24 Pick. 35.

75. U.S.—The Henry, D.C.N.Y., 11 F.Cas.No.6,372, Blatchf. & H. 465.
58 C.J. p 276 note 86.

76. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806.
58 C.J. p 276 note 87.

77. Me.—Prince v. Ocean Ins. Co., 40 Me. 481, 63 Am.D. 676.
58 C.J. p 276 note 88.

78. U.S.—The Sarah Ann, Mass., 13 Pet. 387, 10 L.Ed. 213—The Yarkand, 120 F. 887, 58 C.C.A. 73.

79. U.S.—The Sarah Ann, Mass., 13 Pet. 387, 10 L.Ed. 213.
58 C.J. p 276 note 90.

80. U.S.—The Henry, D.C.N.Y., 11 F. Cas.No.6,372, Blatchf. & H. 465.
58 C.J. p 276 note 91.

81. N.Y.—Chambers v. Grantzon, 20 N.Y.Super. 414
58 C.J. p 276 note 93.

82. N.Y.—McCall v. Sun Mut. Ins. Co., 66 N.Y. 505
58 C.J. p 276 note 95.

83. N.Y.—McCall v. Sun Mut. Ins. Co., supra

84. U.S.—The Sarah Ann, Mass., 13 Pet. 387, 10 L.Ed. 213—The Lucinda Snow, D.C.N.Y., 15 F.Cas.No.8,591, Abb.Adm. 305.

85. U.S.—The Sarah Ann, Mass., 13 Pet. 387, 10 L.Ed. 213.
58 C.J. p 276 note 98.

86. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806.
Me.—Dunning v. Merchants' Mut. Marine Ins. Co., 57 Me. 108.

87. Me.—Dunning v. Merchants' Mut. Marine Ins. Co., supra.

88. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806.

89. U.S.—The Amelie, supra.
58 C.J. p 276 note 5.

90. Mass.—Hall v. Franklin Ins. Co., 9 Pick. 466.
58 C.J. p 276 note 7.

91. N.Y.—McCall v. Sun Mut. Ins. Co., 66 N.Y. 505.
58 C.J. p 277 note 8.

92. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806
58 C.J. p 277 note 9.

93. U.S.—The Sarah Ann, Mass., 13 Pet. 387, 10 L.Ed. 213.
58 C.J. p 277 note 10.

94. Me.—Miller v. Thompson, 60 Me. 322, 99 Am.D. 782.
58 C.J. p 277 note 11.

good faith of the master in making it concur; and if the master sells in bad faith or without necessity, he is guilty of unlawful conversion, and the owners are not thereby divested of their title.

It is essential to the validity of a sale that a necessity therefor and the good faith of the master in making the sale concur.[95] In determining the necessity for, and in effecting, the sale the master must act with entire good faith,[96] and exercise his best discretion in pursuing the course which will best promote the interests of all concerned.[97] If the master sells in bad faith[98] or without necessity,[99] he is guilty of unlawful conversion, and the owners are not thereby divested of their title,[1] and may assert their rights of property against the purchasers.[2] The purchasers, however, should be allowed for their expenditures in rescuing and repairing the vessel.[3]

§ 66. —— Sale or Other Disposition of Cargo

a. In general
b. In case of necessity
c. At port of destination

a. In General

The master of a vessel, as such, has no authority to sell or otherwise dispose of the cargo, or any portion thereof, except to the extent that he is specially authorized to do so, and except in a case of necessity; and, if he sells without authority, he, the owners, or the vessel may be held liable, and the sale confers no title on the purchaser.

As a general rule the master of a vessel, as such, has no authority to sell or otherwise dispose of the cargo, or any portion thereof,[4] except to the extent that he is specially authorized to do so,[5] and except in a case of necessity, as discussed infra subdivision b of this section, and, if he sells without such special authority or such necessity, he may be personally liable to the shippers,[6] and must account therefor to them,[7] or the owners of the vessel may be held liable,[8] or both the master and owners,[9] or the vessel[10] may be held liable for the value of the goods so sold. Furthermore, the sale is invalid and confers no title on the purchaser,[11] unless ratified by the owner.[12]

b. In Case of Necessity

The master of a vessel not only has authority, but it is also his duty, to sell or jettison the cargo or any part thereof when it becomes necessary for him to do so for the best interests of all concerned, but he must act in good faith, and must be unable to communicate with the owners before the necessity for action becomes imperative.

It is a well settled rule that the master of a vessel not only has authority, but it is also his duty, to sell the cargo or any part thereof when it becomes necessary for him to do so for the best interests of all

95. U.S.—The Henry, D.C.N.Y., 11 F.Cas.No 6,372, 1 Blatchf. & H. 465.
58 C.J. p 277 note 13.

96. U.S.—The Henry, supra.
58 C.J. p 277 note 14.

97. U.S.—The Henry, supra.
58 C.J. p 277 note 15.

Consulting surveyors

With a view to the sale of a vessel, a survey, that is, a precedent examination by competent surveyors and their report stating the condition of the vessel and advising a sale, affords authentic evidence to guide the master, but does not bind him to sell, or, of itself, justify a sale. It is an important element in the proofs, in determining the character of the emergency and, especially, the good faith of the master. It should be deliberately made and precede the action of the master. The report should be sworn if an oath can be legally administered at the place of survey. It is not a fixed rule that all proceedings of the surveyors shall be under oath, but such a formality adds to the weight and credit of their decision. A paper signed but not subscribed or sworn until after the sale, signed by persons who were not asked to the vessel to act as surveyors, who made no joint examination of her, did not consult with a view to a report or individually inspect the vessel in such a way as to enable them to form a sound opinion as to her condition, is defective.—The Henry, D.C.N.Y., 11 F.Cas.No 6,372, 1 Blatchf. & H. 465.—58 C.J. p 277 note 15 [b].

98. Mass.—Brightman v. Eddy, 97 Mass. 478.

99. Mass.—Brightman v. Eddy, supra.

1. U.S.—Harrison v. The Susan Ludwig, D.C.N.Y., 11 F.Cas.No.6,145a. Mass.—Brightman v. Eddy, 97 Mass 478.

2. U.S.—The Henry, D.C.N.Y., 11 F.Cas.No 6,372, 1 Blatchf. & H. 465.
58 C.J. p 277 note 19.

3. U.S.—The Sarah Ann, Mass., 13 Pet 387, 10 L.Ed. 213.—The Henry, D.C.N.Y., 11 F.Cas.No 6,372, 1 Blatchf. & H. 465.

4. Tex.—Stillman v. Hurd, 10 Tex 109
58 C.J. p 277 note 27.

Authority as to:
Cargo in general see supra § 63.
Hypothecation of cargo see infra § 91.

Acceptance short of port of delivery

(1) The master is not authorized to accept the cargo on behalf of its owner short of the port of delivery.—The Ann D. Richardson, D.C.N.Y., 1 F.Cas.No.410, Abb.Adm. 499.

(2) Laying claim to the proceeds of a sale of a cargo made by the master at an intermediate port, or the bringing suit for such proceeds, does not amount, in law, to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage.—The Ann D. Richardson, supra.

5. Mass.—Peters v. Ballistier, 3 Pick 495
58 C.J. p 277 note 28

6. U.S.—Pope v. Nickerson, C.C. Mass., 19 F.Cas.No 11,274, 3 Story 465
58 C.J. p 278 note 30

7. Conn.—Redfield v. Davis, 6 Conn. 439
58 C.J. p 278 note 31.

8. Pa.—Myers v. Baymore, 10 Pa. 114, 49 Am.D. 586.
58 C.J. p 278 note 32.

9. U.S.—The Ponce, N.Y., 178 F. 76, 103 C.C.A. 346.

10. U.S.—Myers v. The Harriet, D.C. Pa., 17 F.Cas.No 9,992
58 C.J. p 278 note 34.

11. N.Y.—Saltus v. Everett, 20 Wend. 267, 32 Am.D. 541.
58 C.J. p 278 note 35.

12. Tex.—Stillman v. Hurd, 10 Tex. 109.
58 C.J. p 278 note 36.

concerned;[13] but he must act in good faith in making the sale,[14] and must be unable to communicate with the owners before the necessity for action becomes imperative,[15] and in order to effect such communication he is bound to use every available means within his power.[16] The master may also, in case of urgent necessity, throw overboard or otherwise sacrifice his cargo to obtain the release of his distressed vessel,[17] but he has no right to give it away for such a purpose.[18]

Wrecked or disabled vessel. It has been held that it becomes the duty of the master to exercise all reasonable efforts to have the cargo stored or transshipped and conveyed to its destination, where the vessel becomes disabled,[19] as in the case of stranding,[20] injury from tempestuous weather,[21] or wreck,[22] or disease, disabling the crew;[23] and as a general rule the master has no authority, under such circumstances, except in case of necessity, to sell any part of the cargo at an intermediate port to which the vessel is driven.[24] So, if the master breaks up the voyage at an intermediate port, he has no authority to sell any part of the cargo to pay for advances made to him in order to repair for a new voyage,[25] or to pay seamen's wages.[26] Where, however, a vessel has become unable to proceed on her voyage without repairs or supplies and the master is otherwise unable to raise funds to procure them, he may, if he acts in good faith, sell as much of the cargo as may be necessary to put him in funds to make repairs[27] or obtain the necessary supplies;[28] but before selling any of the cargo, the master should avail himself of all reasonable means to raise funds otherwise for such purposes,[29] and the sale is not justified if it is made without his attempting to raise funds by hypothecation of the vessel,[30] or by maritime contract.[31] The master may also be justified, where his vessel is in a port of distress, in selling as much of the cargo as is of a perishable nature and damaged;[32] or where the vessel is in need of repairs, and the delay for repairs will be longer than is consistent with the preservation of that part of the cargo which is perishable,[33] and it cannot be reshipped to its port of destination except at a ruinous expense,[34] or ruinous loss in value.[35] The above rules have no application to a wreck in a distant ocean where the property is derelict or about to become so.[36]

c. At Port of Destination

Where a cargo has reached its port of destination, the master ordinarily has no authority to sell any part of it unless he is specially authorized to do so, or unless it is of a perishable nature and the consignee refuses to receive it and it cannot be readily stored in a suitable place to preserve it.

Where a cargo has reached its port of destination, the master ordinarily has no authority to sell any part of it,[37] unless he is specially authorized to do so,[38] as where it is consigned to him for sale,[39] or unless it is of a perishable nature, and the consignees refuse to receive it, and it cannot be readily stored in a suitable place to preserve it.[40] Where a master with authority to sell the goods on arrival at the port of destination has unsuccessfully used

13. U.S.—The Ann D. Richardson, D.C.N.Y., 1 F.Cas.No.410, Abb.Adm. 499
58 C.J. p 278 note 39.
Right to sell damaged cargo see infra § 149
14. N.Y.—Butler v. Murray, 30 N.Y. 88, 86 Am.D. 355.
58 C.J. p 278 note 40.
15. U.S.—The Bridgewater, D.C. Mich., 4 F.Cas.No.1,864.
58 C.J. p 278 note 41.
16. Me.—Pike v. Balch, 38 Me. 302, 61 Am.D. 248.
58 C.J. p 279 note 42.
17. U.S.—The Albany, D.C.Mich., 44 F. 431.
Jettison of cargo in general see infra § 128.
18. U.S.—The Albany, supra.
58 C.J. p 279 note 44.
19. U.S.—The Bridgewater, D.C. Mich., 4 F.Cas.No.1,864.
58 C.J. p 279 notes 49-52.
Right and duty of master to transship and forward cargo generally see infra § 115.
20. U.S.—The Bridgewater, supra.
58 C.J. p 279 note 49.
21. S.C.—Halwerson v. Cole, 28 S.C.L. 321, 40 Am.D. 603.
22. Mass.—Bryant v. Commonwealth Ins. Co., 6 Pick. 131, 13 Pick. 543.
58 C.J. p 279 note 51.
23. U.S.—Maas v. Pedee, 15 F.Cas. No.8,652.
24. U.S.—Watt v. Potter, C.C.R.I., 29 F.Cas.No.17,291, 2 Mason 77.
58 C.J. p 279 notes 51 [a], 54.
25. U.S.—Watt v. Potter, supra.
26. U.S.—Watt v. Potter, supra.
27. U.S.—Joy v. Allen, C.C.Mass., 13 F.Cas.No.7,552, 2 Woodb. & M. 303
58 C.J. p 279 note 57.
28. Mass.—Babcock v. Terry, 97 Mass. 482.
58 C.J. p 279 note 58.
29. U.S.—The Harriet, D.C.Pa., 11 F.Cas.No.6,094
58 C.J. p 279 note 59.
30. U.S.—Myers v. The Harriet, D.C.Pa., 17 F.Cas.No.9,992.
31. U.S.—Myers v. The Harriet, supra.
32. La.—Robertson v. Western Marine, etc., Ins. Co., 19 La. 227, 36 Am.D. 673
58 C.J. p 280 note 62.
Duty of carrier as to damaged cargo see infra § 149.
33. U.S.—The Velona, D.C.Mass., 28 F.Cas.No.16,912, 3 Ware 139.
34. U.S.—Hooper v. Rathbone, C.C. Md., 12 F.Cas.No.6,676, Taney 519.
35. N.Y.—Butler v. Murray, 30 N.Y. 88, 86 Am.D. 355
58 C.J. p 280 note 65.
36. U.S.—Post v. Jones, N.Y., 19 How. 150, 15 L.Ed. 618.
58 C.J. p 280 note 66.
37. N.Y.—United Ins. Co. v. Scott, 1 Johns 106.
58 C.J. p 280 note 67.
38. Me.—Stone v. Waitt, 31 Me. 409, 52 Am.D. 621.
58 C.J. p 280 note 68.
39. Md.—Gaither v. Myrick, 9 Md. 118, 66 Am.D. 316.
40. U.S.—The Maria White, D.C.Me., 16 F.Cas.No.9,083, 1 Hask. 204.
58 C.J. p 280 note 70.

all reasonable efforts to effect a sale, and is under the necessity of leaving port with his vessel, he is justified in committing the goods to a responsible merchant for sale.[41]

§ 67. Individual Rights and Privileges

The individual rights and privileges of the master of a vessel in the voyage or its results ordinarily depend on the terms of his agreement with the owners.

The individual rights and privileges of the master of a vessel in the voyage or its results ordinarily depend on the terms of his agreement with the owners.[42] He may be given a right or privilege to traffic on his own account,[43] but, unless expressly given, the master cannot exercise a right or privilege which is inconsistent with his agency.[44] A master has no right to take any member of his family on the voyage free of charge, without a distinct understanding to that effect with the owners.[45]

Rights as to freight. The master controls the earnings of the ship.[46] The freight money, or its equivalent, on a cargo generally belongs to the owners of the vessel and not to the master;[47] but the owners cannot enforce the payment of freight against the shippers until the demands of the master thereon are satisfied.[48] Where by the shipping papers the master is made directly responsible to the seamen for their wages, he may retain freight to indemnify himself.[49]

§ 68. Wages and Other Remuneration

a. In general
b. Extra compensation
c. Forfeitures and deductions
d. Wreck or capture of vessel
e. Persons liable
f. Primage
g. Reimbursement for personal expenses

a. In General

The master's right to compensation, the term for which he is entitled to compensation, and the amount and manner of payment depend on the terms of his contract as construed with the custom or usage existing at the place of employment and on his proper performance of his services thereunder.

A master's right to compensation, whether in the form of wages[50] or commissions,[51] the term for which he is entitled to compensation,[52] and the amount and manner of payment[53] depend on the terms of his contract as construed with the custom or usage existing at the place of employment,[54] and on his proper performance of his services

41. Me.—Stone v. Waitt, 31 Me. 409, 52 Am.D 621.
58 C.J. p 280 note 71.

42. Pa.—Fleming v. Bevan, 2 Pa. 408.
58 C.J. p 280 note 73
Insurable interest of master see Insurance § 217 d.
Master sailing vessel on shares see supra § 55.
Rights as to primage see infra § 68 f.

43. U.S.—Mathewson v. Clarke, R.I., 6 How. 122, 12 L.Ed. 370.
58 C.J. p 280 note 74.

44. N.Y.—Roorbach v. North River Steamboat Co., 6 Johns.Ch. 469.
58 C J. p 280 note 75.

45. U.S —Marshall v. Crawford, D.C Cal , 16 F Cas.No 9,126, 4 Sawy. 37 —Winsor v. Sampson, D C Mass., 30 F.Cas No.17,888, 1 Sprague, 548.

46. U.S —Wandtke v. Anderson, C.C A.Cal , 74 F.2d 381—The Balsa, C C.A Pa , 10 F.2d 408.

47. S.C —Fitzpatrick v. Smith, 1 S. C.Eq. 340
58 C.J. p 280 note 77.

48. Mass —Lane v. Penniman, 4 Mass. 91.
58 C.J. p 281 note 78.

49. Mass.—Goodridge v. Lord, 10 Mass. 483.

50. Me —Woodbury v. Brazier, 48 Me. 302.
58 C.J. p 281 note 81.
Accounting for moneys received as condition precedent to claiming wages see supra § 61.
Compensation of master who takes share of proceeds or profits see supra § 55.

51. U.S —Babcock v. Terry, D.C. Mass., 1 F.Cas.No.702, 1 Lowell 66.
58 C.J. p 281 note 82.

52. U.S.—Kells v. Boyd, C.C.La., 31 F. 621.
58 C.J. p 281 note 83.

53. Mass.—Stanwood v. Flagg, 98 Mass. 124.
58 C J. p 281 note 84.

Contract between employer and union

(1) Lighter captain, employed by tug and barge company, could not recover overtime and subsistence allegedly due under agreement between union of masters, mates, and pilots and company on ground of agency where, at time of contract between company and union, none of company's employees was a member of the union.—Shelley v. Portland Tug & Barge Co., 76 P 2d 477, 158 Or. 377.

(2) Thus, employee could not recover where there was no evidence that agreement was ever considered as part of employment contract of employee who became member of union only after he left employ of company, and whose original contract with company was not changed after execution of agreement between company and the union —Shelley v. Portland Tug & Barge Co, supra.

(3) Contract between union and company was unenforceable by employee because of failure of consideration, where, at time of contract, none of employees of company were members of the trade union, since, under such circumstance, the union had no power to carry out any of its promises and company received nothing in return for its promise —Shelley v. Portland Tug & Barge Co, supra.

Interest

Captain of ship, whose wages were fixed and were owing, was entitled to interest on his claim for wages against fund arising out of sale of ship —The Atlanta, D.C.Ga., 82 F. Supp. 218.

54. Conn.—Smith v. Lawrence, 26 Conn. 468.
58 C.J. p 281 note 86.
Contract of employment see supra § 57 b.

Subsistence

Where it is customary for the officers and crew to be furnished subsistence when a vessel is in commission, and that necessarily enters into compensation for services, a person employed as master of a yacht, which was laid up in her home port and which did not have a cook on board, no stores being furnished by the owner, was entitled to an allowance for his meals.—Burdine v. Walden, C.C.A. Fla., 91 F.2d 321.

thereunder.[55] The master may apply the earnings of the ship to the discharge of the ship's indebtedness to him for his wages.[56] Unless his contract stipulates to the contrary, a master is entitled to his wages during the time the vessel is detained without his fault;[57] but he is not entitled to wages as such for time subsequent to his actually ceasing to serve as master,[58] and, when he is discharged in a foreign port, he is not entitled to wages for the period occupied in returning to the port of his employment,[59] unless there is a stipulation in his contract therefor.[60] Even though the shipowner breaches the master's contract of employment by putting another in command, it is the duty of the ousted master to minimize his damages by continuing to serve on the ship in some other capacity or in seeking some other employment.[61]

b. Extra Compensation

The master is entitled to extra compensation for services rendered out of the line of his duties, but not for services which are within the line of his duties as master.

As a general rule, the master is entitled to extra compensation for services rendered out of the line of his duties,[62] as where his vessel is lost he is entitled on a quantum meruit for services rendered in saving and transmitting the funds or proceeds of the vessel to the owners;[63] but he is not entitled to extra compensation for services which are within the line of his duties as master.[64] Under some statutes it has been held that a master is entitled to extra wages if there is a delay in the payment of his wages without sufficient cause.[65]

c. Forfeitures and Deductions

A master guilty of negligence, fraud, absence from the vessel, or change of voyage contrary to instructions resulting in serious damage or loss to the owner forfeits his wages; or the owners may deduct or offset the damages actually sustained.

Where serious damage or loss results to the owner, a master forfeits his right to wages on being guilty of negligence,[66] fraud,[67] absence from the vessel,[68] or change of voyage contrary to instruction,[69] but, where negligence or misconduct of the master does not cause serious injury or inconvenience to the owner, it does not effect a forfeiture of his wages,[70] although in such a case the owners may be entitled to deduct or offset the damages actually sustained against the wages due to the master.[71] A master will not incur the penalty of a forfeiture of his wages by a mere error in judgment,[72] although it results in a loss.[73]

55. U.S.—Black v. People's Coal Co., D.C.Pa., 180 F. 318.
58 C.J. p 281 note 87.

56. U.S.—Wandtke v. Anderson, C.C.A.Cal., 74 F.2d 381—The Balsa, C.C.A.Pa., 10 F.2d 408.

57. Ga.—Swift v. Tatner, 15 S.E. 842, 89 Ga. 660, 32 Am.S.R. 101.

58. Va.—Edwards Co. v. Deihl, 169 S.E. 907, 160 Va. 587.
58 C.J. p 281 note 89.

Unearned wages and subsistence
In proceeding by master of yacht to enforce his statutory lien for wages brought after yacht was sold by employer to buyer taking with notice of master's claim, master could recover for wages and subsistence for time he was actually employed on boat less amount paid on account, but could not recover for unearned wages and subsistence, notwithstanding failure to pay master may have involved a breach of contract on part of employer—Burdine v. Walden, C.C.A.Fla., 91 F.2d 321.

Resignation
Captain of fishing boat with limited authority could not recover on employment contract as for discharge after resignation on employer's refusal to discharge engineer.—Andrus v. Alaska Pacific Salmon Corporation, D.C.Wash., 46 F.2d 567.

59. U.S.—The Ancaios, D.C.Or., 170 F. 106—Lombard SS. Co. v. Anderson, Md., 134 F. 568, 67 C.C.A. 432
Expenses of return trip see infra subdivision g of this section.

60. U.S.—Lombard SS. Co. v. Anderson, supra.
Md.—Pawson v. Donnell, 1 Gill & J. 1, 19 Am.D. 213.

61. U.S.—The Aguia, D.C.S.C., 72 F. Supp. 201.

62. U.S.—String v. Hill, D.C.Pa., 23 F.Cas.No.13,535, 1 Crabbe 454.
58 C.J. p 281 note 93.

63. Me.—McGilvery v. Stackpole, 38 Me. 283, 61 Am.D. 245.
58 C.J. p 282 note 94.

64. U.S.—Bartlette v. The Viola, D.C.Minn., 2 F.Cas.No.1,083.
58 C.J. p 282 note 95.

65. U.S.—The Wexford, D.C.N.Y., 7 F. 674.
58 C.J. p 282 note 96.

Master held not entitled to double wages under federal statute relating to payment of double wages where payment to seamen is delayed.—Burdine v. Walden, C.C.A.Fla., 91 F.2d 321.

66. U.S.—The Carlotta, D.C.N.Y., 30 F. 378.
58 C.J. p 282 note 98.

67. U.S.—Hansen v. Barnard, C.C.A.N.Y., 270 F. 163.
58 C.J. p 282 note 2.

Master's fraudulent failure to report all receipts works forfeiture of right to compensation.—Higbee v. American Foreign S. S. Corp., D.C.Pa., 94 F.Supp. 921.

Application of vacation bonus against shortage
Where shipowner discovered discrepancy in master's accounts in foreign country, master made no attempt to explain, and employment was at will, owner could discharge master and retain his vacation bonus to apply against shortage without becoming liable for wages or subsistence on theory of wrongful discharge.—Higbee v. American Foreign S. S. Corp., supra.

68. U.S.—Black v. People's Coal Co., D.C.Pa., 180 F. 318.
58 C.J. p 282 note 11.

69. U.S.—Robinson v. Hinckley, C.C.N.Y., 20 F.Cas.No.11,954, 2 Paine 457.
N.Y.—Codwise v. Hacker, 1 Cai. 526.

70. Me.—Freeman v. Walker, 6 Me. 68.
58 C.J. p 282 note 4.

71. U.S.—Willard v. Dorr, C.C.Mass., 29 F.Cas.No.17,680, 3 Mason 161.
58 C.J. p 282 note 5.

72. U.S.—Marshall v. Crawford, D.C.Cal., 16 F.Cas.No.9,126, 4 Sawy. 37.
58 C.J. p 282 note 6.

73. U.S.—Marshall v. Crawford, supra.

d. Wreck or Capture of Vessel

As a general rule, a master's wages as such cease from the time the vessel and cargo pass out of his hands on the vessel's becoming wrecked or captured, but he may recover for wages which were earned before the loss and for the value of his services in recovering the vessel or disposing of it to the best advantage.

As a general rule, a master's wages as such cease from the time the vessel and cargo pass out of his hands on the vessel's becoming wrecked[74] or captured;[75] but he may recover for wages which were earned before the loss.[76] Moreover, it has been held that after such wreck or capture of the vessel, a new duty devolves on the master which does not cease until the proceeds are placed at the owner's disposal, and he is entitled to a quantum meruit for his services, in the exercise of a sound discretion, in recovering the vessel[77] or disposing of it to the best advantage.[78]

e. Persons Liable

Ordinarily the person liable for a master's wages and disbursements is the person who employs him or whose agent he is.

Ordinarily, the person liable for a master's wages and disbursements is the person who employs him[79] If he is employed by the owners of a chartered vessel, he cannot recover for his services from the charterer,[80] although the latter is required by the charter party to pay a certain sum per month as the master's wages.[81] The master of a stranded vessel who remains with her does so as agent of whomsoever may ultimately be determined to be her owner in consequence of that event, and is entitled to recover wages for such services from such person.[82]

f. Primage

Primage, which is compensation to the master for his particular care of the goods, formerly belonged by custom or usage to the master for his own use, but now it seems that primage belongs to the owners or freighters, and is no longer a gratuity to the master unless expressly so stipulated.

Primage, which is compensation to the master for his particular care of the goods[83] or a small payment to the master for his care and trouble,[84] formerly belonged, by custom or usage, to the master for his own use,[85] unless he otherwise agreed with the owners[86] The later rule, however, seems to be that primage belongs to the owners[87] or freighters[88] and is but an increase of the freight[89] and is no longer a gratuity to the master unless expressly so stipulated.[90]

g. Reimbursement of Personal Expenses

A master is entitled to reimbursement or indemnity for all expenses or liabilities incurred by him in the line of his duties as agent of the owners or shippers, but not for expenses and liabilities incurred by him not in the line of his duties as master, or when he obligates himself personally.

A master is entitled to reimbursement or indemnity for all expenses or liabilities incurred by him in the line of his duties as agent of the owners[91] or shippers.[92] So, when in the service of the vessel the master incurs sickness or injury, he is entitled to the expenses of his cure[93] and maintenance.[94] He is not entitled, however, to reimbursement for expenses and liabilities incurred by him not in the line of his duties as master,[95] or contrary to the owner's instructions,[96] or when he obligates himself personally.[97] The master is also entitled to expenses incurred by him in going from the place at which he is employed to the place where

74. Me.—Duncan v. Reed, 39 Me. 415, 63 Am D. 635—McGilvery v. Stackpole, 38 Me. 283, 61 Am D. 245.

75. Mass.—Arfridson v. Ladd, 12 Mass. 173.
58 C.J. p 282 note 13.

76. Mass.—Moore v. Jones, 15 Mass. 424.
N.C.—Ferguson v. Fitt, 1 N.C. 239.

77. Conn.—Smith v. Gilbert, 4 Day 105.

78. Me.—Duncan v. Reed, 39 Me. 415, 63 Am D. 635.

79. La.—Hynes v. Kirkman, 4 La 47.
58 C.J. p 283 note 18.

80. Mass.—McGilvrey v. Capen, 7 Gray 523.

81. Mass.—McGilvrey v. Capen, supra.

82. U.S.—Hume v. Frenz, Cal., 150 F. 502, 80 C.C.A. 320.
58 C.J. p 283 note 21.

83. La.—Blake v Morgan, 3 Mart 375.

84. Md.—Peters v. Speights, 4 Md. Ch. 375.

85. Md.—Peters v. Speights, supra.
58 C.J. p 283 note 23.

86. Md.—Peters v. Speights, supra.
58 C.J. p 283 note 24.

87. U.S.—Carr v Austin, etc., R. Co., C.C.Tex., 14 F. 419, 4 Woods 327.

88. U.S.—Carr v. Austin, etc., R. Co., supra.

89. U.S.—Carr v. Austin, etc., R. Co., supra.

90. U.S.—Carr v. Austin, etc., R. Co., supra.
58 C.J. p 283 note 28.

91. U.S.—Winsor v. Sampson, D.C. Mass., 30 F.Cas.No.17,888, 1 Sprague 548.
58 C.J. p 283 note 29.

92. Me.—Henderson v. Sevey, 2 Me. 139.
58 C.J. p 283 note 30.

93. U.S.—Van Lier v. Dord, D.C.N.Y., 28 F.Cas.No 16,862.
Me.—Duncan v. Reed, 39 Me. 415, 63 Am D. 635.

94. U.S.—The E. H. Russell, D.C.N.Y., 42 F.2d 568.
58 C.J. p 283 note 32.
Maintenance and cure of disabled seamen generally see Seamen §§ 172–187.

95. La.—Barker v. York, 3 La.Ann. 90.
58 C.J. p 284 note 33.

96. Mass.—Rennell v. Kimball, 5 Allen 356

97. U.S.—The Ft. Gaines, D.C.Md., 24 F.2d 438.

he is to take charge of his vessel;[98] but in case of a discharge or other termination of his relation in a foreign port, he is not entitled to the expenses of a return trip,[99] unless his contract of employment so stipulates.[1]

§ 69. —— Liens for Wages and Disbursements

a. Liens for wages
b. Liens for disbursements and damages
c. What law governs
d. Priorities
e. Loss of lien

a. Liens for Wages

A master is not entitled to a lien for his wages on the vessel or on goods consigned to his owners unless he contracts to render the services on the credit of the vessel or unless such a lien is given by statute.

As a general rule, the presumption is that the master of a vessel trusts to the personal credit of the owners for his wages,[2] and he is not entitled to a lien therefor on the vessel,[3] or on goods consigned to his owners,[4] unless he contracts to render the services on the credit of the vessel,[5] or unless such a lien is given by statute.[6] Further, in the absence of contractual or statutory provision therefor, it has been held that the master has no lien for his wages on the freight.[7]

b. Liens for Disbursements and Damages

The master of a vessel who has made necessary advances or disbursements from his own funds for expenses and liabilities incurred during the voyage has a lien therefor on the vessel, and freight, and cargo, which may be enforced after the return of the vessel to her home port.

As a general rule, the master of a vessel, who has made necessary advances or disbursements from his own funds for expenses and liabilities incurred during the voyage, has, at common law, and in some jurisdictions by statute, a lien therefor on the vessel,[8] and freight,[9] and cargo,[10] which may be enforced after the return of the vessel to her home port.[11] A master has no lien on the vessel for unliquidated damages for a breach of his contract of employment.[12]

c. What Law Governs

As a general rule, a master's rights relative to his

98. Me.—Woodbury v. Brazier, 48 Me. 302.

99. U.S.—The Ancaios, D.C.Or., 170 F. 106.
58 C.J. p 284 note 38.
Wages for period occupied in returning to port of employment see supra subdivision a of this section

1. U.S.—Lombard SS. Co v. Anderson, Md., 134 F. 568, 67 C.C.A. 432
58 C.J. p 284 note 39.

2. U.S.—McDowell v. The Lena Mowbray, D.C.Ala., 71 F. 720
Lien of seamen see Seamen §§ 140–152
Maritime liens in general see Maritime Liens § 1 et seq

3. U.S.—The Maret, C.C.A.Virgin Islands, 145 F.2d 431—Burdine v. Walden, C.C.A.Fla., 91 F.2d 321—Woolsey v. The Amiga Mia, D.C.La., 90 F.Supp 228, affirmed, C.A., Walker v Woolsey, 186 F.2d 920—The Atlanta, D.C.Ga., 82 F.Supp 218—The Odysseus III, D.C.Fla., 77 F.Supp. 297—The Aguia, D.C.S.C., 72 F.Supp 201—The Evansville, D.C.Tex., 13 F.Supp. 555.
58 C.J. p 284 note 42.

Master as representative of owner
"Under the law the master is the representative of the owner and he is not in a position to claim a lien upon the very property which he is holding in a representative capacity." —The Herbert L. Rawding, D.C.S.C., 55 F.Supp. 156, 160.

Master performing duties of seaman
(1) Although a true master has no maritime lien for wages, a person who was employed to service motorboat and who constituted both captain and crew was entitled to claim lien.—Swift v. Knowles, C.C.A.Fla., 100 F.2d 977.

(2) Master was not entitled to a seaman's lien for wages on theory that he was required to perform duties of a seaman in conformity with maritime regulation and to preserve the security and safety of the vessel because of insufficient personnel.—U.S. v. The Pomare, D.C.Hawaii, 92 F. Supp. 185.

(3) Master of vessel was not entitled to lien for his services because he was also to act as radio operator, where he merely inspected radio equipment and never operated it.—Vlavianos v. The Cypress, C.A.Md., 171 F.2d 435, certiorari denied 69 S.Ct. 1168, 337 U.S. 924, 93 L.Ed. 1732, and Maryland Drydock Co. v. Vlavianos, 69 S.Ct. 1171, 337 U.S. 924, 93 L.Ed. 1732.

(4) Master could not be granted maritime lien for wages for period he remained aboard vessel while she lay in dock on theory that he was a caretaker rather than master and was entitled to compensation on basis of quantum meruit.—The Herbert L. Rawding, D.C.S.C., 55 F.Supp 156.

4. U.S.—Vowell v. Bacon, D.C., 28 F.Cas.No.17,018, 4 Cranch C.C. 97.

5. U.S.—Pond v. The Hattie Thomas, D.C.Conn., 59 F. 297.
La.—Radowitch v. Siewerd, 25 La.Ann 315.

6. U.S.—The Diane, D.C.Fla., 45 F.Supp 510
58 C.J. p 284 note 45.

Particular statutes construed
(1) As not to give a lien to a master of a vessel for his wages.—The Aguia, D.C.S.C., 72 F.Supp. 201.

(2) As to grant a lien only for amount earned for labor actually performed or services actually rendered, and not to cover wages for future services, although claimant might be entitled to recover them in a suit in personam.—Burdine v. Walden, C.C.A.Fla., 91 F.2d 321.

7. U.S.—Alabama Dry Dock & Shipbuilding Co v. Foster, C.C.A.Ala., 31 F.2d 394, disapproving The Arcturus, D.C.Ohio, 17 F. 95, Adams v. The Wyoming, D.C., 1 F.Cas.No. 71, 2 N.J.L.J. 275 and Drinkwater v. The Spartan, D.C.Me., 7 F.Cas. No.4,085, 1 Ware 145.
58 C.J. p 285 note 46.

8. U.S.—Gardner v. The New Jersey, D.C.Pa., 9 F.Cas.No.5,233, 1 Pet.Adm. 223
58 C.J. p 285 note 49.

9. U.S.—Drinkwater v. The Spartan, D.C.Me., 7 F.Cas.No.4,085, 1 Ware 145.
58 C.J. p 285 note 50.

10. Me.—Newhall v. Dunlap, 14 Me. 180, 31 Am.D. 45.
58 C.J. p 285 note 51.

11. N.Y.—Sturtevant v. Brewer, 17 N.Y.Super. 628.

12. U.S.—The Laurel, D.C.Wash., 113 F. 373.

lien for wages and disbursements are governed by the law of the country to which his vessel belongs.

As a general rule, a master's rights relative to his lien for wages and disbursements are governed by the law of the country to which his vessel belongs,[13] and, as discussed in Admiralty § 48, the admiralty courts of the United States will enforce a lien given by the law of such country, although in the particular case the master is not entitled to a lien under the laws of the United States; but, where the contract is made in a foreign port, in the absence of evidence as to the law there, the general maritime law of the forum will be presumed to control.[14]

d. Priorities

The master's lien for wages and disbursements, when recognized, has priority over all other claims against the vessel except claims for salvage, damages by collision, unpaid dock dues, and liens for seamen's wages.

In general the master's lien for wages and disbursements, when recognized, has priority over all other claims against the vessel,[15] except claims for salvage,[16] damages by collision,[17] unpaid dock dues,[18] and, as considered in Seamen § 149, liens for seamen's wages. Furthermore, as stated in Maritime Liens § 56 b, under a statute giving the master of a vessel the same lien for wages as seamen, under the maritime law, it would seem that the master's lien would take precedence next over the liens of the seamen; however, a claim for wages cannot be set up against a claim for which the master is personally responsible

As against holder of bottomry bond. A master's lien for wages or disbursements outranks claims of holders of bottomry bonds on which the master is not personally liable.[19]

e. Loss of Lien

A master's lien may be lost or waived by his acts inconsistent therewith.

A master's lien may be lost or waived by his acts inconsistent therewith,[20] as by his unreasonably delaying to enforce it,[21] or by his failing to pay for his stock in the company owning the vessel,[22] and it has been held that it may be waived by agreement.[23] Since a maritime lien, as discussed in Maritime Liens § 6, does not ordinarily depend on possession, a statutory lien is not lost when the master surrenders possession.[24]

§ 70. Liabilities of Master

a. In general
b For negligence or misconduct
c. Liability of either master or owner

a. In General

Generally the master of a vessel is personally liable on all contracts made by him relative to the ordinary employment of the vessel, unless he contracts on the owner's credit, or stipulates against his own liability, or unless the person furnishing the supplies has funds of the owner in his hands sufficient to pay therefor.

As a general rule, the master of a vessel is personally liable on all contracts made by him relative to the ordinary employment of the vessel,[25] as for necessary supplies[26] or repairs,[27] unless he contracts on the owner's credit,[28] or stipulates against his own liability,[29] or unless the person furnishing the supplies has funds of the owner in his hands sufficient to pay therefor.[30] Where a master acts as bailee of certain articles, he is not liable for their loss if he uses ordinary care in keeping them.[31] As

13. U.S.—The Atlanta, D C.Ga., 82 F Supp. 218.
58 C.J. p 286 note 54, p 289 note 18 [a].

14. U S.—Howard v. The Georgia, D. C.N.Y., 46 F. 669.

15. U.S.—Drinkwater v. The Spartan, D C.Me., 7 F.Cas No.4,085, 1 Ware 145.
58 C.J. p 286 note 58.
Priority of maritime liens in general see Maritime Liens §§ 50–60

16. Eng.—The Panthea, 1 Aspin. 133
Claim for salvage as taking precedence of prior maritime liens generally see Maritime Liens § 56 c.

17. U S.—The Pride of the Ocean, D C N.Y., 7 F. 247.
58 C.J. p 286 note 60.

18. Eng.—The Emilie Millon, [1905] 2 K.B. 817.

19. U.S.—The Felice B, D C.N.Y., 40 F. 353—The Irma, D C.N.Y., 13 F.Cas.No.7,064, 6 Ben. 1.
Bottomry bonds generally see infra §§ 88–100.

20. U.S.—The Short Cut, D C.Pa., 6 F. 630.
58 C J p 287 note 74.

21. U.S.—The Ft. Gaines, D.C.Md., 24 F 2d 438.
58 C.J. p 287 note 75.

22. U S.—The Short Cut, D.C Pa., 6 F. 630.
58 C.J p 287 note 76.

23. U.S.—The Countess of Dufferin, D.C N.Y., 6 F.Cas No.3,280, 10 Ben 155.

24. U.S.—Burdine v. Walden, C.C.A. Fla., 91 F.2d 321.
Sale to buyer charged with knowledge
State statute, providing that there shall be no lien on personalty against buyers without notice unless person claiming lien be in possession of property on which lien is claimed, did not apply so as to defeat lien of master of yacht for his services which was authorized under state statute, where yacht was sold to a buyer who was charged with knowledge that master had been employed and had not been paid for his services while boat belonged to seller.—Burdine v. Walden, supra.

25. U S.—Fox v. Holt, D.C., 9 F Cas No 5,012, 4 Ben 278, 36 Conn. 558
58 C.J. p 287 note 79.
Liability of master for wages of seamen see Seamen, § 124

26. La.—Henshaw v Rollins, 5 La. 335, 25 Am D 180

27. La.—Mead v. Buckner, 2 La 282.
58 C J. p 287 note 81.

28. S.C.—Stocker v. Corlett, 5 S.C.L. 236.
Tex.—Sydnor v. Hurd, 8 Tex 98.

29. Tex.—Sydnor v. Hurd, supra.

30. N.C.—Bissell v. Boznam, 17 N.C. 229.
58 C.J. p 287 note 84.

31. N.C.—Pender v. Robbins, 51 N. C. 207.

against the master of the ship, the right of the consignee or transferee to rely on the recitals of the bill of lading as to quantity of goods received depends on his having paid for such quantity of goods by reason of recitals in the bill itself.[32]

b. For Negligence or Misconduct

(1) In general
(2) For acts of subordinates

(1) In General

It is the duty of a master to use reasonable skill, care, and diligence in the performance of his duties, and, if he does so, he is not liable to his owners for losses arising from unavoidable accidents; but he is personally liable for damages occasioned by his negligence or misconduct.

It is the duty of a master to use reasonable skill, care, and diligence in the performance of his duties,[33] and if he does so, he is not liable to his owners for losses arising from unavoidable accidents,[34] mere errors of judgment,[35] or failure of success.[36] A master may be held for lack of seamanship only where his conduct is outside the range of possible discretion.[37] The master, however, is responsible civilly[38] and, under some statutes, criminally,[39] for any misconduct or negligence on his part. Thus, he is personally liable for damages occasioned by his negligence or misconduct to passengers,[40] third persons on or about his vessel,[41] or to his owners.[42] A master is also liable for damages caused by his negligence or misconduct to shippers,[43] as where he fails or refuses to deliver any part of the cargo in accordance with the bill of lading pertaining thereto;[44] but he is not so liable if he exercises proper care and diligence in receiving and caring for the cargo.[45] Under a statute making the master liable for the debts of any passenger taken out of the country without a passport, the master is liable even though the passenger subsequently returns to the country.[46] The master is not entirely absolved of responsibility with respect to navigation when a compulsory pilot is in charge.[47]

Barratry. The master of a ship, who commits, in his character of master, an act for an unlawful or fraudulent purpose, to the injury of the owner of the ship, is guilty of the offense of barratry;[48] in order to constitute barratry, the act of the master or mariners must be against the owners of the ship.[49]

(2) For Acts of Subordinates

The master of a vessel ordinarily is liable for the acts of all persons under, or supposed to be under, his command while engaged about their ordinary duties as subordinate officers of the vessel or as seamen; and this rule applies to acts of a pilot under the command of the master of the vessel.

Although it is said that the master of a vessel is not liable for the negligence of other ship's officers and crewmen where the master has used reasonable care in their selection, and has left the vessel in their charge under appropriate orders,[50] the master of a vessel ordinarily is liable for the acts of all persons under,[51] or supposed to be under,[52] his command while engaged about their ordinary duties as subordinate officers of the vessel or as seamen. Where a pilot is hired to accompany a vessel on a voyage, he is under the command of the master of the vessel, and the master is liable for his

32. Mass.—Hall v. Mayo, 7 Allen 454
10 C.J. p 195 note 66

33. Wash.—**Corpus Juris cited in** Ellingson v. American Mail Line, 211 P.2d 491, 492, 35 Wash.2d 129.
58 C.J. p 287 note 87
Liability of master for delay in, or deviation from, voyage see supra § 64.

34. U.S.—Dean v. Angus, Adm. Ct.Pa., 7 F.Cas.No.3,703, Bee 378.

35. U.S.—Dean v. Angus, supra.

36. U.S.—Dean v. Angus, supra.

37. U.S.—The Imoan, C.C.A.N.Y., 67 F.2d 603.

38. Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 19 P.2d 25, 29, 171 Wash. 396.
58 C.J. p 274 note 52.

39. Wash.—**Corpus Juris quoted in** Grays Harbor County v. The Brimanger, 19 P.2d 25, 29, 171 Wash. 396.
58 C.J. p 274 note 53.

40. La.—Keene v. Lizardi, 5 La. 431, 25 Am.D. 197
58 C.J. p 287 note 91.
Liability of master for personal injury to passengers generally see infra § 192.

41. Ala.—Rhodes v. Roberts, 1 Stew. 145.
58 C.J. p 288 note 92.

42. U.S.—Atkyns v. Burrows, D.C. Pa., 2 F.Cas.No.618, 1 Pet.Adm. 244
58 C.J. p 288 note 93.

43. U.S.—Knox v. The Ninetta, D.C. Pa., 14 F.Cas.No.7,912.
58 C.J. p 288 note 95.
Liability of master for sale or other disposition of cargo without authority see supra § 66.

44. U.S.—Stille v. Traverse, Pa., 23 F.Cas.No.13,444, 3 Wash.C.C. 43.
58 C.J. p 288 note 96

45. U.S.—Mepham v. Biesel, Mo., 9 Wall. 370, 19 L.Ed. 677.

N.Y.—Cheviot v. Brooks, 1 Johns. 364.

46. Hawaii.—Sawyer v. Paty, 1 Hawaii 251.

47. U.S.—Dampskibselskabet Atlanta A/S v. U.S., C.C.A.La., 31 F.2d 961.

48. U.S.—Hansen v. Barnard, C.C.A. N.Y., 270 F. 163.

49. U.S.—Intermondale Trading Co. v. North River Ins. Co. of N.Y., D.C.N.Y., 100 F.Supp. 128.

50. Wash.—Ellingson v. American Mail Line, 211 P.2d 491, 35 Wash. 2d 129.

51. U.S.—U.S. v. Farnham, C.C.N.Y., 25 F.Cas.No 15,071
Pa.—**Corpus Juris cited in** McConnell v. Williams, 65 A.2d 243, 246, 361 Pa. 355.
58 C.J. p 288 note 99.

52. N.Y.—Kennedy v. Ryall, 67 N.Y. 379.
58 C.J. p 288 note 1.

acts of negligence or misconduct while in the performance of his duties [53] The master is not ordinarily liable for his acts, however, where the authority of the master is entirely superseded by that of the pilot.[54] Thus, under the charter of a tug fully manned, the master of the tug is bound to follow orders of the charterer to take aboard a pilot who would navigate the tug, regardless of whether the charter amounted to a demise,[55] and, while the taking on of a pilot does not ordinarily divest the master of a ship of all his authority and thereby relieve him of the over-all responsibility for its navigation,[56] the rule is applicable to vessels sailing the high seas with officers and crews under the direction of the owner and not of the charterer,[57] and is not to be extended to include all vessels such as a tug whose master could be and was displaced by the charterer.[58] Where part of the cargo is lost by the negligence and misconduct of the crew, with the crew the master must contribute his proportionate part of the loss.[59]

c. Liability of Either Master or Owner

In maritime law the master, as well as the owners of a vessel, is liable as a common carrier, but the liability is several and not joint, and either may be sued or both may be sued simultaneously.

While in maritime law the master, as well as the owners of a vessel, is liable as a common carrier,[60] they are liable severally and not jointly,[61] and the master is liable only for reasonable care and diligence and the exercise of such skill as his position is supposed to require.[62] The rule seems to be well settled that persons contracting with a master in a foreign port for repairs to, or supplies for, his vessel have a double remedy against the master or the owners on the contract,[63] and they may sue either the master or the owners of the vessel or both simultaneously,[64] and in enforcing this double remedy they may proceed by separate actions against the owners or master in personam, or the vessel in rem, either simultaneously or at different periods.[65]

§ 71. Actions

a. Nature and form of remedy
b. Parties and pleading
c. Presumptions and burden of proof
d. Admissibility of evidence
e. Weight and sufficiency of evidence
f. Trial

a. Nature and Form of Remedy

A master's remedy for his wages and disbursements is ordinarily by an action in personam against the owners, and for improper discharge, an action at law for damages for breach of contract. The master may be sued in admiralty for damages caused by his wrongful acts, and actions of trover and on the case may be maintained under some circumstances.

A master's proper remedy for his wages and disbursements is ordinarily by an action in personam against the owners,[66] and he has no right to proceed in rem against the vessel therefor,[67] except where a lien on the vessel therefor is created by statute,[68] or by the law of the flag of the vessel.[69] A master who is improperly discharged cannot maintain a libel in admiralty to compel the owners to fulfill their contract with him,[70] but his proper

53. N.Y.—Denison v. Seymour, 9 Wend. 9.
58 C.J. p 288 note 3.
Liability of master for acts of negligence while pilot is aboard see supra subdivision b (1) of this section.

54. Mass.—Yates v. Brown, 8 Pick. 23.
58 C.J. p 289 note 4.

55. U.S.—Southern States Towing Lines v. Lee Transit Corp., C.C.A. N.Y., 144 F.2d 101.

56. U.S.—Southern States Towing Lines v. Lee Transit Corp., supra.

57. U.S.—Southern States Towing Lines v. Lee Transit Corp., supra.

58. U.S.—Southern States Towing Lines v. Lee Transit Corp., supra.

59. U.S.—Crammer v. The Fair American, D.C.Pa., 6 F.Cas.No.3,347, 1 Pet.Adm. 242.
58 C.J. p 289 note 6.

60. La.—Rochereau v. The Hausa, 14 La.Ann. 431.
58 C.J. p 289 note 7.
Liability of both master and owners for unauthorized act of master in selling or otherwise disposing of cargo see supra § 66.

61. S.C.—Patton v. Magrath, 24 S.C.L. 162, 33 Am.D. 98.
58 C.J. p 289 note 8.

62. U.S.—Bissell v. Mepham, C.C. Mo., 3 F.Cas.No.1,450, Woolw. 225, affirmed 9 Wall. 370, 19 L.Ed. 677

63. La.—Henshaw v. Rollins, 5 La. 335, 25 Am.D. 180.
58 C.J. p 289 note 10.

64. La.—Zacharie v. Kirk, 14 La. Ann. 433.

65. La.—Henshaw v. Rollins, 5 La. 335, 25 Am.D. 180.
58 C.J. p 289 note 13.
Joinder of proceeding in rem and in personam for same cause in admiralty see Admiralty § 75 b.

66. U.S.—Mitchell v. Kelsey, D.C.N.Y., 17 F.Cas.No.9,664.
58 C.J. p 289 note 15.
Actions on charter party see supra § 56.
Admiralty jurisdiction generally see Admiralty §§ 5–69
Prosecution under immigration laws see Aliens §§ 114–118

Interest held not recoverable where suit was not commenced until a lapse of some years, and it did not appear that any of the charges, except for the wages, rested on any particular contract.—Mitchell v. Kelsey, supra.

67. U.S.—The Evansville, D.C.Tex., 13 F.Supp. 555.
58 C.J. p 289 note 16.

68. U.S.—The William M. Hoag, Or., 18 S.Ct. 114, 168 U.S. 443, 42 L.Ed. 537—Whitney v. The Mary Gratwick, D.C.Cal., 29 F.Cas.No.17,591, 2 Sawy. 342.
Lien of master for wages or disbursements see supra § 69.

69. U.S.—The Felice B., D.C.N.Y., 40 F. 653
58 C.J. p 289 note 18.

70. U.S.—Montgomery v. Henry, Pa., 1 Dall. 49, 1 L.Ed. 32, 1 Am.D. 223.

remedy is an action at law for damages for the breach of the contract.[71]

The owners of a vessel may sue her master in admiralty for damages caused by his wrongful acts,[72] as may also a passenger who is injured thereby.[73] A master who has a lien on goods for his disbursements may maintain trover against one who converts the goods;[74] but trover will not lie against the master for cargo, unless the freight is paid or tendered or the payment thereof is waived,[75] or for goods which were lost so that they did not come to the use of the master,[76] but, where a master has received goods on board under a contract to deliver them at a certain port, and being with the shipper in a port short of the port of destination, there refuses to proceed with the goods to the port of destination, the master is answerable to the shipper in trover, or the latter might take the goods by replevin.[77] Where a master who is also part owner sells the cargo and receives the proceeds, another part owner of such cargo may maintain an action on the case against him for his share of the proceeds.[78]

b. Parties and Pleading

In actions relative to a master of a vessel, general rules governing civil actions and proceedings in admiralty apply with respect to the parties and pleading.

In actions relative to a master of a vessel, general rules governing civil actions and more particularly proceedings in admiralty apply with respect to the parties[79] and pleading.[80] As a general rule, a master has such a special interest in the vessel and cargo that he may sue in his own name for freight,[81] or to recover damages for the breach of a contract of affreightment,[82] or he may bring an action in his own name, either at law or in equity, against one who wrongfully interferes with the vessel or cargo.[83] A master may also file a claim in admiralty on behalf of the owners where they are absent.[84]

c. Presumptions and Burden of Proof

General rules relative to presumptions and burden of proof apply in actions growing out of the acts of a master of a vessel.

As a general rule, in actions growing out of the acts of a master of a vessel, the rules governing civil cases apply with respect to questions relative to presumptions[85] and burden of proof.[86] Thus, where the question of the validity of a sale by a master in a foreign port arises in an action with the purchaser at such sale, the burden of showing good faith in making the sale and the necessity therefor is on the purchaser of the vessel[87] or cargo.[88] So, in an action for supplies and repairs furnished to a vessel in a foreign port by order of the master, the burden of proof is on plaintiff to show that the articles furnished were necessaries to the extent at least of showing that they were what a reasonable and prudent owner would have bought.[89] It is incumbent on a lender of money to a master of a vessel, in an action against the owner, to show the necessity for the loan.[90] In an action by a master for wages, subsistence, and vacation bonus allegedly due by reason of wrongful discharge, the burden is on the master to prove his alleged contract for the duration of a voyage.[91]

d. Admissibility of Evidence

The admissibility of evidence in actions arising out of the acts of the master of a vessel is ordinarily regulated by the rules governing the admissibility of evidence in civil actions and by the rules in admiralty.

71. U.S.—Montgomery v. Henry, supra—Clayton v. The Eliza B. Emery, C.C.N.J., 4 F. 342.

72. U.S.—Dean v. Angus, Adm.Ct. Pa., 7 F.Cas.Nos.3,702, 3,703, Bee 369, 378.

73. U.S.—Chamberlain v. Chandler, C.C.Mass., 5 F.Cas.No.2,575, 3 Mason 242.
58 C.J. p. 290 note 22.

74. N.Y.—Ingersoll v. Van Bokkelin, 7 Cow. 670, reversed on other grounds 5 Wend. 315.
58 C.J. p. 290 note 24.

75. U.S.—Hodgson v. Woodhouse, D.C., 12 F.Cas.No.6,571, 1 Cranch C.C. 549.
N.Y.—Keyser v. Harbeck, 10 N.Y.Super. 373.

76. U.S.—Hodgson v. Woodhouse, D.C., 12 F.Cas.No.6,571, 1 Cranch C.C. 549.

77. Mass.—Portland Bank v. Stubbin, 6 Mass. 422, 4 Am.D. 151.

78. Me.—True v. McGilvery, 43 Me. 485.

79. N.Y.—Clendaniel v. Tuckerman, 17 Barb. 184.
58 C.J. p. 290 notes 30–33.

80. U.S.—The Serapis, D.C.N.Y., 37 F. 436.
58 C.J. p. 290 note 29.

81. Mass.—Manter v. Holmes, 10 Metc. 402.
58 C.J. p. 290 note 30.

82. U.S.—Disney v. Furness, D.C. Md., 79 F. 810.
N.Y.—Clendaniel v. Tuckerman, 17 Barb. 184.

83. Ga.—Tuells v. Torras, 39 S.E. 455, 113 Ga. 691.
58 C.J. p. 290 note 32.

84. U.S.—The Sally, C.C.Mass., 21 F.Cas.No.12,258, 1 Gall. 401.
58 C.J. p. 290 note 33.

85. U.S.—The Oceana, N.Y., 244 F. 80, 156 C.C.A. 508, certiorari denied 38 S.Ct. 13, 245 U.S. 656, 62 L.Ed. 533.
58 C.J. p. 290 note 34.

86. Wash.—Knutson v. Hansen, 251 P. 852, 141 Wash. 623.
58 C.J. p. 290 note 35.

87. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806—The Henry, D.C. N.Y., 11 F.Cas.No.6,372, Blatchf. & H. 465.

88. N.Y.—Saltus v. Everett, 20 Wend. 267, 32 Am.D. 541.

89. N.Y.—Ford v. Crocker, 48 Barb. 142.
58 C.J. p. 291 note 39.

90. U.S.—The Julia Blake, N.Y., 2 S.Ct. 692, 107 U.S. 418, 27 L.Ed. 595.
58 C.J. p. 291 note 40.

91. U.S.—Higbee v. American Foreign S.S. Corp., D.C.Pa., 94 F.Supp. 921.

The admissibility of evidence in actions arising out of the acts of the master of a vessel is ordinarily regulated by the rules governing the admissibility of evidence in civil actions generally, and by the rules in admiralty.[92] Where there is a sale of a stranded or disabled vessel or cargo by the master, evidence is admissible on the question of his good faith in making the sale and the necessity therefor, and of the facility with which the vessel was afterward rescued by the purchaser,[93] as is also evidence of a survey of the vessel,[94] and the fact of his taking advice from other competent persons.[95] The circumstance that the master believed at the time that he could get the stranded vessel off is admissible to show bad faith on his part,[96] but proof that the purchaser believed himself able to rescue the vessel can have no such effect.[97] The advice of surveyors is also competent evidence on the question of necessity for a sale of the cargo.[98]

e. Weight and Sufficiency of Evidence

The general rules governing the weight and sufficiency of evidence in civil actions apply in actions arising out of the acts of the master of a vessel.

The general rules governing the weight and sufficiency of evidence in civil actions generally apply in actions arising out of the acts of the master of a vessel.[99] Thus, in an action by a master for wages, subsistence, and vacation bonus allegedly due by reason of wrongful discharge, the contract of employment must be proved by a preponderance of the evidence.[1] Where supplies are sold and delivered to one as master of a vessel and the registry contains the names of the owners with such person as master, the owners are prima facie liable in the absence of any proof qualifying the master's authority.[2] A survey taken to enable the master to decide whether or not to sell an injured vessel[3] or distressed cargo[4] does not per se render the sale valid, but it affords strong evidence in justification of it, and the fact that the surveyor's advice afterward turns out to be erroneous does not disprove the necessity for the sale.[5] With respect to the question of the integrity of the sale of a vessel by the master, his evidence is vital to one claiming title under such sale.[6]

f. Trial

General rules governing the trial of civil actions apply in actions with respect to the masters of vessels, and, in accordance with such rules, questions of fact on which the evidence is conflicting or doubtful are to be determined by the jury or trier of facts.

General rules governing the trial of civil actions apply in actions with respect to the masters of vessels.[7] In accordance with such rules, questions of fact on which the evidence is conflicting or doubtful are to be determined by the jury or trier of facts.[8] Thus, ordinarily it is a question of fact for the jury as to whether or not, under the circumstances of the particular case, a necessity existed for the master to sell the cargo.[9] In an action by

92. Tex.—Stillman v. Hurd, 10 Tex 109.
58 C.J. p 291 note 42.

93. U.S.—The Henry, D.C.N.Y., 11 F. Cas.No 6,372, Blatchf. & H. 465.

94. U.S.—The Henry, supra.
58 C.J. p 291 note 44.

95. Pa.—Hartshorne v. Campbell, 1 Yeates 143.

96. U.S.—The Lucinda Snow, D.C.N.Y., 15 F.Cas.No 8,591, Abb.Adm 305.

97. U.S.—The Lucinda Snow, supra

98. N.Y.—Butler v. Murray, 30 N.Y. 88, 86 Am.D. 355.

99. U.S.—Smith v. Staley, D.C.N.Y., 190 F. 214.
58 C.J. p 291 notes 36 [b], 49.

Evidence held sufficient

(1) To show contract of employment.—McCambridge v. Crosby Transp. Co., 195 N.W. 678, 225 Mich. 88.

(2) To show that libelant had been engaged as master of ship, and, hence, not entitled to any maritime lien arising out of his services to the ship.—The Agua, D.C.S.C., 72 F.Supp 201.

(3) To establish that libelant was employed as a master, where the contemplated voyages would require a crew of more than one man with a licensed navigator in command, and, hence, libelant was not entitled to a lien under the general admiralty law for his wages.—Burdine v. Walden, C.C.A.Fla., 91 F.2d 321.

(4) To show that master libeling vessel for wages was working for half of profits, which were not shown, rather than fixed wages in addition.—Galatis v. Galatis, C.C.A.Fla., 55 F.2d 571.

(5) To sustain finding that owner of yacht was liable to its master on agreement between parties executed at time of discharge settling master's claim.—Alker v. Johnson, C.C.A. Fla., 81 F.2d 865

Circumstantial evidence to establish the employment of a master should be of a character which leaves no fair reason to doubt the fact.—Higbee v. American Foreign S.S. Corp., D.C.Pa., 94 F.Supp. 921.—Jones v. Davis, D.C.N.Y., 13 F.Cas.No 7,460, Abb.Adm 446.

1. U.S.—Higbee v. American Foreign S.S. Corp., D.C.Pa., 94 F.Supp. 921.

2. N.Y.—Kenzel v. Kirk, 2 Abb.Dec. 500, 32 How.Pr. 269.

3. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806.
Me.—Prince v. Ocean Ins. Co., 40 Me. 481, 63 Am.D. 676.

4. N.Y.—Butler v. Murray, 30 N.Y. 88, 86 Am.D. 355.
58 C.J. p 292 note 52.

5. U.S.—The Amelie, Mass., 6 Wall. 18, 18 L.Ed. 806.

6. U.S.—Hartman v. The Will, D.C. Pa., 11 F.Cas.No 6,163.

7. Mich.—Carney v. Ionia Transp. Co., 121 N.W. 806, 157 Mich. 54.
58 C.J. p 292 notes 55–58.

8. Miss.—The General Worth v. Hopkins, 30 Miss. 703.
58 C.J. p 292 note 55

Evidence held insufficient to establish as matter of law that master of vessel was personally liable for injuries sustained by workman, employed on vessel while it was in port, because of failure to provide a safe place to work.—Ellingson v. American Mail Line, 211 P.2d 491, 35 Wash. 2d 129.

9. U.S.—The Julia Blake, N.Y., 2 S.Ct. 692, 107 U.S. 418, 27 L.Ed. 595
58 C.J. p 292 note 57.

one who has lent money to a master in a foreign port, the questions of the necessity for the money, the good faith in making the loan, and the diligence of the loaner in ascertaining the necessity are for the jury.[10]

V. RIGHTS AND LIABILITIES OF VESSELS AND OWNERS IN GENERAL

§ 72. Representation of Vessel or Owners in General

The owners of a vessel are bound by all acts of their agents done within the scope of their authority, but they are not liable for acts of their agent in excess of his authority.

The power to represent or act as agent for a vessel or her owners and the rights and liabilities growing out of such representation are ordinarily governed by the general law of principal and agent,[11] and the owners are bound by all acts of their agents done within the scope of their authority,[12] but are not liable for acts of their agent which exceed his authority.[13] A charterer under a time charter which did not make him owner pro hac vice has no power to bind the ship by his contracts;[14] nor can the agent of a charterer bind the vessel or her owners;[15] nor has the underwriter of a vessel any authority to contract for the vessel until there has been an abandonment and an acceptance thereof by him.[16] Although, as discussed supra § 63, a master may have authority to act as agent for the owners of a vessel, shipowners cannot be held on a contract made by a ship's master where there is no proof of agency,[17] and nothing to show that the ship belonged to the shipowner.[18] Where the owners of several vessels form an association to run their vessels and to collect and receive the earnings thereof in a common fund out of which all the expenses of the vessels are to be paid, it is in fact a private copartnership, and each member is responsible individually for his acts or contracts in the business of the common concern,[19] and the members of the association are jointly liable on contracts made by an agent of the association on its behalf;[20] but the mere fact that several owners who are not in fact partners allow their boats to be advertised as forming a line under a common name, and have a common agent to solicit business, does not make them jointly liable for the torts and contracts of each other.[21]

Having accepted the benefit of an agreement made by a claimant's agent, claimant cannot repudiate the agreement.[22]

A custom that an agency to act for a ship in distress is irrevocable is invalid as being unreasonable.[23]

Liability of agent to owner. An agent may be liable to the owner for loss incurred by reason of the agent's failure to act with due care in carrying out instructions.[24]

§ 73. Contracts

The rights and liabilities of the owners of a vessel under contracts relating thereto depend on the terms

10. Mass.—Stearns v. Doe, 12 Gray 482, 74 Am.D. 608.

11. **Agency held to exist**
U.S.—Canada S. S. Lines v. Inland Waterways Corp, D.C.La., 71 F. Supp. 137, reversed on other grounds, C.C.A., 166 F.2d 57.

12. U.S.—The Benjamin Noble, D.C. Mich., 232 F. 382, affirmed 244 F. 95, 156 C.C.A. 523, and affirmed Capitol Transp. Co. v. Cambria Steel Co., 39 S.Ct. 292, 249 U.S. 334, 63 L.Ed. 631
58 C.J. p. 292 note 61.

13. U.S.—New York, etc., Transp. Co. v. Payne, D.C.N.Y., 13 F.2d 481, affirmed, C.C.A., 13 F.2d 483, certiorari denied Mellon v. New York & New Jersey Transp. Co., 47 S.Ct. 238, 273 U.S. 726, 71 L.Ed. 861
58 C.J. p. 292 note 62.

14. U.S.—The Capitaine Faure, D.C. N.Y., 7 F.2d 131, affirmed, C.C.A., 7 F.2d 133.
58 C.J. p. 292 note 63.

15. U.S.—The Gul Djemal, D.C.N.Y., 11 F.2d 153, affirmed, C.C.A., 11 F.2d 156
58 C.J. p. 292 note 64.

16. U.S.—The Senator, D.C.Mich., 21 F.Cas.No.12,665, Brown Adm. 544.

17. N.Y.—Potter v. American Union Line, 180 N.Y.S. 393, 110 Misc. 328

18. N.Y.—Potter v. American Union Line, supra.

19. U.S.—The Swallow, D.C.N.Y., 23 F.Cas.No.13,665, Olcott 334.

20. N.Y.—Slocum v. Fairchild, 19 Wend. 329, affirmed 7 Hill 292

21. U.S.—Citizens' Ins. Co. v. Kountz Line, C.C.La., 48 F. 838.

22. U.S.—The Allan Wilde, D.C.N.Y., 255 F. 171, affirmed, C.C.A., 264 F. 291.
58 C.J. p. 293 note 72.

23. U.S.—Minis v. Nelson, C.C.Ga., 43 F. 777.

24. U.S.—Canada S. S. Lines v. Inland Waterways Corp., C.C.A.La., 166 F.2d 57.

Payment of incorrect duty
Where foreign steamship company requested defendant corporation acting as its agent to arrange to have shipment of castor oil cleared by a customs broker, but nothing was said about payment of duty, defendant acted contrary to company's interests in having shipment cleared under a consumption entry requiring payment of duty instead of clearing it on an in transit entry which would have been duty free, and thereby became liable to company for amount of the duty.—Canada S. S. Lines v. Inland Waterways Corp, supra.

Negligence in handling cargo
Petition in admiralty alleging negligence of agents in actually loading, unloading, and caring for cargo of vessel set forth maritime torts for which agents would be liable to their principal in tort, regardless of whether or not agency agreements required agents merely to procure maritime services and not to render them.—O. Maire, Inc., v. The Yaka, D.C.N.Y., 79 F.Supp. 659.

of the particular contract and the proper performance thereof.

The rights and liabilities of the owners of a vessel under contracts relating thereto, whether entered into by them or their authorized agents, depend on the terms of the particular contract and the proper performance thereof.[25] A reasonable custom at the port at which a contract is made and of which the owners' agent has knowledge at the time constitutes a part of the contract and is binding on the owners.[26] A contractor who undertakes to make and finish or fit up a vessel impliedly undertakes that she shall be reasonably fit for the purpose for which he knows she is intended to be used,[27] and if she is not so finished or fitted up the contractor will not be exonerated, although her unfitness is occasioned by secret defects in the materials used.[28] A contract may give rise to certain obligations and duties to a vessel which will render the contracting party liable in tort for his negligent failure to fulfill these obligations.[29]

Consortship. An agreement of consortship between the masters of two or more vessels is not merely personal between the masters but extends to the owners and crews,[30] and to persons joining or becoming interested in a vessel during the continuance of the agreement,[31] and is for, and on account of, the vessels.[32] Such an agreement, unless limited by special understandings when made, is considered to be general and to extend to all earnings, from whatever source, by either vessel,[33] and, in the absence of a stipulation as to its termination, it can be terminated only by voluntary dissolution and notice,[34] a change of owners, master, or crew of one vessel without notice to the other parties being insufficient.[35] No mutual liens arise from a contract of consortship, so that no suit in rem can be maintained for its enforcement.[36]

§ 74. —— Supplies, Repairs, Services, and Advances

a. In general
b. Grounds of liability
c. Who liable as owners

a. In General

As a general rule, the owner of a vessel and the vessel itself are liable for necessary supplies, services, repairs, and advances furnished and received to the use of the vessel on the order of the master or other duly

25. U.S.—The Albisola, D.C.Pa., 6 F. Supp. 392.
58 C.J. p. 293 note 75.

Particular contracts construed

(1) In general—Jarka Corp. v. Hellenic Lines, Limited, C.A.N.Y., 182 F.2d 916—58 C.J. p. 293 note 75 [b]

(2) Clause of contract for discharge of cargo, providing for increase of rates if wage scale was increased, did not apply to contingency of cargo being damaged, although longshoremen under contract with stevedoring company received higher wages because thereof, where wage scale was not changed.—The Albisola, D.C.Pa., 6 F.Supp. 392.

(3) Where carrier hired protective agency to guard cargo aboard ship while in port, and contract provided that agency would be liable for loss by theft only while guards were in charge, and such watch was furnished on only two of five days during which cargo was aboard ship at port, agency was not liable to carrier, in absence of showing that theft occurred while guards were on duty—Remington Rand, Inc. v. U. S., D.C. N.Y., 98 F.Supp. 334.

(4) Fact that corporation, engaged in repairing and installing machinery and engines in vessels, undertook to make repairs after dredge had been moored at its wharf for such purpose disclosed an acceptance by implication sufficient to constitute a bailment.—Orrell v. Wilmington Iron Works, D.C.N.C., 89 F.Supp. 418, affirmed in part and reversed in part on other grounds, C.A., 185 F.2d 181.

Mutuality of obligation

Document providing that stevedoring contractor would handle loading and unloading of any vessel provided to it by defendant was not enforceable because lacking mutuality, since it did not bind or obligate defendant to do anything—Jarka Corp. v. Hellenic Lines, Limited, C.A.N.Y., 182 F.2d 916.

Consideration

Under an offer of stevedoring services providing that the offer might be terminated, modified, or amended on thirty days' notice by either party and that notwithstanding such termination, the contractor should continue to be responsible for the loading and discharging of any cargo which contractor was handling on date of such termination, the state statute with respect to irrevocability of an offer because of absence of consideration was applicable notwithstanding the offer did not use the word "irrevocable," where its clear intent was to keep the offer open for a stated time until thirty days after notice of its termination and, hence, offer was binding even though without consideration.—Jarka Corp. v. Hellenic Lines, Limited, supra.

26. Ga.—Horan v. Strachan, 12 S.E. 678, 86 Ga. 408, 22 Am.S.R. 471.
58 C.J. p. 293 note 76.

27. U.S.—Cunningham v. Hall, D.C. Mass., 6 F.Cas.No. 3,482, 1 Sprague 404
58 C.J. p. 293 note 77.

28. U.S.—Cunningham v. Hall, supra.

29. U.S.—Carnegie Office Appliance Co. v. Thomas A. Edison, Inc., D.C.Md., 28 F.2d 626—O'Maire, Inc., v. The Yaka, D.C.N.Y., 79 F.Supp. 659
Rights and liabilities of owner and vessel with respect to torts generally see infra § 76.

30. U.S.—Andrews v. Wall, Fla., 3 How. 568, 11 L.Ed. 729

31. U.S.—Cash v. One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, D.C.Fla., 5 F.Cas.No. 2,498.

32. U.S.—Cash v. One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, supra

33. U.S.—Cash v. One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, supra.
58 C.J. p. 294 note 83.

34. U.S.—Andrews v. Wall, Fla., 3 How. 568, 11 L.Ed. 729.
58 C.J. p. 294 note 84.

35. U.S.—Cash v. One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, D.C.Fla., 5 F.Cas.No. 2,498.

36. U.S.—Vandewater v. The Yankee Blade, C.C.Cal., 28 F.Cas.No. 16,847, McAllister 9, affirmed 19 How. 82, 15 L.Ed. 554.

authorized agent acting within the scope of his authority.

As a general rule, the owners of a vessel[37] and the vessel itself[38] are liable for necessary supplies,[39] services,[40] or advances[41] furnished and received to the use of a vessel on the order of the master or other duly authorized agent within the scope of his authority,[42] unless credit therefor is given exclusively to the master or agent or others,[43] or unless by the usage and understanding of the business the agent only is held,[44] or unless the special circumstances of the case show that only the agent was intended to be bound and the person furnishing the necessaries or supplies knew or was chargeable with knowledge of it.[45] Where assistance is rendered in port to a distressed vessel, the cargo is liable to attachment only for services rendered in the discharge and protection of the cargo.[46] The usual rules govern in determining the existence of a contract for supplies, services, or advances, and the terms thereof.[47]

Liability for repairs. The nature and extent of the owners' liability for repairs furnished their vessel on a contract therefor depend on the terms of the particular contract,[48] and the due performance thereof by the contractors.[49] It is the duty of one who contracts to repair a vessel to do the work as rapidly as is reasonably possible.[50] The owner may recover damages from the contractor for breach of contract;[51] but he cannot recover for

37. Cal.—Crofton v. Pappas, 171 P. 2d 959, 75 Cal App 2d 814.
Wash.—Abelsen v Prothero, 238 P 2d 397, 39 Wash 2d 737.
58 C.J. p 294 note 88.

38. Ky—Fowler Mills & Co v Smedley, 2 Ky Op. 389.
58 C.J. p 294 note 89.

Lien

(1) A person who furnished material for repairing a boat, under agreement that he was to have a lien against boat to secure such advances and all other advances, had an equitable lien for material furnished for repairs, and for balance due on equipment sold to boat owner—Theut v Burnell, Tex Civ App, 109 S.W.2d 790, error dismissed

(2) Liens on vessels under maritime law generally see Maritime Liens § 1 et seq

Stevedoring services are presumptively rendered on the credit of the vessel—Norwegian Steamship Co. v. Washington, La., 57 F. 224, 6 C.C.A. 313.

39. Tex—Theut v. Burnell, Civ App, 109 S W 2d 790, error dismissed
58 C J p 294 note 90

40. U S—Interstate Lighterage, etc, Co. v Newtown Creek Towing Co, D.C N Y., 267 F 989.
58 C.J. p 294 note 91.

Stevedoring services

(1) Stevedoring company was entitled to be paid its stevedoring charges at agreed rate for loading stone which was lost when barge capsized, in absence of evidence establishing fault on part of stevedoring company in connection with the loss—The O'Leary, D.C.Pa, 74 F.Supp. 313.

(2) Where stevedoring company undertook to load a barge in absence of representative of shipper, representative of charterer of barge and of government inspector and in absence of master of tug, but evidence failed to establish any causal relationship between absence of such persons and capsizing of barge, reasons of such persons' absence were not material to stevedoring company's right to recover for services rendered in loading the barge.—The O'Leary, supra.

(3) In the absence of agreement as to the compensation for particular services, a stevedoring company is entitled to reasonable compensation therefor—The Memnon, Tex, 62 F 482, 10 C C A. 502, 23 U S 647.

41. Tex.—Theut v. Burnell, Civ.App, 109 S W 2d 790, error dismissed
58 C J. p 294 note 93.

42. U S.—The Suliote, D C.N.Y., 23 F. 919.
Hawaii.—Coady v. Lewis, 1 Hawaii 545.
58 C J. p 294 note 95.

43. U S.—The Iris, D.C.Mass, 88 F 902, reversed on other grounds 100 F. 104, 40 C C A. 301.
58 C.J p 295 note 96.

44. U S.—Berwind v. Schultz, D.C. N Y., 25 F 912

45. U S.—Berwind v. Schultz, supra.

46. U.S—Sugar Products Co v. St. Thomas Ship Brokers' Assoc, C C A.Virgin Islands, 280 F. 821.

47. U S—Martin v. The Amiga Mia, D C.N.Y, 80 F.Supp. 42.
Cal.—Crofton v. Pappas, 171 P.2d 959 75 Cal.App.2d 814
La.—Baer v. Chatellier, App, 34 So. 2d 798

Warranty

Where marine machine shop agreed to overhaul gear box and bring it into first-class condition, using finest materials and approved practices for marine gearing, and stated that it would guarantee gear box unconditionally for one year's service, agreement embodied warranty of proper performance for one year rather than mere warranty of workmanship and materials.—James Healing Co v. Walter, 77 A.2d 473, 10 N J Super 492.

48. U.S.—Gibbons Engineering & Mach Co. v. U. S., D.C.Mass., 87 F Supp 207.
Tex—Theut v. Burnell, Civ App., 109 S W.2d 790, error dismissed.
58 C J p 295 note 4.

Particular contracts construed

U S—The President Roosevelt, C.C.A. N Y., 116 F.2d 420—The Ky-Ill, C.C. A Ky, 50 F 2d 70—Martin v. The Amiga Mia, D.C.N.Y., 80 F Supp 42.
58 C J. p 295 note 4 [a].

49. U S—Lawrence v. Morrisania Steam-Boat Co., D.C N.Y., 9 F. 208
58 C J p 295 note 5.

Repairs necessitated by contractor's negligence

Where vessel was damaged from pounding against its mooring when in possession of a repair yard as bailee for hire, yard could not recover for repairs made by yard necessitated by the pounding, in absence of a showing that damages were not sustained as result of negligence of the yard.—Martin v The Amiga Mia, D.C.N.Y., 80 F.Supp. 42.

Extra work

Ordinarily, if owner of vessel demands more than required by contract for repairs, contractor may protest and perform and later sue on quantum meruit, but may not recover for extra work as breach—Todd Dry Dock Engineering & Repair Corporation v. City of New York, C.C.A.N. Y., 54 F 2d 490.

Worthless work

Where repair work on a vessel is so defectively done as to be of no benefit to the owner thereof, the owner of the shipyard performing the work cannot recover therefor.—Walter E. Canulette & Son v. Clesi, La. App, 39 So 2d 853.

50. U.S.—The Mary N. Bourke, N. Y., 145 F. 909, 76 C C.A. 441.
58 C.J. p 295 note 6.

51. U S—Martin v. The Amiga Mia, D.C.N.Y., 80 F.Supp. 42.

failure to complete work within a specified time, in the absence of a definite and positive agreement to make repairs within that time.[52] No liability attaches on a contract for repairs where the master has been misled into supposing that he was dealing with libelant as agent for a third person while in fact libelant was acting for himself;[53] but libelant may recover for labor and services.[54]

Interference with stevedoring contracts. A statute making it unlawful for any person to control or attempt to control the owner or master of any vessel in awarding the loading or unloading of his vessel, except by solicitation in his own behalf as a contracting stevedore regularly engaged in the business of stevedoring, recognizes the right of the owner or master of a vessel to award the loading or unloading of his vessel to any contracting stevedore he desires.[55]

b. Grounds of Liability

The liability of the owner of a vessel for supplies or repairs ordered by the master or an agent is based on a contract undertaken in his behalf by an agent authorized to do so.

The liability of the owners of a vessel to pay for repairs and supplies ordered by the master or an agent rests on the ground of a contract made by one who is the owners' agent for the purpose of ordering such supplies or repairs,[56] although if such necessaries are furnished with the knowledge of the owners and they receive the benefit of them, it will be presumed that they were furnished at their instance and request.[57] In the absence of express authority to pledge the owners' credit, the owners are liable for supplies and repairs furnished to their vessel in a foreign port only in the case of a necessity or apparent necessity for the credit of the vessel to obtain them;[58] and, hence, where the master or agent has funds of the owners in his hands at the time sufficient to pay for such necessaries, and the contractor has actual or constructive notice of this fact, no credit therefor is presumed to be given to the owners of the vessel.[59] The legal owner cannot be held liable for repairs made on the authority of some third person not his agent.[60]

c. Who Liable as Owners

Liability for supplies, repairs, or other necessaries rests on the persons who have the actual interest, control, and management of the vessel at the time they are furnished; and the mere fact that one is the registered owner of the legal title does not render him liable therefor.

The mere fact alone that one is the registered owner or holder of the legal title of a vessel does not make him liable for supplies, repairs, and other necessaries furnished to her,[61] since he may hold her merely in trust, and be neither an actual nor apparent owner;[62] but this liability rests on the persons who have the actual interest, control, and management of the vessel at the time, and who benefit by the supplies, services, or repairs furnished.[63] The mere nominal owner is not equitably estopped to deny liability by the registry of the vessel and the representations of the master where the creditor was put on his guard or had reason to suppose that the registered owner was a nominal owner.[64] The seller of a ship reserving title under a conditional sale contract is not liable for repairs contracted for by the vendee.[65]

§ 75. Negotiable Instruments

A clerk of a vessel may bind the owners thereof by

Items held not recoverable
Wages and subsistence paid to a crew hired while vessel was undergoing repairs, and wages paid to a temporary captain, were not recoverable by owner of vessel as damages for alleged delay on part of repair yard in repairing vessel, and sums paid by the owner for attorneys fees, expert witnesses, an accountant, and for photographs to be used on trial, were expenses of litigation and, although burdensome, were not recoverable as legal damages—Martin v. The Amiga Mia, supra.

Waiver or estoppel
Notwithstanding possibly defective material or workmanship in altering ferryboat, owner who kept and used boat without objection could not recover therefor—The Ky-Ill, C.C.A. Ky., 50 F.2d 70.

52. U.S.—The Garfield No. 6, D.C Wash., 36 F.2d 501.

53. U S—The Kalfarli, C C A N.Y., 277 F. 391.

54. U.S—The Kalfarli, supra.

55. Fla—State ex rel. Biscayne Stevedoring Co v. Turner, 196 So 816, 143 Fla. 424.

56. U.S.—Berwind v. Schultz, D.C N. Y., 25 F. 912.
58 C J. p 295 note 12.

57. Mass.—James v Bixby, 11 Mass. 34

58. U.S—Berwind v. Schultz, D.C N. Y., 25 F. 912—The Sulıote, D.C N. Y., 23 F. 919.

59. U S.—The Lulu, Md, 10 Wall 192, 19 L Ed. 906.
58 C.J. p 296 note 15.

60. U.S.—Davidson v. Baldwin, Mich, 79 F. 95, 24 C C A 453.
Owner held not estopped to deny agency of one ordering repairs.—Davidson v. Baldwin, supra.

61. N Y—Macy v Wheeler, 30 N.Y. 231, 18 Abb Pr. 73.
58 C J p 296 note 19.

62. Ky—Strader v. Lambeth, 7 B. Mon 589.
N.Y—Macy v. Wheeler, 30 N.Y. 231, 18 Abb Pr 73

63. Cal.—Johnson v. Goodwin, 229 P. 708, 68 Cal.App. 363.
58 C J p 296 note 21
"Owner pro hac vice" stands in owner's place for voyage or service contemplated and bears owner's responsibilities even though owner remains legal owner of vessel.—Aird v. Weyerhaeuser S. S Co, C A Pa, 169 F 2d 606, certiorari denied 69 S Ct. 1521, 337 U S. 959, 93 L.Ed 1758

64. U.S—Borland v Zittlosen, D.C. N.Y., 27 F. 131

65. U.S—The Boise Penrose, C.C A. N Y, 22 F 2d 919
58 C.J. p 296 note 23.

a negotiable instrument as far as its consideration inures to their benefit.

A clerk of a vessel may bind the owners thereof by a draft, note, or other negotiable instrument as far as its consideration inures to their benefit,[66] but it must be shown that the maker of the note actually was clerk.[67]

§ 76. Torts

a. In general
b. Liabilities resulting from torts

a. In General

An owner of a vessel or other property damaged by the tortious acts of another committed in the course of shipping is entitled to recover for such injuries.

An owner of a vessel is entitled to recover for injuries caused to him or his vessel by the negligence or other torts of others,[68] as, for example, the unlawful seizure and detention of the vessel.[69] The duty rests on the vessel placed in a position of peril to make every effort to guard against danger;[70] and there can be no recovery from a third person for injury to a vessel where such injury is the result of the negligence of its own master.[71]

What law governs. In a suit under the Federal Tort Claims Act, 28 U.S.C.A. § 2571 et seq, to recover for damages to a state bridge which was struck by vessels of the United States, the law applicable is the law of negligence of such state rather than the law of admiralty,[72] even though the factual background is decidedly maritime in character.[73]

Injury from fire or explosion. The shipper of explosives or of dangerously inflammable goods is under a duty to give notice of their character to the owner of the vessel,[74] and failure to do so is negligence rendering the shipper liable to the owner for damages resulting from a fire or explosion;[75] but where the owner, having been advised of the character of the goods,[76] or having had full opportunity to observe their dangerous character,[77] fails to take proper precautions, he assumes the risk and cannot recover. The shipper is not an insurer against the hazard of fire in an average cargo not inherently dangerous.[78]

b. Liabilities Resulting from Torts

Generally speaking, vessels and their owners are liable for all damages caused by the tortious acts of the owners or those in charge of the vessel for whose conduct the owners are responsible.

Except in so far as their liability may be limited under statutes providing for limitation of shipowners' liability, as discussed infra §§ 239–257, and apart from their liability or statutory exemption from liability for loss of, or injury to, cargo, as discussed infra §§ 125–129, the vessel or her owners are liable for all damages caused by the negligence or other wrongs of the owners or those in charge of the vessel;[79] but there is no liability on the own-

66. La.—Moss v. Smoker, 2 La.Ann 989.
58 C.J. p 296 note 25.

67. La.—Anderson v. Irwin, 7 La. Ann. 494.

68. U.S.—The Montserrat, D.C.N.Y., 7 F.2d 477, affirmed, C.C.A., 15 F. 2d 1015.
58 C.J. p 296 note 28.
Liability for injury to vessel from loading, carrying, or discharging cargo see infra § 105.

69. Conn.—Dennison v. Hyde, 6 Conn 508.

70. U.S.—The Harrisburg, D.C.N.Y., 43 F.2d 360.

71. U.S.—Canada S. S. Lines v. Great Lakes Dredge & Dock Co., C.C.A.Ill., 81 F.2d 100.

72. U.S.—State Road Department of Fla. v. U. S., D.C.Fla., 85 F.Supp. 489, affirmed, C.A., U. S. v. State Road Dept. of Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291, 342 U.S. 903, 96 L.Ed. ——.

73. U.S.—State Road Department of Fla. v. U. S., D.C.Fla., 85 F.Supp 489, affirmed, C.A., U. S. v. State Road Dept. of Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291, 342 U.S. 903, 96 L.Ed. ——.
Rights and liabilities from negligent management or navigation of vessels resulting in injuries to bridges generally see infra § 77

74. U.S.—International Mercantile Marine Co. v. Fels, N.Y., 170 F. 275, 95 C.C.A. 471, 18 Ann.Cas. 18.
N.Y.—Barney v. Burnstenbinder, 64 Barb. 212, 7 Lans. 210.
Cargo of metal turnings
(1) Whether cargo of metal turnings and borings was "dangerous goods," within bill of lading requiring shipper to make good any loss caused by shipping dangerous goods without full previous disclosure to carrier of their nature, depended on whether the cargo contained enough moisture and waste when loaded to make cargo dangerous.—Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., C.C.A.N.Y., 129 F. 2d 319.

(2) The finding that a cargo of metal turnings and borings was not "dangerous goods," within bill of lading binding shipper to make good any loss caused by shipping dangerous goods without previous full written disclosure to carrier of their nature, was not disproved by fact that the particular cargo heated and took fire.—Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., supra.

75. N.Y.—Barney v. Burnstenbinder, 64 Barb. 212, 7 Lans. 210.

76. U.S.—International Merchant Marine Co. v. Fels, D.C.N.Y., 164 F. 337, affirmed 170 F. 275, 95 C.C.A. 471, 18 Ann.Cas. 18.

77. U.S.—Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., D.C.N.Y., 40 F.Supp. 378, affirmed, C.C.A., 129 F.2d 319

78. U.S.—Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., C.C.A.N.Y., 129 F.2d 319.

79. Minn.—Fay v. Davidson, 13 Minn. 523.
N.C.—State Highway & Public Works Commission v. Diamond S. S. Transp. Corp., 38 S.E.2d 214, 226 N.C. 371
58 C.J. p 297 note 42.
Liability for:
Personal injuries to seamen see Seamen §§ 188–206.
Personal injuries to passengers see infra §§ 192–196.

Regardless of any contract, a shipowner is liable for his own acts of

ers or the vessel for injuries which are the result of perils of the sea or inevitable accident,[80] or without negligence or other wrong on the part of the owners or of those in charge of the vessel,[81] as where the negligence is that of an independent contractor.[82] Nevertheless, where the owners of a ship have held themselves out as responsible for the negligence of an independent contractor, they are estopped subsequently to deny liability;[83] and the owners are not freed of responsibility under the doctrine of respondeat superior for negligence of an independent contractor or his servants, where the owners know, or should know, by their supervision of its construction, that the engine of the vessel is inherently dangerous.[84] The negligent act must have been the proximate cause of the injury complained of.[85]

Contributory negligence. Courts other than courts of admiralty will not generally grant relief for negligent injury where the party injured has been guilty of contributory negligence,[86] but courts of admiralty allow a proportionate recovery.[87]

Injuries to property on shore. With respect to the liability of the owner of the vessel for damage to property along the shore, it has been held that the shore and the structures located thereon are subject to the dangers incident to the right of navigation and the probability that they may receive injury, by reason of their location, from moving craft along the waterway.[88]

Injuries resulting from inadequate equipment or appliances. The owner of a vessel is not negligent through omission to equip his vessel with the latest appliances or best devices, but he is required to use only such appliances as are reasonably required for the purposes of the vessel.[89] The owners of a vessel are liable for fires caused to adjoining property by reason of insufficient or defective appliances.[90]

Injuries resulting from unseaworthiness. With respect to liability resulting from unseaworthiness of a vessel, seaworthiness does not comprehend the best form of construction and perfection, but only that the vessel be so staunch and strong as to resist the ordinary action of the sea without loss or damage to the cargo.[91]

Injuries from negligence of longshoremen. The owners of a vessel are liable for negligence of longshoremen hired by them as their servants to aid in loading their vessel.[92]

§ 77. —— Negligent Management or Navigation

a. In general
b. Injuries from suction or swell
c. Injuries to submarine cables or mains

negligence—Hawn v. Pope & Talbot, D C Pa., 99 F Supp. 226

Irrespective of personal liability of the owner, a vessel may be liable in rem as the offending thing—The L & W. B. C. Co. No 11, D.C.N.Y., 53 F Supp. 326.

Under federal statute

A proceeding in rem under the Rivers and Harbors Act to recover damages for injury by a vessel to harbor or river improvements may be maintained only where the property injured or destroyed is used for the preservation or improvement of the navigable waters of the United States or for the other purposes stated in the statute—The Dixie, D.C. Tex., 39 F.Supp. 395.

80. U.S.—The Carl Frederick, D.C. Cal., 33 F. 589, 13 Sawy. 97.
58 C J. p 297 note 44

81. U.S.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., D.C.N.Y., 7 F Supp. 107.
58 C.J. p 298 note 45.

82. U.S—The Satilla, D.C.N.Y., 221 F. 949, affirmed 235 F. 58, 148 C.C. A. 552.
58 C.J. p 298 note 46.

Liability of United States

Rule that, where the United States or its agents are in possession and responsible for operation of a ship operated under a general agency agreement, a tort giving right to damages for property injury must be redressed by an authorized action against the United States has no application where operation of the vessel is under the control of an independent contractor who, through negligence and failure in the common-law duty to use that which he controls so as not to injure others, has caused property damage—Publicker Industries v. American-Hawaiian S S. Co., D C.Pa., 78 F Supp. 223.

83. La.—E. C. Taylor v. New York, etc., SS. Co, 105 So. 379, 159 La 381.
58 C.J. p 298 note 47.

84. U.S—Kunschman v. U. S., C.C.A. N Y., 54 F 2d 987.

85. U.S.—The Santa Rita, Cal., 176 F. 890, 100 C.C.A. 360, 30 L.R.A., N.S., 1210.

86. La—Love v. The Montgomery, 10 La Ann. 113.
58 C.J. p 298 note 51.

87. U S.—The Dauntless, Md, 179 F. 346, 102 C C A. 530—The Number 6 H., D.C.N.Y., 108 F 429.

88. **Wash from propellers**
Md—Adams v. Carey, 190 A. 815, 172 Md. 173.

89. U.S.—In re Defense Plant Corp., D C.Tenn, 58 F.Supp 931.
58 C.J. p 298 note 49 [a].

90. Mich.—Burrows v Transp. Co, 64 N W. 501, 106 Mich. 582, 29 L.R. A. 468.
58 C.J p 298 note 49.

Defects arising after proper installation

A corporation which owned vessel which caught fire following gasoline explosion was liable for damages to other vessels by fire, where, although there was no negligence in original installation of gasoline tanks, with passage of time some part of machinery or equipment did leak and there was no evidence of intervening third person agency.—Coryell v. Pilkington, D.C Fla., 39 F Supp. 142, affirmed, C.C.A, Coryell v. Phipps, 128 F.2d 702, affirmed 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363.

91. U.S.—In re Defense Plant Corp, D.C.Tenn, 58 F Supp. 931
Liability for loss of, or injury to, cargo see infra § 125 et seq.

92. U.S.—Serviss v. The Chattahoochee, D C N.Y., 37 F. 153, affirmed, C C., 39 F. 368
La—Rochereau v. Hausa, 14 La.Ann. 431.

d. Injuries to bridges, piers, or similar structures
e. Negligence of pilot

a. In General

As a general rule, the owner or those in possession and control of a vessel and the vessel itself are liable for all natural and proximate damages caused by reason of her negligent management or navigation.

As a general rule, the owners or those in possession and control of a vessel and the vessel itself are liable for all natural and proximate damages caused by reason of her negligent management[93] or navigation,[94] although the negligent or wrongful acts are committed without authority or knowledge of the owners;[95] and in some jurisdictions this liability for negligence is expressly provided for by statute.[96] However, the owners or vessel cannot be held liable for damages which cannot be attributed to negligence on her part or on the part of the master and crew,[97] and, in courts other than admiralty, the person injured cannot recover if he has been guilty of contributory negligence.[98] Two vessels may be equally at fault so as to impose liability on both;[99] but, where one vessel is solely at fault, it alone is liable.[1]

Duties of vessel and of owner or those in control thereof. With respect to their liability for injuries resulting from negligent management or navigation, it has been said in general terms that shipowners should be held to as strict accountability as modern facilities enable them, with reasonable diligence, to provide;[2] and, in a particular case,

93. U S—City Compress & Warehouse Co v U. S, C A S C, 190 F 2d 699—The Anna O'Boyle, C C A N.Y, 122 F.2d 286, rehearing denied 124 F 2d 180—Goggin v U. S, D C.Cal., 79 F.Supp 812—Publicker Industries v. American-Hawaiian S S. Co, D C Pa, 78 F.Supp. 223—The Mattie, D C N.Y, 38 F Supp 745
Mass—Hill v. Winsor, 118 Mass 251
58 C J. p 298 note 54.

Dock owner's negligence as to moored vessels

Dock owner is liable for damage to bridge caused by dredge and pile driver which broke from moorings in storm, if damage is referable to dock owner's unreasonable failure to anticipate danger and to take reasonable precautions against probable consequences of storm—Pleasure Beach Park Co. v. Bridgeport Dredge & Dock Co, 165 A. 691, 116 Conn. 496.

Proximate cause

In action for damages to property and equipment of plaintiffs by a barge owned by defendant which had dragged its moorings, liability of defendant, where barge struck boathouse adjoining plaintiffs' property, would be the same as if direct contact with plaintiffs' property had taken place, if debris from the boathouse damaged plaintiffs' property—Nicholas v Pfeifer Oil Transp Co., 62 N. Y S 2d 474.

Common bailment of vessels involved

Tug was liable for damage to barges as result of its negligence, regardless of fact that both tug and barges were on demise to same company.—The R Lenahan, Jr, C.C A N.Y, 48 F.2d 110, certiorari denied Cowles v. Reddy, 52 S.Ct. 13, 284 U.S. 629, 76 L Ed 536.

94. U.S.—Great Lakes Dredge & Dock Co. v. Metropolitan Sand & Gravel Corp., D.C.N Y, 82 F Supp. 595—Goggin v. U. S, D.C Cal., 79 F Supp. 812—The Maui, D.C N.Y., 70 F.Supp 772.
58 C.J. p 299 note 55.

95. U S—The Bulley, D C N Y, 138 F. 170.

96. La—Howes v. The Red Chief, 15 La Ann 321.
58 C J p 299 note 57

Vessels held not liable

(1) Where tug approached basin at five miles per hour with scow in tow and with favoring ebb tide attempted to enter basin by shaving end of pier, without rounding to, and observing what was in, basin, and collided with pier in avoiding collision with barge in tow of second tug which had proper lights and had stopped after giving signals and hearing signal from damaged tug, second tug was not at fault, but cause of damage was failure of damaged tug to round to, and observe what was in, basin.—The Isabel A. McAllister, D C N Y, 38 F Supp 585

(2) Where fishing vessel secured similar disabled craft alongside by bow and stern breasts composed of single taut line, and proceeded up wrong side of narrow busy harbor channel with insufficient crew properly to handle vessel and lines, and gave no recognizable signal to approaching landing craft that maintained opposite course and speed of eight knots, landing craft was not liable for damages to vessels caused when its wake caused tow to part.—Goggin v. U. S, D C.Cal., 79 F Supp 812.

(3) The duty, if any, of tug which found scows aground was merely to advise owners of the scows of the situation, and tug was not at fault in failing to stand by, so as to be subject to liability—The Norwich Victory, D C Pa, 77 F Supp. 264, affirmed, C.C A., U. S. v. Dump Scows No 116, No. 120, and No. 122, two cases, 175 F.2d 556, certiorari denied American Dredging Co. v U S., 70 S Ct. 147, two cases, 338 U S. 871, 94 L Ed 534.

97. U S.—Canada S. S. Lines v. Great Lakes Dredge & Dock Co, C C A Ill, 81 F 2d 100—The Flying By, C C A N J, 71 F.2d 968—Petition of Martin, D C Pa, 102 F Supp. 43—Great Lakes Dredge & Dock Co. v. Metropolitan Sand & Gravel Corp, D C N.Y, 82 F.Supp 595—The Jason, D C N.Y, 74 F.Supp 34—The Fidelity, D.C.N.Y., 43 F Supp. 180—Petition of Liverpool, Brazil & River Plate Steam Nav Co, D C N.Y, 7 F Supp. 107—The Hendrick Hudson, D.C.N.Y., 3 F. Supp. 317.
58 C J. p 299 note 58.

Reliance on misplaced buoy

Tug which was not wholly on its side of center of canal when it met motor vessel, as required by statute, was without fault when motor vessel struck bottom and drove hole in her starboard bilge, where buoy was misplaced and tug kept wholly on right side of center of canal as so marked.—The Clevelander, C.C.A.N.Y., 83 F. 2d 947.

Explosives

Where there was no negligence on the part of the shipper or the stevedore loading explosives near the wrecked vessel, neither was liable.—Actiesselskabet Ingrid v. New Jersey Central R Co, 216 F. 72, 132 C.C.A. 316, L.R.A.1916B 716, rehearing denied 216 F. 991, 132 C C A. 665, L.R.A. 1916B 716, and certiorari denied 35 S Ct. 284, 238 U S. 615, 59 L.Ed. 1490.

98. N.Y—Wascin v. Bronx Towing Line, 68 N.Y.S 2d 547, 188 Misc 462, motion for new trial denied 77 N. Y.S 2d 25

99. U S.—The Detroiter, C C A.N.Y., 82 F.2d 234.

1. U S.—The Vulcan, D C La., 60 F. Supp. 158.

2. U S.—The Maria, D.C N.Y., 15 F. Supp. 745.

Standard of due care in navigation is not necessarily dependent on mere statutory enactment, but must be tested in light of advancing knowl-

whether or not there is liability depends on the duty imposed by customs and law on vessels under the circumstances involved.[3] The master of a vessel must exercise a degree of vigilance commensurate with the circumstances.[4] A federal statute prohibiting tying up or anchoring vessels in navigable channels in such manner as to prevent or obstruct the passage of other vessels, discussed in Navigable Waters § 44, establishes a standard of care with which a boat-yard owner must comply in order to be free of negligence.[5] A tug is responsible for the proper navigation of its unmanned[6] or unpowered[7] tow.

b. Injuries from Suction or Swell

A vessel, when being navigated in a river or harbor in the vicinity of other vessels, must exercise due care in view of the circumstances to avoid injuring, by her suction or swell, other vessels which she is approaching or passing, and failure to exercise such care renders her or her owners liable for resultant damage.

A steamer must, when being navigated in a river or harbor in the vicinity of other smaller or weaker craft or vessels, which are properly in such waters, exercise reasonable care and prudence in view of the circumstances existing at the time, to avoid injuring, by her suction or swell, other craft or vessels which she is approaching or passing,[8] and on failure to exercise such care and prudence, the vessel or its owners are liable for damages caused thereby to such other craft or vessel,[9] particularly where the act of the offending vessel is in violation

edge, experience, and most modern appliances of navigation which have become recognized as regular equipment by common usage—The Carroll, D.C.Md., 60 F.2d 985.

3. U.S.—The Carroll, supra—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., D.C.N.Y., 7 F.Supp. 107.

Duty to display arrows

War department's notice requiring floating plants to display wooden arrows indicating course to be followed in passing plants was nugatory as applied to river dredge, power of establishing rules for day signals on such dredges being in commerce department; and a river dredge displaying arrow indicating vessels should pass on starboard side was not negligent, even though arrow was intermittently obscured by swinging boom and even though dredge did not sound alarm signal for yacht, which allegedly sounded signal for passing dredge on port side and, in so passing, struck rock in shallow water placed there by dredge—The Flying By, D.C.N.J., 4 F.Supp. 884, affirmed, C.C.A., 71 F.2d 968.

Failure to maintain proper lookout

U.S.—Canada S. S. Lines v. Great Lakes Dredge & Dock Co., C.C.A. Ill., 81 F.2d 100

La.—Tolle v. Higgins Industries, 31 So.2d 730, 212 La. 173.

Duty to maintain lookouts see Collision § 107.

Lifeboat

Adequate and properly maintained lifeboat equipment is essential to seaworthiness of barge.—The Carroll, D.C.Md., 60 F.2d 985.

Duty of bargee as to lines

Where barge is tied up to a wharf, the bargee is not required to put out enough lines to hold securely any other barges which may later tie up to his barge.—Petition of Tracy, D.C.N.Y., 92 F.Supp. 706, affirmed, C.A., 194 F.2d 362.

Duty of vessel off range

With respect to its right to recover for injury, where a northbound vessel on East River finds itself off the range, it must warn its neighbor of its necessity and its intention to impose either knowledge or duty on such neighbor—The Jason, D.C.N.Y., 74 F.Supp. 34.

Duty to sound signals in general see Collision §§ 103–106.

Knowledge and test of stability

Where owner buys old tug, licensed coastwise, and equips it for ocean going, it is negligence to send tug out without knowing something of her stability and especially without stability test, where history and performance with respect to crankiness and tenderness are matters of official record.—Sabine Towing Co. v. Brennan, C.C.A.Tex., 72 F.2d 490, certiorari denied 55 S.Ct. 141, 293 U.S. 611, 79 L.Ed. 701, rehearing denied 55 S.Ct. 212, 293 U.S. 632, 79 L.Ed. 717.

Absolute guaranty not required

Owner's obligation to provide seaworthy vessel does not contemplate absolute guaranty that vessel can withstand all conditions of wind and sea to which it may be reasonably anticipated it may be subjected during voyages, and with such cargoes as are customarily assigned to her.—The Carroll, D.C.Md., 60 F.2d 985.

4. U.S.—Canada S.S. Lines v. Great Lakes Dredge & Dock Co., C.C.A. Ill., 81 F.2d 100.

Vessels at anchor during windstorm

Masters of vessels anchored in harbor had duty to know and understand their responsibility in case of severe windstorm, and ordinary care or reasonable care was not the test, but a very high degree of care and caution was required—State Road Department of Fla. v. U.S., D.C.Fla., 85 F.Supp. 489, affirmed, C.A., U.S. v. State Road Dept. of Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291, 342 U.S. 903, 96 L.Ed. ——.

Fishing nets

Where both navigation rights and fishing rights can be enjoyed fairly and freely, vessel must exercise ordinary care to avoid damage to fishing nets.—Agger v. The Beatrice and Rose, D.C.Me., 84 F.Supp. 761.

Tug leaving towed barge

What is unreasonable length of time for tug to leave towed barge in search of aid must be determined by particular circumstances of each case—The Carroll, D.C.Md., 60 F.2d 985.

Drifting dredge

In determining negligence of watch officer of steamship lying at anchor in not ordering anchor chain to be paid out when he saw imminent danger of collision with drifting dredge, court would view situation as presented to officer and hold him negligent if what he did was not only wrong, but so plainly wrong that competent navigator placed in his situation would not have done it.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., D.C.N.Y., 7 F.Supp. 107

5. N.Y.—Wascin v. Bronx Towing Line, 68 N.Y.S.2d 547, 188 Misc. 462, motion for new trial denied 77 N.Y.S.2d 25

6. U.S.—In re Defense Plant Corp., D.C.Tenn., 58 F.Supp. 931.

7. U.S.—The Vulcan, D.C.La., 60 F.Supp. 158

8. U.S.—The Emma T. Grimes, D.C.N.Y., 2 F.Supp. 319.

La.—Tolle v. Higgins Industries, 31 So.2d 730, 212 La. 173.

58 C.J. p. 299 note 59.

9. U.S.—The Clevelander, C.C.A.N.Y., 83 F.2d 947—The Detroiter, C.C.A.N.Y., 82 F.2d 234—The Julia C. Davin, C.C.A.N.Y., 70 F.2d 268—Burns Bros. v. The Systematic, D.C.N.Y., 99 F.Supp. 870—The North River, D.C.N.Y., 57 F.2d 600, affirmed, C.C.A., 57 F.2d 601—The Hendrick Hudson, D.C.N.Y., 3 F.

of some statutory regulation.[10] Where a vessel in passing near a smaller or weaker vessel has reason to apprehend danger thereto from her swells, it is her duty to slacken her speed,[11] or to keep at a greater distance,[12] or to stop her paddle wheels or propeller.[13] Steamers passing docks or other mooring places must do so at such a rate of speed[14] or at such a distance[15] that a vessel lawfully there and properly moored will not be harmed by the suction or swell produced by their passage through the water, and the steamer is liable for damage resulting from failure to exercise such care,[16] even though she is proceeding at her customary speed;[17] it has been held that, where necessary, her engines should be slowed or stopped temporarily.[18]

The degree of care and prudence which must be exercised by a vessel to prevent injuries from suction or swell depends on the circumstances of each particular case,[19] and the vessel causing the injury must be held responsible for any failure to appreciate the reasonable effect of her speed and motion through the water at the particular place and under the particular circumstances,[20] a vessel known to be peculiarly liable to create swells either by reason of the construction or the speed of her usual operation must exercise unusual care.[21] Those in charge of a smaller or weaker vessel in a proper place have a right to assume that the larger vessel will observe reasonable precautions to avoid injuring her by reason of her swell or suction,[22] and they are under no obligation to warn the larger vessel of the danger,[23] but, at the same time, it is their duty to use all reasonable care and prudence to avoid the effect of such known dangers,[24] and the vessel causing the suction or swell is liable only for such damages as are the proximate result of her negligence.[25] Where the vessel injured was guilty of contributory negligence, a partial recovery may be allowed in admiralty.[26] The passing vessel is not to be considered an insurer of an inferior vessel,[27] and cannot be held for dam-

Supp. 317—The Emma T. Grimes, D.C.N.Y., 2 F.Supp. 319
La.—Tolle v. Higgins Industries, 31 So.2d 730, 212 La. 173.
58 C.J. p. 300 note 60.

10. **Passing in narrow channel**
U.S.—Kelley Island Lime, etc., Co. v. Cleveland, D.C.Ohio, 144 F. 207, modified on other grounds 176 F. 492, 100 C.C.A. 108.

11. U.S.—Burns Bros. v. The Systematic, D.C.N.Y., 99 F.Supp. 870
La.—Tolle v. Higgins Industries, App., 25 So.2d 744, reversed on other grounds 31 So.2d 730, 212 La. 173.
58 C.J. p. 300 note 62.
Liability for causing injury to vessel through collision or otherwise by reason of suction or swell due to excessive speed see Collision § 128

12. U.S.—Dangelo v. Danforth Co., D.C.N.Y., 192 F. 678—The Chester W. Chapin, D.C.N.Y., 155 F. 854.

13. U.S.—The St. Paul, D.C.N.Y., 124 F. 103.
58 C.J. p. 300 note 64.

14. U.S.—West India Fruit & S. S. Co. v. Raymond, C.A.Fla., 190 F.2d 673.
58 C.J. p. 300 note 65.

15. U.S.—The Rotherfield, D.C.Ala., 123 F. 460—The New Hampshire, D.C.N.Y., 88 F. 306.

16. U.S.—West India Fruit & S. S. Co. v. Raymond, C.A.Fla., 190 F.2d 673.
58 C.J. p. 300 note 67.

Dry dock
The duty of a passing steamer toward a floating dry dock permanently located alongside a pier is the same as its duty toward vessels at docks.—Shewan v. New England Nav. Co., D.C.N.Y., 155 F. 860, reversed on other grounds 169 F. 285, 94 C.C.A. 561.

17. U.S.—The Hendrick Hudson, D.C.N.Y., 163 F. 862, affirmed 168 F. 1021, 93 C.C.A. 670.

18. U.S.—The New York, D.C.N.Y., 34 F. 757.

19. U.S.—Western Oil & Fuel Terminal Co. v. The Elisha Woods, D.C.Ky., 89 F.Supp. 862—Martin Marine Transp. Co. v. U. S., D.C.Pa., 66 F.Supp. 673.

Duty of overtaken vessel
Where tug towing barges in Cape Cod Canal assented to overtaking agreement signalled by steamship, tug did not thereby assume the risk of excessive speed by overtaking vessel and was not bound to anticipate that because of design and power steamship would become unmanageable unless she exceeded a safe passing speed or that steamship would take a sheer necessitating increase of speed to an unreasonable degree.—Eastern Transp. Co. v. The Vera Cruz, D.C.N.Y., 94 F.Supp. 695, affirmed, C.A., 186 F.2d 305.

Duty of overtaking vessel
Even though overtaking steamship sought, and obtained, permission from tug to pass tug to port, which pilot of tug thought could be done safely, steamship still remained under duty of navigating prudently and assumed all risks of such navigation in that permission given merely expressed an understanding on part of tug of what steamship proposed to do and an agreement by tug to do nothing to thwart it, and was not an agreement by tug to assist in maneuver.—Petition of Texas Co., D.C.N.Y., 99 F.Supp. 340.

20. U.S.—The Chester W. Chapin, D.C.N.Y., 155 F. 854.
58 C.J. p. 300 note 70

21. U.S.—The Asbury Park, D.C.N.Y., 138 F. 925
58 C.J. p. 300 note 71.

22. La.—**Corpus Juris quoted in** Tolle v. Higgins Industries, App., 25 So.2d 744, 747, reversed on other grounds 31 So.2d 730, 212 La. 173.
58 C.J. p. 300 note 72.

23. U.S.—Burns Bros. v. The Systematic, D.C.N.Y., 99 F.Supp. 870.
La.—**Corpus Juris quoted in** Tolle v. Higgins Industries, App., 25 So.2d 744, 747, reversed on other grounds 31 So.2d 730, 212 La. 173.
58 C.J. p. 301 note 73.

24. La.—**Corpus Juris quoted in** Tolle v. Higgins Industries, App., 25 So.2d 744, 746, reversed on other grounds 31 So.2d 730, 212 La. 173.
58 C.J. p. 301 note 74.

25. La.—**Corpus Juris quoted in** Tolle v. Higgins Industries, App., 25 So.2d 744, 747, reversed on other grounds 31 So.2d 730, 212 La. 173
58 C.J. p. 301 note 75.

26. U.S.—The Silvia, D.C.N.Y., 2 F.2d 99.
58 C.J. p. 301 note 76.

27. U.S.—Martin Marine Transp. Co. v. U. S., D.C.Pa., 66 F.Supp. 673—The Daniel Drew, C.C.N.Y., 6 F.Cas. No. 3,565, 13 Blatchf. 523.
La.—**Corpus Juris quoted in** Tolle v. Higgins Industries, App., 25 So.2d 744, 747, reversed on other grounds 31 So.2d 730, 212 La. 173.

ages allegedly caused by swell where its speed and distance from the injured vessel were such that the damage could not have been caused by its swell,[28] or where the damages were not reasonably foreseeable[29] or are attributable to unavoidable accident.[30] A vessel, in leaving a slip, must notify other vessels therein likely to be affected by her propeller.[31]

c. Injuries to Submarine Cables or Mains

A vessel or her owners are liable for negligent injury to a submarine cable or main.

The vessel or her owners are liable for negligent injury to a submarine cable[32] or main,[33] as where the vessel attempts to anchor at a known and advertised cable crossing.[34] However, a vessel or its owner is not liable where the injury was not due to negligence,[35] as where the existence and position of the cable are unknown[36] or have been kept secret as a matter of military policy,[37] or where the vessel, having no notice that the cable was not entrenched and being warned only against anchoring, navigated the channel at low tide [38] Under a statute allowing the cutting of a cable when necessary to save life or limb or a vessel, and a treaty provision requiring cable companies to reimburse shipowners for anchors sacrificed to avoid injury to cables, the vessel is liable for the cutting of a cable to release an anchor where it has another anchor on board.[39]

d. Injuries to Bridges, Piers, or Similar Structures

A vessel or its owner is liable for injuries to bridges, piers, or similar structures resulting from negligent navigation or management.

The owner of a bridge may recover damages for injuries thereto from improper or negligent navigation.[40]

A vessel must approach a bridge with reasonable skill and care to avoid injuring it, having in view the difficulties and perils including those caused by the bridge itself,[41] but it need not guarantee its safety;[42] and, in the absence of express regulation requiring a signal,[43] a vessel is not liable for an injury to a drawbridge while advancing slowly, and in the justified expectation that the draw would be opened and in the absence of any signal to the contrary.[44] A defense that the bridge opening is narrower than that prescribed by the war department depends on whether the variation from the specifications is the proximate cause of the collision and injury [45] A vessel or its owner is not liable for injury to a bridge in the absence of negligence on

28. U.S.—The Acadia, C.C.A. N.Y., 98 F.2d 801

29. U.S.—City of New York v. McLain Lines, C.C.A.N.Y., 147 F.2d 393.

30. La.—Tolle v. Higgins Industries, 31 So.2d 730, 212 La. 173.

31. U.S.—The Leo, D.C.N.Y., 15 F. Cas. No. 8,250, 3 Ben. 569.
58 C.J. p. 301 note 78.

32. U.S.—Lakewood S. S. Co. v. Superior Water, Light & Power Co., C.C.A. Wis., 88 F.2d 895—New Jersey Bell Tel. Co. v. Standard Oil Co., N. J., D.C.N.Y., 88 F. Supp. 806
58 C.J. p. 301 note 81

33. U.S.—Lakewood S. S. Co. v. Superior Water, Light & Power Co., C.C.A. Wis., 88 F.2d 895

34. U.S.—Postal Tel. Cable Co. v. P. Sanford Ross, Inc., D.C.N.Y., 221 F. 105.

35. U.S.—Petition of Martin, D.C. Pa., 102 F. Supp. 43—The Anita Berwind, D.C. Pa., 107 F. 721
La.—Department of Highways v. Whiteman Bros., App., 29 So.2d 399.

36. U.S.—The Georgie, C.C.A. Cal., 14 F.2d 98.
45 C.J. p. 448 note 33.

37. Alaska.—U. S. v. The Alameda, 5 Alaska 663.

38. U.S.—U. S. v. Henry Steers, Inc., D.C.N.Y., 8 F. Supp. 363.

Cable owner's assumption of risk

Where power company had laid entrenched power cables across river in area, and company laid additional cables unentrenched on river bottom, and several of the unentrenched power cables were struck by tug and damaged, although government permit gave power company right to lay cables on river bottom unentrenched, in laying cables in that manner power company assumed risk that vessels going to and from adjacent railroad pier might collide with cables in shallow water off power company pier.—Petition of Martin, D.C. Pa., 102 F. Supp. 43

39. U.S.—The William H. Bailey, D.C. Conn., 100 F. 115, affirmed 111 F. 1006, 50 C.C.A. 76.

40. N.J.—Rickards v. Sun Oil Co., 41 A.2d 267, 23 N.J. Misc. 89
N.Y.—Triborough Bridge Authority v. Bronx Towing Line, 52 N.Y.S.2d 62, 184 Misc. 254, affirmed 105 N.Y.S.2d 911, 278 App. Div. 917.
N.C.—State Highway & Public Works Commission v. Diamond S. S. Transp. Corp., 38 S.E.2d 214, 226 N.C. 371.
45 C.J. p. 464 note 97.

Fender piling of bridge owned by city and county was not an unlawful obstruction in navigable waters so as to absolve the United States from liability for damage caused when army steam tug collided with piling of bridge as result of negligence of tug operators.—City and County of San Francisco v. U. S., D.C. Cal., 82 F. Supp. 313.

41. U.S.—The Marguerite W., D.C. Wis., 49 F. Supp. 929, affirmed, C.C.A., 140 F.2d 491.

42. U.S.—St. Louis, etc., Packet Co. v. Keokuk, etc., Bridge Co., C.C. Iowa, 31 F. 755.
45 C.J. p. 465 note 99.

43. N.Y.—Triborough Bridge Authority v. Bronx Towing Line, 52 N.Y.S.2d 62, 184 Misc. 254, affirmed 105 N.Y.S.2d 911, 278 App. Div. 917.

Custom of raising lift span of bridge to permit passage of river traffic without signal from approaching vessel could not be set up by captain of tug in derogation of regulation promulgated by secretary of war requiring master of vessel to signify intention to pass bridge by three blasts of the whistle.—Triborough Bridge Authority v. Bronx Towing Line, supra.

44. Ill.—Batchelder v. Hecla Transp. Co., 178 Ill. App. 105

45. U.S.—Savannah, etc., Transp. Co. v. Klaren Bridge Co., S.C., 252 F. 499, 164 C.C.A. 415.
45 C.J. p. 465 note 3.

the part of the vessel or those in charge,[46] as where, for example, the accident was caused by the fault of those in charge of the bridge;[47] and even where injury results from the negligence of the vessel or those in charge, the vessel or its owner is not liable for damages other than those which are the proximate result of such negligence.[48] The fact that defendant, owner of the vessel, employs an independent contractor to pilot the vessel, does not absolve him from liability for damage to a bridge caused by the owner's negligence or by the owner's negligence cooperating with the negligence of the independent contractor.[49] Where a vessel strikes a bridge or pier and there is no fault imputable to those in charge of such structure, the vessel is liable for the damage which results, unless exonerated by showing that the collision was due to inevitable accident or that it could not have been avoided by adopting any practical precaution.[50] The United States may recover for injuries to a dike caused by the negligence of a steamship colliding therewith.[51] The owner of structures on the shore cannot recover for injuries thereto resulting from the operations of vessels, where the injuries are the result in part of such owner's negligence.[52]

e. Negligence of Pilot

The owner of a vessel is liable for the negligent acts of a pilot voluntarily employed by him, but, where the pilot is a compulsory one, the owner is not personally liable for his negligent acts, although by the admiralty law such negligence is imputable to the vessel, which may be held liable therefor in rem.

Where the pilot of a vessel is not a compulsory one in the sense that the owners or master of the vessel are bound to accept him, but is employed voluntarily, the owners of the vessel are liable for his negligent acts.[53] Statutory provisions, however, generally provide for compulsory pilotage of vessels, and, where the pilot is a compulsory pilot in the sense that he has compulsory charge of the vessel, he is in no sense an agent or servant of the owners of the vessel, and, under the English rule, neither the owners nor the vessel is liable for his negligent acts.[54] In the United States the owners of a vessel are not personally liable for the negligent acts of a compulsory pilot,[55] but by the admiralty law the fault or negligence of a compulsory pilot is imputable to the vessel and it may be held liable therefor in rem.[56] Where, however, by the provisions of the statute the pilot is compulsory only in the sense that his fee must be paid, and is not in compulsory charge of the vessel, there is no exemption from liability.[57] Whether or not

46. U.S.—Department of Highways v. McWilliams Dredging Co., D.C. La., 85 F.Supp. 714—City of Philadelphia v. S. C. Loveland Co., D.C. Pa., 81 F.Supp. 585—The Trenton, D.C.N.Y., 22 F.Supp. 833, affirmed, C.C.A., In re O'Brien Bros., 101 F.2d 1017—The Cromwell, D.C.N.C., 247 F. 207, affirmed Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., 259 F. 166, 170 C.C.A. 234.

N.Y.—Triborough Bridge Authority v. Bronx Towing Line, 52 N.Y.S.2d 62, 184 Misc. 254, affirmed 105 N.Y.S.2d 911, 278 App.Div. 917.

47. U.S.—Department of Highways v. McWilliams Dredging Co., D.C. La., 85 F.Supp. 714.

48. N.J.—Rickards v. Sun Oil Co., 41 A.2d 267, 23 N.J.Misc. 89.

Loss through destruction of egress and ingress

(1) Defendant's negligence in operation of barge destroying drawbridge forming part of county highway, thus destroying the only means of egress from, and ingress to, by roadway, island where plaintiffs' businesses were located, was not proximate cause of plaintiffs' losses from expected gains, and, hence, was not actionable.—Rickards v. Sun Oil Co., supra.

(2) On the other hand, in an action for damages due to collision of steamship with a canal bridge affording the only means of access to a pleasure pier, it was held that plaintiff's loss of profits from failure to operate pier was proximately caused by destruction of bridge, and could be recovered under proper pleadings and proof.—Magnolia Petroleum Co. v. Port Arthur, Tex.Civ.App., 209 S.W. 803, rehearing overruled 209 S.W. 991.

49. N.C.—State Highway & Public Works Commission v. Diamond S.S. Transp. Corp., 38 S.E.2d 214, 226 N.C. 371.

50. U.S.—U. S. v. South Carolina State Highway Dept., C.A.S.C., 171 F.2d 893—State Road Department of Fla. v. U. S., D.C.Fla., 85 F.Supp. 489—Freund v. The Chauncey M. Depew, D.C.N.Y., 45 F.Supp. 263.

51. U.S.—The Barbara Cates, D.C. Pa., 17 F.Supp. 241.

52. N.Y.—Wascin v. Bronx Towing Line, 68 N.Y.S.2d 547, 188 Misc. 462, motion for new trial denied 77 N.Y.S.2d 25.

Noncompliance with statute

The command of statute prohibiting tying up or anchoring vessels in navigable channels in such manner as to prevent or obstruct passage of other vessels is not absolute, but establishes standard of care applicable to ordinary negligence actions for damages, and, if plaintiff departs from such standard and his departure creates field of danger which it was object of statute to eliminate, he cannot complain if he has been injured through the concurring negligence of defendant.—Wascin v. Bronx Towing Line, supra.

53. U.S.—Southern States Towing Lines v. Lee Transit Corp., C.C.A. N.Y., 144 F.2d 101—Mobile Bar Pilots Ass'n v. C. I. R., C.C.A. Ala., 97 F.2d 695—New Jersey Bell Tel. Co. v. Standard Oil Co., N.J., D.C.N.Y., 88 F.Supp. 806—South Carolina State Highway Dept. v. U. S., D.C. S.C., 78 F.Supp. 598.

58 C.J. p. 301 note 89.

54. U.S.—Smith v. Condry, Dist.Col., 1 How. 28, 11 L.Ed. 35.

58 C.J. p. 302 note 91.

55. U.S.—Dampskibsselskabet Atalanta A/S v. U. S., C.C.A. La., 31 F.2d 961—Passaic Valley Sewerage Commissioners v. U. S., 81 Ct.Cl. 503.

Cal.—City of Los Angeles v. Grace S.S. Co., 2 P.2d 401, 116 Cal.App. 237.

58 C.J. p. 302 note 92.

56. U.S.—Harrison v. Hughes, Del., 125 F. 860, 60 C.C.A. 442, certiorari denied 24 S.Ct. 846, 191 U.S. 575, 48 L.Ed. 308.

58 C.J. p. 302 note 93.

57. N.C.—Saulter v. New York & W. Steamship Co., 88 N.C. 123, 43 Am. R. 736.

the pilot is compulsory, if his negligence was not the sole cause of the injury, but the negligence of the master or crew contributed thereto, the owners are liable.[58] A pilot is under a duty to exercise that degree of vigilance which is commensurate with the circumstances.[59]

§ 78. —— Misconduct of Master or Crew

The owners of a vessel, and the vessel, are liable for damages caused by the torts of the master committed within the scope of his employment, but not for damages arising from personal torts committed outside the course and scope of his employment.

The owners of a vessel, and the vessel, are liable for damages caused to third persons or strangers by the torts of the master committed within the scope of his employment,[60] but not for damages arising from personal torts committed by the master outside the course and scope of his employment.[61] By the civil law and common law the owners of a vessel are liable to the full amount for damages caused by the misconduct of the master,[62] but, by the general maritime law of Europe and this country, the responsibility of the owners for the torts of the master is limited to the value of the vessel and freight, and by abandoning these they are discharged from all personal responsibility[63] Neither the owner nor the vessel is responsible for the acts of one who without the owner's authority or consent assumes to act as master.[64] Owners are not liable for crimes committed by a captain outside the scope of his employment.[65]

Embezzlement by master. Where the master of a vessel undertakes, for the shipper, to sell cargo and remit the proceeds, he ordinarily does so as supercargo or factor of the shipper, and if he embezzles or fails to account to the shipper for such proceeds, the vessel or her owners will not be liable therefor,[66] unless the owners expressly authorize the master to act as such a factor,[67] or unless he has implied authority to do so by the usage of trade[68] Where the owners and crew are stockholders in the cargo in a whaling voyage, the owners are liable for the embezzlement of the cargo by the master,[69] unless they have used due care in selecting him[70]

§ 79. —— Persons Liable

Generally speaking, those persons are liable for torts committed in the operation of a vessel who at the time sustain the relationship of master or principal to the person in immediate control of the vessel; where at the time of the tort the owner of the vessel is, with respect to the persons in control, merely a bailor, such persons, rather than the owner, are liable.

As a general rule, those persons are liable for torts committed in the operation of a vessel who at the time sustain the relationship of master or principal to the person in immediate control of the vessel,[71] and while, as discussed supra §§ 76-

58. U.S.—The Emma T. Grimes, D C.N.Y., 2 F Supp. 319.
N.C.—State Highway & Public Works Commission v Diamond S. S Transp Corp., 38 S E 2d 214, 226 N C 371.
58 C.J. p 302 note 95

Failure to displace pilot
The captain or navigating officer of a vessel in charge of a compulsory pilot would not be justified in taking the vessel out of the pilot's hands, unless it was manifest that he was incompetent or incapacitated for the safe navigation of the vessel.—Passaic Valley Sewerage Commissioners v. U. S, 81 Ct Cl. 503.

59. U.S—The Jason, D C.N Y, 74 F. Supp 34—Passaic Valley Sewerage Commissioners v. U. S., 81 Ct.Cl 503.

Reliance on care of others
Pilot of vessel being maneuvered at pier on Brooklyn side of East River is entitled to assume that a deeply laden vessel in coming into river is holding herself on range as marked out by range lights and to make calculations of his own heading and speed accordingly.—The Jason, D.C. N.Y, 74 F.Supp. 34.

60. U.S—Lamb v. Interstate S S. Co., C C A Ohio, 149 F 2d 914.
58 C J. p 302 note 97.

61. U.S.—The Aberfoyle, D C N Y, 1 F Cas No 16, Abb Adm 242, affirmed, C C, 1 F Cas No.17, 1 Blatchf 360
58 C J p 302 note 98.

Master acting as commodore of convoy
Steamship whose master was serving as commodore of convoy could not be held liable in rem for collision between another steamship, which was a member of convoy, and a sailing schooner on ground that its master had failed to issue order to masters of other ships to change course or speed, since the ship could not be held liable for faults charged to master relating to his duties as commodore—The Lillian E Kerr, D C.N.Y, 71 F.Supp 184, affirmed, C C. A., Publicover v. Alcoa S. S Co, 168 F 2d 672

62. U S—The Rebecca, D C Me., 20 F.Cas No 11,619, 1 Ware 187—Stinson v. Wyman, D C Me, 23 F.Cas No 13,460, 2 Ware 176.

63. U S—The Rebecca, D C Me, 20 F.Cas.No 11,619, 1 Ware 187—Stinson v. Wyman, D.C.Me., 23 F.Cas No.13,460, 2 Ware 176

64. U S.—The Calypso, Cal., 230 F. 962, 145 C C.A. 156.

65. U.S.—Ralston v. The State Rights, D C.Pa, 20 F.Cas No.11,540, Crabbe 22.

66. U S—The Alice, D C.Wash, 172 F. 527.
58 C J p 303 note 4

67. Pa—Taylor v. Wells, 3 Watts 65.

68. Ohio.—The Jane Louisa v Williams, 1 Ohio Dec, Reprint, 228.
58 C J p 303 note 6.

69. U S—Joy v. Allen, C C.Mass., 13 F.Cas No 7,552, 2 Woodb. & M. 303.

70. U S—Joy v. Allen, supra.

71. U.S—Scull v. Raymond, D.C.N. Y., 18 F. 547.
58 C.J. p 303 note 10.

A company owning stock in corporation owning tug and barge was not an owner thereof, and was not liable for loss arising from sinking of such vessels.—The Cleveco, D.C.Ohio, 59 F Supp. 71, affirmed, C C.A., 154 F 2d 605.

Independent contractor
One who is under contract to dock or undock a vessel is responsible as principal for the negligence of the agent whom the contractor places on the ship in charge of operations—Publicker Industries v. American-Hawaiian S. S. Co, D C.Pa., 78 F.Supp. 223.

78, ordinarily the owner of the vessel is the person liable for torts, where his relationship to the persons in control of the vessel is merely that of bailor, he is not liable,[72] but those in control are responsible to the person injured.[73] Where the owners of several vessels form a partnership or hold themselves out as engaged in a joint enterprise, they are jointly liable for the default or negligence of those placed in charge of any of the vessels,[74] or each partner is liable for damages caused by the negligence of the servants and agents of the partnership while conducting its business[75] Moreover, where property is damaged through the concurrent fault of two vessels, both wrongdoers are liable to the injured person.[76] A corporation which has advertised itself as being the operator of a vessel cannot thereafter escape liability for loss of vessel, cargo, and passengers by showing that it in fact had no interest in the ship.[77]

§ 80. —— Lien

As a general rule, there is a maritime lien for the injury inflicted by a maritime tort.

It is well settled that there is a maritime lien for the injury inflicted by a maritime tort, with but few exceptions.[78] Thus, conversion by the master of goods shipped on the vessel is a tort which gives rise to a maritime lien.[79] A lien on a vessel for a maritime tort is enforceable only in the federal courts,[80] and courts other than courts of admiralty cannot enforce such a lien.[81] In some states a lien for torts not within admiralty jurisdiction is expressly provided for by statute[82]

A collision imposes a maritime lien on the wrongdoing vessel,[83] which is superior to all preëxisting liens,[84] except possibly sailors' liens for wages[85] While such a lien may be lost by laches,[86] except where so lost it follows the vessel into whosesoever hands the vessel may come.[87] A lien accorded by the maritime law for a maritime tort is a proprietary interest which travels with the vessel and may be enforced notwithstanding she has been sold in a jurisdiction other than that in which the tort was committed.[88] Possession is not necessary to the validity of this lien.[89] For the purposes of the lien the ship is considered as consisting of hull and engines, tackle, apparel, and furniture of all kinds,[90] including wireless equipment rented to the ship under a license agreement[91] Liens on a vessel for several collisions are entitled to priority in the inverse order of the happening of the collisions[92] A lien for collision is inchoate at the moment of the

Agent's liability for acts of subagent

Under operating agreement whereby defendant operated ship owned by United States Maritime Commission, a governmental agency, and had authority to select officers and crew, subject to approval of commission, master of ship was "subagent" of defendant, and, hence, responsibility for master's negligent operation of ship would rest on defendant.—Quinn v Southgate Nelson Corp, D C N Y, 36 F Supp 873, affirmed, C C A, 121 F 2d 190, certiorari denied Southgate Nelson Corp. v. Quinn, 62 S Ct. 135, 314 U S 682, 86 L.Ed 546

72. U S.—Pope v. Seckworth, D C. Pa, 47 F. 830

Duty of owner through bargee

With respect to liability for injuries caused by scow which broke loose, owner of scow, chartered by another, owed no duty, through its bargee, to surrounding shipping to remove or secure scow, lying in exposed position, previous to storm — Moran Towing & Transportation Co. v Sunset Lighterage Corporation, C C.A.N.Y., 62 F.2d 761.

73. U S.—Pope v. Seckworth, D.C. Pa., 47 F. 830.

74. U.S —Sun Mut. Ins. Co. v. Kountz Line, La, 7 S Ct. 1278, 122 U.S. 583, 30 L Ed. 1137.

75. U.S.—Bowas v. Pioneer Tow Line, D C Cal, 3 F.Cas No.1,713, 2 Sawy. 21.

76. U.S —The Nonpareil, D.C N Y, 12 F Supp 985.

Failure to perfect lien

Where tow was damaged by fault of towing tug and another vessel, fact that lien was not perfected on towing tug and stipulation for value was not exacted did not take case out of general rule as to amount of recovery against two wrongdoers for damage to innocent third person — The Nonpareil, supra

77. U S —The Jane Gray, D C.Wash., 99 F. 582

78. U S —The Atlanta, D.C Ga, 82 F Supp 218—The Seefahrer, D C. N.Y., 143 F. 697.
58 C.J. p 303 note 18.

79. U S —The Escanaba, D C Ill, 96 F. 252.

80. La —Young v. The Princess Royal, 22 La.Ann. 388, 2 Am R. 731

81. La.—Stevenson v. Edwards, 24 La Ann. 267.
58 C J. p 303 note 21.

82. U S —Sewerage & Water Board of New Orleans v The Cumulus, C. A La., 172 F.2d 102.
58 C J. p 303 note 22.

Validity of statute

(1) A state statute giving a lien on a vessel enforceable in rem is valid when it does not usurp admiralty jurisdiction.—Martin v West, Wash, 32 S Ct. 42, 222 U S 191, 56 L Ed 159, 36 L R A.,N.S., 592—Johnson v. Chicago, etc, El Co, Ill, 7 S.Ct. 254, 119 U.S 388, 30 L Ed 447.

(2) A state statute providing a remedy for a tort happening within its jurisdiction and applying a lien against a foreign vessel through whose fault the damages occurred is constitutional —Cordrey v. The Bee, 201 P. 202, 102 Or 636, 20 A L. R. 1079.

83. U S.—The John G Stevens, N Y, 18 S Ct. 544, 170 U.S. 113, 42 L Ed. 969.
58 C J p 304 note 23.

84. U S.—The Augusta, D C La, 15 F 2d 727.

85. U.S.—The Augusta, supra.

86. U S —The Admiral, D C Mass, 1 F.Cas No 84
58 C J p 304 note 26.

87. U S.—The China, N Y., 7 Wall. 53, 19 L Ed 67.
58 C J. p 304 note 27.

88. U S —The Avon, C C Ohio, 2 F. Cas No 680, Brown Adm. 170
58 C J. p 304 note 28.

89. U S —The China, N Y., 7 Wall. 53, 19 L Ed. 67—The Admiral, D C. Mass, 1 F Cas.No.84.

90. U S.—The Augusta, D C La, 15 F 2d 727.

91. U.S —The Augusta, supra.

92. U.S —The America, D C.N.J., 168 F. 424.
58 C J. p 304 note 32.

collision, and must be perfected by subsequent proceedings.[93] No maritime lien arises out of a collision with a bridge.[94]

§ 81. Actions and Other Proceedings

a. In general
b. Parties, process, notice, and pleading
c. Evidence
d. Trial
e. Damages and costs

a. In General

General rules, as affected by general or special statutes relating thereto, govern actions or proceedings against vessels or owners.

General rules, as affected by general or special statutes relating thereto, govern actions or proceedings against vessels or owners.[95] Debt on a simple contract, rather than covenant, is the proper form of action on a written memorandum of a ship's clerk for wages due for services on the ship.[96]

Whether an action against a vessel or her owner may be brought in a state court or must be brought in a court of admiralty depends on whether the admiralty court has exclusive jurisdiction of the question, under the rules discussed in Admiralty §§ 5–65.

b. Parties, Process, Notice, and Pleading

Except as regulated by special statutory provisions, the general rules applicable in civil actions, or in admiralty, as the case may be, apply in actions to enforce the rights and liabilities of vessels and their owners with respect to parties, process, notice, and pleading.

Except in so far as they are regulated by special statutory provisions, the general rules applicable in civil actions, or, where brought in an admiralty court, the rules applicable in admiralty cases, apply in actions or proceedings to enforce the rights and liabilities of vessels and their owners, with respect to questions of parties,[97] process,[98] and notice.[99]

Pleading. Except where such actions are regulated by special statutes,[1] the rules of pleading in civil actions generally, and, where applicable, the rules of pleading in admiralty, apply in actions or proceedings by or against the owner or vessel.[2] All material facts necessary to constitute plaintiff's cause of action must be alleged,[3] and all matters of defense must be alleged in the answer.[4] Where the action is brought under a state statute the declaration or complaint should show the applicability of the statutory provisions to the cause of action.[5] Where plaintiff seeks to recover for negligence in the operation of the ship after discovery of peril he must conform to the rule prevailing in actions for negligence generally, as discussed in Negligence §

93. U.S.—The Helen, C.C.A.N.Y., 5 F.2d 54.

94. U.S.—The Rock Island Bridge, Ill., 6 Wall. 213, 18 L.Ed. 753

95. Mich.—The City of Erie v. Canfield, 27 Mich. 479.
58 C.J. p. 304 note 38.

Statutes construed
U.S.—Freeman v. A. H. Bull S.S. Co., C.C.A. Fla., 125 F.2d 774
58 C.J. p. 304 note 38.

In rem or in personam
Where bridge was not used for the preservation and improvement of navigable waters of the United States, and had no connection, direct or remote, with navigation or preservation or improvement of navigable waters, and was not used for any of the other purposes enumerated in provision of the Rivers and Harbors Act relating to injury to harbor or river improvements, but bridge was built and apparently maintained by the department of agriculture in connection with one of its experimental stations, proceeding in rem against vessel could not be maintained by the United States for damages to bridge from collision, but dismissal of proceeding would be without prejudice to proceed against vessel owners.—The Dixie, D.C.Tex., 39 F.Supp. 395.

96. Ky.—Pell v. Dickens, 3 B.Mon. 57.

97. N.Y.—Sager v. Nichols, 1 Daly 1.
58 C.J. p. 305 note 41.

Who may sue
(1) Where a bridge was built and had always been maintained by the town, an action for injury thereto was properly brought in the name of the town.—Menasha v. The Portage, 26 Wis. 534

(2) City and county having sufficient title to bridge may maintain action for damage resulting when tug struck piling of bridge.—City and County of San Francisco v. U.S., D.C.Cal., 82 F.Supp. 313

Highway department as corporation
Even though department of highways is not a "corporation" in the true sense of statute creating it, it was given the same rights as a corporation and, therefore, for purposes of suit by department to recover for damages to bridge maintained by department as result of collision with bridge by ship, rules applicable to corporations are applicable thereto.—Department of Highways v. Lykes Bros. S.S. Co., 24 So.2d 623, 209 La. 381.

98. Ark.—Ford v. Adams, 15 S.W. 186, 54 Ark. 137.
58 C.J. p. 305 note 42.

99. N.J.—Howell v. Gaddis, 31 N.J. Law 313
58 C.J. p. 305 note 43.

1. Mo.—The Blue Ridge v. The Time, 9 Mo. 650
58 C.J. p. 305 note 45.

2. **Modification**
Although original libel exhibited as a single account libelant's dealings with vessel on three voyages seeking recovery for general balance, a later pleading which set up that there were three separate voyages and that what was claimed was a cash advance on the first voyage, and small balance of cash advance on last voyage, and the supplies for the last voyage, was effectual to modify the claim.—Pavlis v. Jackson, C.C.A. Fla., 131 F.2d 362, certiorari denied 63 S.Ct. 761, 318 U.S. 769, 87 L.Ed. 1140.

3. Mich.—Cheboygan Lumber Co. v. Delta Transp. Co., 58 N.W. 630, 100 Mich. 16
58 C.J. p. 305 note 49

4. Hawaii.—Pacific Mail S.S. Co. v. The Pacific, 3 Hawaii Fed. 24
58 C.J. p. 305 note 50.

5. Ohio.—Borden v. The Eagle, 1 Ohio Dec., Reprint, 473, 10 West.L.J. 137
58 C.J. p. 305 note 51.

191, requiring plaintiff to allege that defendant's servants saw or should have seen plaintiff's peril,[6] and that plaintiff's peril was obvious or was known to defendant's servants.[7] Since, as discussed supra § 74, the person in possession and control is liable as owner for supplies furnished the vessel, a mortgagee in possession is properly described as owner in a declaration or complaint for supplies furnished.[8]

c. Evidence

(1) Burden of proof and presumptions
(2) Admissibility
(3) Weight and sufficiency

(1) Burden of Proof and Presumptions

The general rule that the party having the affirmative of an issue has the burden of proving his claim applies to actions by or against vessels and their owners; the mere fact of an injury to or by a vessel does not create a presumption of negligence, but in a proper case the doctrine of res ipsa loquitur may be applied.

In accordance with the general rule, discussed in Evidence § 104, that the burden of proof is on him who has the affirmative of an issue, plaintiff has the burden of proving every fact material to his cause of action where he seeks to recover for services rendered the vessel[9] or advances;[10] and, where negligence is the basis of a party's claim, the burden is on him to prove all the essential elements of the cause of action,[11] such as negligence,[12] the identity of the vessel claimed to have caused the injury,[13] freedom from contributory negligence, where that is the rule in negligence actions generally,[14] and the amount of damages.[15] Defendant or libelee has the burden of proving his defenses or offsets,[16] and one seeking exoneration from liability on a claim based on negligence has the burden of proving his freedom from negligence.[17]

Presumptions and res ipsa loquitur. The mere fact that a vessel suffered or caused injuries does not of itself, apart from causative factors, create a presumption of negligence.[18] However, the doctrine of res ipsa loquitur, discussed generally in Negligence §§ 220(2)–220(12), may be applied in proper cases so as to relieve the claimant of the burden of proving negligence or so as to place on the adverse party the burden of exoneration.[19] The presumption of

6. Ala.—Daniels v. Carney, 42 So. 452, 148 Ala. 81, 121 Am.S.R. 34, 7 L.R.A.,N.S., 920, 12 Ann.Cas. 612
58 C.J. p. 305 note 53

7. Ala.—Daniels v. Carney, supra.
58 C.J. p. 305 note 54.

8. Mass.—Luce v. Hadley, 119 Mass. 229.

9. Va.—Bardach Iron, etc., Co. v. Charleston Port Terminals, 129 S.E. 687, 143 Va. 656

10. Mass.—Bass v. O'Brien, 12 Gray 477.

11. **Precise cause of injury**
Where it is proved that complaining vessel was crowded out of her course by negligent navigation of a passing vessel, the precise character of the underwater obstacle which caused damage need not be established in order to impose liability on passing vessel.—The Fidelity, D.C.N.Y., 43 F.Supp. 180

12. U.S.—Smith Scow Corp. v. Seaboard Great Lakes Corp., C.C.A.N.Y., 146 F.2d 535—The Barbara, D.C.Mass., 62 F.Supp. 265—In re Defense Plant Corp., D.C.Tenn., 58 F.Supp. 931—The Marmor, D.C.N.Y., 43 F.Supp. 942
Ill.—Batchelder v. Hecla Transp. Co., 178 Ill.App. 105.
58 C.J. p. 306 note 61.

In proceeding for exoneration from liability
U.S.—The Hygrade No. 18, D.C.Mass., 41 F.Supp. 304.

13. U.S.—The Fidelity, D.C.N.Y., 43 F.Supp. 180.

14. Ill.—Batchelder v. Hecla Transp. Co., 178 Ill.App. 105

15. U.S.—City of Philadelphia v. S.C. Loveland Co., D.C.Pa., 81 F.Supp. 585.
Measure of damages see infra subdivision e of this section

16. U.S.—State Road Department of Fla. v. U.S., D.C.Fla., 85 F.Supp. 489, affirmed, C.A., U.S. v. State Road Dept. of Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291—The Daly No. 48, D.C.N.Y., 45 F.Supp. 279
58 C.J. p. 306 note 63.

Libelee violating statutory rule
Libelee or defendant, as the case may be, if violating statutory rule at time of accident, has burden of showing that his fault could not have contributed to disaster.
U.S.—Canada S.S. Lines v. Great Lakes Dredge & Dock Co., C.C.A.Ill., 81 F.2d 100—South Carolina State Highway Dept. v. U.S., D.C.S.C., 78 F.Supp. 598, affirmed, C.A., 171 F.2d 893
Wis.—City of Marinette v. Goodrich Transit Co., 140 N.W. 1094, 153 Wis. 92, Ann.Cas.1917B 935.

The Major and Minor Fault Rule, namely, that where the fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the accident, it is not enough for such vessel to raise a doubt with respect to the management of the other vessel, is inapplicable where the fault of the one vessel is not of itself sufficient to account for the accident.—The Barge No. 16, C.C.A.Va., 152 F.2d 76

Inevitable accident
Defendant pleading inevitable accident or act of God has the burden of proving such defense; and he must prove that the accident occurred wholly through an act of God and entirely without fault on the part of defendant's agents.—State Road Department of Fla. v. U.S., D.C.Fla., 85 F.Supp. 489, affirmed, C.A., U.S. v. State Road Dept. of Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291

Maintenance of lookout
Every doubt as to performance of duty of vessel to maintain lookout and effect of nonperformance should be resolved against vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.—Agger v. The Beatrice and Rose, D.C.Me., 84 F.Supp. 761.

17. U.S.—The Trenton, D.C.N.Y., 22 F.Supp. 833, affirmed, C.C.A., In re O'Brien Bros., 101 F.2d 1017.

18. Wash.—Pacific Coast R. Co. v. American Mail Line, 172 P.2d 226, 25 Wash.2d 809.

19. U.S.—Ladd v. U.S., D.C.Va., 97 F.Supp. 80, affirmed, C.A., U.S. v. Ladd, 193 F.2d 929—State Road Department of Fla. v. U.S., D.C.Fla., 85 F.Supp. 489, affirmed, C.A., U.S. v. State Road Dept. of Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291
Cal.—California Union Oil Co. v. Rideout, 177 P. 196, 38 Cal.App. 629.

negligence arising from the collision of a moving vessel with a vessel at anchor, discussed in Collisions § 168, applies to a collision with any stationary or immovable object,[20] such as an object or structure fixed to the land,[21] or with stationary aids to navigation, such as dolphins,[22] or to injuries caused otherwise than by collision to a moored vessel,[23] as, for example, injuries to moored vessel or other fixed objects by swells from the passing vessel,[24] although, as to the latter proposition, the contrary has also been held.[25] Such presumption is only prima facie[26] and is subject to rebuttal by evidence tending to negative the inference of negligence;[27] and the presumption is available only against a person who was in control of the movement of the vessel, and not to a person whose control of the vessel's movement had been turned over to an independent contractor employed to pilot the vessel.[28]

Where it is shown that supplies were furnished a vessel which defendants own, the presumption arises that the vessel was operated for their benefit.[29]

Facts justifying application of doctrine

In admiralty proceeding by United States to limit liability arising out of fire and explosion on Coast Guard boat, evidence showing that leaks in tank and open fuel line could have caused accumulation of fumes and that there was an explosion extraordinary in character which would not have occurred if one having control had used proper care, justified application of doctrine of res ipsa loquitur in absence of other explanation or evidence of regular inspections.—Austerberry v. U. S, C A Mich, 169 F 2d 583.

Exclusive control

In admiralty proceeding by United States to limit liability arising out of explosion and fire on Coast Guard boat, where crew and commanding officer were on board at time of explosion exercising control, although boat was out of water in boat yard, for purposes of applying doctrine of res ipsa loquitur, boat would be considered to have been under exclusive control of Coast Guard in determining negligence of government.—Austerberry v. U. S., supra.

20. U.S.—P. Dougherty Co v U. S, D C Del, 97 F Supp 287—City of Philadelphia v. S C. Loveland Co., D.C Pa., 81 F.Supp 585
N C.—State Highway & Public Works Commission v. Diamond S S. Transp. Corp, 38 S E 2d 214, 226 N.C. 371.

21. U S—State Road Department of Fla v. U S, D C Fla, 85 F Supp 489, affirmed, C.A, U. S v. State Road Dept. of Fla, 189 F 2d 591, certiorari denied 72 S.Ct 291—City of Philadelphia v S. C. Loveland Co., D C.Pa, 81 F.Supp 585—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co, N. C., 259 F. 166, 170 C C.A. 234.
Cal.—San Francisco Bay Toll-Bridge Co v Leslie California Salt Co, 25 P 2d 268, 134 Cal App 237.
Del.—Pennsylvania R Co v Eastern Transp. Co., 178 A. 580, 6 W.W Harr 435
58 C.J. p 306 note 66.

22. U S—U S. v Eastern Transp Co, D C Md, 50 F Supp 815

23. N Y—Wascin v. Bronx Towing Line, 68 N Y S 2d 547, 188 Misc 462, motion for new trial denied 77 N Y S 2d 25.

24. U S—West India Fruit & S. S Co v Raymond, C A Fla., 190 F 2d 673—Western Oil & Fuel Terminal Co. v The Elisha Woods, D C Ky., 89 F Supp 862—Martin Marine Transp Co v. U. S, D C.Pa, 66 F Supp. 673—The Rotherfield, D.C. Ala, 123 F 460
58 C J. p 306 note 67.

Necessity of proper mooring and seaworthiness

The mere evidence that damage to moored ship results from swells of passing vessel is insufficient on which to base a recovery, since a duty exists on ship to be seaworthy and so moored as not to be damaged by ordinary swells created by a passing ship—Martin Marine Transp Co v. U. S, D C Pa, 66 F Supp. 673

25. U.S—The Washington, D C Va, 182 F. 885

26. U.S—West India Fruit & S S Co v Raymond, C A Fla, 190 F.2d 673—City of Philadelphia v S C Loveland Co., D C Pa, 81 F Supp 585—U S. v. Eastern Transp Co, D.C Md, 50 F Supp 815.
N Y—Wascin v Bronx Towing Line, 68 N Y S 2d 547, 188 Misc. 462, motion for new trial denied 77 N Y S 2d 25.

Conflicting evidence

Presumption of negligence from collision of vessel with bridge is but evidence of negligence which may be overcome by other evidence creating conflict, and trial court must determine conflict.—San Francisco Bay Toll-Bridge Co. v Leslie California Salt Co., 25 P 2d 268, 134 Cal App 237.

27. U S—West India Fruit & S S Co v Raymond, C A.Fla, 190 F 2d 673—P. Dougherty Co. v. U S., D C Del, 97 F Supp. 287—City of Philadelphia v. S C Loveland Co, D C Pa., 81 F.Supp. 585—Wilmington Ry Bridge Co. v. Franco-Ottoman Shipping Co., N.C., 259 F. 166, 170 C C A 234
Del—Pennsylvania R. Co. v. Eastern Transp. Co, 178 A 580, 6 W W. Harr 435.
N.Y.—Triborough Bridge Authority v. Bronx Towing Line, 52 N.Y S 2d 62, 184 Misc 254, affirmed 105 N. Y.S 2d 911, 278 App.Div 917.

Sufficiency of rebuttal evidence

(1) Evidence showing that owner of derrick lighter, which had no power or steering apparatus and was under exclusive command of master of tug having it in tow, was free from negligence in connection with collision with bridge overcame presumption of negligence against owner of a moving vessel in colliding with a bridge—Triborough Bridge Authority v Bronx Towing Line, supra

(2) In action by state road department against the United States for damage to bridge struck by vessels of the United States in harbor when severe wind caused vessels to drag anchor and collide with bridge, the law of averages could not be made criterion of liability, and fact that fourteen vessels dragged anchor and seven did not and that only five collided with bridge was merely circumstances to be considered, and each vessel was required to show that it exercised proper care under the circumstances—State Road Department of Fla. v U S, D C Fla, 85 F Supp. 489, affirmed, C.A., U. S v State Road Dept of Fla, 189 F 2d 591, certiorari denied 72 S Ct. 291.

Inevitable accident

Where a drifting ship collides with an object which is in no way at fault, the ship must show affirmatively that drifting was the result of inevitable accident which human skill and precaution could not have prevented—South Carolina State Highway Dept v U. S, D C S.C., 78 F Supp 598, affirmed, C.A., 171 F 2d 893.

28. N C—State Highway & Public Works Commission v. Diamond S. S Transp. Corp, 38 S E 2d 214, 226 N C 371.

29. Pa—Blackstock v. Leidy, 19 Pa. 335.

(2) Admissibility

The general rules governing admissibility of evidence in civil actions or in admiralty, as the case may be, apply in actions or proceedings by or against vessels or their owners.

The general rules governing the admissibility of evidence in civil actions, or proceedings in admiralty when the suit is brought in an admiralty court, apply to actions or proceedings by or against the vessel or her owners.[30]

(3) Weight and Sufficiency

The weight and sufficiency of evidence in actions by or against vessels or their owners is governed by the general rules applicable in civil actions or in admiralty, as the case may be.

As in civil actions generally, as discussed in Evidence § 1018, or proceedings in admiralty, as discussed in Admiralty § 140, the rule requiring the party having the burden of proving a disputed issue of fact to do so by a preponderance of the evidence applies in actions or proceedings by or against a vessel or her owners on contract[31] Testimony which is uncontradicted and not inherently improbable should be accepted as true[32] One who seeks to recover damages for injuries sustained by reason of the negligent management or navigation of a vessel must establish such negligence by a preponderance of the evidence,[33] and the evidence

30. Wis.—Atkinson v. Goodrich Transp. Co., 31 N.W. 164, 69 Wis. 5.
58 C.J. p. 306 note 72, p. 321 note 17 [d] (1).

Evidence held admissible

Mass.—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 355.
58 C.J. p. 306 note 72 [a].

31. U.S.—The Garfield No. 6, D.C. Wash., 36 F.2d 501.
58 C.J. p. 306 note 76.

Evidence held sufficient

(1) In general.—International Bureau v. Bethlehem Steel Co., C.A.N.Y., 192 F.2d 304—Gibbons Engineering & Mach. Co. v. U.S., D.C.Mass., 87 F.Supp. 207—58 C.J. p. 306 note 76 [a].

(2) To justify or warrant recovery on contract generally.—Rathbun v. Halvorson, C.A.Fla., 181 F.2d 57—The Paul E. Thurlow, D.C.N.Y., 53 F. Supp. 362.

(3) To show or sustain findings as to terms of contract.

U.S.—Cramp Shipbuilding Co. v. Luckenbach S. S. Co., C.A.Pa., 181 F.2d 939—The Ky-Ill, C.C.A.Ky., 50 F.2d 70.

La.—Baer v. Chatellier, App., 34 So. 2d 798.

(4) To justify recovery of particular amount for repairs to ship.—Hugo v. Hedger S. S. Corp., C.C.A.N.Y., 142 F.2d 349—Manchester Marine Ry. & Const. Co. v. The Annie, D.C.Mass., 101 F.Supp. 748.

(5) To establish that repair work on boat was so defectively done as to be of no benefit to owner of boat.—Walter E. Canulette & Son v. Clesi, La.App., 39 So. 2d 853.

(6) To sustain finding that labor, materials, and supplies were furnished at request of defendant, either himself or acting through his agent, as against defendant's contention that, although he owned the vessel he was allowing another to use it without himself sharing in the profits and that he was not connected with vessel's operation by agency between himself and the operator.—Crofton v. Pappas, 171 P.2d 959, 75 Cal. App. 2d 814.

Evidence held insufficient

(1) To establish that employee of stevedoring contractor stole missing cargo.—Remington Rand, Inc. v. U.S., D.C.N.Y., 98 F.Supp. 334.

(2) To establish defendant's reconventional demand for payment on cost plus basis.—Baer v. Chatellier, La.App., 34 So. 2d 798.

(3) To show other matters.—The O'Leary, D.C.Pa., 74 F.Supp. 313—58 C.J. p. 306 note 76 [b].

Evidence of matters exclusively within knowledge of one party

In action against boat repairman to recover alleged overpayments made on oral contract as result of padded bills for work done, wherein repairman filed a reconventional demand, testimony of repairman would be carefully scrutinized where plaintiffs were unable to produce any evidence touching on number of workmen employed by repairman and number of hours actually required to repair the damage.—Baer v. Chatellier, La.App., 34 So. 2d 798.

32. U.S.—The Trenton, D.C.N.Y., 22 F.Supp. 833, affirmed, C.C.A., In re O'Brien Bros., 101 F.2d 1017.

33. U.S.—Agger v. The Beatrice and Rose, D.C.Me., 84 F.Supp. 761.
58 C.J. p. 307 note 77.

Evidence held sufficient

(1) In general.—Agger v. The Beatrice and Rose, D.C.Me., 84 F.Supp. 761—Lynch v. The Edward S. Atwood, D.C.N.Y., 82 F.Supp. 722, reversed on other grounds, C.A., Lynch v. Agwilines, Inc., 184 F.2d 826, opinion supplemented 186 F.2d 796—M. & J. Tracey, Inc., v. The Lucijana, D.C.N.Y., 47 F.Supp. 727—The Daly No. 67, D.C.N.Y., 45 F.Supp. 641—The Fidelity, D.C.N.Y., 43 F.Supp. 180—The Isabel A. McAllister, D.C.N.Y., 38 F.Supp. 585—58 C.J. p. 307 note 77 [a].

(2) To identify vessel causing damage.—The Emma T. Grimes, D.C.N.Y., 2 F.Supp. 319.

(3) To show plaintiff's ownership of damaged property.—City and County of San Francisco v. U.S., D.C.Cal., 82 F.Supp. 313.

(4) To establish unseaworthiness of vessel.—O'Brien Bros. v. Moran Towing Corp., D.C.N.Y., 66 F.Supp. 614, affirmed, C.C.A., Beard's Erie Basin v. O'Brien Bros., 162 F.2d 176.

(5) To show that damage was caused by negligence of particular party or his agents.—U.S. v. South Carolina State Highway Dept., C.A.S.C., 171 F.2d 893—U.S. v. The John R. Williams, C.C.A.N.Y., 144 F.2d 451, certiorari denied Great Lakes Dredge & Dock Co. v. U.S., 65 S.Ct. 271, 323 U.S. 782, 89 L.Ed. 625—Ladd v. U.S., D.C.Va., 97 F.Supp. 80, affirmed, C.A., U.S. v. Ladd, 193 F.2d 929—D. M. Picton & Co. v. U.S., D.C.Tex., 96 F. Supp. 1010—Agger v. The Beatrice and Rose, D.C.Me., 84 F.Supp. 761—City and County of San Francisco v. U.S., D.C.Cal., 82 F.Supp. 313—City of Philadelphia v. S.C. Loveland Co., D.C.Pa., 81 F.Supp. 585—South Carolina State Highway Dept. v. U.S., D.C.S.C., 78 F.Supp. 598, affirmed, C.A., 171 F.2d 893—The Daly No. 67, D.C.N.Y., 45 F.Supp. 641—The Daly No. 48, D.C.N.Y., 45 F.Supp. 279—The Barbara Cates, D.C.Pa., 17 F.Supp. 241—The McAllister No. 55, D.C.N.Y., 7 F.Supp. 470—Memphis & C. Packet Co. v. Overman Carriage Co., C.C.Ohio, 93 F. 246.

(6) To show that accident was due to act of God.—Pleasure Beach Park Co. v. Bridgeport Dredge & Dock Co., 165 A. 691, 116 Conn. 496.

(7) To show that particular party's management or navigation was sole cause of damage.—The Agnes A. Moran, C.C.A.N.Y., 143 F.2d 964—The Julia C. Davin, C.C.A.N.Y., 70 F.2d 268—Petition of Texas Co., D.C.N.Y., 99 F.Supp. 340—Eastern Transp. Co. v. The Vera Cruz, D.C.N.Y., 94 F. Supp. 695, affirmed, C.A., 186 F.2d 305—Board of Chosen Freeholders of Cumberland County v. J. V. Paxson

may be sufficient even though it is circumstantial.[34] The party having the burden of proof must, by sufficient evidence, identify the offending vessel,[35] and establish the responsibility of defendant for its management or navigation at the time and place of the injury,[36] and defendant must establish contributory negligence by a preponderance of evidence.[37] Where plaintiff's evidence shows that the negligent management or navigation was the proximate cause of the injury, defendant must rebut such evidence.[38] Where libelees were not present at the survey of a damaged boat, strictest proof of the character and extent of the damage is required.[39] The owner is not required to repair the vessel in order to establish the amount of the damages, but may liquidate the damages by expert testimony;[40] such method of proof, however, should only be permitted in cases of special circumstances which necessitate a departure from the ordinary rule.[41]

d. Trial

The general rules governing trials in civil actions or in admiralty, as the case may be, apply in an action by or against a vessel or its owner.

The general rules governing the trial of civil actions, or, where brought in that court, the rules in admiralty, apply to actions or proceedings by or against a vessel or her owner. Accordingly, in an action for supplies, the weight to be given to evi-

Co, D C N J, 196 F 156, affirmed J W Paxson Co. v. Board of Chosen Freeholders of Cumberland County, 201 F. 656, 120 C C A. 84.

(8) To show that vessel causing heavy swells travelled at excessive speed under the circumstances — Ladd v. U S, D C Va, 97 F Supp 80, affirmed, C A., U S v Ladd, 193 F 2d 929—Western Oil & Fuel Terminal Co v. The Elisha Woods, D C Ky, 89 F Supp 862—The Vijax No 2, D C N Y, 27 F Supp. 159—The Julia C Davin, D C N Y, 6 F.Supp 691, reversed on other grounds, C C A, 70 F 2d 268.

(9) To show absence of causal connection between parting of hawser line and sinking of barge when two of lines by which barge was fastened to derrick parted during a rough sea permitting barge to move over submerged piling which penetrated its bottom — The Barge No. 16, C C.A. Va, 152 F.2d 76.

(10) To show contributory negligence.

U.S — Agger v. The Beatrice and Rose, D C Me, 84 F.Supp 761.

Cal.—San Francisco Bay Toll-Bridge Co v. Leslie California Salt Co., 25 P.2d 268, 134 Cal.App. 237.

(11) To support findings.

U S — U. S v. Ladd, C A.Va., 193 F 2d 929—Westchester Fire Ins Co v Buffalo Housewrecking & Salvage Co, C C A N.Y, 129 F 2d 319—Standard Oil Co of New York v. Mascarenhas, C.C A Mass, 59 F 2d 341—The Bumble Bee, D.C N.Y., 1 F.Supp 327, affirmed, C.C.A., Ira S Bushey & Sons v. Huron Stevedoring Co, 64 F.2d 1014.

Cal — San Francisco Bay Toll-Bridge Co. v Leslie California Salt Co, 25 P.2d 268, 134 Cal.App. 237.

Wis — City of Marinette v Goodrich Transit Co., 140 N.W. 1094, 153 Wis. 92, Ann.Cas 1917B 935.

Evidence held insufficient

(1) To show negligence or fault generally.

U S — Great Lakes Dredge & Dock Co v. Metropolitan Sand & Gravel Corp, D C N Y., 82 F Supp. 595—The C G R-180, D C.Mich, 70 F. Supp 975—Martin Marine Transp Co v U S, D.C Pa, 66 F Supp. 673—The Graebner, D C N.Y., 66 F. Supp. 456—U S. v Eastern Transp. Co, D C Md, 50 F.Supp. 815—The Marmor, D C N Y, 43 F Supp. 942—The Fidelity, D C N Y., 43 F Supp 180—Wilmington Ry. Bridge Co. v Franco-Ottoman Shipping Co, N C, 259 F 166, 170 C C.A 234.

Ill — City of Chicago v Great Lakes Dredge & Dock Co, 53 N E 2d 34, 321 Ill App 300.

La.—Walter E Canulette & Son v. Clesi, App, 39 So 2d 853.

58 C J p 307 note 77.

(2) To show damage was due to inevitable accident.

U S — State Road Department of Fla v U S., D C Fla, 85 F Supp 489, affirmed, C A, U S v State Road Dept of Fla, 189 F 2d 591.

N.Y.—Nicholas v Pfeifer Oil Transp Co., 62 N.Y.S 2d 474.

(3) To show contributory negligence — Salmons Dredging Corp. v. Herma, C.A.S C, 180 F 2d 233.

(4) To show that free gasoline found its way into bilges of Coast Guard vessel so as to give rise to vapors which allegedly caused explosion, fire, and resulting damages.— The C. G. R-180, D.C Mich, 70 F. Supp 975

(5) To show unseaworthiness — In re Defense Plant Corp, D.C Tenn., 58 F Supp 931.

(6) To support findings — The Barge No. 16, C C.A.Va., 152 F.2d 76

(7) To show negligence in attempting to pass through the draw at an improper stage of the tide — The Cromwell, D C.N.C, 247 F. 207, affirmed Wilmington Ry. Bridge Co v. Franco-Ottoman Shipping Co, 259 F. 166, 170 C.C.A. 234.

(8) To show other matters

U.S — Ladd v. U. S, D.C.Va., 97 F. Supp. 80, affirmed, C A, U. S v. Ladd, 193 F 2d 929—Eastern Transp Co. v. Southern Transp Co., D C Va, 69 F.Supp. 642—The Barbara, D C Mass, 62 F Supp 265.

La.—Department of Highways v. Whiteman Bros, App, 29 So 2d 399

58 C J p 307 note 77 [b]

On petition for exoneration

Where vessel was plainly at fault in proceeding without required lights and in colliding with schooner, on petition of owner of schooner for exoneration from liability, any doubt was required to be resolved in schooner's favor unless schooner was also clearly at fault — The Barbara, D C Mass, 62 F Supp 265.

34. U S — Austerberry v. U. S., C.A. Mich., 169 F.2d 583

35. U S.—City of Gretna v. Defense Plant Corp, C C A La., 159 F 2d 412

58 C J p 307 note 78

Evidence held insufficient

Libellant, seeking to impose liability on tug for damage allegedly caused to tanker being towed by another tug when first tug crowded second tug and tanker out of river channel and caused it to strand, failed to sustain burden of proving identity of tug which crowded second tug and tanker out of channel — The Fidelity, D C N.Y, 43 F.Supp. 180.

36. U S — City of Gretna v Defense Plant Corp., C C A La., 159 F.2d 412.

37. U S — Truelson v. Whitney, etc., Shipping Co., C C A.Tex, 10 F.2d 412, certiorari denied 46 S Ct. 474, 271 U S. 661, 70 L.Ed 1138.

58 C.J. p 307 note 79

38. U S — The Luke, D C N Y., 19 F 2d 923, affirmed, C C.A, 19 F.2d 925

58 C.J. p 307 note 80.

39. U.S.—The Confidence, D.C.N.Y., 286 F. 742.

40. U.S.—The Mollie Scully, D.C.N. Y., 52 F.2d 239.

41. U.S — The Mollie Scully, supra.

dence to show that the purchaser was agent for the owner is for the jury,[42] and it is for them to decide what are necessaries for which the owner would be liable.[43] If there is conflicting evidence in an action on a contract for supplies, services, or advances, and such evidence is sufficient to raise an issue of fact, the question is one for the jury and should not be disposed of by the court as a matter of law.[44] Where the evidence is conflicting or is such that reasonable minds may draw different conclusions therefrom, it is for the jury or other trier of facts to determine whether the management of the vessel was negligent,[45] whether the person in charge of the vessel at a given time was the agent of the owner,[46] the seaworthiness of the vessel,[47] what was the proximate cause of the injury,[48] and whether particular conduct constituted contributory negligence;[49] but, where the evidence is such that only one conclusion may be drawn, such conclusion follows as a matter of law.[50] Where the evidence fails to show defendant's negligence, a directed verdict in his favor is proper,[51] or, if the suit is in admiralty, the court will dismiss the libel.[52]

The instructions should correctly state the law applicable to the particular case.[53]

Findings. Where the evidence is conflicting, a court of admiralty may find that damage done resulted from the injury caused by defendant.[54]

e. Damages and Costs

As a general rule, the measure of damages for which the owners and vessel are liable in cases of negligent management or navigation is the actual loss sustained by the injured person; the libelant is entitled to costs in a proper case.

The measure of damages for which the owners and vessel are liable in cases of negligent management or navigation is usually the actual loss sustained by the person damaged as a proximate result of the vessel's negligence.[55]

42. Md.—Henderson v. Mayhew, 2 Gill 393, 41 Am.D. 434.

43. S.C.—Burquin v. Flinn, 12 S.C.L. 316.

44. N.J.—James Healing Co. v. Walter, 77 A.2d 473, 10 N.J.Super. 492.
N.Y.—Oldman-Magee Boiler Works v. Ocean & Inland Transp. Co., 205 N.Y.S. 550, 210 App.Div. 183.

45. U.S.—U. S. v. South Carolina State Highway Dept., C.A.S.C., 171 F.2d 893.
Del.—Pennsylvania R. Co. v. Eastern Transp. Co., 178 A. 580, 6 W.W. Harr. 435.
Mass.—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 385.
N.C.—State Highway & Public Works Commission v. Diamond S. S. Transp. Corp., 38 S.E.2d 214, 226 N.C. 371.
58 C.J. p. 307 note 88.

Interference with pilot
Whether master should interfere with navigation of vessel by compulsory pilot is question of fact for jury.—Hinman v. Moran Towing & Transportation Co., 268 N.Y.S. 409, 241 App.Div. 612, motion dismissed 271 N.Y.S. 1092, 241 App.Div. 746

46. U.S.—Standard Oil Co. of New York v. Mascarenhas, C.C.A.Mass., 59 F.2d 341

47. U.S.—Bruszewski v. Isthmian S. S. Co., C.C.A.Pa., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113

48. W.Va.—American Tel. & Tel. Co. v. Ohio Val. Sand Co., 50 S.E.2d 884, 131 W.Va. 736.
58 C.J. p. 308 note 89.

49. U.S.—Standard Oil Co. of New York v. Mascarenhas, C.C.A.Mass., 59 F.2d 341.

50. U.S.—The Jason, D.C.N.Y., 74 F.Supp. 34.

Negligence
U.S.—Western Oil & Fuel Terminal Co. v. The Elisha Woods, D.C.Ky., 89 F.Supp. 862

Absence of negligence
Ship was not, as matter of law, guilty of negligence in furnishing stevedore dry cable for use on drum hidden from winchman, although dryness made kinks more likely to form.—De Luca v. Shepard S. S. Co., C.C.A.N.Y., 67 F.2d 437, certiorari denied 54 S.Ct. 562, 291 U.S. 685, 78 L.Ed. 1072

51. Mich.—Montgomery v. Muskegon Booming Co., 50 N.W. 729, 88 Mich. 633, 26 Am.S.R. 308.

52. U.S.—Passano v. The New Brunswick, D.C.N.Y., 43 F. 174.

53. Mass.—Hines v. Eastern S. S. Lines, 139 N.E. 823, 245 Mass. 385.
58 C.J. p. 308 note 92.

Instructions held proper
U.S.—U. S. v. State Road Dept. of Fla., C.A.Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291.
58 C.J. p. 308 note 92 [b].

54. U.S.—The Harrisburg, D.C.N.Y., 43 F.2d 360

55. U.S.—U. S. v. Ladd, C.A.Va., 193 F.2d 929.—U. S. v. The John R. Williams, C.C.A.N.Y., 144 F.2d 451, certiorari denied Great Lakes Dredge & Dock Co. v. U. S., 65 S.Ct. 271, 323 U.S. 782, 89 L.Ed. 625.—City and County of San Francisco v. U. S., D.C.Cal., 82 F.Supp. 313.
Tex.—Magnolia Petroleum Co. v. City of Port Arthur, Civ.App., 209 S.W. 803, rehearing overruled 209 S.W. 991.
58 C.J. p. 308 note 96.

Cost of repairing bridge
U.S.—State Road Department of Fla. v. U. S., D.C.Fla., 85 F.Supp. 489, affirmed, C.A., U. S. v. State Road Department of Fla., 189 F.2d 591.
N.Y.—Triborough Bridge Authority v. Bronx Towing Line, 52 N.Y.S.2d 62, 184 Misc. 254, affirmed 105 N.Y.S.2d 911, 278 App.Div. 917.

Cost of temporary facilities
(1) Where permanent bridge which state road department had obligation to maintain was damaged when vessels of United States dragged anchor and collided with bridge during severe wind squall, cost of constructing and removing temporary facilities essential to maintain regular flow of traffic around those portions of permanent bridge which had been damaged was legally part of damage sustained by injury to permanent bridge, and expense of construction and removal of such temporary facilities constituted "actual damage" to highway within purview of state statute making such damage recoverable.—U. S. v. State Road Dept. of Fla., C.A.Fla., 189 F.2d 591, certiorari denied 72 S.Ct. 291.

(2) Where vice president of responsible construction company, at hearing before United States engineers having supervision over river to consider construction of temporary bridge, announced willingness to restore bridge, which had been damaged by petitioners' vessel colliding therewith, for specified sum, it was held that such announcement, although not in form of offer, was equivalent to bid, and became limit of recovery against vessel owner, where bridge was never repaired, but was superseded by new one.—In re Hibbard, C.C.A.N.Y., 27 F.2d 686.

The damages recoverable are not limited to the value of the vessel at the time of the injury.[56] Where the vessel injured was equally at fault, the damages will be apportioned.[57] In an action arising from a maritime tort, the common-law principle that there can be no indemnity or contribution among joint tort-feasors is inapplicable.[58] The measure of damages for a master's tort in shipping a minor against his parent's will is the value of the minor's services, together with expenses and losses.[59]

Costs. Where libelant succeeds on his libel for damages for injury, he is entitled to costs, even though he recovers less than the amount claimed.[60] A failure properly to notify the owners of a vessel of the damages caused by her swell will justify the court in decreeing that the costs of the suit be deducted from libelant's damages.[61] Where two vessels are libeled for injuries caused by the swell produced by the two vessels, and the libel is dismissed as to one of the vessels and the other is held liable, the costs of trial of the vessel against which the libel is dismissed should be assessed against the other vessel where the latter opposed libelant's offer to discontinue as to such vessel.[62] Costs on a libel to enforce an agreement of consortship should be paid out of the fund in controversy where defendant's refusal was, under the circumstances, not necessarily wrongful.[63]

§ 82. Dry-Dock Companies

A dry-dock owner is generally liable for injuries to a vessel caused by his negligence while the vessel is in his care; the charges of a dock owner are usually limited by contract, in the absence of which the prevailing rates in the harbor will control. A shipowner may recover demurrage from a dry-dock company for unexplained detention of the vessel.

Although all the obligations imposed by law on a carrier of goods do not attach, the employment of a dry-dock owner is in a substantial sense a public one and public policy requires a high degree of responsibility.[64] Hence, the dry-dock owner is liable for injuries to a vessel caused by his negligence while the vessel is in his care,[65] and ignorance

Cost of new structure

City and county was not entitled to a new structure in substitution for existing structure which had a remaining life of ten years after serving for fifteen years before being damaged when army steam tug, as result of negligent operation, collided with piling of bridge owned by city and county, where twenty-five years was the reasonable life of the structure.—City and County of San Francisco v. U. S., D C Cal., 82 F Supp 313.

Loss of tolls

(1) Loss of tolls on damaged bridge during period of repair could be recovered.—South Carolina State Highway Dept. v. U. S., D.C.S C, 78 F Supp 598, affirmed, C.A., 171 F.2d 893.

(2) With respect to damages from injury to toll bridge by vessel, no deduction is to be made from what gross receipts would have been during period of repair, where the operating expenses of bridge company were not lessened.—Savannah & New York Transp. Co. v. Klaren Bridge Co, S.C., 252 F. 499, 164 C C A. 415.

Interest on cost of repairs to barges damaged by swell of steamship should be calculated from date on which bills for repairs were paid.—The Mollie Scully, D.C.N.Y., 52 F.2d 239.

56. Ohio—Loud, etc, Lumber Co. v Peter, 20 Ohio Cir.Ct. 73, 11 Ohio Cir.Dec. 155.

57. U.S.—Agger v. The Beatrice and Rose, D.C Me, 84 F Supp. 761—The Maui, D C.N.Y., 70 F Supp. 772—Paco Tankers v. Wood Towing Corp., D.C.Va., 63 F Supp. 443, affirmed, C C.A, 152 F.2d 258—The Daly No 67, D C N.Y, 45 F.Supp 641.

58 C J. p 308 note 99.

58. U S—Erie R Co. v. Erie & W. Transportation Co, Ill, 27 S Ct 246, 204 U.S. 220, 51 L Ed. 450—New York & Porto Rico S S Co. of New York v. Lee's Lighters, D C.N Y, 48 F 2d 372—Barber S S Lines v. Quinn Bros, D C Mass, 94 F. Supp 212

Division of damages and contribution between two vessels whose mutual fault results in collision producing injury to an innocent vessel see Collision § 186 c

Vessel and warehouse company equally liable

In libels by owners of dry dock against steamship and her owner to recover for damages sustained by dry dock when steamship broke her moorings at wharf of warehouse company and drifted down river and collided with dry dock, wherein owner of steamship and warehouse company filed cross claims against each other for their damages, and wherein evidence established that both were negligent, their damages would be divided.—Todd Atlantic Shipyards Corp. v The Southport, D C.S C, 95 F Supp 331, affirmed, C A., City Compress & Warehouse Co. v. U. S., 190 F 2d 699.

Failure to perfect lien against one wrongdoer

Where tow was damaged by fault of towing tug and another vessel, fact that lien was not perfected on towing tug and stipulation for value was not exacted did not take case out of general rule as to amount of recovery against two wrongdoers for damage to innocent third person.—The Nonpareil, D C.N.Y., 12 F.Supp 985.

59. U S.—Sherwood v. Hall, C.C. Mass, 21 F Cas No.12,777, 3 Sumn. 127.

60. U S—The Tiger Lily, D C.N Y, 14 F. 591

61. U.S.—The Rhode Island, D.C N. Y., 20 F Cas.No.11,742, 8 Ben. 50

62. U S—The New York, D C.N.Y., 34 F 757.

63. U S.—Cash v. One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, D C.Fla., 5 F. Cas No 2,498

64. U S—Norwich, etc, Transp. Co. v. New York Balance Dock Co., D C N Y., 22 F. 672.

58 C J. p 309 note 7.

65. U.S—O'Rourke Dry Dock Co. v Neville, D C N J, 189 F 924.

58 C J. p 309 note 8.

Presumption of negligence

(1) Although ultimate liability as bailee of shipyard owner who takes vessel into his custody and control must depend on establishment of negligence, his failure to redeliver the vessel raises a presumption of negligence.—Lackritz v. Petersen, D. C N Y., 31 F Supp. 415.

(2) Where the allegation of the libel against dry-dock company that the vessel was delivered into respondent's possession for repairs was expressly admitted by respondent's pleading, the contractor cannot claim he did not have exclusive possession of the vessel during the prog-

of the weak and unseaworthy condition of the vessel is no defense since, in the absence of representation or special agreement, his contract is to dock the vessel as she is.[66] The charges of the dock owner are usually limited by the contract,[67] and, in the absence of contract, the customary rates prevailing in that particular harbor control.[68] Since it is the duty of the owner of a dry dock to release the vessel as soon as the repairs are so far along that they can be completed with her afloat, the owner will not be allowed a charge for lay days for the use of the dock after the time the vessel should have been released by the use of reasonable dispatch in performing the work.[69] The owner of a dry dock may recover from a vessel or its owner for damages to the dry dock resulting from negligent management or navigation of the vessel.[70]

Demurrage for unexplained detention. A shipowner may recover demurrage from a dry-dock company for unexplained detention of the vessel beyond the time of contemplated redelivery.[71] In order to recover demurrage, the owner must show that the use of the vessel during such period would have produced earnings;[72] but it is not necessary for the owner to prove that he was willing to charter the vessel to some known agent for a specified voyage at an agreed rate,[73] it being sufficient if the owner shows a state of facts from which a court or jury can find that there was an opportunity for him to do so and that he probably would have availed himself of it.[74] In a proceeding to recover such demurrage, the usual rules of evidence apply.[75]

VI. INJURIES TO PERSONS ON OR ABOUT VESSEL

§ 83. In General

A vessel or the owner thereof is not liable for personal injuries sustained by a person on or about the vessel unless there has been a breach of some duty owed to the person injured.

In order that a vessel or the owner thereof may be liable for injuries sustained by a person on or about the vessel there must have been a breach of some duty owed to the person injured.[76] The vessel or owner is liable, however, for injuries sustained by a person on or about the vessel where there has been a breach of some duty, including the duty to use due care, owed to the person injured.[77] In admiralty the owner of a vessel is liable in personam, and the vessel is liable in rem, for injuries done to persons by the negligence of the master or crew, but the negligence must be such as would make the owner of the vessel, under the same circumstances, liable in a suit at common law.[78] One who is rightfully on board a ship may

ress of the work, merely because some of the officers of the ship remained on board while it was being repaired, so that the case does not fall within the admitted exception to the presumption of negligence where the bailee redelivers the goods in bad condition, recognized in cases where the bailee's possession was not exclusive—Pan-American Petroleum Transp. Co v Robins Dry Dock & Repair Co., C C A N.Y, 281 F. 97, certiorari denied Robins Dry Dock & Repair Co v Pan-American Petroleum & Transport Co, 42 S.Ct. 589, 259 U. S 586, 66 L Ed 1076.

66. U.S—Norwich, etc, Transp Co v. New York Balance Dock Co, D C N Y., 22 F. 672

67. U.S—New York Balance Dry Dock Co. v. Howes, D C N.Y., 18 F. Cas No 10,202, 9 Ben 232.
58 C.J. p 309 note 10

68. U S.—Burlee Dry Dock Co. v. Morris, etc., Dredging Co., D C.N. Y., 145 F. 740, affirmed 151 F. 1020, 81 C.C A. 681.
58 C.J. p 309 note 11.

69. U.S.—The Mary N. Bourke, N.Y., 145 F. 909, 76 C C.A. 441.

70. U.S—Todd Atlantic Shipyards Corp. v. The Southport, D C.S.C, 95 F Supp 331, affirmed, C A, City Compress & Warehouse Co v. U. S, 190 F 2d 699

71. U S.—Todd Erie Basin Dry Docks v. The Penelopi, D.C.N.Y., 148 F.2d 884

72. U S.—Todd Erie Basin Dry Docks v. The Penelopi, supra.

Measure of demurrage

(1) Where owner was entitled to demurrage on actual proof of damages during unexplained detention of vessel in repairer's shipyards, period consumed in cleaning and painting vessel by owner between time of redelivery of vessel by repairer and delivery by owner to charterer could not be deducted in computing demurrage, since the measure of the owner's recovery is not what hire the vessel lost during the detention period but what loss of hire did the detention cause—Todd Erie Basin Dry Docks v. The Penelopi, supra

(2) Fixing owner's damages for unreasonable detention of vessel in repairer's shipyards on basis of the single voyage pursuant to charter executed after vessel was repaired was not improper, where ceiling rates of Maritime Commission determined hire which could be obtained and precluded negotiation of an unusually favorable contract.—Todd Erie Basin Dry Docks v. The Penelopi, supra.

Dead-weight tonnage

U S—Todd Erie Basin Dry Docks v. The Penelopi, supra

73. U S—Todd Erie Basin Dry Docks v. The Penelopi, supra.

74. U S—Todd Erie Basin Dry Docks v. The Penelopi, supra.

75. **Evidence held admissible**

In absence of timely objections, the voyage account on a single voyage after vessel had been repaired was properly received in evidence for determining vessel's rental value as an item of damage for unreasonable detention of vessel in repairer's shipyards.—Todd Erie Basin Dry Docks v. The Penelopi, supra.

76. U S—Hogan v. Hellman, D C. Cal., 7 F 2d 949.
58 C.J. p 309 note 13.
Liability for personal injuries to passengers see infra §§ 192–195.

77. U S—The Dalhem, D C Mass, 41 F Supp. 718
Duty to particular classes of persons see infra §§ 84, 85.

78. U.S.—Lamb v Interstate S S Co., C.C A.Ohio, 149 F 2d 914—The Germania, D C N.Y., 10 F.Cas No. 5,360, 9 Ben 356.

recover from the owners for injuries received by him on board the ship through negligence of the master.[79] The rules governing the liability of railroads for injuries caused by defective approaches to stations have been held to apply to vessels.[80]

The owner of a vessel is not liable for personal injuries resulting from acts of the master or crew which are outside the scope of their employment[81] The shipowner ordinarily is not liable for the negligence or misconduct of stevedores or longshoremen employed by an independent contractor, doing work over which the owner has little, if any, control,[82] and the shipowner is not liable for the negligence of stevedores employed by the consignee of the charterer[83] A ship may not be held negligent for failure to follow a claimed local custom unless knowledge of the custom is brought home to it.[84]

Where the vessel is in the control and possession of another person, the owner thereof may not be liable for personal injuries to third persons[85] Where, however, the owner of a vessel leaves the vessel in the possession and control of his copartner, as agent, he is liable for personal injuries as a result of the negligent maintenance, inspection, or operation of the vessel by the copartner.[86]

Persons on piers. The owner of a vessel may be liable for personal injuries sustained by persons on a pier as a result of the negligence of the owner or his employees.[87] A person having business with an approaching steamer may hold the owners liable for injuries received when the steamer negligently approached the dock at high speed and used an unsound fender rope which broke and let the fender hit plaintiff.[88] Where a person is on a pier because of an implied invitation of a steamship company, waiting the arrival of passengers on an incoming steamer, the steamship company is under no other obligation to the person injured and owes him no other duty than to have the pier in a reasonably safe condition for access.[89] Where the injuries are caused by the negligence of an independent contractor or his servants having no connection with the vessel, the owners are not liable.[90]

Liability of persons other than owner. In a proper case a person other than the owner of the vessel may be held liable for injuries to third persons[91] A person who is not in possession or control of the vessel ordinarily is not liable for personal injuries to third persons;[92] and no liability attaches to a person who was in no way at fault.[93]

Contributory negligence and assumption of risk.

79. U.S.—Leathers v. Blessing, La., 105 U.S. 626, 26 L.Ed 1192.

80. U.S.—The Daylesford, D.C.Ala., 30 F. 633.
Liability of railroads for injuries caused by defective approaches see Railroads § 919.

81. N.Y.—Haack v Fearing, 28 N.Y. Super 528, 4 Abb.Pr.,N.S., 297, 35 How.Pr. 459.
58 C.J. p 302 note 98 [a] (2).

Altercation with crew member
Shipowner was not liable to one on the ship collecting clothes for injuries received during an altercation with a member of the crew—Price v U.S., D.C.La., 11 F.2d 283

82. U.S.—Shields v U.S., D.C.Pa., 73 F.Supp 862, affirmed in part and reversed in part on other grounds, C.A., 175 F.2d 743, certiorari denied 70 S.Ct. 249, 338 U.S. 899, 94 L.Ed. 553

83. Mass.—Linton v Smith, 8 Gray 147.

84. U.S.—Miller v. The Sultana, C.A.N.Y., 176 F.2d 203, certiorari denied 70 S.Ct 303, 338 U.S. 907, 94 L.Ed 558

85. U.S.—Thibeault v. Boston Towboat Co., D.C.Mass., 28 F.Supp. 152, affirmed, C.C.A., Mystic Terminal Co. v. Thibeault, 108 F.2d 813.

86. U.S.—Kulack v The Pearl Jack, D.C.Mich., 79 F.Supp. 802, affirmed, C.A., 178 F.2d 154.
Liability of partners in tort generally see Partnership § 181.

87. Mich.—Butterfield v Arnold, 92 N.W. 97, 131 Mich 583
Liability of owner or occupant of pier or wharf for injuries sustained by persons on pier or wharf see the C.J.S. title Wharves §§ 23, 24, also 68 C.J. p 235 note 17 et seq.

88. Mich.—Butterfield v. Arnold, supra

89. N.Y.—Duhme v Hamburg-American Packet Co., 77 N.E. 386, 184 N.Y. 404, 112 Am.S.R. 615

90. U.S.—International Mercantile Marine Co v Gaffney, Pa., 143 F. 305, 74 C.C.A. 443.

91. **"Managing agent"** operating a steamship owned by the United States Maritime Commission under a contract requiring agent to "manage, operate and conduct the business of the line" and to "man, equip, victual, supply and operate vessels," was liable for death of bridge tender which resulted when steamship crashed into bridge, even if the United States or the commission was also liable and the commission selected officers, and even though compensation received by agent was relatively small, where there was no showing that the commission substituted itself as manager either generally or at time of accident.—Quinn v. Southgate Nelson Corporation, C.C.A.N.Y., 121 F.2d 190, certiorari denied Southgate Nelson Corp v Quinn, 62 S.Ct. 185, 314 U.S. 682, 86 L.Ed 546

Joint liability and contribution
Where one injured in fire involving vessel and dock sued dock owner alone in state court and elected not to file a claim in limitation proceeding by owner of vessel, under state law, dock owner would have no right of contribution against owner of vessel based on state court judgment against dock owner—Petition of Chester A. Poling, Inc., D.C.N.Y., 51 F.Supp 375
Liability of
Charterer see supra § 34.
General owner after vessel chartered see supra § 34
Master of vessel see supra § 70.

92. U.S.—McGowan v. J.H. Winchester & Co., C.C.A.N.Y., 168 F.2d 924, certiorari denied 69 S.Ct 133, 335 U.S. 861, 93 L.Ed 408 and Buro v. American Petroleum Transport Corp., 69 S.Ct. 134, 335 U.S. 861, 93 L.Ed. 408—Doll v. Scott Paper Co., C.C.A.Pa., 91 F.2d 860—Thibeault v. Boston Towboat Co., D.C.Mass., 28 F.Supp. 152, affirmed, C.C.A., Mystic Terminal Co. v. Thibeault, 108 F.2d 813

93. U.S.—Thibeault v. Boston Towboat Co., D.C.Mass., 28 F.Supp. 152, affirmed, C.C.A., Mystic Terminal Co. v. Thibeault, 108 F.2d 813.

Contributory negligence of the person injured bars recovery,[94] except where the suit is in admiralty.[95] Recovery may also be denied on the ground that the injured person had assumed the risk.[96] Where one having business with a ship or officer goes on board and puts himself in a place of obvious danger, he assumes the risk and, if injured, cannot hold the ship liable.[97] One who goes on board a ship by virtue of a pass, by the acceptance of which he has assumed all risk and exempted defendant from all liability for injury, cannot hold the owner responsible, even for wanton and reckless injuries.[98]

What law governs. Where a vessel is in port, the law of the place where the injury occurs governs the rights and liabilities of the parties.[99]

§ 84. Particular Classes of Persons

a. Invitees
b. Licensees and trespassers
c. Persons engaged in work
d. Other persons

a. Invitees

The vessel or the owner is liable for personal injuries sustained by an invitee on or about the vessel resulting from a failure to exercise reasonable care to protect him from injury.

An invitee is owed the duty of reasonble care to avoid injuring him,[1] and the vessel or owner is liable for personal injuries to an invitee resulting from a breach of such duty.[2] The general rules governing in the determination of what persons are invitees usually apply in ascertaining who are in-

94. N Y—Leroy v. North German Lloyd SS Co., 38 N.Y.S 835, 16 Misc 162

High heels

Where stairway from upper to main deck of fishing boat was constructed in customary manner and not unsafe, fifty-four year old woman, five feet-five and three quarter inches in height, and weighing one hundred sixty-seven pounds, who fell on stairway, was solely at fault in descending stairway in wearing shoes with heels three inches to four inches high.—The Sachem, D C N Y., 5 F Supp. 417.

95. U S—Militano v. U. S, C C A.N Y., 156 F 2d 599, certiorari dismissed State Marine Corp v Militano, 67 S.Ct. 193, 329 U S. 682, 91 L Ed. 600—Badalamenti v U S, D C N.Y, 67 F Supp 575, affirmed in part and modified in part on other grounds, C.C A., 160 F.2d 422.
58 C.J p 324 note 57.
Apportionment of damages in admiralty see infra § 86
Contributory negligence in admiralty generally see Admiralty § 85.

96. U S—The Iowa, Va, 213 F. 405, 130 C C A 41
Assumption of risk in admiralty generally see Admiralty § 86

97. U S—The Iowa, supra.
58 C J p 309 note 15

98. Mass—Freeman v United Fruit Co, 111 N E 789, 223 Mass. 300

99. U S.—The H S, Inc., No. 72, C C.A.N.J, 130 F 2d 341.
58 C J. p 320 note 77.
What law governs maritime torts generally see Conflict of Laws § 12 a (3)

1. U S.—Radoslovich v. Navigazione Libera Triestina, S. A, C.C A N.Y., 72 F 2d 367—Muratore v. U. S, D C N Y., 100 F.Supp. 276—Stewart v. Atlantic Gulf & Pacific Co., D C Fla, 9 F.Supp 344.
58 C J. p 310 note 26.
Liability for personal injuries to:
Invitees generally see Negligence §§ 43(1)-53.
Passengers on vessel see infra §§ 192-195
Seamen see Seamen § 188 et seq
Liability of
Charterer for personal injuries to third persons see supra § 34.
General owner for personal injuries sustained by third persons after vessel chartered see supra § 34.

Merely warning the invitee or guest is not sufficient, but the duty is the same as that of employer to employee to use reasonable care to provide for the safety of the invitee or guest—Miller v. The Sultana, C A N Y, 176 F 2d 203, certiorari denied 70 S.Ct 303, 338 U S 907, 94 L Ed 558—Guerrini v U. S, C C A N.Y., 167 F 2d 352—Puleo v. H. E Moss & Co, C.C.A.N Y., 159 F 2d 842, certiorari denied Todd Shipyard Corp v Puleo, 67 S.Ct. 1733, 331 U S. 847, 91 L Ed. 1857, and H E. Moss & Co v. Puleo, 67 S Ct. 1736, 331 U.S. 847, 91 L.Ed 1857.

Duty to prospective employee

A ship owed prospective employee thereof, who was experienced seaman familiar with unloading operations, no duty to replace, at noon, an outside hatch cover over portion of hold from which grain had been removed, while unloading in such hold under adjacent hatch was still unfinished, as he was charged with knowledge of such conditions—Miller v. The Sultana, C A N Y., 176 F.2d 203, certiorari denied 70 S Ct. 303, 338 U.S 907, 94 L.Ed 558

Duty to swimmer

Where motorboat operator took swimmer aboard boat, he was required to exercise strict care to see that swimmer was in safe place, whether he believed swimmer to be in distress, whether swimmer invited ride, or whether operator suggested riding—Petition of Liebler, D.C.N.Y., 19 F Supp. 829.

2. U S.—Calanchini v. Bliss, C C.A. Cal., 88 F 2d 82—Sieracki v. Seas Shipping Co., D.C.Pa, 57 F Supp 724, affirmed in part and reversed in part on other grounds, C C A, 149 F 2d 98, affirmed 66 S Ct 872, 328 U S 85, 90 L Ed. 1099, rehearing denied 66 S Ct. 1116, 328 U.S 878, 90 L Ed 1646—The Owen, D C.Pa, 43 F.Supp 897—The Inga, D C N Y., 33 F Supp. 122.

Injury due to fire or explosion

U.S—The Inga, supra—Murphy v Hutzel, D.C Pa, 27 F Supp 473.

Injury to guest in stateroom from exhaust fumes

U.S.—The Friendship II, C C.A Fla., 113 F.2d 105, reversed on other grounds Just v. Chambers, 61 S.Ct. 687, 312 U S. 383, 668, 85 L.Ed 903.

Negligence in taking motorboat to sea

Owner of motorboat having rated capacity of ten was guilty of negligence in going out into open sea with eighteen persons on board, and, hence, was liable for death of guest who was drowned without fault when boat capsized as result of having been overloaded and taken out to sea—Calanchini v. Bliss, C.C A.Cal., 88 F.2d 82.

Applicability of guest statute

(1) State guest statute did not apply to motorboats operating on the waterways and navigable lakes of the state.—Schoremoyer v. Barnes, C.A Tex., 190 F.2d 14.

(2) Automobile guest statutes generally see Motor Vehicles § 399 (3).

vitees on or about a vessel.[3]

In the absence of notice or knowledge, an invitee may assume that the vessel is in a safe condition[4] and where latent dangers exist of which the owner has knowledge he is under a duty to warn the invitee of such dangers.[5] The vessel must use reasonable care to provide a safe passageway for an invitee.[6] The fact that other persons, such as stevedores, may be partially in control of the part of the vessel at which the injury occurs, and may owe a concurrent duty to the invitee, does not absolve the vessel or its owner from the duty to exercise reasonable care to avoid injuring the invitee.[7] It is the duty of the owners to see that an invitee on board their ship receives no injury by the negligence of the master or other employee,[8] and an invitee who receives such injury may hold the owners liable therefor.[9] The owner of a vessel is not liable for injuries to an invitee resulting from acts of a member of the crew outside the scope of his employment.[10] The duty to protect an invitee extends only to those parts of the ship to which he may reasonably be expected to go by virtue of his status as invitee and if he goes elsewhere on the ship he becomes no more than a licensee or even a trespasser.[11] It is not negligence to invite guests in a motorboat to pass from the boat onto the landing platform without first making the boat fast to the platform with ropes.[12] Persons in charge of the ship must give an invitee an opportunity to go ashore before the vessel leaves,[13] and, on failure to do so, the vessel is liable in damages.[14] One on a tug by express or implied invitation must be afforded a reasonably safe means of leaving it.[15]

Rescue. The owner of a vessel under certain circumstances may be under a positive duty to rescue an invitee from drowning and he may be liable for failure to use reasonable care to effect a rescue.[16] In an emergency the owner is not required to exercise the best choice of judgment in attempting a rescue and failure to do so may not be made the basis of liability.[17]

3. Persons held invitees

(1) In general—Calanchini v. Bliss, C.C.A.Cal., 88 F 2d 82.

(2) Former member of crew who was permitted to sleep on vessel and to leave his clothes on board in the hope that he would again be a member of the crew when ship sailed was an invitee—Sibley v Barber S. S Lines, D.C N.Y., 57 F 2d 318

(3) One going aboard ship to seek employment as oiler, pursuant to reference by union hiring-hall through which ship obtained seamen, was business guest or invitee of ship—Miller v. The Sultana, C A N Y, 176 F 2d 203, certiorari denied 70 S.Ct 303, 338 U.S 907, 94 L.Ed 558.

Bargee

(1) Bargee in charge of barge taking on ballast discharged by steamer, when going on steamer in course of his work, was a business visitor—Hendricksen v. Hugh Roberts & Son, D.C N Y., 74 F Supp. 72.

(2) Bargee, falling into water when shore end of gangplank of steamer, alongside which barge was brought to receive cargo, slipped off as he was going ashore after day's work to enjoy his leisure, was invited person.—Radoslovich v. Navigazione Libera Triestina, S. A., C.C.A.N.Y., 72 F.2d 367.

Officer's relative

(1) Where captain's son boarded yacht without any definite purpose except to see his father, but assisted father in placing tank of protane gas in position, son was not an invited person or a business visitor—Gunnarson v. Robert Jacob, Inc., C.C.A.N. Y., 94 F.2d 170, certiorari denied Robert Jacob, Inc. v. Gunnarson, 58 S Ct. 764, 303 U S 660, 82 L Ed 1119, rehearing denied 58 S.Ct. 948, 304 U.S 588, 82 L Ed 1548.

(2) Friends and relatives of passengers on vessel as invitees see infra § 193.

4. Condition of deck

Guest could rightfully assume that no unusual condition existed, and that he took no unusual risk in stepping over deck and windshield as directed by motorboat owner's employee—The Blue Moon III, D C.N.Y., 60 F 2d 653

5. Slippery condition of deck

Motorboat owner's employee, who had recently waxed deck, was obligated to warn guest of slippery condition—The Blue Moon III, supra.

6. U S.—Miller v The Sultana, C A N.Y, 176 F.2d 203, certiorari denied 70 S Ct 303, 338 U S. 907, 94 L.Ed. 558

Bargee in charge of barge taking on ballast discharged by steamer had right, as against owner of steamer, to rely on proper gear and safe passage to and from his barge—Hendricksen v Hugh Roberts & Son, D. C N Y., 74 F Supp 72.

7. U.S—Miller v. Sultana, C A N.Y, 176 F 2d 203, certiorari denied 70 S Ct. 303, 338 U S 907, 94 L Ed 558

8. U S—Leathers v. Blessing, La, 105 U.S. 626, 26 L Ed. 1192—The Blue Moon III, D C N Y., 60 F 2d 653.

Liability of master of vessel for personal injuries see supra § 70.

9. U S.—Leathers v Blessing, La., 105 U.S. 626, 26 L.Ed. 1192—The Blue Moon III, D C.N.Y., 60 F 2d 653

10. U S—Sibley v. Barber S. S. Lines, D C.N.Y, 57 F 2d 318

11. U S—Lauricella v. U. S, C.A.N. Y, 185 F.2d 327.

12. Mich—Stern v. Franklin, 287 N. W. 880, 290 Mich 467

13. U.S—The City of Seattle, Wash, 150 F 537, 80 C C.A 279, 10 L R A., N S, 969

14. U S—The City of Seattle, supra.

15. U.S—The Ross Coddington, D C. N Y., 40 F 2d 280, reversed on other grounds, C.C A, 6 F 2d 191.

58 C J. p 310 note 32

16. U S—Hutchinson v Dickie, C C A.Ohio, 162 F.2d 103, certiorari denied 68 S Ct. 208, 332 U.S. 830, 92 L Ed 404.

58 C J p 313 note 92 [f].

Duty to rescue stranger in peril on high seas see infra subdivision d of this section.

When owner heard cry "Man overboard," it was his duty to use reasonable care to rescue the invited guest, especially where the cruiser was the only instrumentality by which the guest might be rescued.—Hutchinson v. Dickie, supra

Failure to have lifeguard on board

Where invited guest on pleasure cabin cruiser was an experienced seaman and a good swimmer, the host had a right to assume that the guest would use ordinary care to protect himself and host was not required to anticipate the necessity of having a lifeguard as a member of the crew.—Hutchinson v Dickie, supra.

17. U.S—Hutchinson v. Dickie, supra.

Contributory negligence; assumption of risk. The vessel or its owner is not liable for injuries to an invitee, which result from the invitee's failure to exercise due care,[18] although in admiralty contributory negligence is no bar to recovery.[19] Recovery may be barred under the doctrine of assumption of risk.[20]

Exoneration from liability. A shipowner is not entitled to exoneration from liability for injuries to an invitee where the fault of the owner was the proximate cause of the injury.[21]

b. Licensees and Trespassers

No duty is owed by a shipowner to a mere licensee or trespasser other than to refrain from willfully injuring him.

A trespasser or mere licensee coming on board a vessel must take the premises as he finds them,[22] and he comes on board at his own risk.[23] No duty is owed by a shipowner to a mere licensee or trespasser other than to refrain from willfully injuring him,[24] or knowingly allowing him to run into danger;[25] and no liability attaches to the owner of the vessel for an accidental injury to a licensee.[26] No duty is owed a licensee or trespasser to warn him of obviously dangerous conditions of the vessel.[27] One who comes on board a ship at the invitation of a master having no authority, express

N.Y.—Leslie v Robinson, 46 N.Y.S.2d 538, 267 App.Div. 965, 967, affirmed 60 N.E.2d 35, 293 N.Y. 911.

Error in backing instead of turning cruiser about when he heard cry "Man overboard" was one of judgment and not of negligence which would render owner liable for death of invited guest who disappeared overboard.—Hutchinson v. Dickie, C.C.A.Ohio, 162 F.2d 103, certiorari denied 68 S.Ct. 208, 332 U.S. 830, 92 L.Ed. 404.

18. Cal.—Peterson v Klitgaard, 299 P. 54, 212 Cal. 516, certiorari denied Peterson v Naknek Packing Co., 52 S.Ct. 128, 284 U.S. 672, 76 L.Ed. 569

Md.—Elzey v. Boston Metals Co., 56 A.2d 692, 189 Md. 566.

58 C.J. p. 310 note 27.

Failure to object

Ill.—Herbst v Levy, 279 Ill.App. 353.

Falling or stepping into open hatch

Md.—Elzey v Boston Metals Co., 56 A.2d 692, 189 Md. 566

58 C.J. p. 310 note 27 [a].

In passing from motorboat to landing at night without aid of artificial light guest had duty of exercising commensurate care and caution.—Stern v Franklin, 287 N.W. 880, 290 Mich. 467

19. U.S.—Militano v U. S., C.C.A.N.Y., 156 F.2d 599, certiorari dismissed State Marine Corps v Militano, 67 S.Ct. 193, 329 U.S. 682, 91 L.Ed. 600.

58 C.J. p. 324 note 57.

Apportionment of damages in admiralty see infra § 86

Contributory negligence in admiralty generally see Admiralty § 85.

20. Risk not assumed

Motorboat guest who took passage on overloaded motorboat without knowledge of nautical matters or boats, or of danger to himself and his son who also boarded boat, did not assume risk so as to preclude recovery for his death when boat capsized in open sea because of overloading, especially in absence of showing that passenger knew that boat was going out into open sea.—Calanchini v. Bliss, C.C.A.Cal., 88 F.2d 82

Assumption of risk in admiralty generally see Admiralty § 86.

21. U.S.—The Inga, D.C.N.Y., 33 F.Supp. 122

Statutory limitation of liability see infra §§ 239–257.

22. U.S.—Kosba v Bank Line, D.C.Md., 46 F.2d 119—**Corpus Juris quoted in** Lauchert v American S.S. Co., D.C.N.Y., 65 F.Supp. 703, 710.

58 C.J. p. 310 note 33.

Liability for negligent injury to trespassers and licensees generally see Negligence §§ 23–42.

23. U.S.—Lauchert v. American S.S. Co., D.C.N.Y., 65 F.Supp. 703.

58 C.J. p. 310 note 34.

24. U.S.—Rodermond v U. S., C.A.N.J., 179 F.2d 955—Gunnarson v. Robert Jacob, Inc., C.C.A.N.Y., 94 F.2d 170, certiorari denied Robert Jacob, Inc. v. Gunnarson, 58 S.Ct. 764, 303 U.S. 660, 82 L.Ed. 1119, rehearing denied 58 S.Ct. 948, 304 U.S. 588, 82 L.Ed. 1548—Sibley v Barber S.S. Lines, D.C.N.Y., 57 F.2d 318—Kosba v Bank Line, D.C.Md., 46 F.2d 119—Lauchert v American S.S. Co., D.C.N.Y., 65 F.Supp. 703.

La.—Warner v. Dempster, App., 194 So. 131.

58 C.J. p. 310 note 35.

Rules as to passengers inapplicable

Rules of care required for safety of gratuitous passengers or passenger for hire do not apply to mere licensee.—Hogan v. Hellman, D.C.Cal., 7 F.2d 949.

Boy clinging to scow while swimming

Where captain of scow moored to river bank, in removing a boy who swam to the scow and was clinging to its bumper, did so with such unnecessary violence that boy was drowned as the result, under state law scow owner was liable for damages because of boy's death, notwithstanding captain acted with an inflamed mind, since captain was acting in the course of his employment to rid scow of a trespasser.—The H.S., Inc., No. 72, C.C.A.N.J., 130 F.2d 341.

Failure to ballast boat

Fact that fishing boat rocked and rolled because it lacked ballast could not be asserted as negligence of owner, where weight of persons on board accomplished same purpose as ballast and, moreover, no liability attached to gratuitous bailor of boat for failure to ballast it, in absence of express or implied obligation to ballast.—Hogan v. Hellman, D.C.Cal., 7 F.2d 949

Negligence in taking boat into rough sea

Captain of fishing boat, which was gratuitously lent for fifty-mile voyage, and which was not free from violent rocking on a rough sea, was not negligent in taking homeward course at a time when the sea would become rough, where occupants of boat insisted on then returning to mainland.—Hogan v. Hellman, supra

What law governs

Where boy's death resulted from an assault by scow captain while boy was clinging to scow moored at river bank in New Jersey, the law of New Jersey governed the substantive rights of parties.—The H.S., Inc., No. 72, C.C.A.N.J., 130 F.2d 341.

25. U.S.—Rodermond v U. S., C.A.N.J., 179 F.2d 955—Lauchert v American S.S. Co., D.C.N.Y., 65 F.Supp. 703.

58 C.J. p. 310 note 36.

26. U.S.—The Sudbury, D.C.Or., 14 F.2d 533—Lauchert v. American S.S. Co., D.C.N.Y., 65 F.Supp. 703.

27. Mass.—Metcalfe v. Cunard S.S. Co., 16 N.E. 701, 147 Mass. 66

Knowledge by trespasser of defective condition

Owner of houseboat was not liable to trespasser thereon for injuries sustained by the trespasser when he fell through a decayed portion of the floor of the houseboat while removing his personal effects from the houseboat after being notified to do so, where the trespasser was in a better

or implied, to extend such invitation is a trespasser[28] or a mere licensee,[29] to whom, in the absence of knowledge of his presence, the owner owes no duty of care,[30] and such person cannot hold the owner liable for injuries sustained by him.[31]

With respect to appliances, the duty of a ship to a mere licensee is discharged when she is equipped with appliances reasonably suitable for the purpose for which they are adapted[32] A licensee having a right to use a ladder from a wharf up a ship's side to cross her to his own ship may recover for the ship's being negligently moved while he was on the ladder.[33]

Contributory negligence and assumption of risk. A trespasser or mere licensee cannot recover for personal injuries where he has been guilty of contributory negligence[34] Likewise, recovery may be barred under the doctrine of assumption of risk[35]

c. Persons Engaged in Work

(1) In general

(2) Inspectors and other officers

(1) In General

The vessel or the owners are liable for personal injuries sustained by a person engaged in work on or about the vessel as a result of the defective condition of the ship or her appliances.

While a person engaged in work on or about a vessel is not owed the highest degree of care for his safety by the owner thereof,[36] he is an invitee[37] to whom is owed the duty of exercising reasonable care to avoid injuring him;[38] and, where such a person is injured by reason of the defective condition of the vessel or her appliances, he may hold the ship or her owners liable for negligence.[39] Where the injury is purely accidental, the owners are not liable.[40]

Ship in custodia legis. The owners of a ship in custody of a marshal owe no duty to a keeper placed on board by the marshal except to refrain from willfully injuring him[41]

Contributory negligence and assumption of risk. The person injured may be barred from recovery because of his contributory negligence,[42] although, in admiralty, contributory negligence is no bar to recovery.[43] Recovery may also be barred under

position than owner to know of defective condition of houseboat—Warner v Dempster, La App, 194 So 131

28. U S—Silverado SS. Co v. Prendergast, C.C A Wash, 31 F 2d 225, certiorari denied 50 S Ct 17, 280 U S 557, 74 L Ed 612
Liability of master of vessel for personal injuries see supra § 70

29. U.S—The Silverado, D.C Or, 14 F 2d 243

30. U S—Silverado SS. Co v Prendergast, C C A Wash., 31 F 2d 225, certiorari denied 50 S.Ct. 17, 280 U. S 557, 74 L Ed 612
58 C.J. p 310 note 41.

31. U S—Silverado SS. Co. v Prendergast, supra
N.Y—Browning v Erie R. Co., 122 N Y.S. 717, 66 Misc 72.

32. U S. — Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v Gye, La, 207 F. 247, 124 C C.A. 517, certiorari denied 34 S Ct. 323, 231 U.S 755, 58 L.Ed. 468.

33. U S—The Yuri Maru, D C.Pa., 17 F 2d 318.

34. La.—Warner v. Dempster, App, 194 So. 131.

35. **Libelant, who insisted on making voyage** in fishing boat after he and others were advised not to make voyage because of their light attire and limitations of boat, assumed all risks incident to traveling on such a boat on such voyage—Hogan v. Hellman, D C.Cal, 7 F.2d 949.

36. Ill—Atkins v Lackawanna Transp Co, 54 N E 1004, 182 Ill 237
Liability of:
Charterer for personal injuries to third persons see supra § 34
General owner of vessel to third persons for injuries sustained after vessel chartered see supra § 34
Recovery for personal injuries to:
Employees generally see Master and Servant § 224.
Pilots see Pilots § 14 c.
Seamen see Seamen § 188 et seq
Stevedores or other independent contractors or their employees see infra § 85.

37. Cal—California Union Oil Co v. Rideout, 177 P. 196, 38 Cal App. 629.
Employees of consignee
Consignee engaged in removing his cargo from ship was an invitee, and his employees as consequential invitees shared in the incumbencies due from shipowner with respect to providing a reasonably safe place within which to work.—Santamaria v. Lamport & Holt Line, 196 A 706, 119 N.J Law 467

38. U.S—Stewart v. Atlantic Gulf & Pacific Co, D.C Fla., 9 F.Supp. 344
58 C J p 311 note 47.
Injury to members of tug crew
Where there was strong evidence that tandem operation by two tugs in attempting to release stranded freighter was a dangerous method, owner of freighter could not be held accountable for such method resulting in death of employees of tug which sank, where masters of tugs adopted that procedure—Lamb v Interstate S S Co, D C Ohio, 58 F. Supp 582, affirmed, C C A, 149 F 2d 914.

39. N J—Santamaria v. Lamport & Holt Line, 196 A. 706, 119 N J Law 467.
58 C J p 311 note 48

40. La.—Rice v. Cade, 10 La 288.

41. U S—Kjaer v Etier, La, 222 F 243, 137 C C A 659.

42. **Master of vessel**
Owners of a vessel are not liable for injuries to master thereof which result from his own negligence—Patton-Tully Transp Co. v. Turner, C C A.Tenn., 269 F 334.
Emergency
Fact that a person in the presence of an imminent and unexpected danger does not act with deliberation does not make him chargeable with contributory negligence.—The Schooner Robert Lewers Co v Kekauoha, Hawaii, 114 F. 849, 52 C C A 483.

43. U.S—Militano v U S., C C A N Y., 156 F 2d 599, certiorari dismissed State Marine Corp. v. Militano, 67 S Ct 193, 329 U.S. 682, 91 L Ed. 600
58 C.J p 324 note 57.
Apportionment of damages in admiralty see infra § 86.
Contributory negligence in admiralty generally see Admiralty § 85.

the doctrine of assumption of risk.[44]

(2) Inspectors and Other Officers

An inspector or other officer on board ship in the discharge of his official duty may recover for personal injuries received by him as a result of the negligence of the master or crew.

An inspector on board a vessel in the discharge of his official duty in which the vessel has an interest is an invitee[45] and reasonable precaution must be exercised to provide for his safety.[46] An inspector, on board ship in the discharge of his duty, may recover for injuries received by him as a result of the negligence of the master or crew,[47] as where the master failed to exercise reasonable precautions for his safety.[48] An official weigher, in the proper discharge of his duty, injured on board ship by reason of the negligence of a mate in charge of the vessel may hold the ship liable.[49] It is negligence, for which the ship is liable, to leave an open hatch in a place where libelant roundsman's duties called him.[50] A customs officer lawfully on board ship may hold the ship liable for injuries negligently inflicted on him,[51] as where the crew negligently placed a ladder over the side but failed to lash and bolt it so that it fell when libelant was on it.[52]

Where reasonable care has been exercised no liability attaches to the vessel or her owner.[53] A shipowner owes no duty to an employee of a shipper, who climbs about the ship inspecting it, to maintain cleats so that the employee may safely use them to climb on, unless the owner knows, or should have known, or was charged with notice, that the employee intended to use them,[54] nor is the ship rendered unseaworthy because of the owner's failure to maintain the cleats for such purpose.[55] The negligence of the owner of the vessel must be the proximate cause of the injury.[56]

Contributory negligence and assumption of risk. Contributory negligence of an inspector does not, in admiralty, bar his recovery.[57] Recovery may be barred under the doctrine of assumption of risk.[58]

d. Other Persons

In the absence of a treaty or statute imposing civil responsibility, a shipowner is not liable in damages to a stranger in peril on the high seas to whom the ship's master has failed to give aid.

The liability of a vessel or shipowner for personal injuries sustained by persons on or about the vessel, other than those persons considered in supra subdivisions a–c of this section and infra § 85, is to be determined by application of the general rules governing torts and negligence.[59] In the ab-

44. Choosing dangerous instead of safe route

One engaged in work about a vessel who chooses a dangerous route from one place to another, rather than a safe one, does so at his own risk.—The Marie, D.C.N.Y., 137 F. 448—The Patria, D.C.N.Y., 135 F. 255

Assumption of risk in admiralty generally see Admiralty § 86.

45. U.S.—Stewart v. Atlantic Gulf & Pacific Co., D.C.Fla., 9 F.Supp. 344

Held more than mere licensee

U.S.—The Steam Dredge No. 1, D.C. Me., 122 F. 679, rehearing denied 134 F. 160—The City of Naples, Minn., 69 F. 794, 16 C.C.A. 421.

Government inspector on dredge

U.S.—Stewart v. Atlantic Gulf & Pacific Co., D.C.Fla., 9 F.Supp. 344.

46. U.S.—Stewart v. Atlantic Gulf & Pacific Co., supra.

58 C.J. p. 311 note 53.

47. U.S.—The Steam Dredge No. 1, D.C.Me., 122 F. 679, rehearing denied 134 F. 160—The City of Naples, Minn., 69 F. 794, 16 C.C.A. 421.

Liability of master of vessel for personal injuries see supra § 70

Negligence of operator of dredge

Operator of dredge was negligent in swinging dredge so as to strike skiff in which government inspector was standing when lever man knew, or by exercising reasonable diligence could have known, of inspector's position of peril.—Stewart v. Atlantic Gulf & Pacific Co., D.C.Fla., 9 F.Supp. 344.

48. U.S.—The City of Naples, Minn., 69 F. 794, 16 C.C.A. 421.

Directing inspector through dark passage

Inspector may recover where master directed him to the lower deck through a dark passage without light or a guide so that he fell down a hatch.—The City of Naples, supra.

49. U.S.—The Calista Hawes, D.C. N.Y., 14 F. 493.

50. U.S.—The Guillermo, D.C.Mo., 26 F. 921.

51. U.S.—The Daylesford, D.C.Ala., 30 F. 633.

52. U.S.—The Daylesford, supra.

53. U.S.—The Coolgardie, Hawaii, 260 F. 398, 171 C.C.A. 264—The Euxinia, Pa., 150 F. 541, 80 C.C.A. 254, certiorari denied 27 S.Ct. 791, 205 U.S. 544, 51 L.Ed. 923.

54. U.S.—Holub v. Sword S.S. Line, C.C.A.Tex., 132 F.2d 206.

55. U.S.—Holub v. Sword S.S. Line, supra.

56. **Negligence of operator of dredge**

In swinging dredge so as to strike skiff in which government inspector was standing was proximate cause of injury to inspector's fingers crushed in machinery when he grasped cable to check fall.—Stewart v. Atlantic Gulf & Pacific Co., D.C.Fla., 9 F.Supp. 344.

57. U.S.—The Steam Dredge No. 1, Me., 134 F. 161, 67 C.C.A. 67, 69 L.R.A. 293.

Contributory negligence in admiralty generally see Admiralty § 85

Apportionment of damages in admiralty see infra § 86.

Contributory negligence held not shown

U.S.—Stewart v. Atlantic Gulf & Pacific Co., D.C.Fla., 9 F.Supp. 344.

58. **Choosing dangerous instead of safe method**

Doctrine that choice of dangerous method is at peril of person making it was inapplicable in libel against operator of dredge by government inspector injured when dredge struck skiff in which he was standing, and would not be controlling because act of standing in skiff was not per se dangerous, but made so only by active negligence of respondent.—Stewart v. Atlantic Gulf & Pacific Co., supra.

59. **Injury to bridge tender**

U.S.—Quinn v. Southgate Nelson Corp., D.C.N.Y., 36 F.Supp. 873, affirmed, C.C.A., 121 F.2d 190, certiorari denied Southgate Nelson Corp. v. Quinn, 62 S.Ct. 185, 314 U.S. 682, 86 L.Ed. 546.

sence of a treaty or statute imposing civil responsibility, a shipowner is not liable in damages to a stranger in peril on the high seas to whom the ship's master has failed to give aid.[60]

§ 85. —— Stevedores or Other Independent Contractors or Their Employees

a. Duties and liabilities of vessel or owner
b. Duties and liabilities of other persons
c. Contributory negligence and assumption of risk
d. Joint and several liability; liability over
e. Seaworthiness

a. Duties and Liabilities of Vessel or Owner

(1) In general
(2) As to condition of vessel
(3) Appliances

(1) In General

An employee of a stevedore or other independent contractor is an invitee and the ship and owner thereof are liable for injuries sustained by such employee as a result of the negligence of the shipowner.

With respect to the duties and liability of the vessel and shipowner an employee of a stevedore or other independent contractor is an invitee,[61] and the ship must be reasonably sure not to invite him into danger,[62] and reasonable care must be exercised to avoid injuring him.[63] The employee's status as

Injury to canal lock tender
Del.—Bowen v. Baltimore, etc., Steamboat Co., 84 A. 1022, 26 Del. 428
58 C.J. p. 298 note 54 [a] (3), [e].

Person in boat
(1) Operator of tugboat unable to see ahead because of logs piled high on barge and deck hand stationed atop logs as a lookout were negligent in not seeing outboard motor-powered fishing boat on stream, much used by fishermen but infrequently traversed by larger craft, or that fishing boat was capsized by wave or swell created by tug and barge, and, where such negligence resulted in drowning of operator of fishing boat, owner of tug was liable for death.—Tolle v. Higgins Industries, 31 So.2d 730, 212 La. 173

(2) Operator of outboard motor-powered fishing boat, who, when he discovered danger of waves created by tugboat and barge too late to reach safety, turned boat to meet waves, was not guilty of contributory negligence so as to bar recovery against tugboat owner for operator's death when fishing boat was capsized by such waves.—Tolle v. Higgins Industries, supra

(3) Liability of owner or vessel for injury resulting from suction or swell generally see supra § 77

60. U.S.—The Lillian E. Kerr, D.C.N.Y., 71 F.Supp. 184, affirmed, C.C.A., Publicover v. Alcoa S.S. Co., 168 F.2d 672.
Duty to ill, injured, or helpless persons generally see Negligence §§ 54–58.
Duty to rescue invitee on board vessel see supra subdivision a. of this section.

Effect of Salvage Treaty
(1) Provision in Salvage Treaty that owner of vessel incurs no liability for master's refusal to render assistance to persons found at sea and in danger of being lost related to owner's civil liability, and barred action against owner for master's refusal to render such assistance.—Warshauer v. Lloyd Sabaudo S.A., C.C.A.N.Y., 71 F.2d 146, certiorari denied 55 S.Ct. 140, 293 U.S. 610, 79 L.Ed. 700

(2) Salvage generally see Salvage § 1 et seq.

61. U.S.—Lauricella v. U.S., C.A.N.Y., 185 F.2d 327—Anderson v. Lorentzen, C.C.A.N.Y., 160 F.2d 173—Vanderlinden v. Lorentzen, C.C.A.N.Y., 139 F.2d 995—Altamura v. U.S., D.C.N.Y., 78 F.Supp. 531—Fodera v. Booth Am. Shipping Corp., D.C.N.Y., 66 F.Supp. 319, affirmed, C.C.A., 159 F.2d 795—The Dalhem, D.C.Mass., 41 F.Supp. 718.
58 C.J. p. 311 note 66.
Effect of Longshoremen's and Harbor Workers' Compensation Act see the C.J.S. title Workmen's Compensation Acts § 983 et seq., also 71 C.J. p. 1520 note 37 et seq.
Liability of general owner to third persons for injuries sustained after vessel chartered see supra § 34.
Recovery by longshoremen or stevedores as seamen under Jones Act see Seamen § 191.
"The relation of ship and stevedore is a special relation. The ship is the place of employment, and the ship's tackle is used in the work of loading and unloading."—Davis v. Grace S.S. Co., D.C.Pa., 10 F.Supp. 284, 285.

"Business guest"
U.S.—Puleo v. H. E. Moss & Co., C.C.A.N.Y., 159 F.2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S.Ct. 1733, 331 U.S. 847, 91 L.Ed. 1857 and H. E. Moss & Co. v. Puleo, 67 S.Ct. 1736, 331 U.S. 847, 91 L.Ed. 1857—Santiago v. U.S., D.C.N.Y., 102 F.Supp. 425—Lundberg v. Prudential S.S. Corp., D.C.N.Y., 102 F.Supp. 115—Muratore v. U.S., D.C.N.Y., 100 F.Supp. 276—Portel v. U.S., D.C.N.Y., 85 F.Supp. 458.

Employee as volunteer
One sent by repair company to make repairs to defendant's vessel was not volunteer in going up on crane, which had suddenly developed trouble, under defendant's superintendent's orders.—Ranson-Rooney v. Overseas Ry., 134 So. 765, 17 La.App. 205, set aside on other grounds Rooney v. Overseas Ry., 136 So. 486, 173 La. 183.

Special skill is demanded of stevedores and their employees.—La Guerra v. Brasileiro, D.C.N.Y., 39 F.Supp. 668, reversed on other grounds, C.C.A., 124 F.2d 553, certiorari denied Braseleiro v. La Guerra, 62 S.Ct. 918, 315 U.S. 824, 86 L.Ed. 1220.

62. U.S.—Consolidation Coastwise Co. v. Conley, Me., 250 F. 679, 163 C.C.A. 25
Duty of shipowner to invitees generally see supra § 84

63. U.S.—Guerrini v. U.S., C.C.A.N.Y., 167 F.2d 352—The Meton, C.C.A.Tex., 62 F.2d 825—Muratore v. U.S., D.C.N.Y., 100 F.Supp. 276—Davis v. Grace S.S. Co., D.C.Pa., 10 F.Supp. 284.
58 C.J. p. 312 note 68

Care due from employer to employee
Shipowner owed to employee the same duty which he would have owed to him had he entered owner's factory or shop to do repairs, and the measure of care was the same as that due from an employer to his employee.—Puleo v. H. E. Moss & Co., C.C.A.N.Y., 159 F.2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S.Ct. 1733, 331 U.S. 847, 91 L.Ed. 1857 and H. E. Moss & Co. v. Puleo, 67 S.Ct. 1736, 331 U.S. 847, 91 L.Ed. 1857.

Where stevedoring corporation was employed by third person and not by owner of vessel, but owner paid the corporation for its stevedoring work, although privity between the corporation and the owner did not exist in a restricted sense, the relationship of the parties was such as to bring the owner within the orbit of the corporation's obligation of due care, as

an invitee extends only to those parts of the ship which he may reasonably be expected to go in pursuit of his employment and if he goes elsewhere on the ship he becomes a mere licensee or even a trespasser.[64]

Formerly, a stevedore or longshoreman could not recover for injuries on the basis of a seaman's rights or contract, but only on principles of negligence,[65] but, as discussed infra subdivision e of this section, the obligation of seaworthiness traditionally owed by a shipowner to seamen has been extended to stevedores and longshoremen. However, the fact that a stevedore may be classed as a seaman and be awarded full indemnity against the owner of a vessel for injuries received as a result of an unseaworthy vessel does not preclude him from recovering against the shipowner on the basis of negligence.[66]

As a general rule, a vessel, or the owner thereof, which is in charge of stevedores or other independent contractors is not liable for injuries to their employees,[67] unless a contractual relationship exists between the vessel or owner and the person injured,[68] or unless the injuries are sustained by reason of a failure on the part of the owners or of those in charge of the management or navigation of the vessel to perform their maritime duties or obligations;[69] but the owners and vessel are liable to such persons for injuries caused by the negligence of the master or crew while in the performance of their duties.[70]

In order to impose liability, the negligence of the shipowner must have been the proximate cause of the injury.[71]

Fellow servants. The owners and the vessel are not liable for injuries to employees of a stevedore through the negligence of his coemployees.[72] Stevedores and their employees are fellow servants with

one who might certainly be injured if such care was not exercised—Cataldo v. A/S Glittre, D.C.N.Y., 41 F.Supp. 555.

64. U.S.—Lauricella v. U. S., C.A.N.Y., 185 F.2d 327.

65. U.S.—The Howell, C.C.A.N.Y., 273 F. 513.

Right to recover in admiralty for death of a stevedore depended on the same principles as if the action were at common law.—Jeffries v. De Hart, Pa., 102 F. 765, 42 C.C.A. 615.

Ordinary admiralty principles were applied in libel by longshoreman against vessel for injuries sustained while loading cargo.—The Nyhorn, D.C.N.Y., 4 F.Supp. 403.

66. U.S.—Corrado v. Pennsylvania R. Co., C.A.N.Y., 171 F.2d 73, certiorari denied 69 S.Ct. 641, 336 U.S. 919, 93 L.Ed. 1081—Anderson v. Lorentzen, C.C.A.N.Y., 160 F.2d 173—Landgraf v. U. S., D.C.Pa., 75 F. Supp. 58.

67. U.S.—De Luca v. Shepard S. S. Co., C.C.A.N.Y., 65 F.2d 566, modified on other grounds 67 F.2d 437, certiorari denied 54 S.Ct. 562, 291 U.S. 685, 78 L.Ed. 1072—Long v. Silver Line, C.C.A.N.Y., 48 F.2d 15—The Martha R. Grimes, D.C.N.Y., 49 F.Supp. 591—Paolillo v. Rederi A/B Disa, D.C.N.Y., 38 F.Supp. 833. N.Y.—Riley v. Agwilines, Inc., 73 N.E.2d 718, 296 N.Y. 402.
58 C.J. p. 312 note 69.

In absence of defective equipment or unseaworthiness, or negligence, shipowner is not liable to stevedores for injuries or death—Marcus v. U. S., D.C.Cal., 72 F.Supp. 212.

Warning as to dangerous nature of cleaning compound

(1) Ship committing to contractor cleaning of tanks with dangerous compound after full instructions as to danger from use and means of protection would not be liable to contractor's workman injured through use of compound—Sagler v. Kellogg S. S. Corporation, 277 N.Y.S. 792, 155 Misc. 217.

(2) Ship continuing in control of cleaning tanks with dangerous compound by contractor could rely on contractor, whom ship had fully advised, to warn his men, but, if ship knew that men were not adequately warned or learned that work was being done in a dangerous manner, the ship owed the duty of warning the contractor's men—Sagler v. Kellogg S. S. Corporation, supra.

State statute giving a right of action in personam only for death of an employee of persons or firms engaged in certain hazardous occupations, such as boating, did not authorize relief to libelant in rem against a vessel for death of a stevedore who was killed while unloading a vessel's cargo at a port within the state.—Freeman v. A. H. Bull S. S. Co., C.C.A.Fla., 125 F.2d 774.

68. U.S.—The Martha R. Grimes, D.C.N.Y., 49 F.Supp. 591.
58 C.J. p. 312 note 70.

69. U.S.—The Martha R. Grimes, supra
58 C.J. p. 312 note 71.
Failure to provide:
Safe place to work and safe appliances see infra subdivisions a (2), (3) of this section
Seaworthy vessel see infra subdivision e of this section.

70. U.S.—Muratore v. U. S., D.C.N.Y., 100 F.Supp. 276—The Dalhem, D.C.Mass., 41 F.Supp. 718—Calhoun v. Daly, D.C.N.Y., 18 F.Supp. 1005, affirmed, C.C.A., 89 F.2d 1004.
58 C.J. p. 312 note 72.

Painter injured by discharge of hot water

Where independent subcontractor's employee engaged in painting around discharge orifice of salt-water circulating system of steamship was severely injured by discharge of hot water caused by temporary clogging of intake of circulating system by floating debris, owners of steamship were negligent and were liable for the injuries—Coal Operators Casualty Co. v. U. S., D.C.Pa., 74 F.Supp. 236, motion denied 76 F.Supp. 681.

Servant loaned to contractor

(1) Where shipowner contracted with one to have him unload ship as an independent contractor, and thereafter shipowner loaned to independent contractor certain of his general employees for purpose of performing a specific part of work covered by the contract, fact that shipowner paid his employees for time they worked for contractor did not establish that they were shipowner's "employees" during such time, so as to render shipowner liable for injuries sustained by one of contractor's employees as result of alleged negligence of loaned employees.—Magnolia Petroleum Co. v. Francis, Tex.Civ.App., 169 S.W.2d 236, error refused.

(2) Servant lent or hired to another generally see Master and Servant § 2.

71. U.S.—Doll v. Scott Paper Co., C.C.A.Pa., 91 F.2d 860.

72. U.S.—Lynch v. U. S., C.C.A.N.Y., 163 F.2d 97—Peterson v. U. S., D.C.N.Y., 80 F.Supp. 84—The Prince Rupert City, D.C.Fla., 30 F.Supp.

the members of the crew of the vessel where all are engaged in the common work of loading or unloading;[73] and the ship or its owners are not liable for injuries to the stevedore by members of the crew engaged in the same work.[74] Hence, a winchman furnished by a vessel to assist the stevedores, and under the latter's control and orders, being a fellow servant with them and their employees,[75] the vessel is not liable for his negligence where ordinary care was exercised to furnish a competent winchman and a good winch,[76] but where the incompetence of the winchman has been made known to the officer in charge of the vessel his retention thereafter is negligence for which the vessel is liable,[77] and this is so where an inexperienced winchman is furnished.[78] Where there is no negligence on the part of the winchman, the owners are not liable.[79] Where the winchman remains the servant of the vessel and the owner they are liable for injuries caused by his negligence.[80] The stevedores and the crew are not fellow servants when not engaged in the same work.[81]

Voluntary assistance by member of crew. The owners of the ship are not responsible for negligence of an employee of the ship who volunteers assistance,[82] and, while the ship has been held liable where the injury was sustained on board ship,[83] the contrary has also been held where the accident did not take place on board and was not due in any way to the construction of the ship.[84]

What law governs. Where a stevedore or longshoreman or other employee of an independent contractor is injured while the vessel is in port, the law of the place where the injury occurred governs the rights and liabilities of the parties.[85] Where a stevedore is injured while the vessel is in a foreign port, the laws of the foreign country control;[86] and, where such laws do not give a stevedore a maritime lien for injuries, a suit in rem in a court of admiralty in the United States cannot be maintained.[87]

(2) As to Condition of Vessel
- (a) In general
- (b) Hatches

(a) In General

The owner of a vessel is liable for personal injuries sustained by employees of stevedoring or other independent contractors as a result of his failure to furnish them a reasonably safe place in which to work.

It is the duty of the owners of a vessel to use reasonable care to furnish stevedores or other independent contractors and their employees a reasonably safe place to work,[88] and a reasonably

755—The Nyhorn, D C N Y, 4 F. Supp. 403
58 C.J. p 312 note 73.
Fellow servant rule.
Generally see Master and Servant §§ 307–356
In admiralty generally see Admiralty § 82.

73. U S—Carstensen v. Hammond Lumber Co, C C A Cal, 11 F 2d 142.
58 C J. p 313 note 76.

74. U S.—The Rosalie Mahony, D C. Wash., 218 F. 695.

75. U.S.—The Daisy, C C A.Cal., 282 F. 261.
58 C J. p 313 note 78.

76. U S.—Brodbeck v Lavino Shipping Co, C C A Pa., 31 F 2d 943.
58 C.J. p 313 note 79.

77. U.S—The Brookby, D C Pa., 165 F. 93.

78. U.S.—The Anaces, N C., 93 F 240, 34 C.C.A 558

79. U S—Mercurio v Lunn, N Y, 93 F. 592, 35 C C.A. 467.

80. U S.—Standard Oil Co. v Anderson, N Y, 29 S.Ct. 252, 212 U.S 215, 53 L Ed. 480.
58 C.J p 313 note 83

81. U S.—Union Steamboat Co. v Chaffin, Ill, 204 F 412, 122 C.C.A 598.
58 C J p 313 note 84.

82. U.S.—The Corozal, D.C.Mass, 225 F 685—The General De Sonis, D.C Wash, 179 F. 123

83. U S—The General De Sonis, supra
58 C J. p 313 note 86.

84. U S—The Corozal, D.C Mass, 225 F 685

85. U S—Lundberg v Prudential S. S Corp, D C N Y, 102 F Supp 115—The Cuzco, D C Wash, 225 F 169.
What law governs maritime torts generally see Conflict of Laws § 12 a (3).

Wrongful death

Where employee of repair company was killed when gasoline exploded in a valve in a tanker in dry dock in New York, employee's administratrix could not invoke the Death on the High Seas Act, but since a ship in dry dock is within admiralty jurisdiction, administratrix could sue under the Conservation Act, and her recovery depended on the Lord Campbell's Act of New York.—Puleo v. H E Moss & Co, C.C A N.Y., 159 F 2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S Ct. 1733, 331 U.S 847, 91 L Ed 1857 and H. E. Moss & Co. v. Puleo, 67 S Ct. 1736, 331 U S 847, 91 L Ed 1857.

86. U.S.—The Cuzco, D.C.Wash., 225 F 169.
58 C J. p 320 note 77.

87. U.S.—The Cuzco, supra.
Jurisdiction of admiralty to enforce liens see Admiralty §§ 46–48.

88. U S—Lauricella v. U. S, C.A N. Y, 185 F 2d 327—U S v Arrow Stevedoring Co., C A Cal, 175 F.2d 329, certiorari denied 70 S Ct. 307, 338 U S 904, 94 L Ed 557—Anderson v Lorentzen, C C A N Y., 160 F 2d 173—Militano v. U S, C.C.A. N Y., 156 F 2d 599, certiorari dismissed State Marine Corp. v. Militano, 67 S.Ct 193, 329 U S 682, 91 L Ed 600—The Wearpool, C C A Tex, 112 F.2d 245—Panama Mail S S. Co v Davis, C C A Pa., 79 F.2d 430—De Luca v. Shepard S. S. Co, C.C A N Y., 65 F 2d 566, modified on other grounds 67 F.2d 437, certiorari denied 54 S Ct. 562, 291 U.S. 685, 78 L Ed 1072—The Meton, C.C A Tex, 62 F.2d 825—Lundberg v. Prudential S. S. Corp, D.C N.Y, 102 F Supp. 115—Laffoon v. U S., D.C.N Y., 101 F.Supp 823—Greer v. U. S, D C.N.Y, 94 F.Supp 397—Sommerseth v. U. S., D C.Pa, 91 F Supp 457—Portel v U S., D C.N Y, 85 F Supp. 458—Cioffi v. New Zealand Shipping Co, D C N Y., 80 F Supp 98—Altamura v. U S, D.C N Y., 78 F.Supp 531—Lo Bue v. U S., D C.N.Y, 75 F Supp 154, opinion supplemented 78 F.Supp. 86, appeal dismissed, C.C A., 178 F.2d 528—Amendola v. U. S., D C N Y., 74 F.Supp. 488—Fodera v. Booth

safe passageway to and from such place,[89] and they must exercise ordinary care to keep the premises reasonably secure against danger,[90] and are liable for the resulting injuries to such workmen by reason of their failure to exercise ordinary care to provide reasonably safe places in which to work.[91]

American Shipping Corp, D.C N Y., 66 F.Supp. 319, affirmed, C C A, 159 F.2d 795—Puleo v. H E Moss & Co, D.C N Y, 66 F Supp. 78, affirmed in part and reversed in part on other grounds, C C A, 159 F 2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S Ct 1733, 331 U S. 847, 91 L Ed. 1857, and H E Moss & Co. v. Puleo, 67 S.Ct 1736, 331 U S 847, 91 L Ed. 1857—The Martha R. Grimes, D C N Y., 49 F Supp. 591—The Etna, D C Pa., 43 F Supp 303—The Dalhem, D C Mass, 41 F Supp 718—The Ellenor, D C Fla, 39 F Supp 576, affirmed, C C A, Freeman v. A H Bull S S Co, 125 F 2d 774—The Anderson, D C Md, 37 F Supp 695—Davis v. Grace S. S Co., D.C Pa, 10 F Supp. 284—The Nyhorn, D.C N Y, 4 F Supp. 403

Cal—Petersen v. Klitgaard, 299 P. 54, 212 Cal. 516, certiorari denied Peterson v Naknek Packing Co, 52 S Ct 128, 284 U.S. 672, 76 L Ed 569.

N.Y—Buckley v. Cunard S. S Co, 253 N.Y.S 254, 233 App Div 361—Riley v. Agwilines, Inc, 56 N.Y.S. 2d 221, affirmed 63 N Y S 2d 835, 270 App Div. 1010, reversed on other grounds 73 N E.2d 718, 296 N Y. 402.

58 C J. p 313 note 92.

Bulkhead

(1) A ship is responsible for proper construction and maintenance of a bulkhead employed to stabilize a linseed cargo—The Adour, D C.Md, 21 F.2d 858.

(2) Type of material used in a bulkhead which separated cargoes which were stowed by ship's agents was not decisive on question of shipowner's liability for injuries sustained by a stevedore, who was employed by a stevedoring company which was engaged in removing cargo from ship, when bags fell on stevedore—La Guerra v Brasileiro, C C A N.Y, 124 F 2d 553, certiorari denied Brasileiro v. La Guerra, 62 S Ct 918, 315 U S 824, 86 L Ed 1220.

Cargo which was unsafe to work on made the place of work unsafe—Anderson v. Lorentzen, C C A N.Y., 160 F 2d 173.

Liquid on deck

A steamship was an unsafe place for stevedores to work to the extent that its deck was made dangerous by presence of liquid which had leaked out on deck.—Anderson v. Lorentzen, supra.

Applicability of rule where work done for shippers

Safe place to work rule is generally applicable in cases of master and servant or in cases where work is being done on property, vessel, or otherwise, of owner, and rule was inapplicable to question of liability of vessel for death of longshoreman where work being done by stevedore and his employees was being done not for vessel but for shippers—The Ellenor, D C Fla, 39 F Supp 576, affirmed, C C A., Freeman v A. H Bull S S Co, 125 F.2d 774.

Condition not deemed dangerous

A trench 3½ inches wide by eight inches deep around hatch into which battens were fitted when the vessel was at sea was not dangerous or a trap with respect to liability of shipowners to employee of an independent contractor who was employed to clean up ship after discharge of cargo—De La Pena v. Moore-McCormack Lines, D C N.Y, 84 F Supp 698

89. U S—The Wearpool, C C A Tex., 112 F 2d 245—McCarty v U. S, D C N Y, 88 F.Supp 251, affirmed, C. A, 196 F 2d 221—The Martha R Grimes, D C N Y, 49 F.Supp 591—The Anderson, D C Md., 37 F Supp. 695

N Y—Riley v Agwilines, Inc, 56 N. Y S 2d 221, affirmed 63 N Y S 2d 835, 270 App Div 1010, reversed on other grounds 73 N.E 2d 718, 296 N Y. 402

58 C.J p 314 note 93.

Ladders

U S—U S Fidelity & Guaranty Co. v U S, C.C A N Y., 152 F 2d 46—Vanderlinden v. Lorentzen, C C A N.Y, 139 F 2d 995—Grillo v Royal Norwegian Government, C.C A N Y, 139 F.2d 237—McCarty v U S, D C N Y., 88 F Supp 251, affirmed, C A., 196 F 2d 221—The Estrella, D C N Y., 2 F.Supp. 258, affirmed, C C A., Dimatteo v. The Estrella, 67 F.2d 991.

58 C J. p 314 note 93 [a] (3).

Type of equipment required

Libelee was not negligent for failing to furnish the type of "accommodation ladder" which was used on some other freight vessels and passenger ships at the time of the accident, since the libelee was not compelled to furnish the latest invention in equipment for boarding and leaving vessels—B A Carroll Stevedoring Co v. U. S, D.C Mass, 25 F Supp 6.

90. U S—The Joseph B Thomas, Cal, 86 F. 658, 30 C.C.A. 333, 46 L R.A. 58.

58 C J p 314 note 94.

91. U S—Guerrini v. U S, C C A N. Y, 167 F.2d 352, certiorari denied 69 S Ct. 65, 335 U S. 843, 93 L Ed. 393—Anderson v. Lorentzen, C C.A. N.Y, 160 F 2d 173—McNeil v. U. S, D C.Pa., 94 F.Supp. 303—Altamura v U. S, D C N.Y, 78 F.Supp. 531—Fodera v. Booth Am Shipping Corp., D C N Y., 66 F Supp 319, affirmed, C C.A, 159 F 2d 795—Puleo v. H E Moss & Co, D C N Y, 66 F Supp 78, affirmed in part and reversed in part on other grounds, C C A, 159 F 2d 842, certiorari denied Todd Shipyard Corp v. Puleo, 67 S Ct. 1733, 331 U S 847, 91 L Ed 1857 and H E Moss & Co v Puleo, 67 S Ct. 1736, 331 U S. 847, 91 L Ed 1857—The Martha R Grimes, D C N.Y., 49 F.Supp. 591—The Tampico, D C N Y, 45 F.Supp. 174

N Y—Cardinal v State, 109 N Y S 2d 818, 279 App.Div 326, modified on other grounds 107 N E 2d 569, 304 N Y. 400—Buckley v Cunard S S Co, 253 N.Y S. 254, 233 App Div. 361.

58 C J p 315 note 95

Injury by gas

Ship which permitted stevedores to load ship before dissipation of deadly hydrocyanide gas with which ship had been fumigated was negligent and liable to stevedore injured by such gas—Davis v. Grace S S. Co, D C Pa, 10 F Supp 284.

Injury caused by improper stowage of cargo

(1) In general—La Guerra v. Brasileiro, C C A N.Y, 124 F 2d 553, certiorari denied Brasileiro v La Guerra, 62 S Ct 918, 315 U S 824, 86 L Ed. 1220—The Etna, D.C Pa, 43 F Supp. 303—The Dalhem, D C Mass, 41 F Supp 718.

(2) Where an injury occurs to a stevedore, while unloading a cargo, as a result of negligent loading, the ship and her owner cannot escape liability by showing that the loading was done by an independent contractor who employed competent stevedores—The Etna, supra

Injury due to escape of steam into boiler

U S—The Meton, C.C.A Tex, 62 F 2d 825.

58 C.J. p 312 note 72 [a] (3).

Injury from explosion in hydrogen house

Shipowner was liable for injury sustained by employee in explosion caused by welding operations beneath floor of hydrogen house which had become filled with escaping gas from leaky tank—Amendola v U. S., D C. N Y., 74 F.Supp. 488

Permitting top of tank to remain uncovered

U S—The Wearpool, D.C Tex, 28 F. Supp. 886, affirmed, C.C.A., 112 F.2d 245.

Permitting unboxed thermometer pipe in hold

U.S.—Fodera v. Booth American

These duties cannot be delegated[92] and persist despite any concurrent duty on the part of the stevedoring or other independent contractor.[93] Except as the doctrine of seaworthiness may apply, as discussed infra subdivision e of this section, no further duties ordinarily are owed by the shipowners,[94] and, where these duties have been discharged, the ship or owner thereof is not liable for injuries sustained by employees of stevedoring or other independent contractors on board the ship.[95] The safe place to work rule is subject to the limitation that the shipowner or master of the vessel is not required to eliminate all the danger attendant on work that is inherently dangerous.[96] The shipowner is not an insurer, but is merely obligated to use reasonable care to provide a safe place in which to work.[97] The duty to provide a reasonably safe place in which to work is confined to those parts of the ship to which the employee may reasonably be expected to go.[98]

When a shipowner surrenders control of part of his ship to an independent contractor, his duty with respect to the surrendered part extends only up to the time when the independent contractor assumes control.[99] Where the owners turn the vessel over to the stevedores or independent contractors in a safe condition, they are not liable for injuries to stevedores or contractors or their employees, arising from dangers created by the manner in which the injured employee and his fellow workmen do their work,[1] or by defects caused by the stevedores, of

Shipping Corp, C C A.N.Y, 159 F 2d 795.

92. U S —Anderson v. Lorentzen, C C A N Y, 160 F 2d 173—Lundberg v Prudential S S Corp, D C.N.Y, 102 F Supp 115—Sommerseth v. U. S, D C.Pa, 91 F Supp 457—Badalamenti v U. S, D.C N Y, 67 F Supp 575, affirmed in part and modified in part on other grounds, C C A, 160 F.2d 422
N.Y.—Riley v Agwilines, Inc., 56 N. Y S 2d 221, affirmed 63 N Y S 2d 835, 270 App Div 1010, reversed on other grounds 73 N E 2d 718, 296 N. Y 402.
58 C J p 315 note 96

93. U S —Anderson v Lorentzen, C C A N Y, 160 F.2d 173—Fodera v. Booth American Shipping Corp, C. C A N Y, 159 F 2d 795—Vanderlinden v Lorentzen, C C A.N.Y, 139 F. 2d 995—Altamura v U. S, D C N. Y., 78 F.Supp 531.

94. U S.—Freeman v A H. Bull S S. Co, C C A Fla., 125 F 2d 774—McCarty v. U S, D C N.Y., 88 F. Supp 251, affirmed, C A., 196 F.2d 221
58 C J p 315 note 97.
Duty as to appliances see infra subdivision a (3) of this section.

95. U S —Whyatt v. U. S, D C.N Y, 92 F Supp. 543—McCarty v U. S, D C.N.Y, 88 F Supp 251, affirmed, C A., 196 F.2d 221—B A Carroll Stevedoring Co. v. U S, D.C.Mass., 25 F Supp. 6.
58 C.J. p 315 note 98.

Injury by gas

(1) Vessel owner was not liable for injuries from hydrocyanidic poisoning sustained by stevedore who was ordered to begin loading after government expert had fumigated vessel and turned vessel over to owner's officers after determination that gas had entirely escaped, since owner exercised reasonable care in relying on work and word of government's expert that ship was safe for loading. —Panama Mail S S Co v. Davis, C. C A Pa., 79 F.2d 430

(2) Where steamship owners and their agents did not know of presence of carbon monoxide gas in ship's boiler and were not notified that employee of one contracting to supervise reconditioning of ship would inspect and survey it or enter boiler for such purpose, owners were not guilty of negligence rendering them liable for fatal injury to employee because of such gas —The Summerleaf, D.C. Tex, 28 F.Supp. 888.

(3) Where longshoreman employed by stevedoring company, which had been engaged by charterer to unload cargo of castor pomace, boarded vessel under directions of longshoreman's foreman and was asphyxiated by carbon dioxide gas generated by castor pomace in vessel's hold, and vessel had no control over loading and unloading or knowledge of condition of cargo, and there was no evidence of fault or defect in vessel or her appliances, the vessel was not liable in rem for longshoreman's death Under such circumstances, vessel was not bound to see that there was ventilation prior to unloading of cargo —Freeman v A. H Bull S S Co, C C A Fla, 125 F 2d 774

Injury caused by improper stowage of cargo

(1) Loading bags of sugar "athwartship," that is, with ends of the bags toward the sides of the ship, is safe, proper, and customary method of stowage.—Whyatt v. U. S, D C.N. Y., 92 F.Supp. 543.

(2) In the absence of knowledge or information to contrary, navigation company could rely on expert master stevedore's decision to use overlapping method of loading lumber, and fact that overlapping method of loading lumber was frequently used, and expert master stevedore adopted it as best method, excludes idea of navigation company's negligence because stripping method was not used, with respect to company's liability for longshoreman's injuries sustained while assisting in unloading steamship.—Litwinowitch v. Oriental Nav. Co., 166 A. 911, 311 Pa. 257.

Leaving tank open

Ship was not negligent in leaving tank open for use of workmen during repair thereof, being necessary for entrance and ventilation in preparation for work —Long v. Silver Line, C C A.N.Y, 48 F.2d 15.

96. U S.—The Ellenor, D C.Fla., 39 F Supp 576, affirmed, C C A, Freeman v. A. H. Bull S. S. Co, 125 F 2d 774
Assumption of risk see infra subdivision c (2) of this section.

97. Mass —Cullen v. New England Fuel, etc, Co., 148 N.E. 371, 253 Mass. 85.

98. U S —Martini v. U S., C A.N.Y, 192 F 2d 649, certiorari denied 72 S Ct 759, 343 U.S 926, 96 L Ed. —— —Lauricella v. U S, C A N.Y, 185 F 2d 327.

99. U.S.—Lynch v. U S, C.C A.N.Y, 163 F.2d 97—Osnovitz v U S., D.C. Pa, 103 F Supp. 238—Fogel v. U S., D C.N.Y., 102 F.Supp 727—Laffoon v U. S, D C.N Y, 101 F Supp. 823—Muratore v. U S, D.C N.Y, 100 F Supp 276—Cioffi v. New Zealand Shipping Co., D.C.N.Y., 80 F Supp. 98.

Primary duty to furnish employees safe place to work rested on the stevedoring company.—Porello v. U. S, C.C.A N Y., 153 F 2d 605, affirmed in part and reversed in part on other grounds American Stevedores, Inc. v Porello, 67 S.Ct. 847, 330 U.S. 446, 91 L Ed 1011

1. U S —Lynch v U S, C C A N.Y. 163 F 2d 97—Muratore v U S, D.C. N.Y, 100 F.Supp. 276—The Nyhorn, D C.N Y., 4 F.Supp 403.
N.Y —Riley v Agwilines, Inc., 73 N. E.2d 718, 296 N.Y. 402.

which the owners or their agents had no notice, or time and opportunity to repair.[2] When the owner has relinquished control he is not responsible for an unsafe condition of which an independent contractor has been notified and which it is the duty of the independent contractor to repair.[3] However, the shipowner may be liable for personal injuries to employees of an independent contractor resulting from an unsafe condition created after the contractor has commenced work on the vessel where the owner is in control or has the power of control of that part of the vessel at which the unsafe condition is created.[4] The shipowner is not liable for a defective condition where he had no notice or knowledge of it,[5] particularly where the independent contractor had undertaken to repair any defects.[6]

In order to warrant a recovery for injuries resulting from an unsafe condition, the unsafe condition must have been the proximate cause of the injury.[7] The general rules governing proximate cause in negligence cases ordinarily are applicable.[8] If the ship is turned over to the contractor in an unsafe condition as to certain things, but the injury is in no way caused, or contributed to, by the unsafe conditions, such conditions are not the proximate cause of the injury, and the ship is not liable.[9]

Inspection. While the ship is not liable for injuries resulting from a latent defect which a reasonable inspection would not disclose,[10] the inspection and care of the place to work must have been such that no hidden defect which was or should have been known is allowed to exist without warning to the stevedores,[11] and the owners are liable if due care is not used to inspect the vessel so as to discover defects which should be known to the officers of the vessel.[12]

Warnings. The duty to furnish a safe place to work includes the duty to give proper warning of latent dangers or defects,[13] and this duty exists al-

Pa.—Litwinowitch v. Oriental Nav Co., 166 A. 911, 311 Pa. 257.
58 C.J. p 315 note 99.

Knowledge of dangerous practice
However, it has been held that where the shipowner knows, or should know, that employees in doing their work engage in a dangerous practice he is under a duty to provide against the dangerous practice and failure to fulfill this duty constitutes negligence.—Lopez v. American President Lines, Ltd., C.C.A.N.Y., 138 F 2d 914—Lundberg v. Prudential S. S Corp, D.C.N.Y., 102 F.Supp 115.

Unsafe condition created in discharging cargo
U.S.—Whyatt v. U. S, D.C.N.Y., 92 F.Supp 543.

2. U.S.—Roymann v. Brown, Tex., 105 F 250, 44 C.C.A. 464.

3. U.S.—Byars v. Moore-McCormack Lines, C.C.A.N.Y., 155 F.2d 587—Laffoon v U. S., D.C.N.Y., 101 F. Supp 823

4. Circumstances showing control in owner
Where owner of cargo ship engaged independent contractor to convert ship, and by contract terms contractor was required to place proper safeguards and to use his best efforts to prevent accidents or injury to persons or property, but owner maintained crew on ship the members of which were required to report any unsafe and dangerous condition including open hatch areas created by contractor's men, and owner's mate had power to require contractor's foreman to effect removal of any existing danger and in event of failure to do so to terminate activities until compliance was secured, the power of control vested in the shipowner.—Muratore v. U. S, D.C.N.Y., 100 F. Supp. 276.

5. U.S.—Armento v. U. S, D.C.N.Y., 74 F.Supp 198.

Defective ladder
U.S.—Armento v. U. S, supra.

6. U.S.—Armento v U. S, supra.

7. U.S.—Doll v. Scott Paper Co, C.C.A.Pa., 91 F 2d 860—De La Pena v. Moore-McCormack Lines, D.C.N.Y., 84 F Supp 698
58 C.J. p 316 note 11 [b].

8. U.S.—Johnson v. Kosmos Portland Cement Co, C.C.A.Ky., 64 F 2d 193, certiorari denied Kosmos Portland Cement Co v. Johnson, 54 S.Ct 60, two cases, 290 U.S. 641, 78 L.Ed 557.
58 C.J. p 313 note 92 [d].
Proximate cause generally see Negligence §§ 103–115.

Lightning exploding gases
(1) Owner's wrongful act or omission in permitting gases to remain in vessel used for oil was proximate cause of death of men, from explosion caused by lightning, while making alterations on vessel.—Johnson v Kosmos Portland Cement Co, C.C.A.Ky., 64 F 2d 193, certiorari denied Kosmos Portland Cement Co. v. Johnson, 54 S.Ct 60, two cases, 290 U.S. 641, 78 L.Ed 557.

(2) Lightning which exploded gases in vessel, resulting in death of men was not "extraordinary manifestation of natural force" which owner would not have been required to foresee.—Johnson v. Kosmos Portland Cement Co., C.C.A.Ky., 64 F 2d 193, certiorari denied Kosmos Portland Cement Co v. Johnson, 54 S.Ct. 60, two cases, 290 U.S 641, 78 L.Ed 557.

9. U.S.—Long v. Silver Line, D.C.N.Y, 41 F.2d 367, affirmed, C.C.A., 48 F 2d 15.

10. U.S.—Wholey v British, etc, SS Co., D.C.N.Y, 158 F. 379, affirmed 171 F 399, 96 C.C.A. 355—Lunney v. The Concord, D.C.N.Y., 58 F. 913

11. U.S.—Corrado v. Pennsylvania R Co, C.A.N.Y, 171 F 2d 73, certiorari denied 69 S.Ct 641, 336 U.S 919, 93 L.Ed. 1081—Wholey v British, etc, SS. Co, D.C.N.Y., 158 F. 379, affirmed 171 F. 399, 96 C.C.A. 355.

Danger not previously experienced
In absence of any testimony as to any prior knowledge of any dangerous character of castor pomace carried by vessel by those familiar with it, master of vessel was not expected to recognize or anticipate any danger from cargo and was under no duty of investigating and inspecting for danger which no one theretofore had experienced under such circumstances —The Ellenor, D.C.Fla., 39 F Supp. 576, affirmed, C.C.A., Freeman v. A. H Bull S. S. Co, 125 F 2d 774.

12. U.S.—The William Branfoot v. Hamilton, S.C, 52 F. 390, 3 C.C.A 155.
58 C.J. p 316 note 6.

13. U.S.—Corrado v. Pennsylvania R Co., C.A.N.Y., 171 F.2d 73, certiorari denied 69 S.Ct 641, 336 U.S. 919, 93 L.Ed. 1081—Puleo v H. E Moss & Co., C.C.A.N.Y, 159 F 2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S.Ct. 1733, 331 U.S 847, 91 L.Ed 1857 and 67 S.Ct. 1736, 331 U.S. 847, 91 L.Ed. 1857—Lo Bue v. U. S, D.C.N.Y, 75 F.Supp. 154, opinion supplemented 78 F Supp. 86, appeal dismissed, C.A., 178 F.2d 528—The Etna, D.C.Pa., 43 F.Supp. 303—The Dalhem, D.C.

though the stevedoring or other independent contractors are aware of the danger but fail to warn their employees.[14] The shipowner is not under any duty to warn the employee of conditions which are open and comprehensible to any reasonably careful man,[15] and the shipowner is under no duty to give notice or warning of dangers of which the employee has actual notice.[16] The master of the vessel is not required to warn experienced employees of a contractor of dangers with which the employee is thoroughly familiar.[17]

Peculiar construction. Reasonable safeguards must be provided against danger resulting from the peculiar construction of the ship,[18] and warnings thereof must be given in order to escape liability.[19]

Illumination. Where it is the duty[20] or the custom for stevedoring or other independent contractors to furnish their own lights, there is no negligence on the part of the ship in failing to supply lights.[21] Where the shipowner surrenders control of that part of the ship at which the injury occurs to the independent contractor whose duty it is to provide proper illumination, the shipowner is not liable for an injury to an employee due to inadequacy of illumination.[22] Even where the ship has the duty to furnish lights, a particular place thereon need not be lighted until the stevedores are ready to work there,[23] but it is negligence for the vessel to fail to have proper lights at a dark place where men are working.[24] A ship having agreed to furnish lights is not liable for injuries received on the ground that the place was unlighted where it furnished the lights and was not notified that some had temporarily gone out.[25] Where the equipment for illumination is ready and available for use at the scene of the accident the shipowner is not liable for injuries sustained by employees of independent contractors because of the contractors' or employees' failure to use the equipment.[26] Where the shipowner provides a lighted passageway which can be used he is under no duty to keep a dark passageway safe.[27]

Lighters. The owner of a lighter receiving cargo from a ship has the duty to furnish the stevedores or longshoremen employed a safe place to work,[28] and a proper passage to and from that place,[29] and is liable for injuries sustained by a stevedore or longshoreman by reason of an unsafe mode of access.[30] The shipowner ordinarily fulfills his duty, in the absence of some special contract to the contrary, where he puts the goods over the ship's rail so that they may be received on board the lighter,[31] and the ship is under no duty to furnish a ladder for access to the lighter on which the stevedores are

Mass, 41 F Supp. 718—The Anderson, D C.Md, 37 F Supp 695—The Wearpool, D.C Tex, 28 F Supp. 886, affirmed, C C A., 112 F 2d 245.
58 C J. p 316 note 7

Deck made dangerous by presence of liquid
U S —Anderson v. Lorentzen, C.C A. N Y, 160 F 2d 173.

Sufficiency of warning
Owner of vessel was not relieved of liability for injuries sustained by longshoreman, who was engaged in stowing cargo on vessel when thermometer pipe was dislodged, by reason of mate's instruction to keep clear of the pipe, where instruction was not a warning that contact with pipe was dangerous and likely to cause injury, but was merely a direction to keep the cargo free from contact with pipe to permit the circulation of air through perforations of pipe—Fodera v Booth American Shipping Corp, D C.N Y, 66 F Supp. 319, affirmed, C.C.A, 159 F.2d 795.

14. U S —Anderson v Lorentzen, C. C A N Y, 160 F.2d 173.

15. Mass.—Murphy v. Furness, etc, Co., 156 N.E 836, 259 Mass 394
58 C.J p 316 note 8.

16. U S.—Ove Tysko v. Royal Mail Steam Packet Co., C.C.A.Or., 81 F. 2d 960.

17. U S —The Ellenor, D.C Fla, 39 F Supp. 576, affirmed, C C A., Freeman v A. H. Bull S S. Co, 125 F. 2d 774.

18. U S.—The Max Morris, D C N.Y, 24 F 860, affirmed, C C, 28 F 581, affirmed 11 S Ct. 29, 137 U.S 1, 34 L Ed 586.
58 C J p 316 note 9

19. U S —The Earl of Dunmore, D.C N.Y, 120 F 858

20. U S —The Hindustan, D C N.Y, 37 F 2d 932, affirmed, C C A, 44 F. 2d 1015
58 C J p 316 note 11

21. U S —The Nikolai II, D C Ala, 102 F. 174.

Lighting voluntarily supplied by contractor
U S —Long v Silver Line, C C A N Y, 48 F 2d 15

22. U S.—Osnovitz v. U. S, D C Pa., 103 F.Supp. 238.

23. U S —The Santiago, N.Y., 137 F. 323, 69 C C A. 653

24. U S —The Wearpool, D C Tex, 28 F Supp. 886, affirmed, C C.A, 112 F 2d 245—Nelson v. The Manhanset, D C N.Y., 53 F. 843, affirmed 69 F 843, 13 C.C A. 677.

Crew member extinguishing light in hold
Shipowner would not be relieved of liability for injuries sustained by longshoreman when members of ship's crew negligently extinguished light in hold where longshoreman was working merely because longshoreman's foreman had not expressly informed men on deck that work was in progress in hold —Palardy v. U. S, D C Pa., 102 F.Supp 534.

25. U.S —The Omsk, C C.A.Va., 266 F 200

26. U S —Cioffi v New Zealand Shipping Co, D C N Y, 80 F Supp. 98.
N Y —Riley v Agwilines, Inc, 73 N. E 2d 718, 296 N.Y. 402.

27. U S —Long v Silver Line, C C.A N.Y, 48 F 2d 15

28. U S —The No 34, C C A N Y, 25 F 2d 602, certiorari denied Hogan v L Boyers' Sons Co, 49 S Ct. 11, 278 U.S 606, 73 L Ed. 533—McDonough v International Nav. Co., D C.Me, 249 F. 248

29. U S —The No 34, C C A N Y., 25 F 2d 602, certiorari denied Hogan v L Boyers' Sons Co, 49 S Ct 11, 278 U.S. 606, 73 L Ed 533

30. U.S —The No. 34, C C A N Y, 25 F 2d 602, certiorari denied Hogan v L. Boyers' Sons Co., 49 S Ct. 11, 278 U.S. 606, 73 L.Ed 533.
58 C J. p 316 note 18

31. U.S —The No 34, C C A N Y, 25 F 2d 602, certiorari denied Hogan v. L Boyers' Sons Co, 49 S.Ct. 11, 278 U.S 606, 73 L Ed 533.

employed.[32] The fact that the stevedoring contractor generally provides safe access for his employees does not affect the obligation of the owner of the lighter.[33] Where, however, it becomes the duty of the ship to furnish safe passage from the lighter to the wharf, the owner of the lighter is not chargeable with negligence when the ladder furnished by the ship is defective.[34]

Where a stevedore or longshoreman, engaged in loading a vessel, is invited by the captain of a lighter tied alongside to board the lighter in furtherance of the business of loading the lighter's cargo on the vessel, the owner of the lighter is liable for injuries sustained by the stevedore or longshoreman as the result of the unsafe condition of the means of access to the lighter furnished by the captain.[35]

(b) Hatches

A vessel, and the owner thereof, have a right to have its hatches open or closed at their convenience and it is not negligence to leave a hatchway open during intervals of work.

Hatches are not appliances, but are part of the vessel.[36] Subject to the duty to provide the employees of stevedores or other independent contractors with a safe place to work and a safe passage to and from that place, as discussed supra subdivision a (2) (a) of this section, a vessel, and the owner thereof, have a right to have its hatches open or closed at their convenience,[37] and it is not negligence to leave a hatchway open during intervals of work,[38] even at night if the passageway and hatchway are reasonably lighted,[39] but it is negligence to leave an open hatch in a dark, unusual place where men working near it may be expected to go.[40] Where there is a custom to close the opening of hatches, a duty to cover them arises, and a breach of that duty may constitute negligence on the part of the shipowner.[41] The ship must supply adequate and safe planking over the hatches.[42]

No liability attaches to the vessel or owners where the dangerous condition results from the acts or neglect of the injured person's fellow employees,[43] or where the negligence of the owner is not the proximate cause of the injury,[44] or where the injury occurs from the dangerous condition of a hatch on a part of the ship where the employee had no right to be in pursuit of his employment.[45] However, where a shipowner engages an independent contractor to convert the ship, the owner, retaining control of the ship and having knowledge of the dangerous condition created by an opening in a hatch, is liable for injuries to an employee of the contractor who fell through the opening;[46] the fact that the contractor is under a duty to furnish his employee a safe place to work does not relieve the shipowner of responsibility.[47]

Inspection The vessel has the duty of exercising ordinary care in inspecting hatchways to discover defects,[48] and, where the defect could have been

32. U.S.—The No 34, C.C.A.N.Y., 25 F.2d 602, certiorari denied Hogan v. L. Boyers' Sons Co., 49 S.Ct. 11, 278 U.S. 606, 73 L.Ed. 533.

33. U.S.—The No 34, C.C.A.N.Y., 25 F.2d 602, certiorari denied Hogan v. L. Boyers' Sons Co., 49 S.Ct. 11, 278 U.S. 606, 73 L.Ed. 533.

34. U.S.—McDonough v. International Nav. Co., D.C.Me., 249 F. 248

35. **Lack of contractual relationship** between the lighter and the stevedore's employer does not absolve owner of lighter.—The Owen, D.C.Pa., 43 F.Supp. 897

36. Mass.—Crimmins v. Booth, 88 N.E. 449, 202 Mass. 17, 132 Am.S.R. 468.

37. U.S.—The Auchenarden, D.C.N.Y., 100 F. 895.

38. N.Y.—Riley v. Agwilines, Inc., 73 N.E.2d 718, 296 N.Y. 402.
58 C.J. p. 317 note 26.

When ship is awaiting cargo leaving open cargo hatch is not negligence.—Long v. Silver Line, C.C.A.N.Y., 48 F.2d 15.

While loading or unloading vessel, shipowner ordinarily need not keep hatchways covered.—Ove Tysko v. Royal Mail Steam Packet Co., C.C.A.Or., 81 F.2d 960.

39. U.S.—Deming v. The Argonaut, D.C.N.Y., 61 F. 517.

40. U.S.—Badalamenti v. U. S., C.C.A.N.Y., 160 F.2d 422.—Lo Bue v. U. S., D.C.N.Y., 75 F.Supp. 154, opinion supplemented 78 F.Supp. 86, appeal dismissed, C.A., 178 F.2d 528.
58 C.J. p. 317 note 28.

41. U.S.—Ove Tysko v. Royal Mail Steam Packet Co., C.C.A.Or., 81 F.2d 960.—The Anderson, D.C.Md., 37 F.Supp. 695

42. U.S.—The Anderson, supra.

43. U.S.—Lynch v. U. S., C.C.A.N.Y., 163 F.2d 97.—Fogel v. U. S., D.C.N.Y., 102 F.Supp. 727
N.Y.—Riley v. Agwilines, Inc., 73 N.E.2d 718, 296 N.Y. 402
58 C.J. p. 317 note 29.

Leaving hatch open and unguarded
U.S.—Lynch v. U. S., C.C.A.N.Y., 163 F.2d 97.
58 C.J. p. 317 note 29 [a] (1).

44. U.S.—McIntosh v. Miguel De Larrinaga S.S. Co., D.C.Tex., 45 F.2d 240.—Lopez v. U. S., D.C.N.Y., 102 F.Supp. 870
58 C.J. p. 317 note 26 [a].

45. U.S.—Lauricella v. U. S., C.A.N.Y., 185 F.2d 327

46. U.S.—Muratore v. U. S., D.C.N.Y., 100 F.Supp. 276

Custom as affecting owner's duty
Where owner of cargo ship engaged independent contractor to convert ship but owner maintained control of ship, and crew, who were required to report any unsafe and dangerous condition, knew of opening in hatch on ship which created dangerous condition, even if purported custom existed that there was no duty on shipowner with respect to open and dangerous hatch areas, custom would not relieve shipowner of duty to use reasonable care for safety of contractor's employee who was an invitee on ship.—Muratore v. U. S., supra.

47. U.S.—Muratore v. U. S., supra.

48. U.S.—The Saranac, D.C.N.Y., 132 F. 936.

Duty of ship's officer
With respect to liability for injury to stevedore, whether ship's officer

discovered by reasonable care in inspection, the ship is liable.[49]

Warning. One who is injured by reason of a dangerous or defective hatch may recover therefor if the ship was turned over to the contractors without any warning of the dangerous or defective condition;[50] but, where the contractor has been fully informed, the ship is not liable,[51] and owes no duty to warn the individual employee of the contractor,[52] except as to latent defects.[53] Where the employee has actual notice of the danger the shipowner is under no duty to give notice or warning.[54]

(3) Appliances

A shipowner who undertakes to supply appliances and equipment for the use of stevedoring or other independent contractors must furnish reasonably safe appliances and equipment.

A shipowner undertaking to furnish appliances and equipment for the use of stevedoring or other independent contractors must furnish reasonably safe appliances and equipment,[55] reasonably capable of performing the services for which they are furnished,[56] and free from defects.[57] This duty cannot be delegated to another so as to release the ship or its owners from liability.[58] The vessel or its owners are liable if they have failed to exercise reasonable care in furnishing such appliances.[59] In order to impose liability, the defective apparatus must have been the proximate cause of the accident.[60]

Except as the doctrine of seaworthiness may apply, as discussed infra subdivision e of this section, the shipowner is obligated only to exercise reasonable care in furnishing appliances and is not an insurer of his appliances.[61] He is not bound to the highest degree of care, nor is he under a duty to furnish the best appliances.[62] Where the appliances furnished are reasonably safe for the work in hand, the shipowner is not liable for injuries caused by the use of such appliances.[63] The ship-

need merely see that hatches are closed, or must see that they are properly closed, depends on situation—Petersen v Klitgaard, 299 P 54, 212 Cal 516, certiorari denied Peterson v Naknek Packing Co, 52 S. Ct. 128, 284 U S 672, 76 L Ed 569.

49. U S.—Wholey v. British, etc, SS. Co, D C N Y., 158 F. 379, affirmed 171 F 399, 96 C C.A. 355.
58 C.J. p 318 note 36.

50. U S.—The Earl of Dunmore, D.C. N Y, 120 F 858.
58 C J p 318 note 37.

51. U S—The Auchenarden, D.C.N Y., 100 F. 895.

52. U S—The Auchenarden, supra
58 C.J. p 318 note 39

53. U S.—The Anderson, D C Md, 37 F Supp 695—Leyland v. Holmes, La., 153 F. 557, 82 C C A 511 Cal—Petersen v. Klitgaard, 299 P 54, 212 Cal 516, certiorari denied Peterson v Naknek Packing Co., 52 S.Ct. 128, 284 U.S. 672, 76 L.Ed 569.

54. U S—Ove Tysko v. Royal Mail Steam Packet Co., C.C A.Or., 81 F. 2d 960

Where deceased was familiar with conditions generally, ship was under no duty to give him special advice with respect to condition of hatch through which he fell—McIntosh v. Miguel De Larrinaga S. S. Co, D C. Tex, 45 F.2d 240.

55. U S.—Grasso v. Lorentzen, C C A N Y, 149 F 2d 127, certiorari denied 66 S.Ct. 57, 326 U S 743, 90 L Ed. 444, rehearing denied 66 S Ct. 1019, 328 U S. 878, 90 L Ed 1646—Gucciardi v. Chisholm, C.C A N Y, 145 F.2d 514—Glover v. Compagnie Generale Transatlantique, C.C.A. Tex, 103 F 2d 557, certiorari denied 60 S Ct 83, 308 U S. 550, 84 L Ed. 462—Bryant v. Vestland, C C.A Ga, 52 F.2d 1078—Ivusich v Cunard White Star, D C N Y, 65 F Supp 412, affirmed, C.C A, 155 F 2d 104, certiorari denied 66 S Ct 1345, 328 U S 854, 90 L Ed 1626—Olszewski v United Fruit Co, D C Pa, 34 F Supp 113—The Prince Rupert City, D C Fla., 30 F Supp 755—B. A. Carroll Stevedoring Co v U S, D C Mass, 25 F.Supp 6—Davis v. Grace S S Co, D C Pa, 10 F.Supp 284—Weldon v. U S., D C Mass, 9 F. Supp. 347—The Mercier, D.C Or, 5 F Supp 511—The Nyhorn, D C N Y, 4 F Supp. 403.
58 C J p 318 note 41.

Basis of duty

Duty of owners of vessel or those in charge to provide suitable and safe equipment for use of stevedores employed by independent contractor arises, not from contractual relations, but from implied obligation on the part of one who is to provide machinery for use by another to exercise due care to see that the instrumentalities are safe and suitable for the purpose—Weldon v. U. S., D.C Mass., 9 F Supp 347

56. U.S—Pugliese v Panama Transport Co., D C.N.Y, 65 F Supp 433—The Anderson, D C.Md., 37 F Supp 695—Olszewski v. United Fruit Co, D.C.Pa, 34 F Supp. 113
58 C.J p 318 note 42.

57. U.S.—De Luca v. Shepard S S Co, C.C.A N Y, 65 F 2d 566, modified on other grounds 67 F.2d 437, certiorari denied 54 S.Ct. 562, 291 U S. 685, 78 L Ed. 1072—Pugliese v. Panama Transport Co., D C N.Y., 65 F.Supp 433
58 C.J. p 318 note 43.

58. N.Y—Riley v Agwilines, Inc., 56 N.Y S 2d 221, affirmed 63 N Y S. 2d 835, 270 App Div. 1010, reversed on other grounds 73 N E 2d 718, 296 N Y 402.
58 C J p 318 note 47.

59. U S—Militano v. U S, C C.A N. Y., 156 F.2d 599, certiorari dismissed State Marine Corp v Militano, 67 S Ct. 193, 329 U S 682, 91 L Ed. 600—Porello v U. S., C C A. N Y, 153 F 2d 605, affirmed in part and reversed in part on other grounds American Stevedores, Inc. v. Porello, 67 S Ct 847, 330 U S. 446, 91 L Ed 1011—The Meton, C.C. A Tex, 62 F.2d 825.
58 C J. p 319 note 51.

60. U S—Glover v. Compagnie Generale Transatlantique, C C A Tex, 103 F 2d 557, certiorari denied 60 S Ct 83, 308 U.S 550, 84 L Ed 462—Luckenbach SS Co. v Buzynski, C C A Tex, 19 F 2d 871, reversed on other grounds Buzynski v. Luckenbach S. S Co, 48 S.Ct. 440, 277 U S 226, 72 L Ed. 860, conformed to, C C.A, 31 F.2d 1015, certiorari denied 49 S.Ct. 483, 279 U.S. 867, 73 L Ed 1004

61. U S—The Mercier, D.C Or, 5 F. Supp. 511.

62. U S—Ivusich v. Cunard White Star, D.C.N.Y., 65 F Supp. 412, affirmed, C C A, 155 F 2d 104, certiorari denied 66 S Ct 1345, 328 U. S. 854, 90 L.Ed. 1626.

63. U.S—Bruszewski v. Isthmian S. S Co, C.C.A Pa, 163 F 2d 720, certiorari denied 68 S Ct. 451, 333 U. S. 828, 92 L.Ed 1113—Grasso v. Lorentzen, C.C A.N Y, 149 F.2d 127, certiorari denied 66 S Ct. 57, 326 U.S 743, 90 L.Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U S. 878,

owner is not liable for injuries sustained by reason of the negligent use or operation of the appliances by the stevedores or their employees[64] or where the appliances are selected by the stevedores, although furnished by the owners.[65] No liability attaches where the injury results from defects which are latent and of which the shipowner had no knowledge and could not discover by the exercise of ordinary care.[66]

Having furnished proper appliances, the shipowner is under no duty to give instructions as to their use,[67] and he is not liable because of the workmen's failure to use appliances furnished for their use.[68] An owner is not liable for a failure to furnish appliances which he is under no duty to furnish;[69] and where, under the contract, the independent contractor is obliged to furnish the equipment, the shipowner's voluntary offer to permit the contractor to use some of the ship's equipment may not be converted into a duty to furnish all of the necessary gear.[70] The owners are not liable for injuries to an employee of the contractor resulting from the defective condition of appliances supplied by the contractor.[71]

Inspection before furnishing appliances. The shipowner owes the duty of inspecting the appliances before turning them over to the stevedoring or other independent contractor,[72] and furnishing appliances with defects which could have been discovered by inspection is negligence,[73] even though the shipowner is under no duty to furnish appliances.[74]

Warnings. It is the duty of the shipowner to give notice to employees of an independent contractor, such as stevedores and longshoremen, of any latent danger or defects in the ship's appliances,[75] or to give notice of any defects therein, ascertainable by a reasonable inspection, which might constitute a source of danger and which are unlikely to be discovered or their danger realized by those to whom the equipment is supplied.[76] The shipowner is not under an obligation to notify such employees of a patent defect the danger of which is readily ascertainable from a mere casual inspection,[77] unless the circumstances are such that it is probable that even such a casual inspection would not be made.[78]

Defects arising subsequently; inspection and re-

90 L.Ed 1646—Peterson v. U S., D C.N.Y., 80 F Supp. 84—Ivusich v Cunard White Star, D C N Y, 65 F. Supp 412, affirmed, C C A., 155 F 2d 104, certiorari denied 66 S Ct. 1345, 328 U S. 854, 90 L Ed 1626.
58 C J p 318 note 48.

64. U S—De Luca v. Shepard, S. S. Co., C.C A N Y, 67 F.2d 437, certiorari denied 54 S Ct 562, 291 U S 685, 78 L Ed. 1072—The Prince Rupert City, D C.Fla., 30 F Supp 755—The Nyhorn, D C.N.Y., 4 F Supp 403.
58 C J. p 318 note 50.

65. U S—Jeffries v De Hart, Pa, 102 F 765, 42 C C A 615

66. N J—Moran v Moore-McCormack Lines, 36 A.2d 415, 131 N J. Law 332, affirmed 39 A 2d 136, 132 N J Law 171
58 C J p 318 note 49.

Secret defect in appliance, even though effecting casualty, will not fasten responsibility on the vessel or her owner—The Mercier, D C.Or, 5 F.Supp 511.

Platform for unloading cargo
N J.—Moran v Moore-McCormack Lines, 36 A 2d 415, 131 N J Law 332, affirmed 39 A.2d 136, 132 N J Law 171.

Duty to test for defects
(1) Officers and crew of ship must use ordinary care to determine weakness in tackle and must exercise highest degree of care with respect to breaks in overhead tackle—The Mercier, D C.Or., 5 F.Supp. 511.

(2) Ship need not apply strain to gear by testing machine or use of acids and microscope, in absence of circumstances indicating likelihood of break.—The Mercier, supra.

(3) Shipowner was not negligent in permitting use of ship's equipment by longshoreman in loading vessel, without testing for defects, so as to be liable for injuries sustained by longshoremen as result of defect in the equipment, where equipment came from a reliable dealer in maritime supplies, and equipment had been subjected to a standard test prescribed by Maritime Commission.—Sieracki v. Seas Shipping Co., C C A.Pa., 149 F.2d 98, affirmed 66 S Ct 872, 328 U S 85, 90 L Ed 1099, rehearing denied 66 S.Ct. 1116, 328 U S 878, 90 L Ed. 1646

67. U S—Atlantic Transport Co v. Maryland, Md., 259 F. 23, 170 C.C. A. 23.

New device
Shipowner owed to longshoremen rigging preventer guys on booms the duty of making certain that they were aware of the caution essential to safe use of a new device for holding cable fast to winch drum, which was dangerous unless so adjusted that turns of cable about drum, and not eye of bolt to which cable was attached, bore the weight of boom—Barbarino v Stanhope S. S Co, D C N Y, 61 F Supp 171, appeal dismissed, C C A., 150 F 2d 54, reversed on other grounds 151 F 2d 553.

68. N.Y—Riley v. Agwilines, Inc, 73 N E 2d 718, 296 N Y 402

69. U S.—Long v. Silver Line, D C N. Y., 41 F.2d 367
58 C.J. p 319 note 53

70. U S—O'Connell v. Naess, C A N Y., 176 F 2d 138

71. U S—Doll v. Scott Paper Co, C. C.A Pa, 91 F 2d 860—Paolillo v. Rederi A/B Disa, D.C N.Y., 38 F. Supp 833.

72. U S—Luckenbach SS Co v Buzynski, C C A.Tex, 19 F.2d 871, reversed on other grounds Buzynski v Luckenbach S. S Co, 48 S. Ct. 440, 277 U S 226, 72 L.Ed. 860, conformed to, C C A, 31 F.2d 1015, certiorari denied 49 S.Ct. 483, 279 U.S. 867, 73 L Ed 1004.
58 C.J p 319 note 57

73. U S—The Bolton Castle, Mass, 250 F. 403, 162 C C A 473.
58 C.J. p 319 note 58.

74. N Y—Connors v. King Line, 90 N.Y S. 652, 98 App Div. 261.

75. U S—The Anderson, D C Md, 37 F Supp 695.

76. U.S—Olszewski v. United Fruit Co., D.C.Pa., 34 F.Supp 113

77. U.S—Bruszewski v Isthmian S S Co, D C Pa, 66 F Supp. 210, affirmed, C.C A., 163 F.2d 720, certiorari denied 68 S Ct. 451, 333 U S 828, 92 L Ed. 1113—Olszewski v. United Fruit Co., D C Pa, 34 F. Supp 113.

78. U S.—Olszewski v. United Fruit Co., supra.

pair. Where the appliance or equipment as initially furnished to the workmen is reasonably safe, the shipowner is not charged with the duty of constant inspection,[79] and if defects arise while the appliance is in use by the workmen it is necessary that the shipowner be notified of the existence of the defects or have knowledge of them before any duty of repair or replacement, or any liability for failure to repair or replace, arises.[80] However, in some cases, it has been held that the shipowners must keep the appliances in use in reasonably safe repair and condition,[81] and that this duty includes that of making reasonable examination and inspections of such appliances.[82]

b. Duties and Liabilities of Other Persons

In addition to the vessel and owner, various other persons may be liable for personal injuries sustained on or about a vessel by employees of independent contractors, such as a stevedoring company, but a general agent is not in such control of the vessel as to incur liability.

In addition to the vessel and shipowner, discussed supra subdivision a of this section, various other persons may be liable for personal injuries sustained on or about a vessel by employees of independent contractors.[83] Persons who are not in possession and control of the vessel ordinarily are not liable for personal injuries to such employees.[84]

General agent. An agent appointed under a general agency contract to manage and conduct the business of the vessel for the owner, such as the United States,[85] is not liable for personal injuries sustained on or about the vessel by employees of stevedore companies[86] or other independent contractors.[87] A general agency agreement does not

79. U S —Bryant v Vestland, C C A Ga, 52 F 2d 1078—The Prince Rupert City, D C Fla., 30 F Supp. 755—Weldon v. U S., D C Mass, 9 F Supp. 347.

Ship's burden of inspection is lifted when control thereof passes to stevedore —The Mercier, D C Or., 5 F Supp 511.

80. U S —Grasso v. Lorentzen, C C. A N Y, 149 F.2d 127, certiorari denied 66 S Ct. 57, 326 U S 743, 90 L. Ed 444, rehearing denied 66 S Ct. 1019, 328 U S. 878, 90 L Ed. 1646—Bryant v. Vestland, C C A Ga., 52 F 2d 1078—Luckenbach SS. Co v. Buzynski, C C A.Tex, 19 F 2d 871, reversed on other grounds Buzynski v Luckenbach S. S. Co, 48 S. Ct 440, 277 U S 226, 72 L.Ed 860, conformed to, C C A., 31 F 2d 1015, certiorari denied 49 S.Ct. 483, 279 U.S. 867, 73 L Ed 1004—Eagle Indemnity Co to Use of Beall v. U S. Lines Co, D.C Md, 86 F Supp. 949—The Prince Rupert City, D.C Fla., 30 F.Supp. 755—Weldon v U S, D.C Mass., 9 F.Supp. 347—Navigazione Alta Italia, of Turin, Italy v. Vale, C.C A La., 221 F. 413.

Time sufficient to impute knowledge Where ship's ladder was used at 1 P. M. and nothing appeared to be wrong with it, and at 5 P M stevedore was injured in fall when rung of ladder broke, the short time which elapsed was insufficient to impute knowledge to owner of ship of any defect in ladder —The Prince Rupert City, D.C.Fla, 30 F.Supp 755

81. U S —The Haraldshaug, C.C.A. Va, 20 F 2d 337.
58 C.J p 318 note 44.

82. U S.—The Haraldshaug, supra.
58 C.J. p 318 note 45.

83. Va —Tidewater Stevedoring Corp. v. McCormick, 52 S.E.2d 61, 189 Va. 158.

Liability of:
Charterer for personal injuries see supra § 34
Master of vessel see supra § 70.

84. U.S.—McGowan v J. H Winchester & Co, C C A N.Y., 168 F 2d 924, certiorari denied 69 S Ct 133, 335 U S 861, 93 L Ed 408, and Buro v American Petroleum Transport Corp, 69 S Ct 134, 335 U.S. 861, 93 L Ed 408

Where terminal company contracted to furnish services of stevedores to load ships of paper company and arranged with contracting company for actual work of loading ship, terminal company was not liable for injuries of stevedore employed by contracting company to load ship, where terminal company was not engaged in actual loading of ship and not guilty of any act of negligence, or charged with liability by stevedore —Doll v. Scott Paper Co., C.C.A.Pa., 91 F.2d 860.

85. **Vessel owned by United States** U S.—Caldarola v. Eckert, N Y, 67 S. Ct. 1569, 332 U S. 155, 91 L Ed. 1968, rehearing denied 68 S Ct 30, 332 U S 784, 92 L Ed 367—McGowan v. J. H. Winchester & Co., C C.A N.Y, 168 F.2d 924, certiorari denied 69 S.Ct. 133, 335 U S. 861, 93 L.Ed 408 and Buro v American Petroleum Transport Corp, 69 S Ct 134, 335 U S. 861, 93 L Ed 408—Romano v. U. S., D C N.Y, 90 F Supp. 15—Buro v. American Petroleum Transport Corporation, D C N.Y., 75 F. Supp. 371, affirmed, C C.A., McGowan v. J H Winchester, 168 F. 2d 924, certiorari denied 69 S.Ct. 133, 335 U.S. 861, 93 L.Ed 408 and Buro v. American Petroleum Transport Corp, 69 S Ct 134, 335 U.S. 861, 93 L Ed 408—Condino v. U. S, D.C N Y., 73 F Supp. 643.
N J —Lynch v. United Fruit Co., 71 A.2d 344, 4 N J. 24.
N Y.—Pipitone v Standard Fruit & S S Co., 86 N.Y.S 2d 381, 275 App Div 675
Wash —Ellington v. American Mail Line, 211 P 2d 491, 35 Wash 2d 129.

86. U.S —Caldarola v Eckert, N Y, 67 S Ct 1569, 332 U S. 155, 91 L Ed. 1968, rehearing denied 68 S Ct. 30, 332 U.S 784, 92 L Ed 367—Palardy v American-Hawaiian S S. Co, C. A.Pa, 169 F 2d 619, certiorari denied 69 S.Ct 1521, 337 U S. 959, 93 L Ed 1758—Romano v U S, D C. N.Y, 90 F Supp 15—Bruszewski v. U S. War Shipping Administration, D C Pa, 88 F.Supp. 962, affirmed, C. A, Bruszewski v. U S, 181 F 2d 419, certiorari denied 71 S Ct 87, 340 U.S 865, 95 L Ed. 632—Condino v. U. S, D.C N Y., 73 F Supp 643

However, it has been held that the agent under a general agency contract is liable for injuries to employees of a stevedoring company — Bruszewski v. Isthmian S. S Co, D. C Pa., 66 F.Supp 210, affirmed, C C A, 163 F 2d 720, certiorari denied 68 S Ct 451, 331 U S. 828, 92 L Ed. 1113

87. N.J —Lynch v. United Fruit Co., 71 A.2d 344, 4 N J. 24
N Y.—Pipitone v. Standard Fruit & S S Co., 86 N.Y.S.2d 381, 275 App Div. 675

Cleaner of cargo tanks on oil tanker U.S —Buro v American Petroleum Transport Corporation, D.C.N Y, 75 F.Supp 371, affirmed, C.C A., McGowan v. J H Winchester, 168 F. 2d 924, certiorari denied 69 S Ct. 133, 335 U.S. 861, 93 L Ed. 408 and Buro v. American Petroleum Transport Corp., 69 S Ct. 134, 335 U.S. 861, 93 L.Ed. 408

Repairman
U S —McGowan v. J. H Winchester & Co, Inc, C.C A N Y, 168 F.2d 924, certiorari denied 69 S.Ct. 133,

vest in the agent possession and control of the vessel or make him the owner pro hac vice of the vessel so as to impose liability on him.[88]

Stevedoring contractor. In a proper case, a stevedoring contractor may be liable for personal injuries sustained by persons on or about a vessel.[89] Where an employee of an independent contractor is employed to work on or about a vessel in control of a stevedoring contractor, the employee of such independent contractor is an invitee.[90] The stevedoring contractor owes him the duty of exercising ordinary and reasonable care for his safety,[91] and is liable for personal injuries sustained by such employee as a result of his negligence.[92]

c. Contributory Negligence and Assumption of Risk

(1) Contributory negligence
(2) Assumption of risk

(1) Contributory Negligence

Except in admiralty, the contributory negligence of an employee of a stevedoring or other contractor is a complete bar to an action by the employee against a shipowner for damages for personal injuries sustained by such employee on or about the vessel as a result of the owner's negligence.

The contributory negligence of an employee of a stevedoring or other contractor is a complete bar to an action by the employee against the person otherwise liable, such as the shipowner, for damages for personal injuries sustained by such employee on or about the vessel as a result of negligence,[93] except in admiralty[94] wherein, as consid-

335 U S 861, 93 L Ed. 408, certiorari denied Buro v. American Petroleum Transport Corp, 69 S Ct 134, 335 U.S 861, 93 L.Ed. 408.

Ship's scaler

Wash.—Ellingson v American Mail Line, 211 P 2d 491, 35 Wash 2d 129

Defective hatch

Where independent contractor had been employed to build ammunition compartment on ship and to make repairs which included renewal of fifty per cent of wooden hatch covers, and contractor had been warned of defective condition of the hatches, agents for the ship were not liable for injuries sustained by employee of contractor in falling through defective hatch while setting up a beam in connection with construction of ammunition compartment.—Byars v. Moore-McCormack Lines, C C A.N.Y, 155 F.2d 587.

88. U.S.—McGowan v. J. H Winchester & Co, Inc, C.C.A.N Y, 168 F.2d 924, certiorari denied 69 S Ct. 133, 335 U S 861, 93 L Ed 408, certiorari denied Buro v. American Petroleum Transport Corp, 69 S Ct. 134, 335 U S 861, 93 L Ed. 408.

N J.—Lynch v United Fruit Co., 71 A 2d 344, 4 N J. 24

Status of general agent under general agency agreement see supra § 17.

89. Va.—Tidewater Stevedoring Corp. v McCormick, 52 S.E.2d 61, 189 Va. 158.

Effect of Longshoremen's and Harbor Workers' Compensation Act see the C.J S title Workmen's Compensation Acts § 918 et seq.

Liability of stevedoring contractor for injuries to:

Its employees:

Generally see Master and Servant § 224 et seq.

Longshoremen or stevedores as seamen under La Follette and Jones Acts see Seamen §§ 190, 191.

Seamen see Seamen § 206.

90. Va.—Tidewater Stevedoring Corp. v. McCormick, supra.

Business visitor

U S.—Vanderlinden v Lorentzen, C. C A.N.Y, 139 F.2d 995

91. Va.—Tidewater Stevedoring Corp. v. McCormick, 52 S E 2d 61, 189 Va. 158.

Custom exonerating stevedore from necessity of examining ship's ladder, down which stevedore's employees or business visitors must descend from ship to lighter alongside, if casual inspection shows no defect in ladder, did not exempt stevedore from liability for injuries to cargo checker as result of defect in ladder, since such custom was so unreasonable as to be unlawful.—Vanderlinden v. Lorentzen, C.C.A N Y, 139 F. 2d 995

92. **Cargo checker** in employ of one employed by stevedoring contractor is entitled to recover for injuries resulting from negligence of stevedoring contractor.—Vanderlinden v. Lorentzen, supra.

Carpenter working on pier

Injuries sustained by carpenter who had been employed to repair and maintain chutes and stalls used in loading horses on ships, when he was struck by stall which was being lowered to pier by winchmen without a signal from "slingers" who were absent from their stations, or from any other employee of stevedoring company, were caused by negligence of the stevedoring company's employees, and company was accordingly liable.—Tidewater Stevedoring Corp v. McCormick, 52 S E.2d 61, 189 Va. 158.

93. U S.—McIntosh v Miguel De Larrinaga S S. Co, D C Tex., 45 F. 2d 240.—Marcus v. U S, D C Cal, 72 F Supp 212

Cal.—Petersen v. Klitgaard, 299 P 54, 212 Cal. 516, certiorari denied Peterson v Naknek Packing Co, 52 S Ct. 128, 284 U.S 672, 76 L Ed 569

58 C J p 312 notes 68 [b], 73, p 315 note 2, p 317 note 30

Applicability of doctrine where injury results from unseaworthiness of vessel see infra subdivision e of this section

Actions for wrongful death

U S.—Graham v The Novarchos Koundouriotis, D.C Fla, 99 F Supp 450.

N Y.—Spinelli v. Seatrade Corp, 99 N.Y S 2d 945, 277 App Div 992, appeal denied 100 N.Y S 2d 959, 277 App Div. 1038.

94. U S.—Guerrini v. U S, C C A N Y., 167 F 2d 352, certiorari denied 69 S Ct. 65, 335 U.S. 843, 93 L Ed 393.—Militano v. U. S, C C.A.N.Y, 156 F 2d 599, certiorari dismissed State Marine Corp v Militano, 67 S Ct. 193, 329 U S. 682, 91 L Ed 600.—Lundberg v. Prudential S. S. Corp, D C N.Y, 102 F.Supp. 115.—Laffoon v. U. S, D C N Y, 101 F. Supp 823.—Portel v. U S., D C N Y, 85 F.Supp 458.—Bow v. Pilato, D C Cal, 82 F Supp 399.—Badalamenti v. U. S, D C N.Y., 67 F Supp. 575, affirmed in part and modified in part on other grounds, C C A., 160 F 2d 422.

58 C.J. p 324 note 57.

Contributory negligence in admiralty generally see Admiralty § 85.

ered infra § 86 f, contributory negligence may mitigate or reduce the damages. Where the employee's injuries are caused without fault on the part of the shipowner, but are due solely to the employee's contributory negligence and to the negligence of his employer the employee may not recover against the shipowner even in admiralty.[95] The usual rules as to what constitutes contributory negligence ordinarily are applicable with respect to the contributory negligence of an employee of a stevedoring or other independent contractor injured on or about a vessel.[96] Such employee's contributory negligence may consist not only in a failure to discover or appreciate a risk which would be apparent to a reasonable man, but also in an intentional exposure to a danger of which he is aware.[97] The employee is charged with notice of any defects which are apparent or which can be disclosed by a casual inspection.[98]

On the other hand, such an employee has a right to assume that due diligence will be used to guard him against danger in his employment.[99] He has a right to rely on the shipowner's observance of his duty to provide him with a reasonably safe place in which to work,[1] and his reliance on the performance of this duty does not render him guilty of contributory negligence.[2]

The rules governing the defense of contributory negligence in an action by an employee of a stevedoring or other independent contractor injured on or about a vessel have been applied in various situations,[3] as where the injury to the employee is occasioned by gas,[4] by slipping on the deck,[5] by falling into a tank,[6] or by defective appliances and equipment.[7] No liability attaches to the vessel

95. U S —Paolillo v. Rederi A/B Disa, D C.N Y, 38 F Supp 833

96. U.S —McNally v. Zeller Marine Corp., D C N Y, 77 F Supp 985—The Wearpool, D C Tex, 28 F Supp 880, affirmed, C C A, 112 F.2d 245

Contributory negligence generally see Negligence §§ 116–173.

97. U S.—McNally v Zeller Marine Corp, D C N.Y., 77 F Supp 985—Marcus v. U S, D C Cal, 72 F. Supp 212—The Ellenor, D.C Fla, 39 F Supp. 576, affirmed, C.C.A., Freeman v. A. H. Bull S. S Co, 125 F 2d 774

58 C J p 312 note 73 [a], p 315 note 2 [a] (1).

98. U S —Sommerseth v. U. S., D C. Pa, 91 F Supp 457

99. U S.—Grasso v. Lorentzen, C C A N.Y, 149 F.2d 127, certiorari denied 66 S Ct. 57, 326 U S 743, 90 L Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U S 878, 90 L Ed. 1646—Badalamenti v U. S, D C N.Y., 67 F Supp 575, affirmed in part and modified in part on other grounds, C C A, 160 F 2d 422—The Martha R Grimes, D C N.Y, 49 F Supp 591

1. U S —Sommerseth v U. S, D.C Pa., 91 F.Supp 457.

58 C J p 315 note 95 [b].

Duty of shipowner to provide safe place to work see supra subdivision a (2) of this section.

2. U S —The Harry Hudson Smith, N Y, 142 F. 724, 74 C.C A. 56.

3. U S —McNally v. Zeller Marine Corp., D C.N Y, 77 F Supp. 985

58 C J. p 312 note 73 [a], p 315 note 2 [b]

Cargo falling on gang boss in hold

Where strongback on board vessel was not defective and stevedoring contractors' longshoremen's gang boss, who was in bottom of hold directing task of working the cargo, proceeded with the operation with knowledge that strongback was unlocked and, therefore, unsafe to withstand any heavy pull, gang boss was guilty of negligence which was sole and proximate cause of injury resulting in his death when he ordered stevedores to pull pipes up when line from winch would necessarily pull against unlocked strongback —Marcus v U. S, D.C.Cal., 72 F Supp. 212.

Defective or decayed dunnage boards

Where longshoreman who was engaged in storing cargo aboard vessel owned by United States, and who was engaged with other members of his gang in rolling a spool of cable over layer of dunnage consisting of boards or planks did not know that one of the boards was defective because of a decayed section, and visual inspection while longshoreman was working would not have revealed defect to him, he was not chargeable with contributory negligence in suit against United States for injuries sustained when spool tipped over onto him because of defective board.—McNeil v U S, D C.Pa, 94 F Supp. 303.

4. **Matter of common knowledge**

Vessel was not liable for death of longshoreman who was asphyxiated by carbon dioxide gas generated by castor pomace in hold on ground that fact that vegetable matter decays and gives off carbon dioxide is matter of common knowledge which master of vessel should have known, since in such case longshoreman should also have known such fact and he would have been guilty of contributory negligence which would preclude recovery —The Ellenor, D C Fla, 39 F.Supp 576, affirmed, C C A, Freeman v. A. H. Bull S S. Co, 125 F.2d 774.

Entering boiler containing carbon monoxide

Where employee of one contracting to supervise reconditioning of steamship did not advise owners or their agents of his proposed inspection, survey, and entry into boiler of ship, pursuant to contract provision requiring contractor to keep agents advised of progress of repairs, and entered boiler, in which there was carbon monoxide gas, without investigating its condition or exercising any precaution, he was guilty of contributory negligence —The Summerleaf, D C Tex., 28 F Supp. 888

Fumigation with hydrocyanide gas

Stevedore injured by hydrocyanide gas with which ship had been fumigated was not guilty of contributory negligence, where presence of gas was not discoverable other than through its effects —Davis v Grace S. S Co, D C Pa., 10 F Supp 284.

5. U S.—Guerrini v. U S, C C A N. Y., 167 F 2d 352, certiorari denied 69 S Ct. 65, 335 U S. 843, 93 L Ed. 393.

58 C J. p 313 note 92 [h]

Slipping on patch of grease and falling into hold

U S.—Guerrini v. U. S, supra.

6. **Ballast tank**

A longshoreman, who fell into ballast tank as he sought to go to opposite side of ship to shovel grain, was not guilty of contributory negligence, even though place of accident was in darkness, where there was no other means of getting to other side of ship except through small passageway, of which longshoreman may not have known, and presence of small amount of light and air indicated existence of passageway in direction in which he was going —The Wearpool D C.Tex, 28 F.Supp. 886, affirmed, C C.A., 112 F.2d 245

7. U S —U S. Fidelity & Guaranty Co v. U. S, C C A N Y, 152 F 2d 46.

58 C J. p 315 note 2 [a] (1).

or owner thereof for injuries occasioned by hatches on the ship where the injury was due to the negligence of the injured employee, at least where the suit is not in admiralty.[8] The person injured has the right to assume that the hatches are in a safe condition.[9] The owner is not liable where an employee had actual notice of the open hatch through which he fell.[10] Where the defect in the hatch cover is apparent and known to the stevedore, the vessel is not liable for injury resulting from its use.[11]

What law governs. Since the extent to which contributory negligence is a defense is a procedural question, the law of the forum governs with respect thereto.[12]

(2) Assumption of Risk

Recovery by an employee of a stevedoring or other contractor against an owner of a vessel for personal injuries sustained on or about the vessel may be barred under the doctrine of assumption of risk.

In an action by an employee of a stevedoring company or other independent contractor against the person otherwise liable, such as the owner of the vessel, for personal injuries sustained on or about the vessel, recovery may be barred under the doctrine of assumption of risk,[13] but in admiralty it has been held that the defense of assumption of risk is not available,[14] although in some instances the doctrine has been applied in admiralty.[15] The usual rules as to what constitutes an assumption of risk ordinarily apply.[16] Such employee is only charged with risks of which he is aware or which are so plainly observable that he must be presumed to have known of them.[17] The rules as to assumption of risk have been applied to various

Right to rely on equipment furnished
The employee, and his employer, the stevedore or other independent contractor, may assume that appliances and equipment are free from defects not discoverable in the exercise of ordinary care—Grasso v. Lorentzen, C.C.A.N.Y., 149 F.2d 127, certiorari denied 66 S.Ct. 57, 326 U.S. 743, 90 L.Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U.S. 878, 90 L.Ed. 1646—58 C.J. p. 318 note 46.

Breaking of ship's shackle
U.S.—Paolillo v. Rederi A/B Disa, D.C.N.Y., 38 F.Supp. 833.

Ladder
(1) In general.—McDonough v. International Nav. Co., D.C.Me., 249 F. 248—58 C.J. p. 315 note 2 [a] (2)

(2) Where rigger, who had been ordered to begin work on board vessel, started to climb up ladder hanging over ship's side but ladder, which was not properly secured, slipped with result that rigger was severely injured, the rigger was not guilty of negligence in using ladder which was apparently safe.—U.S. Fidelity & Guaranty Co. v. U.S., C.C.A.N.Y., 152 F.2d 46

Using batten as ladder
Where it was generally known to marine painters that battens, unless lodged firmly in their cleats, were dangerous if used as ladders in painting sides of ship's lower holds and for that reason reasonable caution required more than a casual inspection by anyone about to climb on battens, and a reasonably prudent inspection would have disclosed that cleat was missing and that it was unsafe to step on batten which ultimately tilted and gave way, a marine painter who spent four or five minutes looking over the battens and testing a couple of them with his hands before climbing on them to paint side of hold was guilty of contributory negligence—Lundberg v. Prudential S.S. Corp., D.C.N.Y., 102 F.Supp. 115

8. U.S.—Ove Tysko v. Royal Mail Steam Packet Co., C.C.A.Or., 81 F.2d 960.
58 C.J. p. 317 note 30.

Duty to close hatches
Where trimming hatches were open when deceased and men went aboard in broad daylight, such conditions were patent and obvious, placing duty on deceased to remedy situation if he so desired—McIntosh v. Miguel De Larrinaga S.S. Co., D.C.Tex., 45 F.2d 240.

Contributory negligence held not shown
U.S.—Badalamenti v. U.S., C.C.A.N.Y., 160 F.2d 422—Lo Bue v. U.S., D.C.N.Y., 75 F.Supp. 154, opinion supplemented 78 F.Supp. 86, appeal dismissed, C.A., 178 F.2d 528.
58 C.J. p. 317 notes 28 [b], 30 [b].

9. U.S.—Badalamenti v. U.S., D.C.N.Y., 67 F.Supp. 575, affirmed in part and modified in part on other grounds, C.C.A., 160 F.2d 422.
58 C.J. p. 317 note 31.

10. U.S.—Ove Tysko v. Royal Mail Steam Packet Co., C.C.A.Or., 81 F.2d 960.

Failure of coworker to return
Stevedore gang header, who went to search for coworker looking for rope needed in their task, and who fell into hatch which shipowner negligently left open, unguarded, and unlighted some distance from place of work of stevedores engaged in loading lumber as employees of independent contractor, was not guilty of contributory negligence in that failure of coworker to return constituted notice of danger of open hatch into which coworker had fallen.—Badalamenti v. U.S., C.C.A.N.Y., 160 F.2d 422.

11. U.S.—Wholey v. British, etc., SS Co., D.C.N.Y., 158 F. 379, affirmed 171 F. 399, 96 C.C.A. 355.

12. U.S.—Lundberg v. Prudential S.S. Corp., D.C.N.Y., 102 F.Supp. 115

13. U.S.—Bruszewski v. Isthmian S.S. Co., D.C.Pa., 66 F.Supp. 210, affirmed, C.C.A., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113.
R.I.—Coyne v. Coastwise Dredging Co., 89 A. 1060, 36 R.I. 278.
Applicability of doctrine where injury results from unseaworthiness of vessel see infra subdivision e of this section.

14. U.S.—Miranda v. Isthmian S.S. Co., D.C.Cal., 96 F.Supp. 607—Bow v. Pilato, D.C.Cal., 82 F.Supp. 399.
Assumption of risk in admiralty generally see Admiralty § 86.

Risk of owner's negligence is not assumed.—Fodera v. Booth American Shipping Corp., D.C.N.Y., 66 F.Supp. 319, affirmed, C.C.A., 159 F.2d 795.

15. U.S.—Grasso v. Lorentzen, D.C.N.Y., 56 F.Supp. 51, affirmed, C.C.A., 149 F.2d 127, certiorari denied 66 S.Ct. 57, 326 U.S. 743, 90 L.Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U.S. 878, 90 L.Ed. 1646—The Prince Rupert City, D.C.Fla., 30 F.Supp. 755.

16. U.S.—The Martha R. Grimes, D.C.N.Y., 49 F.Supp. 591.
Assumption of risk:
Applicability of doctrine in negligence cases see Negligence § 174.
By servant see Master and Servant §§ 357–420.

Extraordinary risks are not assumed.—The Elton, S.C., 83 F. 519, 31 C.C.A. 496.

17. U.S.—De Luca v. Shepard S.S. Co., C.C.A.N.Y., 65 F.2d 566, modified on other grounds 67 F.2d 437, certiorari denied 54 S.Ct. 562, 291 U.S. 685, 78 L.Ed. 1072—Johnson

situations[18] An employee of a contractor may not recover for injuries resulting from a condition which he was employed to correct or eliminate.[19]

d. Joint and Several Liability; Liability Over

The general rules governing joint and several liability, contribution, and indemnity ordinarily apply to cases involving the liability of a shipowner and a stevedoring or other contractor for injuries sustained by the contractor's employee on or about a vessel.

Where an employee of a stevedoring or other independent contractor is injured while engaged in work on or about a vessel, the question of the joint and several liability of the persons responsible for the injury, such as the shipowner and the independent contractor employer, ordinarily is to be determined in accordance with the usual rules governing joint and several liability[20] Where the combined concurrent negligence or wrong of the persons responsible results in the injury to an employee of a stevedoring or other independent contractor they are joint tort-feasors[21] except to the extent that statutes may otherwise affect their relationship.[22]

Contribution. Where the persons, such as the shipowner and stevedoring or other independent contractor, are jointly liable for injuries sustained by an employee of the contractor generally there can be no contribution between them unless contribution is allowed by statute[23] While in admiralty the shipowner has been allowed contribution from the employer of the injured employee in some cases, although the injury was caused as a result of the concurrent negligence of the shipowner and employer,[24] nevertheless it has been held in other

v Kosmos Portland Cement Co, C.C.A.Ky, 64 F.2d 193, certiorari denied Kosmos Portland Cement Co v Johnson, 54 S.Ct. 60, two cases, 290 U.S. 641, 78 L.Ed. 557—The Martha R. Grimes, D.C.N.Y, 49 F. Supp. 591

58 C.J. p. 315 note 95 [b] (3).

18. U.S.—De Luca v. Shepard S. S. Co, C.C.A.N.Y, 65 F.2d 566, modified on other grounds 67 F.2d 437, certiorari denied 54 S.Ct. 562, 291 U.S. 685, 78 L.Ed. 1072.

58 C.J. p. 312 note 72 [b], p. 314 note 93 [b], p. 315 note 95 [b].

Injury by explosion of gas in hold

Employees of firm employed to make alterations on respondent's barge did not assume risk of explosion, caused by lightning, of gas in hold not cleaned out after carrying oil, where it was not shown they knew gases had not been removed—Johnson v. Kosmos Portland Cement Co., C.C.A.Ky., 64 F.2d 193, certiorari denied Kosmos Portland Cement Co v Johnson, 54 S.Ct. 60, two cases, 290 U.S. 641, 78 L.Ed. 557.

Injury occasioned by hatches

(1) An employee of consignee engaged in unloading cargo from ship, who was injured when board on hatch collapsed, precipitating him into hatchway, where there was nothing in appearance of board or perceptible circumstances to give apprisal of inherent peril, did not assume the injury as risk of employment—Santamaria v. Lamport & Holt Line, 196 A. 706, 119 N.J.Law 467.

(2) A stevedore who attempted to cross a hatch cover which had been placed in position while he was at work in the hold does not assume the risk of injury resulting from insufficient fastening.—Consolidation Coastwise Co v Conley, Me., 250 F. 679, 163 C.C.A. 25.

Unsafe appliances

Stevedores do not assume the risk of unsafe appliances.—The Elton, S.C., 83 F. 519, 31 C.C.A. 496.

19. **Cleaning ship after discharge of cargo**

Where independent contractor was employed to clean up ship after discharge of cargo by stevedores and one of his employees slipped on pile of bars or plates near trench and was injured, employee had no cause of action against shipowners—De La Pena v. Moore-McCormack Lines, D.C.N.Y, 84 F.Supp. 698.

Repairing broken boom

Where employee of stevedoring company came aboard ship for the sole purpose of repairing a broken boom, employee assumed the risk of his employment.—Bruszewski v. Isthmian S. S. Co, D.C.Pa., 66 F. Supp. 210, affirmed, C.C.A., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113.

20. U.S.—Vanderlinden v. Lorentzen, C.C.A.N.Y, 139 F.2d 995.

58 C.J. p. 317 note 28 [a].

Impleading third persons see infra § 86 c.

Joint and several liability for:

Negligence generally see Negligence § 102

Torts generally see the C.J.S. title Torts §§ 34-39, also 62 C.J. p. 1130 note 42 et seq.

Vessel chartered see supra § 34.

21. U.S.—Vanderlinden v. Lorentzen, supra.

Shipowner and contractor engaged to repair

U.S.—Portel v. U. S., D.C.N.Y., 85 F. Supp. 458.

Shipowner and stevedoring contractor

(1) In general.—Porello v. U. S., C.C.A.N.Y., 153 F.2d 605, affirmed in part and reversed in part on other grounds, C.C.A., American Stevedores, Inc v. Porello, 67 S.Ct. 847, 330 U.S. 446, 91 L.Ed. 1011—McCarty v. U. S., D.C.N.Y, 88 F.Supp. 251, affirmed, C.A., 196 F.2d 221—Puleo v. H. E. Moss & Co, D.C.N.Y, 66 F. Supp. 78, affirmed in part and reversed in part on other grounds, C.C.A., 159 F.2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S.Ct. 1733, 331 U.S. 847, 91 L.Ed. 1857 and H. E. Moss & Co. v. Puleo, 67 S.Ct. 1736, 331 U.S. 847, 91 L.Ed. 1857—58 C.J. p. 315 note 95 [c]

(2) Injury to cargo checker employed by one engaged by stevedoring contractor—Vanderlinden v. Lorentzen, C.C.A.N.Y, 139 F.2d 995.

Appliances

Stevedore company and ship both are liable for concurrent negligence in using unsafe appliances—The Jethou, D.C.Or., 2 F.2d 286.

22. **Effect of statute exempting employer from liability**

(1) Where a statute exempts employer from liability for negligently injuring his employee and substitutes thereof an absolute duty to pay prescribed compensation, the shipowner and employer are not joint tort-feasors.—Gill v. U. S., C.A.N.Y., 184 F.2d 49—American Mut. Liability Ins. Co v. Matthews, C.A.N.Y., 182 F.2d 322—Lo Bue v. U. S., D.C.N.Y., 91 F.Supp. 299.

(2) Effect of Longshoremen's and Harbor Workers' Compensation Act see the C.J.S. title Workmen's Compensation Acts § 964 et seq.

23. U.S.—Vanderlinden v. Lorentzen, C.C.A.N.Y., 139 F.2d 995.

Contribution among joint tort-feasors generally see Contribution § 11.

Contribution where vessel chartered see supra § 34.

24. U.S.—The Tampico, D.C.N.Y., 45 F.Supp. 174.

admiralty cases that, in the absence of congressional authorization, a shipowner is not entitled to contribution from an employer whose employee has been injured as a result of the combined fault of the shipowner and employer.[25] In order that a right of contribution may exist as between the shipowner and the employer of the injured employee they must be joint wrongdoers in the sense that their wrong has imposed a common liability on them to the injured employee.[26] Where the employee of the contractor has no cause of action against his employer, the shipowner may not claim contribution on the theory of a common liability which he has been compelled to pay.[27] Where the negligence of the shipowner was the sole proximate cause of the injury, he is not entitled to contribution from the employer of the injured employee.[28]

Indemnity. Where an employee of a stevedoring or other independent contractor has been injured on or about a vessel, the right of indemnity as between the shipowner and the stevedoring or other contractor, in the absence of an express indemnity agreement, ordinarily is governed by the usual rules regulating implied contracts of indemnity.[29] Where the owner of the vessel has paid a judgment against him for injuries to a stevedore resulting from the negligence of the stevedore company's agent, the stevedore company is liable to the owner for the amount paid.[30] Where the injury to the employee results from the joint negligence or wrong of the shipowner and contractor there can be no recovery of indemnity,[31] and where the injury to the employee is due to the primary or sole fault of the shipowner he is not entitled to indemnity against the contractor.[32] The liability of a stevedoring or other contractor to indemnify the shipowner may be governed by an express indemnity agreement.[33] The liability of the stevedoring or other contractor and the extent of liability depend on the terms of the agreement.[34] Under the terms of the particular agreement the contractor may be liable to indemnify the shipowner, although the contractor was not at fault,[35] or liability may arise where the

25. U S.—Palardy v. U. S., D C.Pa., 102 F Supp 534.

Carpenter making repairs on ship

U S —Halcyon Lines v Haenn Ship Ceiling & Refitting Corp, Pa, 72 S Ct 277, 342 U S 282, 96 L Ed —

26. U S —Lo Bue v U S, C.A N Y., 188 F 2d 800—American Mut Liability Ins. Co v Matthews, C A N Y, 182 F.2d 322.

27. U S —Porello v. U S, C.C A.N Y, 153 F 2d 605, affirmed in part and reversed in part on other grounds American Stevedores, Inc v Porello, 67 S.Ct. 847, 330 U S 446, 91 L Ed 1011

28. U S.—Gill v. U. S, D.C N Y., 85 F Supp. 717, affirmed, C.A, 184 F.2d 49.

29. U S —Lo Bue v U S, C A N Y, 188 F 2d 800.

Implied contracts of indemnity generally see Indemnity §§ 20–27.

Implied indemnity against shipowner's wrong

Where rigger aboard steamship sued shipowner and stevedoring company for injuries sustained when sun deck being shifted by company by means of a crane, fell and struck rigger, and shipowner impleaded rigger's employer performing repair work aboard vessel, the implied contract of indemnity on which shipowner relied would have to be a contract of indemnity against shipowner's own wrong, since the shipowner was not liable to the rigger in the absence of negligence on his part, and such a contract could not reasonably be implied —Mikkelsen v The Granville, C A N.Y., 192 F.2d 809.

Shipowner allowed indemnity

Where evidence disclosed that winch defect had been reported to ship operator and stevedoring corporation permitted its employee to work even though it knew of defect, ship operator was entitled to full indemnity over against stevedoring corporation for amount of damages awarded employee of stevedoring corporation for injuries resulting from such defect —U. S v. Rothschild Intern Stevedoring Co, C A Wash, 183 F.2d 181

30. U S —Sagadahoc SS Corp. v Seaboard Stevedoring Corp, D C Cal, 26 F 2d 295, affirmed, C C A, 32 F 2d 886

31. **By stevedoring contractor against shipowner**

U S.—Vanderlinden v. Lorentzen, C C A N Y, 139 F.2d 995

Where negligent acts were similar in character and both were proximate causes of the injury, shipowner was not entitled to indemnity from contractor —Portel v. U S., D C N.Y., 85 F Supp 458

32. U S —Lo Bue v. U S., C A.N Y, 188 F 2d 800—Porello v U. S, D C N Y, 94 F.Supp. 952—Cataldo v A/S Glittre, D C N Y, 41 F Supp 555

33. U S —American Stevedores v Porello, N Y, 67 S Ct. 847, 330 U S 446, 91 L Ed. 1011.

Indemnity clause as part of main contract

An indemnity clause in a contract between the shipowner and contractor providing that the shipowner would be indemnified by the contractor against claims for damages arising out of the contract for the repair of the ship is not a separable agreement, but is a part of, and incident to, the repair contract —Severn v U. S, D C N.Y, 69 F Supp 21.

34. U S —Lo Bue v. U. S, C.A.N.Y, 188 F.2d 800—Puleo v. H E Moss & Co, C C A.N.Y., 159 F 2d 842, certiorari denied Todd Shipyard Corp. v Puleo, 67 S Ct 1733, 331 U S. 847, 91 L Ed. 1857 and H E. Moss & Co v. Puleo, 67 S Ct 1736, 331 U.S. 847, 91 L Ed. 1857—Palardy v. U S, D. C Pa, 102 F Supp 534—Amendola v. U S, D C.N.Y., 74 F Supp. 488.

Where indemnity provision is ambiguous, the parties to the contract must be given an opportunity to submit evidence as to their intentions with respect to the provision so that the court may be able to interpret it and determine what amount, if any, one of them may recover over from the other —Porello v. U. S, C C A.N. Y, 153 F 2d 605, affirmed in part and reversed in part on other grounds American Stevedores, Inc v. Porello, 67 S Ct 847, 330 U S. 446, 91 L Ed. 1011—Porello v U S, D C.N Y., 94 F Supp 952—Lo Bue v. U S, D C N Y., 91 F Supp 299—Lo Bue v U S, D C. N Y, 75 F Supp 154, opinion supplemented 78 F Supp 86, appeal dismissed, C A, 178 F 2d 528—Landgraf v. U S D C Pa., 75 F Supp. 58

35. **Particular contract imposing liability**

Where the contractor agreed to 'save harmless . . . the owner of the vessel from all suits, or actions or damages or cost . . . to which . . . the owner . . . may be subjected or put by reason of injury to the person or property of an-

injury is caused in any part by the contractor's negligence,[36] or as a result of the negligence or wrongful acts or omissions of the contractor's officers, agents, or employees and not resulting from default of the ship or other gear supplied by the owner,[37] or only in cases of injury arising or growing out of sole fault or negligence of the contractor or any of his subcontractors, servants, agents, or employees.[38] A clause in the contract for unloading which states that the stevedore company is insured against all accidents to its employees does not entitle the shipowner to recover from the company the amount paid by him to an injured employee of the company where the injury was caused solely by the negligence of the ship.[39]

e. Seaworthiness

The owner of a vessel is liable for personal injuries sustained by stevedores or longshoremen working aboard the ship as a result of his failure to provide for them a seaworthy vessel.

The obligation of seaworthiness, traditionally owed by an owner of a vessel to seamen, as discussed in Seamen, §§ 46, 192–197, has been extended to stevedores or longshoremen while working aboard the ship, although the stevedores or longshoremen are employed by an independent contractor whom the owner has hired to load or unload the ship,[40] and, in such case, the shipowner is liable to the stevedores or longshoremen for personal injuries resulting from the unseaworthiness of the vessel.[41] The doctrine is properly applied in a suit on the law side as well as in a suit in admiralty.[42] The shipowner's liability for personal injuries under the doctrine of unseaworthiness is a species of liability without fault[43] Derived from, and shaped to meet, the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence[44] nor contractual in

other arising . . . out of the performance of the contract by the contractor," the contractor was liable to the shipowner although he may not have been at fault—Puleo v H. E. Moss & Co, C C.A N Y, 159 F.2d 812, certiorari denied Todd Shipyard Corp v Puleo, 67 S Ct 1733, 331 U S 847, 91 L Ed 1857 and H E. Moss & Co v Puleo, 67 S Ct. 1736, 331 U.S 847, 91 L Ed. 1857.

36. U S—Porello v. U. S, D.C N.Y., 94 F Supp. 952

37. U S—U. S. v Arrow Stevedoring Co, C A Cal, 175 F.2d 333, certiorari denied 70 S Ct. 307, 338 U S. 904, 94 L Ed 557—U S v. Arrow Stevedoring Co, C A Cal, 175 F 2d 329, certiorari denied 70 S Ct 307, 338 U S 904, 94 L Ed. 557

38. U S—Amendola v U. S., D C N Y., 74 F Supp 488

39. U S.—The Slingsby, D C N Y, 116 F 227, affirmed 120 F. 748, 57 C.C A. 52.

40. U S.—Seas Shipping Co. v. Sieracki, Pa, 66 S Ct 872, 328 U S 85, 90 L Ed 1099, rehearing denied 66 S Ct. 1116, 328 U.S 878, 90 L.Ed. 1646.

41. U S—U S v Arrow Stevedoring Co, C A Cal., 175 F 2d 329, certiorari denied 70 S.Ct 307, 338 U S 904, 94 L Ed. 557—Vitozi v Balboa Shipping Co, C C A Mass, 163 F 2d 286—Lauro v U S, C C A.N.Y., 162 F 2d 32, motion granted in part and denied in part 163 F 2d 642—Anderson v Lorentzen, C.C A.N Y., 160 F 2d 173—Bochantin v. Inland Waterways Corp., D C.Mo, 96 F.Supp 234, appeal dismissed, C.A., 191 F. 2d 734—Greer v. U. S., D C N Y., 94 F Supp 397—Andrade v. U. S, D C.R I, 94 F Supp 170—Gill v. U. S, D C.N.Y., 85 F.Supp. 717, affirmed, C.A., 184 F 2d 49—Cioffi v. New England Shipping Co., D C N. Y, 80 F.Supp 98—Shelton v. Seas Shipping Co, D C.Pa, 75 F Supp. 195—Landgraf v U. S, D C Pa, 75 F Supp 58—Shields v U S., 73 F Supp. 862, affirmed in part and reversed in part on other grounds, C A, 175 F 2d 743, certiorari denied 70 S Ct. 249, 338 U S 899, 94 L Ed 553—The Samovar, D C Cal, 72 F Supp. 574—Fodera v Booth American Shipping Corp, D C N Y., 66 F.Supp 319, affirmed, C C A, 159 F 2d 795—Sulovitz v. U. S., D C.Pa., 64 F Supp 637

N Y—Riley v. Agwilines, Inc, 73 N. E 2d 718, 296 N.Y 402—Raia v. Grace Line, 108 N.Y S 2d 137, 279 App Div 647.

Seaworthiness with respect to:
Charter parties see supra § 36
Liability of charterer for personal injuries see supra § 34
Passengers see infra § 184.

Stevedore is seaman for the purpose because he is doing a seaman's work and incurring a seaman's hazard

U S—Seas Shipping Co. v. Sieracki, Pa, 66 S Ct 872, 328 U S 85, 90 L. Ed. 1099, rehearing denied 66 S Ct 1116, 328 U S. 878, 90 L Ed 1646—Fine v U. S., D C N Y, 66 F Supp 768

N Y.—Raia v Grace Line, 108 N.Y.S 2d 137, 279 App Div. 647.

Longshoremen on pier is within doctrine.—Strika v. Netherlands Ministry of Traffic, C.A N.Y., 185 F.2d 555, certiorari denied Netherlands Ministry of Traffic v Strika, 71 S.Ct 614, 341 U.S. 904, 95 L.Ed 1343.

Recovery for wrongful death under state statute

Where widow of stevedore, killed while unloading a vessel in port, brought libel to recover under state wrongful death statute, widow could not rely on unseaworthiness of vessel, but was limited to her asserted cause of action by reason of negligence of the vessel, her owners and crew—Graham v The Novarchos Koundouriotis, D C Pa, 99 F Supp. 450

42. U S.—Seas Shipping Co v. Sieracki, Pa, 66 S.Ct 872, 328 U S. 85, 90 L Ed 1099, rehearing denied 66 S Ct 1116, 328 U.S 878, 90 L Ed. 1646.

43. U S.—Seas Shipping Co v Sieracki, supra—Graham v. The Novarchos Koundouriotis, D C Pa, 99 F. Supp. 450—Bochantin v Inland Waterways Corp, D C Mo, 96 F. Supp 234, appeal dismissed, C A, 191 F.2d 734—Rederii v. Jarka Corp, D C Me, 82 F Supp 285—Shelton v Seas Shipping Co, D C. Pa, 75 F Supp. 195

N.Y—Raia v. Grace Line, 108 N Y.S 2d 137, 279 App Div. 647

44. U S—Seas Shipping Co v. Sieracki, Pa, 66 S Ct. 872, 328 U S. 85, 90 L Ed 1099, rehearing denied 66 S Ct 1116, 328 U.S 878, 90 L Ed. 1646—Rochantin v Inland Waterways Corp, D C.Mo, 96 F Supp. 234, appeal dismissed, C A, 191 F. 2d 734—Rederii v Jarka Corp., D. C.Me., 82 F Supp 285—Shelton v. Seas Shipping Co., D.C Pa., 75 F. Supp. 195.

N.Y—Raia v. Grace Line, 108 N Y S. 2d 137, 279 App.Div 647.

Proof of owner's negligence is not necessary—Seas Shipping Co. v. Sieracki, Pa, 66 S.Ct. 872, 328 U S. 85, 90 L Ed 1099, rehearing denied 66 S.Ct 1116, 328 U S 878, 90 L Ed 1646—Fodera v. Booth American

character.[45]

Where the ship remains under the control of the shipowner[46] the obligation of seaworthiness is peculiarly and exclusively his obligation,[47] and is an obligation he may not delegate[48] or contract away as to any workman within the protection of the obligation.[49] When the shipowner surrenders control of any part of the ship to an independent contractor, the owner's duty of seaworthiness as to the part surrendered extends only up to the time the independent contractor assumes control;[50] and, if the agents or employees of the independent contractor, while he is in control, create an unsafe condition where none existed before, the shipowner is not liable for accidents resulting therefrom.[51]

Seaworthiness of a vessel contemplates not only its fitness for the safe transportation of cargo, but also its being equipped with safe and proper appliances in good order and condition.[52] A vessel with a hydrogen house containing explosive and highly inflammable free hydrogen vapor is not seaworthy.[53] The failure to have any life-saving equipment aboard a vessel renders it unseaworthy.[54] A longshoreman may not claim that the ship is unseaworthy because, while stowing pipe in the hold of the ship, the listing of the vessel causes the pipe to roll on him.[55]

It is essential that the vessel be unseaworthy with respect to the instrument whereby the injuries are occasioned.[56] Liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, on the seaworthiness of something actually unseaworthy.[57] Where the stevedore or longshoreman is directed by his employer to eliminate or remove an obvious danger on board ship, the shipowner is not liable for injuries on the ground of unseaworthiness.[58]

Shipping Corp., D.C.N.Y., 66 F.Supp. 319, affirmed, C.C.A., 159 F.2d 795—Bruszewski v. Isthmian S. S. Co., D.C.Pa., 66 F.Supp. 210, affirmed, C.C.A., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113.

45. U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646—Rederii v. Jarka Corp., D.C.Me., 82 F.Supp. 285—Shelton v. Seas Shipping Co., D.C.Pa., 75 F.Supp. 195
N.Y.—Raia v. Grace Line, 108 N.Y.S. 137, 279 App.Div. 647.

46. U.S.—Lauro v. U.S., C.C.A.N.Y., 162 F.2d 32, motion granted in part and denied in part, 163 F.2d 642.

47. U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646.

Duty is absolute and continuous where shipowner has control, and the shipowner may not discharge the duty solely by furnishing a sound ship and making suitable equipment available—Lauro v. U.S., C.C.A.N.Y., 162 F.2d 32, motion granted in part and denied in part 163 F.2d 642.

48. U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646—Vitozi v. Balboa Shipping Co., D.C.Mass., 69 F.Supp. 286, affirmed, C.C.A., 163 F.2d 286.

49. U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646.

50. U.S.—Lauro v. U.S., C.C.A.N.Y., 162 F.2d 32, motion granted in part and denied in part, 163 F.2d 642—Greer v. U.S., D.C.N.Y., 94 F.Supp. 397—Eagle Indemnity Co., to Use of Beall v. U.S. Lines Co., D.C.Md., 86 F.Supp. 949.

51. U.S.—Lauro v. U.S., C.C.A.N.Y., 162 F.2d 32, motion granted in part and denied in part, 163 F.2d 642

52. Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.

Breaking of shackle supporting boom
U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646.

Defect in swivel link in cargo-loading gear
U.S.—Sulovitz v. U.S., D.C.Pa., 64 F.Supp. 637.

Hatch beam
U.S.—Landgraf v. U.S., D.C.Pa., 75 F.Supp. 58.

Permitting unboxed thermometer pipe in hold
U.S.—Fodera v. Booth American Shipping Corp., D.C.N.Y., 66 F.Supp. 319, affirmed, C.C.A., 159 F.2d 795

Winch
U.S.—Gill v. U.S., D.C.N.Y., 85 F.Supp. 717, affirmed, C.A., 184 F.2d 49.

If ship's officers use unsuitable equipment, the shipowner is liable for damage therefrom, even though suitable equipment was available—Lauro v. U.S., C.C.A.N.Y., 162 F.2d 32, motion granted in part and denied in part 163 F.2d 642.

Breaking of cable on lifting gear
Where hinged hatch cover, weighing several tons, was opened by means of ship's lifting gear, and longshoreman operating winch, thinking that cover had passed vertical position, slackened cable, but cover instead of falling open, started to fall shut and longshoreman thereupon reversed winch with result that cable broke and longshoreman was injured, as result of which he died six months later, longshoreman's executrix could not recover from shipowner under maritime law on theory that ship and appliances were unseaworthy, because she failed to show that wire cable did not meet minimum standards required for reasonable purposes for which it was to be used—Shelton v. Seas Shipping Co., D.C.Pa., 75 F.Supp. 195.

53. U.S.—Amendola v. U.S., D.C.N.Y., 74 F.Supp. 488.

54. U.S.—Bochantin v. Inland Waterways Corp., D.C.Mo., 96 F.Supp. 234, appeal dismissed, C.C.A., 191 F.2d 734.

55. U.S.—Miranda v. Isthmian S.S. Co., D.C.Cal., 96 F.Supp. 607.

56. U.S.—Bruszewski v. Isthmian S.S. Co., D.C.Pa., 66 F.Supp. 210, affirmed, C.C.A., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113.

57. U.S.—Bruszewski v. Isthmian S.S. Co., C.C.A.Pa., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113.

58. **Broken boom**
U.S.—Bruszewski v. Isthmian S.S. Co., C.C.A.Pa., 163 F.2d 720, certiorari denied 68 S.Ct. 451, 333 U.S. 828, 92 L.Ed. 1113—Bruszewski v. U.S. War Shipping Administration, D.C.Pa., 88 F.Supp. 962, affirmed, C.A., Bruszewski v. U.S., 181 F.2d 419, certiorari denied 71 S.Ct. 87, 340 U.S. 865, 95 L.Ed. 632

Employees other than stevedores or longshoremen. The authorities are not in agreement on the question whether the obligation of a shipowner to provide a seaworthy vessel for seamen and stevedores or longshoremen should be extended to embrace other employees of independent contractors who do work on or about the ship.[59] In some cases the courts, including the federal court of appeals for the second circuit, have restricted the obligation of the shipowner to provide a seaworthy vessel to stevedores and longshoremen in addition to seamen, and have declined to impose liability for personal injuries sustained by other employees of independent contractors while working on or about the vessel.[60] Such employees still remain business guests or invitees only.[61] In other cases the obligation of seaworthiness of the shipowner, and consequent liability of the owner for personal injuries sustained for failure to provide a seaworthy vessel, have been extended to other employees of independent contractors[62] and, in some instances, to employees of other persons,[63] at least where the duties of the employees on or about the vessel approximate those of a seaman or stevedore engaged in ship service.[64]

Contributory negligence and assumption of risk. Contributory negligence of the injured person is not available to the shipowner as a defense to a suit for personal injuries grounded on the owner's failure to provide a seaworthy vessel,[65] nor is the doctrine of assumption of risk available.[66]

Joint and several liability; liability over. Where a shipowner is sued for personal injuries sustained as a result of his failure to provide a seaworthy vessel and other persons are joined as defendants whose responsibilities are premised on different grounds, the liability of the shipowner is several and not joint.[67] In a proper case a stevedoring or other contractor may be held liable over to a shipowner who has been compelled to pay damages to an employee of the contractor because of injuries sustained due to the unseaworthy condition of the vessel.[68]

59. U.S.—Bochantin v. Inland Waterways Corp, D.C.Mo., 96 F.Supp 234, appeal dismissed, C.A., 191 F.2d 734

60. U.S.—Mikkelsen v. The Granville, C.A.N.Y., 192 F.2d 809—Martini v. U.S., C.A.N.Y., 192 F.2d 649, certiorari denied 72 S.Ct. 759, 343 U.S. 926, 96 L.Ed. ——Lopez v. U.S., D.C.N.Y., 102 F.Supp. 870—Laffoon v. U.S., D.C.N.Y., 101 F.Supp. 823—Muratore v. U.S., D.C.N.Y., 100 F.Supp. 276.

Employee of contract repairman

U.S.—Martini v. U.S., C.A.N.Y., 192 F.2d 649, certiorari denied 72 S.Ct. 759, 343 U.S. 926, 96 L.Ed. ——O'Connell v. Naess, C.A.N.Y., 176 F.2d 138—Peterson v. U.S., D.C.N.Y., 80 F.Supp 84

Cleaner of boilers and tanks

U.S.—Rich v. U.S., C.A.N.Y., 192 F.2d 858—Guerrini v. U.S., C.C.A.N.Y., 167 F.2d 352, certiorari denied 69 S.Ct. 65, 335 U.S. 843, 93 L.Ed. 393.

Painter

U.S.—Santiago v. U.S., D.C.N.Y., 102 F.Supp. 425—Lundberg v. Prudential S.S. Corp., D.C.N.Y., 102 F.Supp. 115.

Shipyard rigger

U.S.—Fine v. U.S., D.C.N.Y., 66 F.Supp. 768.

Shore carpenter making repairs on vessel

U.S.—Armento v. U.S., D.C.N.Y., 74 F.Supp 198.

61. U.S.—Guerrini v. U.S., C.C.A.N.Y., 167 F.2d 352, certiorari denied 69 S.Ct. 65, 335 U.S. 843, 93 L.Ed. 393—Peterson v. U.S., D.C.N.Y., 80 F.Supp 84—Armento v. U.S., D.C.N.Y., 74 F.Supp 198.

62. **Cannery laborer** who was ordered to go on vessel, which was owned jointly by his employer and others, to repair the engine of the ship was entitled to recover damages.—Bow v. Pilato, D.C.Cal., 82 F.Supp 399.

Carpenter employed by ship suppliers, and actually working in ship preparing it to receive a cargo requiring special provision for storage, was rendering service necessary in the performance of the ship's business of carrying cargo, and, hence, was entitled to redress for injuries resulting from unseaworthiness of ship—Sulovitz v. U.S., D.C.Pa., 64 F.Supp 637.

Cleaner

Shipowner owes as much of an obligation of seaworthiness to cleaner as is owed to stevedore.—Christiansen v. U.S., D.C.Mass., 94 F.Supp 934, affirmed, C.A., 192 F.2d 199.

Ship ceiler

Occupation of ship ceiler, who shores cargo in a ship to prevent cargo from shifting during voyage, is in the same class as stevedoring, and doctrine of unseaworthiness applies—Eagle Indemnity Co., to Use of Beall v. U.S. Lines Co., D.C.Md., 86 F.Supp 949.

63. **Employee of shipper**

In action in admiralty on ground of unseaworthiness, for death which resulted when shipper who employed decedent and who, as shipper was loading grain on defendant's barge which was moored in navigable river, directed decedent to go on barge to help close a hatch, and decedent fell into river from barge and was drowned, fact that defendant barge owner was not employer of decedent or that decedent was not regularly employed to load barge did not preclude recovery—Bochantin v. Inland Waterways Corp., D.C.Mo., 96 F.Supp 234, appeal dismissed, C.A., 191 F.2d 734.

64. U.S.—Bochantin v. Inland Waterways Corp., supra

65. U.S.—Graham v. The Novarchos Koundouriotis, D.C.Fla., 99 F.Supp 450—Bochantin v. Inland Waterways Corp., D.C.Mo., 96 F.Supp. 234, appeal dismissed, C.A., 191 F.2d 734

Apportionment or mitigation of damages see infra § 86 f.

In action in state court

N.Y.—Raia v. Grace Line, 108 N.Y.S.2d 137, 279 App.Div. 647.

66. U.S.—Bochantin v. Inland Waterways Corp., D.C.Mo., 96 F.Supp 234, appeal dismissed, D.C.Mo., 191 F.2d 734—Fodera v. Booth American Shipping Corp., D.C.N.Y., 66 F.Supp. 319, affirmed, C.C.A., 159 F.2d 795

67. **Joinder of contractor constructing ship and subcontractor**

U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed 1646

68. **Shipowner as volunteer in settling action**

Any unseaworthiness caused by list of vessel did not cease to operate as a cause of injury to employee of stevedoring company on whom a bale fell which was being hoisted from

§ 86. Actions

a. In general
b. Limitations and laches
c. Parties and pleading
d. Evidence
e. Trial
f. Damages
g. Proceedings for exoneration from liability

a. In General

Where special statutory provisions give a remedy against a vessel or her owners for personal injuries sustained on or about the vessel, there must be a compliance with such provisions.

In some jurisdictions special statutory provisions give a remedy against a vessel or her owners for personal injuries sustained on or about the vessel,[69] in which case there must be a full compliance with the statutory provisions authorizing such a procedure.[70] Where the statute provides an exclusive remedy in equity against the vessel, an action at law is improper.[71]

b. Limitations and Laches

The rules governing limitations and laches in admiralty apply in suits in admiralty to recover damages for personal injuries sustained by a person on or about a vessel.

Where suit is brought in admiralty to recover damages for personal injuries sustained by a person on or about a vessel, the rules of admiralty relative to limitations and laches apply.[72] Where a common-law action was brought but dismissed without prejudice to plaintiff's right to sue in admiralty, the delay in bringing the suit in admiralty is not laches.[73] Where the circumstances of the case indicate that the delay was not inequitable, the libel is not barred for laches.[74]

In an action in the federal courts to recover damages for personal injuries sustained by a person on or about a vessel in navigable waters initiated by complaint the principles of admiralty as to laches apply.[75]

c. Parties and Pleading

The general rules governing parties and pleading in civil actions and in admiralty ordinarily are applicable in actions or proceedings to recover for personal injuries sustained by persons on or about a vessel.

General rules governing parties in civil actions, and in admiralty when suit is brought in that court, ordinarily apply in actions or proceedings for personal injuries sustained by persons on or about a vessel.[76] Where a shipowner is sued by an employee of a stevedoring contractor or other independent contractor for damages for personal injuries sustained by the employee on or about the vessel the shipowner, in a proper case, may implead the employer of the injured employee in conformity with Admiralty Rule 56, 28 U.S.C.A., or under Federal Rules of Civil Procedure, rule 14, 28 U.S.C.A.[77] Where the libel against the ship-

hold, where employee was working, to deck, merely because stevedoring company continued to run the winch used to raise bales, so as to render injury solely result of its negligence and render vessel owner a volunteer in settling action for injuries brought against vessel owner by employee, and therefore not entitled to indemnity from stevedoring company—Rederii v Jarka Corp., D.C.Me., 82 F.Supp. 285.

69. Ga.—Walter v. Kierstead, 74 Ga. 18
58 C.J. p. 320 note 72
Actions for personal injuries:
Against master of vessel, see supra § 71.
By
Passengers on vessel see infra §§ 198–202.
Seamen or longshoremen, or stevedores as seamen, under Jones Act see Seamen §§ 207–215
Jurisdiction in admiralty or state courts see Admiralty § 62
Proceedings to procure compensation under Longshoremen's and Harbor Workers' Compensation Act see the C.J.S. title Workmen's Compensation Acts §§ 414–825, also 71 C.J. p. 951 note 88 et seq.

70. U.S.—The G. H. Montague, C.C. N.Y., 10 F.Cas.No.5,377, 4 Blatchf. 461
58 C.J. p. 320 note 73.

71. Or.—Cordrey v. The Bee, 201 P. 202, 102 Or. 636, 20 A.L.R. 1079.

72. U.S.—The Adour, D.C.Md., 21 F. 2d 858.
Limitations and laches in admiralty see Admiralty § 87.
Applicability of limitations or laches
In maritime tort action by injured longshoreman in federal district court, doctrine of laches applied rather than doctrine of limitations—Apica v. Pennsylvania Warehousing & Safe Deposit Co., D.C.Pa., 101 F. Supp. 575.

73. U.S.—Lincoln v. Cunard SS. Co., N.Y., 221 F. 622, 137 C.C.A. 346.

74. U.S.—The Adour, D.C.Md., 21 F. 2d 858.
58 C.J. p. 320 note 87.

75. U.S.—Apica v. Pennsylvania Warehousing & Safe Deposit Co., D.C.Pa., 74 F.Supp. 819.
Complaint held not barred by laches
A complaint for personal injuries filed June 18, 1947, for maritime tort which occurred on Sept. 30, 1944, was timely under admiralty law doctrine of laches—Apica v. Pennsylvania Warehousing & Safe Deposit Co., supra.

76. U.S.—Benevento v. U. S., D.C.N.Y., 68 F.Supp. 347.
Parties
Generally see Parties § 1 et seq.
In admiralty generally see Admiralty §§ 92–97.

77. U.S.—Altadona v. U. S., D.C.N.Y., 91 F.Supp. 33—Severn v. U. S., D.C. N.Y., 69 F.Supp. 21.
Bringing in new parties in admiralty generally see Admiralty § 102.
Right of shipowner to contribution or indemnity see supra § 85 d.
Third party practice in federal courts generally see Federal Courts § 123 e.
Contractor properly impleaded
In libel by injured employee of stevedoring company against the United States and shipping company for injuries sustained by the employee while unloading vessel, stevedoring corporation was properly im-

owner by the contractor's employee is dismissed, the claim by the shipowner against the impleaded contractor for indemnity will also be dismissed.[78]

Pleading. General rules regulating pleading usually apply in actions or proceedings to recover for personal injuries sustained on or about a vessel.[79] The libel, or declaration, petition, or complaint must state all the facts material to libelant's or plaintiff's cause of action,[80] showing the duty owed by the owner to the person injured.[81] Where the injury resulted from defective appliances, the libel must allege that they were furnished by the ship.[82] A general allegation of negligence is insufficient.[83] There must be a compliance with a statute requiring the complaint to be verified.[84] A libel for injuries resulting from a defective condition of the vessel may be amended to state the particulars of the defect.[85]

The general rules as to issues, proof, and variance ordinarily control.[86]

d. Evidence

(1) In general

(2) Admissibility

(3) Weight and sufficiency

(1) In General

The general rules relating to evidence in civil actions or proceedings in admiralty, including the general rules governing presumptions and burden of proof, ordinarily apply in actions or proceedings for injuries to persons on or about a vessel.

The general rules relating to evidence in civil actions or proceedings in admiralty ordinarily apply in actions or proceedings for injuries to persons on or about a vessel.[87] In accordance with these rules the court will indulge in proper presumptions arising from the facts proved.[88] The leaving open of an ordinary hatchway in port raises no presumption of negligence on the part of the ship,[89] and, if a stevedore falls through such a hatchway, the presumption is that he himself was negligent.[90] No presumption of negligence arises because of the breaking of a new rope.[91]

The burden is on complainant or libelant to prove every essential fact necessary to support his cause of action.[92] He has the burden of proving defendant's

pleaded as a respondent, where impleading petition alleged facts that constituted a claim for indemnity from the stevedore company, based on provisions of a contract between stevedoring company and the United States under which the stevedoring company was unloading the vessel at the time its employee was injured. —Benevento v. U. S., D.C.N.Y., 68 F Supp. 347.

General allegation in petition

Where longshoreman who was injured in fall brought libel against shipowner alleging that the ship supplied defective equipment, allegation of petition of impleader filed by owner against the longshoreman's employer that, if the longshoreman was injured, the injury was caused by negligent acts or omissions of the employer, was too general and set forth a mere conclusion —Cataldo v. A/S Glittre, D.C.N.Y., 41 F Supp. 555

Exceptions to petition

Where longshoreman's libel for injuries sustained in fall, brought against shipowner, alleged negligence consisting in the ship supplying defective equipment, and the owner filed petition of impleader against the longshoreman's employer alleging that acts and omissions alleged in the libel were those of the employer and not of the shipowner, employer's exceptions to the petition were sustained, since impleader appeared to rest on alleged breach of duty owed to the longshoreman by the ship and not by the employer.—Cataldo v. A/S Glittre, supra.

78. U.S.—Romano v. U. S., D.C.N.Y., 90 F.Supp. 15.

79. N.J.—Lynch v. United Fruit Co., 71 A.2d 344, 4 N.J. 24.

80. Wis.—Phillips v. Portage Transit Co., 118 N.W. 539, 137 Wis. 189.
58 C.J. p. 320 note 93

81. U.S.—The Silverado, D.C.Or., 14 F.2d 243
58 C.J. p. 320 note 94.

82. U.S.—Spiess v. Sommarstrom Ship Building Co., C.C.A.Or., 272 F. 109.

83. N.J.—Lynch v. United Fruit Co., 71 A.2d 344, 4 N.J. 24
Puerto Rico.—Valdivieso v. Insular Line, 6 Puerto Rico Fed. 484.

84. U.S.—The G. H. Montague, C.C.N.Y., 10 F.Cas.No. 5,377, 4 Blatchf. 461

85. U.S.—The Saranac, D.C.N.Y., 132 F. 936

86. **Evidence admissible under pleadings**
U.S.—Miller v. The Sultana, C.A.N.Y., 176 F.2d 203, certiorari denied 70 S.Ct. 303, 338 U.S. 907, 94 L.Ed. 558.
58 C.J. p. 321 note 17 [d] (2), [e].

87. U.S.—Lauricella v. U. S., C.A.N.Y., 185 F.2d 327.

88. **Performance of duties**
It is presumed that the shipowner has performed his duties to the person working on the ship.—Aurigemma v. Nippon Yusen Kaisha Co., 144 N.E. 495, 238 N.Y. 183.

Duty to provide safe place to work
Employees of firm engaged to make alterations on respondent's barge, killed by explosion, must be presumed to have relied on customary precautions having been taken to provide them with safe place to work.—Johnson v. Kosmos Portland Cement Co., C.C.A.Ky., 64 F.2d 193, certiorari denied Kosmos Portland Cement Co. v. Johnson, 54 S.Ct. 60, two cases, 290 U.S. 641, 78 L.Ed. 557.

Loading of lumber
No presumption exists that ship's officers interfered with loading of lumber under independent contract with master stevedore, or that officers knew which method of loading was best, or that overlapping method was used and not stripping method, with respect to navigation company's liability for longshoreman's injuries sustained while assisting in unloading steamship.—Litwinowitch v. Oriental Nav. Co., 166 A. 911, 311 Pa. 257.

89. U.S.—The Gladiolus, D.C.Ga., 21 F. 417, affirmed, C.C., 22 F. 454.

90. U.S.—The Gladiolus, supra.
58 C.J. p. 321 note 13.

91. U.S.—Ignetti v. Intall, C.C.A.N.Y., 290 F. 953.

92. U.S.—The Sachem, D.C.N.Y., 5 F.Supp. 417.
58 C.J. p. 320 note 4.

Status of injured person
Person injured in fall on stairway of fishing boat had burden of proof to establish that he boarded boat on invitation of barker in employ of vessel as claimed.—The Sachem, supra.

negligence[93] and that such negligence proximately caused the injury.[94] A licensee charging reckless, willful, or wanton acts need not prove a particular intent to injure him.[95] The burden of proving matters of defense is on defendant.[96] In some jurisdictions, plaintiff has the burden of proving freedom from contributory negligence.[97]

Happening of accident; res ipsa loquitur. In the absence of special circumstances sufficient to bring into operation the doctrine of res ipsa loquitur, the mere happening of an accident to a person on or about a vessel is not proof, and does not raise a presumption, of negligence.[98] Under the doctrine of res ipsa loquitur where the instrument which caused the injury is shown to be under the management of defendant and the accident is such as in the ordinary course of things does not happen if due care has been exercised, the happening of the accident affords reasonable evidence that the accident arose from want of due care.[99] Where the doctrine of res ipsa loquitur applies, the burden is on defendant to establish that he exercised due care.[1] The doctrine applies only where the party sought to be charged was in exclusive control of the instrument which caused the damage.[2]

Seaworthiness. In a proceeding by an employee of an independent contractor, such as a longshoreman or stevedore, against a shipowner to recover damages for personal injuries sustained as a result of the unseaworthiness of the vessel, the burden is on such employee to establish the unseaworthiness.[3]

93. U S—Lauricella v U. S., C A N. Y., 185 F.2d 327—Doll v. Scott Paper Co., C C A.Pa., 91 F 2d 860—Sommerseth v U S, D C.Pa., 91 F. Supp. 457—The Prince Rupert City, D C Fla., 30 F Supp 755.
Ill—Herbst v Levy, 279 Ill.App 353.
N J.—Moran v Moore-McCormack Lines, 36 A 2d 415, 131 N J Law 332, affirmed 39 A 2d 136, 132 N J. Law 171.
58 C J. p 321 note 5.

Appliances, equipment, and tackle
U S.—Glover v. Compagnie Generale Transatlantique, C C A Tex., 103 F. 2d 557, certiorari denied 60 S Ct. 83, 308 U S. 550, 84 L Ed 462—Hendricksen v. Hugh Roberts & Son, D. C N Y., 74 F.Supp. 72—Pugliese v. Panama Transport Co, D C N Y, 65 F Supp. 433—The Mercier, D C Or, 5 F Supp 511—The Nyhorn, D C. N Y, 4 F.Supp. 403
58 C J p 321 note 5 [a] (2).

Capsizing person in other boat by wave or swell
La—Tolle v. Higgins Industries, App, 25 So.2d 744, reversed on other grounds 31 So 2d 730, 212 La. 173.

Defective rope
U S—Colvin v. Kokusai Kisen Kabushiki Kaisha, C.C A Tex., 72 F.2d 44.

Open hatch
U S—The Vinemoor, C C.A Or, 75 F. 2d 28

Shifting of burden
Burden of proving negligence on part of a ship, its master, or crew, which rests on libelant seeking to recover for injuries allegedly caused by negligence of master or crew, never shifts to respondent—Lamb v. Interstate S. S. Co., C C.A.Ohio, 149 F.2d 914.

94. U S—Anderson v. Lorentzen, C. C.A.N Y., 160 F.2d 173—Lamb v. Interstate S. S. Co., C.C.A.Ohio, 149 F 2d 914—Doll v Scott Paper Co., C.C A Pa., 91 F 2d 860—Sommerseth v. U. S, D C Pa., 91 F Supp 457—The Prince Rupert City, D C. Fla, 30 F Supp 755—The Mercier, D C Or, 5 F.Supp 511
Cal—Peterser. v. Klitgaard, 299 P 54, 212 Cal. 516, certiorari denied Peterson v Naknek Packing Co, 52 S Ct 128, 284 U S 672, 76 L Ed 569
Ohio—Frommel v. Coney Island, App, 36 N E 2d 9.

95. Mass—Freeman v United Fruit Co, 111 N E 789, 223 Mass 300.

96. La.—E C Taylor Co v. New York, etc., Mail SS Co, 105 So. 379, 159 La. 381.
58 C.J p 321 note 14.

97. U S.—McNally v. Zeller Marine Corp, D C N Y, 77 F Supp 985.

98. U.S—The Mercier, D.C Or., 5 F. Supp 511.

99. U S.—Quinn v. Southgate Nelson Corp, D C N.Y., 36 F.Supp 873, affirmed, C C A, 121 F 2d 190, certiorari denied Southgate Nelson Corp. v. Quinn, 62 S Ct 185, 314 U S 682, 86 L.Ed 546—Rose v. Stephens, etc., Transp Co, C.C.N Y., 11 F. 438, 20 Blatchf 411.
N Y.—Gluckstein v. Martin, 278 N.Y. S. 129, 244 App Div 39.
58 C J p 321 note 9
Doctrine of res ipsa loquitur generally see Negligence §§ 220(2)–229 (12).

Injury by gas
Where plaintiff's husband was found dead of carbon monoxide poisoning in unventilated cabin next to engine room in defendant's motor yacht, res ipsa loquitur rule was applicable.—Gluckstein v. Martin, supra.

Doctrine held inapplicable
(1) In general—Herbst v. Levy, 279 Ill.App. 353—58 C.J. p 321 note 5 [a] (4).
(2) Res ipsa loquitur was inapplicable to accident in which laborer, employed by contractor to scrape fill from sides of scow and shape it so that crane could remove it, was injured when laborer and foreman sought to secure stern hauser which had started to slip—McNally v. Zeller Marine Corp., D.C N.Y., 77 F. Supp 985.

Knowledge of latent defect
Where independent contractor's employee was injured by collapse of platform which was furnished by defendant for unloading of ship, and collapse was caused by latent defect of eyebolt to which platform was fastened and defendant had no knowledge of such defect, res ipsa loquitur doctrine did not apply.—Moran v Moore-McCormack Lines, 36 A 2d 415, 131 N J Law 332, affirmed 39 A.2d 136, 132 N J.Law 171.

Under statute
A statute providing that, in all suits against proprietors of steamboats for injuries arising to person or property from the bursting of the boiler of any steamboat, the fact of such bursting shall be taken as prima facie evidence of defendant's negligence until he shall show that no negligence has been committed by him or those in his employment applied to actions by a passenger, not on the vessel, the boiler of which exploded, but on a vessel going up the river beside it.—Fay v. Davidson, 13 Minn 523—58 C.J. p 571 note 78.

1. U S.—Fill v. Cunard SS. Co., D.C. N.Y., 217 F. 84, affirmed 221 F. 622, 137 C.C A. 346

2. U.S.—The Etna, D.C Pa., 43 F. Supp. 303—The Mercier, D C.Or., 5 F Supp. 511.
N Y—Massa v Nippon Yusen Kaisha, 190 N E 641, 264 N.Y. 283.

3. U.S—Grillo v. U. S, C.A N.Y., 177 F.2d 904—Romano v. U. S, D. C.N.Y., 90 F Supp. 15.

Actions or proceedings to impose liability over. Where in action against a shipowner by an employee of an independent contractor for injuries received by such employee the shipowner impleads the employer, the shipowner has the burden of proving that the injury resulted from the negligence or wrong of the employer.[4]

(2) Admissibility

The general rules governing the admissibility of evidence in civil actions ordinarily are applicable in actions or proceedings to recover damages for injuries sustained by persons on or about a vessel.

The general rules governing the admissibility of evidence in civil actions, or in proceedings in admiralty where the suit is brought in that court, ordinarily apply in actions or proceedings for damages for injuries to persons on or about a vessel.[5] Evidence of a similar and subsequent accident is admissible to show defective appliances.[6] Evidence of the customary manner of unloading a ship is admissible to show negligence.[7]

(3) Weight and Sufficiency

In an action or proceeding to recover damages for injuries to persons on or about a vessel, the party having the affirmative of an issue must establish it by a preponderance of the evidence.

The general rules governing the weight and sufficiency of evidence in civil actions, or the rules in admiralty where suit is brought in that court, ordinarily apply in actions or proceedings to recover damages for injuries sustained by persons on or about a vessel.[8] The burden of proving the affirmative of any issue must be sustained by a preponderance of the evidence.[9] Thus, a preponderance of the evidence is essential to establish defendant's negligence[10] and that such negligence was the

4. U.S.—Altadona v. U. S., D.C.N.Y., 91 F.Supp. 33

5. **Evidence held admissible**

(1) In longshoreman's action for injuries sustained while employed on merchant vessel owned by United States, documents subpoenaed from respondent's files, which were shown to have been made in regular course of business, and which tended to prove that one of the beam locks on hatch beam, which fell injuring libelant, was missing, and that there was a duty placed on the loading officers to inspect the hatch beams, were admissible.—Landgraf v. U. S., D.C.Pa., 75 F.Supp. 58.

(2) In action against shipowner for injuries sustained by a longshoreman employed by stevedoring contractor while unloading vessel, refusing to allow defendant an opportunity to explain by competent evidence entry in a log book received in evidence of a survey made three days after accident was error.—Raia v. Grace Line, 108 N.Y.S.2d 137, 279 App.Div. 647.

(3) In libel for death of stevedore struck by iron draft which was being lowered in hold, when winch through disengagement of its gears caused the draft to swing, positive testimony, by respondent's witnesses, that bolt and nut were in place, was required to be received where there was no positive testimony by any of libelant's witnesses that bolts were not in place when winchmen started operations.—Sportiello v. U. S., D.C.N.Y., 55 F.Supp. 551.

(4) Other evidence held admissible see 58 C.J. p. 321 note 17 [a].

Evidence held inadmissible

(1) In longshoreman's action for injuries sustained while vessel was in port, commerce department rule with respect to closing of hatches before proceeding to sea was inadmissible.—Schotis v. North Coast Stevedoring Co., 1 P.2d 221, 163 Wash. 305, 78 A.L.R. 1427.

(2) In action against shipowner for injuries sustained by stevedore while unloading cargo, admission of testimony as to precautions taken by defendant after accident was error prejudicial to defendant.—Ambrosino v. Cie De Navagacao Lloyd Brasileiro, 47 N.Y.S.2d 61, 267 App.Div. 910, rehearing denied 48 N.Y.S.2d 439, 267 App.Div. 961.

(3) Other evidence held inadmissible see 58 C.J. p. 321 note 17 [b] [c].

Injury to person on another vessel

Fact that an engineer was skillful may be proved by defendant, in an action by passenger on a nearby vessel to recover damages for the injuries caused by an explosion of a steam boiler on a steamboat, even if the engineer was not licensed, and a statute made it a crime to permit engineers to operate boilers on steamboats unless they were licensed.—Fay v. Davidson, 13 Minn. 523.

6. U.S.—Alaska S.S. Co. v. Katzeek, C.C.A.Alaska, 16 F.2d 210.

7. N.Y.—Kilroy v. Delaware, etc., Canal Co., 1 N.Y.S. 779, 56 N.Y.Super. 138, affirmed 24 N.E. 192, 121 N.Y. 22.

8. U.S.—Pugliese v. Panama Transport Co., D.C.N.Y., 65 F.Supp. 433
Ohio.—Frommel v. Coney Island, App., 36 N.E.2d 9.

Evidence held sufficient

(1) To show that alleged custom had not been brought to attention of owner so that he might have taken proper precautions.—Christiansen v. U. S., C.A.Mass., 192 F.2d 199.

(2) To show willfulness and wantonness.—The H. S. Inc. No. 72, D.C.N.J., 39 F.Supp. 855, reversed on other grounds, C.C.A., 130 F.2d 341.

Evidence held insufficient

(1) To establish an alleged custom.—The Anderson, D.C.Md., 37 F.Supp. 695

(2) To show agent was owner pro hac vice.—Palardy v. American-Hawaiian S.S. Co., C.A.Pa., 169 F.2d 619, certiorari denied, 69 S.Ct. 1521, 337 U.S. 959, 93 L.Ed. 1758.

Corroboration

Fact that deceased's companion who was only eyewitness of accident immediately reported the manner of deceased's drowning strongly corroborated his testimony, in suit by widow against tugboat owner and insurer for husband's death, that fishing boat operated by deceased was capsized by wave or swell created by passing tugboat and barge and refuted any idea of deceased being drowned in any other manner.—Tolle v. Higgins Industries, 31 So.2d 730, 212 La. 173.

Testimony of actual conditions or of custom as prevailing

In action for death of intestate who fell overboard from a barge, testimony as to actual conditions, such as weather, existing at time of accident would prevail over testimony of custom.—Fox v. Tice Towing Line, 30 N.Y.S.2d 305, 262 App.Div. 1030, reversed on other grounds 43 N.E.2d 69, 288 N.Y. 663

9. N.J.—Moran v. Moore-McCormack Lines, 36 A.2d 415, 131 N.J.Law 332, affirmed 39 A.2d 136, 132 N.J.Law 171

10. U.S.—Pugliese v. Panama Transport Co., D.C.N.Y., 65 F.Supp. 433—The Prince Rupert City, D.C.Fla., 30 F.Supp. 755.
N.J.—Moran v. Moore-McCormack Lines, 36 A.2d 415, 131 N.J.Law

proximate cause of the injury.[11] In various cases the sufficiency of the evidence has been adjudicated with respect to defendant's negligence;[12] his failure to furnish a safe place in which to work,[13] a safe passageway to and from that place,[14] or safe appliances with which to work;[15] whether defendant's

332, affirmed 39 A.2d 136, 132 N.J. Law 171.
58 C.J. p 322 note 23.

11. U.S.—The Prince Rupert City, D.C.Fla., 30 F.Supp. 755.
Ohio—Frommel v. Coney Island, App., 36 N.E.2d 9

12. Evidence held sufficient
(1) In general
U.S.—Calanchini v. Bliss, C.C.A.Cal., 88 F.2d 82
Conn.—Parmelee v. Hiller, 29 A.2d 586, 129 Conn. 489
Va.—Tidewater Stevedoring Corp. v. McCormick, 52 S.E.2d 61, 189 Va. 158
58 C.J. p. 322 note 24 [a]

(2) To show that longshoreman was guilty of negligence which contributed to his injury—Palardy v. U.S., D.C.Pa., 102 F.Supp. 534

(3) To show that owner exercised due and reasonable care with respect to condition of ship and her loading equipment and that ship and her equipment were not unseaworthy—Andrade v. U.S., D.C.R.I., 94 F.Supp. 170.

Evidence held insufficient
(1) In general.
U.S.—Rich v. U.S., C.A.N.Y., 192 F.2d 858—Holub v. Sword S.S. Line, C.C.A.Tex., 132 F.2d 206—Christiansen v. U.S., D.C.Mass., 94 F.Supp. 934, affirmed, C.A., 192 F.2d 199—Caldwell v. Sutton Line, D.C.N.J., 79 F.Supp. 796
Ohio.—Frommel v. Coney Island, App., 36 N.E.2d 9
58 C.J. p. 322 note 24 [b].

(2) To show that longshoreman's injuries were caused by respondent's or defendant's negligence, or by any unseaworthiness of the vessel or its appliances
U.S.—Caldarola v. U.S., D.C.N.Y., 98 F.Supp. 987—Greer v. U.S., D.C.N.Y., 94 F.Supp. 397, affirmed, C.A., 187 F.2d 5—Militano v. States Marine Corp., D.C.N.Y., 77 F.Supp. 438.
Mass.—Kelly v. Eastern S.S. Lines, 179 N.E. 921, 278 Mass. 361.

(3) To sustain award against owner of cabin cruiser for death of invited guest who disappeared overboard.—Hutchinson v. Dickie, C.C.A.Ohio, 162 F.2d 103, certiorari denied 68 S.Ct. 208, 332 U.S. 830, 92 L.Ed. 404

13. Evidence held sufficient
U.S.—Martini v. U.S., C.A.N.Y., 192 F.2d 649, certiorari denied 72 S.Ct. 759, 343 U.S. 926, 96 L.Ed. ——— Puleo v. H. E. Moss & Co., C.C.A.N.Y., 159 F.2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S.Ct. 1733, 331 U.S. 847, 91 L.Ed. 1857, and H. E. Moss & Co. v. Puleo, 67 S.Ct. 1736, 331 U.S. 847, 91 L.Ed. 1857—Sommerseth v. U.S., D.C.Pa., 91 F.Supp. 457
58 C.J. p. 322 note 25 [a]

Evidence held insufficient
U.S.—Lynch v. U.S., C.C.A.N.Y., 163 F.2d 97—Laffoon v. U.S., D.C.N.Y., 101 F.Supp. 823
58 C.J. p. 322 note 25 [b]

Injury to longshoreman or stevedores
(1) Evidence held sufficient—Anderson v. Lorentzen, C.C.A.N.Y., 160 F.2d 173—Kreste v. U.S., C.C.A.N.Y., 158 F.2d 575—Romano v. U.S., D.C.N.Y., 90 F.Supp. 15—The Dalhem, D.C.Mass., 41 F.Supp. 718

(2) Evidence held insufficient.—Whyatt v. U.S., D.C.N.Y., 92 F.Supp. 543—Condino v. U.S., D.C.N.Y., 73 F.Supp. 643—La Guerra v. Brasileiro, D.C.N.Y., 39 F.Supp. 668, reversed on other grounds, C.C.A., 124 F.2d 553, certiorari denied Brasileiro v. La Guerra, 62 S.Ct. 918, 315 U.S. 824, 86 L.Ed. 1220

(3) Evidence held to show stevedore's injury was caused by negligent operation of ship's appliances by his employer, and was not caused by unseaworthiness of ship or failure of owner to provide safe place to work—State of Maryland, for Use of Johnson, v. U.S., C.C.A.Md., 165 F.2d 911

(4) Evidence held to show that responsibility for proper illumination had passed to stevedore's employer.—Osnovitz v. U.S., D.C.Pa., 103 F.Supp. 238.

(5) Evidence held to show that ship's officers should have known that longshoremen might be in hold of ship—Palardy v. U.S., D.C.Pa., 102 F.Supp. 534

(6) Evidence held to warrant conclusion as to manner in which longshoreman came to his death—The Ellenor, D.C.Fla., 39 F.Supp. 576, affirmed, C.C.A., Freeman v. A. H. Bull S.S. Co., 125 F.2d 774.

Hatches
(1) Evidence held sufficient.
U.S.—Grillo v. U.S., C.A.N.Y., 177 F.2d 904—Badalamenti v. U.S., D.C.N.Y., 67 F.Supp. 575, affirmed in part and modified in part on other grounds, C.C.A., 160 F.2d 422—The Black Eagle, D.C.Mass., 30 F.Supp. 16
Cal.—Petersen v. Klitgaard, 299 P. 54, 212 Cal. 516, certiorari denied Peterson v. Naknek Packing Co., 52 S.Ct. 128, 284 U.S. 672, 76 L.Ed. 569.
58 C.J. p. 322 note 25 [a]

(2) Evidence held insufficient—Lauricella v. U.S., C.A.N.Y., 185 F.2d 327—The Vinemoor, C.C.A.Or., 75 F.2d 28—Goldberg v. U.S., D.C.N.Y., 91 F.Supp. 104—58 C.J. p. 322 note 25 [b] (2), (3)

(3) Evidence held to show that owner was primarily liable and stevedoring firm secondarily liable for causing injuries sustained by longshoreman when he fell through open hatch—Lo Bue v. U.S., C.A.N.Y., 188 F.2d 800.

(4) Evidence held to show that owner had knowledge of open hatch—Muratore v. U.S., D.C.N.Y., 100 F.Supp. 276.

14. Evidence held sufficient
U.S.—Moran v. U.S., D.C.Mass., 82 F.Supp. 525—Moragnel v. Moore-McCormack Lines, D.C.Md., 75 F.Supp. 969
58 C.J. p. 322 note 26 [a].

Evidence held insufficient
U.S.—Cannella v. Lykes Bros. S.S. Co., C.A.N.Y., 174 F.2d 794, certiorari denied 70 S.Ct. 102, 338 U.S. 859, 94 L.Ed. 526—Vacante v. U.S., D.C.N.Y., 70 F.Supp. 443—The Prince Rupert City, D.C.Fla., 30 F.Supp. 755—Weldon v. U.S., D.C.Mass., 9 F.Supp. 347.
58 C.J. p. 322 note 26 [b].

15. Evidence held sufficient
U.S.—Puleo v. H. E. Moss & Co., D.C.N.Y., 66 F.Supp. 78, affirmed in part and reversed in part on other grounds, C.C.A., 159 F.2d 842, certiorari denied Todd Shipyard Corp. v. Puleo, 67 S.Ct. 1733, 331 U.S. 847, 91 L.Ed. 1857, and H. E. Moss & Co. v. Puleo, 67 S.Ct. 1736, 331 U.S. 847, 91 L.Ed. 1857
58 C.J. p. 322 note 27 [a].

Evidence held insufficient
U.S.—Hendricksen v. Hugh Roberts & Son, D.C.N.Y., 74 F.Supp. 72—The Nyhorn, D.C.N.Y., 4 F.Supp. 403.
58 C.J. p. 322 note 27

Injury to longshoremen or stevedores
(1) Evidence held sufficient—Gill v. U.S., C.A.N.Y., 184 F.2d 49—Porello v. U.S., C.C.A.N.Y., 153 F.2d 605, affirmed in part and reversed in part on other grounds American Stevedores, Inc. v. Porello, 67 S.Ct. 847, 330 U.S. 446, 91 L.Ed. 1011—Lopez v. American President Lines, C.C.A.N.Y., 138 F.2d 914—De Luca v. Shepard S.S. Co., C.C.A.N.Y., 65 F.2d 566, modified on other grounds 67 F.2d 437, certiorari denied 54 S.Ct. 562, 291 U.S. 685, 78 L.Ed. 1072—Bryant v. Vestland, C.C.A.Ga., 52 F.2d 1078—Andrade v. U.S., D.C.R.I., 94 F.Supp. 170—Rawson v. Agwilines, Inc., D.C.N.Y., 90 F.Supp. 651—Iaria v. Silver Line, Limited, D.C.N.Y., 56 F.Supp. 42—58 C.J. p. 322 note 27 [a] (1), (3), (5), (10).

negligence was the proximate cause of the injury;[16] and the extent of the injury inflicted.[17] Where a presumption of negligence arises from the manner in which the injury was received, defendant's evidence must be sufficient to establish his freedom from negligence.[18]

Contributory negligence. In various cases the evidence has been held sufficient[19] or insufficient[20] to establish contributory negligence, or sufficient[21] or insufficient[22] to show freedom from contributory negligence.

Seaworthiness. In proceedings by an employee of an independent contractor, such as a longshoreman or stevedore, against a shipowner to recover damages for personal injuries sustained as a result of the unseaworthiness of the vessel, the evidence in various cases has been adjudged to be sufficient[23] or insufficient[24] to establish unseaworthiness, or sufficient to show that the unseaworthiness was the proximate cause of the injury.[25]

Actions or proceedings to impose liability over. The sufficiency of the evidence has been determined in suits for indemnity by a shipowner against the employer of the injured employee[26] and in suits against the shipowner by the employee wherein the shipowner impleads the employer.[27]

e. Trial

The general rules governing trials of civil actions

(2) Evidence held insufficient.—Altamura v U S., D C N.Y., 78 F.Supp. 531—Sulovitz v. U. S, D C Pa, 64 F. Supp 637—The Mercier, D C Or, 5 F Supp 511—The Nyhorn, D C N.Y, 4 F.Supp 403—58 C J. p 322 note 27 [b] (3), (7)

16. Evidence held sufficient

U S —Christiansen v U S., C A Mass, 192 F 2d 199—The Meton, D C.Tex., 59 F 2d 431, affirmed, C C A, 62 F 2d 825—Portel v. U S, D C N Y., 85 F Supp 458—Bow v. Pilato, D C.Cal, 82 F Supp 399

58 C J p 323 note 28 [a]

Evidence held insufficient

U S —Sportiello v U. S, D.C.N.Y, 55 F.Supp. 551.

58 C J p 323 note 28 [b].

Injury to longshoremen and stevedores

(1) Evidence held sufficient —Palardy v. U S, D C Pa., 102 F Supp. 534—Gill v. U S, D C N Y, 85 F Supp 717, affirmed, C A., 184 F 2d 49 —Pugliese v Panama Transport Co, D C.N Y, 65 F Supp 433—The Etna, D.C.Pa., 43 F Supp 303—The Black Eagle, D C.Mass., 30 F.Supp 16—58 C J. p 323 note 28 [a] (2), (3).

(2) Evidence held insufficient —Osnovitz v. U. S, D C.Pa, 103 F Supp 238—Sportiello v. U S, D C N Y, 55 F Supp. 551—58 C J p 323 note 28 [b] (1), (2)

17. Evidence held sufficient

U.S —The Uxmal, D C Mass, 49 F. Supp 221

18. Evidence held insufficient

U.S —Pleckaitis v Ostervolze Docking Co, C C A N Y., 294 F 824.

58 C J p 323 note 32.

19. U S —Portel v U. S., D.C.N Y, 85 F.Supp 458—Caldwell v. Sutton Line, D.C.N J, 79 F Supp 796

58 C.J. p 323 note 30 [a] (1), (3).

Fall on gangplank

La —Regenbogen v. Southern Shipwrecking Corp., App., 41 So 2d 110

20. U S.—La Guerra v. Brasileiro, C A N.Y, 124 F 2d 553, certiorari denied Brasileiro v La Guerra, 62 S Ct. 918, 315 U S 824, 86 L Ed. 1220—McCarty v U S., D C N J, 88 F Supp 251, affirmed, C.A, 196 F 2d 221.

58 C J. p 323 note 30 [b].

Fall from ladder

U.S.—McCarty v. U. S., supra.

Fall through hatch

U S.—Muratore v U. S, D C N.Y, 100 F Supp. 276.

21. U S —Gill v U. S, C A N Y., 184 F 2d 49—Corrado v Pennsylvania R Co, C A N Y, 171 F 2d 73, certiorari denied 69 S Ct 641, 336 U S 919, 93 L Ed. 1081—The Dalhem, D C Mass, 41 F Supp. 718

58 C J. p 323 note 30 [a] (2), (4)

Fall through hatch

(1) Invitee given permission to sleep on vessel —Sibley v Barber S S. Lines, D C N Y., 57 F.2d 318

(2) Longshoreman —The Black Eagle, D.C Mass, 30 F Supp. 16.

22. U S —McNally v. Zeller Marine Corp., D C N Y, 77 F Supp 985.

Emergency

In libel for injuries sustained by laborer in attempting to make slipping hauser fast after scow had been struck by another, evidence was insufficient to justify conclusion that emergency arose when stern hauser started to slip, in view of evidence that there were two other lines holding scow to wharf —McNally v Zeller Marine Corp., supra.

23. U S.—Gill v. U. S., D C N Y., 85 F Supp 717, affirmed, C A., 184 F 2d 49—Moran v U S, D.C Mass, 82 F Supp. 525—Landgraf v. U. S, D C.Pa, 75 F Supp 58.

Fall through hatch

U S —Lauro v. U. S., C C A.N.Y, 162 F 2d 32, motion granted in part and denied in part 163 F.2d 642.

24. U S.—State of Maryland for Use of Johnson v U. S., C C.A.Md., 165 F 2d 911—Holub v Sword S S Line, C.C.A Tex, 132 F.2d 206—Osnovitz v. U. S, D.C Pa., 103 F. Supp 238—Caldarola v U. S, D.C N.Y, 98 F Supp. 987—Christiansen v. U. S, D.C Mass, 94 F.Supp 934, affirmed, C A., 192 F 2d 199—Greer v. U S., D C N Y., 94 F.Supp. 397, affirmed, C.A., 187 F 2d 5—Andrade v U. S., D C.N Y, 94 F Supp. 170 —Militano v States Marine Corp, D C.N.Y., 77 F Supp 438.

Fall through hatch

U.S —Pignataro v. Waterman S. S. Corp., C A.N.Y, 194 F.2d 404

25. U S —Landgraf v. U. S., D.C.Pa, 75 F Supp 58

Absence of life-saving equipment on ship

U.S —Bochantin v. Inland Waterways Corp, D C Mo, 96 F Supp. 234, appeal dismissed, C.A., 191 F. 2d 734.

26. Evidence held sufficient

(1) To establish that sole proximate cause of injury to the employee was negligence of stevedoring company in use of a defective hatch cover which fell on employee, with knowledge of its defects of dogs and pins, and that shipowner did not participate in such negligent act —U S v. Arrow Stevedoring Co, C.A Cal., 175 F 2d 329, certiorari denied 70 S Ct. 307, 338 U.S. 904, 94 L Ed. 557.

(2) To authorize recovery by shipowner on the ground that the sole proximate cause of the employee's death was the negligence of the stevedoring company's working of the men in the known dangerous condition there existing —U. S v Arrow Stevedoring Co, C A Cal, 175 F 2d 333, certiorari denied 70 S Ct 307, 338 U.S 904, 94 L.Ed. 557.

27. Evidence held sufficient

U S —Baccile v Halcyon Lines, C.A. Pa, 187 F.2d 403, reversed on other grounds Halcyon Lines v Haenn Ship Ceiling & Refitting Corp, 72 S Ct. 277, 342 U S 282, 96 L Ed —— —Christiansen v U S, D.C Mass, 94 F Supp. 934, affirmed, C A., 192 F.2d 199.

ordinarily apply: In actions or proceedings for damages for injuries sustained by persons on or about a vessel.

In actions or proceedings for damages for injuries sustained by persons on or about a vessel, the general rules governing trial in civil actions, or the rules in admiralty where suit is brought in admiralty, ordinarily are applicable.[28]

Questions of law and fact. Where the evidence in a trial before a jury is conflicting or is such that reasonable minds might draw different conclusions therefrom, it is for the jury to determine questions of fact.[29] Thus, on such evidence it is for the jury or other trier of facts to determine whether defendant was negligent,[30] as in failing to furnish a safe place in which to work,[31] or a safe passageway to and from the place of work,[32] or in furnishing defective appliances,[33] and whether defendant's negligence proximately caused the injury.[34] On the other hand, in order to warrant or require submission to the jury, legally sufficient evidence must be produced.[35] Where the evidence is uncontradicted and but one inference reasonably may be drawn therefrom the question is one of law for the court.[36] In the absence of evidence of defendant's negligence,[37] or where all the evidence shows that the injury was due not to defendant's negligence, but to accident, the court may dismiss

28. U S—Williams S S Corp v. Parsons, C.C.A Va., 96 F 2d 219.
Cal.—Petersen v Klitgaard, 299 P. 54, 212 Cal 516, certiorari denied Peterson v Naknek Packing Co, 52 S Ct 128, 284 U S. 672, 76 L Ed 569
Md—Bull S S Line v Fisher, to Use of Globe Indemnity Co., 77 A.2d 142.

Transfer of cause
(1) Where an injured stevedore brought libel against his employer and the shipowner, the contention that, inasmuch as the libel contained all the essential averments of a complaint in a common-law action under state workmen's compensation law, it should have been transferred to the common-law side of the court for trial could not be sustained, where the libel contained no allegation of diversity of citizenship essential to give jurisdiction to a federal court. —Cassil v U. S Emergency Fleet Corporation, C C A Or., 289 F. 774.

(2) Transfer of causes in federal courts generally see Federal Courts § 360.

29. U S—O'Connell v. Naess, C.A.N. Y., 176 F.2d 138.
Md—Bull S S Line v. Fisher, to Use of Globe Indem. Co., 77 A 2d 142.
Wash—Schotis v North Coast Stevedoring Co, 1 P.2d 221, 163 Wash 305, 78 A.L R 1427.

For district judge in absence of jury
U S—Williams S. S Corp. v. Parsons, C.C.A Va, 96 F.2d 219

Ownership of vessel
N Y.—Casey v. Lehigh Valley R Co., 112 N.Y.S 522, 128 App Div. 86.

Status of injured person
(1) Question whether decedent was defendant's invitee, and was entitled to care and protection attaching to such relationship, was for jury—Gluckstein v. Martin, 278 N.Y.S 129, 244 App.Div. 39.

(2) Right of plaintiff to be on the vessel as established by custom and defendant's knowledge of the custom was question for jury.—Pioneer SS Co. v. Jenkins, Ohio, 189 F. 312, 111 C C.A. 44.

Whether photographs reflected condition of vessel and hatch covers at time of accident was question for jury, where photographs were taken more than a year after accident—Petersen v. Klitgaard, 299 P 54, 212 Cal 516, certiorari denied Peterson v Naknek Packing Co, 52 S Ct. 128, 284 U S. 672, 76 L Ed. 569

30. U S.—Meyers v. Pittsburgh S. S Co, C.C.A Ohio, 165 F.2d 642—The Wearpool, C C A Tex., 112 F 2d 245—Williams S S Corp v. Parsons, C C A.Va, 96 F.2d 219.
Md—Bull S. S. Line v. Fisher, to Use of Globe Indemnity Co., 77 A.2d 142
Mich—Stern v. Franklin, 287 N.W 880, 290 Mich. 467.
N.Y.—Monkwall v Turbine Engineering Corp, 93 N.Y S 2d 168, 276 App Div 866, affirmed 93 N E 2d 76, 301 N Y. 521—Ambrosino v Cie De Navagacao Lloyd Brasileiro, 47 N Y S 2d 61, 267 App Div. 910, rehearing denied 48 N Y S 2d 439, 267 App. Div 961.
Pa—Strong v. Jarka Corporation of Philadelphia, 176 A. 732, 317 Pa. 317.
58 C.J. p 323 note 33.

Negligence of impleaded employer of injured employee
U S—Baccile v Halcyon Lines (Halcyon Lijn), D C Pa., 89 F.Supp 765, reversed on other grounds, C A., 187 F 2d 403, reversed on other grounds Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp, 72 U S 277, 342 U.S 282, 96 L Ed. ——

31. U.S—Anderson v. Lorentzen, C C A N Y., 160 F.2d 173—Greco v Lorentzen, C.C.A N.Y, 139 F 2d 113—La Guerra v Brasileiro, C.C.A.N Y., 124 F 2d 553, certiorari denied Brasileiro v. La Guerra, 62 S Ct. 918, 315 U S 824, 86 L Ed 1220.
N.J—Santamaria v. Lamport & Holt Line, 196 A. 706, 119 N J.Law 467.
N Y—Buckley v. Cunard S S Co, 253 N Y S 254, 233 App Div. 361.
58 C J. p 323 note 34.

32. U S.—Coffey v. Nicholson Transit Co, C C A.N Y, 138 F 2d 915
N Y—Albano v. Mediterranean Stevedoring Co, 207 N.Y S. 12, 211 App. Div 121.

33. Or.—Cordrey v The Bee, 201 P. 202, 102 Or 636, 20 A.L R 1079.
58 C J. p 323 note 36.

34. U S.—Anderson v. Lorentzen, C C A N Y, 160 F 2d 173.
N.Y.—Raia v Grace Line, 108 N.Y S 2d 137, 279 App Div 647—Monkwall v Turbine Engineering Corp., 93 N.Y.S 2d 168, 276 App Div 866, affirmed 93 N E 2d 76, 301 N.Y. 521
Wash—Jackson v Mitsui, 232 P. 317, 132 Wash 395, adhered to 236 P 806, 135 Wash 695.

Intervening cause
U.S—La Guerra v. Brasileiro, C.C.A N Y., 124 F.2d 553, certiorari denied Brasileiro v. La Guerra, 62 S Ct 918, 315 U S. 824, 86 L Ed 1220

35. Evidence held insufficient to go to jury
U S—Miller v. The Sultana, C A N Y, 176 F.2d 203, certiorari denied 70 S Ct. 303, 338 U.S. 907, 94 L.Ed. 558—Sable v. A H. Bull & Co., C.C A N.Y., 123 F 2d 350—Glover v. Compagnie Generale Transatlantique, C.C A.Tex, 103 F 2d 557, certiorari denied 60 S Ct. 83, 308 U S 550, 84 L Ed 462—Ondato v. Standard Oil Co, D C N Y., 97 F.Supp. 37.
Ill—Herbst v. Levy, 279 Ill App. 353.
Tex.—Magnolia Petroleum Co. v Francis, Civ App., 169 S W 2d 286, error refused.

36. U S—Labbee v. Travenot SS Co., C.C.A.N.Y, 37 F.2d 52, certiorari denied Labbee v. Thavenot SS Co., 50 S Ct. 408, 281 U.S. 754, 74 L Ed. 1164.
58 C.J. p 324 note 42.

37. U.S—Miller v. The Sultana, C.A. N.Y., 176 F 2d 203, certiorari denied 70 S.Ct 303, 338 U S. 907, 94 L Ed. 558—Pleckaitis v. Ostervolze Docking Co., C.C.A N.Y., 294 F. 824.

the libel[38] or direct a verdict for defendant;[39] and, where plaintiff's testimony shows that defendant owed no duty which he failed to discharge, a nonsuit is proper.[40]

Where in a trial before a jury the evidence is conflicting or more than one conclusion reasonably may be drawn from the evidence the questions of contributory negligence[41] and assumption of risk[42] should be submitted to the jury; but, where the evidence is not in dispute and but one conclusion reasonably may be deduced therefrom, such questions are for the court.[43] The question of seaworthiness of a vessel is usually one of fact,[44] and it is ordinarily a question of fact whether unseaworthiness was the proximate cause of the injury complained of.[45]

Instructions. In an action for damages for injury to persons on or about a vessel, the court should properly instruct the jury as to the law applicable to the case,[46] and should submit the case to the jury on the theory of each party and the evidence in support thereof.[47] The instructions should clearly and accurately state the law applicable to all the facts in issue,[48] and, further, the instructions must

38. U.S.—Hoeffner v. National SS Co., C.C.A.Cal., 1 F.2d 844, certiorari denied 45 S.Ct. 355, 267 U.S. 600, 69 L.Ed. 807.

39. Ill.—Herbst v. Levy, 279 Ill.App. 353.

Mass.—Murphy v. Furness, etc., Co., 156 N.E. 836, 259 Mass. 394.

40. U.S.—Jones v. Clinchfield Nav. Co., C.C.A.S.C., 283 F. 951.

41. U.S.—Greco v. Lorentzen, C.C.A.N.Y., 139 F.2d 113—Coffey v. Nicholson Transit Co., C.C.A.N.Y., 138 F.2d 915—La Guerra v. Brasileiro, C.C.A.N.Y., 124 F.2d 553, certiorari denied Brasileiro v. La Guerra, 62 S.Ct. 918, 315 U.S. 824, 86 L.Ed. 1220.

Md.—Bull S. S. Line v. Fisher, to Use of Globe Indem. Co., 77 A.2d 142.

N.J.—Santamaria v. Lamport & Holt Line, 196 A. 706, 119 N.J.Law 467.

N.Y.—Monkwall v. Turbine Engineering Corp., 93 N.Y.S.2d 168, 276 App.Div. 866, affirmed 93 N.E.2d 76, 301 N.Y. 521—Ambrosino v. Cie. De Navagacao Lloyd Brasileiro, 47 N.Y.S.2d 61, 267 App.Div. 910, rehearing denied 48 N.Y.S.2d 439, 267 App.Div. 961.

58 C.J. p. 323 note 38

For district judge in absence of jury

U.S.—Williams S. S. Corp. v. Parsons, C.C.A.Va., 96 F.2d 219.

Injury by stevedoring company to employee of independent contractor

Va.—Tidewater Stevedoring Corp. v. McCormick, 52 S.E.2d 61, 189 Va. 158.

42. Md.—Bull S. S. Line v. Fisher, to Use of Globe Indem. Co., 77 A.2d 142.

N.J.—Santamaria v. Lamport & Holt Line, 196 A. 706, 119 N.J.Law 467.

N.Y.—Buckley v. Cunard S. S. Co., 253 N.Y.S. 254, 233 App.Div. 361.

58 C.J. p. 323 note 39.

43. Contributory negligence

N.Y.—Maher v. Compagnie Générale Transatlantique, 144 N.Y.S. 985, 160 App.Div. 1.

58 C.J. p. 312 note 73 [a]

Choosing of dangerous passage

A longshoreman is guilty of contributory negligence as a matter of law in proceeding along a dark way on a ship's deck, when a safe way was provided.—Colandria v. China Mut. Steam Nav. Co., 233 N.Y.S. 584, 226 App.Div. 681.

Stevedore falling through hatchway was not guilty of contributory negligence as matter of law in stepping on hatch in going forward to turn back tarpaulin.—Petersen v. Klitgaard, 299 P. 54, 212 Cal. 516, certiorari denied Peterson v. Naknek Packing Co., 52 S.Ct. 128, 284 U.S. 672, 76 L.Ed. 569.

44. Or.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.

Essentially a fact question

U.S.—State of Maryland, for Use of Johnson, v. U. S., C.C.A.Md., 165 F.2d 911.

45. Absence of hatch covers

In action by longshoremen to recover for injuries sustained in fall through hatchway of barge which was unseaworthy because of lack of hatchway covers, whether absence of hatch covers was the proximate cause of the accident was a question of fact.—Marstaller v. Albina Dock Co., 229 P.2d 269, 191 Or. 145.

46. U.S.—Baccile v. Halcyon Lines (Halcyon Lijn), D.C.Pa., 89 F.Supp. 765, reversed on other grounds, C.A., 187 F.2d 403, reversed on other grounds Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 72 S.Ct. 277, 342 U.S. 282, 96 L.Ed. ——

Cal.—Petersen v. Klitgaard, 299 P. 54, 212 Cal. 516, certiorari denied Peterson v. Naknek Packing Co., 52 S.Ct. 128, 284 U.S. 672, 76 L.Ed. 569.

47. N.Y.—Vallero v. Turner, 237 N.Y.S. 475, 227 App.Div. 307

58 C.J. p. 324 note 48

48. Wash.—Schotis v. North Coast Stevedoring Co., 1 P.2d 221, 163 Wash. 305, 78 A.L.R. 1427.

58 C.J. p. 324 note 49

Instructions held erroneous

U.S.—Miller v. The Sultana, C.A.N.Y., 176 F.2d 203, certiorari denied 70 S.Ct. 303, 338 U.S. 907, 94 L.Ed. 558.

N.Y.—Sagler v. Kellogg S. S. Corporation, 277 N.Y.S. 792, 155 Misc. 217.

Requested instructions held improperly refused

Wash.—Schotis v. North Coast Stevedoring Co., 1 P.2d 221, 163 Wash. 305, 78 A.L.R. 1427.

Assumption of risk

(1) In action by injured longshoreman against shipowner, under evidence, instruction on assumption of risk should have been given.—Schotis v. North Coast Stevedoring Co., supra.

(2) Charge to the effect that plaintiff, experienced in operation of loading vessels, could not recover for injuries resulting from the swinging of a load of lumber which he and others had just attached to ship's boom operated by an employee of defendant, if jury thought plaintiff should have anticipated what happened, sufficiently submitted question of assumption of risk by plaintiff, even though assumption of risk was not mentioned in so many words and was submitted in connection with question of contributory negligence.—Bull S. S. Line v. Fisher, to Use of Globe Indemnity Co., Md., 77 A.2d 142.

Contributory negligence

Where contributory negligence was improperly pleaded as a complete, rather than as a partial, defense or in mitigation of damages in action against shipowner for injuries sustained by longshoreman employed by stevedoring contractor while unloading vessel, as a result of unseaworthiness of vessel, but it was made clear, before case was submitted to jury and in request to charge, that defendant sought to invoke the rule under maritime law that damages may be reduced or mitigated if and to the extent that injured longshoreman was guilty of contributory negligence, defendant was entitled to a charge that contributory negligence of injured longshoreman might operate to reduce his damages proportionately.—Raia v. Grace Line, 108 N.Y.S.2d 137, 279 App.Div. 647.

Instruction on employee's right to rely on knowledge of superiors and ship's officers' directions was correct statement of law between master and

not be misleading[49] or lay stress on particular facts,[50] or be on matters not in issue.[51]

Verdict and findings. General rules regulating verdicts and findings in civil actions ordinarily apply.[52] Findings based on conflicting evidence will not be set aside.[53] It is improper for the trial court to grant a new trial where special findings are supported by evidence and are not inconsistent with the general verdict.[54]

f. Damages

A person who has sustained personal injuries on or about a vessel may recover only such damages as are the proximate result of the accident.

A person who has sustained personal injuries on or about a vessel may recover only such damages as are the proximate result of the accident.[55] Where the negligence was of a minor character and plaintiff's case is somewhat doubtful, the actual loss sustained by his injury is all that he will be allowed.[56] The contributory negligence of libelant is no bar to a recovery in admiralty, as considered supra §§ 83–85, but, where the negligence of respondent concurs with the negligence of libelant in causing the injury, the damages should be apportioned,[57] provided libelant's fault, although evident, is neither willful, gross, nor inexcusable, and the other circumstances present a strong case for his relief.[58]

Seaworthiness. In proceedings by an employee of an independent contractor, such as a stevedore or longshoreman, against a shipowner to recover damages for personal injuries sustained as a result of the unseaworthiness of the vessel contributory negligence is not a bar to recovery, as discussed supra § 85 e, but operates merely in reduction or mitigation of damages in admiralty,[59] and this rule has been applied in an action in a state court.[60]

g. Proceedings for Exoneration from Liability

A shipowner may file a petition for exoneration from liability for personal injuries sustained by persons on or about the vessel.

servant, but inapplicable as between longshoreman and ship's officer who was not longshoreman's superior—Schotis v North Coast Stevedoring Co., 1 P.2d 221, 163 Wash. 305, 78 A. L R. 1427.

Res ipsa loquitur

In action by employee of stevedoring contractor for injuries sustained on defendant's vessel when part of rigging under control of stevedoring company fell and struck employee, instruction, under rule of res ipsa loquitur, that happening of accident creates presumption that defendant did not have safe appliances, was error, where rigging was not under defendant's control at time of accident.—Massa v. Nippon Yusen Kaisha, 190 N.E 641, 264 N.Y. 283.

49. Cal.—Petersen v. Klitgaard, 299 P 54, 212 Cal. 516, certiorari denied Peterson v. Naknek Packing Co., 52 S Ct 128, 284 U S. 672, 76 L. Ed. 569.

50. U S.—Netherlands-American Steam Nav Co v Diamond, N Y., 128 F 570, 63 C C A 212.
58 C J p 324 note 50.

51. Mass.—Duart v Simmons, 121 N.E. 10, 231 Mass 313, error dismissed 40 S Ct. 342, 251 U.S. 547, 64 L Ed. 408.
58 C.J. p 324 note 51.

52. U.S.—American Mut. Liability Ins. Co. v. Matthews, D C.N.Y., 87 F.Supp. 854, reversed on other grounds, C A., 182 F 2d 322.

Consistency of verdicts

In actions by stevedores against shipowner and his agent for dermatitis resulting from leakage of cashew nut liquid which was being unloaded, verdicts in favor of plaintiffs who were actually unloading the liquid and verdicts against plaintiffs who were merely working on dock were not inconsistent.—Anderson v Lorentzen, C C A N Y, 160 F.2d 173.

Special verdicts and interrogatories

In action for injuries to longshoremen's foreman, employed by corporation loading steamship moored to pier, while helping another longshoreman on pier to replace a hatch cover, which had been removed to pier, jury's answers to questions in special verdict did not warrant finding of defendant ship owner's negligence, in view of negative answer to question whether defendant knew, or had reason to know, that bridles used in raising cover from pier were unsuitable and affirmative answer to question whether any fault of plaintiff contributed to injuries.—Strika v Holland America Line, D.C.N Y, 90 F. Supp 534, affirmed, C.A., Strika v Netherlands Ministry of Traffic, 185 F 2d 555, certiorari denied 71 S Ct 614, 341 U S 904, 95 L Ed 1343

53. N.J.—Horn v Hamburg-American Packet Co., 80 A. 490, 81 N.J Law 729
58 C.J. p 324 note 53.

54. R.I.—Coyne v. Coastwise Dredging Co., 89 A. 1060, 36 R I. 278.

55. U S.—The Uxmal, D C Mass., 49 F Supp 221.

56. U.S.—The Guillermo, D C N.Y., 26 F. 921.

57. U S.—Guerrini v. U S., C.C.A.N. Y., 167 F.2d 352, certiorari denied 69 S.Ct 65, 335 U.S 843, 93 L.Ed 393—Kreste v. U. S., C C A N.Y., 158 F 2d 575—Palardy v. U. S., D. C.Pa., 102 F.Supp. 534—Lundberg v. Prudential S S. Corp., D.C.N.Y., 102 F.Supp. 115—Laffoon v. U S., D C N.Y., 101 F Supp. 823—Portel v. U. S., D.C N.Y., 85 F Supp 458—Bow v. Pilato, D C Cal., 82 F.Supp 399—Badalamenti v. U S., D.C.N Y., 67 F Supp 575, affirmed in part and modified in part on other grounds, C.C A., 160 F.2d 422—The Wichita Falls, D.C Tex., 15 F Supp. 612.
58 C.J. p 324 note 58.
Apportionment of damages in admiralty generally see Admiralty § 85.

Particular elements of damages

(1) Expenses and loss of time or wages.—The Eddystone, D.C.Va., 33 F. 925—The Truro, D.C.N.Y., 31 F 158.

(2) Loss of past and future earnings, pain and suffering, hospital and physicians' fees.—Lundberg v. Prudential S S. Corp., D C.N.Y., 102 F Supp 115.

(3) Award of eighteen thousand dollars because of injuries, pain and suffering, and loss of earning.—Palardy v. U. S., D.C.Pa., 102 F.Supp 534.

(4) Damages for pain and suffering disallowed.—The Truro, D.C N Y., 31 F. 158.

58. U.S.—The Max Morris v. Curry, N.Y., 11 S Ct. 29, 137 U.S. 1, 34 L Ed. 586—The Truro, D.C.N.Y., 31 F. 158.

59. U.S.—Bochantin v. Inland Waterways Corp., D.C.Mo., 96 F Supp. 234, appeal dismissed, C.A., 191 F. 2d 734.

60. N.Y.—Raia v. Grace Line, 108 N. Y.S.2d 137, 279 App.Div. 647.

In a proper case a shipowner may file a petition for exoneration from liability for personal injuries sustained by persons on or about the vessel.[61]

§ 87. Lien

Where personal injuries are caused by the negligence of the vessel in cases for which a legal liability attaches, a maritime lien exists in favor of the injured person.

Where personal injuries are caused by the negligence of the vessel in cases for which a legal liability attaches, a maritime lien exists in favor of the injured person.[62] Thus, a maritime lien attaches to the vessel in favor of one injured thereon by reason of her defective appliances[63] or the negligence of her officers.[64] No lien arises for the unlawful act of the master in furnishing liquor to his guest who was injured by falling while intoxicated.[65]

VII. BOTTOMRY AND RESPONDENTIA

§ 88. Definitions and Nature

A bottomry bond is a contract for a loan of money on the bottom of a ship, at an extraordinary interest, on maritime risks, to be borne by the lender, for a voyage or a definite period.

In general, a bottomry bond is a contract for a loan of money on the bottom of a ship, at an extraordinary interest, on maritime risks, to be borne by the lender, for a voyage or a definite period.[66] It is a peculiar contract,[67] differing essentially from a loan with security,[68] and is inconsistent with the existence of the lien implied by the marine law to secure advances to a master in a foreign port to make necessary repairs.[69] As the lender sustains the hazard of the voyage he ordinarily receives, on its happy termination, a greater price or premium for his money than the rate of interest allowed by law in ordinary cases.[70] The bond does not create a personal obligation on the owner until the vessel reaches port;[71] but if the ship arrives at the port of her destination, the borrower, personally, as well as the ship, is liable for the repayment of the loan, together with such premium thereon as may have been agreed on.[72]

Respondentia. In general, a respondentia bond is a loan of money on merchandise laden on board a ship, the repayment whereof is made to depend on the safe arrival of the merchandise at the destined port.[73] Such an instrument is now deemed to be

61. Sufficiency of evidence

(1) Evidence held sufficient to support court's denial of application for exoneration—Hutchinson v. Dickle, C.C.A.Ohio, 162 F.2d 103, certiorari denied 68 S.Ct. 208, 332 U.S. 830, 92 L.Ed. 404.

(2) In proceeding by owner of motorboat for exoneration from liability for death of girl who either fell or was thrown from boat by its speed, evidence established that owner's husband, who was operating boat, was negligent, and that such negligence caused girl's death—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829.

(3) In action by motor-boat owner for exoneration from, or limitation of, liability for damages for injuries sustained by defendant when struck by petitioner's boat while it was being operated by petitioner's minor son, evidence sustained finding that there was fault or negligence on the part of the operator of the boat in that he failed to use ordinary care and prudence in ascertaining the presence of defendant, and, therefore, the petitioner was not entitled to exoneration from damages done while the boat was being operated by his son—Rautbord v. Ehmann, C.A.Ill., 190 F.2d 533.

(4) In proceeding by owner of vessel for exemption from liability for injuries caused to crew by explosion occurring in steering-gear room of vessel, evidence was held to sustain finding that explosion was caused by explosion of diffused, leaking gases which would not have occurred in ordinary course of events.—Leathem Smith-Putnam Nav. Co. v. Osby, C.C.A.Ill., 79 F.2d 280, certiorari denied 56 S.Ct. 370, 296 U.S. 653, 80 L.Ed. 465.

(5) In proceeding by owner of vessel for exemption from liability for injuries caused members of crew by explosion occurring in steering-gear room of vessel, mere fact that injured members had, to some degree, duties to perform on vessel was insufficient, in absence of evidence that they did anything which might contribute to injury, to render them guilty of contributory negligence.—Leathem Smith-Putnam Nav. Co. v. Osby, supra.

Proceedings to obtain:
Exoneration from liability for injuries to passengers on vessel see infra § 195
Limitation of liability see infra §§ 245–257.

62. U.S.—Santiago v. U. S., D.C.N.Y., 102 F.Supp. 425.
58 C.J. p. 324 note 63.
Maritime lien arising out of tort:
Generally see Maritime Liens § 12.
Committed by vessel or owner generally see supra § 80.

63. U.S.—The Carolina, C.C.N.Y., 32 F. 112.

64. U.S.—The Anaces, N.C., 93 F. 240, 34 C.C.A. 558.
58 C.J. p. 324 note 65

65. U.S.—The Westmoor, D.C.Or., 27 F.2d 886.
58 C.J. p. 325 note 66.

66. U.S.—Barnes v. The "Kongo," C.A.Ky., 174 F.2d 67.
58 C.J. p. 325 notes 68 [a], 69.
Mortgage and hypothecation of vessel see supra § 24

67. U.S.—Force v. Providence Washington Ins. Co., D.C.N.Y., 35 F. 767.
58 C.J. p. 325 note 71.

68. U.S.—Maitland v. The Atlantic, D.C.La., 16 F.Cas.No. 8,980, Newb. Adm. 514.
58 C.J. p. 325 note 72.

69. U.S.—The Ann C. Pratt, C.C.Me., 1 F.Cas.No. 409, 1 Curt. 340, affirmed 18 How. 63, 15 L.Ed. 267.

70. U.S.—Maitland v. The Atlantic, D.C.La., 16 F.Cas.No. 8,980, Newb. Adm. 514.
Effect of provision for ordinary rate of interest see infra § 90

71. Wash.—Davies v. Soelberg, 64 P. 540, 24 Wash. 308.

72. U.S.—The Dora, D.C.La., 34 F. 343.

73. U.S.—Maitland v. The Atlantic, D.C.La., 16 F.Cas.No. 8,980, Newb. Adm. 514.
58 C.J. p. 326 note 77.

archaic and obsolete.[74]

Maritime loan. A maritime loan is a contract by which the lender lends to the borrower a certain sum of money on condition that, in case of loss of the effects on account of which it is lent by any peril of the sea or superior force, the lender shall not be repaid unless to the amount of what shall remain.[75]

§ 89. What Law Governs

In the absence of express stipulation the law of the ship's home governs a bottomry bond.

The law of the ship's home governs a bottomry bond[76] in the absence of express stipulation.[77]

§ 90. Requisites, Validity, and Construction of Bond

No particular form of contract is necessary in order to constitute a bottomry or respondentia bond, and such a bond is to be liberally construed to effectuate the intention of the parties.

The object of the bond is to procure necessary supplies for vessels in distress in foreign ports, where the master and owners are without credit, and, if assistance could not be so procured, the vessel and cargo might perish.[78] No particular form of contract is necessary.[79] A statute providing for registration of mortgages of personal property does not apply to a bottomry bond.[80] The fact that, when a contract is made for a bottomry bond for money advanced, no exact amount of money is agreed on does not affect the validity of the bond for the amount actually required for repairs and supplies obtained.[81]

These bonds have been regarded as of high and privileged character and have been held in great sanctity in maritime courts,[82] and are liberally construed[83] so as to carry into effect the intention of the parties,[84] and to give effect to the contract according to the manifest intent of all its provisions;[85] and, where there is no suspicion of fraud, every fair presumption is to be made to support them.[86] Where concerned, a respondentia bond, memorandum indorsed on it, and the outward bill of lading and assignment thereon, are all to be construed as one instrument for the purpose of discovering the intention of the parties.[87] However, contracts of bottomry and respondentia are different in different countries,[88] although resembling each other in some prominent features,[89] so that, when disputes arise, they are to be decided by the words of the particular contract in question rather than by any principles of general commercial law.[90]

Contents; marine risk; maritime interest. It is essential to a bottomry transaction that the money lent should run the hazard of the voyage,[91] and be on maritime or marine risk;[92] and in order to con-

74. **Respondentia bonds are "archaic instruments** the use of which has passed, with other appurtenances and trappings of romance of days now remote, when masted ships rode the waters of strange harbors, while their masters, far from their home ports, and unable to send a message to the owners, tried to raise cash on bonds of respondentia to enable their ships to clear for the continuing voyage. . . . Only in case of war, seismic disturbance, breakdown of wireless or radio, or atomic catastrophe whereby communication between a master and owner would become impracticable or impossible, does it seem that use of such contracts of hypothecation could be revived. . . . Respondentia bonds are obsolete"—Barnes v The "Kongo," C.A Ky, 174 F.2d 67, 68, 69, note.

75. U S—The Draco, C C Mass., 7 F. Cas No 4,057, 2 Sumn 157

76. U S—Force v Providence Washington Ins Co, D C N.Y., 35 F. 767
58 C.J. p 327 note 92

77. U.S.—The Wyandotte, Va., 145 F. 321, 75 C.C.A. 117.
58 C.J. p 327 note 93.

78. La—Hill v. Phœnix Tow Boat Co, 2 Rob 35.
58 C.J. p 326 note 78.

79. U S—The Edward Albro, D C.N. Y, 8 F Cas No 4,290, 10 Ben. 668.
58 C J. p 326 note 79.

Seal

Although the earlier bottomry contracts were executed under seal, the later usage has dispensed with the seal—The Dora, D C La., 34 F 343

Written obligations evidencing debts of vessel for advances made in reliance on earnings could not be enforced as respondentia bonds—Barnes v. The "Kongo," C.A Ky., 174 F.2d 67.

80. U S.—The Draco, C C Mass., 7 F. Cas No.4,057, 2 Sumn. 157.

81. U.S.—Furniss v. The Magoun, D. C.N.Y., 9 F.Cas No.5,163, Olcott 55.

82. U S.—Barnes v The "Kongo," C. A Ky., 174 F 2d 67.
58 C.J. p 326 note 83.

83. U.S.—Miller v. O'Brien, D.C N Y., 35 F. 779, reversed on other grounds 67 F. 605, 14 C C.A. 566, reversed on other grounds O'Brien v Miller, 18 S.Ct. 140, 168 U S 287, 42 L Ed 469.
58 C J. p 326 note 84.

84. U.S.—Miller v. O'Brien, D C.N.Y, 35 F. 779, reversed on other grounds 67 F. 605, 14 C C A. 566, reversed on other grounds O'Brien v. Miller, 18 S Ct 140, 168 U.S. 287, 42 L Ed 469.
58 C.J. p 326 note 85.

85. U S—O'Brien v. Miller, N.Y., 18 S.Ct. 140, 168 U S 287, 42 L Ed. 469
58 C J. p 326 note 86.

86. U S—O'Brien v. Miller, N.Y., 18 S Ct. 140, 168 U S 287, 42 L.Ed. 469.

87. U.S—Conard v. Atlantic Ins Co., Pa., 1 Pet. 386, 7 L.Ed. 189.

88. U.S—The Draco, C.C Mass., 7 F. Cas.No 4.057, 2 Sumn. 157.
58 C.J. p 327 note 89.

89. U.S—O'Brien v. Miller, N Y., 67 F. 605, 14 C C.A. 566, reversed on other grounds Miller v. O'Brien, 18 S Ct 140, 168 U.S. 287, 42 L Ed. 469

90. U.S—O'Brien v. Miller, N.Y., 67 F 605, 14 C C A. 566, reversed on other grounds Miller v. O'Brien, 18 S.Ct. 140, 168 U S. 287, 42 L Ed 469
58 C.J. p 327 note 94.

91. U.S.—The William & Emmeline, D.C N.Y., 29 F.Cas.No.17,687, Blatchf. & H. 66.
58 C.J. p 327 note 94.

92. U.S—Greely v. Smith, C.C.Me, 10 F.Cas.No 5,750, 3 Woodb. & M. 236.
58 C.J. p 327 note 95.

Term "perils of the sea" means all those accidents and misfortunes to

stitute a valid contract of bottomry, where more than statutable interest is reserved, both the principal and interest must be put at risk.[93] Hence, an instrument for the repayment of money absolutely is not a bottomry contract[94]

Under the rule that the bond will be construed according to the manifest intent of all its provisions, a hypothecation will be held to be a bottomry bond, although it contains a provision that, in case the bills of exchange given by the master for the money advanced are not accepted and paid, the bond shall become due, where it also contains a condition that the party taking it shall assume the risk of the voyage.[95] A bottomry bond may be valid which states that it is to be paid a stated number of days after arrival,[96] the rule being that renunciation of the obligation in case of loss of the vessel is implied.[97] Where the insurer of a vessel, having the right to loan on bottomry, being applied to by the owners for a bottomry bond, and unwilling to increase the amount of risk on the vessel, suspends a part of the policy equal to the amount of the loan, during its continuance, this is valid as a bottomry loan.[98]

An agreement for maritime interest is a usual but not a necessary element in a contract of bottomry,[99] so that sometimes bonds are made bearing only the ordinary rate of interest;[1] but a loan on low or legal interest will create a suspicion that the marine risk was not contracted for, and that the parties did not intend a bottomry contract.[2]

A loan secured by a bottomry bond is not affected by the usury laws,[3] since the lender is, to the extent of his loan, insurer of the vessel for the voyage;[4] but the reservation of marine interest in a contract for the loan of money on a vessel to be paid at all events is usurious.[5] A bottomry bond, made for a larger sum than is due, for the purpose of being used to defraud underwriters, is void, and no remedy can be had on it, although no fraud was intended against the owners of the vessel[6]

Effect of partial invalidity; ratification A bottomry bond may be good in part, and bad in part, and will be sustained as far as it is good;[7] and the objection that a bottomry bond given in good faith for necessary supplies was executed without due authority operates only to reduce the premium as far as the ship is concerned,[8] but does not necessarily relieve the vessel from liability for the advances made, if that liability can be sustained on the principles of hypothecation.[9] The fraudulent taking of a bottomry bond for a larger amount than the actual advance vitiates the bond, and entirely avoids the bottomry lien;[10] and the person taking it under such circumstances has no lien under the general maritime law on the vessel for his actual advances.[11] Where a bottomry bond covering the whole vessel is void in toto against a part owner of the vessel for fraud, it cannot be good in part against a purchaser from him, with knowledge that part of the debt secured by the bond was originally good[12] However, a bottomry bond is not rendered invalid merely because it covers items of advance not entitled to a bottomry lien;[13] it will be good for the sums which are clearly claimed as a maritime hypothecation,[14] and will be reformed by the court.[15] A bond, bad as a bottomry bond, may be

which ships at sea are exposed, and which human foresight or precaution cannot avert or resist.—Appleton v. Crowninshield, 3 Mass. 443, 450.

93. Mass.—Thorndike v. Stone, 11 Pick. 183
58 C.J. p. 327 note 96.

94. U.S.—The Clotilda, D.C.Me., 5 F. Cas.No. 2,903, 1 Hask. 412.
58 C.J. p. 327 note 97

95. U.S.—The Edward Albro, D.C.N.Y., 8 F.Cas.No. 4,290, 10 Ben. 668.

96. U.S.—The Eliza Lines, C.C.Mass., 61 F. 308, affirmed 114 F. 307, 52 C.C.A. 195, modified on other grounds 132 F. 242, 65 C.C.A. 538, reversed on other grounds 26 S.Ct. 8, 199 U.S. 119, 50 L.Ed. 115
58 C.J. p. 327 note 2.

97. U.S.—The Eliza Lines, supra
La.—Lloyd v. McMasters, 7 Mart. 249

98. N.Y.—Northwestern Ins. Co. v. Ferward, 36 N.Y. 139.

99. U.S.—Force v. The Pride of the Ocean, D.C.N.Y., 3 F. 162
58 C.J. p. 328 note 6
"Maritime interest" is the premium paid for a loan secured by means of a contract of bottomry.—The Dora, D.C.La., 34 F. 343

1. U.S.—The Grapeshot v. Wallerstein, La., 9 Wall. 129, 16 L.Ed. 651

2. U.S.—The Dora, D.C.La., 34 F. 343
58 C.J. p. 328 note 9.

3. N.Y.—Cole v. White, 26 Wend. 511
Wash.—Davies v. Soelberg, 64 P. 540, 24 Wash. 308.

4. N.Y.—Cole v. White, 26 Wend. 511.
Wash.—Davies v. Soelberg, 64 P. 540, 24 Wash. 308.

5. N.Y.—Braynard v. Hoppock, 32 N.Y. 571, 88 Am.D. 349.

6. U.S.—Carrington v. The Ann C. Pratt, C.C.Me., 1 F.Cas.No.409, affirmed 18 How. 63, 15 L.Ed. 267.

7. U.S.—Carrington v. The Ann C. Pratt, Me., 18 How. 63, 15 L.Ed. 267.
58 C.J. p. 328 note 14

8. U.S.—The Eureka, D.C.Mass., 8 F. Cas.No. 4,547, 2 Lowell 417.

9. U.S.—The Eureka, supra.

10. U.S.—Carrington v. The Ann C. Pratt, C.C.Me., 1 F.Cas.No. 409, 1 Curt. 340, affirmed 18 How. 63, 15 L.Ed. 267
58 C.J. p. 328 note 17.

11. U.S.—The Ann C. Pratt, C.C.Me., 1 F.Cas.No. 409, 1 Curt. 340, affirmed 18 How. 63, 15 L.Ed. 267.

12. U.S.—The William, D.C.Mass., 29 F.Cas.No. 17,684.
58 C.J. p. 328 note 19.

13. U.S.—Furniss v. The Magoun, D.C.N.Y., 9 F.Cas.No.5,163, Olcott 55.

14. U.S.—Furniss v. The Magoun, supra.

15. U.S.—Furniss v. The Magoun, supra.

good as a mortgage of the vessel,[16] but, where the laws of the state where it is made require a mortgage to be recorded, and the mortgaged property to be delivered to the mortgagee, a failure to comply with such provisions voids the instrument as a mortgage.[17] A bottomry bond which might otherwise be held invalid may be ratified by the owner.[18]

§ 91. Capacity to Execute

a. In general
b. Master

a. In General

The owner of a vessel may execute a bottomry bond.

The owner of the vessel may execute a bottomry bond,[19] and he is not limited in his power to pledge the vessel to a case of necessity,[20] but he has an absolute control over his property,[21] nor is it necessary that a respondentia loan by the owner of the cargo should be expended in fitting out the ship, or invested in the goods on which the risk is run.[22] It is not necessary to the validity of a bottomry bond, made by the owner of a vessel, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage;[23] and he may employ the money at his discretion,[24] the lender retaining his lien as long as the ship bears the risk.[25] A valid bottomry bond may be made by the owners of a vessel in a foreign[26] or home port.[27]

b. Master

(1) In general
(2) Extent and limitation of authority
(3) Necessity of communication with owner

(1) In General

Under proper circumstances a master of a vessel may obtain money for repairs, supplies, or other needs of the ship on bottomry on the ship or cargo.

Within certain limitations a master may obtain money for repairs, supplies, or other needs of the ship on bottomry on the ship,[28] although the ship is hired on charter,[29] and the master has been appointed by the charterers,[30] and although a note or other obligation is given for the demand;[31] but where advances were made to, and a bond given on, the ship by a master who had resigned his command, and after another master, appointed by the charterers, had succeeded to it, the bond is not valid.[32] Authority to raise money on the vessel itself in the absence of other means is implied where the owner refuses to pay a bill given for supplies furnished, and sends the creditor to demand payment from the master in a foreign port.[33] However, the master cannot hypothecate the ship for the benefit of the cargo.[34] Subject to the same limitations, the master may bottomry the cargo to pay for necessary repairs or supplies to the ship,[35] and such power is not affected by the fact that he has an opportunity to transship.[36] A master appointed in a foreign port by the consul of the country to which the ship belongs has the same powers as to bottomry bonds as one appointed directly by the owner.[37]

Interest in vessel or cargo. A bottomry bond, executed by the master of a ship, as master, although he is at the time owner also, will impart to the holder the same rights and privileges as if given in the character of owner;[38] and the master who is also part owner may create a bottomry on

16. U S—Greely v Smith, C C.Me., 10 F Cas.No.5,750, 3 Woodb. & M. 236
Mortgage of vessel see supra § 24.

17. U S.—Greely v Smith, supra
Recording mortgage see supra § 25.

18. U S—Gardner v The White Squall, D C N Y, 9 F Cas No 5,239
58 C.J p 329 note 27

19. U S—The Draco, C C Mass, 7 F Cas.No 4,057, 2 Sumn. 157.

20. U.S—The Mary, C C Conn, 16 F Cas.No 9,187, 1 Paine 671—The Panama, D C N Y, 18 F Cas No 10,703, Olcott 343

21. U S—The Mary, C.C Conn, 16 F Cas No 9,187, 1 Paine 671

22. U S.—Conard v Atlantic Ins. Co, Pa, 1 Pet. 386, 7 L Ed. 189.

23. U S—Eneas v. The Charlotte Minerva, D C N Y, 8 F.Cas No.4,483.
58 C J. p 330 note 53.

24. U S—Eneas v The Charlotte Minerva, supra.
58 C J. p 330 note 54.

25. U S—Eneas v. The Charlotte Minerva, supra.

26. U.S—The Draco, C C.Mass, 7 F Cas.No 4,057, 2 Sumn 157.
58 C J p 330 note 56

27. U S—The Draco, supra.
58 C J. p 330 note 57

28. U S—Barnes v The "Kongo," C. A Ky, 174 F.2d 67.
58 C J. p 330 note 63.

29. U S—Breed v The Venus, D.C Mass., 4 F Cas No.1,827
Charter of ship see supra §§ 26-56.

30. U S—Breed v The Venus, supra.

31. U.S—The Hilarity, D C.N Y, 12 F.Cas No 6,480, 1 Blatchf & H 90

32. U S—Walden v Chamberlain, C. C Pa, 28 F Cas No 17,055, 3 Wash 290, affirmed The Aurora, 1 Wheat. 96, 4 L Ed 45.

33. U.S—Thomas v Gittings, C.C. Md, 23 F Cas No 13,897, Taney 472

34. N.Y—Fontaine v. Columbian. Ins Co., 9 Johns 29.

35. U S.—Barnes v The "Kongo," C. A Kv, 174 F 2d 67.
N Y—Kelly v Cushing, 48 Barb. 269
58 C J. p 330 note 72.
Contract held bottomry of freight only and not vessel
U S—Banca di Genova v The Sophie Wilhelmine, N.Y, 58 F. 890, 7 C.C. A 569

36. U S—Schmidt v. The George Nicholaus, D C N Y, 21 F.Cas No 12,463
58 C J p 331 note 75.

37. U S—The Jacmel Packet, D C N. Y, 13 F.Cas.No 7,154, 2 Ben 107

38. U S—The Panama, D C N.Y., 18 F Cas No 10,703, Olcott 343.
58 C.J p 333 note 27.

his own interest without the existence of any necessity for a bottomry.[39]

(2) Extent and Limitation of Authority

The authority of the master of a vessel to give a bottomry bond is subject to various limitations.

Under some statutes a bottomry bond can be given by the master of the vessel in,[40] and only in,[41] case of necessity and great distress,[42] abroad,[43] at sea,[44] or in a foreign port,[45] where the owner is not present[46] and has no representative,[47] and when he has no other means at his command,[48] or any funds or credit of his owner[49] or of his own,[50] or any other means of getting money,[51] such as advances on the freight or passage money,[52] and there are no goods of his own[53] or of his owner[54] on board. If he has money on board belonging to shippers, he is not bound to apply it to the ship's necessities before borrowing on bottomry, at least if not equal to the amount of repairs.[55]

The bond cannot be given by the master before the voyage is begun,[56] or contrary to instruction,[57] in the home port,[58] or in those places where the owners reside,[59] even for those necessities without which the vessel cannot proceed to sea.[60] However, it is no objection to a bottomry by the master for necessary repairs in a foreign port that the loan was effected after the repairs were made,[61] and, in case of necessity, the master of a ship may hypothecate her as well at the port of destination as at any other foreign port.[62] It has been said that the law invests the master with a reasonable discretion as to the manner of obtaining the necessary repairs.[63]

Meaning of "necessity." The term "necessity" has a twofold meaning,[64] there must be a necessity of obtaining repairs or supplies in order to prosecute the voyage,[65] a necessity which would induce a prudent owner to provide funds for the cost of them on the security of the ship,[66] although the necessity for supplies to support a bottomry bond need not have been so urgent that the vessel must have been lost to the owner without them;[67] and a necessity, because of inability to procure the required funds in any other way, of resorting to a bottomry bond.[68]

(3) Necessity of Communication with Owner

A master is without authority to bottomry the ship where he fails to communicate with the owner of the vessel, if communication is practicable within a reasonable time.

A master has no authority to bottomry the ship, where he does not communicate with the owner of the vessel[69] or her charterer,[70] or to hypothecate the cargo without communicating with the owner

39. U S—The Kathleen, D C N.Y., 14 F Cas.No 7,624, 2 Ben. 458
40. U S—Grace v. The Mauna Loa, D C.N Y, 76 F 829.
58 C J p 331 note 78
41. U S—The Aurora, Pa, 1 Wheat. 96, 4 L Ed 45.
58 C J p 331 note 79
42. U S—Tunno v. The Mary, D C S C, 24 F Cas No.14,237, Bee 120.
43. U S.—The Archer, C.C N Y, 23 F. 350, 23 Blatchf. 186.
44. N Y.—White v. Cole, 24 Wend 116.
58 C J p 331 note 82.
45. U S.—The Grapeshot v Wallerstein, La., 9 Wall 129, 19 L.Ed. 651.
58 C.J. p 331 note 83.
46. U S.—Patton v. The Randolph, D C.Pa, 18 F Cas No 10,837, Gilp. 457—Ross v The Active, C.C.Pa., 20 F.Cas.No.12,071, 2 Wash C C. 226.
47. U.S —Selden v. Hendrickson, C. C Va, 21 F.Cas No.12,639, 1 Brock. 396.
58 C.J. p 331 note 85.
48. U S —Boreal v. The Golden Rose, D C S C., 3 F.Cas No 1,658, Bee 131.
58 C.J p 331 note 88
49. U.S —Thomas v. Osborn, Md., 19 How. 22, 15 L.Ed 534.
58 C.J. p 331 note 89.
50. U.S —The Packet, C C Mass, 18 F Cas No 10,654, 3 Mason 255.
58 C J p 331 note 90.
51. U.S —Rucher v. Conyngham, D C Pa, 20 F Cas No 12,106, 2 Pet. Adm 295
58 C.J. p 331 note 91.
52. U S —Burke v The M P. Rich, C.C Mass, 4 F.Cas.No 2,161, 1 Cliff. 308.
53. U S —Cupisino v. Perez, Pa., 2 Dall. 194, 1 L Ed 345—Rucher v. Conyngham, D C Pa, 20 F Cas.No. 12,106, 2 Pet Adm. 295.
54. U S.—Rucher v. Conyngham, supra
58 C J p 331 note 94.
55. U.S —The Packet, C.C.Mass, 18 F Cas No 10,654, 3 Mason 255.
56. U S.—Turnbull v. The Enterprise, D C Pa, 24 F.Cas No.14,212, Bee 345.
58 C.J p 331 note 96.
57. U.S.—The Astoria, C.C.A.Canal Zone, 281 F 618—Grace v. The Mauna Loa, D C N.Y., 76 F. 829.
58. U S —The Panama, D.C N.Y., 18 F Cas No.10,703, Olcott 343.
58 C.J. p 332 note 98.
59. U S —Forbes v. The Hannah, Adm Pa, 9 F.Cas No.4,925, Bee 348
58 C.J. p 332 note 1.
60. U S —Turnbull v The Enterprise, D.C.Pa, 24 F Cas No.14,242, Bee 345.
61. U S —The Kathleen, D C N Y., 13 F Cas No.7,624, 2 Ben 458
62. N Y —Reade v Commercial Ins Co, 3 Johns 352, 3 Am D 495
63. U S —The Packet, C C Mass., 18 F Cas No 10,654, 3 Mason 255
64. U S.—Ross v. The Active, C.C. Pa, 20 F Cas No 12,071, 2 Wash C C 226.
58 C.J p 332 note 8.
65. U S —Burke v The M. P. Rich, C C Mass, 4 F Cas No 2,161, 1 Cliff 308.
58 C J. p 332 note 9.
66. U.S —St Thomas Bank v. The Julia Blake, N.Y., 2 S Ct. 692, 107 U S. 418, 27 L Ed. 595.
58 C J p 332 note 10.
67. U S —Thomas v. Gittings, C.C. Md, 23 F Cas No.13,897, Taney 472.
68. U S.—Burke v. The M P Rich, C C.Mass, 4 F.Cas.No 2,161, 1 Cliff. 308.
58 C J. p 332 note 12.
69. U.S —Barnes v. The "Kongo," C. A Ky, 174 F 2d 67.
58 C.J p 332 note 16.
70. U S —The Northern Light, D.C. Wash, 106 F. 748.
58 C.J. p 332 note 17.

of the cargo,[71] if communication is practicable[72] within a reasonable time,[73] stating the necessity for the expenditure and for the hypothecation.[74] Where no sufficiently speedy means of communication exist between the place where the vessel is in distress and the place of residence of the owner, the master may raise money on bottomry without first notifying the owner.[75]

§ 92. Purpose for Which Bond May Be Given

The purpose for which a bond may be given by the master is to effectuate the objects of the voyage or the safety and security of the ship.

In general, the purpose for which the bond may be given by the master is, as provided in some statutes, to effectuate the objects of the voyage,[76] or the safety and security of the ship.[77] Thus, the bond may be for repairs,[78] supplies,[79] to enable the vessel to leave a port where she is detained,[80] to enable the voyage to be prosecuted,[81] for pumping out the boat and repairing leaks,[82] or to relieve the vessel and cargo from the liens of salvors and prevent delay and expense in their enforcement.[83] On the necessary abandonment of the voyage in a foreign port after repairs made, the master may hypothecate the vessel for the purpose of getting her back to the owners, or for a voyage to a place where she can be sold without sacrifice.[84] Various items have been held to be properly[85] or improperly[86] included in a bottomry bond.

Security for preëxisting debt. The general rule is that the master of a vessel cannot hypothecate for a preexisting debt, but only for advances made at the time the necessity existed.[87] However, it is no objection that the advances were made from time to time before the bond was executed, if the original understanding was that the whole sum should be ultimately thus secured,[88] even when the bond purports to protect a direct loan or to secure existing debts;[89] and it has been held that it matters not at what time the loan is made if the risk of the voyage is subsequently taken and if the transaction is not a cloak to cover usury, gaming, or fraud, and if the advance is in good faith for a maritime premium.[90] Nevertheless, a bottomry bond executed by the master is invalid as to items for advances made without an agreement or reasonable expectation that they were to be secured by bottomry.[91] Goods supplied in the first instance on personal security alone generally cannot afterward be made the subject of bottomry;[92] but the fact that the moneys lent on a bottomry bond were on the personal credit of the master has been held to make no difference if the advance was made on a contract for a bottomry bond.[93] A bottomry bond given to pay a former one must stand or fall with the first hypothecation, and the subsequent lender can claim only on the same ground with the former,[94] and, thus, the payment of a hypothecation is not a valid consideration for a new hypothecation, unless it appears that the former one was valid.[95]

§ 93. Capacity or Authority to Take Bond

Under proper circumstances a bond for advances may be taken by the owner of the cargo or by an agent of the charterer. The lender on bottomry must ascertain that the money is necessary for the particular voyage and that the master has no other resources on hand.

Where the consignee is bound to advance freight

71. U S—Barnes v. The "Kongo," C A.Ky, 174 F 2d 67—The Richmond, D C Del, 2 F 2d 903
58 C J. p 332 note 18.

72. U S.—Barnes v The "Kongo," C. A.Ky, 174 F 2d 67
58 C J p 332 note 20, p 278 note 37

73. U.S—The Northern Light, D C. Wash, 106 F 748

74. U.S—Barnes v The "Kongo," C A.Ky., 174 F.2d 67
58 C J. p 332 note 22

75. U S—Elwell v The Georgia, D C N Y., 32 F. 843.

76. U S—The Aurora, Pa, 1 Wheat 96, 4 L Ed 45
58 C.J. p 333 note 31.

77. U S—The Aurora, supra
58 C J. p 333 note 31.

78. U.S.—The R Lenahan, D C Pa, 10 F Supp. 497
58 C.J. p 333 note 33.

79. U.S—The Fortitude, C C.Mass, 9 F Cas.No.4,953, 3 Sumn. 228.
58 C.J. p 333 note 34.

80. U S—Gibbs v. The Texas, D C Pa, 10 F Cas No.5,385, Crabbe 236

81. U S—Walden v Chamberlain, C C Pa., 28 F Cas No.17,055, 3 Wash C C 290, affirmed The Aurora, 1 Wheat 96, 4 L Ed 45
58 C J. p 333 note 37.

82. U S—The C. M. Titus, D C N Y, 7 F. 826

83. U S—The Clotilda, D C Me., 5 F. Cas No 2,903, 1 Hask 412

84. U S—The Robert L Lane, D C. Mass, 20 F.Cas No 11,892, 1 Lowell 388
58 C J p 333 note 42

85. U S—The Edward Albro, D C N. Y., 8 F Cas No 4,290, 10 Ben. 668
58 C J. p 333 note 47.

86. U S—Furniss v The Magoun, D C N Y., 9 F Cas No 5,163, Olcott 55
58 C J p 334 note 48

87. U S—Greely v Smith, C C Me., 10 F Cas No 5,750, 3 Woodb & M. 236
58 C J. p 334 note 49.

88. U.S.—The Virgin, Md., 8 Pet 538, 8 L Ed 1036
58 C J p 334 note 50.

89. U S—The Panama, D C N Y., 18 F Cas.No 10,703, Olcott 343.

90. U S—Conard v. Atlantic Ins. Co., Pa, 1 Pet 386, 7 L.Ed. 189.

91. U.S—The Circassian, D C N Y., 5 F Cas No 2,724, 3 Ben 398—Gardner v. The White Squall, D.C N.Y., 9 F Cas No 5 239.

92. N Y.—White v. Cole, 24 Wend. 116.
58 C J. p 334 note 56.

93. U.S.—The Magoun, D C.N.Y., 9 F Cas.No.5,163, Olcott 55.

94. U S—The Aurora, Pa., 1 Wheat 96, 4 L.Ed 45.

95. U S—Walden v. Chamberlain, C. C Pa, 28 F Cas.No 17,055, 3 Wash. C.C. 290, affirmed The Aurora, 1 Wheat. 96, 4 L Ed. 45.
58 C.J. p 334 note 60.

due on the cargo, he cannot, before payment thereof, advance money to the owner on maritime interest;[96] nor can a consignee do so who has funds in his hands to secure advances made by him for the vessel.[97] Although there may be a state of facts under which consignees may advance on bottomry,[98] and although the consignee of a vessel may apply the proceeds of a cargo and the freight to pay sums due on account of its purchase, without affecting his right to take a bottomry bond from the master for supplies subsequently furnished,[99] such loans are not regarded favorably by the courts.[1] The objection to a bottomry bond that the holders were consignees of the ship is obviated by proof that they were not so by the appointment of the owner, that the owner and consignees did not know each other, and had no commercial relations, and that the owner had no funds in their hands.[2]

If the owner of the cargo is on board a vessel at the time of a disaster requiring that money shall be obtained by the master to enable the vessel to prosecute the voyage, he is not bound to advance funds or credit to benefit the shipowner,[3] but, if he does so, he is entitled to satisfactory security and an extra and adequate compensation for the advance;[4] but one part owner cannot take from the master a bottomry bond, on the share of another part owner, for repairs done to the vessel.[5] A bottomry bond taken in a foreign country, by an agent of the charterers of the ship, in the name of the charterers, is good.[6]

Duty of lender to ascertain and show authority. The lender on bottomry must inform himself whether the alleged necessity exists,[7] that is, he is bound to ascertain that the money is necessary for the particular voyage and that the master has no other resources on hand.[8] Further, he must show the necessity of the repairs and supplies,[9] although where he does so, claimant must show that the money was available other than by bottomry.[10] If the fact of such necessity be left unproved, evidence is necessary to show due inquiry and reasonable grounds of belief that the necessity was real,[11] and the necessity of raising the funds advanced on it by such means,[12] the lender being chargeable with notice of the necessities which develop and limit the master's power to act;[13] and he must judge for himself whether, if the owner were present, he would do what the master is undertaking to do for him.[14]

While the lender is bound to exercise reasonable diligence in order to ascertain whether the supplies and alleged necessaries for which he has advanced money are necessary and proper,[15] he is not bound to show that there was a positive necessity.[16] It is sufficient if there was an apparent necessity,[17] as far as the lender is able, on due inquiry and due diligence, to ascertain the facts,[18] and when there is an apparent necessity for repairs, the lender on bottomry is under no obligation to inquire whether they are made in the most judicious manner,[19] and the lender on bottomry in good faith, and under circumstances which justified the loan, cannot be held responsible for the reasonableness of the charges in the repair of the vessel.[20] Where the necessities of the vessel because of want of repairs and supplies, and the fact that the master had no means of his own and had in vain resorted to others for raising money were facts of notoriety, a person was justified in lending money to the master on a bottomry bond without requiring positive proof that the necessity was absolute and remediless except by a bottomry bond.[21]

96. U.S.—The Lavinia v Barclay, Pa., 15 F Cas.No 8,125, 1 Wash.C.C. 49.
58 C J p 334 note 62.
Obligation of consignee to advance freight due on cargo see infra § 167.

97. U.S—Hurry v. The John & Alice, Pa., 12 F.Cas No.6,923, 1 Wash C C. 293.

98. U S—The Lavinia v. Barclay, Pa, 15 F.Cas.No.8,125, 1 Wash.C C. 49.
58 C J p 334 note 64.

99. U S.—Thomas v. Gittings, C.C. Md, 23 F Cas No 13,897, Taney 472.

1. U.S.—Rucher v Conyngham, D.C. Pa., 20 F.Cas No 12,106, 2 Pet.Adm 295.

2. U.S.—Furniss v. The Magoun, D C N.Y, 9 F.Cas No.5,163, Olcott 55.

3. U S—Ross v. The Active, Pa, 20 F Cas No 12,071, 2 Wash.C.C. 226.

4. U.S—Ross v. The Active, supra.
58 C J. p 335 note 69

5. U.S—Patton v The Randolph, D. C Pa, 18 F Cas No 10,837, Gilp. 457.

6. U S—Breed v. The Venus, D.C. Mass, 4 F Cas No 1,827.

7. U.S—The Grapeshot, La., 9 Wall 129, 19 L Ed 651.
58 C J. p 335 note 79.

8. U.S—The Julia Blake, N Y., 2 S. Ct 692, 107 U S 418, 27 L.Ed. 595.
58 C J. p 335 note 80.

9. U S—The Bridgewater, D C N.Y., 4 F.Cas No.1,865, Olcott 35.
58 C J. p 335 note 81.

10. U S—The Wyandotte, Va., 145 F 321, 75 C.C.A. 117.
58 C J. p 335 note 82.

11. U.S—The Grapeshot, La., 9 Wall. 129, 19 L.Ed. 651.

12. U.S—The Lavinia v. Barclay, Pa, 15 F.Cas No 8,125, 1 Wash.C.C 49.

13. U S—The Julia Blake, N Y., 2 S. Ct. 692, 107 U S 418, 27 L Ed 595

14. U S.—The Julia Blake, supra.

15. U S—The Fortitude, C C Mass., 9 F Cas No.4,953, 3 Sumn. 228.

16. U.S.—The Fortitude, supra.

17. U.S.—The Julia Blake, N Y., 2 S. Ct. 692, 107 U.S 418, 27 L.Ed. 595.
58 C J. p 335 note 89.

18. U S.—The Fortitude, C C Mass, 9 F Cas.No.4,953, 3 Sumn. 228.

19. U S—The Fortitude, supra.
58 C.J. p 336 note 92

20. U S—The Archer, D.C N.Y, 15 F. 276, reversed on other grounds, C C., 23 F. 350—The Yuba, C.C N Y, 30 F Cas.No 18,193, 4 Blatchf 352

21. U.S.—Furniss v. The Magoun,

The lenders of money on a bottomry bond are presumed to have acted in good faith,[22] and are not, in the absence of proof, to be charged with knowledge that the master had disregarded instructions from the owners.[23] The validity of a hypothecation is not affected by the master's previous or subsequent irregular conduct toward his owner, if the lender be not privy thereto.[24]

§ 94. Operation and Effect

A bottomry bond executed by the master of the vessel does not vest an absolute interest in the ship, and a respondentia bond passes no right of property in the goods.

A bottomry bond executed by the master of the vessel does not vest an absolute interest in the ship, but gives a claim on her which admiralty may enforce;[25] nor does a respondentia bond pass the right of property in the goods, since it is a mere personal contract.[26] Where a bottomry bond is given to secure debts for which simple contract securties have been previously given, the bond cannot be regarded as merely collateral security, but the simple contracts are merged in the bond, and the previous securities cannot afterward be enforced.[27] Bills of exchange may be given in connection with a bottomry bond as representing the debt so secured,[28] but the bill is collateral to the bond[29] and subject to the same contingencies.[30]

Personal liability. In order to support a bottomry bond the money must have been advanced on the faith of the vessel,[31] and there is no element of personal liability connected with a bottomry bond as an instrument,[32] and, if the bond is merely collateral security for the debt, it is a nullity.[33] The liability of the owner on the bond is limited to the value of the property pledged if the value of the ship fall short of the debt, and the lender on bottomry loses the balance,[34] and where the bond stipulates that a cargo of specified value be carried, and such condition is not complied with, recovery in toto is not justified,[35] but will be limited to the difference between the sum lent and the value of the cargo at the time of the loss.[36]

Even though the master execute a bottomry bond hypothecating the cargo as well as the ship and freight, and the cargo is afterward sold on such bond, the owner's personal liability will be no greater.[37] However, a bottomry bond is good which includes the personal liability of the master.[38]

§ 95. Negotiability and Transfer

A master's botttomry obligation, payable to order on arrival at the port of destination, is not such a negotiable instrument as to give the indorsee any better rights than those of the payee.

A master's bottomry obligation, payable to order on arrival at the port of destination, is not such a negotiable instrument as to give the indorsee any better rights than those of the payee.[39] However, the bond is assignable.[40]

§ 96. Duration and Termination

A bottomry bond may be on time or on a specific voyage.

A bottomry bond may be on time as well as on a specific voyage,[41] and a bond which hypothecates the vessel for a particular voyage, and a specific period beyond its termination, is good as a bottomry bond, the money lent having been put at risk under

D C.N.Y., 9 F Cas No 5,163, Olcott 55

22. U S.—The Fortitude, C C.Mass., 9 F Cas No 4,953, 3 Sumn 228—Furniss v. The Magoun, D.C N Y, 9 F Cas No.5,163, Olcott 55

23. U S —Furniss v. The Magoun, supra.

24. U S —The Virgin v Vyfhuis, Md, 8 Pet. 538, 8 L Ed. 1036—Canizares v The Santissima Trinidad, Adm Pa, 5 F Cas No 2,383, Bee 353.

25. U S.—Blaine v. The Charles Carter, Va., 4 Cranch 328, 2 L Ed. 635.
58 C J. p 329 note 29.

26. U S —U. S. v Delaware Ins Co., Pa, 25 F Cas No 14,942, 4 Wash C C 418

27. Mass —Bray v. Bates, 9 Metc. 237.

28. U.S —The Hunter, D C.Me, 12 F. Cas.No.6,904, 1 Ware 251.
58 C.J. p 329 note 33.

29. U S —Maitland v The Atlantic, D C La, 16 F Cas No 8,980, Newb Adm 514.
58 C.J. p 329 note 34.

30. U S —The Hunter, D C Me., 12 F Cas No.6,904, 1 Ware 251.
58 C.J. p 329 note 35

31. U S —Walden v Chamberlain, Pa, 28 F.Cas No.17,055, 3 Wash C. C 290, affirmed 1 Wheat 96, 4 L Ed 45
58 C J. p 329 note 36.

32. U S —Greely v. Smith, C C Me., 10 F Cas No 5,750, 3 Woodb. & M. 236
58 C.J p 329 note 37.

33. U S —The Sophie Wilhelmine, N. Y, 58 F 890, 7 C.C A 569.
58 C J. p 329 note 39.

34. U.S —The Virgin, Md, 8 Pet. 538, 8 L Ed. 1036
58 C J. p 329 note 40.

35. U S —Franklin Ins Co v. Lord, C C Mass, 9 F Cas No 5,057, 4 Mason 248

36. U.S —Franklin Ins Co. v. Lord, supra.

37. U.S —Naylor v. Baltzell, C C Md, 17 F Cas No 10,061, Taney 55.

38. U S —Kelly v. Cushing, 48 Barb. 269
58 C J. p 330 note 46.
Master's draft held not binding on master personally
U.S —The Serapis, D.C N Y., 37 F. 436

39. U S.—The Lykus, D C N.Y., 36 F. 919.

40. U.S —Burke v The M P. Rich, C C.Mass, 4 F.Cas.No.2,161, 1 Cliff. 308

41. U S —The Draco, C.C Mass, 7 F. Cas.No 4,057, 2 Sumn. 157.
58 C.J. p 336 note 98.

the contract[42] If, after the risk on a bottomry bond has commenced, a sale or transfer of the vessel takes place,[43] or the voyage is in any manner broken up by the borrower[44] or by the negligence and omission of the master,[45] the maritime risk terminates as in the case of a policy of insurance and the bond becomes immediately payable; and the fact that the obligee of a bottomry bond attaches the ship on another debt of the obligor before the expiration of the term for which the bond is to run, whereby the obligor is prevented from employing her, does not excuse him from performing the condition of the bond.[46]

§ 97. Payment and Satisfaction

The obligee in a bottomry bond, who is also the ship's agent, has a right to use money received for freight after the date of the bond in payment of wages and other expenses incident to a projected voyage.

The obligee in a bottomry bond, who is also the ship's agent, has a right to use money received for freight after the date of the bond in payment of wages and other expenses incident to a projected voyage, and to meet other debts contracted for by him for the benefit of the vessel, and not secured by the bond;[47] and where the agents of shipowners pay a bottomry bond with their own money, and the bond is a valid lien in their hands, freight moneys may be applied first to the payment of unsecured disbursements of such agents, leaving the surplus only to be credited on the bond.[48] Where the loss of vessel and cargo is total, and both belong to the same owner, the doctrine of contribution in payment of the bottomry bond does not apply, as where there are separate owners.[49] Where, according to the form of bond used, payment of the debt and marine interest depends on the safe return of the goods, and not on that of the ship, the borrower is obliged to pay, if he receives his goods safely, although by another ship,[50] and a loss not strictly total cannot be turned into a technical total loss by abandonment, so as to excuse the borrower from payment, even though the expense of repairing the ship exceeds her value.[51] A bond conditioned to be void in case of "utter loss" of the vessel during a certain voyage is not discharged by the stranding of the vessel during the voyage, and abandonment to insurers as a total loss, and sale by them at the place of stranding, as not worth repairing, if the vessel exists in specie at the time of the sale,[52] since the words "an utter loss of the ship" in a bottomry bond mean an actual total loss, and not a constructive one.[53] A bottomry bond will be void, if the voyage on which payment depends is lost in consequence of any of the accidents within the condition, although the borrower eventually loses nothing.[54] Suit against one who has fraudulently substituted himself as borrower on a bottomry bond is not an acquittance of the bond as against the real debtor.[55] Where the vessel is released on express agreement that the lien continue and cover court costs, the lien continues.[56]

§ 98. Lien and Priorities

A hypothecation of a vessel, on maritime risks, draws after it a maritime lien. A bottomry bond outranks a prior mortgage, or a draft for advances for wages and supplies, payable after arrival and discharge, but is inferior to a claim for general average.

A hypothecation of a vessel, on maritime risks, draws after it a maritime lien.[57] Where a bond is given in the nature of a bottomry, but the circumstances under which it was executed were not such as to warrant the captain in executing a maritime hypothecation, and where the captain had a power of attorney from the owner of the vessel to borrow money on the vessel, such a contract, if made by the captain, may create a lien on the vessel, in a court of common law.[58] In the absence of a stipulation to that effect in the bottomry bond, no lien is created on the freight[59] or cargo[60] by reason of the bond.

42. U S.—Eneas v. The Charlotte Minerva, D.C.N.Y., 8 F Cas No 4,483.

43. U S—The Draco, C C.Mass., 7 F. Cas.No.4,057, 2 Sumn. 157.
58 C J p 336 note 2.

44. U S—The Draco, supra.
58 C.J. p 336 note 3.

45. U S—Force v The Pride of the Ocean, D C N.Y., 3 F. 162
58 C.J. p 336 note 4.

46. Mass—Thorndike v. Stone, 11 Pick. 183
58 C.J. p 336 note 5.

47. U S—The Sirius, Cal., 54 F. 188, 4 C.C.A. 273.

48. U.S.—Johnson v. The Belle of the Sea, C C Pa., 13 F Cas No.7,372, affirmed 20 Wall 421, 22 L Ed 362.

49. Pa—Delaware Ins. Co. v Winter, 38 Pa. 176

50. Pa—Commonwealth Ins Co. v. Duval, 8 Serg & R 138

51. U S.—Pope v. Nickerson, C.C Mass, 19 F Cas.No 11,274, 3 Story 465.
58 C J p 336 note 12.

52. U S—Delaware Mut. Safety Ins Co. v Gossler, C C Mass., 7 F.Cas No 3,766, Holmes 475, affirmed 96 U S. 645, 24 L.Ed. 863

53. Pa—Commonwealth Ins. Co. v. Duval, 8 Serg. & R. 138.
58 C J p 337 note 14.

54. Mass—Appleton v Crowninshield, 3 Mass. 443

55. U S—Herwig v Oakley, C C Md., 12 F Cas No 6,435, Taney 389

56. U S—Bolten v. The James L Pendergast, D C N Y, 30 F 717.

57. U S—Bolten v. The James L Pendergast, supra
58 C J. p 337 note 20.
Maritime liens generally see Maritime Liens § 1 et seq

58. U S.—Hurry v Hurry, Pa., 12 F. Cas No 6,922, 2 Wash C.C 145.

59. N Y.—Kelly v. Cushing, 48 Barb 269.
58 C J. p 337 note 22.

60. U S—The Zephyr, C C Mass, 30 F.Cas No 18,210, 3 Mason 341.

A mortgage on the vessel taken solely to secure money lent by an assignee of a bottomry bond will not affect its lien,[61] and the lien is not discharged by a payment of the debt by the agents of the shipowners with their own money, where they take an assignment thereof.[62]

It is a rule of the general maritime law that, if there is any salvage or proceeds of the effects covered by a bottomry bond, the bondholder's lien attaches thereto, although the ship is lost.[63] Although the lien of a bottomry bond will not be affected by the mere departure of the vessel from the return port, with or without the knowledge of the holder of the bond,[64] if the obligee of a bottomry bond permits the ship to make several voyages without asserting his lien, and executions are levied on her, his lien is lost.[65]

Priorities. A bottomry bond lien may outrank, or be inferior to, various other liens or claims.[66] A bottomry bond lien is inferior to a claim for general average,[67] and a claim for damages caused by a collision occurring during the voyage is entitled to preference over a bottomry loan made on the same voyage, prior to the happening of such collision.[68] A bottomry bond outranks a prior mortgage,[69] or a draft for advances for wages and supplies, payable after arrival and discharge,[70] and the claim of a wharfinger who makes an express contract with the owner after the giving of the bond.[71] Similarly, a bottomry bond takes precedence over a purchaser with notice,[72] and will be upheld where there is no laches on the part of the lender, even against a bona fide purchaser, without notice,[73] although the rule is otherwise where there is laches.[74] A delay of a few weeks after the right to enforce a bottomry bond has accrued does not enable a junior creditor to take precedence by reason of a prior attachment.[75]

Bottomry bonds take priority in the inverse order of their execution,[76] but bonds of different dates granted to creditors on one advertisement for tenders are paid pro rata.[77]

§ 99. Recovery of Principal

The lender may recover if the bond becomes void by reason of the voyage being lost in consequence of an accident within the condition of the bond and the borrower eventually loses nothing.

If the bonds become void by reason of the voyage being lost in consequence of an accident within the condition of the bond, and the borrower eventually loses nothing, the lender may recover in an action for money had and received.[78] Moreover, if a vessel on which money is lent does not undertake the voyage described in the bottomry bond by default of the persons obtaining the loan, but undertakes a different voyage, the principal of the loan may be recovered in an action in rem after such voyage, against a claimant who purchased the ship with knowledge.[79]

§ 100. Enforcement of Bond

In a suit in admiralty to enforce bottomry and respondentia bonds, the rules regulating the practice and procedure in admiralty ordinarily are applicable.

Since, as discussed in Admiralty § 29, bottomry bonds are enforceable in admiralty, the general rules governing actions, and the rules regulating the procedure and practice in admiralty where suit is brought in that court, usually are applicable.[80]

61. U.S.—Burke v. The M. P. Rich, C.C.Mass., 4 F.Cas.No.2,161, 1 Cliff. 308.

62. U.S.—The Belle of the Sea v. Johnson, Pa., 20 Wall. 421, 22 L.Ed. 362.

63. U.S.—Delaware Mut. Safety Ins. Co. v. Gossler, Mass., 96 U.S. 645, 24 L.Ed. 863
58 C.J. p. 337 note 26.

64. U.S.—Burke v. The M. P. Rich, C.C.Mass., 4 F.Cas.No. 2,161, 1 Cliff. 308.
58 C.J. p. 337 note 28.

65. U.S.—Blaine v. The Charles Carter, Va., 4 Cranch 328, 2 L.Ed. 636.

66. U.S.—The Virgin v. Vyfhius, Md., 8 Pet. 538, 8 L.Ed. 1036.
Priorities:
Claim for freight see infra § 170.
Lien for advances see Maritime Liens § 56 e.
Master's wages see supra § 69.
Materialmen's lien see Maritime Liens § 56 e.
Salvage claims see Salvage § 143.
Seamen's wages see Seamen § 149.

67. U.S.—The Dora, D.C.La., 34 F. 343.
58 C.J. p. 338 note 34.

68. U.S.—Force v. The Pride of the Ocean, D.C.N.Y., 3 F. 162

69. U.S.—Bolten v. The James L. Pendergast, D.C.N.Y., 30 F. 717.
58 C.J. p. 338 note 38.
Priority of maritime liens generally as against mortgages see Maritime Liens § 51 b.

70. N.Y.—Hanschell v. Swan, 51 N.Y.S. 42, 23 Misc. 304.

71. U.S.—Ex parte Lewis, C.C.Mass., 1 F.Cas.No.8,310, 2 Gall. 483.

72. U.S.—Herwig v. Oakley, C.C.Md., 12 F.Cas.No. 6,435, Taney 389.

73. U.S.—The Draco, C.C.Mass., 7 F. Cas.No. 4,057, 2 Sumn. 157.
58 C.J. p. 338 note 44.

74. U.S.—Persee v. The Clarence, D.C.N.C., 19 F.Cas.No. 11,016.

75. U.S.—Eneas v. The Charlotte Minerva, D.C.N.Y., 8 F.Cas.No.4,483.

76. U.S.—The Mary, C.C.Conn., 16 F. Cas.No. 9,187, 1 Paine 671.
58 C.J. p. 338 note 47.

77. U.S.—The Dora, D.C.La., 34 F. 343.
58 C.J. p. 338 note 48.

78. Mass.—Appleton v. Crowninshield, 3 Mass. 443.

79. U.S.—Wilmer v. The Smilax, D.C.Md., 30 F.Cas.No. 17,777, 2 Pet. Adm. 295.

80. U.S.—Furniss v. The Magoun, D.C.N.Y., 9 F.Cas.No. 5,163, Olcott 55.
La.—Gazzam v. Wright, 3 La. 449.
Actions on bonds generally see Bonds § 99 et seq.
Procedure and practice in admiralty generally see Admiralty §§ 70-206
Prize court
The holder of a bottomry bond has no interest that he can assert in a prize court.—The Mary, R.I., 9 Cranch 126, 3 L.Ed. 678.

Suit may be maintained in the name of the assignor of the bond,[81] particularly where the assignees appear before the court by filing a supplemental libel.[82] If the vessel is sought to be sequestered, and it has been since sold, there must be a personal service of citation on the new owner if a resident,[83] and service on the master of the vessel as agent of the owner is not sufficient.[84] A mortgagee of the vessel may intervene in an action to enforce a bottomry bond in order to contest the validity of the bond[85] or its priority over his mortgage,[86] and general creditors, having obtained decrees against the proceeds of the vessel, may intervene in an action by bottomry holders to arrest the fund.[87]

Questions as to the validity of bottomry claims will not be entertained on motion and notice.[88] In order to impound the fund until a decision on the claim can be had, the creditor must have sued out attachment[89] or pleaded his lien to an antecedent action;[90] presentation of the bond and a petition under it are not sufficient.[91] Where, a bottomry bond having been given to a person in consideration of his assuming the debts due by a vessel, she left the port without opposition, and payment of the bond was afterward contested on the ground of the debts not being satisfied, the mere presentation of the bills without receipts has been held not sufficient to support the defense.[92] A reference to ascertain and report the constituents of the bottomry lien will be ordered.[93] Where various demands are intermingled in bottomry bond, only part of which will sustain a hypothecation, the obligee must exhibit them to the court in such manner that they may be separately considered,[94] and he should exhibit an account of the items of expense covered, so that the court may judge whether they were necessary in order to effectuate the objects of the voyage.[95]

The premium paid on bottomry will be included in the amount of the decree,[96] and the sum lent and the premium are considered as the principal, common interest on that sum for the delay of payment after it is due being allowed,[97] even though the bond contained no stipulation for ordinary interest.[98]

Marshaling assets. Assets will be marshaled by courts of admiralty, in case of bottomry, so as to give the proper priorities in favor of shippers against the property of the master and owner,[99] and also as to the freight and proceeds of the ship.[1] If a bottomry bond covers both ship and cargo, and these are owned by different persons, the cargo is liable only secondarily;[2] but if both belong to the same owner, and are both hypothecated, there is no equity which prevents the owner of the bond from resorting to either,[3] or where the ship and freight have the same owner and are included in the same hypothecation,[4] there is no equity which prevents the owner of the bond from resorting to either.

VIII. CARRIAGE OF GOODS

A. CARRIER IN GENERAL

§ 101. Status as Common Carrier

A common carrier by water has been defined as one whose business it is to carry chattels by water for all persons who may choose to employ and remunerate him.

A common carrier by water has been defined as one whose business it is to carry chattels by water for all persons who may choose to employ and remunerate him,[5] without regard to distance or

81. U.S.—Burke v. The M. P. Rich, C.C.Mass., 4 F.Cas.No.2,161, 1 Cliff. 308.
82. U.S.—Burke v. The M. P. Rich, supra.
83. La.—Gazzam v. Wright, 3 La. 449.
84. La.—Gazzam v. Wright, supra.
85. U.S.—Furniss v. The Magoun, D.C.N.Y., 9 F.Cas.No.5,163, Olcott 55.
86. U.S.—Furniss v. The Magoun, supra.
87. U.S.—French v. The Superb, D.C.N.Y., 9 F.Cas.No.5,103a.
88. U.S.—French v. The Superb, supra.
89. U.S.—French v. The Superb, supra.
90. U.S.—French v. The Superb, supra.
91. U.S.—French v. The Superb, supra.
92. U.S.—Cohen v. The Amanda Frances Myrick, D.C.Pa., 6 F.Cas. No.2,962, Crabbe 277.
93. U.S.—Furniss v. The Magoun, D.C.N.Y., 9 F.Cas.No.5,163, Olcott 55.
94. U.S.—The Aurora, Pa., 1 Wheat. 96, 4 L.Ed. 45.
58 C.J. p. 339 note 73.
95. U.S.—The Bridgewater, D.C.N.Y., 4 F.Cas.No.1,865, Olcott 35
96. U.S.—The Grapeshot, C.C.La., 10 F.Cas.No.5,703, 2 Woods 42.
58 C.J. p. 339 note 75.
97. U.S.—The Packet, C.C.Mass., 18 F.Cas.No.10,654, 3 Mason 255.
98. U.S.—The Grapeshot, C.C.La., 10 F.Cas.No.5,703, 2 Woods 42.
99. U.S.—The Packet, C.C.Mass., 18 F.Cas.No.10,654, 3 Mason 255.
1. Pa.—Welsh v. Cabot, 39 Pa. 342.
2. Pa.—Welsh v. Cabot, supra.
58 C.J. p. 339 note 81
3. Pa.—Welsh v. Cabot, supra.
4. Pa.—Welsh v. Cabot, supra.
5. Pa.—Nicollette Lumber Co. v. Peoples Coal Co., 26 Pa.Super. 575, reversed on other grounds 62 A. 1060, 213 Pa. 379, 110 Am.S.R. 550, 3 L.R.A.,N.S., 327.

Other or similar definitions

(1) One who undertakes, and exercises as a public employment, the transportation or carriage of goods for persons generally, from place to

motive power.[6] In accordance with this definition, a general ship, or its owner or operator, carrying goods or merchandise for hire[7] in the usual course of business,[8] for common carriage,[9] and for all persons indifferently,[10] whether for an ocean voyage,[11] intercoastal voyage,[12] or for a voyage on inland waters,[13] in foreign commerce[14] or interstate commerce,[15] and whatever the character of the vessel whether, for example, sailboats,[16] steamboats or steamships[17] or canal boats,[18] is a common carrier and subject to a common carrier's liability to shippers, considered infra §§ 115–159 although there is no specific agreement of carriage entered into[19] or no particular agreement for hire,[20] and independently of any bill of lading.[21] On the other hand, a shipowner or vessel which carries no other cargo than that of a particular shipper under an agreement to carry such cargo between specified points is a private carrier.[22] Thus, as considered supra § 34, a ship chartered for a special cargo

place, by water, and to deliver them at the place appointed, for hire or reward, and with or without a special agreement as to price—Carpenter v Baltimore, etc, R Co, 64 A 252, 22 Del. 15—Pennewill v. Cullen, 5 Del 238—McHenry v. Philadelphia, etc, R. Co., 4 Del. 448

(2) One who makes it a business to transport goods by water for hire, and holds himself ready to carry them for all persons who apply and pay the hire—The Huntress, D C Me, 12 F Cas.No.6,914, 2 Ware 89, 92.

(3) Any person undertaking to carry goods by water for all persons indifferently.—Alexander v. Greene, 7 Hill, N.Y, 533

(4) One who undertakes, for a reward, to convey produce, or goods of any sort, from any place on the river to another—Turney v. Wilson, 7 Yerg, Tenn., 340, 342, 27 Am.D. 515—Craig v Childress, Peck, Tenn, 270, 14 Am.D. 751.

6. Pa—Nicollette Lumber Co. v. Peoples Coal Co., 26 Pa.Super 575, reversed on other grounds 62 A. 1060, 213 Pa 379, 110 Am S R 550, 3 L.R.A,N S, 327.

7. U.S—Liverpool, etc, Steam Co v Phenix Ins. Co, N Y., 9 S.Ct 469, 129 U S 397, 32 L Ed. 788
58 C J p 340 note 91.

8. Ala—Tennessee River Nav. Co v Walls, 92 So 202, 18 Ala App. 305.
58 C.J p 340 note 92

Carriers of bank bills

A steamboat company, or the members thereof, who by their act of incorporation are made individually liable as common carriers, incorporated for the transportation of goods, wares, and merchandise, are not common carriers of packages of bank bills, unless it is shown that they have made the carriage of such packages a part of their ordinary business.—Sewall v. Allen, 6 Wend., N Y, 335.

Regular trips between same points

In order to make the owner of a vessel a common carrier it is not essential that the trips should be regular between the same points, but it is enough if he is engaged in carrying for others generally to and from any point.

Del.—Pennewill v. Cullen, 5 Del. 238
Mo—Campbell v A. B C. Storage, etc, Co, 174 S.W 140, 187 Mo App 565

Transportation beyond regular trip

Where a common carrier by water agreed to carry to a point beyond its regular trip, it was a common carrier as to the additional transportation—Tuckerman v. Stephens, etc, Transp Co, 32 N.J Law 320.

9. U S—The Vermont, D.C.N.Y, 47 F Supp 877—The Ella Pierce Thurlow, D C N Y., 300 F. 103, affirmed, C C A, Drisko v. Barber S. S Lines, 300 F. 106.

10. U.S—Continental Ins Co. v Anchor Line, D C N.Y., 53 F.2d 1032—The Point Brava, D C Cal, 1 F Supp 366.
58 C J p 340 note 93

Test of whether one is "common carrier" by water is whether he holds out, expressly or by a course of conduct, that he would carry for hire, as long as he has room, goods of all persons indifferently The test is not whether he is carrying as a public employment or whether he carries to a fixed place—North American Accident Ins. Co v Pitts, 104 So. 21, 213 Ala 102, 40 A L R. 1171—Georgia Life Ins Co v. Easter, 66 So. 514, 189 Ala 478, L.R.A.1915C 456

11. U S.—Liverpool, etc, Steam Co v Phenix Ins. Co, N Y., 9 S.Ct 469, 129 U S 397, 32 L.Ed. 788.
58 C J p 340 note 94.

12. U S—The Vermont, D C.N Y., 47 F Supp. 877.

13. Ala.—Tennessee River Nav Co v. Walls, 92 So. 202, 18 Ala.App 305.
58 C J. p 340 note 95
Ferry as common carrier of goods see Ferries § 28 b.

14. U S.—Compagnie Générale Transatlantique v. American Tobacco Co, C C A.N Y., 31 F 2d 663, certiorari denied 50 S Ct. 16, 280 U S. 555, 74 L Ed. 611

15. U.S.—Compagnie Générale Transatlantique v. American Tobacco Co, supra.

16. U S.—Crosby v Grinnell, D.C.N Y, 6 F.Cas No 3,422.

17. U.S—The Vermont, D.C N Y, 47 F Supp. 877—The Point Brava, D C Cal., 1 F Supp. 366
Mass—Goodman v. New York, N H & H R Co, 3 N E 2d 777, 295 Mass. 330, 106 A L.R. 1151
N Y—New York Lumber Trade Ass'n v. Lacey, 277 N Y S 519, 154 Misc 747, reversed on other grounds 281 N.Y.S. 647, 245 App.Div. 262, affirmed 199 N E 688, 269 N Y. 595, amended 200 N E 54, 269 N Y. 277, certiorari denied 56 S.Ct. 954, 298 U S. 684, 80 L.Ed 1404.
58 C J p 340 note 99.
Tugboats as common carriers see the C J.S title Towage § 13, also 63 C J. p 19 note 19–p 20 note 22.

18. N Y—Arnold v. Habenbake, 5 Wend 33
Vt—Spencer v Daggett, 2 Vt. 92.

19. U S—Brower v. The Water Witch, C C N Y, 4 F.Cas No 1,971, 19 How Pr 241, affirmed 1 Black 494, 17 L Ed. 155.

20. N Y—Allen v Sewall, 2 Wend 327.

21. U S—Mackey v. U S, D.C N Y, 83 F Supp. 14, affirmed, C.A., 197 F. 2d 241—The T A. Goddard, D.C.N Y., 12 F. 174.
N.Y.—Robinson v. Chittenden, 69 N Y. 525.
58 C J. p 340 note 7.

22. U.S—The Monarch of Nassau, C C.A.Fla., 155 F 2d 48—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, C.C A N.Y., 89 F 2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co, 58 S Ct 25, 302 U.S. 706, 82 L Ed 545—The W. H. Davis, D C N.Y., 56 F.Supp 564—The Dan, D.C.N.Y., 40 F. 691—Hart v Leach, D.C Md, 21 F. 77—Sumner v. Caswell, D.C.N.Y., 20 F. 249.
Mo.—Osage Tie & Timber Co v. Gorg-Murphy Timber & Grain Co, App., 191 S.W. 1026.
10 C J. p 38 note 17 [e].

Owner of barge was bailee of cargo.—O'Donnell Transp. Co. v. Tidewater Iron & Steel Co., D C.N.J., 90 F.Supp. 953, affirmed, C.A., 185 F.2d 675.

or to a special person is not a common carrier, unless a part of the ship is available to the public.

Ownership and control of the vessel are not essential in order to constitute one a common carrier by water.[23] An express company, considered generally in Carriers § 7, may be a common carrier by water although it does not own or control the vessel in which it forwards the goods intrusted to it for transportation.[24]

Lightermen and hoymen may be common carriers.[25]

Marine carrier. Under some statutes the term "marine carrier" is applied to carriers plying on the ocean, arms of the sea, the Great Lakes, and other navigable waters within the jurisdiction of the United States.[26]

Canal maintained by state. A state, which constructed, equipped, and maintains a barge canal for public use, furnishing it to common carriers by water without charge, is not a common carrier of commerce, intra-state or interstate.[27]

The term "carriage" includes the ability to lift a cargo and hold it afloat, and does not necessarily involve any translation of the vessel from one place to another.[28]

§ 102. Duty to Receive and Transport Property and Provide Facilities

As a general rule, a common carrier by water is under a duty to receive goods which it is able and accustomed to carry, within the limits of its facilities, and to carry and transport them for just compensation without unreasonable delay.

Both under the common law and under statute, the obligation of a common carrier by water is to receive goods which it is able and accustomed to carry, in the order of their tender,[29] without preference to any shipper,[30] and to carry and transport them for just compensation[31] over its regular route,[32] without unreasonable delay.[33] Such duty arises out of the relationship which the carrier sustains to the public,[34] and is imposed by law for the common good,[35] and is independent of any special contract.[36] While a steamboat leaving its terminal with a full cargo is not required to overload by taking additional freight tendered at lower landings,[37] on finding such freight at the lower landings, with notice that it will remain there for transportation, it is its duty to take such freight in its turn, and not to place itself with reference to subsequent consignments so as to render itself unable within a reasonable time to accept and transport the freight tendered at such lower landings.[38] Although a common carrier by water is not bound to inquire into the nature of the goods,[39] it may select the character of the goods it proposes to carry,[40] or discontinue to carry a particular class,[41] and it may voluntarily cease to do business as a common carrier and engage in the business of a special carrier;[42] but as long as it operates as a common carrier it cannot reject goods which it professes to carry and thereafter receive other goods where at the time of tender there is room in the vessel for the goods and the vessel's safety will in no way be imperiled.[43]

Embargo. A steamship company has been held to have the right to establish an embargo on shipments if the circumstances warrant it,[44] and the necessity for placing it is to be determined in the first instance by the steamship company.[45]

23. N.Y.—Spitzer v. Puerto Rican Express Co., 183 N.Y.S. 19, 112 Misc. 453.

24. N.Y.—Spitzer v. Puerto Rican Express Co., supra.

25. Ga.—Fish v. Chapman, 2 Ga. 349, 46 Am.D. 393.

26. Black L.D.

27. N.Y.—People ex rel. New York Cent. R. Co. v. Public Service Commission, Second Dist., 191 N.Y.S. 636, 198 App.Div. 436, affirmed 134 N.E. 590, 232 N.Y. 606, certiorari denied Public Service Commission of State of New York v. New York Cent. R. Co., 42 S.Ct. 314, 258 U.S. 621, 66 L.Ed. 795.

28. U.S.—The Jungshoved, D.C.N.Y., 272 F. 122, modified on other grounds, C.C.A., 290 F. 733, certiorari denied 44 S.Ct. 35, 263 U.S. 707, 68 L.Ed. 517.

29. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593.
58 C.J. p. 341 note 22.

30. Ga.—Ocean S.S. Co. v. Savannah Locomotive Works, etc., Co., 63 S.E. 577, 131 Ga. 831, 127 Am.S.R. 265, 20 L.R.A.,N.S., 867, 15 Ann.Cas. 1044.
58 C.J. p. 341 note 22.
Discrimination see infra § 104.

31. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593.

32. U.S.—The Pacific Spruce, supra. Ala.—Tennessee River Nav. Co. v. Walls, 92 So. 202, 18 Ala.App. 305.

33. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593.

34. U.S.—The Henry W. Breyer, D.C. Md., 17 F.2d 423.

35. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593.

36. U.S.—The Henry W. Breyer, D.C. Md., 17 F.2d 423.—The Pacific Spruce, D.C.Wash., 1 F.Supp. 593.

37. Ala.—Tennessee River Nav. Co. v. Walls, 92 So. 202, 18 Ala.App. 305.

38. Ala.—Tennessee River Nav. Co. v. Walls, supra.

39. U.S.—The Buenos Aires, D.C.N.Y., 46 F.2d 693.

40. Ga.—Ocean S.S. Co. v. Savannah Locomotive Works, etc., Co., 63 S.E. 577, 131 Ga. 831, 20 L.R.A.,N.S., 867.

41. Ga.—Ocean S.S. Co. v. Savannah Locomotive Works, etc., Co., supra.

42. Ga.—Ocean S.S. Co. v. Savannah Locomotive Works, etc., Co., supra.

43. Ga.—Ocean S.S. Co. v. Savannah Locomotive Works, etc., Co., supra.

44. U.S.—Holt Motor Co. v. Nicholson Universal S. S. Co., D.C.Minn., 56 F.Supp. 585.

45. U.S.—Holt Motor Co. v. Nicholson Universal S. S. Co., supra.

Discontinuance of service. The obligation of a common carrier by water to continue the operation of its lines is not imposed by any principle of the common law.[46] The provisions of the Interstate Commerce Act have been held to impose no obligation to continue service,[47] since the requirement as to obtaining from the interstate commerce commission, before abandonment, of a certificate that present or future public convenience and necessity permit such abandonment applies only to lines of railroad;[48] and if the charter of such carrier or any other law of the state under whose laws such carrier was incorporated does not forbid a discontinuance of service, such carrier may properly discontinue.[49]

Receipt of goods as forwarder. A common carrier to whom, as such, goods are tendered for transportation, cannot, without the shipper's knowledge and consent, receive them as a forwarder merely.[50]

Duty to provide facilities. Although it has been said that there is no difference between a land and a water carrier,[51] there is a marked and well defined difference between a company operating boats on waters open to the free navigation of all crafts desiring to engage in serving the public and a railroad company granted certain powers under its charter, and serving exclusively a certain territory.[52] In the one case, the railroad must furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage, as considered in Carriers § 35, and Railroads § 390, while a steamboat is required to accept shipments tendered only up to its ability to transport.[53] Thus, a navigation company, whose charter confers no power of eminent domain, nor imposes any public duties, is not a public or quasi-public corporation,[54] and is not bound to provide sufficient facilities to carry all goods offered, but may decline to receive goods in excess of its transportation facilities.[55] So it may withdraw one or more of its ships and reduce its carrying capacity,[56] although, at the time of making the reduction, it did not have sufficient carrying capacity to take all the freight offered.[57]

§ 103. Statutory Regulation Generally

a. In general
b. Freight rates
c. Regulatory bodies; their powers and proceedings

a. In General

The carriage of goods by water in interstate and foreign commerce is subject to regulation under various federal statutes.

The federal Transportation Act of 1940, 49 U.S C.A. §§ 901–923, together with the prior statutes,

Enforcement of embargo

Where a steamship company was forced to declare an embargo on shipping due to storms, and refused to accept any shipments for delivery and the embargo affected all shippers, no unfair enforcement of embargo was shown.—Holt Motor Co v Nicholson Universal S. S. Co, supra.

Exercise of due diligence

Where a steamship company, which agreed to transport five hundred automobiles from Detroit to Duluth between Nov. 7 and the 26, declared an embargo on shipping on Nov 13, because of storms, but transported all automobiles accepted for shipment prior to that time and made only three shipments following that date to the close of the season but established no regular service, and all boats were loaded to capacity, due diligence in attempting to move the automobiles was shown —Holt Motor Co. v. Nicholson Universal S. S Co, supra.

Applicability of tariff provision

Tariff provision that shipments would be accepted from March 20 to Nov. 15 of each year, and from the later date until date announced by supplements to the tariff, referred to normal operations of a Great Lakes carrier and did not pertain to situation which exists as to the service afforded by carrier when an embargo has been declared —Holt Motor Co v. Nicholson Universal S. S. Co., supra

46. U S.—Lucking v. Detroit, etc, Nav. Co, Mich, 44 S Ct 504, 265 U S. 346, 68 L.Ed. 1047—McCormick S S. Co. v. U. S., D C Cal., 16 F Supp 45.
Obligation to continue service implied in contract see infra § 106

47. U.S —Lucking v. Detroit, etc, Nav. Co., Mich , 44 S.Ct. 504, 265 U S 346, 68 L Ed. 1047.

Power to compel continuance

Department of commerce was without power to compel steamship company to continue through service to two shallow-water ports pursuant to arrangement with barge carrier, on ground that such ports would be subjected to unreasonable disadvantage if rates and service thus established were discontinued —McCormick S. S Co v. U. S., D C Cal , 16 F.Supp. 45.

48. U.S.—Lucking v. Detroit, etc, Nav. Co., Mich, 44 S Ct. 504, 265 U S 346, 68 L Ed. 1047.

49. U.S.—Lucking v. Detroit, etc, Nav. Co., supra—McCormick S. S. Co. v. U. S., D C Cal, 16 F.Supp 45.

50. Mo —Mellier v. St. Louis, etc, Transp. Co, 14 Mo.App. 281.

51. Conn —Hale v. N J. Steam Nav Co., 15 Conn. 539, 39 Am D. 398
N Y —Elliott v. Rossell, 10 Johns 1, 6 Am D. 306.

52. Ala —Tennessee River Nav. Co v Walls, 92 So. 202, 18 Ala.App 305.

53. Ala —Tennessee River Nav. Co. v Walls, supra.
Ga.—Ocean SS. Co v Savannah Locomotive Works, etc, Co, 63 S E 577, 131 Ga 831, 127 Am S R 265, 20 L R A ,N S., 867, 15 Ann Cas. 1044.

54. Ga.—Merchants', etc., Transp. Co. v. Dixon, 82 S E. 141, 141 Ga 762—Ocean SS. Co. v. Savannah Locomotive Works, etc, Co, 63 S E 577, 131 Ga. 831, 127 Am S.R 265, 20 L.R A.,N S., 867, 15 Ann.Cas 1044.

55. Ga.—Ocean SS. Co. v. Savannah Locomotive Works, etc., Co, supra.
58 C.J p 342 note 41.

56. Ga.—Merchants', etc, Transp. Co. v. Dixon, 82 S.E. 141, 141 Ga. 762.

57. Ga.—Merchants', etc., Transp. Co. v. Dixon, supra.

was intended to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers,[58] and the field has been held to be entirely occupied by federal legislation and regulations.[59] Apart from the changes effected by the Transportation Act of 1940, the scheme created by the Shipping Act, 46 U.S.C.A. §§ 801–842, for the regulation of rates and practices of ocean carriers is, in its essential features, the same as that prescribed by the Interstate Commerce Act in the corresponding field for land carriers,[60] and should have a like interpretation, application, and effect in its own field,[61] unless something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requires a different conclusion.[62] The Shipping Act cannot be deemed an exclusive enactment with respect to the regulation of common carriers by water in interstate commerce to the exclusion of the general Interstate Commerce Act.[63]

Statutes enacted to prevent fraud will not be construed to work fraud between shipper and shipowner.[64]

Shipment of explosives. The former federal statutes, making it a misdemeanor to pack or put up for shipment, or knowingly to ship or attempt to ship on vessels any gunpowder, etc., unless packed and marked as required by law, were enacted by congress in the exercise of its constitutional power to regulate foreign and interstate commerce,[65] and were applicable only to shipments on vessels engaged in such commerce.[66] The statutes applied to shipments on foreign private steam vessels carrying passengers from ports of the United States to any other place or country,[67] and the provisions of such sections as to gunpowder included metallic cartridges containing gunpowder.[68]

Persons subject to statute Only such persons as come within the terms of the Shipping Act are subject to, or come within the coverage of, its provisions.[69] As used in the act, "shipper" means the owner or person for whose account the carriage of goods is undertaken.[70] Independent freight forwarders for transshipment of goods in foreign commerce, acting as agents of shippers and assuming no responsibility for the transportation of the goods, are within its coverage as "other persons."[71]

58. U.S.—U. S. v. Pennsylvania R. Co., N.J., 65 S.Ct. 471, 323 U.S. 612, 89 L.Ed. 499

Regulation of water carriers in interstate commerce see Commerce § 2 et seq.

59. Wash.—Luckenbach S. S. Co. v. Denney, 278 P. 419, 152 Wash. 548

60. U.S.—Inter-Island Steam Nav. Co. v. Territory of Hawaii, by Public Utilities Commission of Hawaii, Hawaii, 59 S.Ct. 202, 305 U.S. 306, 83 L.Ed. 189—U. S. Navigation Co. v. Cunard S. S. Co., N.Y., 52 S.Ct. 247, 284 U.S. 474, 76 L.Ed. 408—S. L. Shepard & Co. v. Agwilines, Inc., D.C.S.C., 39 F.Supp. 528, reversed on other grounds, C.C.A., 130 F.2d 67

Regulation of vessels generally see supra §§ 2–12.

61. U.S.—Inter-Island Steam Nav. Co. v. Territory of Hawaii, by Public Utilities Commission of Hawaii, Hawaii, 59 S.Ct. 202, 305 U.S. 306, 83 L.Ed. 189—U. S. Navigation Co. v. Cunard S. S. Co., N.Y., 52 S.Ct. 247, 284 U.S. 474, 76 L.Ed. 408—Prince Line, Ltd. v. American Paper Exports, D.C.N.Y., 45 F.2d 242, affirmed, C.C.A., 55 F.2d 1053—S. L. Shepard & Co. v. Agwilines, Inc., D.C.S.C., 39 F.Supp. 528, 531, reversed on other grounds, C.C.A., 130 F.2d 67.

Identical provisions of both acts are construed alike.—Sands v. Calmar S. S. Corp., 296 N.Y.S. 590, 163 Misc. 757.

62. U.S.—U. S. Navigation Co. v. Cunard S. S. Co., N.Y., 52 S.Ct. 247, 284 U.S. 474, 76 L.Ed. 408.

63. N.Y.—South, etc., American Commercial Co. v. Panama R. Co., 199 N.Y.S. 92, 205 App.Div. 123, affirmed 142 N.E. 666, 237 N.Y. 287.

64. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Société De Navigation À Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.

58 C.J. p. 342 note 53.

65. U.S.—U. S. v. Giordani, C.C.N.Y., 163 F. 772

58 C.J. p. 342 note 56.

66. U.S.—U. S. v. Giordani, supra

67. U.S.—U. S. v. Giordani, supra.

68. U.S.—U. S. v. Giordani, supra

69. Enumeration as not exclusive

Under the provisions of the Shipping Act that the term "person" includes corporations, partners, and associations existing under the laws of the United States, or any state, territory, district or possession thereof or of any foreign country, the statutory enumeration of the entities falling within the term is not exclusive.—State of California v. U. S., D.C. Cal., 46 F.Supp. 474, affirmed 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089, and City of Oakland v. U. S., 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089.

70. U.S.—Compagnie Générale Transatlantique v. American Tobacco Co., C.C.A.N.Y., 31 F.2d 663, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611.

71. U.S.—U. S. v. American Union Transport, N.Y., 66 S.Ct. 644, 327 U.S. 437, 90 L.Ed. 772.

Reason for rule

(1) Under the provision that the term "other person" subject to this Act means any person not included in the term "common carrier by water" carrying on business of forwarding in connection with a common carrier by water, the words "in connection with" do not limit coverage to forwarders actually affiliated with a common carrier.—U. S. v. American Union Transport, supra

(2) The design of the Shipping Act providing the term "other person subject to this Act" means any person not included in term common carrier by water carrying on business of forwarding in connection with a common carrier by water was not merely by indirection to forbid carriers or their affiliates to act as forwarders. The act is designed not only to prevent evasion of regulations by carrier through denying them immunity when they hide behind forwarders, but it also denies immunity to forwarders themselves when they commit acts or practices which carriers and others subject to the Act are forbidden to perform.—U. S. v. American Union Transport, supra.

Receipt of brokerage pursuant to a carrier's filed tariffs does not prove that the forwarder who receives it

Violation of Harter Act. The section of the Harter Act, 46 U.S.C.A. § 194, imposing a penalty for violation of provisions regulating contractual stipulations and refusal on demand to issue the bill of lading provided for is a criminal statute[72] subjecting violators to prosecution by indictment;[73] but a suit for the penalty will only lie for the person injured.[74]

Excessive fines and penalties awarded against vessels or their owners for violation of regulatory statutes will not be sustained on appeal.[75]

b. Freight Rates

The federal statutes regulating rates and charges by common carriers by water in interstate commerce have been held to be full and complete, and to constitute the only remedy provided by law for such purpose.

In the absence of federal regulation, the reasonableness of rates for the carriage of goods by water, moving wholly in foreign commerce, is governed and controlled by common-law principles.[76] The Shipping Act, 46 U.S.C.A. §§ 801–842, and the Intercoastal Shipping Act, 46 U.S.C.A. §§ 843–848, providing means and processes for the adjustment of all rates, fares, and charges by common carriers by water in interstate commerce, have been held to be full and complete, and to constitute the only remedy provided by law for such purpose.[77] The provision of the Shipping Act, 46 U.S.C.A. § 816, that every common carrier by water shall establish, observe, and enforce just and reasonable regulations and practices relating to, or connected with, the receiving, handling, storing, or delivery of property does not forbid the separation by a steamship company of a freight charge into some of its component elements, at least if the tariff clearly so provides.[78]

Filing rate schedules. Under the Intercoastal Shipping Act, 46 U.S.C.A. §§ 844, 845 b, providing that every common carrier by water in intercoastal and interstate commerce must file and keep open to public inspection schedules showing all the rates, fares, and charges for, or in connection with, transportation between intercoastal points on its own route, and, if a through route has been established, all the rates, fares, and charges for, and in connection with, transportation between intercoastal points on its own route and points on the route of any other carrier by water, no carrier may engage in transportation on routes as to which the required schedules are not filed.[79] The provision of the Shipping Act, 46 U.S.C.A. § 817, requiring common carriers by water in interstate commerce to file schedules of their maximum rates applies to ocean carriers.[80] A common carrier by water may properly be ordered to file a schedule of its rates actually charged.[81] On due abandonment of a particular route by a carrier the schedule of rates filed with respect thereto may be withdrawn.[82]

carries on the business of "forwarding in connection with the carriers" within the Shipping Act.—American Union Transport v. U. S., D.C.N.Y., 55 F.Supp. 682, reversed on other grounds 66 S.Ct. 644, 327 U.S. 437, 90 L.Ed. 772.

72. U.S.—U. S. v. Cobb, D.C.Md., 163 F. 791.

73. U.S.—U. S. v. Cobb, supra. 58 C.J. p. 342 note 62.

74. U.S.—The Minnehaha, D.C.N.Y., 114 F. 672

Qui tam action would lie to collect the penalty.—U. S. v. James W. Elwell & Co., N.Y., 250 F. 939, 163 C.C.A. 189, certiorari denied Jones v. U. S. ex rel. Pressprich & Son Co., 39 S.Ct. 8, 248 U.S. 564, 63 L.Ed. 423

75. U.S.—U. S. v. Elwell, 250 F. 939, 163 C.C.A. 189, certiorari denied Jones v. U. S. ex rel. Pressprich & Son Co., 39 S.Ct. 8, 248 U.S. 564, 63 L.Ed. 423.
58 C.J. p. 342 note 64.

76. U.S.—Oliphant v. Florida East Coast Car Ferry Co., D.C.Fla., 4 F. Supp. 288.
Power of congress and the states to regulate rates for water transportation in interstate or intra-state commerce generally see Commerce § 91 c.

77. Alaska.—City of Nome v. Lomen Commercial Co., 10 Alaska 114.

Keeping of books
Territorial statute requiring persons supplying city with lighterage service to keep books of account open to inspection by the mayor and city council was not intended to regulate common carriers by water in interstate commerce as defined in federal statutes relating to such carriers.—City of Nome v. Lomen Commercial Co., supra

Regulation by city
A carrier which is a common carrier by water in interstate commerce within statutes which require such a carrier to file its schedules of rates with a federal commission is not subject to rate regulation by a city.—City of Nome v. Lomen Commercial Co., supra.

In Hawaii, the public utilities commission was held to have no jurisdiction to regulate the rates of common carriers by water for transporting property from port to port in the Territory, because such jurisdiction was vested in the federal administrative body.—In the Matter of the Investigation of the Inter-Island Steam Navigation Company, Ltd., 24 Hawaii 136.

78. U.S.—Sun-Maid Raisin Growers Ass'n v. U. S., D.C.Cal., 33 F.Supp. 959, affirmed 61 S.Ct. 830, 312 U.S. 667, 85 L.Ed. 1111, rehearing denied 61 S.Ct. 940, 313 U.S. 598, 85 L.Ed. 1551.

79. U.S.—McCormick S. S. Co. v. U. S., D.C.Cal., 16 F.Supp. 45.

80. U.S.—U. S. Navigation Co., Inc. v. Cunard SS. Co., Ltd., D.C.N.Y., 39 F.2d 204, affirmed, C.C.A., 50 F.2d 83, affirmed 52 S.Ct. 247, 284 U.S. 474, 76 L.Ed. 408.—U. S. v. Munson SS. Line, C.C.A.Md., 37 F.2d 681, affirmed 51 S.Ct. 360, 283 U.S. 43, 75 L.Ed. 830.

81. U.S.—Isbrandtsen-Moller Co. v. U. S., D.C.N.Y., 14 F.Supp. 407, affirmed 57 S.Ct. 407, 300 U.S. 139, 81 L.Ed. 562.

82. U.S.—McCormick S. S. Co. v. U. S., D.C.Cal., 16 F.Supp. 45.

Compelling continuance of schedule
(1) Department of commerce was held not entitled to compel steamship company to continue prior schedules for through rates to two shallow-water ports on ground that steamship company had no intention of discontinuing through service to such ports, where company's proposal to withdraw all schedules of rates to such

Carrier conference agreements as to rates, filed with, and approved by, the proper federal administrative agency under the Shipping Act, 46 U.S. C.A. § 814, become the tariff for the regulation of freight, and for some purposes have the force of law.[83]

c. Regulatory Bodies; Their Powers and Proceedings

(1) In general
(2) Proceedings before regulatory body
(3) Proceedings to enforce, suspend, set aside, or enjoin orders

(1) In General

Under the federal statutes the Maritime Board possesses a primary jurisdiction to pass on prohibited or unlawful acts of carriers by water in interstate or foreign commerce.

Except in so far as the functions of the federal Maritime Board have been conferred on the Interstate Commerce Commission by the enactment of the Transportation Act of 1940, 49 U.S.C.A. §§ 901–923, the functions and authority of the board under the Shipping Act, 46 U.S C.A. §§ 801–842, are, in substance, the same as the functions of the Interstate Commerce Commission under the Interstate Commerce Act.[84] Accordingly, the board possesses a primary jurisdiction to pass on prohibited or unlawful acts of carriers by water in interstate or foreign commerce.[85] The board has power to prevent or prohibit acts detrimental to commerce,[86] such as carrier conference agreements prohibiting the payment of brokerage to freight forwarders by marine shippers.[87] Also, the board has power to investigate violations of the act on a sworn complaint or in proceedings instituted on its own motion,[88] and to make such orders thereon, after a full hearing, as it deems proper.[89] Only such persons as are within the coverage of the Shipping Act come within the jurisdiction of the board.[90]

ports showed contrary intent—McCormick S S. Co. v U. S, supra

(2) Existence of contract between steamship company and barge company for through intercoastal carriage to two shallow-water ports was held not to justify department of commerce in compelling steamship company to continue prior schedules for joint rate service to such ports which company sought to discontinue, where contract concerned only "terminal rates" and not "joint rates" —McCormick S. S Co v U. S., supra.

83. U.S—Prince Line v. American Paper Exports, C C.A.N.Y., 55 F. 2d 1053.
N Y—Black Diamond S S. Corporation v. S H. Kress & Co, 284 N.Y. S 310, 157 Misc 360.

84. U S—U. S Navigation Co, Inc v Cunard SS Co, Ltd, D.C N Y, 39 F.2d 204, affirmed, C C A., 50 F. 2d 83, affirmed 52 S Ct 247, 284 U S 474, 76 L Ed 408—Holt Motor Co. v. Nicholson Universal S. S Co., D C Minn, 56 F Supp 585
Jurisdiction and authority of Interstate Commerce Commission see Commerce §§ 141–148.

Transfer of functions

(1) The United States Shipping Board was created by the Shipping Act 1916, § 3 Through various steps its functions have come to the federal Maritime Board—Far East Conference v. U. S, N J., 72 S Ct 492, 342 U.S. 570, 96 L Ed. —— —— Pacific Westbound Conference v. U S., D C Cal, 94 F Supp. 649—Atlantic & Gulf/West Coast of Central America & Mexico Conference v. U. S., D.C. N Y., 94 F.Supp. 138.

(2) Transfer of former functions of United States Shipping Board to Department of Commerce by executive order of the president under Reorganization Act was held legal and effective to confer on Secretary of Commerce all regulatory powers conferred by statute on the board—Swayne & Hoyt v. U. S, D C D C., 18 F Supp 25, affirmed 57 S Ct. 478, 300 U.S. 297, 81 L Ed. 659.

(3) Such transfer was held not invalid on ground that it was not authorized by statute permitting such transfers, where congress ratified transfer by appropriation acts and by statute stating that functions of former Shipping Board were vested in Department of Commerce pursuant to executive order—Isbrandtsen-Moller Co v. U. S., N Y, 57 S.Ct. 407, 300 U S. 139, 81 L.Ed 562.

85. U S—U. S. Navigation Co. v Cunard S. S Co, N Y, 52 S.Ct. 247, 284 U.S. 474, 76 L Ed 408

Monopolistic agreements between carriers

Failure of contracting ocean carriers to file alleged monopolistic agreement with Shipping Board does not deprive board of primary original jurisdiction to consider such agreement and disapprove, cancel, or modify it—U S Navigation Co. v. Cunard S S. Co, supra

86. U S.—Pacific Westbound Conference v U. S, D.C Cal, 94 F 649—Atlantic & Gulf/West Coast of Central America & Mexico Conference (No 2743) v. U. S., D C N.Y., 94 F.Supp 138.

87. U S—Pacific Westbound Conference v. U. S., D C Cal, 94 F Supp. 649—Atlantic & Gulf/West Coast of Central America & Mexico Conference (No. 2743) v. U. S., D.C.N. Y., 94 F Supp. 138.

88. U.S—Isthmian S S. Co. v. U. S, D C.N.Y, 53 F 2d 251.

Matters considered

(1) In proceeding before the United States Maritime Commission to determine legality of provisions of conference agreements against payment of brokerage to freight forwarders by marine shippers, evidence relating to foreign forwarding and carrying industries as a whole could be used as basis for findings and order affecting individual shippers, and it was not necessary to consider evidence relating to specific conferences of both shippers—Atlantic & Gulf/West Coast of Central America and Mexico Conference (No 2743) v. U. S, D C N.Y., 94 F Supp. 138

(2) In such case, the commission could make rational inferences from experience of other segments of the industry and apply them to segments immediately involved—Atlantic & Gulf/West Coast of Central America and Mexico Conference (No. 2743) v. U. S., supra.

89. U S—Atlantic & Gulf/West Coast of Central America and Mexico Conference (No. 2743) v. U. S, supra.

90. U S.—U. S. v American Union Transport, N Y, 66 S Ct. 644, 327 U S. 437, 90 L Ed. 772

Independent forwarders of freight for transshipment in foreign commerce, acting as agents of the shipper and assuming no responsibility for the transportation of goods, are subject to the jurisdiction of the commission.—U. S. v. American Union Transport, supra.

Compelling filing of records. The Shipping Act authorizes the board to require a carrier or other person subject to the act to file records relating to the business of such carrier or person.[91]

State or territorial bodies. Under appropriate statutory provisions a state regulatory body may secure an injunction to prevent further violations of the law or the orders of the commission by local carriers by water.[92] The Public Utilities Commission of the Territory of Hawaii has been held to have jurisdiction to investigate the rates, classifications, acts, omissions, and practices of a carrier by water organized and existing in, and, under the laws of, Hawaii, and engaged in transporting freight between ports within the Territory [93]

(2) Proceedings before Regulatory Body

Proceedings involving violations of the Shipping Act may be instituted before the Maritime Board by complaint of one interested or injured, or on the board's own motion.

The Shipping Act, 46 U.S.C.A. § 821, makes provision for the filing of complaints with the federal administrative body with respect to violations of the act,[94] and the Maritime Board may undertake such proceedings on its own motion [95] The administrative remedy must be exhausted before resort is had to the courts.[96] Prior resort to the board in matters within its jurisdiction is not excused because of another decision of such board in a similar case but not involving the same parties,[97] particularly where involved questions of fact must be determined and given effect.[98]

Parties. Any person may be a complainant in a proceeding attacking a violation of the act, although not directly affected by such violation.[99] In such a proceeding against a carrier, other carriers who are not necessary to the making of an order against the carrier complained of need not be joined as parties.[1] Where the party complained of in the complaint has been reorganized as a new corpora-

91. U S —Isbrandtsen-Moller Co. v U. S , N Y., 57 S Ct. 407, 300 U S. 139, 81 L Ed 562.

Record of rates previously charged by particular carrier

Order issued by Secretary of Commerce requiring steamship operator, under provision of Shipping Act, to file record of rates previously charged, was not invalid merely because such operator was only carrier required to file such records —Isbrandtsen-Moller Co. v U. S., supra.

92. Wash.—State ex rel Department of Public Works v Skagit River Navigation & Trading Co., 45 P. 2d 27, 181 Wash. 642.

Future violations

Department of public works was held not entitled to permanent injunction to restrain river carrier's future departure from published tariff schedules where carrier disclaimed intentional past violations or intent to commit future violations — State ex rel Department of Public Works of Washington v. Skagit River Navigation & Trading Co , supra.

93. Hawaii —Territory v. Inter-Island Steam Nav Co , 32 Hawaii 127

Statutory fees may be exacted from such corporation.—Territory v. Inter-Island Steam Nav Co , supra.

94. U S —Far East Conference v. U. S., 72 S Ct. 492, 342 U S 570, 96 L Ed. —— —Isthmian S. S. Co. v. U. S., D C N Y., 53 F.2d 251.

Reparation

One injured by a violation of the act may seek reparation before the board —Far East Conference v. U. S., 72 S Ct. 492, 342 U.S. 570, 96 L Ed. —— —Isthmian S. S. Co. v. U. S , D.C N.Y., 53 F.2d 251.

95. U S.—Isthmian S S. Co v. U. S , supra.

96. U S.—U. S. Navigation Co v. Cunard S S Co , N Y , 52 S Ct 247, 284 U.S 474, 76 L Ed 408

Other remedies superseded

Remedy provided by Shipping Act was held to supersede general jurisdiction of district court to decide matters arising under any law regulating commerce.—Swayne & Hoyt v. Kerr Gifford & Co , D C La , 14 F. Supp 805.

District court should not pass on validity of rate-fixing agreements entered into by members of conference of steamship carriers before United States Maritime Commission, in accordance with its established procedure, has had an opportunity to pass thereon in an adversary proceeding.—Isbrandtsen Co. v. U. S , D. C N.Y , 81 F.Supp 544.

Injunctive relief

(1) Application for interlocutory injunction against owner, charterer, and master of ship on ground that complainants had right of action under Shipping Act would be denied and bill dismissed, where complainants had adequate remedy under Shipping Act, so as to be required to first seek recourse from shipping board.—Swayne & Hoyt v. Kerr Gifford & Co , D C.La., 14 F.Supp. 805.

(2) Steamship owner could not maintain suit to enjoin competitor from operating proposed ships with unreasonably low tariff rates to ruin plaintiff's business, since question involved was within jurisdiction of United States Shipping Board —Wisconsin & Michigan Transp. Co. v Pere Marquette Line Steamers, C.C.A. Wis , 67 F 2d 937.

97. U S —U. S. Navigation Co v Cunard S S Co , N Y., 52 S.Ct. 247, 284 U S. 474, 76 L Ed. 408

Board's dismissal of similar case did not entitle shipowner to maintain injunction suit against competitor where question involved was within shipping board's jurisdiction.—Wisconsin & Michigan Transp. Co. v Pere Marquette Line Steamers, C.C A. Wis., 67 F 2d 937.

98. U S —Roberto Hernandez, Inc , v Arnold Bernstein Schiffahrtsgesellschaft, M. B H, C.C A N.Y , 116 F 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S A. v. Roberto Hernandez, Inc , 61 S Ct. 1101, 313 U S. 582, 85 L Ed. 1539

99. U S —Isthmian S S. Co. v. U S , D C.N Y., 53 F 2d 251.

"Person"

Word "person" is defined in the act as including corporations, partnerships, and associations existing under, or authorized by, the laws of the United States, or any state.—Isthmian S S. Co. v. U. S., supra.

Intervention

Action of shipping board in allowing intervention in proceedings to enjoin violations of act by carriers was held not erroneous.—Isthmian S. S. Co. v. U. S , supra.

United States is "person" within provision of Shipping Act permitting any person to file complaint with Maritime Board for reparations for violations of act —Far East Conference v. U S., N.J., 72 S.Ct. 492, 342 U.S. 570, 96 L Ed ——.

1. U S —Isthmian S. S. Co. v. U. S., D.C N Y , 53 F 2d 251.

tion which, as such corporation, answered the complaint and participated in the proceedings, failure to bring in the new corporation by supplemental petition is not fatal to the proceedings.[2]

Injunctive relief pending proceedings. Pending a decision by the commission on a complaint filed against a carrier seeking to put into effect rate reductions alleged to be unlawful, the court may, in a proper case, enjoin or restrain such carrier from putting the rate reductions into effect.[3]

Orders. A mistake in the designation of the complainant in a cease and desist order of the board is not fatal where no one is prejudiced thereby.[4]

(3) Proceedings to Enforce, Suspend, Set Aside, or Enjoin Orders

Actions to enforce or to annul or enjoin orders of the Maritime Board may be instituted in the federal district courts.

Under the Shipping Act, 46 U.S.C.A. §§ 828, 829, valid orders of the Maritime Board may be enforced by action in the federal district courts.[5] On the other hand, persons aggrieved by orders of the board may sue to set aside, annul, or enjoin them in appropriate proceedings in such courts;[6] it is otherwise as to persons who are not adversely affected by such orders.[7] Orders of the commission will not be set aside on the basis of bare predictions which the commission as an expert body did not foresee.[8] An injunction to restrain an order of the board will not be granted where no irreparable injury to the complainant can result from such order.[9]

Parties. Where the United States has given its consent to be sued and has been made a party to an action to enjoin an order issued by one of its departments, boards, or commissions, such department, board, or commission has no such interest in the suit different from the United States as will make it a proper party.[10] In such a case a government officer who has no connection with, or interest in, the subject matter of the suit is not a proper party.[11]

Scope and extent of review. In actions to enforce or to set aside or enjoin an order of the board, the court's function is to determine whether the order is supported by evidence.[12] Findings of the board are prima facie correct in such an action if

2. U.S.—Isthmian S. S. Co. v. U. S., supra.

3. U.S.—West India Fruit & S. S. Co. v. Seatrain Lines, C.A.N.Y., 170 F.2d 775, certiorari dismissed 69 S.Ct. 514, 336 U.S. 908, 93 L.Ed. 1072.

Commission as intervener

Where United States Maritime Commission intervened as party plaintiff in action to enjoin steamship company from putting into effect rate reductions pending decision in case before the commission, the district court had power to issue temporary injunction.—West India Fruit & S. S. Co. v. Seatrain Lines, supra.

Discretion of court

In action to enjoin steamship company from putting into effect rate reductions, pending decision in case before the United States Maritime Commission, the trial judge was required, in the exercise of its discretion, to balance the harms the injunction might do to the respective parties in determining whether a temporary injunction should issue, and, in view of statutory provision for award of damages by the commission, issuance of temporary injunction was not an abuse of discretion.—West India Fruit & S. S. Co. v. Seatrain Lines, supra.

4. U.S.—Isthmian S. S. Co. v. U. S., D.C.N.Y., 53 F.2d 251.

5. **"Order," within provision of Shipping Act** providing that district court may enforce obedience to order of board by injunction or other proper process, was held order which duly issues after hearing on complaint and answer, or which board issues on its own motion after first having instituted inquiry in matter.—Swayne & Hoyt v. Kerr Gifford & Co., D.C.La., 14 F.Supp. 805.

Orders for payment of money

U.S.—Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M.B.H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc., 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539.—Compagnie Générale Transatlantique v. American Tobacco Co., C.C.A.N.Y., 31 F.2d 663, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611.

6. U.S.—Isthmian S. S. Co. v. U. S., D.C.N.Y., 53 F.2d 251.

Orders exceeding statutory authority

The enforcement of orders of the commission which exceed its statutory authority or are otherwise invalid may be restrained by the court in a suit by persons adversely affected thereby.—American Union Transport v. U. S., D.C.N.Y., 55 F.Supp. 682, reversed on other grounds 66 S.Ct. 644, 327 U.S. 437, 90 L.Ed. 772.

Sufficiency of petition

Allegation in petition to set aside order of shipping board that there was no evidence of prejudicial treatment by carriers was held mere conclusion, where testimony was before court.—Isthmian S. S. Co. v. U. S., D.C.N.Y., 53 F.2d 251.

7. U.S.—American Union Transport v. U. S., D.C.N.Y., 55 F.Supp. 682, reversed on other grounds 66 S.Ct. 644, 327 U.S. 437, 90 L.Ed. 772.

8. U.S.—Atlantic & Gulf/West Coast of Central America & Mexico Conference (No. 2743) v. U. S., D.C.N.Y., 94 F.Supp. 138.

9. **Penalty for violation of order**

Steamship operator did not show irreparable injury entitling it to enjoin order issued on behalf of Shipping Board Bureau of Department of Commerce requiring operator to file rates charged by it, because penalty for disobedience was one hundred dollars per day.—Isbrandtsen-Moller Co. v. U. S., D.C.N.Y., 14 F.Supp. 407, affirmed 57 S.Ct. 407, 300 U.S. 139, 81 L.Ed. 562.

10. U.S.—Isbrandtsen-Moller Co. v. U. S., supra.

11. **Bureau director**

U.S.—Isbrandtsen-Moller Co. v. U. S., supra.

District attorney

U.S.—Isbrandtsen-Moller Co. v. U. S., supra.

12. U.S.—Sun-Maid Raisin Growers Ass'n v. U. S., D.C.Cal., 33 F.Supp. 959, affirmed 61 S.Ct. 830, 312 U.S. 667, 85 L.Ed. 1111, rehearing denied 61 S.Ct. 940, 313 U.S. 598, 85 L.Ed. 1551.

supported by substantial evidence,[13] and, if supported by evidence, will not be interfered with by the court,[14] even though the court might have a different opinion as to the weight of the evidence and come to a different conclusion on the same facts,[15] since the reviewing court is not authorized to substitute its judgment for that of the administrative body,[16] or to decide the question de novo on the evidence submitted to the administrative body.[17]

§ 104. Discrimination

a. In general
b. As to rates and charges
c. Powers and proceedings of regulatory bodies
d. Actions

a. In General

It is unlawful for a common carrier of goods by water to discriminate between shippers.

The obligation of a common carrier by water to serve the public impartially in the receipt and transportation of goods, considered supra § 102, prohibits unjust discrimination,[18] as does the United States Shipping Act,[19] the provisions of which against discriminatory acts apply to a common carrier by water in foreign commerce,[20] notwithstanding the bill of lading issued in a foreign country.[21] The prohibition against discrimination does not inhibit a carrier from granting privileges to shippers provided the privilege is indifferently extended to all.[22] While a contract which discriminates by conferring a preference in violation of the statute is invalid and unenforceable,[23] the mere fact that the carrier might violate the law with respect to preferences does not invalidate the contract if the carrier is not obligated thereby to grant any such preference.[24] Under the Shipping Act, a shipper who is injured as a result of discrimination by the carrier

13. U.S.—Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc., 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539.

Absence of new evidence

Where no new evidence on the subject is introduced by either party at the trial, it is duty of court to accept and give such findings effect.—Roberto Hernandez, Inc., v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc., 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539.

14. U.S.—Swayne & Hoyt v. U. S., App. D.C., 57 S.Ct. 478, 300 U.S. 297, 81 L.Ed. 650—Booth S. S. Co. v. U. S., D.C.N.Y., 29 F.Supp. 221.

Evidence held sufficient

(1) To sustain finding that activity of freight forwarders had a substantial proximate bearing on development of American maritime commerce and that provision of conference agreements binding steamship companies not to pay brokerage to freight forwarders resulted in detriment to commerce of the United States, and justified order of board requiring such provision to be stricken from agreements.—Pacific Westbound Conference v. U. S., D.C.Cal., 94 F.Supp. 649—Atlantic & Gulf/West Coast of Central America and Mexico Conference (No. 2743) v. U. S., D.C.N.Y., 94 F.Supp. 138.

(2) To support finding that steamship companies' practice of making a separate charge for handling of freight after delivery on dock from point of delivery to ship's tackle, instead of including such handling charge in freight rate, was not an unjust or unreasonable practice in violation of the Shipping Act.—Sun-Maid Raisin Growers Ass'n v. U. S., D.C.Cal., 33 F.Supp. 959, affirmed 61 S.Ct. 830, 312 U.S. 667, 85 L.Ed. 1111, rehearing denied 61 S.Ct. 940, 313 U.S. 598, 85 L.Ed. 1551.

(3) To support findings that differential in rates of carriers by water between shipments under contracts, binding shippers to make all shipments by such carriers, and shipments by noncontract shippers was not necessary to assure stability of service and tended to create a monopoly by excluding competition from new lines.—Swayne & Hoyt v. U. S., App. D.C., 57 S.Ct. 478, 300 U.S. 297, 81 L.Ed. 659.

15. U.S.—Swayne & Hoyt v. U. S., supra—Booth S. S. Co. v. U. S., D.C.N.Y., 29 F.Supp. 221.

16. U.S.—Sun-Maid Raisin Growers Ass'n v. U. S., D.C.Cal., 33 F.Supp. 959, affirmed 61 S.Ct. 830, 312 U.S. 667, 85 L.Ed. 1111, rehearing denied 61 S.Ct. 940, 313 U.S. 598, 85 L.Ed. 1551.

17. U.S.—Sun-Maid Raisin Growers Ass'n v. U. S., supra.

18. Ga.—Ocean S. S. Co. of Savannah v. Savannah Locomotive Works, etc., Co., 63 S.E. 577, 131 Ga. 831, 127 Am.S.R. 265, 20 L.R.A., N.S., 867, 15 Ann.Cas. 1044.
58 C.J. p. 342 note 66.

19. **It is unlawful,** under the Shipping Act, for any common carrier by water subject to the act to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect.—Compagnie Générale Transatlantique v. American Tobacco Co., C.C.A.N.Y., 31 F.2d 663, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611—Copper River Packing Co. v. Alaska S. S. Co., C.C.A.Cal., 22 F.2d 12—Isbrandtsen Co. v. U. S., D.C.N.Y., 96 F.Supp. 883, affirmed A/S. J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. ——, and Federal Maritime Board v. U. S., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. ———State of California v. U. S., D.C.Cal., 46 F.Supp. 474, affirmed 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089, and City of Oakland v. U. S., 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089.

20. U.S.—Compagnie Générale Transatlantique v. American Tobacco Co., C.C.A.N.Y., 31 F.2d 663, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611.

21. U.S.—Compagnie Générale Transatlantique v. American Tobacco Co., supra.

22. Ga.—Ocean SS. Co. of Savannah v. Savannah Locomotive Works, etc., Co., 63 S.E. 577, 131 Ga. 831, 127 Am.S.R. 265, 20 L.R.A., N.S., 867, 15 Ann.Cas. 1044.
58 C.J. p. 343 note 67.

23. U.S.—Copper River Packing Co. v. Alaska S. S. Co., C.C.A.Cal., 22 F.2d 12.
Tex.—R. L. Heflin, Inc. v. Texas Oceanic S. S. Co., Civ.App., 53 S.W.2d 133, error dismissed.

24. U.S.—Copper River Packing Co. v. Alaska S. S. Co., C.C.A.Cal., 22 F.2d 12.

is entitled to reparations;[25] but reasonable steps to mitigate damages must be taken by the shipper.[26]

b. As to Rates and Charges

The federal statutes prohibit discrimination between shippers with respect to the rates and charges which common carriers by water may fix for their services.

It is unlawful under the federal statutes for a common carrier of goods by water governed thereby to give a preference to any shipper or discriminate between shippers with respect to the rates and charges for its services.[27] Accordingly, it is unlawful for any such carrier directly or indirectly to allow any person to obtain transportation for property at less than its regularly established rates by any unjust or unfair device whatsoever[28] No

"Sole discharge" clause does not invalidate contract.—R. L Heflin, Inc, v Texas Oceanic S S Co, Tex Civ App, 53 S W 2d 133, error dismissed

25. U.S.—Roberto Hernandez, Inc v Arnold Bernstein Schiffahrtsgesellschaft, M. B H, C.C.A N Y., 116 F 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A, v Roberto Hernandez, Inc, 61 S Ct 1101, 313 U S. 582, 85 L Ed. 1539.

Computation of damages

(1) Damages are not rendered uncertain because they cannot be calculated with absolute exactness, and it is sufficient if reasonable basis for computation is afforded, although result is only approximate.—Roberto Hernandez, Inc, v Arnold Bernstein Schiffahrtsgesellschaft, M B. H, D C N Y., 31 F Supp 76, reversed on other grounds, C C A, 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v Roberto Hernandez, Inc, 61 S.Ct. 1101, 313 U S. 582, 85 L Ed. 1539.

(2) In computing damages, the carrier whose wrongful conduct and negligence have rendered difficult the estimate of precise damages suffered by plaintiff cannot complain that damages cannot be measured with same exactness as otherwise would be possible—Roberto Hernandez, Inc, v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., D.C N.Y, 31 F Supp. 76, reversed on other grounds, C.C.A., 116 F 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S A. v. Roberto Hernandez, Inc, 61 S Ct. 1101, 313 U S 582, 85 L Ed. 1539.

26. U.S.—Roberto Hernandez, Inc, v Arnold Bernstein Schiffahrtsgesellschaft, M B. H, C.C A N Y, 116 F 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S A. v. Roberto Hernandez, Inc., 61 S Ct 1101, 313 U S 582, 85 L.Ed 1539.

Availability of other space

(1) An automobile exporter was not precluded from recovering damages from common carriers by water for unjust discrimination in respect to cargo space accommodations accorded exporter because there was space for such shipments during the period of contract on other vessels not going directly to country of importer and that any automobiles so, sent would have been transshipped at same through freight rates where exporter introduced evidence before Maritime Commission that one reason for refusal of carriers to furnish space was the opposition of manufacturers of automobiles, and whether allotment of space generally available in ships not operated by carriers would have been prevented by the same opposition remained an untouched subject—Roberto Hernandez, Inc, v. Arnold Bernstein Schiffahrtsgesellschaft, M B. H., C.C A N.Y., 116 F 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A v Roberto Hernandez, Inc, 61 S Ct 1101, 313 U.S. 582, 85 L Ed. 1539.

(2) In such a case the exporter was not precluded from recovering damages where it would have broken its contract in delivering automobiles by transshipment by another route, and there was nothing to show that importer would have consented to the change, the route contracted for being a "material" part of exporter's contract—Roberto Hernandez, Inc, v Arnold Bernstein Schiffahrtsgesellschaft, M. B. H, C.C A N.Y., 116 F. 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc, 61 S. Ct. 1101, 313 U.S. 582, 85 L Ed 1539.

Shipment by other route

An exporter claiming reparations from common carriers by water for unjust discrimination in respect to cargo space accommodations accorded exporter was not precluded from recovering damages for failure to attempt to mitigate damages by requesting importer, who had contracted with exporter for the automobiles, for permission for transshipment by another route, where there was no proof of reasonable ground for belief that such attempt would have been successful, and hence failure to attempt to secure modification could not be held to be a breach of duty to take reasonable steps to avoid or diminish damages.—Roberto Hernandez, Inc, v. Arnold Bernstein Schiffahrtsgesellschaft, M B H, C C.A N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S A v. Roberto Hernandez, Inc., 61 S Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539.

27. U.S.—Prince Line v American Paper Exports, C C A.N.Y., 55 F.2d 1053—Holt Motor Co. v. Nicholson Universal S S. Co, D C Minn, 56 F Supp. 585.

N.Y.—Sands v. Calmar S. S Corp, 296 N Y S 590, 163 Misc. 757.

Common carrier in foreign commerce

The provisions in the Shipping Act against discriminatory rates apply to a common carrier by water in foreign commerce, notwithstanding the bill of lading was issued in a foreign country—Compagnie Générale Transatlantique v. American Tobacco Co, C.C A N.Y., 31 F 2d 663, certiorari denied 50 S Ct. 16, 280 U.S. 555, 74 L Ed 611.

Application to localities

The section of the Shipping Act prohibiting discriminatory rates was held to refer to discrimination between shippers and not to discrimination between localities—State of California v U. S., D C Cal, 46 F. Supp 474, affirmed 64 S Ct. 352, 320 U S 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 U S 802, 88 L Ed. 1089, and City of Oakland v U S, 64 S Ct. 516, 321 U S. 802, 88 L Ed 1089.

Discrimination as to commodities

(1) The prohibition against discrimination does not require that charges for all commodities shall be the same—Booth S. S Co. v. U S, D C N.Y, 29 F Supp 221.

(2) However, a cease and desist order by Maritime Commission issued pursuant to authority given it by Shipping Act commanding ship companies to abstain from collecting at port of New York lower pier storage charges for coffee than for other commodities was not illegal as requiring ship companies to establish same pier storage rates for all commodities, since order only condemned preference accorded coffee over all other commodities in pier storage rates—Booth S. S. Co. v. U. S., supra

28. U.S.—Prince Line v. American Paper Exports, D.C.N Y., 45 F.2d 242, affirmed, C.C.A., 55 F.2d 1053.

Billing paper without disclosing classification thereof to conceal contents from shipper's competitors, thereby facilitating preference was "unfair device or means" within statute, for it destroyed equality of treatment between shippers—Prince Line v American Paper Exports, C.C.A.N. Y., 55 F.2d 1053.

valid enforceable contract can be made between a carrier and a shipper which fixes a rate constituting an unlawful discrimination,[29] or which is less than those duly filed, established, and approved by the commission,[30] even though the shipper has no knowledge of the established published rates.[31] Any special arrangement between a common carrier and shipper calling for service other than that provided for in the published tariffs and bills of lading is violative of the Shipping Act and unenforceable.[32] A differential, pursuant to a steamship carrier conference, between rates for shippers agreeing to ship exclusively by vessels of conference members and rates for other shippers of the same commodities has been held to be prima facie discriminatory and violative of the Shipping Act.[33]

A carrier who has agreed to accept from a particular shipper less than the rates filed and approved by the board may recover the difference from the shipper.[34] Such an action is not an action for reparations within the provision of the statute requiring preliminary recourse to the commission before resort may be had to the courts.[35]

Rebates. The provision of the Shipping Act prohibiting payment or allowance of a deferred rebate[36]

Complaisance by carrier

Carrier, unless complaisant to unfair means used by a shipper to obtain lower rate, has not violated statute.—Prince Line v American Paper Exports, C C A N Y., 55 F 2d 1053

29. N Y—Belmont Iron Works v Pacific Coast Direct Line, 291 N.Y S 360, 249 App Div 156, motion denied 292 N Y S 960, 249 App.Div. 730, affirmed 11 N E 2d 297, 275 N Y. 461, certiorari denied 58 S Ct. 264, 302 U.S 747, 82 L Ed 577.

Charge above contract rate not recoverable

Shipper was not entitled to recover alleged overcharge under shipping contract which quoted rate by weight, but which omitted by error of shipper's agent to include shipper's option of rate by dimension which option steamer exercised, resulting in greater charge, since if contract were enforced it would result in unlawful discrimination—Belmont Iron Works v Pacific Coast Direct Line, supra.

30. U S.—Prince Line v. American Paper Exports, D.C N Y., 45 F 2d 242, affirmed, C C A., 55 F 2d 1053—Holt Motor Co. v Nicholson Universal S. S Co., D C Minn., 56 F Supp 585.

N Y—Sands v Calmar S S. Corp., 296 N.Y S. 590, 163 Misc 757—Black Diamond S. S Corporation v. S H Kress & Co, 284 N Y S. 310, 157 Misc 360.

Exceptions as to government

A steamship corporation's contract to carry goods at rate less than that published in tariff was void under Intercoastal Shipping Act, and hence shipper could not recover for breach thereof, even though shipment was for delivery of goods sold to United States and act permitted rate reductions for government, the benefits of such exception being available only to the United States.—Sands v. Calmar S S. Corp., 296 N Y.S. 590, 163 Misc. 757.

31. N.Y.—Black Diamond S S Corporation v. S. H Kress & Co., 284 N.Y.S. 310, 157 Misc 360.

32. U S.—Holt Motor Co. v. Nicholson Universal S. S. Co, D C Minn., 56 F.Supp 585—S. L. Shepard & Co v. Agwilines, Inc, D C S.C., 39 F Supp 528, reversed on other grounds, C C A, 130 F 2d 67.

Precooling agreement

Under provision in Shipping Act against common carriers by water discriminating between shippers, shippers seeking recovery for damage to shipment of melons could not rely on alleged breach of agreement to precool space on vessel in which melons were to be put, and to transport them under refrigeration, in absence of provision for such service in the published tariffs or payment of additional compensation therefor.—S L Shepard & Co. v. Agwilines, Inc., supra

Provision as to reservation of space

An alleged contract in which the carrier agreed to transport specified property between specified dates in the future at the regular tariff rate would be invalid under the Intercoastal Shipping Act as imposing a greater obligation on steamship company than the tariff provided and granting a privilege of reservation of space not granted to other shippers doing business with the company as a common carrier.—Holt Motor Co v Nicholson Universal S. S. Co., D C Minn, 56 F.Supp 585.

33. U S—Swayne & Hoyt v. U S, App D C., 57 S Ct. 478, 300 U S 297, 81 L Ed 659—Isbrandtsen Co. v. U. S, D C N.Y., 96 F Supp 883, affirmed A/S J. Ludwig Mowinckels Rederi v Isbrandtsen Co, 72 S Ct 623, 342 U S 950, 96 L Ed. ——, and Federal Maritime Board v. U S, 72 S.Ct 623, 342 U.S. 950, 96 L.Ed. ——.

Practice of group of intercoastal carriers operating lines from the Gulf to the West Coast in granting lower rates to shippers contracting to make all shipments by such lines than to others was held contrary to statute as giving undue preference to shippers entering into such contracts and subjecting gulf territory to unreasonable prejudice or disadvantage resulting from destruction of competition—Swayne & Hoyt v U S, D C D C, 18 F Supp 25, affirmed 57 S Ct 478, 300 U S 297, 81 L Ed. 659.

34. U S—Prince Line v. American Paper Exports, D C N.Y., 45 F 2d 242, affirmed, C C.A., 55 F.2d 1053

Shippers are charged with knowledge of rates as filed and approved, for which they become liable if obtaining cheaper transportation by means unfair to competitors—Prince Line v. American Paper Exports, C. C A N.Y., 55 F 2d 1053

Notwithstanding carrier's violation of statute, it may recover from shipper amount of preference obtained by shipper by means unfair to competitors.—Prince Line v. American Paper Exports, C C.A.N.Y., 55 F 2d 1053

No estoppel

(1) No act or omission of the carrier can estop or preclude it from enforcing payment of the full amount by a shipper liable therefor—Prince Line v. American Paper Exports, D. C N.Y., 45 F 2d 242, affirmed, C C A, 55 F.2d 1053.

(2) This is so, although prima facie a carrier could not take advantage of its violation of statute by recovering from shipper amount of preference—Prince Line v American Paper Exports, C C.A N.Y, 55 F 2d 1053.

35. U S.—Prince Line v. American Paper Exports, supra.

Necessity for prior complaint to the commission generally see supra § 103 c (2).

36. **Carrier's application of excess rate** shown on bill of lading over that agreed on sale of cargo, to balance of freight on account of cargo stored, did not operate as rebate or refund within the prohibition.—Ambler v. Bloedel Donovan Lumber Mills, C.C.A Wash, 68 F 2d 268.

Soliciting rebates being an offense under Interstate Commerce Act, a shipper cannot successfully maintain a suit to obtain insurance benefits not covered by the freight rate paid by him, since this amounts to soliciting knowingly a concession by which his shipment was being "transported

does not apply to an agreement made or goods shipped before the act went into effect.[37]

c. Powers and Proceedings of Regulatory Bodies

Power to prevent discrimination between shippers has been conferred on the Maritime Board. Persons injured by discrimination may seek reparations in a complaint proceeding before the board.

Under the Shipping Act, the Maritime Board, or similar administrative agency or officer, has power to prevent discrimination between shippers in any respect,[38] including discrimination with respect to rates and charges.[39] Thereunder the administrative body has power to remedy preferences as to rates accorded by a carrier to a shipper by requiring adherence to relative rates.[40] Provision is made in the act for the institution of complaint proceedings before the administrative body for consideration of acts of unlawful discrimination by a carrier.[41] One injured by unlawful discrimination may seek reparations in such a proceeding,[42] and the remedy provided thereby must be first exhausted before resort may be had to the courts.[43] Questions of fact involving extrinsic evidence which arise in claims of discrimination are to be determined by the administrative body,[44] and its findings will be upheld by a reviewing court if there is evidence

at a less rate than that named in the tariffs published and filed by such carrier," within the statutory prohibition—Duplan Silk Co v. American, etc, Marine Ins. Co., N.Y., 205 F. 724, 124 C.C.A. 18.

37. N.Y.—Huttlinger v. Royal Dutch West India Mail, 167 N.Y.S. 158, 180 App.Div. 114

"Shall" as used in statute prohibiting rebates indicates the simple future tense—Huttlinger v. Royal Dutch West India Mail, supra.

38. U.S.—Roberto Hernandez, Inc., v Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc, 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539—State of California v. U. S., D.C.Cal., 46 F.Supp. 474, affirmed 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089, and City of Oakland v. U. S., 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089.

Unjust discrimination as to cargo space

U.S.—Roberto Hernandez, Inc v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v Robert Hernandez, Inc, 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed 1539.

39. U.S.—Swayne & Hoyt v. U. S., App.D.C., 57 S.Ct. 478, 300 U.S. 297, 81 L.Ed. 659—State of California v. U. S., D.C.Cal., 46 F.Supp. 474, affirmed 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089, and City of Oakland v. U. S., 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089.

Congressional validation of act of secretary of commerce in finding rates of carriers by water unduly prejudicial, and ordering their cancellation, was held not ineffective because retroactive, where carriers' rights to an administrative hearing and determination and to a judicial review were fully preserved and proceedings were conducted by Secretary in the name of the United States—Swayne & Hoyt v. U. S., App.D.C., 57 S.Ct. 478, 300 U.S. 297, 81 L.Ed. 659

Pier storage charges

U.S.—Booth S. S. Co. v. U. S., D.C.N.Y., 29 F.Supp. 221

40. U.S.—Isthmian S. S. Co. v. U. S., D.C.N.Y., 53 F.2d 251.

Differential between carload and split delivery rates

U.S.—Isthmian S. S. Co. v. U. S., supra

41. U.S.—Isbrandtsen Co. v. U. S., D.C.N.Y., 96 F.Supp. 883, affirmed A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. ——, and Federal Maritime Board v. U. S., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. ——.

Who may complain

United States Department of Agriculture, as a shipper of agricultural commodities, would have standing to complain of unlawful discrimination between shippers sought to be imposed by members of conference of steamship carriers through agreement requiring shippers to contract to employ conference lines exclusively on pain of being charged higher tariffs upon failure to so contract—Isbrandtsen Co. v. U. S., D.C.N.Y., 96 F.Supp. 883, affirmed A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. ——, and Federal Maritime Board v. U. S., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. ——.

42. U.S.—Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc., 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539.

43. U.S.—Robert Hernandez, Inc., v Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v Roberto Hernandez, Inc., 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed 1539

Necessity for prior proceedings before the commission generally see supra § 103 c (2).

Proceedings involving technical knowledge

The United States Maritime Commission was not without jurisdiction of proceeding in which exporter sought reparations from common carriers by water in foreign commerce for unjust discrimination in respect to cargo space accommodations for automobiles to be shipped, on ground that issue was uncomplicated by technical and intricate factual matters which needed action of any expert commission to bring about uniformity in administration and prevent discrimination, where facts called for technical knowledge in solution of problem of deciding whether carriers were guilty of unjustly discriminatory practices in light of the tonnage and manner in which vessels should be loaded with automobiles which were to be shipped uncrated—Roberto Hernandez, Inc., v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C.C.A.N.Y., 116 F.2d 849, reversing 31 F.Supp. 76, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc, 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1539.

44. U.S.—Holt Motor Co. v. Nicholson Universal S. S. Co., D.C.Minn., 56 F.Supp. 585.

Discriminatory effect of embargo

Whether an embargo on shipping declared by steamship company due to a storm produced unjust discrimination among shippers, whether it was fair and reasonable, and whether it should have been continued after the storm abated, were questions of fact for determination by the United States Maritime Commission and not the federal district court—Holt Motor Co. v. Nicholson Universal S. S. Co., supra.

to sustain them.[45] However, the court will not uphold an ultimate determination as to a discrimination which is inconsistent with the findings.[46]

d. Actions

Administrative orders for the payment of reparations to one injured by a discrimination may be enforced by action.

Administrative orders for the payment of damages or reparations resulting from an unlawful discrimination by a carrier may be enforced by action.[47] An action for damages for discrimination may be brought by the consignee of freight, who has paid discriminatory freight charges thereon.[48] Such an action is not in the nature of one to recover an excessive charge under a mistake of law or fact;[49] nor is it an action for an overcharge.[50] Whether charges are reasonable or otherwise[51] and whether certain discriminations were due or undue[52] are questions of fact, to be passed on in the light of all the facts duly alleged and supported by competent evidence. When defendant fails to make answer to the prima facie evidence offered by plaintiff, it is the duty of the court to direct the verdict for plaintiff.[53] The burden of proving a failure to mitigate damages is on the carrier.[54]

§ 105. Damage to Vessel from Loading or Discharging Cargo

a. In general
b. Liability of charterer generally
c. Berth or mooring
d. Actions
e. Damages

a. In General

An owner of a vessel may recover for loss of, or injury to, the vessel caused by the negligence of others in loading, stowing, or discharging cargo, or in mooring or berthing the vessel for such purposes.

An owner of a vessel may recover for loss of, or injury to, a vessel caused by the negligence of others in loading, stowing, or discharging cargo, or in mooring or berthing the vessel for such purposes.[55] A person having the right or duty to load, stow, or discharge the cargo is under a duty to perform such act properly[56] in a reasonably prudent

45. U S—Booth S S Co v U. S., D C N.Y., 29 F.Supp. 221.

46. U.S—Isbrandtsen Co v. U S, D C N.Y., 96 F Supp. 883, affirmed A /S. J Ludwig Mowinckels Rederi v. Isbrandtsen Co, 72 S.Ct 623, 342 U S. 950, 96 L Ed —, and Federal Maritime Board v. U. S, 72 S.Ct 623, 342 U.S. 950, 96 L. Ed. —.

47. U S—Roberto Hernandez, Inc v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., C C A N.Y., 116 F. 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S. A. v. Roberto Hernandez, Inc, 61 S.Ct. 1101, 313 U S 582, 85 L. Ed. 1539—Compagnie Générale Transatlantique v. American Tobacco Co, C.C.A.N Y, 31 F 2d 663, certiorari denied 50 S Ct 16, 280 U. S. 555, 74 L Ed. 611.

48. U S—Compagnie Générale Transatlantique v. American Tobacco Co., supra.

49. U.S—Compagnie Générale Transatlantique v. American Tobacco Co, supra.

50. U.S—Compagnie Générale Transatlantique v. American Tobacco Co, supra.

51. U S—Compagnie Générale Transatlantique v American Tobacco Co, supra.

52. U S—Compagnie Générale Transatlantique v. American Tobacco Co, supra

53. U.S.—Compagnie Générale Transatlantique v American Tobacco Co, supra
58 C J. p 343 note 78.

54. U S—Roberto Hernandez, Inc, v. Arnold Bernstein Schiffahrtsgesellschaft, M B H., C C A N.Y, 116 F 2d 849, certiorari denied Compania Espanola de Navegacion Maritima, S A v Roberto Hernandez, Inc., 61 S.Ct. 1101, 313 U S. 582, 85 L Ed 1539

55. U S—Seaboard Sand & Gravel Corp v. American Stevedores, C.C. A N Y, 151 F. 2d 846—The Everett Fowler, C C A N.Y., 151 F 2d 662, motion denied 152 F.2d 657, certiorari denied U S. v. Petterson Lighterage & Towing Corp., 66 S. Ct 963, 327 U S. 804, 90 L Ed. 1029, certiorari denied 66 S Ct. 963, 327 U S. 804, 90 L Ed 1029—Gorman Leonard Coal Co v. Peninsular State S. S. Corp, C.C A.Mass., 66 F 2d 83—Florida Gravel Co. v. Tampa Sand & Shell Co., C C A. Fla, 49 F 2d 266—Dempsey v Merrit, Chapman & Scott Corporation, C C A N Y., 10 F.2d 687—O'Brien Bros. v. City of New York, C.C A.N. Y, 9 F 2d 542—Kelly v. Overseas Shipping Co, D.C N.Y, 7 F 2d 732, affirmed, C C.A., 7 F 2d 734—O'Donnell Transp. Co. v. Tidewater Iron & Steel Co, D C.N.J, 90 F.Supp. 953, affirmed, C A., 185 F 2d 675—O'Boyle v. City of New York, D C N.Y, 85 F Supp 858—New York Trap Rock Corp. v. Christie Scow Corp., D.C.N.Y., 68 F.Supp 392, affirmed, C C.A., 162 F.2d 624—The Henry E, D C N Y, 61 F.Supp. 327, affirmed, C C A, 162 F.2d 90—The Wilmer S Nickerson, D.C N Y., 58 F Supp. 777—The Green Leaf, D C N Y, 27 F Supp 911—The McAllister, D C N.Y., 7 F Supp. 470—Donovan v. Frederick Starr Contracting Co, D.C.N.Y., 290 F. 501.

N Y.—Neville v. Morrison Coal & Coke Co., 207 N.Y.S. 471, 211 App Div. 282.

N.C—Pate v. Greenville & R. R. Co, 35 N.C 325.

Loss of, or injury to, cargo from improper loading, stowing, or discharging see infra §§ 141, 142, 146.

Derrick barge used for loading and unloading

U S—Salmons Dredging Corp. v. Herma, C A S C, 180 F.2d 233.

56. U.S—The Scipio, D.C.N.Y., 73 F.Supp. 402.

Duty to stop loading exists when it it is discovered that vessel is in danger—Kelly v. Overseas Shipping Co, D C N.Y., 7 F 2d 732, affirmed, C.C.A., 7 F.2d 734.

Carrying capacity

In determining whether a vessel is loaded properly for purpose of fixing liability for damage resulting from capsizing of vessel, the "carrying capacity" of the vessel, is not the amount necessary to bring her decks awash, but the amount she could carry with safety allowing adequate free board for security against swamping—The S. C. L. No. 9, C.C.A. Pa, 114 F.2d 964.

manner,[57] using reasonable care and skill,[58] and is liable for any damage to the vessel resulting from a failure in this respect.[59] Thus, a person, such as a shipper, using a dangerous method of loading, instead of a safer method available, is liable for the resulting damage to the vessel,[60] and a person will be liable if he loads a vessel under circumstances which he knows, or should know, will place the vessel in a perilous position unless affirmative action is taken to eliminate the peril, and he, knowing or having reason to know that no one else will take such action, fails to take such action himself.[61] The master of the vessel is not bound to do more than protest against the method of loading to recover for the resulting damages,[62] and he is not obliged to interfere with the loading or withdraw the vessel from the charter service,[63] but the owner or the master is bound to use reasonable care to protect the vessel from injury where the danger is reasonably apparent,[64] and, where the damage is caused solely by his negligence, recovery will not be allowed.[65]

Stevedores. A stevedoring company is not an insurer as to the vessel,[66] and the stevedores loading or discharging the vessel are liable only for negligence.[67] In loading and discharging a vessel stevedores have the duty to use due care[68] or to act in a prudent manner,[69] and to refrain from committing affirmative acts of negligence,[70] and they are liable for any damage to the vessel resulting from a failure in this respect.[71] Stevedores are responsible for

57. U.S.—The S. C. L. No 9, supra —O'Donnell Transp Co v. Tidewater Iron & Steel Co, D C N J., 90 F Supp. 953, affirmed, C.A., 185 F 2d 675.

58. U.S.—Gorman Leonard Coal Co v. Peninsular State S S. Corp, C C.A.Mass, 66 F.2d 83—O'Brien Bros v. City of New York, C C.A.N Y., 9 F.2d 542.

Knowledge of leaky condition of vessel

(1) One experienced in loading scows was charged with notice that wooden scow would leak and that water running aft in the scow might easily rise above the keelsons where it would be free to run from side to side and thereby cause the scow to list and the cargo to shift.—O'Brien Bros. v. U. S., C A N.Y., 171 F.2d 586

(2) Where dredging company loaded scow, which had no bargee on board, with wet sand and gravel, whether scow was unseaworthy because she leaked more than a scow should was a factor in determining what attention she required, but otherwise was not important in determining liability for injuries to scow which capsized.—F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp, C.C A N Y, 162 F 2d 90

59. U S—Westchester Fire Ins. Co v. Buffalo Housewrecking & Salvage Co, D.C N.Y., 40 F Supp 378, affirmed, C C A., 129 F.2d 319.

Loading report

The notation "no damage" contained in loading report signed by bargee did not exonerate company which loaded barge from liability for damage to barge resulting from negligent manner in which it was loaded —O'Donnell Transp. Co. v. Tidewater Iron & Steel Co., D.C.N.J., 90 F Supp. 953, affirmed, C.A., 185 F.2d 675.

Act of libelant's manager done in an emergency would not lessen respondent's liability for damages to libelant's barges by reason of negligence of loading pig iron thereon, where damages were caused by negligence of respondent's employees — The G. G. Post, D.C N Y., 64 F Supp 191.

60. U.S.—Arbor Shipping Co. v De La Guardia, Inc, C.C A.N.Y., 54 F 2d 984.

Safe working load

In libel for property damage due to breaking of sling, selection of 1⅛ inch steel wire sling for hoisting of load of twenty-one thousand three hundred pounds out of ship's hold was held not negligence where safe working load for such sling was 11½ tons —The McAllister No. 55, D C.N. Y., 7 F.Supp. 470.

61. U S—O'Brien Bros. v. U. S., C. A.N.Y., 171 F 2d 586—F. E. Grauwiller Transp. Co v. Exner Sand & Gravel Corp, C C A.N.Y., 162 F.2d 90.

62. U.S—Arbor Shipping Co v. De La Guardia, Inc, C C.A N Y., 54 F. 2d 984

63. U S—Arbor Shipping Co. v. De La Guardia, Inc, supra—The Richelieu, C.C A Md, 48 F.2d 497—British Maritime Trust v. Munson S S Line, D.C N.Y., 149 F. 533.

64. U S—O'Donnell Transp. Co. v Tidewater Iron & Steel Co, D C N J., 90 F Supp 583, affirmed, C.A., 185 F.2d 675—The Daly No 40, D C N Y, 76 F Supp 700—National Dredging & Lighterage Co. v Turney Transp. Co., C.C A Pa., 281 F. 315.

Bargee or master held negligent

U.S—O'Donnell Transp Co v. Tidewater Iron & Steel Co, D C N J, 90 F.Supp 953, affirmed, C.A, 185 F 2d 675.

Bargee or master held not negligent

U.S—The Everett Fowler, C.C.A N. Y, 151 F.2d 662, motion denied 152 F 2d 657, certiorari denied U. S. v. Petterson Lighterage & Towing Corp, 66 S Ct 963, 327 U S 804, 90 L.Ed. 1029, certiorari denied 66 S Ct 963, 327 U.S. 804, 90 L.Ed 1029—The C. W Crane, D.C.N.Y, 64 F Supp. 627, affirmed, C.C.A., 155 F 2d 940.

65. U S—Friedland v The Empress, D.C Cal., 48 F.Supp. 348

66. U S.—The Richelieu, 27 F.2d 960, modified on other grounds, C C A, 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v Cornec, 52 S.Ct 9, 284 U.S 621, 76 L Ed. 530

67. U S—New York Trap Rock Corp v Christie Scow Corp, C.C.A.N Y, 162 F 2d 624—O'Brien Bros. v Moran Towing Corp., D.C N.Y., 66 F Supp. 614, affirmed, C C A, Beard's Erie Basin v O'Brien Bros, 162 F.2d 176—The C. W Crane, D C N Y, 64 F Supp. 627, affirmed, C.C.A., 155 F.2d 940.

68. U S—Cornec v Baltimore & O R. Co., C C A Md, 48 F 2d 497, certiorari denied Baltimore & O. R Co v. Cornec, 52 S Ct. 9, 284 U.S 621, 76 L Ed 530.

69. U S—The S. C. L. No. 9, C C.A. Pa, 114 F.2d 964

70. U.S—U S Lighterage Corporation v. Petterson Lighterage & Towing Corporation, D C N.Y., 51 F. Supp. 96, affirmed, C.C.A., 142 F.2d 197.

71. U S—Salmons Dredging Corp v Herma, C.A S.C, 180 F.2d 233—The Moran No. 10, D C.N.Y., 41 F 2d 255—Chile S. S. Co. v. Nacirema Operating Co, D.C.N.Y, 79 F Supp 557—The Carbon Light, D C N.Y., 66 F.Supp. 292, affirmed, C.A., O'Brien Bros v. U. S, 171 F 2d 586 —The Seaboard No. 58, D C.N Y, 59 F Supp 975, affirmed, C.C.A., Seaboard Sand & Gravel Corp v. American Stevedores, 151 F 2d 846—Seaboard Sand & Gravel Corp v. James Hughes, Inc, D C N.Y, 56 F Supp. 468—Smith v. Nicholson Transit Co., D C N Y., 39 F Supp. 795.

58 C.J. p 297 note 35.

Failure to eliminate peril

Stevedore will be liable if vessel is loaded under circumstances which

the proper handling, loading, and discharging of a vessel,[72] including trimming the cargo;[73] the independent contracting stevedore is responsible for the selection and proper use of equipment,[74] even though the equipment is furnished by the vessel itself,[75] and the officers of the vessel owe no duty of supervision in this respect,[76] although the master must see that the cargo is properly stowed so that the vessel will be seaworthy.[77] The owner's agent who is in charge of the vessel is not required to give the stevedores instructions on the proper method of loading or to protest against the methods used,[78] although such agent has the duty to inform the stevedores when the vessel is fully loaded.[79]

Extent of liability. A person may be primarily,[80] or secondarily liable,[81] or in some cases a per-

he knows, or should know, will place vessel in perilous position unless affirmative action is taken to eliminate peril, and he, knowing or having reason to know that no one will take such action, fails to take such action himself.—The Carbon Light, D C N Y, 66 F Supp. 292, affirmed, C.A., O'Brien Bros v. U. S., 171 F.2d 586

Man-power shortage

Though man-power shortage will be considered by court, such shortage cannot excuse negligence or relieve stevedoring company from obligation to use reasonable care in loading slag ballast on top of sand ballast to prevent listing and capsizing of scow.—The Seaboard No 21, D C N. Y, 61 F Supp. 596, affirmed in part and reversed in part on other grounds, C C.A, 154 F 2d 399

72. U S—Seaboard Sand & Gravel Corp v. Moran Towing Corp, C.C A.N.Y., 154 F 2d 399—Smith v Nicholson Transit Co., D C N.Y., 39 F Supp 795
58 C.J. p 297 note 35.

Employer of stevedores engaged in unloading scow could not relieve itself from liability for damage to scow in a fire which resulted from smoking of stevedores on board scow near cargo of cork, on ground that smoking which was a violation of regulations was an individual act outside the scope of stevedores' authority.—U S. Lighterage Corporation v. Petterson Lighterage & Towing Corp., D C N Y, 51 F.Supp. 96, affirmed, C.C.A., 142 F 2d 197.

73. U S—Seaboard Sand & Gravel Corp v. Moran Towing Corp, C C. A.N Y, 154 F.2d 399—The H S No 60, D.C N Y., 52 F Supp 606.
58 C J. p 297 note 37 [b].

74. U S.—Cornec v Baltimore & O R. Co., C C A Md, 48 F 2d 497, certiorari denied Baltimore & O. R Co. v. Cornec, 52 S.Ct. 9, 284 U S 621, 76 L Ed. 530
58 C.J. p 297 note 37.

75. U.S.—Cornec v Baltimore & O R. Co., C C A.Md, 48 F 2d 497, certiorari denied Baltimore & O R Co. v. Cornec, 52 S.Ct. 9, 284 U S 621, 76 L Ed. 530.

Direction of use by master

Without some showing master directed use of instrumentalities and negligent methods in loading, or approved or consented thereto, stevedore cannot be absolved from liability to vessel—Cornec v Baltimore & O R Co., C C A Md, 48 F 2d 497, certiorari denied Baltimore & O R Co v Cornec, 52 S Ct 9, 284 U S 621, 76 L.Ed. 530

76. U S—Cornec v. Baltimore & O R Co, C C A Md, 48 F 2d 497, certiorari denied Baltimore & O R Co. v. Cornec, 52 S Ct. 9, 284 U S 621, 76 L Ed 530
58 C J p 297 note 39.

77. U S—Cornec v Baltimore & O R Co., C C A Md, 48 F 2d 497, certiorari denied Baltimore & O R Co. v Cornec, 52 S Ct. 9, 284 U S. 621, 76 L Ed 530

78. U S.—The G G Post, D C N.Y, 64 F Supp. 191—Seaboard Sand & Gravel Corp v. James Hughes, Inc, D C N.Y., 56 F Supp 468—Smith v Nicholson Transit Co., D C N.Y., 39 F.Supp. 795
58 C J p 297 note 37 [a]

Materiality of complaint

Where a stevedore company was employed to transfer a cargo of steel ingots from a steamship to libellants' barges, and barge master could have reasonably believed that company could load barges without instructions, whether master made complaint to company and steamship respecting loading of barges was immaterial in determining liability of company for damages to barges.—Smith v. Nicholson Transit Co., supra

Protest as notice of fault

Protest of master of vessel to stevedoring company's foreman against manner of loading was notice of fault for which company was liable.—The S C L No. 9, C C A.Pa, 114 F.2d 964—Kelly v. Overseas Shipping Co., D.C N.Y, 7 F 2d 732, affirmed, C.C.A., 7 F 2d 734.

79. U.S—Hastorf Contracting Co. v Ocean Transp Corp., D.C.N.Y., 4 F 2d 583, affirmed, C.C.A., 4 F.2d 584.
58 C J. p 235 note 31 [a].

80. U S—Roah Hook Brick Co v. Erie R. Co., C.A.N Y, 179 F 2d 601—The C. W Crane, C C A N.Y, 155 F 2d 940—The Everett Fowler, C C. A N Y, 151 F 2d 662, motion denied 152 F 2d 657, certiorari denied U S v. Petterson Lighterage & Towing Corp., 66 S Ct. 963, 327 U S. 804, 90 L Ed 1029, certiorari denied 66 S Ct 963, 327 U S. 804, 90 L Ed 1029—McGeeney v Moran Towing Corp, C C A.N Y, 149 F 2d 791—Gorman Leonard Coal Co v. Peninsular State S S Corp, C C A Mass, 66 F 2d 83—The Moran No 10, D C N Y, 41 F 2d 255—O'Brien Bros v. City of New York, C C A N Y, 9 F 2d 542—Shamrock Towing Co. v. Tully & Di Napoli, D.C.N Y, 91 F Supp 239, affirmed, C.A, Anthony O'Boyle, Inc v. The Louis W. Doyle, 187 F.2d 872—The Benjamin Williams, D.C.Mass, 74 F Supp. 119—New York Trap Rock Corp. v. Christie Scow Corp., D C N.Y, 68 F.Supp. 392, affirmed, C C A, 162 F.2d 624—The Henry E, D C N Y, 61 F Supp. 327, affirmed, C C A, 162 F 2d 90—The Wilmer S. Nickerson, D.C.N.Y., 58 F Supp 777—Seaboard Sand & Gravel Corp. v James Hughes, Inc, D C N.Y., 56 F Supp. 468—U. S Lighterage Corporation v. Petterson Lighterage & Towing Corp, D C N.Y., 51 F Supp. 96, affirmed, C.C A, 142 F 2d 197—Producers Pipe Line Co. v. Douglas Guardian Warehouse Corp., D C.Tenn, 48 F.Supp 161—The Millwood, D.C N Y., 3 F.Supp. 156.
58 C J. p 234 note 28 [a].

81. U.S—Red Hook Brick Co. v. Erie R Co, C A.N.Y., 179 F.2d 601—The C. W. Crane, C.C.A N.Y, 155 F.2d 940—Seaboard Sand & Gravel Corp v. Moran Towing Corp., C.C. A N Y., 154 F 2d 399—Seaboard Sand & Gravel Corp. v American Stevedores, C C A N.Y., 151 F 2d 846—The Everett Fowler, C C.A.N.Y, 151 F.2d 662, motion denied 152 F 2d 657, certiorari denied U S v. Petterson Lighterage & Towing Corp., 66 S Ct. 963, 327 U.S. 804, 90 L Ed 1029, certiorari denied 66 S.Ct. 963, 327 U S 804, 90 L.Ed. 1029—McGeeney v. Moran Towing Corp, C.C.A N.Y., 149 F 2d 791—The Moran No. 10, D.C N.Y., 41 F. 2d 255—O'Brien Bros. v. City of New York, C C A N Y., 9 F.2d 542—Shamrock Towing Co. v. Tully & Di Napoli, D.C N.Y., 91 F.Supp 239, affirmed, C.A., Anthony O'Boyle, Inc v. The Louis W. Doyle, 187 F. 2d 872—The Benjamin Williams, D C Mass, 74 F. Supp. 119—New York Trap Rock Corp. v. Christie Scow Corp, D C.N.Y, 68 F.Supp. 392, affirmed, C C A., 162 F.2d 624—Marine Operating Co. v. Lindgren,

son may be thirdly liable[82] for the loss of, or injury to, the vessel caused by negligence in loading, stowing, or discharging a vessel, or in mooring or berthing a vessel for such purposes. A person may be held secondarily liable in the absence of a showing of any affirmative act of negligence on the part of such person,[83] although where the two parties are responsible for the injury to the vessel, each is primarily liable for one half of the damages,[84] and, if any part of the damages assessed against one of the parties cannot be collected from that party, the balance may be assessed against the other in addition to the one half that such a party is compelled to pay in the first instance.[85] Where an independent contractor is employed to do the loading, stowing, or discharging of a vessel, or the berthing or mooring of the vessel for such purposes, and, in the course of such work, injury is caused to the vessel as the result of the negligence of the independent contractor, the independent contractor alone is liable,[86] and not the employer,[87] but, if a bailment relationship exists, the employer of the independent contractor as bailee can be held accountable for the lack of proper care.[88]

b. Liability of Charterer Generally

In the absence of a contract between the parties to the contrary, the charterer is liable for the loss of, or injury to, the vessel caused by his negligence, or that of his servants or agents, or of anyone to whom he intrusts her, in loading, stowing, or discharging the cargo, or in mooring or berthing the vessel for such purposes, but he is liable only for negligence.

The liability for injury to the vessel from loading or unloading, as between the shipowner and the charterer, depends primarily on the contract,[89] and, in the absence of a contract between the parties to the contrary, the charterer is liable for the loss of, or injury to, the vessel caused by his negligence, or that of his servants or agents,[90] or of anyone to whom he intrusts her,[91] in loading, stowing, or discharging the cargo, or in mooring or berthing the vessel for such purposes, but he is liable only because of negligence[92] which was the proximate

Swinerton, Inc., D C N Y, 63 F Supp. 1007—The Henry E, D C N Y, 61 F Supp. 327, affirmed, C C A., 162 F.2d 90—The Wilmer S Nickerson, D C N.Y, 58 F Supp. 777—Seaboard Sand & Gravel Corp. v James Hughes, D C N Y., 56 F Supp. 468—U S Lighterage Corp v Petterson Lighterage & Towing Corp, D.C N Y., 51 F Supp 96, affirmed, C C A., 142 F 2d 197—Producers Pipe Line Co. v Douglas Guardian Warehouse Corp, D.C Tenn, 48 F Supp 161—The Henry McNamee, D C N.Y, 35 F Supp 936—The Millwood, D.C.N.Y, 3 F Supp. 156.

58 C.J. p 234 note 28 [a].

82. U.S.—Seaboard Sand & Gravel Corp. v. James Hughes, Inc., D.C. N.Y., 56 F Supp 468.

83. U.S —The Millwood, D.C.N Y., 3 F.Supp 156

84. U.S —Smith v. Nicholson Transit Co, D C N Y., 39 F.Supp. 795.

85. U.S.—Smith v. Nicholson Transit Co., supra.

86. U.S.—The S. C. L. No. 9, C.C.A. Pa., 114 F.2d 964.

87. U.S.—The S. C L. No. 9, supra

88. U.S.—The Comet, D.C Pa, 66 F. Supp. 231.

89. U.S.—The Gibraltar, C.C.A.Pa, 52 F.2d 787—Schoonmaker Conners Co. v. Lambert Transp. Co., C.C.A N.Y., 268 F. 102.

Liability of charterer for loss of, or injury to, vessel in general see supra § 52.

Custom

With respect to charterer's liability for injury to ship's mast, custom of hauling cargo cars to ship's side by ship gear would not relieve either party from legal responsibility.—The Gibraltar, C.C A.Pa, 52 F.2d 787

90. U.S —Roah Hook Brick Co v. Erie R Co, C A N.Y, 179 F 2d 601—Shamrock Towing Co. v Fichter Steel Corp, C C A.N.Y, 155 F 2d 69—Seaboard Sand & Gravel Corp v. American Stevedores, C.C A N Y, 151 F 2d 846—The Everett Fowler, C C A.N Y., 151 F 2d 662, motion denied 152 F 2d 657, certiorari denied U. S. v Petterson Lighterage & Towing Corp, 66 S Ct. 963, 327 U.S. 804, 90 L Ed 1029, certiorari denied 66 S Ct. 963, 327 U.S. 804, 90 L.Ed 1029—Conners Marine Co v. McClintic-Marshall Co., D C N Y, 59 F 2d 758—The Wilmer S Nickerson, D C N Y., 58 F Supp 777—The Green Leaf, D C N Y, 27 F Supp. 911—Donovan v Frederick Starr Contracting Co., D. C N Y, 290 F. 501—The Monongahela, C C A.Cal, 282 F. 17—Schoonmaker Connors Co v. Lambert Transp Co, C C.A N Y, 268 F. 102—White v. Schoonmaker-Connors Co, C C A N.J, 265 F. 465—The Olympic, D C N Y., 243 F 236, affirmed Healey v. Moran Towing & Transp Co, 253 F 334, 165 C.C.A 116

La —Interstate Transp Co. v. City of New Orleans, 28 So. 310, 52 La Ann. 1859

N Y.—Neville v. Morrison Coal & Coke Co, 207 N Y.S. 471, 211 App Div. 282.

58 C J p 230 note 91 [c], [d], [i].

Duty of care as to berth or mooring see infra subdivision c of this section

Stevedores

Where Cuban stevedores were employed by sugar company to load vessel chartered by steamship company, and vessel was damaged by falling of hatch beam into hold through negligence of stevedores when removing hatch beam, under Cuban law, by which such stevedores are employees of the charterer the steamship company charterer was held liable to vessel owner for resulting damages under charter obligation to return vessel in good order and condition, reasonable wear and tear excepted, and sugar company, as agent of charterer, was exempt from liability to vessel owner—The Rygja, D C N Y., 7 F. Supp. 85.

91. U S —Roah Hook Brick Co v. Erie R Co, C A N Y, 179 F 2d 601—Donovan v Frederick Starr Contracting Co, D C N Y, 290 F. 501—White v. Schoonmaker-Connors Co, C C.A N J, 265 F 465

N Y —Neville v Morrison Coal & Coke Co, 207 N Y S. 471, 211 App Div 282

58 C J. p 234 note 28 [a], [b]

Independent contractor

Fact that loading was being done by independent contractor does not relieve charterer from liability for negligence in loading, as he is liable for any damage to the vessel due to negligence of a third party whom he has permitted to use it or to perform any of the purposes for which it was chartered.—White v Schoonmaker-Connors Co, C C A N J., 265 F. 465.

92. U S.—Shamrock Towing Co v Fichter Steel Corp, C C.A N Y, 155 F.2d 69—The Roslyn, C C A N Y., 93 F.2d 278—Glasgow Shipowners' Co. v. Munson S. S Line, D C.Pa,

cause of the injury,[93] and he is not liable for loss or injury attributable to the negligence of the owner, or of the owner's agents or employees,[94] or inevitable accident,[95] or for the ordinary wear and tear arising from the loading or discharging of the cargo.[96]

The owner has no recourse against a charterer for loss or injury due to loading, stowage, or unloading, which is caused by the unseaworthiness of the vessel for the use to which she was put, where he knew of such use when the charter was made, and the charterer is not otherwise shown to be negligent.[97] The charterer is justified in using the vessel with her masts and rigging for the purpose for which she was chartered up to the limit of the use prescribed and no more,[98] and is not bound to return in good condition a mast which was received in bad condition,[99] but a charterer, who subjects the vessel or a part thereof to strains far above its computed working strength, without the consent of the owner or the master, is responsible for damage to such vessel or its parts.[1] A covenant to return the vessel in the condition in which it is received, necessary or reasonable wear and tear excepted, does not render the charterer liable as an insurer for damage due to loading, stowage, or discharging of the vessel.[2]

c. Berth or Mooring

A charterer, shipper, or consignee, is required to exercise ordinary or reasonable care under the circumstances to provide a safe berth or mooring for loading or discharging cargo.

Although, there is no warranty or insurance of the safety of the vessel coming to a berth or mooring,[3] a charterer, shipper, or consignee has an obligation to provide a berth or mooring which is safe for loading or discharging cargo,[4] and in the fulfillment of this obligation he is required to exercise

44 F 2d 826, affirmed, C C A, The Gibraltar, 52 F 2d 787—C. F Harms Co v. Turner Const. Co, D C N Y, 290 F. 612—The Raymond M. White, D C.N.Y, 290 F. 454, affirmed, C C A, Simmons Transp. Co. v Wright & Cobb Lighterage Co, 296 F 1023—The Monongahela, C. C.A Cal, 282 F 17.

58 C J p 233 note 25 [c], [d] (3).

93. Negligent moving of vessel

Subcharterer which may have been negligent in moving scow before cargo was trimmed but which completed movement without mishap was without fault with respect to capsizing which occurred several hours thereafter as result of improper and uneven additional loading by stevedoring company.—Seaboard Sand & Gravel Corp v. Moran Towing Corp., C C A.N.Y., 154 F 2d 399.

94. U.S —C F. Harms Co v. Turner Const Co, D C N Y, 290 F. 612—The Raymond M White, D C N Y., 290 F 454, affirmed, C.C A, Simmons Transp Co v. Wright & Cobb Lighterage Co, 296 F. 1023.

58 C J p 231 note 94 [a] (1), (5), p 235 note 30 [e]–[f], p 235 note 31 [a]

Ship trapped in ice

(1) Charterer could not be held liable because ship was caught in ice and damaged where captain decided to wait for cargo despite cold weather—The Terne, C C A N Y, 64 F.2d 502, certiorari denied Munson S S Line v Bergen Lloyd, 54 S Ct. 53, 290 U.S 635, 78 L Ed 552, and Bergen Lloyd v. Munson S S Line, 54 S Ct 63, 290 U.S 635, 78 L Ed. 552.

(2) Where port was safe when chartered steamship arrived, responsibility for waiting for cargo or departing to avoid being trapped by ice rested with captain as agent of owner and not as agent of charterer—The Terne, C C A.N Y., 64 F 2d 502, certiorari denied Munson S. S Line v Bergen Lloyd, 54 S Ct 53, 290 U S 635, 78 L Ed. 552, and Bergen Lloyd v. Munson S S Line, 54 S.Ct 63, 290 U.S. 635, 78 L Ed 552

95. U.S.—Booth v. City of New York, D C.N Y., 127 F 459.

96. U S.—The G. G Post, D C N.Y, 64 F.Supp. 191—Marine Operating Co v. Lindgren, Swinerton, Inc, D. C N Y., 63 F Supp 1007—The Federal No 1, D.C N.Y, 27 F.Supp. 907.

58 C J p 233 note 25 [c], p 235 note 35 [a].

97. U.S.—The Harper No 145, C.C A. N Y, 42 F.2d 161, certiorari denied Moran Towing & Transp Co. v. J. W. Higman Co., 51 S.Ct. 79, 282 U S 875, 75 L Ed 772

58 C J. p 235 note 32.

98. U S —Glasgow Shipowners' Co v. Munson S S Line, D C Pa, 44 F. 2d 826, affirmed, C.C.A., The Gibraltar, 52 F.2d 787.

Limitation of weight on ship's mast

Where a charter party limited the capacity of the ship's gear to three tons, there was held to be no corresponding limitation put on the ship's mast.—Scottish Nav. Co. v. Munson SS. Line, C.C A.N.Y, 10 F. 2d 708.

99. U.S —The Gibraltar, C C.A.Pa, 52 F 2d 787.

1. U S.—British Maritime Trust v. Munson SS. Line, D C.N.Y., 149 F 533.

58 C J p 230 note 91 [h].

2. U.S —U. S Lighterage Corp. v. Petterson Lighterage & Towing Corp, D C.N.Y., 51 F.Supp. 96, affirmed, C.C A., 142 F.2d 197—Donovan v. Benn Riegel Contracting & Supply Co., D C N Y., 273 F. 975.

Presumption of negligence from failure to return vessel in as good condition as received does not enlarge substantive obligations or liability.—White v. Schoonmaker-Connors Co., C C A N J., 265 F 465

3. U S —The Roslyn, C.C A N Y, 93 F.2d 278—The Mascot, D C N J, 28 F.Supp. 770—M & J Tracy v Marks, Lissberger & Son, C C A N Y., 283 F 100—Hastorf v O'Brien, N.Y, 173 F. 346, 97 C.C A. 606

Inevitable accident

(1) There is no liability where the injury to the vessel is caused by inevitable accident—Booth v City of New York, D C N.Y, 127 F. 459.

(2) Injury to vessel at berth which could have been foreseen, and might reasonably have been expected in the ordinary course of events, cannot be considered as happening through inevitable accident—Bleakley v. City of New York, D C N.Y, 139 F. 807—58 C.J. p 230 note 91 [i] (1), (2).

4. U S.—Bouker Contracting Co v. Williamsburgh Power Plant Corp, C C A N.Y., 130 F.2d 96—New York Trap Rock Corp v Christie Scow Corp, D C N Y., 68 F Supp 392, affirmed, C C A, 162 F.2d 624—The Jerr V Petrie, D C.N Y, 65 F.Supp 491—The Henry McNamee, D C N Y, 35 F.Supp. 936—The Mascot, D C N J, 28 F Supp. 770—C. F. Harms Co. v. Turner Const. Co., D.C N Y, 290 F. 612, affirmed, C.C.A., 3 F 2d 591—Donovan v. Frederick Starr Contracting Co., D C N Y., 290 F 501—Hastorf v. O'Brien, N.Y., 173 F. 346, 97 C C A. 606—Look v Portsmouth K & Y. St. Ry., D.C. Me, 141 F. 182.

N.Y —Neville v. Morrison Coal & Coke Co., 207 N.Y.S. 471, 211 App Div. 282.

68 C.J. p 228 note 96.

ordinary or reasonable care under the circumstances,[5] which means that he must exercise reasonable diligence in ascertaining the condition of the berth,[6] and give notice of any obstruction or danger;[7] and he is liable for any damage to the vessel resulting from a failure in this respect.[8]

Even though the employees or officers of the owner of the vessel may be justified in assuming the safety of the berth or mooring where it is designated by the person entitled to designate it,[9] they have a duty of care, and cannot knowingly intrude on danger,[10] and the negligence of employees of the owner proximately causing the injury may wholly preclude a recovery,[11] although their contributory negligence will not preclude recovery.[12] Where the master is the servant of the owner, and he has received express assurance from the charterer or consignee that the berth is fair and relies on it, he is not at fault in not sounding,[13] but if he receives such assurance and does not rely on it and undertakes to sound for himself, both are at fault,[14] and if he gets no express assurance, he must sound.[15] In the application of these rules, liability has been assessed for injury to vessels resulting from an uneven bottom[16] or from submerged obstructions.[17]

5. U S.—Waldie v. Steers Sand & Gravel Corp, C C.A.N.Y, 151 F.2d 129—The Mascot, D.C N.J, 28 F. Supp. 770—Northwestern Fire & Marine Ins Co v Seaboard Sand & Gravel Corporation, D C.N Y, 2 F Supp 1019, affirmed, C.C A., 64 F 2d 361—Hastorf v O'Brien, N.Y, 173 F. 346, 97 C C A 606—Look v Portsmouth K & Y. St. Ry., D C Me, 141 F 182.

68 C.J. p 228 notes 96–99.

Weather conditions

(1) One directing loading of vessel is under no obligation to ascertain facts respecting weather conditions by calling up weather bureau station somewhat remote where wind conditions are radically different if there are no indications of storm where vessel then is.—Northwestern Fire & Marine Ins Co v. Seaboard Sand & Gravel Corporation, D.C.N Y, 2 F.Supp. 1019, affirmed, C.C.A., 64 F.2d 361

(2) Charterer, in mooring empty scow to buoy when weather conditions were threatening to knowledge of charterer's officers and when scow could have been taken into harbor, was held solely at fault for loss of scow when it broke away and went on rocks—Northwestern Fire & Marine Ins Co v Seaboard Sand & Gravel Corporation, supra

6. U S.—The Mascot, D.C.N J., 28 F Supp. 770.

N.Y.—Neville v. Morrison Coal & Coke Co, 207 N Y S. 471, 211 App Div. 282

68 C.J p 228 note 97.

Mooring at stake boat

Duty which charterer of scow owed to owner was to use reasonable diligence to ascertain conditions at stake boat where scow was moored at time of injury to the end that the scow would have a safe berth.—The Roslyn, C C A N.Y., 93 F 2d 278.

7. U S.—The Mascot, D.C.N.J., 28 F. Supp. 770.

N.Y—Neville v. Morrison Coal & Coke Co, 207 N.Y.S. 471, 211 App. Div 282

68 C J. p 228 note 98.

8. U S—Waldie v. Steers Sand & Gravel Corp, C C.A.N.Y., 151 F. 2d 129—The Roslyn, C C.A N.Y., 93 F 2d 278—Schoonmaker-Conners Co v. New York Tidewater Gravel Corp., C C.A N Y., 11 F 2d 471—The Jerry V. Petrie, D C.N.Y., 65 F Supp. 491—The Dorothy G., D C N Y, 55 F Supp 318—L. R Connett & Co v. The Republic No. 5, D. C N Y, 43 F Supp. 245—The Mascot, D C N J, 28 F Supp. 770—M & J. Tracy v. Marks, Lissberger & Son, C.C A N Y, 283 F 100—Acme Scow Corporation v Phoenix Sand & Gravel Co, D C N Y, 271 F 1014—Dailey v City of New York, D C. N.Y, 128 F. 796

58 C J. p 230 note 91 [g], [i].

Assignees of bills of lading of the cargo of a vessel are under the same duty as the original consignees with respect to furnishing the vessel with a suitable place at which to discharge, and are liable for damages sustained by her by reason of their having assigned her to an unsafe berth—Carroll v. Holway, D.C.Me, 158 F 328.

Assumption of risk provision

Corporation, with which scow owner had contracted for removal of ashes to be loaded on scow by corporation and removed by owner, could not escape liability for loss of scow by sinking due to bad berth in which it was placed by corporation's employees on the ground of "assumption of risk" by the owner by virtue of contract provision whereby owner assumed all responsibility and risk incident to the work contemplated to be done by owner, particularly where contract further provided owner should not be liable for any negligence of the corporation or its employees.—Bouker Contracting Co v. Williamsburgh Power Plant Corp, C.C.A.N.Y., 130 F 2d 96.

Negligence not shown

U S.—The Cedar Cliff, C C.A.N.Y., 149 F.2d 964—The Cobalt, D C.N.Y., 26 F Supp. 5, affirmed, C.C.A, C. W. Crane & Co. v. Charles Dreifus Co, 107 F 2d 1011—Wright & Cobb Lighterage Co. v. New England N. Co, D C N Y., 189 F. 809, affirmed 204 F. 762, 125 C C A 129.

58 C J. p 233 note 25 [d]

9. U S—The A. F. Co. No 4, D C N.Y, 54 F 2d 145—The Henry McNamee, D C N.Y, 35 F.Supp 936

10. U.S—The Mascot, D.C N J, 28 F Supp. 770

11. U S—The Cobalt, D C N.Y., 26 F. Supp. 5, affirmed, C.C A., C. W. Crane & Co. v Charles Dreifus Co., 107 F 2d 1011—Elwell v. Tucker, Pa., 260 F. 365, 171 C.C.A. 231.

Knowledge of officers

(1) Owner of ship, whose officers failed to keep it proper distance from wharf, cannot recover from shippers for damages to bottom and bilge keel because of projections of which officers knew—Arbor Shipping Co v. De La Guardia, Inc., C C A N Y., 54 F 2d 984.

(2) Facts that ship's officers took their own soundings, became familiar with berth, and accepted it as satisfactory for loading cargo, precluded recovery from shippers by owner for damage due to foul berth.—Arbor Shipping Co. v. De La Guardia, Inc., supra.

12. U.S—Bouker Contracting Co. v. Williamsburgh Power Plant Corp., C C A.N.Y., 130 F.2d 96

Apportionment of damages see infra subdivision e of this section

Contributory negligence not shown

U S—The Mascot, D C N J, 28 F. Supp. 770.

13. U S—Cities Service Transp Co v. Gulf Refining Co, C C A N Y., 79 F 2d 521—The Henry McNamee, D.C N Y., 35 F Supp 936

14. U.S—Cities Service Transp. Co v. Gulf Refining Co, C.C A N Y, 79 F 2d 521.

15. U S—Cities Service Transp Co. v. Gulf Refining Co, C.C.A N Y, supra.

16. U S—The West Branch, D C N Y., 43 F 2d 834—The Jerry V Petrie, D.C N.Y, 65 F Supp 491.

17. U.S.—Kenny v. Venetian Contracting Co., D C.N.Y., 60 F 2d 1053

Where a charterer breaks a covenant to provide a proper and suitable berth, he is liable for the resulting damage to the vessel independently of any negligence in failing to ascertain that the berth was unsuitable,[18] as his liability in such a case does not rest on an implied contract, as does that of a wharfinger who is bound only to exercise reasonable care and diligence, but on a breach of the express terms of the charter thereby subjecting him to liability for the ensuing damage.[19] In like manner, where the charterer guarantees a particular depth of water alongside the dock to which the vessel is to be sent, he may be liable for damages sustained by the vessel where such depth of water is not afforded.[20] However, although there has been a breach of the covenant by the charterer to select a place of loading where vessel could always lie afloat, if the damage to the ship has been brought about by the act of the owner of the vessel or someone for whom the owner was responsible, the charterer is not liable.[21]

While a consignee, who maintains a wharf on which to receive goods for himself, is under the same duty to exercise care and skill as is a wharfinger who maintains a wharf for the purpose of collecting wharfage,[22] a distinction has been suggested between the standard of care required of a consignee and a wharfinger,[23] although the difference does not rest on any legal distinction that can be drawn between their respective standards of duty,[24] as both are bound to the exercise of care and diligence under the circumstances.[25] The means of ascertaining the existence of probable, or even possible, danger are not the same,[26] and the duty rests on a wharfinger to watch, maintain, and keep in order that which he asks the public to pay him for the use of, while the consignee is bound to acquaint himself with the reputation and commonly known characteristics of the wharf offered for hire.[27] A consignee has a right to act on the reputation of the wharf.[28]

d. Actions

In actions for loss of, or injury to, a vessel from loading, stowing, or discharging cargo, or from berthing or mooring the vessel for such purposes, general rules in civil actions, and, more particularly, those applied in

18. U.S.—Eastern Massachusetts Street Ry. Co. v. Transmarine Corp., C.C.A.Mass., 42 F.2d 58—The Mascot, D.C.N.J., 28 F.Supp. 770—Constantine & Pickering S. S. Co. v. West India S. S. Co., D.C.N.Y., 199 F. 464—Merritt v. Sprague, D.C.Me., 191 F. 627—Carroll v. Holway, D.C.Me., 158 F. 328.
58 C.J. p. 233 note 21 [a].

Safe place
In clause of charter party requiring charterer to procure safe "place" for discharge of cargo, quoted word meant spot selected to drop anchor plus area over which tanker might swing on tide, and charterer's duty was not fulfilled merely by selecting area containing safe and unsafe berths since clause required charterer to select safe berth in such area. —Park S. S. Co. v. Cities Service Oil Co., C.A.N.Y., 188 F.2d 804, certiorari denied Cities Service Oil Co. v. Park S. S. Co., 72 S.Ct. 87, 342 U.S. 862, 96 L.Ed. ——.

Employment of pilot
Where under safe berth clause of charter party authorizing charterer to discharge cargo at any safe place charterer was required to procure specific anchorage within bay containing both safe and unsafe berths, for purposes of determining charterer's liability for damages for grounding of vessel in such bay, pilot, employed by owner of vessel, in selecting anchorage in bay would be considered to be performing charterer's work as a "borrowed servant."—Park S. S. Co. v. Cities Service Oil Co., C.A.N.Y., 188 F.2d 804, certiorari denied Cities Service Oil Co. v. Park S. S. Co., 72 S.Ct. 87, 342 U.S. 862, 96 L.Ed. ——.

Guaranty of depth of water
U.S.—P. Dougherty Co. v. Bader Coal Co., D.C.Mass., 244 F. 267.
58 C.J. p. 236 note 41 [a].

19. U.S.—The Halo, D.C.N.Y., 9 F. Supp. 963, affirmed, C.C.A., Cities Service Transp. Co. v. Gulf Refining Co., 79 F.2d 521—Constantine & Pickering S. S. Co. v. West India S. S. Co., D.C.N.Y., 199 F. 964

20. U.S.—P. Dougherty Co. v. Bader Coal Co., D.C.Mass., 244 F. 267.
58 C.J. p. 236 note 41.

21. U.S.—The Halo, D.C.N.Y., 9 F. Supp. 963, affirmed, C.C.A., Cities Service Transp. Co. v. Gulf Refining Co., 79 F.2d 521—The Tynebridge, D.C.Va., 6 F.Supp. 941.

Overloading by master
(1) Charterer is not liable for damages which did not result from unsafe berth but from master's loading of too much cargo thereon to move it safely at low tide and failure to wait until water was sufficiently deep to enable him to move it safely.—The Tynebridge, supra.

(2) Charterer could not escape liability for damage to steamer caused by grounding on ground that grounding was caused by master who took excessive quantity of cargo on board, where owner was obliged to receive "a full and complete cargo" and master took on 81,000 barrels which was within warranted capacity of 75,000 barrels, with "10 per cent. margin more or less."—The Halo, D.C.N.Y., 9 F. Supp. 963, affirmed, C.C.A., Cities Service Transp. Co. v. Gulf Refining Co., 79 F.2d 521.

22. U.S.—Kenny v. Venetian Contracting Co., D.C.N.Y., 60 F.2d 1053—Kenny v. Balbach Smelting & Refining Co., D.C.N.Y., 6 F.2d 671.

Consignee and wharfinger were under duty to exercise due and reasonable care in discharging cargo from barge.—O'Boyle, Inc., v. City of New York, D.C.N.Y., 85 F.Supp. 858.

23. U.S.—Waldie v. Steers Sand & Gravel Corp., C.C.A.N.Y., 151 F.2d 129—The Mascot, D.C.N.J., 28 F. Supp. 770—M. & J. Tracy v. Marks, Lissberger & Son, C.C.A.N.Y., 283 F. 100—Conklin v. R. P. & J. H. Staats Co., N.J., 161 F. 897, 88 C.C.A. 593.

24. U.S.—The Mascot, D.C.N.J., 28 F.Supp. 770—M. & J. Tracy v. Marks, Lissberger & Son, C.C.A.N.Y., 283 F. 100.

25. U.S.—Waldie v. Steers Sand & Gravel Corp., C.C.A.N.Y., 151 F.2d 129—The Mascot, D.C.N.J., 28 F. Supp. 770—M. & J. Tracy v. Marks, Lissberger & Son, C.C.A.N.Y., 283 F. 100.

26. U.S.—The Mascot, D.C.N.J., 28 F.Supp. 770—M. & J. Tracy v. Marks, Lissberger & Son, C.C.A.N.Y., 283 F. 100.

27. U.S.—The Mascot, D.C.N.J., 28 F.Supp. 770—M. & J. Tracy v. Marks, Lissberger & Son, C.C.A.N.Y., 283 F. 100.

28. U.S.—M. & J. Tracy v. Marks, Lissberger & Son, supra.
68 C.J. p. 228 note 99.

admiralty where the suit is brought as a proceeding in admiralty, apply.

In actions for loss of, or injury to, a vessel from loading, stowing, or discharging cargo, or from berthing or mooring the vessel for such purposes, general rules in civil actions, and, more particularly, those applied in admiralty where the suit is brought as a proceeding in admiralty, apply [29]

Presumptions and burden of proof In accordance with general rules, the burden is on the owner of the vessel in an action for the loss of, or injury to, a vessel caused by negligence in loading, stowing, or discharging cargo, or in berthing or mooring the vessel for such purposes, to establish all the facts essential to the cause of action.[30] As a general rule, negligence is never presumed,[31] although the nature of the damage to the vessel may spell negligence [32] Thus, the mere occurrence of a fire with resultant injuries during the loading, stowing, or discharging of the cargo does not raise a presumption of negligence,[33] and, without any showing of negligence, does not make out a prima facie case,[34] but the doctrine of res ipsa loquitur has been held to apply where the circumstances under which the fire originated and spread are such as to show negligence in loading or stowing.[35] In like manner, where the charter is a mere contract of affreightment, there is no presumption of negligence against the charterer rendering him liable for unexplained injury to the vessel during loading,[36] the doctrine of res ipsa loquitur does not apply,[37] and the burden is on the shipowner to prove the negligence asserted as the cause of the injury, not on the charterer to disprove it [38] Furthermore, it has been stated that when a loaded vessel capsizes in calm water unseaworthiness and improper loading are the two possible causes for capsizing,[39] and, hence, when a seaworthy or tight boat capsizes in calm water, the inference is almost irresistible that her action is due to the disposition of her load,[40] and, with the elimination of unseaworthiness as a possible cause, a strong presumption remains that improper loading was the cause [41]

Where the delivery of the vessel constitutes a bailment, as where a vessel is demised to the charterer, there must be sufficient evidence to warrant a finding of negligence in the loading, stowing, or discharging of the cargo, or in berthing or mooring the vessel for such purposes, in order to fix liability on the charterer or bailee,[42] and the ulti-

29. Persons entitled to sue

U S —Westchester Fire Ins Co v Buffalo Housewrecking & Salvage Co., D C N Y, 40 F Supp 378, affirmed, C C A, 129 F 2d 319

Pleadings

Ala —Burton v. May, 103 So. 46, 212 Ala. 435

58 C J p 253 note 61 [b]

Issues, proof, and variance

U.S.—O'Boyle v. City of New York, D.C.N.Y., 85 F Supp. 858

30. U.S.—Waldie v. Steers Sand & Gravel Corp, C C A N Y., 151 F.2d 129—Arbor Shipping Co v De La Guardia, Inc., C C A N.Y., 54 F 2d 984—O'Brien Bros. v. City of New York, D C N.Y, 36 F 2d 102, affirmed, C C A, 36 F 2d 103—O'Brien Bros v City of New York, D C N. Y, 7 F.2d 485, affirmed, C C A, 7 F. 2d 488—The Daly No 40, D C N Y., 76 F.Supp 700—The H. S. No. 60, D.C.N.Y., 52 F Supp. 606.

Seaworthy or undamaged vessel

Burden is on owner to show vessel seaworthy or undamaged when delivered for loading —The Harper No 145, C C.A.N.Y., 42 F.2d 161, certiorari denied Moran Towing & Transp. Co. v. J. W. Higman Co, 51 S.Ct. 79, 282 U S. 875, 75 L.Ed. 772 —Kelly v. Overseas Shipping Co, D. C.N Y, 7 F.2d 732, affirmed, C.C.A, 7 F 2d 734—The Chippewa, D.C N.Y., 11 F Supp. 376.

31. U S —Glasgow Shipowners' Co v. Munson S S. Line, D.C.Pa., 44 F.2d 826, affirmed, C C A, The Gibraltar, 52 F 2d 787—O'Brien Bros v City of New York, D C N Y, 36 F 2d 102, affirmed, C C A, 36 F 2d 103—U S Lighterage Corporation v Petterson Lighterage & Towing Corp, D C N Y, 51 F Supp 96, affirmed, C.C A, 142 F.2d 197.

32. U S —The Benjamin Williams, D C Mass., 74 F Supp. 119—Marine Operating Co v. Lindgren, Swinerton, Inc, D C.N.Y, 63 F Supp 1007

33. U S —O'Brien Bros v. City of New York, D C.N.Y, 36 F.2d 102, affirmed, C C A, 36 F 2d 103

34. U.S —O'Brien Bros. v. City of New York, D C N Y, 7 F 2d 485, affirmed, C.C.A., 7 F 2d 488—U. S Lighterage Corporation v Petterson Lighterage & Towing Corp., D C N Y, 51 F Supp. 96, affirmed, C.C A, 142 F 2d 197.

35. U S —Bartley Scow Corporation v. J. V. Petrie & Sons, C C A N Y, 37 F 2d 58.

36. U S —Glasgow Shipowners' Co. v. Munson S. S Line, D C Pa, 44 F 2d 826, affirmed, C.C.A, The Gibraltar, 52 F.2d 787.

37. U.S.—The Gibraltar, C C.A.Pa., 52 F.2d 787

38. U.S —Glasgow Shipowners' Co. v Munson S S. Line, D.C.Pa., 44 F 2d 826, affirmed, C.C A, The Gibraltar, 52 F 2d 787

58 C J. p 257 note 89 [a].

39. U.S —The S. C. L No. 9, C.C.A. Pa, 114 F.2d 964

Presumption of unseaworthiness

(1) The presumption of unseaworthiness arising when a vesse sinks in calm water is merely a portion of the evidence and must be considered in the light of other evidence —The C W Crane, D C N Y, 64 F Supp 627, affirmed, C.C.A, 155 F.2d 940

(2) If any presumption of unseaworthiness arose from occurrence of accident, such presumption was overcome by evidence establishing that capsizing was caused by improper and uneven loading —Seaboard Sand & Gravel Corp. v Moran Towing Corp, C C A N.Y., 154 F.2d 399

40. U S —The S. C L No 9, C.C.A Pa, 114 F 2d 964—O'Brien Bros v City of New York, C C.A.N.Y, 9 F.2d 542—The Adah, N.Y., 258 F. 377, 169 C.C.A 393

Sufficiency to overcome opinion evidence

A presumption that improper loading caused capsizing of vessel which resulted from elimination of unseaworthiness as a possible cause was held sufficient to overcome opinion of expert witness that it was physically impossible for vessel to capsize as result of manner in which she was loaded —The S C L. No 9, C C.A Pa, 114 F.2d 964.

41. U.S —The S C L No 9, supra

42. U S.—Richmond Sand & Gravel Corp v Tidewater Const. Corp, C.A Va, 170 F 2d 392—The Monongahela, C.C.A.Cal, 282 F. 17—

mate burden of proof rests on the owner to show negligence;[43] but such necessary evidence can be supplied by presumption, where the owner proves delivery in a good or seaworthy condition and a failure to return or a return in a damaged condition,[44] as proof of delivery in a good or seaworthy condition and the failure to return or a return in a damaged condition brings the presumption into operation and makes out a prima facie case of negligence.[45] The burden of introducing evidence in avoidance thereof showing freedom from negligence is then on the charterer,[46] and if he introduces proof which is substantial enough to meet the presumption, or if he presents evidence to show what happened and the evidence shows no negligence, or more strictly fails to show negligence, the presumption disappears.[47] Proof by the owner of damage to a demised vessel and that it was moored in an unsafe place for the purpose of unloading makes out a prima facie case of negligence,[48] and it is then incumbent on the charterer to come forward with proof that the accident happened notwithstanding the exercise of reasonable care.[49]

Admissibility, weight and sufficiency of evidence. In actions for loss of, or injury to, a vessel from loading, stowing, or discharging cargo, or from berthing or mooring the vessel for such purposes, general rules in civil actions, and, more particularly, those applied in admiralty where the suit is brought as a proceeding in admiralty, apply with respect to the admissibility of evidence,[50] and the weight and sufficiency of evidence.[51] Accordingly, under the

Schoonmaker-Conners Co. v. Lambert Transp. Co, C C A N Y, 268 F. 102.

Presumptions and burden of proof in actions against charterer for loss of, or injury to, vessel generally see supra § 56.

43. U.S.—Richmond Sand & Gravel Corp. v. Tidewater Const Corp, C A.Va., 170 F 2d 392—Seaboard Sand & Gravel Corp v American Stevedores, C C A N Y, 151 F.2d 846—The Roslyn, C C A N.Y., 93 F.2d 278—The Moran No 10, D C N Y, 41 F.2d 255—New York Trap Rock Corp. v. Christie Scow Corp., D C. N Y, 68 F Supp 392, affirmed, C C. A., 162 F 2d 624—C. F. Harms Co v. Turner Const Co, D C N Y, 290 F. 612—The Monongahela, C.C.A. Cal., 282 F. 17.

44. U.S.—Seaboard Sand & Gravel Corp. v. American Stevedores, C C A N Y., 151 F.2d 846—The Roslyn, C C A.N.Y., 93 F 2d 278—C. F Harms Co. v. Turner Const Co, D C N Y., 290 F. 612—The John Carroll, C C.A.N Y, 275 F 302—Schoonmaker-Conners Co. v. Lambert Transp. Co, C C A.N.Y., 268 F 102

45. U.S —Richmond Sand & Gravel Corp. v. Tidewater Const Corp, C. A Va, 170 F 2d 392—The C W. Crane, C C A N.Y, 155 F 2d 940—Seaboard Sand & Gravel Corp. v. American Stevedores, C C.A N Y, 151 F 2d 846—Waldie v Steers Sand & Gravel Corp, C C A N.Y., 151 F 2d 129—The Roslyn, C C.A N. Y., 93 F.2d 278—C. F. Harms Co v. Turner Const. Co, D C N.Y., 290 F. 612—The Monongahela, C C A. Cal, 282 F. 17—Schoonmaker Conners Co. v. Lambert Transp Co, C.C A.N.Y., 268 F. 102.

58 C J p 256 note 84 [c]

46. U.S.—Seaboard Sand & Gravel Corp. v. American Stevedores, C C. A.N Y, 151 F.2d 846—The Roslyn, C.C.A N.Y., 93 F.2d 278—The Gibraltar, C C A Pa., 52 F.2d 787—Shamrock Towing Co v. Tully & Di Napoli, D C N.Y., 91 F Supp 239, affirmed, C A, Anthony O'Boyle, Inc, v The Louis W Doyle, 187 F. 2d 872—New York Trap Rock Corp. v Christie Scow Corp, D.C.N.Y, 68 F.Supp 392, affirmed, C.C.A., 162 F 2d 624—C F. Harms Co v. Turner Const Co, D.C.N.Y, 290 F. 612—The John Carroll, C C A.N.Y, 275 F. 302—Schoonmaker Conners Co v Lambert Transp. Co., C.C.A N.Y., 268 F 102

47. U S.—Richmond Sand & Gravel Corp v. Tidewater Const Corp, C A Va, 170 F 2d 392—Seaboard Sand & Gravel Corp v. American Stevedores, C C A.N Y, 151 F.2d 846—The Roslyn, C C A N.Y., 93 F.2d 278

Proof of due care

Proof that bailee exercised due care in all that it did with respect to bailed scow not only served to rebut presumption of negligence of bailee but also tended to destroy bailor's initial proof that article was delivered in good condition.—Richmond Sand & Gravel Corp. v. Tidewater Const Corp, C A.Va., 170 F 2d 392

Evidence held sufficient to rebut presumption

U S —Richmond Sand & Gravel Corp. v Tidewater Const. Corp, supra—The Roslyn, C.C A N Y, 93 F 2d 278

Evidence held insufficient to rebut presumption

U S —Seaboard Sand & Gravel Corp. v American Stevedores, C.C.A N.Y., 151 F 2d 846—The John Carroll, C. C A.N Y., 275 F. 302.

48. N Y —Neville v. Morrison Coal & Coke Co, 207 N.Y S. 471, 211 App Div 282

49. N.Y —Neville v. Morrison Coal & Coke Co., supra.

50. U S —Seaboard Sand & Gravel Corp v. Moran Towing Corp., C.C. A.N.Y., 154 F 2d 399.

58 C.J. p 257 note 95 [a] (5), [c] (2), [d] (3).

51. **Preponderance of evidence** is necessary to prove allegations.—The Cleary Bros. No. 61, C.C A.N.J., 61 F 2d 393—The Daly No 40, D.C.N.Y., 76 F Supp 700.

Evidence held sufficient

(1) To justify holding stevedores employer primarily liable and charterer secondarily liable for fire damage to scow.—U. S. Lighterage Corp v Petterson Lighterage & Towing Corp., C C A.N.Y., 142 F 2d 197.

(2) To show capsizing was not caused or contributed to by subcharterer.—Seaboard Sand & Gravel Corp v Moran Towing Corp., C.C.A N Y, 154 F 2d 399.

(3) To authorize an inference that fire started when stevedores were negligently permitted to smoke aboard scow so as to render their employer liable for damage.—U. S Lighterage Corp v. Petterson Lighterage & Towing Corp, D C.N Y., 51 F Supp 96, affirmed, C.C A, 142 F.2d 197.

(4) To show damages were only such as were rightfully classified as ordinary "wear and tear," for which respondents were not liable.—The G G Post, D.C.N.Y., 64 F Supp. 191.

(5) To show it was practice of dredging company when it had loaded scow which had no bargee on board, and had towed it out to stakeboat, to assign a dredge watchman to pump out scow.—F. E Grauwiller Transp Co. v. Exner Sand & Gravel Corp., C.C.A.N Y., 162 F.2d 90.

(6) To show that vessel could be repaired —Zeller Marine Corp. v. Nessa Corp., C.C.A.N.Y., 166 F 2d 32.

(7) To show amount of damages.—Producers Pipe Line Co. v. Douglas Guardian Warehouse Corp., D.C Tenn, 48 F Supp. 161.

(8) To show other matters.—Salmons Dredging Corp. v. Herma, C.A. S C., 180 F.2d 233—Scottish Nav. Co. v. Munson S. S. Line, D.C.N.Y., 60 F.

facts and circumstances of the particular case evidence has been held sufficient or insufficient to establish seaworthiness[52] or unseaworthiness,[53] to establish negligence in loading, stowing, or discharging cargo,[54] or in using equipment,[55] or in mooring or berthing[56] for such purposes; or to establish negligence on the part of the owner of the vessel[57]

Trial. In actions for loss of, or injury to, a vessel from loading, stowing, or discharging the vessel, or from berthing or mooring the vessel for such purposes, general rules governing trials in civil actions, and, more particularly, those applied in admiralty where the suit is brought as a proceeding in admiralty, apply.[58]

e. Damages

The principle of compensation governing the measurement of damages generally is applicable in the case of the loss of, or injury to, a vessel from loading, stowing, or discharging cargo, or from berthing or mooring the vessel for such purposes. However, in admiralty, where the vessel injured is equally at fault the damages will be divided or apportioned.

2d 101, affirmed, C C A, 10 F 2d 708—The Zeller No 12, D C.N Y., 70 F. Supp 476—New York Trap Rock Corp. v Christie Scow Corp, D C N. Y, 68 F Supp 392, affirmed, C C A., 162 F.2d 624—Producers Pipe Line Co. v. Douglas Guardian Warehouse Corp, D C Tenn., 48 F Supp 161—58 C J p 258 note 98 [g] (32)

Evidence held insufficient to justify recovery

U S —O'Brien Bros. v. City of New York, D.C N.Y., 7 F.2d 485, affirmed, C C.A., 7 F.2d 488—The H. S. No 60, D C.N.Y., 52 F.Supp. 606—The Chippewa, D.C.N.Y., 11 F Supp. 376 —Bartley v. Borough Development Co, D.C.N.Y., 214 F. 296.

52. Evidence held sufficient

U S —The C. W. Crane, C C.A.N Y, 155 F.2d 940—The S. C. L. No. 9, C C A.Pa., 114 F 2d 964—Kelly v. Overseas Shipping Co., D.C.N.Y., 7 F 2d 732, affirmed, C.C.A., 7 F 2d 734—O'Donnell Transp Co. v. Tidewater Iron & Steel Co., D C.N J, 90 F.Supp. 953, affirmed, C A, 185 F. 2d 675—The G. G. Post, D.C.N.Y, 64 F Supp 191.

53. Evidence held sufficient

U S —Scottish Nav. Co. v. Munson S. S. Line, D.C.N Y., 60 F 2d 101, affirmed, C.C A., 10 F 2d 708—New York, etc, Co. v. Delaware, etc, R. Co., C C.A.N.Y., 23 F 2d 487—The Daly No. 40, D.C N Y., 76 F. Supp 700—Penn Builders & Supply Co. v Braeburn Steel Co., C.C. A.Pa, 274 F 794—The Rosalie McLoughlin, D.C N.Y., 186 F. 255

58 C.J p 258 note 98 [g] (45), (46).

Evidence held insufficient

U S.—Salmons Dredging Corp. v Herma, C.A.S.C., 180 F 2d 233.

54. Evidence held sufficient

U.S —Seaboard Sand & Gravel Corp. v. Moran Towing Corp., C.C.A N.Y., 154 F.2d 399—The S. C. L. No 9, C C A.Pa, 114 F 2d 964—Florida Gravel Co. v. Tampa Sand & Shell Co, C.C.A Fla., 49 F.2d 266—Kelly v. Overseas Shipping Co, D.C.N.Y., 7 F.2d 732, affirmed, C.C.A., 7 F 2d 734—O'Donnell Transp. Co. v. Tidewater Iron & Steel Co, D C.N J., 90 F Supp. 953, affirmed, C.C.A., 185 F. 2d 675—The Benjamin Williams, D C Mass, 74 F.Supp 119—The Scipio, D.C N Y, 73 F Supp 402—The G G. Post, D C N Y, 64 F Supp. 191 —Marine Operating Co. v. Lindgren, Swinerton, Inc, D.C N Y, 63 F Supp. 1007—The Wilmer S Nickerson, D.C.N Y, 58 F Supp. 777—Smith v. Nicholson Transit Co, D.C N Y, 39 F Supp. 795—The Green Leaf, D C.N Y., 27 F Supp 911—Schoonmaker-Conners Co v. Lambert Transp. Co, C.C.A.N.Y., 268 F. 102

La —Interstate Transp Co. v. City of New Orleans, 28 So. 310, 52 La Ann. 1859.

Evidence held insufficient

U S —O'Brien Bros v. City of New York, D C N Y., 36 F 2d 102, affirmed, C C A., 36 F.2d 103—Stockard S. S Corp. v Jules S Sottnek Co, D.C N Y, 99 F.Supp 653—Compania De Vapores Arauco Panamena, S. A. v. Moore-McCormack Lines, D C N.Y., 91 F Supp. 545—Christie Scow Corp v. U S, D C.N Y, 85 F Supp 584—The Federal No. 1, D C N.Y., 27 F.Supp 907—Hastorf Contracting Co. v. Standard Oil Co. of New Jersey, C C A N.Y., 272 F. 884—White v Schoonmaker-Connors Co, C C A N.J., 265 F. 465.

58 C.J. p 258 note 98 [h] (22), (41)

55. Evidence held sufficient

U S.—The L. & W B C. Co No. 11, D C N.Y., 53 F.Supp 326—Smith v Nicholson Transit Co., D C N Y., 39 F.Supp. 795

Evidence held insufficient

U S.—The Gibraltar, C.C.A.Pa., 52 F 2d 787—Stockard S S. Corp. v. Jules S Sottnek Co, D C N Y., 99 F.Supp 653.

56. Evidence held sufficient

U S —O'Boyle, Inc, v. City of New York, D C N.Y, 85 F Supp 858—The Zeller, No. 12, D C N Y, 70 F.Supp 476—The Jerry V. Petrie, D C N Y, 65 F Supp. 491—The Dorothy G., D C N Y, 55 F Supp. 318—The Henry McNamee, D C.N Y., 35 F.Supp 936.

Evidence held insufficient

U S.—Park S. S. Co. v Cities Service Oil Co., C.A.N.Y, 188 F 2d 804, certiorari denied Cities Service Oil Co. v. Park S S Co, 72 S.Ct. 87, 342 U S 862, 96 L Ed — —The Cleary Bros No. 61, C C A N.J, 61 F 2d 393—Arbor Shipping Co. v De La Guardia, Inc, C C A N Y., 54 F 2d 984—The Tynebridge, D C.Va, 6 F Supp 941.

57. Evidence held to show negligence

U S —Thorne, Neale & Co v. Reading Co, C C.A N.Y, 87 F.2d 694, certiorari denied Reading Co v Thorne Neal & Co, 58 S.Ct 10, 302 U S 690, 82 L.Ed 533—Bouchard Transp Co. v. Reading Co, C C.A N Y, 87 F 2d 694, certiorari denied Reading Co. v. Bouchard Transp Co, 58 S Ct. 10, 302 U S 690, 82 L Ed 533—Producers Pipe Line Co v. Douglas Guardian Warehouse Corp, D C Tenn, 48 F.Supp 161.

Evidence held to show absence of negligence

U.S —Seaboard Sand & Gravel Corp v Moran Towing Corp, C C.A N.Y., 154 F 2d 399

58. Instructions

(1) Should be confined to the issues —Dunwoody v Saunders, 39 So 965, 50 Fla. 202.

(2) Held proper.—Clyde v. Wood, 179 N.Y S 252, 189 App.Div. 737—58 C J. p 261 note 9 [b] (8).

(3) Held improper —Dunwoody v. Saunders, supra

Questions for court and jury

N Y.—Merrick, etc, Co v Terry, etc, Co, 174 N.Y.S 381, 106 Misc. 247 58 C.J. p 261 note 11 [d] (10), (11)

Judgment or decree

Where owner of scow in good repair, chartered it to scow company, which chartered it to stevedore company, which delivered it at bulkhead of concrete company to be loaded with concrete blocks, and scow became damaged while being loaded with concrete blocks by concrete company because of uneven bottom in the berth, owner of scow was entitled to a decree for the damage against scow company, scow company was entitled to decree over against stevedore company, and stevedore company was entitled to decree over against concrete company —The Jerry V. Petrie, D C.N.Y., 65 F.Supp. 491.

The principle of compensation governing the measurement of damages generally is applicable in the case of the loss of, or injury to, a vessel from loading, stowing, or discharging cargo, or from berthing or mooring the vessel for such purposes [59] If the vessel is totally lost, the measure of damages is the market value of the vessel at the time of her destruction.[60] Restitution or compensation is the measure of damages where the injured vessel is not a total loss, and repairs are practicable,[61] that is, the owner is entitled, in a proper case, to recover what it would cost to restore her to as good a condition as she was in before she was injured.[62] However, as the owner must do everything which may reasonably be expected of him to minimize his damage,[63] an award of damages must be calculated with recognition of this obligation to minimize damages,[64] and damages based on the replacement of an injured portion of the vessel will be denied where repairs made at a substantially lower cost will render her as serviceable as before.[65] The actual damages properly proved may be recovered although the vessel is not repaired [66] Damages may be awarded on satisfactory evidence of cost of reasonable and proper repairs,[67] even though such repairs have not been made,[68] and may never be made,[69] or the owner has made temporary repairs.[70]

Mutual fault. In admiralty, where the vessel injured is equally at fault the damages will be divided or apportioned.[71]

B. CONTRACTS OF AFFREIGHTMENT

§ 106. In General

a. Nature of contract
b. Form, requisites, and validity
c Construction
d. Rescission or cancellation

a. Nature of Contract

Contracts to carry or transport goods by water are contracts of affreightment.

Contracts of affreightment are maritime in nature,[72] and contracts to carry or transport goods by water are contracts of affreightment.[73] Such a con-

59. U.S.—The Zeller No 12, D C.N Y, 68 F.Supp. 795, affirmed, C C A, Zeller Marine Corp v. Nessa Corp, 166 F.2d 32—U. S Lighterage Corp. v Petterson Lighterage & Towing Corp, D C.N.Y, 51 F. Supp 96, affirmed, C C.A, 142 F 2d 197—The Bumble Bee, D C N.Y, 1 F.Supp 327, affirmed, C C A., Ira S. Bushey & Sons v. Huron Stevedoring Co, 64 F.2d 1014.

Ala.—Burton v. May, 103 So. 46, 212 Ala. 435.

Damage resulting from other causes

(1) A dock company improperly loading barge with coal was not liable to extent that damage to barge was aggravated by failure of barge's pumps.—The Scipio, D C.N Y, 73 F. Supp 402.

(2) Damages for any injury to scow caused by collision while being pushed by city fireboat were not recoverable in libel against charterer and employer of stevedores who were loading scow and whose negligence allegedly started fire in her cargo—U S Lighterage Corp v. Petterson Lighterage & Towing Corp, D.C N.Y, 51 F Supp. 96, affirmed, C.C.A., 142 F 2d 197.

Amount stipulated for delay

Where vessel is damaged by loading, amount provided in the charter for each day of delay in loading steamship was a fair, reasonable, and just measure of damages caused by delay.—Pateras v. Walsh Stevedoring Co., D.C Ala, 53 F Supp. 315.

60. U S.—The Zeller No. 12, D.C N. Y., 68 F.Supp. 795, affirmed, C.C.A., Zeller Marine Corp v. Nessa Corp., 166 F 2d 32

61. U S—The Zeller No. 12, D C N Y, 68 F Supp. 795, affirmed, C C.A, Zeller Marine Corp. v. Nessa Corp, 166 F 2d 32

62. U S—Zeller Marine Corp. v Nessa Corp., C C A N.Y., 166 F 2d 32

63. U S—Zeller Marine Corp. v. Nessa Corp., supra.

64. U S—Zeller Marine Corp. v Nessa Corp., supra

65. U.S.—Zeller Marine Corp. v. Nessa Corp, supra

66. U S.—The Bumble Bee, D C.N.Y, 1 F Supp. 327, affirmed, C.C.A, Ira S. Bushey & Sons v. Huron Stevedoring Co., 64 F 2d 1014.

67. U S.—The Zeller No. 12, D C.N Y., 68 F Supp. 795, affirmed, C C A, Zeller Marine Corp. v. Nessa Corp., 166 F 2d 32.

68. U S.—The Zeller No. 12, D C N Y, 68 F Supp. 795, affirmed, C.C.A, Zeller Marine Corp. v. Nessa Corp., 166 F.2d 32

69. U.S.—The Zeller No. 12, D.C.N. Y., 68 F.Supp. 795, affirmed, C.C.A., Zeller Marine Corp. v. Nessa Corp, 166 F.2d 32.

70. U S—The Bumble Bee, D C.N.Y, 1 F.Supp 327, affirmed, C C A., Ira S. Bushey & Sons v. Huron Stevedoring Co, 64 F.2d 1014.

71. U S—Smith Scow Corp. v. Seaboard Great Lakes Corp., C.C A.N. Y., 146 F 2d 535—Bouker Contracting Co v. Williamsburgh Power Plant Corp, C C A N Y., 130 F 2d 96—Bouchard Transp Co. v. Reading Co, C.C A N Y, 87 F.2d 694, certiorari denied Reading Co. v Bouchard Transp Co, 58 S Ct. 10, 302 U S. 690, 82 L Ed 533—O'Donnell Transp. Co. v. Tidewater Iron & Steel Co, D C.N J, 90 F Supp 953, affirmed, C A., 185 F.2d 675—Pateras v. Walsh Stevedoring Co, D C Ala, 53 F Supp. 315—The Millwood, D C N.Y., 3 F Supp 156—National Dredging & Lighterage Co v Turney Transp. Co., C.C A Pa, 281 F. 315.

58 C J. p 234 note 30 [f].

Mitigation of damage

Contributory negligence of tank barge owner in failing to insulate exhaust pipe of engine operating pump used in discharging cargo of kerosene from barge was held properly taken into account in mitigating damages in libel for damage to tank barge caused by fire which occurred while cargo of kerosene was being discharged, and damages were mitigated by reducing them one third and by denial of interest on the entire claim.—Producers Pipe Line Co v. Douglas Guardian Warehouse Corp., D.C.Tenn., 48 F.Supp. 161.

72. U.S.—Belvedere v. Compania Plomari De Vapores, S. A., C.A. Fla., 189 F.2d 148,

73. U.S.—The Fred Smartley, Jr., C.C.A.Va., 100 F.2d 971—Todd Shipyards Corp. v The City of Athens, D.C Md, 83 F.Supp. 67—The Commerce, D C N.Y., 46 F.Supp 360, affirmed, C.C.A., New England S. S.

tract establishes a relationship of shipper and carrier between the parties,[74] and creates mutual and reciprocal obligations between the ship and the cargo.[75] Neither the status of a contract to transport goods as a contract of affreightment[76] nor the relationship of shipper and carrier established thereby[77] is changed by the fact that some towage is involved in the transportation. A contract of hire is not one of affreightment;[78] but a contract entered into by the subcharterer of a steamship for transportation of a cargo for a designated voyage for a specified compensation, the subcharterer remaining in possession and control of the vessel, is a contract of affreightment, even though it is entitled a "charter party".[79]

Floating storage. While a contract for floating storage may, under certain circumstances, contemplate carriage in the limited sense of sustaining on water,[80] the relationship between a vessel owner and the cargo owner is not necessarily that of private carriage in every case of a contract for floating storage[81]

Contract to carry passengers compared. There is no distinction in principle between the liabilities of a ship under a contract to carry cargo and a contract to carry passengers.[82]

b. Form, Requisites, and Validity

A contract of affreightment must be based on a sufficient consideration, be mutual in obligation, and must not violate statutory restrictions on the right to contract.

In the absence of statute no particular form of agreement is required for a contract of affreightment.[83] It may be oral or written,[84] and may arise by implication of law on delivery of goods to a carrier for transportation[85] However, a contract of affreightment, in order to be enforceable, must, like other contracts, be supported by a sufficient consideration, either express or implied,[86] and there must be a meeting of the minds of the parties.[87] The contract must not be uncertain as to terms[88] In order to bind the ship the contract must be executed by a person authorized by the owner.[89] An unauthorized contract may, however, be rati-

Co. v. Howard, 130 F.2d 354
Or.—Marstaller v Albina Dock Co., 229 P 2d 269, 191 Or. 145.
58 C J. p 347 note 53
Contract of affreightment as basis for shipper's lien see infra § 110

In essence, shipowner under a contract of affreightment agrees to transport the goods—Banks v. Chas. Kurz Co, D C Pa, 69 F Supp 61, motion denied 69 F Supp 1017.

74. U S.—The Fred Smartley, Jr., C. C A Va., 100 F.2d 971—Banks v. Chas. Kurz Co, D C Pa., 69 F.Supp 61, motion denied 69 F.Supp. 1017
Or.—Marstaller v Albina Dock Co, 229 P.2d 269, 191 Or. 145

75. U.S.—Krauss Bros Lumber Co v Dimon S. S Corp., Wash, 54 S. Ct 105, 290 U S. 117, 78 L Ed. 216—Belvedere v. Compania Plomari De Vapores, S. A., C.A.Fla, 189 F.2d 148

76. U S—The Fred Smartley, Jr, C. C A.Va, 100 F 2d 971—The Independent, D C La, 37 F Supp 106, reversed on other grounds, C.C A., 122 F 2d 141.
58 C J. p 347 note 53.

77. **Completion of voyage by tug**
The relationship of "shipper" and "carrier" existing between barge owner and owner of cargo was not changed by fact that barge owner had voyage completed by tug operated by third persons with whom barge owner made contract of towage.—The Fred Smartley, Jr., C.C A.Va., 100 F 2d 971.

78. N.Y.—Sherman v. Fream, 30 Barb 478
58 C J p 347 note 54.
Charters see supra §§ 26–36.

Lease of barges
A contract, whereby towing company agreed to lease barges to oil company at certain rate per month and to furnish tug to tow barges at certain rate for each trip, and whereby no receipt or bill of lading was issued by towing company and oil company retained custody and control of oil until it was delivered to its customer, was one of "charter" of barges and a separate contract for towing whenever called on to do so, and was not a contract of "affreightment."—The Independent, C.C A La, 122 F 2d 141

79. U S—The Tampico, C.C.A.Cal., 286 F. 482
Demise charter and contract of affreightment distinguished see supra § 34.

80. U S—The Jungshovel, C C.A N. Y., 290 F. 733.

81. U.S—The Frank A Smith, D C. N.Y., 8 F Supp. 134.

Certificate delivered to owner of grain and signed by owner's agent, stating that grain had been delivered on board barge and would be delivered up on surrender of certificate did not show contract of private carriage, or that barge owner retained possession of barge, but was merely memorandum of delivery of grain and that delivery of receipt would be regarded as symbolic delivery of cargo.—The Frank A. Smith, supra.

82. U.S—Todd Shipyards Corp. v. The City of Athens, D.C Md., 83 F Supp. 67.

83. U.S.—Mackey v. U. S., D.C.N.Y., 83 F Supp 14, affirmed, C.A., 197 F 2d 241

84. U S—Mackey v U. S, supra.
Oral contract held binding on parties
U S.—West India SS Co v. Chicago House Wrecking Co., N Y., 249 F 338, 161 C C.A 346, certiorari denied 38 S Ct. 580, 247 U S. 514, 62 L Ed 1244

85. U S—Mackey v U. S, D C.N Y, 83 F Supp 14, affirmed, C.A., 197 F 2d 241.

86. N.Y.—Transatlantic Rapid System v Decoulos, 62 N Y S 2d 529, 270 App Div. 987.

In the absence of express consideration or mutual promises the contract is unenforceable.—Transatlantic Rapid System v. Decoulos, supra.

Sufficient consideration
Alleged contract, whereby owner of vessel agreed to hold space available on steamer to meet freight contracts which shipper undertook to solicit and procure, was supported by adequate consideration.—Transatlantic Rapid System v. Decoulos, 66 N.Y S 2d 361, 271 App Div. 865.

87. U S.—Chapman v. Java Pac Line, Cal, 241 F. 850, 154 C C.A 552, certiorari denied 38 S.Ct 11, 245 U S. 650, 62 L Ed 531.

88. U.S—Liebes v Klengenberg, C C.A Cal., 23 F 2d 611, certiorari denied 48 S.Ct 559, 277 U.S. 596, 72 L Ed. 1006.

89. U.S—The Capitaine Faure, C.C. A.N.Y., 10 F.2d 950, certiorari denied Société De Navigation A Vapeur France Indo-Chine v. Cooper,

fied,[90] or the carrier may be bound by estoppel.[91] A dock receipt is not the contract governing the right of the parties where a bill of lading is given.[92] Where the parties thought that the vessel whose services were contracted for could carry more than in fact it could, but agreed on a flat rate for a full load for a trip, the contract is not void for mutual mistake.[93]

Offer and acceptance. Where the owner offers to receive goods on board but the writing lacks mutuality, it will be construed as a mere offer to contract, and not as a contract of affreightment,[94] and the fact that he so receives part of the goods does not render him liable for refusal to receive the balance of the shipment.[95] So, negotiations between a prospective shipper and the carrier, which constitute nothing more than a good-faith opinion expressed by the carrier that it will be able to furnish facilities to transport the goods involved before the close of navigation, do not of themselves constitute a binding contract of affreightment.[96] Similarly, the quotation of a rate on a specified tonnage, in reply to an inquiry as to ocean freight rate on certain goods, is at most only an offer, requiring acceptance.[97] However, where the shipper has expressed satisfaction with rates quoted by the carrier and informed it that he would advise when he was ready to ship, the contract is complete notwithstanding the shipper at the same time makes further inquiry as to through rates involving transportation by rail to the point of loading on the carrier's boats.[98] An agent of a lighterage corporation will be deemed to have accepted a contract of carriage where he held in silence the letter and delivery order of the shipper who believed that he was contracting with the corporation, although the latter forwarded the order to another lighterman without informing the shipper.[99]

Mutuality. In accordance with general rules, unless both parties to a contract of affreightment are bound so that either has a cause of action for a breach thereof, neither is bound.[1] A contract, binding the shipper to pay for space unused in a vessel by reason of the shipper's failure to furnish a cargo according to contract, is not, it has been held, unilateral.[2]

Restrictions on right to contract. Within the limits prescribed by legislation and public policy, maritime contracts of carriage may, like any other contract, include provisions limiting and defining the relations of the parties.[3] A distinction has sometimes been made between a contract for private carriage by water and for public or common carriage.[4] In private carriage by water it has been said that the carrier and the shipper are free to contract as they choose, and make such terms as they can agree on.[5] On the other hand, in the case

46 S Ct 634, 271 U S 684, 70 L Ed 1150.

58 C J p 345 note 13.

Requisites and validity of:
Bill of lading see infra § 113.
Stipulations varying general rule as to time freight earned see infra § 160.

Who may execute bills of lading see infra § 112

90. U S —Morris v. Alvah, D.C N.Y., 59 F. 630.

91. La —Dunn v. Branner, 13 La Ann. 452.
Tenn.—Elett v. Embury, 217 S W 818, 142 Tenn. 444.

92. U S —The Capitaine Faure, C C. A N Y., 10 F 2d 950, certiorari denied Société De Navigation A Vapeur France Indo-Chine v. Cooper, 46 S Ct 634, 271 U S 684, 70 L Ed 1150

93. Wis —Horn v. Schlosser, 215 N. W. 451, 193 Wis. 647.

94. N Y.—White v North German Lloyd SS. Co, 113 N Y S 805, 61 Misc. 268.

95. N.Y —White v North German Lloyd SS. Co, supra.

96. U S —Holt Motor Co v. Nicholson Universal S. S. Co., D.C Minn, 56 F Supp. 585.

97. Miss —Gulf, etc, R. Co v U. S Cast-Iron Pipe, etc, Co, 72 So 882, 112 Miss 141.

98. Ala —Payne v Zimmern, 92 So 433, 207 Ala. 155.
58 C J. p 346 note 29

99. U S —Waterbury Co. v. Sunset Lighterage Corp, C.C.A.N Y, 25 F 2d 621.

1. U S —Eastern Transp. Co v Blue Ridge Coal Corp, C C A N Y., 159 F 2d 642.
N Y —Transatlantic Rapid System v Decoulos, 62 N.Y S 2d 529, 270 App. Div 987.

Shipper not required to take any space

Alleged contract, whereby owner of vessel agreed that shipping space on vessel was to be used in any amount required by the defendant up to specified amount, but which did not require defendant to take any space on the vessel, was unenforceable for lack of consideration —Transatlantic Rapid System v. Decoulos, 62 N.Y S 2d 529, 270 App Div 987.

2. Tex —Clarkson v. Gans SS. Line, Civ App, 187 S W. 1106

3. Ga —Bloomberg-Michael Furniture Co v Urquhart, 143 S E 789, 38 Ga App 304
N.Y.—M. & T. Trust Co v. Export S S Corporation, 186 N.E. 214, 262 N.Y. 92, certiorari denied 54 S.Ct 70, 290 U.S. 650, 78 L.Ed. 563.

If a certain mode of carriage is not obviously unreasonable, any contract for such carriage is neither invalid per se nor invalid under the circumstances, in the absence of clear proof of knowledge of some fact that would establish it as unreasonable —The Idefjord, D C N.Y., 31 F Supp. 667, reversed on other grounds, C.C.A, 114 F.2d 262, certiorari denied Den Norske Amerikalinji, A/S v. Blumenthal Import Corp, 61 S.Ct. 175, 311 U.S. 707, 85 L Ed 459

4. U S —Koppers Connecticut Coke Co. v. James McWilliams Blue Line, C C A N.Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co, 58 S.Ct 25, 302 U S. 706, 82 L Ed 545—Petition of Reliance Marine Transp. & Const Corp., D.C Conn, 89 F.Supp. 272.

5. U.S —Koppers Connecticut Coke Co v. James McWilliams Blue Line, C C A N.Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co, 58 S Ct 25, 302 U.S. 706, 82 L Ed 545—Petition of Reliance Marine Transp & Const Corp., D. C Conn, 89 F.Supp 272.

of contracts of common or public carriage, the parties are limited by, and subject to, the statutes regulating carriage by water.[6] Statutes governing contracts of common carriage have been held inapplicable to contracts of private carriage,[7] unless expressly incorporated therein.[8] Where a contract of private carriage is entered into, the existence of a tariff of rates published by the carrier does not transform the contract into one of public carriage,[9] even though the contract, by its terms, is made subject to the conditions of the published tariff.[10] Contracts of affreightment which violate governing statutes are invalid and unenforceable.[11] A contract to carry contraband goods is valid and binding,[12] and so is a contract to carry such goods to a blockaded port.[13] A provision that the ship is to have liberty to call at ports in or out of the customary route, in any order, to receive or discharge cargo or passengers, or for any other purpose, is valid, where a stop is for a purpose proper or necessary to the voyage in which the ship is engaged.[14] A statute, providing that "agreements existing at the time of the organization of the shipping board shall be lawful until disapproved by the board," applies to a continuing contract for carriage between a carrier and a shipper.[15]

Person in possession of goods

As a general rule, a carrier has the right to make any reasonable contract with the person in possession of goods.—The Idefjord, D C N.Y., 31 F Supp. 667, reversed on other grounds, C.C.A., 114 F 2d 262, certiorari denied Den Norske Amerikalinji, A/S v Blumenthal Import Corp., 61 S Ct 175, 311 U S 707, 85 L Ed. 459

6. U.S.—Calderon v. Atlas S S Co, N.Y, 18 S Ct 588, 170 U S 272, 42 L.Ed. 1033—Koppers Connecticut Coke Co v. James McWilliams Blue Line, C C.A.N Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co, 58 S Ct 25, 302 U S 706, 82 L Ed 545—Prince Line v. American Paper Exports, D C N Y, 45 F 2d 242, affirmed, C.C.A., 55 F 2d 1053—Compagnie Générale Transatlantique v. American Tobacco Co., C C A N.Y., 31 F 2d 663, certiorari denied 50 S Ct. 16, 280 U S 555, 74 L Ed 611—Fiorita & Amoroso v. Cunard S. S. Co., D C N.Y, 10 F 2d 244—Atlantic & Gulf/West Coast of Central America & Mexico Conference (No. 2743) v. U. S., D C.N.Y, 94 F Supp. 138—Petition of Reliance Marine Transp & Const Corp, D C.Conn., 89 F Supp 272—The Monte Iciar, D C.Pa, 67 F Supp 201, affirmed, C C A, 167 F 2d 334—Holt Motor Co. v. Nicholson Universal S S. Co., D.C Minn, 56 F Supp 585—S. L. Shepard & Co. v Agwilines, Inc., D C S.C., 39 F Supp. 528, reversed on other grounds, C C A, 130 F 2d 67—Swift v Furness, Withy & Co., Ltd, D.C Mass, 87 F. 345.

N.Y.—Belmont Iron Works v. Pacific Coast Direct Line, 291 N Y.S 360, 249 App.Div 156, motion denied 292 N.Y.S. 960, 249 App Div. 730, affirmed 11 N E.2d 297, 275 N.Y 461, certiorari denied 58 S Ct. 264, 302 U.S. 747, 82 L Ed. 577—Sands v Calmar S. S Corp, 296 N Y.S 590, 163 Misc 757—Black Diamond S. S Corporation v. S. H. Kress & Co, 284 N.Y S. 310, 157 Misc. 360.

Discriminatory contracts see supra § 104.

Limitation of liability of carrier by contract see infra §§ 131–138.

Statute read into contract

U S—Compagnie Générale Transatlantique v American Tobacco Co, C C A N Y, 31 F.2d 663, certiorari denied 50 S Ct. 16, 280 U S 555, 74 L Ed 611.

Approval by Maritime Commission

Where shipping contract containing war clause between merchant and conference formed by ocean carriers and merchant's booking with carrier for transportation of particular commodity were parts of one transaction, in determining carrier's liability on refusing to transport commodity because of war, the shipping contract could not be disregarded on theory that, because journey of vessel was wholly outside United States, the United States Maritime Commission was without authority to sanction contract where carrier did not rely on any action by Maritime Commission and absence of approval by Maritime Commission would not render contract invalid.—Associated Metals & Minerals Corp. v. Swedish America Mexico Line, D C N Y., 48 F Supp. 819, affirmed, C C A., 140 F 2d 863.

7. U S.—Koppers Connecticut Coke Co v James McWilliams Blue Line, C.C A N.Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v Koppers Connecticut Coke Co, 58 S.Ct. 25, 302 U S 706, 82 L Ed 545—The Westmoreland, C C A N Y., 86 F 2d 96—The Robin Gray, C.C A.N.Y, 65 F 2d 376, certiorari denied Seas Shipping Co. v Approximately 3,251,000 Feet Board Measure of Lumber, 54 S Ct. 70, 290 U S. 653, 78 L Ed 566—Petition of Reliance Marine Transp & Const. Corp, D C Conn., 89 F.Supp. 272.

8. U.S.—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, C.C A N Y., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct 25, 302 U.S. 706, 82 L Ed 545—The Westmoreland, C C.A N Y., 86 F.2d 96—Petition of Reliance Marine Transp. & Const Corp, D.C.Conn, 89 F Supp. 272.

9. U S—Petition of Reliance Marine Transp & Const Corp, supra

10. U S—Petition of Reliance Marine Transp. & Const Corp, supra

11. U S—Prince Line v American Paper Exports, D C N.Y., 45 F 2d 242, affirmed, C C A., 55 F 2d 1053—Fiorita & Amoroso v. Cunard S. S Co., D.C N Y, 10 F.2d 244—Holt Motor Co v. Nicholson Universal S S. Co, D C.Minn, 56 F.Supp 585—S L Shepard & Co. v Agwilines, Inc., D C.S C., 39 F Supp 528, reversed on other grounds, C.C.A, 130 F 2d 67.

N.Y—Belmont Iron Works v. Pacific Coast Direct Line, 291 N Y.S 360, 249 App.Div. 156, motion denied 292 N.Y S. 960, 249 App Div. 730, affirmed 11 N E.2d 297, 275 N Y 461, certiorari denied 58 S.Ct. 264, 302 U.S. 747, 82 L Ed 577—Sands v Calmar S S. Corporation, 296 N.Y S. 590, 163 Misc 757—Black Diamond S. S. Corporation v S. H Kress & Co, 284 N.Y.S. 310, 157 Misc. 360.

12. U S—Northern Pac. R. Co. v American Trading Co, N.Y, 25 S Ct. 84, 195 U S 439, 49 L.Ed 269—M. A. Quina Export Co v. Seebold, D C.Fla., 280 F 147, affirmed, C.C A, 287 F. 626—Luckenbach S S Co v. W. R. Grace & Co, C.C.A Va, 267 F. 676, certiorari denied 41 S Ct. 14, 254 U S 644, 65 L Ed. 454

Citizen of a neutral state may lawfully contract to carry contraband of war and his undertaking will be enforced by the courts of the neutral state—Balfour, Guthrie & Co v. Portland & Asiatic S S. Co., D.C Or., 167 F. 1010.

13. U.S—M. A Quina Export Co. v. Seebold, D.C Fla, 280 F 147, affirmed, C C.A., 287 F 626

14. U.S.—South Atlantic SS. Line v London-Savannah Naval Stores Co, Ga, 255 F. 305, 166 C.C.A. 476

15. U S—Ellamar Min. Co. v. Alaska SS Co, C C A.Wash, 5 F 2d 890, certiorari dismissed 47 S Ct. 455, 273 U S. 780, 71 L Ed. 889.

Modification of a contract of affreightment, made without consideration, is ineffective.[16]

c. Construction

In general, contracts of affreightment are subject to construction, and are to be construed like other contracts.

Contracts of affreightment, like other commercial contracts, where the language employed is ambiguous or of doubtful meaning, are subject to judicial construction,[17] and general rules of construction prevail.[18] Thus, the intent of the parties is to be sought,[19] and, when found, is to be made effectual, if possible.[20] A liberal construction is to be given in furtherance of the real intention of the parties,[21] and, on motion to dismiss his suit, a party is entitled to the benefit of the construction most favorable to him;[22] but, although a party intended to insert a certain provision in the contract, if he fails to do so, the court cannot do it for him.[23]

Where several instruments are made as part of the same transaction they will be read together, in order properly to interpret them, as if they constituted a single document.[24] Thus, the mutual obligations of the parties must be governed by the written contract of affreightment and the bills of lading accepted by the shipper without objection,[25] although, where the bills differ from the contract prima facie, the latter governs,[26] it has been held, however, that any irreconcilable repugnancy between a prior written contract and the bill of lading must be resolved in favor of the former,[27] unless the parties clearly intended that the bill of lading should constitute a new contract.[28]

All provisions must be taken into consideration in determining the scope and effect of the contract as a whole,[29] every clause must be given effect, if possible,[30] and, where the meaning is not clear, regard should be had to all the attendant circumstances,[31] the nature of the instrument itself, the condition of the parties executing it, and the object and purposes they had in view,[32] and the court must hold the contract to have been made in light of, and

16. U S—Western Lumber Mfg. Co v. U S, D C.Cal, 9 F 2d 1004
Cal—Atlantic Fish Co. v. Dollar SS Line, 269 P. 926, 205 Cal. 65

17. U S—Bird of Paradise, Cal, 5 Wall 545, 18 L Ed 662—Metals & Minerals Corp. v. Swedish America Mexico Line, D C.N.Y, 48 F Supp 819, affirmed, C C A, 140 F 2d 863.
Construction of provisions as to freight rate see infra § 161.
"Privilege of reshipping" see infra § 115.

18. Tex—Perry v. Langbehn, 252 S W 472, 113 Tex. 72
58 C J. p 346 note 37, p 349 note 83

Contract construed
U S—Metals & Minerals Corp v Swedish America Mexico Line, D C N Y, 48 F Supp. 819, affirmed, C C A., 140 F 2d 863

19. U S—Smith, Kirkpatrick & Co. v Colombian S S. Co., C.C.A Canal Zone, 88 F 2d 392
58 C J. p 346 note 37.

Cargo owner's agreement to insure vessels
Steamer towing barges was held within clause "tugs or other vessels," whose liability was excluded from open policies required of cargo owner—The J B Austin, Jr, C.C.A N.Y., 57 F 2d 80.

20. Tex—Perry v Langbehn, 252 S W. 472, 113 Tex. 72.
58 C.J. p 346 note 38.

21. U.S—Perry v. Langbehn, supra

22. N.Y.—Stearns v. Stollwerck Chocolate Co, 221 N Y.S. 512, 220 App.Div 265
58 C.J. p 347 note 40.

23. U S—Petroleum Export Corp. v Kerr SS Co., C.C A Cal, 32 F.2d 969.

24. U.S.—Associated Metals & Minerals Corp v. Swedish America Mexico Line, D.C N Y, 48 F.Supp 819, affirmed, C C A., 140 F 2d 863

Contracts with carrier conference and with carrier
Where shipping contract between merchant and conference formed by ocean carriers gave conference option to cancel contract in event of war and where booking for transportation of particular commodity did not contain all terms, the shipping contract and the booking were integral parts of a single arrangement and cancellation of the shipping contract by the conference released carrier from liability under the booking—Associated Metals & Minerals Corp v Swedish America Mexico Line, supra.

25. U S—Callister v. U. S. Shipping Board Merchant Fleet Corp, D C N Y, 21 F 2d 447, affirmed, C. C A, 30 F 2d 1008
58 C J. p 347 note 42.
Bill of lading as constituting contract see infra § 113

Reference to regular form
Terms of carrier's regular form of bill of lading attached to shipping contract and referred to therein were held integral part of contract.—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F Supp 515.

Dock receipt stating that it was subject to carrier's bill of lading made bill part of contract.—Lawrence Leather Co. v. Norton, Lilly & Co, D C N Y, 15 F 2d 101—Bingham v Osaka Shosen Kaisha, D C N Y, 12 F Supp. 35, affirmed, C C A., 88 F 2d 1004.

26. U S.—Swift v. Glasgow Steam Shipping Co, D C N Y, 280 F 910—The Citta Di Palermo, D C N Y, 153 F 378, affirmed 165 F 437, 91 C.C A. 592.
Merger of contract in bill of lading see infra § 113.

27. U.S—Toyo Kisen Kaisha v. W R Grace & Co, C.C.A Cal, 53 F 2d 740

28. U.S—Toyo Kisen Kaisha v. W R Grace & Co, supra.

29. U S—The Olympia, D C Or, 156 F. 252
Tex—Perry v. Langbehn, 252 S.W 472, 113 Tex 72.
58 C J p 347 note 44.

30. U S—Balfour, etc, Co v. Portland, etc, SS. Co, D C Or, 167 F. 1010.

31. U S—Toyo Kisen Kaisha v. W R Grace & Co, C C A Cal, 53 F 2d 740—The Wildwood, D C Wash, 41 F Supp. 956, reversed on other grounds, C C A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v American Foreign S. S. Corp., 63 S Ct 1436, 319 U.S 771, 87 L Ed 1719—Pacific Coast Co v. Yukon Independent Transp. Co, C C A.Wash., 155 F. 29.

32. U S—Scott v U. S, Ct.Cl, 12 Wall. 443, 20 L Ed 438.
58 C J. p 347 note 46.

with reference to, known conditions, such as the existence of war.[33]

Words will be given a reasonable construction where that is possible, rather than an unusual one,[34] and should be given a meaning as used in the mercantile sense.[35] If ambiguities and inconsistencies can be avoided by construing words in the sense in which the parties apparently used them, such construction should be employed,[36] and if inharmonious provisions are found, the general intent and leading purpose of the contract should control minor provisions.[37] If ambiguous inferences in a contract prepared by the carrier are rationally conceivable, the one favorable to the shipper is controlling.[38] It is not to be supposed that contracts are entered into to be avoided at the will and pleasure of either of the parties, unless such a purpose be expressed by clear enunciation.[39] They are rather to be considered as mutually obligatory, and the construction, where the language is of doubtful import, that will give them that effect should be adopted.[40] A letter from a shipper to the carrier stating that he will arrange to place marine insurance on the cargo for the invoiced value of it, in addition to freight charges of a specified rate per gross tons, for account of the shipper, has been held not to constitute a contract to insure the cargo and freight for the benefit of both the shipper and carrier.[41]

Time of taking effect. A contract of affreightment takes effect from the loading of the vessel, from which time each party is bound to the other for the full performance of the contract;[42] and the date of the bill of lading is immaterial.[43]

Implied terms. Every contract for carriage by water implies that the boat is fit for the purpose at the time for its performance,[44] and that services performed under the contract will be performed in a workmanlike manner.[45] Specific terms of a contract may be implied from the words used, taken in connection with the previous dealings of the parties.[46] There is an implied understanding or term that the carrier will issue the customary bill of lading prescribing liability.[47] A contract by a carrier to transport goods in certain vessels during a stated period, and by the shipper to load such vessels, obligates the carrier by implication to continue the boats in service during the term.[48] Where a contract to carry freight from a certain port does not specify the place for loading, it is the carrier's duty to take the cargo at any reasonably accessible place in the harbor which might be designated by the shipper.[49] A contract for shipment on one of two specified steamships implies that the goods are to be shipped on the one first sailing if delivered in reasonable time for taking them on board thereof; otherwise on the other.[50]

Representations and warranties. A statement of the carrier's agent that there was little possibility of the steamer being tied up is not a warranty to deliver before close of navigation.[51] Also, a statement by the carrier or his agent as to the expected

33. U.S.—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

34. U.S.—Balfour, etc., Co. v. Portland, etc., SS. Co., D.C.Or., 167 F. 1010.

35. U.S.—Dorrance v. Barber, C.C.A. N.Y., 262 F. 489
58 C.J. p. 347 note 48

36. U.S.—Centrosoyus-America v. U. S., D.C.N.Y., 31 F.2d 610
58 C.J. p. 347 note 49

37. Tex.—Perry v. Langbehn, 252 S.W. 472, 113 Tex. 72

38. U.S.—Pope & Talbot v. Guernsey-Westbrook Co., C.C.A.Cal., 159 F.2d 139.

39. U.S.—Balfour, etc., Co. v. Portland, etc., SS. Co., D.C.Or., 167 F. 1010.

40. U.S.—Balfour, etc., Co. v. Portland, etc., SS. Co., supra.

Contract to furnish barges shipper may require

A contract by which carrier was to furnish such barges as coal shipper "may require" would be illusory if quoted phrase meant only "may request," but would be valid if parties understood that shipper would employ carrier, or another carrier with which shipper had similar contract, to ship whatever coal shipper had for shipment.—Eastern Transp. Co. v. Blue Ridge Coal Corp., C.C.A. N.Y., 159 F.2d 642.

Subsequent understanding of parties

Where the conduct of the parties subsequent to execution of the contract shows an understanding which would make it valid and enforceable, such understanding will be given effect, although the contract might otherwise be unenforceable as not mutually binding.—Eastern Transp. Co. v. Blue Ridge Coal Corp., supra.

41. U.S.—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co., D.C.N.Y., 56 F.2d 271.

42. U.S.—McLeod Lumber Co. v. Crowley, D.C.Cal., 8 F.2d 283.
58 C.J. p. 345 note 9.
What constitutes delivery of cargo to vessel see infra § 109.

43. Ark.—Lee Line Steamers v. Craig, 164 S.W. 274, 111 Ark. 550.

44. U.S.—Morris v. The Alvah, D.C. N.Y., 59 F. 630
58 C.J. p. 348 note 58.

45. Tex.—Elder v. Weld-Neville Cotton Co., Com.App., 231 S.W. 102
58 C.J. p. 348 note 59.

46. U.S.—Balfour, etc., Co. v. Portland, etc., SS. Co., D.C.Or., 167 F. 1010

47. U.S.—The Orizaba, D.C.N.Y., 32 F.2d 326
Duty to issue bill of lading see infra § 112.

48. U.S.—Great Lakes, etc., Transp. Co. v. Scranton Coal Co., Ill., 239 F. 603, 152 C.C.A. 437
Duty to continue service generally see supra § 102.

49. Ala.—Payne v. Zimmern, 92 So. 433, 207 Ala. 155

50. N.Y.—Fowler v. Liverpool, etc., Steam Co., 87 N.Y. 190.
58 C.J. p. 348 note 66

51. U.S.—Grammer SS. Co. v. Richardson, D.C.N.Y., 37 F.2d 366, affirmed, C.C.A., 47 F.2d 186.

date of arrival of a vessel at its destination is a mere representation rather than a warranty,[52] as is a provision in the contract fixing the "expected time of loading;"[53] but a contract for transshipment and carriage of goods to be shipped from the first port at a specified time is a warranty that they will then be shipped.[54]

Agreements to furnish all transportation required between two points do not include through traffic, which does not require transshipment.[55]

Usage of port or trade. A contract for the shipment of goods from a specified port must be understood as having been made in view of the custom of the port with reference to loading;[56] and one peculiar to a certain export trade may be interpreted in the light of the custom of the business,[57] and the construction placed on it by the parties [58]

Liability of agent. In accordance with the general rule, an engagement of cargo space from a steamship line constitutes a contract, which binds the maker to furnish the cargo, or respond in damages, although it was in fact made in behalf of a third person, where such fact was not disclosed;[59] and so a shipping company, signing as "agents" a contract of carriage without disclosing the principal, is bound as carrier,[60] but not where the principal's identity is sufficiently disclosed;[61] and it has been held that an agent booking through brokers is not liable for a breach by the latter, although he failed to disclose the steamship with which the freight had been booked, he not having been able to ascertain the identity thereof and the shipper having made no objection to booking through brokers.[62]

d. Rescission or Cancellation

Contracts of affreightment may be canceled or terminated pursuant to an agreement of the parties or because of a mutual mistake of fact.

A right to cancel or terminate a contract of affreightment in the event of the occurrence of specified events may be conferred on the parties by the express terms thereof.[63] Accordingly, where so provided by the contract, it may be terminated in the event of the imminence or existence of war.[64] Apart from express agreement, a declaration or state of war between two countries has been held to put an end to a contract of affreightment between citizens or subjects of the countries involved,[65] such as a contract to carry cargo to the enemy country.[66] However, a declaration of war does not dissolve a shipping contract where the port of destination is domestic, even though transportation is rendered more hazardous thereby.[67]

52. N Y—Olavarria & Co. v Cosmopolitan Shipping Co., 33 N Y.S 2d 201, affirmed 36 N Y S 2d 422, 264 App.Div 845

53. U.S—Petroleum Export Corp. v. Kerr SS Co., C.C.A.Cal, 32 F 2d 969.

Belief or expectation

A shipping agent's letter to cargo shipper stating that a ship was "expected" to be ready to be loaded at a port on a stated date constituted a representation of a belief or expectation, and did not obligate agent to have the ship at the port on the stated date—L. N Jackson & Co v. Seas Shipping Co, 56 N Y S 2d 501, 185 Misc 94, affirmed 61 N Y S 2d 371, 270 App Div. 830, affirmed 68 N E 2d 605, 296 N.Y. 529, motion denied 69 N E 2d 483, 296 N.Y. 635

54. U.S—Dorrance v. Barber, C C A N Y., 262 F. 489.

55. U S—Scott v. U S, Ct Cl., 12 Wall. 443, 20 L.Ed. 438.
58 C.J. p 349 note 75.

56. U.S—New York, etc, Mail SS Co v Guayaquil, etc, R Co, C C A N Y, 270 F. 200, certiorari dismissed 42 S Ct. 51, 257 U S. 642, 66 L.Ed. 412.

57. Tex—Perry v Langbehn, 252 S. W 472, 113 Tex 72.
58 C.J. p 349 note 77.

58. Tex—Perry v Langbehn, supra.

59. U.S—Baltimore Steam-Packet Co v. Patterson, Md, 106 F. 736, 45 C C.A. 575, 66 L R A. 193.
58 C J p 349 note 80

60. U.S—Eccles v. Strachan Shipping Co, D C Ga, 21 F 2d 653.

61. La—Wichita Falls Motor Co. v. Kerr SS Co., 107 So. 777, 160 La. 992.
N.Y—Olavarria & Co v. Cosmopolitan Shipping Co, 33 N Y S 2d 201, affirmed 36 N Y S 2d 422, 264 App. Div 845

62. U S—Baldwin Shipping Co v. Southern Pac. Co, C C.A.Cal., 274 F. 347.

63. U S—Associated Metals & Minerals Corp v. Swedish America Mexico Line, D C N Y, 48 F Supp. 819, affirmed, C C.A., 140 F 2d 863
N.Y—Olavarria & Co. v. Cosmopolitan Shipping Co, 33 N Y.S 2d 201, affirmed 36 N Y.S 2d 422, 264 App. Div. 845.
Excuses for nonperformance see infra § 108.

64. U S—Associated Metals & Minerals Corp v Swedish America Mexico Line, D C N Y, 48 F Supp 819, affirmed, C C A., 140 F 2d 863.
N Y—Olavarria & Co. v Cosmopolitan Shipping Co., 33 N Y S.2d 201, affirmed 36 N.Y S 2d 422, 264 App. Div. 845.

Construction of contract

(1) Where freight contract to carry sugar from the United States to Bordeaux, France, provided that, in the event of the imminence or existence of war between any nation affecting the operations of the carrier, the carrier shall have the right to cancel the engagement, and the carrier was a citizen of Norway which was at war with Germany, and the Germans had occupied Bordeaux under armistice terms with France, the carrier had the right to cancel the agreement—Olavarria & Co. v. Cosmopolitan Shipping Co, supra.

(2) Under provision of shipping contract between merchant and conference formed by ocean carriers giving conference option of canceling agreement in event of "existence of war," existence of war justified termination of shipping contract as against contention that right of refusal to go on with the contract related only to future commitments.—Associated Metals & Minerals Corp. v. Swedish America Mexico Line, D C N Y, 48 F Supp 819, affirmed, C C. A, 140 F.2d 863.

65. U S—The Francis, C.C R I, 9 F.Cas.No.5,032, 1 Gall. 445, affirmed 8 Cranch 354, 3 L Ed 587 and 9 Cranch 183, 3 L.Ed. 590.

66. U.S.—The Francis, supra.
Mass.—Brown v. Delano, 12 Mass. 370.

67. N Y—Graves v. Miami Steamship Co., 61 N.Y.S. 115, 29 Misc. 645.

A contract of carriage may be rescinded because of mutual mistake of fact;[68] but a carrier cannot cancel its contract, as far as it imposes obligations on it, and hold the cargo in order to keep or earn freight.[69] The fact that a shipper and carrier are both subsidiaries of the same company does not constitute ground for vacating a shipping contract between them, which was fair and advantageous when entered into.[70]

§ 107. —— What Law Governs

In the absence of an intention of the parties to the contrary, the law of the place where the contract is made ordinarily will govern a contract of affreightment, although the law of the place of performance will govern with respect to performance of the contract.

In determining the law applicable with respect to the construction and effect of a shipping contract the court must look to the intention of the parties,[71] and reference should be had to the character of the contract, the parties thereto, and where entered into.[72] The rights and liabilities of the parties under the contract have been variously said to be governed by the law of the place where it was made or where it was to be executed,[73] or by the law of the flag,[74] unless the intention of the parties appears to be that some other law should govern;[75] and a contract of affreightment made in one country, the performance of which begins there, is governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country.[76] A contract of carriage made outside the United States, involving loading and carriage between foreign ports, is governed by foreign law.[77]

Provisions in a bill of lading that all questions arising thereunder against the ship or her owners should be governed by the law of the country under whose flag the ship is sailing have been held valid;[78] but the law of the flag as far as it differs from the general maritime law is but a mere municipal law of the ship's home and has no authority abroad except by comity, and will not be adopted in a foreign forum when against the policy, or prejudicial to the citizens of the country, of the forum,[79] even though the parties have so stipulated in the shipping contract,[80] this rule being especially applicable to contracts exempting the carrier from liability for negligence and also providing that the stipulation shall be governed by the law of a country where such a stipulation is sustained.[81]

Questions of initial validity and of interpretation of the terms of a bill of lading are governed by the law of the place where the bill of lading is issued,[82] but questions relating to the performance

Transportation from neutral foreign port to domestic port

U.S.—Luckenbach S. S. Co v. W. R. Grace & Co., C.C.A.Va., 267 F. 676, certiorari denied 41 S.Ct. 14, 254 U.S. 644, 65 L.Ed. 454.

68. U.S.—Ontario Paper Co. v. Neff, C.C.A.Ill., 261 F. 353
58 C.J. p 349 note 85.

69. U.S.—Cohn v. U. S. Shipping Board, C.C.A.Tenn., 20 F.2d 56

70. N.Y.—Austin v. Pacific Coast Co., 102 N.Y.S.2d 914, 278 App.Div. 640.

71. U.S.—The Steel Inventor, D.C. Md., 35 F.Supp. 986
What law governs lien of shipper see infra § 110.

Maritime law

In entering on a contract of affreightment the parties are presumed to have had in contemplation the maritime law—M. & T. Trust Co. v. Export S. S. Corporation, 256 N.Y.S. 590, 143 Misc. 1, reversed on other grounds 259 N.Y.S. 393, 236 App.Div. 415, reversed on other grounds 186 N.E. 214, 262 N.Y. 92, certiorari denied 54 S.Ct. 70, 290 U.S. 650, 78 L.Ed. 563.

72. U.S.—The Pehr Ugland, D.C.Va., 271 F. 340, appeal dismissed, C.C.A., 277 F. 1019.

Provision rubber-stamped on bill to the effect that the bill of lading shall be subject to the United States Carriage by Sea Act prevails over printed provision that Indian Carriage by Sea Act shall govern.—The Steel Inventor, D.C.Md., 35 F.Supp. 986.

73. U.S.—Naylor v. Baltzell, C.C. Md., 17 F.Cas.No.10,061, Taney 55.

74. U.S.—The Titania, D.C.N.Y., 19 F. 101.
58 C.J. p 343 note 83.
Application of federal statutory limitation of liability to foreign vessels see infra § 240

75. N.Y.—The President Monroe, 286 N.Y.S. 990, 159 Misc. 432.
58 C.J. p 343 note 84.

Indorsement stamped on face of bills of lading that they were subject to Straits Settlement Act required their construction according to laws of Straits Settlement—The President Monroe, supra.

76. U.S.—Jansson v. Swedish American Line, C.A.Mass., 185 F.2d 212
58 C.J. p 344 note 85.

Federal law

Where contract for shipment to nonadjacent foreign destination was made in United States, lex loci contractus was federal law—M. & T. Trust Co. v. Export S. S. Corporation, 256 N.Y.S. 590, 143 Misc. 1, reversed on other grounds 259 N.Y.S. 393, 236 App.Div. 415, reversed on other grounds 186 N.E. 214, 262 N.Y. 92, certiorari denied 54 S.Ct. 70, 290 U.S. 650, 78 L.Ed. 563.

77. U.S.—Cerro De Pasco Copper Corp. v. Knut Knutsen O.A.S., D.C. N.Y., 94 F.Supp. 60.

78. U.S.—The Oranmore, C.C.Md., 92 F. 396.
58 C.J. p 344 note 86.

79. U.S.—The Kensington, N.Y., 22 S.Ct. 102, 183 U.S. 263, 46 L.Ed. 190.
58 C.J. p 344 note 87.

80. U.S.—Strauss v. Canadian Pac. R. Co., 172 N.E. 564, 254 N.Y. 407
58 C.J. p 344 note 88.

81. U.S.—Botany Worsted Mills v. Knott, N.Y., 82 F. 471, 27 C.C.A. 326, affirmed 21 S.Ct. 30, 179 U.S. 69, 45 L.Ed. 90.
58 C.J. p 344 note 89.

82. U.S.—Bank of California, N.A. v. International Mercantile Marine Co., C.C.A.N.Y., 64 F.2d 97, certiorari denied 54 S.Ct. 66, 290 U.S. 649, 78 L.Ed. 563.

Charterer as carrier or agent of shipowner

Where bills of lading by which cargo, originating in Canada, was carried on Norwegian ship, were signed

or breach and its effect are governed by the law of the place of performance.[83] A specific limitation of liability clause in a bill of lading drawn and issued in one foreign country has been held to prevail over a general clause that the contract shall be governed by the law of another foreign country.[84]

Where the contract is to be performed at a place other than at which it is made, the parties are presumed to adopt the law of the place of performance as the law of the contract.[85] The presumption that a contract valid where made is valid everywhere, considered generally in Contracts § 20, is applicable to contracts of affreightment.[86] With respect to goods shipped from one country to another the law of a third country is inapplicable, although some of the cargo was shipped from there.[87] Foreign vessels, being entitled to the benefit of the Harter Act, as considered infra §§ 127–129, will be held subject to its limitations by courts of the United States in suits for damages to cargo arising on the high seas on voyages to this country,[88] but not in actions for cargo damage occurring during carriage exclusively between foreign ports.[89]

Domicile of party. The law of domicile of the party does not govern the contract or determine his rights or obligations when it was neither made nor to be performed there.[90]

Abandonment of voyage. Where the voyage has been ended or abandoned before it has been successfully completed, it has been held that the rights of shipowners and shippers are governed by the laws of the country in whose waters the voyage was thus terminated.[91]

Interstate commerce. Although it has been held that the rights and liabilities of the parties under a contract limiting liability in the shipment of goods by sea from one state to another depend not on the state statutes, but on the acts of congress, the bill of lading, and the principles of the common and maritime laws as accepted and enforced by the federal courts,[92] a contract in one state for the carriage of goods from there to a point in another state is governed by the laws of the former, unless a different intention clearly appears.[93] Statutes of the state where the contract was made, which pertain to carriage by rail, do not affect the validity of an ocean bill of lading clause with respect to notice of claim.[94]

Liability on inland waters. The liability of a general ship employed by the owners in transporting goods under contracts for freight, on navigable waters between ports and places in different states, receiving goods under a contract of shipment corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, must be determined by the rules of law applicable to carriers of goods on such inland waters.[95]

Negligence within foreign jurisdiction. Where a bill of lading contains, besides the ordinary exception of the perils of the sea, an exception against liability for loss occasioned by leakage or stowage, or by negligence of any person in the service of the ship, and this latter exception is valid both by the law of the flag and the law of the place of shipment, the law of the place of shipment governs as

by charterer, question whether charterer, by signing bills, bound itself as a carrier or merely signed as agent for shipowner, by authority of master, would be determined according to Canadian law—The Iristo, D. C N Y, 43 F.Supp. 29, affirmed, C C A., Middleton & Co. (Canada) Limited v Ocean Dominion S. S Corp., 137 F 2d 619, certiorari denied 64 S Ct. 432, 320 U S. 802, 88 L Ed. 484.

83. U.S—Bank of California, N. A., v International Mercantile Marine Co, C C A N Y, 64 F 2d 97, certiorari denied 54 S Ct. 66, 290 U S 649, 78 L Ed 563—The Cypria, D C N Y., 46 F Supp 816, affirmed, C C A., Ore S. S Corp v. D/S A/S Hassel, 137 F.2d 326.
58 C J. p 344 note 90.

Loss of claim by failure to give notice

Where cargo was deliverable in Germany, German law determines whether claim for misdelivery was lost by failure to give notice as required by bill of lading—Bank of California, N. A., v. International Mercantile Marine Co., C C A.N Y, 64 F 2d 97, certiorari denied 54 S.Ct 66, 290 U S. 649, 78 L.Ed. 563.

Misdelivery as excusing notice

Where cargo was deliverable in Germany, German law determines whether misdelivery excused owner from giving notice of claim as provided by bill of lading—Bank of California, N. A., v. International Mercantile Marine Co., supra.

84. U.S—E. Gerli & Co. v Cunard S. S Co, C.C A.N Y., 48 F 2d 115.

85. U S—The Pehr Ugland, D.C. Va., 271 F 340, appeal dismissed, C.C. A., 277 F 1019.
58 C.J. p 344 note 91.

86. U S—The Miguel di Larrinaga, D C N.Y, 217 F. 678.
58 C.J. p 344 note 93.

87. U S—Duche v. Brocklebank, D C N Y, 35 F.2d 184, affirmed, C.C A., 40 F 2d 418.
58 C J p 344 note 94.

88. U S—The Frey, D C.N.Y., 92 F 667.

89. U S—Franklin Fire Ins Co. v. Royal Mail Steam Packet Co, D C N Y, 54 F 2d 807, reversed on other grounds, C C.A, 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins Co, 53 S Ct 82, 287 U S. 630, 77 L. Ed 546.

90. U S—Naylor v Baltzell, C C Md, 17 F Cas No 10,161, Taney 55

91. U S—The Appam, D.C N.Y., 243 F 230.
58 C J p 345 note 98.

92. Ga.—Bloomberg-Michael Furniture Co v. Urquhart, 143 S E 789, 38 Ga App. 304.

93. U.S.—Montague v. The Henry B. Hyde, D C.Cal., 82 F. 681.
Wash—Shaw Supply Co. v Charles Nelson Co., 214 P. 19, 124 Wash 305.

94. U S—Cudahy Packing Co. v. Munson SS. Line, C.C A N Y, 22 F. 2d 898, certiorari denied 48 S.Ct. 433, 277 U S 586, 72 L Ed. 1000

95. U S.—The Niagara v. Cordes, Wis., 21 How. 7, 16 L.Ed 41.

to any negligence within that jurisdiction, and whether the damage was occasioned by perils of the sea, or by negligent stowage at the place of shipment, the shipper cannot recover, where there is no negligence shown or presumed from acts or omissions in this country or on the high seas,[96] and so, where a bill of lading stamped at an interior town of a foreign country for transportation of goods from there to this country, via a port of the foreign country, exempted the carrier from liability for negligence of its servants and agents, which exemption is valid by the foreign law, the carrier cannot be held liable for breakage occurring before the goods reached port[97]

Procedural rules. While local procedural rules may be applied in cases triable under foreign law,[98] it is otherwise with respect to local rules which are more than procedural and affect substantive rights of the parties[99]

Limitations of actions. A provision in the bill of lading that litigation arising out of the interpretation or execution of such bill shall be judged according to a specified foreign law does not require application of the foreign statute of limitations to suits arising thereunder.[1]

Proof of foreign law. Where a contract or bill of lading is to be construed and governed by foreign law, such law must be pleaded and proved like any other essential fact.[2] In the absence of such proof the bill or contract will be construed in accordance with American general mercantile law[3] as affected by the statutes,[4] or the law of the forum[5] Where a bill of lading issued in a foreign country is not clearly against the public policy of the United States, it should not be assumed to be invalid in the absence of proof of the law of that country.[6]

§ 108. —— Performance and Breach in General

a. Of owner or carrier generally
b Of shipper generally
c. Excuses for nonperformance
d. Remedies

a. Of Owner or Carrier Generally

As a general rule a carrier by water is held strictly to the contract of affreightment, and is liable for any breach thereof.

As a general rule, the owner or carrier is held strictly to the contract of affreightment,[7] and is liable for any breach thereof.[8] The justifiable abandonment of the vessel in consequence of the danger of the seas is such a renunciation of the contract of affreightment as to entitle the cargo owners to go on with the voyage, at least where the master has not rejoined the ship before salvors have taken possession, or has not obtained the vessel and cargo from the salvors before the cargo owners have announced their decision to renounce the contract[9]

96. U S —The Trinacria, D C N.Y., 42 F. 863.
58 C.J p 345 note 4.

97. U.S —Baetjer v. La Compagnie Générale Transatlantique, D C.N. Y, 59 F 789
58 C.J. p 345 note 5

98. U S —The Aakre, C C A N Y, 122 F.2d 469, certiorari denied Waterman v The Aakre, 62 S Ct 360, 314 U.S. 690, 86 L Ed 552.

99. U S —The Aakre, C C A N Y, 122 F.2d 469, certiorari denied Waterman v The Aakre, 62 S Ct 360, 314 U S. 690, 86 L Ed 552.

Proof as to statutory violation
If rule making it incumbent on a vessel shown to have been guilty of violating a statutory rule of navigation to prove that violation could not have contributed to the ensuing collision was applicable as well to strandings, and if it prescribed anything more than a shift in the burden of proof with respect to the causal relation of default to injury, rule would be more than a rule of evidence and would affect substantive rights of the parties, and, therefore, would not be applicable to a cause triable under foreign law.—The Aakre, C C A N Y., 122 F.2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U.S. 690, 86 L Ed 552

1. U S —A Salomon, Inc v Compagnie Générale Transatlantique, D.C.N Y., 32 F.2d 283, affirmed, C. C A., 43 F 2d 941.
58 C.J. p 345 note 7.

2. U S.—Liverpool & G W. Steam Co. v. Phenix Ins Co., N.Y, 9 S Ct. 469, 129 U S. 397, 32 L Ed. 788—Blumenthal Import Corp. v. Thos. & Jno Brocklebank, C.C.A.Pa, 148 F 2d 727.

Issue held raised
U S —The Iristo, D C N Y, 43 F Supp 29, affirmed, C C.A, Middleton & Co (Canada) Limited v. Ocean Dominion S S Corp., 137 F 2d 619, certiorari denied 64 S Ct. 432, 320 U S 802, 88 L Ed 484

3. U S —Blumenthal Import Corp v Thos & Jno Brocklebank, C C A Pa, 148 F 2d 727—Franklin Fire Ins Co. v. Royal Mail Steam Packet Co., D C N.Y., 54 F 2d 807, reversed on other grounds, C.C.A, 58 F 2d 175, certiorari denied Royal Mail Steam Packet Co v. Franklin Fire Ins Co., 53 S.Ct. 82, 287 U S 630, 77 L Ed. 546.

4. U S.—The Ferncliff, D C.Md, 22 F Supp. 728, certified questions answered Smith v The Ferncliff, 59 S Ct 615, 306 U S 444, 83 L Ed. 862, affirmed, C.C A, 105 F 2d 1021.

5. N Y —The President Monroe, 286 N.Y.S 990, 159 Misc 432

6. U S —The Ferncliff, D C Md, 22 F.Supp. 728, certified questions answered Smith v The Ferncliff, 59 S Ct. 615, 306 U S 444, 83 L Ed 862, affirmed, C C A, 105 F.2d 1021

7. U S —The Maui, C C A Cal., 113 F. 2d 1018, certiorari denied John Demartini Co. v. The Maui, 61 S Ct. 317, 311 U S 709, 85 L Ed 461.
58 C.J p 349 note 87

Primary obligation of ship was to fulfill the contracts of carriage —The Maui, C.C A Cal., 113 F 2d 1018, certiorari denied John Demartini Co v. The Maui, 61 S Ct 317, 311 U S 709, 85 L Ed. 461.

8. U.S.—Ellamar Min Co v. Alaska S S. Co., C.C A Wash, 5 F 2d 890, certiorari dismissed 47 S Ct 458, 273 U S 780, 71 L Ed 889.
N Y.—Zonite Products Corp v. Mediterranean Nav Co, 52 N Y S 2d 603, 183 Misc 962.
58 C.J p 349 note 88, p 350 note 5.

9. U S —The Eliza Lines, Mass., 26

A change of destination made without the assent of the other party constitutes a breach,[10] but not one made with the shipper's consent;[11] and the reservation in the tender of a vessel of an option of forwarding the cargo via other ports than those designated does not constitute a breach of a contract conditioned to be subject to the provisions of a bill of lading, one of which gave liberty to call at any port.[12] Mere notice to the shipper that the owner might not be able to carry out his contract does not, as a matter of law, constitute an abandonment thereof.[13] Where a shipper of cattle refuses to transport them in a part of the vessel insufficiently ventilated and not covered by insurance provided by the carrier as required by the contract, the ship is liable for failure to transport the cattle thus shut out.[14] The owner is not required to discontinue performance because of a breach of the covenant of seaworthiness on sailings.[15]

Time of performance. Where a contract to furnish a vessel does not fix the time within which the service was to be performed, the law contemplates performance within a reasonable time.[16] Where a statement by the carrier or its agent to a prospective shipper as to the expected date of arrival of a vessel for loading constitutes a representation, rather than a warranty, no liability is incurred by the carrier or its agent because the vessel arrives a few days later than the date stated.[17]

Conditions precedent. When the time of the arrival of the vessel at port of shipment is specified in the contract and both parties contract with respect to it, it is in the nature of a condition precedent to the enforcement of the contract by the owner.[18]

Notice of readinesss to perform. Where a contract to ship goods on a certain trip of a specified vessel does not fix a definite time for performance, it is the carrier's duty to notify the shipper of the time the vessel is ready to receive the goods,[19] and notices of the steamer's departure by advertisements, and the posting of handbills, are not sufficient.[20] A carrier having, in accordance with the terms of the contract, given notice of readiness to load is bound thereby,[21] and, if the boat is not ready at the specified time, the shipper is only bound to furnish a cargo within a reasonable time thereafter.[22]

Requisitioning of vessels by government. A contract by a shipowner to carry the ore from a mine to the smelter for a stipulated term has been held terminated by the requisitioning of the carrier's vessels by the government for war purposes before expiration of the term,[23] but the rule does not apply where the contract provides that, if by reason of force majeure either of the parties is unable to carry out the agreement in whole or in part, such inability by either party will not subject such party to any claims for damages or void the agreement.[24]

Waiver of contractual rights. A steamship company, unqualifiedly denying any obligation on its part to transport goods at the rate fixed in a contract and refusing to transport until an additional amount is paid, waives its right to invoke an arbitration clause of such contract.[25]

b. Of Shipper Generally

The shipper under a contract of affreightment is liable for a failure or refusal to use the space reserved.

The shipper under a contract of affreightment is liable for failure or refusal to use space reserved,[26] or for using more space than he has

S.Ct. 8, 199 U.S. 119, 50 L.Ed. 115, 4 Ann.Cas. 406

10. U.S.—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.
La.—Boyle v. Dickenson, 6 Mart., N.S., 100.

11. U.S.—Thatcher v. McCulloh, D.C.N.Y., 23 F.Cas.No.13,862, Olcott 365.

12. U.S.—South Atlantic SS. Line v. London-Savannah Naval Stores Co., Ga., 255 F. 306, 166 C.C.A. 476.

13. N.Y.—Clyde v. Wood, 179 N.Y.S. 252, 189 App.Div. 737.

14. U.S.—Morris v. The Alvah, D.C.N.Y., 59 F. 630.

15. U.S.—The Malcolm Baxter, Jr., C.C.A.N.Y., 20 F.2d 304, affirmed 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.

16. Ala.—Payne v. Zimmern, 92 So. 433, 207 Ala. 155
Deviation and delay in transportation and delivery see infra § 123.

17. N.Y.—Olavarria & Co. v. Cosmopolitan Shipping Co., 33 N.Y.S.2d 201, affirmed 36 N.Y.S.2d 422, 264 App.Div. 845

18. U.S.—Gray v. Moore, C.C.La., 37 F. 266.

19. La.—Jones v. Smalley, 5 La. 28.

20. La.—Jones v. Smalley, supra.

21. U.S.—New York, etc., Mail SS. Co. v. Guayaquil, etc., R. Co., C.C.A.N.Y., 270 F. 200, certiorari dismissed 42 S.Ct. 51, 257 U.S. 642, 66 L.Ed. 412.

22. U.S.—New York, etc., Mail SS. Co. v. Guayaquil, etc., R. Co., supra.

23. U.S.—Ellamar Min. Co. v. Alaska SS. Co., C.C.A.Wash., 5 F.2d 890, certiorari dismissed 47 S.Ct. 458, 273 U.S. 780, 71 L.Ed. 889.
Restraint of princes, rulers, or peoples as excuse for nonperformance see infra subdivision c of this section

24. U.S.—Société Anonyme des Sucreries de Saint Jean v. Bull Insular Line, C.C.A.Puerto Rico, 276 F. 783, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795.

25. Tenn.—Ellett v. Embury, 217 S.W. 818, 142 Tenn. 444.

26. U.S.—St. Louis Coke, etc., Co. v. Goltra, C.C.A.Ill., 41 F.2d 134—Churchill Line v. Gulf Naval Stores Supply Co., D.C.La., 12 F.2d 131.

reserved;[27] but an action for breach of the contract cannot be maintained until the breach occurs.[28] A contract to ship by the owner's vessels all goods required in the shipper's business is not breached by failure to ship any, if none was needed in the business.[29]

Withdrawal of cargo. On payment of all lawful charges of the vessel against him, a shipper may withdraw his cargo at any time before the termination of the voyage,[30] notwithstanding he does so for the purpose of avoiding contribution in general average.[31] What charges must be paid will depend on the circumstances of the case,[32] and payment of freight for the entire voyage has been held sufficient under some circumstances.[33]

c. Excuses for Nonperformance

No liability attaches for failure to perform a contract of affreightment which has been rightly canceled pursuant to its terms. Impossibility of performance may under some circumstances excuse nonperformance.

Neither party is at liberty to abandon the contract except for legal cause or with the consent of the other.[34] However, no liability attaches to a carrier for its failure to perform under a contract which has been rightly canceled pursuant to its terms,[35] notwithstanding, in the case of the carrier's refusal to accept a cargo for carriage, the shipper has performed all the conditions of the contract on his part to be performed.[36]

Impossibility of performance amounts to an excuse such as will relieve the parties to the contract from all liability for its nonperformance.[37] In order to excuse performance altogether and leave the promisee without remedy for his loss, it is necessary that the intervening event which prevents performance shall be so improbable as to be outside any contingency, which, had the parties been faced with it, they would have agreed that the promisor should undertake.[38] The owner of a vessel is not excused from performing his contract by the freezing in of the vessel and the death of the master,[39] but in such case is entitled to a reasonable time to procure a new master and to await the relief of the vessel.[40] If navigation becomes impracticable in consequence of seasonal cold, storms, or ice, a vessel is excused from fulfilling the contract during the season.[41]

Abandonment of cargo to insurers. Where shippers abandon to their insurers a cargo damaged by the fault of the carrier before its arrival at the place of destination, and insurers take possession and sell the goods at the port of disaster, such action terminates the responsibility of the carrier, and he cannot be held liable for nondelivery.[42]

Default of one party rendering performance by the other impracticable is sufficient excuse for nonperformance,[43] and, accordingly, the shipper may justifiably refuse to ship on a vessel not ready within the time required by the contract.[44] So, a ship may refuse to receive goods under a contract if the other party thereto refuses to be responsible for the freight;[45] but nonperformance of an unqualified

27. Tex.—Elder v. Weld-Neville Cotton Co., Com.App., 231 S.W. 102.
58 C.J. p. 350 note 8

28. U.S.—Grace v. Ford Motor Co., C.C.A.Cal., 278 F. 955.

29. U.S.—Grimwood v. Munson SS. Line, C.C.A.N.Y., 273 F. 166.
58 C.J. p. 350 note 10.

30. U.S.—The Julia Blake, N.Y., 2 S.Ct. 692, 107 U.S. 418, 27 L.Ed. 595
58 C.J. p. 350 note 11.

31. U.S.—Willcox v. Weil, D.C.N.Y., 24 F.2d 587.
58 C.J. p. 350 note 12.
General average generally see infra §§ 224–238.

32. U.S.—The Julia Blake, N.Y., 2 S.Ct. 692, 107 U.S. 418, 27 L.Ed. 595.
58 C.J. p. 350 note 13.

33. U.S.—Willcox v. Weil, D.C.N.Y., 24 F.2d 587.

34. U.S.—Simmons Transp. Co. v. Alpha Portland Cement Co., D.C.N.Y., 286 F. 955.
58 C.J. p. 352 note 51.
Excuse for delay in transportation and delivery see infra § 123.

35. U.S.—Associated Metals & Minerals Corp. v. Swedish Mexico Line, D.C.N.Y., 48 F.Supp. 819, affirmed, C.C.A., 140 F.2d 863.
N.Y.—Olavarria & Co. v. Cosmopolitan Shipping Co., 33 N.Y.S.2d 201, affirmed 36 N.Y.S.2d 422, 264 App. Div. 845.
Rescission or cancellation see supra § 106.

Good faith

Where shipping contract between merchant and conference formed by ocean carriers contained clause permitting cancellation in event of war, cancellation of the shipping contract and booking thereunder for transportation of particular commodity because of war was not in bad faith so as to permit merchant to recover damages, notwithstanding carrier, after the cancellation, transported other goods at freight rate approximately double that provided for by the contract.—Associated Metals & Minerals Corp. v. Swedish America Mexico Line, D.C.N.Y., 48 F.Supp. 819, affirmed, C.C.A., 140 F.2d 863.

36. N.Y.—Olavarria & Co. v. Cosmopolitan Shipping Co., 33 N.Y.S.2d 201, affirmed 36 N.Y.S.2d 422, 264 App. Div. 845.
Liability of carrier for failure or refusal to deliver goods see infra § 120.

37. U.S.—The Tornado, La., 2 S.Ct. 746, 108 U.S. 542, 27 L.Ed. 747.
58 C.J. p. 352 note 52.

38. U.S.—The Poznan, D.C.N.Y., 276 F. 418
58 C.J. p. 352 note 53.

39. U.S.—The Flash, D.C.N.Y., 9 F. Cas.No. 4,858, Abb.Adm. 119

40. U.S.—The Flash, supra.

41. Iowa.—West v. The Berlin, 3 Iowa 532

42. U.S.—The Mohawk, Ill., 8 Wall. 153, 19 L.Ed. 406.

43. U.S.—South Atlantic SS. Line v. London-Savannah Naval Stores Co., Ga., 255 F. 306, 166 C.C.A. 476.
58 C.J. p. 353 note 58.

44. La.—La Compagnie Commerciale de Transports a Vapeur Francais v. Gomila, 36 La.Ann. 280
58 C.J. p. 353 note 59

45. U.S.—The A. Cheesebrough, C.C. N.Y., 1 F.Cas.No. 25, 3 Blatchf. 305.
58 C.J. p. 353 note 61.

contract to ship is not excused by the cancellation by a third person of another contract which made the shipment imperative,[46] and a shipper agreeing to load his cargo within a certain time after the vessel is in the dock is not excused from performance by the fact that the vessel was not at the dock for the stipulated period in consequence of the dock master ordering it to give place to other ships ready to load.[47]

A declaration of war does not excuse performance under a contract between domestic companies for the carriage of cargo from neutral foreign ports to domestic ports, notwithstanding performance after the declaration of war is subject to greater hazards.[48]

Governmental restraints. Governmental interference or restraint which renders performance impossible may excuse nonperformance of a contract of affreightment.[49] A person, agreeing to transport goods under a general carrying contract, not limited to carriage in steamers of which he is owner or manager at the date thereof, is not excused from performance by the fact that the government requisitioned his ships for war purposes.[50] The carrier may abandon the voyage where the hazard of loss or seizure by a belligerent has become substantially greater during the voyage than anticipated by the parties at its beginning,[51] particularly where the bill of lading expressly so provides.[52] Likewise, under a bill of lading excepting liability for the loss or damage occasioned by arrest and restraint of princes, or people, a master acting in good faith and on his own judgment in abandoning a voyage because of the imminent danger of war and capture does not render the carrier guilty of an actionable breach of the contract,[53] but such a

46. Va.—Lehigh Portland Cement Co. v. Virginia SS Co., 111 S.E. 104, 132 Va. 257.
58 C.J. p. 353 note 62

47. N.Y.—Hassett v. McArdle, 28 N.Y.S. 48, 7 Misc. 710.
58 C.J. p. 353 note 63

48. U.S.—Luckenback S.S. Co. v. W. R. Grace & Co., C.C.A.Va., 267 F. 676, certiorari denied 41 S.Ct. 14, 254 U.S. 644, 65 L.Ed. 454.

49. U.S.—L. N. Jackson & Co. v. Royal Norwegian Government, C.A.N.Y., 177 F.2d 694, certiorari denied 70 S.Ct. 574, 339 U.S. 914, 94 L.Ed. 1340.
N.Y.—L. N. Jackson & Co. v. Seas Shipping Co., 56 N.Y.S.2d 501, 185 Misc. 94, affirmed 61 N.Y.S.2d 371, 270 App.Div. 830, affirmed 68 N.E.2d 605, 296 N.Y. 529, motion denied 69 N.E.2d 483, 296 N.Y. 635.

Executive order

Where owner of foreign vessel applied to United States Maritime Commission for priority warrants for all of its ships, and thereafter contracted with buyer of copra to carry copra from Africa to United States, but before owner of vessel could perform contract, attack on Pearl Harbor occurred, and United States was precipitated into World War II, and Assistant Director of Division of Emergency Shipping of Maritime Commission ordered owner of vessel to substitute wool for copra, contract to carry copra was discharged, and owner of vessel was not liable for breach thereof.—L. N. Jackson & Co. v. Royal Norwegian Government, C.A.N.Y., 177 F.2d 694, certiorari denied 70 S.Ct. 574, 339 U.S. 914, 94 L.Ed. 1340.

50. U.S.—Société Anonyme des Sucreries de Saint Jean v. Bull Insular Line, C.C.A.Puerto Rico, 276 F. 783, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795.
58 C.J. p. 353 note 65.

51. U.S.—The Wildwood, C.C.A. Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

Apprehension of danger

A reasonable apprehension of seizure of vessel authorizing an abandonment of voyage arises when degree of danger gets beyond category of rumors or fanciful danger and may be properly called actual and substantial; but the reasonableness of carrier's or master's apprehension of increased hazard resulting in an abandonment of voyage may not be determined by subsequent events.—The Wildwood, C.C.A.Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

Change in conditions

(1) A shipowner could not justify frustrating contract to carry cargo to its destination because of threatened blockade by a belligerent, unless there were increased hazards to shipping greater than those which existed at inception of voyage to such a degree as would have deterred a reasonably prudent sailor from proceeding.—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

(2) Where at time carrier undertook voyage to Russian port from United States, British had intercepted a ship carrying German owned cargo en route to Russia but British minister had declared that there was no contraband control in Pacific, voyage was not undertaken in contemplation of running a blockade, and when, during course of voyage, neutral Russian ship en route from Mexico to Russia with similar cargo was seized and consensus of news reports was that British blockade had been extended and carrier could obtain no additional information from Russian Embassy, British Embassy or Department of State, carrier was justified in abandoning voyage because of increased hazard.—The Wildwood, C.C.A.Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

52. U.S.—The Wildwood, C.C.A. Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

"Impracticable to proceed"

Torpedoing of freighter by Japanese submarine only five miles from Los Angeles on Dec. 24, 1941, resulting in submersion of lumber cargo and its soaking with fuel oil, and requiring that freighter be drydocked for repairs which, because of their nature and war conditions are not in fact completed until May 9, 1942, justifies abandonment of voyage on Feb. 5, 1942, under provisions of bill of lading issued on Dec. 13, 1941, permitting abandonment for conditions, existing or anticipated, causing master to decide that it will be unsafe or "impracticable to proceed" or that carriage will be likely to be delayed.—Pope & Talbot v. Blanchard Lumber Co. of Seattle, C.C.A.Cal., 159 F.2d 134.

53. U.S.—North German Lloyd v. Guaranty Trust Co., Mass., 37 S.Ct. 490, 244 U.S. 12, 61 L.Ed. 960.
58 C.J. p. 354 notes 68, 69.

clause in a contract by a neutral to carry contraband of war, made when conditions of war exist and are known to both parties, affords no ground for repudiation of the contract by the carrier because of the danger of seizure.[54] A clause that, owing to war conditions, a shipment is accepted at the shipper's risk of interference by any power excuses the carrier where the government of the country of destination takes all the space on the boat and refuses to allow the shipment,[55] and, under a provision that the contract is subject to approval of a certain government, the carrier is protected from liability for noncarriage by such government's withdrawal of its original approval.[56]

Embargo. A vessel under embargo is ordinarily excused from performance of its contract of carriage,[57] but a carrier may not plead, in excuse, an embargo to which it has been voluntarily subjected.[58]

Riots and strikes in the port of destination will justify the master's failure to deliver there under a bill of lading excusing performance if, in his judgment, it is impracticable to discharge the goods while the ship is at such port.[59]

Title in third person may be asserted to excuse the owner of a vessel from delivering in accordance with the terms of the contract.[60]

d. Remedies

(1) In general

(2) Procedure

(3) Damages recoverable by shipper

(4) Damages recoverable by carrier

(1) In General

An action in personam against the carrier and in rem against the vessel may lie for a breach of a contract of affreightment.

An action in personam will lie against the carrier for a breach of a contract of affreightment,[61] even though the contracting carrier is not the owner of the vessel,[62] and an action in rem against the vessel will lie for a breach of such a contract,[63] but in order to subject a vessel through a process in rem the goods must have been actually delivered and received on board,[64] and, except where it is provided otherwise by statute,[65] a libel in rem against a vessel will not lie to recover damages caused by the refusal to receive on board the vessel goods which its agents had agreed should be received and carried as freight.[66] An action in personam for the breach will not lie against one not a party to the contract,[67] or against an authorized agent who signed the contract or bill of lading as such.[68] Where the defense pleaded in a suit for breach of a contract to carry cargo is a denial of the breach, respondent will not ordinarily be allowed to change his ground to excuse the breach,[69] and the mere fact that libelant has claimed vis major in excuse of his breach of contract with the consignee does not justify respondent's defense on that ground in the absence of

54. U S—Balfour, etc, Co v. Portland, etc, SS Co., D.C Or, 167 F. 1010.

55. U S—N P. Sloan Co. v. Churchill Line, C.C A N Y, 5 F.2d 153

56. U S—N. P. Sloan Co. v. Churchill Line, supra

57. U S—Allanwilde Transp. Corp. v. Vacuum Oil Co., N.J., 39 S Ct 147, 248 U S 377, 63 L.Ed 312, 3 A. L R 15, answers to certified questions conformed to 256 F. 987, 167 C.C.A 663.

58 C J p 354 note 73

Acceptance prior to embargo

Where some of the automobiles, which steamship company had allegedly agreed to transport for dealer, were not even in existence on date alleged contract was made, there was no "acceptance" of the automobiles for transportation imposing a duty on the carrier to transport notwithstanding subsequent imposition of an embargo, either under the ordinary understanding of the word, or under the tariff provision that shipments would be accepted during a certain period each year and that date on which final instructions for transportation were received should be considered date of acceptance—Holt Motor Co. v. Nicholson Universal S S Co., D C Minn, 56 F.Supp. 535

58. U.S.—The Henry W. Cramp, D. C.Pa, 6 F.2d 900, affirmed, C.C.A., 20 F 2d 320.

59. U.S.—Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., C. C.A Or, 31 F 2d 401.

60. N Y—Bates v Stanton, 8 N.Y. Super. 79

61. U S.—Ellamar Min. Co. v. Alaska S. S Co, C C.A Wash, 5 F.2d 890, certiorari dismissed 47 S.Ct. 458, 273 U.S. 780, 71 L Ed 889.

N Y.—Zonite Products Corp. v Mediterranean Nav. Co., 52 N Y S 2d 603, 183 Misc 962.

58 C.J p 354 note 78

Liability of charterer on bill of lading signed by master see infra § 113.

Jurisdiction in admiralty for breach of contract of affreightment see Admiralty § 30.

62. U.S—The Lake Fabyan, C.C.A. Va, 283 F 771.

58 C J. p 354 note 78 [a], [b].

63. U S—Bulkley v. Naumkeag Steam Cotton Co, Mass, 24 How 386, 16 L Ed. 599.

58 C J. p 354 note 79.

64. U S—The Capitaine Faure, C C A N Y, 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L Ed 1150 and Societe de Navigation à Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S Ct 634, 271 U S. 684, 70 L Ed 1150.

58 C J p 354 note 80.

65. Mo—Taylor v. The Robert Campbell, 20 Mo. 254.

58 C.J. p 355 note 81

66. U S—Herbert v. The James Leakman, D C.N Y., 12 F.Cas.No 6,397a.

58 C J p 355 note 82.

67. U S—The Poznan, D C N.Y., 276 F. 418

58 C.J. p 355 note 83.

68. U.S.—E I. Dupont De Nemours & Co. v. Barge Carriers, D C.Fla., 55 F.Supp 728

69. U.S.—Gottesman v Canada, etc., SS. Co., D C N.Y., 259 F 298.

proof thereof.[70] The fact that plaintiff shipper in an action for breach shipped on another ship part of the material defendant had agreed to carry, the contract not having been rescinded, is not matter in bar of recovery of general damages, but only matter of offset.[71]

Waiver of defense. A previous breach of a contract by the shipper is waived where the owner assigns as its sole reason for refusing to supply ships to the shipper the unsettled conditions in the country to which the goods are destined,[72] and a carrier notifying the consignee that its vessel is discharging on a certain pier waives its right to rely on any contradictory provisions in the contract.[73] So the carrier's breach in failing to have its barges in place for loading in time is waived by the shipper's inducing the carrier to remain after the arrival of the barges pending negotiations for delivery by a third person of the goods to the shipper.[74]

Interest of consignee or assignee to support suit. A consignee who has never become the owner of the consignment so as to sustain a contract relationship with the carrier has no interest which will support a suit in rem against the vessel for breach of the contract of affreightment;[75] but where the freight was prepaid, there is a presumption that the consignee duly named in the bill of lading became the owner of the property.[76] The transferee of a bill of lading may sue the carrier[77] or libel the vessel on which the goods are shipped[78] for failure to deliver them,[79] although he may be but an agent or trustee of the goods for others,[80] and he is not precluded from proceeding against the carrier by the fact that he also had a cause of action against his assignor.[81] Notwithstanding the pledgee to whom a bill is given as security does not ordinarily hold title to the goods, it has been held that he may sue for wrongful delivery of the goods.[82]

(2) Procedure

General rules of procedure apply in actions for breach of contracts of affreightment.

General rules as to pleadings are applicable to actions, suits, or libels for breach of an affreightment contract,[83] and as to evidence,[84] questions of law and fact,[85] instructions,[86] and findings.[87] Failure of plaintiff to tender performance of the contract on the date specified therein is not ground for a nonsuit if it appears that defendant was not ready to perform;[88] but refusal to redeliver inferior goods

70. U S—Gottesman v. Canada, etc, SS Co, supra.

71. Wash—Revett v. Glove Nav. Co., 106 P. 176, 56 Wash 550.

72. U S—Grimwood v. Munson SS. Line, C C.A N.Y, 273 F. 166.

73. U S.—E J. Keller Co. v Cosmopolitan Shipping Co, D C N.Y., 26 F.2d 838

74. U S—St Louis Coke, etc, Co v. Goltra, C C.A.Ill, 41 F 2d 134.

75. U S—The Prussia, D C.Wash, 100 F 484
58 C J. p 356 note 97.

76. Ala—Munson SS Line v. Turner, 81 So 76, 202 Ala 574

77. U S—Olivier Straw Goods Corp v. Osaka Shosen Kaisha, C C A N. Y, 27 F 2d 129, certiorari denied 49 S.Ct. 22, 278 U.S. 618, 73 L Ed 540—Higgins v. Anglo-Algerian SS. Co, N Y., 248 F. 386, 160 C C A 396.
Negotiability and transfer of bills generally see infra § 114.

78. U S—The Thames, N.Y, 14 Wall. 98, 20 L Ed 804.

79. U S—The Thames, supra—Olivier Straw Goods Corp v Osaka Shosen Kaisha, C C A N.Y, 27 F 2d 129, certiorari denied 49 S.Ct. 22, 278 U S. 618, 73 L Ed 540.

80. U.S.—The Thames, N.Y., 14 Wall. 98, 20 L Ed. 804.

81. U S—Olivier Straw Goods Corp v. Osaka Shosen Kaisha, C C A N. Y, 27 F 2d 129, certiorari denied 49 S Ct. 22, 278 U S 618, 73 L.Ed 540.

82. U S.—California Bank v. International Mercantile Marine Co, D C N Y, 40 F.2d 80, reversed on other grounds, C C A, 64 F 2d 100, certiorari denied 54 S.Ct 66, 290 U S. 649, 78 L Ed 563.

83. U S—Overseas Shipping Co. v Struthers, C C A Cal, 265 F. 612.
58 C.J. p 355 note 88.

Arbitration

Barge owner, party to contract of carriage providing for arbitration of disputes before produce exchange's grain committee, may move under federal statute for reference of controversy with shipper with respect to liability for damage to, and destruction of, grain cargo to proper arbitration board.—The F Y. Robertson, D C N Y, 7 F.Supp. 38.

Separate statement of each cause of action

Where shipments are made under separate bills of lading, each bill of lading is separate contract, breach of which constitutes separate and distinct cause of action, which must be separately stated and numbered —Leveille v Osaka Shosen Kaisha, 244 N.Y.S. 112, 137 Misc. 873.

84. **Burden of proof**
(1) In general—Revett v. Globe Nav. Co, 106 P. 176, 56 Wash. 550—58 C J p 355 note 89 [a].

(2) Since, as discussed supra § 106 c, every contract of a carrier for carriage by water implies that the boat is fit for the purpose at the time for its performance, it is incumbent on the carrier, in bringing an action for breaking the contract, to prove that at such time its boat was capable of performing it—McClintock v Lary, 23 Ark 215

Admissibility of evidence
Va.—Lehigh Portland Cement Co. v Virginia SS. Co., 111 S E. 104, 132 Va. 257.
58 C J. p 355 note 89 [b], [c], [d].

Sufficiency of evidence
U S—St Louis Coke, etc, Co v. Goltra, C C A Ill, 41 F 2d 134.
58 C J. p 355 note 89 [e], [f].

85. U S—Empire Fuel Co v Lyons, Ohio, 257 F 890, 169 C C A 40, certiorari denied 40 S Ct. 393, 252 U S 582, 64 L.Ed 727.
58 C J. p 356 note 90

86. **Instructions presenting issue**
Ala—Tennessee River Nav. Co v Walls, 85 So. 711, 204 Ala. 285.
58 C J p 356 note 91.

87. U S—Herr v. Tweedie Trading Co, N.Y., 181 F. 483, 104 C.C.A. 231
58 C.J. p 356 note 92.

88. Wash.—Revett v. Globe Nav Co, 106 P. 176, 56 Wash 550.

claimed to have been wrongfully delivered to the consignee amounts to an acceptance precluding recovery for the alleged misdelivery.[89]

(3) Damages Recoverable by Shipper

As a general rule, damages recoverable by the shipper in an action for breach of a contract of affreightment are limited to those which naturally and directly result from the breach or may fairly be presumed to have been within the contemplation of the parties on entering into the contract.

In accordance with the general rule, discussed in Damages § 24, damages for breach of a contract of affreightment by the carrier must be confined to those which naturally and directly result from the breach or may fairly be presumed to have been within the contemplation of the parties when the contract was made.[90] Where a vessel is to arrive at a port and receive a cargo by a certain day specified, and she does not arrive until after the appointed time, the only damages that can be recovered because of the delay, when the vessel is accepted and the cargo shipped, are such expense as may have been incurred for keeping the cargo during the period of delay and the additional insurance the shipper may have had to pay by reason of the increased risk caused thereby.[91] Where the vessel on which the goods are received never sails because of the fault of the carrier, the shipper may recover as special damages the cost of delivery to the vessel and return to the shipper's place of business,[92] as well as other costs necessarily involved in the shipment.[93] When the ship, after receiving goods for a particular port, changes her destination and refuses to deliver them up, she is liable at least for their full value;[94] and so, where performance is interrupted while loading is going on and the owner repudiates the contract, refusing to take on board the residue or deliver up that already loaded, the shipper may recover damages for the value of the goods taken on board and withheld,[95] for the cost of transporting the residue from the storehouse to the dock,[96] for injuries received by them while they lay there awaiting the owner's acceptance,[97] and for the difference between the contract price of transportation and any greater expense incurred in obtaining another mode of conveyance,[98] but not for injuries received by the property after notice of the owner's refusal to complete the contract.[99] Where a shipper is induced to hold the goods ready for shipment on representations of transportation companies that he would be able to ship on vessels presently leaving port, he is entitled, on breach of the contract, to recover demurrage,[1] interest on value of goods during delay,[2] and additional damages for transportation through another carrier.[3] Where the breach of the contract has resulted in no loss to the shipper[4] or indorsee of the bill of lading,[5] or where there is no evidence of loss and the amount thereof,[6] he is not entitled to recover in excess of nominal damages.

Costs of substituted performance. The measure of damages of a shipper suing for breach of contract to transport his goods is the difference between the cost of transportation at the agreed rate and the cost reasonably incurred in procuring a substitutionary performance.[7] Thus, he is entitled to recover the increased cost of freight,[8] the expense of storage,[9] and the cost of fire protection until a bottom can be procured.[10]

Difference in value at ports of shipment and destination. Where shipowners without legal justification refuse to perform the voyage, the damage to the owners of the goods is the difference in value between the goods at the port of shipment and the price they would have commanded at the port of

89. U S —The Cardiganshire, D C Cal., 9 F 2d 416.

90. U S —The Georg Dumois, N.Y., 115 F 65, 52 C.C A. 659.
58 C.J. p 357 note 12, p 358 note 36

91. U S —The J. C. Stevenson, D C Md., 17 F. 540.
58 C.J. p 357 note 13.

92. N.Y.—Zonite Products Corporation v. Mediterranean Nav Co, 52 N Y.S 2d 603, 183 Misc 962.

93. **Costs of insurance and consular invoices**
N.Y —Zonite Products Corporation v. Mediterranean Nav. Co., supra.

94. La.—Boyle v. Dickenson, 6 Mart, N S., 100.
Damages for nondelivery or misdelivery by carrier generally see infra § 124.

95. U S —The Flash, D C N Y, 9 F. Cas No 4,858, Abb Adm 119

96. U S —The Flash, supra.

97. U S.—The Flash, supra.

98. U S —The Flash, supra.

99. U S —The Flash, supra

1. U S —Rotterdamsche Lloyd v Gosho Co., C C A Cal, 298 F 443, certiorari denied 45 S Ct. 99, 266 U S. 621, 69 L Ed 472.

2. U S.—Rotterdamsche Lloyd v. Gosho Co., supra.

3. U S —Rotterdamsche Lloyd v. Gosho Co, supra.

4. U S —The West Cawthon, D C Md, 281 F 894—Munson SS Line v Grimwood, N.Y., 249 F. 722, 161 C.C A. 632.
58 C.J. p 357 note 23.

5. U S —Goepel v. Hamburg American Packet Co, D.C N.Y., 191 F. 744
58 C J p 357 note 24.

6. Ala —Munson SS Line v. Turner, 81 So. 76, 202 Ala 574

7. U S —U. S v. Shaw, D C Pa, 15 F.2d 888
58 C.J. p 357 note 26.

8. U S —London-Savannah Naval Stores Co v. South Atlantic SS. Line, D C Ga., 248 F. 949, reversed on other grounds 255 F. 306, 166 C C.A. 476.

9. U S.—London-Savannah Naval Stores Co. v. South Atlantic SS. Line, supra.

10. U S.—London-Savannah Naval Stores Co v. South Atlantic SS. Line, supra.

destination, if the contract had been performed.[11]

Differences in value at destination. Where, after loading goods, a ship fails to sail, the measure of damages with respect to goods reshipped is the difference between the market value at destination at the time the goods would have arrived if the contract had not been breached and the value there at the time they were actually received in ordinary course, plus the freight and other necessary expenses incurred in connection with such reshipment,[12] and as to goods not reshipped the measure is the difference between the value at the time the ship should have arrived at her destination, if she had sailed, and the market value of the same goods at such ports on the arrival of the next available vessel.[13]

Remote or speculative damages. Remote[14] or speculative[15] damages are not recoverable; and profits which the shippers might have made by ulterior speculations[16] or by shipping the goods from the port of destination to other places and better markets[17] are too remote to be considered.

Mitigation of damages. The shipper should mitigate damages by forwarding the goods by other means, if possible, where the ship wrongfully discharges the cargo.[18]

(4) Damages Recoverable by Carrier

The damages recoverable by a carrier for the shipper's breach of contract to furnish freight is the actual loss sustained by the carrier, and not the contract price.

Where a carrier has a contract to transport a cargo at an agreed price to a designated point, and the shipper fails to deliver the cargo, the carrier's measure of damages is the difference between the cost of transportation and the contract price.[19]

The measure in all cases where the shipper breaks the contract to furnish freight is the actual loss, and not the contract price.[20] The contract price should be credited with the sum received,[21] or which might, with reasonable diligence, have been received,[22] for transporting goods other than those the shipper contracted to furnish; and, accordingly, the shipper may reduce the damages by showing that the carrier received freight from others in lieu of that which the shipper failed to furnish, or by proving in any other way that the injury was less than the contract price.[23] The master cannot recover for failure to furnish the freight merely by showing that no other freight was offered to him at the port at which the shipper breached his contract; it must appear that none was to be had at that port, but the master is not bound to go to another port in search of freight.[24] Where the breach consisted of shipping compressed cotton of less density than that stipulated in the contract, the shipper should pay for the additional space at the contract rate for the smallest amount of cotton by weight of the required minimum density necessary to fill it,[25] and where, through defendant's breach of contract, plaintiff's barge was sunk, plaintiff may recover, not only the loss on his contract with defendant to transport the goods, but the difference between the value of the barge before and after it sunk.[26]

Effect of embargo. Where, after a vessel had taken on board a cargo to be carried, the embargo law prevented it from sailing, and the cargo remained on board for some time, when it was sold at the place of shipment, the owner of the vessel can recover nothing in the way of damages, on the theory that had it not been for its possession of

11. U.S.—Harrison v. Stewart, C.C. Md., 11 F.Cas.No.6,145, Taney 485

12. U.S.—The Capitaine Faure, C.C. A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150 and Societe de Navigation À Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150

Measure of damages arising from deviation and delay see infra § 124.

13. U.S.—The Capitaine Faure, C.C. A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150 and Societe de Navigation A Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.

14. U.S.—Letts v. Hackett, D.C. Mich., 15 F.Cas.No.8,283, Brown Adm. 480.

15. Ala.—Payne v. Zimmern, 92 So. 433, 207 Ala. 155.
58 C.J. p. 358 note 34.

16. U.S.—Harrison v. Stewart, C.C. Md., 11 F.Cas.No.6,145, Taney 485.

17. U.S.—Harrison v. Stewart, supra.

18. U.S.—The Capitaine Faure, C.C. A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150 and Societe de Navigation À Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.

19. U.S.—Boland v. Northwestern Fuel Co., C.C.Minn., 34 F. 523.
N.Y.—Stearns v. Stollwerck Chocolate Co., 221 N.Y.S. 512, 220 App. Div. 265

20. N.Y.—Shannon v. Comstock, 21 Wend. 457, 34 Am.D. 262.

21. U.S.—St. Louis Coke, etc., Co. v. Goltra, C.C.A.Ill., 41 F.2d 134
Mass.—Bailey v. Damon, 3 Gray 92.

22. U.S.—Bailey v. Damon, supra.
58 C.J. p. 358 note 40.

23. N.Y.—Shannon v. Comstock, 21 Wend. 457, 34 Am.D. 262.

24. Wis.—Bradley v. Denton, 3 Wis. 557.

25. Tex.—Elder v. Weld-Neville Cotton Co., Com.App., 231 S.W. 102.

26. Ala.—Doran v. Gilreath, 72 So. 94, 196 Ala. 377.

this cargo it might have been employed in the coast trade.[27]

Excessive damages should not be awarded [28]

§ 109. —— Delivery of Cargo to Vessel

Responsibility of a carrier for goods to be carried under a contract of affreightment commences on delivery of the goods to the carrier. What constitutes a sufficient delivery depends in general on the facts of each case.

The receipt of goods by the carrier has been said to lie at the foundation of the contract to carry and deliver, and if actually no goods are received there can be no such contract.[29] The liability and responsibility of the carrier under a contract for the carriage of goods commence on their actual delivery to, or receipt by, the carrier or an authorized agent.[30] What is a sufficient delivery to the carrier or vessel depends in general on the facts in each case [31] Giving the goods to the mate for transportation and taking his signed receipt therefor has been held to be a good delivery to, and binding on, the vessel,[32] and delivery to a lighter in charge of a vessel for shipment on the vessel, where it is the custom to deliver in that way, is a good delivery and binds the vessel receiving the freight, the liability commencing at the time of delivery to the lighter.[33] Delivery at a wharf may be sufficient;[34] but such delivery on the dock must be accompanied with notice to the master in order to render him liable for failure to deliver the goods at their destination;[35] and, similarly, where there is a contract to carry goods from one port to another, and they cannot be loaded directly on the vessel, and lighters are sent by the vessel to bring the goods to it, the lighters are for the time its substitutes, so that the bill of lading is applicable to the goods as soon as they are placed on the lighters [36] Where the contract provides for delivery of the cargo at the port of shipment within reach of the vessel's tackle, there is a sufficient delivery within the terms of the contract if the cargo is on a pier or lighter within reach of such tackle and thus is in the custody of the master.[37] Where the lighter is employed by the shipper, and the cargo is transferred from the lighter to the ship by slings and horses belonging to the ship, or the stevedores in the employ of the ship, the responsibility of the lighterman ceases when the cargo is properly placed on the slings and hooked to the tackle;[38] and the duty of the ship begins with the hoisting of it to the deck of the ship.[39] Delivery on the wharf at the shipowner's request is sufficient,[40] but delivery there to an agent of the charterer, while constituting a delivery to the charterer,[41] is not, in the absence of authority in him to receive it as such, delivery to the vessel.[42]

27. U S.—Kelly v. Johnson, Pa., 14 F Cas.No 7,672, 3 Wash.C C 45.

28. Va —Lehigh Portland Cement Co v Virginia SS. Co, 111 S E 104, 132 Va 275.
58 C J p 358 note 47.

29. U S —Pollard v. Vinton, Ky, 105 U S. 7, 26 L Ed. 998—Ortega & Emigh v. Grace Line, D C Cal, 72 F Supp 302.

30. U.S —Strohmeyer & Arpe Co. v American Line S S. Corp, C.C.A N Y, 97 F 2d 360—Inland Waterways Corporation v Standard Commercial Tobacco Co., C C A La, 65 F.2d 715—The Robin Gray, C.C A.N Y, 65 F 2d 376, modified in part on other grounds 65 F 2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U S 653, 78 L Ed. 566—Archibald McNeil & Sons Co. of New York v. Western Maryland Ry. Co, D.C Pa, 42 F 2d 669, affirmed, C.C.A., 51 F.2d 1073, certiorari denied 52 S.Ct. 41, 284 U.S 665, 76 L.Ed 563 —Crenshawe v. Pearce, D C.N.Y, 37 F. 432.

Delivery to, and acceptance by, carrier in order to charge it for loss or injury to goods see infra § 125.

On delivery and storage of cargo on shipboard, the ship becomes bound to cargo and cargo to the ship—The Pacific Spruce, D.C Wash., 1 F.Supp. 593.

Delivery to carrier must be complete, so that carrier has full dominion over the property to be carried —Strohmeyer & Arpe Co. v. American Line S. S Corporation, C.C A N Y, 97 F.2d 360

In order to bind carrier, the delivery is sufficient only when the goods are delivered to it or its authorized agent.—The Capitaine Faure, C C A N Y, 10 F 2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v Cooper, 46 S Ct. 634, 271 U.S. 684, 70 L Ed 1150, and Societe de Navigation À Vapeur France Indo-Chine v Harrisons & Crossfield, 46 S Ct 634, 271 U.S 684, 70 L.Ed. 1150—58 C.J. p 351 note 27

31. U S —Strohmeyer & Arpe Co v. American Line S S Corp., C.C.A N. Y, 97 F 2d 360.
58 C J p 350 note 16.

Taking of a receipt for the cargo is not essential to complete delivery of the cargo to a carrier.—Mackey v. U. S, D C.N.Y., 83 F Supp. 14.

Issuance of dock receipts

Where dock receipts issued by charterer when goods were delivered to it provided that goods were accepted for shipment subject to provisions of company's usual bill of lading, the terms of bill of lading were binding on cargo from time receipt was executed, irrespective of whether goods were loaded, or bills of lading were actually issued —The Toledo, D C N Y, 30 F Supp 93, affirmed, C C A., 122 F 2d 255.

32. U S.—Burdoin v The Harriet Smith, D C N Y., 4 F.Cas No 2,147a.

33. U.S.—Bulkley v. Naumkeag Steam Cotton Co, Mass, 24 How. 386, 16 L Ed 599
58 C J p 351 note 18.

34. U S —Petersburg, etc., Steamboat Line v Norfolk-Virginia Peanut Co, Va, 172 F. 321, 96 C.C A. 383, 24 L R A.,N S, 569.
58 C J p 351 note 19.

35. N Y—Packard v Getman, 6 Cow 757, 16 Am D 475

36. U S —Insurance Co. of North America v. North German Lloyd Co., D C.Md, 106 F. 973, affirmed 110 F 420, 49 C C A. 1.

37. U S —The Robin Gray, C.C.A.N. Y., 65 F 2d 375.

38. U S —The Cordillera, C C N Y, 6 F.Cas No 3,229a, 5 Blatchf 518.

39. U S —The Cordillera, supra

40. U S —American Mills Co. v. Luckenbach S. S. Co, D.C.La, 20 F. 2d 217, reversed on other grounds, C C.A., Luckenbach S S. Co. v. American Mills Co, 24 F 2d 704.

41. U S —The Arabien, D.C Cal., 11 F.2d 304.

42. U S —The Arabien, supra.
58 C.J. p 351 note 26.

Accepted delivery to ship's side is sufficient to put the cargo at the vessel's risk,[43] notwithstanding the shipper reserved the right to reject and unload undesirable goods after loading;[44] but delivery to an adjacent dock is insufficient.[45]

Time of delivery. Where the contract does not stipulate a time for delivery of the goods on the vessel, the carrier may fix it,[46] although the shipper is entitled to a reasonable time after the vessel is ready to receive the goods on board.[47]

Authority to accept delivery for, and to bind, the vessel, may be conferred by express grant, or the conduct and relations of the parties may establish such an apparent authority that the carrier will be estopped to deny its existence to a shipper who has been misled thereby;[48] but such apparent authority to accept delivery must be actually shown, delivery to an unauthorized person not binding the boat.[49]

Inspection. A ship, like any other consignee, is entitled to inspect the goods before accepting them for carriage.[50]

§ 110. —— Lien of Shipper

As a general rule, the shipper has a maritime lien on the vessel for the execution of the contract of affreightment, which attaches at the time of delivery of the cargo to the owner or agent.

The shipper has a lien on the vessel for the execution of the contract of affreightment which may be enforced by process in rem in admiralty,[51] and which attaches at the time of the delivery of such goods to her agents and owners;[52] the failure of the ship to break ground, although it may defeat the ship's lien for freight, as considered infra § 170, does not defeat the shipper's lien for the safe transfer of his goods.[53] This lien has its source in the contract of affreightment,[54] and is justified as a means by which the vessel, treated as a personality or as impliedly hypothecated to secure performance of the contract, is made answerable for nonperformance.[55] The lien operates alike whether the contract of affreightment be by charter party, bill of lading, or parol,[56] but, where there is no agreement or contract of affreightment between the parties, a vessel is not subject to a maritime lien as security for the performance of a contract to transport a cargo.[57]

The lien on the vessel does not ensue on the mere execution of the contract,[58] and under the rule, discussed in Admiralty § 26, that no right in rem exists where the contract remains wholly executory, as long as a contract of affreightment remains wholly executory, the vessel and cargo are subjected to no lien which can be enforced by a libel in rem[59]

43. U.S.—The Olga S., C.C.A.La., 25 F.2d 229—McLeod Lumber Co. v. Crowley, D.C.Cal., 8 F.2d 283.
58 C.J. p. 351 note 28

44. U.S.—McLeod Lumber Co. v. Crowley, supra
58 C.J. p. 351 note 29

45. U.S.—McLeod Lumber Co. v. Crowley, supra.
58 C.J. p. 351 note 30

46. U.S.—Aron v. Luckenbach SS. Co., D.C.N.Y., 282 F. 937

47. U.S.—Aron v. Luckenbach SS. Co., supra
58 C.J. p. 348 note 68

48. U.S.—The Arabien, D.C.Cal., 11 F.2d 304—The City of Alexandria, C.C.N.Y., 28 F. 202

49. U.S.—The Arabien, D.C.Cal., 11 F.2d 304.
58 C.J. p. 351 note 32.

50. U.S.—Inland Waterways Corporation v. Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715

51. U.S.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216—Belvedere v. Compania Plomari De Vapores, S.A., C.A.Fla., 189 F.2d 148.
58 C.J. p. 351 note 34.
Lien of:
Parties under charter see supra §§ 45, 49.
Shipowner for freight see infra § 170
Shipper for loss occasioned by deviation and delay see infra § 123
Shipper for loss of, or injury to, goods see infra § 159.

Liens as mutual

(1) It has been said that only the obligations of ship and cargo under contract of affreightment are mutual and reciprocal, not the lien resulting from breach of those obligations; the one lien may come into existence without the other—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216

(2) It has also been said that the lien of a cargo owner on the ship is limited by the corresponding and reciprocal rights of the shipowner to the cargo—Osaka Shosen Kaisha v. Pacific Export Lbr. Co., Or., 43 S.Ct. 172, 260 U.S. 490, 67 L.Ed. 364—Belvedere v. Compania Plomari De Vapores, S.A., C.A.Fla., 189 F.2d 148.

52. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150—Pearce v. The Thomas Newton, D.C.N.C., 41 F. 106.

53. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150

54. U.S.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216

55. U.S.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, supra

56. Alaska.—Miners' Co-op. Assoc. v. The Monarch, 2 Alaska 383

57. U.S.—Belvedere v. Compania Plomari De Vapores, S.A., C.A.Fla., 189 F.2d 148
58 C.J. p. 352 note 44.

58. U.S.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216—Osaka Shosen Kaisha v. Pacific Export Lbr. Co., Or., 43 S.Ct. 172, 260 U.S. 490, 67 L.Ed. 364—Belvedere v. Compania Plomari De Vapores, S.A., C.A.Fla., 189 F.2d 148

59. U.S.—Belvedere v. Compania Plomari De Vapores, S.A., supra—Todd Shipyards Corporation v. The City of Athens, D.C.Md., 83 F.Supp. 67, petition denied, C.A., Acker v. The City of Athens, 177 F.2d 961.
38 C.J. p. 1230 note 80.

Accordingly, there is no lien on a vessel for breach of a contract of affreightment unless the goods are delivered to the ship or to someone authorized to act for her.[60] Thus, the vessel is not subject to a maritime lien for breach of contract by failing to call for the cargo[61] or proceed to the designated berth for loading,[62] or receive and load the cargo in whole or in part,[63] even though the cargo was later loaded thereon.[64] Receipt of part of the cargo called for by the contract does not entitle the shipper to a lien on the vessel for damages caused by its refusal to receive the rest of the cargo called for by the contract.[65]

A state statute may create a lien in rem on a domestic vessel for breach of such contracts of the owner as would give a right of suit in personam.[66]

What law governs. Since the right to a maritime lien is generally controlled by the lex loci contractus, where the lien does not exist in the place of the contract, it will not be allowed in another country, although the law of the place where suit is brought would otherwise sustain it.[67] Thus, in order that a lien may attach under the provisions of a state statute, the contract must arise in the state,[68] and the lien does not attach where there is a breach of a contract, which, although to be performed within the state, was made in another state.[69]

§ 111. Bills of Lading

As a general rule, the bill of lading in transportation of goods by water is an acknowledgment by the master or owner of the vessel of the receipt of specified goods to be carried on the terms stated. It is both a receipt and a contract.

The bill of lading in transportation of goods by water generally is in substance a written acknowledgment by the master or owner of the vessel that he has received such goods as it describes for the voyage stated, to be carried on the terms stated, and delivered to the persons specified in the bill.[70] It is twofold in its character: It is a receipt as to the quantity and description of the goods shipped; and it is a contract to transport and deliver the goods to the consignee or other person therein designated on the terms specified in the instrument;[71] and its office is to provide for the rights and liabilities of the parties with reference to the contract to carry.[72] It is a contract of bailment,[73] one of the most distinctly maritime of all contracts.[74] A bill of

60. U.S.—Belvedere v. Compania Plomari De Vapores, S. A., C.A. Fla., 189 F.2d 148—Todd Shipyards Corp. v. The City of Athens, D.C. Md., 83 F. Supp. 67, petition denied, C.A., Acker v. The City of Athens 177 F.2d 961—The Garonne, Alaska, 160 F. 847, 87 C.C.A. 651—The Caroline Miller, D.C.N.Y., 53 F. 136.

Union of ship and cargo

Affreightment contract gives cargo right to lien on vessel only where there is union of ship and cargo—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216—Belvedere v. Compania Plomari De Vapores, S. A., C.A. Fla., 189 F.2d 148.

Cost of making delivery

There is no lien for the cost of making delivery, where the goods are not received or carried—The Garonne, Alaska, 160 F. 847, 87 C.C.A. 651

Owner of a cargo has no lien on the vessel until the cargo or some portion thereof has been laden on board or delivered to the master—The Arabien, D.C. Cal., 11 F.2d 304—58 C.J. p. 352 note 39.

61. U.S.—The Trader, D.C. S.C., 17 F.2d 623

62. U.S.—The Saturnus, D.C.N.Y., 242 F. 173, affirmed 250 F. 407, 162 C.C.A. 477, 3 A.L.R. 1187, certiorari denied 38 S.Ct. 583, 247 U.S. 521, 62 L.Ed. 1247.

63. U.S.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216—Belvedere v. Compania Plomari De Vapores, S. A., C.A. Fla., 189 F.2d 148

64. U.S.—The Saturnus, D.C.N.Y., 242 F. 173, affirmed 250 F. 407, 162 C.C.A. 477, 3 A.L.R. 1187, certiorari denied 38 S.Ct. 583, 247 U.S. 521, 62 L.Ed. 1247

65. U.S.—Osaka Shosen Kaisha v. Pacific Export Lumber Co., Or., 43 S.Ct. 172, 260 U.S. 490, 67 L.Ed. 364.

66. U.S.—The Energia, D.C. Wash., 124 F. 842

67. Mich.—Turner v. Lewis, 2 Mich. 350

What law governs:

Contracts of affreightment generally see supra § 107

Maritime liens generally see Maritime Liens § 4.

68. Ind.—Coplinger v. The David Gibson, 14 Ind. 480.

58 C.J. p. 352 note 48

69. Mich.—Turner v. Lewis, 2 Mich. 350.

70. U.S.—Bank of Taiwan v. Union Nat. Bank of Philadelphia, C.C.A. Pa., 1 F.2d 65.

58 C.J. p. 358 note 50.

Master's copy or ship's bill see infra § 113.

What law governs see supra § 107

Bill of lading imports receipt of goods to be transported and delivered at place of destination—Strohmeyer & Arpe Co. v. American Line S. S. Corp., C.C.A. N.Y., 97 F.2d 360.

As contract

(1) Bill of lading under which shipment moved constitutes a contract between parties—Fadex Chemical Corporation v. Lorentzen, 44 N.Y.S.2d 789.

(2) Other similar statements or definitions see 58 C.J. p. 358 note 50 [a].

"Manifest" distinguished

"A manifest is a declaration of the entire cargo, a bill of lading is a declaration of a specific part of the cargo. A manifest is essentially a summary of all the bills of lading."—New York, etc., SS Co. v. U.S., D.C.N.Y., 125 F. 320, reversed on other grounds 26 S.Ct. 327, 200 U.S. 488, 50 L.Ed. 569.

71. U.S.—Pollard v. Vinton, Ky., 105 U.S. 7, 26 L.Ed. 998—Ortega & Emigh v. Grace Line, D.C. Cal., 72 F. Supp. 302—The Jean Jadot, D.C. N.Y., 14 F. Supp. 161.

58 C.J. p. 359 note 51.

72. U.S.—The Santa Ana, Wash., 154 F. 800, 84 C.C.A. 312.

73. U.S.—The Idefjord, D.C.N.Y., 31 F. Supp. 667, reversed on other grounds, C.C.A., 114 F.2d 262, certiorari denied Den Norske Amerikalinje A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459

Mass.—Blanchard v. Page, 8 Gray 281.

74. U.S.—Hidalgo Steel Co. v.

lading is a document of dignity,[75] and courts should do everything possible to preserve the integrity thereof in international trade.[76] While, as considered infra § 113, no particular form may be required for a bill of lading, a dock receipt is not in legal effect a negotiable bill of lading.[77]

As receipt exclusively. A bill of lading which both parties intend shall operate as receipt rather than as a contract of carriage has the legal effect of a receipt.[78] Such an intent is found when the shipper is the charterer,[79] and may equally be found where the shipper is a subcharterer.[80] Thus, a bill of lading, issued after the contract of carriage was entered into,[81] or one issued by a master to a charterer, who has contracted for the full capacity of the ship,[82] is merely a receipt for goods to be transported, and not a contract. Likewise, a bill of lading, given by the master to a subcharterer which left blank the space provided for insertion of the freight rate, is a receipt rather than a contract of carriage.[83]

Ship's bill is a bill of lading retained by a ship, designed only for information and convenience, and not for evidence, as between the parties, of what constituted their agreement.[84]

Clean bills of lading. A clean bill of lading has been variously defined as one which contains nothing in the margin qualifying the words in the bill of lading itself,[85] or one which is silent as to the mode of stowing the goods,[86] and which contains no exceptions as to the liability of the master except the usual one of the dangers of the sea.[87] It imports that the goods are to be safely and properly stowed under deck.[88]

§ 112. —— Issuance

a. Duty to issue
b. Persons entitled to receive bill
c. Who may execute

a. Duty to Issue

A shipper of goods is entitled to a bill of lading as a matter of right.

Moore, etc., Co, D C N Y, 298 F 331.
Admiralty jurisdiction over contracts of affreightment generally see Admiralty § 30.

75. U S—The Carso, D C N Y, 43 F 2d 736, modified on other grounds, C C A., 53 F.2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli Giannusa & Rao, Inc., 52 S Ct. 140, 284 U S 679, 76 L Ed 574—The Idefjord, D C N.Y, 31 F Supp 667, reversed on other grounds, C C A., 114 F 2d 262, certiorari denied Den Norske Amerikalinje A/S v. Blumenthal Import Corp, 61 S Ct. 175, 311 U S. 707, 85 L Ed. 459.

Sanctity of bill of lading

U.S—General Foods Sales Co. v. The Felipe Camarao, D.C.N.Y., 82 F. Supp 622.

76. U S—The Carso, D C N Y, 43 F 2d 736, modified on other grounds, C C A., 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli Giannusa & Rao, Inc, 52 S.Ct 140, 284 U S. 679, 76 L.Ed 574—The Idefjord, D C N.Y., 31 F. Supp. 667, reversed on other grounds, C C A., 114 F.2d 262, certiorari denied Den Norske Amerikalinje A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed 459.

77. N.Y—Chandler Motor Car Co. v United Fruit Co., 216 N.Y.S. 413, 127 Misc 432.
58 C J. p 359 note 59.

78. U S.—Flat-Top Fuel Co. v Martin, C C A N.Y., 85 F.2d 39, certiorari denied 57 S Ct. 110, 299 U S 585, 81 L Ed. 431.

Bill sent to shipper after loss

Where evidence failed to show that original bill of lading which was mailed to shipper of cargo subsequent to sinking of barge was a part of the contract of carriage, bill of lading could be regarded only as a receipt for the cargo and its provisions would not apply—American Agr. Chemical Co. v O'Donnell Transp. Co., D C.N Y, 62 F Supp 239.

79. U S—Flat-Top Fuel Co v Martin, C C.A N Y, 85 F 2d 39, certiorari denied 57 S Ct. 110, 299 U S 585, 81 L Ed 431.
Effect and construction of charter party in connection with bill of lading see supra § 32
". . . a bill of lading, while in the hands of the charterer [supplying his own cargo] is usually merely a receipt of goods, but may be evidence of a contract adding to or varying the contract . . . contained in the charter party."—The Iristo, D C N Y, 43 F Supp 29, 32, affirmed, C.C A, Middleton & Co (Canada) Limited v. Old Dominion S. S. Corp, 137 F 2d 619, certiorari denied 64 S Ct. 432, 320 U S. 802, 88 L Ed 484

Charter party containing terms for barge service

U S—Petition of Howard, D.C.N Y, 53 F.Supp 556.

80. U.S—Flat-Top Fuel Co. v. Martin, C C A N Y, 85 F 2d 39, certiorari denied 57 S Ct. 110, 299 U S 585, 81 L.Ed. 431.

81. U.S—The Mar Mediterraneo, D. C.N.Y., 1 F 2d 459.

82. U.S.—Petition of Howard, D C N Y, 53 F Supp. 556.
58 C J p 359 note 61.

83. U S—Flat-Top Fuel Co v Martin, C C A N Y, 85 F 2d 39, certiorari denied 57 S Ct. 110, 299 U S 585, 81 L Ed 431.

84. U S—The Thames, N.Y., 14 Wall 98, 105, 20 L Ed. 804.
Operation and effect of ship's bill see infra § 113.

85. U S.—Givaudan Delawanna, Inc v. The Blijdendijk, D.C N Y., 91 F Supp 663—Thomas Roberts & Co v. Calmar S. S Corp., D.C.Pa., 59 F Supp. 203
58 C.J. p 359 note 62.

86. U S—Givaudan Delawanna, Inc v. The Blijdendijk, D.C.N.Y., 91 F. Supp. 663.
58 C J. p 359 note 63.

Bill with no reference to loading on deck

U S—The St. Johns N. F., C C A N Y., 272 F. 673.

87. U S—The Delaware, Cal., 14 Wall. 579, 20 L Ed 779.

88. U S.—Givaudan Delawanna, Inc v. The Blijdendijk, D C N.Y., 91 F Supp. 663—Thomas Roberts & Co v Calmar S. S. Corp., D C.Pa, 59 F Supp 203.
58 C J p 359 note 65.

On-deck carriage of goods such as wool is negatived by clean bill of lading.—The Idefjord, C C A.N.Y, 114 F.2d 262, certiorari denied Den Norske Amerikalinje A/S v. Blumenthal Import Corp, 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

Sometimes by reason of statute or long established usage,[89] a shipper of goods on a vessel is entitled as a matter of right to a bill of lading,[90] and the master is bound to give one when goods are laden on board, even if the freight is not agreed on,[91] or there is a dispute about it,[92] or the shipper has not submitted a correct bill as required by the contract of affreightment.[93] Where the quantity of a cargo is uncertain, however, the master is not bound to sign bills of lading stipulating freight on a fixed amount, but may tender the usual bill of lading, specifying the quantity of the cargo as "more or less,"[94] or inserting in the bill, "vessel not responsible for difference in weight,"[95] a phrase substantially equivalent to "weight unknown;"[96] and although, when true bills of lading are presented, the master cannot make any indorsement impairing their negotiability, he may, before signing, indorse a correction of any errors in bills of lading presented to him,[97] and, where the master claims demurrage, he has the right to give notice of the claim in, or by indorsement on, such bill, so as to charge a transferee with such notice.[98] If the bill is not issued when the goods are loaded, the shipper is entitled to the bill as it would have been at that time,[99] although in the meantime the goods have been damaged or destroyed.[1] Where a shipper had the option of shipping under a regular bill of lading or under a parcel tariff, but chose the latter course, he is not entitled to receive the bill of lading contract.[2]

b. Persons Entitled to Receive Bill

The bill of lading should be given to the person entitled thereto.

The bill of lading must be given to the person entitled to it, who is ordinarily the owner of the cargo,[3] or the person who has the usual evidence on which such bills are customarily delivered.[4] However, the bill of lading does not represent goods or merchandise, when shipped on board a vessel, unless it has been delivered to the true owner of the merchandise.[5]

89. U S —Aktieselskabet Bruusgaard v Standard Oil Co, C C A N Y, 283 F 106—U S v. Elwell, N Y, 250 F 939, 163 C C A 189, certiorari denied 39 S.Ct 8, 248 U S 564, 63 L Ed 423
58 C J p 359 note 67 [a].

Harter Act

The policy declared in the provision of the Harter Act, 46 U S C A. § 193, making it the duty of the owner, master, or agent of any vessel transporting merchandise to issue to the shipper a bill of lading was held to be inapplicable to private carriers — Koppers Connecticut Coke Co v. James McWilliams Blue Line, C C A N Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v Koppers Connecticut Coke Co, 58 S Ct. 25, 302 U S 706, 82 L Ed. 545
Penalty under Harter Act see supra § 103 a.

90. U S —The Capitaine Faure, C C A.N.Y., 10 F 2d 950, certiorari denied Societe de Navigation A Vapeur France Indo-Chine v Cooper, 46 S Ct 634, 271 U S. 684, 70 L Ed. 1150.
58 C.J p 359 note 67.
Implied agreement to issue customary bill of lading see supra § 106 c.

Clean bill of lading

Where nothing appeared on government bill of lading to qualify its printed terms, and according to printed terms conditions in carrier's usual bill of lading were incorporated therein, bill of lading issued by carrier was a "clean bill of lading" and complied with agreement that no goods were to be loaded unless carrier could supply government with clean bill of lading, and it was none the less so because of the incorporation —Thomas Roberts & Co. v. Calmar S S Corp., D C Pa., 59 F Supp. 203

Cargo on lighter necessary for loading

Where it was necessary in order to load cargo on ship to use lighters, shippers became entitled to bills of lading at time lighters were secured alongside the ship and the loading operations commenced —Mackey v. U S, D C N Y, 83 F Supp 14, affirmed, C.A., 197 F.2d 241.

91. U S —The May Flower, D.C.Me, 16 F.Cas No 9,346, 3 Ware 300.

92. U.S —The May Flower, supra

93. U S —Hansen v American Trading Co, Me, 208 F 884, 126 C C A. 44
58 C J. p 360 note 71

94. U S —The Alonzo, D C Me, 1 F Cas No 257, 1 Hask 184—The May Flower, D C Me, 16 F Cas No 9,346, 3 Ware 300.

95. U S —McKay v Ennis, D.C N.Y, 37 F 229
58 C J. p 360 note 73.

96. U S —McKay v. Ennis, supra
Operation and effect of recitals as to quantity and weight generally see infra § 113

97. U S.—Lightburne v. The Tongoy, D C Ala., 55 F. 329.

98. U.S —Watt v Cargo of Lumber, N Y, 161 F. 104, 88 C.C.A 268

99. U.S —Ocean SS. Co, Ltd. v. U. S Steel Products Co, N.Y, 239 F. 823, 152 C C A 609, certiorari denied 37 S Ct 650, 244 U.S. 652, 61 L Ed 1373.

1. U S.—Ocean SS Co., Ltd. v. U S Steel Products Co., supra
58 C J. p 360 note 78.

Damage to cargo on lighter secured to ship

Where the use of a lighter was necessary to load cargo on the vessel, the bill of lading is presumed issued and dated as of the time the lighter was secured alongside the vessel and loading operations commenced, free of notations written on the face of the bill concerning loss and damage which occurred while the lighter was secured to the ship and in the control and custody of the charterer.—Mackey v. U. S, D C N Y, 83 F Supp. 14, affirmed, C.A, 197 F.2d 241.

2. U S —Hugetz v Compania Trasatlantica, C C.A.N.Y, 270 F. 90

3. N Y.—Blossom v. Champion, 37 Barb 554

4. U S —Blossom v Champion, supra

Master's receipt

Where such an established custom has long prevailed at the port of shipment the bill should be delivered only to the person holding the receipt of the master or agent.—Blossom v Champion, supra

5. U S —Blossom v. Champion, supra.

Power to change title

It is not in power of a common carrier to change the title to merchandise shipped on board a vessel by the delivery of a bill of lading to one not the owner or possessed of the apparent right of ownership or of disposal as agent —Blossom v. Champion, supra.

c. Who May Execute

(1) In general
(2) Master
(3) Charterers and subcharterers
(4) Ratification

(1) In General

In order to be effective to bind the owner of the vessel, the bill of lading must be executed by the owner or his duty authorized agent.

While a shipper has an absolute right to a bill of lading, he must secure it from the properly authorized person.[6] In general the bill may be executed by the owner of the vessel,[7] or by anyone duly authorized by the owner;[8] and, so where the government has authorized the operator of a government-owned vessel to sign and deliver a bill of lading, it is bound by the bills issued.[9] Where it was apparently done in the general course of business, the agent of a railroad carrier has been held authorized to sign export bills of lading for an ocean carrier,[10] and a bill issued by a railroad carrier for transportation of goods by rail and water is binding on the connecting carrier by water.[11] An instrument signed only by the shipper[12] or his agent[13] is not ordinarily a good bill of lading, although purporting to be one;[14] and a bill of lading signed only by the brokers who procured the cargo is of no effect as against a prior regular bill of lading signed by the master and owner of the boat.[15] A bill of lading signed by a duly authorized agent as such binds the principal,[16] but imposes no personal liability on such agent.[17]

(2) Master

Ordinarily a bill of lading signed by the master of the vessel binds the owner and the vessel.

Although it has been held that the captain of a vessel cannot bind the owner by signing bills of lading, unless he is clothed with express authority for that purpose, or authority implied by the usual course of employment or a subsequent assent,[18] masters are commonly held to be authorized to execute bills of lading, binding on the owner and the vessel,[19] notwithstanding the ship is under charter to a third person,[20] where the bill contains no reference to the charter party or to the owner;[21] and a bill of lading, signed by the master of a ves-

6. U.S.—Aktieselskabet Bruusgaard v Standard Oil Co., C.C.A.N.Y., 283 F. 106

7. N.Y.—Rawls v. Deshler, 4 Abb. Dec. 12, 3 Keyes 572, 3 Transcr.A. 91, 33 How.Pr. 611.
58 C.J. p. 360 note 89.

8. U.S.—U.S. v. Middleton, C.C.A.S.C., 3 F.2d 384, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809
58 C.J. p. 360 note 90.

Proof of authority

Where it was conceded that many other bills of lading in evidence were issued by shipowner's agent and that they were signed by the same person who signed clean bill of lading purchased by libelant in due course, relying on statements in bill that goods were on board vessel, that person's agency and authority to issue bills of lading in behalf of shipowner was established.—The Manuel Arnus, D.C.N.Y., 23 F.Supp. 770

9. U.S.—U.S. v. Middleton, C.C.A.S.C., 3 F.2d 384, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809

10. U.S.—Loma Fruit Co. v. International Nav. Co., C.C.A.N.Y., 11 F.2d 124, certiorari denied 46 S.Ct. 471, 270 U.S. 662, 70 L.Ed. 787

11. N.Y.—D'Utassy v. Mallory S.S. Co., 147 N.Y.S. 313, 162 App.Div. 410

12. Ind.—Babcock v. Orbison, 25 Ind. 75
N.Y.—Gage v. Jaqueth, 1 Lans. 207.

13. N.Y.—Covill v. Hill, 4 Den. 323, reversed on other grounds 1 N.Y. 522.

14. Ind.—Babcock v. Orbison, 25 Ind. 75.
58 C.J. p. 360 notes 94, 95

15. U.S.—Vandover v. Wilmot, D.C.N.Y., 28 F.Cas.No.16,848, 10 Ben. 223.

16. U.S.—Dietrich v. U.S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 9 F.2d 733.

17. U.S.—E. I. Du Pont De Nemours & Co. v. Barge Carriers, D.C.Fla., 55 F.Supp. 728.
Liability of agent under contract of affreightment generally see supra § 106 c.

War Shipping Administration as agent

Where bill of lading was signed by defendant as agent for master, who was agent for federal government and bill of lading was labeled war-shiplading and provided that if ship was not owned by or chartered by demise to the War Shipping Administration or company designated, bill of lading would take effect only as a contract with owner or demise charterer as principal, made through agency of War Shipping Administration or company designated which acted as agent only and was under no personal liability, shipper was put on notice that ship was not owned or chartered by demise to defendant and having accepted bill of lading plaintiffs could not predicate defendant's liability thereon.—Federated Trading Corp. v. United Fruit Co., 93 N.Y.S.2d 841.

18. R.I.—Nichols v. De Wolf, 1 R.I. 277

19. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150 and Societe de Navigation à Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150—Epstein v. U.S., D.C.N.Y., 86 F.Supp. 740.
58 C.J. p. 361 note 99

Master, as used in definition of bill of lading, as a written acknowledgment, signed by the master, that he has received goods, etc., stands for anyone authorized to bind the vessel or carrier.—The Guiding Star, Ohio, 62 F. 407, 10 C.C.A. 454.

20. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150—Gans S.S. Line v. Wilhelmsen, C.C.A.N.Y., 275 F. 254, certiorari denied 42 S.Ct. 97, 257 U.S. 655, 66 L.Ed. 419.

As between shipper and owner master acts for owner.—Venezuelan Meat Export Co. v. U.S., D.C.Md., 12 F.Supp. 379.

21. U.S.—Venezuelan Meat Export Co. v. U.S., supra

Master acting for charterer

(1) Shipowner was bound to shipper under bills of lading signed by master of vessel, as regards liability of owner for damage to cargo, even

sel in his own name in the usual course of employment, will bind the owner,[22] although the vessel at the time is under a charter under which there is no provision for the signing of such bills by him.[23] Where, however, the charter is a demise of the ship, as considered supra § 34, it has been said that the shipowner is not liable on bills of lading signed by the master.[24] When the owner signs, the signature of the master is unnecessary.[25]

The authority of the master to issue bills of lading is for ordinary bills.[26] The master has no implied authority to sign a blank bill of lading, and, if he does, it is not binding on the owner;[27] nor has he authority to contract on the owner liabilities properly devolving on others.[28] So a master has no power to bind the owners or the ship by a false bill of lading, whether the falsity is with relation to the amount of goods shipped or the date of the shipment,[29] and under no circumstances can a master of a vessel charge the vessel or her owner by signing a bill of lading for goods which are not on board.[30]

Proof of authority. Proof of a practice of the captain of a vessel to sign bills of lading for articles delivered at one port is no proof of authority to sign bills for a different port.[31]

Liability of charterers on master's bill. The charterers of a vessel are liable on a bill of lading signed by the master under their authority,[32] or with their consent.[33]

(3) Charterers and Subcharterers

A charterer as such is not an agent to sign a bill of lading.

A charterer, as such, is not an agent to sign bills of lading,[34] and so a subcharterer is without power to bind the ship by bills of lading signed by him.[35] A bill of lading signed by a charterer is not equivalent to one signed by the master, with respect to the liability of the ship, although the charter party required the master to sign bills of lading, and, under the owner's instructions, he refused to do so.[36] A loading agent of the charterer has no authority to issue a bill.[37]

(4) Ratification

An unauthorized bill of lading may be made binding and effective by ratification.

Bills of lading which have been issued by unauthorized persons and before arrival of the ship may be ratified by the master,[38] and his approval with full knowledge of all the facts by signing,[39] or

if under charter party master was acting for charterer only, since shipper, who had no knowledge of terms of charter party, could assume that master was shipowner's general agent and had general authority to sign bills of lading on behalf of shipowner.—Venezuelan Meat Export Co v. U. S, supra.

(2) Charter party provisions that charterers agreed to indemnify owners from liabilities arising out of signing of bills of lading by master and that master would act as agent of charterers in signing bills of lading are immaterial.—Venezuelan Meat Export Co. v U. S, supra

22. U.S.—The Niagara, D.C.N.Y., 297 F. 667, affirmed, C.C.A., 297 F. 670 Ala.—McTyer v Steele, 26 Ala 487. 58 C.J. p 361 note 2.

23. U.S—The Mary Bradford, D.C. N.Y., 18 F. 189, affirmed, C.C., 23 F 733

24. U.S—The Capitaine Faure, C.C A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S.Ct 634, 271 U.S 684, 70 L.Ed 1150 and Societe de Navigation à Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct 634, 271 U.S 684, 70 L.Ed. 1150.

25. N.Y.—Rawls v. Deshler, 4 Abb. Dec. 12, 3 Keyes 572, 3 Transcr.A. 91—Dows v. Greene, 32 Barb. 490, 16 Barb. 72, affirmed 24 N.Y. 638.

26. U.S—Epstein v. U. S, D.C.N.Y., 86 F.Supp 740

27. U.S—The Joseph Grant, D.C. Wis., 13 F.Cas.No 7,538, 1 Biss 193

28. U.S—Epstein v. U. S, D.C.N.Y., 86 F.Supp. 740.

29. U.S—The Isola di Procida, D.C. N.Y., 124 F 942.
58 C.J. p 361 note 11

30. U.S—Missouri Pac R. Co. v McFadden, Tex., 14 S.Ct 990, 154 U.S 155, 38 L.Ed 944
La.—Fearn v. Richardson, 12 La.Ann 752
58 C.J. p 361 note 12.

31. R.I—Nichols v. De Wolf, 1 R.I 277

32. U.S—Pendleton v. Benner Line, N.Y., 38 S.Ct 330, 246 U.S. 353, 62 L.Ed 770
N.Y—McPherson v Cox, 86 N.Y 472
Agent for master
Where bills of lading were on charterer's regular forms and bore signature of charterer's agent over the words "agents for Master," and such agent had been authorized in writing by captain to sign bills of lading on behalf of vessel, and agent had attended to detail work of clearing shipments for charterer, and issuance of bills had been preceded by freight contracts entered into by charterer in the United States covering more than 90 per cent of the cargo, such bills were binding not only on the vessel and owner but also on charterer.—Mente & Co. v. Isthmian S.S. Co., D.C.N.Y., 36 F.Supp 278, affirmed, C.C.A., The Quarrington Court, 122 F.2d 266

33. U.S—The Poznan, D.C.N.Y., 276 F 418

34. U.S—Aktieselskabet Bruusgaard v Standard Oil Co., D.C.N.Y., 274 F. 996, affirmed, C.C.A., 283 F. 106.

35. U.S—The Capitaine Faure, D.C. N.Y., 1 F.2d 406, modified on other grounds, C.C.A., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v Cooper, 46 S.Ct. 634, 271 U.S 684, 70 L.Ed 1150

36. U.S—The Esrom, C.C.A.N.Y., 272 F 266, certiorari denied 42 S.Ct 47, 257 U.S. 634, 66 L.Ed 408

37. U.S—Aktieselskabet Bruusgaard v Standard Oil Co., C.C.A.N.Y., 283 F 106

38. U.S—The Capitaine Faure, C.C A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v Cooper, 46 S.Ct 634, 271 U.S. 684, 70 L.Ed. 1150 and Societe de Navigation à Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct. 634, 271 U.S 684, 70 L.Ed. 1150.
58 C.J. p 362 notes 20–26.

39. U.S.—The Capitaine Faure, C.C. A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper,

verbally assenting to,[40] or subsequently saying that he authorized[41] such bills, constitutes a ratification binding on the vessel. The master ratifies unauthorized bills of lading covering goods on board by sailing,[42] but such ratification does not extend to bills issued for goods not laden.[43] A carrier ratifies and is bound by export bills requiring refrigeration of goods to their destination by receiving and carrying the shipments.[44]

§ 113. —— Validity, Construction, Operation, and Effect

a Requisites and validity
b. Construction
c Operation and effect

a. Requisites and Validity

Bills of lading in the carriage of goods by water must be just and reasonable and conform to statutory requirements.

Although a bill of lading is subject to statutory requirements,[45] and must conform to and not violate such requirements,[46] in the absence of a statute to the contrary no particular form is prescribed for a valid bill of lading[47] A bill of lading must be just and reasonable,[48] and if unjust or unreasonable, the court has power to excuse compliance therewith,[49] or, under some statutes, it may be corrected by the supervising board[50] A bill issued by an unauthorized person is invalid,[51] but the fact that the master does not place the word "master" after his signature does not affect the validity.[52] The bill

46 S Ct 634, 271 U.S 684, 70 L Ed. 1150 and Societe de Navigation à Vapeur Indo-Chine v. Harrisons & Crossfield, 46 S Ct 634, 271 U S 684, 70 L Ed. 1150

40. U.S —The Capitaine Faure, C C. A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S Ct 634, 271 U.S 684, 70 L Ed. 1150 and Societe de Navigation à Vapeur Indo-Chine v. Harrisons & Crossfield, 46 S Ct. 634, 271 U S. 684, 70 L.Ed 1150.
58 C.J. p 362 note 21.

41. U S.—The Capitaine Faure, C C. A N.Y., 10 F 2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S Ct. 634, 271 U.S. 684, 70 L Ed 1150 and Societe de Navigation à Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S Ct 634, 271 U.S 684, 70 L Ed. 1150.
58 C J. p 362 note 22.

42. U S —The Arabien, D.C.Cal, 11 F 2d 304
58 C J p 362 note 24

43. U S —The Arabien, supra

44. U S.—Loma Fruit Co v. International Nav. Co., C C.A.N Y, 11 F. 2d 124, certiorari denied 46 S.Ct. 471, 270 U S. 662, 70 L Ed. 787

45. U S —George F Pettinos, Inc. v Thos & Jno Brocklebank, Limited, D C Pa, 65 F Supp. 102—The Vale Royal, D.C Md, 51 F Supp 412—The Ferncliff, D.C.Md, 22 F Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S Ct. 615, 306 U.S. 444, 83 L Ed. 862, affirmed, C.C A, 105 F 2d 1021—Strohmeyer & Arpe Co v American Line S S Corp., D C N.Y, 19 F Supp. 188—U S v Elwell, N Y, 250 F. 939, 163 C C A 189, certiorari denied 39 S Ct 8, 248 U.S. 564, 63 L.Ed. 423.
N.Y.—Zonite Products Corp. v Mediterranean Nav. Co., S. A., 52 N Y. S.2d 603, 183 Misc. 962.

Carriage of Goods by Sea Act

Ocean bill of lading was held subject to requirements of Carriage of Goods by Sea Act —Zonite Products Corp. v. Mediterranean Nav Co, S A, supra.

Federal Bills of Lading Act

(1) Act was held not applicable to a bill of lading originating in a foreign country.—Archibald, etc, Co v Banque Internationale de Commerce, 214 N.Y.S. 366, 216 App Div 322

(2) Act was also held not to be applicable to a bill of lading issued by the carrier as a private carrier for private carriage —The Robin Gray, C C A N Y., 65 F 2d 376, certiorari denied Seas Shipping Co v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S Ct 70, 290 U S. 653, 78 L Ed 566.

Harter Act

Negotiable bills of lading issued by a ship's master in international commerce with the United States must be held subject to Harter Act, in absence of knowledge to the contrary by holder for value —The Ferncliff, D C Md., 22 F Supp 728, certified questions answered Smith v. The Ferncliff, 59 S Ct 615, 306 U S 444, 83 L Ed 862, affirmed, C C.A., 105 F 2d 1021.

The Shipment Act

(1) The act was held not to attempt to modify, repeal, or in any manner regulate or correct the nature, extent, or provisions of bills of lading in any interstate commerce shipments —South, etc., American Commercial Co. v. Panama R. Co, 199 N Y S 92, 205 App Div 123, affirmed 142 N E 666, 237 N Y. 287.

(2) Its failure to make regulations with respect to bills of lading and their restrictions and limitations cannot be held to be a removal of the restrictions of the first Cummins Amendment to the general Interstate Commerce Act.—South, etc, American Commercial Co. v. Panama R Co, supra.

Through bill of lading issued under the former provision of the Interstate Commerce Act, 49 U S C A. § 25 (4, 5) was held not to constitute "an arrangement for continuous carriage or shipment" within the meaning of the Act —Great Northern Ry Co v Sullivan, Minn, 55 S Ct. 472, 294 U S 458, 79 L Ed. 992.

46. U S —Koppers Connecticut Coke Co. v James McWilliams Blue Line, C C A N.Y., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co, 58 S Ct. 25, 302 U.S 706, 82 L Ed 545.

Statute prohibiting false bills of lading

U S —The Capitaine Faure, C C.A N. Y, 10 F 2d 950, certiorari denied Société De Navigation Á Vapeur France Indo-Chine v. Cooper, 46 S Ct 634, 271 U S. 684, 70 L.Ed. 1150.

47. Philippine —Wise v. Insular Collector of Customs, 49 Philippine 966.

48. N Y.—South, etc, American Commercial Co. v Panama R. Co., 142 N.E. 666, 237 N Y 287.
58 C J. p 364 note 69.

49. U S —The Carso, D C N.Y, 43 F. 2d 736, modified on other grounds, C C A, 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc, 52 S Ct. 140, 284 U S. 679, 76 L Ed. 574—Gelderman v Dollar SS. Lines, D.C N Y., 41 F.2d 398.

50. N Y —South, etc., American Commercial Co v. Panama R Co., 142 N E. 666, 237 N.Y. 287.

51. U.S.—Crenshawe v Pearce, D C. N Y., 37 F. 432, reversed on other grounds, C C, 43 F 803.
Who may execute see supra § 112 c.

52. U.S —Fox v Holt, D.C., 9 F Cas. No.5,012, 4 Ben 278, 36 Conn 558.

must be dated,[53] and is effective as of the date of receipt of the shipment on board the ship,[54] and the contract of the parties is not changed by a subsequent notation of short shipments.[55] Bills showing receipt for shipment dated before arrival of the vessel, and stamped "On board," after the goods were placed on board without indicating the date thereof, are issued unlawfully.[56] The master cannot be required to state in his bill of lading the precise chemical character of the cargo, having no authority to do so,[57] nor has he authority to estimate and determine and state in the bill of lading the particular mercantile quality of the goods before they are put aboard;[58] but the shipper may require the master to state on the bill the condition of the cargo ascertainable by the senses.[59]

A bill of lading issued for goods not actually received on board the vessel has been held to be void[60] even, as discussed infra § 114, as against a bona fide transferee in good faith and for value. As considered infra § 123, a bill reserving broad rights in the matter of deviation and delay is not void as against public policy.

Consideration for change in bill. Receiving freight in advance is a sufficient consideration to render a change in the original bill of lading binding on the parties.[61]

b. Construction

(1) In general

(2) Particular clauses

(1) In General

Bills of lading in the carriage of goods by water are construed in accordance with the general rules applicable to the construction of contracts.

Since, as considered infra subdivision c of this section, the bill of loading constitutes the contract of the parties, the rules as to the construction of contracts in general, and contracts of affreightment in particular, are applicable to the construction of the bill of lading.[62] Accordingly, a bill of lading, like any other commercial instrument, when indefinite in its terms, is to be construed reasonably according to the presumed intention, to be gathered from the situation of the parties and their relations to the ship and to each other,[63] and in construing and giving effect to the provisions, the conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it are to be taken into consideration.[64] The provisions must all be construed together[65] and as consistent with each other, if possible.[66] It is the intention of the parties as expressed in the contract which must be regarded, and no exception of a private nature not contained in the contract itself or arising therefrom by implication of law can be engrafted on it.[67] It must be so construed as to preserve to each of the contracting parties the rights which have been conceded by one to the other in the instrument itself.[68] Where there is a custom to

53. U.S.—The Orizaba, C.C.A.N.Y., 33 F.2d 326

54. U.S.—The Orizaba, supra.

55. U.S.—The Orizaba, supra.

56. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150 and Societe de Navigation à Vapeur France Indo-Chine v. Harrisons & Crossfield, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.

57. U.S.—The Kate V. Aitkin, D.C.S.C., 39 F. 328.
58 C.J. p. 364 note 79.

58. U.S.—The Kate V. Aitkin, supra.

59. U.S.—The Kate V. Aitkin, supra.
58 C.J. p. 364 note 81.

60. U.S.—Archibald McNeil & Sons Co. of New York v. Western Maryland Ry. Co., D.C.Pa., 42 F.2d 669, affirmed, C.C.A., 51 F.2d 1073, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

Bill held not to bind vessel or owner
U.S.—Archibald McNeil & Sons Co. of New York v. Western Maryland Ry. Co., supra.

61. Iowa.—Baker v. The Milwaukee, 14 Iowa 214

62. U.S.—The Marianne, D.C.La., 24 F.Supp. 786—Venezuelan Meat Export Co. v. U. S., D.C.Md., 12 F. Supp. 379
58 C.J. p. 362 note 33–p. 364 note 67.
What law governs see supra § 107.
Construction of bill of lading with contract of affreightment see supra § 106 c.

Words of general significance
Meaning of words having a general significance is confined within the particular purpose of the agreement, but in ascertaining the true sense in which general words are used, the words themselves cannot be deprived of all meaning.—American Cyanamid Co. v. Booth S. S. Co., D.C.N.Y., 99 F. Supp. 232

63. U.S.—Grace v. Waterhouse, C.C.A.Wash., 264 F. 422.
58 C.J. p. 362 note 33.

64. U.S.—W. R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856—Pacific Coast Co. v. Yukon Independent Transp. Co., Wash., 155 F. 29, 83 C.C.A. 625—Marx v. National Steamship Co., D.C.N.Y., 22 F. 680
"In construing ocean bills of lading, . . . , it is the right and duty of the court to look not only to the language employed, but also to the subject matter, and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself, so far as possible, in the place of the contracting parties."—The Marianne, D.C.La., 24 F.Supp. 786, 789.

65. U.S.—Herr v. Tweedie Trading Co., N.Y., 181 F. 483, 104 C.C.A. 231

66. U.S.—Herr v. Tweedie Trading Co., supra.

Retention of purpose of each provision
Provisions of bill of lading, one of which allegedly nullified the other, are to be construed so that each retains its purpose.—Pope & Talbot v. Blanchard Lumber Co. of Seattle, C.C.A.Cal., 159 F.2d 134.

67. U.S.—Kuhnhold v. Deutsch-Australische Dampfschiffs Gesellschaft, D.C.N.Y., 265 F. 805

68. Puerto Rico.—Pagan v. Maya-

sign bills of lading before the goods are delivered, the bills must be considered as conditional and only binding in the event the goods are really delivered to the boat.[69] A printed paper pasted on a bill of lading has been held to be a part of the bill binding on the consignee, at least where he received the cargo without objection;[70] and so stipulations stamped on the face of a bill of lading, before its delivery to the shipper, and by express terms included therein, become a part of the contract.[71] Typewritten recitals in the bill will prevail over inconsistent printed recitals,[72] as for example a typewritten statement giving the weight of the goods received as against a printed recital that the weight is unknown.[73] When a statute is expressly incorporated in a bill of lading, not otherwise subject thereto, the provisions of the statute prevail over other inconsistent provisions of the bill.[74] Covenants in a bill of lading requiring the shipper to pay freight and the carrier to compensate for lost cargo have been held to be independent covenants.[75]

Construction against carrier. In cases of doubt as to its meaning, the bill, having been drawn by the carrier, must be construed most strongly against it[76] or strictly in favor of the shipper.[77] However, where a bill of lading prepared by the government as shipper permits of more than one interpretation, the carrier is entitled to the more favorable interpretation.[78]

Implied provisions. If nothing is expressed to the contrary in the bill of lading, established usages relating to a voyage are impliedly made part of the contract,[79] and, in default of a special provision, there is an implied warranty that the voyage will be prosecuted without unnecessary delay or deviation.[80] A carrier, by issuing bills of lading with no statement as to the condition in which the goods were received, does not affirmatively represent that they were received in good order and condition.[81]

(2) Particular Clauses

Particular clauses of a bill of lading should be construed with reference to the general purpose of the bill, as indicated by its various clauses taken together, the surrounding circumstances, and the usages and customs of business.

Particular clauses of a bill of lading should be construed with reference to the general purpose of the bill, as indicated by its various clauses taken together, the surrounding circumstances, and the usages and customs of business.[82]

A recital of "good condition" means that condition in which sound cargo is usually shipped.[83] A recital that the goods were received in good order, or in good condition, is not contractual and is not a warranty as between the immediate parties,[84] but,

guez Dock, etc., Co., 18 Puerto Rico 387.

69. La.—Fearn v Richardson, 12 La. Ann. 752.

Delivery to different vessel

Where the agent delivered a bill of lading for merchandise, which was subsequently delivered to a different vessel from the one from which the bill of lading had been taken, it was held that the bill of lading was conditional, and did not bind the vessel for which the bill was issued, there having been no actual delivery of the goods.—King v The Lady Franklin, Ill, 8 Wall 325, 19 L Ed 455.

70. R I.—Falkenburg v Clark, 11 R. I 278.
58 C.J. p 362 note 40.

71. U S —Toyo Kisen Kaisha v W. R Grace & Co., C C A.Cal, 53 F 2d 740—Montague v. The Henry B Hyde, D.C Cal, 82 F 681

72. U.S —George F. Pettinos, Inc v Thos. & Jno. Brocklebank, Limited, D.C Pa, 65 F.Supp. 102—The Steel Inventor, D.C.Md., 35 F Supp 986

Superseding paramount clause

Where bill of lading issued by carrier by sea contained printed paramount clause but in margin of the bill of lading there was placed by a rubber stamp a paramount clause stating that the bill of lading should have effect subject to the provisions of the Carriage of Goods by Sea Act, the physical appearance of the bill of lading indicated that it was the intention of the parties to supersede the printed so-called paramount clause by the United States Carriage of Goods by Sea Act.—The Steel Inventor, supra.

73. U.S —George F. Pettinos, Inc., v. Thos. & Jno Brocklebank, Limited, D C Pa, 65 F Supp. 102.

74. U.S —The Vale Royal, D.C Md, 51 F Supp. 412.

75. Cal —Transmarine Corporation v R W. Kinney Co, 11 P 2d 877, 123 Cal.App. 411.

76. U S —Toyo Kisen Kaisha v W R. Grace & Co., C.C.A Cal., 53 F 2d 740—E Gerli & Co v. Cunard S. S. Co, C C A.N.Y., 48 F.2d 115.
58 C J. p 362 note 42

77. U S —Marx v National S. S Co, D C N Y, 22 F 680.

78. U S —Alcoa S. S Co. v. U S., D. C N Y, 80 F Supp 158, reversed on other grounds, C.A, 175 F 2d 661, affirmed 70 S Ct. 190, 338 U S 421, 94 L Ed. 225

79. U S —Richardson v Jenkins SS. Co, C C A Mich, 44 F 2d 759, certiorari denied 51 S Ct 345, 283 U S. 821, 75 L Ed 1436.
58 C J. p 363 note 43.

Admissibility of evidence of usage to explain the meaning of bills of lading and shipping contracts see Customs and Usages § 27 a

80. U S —The Pelotas, D C La, 43 F 2d 571, affirmed, C C A, 66 F 2d 75
Time for delivery generally see infra § 123.

81. U.S —Nichols v The Isla De Panay, N Y, 45 S Ct 269, 267 U S. 260, 69 L.Ed. 603.

82. U.S —W R Grace & Co. v. Toyo Kisen Kabushiki Kaisha, D C Cal, 7 F.2d 889, affirmed, C C.A, 12 F 2d 519, certiorari denied 47 S Ct 109, 273 U S 717, 71 L Ed. 856—The Marianne, D C La., 24 F.Supp 786—Marx v National Steamship Co, D. C N.Y, 22 F. 680.

83. U S —The Dondo, D C.N.Y., 287 F. 239.

84. U S —Cheek Neal Coffee Co. v. Osaka Shosen Kaisha, D.C La, 36 F 2d 256—Amerlux Steel Corporation v Johnson Line, C C A.Cal., 33 F.2d 70—Lawrence Leather Co. v. Norton Lilly & Co, D.C.N Y., 15 F. 2d 101—Orient Ins. Co. v. Flota Mercante del Estado, D C La., 102 F Supp 729—The Ciano, D C Pa., 69 F.Supp 35—Thomas Roberts & Co. v. Calmar S. S. Corp., D C Pa., 59 F.Supp 203.

as considered infra § 154, is only prima facie evidence, the carrier being free to prove the contrary.[85] Such a recital relates only to the external appearance of the things received,[86] especially where there is also a recital that the weight, measure, quality, contents, and value are unknown.[87] So the admission by the carrier in a bill of lading reciting that the goods were received in apparent good order applies to the visible aspect of the subject matter.[88] Such a recital is not an admission that there were no stains on the covering of the goods when it was customary to use secondhand coverings which frequently were stained by use;[89] but it does admit that externally the goods appeared to be in good condition when received.[90] A good order receipt or clean bill of lading cannot properly be read to mean standard shipping condition where it would tend to contradict the apparent good order clause of the bill or receipt.[91]

Date. The date of a bill of lading is merely the date on which the owner of the vessel receives property on board.[92] Where an "on board" indorsement on the bill bears no date, the date of the bill itself should be taken as the date of indorsement.[93]

Deviation. A provision in a bill of lading that the carrier shall not be charged with deviation under conditions set out must be given a reasonable interpretation.[94]

Insurance. Where through bills of lading for railroad and steamship transportation are signed by an agent of the connecting lines as agent severally, but not jointly, a provision in the land-transportation clause giving the carrier full benefit of any insurance effected on the goods does not apply to the ocean carriage.[95] A provision in a bill, in consideration of a higher freight rate, that the cargo is covered by marine insurance while on board, under, and in accordance with, and subject to, the conditions of policies of marine insurance held by the carrier, must be construed as an obligation on the part of the carrier to pay the shipper's loss under the same contingencies as permitted it, through its reinsurance, to throw the loss on its own insurers.[96]

Lighterage. A provision giving the master or

85. U.S.—Cheek Neal Coffee Co. v Osaka Shosen Kaisha, D C La, 36 F 2d 256—Orient Ins Co v Flota Mercante del Estado, D.C La, 102 F.Supp 729.

86. U S—The Ciana, D.C Pa, 69 F Supp. 35—The Magdapur, D C N.Y, 46 F Supp 517—Bingham v Osaka Shosen Kaisha, D.C N.Y, 12 F Supp. 35, affirmed, C C A., 88 F.2d 1004—The Tymeric, D C N.Y., 3 F Supp. 773.
La—Gauche v. Storer, 14 La Ann 411.

Straight as well as order bills of lading are within rule—Munson S S Line v. Rosenthal, D.C.N Y, 6 F Supp. 374.

Cloth

Bare recital in bill of lading that cargo of cloth was shipped in good order and condition was only proof of external condition of bales at time of shipment, and did not justify inference that contents were free from moisture—The Tymeric, D.C N Y., 3 F Supp 773.

Corn

In libel for damages to cargo of corn, receipt reciting that corn was in "apparent good order and condition" when loaded implied no more than that corn was in that condition as far as inspection of outside of grains could indicate.—Albers Bros. Milling Co v. Hauptman, C.C.A Cal, 95 F.2d 286.

Damage to outer covers

Recital of bill of lading that goods were received in good condition was satisfied, even though burlap was spotted, and hoops rusted on bales of salted skins, since such recital refers only to external condition—Cohen v. Holland-America Line, D C.N. Y, 6 F Supp 247.

87. U S—The Magdapur, D.C.N.Y., 46 F Supp 517.

Contents unknown

Where the bill of lading acknowledging receipt of the goods contains recitals of a nature which indicates that the contents are unknown, the acknowledgment is generally taken to refer to the external condition of the goods and to preclude any admission or inference as to the condition, quality, quantity, or contents of the shipment beyond what is externally apparent or visible.—Clark v Barnwell, S.C, 12 How. 272, 13 L Ed 985—13 C.J. p 109 note 26.

Receipt referring to bill of lading

Where mate's receipt for goods stated they were "in good order" and also stated that receipt was subject to all conditions inserted in bill of lading, one of which conditions was that contents, quality, and value were unknown, admission in receipt that goods were in good order applied only to external condition of bales—Bingham v Osaka Shosen Kaisha, D C N Y, 12 F Supp 35, affirmed, C C.A., 88 F.2d 1004.

88. U S—Clark v. Barnwell, S C., 12 How. 272, 13 L Ed 985.
58 C.J p 363 note 54.

89. U.S—The Dondo, D.C.N.Y., 287 F. 239.

90. U.S.—Gulden v. Hijos de Jose Taya S. en C., N Y, 252 F. 577, 164 C C A. 493
58 C J. p 363 note 56.

91. U S—John R Evans & Co v The Express, D C.Pa, 100 F.Supp 347.

92. U S—Archibald McNeil & Sons Co. of New York v. Western Maryland Ry. Co, D C.Pa, 42 F.2d 669, affirmed, C C A, 51 F 2d 1073, certiorari denied 52 S Ct. 41, 284 U S 665, 76 L Ed. 563.

93. U S—The Capitaine Faure, D C N Y, 1 F 2d 406, modified on other grounds, C C A, 10 F.2d 950, certiorari denied Societe de Navigation A Vapeur France Indo-Chine v. Cooper, 46 S Ct. 634, 271 U.S 684, 70 L. Ed 1150 and Societe de Navigation A Vapeur France Indo-Chine v Harrisons & Crossfield, 46 S Ct. 634, 271 U S 684, 70 L Ed. 1150.

94. U S—Romano v. West India Fruit & S S. Co, C C.A Fla, 151 F 2d 727.

Discretion of master

Discretion given to master by such a provision may not be exercised in an unreasonable manner or without substantial grounds and master's good faith alone will not suffice.—Romano v. West India Fruit & S. S. Co., supra

95. U.S—The Montana, C C.N Y, 22 F. 715, 22 Blatchf 372, affirmed 9 S Ct 469, 129 U S. 397, 32 L Ed 788 and 9 S Ct 480, 129 U.S. 397, 32 L Ed 800

96. U S.—Southern Cotton Oil Co. v. Merchants', etc, Transp. Co., D C. N Y., 179 F. 133.

agent of the ship the option of hiring lighters at the port of discharge for the landing of the goods at the expense and risk of the shipper or consignee does not give him the right to do so when the shipper or consignee is there ready and demanding his goods on the ship's arrival,[97] and a clause that lighterage, if required, should be at the expense of the cargo, is inapplicable where the conditions do not necessitate lighters.[98]

Reference to charter party. Where a charterer with whom a shipowner enters into a contract of affreightment intends to enter into subcontracts of carriage with other shippers, bills of lading issued to the individual shippers constitute contracts between the shippers and the shipowner or charterer independent of the contract expressed in the charter party, except in so far as the bills expressly incorporate it.[99] In determining whether the bill is the contract of the shipowner or of the charterer, the documents and circumstances in each case will govern.[1] Where the bill refers to the charter party by such words as "all conditions as per charter party," such a clause brings in only those provisions of the charter party which are applicable to the contract contained in the bill,[2] and not specifically covered thereby.[3] A shipper may claim rights under a charter party clause incorporated in the bill of lading, although he is not a party to the charter.[4]

Towage of vessel. A provision in a bill, which required the consignee to tow the vessel in and out of the bay free, is not a contract to pay for the towage merely, but to provide it.[5]

Delivery to ship. A provision in the bill that the cargo shall be delivered to the ship has been construed to mean that there shall always be accorded to the carrier a reasonably immediate access to the point of loading or unloading.[6]

"Short-shipped" is an expression in a bill of lading said to mean a deduction from the amount or number previously stated.[7]

c. Operation and Effect

(1) In general
(2) Recitals as to quantity and weight
(3) Effect as to consignee in general
(4) Effect as estoppel

(1) In General

As a general rule, the bill of lading, properly signed by the carrier and accepted by the shipper, constitutes the contract which binds them.

The contract between a ship and the shipper is that which is contained in the bills of lading delivered to the shipper.[8] The original parties to a bill of lading are the shippers and the captain, or carrier,[9] who are presumed to know its provisions,[10] and the relations between them are governed thereby.[11] A bill signed by the carrier, and delivered to, and accepted by, the shipper without objection, in the absence of fraud, although not signed by him, binds the shipper,[12] according to the decisions

97. Puerto Rico—Pagan v Mayaguez Dock, etc, Co, 18 Puerto Rico 387.

98. U.S—E. J. Keller Co v. Cosmopolitan Shipping Co., D.C.N.Y, 26 F 2d 838

99. U S—The Iristo, D C N Y, 43 F Supp 29, affirmed, C C.A, Middleton & Co. (Canada) Limited v Ocean Dominion S S. Corp, 137 F. 2d 619, certiorari denied 64 S Ct 432, 320 U.S. 802, 88 L Ed 484

1 U S—The Iristo, D.C.N Y, 43 F Supp. 29, affirmed, C.C A., Middleton & Co (Canada) Limited v. Ocean Dominion S S. Corp, 137 F. 2d 619, certiorari denied 64 S Ct. 432, 320 U S 802, 88 L Ed 484.

2. U S—The Albert F. Paul, C.C A. N.Y, 1 F 2d 16.

3. U.S—The Robin Gray, C C.A.N. Y., 65 F.2d 376, certiorari denied Seas Shipping Co v Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct 70, 290 U S 653, 78 L Ed 566.

4. U.S—Centrosoyus-America v U S., D C N Y, 30 F 2d 302, reheard 31 F.2d 610.
58 C.J. p 364 note 66.

5. U.S.—Thompson v. Winslow, D C Me, 130 F 1001, affirmed 134 F 546, 67 C C A. 470.

6. U.S.—Roah Hook Brick Co. v. Erie R Co, C A.N.Y., 179 F.2d 601

7. U S.—Abbott v. National Steamship Co, D.C N Y, 33 F. 895

8. U S—The Eva D Rose, D.C N C, 151 F 704, modified on other grounds 153 F. 912, affirmed 166 F 101, 92 C C A 85
58 C J p 364 notes 87, 88.
Operation and effect of provisions limiting liability see infra § 131
What law governs see supra § 107

Presumption of contract
Ship's bill of lading, delivered to, and accepted without objection by, consignee, is presumed to constitute contract of carriage.—Yorke v Pickwick Stages System, 298 P. 831, 113 Cal App 566

Rights of cargo owner are governed by bill of lading.—The Toledo, C. C A N Y, 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co v The Toledo, 62 S Ct. 302, 314 U.S 689, 86 L Ed 551.

Provisions of other instruments to which the bill refers and makes the property covered subject constitute parts of the contract by incorporation by reference.—Bank of California, N. A, v International Mercantile Marine Co, C C A.N Y, 64 F 2d 97, certiorari denied 54 S Ct. 66, 290 U S. 649, 78 L.Ed 563

Shipments under separate bills
Where shipments are made under separate bills of lading each bill is a separate contract.—Leveille v Osaka Shosen Kaisha, 244 N.Y S 112, 137 Misc 873.

9. La—Hall v. The Chieftain, 9 La. 318.

10. U.S.—Venezuelan Meat Export Co. v. U. S, D C Md, 12 F Supp. 379.

11. U.S—The Vale Royal, D C Md, 51 F Supp. 412.

12. U.S.—The Caledonier, C.C.A.N.Y, 42 F.2d 856.
58 C J. p 364 note 88.
Effect of bills signed only by charterer see supra § 112 c (3).

Cause of action based on bill of lading
Where shipper accepted bill of lading for goods shipped, and based its cause of action thereon, plaintiff was

on the question, as of the date of shipment;[13] but the bill must have been received and accepted by the shipper as a contract,[14] and, under some statutes, assent to the bill of lading, in so far as it contains special stipulations for the benefit of the carrier, must be shown by the shipper's signature thereto.[15] Prior negotiations, understandings, and oral agreements between the parties are generally merged in the bill of lading,[16] unless the goods are beyond recall when the bill of lading is issued and accepted.[17] Where, however, the carrier and the shipper have entered into a contract of affreightment, a bill of lading which differs therewith will not bind the shipper without his express agreement to the change.[18]

Where a loss has occurred to a cargo before the signing of the bill by the master, it is inoperative as to the liability of the vessel, the rights of the parties having been previously fixed at the time the damage occurred;[19] but where a bill is signed by the master after the damage to the cargo, and the owner repudiates its validity for that reason, the latter cannot deny the liability of the vessel on the ground that the contract under which the goods were received by the vessel was merged in such bill, the validity of which he denies.[20] The effect of provisions giving the shipper the benefit of any insurance the carrier may have is to restore the latter's common-law liability for fire abrogated by statute to the amount of such insurance,[21] and, in an action based on such provision, the carrier cannot, in order to discharge or lessen its liability, invoke a policy held by the shipper.[22]

The bill of lading extends only to goods actually received or within control of the carrier or his representative.[23]

Shipping bill, executed by an owner of merchandise and of the canal boat on which it was placed for carriage, stating that it was to be delivered according to the marginal address, has the legal force and effect of a regular bill of lading.[24]

Master's copy or ship's bill is, in legal effect, a simple memorandum for the convenience of the master, and not the contract by which the goods were to be delivered,[25] and, if it differs from the bill delivered to the shipper, the latter controls.[26] Where, however, two bills of lading are made out, but neither is signed by the master, and one is delivered to the master and the voyage performed thereunder, the second not being seen by him until the end of the voyage, the former is the contract binding on the parties.[27]

Through bill. The fact that a carrier is not the initial carrier under an ordinary through bill of lading does not prevent it from being a party to the bill,[28] and, if it is a party, the fact that it does not carry the cargo does not necessarily relieve it of responsibility under the bill.[29]

Persons protected. A bill of lading protects all

bound by its terms—Federated Trading Corp. v. United Fruit Co., 93 N.Y S 2d 841

13. U S—The Orizaba, D C N Y, 33 F.2d 326

14. Wash—Revilla Fish Products Co v. American-Hawaiian SS Co., 137 P 337, 77 Wash. 49
58 C.J. p 365 note 90.

15. Cal—Schroeder v. Schweizer Lloyd Transport Versicherung's Gesellschaft, 5 P 478, 66 Cal 294.

16. U S—Transmarine Corporation v. Charles H Levitt & Co, C.C A N.Y., 25 F.2d 275—American Tobacco Co v The Katingo Hadjipatera, D.C N Y, 81 F Supp 438, modified on other grounds, C A., 194 F 2d 449, certiorari denied 72 S Ct 1076, 343 U.S 978, 96 L Ed —— —— The Jean Jadot, D C N Y., 14 F. Supp 161
58 C J. p 364 note 88 [a].

Stowage agreement

Where there was no proof that at time bills of lading, which did not specify tweendeck stowage, were issued and accepted goods were beyond recall or that any protest was made with respect to place of stowage carrier could not be held liable for breach of alleged prior agreement for tweendeck stowage—American Tobacco Co. v. The Katingo Hadjipatera, D C N.Y., 81 F.Supp 438, modified on other grounds, C A, 194 F. 2d 449, certiorari denied 72 S Ct 1076, 343 U S. 978, 96 L Ed. ——

17. U S—Transmarine Corporation v Charles H Levitt & Co., C C A N Y, 25 F 2d 275—American Tobacco Co v The Katingo Hadjipatera, D C N Y, 81 F Supp 438, modified on other grounds, C A, 194 F 2d 449, certiorari denied 72 S Ct 1076, 343 U S 978, 96 L Ed. ——

18. U S.—The Citta di Palermo, D.C N.Y, 153 F 378, affirmed 165 F. 437, 91 C.C A. 592

Insertion of restrictive provisions

Where parties have entered into contract of affreightment, the shipper is not bound by terms restrictive of the usual liability of carriers inserted in the bill of lading without his express agreement and in the absence of custom or usage sanctioning it.—The Arctic Bird, D.C Cal., 109 F 167—58 C J. p 365 note 90 [b].

19. U S.—The Edwin, D C Mass., 7 F Cas.No 4,300, 1 Sprague 477, affirmed 24 How. 386, 16 L.Ed. 599.

20. U S.—The Edwin, supra.

21. U S—Southern Cotton Oil Co v Merchants', etc, Transp Co, D C.N Y., 179 F 133.

22. U S.—Southern Cotton Oil Co v Merchants', etc, Transp Co., supra
58 C.J. p 365 note 94

23. U S—Strohmeyer & Arpe Co v American Line S. S Corp, C.C.A. N Y, 97 F 2d 360

24. N.Y—Dows v Greene, 24 N.Y 638

25. U S—The Thames v Seaman, N Y., 14 Wall 98, 20 L Ed. 804—The Mary Bradford, D C N Y., 18 F 189, affirmed, C C, 23 F, 733.

26. U S.—The Thames v Seaman, N. Y., 14 Wall. 98, 20 L Ed 804
N Y—Ontario Bank v. Hanlon, 23 Hun 283.

27. U S—Costello v 734,700 Laths, D C N Y, 44 F. 105.

28. U.S.—Blumenthal Import Corp v Thos. & Jno. Brocklebank, C.C.A. Pa, 148 F 2d 727.

29. U S—Blumenthal Corp. v. Thos. & Jno. Brocklebank, supra.

persons who by means of, or under, it become the owners or custodians of the goods.[30]

Notice of terms of charter. A shipper is not, in accepting a bill of lading, under the duty of inquiring whether the ship was chartered or owned by the person soliciting the shipping, although, if actual knowledge of the terms of the charter were brought home to him, he is bound thereby.[31]

(2) Recitals as to Quantity and Weight

As a general rule, recitals in a bill of lading as to the weight or quantity of goods received by the carrier are not conclusive but are open to explanation.

The estimated weight of a cargo stated in bills of lading prepared by the shipper and signed by the master constitutes an agreement binding on the parties for the purpose of computing freight, unless impeached by proof of a difference in the actual weight;[32] and the shipowner is bound to deliver the full amount specified in the bill, unless he can show that the whole, or some part of it, was in fact not received.[33] However, on the ground that, as to matters relating to the quantity of goods shipped, a bill of lading operates merely as a receipt,[34] and on the further ground that a bill of lading cannot be given by an agent of the owner for goods not actually received,[35] it is held that an ordinary bill of lading is not conclusive as between the original parties as to the quantity of goods shipped, and is open to explanation like other receipts,[36] and there can be no recovery for goods indicated in the bill of lading but not actually laden on board.[37] Where the cargo as received is all delivered by the carrier at the port of destination, the weight officially ascertained at that place is the conclusive measure of the carrier's accountability, and the fact that the bill of lading calls for a greater tonnage is immaterial.[38] A fortiori a bill of lading which states that the vessel is not responsible for the number of pieces or the weight removes the ship's presumptive liability for the weight stated therein, and leaves her liable only for what is actually put on board;[39] and she cannot be held liable for shortage, without further proof than the statements of the bill as to the actual amount delivered by the shipper.[40] Similarly, when the bill of lading states "weights unknown," in the absence of proof of the weight shipped on a vessel, other than the recitals of the bill of lading, the vessel cannot be held for shortage,[41] the rule that the recital of quantity prima facie binds the ship being inapplicable where the recital is qualified by such terms as "more or less," "weight unknown," and "weight subject to correction."[42] Although the master of a vessel has no power to bind it by such an agreement,[43] a carrier may agree that he will be bound by the quantity specified or that the bill shall furnish the only evidence of the quantity, and in that case will be liable.[44]

(3) Effect as to Consignee in General

Contractual relations between the carrier and a consignee ordinarily are established by the latter's acceptance of the bill of lading from the shipper. The consignee's rights under the bill are not complete until it comes into his hands.

The consignee of a shipment of goods by water is designated by the shipper in the bill of lading,[45] and he is presumed to be the agent[46] or factor[47]

30. N Y—Woodruff v Havemeyer, 12 N.E 628, 106 N.Y. 129.
58 C J. p 365 note 99.

31. U.S.—The Capitaine Faure, D.C N.Y., 1 F 2d 406, modified on other grounds, C C A., 10 F 2d 950, certiorari denied Societe de Navigation À Vapeur France Indo-Chine v Cooper, 46 S Ct 634, 271 U.S 684, 70 L Ed 1150 and Societe de Navigation À Vapeur France Indo-Chine v Harrisons & Crossfield, 46 S Ct 634, 271 U.S. 684, 70 L Ed 1150.
58 C J. p 365 note 1.

32. U.S—Symons v. 10,466 Barrels of Cement, D C.Wash., 195 F. 1017
Bill as prima facie evidence of receipt of quantities named therein see infra § 154.

33. U S.—The John Twohy, C.C A. Pa., 279 F. 343, reversed on other grounds 41 S Ct. 251, 255 U.S. 77, 65 L.Ed. 511.

34. U.S—James v. Standard Oil Co, N Y, 191 F 827, 112 C.C A. 341.
58 C.J. p 366 note 11.

35. La—Kirkman v. Bowman, 8 Rob. 246
Authority of master to sign bill for goods not on board see supra § 112 c (2).

36. U S—The Seefahrer, D C Cal, 133 F. 793—Sawyer v. Cleveland Iron Min. Co, C C.A N Y., 69 F. 211.
58 C J. p 366 note 13.

37. U S—James v Standard Oil Co of New York, N.Y, 191 F. 827, 112 C C A 341
58 C J. p 366 note 14.

38. U S—Cafiero v Welsh, C.C., 4 F.Cas No.2,286, 8 Phila. 130.

39. U S—Eaton v. Neumark, D.C N. Y., 33 F. 891, affirmed, C C., 37 F. 375.

40. U S—Abbott v. National Steamship Co, D C N Y., 33 F. 895.
58 C.J p 366 note 17.
Short delivery generally see infra § 122.

41. U S—The Seefahrer, D C.Cal, 133 F. 793.
58 C J. p 366 note 18.

42. U S—Vanderbilt v. Ocean SS Co, N Y, 215 F 886, 132 C C A. 226—The Dixie, D C.N.Y., 46 F 403
58 C J p 366 note 19.
Burden of proving actual weight or quantity when bill recites weight and quantity are unknown see infra § 154.

43. U S—Law v. Botsford, D.C Mich, 26 F. 651.
58 C.J p 366 note 21.

44. U S—Sawyer v Cleveland Iron Min. Co., N.Y., 69 F. 211, 16 C.C.A 191.
58 C J. p 366 note 22.

45. La—Hall v. The Chieftain, 9 La 318

46. U S—Conard v. Atlantic Ins. Co., Pa, 1 Pet. 386, 7 L Ed. 189.
La—Hall v. The Chieftain, 9 La 318

47. La.—Hall v. The Chieftain, supra.

of the shipper, but his right is not complete, at all events before the bill of lading comes into his hands.[48] Contractual relations between the carrier and the consignee are ordinarily established by the latter's acceptance of the bill of lading from the shipper,[49] and the carrier's duty to the consignee rests on such accepted bills, and not on a special agreement between the shipper and the carrier.[50] If, before the bill of lading comes into the hands of the consignee, the shipper chooses to vary, or modify the contract between himself and the carrier, or to acknowledge that there was error as to the description of the goods, in the bill of lading signed, the consignee has no right to complain,[51] and, when the cargo specified in a bill of lading was never received by the carrier, the original consignee cannot hold it liable for the loss of the cargo, unless it appears that the bill of lading was issued with intent to defraud.[52]

(4) Effect as Estoppel

(a) In general

(b) Receipt on board

(c) Condition of goods

(a) In General

A bill of lading in the transportation of goods by water may contain elements of an estoppel against the carrier.

A bill of lading in the case of shipments of goods by water may contain elements of an estoppel against the carrier.[53] However, the carrier is not estopped by the signature of the master to deny that the bill contains the contract under which the goods were shipped where the master prominently indorsed the words "Signed under protest" on the bill;[54] and the general owner of a vessel is not estopped to deny the validity of bills of lading fraudulently signed by the master of a vessel, appointed by a special owner, in a suit against the vessel by a bona fide holder of the bills, who has made advances on the faith of them.[55] Connivance with the shipper with respect to the false issuance of clean bills of lading is unnecessary in order to render the shipowner liable to the consignee by estoppel.[56]

Weight and quantity. Although, as between the original parties to a bill, recitals as to quantity and weight are not conclusive, as considered supra subdivision c (2) of this section, as against an assignee for value relying thereon, the owner of a vessel is estopped to set up a state of facts different from that set forth in a bill signed by him.[57]

Estoppel of shipper. The shipper is estopped to complain of the form of the bill of lading, constituting but a mere receipt for the cargo, where such bill was prepared by the shipper's agent at the shipper's request, a copy of which was received by the shipper soon after the loading of the cargo.[58]

(b) Receipt on Board

A carrier by water may be estopped to deny the receipt of goods on board by statements in the bill of lading.

A carrier by water may be estopped to deny receipt on board of goods as stated in its bill of lading,[59] as against a purchaser of the bill who has been misled by the representation and has altered his position to his detriment on the faith of the representation.[60] However, since the master has no authority to charge the vessel or its owner for goods not on board, as considered supra § 112 c (2), the owner is not estopped by the signature of the master to the bill to show that the goods were never actually on board,[61] and a verified statement, signed by the master of a vessel, admitting delivery to the vessel for loading of goods, which were sub-

48. La.—Hall v. The Chieftain, supra.

49. U.S.—Mowinckel v Dewar, D C. Cal, 173 F. 544, affirmed 179 F. 355, 102 C C A 539
58 C.J. p 367 note 28

50. U S.—American Steel Co. v. Transmarine Corp., D.C N Y, 36 F. 2d 246.

51. La.—Hall v. The Chieftain, 9 La. 318

52. Ga.—McIntyre v. South Atlantic Steamship Line, 78 S.E 347, 12 Ga App. 399.

53. U.S —The Ciano, D.C.Pa., 69 F. Supp. 35.

54. U.S —Nine Hundred and Seventy-Nine Boxes of Sugar, D C.N.Y., 18 F Cas No 10,271, 7 Ben. 242.
58 C J. p 367 note 35.

55. U S —The Freeman v. Buckingham, N Y, 18 How 182, 15 L Ed. 341
58 C J p 367 note 36.

56. U.S —The Carso, D C.N Y., 43 F.2d 736, modified on other grounds, C C.A., 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli Giannusa & Rao, Inc., 52 S Ct. 140, 284 U.S 679, 76 L Ed 574.

57. N.Y.—Byrne v. Weeks, 4 Abb Dec. 657.
58 C J p 368 note 56

Buyer paying sight draft on bill of lading
U S —General Foods Sales Co. v. The Felipe Camarao, D.C N.Y., 82 F Supp. 622.

58. U.S.—Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, C C A N Y, 133 F 2d 552, certiorari denied 63 S Ct. 858, 318 U S 781, 87 L.Ed. 1148.

59. U S —General Foods Corp v The Felipe Camarao, C A.N Y., 172 F 2d 131, certiorari denied Republic of the U S of Brazil v General Foods Corp., 69 S.Ct 1047, 337 U S 908, 93 L Ed. 1720—Olivier Straw Goods Corp v. Osaka Shosen Kaisha, D C N.Y, 27 F 2d 129, certiorari denied 49 S Ct. 22, 278 U S. 618, 73 L Ed 540.

60. U S.—Ortega & Emigh v. Grace Line, D.C.Cal., 72 F.Supp. 302—The Manuel Arnus, D.C.N.Y, 23 F. Supp. 770.

61. Mass.—Sears v. Wingate, 3 Allen 103.

sequently lost, signed under the belief that it was to enable the shipper to collect insurance, does not estop respondents in a libel in personam to assert that no delivery had in fact been made to the vessel.[62] So, where the bill of lading clearly states that the goods were lost before receipt thereof by the ship was effected, either actually or constructively, a certificate stating that the goods were on board signed by the captain in contemplation of receipt of the goods in regular course does not estop the carrier to deny liability as against a consignee who paid the draft accompanying the bill of lading with knowledge of the facts[63] Bills of lading signed by the master before the goods are on board, however, operate on the goods as received, as against the shipper and master, by way of relation and estoppel,[64] and thus if in anticipation of the delivery of goods to the vessel the master signs a bill of lading and goods are subsequently delivered as and for the goods intended to be embraced in it, if there be no intervening title to the goods between the issuing of the bill of lading and the delivery on board, the bill will cover the goods.[65] A statute making every bill of lading acknowledging the receipt of goods conclusive evidence, in the hands of bona fide holders, that the goods were actually received for transportation does not apply to bills issued for a steamboat line, but not naming or designating any particular boat[66]

Mutuality of estoppel. Although a steamship company, because of its misrepresentation in the bill of lading, is estopped to assert a defense based on the actual fact that the goods were never shipped, the assignee of the bill is not thereby through any doctrine of mutuality estopped to base his claim to damages on the failure to make the shipment, with the resulting failure to make proper delivery.[67]

Under the Federal Bill of Lading Act, 49 U.S.C.A. § 102, providing for liability of the carrier in the case of nonreceipt of the goods described in the bill of lading or in the case of failure of the goods to conform to the description in the bill, the whole basis of liability of the carrier is estoppel,[68] and, unless something was advanced or some loss sustained on faith of the recitals of the bill, there can be no recovery.[69]

(c) Condition of Goods

The carrier may be estopped to contradict recitals in a bill of lading with respect to the condition of the goods.

As against the original shipper,[70] it has been said to be well settled that ordinarily the carrier is free to contradict an acknowledgment in a bill of lading that the shipment is in apparent good order.[71] Special circumstances, however, may operate to create an estoppel;[72] but, in order to furnish a basis for an estoppel, it is essential that the recital be false,[73] and that there be reliance thereon resulting in injury[74] A carrier which, although knowing that shipments when received appeared to have been damaged, executes bills reciting that the shipments had been received in good condition is, as against holders of the bills of lading who acquired them in course of trade, estopped to deny that it received the shipments in good order.[75] Such a recital does not

62. U S—McLeod Lumber Co v Crowley, D.C Cal, 8 F 2d 283

63. U S—Ortega & Emigh v Grace Line, D C.Cal., 72 F.Supp 302.

64. U S—The Delaware, Cal, 14 Wall 579, 20 L Ed 779.
Mass—Rowley v Bigelow, 12 Pick. 307, 23 Am D 607
58 C J p 367 note 42.
Construction of bill of lading signed by custom before delivery as conditional see supra subdivision b (1) of this section

65. U S—The Idaho, N.Y., 93 U S 575, 23 L Ed. 978—The John K. Shaw, D C Md, 32 F. 491.
Rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed
U.S—The Delaware, Cal, 14 Wall 579, 20 L.Ed. 779.
Mass.—Rowley v Bigelow, 12 Pick. 307, 23 Am.D. 607.

66. U S.—The Guiding Star, Ohio, 62 F. 407, 10 C.C A. 454.
58 C.J. p 367 note 44.

67. U S.—Olivier Straw Goods Corp v. Osaka Shosen Kaisha, D C N.Y., 42 F 2d 717, affirmed, C C.A., 47 F 2d 878, 74 A L R 1378, certiorari denied Osaka Shosen Kaisha v Olivier Straw Goods Corp, 51 S Ct. 648, 283 U S. 856, 75 L Ed 1462

68. U S—Strohmeyer & Arpe Co v. American Line S S. Corp, D C N Y, 19 F Supp. 188.

69. U S—Strohmeyer & Arpe Co. v. American Line S. S. Corp, supra
Owner of goods or holder of bill
In libel proceeding arising from carrier's nonreceipt of goods described in bills of lading, libelant could recover only under provision of Bill of Lading Act providing for recovery in such cases by owner of goods or holder of bills of lading who has given value in reliance on description in bills of lading.—Strohmeyer & Arpe Co. v. American Line S S. Corp., supra.

70. U S.—Munson S. S Line v. Rosenthal, D C N.Y, 6 F Supp. 374.
Clean bill of lading does not estop carrier to show as against original shipper the true condition of the goods when received.—The Georgian, D C Fla, 4 F Supp. 718, affirmed, C.C A, 76 F.2d 550.

71. U S—The Ciano, D C Pa., 69 F Supp. 35—Thomas Roberts & Co. v. Calmar S. S. Corp., D.C.Pa., 59 F.Supp 203.
Reason for rule
The recital is neither contractual nor a warranty—The Ciano, D.C Pa, 69 F Supp 35—The Georgian, D C Fla., 4 F Supp. 718, affirmed, C.C A, 76 F 2d 550.

72. U S—The Ciano, D.C.Pa., 69 F Supp. 35.

73. U S.—The Sophocles, D.C.N.Y., 51 F Supp. 953.

74. U.S—The Carso, C C.A N Y., 53 F.2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli Giannusa & Rao, Inc., 52 S.Ct. 140, 284 U S. 679, 76 L Ed. 574—The Ciano, D C.Pa, 69 F.Supp. 35.

75. U.S—Baltic Cotton Co. v. U. S., C C A.Ala, 55 F.2d 568—The Carso, C C.A.N.Y., 53 F.2d 374, cer-

estop the carrier where the bill contains other notations sufficient to put one seeing them on notice as to the possible poor condition of the goods,[76] or as to one who had knowledge of the damaged condition of the goods,[77] or who did not rely on the recital.[78] With respect to the right of the consignee, it is immaterial that the bill is not negotiable,[79] and the fact that the consignees learned of the damaged condition of the cargo after acceptance of the draft, but before payment thereof, and nevertheless paid it, does not relieve the shipowner from the estoppel.[80] Where the bill contains no recital that the shipment was received in good condition, failure to note therein any insufficiency in the containers does not estop the carrier to assert such insufficiency as the cause of the damage as against a consignee suing for damage.[81] Likewise, where the bill or receipt contains a general writing-off notation going to the entire shipment indicating that the wrappers on the packages of goods were damaged and the condition of the contents unknown, the fact that only some of the packages were listed by number as badly damaged does not limit the general character of the writing-off notation or constitute an implied representation that the packages not listed were in good order so as to estop the carrier to deny that such unlisted packages were in good order.[82] A carrier accepting broken cases but issuing a clean bill of lading has been held not estopped to assert against a buyer-consignee, accepting drafts attached to the bill, that the goods were damaged by causes other than breakage.[83]

§ 114. —— Negotiability and Transfer

While the transfer of a bill of lading may pass title to the property represented thereby, apart from statute, defenses available between the original parties usually are available as to the transferee.

Even though a bill of lading in the transportation of goods by water is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder,[84] it has been held not to be a negotiable instrument in the sense that a bill of exchange or promissory note is.[85] Hence, in the absence of a statute removing the restrictions on the full negotiability of a bill of lading,[86] such a bill is merely assignable and quasi-negotiable,[87] passing title to the property.[88] The assignment and delivery of a bill of lading and invoice of goods in transitu for a valuable consideration convey the legal title, and the goods cannot be attached[89] or replevied[90] as the property of the assignor. However, in the absence of a statute providing otherwise, a bill is negotiable only in a qualified sense;[91] everyone dealing with

tiorari denied Navigazione Libera Triestina v Molinelli, Giannusa & Rao, Inc, 52 S Ct 140, 284 U S 679, 76 L Ed 574—The Sophocles, D C.N.Y, 51 F Supp 953—New England Newspaper Pub Co v. U S, D C Mass, 18 F.Supp 674.
58 C J. p 368 note 46

As to subrogee of consignee
U S —Switzerland General Ins Co. of Zurich v Navigazione Libera Triestina, S. A., C C A N.Y., 91 F.2d 960.

As to purchaser of bill
Carrier, giving clean bill of lading, stating that cargo, manifestly damaged when received, was received in good order, is estopped to deny truth of such statement as against purchaser of bill, who is misled by and alters his position on faith thereof —Munson S S Line v. Rosenthal, D C.N Y., 6 F.Supp 374.

76. Notation, "not responsible for condition"
U S —Munson S. S Line v. Rosenthal, supra.

77. U S.—Munson S S. Line v. Rosenthal, supra.

78. U S —Munson S S. Line v. Rosenthal, supra.

Shipper's agent
Commission merchant, accepting vegetables, consigned to him as shipper's agent, with knowledge of their damaged condition, and paying tariff duty for principal's account was held not entitled to set up carrier's estoppel by recital in bill of lading as to good condition thereof when received for shipment to show their poor condition at such time, such payment not having been made in reliance on the recital —Munson S. S Line v Rosenthal, supra.

79. U S —The Carso, D C N Y, 43 F 2d 736, modified on other grounds, C C A, 53 F 2d 374, certiorari denied Navigazione Libera Triestina v Molinelli, Giannusa & Rao, Inc, 52 S Ct. 140, 284 U.S. 679, 76 L Ed. 574.
58 C J. p 368 note 50.

80. U.S.—The Carso, D C.N Y., 43 F. 2d 736, modified on other grounds, C C A, 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc, 52 S Ct. 140, 284 U.S 679, 76 L Ed 574.
58 C J. p 368 note 51.

81. U S —The Isla De Panay, D.C N Y, 8 F.2d 91, affirmed, C.C.A., 292 F. 723, affirmed 45 S Ct. 269, 267 U S 260, 69 L.Ed. 603.

82. U S —New England Newspaper Pub. Co. v. U. S, D C.Mass., 18 F. Supp. 674.

83. U.S —The Carso, C.C A.N Y., 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc, 52 S.Ct 140, 284 U S 679, 76 L Ed 574.

84. U S —Pollard v. Vinton, Ky, 105 U.S. 7, 26 L Ed. 998.

85. U S —Pollard v. Vinton, supra—The St Johns N. F., C C A N.Y., 272 F. 673.

86. U S —The Ferncliff, D C.Md, 22 F Supp. 728

Substantially full negotiability has been given to bills of lading by the Federal Bill of Lading Act, and the Uniform Bills of Lading Act in effect in many states.—The Ferncliff, supra

87. U.S —**Corpus Juris cited in** The Ferncliff, D.C.Md, 22 F Supp. 728, 739.
58 C.J. p 368 note 63.

88. U S.—The Vaughan and Telegraph, N.Y., 14 Wall. 258, 20 L Ed 807.
58 C J. p 368 note 63.
Right of transferee of bill to maintain suit against carrier see supra § 108 d.

89. U.S —Balderston v Manro, D C., 2 F.Cas No 793, 2 Cranch C.C. 623.

90. U S.—The Mary Ann Guest, C C. N.Y., 16 F Cas.No.9,196, 1 Blatchf. 358.

91. U S —The Idefjord, D C N.Y., 31 F.Supp. 667, reversed on other

such a bill is charged with knowledge that the merchandise described therein is in transit and may be handled and treated by many persons whom he may not know and who may not know him,[92] and a purchaser thereof takes it subject to all provisions appearing on its face.[93] While transferring title, transfer of the bill does not shut out any defenses as between the carrier and the original holder,[94] and since, as considered supra § 112 c (2), the master cannot bind the vessel's owner in receipting for goods not actually in his custody, this defense can be set up against a bona fide holder of the bill of lading[95] for value,[96] and against one who in reliance on the bill of lading had lent money on the cargo,[97] but the title of a person who makes a bona fide advance on a bill of lading of goods subsequently delivered alongside the vessel is not affected by the removal of the goods by the owner from the custody of the vessel, and shipping them in another vessel under a new bill of lading.[98] The transferee of a bill not indorsed by the consignee of the goods presumptively holds the bill subject to the terms of any agreement with the transferor.[99]

Issuance of several originals. Where several originals of the bill of lading are issued, the delivery of one or more of them for value transfers title to the goods, regardless of the retention of one of the originals by the transferor.[1]

Pledge of bill. A pledgee to whom a bill of lading is given as security gets the legal title to the goods only if such is the intention of the parties.[2]

Transfer of the master's copy of the bill of lading does not entitle the holder to delivery of the goods to him.[3]

Apportionment of deficient shipment. Where two bills of lading are issued at different times for goods not then delivered and only a part of the goods for which the bills are issued is shipped, bona fide holders of the bills are, in the absence of designation by the shipper of any portion of the goods as intended to fill either bill, entitled to the pro rata quantity called for by their bills.[4]

Requisites and sufficiency. The delivery of the bill of lading and policy of insurance is a sufficient assignment of goods shipped to a foreign port, provided the assignee follows up his claim with due diligence.[5] It is not absolutely necessary that a bill of lading should have been actually indorsed or delivered to the buyer in order to make him the assignee thereof;[6] other circumstances may be equally sufficient to show the relationship.[7] Where, however, a statute provides that title of the first holder of a bill drawn to order passes by indorsement, and of a bill drawn to bearer, by delivery, in the absence of estoppel, no title passes when an order bill is transferred without indorsement.[8]

C. TRANSPORTATION AND DELIVERY

§ 115. Transshipping and Forwarding

Where a vessel is disabled in the course of a voyage, it is the duty of the master if the ship cannot be repaired within a reasonable time to transship the goods by another vessel if one is available.

Where a vessel is disabled in the course of a voy-

grounds, C C A., 114 F 2d 262, certiorari denied Den Norske Amerikalinje A/S v. Blumenthal Import Corp., 61 S Ct 175, 311 U S 707, 85 L Ed. 459—The Treasurer, D C. Mass., 24 F.Cas.No 14,159, 1 Sprague 473.

92. U S —The Idefjord, D C N Y., 31 F Supp 667, reversed on other grounds, C C A., 114 F 2d 262, certiorari denied Den Norske Amerikalinje A/S v Blumenthal Import Corp., 61 S Ct 175, 311 U.S. 707, 85 L Ed. 459.

93. U S.—Givaudan Delawanna, Inc v The Blijdendijk, D.C N.Y., 91 F Supp 663.

Reason for rule

The purchase of a bill of lading ordinarily constitutes a commercial transaction between experienced business men or companies and they must be held to take with notice of provisions of the bill.—Givaudan Delawanna, Inc. v. The Blijdendijk, supra.

94. U S —Pollard v. Vinton, Ky., 105 U S 7, 26 L Ed 998.
58 C J p 369 note 66.

Doctrines favoring an innocent holder for value of negotiable paper do not wholly apply to holders of bills of lading —The St. Johns N. F., C C.A N.Y., 272 F 673.

95. U.S —Missouri Pac R. Co. v McFadden, Tex., 14 S Ct 990, 154 U S 155, 38 L.Ed 944
58 C.J p 369 note 68

96. U.S —Archibald McNeil & Sons Co. of New York v Western Maryland Ry Co, D.C Pa., 42 F 2d 669, affirmed, C C A., 51 F 2d 1073, certiorari denied 52 S Ct 41, 284 U S 665, 76 L Ed 563

97. U S —The Loon, C C N.Y., 15 F. Cas No 8,499, 7 Blatchf. 244.

98. U S —The Idaho, D C.N Y, 12 F Cas No 6,997, 5 Ben 280, affirmed 93 U S. 575, 23 L Ed. 978.

99. N Y —Neumann v Reiss, 245 N Y.S. 464, 138 Misc 576.

1. U S.—Merchants Transfer & Storage Co. v First Federal Foreign Banking Corporation, C.C A.N.Y., 79 F 2d 243.

Transfer to secure loan

U S —Merchants Transfer & Storage Co. v. First Federal Foreign Banking Corporation, supra

2. U S —The Carlos F Roses, Fla., 20 S Ct 803, 177 U S. 655, 44 L Ed 929.
58 C.J p 369 note 80

3. U.S.—The Mary Bradford, D C.N Y., 18 F. 189, affirmed, C.C., 23 F. 733

4. U S —The L. J Farwell, D C Wis., 15 F Cas No 8,426, 8 Biss. 61.

5. Pa.—Dawes v. Cope, 4 Binn 258

6. U S —Philadelphia, etc., R Co v. Barnard, D.C N Y., 19 F.Cas.No.11,086, 3 Ben 391.

7. U S —Philadelphia, etc., R Co. v Barnard, supra.

8. U S —Sheppard v Newhall, Cal., 54 F. 306, 4 C.C A. 352.

age and is compelled to seek a port of refuge, it is the duty of the master if the ship cannot be repaired within a reasonable time to transship the goods by another vessel if one is available,[9] and his duty as carrier is not ended until they are delivered at the place of destination, or are returned to the possession of the owner, or kept safely until the owner can resume them, or otherwise carefully disposed of.[10] In the absence of provisions in the contract so permitting,[11] a master has no right, without necessity, to transship goods shipped for the voyage on freight,[12] although a moral necessity is sufficient to justify transshipment.[13] So on a temporary detention the vessel is not bound to transship cargo unless damage is to be expected from the probable delay.[14] Where goods are to be transported by water and it becomes impossible to do so, the carrier is not bound to forward them overland,[15] and, similarly, when it becomes impossible to fulfill a contract to transport by sailing vessel, the carrier is not bound to transship them and send them on by steamboat.[16] A carrier which has performed its contract by delivering goods at their destination is not bound to reship them to any other point free of charge.[17] A transshipment without legal excuse, however competent and safe the vessel into which the transfer is made, is a violation of the contract and subjects the carrier to liability if the freight is lost;[18] but, where goods are properly transshipped from one vessel to another under circumstances which justify such transshipment, the owners of the first vessel are not liable for the subsequent loss of the goods on the other vessel,[19] although they could have received them again on their own vessel after the danger which caused the transshipment was passed.[20]

Transshipment by ordinary methods does not constitute conversion where the carrier has the right to transship,[21] and, where goods were to be shipped by water, the mere transshipment by rail and deposit in a warehouse subject to charges, and without notice to the consignee, is not a conversion by the carrier, entitling the consignee to recover the full value of the goods.[22] Where a bill of lading which contains provisions allowing transshipment at a certain port is stamped with a clause indicating that forwarding beyond such port is to be in connection with a certain company, the terms "transshipment" and "forwarding" are interchangeable and must be construed together.[23] Where goods become contaminated on their transfer from one vessel to another, the consignee, after receiving a portion of such goods, can reject further deliveries of the total consignment.[24] A connecting carrier which is in possession and control of a barge and its cargo delivered to such carrier by the initial carrier is under a primary duty to care for such barge and cargo.[25] Where a succeeding carrier refuses to accept goods from an intermediate carrier and the consignee instructs the latter to store the goods, the liability of the intermediate carrier for subsequent

9. U.S.—The Plow City, D.C.Pa., 23 F.Supp. 548.
58 C.J. p. 369 note 85

10. U.S.—King v. Shepherd, C.C. Mass., 14 F.Cas.No. 7,804, 3 Story 349

11. U.S.—Marx v. National SS. Co., D.C.N.Y., 22 F. 680.
58 C.J. p. 370 note 88.

12. Ala.—Cox v. Foscue, 37 Ala. 505, 79 Am.D. 69
58 C.J. p. 370 note 89

13. U.S.—The Fortitude, C.C.Mass., 9 F.Cas.No. 4,953, 3 Sumn. 228
58 C.J. p. 370 note 90

14. U.S.—Murray v. Ætna Ins. Co., C.C.Ill., 17 F.Cas.No. 9,955, 4 Biss. 417
58 C.J. p. 370 note 91.

15. Mo.—Silver v. Hale, 2 Mo.App. 557.

16. U.S.—Allanwide Transport Corp. v. Vacuum Oil Co., N.J., 39 S.Ct. 147, 248 U.S. 377, 63 L.Ed. 312, 3 A.L.R. 15, answers to certified questions conformed to 256 F. 987, 167 C.C.A. 663

17. Ark.—Lee Line Steamers v. Tucker, 165 S.W. 961, 112 Ark. 301.

18. U.S.—Trott v. Wood, C.C.R.I., 24 F.Cas.No.14,190, 1 Gall. 443.
58 C.J. p. 370 note 96

19. Ala.—Cox v. Foscue, 33 Ala. 713
58 C.J. p. 370 note 97.

20. Ala.—Cox v. Foscue, supra.

21. U.S.—Louis-Dreyfus v. Paterson Steamships, C.C.A.N.Y., 43 F.2d 824, 72 A.L.R. 242.

22. U.S.—Howe v. Lexington, D.C.N.Y., 12 F.Cas.No. 6,767a

23. U.S.—Smith, Kirkpatrick & Co. v. Colombian S. S. Co., C.C.A., 88 F.2d 392.

Prima facie import of stamped clause

Where bill of lading allowing transshipment at certain port was stamped with clause indicating that forwarding beyond such port was to be "in connection with" named carrier, stamp imported prima facie that agreement contemplated forwarding by or through such carrier.—Smith, Kirkpatrick & Co. v. Colombian S. S. Co., supra.

Liability of initial carrier

Initial carrier, even if mere forwarding agent, would still be liable for its own negligence, regardless of alleged deviation by forwarding goods by connecting carrier other than carrier named in bill of lading contemplating transshipment.—Smith, Kirkpatrick & Co. v. Colombian S. S. Co., supra.

24. U.S.—Connecticut Fire Ins. Co. v. Lake Transfer Corporation, D.C.N.Y., 60 F.2d 172.

Evidence of negligence in transfer

Evidence in suit for loss resulting from consignee's rejection of barge load of sulphur was held to show that cargoes previously delivered were contaminated by iron ore because of impleaded respondent's negligence in transferring them to other barges.—Connecticut Fire Ins. Co. v. Lake Transfer Corporation, supra.

Liability for damages

Corporation employed to transfer sulphur to other barges held liable for damages resulting from contamination thereof with iron ore because of negligence of pig iron manufacturer, engaged by it to make transfers.—Connecticut Fire Ins. Co. v. Lake Transfer Corporation, supra.

25. U.S.—Palmer v. Agwilines, Inc., C.C.A.N.Y., 135 F.2d 689.

damage to the goods terminates on storage of the goods as instructed [26]

The payment of brokerage to freight forwarders in ocean commerce has been held not to be unlawful or against congressional policy.[27] An action against a freight forwarder for breach of contract is governed by the usual rules relating to civil actions.[28]

Reservation of privilege in contract. Privilege to reship may be reserved in the contract of carriage,[29] and while it has been held that words "privilege of reshipping," in a bill of lading, are for the benefit of the carrier, and place no obligations on him to reship,[30] it has also been held that the phrase is to be construed as granting to the vessel the privilege of reshipping during the voyage, according as its interest or convenience may advise, and is at the same time imposing on it the duty to do so when practicable and necessary,[31] but the carrier is not bound to transship on any other vessels than its own, although it must avoid unreasonable delay, and is liable for damages caused thereby.[32] A carrier or forwarder of goods is not the general agent of the owner, and after delivery, pursuant to contract, to another carrier, it has no authority subsequently to dispense with any of the conditions for safe transportation, and the shipper will not be bound thereby;[33] nor does the privilege of reshipping reserved in a bill of lading discharge the vessel from any liability not excepted in the contract, and although the right is secured of transshipping on another vessel, the liability continues until the goods are safely delivered at the port of destination, if under like circumstances the carrier would be liable had the loss occurred on its own vessel.[34] The reservation confers only the simple right to transfer from one vessel to another,[35] and it cannot be exercised before the voyage has been undertaken or commenced by the original vessel.[36] By reshipping under such a clause the master does not lessen his liability to transport to the port named in the bill, and must show that the goods were put in a good ship.[37]

Agency of master In reshipping cargo, if the master can save a part of the freight to the owner, he will be considered his agent as well as the shipper's, otherwise, the shipper's alone.[38]

Through carriage. A carrier under a through bill of lading is presumably authorized to transship the goods when the shipper has notice that the carrier's vessel does not go all the way to the port of ultimate destination,[39] and where a bill of lading shows that a voyage to a particular place named on it is but part of a longer transit, which it is understood is to be made by the cargo shipped, and that the cargo is to be carried forward in a continuous way on its further voyage, the master must be presumed to have contracted with reference to the course of trade connected with getting the cargo forward.[40] A steamship company which issues a through bill of lading cannot limit its liability by accepting a local bill of lading which contains an agreed valuation clause for an amount less than that contained in the through bill of lading.[41] The terms of a through bill of lading providing for transshipment has been held to demonstrate that an ocean bill of lading was in the contemplation of the parties and was intended to become an integral part of the contract of carriage.[42] A provision in a through bill of lading that a forwarding shipment

26. Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala. 594, opinion conformed to 81 So. 245, 17 Ala. App. 34

27. U.S.—Atlantic & Gulf West Coast of Central America and Mexico Conference (No. 2743) v. U. S., D.C.N.Y., 94 F. Supp. 138

28. **Questions of fact** should be submitted to the jury.—Beol, Inc., v. H. S. Dorf Co., 105 N.Y.S.2d 323, 278 App.Div. 896, appeal and reargument denied 105 N.Y.S.2d 1020, 278 App. Div. 942.

29. **Particular provisions construed**
U.S.—Grace v. Waterhouse, C.C.A. Wash., 264 F. 422

30. U.S.—Broadwell v. Butler, C.C. Ohio, 4 F. Cas. No. 1,910, 6 McLean 296, Newb. Adm. 171.
58 C.J. p. 370 note 3.

31. U.S.—Dorris v. Copelin, D.C.Mo., 7 F. Cas. No. 4,011
58 C.J. p. 371 note 4.

32. U.S.—Mina v. I. & V. Florio SS Co., D.C.N.J., 23 F. 915

33. U.S.—The T. A. Goddard, D.C.N.Y., 12 F. 174

34. Mo.—Carr v. The Michigan, 27 Mo. 196, 72 Am.D. 257.
Pa.—Whitesides v. Russell, 8 Watts & S. 44

35. Mo.—Carr v. The Michigan, 27 Mo. 196, 72 Am.D. 257
58 C.J. p. 371 note 9

36. U.S.—Dorris v. Copelin, D.C.Mo., 7 F. Cas. No. 4,011.

37. Ill.—Dunseth v. Wade, 3 Ill. 285

38. Pa.—McLoon v. Cummings, 73 Pa. 98.
58 C.J. p. 371 note 13.

39. U.S.—Pacific SS. Co. v. Washington, C.C.A.Wash., 284 F. 712.
58 C.J. p. 371 note 14

40. U.S.—The Convoy's Wheat, 3 Wall. 225, 18 L.Ed. 194.
58 C.J. p. 371 note 15.

41. U.S.—The Cayo Mambi, C.C.A.N.Y., 62 F.2d 791.

Liability of second carrier is measured by its own contract, not by through bill of lading.—The Cayo Mambi, D.C.N.Y., 1 F.Supp. 116, affirmed, C.C.A., 62 F.2d 791

42. N.Y.—Kachurin v. Barr, 71 N.Y.S.2d 629, 272 App.Div. 391, appeal denied 75 N.Y.S.2d 281, 272 App. Div. 1048, affirmed 79 N.E.2d 736, 297 N.Y. 889

Two bills of lading as single document
Where terms of ocean bill of lading were incorporated by reference into through bill of lading for cargo issued by master of ship transporting cargo from Cyprus to Port Said, Egypt, for transshipment to New York, they were a part of the contract of affreightment and the two bills would be read together as if they constituted a single document.—Kachurin v. Barr, supra.

is subject to the conditions of bills of lading at present in use by on-carrying vessels is of no help to an on-carrying vessel with respect to its liability for damage to cargo stowed on deck where a provision for on-deck carriage is typed over the printed form for the particular contract of affreightment.[43]

§ 116. Goods Sent C. O. D.

Bills of lading C. O D are not a lien on the vessel to secure payment of the money collected from the consignee on delivery of the goods.

In the absence of a statute providing otherwise, bills of lading C O. D. are not a lien on the vessel to secure payment of the money collected from the consignee on delivery of the goods.[44]

§ 117. Delivery

The liability of a carrier under a bill of lading continues until the merchandise is safely delivered to the consignee at the port of discharge, or placed in such a situation as to equal a safe delivery, and the carrier is not discharged of the custody of the goods until this is done.

The liability of a carrier under a bill of lading continues until the merchandise is safely delivered to the consignee at the port of discharge, or placed in such a situation there as to be equivalent to a safe delivery, and the carrier is not discharged of the custody of the goods until this is done.[45] Where the owner of a vessel agrees, for a single price, to transport a cargo from one port to another, and allow storage thereof in the vessel following the voyage, his liability as carrier ceases on arrival at the port of destination, and he is thereafter liable as a warehouseman only.[46]

§ 118. —— Mode and Place

a. In general
b. Constructive delivery; notice to shipper or consignee
c. Place

a. In General

It is the duty of a vessel and its owners to make delivery of its cargo at the port of destination. Delivery must be in accordance with any reasonable provisions with respect to it in the contract and, if the bill of lading or contract is silent as to the delivery, it must be according to the reasonable usages and regulations of the port or according to the custom of trade between the parties.

It is the duty of a vessel and its owners to make delivery of its cargo[47] at the port of destination.[48] Delivery must be in accordance with any reasonable provisions with respect to it in the contract.[49] Where the contract or bill of lading is silent as to the delivery, it must be according to the reason-

Inconsistent provisions

If terms of through bill of lading and subsequent ocean bill of lading are inconsistent, under English rule the provisions of the ocean bill of lading must prevail.—Kachurin v Barr, supra

"Freight prepaid" in through bill of lading

The legend "freight prepaid" in through bill of lading for cargo issued by master of ship transporting cargo from Cyprus to Port Said, Egypt, for transshipment to New York, was not conclusive evidence that full freight from Cyprus to New York including any additional freight of the on-carrying steamer was paid.—Kachurin v. Barr, supra.

43. U.S.—The Idefjord, C.C.A.N.Y., 114 F.2d 262, certiorari denied Den Norske Amerikalinje A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

Reasonableness of variation

The reasonableness of a variation inserted into a contract of carriage by an on-carrying conveyance depends on the circumstances of the particular case and on whether a clean negotiable document of title is outstanding.—The Idefjord, C.C.A.N.Y., 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

Liability in rem for right delivery

An on-carrying steamer by accepting a cargo of wool for carriage on deck with knowledge of clean negotiable through bills of lading made the issuer of those bills its agent, and it could not then accept the goods under its own conditions, and it was bound in rem for right delivery.—The Idefjord, C.C.A.N.Y., 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

44. U.S.—The Illinois, D.C.Tenn., 12 F.Cas.No.7,005, 2 Flipp. 383.
58 C.J. p. 371 note 17.
Abbreviation "C. O. D." defined see 1 C.J.S. p. 276 note 5
Goods carried C. O. D. by carriers in general see Carriers § 186

45. U.S.—Vose v. Allen, D.C.N.Y., 28 F.Cas.No.17,005, affirmed, C.C., 28 F.Cas.No.17,006, 3 Blatchf. 289.

46. U.S.—Norton v. The Richard Winslow, D.C.Wis., 67 F. 259, affirmed 71 F. 426, 18 C.C.A. 344

47. U.S.—Irzo v. Perkins, D.C.N.Y., 10 F. 779—Crosby v. Grinnell, D.C.N.Y., 6 F.Cas.No.3,422.

48. U.S.—The Elvaston, C.C.A.La., 279 F. 935
58 C.J. p. 371 note 22

Authority to deliver at different port

Ocean carrier could not justify nonperformance under bill of lading providing that goods should be delivered at designated port, or as near thereto as she may safely get, upon ground that shipper by reason of his conduct in certain previous transactions had impliedly authorized carrier to deliver goods elsewhere.—The Jean Jadot, D.C.N.Y., 14 F.Supp. 161

Risks at destination known to consignee

The United States is not liable to consignee of merchandise, shipped on its vessel to Manila, P. I., for value of part of cargo lost, on ground of its negligence in discharging cargo at such port into custody of Philippine customs' corporate agent, which was unable to handle cargo properly, where consignees knew of risks inherent in discharging cargo at Manila because of looting on piers and failed to show that parties contemplated unloading of cargo elsewhere if conditions had not improved at time of its arrival.—Tan Hi v. U. S., D.C.Cal., 94 F.Supp. 432

49. U.S.—E. J. Keller Co. v. Cosmopolitan Shipping Co., D.C.N.Y., 26 F.2d 838
58 C.J. p. 372 note 23.

able[50] usages and regulations of the port,[51] or according to the custom of trade between the parties,[52] without confusion,[53] and in proper landing order;[54] but the carrier is not bound to deliver the goods in any particular position on the dock.[55] In the absence of a special contract to the contrary, a shipowner has delivered his cargo when he has put it over the rail of his ship,[56] but it has been said that ordinarily a ship has not performed her obligation to deliver the cargo until it has been placed on the wharf.[57] Different consignments must be properly separated[58] so as to be open to inspection by their respective owners, and a fair opportunity afforded the consignee to remove his goods,[59] and a mere deposit of goods on the carrier's own wharf, the goods not being separated and set apart from the rest of the cargo, and there being no acceptance by the consignee, and no reasonable time or opportunity for their removal, is not a delivery to the consignee.[60] A vessel is not ordinarily bound to count or weigh the cargo on delivery.[61]

Delivery on the wharf alone may be sufficient where it is by direction of the consignee.[62]

Physical possession of consignee. Delivery is complete when the consignee has surrendered documents of title and the cargo is physically in his possession,[63] and the fact that the consignee or his agent is required to sign a delivery book does not make the delivery incomplete until it is signed.[64]

b. Constructive Delivery; Notice to Shipper or Consignee

In the absence of a special contract goods will be regarded as properly delivered when deposited on the proper wharf at their place of destination, at a proper time, and notice given to the consignee, after which he has had a reasonable time and opportunity to remove them.

In the absence of a special contract goods will be regarded as properly delivered when deposited on the proper wharf at their place of destination, at a proper time, and notice given to the consignee, after which he has had a reasonable time and opportunity to remove them.[65] Although it has been said that notice to the consignee of the arrival of the goods may be dispensed with by usage of the port[66] and the established course of business between the parties,[67] ordinarily, in case of carriage by water, otherwise than by steamboats having a regular schedule time for arriving and departing, the liability of the carrier as such continues until the consignee has been notified that the goods are ready for delivery, and he has had a reasonable opportunity to receive them,[68] and it has been held that usage

50. U S.—Tan Hi v. U. S., D C.Cal., 94 F Supp 432.
58 C J. p 372 note 24.

Requirement held reasonable
A requirement of Philippine law that all cargo unloaded at Manila be delivered to consignee through terminal company acting as Philippine customs' agent under contract with Philippine government, was not unreasonable, in view of general disorder, subjecting cargo lying on Manila piers awaiting removal by consignee, to risk of looting, which local government authorities were powerless to prevent.—Tan Hi v. U. S., supra.

51. U S.—Richardson & Sons v. Jenkins S S. Co., C C.A Mich., 44 F.2d 759, certiorari denied James Richardson & Sons v. Jenkins S S. Co., 51 S Ct 345, 283 U S 821, 75 L Ed 1436.
58 C.J. p 372 note 25.

Common law
The common law elements of proper delivery of goods by water carrier apply only when custom regulations, or law of port of destination do not otherwise provide, as delivery must be according to custom and usage of port and such delivery will discharge carrier of responsibility.—Tan Hi v. U. S., D C.Cal., 94 F Supp. 432.

Delivery subject to risks
(1) The rule that delivery of cargo according to usage or law of port of destination is not proper delivery, if cargo is thereby subjected to risks which are unusual with relation to those ordinarily involved in making such delivery, is inapplicable where inherent risks of delivery at certain port have long existed and are well known to both consignees and carrier.—Tan Hi v. U. S., supra.

(2) The fact that usage or law at port of delivery of cargo may subject it to risks not incident to normal delivery at other ports is immaterial in determining propriety of delivery at such port.—Tan Hi v. U. S., supra.

52. N.Y.—Jameson v. Sweeney, 66 N. Y S. 494, 32 Misc. 645

53. U.S.—The Cardiganshire, D C. Cal., 9 F 2d 416
58 C J p 372 note 28.

54. U S.—The Harold Haarfager, D C N.Y., 11 F.Cas No.6,083, 8 Ben. 216.
58 C.J p 372 note 29

55. U.S.—Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co., D C N Y, 93 F 374.
58 C J p 373 note 30

56. U S.—The No 34, C C.A N.Y., 25 F 2d 602, certiorari denied 49 S.Ct 11, 278 U S. 606, 73 L.Ed. 533.
58 C J. p 373 note 32

57. U.S.—The Iossifoglu, D C Md., 32 F 2d 928.—Tan Hi v. U. S., D C Cal., 94 F.Supp. 432.

58. U S.—Tan Hi v. U. S., supra
58 C J p 373 note 34.

59. U S.—Tan Hi v. U. S., supra
58 C.J. p 373 note 35.

60. U S.—Warner v The Illinois, C C Pa., 29 F.Cas No 17,184a.
58 C J p 373 note 36.

61. Puerto Rico.—Hansen v. Nine Hundred and Ninety-Eight Tons Coal, 6 Puerto Rico Fed. 394.

62. U S.—Howland v The Henry Hood, D C N Y, 12 F.Cas No 6,795

63. U S.—Priestley v. Cunard SS. Co, C C.A N Y, 29 F 2d 39.

64. U.S.—Priestley v. Cunard SS Co., supra.

65. U S.—Southern Pac Co. v. Van Hoosear, C C A Cal., 72 F.2d 903
58 C J. p 373 note 41.

Where owners cannot be notified
If consignees or owners cannot be notified of delivery on wharf, goods should be stored safely until delivery can be accomplished.—Clifford v. Merritt-Chapman & Scott Corporation, C C A Fla., 57 F 2d 1021.

66. N.Y.—Atlantic Nav. Co. v. Johnson, 27 N.Y.Super. 474.
58 C J. p 374 note 42.

67. N.Y.—Russell Mfg Co v. New Haven Steamboat Co., 50 N Y. 121.
58 C.J. p 374 note 43.

68. U S.—Tan Hi v. U. S., D.C.Cal., 94 F.Supp. 432.

or custom of a port cannot dispense with notice of the landing of the goods.[69] The notice to take the place of actual delivery must be a reasonable one,[70] properly directed to the consignee's business address.[71] The obligation to give notice is not increased or modified by the fact that the carriers discharge at a wharf other than the usual one if the consignee is not prejudiced by the change,[72] and where the unloading is temporarily interrupted by the crowded state of the wharf, because of other consignees not removing their goods, no new notice need be given on resumption of the work.[73] A master cannot avail himself of his own wrong as an excuse for not giving notice.[74]

Notice may be rendered unnecessary by the terms of the bill of lading,[75] and, in such case, if the goods are landed in suitable weather with opportunity to remove them without injury, the vessel is absolved from all further liability, although no notice is given,[76] but even under such a bill if the goods are discharged at an improper time, or exposed to known and imminent peril of loss, without due notice, the ship will be held liable for breach of duty,[77] and any right of the carrier under the contract to compel consignees to take goods shipped "from alongside" is waived by the carrier unloading the goods onto the dock.[78]

c. Place

While the place of delivery of a cargo depends much on the usage of the particular port, generally the goods need not be tendered personally to the consignee or delivered at his warehouse. A vessel is bound to land her cargo at some suitable wharf; the place selected must be fit and safe for its deposit.

While the place of delivery of a cargo depends much on the usage of the particular port,[79] generally the goods need not be tendered personally to the consignee,[80] or delivered at his warehouse[81] or residence,[82] nor is the ship obliged to deliver freight at a pier nearest to the address of the consignee as given in the bill of lading.[83] In the absence of any different usage of the port, or other indication in the bill of lading, a vessel is bound to land her cargo at some suitable wharf;[84] the place selected must be fit and safe for its deposit,[85] but the carrier is not bound to provide a heated wharf unless it has so contracted.[86] The place selected for discharge of cargo must, if possible, be the customary wharf,[87] but the customary discharge of goods by a carrier at its own wharf raises no liability for loss occasioned solely by the discharge of goods at another wharf, unless the custom is clearly long established, and without exception.[88]

A vessel must deliver her cargo within such parts of the port as have become fixed by established usage, if a customary berth can be obtained there within a reasonable time,[89] and if the vessel discharges at the wrong place she is liable for the additional expense thereby caused to the consignee.[90] While the master may, in the absence of instructions, lawfully proceed to any usual and convenient wharf at the port of discharge, without consulting the shippers,[91] the sole consignee, or all the con-

N Y —Murphy v. Export S S. Corporation, 271 N.Y.S. 880, 151 Misc 655.
58 C J p 374 note 44.

Carrier held liable
Steamship owner failing to give notice of discharge of goods into lighter as required by contract of carriage was liable for loss when lighter sank.—Murphy v. Export S S Corporation, supra

Construction of bill of lading
Lighterage and end-of tackle clauses of bill of lading and clause requiring notice of discharge to be given consignees or shipper must be read together.—Murphy v. Export S. S. Corporation, supra.

69. Tenn —Dean v. Vaccaro, 2 Head 488, 75 Am D. 744.

70. Mass —Ideal Leather Goods Co v Eastern SS. Corp, 107 N E. 525, 220 Mass. 133
58 C J p 374 note 46.

71. Ill —Union Steamboat Co v. Knapp, 73 Ill. 506.

72. U S —Constable v. National SS Co, N Y, 14 S.Ct. 1062, 154 U.S. 51, 38 L Ed. 903.

73. U S.—Salmon Falls Mfg. Co v The Tangier, D C Mass, 21 F Cas No 12,267, 3 Ware 110, affirmed, C. C, 21 F Cas No 12,266, 1 Cliff 396

74. U S —The Peytona, C C.Me, 19 F Cas No 11,058, 2 Curt. 21.
58 C J. p 375 note 50

75. U S —Constable v National SS Co, N Y, 14 S Ct 1062, 154 U S 51, 38 L Ed 903
58 C.J p 375 note 51

76. U S —The Boskenna Bay, C C N Y, 40 F 91, 6 L R A 172—The Surrey, C.C N Y, 40 F 90

77. U S.—The Surrey, D C N Y, 26 F 791, reversed on other grounds, C.C, 40 F 90.
58 C J p 375 note 53.

78. U S —The Titania, N.Y., 131 F. 229, 65 C C A 215.

79. U S —The G A Tomlinson, D C N Y, 293 F 51.
58 C J. p 375 note 55.

80. U S.—The Eddy, S C., 5 Wall. 481, 18 L Ed 486
58 C J. p 376 note 57.

81. U.S —Tan Hi v U. S, D.C.Cal., 94 F.Supp. 432.
58 C.J. p 376 note 58.

82. La —Kohn v. Packard, 3 La. 224, 23 Am D 453.

83. N.Y —Western Transp Co v Hawley, 1 Daly 327.

84. U.S —Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, D C N.Y, 20 F 510.
58 C J. p 376 note 61

85. U S.—The City of Lincoln, D C. N Y, 25 F. 835
58 C J p 376 note 62

86. N Y —Kronman v Texas Transport, etc, Co, 191 N.Y.S 380, 117 Misc 300

87. U S.—The Port Adelaide, D C N Y, 38 F 753
58 C J. p 376 note 64.

88. U.S —Arnold v National SS Co., D C N Y, 29 F. 184, affirmed 14 S Ct 1062, 154 U S 51, 38 L Ed 903.
58 C J p 376 note 65.

89. U S —The Port Adelaide, D C N Y., 38 F. 753.

90. U.S —The Port Adelaide, supra.
58 C.J p 376 note 67.

91. U S —The E H. Fittler, D.C Mass, 8 F.Cas No 4,311, 1 Lowell 114.

signees, if unanimous,[92] or a majority of them when it is the custom,[93] or any one of them when this is the usage of the port,[94] may direct the master to unload at any usual and convenient wharf at the port of discharge; but a vessel is not bound, at the consignee's direction to unload at a wharf which is unreasonably inconvenient, inaccessible, or extra-hazardous to the vessel.[95] Where a cargo is sent to a foreign country, and the consignor does not designate any particular port of delivery, the presumption is that the general port of delivery of such cargoes was intended.[96] If a vessel goes aground not far from a port of delivery, consignees who receive cargo where she lay thereby waive a delivery in strict compliance with the contract.[97]

By special agreement a carrier may be bound to deliver at a special wharf,[98] and, under a bill of lading requiring goods to be landed at a certain place, the goods must be landed there from the ship, if it can be done with safety to her,[99] the consignee not being required to accept delivery elsewhere.[1] So, where the bill reserves to the consignee the right to choose the wharf, delivery must be made at the wharf chosen if it is ready to receive the cargo.[2] A contract to deliver to the consignee or his assigns is not an undertaking to deliver at the consignee's wharf;[3] and where the carrier has agreed to transport a cargo of goods and deliver them at a certain wharf, and on arrival at the designated place no wharf exists, the refusal of the carrier to build one constitutes no defense to an action for the freight.[4] If the consignee fails to provide a convenient place for unloading in accordance with the specifications of the contract, the carrier may treat the contract as broken and land the cargo at the usual place.[5]

§ 119. —— To Whom Made; Misdelivery

His proper share of the cargo must be delivered to the consignee or owner of the goods or to one duly authorized to receive it. A wrongful delivery constitutes a conversion.

His proper share of the cargo[6] must be delivered to the consignee[7] or owner of the goods,[8] or to one duly authorized to receive it,[9] the primary duty of the carrier being to deliver the goods to the right person.[10] A wrongful delivery constitutes a conversion.[11] A carrier has no right under any circumstances to deliver goods to a stranger,[12] and where an order bill of lading has been issued, delivery should be made only to the holder thereof.[13] A carrier, which agrees to deliver cargo to a foreign consignee on the surrender of the bill of lading, but delivers the cargo to customs officials at the port of destination who, in turn, deliver such cargo to

92. U.S.—The Cervin, D.C.Md., 17 F. 462.
58 C.J. p. 376 note 69

93. U.S.—Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, D.C.N.Y., 20 F. 510.
58 C.J. p. 376 note 70

94. U.S.—The G. A. Tomlinson, D.C.N.Y., 293 F. 51.
58 C.J. p. 376 note 71.

95. U.S.—O'Rourke v. Two Hundred and Twenty-One Tons of Coal, D.C.N.Y., 1 F. 619
58 C.J. p. 376 note 72

96. Me.—Smith v. Davenport, 34 Me. 520

97. U.S.—The Eva D. Rose, D.C.N.C., 151 F. 704, 153 F. 912, affirmed 166 F. 101, 92 C.C.A. 85.

98. Mass.—Shaw v. Gardner, 12 Gray 488

99. Mass.—Shaw v. Gardner, supra.

1. U.S.—Liebes v. Klengenberg, C.C.A.Cal., 23 F.2d 611, certiorari denied 48 S.Ct. 559, 277 U.S. 596, 72 L.Ed. 1006.

2. La.—Manson v. Harrison, 2 La.A., Orleans, 95.

3. U.S.—Smith v. Lee, Mass., 66 F. 344, 13 C.C.A. 506.

4. Miss.—McCaughn v. Milliot, 29 So. 818, 78 Miss. 976.

5. Conn.—Wordin v. Bemis, 32 Conn. 268, 85 Am.D. 255.

6. U.S.—The Pietro G., D.C.N.Y., 38 F. 148.

7. N.Y.—Tarbell v. Royal Exch. Shipping Co., 17 N.E. 721, 110 N.Y. 170, 6 Am.S.R. 350
58 C.J. p. 377 note 84.

"To consign" defined
When used in connection with a vessel, the term "to consign" generally refers to the goods which are shipped by her.—Gillespie v. Winberg, 4 Daly, N.Y., 318—12 C.J. p. 528 note 38

"Consignee" defined
The word "consignee" in its ordinary and usual significance indicates a person residing at the port of delivery to whom the goods are to be delivered when they arrive.—The Arizpa, C.C.A.Md., 63 F.2d 42.
"Consignee" defined generally see 15 C.J.S. p. 988 note 25-p. 989 note 33.

8. U.S.—The Boskenna Bay, C.C.N.Y., 40 F. 91, 6 L.R.A. 172.
58 C.J. p. 377 note 85

9. U.S.—Tan Hi v. U. S., D.C.Cal., 94 F.Supp. 432.
58 C.J. p. 377 note 86.

When bill of lading "accomplished"
A bill of lading is "accomplished" not by transportation of shipment to its destination but delivery at destination must be made bona fide to person apparently having right to receive shipment.—Alcoa S. S. Co. v. U. S., D.C.N.Y., 80 F.Supp. 158, reversed on other grounds, C.A., 175 F.2d 661, affirmed 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225.

10. Cal.—Webb v. Winter, 1 Cal. 417.

11. N.Y.—M. & T. Trust Co. v. Export S. S. Corporation, 259 N.Y.S. 393, reversed on other grounds 186 N.E. 214, 262 N.Y. 92, certiorari denied 54 S.Ct. 70, 290 U.S. 650, 78 L.Ed. 563
58 C.J. p. 377 note 88.

12. U.S.—The Thames v. Seaman, N.Y., 14 Wall. 98, 20 L.Ed. 804—Bank of California, N.A. v. International Mercantile Marine Co., D.C.N.Y., 40 F.2d 80, reversed on other grounds, C.C.A., 64 F.2d 100, certiorari denied 54 S.Ct. 66, 290 U.S. 649, 78 L.Ed. 563.

13. U.S.—Israel v. U. S. Shipping Board Emergency Fleet Corp., C.C.A.La., 23 F.2d 786
58 C.J. p. 377 note 90.

Necessity of notice
Shipowner's failure to notify shipper or holder of bill of lading of arrival of goods or of time of completion of vessel's discharge are not defenses in libel for misdelivery of cargo, since consignee is bound to be on hand to take goods when they come to hand.—The Jean Jadot, D.C.N.Y., 9 F.Supp. 162.

the consignee without a surrender of the bill of lading, is liable to the shipper for loss consequent on its breach of the shipping agreement where it knows that the law at such port requires delivery of dutiable goods to customs officials.[14] Where the shipper has delivered goods to a carrier on a dock receipt running to the consignee and not to his order, the carrier is justified in delivering to the consignee without surrender of the dock receipt.[15] The carrier is not liable where a misdelivery results from reliance on the bill of lading accepted by the shipper,[16] or where the loss results as a consequence of the negligence of the person properly entitled to delivery.[17] If a vessel strands on a voyage near her port of delivery, and on being released starts back with the intention of delivering the cargo back to the consignors, in violation of the contract of carriage, the consignees are entitled to sue the vessel in admiralty to recover the cargo and damages for its nondelivery.[18]

Ratification. The delivery of bills of lading by shippers to importers after the latter have wrongfully obtained the goods from the carrier does not operate as a ratification of the previous deliveries, of which the shippers had no knowledge.[19]

§ 120. —— Failure or Refusal to Deliver

A carrier's primary duty is to carry and deliver, and failure or refusal to deliver will render it liable unless justified by some legal excuse. The act of a carrier in failing, without lawful excuse, to deliver goods may constitute a conversion or breach of contract.

A carrier's primary duty is to carry and deliver, and failure or refusal to deliver will render it liable,[20] unless justified by some legal excuse.[21] A carrier who contracted to carry under an agreement that it should not be liable for loss or damage to the goods is liable for failure to deliver, unless it shows that such failure was caused by the goods being lost.[22] The duty to deliver is, however, a duty to all the shippers,[23] and the case cannot be disposed of as though plaintiff's goods were the only goods on board;[24] the extent of the duty must be determined by a consideration of all the surrounding circumstances.[25] The act of a carrier in failing, without lawful excuse, to deliver goods constitutes a conversion,[26] and a breach of contract.[27]

Abandonment of goods defeats a claim for nondelivery thereof.[28]

14. Tex.—South Texas Lumber Co v. Wolvin Line, Civ.App., 199 S.W. 1129.
58 C.J. p. 377 note 86 [a]

15. N.Y.—Chandler Motor Car Co v. United Fruit Co., 216 N.Y.S. 413, 127 Misc. 432

16. Mass.—Porter v. Ocean SS Co., 111 N.E. 864, 223 Mass. 224.

17. U.S.—MacAndrews, etc., Co., v. U.S., C.C.A.N.J., 23 F.2d 667
58 C.J. p. 377 note 93.

18. U.S.—The Eva D. Rose, D.C.N.C., 151 F. 704, modified 153 F. 912, affirmed 166 F. 101, 92 C.C.A. 85.

19. U.S.—Goepel v. Hamburg American Packet Co., D.C.N.Y., 191 F. 744.

20. U.S.—Herschel Jones Marketing Service v. U.S., D.C.N.Y., 32 F.2d 530
58 C.J. p. 378 note 2.

Unloading cargo

(1) A vessel refusing to discharge cargo or deliver it to owners until ordered to do so by court on ground that contract venture had been frustrated by war was liable for cost of unloading cargo at port where vessel was interned after calling thereat for coal bunkers as authorized by bills of lading, notwithstanding provisions therein authorizing vessel, in event of war, to proceed to or remain at any other port than that of discharge and retain goods on board or discharge them at owners' risk and expense.—The San Giuseppe, C.C.A.Va., 122 F.2d 579.

(2) A provision of war risk clause in foreign vessel's time charter that if port at which it is ordered to discharge cargo be one to which it is prohibited from going by government of nation under whose flag it sails, owner shall discharge cargo at any other port covered by charter party as ordered by charterers, imposed on vessel and her owners burden of unloading cargo at port covered by charter, as ordered by court on cargo owners' motion, after foreign government prohibited vessel from going to port of discharge named in bills of lading.—The San Giuseppe, supra.

Liability of agent

Where shipping company's agent refused to surrender carrier certificates to shipper except upon payment of additional freight charges wrongfully imposed by connecting carrier, the agent abandoned any status he may have possessed as a disinterested intermediary and identified himself as an agent whose liability for his conduct in assuming dominion over the property of the shipper could not be distinguished from that of the principal.—Kachurin v. American Iraq Shipping Co., 61 N.Y.S.2d 414, 187 Misc. 178.

Payment of additional charges under protest

Owner of goods was not required to pay additional freight charges under protest, in order to obtain possession of the goods, since he was not bound to submit to an improper exaction of fees or charges in order to obtain his own property.—Kachurin v. American Iraq Shipping Co., supra

21. U.S.—Ortega & Emigh v. Grace Line, D.C.Cal., 72 F.Supp. 302.
Excuses for nonperformance of contract generally see supra § 108.

No goods received

Carrier was not liable for failure to deliver goods which it never received.—Ortega & Emigh v. Grace Line, D.C.Cal., 72 F.Supp. 302.

22. N.Y.—Newstadt v. Adams, 12 N.Y.Super. 43

23. U.S.—New York, etc., SS Co. v. Guanica Centrale, N.Y., 231 F. 820, 145 C.C.A. 649.

24. U.S.—New York, etc., SS. Co. v. Guanica Centrale, supra.

25. U.S.—New York, etc., SS Co. v. Guanica Centrale, supra.

26. N.Y.—Kachurin v. American Iraq Shipping Co., 61 N.Y.S.2d 414, 187 Misc. 178
58 C.J. p. 378 note 8.

If there is no suitable place for storage, the carrier transporting the goods by boat may, without liability for conversion, retain them in possession on the boat.—The Hattie Palmer, N.Y., 68 F. 380, 15 C.C.A. 479.

27. N.Y.—Winkler v. Compania Sud Americana De Vapores, 41 N.Y.S.2d 67, 180 Misc. 181
58 C.J. p. 378 note 9.

28. U.S.—The Baltic, D.C.N.Y., 212 F. 759
58 C.J. p. 378 note 10.

Penalties. Where the statutes so provide, failure to deliver cargo manifested for delivery at a port subjects the carrier to penalties imposed by the collector of customs.[29]

§ 121. —— Failure or Refusal to Receive

A consignee cannot decline to receive cargo on the ground of adverse weather conditions if the weather is reasonably fit for unloading. Where a consignee refuses to accept goods, the carrier must keep the goods for the owner or land and store them with a competent third person.

A consignee cannot, if the weather is reasonably fit for unloading, decline to receive cargo on the ground of adverse weather conditions[30] or in apprehension of bad weather,[31] and a refusal to receive cargo after due notice, and after the lapse of a reasonable time given the consignee to accept, dispenses with the necessity of a formal tender.[32] If the goods are damaged or deteriorated, the consignee cannot refuse to receive them and then sue for conversion, but must accept the tender and claim for the difference in quality or quantity.[33]

Storage of goods. Where a consignee refuses to receive goods,[34] or pay the freight,[35] or if they are not called for,[36] the carrier must keep the goods for the owner[37] or land them and store them with a competent third person, subject to the consignee's order on performance of the conditions,[38] or for the account of the owner,[39] and, having done this, it has fulfilled its full duty as a carrier;[40] and, if the consignee is bound to receive them, the goods are thereafter at his risk.[41] If it is impossible to store the goods at the port of destination, the master may take them to the nearest port where it is possible.[42]

§ 122. —— Short Delivery

A carrier is liable for a short delivery, in the absence of a valid exception in the bill of lading, unless shrinkage of cargo is caused by its own inherent nature and quality and not by any negligence of the carrier.

A carrier is liable for a short delivery,[43] in the absence of a valid exception in the bill of lading,[44] unless shrinkage of cargo is caused by its own inherent nature and quality and not by any negligence of the owners of the ship,[45] and the carrier cannot avoid liability by a provision in the bill of lading that weight, contents, and material are unknown.[46] However, a vessel is not liable for a shortage in the number of packages set out in the bill of lading signed by the master, although such bill and the cargo represented by it have passed to a bona fide purchaser, where no fraud is charged, and it is conceded that all the cargo actually received on board, or which came into the hands of the master, was delivered.[47] In determining whether there is a shortage of cargo, both the consignee's output count and the intake counts as shown by the bill of lading are controlled by proof that the hatches were sealed after the cargo was in, and opened only by the port wardens on the vessel's arrival, and that there was no opportunity for loss or abstraction;[48] and in determining a question of shortage of weight of

29. Philippine—Smith v. Insular Collector of Customs, 37 Philippine 97.
58 C.J. p 378 note 12.

30. U S—Liverpool, etc., Steam Co. v. Suitter, D C N Y, 17 F. 695, affirmed, C C., 22 F 560.
58 C J. p 378 note 13

31. U S—The Grafton, D C N.Y., 10 F Cas No 5,656, Olcott 43, affirmed, C C, 10 F.Cas No 5,655, 1 Blatchf 173.

32. U S—O'Rourke v. Two Hundred and Twenty-One Tons of Coal, D C N.Y., 1 F. 619.

33. U S—The Timor, D C N.Y, 61 F. 633.

34. U S—The Eddy, S C., 5 Wall. 481, 18 L Ed 486.
58 C J. p 379 note 20.

35. U.S.—The Adella S Hills, D C N Y, 47 F. 76—Fox v Holt, D C, 9 F Cas No 5,012, 4 Ben. 278, 36 Conn 558.

36. Ill—Crawford v. Clark, 15 Ill 561.
N.Y.—Redmond v. Liverpool, etc., Steamboat Co, 46 N Y. 578, 7 Am R 390

37. U S—Wilson v Royal Exch Shipping Co., D C N Y., 24 F. 815.

38. U S—The Eddy, S C., 5 Wall. 481, 18 L Ed 486.
58 C J p 379 notes 20–22.

39. U S—California Bank v. International Mercantile Marine Co, D C N Y, 40 F.2d 80.
58 C J p 379 note 25

40. U.S—Brittan v. Barnaby, Cal, 21 How 527, 16 L Ed. 177.
58 C J. p 379 note 26.

41. U S—Knott v. One Hundred Bales of Rags, D C N J., 60 F 634
Mass—Chickering v. Fowler, 4 Pick. 371.

42. U S—Fox v. Holt, D C, 9 F Cas. No 5,012, 4 Ben 278, 36 Conn. 558.
58 C J p 379 note 33

43. U S—American Trading Co. v. The Harry Culbreath, D C N Y, 95 F Supp 312, affirmed, C A, 187 F 2d 310—The Rita Sister, D C Pa., 69 F Supp. 480—Shackman v Cunard White Star, D C N Y., 31 F.Supp 948.
58 C.J p 379 note 35.

Establishment of lawful excuse by carrier

Where ship was required to be considered as having been loaded by carrier within Carriage of Goods by Sea Act, carrier, to establish lawful excuse for its failure to deliver goods in quantities stated in bills of lading, was required to show that there could have been no loss of goods after ship docked at end of voyage—American Trading Co v The Harry Culbreath, C A N Y., 187 F.2d 310

44. U S.—The Seneca, D.C N Y, 163 F. 591, reversed on other grounds 172 F. 370, 97 C.C A. 68.

45. U S—Janney v. Tudor Co., D.C. Mass, 3 F 814
58 C J. p 379 note 37.

46. U S—The Nora, D C Pa., 14 F. 429.

47. U S—Maddock v. American Sugar Refining Co, D C Mass., 91 F 166, affirmed 93 F. 980, 36 C.C A. 42

48. U S.—The Ethel, D.C.Pa., 59 F. 473.

cargo the customhouse weight is entitled to superior credit as against a subsequent unofficial weight, taken after the cargo had been stored for months.[49] Where there has been a short delivery and the consignee withholds filing claim because delivery to make up the shortage is guaranteed from another shipment by the shipper but such other shipment is lost at sea, the consignee may enforce the original duty of the carrier,[50] and the fact that the consignee has received satisfaction from his insurer furnishes no valid ground of defense to the carrier.[51]

§ 123. Deviation and Delay

The general rule as to when a vessel for hire shall proceed from her port of loading is that she is to deliver the goods carried within a reasonable time and the carrier is liable for loss caused by unjustifiable delay in transportation and delivery of the goods.

The general rule, in the absence of a clear agreement, as to when a vessel for hire shall proceed from her port of loading is that she is to deliver the goods carried or fulfill her engagement within a reasonable time,[52] and the shipowner is bound to prosecute the voyage with due diligence.[53] Although it has been held that delay in discharging through default of the vessel does not entitle the charterer or consignee to damages, in the absence of a contract for delivery by a particular day, but simply extends the time within which the discharge may be made without liability of the charterer or consignee for demurrage,[54] the general rule is that the carrier is liable for loss caused by unjustifiable delay in transportation and delivery of the goods,[55] and shippers have a lien on the vessel for the loss occasioned thereby.[56] While it may be the duty of a common carrier receiving freight for transportation by rail and beyond the seas ordinarily to provide for the clearance of the vessel in which the goods are to be shipped, the shipper cannot complain of failure to obtain such clearance when it is prevented by the nature of the shipment.[57] Similarly, a bill of lading for the transportation of goods from one port to another prima facie imports a direct voyage,[58] unless there is a known usage of trade to touch at intermediate ports,[59] or deviation is permitted in the contract of affreightment,[60] and an unjustifiable deviation renders the carrier liable for the delay[61] and deprives him of the benefit of an insurance clause in the bill.[62] An overcarriage of cargo is a deviation,[63] and a carrier which carries a shipment beyond its destination is liable to the shipper for additional expenses incurred by him because of such deviation.[64]

The master may deviate where stress of weather makes it apparently necessary for a reasonable mariner to lay in,[65] or to make necessary repairs[66] with-

49. U S —Linklater v. Howell, D C N.Y, 88 F 526.

50. U S —General Foods Corp. v. The Felipe Camarao, C A N Y, 172 F 2d 131, certiorari denied Republic of the U. S. of Brazil v. General Foods Corp., 69 S Ct. 1047, 337 U S. 908, 93 L Ed. 1720.

51. U.S —General Foods Corp. v. The Felipe Camarao, C.A N Y, 172 F 2d 131, certiorari denied Republic of the U S. of Brazil v. General Foods Corp, 69 S.Ct. 1047, 337 U S 908, 93 L Ed. 1720.

52. U S —Grammer S S. Corporation v James Richardson & Sons, C C A N.Y, 47 F.2d 186—The Terne, D C.N.Y, 1 F Supp 537.
58 C.J. p 380 note 44

Determination of reasonable time

What is reasonable time for delivery, where neither charter nor bills of lading specify time, must be determined in light of possibilities, including stoppage of channel by ice.—Grammer S S Corporation v James Richardson & Sons, C.C.A N Y., 47 F. 2d 186.

Customary expedition

Shippers are entitled to have goods carried to destination with customary expedition —The Salvore, C C.A. N Y., 60 F 2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S Ct 117, 287 U S 653, 77 L Ed. 565

Warranty

The fact that the parties to freight charter expected delivery before close of navigation for season did not constitute warranty, and the statement of the carrier's agent that steamer would get through before navigation closed for season was a mere expression of opinion, not a warranty —Grammer S S. Corporation v James Richardson & Sons, C C A.N Y., 47 F 2d 186.

53. U S.—Grammer S. S Corporation v. James Richardson & Sons, supra

54. U S.—Milburn v. Federal Sugar Refining Co, N Y., 161 F. 717, 88 C C.A. 577.

55. U S —Wayne v Inland Waterways Corp, D C Ill, 92 F Supp 276.
58 C J. p 380 note 46.

56. U S —The J. C Stevenson, D C. Md, 17 F 540
58 C J p 380 note 47.

57. U.S —Farmers' L & T. Co v. Northern Pac. Co, C.C N.Y, 112 F. 829, reversed on other grounds 120 F 873, 57 C C A. 533, affirmed 25 S.Ct 84, 195 U S 439, 49 L Ed. 269
58 C.J. p 380 note 48.

58. U S.—The City of Brunswick, D. C Mass, 4 F Supp 908
Mass.—Lowry v Russell, 8 Pick. 360.

59. U S.—Thatcher v McCulloh, D. C N Y, 23 F Cas No 13,862, Olcott 365

60. U S.—Blank v. U. S, C.C.A N.Y, 13 F 2d 394.
58 C J. p 380 note 51.

61. Ga —Robinson v. Holst, 23 S E. 76, 96 Ga 19
58 C J p 381 note 52.

62. U S —Rosenberg v. U S. Shipping Board Emergency Fleet Corp., D C Cal, 7 F.2d 893, affirmed, C C. A, U S Shipping Board Emergency Fleet Corporation v Rosenberg Bros & Co., 12 F.2d 721, reversed on other grounds 48 S Ct. 256, 276 U S 202, 72 L Ed 531.

63. N Y —Fadex Chemical Corp. v. Lorentzen, 44 N.Y S 2d 789.

64. N Y —Fadex Chemical Corp v. Lorentzen, supra.

65. U S —Wilcox v Five Hundred Tons of Coal, C.C Ill, 14 F 49
58 C J p 381 note 53.

66. U S —The Malcolm Baxter, Jr, C C A N Y, 20 F 2d 304, affirmed France v French Overseas Corp, 48 S Ct 516, 277 U S. 323, 72 L Ed. 901
La —Rathbone v. Neal, 4 La.Ann. 563, 50 Am.D. 579.

in a reasonable time.[67] Delay does not render the owner liable to the shipper's agents where the latter had no property at risk in the venture.[68] A shipping agent is not liable as a guarantor if a ship's arrival is delayed where such delay has been provided for by the contracting parties.[69] A bill reserving broad rights in the matter of deviation and delay is not void, as against public policy.[70]

Excuse for delay. The extent of the carrier's obligation to a consignee of goods is to use reasonable efforts to make an early delivery with such facilities as the port affords,[71] and delay in transportation and delivery may be excused by the circumstances of the case, in which event no liability therefor attaches to the carrier,[72] but where there is no valid excuse for the delay the carrier is liable.[73] Wrongful cancellation[74] or postponement[75] of sailing is not within the benefit of exceptions excusing a reasonable delay.

Restraint of princes. Stipulations exempting the carrier from liability for loss resulting from "arrest or restraint of princes, rulers, or people" relate to future restraints[76] and not to those already in effect.[77] Unauthorized restraints imposed by subordinate government officials are not within the exemption.[78] Where the contract is made during existence of a state of war, the clause as to restraint of princes will be construed as contemplating exemption from loss caused by actual physical restraint,[79] and not as exempting from loss due to the carrier's refusal to carry contraband.[80] Commandeering of ships by the government in time of war is a risk within exceptions as to restraint of princes.[81]

War conditions Stipulations as to war conditions operate to relieve the carrier from liability for loss or damage resulting therefrom,[82] unless it is shown that the carrier was at fault.[83] Under exceptions excusing the carrier for delay if occasioned by "conditions of war or hostilities, actual or threatened," such as render it unsafe for vessels to sail, a revolution in the country of destination, confined to a portion thereof distant from the port of destination, will not excuse delay.[84] Under exceptions exempting the carrier from liability for damages resulting from failure to operate ships during war, the carrier will not be liable where, in good faith and reason, it refuses to carry cargo contracted for shipment subject to the war clause,[85] but in order to serve as an excuse the refusal to carry goods

67. U S—The Louise, D.C.Md., 58 F Supp 445—The Plow City, D C.Pa., 28 F Supp. 548

Shipper's failure to await repairs

Where it was apparent when vessel left convoy to return to port that vessel had been unseaworthy at start of voyage, and it was very uncertain that vessel could be made seaworthy to resume carriage of cargo to destination, and ship was libeled and in custody of court and had not been released upon stipulation, and shipowner had stated financial inability to care for cargo, thus forcing cargo owners to resume possession of cargo, and shipowner had unjustifiably demanded a general average adjustment, cargo owners were justified in making prompt reshipment of their respective goods to avoid further loss without giving ship a reasonable time within which to complete repairs.—The Louise, D.C Md, 58 F. Supp. 445

68. U S—U. S v. Middleton, C.C A. S C, 3 F 2d 384, certiorari denied 45 S Ct. 463, 267 U S. 603, 69 L Ed. 809.

69. N.Y—L N. Jackson & Co. v. Seas Shipping Co., 56 N.Y.S.2d 501, 185 Misc. 94, affirmed 61 N Y S 2d 371, 270 App Div. 830, affirmed 68 N E 2d 605, 296 N Y 529, motion denied 69 N E 2d 483, 296 N.Y. 635.

70. U S.—Dietrich v U. S Shipping Board Emergency Fleet Corp, C.C. A N.Y., 9 F.2d 733, certiorari denied 49 S.Ct 82, 278 U S. 647, 73 L.Ed. 560
58 C J p 364 note 78.

71. U S—American Steel Co v. Transmarine Corp, D C N Y, 36 F 2d 246.

72. U S.—Grammer S S Corporation v James Richardson & Sons, C C A N Y., 47 F 2d 186.
58 C J p 381 note 60.

Ice blockade

Carrier was under no obligation to make efforts in advance of sailing to prevent formation of anticipated ice blockade—Grammer S S. Corporation v. James Richardson & Sons, supra.

73. U.S.—Cohn v U S Shipping Board, C C A Tenn, 20 F 2d 56
58 C J p 381 note 62.

74. U S.—Cohn v. U. S. Shipping Board, supra.

75. U.S.—Cohn v. U. S Shipping Board, supra.
58 C.J p 381 note 64.

76. U.S.—Rotterdamsche Lloyd v. Gosho Co, C C.A Cal, 298 F 443, certiorari denied 45 S.Ct. 99, 266 U. S 621, 69 L Ed. 472

77. U S—Rotterdamsche Lloyd v. Gosho Co, supra.

78. U S—Northern Pac. R. Co. v. American Trading Co., N Y., 25 S. Ct 84, 195 U S 439, 49 L Ed 269.
58 C J. p 381 note 67.

79. U S—Balfour v. Portland, etc, SS Co, D C.Or., 167 F. 1010.

80. U S—Balfour v. Portland, etc, SS Co, supra.
58 C J. p 382 note 69.

81. U S.—Vacuum Oil Co. v Luckenbach SS. Co, D C Va., 275 F 998

82. La—General Mills v. United Fruit Co, 44 So 2d 303, 216 La 579
58 C J p 382 note 71.

Notice to shipper of delay

Where receipt stipulated that carrier would not be responsible for any delay or default in making shipment because of lack of conveyances, and bill of lading, customarily used by carrier, stipulated acceptance by carrier was subject to delays occasioned by war, rule that a carrier which agrees during existing war conditions, to transport merchandise, is liable for damage suffered by merchandise while in its possession due to delay in loading and transporting it, did not apply where shipper was advised of delays and conditions causing them—General Mills v. United Fruit Co, supra.

83. U S—Aron v Luckenbach SS Co., D C.N Y, 282 F 937.
58 C J. p 382 note 72.

84. U.S.—Cohn v. U. S Shipping Board, C C A Tenn, 20 F.2d 56
58 C J. p 382 note 73.

85. N Y.—Compagnie de Trefileries, etc v. France, etc., SS. Co, 183 N. Y.S 169, 192 App Div 709, affirmed 135 N.E. 932, 233 N.Y. 596.
58 C.J. p 382 note 74.

under the war clause must be based on actual conditions reasonably inducing belief that the voyage cannot be safely completed.[86]

§ 124. Remedies of Shipper

a. In general
b. Damages

a. In General

Where goods shipped on board were not delivered, the holder of a bill of lading has a remedy in admiralty against the master on his undertaking, against the owners of the vessel in personam, or against the vessel in rem.

Where goods shipped on board were not delivered, the holder of a bill of lading has a remedy in admiralty against the master on his undertaking[87] or generally against the owners of the vessel in personam,[88] against the vessel in rem,[89] or in tort against one not a party to the contract who procures the obligor to break it.[90] A carrier under a subcontract with the carrier contracting with the shipper to transport the goods is not, however, liable to the shipper for damages for failure to perform its contract.[91] A party's acceptance of a shipment with knowledge that there has been a deviation or delay does not constitute a waiver of his right of action for damages.[92] Where a shipping company's agent attempts to exact improper freight charges on a shipment of goods, the owner of such goods may abandon them from the moment of their conversion by the agent and sue for their value.[93]

The general rules governing actions for loss or injury to goods carried, discussed infra §§ 150–157, apply to actions by shippers against carriers by water for damages arising out of breach of the duty to transport and deliver, for example, the rules relating to what law governs in enforcing a contract,[94] or the rules relating to the parties,[95] pleading,[96] presumptions and burden of proof,[97] and admissibility,[98] and weight and sufficiency[99] of the evidence introduced.

b. Damages

(1) Nondelivery or misdelivery
(2) Deviation or delay

(1) Nondelivery or Misdelivery

In an action against a carrier for nondelivery of cargo, the measure of damages is the value of the articles at the port of delivery less whatever the cargo owner would have been obliged to pay to get them.

The general rules governing the measure of damages for loss of, or injury to, cargo, discussed infra § 158, apply to actions for failure on the part of the carrier to deliver according to the contract of affreightment.[1] Thus, in an action against a carrier for nondelivery of a cargo, the measure of damages is the value of the articles at the port of delivery,[2] less whatever the cargo owner would have been obliged to pay to get them[3] with interest from the time the delivery ought to have been made[4] or

86. U S—Cohn v. U S. Shipping Board, C C A.Tenn., 20 F.2d 56.

87. U S—The Leonidas, D C N Y., 15 F Cas.No.8,262, Olcott 12

88. U.S.—The Leonidas, supra.
58 C J p 382 note 78

89. U S—The Leonidas, supra

90. U S—The Poznan, D.C N Y, 276 F. 418.
58 C J. p 382 note 80.

91. U S—Vital v Kerr, C C A.N Y., 297 F 959, certiorari denied 44 S Ct 637, 265 U S 592, 68 L Ed 1196
58 C J. p 382 note 81.

92. U S.—Cohn v. U. S Shipping Board, C C.A.Tenn, 20 F.2d 56.
58 C.J p 384 note 89.

93. N Y—Kachurin v American Iraq Shipping Co, 61 N.Y.S 2d 414, 187 Misc. 178.

94. Ohio—The Steamboat Baltimore v. Levi, 12 Ohio Dec., Reprint, 314, 2 Handy 30.
58 C.J. p 383 note 83.

95. Mass—Driscoll v. Nicholls, 5 Gray 488.
58 C.J. p 383 note 84

Suit by indorsee of bill of lading
Indorsee of bill of lading reciting goods were shipped acquired direct obligation of carrier and right to sue for carrier's failure to deliver—Olivier Straw Goods Corporation v Osaka Shosen Kaisha, C C A N.Y, 47 F 2d 878, 74 A L R 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 51 S.Ct 648, 283 U S. 856, 75 L Ed 1462.

96. N.Y—Boera v. Hijos De Jose Taya S. En C., 176 N.Y.S. 47, 107 Misc. 231
58 C.J. p 383 note 85.

Suit brought under statute
Wis—The Galena v Beals, 5 Wis 91.

97. U S—U S v Middleton, C.C A S C, 3 F 2d 384, certiorari denied 45 S Ct. 463, 267 U S. 603, 69 L Ed 809.
58 C J. p 383 note 86.

98. La—Evart v. Lowndes, 5 La Ann. 426.
58 C.J. p 383 note 87.

99. U S—Struver v The Roderick Dhu, D C N Y., 23 F.Cas No.13,552
58 C J p 383 note 88

Recital in bill of lading
A recital in a bill of lading as to the receipt of a certain quantity of goods controls in the absence of convincing testimony establishing mistake.—Goodrich v. Norris, D.C.N Y., 10 F Cas No.5,545—10 C J. p 200 note 2.

1. **Delivery without payment**
Where a steamship company delivered potatoes without bill of lading to buyer to whom shipper had sold potatoes, after a part thereof had rotted because of nonarrival of bill of lading, without requiring the buyer to pay therefor, the shipper's refusal to collect check sent by the buyer for unrotted potatoes, without agreement on shipper's part to release the steamship company and look to buyer for payment, did not entitle the carrier to credit for amount of check on amount for which it was liable to the shipper for delivery of goods to buyer—Merchants' & Miners' Transp Co. v Branch, C C.A Va., 282 F. 494.

2. U.S.—The Cabo Villano, C C A N. Y., 18 F.2d 220.
58 C J p 384 note 93.

3. U.S.—The Cabo Villano, supra.
58 C.J. p 384 note 94

4. U S—The Cabo Villano, supra—The Nith, D C Or., 36 F 86, 13 Sawy 368, affirmed, C C., 36 F. 383, 13 Sawy. 481.

from the time the damages were ascertained.[5] The ordinary measure of damages for failure to transport has also been said to be the difference between the value of the goods at the place of shipment and the place of delivery where they should have arrived, deducting the freight or price of carriage.[6] On a libel for not delivering according to the bill of lading, the measure of damages is the value of the cargo less the freight charges,[7] and if, on reaching port, the master refuses to deliver the goods until he has been paid excessive charges and the consignee, after tendering what was due, notifies the master that he abandons the goods to the vessel, the consignee is entitled to recover from the vessel the value of the goods less the lawful charges.[8] Where but a portion of the cargo stated on a false bill of lading was actually shipped, and the owner of the vessel is not shown to have been a party to the fraud, the only damages to be found in an action in rem against the vessel are for the nondelivery of the cargo shown to have been put on board.[9] The counsel fees of a replevin suit by the shipper to recover the cargo are not to be included in the damages assessed in the action for nondelivery,[10] but the assessment of damages will be postponed until the replevin suit shall be determined.[11] If the owner of a cargo of a sunken vessel raises it, after notice to the owner of the vessel, the expense of such raising, with interest, may be allowed as damages in a suit for nondelivery.[12] A carrier, having knowingly and falsely represented that goods were being carried on the vessel, loses the benefit of a valuation clause in the bill[13] and cannot set it up to reduce damages for failure to deliver.[14] A provision in a bill of lading that a carrier is not required to deliver goods at the port of discharge or destination at any particular time, or to meet any particular market, or in time for any particular use, relates to the measurement of damages.[15]

Refusal of consignee to receive. Where the master by his agreement with the shipper is to deliver the cargo at a certain port, but on his arrival there the consignee refuses to receive it, and the master, instead of landing the cargo and storing it for the shipper's benefit at such port, carries it to another port, and sells it, the measure of damage, in an action by the shipper to recover damages for the nondelivery by the master, is the actual value of the cargo at the port where the master agreed to deliver it at the time when it might have been landed, deducting all duties and charges and freight for the voyage.[16]

Time of accrual. The carrier's liability for a wrongful delivery should be fixed as of the time it made it possible for the person receiving the goods to do so, although the actual delivery was later.[17]

(2) Deviation or Delay

In the ordinary case of deviation or delay, the measure of damages is the difference in the market value of the goods at the time when actually delivered and when they should have been delivered, with interest.

In the ordinary case of deviation or delay by a

5. U S—W R. Grace & Co v Luckenbach S S. Co, D C Va, 258 F. 49, C C.A, affirmed Luckenbach S S Co v. W. R. Grace & Co, 267 F 676, certiorari denied 41 S Ct. 14, 254 U S. 644, 65 L Ed 454.

6. U S—L N Jackson & Co v. Lorentzen, D C N.Y, 83 F Supp 486, reversed on other grounds, C.A, L N Jackson & Co. v Royal Norwegian Government, 177 F 2d 694, certiorari denied 70 S Ct 574, 339 U S 914, 94 L Ed 1340—Lindsay v U. S, 69 Ct Cl. 34.

Measurement of arrival time of goods

Where contract for carriage of goods was cancelled by shipowner, time for arrival of the goods at destination was to be measured from date of cancellation, in computing damages for breach—L N Jackson & Co. v Lorentzen, D C.N Y, 83 F Supp. 486, reversed on other grounds, C.A., L. N. Jackson & Co. v. Royal Norwegian Government, 177 F 2d 694, certiorari denied 70 S.Ct. 574, 339 U. S. 914, 94 L.Ed. 1340.

Contract of carriage in advance of purchase

Where there is a firm contract for purchase at place of loading and commodity is ready for shipment at such point, the fact that contract of carriage is made in advance of purchase does not destroy purchaser's right to recover customary measure of damages for failure to transport —L N Jackson & Co. v. Lorentzen, D C N.Y, 83 F Supp 486, reversed on other grounds, C A, L. N. Jackson & Co. v Royal Norwegian Government, 177 F 2d 694, certiorari denied 70 S Ct 574, 339 U S. 914, 94 L Ed 1340.

7. U S—Atlantic, etc, Guano Co. v The Robert Center, D C N.Y, 2 F Cas.No 630
58 C J. p 384 note 96.

8. U S—Hoxsie v The Reuben Doud, D C Mich, 46 F. 800

9. U S.—The Alice, D.C.Fla, 12 F 496.

10. U.S.—The Boston, D C Mass, 3 F.Cas No 1,671, 1 Lowell 464.

11. U.S—The Boston, supra
58 C J. p 384 note 1

12. U S—The Sunswick, C C.N.Y, 23 F.Cas No 13,625, 5 Blatchf 280

13. U S.—Olivier Straw Goods Corp v. Osaka Shosen Kaisha, D C N Y, 42 F 2d 717, affirmed, C C A, 17 F 2d 878, 74 A.L R 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 51 S Ct. 648, 283 U S 856, 75 L Ed 1462.

14. U.S.—Olivier Straw Goods Corp v. Osaka Shosen Kaisha, D C N.Y., 42 F 2d 717, affirmed, C.C A., 47 F 2d 878, 74 A L R 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 51 S Ct 648, 283 U.S 856, 75 L Ed 1462.

15. U S—Pope & Talbot v Blanchard Lumber Co. of Seattle, C C A Cal, 159 F 2d 134

16. U S—Arthur v The Cassius, C C Mass, 1 F.Cas.No.564, 2 Story 81.

17. U S—Bank of California, N. A v. International Mercantile Marine Co, D.C N.Y, 40 F 2d 80, reversed on other grounds, C.C A, 64 F.2d 100, certiorari denied 54 S.Ct. 66, 290 U S. 649, 78 L.Ed. 563.

common carrier in delivering goods, the measure of damages is the difference in their market value at the time when actually delivered and when they should have been delivered,[18] with interest[19] from the date the damages were certainly calculable[20] or from the date the liability became fixed to satisfaction of the decree.[21] The damages are to be reckoned on the basis of the market value of the goods when they are discharged on the wharf, and not when they arrive in port,[22] and the measure of damages is not changed by a stipulation in the bill of lading that the shipowner is not to be liable in any case for more than the invoiced or declared value of the goods, the purpose of which is only to fix the outside limit of liability.[23] The value of the goods[24] or expenses incurred by a person in preparation and assertion of his claim[25] are not properly to be considered in fixing the amount of damages, and loss incurred through breach of the shipper's contract of sale to a third person is not a proper element of damages where the shipper has been awarded damages based on the market value of the goods when they should have been delivered.[26] The owner of goods delayed in transit is entitled to compensation for their detention,[27] that is, interest on the value of the goods, after deducting freight, commissions, and other expenses which the shipper is bound to pay, from the time they should have been delivered until settlement is made.[28]

Special damages for delay in delivery with respect to which the parties have not contracted are not recoverable,[29] and, thus, special damages will not be allowed unless the carrier had notice of the special use to which the goods were to be put,[30] which notice must have been given under such circumstances as to make it a term of the contract that such damages are to be met in case of breach.[31]

Uncertain or speculative claims for damages will not be allowed.[32]

D. LOSS OF, OR INJURY TO, CARGO

§ 125. Liability of Carrier in General

a. General rules
b. Act of God
c. Perils of sea and of navigation
d. Jettison
e. Seizure of cargo under legal authority

a. General Rules

In the absence of a special contract or a statute providing otherwise, common carriers of goods by water are liable for loss or destruction of, or injury to, such goods not occasioned by act of God or of the public enemy, and not due to the fault of the shipper or consignee or the inherent nature of the goods carried, or necessarily incident to water carriage.

In accordance with the rule applicable to common carriers of goods generally in the absence of a special contract or a statute providing otherwise, common carriers of goods by water are liable for loss or destruction of, or injury to, such goods, not occasioned by act of God or of the public enemy,[33]

18. U S—The Iossifoglu, D C Md, 32 F.2d 928
58 C J p 385 note 7.
19. U S—The Iossifoglu, supra.
58 C.J. p 385 note 8.
20. U S—Transmarine Corp v. Levitt, C C.A.N Y, 25 F 2d 275.
21. U S—U. S Shipping Board Emergency Fleet Corp v. Florida Grain, etc., Co, C C A Fla, 20 F.2d 583
58 C J. p 385 note 10
22. U S—The Iossifoglu, D C Md, 32 F.2d 928
58 C.J p 385 note 11.
23. U S.—The Styria, N Y, 101 F. 728, 41 C C A. 639, modified on other grounds 22 S.Ct. 731, 186 U S. 1, 46 L Ed. 1027.
24. Ark—Lee Line Steamers v. Tucker, 165 S W 961, 112 Ark. 301.
25. U S—Middleton v U. S., D C.S. C, 286 F. 548, modified on other grounds, C C A, 3 F 2d 384, certiorari denied 45 S.Ct. 463, 267 U S 603, 69 L Ed 809
26. U.S.—Middleton v. U. S., supra.
27. U S—The Iossifoglu, D.C Md, 32 F 2d 928.
28. U S—The Iossifoglu, supra.
29. U S—American Steel Co v Transmarine Corp, D C N Y, 36 F. 2d 246—Earn Line SS Co v. Manati Sugar Co, 269 F 774.
30. U S—U S. Shipping Board Emergency Fleet Corp v Florida Grain, etc, Co, C C A Fla, 20 F 2d 583.
58 C J p 385 note 20.
31. U S—Holland v Seven Hundred and Twenty-Five Tons of Coal, D C.Wis, 36 F. 784.
32. U S—Middleton v. U S, D C S. C., 286 F 548, modified on other grounds, C C A, 3 F.2d 384, certiorari denied 45 S.Ct. 463, 267 U.S 603, 69 L.Ed. 809.
58 C J. p 386 note 22.
33. U S.—Isthmian S. S. Co v Martin, C A Md, 170 F 2d 25—Remington Rand, Inc. v U S, D.C.N Y., 98 F.Supp. 334—Petition of Pennsylvania R. Co., D C N.Y, 44 F Supp 617—Export S. S. Corp. v. American Ins. Co., Newark, N. J., D.C N.Y, 26 F Supp. 79, reversed on other grounds, C C.A., 106 F 2d 9, opinion adhered to 108 F 2d 1013, certiorari denied American S S Owners Mut Protection and Indemnity Ass'n v Export S. S. Corp. and American Export Lines, 60 S Ct. 809, 309 U.S 686, 84 L Ed. 1029—The Ella Pierce Thurlow, D.C.N. Y., 300 F 103, affirmed, C.C A., Drisko v. Barber S S Lines, 300 F 106
58 C J p 386 note 28—10 C J. p 111 note 13 [a].

Liability of carrier for loss of, or injury to, goods carried generally see Carriers §§ 71–118

Contractual exemption from liability of carrier by water see infra §§ 131–138.

Statutory exemption from liability of carrier by water see infra §§ 126–129

Liability for act of God see infra subdivision b of this section.

Ownership of cargo

Liability of barge owner for damages to grain transported was not dependent on libelant shipper's ownership thereof.—Canadian Co-op. Wheat

and their liability to that extent is that of an insurer.[34] The high standard of care required and the burden usually imposed of disproving negligence work the practical result that the obligation of such a carrier is little short of insurance,[35] but strictly speaking a carrier is not an insurer,[36] and the basis of its liability is negligence.[37] Where a shipment is received aboard in good condition the carrier is bound to discharge it in the same condition, unless it is excused by reason of some provision in the Carriage of Goods by Sea Act[38] or by some other provision of the law,[39] and so at common law the shipowner was liable as an insurer for fire damage to cargo,[40] prior to modification of the rule by statute, as discussed infra § 129.

A carrier is, in the absence of contractual exemption, liable in any event for injuries resulting from its failure to exercise ordinary care,[41] and until the enactment of the Harter Act, a shipowner was not at liberty by any contract with the shipper to rid himself of liability to the owners of the cargo for damages resulting from the negligence of the master or crew.[42] The owners of vessels, their masters and other officers, are required to exercise the highest degree of care and skill safely to transport the cargo,[43] and the fact that damage to the cargo arises out of its inherent nature constitutes no defense to the carrier if it appears that the damage would not have occurred were it not for the carrier's negligence.[44] Where the cargo has been damaged aboard ship during the voyage, the question of the condition of the cargo at the time it was received by the vessel is not material.[45]

The carrier is charged with the responsibility of making proper inquiry as to the characteristics of the cargo which it accepts.[46] It is charged with whatever knowledge it would have acquired by the exercise of reasonable care to acquaint itself with the facts,[47] and bound to take reasonable precautions in the light of such knowledge to protect the car-

Producers v Murphy & Hoffman, D C N.Y, 52 F 2d 496

34. U.S—Commercial Molasses Corp. v New York Tank Barge Corp, N Y, 62 S Ct. 156, 314 U.S 104, 86 L Ed 89—U. S. v Farr Sugar Corp, C A N Y., 191 F.2d 370, affirmed U S. v Atlantic Mut Ins Co, 72 S Ct. 666, 343 U S. 236, 96 L Ed —
Mass —Goodman v. New York, N. H & H. R Co., 3 N E 2d 777, 295 Mass 330, 106 A.L.R. 1151.
58 C J. p 386 note 28

35. U S—Krebs Pigment & Chemical Co v. Sheridan, D.C.Pa, 12 F. Supp 254, affirmed, C C.A., 79 F.2d 479.

36. U.S—Krebs Pigment & Chemical Co v. Sheridan, supra.

37. U S—Krebs Pigment & Chemical Co v. Sheridan, supra.

38. U.S—E S Ullmann-Allied Co. v. The George E. Pickett, D.C N.Y., 77 F Supp 988

39. U.S—Anglo-American Fur Merchant Corp v. U S., D C N.Y, 77 F Supp. 1000

40. U S—Consumers-Import Co. v. Kabushiki Kaisha Kawasaki Zosen-jo, N Y, 64 S Ct. 15, 320 U.S. 249, 88 L Ed. 30
58 C.J. p 390 note 78.
Validity of contractual stipulation exempting carrier from liability for damages by fire see infra § 133

41. U S—Isthmian S. S. Co. v Martin, C A.Md, 170 F 2d 25—The John J. Grimes, D C.N.Y., 57 F 2d 321—Export S S. Corp. v American Ins. Co., Newark, N. J, D C.N Y., 26 F.Supp 79, reversed on other grounds, C C.A., 106 F.2d 9, opinion adhered to 108 F.2d 1013, certiorari denied American S. S Owners Mut. Protection and Indemnity Ass'n v Export S S Corp and American Export Lines, 60 S Ct 809, 309 U S. 686, 84 L Ed. 1029—Venezuelan Meat Export Co. v. U S, D.C Md, 12 F.Supp. 379
58 C J p 387 note 38
Validity of contractual exemption from negligence see infra § 132.

Negligence of government

Vessel which on dark rainy morning proceeded at full speed on course dangerously close to known locality of unlighted sunken wreck without reducing speed or having lookout in the bow was at fault for collision with respect to liability for cargo damage, regardless of government's negligence in not lighting wreck.—The E Madison Hall, C.C A.Md., 140 F.2d 589, certiorari denied 64 S.Ct. 1159, 322 U.S. 748, 88 L Ed. 1579.

Carrier held not negligent

(1) Shipowners were held not negligent in sailing shortly after receipt of Weather Bureau warning, indicating storm at sea of no great intensity some two thousand miles away, but not its probable course.—The Velma Lykes, D.C.Tex., 6 F.Supp. 886.

(2) Carrier by water was held not negligent as to fire destroying cotton at landing, where it provided watchman who made rounds every hour.—American Cotton Co-op. Ass'n v. New Orleans & Vicksburg Packet Co., 157 So. 733, 180 La. 836

42. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct. 162, 290 U. S. 333, 78 L Ed. 348.

43. U.S.—Peninsular & Occidental S. S. Co v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L R B. v. Peninsular S. S. Co, 59 S Ct. 248, 305 U S. 653, 83 L.Ed. 423

Negligence imputable to carrier

Negligence of captain of barge, owner's servant, resulting in damage to cargo, is imputable to carrier—The Supreme, C C A.N J., 61 F 2d 334

44. U S.—The Vallescura, N Y, 55 S Ct. 194, 293 U S. 296, 79 L Ed 373—Isthmian S S Co. v. Martin, C A Md, 170 F 2d 25—Bank Line v Porter, C C A.Va., 25 F 2d 843.

Goods susceptible to damage by sea water

Fact that inherent character of cargo was such that it was susceptible to damage from sea water did not relieve carrier from liability for damage by sea water, where carrier's negligence unnecessarily exposed the cargo to that damage—Pioneer Import Corp. v. The Lafcomo, D C.N.Y, 49 F Supp. 559, affirmed, C C.A, 138 F 2d 907, certiorari denied Black Diamond Lines v Pioneer Import Corp, 64 S.Ct. 523, 321 U.S. 766, 88 L Ed 1063.

45. U.S.—The Vizcaya, D C.Pa., 63 F.Supp. 898.

46. U S.—The Nichiyo Maru, C.C.A Md., 89 F.2d 539—Accinanto, Limited v. Cosmopolitan Shipping Co., D C Md, 99 F.Supp. 261—The Ferncliff, D C Md., 22 F Supp. 728, certified questions answered Smith v The Ferncliff, 59 S Ct. 615, 306 U S. 444, 83 L.Ed. 862, affirmed, C C A., 105 F.2d 1021—The Niel Maersk, D.C.N.Y., 18 F Supp. 824, reversed on other grounds, C.C A., 91 F.2d 932, certiorari denied Bradley v. The Niel Maersk, 58 S Ct. 281, 302 U S 753, 82 L Ed. 582.
58 C J. p 451 note 22.

47. U.S.—Anderson v. Lorentzen, C. C.A.N.Y., 160 F.2d 173.

go;[48] but a ship's captain is not expected to be familiar with the minutiae of trading in the adoption of precautions to avoid damage to cargo, but can only be called on to meet the situation that is overtly presented to him.[49] A carrier operating a tug is charged with notice of all information available to those in its employ on shore,[50] and its liability is not limited by what the tug's master knew,[51] an adequate system of communication with its tugs when they touch shore being as much a necessity as that they should be well found in hull and gear;[52] and where a tug touches shore or otherwise gets in touch with her owner, any information then possessed by him, or available to him through ordinary care, is to be as much charged against him as though the master of the tug himself had it or could have obtained it.[53] The carrier may be held liable for goods saved from a cargo partly destroyed by inherent defect.[54]

A carrier by water is not liable for loss or injury occasioned by act of the public enemy,[55] or which is due to the fault of the shipper,[56] or consignee as owner,[57] or the inherent nature, qualities, or defects of the goods carried,[58] or their having been shipped in an unfit condition,[59] or in improper containers,[60] or which is necessarily incident to water carriage and in no way occasioned by its fault.[61] The carrier is not liable for damages to goods shown to have been delivered at destination in substantially the same condition as they had been when received by the carrier.[62] A ship must not

Matters irrelevant to general knowledge

In suit for damages to cargo resulting from fire which was result of spontaneous combustion of ammonium nitrate fertilizer which was part of cargo, finding in other suits that fire which caused damages for which such other suits were brought was due to spontaneous combustion of same kind of fertilizer was not relevant to general knowledge relative to possibility of spontaneous combustion which existed when fire involved in present suit started which was prior to time such other fire started —Accinanto, Limited v. Cosmopolitan Shipping Co, D.C.Md, 99 F.Supp 261.

48. U.S.—Anderson v. Lorentzen, C C.A.N.Y., 160 F.2d 173.

49. U S —The M V Silversandal, D. C N.Y., 26 F.Supp 61, affirmed, C C A., Bache v. Silver Line, 110 F.2d 60.

50. U.S —Sidney Blumenthal & Co v. Atlantic Coast Line R. Co., C C. A.N Y, 139 F 2d 288, certiorari denied Atlantic Coastline R Co. v. Sidney Blumenthal & Co., 64 S.Ct. 848, 321 U.S. 795, 88 L Ed. 1084.

51. U.S —Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., C C. A.N Y., 139 F.2d 288, certiorari denied Atlantic Coastline R. Co. v Sidney Blumenthal & Co., 64 S.Ct. 848, 321 U.S 795, 88 L.Ed 1084.

52. U S —Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., C.C. A.N.Y., 139 F 2d 288, certiorari denied Atlantic Coastline R Co. v Sidney Blumenthal & Co., 64 S Ct. 848, 321 U S. 795, 88 L.Ed 1084.

53. U.S —Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co, C C. A.N.Y., 139 F.2d 288, certiorari denied Atlantic Coastline R. Co. v Sidney Blumenthal & Co., 64 S.Ct. 848, 321 U.S. 795, 88 L Ed. 1084.

Knowledge of impending storm

(1) Where, at time carrier's tug put off the carrier's shore, employees knew or should have known that extremely high winds and plunging seas would be encountered and the tug's master was within reach of carrier's shore employees for 50 minutes before the tug put off, carrier's liability for damage to shipment in hurricane was not limited by what the tug's master knew —Sidney Blumenthal & Co v Atlantic Coast Line R Co., C C A.N Y, 139 F 2d 288, certiorari denied Atlantic Coastline R Co. v. Sidney Blumenthal & Co, 64 S Ct. 848, 321 U S. 795, 88 L Ed. 1084

(2) Carrier's fault, in permitting its tug to leave the pier in the face of information that should have led carrier to believe that a hurricane would be encountered, was not excused by fact that hurricane signal had been hauled down and another weather report given, after the tug had left the pier and it was then too late to stop her —Sidney Blumenthal & Co v. Atlantic Coast Line R Co, C C A N Y., 139 F 2d 288, certiorari denied Atlantic Coastline R. Co. v Sidney Blumenthal & Co, 64 S.Ct 848, 321 U S 795, 88 L Ed 1084

54. U.S —The Gomez de Castro, D C N.Y, 10 F.Cas.No 5,525, 10 Ben 540

58 C J p 387 note 39.

55. La —Hedricks v. The Morning Star, 18 La.Ann 353

56. U.S.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C A.N Y., 106 F 2d 32— The Kawsar, D.C.N.Y, 53 F.Supp 323.

58 C.J. p 387 note 31.

57. U.S.—The Annie Harjes, D.C.N. Y, 45 F. 900.

58. U.S.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A N Y., 106 F 2d 32

58 C.J. p 387 note 33.

Statutory exemption see infra § 128 g.

59. U.S.—The Muskegon, D.C.N.Y., 10 F 2d 817—Ordt v. Ocean Steam Nav Co, D C Conn., 18 F Cas No 10,551.

58 C J p 387 note 34

60. N Y —Nelson v Stephenson, 12 N.Y Super 538

Wash.—Revilla Fish Products Co. v American-Hawaiian SS. Co., 137 P. 337, 77 Wash 49.

Goods held not insufficiently packed

Baled rubber packed in burlap bags, customarily used for rubber shipments from the Far East and received in good condition on board vessel, was not insufficiently packed so as to exempt carrier from liability for damage thereto, notwithstanding absence of talc or other protective material underneath covers to prevent burlap from adhering to rubber, in absence of showing of established practice of using talc or other protective material —The City of Khios, D C N.Y., 16 F Supp. 923.

61. U S —Baxter v. Leland, D.C N. Y, 2 F.Cas No.1,124, Abb Adm 348, affirmed, C C, 2 F Cas.No.1,125, 1 Blatchf 526

58 C J. p 387 note 36.

Sweating of vessel or cargo

(1) The vessel or carrier is not liable for injury to the cargo caused by a dampness or sweating of the hold if the sweating is not augmented by improper stowage.

U.S.—Cohen v. Holland-America Line, D C N Y, 6 F Supp 247.

Hawaii.—La Motte v. Angel, 1 Hawaii 237.

58 C J p 387 note 36 [b].

(2) Dampness, decay, and sweating as peril or danger of sea within contractual exemption see infra § 134

(3) Sweating as danger of sea within statutory exemption see infra § 128 d (1).

62. U.S.—The Carso, C.C.A.N.Y., 53 F.2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli Giannusa & Rao, Inc., 52 S.Ct 140,

accept a shipment of perishable goods unless it is equipped to carry them safely,[63] but if the carrier fully explains the inadequacy of equipment on the ship and the shippers express their willingness to take the risk of damages to the shipment, the carrier will not be liable for damage caused by the inadequacy of the equipment.[64]

Private carriers are not insurers.[65] They are obligated to exercise due care for the protection of the cargo,[66] and to perform the obligations of their contracts,[67] and are liable for negligence,[68] and only for negligence.[69] A private carrier who has complied with his duty to furnish a seaworthy vessel is not liable for a loss of cargo due to the sinking of the vessel because of an unforeseen accident.[70]

Inland water or coasting voyages. The rule as to the carrier's liability applies to carriers on inland as well as on other waters,[71] whether on coasting or ocean voyages.[72]

Delivery to, and acceptance by, carrier. In order to charge the carrier as such for loss or injury, the goods must have come into its possession as a carrier,[73] and, unless something still remains to be done by the shipper before they are to be transported, liability attaches on receipt of the goods for transportation,[74] although they may not have been placed on board the vessel.[75]

Necessity of bill of lading. The liability of the carrier exists independently of any bill of lading,[76] although it has been held that, where bills of lading were issued on the day barges were loaded with goods for shipment, the responsibility of the barge owner commenced on the date of the issuance of the bills of lading.[77]

Custom or usage. If it is not in conflict with express provisions of the contract of the parties,[78] or settled rules of law,[79] and if it is of long con-

284 U S 679, 76 L.Ed. 574—Munson S S. Line v. Rosenthal, D.C N Y, 6 F Supp. 374.

63. U S.—S L Shepard & Co. v. Agwilines, Inc, C C.A.S C, 130 F.2d 67.

64. U.S—S. L. Shepard & Co v. Agwilines, Inc, supra.

65. U.S—Schuylkill Transp Co v Banks, C.C A Pa, 152 F 2d 405—The W H Davis, D.C.N Y, 56 F Supp. 564—The Dan, D C N Y, 40 F. 691.
Mo—Osage Tie & Timber Co. v Gorg-Murphy Timber & Grain Co, App., 191 S.W 1026.

Private bailment
In case of a private bailment of merchandise on a barge in a harbor, bailee is not an insurer of delivery of merchandise, but is free to stipulate for such insurance or for any lesser obligation, in which case the bailor cannot recover without proof of its breach—Commercial Molasses Corp v. New York Tank Barge Corp., N Y, 62 S Ct 156, 314 U S. 104, 86 L Ed 89.

Explosion
Owner of vessel was not insurer of cargo and was not liable for loss from explosion where circumstances did not warrant inference of negligence—Cruse v. Sabine Transp Co, C.C A Tex, 88 F 2d 298, certiorari denied 58 S Ct 20, 302 U S. 701, 82 L Ed 541, rehearing denied 58 S Ct. 134, 302 U S 775, 82 L.Ed 600

66. U.S—Commercial Molasses Corp. v New York Tank Barge Corp., N.Y, 62 S.Ct 156, 314 U.S 104, 86 L Ed. 89—Schuylkill Transp Co v. Banks, C.C.A.Pa, 152 F.2d 405.
Mo.—Osage Tie & Timber Co. v Gorg-Murphy Timber & Grain Co., App, 191 S.W. 1026.

Liability held that of bailee
U S—The W. H Davis, D.C.N.Y., 56 F.Supp 564—The Frank A. Smith, D.C N Y, 8 F Supp. 134

67. U.S—Commercial Molasses Corp. v. New York Tank Barge Corp., N Y, 62 S Ct. 156, 314 U S 104, 86 L Ed. 89—California & Hawaiian Sugar Refining Corporation v. Rideout, C.C.A.Cal, 53 F 2d 322—The W H Davis, D C N Y., 56 F Supp 564—Sumner v. Caswell, D C N.Y, 20 F. 249.

68. U.S—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, C C.A.N Y., 89 F 2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co, 58 S Ct 25, 302 U S. 706, 82 L Ed. 545—The Joseph J Hock, C C A.N Y., 70 F 2d 259—The Raleigh, D C Md, 50 F Supp. 961.

Liability of barge for negligence of tug
Barges which are private carriers and bailees of cargo are liable for loss or damage due to negligence of tug helping barges perform their contract.—Tice Towing Line v James McWilliams Blue Line, D.C N Y., 51 F 2d 243, modified on other grounds, C C A, 57 F.2d 183.

69. U S—The Chehaw, D.C N Y, 54 F 2d 645—Petition of Reliance Marine Transp & Const. Corp, D C Conn, 89 F Supp. 272—The Dan, D.C N.Y., 40 F 691.

70. U S—Southern Pac. SS Co v. New Orleans Coal, etc, Co., D C. La, 43 F 2d 177.
58 C J. p 388 note 47.

71. U.S.—U S v. Farr Sugar Corp, C A.N.Y, 191 F.2d 370, affirmed U S. v. Atlantic Mut Ins. Co, 72 S. Ct 666, 343 U S 236, 96 L Ed —
58 C J. p 387 note 41.

72. U.S—U. S v Farr Sugar Corp, C A.N.Y, 191 F 2d 370, affirmed U S. v Atlantic Mut Ins Co., 72 S Ct. 666, 343 U.S. 236, 96 L Ed. —.
58 C.J. p 388 note 42

73. U.S—Strohmeyer & Arpe Co v American Line S. S Corp., C C.A.N Y, 97 F 2d 360
58 C.J. p 388 note 43—6 C.J. p 1187 note 25 [a].

74. La.—Barrett v. Salter, 10 Rob 434.
58 C.J p 388 note 44.

75. U S—Bulkley v Naumkeag Steam Cotton Co, Mass., 24 How 386, 16 L Ed 599
58 C.J. p 388 note 45

Carriage to ship
(1) Fact that shipowner, after receiving goods, delegated carriage to ship to another, was held not to affect liability for cargo damage during such carriage—Morris v. Lamport & Holt, D C N Y., 54 F 2d 925, affirmed, C C A., 57 F 2d 1081.

(2) Thus, shipowner was liable for cargo damage while taking goods to steamer on a lighter.—Morris v Lamport & Holt, supra—58 C J. p 388 note 45 [c].

76. U.S—The Esrom, C.C.A.N Y., 272 F. 266, certiorari denied 42 S.Ct 47, 257 U S. 634, 66 L Ed. 408.
58 C.J. p 388 note 46.

77. U.S—Wayne v. Inland Waterways Corp., D.C Ill., 92 F Supp. 276.

78. U.S—The Reeside, C.C.Mass., 20 F.Cas No 11,657, 2 Sumn. 567.

79. U.S.—The Charles Rohde, D.C. Md, 8 F.2d 506, appeal dismissed

tinuance and notoriety,[80] a custom or usage in a particular trade or between particular ports may qualify the responsibility of the carrier.[81] Custom does not, however, excuse negligence.[82] A custom or usage may always be waived by the parties.[83]

Gratuitous carriage of money. The probability that the carriage of money by an officer of the boat will ultimately result in increased freight business is insufficient to fix the liability of the carrier as a carrier for hire,[84] and the federal statutes concerning the duties and liabilities of steamboats engaged in carrying the mail do not impose on the owners of steamboats the responsibilities of common carriers, in favor of a third person who has contracted for no more than the diligence of a mandatary in the carrying of bank bills.[85]

Detention by act of consignee. Where a vessel is detained, after the expiration of the time for unloading, by the act of the consignee, her strict liability as a carrier ceases, and she is liable as a warehouseman only for reasonable care in keeping the cargo [86]

Attempt to save goods from wreck. The right to recover damages is not waived by making an effort to save a portion of the goods from the wreck of the vessel containing the consignment.[87]

b. Act of God

Carriers by water are not liable for loss or damage arising solely and immediately from acts of God.

It is a general rule that carriers by water, as is the case with other carriers, are not liable for loss or damage arising from acts of God.[88] The act of God which excuses the carrier within this rule must be a direct and violent act of nature,[89] and it may consist, for example, of such occurrences as an unprecedented storm,[90] a hurricane,[91] a snowstorm with accompanying wind,[92] a tidal wave and flood,[93] or even a sudden failure of the wind.[94]

An injury has been held not attributable to an act of God where it is due to a leak caused by stranding because of mistaking a light on a stranded vessel for a beacon which was generally exhibited,[95] or to the vessel's being thrown against the shore by a river current,[96] or striking a submerged log in a river,[97] or striking the mast of a sunken vessel, visible at low water,[98] or stranding on a river bar known to the navigators,[99] or running on a sunken rock, the position of which is generally known,[1] or stranding on a bar in a river, of which the navigators were ignorant;[2] but it has also been held that an injury occasioned by striking a snag or rock, not theretofore known, and not actually known to the master, may be regarded as due to an act of God.[3]

Collision between vessels, although without the fault of either, causing a loss or injury to goods shipped is not an act of God.[4]

Fire. While a fire occasioned by lightning is an act of God within the rule exempting the carrier from liability,[5] other fires have been held not within the rule.[6]

Johnson & Wimsatt v Hax, C.C.A., 15 F.2d 1009
58 C.J. p 389 note 50

80. U.S.—Crosby v. Grinnell, D.C.N.Y., 6 F.Cas.No 3,422.
58 C.J. p 389 note 51.

81. U.S.—Crosby v. Grinnell, supra
58 C.J. p 389 note 52

82. U.S.—The Nichiyo Maru, C.C.A. Md, 89 F.2d 539

83. U.S.—The Reeside, C.C.Mass., 20 F.Cas.No.11,657, 2 Sumn. 567.
58 C.J. p 389 note 53

84. Ind.—Cincinnati, etc., Mail Line Co. v. Boal, 15 Ind. 345.
Mo.—Whitmore v. The Caroline, 20 Mo. 513.

85. Ala.—Haynie v. Waring, 29 Ala. 263.

86. U.S.—The M. C. Currie, D.C.N.Y., 132 F. 125.

87. La.—Lengsfield v. Jones, 11 La. Ann. 624.

88. U.S.—Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., C.C.A.N.Y., 139 F.2d 288, certiorari denied Atlantic Coastline R. Co. v. Sidney Blumenthal & Co., 64 S.Ct 848, 321 U.S. 795, 88 L.Ed 1084.
58 C.J p 389 note 56—13 C.J p 817 note 28 [c].
Liability of carrier for loss or injury caused by act of God generally see Carriers § 76.

89. Va.—Friend v. Woods, 6 Gratt. 189, 47 Va 189, 52 Am.D. 119.
58 C.J p 389 note 57.

90. U.S.—Pearce v. The Thomas Newton, D.C.N.C., 41 F 106

91. U.S.—Sidney Blumenthal & Co v. Atlantic Coast Line R. Co., C.C.A.N.Y., 139 F.2d 288, certiorari denied Atlantic Coastline R. Co. v. Sidney Blumenthal & Co., 64 S.Ct 848, 321 U.S. 795, 88 L.Ed 1084

92. U.S.—The Cape Charles, D.C.N.C., 198 F. 346.

93. U.S.—Pearce v. The Thomas Newton, D.C.N.C, 41 F. 106.
58 C.J. p 389 note 61.

94. N.Y.—Colt v. McMechen, 6 Johns. 160, 5 Am.D 200.

95. N.Y.—McArthur v. Sears, 21 Wend. 190.

96. Tenn.—Craig v. Childress, Peck 270, 14 Am.D 751

97. Ala.—Steele v. McTyer, 31 Ala. 667, 70 Am.D 516.

98. N.Y.—Merritt v. Earle, 29 N.Y. 215, 86 Am.D 292.

99. Ky.—Bentley v Bustard, 16 B. Mon 643, 63 Am.D. 561.

1. Md.—Fergusson v Brent, 12 Md. 9, 71 Am.D. 582

2. Va.—Friend v Woods, 6 Gratt. 189, 47 Va 189, 52 Am.D 119

3. Conn.—Williams v. Grant, 1 Conn. 487, 7 Am.D 235.
58 C.J p 389 note 75.

4. Me.—Plaisted v. Boston and Kennebec Steam Nav. Co., 27 Me. 132, 46 Am.D. 587.
58 C.J. p 389 note 76.

5. U.S.—New Jersey Steam Nav Co. v. Merchants' Bank, R.I., 6 How. 344, 12 L.Ed 465.
58 C.J p 390 note 77.

6. N.Y.—Miller v. Steam Nav. Co., 10 N.Y. 431.
58 C.J. p 390 note 78.

Proximate cause. In order that the act of God may excuse the carrier, it must be not only the sole, but the immediate, and not the remote, cause of the loss.[7] The carrier is not excused where his negligence is a concurring cause, although an act of God may have been the immediate cause.[8]

c. Perils of Sea and of Navigation

In the absence of an exception to the carrier's liability by statute or by an express provision of the bill of lading, it has been held that there is no implication that the ship is not responsible for perils of the sea, at least where the cause of the injury does not come within the definition of an act of God.

In the absence of statutory exception or an exception to the carrier's liability by express provisions of the bill of lading, there is no implication that the ship is not responsible for perils of the sea,[9] at least where the cause of the injury does not come within the definition of an act of God.[10]

d. Jettison

In the case of extreme necessity and danger occasioned by act of God or excepted causes the master may jettison cargo, but the carrier is liable if the jettison is made without sufficient cause or where the peril is directly attributable to the want of diligence or skill on the part of the master or crew.

In cases of extreme necessity and danger occasioned by act of God or excepted cause the master may jettison cargo.[11] He may select what articles he pleases, and whatever proportion he deems proper, and, if necessary, he may jettison the whole cargo.[12] Jettison is not justifiable if made merely to prevent harm to the boat or to expedite the voyage.[13] While hazard of life is not essential to justify jettison,[14] the carrier is responsible if the jettison is made without sufficient cause;[15] and where a jettison of cargo becomes necessary for the safety of the vessel, the owner and vessel are liable for the loss, if the peril of the ship is directly attributable to want of diligence or skill on the part of the master or crew.[16] Jettison rendered necessary by unseaworthiness existing at the commencement of the voyage makes the ship liable.[17] The vessel is liable for a jettison of a cargo which the master might have saved by lighters.[18]

e. Seizure of Cargo under Legal Authority

Where the goods are taken from the carrier by valid legal process against the owner, if the carrier acts in good faith he is not liable.

Where the goods are taken from the carrier by valid legal process against the owner, if the carrier acts in good faith he is not liable,[19] but he must immediately notify the owner.[20] An illegal seizure will not absolve the carrier.[21]

7. U S—King v. Shepherd, C.C Mass, 14 F.Cas No 7,804, 3 Story 349
N.Y.—Merritt v. Earle, 29 N.Y. 115, 86 Am D. 292

8. U S—Sidney Blumenthal & Co v. Atlantic Coast Line R Co, C.C.A N Y, 139 F.2d 288, certiorari denied Atlantic Coastline R. Co v Sidney Blumenthal & Co,, 64 S Ct 848, 321 U S 795, 88 L Ed. 1084
58 C.J. p 390 note 82.

Failure to have a barometer was a fault on part of a carrier engaged in extensive maritime operations.—Sidney Blumenthal & Co v. Atlantic Coast Line R Co., C C A N Y., 139 F. 2d 288, certiorari denied Atlantic Coastline R Co. v Sidney Blumenthal & Co, 64 S Ct. 848, 321 U.S. 795, 88 L Ed. 1084.

9. Me—Plaisted v. Boston and Kennebec Steam Navigation Co., 27 Me. 132, 46 Am D. 587.
58 C.J p 390 note 84.
Contractual limitation of liability for loss resulting from perils of the sea see infra § 134.
Dangers of sea as cause of loss within statutory exemption from liability see infra § 128 d.

10. Me—Plaisted v. Boston and Kennebec Steam Navigation Co., supra.
58 C J. p 390 note 85.

11. U S—Lawrence v Minturn, Cal., 17 How 100, 15 L Ed 58.
58 C.J. p 390 note 87.
"Jettison" defined see 48 C J S. p 793.
Claim for contribution in general average see infra § 228.

12. U S—The Milwaukee Bridge, C C A S D., 26 F 2d 327, certiorari denied Moore v. U. S., 49 S.Ct. 31, 278 U S 632, 73 L Ed 550
58 C J. p 391 note 88

13. Ky—Bentley v. Bustard, 16 B. Mon. 643, 63 Am.D. 561.

14. Ky—Bentley v. Bustard, supra

15. U.S.—Van Syckel v. The Thomas Ewing, D.C Pa., 28 F Cas.No.16,877, Crabbe 405.
58 C.J. p 391 note 91.

16. U.S.—The Portsmouth, D.C Ill., 19 F Cas No.11,295, 2 Biss. 56, affirmed 9 Wall 682, 19 L.Ed. 754.
58 C J. p 391 note 92.

17. U S—The Planter, C C.Ala., 19 F Cas No 11,207a, 2 Woods 490.
58 C.J. p 391 note 93.

18. U.S—The Portsmouth, D.C.Ill., 19 F Cas No.11,295, 2 Biss. 56, affirmed 9 Wall. 682, 19 L Ed. 754.
58 C.J. p 391 note 94.

19. U S.—The Baltic, D C.N.Y., 212 F 759.
58 C J. p 391 notes 95, 97 [a].

Detention by belligerent government
Where a neutral ship, bound for a neutral port in time of war was detained by a belligerent government and allowed to proceed only on agreement of the owner to return a part of the cargo for action of the prize court, such action amounted to a seizure of the property.—Furness Shipping & Agency Co. v. Barber & Co, C C.A.N.Y., 6 F.2d 779.

Stipulation with sheriff
Where a stipulation is made with the sheriff that goods loaded will be delivered to him on the return voyage, it was held that the custody of the master was the custody of the sheriff, and the consignee had no right to delivery at destination—The Lord, C C.N.C., 15 F.Cas No.8,504, Chase 527.

20. U S.—The M. M. Chase, D.C.N.Y., 37 F. 708.
58 C.J. p 391 note 96.

21. U.S.—The Matilda A. Lewis, C.C. N.Y, 16 F.Cas No 9,281, 5 Blatchf. 520.

Contest of claim
The carrier has been held liable where the master had the right to hold the goods against the sheriff and should have contested the claim to take goods from his possession.—The Mary Ann Guest, D.C.N.Y., 16 F.Cas No.9,197, Olcott 498.

§ 126. Statutory Exemptions from Liability

a. In general
b. Carriage of Goods by Sea Act in general

a. In General

An action for damage to goods shipped is governed by maritime law as relaxed by the statutes A statutory exemption from liability does not apply where the conditions of the statute are not fulfilled.

An action for damage to goods shipped is governed by maritime law as relaxed by the statutes.[22] Under statutes exempting the shipowner from liability for damage to cargo while the ship is under control of a compulsory pilot, exemption cannot be secured if, at the time of the damage, the presence of the pilot was not required by law.[23]

Shipper's failure to give notice of character and value of articles carried. Under statutes exempting the master and shipowner from liability for loss of enumerated classes of valuables, unless prescribed requirements as to notice of their character and value are followed, noncompliance with the statutory requirements exempts the vessel from liability for loss of such valuables to the extent provided by statute.[24] Where the statute exempts the master or owners from liability unless the shipper at the time of lading the valuables on board the vessel gives to the master, agent, or owners of the vessel, a note in writing of the true character and value thereof, and has it entered on the bill of lading therefor, it has been held that a literal compliance with the statute is not necessary to render the master or owner liable,[25] and that the exemption will not apply if the true character and value of the articles shipped were fairly and clearly on the bill of lading,[26] even though such entry was not preceded by a written note.[27]

Under a statute which provides that, on noncompliance with its provisions as to notice, the master or owner shall not be liable as "carriers" in any form or manner, the shipowner may still be held liable for loss of valuables resulting from his negligence as bailee.[28]

Parties' failure to stipulate against transportation at shipper's risk. Under statutes providing that, in the absence of the carrier's negligence or failure to take customary precautions, all merchandise shall be transported at the risk and venture of the shipper, unless the contrary be expressly stipulated, where there has been no such stipulation, all damages and impairment are for the account and risk of the shipper where suffered by reason of accident[29] or force majeure,[30] or by virtue of the nature[31] or defect[32] of the articles.

Loss occasioned by accidental and uncontrollable events. Under statutes providing that carriers and watermen are liable for the loss or damage of things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events, a loss caused by the nonnegligent striking of the ship against an obstruction is within the exemption of the statutes,[33] as is also loss arising from collision for which the carrier was not to blame,[34] or from perils of the sea.[35] Exemption will be denied, however, where loss resulted from the carrier's fault,[36] as from defective condition of the vessel.[37]

b. Carriage of Goods by Sea Act in General

The Carriage of Goods by Sea Act, which was enacted to mitigate the carrier's "insurer's" liability, establishes numerous exceptions from liability which the act does not condition on due diligence to make the vessel seaworthy.

The carriage of Goods by Sea Act of 1936, 46 U.S.C.A. § 1300 et seq, expresses adherence to the Brussels Convention of 1924, embodying substantially the provisions of the earlier Harter Act of 1893, 46 U.S.C.A. § 190 et seq.[38] The purpose of the act

22. U.S.—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.
Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775.
Liability as insurer is not imposed on a common carrier by water under the statutes.—Accinanto, Limited v. Cosmopolitan Shipping Co., D.C.Md., 99 F.Supp. 261.

23. N.Y.—Guiterman v. Liverpool, etc., SS. Co., 83 N.Y. 358.
58 C.J. p. 408 note 37

24. U.S.—The Island Queen, D.C. Mich., 13 F.Cas.No.7,110, Brown Adm. 279.
58 C.J. p. 407 note 20.

25. N.Y.—Reid v. Luckenbach SS Co., Inc., 230 N.Y.S. 602, 133 Misc. 21
58 C.J. p. 407 note 23.

26. U.S.—Wattson v. Marks, D.C.Pa., 29 F.Cas.No.17,296.

27. U.S.—Wattson v. Marks, supra

28. U.S.—Kuhnhold v. Compagnie Générale Transatlantique, D.C.N.Y., 251 F. 387.
58 C.J. p. 407 note 26.

29. Philippine.—Tan Chiong Sian v. Inchausti, 22 Philippine 152.
58 C.J. p. 408 note 27.

30. Philippine.—Tan Chiong Sian v. Inchausti, supra.

31. Philippine.—Tan Chiong Sian v. Inchausti, supra

32. Philippine.—Tan Chiong Sian v. Inchausti, supra.

33. La.—Kirk v. Folsom, 23 La.Ann. 584
58 C.J. p. 408 note 31.

34. La.—Van Hern v. Taylor, 7 Rob. 201, 41 Am.D. 279
58 C.J. p. 408 note 32

35. La.—Medina v. Hansen, 17 La. Ann. 290.
58 C.J. p. 408 note 33

36. La.—Darrall v. Southern Pac. Co., 17 So. 884, 47 La.Ann. 1455.
58 C.J. p. 408 note 34.

37. La.—The Tennessee v. Tardos, 7 La.Ann. 28
58 C.J. p. 408 note 35.

38. U.S.—Scarburgh v. Compania

was to carry over into the international sphere the uniformity achieved for American voyages in the Harter Act by mitigating the common-law "insurer's" liability of carriers in exchange for a prohibition of clauses in the contract of carriage lessening the carriers' liability,[39] to regulate rights and liabilities between carriers and cargo interests[40] in an attempt to create international uniformity,[41] to enable the consignee to rely on the facts stated in the bill of lading,[42] and to accomplish uniformity and agreement with many other nations as to the text of those clauses of ocean bills of lading with which the act deals.[43] The act does not give the carrier the right to relieve itself from any of its responsibilities and liabilities[44] and the effect of the so-called British Ordinances which is to increase the immunities of the carrier will not be considered in determining the liability of the carrier under the act.[45]

Section 4 of the Act, 46 U.S.C.A. § 1304, establishes sixteen exceptions from liability,[46] and the act does not condition its exemptions on due diligence to make the vessel seaworthy,[47] but only exemption from liability for loss due to unseaworthiness is so conditioned.[48] In this respect the Carriage of Goods by Sea Act differs from the Harter Act,[49] which, as shown infra § 127 b (1) makes immunities dependent on the exercise of due diligence to make the vessel seaworthy.

The Carriage of Goods by Sea Act expressly relates to foreign trade, that is, to the transportation of goods between ports of the United States and ports of foreign countries.[50] It does not apply to carriage of goods not in foreign trade[51] or to cargo carried on deck under provisions in the bill of lading for on-deck carriage.[52] Provision is made, however, for adoption of the act by express agreement in cases of domestic trade,[53] in which event it supersedes the earlier Harter Act,[54] and the parties may by the terms of their bill of lading agree that its provisions shall apply to cargo carried on deck between ports of the United States.[55] It has been held that, in the absence of contract to that effect, the provisions of the act do not operate to relieve a private carrier from liability for damage to cargo.[56] Although the contract by its terms is subject

Sud-Americana De Vapores, C.A., N.Y., 174 F.2d 423.

39. U.S.—Scarburgh v. Compania Sud-Americana De Vapores, supra.
Exemption provisions of the Harter Act see infra §§ 127–128

Same underlying purpose of statutes
"Both the Harter Act and the 1936 Act have the same underlying purpose."—The Temple Bar, D.C.Md., 45 F.Supp. 608, 613, affirmed, C.C.A., 137 F.2d 293.

40. U.S.—Lyons-Magnus, Inc., v. American-Hawaiian S. S. Co., D.C.N.Y., 41 F.Supp. 575.

41. U.S.—Uniao De Transportadores Para Importacao E Comercio, Ltda. v. Companhia De Nevegacao Carregadores Acoreanos, D.C.N.Y., 84 F.Supp. 582

Counterpart of British act
"The purpose of the Act is to create international uniformity. It is a counterpart of the British Carriage of Goods by Sea Act, 1924, and the Barbadoes Carriage of Goods by Sea Act of 1926."—The Asturias, D.C.N.Y., 40 F.Supp. 168, 169, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.

42. U.S.—George F. Pettinos, Inc., v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.

43. U.S.—Pan-Am Trade & Credit Corp. v. The Campfire, C.C.A.N.Y., 156 F.2d 603, certiorari denied Waterman S. S. Corp. v. P-A. T. & C. Corp., 67 S.Ct. 194, 329 U.S. 774, 91 L.Ed. 666.

44. U.S.—The Vermont, D.C.N.Y., 47 F.Supp. 877.
Extension of liability see infra § 139

45. U.S.—The Zarembo, D.C.N.Y., 44 F.Supp. 915, affirmed, C.C.A., Balfour, Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486.

46. U.S.—George F. Pettinos, Inc. v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.
Particular causes of loss or damage within Carriage of Goods by Sea Act see infra § 128.

47. U.S.—The Vale Royal, D.C.Md., 51 F.Supp. 412.

Under similar provisions of Canadian Water Carriage of Goods Act of 1936, due diligence by shipowner is not made a proviso of any of the exceptions, but is to be considered separately therefrom.—The Iristo, D.C.N.Y., 43 F.Supp. 29, affirmed, C.C.A., Middleton & Co. (Canada) Limited v. Ocean Dominion S. S. Corp., 137 F.2d 619, certiorari denied 64 S.Ct. 432, 320 U.S. 802, 88 L.Ed. 484.

48. U.S.—The Vale Royal, D.C.Md., 51 F.Supp. 412.
Exemption from liability for unseaworthiness see infra § 128 b (2)

49. U.S.—The Vale Royal, supra.

50. U.S.—The Vale Royal, supra—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

Act held applicable to:
(1) Voyage from a foreign port to the United States, even if bill of lading had not been expressly made subject to such act.—The Bill, D.C.Md., 47 F.Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470.

(2) A libel for damages to cargo which was carried from Spain to Philadelphia, Pa., even though bill of lading was issued in Spain.—The Ciano, D.C.Pa., 69 F.Supp. 35.

51. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

52. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

53. U.S.—The Vale Royal, D.C.Md., 51 F.Supp. 412.—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

54. U.S.—The Vale Royal, D.C.Md., 51 F.Supp. 412.

55. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

56. U.S.—The Raleigh, D.C.Md., 50 F.Supp. 961.

to the Carriage of Goods by Sea Act and the Harter Act, the exemption of liability provisions in those acts do not operate where the carrier has not been negligent.[57]

Time of loss or damage. The Carriage of Goods by Sea Act does not cover the period of time prior to loading or the period of time subsequent to discharge of the cargo, until delivery thereof to the consignee.[58] Where the cargo has been damaged on lighters while secured alongside the vessel but before the goods have reached the ship's tackles, the provisions of the Carriage of Goods by Sea Act are not applicable proprio vigore,[59] but they are made applicable and control the relations of the parties by virtue of a clause of the bill of lading which provides that the act shall govern before the goods are loaded on, and after they are discharged from, the ship, and throughout the entire time the goods are in the custody of the carrier.[60] The Carriage of Goods by Sea Act supersedes the Harter Act as far as the rights and liabilities with respect to a shipment between a foreign and a domestic port during the voyage, and not before its loading or after its discharge from the vessel, are concerned,[61] but, as shown infra § 127 d, the Harter Act may be applicable to the period subsequent to discharge and until delivery of the cargo.

Fraudulent Misstatement of Nature or Value of Goods. Under the provision of the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(5), that neither the carrier nor the ship shall be responsible for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading, the exemption does not apply where the shipper, without stating any value, has employed the term "used removal goods" as descriptive of usual household furniture, silverware, etc.[62]

§ 127. —— In Case of Seaworthiness of Vessel or Exercise of Diligence with Respect Thereto in General

a. Purpose, effect, and construction of Harter Act in general
b. Necessity of seaworthiness or diligence
c. Character and extent of seaworthiness or diligence
d. Time of loss or damage
e. Carriers and other persons entitled to exemption
f. Vessels within exemption provision; character of voyage
g. Availability of exemption as against third persons; collision
h. Effect of deviation
i. Proceedings in which exemption may be claimed
j. Waiver of benefits

a. Purpose, Effect, and Construction of Harter Act in General

The exemption provision of the Harter Act, 46 U.S.C.A. § 192, which operates to relieve the shipowner from liability for damage arising from the causes specified therein, was enacted to encourage shipping in the United States by modifying the stringent rule of liability theretofore imposed by the maritime law, and, being in derogation of common law, it must be strictly construed.

The exemption provision of the Harter Act, 46 U.S.C.A. § 192, which operates to relieve the shipowner from liability for damage arising from the causes specified therein,[63] was enacted in the interest of the carrier,[64] and intended as a compensation for the loss of his right to limit his liability by contract, as provided by other sections of the act.[65]

57. U.S.—Petition of Reliance Marine Transp. & Const. Corp., D.C. Conn., 89 F.Supp. 272.

58. U.S.—The Monte Iciar, D.C.Pa., 67 F.Supp. 201, affirmed, C.C.A., 167 F.2d 334.

Discovery of damage after discharge of cargo

Where an inspection of the 'tween decks, where libellant's cargo of wine had been stowed, showed that the space was clean and dry and first evidence of any loss of wine from shipment was the gauging of seven of the barrels on the pier by United States Customs authorities when shipment was delivered to libellant several days after discharge of cargo, and there was nothing to show any act or omission of respondent carrier with respect to custody, care, or handling of cargo from loading thereof to discharge thereof that contributed to loss, loss was not within purview of Carriage of Goods by Sea Act.—The Monte Iciar, supra

59. U.S.—Mackey v. U. S., D.C.N.Y., 83 F.Supp. 14, affirmed, C.A., 197 F.2d 241.

60. U.S.—Mackey v. U. S., supra.

61. U.S.—The Monte Iciar, D.C.Pa., 67 F.Supp. 201, affirmed, C.C.A., 167 F.2d 334.—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

62. U.S.—Kratina v. South Atlantic S. S. Co., D.C.Ga., 63 F.Supp. 895.

63. U.S.—U. S. v. Farr Sugar Corp., C.A.N.Y., 191 F.2d 370, affirmed U. S. v. Atlantic Mut. Ins. Co., 72 S. Ct. 666, 343 U.S. 236, 96 L.Ed. ——.—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780

N.Y.—Gelderman v. Munson S. S. Line, 254 N.Y.S. 537, 234 App.Div. 889.

58 C.J. p. 392 note 2.

Exemption as to particular causes see infra § 128.

64. U.S.—The Germanic, N.Y., 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed. 610

65. U.S.—The Germanic, supra.

Limitation of liability by contract or bill of lading see infra §§ 131–138.

Remedy of abuses

U.S.—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, C.C.A.N.Y., 89 F.2d 865, certiorari denied James McWilliams Blue

The purpose of the act was to encourage shipping in the United States[66] by modifying the stringent rule of liability theretofore imposed by maritime law,[67] and relieving the diligent shipowner from his former responsibility for extraordinary risks,[68] such as fault or error of those beyond his personal control[69] with respect to navigation or management of the ship.[70] It was not repealed by the Interstate Commerce Act.[71]

Construction. The rule of strict construction applicable to statutes in derogation of common law or common right applies to the exemption provision of the Harter Act.[72] Accordingly, the exemption from liability will be limited to the relief afforded by the express language of the statute;[73] but the rule of strict construction is not violated by permitting the words of the statute to have their full meaning,[74] or the more extended of two possible meanings.[75]

Retroactive effect. The Harter Act has no retroactive effect, so as to apply to damages occasioned before its passage.[76]

b. Necessity of Seaworthiness or Diligence

(1) In general
(2) Causal connection with loss

(1) In General

In order to secure the statutory exemptions under the Harter Act it is necessary either that the ship was in fact seaworthy and properly manned or that the owner used due diligence to make her so.

In order to secure the statutory exemption under the Harter Act it is necessary either that the ship was in fact seaworthy[77] and properly manned[78] or that, whether or not seaworthy, the owner used due diligence to make her so.[79] While due diligence is all that is required,[80] the owner must establish the existence of one or the other of these facts,[81] as a

Line v. Koppers Connecticut Coke Co., 58 S.Ct. 25, 302 U.S. 706, 82 L.Ed. 545.

66. U.S.—The Humarock, D.C.Ga., 234 F. 716

67. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775.
58 C.J. p. 392 note 7.

68. U.S.—The Humarock, D.C.Ga., 234 F. 716—Great Lakes Towing Co. v. Mills Transp. Co., Mich., 155 F. 11, 83 C.C.A. 607, 22 L.R.A.,N.S., 769, certiorari denied 28 S.Ct. 262, 207 U.S. 596, 52 L.Ed. 357.

69. U.S.—The Humarock, D.C.Ga., 234 F. 716.

70. U.S.—The Irrawaddy, N.Y., 18 S.Ct. 831, 171 U.S. 187, 43 L.Ed. 130.
58 C.J. p. 392 note 11.

71. U.S.—Alaska SS. Co. v. U. S., D.C.N.Y., 259 F. 713, reversed on other grounds 40 S.Ct. 448, 253 U.S. 113, 64 L.Ed. 808.

72. U.S.—U. S. Steel Products Co. v. American & Foreign Ins. Co., C.C.A.N.Y., 82 F.2d 752—California & Hawaiian Sugar Refining Corporation v. Rideout, C.C.A.Cal., 53 F.2d 322
58 C.J. p. 392 note 13.

Trend of judicial decision has been to construe the Harter Act strictly and not to extend the carrier's exemption from liability to doubtful and uncertain cases, but to leave such liability as it was defined and enforced by the law maritime and by the common law unless the act plainly and unequivocally asserts a different liability.—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, D.C.N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct. 25, 302 U.S. 706, 82 L.Ed. 545—The Germanic, N.Y., 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed. 610

73. U.S.—The Irrawaddy, N.Y., 18 S.Ct. 831, 171 U.S. 187, 43 L.Ed. 130

74. U.S.—Sacramento Nav. Co. v. Salz, Cal., 47 S.Ct. 368, 273 U.S. 326, 71 L.Ed. 663.

75. U.S.—Sacramento Nav. Co. v. Salz, supra
58 C.J. p. 392 note 16.

76. U.S.—The Edith, C.C.A.N.Y., 10 F.2d 684—Humboldt Lumber Manufacturers' Assoc. v. Christopherson, Cal., 73 F. 239, 19 C.C.A. 48, 46 L.R.A. 264.

77. U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853—Spencer, Kellogg & Sons v. Buckeye S. S. Co., C.C.A. Ohio, 70 F.2d 146, certiorari denied 55 S.Ct. 74, 293 U.S. 562, 79 L.Ed. 663—U. S. v. City of New York, D.C.N.Y., 8 F.2d 270—The Iowa, D.C.Or., 34 F.Supp. 843—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550.
58 C.J. p. 392 note 21.
Burden of proving diligence or seaworthiness under exemption claim see infra § 154.
Seaworthiness generally see infra § 140.

78. U.S.—The Denali, C.C.A.Wash., 105 F.2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S. S. Co. v. Pacific Coast Coal Co., 61 S.Ct. 65, 311 U.S. 687, 85 L.Ed. 444—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900—The Iowa, D.C.Or., 34 F.Supp. 843—The Condor, D.C.N.Y., 8 F.Supp. 929, affirmed, C.C.A., The Nordpol, 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111, two cases, 299 U.S. 586, 81 L.Ed. 432.

Licensed pilot on motorboat
Motorboat only 62.2 feet in length and propelled by diesel engine was not required by Motor Boat Act to have licensed pilot and therefore failure to have licensed pilot on board did not preclude exemption from liability under Harter Act.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash.2d 491.

79. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., C.C.A.N.Y., 114 F.2d 248, affirmed 61 S.Ct. 840, 313 U.S. 541, 58 L.Ed. 1510, vacated on other grounds 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, affirmed 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—Southern Pac. Co. v. U. S., C.C.A.N.Y., 72 F.2d 212—U. S. v. Charbonnier, C.C.A.S.C., 45 F.2d 174—American Agr. Chemical Co. v. O'Donnell Transp. Co., D.C.N.Y., 62 F.Supp. 239—The Vale Royal, D.C.Md., 51 F.Supp. 412—The Heddernheim, D.C.N.Y., 39 F.Supp. 558—The Venice Maru, D.C.N.Y., 39 F.Supp. 349, affirmed, C.C.A., Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30—The Iowa, D.C.Or., 34 F.Supp. 843—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550.
58 C.J. p. 392 note 23.

80. Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash.2d 491.

81. U.S.—The Iowa, D.C.Or., 34 F.Supp. 843
58 C.J. p. 392 note 24.

distinct condition of,[82] or condition precedent to,[83] or preliminary condition to[84] exemption An owner who consciously sends a vessel to sea in an unseaworthy condition may not claim a defense under the Harter Act.[85] Financial straits of owner, rendering him unable to meet the necessary expense of making the ship seaworthy, are not a legal excuse for failure to exercise due diligence in such respect.[86]

When and where requirement must be met. The requirement that the ship must be seaworthy or that due diligence must be exercised to make her so applies to seaworthiness at the beginning of the voyage,[87] at the place where the ship broke ground.[88] Where voyage is divided into stages, the requirement applies to the beginning of each separate stage of the voyage,[89] as where the major portion of the voyage is to be undertaken after fueling and the ship is unseaworthy on leaving the fueling port.[90] Merely dropping anchor after proceeding a short distance does not create a new stage of the voyage.[91]

(2) Causal Connection with Loss

Under the Harter Act, if the condition as to seaworthiness or diligence is not performed, exemption will be denied irrespective of whether failure to perform such condition contributed to the loss or damage.

Under the Harter Act, if the condition as to seaworthiness or diligence is not performed, exemption will be denied irrespective of whether failure to perform such condition contributed to the loss or damage,[92] as where exemption is denied for loss result-

82. U.S.—The Wildcroft, Pa., 26 S Ct. 467, 201 U.S. 378, 50 L.Ed 794—Compagnie Maritime Francaise v. Meyer, Cal., 248 F. 881, 160 C.C.A. 639

83. U.S.—California & Hawaiian Sugar Refining Corporation v. Rideout, C.C.A.Cal., 53 F.2d 322—The Heddernheim, D.C.N.Y., 39 F.Supp. 558—The Georgian, D.C.Fla., 4 F. Supp 718, affirmed, C.C.A., 76 F 2d 550

Wash.—National Grocery Co. v Olsen, 108 P.2d 320, 6 Wash.2d 491

58 C.J. p 392 note 26.

84. U.S.—Nord-Deutscher Lloyd v Insurance Co of North America, Md., 110 F. 420, 49 C.C.A. 1.

85. U.S.—The Denali, C.C.A.Wash., 112 F.2d 952, certiorari denied Alaska S. S. Co. v. Pacific Coast Coal Co., 61 S.Ct 65, 311 U.S. 687, 85 L.Ed. 444—The West Arrow, C.C.A.N.Y., 80 F.2d 853

86. U.S.—Palmer, etc., Co. v. U. S., D.C.Mass., 10 F.2d 214.

87. U.S.—Spencer, Kellogg & Sons v. Buckeye S. S. Co., C.C.A.Ohio, 70 F.2d 146, certiorari denied 55 S.Ct 74, 293 U.S. 562, 79 L.Ed. 663—American Agr. Chemical Co. v. O'Donnell Transp Co., D.C.N.Y., 62 F.Supp. 239—The Havana, D.C.N.Y., 45 F.Supp 244.

58 C.J. p 393 note 34.

Shifting barge between docks

Where barge was being shifted from one dock to another by hand when it was damaged by striking hard against steel pier, voyage had not yet "commenced," and hence barge owner could not escape liability for loss of cargo under exception provision of the Harter Act.—American Agr. Chemical Co. v. O'Donnell Transp. Co., D.C.N.Y., 62 F.Supp. 239.

Port from which cargo was shipped

Voyage, with respect to vessel's liability for error in management, commenced as to cargo owner at port from which cargo was shipped—The J. L. Luckenbach, D.C.N.Y., 1 F.Supp. 692, affirmed, C.C.A., 65 F.2d 570

88. U.S.—Yokohama Specie Bank v. Mitsui & Co., C.C.A.N.Y., 73 F.2d 526, certiorari denied Yokohama Specie Bank v Mitsui & Co., 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684.

89. U.S.—The Willdomino, C.C.A.N.J., 300 F 5, affirmed 47 S.Ct. 261, 272 U.S. 718, 71 L.Ed 491.

90. U.S.—The Viking, C.C.A.Ohio, 271 F. 801

58 C.J. p 393 note 36.

91. U.S.—The Oritani, D.C.Pa., 40 F. 2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

58 C.J. p 393 note 37.

92. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct 162, 290 U.S. 333, 78 L.Ed 348—U. S Steel Products Co. v. American & Foreign Ins. Co., C.C.A.N.Y., 82 F.2d 752—The Indien, C.C.A.Cal., 71 F.2d 752—Spencer, Kellogg & Sons v. Buckeye S. S. Co., C.C.A.Ohio, 70 F.2d 146, certiorari denied 55 S.Ct. 74, 293 U.S. 562, 79 L.Ed. 663—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co v. Newfoundland Export & Shipping Co., 54 S. Ct 860, 292 U.S 651, 78 L.Ed 1500—The Vale Royal, D.C.Md., 51 F. Supp. 412—The Havana, D.C.N.Y., 45 F.Supp. 244—The Heddernheim, D.C.N.Y., 39 F.Supp. 558—The Iowa, D.C.Or., 34 F.Supp. 843—Daisy Philippine Underwear Co. v. U. S. Steel Products Co., D.C.N.Y., 11 F.Supp. 175, affirmed, C.C.A., U. S Steel Products Co., v. American & Foreign Ins. Co., 82 F.2d 752.

Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash 2d 491.

58 C.J. p 393 note 29

Exemptions of Carriage of Goods by Sea Act as not conditioned on due diligence to make vessel seaworthy see supra § 126 b.

Unseaworthiness as exempted cause of loss or damage under Carriage of Goods by Sea Act see infra § 128 b (2).

Contrary authority

(1) There are some decisions and dicta which are contrary to the rule of the text.—Hartford & New York Transp. Co. v. Rogers & Hubbard Co., C.C.A.Conn., 47 F.2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co., 51 S.Ct 483, 283 U.S. 835, 75 L.Ed. 1446—58 C.J. p 393 notes 31, 32.

(2) These decisions and dicta have been disapproved by the United States supreme court which, taking note of the discord in the cases, stated that the rulings and dicta favoring the view that the benefit of the act is lost without reference to any causal relation between the defect and the disaster are supported by the better reasons—May v Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct. 162, 299 U.S 333, 78 L.Ed. 348.

(3) However, it has been said, citing May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, supra, that if unseaworthiness of vessel is not the proximate cause of loss of cargo, the vessel may not be charged with damages for the loss—Interlake Iron Corp. v. Gartland S. S Co., C.C.A.Mich., 121 F.2d 267, certiorari denied Gartland S. S Co. v. Interlake Iron Corp., 62 S.Ct. 181, 314 U.S 681, 86 L.Ed. 545.

Fatigue in navigation

In the causal and contributing chain of events leading to the wreck of a vessel being navigated by a mate in violation of the requirements of a statute to prevent fatigue in navigation, the last link was the mind and body of the navigator affected by the violation.—The Denali, C.C.A.Wash., 112 F.2d 952, certiorari denied Alaska

ing from improper navigation or management,[93] or from a storm of violent intensity.[94] A like rule has been applied under similar controlling provisions of the Canadian Water Carriage of Goods Act.[95]

c. Character and Extent of Seaworthiness or Diligence

(1) In general
(2) Factors considered

(1) In General

Seaworthiness under the Harter Act involves no more than a reasonable fitness for the purpose of the voyage. The requisite diligence must be exercised in all respects necessary to make the ship in fact seaworthy at the beginning of her voyage and should be of a character adequate to accomplish the result intended.

Seaworthiness under the Harter Act involves no more than a reasonable fitness for the purpose of the voyage.[96] A ship may be seaworthy, although not in all respects fit for her service, when she breaks ground,[97] as where she is well found in hull and gear, but the master and crew know that she is not made ready as she rides, and expect to fit her with what is at hand when the occasion arises,[98] but the existing unfitness must be so known at the outset.[99]

The requisite diligence must be exercised in all respects necessary to make the ship in fact seaworthy at the beginning of her voyage,[1] and an ineffectual practice furnishes no excuse for omission to use all reasonable precautions.[2] It is not sufficient to provide her with proper structures and equipment, but due diligence must also be exercised by the owner's servants in the use of such equipment before and up to the time of the beginning of the voyage,[3] as by making such inspection as circumstances may require[4] and effecting necessary re-

S. S. Co. v. Pacific Coast Coal Co., 61 S.Ct. 65, 311 U.S. 687, 85 L.Ed. 444.

93. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct. 162, 299 U.S. 333, 78 L.Ed. 348—The West Arrow, C.C.A.N.Y., 80 F.2d 853—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900—The Heddernheim, D.C.N.Y., 39 F.Supp. 553—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F.Supp. 520—The Harry Luckenbach, D.C.N.Y., 8 F.Supp. 507.
58 C.J. p. 393 note 30.

94. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775

95. U.S.—In re Great Lakes Transit Corp., C.C.A.Ohio, 81 F.2d 441.

96. U.S.—Pillsbury Flour Mills Co. v. Becker S. S. Co., D.C.N.Y., 49 F.2d 648—The R. Lenahan, Jr., C.C.A.N.Y., 48 F.2d 110, certiorari denied Cowles v. Reddy, 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 536—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075

Requisites and essentials of seaworthiness or fitness generally see infra § 140

Fitness to carry cargo

A vessel, to be seaworthy, must be reasonably fit to carry the cargo which she has undertaken to transport.—Spencer Kellogg & Sons v. Buckeye S. S. Co., C.C.A.Ohio, 70 F.2d 146, certiorari denied 55 S.Ct. 74, 293 U.S. 562, 79 L.Ed. 663—Kalbfleisch Corporation v. U.S., D.C.Mass., 53 F.2d 867—The Havana, D.C.N.Y., 45 F.Supp. 244—The Emilia, D.C.N.Y., 13 F.Supp. 7—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550—The Point Brava, D.C.Cal., 1 F.Supp. 366—The R. P. Fitzgerald, Mich., 212 F. 678, 129 C.C.A. 214, certiorari denied 34 S.Ct. 675, 234 U.S. 757, 58 L.Ed. 1579.
Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash.2d 491.

Most improved construction or equipment

(1) A vessel is not required to be impregnable or of the most improved construction.—Spencer Kellogg & Sons v. Buckeye S. S. Co., C.C.A.Ohio, 70 F.2d 146, certiorari denied 55 S.Ct. 74, 293 U.S. 562, 79 L.Ed. 663.

(2) A vessel is not bound to have latest and most improved telemotor.—The West Arrow, D.C.N.Y., 7 F.Supp. 827, modified on other grounds, C.C.A., 80 F.2d 853—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550

97. U.S.—Yokohama Specie Bank v. Mitsui & Co., C.C.A.N.Y., 73 F.2d 526, certiorari denied Yokohama Specie Bank v. Mitsui & Co., 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684—Compania General De Tabacos De Filipinas v. U.S., C.C.A.N.Y., 49 F.2d 700—Daisy Philippine Underwear Co. v. U. S. Steel Products Co., D.C.N.Y., 11 F.Supp. 175, affirmed, C.C.A., U. S. Steel Products Co. v. American & Foreign Ins. Co., 82 F.2d 752.

98. U.S.—Compania General De Tabacos De Filipinas v. U.S., C.C.A.N.Y., 49 F.2d 700.

99. U.S.—Compania General De Tabacos De Filipinas v. U.S., supra.

1. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.
58 C.J. p. 393 note 38.

2. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., supra.

3. U.S.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F.Supp. 520.
58 C.J. p. 393 note 39.

4. U.S.—The Willowpool, D.C.N.Y., 12 F.Supp. 96, affirmed, C.C.A., John W. Higman & Co. v. The Willowpool, 86 F.2d 1002—The Indien, D.C.Cal., 5 F.Supp. 349, affirmed, C.C.A., 71 F.2d 752
58 C.J. p. 393 note 40.

Casual inspection is insufficient to constitute due diligence.
U.S.—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900—The Agwimoon, D.C.Md., 24 F.2d 864, affirmed, C.C.A., Atlantic, etc., SS. Lines v. Interocean Oil Co., 31 F.2d 1006, certiorari denied 49 S.Ct. 514, 279 U.S. 874, 73 L.Ed. 1009—The Indien, D.C.Cal., 5 F.Supp. 349, affirmed, C.C.A., 71 F.2d 752
Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

Usual inspection was held not due diligence with respect to boilers and condensers when it was known to owners of vessel that condenser tubes were constantly breaking down prior thereto and that boilers were not in a seaworthy condition.—The Heddernheim, D.C.N.Y., 39 F.Supp. 558.

Reliance on external appearance

(1) In making inspection, owner is not justified in relying on external appearances in place of known tests.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

(2) If, instead of making careful examinations and tests, owner relies on external appearances of ship or superficial survey, he assumes re-

pairs;[5] and the undertaking as to seaworthiness is not discharged when want of fitness is the result either of laches or of a latent defect discoverable by the use of due diligence.[6] The duty includes the furnishing of charts, light lists, and similar navigational data.[7] The shipper bears no loss until the owner has done his best to remove all risks except those inevitable on the seas.[8]

The duty of the shipowner to exercise due diligence to render the ship seaworthy is nondelegable;[9] it is a personal duty to see that the ship is seaworthy when she starts on the voyage,[10] and the owner must know that those whom he employs to act use due diligence.[11] In this connection it has been pointed out that failure of the owner's agents in respect of the exercise of diligence is legally attributable to him,[12] and that the mere selection of competent agents for such purposes is insufficient to show diligence by the owner.[13] The due diligence as to making the vessel seaworthy must in fact be exercised by the agents selected,[14] and should be of a character adequate to accomplish the result intended.[15]

Procuring certificates of seaworthiness does not show exercise of due diligence.[16]

Protection of cargo. In order to discharge the duty of due diligence the owner will be required to take such precautions as are reasonably adequate for the protection of the cargo against known perils,[17] or against perils which reasonable foresight would have anticipated.[18] Although the vessel be seaworthy as a whole, exemption will be

sponsibility for what diligent inspection would reveal—Blake, Moffitt & Towne v Luckenbach S S. Co, supra—58 C J. p 393 note 40 [d].

Inclosed pipe

Fact that sounding pipe was inclosed did not lessen obligation to remove sufficient portion of casing for thorough test and inspection to assure beginning voyage with thoroughly seaworthy ship—Blake, Moffitt & Towne v. Luckenbach S. S. Co, supra.

5. U.S—The Yungay, D C N Y., 58 F 2d 352.
58 C.J. p 393 note 41.

6. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

7. U.S—The Maria, C C.A Va, 91 F. 2d 819—The Iowa, D C Or, 34 F. Supp. 843.

Corrected and uncorrected charts

(1) Ship is seaworthy if she has proper documents on board and if, when she sails, such of her charts and light lists are corrected as cover waters she will enter before her officers will have ready opportunity to correct them.—U. S Steel Products Co. v. American & Foreign Ins. Co., C C A N.Y., 82 F.2d 752.

(2) Failure to correct charts and light book before setting sail did not render ship unseaworthy, where charts and light book could have conveniently been brought up to date before ship reached waters which charts and book covered, although on previous voyage through same waters ship had set sail without having proper charts and light book aboard—U. S. Steel Products Co v. American & Foreign Ins Co., supra.

(3) A vessel on sailing from Swedish port and striking a rock near lighthouse in Swedish waters was not "unseaworthy" because master did not have on board Swedish chart instead of or in addition to German chart, where, at time of grounding, vessel was being navigated by government pilot and captain without a chart, both charts were serviceable, and difference in scale was not of great consequence—The Heddernheim, D.C N.Y, 39 F.Supp. 558.

8. U.S—Compania General De Tabacos De Filipinas v. U. S., C.C A. N Y, 49 F 2d 700.

9. U S—The Maria, C.C A Va, 91 F 2d 819—The Framlington Court, C. C A.Tex, 69 F 2d 300, certiorari denied United British S. S. Co. v Newfoundland Export & Shipping Co, 54 S.Ct. 860, 292 U S 651, 78 L.Ed. 1500—The Iowa, D.C Or., 34 F Supp 843—The Point Brava, D C. Cal, 1 F Supp. 366.

Delegation held not to show lack of due diligence

Where duty of owner was being performed through the master, master's delegation to Sea Service Bureau of exercise of diligent inquiry as to qualifications of desired chief officer was held not to show lack of due diligence.—The James Griffiths, C.C A Wash., 84 F 2d 785, certiorari denied Sperry Flour Co. v. Coastwise Steamship & Barge Co, 57 S Ct. 315, 299 U S. 612, 81 L Ed 452, rehearing denied 57 S Ct. 430, 300 U.S. 686, 81 L.Ed. 888.

10. U S—The Wildwood, D C.Wash, 41 F.Supp. 956, reversed on other grounds, C C A, 133 F.2d 765, certiorari denied Amtorg Trading Corp v. American Foreign S. S Corp, 63 S Ct. 1436, 319 U.S. 771, 87 L Ed. 1719.

11. U.S.—The Wildwood, D C Wash, 41 F.Supp 956, reversed on other grounds, C.C.A, 133 F 2d 765, certiorari denied Amtorg Trading Corp v. American S. S. Corp., 63 S. Ct. 1436, 319 U S. 771, 87 L.Ed 1719.

12. U.S—The Maria, C C.A Va., 91 F 2d 819—The James Griffiths, C C. A Wash., 84 F.2d 785, certiorari denied Sperry Flour Co v. Coastwise Steamship & Barge Co., 57 S.Ct. 315, 299 U S. 612, 81 L.Ed 452, rehearing denied 57 S Ct 430, 300 U. S. 686, 81 L Ed. 888—The Framlington Court, C C A.Tex., 69 F.2d 300, certiorari denied United British S S Co v. Newfoundland Export & Shipping Co, 54 S Ct 860, 292 U S. 651, 78 L.Ed 1500—Nord-Deutscher Lloyd v Insurance Co. of North America, Md., 110 F. 420, 49 C C.A. 1.

13. U.S—The Maria, C.C A.Va., 91 F 2d 819
Cal.—Blake, Moffitt & Towne v Luckenbach S S. Co., 6 P.2d 121, 120 Cal App Supp. 775
58 C.J. p 393 note 43

14. U.S—The Maria, C C.A.Va., 91 F 2d 819—The Yungay, D C.N.Y., 58 F 2d 352
58 C J. p 394 note 44.

15. U.S.—Nord-Deutscher Lloyd v. Insurance Co. of North America, Md., 110 F 420, 49 C C.A. 1.

16. U S.—The Georgian, D C.Fla, 4 F Supp 718, affirmed, C.C A., 76 F. 2d 550.
Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co, 6 P.2d 121, 120 Cal App Supp. 775.
58 C J p 394 note 46.

17. U S.—The Georgian, D C Fla., 4 F.Supp. 718, affirmed, C.C A, 76 F. 2d 550—The R P. Fitzgerald, Mich, 212 F. 678, 129 C C.A 214, certiorari denied 34 S.Ct. 675, 234 U.S. 757, 58 L Ed. 1579.

18. U S—The Georgian, D C.Fla., 4 F.Supp. 718, affirmed, C C A, 76 F. 2d 550—The R. P. Fitzgerald, Mich, 212 F. 678, 129 C C A 214, certiorari denied 34 S Ct 675, 234 U.S. 757, 58 L Ed 1579.

denied if it was unseaworthy with respect to the cargo damaged.[19]

(2) Factors Considered

In determining whether or not the duty of exercising due diligence was discharged the measure of that duty must be considered with reference to the conditions under which it was to be performed, and the courts will consider all relevant circumstances.

In determining whether or not the duty of exercising due diligence was discharged, the measure of that duty must be considered with reference to the conditions under which it was to be performed,[20] and in this connection the courts will consider all relevant circumstances,[21] such as the character of the cargo,[22] the nature of the voyage,[23] the sufficiency of the fuel supply,[24] condition of the weather,[25] the age[26] and condition[27] of the ship, the previous practice of the owners with respect to examination for repairs,[28] and the incompetency of the master or crew due to lack of adequate training or experience,[29] but hiring a master who has never before served in such capacity does not show lack of due diligence.[30] The same considerations control the seaworthiness of the ship's holds as of her bottom.[31]

Lack of license for the voyage taken may render

19. U S—The Manitoba, D C N Y., 104 F 145
58 C.J. p 391 note 49.

20. U S—Atlantic Transport Co. v Rosenberg, C C.A Cal, 34 F 2d 843—The Jean Bart, D C Cal, 197 F 1002.
What constitutes seaworthiness generally see infra § 140.

Statute subsequently enacted
Statute relating to hours and work for officers passed after stranding of vessel did not apply in subsequent proceeding for exemption from liability—The Denali, D C.Wash., 23 F Supp 145, reversed on other grounds, C.C A, 105 F.2d 413, adhered to 112 F 2d 952, certiorari denied Alaska S S. Co. v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U.S. 687, 85 L Ed. 444.

21. Ship held unseaworthy
(1) With respect to deck plate which was fractured where voyage was of kind that should have been expected.—The Emilia, D.C N Y., 13 F.Supp. 7.

(2) Where steamship was not equipped with a communication system with its emergency steering gear—The Iowa, D C.Or., 34 F Supp. 843.

(3) Where owner violates the statutory three-watch requirement for mates—The Denali, C.C A.Wash, 112 F 2d 952, certiorari denied Alaska S S Co v. Pacific Coast Coal Co, 61 S.Ct 65, 311 U.S 687, 85 L Ed. 444.

(4) Other illustrations of unseaworthiness see 58 C.J. p 394 note 52 [c].

Unseaworthiness not shown
U S—Hartford & New York Transp Co. v. Rogers & Hubbard Co, C C. A Conn, 47 F.2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co, 51 S Ct. 483, 283 U S 835, 75 L Ed 1446.
58 C.J. p 394 note 52 [d].

Due diligence shown
U.S.—The Silvia, D.C N Y., 64 F 607, affirmed 68 F. 230, 15 C C.A. 362, affirmed 19 S Ct 7, 171 U S. 462, 43 L.Ed. 241.
58 C.J. p 394 note 52 [a].

Due diligence held not properly exercised
(1) Where there existed a violation of the statutory three watch mandate for mates—The Denali, C C.A.Wash., 105 F 2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S. S. Co v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U.S. 687, 85 L Ed. 444

(2) Failure to make hydrostatic test after repair of rivets—The Point Brava, D C.Cal., 1 F Supp. 366

(3) Failure to provide Class 1 steel closing appliances for booby hatch, as well as openings on superstructure, or to close hatches in upper deck bunkers—The Vestris, D.C N. Y., 60 F 2d 273.

(4) Failure definitely to determine metacentric height and stability of vessel at time of sailing.—The Vestris, supra.

(5) Failure to warn ship's officers of necessity of keeping bottom tanks filled to maintain ship's seaworthiness—The Vestris, supra.

(6) Where shipowner's marine superintendent and his assistant in port, from which vessel lost at sea sailed with bunker hatches buried beneath coal, knew of practice of leaving hatches uncovered—The Vestris, supra.

(7) Other conduct held to show lack of due diligence see 58 C J. p 394 note 52 [b].

22. U.S—The Agwimoon, D C Md., 24 F.2d 864, affirmed, C C.A., Atlantic, etc, SS. Lines v. Interocean Oil Co, 31 F.2d 1006, certiorari denied 49 S.Ct. 514, 279 U S. 874, 73 L Ed. 1009.
58 C J. p 394 note 53.

23. U S.—The Jean Bart, D.C.Cal, 197 F. 1002.
58 C J. p 395 note 54.

24. U.S—The Willdomino, C C.A.N J., 300 F. 5, affirmed 47 S Ct. 261, 272 U.S. 718, 71 L Ed. 491.

25. U S—Texas, etc, SS Co v. Parker, C C A Tex, 263 F 864, certiorari denied 40 S Ct. 485, 253 U S 488, 64 L Ed 1026

26. U S.—The Pehr Ugland, D C Va, 271 F. 340, appeal dismissed, C.C. A., 277 F. 1019
58 C J. p 395 note 57.

27. U S—The Pehr Ugland, supra.
58 C J. p 395 note 58.

28. U S—The Agwimoon, D C.Md, 24 F 2d 864, affirmed, C.C A., Atlantic, etc, SS Line v. Interocean Oil Co., 31 F 2d 1006, certiorari denied 49 S Ct. 514, 279 U.S 874, 73 L Ed 1009
58 C J p 395 note 59.

29. U.S.—Gold Dust Corporation v. Munson S. S. Line, C C A N.Y., 55 F.2d 900—The Vale Royal, D.C.Md., 51 F Supp. 412.

Inability to understand orders
Shipowner who, at foreign port, employed seaman who neither understood nor spoke English and lacked experience with American indirect helm orders failed properly to man vessel, which was therefore not seaworthy, precluding exemption from liability for cargo damage caused by collision occurring when such seaman, while acting as helmsman, apparently misunderstood order given in English.—The Nordpol, C.C A N. Y., 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111 (two cases), 299 U S. 586, 81 L Ed 432.

Duty to know local conditions
Master in charge of steamship had the duty to know all local conditions before he discharged the river pilot and started down the Columbia River—The Iowa, D.C Or., 34 F.Supp. 843.

30. U.S.—The Benjamin Noble, D C Mich, 232 F. 382, affirmed 244 F 95, 156 C C.A. 523, affirmed Capitol Transp. Co. v Cambria Steel Co., 39 S.Ct. 292, 249 U S. 334, 63 L.Ed. 631.

31. U S.—Compania General De Tabacos De Filipinas v. U. S., C C.A. N.Y., 49 F.2d 700.

a ship so far unseaworthy as to preclude exemption.[32]

Loading. In determining whether a vessel was seaworthy so as to entitle the owner to exemption, the courts will consider the matters of loading[33] and stowage[34] of cargo. The like practice of others will not excuse an owner for so far overloading his ship as to render her unseaworthy.[35]

d. Time of Loss or Damage

In order to be within the exemption of the Harter Act the loss or damage must occur after the voyage begins. The protection of the act extends to the final delivery of the cargo.

In order to be within the exemption provision of the Harter Act, the loss or damage must occur after the voyage begins.[36] Exemption will be denied where the act or omission causing loss occurred in connection with preparation for the voyage.[37]

After end of voyage. The protection of the Harter Act is not confined to the voyage,[38] but extends to the final delivery of the cargo.[39] So, even though the Harter Act is superseded by the Carriage of Goods by Sea Act, as discussed supra § 126 b, as far as the rights and liabilities in relation to a shipment between a foreign and a domestic port during the voyage, and not before its loading or after its discharge from the vessel, are concerned, the Harter Act can be applicable to the period subsequent to discharge and until delivery of the cargo.[40]

e. Carriers and Other Persons Entitled to Exemption

The exemption provision of the Harter Act applies to common carriers, but it is generally held that such provision does not apply of its own force to private carriers.

The exemption provision of the Harter Act applies to common carriers,[41] but it is generally held that such provision does not apply of its own force to private carriers.[42] Where the contract between carrier and cargo is by its terms subject to the Carriage of Goods by Sea Act and the Harter Act, for the purposes of the latter act the carrier as to the cargo stands as owner of the vessel which it has chartered to carry out the contract,[43] and neither act was held applicable to the owner of the vessel chartered who did not stand as a carrier as against either the charterer or the owner of the cargo.[44]

Part owner, who as master has personally participated in negligence causing the loss, cannot secure exemption as to his interest in the ship;[45] but the

32. U.S.—The St Paul, D.C.N.Y., 277 F. 99.

33. U.S.—The Indien, D.C.Cal., 5 F. Supp. 349, affirmed, C.C.A., 71 F.2d 752.
58 C.J. p 395 note 63

Overloading renders the ship unseaworthy.—The Indien, D.C.Cal., 5 F.Supp. 349, affirmed, C.C.A., 71 F.2d 752—The Benjamin Noble, D.C.Mich., 232 F. 382, affirmed 244 F. 95, 156 C.C.A. 523, affirmed Capitol Transp. Co. v. Cambria Steel Co., 39 S.Ct. 292, 249 U.S. 334, 63 L.Ed. 631.

34. U.S.—Corsar v. Spreckels, Cal., 141 F. 260, 72 C.C.A. 378.

Dunnage

(1) Proper stowage of cargo is part of vessel's seaworthiness, and proper dunnage is element of proper stowage.—The Indien, C.C.A.Cal., 71 F.2d 752.

(2) Custom, without more, in manner of dunnage, is not conclusive as to whether shipowner used adequate dunnage to make vessel seaworthy.—The Indien, supra.

35. U.S.—The Benjamin Noble, D.C. Mich., 232 F. 382, affirmed 244 F. 95, 156 C.C.A. 523, affirmed Capitol Transp. Co. v. Cambria Steel Co., 39 S.Ct. 292, 249 U.S. 334, 63 L.Ed 631.

36. Minn.—Cargill Grain Co. v. Cleveland-Cliffs S. S. Co., 235 N.W. 268, 182 Minn. 516, certiorari denied 52 S.Ct. 25, 284 U.S. 646, 76 L. Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S. S. Co., 237 N.W. 197, 183 Minn. 620.
58 C.J. p 401 note 83.

37. U.S.—The President, D.C.N.Y., 52 F.2d 680
58 C.J. p 402 note 84.

Lighterage

Where under tariff ship was not required to transport lumber beyond lighterage limits, agreement for such transportation represented new undertaking with respect to application of Harter Act to loss caused by sinking of lighter before it was fully loaded.—The President, supra.

38. U.S.—Sun Co. v. Healy, N.Y., 163 F. 48, 89 C.C.A. 300, certiorari denied 29 S.Ct. 693, 212 U.S. 583, 53 L.Ed. 660.

39. U.S.—Sun Co. v. Healy, supra.
58 C.J. p 402 note 86.

40. U.S.—The Monte Iciar, C.C.A. Pa., 167 F.2d 334

Delivery to rail carrier

Under bill of lading for shipment of wine from Spain to "Philadelphia in transit to New York," ship was responsible under Harter Act for due care of wine during period after its discharge and prior to its delivery to rail carrier.—The Monte Iciar, supra.

41. U.S.—The Ft. Gaines, D.C.Md., 24 F.2d 849, affirmed, C.C.A., Federal Forwarding Co. v. Lansa, 32 F.2d 154.

42. U.S.—The Monarch of Nassau, C.C.A.Fla., 155 F.2d 48—O. F. Nelson & Co. v. U.S., C.C.A.Cal., 149 F.2d 692, followed in General Cocoa Co. v. U.S., 149 F.2d 815 and 149 F.2d 816, motion denied 169 F.2d 833, motion denied 169 F.2d 833—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, C.C.A.N.Y., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct. 25, 302 U.S. 706, 82 L.Ed. 545—Tice Towing Line v. James McWilliams Blue Line, D.C.N.Y., 51 F.2d 243, modified on other grounds, C.C.A., 57 F.2d 183—The Raleigh, D.C.Md., 50 F.Supp. 961—Ætna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.
58 C.J. p 402 note 92
Application of other provisions see infra § 132

View that provision is applicable to private carriers is supported by some authority.—The Alberta M., D.C.N.Y., 60 F.2d 154—The Ft. Gaines, D.C.Md., 24 F.2d 849, affirmed Federal Forwarding Co. v. Lansa, C.C.A., 32 F.2d 154.

43. U.S.—Petition of Reliance Marine Transp. & Const. Corp., D.C. Conn., 89 F.Supp. 272

44. U.S.—Petition of Reliance Marine Transp. & Const. Corp., supra

45. U.S.—The Humarock, D.C.Ga., 234 F. 716.

other part owners, who have not personally participated in such negligence, are entitled to exemption with respect to their interests in the ship.[46]

f. Vessels within Exemption Provision; Character of Voyage

(1) In general
(2) Tows

(1) In General

The Harter Act deals with the vessel on which the merchandise is being transported at the time of loss or damage, and is applicable to foreign as well as American vessels. It applies to voyages between American and foreign ports and to voyages between American ports, but not to the carriage of goods wholly within the same port.

The Harter Act deals with the vessel on which the merchandise is being transported at the time of loss or damage,[47] and is applicable to foreign as well as American vessels.[48] The act applies to voyages between American and foreign ports[49] and to voyages between American ports,[50] but not to the carriage of goods wholly within the same port.[51]

Vessel used for storage. It seems that, where a cargo is shipped on a vessel, properly manned and equipped, for transportation to another port and storage there, on board, even if the contract is maritime, the act would protect the owner from liability for damage caused by negligent management of the vessel while used for storage[52]

(2) Tows

A combination of towed and towing ship together is regarded as a single ship or carrier within the exemption provision of the Harter Act. Exemption may be had where there was injury to merchandise on the towed ship due to fault or error in the navigation or management of the towing vessel, even though the ships are separately owned, provided that the duty as to seaworthiness or diligence was performed with respect to both vessels.

Under the language of the Harter Act making its exemptions applicable with respect to "any vessel" transporting merchandise, a combination of towed and towing ship together constitute "any vessel,"[53] being regarded as a single ship[54] or carrier.[55] Under this view exemption may be had where there was injury to merchandise on the towed ship due to fault or error in the navigation or management of the towing vessel.[56] The fact that the towed and towing ship are separately owned does not of itself take them out of the rule that they constitute one ship for the purposes of the statute,[57] and it is not necessary for the parties to agree that the vessels shall be considered as a unit, since they are such in contemplation of law where engaged in executing a contract of carriage.[58] In order to secure the exemption, however, it must appear that the duty as to seaworthiness or diligence was performed with respect to both vessels,[59] and that the vessels were jointly operated.[60]

To "tow" cargo is to "transport" it within the meaning of the statute.[61]

46. U S—The Humarock, supra

47. U S—Ralli v New York, etc, SS Co, N.Y, 154 F. 286, 83 C C A. 290
58 C J p 402 note 97.
Vessels within contract limitation provisions see infra § 132.

48. U S—The Chattahoochee, Mass, 19 S Ct. 491, 173 U S. 540, 43 L.Ed 801.
58 C J. p 402 note 98.

49. U S—The E A. Shores, Jr, D C Wis., 73 F 342.

50. U S—In re Piper Aden Goodall Co, D C Cal, 86 F. 670.
58 C J. p 402 note 1.

51. U S—Tice Towing Line v. James McWilliams Blue Line, D C N Y, 51 F.2d 243, modified on other grounds, C.C.A, 57 F.2d 183

52. U S—Norton v. The Richard Winslow, D C Wis, 67 F. 259, affirmed 71 F 426, 18 C C.A 344

53. U S—Sacramento Nav Co v Salz, Cal., 47 S Ct. 368, 273 U S 326, 71 L Ed. 663.
58 C J p 402 note 4.

54. U S.—Sacramento Nav. Co. v. Salz, supra—The Lehigh, D.C N Y., 12 F Supp 75

55. U S—The Bathgate, D C Pa., 19 F 2d 663, affirmed, C C A., Insurance Co. of North America v. Southern Transportation Co., 25 F. 2d 103, certiorari denied Insurance Co of North America v. The Bathgate, 48 S Ct. 437, 277 U.S. 589, 72 L.Ed 1002.
58 C J p 402 note 6.

56. U S—The Marmor, D C N.Y, 56 F Supp 435—The Lehigh, D C N. Y, 12 F.Supp 75.
58 C J. p 403 note 8.

Contrary view

(1) There were early cases holding the Harter Act inapplicable to the question of the liability of a tug for damage to the cargo of her tow. —Bradley v. Lehigh Valley R. Co., D C.N.Y, 145 F. 569, affirmed 153 F. 350, 82 C.C.A. 426—58 C J. p 402 note 7 [a]

(2) However, cases expressing this view were stated to have been overruled in Sacramento Nav. Co v. Salz, Cal, 47 S Ct. 368, 273 U S 326, 71 L. Ed 663, by implication without express mention by the court in the Sacramento case—In re O'Donnell, C C A N.Y, 26 F.2d 334, 34 F.2d 925.

57. U S—In re O'Donnell, supra—The Marmor, D C N Y, 56 F Supp. 435—The McAllister Bros., D C.N. Y., 18 F Supp 106—The Lehigh, D C N.Y., 12 F.Supp 75

58. U S—The J B. Austin, Jr., D C. N.Y, 33 F 2d 215

59. U S.—In re O'Donnell, C C A.N. Y, 34 F.2d 925.
58 C J. p 403 note 12.

Loss due to unseaworthiness of tug

Where tug, because of unseaworthiness thereof, foundered while towing barge in Lake Erie and barge was thereafter destroyed in storm, owners of tug and barge were liable for loss arising from sinking of barge regardless of seaworthiness of barge or competency of her master—The Cleveco, D C.Ohio, 59 F.Supp. 71, affirmed, C.C.A., 154 F.2d 605.

60. U S.—The J B Austin, Jr., D C N.Y., 33 F.2d 215.

61. U S.—Sacramento Nav. Co. v Salz, Cal., 47 S Ct. 368, 273 U.S 326, 71 L.Ed. 663.

Proceeding in rem or in personam. The exemption is available whether the proceeding be brought in rem[62] or in personam[63]

g. Availability of Exemption as against Third Persons; Collision

The exemption provision of the Harter Act is restricted to the rights and liabilities of owners and shippers as between themselves with respect to cargo, and does not affect liability to third persons or to other vessels for maritime torts, such as collision.

The exemption provision of the Harter Act is restricted to the rights and liabilities of owners and shippers as between themselves[64] with respect to cargo,[65] and does not affect liability to third persons[66] or to other vessels[67] for maritime torts, such as collision.[68] Thus, in the case of a collision, exemption from direct responsibility of the vessel to cargo owners granted by the Harter Act does not prevent recovery by the cargo against the noncarrier,[69] and recovery by the noncarrier in part against the carrier,[70] and, where the liability of the carrier to contribute to the noncarrier exists, it has been said that it can make no difference that the owner of the cargo recovers half damages against each vessel.[71]

h. Effect of Deviation

Except with respect to a deviation to save life or property at sea, deviation renders the exemption provisions of the Harter Act inapplicable.

Except with respect to a deviation to save life or property at sea,[72] deviation so far nullifies the carrier's contract as to render the exemption provisions of the Harter Act inapplicable[73] Within the meaning of this rule, a deviation is a departure, without necessity or reasonable cause, from the regular and usual course of a voyage[74]

i. Proceedings in Which Exemption May Be Claimed

Exemption under the Harter Act may properly be claimed in a direct action for damages and in proceedings brought by the owner for limitation of liability.

Exemption under the Harter Act may properly be claimed in a direct action for damages,[75] and in proceedings brought by the owner for limitation of liability.[76]

The effect of the exemption provision of the Harter Act, with respect to the rule that the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, is considered infra § 227.

j. Waiver of Benefits

The benefits of the Harter Act may be waived by the shipowner.

The benefits of the Harter Act may be waived by the shipowner[77] Thus, the carrier may by contract waive the statutory right to exemption.[78] Where

62. U.S.—Insurance Co. of North America v. Southern Transp. Co., C.C.A.Pa., 25 F.2d 103, certiorari denied Insurance Co. of North America v. The Bathgate, 48 S Ct 437, 277 U.S. 589, 72 L Ed 1002.
58 C.J. p 403 note 15.

63. U.S—The Bathgate, D.C.Pa., 19 F 2d 663, affirmed, C C A., Insurance Co. of North America v. Southern Transportation Co, 25 F. 2d 103, certiorari denied Insurance Co of North America v The Bathgate, 48 S Ct. 437, 277 U S 589, 72 L Ed 1002.

64. U S—The Delaware, N.Y., 16 S Ct. 516, 161 U.S. 459, 40 L Ed. 77—Norfolk, etc., R. Co. v. The Berkshire, D C R I, 59 F. 1007.

65. U S—Norfolk, etc., R. Co. v The Berkshire, supra.

66. U S.—Norfolk, etc., R Co. v. The Berkshire, supra.

67. U S.—The Delaware, N.Y., 16 S. Ct. 516, 161 U S. 459, 40 L.Ed. 771.

68. U.S—The Cockatoo, C.C.A N Y., 61 F.2d 889, certiorari denied Howard v. Randall & McAllister, 53 S Ct. 292, 287 U.S. 669, 77 L Ed 576.
58 C.J. p 403 note 22.

69. U.S—U. S. v Farr Sugar Corp., C A.N.Y., 191 F.2d 370, affirmed U. S. v. Atlantic Mut Ins Co., 72 S. Ct 666, 343 U S 236, 96 L Ed. ——
—The Cockatoo, C C A.N.Y, 61 F. 2d 889, certiorari denied Howard v Randall & McAllister, 53 S Ct 292, 287 U S 669, 77 L Ed 576.

70. U.S—U. S. v. Farr Sugar Corp, C A N Y, 191 F 2d 370, affirmed U. S v. Atlantic Mut Ins. Co., 72 S Ct 666, 343 U S 236, 96 L Ed ——
—The Cockatoo, C C.A.N Y, 61 F 2d 889, certiorari denied Howard v. Randall & McAllister, 53 S.Ct 292, 287 U S 669, 77 L Ed. 576.

71. U S—The Cockatoo, C C.A N Y, 61 F 2d 889, certiorari denied Howard v Randall & McAllister, 53 S Ct 292, 287 U S. 669, 77 L Ed. 576

72. U S—U. S. Shipping Board Emergency Fleet Corp. v Rosenberg, C C.A.Cal., 12 F.2d 721, reversed on other grounds 48 S Ct. 256, 276 U.S 202, 72 L Ed 531

73. U S—U. S v City of New York, D C.N Y., 8 F 2d 270.
58 C J. p 403 note 25.
Deviation generally see infra § 144

74. U S—Spencer Kellogg & Sons v. Buckeye S. S Co, C C A Ohio, 70 F.2d 136, certiorari denied 55 S Ct 74, 293 U S 562, 79 L.Ed. 663.

Acts held not deviation

(1) Stopping for a few minutes by a lake vessel at island passed on route to take on additional coal in accordance with custom was held not a "deviation" although coal was not needed to reach port or to meet any expected emergency.—Spencer Kellogg & Sons v. Buckeye S. S. Co, supra

(2) Stowage of cargo in trunk hatch which was battened down like all other hatches, although opening in it was eight feet higher than in the others, was held not a "deviation" in stowage—Spencer Kellogg & Sons v. Buckeye S S Co, supra.

75. U S.—In re California Nav, etc, Co, D C Cal., 110 F 678

76. U S—In re California Nav., etc., Co, supra.
Limitation of liability see infra §§ 239–257.

77. U S—The Grecian, C.C A N.Y., 78 F.2d 657.

78. U.S—Dreyfus v. Hedger Transp. Co., D C N.Y, 60 F.2d 571—Canadian Co-op. Wheat Producers v. Murphy & Hoffman, D C.N Y, 52 F. 2d 496—Dreyfus v. Marine Transit Corp, C C.A.N Y, 49 F 2d 215.
58 C J. p 404 note 33.

a charterer has assumed the marine risk of loss on the cargo, under the Harter Act he has been denied recovery against the owner on jettison following a nonnegligent stranding.[79]

§ 128. —— Causes of Loss or Damage within Exemption

a. In general
b. Unseaworthiness
c Improper navigation or management of ship
d. Dangers of sea
e. Seizure under legal process
f Saving life or property at sea
g. Inherent defect of cargo
h. Latent defects

a. In General

The carrier will not be held liable for loss or damage which is caused by one of the exceptions enumerated by statute unless it appears that its negligence contributed to the damage. The exemption from liability is limited to loss or damage arising from the causes specified by statute.

The carrier will not be held liable for loss or damage which is caused by one of the exceptions enumerated by statute[80] unless it appears that its negligence contributed to the damage.[81] The exemption from liability is limited to loss or damage arising from the causes specified by statute,[82] and will not be extended by implication to include exemption from liability for loss or damage arising from nonspecified causes[83] The carrier is relieved from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it[84] The exemption under the Harter Act is unavailable where the proximate cause of damage is a negligent act or omission in connection with the care and custody of cargo,[85] especially where other statutory provisions forbid insertion in the shipping contract of clauses exempting the carrier from liability for negligence with respect to care and custody of cargo.[86]

b. Unseaworthiness

(1) Under the Harter Act
(2) Under the Carriage of Goods by Sea Act

(1) Under the Harter Act

The Harter Act does not relieve the shipowner from the general duty to furnish a seaworthy vessel at the beginning of the voyage, change general rules as to warranty of seaworthiness, or affect general liability for damages to the cargo arising from unseaworthiness.

The Harter Act does not relieve the shipowner from the general duty to furnish a seaworthy vessel at the beginning of the voyage[87] and substitute therefor the less extensive obligation to use due diligence,[88] or change general rules as to warranty

Contracts providing that statutory exemption will apply in cases not within statute by own force see infra § 131.
Statutory restriction on right to contract for exemption see infra § 132

Contractual provision including marine insurance
Under steamship bills of lading providing that the rates named included marine insurance and that the carrier assumed liability for loss or damage caused by perils of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry, and other perils or misfortunes to the hurt or damage of the property including general average charges and expenses, but excluding risks of riots, war, or insurrections, the carrier waived the saving clauses of the statute and assumed full liability to cargo owners for loss or damage caused by marine perils—Great Lakes Transit Corp. v Interstate S S. Co., Ohio, 57 S Ct 915, 301 U S. 646, 81 L Ed. 1318.

Waiver under Canadian statute
Where under Canadian statute burden of proving unseaworthiness of vessel was cast on cargo owner and rules annexed to statute permitted carrier to surrender right provided such surrender was embodied in bill of lading issued to shipper, the rules imported the necessity of an explicit provision for a waiver or at least some provision from which a modification of the statutory rights must necessarily be inferred.—The Aarkes, D C N Y., 31 F Supp 8, affirmed, C C A., 122 F.2d 469.

79. U S.—Lewis v. Kotzebue Trading, etc., Co., D.C Wash, 236 F. 997.

80. U.S —George F Pettinos, Inc., v American Export Lines, D C.Pa, 68 F.Supp. 759, affirmed, C C A., 159 F.2d 247—The Vale Royal, D C Md., 51 F.Supp. 412.

Insufficiency of packing
The carrier is not liable for loss due to insufficiency of packing—The Rita Sister, D.C Pa., 69 F.Supp 480—The M V Silversandal, D C.N.Y, 26 F Supp 61, affirmed, C C.A., Bache v. Silver Line, 110 F.2d 60.

81. U.S.—George F. Pettinos, Inc. v. American Export Lines, D.C.Pa, 68 F.Supp 759, affirmed, C.C.A., 159 F. 2d 247—The Vale Royal, D C.Md, 51 F.Supp. 412.

82. U.S.—Farr, etc., Mfg. Co. v International Nav Co., D.C Pa., 94 F. 675, reversed on other grounds 98 F 636, 39 C C A. 197, affirmed 21 S Ct 591, 181 U S 218, 45 L Ed 830—Spreckles Sugar Co v. South Atlantic S. S. Line, D C.Ga., 49 F. Supp. 714.

83. Tex—Mallory SS. Co. v. Harriss-Irby Cotton Co, Civ.App, 204 S W. 789.
58 C.J. p 395 note 67.

84. U S—The Vallescura, N.Y., 55 S Ct. 194, 293 U S. 296, 79 L Ed. 373.

85. U S—W. T. Lockett Co. v. Cunard SS. Co., D.C N Y., 21 F 2d 191.
58 C.J p 396 note 84.

86. U S—The Jean Bart, D C.Cal., 197 F. 1002—The Germanic, D C N. Y., 124 F. 1, 59 C C A 521, affirmed 25 S Ct. 317, 196 U S 589, 49 L Ed. 610.

87. U S.—The Silvia, N Y, 19 S.Ct. 7, 171 U.S 462, 43 L Ed. 241.
58 C.J. p 395 note 69.
Duty of carrier to furnish seaworthy vessel generally see infra § 140.

88. U.S —The C. W. Elphicke, D.C. N.Y., 117 F. 279, affirmed 122 F. 439, 58 C.C.A. 421.
58 C.J. p 396 note 70.

of seaworthiness;[89] and it does not affect the shipowner's general liability for damages to the cargo arising from unseaworthiness.[90]

(2) Under the Carriage of Goods by Sea Act

Under the Carriage of Goods by Sea Act, neither the carrier nor the ship is liable for loss resulting from unseaworthiness unless caused by a failure to exercise due diligence to make the ship seaworthy, but where the ship was in fact unseaworthy at the time she sailed, her owner can be exculpated from liability only if due diligence was exercised to make her seaworthy.

Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(1), neither the carrier nor the ship is liable for loss resulting from unseaworthiness unless caused by a failure to exercise due diligence to make the ship seaworthy,[91] but where the ship was in fact unseaworthy at the time she sailed, her owner can be exculpated from liability only if due diligence was exercised to make her seaworthy.[92] The statutory exemption does not apply where the damage proximately resulted from the unseaworthiness of the vessel at the beginning of the voyage due to the failure of the shipowner and his agents to exercise due diligence,[93] and in this situation there is no substantial difference between the liability of the ship under the Harter Act and the Carriage of Goods by Sea Act.[94] If there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against the shipowner.[95]

The obligation of the carrier is to use due diligence,[96] and the carrier is not relieved from this obligation by the provisions of freight tariff rules certified by the Interstate Commerce Commission.[97] The obligation to use due diligence,[98] and the measure of due diligence,[99] to make the vessel seaworthy are the same under the Harter Act and the Carriage of Goods by Sea Act, and the words "due diligence" as used in the latter act have the same mean-

89. U.S.—The Turret Crown, C.C.A. N.Y., 297 F. 766, certiorari denied 44 S.Ct. 403, 264 U.S. 591, 68 L.Ed. 865

58 C.J. p. 396 note 71

Warranty of seaworthiness generally see infra § 140.

90. U.S.—The Cleveco, C.C.A. Ohio, 154 F.2d 605—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S.S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co., D.C.N.Y., 50 F.2d 270—Compania General De Tabacos De Filipinas v. U.S., C.C.A.N.Y., 49 F.2d 700, affirming, D.C., The Elkton, 35 F.2d 49.

58 C.J. p. 396 note 72.

91. U.S.—General Foods Corp. v. The Troubador, D.C.N.Y., 98 F. Supp. 207—The Vizcaya, D.C.Pa., 63 F.Supp. 898—The Vale Royal, D.C.Md., 51 F.Supp. 412—The Cyprıa, D.C.N.Y., 46 F.Supp. 816, affirmed, C.C.A., Ore S.S. Corp. v. D/S. A/S. Hassel, 137 F.2d 326—The Zarembo, D.C.N.Y., 44 F.Supp. 915, affirmed, C.C.A., Balfour Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486—Mente & Co. v. Isthmian S.S. Co., D.C.N.Y., 36 F. Supp. 278, affirmed, C.C.A., The Quarrington Court, 122 F.2d 266

Facts held not to show unseaworthiness

U.S.—The Temple Bar, C.C.A.Md., 137 F.2d 293.

Similar provisions of Canadian Water Carriage of Goods Act of 1936 construed

U.S.—Middleton & Co. (Canada), Limited, v. Ocean Dominion S.S. Corp., C.C.A.N.Y., 137 F.2d 619, certiorari denied 64 S.Ct. 432, 320 U.S. 802, 88 L.Ed. 484—The Aakre, C.C.A.N.Y., 122 F.2d 469, certiorari denied Waterman v. The Aakre, 62 S.Ct. 360, 314 U.S. 690, 86 L.Ed. 552

92. U.S.—Balfour, Guthrie & Co. v. American-West African Line, C.C.A.N.Y., 136 F.2d 320, certiorari denied 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486.

Ship held unseaworthy

(1) As to pipe and valve, where steamship sank by flooding following a break in main injection pipe and concurrent jamming of main injection valve.—Mente & Co. v. Isthmian S.S. Co., D.C.N.Y., 36 F.Supp. 278, affirmed, C.C.A., The Quarrington Court, 122 F.2d 266

(2) Where vessel operating where zero and sub-zero temperatures were to be expected, had an unprotected three-fourths inch water line in the cargo hold.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C. Mich., 32 F.Supp. 520.

(3) Where vessel had a frozen water line in her cargo hold when the hatches were closed and battened.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., supra

(4) Where there was a leaky steam line in cargo space utilized for banana powder.—Sanib Corp. v. United Fruit Co., D.C.N.Y., 74 F. Supp. 64.

93. U.S.—The Hill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470—The Cyprıa, D.C.N.Y., 46 F. Supp. 816, affirmed, C.C.A., Ore S.S. Corp. v. D/S A/S. Hassel, 137 F. 2d 326—Ætna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C. Mich., 32 F.Supp. 520

94. U.S.—The Bill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470

Necessity of seaworthiness or diligence under Harter Act see supra § 127 b.

Standards or requirements

The Carriage of Goods by Sea Act does not reduce the standards by which the seaworthiness of a vessel is to be tested, or the requirements which constitute exercise of due diligence.—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F. 2d 293—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F.Supp. 520.

95. U.S.—The Vizcaya, D.C.Pa., 63 F.Supp. 898.

96. U.S.—The Vale Royal, D.C.Md., 51 F.Supp. 412—The Vermont, D.C.N.Y., 47 F.Supp. 877.

97. U.S.—The Vermont, supra

Particular rules held not to relieve carrier from obligation

U.S.—The Vermont, supra.

98. U.S.—The Zarembo, D.C.N.Y., 44 F.Supp. 915, affirmed, C.C.A., Balfour, Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486.

99. U.S.—The Hill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470

Character and extent of diligence required under Harter Act see supra § 127 c.

ing as that assigned to them in decisions construing the words as used in the Harter Act.[1] Due diligence within the provision is that diligence which would or should have been exercised under the circumstances by a competent vessel owner[2] and prudent officers of the ship,[3] and it depends on the facts and circumstances of the particular case.[4] The duty of the owner is not satisfied by delegating it to a third person,[5] or to the master or crew of the ship,[6] although the master and crew must also exercise due diligence[7] in the use of the equipment of the vessel before and at the beginning of the voyage.[8] A mere superficial inspection of the ship is insufficient to establish an exercise of due diligence on the part of the owner to make her seaworthy.[9]

The shipowner and the crew must be held to familiarity with the particular construction and design of the ship and its apparatus, and with the characteristics and effect of the particular cargoes which the vessel carries,[10] and when loss occurs due to a combination of facts arising from particularities or peculiarities of ship construction in combination with cargo carried, it is not a sufficient defense to the ship to plead ignorance of the ship's agents with respect to such matters.[11] Factors which enter into the test of seaworthiness include the nature of the cargo,[12] the time of the year in which it is to be carried,[13] and the conditions reasonably to be expected at that time of year.[14] General practice is not necessarily the test by which seaworthiness is to be determined,[15] and the practice of carriers of nonperishable cargoes is not necessarily relevant in determining the seaworthiness of a vessel transporting perishable cargoes.[16] Furthermore, an installation which may have been considered proper thirty years ago is not necessarily the standard by which seaworthiness is to be measured today.[17]

c. Improper Navigation or Management of Ship

(1) In general
(2) What constitutes navigation or management of ship

(1) In General

Under the Harter Act shipowners are exempt from liability for loss resulting from faults or errors in the navigation or management of the ship where compliance

1. U.S.—Spencer Kellogg & Sons v Great Lakes Transit Corp., D.C Mich, 32 F Supp. 520

2. U S —General Foods Corp. v The Troubador, D.C.N.Y., 98 F Supp. 207—Spencer Kellogg & Sons v Great Lakes Transit Corp., D.C Mich., 32 F Supp. 520

Acts held not to constitute due diligence

U.S —The Bill, D C Md., 47 F.Supp 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc, 145 F.2d 470

Requirements of due diligence held satisfied

U S —Mente & Co v. Isthmian S. S. Co, D C N Y, 36 F Supp 278, affirmed, C C A., The Quarrington Court, 122 F.2d 266.

3. U S.—Spencer Kellogg & Sons v. Great Lakes Transit Corp, D C. Mich, 32 F Supp 520.

4. U S —The Bill, D C.Md, 47 F. Supp. 969, affirmed, C C.A., Lorentzen v Brazil Oiticica, Inc., 145 F 2d 470

5. U S —The Otho, D C N Y., 49 F Supp. 945, affirmed, C C A., Huilever, S A Division, Huileries Du Congo Belge v. The Otho, 139 F.2d 748, certiorari denied American West African Line v. Huilever, S A. Division Huileries Du Congo Belge, 64 S Ct. 1047, 322 U S 735, 88 L Ed 1568—The Zarembo, D C. N.Y., 44 F Supp 915, affirmed, C C. A, Balfour, Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S.Ct. 437, 320 U S 804, 88 L Ed 486 —Mente & Co v Isthmian S. S. Co, D C N.Y., 36 F Supp. 278, affirmed, C C A., The Quarrington Court, 122 F 2d 266

Loading of dangerous cargo

Where water common carrier accepted cargo of ammonium nitrate fertilizer which was extremely dangerous cargo because of possibility of internal combustion and explosion, reliance by carrier upon general supervision of loading of fertilizer by local fire department, Coast Guard, and representatives of New York Board of Underwriters, was not sufficient diligence with respect to safety of general cargo to relieve carrier of liability for damage to cargo which resulted from fire and explosion several days after vessel left United States—Accinanto, Limited v. Cosmopolitan Shipping Co., D.C Md, 99 F Supp. 261.

6. U S —The Bill, D C.Md, 47 F. Supp 969, affirmed, C C A., Lorentzen v Brazil Oiticica, Inc, 145 F 2d 470.

7. U S —The Bill, D C Md, 47 F. Supp. 969, affirmed, C C.A, Lorentzen v. Brazil Oiticica, Inc, 145 F 2d 470—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D C Mich, 32 F.Supp. 520.

8. U S —Spencer Kellogg & Sons v. Great Lakes Transit Corp, supra.

9. U.S —Ore Steamship Corp. v. D/S A/S Hassel, C.C A N.Y, 137 F.2d 326—The Vizcaya, D.C.Pa, 63 F. Supp. 898.

10. U S —The Bill, D.C Md., 47 F Supp. 969, affirmed, C.C A, Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470.

11. U.S —The Bill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v Brazil Oiticica, Inc., 145 F. 2d 470

Want of conscious or intentional negligence held insufficient

U S —The Bill, D.C.Md, 47 F.Supp. 969, affirmed, C.C A, Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470.

12. U S.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C. Mich, 32 F.Supp 520.

13. U S —Spencer Kellogg & Sons v Great Lakes Transit Corp., supra.

14. U.S —Spencer Kellogg & Sons v. Great Lakes Transit Corp., supra

15. U S.—Spencer Kellogg & Sons v Great Lakes Transit Corp, supra

16. U S.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., supra.

Uninsulated water line in cargo hold

The practice of carriers of nonperishable cargoes, such as stone, coal and ore, not to insulate water lines in cargo holds on the Great Lakes, was not relevant in determining seaworthiness of vessel transporting cargo of wheat, as regards liability for damage to wheat caused when water line in cargo hold froze and permitted water to drain into cargo. —Spencer Kellogg & Sons v. Great Lakes Transit Corp, supra.

17. U S —Spencer Kellogg & Sons v. Great Lakes Transit Corp, supra

with the rule as to seaworthiness or diligence has been shown. The Carriage of Goods by Sea Act carries on the policy of the Harter Act but it removes the condition of due diligence.

Exemption will be granted under the provision of the Harter Act, 46 U.S.C.A. § 192, exempting owners from liability for loss resulting from "faults or errors" in the navigation or management of the ship, where compliance has been shown with the rule as to seaworthiness or diligence with respect thereto, and where it further appears that the proximate cause of the loss or damage was improper navigation or management to which the owner was not personally privy;[18] but the statutory exemption has been held not to apply in the absence of negligence on the part of the crew or a member thereof.[19] The Carriage of Goods by Sea Act of 1936, 46 U.S.C.A. § 1300 et seq, carries on the policy of the Harter Act, but it removes the condition of due diligence for the exemption from liability of the carrier or ship for "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."[20] It has been held that, under the Carriage of Goods by Sea Act, where unseaworthiness of the vessel, caused by the failure of the carrier to exercise due diligence, and negligence in the management of the ship concur in causing the loss, the carrier is liable for the loss.[21]

Words "fault" or "error," as used in the Harter Act, are not synonymous,[22] but signify different causes or circumstances of loss.[23] "Fault" imports blame,[24] while "error" may arise from ignorance or mistake alone.[25]

Proximate cause of loss In order to secure exemption based on negligence in the navigation or management of the ship, it is necessary to show that such negligence was the proximate cause of loss.[26]

(2) What Constitutes Navigation or Management of Ship

(a) In general

(b) Equipment

(c) Stranding or striking obstructions

(a) In General

Where the act or omission alleged as a cause of loss related primarily to the ship it will be classified as one of navigation or management, but where it related primarily to other things, the fact that it incidentally affected the ship will not change its classification to that of navigation or management. Negligent acts or omissions affecting cargo may or may not be faults or errors of navigation or management in accordance with the circumstances involved.

The words "in the navigation or in the management of the ship" as used in the Carriage of Goods by Sea Act have the same meaning as that assigned to them in the decisions construing these words as used in the Harter Act.[27] Under the Harter Act

18. U S —Luria Bros. & Co. v. Eastern Transp. Co, C.C.A.N.Y., 89 F.2d 900—Ravenscroft v. U. S, C.C.A.N.Y., 88 F.2d 418, certiorari denied 57 S Ct. 940, 301 U.S. 707, 81 L Ed 1361—The James Griffiths, C C.A. Wash, 84 F.2d 785, certiorari denied Sperry Flour Co v. Coastwise Steamship & Barge Co, 57 S Ct 315, 299 U.S. 612, 81 L Ed. 452, rehearing denied 57 S Ct. 430, 300 U S 686, 81 L Ed. 888—U. S v Los Angeles Soap Co, C C A Cal., 83 F. 2d 875—U S Steel Products Co v. American & Foreign Ins Co., C C.A N.Y., 82 F 2d 752—Kalbfleisch Corporation v. U S., D C Mass, 53 F.2d 867—Compania General De Tabacos De Filipinas v. U. S., C.C.A.N.Y., 49 F.2d 700—U. S. v. The Esso Belgium, Atlantic Mut Ins. Co, Intervener, D.C.N.Y, 90 F Supp 836, reversed on other grounds, C.A., U. S. v. Farr Sugar Corp, 191 F.2d 370, affirmed U. S. v. Atlantic Mut. Ins. Co, 72 S.Ct 666, 343 U.S 236, 96 L Ed. —— —Atlantic Towing Co. v. The Caliche, D.C.Ga., 47 F.Supp 610—The Havana, D.C N.Y., 45 F. Supp. 244—Daisy Philippine Underwear Co. v. U. S. Steel Products Co., D.C.N.Y., 11 F Supp. 175, affirmed, C.C.A., U. S. Steel Products Co. v. American & Foreign Ins. Co, 82 F 2d 752—The Indien, D C Cal., 5 F Supp. 349, affirmed, C C.A., 71 F 2d 752

58 C J. p 396 note 89, p 397 note 90

Immunities granted under Harter Act as dependent on exercise of due diligence to make vessel seaworthy in general see supra § 127 b (1).

Injury to merchandise on towed ship due to fault or error in navigation or management of towing vessel see supra § 127 f (2).

19. U.S —The Indien, C.C A Cal, 71 F.2d 752

20. U S —U. S. v. Farr Sugar Corp, C.A N Y., 191 F.2d 370, affirmed U. S. v. Atlantic Mut Ins. Co, 72 S.Ct. 666, 343 U S. 236, 96 L Ed. ——

Exemptions of Carriage of Goods by Sea Act as not conditioned on due diligence to make vessel seaworthy generally see supra § 126 b.

Policy expressed by statutes of Canada and United States

The policy of Canada, as expressed in the Canadian Water Carriage of Goods Act, and of the United States, as expressed in its Carriage of Goods by Sea Act, as to the merchant marine, accords to water carrier full protection against negligent navigation of its own servants.—The Aakre, C C A.N.Y., 122 F 2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U.S. 690, 86 L Ed 552.

21. U S.—Spencer Kellogg & Sons v Great Lakes Transit Corp, D.C Mich, 32 F Supp 520.

Liability under Carriage of Goods by Sea Act for injury resulting from unseaworthiness of vessel caused by failure of carrier to exercise due diligence generally see supra subdivision b (2) of this section.

22. U S —The Manitoba, D.C N Y, 104 F. 145

23. U S —The Manitoba, supra.

24. U.S —The Manitoba, supra.

25. U.S —The Manitoba, supra.

26. U.S —The Manitoba, supra.

58 C J. p 400 note 53.

Unseaworthiness as concurring cause

If facts disclose unseaworthiness resulting from vessel owner's failure to exercise due diligence to make vessel seaworthy, which concurs with negligent navigation in causing the loss, owner will be liable —The Temple Bar, D.C Md., 45 F.Supp 608, affirmed, C.C.A., 137 F 2d 293

27. U.S —Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C. Mich., 32 F Supp 520.

one of the tests used in determining whether an act constitutes negligence in the management of the ship is the purpose for which the act was done or left undone.[28] Where the act or omission alleged as a cause of loss related primarily to the ship, it will be classified as one of navigation or management,[29] but where the act or omission related primarily to other things, the fact that it incidentally affected the ship will not change its classification to that of navigation or management.[30]

Care and custody of cargo generally. Negligent acts or omissions affecting cargo may or may not be faults or errors of navigation or management, in accordance with the circumstances involved.[31] The test is the primary purpose involved.[32] If such primary purpose was navigation or management of the ship, the fact that the act or omission incidentally affected cargo will not destroy the right to exemption;[33] on the other hand, the fact that an act performed primarily in connection with cargo incidentally affects the ship does not make it an act of navigation or management.[34] Exemption sought as for improper navigation and management of the ship will be denied where it appears that the substantial cause of loss was negligence in the care or custody of cargo,[35] such as improper handling,[36] loading,[37] unloading,[38] stowage,[39] or delivery[40] of cargo.

Change of course. Any error of the master as to the advisability of a change of course relates to the navigation of the ship.[41]

Compass and navigational data. Obtaining sufficient compass data,[42] as by supplementing an insufficient deviation record,[43] relates to navigation and not to seaworthiness, so that any fault or error in such respect is ground for exemption.[44] Failure to supply adequate charts, light lists, and similar navigational data, or navigation without it, may constitute negligent navigation or management for which the officers of the ship are chargeable;[45] but

28. U.S.—Spencer Kellogg & Sons v Great Lakes Transit Corp., supra

Mere visual examination of ship's cargo port by owner's representatives, without moving cargo, after collision with wall, was held not error in management, but lack of due diligence to make ship seaworthy.—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900.

29. U.S.—Ravenscroft v U. S., C.C.A.N.Y., 88 F.2d 418, certiorari denied 57 S.Ct. 940, 301 U.S. 707, 81 L.Ed 1361.
58 C.J. p 397 note 98.

Failure to give distress signals
U.S.—Luria Bros & Co v. Eastern Transp. Co., C.C.A.N.Y., 89 F.2d 900

Failure to replace cap on sounding pipe
U.S.—The Point Chico, D.C.Tex., 32 F.Supp. 484, affirmed, C.C.A., 122 F. 2d 1.

Negligent puncture of soil pipe after ship left port
U.S.—The J. L. Luckenbach, C.C.A. N.Y., 65 F.2d 570, affirming, D.C., 1 F.Supp. 692.

Selecting unsafe anchorage
U.S.—Luria Bros & Co v. Eastern Transp. Co., C.C.A.N.Y., 89 F.2d 900.

30. U.S.—The Jean Bart, D.C.Cal., 197 F. 1002—The Germanic, D.C.N.Y., 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed 610.

31. U.S.—The Germanic, D.C.N.Y., 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed 610—Jay Wai Nam v Anglo-American Oil Co., Cal., 202 F. 822, 121 C.C.A. 130.

32. U.S.—Ravenscroft v U. S., C.C.A.N.Y., 88 F.2d 418, certiorari denied 57 S.Ct 940, 301 U.S. 707, 81 L.Ed. 1361
58 C.J. p 397 note 6.

33. U.S.—Ravenscroft v. U. S., supra.
58 C.J. p 397 note 7.

34. U.S.—The Jean Bart, D.C.Cal., 197 F. 1002—The Germanic, D.C.N.Y., 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed 610

35. U.S.—Ravenscroft v. U. S., C.C.A.N.Y., 88 F.2d 418, certiorari denied 57 S.Ct 940, 301 U.S. 707, 81 L.Ed 1361
58 C.J. p 397 note 9

Attending hatches and ventilators is not a matter of ship's management but care of cargo.—The Asturias, D.C.N.Y., 40 F.Supp 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.

Negligent failure to ventilate cargo was held not fault or error in navigation or management of vessel from consequences of which vessel would be relieved by statute, since management involved was management of cargo, not management of vessel within the act.—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed 373—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32.

Failure to close valve in water line which resulted in damage to cargo from a break in the line has been held not negligence in the management of the ship but negligence in the care and custody of the cargo.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F. Supp. 520

36. U.S.—The Breedijk, D.C.Md., 22 F.2d 328.

37. U.S.—The Oneida, N.Y., 128 F. 687, 63 C.C.A. 239, certiorari denied 24 S.Ct. 856, 194 U.S. 632, 48 L. Ed 1159—The Germanic, D.C.Cal., 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed. 610.

38. U.S.—The Germanic, N.Y., 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed. 610.
58 C.J. p 397 note 12.

39. U.S.—The Willfaro, D.C.Cal., 9 F.2d 940, affirmed, C.C.A., Williams SS Co v Wilbur, 9 F.2d 622, certiorari denied 46 S.Ct. 482, 271 U. S. 666, 70 L.Ed. 1140
58 C.J. p 397 note 13.
Improper stowage generally see infra § 141.

40. U.S.—The Germanic, D.C.Cal. 124 F. 1, 59 C.C.A. 521, affirmed 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed 610

41. U.S.—Corsar v. Spreckels, Cal., 141 F. 260, 72 C.C.A. 378.
58 C.J. p 398 note 16.

42. U.S.—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

43. U.S.—The Oritani, D.C.Pa., 40 F. 2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

44. U.S.—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

45. U.S.—The Maria, C.C.A.Va., 91 F.2d 819.

it does not follow that the owner is thereby relieved by the Harter Act from liability from ensuing disaster, because the same circumstances may also amount to failure on his part to use due diligence to make the vessel seaworthy.[46]

Hold. Damage arising from negligent failure to inspect,[47] or otherwise ascertain conditions in[48] the ship's hold, results from a fault or error in the management of the ship.

Repairs during voyage. Fault or error of the master as to the necessity for,[49] or extent of,[50] repairs after injury to the ship during the voyage relates to the management of the ship.

Time and manner of leaving port. The navigation and management of a vessel within the meaning of the exemption statutes include the determination of the time[51] and manner[52] of leaving port, which is the prerogative of the master. Where a vessel is seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage.[53] Where the owner was personally privy to the negligence, however, exemption will be denied.[54] Leaving harbor without a pilot is, if a pilot was necessary, an error of management or navigation.[55]

Trimming ship. Acts performed for the purpose of trimming ship relate to navigation or management,[56] unless it appears that the primary purpose of such acts was to accomplish something relating to cargo.[57]

(b) Equipment

The "navigation" and "management" of the ship include the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; but failure to have equipment in good condition for use at the commencement of the voyage is a want of due diligence, and not a fault in the navigation or management of the ship.

The "navigation" and "management" of the ship, as such words are used in the statutes granting exemption for negligence with respect thereto, include the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas.[58] Failure to have equipment in good condition for use at the commencement of the voyage is a want of due diligence,[59] and not a fault in the navigation or management of the ship.[60] The furnishing of proper refrigerating apparatus for the safe transportation of cargo requiring refrigeration

46. U.S.—The Maria, supra.
Duty of due diligence to render the ship seaworthy as including the furnishing of charts, light lists, and other navigational data generally see supra § 127 c (1)

47. U.S.—Ravenscroft v. U. S., C.C.A.N.Y., 88 F.2d 418, certiorari denied 57 S.Ct. 940, 301 U.S. 707, 81 L.Ed. 1361.
58 C.J. p 399 note 40.

48. U.S.—The British King, N.Y., 92 F. 1018, 35 C.C.A. 159.
58 C.J. p 399 note 41

Suspected fire

(1) Even if captain was negligent in causing steam and water to be let into hold at sea, and under mistaken belief that cotton in hold was on fire, without first inspecting hold, resulting damage to cotton could not be recovered since cotton was damaged primarily in management of ship in effort to save ship from what seemed to be impending disaster from fire.—Ravenscroft v. U. S., C.C.A.N.Y., 88 F.2d 418, certiorari denied 57 S.Ct. 940, 301 U.S. 707, 81 L.Ed. 1361.

(2) Where fire was erroneously thought to be smoldering in cotton and cotton was wet at sea to extinguish fire, damage due to additional wetting, after ship reached port as required to securing permission to dock, could not be recovered since additional wetting was required as part of management of ship.—Ravenscroft v. U. S., supra.

49. U.S.—Corsar v. J. D. Spreckels, etc., Co., Cal., 141 F. 260, 72 C.C.A. 378.
58 C.J. p 399 note 42.

50. U.S.—The Guadeloupe, D.C.N.Y., 92 F. 670
58 C.J. p 400 note 43.

51. U.S.—Hanson v. Haywood Bros., etc., Co., Ill., 152 F. 401, 81 C.C.A. 527.

52. U.S.—Hanson v. Haywood Bros., etc., Co., supra

Unberthing without tug's assistance

Master's fault, if any, in unberthing steamer without tugs' assistance, with result that vessel swung against piling at end of pier when struck by ebb tide, causing leak in drain pipe, was error of navigation within protection of Harter Act.—The Harry Luckenbach, D.C.N.Y., 8 F.Supp. 507.

53. U.S.—Hanson v. Haywood Bros., etc., Co., Ill., 152 F. 401, 81 C.C.A. 527.

54. U.S.—Texas, etc., SS. Co. v. Parker, C.C.A.Tex., 263 F. 864, certiorari denied 40 S.Ct. 485, 253 U.S. 488, 64 L.Ed. 1026.
58 C.J. p 400 note 49.

Consultation at port of refuge

Where at port of refuge vessel was boarded by agent of operators, port superintendent, and other officials of United States Shipping Board, who discussed ways and means of handling damage to ship and cargo, if vessel sailed from such port in unseaworthy condition, fault would be attributable to shipowner and could not be regarded as fault of navigation or management within exceptions of Harter Act.—U.S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875.

55. U.S.—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

56. U.S.—Jay Wai Nam v. Anglo-American Oil Co., Cal., 202 F. 822, 121 C.C.A. 130.

57. U.S.—The Germanic, N.Y., 25 S.Ct. 317, 196 U.S. 589, 49 L.Ed. 610.
58 C.J. p 400 note 52.

58. U.S.—The McAllister Bros., D.C.N.Y., 18 F.Supp. 106.
58 C.J. p 398 note 19.

59. U.S.—Stahl v. The Niagara, N.Y., 84 F. 902, 28 C.C.A. 528.

60. U.S.—Stahl v. The Niagara, supra
58 C.J. p 398 note 22.

is within the general duty of due diligence as to seaworthiness.[61]

Failure to use Where the failure to use equipment occurs at the beginning of the voyage, and where it further appears that such failure rendered the ship unseaworthy, the negligence is a breach of the duty of diligence,[62] and exemption cannot be secured on the ground that failure to use equipment was a mere fault or error in navigation or management.[63] The act or omission is a fault or error of navigation serving as a proper basis for exemption, however, where the failure to use equipment occurs during the course of the voyage,[64] or where, although originating at the commencement of the voyage, such failure did not become operative as negligence until a later period.[65] Thus, if the ship is well found in hull and gear, but the master and crew know that she is not made ready as she rides, and expect to fit her with what is at hand when the occasion arises, it is an error of management if they fail to do so.[66]

In accordance with the foregoing principles, exemption has been granted or denied where the loss resulted from negligent failure to close a port,[67] cover a hatch,[68] fasten a hold cover,[69] open a sluice gate,[70] screw plugs in sounding pipes,[71] or use pumps[72]

Negligent or improper use. The negligent use of proper equipment of the ship, operating as a cause of loss, is a fault or error in navigation or management, serving as legal basis for exemption[73] So use of equipment without test reasonably necessary to show whether it was in proper working condition is a fault or error in navigation or management.[74] Improper use of refrigerating apparatus designed primarily for cooling cargo is not ground for exemption, because the negligence relates to care and custody of cargo rather than to management of the ship.[75]

(c) Stranding or Striking Obstructions

Negligence in the stranding of a ship or in striking an obstruction is a fault or error in the navigation or management of the ship.

Exemption will be granted as for a fault or error in navigation or management of the ship, where damage results from negligence in the stranding of the ship[76] or in striking an obstruction.[77]

Jettison. It has been held that, where the proximate cause of loss is a voluntary jettison of cargo

61. U S—Martin v. The Southwark, Pa, 24 S.Ct 1, 191 U S. 1, 48 L.Ed. 65.
58 C.J p 399 note 37.

62. U S.—International Nav Co. v Farr, etc, Mfg Co, Pa, 21 S Ct. 591, 181 U S 218, 45 L Ed 830—The Asuarca, D C N Y, 291 F. 73, affirmed, C.C.A., 291 F 77.

63. U S—International Nav Co v Farr, etc, Mfg Co, Pa, 21 S.Ct. 591, 181 U S. 218, 45 L Ed. 830.
58 C J p 398 note 24.

64. U S.—The British King, N Y., 92 F 1018, 35 C C.A. 159—The Sandfield, N.Y, 92 F 663, 34 C C A. 612.

65. U S—The Silvia, N Y, 19 S Ct. 7, 171 U S. 462, 43 L Ed 241.

Canadian Water Carriage of Goods Act

Failure of officers of Norwegian vessel, which was stranded while carrying goods to Bermuda under bills of lading incorporating Canadian Water Carriage of Goods Act to bring chart which was aboard vessel up to date, or otherwise to use the information available when navigating in vicinity of Bermuda, was a "fault in navigation or management," for which carrier was not liable—Middleton & Co (Canada), Limited, v Ocean Dominion S S Corp., C.C A.N.Y., 137 F.2d 619, certiorari denied 64 S.Ct. 432, 320 U.S. 802, 88 L Ed 484.

66. U.S—Compania General De Tabacos De Filipinas v. U. S., C.C A. N Y., 49 F 2d 700.

67. U S—The Silvia, N.Y, 19 S.Ct. 7, 171 U S 462, 43 L Ed. 241.
58 C J. p 398 note 29.

68. U S—The Mississippi, N Y., 120 F 1020, 56 C C A 525.
58 C J. p 398 note 30.

69. U S.—The Steel Navigator, C.C. A N.Y., 23 F 2d 590.
58 C.J p 398 note 31

70. U.S.—The Sandfield, N.Y, 92 F. 663, 34 C C A 612.
58 C.J. p 398 note 32.

71. U S—The Carisbrook, D C Mass, 247 F. 583.
58 C.J p 398 note 33.

72. U S—The Ontario, D C N.Y, 106 F. 324, affirmed 115 F. 769, 53 C C.A. 199.
58 C J. p 398 note 34.

73. U.S—The McAllister Bros., D.C N.Y, 18 F Supp. 106
58 C.J p 399 note 35.

Charts, light books, and supplements

U S—Daisy Philippine Underwear Co. v. U. S. Steel Products Co, D. C N Y, 11 F Supp 175, affirmed, C C.A., U. S. Steel Products Co v American & Foreign Ins Co, 82 F 2d 752.

74. U S.—The Mexican Prince, D.C N.Y., 82 F. 484, affirmed 91 F. 1003, 34 C C A. 168, certiorari denied 19 S Ct. 887, 174 U S. 801, 43 L.Ed 1187.
58 C.J. p 399 note 36.

75. U S—The Jean Bart, D.C.Cal, 197 F 1002
58 C J. p 399 notes 38, 39

76. U S—The James Griffiths, C C A. Wash, 84 F 2d 785, certiorari denied Sperry Flour Co v. Coastwise Steamship & Barge Co., 57 S Ct 315, 299 U S 612, 81 L Ed. 452, rehearing denied 57 S Ct 430, 300 U. S 686, 81 L Ed 888—The Havana. D C.N.Y, 45 F Supp. 244.
58 C J. p 400 note 44.

77. U S—The Nettie Quill, D.C Ala., 124 F. 667.

Rock off lighthouse

(1) Striking a rock off a lighthouse when the vessel was passing too close to the lighthouse and it was known that many rocks were in the neighborhood thereof has been held to be a fault or error in navigation, and owners who did not exercise due diligence in making the vessel seaworthy were held not exempt from liability for damage to the cargo under the Harter Act—The Heddernheim, D C.N.Y., 39 F Supp. 558.

(2) The owners in such case may not claim exemption on the ground that the blame for striking the rock should be passed on to the government pilot on board the vessel where the owners issued directions instructing ships' officers to keep check on the pilot on the basis of sea charts, special charts, and sailing manuals. —The Heddernheim, supra.

following negligent stranding of the ship, exemption claimed on the ground of fault or error in navigation will be denied.[78]

d. Dangers of Sea

The Harter Act relieves the vessel and her owners from liability for losses resulting from dangers of the sea if the owner has exercised due diligence to make the vessel seaworthy. The Carriage of Goods by Sea Act carries on the policy of the Harter Act, but it removes the condition of due diligence for the exemption from liability.

The Harter Act, 46 U.S.C.A. §§ 190–195 relieves the vessel and her owners from liability for losses resulting from dangers of the sea if the owner has exercised due diligence to make the vessel seaworthy.[79] The Carriage of Goods by Sea Act of 1936, 46 U.S.C.A. § 1300 et seq, carries on the policy of the Harter Act, but it removes the condition of due diligence for the exemption from liability.[80] If the loss or damage proximately resulted from causes other than dangers of the sea, exemption will be denied under the statutes,[81] but where the proximate cause of damage was a danger of the sea, exemption will be granted.[82]

Under a statutory exemption of liability, the phrase "dangers of the sea" has a settled meaning.[83] Perils of the sea or dangers of the sea mean those perils which are peculiar to the sea,[84] and which are of an extraordinary nature or arise from irresistible force or overwhelming power,[85] and which cannot be guarded against by the ordinary exertions of human skill and prudence.[86] Exemption sought under the statutory clauses may be granted where damage resulted from an extraordinary occurrence,[87] such as nonnegligent stranding of the ship[88] or the striking of an obstruction.[89] Ordinary occurrences reasonably to be anticipated,[90] or dan-

78. U S—The Mary F Barrett, D C. Pa, 270 F 618, reversed on other grounds, C.C.A., 279 F. 329.

79. U.S.—U. S. v. Farr Sugar Corp, C.A.N Y., 191 F.2d 370, affirmed U. S. v. Atlantic Mut Ins. Co, 72 S. Ct. 666, 343 U S. 236, 96 L Ed ——Automobile Ins Co. of Hartford, Conn., v Hart-Wood Lumber Co, C C.A.Cal., 105 F 2d 387—The Josephine, C.C A.Pa, 49 F 2d 207—The Indien, D C.Cal., 5 F Supp. 349, affirmed, C C A., 71 F 2d 752

Immunities granted under Harter Act as dependent on exercise of due diligence to make vessel seaworthy in general see supra § 127 b (1).

80. U S—U S. v. Farr Sugar Corp, C.A.N.Y., 191 F.2d 370, affirmed U. S v. Atlantic Mut. Ins Co., 72 S. Ct. 666, 343 U.S. 236, 96 L Ed ——The Vizcaya, D.C Pa., 63 F.Supp 898—The Cypria, D C N.Y, 46 F Supp. 816, affirmed, C.C.A., Ore S S Corp. v D/S. A/S. Hassel, 137 F. 2d 326—The Schickshinny, D.C. Ga., 45 F.Supp. 813

Exemptions of Carriage of Goods by Sea Act as not conditioned on due diligence to make vessel seaworthy generally see supra § 126 b.

81. U.S.—The Schickshinny, supra.
58 C.J. p 401 note 69

Negligent stowage

Where barrels of lard on board ship were badly stowed, and because of fault of ship in that respect the barrels shifted, broke loose, and caused damage to cargoes of cotton and lumber, the carrier was liable for damage to cotton and lumber, notwithstanding contention that ship encountered very severe weather on voyage which caused the lard to shift.—The Schickshinny, supra.

82. U.S.—Duche v. Brocklebank, D C N Y., 35 F 2d 184, affirmed, C C A., 40 F 2d 418.
58 C J p 401 note 70.

83. U S—Nord-Deutscher Lloyd v. Insurance Co, of North America, Md, 110 F. 420, 49 C C A. 1.

84. U S—Waterman S S Corp. v. U. S Smelting, Refining & Min Co., C C A.La, 155 F 2d 687, certiorari denied 67 S Ct 115, 329 U S. 761, 91 L Ed 656.

85. U.S—Waterman S. S Corp. v. U. S Smelting, Refining & Min Co., supra—The Cleveco, D.C Ohio, 59 F.Supp. 71, affirmed, C C.A, 154 F 2d 605.

86. U S—Waterman S. S Corp. v. U. S. Smelting, Refining & Min. Co., C C A La, 155 F 2d 687, certiorari denied 67 S Ct 115, 329 U S 761, 91 L.Ed. 656—The Georgian, D.C Fla, 4 F Supp. 718, affirmed, C.C A., 76 F.2d 550

Cal.—Blake, Moffitt & Towne v. Luckenbach S. S Co, 6 P 2d 121, 120 Cal.App Supp 775.

Similar definitions

(1) Something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety—The Cleveco, C C A Ohio, 154 F 2d 605, 615.

(2) Conditions which are so extraordinary or catastrophic as to overcome those safeguards by which skillful and diligent seamen ordinarily bring ship and cargo to port in safety.—The Georgian, D.C Fla, 4 F.Supp 718, 726, affirmed, C.C.A., 76 F.2d 550

(3) All marine casualties resulting from the violent action of the elements, as distinguished from their natural silent influence upon the fabric of the vessel, casualties which may, and not consequences which must, occur.—National Grocery Co. v Olsen, 108 P 2d 320, 6 Wash.2d 491.

87. U S—Duche v. Brocklebank, D. C.N.Y., 35 F 2d 184, affirmed, C.C. A., 40 F 2d 418
58 C.J p 400 note 57.

"Witch tide"

Danger of being caught in "witch tide" caused by action of wind, tide, and spring freshets was a peril of the sea—Hartford & New York Transp Co. v. Rogers & Hubbard Co., C C.A Conn., 47 F.2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co, 51 S. Ct. 483, 283 U S. 835, 75 L Ed. 1446.

88. U.S—American Trading Co. v Fairhaven Co., D.C Cal, 10 F 2d 981

89. U S—The Nettie Quill, D.C Ala, 124 F. 667.

Knowledge of rocks

Where evidence disclosed that vessel was passing too close to lighthouse when it was known that many rocks were in neighborhood of lighthouse, striking of rock off the lighthouse was not a "peril of the sea"—The Heddernheim, D.C N.Y., 39 F Supp 558.

90. U.S.—The Schickshinny, D C Ga, 45 F Supp. 813.
58 C J. p 400 note 60.

Severe weather which was expectable during the winter season did not amount to a "peril of the sea"—The Norte, D C Pa, 69 F Supp 881, motion denied 71 F Supp 147—The Vizcaya, D C Pa., 63 F.Supp. 898

Storm of not extreme violence

U S.—The Vizcaya, D.C.Pa, 63 F Supp. 898—The Cypria, D C N.Y, 46 F Supp. 816, affirmed, C.C A, Ore S S. Corp. v D/S. A/S Hassel, 137 F.2d 326—The Emilia, D C N.Y., 13 F.Supp. 7.

gers which would not have been such had the owner complied with his duty of diligence to provide a seaworthy ship,[91] are not dangers, perils, or accidents of the sea serving as basis for exemption.

It has been stated that the degree of violence is not the sole, or even the real, test of whether loss arose from storms constituting a sea peril under the exemption provisions, the question depending not on a verbal definition of "sea peril," but on the findings of fact as to all matters involved,[92] such as the velocity of the wind,[93] whether storms were normally to be expected when and where encountered,[94] the location of the ship during the storm,[95] the seaworthiness of the ship,[96] the skill with which she was handled when beset by storm,[97] and whether or not her encountering the storm resulted from errors of navigation.[98]

Jettison. It would seem that, where the proximate cause of loss is a voluntary jettison of cargo following negligent stranding of the ship, exemption might be granted on the ground that jettison was a danger of the sea under the provision of the act exempting an owner from liability for loss resulting from such dangers.[99]

Sweating. The presence of sweat or condensation in the hold of a ship has been held to be a peril of the sea and consequently within the statutory exceptions,[1] and the taint of sweat damage is answered if it appears that the cargo has an unavoidable tendency to cause sweat,[2] that weather conditions made it impossible to ventilate the cargo properly,[3] or that the hold cannot be opened.[4] Sweat can be regarded as a peril of the sea within the meaning of the statutory exceptions only when all available and reasonable precautions are taken to avoid it,[5] and the carrier remains liable if it fails to provide, without excuse, sufficient ventilation,[6] if its improper stowage contributed to the sweat,[7] or if it is otherwise negligent in handling the cargo.[8]

e. Seizure under Legal Process

Where the statutory condition relative to seaworthiness or diligence has been complied with, exemption will be granted under the Harter Act from liability resulting from seizure of the ship under legal process.

Where there has been due compliance with the owner's duties with respect to seaworthiness or diligence, under the provision of the Harter Act, 46 U.S.C.A. § 192, relative to exemption from liability for loss arising from seizure of the ship under legal process, exemption will be granted with respect to loss resulting from such seizure.[9] The exemption

Heavy seas

U.S.—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550.

91. U.S.—Edmond Weil Co. v. American West African Line, C.C.A.N.Y., 147 F.2d 363—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550.
58 C.J. p. 401 note 61.

92. U.S.—The Josephine, D.C.Pa., 37 F.2d 928, affirmed, C.C.A., 49 F.2d 207.

Unusual violence of storm and unexpected damage

When a storm is of such unusual violence that it cannot reasonably be anticipated and avoided or cannot be resisted by ordinary exertions of skill and prudence and when it has caused unusual and unexpected damage to the hull of a seaworthy vessel resulting in damage to her cargo, the loss may fairly be attributed to a peril of the sea.—The Josephine, C.C.A.Pa., 49 F.2d 207

93. U.S.—The Josephine, D.C.Pa., 37 F.2d 928, affirmed, C.C.A., 49 F.2d 207
58 C.J. p. 401 note 63.

94. U.S.—The Josephine, supra.

95. U.S.—The Josephine, supra.
58 C.J. p. 401 note 65.

96. U.S.—The Josephine, supra.

97. U.S.—The Josephine, supra.

98. U.S.—The Josephine, supra.
58 C.J. p. 401 note 68

99. U.S.—The Mary F. Barrett, C.C.A.Pa., 279 F. 329
58 C.J. p. 396 note 81.

1. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.—George F. Pettinos, Inc., v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.

Dampness, decay, or sweating as peril of sea within contractual exception from liability see infra § 134.

2. U.S.—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999.

3. U.S.—Wessels v. The Asturias, supra—The Zarembo, D.C.N.Y., 44 F.Supp. 915, affirmed, C.C.A., Balfour, Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie and Co. v. The Zarembo, 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486.

4. U.S.—The Naples Maru, D.C.N.Y., 20 F.Supp. 258, modified on other grounds, C.C.A., Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, 106 F.2d 32.

5. U.S.—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999—Standard Brands v. Thos. & Jno. Brocklebank, Limited, D.C.N.Y., 81 F.Supp. 670—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.—George F. Pettinos, Inc. v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.

6. U.S.—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32—George F. Pettinos, Inc. v. American Export Lines, D.C.Pa., 69 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.

7. U.S.—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999—The Rita Sister, D.C.Pa., 69 F.Supp. 480—George F. Pettinos, Inc. v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.

8. U.S.—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999—Standard Brands v. Thos. & Jno. Brocklebank, Limited, D.C.N.Y., 81 F.Supp. 670—George F. Pettinos, Inc. v. American Export Lines, D.C.Pa., 69 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.

9. U.S.—The Brunswick, D.C.La., 263 F. 907.

Exemptions of Carriage of Goods by Sea Act as not conditioned on due diligence to make vessel seaworthy generally see supra § 126 b.

will be denied, however, where the duty as to seaworthiness or diligence was not complied with,[10] or where the ship was financially unable to equip and carry forward the enterprise.[11]

f. Saving Life or Property at Sea

A statutory provision exempting the vessel and owners from liability for loss or damage resulting from saving or attempting to save life or property at sea, or from any deviation in rendering such service refers to the saving of life or property on another vessel.

The provision of the Harter Act, 46 U.S.C.A. § 192, exempting the vessel and owners from liability for loss or damage resulting from "saving or attempting to save life or property as sea, or from any deviation in rendering such service," has been construed as referring to the saving of life or property on another vessel,[12] and not to the saving of property on the carrier ship.[13] Accordingly it has been held that the act does not abolish general average for jettison.[14]

g. Inherent Defect of Cargo

Under some exemption statutes the shipowner is relieved from liability for injury proximately resulting from an inherent defect of the thing carried.

Under the express provision of some exemption statutes, the shipowner is relieved from liability for injury arising from an inherent defect of the thing carried[15] Where the loss proximately results from the owner's negligence or lack of due diligence rather than from inherent defect of cargo, exemption will be denied.[16]

h. Latent Defects

Under the Carriage of Goods by Sea Act the ship is not responsible for loss or damage arising or resulting from latent defects which could not be discovered by any known and customary test. Under the Harter Act it has been held that irrespective of the exercise of due diligence the owner remains liable for loss or damage resulting from latent defects which rendered the ship unseaworthy at the beginning of her voyage.

Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(2) (p), the ship is not responsible for loss or damage arising or resulting from latent defects not discoverable by due diligence.[17]

A latent defect under such provision is one which could not be discovered by any known and customary test.[18]

Under the Harter Act, 46 U.S.C.A § 192, it has been held that, irrespective of the exercise of due diligence, the owner remains liable for loss or damage resulting from latent defects which rendered the ship unseaworthy at the beginning of her voyage.[19] There are, however, dicta to the effect that the act relieves the diligent shipowner from liability for loss or damage resulting from latent defects,[20] and it has been said that the purpose of the Harter Act is to relieve the shipowner of liability for only those latent defects which are not discoverable by the utmost care and diligence.[21]

§ 129. —— Based on Absence of Owner's Design or Neglect with Respect to Fire

a. In general
b. Cause of fire loss
c. Persons and property entitled to exemption

Immunities granted under Harter Act as dependent on exercise of due diligence to make vessel seaworthy in general see supra § 127 b (1).

10. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593—The St Paul, D.C.N.Y., 277 F. 99.

11. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593

12. Puerto Rico.—St. Paul Fire & Marine Ins. Co. v. The Schooner Ernestina, 10 Puerto Rico Fed. 478

13. Puerto Rico.—St. Paul Fire & Marine Ins. Co. v. The Ernestina, supra.

14. Puerto Rico.—St. Paul Fire & Marine Ins. Co. v. The Schooner Ernestina, supra.

15. U.S.—The M. C. Currie, D.C.N.Y., 132 F. 125.
58 C.J. p 401 note 72.

Alteration due to natural characteristics

Ship which delivered rubber cargo undeteriorated in quality and undiminished in weight was not liable for damage to bales which were altered in shape and flattened from alleged poor stowing and from embedding of binding metal bands as result of rubber's natural characteristics—The M. V. Silversandal, D.C.N.Y., 26 F.Supp. 61, affirmed, C.C.A., Bache v. Silver Line, 110 F.2d 60

16. U.S.—Thomas Roberts & Co. v. Calmar S. S. Corp., D.C.Pa., 59 F. Supp. 203.
58 C.J. p 401 note 73.

17. U.S.—The Quarrington Court, C.C.A.N.Y., 122 F.2d 266.

18. U.S.—The Bill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470.

Defect in metal

(1) A true latent defect in metal is not caused by the use of the metallic object and is not a gradual deterioration but is a defect or flaw in the metal not discoverable by any known and customary test—Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

(2) Where hole in bilge pipe was not due to any flaw in the metal but to the corrosive effect of foreign substances resulting from the use of the ship, defect in the bilge pipe was not a true "latent defect."—The Bill, D.C.Md., 47 F.Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470

19. U.S.—Benner Line v. Pendleton, N.Y., 217 F. 497, 133 C.C.A. 349, affirmed 38 S.Ct. 330, 246 U.S. 353, 62 L.Ed. 770.
58 C.J. p 396 note 74.

20. U.S.—The Irrawaddy, N.Y., 18 S.Ct. 831, 171 U.S. 187, 43 L.Ed. 130.
58 C.J. p 396 note 75.

21. Cal.—Blake, Moffitt & Towne v. Luckenbach S.S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775.

d. Vessels used in inland navigation
e. Carriage by land and water

a. In General

Under both the fire statute and the Carriage of Goods by Sea Act the shipowner and carrier are not liable for fire damage, unless caused by owner's design or neglect, or carrier's actual fault or privity. The object of the fire statute is to modify shipowners' common-law liability for fire loss by exempting them from the onerous liability to which they were held, as carriers or otherwise, for the acts or neglect of their agents and servants or of third persons, and to relieve carriage rates of the insurance burden.

Under both the Fire Statute, 46 U S C A. § 182, and the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(2) (b), the shipowner and carrier are not liable for fire damage, unless caused by owner's design or neglect, or carrier's actual fault or privity.[22] The object of the fire statute exempting the owner of a vessel from liability for loss or damage to merchandise shipped, taken in or put aboard the vessel, by reason of any fire happening to or on board the vessel, unless such fire is caused by design or neglect of such owner, is to modify shipowners' common-law liability for fire loss[23] by exempting them from the onerous liability to which they were held, as carriers or otherwise, for the acts or neglect of their agents and servants or of third persons without their knowledge or concurrence,[24] and to relieve carriage rates of the insurance burden.[25]

The fire statute is not a statute of limitation but of exoneration,[26] and it serves as a complete defense to suits falling within its purview.[27] Shipowners are released from liability for fire in all cases not falling within the exception as to their design or neglect,[28] and the fact that the statute was not specifically incorporated in the bill of lading does not deprive the owners of the vessel of the right to avail themselves of the protection of it.[29] It is not intended, however, to diminish the responsibility of the shipowners for their own willful[30] or negligent[31] acts, and it should be strictly construed,[32] although its purpose should not be frustrated by strict construction.[33] The statute was not modified by the Harter Act[34] or, it seems, by the Carriage of Goods by Sea Act.[35]

Fire is caused by ignition or combustion, and it includes the idea of visible heat or light;[36] where the internal development of heat never at any time becomes so rapid as to produce a flame or a glow, there is no fire within the meaning of the statute [37] The statute does not exempt the owner from liability for damage caused by heat without fire,[38] but, where some damage has occurred by heating be-

22. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D C N. Y., 81 F Supp. 438, modified on other grounds, C A., 194 F.2d 449, certiorari denied 72 S Ct. 1076, 343 U S. 978, 96 L.Ed. ——.

23. U S—Walker v. Western Transp Co., Ill., 3 Wall. 150, 18 L Ed 172
58 C J p 404 note 36.

24. U S—Walker v. Western Transp. Co, supra.
Mass.—Hill Mfg Co. v Providence, etc, SS Co., 113 Mass. 495, 18 Am R 527

25. U S—Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, N Y., 64 S Ct. 15, 320 U S. 249, 88 L Ed 30.

26. U.S—Hoskyn & Co. v Silver Line, D C N.Y, 63 F Supp 452, affirmed, C C A, 143 F 2d 462, certiorari denied 65 S.Ct. 116, 323 U. S 767, 89 L Ed. 613.

27. U S.—Earle & Stoddart v Ellerman's Wilson Line, N Y., 53 S Ct 200, 287 U S. 420, 77 L Ed. 403—The President Wilson, D C Cal, 5 F.Supp 684
58 C J. p 404 note 37.

28. U S.—American Tobacco Co v The Katingo Hadjipatera, D C N Y., 81 F.Supp 438, modified on other grounds, C A, 194 F 2d 449, certiorari denied 72 S.Ct. 1076, 343 U S 978, 96 L Ed. —— —Rockwood & Co. v American President Lines, D C N J., 68 F.Supp. 224—The Munaires, D C La, 12 F Supp 913—The President Wilson, D C Cal., 5 F Supp 684.
58 C.J. p 404 note 41.
Liability to extent of interest in ship see infra § 129 c (2).

Failure to notify cargo surveyor of carriage of coal

Shipowner's neglect to notify cargo surveyor, employed by board of underwriters, that coal was being carried for delivery to other ships was held not contributing to cause of fire, with regard to owner's liability for cargo loss—The Galileo, C C A N.Y., 54 F 2d 913, affirmed 53 S Ct. 200, 287 U.S. 420, 77 L Ed 403

29. U S.—The Cabo Hatteras, D.C N.Y, 5 F.Supp. 725.

30. Mass.—Hill Mfg Co. v Providence, etc, SS Co, 113 Mass. 495, 18 Am.R. 527.

31. U.S—Charbonnier v U S, D C S.C, 45 F 2d 166, affirmed, C.C A, U. S. v Charbonnier, 45 F.2d 174.
58 C.J. p 404 note 40.

32. U.S—Hoskyn & Co. v. Silver Line, D C N Y., 63 F Supp. 452, affirmed, C C.A, 143 F.2d 462, certiorari denied 65 S.Ct. 116, 323 U.S 767, 89 L.Ed 613.

33. U.S.—Consumers Import Co. v Kabushiki Kaisha Kawasaki Zosenjo, N Y, 64 S.Ct. 15, 320 U S. 249, 88 L Ed. 30.

34. U S—Fyfe v. Pan-Atlantic S S Corp, C C A N.Y, 114 F.2d 72, 77, certiorari denied Pan-Atlantic S S. Corp v Fyfe, 61 S Ct. 319, 311 U.S. 711, 85 L Ed. 462—The Galileo, C C. A N Y, 54 F 2d 913, affirmed 53 S Ct. 200, 287 U.S. 420, 77 L Ed. 403
Statutory exemptions from liability under the Harter Act see supra §§ 127, 128.

Harter Act held inapplicable to fire loss

U S—The Buckeye State, D.C N Y, 39 F Supp 344.

35. U S—Fyfe v. Pan-Atlantic S. S. Corp, C C A N Y., 114 F.2d 72, certiorari denied Pan-Atlantic S. S Corp v. Fyfe, 61 S.Ct. 319, 311 U. S. 711, 85 L Ed. 462

36. U.S—The Buckeye State, D.C.N Y., 39 F Supp. 344.

37. U S—The Buckeye State, supra.

38. U.S.—The Buckeye State, supra

Heat from lighting fixtures

U S.—The Buckeye State, supra.

Internal heating

The fact that shippers of tobacco could not establish internal good condition of tobacco at time of shipment did not preclude recovery for damage not caused by internal heating, but by heat and fire originating in other cargo.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.

fore fire broke out, the fact that the ship cannot prove what damage was solely caused by fire does not render it liable for the entire damage.[39]

Necessity of fire occurring on ship. Under provisions of such statutes limiting the exemption to loss by reason of fires happening to or on board the vessel, no exemption will be granted where the loss resulted from fire occurring in another place,[40] such as a wharf[41] or wharf boat,[42] although the statute is applicable where the fire starts on a pier and is communicated to cargo on the ship.[43]

Character of property damaged. Under statutes exempting shipowners from liability for damage to "merchandise," horses[44] and trucks[45] taken aboard a ferryboat by their drivers who are passengers and remain in charge of such property on the trip are not "merchandise." Where the statute exempts from liability for damage to "goods," baggage is "goods" within the exemption provision.[46]

Waiver of exemption in general. It is competent for a carrier to waive the statutory immunity,[47] and where the parties stipulate by contract that the statutory exemption from fire loss shall not apply, the shipowner cannot secure the benefit of such exemption.[48] A bill of lading expressly incorporating the fire statute therein is not to be construed as a waiver of the statutory immunity for loss by fire;[49] and a warranty of seaworthiness in the contract of affreightment does not preclude the shipowner from invoking the statute.[50]

b. Cause of Fire Loss

(1) Owner's design or neglect; actual fault or privity of carrier
(2) Negligence of agents
(3) Deviation
(4) Damages arising from independent causes

(1) Owner's Design or Neglect; Actual Fault or Privity of Carrier

The shipowner is relieved of his common-law liability only on condition that he exercises care measured by the occasion, and exemption will be denied where the fire loss arose from the owner's design or neglect.

The shipowner is relieved of his absolute liability at common law only on condition that he exercises care measured by the occasion;[51] exemption will be denied where the fire loss arose from the owner's design[52] or neglect.[53] The word "design" means with intent,[54] and the word "neglect" means personal negligence of the owner, or in case of a corporate owner, negligence of its managing officers or agents,[55] and in construing the word "neglect"

N.Y., 81 F Supp 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S Ct. 1076, 34 U S 978, 96 L Ed. ——.

39. U S—American Tobacco Co. v. The Katingo Hadjipatera, supra.

40. U.S—The City of Clarksville, D C Ind., 94 F. 201
58 C.J p 405 note 60.

41. U S—The Egypt, D.C.N Y, 25 F. 320.
58 C J. p 405 note 61.

42. U.S.—The City of Clarksville, D C.Ind., 94 F 201

43. U.S.—The Munaires, D C La., 12 F Supp. 913.

44. U.S—The Garden City, D C N. Y., 26 F. 766

45. U.S—The Garden City, supra.

46. N Y.—Chamberlain v. Western Transp. Co., 44 N.Y. 305, 4 Am.R. 681.

47. U.S.—Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, N.Y., 64 S Ct. 15, 320 U S. 249, 88 L Ed 30.
58 C.J p 406 note 89

48. U.S—Schimmel v. Mallory SS. Co, D C N.Y., 30 F.2d 735.
58 C.J. p 406 note 90.

49. U S.—Earle & Stoddart v. Ellerman's Wilson Line, N.Y., 53 S.Ct. 200, 287 U.S. 420, 77 L.Ed. 403.

50. U S—Globe & Rutgers Fire Ins Co. v. U S, C C A N Y, 105 F 2d 160, certiorari denied 60 S Ct. 175, 308 U.S. 611, 84 L Ed 511.

Owner's contractual obligation of due care to make vessel seaworthy does not destroy statutory exemption from liability for loss of cargo by fire because of ship officer's negligence—Earle & Stoddart v. Ellerman's Wilson Line, D C.N Y, 45 F 2d 231, affirmed, C C A, The Galileo, 54 F 2d 913, affirmed 53 S Ct. 200, 287 U S. 420, 77 L Ed 403.

51. U.S.—Great Atlantic & Pacific Tea Co v Lloyd Brasileiro, C C A N.Y, 159 F 2d 661, certiorari denied Republic of Brazil v. Great Atlantic and Pacific Tea Co, 67 S Ct. 1519, 331 U S 836, 91 L Ed. 1849.

52. U.S.—Fidelity-Phenix Fire Ins Co of N. Y. v. Flota Mercante Del Estado, D.C.La, 102 F.Supp 861
Mass—Hill Mfg Co v. Providence, etc, SS. Co., 113 Mass. 495, 18 Am. R. 527.

53. U.S.—Fidelity-Phenix Fire Ins. Co. of N. Y v. Flota Mercante Del Estado, D.C.La, 102 F.Supp 861—American Tobacco Co. v. The Katingo Hadjipatera, D C.N.Y., 81 F Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S Ct. 1076, 343 U.S. 978, 96 L Ed ——
58 C.J. p 404 note 94.

54. U S—The Buckeye State, D C. N Y., 39 F Supp 344

55. U S—Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, N Y., 64 S Ct 15, 320 U.S 249, 88 L Ed 30—The Galileo, C.C.A N. Y., 54 F.2d 913, affirmed 53 S Ct 200, 287 U S 420, 77 L Ed 403—Charbonnier v U. S, D.C.S C, 45 F 2d 166, affirmed, C C A., U. S v. Charbonnier, 45 F 2d 174—The Doris Kellogg, D C N.Y, 18 F.Supp. 159, affirmed, C C A, In re Kellogg S S Corp, 94 F 2d 1015
Negligence of agents generally see infra subdivision b (2) of this section.

Delegable or nondelegable duty

(1) Negligence of what in other connections is held to be a nondelegable duty does not take away the exemption—Earle & Stoddart v. Ellerman's Wilson Line, N Y., 53 S Ct 200, 287 U.S 420, 77 L Ed. 403—The Buckeye State, D.C.N.Y., 39 F Supp 344.

(2) The duty to stow cargo properly is considered delegable in determining whether there was design or neglect of shipowner personally within provisions of fire statute—The Venice Maru, D C.N.Y., 39 F.Supp.

imputed negligence has been excluded.[56] The neglect which will deprive the shipowner of protection is a neglect which caused the fire.[57] So, exemption will be denied where the fire was caused by unseaworthiness resulting from the owner's personal negligence,[58] such as negligent stowage of cargo[59] or ship's supplies,[60] or failure to provide proper means for combating fires,[61] but unseaworthiness of the ship does not alone deprive the owner of the benefit of the fire statute,[62] and the failure of the owner diligently to determine whether the vessel was seaworthy is not such neglect of the owner as to defeat his immunity under the statute.[63]

The fact that fire occurred from a heated flue in a ship constructed by reputable builders does not show that it was caused by the "design or neglect of the shipowners"[64] The use of a wooden bulkhead separating a cross bunker carrying coal from the hold carrying cargo, permitting air to penetrate into the body of the coal, does not in itself constitute such negligence on the part of the owner as would render him liable,[65] particularly where there is no evidence that any deficiency in the wooden bulkhead contributed in any way to the cause of the fire,[66] and the fact that a steam smothering system failed to put the fire out is not alone sufficient to establish negligence on the part of the owner in the absence of a showing that the system was defective.[67] Failure of a foreign vessel, which met all requirements of the law applicable to her, to have equipment required of United States vessels by the laws of the United States has been held not to preclude her owners from claiming exemption under the American fire statute.[68]

Lack of privity. The shipowner seeking complete exemption cannot succeed by establishing merely that the fire loss occurred without his privity or knowledge.[69]

349, affirmed, C C A., Consumers Import Co v Kawasaki Kisen Kabushiki Kaisha, 133 F 2d 781, affirmed Consumers Import Co v Kabushiki Kaisha Kawasaki Zosenjo, 64 S Ct. 15, 320 U S. 249, 88 L Ed 30

(3) The owner of a steamship was not negligent in delegating the duty to plan and supervise stowage of cargo of Japanese sardine meal, which was to be carried from a Japanese port to United States Atlantic Coast ports, to an independent, experienced Lloyd's agent marine surveyor who was qualified to perform the service, and the charterer was justified in relying on surveyor's expert knowledge as to what was proper method of stowing and ventilating the meal.—The Venice Maru, D C N.Y., 39 F. Supp. 349, affirmed, C.C.A., Consumers Import Co v Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S Ct 15, 320 U.S 249, 88 L.Ed. 30.

56. U S—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C C.A.N.Y, 133 F.2d 781, affirmed Consumers Import Co v Kabushiki Kaisha Kawasaki Zosenjo, 64 S Ct. 15, 320 U.S 249, 88 L Ed. 30—Charbonnier v U. S, D C S C., 45 F 2d 166, affirmed, C C A, U. S v. Charbonnier, 45 F 2d 174.

57. U S.—Hoskyn & Co. v Silver Line, C.C.A.N Y., 143 F 2d 462, certiorari denied 65 S Ct 116, 323 U S. 767, 89 L Ed 613—The Ida, C.C A.N.Y., 75 F.2d 278.

Care commensurate with dangerous nature of cargo

Under statute it is incumbent on owner to use degree of care commensurate with the dangerous nature of the cargo, and the question is whether the vessel was properly equipped for the transportation of particular cargo which she undertook to carry—The Doris Kellogg, D. C N Y., 18 F Supp 159, affirmed, C C A, In re Kellogg S. S. Corp, 94 F 2d 1015.

Employment of incompetent crew

Personal negligence of shipowner in employment of incompetent crew, contributing to fire which damaged cargo, prevented exemption from liability—U S v. Charbonnier, C C A S C, 45 F 2d 174.

Electric wiring

(1) Chartered owner of vessel was chargeable with neglect within statute in maintaining electric wires through empty dry cargo space having little or no ventilation and surrounded by tanks filled with crude oil containing a high percentage of explosive gas—The Doris Kellogg, D. C N Y, 18 F.Supp 159, affirmed, C C A, In re Kellogg S. S. Corp, 94 F 2d 1015.

(2) In determining whether chartered owner of tank steamer was negligent with respect to electric wiring, rules of American Bureau of Shipping and American Institute of Electrical Engineers, though not controlling, should be taken into consideration, and this is true though they were not in force until after the steamer was converted into a tanker.—The Doris Kellogg, D.C.N.Y., 18 F.Supp. 159, affirmed, C.C A, In re Kellogg S. S. Corp, 94 F.2d 1015.

58. U S—Charbonnier v. U. S, D C S.C, 45 F 2d 166, affirmed, C.C A., U S. v. Charbonnier, 45 F 2d 174—Fidelity-Phenix Fire Ins. Co. of N Y. v. Flota Mercante Del Estado, D.C La, 102 F Supp. 861.
58 C.J. p 404 note 45.

59. U S.—The Willfaro, D C N Y., 9 F.2d 940, affirmed, C C A, Williams SS Co v Wilbur, 9 F 2d 622, certiorari denied 46 S Ct 482, 271 U.S 666, 70 L Ed 1140
58 C J p 404 note 46
Negligence of agents in stowage of cargo as not depriving owner of statutory immunity see infra subdivision b (2) of this section.

60. U S—Arkell v. U. S., C C A N Y, 13 F 2d 555, certiorari denied U S v Arkell & Douglas, 47 S Ct. 243, 273 U S 735, 71 L Ed 865.
58 C J. p 404 note 47.

61. U S—Fidelity-Phenix Fire Ins. Co. of N Y v Flota Mercante Del Estado, D C La, 102 F Supp. 861
58 C.J. p 404 note 48.

62. U S—Hoskyn & Co v. Silver Line, Limited, C C.A.N.Y., 143 F.2d 462, certiorari denied 65 S Ct. 116, three cases, 323 U.S. 767, 89 L.Ed. 613.

Where there is nothing to show design or neglect on the part of the owner, it is immaterial whether the vessel was unseaworthy—The Buckeye State, D.C N Y, 39 F.Supp. 344.

63. U S—Earle & Stoddart v Ellerman's Wilson Line, N.Y, 53 S.Ct. 200, 287 U S. 420, 77 L.Ed 403.

64. U S—The Strathdon, D.C.N Y, 89 F 374.

65. U S.—Fidelity-Phenix Fire Ins. Co. of N. Y v. Flota Mercante Del Estado, D C.La., 102 F.Supp 861.

66. U S—Fidelity-Phenix Fire Ins. Co. of N Y. v. Flota Mercante Del Estado, supra.

67. U S—Fidelity-Phenix Fire Ins Co. of N Y. v. Flota Mercante Del Estado, supra.

68. U.S.—The Cabo Hatteras, D C.N. Y., 5 F.Supp. 725.

69. U.S—Arkell v. U. S., C.C.A.N. Y., 13 F.2d 555, 557, certiorari de-

Actual fault or privity of carrier. Under the provision of the Carriage of Goods by Sea Act, 46 USCA § 1304(2) (b), that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from fire unless caused by the actual fault or privity of the carrier, the phrase "actual fault or privity" is to be construed as substantially equivalent to "design or neglect" as used in the fire statute.[70]

(2) Negligence of Agents

The shipowner is not deprived of his statutory immunity, in case of fire not caused by his design or neglect, by the negligence of the master, chief engineer, other ship's officers, members of the crew, clerks, or other agents. Negligence of executive officers and directors of a corporate owner is the negligence of the owner, and the rule of immunity does not apply in such case.

The shipowner is not deprived of his statutory immunity in case of fire, not caused by his design or neglect, by the negligence of his agent, employee, or servant,[71] such as the master,[72] chief engineer,[73] or other ship's officers,[74] the members of the ship's crew,[75] the shipowner's clerks,[76] or an agent on board who supervised stowage.[77] Where there is nothing to show design or neglect on the part of the owner, it is immaterial whether the fire was caused through negligence in the loading or stowage of the cargo.[78]

Executive officers and directors of a corporate owner are not its agents within the statutory exemption,[79] and their act or negligence causing a fire is the act or negligence of the corporate owner.[80]

(3) Deviation

Deviation does not deprive the shipowner of his right

nied U. S. v. Arkell & Douglas, 47 S.Ct. 243, 273 U.S. 735, 71 L.Ed. 865. 58 C.J. p. 404 note 50.

70. U.S.—Accinanto, Limited v. Cosmopolitan Shipping Co., D.C. Md., 99 F.Supp. 261.

71. U.S.—Charbonnier v. U. S., D.C. S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174.

72. U.S.—Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, N.Y., 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30—Earle & Stoddart v. Ellerman's Wilson Line, N.Y., 53 S.Ct. 200, 287 U.S. 420, 77 L.Ed. 403—Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, C.C.A.N.Y., 159 F.2d 661, certiorari denied Republic of U.S. of Brazil v. Great Atlantic & Pacific Tea Co., 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. 1849—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.

73. U.S.—Earle & Stoddart v. Ellerman's Wilson Line, N.Y., 53 S.Ct. 200, 287 U.S. 420, 77 L.Ed. 403

74. U.S.—Earle & Stoddart v. Ellerman's Wilson Line, supra—The Doris Kellogg, D.C.N.Y., 18 F.Supp. 159, affirmed, C.C.A., In re Kellogg S. S. Corp., 94 F.2d 1015

75. U.S.—The Buckeye State, D.C.N.Y., 39 F.Supp. 344. 58 C.J. p. 405 note 55

76. U.S.—The Munaires, D.C.La., 12 F.Supp. 913.

77. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed —— —The Venice Maru, D.C.N.Y., 39 F.Supp. 349, affirmed, C.C.A., Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30.

78. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. —— —The Buckeye State, D.C.N.Y., 39 F.Supp. 344

79. Mass.—Hill Mfg. Co. v. Providence, etc., SS. Co., 113 Mass. 495, 18 Am.R. 527.

80. Mass.—Hill Mfg. Co. v. Providence, etc., SS. Co., supra.

Managing director

U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——

Managing officer of operating agent for shipowner

U.S.—U. S. v. Charbonnier, C.C.A.S.C., 45 F.2d 174.

Port engineer

(1) A shipowner was chargeable with alleged negligence of traffic manager to whom, in absence of general agent, was deputed supervision over condition of ships, as they came in and of any repairs they might need and whose word was final about their proper care in port, notwithstanding that traffic manager's superior was owner's general agent.—Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, C.C.A.N.Y., 159 F.2d 661, certiorari denied Republic of Brazil v. Great Atlantic and Pacific Tea Co., 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. ——

(2) The measure of duty imposed on port engineer depended on difficulty of precaution compared with hazard and interest at stake, so that measure was not what he knew but what he was charged with finding out.—Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, C.C.A.N.Y., 159 F.2d 661, certiorari denied Republic of Brazil v. Great Atlantic and Pacific Tea Co., 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. ——.

Knowledge of vice president and marine superintendent of chartered owner of vessel as to its dangerous condition was sufficient to charge such owner with neglect under statute as to liability for fire.—The Doris Kellogg, D.C.N.Y., 18 F.Supp. 159, affirmed, C.C.A., In re Kellogg S. S. Corp., 94 F.2d 1015.

General manager held not negligent

(1) In failing to inform surveyor to whom duty to supervise stowage of cargo was properly delegated with respect to charterer's previous experiences with fire on similar voyages, and in not issuing special instructions as to stowage to officers of steamship.—The Venice Maru, D.C.N.Y., 39 F.Supp. 349, affirmed, C.C.A., Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30.

(2) In failing to make arrangements to have cargo shipped under deck after ship reached intermediate port in voyage, or in failing to consult surveyor concerning deck cargo.—The Venice Maru, D.C.N.Y., 39 F.Supp. 349, affirmed, C.C.A., Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30.

to exoneration under the fire statute unless it was a cause of the fire and was the result of the neglect or design of the owner personally; but deviation may subject a shipowner to liability for loss caused by fire occurring during such deviation.

Deviation does not deprive the shipowner of his right to exoneration under the fire statute unless it was a cause of the fire,[81] and not even then, unless the deviation was the result of the neglect or design of the owner personally.[82] Deviation may, however, subject a shipowner to liability for loss caused by fire occurring during such deviation,[83] unless he can affirmatively prove that the fire would have occurred in the absence of deviation.[84] It has been held that, where the shipowner was under a duty to deliver the libelant's cargo at an intermediate port on the voyage but negligently carried it on to a port beyond, where it was destroyed by fire, the shipowner was not entitled to protection under the fire statute, particularly where by reason of such overcarriage libelants would have had a cause of action for damage had there been no fire.[85]

(4) Damages Arising from Independent Causes

An action arising from independent acts of negligence on the part of the ship and from breach of a maritime duty in failing to enforce a general average contribution is not within the statutory exemption.

An action arising from independent acts of negligence on the part of the ship and from breach of a maritime duty in failing to enforce a general average contribution is not within the statutory exemption.[86]

c. Persons and Property Entitled to Exemption

(1) Personal liability
(2) Ship and interests therein

(1) Personal Liability

The provision of the statute exempting the "owner of any vessel" exempts the owner in personam, but a carrier by vessel cannot secure exemption under such statute where he neither owns nor charters the vessel on which the fire occurred. A negligent master may be held personally liable, even if he is part owner of the ship.

The provision of the Fire Statute, 46 U S C.A. § 182, exempting the "owner of any vessel," exempts the owner in personam,[87] but a carrier by vessel cannot secure exemption under such statute where he neither owns[88] nor charters[89] the vessel on which the fire occurred. The fact that a lighterage company which was the carrier's agent was exonerated from liability under the fire statute for damage to cargo resulting from a fire on its lighter caused by the negligence of the crew of the lighter does not relieve the carrier as principal from liability to the shipper.[90] It is expressly provided, however, by the Carriage of Goods by Sea Act, 46 U S.C.A. § 1304(2) (b), that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from fire, unless caused by the actual fault or privity of the carrier.

Master of the ship may be held personally liable for his own negligence;[91] if he is also part owner of the ship, the negligent master may be held either in his capacity as master or as owner,[92] but other innocent part owners are exempted.[93]

(2) Ship and Interests Therein

The statutory provision exempting "the owner of any vessel" also exempts the ship.

The statutory provision exempting the "owner of any vessel" also exempts the ship,[94] and extinguish-

81. U S.—Globe & Rutgers Fire Ins Co v U S, C C A.N.Y., 105 F 2d 160, certiorari denied 60 S.Ct 175, 308 U S. 611, 84 L Ed. 511—The Ida, C C A N Y., 75 F 2d 278.

82. U S.—The Venice Maru, D C N. Y., 39 F Supp 349, affirmed, C.C A., Consumers Import Co v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S 249, 88 L Ed 30.

Deviation by stowage on deck

U S.—The Venice Maru, D C N Y, 39 F Supp. 349, affirmed, C C A, Consumers Import Co v Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S Ct. 15, 320 U S. 249, 88 L Ed. 30.

83. U S.—The Ida, D C N Y, 6 F Supp 992.
58 C J p 405 note 57.

84. U S.—The Indrapura, D C Or., 171 F. 929

85. U S.—Hoskyn & Co. v Silver Line, D C N Y., 63 F.Supp 452, affirmed, C.C.A, 143 F.2d 462, certiorari denied 65 S Ct 116, 323 U S 767, 89 L Ed 613.

86. U.S.—Heye v. North German Lloyd, D C.N Y, 33 F 60, 2 L R A 287.

87. U S.—Consumers Import Co v Kawasaki Kisen Kabushiki Kaisha, C C.A N Y., 133 F.2d 781, affirmed Consumers Import Co. v Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct 15, 320 U.S. 249, 88 L Ed. 30.

88. U S.—Accinanto, Limited v Cosmopolitan Shipping Co, D.C Md., 99 F.Supp. 261.

Mass.—Hill Mfg Co. v. Boston, etc, R. Corp., 104 Mass 122, 6 Am R. 202.

89. Mass.—Hill Mfg Co. v. Boston, etc, R Corp., supra.
58 C J. p 405 note 68.

90. U.S.—Fyfe v. Pan-Atlantic S S Corp., C C A.N Y., 114 F 2d 72, certiorari denied Pan-Atlantic S. S Corp v. Fyfe, 61 S Ct. 319, 311 U. S. 711, 85 L Ed. 462

91. U S.—Keene v. The Whistler, D. C Cal, 14 F.Cas No 7,645, 2 Sawy. 348.

92. U.S.—Keene v. The Whistler, supra.

93. U.S.—Keene v. The Whistler, supra.
58 C J. p 405 note 72.

94. U S.—Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, N.Y., 64 S Ct. 15, 320 U.S. 249,

es maritime liens for cargo damage by fire not caused by the design or neglect of the owner;[95] and one purchasing the ship after the fire is entitled to enforce the ship's exemption in proceedings in rem against her.[96]

Part owners. Where negligence appeared as to one part owner but not as to others, a libel against the ship has been dismissed.[97]

d. Vessels Used in Inland Navigation

Prior to enactment of statutes expressly extending the fire-damage exemption to vessels navigating inland waters, the exemption could not properly be claimed with respect to such vessels.

Under express statutory provision, the federal statute exempting shipowners from liability for fire now applies, inter alia, "to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." Prior to enactment of statutes expressly extending the fire-damage exemption to vessels navigating inland waters, and under earlier federal statutes excluding from the exemption vessels "used in rivers or inland navigation," the exemption could not properly be claimed with respect to vessels navigating on waters lying wholly within a single state,[98] but the fact that vessels constructed and used primarily for ocean navigation at times entered inland waters did not exclude them from the statutory exemption.[99]

Navigation on Great Lakes was not inland navigation so as to exclude vessels sailing on them from the statutory exemption.[1]

Association extending carriage inland. The fact that shipowners had formed an association with other companies extending their business as carriers into the interior was held not to deprive them of the exemption.[2]

e. Carriage by Land and Water

The fact that merchandise is shipped under a through bill of lading covering land carriage will not of itself deprive the water carrier of its right to the statutory exemption; but, where the through bill of lading expressly or impliedly waives the exemption, the water carrier will be denied the right thereto.

The fact that merchandise is shipped under a through bill of lading covering land carriage will not of itself deprive the water carrier of its right to the statutory exemption;[3] but, where the through bill of lading expressly or impliedly waives the exemption, the water carrier will be denied the right thereto.[4] Under a through bill of lading reserving to carriers by water in respect of their "water carriage" the statutory exemption from liability for fire, but excluding from the term "water carriage," "lighterage in or across rivers, harbors or lakes, when performed by, or on behalf of, rail carriers," the phrase "on behalf of" does not necessarily mean as agent of the railroad,[5] and a water carrier engaged in lighterage as an independent party but thereby performing a service which the railroad was obligated to perform for the shipper is acting "on behalf of" the railroad,[6] so that the water carrier in performing such lighterage service is within the exception of lighterage from the statutory exemption otherwise reserved, and can be held liable for damage from nonnegligent fire occurring on the lighter.[7]

§ 130. Hague Rules

Under the Hague rules, the owner and operator of a ship cannot relieve himself of liability without showing that he exercised due diligence to make the ship seaworthy at the commencement of the voyage; and the

88 L.Ed 30—The President Wilson, D C Cal., 5 F Supp 684.
58 C J. p 405 note 74.

Contrary authority

(1) Before the rule was definitely settled it was held in one decision that such provision must be read in pari materia with sections merely limiting liability, and that, where the statutes are thus construed, the ship may remain liable in rem for fire damage occurring without the owner's design or neglect, and that to the extent of his interest in the ship the nonnegligent owner may still be held —Kokusai Kisen Kabushiki Kaisha v. Texas Gulf Sulphur Co., C C.A Tex., 33 F 2d 232, certiorari denied 50 S Ct 85, 280 U.S. 603, 74 L Ed. 648.

(2) This decision in so far as it conflicts with the text rule has been expressly disapproved by the supreme court of the United States — Consumers Import Co v. Kabushiki Kaisha Kawasaki Zosenjo, N.Y., 64 S Ct. 15, 18, 320 U.S. 249, 88 L Ed 30

95. U S.—Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, supra.

96. U.S —Deming v. The Rapid Transit, D C Wash., 52 F. 320

97. U.S —Keene v The Whistler, D C Cal., 14 F.Cas No.7,645, 2 Sawy. 348.

98. U.S —Moore v. American Transp. Co., Mich., 24 How. 1, 16 L Ed 674.
N C.—Woodhouse v. Cain, 95 N C 113
58 C.J. p 405 note 85.

99. N.Y.—Knowlton v Providence, etc, SS. Co., 33 N Y Super. 370.
58 C J. p 406 note 86.

1. U S —Moore v. American Transp Co., Mich., 24 How. 1, 38, 16 L Ed. 674

2. Ga —Headrick v. Virginia, etc, Air Line R Co., 48 Ga. 545.

3. N.Y.—D'Utassy v. Mallory SS Co, 147 N Y S 313, 162 App Div. 410, affirmed 119 N.E. 1040, 223 N. Y 592—Burke v. Gulf, etc., R Co, 147 N Y S 794

4. U S —Charles J. Webb Sons Co., Inc v. New Jersey Cent R. Co, C C.A N Y., 36 F.2d 702—Schimmel v Mallory SS. Co, D C.N Y, 30 F.2d 735.

5. U S —Schimmel v. Mallory SS. Co., supra.

6. U.S —Schimmel v. Mallory SS. Co., supra.

7. U S —Schimmel v. Mallory SS Co., supra.

carrier is not relieved from liability for loss or damage arising from negligence in the care and custody of the cargo.

Under the Hague rules providing that neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, the owner and operator of a ship cannot relieve himself of liability without showing that he exercised due diligence to make the ship seaworthy[8] at the commencement of the voyage.[9] Under provisions to the substantial effect that if due diligence has been exercised, neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship, the carrier is not relieved from liability for loss or damage arising from negligence in the care and custody of the cargo.[10]

§ 131. Limitation of Liability by Contract or Bill of Lading

a. In general
b. Construction, operation, and effect
c. Loss of benefit of exceptions

a. In General

In order that an alleged contract may be effective to limit the liability of a carrier, the usual requisites of a valid contract must be present, and it must be shown that a contract for limitation was in fact made.

In order that an alleged contract may be effective to limit the liability of a carrier, the usual requisites of a valid contract must be present, and it must be shown that a contract for limitation was in fact made,[11] as by the carrier's special agreement with the shipper or his agent,[12] or by notice to the shipper acquiesced in by him,[13] or by shipment of goods on the implied understanding that the shipment is subject to limitations customary in bills to be issued later,[14] or by the shipper's ratification of terms of limitation not agreed to by him on delivery of the goods.[15]

The parties may properly incorporate statutory limitations of liability in the bill of lading,[16] or provide by appropriate stipulations in the contract of shipment that the carrier shall be entitled to exemptions specified by statutes which would not otherwise be applicable,[17] and they may also agree that statutory restrictions on the right to contract for exemption shall be applicable;[18] but it is not competent for the parties to agree that a statute which is declaratory of the rights and liabilities of shippers and carriers shall be inapplicable to a shipment falling within its purview.[19] Where a particular statute is incorporated in a bill of lading, the provisions of the statute prevail over other provisions of the contract.[20] Express contractual adoption of a specified statute is equivalent to a recital of its exemptions.[21]

Proximate cause. In order to secure exemption with respect to loss or damage from an excepted risk, it must be shown that such excepted risk was

8. U S—American Linseed Co. v. Norfolk & North American Steam Shipping Co, D C N Y, 32 F 2d 281.
58 C J. p 408 note 38.

9. U S—W T. Lockett Co v. Cunard SS Co, D.C N.Y., 21 F 2d 191.

10. U S—W T Lockett Co. v. Cunard SS Co, supra.
58 C J. p 408 note 40

11. U S—The Jeanie, Wash, 236 F 463, 149 C C.A. 515
58 C J. p 412 note 10.

Provisions of bills of lading held incorporated by reference
U S—The Iristo, D C N Y, 43 F Supp 29, affirmed, C C A, Middleton & Co (Canada) Limited v Ocean Dominion S. S Corp, 137 F 2d 619, certiorari denied 64 S.Ct 432, 320 U.S 802, 88 L Ed 484.

12. U S—Hus v Kempf, D C N.Y, 12 F Cas No 5,943, 10 Ben. 231.
58 C J. p 412 note 11.

13. U.S—Merriman v The May Queen, D C La., 17 F.Cas No 9,481, Newb.Adm 464.
58 C J. p 412 note 12.

14. U S—Luckenbach SS Co. v. American Mills Co, C C A La, 24 F.2d 704.

15. N.Y.—Rubens v. Ludgate Hill SS. Co., 20 N Y S 481, 65 Hun 625.
58 C J p 412 note 14.

16. U.S—The Fred Smartley, Jr., C. C A Va., 108 F 2d 603, certiorari denied S. C. Loveland, Inc. v. Pennsylvania Sugar Co, 60 S Ct. 724, 309 U S. 683, 84 L Ed. 1027—Ravenscroft v. U. S, C C A N.Y., 88 F. 2d 418, certiorari denied 57 S Ct. 940, 301 U.S. 707, 81 L Ed 1361—Epstein v. U. S, D C N Y, 86 F Supp 740—The Vale Royal, D C. Md, 51 F Supp 412
Statutory exemptions from liability in general see supra §§ 126–129.

17. U.S—Constable v. National SS. Co, N Y, 14 S Ct. 1062, 154 U.S. 51, 38 L.Ed. 903
58 C J. p 412 note 17.

Cargo carried on deck
Parties may by bill of lading agree that Carriage of Goods by Sea Act shall apply to cargo carried on deck —Globe Solvents Co v The California, C C A.Pa, 167 F 2d 859, certiorari denied 69 S Ct. 67, 335 U S 844, 93 L Ed. 394—Waterman S. S Corp. v. U. S. Smelting, Refining & Min. Co., C C A La., 155 F 2d 687, certiorari denied 67 S Ct. 115, 329 U S 761, 91 L Ed 656—Uniao De Transportadores Para Importacao E Comercio, Ltda v. Companhia De Navegacao Carregadores Acoreanos, D C N Y, 84 F Supp 582.

18. U.S.—The Cornelia, D C.N.Y., 15 F.2d 245.
58 C J. p 412 note 18.

19. N Y.—Straus v. Canadian Pac. R Co., 234 N.Y.S 622, 134 Misc. 439.
Power to limit liability see infra § 132.

20. U S—Epstein v. U S, D.C N.Y., 86 F.Supp 740—The Vale Royal, D. C Md, 51 F Supp. 412.

21. U.S.—The Manitoba, D.C.N.Y, 104 F. 145
58 C J. p 412 note 20.

the proximate cause of damage.[22] If reasonable doubt exists as to whether damage arose from the excepted peril, exemption will be denied.[23] Proof that loss occurred from an unknown cause will not excuse the carrier.[24]

b. Construction, Operation, and Effect

As a general rule, restrictions on a water carrier's liability in contracts drawn by it are strictly construed against the carrier.

While contractual provisions limiting the carrier's liability will be given a reasonable interpretation,[25] in accordance with the presumed intent of the parties,[26] in the light of the applicable circumstances,[27] as a general rule, restrictions on a water carrier's liability in contracts drawn by it are construed strictly against the carrier and in favor of the shipper.[28] Exceptions relieving carriers from liability for loss resulting from "other" causes or circumstances have been construed as merely adding a penumbra of meaning to specified risks[29] so as to include similar things not literally covered.[30]

Where loss occurs from an excepted peril, the ship is prima facie excused,[31] if seaworthy,[32] and can be held liable only on affirmative proof of its negligence as efficient cause of the loss.[33] In other words, where the carrier shows that damage arose from an excepted cause, and there is no evidence either way as to negligence, exemption will be granted.[34]

In the absence of express stipulation to such effect, exemptions are never construed to include negligence[35] or other default[36] of the carrier. Exceptions in bills of lading are not to be construed as affecting the implied warranty of seaworthiness at the commencement of the voyage unless that intention clearly appears,[37] but rather as applying only to matters arising after commencement of the voyage.[38] General rules govern as to construction of particular clauses relating to unseaworthiness.[39] It has been held that stowage of cargo in a part of the ship unfit to carry the cargo stowed there renders the ship unseaworthy quoad such cargo so as to make contractual exceptions unavailable.[40]

c. Loss of Benefit of Exceptions

(1) In general
(2) Carrier's negligence
(3) Deviation
(4) Unseaworthiness
(5) Waiver or estoppel

(1) In General

Where damage arises from the carrier's breach of contract it will be denied the benefit of exceptions otherwise available.

Where damage arises from the carrier's breach of contract[41] by a departure from the agreed method of transportation,[42] such as the omission to cover goods with tarpaulins[43] or stowing goods above

22. U.S.—The G. R. Booth, Cal., 19 S.Ct. 9, 171 U.S. 450, 43 L.Ed. 234
58 C.J. p. 417 note 95

23. N.Y.—Corn Products Refining Co. v. Norton, 236 N.Y.S. 700, 135 Misc. 238.

24. U.S.—The Lennox, D.C.N.Y., 90 F. 308.
Tenn.—Turney v. Wilson, 7 Yerg. 340, 27 Am.D. 515.
58 C.J. p. 417 note 97.

25. U.S.—The Cardiganshire, D.C. Cal., 9 F.2d 416—Middle East Agency v. The John B. Waterman, D.C. N.Y., 86 F.Supp. 487.

Provisions construed

Large pieces of machinery which were shipped on skids, not cased or crated, were "packages" within limitation of liability provisions of bill of lading.—Middle East Agency v. The John B. Waterman, supra.

26. N.Y.—Spinetti v. Atlas S.S. Co., 80 N.Y. 71, 36 Am.R. 579.

27. U.S.—The Cardiganshire, D.C. Cal., 9 F.2d 416.

28. U.S.—Smith, Kirkpatrick & Co. v. Colombian S.S. Co., C.C.A. Canal Zone, 88 F.2d 392
58 C.J. p. 413 note 28.

Exception held too general to excuse carrier from liability

U.S.—Spreckles Sugar Co. v. South Atlantic S.S. Line, D.C.Ga., 49 F. Supp. 714

29. U.S.—The Poznan, D.C.N.Y., 276 F. 418.

30. U.S.—The Poznan, supra.

31. U.S.—The Florinda, D.C.N.Y., 31 F.2d 262, certiorari denied 49 S.Ct. 514, 279 U.S. 874, 73 L.Ed. 1009.
58 C.J. p. 413 note 29

32. U.S.—The Thomas P. Beal, C.C.A.N.J., 11 F.2d 49—Kaufer Co. v. Luckenbach SS. Co., D.C.Wash., 284 F. 160

33. U.S.—The Maryland, D.C.N.Y., 19 F.Supp. 505.
58 C.J. p. 413 note 31.

34. U.S.—The J. L. Luckenbach, D.C. Cal., 209 F. 142
58 C.J. p. 413 note 32.

35. U.S.—The Toronto, N.Y., 174 F. 632, 98 C.C.A. 386

36. U.S.—The Toronto, supra.

37. U.S.—Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., C.C.A.N.Y., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546
58 C.J. p. 413 note 35.

38. U.S.—The Indrapura, D.C.Or., 178 F. 591, affirmed 190 F. 711, 112 C.C.A. 351.

39. U.S.—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S.C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027.
58 C.J. p. 413 note 38.

40. U.S.—The Thomas P. Beal, C.C.A.N.J., 11 F.2d 49.

41. U.S.—Pioneer Import Corp. v. The Lafcomo, C.C.A.N.Y., 159 F.2d 654, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 67 S.Ct. 1310, 331 U.S. 821, 91 L.Ed. 1838
58 C.J. p. 414 note 49.

42. U.S.—The Lafcomo, D.C.N.Y., 64 F.Supp. 529, modified on other grounds, C.C.A., Pioneer Import Corporation v. The Lafcomo, 159 F.2d 654, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 67 S.Ct. 1310, 331 U.S. 821, 91 L.Ed. 1838.

43. U.S.—Pioneer Import Corp. v. The Lafcomo, C.C.A.N.Y., 159 F.2d 654, certiorari denied Black Dia-

deck when obligated to stow them below,[44] it will be denied the benefit of exceptions otherwise available.

(2) Carrier's Negligence

An exemption sought with respect to damage arising from excepted risks will be denied where it appears that negligence of the carrier contributed to the loss.

Exemption sought with respect to damage arising from excepted risks will be denied where it appears that negligence of the carrier contributed to the loss.[45] Thus, exceptions otherwise applicable do not relieve the carrier from liability for damage resulting from negligence in the stowage,[46] care,[47] or custody[48] of cargo.

(3) Deviation

Voluntary and wrongful deviation deprives the carrier of the benefit of contractual limitations of liability.

Voluntary and wrongful deviation abrogates the shipping contract,[49] at the shipper's option,[50] and deprives the carrier of the benefit of contractual limitations on liability,[51] such as exceptions relative to particular risks or causes of loss,[52] limitations tolling time for suit,[53] and limitations as to value.[54] The contract and its limitations of liability remain in full force and effect where the claim of actionable deviation is not sustained,[55] as where the deviation was involuntary,[56] as where it was necessary to depart from the usual route to save ship, crew, and cargo from destruction at sea;[57] or was justifiable,[58] as under general usage[59] or particular contract provisions[60]

It has been held that deviation deprives the shipowner of the benefit of contractual exceptions unless it affirmatively appears that the loss would have occurred if there had been no deviation,[61] and that a trivial deviation causing no damage will not deprive the carrier of the benefit of contractual exceptions.[62] Deviation caused by unseaworthiness

mond Lines v. Pioneer Import Corp., 67 S.Ct. 1310, 331 U.S. 821, 91 L.Ed. 1838

44. U.S.—The Sarnia, C.C.A.N.Y., 278 F. 459, certiorari denied 42 S.Ct. 382, 258 U.S. 625, 66 L.Ed. 797.

45. U.S.—Pioneer Import Corporation v. The Lafcomo, C.C.A.N.Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Importing Corp., 64 S.Ct. 523, 321 U.S. 776, 88 L.Ed. 1063—Imperial Sugar Co. v. Bright Star S.S. Co., D.C.Tex., 92 F.Supp. 693—The West Arrow, D.C.N.Y., 7 F.Supp. 827, modified on other grounds, C.C.A., 80 F.2d 853—General Electric Co. v. Argonaut S.S. Line, D.C.N.Y., 7 F.Supp. 710.
58 C.J. p. 414 note 53.
Power to stipulate against liability for negligence see infra § 132 b.

46. U.S.—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373—Pioneer Import Corporation v. The Lafcomo, C.C.A.N.Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 776, 88 L.Ed. 1063—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.A., Isthmian S.S. Co. v. Martin, 170 F.2d 25
58 C.J. p. 414 note 54

47. U.S.—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.C.A., Isthmian S.S. Co. v. Martin, 170 F.2d 25—Pioneer Import Corp. v. The Lafcomo, D.C.N.Y., 49 F.Supp. 559, affirmed, C.C.A., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063
58 C.J. p. 415 note 55.
Care throughout voyage
The carrier's duty to give proper care to cargo under the Harter Act regardless of stipulations attempting to relieve it of such duty continues throughout the voyage—Knott v. Botany Worsted Mills, N.Y., 21 S.Ct. 30, 179 U.S. 69, 45 L.Ed. 90—The Skipton Castle, Cal., 243 F. 523, 156 C.C.A. 221.

48. U.S.—The Milwaukee Bridge, D.C.S.D., 15 F.2d 249, affirmed, C.C.A., 26 F.2d 327, certiorari denied Moore v. U.S., 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.

49. U.S.—France v. French Overseas Corp., N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901
58 C.J. p. 415 note 60.

50. U.S.—Sidney Blumenthal & Co., Inc. v. U.S., D.C.N.Y., 21 F.2d 798, reversed on other grounds, C.C.A., 30 F.2d 247, certiorari denied Admiral-Oriental Line v. U.S., 49 S.Ct. 345, 279 U.S. 847, 73 L.Ed. 991
58 C.J. p. 415 note 61.

51. U.S.—U.S. v. City of New York, D.C.N.Y., 8 F.2d 270—The City of Brunswick, D.C.Mass., 4 F.Supp. 908.
58 C.J. p. 415 note 62

52. U.S.—The Ile de Sumatra, D.C.N.Y., 286 F. 437
58 C.J. p. 415 note 63.

53. U.S.—Sidney Blumenthal & Co., Inc. v. U.S. D.C.N.Y., 21 F.2d 798, reversed on other grounds, C.C.A., 30 F.2d 247, certiorari denied Admiral-Oriental Line v. U.S., 49 S.Ct. 345, 279 U.S. 847, 73 L.Ed. 991.
Limitations tolling time for suit generally see infra § 136.

54. U.S.—Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto, C.C.A.N.Y., 282 F. 235
58 C.J. p. 415 note 65
Limitations as to value generally see infra § 137

55. U.S.—Lagerloef Trading Co., Inc. v. U.S., D.C.N.Y., 43 F.2d 871.
58 C.J. p. 415 note 66.

56. U.S.—France v. French Overseas Corp., N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901—Venezuelan Meat Export Co. v. U.S., D.C.Md., 12 F.Supp. 379

57. U.S.—The Turret Crown, C.C.A.N.Y., 297 F. 766, certiorari denied Commonwealth S.S. Co. v. Patent Vulcanite Roofing Co., 44 S.Ct. 403, 264 U.S. 591, 68 L.Ed. 865.

58. U.S.—Hostetter v. Park, Pa., 11 S.Ct. 1, 137 U.S. 30, 34 L.Ed. 568
Deviation held not excused
U.S.—The City of Brunswick, D.C.Mass., 4 F.Supp. 908

59. U.S.—Hostetter v. Park, Pa., 11 S.Ct. 1, 137 U.S. 30, 34 L.Ed. 568.
58 C.J. p. 415 note 70.

60. U.S.—Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, C.C.A.N.J., 28 F.2d 249
58 C.J. p. 415 note 71.
Stipulations expressly permitting delay see infra § 133.

61. U.S.—Globe Nav. Co. v. Russ Lumber, etc., Co., D.C.Cal., 167 F. 228.

62. U.S.—The Caterina Gerolimich, D.C.N.Y., 43 F.2d 248, affirmed, C.C.A., 54 F.2d 1080.
58 C.J. p. 416 note 74.

displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness;[63] or, in other words, the carrier is denied the benefit of contractual exceptions because of the unseaworthiness and not because of an involuntary deviation resulting therefrom.[64]

(4) Unseaworthiness

An exemption sought with respect to excepted risks will be denied where it appears that unexcepted unseaworthiness of the ship contributed to the loss or damage.

An exemption sought with respect to excepted risks will be denied where it appears that unexcepted unseaworthiness of the ship contributed to the loss or damage.[65] Unseaworthiness of the ship does not preclude exemption from liability for damage resulting from a cause wholly distinct from unseaworthiness and excepted by the parties.[66]

Diligence. A shipowner failing in the statutory[67] or contractual[68] duty to exercise diligence to furnish a seaworthy ship is precluded from securing the benefit of contract exemptions from loss. Whether or not due diligence has been exercised will depend on the particular circumstances involved.[69] Where the carrier fails to exercise due diligence to have the vessel properly manned, and damage to cargo results from incompetence of employees aboard ship, the carrier will be denied the benefit of contractual limitations.[70]

Where specific exception as to loss resulting from unseaworthiness is by contract provision dependent on the shipowner's exercise of due diligence, failure to exercise due diligence deprives the owner of the benefit of such exception.[71]

(5) Waiver or Estoppel

Contractual exceptions or limitations of liability are subject to defeat by waiver or estoppel.

Contractual exceptions or limitations as to liability are subject to defeat by waiver[72] or estoppel.[73] Waiver is a question of intention.[74]

§ 132. —— Power to Limit

a. In general
b. Exceptions relieving carrier from negligence
c. Unseaworthiness

a. In General

Within the restrictions prescribed by legislation and public policy, a common carrier of goods by water may by contract limit its liability for loss.

A common carrier of goods by water may by contract limit its liability for loss,[75] but, the contract must be within the restrictions prescribed by legislation and public policy,[76] and contractual ex-

63. U.S.—France v. French Overseas Corp., N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.

64. U.S.—France v. French Overseas Corp., supra.

65. U.S.—The West Arrow, D.C.N.Y., 7 F.Supp. 827, modified on other grounds, C.C.A., 80 F.2d 853—The City of Brunswick, D.C.Mass., 4 F.Supp. 908
58 C.J. p. 416 note 78.
Power to stipulate against liability for unseaworthiness see infra § 132 c.

Unseaworthiness alone displaces contract of affreightment only in so far as damage is caused by the unseaworthiness of vessel.—The Maui, C.C.A.Cal., 113 F.2d 1018, certiorari denied John Demartini Co. v. The Maui, 61 S.Ct. 317, 311 U.S. 709, 85 L.Ed. 461.

66. U.S.—Venezuelan Meat Export Co. v. U.S., D.C.Md., 12 F.Supp. 379.
58 C.J. p. 416 note 90.

67. U.S.—France v. French Overseas Corp., N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.
58 C.J. p. 416 note 83.
Statutory duty as to diligence with respect to seaworthiness see supra § 127.

68. U.S.—Warner Sugar Refining Co. v. Munson SS Line, D.C.N.Y., 23 F.2d 194, affirmed, C.C.A., 32 F.2d 1021—The Willowpool, D.C.N.Y., 12 F.Supp. 96, affirmed, C.C.A., John W. Higman & Co. v. The Willowpool, 86 F.2d 1002.

Agreement making Harter Act applicable
Where the parties have agreed that the Harter Act shall be applicable in a case where it would not apply without such agreement, in order to secure the benefit of contractual exceptions the shipowner must show exercise of due diligence to make the ship seaworthy.—Warner Sugar Refining Co. v. Munson SS Line, D.C.N.Y., 23 F.2d 194, affirmed, C.C.A., 32 F.2d 1021.

69. U.S.—Warner Sugar Refining Co. v. Munson SS Line, supra.
58 C.J. p. 416 note 85

70. U.S.—U.S. v. U.S. Steel Products Co., D.C.N.Y., 27 F.2d 547.
58 C.J. p. 416 note 86.

71. U.S.—Warner Sugar Refining Co. v. Munson SS Line, D.C.N.Y., 23 F.2d 194, affirmed, C.C.A., 32 F.2d 1021.

72. U.S.—The Jeanie, Wash., 236 F. 463, 149 C.C.A. 515.
58 C.J. p. 417 note 92.

73. U.S.—The Carso, C.C.A.N.Y., 53 F.2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc., 52 S.Ct. 140, 284 U.S. 679, 76 L.Ed. 574.
58 C.J. p. 417 note 93.

Where bills of lading contain false statements to the knowledge of the issuing carrier, and where the shipper in good faith relies and acts thereon, the carrier may be denied the benefit of limitations contained in such bills.—Switzerland General Ins. Co. of Zurich v. Navigazione Libera Triestina, S.A., C.C.A.N.Y., 91 F.2d 960—58 C.J. p. 412 note 15, p. 417 note 93 [a].

74. U.S.—The General G. W. Goethals, D.C.N.Y., 298 F. 933, affirmed, C.C.A., 298 F. 935, certiorari denied 45 S.Ct. 94, 266 U.S. 610, 69 L.Ed. 466
58 C.J. p. 417 note 94.

75. U.S.—The Margaret Lykes, D.C.La., 57 F.Supp. 466
58 C.J. p. 409 note 43

Attempted limitation held ineffectual
La.—Fassett v. Ruark, 3 La.Ann. 694.

76. U.S.—The Monte Iciar, C.C.A.Pa., 167 F.2d 334—Smith, Kirkpatrick & Co. v. Colombian S.S. Co., C.C.A.Canal Zone, 88 F.2d 392—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, D.C.N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied James McWilliams Blue Line v.

ceptions contrary to statute are void.[77] The limitation must be just and reasonable,[78] and whether it will be sustained necessarily depends on the facts in each particular case.[79] Where the liability of the vessel is limited by a condition impossible of execution, such condition becomes nugatory, and the general liability of carriers for the nondelivery of freight attaches.[80] Although a stipulation for exemption from liability be in part in contravention of law, such portion as is otherwise valid may be enforced[81] where it is capable of separation.[82]

Exceptions or limitations of liability in bills of lading are subject to the provisions of the Carriage of Goods by Sea Act,[83] and any exceptions or limitations in conflict therewith are invalid and of no effect.[84]

The Harter Act was enacted for the purpose of prohibiting contracts restricting the carriers' liability in certain particulars.[85] It is confined to the liabilities and immunities of carriers to shippers of merchandise,[86] it does not apply to shipments between foreign ports,[87] but it does apply to all vessels, domestic or foreign, engaged in transporting cargo to a United States port, whether hailing from a domestic or a foreign port.[88] Provisions of the Harter Act expressly forbidding contractual exceptions relieving the carrier from liability for its negligence with respect to care and custody of cargo, have been held applicable to special,[89] as well as to common,[90] carriers; but inapplicable to private carriers,[91] as where goods are carried under a

Koppers Connecticut Coke Co, 58 S Ct 25, 302 U S 706, 82 L Ed 545—The Ansaldo San Giorgio I, D C N Y., 3 F Supp 579, reversed on other grounds, C C A, 73 F 2d 40, affirmed The Ansaldo San Giorgio I v Rheinstrom Bros Co, 55 S Ct 483, 294 U S 494, 79 L Ed 1016
Mass—Cunningham Leather Co v American-Hawaiian S S Co, 189 N E 98, 285 Mass 232
N Y—M & T Trust Co v Export S S Corporation, 186 N.E 214, 262 N.Y 92

77. U S—Swift v Furness, Withy & Co, Ltd, D C Mass, 87 F. 345
58 C J p 409 note 47.

78. U S—Liverpool, etc, Steam Co v Phenix Ins. Co, N Y., 9 S Ct 469, 129 U S 397, 32 L Ed. 788—Smith, Kirkpatrick & Co v Colombian S. S Co, C C A.Canal Zone, 88 F.2d 392—The Ansaldo San Giorgio I, D C N Y, 3 F Supp 579, reversed on other grounds, C C.A., 73 F 2d 40, affirmed The Ansaldo San Giorgio I v. Rheinstrom Bros. Co, 55 S Ct 483, 294 U S. 494, 79 L Ed 1016
Mass—Cunningham Leather Co v American-Hawaiian S. S. Co, 189 N E 98, 285 Mass 232

79. U S—Smith, Kirkpatrick & Co v Colombian S S. Co, C C A.Canal Zone, 88 F 2d 392.

80. U S—Turnbull v. Citizens' Bank, C C La, 16 F. 145, 4 Woods 193.

81. U S—The Prussia, D C N.Y, 88 F 531, affirmed 93 F 837, 35 C C A 625, certiorari denied 19 S Ct 885, 174 U S 803, 43 L Ed 1188

82. U S—Venezuelan Meat Export Co. v. U S, D.C Md, 12 F Supp 379.

83. U S.—General Foods Corp. v The Troubador, D C N Y, 98 F Supp. 207—George F Pettinos, Inc, v. American Export Lines, D.C.Pa, 68 F Supp. 759. Affirmed, C C.A, 159 F.2d 247—Export S S Corp v American Ins. Co., Newark, N. J., D C N Y, 26 F Supp 79, reversed on other grounds, C C A, 106 F 2d 9, opinion adhered to 108 F 2d 1013, certiorari denied American S S. Owners Mut Protection and Indemnity Ass'n v Export S S Corp and American Export Lines, 60 S Ct 809, 309 U S 686, 84 L Ed 1029

Printed provision of bill of lading

Any attempt by carrier to modify the limitation provisions of the statute through a printed provision of a bill of lading should be carefully scrutinized by the courts—Middle East Agency v The John B Waterman, D C.N.Y., 86 F Supp. 487.

84. U S—General Foods Corp v The Troubador, D C N.Y, 98 F Supp. 207—Export S S Corp. v. American Ins. Co, D C N.Y., 26 F Supp. 79, reversed on other grounds, C C A, 106 F 2d 9, opinion adhered to 108 F 2d 1013, certiorari denied American S S Owners Mut Protection and Indemnity Ass'n v Export S. S Corp. and American Export Lines, 60 S Ct. 809, 309 U S 686, 84 L Ed. 1029.

Liability for failure to deliver goods

Bill of lading issued by berth agent of vessel time chartered to War Shipping Administration was invalid in so far as it purported to relieve the United States from liability for failure to deliver the goods.—Epstein v U S, D C.N.Y, 86 F Supp 740.

Both-to-Blame clause in bill of lading, providing that in event of collision, cargo owners will indemnify carrying ship owner against liability to other ship for claim of such cargo paid or payable by other ship and set off, recouped, or recovered by such ship as part of its claim against carrying ship, was invalid by pre-existing law as well as Carriage of Goods by Sea Act providing that any clause relieving the carrier from liability in connection with the goods was null and void and of no effect—U. S v Farr Sugar Corp., C A N Y., 191 F.2d 370, affirmed U S v Atlantic Mut Ins Co, 72 S Ct 666, 343 U S. 236, 96 L Ed —

85. U S—The Delaware, N Y, 16 S. Ct. 516, 161 U S 459, 40 L Ed 771—Tan Hi v U S, D C Cal, 94 F. Supp 432—The Willdomino, C C A N J, 300 F 5, affirmed 47 S.Ct. 261, 272 U S 718, 71 L Ed 491.
Statutory exemptions under Harter Act see supra §§ 127, 128

86. Wash—Heino v Libby, 205 P 854, 116 Wash. 148.
58 C J. p 409 note 49.

87. U S—Louis-Dreyfus v. Paterson Steamships, Ltd, D.C N Y, 35 F 2d 353, reversed on other grounds, C C A, 43 F 2d 824, 72 A L R 242.
N Y.—Strauss v. Canadian Pac R. Co, 173 N E 564, 254 N Y. 407, 416.
58 C J. p 409 note 50.

88. U S.—Knott v. Botany Worsted Mills, N.Y, 21 S Ct. 30, 179 U S 69, 45 L Ed 90—The Ferncliff, D C Md, 22 F Supp 728, certified questions answered 59 S Ct 615, 306 U S. 444, 83 L Ed 862, affirmed, C C A., 105 F.2d 1021.

89. U S.—Bolton Steam Shipping Co. v. Crossman, D.C N.Y., 206 F. 183.

90. U S—Bolton Steam Shipping Co. v. Crossman, supra

91. U S.—Koppers Connecticut Coke Co v. James McWilliams Blue Line, C C A N.Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S Ct 25, 302 U S. 706, 82 L Ed. 545—The Nat Sutton, C C A.N Y, 62 F 2d 787, amended on other grounds, C.C A, In re W. E. Hedger Co., 63 F 2d 1021—American Agr. Chemical Co. v. O'Donnell Transp. Co, D.C N.Y, 62 F Supp. 239—The Ferncliff, D C.Md., 22 F. Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S Ct 615, 306 U S 444, 83 L.Ed 862, affirmed, C.C.A., 105 F.2d 1021

charter party by which the whole ship is demised,[92] unless the parties expressly so agree.[93]

b. Exceptions Relieving Carrier from Negligence

Unless authorized by statute, the general rule is that a carrier lacks power to contract itself out of responsibility for the negligence of itself and its employees.

Unless authorized by statute,[94] the general rule is that a carrier lacks power to contract itself out of responsibility for the negligence of itself and its employees,[95] as in the case of negligence of master and crew,[96] or of stevedores[97] in the employ of the carrier, as where the contract attempts to relieve the carrier from liability for negligent navigation.[98] Stipulations exempting the carrier from liability for its negligence have been held void as contrary to public policy,[99] and general principles of maritime law.[1]

In view of the provision of the Harter Act exempting shipowners diligent as to seaworthiness from liability for loss resulting from negligence in the navigation or management of the ship, a contractual stipulation relieving the carrier with respect to such negligence is not invalid under the act.[2] Under the provision of the act dealing primarily with stipulations as to seaworthiness and further prohibiting agreements lessening the obligations of the shipmaster and other agents of the carrier carefully to handle, stow, care for, and deliver the cargo, stipulations relieving the carrier from liability for negligence in such respects are invalid.[3]

—The Northern No 29, D C N.Y., 15 F Supp 543, reversed on other grounds, C C A, Flat-Top Fuel Co v Martin, 85 F.2d 39, certiorari denied 57 S Ct 110, 299 U S 585, 81 L Ed 431
58 C J. p 409 note 55.

The judicially determined inapplicability of Harter Act to private carriers is consistent with legislative policy to free marine commerce from hampering conditions in marine bills of lading purporting to exempt ship from liability only if its inapplicability is restricted to original parties to contract of private carriage and those who have knowledge or notice thereof—The Ferncliff, D C Md, 22 F.Supp 728, certified questions answered Smith v The Ferncliff, 59 S Ct. 615, 306 U.S. 444, 83 L Ed. 862, affirmed, C C A., 105 F.2d 1021.

92. U.S—Pan-American Trading Co. v. Franquiz, D C Fla., 8 F 2d 500
58 C J p 409 note 56.

93. U.S—Koppers Connecticut Coke Co v James McWilliams Blue Line, C.C A N Y, 89 F 2d 865, certiorari denied James McWilliams Blue Line v Koppers Connecticut Coke Co, 58 S Ct. 25, 302 U S 706, 82 L Ed 545.

94. U S—Fyfe v Pan-Atlantic S S Corp., C C A.N Y., 114 F 2d 72, certiorari denied Pan Atlantic S S. Corp. v. Fyfe, 61 S Ct. 319, 311 U. S 711, 85 L Ed 462

95. U.S—Globe Solvents Co. v The California, C C A Pa, 167 F.2d 859, certiorari denied 69 S Ct 67, 335 U.S. 844, 93 L Ed 394—The Monte Iciar, C C A Pa, 167 F.2d 334—Mackey v. U S, D.C N.Y, 83 F. Supp. 14, affirmed, C A., 197 F.2d 241—The Ferncliff, D C Md., 22 F. Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct. 615, 306 U.S 444, 83 L.Ed. 862, affirmed, C.C.A, 105 F 2d 1021—Daisy Philippine Underwear Co. v. U S. Steel Products Co., D.C.N Y, 11 F.Supp. 175, affirmed, C.C.A, U S Steel Products Co v American & Foreign Ins Co, 82 F 2d 752—The Harry Luckenbach, D C N Y, 8 F Supp 507
La.—American Cotton Co-op. Ass'n v New Orleans & Vicksburg Packet Co., 157 So 733, 180 La 836.
58 C J p 409 note 63.
Negligence as depriving carrier of exceptions see supra § 131 c (2)

Lighter's employees
A main carrier may not stipulate away liability to shipper for loss due to negligence of a lighter's employees if the lighterage is a job undertaken by the carrier—Fyfe v. Pan-Atlantic S. S. Corp, C C.A.N.Y, 114 F.2d 72, certiorari denied Pan Atlantic S S Corp. v. Fyfe, 61 S.Ct 319, 311 U S 711, 85 L Ed. 462

Stipulation for delivery from ship's side has been held valid and not an attempt to exempt liability for negligence—Bonura v United Fruit Co, 110 So. 86, 162 La 53.

96. U S.—The Mary F Barrett, D C Pa., 270 F 618, reversed on other grounds, C C.A, 279 F. 329
58 C.J. p 410 note 64

Prior to Harter Act, common carrier by sea could not exempt himself from liability to cargo owner for damages caused by negligence of master or crew.—Aktieselskabet Cuzco v The Sucarseco, N Y., 55 S Ct 467, 294 U S 394, 79 L Ed. 942—The Framlington Court, C C.A.Tex, 69 F. 2d 300, certiorari denied United British S. S. Co. v Newfoundland Export & Shipping Co, 54 S Ct. 860, 292 U.S. 651, 78 L Ed 1500—The Mary F. Barrett, D C.Pa, 270 F 618, reversed on other grounds, C C A, 279 F. 329

97. U S—The Orcadian, D C Pa, 116 F. 930.
58 C J. p 410 note 65

98. U.S—The Brantford City, D.C N.Y, 29 F. 373
58 C.J. p 410 note 66.

Prior to the Harter Act, any agreement absolving shipowner from liability for negligent navigation or negligence in management and operation of the vessel was void as against public policy.—U S. v. The Esso Belgium, Atlantic Mut Ins Co, Intervener, D C.N.Y, 90 F Supp. 836, reversed on other grounds, C A, U. S. v Farr Sugar Corp, 191 F 2d 370, affirmed U S v Atlantic Mut Ins. Co, 72 S.Ct 666, 343 U.S 236, 96 L. Ed —

99. U S—The Ansaldo San Giorgio I v. Rheinstrom Bros Co., N Y, 55 S. Ct 483, 294 U S 494, 79 L Ed 1016—The California, D C.Pa, 67 F. Supp 719, reversed on other grounds, C C A, Globe Solvents Co. v. The California, 167 F 2d 859, certiorari denied 69 S Ct 67, 335 U S. 844, 93 L Ed 394.
58 C.J p 410 note 67

1. U S—The C Lopez y Lopez, C C. A N Y, 297 F 457—Gilchrist Transp. Co v Boston Ins Co, Mich, 223 F 716, 139 C C.A. 246

Exemption held valid under English law
U.S—The Miguel di Larrinaga, D C. N.Y, 217 F 678.

2. U S—U S v The Esso Belgium, Atlantic Mut Ins Co, Intervener, D.C N Y, 90 F Supp 836, reversed on other grounds, C A., U S v Farr Sugar Corp, 191 F 2d 370, affirmed U. S. v Atlantic Mut. Ins Co, 72 S.Ct 666, 343 U S 236, 96 L Ed —.
58 C.J p 410 note 77.

3. U.S—The Monte Iciar, C C.A Pa., 167 F 2d 334—Fyfe v Pan-Atlantic S S Corp., C.C.A N Y., 114 F 2d 72, certiorari denied Pan Atlantic S. S Corp v. Fyfe, 61 S Ct. 319, 311 U S 711, 85 L Ed 462
58 C J. p 410 note 80.

Substituted delivery
The provision of Harter Act making it unlawful to insert in a bill of

Under the provision expressly forbidding contractual exceptions relieving the carrier from liability for negligence in the care and custody of cargo, stipulations purporting to relieve the carrier from liability for such negligence are void.[4]

Under the Harter Act, exceptions are ordinarily invalid which purport to relieve the carrier from liability for damage resulting from negligent loading,[5] stowage,[6] custody,[7] care,[8] or proper delivery[9] of the cargo. If taking a cargo to a vessel in lighters be part of the loading of a vessel, a stipulation in the bill of lading relieving the carrier from failure to provide a fit lighter is prohibited;[10] and the parties cannot insert stipulations determining what shall constitute a proper delivery any further than shall appear reasonable under the circumstances, and no such stipulation could cover negligence in receiving and stowing the goods, or in making a search for them at the port of delivery, whereby the goods are carried past the port and not delivered.[11] A stipulation that the law of the ship's flag shall govern, in a bill of lading for goods in a foreign vessel on a voyage from a foreign port to the United States, is nullified and overridden by the provision of the act prohibiting contracts against liability for negligence in loading and stowing the cargo.[12]

c. Unseaworthiness

A shipowner may relieve himself from liability for unseaworthiness provided due diligence has been used to make the ship seaworthy.

Subject to statutory restrictions, a shipowner may relieve himself from liability for loss to cargo caused by an unseaworthy ship,[13] but an ambiguous contract will not be construed as lessening the duty of furnishing a seaworthy ship.[14] Under provisions of the Harter Act prohibiting contractual stipulations relieving an owner from his duty of exercising due diligence to furnish a seaworthy ship, liability for loss to cargo caused by unseaworthiness may be contracted away providing the shipowner used due diligence to make the vessel seaworthy.[15] While the act does not by the force of its own terms reduce the warranty of seaworthiness to the duty to exercise due diligence,[16] and in the absence of a contract provision to the contrary the usual absolute warranty of seaworthiness is applicable,[17] the owner may, by proper stipulation, reduce the warranty of seaworthiness to one of diligence with respect thereto.[18]

Under the Harter Act, liability for loss caused by unseaworthiness arising from the owner's lack of diligence cannot be contracted away,[19] and con-

lading any words whereby the obligations of the master "to carefully handle and stow cargo and to care for and properly deliver same shall in any wise be lessened, weakened, or avoided" does not make improper a substituted delivery in accordance with long-established custom, or render void a provision in a bill of lading authorizing delivery on a quay or into lighters, and providing that the goods shall "remain at consignee's risk and expense immediately after being placed into lighters or on the quay"—The Portuguese Prince, D C N Y, 209 F. 995

4. U.S—The Vallescura, N.Y, 55 S Ct 194, 293 U S 296, 79 L Ed 373
58 C J p 410 note 82.

5. U S—Morris v Lamport & Holt, D C N.Y, 54 F 2d 925, affirmed, C C.A, 57 F 2d 1081
58 C J p 411 note 83.

6. U S—Export S S Corp v. American Ins Co, Newark, N. J, D C N Y, 26 F Supp 79, reversed on other grounds, C C A, 106 F.2d 9, opinion adhered to 108 F 2d 1013, certiorari denied American S S Owners Mut. Protection and Indemnity Ass'n v. Export S S Corp. and American Export Lines, 60 S.Ct 809, 309 U.S 686, 84 L Ed 1029
58 C.J. p 411 note 84.

7. U S—Dietrich v. U. S. Shipping Board Emergency Fleet Corp, C C A.N.Y, 9 F 2d 733, certiorari denied 49 S Ct 82, 278 U S 647, 73 L Ed 560—The Germanic, N Y., 124 F 1, 59 C C A 521, affirmed 25 S Ct 317, 196 U.S 589, 49 L Ed 610.

8. U S—The Edith, C C.A N Y., 10 F. 2d 684.
58 C J p 411 note 86.

9. U S—Tan Hi v. U. S., D.C Cal, 94 F Supp. 432.
58 C J p 411 note 87.

10. U S—The Seaboard, D C N Y, 119 F. 375—Insurance Co of North America v. North German Lloyd Co, D C Md, 106 F. 973, affirmed 110 F. 420, 49 C C A. 1

11. U S—Calderon v. Atlas SS Co, D C N.Y, 64 F 874, reversed on other grounds 18 S.Ct. 588, 170 U S 272, 42 L Ed 1033

12. U S—The Kensington, N.Y., 22 S.Ct 102, 183 U S 263, 46 L Ed 190—Botany Worsted Mills v Knott, N.Y., 82 F 471, 27 C C A. 326, affirmed 21 S Ct 30, 179 U S 69, 45 L Ed 90.

13. U S—Spencer Kellogg & Sons v Buckeye S. S. Co, C.C.A Ohio, 70 F. 2d 146, certiorari denied 55 S Ct 74, 293 U S 562, 79 L Ed. 663
58 C J. p 411 note 93
Exceptions as to latent defects see infra § 133.

14. U S.—The Caledonia, Mass, 15 S.Ct. 537, 157 U S 124, 39 L Ed 644
58 C J. p 411 note 94.
Duty to furnish seaworthy ship generally see infra § 140.

15. U S—The Toledo, C C A N Y, 122 F 2d 255, certiorari denied Isbrandtsen-Moller Co. v. The Toledo, 62 S Ct. 302, 314 U S. 689, 86 L Ed 551—Franklin Fire Ins Co. v. Royal Mail Steam Packet Co, D C N.Y, 54 F.2d 807, reversed on other grounds, C C.A., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins Co, 53 S Ct 82, 287 U S 630, 77 L Ed. 546—The Emilia, D C N Y, 13 F Supp 7—The Empress of Russia, D C N Y, 1 F.Supp. 978.
58 C J p 411 note 96.
Due diligence held shown
U.S.—The Floridian, C C A.N.Y., 83 F 2d 949, certiorari denied Roberts, Brining & Co v The Floridian, 57 S Ct 41, 299 U S 577, 81 L.Ed. 425.

16. U S—The Ft Gaines, D C.Md., 24 F 2d 849, affirmed, C C A, Federal Forwarding Co. v. Lanasa, 32 F 2d 154—The Arakan, D C Cal., 11 F 2d 791.

17. U S—The Ft. Gaines, D C.Md., 24 F 2d 849, affirmed, C C A., Federal Forwarding Co. v. Lanasa, 32 F. 2d 154.

18. U S—The Carib Prince, N.Y, 18 S Ct 753, 170 U.S 655, 42 L.Ed. 1181.
58 C.J. p 411 note 99.

19. U.S—American Agr Chemical

tract stipulations purporting to relieve the owner of such duty are invalid,[20] even if they seek to accomplish such result indirectly,[21] as by providing that a specified report shall be conclusive evidence of the exercise of due diligence with respect to seaworthiness.[22] In other words, stipulations in a bill of lading cannot relieve a carrier from the discharge of his initial duty under the act to use due diligence to furnish a seaworthy vessel,[23] and in order to render available a specific contractual exception from the usual warranty of seaworthiness, the carrier must prove exercise of due diligence to make the ship seaworthy.[24] The degree of diligence required under the provision of the act regulating stipulations as to seaworthiness does not vary from that required under the provision as to statutory exemption.[25]

The provision of the Harter Act restricting contractual exceptions as to seaworthiness applies to common,[26] but not to private,[27] carriers, unless the parties so agree.[28]

§ 133. —— Particular Risks or Causes of Loss in General

a. In general
b. Acts of God
c. Dangers of rivers and lakes and navigation thereon
d Decay
e Effect of climate
f. Fire
g Heat or heating
h Inherent defect, quality, or vice
i Insurable damage, giving carrier benefit of insurance
j. Latent defects
k. Leakage
l Rust or corrosion
m Shipper's or consignee's risk
n Sweat
o Theft

a. In General

The courts have considered and construed a large number of terms and phrases included in shipping contracts or bills of lading excepting particular risks or causes of loss, such as exceptions relieving the carrier from liability for breakage, collision, deck stowage, delay, taint from other goods, strikes, etc.

The courts have considered and construed a large number of terms and phrases included in shipping contracts or bills of lading excepting particular risks or causes of loss.[29] Under exceptions relieving the

Co v. O'Donnell Transp Co, D C N Y, 62 F Supp. 239.
58 C J p 411 note 1.

20. U.S.—Martin v. The Southwark, Pa, 24 S.Ct. 1, 191 U.S 1, 48 L.Ed 65.
58 C J. p 412 note 2.

21. U S.—Philippine Refining Corp. v. U. S, D C N.Y, 29 F 2d 134, affirmed, C C.A, 41 F.2d 1010

22. U S.—Philippine Refining Corp v. U. S, supra.
58 C J p 412 note 4.

23. U S —Martin v. The Southwark, Pa., 24 S Ct. 1, 191 U S. 1, 48 L. Ed 65—Standard Oil Co. v. U S, D C N.Y., 26 F.2d 385

24. U.S —Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co, D C N.Y, 54 F.2d 807, reversed on other grounds, C.C.A., 58 F 2d 175, certiorari denied Royal Mail Steam Packet Co v Franklin Fire Ins Co., 53 S Ct. 82, 287 U S 630, 77 L Ed 546.
58 C J p 412 note 6.

25. U.S.—American Co for International Commerce v. U. S., D.C N Y, 26 F.2d 468

26. U.S.—The City of Dunkirk, D.C. N Y., 10 F.2d 609.
58 C J. p 409 note 59.

27. U.S.—The Ft Gaines, D.C Md., 24 F.2d 849.
58 C J. p 409 note 60.

28. U S —The Agwimoon, D C.Md., 24 F 2d 864, affirmed, C.C A, Atlantic, etc, SS Lines v Interocean Oil Co, 31 F 2d 1006, certiorari denied 49 S Ct. 514, 279 U S 874, 73 L Ed 1009.

29. **Barratry**

(1) Under exceptions as to barratry, exemption may be had for theft by a member of the ship's company —Spinetti v Atlas SS Co., 80 N.Y 71, 36 Am.R 579—58 C J. p 418 note 22

(2) An exception of "damage occasioned by barratry" has been held not to include a mere incident of an attempted but unsuccessful barratry —Putman v The Manitoba, D C N.Y, 104 F 145—58 C J p 418 note 23

(3) A jettison of cattle by the master from mere unfounded apprehension during rough weather is not barratry within the exception —Compania de Navigacion, etc v Brauer, N Y, 18 S Ct. 12, 168 U.S 104, 42 L. Ed 398

Cargo changing character

Under an exception granting exemption as to loss occasioned by the cargo's "change of character," fusing together of bags of quebracho extract during transit constitutes a change of character —Monnier v. U S, D C N Y, 16 F.2d 812, affirmed, C C A, 16 F.2d 815.

"Casualties of river navigation and of steam"

Ind —Adams Express Co. v. Fendrick, 38 Ind 150
58 C J. p 433 note 92.

Contamination

Where, although oil uncontaminated when shipped was contaminated at end of voyage, and tank used did not leak, exception in bill of lading against liability for contamination protected shipowner in absence of negligence —The Anaconda, C.C.A N. Y, 60 F 2d 898.

Custody of carrier

Where bill of lading issued by barge line company limited its responsibility to damages occurring while goods were in its custody and evidence established that damage to goods did not occur while in custody of barge line, barge line was not liable —Newport Rolling Mill Co. v Mississippi Valley Barge Line Co, D C.La, 50 F Supp 623

Damage caused by other goods

Under exceptions relieving the carrier from liability for "damage caused by other goods," exemption will be denied where it appears that negligent stowage was the proximate cause of loss.—The C Lopez y Lopez, C.C.A N.Y, 297 F. 457

Damage to cargo while on lighters

Where shippers had been issued a through bill of lading, carriers could not contract against their liability

carrier from liability for damage arising from "dangerous goods shipped without full disclosure of their nature," exemption for loss will be denied where it appears either that a full disclosure was in fact made,[30] or that the goods shipped were not of a dangerous character.[31] Under a bill of lading exempting the carrier from liability for damage arising from "forced interruption or abandonment of the voyage," where the ship is compelled to deviate by perils of the sea proximately deriving their perilous character from original unseaworthiness of the ship, exemption will be denied for delay caused by the deviation alone,[32] but for additional damages resulting from further delay at a port of distress caused by an embargo exemption will be granted.[33]

The fact that a seized ship is released and permitted to proceed to a neutral port under guaranty of return does not preclude operation of a clause exempting from loss or damage occasioned by arrest or restraint of princes, rulers, or people;[34]

during transshipment, in view of the Harter Act, so as to be relieved from liability for negligence of crew of lighter engaged in transferring cargo from vessel of one carrier to vessel of another carrier, by stipulating in bill of lading that carriers were exempted from liability for damage to cargo while on lighters —Fyfe v. Pan-Atlantic S S Corp, C C A N Y, 114 F 2d 72, certiorari denied Pan Atlantic S S. Corp. v Fyfe, 61 S Ct 319, 311 U.S 711, 85 L.Ed 462

Frost

Under specific exceptions as to "frost" the carrier will be exempted from liability for damage arising from the freezing of cargo without its negligence —The Angelo Toso, D C.N.Y., 278 F. 212—58 C J. p 422 note 17

Goods not in actual custody

Under bills of lading providing that carrier shall not be liable for any loss or damage to goods occurring while goods are not in "actual custody" of the carrier, quoted phrase does not require that the goods be on ship's deck or in her slings, and such bills did not relieve carrier from liability for loss or damage to cargo of coffee occurring by carrier's negligence after lighters were secured to the ship and some portion of the cargo of each lighter had been hoisted to the deck of the ship —Mackey v U. S, D C N.Y., 83 F Supp. 14, affirmed, C.A, 197 F 2d 241

Jettison

The validity of a specific exception as to jettison has been upheld —Antola v Gill, C C Md, 7 F. 487, 5 Hughes 284—58 C.J p 423 note 46

Legal process

Exceptions relieving the carrier from liability for loss caused by legal process will not operate to exempt it as to damage proximately due to other causes —The Henry W Breyer, D C.Md, 17 F 2d 423

"Loss or damage on the lakes or rivers"

Ind —St Louis, etc., R. Co v. Smuck, 49 Ind 302.
58 C.J. p 433 note 93.

Loss beyond shipowner's control

Under exceptions relieving the carrier from liability for loss resulting from causes beyond its control, exemption will be granted where the loss was beyond the power of the carrier to prevent —The Angelo Toso, D C N Y, 278 F 212—58 C J p 418 note 14.

Marine risk

Under exceptions as to "marine risk," the carrier is not exempt from damage caused by its negligence, or from damage caused by unseaworthiness of the ship —The Dana, D C N Y, 190 F 650

Negligence in management of ship

Under a bill of lading exempting the carrier from liability for loss resulting from negligent management of the ship, exemption will be denied where it appears that the negligence primarily concerned care of cargo — The Skipton Castle, Cal, 243 F 523, 156 C.C A 221

"Not responsible for weight, quality, or loose bales"

U.S —The La Kroma, D.C.Pa., 138 F 936.
58 C J p 434 note 94

Obliteration or inaccuracy of marks

Under a bill of lading excepting liability for "obliteration or inaccurracy of marks," delivery of the number of pieces called for by the bill discharges the carrier, even though marks on pieces delivered have been obliterated —Hard v The Enchantress, D C N Y., 58 F 910, affirmed 63 F 272, 11 C C A. 180—58 C.J. p 424 note 78

Rain

An exception as to "loss or damage by rain" does not protect the ship if the presence of rain on the cargo was due to the negligence of those in charge of the ship —The Good Hope, N Y, 197 F. 149, 116 C C A 573.

"Risk of craft or hulk or transshipment"

U S —The Hadji, D C N Y., 16 F. 861, affirmed, C.C A, 20 F 875
58 C J p 433 note 79.

"Risk of craft to or from ship"

Bill of lading exception, exempting carrier from liability for loss due to "risk of craft to or from ship," regardless of lightermen's negligence, was void to extent of negligence provision.—Morris v. Lamport & Holt, D C N Y, 54 F 2d 925, affirmed, C C.A., 57 F 2d 1081.

Stranding

Where under terms of bill of lading for barge cargo and incorporating Harter Act there was an exemption from liability for stranding if there was due diligence to make vessel seaworthy, and both barge and tug were seaworthy, barge and tug together constituted one "vessel transporting merchandise or property" within meaning of Harter Act so that exemption from liability for cargo loss extended to tug when barge drifted into breakwater as result of negligent navigation of both barge and tug —The Vale Royal, D C. Md, 51 F Supp. 412.

"Variation of weight"

(1) Term "variation of weight," in exemption clause of contract of carriage means shortage in weights, and therefore exemption clause covers shortage in weights and shrinkage — Inland Waterways Corporation v. Hallet & Carey Co., C C.A Minn., 52 F 2d 13

(2) The carrier is not exempt from liability for shortage or shrinkage due to its negligence —Inland Waterways Corporation v Hallet & Carey Co, C C A Minn, 52 F.2d 13.

Wetting of cargo

Under a specific exception against wetting of cargo by sea water, the carrier nevertheless remains liable for such wetting through its negligence —Herman v. Compagnie Générale Transatlantique, N Y, 242 F. 859, 155 C C.A. 447—58 C.J. p 433 note 90.

30. U S —The Zulia, D C.N Y., 235 F 433.

31. U.S —The Zulia, supra.
58 C J p 419 note 47

32. U.S —France v French Overseas Corp., N Y, 48 S.Ct. 516, 277 U S. 323, 72 L Ed 901

33. U S —France v French Overseas Corp, supra
58 C.J. p 417 note 1.

34. U.S.—The Hellig Olav, C C A N. Y, 282 F 534, certiorari denied 43 S Ct. 96, 260 U S. 735, 67 L Ed. 488.

but such a clause does not relieve the carrier from liability for a seizure in a port beyond that to which the goods were to be delivered.[35] Exceptions as to "civil commotion" and "disturbance" are substantially as to the same thing,[36] and, if there is any difference, each refers to political, and not to economic, disorders.[37]

Breakage Under exceptions relieving the carrier from liability for loss resulting from breakage, in the absence of negligence the carrier will be exempted as to damage falling within the scope of such exceptions,[38] and where the nature of the injury of itself shows that it belongs within such exception and there is no further evidence as to the nature of the damage or negligence, the libel will be dismissed.[39] Where it appears that the negligence of the carrier as to care of cargo,[40] or unseaworthiness of the ship,[41] contributed to the loss by breakage, exemption will be denied. Whether loss can properly be classified as "breakage" within exceptions will depend on the particular circumstances involved.[42]

Collision The courts have upheld the validity of exceptions as to collision.[43] Exceptions as to "collision" ordinarily include all collisions not caused by negligence of the carrier claiming exemption.[44] The exception has been construed as excluding a collision caused by negligence of the carrier.[45]

Deck stowage. Exceptions permitting deck stowage of cargo are valid in the absence of a statute to the contrary,[46] and have been held valid under the Harter Act.[47] Under an exception permiting deck stowage, injury proximately resulting from the cargo's being on deck comes within the clause so as to exempt the carrier from liability.[48]

Delay Stipulations expressly relieving the carrier with respect to loss resulting from delay are valid where reasonable in character,[49] and will exempt it from liability for damage resulting from delays within their contemplation.[50] A carrier cannot, however, by contract relieve itself from the consequences of unreasonable delay in the movement of cargo.[51]

Insufficiency of packages and wrappers. Exceptions as to insufficiency of packages or wrappers operate to relieve the carrier from liability resulting wholly from such causes,[52] but ordinarily will not exempt it as to loss contributorily arising from unseaworthiness of the ship[53] or from negligence of the carrier;[54] and such stipulations have been held void in so far as they purport to except negligence.[55] "Insufficiency of packages" ordinarily refers to package of the goods damaged,[56] and damage to particular goods caused by insufficiency of package of other goods has been held beyond the scope of such exception.[57]

Interdict

(1) An exception exempting the carrier from damages for failure to deliver cargo at a specified port as the result of an "interdict" refers to political matters.—The Poznan, D C N Y, 276 F. 418

(2) Under such exception nondelivery will not be excused where caused by mere congestion at the port.—The Poznan, supra

35. U.S.—The Jean Jadot, D C.N.Y., 14 F.Supp 161.

36. U S—The Poznan, D C N.Y., 276 F. 418.

37. U.S—The Poznan, supra.

38. U S—The Isla de Panay, C.C A N Y, 292 F. 723, affirmed 45 S.Ct. 269, 267 U S 260, 69 L.Ed. 603

Breakage of barrels

U S—Orient Ins. Co v. Flota Mercante del Estado, D.C.La, 102 F. Supp. 729.

39. U.S—The Henry B. Hyde, Cal., 90 F 114, 32 C C A 534
58 C.J. p 418 note 26

40. U.S—The Matilde Peirce, C.C A N.Y., 32 F.2d 688.
58 C.J. p 418 note 27.

41. U S—The Milwaukee Bridge, D C S.D., 15 F 2d 249, affirmed, C.C.A., 26 F 2d 327, certiorari denied Moore v U S, 49 S Ct. 31, 278 U S. 632, 73 L Ed 550
58 C J p 418 note 28.

42. U S—The Solveig, D C Cal, 217 F 805.
58 C J p 418 note 30.

43. U S—The Victory, Va, 18 S Ct 149, 168 U S. 410, 42 L Ed 519
Mass.—Burroughs v Norwich, etc, R Co, 100 Mass 26, 1 Am R. 78

44. U S—The Jay St Terminal No 3, C C A.N Y., 281 F. 279

45. U.S.—The Britannic, D C N Y., 39 F 395
58 C J. p 419 note 43.

46. U.S—The Carriso, D.C Cal, 27 F 2d 1015, affirmed, C C A, Davidson v Flood Bros, 30 F 2d 279, certiorari denied 49 S Ct. 348, 279 U.S. 853, 73 L Ed. 996.

47. U S.—Davidson v Flood Bros, C C.A Cal, 30 F 2d 279, certiorari denied 49 S Ct. 348, 279 U.S 853, 73 L Ed 996.
58 C J. p 419 note 34

48. U.S—The Carriso, D.C Cal, 27 F.2d 1015, affirmed, C.C A., Davidson v Flood Bros, 30 F 2d 279, certiorari denied 49 S Ct. 348, 279 U S 853, 73 L.Ed 996

49. U S—Dietrich v U S Shipping Board Emergency Fleet Corp., C C. A N Y, 9 F 2d 733, certiorari denied 49 S Ct. 82, 278 U.S 647, 73 L Ed 560

50. U S—Dietrich v U S. Shipping Board Emergency Fleet Corp, supra
58 C.J p 421 note 92

51. U S—U S Shipping Board Emergency Fleet Corp v. Texas Star Flour Mills, C C.A.Tex., 12 F 2d 9
58 C J p 421 note 93

52. U S—Fiorita v Cunard SS. Co, D C.N Y, 10 F 2d 244

53. U S—The Milwaukee Bridge, D. C S D., 15 F 2d 249, affirmed, C C A, 26 F 2d 327, certiorari denied Moore v. U S, 49 S.Ct. 31, 278 U.S 632, 73 L.Ed 550.

54. U S—The Milwaukee Bridge, supra—Fiorita v Cunard SS. Co, D.C N Y, 10 F 2d 244

55. U.S—Fiorita v. Cunard SS Co, supra
58 C.J p 423 note 34.

56. U.S—The Zulia, D C.N.Y., 235 F. 433.

57. U S—The Zulia, supra.

Livestock and other perishable cargo. Courts have upheld the validity of exceptions specifically limiting liability with respect to livestock[58] or inanimate cargo of a perishable nature.[59] Such exceptions operate to relieve the carrier from liability for loss occurring without its fault,[60] but will not be construed to cover loss of an avoidable character.[61]

Taint from other goods. Exceptions as to "taint from other goods" operate to relieve the carrier from liability for damage so caused,[62] in the absence of unseaworthiness of the ship[63] or negligence in the care of cargo.[64]

Strikes. Under exceptions as to strikes or stoppage of labor, exemption has been granted[65] where damage resulted from the striking of stevedores[66] or repair men.[67] Exceptions as to strikes will not relieve the carrier from liability for damage resulting from its negligence.[68]

Unavoidable or inevitable accident. An exception as to "unavoidable accident" is valid.[69] Damage arising from a collision occurring without fault of the carrier falls within an exception as to "unavoidable accident."[70] "Inevitable accident" applies to occurrences which no foresight or precaution of the carrier could prevent.[71]

Vermin. Under a specific exception as to damage by vermin, a carrier exercising due care will be exempt from liability for such damage.[72] Where the carrier's negligence contributes to the damage by vermin, exemption will be denied.[73]

b. Acts of God

A contractual provision excusing the carrier for loss caused by act of God is not available where the act of God causing the loss could have been avoided by the exercise of due care and diligence.

A contractual provision excusing the carrier for loss caused by act of God is not available where the act of God causing the loss could have been avoided by the exercise of due care and diligence.[74] Exceptions as to acts of God refer to damage resulting from disasters beyond the scope of human agency,[75] such as lightning[76] and tempest.[77]

"Act of God" has been distinguished from exceptions as to "dangers of navigation,"[78] "dangers of the river,"[79] "dangers of the sea,"[80] "perils of the sea,"[81] "inevitable accident,"[82] and "unavoidable accident."[83] Under certain circumstances, however, act of God may be construed as equivalent to "dangers of the sea"[84] or "perils of the sea."[85]

c. Dangers of Rivers and Lakes and Navigation Thereon

Exceptions as to dangers of the river and river navigation have the effect of exempting the carrier as to

58. U.S.—Liverpool, etc., Steam Co v Phenix Ins Co, N.Y., 9 S.Ct. 469, 129 U.S. 397, 32 L.Ed. 788

59. U.S.—Liverpool, etc., Steam Co v Phenix Ins Co, supra—Callister v U.S. Shipping Board Emergency Fleet Corp., D.C.N.Y., 21 F.2d 447, affirmed, C.C.A., Callister v U.S. Shipping Board Emergency Fleet Corp., 30 F.2d 1008.

60. U.S.—The J. C. Stevenson, D.C. Md., 17 F. 540
58 C.J. p. 424 note 72.

61. U.S.—Compania de Navigacion La Flecha v Brauer, N.Y., 18 S.Ct. 12, 168 U.S. 104, 42 L.Ed. 398
58 C.J. p. 424 note 73

62. U.S.—The Milwaukee Bridge, C.C.A.S.D., 26 F.2d 327, certiorari denied Moore v U.S., 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.

63. U.S.—The Milwaukee Bridge, D.C.S.D., 15 F.2d 249, affirmed, C.C.A., 26 F.2d 327, certiorari denied Moore v U.S., 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.

64. U.S.—The Milwaukee Bridge, D.C.S.D., 15 F.2d 249, affirmed, C.C.A., 26 F.2d 327, certiorari denied Moore v U.S., 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550
58 C.J. p. 432 note 59.

65. U.S.—The Maui, C.C.A.Cal., 113 F.2d 1018, certiorari denied John Demartini Co v The Maui, 61 S.Ct. 317, 311 U.S. 709, 85 L.Ed. 461

66. U.S.—The Toronto, N.Y., 174 F. 632, 98 C.C.A. 386.
58 C.J. p. 432 note 46.

67. U.S.—Lighter v U.S. Shipping Board Emergency Fleet Corp., C.C.A.La., 33 F.2d 288

68. N.Y.—Armand Schmoll, Inc v Commonwealth, etc., Line, 245 N.Y.S. 224, 230 App.Div. 430
58 C.J. p. 432 note 48

69. Or.—Rosenwald v Oregon City Transp. Co., 163 P. 831, 164 P. 189, 84 Or. 15

70. Or.—Rosenwald v. Oregon City Transp. Co. supra.

71. N.Y.—Merritt v Earle, 31 Barb. 38.

72. U.S.—The Timor, N.Y., 67 F. 356, 46 C.C.A. 412.
58 C.J. p. 433 note 87

73. U.S.—The Italia, D.C.N.Y., 59 F. 617.
58 C.J. p. 433 note 88.

74. U.S.—Texas, etc., SS. Co v. Parker, C.C.A., 263 F. 864, certiorari denied 40 S.Ct. 485, 253 U.S. 488, 64 L.Ed. 1026
58 C.J. p. 417 note 5.

75. Me.—Plaisted v Boston, etc., Steam Nav. Co., 27 Me. 132, 46 Am.D. 587.
58 C.J. p. 417 note 2.

76. Tenn.—Gordon v. Buchanan, 5 Yerg. 71

77. Tenn.—Gordon v. Buchanan, supra.
58 C.J. p. 417 note 4

78. Or.—Rosenwald v. Oregon City Transp. Co., 163 P. 831, 164 P. 189, 84 Or. 15.
58 C.J. p. 417 note 6.

79. Tenn.—Gordon v. Buchanan, 5 Yerg. 71
Va.—Friend v Woods, 6 Gratt. 189, 47 Va. 189, 52 Am.D. 119.

80. N.J.—Stephens, etc., Transp. Co v. Tuckerman, 33 N.J.Law 543
58 C.J. p. 417 note 8.

81. U.S.—Cook v. Southeastern Lime, etc., Co., D.C.S.C., 146 F. 101.
58 C.J. p. 417 note 9.

82. N.Y.—Merritt v Earle, 31 Barb. 38
58 C.J. p. 417 note 10

83. Or.—Rosenwald v. Oregon City Transp. Co., 163 P. 831, 164 P. 189, 84 Or. 15.
58 C.J. p. 418 note 11.

84. N.J.—Stephens, etc., Transp. Co v. Tuckerman, 33 N.J.Law 543.
58 C.J. p. 418 note 12.

85. U.S.—Cook v. Southeastern Lime, etc., Co., D.C.S.C., 146 F. 101.

losses from natural accidents incident to river navigation. Exceptions relating to dangers of lake navigation embrace all ordinary perils which attend navigation on lakes

Exceptions as to dangers or perils of the river and of river navigation have the effect of exempting the carrier as to losses arising from natural accidents incident to river navigation[86] peculiar to the element of water,[87] and from accidents peculiar to the river,[88] even though resulting from the interposition of human agency.[89] Exemption under such exceptions is ordinarily confined to loss resulting from inevitable accident or irresistible force,[90] and dangers such as cannot be guarded against by human skill or foresight.[91] Losses due to negligence of the carrier are not within the contemplation of such exceptions.[92] In so far as there may be any distinction between "dangers of the river" and "dangers of the river navigation," the latter phrase is of larger import.[93]

Exceptions relating to "dangers of lake navigation" embrace all ordinary perils which attend navigation on lakes,[94] including those which arise from shallowness of waters at the entrance of harbors formed from them;[95] but negligence of the carrier contributing to the loss will deprive it of the benefit of such exceptions.[96] As applied to inland navigation, exceptions as to "dangers of the seas" and as to "dangers of the lakes and rivers" have been held identical in meaning.[97]

Collision occurring without negligence of the carrier is within the protection of exceptions as to "dangers of the river,"[98] "dangers of the river navigation,"[99] or "unavoidable accidents and dangers of the river;"[1] but a collision resulting from negligence of the carrier is not within the contemplation of such exceptions.[2]

Fire. Under exceptions as to dangers[3] or perils[4] of the river, exemption has been denied for loss resulting from fire, although other authority construing exceptions as to "dangers of the river" has held fire loss within the exception by usage.[5]

Hidden obstructions. Under exceptions as to dangers of the river or of river navigation, exemption has been granted where, despite exercise of due care, damage to cargo resulted from the ship's striking a hidden obstruction;[6] but to make the exception available it must appear that the master used reasonable caution,[7] and where negligence is shown exemption will be denied.[8] In determining whether there was negligence excluding the exception, the rule which imputes negligence to the master of a ship at sea that strikes a known and charted natural obstruction has been held inapplicable to navigation on rivers,[9] and it has been said that each case must be governed by its own circumstances.[10]

Low water is not within exceptions as to dangers of the river and navigation thereon.[11]

Robbery is not a "danger of the river."[12]

d. Decay

In the absence of statutory restrictions, exceptions as to decay may operate to relieve the carrier from liability for loss resulting from that cause.

86. Mo.—Hill v. Sturgeon, 35 Mo. 212, 86 Am. D. 149.
58 C. J. p. 420 note 55.

87. Ala.—Sampson v. Gazzam, 6 Port. 123, 30 Am. D. 578

88. Miss.—Neal v. Saunderson, 10 Miss. 572, 41 Am. D. 609
Pa.—Hayes v. Kennedy, 2 Pittsb. 262

89. Miss.—Whitesides v. Thurlkill, 20 Miss. 599, 51 Am. D. 128
Pa.—Hayes v. Kennedy, 2 Pittsb. 262.

90. U. S.—The Northern Belle, D. C. Wis., 18 F. Cas. No. 10,319, 1 Biss. 529, affirmed 9 Wall. 526, 19 L. Ed. 746

91. Tenn.—Turney v. Wilson, 7 Yerg. 340, 27 Am. D. 515.
58 C. J. p. 420 note 61.

92. Ohio.—Graham v. Davis, 4 Ohio St. 362, 62 Am. D. 285.—Davidson v. Graham, 2 Ohio St. 131.
58 C. J. p. 420 note 62.

93. Pa.—Hayes v. Kennedy, 2 Pittsb. 262.

94. U. S.—Western Transp. Co. v. Downer, Ill., 11 Wall. 129, 20 L. Ed. 160.
58 C. J. p. 419 note 49.

95. U. S.—Western Transp. Co. v. Downer, supra
Ind.—Insurance Co. of North America v. Lake Erie, etc., R. Co., 53 N. E. 382, 152 Ind. 333

96. U. S.—The Portsmouth, Ill., 9 Wall. 682, 19 L. Ed. 754
58 C. J. p. 419 note 51.

97. Ind.—Harrison v. Hixson, 4 Blackf. 226.

98. Ala.—Jones v. Pitcher, 3 Stew. & P. 135, 24 Am. D. 716.
Miss.—Whitesides v. Thurlkill, 20 Miss. 599, 51 Am. D. 128.

99. Pa.—Hays v. Kennedy, 41 Pa. 378, 80 Am. D. 627, 3 Grant 351

1. La.—Van Horn v. Taylor, 2 La. Ann. 587, 46 Am. D. 558

2. La.—Van Horn v. Taylor, supra
Miss.—Whitesides v. Thurlkill, 20 Miss. 599, 51 Am. D. 128

3. Miss.—Gilmore v. Carman, 9 Miss. 279, 40 Am. D. 96.
58 C. J. p. 420 note 70.

4. U. S.—Garrison v. Memphis Ins. Co., Mo., 19 How. 312, 15 L. Ed. 656

5. Ala.—Boon v. Steamboat Belfast, 40 Ala. 184, 88 Am. D. 761.
58 C. J. p. 420 note 72

6. U. S.—Hibernia Ins. Co. v. St. Louis, etc., Transp. Co., Mo., 7 S. Ct. 550, 120 U. S. 166, 30 L. Ed. 621
58 C. J. p. 420 note 73

7. Tenn.—Turney v. Wilson, 7 Yerg. 340, 27 Am. D. 515
58 C. J. p. 420 note 74

8. Mo.—Costigan v. Michael Transp. Co., 38 Mo. App. 219.
58 C. J. p. 420 note 75

9. Mo.—Collier v. Valentine, 11 Mo. 299, 49 Am. D. 81
58 C. J. p. 420 note 77.

10. Mo.—Collier v. Valentine, supra.

11. U. S.—The Northern Belle, D. C. Wis., 18 F. Cas. No. 10,319, 1 Biss. 529, affirmed 9 Wall. 526, 19 L. Ed. 746.
58 C. J. p. 420 note 79

12. Ala.—Boon v. Steamboat Belfast, 40 Ala. 184, 88 Am. D. 761
U. S.—The Northern Belle, D. C. Wis., 18 F. Cas. No. 10,319, 1 Biss. 529, affirmed 9 Wall. 526, 19 L. Ed. 746.

In the absence of statutory restrictions, contractual exceptions as to "decay" may operate to relieve the carrier from liability for loss resulting from decay[13] or bacterial action,[14] such as putrefaction[15] or rot,[16] whether the cause thereof is inherent in the cargo damaged[17] or results from its exposure to some outside agency.[18] The negligence of the carrier contributing to the loss deprives it of the benefit of the exception,[19] as where there is a want of diligence in the stowage[20] or care[21] of the cargo

Contractual provisions excepting damage by decay cannot broaden the scope of the exception of the Carriage of Goods by Sea Act § 4(2) (m) which is "Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods."[22]

e. Effect of Climate

Exceptions as to the effect of climate operate to relieve the carrier from liability for damage to cargo resulting from its inevitable exposure to natural and excessive heat or change in temperature.

Exceptions as to effect of climate operate to relieve the carrier from liability for damage to cargo resulting from its inevitable exposure to natural and excessive heat,[23] or change in temperature during the course of the voyage,[24] but will not exempt the carrier as to damage resulting from its negligence [25]

f. Fire

The courts have upheld the validity of stipulations exempting the carrier from liability for damage by fire.

The courts have upheld the validity of stipulations exempting the carrier from liability for damage by fire.[26] The carrier cannot, however, relieve itself from liability from fire due to its negligence,[27] and such exceptions are unavailable where the carrier's negligence contributed to the fire loss.[28] Partial land carriage of goods will not preclude application of exceptions as to fire loss while the goods are in the possession of a water carrier.[29]

The term "fire," as used in an exemption clause, means any fire,[30] and is not confined to a fire originating in the ship's furnace.[31] Exceptions as to loss from damage by fire, in the absence of phrases which limit the exception to fire loss on the water,[32] ordinarily include not only fire loss occur-

13. U S—The Hog Island, C C A N Y, 48 F 2d 101—Bingham v. Osaka Shosen Kaisha, D C.N Y, 12 F. Supp 35, affirmed, C C A., 88 F 2d 1004.
Decay as sea peril see infra § 134 b
Flower bulbs
U S—Rhodes v. U. S, D C.N.Y, 8 F.Supp. 124.
Onions
U S—The Vallescura, C C A.N.Y, 70 F.2d 261, reversed on other grounds 55 S Ct. 194, 293 U S 296, 79 L. Ed 373—The Tergestea, D C.N.Y., 54 F 2d 809.

14. U S—Pan-American Hide Co v. Nippon Yusen (Kabushiki) Kaisha, D C N Y., 13 F.2d 871.

15. U.S.—Pan-American Hide Co, Inc v Nippon Yusen (Kabushiki) Kaisha, supra
58 C J p 421 note 85.

16. U.S—The Solveig, D C.Cal., 217 F 805
58 C J p 421 note 86

17. U S—The Anna, D C Pa., 223 F. 558
58 C.J p 421 note 87.

18. U S.—Pan-American Hide Co v Nippon Yusen (Kabushiki) Kaisha, D.C N Y, 13 F 2d 871
58 C J. p 421 note 88.

19. U S—The Vallescura, N Y, 55 S Ct. 194, 293 U.S 296, 79 L Ed 373.
58 C.J p 421 note 89

20. U S.—The Vallescura. N.Y., 55 S Ct 194, 293 U.S. 296, 79 L.Ed. 373.

21. U S—The Vallescura, N.Y, 55 S Ct. 194, 293 U S 296, 79 L Ed. 373.

22. U.S—George F Pettinos, Inc, v. American Export Lines, D.C Pa, 68 F Supp 759, affirmed, C C A., 159 F. 2d 247.

23. U S—Monnier v. U S, D C N.Y., 16 F.2d 812, affirmed, C.C A, 16 F. 2d 815.
58 C.J. p 421 note 95.

24. U S—The Aline, C C N Y., 25 F. 562, 23 Blatchf. 335.
58 C.J. p 421 note 97.

25. U S—The Africa Maru, C C A N. Y, 54 F 2d 265, certiorari denied Osaka Shosen Kaisha v. Habicht Braun & Co, 52 S Ct 457, 285 U S 556, 76 L Ed. 945—The Aline, C. C N Y, 25 F. 562, 23 Blatchf. 335.
58 C.J. p 421 note 98.

26. U S.—The President Wilson, D. C Cal., 5 F.Supp. 684
La—American Cotton Co-op. Ass'n v. New Orleans & Vicksburg Packet Co, 157 So 733, 180 La. 836.
58 C.J. p 421 note 2.
Ship in rem
Where bills of lading contained express contract making fire statute defense, such contract was available not only to shipowner, but to ship in rem.—The Munaires, D.C La, 12 F Supp. 913

27. U S.—Fyfe v. Pan-Atlantic S. S. Corp, C C.A.N.Y, 114 F 2d 72, certiorari denied Pan Atlantic S S. Corp v Fyfe, 61 S Ct. 319, 311 U. S. 711, 85 L Ed 462.

Clerk's negligence, which allegedly caused fire at time when general manager and wharf superintendent were not on dock, has been held not negligence of shipowner—The Munaires, D C La, 12 F Supp 913.

28. Ala.—Grey v. Mobile Trade Co, 55 Ala. 387, 28 Am R 729
58 C J. p 421 note 3.

29. N.Y.—Sea Coast Lumber Co v. Clyde SS. Co, 133 N.Y S 303, 148 App.Div 622, affirmed 104 N E. 1141, 210 N.Y. 571.
58 C J. p 422 note 12.

30. S C—Swindler v Hilliard, 31 S. C L. 286, 45 Am D. 732.
"Dangers of fire" and "unavoidable accidents of fire," as used in contractual exceptions, have been construed as identical in meaning—Swindler v. Hilliard, supra.

31. S C.—Swindler v. Hilliard, supra.

32. Fire on rivers and sea
Exceptions as to damages "by fire . . on the rivers and sea" cover only such fire loss as occurs on the water—Little Rock, etc., R. Co. v. Talbot, 39 Ark. 523
Dangers of fire and navigation
A receipt exempting the carrier from "dangers of fire and navigation or any other accident or danger of the seas, rivers or steam navigation, of whatsoever kind or nature," is applicable only to loss by fire occurring at sea and does not attach to the land route.—Van Valkenberg v Wilder SS Co, 9 Hawaii 67—10 C.J. p 186 note 62 [a] (2).

ring aboard ship,[33] but also fire loss occurring on the wharf while the goods are under the control of the carrier,[34] and the shipowner may be exempt as a party in possession even if not technically a carrier at the time of fire[35]

g. Heat or Heating

Contractual stipulations exempting the carrier from liability for loss arising from heat or heating have been held valid.

Contractual stipulations exempting the carrier from liability for loss arising from heat[36] or heating[37] have been held valid, and the two words have been construed as synonymous.[38] The carrier is relieved of liability under such stipulations,[39] except where it is negligent[40] as to stowage[41] or ventilation.[42] Under exceptions relating to "heat," exemption has been granted for damage arising from climatic heat.[43]

h. Inherent Defect, Quality, or Vice

Under exceptions exempting the carrier from liability for loss arising from the inherent defect, quality, or vice of the cargo, the carrier is released from damages falling within the scope of such exceptions.

Under exceptions exempting the carrier from liability for loss arising from the inherent defect, quality, or vice of the cargo, the carrier is released from damages falling within the scope of such exceptions[44] The carrier is deprived of the benefit of such exceptions where the loss is due to its negligence[45] in stowage.[46]

i. Insurable Damage; Giving Carrier Benefit of Insurance

Exceptions as to any loss capable of being covered by insurance have been held valid The carrier may contract for the benefit of insurance unless prohibited by statute.

Exceptions as to any loss capable of being covered by insurance have been held valid[47] and enforceable,[48] but such clauses have been construed as not relieving the carrier of liability for loss due to negligence,[49] or as invalid if they did in fact purport to relieve the carrier from its liability for negligence.[50] Clauses relieving the carrier from liability for losses capable of being covered by insurance are ordinarily construed as referring only to insurance obtainable in the usual course of business, and not to insurance which might possibly be obtained from an extraordinary insurance association[51]

Benefit of insurance. Unless prohibited by statute, the carrier may contract for the benefit of insurance.[52] Stipulations giving the carrier the benefit of insurance on damaged cargo have been held

33. U S—Scott v. Baltimore, etc., Steam-Boat Co, C C.Md, 19 F. 56.

34. U S—The Munaires, D C La, 12 F.Supp 913
58 C J p 422 note 8.

35. N Y.—Jennings v Clyde SS Co, 133 N.Y S 298, 148 App.Div. 615, affirmed 104 N.E. 1132, 210 N.Y. 570.
58 C J. p 422 note 9.

36. U S—The Hog Island, C.C A N. Y, 48 F 2d 101—The New Orleans, C C La, 26 F 44

37. U S—Rhodes v. U. S, D.C N Y., 8 F Supp 124—The New Orleans, C.C La, 26 F 44.

38. U S—The Good Hope, N Y, 197 F. 149, 116 C C.A. 573.

39. U S—Bingham v Osaka Shosen Kaisha, D.C N.Y, 12 F Supp. 35, affirmed, C C A, 88 F 2d 1004

40. U S.—The Nichiyo Maru, D C. Md., 14 F.Supp 727, affirmed, C C A., 89 F 2d 539.

41. U S—The Niel Maersk, D C N.Y., 18 F.Supp. 824, reversed on other grounds, C C.A., 91 F 2d 932, certiorari denied Bradley v The Niel Maersk, 58 S.Ct. 281, 302 U S 753, 82 L.Ed. 582—The Nichiyo Maru, D.C.Md, 14 F Supp. 727, affirmed, C.C.A., 89 F.2d 539.

42. U S.—The Niel Maersk, D.C.N. Y., 18 F.Supp 824, reversed on other grounds, C C A, 91 F.2d 932, certiorari denied Bradley v. The Niel Maersk, 58 S Ct 281, 302 U S 753, 82 L.Ed 582—The Nichiyo Maru, D.C Md, 14 F.Supp. 727, affirmed, C.C.A, 89 F.2d 539

43. U S—Monnier v U S, D.C.N Y, 16 F 2d 812, affirmed, C.C A., 16 F 2d 815.
58 C J. p 422 note 22.

44. U S—The Nagisan Maru, D C N Y, 14 F Supp 1010

"Anything arising from the nature of the goods"
U S—The Tergestea, D C N.Y., 54 F 2d 809.

"Chemical action"
U S—Bingham v Osaka Shosen Kaisha, D C N Y, 12 F Supp 35, affirmed, C C A, 88 F 2d 1004

45. U S—The Nichiyo Maru, C.C A Md, 89 F.2d 539
58 C J. p 422 notes 28–30

46. U S—The Nichiyo Maru, supra —The Ferncliff, D.C Md, 22 F.Supp 728, certified questions answered Smith v The Ferncliff, 59 S Ct 615, 306 U S. 444, 83 L Ed 862, affirmed, C.C.A, 105 F 2d 1021.

47. U S—The Egypt, D C.N Y, 25 F. 320—The Titania, D C.N.Y, 19 F. 101

48. U S.—The Ferncliff, D C Md, 22 F.Supp. 728, certified questions answered Smith v The Ferncliff, 59 S Ct. 615, 306 U S 444, 83 L Ed. 862, affirmed, C C.A., 105 F 2d 1021.

Compromise settlement with insurer
The fact that holders of bills of lading made compromise settlement with insurers without notice to ship did not discharge ship from liability for amount of damage to cargo of fish meal not covered by insurance, where ship had previously denied any liability.—The Ferncliff, D C Md, 22 F Supp. 728, certified questions answered Smith v The Ferncliff, 59 S Ct 615, 306 U S 444, 83 L Ed 862, affirmed, C.C A, 105 F 2d 1021.

49. U S—The Ferncliff, D.C.Md, 22 F.Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct 615, 306 U S 444, 83 L Ed 862, affirmed, C.C A, 105 F.2d 1021
58 C J. p 423 note 38.

50. U.S—The Anna, D.C Pa., 223 F. 558

51. U S—The Titania, D.C.N.Y., 19 F. 101.

52. U.S.—The J L Luckenbach, C C A.N.Y., 65 F 2d 570.

Loans to shipper
If carrier contracts for benefit of insurance paid to shipper, it does not obtain benefit of loans to shipper repayable out of recovery from carrier.—The J. L. Luckenbach, supra.

enforceable,[53] or unenforceable,[54] in accordance with the circumstances involved.

j. Latent Defects

The carrier may exempt itself from liability for latent defects.

The carrier may exempt itself from liability for latent defects[55] and the validity of such exceptions has been upheld.[56] Provisions of the Harter Act making it unlawful to contract away the duty of diligence with respect to seaworthiness have been construed as permitting the diligent carrier to exempt itself from liability as to latent defects,[57] but such statutory provisions will not be extended by judicial interpretation to effect an exemption as to latent defects.[58] Under the act, exceptions as to latent defects are inoperative where there was negligence with respect to care of cargo.[59]

The exception will be strictly construed,[60] and will not be extended to include patent defects,[61] or defects not latent at the beginning of the voyage.[62] Exceptions in a bill of lading of damage from "latent defects in hull" do not include unseaworthiness existing at the inception of the voyage, and at the time the bill of lading was signed, and resulting from a latent defect in a rivet in a water tank.[63]

k. Leakage

Exceptions as to leakage operate to relieve the carrier from liability for all losses of this character occurring without its fault.

Exceptions as to leakage operate to relieve the carrier from liability for all losses of this character occurring without its fault,[64] whether resulting from leakage of the cargo sued on,[65] or from leakage of other cargo to the damage of that sued on.[66] The exception is ordinarily defeated by unseaworthiness of the ship[67] or negligence of the

53. U S—Olivier Produce Corp v U S, D C Wash, 20 F 2d 214

54. U S—The J. L Luckenbach, C C A N Y, 65 F 2d 570
58 C J. p 423 note 42

Unpaid insurance
The fact that the bill of lading provides that the carrier shall have the benefit of any insurance effected by the shipper is not available as a defense where it does not appear that the insurance has been paid—Baker v. New York, etc, R Co., D C N Y, 162 F. 496, affirmed 168 F. 248, 93 C C A 550, certiorari denied 29 S Ct. 696, 214 U.S. 514, 53 L Ed 1063

Right of owner of lighter to benefit of insurance
Where steamship company obligated to reship burlap arranged with second steamship company to carry burlap to destination under oral agreement therefor including lighterage which the second company engaged tug owner to perform and tug owner in turn subcontracted work to owner of lighter, even though second company's usual bill of lading contained provision giving carrier full benefit of insurance effected upon property shipped, the owner of the lighter was not entitled to benefit of shipper's insurance in determining amount of damages for which owner of lighter was liable when lighter capsized with cargo of burlap—The Steel Inventor, D.C.Md, 35 F.Supp 986

55. U S.—The Toledo, C.C.A N Y, 122 F.2d 255, certiorari denied Isbrandtsen-Moller Co v. The Toledo, 62 S Ct 302, 314 U S. 689, 86 L Ed 551
Unseaworthiness defeating benefit of exceptions see supra § 131 c (4).

56. U S.—The Prussia, N.Y., 93 F 837, 35 C C A. 625, certiorari denied 19 S Ct 885, 174 U S 803

57. U S—The Ft Gaines, D C Md, 24 F 2d 849, affirmed, C.C A, Federal Forwarding Co. v. Lanasa, 32 F 2d 154.
58 C J. p 423 note 57.

58. U S.—The Ft Gaines, D C Md., 24 F.2d 849, affirmed, C C A, Federal Forwarding Co. v. Lanasa, 32 F.2d 154.

59. U S—Barr v International Mercantile Marine Co., D C N Y., 29 F 2d 26

60. U S—The Citta di Palermo, D.C N Y, 226 F. 522, affirmed 226 F 529, 141 C C A 285.
58 C J. p 423 note 51

61. U S.—The Cameronia, D.C N.Y., 38 F 2d 522.
58 C J. p 423 note 52.

Leaky or open port
(1) A leaky port on a new vessel, so near the water line as would render the steamer unfit for the carriage of cargo in the compartment into which such port opened, cannot be regarded as a "latent defect," since it was easily discoverable on inspection by the water test, a test which is easily made, and which is customarily made, and which reasonable prudence requires to be made, with respect to ports near the water line before a ship sails on her first voyage.—The Phoenicia, D.C N Y, 90 F. 116, affirmed 99 F. 1005, 40 C.C.A. 221.

(2) The term "latent defect," in a bill of lading exempting the owner from liability for loss occurring by latent defects in hull, even existing before shipment or sailing, does not include an open port, although unknown to the master on sailing.—Putnam v. The Manitoba, D C.N.Y., 104 F 145, 151—The Carib Prince, D C N Y, 63 F. 266, affirmed, C C A, 68 F. 254, reversed on other grounds 18 S Ct. 753, 170 U.S 655, 42 L Ed 1181.

62. U S—The Citta di Palermo, D.C N Y, 226 F. 522, affirmed 226 F 529, 141 C C A. 285

63. U S—Wuppermann v The Carib Prince, N Y, 18 S Ct. 753, 170 U S 655, 42 L Ed. 1181
58 C.J. p 414 note 47.

64. U S—The Claverburn, D C N.Y., 147 F. 850.
58 C J p 424 note 60

65. U S—The Monte Iciar, C C.A. Pa., 167 F.2d 334
58 C.J p 424 note 61.

Cocoanut oil
U S—The Neidenfels, D C N Y, 174 F. 293
N Y.—Proctor & Gamble Mfg. Co v Ocean S. S Co., 267 N.Y.S. 405, 149 Misc. 701.

Wine
Provision in bill of lading for shipment of wine reciting "Not responsible for leakage, breakage or spigoting," was permissible under the Harter Act, and such exemption was not contrary to Carriage of Goods by Sea Act—The Monte Iciar, C.C.A.Pa, 167 F 2d 334.

66. U S—The Florinda, C.C.A.N.Y., 31 F.2d 262, certiorari denied Saitta v. The Florinda, 49 S Ct. 514, 279 U.S. 874, 73 L Ed 1009.
58 C.J. p 424 note 62.

67. U S.—The Milwaukee Bridge, D C.S D., 15 F 2d 249, affirmed, C.C. A., 26 F.2d 327, certiorari denied Moore v. U. S., 49 S Ct. 31, 278 U. S 632, 73 L Ed. 550.

Defect in ship
In libel for loss of oil which was pumped overboard to prevent it from

carrier,[68] such as bad stowage.[69]

Exceptions as to "drainage" do not exempt from liability for damage resulting from unseaworthiness[70] or from negligence in care of cargo.[71]

l. Rust or Corrosion

Contractual exemptions from liability for damage arising from rust or corrosion have been held valid.

Contractual exemptions from liability for damage arising from rust or corrosion have been held valid,[72] and, under such exceptions, carriers are not liable for damage by rust occurring without their negligence.[73] Exemption is granted not only as to oxidation of iron,[74] but also as to oxidation of other metals.[75] Under a general exception as to "rust," the carrier is exempted from liability for damage whether the rust resulted from dampness of the atmosphere[76] or from water.[77]

m. Shipper's or Consignee's Risk

Unless a statute is contravened, stipulations that cargo shall be carried at the risk of the shipper or cargo owner are valid and enforceable.

Unless a statute is contravened, stipulations that cargo shall be carried at the risk of the shipper or cargo owner,[78] such as provisions for carriage on deck at the shipper's risk of damage or loss,[79] are valid and enforceable. Such stipulations except risks of damage or loss, however, only so far as the damage or loss occurs under proper stowage,[80] and they do not relieve the carrier from liability for loss resulting from its negligence.[81]

Where the carrier has notice that the outstanding bill of lading does not contain permission for on-deck carriage and that, therefore, commercial drafts might be honored in reliance on normal conditions of carriage, it may not charge its obligations by stipulating that the cargo is carried on deck at the shipper's risk,[82] since such a stipulation would be a fraud on anyone who might innocently pay value for the bill of lading.[83]

flowing into forward holds due to small hole in bilge pipe and sticking open of non-return valve, a provision in the bill of lading that the carrier should not be liable for loss or damage occasioned by "drainage or leakage" did not apply, since the necessity for pumping oil overboard was due to a defect in the ship and not to insufficient containers furnished by the shipper.—The Bill, D C.Md., 47 F.Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F. 2d 470

68. U S.—The Milwaukee Bridge, D. C S D, 15 F.2d 249, affirmed, C C A., 26 F 2d 327, certiorari denied Moore v. U S, 49 S Ct 31, 278 U. S 632, 73 L Ed. 550.
58 C.J. p 424 note 64.

69. U.S —The Matilde Peirce, D.C. N Y, 32 F.2d 688
58 C J. p 424 note 65.

70. U S.—The Milwaukee Bridge, D. C S D, 15 F 2d 249, affirmed, C C A., 26 F 2d 327, certiorari denied Moore v. U. S, 49 S.Ct. 31, 278 U.S 632, 73 L.Ed. 550.

71. U S —The Milwaukee Bridge, D. C S D, 15 F 2d 249, affirmed, C C A., 26 F 2d 327, certiorari denied Moore v U. S, 49 S.Ct 31, 278 U.S 632 73 L Ed 550.
58 C.J. p 424 note 67.

72. U.S —Wolff v The Vanderland, D.C N Y, 18 F. 733.

73. U.S —The Bristol, D.C.N.Y, 6 F 638—Zerega v. Gee, D.C.N.Y., 30 F.Cas.No.18,211.
N.Y.—Nestle's Milk Products v. Luckenbach S. S Co., 297 N.Y.S. 487, 251 App Div 358.

Dampness, discoloration, and rust
In absence of proof of negligence, water carrier was not liable for damage to milk shipment caused by dampness, discoloration, or rust, under express exceptions in the bill of lading.—Nestle's Milk Products v Luckenbach S S Co, supra.

Mould, rust, and discoloration
Under clause of bill of lading excepting carrier and vessel from liability for damage caused by mould, rust, and discoloration, cargo owner could not recover from carrier and vessel for damage to shipment of canned beets by mould, rust, and staining of labels, in absence of evidence of negligence —Thomas Roberts & Co. v. Calmar S. S. Corp, D.C Pa, 59 F Supp. 203

74. U.S.—Wolff v The Vanderland, D C N.Y., 18 F 733.

75. U S —Wolff v. The Vanderland, supra
58 C.J. p 431 note 30.

76. U.S —The J L. Luckenbach, D C Cal, 209 F. 142
Wash —Broderick, etc, Rope Co v Luckenbach SS Co, 247 P. 937, 139 Wash 444.

77. U S.—The J L. Luckenbach, D. C Cal, 209 F 142
Wash —Broderick, etc, Rope Co. v Luckenbach SS. Co, 247 P. 937, 139 Wash. 444.

78. U.S.—Globe Solvents Co. v The California, C.C A.Pa, 167 F 2d 859, certiorari denied 69 S Ct 67, 335 U.S 844, 93 L Ed 394.
58 C.J. p 431 note 33.

"During the voyage"
A stipulation for carriage at the shipper's risk "during the voyage" will be construed as limited to loss during the particular voyage within the contemplation of the parties.—Swift v Furness, D C Mass., 87 F. 345—58 C J p 431 note 38.

Private carrier
Under the Harter Act, a stipulation for carriage at the shipper's risk is valid where made with a private carrier —The Elizabeth Edwards, C.C A N Y, 27 F 2d 747.

79. U S —The Idefjord, D C N.Y., 31 F.Supp. 667, reversed on other grounds, C.C A, 114 F 2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp, 61 S Ct 175, 311 U.S. 707, 85 L Ed 459

A greater risk of loss to goods "on deck" is recognized and provision for carriage on deck at shipper's risk of damage or loss is proper.—Globe Solvents Co. v The California, C C A.Pa, 167 F 2d 859, certiorari denied 69 S Ct. 67, 335 U S. 844, 93 L Ed. 394.

80. U S —Globe Solvents Co v. The California, supra—The Ponce, D C N J, 67 F Supp. 725, affirmed, C C. A., Pompeian Olive Oil Corp v. The Ponce, 160 F.2d 107.

81. U S —Colton v New York, etc, Mail SS Co, C.C A.N Y, 27 F 2d 671
58 C J p 431 note 37.

82. U S.—The Idefjord, C C A.N.Y, 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp, 61 S Ct 175, 311 U.S. 707, 85 L Ed. 459.

83. U S.—The Idefjord, C C A N Y, 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v Blumenthal Import Corp, 61 S.Ct. 175, 311 U S. 707, 85 L Ed. 459.

Lighterage. Under exceptions providing for lighterage at the shipper's or consignee's risk for loss arising during lighterage without its fault, the carrier is not liable.[84] Stipulations as to lighterage "at risk and expense of cargo" do not relieve the carrier from liability for damage, during lighterage, resulting from its culpable negligence,[85] and stipulations for lighterage at the cargo owner's risk are inapplicable to risks arising from the unfitness of the lighter.[86]

Stipulations for transshipment of goods "by the usual methods of conveyance, at the sole risk of the owners of the goods," will be strictly construed against the carrier,[87] and will not relieve it from liability for loss, during lighterage, resulting from negligence.[88]

n. Sweat

A stipulation excusing liability for sweating is not effective with respect to a carrier under the Carriage of Goods by Sea Act, but, in the absence of statutory restrictions, such a stipulation may operate to relieve a carrier from liability for sweating where it appears that damage proximately resulted from such cause.

A stipulation excusing liability for sweating is not effective with respect to a carrier under the Carriage of Goods by Sea Act [89] In the absence of statutory restrictions, such a stipulation may operate to relieve the carrier from liability for sweating where it appears that damage proximately resulted from such cause,[90] but, where the damage from sweat is proximately due to the carrier's negligence, exemption will be denied.[91] Exceptions as to damage from "sweat" have been construed as relating not only to sweat from cargo,[92] but also to sweat from the ship.[93]

o. Theft

Subject to statutory restrictions, a carrier may limit its liability for loss or damage by theft

Subject to statutory restrictions, a carrier may, by contract, limit its liability for loss or damage by theft,[94] as in the case of undeclared valuables.[95] Such exceptions do not relieve the carrier from liability for theft arising from its negligence [96] Under exceptions as to "theft on land or afloat," coupled with other clauses evincing intent to exempt the carrier from loss caused by the ship's employees, it has been held that theft by a ship's purser is within the benefit of the exception.[97]

Exceptions against loss by thieves are valid under the Harter Act where construed with an implied limitation as to the carrier's exercise of due diligence in respect of care and custody of cargo.[98] Thefts by persons not connected with the vessel may be stipulated against if no negligence in watching appears,[99] and a diligent carrier has been held not liable for thieving by employees of an independent stevedore.[1] Under the act, relief from liability cannot be obtained with respect to theft by those belonging to the ship.[2]

A general clause in a bill of lading, exempting a shipowner from liability for loss of goods while on the quay, or loss by thieves, is not to be construed as applying to cases where such loss arises through the carrier's negligence or failure in proper custody or care, so as to render it invalid, under the Harter Act,[3] and it is not rendered void by a subsequent

84. U S—The Seguranca, D C.N.Y., 63 F 1014
N Y—Nichols v. Compania Trasatlantica, 219 N Y S 86, 218 App Div 660, affirmed 157 N E. 884, 245 N. Y 624.

85. U S—The Ogeechee, D C Pa., 248 F 803.

86. U S—Insurance Co. v. North German Lloyd Co, D.C Md, 106 F 973, affirmed 110 F. 420, 49 C C A. 1

87. U S—Colton v New York, etc., SS Co, C C A N Y., 27 F 2d 671

88. U S—Colton v New York, etc., SS Co, supra.
58 C J p 432 note 45

89. U.S—The Asturias, D C N Y, 40 F Supp. 168, affirmed, C C A, Wessels v The Asturias, 126 F 2d 999
Sweating as sea peril see infra § 134 b.

90. U.S.—The Tergestea, D C.N Y, 54 F.2d 809—The Hog Island, C.C A.N.Y., 48 F.2d 101—Bingham v Osaka Shosen Kaisha, D C N Y, 12 F Supp. 35, affirmed, C.C.A., 88 F.2d 1004.
N Y—Nestle's Milk Products v Luckenbach S S Co, 297 N.Y.S. 487, 251 App Div 358.
58 C J. p 432 note 52

91. U.S—The Niel Maersk, D.C N.Y, 18 F.Supp 824, reversed on other grounds, C C A, 91 F 2d 932, certiorari denied Bradley v The Niel Maersk, 58 S Ct. 281, 302 U S. 753, 82 L Ed 582—The Nichiyo Maru, D C Md., 14 F Supp. 727, affirmed, C C A, 89 F.2d 539.
58 C.J. p 432 note 53.

Carriage of Goods by Sea Act

Although bills of lading provided that shipowner should not be responsible for damages arising from sweat, such limitation was subject to provision in Carriage of Goods by Sea Act invalidating any clause in a contract of carriage relieving carrier or ship from liability for damage to, or in connection with, goods arising from negligence—Standard Brands v. Thos. & Jno. Brocklebank, Limited, D C.N Y., 81 F.Supp. 670.

92. U S—The La Drome, D C.N Y, 43 F 2d 241.

93. U.S—The La Drome, supra.

94. U.S—The Saratoga, D.C.N.Y, 20 F. 869.

95. U S—Liverpool, etc, Steam Co v. Phenix Ins Co, N Y., 9 S.Ct. 469, 129 U S 397, 32 L Ed. 788.

96. U S—Remington Rand, Inc v U S, D.C N Y, 98 F.Supp. 334.
58 C.J p 432 note 66.

97. N.Y—Spinetti v. Atlas SS. Co., 80 N.Y 71, 36 Am R. 579.

98. U S—The Poznan, D.C.N.Y., 276 F. 418.

99. U.S—Cunard SS Co. v. Kelley, Mass, 115 F 678, 53 C C A. 310—The Saratoga, D.C N.Y, 20 F. 869.

1. U S.—The Poznan, D.C.N.Y., 276 F. 418.

2. U S.—The Seneca, D C.N.Y., 163 F. 591, reversed on other grounds 172 F 370, 97 C.C A. 68

3. U.S.—Cunard SS Co. v. Kelley, Mass, 115 F. 678, 53 C C A. 310.

clause extending all exemption provisions to cases of negligence, the two clauses being separable;[4] but the carrier is entitled to the benefit of the exemption, unless it is found that its negligence or fault contributed to the loss.[5] The Harter Act does not affect the validity of exceptions as to theft with respect to shipments between ports of a foreign country,[6] or between ports of different foreign countries, even though intended ultimately to reach this country via rail.[7]

§ 134. —— Perils of Sea

a. In general
b. Validity, operation, and effect

a. In General

The phrase "peril of the sea," as used in contracts exempting carriers from liability for loss arising therefrom, generally means such perils as are peculiar to the sea and to navigation, of an extraordinary nature, arising from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.

The phrase "peril of the sea" does not lend itself to accurate definition.[8] As used in contracts exempting carriers from liability for loss arising therefrom, "perils or peril of the sea" generally means such perils as are peculiar to the sea[9] and to navigation,[10] of an extraordinary nature,[11] arising from irresistible force[12] or overwhelming power,[13] ordinarily,[14] although not necessarily,[15] arising from natural causes, which cannot be guarded against by the ordinary exertions of human skill and prudence.[16] The term may be defined as denoting all marine casualties resulting from the violent action of the elements,[17] not reasonably to be expected,[18] as distinguished from their natural, silent influence,[19] casualties which may, rather than consequences which must, occur.[20] In other words, a "peril of the sea" is one of an inevitable character,[21] in the sense that it is something so catastrophic as to triumph over the safeguards by which skillful and vigilant seamen usually bring ship and cargo safely to port,[22] but is not entirely synony-

4. U.S.—Cunard S.S. Co. v. Kelley, supra

5. U.S.—Cunard S.S. Co. v. Kelley, supra

6. N.Y.—Straus v. Canadian Pac. R. Co., 173 N.E. 564, 254 N.Y. 407

7. N.Y.—Straus v. Canadian Pac. R. Co., supra.

8. U.S.—The Josephine, D.C.Pa., 37 F.2d 928, affirmed, C.C.A., 49 F.2d 207.
58 C.J. p. 425 note 86.
Statutory exemptions as to sea peril see supra § 128 d
Dangers or perils of rivers and lakes see supra § 133 c

9. U.S.—Duche v. Brocklebank, C.C.A.N.Y., 40 F.2d 418, 420.
58 C.J. p. 425 note 87.

Similarity with meaning in policy of insurance

Generally speaking, words have same meaning in bill of lading as in policy of insurance, although the effect of negligence of the master or crew contributing to the loss by a peril of the sea may be different on the two contracts.—The G. R. Booth, Cal., 19 S.Ct. 9, 171 U.S. 450, 43 L.Ed. 234.

10. U.S.—Cook v. Southeastern Lime, etc., Co., D.C.S.C., 146 F. 101.—The Arctic Bird, D.C.Cal., 109 F. 167.

11. U.S.—Duche v. Brocklebank, C.C.A.N.Y., 40 F.2d 418, 420.
58 C.J. p. 425 note 89.

12. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.
58 C.J. p. 425 note 90.

13. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., supra.
58 C.J. p. 425 note 91

14. U.S.—Cook v. Southeastern Lime, etc., Co., D.C.S.C., 146 F. 101
Ky.—Bentley v. Bustard, 16 B.Mon. 643, 63 Am.D. 561

15. N.Y.—McArthur v. Sears, 21 Wend. 190
58 C.J. p. 425 note 93.

16. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775
58 C.J. p. 425 note 94.

17. U.S.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32, 35—The California, D.C.Pa., 67 F. Supp. 719, reversed on other grounds, C.C.A., Globe Solvents Co. v. The California, 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed. 394.
58 C.J. p. 425 note 95.

Storms of extreme violence

In maritime law, a peril of the seas is an expression commonly understood to refer only to storms of extreme violence.—Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., D.C.N.Y., 54 F.2d 807, reversed on other grounds, C.C.A., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546.

18. U.S.—Morris v. Lamport & Holt, D.C.N.Y., 54 F.2d 925, affirmed, C.C.A., 57 F.2d 1081.

19. U.S.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32, 35—The California, D.C.Pa., 67 F. Supp. 719, reversed on other grounds, C.C.A., Globe Solvents Co. v. California, 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed. 394
58 C.J. p. 425 note 96

20. U.S.—Duche v. Brocklebank, C.C.A.N.Y., 40 F.2d 418, 420.
58 C.J. p. 425 note 97.

21. Or.—Pettyjohn v. Oregon Coal, etc., Co., 113 P. 438. 58 Or. 392.
S.C.—Blythe v. Marsh, 12 S.C.L. 360.

22. U.S.—Morris v. Lamport & Holt, D.C.N.Y., 54 F.2d 925, 926, affirmed, C.C.A., 57 F.2d 1081—The California, D.C.Pa., 67 F.Supp. 719, reversed on other grounds, C.C.A., Globe Solvents Co. v. The California, 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed. 394—Petition of Howard, D.C.N.Y., 53 F.Supp. 556—The Naples Maru, D.C.N.Y., 20 F.Supp. 258, modified on other grounds, C.C.A., Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, 106 F.2d 32.
58 C.J. p. 425 note 99.

Similar statements

(1) "Peril of the sea" is that danger which comes when wind and waves in their fury work their will with ship and cargo after owner has used all reasonable effort to make ship seaworthy and well qualified to withstand those hazards and perils that owner knows, or has reason to believe, must be encountered.—Norris Grain Co. v. Great Lakes Transit Corporation, C.C.A.Ill., 70 F.2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co., 55 S.Ct. 75, 293 U.S. 565, 79 L.Ed. 664.

(2) A "peril of the sea," means that the weather encountered must

mous with "inevitable accident."[23]

Equivalent exceptions. The phrase "dangers of navigation" is ordinarily construed as equivalent in meaning to dangers[24] or perils[25] of the sea. Exemptions as to "dangers of navigation" refer to latent dangers, and not such as are, or ought to be, patent, which can be avoided by skill, judgment, and foresight of the persons engaged in navigation,[26] those perils that are incident to navigation in a lawful course of it,[27] and are restricted in meaning to dangers of an inevitable character.[28]

The phrase "dangers of the sea" or "seas" has been construed as equivalent to "perils of the sea"[29] By dangers of the sea or seas is meant those accidents peculiar to the sea[30] and to navigation thereon[31] In its broadest sense the phrase includes all hazards which may arise on the sea, of whatever nature,[32] but in a narrower sense it is confined to hazards arising directly and exclusively from that element[33] or of which that element is the efficient cause.[34] In either sense "dangers of the seas" include only losses arising from extraordinary conditions beyond the control of human skill and prudence.[35]

An exception as to "occurrences of seas, rivers, or navigation" has been construed as equivalent to "peril of the seas"[36]

b. Validity, Operation, and Effect

The courts have upheld the validity of exceptions exempting the carrier from liability for loss resulting from perils of the sea, and under such an exception the carrier may be relieved from liability for loss resulting from such cause. Various risks and causes of loss have been held to be within the exception.

The courts have upheld the validity of exceptions exempting the carrier from liability for loss resulting from perils of the sea,[37] and under such an exception the carrier may be relieved from liability for loss resulting from such cause[38] Exceptions of the character covered by "perils of the sea" or other clauses of similar import are not available where the efficient cause of loss was the negligence of the carrier,[39] and this is true, even though the sea peril was a contributing cause of loss.[40] Where, however, the charge of negligence is not sustained, the exception will be available.[41] Deck stowage of cargo may[42] or may not[43] constitute negligence depriving a carrier of the benefit of exceptions as to perils of the sea.

Where loss was proximately due to original unseaworthiness of the ship, an exemption claimed as for a peril of the sea will ordinarily be denied,[44] as

be too much for a well-found vessel to withstand—Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha, C C A N.Y, 106 F 2d 32.

23. N Y—Merritt v Earle, 31 Barb 38.

24. U S.—Baxter v Leland, D C N Y, 2 F Cas No 1,124, Abb Adm. 348, affirmed, C C., 2 F Cas No.1,125, 1 Blatchf 526.

25. U S—Norris Grain Co. v Great Lakes Transit Corporation, C C A Ill, 70 F 2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co., 55 S.Ct 75, 293 U S 565, 79 L Ed 664—Baxter v. Leland, D C N.Y, 2 F Cas No.1,124, Abb Adm 348, affirmed, C C., 2 F. Cas No 1,125, 1 Blatchf. 526.

26. Mo—Costigan v. Michael Transp Co, 38 Mo App. 219.
Or—Pettyjohn v Oregon Coal, etc., Co, 113 P 438, 58 Or 392, 395.

27. Pa.—Atwood v Reliance Transp Co., 9 Watts 87, 34 Am D. 503.

28. Or—Pettyjohn v. Oregon Coal, etc, Co, 113 P 438, 58 Or. 392

29. U S—Baxter v. Leland, D.C N Y., 2 F Cas No 1,124, Abb Adm 348, affirmed, C C, 2 F Cas No 1,126, 1 Blatchf 526
N Y—Redpath v. Vaughan, 52 Barb. 489.

30. U S—Airey v Merrill, C C Me, 1 F Cas No 115, 2 Curt 8.

31. N J—Stephens, etc, Transp. Co v. Tuckerman, 33 N.J.Law 543.

32. U S—Merrill v. Arey, D C Me, 17 F Cas No 9,468, 3 Ware 215, affirmed, C C, Airey v. Merrill, 1 F Cas No.115
58 C.J p 425 note 14

33. U.S—Merrill v Arey, D C Me, 17 F Cas No.9,468, 3 Ware 215, affirmed, C C, Airey v. Merrill, 1 F. Cas No.115.

34. U.S—Merrill v. Arey, D C Me, 17 F Cas No 9,468, 3 Ware 215, affirmed, C C, Airey v. Merrill, 1 F. Cas No.115.
58 C J p 426 note 16.

35. U.S—Insurance Co. of North America v. Easton, etc., Transp Co, D C Pa, 97 F 653.
58 C J. p 426 note 17.

36. U S—Herman v. Compagnie Générale Transatlantique, N.Y., 242 F. 859, 155 C.C A 447.

37. U S—Franklin Fire Ins Co. v Royal Mail Steam Packet Co., D C N Y, 54 F 2d 807, reversed on other grounds, C C A, 58 F 2d 175, certiorari denied Royal Mail Steam Packet Co. v Franklin Fire Ins Co, 53 S Ct 82, 287 U S 630, 77 L Ed. 546—The Emilia, D C N Y, 13 F Supp 7
58 C J. p 426 note 22.

38. U S.—The Nagisan Maru, D.C.N. Y, 14 F Supp. 1010.
58 C J p 426 note 26.

39. U S.—Globe Solvents Co. v. The California, C C A Pa, 167 F 2d 859, certiorari denied 69 S Ct. 67, 335 U. S 844, 93 L Ed. 394.
58 C J p 426 note 30.

40. U S—The Olga S, C C.A.La., 25 F.2d 229

41. U S.—The Del Norte, D C.Cal, 234 F. 667.

42. U S—The Paragon, D C Me, 18 F.Cas No 10,708, 1 Ware 326—The Rebecca, D C Me., 20 F Cas No 11,619, 1 Ware 187.

43. U S—The Del Norte, D C.Cal., 234 F. 667
58 C J p 426 note 36.

44. U S—Interlake Iron Corp. v Gartland S S. Co, C C A Mich, 121 F.2d 267, certiorari denied Gartland S S. Co. v. Interlake Iron Corp, 62 S Ct. 181, 314 U S 681, 86 L Ed 545—Norris Grain Co v. Great Lakes Transit Corporation, C C A Ill, 70 F.2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co, 55 S.Ct 75, 293 U S 565, 79 L Ed 664—The Manuel Arnus, D C N Y, 10 F.Supp. 729, affirmed, C.C.A, M. Binkovitz & Sons v The Manuel Arnus, 80 F.2d 1015—The Empress of Russia, D C N Y, 1 F Supp. 978.
58 C J p 427 note 37.

where there was a breach of the duty of diligence to make the vessel seaworthy [45]

Particular risks or causes of loss have been considered by the courts to be,[46] or not to be,[47] a peril of the sea within the meaning of the exception so as to relieve the carrier from liability. Damage arising from ordinary wear and tear does not fall within the exception,[48] and, where cargo containers are torn as the result of contact with other cargo in a tossing ship, exemption as for a sea peril will be denied if the proximate cause of loss was faulty stowage.[49] Loss by piracy is within the benefit of the exception,[50] but theft not amounting to piracy has been held to be excluded.[51]

Collision. Exemptions may be granted for damages arising from a collision without fault of the carrier,[52] although there is authority holding that, in order to be a "danger of the sea," within a bill of lading exempting the owners from liability as carriers, the collision must be such as could not be avoided by either ship by human prudence and skill.[53] Exemption will be denied where collision resulted from the fault of the carrier seeking it.[54]

Dampness, decay, and sweating. The exemption as a peril of the sea has been allowed as to damage arising from dampness,[55] decay,[56] or sweating.[57] However, exemption for damage resulting from dampness[58] or sweating[59] has also been denied. Where the carrier's unexcepted negligence contributes to the damage, exemption will be denied.[60]

Entrance of sea water and wetting of cargo Exemption may be granted as for a sea peril where the cargo is damaged by the entrance of sea water,[61] as where sea water entered through leaks in a previously sound ship which were caused by stress of weather,[62] or where water entered because the vessel shipped an unusually heavy sea [63]

45. U S —The Charles Rohde, D C Md, 8 F 2d 506, appeal dismissed, C C.A., Johnson & Wimsatt v Hax, 15 F 2d 1009—The Empress of Russia, D C N Y, 1 F Supp 978

46. Breakage
The exemption has been allowed for breakage —In re Twelve Hundred and Sixty-five Vitrified Stoneware Sewer Pipes, D C N Y, 24 F. Cas No 14,280, 5 Ben. 402.

Freezing
A ship so injured by storms as to be forced to leave her usual course and sail to a cold port for necessary repairs may be exempt for freezing of cargo at such port of distress — The Angelo Toso, D C N.Y., 278 F. 212.

Sale of cargo to pay salvage claims against a ship driven ashore has been held a loss within exceptions as to sea peril —The Wiley Smith, D C N.Y, 29 F Cas No 17,657, 6 Ben 195.

47. Bilging
Loss arising from bilging is not within an exception of sea perils — Atwood v. Reliance Transp Co, 9 Watts, Pa, 87, 34 Am D. 503—58 C. J. p 427 note 40

Explosion
Exemption has been denied for loss proximately resulting from an explosion.—The G. R Booth, Cal, 19 S.Ct 9, 171 U.S. 450, 43 L Ed 234— 58 C.J. p 428 note 64.

Ice
The presence of ice in waters navigated is not a peril of the sea where ice is normally to be expected at the place where, and season when, encountered.—The H. A. Rock, D C N Y., 23 F.2d 198—58 C.J. p 429 note 74

Impassability of canal
An exception as to "the dangers of navigation" has been held not to apply to dangers caused by impassability of a canal resulting from inevitable accident —Hand v Baynes, 4 Whart, Pa, 204, 33 Am D 54.

A pilot's lack of skill does not fall within exceptions as to sea peril — Harvey v Pike, 4 N C. 519, 7 Am D 693.

Pressure of cargo
Damage resulting from pressure of one part of a cargo on another has been held not within exceptions as to sea peril —Muller v. The Iginia, D.C. N Y., 17 F.Cas No 9,917

48. U S —Insurance Co of North America v Easton, etc, Transp Co, D C Pa, 97 F. 653—The Warren Adams, N Y, 74 F 413, 20 C C A. 486, certiorari denied 16 S Ct 1199, 163 U.S. 679, 41 L Ed. 316

49. U S —The Trignac, D C N Y., 169 F 682

50. Mass —Gage v. Tirrell, 9 Allen 299
58 C J p 429 note 89.

51. U S —The Gold Hunter, D.C N Y, 6 F Cas No 5,513, Blatchf. & H 300
58 C.J p 429 note 90

52. Ala —Jones v Pitcher, 3 Stew & P. 135, 24 Am D 716
58 C.J. p 427 note 44

53. S C.—Blythe v. Marsh, 12 S.C L 360

54. U.S.—Schulze-Berge v. The Guildhall, D.C.N Y, 58 F. 796.
58 C.J. p 427 note 46

55. U S.—Rich v Lambert, S.C., 12 How. 347, 13 L.Ed. 1017.
58 C J. p 427 note 47.

Humidity of ship's hold is a peril of the sea —The Nagisan Maru, D C N Y, 14 F Supp 1010.

56. U.S —Clark v. Barnwell, S C., 12 How 272, 13 L Ed 985.

57. U S —The Zarembo, D C N Y., 44 F Supp 915, affirmed, C C.A, Balfour, Guthrie & Co v American-West African Line, 136 F 2d 320, certiorari denied Balfour, Guthrie & Co v The Zarembo, 64 S.Ct 437, 320 U S. 804, 88 L.Ed. 486
Sweating as danger of sea within statutory exemption see supra § 128 d.

Moisture and sweat in a ship's hold when the hold cannot be opened are a peril of the sea which relieves the carrier from liability —The Naples Maru, D.C N Y, 20 F Supp. 258, modified on other grounds, C.C A, Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha, 106 F 2d 32.

58. U S.—Baxter v. Leland, D C N. Y, 2 F Cas No.1,124, Abb Adm. 348, affirmed, C C., 2 F.Cas No 1,125.

59. U S —Baxter v Leland, supra.
58 C J p 427 note 50

60. U.S —The Star of Hope, Cal, 17 Wall. 651, 21 L Ed. 719.
58 C J p 427 note 51

61. U S —Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C C.A N Y, 106 F.2d 32 —Atlantic Sugar Refineries v. Royal Mail Steam Packet Co, C C.A N Y, 47 F 2d 880

62. U S —The Dolbardorn Castle, D C.Cal., 212 F. 565, affirmed 222 F. 838, 138 C.C A. 264.
58 C J p 428 note 58.

63. U S —The Dunbritton, D C N Y., 61 F. 764, reversed on other grounds, 73 F. 352, 19 C.C.A 449.
58 C.J. p 428 note 60.

If the predominant cause of loss is not in itself a peril of the sea, the simultaneous entrance of sea water does not make it such,[64] and carriers will be denied the benefit of such exceptions where sea water entered because the ship was unseaworthy,[65] or because of unexcepted negligence in her operation,[66] or where entrance of sea water resulted in damage to cargo only because of faulty stowage.[67] Unexplained presence of sea water, without evidence to show how or why it entered the ship, renders the carrier liable for resultant damage to cargo.[68]

Fire. Exemption as a peril of the sea has been denied for loss arising from fire.[69] Even on the assumption that fire comes within exceptions as to "perils of navigation and perils of the sea," so as to exempt a carrier from liability for a nonnegligent fire, it does not follow that such exceptions impliedly render the carrier liable for fire arising from its negligence[70] so as to extend the liability of the carrier beyond the limits prescribed by statutes exempting from fire loss.[71]

Jettison. The carrier is not liable for loss occasioned by a jettison which proximately resulted from a sea peril,[72] but exemption will not be granted as for a sea peril, where the jettison was wrongful,[73] or where the jettison was necessary under prevailing conditions, but such conditions arose from the carrier's fault[74] or breach of contract,[75] such as negligence[76] or original unseaworthiness of the ship.[77]

Leakage of cargo. Where, without negligence, containers of liquid cargo are so injured by rolling of the ship in heavy weather as to cause such liquid to leak onto and damage other cargo, the damage caused by the leaking cargo is within exceptions as to sea peril.[78] Where the proximate cause of such leakage is negligence of the carrier, exemption will be denied.[79] Loss by leakage of cargo resulting in a short delivery does not come within exceptions as to perils of the sea where it appears that such loss arose from a defect in the ship's tank wherein cargo was carried.[80]

Sinking of ship. The sinking of the ship through unavoidable accident has been held within exceptions as to sea peril,[81] but sinking will not be within such exceptions where it resulted from the vessel's unseaworthiness.[82] The unexplained sinking of a ship under normal weather conditions will not be ascribed to perils of the sea,[83] but where it appears that in a manner unexplained a floating object was driven through the ship's bottom, causing her to sink, the loss may be held to result from a sea peril.[84]

Stranding and striking obstructions. Loss has been held to come within exceptions as to sea peril where it resulted from nonnegligent stranding of

64. U.S.—The G. R. Booth, Cal., 19 S.Ct. 9, 171 U.S. 450, 43 L.Ed. 234
58 C.J. p. 427 note 54.

65. U.S.—The Nellie Floyd, D.C.N.C., 116 F. 80, affirmed 122 F. 617, 60 C.C.A. 175
58 C.J. p. 427 note 55

Rivets dropping out

Damage to cargo by water entering hold of ship as result of rivets dropping out during heavy weather not unusual at time of voyage did not arise from "perils of the sea"—Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., C.C.A.N.Y., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546

66. U.S.—The Nith, D.C.Or., 36 F. 86, 13 Sawy. 368.
58 C.J. p. 427 note 56

67. U.S.—The Charlton Hall, D.C.N.Y., 285 F. 640
58 C.J. p. 428 note 57

68. U.S.—Herman v. Compagnie Générale Transatlantique, N.Y., 242 F. 859, 155 C.C.A. 447.
58 C.J. p. 428 note 63.

69. U.S.—Garrison v. Memphis Ins. Co., Mo., 19 How. 312, 15 L.Ed. 656
58 C.J. p. 428 note 66.

70. U.S.—Walker v. Western Transp. Co., Ill., 3 Wall. 150, 18 L.Ed. 172

71. U.S.—Walker v. Western Transp. Co., supra.

72. U.S.—The Mary F. Barrett, C.C.A.Pa., 279 F. 329.
58 C.J. p. 429 note 78.

73. U.S.—Compania de Navigacion La Flecha v. Brauer, N.Y., 14 S.Ct. 12, 168 U.S. 104, 42 L.Ed. 398.
58 C.J. p. 429 note 79.

74. U.S.—Lawrence v. Minturn, Cal., 17 How. 100, 15 L.Ed. 58—The Hettie Ellis, C.C.La., 20 F. 507, reheard 22 F. 350.

75. U.S.—Lawrence v. Minturn, Cal., 17 How. 100, 15 L.Ed. 58—The Hettie Ellis, C.C.La., 20 F. 507, reheard 22 F. 350.

76. U.S.—The Hettie Ellis, supra.
58 C.J. p. 429 note 82

77. U.S.—Dupont de Nemours v. Vance, La., 19 How. 162, 15 L.Ed. 584

78. U.S.—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880.
58 C.J. p. 429 note 86.

79. U.S.—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., supra.
58 C.J. p. 429 note 87.

80. U.S.—The City of Dunkirk, D.C.N.Y., 10 F.2d 609
58 C.J. p. 429 note 85

81. U.S.—Hostetter v. Park, Pa., 11 S.Ct. 1, 137 U.S. 30, 34 L.Ed. 568

82. U.S.—The Arctic Bird, D.C.Cal., 109 F. 167

83. U.S.—Hartwell v. Neptune Line, C.C.A.N.Y., 273 F. 687.
58 C.J. p. 429 note 95

Usual heavy seas in area

With respect to liability to cargo owners, the sinking of coal barges, in an area in which bad weather and heavy seas were not unusual in December, was not due to a peril of the sea, where the wind though suddenly changing and continuing to increase, did not reach the force of a gale, and the sea, though much higher than was to be expected from the strength of the wind, was much less than 20 feet in height—Petition of Howard, D.C.N.Y., 53 F.Supp. 556.

84. U.S.—The William I. McIlroy, D.C.N.Y., 37 F.2d 909, affirmed, C.C.A., 45 F.2d 1023.
N.Y.—Feldman v. Old Dominion S.S. Co., 176 N.Y.S. 183, 107 Misc. 221

the ship,[85] or where, without negligence, the ship struck an obstruction.[86] Where negligence was the proximate cause of loss, the carrier cannot secure exemption as for a sea peril from liability for damages resulting from stranding[87] or the striking of an obstruction.[88]

Vermin Ordinarily, damage caused by vermin,[89] such as rats,[90] is not within exceptions as to sea peril.

Wind and wave. There is no rule accurately defining the degree of violence of wind and wave necessary to constitute a peril of the sea,[91] and the question of whether or not weather conditions constitute such a peril depends on all the special circumstances of the particular case.[92] Damage has been held to arise from a sea peril where, without negligence of the carrier, it resulted from extraordinary action of wind or wave,[93] such as unusually severe storms,[94] sudden squalls,[95] or the breaking of a huge wave over the ship.[96] There is authority holding that rough, although not extraordinary, seas may constitute a sea peril.[97] On the other hand, exemption sought as for sea peril has been denied where it appears that damage arose under ordinary weather conditions,[98] such as a moderate breeze,[99] heavy weather,[1] gales normally to be expected in the place and season where encountered,[2] or the mere rolling of the ship by a cross sea.[3]

§ 135. —— Stipulations as to Notice of Loss or Claim

a. In general
b. Compliance

a. In General

Under the Carriage of Goods by Sea Act, a contractual provision which conditions the carrier's liability on the filing by the cargo owner of a particular notice of loss or claim which is less favorable to the shipper than that specified in the statute is unenforceable; but, in the absence of prohibitory or regulatory legislation, it has been held that any reasonable provision is valid and enforceable.

Under the section of the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1303(6), (8), which prescribes the nature and time of the notice of loss to be given by the cargo owner and provides that any agreement lessening the liability of the carrier shall be void, a contractual provision which conditions the carrier's liability on the filing by the cargo owner of a particular notice of loss or claim which is less favorable to the shipper than that specified by the statute is unenforceable.[4] In the absence of prohibitory or regulatory legislation, it has been held that the carrier may stipulate that it shall not be liable unless a specified notice of loss or claim is given within a prescribed time,[5] and such

85. U.S.—The Juniata Paton, D.C. Wis., 14 F.Cas.No.7,584, 1 Biss. 15.
58 C.J. p. 430 note 1.

86. U.S.—The Morning Mail, D.C. Ky., 17 F. 545
58 C.J. p. 430 note 2

87. U.S.—Louis-Dreyfus v. Paterson Steamships, C.C.A.N.Y., 43 F.2d 824, 72 A.L.R. 242.
58 C.J. p. 430 note 3.

88. U.S.—The Mohler, Wis., 21 Wall. 230, 22 L.Ed. 485.
58 C.J. p. 430 note 4

89. U.S.—The Miletus, C.C.N.Y., 17 F.Cas.No.9,545, 5 Blatchf. 335.
58 C.J. p. 430 note 6

90. U.S.—American Sugar-Refining Co. v. The Euripides, N.Y., 71 F. 728, 18 C.C.A. 226
58 C.J. p. 430 notes 7, 8.

91. U.S.—Davison Chemical Co. v. Eastern Transp. Co., C.C.A.Md., 30 F.2d 862—The Frey, N.Y., 106 F. 319, 45 C.C.A. 309.

92. U.S.—Eastern Gas & Fuel Associates v. Martin Marine Transp. Co., C.A.Pa., 190 F.2d 394.
58 C.J. p. 430 note 13.

In order to constitute a good exception, the weather must be irresistible, overwhelming, and extraordinary for the particular time of year involved and not a common occurrence.—Eastern Gas & Fuel Associates v. Martin Marine Transp. Co., supra—The Willowpool, D.C.N.Y., 12 F.Supp. 96, affirmed, C.C.A., John W. Higman & Co. v. The Willowpool, 86 F.2d 1002—The Manuel Arnus, D.C.N.Y., 10 F.Supp. 729, affirmed, C.C.A., M. Binkovitz & Sons v. The Manuel Arnus, 80 F.2d 1015.

93. U.S.—Christie v. The Craigton, D.C.Ala., 41 F. 62.
N.Y.—Pitcher v. Hennessey, 48 N.Y. 415

94. U.S.—Davison Chemical Co. v. Eastern Transp. Co., C.C.A.Md., 30 F.2d 862.
58 C.J. p. 430 note 15

95. U.S.—Bregaro v. The Centurion, N.Y., 68 F. 382, 15 C.C.A. 480
58 C.J. p. 431 note 16.

96. U.S.—Duche v. Brocklebank, C.C.A.N.Y., 40 F.2d 418
58 C.J. p. 431 note 17

97. U.S.—The Newport News, D.C.N.Y., 199 F. 968

98. U.S.—The H. A. Rock, D.C.N.Y., 23 F.2d 198
58 C.J. p. 431 note 19.

99. U.S.—Insurance Co. of North America v. Easton, etc., Transp. Co., D.C.Pa., 97 F. 653

1. U.S.—Petition of Howard, D.C.N.Y., 53 F.Supp. 556.
58 C.J. p. 431 note 21.

2. U.S.—The City of Khios, D.C.N.Y., 16 F.Supp. 923—The Empress of Russia, D.C.N.Y., 1 F.Supp. 978.
58 C.J. p. 431 note 22

3. U.S.—The Reeside, C.C.Mass., 20 F.Cas.No.11,657, 2 Sumn. 567.

4. U.S.—Balfour, Guthrie & Co. v. American-West African Line, C.C.A.N.Y., 136 F.2d 320, certiorari denied 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486—Givaudan Delawanna, Inc. v. The Blijdendijk, D.C.N.Y., 91 F.Supp. 663—Mackey v. U.S., D.C.N.Y., 83 F.Supp. 14, affirmed, C.A., 197 F.2d 241.

5. U.S.—The Ferncliff, D.C.Md., 22 F.Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862, affirmed, C.C.A., 105 F.2d 1021

Utility and burdensome character of provision

In absence of statute, courts cannot question utility and burdensome character of bill of lading clause requiring notice and written demand for payment within specified period—The J. L. Luckenbach, C.C.A.N.Y., 65 F.2d 570.

Public policy

Requirement of notice of claim in misdelivery cases, in absence of statute, is not repugnant to public policy.—Bank of California, N.A., v. In-

stipulations, where reasonable in character, have been held valid[6] and enforceable,[7] as where notice or claim is required before removal of goods[8] from the vessel,[9] dock or wharf,[10] or from carrier's custody and control,[11] before accepting delivery[12] or taking receipt,[13] or within a specified number of days[14] or hours[15] after the occurrence of a particular event. On the other hand, such provisions are invalid where unreasonable.[16]

The reasonableness of stipulations depends on the facts of the particular case,[17] such as the cargo owner's ability to comply with it,[18] the object of the notice,[19] the knowledge possessed by the parties,[20] and the length of the voyage.[21] A shipper who has delayed giving notice for an unreasonable time far in excess of that stipulated is not in a position to urge the unreasonableness of the stipulated time.[22]

It has been stated that the purpose of stipulations requiring notice of loss or claim is to afford the

ternational Mercantile Marine Co., C C A N Y, 64 F 2d 97, certiorari denied 54 S Ct. 66, 290 U S 649, 78 L Ed. 563

Interstate Commerce Act regulating stipulations as to time of notice has been held not to affect the validity of such stipulations in bills of lading for ocean carriage to foreign ports—Cudahy Packing Co. v Munson SS Line, C C A N Y, 22 F.2d 898, certiorari denied 48 S Ct. 433, 277 U S 586, 72 L Ed 1000—58 C J. p 434 note 12.

Incorporation by reference

A through bill of lading, issued by barge line company, providing that shipment, while in custody of steamship company, should be subject to the terms of steamship company's bill of lading, had effect of incorporating in contract of carriage the ocean carrier's bill of lading, including requirements for written notice for claim for damage to the shipment.—Newport Rolling Mill Co. v Mississippi Valley Barge Line Co., D.C La., 50 F Supp 623.

Notice and claim distinguished

(1) There is a clear distinction between notice of loss and damage and written claim for loss—The Zarembo, D C N Y., 44 F.Supp. 915, affirmed, C C A., Balfour, Guthrie & Co v. American-West African Line, 136 F 2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S Ct 437, 320 U S 804, 88 L.Ed. 486—The Georgian, D.C Fla, 4 F. Supp 718, affirmed, C.C A., 76 F.2d 550.

(2) It has been stated that the only reasonable distinction between "notice of claim" and "claim," both of which were required by bills of lading in case of cargo loss or damage, is that claim should be more definite in its language as to demand for payment and as to amount demanded—The West Arrow, C C A N. Y., 80 F 2d 853.

6. U.S.—The Georgian, C C A Fla., 76 F 2d 550—Newport Rolling Mill Co. v Mississippi Valley Barge Line Co, D C La, 50 F.Supp 623. N Y—M. & T Trust Co v Export S. S. Corporation, 186 N E. 214, 262 N Y 92, certiorari denied 54 S Ct 70, 290 U S 650, 78 L Ed 563
58 C J p 434 note 95

7. U.S—The J. L Luckenbach, C C A N Y, 65 F 2d 570—Newport Rolling Mill Co. v Mississippi Valley Barge Line Co, D C La, 50 F Supp 623—The West Arrow, D C N Y, 10 F Supp. 385, modified on other grounds, C C A, 80 F 2d 853—The Eldridge, D C Wash, 295 F 696
58 C J p 434 note 96

8. U S—E Cerli & Co v Cunard S S. Co, D C N.Y, 45 F 2d 630.

Clause inapplicable

Clause in bill of lading, precluding claim for cargo damage unless notice be given shipowner before removal of goods, was inapplicable where cargo was never delivered—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co, C.C A.N.Y, 47 F 2d 880.

9. U S.—The Mauretania, C C A N Y, 84 F 2d 408

"Discharged from vessel"

(1) Phrase "discharged from the vessel" in bill of lading requiring notice of claim for short delivery before removal of goods so discharged means delivery to shipper—E Cerli & Co v. Cunard S S Co., C C.A N Y, 48 F.2d 115.

(2) While clause in bill of lading, requiring notice of claim for short delivery before removal of goods discharged from vessel, is valid, it must give shipper reasonable opportunity to make claim—E Cerli & Co v. Cunard S S Co, supra.

(3) Such a clause does not require a claim until carrier abandons search for missing goods—E Cerli & Co. v Cunard S. S. Co, supra

10. U.S—K Ikuno v Morris, C C.A Va., 22 F 2d 140, certiorari denied Morris v. K Ikuno, 48 S Ct 320, 276 U S. 626, 72 L Ed. 738
58 C.J p 434 note 97.

11. U S—Duche v. Lloyd Mediterraneo, D C N Y., 31 F 2d 496, affirmed, C C A, 31 F 2d 1010—The Persiana, N Y., 185 F. 396, 107 C C A. 416.

12. U S.—The Texas Maru, C C A N. Y., 13 F 2d 538, certiorari denied 47 S Ct. 244, 273 U S. 736, 71 L Ed. 866.

13. U S—Duche v Brocklebank, D C N Y, 35 F 2d 184, affirmed, C C A, 40 F 2d 418

14. U S.—The J L Luckenbach, C C A N Y, 65 F 2d 570—U. S v Industrial Alcohol Co v. Calmar S S Corporation, C C A N Y., 57 F 2d 182, certiorari denied 53 S Ct. 21, 287 U S 622, 77 L Ed 540.
58 C J p 434 note 2.

Ten days after discharge

U S—U S Industrial Alcohol Co. v. Calmar S S Corporation, C C A N. Y., 57 F.2d 182, certiorari denied 53 S Ct 21, 287 U.S 622, 77 L Ed. 540—The Commercial Guide, D C. N.Y, 24 F.2d 868

15. U S—The Cherca, C C A.N.Y, 55 F.2d 926
58 C J p 494 note 3.

16. U S—The Carso, D C N.Y, 43 F. 2d 736, modified on other grounds, C.C A, 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc, 52 S Ct 140, 284 U S 679, 76 L.Ed. 574.
58 C J p 434 note 4.

17. U S—The J L Luckenbach, C. C.A.N.Y, 65 F 2d 570.
58 C J p 434 note 5.

Stipulations requiring written notice have been held reasonable—The West Arrow, C.C.A N Y, 80 F 2d 853—Bombace v. American Bauxite Co, C C.A.La, 39 F.2d 867.

18. U S—The J L. Luckenbach, C C A N.Y., 65 F 2d 570.

19. U S.—The Queen of the Pacific, Cal, 21 S Ct 278, 180 U S 49, 45 L Ed 419
58 C J. p 434 note 6.

20. U S—The Natal, C C A.Cal., 14 F 2d 382, certiorari denied Dampskibs Aktieselsk Orient v W. R Grace & Co, 47 S Ct. 449, 273 U.S 748, 71 L Ed 872.

21. U S.—The Queen of the Pacific, Cal, 21 S.Ct. 278, 180 U S. 49, 45 L Ed. 419.
58 C J. p 434 note 8.

22. U S—Grace v. Panama R. Co, C.C A N Y., 12 F 2d 338, certiorari denied 47 S Ct. 108, 273 U S. 715, 71 L.Ed. 855.
58 C.J. p 434 note 10.

carrier an opportunity for prompt investigation[23] and to protect it against fictitious,[24] excessive,[25] or imaginary[26] claims, and not to relieve it from just liability.[27] Such stipulations should receive a reasonable[28] and practicable[29] interpretation, in the light of the facts to which they are applied,[30] rather than a broad[31] or a technical,[32] literal,[33] or unvarying[34] construction. The clause must be construed as an entirety,[35] and strictly against the carrier.[36]

Stipulations requiring notice "before removal" of the goods have been construed as meaning before removal from the dock or wharf,[37] or before removal from the carrier's custody and control.[38]

Stipulations requiring notice are inapplicable to losses or claims beyond their scope,[39] such as claims arising under a different contract,[40] and the question of whether or not any particular loss or claim comes within the scope of a notice stipulation will depend on the circumstances of the case at bar.[41]

Failure to give required notice with respect to some of cargo will not preclude recovery for damage to other cargo as to which due notice of loss or claim was given,[42] or which was left on the wharf and destroyed by public health authorities so that requirements of notice before removal become inapplicable.[43]

Notice of one claim will not support a suit for a different and distinct claim.[44]

b. Compliance

(1) In general
(2) Excuses for noncompliance; waiver and estoppel

(1) In General

In the absence of statute rendering the stipulation unenforceable, a failure to comply with a reasonable and valid stipulation as to notice or claim ordinarily bars recovery of damages.

In the absence of statute rendering the stipulation unenforceable, a failure to comply with a reasonable and valid stipulation as to notice or claim ordinarily bars recovery of damages.[45] Compliance with stipulations as to notice has been held a condition precedent not only to suits against the shipowner,[46] but also to libels in rem against the ship.[47] Where the shipper has in fact complied with stipulations as to notice of loss or claim, his recovery is not barred on such grounds.[48]

What constitutes. In accordance with the rule of reasonable construction, it is ordinarily not neces-

23. Ga.—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550.
58 C.J. p. 435 note 13.

24. N.Y.—J. Aron & Co., Inc. v. Panama R. Co., 238 N.Y.S. 24, 135 Misc. 528.

25. N.Y.—J. Aron & Co., Inc. v. Panama R. Co., supra.

26. N.Y.—J. Aron & Co., Inc. v. Panama R. Co., supra.

27. U.S.—The Cornelia, D.C.N.Y., 15 F.2d 245.
58 C.J. p. 435 note 17.

28. U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853.
58 C.J. p. 435 note 18.

29. N.Y.—J. Aron & Co., Inc. v. Panama R. Co., 238 N.Y.S. 24, 135 Misc. 528.

30. U.S.—The Cardiganshire, D.C.Cal., 9 F.2d 416—Jamison v. New York, etc., SS. Co., D.C.N.Y., 241 F. 389.

31. U.S.—Dibrell Bros. v. Prince Line, C.C.A.N.Y., 58 F.2d 959—The West Arrow, D.C.N.Y., 10 F.Supp. 385, modified on other grounds, C.C.A., 80 F.2d 853.

32. N.Y.—J. Aron & Co., Inc. v. Panama R. Co., 238 N.Y.S. 24, 135 Misc. 528.

33. N.Y.—J. Aron & Co., Inc. v. Panama R. Co., supra.

34. U.S.—The Cardiganshire, D.C.Cal., 9 F.2d 416.

35. U.S.—The Carso, D.C.N.Y., 43 F.2d 736, modified on other grounds, C.C.A., 53 F.2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc., 52 S.Ct. 140, 284 U.S. 679, 76 L.Ed. 574.

36. U.S.—The West Arrow, D.C.N.Y., 10 F.Supp. 385, modified on other grounds, C.C.A., 80 F.2d 853.
58 C.J. p. 435 note 25.

37. U.S.—The Westminster, Pa., 127 F. 680, 62 C.C.A. 406, certiorari denied 24 S.Ct. 860, 194 U.S. 637, 48 L.Ed. 1161—The St. Hubert, Pa., 107 F. 727, 46 C.C.A. 603, certiorari denied 21 S.Ct. 925, 181 U.S. 621, 45 L.Ed. 1032.

38. U.S.—The Persiana, N.Y., 185 F. 396, 398, 107 C.C.A. 416.

39. U.S.—Boak v. U. S. Shipping Board Emergency Fleet Corp., C.C.A.Ala., 11 F.2d 523.

40. U.S.—Boak v. U. S. Shipping Board Emergency Fleet Corp., supra.

41. U.S.—The Lake Gaither, C.C.A.N.Y., 26 F.2d 198.
58 C.J. p. 437 note 66.

42. U.S.—Anchor Line v. Jackson, C.C.A.N.Y., 9 F.2d 543.

43. U.S.—The San Guglielmo, N.Y., 249 F. 588, 161 C.C.A. 514.

44. U.S.—The Turret Crown, C.C.A.Va., 284 F. 439, certiorari denied Vulcanite Roofing Co. v. Commonwealth SS. Co., 43 S.Ct. 520, 262 U.S. 742, 67 L.Ed. 1210.
58 C.J. p. 437 note 69.

45. U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853—Bank of California, N.A., v. International Mercantile Marine Co., C.C.A.N.Y., 64 F.2d 100, certiorari denied 54 S.Ct. 66, 290 U.S. 649, 78 L.Ed. 563—Bank of California, N.A., v. International Mercantile Marine Co., C.C.A.N.Y., 64 F.2d 97, certiorari denied 54 S.Ct. 66, 290 U.S. 649, 78 L.Ed. 563—The Bellingham, C.C.A.N.J., 57 F.2d 1015—E. Cerli & Co. v. Cunard S.S. Co., D.C.N.Y., 45 F.2d 630—The West Arrow, D.C.N.Y., 10 F.Supp. 385, modified on other grounds, C.C.A., 80 F.2d 853—Rhodes v. U.S., D.C.N.Y., 8 F.Supp. 124.
N.Y.—M. & T. Trust Co. v. Export S.S. Corporation, 186 N.E. 214, 262 N.Y. 92.
58 C.J. p. 435 note 31.

46. U.S.—The Queen of the Pacific, Cal., 21 S.Ct. 278, 180 U.S. 49, 45 L.Ed. 419.

47. U.S.—The Queen of the Pacific, supra.

48. U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853.
58 C.J. p. 435 note 38.

sary that any particular form of notice be given,[49] and it has been held that a substantial,[50] in contradistinction to a literal[51] or strict,[52] compliance with stipulations as to notice or claim is sufficient. There must, however, be at least a substantial compliance with such stipulations.[53] The filing of libels against the vessel and her owners has been held to constitute sufficient compliance with requirements of a bill of lading which called for notice of claim followed by written claim for loss,[54] but filing a libel against the vessel is not compliance with a requirement that notice of claim be given to the company operating the vessel.[55]

In the absence of stipulation to such effect, a written notice is not necessary.[56] Where written notice is expressly required, an oral notice is insufficient.[57]

In order to be sufficient the notice must be given within the stipulated time.[58] A provision of bills of lading requiring notice of any claim for damage to cargo to be given before the goods are removed from the dock is complied with, where notice is given after the cargo has been unloaded into lighters, which still remain at the ship's side.[59] Notice of loss is not compliance with a stipulation requiring notice of claim.[60] Where notice of claim is required, the claim must be presented in sufficient detail as to nature of damage[61] and amount of loss[62] in order to warrant payment if well founded. Under a bill of lading requiring notice of apparent loss or damage before removal of the goods from the ship's custody, and notice of loss or damage within a specified number of days thereafter, and claim for damage within a specified time after notice, notice of apparent damage is not equivalent to a claim for damage.[63]

Notice to the agent of the carrier constitutes notice to it.[64]

(2) Excuses for Noncompliance; Waiver and Estoppel

Noncompliance with stipulations requiring notice of loss or claim may be excused under some circumstances. The stipulations are subject to defeat by waiver or estoppel.

Noncompliance with stipulations requiring notice of loss or claim may be excused under some circumstances.[65] While it has been held that noncompliance with stipulations requiring notice of loss

49. U.S.—The Cornelia, D.C.N.Y., 15 F.2d 245
58 C.J. p. 435 note 35.

50. U.S.—The Georgian, C.C.A.Fla., 76 F.2d 550—The Ferncliff, D.C.Md., 22 F.Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862, affirmed, C.C.A., 105 F.2d 1021—The West Arrow, D.C.N.Y., 10 F.Supp. 385, modified on other grounds, C.C.A., 80 F.2d 853.
58 C.J. p. 435 note 36.

51. U.S.—Jamison v. New York, etc., S.S. Co., D.C.N.Y., 241 F. 389
N.Y.—J. Aron & Co., Inc. v. Panama R. Co., 238 N.Y.S. 24, 135 Misc. 528.

52. U.S.—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550

53. U.S.—Anchor Line v. Jackson, C.C.A.N.Y., 9 F.2d 543.
58 C.J. p. 435 note 37.

One letter

A notice of claim and a claim for cargo damage required by bill of lading may be contained in one letter—The West Arrow, D.C.N.Y., 10 F.Supp. 385, modified on other grounds, C.C.A., 80 F.2d 853.

Notice of claim held sufficient

U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853—The J. L. Luckenbach, C.C.A.N.Y., 65 F.2d 570—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550
La.—Taormina Corp. v. Luckenbach Gulf S.S. Co., App., 6 So.2d 235
58 C.J. p. 435 note 37 [a].

Notice of claim held insufficient

N.Y.—The President Monroe, 286 N.Y.S. 990, 159 Misc. 432
58 C.J. p. 435 note 37 [b].

Claim held sufficient

U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853—The J. L. Luckenbach, C.C.A.N.Y., 65 F.2d 570—The Point Brava, D.C.Cal., 1 F.Supp. 366.

Claim held insufficient

U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853.

54. U.S.—The West Arrow, supra

55. U.S.—The Bencleuch, C.C.A.N.Y., 10 F.2d 49, certiorari denied 46 S.Ct. 631, 271 U.S. 680, 70 L.Ed. 1148.

56. U.S.—The J. L. Luckenbach, C.C.A.N.Y., 65 F.2d 570.
58 C.J. p. 435 note 38.

Notice of apparent damage

U.S.—The Georgian, C.C.A.Fla., 76 F.2d 550.

57. U.S.—Bombace v. American Bauxite Co., C.C.A.La., 39 F.2d 867.

58. U.S.—The Texas Maru, C.C.A.N.Y., 13 F.2d 538, certiorari denied 47 S.Ct. 244, 273 U.S. 736, 71 L.Ed. 866

Notice held timely

U.S.—The Carnia, D.C.N.Y., 2 F.Supp. 929.

Notice before arrival of vessel

Giving written notice of claim several days before arrival of vessel satisfied bill of lading requirement of notice "within three days after steamer shall have finished discharging"—Morris v. Lamport & Holt, D.C.N.Y., 54 F.2d 925, affirmed, C.C.A., 57 F.2d 1081.

59. U.S.—Jamison v. New York, etc., S.S. Co., D.C.N.Y., 241 F. 389.

60. U.S.—Duche v. Brocklebank, D.C.N.Y., 35 F.2d 184, affirmed, C.C.A., 40 F.2d 418
58 C.J. p. 436 note 42.

61. U.S.—Russo v. U.S., C.C.A.La., 40 F.2d 39.

62. U.S.—Russo v. U.S., supra.

63. U.S.—Russo v. U.S., supra—The West Arrow, D.C.N.Y., 10 F.Supp. 385, modified on other grounds, C.C.A., 80 F.2d 853

64. U.S.—The Persiana, D.C.N.Y., 156 F. 1019, reversed on other grounds 185 F. 396, 107 C.C.A. 416.
58 C.J. p. 436 note 47.

Notice to chief mate

U.S.—The Georgian, C.C.A.Fla., 76 F.2d 550.

Notice to shipping agents of shipowner who were also forwarding agents of consignee has been held sufficient—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880

65. U.S.—General Electric Co. v. Argonaut S.S. Line, D.C.N.Y., 7 F.Supp. 710

Negligence of carrier

Negligence of the carrier causing damage has been held to render noncompliance with notice requirements unavailable as a defense to the shipper's suit.—J. Aron & Co., Inc. v.

or claim may be excused and recovery of damages permitted where the carrier already knew of the loss or claim,[66] there is authority to the contrary;[67] and it has been held that the carrier's knowledge of the loss will not excuse failure to give notice of claim.[68] While noncompliance has been excused where the facts were such as to render literal compliance with notice requirements impossible,[69] it has been held that the impossibility of literal compliance does not excuse failure to give notice,[70] since, where literal compliance is impossible, notice must be given as soon as reasonable under the circumstances.[71] Where goods are seized and condemned by public authorities, stipulations requiring the shipper to give notice before removal have been held inapplicable;[72] but where the goods are destroyed by the shipper pursuant to public health regulations, stipulations as to notice remain applicable.[73]

Waiver and estoppel. Stipulations as to notice are subject to defeat by waiver[74] or estoppel.[75] Where the contract itself provides that the requirement of notice of claim may be waived only by express written waiver, an oral waiver is insufficient.[76]

§ 136. —— Limitations Tolling Time for Suit

a. In general
b. Operation and effect

a. In General

A contractual provision in a transaction within the Carriage of Goods by Sea Act which fixes a shorter period for bringing suit against a carrier than that provided in the Act is not valid.

A contractual provision in a transaction within the Carriage of Goods by Sea Act which fixes a shorter period for bringing suit against a carrier than that provided in the Act is not valid,[77] but a contractual provision which grants a longer period of time for bringing suit than that provided in the Act is valid,[78] since the Act prevents only a lessening, and not an enlargement, of a carrier's liability.[79] In the absence of statutory limitations on the right of the carrier to lessen his liability, stipulations imposing a restriction on the time within which suit may be brought have been held to be valid,[80] and such restrictive stipulations have been

Panama R Co, 238 N.Y.S. 24, 135 Misc 528—58 C J p 437 note 55.

Unseaworthiness

Unseaworthiness operating as a cause of loss does not necessarily preclude the operation of a stipulation requiring notice as a bar to recovery of damages—Grace v Panama R Co, C C A N Y, 12 F 2d 338, certiorari denied 47 S Ct 108, 273 U. S 715, 71 L Ed. 855—58 C J p 437 note 57.

66. La—**Corpus Juris quoted in** Taormina Corp. v. Luckenbach Gulf S. S, App, 6 So 2d 235, 239.
58 C J p 436 note 48

67. U S—The J. L Luckenbach, C. C A.N Y, 65 F.2d 570—Newport Rolling Mill Co v Mississippi Valley Barge Line Co., D C La, 50 F. Supp. 623—The James Griffiths, D. C Wash, 3 F Supp 685.
58 C J p 436 note 49.

68. U.S—The West Arrow, C.C A.N. Y., 80 F.2d 853—The J. L Luckenbach, C C A N Y., 65 F 2d 570—Rhodes v. U. S, D.C.N.Y., 8 F Supp. 124.

Misdelivery of goods does not relieve the shipper from the necessity of compliance with stipulations as to notice—Bank of California, N. A. v. International Mercantile Mar. Co., C C.A N.Y, 64 F.2d 97, certiorari denied 54 S Ct 66, 290 U.S. 649, 78 L.Ed. 563.

69. U S—American Steel Co v. Transmarine Corp., D.C N.Y, 36 F 2d 246.
58 C.J. p 436 note 51.

70. U S—Newport Rolling Mill Co v. Mississippi Valley Barge Line Co, D C La, 50 F Supp 623

Unreasonable time specified for notice

Notice is not excused entirely where the time within which it must be given is unreasonable, but it must be given within a reasonable time—The J L Luckenbach, C.C A.N.Y, 65 F 2d 570

71. U S—Newport Rolling Mill Co v. Mississippi Valley Barge Line Co, D C La., 50 F Supp 623

72. U S.—The Bencleuch, C C A N Y, 10 F.2d 49, certiorari denied 46 S Ct 631, 271 U S 680, 70 L Ed 1148
58 C J p 436 note 52.

73. U S—Cudahy Packing Co. v. Munson SS. Line, C C A.N Y, 22 F 2d 898, certiorari denied 48 S Ct 433, 277 U S 586, 72 L Ed 1000.

74. U S—**Corpus Juris cited in** The Ferncliff, D C Md, 22 F Supp 728, 740, certified questions answered Smith v The Ferncliff, 59 S Ct 615, 306 U S 444, 83 L.Ed. 862, affirmed, C.C A, 105 F.2d 1021
58 C J p 437 note 61.

Waiver held not shown

(1) In general.—The J. L. Luckenbach, C.C A.N Y., 65 F 2d 570—The James Griffiths, D.C Wash, 3 F.Supp 685—58 C.J. p 437 note 61 [b].

(2) Objection that claim for damage to goods was not made within proper time was not waived by shipowner's rejection of claim on another ground—The Mauretania, C.C.A. N.Y, 84 F.2d 408—E. Cerli & Co. v. Cunard S S. Co, D C N.Y, 45 F.2d 630—Grace v. Panama R. Co, C C.A N Y, 12 F 2d 338, certiorari denied 47 S Ct 108, 273 U.S 715, 71 L Ed. 855.

(3) The fact that shipowner knew that some damage had occurred to cargo did not show a waiver of the written notice of claim—Newport Rolling Mill Co. v. Mississippi Valley Barge Line Co, D.C La., 50 F. Supp. 623.

75. U S—The Carso, C C A N.Y, 53 F.2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc., 52 S Ct. 140, 284 U S 679, 76 L Ed. 574—**Corpus Juris cited in** The Ferncliff, D.C. Md, 22 F Supp 728, 740, certified questions answered Smith v. The Ferncliff, 59 S.Ct 615, 306 U S 444, 83 L Ed. 862, affirmed, C C.A, 105 F 2d 1021
58 C J. p 437 note 62.

76. La—Lloveras v. United Fruit Co, 123 So 374, 11 La App. 343.

77. U S—The Argentino, D C N.Y, 28 F.Supp 440

78. N Y.—Lowendahl v. Norwegian Shipping & Trade Mission, 32 N. Y.S 2d 744.

79. N Y.—Lowendahl v Norwegian Shipping & Trade Mission, supra

80. N.Y.—J. Aron & Co v. Panama R Co, 175 N.E 273, 255 N Y. 513, certiorari denied J. Aaron & Co v. Panama R. Co., 52 S Ct 18, 284 U S. 635, 76 L Ed. 540, motion and reargument denied 177 N E 136, 256 N Y. 550—M & T Trust Co. v. Export S. S. Corporation, 259 N Y.S.

held to be binding,[81] and enforceable,[82] in so far as reasonable, as where suit is required within a specified and reasonable time after shipment,[83] delivery,[84] or notice of loss or claim.[85] Such limitations are invalid and unenforceable where unreasonable in character.[86] Where the contract stipulation is invalid because setting too short a time, the court lacks power to apply a reasonable period of limitation,[87] since that is a matter for the legislature.[88]

The reasonableness of stipulations tolling time for suit have been held to depend on all the facts and circumstances involved,[89] such as the time allowed considered in connection with the accessibility of the ship to the process of the court,[90] the distance between the point of delivery and the home offices of the shipper,[91] and the time required for transmission of communications by mail,[92] and the actual period after delivery to the carrier afforded the shipper to investigate and sue under a stipulation limiting suit to a specified time after delivery to the carrier.[93] All claims reasonably contemplated by contractual limitations fall within the scope thereof.[94]

A statute which limits the period of time for bringing suit but which does not prohibit the carrier from lessening his liability does not preclude the parties from contracting for a shorter period of limitation.[95] It has been held that statutes expressly providing that no period shorter than they prescribe shall be limited for bringing of suit against railroad carriers do not of their own force invalidate stipulations shortening the period for suit against a water carrier,[96] but are relevant on the question of whether particular contractual limitations are so short as to be void as a matter of public policy,[97] and furnish a standard to which there should be an approximate or reasonable conformity.[98]

b. Operation and Effect

A failure to bring suit within the time specified in a valid contractual limitation on time for suit bars recovery, unless good reason is shown for the delay.

393, 236 App Div. 415, reversed on other grounds 186 N E 214, 262 N Y 92, certiorari denied 54 S Ct 70, 290 U.S 650, 78 L.Ed. 563—David Coleman, Inc v. American Hawaiian S S Co., 289 N.Y.S 836, 160 Misc 211—Ferres v Linea Sud-Americana, Inc., 266 N Y S. 671, 149 Misc 335

58 C J. p 438 note 70.

Unseaworthiness of the ship has been held not to preclude the carrier from making a stipulation limiting the time for bringing suit.—Lagerloef Trading Co., Inc. v. U. S, D C.N Y, 43 F 2d 871

81. N.Y—The President Monroe, 286 N Y.S. 990, 159 Misc 432

58 C J. p 438 note 71.

82. U.S.—Bombace v. American Bauxite Co, C C A La, 39 F.2d 867

Incorporation of Hague rules in bill of lading

N Y—Jones v. Cunard S S. Co, 263 N Y S. 769, 238 App Div 172.

83. U S.—Rosenberg v. Atlantic Transport Co, D.C.Cal., 25 F 2d 739, affirmed, C C A., Atlantic Transport Co v Rosenberg, 34 F 2d 843

84. U S—Armour v Gjeruldsen, C C.A Va, 15 F 2d 553.

85. N Y—The President Monroe, 286 N.Y S 990, 159 Misc. 432

58 C.J. p 438 note 75.

86. U S—The President Polk, C C.A N Y, 43 F 2d 695, 40 F.2d 665.

58 C J. p 438 note 76.

87. U.S.—Gelderman v Dollar SS Lines, D C N.Y., 41 F 2d 398.

88. U S—Gelderman v. Dollar SS. Lines, supra.

89. N Y.—David Coleman, Inc, v American-Hawaiian S S Co., 289 N.Y S. 836, 160 Misc. 211—Ferres v. Linea Sud-Americana, Inc, 266 N Y S. 671, 149 Misc 335

58 C.J. p 438 note 77.

Periods of limitation held reasonable

U.S—Krauss Bros. Lumber Co. v. Dampskibsselskabet Norden Aktieselskab, D.C N.Y, 3 F Supp 1014

Mass—Cunningham Leather Co v American-Hawaiian S S Co, 189 N E 98, 285 Mass. 232

N Y.—J. Aron & Co. v. Panama R. Co., 175 N.E 273, 255 N.Y 513, certiorari denied J Aaron & Co. v Panama R Co, 52 S.Ct 18, 284 U S. 635, 76 L Ed. 540, motion and reargument denied 177 N E 136, 256 N Y 550—Continental Leather Co. v. Liverpool, Brazil & River Plate Steam Nav Co, 255 N Y S. 4, 234 App Div. 386, affirmed 182 N E. 207, 259 N Y. 621, certiorari denied Continental Leather Co v. Lamport & Holt, 53 S Ct. 91, 287 U.S 644, 77 L Ed 557—Ferres v. Linea Sud-Americana, Inc, 266 N. Y.S. 671, 149 Misc 335.

58 C.J. p 438 note 83.

Periods of limitation held unreasonable

U.S—U S Shipping Board Emergency Fleet Corp v Texas Star Flour Mills, C C A Tex, 12 F.2d 9.

58 C J. p 438 note 84.

90. U S.—K Ikuno v. Morris, C.C A. Va., 22 F.2d 140.

91. U.S.—Gelderman v. Dollar SS. Lines, Ltd., D C N Y, 41 F 2d 398—Green Star SS Co. v. Nanyang Bros Tobacco Co, C.C.A.China, 3 F 2d 369.

92. U.S—Green Star SS Co v. Nanyang Bros. Tobacco Co, supra.

93. U S—U S Shipping Board Emergency Fleet Corp v. Texas Star Flour Mills, C C.A.Tex., 12 F 2d 9.

58 C J. p 438 note 82.

94. U S—Armour v Gjeruldsen, C. C A Va., 15 F 2d 553.

58 C J. p 439 note 99.

95. U S.—Schnell v U S, C.C A.N Y, 30 F 2d 676, certiorari denied 49 S Ct. 352, 279 U S 858, 73 L.Ed. 999.

N.Y—J Aron & Co. v Panama R. Co, 175 N E 273, 255 N.Y. 513, certiorari denied J. Aaron & Co. v Panama R Co., 52 S Ct 18, 284 U S 635, 76 L Ed 540, motion and reargument denied 177 N E 136, 256 N Y 550—David Coleman, Inc, v American-Hawaiian S. S. Co, 289 N Y S. 836, 160 Misc. 211—Ferres v Linea Sud-Americana, Inc, 266 N Y S. 671, 149 Misc 335

96. N Y—South, etc., American Commercial Co v Panama R. Co., 142 N.E 666, 237 N Y. 287.

58 C.J. p 438 note 88.

97. U S—Green Star SS. Co. v. Nanyang Bros. Tobacco Co, C C.A. China, 3 F 2d 369

N.Y.—South, etc., American Commercial Co Inc. v Panama R Co, 142 N.E. 666, 237 N Y. 287, 291.

98. N.Y.—Sapinkopf v. Cunard SS. Co, 172 N E 259, 254 N.Y. 111.

58 C J. p 439 note 90.

A failure to bring suit within the time specified in a valid limitation on time for suit bars recovery,[99] unless good reason is shown for the delay.[1] A contract which provides the same period of time for bringing suit as that provided in the Carriage of Goods by Sea Act bars recovery in a suit instituted after that time,[2] and, where the contract provides a longer period of time than that provided in the Act, a suit is not barred until the time specified by the contract has expired.[3] Negligence of the carrier contributing to the loss has been held not to deprive it of the benefit of contractual limitations on time for bringing suit.[4] Filing of libel in personam begins the suit so that if the libel is filed within the stipulated time compliance is shown with the requirements with respect to institution of suit.[5]

Waiver. Delay in bringing suit under stipulations limiting the time therefor may be waived by the carrier.[6]

§ 137. —— Limitations as to Value

Under the Carriage of Goods by Sea Act, a carrier may not contract for a limitation of liability to an amount less than the minimum sum per package specified in the statute. In the absence of statutory restrictions, it has been held that a carrier may by contract limit the amount of recovery to a stated valuation where the limitation is reasonable.

Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(5), a carrier may not contract for a limitation of liability to an amount less than the minimum sum per package specified in the statute,[7] and, accordingly, a contractual limitation of liability in contravention of the statute is invalid[8] and inoperative.[9] A stipulation which does not fix any valuation of the goods shipped but which merely sets up the basis for a determination of their value does not constitute a maximum amount other than that named in the statute,[10] and does not contravene the statute.[11] The parties may properly provide for a limitation to an amount equal to, or greater than, the minimum statutory amount.[12]

In the absence of statutory restrictions, it has been held that a carrier may by contract limit the amount of recovery to a stated valuation where the limitation is reasonable,[13] or it may provide the method by which the value of the goods shall be determined.[14] Stipulations as to limitation of value are invalid where unreasonable,[15] as where the carrier attempts to exempt itself not only from liability for amounts in excess of a stated value, but also from any liability at all for damage to goods exceeding such stated value,[16] or where the effect of the stipulation is to relieve the carrier entirely from the consequences of its negligence.[17] It is competent for the carrier to limit its liability to a stated

99. U.S.—Switzerland General Ins. Co. of Zurich v. Navigazione Libera Triestina, S. A., C.C.A.N.Y., 91 F.2d 960—The Bellingham, C.C.A. N.J., 57 F.2d 1015, affirmed in part, C.C.A., A. C. Monk & Co. v. U. S., 57 F.2d 1018—The Mormacmar, D.C. N.Y., 75 F.Supp. 520, motion denied L. W. & P. Armstrong, Inc. v. The Mormacmar, 88 F.Supp. 736—Mangelsdorf v. U. S., 69 Ct.Cl. 600.
58 C.J. p. 439 note 92.

1. U.S.—The Eldridge, D.C.Wash., 295 F. 696.

2. N.Y.—Singer Hosiery Mills of N. Y. v. Cunard White Star, Limited, 102 N.Y.S.2d 762, 199 Misc. 389—Scala v. Italia Societa Anonima Di Navigazione of Genoa, 26 N.Y.S.2d 667.

3. N.Y.—Lowendahl v. Norwegian Shipping & Trade Mission, 32 N.Y.S.2d 744.

4. U.S.—Lagerloef Trading Co. v. U. S., D.C.N.Y., 43 F.2d 871.
58 C.J. p. 439 note 96.

5. U.S.—Leveille v. Eastern SS. Lines, D.C.N.Y., 12 F.2d 486.
58 C.J. p. 439 note 94.

6. U.S.—Green Star SS. Co. v. Nanyang Bros. Tobacco Co., C.C.A. China, 3 F.2d 369.
58 C.J. p. 439 note 1.

Waiver or estoppel not shown
N.Y.—Ferres v. Linea Sud-Americana, Inc., 266 N.Y.S. 671, 149 Misc. 335.
58 C.J. p. 439 note 1.

7. U.S.—Pan-Am. Trade & Credit Corp. v. The Campfire, C.C.A.N.Y., 156 F.2d 603, certiorari denied Waterman S. S. Corp. v. P. A. T. & C. Corp., 67 S.Ct. 194, 329 U.S. 774, 91 L.Ed. 666—The Steel Inventor, D.C.Md., 35 F.Supp. 986.

8. U.S.—Sanib Corp. v. United Fruit Co., D.C.N.Y., 74 F.Supp. 64.

9. U.S.—The Steel Inventor, D.C. Md., 35 F.Supp. 986.

Partial loss
Under the Carriage of Goods by Sea Act, a carrier is prohibited from limiting its liability for partial loss to a pro rata share of the statutory limit.—Pan-Am. Trade & Credit Corp. v. The Campfire, C.C.A.N.Y., 156 F.2d 603, certiorari denied Waterman S. S. Corp. v. P. A. T. & C. Corp., 67 S.Ct. 194, 329 U.S. 774, 91 L.Ed. 666.

10. U.S.—The Bill, D.C.Md., 55 F. Supp. 780.

11. U.S.—The Bill, supra.

12. U.S.—The Margaret Lykes, D.C. La., 57 F.Supp. 466.

Unboxed motortruck
Provisions in bill of lading limiting carrier's liability to five hundred dollars per "package" were applicable to an unboxed motortruck, where the contract of carriage in effect stipulated that the truck was to be so regarded.—The Margaret Lykes, supra.

13. U.S.—Kuhnhold v. Compagnie Generale Transatlantique, D.C.N.Y., 251 F. 387.
58 C.J. p. 439 note 5.

14. U.S.—Smith v. The Ferncliff, Md., 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862.

15. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016—Calderon v. Atlas SS. Co., N.Y., 18 S.Ct. 588, 170 U.S. 272, 42 L.Ed. 1033.

16. U.S.—Calderon v. Atlas SS. Co., supra.
58 C.J. p. 439 note 7.

17. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016.
Validity of exceptions as to negligence generally see supra § 132 b.

value, if the value is reasonable, even as against loss arising from its own negligene [18]

Particular stipulations which have been held valid include stipulations limiting recovery to a value specified in dollars,[19] pounds,[20] francs,[21] or yen;[22] stipulations limiting recovery to a specified monetary maximum value unless a greater value be declared,[23] to invoice cost not exceeding a specified valuation,[24] or to the invoice or declared value of the goods;[25] or a stipulation that the carrier will not be responsible for certain specified articles of value contained in any package shipped under the bill of lading, unless the value thereof be expressed and extra freight paid therefor.[26] A stipulation which provides for adjustment on the basis of the invoice value of the entire shipment, rather than on the invoice value of the damaged goods, is invalid [27] A provision in a bill of lading limiting a carrier's liability to the value of the goods at the place of shipment has been held not to relieve it from a greater liability for a loss occurring through the negligence of the shipper in using an unseaworthy vessel [28]

Reasonable limitations as to value have been held valid where based on a lower freight rate than would otherwise be charged;[29] but where no choice of rates is offered the shipper, restriction of liability has been held invalid for lack of supporting consideration,[30] at least in the absence of other consideration moving to the shipper.[31] Lack of alternative rates invalidates a contract for restriction of liability whether such restriction be to an agreed valuation,[32] or to the invoice cost[33] or value[34] of the lost or damaged goods. Whether in any particular case a choice of rates has in fact been offered, with respect to the cargo to which it is sought to apply a limitation of value, will depend on the circumstances involved.[35] Offering choice of rates as to one class of cargo will not validate a restriction as to another class of cargo with respect to which no choice of rates was offered [36]

18. U S —Leyland v Hornblower, Mass, 256 F 289, 167 C.C.A 461.
58 C J p 441 note 36.

Harter Act does not invalidate limitations as to value with respect to losses resulting from the carrier's negligence.
U S —Leyland v Hornblower, supra
N Y.—Mariani Bros v Wilson, 177 N Y S 335, 188 App Div 617.

19. U S —Hugetz v Compania Trasatlantica, C C.A N.Y, 270 F 90.
58 C J. p 440 note 9.

20. U S —The Koan Maru, D C N Y, 251 F. 384.
58 C J. p 440 note 10.

21. U.S —Kuhnhold v. Compagnie Générale Transatlantique, D C N Y, 251 F 387
N.Y —E. Gerli & Co. Inc v. Compagnie Générale Transatlantique, 230 N Y S 282, 285, 132 Misc. 752.

22. U S —Olivier Straw Goods Corp. v. Osaka Shosen Kaisha, D C N Y, 42 F 2d 717, affirmed, C C.A., 47 F. 2d 878, 74 A.L R 1378, certiorari denied Osaka Shosen Kaisha v Olivier Straw Goods Corp, 51 S Ct. 648, 283 U S 856, 75 L Ed. 1462—Bingham v. Osaka Shosen Kaisha, D C N.Y, 12 F Supp 35, affirmed, C C A., 88 F.2d 1004

23. U S.—Olivier Straw Goods Corp v Osaka Shosen Kaisha, D.C N.Y, 42 F.2d 717, affirmed, C C.A, 47 F 2d 878, 74 A L R 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corp, 51 S Ct 648, 283 U.S 856, 75 L Ed 1462.
58 C.J. p 440 note 13.

24. U.S —The Koan Maru, D C N Y, 251 F 384.

25. U S.—U. S. Lace Curtain Mills v Oceanic Steam Nav. Co., D C N Y., 145 F 701.
58 C.J p 440 note 15.

Invoice cost plus disbursements
A clause in marine bills of lading providing that all claims for which ship may be liable shall be adjusted and settled on value declared by shipper or on net invoice cost plus disbursements, whichever shall be the least, is valid and binding on the parties in absence of fraud or imposition.—Smith v. The Ferncliff, Md, 59 S Ct. 615, 306 U.S. 444, 83 L.Ed 862

26. U S —The Bermuda, C C N.Y, 29 F. 399, 23 Blatchf. 554.
58 C.J. p 440 note 16.

27. U S —The Ansaldo San Giorgio I v Rheinstrom Bros Co., N Y, 55 S Ct 483, 294 U.S. 494, 79 L Ed 1016.

28. N.Y.—Lowenstein v. Lombard, 58 N E 44, 164 N.Y. 324

29. U S —The Lafcomo, D C.N.Y., 64 F Supp. 529, modified on other grounds, C.C A, Pioneer Import Corporation v. The Lafcomo, 159 F.2d 654, certiorari denied Black Diamond Lines v Pioneer Import Corp, 67 S.Ct 1310, 331 U S. 821, 91 L Ed. 1838—Venezuelan Meat Export Co v. U. S., D.C Md, 12 F Supp. 379.
58 C J. p 440 note 18.

30. U S.—The Lafcomo, D C N.Y, 64 F.Supp 529, modified on other grounds, C C A, Pioneer Import Corporation v. The Lafcomo, 159 F 2d 654, certiorari denied Black Diamond Lines v Pioneer Import Corp, 67 S.Ct 1310, 331 U S. 821, 91 L.Ed. 1838—Venezuelan Meat Export Co. v. U. S, D C Md, 12 F. Supp. 379
58 C J p 440 note 19

31. N.Y —Kilthau v International Mercantile Marine Co., 157 N E 267, 245 N Y. 361.

32. U.S.—The Merauke, C C A N Y, 31 F 2d 974—Toyo Kisen Kabushiki Kaisha v. Willits, C C A Cal, 17 F. 2d 762

33. U S —The Merauke, C C A N Y, 31 F 2d 974

34. U S —Olivier Straw Goods Corp v. Osaka Shosen Kaisha, D C N Y, 42 F 2d 717, affirmed, C C A, 47 F 2d 878, 74 A L R 1378, certiorari denied Osaka Shosen Kaisha v Olivier Straw Goods Corp, 51 S Ct 648, 283 U S 856, 75 L Ed 1462.

35. U.S —The Lafcomo, D C N.Y, 64 F Supp 529, modified on other grounds, C C A, Pioneer Import Corporation v The Lafcomo, 159 F 2d 654, certiorari denied Black Diamond Lines v. Pioneer Import Corp, 67 S Ct. 1310, 331 U.S 821, 91 L Ed 1838.
58 C J. p 440 note 24.

Choice of rates not shown
U.S —The Lafcomo, D C N.Y., 64 F Supp. 529, modified on other grounds, C.C.A., Pioneer Import Corporation v. The Lafcomo, 159 F 2d 654, certiorari denied Black Diamond Lines v Pioneer Import Corp, 67 S Ct. 1310, 331 U S. 821, 91 L Ed 1838
N.Y —Kilthau v. International Mercantile Mar. Co., 157 N E. 267, 245 N.Y. 361.

36. U S —Philippine Refining Corp. v. U. S, D C N.Y, 33 F.2d 974, affirmed, C C A, 41 F 2d 1010.
58 C.J. p 440 note 25.

In accepting the bills of lading, the shipper accepts the terms of the contract which they contain with respect to limitations as to value,[37] and the shipper's acceptance may be by his agent.[38] In order to ascertain the meaning of different limitation of value stipulations contained in a single contract, the court will ordinarily construe them as a whole.[39] Ambiguities will be resolved against the carrier where the contract has been drawn by it.[40] Defenses based on contractual limitations as to value are unavailable where the nature of the loss is beyond the purview or scope of the limitation clause.[41]

Operation and effect. Under a valid clause restricting the value or amount recoverable, the shipper subject thereto cannot recover in excess of the amount specified,[42] but may recover the extent of his loss not in excess of such stipulated amount,[43] as where recovery is based on invoice value[44] or cost.[45] Where the shipper complies with requirements of value limitations imposing full liability on the carrier, he may recover his actual loss.[46] Prorating of recovery under a limitation per unit of cargo will be made in accordance with valid contract provisions.[47]

Loss of benefit. The carrier may lose the benefit of limitation of value clauses,[48] as where it commits a breach of the contract.[49]

§ 138. —— Other Limitations

Stipulations limiting penalties for nonperformance to proved damages, if treated as limitations of liability, are inapplicable to the carrier's willful and unexcused refusal to proceed with the voyage.

Stipulations limiting penalties for nonperformance to proved damages, if treated as limitations of liability, are inapplicable to the carrier's willful and unexcused refusal to proceed with the voyage.[50] It has been held that a bill of lading providing that for cargo left with it a stipulated period after notice to consignee of award, the carrier's liability will be that of a warehouseman, is controlling with respect to the shipowner's liability for damage to cargo so detained.[51] Stipulations in contracts of through carriage have been held invalid where they purported to relieve the carrier of further responsibility on delivery to a continuing carrier.[52]

Waiver of lien. A stipulation waiving lien against a vessel in advance is void.[53]

§ 139. Extension of Liability

The parties may contract to extend the carrier's liability beyond that to which it would otherwise be subject.

It is competent for the parties by contract to extend the carrier's liability beyond that to which it would otherwise be subject.[54] An extension of lia-

37. U.S.—The Aline, C.C.N.Y., 25 F. 562, 23 Blatchf. 335.
58 C.J. p 440 note 26.

38. U.S.—The Caledonier, C.C.A.N.Y., 31 F.2d 257, certiorari denied Picard v. The Caledonier, 49 S.Ct. 480, 279 U.S. 865, 73 L.Ed. 1003.
58 C.J. p 440 note 27.

39. U.S.—Stevens v. Cunard SS. Co., D.C.N.Y., 265 F. 871, affirmed, C.C.A., 271 F. 306.
58 C.J. p 440 note 28.

40. U.S.—Kuhnhold v. Compagnie Générale Transatlantique, D.C.N.Y., 251 F. 387.

41. U.S.—The Cabo Villano, D.C.N.Y., 14 F.2d 978, modified on other grounds, C.C.A., 18 F.2d 220.
58 C.J. p 442 note 45.

42. U.S.—The Caledonier, C.C.A.N.Y., 42 F.2d 856.
58 C.J. p 441 note 30.

43. U.S.—The Caledonier, supra.

44. U.S.—Anchor Line v. Jackson, C.C.A.N.Y., 9 F.2d 543.
58 C.J. p 441 note 32.

45. U.S.—The Merauke, D.C.N.Y., 26 F.2d 836, reversed on other grounds, C.C.A., 31 F.2d 974.
58 C.J. p 441 note 33.

Lack of consideration

The limitation is not effective where it is not based on consideration.—The Merauke, C.C.A.N.Y., 31 F.2d 974.

46. U.S.—Kuhnhold v. Compagnie Générale Transatlantique, D.C.N.Y., 251 F. 387.
58 C.J. p 441 note 34.

47. U.S.—Kuhnhold v. Compagnie Générale Transatlantique, supra.

48. U.S.—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, C.C.A.N.Y., 47 F.2d 878, 74 A.L.R. 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 51 S.Ct. 648, 283 U.S. 856, 75 L.Ed. 1462.

The carrier's conversion of the goods vitiates limitations as to value.—Bank of California, N.A. v. International Mercantile Marine Co., D.C.N.Y., 40 F.2d 78, reversed on other grounds, C.C.A., 64 F.2d 97, certiorari denied 54 S.Ct. 68, 290 U.S. 649, 78 L.Ed. 563—58 C.J. p 441 note 42.

49. U.S.—The Lafcomo, D.C.N.Y., 64 F.Supp. 529, modified on other grounds, C.C.A., Pioneer Import Corporation v. The Lafcomo, 159 F.2d 654, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 67 S.Ct. 1310, 331 U.S. 821, 91 L.Ed. 1838.

Breach of warranty

Carrier having breached warranty in bill of lading that goods were shipped was held precluded from invoking valuation clauses limiting liability.—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, C.C.A.N.Y., 47 F.2d 878, 74 A.L.R. 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 51 S.Ct. 648, 283 U.S. 856, 75 L.Ed. 1462.

50. U.S.—Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet, N.Y., 40 S.Ct. 332, 252 U.S. 313, 64 L.Ed. 586.

51. U.S.—Camden Woolen Co. v. Eastern SS. Lines, D.C.Me., 8 F.2d 162, vacated on other grounds, C.C.A., 12 F.2d 917.
58 C.J. p 442 note 47.

Notice of arrival

Delivery of documents to receiving clerk at docks was not "notice of arrival" which bill of lading required to be delivered to consignee in order that lighter owner may have benefit of provision reducing its responsibility to that of a warehouseman—Petition of Pennsylvania R. Co., D.C.N.Y., 44 F.Supp. 617.

52. U.S.—Yukon Mill, etc., Co. v. Lone Star SS. Co., D.C.Tex., 40 F.2d 752.

53. U.S.—The Tampico, D.C.Cal., 151 F. 689.
58 C.J. p 442 note 49.

54. U.S.—Bank Line v. Porter, C.C.A.Va., 25 F.2d 843, certiorari de-

bility cannot be established by an alleged contract which the party sought to be charged therewith never accepted.[55]

§ 140. Unseaworthiness and Unfitness of Vessel

a. In general
b. Warranty of seaworthiness
c. Requisites and essentials of seaworthiness or fitness
d. Assumption of risk
e. Time when seaworthiness must be present

a. In General

A carrier by water, whether a common or a private carrier, is under a duty to furnish a vessel that is seaworthy and suitable for the service in which she is employed, and, in the absence of contractual or statutory exemption, the carrier is liable for loss of, or damage to, cargo resulting from unseaworthiness of the vessel.

In general, a carrier of goods by water, whether it is a common carrier or a private carrier,[56] is under a duty to furnish a vessel that is seaworthy and suitable for the service in which she is to be employed,[57] or, under some statutes, it is under a duty to exercise due diligence to make the ship seaworthy.[58] The duty of the carrier to make the vessel seaworthy,[59] or to exercise due diligence to make the vessel seaworthy,[60] may not be delegated, the shipowner being responsible for his agents or subordinates.[61]

In the absence of a contract or statute providing otherwise, the carrier is liable for loss of, or injury to, cargo resulting from unseaworthiness of the vessel,[62] or for loss resulting from the carrier's lack of

nied 49 S.Ct. 25, 278 U.S. 623, 73 L.Ed. 544
58 C.J. p 442 note 50½

Under Carriage of Goods by Sea Act
In view of provisions of United States Carriage of Goods by Sea Act, permitting carrier to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities under the act, provided such surrender or increase be embodied in bills of lading issued to shipper, the act, although providing that every bill of lading covering carriage by sea in foreign trade shall be subject to provisions of the act, does not prevent an enlargement of the carrier's liability.—Lowendahl v. Norwegian Shipping & Trade Mission, 32 N.Y.S.2d 744.

Particular contracts
(1) Provision of charter party that vessel shall be tight, strong, and in every way fitted for voyage does not extend or qualify owner's obligation on implied warranty of seaworthiness.—The Smyrna, C.C.A.Md., 62 F.2d 1048

(2) Freight contract making owner liable for all claims arising out of ownership, maintenance, navigation, operation, control, or possession of barge did not make owner personally liable for damage to property of lessee of space thereon.—The Philip J. Kenny, D.C.N.J., 57 F.2d 337.

55. U.S.—The Isla de Panay, C.C.A.N.Y., 292 F. 723, affirmed 45 S.Ct. 269, 267 U.S. 260, 69 L.Ed. 603.
58 C.J. p 442 note 51.

56. U.S.—Schuylkill Transp. Co. v. Banks, C.C.A.Pa., 152 F.2d 405—Continental Ins. Co. v. Anchor Line, D.C.N.Y., 53 F.2d 1032—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—Aetna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.
58 C.J. p 442 note 53.

57. U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—Schuylkill Transp. Co. v. Banks, C.C.A.Pa., 152 F.2d 405—The Fred Smartley, Jr., C.C.A.Va., 100 F.2d 971—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co., D.C.N.Y., 56 F.2d 271—Continental Ins. Co. v. Anchor Line, D.C.N.Y., 53 F.2d 1032—Charbonnier v. U.S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U.S. v. Charbonnier, 45 F.2d 174—W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., D.C.S.C., 98 F.Supp. 256, affirmed in part and reversed in part on other grounds, C.A., 193 F.2d 539—The G. G. Post, D.C.N.Y., 64 F.Supp. 191—The Cleveco, D.C.Ohio, 59 F.Supp. 71, affirmed, C.C.A., 154 F.2d 605—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719—Aetna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781—Venezuelan Meat Export Co. v. U.S., D.C.Md., 12 F.Supp. 379—The Indien, D.C.Cal., 5 F.Supp. 349, affirmed, C.C.A., 71 F.2d 752.
58 C.J. p 442 note 52.

Duty to inspect
(1) One who for hire furnishes barges or lighters for service has a duty to have them inspected and examined so as to be sure of their condition.—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—58 C.J. p 442 note 52 [c].

(2) Bargee was held negligent in failing to inspect barge before beginning of operations to load it with coal.—In re Berwind-White Coal Min. Co., D.C.N.Y., 80 F.Supp. 125, affirmed, C.A., Berwind-White Coal Min. Co. v. Pitney, 187 F.2d 665.

58. **Under Carriage of Goods by Sea Act**
U.S.—Ore Steamship Corp. v. D/S A/S Hassel, C.C.A.N.Y., 137 F.2d 326—J. C. Penney Co. v. The American Exp. Co., D.C.N.Y., 102 F.Supp. 742—Standard Oil Co. of Cal. v. U.S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312—The Louise, D.C.Md., 54 F.Supp. 157—The Bill, D.C.Md., 47 F.Supp. 963

59. U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—The Louise, D.C.Md., 54 F.Supp. 157.
58 C.J. p 442 note 54.

60. U.S.—Philippine Refining Corporation v. U.S., D.C.N.Y., 29 F.2d 134, affirmed, C.C.A., 41 F.2d 1010—The Otho, D.C.N.Y., 49 F.Supp. 945, affirmed, C.C.A., Huilever, S.A. Division Huileries Du Congo Belge v. The Otho, 139 F.2d 748—The Bill, D.C.Md., 47 F.Supp. 969

61. U.S.—The Frey, D.C.N.Y., 92 F. 667.
58 C.J. p 442 note 55.

62. U.S.—Schuylkill Transp. Co. v. Banks, C.C.A.Pa., 152 F.2d 405—Interlake Iron Corporation v. Gartland S.S. Co., C.C.A.Mich., 121 F.2d 267, certiorari denied Gartland S.S. Co. v. Interlake Iron Corp., 62 S.Ct. 181, 314 U.S. 681, 86 L.Ed. 545—The Fred Smartley, Jr., C.C.A.Va., 100 F.2d 971—Norris Grain Co. v. Great Lakes Transit Corporation, C.C.A.Ill., 70 F.2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co., 55 S.Ct. 75, 293 U.S. 565, 79 L.Ed. 664—Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., C.C.A.N.Y., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546—Cargo Carriers v. Brown S.S. Co., D.C.N.Y., 95 F.Supp. 288—The W. H. Davis, D.C.

due diligence to make the vessel seaworthy,[63] but the obligation to furnish a seaworthy vessel does not make the carrier the insurer of the cargo.[64] Under the Carriage of Goods by Sea Act, 46 U.S. C.A. § 1304, the carrier is liable for loss of, or injury to, cargo resulting from unseaworthiness where the unseaworthiness was caused by the carrier's want of due diligence to make the ship seaworthy,[65] but neither the carrier nor the ship is liable for such loss unless the unseaworthiness was caused by the carrier's want of due diligence to make the ship seaworthy.[66] Mere inspection certificates giving the vessel a right to sail will not overcome definite notice to the owners of the instability of the vessel.[67]

The cargo owner is ordinarily under no obligation concerning seaworthiness,[68] and his rights are not affected by failure to determine the vessel's seaworthiness, unless her unfitness was actually known to him, or was a matter of such general notoriety that his knowledge or negligence is presumed.[69]

Fitness for cargo. Where the carrier is aware of the nature of the cargo, it is bound to furnish a vessel seaworthy for its conveyance,[70] that is, a vessel that is suited and equipped to carry the particular type of cargo.[71]

b. Warranty of Seaworthiness

In the absence of a stipulation providing otherwise, every contract of affreightment by water contains an implied absolute warranty of seaworthiness, requiring the vessel to be seaworthy in fact.

In the absence of a stipulation providing otherwise, underlying every contract of affreightment there is an implied absolute warranty of seaworthiness,[72] requiring the vessel to be seaworthy in fact,[73] and including an implied warranty that the vessel is reasonably fit for the cargo which she is to receive and carry.[74] This warranty applies to a private carrier as well as to a common carrier,[75]

N.Y., 56 F.Supp 564—Aetna Ins Co. v. Florida Towing Corp, D C Fla., 37 F Supp 781—The S C. L No. 9, D C Pa, 37 F.Supp 386, affirmed, C C A, 114 F.2d 964.

Faulty equipment of tug

A tug engaged to tow a barge is liable for damage to the cargo of the barge caused by faulty equipment of the tug.—The Raleigh, D.C.Md., 50 F. Supp. 961.

63. U S.—Gold Dust Corporation v. Munson S. S. Line, C.C.A N Y, 55 F.2d 900—J. C. Penney Co v. The American Exp. Co., D.C N.Y., 102 F.Supp. 742.

64. U S.—The Smyrna, C.C.A.Md, 62 F 2d 1048

65. U S—Edmond Weil, Inc, v American West African Line, C.C. A.N.Y, 147 F 2d 363—Ore Steamship Corp v. D/S A/S Hassel, C C. A N.Y., 137 F.2d 326—Southwestern Sugar & Molasses Co. v. Artemis Maritime Co., D.C.Va., 92 F.Supp 631, affirmed, C A, Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 189 F 2d 488—The Norte, D C.Pa, 69 F.Supp 881, motion denied 71 F.Supp. 147—The Louise, D C Md., 54 F Supp. 157.

Exemption from liability for unseaworthiness under Carriage of Goods by Sea Act see supra § 128.

Private carrier

U S.—Aetna Ins Co. v. Florida Towing Corp., D C Fla., 37 F.Supp. 781.

66. U.S.—Ore Steamship Corp. v. D/S A/S Hassel, C.C.A N.Y., 137 F. 2d 326.

67. U.S.—The Cleveco, D.C.Ohio, 59 F.Supp. 71, affirmed, C.C.A., 154 F. 2d 605.

68. U S—The City of Dunkirk, D C N Y, 10 F 2d 609

58 C J. p 442 note 56

69. U S—The Presque Isle, D.C.N Y, 140 F. 202.

58 C.J p 442 note 57.

Assumption of risk see infra subdivision d of this section.

70. U.S—The J. L. Luckenbach, C C.A N.Y., 65 F.2d 570—Standard Oil Co. of Cal v. U. S, D.C.Cal., 59 F Supp. 100, affirmed, C.C.A., 156 F. 2d 312.

58 C J. p 442 note 58.

71. U S.—Venezuelan Meat Export Co. v. U. S., D C.Md., 12 F.Supp. 379.

72. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N Y., 62 S Ct. 156, 314 U S 104, 86 L Ed 89—W. R Grace & Co. v Charleston Lighterage & Transfer Co., C A S.C, 193 F 2d 539—Metropolitan Coal Co. v. Howard, C.C A.N.Y, 155 F.2d 780—O F Nelson & Co v. U S, C C.A Cal, 149 F.2d 692, followed in General Cocoa Co v. U. S, 149 F.2d 815, and 149 F.2d 816, motion denied 169 F.2d 833—The Framlington Court, C C.A.Tex, 69 F.2d 300, certiorari denied United British S S Co v. Newfoundland Export & Shipping Co., 54 S Ct 860, 292 U S. 651, 78 L Ed. 1500—The W H Davis, D C N Y, 56 F Supp 564—The Commerce, D.C N.Y, 46 F Supp. 360, affirmed, C C A, New England S S. Co. v. Howard, 130 F 2d 354—Aetna Ins Co. v Florida Towing Corp., D.C Fla., 37 F Supp. 781—Hickman, Williams & Co v. Murray Transp. Co., D C N.Y, 31 F Supp. 820—The Emilia, D.C.N.Y., 13 F Supp. 7.

Minn—Cargill Grain Co. v. Cleveland-Cliffs S. S Co., 235 N.W. 268, 182 Minn. 516, certiorari denied 52 S Ct. 25, 284 U S. 646, 76 L.Ed 549, followed in Cargill Grain Co. v Cleveland-Cliffs S S. Co., 237 N.W 197, 183 Minn. 620.

58 C J p 443 note 61.

Warranty of seaworthiness in marine insurance see Insurance § 652 b

73. U.S—The Josephine, D.C Pa., 37 F 2d 928

58 C J. p 443 note 62.

74. U.S—The Emilia, D C N.Y., 13 F Supp. 7—Venezuelan Meat Export Co. v. U. S., D.C.Md., 12 F Supp. 379

Minn—Cargill Grain Co. v. Cleveland-Cliffs S. S Co., 235 N W 268, 182 Minn. 516, certiorari denied 52 S Ct. 25, 284 U S 646, 76 L.Ed 549, followed in Cargill Grain Co. v Cleveland-Cliffs S S. Co, 237 N.W. 197, 183 Minn. 620.

58 C J. p 444 note 74.

75. U.S—Commercial Molasses Corp v. New York Tank Barge Corp, N Y., 62 S Ct 156, 314 U.S 104, 86 L Ed. 89—Metropolitan Coal Co v. Howard, C C A.N.Y, 155 F 2d 780—O F. Nelson & Co. v. U S, C C.A.Cal., 149 F.2d 692, followed in General Cocoa Co v U S., 149 F 2d 815 and 149 F 2d 816, motion denied 169 F.2d 833—The Framlington Court, C C A.Tex, 69 F 2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co, 54 S Ct. 860, 292 U.S. 651, 78 L Ed 1500—The W. H. Davis, D C.N.Y, 56 F. Supp. 564—Aetna Ins Co. v Florida Towing Corp., D.C.Fla, 37 F. Supp. 781.

and, where the warranty is breached, the carrier is liable for the loss occasioned thereby.[76]

The warranty does not depend on the owner's knowledge or ignorance, or on his care or negligence;[77] it covers latent defects not ordinarily susceptible of detection as well as those which are known or discoverable by inspection,[78] although just prior to the voyage the vessel has been put in what seems to be perfect repair.[79] An express warranty that the vessel is tight, stanch, strong, and in every way fitted for the voyage is an absolute warranty of fitness, even against latent defects.[80] The warranty of seaworthiness by the shipowner existed prior to the Harter Act,[81] and it has been held that the warranty is not affected by the Harter Act,[82] but it has also been stated that the Harter Act reduces the warranty of seaworthiness to a warranty of diligence to make the vessel seaworthy.[83]

The warranty of seaworthiness is a favorite of the law and exceptions to it or limitations on it are narrowly scrutinized.[84] Where the shipowner desires to avoid the warranty he must expressly or unequivocally so contract.[85] A carrier's agreement to do certain acts, intended to make its vessel seaworthy, will not operate to modify the absolute warranty of seaworthiness which its contract otherwise imports.[86] An inspection of the vessel by a representative of the shipper's insurance carrier before the vessel was loaded has been held not to operate as a waiver or an estoppel to nullify the warranty of seaworthiness.[87]

Time to which warranty relates. The warranty is measured by the vessel's fitness as a ship to fulfill the purposes of her voyage when the ship breaks ground,[88] or at the beginning of the voyage,[89] not in relation to some subsequent exigency beyond the contemplation of the parties at such time,[90] and requires the ship to be fit as such to encounter whatever perils may reasonably be expected on the voyage, without damage or loss.[91] Some courts have held that this warranty is not continuing,[92] while others have held to the contrary.[93] The implied warranty that the vessel is reasonably fit to receive and carry the cargo attaches at the time the cargo is put on board,[94] and, where the vessel was rendered unseaworthy before the commence-

76. U.S.—W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., C.A.S.C., 193 F.2d 539—American Agr. Chemical Co. v. O'Donnell Transp. Co., D.C.N.Y., 62 F.Supp. 239—Hickman, Williams & Co. v. Murray Transp. Co., D.C.N.Y., 31 F.Supp. 820.

77. U.S.—The Emilia, D.C.N.Y., 13 F.Supp. 7
58 C.J. p. 443 note 63

78. U.S.—The Carib Prince, N.Y., 18 S.Ct. 753, 170 U.S. 655, 42 L.Ed. 1181.
58 C.J. p. 449 note 4.

79. U.S.—Hubert v. Recknagel, D.C. N.Y., 13 F. 912.
58 C.J. p. 449 note 5.

80. U.S.—The Lockport, D.C.N.J., 197 F. 213

81. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

82. U.S.—The Carib Prince, N.Y., 18 S.Ct. 753, 170 U.S. 655, 42 L.Ed. 1181.
58 C.J. p. 444 note 64.

83. U.S.—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719
Statutory exemptions from liability see supra §§ 126–129.

84. U.S.—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780.

Construction against owner

Any exception in the contract of affreightment which tends to weaken the warranty of seaworthiness is to be construed most strongly against the shipowner.—The Caledonia, Mass., 15 S.Ct. 537, 157 U.S. 124, 39 L.Ed. 644—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

85. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., C.C.A.N.Y., 114 F.2d 248, affirmed 61 S.Ct. 840, 313 U.S. 541, 85 L.Ed. 1510, vacated on other grounds 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—The Commerce, D.C.N.Y., 46 F.Supp. 360, affirmed, C.C.A., New England S. S. Co. v. Howard, 130 F.2d 354.
58 C.J. p. 444 note 65.
Contractual exemption from liability for unseaworthiness see supra § 134.

86. U.S.—The Arakan, D.C.Cal., 11 F.2d 791—Church Cooperage Co. v. Pinkney, N.Y., 170 F. 266, 95 C.C.A. 462.

87. U.S.—The Mary M., D.C.N.Y., 73 F.Supp. 674.

88. U.S.—The Anastasia, D.C.Va., 11 F.Supp. 314, remanded, C.C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011.
58 C.J. p. 444 note 68.
When seaworthiness must exist see infra subdivision e of this section

89. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348—Interlake Iron Corp. v. Gartland S. S. Co., C.C.A.Mich., 121 F.2d 267, certiorari denied Gartland S. S. Co. v. Interlake Iron Corp., 62 S.Ct. 181, 314 U.S. 681, 86 L.Ed. 545.
Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal. App.Supp. 775.

90. U.S.—The Steel Navigator, C.C. A.N.Y., 23 F.2d 590

91. U.S.—The Prussia, N.Y., 93 F. 837, 35 C.C.A. 625, certiorari denied 19 S.Ct. 885, 174 U.S. 803, 43 L.Ed. 1188.
58 C.J. p. 444 note 70.

92. U.S.—The Steel Navigator, C.C. A.N.Y., 23 F.2d 590.
58 C.J. p. 444 note 71.

93. U.S.—Whipple v. Mississippi, etc., Packet Co., D.C.Miss., 34 F. 54.
58 C.J. p. 444 note 72.

94. U.S.—Aetna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.
58 C.J. p. 444 note 75.

Partial delivery

Where entire cargo had not been loaded on lighter when it sank because of unseaworthy condition, there was a "delivery" pro tanto of that portion of cargo which had been loaded and liability of private contract carriers as bailees had attached so that they were liable for the damage to the cargo.—Ætna Ins. Co. v. Florida Towing Corp., supra.

ment of the voyage by the negligence of the agent of the shipowner, it has been held that the fact that it was seaworthy when loaded will not enable the owner to escape liability on his implied warranty for loss to cargo caused by the vessel's unseaworthiness.[95]

Voyages by stages. The doctrine of voyage by stages means that when the demands on a vessel change as the voyage proceeds, the covenant of seaworthiness is satisfied if she is fitted out in port for the leg of the voyage immediately following.[96] Dropping anchor in a roadstead to discharge stevedores after breaking ground does not cause a new stage of the voyage to begin at that point.[97]

c. Requisites and Essentials of Seaworthiness or Fitness

"Seaworthiness" is a relative term depending for its application on the type of vessel, the character of the voyage, and the cargo carried. A vessel may be regarded as seaworthy if she is reasonably fit to transport the cargo safely and to encounter the ordinary perils to be expected during her voyage under the conditions existing at the time.

"Seaworthiness" is a relative term depending for its application on the type of vessel and the character of the voyage,[98] and it must be determined by the facts and circumstances of each particular case.[99] In order that a vessel may be regarded as seaworthy, she must be reasonably fit to encounter the ordinary perils to be expected during her voyage,[1] under the weather conditions existing at the

95. U S—American Agr. Chemical Co v O'Donnell Transp. Co, D.C N.Y, 62 F.Supp 239

96. U.S—The Oritani, D C Pa, 40 F.2d 522, affirmed, C C A., Atlantic Fruit Co. v. The Oritani, 54 F 2d 1075—The Steel Navigator, C.C.A N.Y., 23 F 2d 590.

97. U S—The Oritani, D.C Pa., 40 F 2d 522, affirmed, C C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

98. U S—The Framlington Court, C C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co v Newfoundland Export & Shipping Co, 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The Cleveco, D C.Ohio, 59 F Supp. 71, affirmed, C.C A, 154 F.2d 605.

Changing standard

Standard of seaworthiness is not dependent on statutory enactment, but changes with advancing knowledge, experience, and changed appliances of navigation—The T. J. Hooper, D C N.Y., 53 F 2d 107, affirmed, C C A., 60 F 2d 737, certiorari denied Eastern Transp Co. v. Northern Barge Corp., 53 S.Ct. 220, 287 U S. 662, 77 L.Ed. 571.

Barge

(1) Standard of seaworthiness of barge, particularly coastwise wooden barge, is not same as that required of larger and different types of seagoing vessels—The Smyrna, D C Md., 2 F Supp. 351, affirmed, C.C A., 62 F. 2d 1048.

(2) Wet ceiling in barge does not necessarily denote unseaworthiness, question being one of degree.—The Smyrna, supra.

99. U S.—The Smyrna, C.C.A.Md., 62 F.2d 1048.

Port maneuver

Whether vessel was seaworthy for purpose of port maneuver was to be determined from the nature of the movement.—The Maui, C.C.A.Cal., 113 F.2d 1018, certiorari denied John Demartini Co. v The Maui, 61 S.Ct 317, 311 U S. 709, 85 L Ed 461.

Absence of previous trouble

Fact that unused conduit pipes protruding above deck had previously caused no trouble was relevant but not conclusive on issue of seaworthiness of vessel as respects liability for cargo damage—Edmond Weil, Inc., v. American West African Line, C.C.A.N.Y., 147 F 2d 363.

1. U S—Schuylkill Transp. Co. v. Banks, C C A Pa, 152 F 2d 405. 58 C J. p 445 note 80

Other statements of seaworthiness

(1) Generally, seaworthiness is that strength, durability and engineering skill made a part of a ship's construction and continued maintenance, together with a competent and sufficient crew, which would withstand the vicissitudes and dangers of the elements which might reasonably be expected or encountered during her voyage without loss or damage to her particular cargo—The Cleveco, D C.Ohio, 59 F.Supp. 71, 78, affirmed, C.C A., 154 F 2d 605.

(2) Seaworthiness means such fitness as to structure, lading, captain, crew, etc, as will enable a ship to encounter the winds and battering waves of the seas which must be encountered during the season and in the places where the ship must travel so that its cargo will be carried safely and delivered in good condition.—Norris Grain Co. v. Great Lakes Transit Corporation, C C A Ill., 70 F. 2d 32, 35, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co, 55 S Ct. 75, 293 U.S. 565, 79 L Ed. 664.

Criterion of seaworthiness

(1) Generally, seaworthiness of vessel depends on standard ordinarily accepted in trade for which ship is used.—Louis-Dreyfus v. Paterson Steamships, C.C.A.N.Y., 67 F 2d 331.

(2) Shippers are not entitled to latest design in ships, but only to usual carriage—Spang Chalfant & Co v Dimon S S. Corporation, C.C A. N Y, 57 F 2d 965.

(3) Vessel owner must make vessel reasonably safe and efficient for service and need not equip her with all known safety devices nor latest improvements under peril of ship being held unseaworthy.—The Cabo Hatteras, D C.N Y, 5 F.Supp. 725.

(4) While ship must be reasonably fitted for her service, she ordinarily need not conform to higher standard of care than that which prevails among duly accredited masters of experience.—U S. Steel Products Co v. American & Foreign Ins. Co., C.C.A. N.Y., 82 F.2d 752.

(5) Ship is seaworthy if conforming to requirements of her class and service, notwithstanding owner failed to maintain higher standard gratuitously assumed.—Louis-Dreyfus v. Paterson Steamships, supra.

(6) Vessel is unseaworthy if she could not reasonably have been expected to make the voyage on which she was embarked.—Interlake Iron Corporation v. Gartland S S. Co., C.C. A Mich., 121 F 2d 267, certiorari denied Gartland S. S. Co. v. Interlake Iron Corp, 62 S Ct. 181, 314 U.S. 681, 86 L Ed. 545.

(7) Other statements of standard by which seaworthiness is determined see 58 C.J. p 445 note 80 [a].

Ability to withstand gale

Vessel warranted to be "tight, stanch, strong, and in every way fitted for the contemplated voyage" must be so equipped as to withstand the buffeting of a forty-mile gale.—The Plow City, C.C A.Pa, 122 F 2d 816, certiorari denied Plow City S S. Co. v. Texas Gulf Sulphur Co, 62 S. Ct. 579, 315 U.S. 798, 86 L Ed. 1199.

Vessel held unseaworthy

(1) In general.—W. R Grace & Co v. Charleston Lighterage & Transfer Co., C.A S.C., 193 F 2d 539—Metropolitan Coal Co. v. Howard, C.C A.N.

time,[2] or be reasonably fit to transport the cargo through conditions which are normal for the season,[3] or be suitable for the service on which she is employed.[4] Unseaworthiness is not confined to faults or omissions in the construction of the vessel, but may arise out of a fault in the conduct of the carrier with respect to the vessel and its equipment.[5]

More is required to make a vessel seaworthy than a tight hull, a sound rudder, and a working engine.[6] The vessel must be staunch and strong,[7] well equipped for the intended voyage,[8] fit to receive and discharge cargo,[9] and to carry safely the particular cargo on the voyage undertaken.[10] The requirements of seaworthiness vary with the nature of the

Y., 155 F.2d 780—Schuylkill Transp. Co v Banks, C.C.A.Pa., 152 F.2d 405—Edmond Weil Co v American West African Line, C.C.A.N.Y., 147 F.2d 363—Ore Steamship Corp. v D/S A/S Hassel, C.C.A.N.Y., 137 F.2d 326—The Fred Smartley, Jr., C.C.A.Va., 100 F.2d 971—Franklin Fire Ins. Co v Royal Mail Steam Packet Co., C.C.A.N.Y., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546—Southwestern Sugar & Molasses Co. v. Artemis Maritime Co., D.C.Va., 92 F.Supp. 631, affirmed, C.A., Artemis Maritime Co v Southwestern Sugar & Molasses Co., 189 F.2d 488—Middle East Agency v. The John B. Waterman, D.C.N.Y., 86 F.Supp. 487—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—The Emilia, D.C.N.Y., 13 F.Supp. 7—58 C.J. p. 445 note 80 [m].

(2) Barge which could not proceed through twenty to thirty-mile wind without imminent danger of her hatch covers being washed away and could not ride out storm with wind velocity of forty to forty-five miles, which storms were not infrequent and were to be expected.—The Anastasia, D.C.Va., 11 F.Supp. 314, remanded, C.C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011.

(3) New vessel on maiden voyage which stopped repeatedly for repairs and at no time approximated normal speed, as result of which normal forty-day voyage consumed nearly five months—Venezuelan Meat Export Co v U. S., D.C.Md., 12 F.Supp. 379.

(4) Vessel within which, because of engineer's negligence, there existed at commencement of voyage condition so dangerous that bunker fire was inevitable—The Galileo, C.C.A.N.Y., 54 F.2d 913, affirmed 53 S.Ct. 200, 287 U.S. 420, 77 L.Ed. 403

(5) Lighter which had a hole about six feet long and ten inches wide about three feet above normal draft line of lighter when not loaded.—Ætna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.

Vessel held seaworthy

U.S.—Louis-Dreyfus v. Paterson Steamships, C.C.A.N.Y., 67 F.2d 331—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A. Atlantic Fruit Co v. The Oritani, 54 F.2d 1075—The Josephine, D.C.Pa., 37 F.2d 928.
58 C.J. p. 445 note 80 [l].

2. U.S.—Schuylkill Transp. Co v. Banks, C.C.A.Pa., 152 F.2d 405.

3. U.S.—Edmond Weil, Inc., v. American West African Line, C.C.A.N.Y., 147 F.2d 363—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564.

4. U.S.—The Caledonia, Mass., 15 S.Ct. 537, 157 U.S. 124, 39 L.Ed. 644—W. R. Grace & Co v. Charleston Lighterage & Transfer Co., C.A.S.C., 193 F.2d 539—The T. J. Hooper, C.C.A.N.Y., 60 F.2d 737, certiorari denied Eastern Transp. Co v. Northern Barge Corp., 53 S.Ct. 220, 287 U.S. 662, 77 L.Ed. 571—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co., D.C.N.Y., 56 F.2d 271.

5. Minn.—Cargill Grain Co. v. Cleveland-Cliffs S. S. Co., 235 N.W. 268, 182 Minn. 516, certiorari denied 52 S.Ct. 25, 284 U.S. 646, 76 L.Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S. S. Co., 237 N.W. 197, 183 Minn. 620.

Ventilation

Unseaworthiness may arise out of the failure of the carrier to properly manipulate the hatches so as to afford ventilation—Cargill Grain Co. v. Cleveland-Cliffs S. S. Co., 235 N.W. 268, 182 Minn. 516, certiorari denied 52 S.Ct. 25, 284 U.S. 646, 76 L.Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S. S. Co., 237 N.W. 197, 183 Minn. 620.

6. U.S.—Norris Grain Co. v. Great Lakes Transit Corporation, C.C.A.Ill., 70 F.2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co., 55 S.Ct. 75, 293 U.S. 565, 79 L.Ed. 664

7. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The G. G. Post, D.C.N.Y., 64 F.Supp. 191.

8. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500

Compass

(1) Defective compasses have been held to render a vessel unseaworthy.—The Yungay, D.C.N.Y., 58 F.2d 352

(2) New compass data is not required because rivets are renewed and slight changes are made in location of ballast at too great a distance to affect compass—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075.

(3) Where a vessel deviated from her course and ran on a well-known reef, it was held that the existence of a deflection of her compass of one-eighth of a point was not sufficient ground for finding her unseaworthy, in the absence of its continuance for a sufficient time to require notice—The E. A. Shores, Jr., D.C.Wis., 73 F. 342.

Wooden bulkhead

Use of wooden bulkhead on coal bunker, permitting air to penetrate into body of coal, does not in itself make ship unseaworthy—Earle & Stoddart v. Ellerman's Wilson Line, D.C.N.Y., 45 F.2d 231, affirmed, C.C.A., The Galileo, C.C.A., 54 F.2d 913, affirmed 53 S.Ct. 200, 287 U.S. 420, 77 L.Ed. 403

9. U.S.—The Cary Brick Co. No. 8, D.C.N.Y., 34 F.2d 981.
58 C.J. p. 446 note 81.

10. U.S.—The Caledonia, Mass., 15 S.Ct. 537, 157 U.S. 124, 39 L.Ed. 644—The J. L. Luckenbach, C.C.A.N.Y., 65 F.2d 570—The Oritani, D.C.Pa., 40 F.2d 522, affirmed, C.C.A., Atlantic Fruit Co. v. The Oritani, 54 F.2d 1075—The G. G. Post, D.C.N.Y., 64 F.Supp. 191—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312—The Commerce, D.C.N.Y., 46 F.Supp. 360, affirmed, C.C.A., New England S. S. Co v. Howard, 130 F.2d 354—Venezuelan Meat Export Co v. U. S., D.C.Md., 12 F.Supp. 379—The Indien, D.C.Cal., 5 F.Supp. 349, affirmed, C.C.A., 71 F.2d 752—The Point Brava, D.C.Cal., 1 F.Supp. 366.
58 C.J. p. 446 note 82.

Open or unsecured portholes or hatches

(1) Hatchways must be watertight in order that vessel carrying cargo which may be damaged by the sea may be seaworthy—Norris Grain Co v. Great Lakes Transit Corporation, C.C.A.Ill., 70 F.2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co., 55 S.Ct. 75, 293 U.S. 565, 79 L.Ed. 664—The Guanancita, D.C.Fla., 69 F.Supp. 928.

(2) Failure to dog down large steel covers of two deep tank hatches in which there was water for ballast

cargo;[11] a vessel seaworthy as to navigation may be unseaworthy as to cargo,[12] and a ship may be seaworthy as to one part of the cargo and unseaworthy as to another.[13]

Although it has been held that "seaworthiness" is to be determined with reference to customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons,[14] where the construction of the vessel is obviously defective, such test must be rejected.[15] Latent defects have been held to be no excuse for unseaworthiness causing damage to cargo;[16] but a latent defect, although it exists, will not be regarded as rendering the vessel unseaworthy, unless it is of such a character that if known it would have been deemed to render the ship, with respect to the defective subject matter, not reasonably fit for the service designed.[17] A ship is not unseaworthy because of a defect which is of such a character that it can be remedied on the spot and in a short time by the materials available.[18] The failure to repair the fittings of a hatch cover through which water had leaked on a previous voyage has been held to be a lack of due diligence to make the vessel seaworthy.[19]

A shipowner's negligence in failing to use due care to furnish a seaworthy vessel in respect of one part of a single unit of transportation will render the owner liable for mishap to either part of the unit, or the whole entity, if such negligence was the producing cause of the loss or damage sustained by either or both.[20] Where a barge without motive power of its own is used in connection with a tug for the purpose of transporting a cargo, the two are to be considered as one vessel for the purpose of the voyage,[21] but the rule does not apply where the shipment is pursuant to separate contracts with respect to the tug and the barges.[22]

Loading or stowage and ballast. The requirement of seaworthiness at the beginning of a voyage includes not only seaworthiness in hull and equipment, but also in the stowage of the cargo.[23] The vessel is unseaworthy where by the manner in which she is loaded or stowed she is rendered unfit to encounter the perils of the sea or ordinary perils of navigation reasonably to be anticipated;[24] and this

rendered vessel unseaworthy—Middle East Agency v. The John B Waterman, D C N.Y., 86 F Supp 487.

(3) Where vessel carrying corn was not bulk freighter, but package freighter with openings or gangways in its sides, gangways should have been made as tight as solid, unbroken side of ship—Norris Grain Co. v. Great Lakes Transit Corporation, C C.A.Ill., 70 F 2d 32, certiorari denied Great Lakes Transit Corporation v Norris Grain Co, 55 S.Ct. 75, 293 U. S. 565, 79 L Ed 664.

(4) Other cases relative to unseaworthiness of vessel because of open portholes or hatches see 58 C J. p 446 note 82 [d].

Ventilation

(1) Vessel used for carriage of general cargo, including tobacco, was held not unseaworthy because she had but two ventilators per hold.—American Tobacco Co. v. The Katingo Hadjipatera, D C N.Y, 81 F Supp. 438, modified on other grounds, C A., 194 F.2d 449, certiorari denied 72 S. Ct. 1076, 343 U S. 978, 96 L Ed ——.

(2) Other cases involving unseaworthiness of vessel because of ventilation see 58 C J. p 446 note 82 [f]

11. U S.—The Smyrna, C.C.A.Md., 62 F.2d 1048.

12. U.S—The Indrapura, D.C Or., 178 F. 591, affirmed 190 F. 711, 112 C.C.A. 351.

Vessel held seaworthy as to cargo

U.S.—The Smyrna, C.C.A.Md., 62 F. 2d 1048.

Vessel held not seaworthy as to cargo

U S—Edmond Weil, Inc, v. American West African Line, C C A N Y, 147 F 2d 363—Cargo Carriers v. Brown S. S Co, D C N Y., 95 F.Supp 288—The Kawsar, D C.N.Y., 53 F Supp. 323.

13. U.S—Martin v. The Southwark, Pa., 24 S.Ct. 1, 191 U S 1, 48 L.Ed 65.

58 C J. p 447 note 84.

Cocoanut oil

Vessel which left port with leak between her port deep tank containing cocoanut oil and her port double bottom tank containing fuel oil was unseaworthy for carriage of cocoanut oil.—U. S. v Los Angeles Soap Co., C C A Cal, 83 F 2d 875.

14. U S—The Titania, D.C N.Y., 19 F. 101.

58 C J. p 447 note 85

15. U S—The Indrapura, Or, 190 F 711, 112 C C A. 351.

58 C J. p 447 note 86.

16. U S.—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co., D.C N Y., 56 F.2d 271.

17. U S.—The Rover, D.C N Y., 33 F. 515.

18. U S.—Middleton & Co (Canada), Limited, v. Ocean Dominion S. S. Corp., C C A N.Y., 137 F 2d 619, certiorari denied 64 S Ct. 432, 320 U. S. 802, 88 L.Ed. 484.

19. U S.—J. C. Penney Co v. American Exp. Co., D C N.Y., 102 F.Supp. 742.

20. U S.—The Cleveco, D.C.Ohio, 59 F Supp. 71, affirmed, C.C.A, 154 F. 2d 605.

21. U S—The Cleveco, supra.

22. U S.—The Independent, C.C.A. La., 122 F.2d 141.

23. U S.—Metropolitan Coal Co v Howard, C C.A N.Y, 155 F 2d 780—Pioneer Import Corp v. The Lafcomo, C C A.N Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S 766, 88 L Ed. 1063—The West Kebar, D.C N.Y., 53 F. Supp. 763, amended 53 F.Supp. 766, reversed on other grounds, C.C.A., Edmond Weil Co v. American West African Line, 147 F 2d 363—The Indien, D.C.Cal, 5 F.Supp. 349, affirmed, C.C.A., 71 F.2d 752.

Minn.—Cargill Grain Co. v. Cleveland-Cliffs S. S. Co, 235 N.W. 268, 182 Minn 516, certiorari denied 52 S.Ct. 25, 284 U S 646, 76 L.Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S S. Co., 237 N.W. 197, 183 Minn 620.

58 C J. p 447 note 87.

Element of seaworthiness

Proper stowage is an element of "seaworthiness"—Globe Solvents Co. v. The California, C.C A Pa., 167 F 2d 859, certiorari denied 69 S Ct. 67, 335 U S. 844, 93 L.Ed. 394.

24. U S.—The West Kebar, D C N Y, 53 F.Supp 763, amended 53 F Supp. 766, reversed on other grounds, C. C.A., Edmond Weil Co v. American West African Line, 147 F 2d 363—Pioneer Import Corp v. The Lafcomo, D C N Y, 49 F Supp. 559, affirmed, C C A, 138 F.2d 907, cer-

rule has been held not limited in its application to negligent or improper stowage which makes the ship unseaworthy as a ship, but to extend to stowage as it affects the safety of the cargo itself.[25] Furthermore, the vessel may be unseaworthy, if she is improperly ballasted with reference to her load,[26] or has the wrong kind of ballast for her cargo,[27] or if she is overloaded,[28] or improperly loaded.[29] Deck-load dunnage to be seaworthy should be laid so that the superimposed load will bear as evenly as practicable on all the dunnage [30]

Officers and crew. A vessel is unseaworthy if she sails without men competent to navigate her and attend to her equipment[31] or without a pilot, under certain circumstances [32] Ignorance on the part of the ship's officers as to the necessity of taking particular precautions to insure her safety may render her unseaworthy [33]

Supplies and fuel. The vessel may be unseaworthy because not furnished with proper supplies.[34] The vessel is unseaworthy if she sails without fuel sufficient for her voyage[35] with a reasonable margin for safety.[36] Deviation or liberty clauses do not excuse a deviation for fuel, where the ship was unseaworthy in sailing without sufficient fuel.[37]

d. Assumption of Risk

A shipper and owner of merchandise may assume the risk of injury or loss from unseaworthiness provided he has knowledge of the unseaworthiness of the vessel at the beginning of the voyage.

The existence of an implied warranty of seaworthiness does not necessarily exclude the applica-

tiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S Ct 523, 321 U S 766, 88 L Ed 1063.
58 C.J p 448 note 89.

Deck cargo

Where unused conduit pipes protruding above deck were likely to be broken off should heavy deck cargo break loose in a storm, thereby opening holes into 'tween-deck through which water could enter, deck cargo, stowed so that it broke loose in storm such as could be expected at that season and plunged about the deck snapping off conduit pipes, was so improperly stowed as to make the ship unseaworthy.—Edmond Weil, Inc, v. American West African Line, C.C.A N.Y., 147 F.2d 363.

25. U S —Pioneer Import Corp. v. The Lafcomo, C C A N Y, 138 F.2d 907, certiorari denied Black Diamond Lines v Pioneer Import Corp, 64 S Ct 523, 321 U S 766, 88 L Ed 1063—The Arakan, D C.Cal, 11 F.2d 791.
Minn —Cargill Grain Co. v. Cleveland-Cliffs S S Co, 235 N.W 268, 182 Minn. 516, certiorari denied 52 S Ct 25, 284 U S 646, 76 L.Ed 549, followed in Cargill Grain Co. v Cleveland-Cliffs S S. Co, 237 N.W. 197, 183 Minn. 620

26. U S.—Sumner v. Caswell, D C N. Y, 20 F 249.
58 C J p 448 note 90.

27. U S —The Owego, D C.N.Y, 11 F 2d 288, affirmed, C C.A., Fruit Auction Co v. The Owego, 11 F.2d 288.

28. U.S —Interlake Iron Corporation v Gartland S. S. Co, C C A Mich, 121 F 2d 267, certiorari denied Gartland S. S Co. v Interlake Iron Corp, 62 S Ct 181, 314 U.S 681, 86 L.Ed. 545—The Indien, D C Cal, 5 F.Supp 349, affirmed, C.C.A., 71 F. 2d 752.
58 C.J. p 448 note 92.

29. U.S.—Steamship Wellesley Co. v. Hooper, Cal., 185 F 733, 108 C C A. 71
58 C J. p 448 note 93

30. U.S —The Indien, D C Cal, 5 F Supp. 349, affirmed, C.C A., 71 F 2d 752.

31. U S —Peninsular & Occidental S S Co v. N L R. B, C C A 5, 98 F 2d 411, certiorari denied N L. R B. v. Peninsular & Occidental S. S Co, 59 S Ct. 248, 305 U S 653, 83 L.Ed 423—The Framlington Court, C.C A.Tex, 69 F.2d 300, certiorari denied United British S S. Co. v. Newfoundland Export & Shipping Co, 54 S Ct. 860, 292 U S. 651, 78 L.Ed 1500—Charbonnier v U S, D C S C, 45 F 2d 166, affirmed, C C A., U. S. v. Charbonnier, 45 F.2d 174—Venezuelan Meat Export Co v U. S, D C Md, 12 F.Supp. 379.
58 C J p 448 note 94.

Standard for determination

Seaworthiness in respect of the crew of a vessel depends on whether the personnel is competent to perform maritime services and not on whether the carrier complied with the terms of an inspector's certificate with respect to the crew —Hartford & New York Transp Co. v. Rogers & Hubbard Co, C C A.Conn, 47 F 2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co, 51 S Ct. 483, 283 U.S. 835, 75 L Ed. 1446.

Shortage of one man in crew aboard a tug has been held not to make the tug or the barges in tow unseaworthy where an additional man could have done nothing toward preventing the accident.—Hartford & New York Transp. Co. v. Rogers & Hubbard Co., C C.A.Conn, 47 F.2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp Co, 51 S Ct. 483, 283 U.S. 835, 75 L. Ed. 1446.

32. U S —The Framlington Court, C. C.A.Tex., 69 F.2d 300, certiorari denied United British S S Co v. Newfoundland Export & Shipping Co, 54 S Ct. 860, 292 U S. 651, 78 L.Ed 1500
58 C J. p 448 note 95.

Pilot required by nature of navigation

Generally, where pilotage is customary and pilot is available, and nature of navigation requires one, failure to employ pilot breaches warranty of seaworthiness —The Framlington Court, C C A.Tex., 69 F.2d 300, certiorari denied United British S S. Co. v. Newfoundland Export & Shipping Co., 54 S Ct. 860, 292 U.S 651, 78 L Ed. 1500.

33. U.S —The Elkton, D C.N.Y., 35 F.2d 49, affirmed, C.C A., Compania General De Tabacos De Filipinas v. U S., 49 F.2d 700.
58 C J. p 449 note 96.

Ignorance of engineer held immaterial

That chief engineer did not know that vessel had suctions leading from cargo hold to pumps harnessed directly to boilers was held not to render ship unseaworthy, where all pumps were started after ship stranded —Louis-Dreyfus v Paterson Steamships, C.C.A.N.Y., 67 F.2d 331.

34. Conn —Clark v. Richards, 1 Conn. 54.
Pa —Bell v. Reed, 4 Binn 127, 5 Am. D. 398.

35. U S —The Waalhaven, C C A.N. Y., 36 F 2d 706, certiorari denied 50 S.Ct. 352, 281 U S. 747, 74 L Ed. 1159.
58 C J. p 449 note 97.

36. U S.—The Willdomino, C.C A.N. J., 300 F. 5, affirmed 47 S Ct. 261, 272 U.S. 718, 71 L Ed. 491.
58 C.J. p 449 note 98.

37. U.S.—The Caledonier, C.C A.N. Y., 31 F.2d 257, certiorari denied 49 S Ct. 480, 279 U.S. 865, 73 L.Ed. 1003.

tion of the doctrine of assumption of risk from unseaworthiness by a shipper and owner of merchandise.[38] However, the doctrine does not apply when the shipper cannot be deemed to have had knowledge of the unseaworthiness of the vessel at the beginning of the voyage,[39] and the shipper by accepting a vessel as one safe to carry the cargo does not prejudice his right to rely on a covenant of seaworthiness.[40] A provision in a contract that the shipper assumes the risk of deck stowage presupposes proper loading and a seaworthy ship.[41]

e. Time When Seaworthiness Must Be Present

The vessel must be seaworthy at the beginning of the voyage, and it is the duty of the carrier to keep the vessel in proper repair unless prevented by perils of the sea or unavoidable accident.

The vessel must be seaworthy, or the shipowner must have exercised due diligence to make the vessel seaworthy, at the beginning of the voyage,[42] or at the time she sails,[43] or when she breaks ground,[44] or at the point at which the cargo is loaded;[45] and it is the duty of the carrier to keep the vessel in proper repair, unless prevented by perils of the sea or unavoidable accident.[46]

Crew. It is the duty of the shipowner to obtain a crew at the outset of the voyage.[47]

§ 141. Improper Stowage

a. In general
b. Stowage on deck
c. Dunnage

a. In General

A carrier of goods by water has the duty to exercise due care in their stowage and, in the absence of contractual or statutory exemption, is liable for injury to, or loss of, cargo caused by defective or improper stowage.

A carrier of goods by water is under a duty to exercise due care in their stowage,[48] sufficient to meet the conditions reasonably to be anticipated;[49] and, in the absence of contractual or statutory exemption, the carrier is liable for injury to, or loss of, cargo caused by defective or improper stowage.[50]

38. U.S.—Sun Co. v. Philadelphia Transp., etc., Co., D.C.Pa., 244 F. 580.
58 C.J. p. 449 note 8.

39. U.S.—Davis v. Dittmar, C.C.A.N.Y., 6 F.2d 141.

40. U.S.—The Josephine, D.C.Pa., 37 F.2d 928, affirmed, C.C.A., 49 F.2d 207.

41. U.S.—The Royal Sceptre, D.C.N.Y., 187 F. 224.
58 C.J. p. 450 note 11.

42. U.S.—Charbonnier v. U. S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174—The Wildwood, D.C.Wash., 41 F. Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719—The City of Brunswick, D.C.Mass., 4 F.Supp. 908.
58 C.J. p. 450 note 13.
Harter Act as not relieving shipowner from general duty to furnish seaworthy vessel at beginning of voyage see supra § 128
Time as of which warranty is determined see supra subdivision b of this section.

43. U.S.—The Frey, D.C.N.Y., 92 F. 667.
58 C.J. p. 450 note 14.

44. U.S.—The Anastasia, D.C.Va., 11 F.Supp. 314, remanded, C.C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011.
58 C.J. p. 450 note 15.

45. U.S.—J. C. Penney Co. v. American Exp. Co., D.C.N.Y., 102 F. Supp. 742.

46. U.S.—Work v. Leathers, La., 97 U.S. 379, 24 L.Ed. 1012—The Wildwood, D.C.Wash., 41 F.Supp. 956, affirmed, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

47. U.S.—Charbonnier v. U. S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174.

48. U.S.—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.C.A., Isthmian S. S. Co. v. Martin, 170 F.2d 25—George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank, Limited, D.C.Pa., 65 F.Supp. 102—Venezuelan Meat Export Co. v. U. S., D.C.Md., 12 F.Supp. 379.

Statutory duty

Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1303, it is the duty of the carrier to properly and carefully stow the goods carried—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.

Knowledge of proper stowage

Question of shipowner's common knowledge of danger in stowing cargo is to be decided from standpoint of knowledge, experience, and judgment of competent person engaged at time in loading cargoes in port from which ship sailed—The Cabo Hatteras, D.C.N.Y., 5 F.Supp. 725

49. U.S.—The Terne, D.C.N.Y., 1 F. Supp. 537.

Requirement in shipper's insurance policy

Shipowners, rightfully stowing cargo in bridge deck space, were held not liable for loss of and damage to it because of requirement, of which they had no notice or knowledge, in shippers' insurance policy that cargo be stowed under main deck.—The Velma Lykes, D.C.Tex., 6 F.Supp. 886

50. U.S.—Armco International Corp. v. Rederi A/B Disa, C.C.A.N.Y., 151 F.2d 5—The Nichiyo Maru, C.C.A.Md., 89 F.2d 539—Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., D.C.N.Y., 50 F.2d 199—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880—Middle East Agency v. The John B. Waterman, D.C.N.Y., 86 F.Supp. 487—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.A., Isthmian S. S. Co. v. Martin, 170 F.2d 25—The Mangalia, D.C.N.Y., 69 F.Supp. 688—The Rita Sister, D.C.Pa., 69 F.Supp. 480—Stirnimann v. The San Diego, D.C.N.Y., 55 F.Supp. 798, affirmed, C.C.A., 148 F.2d 141—The West Kebar, D.C.N.Y., 53 F.Supp. 763, amended on other grounds 53 F.Supp. 766, reversed on other grounds, C.C.A., Edmond Weil Co. v. American West African Line, 147 F.2d 363—Export S. S. Corp. v. American Ins. Co., Newark, N. J., D.C.N.Y., 26 F.Supp. 79, reversed on other grounds, C.C.A., 106 F.2d 9, opinion adhered to 108 F.2d 1013, certiorari denied American S. S. Owners Mut. Protection and Indemnity Ass'n v. Export S. S. Corp. and American Export Lines, 60 S.Ct. 809, 309 U.S. 686, 84 L.Ed. 1029—The Ferncliff, D.C.Md., 22 F. Supp. 728, certified questions an-

However, the carrier is not liable for loss of, or injury to, cargo caused by improper stowage where the cargo was stowed according to the directions and orders of the shipper.[51] Liability for damage due to negligence in handling or stowage of cargo may not be avoided merely because the cargo was not in good condition when accepted or was of a character to sustain damage if not handled properly,[52] and the carrier is liable where cargo is in worse condition when delivered by the vessel than when received if such deterioration in condition is due to negligent stowage.[53] Bad stowage may constitute negligence precluding the carrier from relying on exceptions from liability contained in the bill of lading.[54]

The cargo must be stowed in accordance with the conditions of the ship[55] and the character of the cargo.[56] A carrier who accepts goods of a nature which require special care in their stowage must exercise such care.[57] Further, where the shipment increases the danger, increased caution in stowage is required,[58] and, when the voyage is one on which severe and stormy weather is to be anticipated, care in securing the cargo against shifting under stress of weather is required.[59] The law imposes on the carrier the duty of using due care to ascertain and consider the nature and characteristics of goods offered for shipment and to exercise due care in their handling,[60] and, further, the carrier is charged

swered Smith v The Ferncliff, 59 S Ct. 615, 306 U S 444, 83 L Ed 862, affirmed, C C A, 105 F 2d 1021—The City of Khios, D C N.Y., 16 F Supp 923.

58 C J. p 450 note 18.

Contractual exemption from liability for loss of, or injury to, cargo see supra §§ 131–138.

Statutory exemption from liability for loss of, or injury to, cargo see supra §§ 126–129.

Reasonable apprehension of injury

With respect to question whether improper stowage of cargo caused damage from heating, inquiry was not whether method of operation was used without disastrous results, but whether it was of such a character that danger of injury was reasonably to be apprehended.—The Nichiyo Maru, C.C A.Md, 89 F 2d 539.

Stowage held not bad or negligent

(1) Dye—The Hokkai Maru, D.C. N.Y., 17 F.Supp 249.

(2) Newsprint—New England Newspaper Pub. Co. v. U. S., D C. Mass., 18 F Supp. 674.

(3) Olive oil.—American Tobacco Co. v. The Katingo Hadjipatera, D.C. N.Y, 81 F Supp 438, modified on other grounds, C A, 194 F 2d 449, certiorari denied 72 S Ct. 1076, 343 U.S 978, 96 L Ed. —.

(4) Salad oil—The Velma Lykes, D C Tex., 6 F Supp 886.

(5) Tobacco—American Tobacco Co. v The Katingo Hadjipatera, supra.

(6) Stowage of other cargo held not bad or negligent see 58 C J. p 450 note 18 [f]

Stowage held bad or negligent

(1) Banana powder—Sanib Corp v. United Fruit Co, D C N Y, 74 F. Supp 64

(2) Cheese.—American Tobacco Co v The Katingo Hadjipatera, D.C N.Y., 81 F.Supp 438, modified on other grounds, C.A, 194 F 2d 449, certiorari denied 72 S.Ct. 1076, 343 U S 978, 96 L.Ed. —.

(3) Coffee—General Foods Corp v The Troubador, D C N Y., 98 F. Supp. 207.

(4) Fish meal—The Nichiyo Maru, C C A Md, 89 F 2d 539—The Venice Maru, D C N.Y, 39 F Supp 349, affirmed, C C A, Consumers Import Co v. Kawasaki Kisen Kabushiki Kaisha, 133 F 2d 781, affirmed 64 S Ct 15, 320 U S 249, 88 L Ed 30—The Ferncliff, D C.Md, 22 F Supp 728, certified questions answered Smith v. The Ferncliff, 59 S Ct. 615, 306 U S. 444, 83 L Ed. 862, affirmed, C C A., 105 F 2d 1021—58 C J p 450 note 18 [g] (8)

(5) Onions—The Carnia, D C N.Y., 2 F Supp. 929.

(6) Palm oil.—Edmond Weil, Inc, v. American West African Line, C C A N.Y., 147 F.2d 363.

(7) Stowage of other cargo held bad or negligent see 58 C.J. p 450 note 18 [g].

51. U S—Katzenberg v. Lamport & Holt, D.C.N.Y., 59 F 2d 739, affirmed, C C.A., 64 F.2d 1014.

Carriage of dogs

Carrier was not liable for death of racing dogs during voyage as result of heat exhaustion superinduced by lack of air resulting from inclosing kennels with canvas, where crew had merely followed shippers' direction in covering kennels—Thomas v. Pacific S. S. Lines, C C A.Cal, 84 F.2d 506.

52. U S—Isthmian S S Co. v. Martin, C A.Md., 170 F.2d 25.

53. U S—Isthmian S S. Co. v. Martin, supra

54. U.S—The Ensley City, D C.Md, 71 F Supp. 444, affirmed, C.A, Isthmian S. S. Co. v Martin, 170 F 2d 25.

58 C J p 451 note 19.

55. U S—The Wildwood, D.C Wash, 41 F Supp. 956, reversed on other grounds, C.C A., 133 F.2d 765, certiorari denied Amtorg Trading Corp v. American S. S Corp., 63 S Ct. 1436, 319 U.S 771, 87 L Ed 1719

58 C.J. p 450 note 18 [c].

56. U S—The F J. Luckenbach, D C.Pa., 213 F. 670.

57. U S—The Nichiyo Maru, C C A Md, 89 F 2d 539—The Ferncliff, D.C Md, 22 F Supp 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct. 615, 306 U S 444, 83 L Ed 862, affirmed, C C.A., 105 F 2d 1021.

58 C J. p 451 note 24.

58. U S—The Tamba Maru, D.C Wash, 274 F 696

58 C.J. p 451 note 25

59. U.S.—Hodgson v. Royal Mail Steam Packet Co, D C N.Y, 33 F 2d 337, affirmed, C C.A, Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., 47 F 2d 880—Middle East Agency v. The John B Waterman, D.C N.Y., 86 F Supp 487

60. U S—The Nichiyo Maru, C C A. Md, 89 F.2d 539—The Ferncliff, D C Md, 22 F Supp. 728, certified questions answered Smith v The Ferncliff, 59 S Ct 615, 306 U S. 444, 83 L Ed. 862, affirmed, C.C.A, 105 F 2d 1021.

Minn—Cargill Grain Co. v. Cleveland-Cliffs S S. Co, 235 N.W 268, 182 Minn. 516, certiorari denied 52 S Ct 25, 284 U.S. 646, 76 L Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S S. Co., 237 N W. 197, 183 Minn. 620.

58 C J. p 451 note 22.

Duty of carrier to make proper inquiry as to characteristics of cargo which it accepts generally see supra § 125.

Duty to refuse cargo

A vessel should not accept a cargo unless it can be given the type of stowage that its character requires—The Ensley City, D.C Md, 71 F. Supp. 444, affirmed, C A., Isthmian S. S. Co. v. Martin, 170 F.2d 25.

Refrigeration

Steamship company which issued

with notice of any patent defect in the goods;[61] but a carrier is not bound to know grade marks, or to take note of marks on packages, even of stowage directions on them.[62] It has been held that a shipowner who delegates to the shipper the loading of the ship cannot escape liability to the holders of the bills of lading for damage caused by improper stowage, even though the ship's master has not been consciously or willfully negligent in the matter of stowage[63]

Custom and usage. The prevailing standards of stowage are ordinarily considered part of the contract of carriage.[64] However, conformity with custom in the stowage of cargo is not of itself the exercise of due care which will relieve a carrier from liability for loss of, or injury to, the cargo, but reasonable prudence under the circumstances must be exercised[65] A custom of stowing cargo in a particular part of a vessel will not justify stowing more cargo there than all of the conditions in relation to the physical surroundings warrant.[66]

Cargo stowed by stevedores. The ship and its owners are exempt from liability for damages resulting from bad stowage performed by stevedores selected by the owner of the cargo;[67] but this rule does not exempt ship and its owners from liability for a failure in their duty as a carrier after the stowage has been performed,[68] and the mere right on the part of the cargo owner to select the stevedore does not exempt the ship from liability for bad stowage where the master is not deprived of his authority to control the loading and to insist on stowage satisfactory to him[69] As the master designates the place within the ship where each kind of cargo is to go, when such place is improper the ship is liable for consequent damages to the cargo, although it was stowed by another's stevedore.[70] Where goods are stowed in the customary way, and according to the best judgment of experienced stevedores, the fact that if they had been stowed differently the injury sustained might have been avoided does not make the carrier liable, as he is not required to take such extraordinary precautions.[71]

Injury to cargo from other cargo. Different parts of the cargo must be so stowed as not unnecessarily to injure one another;[72] and a vessel is liable for damages caused to goods of one shipper by those of another, although the goods are stowed in the

bill of lading providing for refrigerator shipment of pears, and showing different markings of barrels containing apples and pears, was held liable for loss resulting from confusion of barrels and shipments — Kimball Fruit Co v. New York Cent R. Co., 254 N.Y.S. 280, 142 Misc 558

61. Tex.—Southern Pac Co. v Walker-Smith Co., Civ App., 257 S W. 347.
58 C.J. p 451 note 23.

62. U.S.—The Buenos Aires, D.C.N Y., 46 F.2d 693.

Notices on packages shipped giving directions as to their stowage were held not to increase the carrier's responsibility where they were not called to the attention of the carrier and were not mentioned in the bill of lading.—The New Orleans, C.C.La., 26 F 44

63. U.S.—The Ferncliff, D.C.Md., 22 F.Supp. 728, certified questions answered Smith v. The Ferncliff, 59 S.Ct 615, 306 U.S 444, 83 L.Ed 862, affirmed, C.C.A., 105 F.2d 1021

64. U.S.—Bache v. Silver Line, C.C. A.N.Y., 110 F.2d 60.

65. U.S.—The California, D.C.Pa., 67 F.Supp. 719, reversed on other grounds, C.C.A., Globe Solvents Co v. The California, 167 F.2d 859, certiorari denied 69 S.Ct 67, 335 U.S 844, 93 L.Ed. 394—The City of Khios, D.C.N.Y., 16 F.Supp. 923—The Nichiyo Maru, D.C.Md., 14 F Supp. 727, affirmed, C.C.A., 89 F 2d 539.

66. U.S.—The San Guglielmo, D.C.N Y., 241 F 969, modified on other grounds 249 F 588, 161 C.C.A 514.

67. U.S.—California Navigation & Improvement Co v. Stockton Milling Co., Cal., 184 F. 369, 107 C.C.A 46.
58 C.J. p 451 note 28.

Duty to give information
In certain circumstances a shipowner may be under a duty to give information with respect to stowage —The Venice Maru, D.C.N.Y., 39 F Supp 349, affirmed, C.C.A., Consumers Import Co v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed 30.

68. U.S.—California Nav., etc., Co v. Stockton Milling Co., Cal., 184 F. 369, 107 C.C.A. 46.

69. U.S.—Knohr v. Pacific Creosoting Co., D.C.Wash., 181 F 856

70. U.S.—The Thames, Md., 61 F. 1014, 10 C.C.A. 232.

71. U.S.—Montague v. The Isaac Reed, D.C.Cal., 82 F. 566.
58 C.J. p 452 note 34.

72. U.S.—Armco International Corp. v. Rederi A/B Disa, C.C.A.N.Y., 151 F.2d 5—The Mangalia, D.C.N.Y., 69 F.Supp 688
58 C.J. p 452 note 35.

Stowage held improper
(1) The stowage of cheese in lower cross-bunker above other cargo subject to damage by spoilage of cheese. —American Tobacco Co. v The Katingo Hadjipatera, D.C.N.Y., 81 F Supp 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed —.

(2) Stowage of cases of cheese on top of cases of canned tomatoes — Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., D.C.N.Y., 50 F.2d 199.

(3) Placing casks of cocoanut oil and barrels of molasses above sugar and with coffee in same compartment "'tween-decks," without installing temporary bulkheads —Atlantic Sugar Refineries v Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880

(4) Stowage of leaky rum casks over green, salted hides without separation of watertight planking.— Venezuelan Meat Export Co v. U.S., D.C.Md., 12 F.Supp. 379

(5) Placing of cargo of rabbit skins in hold with cargo, which would be apt to heat unless well ventilated and could not be properly ventilated when hatches had to be shut down in rain or rough seas.—Bingham v. Osaka Shosen Kaisha, D.C.N Y., 12 F.Supp 35, affirmed, C.C.A., 88 F.2d 1004

Stowage held not improper or negligent
Stowage of fifteen tierces of beef casings in hold with flour taking up a space of twenty seven hundred feet was held not negligent stowage.— The Chester Valley, C.C.A.La., 110 F. 2d 592.

usual way, if the injury is caused by the goods of the third party being in bad condition when put on board,[73] or being of such a nature as naturally to cause damage;[74] and where the vessel carries different kinds of cargo, which are liable to damage each other, special care must be taken that they are so stowed that damage shall not result.[75] Where the different parts of the cargo are such as are very probable to injure each other, the carrier is liable, although they are well stowed, if injury result.[76] However, the carrier is not responsible for injury necessarily resulting to the goods of one shipper from their being carried in the same vessel with the goods of other shippers, which, by usage, are a proper part of the same general cargo, unless such injury could have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods.[77]

Violation of statutory requirement for protection from fire. The violation of statutory requirements for the protection of cotton or other easily ignitible commodity from fire while being carried on steamboats has been held negligence making the carrier liable for loss caused thereby, even though the statute was intended for the protection of life.[78]

b. Stowage on Deck

The parties to a contract for the carriage of goods by water may lawfully stipulate for on-deck stowage, and where stowage on deck is authorized the carrier is not liable for loss or damage to cargo by reason of its having been stowed on deck; but where stowage on deck is without the consent of the shipper the carrier is liable for loss resulting therefrom.

The parties to a contract for the carriage of goods by water may lawfully stipulate for on-deck stowage;[79] and where no culpable neglect or misconduct is attributable to the carrier or owner of the vessel for the injury, destruction, or jettison of goods loaded on deck, the carrier or vessel is not liable for loss or damage to cargo by reason of its having been stowed on deck, if it must have been contemplated from the nature of the cargo that it should be so stowed,[80] or if it was loaded on deck with the consent of the shipper.[81] On the other hand, stowage on deck without consent of the shipper, express or implied, renders the carrier liable for loss resulting therefrom,[82] even as against damages of the sea,[83] and notwithstanding exceptions in the bill of lading,[84] unless they would have been equally fatal if the goods had been under deck.[85]

The failure to mention the place of stowage, in the absence of custom to the contrary, implies that the goods will be stowed below deck.[86] Ordinarily, where goods are shipped under a clean bill of lading they are to be put under deck, there being no positive agreement to the contrary, or circumstances from which it might be inferred,[87] particularly with re-

73. U.S.—Armco International Corp. v. Rederi A/B Disa, C.C.A.N.Y., 151 F.2d 5.
58 C.J. p 452 note 36.

Leaking containers
U.S.—Armco International Corp. v. Rederi A/B Disa, supra.
58 C.J. p 452 note 36 [a].

74. U.S.—Wiggin v. The Glamorganshire, D.C.N.Y., 50 F. 840.
58 C.J. p 452 note 37.

75. U.S.—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880—The Mangalia, D.C.N.Y., 69 F.Supp 688.
58 C.J. p 452 note 38.

76. U.S.—Braker v. The H. G. Johnson, D.C.N.Y., 48 F. 696.

77. U.S.—Mainwaring v. The Carrie Delap, D.C.N.Y., 1 F. 874.
58 C.J. p 452 note 42.

78. Ala.—Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am.R. 729.

79. U.S.—Davidson v. Flood Bros., C.C.A.Cal., 30 F.2d 279.
Stowage or carrying of cargo on deck as constituting deviation see infra § 144 g.

Reservation in bill of lading
A shipper accepting bill of lading reserving the right to carrier to stow the cargo on deck assented to stowage of cargo on deck.—The Peter Helms, D.C.Wash., 24 F.Supp. 461.

80. U.S.—Talbot v. Wakeman, D.C.N.Y., 23 F.Cas.No.13,731, 19 How.Pr. 36

81. U.S.—Globe Solvents Co. v. The California, C.C.A.Pa., 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed. 394.
58 C.J. p 452 note 43.

82. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.—The Margaret Lykes, D.C.La., 57 F.Supp 466.
58 C.J. p 452 note 45.

83. U.S.—The Muskegon, D.C.N.Y., 10 F.2d 817
58 C.J. p 453 note 46.

84. U.S.—St. Johns N. F. Shipping Corp. v. Companhia Geral, etc., N.Y., 44 S.Ct. 30, 263 U.S. 119, 68 L.Ed. 201—The Muskegon, D.C.N.Y., 10 F.2d 817.

85. U.S.—The Margaret Lykes, D.C.La., 57 F.Supp. 466.
58 C.J. p 453 note 48.

86. U.S.—The Idefjord, D.C.N.Y., 31 F.Supp 667, reversed on other grounds, C.C.A., 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

87. U.S.—St. Johns N. F. Shipping Corporation v. S. A. Companhia Geral Commercial Do Rio De Janeiro, N.Y., 44 S.Ct. 30, 263 U.S. 119, 68 L.Ed. 201—The Idefjord, C.C.A.N.Y., 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459—The Margaret Lykes, D.C.La., 57 F.Supp 466—The Freda, D.C.N.Y., 266 F. 551.
58 C.J. p 452 note 44.

Notice after purchase of bills of lading
Fact that buyer of wool effected insurance when he received letter advising him of on-deck stowage of cargo and did not seek to disaffirm its purchase could have no bearing on ship's liability under clean negotiable bills of lading for damage to cargo stowed on deck, where bills had already been presented and buyer's responsibility to holders fixed.—The Idefjord, C.C.A.N.Y., 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v. Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

spect to goods such as wool;[88] and any inference that the cargo may be carried on deck, implied by a reference in the contract to the capacity of the vessel, is repelled by the fact that the shipper refused to insert leave to carry on deck in the bills of lading proposed to be signed, and paid under-deck freight.[89] Taking a full price for stowing on deck will subject the owner of the vessel to damages, if the freight placed on deck is thereby lost or damaged.[90]

As silence in a bill of lading as to stowage is not an express contract on that point, the shipowner, where a claim for loss is made, may prove an agreement to carry on deck[91] or usage to that effect;[92] and a shipper who agrees that his goods shall be carried on deck, and assents to the manner of stowing and protecting them, cannot recover for an injury through natural causes where all reasonable care was taken of them during the voyage.[93] A shipper who sees goods deck-stowed without objection cannot claim damages for injury to them occurring without fault of the carrier.[94] Even though the shipper agreed to deck shipment or a cargo was of such character as to be properly stowed on the deck, the carrier is liable for damages caused by its improper stowage,[95] as by its being insufficiently secured[96] or covered,[97] or because of the improper loading of the vessel,[98] or for an unnecessary jettison.[99]

c. Dunnage

Proper dunnage is an element of proper stowage, and, hence, the carrier or vessel is liable for loss of, or injury to, cargo caused by lack of sufficient dunnage.

Proper dunnage is an element of proper stowage,[1] and, hence, lack of sufficient dunnage to protect cargo is bad stowage, for which the carrier or vessel is liable.[2] A ship must be dunnaged so as to protect the cargo in rough weather, even if the vessel springs no serious leak.[3] Where the vessel has met with extraordinary sea peril, on proof of usual good dunnage the carrier will not be liable.[4]

§ 142. Improper Loading or Handling

As a general rule, a carrier of goods by water is under a duty properly and carefully to load, handle, carry, keep, and care for the goods carried, and, in the absence of contractual or statutory exemption, he is liable for loss of, or injury to, cargo resulting from his failure so to do.

As a general rule, a carrier of goods by water is under a duty properly and carefully to load the goods carried,[5] and, in the absence of contractual

Stowage in bridge deck space

Stowage of cargo in bridge deck space of ship was held full compliance with shipowners' obligations under bill of lading and statute—The Velma Lykes, D.C.Tex., 6 F. Supp. 886.

88. U.S.—The Idefjord, C.C.A.N.Y., 114 F.2d 262, certiorari denied Den Norske Amerikalinje, A/S v Blumenthal Import Corp., 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459.

89. U.S.—The Water Witch, N.Y., 1 Black 494, 17 L.Ed. 155

90. N.C.—Gardner v. Smallwood, 3 N.C. 349.

91. U.S.—Two Hundred and Sixty Hogsheads of Molasses, D.C.Me., 24 F.Cas.No.14,296, 1 Hask. 24.
58 C.J. p 453 note 49.
Parol evidence of agreement that goods shipped under clean bill of lading were to be stowed on deck see infra § 155.

92. U.S.—The Delaware, Cal., 14 Wall. 579, 20 L.Ed 779.
58 C.J. p 453 note 50.

93. U.S.—The Thomas P. Thorn, D.C.N.Y., 23 F.Cas.No.13,927, 8 Ben. 3.
58 C.J. p 453 note 51.

94. La.—Van Horn v. Taylor, 2 La. Ann. 587, 46 Am.D. 558.
58 C.J. p 453 note 52.

95. U.S.—U.S. Industrial Alcohol Co. v. Calmar S.S. Corporation, D.C.N.Y., 53 F.2d 1023, reversed on other grounds, C.C.A., 57 F.2d 182, certiorari denied 53 S.Ct. 21, 287 U.S. 622, 77 L.Ed. 540—Pioneer Import Corp. v. The Lafcomo, D.C.N.Y., 49 F.Supp. 559, affirmed, C.C.A., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed 1063.

Effect of statutory authorization

The right to stow inflammable cargo on deck by virtue of act of congress and regulations issued pursuant thereto does not relieve vessel from liability for damage to cargo arising out of vessel's failure properly to stow the cargo—The California, D.C.Pa., 67 F.Supp 719, reversed on other grounds, C.C.A., Globe Solvents Co. v. The California, 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed 394.

96. U.S.—U. S. Industrial Alcohol Co. v Calmar S. S. Corporation, D.C.N.Y., 53 F.2d 1023, reversed on other grounds, C.C.A., 57 F.2d 182, certiorari denied 53 S.Ct. 21, 287 U.S. 622, 77 L.Ed. 540.
58 C.J. p 453 note 53.

Insufficient room

It is no defense that there was insufficient room for safe stowage of all of cargo.—U.S. Industrial Alcohol Co. v. Calmar S. S. Corporation, supra.

97. N.Y.—Schwinger v. Raymond, 83 N.Y. 192, 38 Am.R. 415

98. U.S.—Barker v. The Swallow, D.C.Ill., 44 F. 771.
58 C.J. p 453 note 55.

99. U.S.—Compania de Navigacion La Flecha v Brauer, N.Y., 18 S.Ct. 12, 168 U.S. 104, 42 L.Ed 398

1. U.S.—Globe Solvents Co. v. The California, C.C.A.Pa., 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed 394.

2. U.S.—The Edith, C.C.A.N.Y., 10 F.2d 684.
58 C.J. p 453 note 60.

Responsibility of carrier

Dunnaging is the responsibility of the carrier in determining liability for damage to cargo caused by faulty dunnaging.—The Norte, D.C.Pa., 69 F.Supp. 881, motion denied 71 F.Supp. 147

3. U.S.—Endicott v. Renauld, D.C.N.Y., 8 F.Cas.No.4,482, 10 Ben. 582—The Howden, D.C.Cal., 12 F.Cas.No. 6,765, 5 Sawy. 389.

4. U.S.—Steinwender v. The Aspasia, D.C.N.Y., 79 F. 91.

5. U.S.—Standard Oil Co. of Cal. v U. S., D.C.Cal., 59 F.Supp 100, affirmed, C.C.A., 156 F.2d 312—Venezuelan Meat Export Co. v. U. S., D.C.Md., 12 F.Supp. 379

"Lumber ports" are openings in the bow of the barge which are used when long pieces of lumber are put

or statutory exemption, the carrier is liable for injury to, or loss of, cargo resulting from improper or negligent handling in loading,[6] or from overloading the vessel.[7] Since the loading of the cargo is a duty which the shipowner is bound to perform as a part of the contract of carriage,[8] it is immaterial to the shipper whether the duty is performed through the general employees of the shipowner or through an independent contractor.[9] However, where the injury to the cargo is caused by the negligence of the shipper in loading, the carrier is not liable,[10] and it has been held that the vessel and its owner are not liable for loss caused by the acts of a third person in charge of the loading over whom the owner of the vessel has no control and for whose acts he is not responsible.[11]

It is the duty of the carrier properly and carefully to handle, carry, keep, and care for the goods carried.[12] It has the duty to exercise due care to ascertain and consider the nature of the goods offered for shipment and to use such methods for their care during the voyage as their nature requires,[13] and it is liable for injury to, or loss of, cargo resulting from the failure properly to care for and handle the cargo en route.[14] The carrier is required to provide adequate ventilation for the safe carriage of the cargo,[15] and to provide reasonable and ordinary inspection and care in and about the transportation of the cargo.[16] However, where under a special contract of carriage, the shipper reserves to himself the care and control of the cargo while in transit, and injury occurs thereto by reason of the acts and orders of the shipper, there is no liability on the carrier.[17]

§ 143. Negligent Management or Navigation

A carrier of goods by water has the duty to furnish a vessel that is fully manned by competent officers and crew, and the carrier or owner of the vessel, in the absence of contractual or statutory exemption, is liable for loss of, or injury to, cargo resulting from negligent management or navigation of the vessel.

A carrier of goods by water is required to use due care to furnish a vessel that is fully manned

on board—The Chehaw, D.C.N.Y., 54 F.2d 645.

6. U.S.—Stirnimann v. The San Diego, D.C.N.Y., 55 F.Supp. 798, affirmed, C.C.A., 148 F.2d 141.

58 C.J. p. 454 note 65.

Contractual exemption from liability for loss of, or injury to, cargo see supra §§ 131–138.

Statutory exemption from liability for loss of, or injury to, cargo see supra §§ 126–129.

7. U.S.—The Indien, C.C.A.Cal., 71 F.2d 752, 759.

"Plimsoll mark" or "load line"

"Plimsoll mark" or "load line" is a design, painted on each side of a vessel, consisting of a circle transected by a horizontal line to right of which there are a few horizontal lines with a vertical crossbar at the left, and it is intended as a guide to determine the safe loading depth under various conditions—The Indien, supra.

8. U.S.—The Zulia, D.C.N.Y., 235 F. 433.

9. U.S.—The Zulia, supra.

58 C.J. p. 454 note 67.

10. U.S.—The Wildwood, C.C.A. Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S.S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

11. U.S.—Krebs Pigment & Chemical Co. v. Sheridan, D.C.Pa., 12 F.Supp. 254, affirmed, C.C.A., 79 F.2d 479.

12. U.S.—The Mormacmar, D.C.N.Y., 75 F.Supp. 520, motion denied L. W. & P. Armstrong, Inc. v. The Mormacmar, 88 F.Supp. 736—George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank, Limited, D.C.Pa., 65 F.Supp. 102—Standard Oil Co. of Cal. v. U.S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999—Venezuelan Meat Export Co. v. U.S., D.C.Md., 12 F.Supp. 379.

Standard of care required

(1) The shipowners must use due care in handling the goods carried—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.A., Isthmian S.S. Co. v. Martin, 170 F.2d 25.

(2) A carrier in undertaking to transport oil on a tanker charged itself with a high degree of care—Standard Oil Co. of Cal. v. U.S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312.

Duty to insure

Where master of vessel hauling cargo as common carrier caused part of cargo to be taken ashore in order that vessel might proceed to floating dock for repairs, it was duty of vessel to place insurance on cargo to cover risk of damage by fire and, on failure to do so, it would be liable for resulting loss—The Mormacmar, D.C.N.Y., 75 F.Supp. 520, motion denied L. W. & P. Armstrong, Inc. v. The Mormacmar, 88 F.Supp. 736.

13. U.S.—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.A., Isthmian S.S. Co. v. Martin, 170 F.2d 25—The Nichiyo Maru, D.C.Md., 14 F.Supp. 727, affirmed, C.C.A., 89 F.2d 539.

Seaworthiness with respect to cargo see supra § 140 c.

14. U.S.—McNeely & Price Co. v. Ellerman & Bucknall S.S. Co., D.C.Pa., 100 F.Supp. 339.

Improper care or negligence held not shown

U.S.—The Magdapur, D.C.N.Y., 46 F.Supp. 517—The Hokkai Maru, D.C.N.Y., 17 F.Supp. 249.

15. Minn.—Cargill Grain Co. v. Cleveland-Cliffs S.S. Co., 235 N.W. 268, 182 Minn. 516, certiorari denied 52 S.Ct. 25, 284 U.S. 646, 76 L.Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S.S. Co., 237 N.W. 197, 183 Minn. 620.

Lack of knowledge as to ventilation required

Fact that amount of ventilation necessary for safe carriage of fish meal was not generally known to shipping trade was held not to preclude finding that shipowners were negligent in stowing fish meal without proper ventilation—The Nichiyo Maru, D.C.Md., 14 F.Supp. 727, affirmed, C.C.A., 89 F.2d 539.

Discretion of master

With respect to liability for cargo damage, matter of opening and closing hatches was held to rest in discretion of ship's master—The Tergestea, D.C.N.Y., 54 F.2d 809.

Ventilation held not adequate

U.S.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32.

16. U.S.—Ætna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.

17. U.S.—Thomas v. Pacific S.S. Lines, C.C.A.Cal., 84 F.2d 506.

by competent officers and crew,[18] and, in the absence of contractual or statutory exemption, the carrier or owner of the vessel is answerable for injury to cargo resulting from the carelessness or unskillfulness of his master or crew.[19] Thus, in a contract by a common carrier by water, he impliedly undertakes that his captain and sailors have a competent knowledge of the navigation, and that he will be liable for a loss occasioned by the want of such knowledge,[20] or by negligent management or navigation of the ship,[21] as by carelessly running the vessel in a fog,[22] or selecting an improper mooring,[23] or failing to take soundings;[24] and as an owner of cargo has a right to assume that necessary care and caution will be exercised in not going out in extrahazardous weather, if the carrier goes out in such weather, and the owner does not consent thereto, he may recover his whole damage.[25]

§ 144. Deviation

a. In general
b. Abandonment of voyage
c. Delay
d. Departure from route
e. Dry-docking; repairs
f. Failure to deliver or misdelivery; overcarriage
g. Improper stowage, care, and custody of cargo
h. Mode of transportation
i. Towing

a. In General

Deviation in the law of shipping is not limited to a mere change in the route of a vessel, but it includes any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased. In the absence of specific provision to the contrary, a carrier of goods by water warrants that there will be no unnecessary deviation, and, if there is an unjustifiable deviation, the carrier is liable as insurer for damage to the cargo, unless the loss would have occurred even if there had been no deviation.

To deviate, lexicographically, means to stray[26] or wander.[27] As originally applied in admiralty and shipping law, the term "deviation" meant the wandering or straying of the vessel from the customary course of the voyage,[28] with or without necessity,[29] and its precise meaning in the original sense of a "departure" varies with the context in which it is used.[30] However, in the development of the law of shipping the meaning of "deviation" has not been limited to a mere change in the route of a vessel, but it has been given a more varied meaning and

18. U.S.—Venezuelan Meat Export Co v. U. S, D C Md., 12 F Supp 379

19. U S—The Fred Smartley, Jr, C. C A.Va., 100 F.2d 971—The Marianne, D C.La, 24 F Supp. 786.
58 C.J. p 454 note 69.
Carrier's negligence as depriving it of benefit of contractual exemption see supra § 131.
Effect of Harter Act as relieving carrier from liability for loss of, or injury to, cargo resulting from improper management or navigation of vessel see supra § 128.

A tug engaged to tow a barge is liable for damage to cargo of barge caused by faulty navigation—The Raleigh, D C Md, 50 F.Supp. 961.

Choice between two channels

Matter of navigation involving choice as between two channels to reach open sea in winter, with risk of being frozen in, was held question of exercise of best judgment by experienced mariner.—The Terne, D C.N.Y., 1 F.Supp 537.

20. U S.—The Jenny Jones, D C Or., 13 F.Cas No.7,286, Deady 82.
58 C J. p 454 note 70.

Duty of master

Master of vessel has duty of obtaining necessary data to enable him properly to navigate vessel as part of the navigation of the vessel.—The Havana, D C N.Y, 45 F Supp 244.

21. U S.—The Marianne, D C La., 24 F Supp 786.
58 C J p 454 note 71.

Stranding of vessel

The stranding of vessel which ran on a submerged wreck as the result of insufficient allowance being made for wind and current as vessel was proceeding at slow speed in close proximity to chartered wreck was the result of negligence constituting a fault of error of navigation, rendering carrier liable for consequent injury to cargo.—The Marianne, supra.

Negligence in passing in canal

U.S—The Pearl Harbor, C.C A N Y., 74 F 2d 58.

Negligent navigation of ship held not shown

U S—The Cherca, D C N.Y, 52 F 2d 646, affirmed, C C.A, Dingfelder v. The Cherca, 61 F.2d 1025.

22. U.S—The Rocket, D C Wis., 20 F Cas No.11,975, 1 Biss. 354.
58 C.J. p 454 note 72.

23. U.S.—The John Cottrell, D.C N Y, 34 F. 907.

24. U S—The Alpin, D C.N.Y., 23 F. 815.
58 C J. p 455 note 74.

25. U.S—The Wm. Murtagh, D.C N Y, 17 F. 259.
58 C.J. p 455 note 75.

Vessel held justified in starting voyage

U S—Hartford & New York Transp Co v Rogers & Hubbard Co, C C A Conn, 47 F 2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp Co., 51 S Ct. 483, 283 U S. 835, 75 L.Ed. 1446.

26. U S.—Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, C.C.A.N J., 28 F.2d 249

27. U S—Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, supra.

28. U S—Smith, Kirkpatrick & Co. v Colombian S S. Co., C C A Canal Zone, 88 F 2d 392—The Salvore, C. C.A N Y, 60 F 2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione, Libera Triestina Societa Anonima, 53 S Ct. 117, 287 U S. 653, 77 L.Ed. 565—Charbonnier v U. S, D.C S C., 45 F.2d 166, affirmed, C C A., U S. v. Charbonnier, 45 F 2d 174—Shackman v Cunard White Star, D.C.N.Y., 31 F Supp. 948.
58 C.J. p 455 note 82.

29. U.S.—Swift v. Furness, Withy & Co, Ltd., D.C.Mass., 87 F 345.
58 C.J. p 455 note 83.

30. U S.—Swift v. Furness, Withy & Co., Ltd., supra.

wider significance.[31] It has been extended to include any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased,[32] or, in other words, to a departure from the agreement or contract of carriage,[33] and it may be accomplished by a number of different acts.[34]

In the absence of special provision to the contrary, every ship's contract of carriage contains an implied warranty that there will be no unnecessary deviation.[35] A voluntary and wrongful deviation deprives the carrier of the benefit of exemptions or exceptions;[36] it renders the carrier, whether a common carrier or a private carrier,[37] liable as an insurer for damage to cargo[38] from the moment of deviation,[39] irrespective of how the damage was occasioned,[40] unless the loss would have occurred even if there had been no deviation.[41] It has been stated that by a deviation the shipowner converts the cargo or that the deviation gives the shipper a right to treat the goods as converted,[42] although other authority has questioned whether the consequences should be pressed so far.[43] Generally, a deviation by a carrier of goods by water has been treated as a more serious breach of the contract of carriage than if it had occurred on land,[44] and it has been stated that all except the most trivial deviations are considered gravely to affect the contract.[45] Under the Carriage of Goods by Sea Act, 46 U.S. C.A. § 1304(4), any reasonable deviation is not considered a breach of the contract of carriage, and the carrier is not liable for any loss or damage resulting therefrom.[46]

Ratification or waiver. The shipper's ratification of a voluntary and wrongful deviation may preclude his thereafter taking advantage of it.[47] However, a shipper or consignee is not estopped to claim a deviation, or does not lose his privilege of treating the ship as an insurer because of a deviation, by the fact that he claimed or accepted the goods, or such portion of them as was delivered at destination, or sought to recover damages because of the goods lost or destroyed,[48] at least where he did not learn of the deviation until the goods arrived.[49]

31. U.S.—Charbonnier v. U. S., D.C. S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174—Venezuelan Meat Export Co. v. U. S., D.C.Md., 12 F.Supp. 379.

32. U.S.—Smith, Kirkpatrick & Co. v. Colombian S. S. Co., C.C.A.Canal Zone, 88 F.2d 392—Charbonnier v. U. S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174—Shackman v. Cunard White Star, D.C.N.Y., 31 F.Supp. 948
58 C.J. p. 455 note 85.

33. U.S.—Smith, Kirkpatrick & Co. v. Colombian S. S. Co., C.C.A.Canal Zone, 88 F.2d 392.

Breach of contract
A "deviation" is no more than a breach of the contract of carriage.—Farr v. Hain S. S. Co., C.C.A.N.Y., 121 F.2d 940.

34. U.S.—Shackman v. Cunard White Star, D.C.N.Y., 31 F.Supp. 948.

Commencement of voyage with unseaworthy ship
The shifting of vessel from one loading place to another has been held not the commencement of voyage, as against contention that conduct of carrier in commencing voyage while the ship was unseaworthy because she lacked a full crew constituted a voluntary deviation.—The Maui, C.C.A.Cal., 113 F.2d 1018, certiorari denied John Demartini Co. v. The Maui, 61 S.Ct. 317, 311 U.S. 709, 85 L.Ed. 461.

Premature delivery of bill of lading
Shipmaster's conduct in dating and allegedly delivering bill of lading before consignment was placed on board was held not a deviation, where consignee suffered no prejudice from premature delivery, especially in absence of proof of time when bill of lading was delivered.—Switzerland General Ins. Co. of Zurich v. Navigazione Libera Triestina, S.A., C.C.A.N.Y., 91 F.2d 960.

35. U.S.—The Pelotas, C.C.A.La., 66 F.2d 75—The Hermosa, C.C.A.Cal., 57 F.2d 20.
58 C.J. p. 455 note 77.

36. U.S.—Western Lumber Mfg. Co. v. U. S., D.C.Cal., 9 F.2d 1004.
Deviation as depriving carrier of benefit of:
Contractual exceptions and limitations see supra § 131.
Statutory
Exemptions see supra §§ 127, 129.
Limitations see infra § 244.

37. U.S.—The Hermosa, C.C.A.Cal., 57 F.2d 20

38. U.S.—The Pelotas, C.C.A.La., 66 F.2d 75—The Hermosa, C.C.A.Cal., 57 F.2d 20—Charbonnier v. U. S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 31 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ———The Ida, D.C.N.Y., 6 F.Supp. 992.
N.Y.—Singer Hosiery Mills of N. Y. v. Cunard White Star, Limited, 102 N.Y.S.2d 762, 199 Misc. 389.
58 C.J. p. 455 note 88.
Deviation as abrogating:
Charter party see supra § 39.
Shipping contract see supra § 131.

39. U.S.—The Pelotas, D.C.La., 43 F.2d 571, affirmed, C.C.A., 66 F.2d 75.

40. U.S.—The Pelotas, supra.

41. U.S.—The Hermosa, C.C.A.Cal., 57 F.2d 20—The Margaret Lykes, D.C.La., 57 F.Supp. 466.
Liability of carrier for fire damage notwithstanding a deviation which had no causal relation to the fire see supra § 129

Proof of loss without deviation
Any deviation increasing or changing risk at least requires proof that loss would have occurred without deviation.—Charbonnier v. U. S., D.C. S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174.

42. U.S.—Sidney Blumenthal & Co. v. U. S., D.C.N.Y., 21 F.2d 798—The Citta Di Messina, D.C.N.Y., 169 F. 472.

Tort liability
Deviation raises a tort liability.—The Pacific Spruce, D.C.Wash., 1 F.Supp. 593.

43. U.S.—Farr v. Hain S. S. Co., C.C.A.N.Y., 121 F.2d 940.

44. U.S.—Farr v. Hain S. S. Co., supra.

45. U.S.—Farr v. Hain S. S. Co., supra.

46. U.S.—American Cyanamid Co. v. Booth S. S. Co., D.C.N.Y., 99 F.Supp. 232, affirmed, C.A., Feuer v. Booth S. S. Co., 195 F.2d 529.

47. U.S.—The Margaret Lykes, D.C.La., 57 F.Supp. 466.
58 C.J. p. 462 note 12.

48. U.S.—The Pelotas, C.C.A.La., 66 F.2d 75.

49. U.S.—Farr v. Hain S. S. Co., C.C.A.N.Y., 121 F.2d 940.

b. Abandonment of Voyage

A wrongful and total abandonment of the voyage contracted for constitutes a deviation.

A wrongful and total abandonment of the voyage contracted for constitutes a deviation.[50]

c. Delay

Delay may constitute a deviation, but it does not do so where it results from excusable causes.

Delay may constitute deviation,[51] as where the delay is voluntary and without justification.[52] However, delay does not constitute a deviation where it results from excusable causes,[53] such as effecting necessary repairs[54] or helping another ship in distress,[55] and is not unreasonable in time,[56] even though due to unseaworthiness of the ship.[57] Similarly, delay is not deviation where it is within contract provisions permitting delay,[58] or where it is with the approval of the shipper.[59]

d. Departure from Route

(1) In general
(2) Contractual permission to deviate
(3) Voluntary character of departure; justifiable cause

(1) In General

A voluntary departure, without necessity or reasonable cause, from the agreed, regular, and usual course or route of the voyage, or from the route selected after the voyage has been commenced, constitutes a deviation.

In the absence of a sufficient excuse or authorization for departure therefrom, a ship is bound to proceed to her destination by the regular and usual route,[60] which, prima facie, is the most direct route,[61] and a voluntary departure, without necessity or reasonable cause, from the agreed, regular, and usual or customary course or route of the voyage constitutes a deviation.[62] The bill of lading need not expressly declare what the route is,[63] and, in the absence of a provision to the contrary, it implies that the carrier will take the goods to their destination by the usual and customary route.[64] Carrying cargo from the port of shipment to a port specifically designated in the contract of carriage as a port of call on the itinerary of the voyage is not a deviation.[65] Prior to commencement of voyage there can be no deviation from route.[66]

By virtue of custom or usage, a ship may have the option of selecting one of two or more routes,[67] and following a route permissible by custom or usage is not a deviation,[68] even if the route followed

50. U.S.—The Poznan, D.C.N.Y., 276 F. 418.
58 C.J. p 455 note 91.

51. U.S.—The Hermosa, C.C.A.Cal., 57 F.2d 20—The Pacific Spruce, D. C Wash., 1 F Supp. 593.
58 C.J. p 455 note 93.

52. U.S.—The Hermosa, C.C.A.Cal., 57 F.2d 20
58 C.J. p 456 note 94.

Time when deviation occurs
A deviation occurs the moment a delay, even on the prescribed route, becomes unreasonable.—The Citta Di Messina, D.C.N.Y., 169 F. 472.

Master's intoxication
Delay of vessel caused by master's intoxication was held to constitute deviation.—The Hermosa, C C A Cal., 57 F.2d 20.

53. U.S.—Porter v. Bank Line, D C Va., 17 F 2d 513, affirmed, C C.A., 25 F.2d 843, certiorari denied 49 S Ct. 25, 278 U S. 623, 73 L Ed 544

54. U.S.—The Rosalie Hull, D.C.N Y., 296 F. 938, affirmed, C.C.A., 4 F. 2d 985.
58 C.J. p 456 note 96.

55. Mo.—Walsh v. Homer, 10 Mo. 6, 45 Am.D. 342.
58 C.J. p 456 note 97.

56. U.S.—The Caterina Gerolimich, D.C N.Y., 43 F.2d 248, affirmed, C C.A., 54 F 2d 1080.
58 C.J. p 456 note 98.

57. U.S.—Palmer, etc., Co. v. U. S., D.C.Mass., 10 F 2d 214.
58 C J. p 456 note 99.

58. U.S.—American Steel Co v. Transmarine Corp., D.C.N Y., 36 F. 2d 246—The Citta Di Messina, D.C. N.Y., 169 F. 472
58 C.J. p 456 note 1

59. U S.—Globe & Rutgers Fire Ins. Co v. U. S., C C A N.Y., 105 F.2d 160, certiorari denied 60 S Ct. 175, 308 U S. 611, 84 L Ed. 511.

60. U S.—General Hide, etc., Corp. v. U. S, D C N.Y., 24 F 2d 736.

61. Wash.—Emerson Co, Inc. v Reunis, 118 P. 631, 65 Wash 513, 37 L R.A.,N S., 222.
58 C J. p 456 note 8

Direct practical course
A vessel, in the absence of special contract, is under legal obligation to proceed from her port of loading to the contractual ports of destination of cargo intrusted to her on the most direct, practical course.—The Marianne, D.C.La., 24 F.Supp. 786.

62. U S.—The Willdomino v. Citro Chemical Co. of America, Pa., 47 S.Ct 261, 272 U S. 718, 71 L Ed. 491—The San Giuseppe, C C A.Va., 122 F 2d 579—The Pelotas, C.C.A La., 66 F.2d 75—Charbonnier v. U. S., D C S.C., 45 F 2d 166, affirmed, C.C.A., U S. v. Charbonnier, 45 F. 2d 174—American Cyanamid Co. v. Booth S S. Co, D.C.N.Y, 99 F. Supp. 232, affirmed, C A., Feuer v Booth S. S Co., 195 F 2d 529—The Jean Jadot, D C N.Y., 9 F.Supp. 162 —The Terne, D C N.Y., 1 F Supp 537
58 C J. p 456 notes 5, 9.

Substantial departure
There is no "deviation" depriving shipowner of benefit of bill of lading exceptions, unless there is substantial departure from regular route.—Morris v. Lamport & Holt, D C.N.Y., 54 F.2d 925, affirmed, C.C.A., 57 F.2d 1081.

63. U S.—The Pelotas, C.C.A.La., 66 F 2d 75.

64. U.S.—The Pelotas, supra.

65. U.S.—American Cyanamid Co. v Booth S S. Co, D C N.Y., 99 F Supp. 232, affirmed, C.A., Feuer v Booth S. S Co., 195 F 2d 529.

66. U.S.—Gilchrist Transp. Co. v Boston Ins Co., Mich., 223 F. 716, 139 C.C A. 246.
58 C J. p 456 note 10.

67. U.S.—The Marianne, D.C La., 24 F.Supp. 786.
Wash.—Emerson Co, Inc. v. Reunis, 118 P. 631, 65 Wash. 513, 37 L R A., N S., 222.

68. U.S.—The Marianne, D.C.La., 24 F.Supp 786
58 C.J. p 456 note 12.

is the less direct of those available[69] Where a ship, having by reason of custom or contract the choice of following one of two or more permissible routes, has exercised her option by commencing the voyage along a particular route, she is bound to proceed on the route selected,[70] and a departure therefrom may constitute deviation[71]

(2) Contractual Permission to Deviate

(a) In general

(b) Purpose of deviation

(c) Extent of deviation

(a) In General

Deviation or liberty clauses in contracts of carriage by water, granting a ship the right to depart from the regular and usual route, will be given effect, in so far as they do not conflict with statutory provisions, the general purpose and policy of the law, or the real intent of the contract of shipment. The clauses must be given a reasonable, but strict, construction.

"Deviation" or "liberty" clauses in contracts of carriage, granting a ship the right to depart from the regular and usual route, will be given effect,[72] in so far as they do not conflict with statutory provisions,[73] or with the general purpose[74] and policy[75] of the law, or with the real intent of the contract of shipment;[76] and a deviation made in accordance with such contractual provisions is not actionable.[77] Where the departure made is not within the permissive scope of the deviation or liberty clause, the departure from route is an actionable deviation[78]

Factors governing propriety of deviation. There is no fixed rule governing the propriety, under a deviation or liberty clause, of any particular departure from route.[79] The question is one of fact to be determined under the particular clause,[80] when considered in the light of all the surrounding circumstances,[81] such as the commercial adventure which is the subject of contract, the character of the vessel, the usual and customary route, the natural and customary ports of call, and the location of the port to which deviation was made.[82]

Rules of construction. Deviation or liberty clauses must be given a reasonable,[83] but strict,[84] construction They will be construed in a business sense,[85] with due reference to the voyage contemplated by the parties,[86] and in subordination to the main commercial purpose of the contract of affreightment[87] The rule is one of interpretation,

69. U.S.—The Marianne, supra.
58 C.J. p 457 note 13

70. U.S.—General Hide, etc., Corp v U. S., D.C.N.Y., 24 F.2d 736

71. U.S.—General Hide, etc., Corp. v. U. S., supra
58 C.J. p 459 note 64.

72. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—The Hindanger, C.C.A. Cal., 76 F.2d 13—The Salvore, D.C.N.Y., 52 F.2d 278, affirmed, C.C.A., 60 F.2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S.Ct. 117, 287 U.S. 653, 77 L.Ed. 565—American Cyanamid Co. v. Booth S. S. Co., D.C.N.Y., 99 F.Supp. 232, affirmed, C.A., Feuer v. Booth S. S. Co., 195 F.2d 529—The Marianne, D.C.La., 24 F.Supp. 786.
58 C.J. p 457 note 14.

73. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—The Hindanger, C.C.A. Cal., 76 F.2d 13.
58 C.J. p 457 note 16

74. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—Grace v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856.

75. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—Grace v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856

76. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—Grace v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856.

77. U.S.—The Hindanger, C.C.A. Cal., 76 F.2d 13—The Salvore, C.C.A.N.Y., 60 F.2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S.Ct. 117, 287 U.S. 653, 77 L.Ed. 565—American Cyanamid Co. v. Booth S. S. Co., D.C.N.Y., 99 F.Supp. 232, affirmed, C.A., Feuer v. Booth S. S. Co., 195 F.2d 529—The Nichiyo Maru, D.C.Md., 14 F.Supp. 727, affirmed, C.C.A., 89 F.2d 539.
58 C.J. p 457 note 15.

78. U.S.—The Eastern Prince, D.C. Cal., 21 F.2d 79.

79. U.S.—The Hindanger, C.C.A. Cal., 76 F.2d 13—Grace v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856. -

80. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—The Hindanger, C.C.A.Cal., 76 F.2d 13.
58 C.J. p 457 note 22

81. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—The Hindanger, C.C.A. Cal., 76 F.2d 13—Grace v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 956.

82. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579—The Hindanger, C.C.A.Cal., 76 F.2d 13—Grace v. Toyo Kisen Kabushiki Kaisha, D.C.Cal., 7 F.2d 889, affirmed, C.C.A., 12 F.2d 519, certiorari denied 47 S.Ct. 109, 273 U.S. 717, 71 L.Ed. 856

83. U.S.—Romano v West India Fruit & S. S. Co., C.C.A.Fla., 151 F.2d 727—The Wildwood, C.C.A. Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

84. U.S.—Smith v. U. S. Shipping Board Emergency Fleet Corp., D.C.N.Y., 26 F.2d 337, certiorari denied 49 S.Ct. 29, 278 U.S. 628, 73 L.Ed. 547—Rosenberg Bros. & Co. v. U. S. Shipping Board Emergency Fleet Corp., D.C.Cal., 7 F.2d 893, affirmed, C.C.A., 12 F.2d 721.

85. U.S.—The Frederick Luckenbach, D.C.N.Y., 15 F.2d 241.

86. U.S.—American Cyanamid Co. v Booth S. S. Co., D.C.N.Y., 99 F.Supp. 232, affirmed, C.A., Feuer v Booth S. S. Co., 195 F.2d 529.
58 C.J. p 457 note 27.

Language restricted to voyage

The language of a broad liberty of call clause must be interpreted and cut down to what is fairly applicable to the voyage agreed on and defined —American Cyanamid Co. v Booth S. S. Co., D.C.N.Y., 99 F.Supp. 232, affirmed, C.A., Feuer v. Booth S. S. Co., 195 F.2d 529.

87. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579.
58 C.J. p 457 note 29.

by which the meaning of words having a general significance is confined within the particular purpose of the agreement [88] In ascertaining the true sense in which general words are used, the words themselves cannot be deprived of all meaning, for this would not be to interpret the agreement but to erase a part of it,[89] and instances may be found where, because of the particularity with which the parties have provided that the ship may depart from the established and customary route, such departures, not foreign to the general purposes of the voyage, have been permitted.[90]

(b) Purpose of Deviation

In determining the propriety of a deviation the purpose of the departure from route is considered, and if it is for a purpose inconsistent with the purpose of the voyage it is unauthorized.

In determining the propriety of a deviation under a permissive clause, the court will consider the purpose of the departure from route [91] Such clauses ordinarily will not authorize departure from route for a purpose unconnected with the voyage,[92] or inconsistent with its particular or main commercial purpose,[93] and they do not authorize the owner's arbitrary making of an additional voyage.[94]

Deviation for fuel. Liberty clauses, authorizing the vessel to call at any port or ports in or out of the customary order or authorizing a departure from the customary or advertised route for the purpose of bunkering or taking on fuel, permit a call for such purpose at a port within the general course of the voyage and ancillary thereto,[95] and they do not limit the right to cases of emergency or where there is necessity for bunkering by stages,[96] or deny the vessel the benefit of the clause because of a failure to take on sufficient bunkers for the entire voyage prior to its commencement.[97] However, liberty clauses granting the ship the right to call at ports off the agreed or customary route do not authorize her to sail voluntarily with a shortage of fuel which will create a necessity of visiting fuel ports at which a call would not otherwise be made [98]

War conditions. A clause permitting deviation in view of war conditions will not authorize a deviation occasioned by circumstances unconnected with war [99]

(c) Extent of Deviation

The extent of departure from the regular and usual course of the voyage authorized under a deviation or liberty clause in a contract of carriage by water is not unlimited, but is determined on the basis of what is reasonable when the clause, the voyage contemplated, and the facts are considered.

Deviation or liberty clauses give the shipowner only a limited right of departure from the voyage, the limits being those of necessity and reasonable regard for the rights of both shipper and carrier growing out of the nature of the principal contract.[1] In determining the propriety of a departure from route under the permissive provisions of a

88. U S —The Frederick Luckenbach, D.C N Y, 15 F.2d 241—American Cyanamid Co. v. Booth S S. Co, D C.N.Y., 99 F Supp. 232, affirmed, C A., Feuer v. Booth S S Co., 195 F. 2d 529.

89. U.S.—The Frederick Luckenbach, D C.N Y, 15 F.2d 241—American Cyanamid Co. v. Booth S S Co, D C N Y, 99 F Supp. 232, affirmed, C A, Feuer v. Booth S S Co, 195 F 2d 529.

90. U S —The Frederick Luckenbach, D.C N Y., 15 F 2d 241.
58 C.J. p 457 note 31.

91. U S —The San Giuseppe, C C A Va, 122 F.2d 579—The Hindanger, C C A Cal, 76 F.2d 13—Grace v Toyo Kisen Kabushiki Kaisha, D C Cal, 7 F.2d 889, affirmed, C C A, 12 F.2d 519, certiorari denied 47 S Ct. 109, 273 U.S. 717, 71 L.Ed 856

Reasonable control over course of vessel

In order to avoid deviation, neither owner nor master of ship is required to abdicate to cargo interest reasonable control over course of vessel —The Salvore, D.C.N.Y., 52 F. 2d 278, affirmed, C C.A., 60 F 2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, D C N Y, 53 S Ct 117, 287 U S 653, 77 L Ed. 565

92. U S —The Eastern Prince, D C Cal, 21 F 2d 79
58 C J. p 458 note 34.

93. U.S —The San Giuseppe, C C.A Va, 122 F 2d 579—Grace v. Toyo Kisen Kabushiki Kaisha, D C.Cal, 7 F 2d 889, affirmed, C C A, 12 F 2d 519, certiorari denied 47 S Ct 109, 273 U.S. 717, 71 L Ed 856

94. U.S —The Willdomino, C C A N J, 300 F 5, affirmed 47 S Ct 261, 272 U S 718, 71 L Ed. 491—Swift v Furness, Withy & Co, Ltd, D C Mass, 87 F 345

95. U.S.—The San Giuseppe, C C A Va, 122 F 2d 579

Purpose of clause is to enable vessel to avail herself of privilege of calling for bunkers on general course of voyage at ports where coal may be obtained advantageously.—The San Giuseppe, supra

Call held not deviation

U S.—U. S. v Los Angeles Soap Co, C C.A.Cal, 83 F 2d 875—The Salvore, C C A N Y, 60 F 2d 683, certiorari denied U S Steel Products Co v Navigazione Libera Triestina Societa Anonima, 53 S Ct. 117, 287 U.S 653, 77 L Ed 565

96. U S —The San Giuseppe, C.C A Va, 122 F.2d 579.

Use of cargo

The ship is not required to use coal from its hold in order to avoid deviation in stopping for coal.—The Salvore, D C N.Y, 52 F.2d 278, affirmed, C C.A., 60 F 2d 683, certiorari denied U S. Steel Products Co. v Navigazione Libera Triestina Societa Anonima, 53 S Ct. 117, 287 U S. 653, 77 L Ed 565

97. U S —The San Giuseppe, C.C.A. Va, 122 F.2d 579

98. U S —The Caledonier, C C.A.N. Y, 31 F 2d 257, certiorari denied 49 S Ct 480, 279 U.S. 865, 73 L.Ed 1003
58 C J p 461 note 92.

99. U S —The Blandon, D C N.Y., 287 F. 722
58 C.J. p 458 note 37.

1. U.S —The Willdomino, C.C A N. J., 300 F 5, affirmed 47 S.Ct. 261, 272 U S. 718, 71 L Ed 491—Swift v. Furness, Withy & Co, Ltd, D. C.Mass., 87 F. 345.

deviation clause, the courts will consider the reasonableness of the departure made,[2] as incident to the voyage contemplated,[3] upholding the departure as a permissible deviation where reasonable under the clause and facts,[4] and condemning the departure as an actionable deviation where unreasonable.[5] The authority granted may not be exercised in an arbitrary or unreasonable manner without substantial grounds,[6] and good faith alone will not suffice.[7]

In the absence of express provisions authorizing departure from the usual route, a liberty of call clause permits calls only at ports properly in the course of the voyage,[8] that is, ports which would, in a business sense, be passed in the usual course of the voyage undertaken,[9] or ports substantially on the course of the voyage,[10] and it will not authorize a complete departure from the general course of the voyage.[11] In other words, the scope of permissible deviation may include ports not exactly in the ordinary track of the specific voyage, but will not include those far outside or beyond the ordinary track.[12] Where, however, the clause expressly authorizes a deviation from the usual route, such express provision will be given effect.[13]

Particular clauses. Adding to a deviation or liberty clause the words "in or out of the customary route" broadens the carrier's right to deviate, and clauses containing this or similar language allow the ship to depart to a reasonable extent from the customary[14] or direct[15] route between the termini of the voyage; but such words do not authorize the ship to proceed beyond her contractual destination,[16] or to return to her port of original departure,[17] or justify initiation of a new voyage before completion of the original voyage.[18] Liberty clauses granting the ship the right "to call at intermediate ports" do not permit calls at ports not customarily ports of call for the ship.[19]

A clause authorizing a ship to proceed from one port to another "via other ports" permits her to call at intermediate ports in the course of the usual geographical route,[20] but does not authorize pass-

2. U S—The San Giuseppe, C C.A Va., 122 F 2d 579—The Yungay, D C N Y., 58 F 2d 352
58 C J p 458 note 39

3. U.S.—The Willdomino, C.C A.N J, 300 F. 5, affirmed 47 S.Ct 261, 272 U.S. 718, 71 L Ed 491—Swift v. Furness, Withy & Co., Ltd, D C Mass., 87 F 345

4. U.S.—The San Giuseppe, C C.A. Va., 122 F.2d 579—The Yungay, D C.N Y., 58 F 2d 352.
58 C J. p 458 note 41

Call for secret sailing orders
An Italian steamship's call at Norfolk, Va, which was nearest and most convenient Atlantic port at which to call for secret sailing orders, before completing contractual voyage from New Orleans to England during war between England and Germany and before Italy entered war, was justified and not unreasonable exercise of privilege conferred by clauses in cargo bills of lading giving ship liberty to call at any port to receive coal or for any other purpose—The San Giuseppe, C. C.A.Va., 122 F 2d 579.

5. U S—Pacific Coast Co v Yukon Independent Transp Co, C C.A. Wash., 155 F. 29, 83 C C A. 625.
58 C.J. p 458 note 42.

6. U S—The Wildwood, C C.A. Wash., 133 F 2d 765, certiorari denied Amtorg Trading Corp v. American Foreign S S. Corp, 63 S.Ct. 1436, 319 U S. 771, 87 L Ed 1719.

7. U S.—The Wildwood, C.C A. Wash, 133 F 2d 765, certiorari denied Amtorg Trading Corp v. American Foreign S. S. Corp., 63 S. Ct. 1436, 319 U.S. 771, 87 L Ed 1719.

Ignorance of depth at discharge port
Where weather disturbance which caused master to deviate and deliver cargo at port other than port of discharge was a mild one and were it not for master's ignorance of the real depth at designated discharge port, he would not have made the deviation, such deviation was not a justifiable exercise of master's discretion under clause authorizing deviation in case of threatened or existing hazardous weather conditions—Romano v. West India Fruit & S. S. Co., C C A.Fla, 151 F 2d 727.

8. U.S.—The Ida, D.C.N.Y., 8 F. Supp. 951, reversed on other grounds, C C A., 75 F.2d 278.
58 C.J. p 458 note 43.

9. U.S.—U. S. Shipping Board Emergency Fleet Corp v. Rosenberg, C C.A.Cal., 12 F 2d 721.
58 C J. p 458 note 44

10. U.S.—American Cyanamid Co. v Booth S. S. Co., D C N.Y, 99 F. Supp. 232, affirmed, C.A., Feuer v. Booth S. S. Co., 195 F.2d 529.

Ports held substantially on course
U.S—American Cyanamid Co v. Booth S. S. Co., D.C.N.Y., 99 F Supp. 232, affirmed, C.A., Feuer v. Booth S. S Co, 195 F.2d 529.

11. U S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579.

12. U S.—The Ida, D.C N.Y., 8 F. Supp. 951, reversed on other grounds, C.C.A., 75 F.2d 278.
58 C J. p 458 note 45.

13. U.S.—Smith v. U. S. Shipping Board Emergency Fleet Corp., C.C A N.Y, 26 F 2d 337, certiorari denied 49 S Ct. 29, 278 U.S. 628, 73 L Ed. 547—Rosenberg v. U S Shipping Board Emergency Fleet Corp, D.C Cal, 7 F 2d 893, affirmed, C C. A., U S Shipping Board Emergency Fleet Corp v. Rosenberg & Co, 12 F 2d 721, reversed on other grounds 48 S.Ct. 256, 276 U S. 202, 72 L Ed. 531.
58 C J p 458 note 46.

14. U S.—Smith v. U. S Shipping Board Emergency Fleet Corp, C.C. A.N Y, 26 F 2d 337, certiorari denied 49 S Ct. 29, 278 U S. 628, 73 L Ed 547.
58 C J. p 458 note 48

15. U S—Callister v. U. S Shipping Board Merchant Fleet Corp., D.C. N Y, 21 F 2d 447, affirmed, C.C A., Callister v. U. S Shipping Board Emergency Fleet Corporation, 30 F.2d 1008.
58 C.J. p 459 note 49.

16. U S—Rosenberg v. U. S. Shipping Board Emergency Fleet Corp., D.C Cal., 7 F 2d 893, affirmed, C.C. A., 12 F 2d 721.
58 C.J. p 459 note 50.

17. U.S.—The Blandon, D C.N.Y., 287 F. 722.
58 C.J. p 459 note 51.

18. U.S.—Rosenberg v. U. S. Shipping Board Emergency Fleet Corp, D.C.Cal, 7 F 2d 893, affirmed, C.C. A., 12 F 2d 721

19. U.S.—The Caledonier, C.C A.N. Y., 31 F.2d 257, certiorari denied Picard v. The Caledonier, 49 S.Ct. 480, 279 U.S. 865, 73 L Ed. 1003.

20. U.S—Centrosoyus-America, Inc. v. U. S, D C N.Y., 30 F.2d 302, affirmed, C.C.A., 31 F.2d 610.

ing beyond the contractual terminus of the voyage.[21] Rotation clauses, such as those granting the ship the right to call at any port or ports in any order or rotation, relieve the ship from the duty of visiting ports along the customary route in their geographical order,[22] at least where there is a valid reason within the purpose of the voyage for so doing;[23] but they do not authorize calling at ports off the customary business route of the particular voyage.[24]

Under a clause authorizing the ship "to make deviation" she can deviate only to a reasonable extent.[25] A clause authorizing the vessel to proceed according to itinerary and ports of call if it is impossible to discharge cargo at the port of destination, because of heavy weather or other enumerated causes, does not authorize a deviation before the vessel reaches the port of destination mentioned.[26] Under a clause expressly permitting a ship to pass her destination, going beyond the contractual terminus of the voyage is not an actionable deviation.[27]

(3) Voluntary Character of Departure; Justifiable Cause

A departure from route by a carrier of goods by water must be voluntary in the sense of being without necessity or reasonable cause in order to constitute a deviation. A deviation in the face of an emergency may be justified even though the danger arose from the fault of the carrier, provided the emergency was not deliberately planned in advance or did not arise from the carrier's gross negligence.

In order to constitute deviation the departure from route must be voluntary,[28] in the sense of being without necessity[29] or reasonable cause,[30] and a departure because of necessity or for reasonable cause will not render the carrier liable as an insurer for damage to cargo.[31] Deviation presupposes exercise of deliberate choice before occurrence of compelling necessity,[32] and departure from route is justifiable where reasonably necessary for the safety of the crew,[33] ship,[34] or cargo.[35] Departure from route to save human life on another vessel is not deviation.[36]

21. U S—Centrosoyus-America, Inc. v U. S, supra

22. U S—Smith v U S Shipping Board Emergency Fleet Corp, C C. A.N Y, 26 F.2d 337, certiorari denied 49 S Ct. 29, 278 U.S 628, 73 L Ed 547.

23. U.S—American Cyanamid Co. v. Booth S. S. Co, D.C.N.Y., 99 F. Supp 232, affirmed, C.A., Feuer v. Booth S S Co, 195 F.2d 529.

To catch spring tides

Calling at permissible ports of call out of their geographical order in order to catch the spring tides at a particular port and thus decrease the elapsed time of voyage to port of discharge does not constitute a "deviation" under the clause—American Cyanamid Co. v. Booth S S. Co, D.C.N Y, 99 F.Supp. 232, affirmed, C A., Feuer v. Booth S. S Co., 195 F. 2d 529.

24. U.S—Smith v U. S. Shipping Board Emergency Fleet Corp., C.C. A.N.Y, 26 F.2d 337, certiorari denied 49 S Ct. 29, 278 U.S. 628, 73 L.Ed. 547
58 C J. p 459 note 56.

25. U S.—Swift v Furness, Withy & Co., Ltd., D C Mass, 87 F 345
58 C.J. p 459 note 58

26. U S—The Pelotas, C C.A La., 66 F.2d 75.

Ports designated in bill of lading

The bill of lading was held to refer to ports shown by the bill and not to any other port or itinerary designated in order issued by shipowner.—The Pelotas, supra.

27. U.S—The Emelia S. de Perez, D C N.Y, 287 F 361, affirmed, C C. A, 288 F 1019
58 C.J p 459 note 59.

28. U S—The San Giuseppe, C C.A. Va, 122 F 2d 579—Charbonnier v U S, D C S C, 45 F 2d 166, affirmed, C C A, U S v. Charbonnier, 45 F.2d 174—The Terne, D C N Y., 1 F.Supp 537.
58 C.J p 460 note 65.

29. U S—The San Giuseppe, C.C A. Va., 122 F 2d 579—Charbonnier v U. S., D.C S.C, 45 F.2d 166, affirmed, C C A, U S v Charbonnier, 45 F 2d 174—The Terne, D C N Y., 1 F Supp 537.
58 C.J p 460 note 66.

30. U S.—The San Giuseppe, C C A Va., 122 F.2d 579—Charbonnier v. U S., D C S.C., 45 F.2d 166, affirmed, C C A., U. S v Charbonnier, 45 F 2d 174—The Terne, D C.N.Y., 1 F Supp 537.
58 C.J p 460 note 67.

Test of reasonable deviation

In determining whether a deviation is reasonable within the Carriage of Goods by Sea Act relieving carrier from liability for loss or damage resulting from a reasonable deviation, the true test is what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances, including the terms of the contract and the interests of all parties concerned without considering the interests of any one party as conclusive. —American Cyanamid Co. v. Booth S. S. Co., D.C N.Y, 99 F Supp. 232, affirmed, C.A., Feuer v. Booth S. S. Co, 195 F.2d 529

Deviation to catch spring tides

Any deviation involved in calling at permissible ports of call out of their geographical order in order to catch spring tides at a particular port and thereby decrease the elapsed time of voyage from port of shipment to port of discharge was a "reasonable deviation."—American Cyanamid Co. v. Booth S S Co, D C N Y, 99 F Supp. 232, affirmed, C A., Feuer v. Booth S. S Co, 195 F.2d 529

31. U S—The San Giuseppe, C C A Va., 122 F 2d 579.

32. U S—Royal Ins Co v. U. S, C C A.N Y, 87 F 2d 714—The Waalhaven, C C A N Y, 36 F.2d 706, certiorari denied 50 S Ct 352, 281 U S 747, 74 L Ed 1159

33. U.S—The Malcolm Baxter, Jr, C C A N Y., 20 F.2d 304, affirmed France v French Overseas Corp, 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.
58 C.J. p 460 note 69.

34. U.S—The Malcolm Baxter, Jr, C.C A N Y, 20 F 2d 304, affirmed France v French Overseas Corp, 48 S.Ct. 516, 277 U S. 323, 72 L.Ed. 901.
58 C J. p 460 note 70.

35. U.S—The Malcolm Baxter, Jr, C C.A.N.Y., 20 F.2d 304, affirmed France v. French Overseas Corp, 48 S Ct 516, 277 U S. 323, 72 L Ed 901—The Turret Crown, C C.A N Y, 297 F. 766, certiorari denied Commonwealth SS Co. v. Patent Vulcanite Roofing Co, 44 S Ct 403, 264 U S 591, 68 L.Ed. 865.

36. U.S—Crocker v. Jackson, D C. Mass., 6 F.Cas.No.3,398, 1 Sprague 141.
58 C.J. p 460 note 72.

It has been said that it is the presence of the peril, rather than its cause, that justifies the deviation,[37] and deviation in the face of emergency may be justified even though the danger arose from fault of carrier,[38] as where the fundamental cause of the emergency necessitating deviation was original unseaworthiness of the ship.[39] More is required in order that a deviation may be voluntary and inexcusable than mere negligence which renders the vessel unseaworthy[40] or mere careless disregard of the vessel's ability to reach her destination.[41] The deviation is not justified, however, where the emergency was deliberately planned in advance,[42] or arose because of the carrier's gross negligence.[43]

Deviation may be deemed voluntary if circumstances were such as to make the future necessity therefor presently obvious,[44] but it may be held involuntary if such future necessity was not clearly apparent on leaving port,[45] as where the unseaworthiness of the vessel was known, but it was not known that the completion of the journey successfully would be impossible.[46] The question of whether the deviation was voluntary or involuntary will turn on the condition of the ship and the intention of the master at the commencement of the voyage, and not on such condition and intention when the ship thereafter left another port.[47] It has been held that the necessity which will excuse a deviation must arise during the voyage,[48] and not at the loading port prior to its inception.[49]

Food supplies. A deviation necessary to replenish food supplies may be justified.[50]

Fuel Where a ship leaves port with insufficient bunker coal[51] or fuel oil[52] for the voyage, and is forced to depart from the route to secure additional fuel, there is an actionable deviation if the original insufficiency resulted from a preconceived intent or deliberate plan to depart from the route to secure replenishment, as where it was desired to buy fuel at a port where prices would be cheaper,[53] or was the result of gross negligence,[54] as where the supply in the bunkers was grossly inadequate for the voyage undertaken.[55] However, no actionable deviation arises where the insufficiency was caused by the use of more than the usual amount of coal because of rough weather,[56] or, it has been held, if the original insufficiency resulted merely from neglect.[57]

Repairs. Departure from route to effect necessary repairs is not deviation.[58]

Perils of sea. Deviation reasonably required by perils of the sea is justified[59] where the vessel was

37. U.S.—Venezuelan Meat Export Co v. U. S., D.C.Md, 12 F.Supp. 379.
58 C.J. p 460 note 73

38. U.S.—France v French Overseas Corp, N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901

39. U.S.—May v Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, D.C.N.Y., 57 F.2d 265, affirmed, C.C.A., 63 F.2d 248, reversed on other grounds 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348—Venezuelan Meat Export Co. v. U. S., D.C.Md, 12 F.Supp. 379.
58 C.J. p 460 note 75

40. U.S.—Royal Ins. Co v. U. S., C.C.A.N.Y., 87 F.2d 714

41. U.S.—May v Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, D.C.N.Y., 57 F.2d 265, affirmed, C.C.A., 63 F.2d 248, reversed on other grounds 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348

42. U.S.—The Willdomino v. Citro Chemical Co., Pa., 47 S.Ct. 261, 262, 272 U.S. 718, 71 L.Ed. 491

43. U.S.—The Willdomino v. Citro Chemical Co., supra
58 C.J. p 460 note 77.

44. U.S.—The Malcolm Baxter, Jr., C.C.A.N.Y., 20 F.2d 304, affirmed France v French Overseas Corp, 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.

45. U.S.—May v Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, D.C.N.Y., 57 F.2d 265, affirmed, C.C.A., 63 F.2d 248, reversed on other grounds 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348—The Malcolm Baxter, Jr., C.C.A.N.Y., 20 F.2d 304, affirmed France v French Overseas Corp, 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901

46. U.S.—Royal Ins. Co v. U. S., C.C.A.N.Y., 87 F.2d 714—The Malcolm Baxter, Jr., C.C.A.N.Y., 20 F.2d 304, affirmed France v French Overseas Corp, 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.

47. U.S.—The Malcolm Baxter, Jr., C.C.A.N.Y., 20 F.2d 304, affirmed France v. French Overseas Corp, 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed 901

48. U.S.—The Maine, D.C.N.Y., 8 F.2d 291

49. U.S.—The Maine, supra.

50. U.S.—The Rosalie Hull, D.C.N.Y., 296 F. 938, affirmed, C.C.A., 4 F.2d 985.
58 C.J. p 461 note 93

51. U.S.—The Willdomino v. Citro Chemical Co., Pa., 47 S.Ct. 261, 272 U.S. 718, 71 L.Ed 491.
58 C.J. p 460 note 85.

52. U.S.—The Maine, D.C.N.Y., 8 F.2d 291.
58 C.J. p 461 note 90.

53. U.S.—The Waalhaven, C.C.A.N.Y., 36 F.2d 706, certiorari denied 50 S.Ct. 352, 281 U.S. 747, 74 L.Ed. 1159
58 C.J. p 460 note 86, p 461 note 90 [a].

54. U.S.—The Willdomino v. Citro Chemical Co., Pa., 47 S.Ct. 261, 272 U.S. 718, 71 L.Ed 491.

55. U.S.—The President Arthur, D.C. N.Y., 28 F.2d 391.

Amount held sufficient

Excess coal on vessel of more than twenty-five per cent over ordinary requirements for voyage was held sufficient—The Cherca, D.C.N.Y., 52 F.2d 646, affirmed, C.C.A., Dingfelder v The Cherca, 61 F.2d 1025

56. U.S.—The Cherca, D.C.N.Y., 52 F.2d 646, affirmed, C.C.A., Dingfelder v The Cherca, 61 F.2d 1025.

57. U.S.—The Waalhaven, C.C.A.N.Y., 36 F.2d 706, certiorari denied 50 S.Ct. 352, 281 U.S. 747, 74 L.Ed. 1159.

58. U.S.—The Turret Crown, C.C.A. N.Y., 297 F. 766, certiorari denied Commonwealth SS. Co v. Patent Vulcanite Roofing Co., 44 S.Ct. 403, 264 U.S. 591, 68 L.Ed. 865.

59. U.S.—France v. French Overseas Corp, N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed 901
58 C.J. p 461 note 95.

seaworthy at the time of leaving port,[60] and it does not impose on the carrier the liability of insurers, as for a deviation.[61]

Exigencies of war. A departure from, or change of, route is not a deviation which will render the carrier liable as an insurer for damage to cargo where it was necessitated by the exigencies of war,[62] as where it is to avoid capture by the public enemy.[63]

e. Dry-Docking; Repairs

Dry-docking may constitute a deviation, unless justifiable.

Dry-docking may constitute deviation,[64] unless justifiable.[65] Repairing a ship in port while cargo was being loaded or discharged has been held not to be a deviation [66]

f. Failure to Deliver or Misdelivery; Overcarriage

Deviation by a carrier of goods by water may consist of a failure to deliver goods at the port of discharge or of an overcarriage of goods, but a misdelivery of goods at the port of discharge does not constitute a deviation.

Deviation by a carrier of goods by water may consist of failure to deliver goods at the port named in the bill of lading,[67] or of an overcarriage of goods.[68] However, a misdelivery of goods at the port of discharge does not constitute a deviation,[69] and mere nondelivery does not necessarily constitute a deviation.[70] Where overcarriage of goods is excusable within stipulations covering such matter, there is no deviation.[71]

g. Improper Stowage, Care, and Custody of Cargo

Mere negligent stowage or handling of cargo does not constitute a deviation, but stowage which constitutes a serious departure from the contract of carriage, such as carrying cargo on deck contrary to custom and without the consent of the shipper, may constitute a deviation.

Mere negligent stowage or handling of the cargo does not constitute a deviation,[72] but stowage which constitutes a serious departure from the contract of carriage may constitute a deviation.[73] Carrying cargo on deck contrary to custom and without consent of the shipper[74] or under a clean bill of lading[75] constitutes deviation, and the carrier is liable

60. U S —The Mormacmar, D C N Y., 75 F Supp 520, motion denied L W & P Armstrong, Inc. v. The Mormacmar, 88 F.Supp. 736

61. U S —The Mormacmar, D.C N.Y., 75 F.Supp 520, motion denied L W. & P. Armstrong, Inc v. The Mormacmar, 88 F Supp. 736.

62. U S —American Tobacco Co. v The Katingo Hadjipatera D C N Y, 81 F.Supp. 438, modified on other grounds, C A., 194 F 2d 449, certiorari denied 72 S Ct. 1076, 343 U S 978, 96 L Ed —.

Effort to secure shipper's consent

Where change in route was necessitated by exigencies of war and charterer made every effort to reach various shippers to secure their approval for new route and no shipper contacted refused to give consent, shippers who neither consented to nor ratified the new route could not recover for damage to cargo on ground of deviation —American Tobacco Co. v. The Katingo Hadjipatera, D C N Y., 81 F.Supp 438, modified on other grounds, C A., 194 F 2d 449, certiorari denied 72 S.Ct 1076, 343 U S. 978, 96 L Ed —.

Call for sailing orders

An Italian steamship's call at Norfolk, Va, for sailing orders before completing contractual voyage from New Orleans to England during war between England and Germany and only a few days before entry into war by Italy, consuls of which were already refusing to permit Italian vessels in port to put to sea, was not unreasonable deviation from voyage route, even if ship's captain did not know of imminence of war between Italy and England —The San Giuseppe, C C.A.Va , 122 F 2d 579.

63. Philippine.—Compagnie Franco-Indochinoise v Deutsch Australische Dampschiffs Gesellschaft, 36 Philippine 643—Compagnie de Commerce et de Navigation D'Extreme Orient v. Hamburg Amerika Packetfahrt Actien Gesellschaft, 36 Philippine 590

64. U S —The Indrapura, D C.Or , 171 F. 929.
58 C J. p 461 note 97.

65. U S —The Indrapura, supra.
58 C.J. p 461 note 98

66. U S —The Salvore, D.C N Y , 52 F 2d 278, affirmed, C.C.A , 60 F.2d 683, certiorari denied U. S Steel Products Co v Navigazione Libera Triestina Societa Anonima, 53 S Ct 117, 287 U S 653, 77 L Ed 565
Departure from route to make repairs see supra subdivision d (3) of this section.

67. U S —Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, C.C.A N J., 28 F 2d 249

68. N.Y —Singer Hosiery Mills of N Y v. Cunard White Star, Limited, 102 N Y.S 2d 762, 199 Misc. 389.
58 C.J p 461 note 1.

Ratification

Shipper, by attempting to recover possession of goods and otherwise asserting ownership, did not ratify overcarriage of goods which were seized under process of Swiss courts when carrier, in violation of bill of lading, attempted to deliver goods at Geneva instead of Antwerp —The Jean Jadot, D C N.Y., 14 F.Supp 161.

69. U S.—The Jean Jadot, D.C.N.Y., 9 F.Supp. 162.

Delivery to another carrier

Handing over of cargo by carrier after completion of voyage and discharge of cargo at port provided in bill of lading to another carrier instead of to the holder of the bill of lading on surrender thereof, as required by contract of carriage, was held not "deviation."—The Jean Jadot, supra.

70. U S —Shackman v. Cunard White Star, D.C.N Y., 31 F.Supp. 948.
Nondelivery as creating presumption of overcarriage resulting in deviation see infra § 154.

71. U.S.—Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, C.C.A.N.J , 28 F.2d 249.
58 C J p 461 note 2.

72. U.S —The Chester Valley, C.C.A. La , 110 F 2d 592.
58 C.J p 461 note 6.

73. U.S.—The Chester Valley, supra.

74. U S —St. Johns N F Shipping Corp v. S. A. Companhia Geral, etc., N. Y , 44 S.Ct. 30, 263 U S 119, 68 L Ed 201.
58 C J. p 461 note 5.

75. U.S.—The Margaret Lykes, D C. La., 57 F Supp 466—The Velma Lykes, D C Tex , 6 F.Supp. 886.

as for a deviation if the cargo sustains loss or damage by reason of its having been stowed on, rather than under, deck.[76] However, if a shipper holding a clean bill of lading approves and consents to stowage on deck, such stowage does not constitute a deviation.[77]

h. Mode of Transportation

Carriage in part by a carrier other than the one specified in the contract of carriage may constitute a deviation, but carriage in part by rail is not deviation where it is permissible under the contract of shipment.

Transshipment or forwarding of cargo from a certain port by a carrier other than the carrier specified in the contract of affreightment may constitute a deviation making the initial carrier liable for damage to the cargo while in the hands of the connecting carrier.[78] However, carriage in part by rail is not deviation where it is permissible under the contract of shipment.[79]

i. Towing

Taking another vessel in tow or being towed, without justifiable cause or excuse or the consent of the shipper, constitutes a deviation.

Taking another vessel in tow, without the consent of the shipper, constitutes deviation,[80] except to the extent that towing of another ship is necessary to save human life.[81] Permitting the vessel to be towed without justifiable cause or excuse also constitutes a deviation.[82]

Contractual permission "to tow and assist vessels in all situations" authorizes a ship to go to the assistance of a vessel in distress and tow her to such place of safety as, under the circumstances, is most reasonably accessible,[83] but such clauses do not justify the salving vessel in towing the distressed ship for an unreasonable distance.[84]

§ 145. Delay

a. In general
b Excusable delay

a. In General

A carrier of goods by water is liable for damage to cargo resulting from unreasonable delay in the commencement or completion of the voyage.

In the absence of an agreement to the contrary,[85] the ship is obligated to sail from the port of loading within a reasonable time,[86] although she need not sail sooner,[87] and she must prosecute her voyage without unnecessary delay.[88] Where the carrier unreasonably delays the commencement or completion of the voyage without legal excuse it may be held liable for resultant damage to cargo.[89]

Unseaworthiness. The carrier has been held liable where the delay in the voyage was occasioned by unseaworthiness of the vessel when the voyage began.[90]

Waiver of delay. The fact that the cargo owner permits goods to be shipped after expiration of the

76. U.S.—The Margaret Lykes, D.C La., 57 F Supp. 466.

Election of remedies

(1) Where shipper had knowledge of deviation with respect to stowage of cargo on deck rather than under, shipper had option of treating such breach as a repudiation of the contract of carriage or to waive the deviation as final repudiation of the contract by carrier and treat contract as fully subsisting, reserving legal right to damages it might subsequently sustain by reason of the breach.—The Margaret Lykes, supra

(2) Where no loss or injury resulted from carrying cargo on deck, shipper who had knowledge of such deviation and elected to treat the contract of carriage as not repudiated could not claim damages on that ground.—The Margaret Lykes, supra

Loss from fire

Stowage of cargo was held not deviation where bridge deck space where cargo was stowed was watertight and suitable, and the cargo was damaged by fire and not by reason of its stowage.—The Salvore, C.C.A.N.Y., 60 F.2d 683, certiorari denied U.S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S.Ct. 117, 287 U.S. 653, 77 L.Ed. 565

77. U.S.—The Margaret Lykes, D.C La., 57 F.Supp. 466.

78. U.S.—Smith, Kirkpatrick & Co. v. Colombian S.S. Co., C.C.A.Canal Zone, 88 F.2d 392.

79. N.Y.—Robertson v. National SS Co., 34 N.E. 1053, 139 N.Y. 416

Transshipment by rail held authorized

U.S.—Rudy-Patrick Seed Co. v. Kokusai Kisen Kasushiki Kaisha, D.C.N.Y., 85 F.2d 17.

80. U.S.—Globe Navigation Co., Ltd. v. Russ Lumber, etc., Co., D.C.Cal., 167 F. 228.

81. U.S.—Crocker v. Jackson, D.C. Mass., 6 F.Cas.No. 3,398, 1 Sprague 141.

82. U.S.—Charbonnier v. U.S., D.C. S.C., 45 F.2d 166, affirmed, C.C.A., U.S. v. Charbonnier, 45 F.2d 174.

Existence of strike, which had already begun before the shipowner undertook to tow the vessel from one port to another, was held not sufficient ground for deviation by towage.—Charbonnier v. U.S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U.S. v. Charbonnier, 45 F.2d 174.

83. U.S.—Morris Beef Co. v. The Wells City, N.Y., 61 F. 857, 10 C.C.A. 123
58 C.J. p. 461 note 10.

84. U.S.—Schwarzchild v. National SS. Co., D.C.N.Y., 74 F. 257.
58 C.J. p. 461 note 11.

85. U.S.—Armour Grain Co. v. Compagnie Generale Transatlantique, D.C.N.Y., 26 F.2d 739, affirmed, C.C.A., 26 F.2d 741.

86. U.S.—Armour Grain Co. v. Compagnie Generale Transatlantique, supra.
58 C.J. p. 462 note 15.
Delay as deviation see supra § 144 c.

87. U.S.—The Esrom, C.C.A.N.Y., 272 F. 266, certiorari denied 42 S.Ct. 47, 257 U.S. 634, 66 L.Ed. 408
58 C.J. p. 462 note 16

88. U.S.—The Caledonia, Mass., 15 S.Ct. 537, 157 U.S. 124, 39 L.Ed. 644.
58 C.J. p. 462 note 17.

89. U.S.—U.S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.
58 C.J. p. 462 note 19.

90. U.S.—The Plow City, D.C.Pa., 23 F.Supp. 548.
58 C.J. p. 462 note 20.

time specified for forwarding them does not show waiver of a claim for damage resulting from delay.[91]

b. Excusable Delay

A carrier of goods by water is not liable for damage to cargo resulting from delay for which it was not legally responsible or which was permissible under the terms of the contract of shipment.

A carrier of goods by water is not liable for damage to cargo resulting from delay for which it was not legally responsible[92] Thus, for damage to cargo arising from delay due to the condition of the weather, and not to any negligence in navigation, the carrier is not liable.[93] Where damage results from delay permissible under the terms of the contract of shipment, recovery will be denied.[94]

Repairs. Where a seaworthy vessel is so disabled in a severe gale as to require her to put into the nearest port for repairs, her owners are not liable for damage to cargo caused by the necessary delay for repairs,[95] if the master was justified in putting into the port for repairs, used proper diligence in getting repairs made, exerted himself to preserve the cargo, under the best advice he could get, and was unable to send the cargo forward by another vessel;[96] and the owners are not liable even if the means used by the master to preserve it, under the advice of experienced and competent persons, were not the most suitable and well judged.[97]

The vessel will be liable to the shipper for damages resulting from the decrease in the value of the cargo during an unreasonable delay of the voyage for repairs, if the vessel was unseaworthy when the voyage began.[98] The carrier is liable for delaying longer than was necessary to make proper temporary repairs,[99] or for refusing to deliver the cargo to the consignee at the port of delay on tender of full freight and a general average bond.[1] Where a vessel is compelled to lie in a foreign port for a long time waiting for means to procure repairs, the voyage is in effect broken up, and the disabling of the master and mate by sickness from attending to the duties of the ship will not exonerate the owner from responsibility for the loss of the cargo by lack of proper attention.[2] The vessel is not liable for delay in the voyage for repairs where the cargo did not decrease in value during the delay[3]

§ 146. Discharge of Cargo

A carrier of goods by water has the duty carefully and properly to discharge the cargo and it is liable for loss of, or injury to, goods caused by its negligence in discharging them

A carrier of goods by water has the duty properly and carefully to discharge the cargo,[4] and this is its duty under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1303.[5] The carrier is liable for loss of goods through negligent discharging,[6] such as where it fails to exercise due care in discharging the cargo to a lighter,[7] and it has been held liable for goods destroyed by fire after they were transferred, preparatory to their delivery, to a float belonging to the carrier.[8] However, where the contract of carriage imposes on the shipper the duty of discharging the cargo and the furnishing of any equipment and facilities necessary therefor the shipper, and not the carrier, is liable for any damage caused the cargo thereby.[9] Where consignees, although having given notice to the ship that they will not receive the cargo because of the unfavorable state of the weather, do accept and remove it

91. U.S.—Farr v. Hain S. S. Co., C.C.A.N.Y., 121 F.2d 940—Cohn v. U. S. Shipping Board, C.C.A.Tenn., 20 F.2d 56—W. E. Hedger Transp. Corp. v. James Richardson & Sons, D.C.N.Y., 20 F.Supp. 909.
58 C.J. p. 463 note 31.

92. U.S.—The Plow City, D.C.Pa., 23 F.Supp. 548.
58 C.J. p. 462 note 21.

93. Va.—Reed & Rice Co. v. Wood, 120 S.E. 874, 138 Va. 187.
58 C.J. p. 463 note 30.

94. U.S.—American Steel Co. v. Transmarine Corp., D.C.N.Y., 36 F.2d 246.
58 C.J. p. 462 note 23.

95. U.S.—The Plow City, D.C.Pa., 23 F.Supp. 548.
58 C.J. p. 462 note 24.

96. U.S.—The Collenberg, N.Y., 1 Black 170, 17 L.Ed. 89.
58 C.J. p. 462 note 25.

97. U.S.—Lawrence v. The Lieutenant Admiral Callomberg, D.C.N.Y., 15 F.Cas.No. 8,139, affirmed, C.C., 7 F.Cas.No. 3,716, 18 How.Pr. 141, affirmed 1 Black 170, 17 L.Ed. 89.

98. U.S.—The Plow City, D.C.Pa., 23 F.Supp. 548.

99. U.S.—The Queen, D.C.N.Y., 28 F. 755.

1. U.S.—The Martha, D.C.N.Y., 35 F. 313.

2. U.S.—Phelan v. The Alvarado, D.C.N.Y., 19 F.Cas.No. 11,067.

3. U.S.—The Plow City, D.C.Pa., 23 F.Supp. 548.

4. U.S.—George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank, Limited, D.C.Pa., 65 F.Supp. 102.
Duty of carrier as to delivery of cargo see supra §§ 117–122.

5. U.S.—The Mormacmar, D.C.N.Y., 75 F.Supp. 520, motion denied L. W. & P. Armstrong, Inc. v. The Mormacmar, 88 F.Supp. 736—Standard Oil Co. of California v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.

6. U.S.—Standard Oil Co. of California v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312.
58 C.J. p. 463 note 32
Negligence of carrier held not shown
U.S.—New England Newspaper Pub. Co. v. U. S., D.C.Mass., 18 F.Supp. 674.

7. U.S.—The Ogeechee, D.C.Pa., 248 Pa. 803
58 C.J. p. 463 note 32 [f].

8. N.Y.—Goold v. Chapin, 20 N.Y. 259, 75 Am.D. 398—Miller v. Steam Nav. Co., 10 N.Y. 431.

9. U.S.—The Vermont, D.C.N.Y., 47 F.Supp. 377.

in part as delivered from the ship, they cannot claim indemnity from the ship for injury to the cargo by a storm to which it was exposed while in conveyance to its place of storage.[10]

Lightermen and stevedores. Where the carrier is authorized to employ lightermen for the shipper's account it is not liable for loss caused by their negligence.[11] A stevedore company engaged in discharging cargo from a vessel to a lighter has the duty to load the cargo on the lighter in a prudent manner,[12] and it is liable for injury to, or loss of, cargo caused by its negligence in loading the cargo on a lighter;[13] and where the officers and members of the crew of the vessel do nothing and have no responsibility in the discharge of cargo by stevedores to a lighter, the vessel is not liable for loss of, or damage to, the cargo caused by the negligence of the stevedores or those in charge of the lighter.[14]

§ 147. Loss or Injury after Discharge or Tender

The liability of a carrier of goods by water, as such, continues until the actual or constructive delivery of the goods, even though they have been taken from the vessel, but where the consignee is not present to receive the goods as they are unloaded, pursuant to a notice, the carrier is liable only as an ordinary bailee for hire or warehouseman.

Although the liability of the carrier, as such, terminates on an actual or constructive delivery of the goods,[15] it continues until such delivery, even though the goods have been taken from the vessel[16] Thus, a carrier who, without notice to the consignee of the arrival of the goods, turns them out on the wharf[17] or places them in a public store[18] is liable for their subsequent loss, and where a consignee presents himself in reasonable time, and at a proper place, to receive the goods, or until he has had opportunity to do so, there is no ground for reducing the liability of the carrier to that of a warehouseman, and relieving the carrier from liability for loss by fire on the dock.[19]

Where the consignee is not present to receive the goods as they are unloaded, pursuant to a notice,[20] or does not remove the goods before the expiration of the free time allowed,[21] the carrier is thereafter liable only as an ordinary bailee for hire

10. U S—The Grafton, D C N Y, 10 F Cas No 5,656, Olcott 43, affirmed, C C, 10 F Cas No 5,655, 1 Blatchf 173.

11. La.—Bonura v. United Fruit Co, 110 So 86, 162 La. 53.

12. U S—The S C. L. No. 9, C C.A Pa, 114 F.2d 964
58 C J. p 463 note 32 [f] (5)

Duty to trim load
A cargo being loaded on a deck lighter should have been trimmed by the stevedoring company, or loading stopped when the lighter began to list badly and when the captain protested, with respect to the company's liability to the owner of the cargo after the lighter capsized.—The S C L. No 9, D C Pa, 37 F.Supp 386, affirmed, C C A., 114 F.2d 964

13. U S—The S. C. L. No. 9, C C.A Pa., 114 F 2d 964.
58 C J. p 463 note 32 [f] (2), (4).

Liability as matter of law
Where evidence established that capsizing of lighter was due solely to negligence of company which loaded the lighter with the cargo, liability of the company for the resulting damages attached as a matter of law. —The S. C. L No. 9, C.C A Pa., 114 F 2d 964.

Notice of improper loading
Protests of master of lighter to foreman of stevedoring company against the manner in which lighter was being loaded constituted "notice" of the fault for which the company was responsible and for which it was alone answerable on capsizing of the lighter as the result of improper loading—The S C L No 9, supra

14. U S.—The Teno, C C.A.N Y., 47 F 2d 197

Duty of master of lighter
Master of lighter receiving cargo from steamship has duty of seeing that lighter is moved safely and kept out of danger—The Teno, supra.

15. U S—Standard Brands v Nippon Yusen Kaisha, D C Mass, 42 F Supp. 43.
58 C.J. p 464 note 35.

Discharge at pier or wharf
Liability as a common carrier ceases when the cargo is unladen at a pier or wharf by direction of the consignee.—Standard Brands v. Nippon Yusen Kaisha, supra—58 C J. p 464 note 35 [c].

Delivery to lighter
Where bill of lading provided that liability of shipowner should cease as soon as goods were free from tackles of ship, and the contract contemplated the discharge of cargo by lighters, according to custom, the shipowner was not liable for subsequent damage to cargo caused when lighter sank at moorings—Continental Ins. Co v. Anchor Line, D.C.N Y., 53 F.2d 1032.

16. U S.—Higgins v. Hamburg-American Packet Co., N.Y., 145 F. 24, 76 C C A 24.
58 C J. p 464 note 36.

17. U S—Dibble v. Morgan, C C Tex, 7 F Cas No 3,881, 1 Woods 406
58 C J. p 464 note 37.

18. U.S—The George Skolfield, D C. N Y, 4 F Cas No 2,155

19. Conn.—Graves v Hartford, etc, Steamboat Co, 38 Conn. 143, 9 Am. R. 369

20. U S—The Bellingham, D C N J, 49 F 2d 442, reversed in part on other grounds, C C A., 57 F 2d 1015, and affirmed in part A. C Monk & Co. v U. S, 57 F 2d 1018—Standard Brands v Nippon Yusen Kaisha, D.C Mass, 42 F Supp 43.
58 C J p 464 note 40

21. U S—Standard Brands v. Eastern S S. Lines, C C A.N Y, 97 F. 2d 918.

Sufficiency of notice
(1) Where tariff allowed free time computed from morning after discharge of freight, and required notice of arrival to be given within twenty-four hours, notice given within that time, even if sent before actual discharge of cargo, was not premature, but was sufficient to start free time running—Standard Brands v. Eastern S. S. Lines, supra.

(2) Fact that notice of arrival of shipment erroneously stated date of expiration of free time did not render notice insufficient, where damage to shipment occurred subsequent to actual expiration of free time, and there was nothing to indicate that shipment would have been removed prior thereto if expiration date had been correctly stated—Standard Brands v. Eastern S S. Lines, supra.

or warehouseman; and, even though the bill of lading provides that the goods may be placed on the wharf or in a warehouse at the sole risk of the consignee,[22] the carrier is charged with the duty to take ordinary care of the property for a reasonable length of time, and not to abandon it, or negligently expose it to injury.[23] In such case, the carrier is liable as ordinary bailee for hire or warehouseman for goods damaged because of its negligence and failure to exercise reasonable care to protect them from injury,[24] or for goods stolen through negligence, while still in the custody of the owners of the ship, after being discharged on a pier, and waiting to be conveyed to the public warehouse by the public carman,[25] or after being actually placed in the warehouse.[26]

The carrier is not liable for a loss of part of the cargo on the pier, after actual receipt by the consignees of all the cargo shipped,[27] or for a loss which would not have occurred except for the negligence of the consignee in failing to remove his goods promptly.[28] Failure to give actual notice to consignees of the time and place of discharge of cargo unloaded at a wharf, other than the vessel's usual wharf, at which the goods, before delivery to the consignees, are destroyed by fire, has been held not to render the carrier liable for the loss, where the consignees, had they received notice, could not have removed their goods before the fire, and where they took no steps on the faith of the cargo being discharged at the usual place.[29] A consignee who was misled by the ship's tally clerk into believing that cargo injured on board the ship was not damaged has been held not chargeable with negligence in indiscriminately mixing good cargo with damaged cargo, thereby causing injury to the good cargo.[30]

§ 148. Proximate Cause

A carrier liable for loss of, or injury to, cargo because of his delinquency as a carrier is liable for all damages proximately resulting therefrom, but a carrier's delinquency as a carrier cannot be made a ground of recovery for loss of, or injury to, cargo not proximately caused thereby. In order that a carrier may be absolved from liability for loss on the ground of an excepted peril, the excepted peril must have been the proximate cause of the loss.

A carrier liable for loss of, or injury to, cargo because of the unseaworthiness of the vessel is liable for all damages proximately resulting therefrom.[31] On the other hand, the nonfulfillment by a carrier of all its duty cannot be made a ground of recovery if the loss was not proximately due to its delinquency as a carrier,[32] such as improper or

22. U.S.—Standard Brands v Nippon Yusen Kaisha, D.C.Mass, 42 F Supp. 43.

23. U.S.—The Bellingham, D C N J, 49 F 2d 442, reversed in part on other grounds, C.C.A, 57 F.2d 1015, and affirmed in part A. C Monk & Co. v. U S, 57 F 2d 1018.
58 C.J. p 465 note 41.

24. U.S.—Standard Brands v Nippon Yusen Kaisha, D.C Mass, 42 F Supp. 43
58 C J. p 465 note 41 [c]

Goods placed near defective door

(1) Shipowner who placed cargo of tea on floor of storage shed on wharf where ship docked, within two feet of a door which could not be properly closed and under which water had leaked on previous occasions, was negligent and hence liable to consignee for water damage to the tea during storm which occurred the day after the tea was unloaded.—Standard Brands v. Nippon Yusen Kaisha, supra.

(2) Since the damage could have been avoided by precautions, the shipowner was held not relieved of liability on the ground that the damage was caused by an act of God.—Standard Brands v. Nippon Yusen Kaisha, supra.

25. U.S.—Unnevehr v. The Hindoo, D.C N.Y., 1 F. 627.

26. U.S.—Evans v. New York, etc, SS Co, D C.N Y, 163 F. 405

27. U S—Dike v Von Lefferl Lahsen, D C N.Y., 7 F.Cas No.3,909.
58 C J. p 465 note 44.

28. U.S.—The Bellingham, C C A.N. J., 57 F 2d 1015, affirmed in part, C C A, A. C Monk & Co v. U. S, 57 F.2d 1018—Standard Brands v Nippon Yusen Kaisha, D C Mass, 42 F Supp. 43—Smith v. Britain S S. Co, D C.N Y., 123 F 176.

Consignee held not negligent

U S—Standard Brands v. Nippon Yusen Kaisha, D C.Mass, 42 F.Supp. 43.

29. U S—Constable v. National SS Co, N Y, 14 S Ct. 1062, 154 U.S. 51, 38 L Ed 903.
58 C J. p 465 note 45

30. U.S—Armco Intern Corp. v. Rederi A/B Disa, C C A N.Y., 151 F.2d 5

Inability to prove damage

Where consignee was not chargeable with negligence in indiscriminately mixing iron plates dry when discharged from vessel with other plates wet with acetic acid from leaking drum negligently stowed on top of them, ocean carrier could not shift to consignee any part of liability for damage to plates which were dry when discharged, because of inability to prove what part of damage was caused by any negligence of consignee.—Armco Intern. Corp. v. Rederi A/B Disa, supra.

31. U S—Republic of France v French Overseas Corporation, N.Y, 48 S.Ct. 516, 277 U S. 323, 72 L.Ed 901.

Entrance of water into ship

The fact that water entering ship because of unseaworthiness carried zinc concentrate stowed in hold to bilges, clogged the rose-box and put pumps out of action was not so unexpected a consequence of original entrance of the water, regardless of whether zinc concentrate was ill or well stowed, as to warrant limiting ship's liability to cargo damage that would have occurred had pumps been working.—Edmond Weil, Inc., v American West African Line, C.C A N.Y., 147 F 2d 363.

32. U S—The Yungay, D C N.Y., 58 F 2d 352—Hartford & New York Transp. Co. v. Rogers & Hubbard Co., C.C.A Conn., 47 F.2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co., 51 S Ct. 483, 283 U S. 835, 75 L. Ed. 1446.
Mich.—Thunder Bay Quarries Co. v. Pollard, 3 N.W.2d 316, 301 Mich. 388.
58 C.J. p 466 note 48.

negligent stowage,[33] overloading,[34] rough or other improper handling,[35] or unseaworthiness.[36] However, it is not sufficient to exonerate the carrier that the loss might have otherwise occurred.[37] If the vessel was not sufficiently seaworthy to withstand a storm of ordinary intensity the fact that the particular storm which caused the cargo loss was of unusual intensity or extraordinary violence will not relieve the carrier from liability for cargo loss.[38]

In order that a carrier may be absolved from liability for loss on the ground of one of the excepted perils, it must have been the proximate cause. If human agency or fault or some other not excepted cause has intervened, he is not as a general rule excused,[39] and where, although a peril of the sea has arisen, the damage might have been avoided by the use of ordinary care and diligence on the part of the ship, the negligence, and not the peril of the seas, is then considered the proximate cause of the loss.[40] However, while it is competent for the carrier to show that the loss was in fact occasioned by the excepted perils, and not by the unseaworthiness of the boat, and would have happened if that defect had not existed, a delinquency which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurrence which might have had an agency in producing it, will render him liable.[41] If the loss might have happened without the carrier's fault, this does not excuse him,[42] but if it must have happened without his fault, he is absolved.[43]

Although the carrier may have been derelict in his duty, if the proximate cause of the loss is attributable to the shipper[44] or to the consignee,[45] the carrier is not liable. A vessel has been held not liable for the loss of cargo it was required to jettison because of the unseaworthiness of another vessel.[46]

Insufficient crew and equipment

Fact that vessel lacked one oiler and that fog whistle could not be blown when it started is immaterial with respect to liability for cargo loss, where there was no causal connection between these matters and vessel's stranding—The Yungay, D C.N.Y., 58 F.2d 352.

Negligence in routing

Negligence, if any, of forwarding agent of purchaser of cargo in accepting bill of lading calling for discharge of shipment at New York instead of Boston, in absence of any causal connection between such negligence and water damage to cargo, afforded no ground for recovery by purchaser against forwarding agent—J C Penney Co. v. The American Exp. Co, D C N.Y., 102 F Supp. 742.

33. U.S.—The Chester Valley, C.C.A. La., 110 F 2d 592
58 C J. p 451 note 20, p 466 note 48 [a] (1), [b] (2).

34. U.S—The Naples Maru, D.C.N Y., 20 F Supp. 258, modified on other grounds, C.C.A., Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, 106 F 2d 32—The Glasgow Maru, D.C.N.Y., 19 F. Supp 530, reversed on other grounds, C C A, Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F 2d 450, modified on other grounds 103 F.2d 430.

Deck stowage at shipper's risk

Where wool, carried pursuant to contract for on-deck stowage at shipper's risk, was wet by sea water and rain, but the wool was raised at least three feet above deck, there was no causal connection between such wetting and alleged overloading of vessel.—The Idefjord, D.C.N.Y., 31 F Supp. 667, reversed on other grounds, C C A, 114 F 2d 262, certiorari denied Den Norske Amerikalinje, A/S v Blumenthal Import Corp., 61 S.Ct 175, 311 U.S 707, 85 L Ed 459

Overloading held proximate cause

U.S—Interlake Iron Corp. v. Gartland S. S. Co., C.C A Mich, 121 F. 2d 267, certiorari denied Gartland S S Co v Interlake Iron Corp, 62 S Ct 181, 314 U.S. 681, 86 L Ed 545.

35. U.S.—S. L. Shepard & Co v. Agwilines, Inc, D C S.C, 39 F Supp 528, reversed on other grounds, C C.A., 130 F 2d 67.

36. U S—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S Ct. 162, 290 U S 333, 78 L Ed 348.
58 C.J. p 466 note 48 [b] (1).

Displacement of contract of affreightment

Unseaworthiness displaces contract of affreightment only in so far as damage is caused by unseaworthiness—Republic of France v French Overseas Corporation, N Y., 48 S.Ct 516, 277 U.S. 323, 72 L.Ed 901—American Finance & Commerce Co. v. U S, D C.Cal, 55 F 2d 725.

Unseaworthiness held proximate cause

U.S.—The Mary M., D.C.N.Y, 73 F Supp 674.
58 C J. p 466 note 48 [c] (1).

37. N.C.—Gardner v. Smallwood, 3 N.C. 349.
58 C J. p 451 note 21.

Subsequent catastrophic storm

Where structure of ship and character of cargo required that cargo be made fast against all but most unexpected and catastrophic storms, and cargo began to break loose before storm had attained wind force of fifty miles per hour, it was immaterial with respect to liability for cargo damage that storm later reached catastrophic proportions—Edmond Weil, Inc, v American West African Line, C.C.A.N Y, 147 F 2d 363

38. U S—Atlantic Transport Co. of West Virginia v. Rosenberg Bros & Co, C C.A Cal, 34 F 2d 843—The Anastasia, D C.Va, 11 F Supp. 314, remanded, C C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011.

39. Ark—Packard v. Taylor, 35 Ark. 402, 37 Am.R. 37.
58 C.J. p 465 note 46.

40. U S—The Olga S, C.C.A La, 25 F 2d 229.
58 C.J p 466 note 47.

41. Mo—Collier v Valentine, 11 Mo. 299, 49 Am D 81
58 C.J. p 466 note 51.

42. Mo.—Hill v. Sturgeon, 28 Mo. 323—Collier v Valentine, 11 Mo. 299, 49 Am D. 81.

43. N C—Gardner v. Smallwood, 3 N.C. 349.

44. U.S.—The M. C. Currie, D.C.N.Y., 132 F 125.
58 C.J. p 466 note 49

45. La.—Northern v. Williams, 6 La. Ann. 578.

46. U.S.—The Mary M, D C N.Y., 73 F.Supp. 674.

Barge

Where careening of unseaworthy barge caused barge alongside to list to port, making it necessary to jettison a portion of cargo of molasses of second barge, the proximate cause for jettison of cargo was the unseaworthiness of the first barge.—The Mary M., supra.

Deviation It has been held that a voluntary and wrongful deviation renders the ship or carrier liable for subsequent loss irrespective of whether the deviation was the proximate cause of such subsequent loss,[47] but it has also been held that the vessel is not liable for loss or damage which must equally have occurred even if there had been no deviation.[48]

§ 149. Duties of Carrier after Disaster or Injury to Cargo

a. In general
b. Sale of cargo

a. In General

After a vessel is wrecked, stranded, disabled, or injured, the carrier is required to take all possible care of the cargo and is responsible for damage thereto which could have been prevented by reasonable diligence and prudence.

After a vessel is wrecked, stranded, disabled, or injured, the master is still under obligation to take all possible care of the goods, and he is bound to show that human diligence, skill, or care could not save the property from being lost by the disaster.[49] So, after a shipment has been overtaken by a storm that may be properly classed as an act of God, it is the duty of the carrier to exercise at least reasonable diligence in endeavoring to save the shipment and prevent further loss.[50] As the master of a vessel is quasi agent for both parties, owner or consignee of the cargo and the owner of the vessel, in respect of the cargo found in a perishable condition on board the ship, his acts, honestly put forth in an emergency, even if not the most suitable and well judged, with the intent to the best interests of all concerned are to be indulgently considered,[51] and, thus, a master is not negligent so as to render the vessel liable for damages to the cargo if, in preserving the cargo after damage by storm, he pursues the course deemed most expedient in the exercise of a sound discretion.[52]

b. Sale of Cargo

A carrier of goods by water may sell damaged cargo for the good of the cargo and the ship, on the shipper's refusal to receive the cargo or where the carrier is unable to communicate with the owner of the damaged cargo; but it is not entitled to sell damaged cargo, without notice to the owner or shipper, when there is time and means for communicating with him.

Where a cargo of goods is in part damaged, the master may sell it for the good of the cargo and the ship, on the shipper's refusal to receive it,[53] and the same rule applies where the master attempts to communicate with the owner of the damaged cargo and receives no reply.[54] However, the master has no authority to sell damaged cargo, without notice to the owner or shipper, when there is abundant time and means for communicating with him,[55] and such a sale is a conversion of the goods.[56] Where a cargo of goods is in part damaged, it is the duty of the master and not of the consignee to separate the goods for auction sale.[57]

§ 150. Actions for Damages

a. In general
b. Defenses

a. In General

Where there is a loss of, or injury to, cargo, the shipper ordinarily has the choice of suing the carrier by water on the contract or in tort. Suit must be brought within the time limited by statute or by a valid provision of the contract of carriage.

In accordance with the general rule as to actions against carriers, as discussed in Actions § 49 e (4), where there is a loss of, or injury to, cargo, the shipper ordinarily has the choice of suing the carrier by water on the contract[58] or in tort for breach of the duty imposed by law.[59] A shipper suing for loss from deviation, even though it constitutes a conversion, must either rescind the contract and sue for the value of the goods[60] or sue for damages for the breach of the contract of

47. U.S.—The Ida, D.C.N.Y., 6 F. Supp. 992
58 C.J. p. 455 note 90.
Liability of carrier for fire damage after deviation see supra § 129.

48. U.S.—The San Giuseppe, C.C.A. Va., 122 F.2d 579.

49. U.S.—U. S. v. Los Angeles Soap Co., C.C.A. Cal., 83 F.2d 875.
58 C.J. p. 466 note 54.

50. U.S.—McNeil Higgins Co. v. Old Dominion SS. Co., Ill., 235 F. 854, 149 C.C.A. 166.

51. U.S.—De Bruns v. Lawrence, C.C.N.Y., 7 F.Cas.No.3,716, 18 How Pr. 141, affirmed 1 Black 170, 17 L.Ed. 89.

52. U.S.—Soule v. Rodocanachi, D.C. La., 22 F.Cas.No.13,178, Newb.Adm. 504.
58 C.J. p. 467 note 57.

53. U.S.—The Brewster, D.C.Cal., 95 F. 1000.
Right of master to dispose of cargo in general see supra § 66.
Cash sale
Where carrier by water was required to sell perishable goods because of nonarrival of bill of lading, it had no authority to sell the goods on credit, and was required to account to shipper as if it had received the cash value of the goods —Merchants' & Miners' Transp. Co. v. Branch, C.C.A.Va., 282 F. 494.

54. U.S.—Astsrup v. Lewy, D.C.N.Y., 19 F. 536.

Philippine—Compagnie de Commerce v. Hamburg Amerika, etc., 36 Philippine 590

55. U.S.—Astsrup v. Lewy, D.C.N.Y. 19 F. 536.

56. U.S.—The Joshua Barker, D.C.N.Y., 13 F.Cas.No.7,547, Abb.Adm. 215.

57. U.S.—The Columbus, D.C.N.Y., 6 F.Cas.No.3,041, Abb.Adm. 37.

58. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593.
58 C.J. p. 470 note 37.

59. U.S.—The Pacific Spruce, supra.
58 C.J. p. 470 note 38.

60. U.S.—Western Lumber Mfg. Co. v. U. S., D.C.Cal., 9 F.2d 1004.

carriage,[61] and he cannot do both.[62] For a wrongful conversion of the goods carried trover may be maintained against the owners of the vessel.[63]

Cross libel. On a libel by the carrier to recover, under the bills of lading, charges incurred in reconditioning goods alleged to have been damaged without fault on the part of the carrier, the shipper by cross bill may sue the carrier for any breach of contract by it;[64] and, if the shipper has delivered the bills of lading to the consignee, he may maintain such cross bill, on his filing an instrument executed by the consignee authorizing or ratifying the suit against the carrier.[65]

Jurisdiction. A statutory provision authorizing persons having claims against vessels to commence proceedings against the vessels themselves instead of against the owners gives a state court jurisdiction of an action against a vessel for loss caused by its negligent management although it is owned by persons residing outside the state.[66] A statute providing for a proceeding in rem against vessels "navigating the waters of" the state applies to vessels passing to and from the ports of other states through and across the waters of the state.[67]

Conditions precedent. Where the suit is for goods which were so damaged as to be valueless and unsalable, the shipper is not bound to send them to auction to be sold, as a prerequisite to his right of action.[68] The fact that the owner of the vessel may compel the crew to make good from their wages a loss or damage to the cargo caused by their misconduct and negligence does not render it necessary that the shipper in bringing an action on the case against the owner for the loss should give notice of such damages previous to the discharge of the crew.[69]

A statutory requirement that a claim for damage to goods shall be made within a specified time after receipt of the goods does not apply where the goods are not delivered by the carrier in pursuance of the contract of carriage but are recovered by the cargo owner from a wreck of the vessel in an effort to save his property from total loss,[70] and even where such a statute does apply, failure to give notice does not bar an action by the shipper or an insurer subrogated to his rights.[71] Where goods have been insured it is not a condition precedent to a suit, after an unjustified deviation by the ship, that the shipper shall have been deprived of his right against insurer.[72]

Accrual of right of action. A shipper's right of action for cargo wrongfully unloaded by the vessel before departure from the port and destroyed or damaged after unloading accrues at the time of the loss or damage,[73] and not at the time of the arrival of the vessel at its destination.[74]

Time to sue; laches. On the destruction of cargo the owner thereof may sue at once for the loss of the goods[75] or he may wait until a reasonable time for performance has elapsed.[76] Where the time for bringing suit for loss of, or injury to, cargo is limited by statute or by a valid provision of the contract of carriage, it must be brought within such time.[77] In the absence of such limitation,

61. U.S.—Western Lumber Mfg. Co v U. S, supra

62. U S.—Western Lumber Mfg. Co v. U. S, supra.

63. U.S —Taylor v. Brigham, C C Ga., 23 F.Cas No 13,781, 3 Woods 377.

64. U S —U S. v. U. S Steel Products Co., D C N Y., 27 F.2d 547.
Cross libel in general see Admiralty § 88.

65. U.S —U. S v. U S Steel Products Co, D C.N.Y., 27 F 2d 547

66. Mo —Yore v. The C. Bealer, 26 Mo 426.
Jurisdiction in admiralty see Admiralty § 30
Power of states with respect to maritime law generally see Admiralty § 6.
Jurisdiction in actions against carriers generally for loss of, or injury to, goods see Carriers § 246.

67. Wis —The Sultana v. Chapman, 5 Wis. 454.

68. La —Elkin v New York, etc., SS Co., 14 La Ann. 647.
Conditions precedent to action against carrier for loss of, or injury to, goods generally see Carriers § 247.
Sale of damaged cargo in general see supra § 149

69. N.Y.—Schieffelin v. Harvey, Anth N.P. 76.

70. Philippine —Roldan v. Ponzo, 37 Philippine 285.

71. N Y —Fire Ass'n of Philadelphia v. Isbrandtsen, 103 N.Y.S.2d 118, 199 Misc. 257.

72. U.S.—Rosenberg v. U S. Shipping Board Emergency Fleet Corp., D.C Cal., 7 F.2d 893, affirmed, C.C A., U S. Shipping Board Emergency Fleet Corp. v. Rosenberg, 12 F.2d 721, reversed on other grounds 48 S.Ct 256, 276 U.S. 202, 72 L Ed 531—The Citta di Messina, D.C.N.Y, 169 F 472.

73. U.S.—The Elvaston, C.C A La, 279 F. 935.

74. U S —The Elvaston, supra.

75. N Y —Aristo Hosiery Co v. Atlantic Coast Line R Co, 221 N.Y S 298, 129 Misc 305

76. N.Y.—Aristo Hosiery Co. v. Atlantic Coast Line R. Co., supra.

77. U.S —Potter v. North German Lloyd, D C Cal., 50 F.Supp 173—The Kermit, D.C.Cal, 6 F Supp. 113, affirmed, C C A, 76 F.2d 363, certiorari denied Lamborn v. American Ship & Commerce Nav. Corporation, 56 S.Ct. 93, 296 U.S 581, 80 L Ed. 411.
N.Y.—Singer Hosiery Mills of N. Y v. Cunard White Star, Limited, 102 N.Y.S.2d 762, 199 Misc. 389.
58 C.J p 472 note 75
Limitations and laches to suit in admiralty generally see Admiralty § 87.
Application of general statutes of limitation to actions against carriers see Limitations of Actions § 48.

the suit or libel must be brought within a reasonable time after the loss or damage has occurred or the right of action has accrued,[78] otherwise it may, under the circumstances, be barred by laches;[79] and, unless circumstances showing laches have intervened, a libel for damages to the cargo may be filed even after the vessel has made one or two voyages subsequent to the injury being received.[80] The limitation prescribed by the Interstate Commerce Act for actions for damages to interstate shipments does not apply to a shipment entirely by water from a point within a state to a foreign port,[81] but a prescription of a state law in respect of an action by or against common carriers for loss of, or damage to, shipments of freight applies in case of loss while freight is still aboard the vessel after reaching a state harbor.[82]

b. Defenses

In the absence of a contract provision to the contrary, it is not a defense to an action for a loss of, or injury to, cargo that the goods were insured and that the insurance has been paid.

In the absence of a provision in the contract or bill of lading giving the carrier the benefit of the shipper's insurance, it is no defense to an action for loss of, or injury to, cargo, that the goods were insured and that the insurance has been paid,[83] or that the insurer has made a loan to the cargo owner,[84] even though it does not appear from the pleadings or evidence that the suit is brought by the direction or for the benefit of insurers.[85]

Where a disaster happens to a cargo in consequence of a peril or accident not within the exceptions in the bill of lading, a mere acceptance of the goods by the owner, at the place of the disaster or an intermediate port, is no defense to his action for damage to the goods,[86] unless it appears that the acceptance was intended as a discharge of the vessel and her owner from any further responsibility;[87] but where a ship is detained and her cargo damaged before she proceeds, although she subsequently delivers it to the consignees, a shipper cannot, without rescinding the contract, sustain a libel in rem for a breach of the bill of lading, until the term for the performance of the contract has expired.[88]

It is no defense to an action in the name of the owner of the vessel for damage to the cargo that he is doing business under a fictitious or trade name and that the contracts of affreightment are made in such name.[89] Where loss occurs due to a combination of facts arising from particularities or peculiarities of the ship's construction in combination with the cargo carried, it is not a sufficient defense that the carrier was ignorant as to such matters,[90] since the carrier must be held to familiarity with the particular construction and design of the ship and its apparatus, and with the characteristics and effect of the cargoes which the vessel carries.[91] The fact that other persons may have equitable claims to the damages has been held not to be a defense.[92]

Release. An agreement by the shipper to indemnify the carrier on a redelivery of the goods to the shipper,[93] or on a refund of freight to the shipper[94] will not be construed to amount to a release of the carrier from existing breaches, unless the intent to do so is apparent.[95]

78. U.S.—The President Polk, C.C.A. N.Y., 43 F.2d 695.
58 C.J. p. 472 note 76.

79. U.S.—The Kermit, C.C.A.Cal., 76 F.2d 363, certiorari denied Lamborn v. American Ship & Commerce Nav. Corporation, 56 S.Ct. 93, 296 U.S. 581, 80 L.Ed. 411—The Mar Mediterraneo, D.C.La., 13 F.Supp. 860
N.Y.—Continental Leather Co. v. Liverpool, Brazil & River Plate Steam Nav. Co., 255 N.Y.S. 4, 234 App.Div. 386, affirmed 182 N.E. 207, 259 N.Y. 621, certiorari denied Continental Leather Co. v. Lamport & Holt, 53 S.Ct. 91, 287 U.S. 644, 77 L.Ed. 557.
58 C.J. p. 472 note 77.

80. U.S.—Knox v. The Ninetta, D.C.Pa., 14 F.Cas.No.7,912, Crabbe 534, 5 Pa.L.J. 33.

81. La.—Klopstock v. United Fruit Co., 131 So. 25, 171 La. 296

82. La.—Klopstock v. United Fruit Co., supra.
58 C.J. p. 472 note 82.

83. U.S.—Sorenson v. Boston Ins. Co., C.C.A.Md., 20 F.2d 640, certiorari denied 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423
58 C.J. p. 471 note 63
Defenses in action against carrier in general see Carriers § 245
Insurance as affecting right to sue see infra § 151.

84. U.S.—The Plow City, C.C.A.Pa., 122 F.2d 816, certiorari denied Plow City S.S. Co. v. Texas Gulf Sulphur Co., 62 S.Ct. 579, 315 U.S. 798, 86 L.Ed. 1199—Wittig v. Canada S.S. Lines, D.C.N.Y., 59 F.2d 428.
58 C.J. p. 471 note 64

85. U.S.—Steamship Wellesley Co. v. Hooper, Cal., 185 F. 733, 108 C.C.A. 71—Stockton Milling Co. v. California Nav., etc., Co., D.C.Cal., 165 F. 356, affirmed 184 F. 369, 107 C.C.A. 46.

86. N.Y.—Home Ins. Co. v. Western Transp. Co., 51 N.Y. 93.

87. U.S.—The Eva D. Rose, D.C.N.C., 153 F. 912, affirmed 166 F. 101, 92 C.C.A. 85
58 C.J. p. 471 note 59

88. U.S.—Jones v. The Floating Zephyr, C.C.Pa., 13 F.Cas.No. 7,462

89. U.S.—The Nonpariel, D.C.N.Y., 149 F. 521

90. U.S.—The Bill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470

91. U.S.—The Bill, D.C.Md., 47 F. Supp. 969, affirmed Lorentzen v. Brazil Oiticica, Inc., C.C.A., 145 F.2d 470.

92. U.S.—The Nichiyo Maru, C.C.A. Md., 89 F.2d 539.

93. U.S.—Transmarine Corp. v. Levitt, C.C.A.N.Y., 25 F.2d 275.

94. U.S.—Transmarine Corp. v. Levitt, supra.

95. U.S.—Transmarine Corp. v. Levitt, supra.

§ 151. —— Persons Entitled to Sue

An action for damages for loss of, or injury to, cargo shipped on board a vessel may be maintained by the owner of the cargo.

An action for damages for loss of, or injury to, cargo shipped on board a vessel may be maintained by the owner of the cargo.[96] It has been held that anyone who has a special property or interest in the goods shipped, or a beneficial interest in the performance of the contract, may maintain an action for their loss or injury,[97] but one who purchased cargo ex dock without a transfer of the bill of lading was held not to have sufficient interest in the cargo to maintain an action for damage to the cargo while on the vessel.[98]

The fact that the cargo owner has recovered for the loss from an insurance company does not bar him from maintaining the suit as the real party in interest.[99] If the loss has been paid by the insurer, the suit may be maintained in the name of the owner for the benefit of the insurer,[1] or in the name of the insurance company which has paid the loss or accepted an abandonment;[2] and where, by arrangement therein, the payment by the insurer is only in the nature of a loan, the owner may sue for the benefit of the insurer, although the bill of lading provides that the carrier shall have the benefit of any insurance effected by the shipper.[3]

Agent of owner. In admiralty the agent of an absent owner of a cargo may libel in his own name his principal's right of action,[4] or he may libel in the name of his principal.[5]

Consignor. A consignor of goods may recover for the loss thereof, or injury thereto, which occurs while the title to the goods remains in him,[6] as where the consignee refuses to receive them.[7] It has been held that the consignor cannot recover damages caused after he has parted with title to the goods,[8] as where he has indorsed the bill of lading to another,[9] unless the indorsee authorizes the suit.[10] On the other hand, it has been held that the consignor may maintain the action irrespective of the question of ownership where he made the contract of shipment with the carrier,[11] where the suit is for the benefit of the consignee,[12] or where he has borne the loss resulting from the damage to the cargo.[13] Where the title to the goods, on

96. U S —The West Kebar, D.C N Y., 53 F.Supp. 763, amended on other grounds 53 F Supp. 766, reversed on other grounds, C C A., Edmond Weil Co. v American West African Line, 147 F.2d 363.
58 C.J. p 467 note 66.
Persons entitled to sue carrier for loss of, or injury to, goods generally see Carriers § 249.

Estoppel to claim sale
Where contract of sale of electric motor was entered into between plaintiff and third party, and the third party did not accept the motor, and it was damaged while being transported back by defendant carrier, and the parties to the contract closed their mutual dealings on the basis that no sale had taken place, they were estopped as between themselves to assert an actual sale, and of course estopped from asserting it as against any one else, and the defendant must respond to plaintiff for the injury done —Gray & Barash v. Puget Sound Nav Co, 203 P. 975, 118 Wash. 376.

97. U S —Perry v. Bangs, D.C N Y, 19 F.Cas.No 11,013.
58 C J. p 468 note 87.

98. U.S —Firestone Plantations Co v. Pan Atlantic S. S. Corp., D C.N. Y., 77 F Supp. 401.

99. U.S.—The Plow City, C C A Pa, 122 F.2d 816, certiorari denied Plow City S. S. Co v. Texas Gulf Sulphur Co, 62 S.Ct 579, 315 U.S 798, 86 L Ed. 1199—Wittig v. Canada S. S. Lines, D C N.Y., 59 F 2d 428

1. U S —The Ft. Gaines, D C Md, 24 F 2d 849, affirmed, C C A., Federal Forwarding Co. v. Lanasa, 32 F.2d 154.
58 C J. p 467 note 68.

2. U S —The Keokuk, D C.Wis., 14 F Cas.No 7,721, 1 Biss. 522

3. U S —Luckenbach v. W. J. McCahan Sugar Refining Co, N.Y., 39 S Ct. 53, 248 U S. 139, 63 L.Ed 170, 1 A.L R. 1522
Contract or bill of lading requiring shipper to insure or giving carrier benefit of insurance generally see supra § 133.

4. U.S.—Houseman v. The North Carolina, Fla., 15 Pet. 40, 10 L Ed 653.
58 C.J. p 468 note 72.

5. U.S.—Houseman v. The North Carolina, supra

6. U.S.—Transmarine Corp. v. Levitt, C C.A.N.Y., 25 F 2d 275—The W Ferdinand Armstrong, D.C.N Y., 69 F Supp. 824.

Title restored to consignor
Where shipper paid return freight charges and also charges for discharging cargo, wharfage, and storage, consignees surrendered bills of lading to shipper and assigned to shipper all their right, title, and interest in cargo, and on surrender of bills of lading to shipowner cargo was delivered to shipper, full title to cargo was restored to shipper, and shipper was entitled to sue as "real party in interest" for breach of contract to carry cargo to a foreign port, and consignees had no interest in the controversy.—The Wildwood, D.C. Wash, 41 F Supp 956, reversed on other grounds, C C A., 133 F 2d 765, certiorari denied Amtorg Trading Corp v. American S. S. Corp, 63 S. Ct. 1436, 319 U S 771, 87 L Ed 1719.

Denial of interest
A shipowner who by negotiations, notices, and demands has recognized the shipper as the real party in interest may be precluded from denying that he is the real party in interest.—The Wildwood, D.C.Wash, 41 F Supp. 956, reversed on other grounds, C C A, 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American S S. Corp., 63 S Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

7. U.S —Armco Intern. Corp. v. Rederi A/B Disa, C.C A.N.Y, 151 F.2d 5—Transmarine Corp. v. Levitt, C. C.A.N.Y., 25 F.2d 275.

8. U.S —U. S v. U. S Steel Products Co., D.C.N.Y., 27 F.2d 547.

9. U.S —Aunt Jemima Mills Co v. Lloyd Royal Belge, C.C A.N.Y, 34 F 2d 120.

10. U.S.—Aunt Jemima Mills Co. v. Lloyd Royal Belge, supra

11. U S —The City of Brunswick, D. C.Mass., 6 F.Supp. 597.

12. U.S.—The City of Brunswick, supra.

13. U.S.—Wayne v. Inland Waterways Corp, D.C.Ill., 92 F.Supp 276.

delivery thereof to the vessel for transportation, passes to a firm consisting of the consignor and consignee, the consignor may sue as the trustee of an express trust[14]

Consignee. Where the consignee is the owner of the cargo, he may sue for its loss or injury[15] and he may maintain an action against the carrier for breach of the contract of carriage.[16] The consignee may maintain a suit against the vessel for damages to the goods, although no bill of lading was executed,[17] and may maintain an action against the owners of a vessel, which collided with the vessel on which his goods were shipped, for the loss sustained by reason of the collision,[18] and it is no bar to such action that an action in rem, by the consignee, is pending in another district against the vessel.[19] A consignee who does not have title to the goods but who has made advances to the owner has been held to have sufficient interest in the cargo to maintain an action against the carrier for injury to the cargo.[20]

Holder of bill of lading. A lawful holder of a bill of lading for the goods issued by the carrier may sue for the loss thereof, or injury thereto;[21] and where the consignor indorses the bill of lading to another the indorsee may sue in his own name.[22] The indorsee may libel the vessel on which the goods are shipped for their loss or injury[23] although he is but the agent or trustee of the goods for others.[24] Where a general bill of lading is given, but separate bills are delivered to the owners of the cargo for their respective portions, the several holders thereof may libel the vessel for damages to the cargo, although the consignment is to one party in bulk.[25]

Carrier of goods by water, as a bailee of the goods, has a special property therein which entitles him to maintain a suit against a third person for their loss or injury in behalf of all the parties in interest.[26]

§ 152. —— Persons or Vessels Liable

Liability as carrier for a loss of, or injury to, cargo is generally on the person who has the custody and control of the vessel at the time the loss or injury is caused.

Liability as carrier for the loss of, or injury to, cargo on board a vessel is generally on the person who has the custody and control of the vessel at the time the loss or injury is caused;[27] and if one other than the real owner has control of the vessel, and it is engaged in his business, he is regarded as the owner pro hac vice, and as such is answerable to the freighter.[28] The owners of the vessel are not liable as carriers merely by virtue of their ownership,[29] but only where the vessel is in their employment, so as to make them parties to the contract of carriage,[30] or where they retain custody and control of the vessel, in which case they are liable although the vessel is under contract to a third person.[31] On the other hand, one who has contracted as carrier to transport goods may be held liable for their loss or injury although he is not the owner of the vessel on which they were shipped.[32]

A shipper cannot recover of all the owners of a boat carrying goods for hire, where he makes a spe-

14. U.S.—Northern Commercial Co. v. Lindblom, Alaska, 162 F. 250, 89 C.C.A. 230.

15. U.S.—**Corpus Juris cited in** The Nichiyo Maru, C.C.A.Md., 89 F.2d 539, 543.
58 C.J. p. 468 note 82.
Name of agent or principal
Consignee of shipment may sue for damages either in his own name or in name of his principal.—The Nichiyo Maru, C.C.A.Md., 89 F.2d 539.

16. U.S.—The Fred E. Hasler, C.C.A. N.Y., 66 F.2d 609, certiorari denied Atlantic Oil Transit Corporation v. Proctor & Gamble Co., 54 S.Ct. 125, 290 U.S. 689, 78 L.Ed. 594.
58 C.J. p. 468 note 83.

17. U.S.—Brower v. The Water Witch, C.C.N.Y., 4 F.Cas.No. 1,971, 19 How.Pr. 241, affirmed 1 Black 494, 17 L.Ed. 155.
58 C.J. p. 468 note 84.

18. U.S.—Dollner v. Garcia, D.C.N.Y., 7 F.Cas.No.3,970.

19. U.S.—Dollner v. Garcia, supra.

20. U.S.—Munson S.S. Line v. Rosenthal, D.C.N.Y., 6 F.Supp. 374

21. U.S.—Aunt Jemima Mills Co. v. Lloyd Royal Belge, C.C.A.N.Y., 34 F.2d 120.

22. U.S.—Aunt Jemima Mills Co. v. Lloyd Royal Belge, supra.

23. U.S.—**Corpus Juris cited in** The Nichiyo Maru, C.C.A.Md., 89 F.2d 539, 543
58 C.J. p. 468 note 93.

24. U.S.—The Thames v. Seaman, N.Y., 14 Wall. 98, 20 L.Ed. 804—**Corpus Juris cited in** The Nichiyo Maru, C.C.A.Md., 89 F.2d 539, 543.

25. U.S.—Bucknor v. The Gilbert Green, C.C.Pa., 4 F.Cas.No.2,099.

26. U.S.—The Nonpariel, D.C.N.Y., 149 F. 521.
Right of carrier to sue for injury to cargo by collision see Collision § 160.

27. U.S.—Bank Line v. Porter, C.C.A.Va., 25 F.2d 843, certiorari denied 49 S.Ct. 25, 278 U.S. 623, 73 L.Ed. 544
58 C.J. p. 469 note 97
Liability of:
Charterer or owner see supra §§ 34, 50.
Master see supra § 70.

28. N.Y.—Tuckerman v. Brown, 17 Barb. 191.
Charterer as owner pro hac vice in general see supra § 34.

29. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Societe de Navigation à Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.
N.Y.—Tuckerman v. Brown, 17 Barb. 191.

30. N.Y.—Tuckerman v. Brown, supra.

31. U.S.—The Mary M, D.C.N.Y., 73 F.Supp. 674—The T. A. Goddard, D.C.N.Y., 12 F. 174

32. U.S.—Western Lumber Mfg. Co. v. U.S., D.C.Cal., 9 F.2d 1004.
58 C.J. p. 469 note 3.

cial contract with some of the joint owners, without the knowledge of the others, by which the freight is to go in extinguishment of a demand of the shipper against the owners with whom the contract was made,[33] but ordinarily all the owners are liable for a wrongful conversion of cargo.[34] Where two steamboat companies so conduct themselves with respect to the general public as to induce a shipper acting with reasonable caution to believe that they have formed a combination in the nature of a partnership they are jointly liable for loss of cargo;[35] and this rule also applies where certain shippers and owners of boats form an association for the transportation of goods[36]

In the absence of statute or contract providing otherwise, the liabilities of connecting carriers are several and each is liable only for safe carriage on its own line.[37] A through carrier transshipping cargo on another's ship is liable for loss of, or damage to, the cargo thereon as though it had owned the ship,[38] but an intermediate carrier is not liable for loss occurring on a vessel of a connecting line.[39] Where a connecting carrier is an agent of the principal carrier and is paid by him, rather than an independent carrier sharing in the freight charge, the principal carrier is liable for the loss of, or injury to, goods while in the connecting carrier's custody.[40]

Vessel. As a general rule, whenever the owners of a ship are liable for injury to her cargo, the ship is also liable in rem[41] The vessel is liable in rem for loss of, or injury to, cargo resulting from the unseaworthiness or unfitness of the vessel,[42] improper stowage of the cargo,[43] or the violation of the conditions of a bill of lading binding on the vessel[44] It has been held that the vessel carrying the cargo is not liable where the loss is due to the fault of another vessel,[45] but the contrary has also been held on the theory that the carrier is liable as an insurer.[46] A vessel may be proceeded against, it has been held, although the injury or loss occurs at a landing[47] A vessel receiving goods from a connecting carrier under a through bill of lading, and delivering a part of the goods, and demanding freight, may be sued primarily for goods lost by her.[48]

Agent of carrier. One who operates a vessel as agent for the owners thereof is not liable to a shipper for breach of a contract of carriage made by the shipper with the owners.[49] In accordance with the general rule discussed in Agency § 248, where the agency was not disclosed, the shipper may hold

33. Ala.—Jones v. Sims, 9 Port 236, 33 Am D 313

34. U.S.—Taylor v. Brigham, C C Ga., 23 F Cas No 13,781, 3 Woods 377.

35. U.S.—Sun Mut. Ins. Co v. Kountz Line, La., 7 S Ct 1278, 122 U S 583, 30 L Ed. 1137.

36. N.Y.—Slocum v. Fairchild, 7 Hill 292
58 C J. p 469 note 7.

37. U S.—Inland Waterways Corporation v. Standard Commercial Tobacco Co, C C A La, 65 F 2d 715.

38. Mass.—Philadelphia Tapestry Mills v. New England SS Co, 146 N E 777, 251 Mass 270.
58 C.J. p 469 note 8.

39. U S.—Pacific SS Co v. Washington, C C A Wash, 284 F. 712.

40. U S.—Fyfe v Pan-Atlantic S. S Corp, C C A N Y, 114 F 2d 72, certiorari denied Pan Atlantic S. S Corp. v Fyfe, 61 S Ct. 319, 311 U S. 711, 85 L Ed 462.

41. U S.—The T. A. Goddard, D.C N Y., 12 F 174
58 C.J. p 469 note 10

42. U.S.—The Mary M, D C.N.Y, 73 F.Supp. 674—Pioneer Import Corp v The Lafcomo, D.C N.Y, 49 F Supp 559, affirmed, C C A, 138 F 2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp, 64 S Ct. 523, 321 U S 766, 88 L Ed. 1063

43. U.S.—Pioneer Import Corp v The Lafcomo, D C N Y, 49 F.Supp 559, affirmed, C C A, 138 F 2d 907, certiorari denied Black Diamond Lines v Pioneer Import Corp, 64 S Ct. 523, 321 U S. 766, 88 L Ed 1063.

44. U.S.—Eastern SS. Co v 170,040⅝ Bushels of Wheat, etc, D. D N Y., 1 F 2d 558, affirmed, C C A, Pioneer S S. Co v 92,680 Bushels of Wheat, 11 F 2d 1015

45. U.S.—The Mary M, D C N.Y., 73 F Supp 674.

46. U S.—The Snap, D.C N J., 28 F. 527.
58 C J. p 469 note 11.

47. U S.—Bennitt v. The Guiding Star, D.C.Ohio 53 F 936, affirmed 62 F. 407, 10 C C A. 454.
58 C J. p 469 note 13

48. U S.—Maxwell v. The Powell, C. C.La., 16 F.Cas No 9,324, 1 Woods 99.

49. U S.—Mallory SS. Co. v. Garfield, C C A N.Y., 10 F.2d 664, certiorari denied 47 S Ct. 97, 273 U.S 703, 71 L Ed. 848—Epstein v. U. S., D.C N. Y, 86 F Supp. 740.

Berth agent

Where vessel which carried goods allegedly damaged in transit was owned by the United States and operated by War Shipping Administration, a navigation company which was the berth agent for such administration would not be liable for such damage.—Jensen v. Matson Nav. Co, D.C Hawaii, 71 F Supp. 939

Forwarding agent

(1) Express company which handled details of shipment, procured overseas transportation by carrier, and paid all charges therefor, and which received reimbursement from owner of cargo and payment of fee for its services, was not carrier but was merely forwarding agent and, as such, was liable only for its own negligence.—J C. Penney Co. v. American Exp Co, D.C N.Y., 102 F.Supp 742.

(2) The fact that express company which had been forwarding agent of owner of cargo on previous shipment had suggested that owner modify its letter of credit to allow express company to issue its own bill of lading and to prescribe different route for shipment did not make express company carrier and impose liability for negligence in connection with water damage to cargo while at sea, notwithstanding fact that express company had more authority and discretion on second shipment than on first.—J. C. Penney Co. v. American Exp. Co., supra.

either the principal or the agent on the contract, but he cannot sue both jointly.[50] One who operates a vessel as agent for the owner may be liable in tort for loss of, and damages negligently caused to, such cargo,[51] without prejudice, however, to his rights against the owner of the vessel;[52] and the fact that he operates for an undisclosed principal does not relieve him from such liability.[53] An agent who is primarily liable for a loss caused by his transshipping the goods on a wrong vessel may be interpleaded in a suit against the carrier for such loss.[54]

Broker who acts in good faith in loading a ship is not liable over to the owner of the vessel for damages recovered by the cargo owner from the vessel owner for delay in shipment, merely because the broker knew that the goods could not be transported from that particular port.[55]

Tug and tow. A tug and tow which are in the same ownership and are operated as a unit are to be regarded as one vessel.[56] A tug and tow are not jointly liable for injury to cargo caused by the negligence of the tug.[57] Where the one making the contract of carriage with the cargo owner employs a tug and tow to transport the goods, he is liable for injury to the goods caused by either the tug or the tow.[58]

Carrier, lighterage company, or stevedore. A steamboat company and a lighterage company are jointly liable for loss of cargo caused by the negligence of the lighterage company in assisting the steamboat company, on its request, in transshipping goods,[59] and where both contribute to the loss, but it is impossible to determine how much of the damage each contributed, it has been held that they may be required to share the loss between them,[60] but it has also been held that, where the capsizing of a vessel and the consequent injury to the cargo are due both to the unseaworthiness of the vessel and its improper loading, the carrier and the loader are jointly and severally liable to the owner of the cargo, and neither may recover anything from the other.[61]

Where goods are delivered at the vessel's dock for shipment, and it is thereafter found necessary to transport the goods to the steamer on a lighter, and they are damaged by the sinking of the lighter before reaching the steamer, the steamer is liable for the loss;[62] but where the agent of a steamship company, to facilitate unloading, employs a lighter without covers and agrees on behalf of the steamship company to furnish the covers, which he fails to do, resulting in injury to the cargo because of rain, the lighter is not liable in rem for the damage,[63] but the agent is primarily liable[64] and the steamship company secondarily liable.[65] A company issuing a through bill of lading is liable as common carrier for loss or injury caused in lightering the cargo from one vessel to another.[66]

A stevedore is liable for loss or damage caused by his negligence in loading or unloading a vessel,[67]

50. U S —Accinanto, Limited v Cosmopolitan Shipping Co., D.C.Md., 99 F Supp. 261.

Management agent of carrier who has entered into no contract of carriage for an undisclosed principal is not liable for damage to the goods carried —Alabama Sawmill Co v. N V. Gebr. Van Uden's Scheepvaart En-Agentuur Mij, D.C.La., 37 F Supp 897.

Disclosure of principal held sufficient
U S —Accinanto, Limited v Cosmopolitan Shipping Co., D C Md, 99 F Supp. 261—Jensen v. Matson Nav. Co., D.C Hawaii, 71 F.Supp 939.

51. U.S.—Fiorita v Cunard SS. Co., D C N Y, 10 F 2d 244.
Philippine.—Behn v. McMicking, 11 Philippine 276.

52. Philippine —Behn v McMicking, supra.

53. U S —Fiorita v. Cunard SS. Co., D C.N.Y., 10 F 2d 244

54. U.S.—Blumenthal v. U. S, C C A N.Y., 30 F 2d 247, certiorari denied Admiral-Oriental Line v. U. S., 49 S Ct. 345, 279 U.S 847, 63 L Ed 991.

55. U S —U S. v Middleton, C C.A S C, 3 F 2d 384, certiorari denied 45 S Ct 463, 267 U S 603, 69 L Ed 809.
58 C J. p 470 note 19

56. U S —Oceanic Fisheries v The John Michael, D C Wash, 97 F. Supp 305.

Tank cleaners as part of vessel
In determining whether tank cleaners on barge were part of vessel as a unit, test was whether they were necessary to accomplishment of the particular voyage, where powerless barge hauling fish oil was being towed by tug at time barge sank, and two tank cleaning devices aboard tug were being carried solely to clean fish oil out of tanks of barge at end of voyage so that barge might be used for other cargo, tank cleaners were not necessary to accomplishment of particular voyage, and, hence, were not subject to libel by owner of cargo against vessel, and her tackle, apparel, furniture and equipment.—Oceanic Fisheries v. The John Michael, supra.

57. U S —The Raleigh, D.C Md., 50 F Supp 961.

58. U S —The Alberta M, D C.N Y., 60 F 2d 154.

59. U.S.—Smith v. Booth, N Y., 122 F 626, 58 C C A 479

60. U.S —Sanbern v. Panama R. Co, N.Y, 205 F. 348, 123 C C A 423.

61. U S —The S C L No 9, D C.Pa, 37 F Supp 386, affirmed, C C A., 114 F.2d 964

62. U S.—Petersburg, etc., Steamboat Line v Norfolk-Virginia Peanut Co, Va, 172 F. 321, 96 C.C A. 383, 24 L R A,N.S, 569.

63. U S.—The Seven Brothers No 1, N.Y, 203 F. 21, 121 C.C.A. 385.

64. U S.—The Seven Brothers No. 1, supra.

65. U S —The Seven Brothers No. 1, supra.

66. U S.—Colton v New York, etc., Mail SS. Co., C.C A N Y., 27 F.2d 671.

67. U S.—The O'Leary, D C Pa, 74 F.Supp. 313
58 C J p 470 note 28.

or in overloading it,[68] unless the loss or damage is due to an intervening agency.[69] Where the loss was due to the negligence of both the stevedore and the lighter, both are liable.[70] The owner of a lighter chartered by the owner of the goods for transporting them from a ship is secondarily liable for their loss by the capsizing of the lighter because of overloading by the stevedore, where the lighter captain does not object to further loading when it is plain that the lighter is overloaded and listing.[71] Where a barge negligently permitted itself to be towed when improperly loaded, it was held that it could recover from the loader only for half of the damage to the cargo.[72]

Seamen A seaman is not responsible to a cargo owner for the seaworthiness of the ship[73] or for losses to cargo occurring in the loading, stowage, or unloading thereof;[74] but he is liable for articles stolen by him,[75] and it has been held that if any part of the cargo has been stolen, all the seamen must contribute to make it good, unless the guilt can be placed on particular persons.[76]

Construction company working on a dam was held not liable for loss of cargo due to the sinking of a vessel, caused by its opening of the gates of the dam on the orders of the canal superintendent which it was bound to obey.[77]

An independent contractor engaged in the repair of the vessel is not liable for fire or other damage to cargo, unless such damage was proximately caused by his negligence or fault.[78]

§ 153. —— Pleading

a. Declaration, complaint, or libel
b Plea or answer
c. Issues, proof, and variance

a. Declaration, Complaint, or Libel

General rules as to declarations, complaints, and libels, particularly in actions against carriers generally for loss of, or injury to, goods, and in so far as applicable the rules relating to libels in admiralty, apply to the declaration, complaint, or libel in an action against a carrier by water for loss of, or injury to, cargo.

The general rules relating to declarations, complaints, or petitions, particularly in actions against carriers in general for loss of, or injury to, goods, as discussed in Carriers § 251, and in so far as applicable the rules relating to libels in admiralty, as discussed in Admiralty § 119, apply to the declaration, complaint, or libel in an action against a carrier by water for loss of, or injury to, goods, with respect to the character and sufficiency of the averments, to state a cause of action,[79] such as with regard to anticipating or negativing matters of defense,[80] the joinder and misjoinder of counts,[81] and as to the propriety and sufficiency of amendments.[82] A libel in personam must show a breach

Failure to take affirmative action
A stevedoring company will be liable if it loads a barge under circumstances which it knows, or should know, will place barge in a perilous position unless affirmative action is taken to eliminate the peril, and company, knowing or having reason to know that no one else will take such action, fails to take such action itself —The O'Leary, supra.

68. U.S —The Frederick W Starr No 25, D.C.N.Y, 41 F 2d 528.
58 C J p 470 note 29.

69. U S —The Frederick W Starr No 25, supra
58 C J p 470 note 30

70. U S —The Teno, C.C.A.N.Y., 47 F.2d 197.

71. U S —The Evelyn, C.C.A.N.Y., 282 F 250.

72. U.S.—O'Donnell Transp Co. v Tidewater Iron & Steel Co, D C N J., 90 F.Supp 953, affirmed, C A., 185 F.2d 675

73. U S —The Owego, D C La., 292 F. 505.

74. U.S —The Owego, supra.

75. U S.—Frederick v. The Fanny, D C.S C., 9 F.Cas No 5,077, Bee 262

76. U.S —Frederick v. The Fanny, supra.

77. U S —The J B Austin, Jr, D C. N Y., 33 F 2d 215.

78. U.S —Rockwood & Co. v. American President Lines, D C N J, 68 F Supp. 224.

79. U S —Smith, Kirkpatrick & Co v. Colombian S S Co, C C.A.Canal Zone, 88 F 2d 392
58 C J. p 472 note 88.

Shipments under separate bills of lading
Complaint for breach of contracts of carriage alleging shipments under separate bills of lading should separately state and number each cause of action on separate bills —Leveille v. Osaka Shosen Kaisha, 244 N.Y.S 112, 137 Misc. 873.

Libel held sufficient
U.S —Smith, Kirkpatrick & Co v. Colombian S S Co, C C A.Canal Zone, 88 F 2d 392
58 C J p 472 note 88 [a].

80. U.S —Olavarria & Co. v. International Transp Corp., D C N.Y., 62 F Supp. 94.
58 C J p 473 note 89.

Circumstances which might exculpate carrier need not be anticipated and negatived —Olavarria & Co. v International Transp. Corp, supra.

Exceptions from liability contained in bill of lading need not be negatived —Smith, Kirkpatrick & Co v. Colombian S S Co, C.C.A Canal Zone, 88 F 2d 392—Spreckles Sugar Co v. South Atlantic S S Line, D.C. Ga., 49 F Supp. 714.

81. Mich —The Milwaukie v. Hale, 1 Dougl. 306.

82. Ga.—Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 131 S E. 283, 161 Ga. 480, answers to certified questions conformed to 132 S. E 454, 35 Ga.App 94.
58 C.J. p 473 note 91.

Claim barred by limitations
(1) Libelants suing as owners of cargo damaged by lightering could not amend libel to allege that they were notify parties named in bill of lading and that they brought suit as owners or as agents for owner of bill of lading, where claim of owners was barred by limitation, as against contention that limitation could still be pleaded by amended answer, since libel, as amended, would date back to original filing —The Bowling Green, D.C N.Y., 6 F Supp. 924.

(2) Amendment of libel would not be allowed on ground that respondents had full knowledge of claim and that hence no hardship would be imposed by granting amendment, where owners' claim for cargo damages was

of a duty owed the libelant by the person sued.[83]

In a suit in rem it is not necessary to charge defendant as a common carrier,[84] but it may be necessary where the suit is in personam.[85] It has been held that a libel which alleges a contract to carry specified goods, the delivery of goods to a vessel, and a failure of the carrier to deliver all or some of the goods to the consignee or the shipper states a cause of action,[86] without alleging that respondent was a common carrier,[87] or that it was negligent,[88] or that the failure to deliver the goods did not come within the lawful exceptions of the contract.[89] In a tort action, contractual relations are stated by way of inducement only.[90] Averments of deviation and unseaworthiness as grounds for recovery are not so inconsistent as to require claimant to elect on which he will proceed.[91]

Right to sue Where the suit is brought by one other than the real owner, the right to sue must be alleged.[92] A libel by the shipper "for the benefit of all persons who may be or may become interested" may be sufficient to permit one who acquired any rights in the cargo while it was cargo or as assignee of the bills of lading to maintain the action.[93] A statutory provision requiring an assignee of a chose in action to state by a sworn pleading or affidavit that he is the owner and how he acquired title does not apply in a suit by a shipper who is the owner.[94]

Compliance with conditions precedent Where the suit is based on the contract of carriage embodied in the bill of lading, which is attached to the libel, libelant must allege compliance with any provision therein which is a condition precedent to recovery,[95] such as the giving of notice of the claim, or some excuse for failure to give it,[96] or he must allege a waiver of such condition.[97] Even though plaintiff sues in tort, if defendant sets up the terms of the bill of lading as a defense, plaintiff must allege compliance with conditions or an excuse for failure to do so.[98]

Pleading bill of lading. A libel for failure properly to transport the goods need not make the bill of lading a part of the libel, where libelant does not rely on such bill,[99] but a libel is insufficient where its allegations are negatived by the annexed bill of lading.[1]

Damage. The cause of the damage, as claimed by plaintiff, should be alleged,[2] and also the nature and extent thereof;[3] but a libel for damage to cargo need not contain an itemized statement of the damages,[4] as this is a matter of subsequent proof.[5]

barred by limitation—The Bowling Green, supra.

Change in burden of proof

Libel alleging that respondents took possession of cargo and caused it to be loaded on lighter and by reason of faults specified damage ensued could not be amended to allege that respondents employed lighterage corporation to transport cargo which was damaged and that respondents were liable as bailees, since amendment sought to relieve libelants of burden of proof initially assumed without furnishing reason therefor—The Bowling Green, supra

83. U.S.—Olavarria & Co v. International Transp. Corp., D.C.N.Y., 62 F.Supp. 94.

84. U.S.—Seller v. The Pacific, D.C., 21 F.Cas.No.12,644, Deady 17, 1 Or 409.

85. U.S.—Seller v. The Pacific, supra

86. U.S.—Eccles v. Strachan Shipping Co., D.C.Ga., 21 F.2d 653—Olavarria & Co. v. International Transp. Corp, D.C.N.Y., 62 F.Supp. 94

87. U.S.—Olavarria & Co v. International Transp. Corp, supra.
58 C.J. p 473 note 95

88. U.S.—The Mar Mediterraneo, D.C.N.Y., 1 F.2d 459.
58 C.J. p 473 note 96.

Bill of lading limiting liability to negligence

Holder of bill of lading, stipulating shipowner should not be liable for any damage unless it was shown to have been caused by shipowner's negligence, could plead good cause of action for damage to cargo without affirmatively alleging that damage was due to carrier's negligence—S. A. Gerrard Co of New York v. Prince Line, D.C.N.Y., 1 F.Supp 123.

89. U.S.—Eccles v Strachan Shipping Co, D.C.Ga., 21 F.2d 653

90. U.S.—The Pacific Spruce, D.C. Wash., 1 F.Supp. 593

91. U.S.—The Pelotas, D.C.La., 43 F. 2d 571, affirmed, C.C.A., 66 F.2d 75.

92. U.S.—Aunt Jemima Mills Co. v. Lloyd Royal Belge, C.C.A.N.Y., 34 F.2d 120
58 C.J. p 473 note 99.

93. U.S.—Firestone Plantations Co. v. Pan Atlantic S.S. Corp, D.C.N.Y., 77 F.Supp. 401.

94. Ill.—Delta Bag Co. v. Leyland, 173 Ill.App. 38

95. U.S.—The General G. W. Goethals, D.C.N.Y., 298 F. 933, affirmed, C.C.A., 298 F. 935, certiorari denied 45 S.Ct. 94, 266 U.S. 610, 69 L.Ed. 466.
58 C.J. p 473 note 3.

96. U.S.—Cudahy Packing Co. v. Munson SS. Line, C.C.A.N.Y., 22 F.2d 898, certiorari denied 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1000—Krauss Bros. Lumber Co. v. Dampskibsselskabet Norden Aktieselskab, D.C.N.Y., 3 F.Supp. 1014.

97. U.S.—Krauss Bros. Lumber Co. v. Dampskibsselskabet Norden Aktieselskab, supra—The Sagadahoc, D.C.Wash., 291 F. 920.

98. U.S.—Cudahy Packing Co. v. Munson SS. Line, C.C.A.N.Y., 22 F.2d 898, certiorari denied 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1000.

99. U.S.—The Southern Cross, D.C. N.Y., 6 F.Supp. 436.
58 C.J. p 473 note 7.

1. U.S.—Olavarria & Co. v. International Transp. Corp., D.C.N.Y., 62 F.Supp. 94—The Peter Helms, D.C.Wash., 24 F.Supp. 461

2. U.S.—Smith, Kirkpatrick & Co. v. Colombian S.S. Co., C.C.A.Canal Zone, 88 F.2d 392.
58 C.J. p 473 note 8.

3. U.S.—Krauss Bros. Lumber Co. v. Dampskibsselskabet Norden Aktieselskab, D.C.N.Y., 3 F.Supp. 1014.
58 C.J. p 473 note 9.

4. U.S.—The Fort Gaines, D.C.Md., 21 F.2d 865

5. U.S.—The Fort Gaines, supra.

b. Plea or Answer

General rules apply with respect to the plea or answer in an action against a carrier by water for loss of, or injury to, cargo.

General rules as to plea or answer, particularly in actions against carriers in general for loss of, or injury to, goods, as discussed in Carriers § 252, apply with respect to the plea or answer in an action for loss of, or injury to, cargo,[6] such as with regard to the necessity and sufficiency of pleading special defenses,[7] and as to their being waived if they are not so pleaded.[8] Such rules also apply with respect to an amendment of the plea or answer.[9]

Exceptions from, or limitation of, liability. Exceptions or limitations by statute or contract exempting the carrier from liability or limiting its liability are matters of defense to be alleged in the answer.[10] An allegation in the answer that the damage was caused by dangers of the seas, which were excepted in the bill of lading, ordinarily must state the facts relied on to bring the case within such exception.[11] Where the defense is based on exceptions from liability under the terms of the contract of affreightment, defendant is not required to allege whether or not the cargo was damaged.[12]

c. Issues, Proof, and Variance

General rules as to issues, proof, and variance apply in an action against a carrier by water for loss of, or injury to, cargo.

The general rules as to issues, proof, and variance apply in an action against a carrier by water for loss of, or injury to, cargo with respect to the issues or theory of the action,[13] the matters to be proved,[14] matters admitted in the pleadings,[15] and the conformity of the pleadings and proof.[16] In accordance with such rules defendant cannot prove a matter of special defense which has not been specially pleaded.[17] An allegation of stowing, handling, and carrying the goods in a grossly careless and negligent manner is prima facie sufficient to admit proof of injury by crushing.[18] Where the defense of inherent vice in the goods is raised, it brings into issue the good condition of the goods when shipped,[19] but the good condition of the goods on delivery to the carrier need not be proved where it is established that the damage was caused by the carrier,[20] and the good internal order of the goods on delivery to the carrier need not be proved where the external covering of the goods was so damaged when they were delivered at their destination as to account for the injury to the contents.[21]

6. U S —Givaudan Delawanna, Inc v. The Blijdendijk, D C N.Y, 91 F Supp. 663.
58 C J p 474 note 14

Carrier acting as forwarding agent

Where initial carriers, under terms of original transshipment bills of lading, were to act as shipper's forwarding agents for transportation of cargo, and were liable for damage occurring only while cargo was in their possession, and libelant seeking to recover for damages to cargo did not allege that carriers were negligent in contracting with another carrier and should therefore be held primarily liable, initial carriers had no grounds for filing an impleading petition contending that they should be indemnified in event it should be held on trial that they were primarily liable to libelant for damage caused by the other carrier —Armand Schmoll, Inc., v. Oceanic S. S Co, D C N Y, 42 F. Supp 759.

7. U S —Canadian Co-op. Wheat Producers v Murphy & Hoffman, D.C N.Y, 52 F 2d 496
58 C J. p 474 note 15

Negligence of ship

Defense that loss was attributable to negligence of ship for which owner was not liable was held too general as against exceptions —Canadian Co-op Wheat Producers v Mathews, S S. Co, D.C N Y., 52 F 2d 495.

Failure to sue within time limited in bill of lading

N.Y —Jones v Cunard S S. Co, 263 N Y S 769, 238 App Div 172—David Coleman, Inc, v American-Hawaiian S. S. Co., 289 N.Y.S. 836, 160 Misc 211
58 C J p 474 note 16

Plea held sufficient

U S —Canadian Co-op Wheat Producers v. Murphy & Hoffman, D C N Y, 52 F 2d 496.

8. U S —Rosenberg v Atlantic Transport Co, D C Cal, 25 F 2d 739, affirmed, C C A., Atlantic Transport Co. of West Virginia v. Rosenberg Bros & Co, 34 F 2d 843
58 C J p 474 note 17.

9. U.S —McCullough v The Echo, D C N Y, 16 F Cas No 8,740a.
58 C J. p 474 note 18.

10. Puerto Rico —St Paul Fire & Marine Ins. Co. v. The Schooner Ernestina, 10 Puerto Rico Fed 478.

11. N.Y —Washington Dean Co. v Nippon Yusen Kaisha, 211 N.Y.S 737, 125 Misc. 855.
58 C J. p 474 note 23

12. U.S.—Canadian Co-op. Wheat Producers v Murphy & Hoffman, D C N.Y, 52 F 2d 496

13. U S —Mallory SS. Co. v. Garfield, C C.A.N Y, 10 F 2d 664, certiorari denied 47 S.Ct. 97, 273 U S 703, 71 L Ed. 848
58 C J. p 474 note 27.

14. U S —The St Johns N. F', C C A. N.Y, 272 F 673
58 C J. p 474 note 28

15. U S.—The Arakan, D C.Cal., 11 F 2d 791.
58 C J. p 475 note 29.

16. U S —The Maryland, D C N.Y, 19 F Supp. 505
58 C J. p 475 note 30.

17. N Y.—Guiterman v Liverpool, etc., Mail SS. Co, 9 Daly 119
58 C J. p 475 note 31

18. U S.—Wolff v The Vanderland, D C.N.Y, 18 F 733.

19. U.S —The Niel Maersk, C C A.N. Y, 91 F.2d 932, certiorari denied 58 S Ct 281, 302 U S 753, 82 L Ed. 582—General Foods Corp. v. The Troubador, D C N Y, 98 F.Supp 207—American Tobacco Co. v. The Katingo Hadjipatera, D C N Y, 81 F Supp 438, modified on other grounds, C A, 194 F 2d 449, certiorari denied 72 S Ct 1076, 343 U. S 978, 96 L Ed —.

20. U S.—The Ponce, D C N J., 67 F. Supp. 725, affirmed, C C A, Pompeian Olive Oil Corp v. The Ponce, 160 F 2d 107—The America, D C.N Y., 1 F Cas No 283, 8 Ben 491.

Goods damaged by sea water

U.S.—The Kawsar, D C N.Y, 53 F. Supp 323

21. U S.—The Solveig, D.C Cal., 217 F. 805.

A cargo owner, suing for damages caused by the sinking of an unseaworthy lighter, is not entitled to a decree against the impleaded bailee of the lighter where no contract between them is alleged, and where he is not charged with any fault.[22] Where the contract is to transport by a named steamer "or any other steamer or steamers," a claim for damages for delay in shipment is not sustained by proof that the named steamer's failure to take the entire shipment was due to improper stowage, since there was no obligation to transport the shipment by any particular steamer.[23] Only such damages as are authorized by the pleadings can be recovered.[24] Where plaintiff fails to prove what he received from the sale of the goods damaged by the carrier, his recovery is limited to the cost of reconditioning the goods for the sale.[25] Where the answer admits a stipulation in the bill of lading that under conditions such as exist in the case a provision in the contract should be eliminated, defendant cannot introduce evidence in support of allegations in the answer that such provision exists.[26]

Negligence. Negligence may not be proved unless it is alleged,[27] and it need not be proved where it is alleged and admitted.[28] Where a vessel is properly protected against fire, it is necessary, in an action for damages to cargo by fire, to prove negligence on the part of the officers of the vessel;[29] but in an action for loss of cargo resulting from the stranding of the vessel, the shipper is not required to prove negligence on the part of the master, until evidence is given to show that the injury came within a clause in the bill of lading, excepting the carrier from liability.[30]

Notice of claim. It has been held that, where defendant sets up the terms of the bill of lading, plaintiff must prove notice of loss, or some excuse for failure to give it, as required by the bill of lading,[31] although failure to give such notice is not pleaded as a special defense;[32] but, on the other hand, it has been held that a failure of plaintiff to prove such notice does not bar a recovery, where there is no allegation in the answer that notice had not been given or that the claim had not been filed or that the libel was barred for that reason.[33]

§ 154. —— Presumptions and Burden of Proof

a. Presumptions in general
b. Burden of proof in general
c. Goods damaged or lost while in carrier's possession
d. Loss or damage due to excepted peril
e. Negligence
f. Seaworthiness
g. Particular cause of loss or damage in general
h. Damage by sea water
i. Deviation and delay
j Private carrier
k. Amount of damage
l. Notice of claim; time to sue

a. Presumptions in General

The general rules as to presumptions ordinarily apply in an action against a carrier by water for loss of, or injury to, cargo.

The general rules as to presumptions in other similar actions ordinarily apply in an action against a carrier by water for loss of, or injury to, cargo.[34] In the absence of evidence to the contrary, the presumption obtains that the carrier conformed to the requirements of the law in carrying out the contract of affreightment,[35] and that the vessel was one to which the Harter Act might apply.[36]

22. U.S.—Waterbury Co v Sunset Lighterage Corp, C C A N.Y, 25 F 2d 621.

23. U.S.—Israel v U S Shipping Board Emergency Fleet Corp, C C A La., 23 F.2d 786.

24. U S —The Aki Maru, Wash, 255 F. 721, 167 C C A 67.
58 C.J. p 494 note 98.

25. U.S.—Weirton Steel Co v. Isbrandtsen-Moller Co., C C.A N.Y., 126 F.2d 593.

26. N.Y —Burnside v. Indra Line, 141 N.Y S. 238, 80 Misc. 414.

27. U.S.—The Maryland, D.C.N.Y., 19 F.Supp. 505.

28. U.S —Fyfe v. Pan-Atlantic S. S. Corp, C C.A N.Y., 114 F 2d 72, certiorari denied Pan-Atlantic S. S. Corp v Fyfe, 61 S Ct. 319, 311 U S. 711, 85 L Ed 462

29. U.S —The Buckeye, C.C Ill, 4 F. Cas No 2,084, 7 Biss 23

30. U S.—The Ocean Wave, D C Wis., 18 F Cas No 10,416, 3 Biss. 317.
58 C J. p 475 note 38.

31. U.S —Cudahy Packing Co. v. Munson SS Line, C C A.N Y., 22 F 2d 898, certiorari denied 48 S Ct 433, 277 U S 586, 72 L Ed. 1000.

32. U S.—Cudahy Packing Co. v. Munson SS. Line, supra.

33. U.S.—Navigazione Libera Triestina v Garcia, etc, Co., C C A Cal., 30 F.2d 62.

34. U S.—The Alpin, D.C.N.Y., 23 F 815
58 C J. p 476 note 46.

Clean oil tanks

Where carrier affirmatively established that its oil tanks were found clean and fit by the shipper's surveyors and accepted by them for loading of shipper's oil cargo, the acceptance of the tanks for loading by the shipper's surveyors was "prima facie evidence" of the cleanness of the tanks. —The Vermont, D C.N Y., 47 F.Supp. 877.

35. U S —Copper River Packing Co. v Alaska SS. Co., C.C.A Cal, 22 F 2d 12.

36. Or—Sevier v. Mitchell, 142 P. 780, 72 Or. 483
Harter Act and other statutes exempting carrier from liability see supra § 126 et seq.

It will be assumed that the master of a vessel knew the local aids to navigation and the storm conditions prevailing when he put to sea.[37]

In the absence of evidence to the contrary, the carrier is presumed to know the manner in which cargo is loaded on his vessel, when he accepts it and issues a bill of lading therefor,[38] and presumably it is so loaded under his direction or that of his representative.[39] It has been held that evidence that a locked room on board ship, in which goods were stowed, was broken open during the night and goods taken therefrom, justifies a presumption that the theft was committed by the carrier's employees.[40] Where the owner has transferred legal title to a vessel to an insolvent relative, it will be presumed that his purpose was to avoid liability for claims arising from the operation of the vessel.[41]

Ownership of goods. A presumption of ownership of the goods in question arises from the production of bills of lading thereof,[42] but this presumption may be explained or rebutted by other evidence showing the real ownership.[43] Similarly, there is a rebuttable presumption that the consignee of the goods is the owner.[44]

Foreign law. The presumptions with respect to the law of a foreign country, as discussed in Evidence § 133, have been applied in actions for the loss of, or damage to, cargo.[45]

b. Burden of Proof in General

In an action against a carrier by water for loss of, or injury to, goods, the plaintiff or libelant has the burden of proving the essential elements of his cause of action and the carrier has the burden of proving any matter of affirmative defense relied on by it.

In an action against a carrier by water for loss of, or injury to, goods, plaintiff or libelant has the burden of proving the essential elements of his cause of action as alleged in his complaint or libel,[46] such as a contract of carriage.[47] Where plaintiff or libelant has established a prima facie case, the burden is on defendant carrier to prove any matter of affirmative defense relied on by it,[48] such as that it has fully performed its contract.[49] The burden is on the carrier to show an excuse for its refusal to transport a shipment of goods in violation of a special contract.[50] Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 et seq, a provision in the bill of lading cannot operate to shift the burden of proof.[51]

Benefit of insurance. Under a provision of a bill of lading giving the carrier, in case of loss or damage to the property for which it is liable, the benefit of "any insurance that may have been effected on or on account of such property," the burden rests on the carrier, when sued for a loss to prove that there was insurance, to the benefit of which it was entitled.[52]

Foreign law. A party who bases his right of action or defense on the law of a foreign country must prove the foreign law.[53]

c. Goods Damaged or Lost While in Carrier's Possession

(1) In general

37. U.S.—The Iowa, D.C.Or., 34 F. Supp. 843.

38. Tex.—Abbott v. Tompkins, Civ. App., 283 S.W. 647.

39. Tex.—Abbott v. Tompkins, supra
58 C.J. p. 483 note 75.

40. N.Y.—Straus v. Canadian Pac. R. Co., 234 N.Y.S. 622, 134 Misc. 439

41. U.S.—Gardner v. Dantzler Lumber & Export Co., C.C.A.Fla., 98 F. 2d 478

42. U.S.—The Carlos F. Roses, Fla., 20 S.Ct. 803, 177 U.S. 655, 44 L.Ed. 929—The Cabo Villano, D.C.N.Y., 14 F.2d 978, modified on other grounds, C.C.A., 18 F.2d 220.
Nature and effect of bill of lading in general see supra § 111 et seq.

43. U.S.—The Carlos F. Roses, Fla., 20 S.Ct. 803, 177 U.S. 655, 44 L.Ed. 929.

44. U.S.—Hickman, Williams & Co. v. Murray Transp. Co., D.C.N.Y., 31 F.Supp. 820.

45. U.S.—E. Gerli & Co. v. Cunard S. S. Co., C.C.A.N.Y., 48 F.2d 115.

46. U.S.—Bashinsky Cotton Co. v. Sunset Lighterage Corp., D.C.N.Y., 272 F. 120, affirmed, C.C.A., 281 F. 1019
58 C.J. p. 476 note 55.
Liability of carrier for loss of, or injury to, cargo in general see supra § 125
Burden of proof in actions against carriers for loss of, or injury to, goods generally see Carriers § 254

47. U.S.—The Evelyn, D.C.N.Y., 60 F.2d 644.

48. U.S.—The Nith, D.C.Or., 36 F. 86, 13 Sawy. 368, affirmed, C.C., 36 F. 383
58 C.J. p. 477 note 63.

49. Mo.—Hill v. Sturgeon, 28 Mo. 323
Philippine.—Keller v. Ellerman, etc., SS. Co., 38 Philippine 514.

50. U.S.—Copper River Packing Co. v. Alaska SS. Co., C.C.A.Cal., 22 F. 2d 12
58 C.J. p. 477 note 66

51. U.S.—George F. Pettinos, Inc., v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247

52. U.S.—Baker v. New York, etc., R. Co., N.Y., 168 F. 248, 93 C.C.A. 550, certiorari denied 29 S.Ct. 696, 214 U.S. 514, 53 L.Ed. 1063.
58 C.J. p. 477 note 67

53. U.S.—E. Gerli & Co. v. Cunard S. S. Co., C.C.A.N.Y., 48 F.2d 115.

British Carriage of Goods by Sea Act

On an application to an American court to refuse to exercise jurisdiction and to permit the dispute to be litigated in Canada, it was held that the fact that the bill of lading incorporated the British Carriage of Goods by Sea Act was not a special circumstance, since the English law would have to be proved by the vessel whether the action was tried in an American or a Canadian court.—The Canadian Commander, D.C.N.Y., 43 F.2d 857.

(2) Goods not delivered or lost in general
(3) Delivery of goods to carrier in good condition

(1) In General

Proof that the goods were damaged while in the possession of a common carrier by water puts the burden on the carrier to exculpate itself.

Proof that the goods were damaged while in a common carrier's possession, or that when delivered to the carrier by water, the goods were in good condition and were damaged when delivered to their destination, raises presumptions that the carrier was negligent and that the vessel was unseaworthy, as discussed infra subdivisions e and f of this section, and the burden is then on the carrier to exculpate itself[54] and to prove that it was not negligent or that the damage resulted from a peril or cause from which it was relieved of liability by statute or valid contract.[55] Where the carrier discharges this burden, the plaintiff must come forward with proof establishing the carrier's liability.[56] So where, in an action to recover for the loss of cargo, occasioned by leakage caused by excessive heat, the carrier shows that the cargo was stored in the proper and coolest part of the ship, the burden is on the shipper to show either that the place of storage was not suitable, or not the most suitable place on the ship.[57]

The burden is on plaintiff or libelant to prove that the goods were lost or damaged while in the carrier's possession,[58] or that the goods were in good condition when delivered to the vessel, as discussed infra subdivision c (3) of this section, and that they were damaged when delivered at their destination.[59]

Received in good order by consignee. Where the goods, on delivery to the consignee, are receipted for by him as being in good order, such receipt repels any presumption that damage to the goods was caused by any fault of the carrier[60] and is prima facie evidence of the good order of the goods at the time of such delivery.[61]

(2) Goods Not Delivered or Lost in General

In a suit for nondelivery of goods the burden of proof on the issue of the carrier's liability is on the plaintiff or libelant, but proof of the delivery of the goods to the carrier and of the nondelivery of the goods at their destination puts the burden on the carrier to go forward with the evidence to exonerate itself from liability.

In a suit for nondelivery of goods the burden of proof on the issue of the carrier's liability is on plaintiff or libelant,[62] such as in case of loss during transit, to prove that defendant had failed to carry the goods and deliver them to the consignee.[63] However, proof of the delivery of the goods to the carrier and of the nondelivery of the goods at their destination puts the burden on the carrier to go forward with evidence[64] to show that a delivery has been made in accordance with the terms of the contract for carriage,[65] or to explain or excuse the disappearance of the goods or failure to deliver them,[66] as that it was occasioned by something for

54. Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775
Burden of proof and presumptions in case of private carrier see infra subdivision j of this section.
Rule of primary liability
The question as to the burden of proof in such a case is not one of pleading, but of primary liability which the carrier must meet according to the tenor of his contract.—The Medea, Cal., 179 F. 781, 103 C.C.A. 273.
Damage caused by another
When it appears that cargo was in good condition when loaded on vessel, responsibility rests on owner of vessel to establish that any damage to cargo was caused by another.—Cargo Carriers v. Brown S. S. Co., D.C.N.Y., 95 F.Supp. 288.

55. U.S.—General Foods Corp. v. The Troubador, D.C.N.Y., 98 F.Supp. 207—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.—E. S. Ullmann-Allied Co. v. The George E. Pickett, D.C.N.Y., 77 F.Supp. 988—The Vizcaya, D.C.Pa., 63 F.Supp. 898.
Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294
Burden of proof that loss or damage was due to excepted cause or peril see infra subdivision d of this section.

56. N.Y.—Lambert v. Benner, 31 N.Y.Super. 665.

57. N.Y.—Lambert v. Benner, supra

58. U.S.—The Dondo, D.C.N.Y., 287 F. 239.
58 C.J. p. 479 note 5, p. 476 note 56.
Burden of proof as to amount of damage see infra subdivision k of this section.

59. U.S.—The Ponce, D.C.N.J., 67 F. Supp. 725, affirmed, C.C.A., Pompeian Olive Oil Corp. v. The Ponce, 160 F.2d 107—The Vincenzo T., D.C.N.Y., 28 F.Cas.No.16,948, 10 Ben. 228.

60. Ga.—Ocean S.S. Co. v. McAlpin, 69 Ga. 437.
Failure to give notice of damage or loss as raising presumption of good delivery by carrier see infra subdivision l of this section.

61. Ga.—Ocean S.S. Co. v. McAlpin, supra.

62. U.S.—In re Companhia de Navegacao Lloyd Brasileiro, D.C.La., 7 F.2d 238—The Falcon, C.C.N.Y., 8 F.Cas.No.4,617, 3 Blatchf. 64, appeal dismissed 17 How. 19, 15 L.Ed. 43.

63. Ark.—Tri-State Packet Co. v. G. R. Brickey Mercantile Co., 235 S.W. 40, 150 Ark. 657

64. U.S.—In re Companhia de Navegacao Lloyd Brasileiro, D.C.La., 7 F.2d 238.
Delivery of goods to carrier and nondelivery at destination as establishing prima facie case of carrier's liability see infra § 156

65. U.S.—The Falcon, C.C.N.Y., 8 F.Cas.No.4,617, 3 Blatchf. 64, appeal dismissed 17 How. 19, 15 L.Ed. 43
58 C.J. p. 478 note 84.

66. U.S.—Krebs, Pigment & Chemical Co. v. Sheridan, D.C.Pa., 12 F.Supp. 254, affirmed, C.C.A., 79 F.2d 479
58 C.J. p. 478 note 85.

which the carrier was not responsible,[67] or that the loss was due to a cause or peril from which the carrier was excepted from liability by statute or the contract of carriage, as discussed infra subdivision d of this section.

Deficiency in quantity. Plaintiff has the burden of proving that the cargo was short when it was discharged from the ship,[68] and the amount of the shortage.[69] Bills of lading are prima facie evidence that the quantities named therein were received by the carrier,[70] and are prima facie evidence of the weight of the goods,[71] but the presumption arising from such bill of lading is rebuttable,[72] and the burden is on the carrier to prove that it delivered all that it received,[73] and that the shipment was short of the quantity stated in the bill of lading,[74] or to explain or account for the discrepancy in quantity.[75] Where a bill recites that the weight and quantity are unknown, the burden rests on the shipper to show their weight, when received, in order to hold the last carrier liable for a claimed short weight in the quantity delivered.[76]

Where it is shown that goods, when delivered to the consignee by a vessel which was the last of several carriers, were deficient in quantity, the presumption is that the missing goods were delivered to such vessel.[77] It has been held that, where the contract of carriage exempts the carrier from liability for shortage and shrinkage, the burden is on the carrier to show that the shortage or shrinkage was not due to its negligence.[78]

Presumption as to time of loss. Merchandise delivered to a vessel for shipment, but which cannot be found at the time of unloading at its destination, will be presumed to have been lost before that time,[79] and will not be presumed to have been lost because of its being carried beyond its destination, contrary to the purpose of the shipment[80] so as to constitute a deviation, precluding the vessel from setting up bill of lading provisions limiting liability.[81]

(3) Delivery of Goods to Carrier in Good Condition

The burden is on the plaintiff or libelant to prove that the goods were in good condition when delivered to the carrier, but a bill of lading which receipts for the goods as shipped in apparent good order and condition raises a rebuttable presumption that the goods were in good order and condition at the time of shipment, so far as visible.

The burden is on plaintiff or libelant to prove that the goods were in good condition[82] or were

Burden of proof as to cause of damage or loss generally see infra subdivision g of this section

Existence of lawful excuse

Where evidence showed that ship was "loaded by a carrier" within meaning of Carriage of Goods by Sea Act, carrier had heavy burden of establishing the existence of a lawful excuse for its failure to deliver goods in the quantities stated in the bills of lading—American Trading Co. v The Harry Culbreath, C.A.N.Y., 187 F.2d 310.

67. U S—Eccles v Strachan Shipping Co, D C Ga, 21 F 2d 653.
58 C J p 478 note 86

68. U S—George F Pettinos, Inc, v American Export Lines, D C Pa, 68 F Supp 759, affirmed, C C A, 159 F 2d 247
Burden of proving goods were damaged while in carrier's possession see supra subdivision c (1) of this section.

69. U S—George F Pettinos, Inc v. American Export Lines, supra
Burden of proof as to amount of damage generally see infra subdivision g of this section.

70. U S.—The Lady Franklin, Ill, 8 Wall 325, 19 L Ed 455
58 C J. p 365 note 9.

71. U.S—George F. Pettinos, Inc, v. American Export Lines, D C.Pa, 68 F Supp. 759, affirmed, C.C A., 159 F.2d 247.

Particulars declared by shipper

The fact that the bill of lading states that the particulars stated in the bill as to the weight and description of the goods were furnished by the shipper does not prevent the bill from being prima facie evidence as to such matters.—George F Pettinos, Inc, v. American Export Lines, supra

72. U S—The John Twohy, C.C A Pa, 279 F 343
58 C J p 478 note 89 [a].

73. U S.—The Ghazee, N.Y, 172 F. 368, 97 C C.A 66
58 C J. p 478 note 89.

74. U S—Scott v. Grace, C C.A N. Y., 275 F 340
58 C J p 478 note 90, p 366 note 10

75. U S—Scott v Grace, supra
58 C.J p 478 note 91.

76. U S—The Seneca, N Y., 172 F 370, 97 C C.A. 68.

77. U S—The Ghazee, N Y, 172 F 368, 97 C.C.A 66.

78. U S—Inland Waterways Corporation v Hallet & Carey Co, C C A Minn., 52 F 2d 13.
Burden of proof as to negligence where loss or damage is within excepted peril or cause generally see infra subdivision e of this section

79. U.S—Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, C C A N.J., 28 F.2d 249.

80. U.S—Sheldon v Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, supra

81. U S—Sheldon v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, supra
Burden of proof as to deviation see infra subdivision i of this section

82. U.S—Warner Barnes & Co v. Kokosai Kisen Kabushiki Kaisha, C C A N Y, 102 F 2d 450, modified on other grounds 103 F 2d 430—Albers Bros Milling Co v. Hauptman, C C A.Cal, 95 F 2d 286—The Niel Maersk, C C.A N.Y, 91 F 2d 932, certiorari denied Bradley v The Niel Maersk, 58 S Ct 281, 302 U S. 753, 82 L Ed 582—The Goyaz, C C A N Y, 3 F 2d 553, certiorari denied 45 S Ct. 230, 267 U S 594, 69 L Ed 804—Thomas Roberts & Co v. Calmar S S Corp, D C Pa, 59 F.Supp 203—New England Newspaper Pub. Co. v U. S, D C Mass, 18 F Supp. 674—J. Lichtman & Sons v. Dollar S S Line, D C N Y, 13 F Supp 717, affirmed, C.C.A., 91 F 2d 1015
58 C J. p 477 note 76.

Condemned goods

This rule applies where libelant seeks to recover for merchandise condemned and removed by the board of health.—The Ellerdale, C C.A.N Y, 10 F 2d 53, certiorari denied 46 S Ct. 631, 271 U S. 681, 70 L.Ed 1148.

free of the damage complained of[83] when delivered to the carrier A "clean" bill of lading or one which receipts for the goods as shipped in apparent good order and condition raises a presumption or is prima facie evidence that they were in good order and condition at the time of shipment, so far as visible,[84] but, in the absence of facts creating an estoppel, as discussed supra § 113, it is only prima facie evidence,[85] and the presumption may be rebutted;[86] but the burden is on the carrier to show to the contrary, that they were not in good order or condition when received by it,[87] or were not properly packed[88]

The presumption or admission warranted by a bill of lading which recites that the goods were in apparent good order and condition is limited to conditions visible to the eye and such bill of lading does not raise a presumption as to defects which could have existed without being externally evidenced,[89] and, where the damage is of a kind that could have been caused by unobservable defects in the goods at the time of their receipt by the carrier, the burden is on plaintiff to show that the goods were in good condition at that time and he is not aided by the fact that the bill of lading recites receipt in apparent good order and condition.[90] Proof that the goods were in good condition some time prior to their delivery to the carrier has been held not to warrant a presumption that they were in good condition when delivered, in the absence of evidence as to the care of the goods in the interim.[91] Where goods are accepted by a connecting carrier as in good order, the connecting carrier has the burden of

Absence of proof that goods were defective

In libel for damage to shipment of canned beets, where, on discharge, cases were found mouldy, cans were rusted, and labels soiled because of excess moisture in wood of cases, absence of proof that moisture was present at time of shipment did not authorize conclusion that moisture got into wood during voyage —Thomas Roberts & Co. v Calmar S S Corp., D C Pa, 59 F Supp. 203

83. U S —McNeely & Price Co v. The Exchequer, D C.Pa., 100 F. Supp. 343

84. U S —Stirnimann v. The San Diego, C C A N.Y, 148 F.2d 141—The Niel Maersk, C.C A N Y, 91 F. 2d 824, certiorari denied Bradley v. The Niel Maersk, 58 S Ct. 281, 302 U S. 753, 82 L Ed. 582—McNeely & Price Co. v The Exchequer, D.C Pa., 100 F.Supp 343—The Ciano, D C.Pa., 69 F.Supp 35—The Ponce D C.N.J, 67 F Supp 725, affirmed, C C.A., Pompeian Olive Oil Corp v The Ponce, 160 F 2d 107—George F. Pettinos, Inc., v Thos & Jno Brocklebank, Limited, D.C.Pa., 65 F Supp 102—The Vizcaya, D C.Pa, 63 F Supp. 898.

58 C J. p 477 note 70.

"Clean" bill of lading defined see supra § 111.

Lax inspection of cargo

The laxity of those whose responsibility it is to examine on ship's behalf the cargo received does not create an inference that goods were damaged when received aboard ship and is not sufficient to relieve vessel of its receipt —McNeely & Price Co v. Ellerman & Bucknall S. S. Co, D C Pa., 100 F.Supp. 339.

As to third persons

The legal presumption which, as between the shipper and master, arises from the bill of lading that the goods were in good condition, cannot affect third persons —Brousseau v The Hudson, 11 La Ann 427.

85. U S —Amerlux Steel Corp v Johnson Line, C C A Cal., 33 F 2d 70—Thomas Roberts & Co. v. Calmar S S Corp., D C Pa., 59 F Supp. 203—The Georgian, D C Fla, 4 F Supp. 718, affirmed, C C A., 76 F. 2d 550.

58 C.J. p 488 note 50 [b].

86. U S —Stirnimann v. The San Diego, C C A N Y., 148 F.2d 141—McNeely & Price Co. v. The Lambrook, D C Pa, 100 F Supp. 345—The Ciano, D C Pa, 69 F.Supp 35—The Vizcaya, D C Pa, 63 F Supp 898—Thomas Roberts & Co. v Calmar Steamship Corp., D.C Pa, 59 F. Supp 203

Action for misrepresentation

Holder in due course for value of bill of lading signed by master of vessel and covering damaged shipment of talc powder had the burden of proving falsity of representation of bill that talc was received in apparent good order and condition in order to hold vessel liable on theory of estoppel for damage resulting from reliance on such representation —The Sophocles, D C N Y., 51 F Supp 953

87. U S —The Ciano, D C Pa., 69 F Supp 35

58 C.J. p 477 note 71.

88. Hawaii —Honolulu Rapid Transit, etc, Co v American-Hawaiian SS. Co, 3 Hawaii Fed. 11.

89. U S —Albers Bros. Milling Co, v. Hauptman, C C A., 95 F 2d 286—The Niel Maersk, C.C A.N.Y, 91 F 2d 932, certiorari denied Bradley v. The Niel Maersk, 58 S.Ct. 281, 302 U.S. 753, 82 L Ed. 582—McNeely & Price Co. v The Exchequer, D.C Pa, 100 F.Supp. 343—Jensen v Matson Nav Co, D C Hawaii, 71 F Supp. 939—The Ciano, D C Pa, 69 F Supp. 35

Construction of bill of lading acknowledging receipt of goods in apparent good order and condition see supra § 113.

Condition unknown

Where such a bill of lading further recites "weight and contents" unknown or character or condition unknown, there is no presumption as to the condition of the goods beyond that visible to the eye or apparent from the handling of the cases, bales, or casks in which the goods are shipped —The Erskine M. Phelps, D C Cal, 231 F. 767—58 C J. p 477 note 73.

90. U S.—The Niel Maersk, C C A.N. Y., 91 F 2d 932, certiorari denied Bradley v The Niel Maersk, 58 S. Ct 281, 302 U S 753, 82 L.Ed 582—American Finance & Commerce Co v. U S, D C Cal, 55 F.2d 725—McNeely & Price Co v. The Exchequer, D C Pa, 100 F.Supp. 343—American Tobacco Co. v The Katingo Hadjipatera, D C.N.Y., 81 F Supp 438, modified on other grounds, C A., 194 F 2d 449, certiorari denied 72 S Ct. 1076, 343 U.S 978, 96 L.Ed — —Jensen v Matson Nav. Co, D.C Hawaii, 71 F Supp 939—Thomas Roberts & Co v. Calmar S S Corp., D C Pa, 59 F Supp 203—The Chester Valley, D C.La., 28 F Supp 290, affirmed, C.C A., 110 F.2d 592—The Naples Maru, D.C N.Y., 20 F Supp 258, modified on other grounds, C C.A., Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, 106 F.2d 32.

58 C J. p 477 note 74, p 488 note 50 [b].

91. U.S —Bingham v Osaka Shosen Kaisha, D C N Y, 12 F Supp. 35, affirmed, C.C.A., 88 F.2d 1004.

proving that any damage subsequently appearing was inflicted before it got the goods.[92]

Delivery of goods to carrier. The burden is on plaintiff or libelant to prove delivery of the goods to the carrier,[93] but a bill of lading reciting receipt of the goods presumptively establishes the receipt of the goods by the carrier,[94] and the burden is then on the carrier to prove that it did not receive them.[95]

d. Loss or Damage Due to Excepted Peril

Where the goods are lost or damaged while in the carrier's possession, the burden is on the carrier to prove that the loss or damage was due to some cause or peril as to which it is exempt from liability, if it pleads that as a defense.

Where loss of, or damage to, cargo is shown to have occurred while in the carrier's possession and control, the burden is on the carrier, if it pleads such defense, to show that the loss or damage was due to some excepted peril or cause as to which it is exempt from liability[96] by statute,[97] such as the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 et seq,[98] or the Harter Act, 46 U.S.C.A. § 181 et seq,[99] or by a valid provision in the contract of carriage or bill of lading.[1] The burden is on the car-

92. U.S.—Inland Waterways Corporation v. Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715

93. U.S.—The Robin Gray, C.C.A.N.Y., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.

94. U.S.—The Robin Gray, C.C.A.N.Y., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.
10 C.J. p. 371 note 59

95. U.S.—The Robin Gray, C.C.A.N.Y., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566

96. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—Edmond Weil, Inc. v. American West African Line, C.C.A.N.Y., 147 F.2d 363—The Mauretania, C.C.A.N.Y., 84 F.2d 408—The Yungay, D.C.N.Y., 58 F.2d 352—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co., D.C.N.Y., 56 F.2d 271—The Africa Maru, C.C.A.N.Y., 54 F.2d 265, certiorari denied Osaka Shosen Kaisha v. Habicht Braun & Co., 52 S.Ct. 457, 285 U.S. 556, 76 L.Ed. 945—J. C. Penney Co. v. The American Exp. Co., D.C.N.Y., 102 F.Supp. 742—Middle East Agency v. The John B. Waterman, D.C.N.Y., 86 F.Supp. 487—The Ponce, D.C.N.J., 67 F.Supp. 725, affirmed, C.C.A., Pompeian Olive Oil Corp. v. The Ponce, 160 F.2d 107—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—Spreckles Sugar Co. v. South Atlantic S.S. Line, D.C.Ga., 49 F.Supp. 714—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999—The Buckeye State, D.C.N.Y., 39 F.Supp. 344—The City of Khios, D.C.N.Y., 16 F.Supp. 923—Alliance Tobacco Co. v. U.S., D.C.N.Y., 12 F.Supp. 661, affirmed, C.C.A., 85 F.2d 86—Charles Dreifus Co. v. Diamond P. Transp. Co., D.C.Pa., 7 F.Supp. 363—The Carnia, D.C.N.Y., 2 F.Supp. 929—The W. C. Franz, D.C.N.Y., 2 F.Supp. 497, affirmed, C.C.A., Hallet Carey Swart, Ltd., v. The W. C. Franz, 67 F.2d 995
N.Y.—Smith v. Anchor Lines, 255 N.Y.S. 622, 143 Misc. 326
58 C.J. p. 479 note 12, p. 484 note 93
In action against private carrier see infra subdivision j of this section.
Burden of proving negligence where loss is due to excepted peril see infra subdivision e of this section.
Proof that damage by sea water was due to excepted peril see infra subdivision h of this section.
Cause of loss or damage in general see infra subdivision g of this section

Act of God

U.S.—Petition of Pennsylvania R. Co., D.C.N.Y., 44 F.Supp. 617.

Sweat damage

Burden is on carrier to prove that sweat damage was caused by a peril of the sea within carrier's exception from liability.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32—Standard Brands v. Thos. & Jno. Brocklebank, Limited, D.C.N.Y., 81 F.Supp. 670

97. U.S.—Sparks Milling Co. v. U.S., D.C.La., 5 F.Supp. 567.
Statutory exemptions from liability generally see supra § 126 et seq.

98. U.S.—Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656—Standard Brands v. Thos. & Jno. Brocklebank, Limited, D.C.N.Y., 81 F.Supp. 670—Sanib Corp. v. United Fruit Co., D.C.N.Y., 74 F.Supp. 64—The Mangalia, D.C.N.Y., 69 F.Supp. 688—George F. Pettinos, Inc., v. Thos. & Jno. Brocklebank, Limited, D.C.Pa., 65 F.Supp. 102—The Vizcaya, D.C.Pa., 63 F.Supp. 898.

99. U.S.—U.S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Pillsbury Flour Mills Co. v. Becker S.S. Co., D.C.N.Y., 49 F.2d 648—Spreckles Sugar Co. v. South Atlantic S.S. Line, D.C.Ga., 49 F.Supp. 714—The Schickshinny, D.C.Ga., 45 F.Supp. 813—The Buckeye State, D.C.N.Y., 39 F.Supp. 344.
Cal.—Blake, Moffitt & Towne v. Luckenbach S.S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775.
Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash.2d 491.
58 C.J. p. 484 note 81.

1. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., C.C.A.N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32—Warner Barnes & Co. v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 102 F.2d 450, modified on other grounds 103 F.2d 430—U.S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Morris v. Lamport & Holt, D.C.N.Y., 54 F.2d 925, affirmed, C.C.A., 57 F.2d 1081—The Africa Maru, C.C.A.N.Y., 54 F.2d 265, certiorari denied Osaka Shosen Kaisha v. Habicht Braun & Co., 52 S.Ct. 457, 285 U.S. 556, 76 L.Ed. 945—Pillsbury Flour Mills Co. v. Becker S.S. Co., D.C.N.Y., 49 F.2d 648—Orient Ins. Co. v. Flota Mercante del Estado, D.C.La., 102 F.Supp. 729—George F. Pettinos, Inc., v. Thos. & Jno. Brocklebank, Limited, D.C.Pa., 65 F.Supp. 102—Spreckles Sugar Co. v. South Atlantic S.S. Line, D.C.Ga., 49 F.Supp. 714—The Nagisan Maru, D.C.N.Y., 14 F.Supp. 1010—Alliance Tobacco Co. v. U.S., D.C.N.Y., 12 F.Supp. 661, affirmed, C.C.A., 85 F.2d 86—Charles Dreifus Co. v. Diamond P. Transp. Co., D.C.Pa., 7 F.Supp. 363—Sparks Milling Co. v. U.S., D.C.La., 5 F.Supp. 567—The W. C. Franz, 2 F.Supp. 497, D.C.N.Y., affirmed, C.C.A., Hallet

rier to show any special contract which restricts or limits its liability,[2] and, where the injury is to merchandise carried on deck, the burden is on the carrier to prove that the shipper agreed that his property might be so carried.[3] It has been held that where the bill of lading stipulates against liability for "average leakage or breakage," the burden is on plaintiff to show that the leakage or breakage was greater than the average.[4]

Goods removed before notice. Where the bill of lading exempts the carrier from liability from any claim for goods removed before notice of claim, it has been held that libelant has the burden of showing what goods were removed after the giving of notice.[5]

e. Negligence

As a general rule, where goods are lost or damaged while in the carrier's possession, the burden is on the carrier to prove its freedom from negligence, but, where the damage is due to an excepted peril or cause, the burden is ordinarily on the plaintiff or libelant to prove the carrier's negligence.

Ordinarily, where plaintiff or libelant relies on negligence as being the cause of the loss or damage for which he seeks to recover, the burden is on him to prove the negligence,[6] and that it was the proximate cause of the loss or damage.[7] Unless the facts manifestly negative negligence,[8] proof that the goods were lost or damaged while in the possession of a carrier by water raises a presumption that the carrier was negligent,[9] and, in such case, if the carrier fails to show that the damage or loss was due to an excepted cause or peril, the burden is on the carrier to prove that it was free from negligence causing the damage,[10] and that it exercised due care in handling, caring for, and stowing the goods,[11] and that the injury could not have been avoided by ordinary care, with respect to stowage.[12]

The doctrine of res ipsa loquitur applies in actions for loss of, or damage to, cargo[13] and, where the damage or accident is such as in the ordinary course of events would not happen if the carrier used due care, negligence on the carrier's part may be inferred or presumed.[14] Where inherent defects in goods, casks, or cases are shown, the burden is on the cargo owner to show that the injury to the goods, casks, or cases was caused by the negligence of the vessel.[15] Where the vessel has conformed to the prevailing standards of stowage, libelant has the burden of showing that the stan-

Carey Swart, Ltd. v. The W. C. Franz, 67 F.2d 995—The Empress of Russia, D.C.N.Y., 1 F.Supp. 978—Doherr v. Houston, N.Y., 128 F. 594, 64 C.C.A. 102.

Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App. Supp. 775.

58 C.J. p. 483 note 80, p. 478 note 87.

Limitation of liability by contract or bill of lading generally see supra § 131 et seq.

2. Mich.—American Transp. Co. v. Moore, 5 Mich. 368.

58 C.J. p. 477 note 65.

Inadequate refrigeration.

In action for damage to shipment of watermelons, carrier had burden of showing that it had explained inadequacy of refrigeration on ship to shippers and that shippers had expressed willingness to take risk of damage.—S. L. Shepard & Co. v. Agwilines, Inc., C.C.A.S.C., 130 F.2d 67.

3. U.S.—The Peytona, C.C.Me., 19 F. Cas.No.11,058, 2 Curt. 21.

4. U.S.—In re Six Hundred and Thirty Casks of Sherry, C.C.N.Y., 22 F. Cas.No.12,918, 14 Blatchf. 517.

5. U.S.—The Ellerdale, C.C.A.N.Y., 10 F.2d 53, certiorari denied 46 S. Ct. 631, 271 U.S. 681, 70 L.Ed. 1148.

Notice of claim generally see infra subdivision 7 of this section.

6. U.S.—The Cleveland, D.C.N.Y., 54 F.Supp. 819, affirmed, C.C.A., Petition of Pennsylvania R. Co., 141 F.2d 1020.

58 C.J. p. 485 note 12.

Burden of proof as to negligence in action against private carrier see infra subdivision j of this section.

Contract for towing.

In libel in rem against tug for loss of cargo under a contract for towing, burden was on libelant to prove negligence of the tug as the offending vessel.—The Independent, C.C.A.La., 122 F.2d 141.

7. U.S.—Rockwood & Co. v. American President Lines, D.C.N.J., 68 F.Supp. 224.

8. U.S.—Western Transp. Co. v. Downer, Ill., 11 Wall. 129, 20 L.Ed. 160—Williams v. The Exe, N.Y., 57 F. 399, 6 C.C.A. 410.

9. U.S.—Standard Oil Co. of Cal. v. U. S., D.C.Cal., 59 F.Supp. 100, affirmed, C.C.A., 156 F.2d 312—Krebs Pigment & Chemical Co. v. Sheridan, D.C.Pa., 12 F.Supp. 254, affirmed, C.C.A., 79 F.2d 479—The W. C. Franz, D.C.N.Y., 2 F.Supp. 497, affirmed, C.C.A., Hallet Carey Swart, Ltd. v. The W. C. Franz, 67 F.2d 995—The Rosalia, C.C.A.N.Y., 264 F. 285—Herman v. Compagnie Generale Transatlantique, N.Y., 242 F. 859, 155 C.C.A. 447.

N.Y.—Littlejohn v. Ellerman, etc., S.S. Co., 236 N.Y.S. 699, 135 Misc. 237.

58 C.J. p. 485 note 12 [b].

Proof that goods were lost or damaged while in carrier's possession as establishing prima facie case see supra § 146.

10. U.S.—The Vallescura, N.Y., 55 S. Ct. 194, 293 U.S. 296, 79 L.Ed. 373—Cafiero & Mencacci v. Navigazione Libera Triestina, S.A., D.C.N.Y., 50 F.2d 199—J. C. Penney Co. v. The American Exp. Co., D.C.N.Y., 102 F.Supp. 742—McNeely & Price Co. v. The Lambrook, D.C.Pa., 100 F.Supp. 345—McNeely & Price Co. v. The Exchequer, 100 F.Supp. 343—The Guanancita, D.C.Fla., 69 F.Supp. 928—The Vizcaya, D.C.Pa., 63 F.Supp. 898—Cox v. Farley, D.C.N.Y., 34 F.Supp. 446.

58 C.J. p. 479 note 11.

11. U.S.—The Vallescura, N.Y., 55 S. Ct. 194, 293 U.S. 296, 79 L.Ed. 373—Cafiero & Mencacci v. Navigazione Libera Triestina, S.A., D.C.N.Y., 50 F.2d 199—General Foods Corp. v. The Troubador, D.C.N.Y., 98 F.Supp. 207—Cox v. Farley, D.C.N.Y., 34 F.Supp. 446.

58 C.J. p. 483 note 64.

12. U.S.—The Maggie M., D.C.N.Y., 30 F. 692.

13. U.S.—Morris v. Lamport & Holt, D.C.N.Y., 54 F.2d 925, affirmed, C.C.A., 57 F.2d 1081—The Hygrade No. 18, D.C.Mass., 41 F.Supp. 304.

14. U.S.—Morris v. Lamport & Holt, D.C.N.Y., 54 F.2d 925, affirmed, C.C.A., 57 F.2d 1081.

15. U.S.—The Connaught, D.C.N.Y., 32 F. 640.

dard of stowage was unreasonable.[16] Where a seaworthy boat capsizes in calm water, the inference is almost irresistible that her action was due to improper loading.[17]

Damage or loss due to excepted peril or cause in general. Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304, where the loss or damage arises or results from one of the causes or perils specified therein, the burden is on plaintiff or libelant to prove the carrier's negligence,[18] but where damage not resulting from an excepted cause is shown, the burden is on the carrier to prove its freedom from negligence[19] even though the loss or damage is within the terms of an exception from liability contained in the bill of lading.[20] In cases not governed by that statute it has been held that if the loss or damage is shown to come within the language of a general exception from liability as contained in the bill of lading,[21] or where the loss or damage was due to an excepted peril or cause,[22] the burden is on plaintiff to prove that the carrier was negligent or that the damage could have been avoided by the exercise of reasonable care by the carrier; but, where plaintiff has introduced evidence which prima facie shows liability of the carrier, the burden is on the carrier to go forward with the evidence to show that the damage occurred without negligence on its part,[23] unless the nature of the goods furnishes evidence of itself that due care and vigilance could not have prevented the injury.[24]

While it has been urged that the rule putting the burden of proof as to negligence on the plaintiff should be limited to excepted perils and causes and that the burden is on the carrier to establish his freedom from negligence where he relies on an exception from effects or kinds of losses,[25] it is generally held that in such cases the burden is on plaintiff to prove the carrier's negligence.[26] However, where the contract of carriage exempts the carrier from all liability except for damage due to its negligence, it has been held that on proof of the damaged condition of the goods the burden is on the carrier to prove its freedom from negligence.[27]

Breakage, leakage, or heat. Where bill of lading exempts the carrier from liability for damage due to breakage and leakage, the burden is on the cargo owner to prove that the breakage or leakage was caused or contributed to by the shipowner's negligence[28] or improper stowage,[29] particularly where it appears that the casks or cases in which the goods were shipped were insufficient.[30] Where the goods

16. U.S.—Bache v. Silver Line, C.C.A.N.Y., 110 F.2d 60.

17. U.S.—The S. C. L. No. 9, C.C.A. Pa., 114 F.2d 964—The Adah, N.Y., 258 F. 377, 169 C.C.A. 393.

Sinking of vessel as raising presumption of unseaworthiness see infra subdivision f of this section.

Where unseaworthiness was eliminated as possible cause for capsizing, a strong presumption remained that improper loading was the cause. —The S. C. L. No. 9, C.C.A.Pa., 114 F. 2d 964.

18. U.S.—Globe Solvents Co. v. The California, C.C.A.Pa., 167 F.2d 859, certiorari denied 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed. 394—George F. Pettinos, Inc., v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.

Burden of proving that loss or damage resulted from excepted peril see supra subdivision d of this section.

19. U.S.—Eppens, Smith Co., Inc. v. Silver Line, Ltd., C.C.A.La., 128 F. 2d 882—McNeely & Price Co. v. Ellerman & Bucknall S. S. Co., D.C. Pa., 100 F.Supp. 339—General Foods Corp. v. The Troubador, D.C. N.Y., 98 F.Supp. 207—George F. Pettinos, Inc., v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247—The Asturias, D.C.N.Y., 40 F.Supp. 168, affirmed, C.C.A., Wessels v. The Asturias, 126 F.2d 999.

20. U.S.—The Vizcaya, D.C.Pa., 63 F.Supp. 898.

21. U.S.—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—The Monte Iciar, D.C.Pa., 67 F.Supp. 201, affirmed, C.C.A., 167 F.2d 334—Eppens, Smith Co. v. Silver Line, D.C.La., 37 F.Supp. 684, affirmed, C.C.A., 128 F.2d 882—Bingham v. Osaka Shosen Kaisha, D.C.N.Y., 12 F.Supp. 35, affirmed, C.C.A., 88 F. 2d 1004—The Gothic Star, D.C.N.Y., 4 F.Supp. 240.

58 C.J. p. 486 notes 17, 18.

Negligent stowage

Libelant suing for cargo damage, where damage was prima facie within exception to liability in bill of lading, had burden to establish negligent stowage.—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880.

22. U.S.—Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, C.C.A.N.Y., 102 F.2d 450, modified on other grounds 103 F.2d 430—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., D.C.N.Y., 50 F.2d 199—The Ponce, D.C.N.J., 67 F.Supp. 725, affirmed, C.C.A., Pompeian Olive Oil Corp. v. The Ponce, 160 F.2d 107—The Naples Maru, D.C. N.Y., 20 F.Supp. 258, modified on other grounds, C.C.A., Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, 106 F.2d 32—The City of Khios, D.C.N.Y., 16 F.Supp. 923—The Nichiyo Maru, D.C.Md., 14 F.Supp. 727, affirmed, C.C.A., 89 F.2d 539.

58 C.J. p. 486 note 18.

23. Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.

58 C.J. p. 485 note 15.

24. Ala.—Steele v. Townsend, 37 Ala. 247, 79 Am.D. 49.

25. U.S.—Inland Waterways Corporation v. Hallet & Carey Co., C.C.A.Minn., 52 F.2d 13.

26. U.S.—The Folmina, N.Y., 29 S.Ct. 363, 212 U.S. 354, 53 L.Ed. 546, 15 Ann.Cas. 748—Thomas Roberts & Co. v. Calmar S. S. Corp., D.C.Pa., 59 F.Supp. 203—The Patria, N.Y., 132 F. 971, 68 C.C.A. 397.

27. U.S.—James Richardson & Sons v. Conners Marine Co., C.C.A.N.Y., 141 F.2d 226.

28. U.S.—The Monte Iciar, C.C.A. Pa., 167 F.2d 334—Atlantic Sugar Refineries v. Royal Mail Steam Packet Co., C.C.A.N.Y., 47 F.2d 880.

58 C.J. p. 485 note 5.

29. U.S.—The Orion, C.C.A.N.Y., 290 F. 379.

30. U.S.—In re Six Hundred and Thirty Casks of Sherry, C.C.N.Y., 22 F.Cas.No.12,918, 14 Blatchf. 517.

are received under a bill of lading which exempts the carrier from liability for breakage, heat, etc., not caused by negligence, it is incumbent on plaintiff in an action to recover damages caused by breakage or heat to prove negligence in stowing, ventilating, or landing the cargo,[31] and, where the bill of lading exempts the carrier from liability for loss by breakage, heat, etc, unless occasioned by improper stowage, the burden of proof is on plaintiff to show that the damage did result from such stowage.[32]

Breakage or leakage does not raise a presumption of negligence on the part of the carrier.[33] Mere excess of breakage or leakage over what is usual under the circumstances is not prima facie evidence of negligence in stowage,[34] but it may warrant an inference of negligence where there is no indication of any other adequate cause for the unusual breakage,[35] and it has been held that where such breakage occurs in discharging the cargo it raises a presumption of negligence on the part of the ship in handling.[36] The shifting and breaking of cargo do not of themselves necessarily involve an inference of negligent stowage.[37]

Fire. It has been held that in order to defeat a carrier's statutory exemption from liability for injury to cargo by fire, libelant must show that the fire was caused by the carrier's design or neglect.[38] The mere fact of a fire on a vessel[39] or on a pier[40] does not warrant an inference of negligence.

Goods in carrier's custody as warehouseman. Where it is sought to hold the carrier for loss of, or injury to, the goods after their discharge from the vessel and while they are in its custody as warehouseman, it has been held that libelant has the burden of proving negligence,[41] but it has also been held that, where the goods were damaged while in the custody of the carrier as warehouseman, the burden is on it to establish its freedom from negligence.[42]

f. Seaworthiness

Proof that the goods were lost or damaged while in the possession of a carrier by water may raise a presumption that the vessel was unseaworthy, and the carrier must prove that the vessel was seaworthy at the beginning of the voyage or that due diligence was exercised to make the vessel seaworthy.

Proof that the goods were lost or damaged while in the possession of a carrier by water may raise a presumption or inference that the vessel was unseaworthy,[43] particularly where the vessel was very old,[44] and the burden is then on the vessel or carrier to prove that it was seaworthy at the beginning of the voyage[45] and reasonably fit for the

31. U S —The Hog Island, D C.N.Y., 43 F 2d 243, affirmed, C C.A., 48 F. 2d 101.
58 C J. p 483 note 72.

32. U S —The Dolbadarn Castle, Cal., 222 F. 838, 138 C C A. 264.
58 C.J. p 483 note 73

33. N Y.—Roth v. Hamburg-American Packet Co., 12 N.Y.S 460, 59 N Y.Super 49.
58 C J. p 485 note 3

34. U S —The Arpillao, C C.A.N Y., 270 F 426, certiorari denied Jose Tayas' Sons Co v. Pompeian Co, 41 S.Ct. 377, 255 U.S 574, 65 L Ed 793.
58 C J p 483 note 76, p 485 note 6.

35. U S —General Foods Corp. v The Troubador, D C N Y, 98 F Supp 207

36. U S —The Asiatic Prince, D.C.N Y., 103 F. 676

37. U S —Atlantic Sugar Refineries v Royal Mail Steam Packet Co., C C A N.Y., 47 F.2d 880

38. U S.—American Tobacco Co. v The Katingo Hadjipatera, C.A.N.Y., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U S. 978, 96 L.Ed —— —Hoskyn & Co. v. Silver Line, Limited, C C A.N Y, 143 F.2d 462, certiorari denied 65 S Ct 116, three cases, 323 U S. 767, 89 L.Ed 613—Consumers Import Co v. Kawasaki Kisen Kabushiki Kaisha, C C.A N Y., 133 F.2d 781, affirmed Consumers Import Co. v Kabushiki Kaisha Kawasaki Zosenjo, 64 S Ct. 15, 320 U S. 249, 88 L Ed 30—The Salvore, C C.A.N Y, 60 F 2d 683, certiorari denied U S. Steel Products Co. v Navigazione Libera Triestina Societa Anonima, 53 S.Ct 117, 287 U S. 653, 77 L Ed 565—Fidelity-Phenix Fire Ins Co of N Y v. Flota Mercante Del Estado, D.C.La., 102 F Supp. 861—The Hygrade No 18, D C Mass., 41 F.Supp 304—The Sandgate Castle, D C N Y, 30 F. Supp 344—The Cabo Hatteras, D C N Y, 5 F Supp 725—The President Wilson, D C Cal, 5 F Supp 684.
Exemption from injury to cargo by fire generally see supra § 129.

39. U.S.—The President Wilson, supra.

Exclusion of accidental and outside agencies

In order to authorize application of "res ipsa loquitur" doctrine in proceeding for exoneration from liability for damage resulting from a fire, although it may not have been necessary to exclude every possibility that fire might have originated from some other cause than negligence of the petitioners, claimants were bound to introduce evidence enough to remove the probable causes from which it might have started—The Hygrade No 18, D.C Mass., 41 F Supp. 304.

40. U S —De Grau v Wilson, D.C.N. Y., 17 F. 698, affirmed, C.C., 22 F. 560.
58 C.J p 485 note 12 [a]

41. U.S —The Bellingham, C C.A.N J, 57 F 2d 1015

42. Minn —Cargill Grain Co. v Cleveland-Cliffs S S. Co, 235 N.W. 208, 182 Minn 516, certiorari denied 52 S Ct 25, 284 U S. 646, 76 L Ed. 549, followed in Cargill Grain Co v. Cleveland-Cliffs S. S Co, 237 N.W 197, 183 Minn. 620.

43. Cal —Blake, Moffitt & Towne v. Luckenbach S S. Co, 6 P.2d 121, 120 Cal App Supp. 775.
N Y —Littlejohn v Ellerman, etc., S S. Co, 236 N Y S. 699, 135 Misc. 237
58 C J p 480 note 33.
Seaworthiness generally see supra § 140
As prima facie case of breach of warranty of seaworthiness see infra § 156.
Damage by sea water as raising presumption vessel is unseaworthy see infra subdivision h of this section.

44. U S.—Forbes v Merchants' Express, etc, Co., D C N Y, 111 F 796, affirmed 120 F. 1019, 56 C.C A 681.

45. U.S.—Commercial Molasses Corp.

cargo,[46] or that the loss was occasioned by some cause other than unseaworthiness of the vessel.[47] It has been held generally and under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 et seq, that the burden is on plaintiff to establish that the unseaworthiness did, in fact, cause the loss or damage in question,[48] and under a statute relieving the owner of a vessel from liability for damage caused by fire, unless the fire was caused by the design or neglect of the owner, the burden is on plaintiff to establish that the unseaworthiness of the vessel was the cause of the fire.[49]

Where the carrier seeks to avoid liability for loss of, or injury to, cargo under the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304, relieving the carrier of liability for damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy,[50] or under the provisions of the Harter Act, 46 U.S.C.A. § 192, relieving the carrier from liability for damage from specified causes where it has exercised due diligence to make the vessel seaworthy,[51] or under a clause of the bill of lading exempting it from liability for

v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—Gardner v. Dantzler Lumber & Export Co., C.C.A.Fla., 98 F.2d 478—The Indien, D.C.Cal., 71 F.2d 752—Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., C.C.A.N.Y., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546—The W. H. Davis, D.C.N.Y., 56 F. Supp. 564—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

58 C.J. p. 481 note 35.

Burden of proof as to seaworthiness in action against private carrier see infra subdivision j of this section

Basis of rule

Rule is based on fact that common carrier has the obligation of an insurer except as it is relieved therefrom by law or by valid contract—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The W. H. Davis, D.C.N.Y., 56 F. Supp. 564

Seaworthiness in relation to cargo and voyage

Burden is on vessel, sued for damage to cargo, to prove its seaworthy condition, both generally, and in relation to particular type of cargo and voyage—The Smyrna, D.C.Md., 2 F.Supp. 351, affirmed, C.C.A., 62 F.2d 1048

Canadian law

(1) Under Canadian Water Carriage of Goods Act and its annexed rules, burden of proving unseaworthiness of vessel is on cargo libelants, and, if unseaworthiness is shown, burden is then cast on shipowner or carrier, if it wishes to escape liability, to go on with the evidence and show that due diligence was used to make the ship seaworthy—The Iristo, D.C.N.Y., 43 F.Supp. 29, affirmed, C.C.A., Middleton & Co. (Canada) Limited v. Ocean Dominion S. S. Corp., 137 F.2d 619, certiorari denied 64 S.Ct. 432, 320 U.S. 802, 88 L.Ed. 484—The Aakre, D.C.N.Y., 31 F.Supp. 8, affirmed, C.C.A., 122 F.2d 469

(2) Fact that vessel, which was stranded while carrying goods under bills of lading incorporating Canadian Water Carriage of Goods Act, was without the guide of sailing directions, did not establish that vessel was "unseaworthy," so as to cast burden upon shipowner or carrier, if it wished to escape liability for loss of cargo, to show that due diligence was used to make the ship seaworthy, where all the elements which crew of ship might have obtained from sailing directions were contained on the chart which they used—The Iristo, D.C.N.Y., 43 F.Supp. 29, affirmed, C.C.A., Middleton & Co. (Canada) Limited v. Ocean Dominion S. S. Corp., 137 F.2d 619, certiorari denied 64 S.Ct. 432, 320 U.S. 802, 88 L.Ed. 484

46. U.S.—The Capulin, D.C.Md., 298 F. 953.

58 C.J. p. 481 note 36.

47. U.S.—The J. L. Luckenbach, D.C.N.Y., 1 F.Supp. 692, affirmed, C.C.A., 65 F.2d 570

58 C.J. p. 481 note 37.

48. U.S.—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293

58 C.J. p. 482 note 52 [a].

49. U.S.—Hoskyn & Co. v. Silver Line, D.C.N.Y., 63 F.Supp. 452, affirmed, C.C.A., 143 F.2d 462, certiorari denied 65 S.Ct. 116, 323 U.S. 767, 89 L.Ed. 613.

50. U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—Ore Steamship Corp. v. D/S A/S Hassel, C.C.A.N.Y., 137 F.2d 326—The Vizcaya, D.C.Pa., 63 F.Supp. 898—The Vermont, D.C.N.Y., 47 F.Supp. 877—Mente & Co. v. Isthmian S. S. Co., D.C.N.Y., 36 F.Supp. 278, affirmed, C.C.A., The Quarrington Court, 122 F.2d 266

Exemption from liability for unseaworthiness under Carriage of Goods by Sea Act generally see supra § 128.

Latent defect

Under provision in the Carriage of Goods by Sea Act that carrier shall not be responsible for damage from latent defects not discoverable by due diligence, shipowner sued for loss has burden of showing that latent defect was not discoverable—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

51. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780—The Plow City, C.C.A.Pa., 122 F.2d 816, certiorari denied Plow City S. S. Co. v. Texas Gulf Sulphur Co., 62 S.Ct. 579, 315 U.S. 798, 86 L.Ed. 1199—The Point Chico, C.C.A.Tex., 122 F.2d 1—The Denali, C.C.A.Wash., 105 F.2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S. S. Co. v. Pacific Coast Coal Co., 61 S.Ct. 65, 311 U.S. 687, 85 L.Ed. 444—The Nordpol, C.C.A.N.Y., 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corp., 57 S.Ct. 111, two cases, 299 U.S. 586, 81 L.Ed. 432—The West Arrow, C.C.A.N.Y., 80 F.2d 853—The Indien, C.C.A.Cal., 71 F.2d 752—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—The Vestris, D.C.N.Y., 60 F.2d 273—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900—The Chehaw, D.C.N.Y., 54 F.2d 645—Kalbfleisch Corporation v. U. S., D.C.Mass., 53 F.2d 867—The Josephine, C.C.A.Pa., 49 F.2d 207—Charbonnier v. U. S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U. S. v. Charbonnier, 45 F.2d 174—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293—The Havana, D.C.N.Y., 45 F.Supp. 244—The Wildwood, D.C.Wash., 41 F.Supp. 956, affirmed, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719—The

unseaworthiness of the vessel, if it has exercised due diligence to make her seaworthy,[52] the burden is on the carrier to prove that the vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so, and that the vessel was properly manned.[53]

A shipowner relying on a release from the usual warranty of seaworthiness has the burden of proving the release[54] and that he fulfilled the conditions on which the release depended.[55] A vessel which ships water a few days after leaving port cannot be presumed to have been seaworthy when she left port.[56] Where the carrier prima facie shows the seaworthiness of the vessel, the burden is then on the cargo owner to rebut this prima facie showing,[57] or to show some fault in the vessel or her management that made the excepted peril efficient.[58] Where there is no implied warranty that the vessel is fit at the beginning of a voyage safely to carry the cargo received by her, the burden of proof is not on the carrier, but on the shipper, who must show the carrier's negligence in order to entitle him to recover for loss of, or damage to, cargo.[59]

Presumption of unseaworthiness arising from sinking or defect. The unexplained sinking of a vessel raises a presumption that she was unseaworthy[60] where the sinking takes place in smooth water[61] or where there is no undue stress of weather or other known external cause,[62] as where the vessel sank at her dock or pier, or berth, without apparent cause,[63] or where she careened and dumped her cargo without known external cause.[64] This presumption is of course rebuttable.[65] The presumption is that the vessel was unseaworthy at the time of sailing where she becomes leaky or a breakdown or other disaster overtakes her soon after beginning her voyage, without stress of weather or other adequate cause appearing therefor.[66]

Heddernheim, D.C.N.Y., 39 F.Supp. 558—The Emilia, D.C.N.Y., 13 F.Supp. 7—Daisy Philippine Underwear Co. v. U.S. Steel Products Co., D.C.N.Y., 11 F.Supp. 175, affirmed, C.C.A., U.S. Steel Products Co. v. American & Foreign Ins. Co., 82 F.2d 752—The Harry Luckenbach, D.C.N.Y., 8 F.Supp. 507—The Horaisan Maru, D.C.N.Y., 5 F.Supp. 311, reversed on other grounds, C.C.A., Yokohama Specie Bank v. Mitsui & Co., 73 F.2d 526, certiorari denied 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550—The Empress of Russia, D.C.N.Y., 1 F.Supp. 978—The J. L. Luckenbach, D.C.N.Y., 1 F.Supp. 692, affirmed, C.C.A., 65 F.2d 570—The Point Brava, D.C.Cal., 1 F.Supp. 366

Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash.2d 491

58 C.J. p. 481 note 42.

Exemption from liability under Harter Act generally see supra § 127

Conflicting evidence

The burden is on the carrier in all cases and not only in those where there is conflicting evidence—The Wildcroft, Pa., 26 S.Ct. 467, 201 U.S. 378, 50 L.Ed. 794.

52. U.S.—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—The Vale Royal, D.C.Md., 51 F.Supp. 412.

58 C.J. p. 481 note 42.

53. U.S.—Gold Dust Corporation v. Munson S. S. Line, C.C.A.N.Y., 55 F.2d 900—Charbonnier v. U.S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U.S. v. Charbonnier, 45 F.2d 174—The Condor, D.C.N.Y., 8 F.Supp. 929, affirmed, C.C.A., The Nordpol, 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111, two cases, 299 U.S. 586, 81 L.Ed. 432

58 C.J. p. 481 note 41

Inquiry as to competency of chief officer

While burden of proof is on shipowner to show a diligent inquiry concerning competency of chief officer, master is not put on inquiry as to whether chief officer was about to use or was using medical treatment which might result in chief officer's incompetency, where such officer appeared strong and healthy.—The James Griffiths, C.C.A.Wash., 84 F.2d 785, certiorari denied Sperry Flour Co. v. Coastwise Steamship & Barge Co., 57 S.Ct. 315, 299 U.S. 612, 81 L.Ed. 452, rehearing denied 57 S.Ct. 430, 300 U.S. 686, 81 L.Ed. 888

54. U.S.—New England S.S. Co. v. Howard, C.C.A.N.Y., 130 F.2d 354

55. U.S.—New England S. S. Co. v. Howard, supra.

56. U.S.—The Plow City, C.C.A.Pa., 122 F.2d 816, certiorari denied Plow City S. S. Co. v. Texas Gulf Sulphur Co., 62 S.Ct. 579, 315 U.S. 798, 86 L.Ed. 1199

57. U.S.—The Thomas Melville, D.C.N.Y., 31 F. 486.

58. U.S.—The Thomas Melville, supra

59. U.S.—The Tjomo, D.C.Ala., 115 F. 919.

60. U.S.—Continental Ins. Co. v. Anchor Line, D.C.N.Y., 53 F.2d 1032—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272.

Res ipsa loquitur

This is but a particular application of the doctrine of res ipsa loquitur—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89.

Where improper loading is eliminated as a cause for the vessel capsizing, the presumption is that the vessel was unseaworthy—Taylor Bros. Lumber Co., Inc. v. Sunset Lighterage Co., C.C.A.N.Y., 43 F.2d 700.

61. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The Evelyn, D.C.N.Y., 60 F.2d 644—The S.C.L. No. 9, D.C.Pa., 37 F.Supp. 386, affirmed, C.C.A., 114 F.2d 964.

62. U.S.—Petition of Erlandsen, D.C.Wash., 51 F.Supp. 921.

63. U.S.—The Buffalo, C.C.A.N.Y., 56 F.2d 738—The Harper, C.C.A.N.Y., 42 F.2d 161—Federal Forwarding Co. v. Lanasa, C.C.A.Md., 32 F.2d 154—The Fort Gaines, D.C.Md., 21 F.2d 865—The Jungshoved, C.C.A.N.Y., 290 F. 733, certiorari denied 44 S.Ct. 35, 263 U.S. 707, 68 L.Ed. 517

58 C.J. p. 482 note 55

64. U.S.—Hickman, Williams & Co. v. Murray Transp. Co., D.C.N.Y., 31 F.Supp. 820—U.S. Metals Refining Co. v. Jacobus, N.Y., 205 F. 896, 124 C.C.A. 209

65. U.S.—The S.C.L. No. 9, D.C.Pa., 37 F.Supp. 386, affirmed, C.C.A., 114 F.2d 964.

66. U.S.—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co., D.C.N.Y., 56 F.2d 271—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American

g. Particular Cause of Loss or Damage in General

As a general rule, where the loss of, or damage to, cargo is in part due to a cause for which the carrier is liable and in part due to a cause for which it is not liable, the burden of proof is on the carrier to establish what part of the damage was due to the cause for which it is not liable.

As a general rule, where the loss of, or damage to, the cargo was in part due to a cause for which the carrier is liable and in part due to a cause for which it is not liable, the burden of proof is on the carrier to establish what part of the damage was due to the cause for which it is not liable,[67] and this rule has been held to apply where the injury to the goods was caused by an inherent vice in the goods for which the carrier was not liable and another cause for which it was liable,[68] but it has also been held that, where the goods are not in good condition when received by the carrier, the burden is on plaintiff to establish what part of the damage was due to a cause for which the carrier was liable.[69] The rule putting the burden on the carrier to prove the damage due to each cause does not apply where a determination of the damage due to the respective causes is prevented by the consignee of the goods.[70]

While it is generally stated that proof that the loss or damage occurred while the goods were in the carrier's possession puts the burden on the carrier or shipowner, in order to relieve itself from liability, to account for or explain such damage[71] it has been held that, under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 et seq, the carrier does not have to show the cause of the damage or loss if he shows that he was free from negligence.[72] Under a statute exempting the carrier from liability for damage from fire unless the fire was caused by the carrier's design or neglect, the carrier does not have the burden of proving the cause of a fire.[73]

Where the bill of lading exempts the carrier from liability for breakage and leakage, the carrier need not show the cause of the breakage or leakage.[74] Similarly, where the bill of lading exempts the carrier from liability for damage caused by mould, rust, and discoloration, the carrier does not have the burden of establishing the cause of the moisture, rust, and discoloration.[75] If sufficiently heavy weather is experienced by a vessel to account for damage to cargo by motion of the ship, the presumption is that the damage was so caused, and not by bad stowage,[76] and the fact that part of a cargo endures the voyage without damage raises no presumption that damage to other parts was caused by bad stowage.[77] Where it appears that

Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.
58 C.J. p. 482 note 57

Collapse of boilers

In determining liability for damage to cargo, a presumption existed that vessel was unseaworthy as to boilers which collapsed, notwithstanding vessel was forty-five days from sailing at time of collapse, where it was admitted that the starboard boiler, which was in the worse condition, was used for only eight days.—The Heddernheim, D.C.N.Y., 39 F.Supp. 558.

67. U.S.—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373.—U.S. v. Apex Fish Co., C.A.Wash., 177 F.2d 364.—Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, C.C.A.N.Y., 159 F.2d 661, certiorari denied 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. 1849.—Armco International Corp. v. Rederi A/B Disa, C.C.A.N.Y., 151 F.2d 5.—Edmond Weil, Inc., v. American West African Line, C.C.A.N.Y., 147 F.2d 363.—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32.—U.S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 489.—Sanib Corp. v. United Fruit Co., 74 F.Supp. 64.—The Vizcaya, D.C.Pa., 63 F.Supp. 898.—Cox v. Farley, D.C.N.Y., 34 F.Supp. 446.

68. U.S.—The Nichiyo Maru, C.C.A.Md., 89 F.2d 539.—Cox v. Farley, D.C.N.Y., 34 F.Supp. 446.

69. U.S.—Albers Bros. Milling Co. v. Hauptman, C.C.A.Cal., 95 F.2d 286.—The Niel Maersk, C.C.A.N.Y., 91 F.2d 932, certiorari denied 58 S.Ct. 281, 302 U.S. 753, 82 L.Ed. 582.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 489.—The Ensley City, D.C.Md., 71 F.Supp. 444, affirmed, C.C.A., Isthmian S.S. Co. v. Martin, 170 F.2d 25.

Exemption of liability for "taint"

In libel to recover damages for injury to shipment of flour where damage was brought within clause of bill of lading exempting vessel from liability for "taint," burden was on shipper to show that there was a causal connection between condition of flour on discharge and improper stowage.—The Chester Valley, D.C.La., 28 F.Supp. 290, affirmed, C.C.A., 110 F.2d 592.

70. U.S.—Beck v. Vizcaya, D.C.Pa., 88 F.Supp. 818, affirmed, C.A., 182 F.2d 942, certiorari denied 71 S.Ct. 124, 340 U.S. 877, 95 L.Ed. 638.

71. U.S.—James Richardson & Sons v. Conners Marine Co., C.C.A.N.Y., 141 F.2d 226.—The Cherca, D.C.N.Y., 52 F.2d 644, reversed on other grounds, C.C.A., 55 F.2d 926.—Cafiero & Mencacci v. Navigazione Libera Triestina, S.A., D.C.N.Y., 50 F.2d 199.—The Mangalia, D.C.N.Y., 69 F.Supp. 688.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F.Supp. 520.—Sparks Milling Co. v. U.S., D.C.La., 5 F.Supp. 567.
58 C.J. p. 479 note 10.
Burden of explaining cause of loss or damage in action against private carrier see infra subdivision j of this section.

72. U.S.—George F. Pettinos, Inc., v. American Export Lines, D.C.Pa., 68 F.Supp. 759, affirmed, C.C.A., 159 F.2d 247.—The Vermont, D.C.N.Y., 47 F.Supp. 877.

73. U.S.—Charbonnier v. U.S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U.S. v. Charbonnier, 45 F.2d 174.

74. U.S.—The Monte Iciar, C.C.A.Pa., 167 F.2d 334.—The Patria, N.Y., 132 F. 971, 68 C.C.A. 397.

75. U.S.—Thomas Roberts & Co. v. Calmar S.S. Corp., D.C.Pa., 59 F.Supp. 203.

76. U.S.—The Connaught, D.C.N.Y., 32 F. 640.—The Polynesia, D.C.N.Y., 30 F. 210.

77. U.S.—The Polynesia, supra.

the casks in which goods were shipped were insufficient, the burden is on the shipper to prove that the defect in the casks was not the cause of the damage.[78]

h. Damage by Sea Water

The burden is on the plaintiff to prove that the goods were damaged by sea water, and, where such proof is made, it raises a presumption that the vessel was unseaworthy.

The burden of proof is on plaintiff to show that the bad condition of the goods on delivery was due to sea water,[79] and, where such proof is made, it raises a presumption that the vessel was unseaworthy.[80] The burden is then on the carrier to show how the sea water got into the hold of the vessel and damaged the cargo[81] and, since this should have been guarded against, the burden is on the carrier to show that it has fully discharged its duty in this respect,[82] and that the damage occurred without any fault on its part,[83] as that it was occasioned by a peril of the sea for which it was not responsible.[84]

The burden is on the carrier to show a sea peril adequate to cause such leaks to a seaworthy ship,[85] such as to show sufficient stress of weather to warrant the inference that such water found access to the cargo through a peril of the sea,[86] the consequences of which could not have been guarded against with the means available to the officers and crew,[87] and it is not sufficient to show merely that the vessel had encountered unusual stress of weather, without showing that proper precautions had been taken to protect the cargo.[88] Where the ship has shown a sea peril which might reasonably be expected, under the circumstances, to cause the damage found to exist, it will be presumed to have produced it, if there is satisfactory proof that any or all other suggested causes did not produce it,[89] and where it appears that the vessel encountered an unusually violent storm which fully accounted for the damage within an exception in the bill of lading, the burden is on the shipper to show carelessness or negligence on the part of the vessel leading to the loss.[90]

i. Deviation and Delay

In a suit for damages for delay in shipping and transporting the goods, the burden is on the plaintiff or libelant to prove that the damages resulted from unreasonable delay.

In a suit for damages for delay in shipping and transporting the goods, the burden is on plaintiff or libelant of proving that the damages resulted from an unreasonable delay in this respect;[91] but he is not required to prove that the damage would not have happened except for such delay.[92] Any excuse for its delay in shipping the goods must be proved by defendant.[93]

Deviation. The burden is on plaintiff or libelant to prove a deviation by the carrier,[94] but where there is a deviation by the carrier, the burden is on it to prove that the deviation was justified,[95] or

78. U.S.—Atkins v. Horrman, D.C.N.Y., 2 F.Cas.No.602a.

79. U.S.—The Goyaz, C.C.A.N.Y., 3 F.2d 553, certiorari denied 45 S.Ct. 230, 267 U.S. 594, 69 L.Ed. 804.

80. U.S.—The Folmina, N.Y., 29 S.Ct. 363, 212 U.S. 354, 53 L.Ed. 546, 15 Ann.Cas. 748—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A., 189 F.2d 488—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999.

81. U.S.—The Lassell, D.C.N.Y., 53 F.2d 687—Herman v. Compagnie Generale Transatlantique, N.Y., 242 F. 859, 155 C.C.A. 447.

82. U.S.—Toyo Kisen Kabushiki Kaisha v. Willits, C.C.A.Cal., 17 F.2d 762.
58 C.J. p. 480 note 22.

83. U.S.—Toyo Kisen Kabushiki Kaisha v. Willits, supra

84. U.S.—Pillsbury Flour Mills Co. v. Becker S. S. Co., D.C.N.Y., 49 F.2d 648—Alliance Tobacco Co. v. U.S., D.C.N.Y., 12 F.Supp. 661, affirmed, C.C.A., 85 F.2d 86—The Empress of Russia, D.C.N.Y., 1 F.Supp. 978
58 C.J. p. 480 note 24.

85. U.S.—The Queen, D.C.Cal., 78 F. 155, affirmed 94 F. 180, 36 C.C.A. 135, reversed on other grounds 21 S.Ct. 278, 180 U.S. 49, 45 L.Ed. 419

86. U.S.—Darragh v. The Dunbritton, N.Y., 73 F. 352, 19 C.C.A. 449.

87. U.S.—The Sloga, D.C.N.Y., 22 F.Cas.No.12,955, 10 Ben. 315.
58 C.J. p. 480 note 27.

88. U.S.—The Italia, D.C.N.Y., 184 F. 366, modified on other grounds 187 F. 113, 109 C.C.A. 33.
58 C.J. p. 480 note 28.

89. U.S.—Darragh v. The Dunbritton, N.Y., 73 F. 352, 19 C.C.A. 449

90. U.S.—The Neptune, C.C.N.Y., 18 F.Cas.No.10,118, 6 Blatchf. 193.
58 C.J. p. 480 note 30

91. U.S.—U. S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455
58 C.J. p. 479 note 17.

92. U.S.—The Esrom, D.C.N.Y., 261 F. 624, reversed on other grounds, C.C.A., 272 F. 266, certiorari denied 42 S.Ct. 47, 257 U.S. 634, 66 L.Ed. 408.
58 C.J. p. 480 note 18.

93. Mass.—Ideal Leather Goods Co. v. Eastern SS Corp., 107 N.E. 525, 220 Mass. 133

94. U.S.—The Salvore, C.C.A.N.Y., 60 F.2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S.Ct. 117, 287 U.S. 653, 77 L.Ed. 565.

Repair of ship
In proceeding for exoneration from liability, burden was held to be on cargo owners to show that making repairs during unloading, in course of which fire broke out, was not customary and was unreasonable so as to constitute a deviation.—The Salvore, C.C.A.N.Y., 60 F.2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S.Ct. 117, 287 U.S. 653, 77 L.Ed. 565

95. U.S.—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

was permitted by the bill of lading,[96] or that the loss of, or damage to, the goods would have occurred in the absence of the deviation.[97] Mere nondelivery of the goods does not create a presumption of overcarriage of the goods resulting in a deviation.[98]

j. Private Carrier

In an action against a private carrier for loss of, or injury to, cargo, the burden is on the plaintiff to prove that the carrier was negligent or unseaworthy, and the fact that the goods were lost or damaged while in the carrier's custody does not put the burden of proof on the carrier.

Since, as discussed supra § 125, a private carrier is not an insurer but undertakes only to exercise due care in the protection of the goods committed to its care, the burden of proving negligence or a breach of that duty rests on plaintiff[99] and proof of loss of, or damage to, cargo while in the carrier's possession does not cast on it the burden of proving proper care and diligence on its part[1] or that the loss occurred from an excepted cause in the contract or bill of lading.[2] However, in discharging the burden of proof, plaintiff is entitled to the benefit of the presumptions and inferences by which the law aids the bailor in an action against a bailee,[3] and since the carrier is in a better position to know the cause of the loss and that it was not one involving its liability, the law requires that it come forward with the information available to it,[4] and its failure to do so warrants an inference or presumption of its liability.[5] However, such inferences and presumptions, while they may affect the burden of coming forward with evidence, do not alter the burden of proof which remains on plaintiff,[6] and, where the carrier comes forward with evidence explaining the loss or damage, the burden of going forward with the evidence is again on plaintiff.[7]

Where the action is based on the shipowner's warranty of seaworthiness, the burden of proving a breach thereof[8] and that such breach was the proximate cause of the damage[9] rests on plaintiff, and proof that the goods were lost or damaged while in the carrier's possession does not cast on it the burden of proving seaworthiness.[10] While plaintiff may be aided by a presumption or inference of unseaworthiness arising from the unexplained sinking of the vessel,[11] where evidence explaining the sinking is presented, the burden of proof on the issue of unseaworthiness remains on plaintiff.[12] Where the contract of carriage exempts the carrier from liability for unseaworthiness not discoverable by due diligence, the carrier has the preliminary

96. U.S.—The Wildwood, D.C.Wash., 41 F.Supp. 956, reversed on other grounds, C.C.A., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.

97. U.S.—The Hermosa, C.C.A.Cal., 57 F.2d 20

98. U.S.—Shackman v. Cunard White Star, D.C.N.Y., 31 F.Supp. 948

99. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—American Agr. Chemical Co. v. O'Donnell Transp. Co., D.C.N.Y., 62 F.Supp. 239—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—The Commerce, D.C.N.Y., 46 F.Supp. 360, affirmed, C.C.A., New England S. S. Co. v. Howard, 130 F.2d 354.

58 C.J. p. 478 note 97.

Burden of proof as to negligence generally see supra subdivision e of this section.

1. U.S.—In re Steamship Co. Norden, D.C.Md., 6 F.2d 883—The Rokeby, D.C.N.Y., 202 F. 322

2. U.S.—In re Steamship Co. Norden, D.C.Md., 6 F.2d 883.

Burden of proof that loss or damage resulted from excepted peril generally see supra subdivision d of this section.

3. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564.

Presumptions and burden of proof in actions by bailor against bailee generally see Bailment § 50.

4. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—In re Steamship Co. Norden, D.C.Md., 6 F.2d 883—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564.

5. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The Joseph J. Hock, C.C.A.N.Y., 70 F.2d 259—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564—Ætna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781—The Westmoreland, D.C.N.Y., 14 F.Supp. 762, affirmed, C.C.A., 86 F.2d 96.

6. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—The W. H. Davis, D.C.N.Y., 56 F.Supp. 564.

7. U.S.—The Bowling Green, D.C.N.Y., 11 F.Supp. 109, affirmed, C.C.A., Cyarnikow Rionda Co. v. Ellerman & Bucknall S. S. Co., 81 F.2d 1017—The Frank A. Smith, D.C.N.Y., 8 F.Supp. 134.

8. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—Eastern Gas & Fuel Associates v. Martin Marine Transp. Co., C.A.Pa., 190 F.2d 394—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272

9. U.S.—New England S. S. Co. v. Howard, C.C.A.N.Y., 130 F.2d 354—The Mary M., D.C.N.Y., 73 F.Supp. 674.

10. U.S.—In re Steamship Co. Norden, D.C.Md., 6 F.2d 883.

11. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89—Eastern Gas & Fuel Associates v. Martin Marine Transp. Co., C.A.Pa., 190 F.2d 394—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272

Presumption of unseaworthiness from sinking of vessel in general see supra subdivision f of this section.

12. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89.

burden of proving the exercise of due diligence to make the vessel seaworthy.[13]

k. Amount of Damage

In an action for loss of, or damage to, cargo the burden is on the plaintiff or libelant to prove the amount of the damage.

In an action for loss of, or damage to, cargo, the burden is on plaintiff or libelant to prove the amount of the loss or damage,[14] such as the value of the goods lost;[15] and where he is entitled to recover damages to goods during unloading and transferring on a wharf, but not damages during shipment, the burden is on him to show the recoverable damages, separate and distinguished from nonrecoverable damages.[16] Where libelant has been paid part of his loss by insurer, the amount claimed in the libel is presumed to be the amount of damages for which it has not received payment.[17]

l. Notice of Claim; Time to Sue

The plaintiff or libelant has the burden of proving that notice of loss or of his claim was timely given and that the action was instituted within the time limited by the contract of carriage

Plaintiff or libelant has the burden of proving the giving of timely notice of the loss or injury and of his claim[18] and that notice of loss as required by the bill of lading or contract of carriage was given,[19] waived,[20] or excused.[21] Under the Carriage of Goods by Sea Act, 46 U S C A. § 1303 (6), on a failure to give notice of the damage or loss within the statutory time, there is a presumption of good delivery in favor of the carrier[22] and the burden is on plaintiff or libelant in an action for damages to the goods to overcome that presumption by proof.[23]

Stipulation limiting time to sue. Plaintiff or libelant has the burden of proving compliance with valid provisions in the bill of lading or contract of carriage limiting the time within which suit must be commenced,[24] waiver thereof,[25] or excuse for noncompliance therewith.[26] Where plaintiff contends that the provision is unreasonable, the burden is on him to establish that fact.[27]

§ 155. —— Admissibility of Evidence

General rules as to the admissibility of evidence, particularly in actions against carriers generally for loss of, or injury to, goods, apply in actions against carriers by water for loss of, or injury to, cargo.

13. U.S.—Metropolitan Coal Co. v Howard, C C A N.Y., 155 F.2d 780

14. U S—Weirton Steel Co. v Isbrandtsen-Moller Co, C C A N Y, 126 F 2d 593—U. S v Palmer & Parker Co, C C A.Mass, 61 F 2d 455—Baltic Cotton Co. v U S., C C.A Ala, 55 F 2d 568—The Carlotta, C C.N Y., 5 F Cas No.2,413a

Burden of proof as to shortage or deficiency of quantity see supra subdivision c (2) of this section.

Measure of damages generally see infra § 158.

Market not available

Consignor suing for damages on basis of resale price obtained was held obliged to show that market wherein price of goods was same as contract price was not available to consignor—Connecticut Fire Ins Co v Lake Transfer Corporation, C.C A N Y., 74 F.2d 258

15. Ga.—Strachan Shipping Co v. Hazlip-Hood Cotton Co., 131 S.E 283, 161 Ga. 480, answer to certified questions conformed to 132 S.E. 454, 35 Ga App. 94.

58 C J p 476 note 60.

16. U S—The Bencleuch, C.C A.N.Y., 10 F.2d 49, certiorari denied 46 S Ct 631, 271 U S. 680, 70 L Ed 1148.

17. U S—The Turret Crown, C.C.A. N.Y., 297 F 766, certiorari denied Commonwealth SS Co. v. Patent Vulcanite Roofing Co., 44 S.Ct. 403, 264 U.S. 591, 68 L.Ed. 865.

18. U S—E Gerli & Co. v Cunard S. S Co, C C A N Y, 48 F 2d 115

19. U S—Warner Barnes & Co v. Kokosai Kisen Kabushiki Kaisha, C C A N Y, 103 F 2d 430—The J. L. Luckenbach, C C A N.Y, 65 F 2d 570—U. S. Industrial Alcohol Co. v. Calmar S. S Corporation, C C A. N Y., 57 F.2d 182, certiorari denied 53 S Ct 21, 287 U S 622, 77 L Ed. 540—Newport Rolling Mill Co. v. Mississippi Valley Barge Line Co, D.C La., 50 F Supp. 623—The West Arrow, D.C N Y, 10 F Supp 385, modified on other grounds, C C A, 80 F 2d 853—Krauss Bros Lumber Co. v. Dampskibsselskabet Norden Aktieselskab, D C.N Y, 3 F Supp. 1014.

58 C.J. p 476 note 57.

Shipment to foreign country

(1) Burden of proving compliance with notice clause in bill of lading was on cargo owner suing for misdelivery, although shipment was to foreign country—Bank of California, N. A., v. International Mercantile Marine Co, C.C A N Y., 64 F.2d 97, certiorari denied 54 S.Ct. 66, 290 U.S. 649, 78 L Ed. 563

(2) In the absence of proof by cargo owner that under German law misdelivery of cargo in Germany excused giving of notice of claim therefor as provided in bill of lading, court must give effect to notice clause.—Bank of California, N. A., v. International Mercantile Marine Co, supra.

20. U S—Krauss Bros. Lumber Co v Dampskibsselskabet Norden Aktieselskab, D.C N.Y, 3 F Supp 1014

21. U S—Krauss Bros Lumber Co v Dampskibsselskabet Norden Aktieselskab, supra.

22. N Y—Fire Ass'n of Philadelphia v Isbrandtsen Co, 103 N Y.S 2d 118, 199 Misc. 257.

23. N Y—Fire Ass'n of Philadelphia v Isbrandtsen, supra.

24. U S—Krauss Bros Lumber Co v. Dampskibsselskabet Norden Aktieselskab, D C N.Y., 3 F Supp 1014

58 C.J. p 476 note 58

25. U S.—Krauss Bros Lumber Co v Dampskibsselskabet Norden Aktieselskab, supra.

Concealment by carrier

In libel by insurer as consignee's subrogee against carrier for damages to consignment, insurer had burden of establishing concealment by carrier and consignee's diligence in discovering claim, in order to escape provision in bill of lading that claim must be sued on within one year after delivery.—Switzerland General Ins. Co. of Zurich v. Navigazione Libera Triestina, S. A., C.C A. N.Y., 91 F 2d 960.

26. U.S.—Krauss Bros. Lumber Co v. Dampskibsselskabet Norden Aktieselskab, D.C.N Y., 3 F.Supp 1014.

27. N.Y.—The President Monroe, 286 N.Y.S. 990, 159 Misc. 432.

The rules governing the admissibility of evidence in actions generally, and particularly in actions against carriers for loss of, or damage to, goods, as discussed in Carriers § 255, apply in an action for loss of, or injury to, goods by carriers by water, with respect to the admissibility[28] or inadmissibility[29] of particular evidence on matters in issue, such as with respect to improper loading or stowage,[30] the carrier's liability as warehouseman,[31] and with respect to the admissibility of copies of the bill of lading.[32] On the question of seaworthiness at the time of sailing, evidence of the condition and performance and mechanical equipment of the vessel during the subsequent voyage may be considered.[33] A report made by a surveyor which was not based on his own knowledge is not admissible in connection with the seaworthiness of the vessel[34]

It has been held that parol evidence of an agreement that goods shipped under a clean bill of lading should be carried on deck is inadmissible in a libel for injury to cargo,[35] although such evidence may be received to show a supplemental agreement for a particular mode of storage under deck,[36] but it has also been held that, where stowage on deck was stipulated in the dock receipts, it was competent to show an agreement for stowage on deck even though the bill of lading erroneously failed to provide for it.[37] The contemplated voyage at the time of shipment may be shown by extrinsic evidence,[38] such as by the carrier's advertisements.[39] Where defendant denies it was the carrier, and evidence is offered which shows that the contract of carriage was entered into by plaintiff with general agents of defendant, a bill of lading issued by such agents and which they were authorized to sign is admissible in evidence[40]

The testimony of an officer of the consignee named in the bill of lading[41] or of an officer of the libelant[42] is competent to prove the ownership of the goods involved in the action. It has been held that the certificates of an exporters' association are not admissible to prove the good condition of the goods when shipped where such certificates are not official documents[43] The results of chemical tests made on the goods may be introduced to prove that they were damaged by sea water.[44] Evidence other than sales is admissible to prove the market value of goods.[45] Where goods are imported for use and not for sale, it has been held that evidence of market value when the goods arrived and when they should have arrived is not admissible on the question of damages for delay in delivery,[46] but that contracts in fulfillment of which the imported goods could have been used are admissible.[47]

Vessel's log book A vessel's log is competent evidence against her in an action for damages to cargo.[48]

Insurance. Evidence that the cargo owner had received from insurer the amount for which the goods had been insured has been held to be irrelevant in an action for their loss[49]

Custom and usage. Parol evidence is admissible of a custom or usage as to the meaning of the words "dangers of the river" as used in a bill of lading for transportation of goods by inland navigation,[50]

28. U S—The Monte Iciar, D.C Pa., 67 F.Supp 201, affirmed, C C.A., 167 F 2d 334.
58 C.J p 486 note 21.

29. U S—The Pelotas, D C La., 43 F 2d 571, affirmed, C C.A., 66 F.2d 75.
58 C J p 486 note 22.

30. U S—The Koranna, D.C N.Y., 214 F 172—Donaldson v. J. W Perry Co., Va., 138 F. 643, 71 C.C A. 93.

31. U S—Camden Woolen Co. v Eastern SS Lines, D.C Me., 8 F 2d 162, vacated on other grounds, C.C A., 12 F.2d 917.

32. U S.—The Arpillao, C.C A.N.Y., 270 F 426, certiorari denied Jose Tayas' Sons Co v Pompeian Co, 41 S Ct 377, 255 U S. 574, 65 L Ed 793

33. U.S—The Oritani, D C Pa., 40 F. 2d 522, affirmed, C C A., Atlantic Fruit Co. v. The Oritani, 54 F 2d 1075.

34. U S.—Yokohama Specie Bank v Mitsui & Co., C.C.A N.Y., 73 F 2d 526, certiorari denied Yokohama Specie Bank v Mitsui & Co, 55 S Ct. 648, 295 U S 736, 79 L Ed. 1684.

35. U S.—The Delaware, Cal., 14 Wall 579, 20 L Ed 779—The Star of Hope, D C.Cal., 22 F.Cas No 13,-313, 2 Sawy 15, affirmed 17 Wall 651, 21 L Ed. 719

36. U.S.—The Star of Hope, supra.

37. U.S—The Margaret Lykes, D.C La., 57 F Supp. 466

38. U.S—General Hide, etc, Corp v U. S, D C N Y, 24 F.2d 736

39. U.S.—General Hide, etc, Corp. v. U. S., supra.

40. U.S.—Patent Vulcanite Roofing Co v. Transoceanica Societa Italiana di Navigazione, C C A.N Y, 32 F 2d 213, certiorari denied 50 S Ct 30, 280 U S 574, 74 L.Ed. 626

41. U S—The Monte Iciar, D.C Pa., 67 F Supp 201, affirmed, C.C.A., 167 F 2d 334.

42. U.S.—Hickman, Williams & Co, Inc. v Murray Transportation Co, D.C.N.Y., 31 F Supp 820.

43. U S—The Niel Maersk, C C A.N. Y, 91 F 2d 932, certiorari denied Bradley v. The Niel Maersk, 58 S Ct. 281, 302 U.S. 753, 82 L.Ed. 582.

44. U S—Wessels v. The Asturias, C C.A N.Y, 126 F 2d 999.

45. U S—The Waalhaven, D C N Y., 1 F Supp 396, affirmed, C.C.A., 64 F 2d 25, certiorari denied The Waalhaven v Potash Importing Corporation of America, 53 S Ct. 696, 289 U S. 752, 77 L.Ed. 1497.

46. U S—U. S v Palmer & Parker Co., C.C.A Mass, 61 F.2d 455

47. U S.—U. S. v. Palmer & Parker Co., supra.

48. U.S.—The Waalhaven, C.C A N Y., 36 F 2d 706, certiorari denied 50 S.Ct. 352, 281 U.S 747, 74 L Ed 1159

49. Pa.—Nimick v Holmes, 25 Pa. 366, 64 Am.D. 710.

50. Pa—Gordon v Little, 8 Serg. & R 533, 11 Am.D. 632.

such as to show that by custom and usage they include dangers by fire occurring without fault or negligence of the carrier,[51] or casualties other than those arising from the element of water,[52] except where the custom or usage is contrary to law and in contravention of public policy.[53] Parol evidence is not admissible to show that, by a custom existing on a particular river, flat-boat men were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception.[54] Evidence that it was usual and customary for one boat on a voyage to stop and aid another boat in distress was held competent to show that such act is not a deviation, where the loss occurred by the sinking of the boat after such aid was rendered.[55]

In determining whether or not the construction of a vessel rendered her unseaworthy, it is proper to consider evidence of the usual custom of shipowners and the usual method of construction of ships and their appliances,[56] but such evidence should be considered in the light of what would appear to be the prudent method of construction,[57] and may be rejected entirely where the construction is obviously defective.[58]

§ 156. —— Weight and Sufficiency of Evidence

General rules as to the weight and sufficiency of the evidence have been applied in actions against carriers by water for loss of, or injury to, cargo. These rules have been applied with respect to the weight and sufficiency of evidence concerning negligence of the carrier, the existence of damage to the goods, the cause of loss or damage, the condition of the goods on delivery to the carrier, the loading and discharge of cargo, and the seaworthiness of the vessel

General rules as to the weight and sufficiency of the evidence,[59] such as that the party having the burden of proof on an issue must prove it by a fair preponderance of the evidence,[60] have been applied in actions against carriers by water for loss of, or injury to, cargo. Proof that the goods were damaged while in the vessel's possession, or that at the time the goods were delivered to the carrier for shipment they were in good order and condition and that they were damaged at the time of their delivery at their destination makes a prima facie case against the carrier,[61] without any proof on the part of plaintiff as to how the damage was caused,[62] unless the goods have been shipped by more than one carrier.[63] So, also, proof of the

51. Ala.—McClure v. Cox, 32 Ala 617, 70 Am D 552
58 C.J p 487 note 33.

52. Ala.—Sampson v Gazzam, 6 Port 123, 30 Am D. 578
Pa.—Gordon v. Little, 8 Serg & R 533, 11 Am D. 632

53. Ala.—Boon v Steamboat Belfast, 40 Ala 184, 88 Am D. 761.
58 C.J. p 487 note 35.

54. Ala.—Boon v Steamboat Belfast, 40 Ala. 184, 88 Am D. 761, overruling Steele v McTyer, 31 Ala 667, 70 Am.D. 516

55. Mo.—Walsh v. Homer, 10 Mo. 6, 45 Am D. 342.

56. U S.—The Indrapura, Or., 190 F 711, 112 C C A. 351—The Titania, D C N.Y., 19 F. 101.

57. U.S.—The Indrapura, Or., 190 F 711, 112 C C.A. 351.

58. U.S.—The Indrapura, supra.

59. U S.—American Trading Co v The Harry Culbreath, C A N Y, 187 F 2d 310—Farr v Hain S. S. Co, C.C.A N Y, 121 F.2d 940—Beck v The Vizcaya, D C Pa, 88 F Supp 818, affirmed, C A, 182 F.2d 942, certiorari denied 71 S Ct. 124, 340 U.S. 877, 95 L Ed 638—The Sophocles, D C.N.Y., 51 F Supp. 953—Spencer Kellogg & Sons v. Great Lakes Transit Corp, D C.Mich., 32 F.Supp. 520—The Harry Luckenbach, D.C.N.Y, 8 F Supp. 507.
58 C.J. p 487 note 46, p 488 note 47

Evidence held sufficient

(1) To establish liability of carrier—Gartland S S Co v Utah-Idaho Sugar Co, C.C A.Wis, 92 F 2d 940.

(2) To establish that carrier was not liable—Edmond Weil, Inc, v American West African Line C C A N Y, 147 F 2d 363—Kasser Distillers Products Corp v Companhia De Navegacao Carregadores Acoreanos, D C. N Y., 76 F Supp. 796—Dixon Irmaos & Cia, Ltd, v. Manhattan Lighterage Corp, D C.N.Y., 75 F.Supp. 593.

Evidence held insufficient

(1) To establish carrier's liability—Anglo-American Fur Merchant Corp. v. U. S., D C N.Y, 77 F Supp. 1000—The Mar Mediterraneo, D C. La, 13 F.Supp. 860.

(2) To establish that transshipment of cargo was a delivery of cargo to shipper either actually or constructively—Anglo-American Fur Merchant Corp. v. U. S., supra.

60. U.S.—Cargo Carriers v. Brown S S Co., D C N Y, 95 F.Supp 288
58 C.J p 476 note 54.

Unusual claims must be established by clear and convincing proof.—The Rosalia, C C.A N.Y., 264 F. 285—58 C J. p 488 note 48.

61. U.S.—Commercial Molasses Corp v New York Tank Barge Corp, N. Y., 62 S Ct 156, 314 U.S. 104, 86 L Ed. 89—Schnell v. The Vallescura, N.Y., 55 S Ct 194, 293 U.S 296, 79 L.Ed 373—U. S. v. Apex Fish Co, C A Wash, 177 F.2d 364—The Mauretania, C.C.A.N.Y, 84 F 2d 408—The Carso, C.C A N.Y, 53 F 2d 374, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc, 52 S Ct 140, 284 U.S. 679, 76 L.Ed. 574—McNeely & Price Co v. The Exchequer, D C.Pa., 100 F.Supp 343—Wayne v. Inland Waterways Corp, D.C Ill., 92 F Supp. 276—E S. Ullmann-Allied Co. v. The George E Pickett, D C.N.Y, 77 F Supp 988—Cox v Farley, D C N Y, 34 F Supp 446—Daisy Philippine Underwear Co v. U. S Steel Products Co, D C N Y, 11 F Supp 175, affirmed, C C A, U. S Steel Products Co v. American & Foreign Ins. Co., 82 F 2d 752.
58 C J. p 479 note 8.
Burden of proof and presumptions in case of private carrier see supra § 154 j

Bill of lading

Bill-of-lading acknowledgment that raw linseed was shipped in good order established prima facie case of shipper's right to recover for damages by sea water.—The Lassell, D C N.Y, 53 F.2d 687.

62. Tex.—Mallory SS. Co. v. Harriss-Irby Cotton Co, Civ App, 204 S W 789
58 C J. p 479 note 9.

63. **First of connecting carriers**

Proof that goods were delivered to vessel in good condition and were damaged on delivery to consignee did not establish prima facie case against vessel where vessel delivered goods to another carrier who made

delivery of the goods to the carrier and of non-delivery at the destination makes a prima facie case of the carrier's liability.[64] Facts may not be established by speculation or uncertain inferences.[65]

General rules apply as to the weight and sufficiency of the evidence on the question of the right or authority to sue for the loss or injury,[66] the contract of carriage,[67] the delivery of the goods to the carrier,[68] and on the question of the loss or damages occurring while the goods were in the carrier's custody.[69] Such general rules also apply on the issues of wrongful delay[70] or deviation[71] by the vessel.

Negligence in general General rules apply as to the weight and sufficiency of the evidence on the question of the carrier's negligence,[72] and, where

delivery to consignee and there was no proof as to the condition of the goods on discharge from the vessel —U. S. Smelting, Refining & Mining Co. v. Waterman S. S. Corp., D.C. La., 62 F.Supp. 511.

64. N.Y.—Reid v. Luckenbach SS. Co., 230 N.Y.S. 602, 133 Misc. 21.
58 C.J. p. 478 note 82

65. U.S.—The Bill, D.C.Md., 47 F. Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470.

66. U.S.—Hickman, Williams & Co. v. Murray Transp. Co., D.C.N.Y., 31 F.Supp. 820
58 C.J. p. 488 note 49.

67. U.S.—The Hindanger, C.C.A.Cal., 76 F.2d 13

68. U.S.—Kelley v. Cunard SS. Co., C.C.Mass., 120 F. 536, reversed on other grounds 126 F. 610, 61 C.C.A. 532, certiorari denied 24 S.Ct. 853, 193 U.S. 670, 48 L.Ed. 840
58 C.J. p. 488 note 51

Evidence held sufficient

(1) To establish delivery of goods to carrier—Mackey v. U. S., D.C.N.Y., 83 F.Supp. 14.

(2) To establish that goods were not delivered to carrier by railroad —Neuss Hesslein & Co. v. Louisville & N. R. Co., La.App., 50 So.2d 855.

69. U.S.—The Dondo, D.C.N.Y., 287 F. 239.
58 C.J. p. 488 note 52

Rust stains on bales of goatskins constituted evidence that water damage to goatskins occurred while they were on board vessel —John R. Evans & Co. v. The Express, D.C.Pa., 100 F.Supp. 347.

Application for refund of custom duties

Fact that consignees applied to customs house for refund of duty on ground that part of cargo of onions was decayed was held not conclusive that cargo was not damaged in transit, where rebate was allowed in case of decay or injury destroying commercial value —The Carnia, D.C.N.Y., 2 F.Supp. 929.

Evidence held sufficient

(1) To establish that loss or injury occurred while goods were in carrier's custody—John R. Evans & Co. v. The Express, D.C.Pa., 100 F.Supp. 347—McNeely & Price Co. v. Ellerman & Bucknall S. S. Co., D.C.Pa., 100 F.Supp. 339—The Ciano, D.C.Pa., 69 F.Supp. 35—58 C.J. p. 488 note 52 [a] (1), (2).

(2) To establish that loss or injury did not occur while goods were in carrier's custody—McNeely & Price Co. v. The Lambrook, D.C.Pa., 100 F.Supp. 345—58 C.J. p. 488 note 52 [a] (3), (4).

70. U.S.—Grammer S. S. Corporation v. James Richardson & Sons, C.C.A.N.Y., 47 F.2d 186—The Terne, D.C.N.Y., 1 F.Supp. 537.
58 C.J. p. 489 note 54.

Prima facie case

In libel to recover damages for spoilage of cargo during shipment, prima facie case was made by proof of unreasonable and unexcused delay by carrier in delivery of shipment—Wayne v. Inland Waterways Corp., D.C.Ill., 92 F.Supp. 276

71. U.S.—The Wildwood, C.C.A.Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719.
58 C.J. p. 489 note 55.

Evidence held sufficient

(1) To show no deviation.—Rudy-Patrick Seed Co. v. Kokusai Kisen Kasushiki Kaisha, C.C.A.N.Y., 85 F.2d 17—The Marianne, D.C.La., 24 F.Supp. 786.

(2) To show that deviation was justified—The Wildwood, C.C.A.Wash., 133 F.2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S. Corp., 63 S.Ct. 1436, 319 U.S. 771, 87 L.Ed. 1719—Accinanto, Limited v. Cosmopolitan Shipping Co., D.C.Md., 99 F.Supp. 261—The Rita Sister, D.C.Pa., 69 F.Supp. 480.

Damage from deviation

Evidence was held insufficient to establish that deterioration to cargo of tomatoes would have occurred even without deviation—The Hermosa, C.C.A.Cal., 57 F.2d 20

72. U.S.—Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., D.C.N.Y., 50 F.2d 199
58 C.J. p. 488 note 53.

Weight of testimony of crew

(1) In libel for cargo damage, in weighing testimony of crew, court could consider fact that crew of vessel are always reluctant to admit responsibility for a loss—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F.Supp. 520

(2) Where loss was not entered in the ship's log and first record in writing was the marine protest executed by the master ten days after the loss occurred and five days after the ship arrived at its destination, testimony of crew given under such circumstances required close scrutiny and was not necessarily to be accepted unless found to be inherently worthy of belief.—Spencer Kellogg & Sons v. Great Lakes Transit Corp., supra.

Evidence held sufficient

(1) To show that loss or damage was due to carrier's negligence—James Richardson & Sons v. Conners Marine Co., C.C.A.N.Y., 141 F.2d 226—The Fred Smartley, Jr., C.C.A.Va., 100 F.2d 971—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., D.C.N.Y., 50 F.2d 199—Imperial Sugar Co. v. Bright Star S. S. Co., D.C.Tex., 92 F.Supp. 693—The Daly No. 40, D.C.N.Y., 76 F.Supp. 700—American Agr. Chemical Co. v. O'Donnell Transp. Co., D.C.N.Y., 62 F.Supp. 239—Ætna Ins. Co. v. Florida Towing Corp., D.C.Fla., 37 F.Supp. 781.

(2) To show that loss of, or injury to, cargo was not due to carrier's negligence.

U.S.—Scarburgh v. Compania Sud-Americana De Vapores, C.A.N.Y., 174 F.2d 423—The Maui, C.C.A.Cal., 113 F.2d 1018, certiorari denied John Demartini Co. v. The Maui, 61 S.Ct. 317, 311 U.S. 709, 85 L.Ed. 461—Automobile Ins. Co. of Hartford, Conn. v. Hart-Wood Lumber Co., C.C.A.Cal., 105 F.2d 387—The James Griffiths, C.C.A.Wash., 84 F.2d 785, certiorari denied Sperry Flour Co. v. Coastwise Steamship & Barge Co., 57 S.Ct. 315, 299 U.S. 612, 81 L.Ed. 452, rehearing denied 57 S.Ct. 430, 300 U.S. 686, 81 L.Ed. 888—Krebs Pigment & Chemical Co. v. Sheridan, C.C.A.Pa., 79 F.2d 479—The Vermont, D.C.N.Y., 47 F.Supp. 877.

N.Y.—Proctor & Gamble Mfg. Co. v. Ocean S. S. Co., 267 N.Y.S. 405, 149 Misc. 701.

(3) To show that there was no improper handling of barge by tug, and that tug was free from fault with respect to speed—W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., C.A.S.C., 193 F.2d 539.

the burden of proof is on plaintiff, negligence must be established by a fair preponderance of the evidence.[73] The kind and quality of proof required to exonerate the carrier and establish that the loss or damage occurred without fault on its part depend to some extent on the nature of the cargo and the damage suffered.[74]

Loss or injury generally. General rules apply as to the weight and sufficiency of the evidence with respect to the fact of loss of, or injury to, the goods,[75] or a shortage thereof;[76] the time when,[77] and the place where,[78] the injury to the goods occurred; the extent or amount of the loss or injury;[79] the cause of the loss or injury,[80] and notice by the shipper, to the carrier, of his claim for loss or damage.[81]

Condition of goods on delivery to carrier. The good or undamaged condition of the goods at the time of their delivery to the carrier must be established by a preponderance of the evidence.[82] Con-

Evidence held insufficient

(1) To show that loss of, or damage to, cargo was due to carrier's negligence—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C C A N Y., 106 F. 2d 32—The Anaconda, C.C A N Y., 60 F 2d 898—The Tergestea, D C N Y, 54 F.2d 809—Rhodes v U. S., D C N. Y, 8 F.Supp. 124—The Gothic Star, D C N Y., 4 F Supp. 240.

(2) To show that loss or damage was not due to carrier's negligence—Accinanto, Limited v Cosmopolitan Shipping Co, D C Md, 99 F.Supp 261—The Guanancita, D C Fla., 69 F. Supp 928—Kratina v South Atlantic S. S. Co, D.C Ga, 63 F Supp. 895.

Repair

Evidence that some barrels of wine were recoopered by carrier was not evidence that carrier had been negligent with respect to cargo—The Monte Iciar, D C.Pa., 67 F Supp. 201, affirmed, C C A., 167 F.2d 334.

73. U.S—American Agr Chemical Co. v. O'Donnell Transp Co., D.C N Y, 62 F Supp. 239.

74. U S—Kasser Distillers Products Corp. v Companhia De Navegacao Carregadores Acoreanos, D.C N.Y, 76 F.Supp. 796.

Evidence held sufficient to exonerate carrier

U S.—Kasser Distillers Products Corp. v. Companhia De Navegacao Carregadores Acoreanos, supra.

Evidence held insufficient to exonerate carrier

U.S—The Africa Maru, C C A.N Y, 54 F.2d 265, certiorari denied Osaka Shosen Kaisha v. Habicht Braun & Co., 52 S Ct. 457, 285 U.S. 556, 76 L Ed. 945—Remington Rand, Inc. v. U. S, D.C N.Y., 98 F Supp. 334—Standard Brands v. Thos & Jno Brocklebank, Limited, D C.N.Y., 81 F.Supp. 670—E. S. Ullmann-Allied Co. v. The George E. Pickett, D C. N.Y., 77 F Supp. 988—The Mangalia, D C N.Y., 69 F Supp. 688—The Ciano, D.C.Pa., 69 F.Supp. 35.

75. U.S.—The M V. Silversandal, D. C.N Y., 26 F.Supp. 61, affirmed, C. C.A., Bache v. Silver Line, 110 F.2d 60.

Mere acceptance or rejection by inspector for purchaser for reasons not apparent is insufficient ground for determining existence of damage properly attributable to ship or owner—The M V. Silversandal, D C N Y., 26 F Supp 61, affirmed, C C A., Bache v Silver Line, 110 F 2d 60

Evidence held sufficient to show damage to goods

U S—Bache v. Silver Line, C C A N Y, 110 F.2d 60—The Norte, D C Pa, 69 F Supp 881, motion denied 71 F Supp. 147—The Mangalia, D C. N Y., 69 F Supp 688

76. U S.—The Rita Sister, D C.Pa, 69 F Supp 480

77. U S—The Monte Iciar, C.C A. Pa, 167 F.2d 334

78. U S—George F Pettinos, Inc, v American Export Lines, D C Pa, 68 F Supp 759, affirmed, C C A, 159 F 2d 247—George F Pettinos, Inc, v Thos. & Jno Brocklebank, Limited, D C.Pa., 65 F.Supp 102

79. U.S.—Baltic Cotton Co. v. U. S, C C.A.Ala., 55 F.2d 568.
58 C J. p 489 note 58.

Evidence held sufficient

(1) To establish amount of damage—The Guanancita, D.C Fla, 69 F. Supp. 928—The Ciano, D C Pa, 69 F Supp 35—The Raleigh, D.C Md., 50 F Supp. 961—The Nichiyo Maru, D C. Md., 14 F.Supp. 727, affirmed, C C A., 89 F.2d 539—58 C J. p 489 note 58 [a].

(2) To establish market value by which cost of replacement could be measured.—The Waalhaven, D.C.N.Y, 1 F Supp 396, affirmed, C C.A., 64 F. 2d 25, certiorari denied The Waalhaven v. Potash Importing Corporation of America, 53 S.Ct. 696, 289 U.S. 752, 77 L.Ed. 1497

(3) To establish proper calculation of damage.—The Nichiyo Maru, D.C. Md., 14 F.Supp. 727, affirmed, C.C A., 89 F.2d 539.

Evidence held insufficient to establish amount of damage

U.S—Stirnimann v The San Diego, C C.A.N.Y., 148 F.2d 141.
58 C.J. p 489 note 58 [b], [c].

80. U.S.—The Georgian, D C.Fla., 4 F.Supp. 718, affirmed, C C.A., 76 F. 2d 550.

Doubt as to cause of damage should be resolved against carrier—Sparks Milling Co. v. U. S., D.C La., 5 F Supp 567—The Carnia, D C N.Y., 2 F Supp 929

Evidence held sufficient to show damage by sea water

U S—Wessels v The Asturias, C C.A. N Y, 126 F 2d 999—Alliance Tobacco Co. v. U S, C.C.A.N Y, 85 F 2d 86—The Dondo, D C N.Y., 287 F 239.

Fla—Bull S. S. Line v Graybar Electric Co., 3 So 2d 122, 147 Fla. 516

Evidence held insufficient

(1) To show what caused damage—The Guanancita, D.C.Fla., 69 F Supp. 928.

(2) To show damage by sea water—U. S. v Cia. Luz Stearica, C.A. Wash, 186 F 2d 594.

(3) To show damage was caused by latent defect.—The Lassell, D.C N.Y, 53 F 2d 687—Kratina v South Atlantic S S. Co, D.C.Ga., 63 F Supp 895.

(4) To show part of damage was not caused by carrier's fault—Sanib Corp. v United Fruit Co, D.C N Y., 74 F Supp. 64.

81. U S—The J. L. Luckenbach, C. C.A N Y., 65 F 2d 570.
58 C J. p 489 note 57.

Evidence held sufficient to show proper notice

U.S—The J L. Luckenbach, supra
58 C J. p 489 note 57 [a].

Evidence held insufficient to show proper notice

U S—The Mar Mediterraneo, D C.La., 13 F.Supp. 860.
58 C J. p 489 note 57 [b].

82. U S.—The Chester Valley, D C La, 28 F Supp 290, affirmed, C.C A., 110 F.2d 592—New England Newspaper Pub. Co v. U S, D C.Mass., 18 F Supp 674.
58 C.J. p 488 note 50.

Evidence held sufficient

(1) To establish that goods were in good condition when delivered to carrier.

U.S—U. S v. Apex Fish Co, C.A. Wash, 177 F.2d 364—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C C A.N. Y., 106 F.2d 32—Warner Barnes & Co. v Kokosai Kisen Kabushiki Kaisha, C.C.A N Y, 102 F 2d 450, modified on other grounds 103 F 2d 430—General Foods Corp. v. The

vincing evidence is required to overcome the presumption arising from a clean bill of lading that the goods were in apparent good order and showed no surface evidence of damage.[83] The good internal order of the goods at the time of their delivery to the carrier need not be established by direct affirmative evidence,[84] but may be established by proof of facts and circumstances from which it can be inferred that the damage did not exist when the goods came into the possession of the carrier.[85] The condition of the goods at outturn, that is, on their discharge, may be evidence of their good condition when delivered to the carrier,[86] as where a substantial proportion of the goods are in good condition at outturn.[87] The good internal order of the goods may also be established by proof by the bill of lading that they were in apparent good order when delivered to the carrier and that the cause of the damage was external, not internal.[88]

Care of cargo, loading, stowage, and discharge. General rules apply in actions for the loss of, or injury to, cargo with respect to the weight and sufficiency of the evidence as to the proper care and handling of the cargo,[89] the weight and sufficien-

Troubador, D C N Y., 98 F Supp 207—Petition of Republic of U S of Brazil, D C.N.Y, 91 F Supp. 961—E S. Ullmann-Allied Co v The George E Pickett, D C N Y., 77 F Supp 988—The Mangalia, D C N Y., 69 F.Supp. 688—The Ponce, D.C N J, 67 F Supp 725, affirmed, C C A, Pompeian Olive Oil Corp. v. The Ponce, 160 F 2d 107—Stirnimann v The San Diego, D C.N Y, 55 F Supp. 798, affirmed, C C A., 148 F. 2d 141.

La.—Taormina Corporation v Luckenbach Gulf S S Co., App., 6 So 2d 235.

58 C.J. p 488 note 50 [a].

(2) To establish that goods were inherently defective or were damaged at time of their delivery to carrier—Bingham v. Osaka Shosen Kaisha, D C N Y, 12 F.Supp 35, affirmed, C C A, 88 F 2d 1004—Rhodes v. U. S., D.C N.Y., 8 F Supp 124—The Georgian, D C Fla, 4 F.Supp. 718, affirmed, C.C A., 76 F.2d 550.

(3) To show that damage was due to defects inherent in the goods—S. L. Shepard & Co. v. Agwilines, Inc, C C A S C, 130 F.2d 67—Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha, C C A.N.Y, 106 F 2d 32—The Heranger, C C.A. Cal, 101 F 2d 953—Albers Bros Milling Co v. Hauptman, C C A.Cal., 95 F 2d 286—The Nagisan Maru, D C. N Y, 14 F Supp. 1010—J. Lichtman & Sons v. Dollar S S Line, D C N Y., 13 F Supp 717, affirmed, C C A, 91 F. 2d 1015—The Georgian, D C Fla, 4 F.Supp. 718, affirmed, C C A., 76 F.2d 550.

(4) To show that damage was not due to vice inherent in the goods—The Africa Maru, C C A.N.Y., 54 F 2d 265, certiorari denied Osaka Shosen Kaisha v. Habicht Braun & Co., 52 S Ct. 457, 285 U S. 556, 76 L Ed 945—E S Ullmann-Allied Co. v The George E Pickett, D C N Y., 77 F Supp. 988.

(5) To show that damage was due to insufficiency of the packing.—Scarburgh v. Compania Sud-Americana De Vapores, C.A N Y, 174 F.2d 423—The Rita Sister, D C Pa, 69 F Supp. 480—The Ponce, D.C N.J., 67 F Supp 725, affirmed, C C A, Pompeian Olive Oil Corp v The Ponce, 160 F 2d 107—The Mar Mediterraneo, D C.La, 13 F Supp 860

Evidence held insufficient

(1) To show that goods were in good or undamaged condition when delivered to carrier—The Niel Maersk, C C A N Y, 91 F 2d 932, certiorari denied Bradley v. The Niel Maersk, 58 S Ct 281, 302 U S. 753, 82 L Ed. 582—McNeely & Price Co v The Exchequer, D C.Pa., 100 F.Supp 343.

(2) To establish that goods were damaged or defective at time of delivery to carrier.—The Ciano, D C Pa., 69 F.Supp. 35

(3) To show that damage was caused by defects inherent in the goods—George F Pettinos, Inc, v Thos & Jno Brocklebank, Limited, D C Pa, 65 F Supp 102

(4) To establish sufficiency of packing—Kasser Distillers Products Corp v Companhia De Navegacao Carregadores Acoreanos, D C.N Y, 76 F Supp. 796.

83. U S—John R Evans & Co v The Express, D.C Pa., 100 F Supp 347

Presumption of good condition arising from clean bill of lading see supra § 154 c (3)

Evidence held insufficient to overcome presumption

U S—Stirnimann v. The San Diego, C C A N.Y., 148 F.2d 141

84. U S—The Ponce, D C N.J, 67 F Supp 725, affirmed, C C A, Pompeian Olive Oil Corp. v. The Ponce, 160 F.2d 107.

85. U S—McNeely & Price Co. v. The Exchequer, D.C.Pa, 100 F. Supp 343

86. U S—Warner Barnes & Co v Kokosai Kisen Kabushiki Kaisha, C C A N Y., 102 F.2d 450, modified on other grounds 103 F 2d 430—The Matilde Peirce, C C.A N Y, 32 F 2d 688—McNeely & Price Co. v The Exchequer, D C.Pa, 100 F Supp. 343.

87. U.S—Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha, C C A N Y., 106 F 2d 32—General Foods Corp v. The Troubador, D C N Y., 98 F Supp 207—Petition of Republic of U. S. of Brazil, D C N.Y, 91 F Supp. 961.

88. U.S—The Ciano, D C Pa, 69 F. Supp. 35—George F Pettinos, Inc. v Thos & Jno Brocklebank, Limited, 65 F Supp 102

89. U S—General Foods Corp. v. The Troubador, D.C N Y., 98 F. Supp 207

58 C J p 491 note 71.

Evidence held sufficient

(1) To establish due care by carrier—Eppens, Smith Co v. Silver Line, C C A La, 128 F 2d 882—George F Pettinos, Inc, v American Export Lines, D C Pa, 68 F Supp 759, affirmed, C C A., 159 F 2d 247

(2) To establish lack of due care by carrier

U S—The Indien, C C A Cal, 71 F.2d 752—The Cherca, D C N Y, 52 F 2d 644, reversed on other grounds, C C.A., 55 F.2d 926—General Foods Corp v. The Troubador, D C N Y, 98 F Supp 207—The Norte, D C Pa., 69 F Supp 881, motion denied 71 F. Supp 147—The Bill, D C Md, 47 F. Supp. 969, affirmed, C C A., Lorentzen v. Brazil Oiticica, Inc., 145 F 2d 470.

La—Taormina Corporation v. Luckenbach Gulf S. S. Co, App, 6 So. 2d 235.

Minn—Cargill Grain Co v. Cleveland-Cliffs S. S Co, 235 N W. 268, 182 Minn. 516, certiorari denied 52 S.Ct 25, 284 U S 646, 76 L Ed 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S S. Co, 237 N.W. 197, 183 Minn. 620.

58 C J p 491 note 71 [a].

Evidence held insufficient

(1) To establish due care by carrier.—McNeely & Price Co. v Ellerman & Bucknall S. S Co., D.C.Pa., 100 F Supp. 339—General Foods Corp. v. The Troubador, D C N Y, 98 F. Supp 207—The Rio Novo, D.C.N Y, 62 F.Supp 32—58 C.J p 492 note 71 [b]

(2) To establish lack of due care by carrier—Eppens, Smith Co. v Silver Line, C.C A.La, 128 F 2d 882—

cy of evidence as to the loading[90] and the stowing[91] of cargo, to the providing of proper ventilation[92] or refrigeration[93] for cargo, and to the discharging of cargo[94] and caring for it after it

Thomas Roberts & Co. v Calmar S S Corp, D C Pa, 59 F Supp 203

90. U S —The Zulia, D C N.Y, 235 F. 433.
58 C.J. p 491 note 68

Presumption of improper loading

A strong presumption that improper loading caused capsizing of vessel which resulted from elimination of unseaworthiness as a possible cause was sufficient to overcome opinion of expert witness that it was physically impossible for the vessel to have capsized as result of the manner in which she was loaded —The S. C L No. 9, C C A.Pa., 114 F.2d 964.

Plimsoll mark

In determining whether seaworthiness of vessel was impaired by overloading, Plimsoll mark placed on ship after mathematical determination of safe loading point should be regarded as very strong evidence of ship's capacity, and efficacy of Plimsoll mark should not be destroyed except on clear and convincing proof that it is erroneously placed or that specific facts warrant finding that loading vessel so as to submerge Plimsoll mark did not render vessel unseaworthy —The Indien, D C Cal, 5 F Supp. 349, affirmed, C.C A, 71 F 2d 752.

Evidence held sufficient

(1) To establish negligence in loading cargo —Connecticut Fire Ins Co v. Lake Transfer Corporation, C C A N.Y, 74 F 2d 258—58 C.J. p 491 note 68 [a].

(2) To establish that vessel was overloaded —The Indien, D.C Cal, 5 F Supp. 349, affirmed, C C A., 71 F 2d 752.

(3) To establish that capsizing of vessel was caused by improper loading.—The S. C L. No. 9, D C Pa., 37 F Supp 386, affirmed, C.C A, 114 F.2d 964—58 C J. p 491 note 68 [a] (3), (4).

Evidence held insufficient to show overloading

U S —Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha, C C A N Y, 106 F 2d 32

91. U.S.—Isthmian S S Co. v. Martin, C A Md, 170 F 2d 25.
58 C J. p 491 note 69

Conformity to standard

A ship was not liable for damage to cargo of rubber, where evidence warranted finding that ship conformed to prevailing standard with respect to manner of stowage, and there was no showing that standard was unreasonable and standard was not so unreasonable that it would be unfair to charge shipper with notice thereof —Bache v Silver Line, C.C.A N.Y., 110 F.2d 60.

Proportion of damage to entire shipment may be considered on question whether there was negligence in stowing cargo.—Cafiero & Mencacci v Navigazione Libera Triestina, S A, D C N Y, 50 F 2d 199

Goods received in good condition

Where the goods have been received by the carrier in good condition and delivered in bad condition, the carrier must satisfactorily show that the goods were properly stowed, proof of proper stowage cannot be supplied by speculation and doubts should be resolved in favor of the shipper.—Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., supra

Evidence held sufficient

(1) To establish that loss of, or damage to, cargo resulted from improper stowage.—Isthmian S. S Co. v. Martin, C A.Md, 170 F 2d 25—The Florida, C.C A.Md, 61 F 2d 55—Katzenberg v Lamport & Holt, D C N.Y., 59 F 2d 739, affirmed, C C A, 64 F 2d 1014—U. S Industrial Alcohol Co v. Calmar S. S Corporation, D C N.Y., 53 F 2d 1023, reversed on other grounds, C C A, 57 F 2d 182, certiorari denied 53 S Ct 21, 287 U S. 622, 77 L Ed 540 —Cafiero & Mencacci v. Navigazione Libera Triestina, S A., D C N Y, 50 F 2d 199—Firestone Plantations Co v. Pan Atlantic S. S Corp, D C N Y., 77 F Supp 401—The Norte, D.C Pa., 69 F Supp 881, motion denied 71 F Supp. 147—The Mangalia, D C N.Y., 69 F.Supp. 688—The Rita Sister, D C Pa, 69 F Supp. 480—U. S. Smelting, Refining & Mining Co. v. Waterman S S. Corp, D C La., 62 F Supp 511—The Schickshinny, D C Ga, 45 F Supp. 813—The J L Luckenbach, D C N Y, 1 F Supp 692, affirmed, C C A, 65 F 2d 570—58 C J p 491 note 69 [a] (1)

(2) To establish proper stowage.—Kasser Distillers Products Corp v Companhia De Navegacao Carregadores Acoreanos, D C N Y, 76 F Supp. 796—The Brenta II, D C N.Y, 5 F Supp 682, affirmed, C C A, Dingfelder v. The Brenta II, 68 F.2d 999, certiorari denied Boera v The Brenta II, 55 S Ct. 91, 293 U S 579, 79 L Ed. 675, rehearing denied 55 S.Ct. 659, 294 U S 733, 79 L Ed 1262—The Tymeric, D C.N.Y., 3 F.Supp. 773—58 C J p 491 note 69 [a] (2), (3), (7).

Evidence held insufficient

(1) To establish improper stowage —Globe Solvents Co v The California, C C A Pa, 167 F 2d 859, certiorari denied 69 S Ct 67, 335 U.S 844, 93 L Ed 394—The Chester Valley, C C A La., 110 F 2d 592—Spang Chalfant & Co. v. Dimon S. S. Corporation, C.C A.N Y., 57 F 2d 965—The Mangalia, D C.N.Y., 69 F Supp. 688—George F. Pettinos, Inc, v American Export Lines, D C Pa, 68 F Supp. 759, affirmed, C C A, 159 F.2d 247—The Ponce, D C N.J, 67 F Supp. 725, affirmed, C C A, Pompeian Olive Oil Corp v. The Ponce, 160 F.2d 107—Eppens, Smith Co v. Silver Line, D C La., 37 F Supp 684, affirmed, C.C A, 128 F 2d 882—The Terne, D.C N Y, 1 F Supp 537
58 C J p 491 note 69 [b].

(2) To show agreement between parties that libelant's cargoes should not be carried above main deck.—The Velma Lykes, D C.Tex., 6 F.Supp. 886

92. U S —The Nichiyo Maru, D.C Md., 14 F Supp 727, affirmed, C.C. A, 89 F 2d 539
58 C J. p 491 notes 70, 71 [c].

Alteration of entries in ship's log with respect to ventilation of ship during voyage did more than merely discredit document itself as evidence but constituted positive and weighty evidence that damage to cargo was result of improper ventilation —Warner Barnes & Co. v Kokosai Kisen Kabushiki Kaisha, C C.A.N Y, 102 F. 2d 450, modified on other grounds 103 F 2d 430.

Evidence held sufficient to establish damage from improper ventilation

U S —Warner Barnes & Co v. Kokosai Kisen Kabushiki Kaisha, supra—General Foods Corp v The Troubador, D.C N Y., 98 F Supp 207 —The Norte, D C Pa, 69 F Supp 881, motion denied 71 F Supp. 147 —The Mangalia, D C N Y., 69 F Supp 688—The Rita Sister, D C Pa., 69 F Supp. 480—The Nichiyo Maru, D C Md, 14 F Supp. 727, affirmed, C C.A., 89 F 2d 539.

Minn —Cargill Grain Co. v Cleveland-Cliffs S S Co, 235 N W. 268, 182 Minn. 516, certiorari denied 52 S Ct. 25, 284 U.S 646, 76 L Ed. 549, followed in Cargill Grain Co. v. Cleveland-Cliffs S S Co., 237 N.W. 197, 183 Minn. 620
58 C J. p 491 note 70 [a].

Evidence held insufficient to establish damage from improper ventilation

U S.—Eppens, Smith Co. v. Silver Line, D C.La., 37 F Supp. 684, affirmed, C.C A, 128 F.2d 882—The Brenta II, D C.N.Y, 5 F Supp. 682, affirmed, C C.A, Dingfelder v. The Brenta II, 68 F.2d 999, certiorari denied Boera v The Brenta II, 55 S Ct. 91, 293 U.S. 579, 79 L Ed. 675, rehearing denied 55 S Ct. 659, 294 U S 733, 79 L Ed 1262.
58 C.J. p 491 note 70 [b].

93. U S.—Cox v. Farley, D C N Y., 34 F Supp. 446—The Georgian, D C Fla, 4 F Supp 718, affirmed, C C A., 76 F.2d 550.

94. U S.—The Bellingham, C C.A N J, 57 F.2d 1015, affirmed in part,

has been discharged.[95] It has been held that, where libelant proves negligent stowage and damage, it is sufficient if he shows that such negligence might have caused the damage.[96] The fact that part of the cargo was undamaged does not prove that the damage to the remainder was not due to improper stowage and lack of proper ventilation.[97]

Excepted peril or cause. In order to establish the defense that the loss or damage was due to an excepted peril or cause, the carrier must affirmatively show that fact by clear evidence,[98] and the burden is not sustained by evidence which leaves the matter in doubt[99] whether such doubt exists as to the nature of the injurious occurrence[1] or as to the sufficiency of the cause assigned.[2] Under a bill of lading exempting the carrier from liability for unavoidable dangers, it is not sufficient for the carrier to show merely that the vessel was stranded, but it must be shown that she was stranded by an unavoidable danger;[3] but in an action for a loss, by the perils of navigation within the exceptions of the bill of lading, it is sufficient for defendant to prove that fact generally, and he is not obliged to show affirmatively the particular and identical cause of loss.[4]

Proof that the vessel encountered rough weather is insufficient to establish that the loss or damage was caused by a peril of the sea[5] where the weather was normal for that time of year[6] or might reasonably have been anticipated and could have been withstood by a seaworthy vessel.[7] Mere proof of damage to the cargo by sea water is insufficient to show that the damage arose from an excepted peril.[8] In particular cases, the evidence has been held sufficient to establish that the loss or damage was due to an excepted peril or cause,[9] such as a peril of the sea,[10] or a fault or error in navigation or in the management of the vessel,[11] or the evi-

CCA, A. C Monk & Co. v. U S, 57 F 2d 1018

58 C J. p 492 note 72.

95. U.S—Home Ins Co v Philadelphia Piers, D C Pa, 100 F Supp. 348

58 C J. p 492 note 73.

96. U S—Bingham v. Osaka Shosen Kaisha, D C N Y, 12 F Supp. 35, affirmed, C C A, 88 F 2d 1004.

97. U S.—The Nichiyo Maru, C C A Md, 89 F 2d 539.

98. U.S.—The Poznan, D C N.Y., 276 F. 418.

58 C.J. p 484 note 87, p 489 notes 56, 61.

99. U.S.—Commercial Molasses Corp v. New York Tank Barge Corp., N.Y., 62 S Ct 156, 314 U S. 104, 86 L.Ed. 89—Waterman S. S Corp. v U. S. Smelting, Refining & Min Co., C C A.La., 155 F 2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L Ed. 656—The W C Franz, D.C N Y., 2 F Supp. 497, affirmed, C C.A, Hallet Carey Swart, Ltd. v. The Franz, 67 F.2d 995.

58 C J. p 484 note 88

1. U S—The W C. Franz, D.C N.Y, 2 F Supp 497, affirmed, C C.A., Hallet Carey Swart, Ltd., v. The Franz, 67 F 2d 995.

58 C J. p 484 note 89.

2. U.S.—The W. C. Franz, D.C N Y., 2 F.Supp 497, affirmed, C C A, Hallet Carey Swart, Ltd v. The W. C Franz, 67 F 2d 995

58 C J. p 484 note 90.

3. U.S—The Keokuk, D C.Wis., 14 F Cas.No.7,721, 1 Biss 522.

4. Mo.—Hill v Sturgeon, 35 Mo 212, 86 Am.D. 149

5. U.S.—The Lassell, D.C.N.Y, 53 F 2d 687.

6. U.S.—Sturnimann v. The San Diego, D C N Y, 55 F Supp 798, affirmed, C C A, 148 F 2d 141.

Absence of other injury

In suit by shipper against carrier for loss of deck cargo, testimony of ship's master that a severe roll and a short jerk on the next wave occasioned the release of the cargo from its lashings was insufficient to establish loss from a "peril of the sea," in view of further testimony that accompanying weather was not unusual for that vicinity and time of year, and that the roll caused no other injury on ship or any injury to any other ship in the vicinity.—Waterman S. S Corp v. U S Smelting, Refining & Min. Co, C.C.A La, 155 F. 2d 687, certiorari denied 67 S Ct 115, 329 U S 761, 91 L.Ed. 656

7. U.S.—Artemis Maritime Co v. Southwestern Sugar & Molasses Co, C A Va., 189 F 2d 488

8. U.S.—The Asturias, D C N.Y., 40 F Supp 168, affirmed, C C A, Wessels v. The Asturias, 126 F.2d 999

9. U.S—Eppens, Smith Co. v. Silver Line, C.C.A.La., 128 F 2d 882—The Josephine, C.C A.Pa., 49 F.2d 207.

58 C.J. p 484 note 87 [a], p 489 note 61 [a].

Strike

U.S—The Maui, C C A.Cal., 113 F.2d 1018, certiorari denied John Demartini Co. v The Maui, 61 S.Ct 317, 311 U.S. 709, 85 L Ed 461.

Sweat

U S.—Cohen v. Holland-America Line, D C N Y, 6 F Supp 247—The Tymeric, D C.N.Y, 3 F Supp 773.

10. U S—Edmond Weil, Inc. v. American West African Line, C.C. A N Y, 147 F 2d 363—Balfour, Guthrie & Co v. American-West African Line, C C.A.N Y, 136 F.2d 320, certiorari denied 64 S.Ct. 437, 320 U S. 804, 88 L Ed 486—The Wildwood, C C A.Wash, 133 F 2d 765, certiorari denied Amtorg Trading Corp. v. American Foreign S. S Corp, 63 S Ct. 1436, 319 U.S 771, 87 L Ed. 1719—Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha, C C.A N Y, 106 F 2d 32—Automobile Ins. Co. of Hartford, Conn., v. Hart-Wood Lumber Co, C C A Cal, 105 F 2d 337—The Cherca, D C N Y, 52 F 2d 646, affirmed, C.C.A, Dingfelder v. The Cherca, 61 F.2d 1025—Pillsbury Flour Mills Co v. Becker S. S. Co, D C N.Y., 49 F.2d 648—The Josephine, C.C A Pa, 49 F 2d 207—Charles Dreifus Co. v. Diamond P. Transp. Co, D.C Pa., 7 F.Supp 363—The Velma Lykes, D C.Tex, 6 F. Supp. 886—The Brenta II, D C N. Y., 5 F Supp. 682, affirmed, C C.A, Dingfelder v. The Brenta II, 68 F. 2d 999, certiorari denied Boera v. The Brenta II, 55 S Ct 91, 293 U S. 579, 79 L Ed 675, rehearing denied 55 S Ct. 659, 294 U S. 733, 79 L Ed. 1262—Sparks Milling Co. v. U. S, D.C La, 5 F Supp. 567.

Wash—National Grocery Co v Olsen, 108 P 2d 320, 6 Wash 2d 491.

58 C J p 489 notes 56 [a], 61 [a] (1), p 484 note 87 [a]

11. U S—The Temple Bar, C C.A. Md., 137 F.2d 293—The Point Chico, C.C A.Tex., 122 F 2d 1—The West Arrow, C C A N.Y., 80 F 2d 853—The J. L. Luckenbach, C C.A. N.Y, 65 F 2d 570—The Oritani, D. C.Pa., 40 F 2d 522, affirmed Atlantic Fruit Co v. The Oritani, 54 F. 2d 1075—Rooks v Elliott & Watrous, D.C.R.I, 65 F.Supp. 325—The Havana, D.C.N.Y., 45 F.Supp. 244—The Iristo, D.C.N.Y., 42 F.Supp. 29, affirmed, C.C A, Middleton & Co. (Canada) Limited v. Ocean Domin-

dence has been held insufficient to show that the loss or damage was due to an excepted peril or cause,[12] such as a peril of the sea,[13] or a fault or error in navigation or in the management of the vessel.[14]

Fire. In particular actions for loss of, or injury to, cargo by fire, under statutes exempting the carrier from liability for such loss or damage unless occasioned by the carrier's design or neglect, the evidence has been held sufficient[15] or insufficient[16] to establish that the fire was caused by the carrier's design or neglect. Liability under the statute is not established by proof which leaves the cause of the fire in doubt, or which is evenly balanced.[17] Clear proof is required to establish the shipowner's relinquishment of his exemption from liability for loss or damage caused by fire.[18]

Seaworthiness. General rules as to the weight and sufficiency of evidence apply as to the seaworthiness of the vessel.[19] The party having the

ion S. S Corp, 137 F 2d 619, certiorari denied 64 S Ct 432, 320 U S 802, 88 L Ed 484—The Aakre, D C N.Y, 31 F Supp. 8, affirmed, C.C A, 122 F 2d 469.
58 C J. p 488 note 53.

12. U S—U. S v Los Angeles Soap Co, C C A Cal, 83 F 2d 875—The Lassel, D C N.Y., 53 F 2d 687—Orient Ins Co v Flota Mercante del Estado, D C La, 102 F Supp 729.
58 C J. p 484 note 88 [a], p 489 note 61 [b]

Sweat

U.S—Alliance Tobacco Co. v U S, D C N Y, 12 F Supp 661, affirmed, C C.A., 85 F 2d 86

13. U S—Waterman S S Corp. v U. S Smelting, Refining & Min Co, C C.A La, 155 F 2d 687, certiorari denied 67 S Ct. 115, 329 U S. 761, 91 L Ed 656—Hullever, S A Division Hulleries Du Congo Belge v The Otho, C C A N Y, 139 F 2d 748, certiorari denied 64 S.Ct. 1047, 322 U. S 735, 88 L Ed 1569—Ore Steamship Corp v. D/S A/S Hassel, C C. A N Y, 137 F.2d 326—The Plow City, C C A Pa, 122 F 2d 816, certiorari denied Plow City S. S. Co. v. Texas Gulf Sulphur Co, 62 S. Ct. 579, 315 U.S. 798, 86 L.Ed 1199—The Mauretania, C C.A.N.Y, 84 F.2d 408—Norris Grain Co. v. Great Lakes Transit Corporation, C.C.A. Ill., 70 F.2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co., 55 S Ct. 75, 293 U S. 565, 79 L Ed. 664—The Vestris, D.C.N.Y, 60 F 2d 273—U S. Industrial Alcohol Co v. Calmar S. S. Corporation, D C.N.Y., 53 F 2d 1023, certiorari denied 53 S Ct 21, 287 U S. 622, 77 L Ed. 540—J. C Penney Co v American Exp. Co, D C N Y, 102 F Supp 742—U. S Smelting, Refining & Mining Co. v Waterman S. S Corp., D C La., 62 F.Supp. 511—The Asturias, D.C N Y, 40 F. Supp 168, affirmed, C.C A, Wessels v. The Asturias, 126 F.2d 999.
58 C.J. p 489 notes 56 [b], 61 [b] (1).

14. U.S—U. S v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—The W. C. Franz, D.C.N Y., 2 F.Supp. 497, affirmed, C C.A., Hallet Carey Swart, Ltd., v. The Franz, 67 F.2d 995—The Terne, D.C N Y., 1 F.Supp 537.
58 C J p 488 notes 53, p 489 note 61 [b] (2).

15. U S—Great Atlantic & Pacific Tea Co v Lloyd Brasileiro, C C A. N Y, 159 F 2d 661, certiorari denied Republic of the U. S. of Brazil v. Great Atlantic & Pacific Tea Co, 67 S.Ct 1519, 331 U S 836, 91 L.Ed 1849—Accinanto, Limited v. Cosmopolitan Shipping Co, D C Md, 99 F Supp. 261—The Venice Maru, D C N Y, 39 F Supp 349, affirmed, C. C A., Consumers Import Co. v Kawasaki Kisen Kabushiki Kaisha, 133 F 2d 781, affirmed 64 S Ct 15, 320 U S 249, 88 L Ed. 30—The Sandgate Castle, D.C N Y., 30 F. Supp 344—The Doris Kellogg, D C. N Y, 18 F Supp 159, affirmed, C C. A, In re Kellogg S S. Corp., 94 F. 2d 1015

Combustion or heat without fire

(1) Evidence established that there was combustion without "fire" so that carrier was not excused from liability under statutory provision that no owner of any vessel shall be liable for loss or damage caused by any "fire" unless "fire" is caused by design or neglect of owner—Cargo Carriers v. Brown S S. Co, D.C N Y, 95 F.Supp. 288

(2) Evidence required finding that damage was caused by "heat" and not by "fire" within the statute exempting owner of vessel from liability for fire unless caused by design or neglect—The Buckeye State, D C N. Y, 39 F Supp. 344

Cause of explosion

Burden to show cause of explosion was met if conditions and circumstances were shown from which inference could reasonably be drawn that explosion was produced as claimed.—The Doris Kellogg, D C N. Y., 18 F Supp. 159, affirmed, C C A, In re Kellogg S. S. Corp, 94 F 2d 1015.

16. U S—American Tobacco Co. v The Katingo Hadjipatera, C.A N. Y., 194 F.2d 449, certiorari denied 72 S.Ct 1076, 343 U.S 978, 96 L Ed —— —Globe & Rutgers Fire Ins Co. v. U. S, C C A N Y., 105 F.2d 160, certiorari denied 60 S Ct 175, 308 U.S. 611, 84 L Ed. 511—The Salvore, C C A N Y, 60 F 2d 683, certiorari denied U S Steel Products Co. v Navigazione Libera Triestina Societa Anonima, 53 S. Ct 117, 287 U S 653, 77 L Ed 565—The Galileo, C C A N Y., 54 F 2d 913, affirmed 53 S Ct. 200, 287 U S. 420, 77 L Ed 403—Fidelity-Phenix Fire Ins Co. of N Y. v Flota Mercante Del Estado, D C La, 102 F. Supp 861—The Venice Maru, D C N Y, 39 F.Supp 349, affirmed, C.C A., 64 S Ct. 15, 320 U.S 249, 88 L Ed. 30—Consumers Import Co v. Kawasaki Kisen Kabushiki Kaisha, 133 F 2d 781, affirmed 64 S.Ct 15. 320 U S 249, 88 L Ed 30—The Cabo Hatteras, D C N Y, 5 F Supp. 725—The Brenta II, D C N.Y., 5 F Supp 682, affirmed, C.C A, Dingfelder v. The Brenta II, 68 F.2d 999, certiorari denied Boera v The Brenta II, 55 S Ct 91, 293 U S 579, 79 L Ed. 675, rehearing denied 55 S Ct. 659, 294 U S. 733, 79 L Ed 1262.

Spontaneous combustion

In libel for damage to cargo as result of fire, evidence was insufficient to establish that fire originated through spontaneous combustion of coal carried in bunker of vessel—Fidelity-Phenix Fire Ins. Co of N. Y v. Flota Mercante Del Estado, D C La, 102 F Supp. 861

17. U S.—Hoskyn & Co. v. Silver Line, Limited, C C A N Y, 143 F. 2d 462, certiorari denied 65 S Ct. 116, three cases, 323 U S 767, 89 L Ed. 613.

18. U.S—The Ida, C C A.N.Y., 75 F 2d 278

19. U.S—Commercial Molasses Corp v New York Tank Barge Corp, N.Y, 62 S Ct. 156, 314 U S 104, 86 L Ed 89—The S. C L. No. 9, D C.Pa., 37 F.Supp. 386, affirmed, C C A., 114 F.2d 964.
58 C.J. p 490 note 62.

Time vessel became unseaworthy

Where lighter was in good condition up to late afternoon of day on which it sank and caused damage to cargo during all of which time it was in the possession of private contract carriers and where lighter sank as soon as a substantial part of the cargo was placed aboard her, evidence in libel for damage to cargo, established that the lighter became unsea-

burden of proof on the issue of seaworthiness must prove it by a preponderance of the evidence[20] and must do more than create a doubt which the trier of facts is unable to resolve[21] Where the burden of proof is on the carrier, doubts as to the seaworthiness of the vessel are to be resolved against it,[22] and proof of seaworthiness cannot be supplied by speculation,[23] or by inference or presumption[24] Proof that the goods were lost or damaged while in the possession of a carrier by water establishes a prima facie case of breach of the carrier's warranty that the vessel was seaworthy.[25] Unfitness developing in a vessel shortly after she breaks ground is sufficient evidence of unseaworthiness,[26] and evidence that a vessel carrying an unusually large cargo of particular goods began leaking during the voyage without encountering any unusual seas leads to the conclusion that the vessel was unseaworthy for the transportation of that cargo before the voyage commenced.[27]

The fact that a vessel successfully made numerous trips before and after capsizing tends to overcome the presumption of unseaworthiness arising from the capsizing,[28] but it has been held that, while evidence of previous good condition of a vessel sinking without apparent reason is of some probative value, it will not alone rebut a presumption of unseaworthiness.[29] Where cargo is damaged by the stranding of a vessel, proof that the vessel had stranded on prior occasions is not evidence of unseaworthiness in the absence of evidence as to the cause of the prior strandings.[30] The fact that extensive repairs are made to a vessel after a voyage does not warrant an inference that damage to cargo on such voyage was due to unseaworthiness, where the repairs were not made to correct defects which could have caused the damage.[31]

Where all the direct evidence is to the effect that the vessel was seaworthy when she entered on her voyage, the fact that a short time before she had met with accidents, in one of which she was slightly injured, does not give rise to an inference that her seaworthiness was thereby impaired, where there is no affirmative evidence that she was in fact injured thereby in her hull or machinery.[32] Certificates of seaworthiness or the fact that a boat passed official and other inspections is not conclusive of the fact of seaworthiness,[33] and such certificates are to be valued in the light of what the actual facts disclose.[34]

The burden of proving seaworthiness is sustained prima facie by general proof of seaworthiness and that there was no leak until after stress of very severe weather,[35] particularly where for a considerable time the vessel successfully combated such peril.[36] Where the vessel was unseaworthy, liability for damages caused by its sinking cannot be escaped, without the clearest showing that the disaster was bound to have happened, despite the unseaworthiness.[37] In particular cases, the evidence has been held sufficient to establish that the vessel was seaworthy or insufficient to establish that it was unseaworthy[38] with respect to charts and other

worthy while in the hands of the carriers.—Ætna Ins Co. v. Florida Towing Corp, D C.Fla, 37 F Supp. 781.

20. U.S —Commercial Molasses Corp v. New York Tank Barge Corp, N.Y, 62 S.Ct 156, 314 U S. 104, 86 L Ed. 89
58 C J. p 481 note 45
Burden of proof as to seaworthiness see supra § 154 f.

21. U S —Commercial Molasses Corp v. New York Tank Barge Corp, supra—The Indien, C.C.A. Cal, 71 F 2d 752

22. U.S —Cafiero & Mencacci v. Navigazione Libera Triestina S A, D C N Y, 50 F 2d 199—The Heddernheim, D.C N Y, 39 F Supp. 558—The Georgian, D C Fla, 4 F.Supp. 718, affirmed, C.C.A, 76 F 2d 550.
58 C J. p 482 note 47

23. U S —Cafiero & Mencacci v Navigazione Libera Triestina, S A, D. C N.Y., 50 F.2d 199

24. U.S —S. C Loveland Co, Inc v. Bethlehem Steel Co., C C A Pa, 33 F.2d 655—Bradley v. Lehigh Valley R. Co., N.Y., 153 F. 350, 82 C C. A. 426

25. U S —Franklin Fire Ins Co. v. Royal Mail Steam Packet Co, C C. A N Y, 58 F 2d 175, certiorari denied Royal Mail Steam Packet Co v. Franklin Fire Ins Co, 53 S Ct. 82, 287 U S. 630, 77 L Ed. 546

26. U.S —Metropolitan Coal Co. v. Howard, C C.A.N Y., 155 F 2d 780

27. U S.—Grace v. Panama R Co, C. C.A N Y, 285 F. 718.

28. U S —The S. C L No. 9, D C. Pa., 37 F Supp. 386, affirmed, C.C. A, 114 F.2d 964
Presumption of unseaworthiness arising from capsizing of vessel see supra § 154 f.

29. U S —S C Loveland Co. v. Bethlehem Steel Co, C C.A Pa., 33 F.2d 655.

30. U S.—The Aakre, C C.A.N Y., 122 F 2d 469, certiorari denied Waterman v. The Aakre, 62 S Ct 360, 314 U S. 690, 86 L Ed 552

31. U S —The Goyaz, C C.A.N Y, 3 F 2d 553, certiorari denied 45 S.Ct. 230, 267 U S 594, 69 L Ed. 804.

32. U S —The Longfellow, Ohio, 104 F 360, 45 C C A. 379.

33. U S —Newhall v. U. S, D C Cal, 8 F 2d 422—The Georgian, D C Fla, 4 F Supp. 718, affirmed, C C A., 76 F 2d 550—The Abbazia, D.C.N Y, 127 F. 495
58 C.J p 491 note 64.

34. U S —The Vestris, D C N Y., 60 F 2d 273—The Doris Kellogg, D C N Y, 18 F Supp. 159, affirmed, C C A., In re Kellogg S S Corp, 94 F. 2d 1015.

35. U S —The Sandfield, D.C.N Y., 79 F 371, affirmed 92 F. 663, 34 C.C A. 612
58 C.J p 482 note 52.

36. U.S —The Babin Chevaye, Or, 208 F. 966, 126 C C A. 54—Ceballos v. The Warren Adams, N Y., 74 F. 418, 20 C C.A. 486.

37. U S —The Viking, C C A Ohio, 271 F 801.

38. U.S —The Point Chico, C.C.A. Tex, 122 F.2d 1—The S. C L. No. 9, C C A Pa, 114 F.2d 964—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C. C.A.N Y., 106 F 2d 32—Louis-Drey-

equipment for proper navigation,[39] sufficient to establish that the vessel was unseaworthy or insufficient to establish that it was seaworthy[40] with respect to charts and other equipment for proper navigation,[41] and sufficient to establish that the unseaworthiness of the vessel was[42] or was not[43] the proximate cause of the loss of, or injury to, the cargo.

Due diligence to make vessel seaworthy. All of the surrounding facts and circumstances are to be

fus v. Paterson Steamships, C C A. N Y, 67 F 2d 331—The Smyrna, C. C A Md., 62 F 2d 1048—The Supreme, C.C A N J., 61 F 2d 334—Dreyfus v Paterson Steamships, D C N Y, 59 F 2d 824—Spang Chalfant & Co. v. Dimon S S Corporation, C.C A N Y., 57 F 2d 965—The Josephine, C C A Pa, 49 F 2d 207—Earle & Stoddart v. Ellerman's Wilson Line, D C N Y, 45 F 2d 231, affirmed, C C A, The Galileo, 54 F 2d 913, affirmed 53 S Ct 200, 287 U S. 420, 77 L Ed. 403—O'Donnell Transp. Co. v. Tidewater Iron & Steel Co., D.C N J., 90 F Supp 953, affirmed, C A, 185 F 2d 675—Kasser Distillers Products Corp v Companhia De Navegacao Carregadores Acoreanos, D C N.Y, 76 F Supp 796—The Temple Bar, D C Md., 45 F Supp 608, affirmed, C C A, 137 F 2d 293—The Ariel, D C N Y, 33 F Supp. 573, affirmed, C C.A., 119 F.2d 866—Sparks Milling Co v U S, D C La., 5 F.Supp 567—The Tymeric, D C N.Y, 3 F Supp 773.

N Y—Proctor & Gamble Mfg Co v Ocean S S Co, 267 N.Y.S. 405, 149 Misc. 701.

58 C J. p 490 note 62 [a] (1), [b] (2) (4).

39. U S—The Temple Bar, C C A Md., 137 F 2d 293—The Aakre, C. C A N Y, 122 F.2d 469, certiorari denied Waterman v. The Aakre, 62 S Ct. 360, 314 U S. 690, 86 L Ed 552—The Iristo, D C N.Y, 43 F Supp. 29, affirmed, C C.A., Middleton & Co. (Canada) v. Ocean Dominion S S. Corp, 137 F.2d 619, certiorari denied 64 S Ct. 432, 320 U S. 802, 88 L Ed 484—The Denali, D C Wash, 23 F Supp. 145, reversed on other grounds, C C.A, 105 F 2d 413, adhered to 112 F 2d 952, certiorari denied Alaska S S Co. v. Pacific Coast Coal Co., 61 S Ct. 65, 311 U.S 687, 85 L Ed 444.

Statements in text-books and manuals concerning importance of keeping charts corrected, "up to date," and "down to time of sailing" represented only opinions and advice of authors and did not establish general custom or fix standard of seaworthiness, with respect to whether shipowner used due diligence in making ship seaworthy in respect of charts furnished so as to be entitled to exemption from liability for cargo claims resulting from faults or errors in navigation or management of ship—Daisy Philippine Underwear Co. v. U. S. Steel Products Co., D.C. N Y, 11 F Supp 175, affirmed, C C A, U S Steel Products Co v. American & Foreign Ins Co, 82 F 2d 752

40. U S—W. R. Grace & Co v Charleston Lighterage & Transfer Co, C A S C, 193 F 2d 539—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co, C A Va, 189 F 2d 488—James Richardson & Sons v. Conners Marine Co, C C A N.Y, 141 F.2d 226—Huilever, S A Division Huileries Du Congo Belge v The Otho, C C A N Y, 139 F 2d 748, certiorari denied 64 S Ct 1047, 322 U S. 735, 88 L.Ed 1569—Interlake Iron Corp. v. Gartland S S. Co, C C.A Mich, 121 F 2d 267, certiorari denied Gartland S S Co. v Interlake Iron Corp., 62 S Ct. 181, 314 U S. 681, 86 L Ed 545—The Fred Smartley, Jr, C C A Va, 100 F.2d 971—Gardner v Dantzler Lumber & Export Co, C C A Fla., 98 F 2d 478—The Mauretania, C C A N Y., 84 F 2d 408—U. S v. Los Angeles Soap Co, C C A Cal, 83 F 2d 875—In re Great Lakes Transit Corp, C C A Ohio, 81 F 2d 441—The Indien, C C.A Cal, 71 F 2d 752—Norris Grain Co v Great Lakes Transit Corporation, C.C A Ill., 70 F 2d 32, certiorari denied Great Lakes Transit Corporation v. Norris Grain Co, 55 S Ct 75, 293 U.S. 565, 79 L Ed 664—The Framlington Court, C C A Tex., 69 F 2d 300, certiorari denied United British S S Co v. Newfoundland Export & Shipping Co, 54 S Ct 860, 292 U S 651, 78 L Ed 1500—The J L. Luckenbach, C C A N Y, 65 F 2d 570—The T. J Hooper, C C A N Y., 60 F 2d 737, certiorari denied Eastern Transp Co v Northern Barge Corp, 53 S Ct 220, 287 U S 662, 77 L Ed 571—American Agr Chemical Co v. Brooklyn & Buffalo Nav. Co, D C N Y, 56 F 2d 271—California & Hawaiian Sugar Refining Corporation v Rideout, C C A Cal, 53 F.2d 322—The Daly No 40, D C. N.Y, 76 F Supp 700—The Mary M, D C.N.Y., 73 F Supp 674—The Vizaya, D C.Pa, 63 F Supp 898—The Bill, D C Md., 47 F Supp 969, affirmed, C C.A, Lorentzen v. Brazil Oiticica, Inc, 145 F.2d 470—The Cypria, D C.N.Y., 46 F Supp 816, affirmed, C.C A., Ore S S Corp. v. D/S. A/S Hassel, 137 F.2d 326—The Commerce, D C.N Y., 46 F Supp. 360, affirmed, C C A., New England S S. Co. v. Howard, 130 F 2d 354—The Zarembo, D C.N Y, 44 F Supp 915, affirmed, C C A, Balfour, Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie & Co v The Zarembo, 64 S.Ct 437, 320 U.S 804, 88 L Ed. 486—The Heddernheim, D C N Y, 39 F Supp. 558—The City of Brunswick, D C Mass, 4 F Supp 908—The Point Brava, D C Cal, 1 F. Supp 366.

58 C J p 490 note 62 [a] (3), (4), (7), (10)–(12), [b] (1).

41. U S—The Maria, C C A Va, 91 F 2d 819.

42. U S—James Richardson & Sons v. Conners Marine Co, C C A.N.Y, 141 F 2d 226—Huilever, S A Division Huileries Du Congo Belge v The Otho, C.C A N Y, 139 F 2d 748, certiorari denied 64 S Ct. 1047, 322 U.S 735, 88 L Ed 1569—American Agr. Chemical Co. v. Brooklyn & Buffalo Nav. Co, D C.N Y., 56 F 2d 271—American Co for International Commerce v. U. S, D C.N.Y., 26 F.2d 468—The Mary M., D.C N Y, 73 F Supp 674—The Bill, D.C Md, 47 F.Supp. 969, affirmed, C C A, Lorentzen v. Brazil Oiticica, Inc., 145 F 2d 470—The Iristo, D C N Y, 43 F Supp. 29, affirmed, C C A, Middleton & Co. (Canada) Limited v. Ocean Dominion S S. Corp, 137 F.2d 619, certiorari denied 64 S. Ct 432, 320 U.S. 802, 88 L Ed. 484—The Maria, D.C Va, 7 F Supp. 724.

58 C J p 490 note 62 [a] (2), (5), (6), (8), (9), (14).

43. U S—The Temple Bar, C C A. Md, 137 F 2d 293—The Aakre, C C. A N Y, 122 F 2d 469, certiorari denied Waterman v. The Aakre, 62 S. Ct 360, 314 U S. 690, 86 L Ed 552—Automobile Ins Co of Hartford, Conn v Hart-Wood Lumber Co, C C A Cal, 105 F 2d 387—Yokohama Specie Bank v. Mitsui & Co., C C. A.N Y, 73 F.2d 526, certiorari denied Yokohama Specie Bank v Mitsui & Co, 55 S Ct 648, 295 U S. 736, 79 L Ed 1684—Pillsbury Flour Mills Co v Becker S. S Co, D C N. Y, 49 F 2d 648—The Iristo, D C N. Y, 43 F Supp 29, affirmed, C C.A, Middleton & Co (Canada) Limited v. Ocean Dominion S S Corp, 137 F.2d 619, certiorari denied 64 S.Ct. 432, 320 U S 802, 88 L.Ed. 484—The Denali, D C Wash, 23 F Supp. 145, reversed on other grounds, C. C.A, 105 F.2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S S Co v Pacific Coast Coal Co, 61 S Ct 65, 311 U S 687, 85 L Ed 444

58 C J. p 490 note 62 [b] (3), (6).

considered in determining whether or not the carrier exercised due diligence to make the vessel seaworthy,[44] and visual inspection,[45] inspection of the hull and machinery of the vessel,[46] or diligence in the acquisition of seaworthiness certificates,[47] is not conclusive as to the fulfillment of its duty by the carrier. Where the burden is on the carrier to establish due diligence, doubts must be resolved against it,[48] and the carrier's uncontradicted testimony is not conclusive.[49] The burden of showing due diligence to make the vessel seaworthy is not sustained by evidence of a superficial inspection,[50] or by evidence so indefinite that it is impossible to say that any real inspection has been made,[51] or by evidence that competent men were employed to do the work,[52] and the establishment of due diligence is not left to presumption.[53]

In case of damage by a leak, the burden is not discharged by simply showing that the ship was in a seaworthy condition at the commencement of the voyage, and presenting evidence which merely leaves in doubt the question as to how the leak arose.[54] A latent defect, not discoverable by due diligence, must be established by proof and not by conjecture.[55] The carrier cannot satisfy the burden of proving a latent defect without producing the defective part and without testimony by a competent witness on the latent defect,[56] but no inference against the carrier will be drawn from his failure to produce the defective part, where there is an adequate excuse for such failure.[57] A certificate

44. U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—The Bill, D.C.Md., 47 F.Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470

Evidence held sufficient

(1) To establish that carrier exercised due diligence—Balfour, Guthrie & Co. v. American-West African Line, C.C.A.N.Y., 136 F.2d 320, certiorari denied 64 S.Ct. 427, 320 U.S. 804, 88 L.Ed. 486—The Quarrington Court, C.C.A.N.Y., 122 F.2d 226—Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., D.C.N.Y., 54 F.2d 807, reversed on other grounds, C.C.A., 58 F.2d 175, certiorari denied Royal Mail Steam Packet Co. v. Franklin Fire Ins. Co., 53 S.Ct. 82, 287 U.S. 630, 77 L.Ed. 546—General Foods Corp. v. The Troubador, D.C.N.Y., 98 F.Supp. 207—The Vermont, D.C.N.Y., 47 F.Supp. 877—The Zarembo, D.C.N.Y., 44 F.Supp. 915, affirmed, C.C.A., Balfour, Guthrie & Co. v. American-West African Line, 136 F.2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486—The Heddernheim, D.C.N.Y., 39 F.Supp. 558—The Aakre, D.C.N.Y., 31 F.Supp. 8, affirmed, C.C.A., 122 F.2d 469—The Marianne, D.C.La., 24 F.Supp. 786—The Emilia, D.C.N.Y., 13 F.Supp. 7—Sparks Milling Co. v. U. S., D.C.La., 5 F.Supp. 567

(2) To establish that carrier did not exercise due diligence—The J. L. Luckenbach, C.C.A.N.Y., 65 F.2d 570—The Anaconda, C.C.A.N.Y., 60 F.2d 898—The Vizcaya, D.C.Pa., 63 F.Supp. 898—The Otho, D.C.N.Y., 49 F.Supp. 945, affirmed, C.C.A., Hulever, S. A. Division Huileries Du Congo Belge v. The Otho, 139 F.2d 748, certiorari denied American West African Line v. "Hulever" S. A. Division Huileries Du Congo Belge, 64 S.Ct. 1047, 322 U.S. 735, 88 L.Ed. 1568—The Bill, D.C.Md., 47 F.Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470—The Heddernheim, D.C.N.Y., 39 F.Supp. 558—Spencer Kellogg & Sons v. Great Lakes Transit Corp., D.C.Mich., 32 F.Supp. 520—The City of Brunswick, D.C.Mass., 4 F.Supp. 908.

(3) To support finding that numerous surveys or inspections of vessel were incomplete—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488

(4) To establish that defect was latent and not discoverable by due diligence—The Quarrington Court, C.C.A.N.Y., 122 F.2d 266.

Evidence held insufficient

(1) To establish that carrier exercised due diligence

U.S.—In re Great Lakes Transit Corp., C.C.A.Ohio, 81 F.2d 441—The Chehaw, D.C.N.Y., 54 F.2d 645—The Cypria, D.C.N.Y., 46 F.Supp. 816, affirmed, C.C.A., Ore S. S. Corp. v. D/S. A/S. Hassel, 137 F.2d 326.

Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

(2) To establish carrier's failure to exercise due diligence—The Temple Bar, D.C.Md., 45 F.Supp. 608, affirmed, C.C.A., 137 F.2d 293.

(3) To establish that defects were latent and not discoverable by due diligence—Hulever, S. A. Division Huileries Du Congo Belge v. The Otho, C.C.A.N.Y., 139 F.2d 748, certiorari denied 64 S.Ct. 1047, 322 U.S. 735, 88 L.Ed. 1569—Kratina v. South Atlantic S. S. Co., D.C.Ga., 63 F.Supp. 895.

45. U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—Ore Steamship Corp. v. D/S A/S Hassel, C.C.A.N.Y., 137 F.2d 326

46. U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—The Vizcaya, D.C.Pa., 63 F.Supp. 898.

47. U.S.—The Folmina, N.Y., 29 S.Ct. 363, 212 U.S. 354, 53 L.Ed. 546—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.A.Va., 189 F.2d 488—The Abbazia, D.C.N.Y., 127 F. 495

48. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

Cal.—Blake, Moffitt & Towne v. Luckenbach S. S. Co., 6 P.2d 121, 120 Cal.App.Supp. 775.

Burden of proof as to due diligence to make vessel seaworthy see supra § 154 f

49. U.S.—Metropolitan Coal Co. v. Howard, C.C.A.N.Y., 155 F.2d 780.

50. U.S.—Martin v. The Southwark, Pa., 24 S.Ct. 1, 191 U.S. 1, 48 L.Ed. 65.

58 C.J. p. 482 note 48

51. U.S.—Nederlandsche Amerikaansche Stoomvaart Maatschappij v. Mediterranean, etc., Traders, Inc., C.C.A.La., 17 F.2d 586

N.Y.—Williams v. Lamport, 224 N.Y.S. 587, 130 Misc. 644

52. U.S.—Nederlandsche Amerikaansche Stoomvaart Maatschappij v. Mediterranean, etc., Traders, Inc., C.C.A.La., 17 F.2d 586.

N.Y.—Williams v. Lamport, 224 N.Y.S. 587, 130 Misc. 644.

53. U.S.—The Heddernheim, D.C.N.Y., 39 F.Supp. 558

54. U.S.—The Queen, D.C.Cal., 78 F. 155, affirmed 94 F. 180, 36 C.C.A. 135, reversed on other grounds 21 S.Ct. 278, 180 U.S. 49, 45 L.Ed. 419.

55. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

56. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., supra.

57. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., supra.

of apparent good condition does not warrant any consideration in determining if a latent defect existed.[58]

§ 157. —— Trial

General rules as to trial in civil actions apply in actions against carriers by water for loss of or injury to, cargo.

The general rules of procedure in respect of trials in civil actions, particularly in similar actions against carriers generally, as discussed in Carriers § 257 et seq, and in so far as relevant the rules governing procedure in admiralty, apply in actions against carriers by water for loss of, or injury to, goods,[59] such as in respect of the reception of evidence,[60] the instructions of the court,[61] and the verdict or findings,[62] or decree in admiralty.[63] In the absence of proof of unseaworthiness or negligence in handling the vessel or cargo a libel for damages to a shipment may properly be dismissed;[64] and, where libelant has retained from freight due more than double the amount of damages proved, it is not error to dismiss the libel, with costs to respondent.[65]

Questions of law and fact. In accordance with general rules, where the evidence in an action against a carrier by water for loss of, or injury to, cargo is conflicting or subject to different conclusions, the case should be submitted to the jury or other trier of facts,[66] and should not be disposed of by the court as a matter of law.[67] On the other hand, where the facts are undisputed or there is no substantial conflict in the evidence, and but one conclusion may reasonably be drawn therefrom, the question is one of law for the court.[68]

Subject to these rules, it is usually a question of fact for the jury or other trier of facts as to whether the goods were lost or injured through negligence of the carrier;[69] whether the vessel was seaworthy;[70] whether the carrier exercised due diligence to make the vessel seaworthy;[71] whether the loss of, or damage to, the cargo was caused by the unseaworthiness of the vessel,[72] or by a peril of the sea or danger of navigation within an exception in the bill of lading;[73] whether the consignee proceeded with reasonable diligence to unload the cargo;[74] and whether a reasonable time had elapsed for the removal of goods on a wharf after notice to

58. U.S.—Waterman S. S Corp. v U S Smelting, Refining & Min Co., supra

59. Fla.—Clyde SS Co. v. Burrows, 18 So 349, 36 Fla. 121.
58 C J. p 492 note 77.

60. U S.—The Caledonier, D.C.N.Y., 60 F.2d 562.
58 C J p 492 note 78

61. Minn.—Cargill Grain Co. v. Cleveland-Cliffs S. S Co., 235 N.W. 268, 182 Minn. 516, certiorari denied 52 S.Ct. 25, 284 U.S. 646, 76 L.Ed. 549, followed in Cargill Grain Co v Cleveland-Cliffs S. S. Co., 237 N.W. 197, 183 Minn 620
Wash.—Lagomarsino v Pacific Alaska Nav. Co., 170 P 368, 100 Wash. 105.
58 C J. p 492 note 79

62. Or.—Sevier v. Mitchell, 142 P. 780, 72 Or. 483.
58 C J. p 493 note 80.
Informal findings held sufficient
U.S.—The Vallescura, N.Y., 55 S.Ct 194, 293 U.S. 296, 79 L.Ed 373
Findings held not inconsistent
U.S.—American Trading Co. v The Harry Culbreath, C.A.N.Y., 187 F. 2d 310.

63. U.S.—The Marinin, C.C.N.Y., 32 F 918.
58 C.J. p 493 note 81.

64. U.S.—The Katie E., D.C.N.Y., 46 F.2d 534.
58 C.J. p 493 note 82

65. U.S.—The Lyra, Cal., 255 F. 667, 167 C.C.A. 43.

66. Wash.—National Grocery Co. v. Olsen, 108 P 2d 320, 6 Wash.2d 491
58 C J p 493 notes 85, 86—10 C J p 149 note 44 [c]
Agency held fact question
U.S.—Fyfe v. Pan-Atlantic S. S. Corp., C.C.A.N.Y., 114 F 2d 72, certiorari denied Pan-Atlantic S S. Corp. v Fyfe, 61 S.Ct 319, 311 U S. 711, 85 L.Ed. 462.
Reference to special commissioner held warranted
U.S.—The Harry Luckenbach, D.C.N.Y., 8 F.Supp. 507.

67. Tex.—Mallory SS. Co. v. G. A. Bahn Diamond, etc., Co., Civ.App., 154 S.W 282.
58 C J. p 493 note 87.

68. Mass.—Cunningham Leather Co. v American-Hawaiian S. S. Co., 189 N.E 98, 285 Mass. 232

69. U.S.—The Niel Maersk, C.C.A.N.Y., 91 F.2d 932, certiorari denied Bradley v. The Niel Maersk, 58 S. Ct. 281, 302 U.S. 753, 82 L.Ed 582.
58 C J. p 493 note 88
Improper stowage
U.S.—The Niel Maersk, C.C.A.N.Y., 91 F 2d 932, certiorari denied Bradley v The Niel Maersk, 58 S. Ct. 281, 302 U.S. 753, 82 L.Ed 582 —The Hog Island, C.C.A.N.Y., 48 F 2d 101.
Improper loading
Wash.—National Grocery Co. v. Olsen, 108 P 2d 320, 6 Wash.2d 491.
Refrigeration
In action for damage to shipment of watermelons, whether refrigeration on ship was inadequate, whether inadequacy, if any, caused or contributed to damage, and whether shippers were warned of inadequacy, if any, and, nevertheless, expressed willingness to take risk of damage, were questions for jury.—S L. Shepard & Co v. Agwilines, Inc., C.C.A S.C., 130 F 2d 67.

70. Wash.—National Grocery Co. v. Olsen, 108 P.2d 320, 6 Wash.2d 491.
58 C J. p 493 note 89.
Surveys, inspections, and ratings
Whether vessel is seaworthy is a question of fact to be decided independently of surveys, inspections, and ratings.—Rosenberg v Atlantic Transport Co., D.C.Cal., 25 F 2d 739, affirmed, C.C.A., Atlantic Transport Co. of West Virginia v. Rosenberg Bros & Co., 34 F 2d 843
Proper construction of vessel
Wash.—National Grocery Co. v. Olsen, 108 P 2d 320, 6 Wash.2d 491

71. U.S.—The Point Brava, D.C.Cal., 1 F.Supp 366.

72. U.S.—Galle v. Hamburg Amerikanische Packetfarht Actien Gesellschaft, N.Y., 233 F. 424, 147 C C.A. 360.

73. U.S.—The Governor Powers, D.C. Mass., 243 F. 961.
58 C.J. p 493 note 92.

74. N.Y.—Scheu v Benedict, 22 N. E. 1073, 116 N.Y. 510, 15 Am S R. 426.

the consignee.[75] In determining whether goods were transported with reasonable dispatch, the crowded condition of the harbor, making the dispatch of goods difficult, constitutes a question of fact relative to how much the delivery should have been delayed thereby.[76]

§ 158. —— Extent of Liability and Damages in General

As a general rule the measure of damages in an action against a carrier by water for loss of, or injury to, cargo is the actual loss sustained by the owner of the cargo, that is, all the damages which proximately resulted from the carrier's negligence or breach of duty or contract.

As a general rule the measure of damages, in an action or libel against a carrier by water, for loss of, or injury to, cargo is the actual loss sustained by the owner of the cargo, that is, all the damages which proximately result to him from the carrier's negligence or breach of duty or of contract,[77] subject, of course, to the limitations that such damages only can be recovered as are authorized by the pleadings, as discussed supra § 153 c, and that there can be no recovery for damages which are too remote or speculative,[78] such as anticipated profits,[79] but it has been held that, where the goods were shipped with the view of realizing a profit on their sale, a reasonable sum may be added for the importer's profit.[80] Where the contract of carriage limits liability to the shipper's actual pecuniary loss, it has been held that anticipated profits may not be recovered.[81]

Special damages not within the contemplation of the parties when the contract of carriage was made are not recoverable.[82] On a deviation because of unseaworthiness, the shipper may recover all damage legally attributable to the breach of warranty of seaworthiness;[83] and, where all of the goods received have been delivered but some of them have been so damaged that they cannot be identified, recovery may be had for the goods which were lost as well as damage to those which can be identified.[84]

Value of goods as measure of recovery. The loss suffered by the owner of the cargo lost or damaged is ordinarily measured by the market value of the goods,[85] but market value is only a convenient measure of the loss[86] and other means may be re-

75. N.Y.—Goodwin v. Baltimore, etc., R. Co., 58 Barb. 195, reversed on other grounds 50 N.Y. 154.

76. U.S.—Transmarine Corp. v. Levitt, C.C.A.N.Y., 25 F.2d 275.

77. U.S.—Pan-Am. Trade & Credit Corp. v. The Campfire, C.C.A.N.Y., 156 F.2d 603, certiorari denied Waterman S. S. Corp. v. P. A. T. & C. Corp., 67 S.Ct. 194, 329 U.S. 774, 91 L.Ed. 666—The Bill, D.C.Md., 47 F.Supp. 969, affirmed, C.C.A., Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470—U. S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.
58 C.J. p. 494 note 97.

Injury not involving pecuniary loss
A change in shape or flattening of rubber bales which have no uniform size or shape cannot be an element of damage to rubber cargo fairly attributable to ship except in extreme cases.—The M. V. Silversandal, D.C.N.Y., 26 F.Supp. 61, affirmed, C.C.A., Bache v. Silver Line, 110 F.2d 60.

Agreement by surveyor of damage
Surveyor engaged by claimant-respondent to make a joint survey of cargo damage and to take care of salvage did not have authority to bind claimant-respondent by agreement that proportion of damaged bags in each category among bags examined would be deemed proportion in each category among all damaged bags, including those not examined.—Beck v. The Vizcaya, D.C.Pa., 88 F.Supp. 818, affirmed, C.A., 182 F.2d 942, certiorari denied 71 S.Ct. 124, 340 U.S. 877, 95 L.Ed. 638.

78. U.S.—The Muskegon, D.C.N.Y., 10 F.2d 817.
58 C.J. p. 494 note 99.

Loss of good will because of delayed delivery of goods to fill orders was held too remote and speculative to warrant recovery of damages therefor.—U. S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.

79. U.S.—U. S. v. Palmer & Parker Co., supra—Eastern Transp. Co. v. Blue Ridge Coal Corp., D.C.N.Y., 53 F.Supp. 507, affirmed, C.C.A., 159 F.2d 642.
58 C.J. p. 494 note 1.

80. U.S.—Northern Commercial Co. v. Lindblom, Alaska, 162 F. 250, 89 C.C.A. 230.

81. U.S.—The M. S. Californian, C.C.A.N.Y., 82 F.2d 283, certiorari denied J. V. Lane & Co. v. The M. S. Californian, 56 S.Ct. 959, 298 U.S. 690, 80 L.Ed. 1408, rehearing denied 57 S.Ct. 6, 299 U.S. 620, 81 L.Ed. 457.

82. N.Y.—Winkler v. Compania Sud Americana De Vapores, 41 N.Y.S.2d 67, 180 Misc. 181.

Change in form of action to conversion
Where plaintiff sought to recover for carrier's failure to deliver merchandise, a change in form of action from contract to conversion did not give plaintiff the right to recover special damages.—Winkler v. Compania Sud Americana De Vapores, supra.

Agent's expenses resulting from delay
In absence of provision in contract for shipment of merchandise to Panama for special damage in event of delay, or of anything in shipper's bill of particulars indicating that such special damage was in contemplation of contracting parties, or that carrier was put on notice of special circumstances calling for special damages, shipper could not recover for agent's expenses incurred in spending forty-five additional days in Panama, or for additional expense of returning agent to New York by airplane as a result of carrier's delay in shipment.—Winkler v. Compania Sud Americana De Vapores, supra.

83. U.S.—France v. French Overseas Corp., N.Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901.

84. U.S.—The Good Hope, D.C.N.Y., 190 F. 597, affirmed 197 F. 149, 116 C.C.A. 573.

85. U.S.—Waterman S. S. Corp. v. U. S. Smelting Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

The invoice value of lost goods is not the proper basis for measuring damages.—Kemsley v. U. S., C.C.A.N.Y., 19 F.2d 441.

86. U.S.—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656.

sorted to if a market value is not available[87] or is not an adequate or proper measure of the loss,[88] or if a better means of measuring the loss is available.[89] Where the goods have no market value at the port of destination, the measure of damages may be such a sum as would enable plaintiff to replace the goods at that point,[90] that is, the price or value of the goods at the place of shipment,[91] together with all charges of lading and transportation,[92] and, where the goods have no market value at the place of shipment, resort may be had to other means of ascertaining their actual value, such as the price which they usually bring at the port of destination, with a fair deduction for profits and charges.[93]

In case of a loss of goods, through its fault, the carrier is ordinarily liable for the value of the lost goods,[94] and in case of injury to the goods, it is ordinarily liable only for the diminution in its value by reason thereof.[95] Where the goods have been wrongfully converted by the carrier, the measure of damages is their value at the time of the conversion.[96]

Stipulation as to value of goods. A valid stipulation as to the value of the goods embodied in the contract of carriage will be followed in measuring the damage sustained by a loss of, or injury to, the goods.[97] Under a clause in the bill of lading making the declared value or the invoice cost the measure of the value of the goods for the purpose of determining damages, the damages are to be computed by deducting the value of the damaged goods from the value fixed by the clause,[98] and not by a percentage of the value of the goods as fixed by the clause, based on the ratio which the value of the damaged goods bears to their value if sound.[99] Where the bill of lading provided that damages should be adjusted on the basis of invoice value and that the carrier should in no case be liable for more than the actual pecuniary loss suffered, it was held that plaintiff's damages were to be measured by invoice value or market value, whichever was lower.[1]

Loss or injury occurring at place of shipment. When the loss of, or injury to, cargo occurs at the place where it is laden, and before the voyage begins, the measure of damages is ordinarily based on the value of the cargo at the port of shipment,[2] unless special circumstances exist which make the carrier liable for the value at the port of delivery.[3] However where the vessel, by a tortious deviation, returns to the port of shipment, the measure of damages to the shipper is the difference in value of the goods at the port of discharge, delivered at a reasonable time after the ship arrived there, and their value in the port of shipment when delivered.[4]

Where loss or injury occurs after leaving place of shipment. It has been held that the ordinary measure of damages for the breach of a contract of affreightment, where the goods have been unlawfully lost or disposed of at an intermediate port,

87. U.S.—Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co., supra—U.S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.

88. U.S.—U.S. v. Palmer & Parker Co., supra.

Goods for manufacture

Corporation importing mahogany logs for manufacture and sale in manufactured form cannot recover market value thereof as damages for delayed delivery, especially in absence of substantial market therefor, damage being limited to resulting diminution in price received for manufactured mahogany.—U.S. v. Palmer & Parker Co., supra.

89. U.S.—Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656—U.S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.

90. U.S.—Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656—Northern Commercial Co. v. Lindblom, Alaska, 162 F. 250, 89 C.C.A. 230.

91. U.S.—Northern Commercial Co. v. Lindblom, supra.
58 C.J. p. 495 note 19.

92. U.S.—The Scotland, N.Y., 105 U.S. 24, 26 L.Ed. 1001
58 C.J. p. 495 note 20.

93. U.S.—The Scotland, supra.

94. U.S.—The City of Para, D.C.N.Y., 44 F. 689.
58 C.J. p. 494 note 5.

95. U.S.—The City of Para, supra.
58 C.J. p. 495 note 6.

96. U.S.—Vanderbilt v. Ocean S.S. Co., N.Y., 215 F. 886, 132 C.C.A. 226

97. U.S.—Smith v. The Ferncliff, Md., 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862—The Merauke, C.C.A.N.Y., 31 F.2d 974.
58 C.J. p. 496 note 25
Stipulations as to value generally see supra § 137.

Averaging damage

Where the contract of carriage limits the value of each item shipped, computing the damages on the basis of the injury to the entire shipment or the average damage to each item is improper, and the injury to each item must be ascertained to give the carrier the benefit of the limitation of value clause in the contract.—The Caledonier, D.C.N.Y., 60 F.2d 562

98. U.S.—Smith v. The Ferncliff, Md., 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862.

99. U.S.—Smith v. The Ferncliff, supra.

1. U.S.—The M.S. Californian, C.C.A.N.Y., 82 F.2d 283, certiorari denied J.V. Lane & Co. v. The M.S. Californian, 56 S.Ct. 959, 298 U.S. 690, 80 L.Ed. 1408, rehearing denied 57 S.Ct. 6, 299 U.S. 620, 81 L.Ed. 457.

2. U.S.—Dusar v. Murgatroyd, C.C.Pa., 8 F.Cas.No.4,199, 1 Wash.C.C. 13.
58 C.J. p. 495 note 9.

3. U.S.—The Joshua Barker, D.C.N.Y., 13 F.Cas.No.7,547, Abb.Adm. 215.

4. U.S.—The Poznan, D.C.N.Y., 276 F. 418
58 C.J. p. 495 note 11.

is their prime cost[5] or value[6] at such port; but as a general rule, where the goods are lost in transit, the measure of damages is the market value of the goods at the port of destination at the time when delivery should have been made.[7]

If the goods are merely injured, the measure of damages is the difference between their market value at the time and place of delivery, in such condition as they would have arrived but for the carrier's fault, and their market value in the condition in which they did actually arrive there.[8] The market value of damaged goods is ordinarily determined by the price brought by the damaged goods at a fair sale thereof,[9] at the nearest available market,[10] and not by the testimony of experts.[11] After such sale of the injured goods, the measure of damages is the difference between the market value of the goods at the place of delivery in good condition and the net amount realized from their sale in their damaged condition.[12]

A sale by the consignee is not binding on the carrier so as to fix its liability as to the amount of damages unless it is made at auction with notice to the carrier,[13] or after an appraisement, with notice, has been made.[14] Where, the goods are shipped under a contract of sale, at a stipulated price, at the port of destination, and, the buyer refusing to accept them, they are sold for the account of the seller, the market price is not the proper basis for estimating damages,[15] but the measure of damages is the difference between the contract price and the price received at the sale by the carrier.[16] It has been held that, where, on the consignee's refusal to receipt for the goods as being in good order, the carrier sells them, the consignee may recover the sound value of the goods,[17] or the shipper may recover the proceeds of the sale, less charges for care and for expense of the sale.[18]

Where the market price rises in the interim between the receipt of the damaged goods by the consignee and their sale, the court may determine the damages by assuming that the ratio between the value of sound and damaged goods on the date the goods were delivered was the same as on the date of the sale.[19] Where a shipment of goods is damaged when delivered to such an extent that they have to be reconditioned before marketing, the shipper is entitled to recover the amount of his loss from a decline in the market price during the time necessarily required for such work.[20] Where the consignee resold the goods ex dock for the same price he paid, he was held not to have suffered any damage by reason of the injury to the goods in transit.[21]

5. U.S.—The Harriet, D.C.Pa., 11 F. Cas.No.6,094
58 C.J. p 495 note 12.

6. U.S.—King v. Shepherd, C.C. Mass., 14 F.Cas.No.7,804, 3 Story 349.

7. U.S.—Isthmian S. S. Co. v. Martin, C.A.Md., 170 F.2d 25—Pioneer Import Corp. v. The Lafcomo, C.C.A.N.Y., 159 F.2d 654, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 67 S.Ct. 1310, 331 U.S. 821, 91 L.Ed. 1838—Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, C.C.A.N.Y., 47 F.2d 878, 74 A.L.R. 1378, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 51 S.Ct. 648, 283 U.S. 856, 75 L.Ed. 1462—The Guanancita, D.C.Fla., 69 F.Supp. 928—The Waalhaven, D.C.N.Y., 1 F.Supp. 396, affirmed, C.C.A., 64 F.2d 25, certiorari denied The Waalhaven v. Potash Importing Corporation of America, 53 S.Ct. 696, 289 U.S. 752, 77 L.Ed. 1497.
58 C.J. p 495 note 15.

8. U.S.—Pioneer Import Corporation v. The Lafcomo, D.C.N.Y., 159 F.2d 654, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 67 S.Ct. 1310, 331 U.S. 821, 91 L.Ed. 1838—Weirton Steel Co. v. Isbrandtsen-Moller Co., C.C.A.N.Y., 126 F.2d 593—The Caledonier, D.C.N.Y., 60 F.2d 562—McNeely & Price Co. v. Ellerman & Bucknall S. S. Co., D.C.Pa., 100 F.Supp. 339—Petition of Republic of U. S. of Brazil, D.C.N.Y., 91 F.Supp. 961—Sanib Corp. v. United Fruit Co., D.C.N.Y., 74 F.Supp. 64—The Waalhaven, D.C.N.Y., 1 F.Supp. 396, affirmed, C.C.A., 64 F.2d 25, certiorari denied The Waalhaven v. Potash Importing Corporation of America, 53 S.Ct. 696, 289 U.S. 752, 77 L.Ed. 1497.
58 C.J. p 496 note 26.

9. U.S.—The Boskenna Bay, D.C.N.Y., 31 F. 612
58 C.J. p 496 note 30.
Sale of damaged cargo by carrier in general see supra § 149.

10. U.S.—Connecticut Fire Ins. Co. v. Lake Transfer Corporation, D.C.N.Y., 5 F.Supp. 416, modified, C.C.A., 74 F.2d 258.

Solicitation of bids

Consignor was held not precluded from recovering damages on basis of difference between contract price and price for which defective goods were sold at nearest available market on ground that consignor did not solicit bids from customers in local market, where such customers were under contract to buy only from another company.—Connecticut Fire Ins. Co. v. Lake Transfer Corporation, C.C.A.N.Y., 74 F.2d 258.

11. U.S.—Hamilton v. The Kate Irving, D.C.Md., 5 F. 630, 5 Hughes 253.

12. U.S.—The Florida, C.C.A.Md., 61 F.2d 55.
58 C.J. p 496 note 34.

13. U.S.—Crosby v. Grinnell, D.C.N.Y., 6 F.Cas.No.3,422.

14. U.S.—Crosby v. Grinnell, supra.
58 C.J. p 496 note 33

15. U.S.—Florida Grain, etc., Co. v. U. S. Shipping Board Emergency Fleet Corp., D.C.Fla., 3 F.2d 314, reversed on other grounds, C.C.A., U. S. Shipping Board Emergency Fleet Corporation v. Florida Grain & Elevator Co., 20 F.2d 583.

16. U.S.—Florida Grain, etc., Co. v. U. S. Shipping Board Emergency Fleet Corp., supra.

17. U.S.—The Augusto, D.C.N.Y., 29 F. 334.

18. Mass.—Stevens v. Sayward, 3 Gray 108.

19. U.S.—The Buckeye State, D.C.N.Y., 42 F.Supp. 715—The Compta, D.C.Cal., 6 F.Cas.No.3,070

20. U.S.—The Jeanie, Wash., 236 F. 463, 149 C.C.A. 515.

21. U.S.—Firestone Plantations Co.

Interest. As a general rule a shipper or cargo owner is entitled to interest on the amount of his loss or damage from the date of the loss or injury,[22] that is, generally, from the time when the goods should have been delivered,[23] or in case of injury to goods, from the time they were delivered.[24] As discussed in Admiralty § 205 b, the allowance of such interest in admiralty is generally discretionary, and the court may in its discretion refuse to allow interest,[25] but interest will usually be allowed where no reason appears for denying such allowance.[26] Interest may be allowed despite a delay in the proceedings where libelant was not responsible for the greater part of the delay,[27] but it has been held that interest will not be allowed during a period of delay in the proceedings, which is caused by libelant.[28]

The fact that a decree for loss of cargo includes interest to the date of its entry does not make it error to award interest on the entire decree from that time forward.[29] It has been held that interest should not be allowed as an incident to the damages, except by way of punitory damages for any fraud, delinquency, or injustice done by the carrier to the owner of the cargo.[30] Where the cost of the goods is not used as the measure of damages, interest on that cost is not to be awarded.[31]

Ordinarily interest will be computed at the legal rate.[32] In admiralty the court will allow the rate of interest established by local law[33] except where it is expressly limited by a federal statute.[34]

Incidental damages. In addition to the ordinary damages based on the value of the goods lost or injured, the vessel or owner may also be held liable for other and incidental damages which naturally and proximately result from the loss or injury complained of,[35] such as storage charges,[36] the reasonable expense of reconditioning the goods,[37] and, in the case of a stranded vessel, the costs and charges attending the salvage of the cargo.[38] However, it has been held that the carrier may not be held liable for the expense of salvaging worthless cargo.[39]

The carrier may be liable for customhouse duties which have been paid on the goods,[40] but is entitled to a reduction for any rebate on such duties allowed by the customhouse,[41] unless the rebate does not refer to, and is not allowed by reason of, the damages,[42] or the duties have not been paid.[43]

v. Pan Atlantic S. S Corp., D C N Y., 77 F Supp. 401.

22. U.S.—The Florida, C C A.Md, 61 F 2d 55—U S Smelting, Refining & Mining Co. v. Waterman S. S Corp., D C.La, 62 F Supp. 511.
58 C.J. p 496 note 42.

23. U S—Northern Commercial Co v. Lindblom, Alaska, 162 F. 250, 89 C C A 230.
58 C J. p 497 note 43

24. U S—The President Arthur, D. C.N.Y., 28 F 2d 391
58 C J p 497 note 44.

25. U.S—The Nichiyo Maru, D.C. Md., 14 F.Supp. 727, affirmed, C.C A, 89 F 2d 539.

26. U.S.—The S. C. L. No 9, D C Pa., 37 F.Supp. 396—U. S. Willow Furniture Co v. La Compagnie Générale Transatlantique, C.C.A.N Y., 271 F. 184.

The fact that recovery is small is no basis for withholding interest—The Ferncliff, D.C.Md., 22 F.Supp 728, certified questions answered Smith v. The Ferncliff, 59 S Ct. 615, 306 U S. 444, 83 L.Ed. 862, affirmed, C.C A, 105 F.2d 1021.

27. U.S.—The Caledonier, D.C.N.Y., 60 F.2d 562.

Delay of six months in filing a libel for loss of a cargo was not so unreasonable as to deprive the cargo owner of the right to recover interest.—The S. C. L. No. 9, D.C.Pa., 37 F.Supp. 396.

28. U S—The Bencleuch, C C.A N.Y., 10 F 2d 49, certiorari denied 46 S Ct 631, 271 U.S 680, 70 L Ed. 1148
58 C J. p 497 note 48

Lower rate of interest

Libelant may be penalized for delay in prosecuting action by allowance of interest at less than the usual rate from institution of libel to final decree.—The Guanancita, D C Fla, 69 F.Supp 928.

29. U S.—Steamship Wellesley Co v. Hooper, Cal., 185 F. 733, 108 C.C. A 71.

30. N Y.—Lakeman v. Grinnell, 18 N Y.Super. 625
58 C J. p 497 note 49.

31. U.S.—U. S. v Palmer & Parker Co, C.C.A Mass, 61 F 2d 455.

32. U.S.—The Scotland, N.Y., 105 U S 24, 26 L Ed. 1001.

33. U.S—The Guanancita, D.C.Fla., 69 F.Supp. 928.
58 C J. p 497 note 51.

34. U.S—Smith v. U. S Shipping Board Emergency Fleet Corp, C. C A N Y., 26 F 2d 337, certiorari denied 49 S Ct. 29, 278 U.S. 628, 73 L Ed. 547.
58 C.J. p 497 note 52.

35. U.S.—The Anaconda, C.C.A.N.Y, 60 F 2d 898—The Bérengére, D.C. Or., 155 F. 439
58 C.J. p 497 note 58.

Brokerage on original sales of flour by mills prior to shipment was held part of invoice value—The M. S Californian, C C A.N Y, 82 F.2d 283, certiorari denied J V. Lane & Co v. The M S. Californian, 56 S Ct. 959, 298 U S 690, 80 L Ed. 1408, rehearing denied 57 S Ct. 6, 299 U.S 620, 81 L Ed. 457.

36. U.S—The Florida, C.C.A.Md, 61 F 2d 55.
58 C J. p 497 note 55.

37. U.S—The Florida, supra—The Rio Novo, D C N Y, 62 F Supp. 32—The Jeanie, Wash., 236 F. 463, 149 C.C.A. 515.

Where there is no market for the goods in their damaged condition, plaintiff may recover the cost of reconditioning the goods.—The Florida, C.C A.Md., 61 F.2d 55.

38. U S—The City of Para, D.C.N. Y, 44 F. 689.
Ind—Rogers v. West, 9 Ind. 400.
58 C.J. p 497 note 57.

39. U S—The Hustler, D.C.N.Y., 56 F.2d 1039

40. N Y.—Vietor v. International Nav. Co., 45 N.Y.Super. 129.

41. U.S.—The Mangalore, D C.Cal., 23 F. 463.

42. U.S.—Morrison v I. & V. Florio Steamship Co, D C N.J, 36 F. 569.
58 C.J. p 497 note 62.

43. U S—The Surrey, D.C.N.Y, 30 F. 223.

Where, by reason of the carrier's wrongful act or omission, the shipper loses his insurance coverage on the goods, the damages recoverable are the same as those for a breach of a contract to insure,[44] and plaintiff may recover of the carrier what he could have recovered from insurer but for the carrier's act,[45] and, in addition thereto, he may recover the expenses incurred in a good faith attempt to collect the insurance.[46]

Deductions and credits; freight. Where the shipper consented to have delivery of goods damaged during shipment made to a place other than the original destination, it was his duty to accept them at the place of delivery, and reduce the amount of his claim for damage by the value of the goods so delivered.[47] As a deduction from the amount of the damages for injured cargo, the carrier is entitled to a fair and reasonable allowance or charge for the storage of the goods which the shipper failed to remove from the pier,[48] and the reasonable cost and expense of disposing of them,[49] and has also been held entitled to a credit for insurance received by the shipper,[50] and for the amount received by the shipper from the bankrupt estate of a charterer for delay in arrival of cargo.[51]

The carrier is not entitled to a deduction for the amount paid for wharfage or demurrage at the place of delivery,[52] or for expenses incurred in minimizing the damage.[53] On a libel for injury to goods by improper stowage, libelant's damages cannot be reduced because the consignees sold the goods at auction as damaged goods, instead of overhauling and repairing the damage, where the ship's agents had the same opportunity to perform the work of overhauling as had the consignees.[54] A deduction for lack of diligence by the shipper in mitigating the damages is not justified where the shipper has in fact acted reasonably to minimize the damages.[55]

Where damages are measured by the difference between the value of the damaged goods and the value of sound goods at the place of destination, the shipper is not entitled to an allowance for his freight expense,[56] and unpaid charges for shipment and transportation should be deducted from the damage award;[57] but, where the contract of carriage provides for value at the place of shipment as the standard for computing damages, the shipper is entitled to recover his freight expense.[58]

Where the invoice value is made the basis of settlement by the bill of lading, and the damaged goods are sold on their arrival, the freight paid thereon or due should be deducted from the proceeds, and the remainder only credited to the carrier against the invoice value, to determine the amount of its liability,[59] but, where the bill of lading provides that damages be adjusted on the basis of invoice value and that freight be considered earned notwithstanding damage to the goods, plaintiff is not entitled to a credit for the freight charges paid.[60] Where the carrier sells the goods on their rejection by the consignee, it has been held to be entitled to a credit for the unpaid freight,[61] but the contrary has also been held on the ground that, the contract of affreightment not having been performed, the freight was not earned.[62] Extra freight expense to which the shipper is put because of the

44. U.S.—F. S. Royster Guano Co. v. W. E. Hedger Co., C.C.A.N.Y., 48 F.2d 86, certiorari denied W. E. Hedger Co. v. F. S. Royster Guano Co., 51 S.Ct. 651, 283 U.S. 858, 75 L.Ed. 1464.

45. U.S.—F. S. Royster Guano Co. v. W. E. Hedger Co., C.C.A.N.Y., 48 F.2d 86, certiorari denied W. E. Hedger Co. v. F. S. Royster Guano Co., 51 S.Ct. 651, 283 U.S. 858, 75 L.Ed. 1464.
Ala.—Turner v. Munson S.S. Line, 77 So. 61, 16 Ala. App. 223.

46. U.S.—F. S. Royster Guano Co. v. W. E. Hedger Co., C.C.A.N.Y., 48 F.2d 86, certiorari denied W. E. Hedger Co. v. F. S. Royster Guano Co., 51 S.Ct. 651, 283 U.S. 858, 75 L.Ed. 1464.

47. Wash.—Hart v. Tuttle, 234 P. 19, 133 Wash. 558.

48. U.S.—The Asuarca, D.C.N.Y., 13 F.2d 222.

49. U.S.—The Asuarca, supra.
Mass.—Stevens v. Sayward, 3 Gray 108.

50. U.S.—Middleton v. U. S., D.C.S.C., 286 F. 548, modified on other grounds, C.C.A., U. S. v. Middleton, 3 F.2d 384, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809.
58 C.J. p. 498 note 69.
Contract provision giving carrier benefit of shipper's insurance generally see supra § 133.

51. U.S.—The Blandon, D.C.N.Y., 39 F.2d 933, affirmed, C.C.A., 42 F.2d 1013.

52. U.S.—The Asuarca, D.C.N.Y., 13 F.2d 222.

53. U.S.—Ralli v. New York, etc., S.S. Co., N.Y., 154 F. 286, 83 C.C.A. 290.

54. U.S.—Hills v. Mackill, D.C.N.Y., 36 F. 702.

55. U.S.—W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., C.A.S.C., 193 F.2d 539.

56. U.S.—The M. S. Californian, C.C.A.N.Y., 82 F.2d 283, certiorari denied J. V. Lane & Co. v. The M. S. Californian, 56 S.Ct. 959, 298 U.S. 690, 80 L.Ed. 1408, rehearing denied 57 S.Ct. 6, 299 U.S. 620, 81 L.Ed. 457.
10 C.J. p. 403 note 65.

57. U.S.—The Nat Sutton, C.C.A.N.Y., 62 F.2d 787.
58 C.J. p. 498 note 74—10 C.J. p. 403 note 65.

58. U.S.—The Asuarco, D.C.N.Y., 13 F.2d 222—The Tamba Maru, D.C. Wash., 274 F. 696.

59. U.S.—The Styria, D.C.N.Y., 95 F. 698.

60. U.S.—The M. S. Californian, C.C.A.N.Y., 82 F.2d 283, certiorari denied J. V. Lane & Co. v. The M. S. Californian, 56 S.Ct. 959, 298 U.S. 690, 80 L.Ed. 1408, rehearing denied 57 S.Ct. 6, 299 U.S. 620, 81 L.Ed. 457.

61. U.S.—The Augusto, D.C.N.Y., 29 F. 334.

62. Mass.—Stevens v. Sayward, 3 Gray 108.

injury to the goods is recoverable as part of his damages.[63]

Apportionment of damages. Where it is possible to determine the loss or injury due to a cause for which the carrier is liable and that due to a cause for which it is not liable, the damages will be apportioned accordingly.[64] In admiralty, where damage to goods is attributable partly to the fault of the carrier and partly to the fault of the shipper, and it is impossible to ascertain for what proportion each is responsible, the loss will be equally divided between them;[65] but apportionment or division of damages is not proper where the shipper was not at fault, although it is impossible to determine what part of the damage the carrier's fault caused,[66] and in such case the damage is to be borne in accordance with the burden of proof.[67] Thus, where the burden is on the carrier to establish what part of the damage was due to the cause for which it was not liable, and it is unable to sustain the burden, the total damage will be assessed against it.[68]

It has been held that, where a cargo has been damaged by independent causes, for only a part of which the ship is liable, the loss will not be equally divided, or cast wholly on the ship, except as a last resort and when all means fail of making an approximate apportionment of the loss to the several causes of damage,[69] and that, where it appears that the greater part of the damage to a cargo resulted from sea perils for which the ship is not liable, but further damage occurred through the negligence of the master in failing to put into port to make repairs, it would be inequitable to hold the ship liable for the entire damage, although it cannot be separated, and the loss should be divided.[70] The owner of a boat liable for wrongful jettison is entitled to a deduction for loss occurring without his fault, before the jettison,[71] and, where animals injured by perils of the sea are thrown overboard with others not injured, the failure of the carrier to prove the precise number injured does not render it responsible for all that were lost.[72]

§ 159. —— Lien

A shipper of goods on a carrier by water has a lien on the vessel for the loss of his goods or for any damage they may sustain from the fault or neglect of the master or the insufficiency of the vessel to transport them safely.

In accordance with the general rules relating to a shipper's lien under a contract of affreightment, as discussed supra § 110, a shipper of goods on a carrier by water has a lien on the vessel for the loss of his goods, or any damage they may sustain, from the fault or neglect of the master or the insufficiency of the vessel to transport them safely,[73]

63. U.S.—The Buckeye State, D.C.N.Y., 42 F.Supp. 715

64. U.S.—Beck v. The Vizcaya, D.C.Pa., 88 F.Supp. 818, affirmed, C.A., 182 F.2d 942, certiorari denied 71 S.Ct. 124, 340 U.S. 877, 95 L.Ed. 638.

Tug and tow

(1) Where both barge and tug were equally at fault each was liable for one-half damages to cargo.—The Detroiter, C.C.A.N.Y., 82 F.2d 234.

(2) Where loss of cargo in barge which collided with wall of barge canal was due to negligent steering of tug, towing barge, and to negligence of approaching tug, division of damages between negligent parties was proper.—The Pearl Harbor, C.C.A.N.Y., 74 F.2d 58.

(3) Where such additional damage to cargo as resulted from continuance of voyage after collision between two barges in tow for which tug alone was responsible could not be segregated, tug was liable for all such damage in absence of fault of barge master or crew during voyage or unpredictable intervening conditions that aggravated the situation.—The Raleigh, D.C.Md., 50 F.Supp. 961.

65. U.S.—American Finance & Commerce Co. v. U. S., D.C.Cal., 55 F.2d 725—The Georgian, D.C.Fla., 4 F.Supp. 718, affirmed, C.C.A., 76 F.2d 550.

58 C.J. p. 498 note 77.

66. U.S.—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373—Pioneer Import Corp. v. The Lafcomo, C.C.A.N.Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063.

67. U.S.—The Vallescura, N.Y., 55 S.Ct. 194, 293 U.S. 296, 79 L.Ed. 373

68. U.S.—The Vallescura, supra—U.S. v. Apex Fish Co., C.A.Wash., 177 F.2d 364—Armco Intern. Corp. v. Rederi A/B Disa, C.C.A.N.Y., 151 F.2d 5—Edmond Weil, Inc. v. American West African Line, C.C.A.N.Y., 147 F.2d 363—Pioneer Import Corp. v. The Lafcomo, C.C.A.N.Y., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063—Wessels v. The Asturias, C.C.A.N.Y., 126 F.2d 999—Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha, C.C.A.N.Y., 106 F.2d 32—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Speyer v. The Mary Belle Roberts, D.C.Cal., 22 F.Cas.No.13,240, 2 Sawy. 1.

69. U.S.—The Shand, D.C.N.Y., 16 F. 570

70. U.S.—The Musselcrag, D.C.Cal., 125 F. 786

71. Ky.—Bentley v. Bustard, 16 B. Mon. 643, 63 Am.D. 561

72. U.S.—Brauer v. Compania Navigacion La Flecha, N.Y., 66 F. 776, 14 C.C.A. 88, affirmed 18 S.Ct. 12, 168 U.S. 104, 42 L.Ed. 398.

73. U.S.—Inland Waterways Corporation v. Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715—Pioneer Import Corp. v. The Lafcomo, D.C.N.Y., 49 F.Supp. 559, affirmed, C.C.A., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063

58 C.J. p. 498 note 86.

Lien for loss of, or injury to, goods where ship chartered see supra § 51.

One to whom the shipper has hypothecated the goods has a lien—American Ins. Co. v. Coster, 3 Paige, N.Y., 323—58 C.J. p. 498 note 85.

Improper stowage

A lien arises against ship for damage to cargo caused by improper stowage.—Pioneer Import Corp. v. The Lafcomo, D.C.N.Y., 49 F.Supp. 559, affirmed, C.C.A., 138 F.2d 907, certiorari denied Black Diamond Lines v. Pioneer Import Corp., 64 S.Ct. 523, 321 U.S. 766, 88 L.Ed. 1063.

and such a lien may exist by virtue of a state statute,[74] provided such statute does not materially alter the rights and liabilities of the parties under the general rules of maritime law.[75]

The lien attaches when, and only when, in pursuance of the contract of affreightment, the goods are received on board the vessel for transportation,[76] or on a lighter engaged by the ship,[77] or are, in some other way delivered to the possession or control of the ship or her master;[78] and is not deferred until the vessel breaks ground for the voyage,[79] and, whenever any event happens which renders the lien enforceable, it relates back to the time it was so delivered or received.[80] Where, by virtue of a clause in the bill of lading, or a provision of the Harter Act, the vessel is exempt from liability for damages caused by legal process, a lien thereon does not arise for damages for the nondelivery of perishable cargo due to the seizure of the vessel under legal process,[81] and, therefore, claimant of such damages cannot complain because a lien allowed to him is ranked last.[82]

Priorities. The lien on the vessel for loss or damage to cargo is preferred to the right of the general creditors of the owners,[83] and to a mortgage on the vessel for labor and material furnished in her home port in fitting her for a voyage, where notice has been entered on the register.[84]

Loss or waiver of lien. The lien vests no absolute, indefeasible interest in the ship or vessel,[85] and may be lost by unreasonable delay.[86] It is not defeated by a bona fide sale of the vessel before the shipper has had an opportunity for enforcing his lien,[87] particularly where the purchaser has knowledge of the claim;[88] and so a purchaser of a vessel cannot invoke the defense of laches to defeat a suit by an insurer to enforce a lien for the negligent loss of cargo, occurring before the purchase, where the suit was commenced within a year after the loss, and it does not appear that he bought without knowledge of the lien.[89] In order to constitute a waiver of the lien there must be a knowledge of the loss or injury coupled with an intention to abandon the remedy,[90] or some contract inconsistent with the existence of the lien;[91] and it is not waived by the acceptance of the goods by the consignee or owner,[92] or by a receipt specifying that the goods have been received in good order.[93]

Enforcement. The lien may be enforced by process in rem against the vessel in admiralty.[94] Where the lien is sought to be enforced under the general admiralty law, and not under a state law, it is not subject to a requirement of the state law that the libel should be filed before the vessel make another voyage.[95]

E. FREIGHT

§ 160. Right to Freight

a. In general
b. Effect of loss of, or injury to, goods

a. In General

Generally, a carrier of goods by water is entitled to freight when it has properly fulfilled its contract of car-

74. Ala.—The Robert Morris v. Williamson, 6 Ala. 50
58 C.J. p 499 note 87
Maritime liens under state statutes in general see Maritime Liens §§ 17, 31 et seq.

75. U.S.—Osaka Shosen Kaisha v Pacific Export Lumber Co., Or., 43 S.Ct. 172, 260 U.S. 490, 67 L.Ed. 364

76. U.S.—Inland Waterways Corporation v Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715.
58 C.J. p 499 note 93.

77. U.S.—The Trader, D.C.S.C., 17 F.2d 623.

78. U.S.—Inland Waterways Corporation v Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715.
58 C.J. p 499 note 95
Cargo on wharf held accepted by ship
U.S.—Inland Waterways Corporation v. Standard Commercial Tobacco Co., supra.

79. U.S.—The Esrom, D.C.N.Y., 261 F. 624, reversed on other grounds, C.C.A., 272 F. 266, certiorari denied 42 S.Ct. 47, 257 U.S. 634, 66 L.Ed. 408.

80. U.S.—The St. Paul, D.C.N.Y., 277 F. 99

81. U.S.—The Estrada Palma, D.C.La., 8 F.2d 103.

82. U.S.—The Estrada Palma, supra.

83. U.S.—The Rebecca, D.C.Me., 20 F.Cas.No.11,619, 1 Ware 187.
Priorities of maritime liens in general see Maritime Liens § 50 et seq.

84. U.S.—Justi Pon v. Arbustci, D.C.N.Y., 14 F.Cas.No.7,589.

85. U.S.—The Favorite, D.C.Wis., 8 F.Cas.No.4,696, 1 Biss. 525.

86. U.S.—The Rebecca, D.C.Me., 20 F.Cas.No.11,619, 1 Ware 187.
Loss of maritime lien in general see Maritime Liens § 61 et seq.

87. U.S.—The Rebecca, supra.

88. U.S.—The Rebecca, supra.

89. U.S.—The Seaboard, D.C.N.Y., 119 F. 375.

90. Ala.—The Robert Morris v. Williamson, 6 Ala. 50.
Waiver of maritime liens in general see Maritime Liens § 63 et seq.

91. Ala.—The Robert Morris v. Williamson, supra

92. Ala.—The Robert Morris v. Williamson, supra

93. Ala.—The Robert Morris v. Williamson, supra.

94. U.S.—Taylor Bros. Lumber Co. v. Sunset Lighterage Co., C.C.A.N.Y., 43 F.2d 700.
58 C.J. p 500 note 18
Enforcement of maritime lien in general see Maritime Liens § 79 et seq.

95. U.S.—Knox v. Ninetta, D.C.Pa., 14 F.Cas.No.7,912, Crabbe 534, 5 Pa.L.J. 33.

riage. Before any freight is earned, the goods must be delivered as well as carried to the point of destination.

Generally, a carrier of goods by water is entitled to freight when,[96] and only when,[97] it has properly fulfilled its contract of carriage. If the ship does not begin her voyage at all, does not break ground, no freight is payable.[98] Thus, if the vessel sinks in the port of departure and the goods are rescued by the insurers and turned over to the owner,[99] or if the vessel, before she breaks ground for a voyage, is so injured as to be rendered unseaworthy and incapable of earning freight,[1] no freight is earned. If the goods are wrongfully taken from a vessel by the shipper before she has broken ground on the voyage the shipowner is not entitled to freight as such.[2]

As a general rule, delivery of the cargo at the port of destination is a condition precedent to the right to freight,[3] and without such delivery the voluntary acceptance of the cargo at an intermediate place by the owner of the cargo is necessary to enable the shipowner to recover either full or pro rata freight,[4] or, as it has been probably more comprehensively stated, freight is due, notwithstanding the nonarrival of the goods at the port of destination, only where the nonarrival has been occasioned by no default or inability of the carrier ship, but has been occasioned by the default or waiver of the merchant shipper.[5] This general rule may be varied by stipulations,[6] but such stipulations, in order to be effective, must be in writing and signed by the parties.[7]

Return to port of departure. If a ship is obliged by perils of the sea to put back to her port of departure, and her cargo is there sold by the master with the consent of the shipper, no freight is earned.[8] Under a bill of lading providing that where it is unsafe to discharge goods the carrier has the option to return them and that the carrier shall be entitled to extra compensation for such service, it has been held that a carrier whose master failed to discharge the goods because of a military invasion at the point of destination and returned such goods to the point of origin rendered a service entitling the carrier to extra compensation.[9] Where a vessel is damaged in a collision as it starts on a voyage and the cargo is also damaged to such an extent that it has to be sold in the port of origin, with respect to the right to freight, whether the shipowner repaired the vessel within a reasonable time cannot be measured by the time actually consumed because, after the sale of the cargo, there was no reason for hastening repairs.[10]

Abandonment of vessel and cargo. If a vessel and cargo are abandoned at sea by the master and crew without intention to retake them no freight is earned,[11] but if the abandonment is intended to be temporary, the shipowners have a right to take the cargo to the port of destination and to be paid the agreed freight.[12]

Abandonment of voyage. Under a bill of lading which provides that freight is to be deemed earned "ship or goods lost or not lost," it has been held that

96. U.S.—The Louise, D.C.Md., 58 F. Supp. 445
58 C.J. p. 500 note 22.

Meaning of term "freight"

(1) Term "freight" in marine contracts is generally used to denote remuneration or reward for carriage of goods by ship, rather than the goods themselves—Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co., C.C.A.La., 155 F.2d 687, certiorari denied 67 S.Ct. 115, 329 U.S. 761, 91 L.Ed. 656—The Bill, D.C.Md., 55 F. Supp. 780—The Norman Prince, D.C.Ala., 185 F. 169—27 C.J. p. 902 notes 60, 64–70, 74–81.

(2) Term "freight" has another meaning, that of the articles carried—The Nassau, N.Y., 188 F. 46, 110 C.C.A. 184, certiorari denied 32 S.Ct. 524, 223 U.S. 722, 56 L.Ed. 630—27 C.J. p. 902 note 61, p. 903 notes 86–10.

(3) The term does not always imply that it is the naulum, merces, or fare for the transportation of goods.—The Main v. Williams, Md., 14 S.Ct. 486, 152 U.S. 122, 129, 38 L.Ed. 381—Giles v. The Cynthia, D.C.Pa., 10 F. Cas.No.5,424, 1 Pet.Adm. 203.

(4) Meaning of term "freight" as applied to carriage of passengers see infra § 174.

"Freight pending" extends to passage money and to freight prepaid at the port of departure—The Main v. Williams, Md., 14 S.Ct. 486, 152 U.S. 122, 132, 32 L.Ed. 381—27 C.J. p. 905 note 48.

97. U.S.—The Excelsior, D.C.N.Y., 8 F.Cas.No.4,592, 2 Ben. 434.
58 C.J. p. 500 note 23.

98. U.S.—The Tornado, La., 2 S.Ct. 746, 108 U.S. 342, 27 L.Ed. 747

99. Ind.—Rogers v. West, 9 Ind. 400
58 C.J. p. 500 note 26.

1. U.S.—The Tornado, La., 2 S.Ct. 746, 108 U.S. 342, 27 L.Ed. 747

2. Mass.—Bailey v. Damon, 3 Gray 92.
58 C.J. p. 500 note 28.

3. U.S.—Clifford v. Merritt-Chapman & Scott Corporation, C.C.A.Fla., 57 F.2d 1021
58 C.J. p. 500 note 29

4. U.S.—Mitsui v. St. Paul F. & M. Ins. Co., Cal., 202 F. 26, 120 C.C.A. 280, certiorari denied 34 S.Ct. 321, 231 U.S. 749, 58 L.Ed. 465.
58 C.J. p. 501 note 30.

5. Hawaii—Janion v. Fox, 1 Hawaii 271.

6. U.S.—The Norman Prince, D.C.Ala., 185 F. 169

Validity

Contractual provisions establishing a shipper's liability for ocean freight charges, regardless of actual delivery of goods to destination, are valid—Alcoa S.S. Co. v. U.S., N.Y., 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225.

7. U.S.—The Norman Prince, D.C.Ala., 185 F. 169.

8. Mass.—Lord v. Neptune Ins. Co., 10 Gray 109.

9. U.S.—Colonialgrossisternes Forening v. Moore-McCormack Lines, C.A.N.Y., 178 F.2d 288.

10. U.S.—The Fredensbro, D.C.Pa., 52 F.2d 854.

11. U.S.—The James Martin, D.C.Va., 88 F. 649.

12. N.Y.—Hughes v. Sun Mut. Ins. Co., 2 N.E. 901, 3 N.E. 71, 100 N.Y. 58.
58 C.J. p. 501 note 36.

a carrier is entitled to freight where it abandons the voyage after being torpedoed by a warship of an enemy nation.[13] However, under a contract which provides for "Ocean freight net cash on arrival of steamer," a carrier is not entitled to freight on abandonment of a voyage where the contract incorporates by reference a bill of lading providing that freight "shall be deemed fully earned and due and payable to the carrier at any stage," it being held that arrival at the destination is the carrier's choice of the stage when the freight is deemed fully earned.[14]

Deviation or retardation of voyage. Violation of a shipping contract, by deviation from the course and taking additional cargo, does not of itself forfeit freight, but merely authorizes a distinct action for damages against the vessel,[15] and even where there is a deviation during a voyage which avoids the contract of affreightment, the acceptance of the cargo by the freighter, with full knowledge of the deviation, restores to the shipowner his right to freight.[16] A temporary retardation does not deprive the carrier of his right to the freight money.[17]

Prevention of carriage If the owner of the cargo is the cause of its not being transported to the port of destination, full freight is earned,[18] and, after the cargo is on board and the voyage begun, the shipper cannot demand it short of the port of destination without payment of full freight for the whole voyage.[19] Thus, where a ship grounds a short distance down a river from the port of departure, and the shipper, alleging the consignee's failure, withdraws the cargo under legal process, he will be liable for the whole freight, at least where the ship soon after the disaster is ready to continue her voyage;[20] and if the cargo is damaged, and by the mutual voluntary agreement of the master and shipper it is sold short of the port of destination, full freight may be recovered.[21] If a ship is overtaken by a disaster, or the restraint of princes or governments makes it impossible for the ship to continue the voyage to the port of destination, the shipowner is not entitled to "freight payable on delivery" at such port, unless he brings the cargo forward in other vessels or is prevented from doing so by the owner of the cargo.[22] Where a vessel is expropriated by a foreign government and directed to a port other than its destination, a cargo owner who gets options on vessels to carry the cargo and concludes arrangements with such government does not prevent the charterer from fulfilling his contract of affreightment where he does nothing effective to meet the situation and is unwilling to make any commitment to bring on the cargo.[23] Where the bills of lading provide that a shipowner has earned freight charges when the cargo is loaded, he is entitled to retain freight charges paid after the cargo is loaded although the voyage is prevented by the outbreak of war.[24] If, after a vessel has

13. U.S.—Pope & Talbot v. Blanchard Lumber Co of Seattle, C.C.A. Cal., 159 F.2d 134

Freight earned clause construed

The freight to be deemed earned "ship or goods lost or not lost" clause in bill of lading is not limited in application to freight which carrier has declared due on the receipt of the goods, and applies to freight other than so declared due—Pope & Talbot v. Blanchard Lumber Co. of Seattle, supra.

14. U.S.—Pope & Talbot v. Guernsey-Westbrook Co., C.C.A. Cal., 159 F.2d 139

Entire contract considered

Where acceptance of contract to purchase lumber from seller-carrier incorporated by reference a bill of lading which embodied a freight earned clause, the right of the carrier to earned freight is to be determined by the agreement of the parties incorporating the acceptance and bill of lading and the bill of lading cannot be deemed a complete and separate contract of affreightment from which the right to earned freight can be determined—Pope & Talbot v. Guernsey-Westbrook Co., supra.

Bill of lading construed

Under bill of lading providing "full freight to destination . . . are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same . . . shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder," the words "the same" applies to the words "full freight to destination" and not to the words "due and payable to the carrier at its option upon receipt of the goods."—Pope & Talbot v. Guernsey-Westbrook Co., supra.

15. U.S.—Knox v The Ninetta, D.C. Pa., 14 F.Cas.No 7,912, Crabbe 534, 5 Pa.L.J. 33

16. U.S.—Thatcher v McCulloh, D.C.N.Y., 23 F.Cas.No 13,862, Olcott 365
58 C.J. p 501 note 39.

17. U.S.—Murray v Ætna Ins Co., C.C.Ill., 17 F.Cas.No 9,955, 4 Biss. 417.
58 C.J. p 501 note 40

18. U.S.—Owens v Breitung, C.C.A. N.Y., 270 F. 190.
58 C.J. p 502 note 41.

19. N.D.—Braithwaite v Power, 48 N.W. 354, 1 N.D. 455
58 C.J. p 502 note 42

20. La.—Blake v. Morgan, 3 Mart 375.
Md.—Merchants' Mut Ins Co. v. Butler, 20 Md. 41.

21. U.S.—Jordan v. Warren Ins. Co., C.C.Mass., 13 F.Cas.No 7,524, 1 Story 342

22. U.S.—Linea Sud-Americana v 7,295.40 Tons of Linseed, D.C.N.Y., 29 F.Supp. 210, affirmed, C.C.A., 108 F.2d 755, certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1018.

Exception in bill of lading

Exception in bill of lading releasing charterer of vessel from any claim for damages to the cargo due to "act of God . . . restraints of princes and rulers or people" and the like did not affect the conditions under which charterer would be entitled to freight "payable at destination," where vessel was expropriated and diverted from its course by foreign government—Linea Sud-Americana v. 7,295.40 Tons of Linseed, supra

23. U.S.—Linea Sud-Americana v 7,295.40 Tons of Linseed, supra.

24. N.Y.—Tee Ka Chay v De La Rama S. S. Co., 55 N.Y.S.2d 241—

taken on board a cargo to be carried, an embargo prevents her from sailing, and the cargo is sold at the port of shipment, the owner of the vessel can recover nothing in the way of freight from the shipper.[25]

Right to transship and forward. If the cargo in fact reaches the port of destination so that delivery can be made, whether by the boat named, or by another agency set in motion by the original carrier or by one standing in his place, freight is earned.[26] Thus, if the ship is disabled from completing her voyage, the master may earn full freight by transshipping and forwarding the goods.[27] In such case if the master transships the cargo, he may charge the excess of the cost of transshipment over his freight to the owner of the goods,[28] but the owner of the goods cannot be held both for the whole freight originally contracted for and the freight paid on the transshipped goods,[29] and if there is no necessity for reshipment he cannot be held liable for the cost thereof.[30] If the master declines or is unable either to repair or transship, he may be called on to deliver without payment of freight,[31] but before a reasonable time has elapsed he cannot be required to deliver except on payment of full freight and waiver of delivery.[32]

Where a shipment accepted with full knowledge as to its character becomes dangerous so that it has to be unloaded and transshipped at an intermediate port, the carrier is not entitled to the cost of transshipment and the expense of discharging it.[33]

Delivery. As a general rule, before any freight is earned the goods must be delivered as well as carried to the point of destination.[34] Thus, in the

E Awad & Sons v. De La Rama SS Co, 53 N Y S 2d 900, affirmed 38 N.Y S 2d 897, 265 App Div. 913, appeal denied 39 N Y S 2d 989, 265 App.Div 990.

Unpaid freight charges

Where bills of lading drawn in accordance with United States Carriage of Goods by Sea Act constituted contract of parties and determined their rights and obligations, steamship company which had loaded cargo for Philippine Islands and which was frustrated in voyage by outbreak of war was entitled to sue for and recover all freight charges unpaid.—E Awad & Sons v. De La Rama SS. Co, supra.

Instructions from shipper

A steamship owner, requiring prepayment of freight charges, had the right to continue loading goods thereon for shipment to Philippines after Japanese attack on Pearl Harbor and entry of United States into war, in absence of instructions from shipper to desist from such loading, so as to preclude shipper's recovery of such charges after abandonment of voyage and unloading of cargo, even if loading was not completed until day after such attack.—Tee Ka Chay v. De La Rama S. S. Co, 55 N.Y S 2d 241.

Continuance of loading

(1) In determining whether carrier's agent arbitrarily continued loading of cargo on ship which was to sail for Philippine Islands after receiving news of the Pearl Harbor attack, court should not find that course pursued was blameworthy merely because results were unfortunate, the shipper having the right to demand of carrier after receiving news of the Pearl Harbor attack not infallibility, but exercise of a reasoned judgment of the situation as it appeared at the moment having regard to rights of all concerned.—De La Rama S. S Co. v Ellis, C C.A Cal, 149 F.2d 61, certiorari denied 66 S. Ct. 23, 326 U S 718, 90 L Ed 425.

(2) A carrier which was in process of loading cargo destined for Philippine Islands had discretion to complete the loading without waiting future developments in absence of contrary instructions from shippers, notwithstanding carrier received news of the Pearl Harbor attack, since such attack did not constitute automatically a restraint on shipping.—De La Rama S S Co v Ellis, supra.

25. U S.—Kelly v Johnson, C C Pa, 14 F.Cas No 7,672, 3 Wash 45

26. N Y.—Hughes v Sun Mut. Ins Co, 2 N E 901, 3 N E 71, 100 N Y. 58

27. Hawaii.—Janion v Fox, 1 Hawaii 271
N Y.—Bradhurst v. Columbian Ins. Co., 9 Johns 17.

28. U S.—The Plow City, D C Pa., 23 F Supp 548.
58 C.J. p 502 note 52.

29. Md.—Hugg v. Baltimore, etc, Smelting, etc, Co, 35 Md 414, 6 Am R 425
Tenn.—Crawford v Williams, 1 Sneed 205, 60 Am D 146

30. Md.—Gaither v. Myrick, 9 Md 118, 66 Am.D. 316
58 C J p 502 note 54

31. N Y.—Bradhurst v. Columbian Ins Co., 9 Johns. 17.

32. N.Y.—Hubbell v. Great Western Ins. Co, 74 N.Y. 246.

33. U S.—The Rangoon Maru, C C.A N.Y, 27 F.2d 722

34. U S.—Alcoa S S Co. v U S., N Y., 70 S.Ct 190, 338 U.S. 421, 94 L Ed 225.—James Richardson & Sons v. 158,200 Bushels of No. 1 Northern Manitoba Wheat, C C.A.N.Y., 90 F 2d 607.—Toyo Kisen Kaisha v. W. R Grace & Co., C C A Cal., 53 F 2d 740.
58 C J p 503 note 59.

Notification of consignee

In absence of contract provision or custom to the contrary, ship, before demanding agreed freight, must deliver goods on wharf at destination, and notify consignees or owners.—Clifford v Merritt-Chapman & Scott Corporation, C C A Fla., 57 F.2d 1021.

Storage of goods

(1) If consignees or owners cannot be notified, or if agreed freight is unpaid, ship, on storage of goods at destination, has earned freight.—Clifford v. Merritt-Chapman & Scott Corporation, supra.

(2) Ship's placing goods in storage at destination pending notice and delivery to consignee was not conversion forfeiting freight.—Clifford v. Merritt-Chapman & Scott Corporation, supra.

Seizure of ship and cargo

Seizure of ship and cargo under in rem libels, after cargo was stored at destination pending notice and delivery to consignees, did not destroy ship's right to freight where no liens on cargo beyond freight and storage existed.—Clifford v. Merritt-Chapman & Scott Corporation, supra.

Shipment under government bill of lading

(1) Where first condition of government standard form bill of lading for shipment of goods by water provided for payment on presentation of bill properly accomplished, attached to freight voucher on authorized government form, and second condition provided that bill was subject to conditions on usual forms provided by carrier unless otherwise specifically provided "hereon," reference was to

absence of an agreement to the contrary, freight under an ordinary bill of lading is demandable only by the owner, master, or consignee of the ship when he is ready to deliver the goods in the like good order as they were when they were received on board the ship.[35] If a shipment under one bill of lading cannot be landed in the business hours of one day, the master can demand security for the payment of the entire freight or an arrangement for payment of the freight pro rata as the merchandise is landed,[36] but payment of the freight of the entire shipment cannot be demanded until all the merchandise has been landed and the consignee afforded an opportunity to examine his goods to see whether the obligations of the bill of lading have been fulfilled by the shipowner.[37] If, under a bill of lading calling for delivery alongside, the vessel arrives at the port of destination but sinks before a reasonable time for the consignee to take the goods off has elapsed,[38] or if the carrier delivers the goods to the wrong person,[39] no freight is earned. However, in the latter case, if the carrier regains possession of the goods and tenders them to the proper person, the freight may be collected.[40]

Sale of cargo at destination. If a perishable cargo is sold at the port of destination by the master on the consignee's refusal to receive it, the shipowners may recover from the shippers the stipulated freight.[41]

Illegal contracts. A vessel which carries merchandise in violation of a statute prohibiting it from doing so earns no freight.[42]

b. Effect of Loss of, or Injury to, Goods

The parties may so contract that freight is payable whether or not the cargo is lost or injured, or otherwise regulate the matter by contract, in which case the contract governs. In the absence of such a contract, if the goods are lost by a danger of navigation or peril of the sea, the carrier is not entitled to freight.

The parties may so contract that freight is payable whether or not the cargo is lost or injured,[43] or otherwise regulate the matter by contract, in which case the contract governs.[44] However, even

be made to government voucher form in determining whether government was to be held liable for freight on undelivered goods—Alcoa S S Co v. U. S, N.Y., 70 S Ct. 190, 338 U.S. 421, 94 L Ed. 225.

(2) Where government standard form bill of lading was subject to conditions of forms used by ocean carrier unless otherwise specifically stated, and government bill provided for payment on presentation of bill properly accomplished attached to freight voucher prepared on authorized government form which clearly stated that payment for transportation charge would be made only for stores delivered at destination, terms of government bill were inconsistent with ocean carrier's requirement for payment of full freight to destination, goods or vessel lost or not lost, and government was not liable for freight charges on public goods lost at sea—Alcoa S. S. Co. v. U. S, supra

(3) Where comptroller general, although allowing payment of freight under government form bill of lading, which required signature of consignee for delivery of goods shipped, when consignee in Philippines could not be found because of war conditions, warned carriers that question of recovery of freight for goods destroyed in shipment as result of enemy action was still an open question, court in determining carrier's right to recover freight charges for goods so lost was not required to give substantial weight to administrative rulings—Alcoa S. S. Co. v U. S, C.A N.Y., 175 F.2d 661, affirmed 70 S Ct 190, 338 U S. 421, 94 L Ed 225.

(4) Condition contained in government form bill of lading under which goods were shipped, against prepayment of charges and against collection of freight charges from consignee, and instruction that consignee's certificate of delivery should be evidence on which settlement would be made established that the United States, as shipper, was asserting its privilege under admiralty law of requiring performance of carrier's duty to deliver shipment as a condition precedent to payment of freightage—Alcoa S S. Co. v. U. S, C A.N Y., 175 F.2d 661, affirmed 70 S. Ct. 190, 338 U.S 421, 94 L Ed. 225

35. U.S—Brittan v. Barnaby, 21 How. 527, 16 L Ed 177
58 C J p 503 note 60

36. U.S—Brittan v Barnaby, supra.

37. U.S—Brittan v Barnaby, supra.

38. N.Y—McKee v Heckscher, 10 Daly 393.

39. Md.—Ferguson v. Cappeau, 6 Harr & J 394.
N Y.—Atlantic Nav. Co. v. Johnson, 27 N.Y.Super. 475.

40. Ga—Barnett v. Central Line of Boats, 51 Ga. 439

41. U.S.—The Maria White, D C.Me, 16 F Cas No 9,083, 1 Hask. 204.
58 C J. p 503 note 67.

42. U S—Petrel Guano Co. v. Jar nette, C.C N.C, 25 F. 675.
58 C J. p 505 note 88.

43. Cal—Transmarine Corporation v. R W Kinney Co, 11 P.2d 877, 123 Cal App 411
58 C.J. p 503 note 68.

Provision for payment after arrival
Where goods were shipped from foreign country to New York under a bill of lading providing that freight would be considered earned even in case of shipwreck, etc., a clause stamped thereon requiring payment of transatlantic freight twenty-four hours after arrival of the vessel merely postponed the time of payment, and did not discharge the shipper or consignee from liability for freight, even though the vessel was lost at sea.—Otis Astoria Corp v. Brasileiro, 52 N.Y.S 2d 235.

Percentage of freight payable on arrival
A charter party making eighty per cent of the freight payable on arrival of boats at destination, "cargo lost or not lost," precludes the cargo owners from recovering the cargo without paying eighty per cent of the freight, even though the shipowner, claiming a maritime lien therefor, refuses to provide security for the cargo owners' claims for damages for delay in delivering the goods—James Richardson & Sons v. 158,200 Bushels of No 1 Northern Manitoba Wheat, C.C A N.Y., 90 F 2d 607.

44. U S—Taylor v. Insurance Co of North America, C C Mass., 6 F. 410.
58 C.J. p 503 note 69

Oral contract as binding
Oral agreement confirmed by letter making freight payable on delivery was contract of affreightment, precluding recovery of freight charges where cargo was lost at sea.—Toyo Kisen Kaisha v. W R. Grace & Co., C.C.A.Cal., 53 F.2d 740.

though the bill of lading calls for payment of freight "ship lost or not lost," if the goods are so damaged by the carrier's negligence that they cannot be delivered in specie freight is not recoverable.[45] In the absence of such a contract, if the goods are lost by a danger of navigation or peril of the sea, the carrier is not entitled to freight.[46] Thus, where a voyage is broken up by an overwhelming calamity and the vessel is taken to an intermediate port by salvors, and a portion of her cargo is sold to pay salvage, the portion sold is to be treated as lost, and, no freight is recoverable for its carriage,[47] and the same rule applies on a proper jettison of part of the cargo.[48] So, also, where a vessel puts in at an intermediate port in distress, and it is there found that a portion of the cargo has been rendered worthless by perils of the sea, while the residue is not of sufficient value to warrant continuing the voyage, and such portion is therefore sold by the master and the voyage broken up, no claim for freight can be maintained by the shipowner;[49] and, similarly, where cargo is destroyed in specie by a peril of the sea, which causes the vessel to put into a port of distress, so that such cargo loses its original character at the port of distress, or where the damage to it is such that, if reshipped, a total destruction of it in specie will be inevitable before it can arrive at its port of destination, the shipper is not liable for the freight[50]

Where, however, the cargo is carried to the port of destination, freight is earned even though at its arrival it is, by reason of sea damage, partially or utterly ruined and worthless,[51] and, where the loss of a portion of a cargo is caused by a "danger of navigation or peril of the sea," the carrier is entitled to freight on the portion of the cargo actually delivered,[52] and freight is payable, in the case of wreck, on each package landed, if equal in value to the freight[53] Generally, if the goods are lost, damaged, or destroyed either wholly or partially, otherwise than by a peril of the sea or a cause excepted in the contract of affreightment, the carrier is not entitled to freight.[54] However, if part performance is accepted or if the contract is by its terms or by implication divisible, the carrier is entitled to freight on the portion delivered,[55] but not on that which has been lost;[56] and in such case if the goods lost are of greater value than the freight of the remainder, the carrier cannot recover for the freight of those delivered,[57] but full freight may be recovered where, due to an intrinsic vice in the goods, there is a loss in quantity on the voyage,[58] or the goods spoil.[59]

Goods spoiled and sold at intermediate port. If goods destined for inland points are damaged on the dock at the end of the ocean voyage and such portion thereof as can be identified is sold with the consent and approval of the owners, such consent is in effect a voluntary acceptance of delivery at an intermediate port so that the carrier is entitled to pro rata freight thereon,[60] but freight cannot be recovered on unidentified portions of the goods sold[61] or for lost goods.[62]

§ 161. Amount and Rate

a. In general
b. Freight pro rata
c. Quantity shipped and determination thereof

a. In General

The amount and rate of freight are generally provided for in the contract of carriage, in which case the contract governs In the absence of an express agreement as to the freight rate the owner of the vessel is entitled to reasonable freight.

The amount and rate of freight are generally

45. U.S.—The Willdomino, C.C.A.N.J., 300 F. 5, affirmed 47 S.Ct. 261, 272 U.S. 718, 71 L.Ed 491.
46. U.S.—The Cuba, D.C.Me., 6 F.Cas.No.3,458, 3 Ware 260.
58 C.J. p 504 note 71.
47. U.S.—The Nathaniel Hooper, C.C.Mass., 17 F.Cas.No.10,032, 3 Sumn. 542.
48. U.S.—Christie v. Davis Coal, etc., Co, D.C.N.Y., 95 F. 837, affirmed 110 F. 1006, 49 C.C.A. 170—The Cuba, D.C.Me., 6 F.Cas.No.3,458, 3 Ware 260.
49. U.S.—The Ann D. Richardson, D.C.N.Y., 1 F.Cas.No.410, Abb.Adm. 499, affirmed, C.C., 1 F.Cas.No.411, 1 Blatchf. 358 note.
58 C.J. p 504 note 74.
50. U.S.—Ridyard v. Phillips, C.C.N.Y., 20 F.Cas.No.11,820, 4 Blatchf 443.
51. U.S.—Carao v. Guimaraes, D.C.Pa., 10 F. 783
58 C.J. p 504 note 76
52. U.S.—The Collenberg, N.Y., 1 Black 170, 17 L.Ed 89
58 C.J. p 504 note 77
53. U.S.—Smith v. Welsh, D.C.Pa., 22 F.Cas.No.13,126.
54. U.S.—British, etc., Mar. Ins. Co v. Southern Pac. Co., D.C.N.Y., 55 F. 82, affirmed 72 F. 285, 18 C.C.A. 561.
58 C.J. p 504 note 79
55. N.Y.—New York Cent., etc., R. Co. v. Standard Oil Co, 87 N.Y. 486—Hinsdell v. Weed, 5 Den. 172.
56. N.H.—Harris v. Rand, 4 N.H. 259, 555, 17 Am.D. 421.
N.Y.—New York Cent., etc., R. Co. v. Standard Oil Co, 87 N.Y. 486.
57. Ala.—Waring v. Morse, 7 Ala. 343
58 C.J. p 504 note 82.
58. U.S.—Steelman v. Taylor, D.C.Mass., 22 F.Cas.No.13,349, 3 Ware 52.
N.Y.—Griswold v. New York Ins. Co, 3 Johns. 321, 3 Am.D. 490.
59. U.S.—Seaman v. Adler, C.C.La., 37 F. 268
58 C.J. p 504 note 84.
60. Wash.—Northern Pac. R. Co. v. Johnson, 188 P. 30, 110 Wash. 86
61. Wash.—Northern Pac. R. Co. v. Johnson, supra.
58 C.J. p 505 note 86.
62. Wash.—Northern Pac. R. Co. v. Johnson, supra.

provided for in the contract of carriage, in which case the contract governs.[63] Thus, a shipper who, without any knowledge of the charter, contracts with a charterer for shipment of a cargo at a specified freight rate is not liable for freight in accordance with the terms of the charter, but the extent of his liability is determined by his own contract with the charterer.[64] In the absence of an express agreement as to the freight rate the owner of the vessel is entitled only to reasonable freight,[65] and it has been held that, in the absence of a contract, where goods are incorrectly declared, the carrier is entitled to the rate which would have been due had the shipper truthfully declared his goods.[66] If the goods are carried on deck when the contract called for them to be carried under deck the carrier is entitled only to deck freight.[67] In the absence of a special handling charge, the freight rate covers the stevedoring charge.[68] Where the cargo owner takes the cargo from a vessel before the completion of her voyage, under circumstances which do not entitle her to exemplary damages, she can recover only such damages as will compensate her for the net injury suffered, and from the estimated net freight she would have earned is to be deducted the net amount she earned, or should reasonably have earned, during the time it would have taken her to complete the voyage.[69]

Interest. The shipowner has been held entitled to interest on freight charges from the date of the completion of the unloading of the cargo.[70]

Dead freight. Whether or not dead freight is payable depends on the terms of the contract of affreightment.[71] Dead freight may be recovered on cargo not furnished but contracted for, where the vessel is ordered into her berth by the agent of the shipper at a time when a full cargo is not available, and when she cannot wait therein for the rest of her cargo or return for more,[72] but the owners of a vessel cannot recover dead freight from a shipper because of his failure to load the full quantity contracted to be carried where there were no facilities for weighing the cargo, and the shipper accepted the estimate of the master that the full quantity had been loaded,[73] or where the failure of the shipper to ship the full quantity was caused by the action of the captain.[74]

Freight short-shipped. In an action to recover for freight short-shipped defendant may not com-

63. U.S.—North German Lloyd v Elting, C.C.A.N.Y., 96 F.2d 48
58 C.J. p 505 note 92.

Essential part of contract

Undertaking to charge only agreed freight is essential part of affreightment contract—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216.

Freight fixed by reference to lower rate of competitors

Steamship owner's demand for payment of freight at contract rate was held unauthorized, in view of provision for application of lower rate charged by another carrier moving similar cargo, even though neither party knew of such fact at time of demand—The Pacific Cedar, C.C.A. Wash., 61 F.2d 187, reversed on other grounds 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216.

Agreement as to incorrect declaration of cargo

An agreement between shipper and carrier for double the regular ocean freight rate on goods, which have been incorrectly declared, was not invalid as a penalty rather than an agreed charge for service.—North German Lloyd v Elting, C.C.A.N.Y., 96 F.2d 48.

Standard fixed in contract

Where the through bills of lading given to plaintiff covering merchandise purchased by plaintiff for transportation to New York fixed the computation of freight charges on weight, plaintiff was not liable for additional freight charges recomputed by connecting carrier on a cubic foot instead of a weight basis—Kachurin v. American Iraq Shipping Co., 61 N.Y.S.2d 414, 187 Misc. 178

Carrier's agreements held not applicable

Carrier's agreements with respect to rates were not applicable to shipments under contracts entered into at time agreements were not in force—Ambler v. Bloedel Donovan Lumber Mills, C.C.A.Wash., 68 F.2d 268.

Notation of rate on bill of lading

Notation of rate on bill of lading is not conclusive, since bill of lading is not contract, but, at best, only evidence thereof, and any irreconcilable repugnancy between prior written contract and bills of lading must be resolved in favor of former, and where a shipping contract is attested by letter of confirmation showing agreed rate, the rate shown on bill of lading, contrary thereto, is not controlling—Ambler v Bloedel Donovan Lumber Mills, supra.

64. U.S.—Vane v. Wood, D.C.N.Y., 231 F. 353.

65. U.S.—Oliphant v. Florida East Coast Car Ferry Co., D.C.Fla., 4 F. Supp. 288.
58 C.J. p 505 note 94.
Statutory regulation of rates see supra § 103.

66. U.S.—North German Lloyd v Elting, C.C.A.N.Y., 96 F.2d 48

67. U.S.—The Water Witch, C.C.N.Y., 4 F.Cas.No.1,971, affirmed 1 Black 494, 17 L.Ed. 155—Vernard v. Hudson, C.C.Mass., 28 F.Cas.No. 16,921, 3 Sumn. 405

68. U.S.—Sun-Maid Raisin Growers Ass'n v. U.S., D.C.Cal., 33 F.Supp. 959, affirmed, C.C.A., 61 S.Ct. 830, 312 U.S. 667, 85 L.Ed. 1111, rehearing denied 61 S.Ct. 940, 312 U.S. 598, 85 L.Ed. 1551

69. U.S.—The Eliza Lines, C.C. Mass., 102 F. 184, affirmed 114 F. 307, 52 C.C.A. 195, reheard 132 F. 242, 65 C.C.A. 538, and reversed on other grounds 26 S.Ct. 8, 199 U.S. 119, 50 L.Ed. 115.

70. U.S.—Richardson v. Jenkins S. S. Co., C.C.A.Mich., 44 F.2d 759, certiorari denied James Richardson & Sons v. Jenkins S. S. Co., 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436.

71. Wis.—Warehouse, etc., Supply Co. v. Galvin, 71 N.W. 804, 96 Wis. 523, 65 Am.S.R. 57.
58 C.J. p 506 note 7.

72. U.S.—New York, etc., Mail S.S. Co. v. Guayaquil, etc., R. Co., C.C.A.N.Y., 270 F. 200, certiorari dismissed 42 S.Ct. 51, 257 U.S. 642, 66 L.Ed. 412
58 C.J. p 506 note 8.

73. U.S.—Barber v. Vlasto, D.C.N.Y., 104 F. 101.

74. N.Y.—Clancy v. Dutton, 113 N.Y.S. 124, 129 App.Div. 23.

plain that plaintiff shipped certain goods on another vessel where such goods were of such a character that they would have interfered with the finishing of the loading of the vessel at another port.[75]

Advance freight as affected by change of ownership. A purchaser of a ship in an admiralty suit who, without any new agreement or the issuance of a new bill of lading, orders the ship to proceed with a cargo already loaded is entitled only to the freight due after advances credited on the bill of lading have been deducted.[76]

Delay as affecting rate. Where diligent effort is made to deliver the cargo before the final close of navigation but without fault the ship becomes icebound so that delivery is delayed from fall until spring the carrier is entitled to a specified freight rate, higher than usual, which was agreed on under the expectation that prompt delivery of the cargo at its destination was not improbable.[77] Where a bill of lading provides for an increase in freight for a delay caused by any government by reason of suspected contraband, destination, ownership, or consignment, where libelant's vessels are delayed by government officials, the libelant is entitled to be paid for delay directly resulting therefrom.[78]

b. Freight Pro Rata

If a carrier under an entire contract of affreightment refuses to transport all of the goods contracted to be carried, it is, nevertheless, entitled to recover freight pro rata according to the proportion of goods carried. If a cargo is voluntarily accepted by the owner or his agent at any port other than the place of destination, freight pro rata is due in proportion to the voyage actually performed.

If a carrier under an entire contract of affreightment refuses to transport all of the goods contracted to be carried, it is, nevertheless, entitled to recover freight pro rata according to the proportion of goods carried.[79] At common law, however, unless the consignee voluntarily accepts a less portion, if the contract of affreightment is an entirety the entire shipment must be delivered before any freight is earned.[80] In either case if the consignee voluntarily accepts a portion of the shipment, freight pro rata is due.[81] However, in the case of a general ship, or one chartered for freight to be paid according to the quantity of goods, freight is due for what the ship delivers.[82]

Pro rata itineris. If a cargo is voluntarily accepted by the owner or his agent at any port other than the place of destination, freight pro rata is due in proportion to the voyage actually performed.[83] Conversely, freight pro rata itineris is not due, unless the owner of the cargo voluntarily agrees to receive it at a place short of its ultimate destination.[84] What amounts to voluntary acceptance depends largely on the facts and circumstances of each particular case,[85] and may be inferred from the shipper's or consignee's actions,[86] it being essential in order to sustain a claim for pro rata freight that there be such a voluntary acceptance of the goods by their owner at an intermediate port as to raise a fair inference that further carriage of the goods was dispensed with.[87] It has been held that the election to receive the goods at an intermediate port can be made only when the master is able and willing to transport them to their port of destination.[88] The taking possession because of necessity to save the property from destruction,[89] or in consequence of the carrier's refusal to continue the voyage,[90] or the acceptance of the proceeds of goods sold at an intermediate port,[91] is not such an acceptance as to entitle the carrier to freight pro rata itineris. The danger of shipment or its commercial inexpediency is not sufficient to render the shipper liable for freight pro rata itineris on damaged goods where he refuses to dispense with further carriage.[92] However, it has been held that

75. U.S.—Walker-Ross v. Dodwell, D.C.Wash., 297 F. 257.

76. U.S.—Chadwick v. Five Hundred and Seventy-Six Granite Blocks, D.C.N.Y., 178 F. 140.

77. U.S.—Grammer SS Co. v. Richardson, D.C.N.Y., 37 F.2d 366, affirmed, C.C.A., Grammer S. S. Corporation v. James Richardson & Sons, 47 F.2d 186.

78. U.S.—American Transp. Co. v. Swift & Co., D.C.N.Y., 53 F.2d 265.

79. U.S.—Edward Hines Lumber Co. v. Chamberlain, Ill., 118 F. 716, 55 C.C.A. 236.

80. N.Y.—Western Transp. Co. v. Hoyt, 69 N.Y. 230, 25 Am.R. 175.

81. N.Y.—Hinsdell v. Weed, 5 Den. 172.

82. La.—Vance v. Clark, 1 La. 324

83. U.S.—The Louise, D.C.Md., 58 F. Supp. 445
58 C.J. p. 506 note 19.

84. U.S.—Clifford v. Merritt-Chapman & Scott Corporation, C.C.A. Fla., 57 F.2d 1021—Linea Sud-Americana v. 7,295.40 Tons of Linseed, D.C.N.Y., 29 F.Supp. 210, affirmed, C.C.A., 108 F.2d 755, certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1018.
58 C.J. p. 507 note 20.

85. Wash.—Northern Pac. R. Co. v. Johnson, 188 P. 30, 110 Wash. 86.
58 C.J. p. 507 note 21.

86. Pa.—Gray v. Waln, 2 Serg. & R. 229, 7 Am.D. 642

87. U.S.—Merchants', etc., Transp. Co. v. Seven Hundred and One Bales of Cotton, D.C.Pa., 216 F. 237
58 C.J. p. 507 note 23.

88. N.Y.—Atlantic Mut. Ins. Co. v. Bird, 15 N.Y.Super. 195.

89. N.Y.—Western Transp. Co. v. Hoyt, 69 N.Y. 230, 25 Am.R. 175
58 C.J. p. 508 note 25.

90. N.Y.—Western Transp. Co. v. Hoyt, supra.

91. Conn.—Escopiniche v. Stewart, 2 Conn. 391.
58 C.J. p. 508 note 27.

92. U.S.—Merchants', etc., Transp. Co. v. Seven Hundred and One Bales of Cotton, D.C.Pa., 216 F. 237.

when goods, shipped for long distances under through bills of lading which recognize several distinct carriers and states of transportation, are damaged at one of the recognized points of transshipment, so that their further shipment becomes impracticable and an immediate sale is necessary for the interests of all concerned, the carrier which has performed the last stage of the carriage and advanced the freights of preceding carriers is entitled to a pro rata freight.[93] If the cargo is lost on the voyage the shipper is not liable for freight for that portion of the voyage which it was carried.[94]

c. Quantity Shipped and Determination Thereof

Freight is payable only on as much of a cargo as is delivered, and there is an equitable presumption that such is the contract of the parties, to overcome which an intent to the contrary must be expressed with certainty. Statements in the bill of lading with respect to the weight or quantity of the goods, although prima facie correct, are not necessarily conclusive on a question of freight unless expressly made so by the parties.

As a general principle, freight is payable only on as much of a cargo as is delivered,[95] and there is an equitable presumption that such is the contract of the parties, to overcome which an intent to the contrary must be expressed with reasonable clearness and certainty.[96] If the agreement is for an amount to be determined by the quantity or weight of the goods, the amount of charge will be determined by the quantity received and delivered.[97] Where the ship is entitled to freight only on the weight delivered, whenever weighing is necessary in order to compute freight charges, the ship is bound to weigh the cargo[98] and where the evidence shows that the cargo as received was all delivered at the port of destination, the official weight at that place is conclusive of the extent of the carrier's right to freight.[99] A shipowner in addition to his claim for damages for delay caused by loading the ship in excess of the amount called for by the contract may not recover freight for the transportation of the additional weight.[1] If the parties agree in their contract to a freight rate with a guaranteed maximum weight per freight unit or with a guaranteed minimum weight per cubic content, the shipper must pay for the excess weight or for deficiency in weight, if the ship loses cargo space because thereof.[2]

Statement in bill of lading or invoice Statements in the bill of lading with respect to the weight or quantity of the goods, although prima facie correct,[3] are not necessarily conclusive on a question of freight unless expressly made so by the parties,[4] nor are statements in the invoice and entry[5] or in a due bill given for freight.[6]

Cotton shipments. Under a contract of affreightment of cotton of a specified density, if cotton of less density is shipped the shipowner is entitled to freight on the additional space occupied at the rate which, under the contract, that space would have earned carrying cotton of the specified density.[7] In measuring the bales to determine whether the cotton is of the density guaranteed in the contract it has been held proper to measure around the bulge of the cotton as that measurement shows the cubic space needed for shipment.[8] Under a contract exclusively for the shipment of cotton and not for space or

93. U.S.—The Scow No. 190, D.C. Md., 88 F. 320.

94. U.S.—Mitsui v. St. Paul F. & M. Ins. Co., Cal., 202 F. 26, 120 C.C.A. 280, certiorari denied 34 S.Ct. 321, 231 U.S. 749, 58 L.Ed. 465.
58 C.J. p. 508 note 30.

95. U.S.—Christie v. Davis Coal, etc., Co., D.C.N.Y., 95 F. 837, affirmed 110 F. 1006, 49 C.C.A. 170
58 C.J. p. 508 note 31.

96. U.S.—Christie v. Davis Coal, etc., Co., supra.

97. U.S.—The Andover, C.C.N.Y., 1 F.Cas.No. 366, 3 Blatchf. 303.
58 C.J. p. 508 note 33

98. U.S.—Nine Thousand Six Hundred and Eighty-One Dry Ox Hides, D.C.N.Y., 18 F.Cas.No. 10,273, 6 Ben. 199

99. U.S.—Cafiero v. Welsh, C.C.Pa., 4 F.Cas.No. 2,286, 8 Phila. 130

1. U.S.—Shaw v. Folsom, D.C.N.Y., 38 F. 356.

2. U.S.—Compania De Navegacion Transmar, S.A., v. Georgia Hardwood Lumber Co., D.C.Ga., 48 F. Supp. 402, reversed on other grounds, C.C.A., 141 F.2d 652, affirmed 65 S.Ct. 293, 323 U.S. 334, 89 L.Ed. 280.

Trouble and expense of weighing
In absence of custom, party wanting to ascertain quantity of article shipped must incur trouble and expense of weighing.—Compania De Navegacion Transmar, S.A., v. Georgia Hardwood Lumber Co., supra.

Weight on board ship
The weight of cargo on board ship, and not the weight on board railroad cars, controls the amount owed for ship freight.—Compania De Navegacion Transmar, S.A., v. Georgia Hardwood Lumber Co., supra.

3. Mass.—Shepherd v. Naylor, 5 Gray 591
58 C.J. p. 508 note 39.

4. U.S.—James v. Standard Oil Co., N.Y., 191 F. 827, 112 C.C.A. 341.
58 C.J. p. 508 note 40.

Waiver
Insertion of the words "10 tons" in through bill of lading issued by the master of ship transporting cargo under legend "weight or measurement" was not an irrevocable waiver on the part of seller and carriers not thereafter to measure the merchandise by cubic content.—Kachurin v. Barr, 71 N.Y.S.2d 629, 272 App.Div. 391, appeal denied 75 N.Y.S.2d 281, 272 App.Div. 1048, affirmed 79 N.E.2d 736, 297 N.Y. 889.

5. U.S.—Nine Thousand Six Hundred and Eighty-One Dry Ox Hides, D.C.N.Y., 18 F.Cas.No. 10,273, 6 Ben. 199.

6. La.—Cushing v. Jacobs, 24 La. Ann. 463
58 C.J. p. 509 note 42.

7. Tex.—Elder v. Weld-Neville Cotton Co., Com.App., 231 S.W. 102.
58 C.J. p. 509 note 43.

8. U.S.—Barber S.S. Lines v. N. P. Sloan Co., C.C.A.N.Y., 274 F. 365.

room in the ship the shipper is not entitled to the profits made by the shipowner when he recompressed the cotton to save space which he used in carrying other goods.[9]

Meaning of "ton." Contracts to carry dead-weight tons generally give the carrier the option to collect freight by weight or measurement in order to cover large but light packages,[10] and when the word "ton" is used alone a dead-weight ton is meant and in foreign trade long tons of two thousand two hundred and forty pounds[11]

§ 162. Expenses

The carrier is entitled to be compensated for expenses incurred in the performance of its contract of affreightment when such expenses are necessary or requested by the shipper or consignee.

The carrier is entitled to be compensated for services performed or expenses incurred outside of those required in the performance of its contract of affreightment when such services or expenses are requested by the shipper or consignee[12] or are rendered necessary by the facts of the case,[13] but it is not entitled to recover for expenses unnecessarily incurred.[14] A steamship company which, under the bill of lading, performed its whole duty to the shipper by delivering the goods on a pier or to a lighter is under no obligation to furnish free wharfage to the consignee for lightering the goods from the pier or vessel.[15]

§ 163. Deductions and Offsets

The person liable for freight may offset against the carrier's claim damages for which the carrier is liable.

As against a carrier's claim for freight the person liable therefor may offset damages for which the carrier is liable.[16] Thus, he may offset claims which he may have for damage to,[17] or loss of,[18] the goods carried, and where the loss exceeds the freight the carrier's right to freight is defeated[19] In order to sustain the offset the damage must be clearly shown,[20] must be a valid claim against the carrier,[21] the demands must be mutual,[22] and in order to be recouped[23] or counterclaimed[24] must have arisen out of the contract or transaction sued on or be connected with the subject of the action If the cargo owner is allowed as damages against the vessel the full value of the cargo at the port of delivery he is not entitled to a reduction in freight because of the loss of cargo.[25]

The owners of the cargo cannot split up their demand for loss and damage and apply part of it as an offset to the freight,[26] and, thus, a libelant who insists on recovering damages to a cargo in an independent suit cannot apply any portion of them by way of abatement in a suit for the recovery of freight, although he has set up, in his answer to the latter suit, such damages by way of abatement.[27] A consignee who relies on the statement in the bill of lading as to the amount of goods may offset as against the freight the loss suffered by the failure of the carrier to deliver the quantity stated,[28] but if the consignee did not suffer any loss by reason of

9. Tex.—Perry v. Langbehn, 252 S. W. 472, 113 Tex 72
58 C.J. p 509 note 45.

10. U S—Herr v Tweedie Trading Co., N Y, 181 F 483, 104 C C A 231, certiorari denied 31 S Ct. 227, 218 U.S 679, 54 L Ed 1207.

11. U S—Herr v Tweedie Trading Co, supra.
58 C J p 509 note 47.

12. U.S—The Terne, D C N Y., 1 F Supp. 537.
58 C J. p 509 note 48.

13. U S—The Caterina Gerolimich, D C N.Y., 43 F.2d 248, affirmed, C. C.A., 54 F.2d 1080.
58 C.J. p 509 note 49.

14. N.Y.—Gottesman v. Furness, 188 N.Y S. 377, 196 App Div 961, affirmed 135 N.E. 963, 233 N.Y. 669.
58 C.J. p 509 note 50.

15. U.S—Beard v. Marine Lighterage Corp., D.C N Y., 296 F. 146

16. U.S.—Munson S. S. Line v. Rosenthal, D.C.N Y., 6 F.Supp. 374.
58 C.J. p 509 note 53.

Additional transportation charges
Where carrier with notice that coal cargoes were available for loading failed to supply additional barges as required by shipping contract, shipper was justified in making the shipments by rail and could set off additional transportation charges against carrier's claim for transportation.—Eastern Transp. Co. v. Blue Ridge Coal Corp., D C N Y, 53 F Supp. 507, affirmed, C C A., 159 F.2d 642.

17. U S.—Munson S S Line v. Rosenthal, D C N Y, 6 F Supp. 374.
58 C J. p 510 note 54.

18. N Y.—Hinsdell v. Weed, 5 Den 172.
58 C J. p 510 note 55.

19. U S—Bradstreet v Heran, C.C. N.Y., 3 F.Cas No.1,792a, 2 Blatchf 116.
58 C J. p 510 note 56.

20. U S.—Brouty v Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, D C.N Y., 21 F. 590, affirmed, C C., 23 F. 106.
N.Y.—Nye v. Ayres, 1 E D Smith 532.

21. U S—Costello v. 734,700 Laths, etc, D C N Y, 44 F 105
58 C J. p 510 note 59.

22. U S—Sumner v. Walker, D.C N. Y, 30 F 261
58 C J. p 510 note 60.

23. Mass.—Ryder v. Hall, 7 Allen 456—Sears v Wingate, 3 Allen 103.

24. U S—The Tourist, D.C N Y, 16 F.2d 154, affirmed, C C.A., Seaboard Forwarding Co. v Freights on Four Cargoes of Flaxseed, 25 F.2d 1021 and Spencer Kellogg & Sons v. Tourist, 25 F.2d 1022.
58 C J p 510 note 62

25. U S—Carolina Portland Cement Co. v. Anderson, Ga., 186 F. 145, 108 C.C.A. 257

26. U S—The Ethel, D.C N.Y., 8 F. Cas.No 4,540, 5 Ben 154.

27. U S.—Brower v. The Water Witch, C.C N.Y., 4 F Cas No 1,971, 19 How.Pr 241, affirmed 1 Black 494, 17 L Ed. 155

28. U.S.—Relyea v New Haven Rolling-Mill Co, D.C Conn., 75 F. 420.
58 C.J. p 511 note 66.

the erroneous statement in the bill of lading, the value of a deficiency between the amount delivered by the carrier and that receipted for in the bill of lading may not be deducted from the freight, provided the carrier can show an error in the bill and that he delivered all the cargo that he actually received.[29] When a bill of lading recites a shipment in bulk as so many tons, at so much freight per ton, it will be construed as a contract for carriage in bulk, and the freight is not subject to reduction because the cargo when delivered does not weigh out the quantity stated.[30] A vessel chartered to carry forward part of the cargo of another vessel from a port into which the latter had put in distress is entitled to her freight without deductions for advances made by the charterers of such other vessel secured by a bottomry note, which also assigned the freight to pay such advances.[31]

§ 164. Payment and Tender

If the bill of lading is silent as to the time for payment of freight, the law implies that it is to be paid on delivery of the goods at the port of discharge. A tender of the freight at the port of discharge relieves the shipper or consignee from liability for costs or expenses subsequent thereto.

If the bill of lading is silent as to the time for payment of freight, the law implies that it is to be paid on delivery of the goods at the port of discharge.[32] Payment of freight cannot be demanded before the consignee has had opportunity to examine the goods,[33] and, although the holder of the bill of lading cannot require delivery of the cargo without paying freight, he may require it to be discharged so that it can be inspected by him,[34] but he cannot require that he be allowed to transport it to his own warehouse and there inspect it before payment of freight.[35] Under a government form bill of lading which provides that prepayment of charges shall in no case be demanded by the carrier, payment in advance is prohibited but accrual of the freight charge obligation in advance of delivery is not forbidden.[36]

In the absence of agreement to the contrary freight is payable in cash; but the parties may regulate the matter between themselves and arrange for another medium of payment, such as commercial paper,[37] in which case, however, if the paper is dishonored on maturity the payer is not discharged from his original liability.[38] The acceptance of due bills for freight charges has been held not to amount to an extinguishment of the debt for the freight charges or operate as a payment thereof, the carrier having the right to stand on the original contract and seek its remedy in the form in which it originally existed as fully as if the due bills have never been received.[39]

A tender of the freight at the port of discharge relieves the shipper or consignee from liability for costs or expenses subsequent thereto,[40] to which a refusal to pay would subject him;[41] but the master, on a tender of freight at the ship, may take a reasonable time to ascertain the correct amount

29. U.S.—James v. Standard Oil Co., N.Y., 191 F. 827, 112 C.C.A. 341
58 C.J. p. 511 note 67

30. U.S.—Planters' Fertilizer Mfg. Co. v. Elder, La., 101 F. 1001, 42 C.C.A. 130

31. U.S.—Berry v. Grace, D.C.N.Y., 62 F. 607.

32. U.S.—British, etc., Mar. Ins. Co. v. Southern Pac. Co., N.Y., 72 F. 285, 18 C.C.A. 561
Puerto Rico.—H. T. Hansen v. Nine Hundred and Ninety-Eight Tons of Coal, 6 Puerto Rico Fed. 394.

33. U.S.—Brittan v. Barnaby, Cal., 21 How. 527, 16 L.Ed. 177.
58 C.J. p. 511 note 71.

34. U.S.—The Eddy, S.C., 5 Wall. 481, 18 L.Ed. 486
58 C.J. p. 511 note 72.

35. U.S.—The Eddy, supra.

36. U.S.—Alcoa S.S. Co. v. U.S., N.Y., 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225.

Payment of bill "properly accomplished"

Under condition of government standard form bill of lading for shipment of goods by water which provided payment would be made on presentation of bill "properly accomplished" attached to freight voucher on authorized government form, and which contained instructions indicating that evidence on which carrier could rely for payment was the surrendered bill accompanied by a certificate of delivery, signed on receipt of shipment, with the receipt subject to loss or damage report, bill could not be "properly accomplished" without receipt of goods by consignee for purposes of payment of freight to carrier.—Alcoa S.S. Co. v. U.S., supra.

Exclusion of usual prepayment clause of carrier

Where United States Government form bill of lading, under which goods were shipped, recited that bill was subject to same conditions governing commercial shipments made on usual form bill of lading provided by carrier unless "otherwise specifically provided," the further recitation in government form bill against prepayment of charges and against collection thereof from consignee and instruction that consignee's certificate of delivery should constitute evidence on which settlement would be made were an "other specific provision" which excluded application of clause in carrier's usual bill of lading providing for prepayment of freight charges.—Alcoa S.S. Co. v. U.S., C.A.N.Y., 175 F.2d 661, affirmed 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225.

37. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662
58 C.J. p. 511 note 74.

38. Conn.—Bacon v. Westervelt, 29 Conn. 591
N.J.—Grant v. Wood, 21 N.J.Law 292, 47 Am.D. 162.

39. N.Y.—E. Awad & Sons v. De La Rama S.S. Co., 53 N.Y.S.2d 900, affirmed 38 N.Y.S.2d 897, 265 App.Div. 913, appeal denied 39 N.Y.S.2d 989, 265 App.Div. 990.

40. U.S.—Dedekam v. Vose, D.C.N.Y., 7 F.Cas.No.3,732, affirmed, C.C., 7 F.Cas.No.3,729, 3 Blatchf. 44.
58 C.J. p. 511 note 76.

41. U.S.—Brittan v. The Albani, D.C. Cal., 4 F.Cas.No.1,902, reversed on other grounds 21 How. 527, 16 L.Ed. 177.

from the consignees of the ship, but cannot in the meantime order the goods to be stored at the expense of the owner.[42]

§ 165. —— Persons Liable

Liability for freight is primarily on the person who makes the contract. A consignee of cargo and holder of the bill of lading, who receives the cargo from the vessel, is liable for the freight

Liability for freight is primarily on the person who makes the contract.[43] Thus, a shipper who is the owner of the goods sent by a general ship is liable for the freight at all events, independent of the bill of lading.[44] Delivery to the consignee without payment of freight of goods shipped under a bill of lading engaging the master to deliver the goods to the consignees "he or they paying freight" does not discharge the shipper from his liability for the freight.[45] A consignee of cargo and holder of the bill of lading, who receives the cargo from the vessel, is, in the absence of a different understanding, liable for freight,[46] although but an agent to sell,[47] as is also the assignee of the bill of lading, who received the goods,[48] unless the assignor is bound by charter party to pay it[49] or unless the assignee had bound himself by an express agreement to pay it as surety for the assignor.[50] An implied undertaking by one who receives the goods to pay the freight may be inferred from the mere receipt, although he has not presented any bill of lading or asked for delivery, if the course of business between the parties on previous occasions has been for him to receive goods consigned to him and pay the freight on them.[51] Where goods are delivered to persons who are neither assignees of the bills of lading nor owners of the cargo until after delivery, they are not liable for the freight,[52] nor, in the absence of an agreement to pay it, is a person who, as agent of the consignee, receives a cargo consigned to the owner in his care, liable for the freight.[53] A purchaser is not individually liable for freight on goods shipped by the seller and consigned to a third person.[54] Captors substitute themselves in the place of the original owners, and take the property cum onere, and they are therefore responsible for the freight which then attached on the property.[55]

Owners of disabled ship are not liable for freight earned in forwarding the cargo under an agreement made with the master for a freight rate greater than that under which the cargo was originally shipped.[56]

§ 166. —— To Whom Payable

The right to freight is incidental to the ownership of a vessel and the owners of the vessel or their authorized agent is entitled to the freight earned.

As a general rule, the right to freight is incidental to the ownership of a vessel[57] and the owners of the vessel[58] or their authorized agent[59] is en-

42. U.S.—The Diadem, D.C.N.Y., 7 F. Cas.No.3,875, 4 Ben. 247

43. U.S.—The Arizpa, C.C.A.Md., 63 F.2d 42, certiorari denied U. S. v. Consolidation Coal Co., 54 S.Ct. 66, 290 U.S. 648, 78 L.Ed. 562
58 C.J. p. 512 note 79.

Assignment of bill of lading

Shipper's primary obligation to pay carrier's charges survives, although shipper assigns bill of lading to one receiving goods.—The Arizpa, C.C.A. Md., 63 F.2d 42, certiorari denied U. S. v. Consolidation Coal Co., 54 S.Ct. 66, 290 U.S. 648, 78 L.Ed. 562.

Under F. O. B. contract

N.Y.—Kachurin v. Barr, 71 N.Y.S.2d 629, 272 App.Div. 391, appeal denied 75 N.Y.S.2d 281, 272 App.Div. 1048, affirmed 79 N.E.2d 736, 297 N.Y. 889.

44. N.J.—Grant v. Wood, 21 N.J. Law 292, 47 Am.D. 162.
58 C.J. p. 512 note 81.

45. N.J.—Grant v. Wood, supra.
58 C.J. p. 512 note 84.

46. U.S.—Munson S. S. Line v. Rosenthal, D.C.N.Y., 6 F.Supp. 374.
58 C.J. p. 512 note 85.

Where goods damaged

Consignee receiving goods from carrier under bill of lading incorporating charter provisions is personally responsible for freight charges, even though goods were damaged through carrier's fault.—Munson S. S. Line v. Rosenthal, supra.

47. U.S.—Gates v. Ryan, D.C.N.Y., 37 F. 154.
58 C.J. p. 512 note 86.

48. U.S.—Trask v. Duvall, Pa., 24 F. Cas.No.14,144, 4 Wash.C.C. 181.
N.Y.—Elwell v. Skiddy, 77 N.Y. 282

49. U.S.—Trask v. Duvall, Pa., 24 F. Cas.No.14,144, 4 Wash.C.C. 181
N.Y.—Elwell v. Skiddy, 77 N.Y. 282.

50. U.S.—Trask v. Duvall, Pa., 24 F. Cas.No.14,144, 4 Wash.C.C. 181
N.Y.—Dayton v. Parke, 22 N.Y.S. 613, 67 Hun 137, reversed on other grounds in 37 N.E. 642, 142 N.Y. 391.

51. U.S.—Frontier S.S. Co. v. Central Coal Co., Wis., 234 F. 30, 148 C.C.A. 46
58 C.J. p. 512 note 90.

52. U.S.—The Syskonen v. Logan, D.C.Pa., 28 F. 335.

53. U.S.—Great Lakes Coal, etc., Co. v. Seither Transit Co., Minn., 220 F. 28, 136 C.C.A. 110

54. U.S.—Perkins v. Bethlehem Steel Corp., C.C.A.N.J., 43 F.2d 334.

55. U.S.—The Antonia Johanna, N.C., 1 Wheat. 159, 4 L.Ed. 60.

56. Me.—Lemont v. Lord, 52 Me. 365

57. U.S.—Layne, etc., Corp. v. U. S. Shipping Board Emergency Fleet Corp., C.C.A.Cal., 27 F.2d 39.
58 C.J. p. 513 note 2.

58. U.S.—Layne, etc., Corp. v. U. S. Shipping Board Emergency Fleet Corp., supra.
Mass.—Brown v. Putnam, 2 Metc. 275
58 C.J. p. 513 note 3.

Under quasi contract

Where a number of fishing vessels were requisitioned by the Navy and fish on board requisitioned vessels were transferred to plaintiffs' vessel, which had not been requisitioned, and by it taken to San Diego and defendants, who owned requisitioned vessels, were paid by canning companies for fish, defendants were indebted to plaintiff under an implied contract or quasi contract to pay proportionate cost of operation of plaintiffs' vessel.—Medina v. Van Camp Sea Food Co., 171 P.2d 445, 75 Cal.App.2d 551.

59. N.Y.—Kachurin v. Barr, 71 N.Y.S.2d 629, 272 App.Div. 391, appeal

titled to the freight earned. The right of the charterer of a ship to collect the freight, as against the general owner of the ship, depends on who is the owner for the voyage; and, if the charterer is a charterer pro hac vice, ordinarily he is entitled to collect the freight, but if the general owner has not parted with the ownership and possession of the vessel he, the owner, ordinarily is entitled to receive the freight.[60] If the charter party does not contain a provision requiring the master to sign bills of lading as demanded, the master and not the charterer is the only person entitled to collect the freight.[61] Charterers who offer to replace cargo jettisoned, which the master refuses and replaces with other cargo at a higher freight, are entitled to the excess freight so earned where the charter prohibited goods to be laden on board otherwise than from the charterers.[62] Where a vessel is expropriated by a foreign government, the charterer of such vessel who makes a tender of abandonment to the underwriters on a war risk policy and fails to take any steps to bring on the vessel's cargo to its destination has been held to have abandoned the contract of carriage with a loss of any right to claim freight from the cargo owner.[63]

§ 167. —— Advance Freight and Recovery Back Thereof, and Recovery of Overcharges

Agreements for the payment of freight in advance or for its retention whether or not the contract of affreightment is carried out are valid and enforceable. Generally, where freight is paid in advance and the voyage is not performed, the shipowner cannot retain the freight without an express agreement to this effect.

Agreements for the payment of freight in advance[64] or for its retention whether or not the contract of affreightment is carried out[65] are valid and enforceable. Generally, where freight is paid in advance and the voyage is not performed or the contract of affreightment not fulfilled, the shipowner cannot, without an express agreement to this effect, retain it,[66] and such agreement must be clear and

denied 75 N Y S 2d 281, 272 App Div 1048, affirmed 79 N E 2d 736, 297 N Y. 889

60. N Y—Clarkson v Edes, 4 Cow 470.
58 C J. p 514 note 12

61. U.S—Aktieselskabet Bruusgaard v Standard Oil Co, D C N Y., 274 F. 996, affirmed, C C.A, 283 F. 106
58 C J. p 514 note 13

62. U S—The Wergeland, D C Wash, 262 F. 785

63. U S—Linea Sud-Americana v. 7,295 40 Tons of Linseed, D C.N Y, 29 F Supp 210, affirmed, C C A, 108 F 2d 755, certiorari denied 60 S Ct. 615, 309 U.S 672, 84 L.Ed. 1018

Expropriating government not acting for charterer

In action by charterer of vessel, which was expropriated by foreign government and diverted from its course, for freight due on cargo to original destination, decree of confiscation, whereby the government "subrogates itself in whatever lawful credits and obligations refer to the confiscated vessel," and other evidence were held to establish that the foreign government did not intend to act for charterer or make charterer entitled to the freight due under original contract—Linea Sud-Americana v. 7,295 40 Tons of Linseed, supra.

64. Ala.—Norton-Crossing Co. v Martin, 81 So. 71, 202 Ala. 569
58 C J. p 514 note 18

"Prepaid freight" includes any freight which is payable before arrival of ship at port of destination.—E Awad & Sons v De La Rama SS Co, 53 N Y S 2d 900, affirmed 38 N Y S 2d 897, 265 App Div 913, appeal denied 39 N Y S 2d 989, 265 App Div 990

65. U S—De La Rama S S Co v. Ellis, C C A Cal., 149 F 2d 61, certiorari denied 66 S.Ct 23, 326 U S 718, 90 L Ed 425
58 C J p 514 note 19.

Effect of such agreement

A stipulation of bill of lading that "prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the carrier, cargo lost or not lost, or if there be a forced interruption or abandonment of voyage at a port of distress or elsewhere," shifted from carrier to shipper the risk of forced abandonment of voyage.—De La Rama S. S. Co. v. Ellis, supra.

66. U S—The Fredensbro, D C Pa., 52 F.2d 854.
N Y—Republic Chemical Corp. v Bankers Commercial Corp, 73 N Y S.2d 318, affirmed 54 N.Y S.2d 396.
58 C.J. p 514 note 21.

Joint adventurers

In libel by shippers to recover prepaid freight paid to respondents who acted as agents for alleged corporation claimed to own vessel which never sailed, evidence was held to establish that vessel was operated at time in question by respondents and that money received by them for freight from shippers was received by respondents for themselves and as joint adventurers in operation of the vessel, rendering them liable for amounts paid by shippers for freight.—Kaufman v. John Block & Co., D C. N Y, 79 F.Supp 528.

Liability of mortgagee of vessel

Where joint adventurers were operating vessel in their own interest when they received prepaid freight from shippers, and were not acting as agents for mortgagee to whom title of the vessel had been given, mortgagee was not liable in shippers' libel to recover the prepaid freight when the vessel never sailed—Kaufman v John Block & Co., supra

Under English law

(1) Under the law of England, a distinction is made between the rule governing prepaid freight, which may not be recovered when a ship is lost unless the contract of carriage provides expressly for the contrary, and the rule governing advance payments on ordinary commercial contracts, which payments may be recovered on the theory of failure of consideration when performance of contract is frustrated by war.—Woods Mfg. Co v. Canadian Pac. Ry Co, C C.A N Y, 151 F.2d 711—58 C J. p 514 note 20.

(2) Where one clause of bill of lading provided that the expression 'the carriers" included owners of carrying vessel, clause reciting that prepaid freight was earned on receipt of goods by carrier and was not returnable was required to be construed under English law as if it read "prepaid freight is earned on receipt of goods by owners of any carrying vessel and is not returnable."—Woods Mfg. Co. v. Canadian Pac. Ry. Co., supra.

(3) Under the law of England, shippers could not recover from any of the carriers on a through bill of lading for prepaid freight on cargoes which were lost when the ship was

unambiguous in its terms,[67] and this rule cannot be overcome by proof of a local custom that freight prepaid is not to be returned where the vessel is lost on the voyage.[68] Thus, prepaid freight is recoverable where the goods are lost through improper storage,[69] or through the negligence of the ship,[70] or where the voyage is abandoned because the vessel proves unseaworthy,[71] or because of the outbreak of war,[72] or where the voyage is broken up and the delivery of the goods prevented by the dangers of the sea, at least where there is no evidence of a special contract varying that contained in the bill of lading, which is in the usual form.[73] However, if the contract of affreightment so provides, prepaid freight need not be refunded where the vessel is unable to perform the voyage or otherwise carry out its contract of affreightment,[74] and, under such a contract, where all the conditions precedent to payment have been performed, the shipowner is entitled to recover the freight even though the goods were lost at the time the obligation to pay became due.[75] Where a voyage is abandoned because of the inability of the carrier to obtain sufficient cargo and freights to render the voyage profitable, it has been held that the shipper may recover prepaid freight despite a provision in the bill of lading that "freights prepaid will not be returned, goods lost or not lost."[76] Ordinarily, a stipulation that the freight shall not be repaid if the goods do not arrive does not apply where the vessel never starts on the voyage.[77]

Transshipment charges Transshipment charges which are voluntarily paid by a shipper where the original vessel is subjected to delay have been held to be in the nature of special damages for which the original vessel is not responsible in the absence of a special agreement,[78] or unless advance notice has been given of the special urgency of delivery

sunk—C Brewer & Co v American President Lines, D C N Y, 59 F.Supp 796.

67. Ala—Norton-Crossing Co v Martin, 81 So 71, 202 Ala 569.
58 C J. p 515 note 22.

68. U S—De Sola v. Pomares, D.C N Y., 119 F 373.
58 C J p 515 note 23

69. U S—Fleishman v. The John P. Best, D C Pa, 9 F Cas No 4,861, 14 Phila 527, 8 Wkly N Cas. 30

70. U S—The Königin Luise, D.C N Y, 173 F. 811, reversed on other grounds 185 F. 478, 107 C C A 578—Brauer v. Compagnia De Navigacion La Flechs, D.C N Y, 61 F. 860, affirmed 66 F. 776, 14 C C A 88

71. U S—The Pehr Ugland, D C Va, 271 F. 340, appeal dismissed, C C A., 277 F. 1019.

Bill of lading provisions held no defense

Provisions of bill of lading requiring prepayment of freight charges, and authorizing carrier to retain them under all circumstances, were not available as defense in action to recover prepaid freight charges, where it was established that defendant received goods on board vessel knowing it to be unseaworthy without any effort to render the ship seaworthy, with result that ship was not allowed to leave port.—Zonite Products Corp v Mediterranean Nav Co, S. A, 52 N Y S 2d 603, 183 Misc 962

Unseaworthiness held cause of abandoning voyage

U S—The Louise, D C Md., 58 F. Supp 445.

72. U S—Gamboa, Rodriguez, Rivera & Co v. Imperial Sugar Co, C. C A Fla, 125 F.2d 970, certiorari denied 62 S.Ct. 1282, 316 U.S. 691, 86 L.Ed. 1762.

Annulment of contract

An ocean carrier, prevented from performance of contract of carriage by the vis major of an embargo, has the right to annul contract, but only on restoration of shipper to precontract situation by return of freight—The Henry W Cramp, D C Pa, 6 F 2d 900, affirmed, C C A., 20 F 2d 320

Refund to buyer under C. I. F. contract

Where seller under "C. I. F." contract for sale of commodity shipped commodity on vessels which were prevented from completing their voyages by war, and buyer paid seller for commodity and insurance, and also paid freight charges, and transshipment charges and suffered risk of loss, buyer rather than seller, was entitled to refund of freight charges—Gamboa, Rodriguez, Rivera & Co v Imperial Sugar Co, C C A Fla., 125 F 2d 970, certiorari denied 62 S Ct 1282, 316 U S 691, 86 L Ed 1762

73. N.Y—Emery v. Dunbar, 1 Daly 408
58 C J. p 515 note 27

74. U.S—De La Rama S S Co v Ellis, C C A Cal, 149 F 2d 61, certiorari denied 66 S Ct 23, 326 U S 718, 90 L Ed 425—Globe & Rutgers Fire Ins Co v. U S, C C.A N Y, 105 F 2d 160, certiorari denied 60 S Ct. 175, 308 U S 611, 84 L Ed. 511.
58 C.J. p 515 note 28.

Legal impossibility of performance

Bill of lading containing a clause that prepaid freight is not to be refunded even though vessel be lost or voyage not completed is given controlling effect where voyage is broken up by legal impossibility of performance without fault of shipowner.—The Louise, D C.Md, 58 F.Supp, 445

Payment under mistake of law

Where the consignee of goods shipped from foreign country to New York, knowing that the vessel had been torpedoed and lost at sea, voluntarily paid the transatlantic freight, recovery back could not be had, under the principle which prevents recovery of a payment by hypothesis made under a mistake of law—Otis Astoria Corp v. Brasileiro, 52 N Y S 2d 235.

75. U S—National Steam Nav Co, Ltd. v. International Paper Co., N Y, 241 F 861, 154 C.C A. 563.
58 C J. p 516 note 29

76. U S.—Silva v Bankers Commercial Corp, C C A N Y, 163 F 2d 602.

Liability of creditor of carrier

Where carrier's creditor controlled sailings of vessel and creditor received prepaid freight money knowing that money was paid for a voyage which had been abandoned by carrier with consent and assistance of creditor, the creditor was liable to shipper for prepaid freight money—Silva v Bankers Commercial Corp, supra.

77. N Y—McInnes v Equitable Trust Co, 189 N.Y S. 518, 197 App. Div. 649.
58 C J p 516 note 30

78. U S—The Plow City, D.C.Pa, 23 F.Supp. 548.

Breakdown during voyage

Where breakdown of main circulating pump during voyage was the reason for steamship putting into harbor for repairs, the alleged fact that steamship was unseaworthy at beginning of voyage would not support shipper's claim for expense of transshipping his cargo.—The Plow City, supra.

by reason of the special use to which the cargo was to be put.[79]

Freight on goods misdelivered. Where freight on goods delivered at the wrong elevator is paid under protest to diminish damages, the consignee may recover it in an action in rem against the vessel.[80]

Recovery of overcharges. Where a steamer is paid in advance for the transportation of certain goods, and compels the consignee to pay a further amount on delivery of the goods to him, a claim for the amount so paid is allowable against the vessel;[81] but a shipper whose agent retained the contract of affreightment a long time and used it as a basis for preparing the bill of lading which was presented to the ship's agent for signature is not entitled to recover from said ship's agent overcharges for freight, especially after the ship's agent has settled accounts with his principal and has no funds in his hands.[82] In a suit by a consignor to recover overcharges made by a carrier, the fact that the consignor acted as agent for other persons by whom he has been reimbursed for such overcharges is immaterial with respect to the right of the consignor to recover from the carrier.[83] Where a captain of a vessel has possession of goods owned by a shipper but refuses to deliver such goods unless the shipper pays him more freight than is due, payment of the excess amount is payment made by compulsion and may be recovered back.[84] Similarly, duplicate freight paid under protest to a vessel may be recovered back.[85]

Lien for excess freight paid Where a vessel agrees to carry cargo at a specified rate unless a regular intercoastal carrier moves similar cargo at a lower rate, in which case the lower rate applies, and freight is paid at the specified rate in ignorance of the fact that a lower rate is being used, the shipper is entitled to a cargo lien on the vessel for the excess freight paid.[86]

§ 168. Assignment or Hypothecation

Freights may be assigned independently of the ship. Except for the master, who has authority to hypothecate the freight for the payment of necessary repairs on the ship during the voyage, freight can be assigned only by the person who has the right thereto.

Freights may be assigned independently of the ship[87] Except for the master, who has authority to hypothecate the freight for the payment of necessary repairs on the ship during the voyage,[88] freight can be assigned only by the person who has the right thereto, that is, the owner of the vessel,[89] or its charterer.[90] Future freights may be hypothecated or assigned[91] Freights may be hypothecated or assigned for any maritime purpose independent of the particular voyage.[92] Where freight is hypothecated, it means the freight of the whole voyage, and not merely for that part of the voyage unperformed at the execution of the bond.[93] Where the contract for the carriage of the goods made by an unauthorized person differs from that specified in the bill of lading signed by the master, and the freight due by the bill of lading is assigned by indorsement on the bill, made with the assent of the owners, to parties who have furnished supplies to the vessel, they will be entitled to recover in an action on the assignment whatever may be due under the actual contract[94]

79. U.S.—The Plow City, supra

80. U.S.—The G. A. Tomlinson, D.C. N.Y., 279 F. 786

81. U.S.—The Wyoming, D.C.Mo., 36 F. 493.

82. La.—Wichita Falls Motor Co. v. Kerr SS Co., 107 So. 777, 160 La. 992

83. U.S.—Olliphant v. Florida East Coast Car Ferry Co., D.C.Fla., 4 F. Supp. 288

84. N.Y.—Clancy v. Dutton, 113 N.Y.S. 124, 129 App.Div. 23

85. U.S.—The Muskegon, D.C.N.Y., 10 F.2d 817

86. U.S.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U.S. 117, 78 L.Ed. 216

Liens not mutual and reciprocal

Only the obligations of ship and cargo under contract of affreightment are mutual and reciprocal, not the liens resulting from breach of those obligations.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, supra.

Knowledge of excess freight immaterial

Parties' lack of knowledge that freight paid was excessive was held immaterial to lien in favor of cargo on vessel.—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, supra.

87. U.S.—In re Atlantic, etc., SS. Co., D.C.Md., 289 F. 145, affirmed, C.C.A., Standard Oil Co. v. Miller, 3 F.2d 438.
58 C.J. p. 516 note 35.

88. U.S.—Murray v. Lazarus, C.C.N.Y., 17 F.Cas.No. 9,962, 1 Paine 572.
58 C.J. p. 516 note 36.
Bottomry and respondentia see supra §§ 88–100

89. U.S.—Layne, etc., Corp. v. U.S. Shipping Board Emergency Fleet Corp., C.C.A.Cal., 27 F.2d 39.
58 C.J. p. 516 note 37.

Assignment held without right

Charterer of United States vessel under charter party giving owner lien on subfreights and prohibiting transfer of charterer's rights without owner's written consent had no right to assign freight money as security.—U.S. v. Palmer & Parker Co., C.C.A.Mass., 61 F.2d 455.

90. U.S.—Cooper v. Sun Co., C.C.A.Pa., 33 F.2d 881.
58 C.J. p. 516 note 38.

91. U.S.—Freights of The Kate, D.C.N.Y., 63 F. 707
58 C.J. p. 516 note 39.

92. U.S.—The Tourist, D.C.Me., 16 F.2d 154, affirmed, C.C.A., Seaboard Forwarding Co. v. Freights on Four Cargoes of Flaxseed, 25 F.2d 1021, affirmed Spencer Kellogg & Sons v. Tourist, 25 F.2d 1022.
58 C.J. p. 517 note 40

93. U.S.—The Zephyr, C.C.Mass., 30 F.Cas.No. 18,210, 3 Mason 341.

94. N.Y.—Trask v. Jones, 18 N.Y. Super. 62.

Priorities. A general hypothecation or assignment of all freights is inferior to a specific hypothecation for the purposes of securing aid on the particular voyage on which the freight is earned,[95] and a mortgage covering the ships and freights of the line as a whole is inferior to a general hypothecation of the freights of the line for maritime purposes.[96] If the purchaser of a vessel has assigned the freights thereof, the seller on retaking possession becomes entitled, as against the assignee, to all freights which have not been earned,[97] but freights earned although not collected belong to the assignee.[98]

§ 169. Actions

An action for the recovery of freight lies in favor of the master of a ship against the consignee of cargo, equally in personam and in rem. Actions for freight are governed by the general rules relating to civil actions and actions in admiralty.

An action for the recovery of freight lies in favor of the master of a ship against the consignee of cargo, equally in personam and in rem.[99] However, a claim for dead freight is not recoverable in an action in rem against the cargo,[1] and a claim by a vessel owner for the extra cost of handling timber of larger dimensions than that specified in the contract can be recovered only in rem against the cargo in so far as it is a claim for the services of stevedores who would be entitled to a lien, and is not so recoverable where the stevedores were furnished by the shipper.[2] Prepaid freight to which the shipper is entitled may be recovered in an action for money had and received.[3] An action to recover for payments in excess of agreed freight is based on violation of the contract of affreightment, whether such action is in admiralty or one for money had and received.[4]

Ordinarily, actions for freight are governed by the general rules relating to the trial of civil actions and actions in admiralty with respect to the time of bringing the suit,[5] the pleadings,[6] presumptions[7] and the burden of proof,[8] the admissibility[9] and the weight and sufficiency[10] of the evidence, and, like-

95. U S —The Tourist, D C Me , 16 F 2d 154, 159, affirmed, C C A , Seaboard Forwarding Co v Freights on Four Cargoes of Flaxseed, 25 F 2d 1021, affirmed Spencer Kellogg & Sons v Tourist, 25 F 2d 1022.
58 C J p 517 note 43.

96. U.S.—Freights of The Kate, D C N Y , 63 F 707

97. U S —In re Atlantic, etc , SS Co , D C Md , 289 F 145, affirmed, C C A , Standard Oil Co. v. Miller, 3 F.2d 438

98. U S —In re Atlantic, etc , SS Co , D C Md , 289 F 145, affirmed, C.C.A., Standard Oil Co. v. Miller, 3 F.2d 438.
58 C J p 517 note 46.

99. U S —Thatcher v McCulloh, D.C N Y , 23 F Cas.No 13,862, Olcott 365.
58 C J p 517 note 48.

1. U S —Hagan v Cargo of Lumber, D C.N.Y., 163 F. 657

2. U.S —Hagan v Cargo of Lumber, supra.

3. Ala —Hunter v. Lauderdale Cotton Mills, 112 So. 215, 215 Ala. 638

4. U S —Krauss Bros. Lumber Co. v Dimon S S Corporation, Wash , 54 S.Ct 105, 290 U S. 117, 78 L Ed 216.

5. Cal.—Transmarine Corporation v. R W Kinney Co., 11 P.2d 877, 123 Cal.App. 411
58 C J. p 517 note 52

Statute of limitations

Three-year limitation in interstate commerce act was held inapplicable, where water carrier sued shipper for freight, notwithstanding total claim was partly inland and partly ocean freight —Transmarine Corporation v R W Kinney Co , supra.

6. Cal —Transmarine Corporation v R W Kinney Co , supra.
58 C J. p 517 note 53

Matters not necessary to be alleged

In action for freight under bills of lading exempting carrier for specified losses, the carrier need not allege or prove nondelivery resulted from exempted cause —Transmarine Corporation v R W. Kinney Co , supra

Matters held not in issue

Cal —Transmarine Corporation v. R. W Kinney Co , supra

Issue under answer or counterclaim

In action for freight under bills of lading exempting carrier for specified losses, shipper should present issue with respect to cause of loss by answer or counterclaim —Transmarine Corporation v R. W. Kinney Co , supra

7. U S —The Fredensbro, D C.Pa., 52 F 2d 854
58 C.J p 518 note 55 [c].

Ventilation

Where ship was sunk, wetting coal, court could not presume that shipowner, being willing to resume voyage to earn freight, would not provide ventilation to guard against spontaneous combustion —The Fredensbro, supra.

8. U S.—The Fredensbro, supra.
58 C J p 518 note 57.

Failure to offer evidence

Libelant suing for freight had burden of proving that weight of timbers exceeded maximum stipulated in contract, and where neither party offered evidence shipper was entitled to judgment on the pleadings —Compania De Navegacion Transmar, S. A , v Georgia Hardwood Lumber Co., D C Ga , 48 F Supp. 402, reversed on other grounds, C C A , 141 F 2d 652, affirmed 65 S Ct 293, 323 U S. 334, 89 L Ed 280

Cause of loss

In action for freight under bills of lading exempting carrier for specified losses, shipper, if presenting issue with respect to cause of loss, had burden of proving it.—Transmarine Corporation v. R W Kinney Co , 11 P 2d 877, 123 Cal.App 411.

Shortage

(1) Where the defense to an action for freight is short delivery, the burden of proof is on respondent to prove shortage —Kerruish v. Havemeyers, etc , Sugar Refining Co., N Y , 49 F 280, 1 C C A 243

(2) Where a paragraph of a bill in an action for freight avers delivery of the whole cargo taken on board, and the answer acknowledges that the paragraph containing this averment is true, a claim for shortage of cargo cannot be allowed — Muller v Spreckels, D.C Pa., 48 F 574

9. N Y.—Zimmerman v. Rainey, 56 N.Y.S 199, 26 Misc 795
58 C.J. p 518 note 54

10. U S —Linea Sud-Americana v. 7,295.40 Tons of Linseed, D C N. Y., 29 F.Supp. 210, affirmed, C.C A , 108 F.2d 755, certiorari denied 60 S Ct 615, 309 U.S. 672, 84 L Ed 1018.
58 C.J. p 518 note 55.

wise such general rules apply with respect to the trial,[11] and costs.[12]

§ 170. Lien

a. In general
b. Waiver or loss

a. In General

The law gives a carrier by water a lien on goods carried by him for the freight due for their carriage.

A lien for freight may arise by express contract between the parties,[13] but, irrespective of any express contract, the law gives a carrier by water a lien on goods carried by him for the freight due for their carriage.[14] It arises from the usages of commerce, independent of the agreement of the parties, and not from any statutory regulations.[15] A lien for freight, however, will be held not to exist if the contract of affreightment contains stipulations inconsistent with the notion thereof,[16] but the lien is not waived by any provisions of the contract of hire not absolutely incompatible with the enforcement of the lien at the time of delivery;[17] nor is the lien divested by assignment.[18] Although it has been stated that the lien exists if it appears that the payment is to be made before or at the delivery of the cargo, or even if it does not appear that the delivery is to precede such payment,[19] there is also authority for the statement that it does not arise unless payment of the freight is to be on the delivery of the cargo.[20] If the freight is payable after delivery of the cargo there is no lien.[21] The lien arises when, and only when, the vessel has earned or commenced to earn freight,[22] and attaches to property shipped by one authorized by the owner of the cargo as well as by the owner himself,[23] and it is not affected by any indebtedness in-

Evidence held sufficient

U.S.—Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., C.C.A.Va., 189 F.2d 488—Compania De Navegacion Transmar, S.A., v. Georgia Hardwood Lumber Co., C.C.A.Ga., 141 F.2d 652, affirmed 65 S.Ct. 293, 323 U.S. 334, 89 L.Ed. 280—Linea Sud-Americana v. 7,295 40 Tons of Linseed, D.C.N.Y., 29 F.Supp. 210, affirmed, C.C.A., 108 F.2d 755, certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1018—The Plow City, D.C.Pa., 23 F.Supp. 548.

Cal.—Bedford v. Pacific Structural Welding Corporation, 8 P.2d 558, 121 Cal.App. 162.

N.Y.—Republic Chemical Corp. v. Bankers Commercial Corp., 73 N.Y.S.2d 318, affirmed 54 N.Y.S.2d 396.

Evidence held insufficient

U.S.—De La Rama S.S. Co. v. Ellis, C.C.A.Cal., 149 F.2d 61, certiorari denied 66 S.Ct. 23, 326 U.S. 718, 90 L.Ed. 425—The Plow City, D.C.Pa., 23 F.Supp. 548.

Prima facie evidence

The Carriage of Goods by Sea Act does not foreclose a shipper from disputing the weights shown by ocean bill of lading which is prima facie evidence of receipt of goods as described, including weight, in absence of showing that bill recited any weights.—Compania De Navegacion Transmar, S.A., v. Georgia Hardwood Lumber Co., D.C.Ga., 48 F.Supp. 402, reversed on other grounds, C.C.A., 141 F.2d 652, affirmed 65 S.Ct. 293, 323 U.S. 334, 89 L.Ed. 280.

11. N.Y.—Doty v. Thomson, 22 N.E. 1089, 116 N.Y. 515.
58 C.J. p. 519 note 58.

12. U.S.—The Asiatic Prince, D.C.N.Y., 103 F. 676.
58 C.J. p. 519 note 59.

Unnecessary litigation

Where litigation between a carrier and a shipper is wholly unnecessary and is caused by the unreasonable conduct of both parties, each party will be required to pay its own costs.—The Asiatic Prince, supra.

Shipper held entitled to costs

U.S.—Edward Hines Lumber Co. v. Chamberlain, Ill., 118 F. 716, 55 C.C.A. 236.

13. **Evidence of creation of lien**

Charter party binding vessel, freight, tackle, and appurtenances, and merchandise, each to other in penal sum of estimated amount of charter, although in itself mere penalty, was evidence of creation of a lien for freight.—The Albert F. Paul, C.C.A.N.Y., 1 F.2d 16.

Under cesser clause

Under cesser clause, shipowner's lien on cargo was commensurate with liability which, except for clause, charterer would assume.—The Arizpa, C.C.A.Md., 63 F.2d 42, certiorari denied U.S. v. Consolidation Coal Co., 54 S.Ct. 66, 290 U.S. 648, 78 L.Ed. 562.

14. U.S.—Clifford v. Merritt-Chapman & Scott Corporation, C.C.A.Fla., 57 F.2d 1021—The Fredensbro, D.C.Pa., 52 F.2d 854.
58 C.J. p. 519 note 62.

Issuance of bill of lading

In absence of special agreement, goods shipped by charterers themselves are subject to lien for chartered freight, regardless of whether bill of lading was issued.—The Albert F. Paul, C.C.A.N.Y., 1 F.2d 16.

Priority

(1) A towage lien has been held superior to claims under a contract of affreightment.—The Unadilla, D.C.Mich., 24 F.Cas.No.14,333—63 C.J. p. 17 note 68.

(2) In ordinary cases of the hypothecation of a cargo, the lien for freight takes precedence.—Gracie v. Palmer, Pa., 8 Wheat. 605, 5 L.Ed. 696.

15. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662.

16. U.S.—The Volunteer, C.C.Mass., 28 F.Cas.No.16,991, 1 Sumn. 551.

17. U.S.—Portland Flouring Mills Co. v. Portland, etc., SS. Co., D.C.Or., 145 F. 687.
58 C.J. p. 520 note 65.

18. N.Y.—Everett v. Coffin, 6 Wend. 603, 22 Am.D. 551.
58 C.J. p. 520 note 66.

19. U.S.—The Volunteer, C.C.Mass., 28 F.Cas.No.16,991, 1 Sumn. 551.

20. U.S.—Portland Flouring Mills Co. v. Portland, etc., SS. Co., D.C.Or., 145 F. 687.

21. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed. 662—The Volunteer, C.C.Mass., 28 F.Cas.No.16,991, 1 Sumn. 551.

22. U.S.—The Capitaine Faure, C.C.A.N.Y., 10 F.2d 950, certiorari denied Société De Navigation A Vapeur France Indo-Chine v. Cooper, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150 and Société De Navigation A Vapeur France Indo-Chine v. Harrisons, 46 S.Ct. 634, 271 U.S. 684, 70 L.Ed. 1150.
58 C.J. p. 520 note 73.

Storage of goods at destination

If consignees or owners cannot be notified, or if agreed freight is unpaid, ship, on storage of goods at destination, retains lien therefor.—Clifford v. Merritt-Chapman & Scott Corporation, C.C.A.Fla., 57 F.2d 1021.

23. Cal.—Green v. Campbell, 52 Cal. 586.

curred by the captain to the consignees on his personal account [24]

Nature The shipowner's lien for freight is, at least in admiralty, a maritime lien[25] and differs from most maritime liens in that it is possessory.[26] It is a mere right to hold the goods carried as security for the payment of the freight due[27] and arises from the right to retain them until the freight is paid.[28] It depends on the possession of the goods,[29] and it is not the same as the privileged claim of the civil law;[30] nor is it an hypothecation of the cargo which will remain a charge on the goods after the shipowner has parted unconditionally with the possession.[31]

Liberal construction. The maritime lien for freight is not governed by the strict and technical rules of the common law,[32] but is dealt with on equitable principles and with reference to the usages and customs of trade [33]

Enforcement. The shipowner's lien for freight is enforceable in admiralty.[34] He may enforce the lien by a proceeding in rem[35] or he may retain the goods until the freight is paid.[36] If the consignee and owner of a cargo fails to pay or tender the freight due on the discharge of the cargo, the carrier, to preserve its lien, is authorized to retain and store sufficient of the cargo to pay such freight,[37] and the expense of storage and loss of use of the commodity must be borne by the owner;[38] but where a vessel delivers a consignment, a portion of which is damaged, it is incumbent on her to ascertain the amount of damage before retaining a part of the consignment for balance of freight, in order that she may not, by retaining an unreasonable amount, become liable for the storage and selling charges.[39] A sea carrier under a common bill of lading cannot enforce a lien for freight by a sale of the goods on its own motion without a decree,[40] nor can a lien for freight payable in advance, but unpaid, be exercised en route,[41] since, in the absence of some stipulation to the contrary, the lien is enforceable only when the ship has arrived at her destination and is ready to deliver.[42]

Lien of third person. Third persons cannot have a maritime lien on freights if there is none on the ship [43] An assignment or pledge of freights in consideration of advancements furnished without restriction as to purpose does not create a maritime lien,[44] and is inferior to a stevedore's lien[45] or to the claim of one who furnished fuel to the ship for the voyage on which the freights claimed by the assignee were earned.[46] Admiralty has jurisdiction to enforce a lien created by a pledging of freights for a maritime purpose.[47] It also has jurisdiction to enforce a lien on subfreights by a proceeding in rem,[48] and since jurisdiction in rem in admiralty is determined by the allegations of the libel, an answer denying that such freights are due does not oust the jurisdiction of the court;[49] but

24. U.S.—Fox v. Holt, D.C Conn., 9 F.Cas.No.5,012, 4 Ben 278, 36 Conn 558.

25. U.S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L Ed. 662.
58 C J. p 521 note 79.

26. U.S.—In re Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Mass., 1 Black 108, 17 L Ed 35—The Appam, D.C. N.Y., 243 F. 230.

27. U.S.—The Maria White, D C Me., 16 F.Cas No 9,083, 1 Hask. 204.

28. U S—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed 662.
58 C.J. p 521 note 82.

29. U.S.—Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Mass., 1 Black 108, 17 L. Ed 35—Portland Flouring Mills Co. v. Portland, etc, SS. Co, D.C.Or., 145 F. 687.

30. U.S.—The Eddy, S.C., 5 Wall. 481, 18 L.Ed. 486—The Bird of Paradise, Cal., 5 Wall. 545, 18 L.Ed 662.

31. U.S—The Bird of Paradise, supra—Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Mass, 1 Black 108, 17 L Ed. 35.

32. U S.—Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, supra—Leggett v. 500 Cases of Tomatoes, C.C.A N Y., 15 F.2d 270.

33. U S—Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Mass., 1 Black 108, 17 L. Ed 35—Leggett v. 500 Cases of Tomatoes, C.C A.N.Y., 15 F 2d 270.

34. U S—Leggett v. 500 Cases of Tomatoes, supra.

35. U S.—The Bird of Paradise, Cal., 5 Wall. 545, 18 L Ed. 662.
58 C.J. p 521 note 89.

36. U S.—The Bird of Paradise, supra.
58 C.J. p 521 note 90.

37. U S.—The Asiatic Prince, D.C N. Y., 103 F. 676.

38. U.S.—The Asiatic Prince, supra.

39. U S—The Tangier, D.C.N.Y., 32 F. 230.

40. U.S.—The Maria White, D C Me., 16 F.Cas.No.9,083, 1 Hask. 204.
58 C.J. p 521 note 94.

41. U S.—The Appam, D.C.N.Y, 243 F. 230.

42. U S.—The Appam, supra.

43. U.S—U S v. Robins Dry Dock, etc., Co, C.C A.Mass, 13 F.2d 808.

44. U S—In re Atlantic, etc, SS Co., D.C Md., 3 F.2d 311, affirmed, C C A, Standard Oil Co. v. Miller, 3 F 2d 438—In re Atlantic, etc, SS Co., D C Md, 3 F.2d 309, affirmed, C C.A., Standard Oil Co. v. Miller, 3 F.2d 438

45. U S—In re Atlantic, etc., SS Co., D.C.Md, 3 F 2d 309, affirmed, C.C.A, Standard Oil Co v. Miller, 3 F.2d 438.

46. U.S.—In re Atlantic, etc., SS Co., D.C Md., 3 F 2d 311, affirmed, C.C A, Standard Oil Co. v. Miller, 3 F 2d 438.

47. U.S.—In re Atlantic, etc, SS. Co., D.C.Md, 3 F 2d 309, affirmed, C.C A., Standard Oil Co. v. Miller, 3 F.2d 438

48. U S.—U S. v. Freights, etc, of The Mount Shasta, Mass, 47 S Ct 666, 274 U S. 466, 71 L Ed. 1156.
58 C.J. p 522 note 4.

49. U S.—U. S. v. Freights, etc, of The Mount Shasta, supra.

proof on the trial that the res does not exist will defeat the jurisdiction of the court.[50] A person who has made advances for the benefit of a vessel and has taken an assignment of the master's lien on the freight therefor has been held entitled to the appointment of a receiver to collect such freight where the owners of the vessel are insolvent.[51]

b. Waiver or Loss

The carrier may waive or lose its lien on the goods. Delivery of the cargo without condition or qualification is a waiver of the lien.

The carrier may waive or lose its lien on the goods.[52] If the contract of carriage ends, the conventional lien embodied in, and created by, that contract falls with it.[53] Thus, the shipowner loses his lien where he totally abandons the carriage of the goods,[54] as where the ship is wrecked and the master sells the cargo which is of a perishable nature[55] or where the ship is captured by the enemy,[56] but, where the vessel has earned freight, a formal abandonment of the ship to the underwriters by the owner who, at the same time, keeps the master on board in order to retain possession of the cargo is not sufficient to cause a loss of the lien for freight.[57] It is not necessary for the preservation of the lien that the goods be carried to their destination in the vessel on which they were originally laden, but if in fact they reach the port of destination so that delivery can be made, whether by the original boat or by another agency set in motion by the original carrier or by one standing in his place, the lien continues and can be enforced.[58]

Conversion. The deposit of the goods in a warehouse prior to the expiration of the time allowed for delivery in the bill of lading amounts to a conversion and deprives the carrier of his lien.[59]

Effect of delivery of goods. Delivery of the cargo without condition or qualification is a waiver of the lien.[60] Accordingly, the lien for freight is discharged by delivery to the consignee without demanding freight or notifying him of a lien therefor, in the absence of a special agreement or local usage to the contrary, irrespective of the intentions of the master.[61] Part delivery, however, does not waive the lien on the remainder of the goods.[62] The manual delivery of the cargo by the shipowners does not of itself operate necessarily to discharge their lien for freight, where the intent of the shipowners in making such delivery is merely to discharge the cargo, and not to deliver it,[63] since there is a well defined difference in law between the discharge of a cargo and its delivery, and it may be discharged, but cannot be delivered unconditionally, without divesting the vessel's lien thereon for freight.[64] If it is clear from the agreement of the parties, either express or implied by the local usage of the port, that the transfer was only for certain purposes, presumably for the benefit of both parties, as for examination or storing for a brief period, the law

50. U.S.—U. S. v. Freights, etc., of The Mount Shasta, supra

51. N.Y.—Sorley v. Brewer, 1 Daly 79.

52. U.S.—Allen v. Three Thousand One Hundred and Eighty-Three Bushels of Potatoes, D.C.N.Y., 8 F. 763

58 C.J. p. 522 note 7.

Clear proof required

Defense that shipowner chartering entire vessel intended to waive lien on cargo for freight, actually or presumptively, requires clear proof.—The Robin Gray, 53 F.2d 1037, reversed in part on other grounds, C.C.A., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566

53. U.S.—The Appam, D.C.N.Y., 243 F. 230.

58 C.J. p. 522 note 8.

54. U.S.—The Appam, supra.

55. U.S.—Allen v. Three Thousand One Hundred and Eighty-Three Bushels of Potatoes, D.C.N.Y., 8 F. 763.

58 C.J. p. 522 note 10.

56. U.S.—The Appam, D.C.N.Y., 243 F. 230

58 C.J. p. 522 note 11

57. U.S.—Richardson & Sons v. Jenkins S.S. Co., C.C.A.Mich., 44 F.2d 759, certiorari denied James Richardson & Sons v. Jenkins S.S. Co., 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436.

58 C.J. p. 522 note 12.

58. N.Y.—Hughes v. Sun Mut. Ins. Co., 2 N.E. 901, 3 N.E. 71, 100 N.Y. 58

59. N.Y.—Western Transp. Co. v. Barber, 56 N.Y. 544.

60. U.S.—Eastern Transp. Co. v. U.S., C.C.A.N.Y., 159 F.2d 349.—Alcoa S.S. Co. v. U.S., D.C.N.Y., 80 F. Supp. 158, reversed on other grounds, C.A., 175 F.2d 661, affirmed 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225

58 C.J. p. 522 note 15.

Shipowner held to have retained possession

Shipowner, where master of barge remained on board after fire, retained possession of cargo, with respect to right to lien for freight, notwithstanding abandonment of barge to fire underwriters.—Richardson & Sons v. Jenkins S.S. Co., C.C.A. Mich., 44 F.2d 759, certiorari denied James Richardson & Sons v. Jenkins S.S. Co., 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436.

Estoppel

Shipowner was not estopped with respect to lien for freight on cargo, as against purchasers thereof, by fire underwriters exacting guaranty that they would not have to pay freight.—Richardson & Sons v. Jenkins S.S. Co., C.C.A.Mich., 44 F.2d 759, certiorari denied James Richardson & Sons v. Jenkins S.S. Co., 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436.

61. U.S.—The Tan Bark Case, D.C. Mich., 23 F.Cas.No.13,742, Brown Adm. 151

58 C.J. p. 522 note 16

62. U.S.—Fox v. Holt, D.C., 9 F.Cas. No.5,012, 4 Ben. 278, 36 Conn. 558.

58 C.J. p. 522 note 17.

63. U.S.—In re Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Mass., 1 Black 108, 17 L.Ed. 35.

58 C.J. p. 523 note 19.

64. U.S.—Cranston v. A Cargo of Two Hundred and Fifty Tons of Coal, D.C.N.Y., 22 F. 614.

will deem the possessor as a depositary for both parties, and the master as still constructively in possession, so far as to preserve his lien and his remedy in rem.[65] Thus, it has been held that a delivery of cargo subject to a lien for freight, made to a person liable to pay the freight, will not be held to be a waiver of the lien for freight unless facts appear from which it can be found that the act of delivering the cargo was accompanied with an intention to waive the lien for freight,[66] and, where delivery is made on an understanding between the parties that the transfer of the goods shall not be regarded as a waiver, no such consequence follows.[67] A delivery made under the expectation that the freight will be paid at the time is not such a delivery as to constitute a waiver of the lien, and the carrier may afterward libel the article in rem, in admiralty, for the freight;[68] nor is cargo divested of a lien for freight merely by being discharged into a warehouse without other evidence of the carrier's intention to waive the lien.[69] A delivery to a wharfinger or warehouseman on the consignee's account, accompanied by a notice of lien, is no waiver, even if the notice is served an hour or two after the last of the cargo is delivered, so slight a delay not necessarily indicating an intent to unconditionally deliver;[70] nor is the lien divested by delivery where it is the notorious usage of the port where the cargo is detained that the lien shall remain.[71]

F. SUPERCARGO

§ 171. Definition; Nature of Duties

A supercargo is a person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.

A supercargo is a person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.[72] He may sell or pledge the cargo if necessary before it has arrived at its destination.[73] The principles which regulate the conduct of factors abroad apply to supercargoes,[74] and they are liable for injuries to the employer occasioned by the want of reasonable skill or ordinary diligence and are bound to use good faith and must exercise their judgment after proper precautions and inquiries.[75] A supercargo is not bound to observe the exact terms of his instructions, if thereby the interests of the owner would be sacrificed or his objects frustrated, and in cases of necessity or urgency, it is only necessary that he act bona fide and with reasonable discretion in order to bind the owner.[76] Where he makes a shipment of merchandise on his principal's account, the exportation of which is prohibited, it is at his own risk, and, if seized and condemned at the place of exportation, he must bear the loss,[77] unless the shipper has ratified the sale by retaining the proceeds after knowledge of the facts.[78] As a general rule, a supercargo cannot delegate his authority any more than any other agent, but exception may arise where the power of delegation is conferred by the necessity of the case, the usages of trade, or the law and customs of the country where the agency is to be executed.[79]

§ 172. Master as Supercargo

While a master has no implied powers of a supercargo, he may have them conferred on him by express authority of the shipper.

While a master has, as such, no implied powers of a supercargo,[80] he may have them conferred on

65. U.S.—Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, Mass., 1 Black 108, 17 L Ed 35.
58 C.J. p 523 note 21.

66. U.S.—McBrier v. A Cargo of Hard Coal, D.C.Minn., 69 F. 469.
58 C.J. p 523 note 22

67. U.S.—Wilcox v. Five Hundred Tons of Coal, C.C.Ill., 14 F. 49—Kimball v. The Anna Kimball, C.C. Mass., 14 F.Cas.No 7,772, 2 Cliff. 4.

68. U.S.—Costello v. 734,700 Laths, etc., D.C.N.Y., 44 F. 105.
58 C.J. p 523 note 24.

69. U.S.—Howard v. 9,889 Bags of Malt, D.C.Mass., 255 F. 917.
58 C.J. p 523 note 25.

70. U.S.—The Giulio, D.C.N.Y., 34 F. 909

71. U.S.—Wilcox v. Five Hundred Tons of Coal, C.C.Ill., 14 F. 49.
58 C.J. p 523 note 27.

72. Md.—Gaither v. Myrick, 9 Md. 118, 66 Am.D. 316.
58 C.J. p 523 note 28.

73. U.S.—Forrestier v. Bordman, C.C.Mass., 9 F.Cas.No 4,945, 1 Story 43

74. Md.—Gaither v. Myrick, 9 Md. 118, 66 Am.D. 316.
58 C.J. p 524 note 33.

75. Md.—Gaither v. Myrick, supra.
58 C.J. p 524 note 34.

76. U.S.—Forrestier v. Bordman, C.C.Mass., 9 F.Cas.No 4,945, 1 Story 43
58 C.J. p 524 note 35

77. Md.—Pawsons v. Donnell, 1 Gill & J. 1, 19 Am.D. 213.

78. U.S.—Forrestier v. Bordman, C.C.Mass., 9 F.Cas.No.4,945, 1 Story 43

79. U.S.—Merrick v. Bernard, C.C. Pa., 17 F.Cas.No 9,464, 1 Wash. 479.
58 C.J. p 524 note 38.

80. Pa.—Rapp v. Palmer, 3 Watts 178—Taylor v. Wells, 3 Watts 65.

him by express authority of the shipper,[81] and sometimes the circumstances are such that the necessity devolves on him to act as supercargo to protect the property and interests intrusted to him.[82] Where the master is supercargo his duties and liabilities are as distinct as if confined to different persons,[83] and in dealing under his powers of supercargo he acts as agent of the shipper, not the owner of the vessel, and the former, not the latter, is liable for his acts;[84] but where, in pursuance of a general usage, goods shipped on a vessel are consigned to the master to sell and make returns, the owner of the vessel is liable for the safe transportation of the goods.[85]

§ 173. Compensation; Lien

On a valid sale a supercargo has a right to retain the proceeds of a cargo for a general balance due to him by the owners.

On a valid sale a supercargo has a right to retain the proceeds of a cargo for a general balance due to him by the owners,[86] and, if he receives his instructions from the ostensible owners of the whole cargo, he has a right to retain, out of the whole proceeds of the cargo, the amount of a general balance due to him from such ostensible owners, although there may be another part owner, whose interest was not disclosed to him until he had settled his account with the ostensible owners.[87] He has a lien on a return cargo to reimburse himself for advances made by him and to satisfy any balance due him on the final adjustment of the transaction between him and the consignor,[88] and he has also a lien on the indemnity fund provided for by treaty with a foreign nation for sequestration of a cargo.[89] On his death during the voyage, after he appoints substitutes, his representatives are entitled to full compensation stipulated for the whole voyage,[90] but if he did not appoint a representative, compensation is allowed only in proportion to the services performed.[91]

IX. CARRIAGE OF PASSENGERS

§ 174. In General

General rules relating to carriage of passengers are applicable to carriers of passengers by water.

The law which regulates the rights and duties of carriers of passengers by train, street car, motor vehicle, or airplane is, in the main, applicable to carriers of passengers by water,[92] the only difference being conditions peculiar to the means and manner of transportation,[93] and certain statutory provisions.[94]

Public or common carriers; private carrier. Carriers by water, holding themselves out to the public as carriers of passengers, are public or common carriers of passengers.[95] A company which maintains boats for the sole and exclusive use of its own patrons is engaged in the business of a private carrier[96] and is not subject to rules applicable to common carriers.[97]

Regulations by carrier. In accordance with rules considered in Carriers § 575, a carrier of passengers by water may make reasonable rules and regulations for the use of the carrier's premises;[98] they cannot be used, without the carrier's consent, by the operators of taxicabs,[99] and they may be enjoined from such use.[1]

81. Md.—Gaither v. Myrick, 9 Md 118, 66 Am D. 316.
58 C J. p 524 note 40.

82. U S —The Collenberg, N.Y., 1 Black 170, 17 L.Ed. 89.
58 C.J p 524 note 41.

83. U S —The Waldo, D C.Me., 28 F. Cas No 17,056, 2 Ware 165.
58 C.J. p 524 note 42.

84. U S.—The St Nicholas, Ga., 1 Wheat 417, 4 L.Ed 125.
58 C J. p 525 note 43.

85. Md.—Gaither v. Myrick, 9 Md 118, 66 Am D. 316.
58 C J. p 525 note 44.

86. U.S.—Vowell v. West, D C., 28 F.Cas No 17,024, 4 Cranch C.C. 100
58 C J. p 525 note 45.

87. U.S —Luckett v West, D.C., 15 F.Cas.No.8,593, 4 Cranch C.C. 101

88. Md —Karthaus v. Owings, 4 Harr. & J. 263

89. U.S —Stewart v. Callaghan, D C., 23 F.Cas.No 13,423, 4 Cranch C. C. 594.

90. N.Y.—Gray v. Murray, 3 Johns. Ch. 167.

91. Pa —Welsh v. Dusar, 3 Binn. 329.

92. Ky —Coney Island Co v. Brown, 162 S.W.2d 785, 290 Ky. 750.

93. Ky —Coney Island Co. v. Brown, supra.

94. Ky —Coney Island Co. v. Brown, supra

95. Ky —Reasor v. Paducah, etc, Ferry Co., 153 S W. 222, 152 Ky. 220, 43 L.R.A ,N S., 820.
10 C J. p 608 note 77.
Carriers of passengers generally, as public or common carriers see Carriers §§ 530–534.

96. Ohio.—Cloke v. Coney Island, 10 N E 2d 1009, 56 Ohio App. 384
Transporting to park
A company maintaining pleasure boats used solely to transport patrons from the mainland to its park on an island was a private carrier within the text rule.—Cloke v. Coney Island, supra.

97. Ohio.—Cloke v. Coney Island, supra.

98. N.Y.—Borland v. Curto, 201 N.Y. S 469, 121 Misc. 814.

99. N Y.—Borland v Curto, supra.

1. N.Y.—Borland v. Curto, supra.

§ 175. —— Duty to Carry; Schedules and Route

A vessel, as a common carrier, is bound to receive for carriage, without discrimination, all proper persons who desire passage and properly offer to became passengers, unless some sufficient excuse exists for refusing them.

A vessel generally engaged as a common carrier of passengers, like other common carriers, as considered in Carriers § 538, is bound to receive for carriage, without discrimination,[2] all proper persons who desire it and properly offer to become passengers,[3] unless some sufficient excuse exists for refusing them.[4] The obligation to transport passengers by water, either in accordance with a previous contract or advertised schedule, is the obligation of the owner of the vessel, rather than that of the vessel itself.[5] When not in some manner properly regulated, the schedule of sailing, or the ports to which carriage shall be made, is largely a matter to be determined by the vessel owner.[6]

§ 176. —— Who Are Passengers

a. In general
b. Commencement of relation
c. Continuance and termination of relation

a. In General

A passenger, in shipping, is said to include all who pay freight for their own persons apart from their merchandise. The relation between vessel owner and passenger is the primarily contractual one of carrier and passenger.

The term "passenger," as used in shipping, has been said to include all persons who pay freight for their own persons apart from their merchandise.[7] The relation between vessel owner and passenger is the primarily contractual one of passenger and carrier.[8] In order that this relation may come into existence, there must be a contract of carriage, either express or implied, entered into between the passenger and the vessel owner, or by their respective agents.[9] Such contract must ordinarily comprehend the payment of fare or an equivalent therefor.[10] It is not essential that there be a direct payment of fare by the passenger to the vessel owner.[11] Hence, the transferee of a ticket from one who was going to take a voyage,[12] a person who purchases a ticket from one who holds a contract with the vessel owner for the carriage of an excursion party,[13] or a former employee of a vessel who is having his transportation to home from a foreign port paid by the employer, as a part of the contract of employment,[14] may become a passenger. However, in instances where the owner of one vessel contracts with another vessel to have his employees carried back and forth to work, the employees are not passengers of the other vessel,[15] but rather invitees who have been invited to come aboard for a consideration paid by the employer.[16]

b. Commencement of Relation

The relation of carrier and passenger commences as soon as a person with bona fide intention of taking passage places himself in the care of the vessel or its employees and is accepted as a passenger.

The relationship commences as soon as a person with the bona fide intention of taking passage places himself in the care of the vessel or its employees and is accepted as a passenger;[17] he need not actually have come on board the vessel,[18] but, if in good faith one intending to become a passenger

2. N.C.—Patterson v. Old Dominion SS Co., 53 S.E. 224, 140 N.C. 412, 111 Am.S.R. 848, 5 L.R.A.,N.S., 1012
58 C.J. p 525 note 54.

3. U.S.—Weade v. Dichmann, Wright & Pugh, Va., 69 S.Ct. 1326, 337 U.S. 801, 93 L.Ed. 1704.
58 C.J. p 525 note 55.

4. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.
Mass.—Connors v. Cunard SS Co., 90 N.E. 601, 204 Mass. 310, 134 Am.S.R. 662, 26 L.R.A.,N.S., 171, 17 Ann.Cas. 1051.
58 C.J. p 525 note 52.

5. U.S.—Acker v. The City of Athens, C.A.Md., 177 F.2d 961—Todd Shipyards Corp. v. The City of Athens, D.C.Md., 83 F.Supp. 67.

6. Philippine.—Yangco v. Public Utility Comrs., 36 Philippine 116.
58 C.J. p 525 note 56.

7. U.S.—The Main v. Williams, Md., 14 S.Ct. 486, 487, 152 U.S. 122, 38 L.Ed. 381.

8. U.S.—Austro-American SS. Co. v. Thomas, N.Y., 248 F. 231, 231 C.C.A. 309, L.R.A.1918D 873.

9. U.S.—The Vueltabajo, D.C.Ala., 163 F. 594.
58 C.J. p 526 note 59.

10. U.S.—Carlsen v. A. Paladini, Inc., C.C.A.Cal., 5 F.2d 387.
58 C.J. p 526 note 60.
Bartenders who pay for the privilege of conducting a bar on board a vessel are passengers and not employees.—Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

11. U.S.—Gleason v. The Willamette Valley, D.C.Cal., 71 F. 712.
58 C.J. p 526 note 61.

12. U.S.—Gleason v. The Willamette Valley, supra.

13. D.C.—Mt. Vernon, etc., Steamboat Co. v. McKenney, 46 App.D.C. 99
Pa.—McBride v. McNally, 89 A. 1131, 243 Pa. 206, 52 L.R.A.,N.S., 259.

14. U.S.—The European, La., 120 F. 776, 57 C.C.A. 140.

15. U.S.—The Ross Coddington, D.C.N.Y., 40 F.2d 280, reversed on other grounds, C.C.A., 6 F.2d 191.
58 C.J. p 526 note 65.

16. U.S.—The Ross Coddington, supra.

17. U.S.—In re Kimball SS. Co., D.C.Cal., 123 F. 838, reversed on other grounds 128 F. 397, 63 C.C.A. 139, 65 L.R.A. 84, certiorari denied 24 S.Ct. 859, 194 U.S. 638, 48 L.Ed. 1162.
58 C.J. p 526 note 67.

18. U.S.—In re Kimball SS. Co., supra.
58 C.J. p 526 note 68.

goes on the vessel for the purpose of taking passage on the usual terms and conditions established by the carrier, and the latter accepts the passenger, the relationship is at once established.[19] On the other hand, prospective passengers who have purchased tickets for transportation but have not boarded the vessel are not passengers.[20] The fact that a ticket has not been purchased nor the fare paid does not prevent the creation of the relation,[21] although it has been said that a subsequent nonpayment of fare, after demand therefor, may constitute good cause for a rescission of the contract.[22]

c. Continuance and Termination of Relation

The relation of carrier and passenger continues until the passenger has been landed at the port of destination and has left the vessel owner's dock or premises.

The relation ordinarily continues until the passenger has been landed at the port of destination and left the vessel owner's dock or premises,[23] and one who has become a passenger by reason of the purchase of through passage to the port of destination does not lose his rights as such, during ingress to, and egress from, the steamer, while going ashore at an intermediate port for his own convenience, if in so doing he violates no rule of the carrier or condition of his ticket.[24]

Termination. The relation of passenger and carrier ceases when the passenger is made aware of the arrival at the port of destination, and has had a reasonable time to get off the vessel;[25] if thereafter he remains on the vessel, he ceases to be a passenger[26] and becomes in effect a trespasser.[27] Where a passenger is transferred from one vessel to another, the relation of passenger and carrier between the passenger and the transferor carrier ceases when the transferee carrier accepts him as a passenger.[28]

§ 177. Statutory Regulation

The carriage of passengers by water is now largely regulated by statute. Such statutory regulations are usually not regarded as limiting the common-law liability of the vessel owner; but as an aid of the common law or giving additional protection to passengers.

The carriage of passengers by vessels has been largely regulated by federal statutes, having as an object the protection of the lives of the passengers and the assurance of suitable accommodations and proper transportation, although there have also been state statutes, designed to regulate steamboats used for the conveyance of passengers, which were not subject to regulation by congress because they were not used in navigating waters of the United States,[29] or to regulate the landing of foreign passengers who may become a charge on the state.[30] Statutory regulations of this nature are usually not regarded as limiting the common-law liability of the vessel owner,[31] but rather as coming in aid of the common law or giving additional protection to passengers.[32]

§ 178. —— Vessels Subject to Regulations

a. Ownership and place of use
b. Type of use

a. Ownership and Place of Use

Privately owned steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation are subject to regulation by congress. Some statutes regulate privately owned foreign vessels carrying passengers from any port of the United States.

Although there seems to be some dispute as to the extent to which vessels engaged in purely internal commerce within a state can be subjected to federal regulations, as discussed in Commerce § 42, congress in some acts has undertaken to regulate all privately owned steam vessels navigating any waters of the

19. U.S.—Mellquist v. The Wasco, D.C.Wash., 53 F. 546.
58 C.J. p 526 note 69.

20. U.S.—Acker v. The City of Athens, C.A.Md., 177 F.2d 961—Todd Shipyards Corp. v. The City of Athens, D.C.Md., 83 F.Supp. 67.

21. U.S.—Mellquist v. The Wasco, D.C.Wash., 53 F. 546
58 C.J. p 526 note 70

22. Or.—Clark v. North Pac. SS Co., 144 P. 472, 74 Or. 470, L.R.A.1916E 487.

23. Mass.—Dodge v. Boston, etc., SS. Co., 19 N.E. 373, 148 Mass. 207, 12 Am.S.R. 541, 2 L.R.A. 83.
Or.—Dice v. Willamette Transp., etc., Co., 8 Or. 60, 34 Am.R. 575.

24. Mass.—Dodge v. Boston, etc., SS. Co., 19 N.E. 373, 148 Mass. 207, 12 Am.S.R. 541, 2 L.R.A. 83.
Or.—Dice v. Willamette Transp., etc., Co., 8 Or. 60, 34 Am.R. 575.
Successive transfers
Carrier-passenger relationship between steamship and a passenger ceased when he was carried from the first steamship and accepted as passenger by second steamship, and such relationship between second steamship and him ceased when he was transferred and accepted by a third steamship.—Ransom v. Dollar S. S. Line, supra.

25. Wash.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149.
58 C.J. p 527 note 74.

26. Wash.—Duval v. Inland Nav. Co., supra.
58 C.J. p 527 note 75.

27. Wash.—Duval v. Inland Nav. Co., supra.

28. U.S.—Ransom v. Dollar S. S. Line, D.C.Wash., 2 F.Supp. 409

29. Mass.—Commonwealth v. King, 22 N.E. 905, 150 Mass. 221, 5 L.R.A. 536.
58 C.J. p 527 note 78.

30. Me.—Lawrence v. Small, 48 Me. 468.
58 C.J. p 527 note 79.

31. Mass.—Simmons v. New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am.D. 99.
58 C.J. p 527 note 82.

32. N.Y.—Carroll v. Staten Island R. Co., 58 N.Y. 126, 17 Am.R. 221.
58 C.J. p 527 note 83.

United States which are common highways of commerce or open to general or competitive navigation.[33] As to foreign owned vessels the defining section of some regulatory acts provides that all privately owned foreign vessels carrying passengers from any port of the United States shall be subject to certain enumerated provisions, with a proviso that, when such foreign vessel belongs to a country having inspection laws similar to those of the United States and has a proper certificate of inspection from its own country, it shall not be subject to general inspection under our laws;[34] and a foreign owned vessel having complied in all pertinent respects with the laws of its own country and procured an American certificate of inspection is thereby relieved from further compliance with our regulations as to life-saving equipment.[35] Such a proviso operates to limit the applicability of other sections of the act,[36] so that, if a subsequent section of the act relating to life saving appliances is amended to apply to foreign vessels, it will have no application to such foreign vessels as are excepted from the entire act by the proviso of the defining section.[37]

b. Type of Use

Some regulatory statutes expressly except ferryboats and tugs, many statutes profess by their terms to apply only to vessels engaged in the carriage of passengers.

An express exception is sometimes made in the statutes in favor of ferryboats and tugs,[38] and many regulatory statutes profess by their terms to apply only to vessels engaged in the carriage of passengers,[39] as common carriers.[40] Statutes of this type have been held to apply to a vessel which actually carries passengers for hire, although it does not regularly engage in that business.[41] Certain gratuitous carriages of persons, other than the officers or crew of a vessel, for noncommercial purposes, have been held not to bring a vessel within the scope of acts regulating the carriage of passengers.[42] However, the transportation of persons who pay only the actual expenses incurred may be regarded as a carriage of passengers,[43] and the conclusion that a person, other than a regular member of the crew, is not a passenger, is not rendered necessary by the fact that he signs a paper which purports to make him a member of the crew at a set price but which he does not receive and for which he renders no services.[44]

§ 179. —— Particular Matters of Regulation

a. Number of passengers
b. Carriage of emigrant or steerage passengers
c. Dangerous articles
d. Equipment
e. Inspection
f. Miscellaneous matters

a. Number of Passengers

The number of passengers which can be safely carried may be regulated by statute.

Under some statutes the number of passengers of each class which can be safely carried with prudence and safety by passenger vessels, other than ferryboats, is prescribed, and is to be stated in the certificate of inspection, and penalties are fixed for taking on board a greater number of passengers than are thus allowed.[45] Under such a statute, a penalty will not be inflicted for carrying an unlawful number of passengers where the excess of passengers over the number permitted by the certificate is composed of persons who have forced their way on the vessel against the wishes of the owners or officers of the vessel.[46]

33. U.S.—The City of Salem, D.C. Or., 38 F. 762, 13 Sawy. 607, 4 L.R.A. 125.
58 C.J. p. 527 note 85.

34. U.S.—Petition of Canadian Pac. R. Co., D.C.Wash., 278 F. 180
58 C.J. p. 528 note 89.

35. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980

36. U.S.—Petition of Canadian Pac. R. Co., D.C.Wash., 278 F. 180.

37. U.S.—Petition of Canadian Pac. R. Co., supra.
58 C.J. p. 528 note 91.

38. U.S.—Elizabethport, etc., Ferry Co. v. U. S., C.C.N.Y., 8 F.Cas.No. 4,362, 5 Blatchf. 198.
58 C.J. p. 528 note 92.

39. U.S.—U. S. v. The Thomas Swan, D.C.S.C., 28 F.Cas.No. 16,480.
58 C.J. p. 528 note 93

40. Pa.—Commonwealth v. Cerra, 66 Pa.Dist. & Co. 96, 50 Lack.Jur. 153 —Commonwealth v. Cerine, Quar. Sess., 11 Monroe L.R. 73

Operators of amphibious "duck"

The operators of an amusement park at a privately-owned lake, who operate an amphibious motor vehicle known as a "duck" as a diversion for their patrons, are not common carriers within the meaning of statute requiring a certificate of public convenience for its operation, where the "duck," in making a round trip of approximately two miles, partly on land and partly on the waters of the lake, from a point within the park, makes no stops for the purpose of picking up or discharging passengers and renders no intermediate service.—Commonwealth v. Cerra, 66 Pa.Dist. & Co. 96, 50 Lack.Jur. 153.

41. U.S.—The Scow No. 1, D.C.N.Y., 169 F. 717
58 C.J. p. 528 note 94.

42. U.S.—U. S. v. Guess, D.C.La., 48 F. 587
58 C.J. p. 529 note 95.

43. U.S.—The Scow No. 1, D.C.N.Y., 169 F. 717.
58 C.J. p. 529 note 96.

44. U.S.—U. S. v. Jones, D.C.Md., 195 F. 860

45. U.S.—The Hazel Kirke, D.C. & C.C.N.Y., 25 F. 601, 23 Blatchf. 292.
58 C.J. p. 529 note 6.

46. U.S.—The Geneva, D.C.Pa., 26 F. 647.
58 C.J. p. 529 note 7.

Excursion permits Where a passenger steamer is to engage in excursions, some statutes allow the inspectors to issue to such steamer a special written permit stating the additional number of passengers that may be carried, and also to limit the route and distance of the excursion.[47] In such a case an oral permission to carry additional passengers is insufficient as the statute requires the permit to be in writing.[48] A statute of this type does not require a special excursion permit, where a passenger steamer does not carry or purpose to carry a number of passengers in excess of those allowed by its regular certificate, and the route selected is within the one that the steamer is already permitted to navigate.[49] It has also been held that a boat usually engaged as a ferry, but which frequently forsakes its ferry route and undertakes employment as an excursion boat, need not obtain a special excursion permit,[50] and that, if it does obtain such a permit, it cannot be penalized for carrying more passengers than the number specified.[51]

b. Carriage of Emigrant or Steerage Passengers

Special statutes relating to the carriage of emigrant and steerage passengers may regulate the number of passengers to be carried, food or provisions to be furnished, and accommodations to be provided.

Under special statutes relating to the carriage of emigrant or steerage passengers, congress has, among other matters, made subject to regulation the number of passengers to be carried,[52] the food or provisions to be furnished,[53] and accommodations to be provided.[54] When such regulations are applicable, the responsibilities and duties thus imposed cannot be evaded by contract of charter.[55] Although the general terms of such an act are broad enough for all its provisions to be applicable to steam vessels engaged in the carriage of steerage passengers, only certain provisions of the notice specified have been held to apply to such vessels, where one section of the act specifically declares that steam vessels shall be subject to the provisions of the act relating to the space in vessels appropriated to the use of passengers.[56] Such regulations may be made applicable to any vessel which takes on steerage passengers in a foreign port for transportation to any port in the United States,[57] but an exception where the port of loading is in foreign territory contiguous to the United States extends to any port within such territory and is not limited to ports along the waters separating that territory from the United States.[58]

c. Dangerous Articles

The carriage of dangerous articles on passenger vessels may be subject to statutory regulation.

Under statutory regulations, the carriage of dangerous articles, such as explosives and highly inflammable substances, on passenger vessels, may be prohibited or controlled.[59] A regulation permitting the carriage of such gasoline as is used by automobiles as a source of motive power, provided any fire in the vehicle is extinguished before it enters the vessel and is not relighted until after it has left it, is violated, if an ordinary automobile propelled by gas is run on and off the vessel under its own motive power.[60] A statutory exception permitting the carriage of petroleum of a certain class, where there is no other practicable mode of transportation, does not apply where there is an all-rail route over which the oil may be carried with any profit;[61] but, if the rate of freight by rail is so high as to prevent any profit on the sale of the oil, or to destroy the trade between the points in question, it is not a practicable mode of transportation between those points.[62]

d. Equipment

The equipment to be carried and maintained by passenger vessels is sometimes made the subject of statutory regulation.

Under some regulatory acts the life-saving ap-

47. U S—The Pope Catlin, D.C.Ga., 31 F. 408.
58 C J. p 529 note 8.

48. U S—Pollock v. The Laura, D.C. N Y, 5 F. 133, affirmed 5 S.Ct 881, 114 U S. 411, 29 L Ed. 147.

49. U S—The Pope Catlin, D C.Ga., 31 F 408

50. U S—Schwerin v. North Pac R Co, D.C.Cal, 36 F. 710, 13 Sawy 507.

51. U.S.—Schwerin v. North Pac R Co., supra.

52. U.S—U. S. v. The Louisa Barbara, D C Pa, 26 F.Cas No.15,632, Gilp. 332.
58 C J. p 530 note 14.

53. U.S—The European, La., 120 F. 776, 57 C.C.A. 140.
58 C J. p 530 note 15.

54. U S—U. S. v. Lavarrello, C.C.N Y., 149 F. 297
58 C.J. p 530 note 16.

55. U S.—The Prinz Georg, C.C.La, 23 F. 906.

56. U S—The Strathairly, Cal., 8 S. Ct 609, 124 U S. 558, 31 L.Ed. 580.
58 C.J. p 530 note 18.

57. U.S—The European, La., 120 F 776, 57 C.C A 140.
58 C.J. p 531 note 19.

58. U S—U. S. v. The Danube, D.C Or, 55 F 993.
58 C J. p 531 note 20.

59. N.Y.—Egan v. New Jersey Steamboat Co, 33 N Y S. 791, 86 Hun 542, affirmed 49 N E. 1096, 154 N Y. 777.
58 C.J. p 531 note 24

60. U.S—The Texas, D C.N.Y., 134 F. 909
58 C.J. p 531 note 25.

61. U.S—U. S. v. Thornburg, D.C. Mo, 6 F. 41, affirmed, C.C., 7 F. 190
58 C.J. p 531 note 26.

62. U.S.—U. S. v. Thornburg, supra.

pliances and other equipment to be carried and maintained by passenger vessels is prescribed and some group of officials is given the power to make rules with respect to the matters provided for.[63] If the rules of such officials are declared to have, when properly promulgated and approved, the force and effect of law, and these rules are complied with, there can be no violation of the statutory regulations relating to the same matter;[64] while a violation of such rules may constitute a fraud on the government and be punishable as such.[65] Although a statute may place the primary duty as to the selection and maintenance of the prescribed life preservers, and other safety appliances, on the owner of the vessel, it is, nevertheless, the duty of the master to use ordinary observation and inquiry; and, if he thereby acquires notice of some defect in the vessel's appliances, it is his duty to take some steps toward remedying the situation.[66] A statute requiring that a certain type of life preservers be furnished is as much violated by a furnishing of improper life preservers as by a failure to furnish any at all.[67]

Radio and wireless. A statute, making it an offense for a master or other person in charge of an ocean going steamer carrying passengers to leave, or attempt to leave, any port of the United States on a voyage of over a certain distance without being equipped with prescribed wireless apparatus, may be violated by the making of such a trip by a steamer which carries besides its regular crew only persons who have signed a paper which purports to make them members of the crew at a specified sum per month but which they do not receive and for which they render no services, even though they pay no fare beyond a certain sum which they give to a ship officer to enable him to furnish them with extra food and provisions which they desire to have on the voyage.[68]

e. Inspection

Carriers of passengers by water are subject to regulation by statutes providing for inspection of vessels.

Statutes imposing a penalty for navigating a vessel without having it inspected are strictly construed,[69] and, if the object and scope of an inspection act are to provide for the better security of the lives of passengers, it will repeal, as inconsistent, a provision in an earlier act which imposes a penalty on merchandise vessels that navigate without inspection, and which provision is omitted from the latter act.[70] An inspection statute applicable by its terms only to passenger steamers applies to vessels which at any particular time carry passengers for hire as well as those whose regular business is to carry passengers.[71] A statute, prescribing that the inspectors shall, at least once in every year on application in writing of the master or owner, carefully inspect the hull, accommodations, and equipment of every passenger steamer, is construed not to leave it optional with the shipowner whether or not he shall have his vessel inspected;[72] but rather it is regarded as creating a duty on the part of the shipowner to make a written application for an inspection at least once in every year.[73] Under a statute providing for the inspection of the boiler in every steam vessel before it is used, it is as much the duty of the owner of a passenger ship to cause an inspection of a boiler that has been repaired in a substantial part, as it is to cause the inspection of a new boiler before using it.[74] After a vessel has passed inspection on the basis of its equipment being in the condition required by statute, it is the duty of the vessel to see that the equipment is maintained in the condition required.[75]

f. Miscellaneous Matters

Particular matters, which may be subjects of regulation in connection with the carriage of passengers by water, include the sale of tickets, the crew, a ship physician or surgeon, steam pressure, and other matters.

In addition to those matters considered supra subdivisions a–e of this section, various other particular matters are subject to regulation, such as the time for making claims for personal injuries.[76]

63. U.S.—The Thomas Swan, D.C.N.Y., 23 F.Cas.No.13,931, 6 Ben. 42.
58 C.J. p. 531 note 28.

64. U.S.—Deslions v. La Compagnie Generale Transatlantique, N.Y., 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973
58 C.J. p. 532 note 29.

65. U.S.—U. S. v. Stone, D.C.N.J., 135 F. 392.
58 C.J. p. 532 note 30.

66. U.S.—U. S. v. Van Schaick, C.C.N.Y., 134 F. 592, 159 F. 847.

67. U.S.—U. S. v. Van Schaick, supra.

68. U.S.—U. S. v. Jones, D.C.Md., 195 F. 860.

69. U.S.—The Sun, D.C.Wis., 23 F.Cas.No.13,612, 1 Biss. 373.

70. U.S.—The Sun, supra

71. U.S.—The Jacob G. Neafie, D.C.N.Y., 13 F.Cas.No.7,156, 8 Ben. 251.
58 C.J. p. 532 note 36.

72. U.S.—The Jacob G. Neafie, supra.

73. U.S.—The Jacob G. Neafie, supra.

74. U.S.—The Annie Faxon, Wash., 75 F. 312, 21 C.C.A. 366

75. U.S.—The Garden City, D.C.N.Y., 26 F. 766.

76. **Statute not retroactive**
Statute relating to time for making claims for personal injuries against a steamship company as a carrier was not applicable to an accident that occurred a month or more before the enactment of such statute. —Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21.

Under some statutes[77] designed to protect uneducated or foreign persons, such as steerage or emigrant passengers,[78] the sale of steamship tickets is regulated.

Copies of synopsis of laws. Under a law requiring the secretary of the treasury to prepare a synopsis of the laws relating to the carriage of passengers and requiring the owners of vessels to keep two copies of the synopsis posted in conspicuous places on the vessel, it is no defense that one copy had been posted,[79] or that the surveyor of the port where the vessel was registered had been unable to furnish the owner two copies.[80]

Crew. Where a statute requires a passenger steamer to have on board and in its service such complement of licensed officers and crew as may be entered by the local inspectors in the certificate of inspection, the sufficiency of the crew depends on the terms and construction of the inspection certificate.[81] A statute repairing a full crew, and sufficient at all times to manage the vessel, is violated where the crew taken on board is of such a race that they cannot understand orders that are given them because of lack of knowledge of the language in which they are given.[82]

Physicians and surgeons. A federal statute, found in an act regulating the carriage of emigrant or steerage passengers, and requiring that ships carrying more than fifty steerage passengers carry a duly qualified and competent surgeon or medical practitioner, permits his services to be required only by steerage or emigrant passengers,[83] and not by cabin passengers or members of the crew.[84]

Rates, classification, etc. Under the federal Constitution and statutes applicable to the territory of Hawaii, the territory is authorized to investigate and regulate the rates, classifications, acts, omissions, and practices of a Hawaiian steamship corporation engaged in the business of carrying passengers in territorial waters[85]

Steam pressure. Under a statute making it the duty of the master to see that the safety valve on the boiler is raised when the vessel comes to a stop, so as to relieve the steam pressure, the master cannot leave it to the discretion of the engineer whether or not the safety valve will be opened at stops,[86] and the statute is violated if the valve is not raised even though other means, such as opening the furnace door, are sought to be used to reduce the pressure[87]

§ 180. —— Penalties, Forfeitures, and Liabilities for Violation

a. In general
b. Liens
c. Remission
d. Actions and proceedings to collect

a. In General

Statutes regulating the carriage of passengers by water usually provide for the imposition of penalties for a violation of their provisions. A statute which, in addition to a penalty, imposes a special liability if damage results from the neglect of specified persons does not limit the common-law liability of the shipowner as a carrier of passengers.

Under regulatory acts providing for special penalties for the violation of particular provisions, and providing in a general section for the payment of a certain sum where any vessel is navigated without complying with any of the terms of the act, it has been held that the fact that the provision violated is one for which a special penalty is provided does not prevent the imposition of the general penalty,[88] although there is also authority to the contrary.[89] The fact that a general penalty is to be imposed only when a vessel has been "navigated" without complying with the provisions of the act has been held not to restrict its imposition to situations only where regulations dealing with technical matters of navigation are violated[90] A penalty of this nature may be imposed for failure to do anything required or provided for in the regulatory act,[91] such as, noncompliance with a provision limit-

77. Mich.—People v. Fidelity & Casualty Co. of New York, 192 N.W. 658, 222 Mich. 296
58 C.J. p. 529 note 98.

78. Pa.—Commonwealth v. Disanto, 131 A. 489, 285 Pa. 1.
58 C.J. p. 529 note 98.

79. U.S.—The Lewellen, D.C.Ind., 15 F.Cas.No. 8,307, 4 Biss. 156

80. U.S.—The Lewellen, supra.

81. U.S.—In re Meyer, D.C.Cal., 74 F. 881.

82. U.S.—In re Pacific Mail S.S. Co., Cal., 130 F. 76, 64 C.C.A. 410, 69 L.R.A. 71, certiorari denied 25 S.Ct. 790, 195 U.S. 632, 49 L.Ed. 353

83. U.S.—Geistlinger v. International Mercantile Marine Co., D.C.N.Y., 295 F. 176.

84. U.S.—Geistlinger v. International Mercantile Marine Co., supra
58 C.J. p. 531 note 23.

85. Hawaii.—Territory v. Inter-Island Steam Nav. Co., 32 Hawaii 127

86. U.S.—U. S. v. Farnham, C.C.N.Y., 25 F.Cas.No. 15,071, 2 Blatchf. 528

87. U.S.—U. S. v. Farnham, supra

88. U.S.—U. S. v. Independent Packet Co., Mo., 226 F. 721, 141 C.C.A. 477, rehearing denied 228 F. 673, 143 C.C.A. 195—The Idaho, D.C.Or., 29 F. 187.

89. U.S.—U. S. v. The Manhattan, C.C.N.Y., 26 F.Cas.No. 15,714, 3 Blatchf. 270

90. U.S.—The Idaho, D.C.Or., 29 F. 187

91. U.S.—The Idaho, supra.

ing the number of passengers which may be carried.[92]

Regulatory acts which, in addition to penalties and forfeitures, provide that whenever damage is caused to a passenger or his baggage, the master and owner, or either, and the vessel shall be liable for the full amount of damage if it happens through failure to comply with any of the regulatory provisions, and that if the loss occurs through neglect on the part of the mate, engineer, or pilot, they may be sued for the damages sustained, do not limit the common-law liability of a shipowner as a carrier of passengers by confining his liability to cases where he is himself at fault,[93] but the liability may be imposed where the injury is caused by the failure of those employed on the vessel to comply with the regulatory provisions.[94] The liability arising under such a statute is not affected by other statutes providing for a limitation of liability for merchandise on behalf of shipowners, but the unlimited statutory liability arises only where the property injured is such as may be said properly to constitute "baggage" of a passenger.[95] If the owner of a passenger vessel fails to have his boiler inspected as required by statute, and it subsequently explodes to the injury of passengers, liability arises, under a statute of the nature above described, even though it is not shown that the failure to inspect was the cause of the explosion,[96] or that an inspection would have necessarily disclosed the imperfections and weakness which resulted in the accident.[97]

b. Liens

In the absence of express statutory provision, no lien exists against the vessel for penalties and fines incurred because of violation of statutory regulations.

In the absence of express provision, no lien exists against a vessel to secure the payment of penalties and fines incurred by its officers or owner because of violation of statutory regulation;[98] and a provision that the vessel engaged in violation of a regulation shall be liable for the penalties prescribed, and may be seized and proceeded against by way of libel, does not create a lien,[99] but merely gives a right to enforce the penalty by a proceeding in rem.[1] A statute providing that the amount "of the several penalties imposed by the foregoing provisions" of a regulatory act shall be liens on the vessel violating such provisions creates a lien on the vessel for a sum which a preceding section provides the master shall "be fined" and imprisoned in event of violation.[2] The rule is the same even though the extent of the lien cannot be determined until after the conviction of the master, and the assessment of the amount of the fine imposed on him,[3] although in this situation the only penalty recoverable against the vessel is that which has been adjudged against the master in the criminal prosecution.[4] A statutory lien, to secure the payment of penalties, is not divested by a sale of the vessel to a bona fide purchaser,[5] but if the right in rem, which is given, is only one to proceed by way of libel, and not a lien, a sale of the vessel before the filing of a libel will defeat any remedy against it.[6]

c. Remission

Fines and penalties incurred because of violation of statutory regulations may be remitted under appropriate statutory provisions.

Congress may validly grant to the secretary of the treasury the power to remit fines and penalties incurred by the violation of federal regulations relating to the carriage of passengers;[7] and where the power granted is to remit "any fine or penalty" provided for in a regulatory act, and the rights granted informers are made subject to the power of remission except where the claims of the informer have been adjudicated prior to the application for remission, a warrant of remission operates to discharge all liability for penalties given in favor of individuals and for which a suit in rem has been brought but not yet tried.[8] The power of the secretary of the treasury to remit fines and penalties may be limited to those provided for in an act relating to the supervision and inspection of steam vessels,[9] and may not extend to penalties provided for in an act regu-

92. U S —The Idaho, supra

93. U S —Sherlock v Alling, Ind , 93 U S 99, 23 L Ed 819.
N Y —Carroll v Staten Island R Co , 58 N.Y 126, 17 Am.R 221

94. U S.—Sherlock v Alling, Ind , 93 U S 99, 23 L Ed 819.
N Y —Carroll v Staten Island R Co , 58 N.Y. 126, 17 Am R. 221

95. N Y.—Chisholm v Northern Transp. Co., 61 Barb. 363
Liabilities of shipowner subject to limitation by statute see infra § 243.

96. U S —The Annie Faxon, Wash , 75 F 312, 21 C C A 366

97. U S —The Annie Faxon, supra

98. U S —U S v. The Laurel, D C Mo , 26 F Cas No 15,569, Newb Adm 269

99. U S —U S. v The Laurel, supra

1. U S.—U S. v The Laurel, supra

2. U S —The Strathairly, Cal., 8 S.Ct 609, 124 U S 558, 31 L Ed 580
58 C J p 533 note 59.

3. U.S —The Strathairly, supra.

4. U S —The Strathairly, supra

5. U S —Hatch v. The Boston, D C Pa , 3 F. 807.

6. U S —U. S v. The Laurel, D C Mo , 26 F Cas.No 15,569, Newb Adm 269

7. U S —The Laura, C C N Y , 8 F. 612, 19 Blatchf 562, affirmed 5 S Ct. 881, 114 U S. 411, 29 L Ed. 147

8. U S.—The Laura, supra.

9. U S —Findlay v U S , Hawaii, 225 F. 337, 139 C C A. 207.

lating the carriage of steerage and emigrant passengers;[10] and a statute transferring to the secretary of commerce the power conferred on the secretary of the treasury, as to the remission of fines and penalties, does not give to the secretary of commerce any greater power than that previously possessed by the secretary of the treasury.[11] In the absence of express authority, an executive officer, charged with the duty of prosecuting for penalties incurred under the provisions of a regulatory act, has no power to grant a remission or mitigation of such penalties;[12] but where it is within his supervisory authority to determine as a preliminary matter whether the penalties of an act have been incurred, he may, after an investigation of the evidence, determine the amount of penalties, if any, for which prosecution will be taken.[13]

d. Actions and Proceedings to Collect

(1) Determination by executive department

(2) Judicial actions and proceedings

(1) Determination by Executive Department

An executive department, vested with power and duty to prosecute for violation of statutory regulations relating to carriage of passengers, has no jurisdiction to determine judicially the existence of a liability for penalties.

A statute vesting a certain executive department or official with the power and duty to prosecute for violations of regulations relating to the carriage of passengers confers no jurisdiction on the executive to determine judicially the existence of a liability for penalties.[14] Such a department may, however, in consideration of its delay in taking court proceedings to enforce a penalty which is a lien on the vessel, and in order that the vessel may obtain immediate clearance, take a bond conditioned to pay such penalties as the department shall, after an investigation of the facts, determine to have been incurred.[15] This bond will be valid as a common-law obligation even though the department has no statutory authority to require bonds;[16] and the case being properly submitted by the condition in the bond, the department may proceed to determine the penalties incurred.[17] In an action on the bond, the court will not revise the proceedings before the department,[18] but will only decide whether the facts have been submitted to the department and what determination has been made by the department on such facts.[19]

(2) Judicial Actions and Proceedings

In the absence of a prescribed remedy for the recovery of a penalty for violation of statutory regulations relating to the carriage of passengers, a common-law action of debt is appropriate.

When no remedy has been prescribed for the recovery of a penalty imposed on the master or owner personally, a common-law action of debt is an appropriate remedy;[20] and this remedy is exclusive if the statute creating the penalty gives only this remedy for its enforcement,[21] but there exists authority to the effect that a libel in personam may be maintained in an admiralty court for the recovery of a penalty.[22] Where the statute makes a violation a misdemeanor on the part of the master, and subjects him to a fine and imprisonment, a civil proceeding in admiralty cannot be maintained against him for the recovery of the fine.[23] If a federal statute, providing for full liability for injuries to person or property resulting from a failure to comply with regulatory provisions, prescribes no remedy for the enforcement of the liability, it may be enforced in the state courts by a common-law action.[24]

In the absence of a lien or express authority, a proceeding in rem cannot be maintained for the recovery of a penalty,[25] but where a penalty has been made a lien on the vessel,[26] or where no personal liability for the penalty is prescribed but the vessel itself is made subject to forfeiture,[27] a libel in rem in admiralty may be brought to secure the enforcement of the penalty; and an error of the clerk in docketing the case on the civil docket as if it were a common-law action will not prevent the court from proceeding with the case as an admiralty suit in rem.[28] When by one section of a

10. U S—Findlay v. U. S, supra
11. U S—Findlay v. U S., supra.
12. U S—Findlay v U S, supra
13. U S—Findlay v. U S, supra
14. U S—Findlay v U S, Hawaii, 225 F. 337, 139 C.C A 207
15. U S—Findlay v U S., supra.
16. U.S—Findlay v. U. S, supra
17. U.S.—Findlay v U S, supra
18. U.S.—Findlay v. U. S, supra.
19. U S—Findlay v. U. S., supra.
20. U S.—U. S. v The C B Church, C C La., 25 F Cas No 14,762, 1 Woods 275
58 C.J. p 534 note 71.
21. U S.—The Nashville, D C Ind, 17 F.Cas No.10,023, 4 Biss 188
22. U.S.—U S. v. Burlington, etc, Ferry Co., D C Iowa, 21 F 331.
23. U S—The Scotia, D.C N.Y., 39 F 429.
58 C J. p 534 note 73.
24. N Y—Chisholm v. Northern Transp Co, 61 Barb. 363
25. U S—The Nashville, D C Ind, 17 F Cas No 10,023, 4 Biss. 188
58 C J p 534 note 75.
26. U S—The Prinz Georg, C.C La, 23 F. 906
58 C J. p 534 note 76.
27. U.S—The Lewellen, D C.Ind, 15 F Cas.No 8,308, 4 Biss 167.
58 C J. p 534 note 77.
28. U S—Hatch v. The Boston, D.C Pa, 3 F 807.

regulatory act the master of the vessel is made guilty of a misdemeanor and subject to a fine for the doing of a certain act, and by another section the fine thus imposed is made a lien on the vessel, it is usually held that no libel can be maintained against the vessel until after the master has been criminally prosecuted and convicted,[29] although there is also some authority to the contrary.[30] If the penalty, made a lien, is one which may be recovered in an action of debt by any person suing for it, and the conduct which causes it to be incurred is not made a misdemeanor, the proceedings in rem may be brought direct without a previous action in personam.[31] An attachment or seizure of the vessel, before the filing of the libel, has been held unnecessary, where the penalty and the lien may be enforced by a private individual,[32] and other cases have held that the execution and delivery of a statutory bond to secure the release of a vessel operates as a waiver of any objection that the vessel was not seized until after the filing of the libel.[33]

Election of remedies. In situations where a penalty may be recovered either by an action in personam or a proceeding in rem, a pursuit of one remedy does not necessarily amount to an abandonment of the other,[34] and although a personal judgment has been obtained, if the penalties have not been paid, a lien still exists against the vessel, and this may be enforced by a proceeding in rem.[35]

Jurisdiction Where a penalty is made a lien on the vessel, jurisdiction for a proceeding in rem for its recovery does not depend on the place where the offense was committed,[36] but any court, within whose territorial jurisdiction the vessel may be at the time of the commencement of the suit, has jurisdiction of the cause, and the vessel may be seized by the marshal of that court.[37] If not expressly or impliedly prohibited, an action to enforce a statutory liability imposed by federal statute for failure to comply with federal regulatory provisions may be brought in a state court[38]

Parties, pleading, and evidence. If by statute the right to recover a penalty is given to any person suing for it, the United States is not a necessary party to an action brought for its recovery,[39] nor need the suit be prosecuted in its name, since such a statute implies the right of a private party who proceeds to enforce the penalty to sue therefor in his own name.[40] A statute providing that every pilot, engineer, mate, or master of any vessel who refuses to observe certain regulations shall be liable to a penalty of a certain sum, and for all damages sustained by any passenger, does not authorize recovery by one not a passenger,[41] or the imposition of a penalty against an owner.[42]

A libel for the recovery of penalties may set forth the offense in the language of the statute which creates it, if there is designated with sufficient certainty the time and place of its commission;[43] but the libel must set forth the grounds on which the penalty is demanded.[44] A pleading based on an offense of carrying passengers without complying with certain statutory provisions may use the word "passengers" in the same manner as the statute, without specifying that the persons were carried for hire, even though a person must be carried for hire in order to be a passenger.[45] In a proceeding in rem to recover a penalty, prescribed for carrying an excess number of passengers, which is made recoverable by any person suing for it, the libel need not allege that the libelant was a passenger,[46] or that he was an informer, or that he sued as such;[47] nor need it set out the names of the passengers taken on board[48] A libel is defective if it fails to disclose the statute relied on,[49] but this is a defect which may be cured by amendment.[50]

29. U S—U S v The Nellie May, D C R I., 50 F 605
58 C J p 534 note 79.

30. U.S—The Scotia, D C N Y, 39 F. 429.

31. U S.—Pollock v. The Sea Bird, D C N Y, 3 F. 573

32. U S—Hatch v. The Boston, D C Pa, 3 F 807.

33. U S.—The Lewellen, D C.Ind, 15 F.Cas No 8,807, 4 Biss 156—The Lewellen, D C Ind., 15 F.Cas No.8,-308, 4 Biss. 167.

34. U S—Hatch v The Boston, D.C Pa., 3 F 807.

35. U S.—Hatch v. The Boston, supra.

36. U S—Pollock v. The Sea Bird, D.C N.Y, 3 F. 573.

37. U S—Pollock v. The Sea Bird, supra.

38. N Y.—Carroll v Staten Island R Co., 58 N Y 126, 17 Am.R 221

39. U S—The Laura M. Starin, D C N.Y., 11 F 177—Pollock v. The Sea Bird, D C N Y, 3 F. 573

40. U S.—Hatch v. The Boston, D C Pa, 3 F. 807.

41. U S.—Beck v. Johnson, C C.Ky., 169 F. 154.

42. U S—Beck v Johnson, supra.

43. U S—U. S v. The Neurea, Cal, 19 How 92, 15 L Ed. 531.
58 C.J. p 535 note 2.

44. U S—The Pope Catlin, D.C.Ga, 31 F. 408
58 C J p 535 note 3.

45. Mass—Commonwealth v. King, 22 N.E 905, 150 Mass. 221, 5 L R.A 536

46. U S.—The Laura M Starin, D.C. N Y., 11 F 177—Pollock v. The Sea Bird, D.C N Y., 3 F. 573.

47. U S—The Laura M Starin, D C. N Y, 11 F. 177—Pollock v. The Sea Bird, D C.N.Y., 3 F. 573.

48. U S—The Laura M. Starin, D. C.N Y., 11 F. 177—Pollock v. The Sea Bird, D.C.N.Y., 3 F. 573

49. U S.—The Scotia, D.C.N.Y, 39 F. 429.

50. U.S.—The Scotia, supra

General rules of evidence govern with respect to the burden of proof,[51] presumptions,[52] the admissibility,[53] and weight and sufficiency[54] of evidence in actions brought to recover penalties incurred by a violation of the regulations as to the carriage of passengers.

Judgment, costs, and review. As in other cases, the amount of the judgment is measured by the allegations of the pleadings.[55] A judgment rendered in a personal action, against the owners of a vessel for penalties incurred by the carriage of an illegal number of passengers, is not conclusive as against the vendees of the vessel in a subsequent suit in rem to enforce payment of the penalties,[56] and they may show in the suit in rem that the number of passengers illegally carried was less than found by the jury in the first action.[57]

Where there is apparently good ground for a suit against a vessel to recover penalties, the case is a proper one for judicial investigation and costs will not be awarded to the respondents,[58] notwithstanding the suit is required to be dismissed,[59] particularly where the respondents have not explicitly set forth the real grounds of defense in their answer,[60] thus lengthening the time required for the investigation.[61]

In proceedings for the forfeiture of a vessel for violation of a regulatory statute, new grounds for forfeiture, or charges not made in the lower court, cannot be urged on appeal.[62]

§ 181. —— Offenses

a. In general
b. Prosecution

a. In General

Under statute certain action or conduct on the part of specified members of a vessel's personnel, resulting in the destruction of life, may constitute a criminal offense. Intent or malice is not an essential element of such offense.

In order better to secure the lives of passengers carried on navigable waters, congress may, within its constitutional powers, enact a statute making guilty of a criminal offense every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed.[63] It may and must be shown that accused is a person within the terms of the statute in order to constitute this offense,[64] and he must have been guilty of some act or conduct condemned by the statute,[65] and such default must have resulted in the destruction of human life.[66] Intent or malice is not an essential element of the offense.[67] The application of such a statute is not limited to situations where the vessel involved is propelled by steam,[68] but it applies in the case of any vessel on the navigable waters of the United States,[69] including sailing yachts.[70]

Under a statute, so providing, it is an offense for one, without consent of the owner of a vessel, to secrete himself thereon with intent to obtain transportation without paying therefor.[71]

b. Prosecution

In the absence of a statute providing otherwise, the federal courts have jurisdiction of offenses created by the federal statutes relating to the carriage of passengers by water.

When not prohibited by express provision,[72] the federal courts have jurisdiction of offenses created by the federal statutes relating to the carriage of

51. U.S.—The Pope Catlin, D.C.Ga., 31 F. 408.
58 C.J. p 535 note 11.

52. U.S.—U. S. v. Thomson, D.C.Or., 12 F. 245, 8 Sawy. 122.
58 C.J. p 535 note 12.

53. U.S.—Findlay v. U. S., Hawaii, 225 F. 337, 139 C.C.A. 207.
58 C.J. p 535 note 13.

54. U.S.—The City of Lowell, N.Y., 204 F. 271, 122 C.C.A. 395
58 C.J. p 535 note 14.

55. U.S.—The Columbia, D.C.N.Y., 39 F. 617, reversed on other grounds 50 F. 441, 1 C.C.A. 526.
58 C.J. p 536 note 16.

56. U.S.—The Boston, C.C.Pa., 8 F. 628.

57. U.S.—The Boston, supra.

58. U.S.—The Geneva, D.C.Pa., 26 F. 647.

59. U.S.—The Geneva, supra.

60. U.S.—The Geneva, supra.

61. U.S.—The Geneva, supra.

62. U.S.—U. S. v. The Anna, C.C. Md., 24 F. Cas. No. 14,458, Taney 549

63. U.S.—U. S. v. Holtzhauer, C.C.N.J., 40 F. 76.
N.Y.—People v. Welch, 36 N.E. 328, 141 N.Y. 266, 38 Am.S.R. 793, 24 L.R.A. 117.

64. U.S.—Van Schaick v. U. S., N.Y., 159 F. 847, 87 C.C.A. 27, 14 Ann. Cas. 456.
58 C.J. p 536 note 23.

Master, rather than the mate, is directly charged under statute and regulation with the kind and conduct of drills to be practiced for the passengers' safety.—U. S. v. Abbott, C.C.A.N.Y., 89 F.2d 166.

65. U.S.—Van Schaick v. U. S., N.Y., 159 F. 847, 87 C.C.A. 27, 14 Ann. Cas. 456
58 C.J. p 536 note 24.

66. U.S.—U. S. v. Warner, C.C.Ohio, 28 F. Cas. No. 16,643, 4 McLean 463.
58 C.J. p 537 note 25

67. U.S.—Van Schaick v. U. S., N.Y., 159 F. 847, 87 C.C.A. 27, 14 Ann. Cas. 456.
58 C.J. p 536 note 22

68. U.S.—U. S. v. Holmes, C.C.Ohio, 104 F. 884

69. U.S.—U. S. v. Holmes, supra

70. U.S.—U. S. v. Holmes, supra

71. U.S.—U. S. v. Russo, C.A.N.Y., 172 F.2d 553.

72. U.S.—U. S. v. Holtzhauer, C.C. N.J., 40 F. 76.
58 C.J. p 537 note 29.

passengers by water,[73] even though such offenses take place on navigable waters within the territorial jurisdiction of a state.[74] As between federal courts, if the offense is committed within United States territory, jurisdiction of the offense is in the federal court within whose territorial jurisdiction the destruction of life takes place.[75] Where the act which results in death is felonious and willful so as to constitute the crime of manslaughter under the laws of a state, and is committed on navigable waters within the territorial jurisdiction of a state, a state court may take jurisdiction of the offense under its laws, although the same act may be an offense under the federal statute, if congress has not manifested its intention to exclude the exercise of such jurisdiction.[76]

Defenses. In a prosecution of the captain of a vessel for manslaughter because of the loss of life due to his failure to attend to his duties in properly providing the vessel with safety appliances and fire fighting apparatus, it is no defense that the government inspectors have failed in their duties, and have issued a certificate of inspection, when the appliances of the vessel were in such a condition that it should not have been allowed to navigate.[77]

Indictment. It is not necessary for the indictment to show that the offense charged was committed under the exclusive jurisdiction of the United States, or on the high seas, and outside of the jurisdiction of any state;[78] nor need it be expressly alleged that the offense was committed on navigable waters of the United States if it is shown that the vessel was on a specific water, which is in fact navigable, and the court judicially notices that fact.[79] Accused need not be expressly charged with having committed the crime of manslaughter.[80] It has been held that the indictment in stating the offense must do more than follow the words of the statute,[81] and that it should describe the facts relied on to show "misconduct," "negligence," or "inattention to his duties," on the part of accused,[82] but there is also authority to the contrary.[83] It has been held that the indictment may join, as defendants, several officers or employees on a vessel, without showing that their acts were jointly destructive of the lives of those on board or were joint in their commission.[84]

Evidence. General rules as to evidence in criminal prosecutions apply in prosecutions by the United States for offenses involving the death of passengers,[85] and for the offense of secreting one's self on a vessel, without consent of the owner, with intent to obtain transportation without paying for it.[86]

Trial General rules as to trial in criminal prosecutions apply in prosecutions by the United States for offenses involving the death of passengers.[87] Questions of fact are for the jury.[88] Instructions should correctly state the law in conformity with the issues and evidence.[89]

§ 182. Fares, Tickets, and Special Contracts

a. Fares, freight, or passage money
b. Tickets and contracts

a. Fares, Freight, or Passage Money

"Fare," as used in the law of shipping, means the money paid for a voyage or passage and "passage money" is defined as the fare of a passenger. "Freight" may include a passenger's fare.

"Fare," as the term is used in shipping, means

73. U S—U. S. v. Holtzhauer, supra —U. S v Collyer, C C N Y., 25 F Cas No 14,838.

74. U.S.—U. S v. Holtzhauer, C C N J, 40 F 76—U S v Collyer, C C N Y, 25 F Cas No 14,838.

75. U.S.—In re Doig, C.C Cal, 4 F. 193.
58 C.J. p 537 note 31.

76. U S—In re Welch, C C N.Y., 57 F. 576
N Y—People v. Welch, 36 N E. 328, 141 N.Y. 266, 38 Am S R 793, 24 L R A. 117

77. U.S—Van Schaick v. U S., N Y., 159 F. 847, 87 C C.A. 27, 14 Ann Cas. 456

78. U S.—U S. v. Holtzhauer, C.C. N.J, 40 F. 76.

79. U.S.—U. S. v. Beacham, C.C Md, 29 F. 284.

80. U S—U S v. Holtzhauer, C.C.N J., 40 F. 76.

81. U S.—U S. v Holtzhauer, supra

82. U S—U. S v Holtzhauer, supra
58 C J p 537 note 38

83. U S—U S v Collyer, C C.N Y, 25 F.Cas No 14,838.

84. U.S—U S v Collyer, supra.

85. U S—U S v. Abbott, C.C.A.N Y, 89 F 2d 166
58 C J p 538 note 42

Evidence held insufficient to sustain conviction
U S.—U. S v. Abbott, supra.

86. **Evidence held insufficient to sustain conviction**
U.S—U S. v. Russo, C A N.Y., 172 F 2d 553.

87. U S.—U S v. Abbott, C C.A.N Y, 89 F 2d 166.

88. U S.—U. S. v. Abbott, supra.

Particular questions
Whether the chief engineer, in charge of a lifeboat leaving a burning vessel, was so disabled that he could not direct operations and whether the motor of the lifeboat was out of commission or whether no serious attempt was made to operate it because he was afraid of sparks from the burning vessel were held to be questions of fact within the meaning of the text.—U. S. v. Abbott, supra

Evidence held insufficient to go to the jury as to the mate's authority and control of fire and boat drills—U S. v Abbott, supra.

89. U S—U S v. Abbott, supra.

Instruction held improper
Where the evidence was insufficient to go to the jury on the issue of the criminal neglect of accused, the chief engineer, while aboard the steamship, an instruction that such neglect might afford a sufficient basis for conviction was held to be improper.—U. S. v. Abbott, supra.

money paid for a voyage or passage.[90] The term "freight" may include a passenger's fare,[91] but not when the meaning of the word is otherwise determined by the context.[92] "Passage money" is defined as the fare of a passenger by sea; money paid for the transportation of persons in a ship or vessel.[93]

Under a contract to transport to the port of destination, the shipowner is ordinarily not entitled to passage money until he has fully completed performance of the contract by landing the passenger at the port of destination,[94] even though the voyage is prevented by inevitable accident[95] or the acts of the government at the port of embarkation.[96] Where, however, the contract is not to transport to the port of destination, but simply to permit a person to come on board and remain there as a passenger, during the voyage, the passage money may be earned although the passenger is not taken to the port of destination because of shipwreck.[97] Unless it is specially agreed on, a partial completion of the voyage does not entitle the shipowner to a pro rata payment of passage money;[98] and unpaid passage money cannot be recovered if passengers without their consent are carried past the port of destination and landed at another.[99]

Special contracts as to baggage will be considered infra § 196 a. Recovery of passage money paid in advance is discussed infra § 202.

Liability for the payment of fare or passage money. A person who has been invited by a part owner of a vessel to take free passage thereon as a guest may not be held responsible for passage money by the other owners of the vessel,[1] but the inviting owner will be responsible to the others for such profits of theirs as he has appropriated.[2]

b. Tickets and Contracts

(1) In general
(2) Purchase by third person for passenger
(3) Sale by agents and brokers
(4) Tickets and contracts for carriage over connecting lines
(5) Conditions in tickets and limitations on use
(6) Transferability
(7) What law governs

(1) In General

The obligations incurred by a contract for the carriage of passengers depend on the terms of the offer and acceptance. Tickets which on their face purport to be a contract and prescribe the rights and obligations of the parties in detail are regarded as contracts.

In general the obligations incurred by a contract for the carriage of passengers depend on the terms of the offer and the acceptance.[3] A passage ticket which does not purport on its face to be a contract, and which is drawn in the nature of a receipt, is regarded as a mere token to enable the bearer to be recognized as a person entitled to be received on board the vessel;[4] but steamship tickets for ocean voyages which bear as a heading the words "Passenger's Contract Ticket," or their equivalent, and which purport to prescribe the rights and obligations of the parties in detail, are generally regarded as contracts which govern the rights of the parties,[5] and not as mere tokens.[6] It is not necessary in order to have the ticket constitute a contract that there be a showing of some additional consideration other than the passage authorized by the ticket and the amount paid therefor.[7] Although

90. Ind.—Clark v. Southern R. Co., 119 N.E. 539, 69 Ind.App. 697

91. U.S.—The Main v. Williams, Md., 14 S.Ct. 486, 152 U.S. 122, 38 L.Ed. 381—Giles v. The Cynthia, D.C.Pa., 10 F.Cas.No. 5,424, 1 Pet.Adm. 203
27 C.J. p. 902 note 83.
Meaning of term "freight" for carriage of goods see supra § 160

Origin
In Saxon, freight as compensation for transportation of passengers in ships by sea, whether in gross or detail, is called "fracht."—The Main v. Williams, Md., 14 S.Ct. 486, 487, 152 U.S. 122, 38 L.Ed. 381—Giles v. The Cynthia, D.C.Pa., 10 F.Cas.No. 5,424, 1 Pet.Adm. 203.

92. U.S.—Interstate Commerce Commission v. Southern Pac. Co., C.C.Cal., 182 F. 829, reversed on other grounds 26 S.Ct. 330, 200 U.S. 536, 50 L.Ed. 585.

93. Black L.D.

94. Mass.—Brown v. Harris, 2 Gray 359
58 C.J. p. 538 note 45.

95. Pa.—Cope v. Dodd, 13 Pa. 33.
58 C.J. p. 538 note 46.

96. U.S.—Foster v. Compagnie Francaise De Navigation à Vapeur, D.C.N.Y., 237 F. 858.

97. N.Y.—Watson v. Duykinck, 3 Johns. 335

98. Mass.—Brown v. Harris, 2 Gray 359
58 C.J. p. 538 note 49.

99. La.—McGloin v. Henderson, 6 La. 715

1. Mo.—Frazer v. Yeatman, 10 Mo. 501.

2. Mo.—Frazer v. Yeatman, supra.

3. N.Y.—Barrow S.S. Co. v. Mexican Cent. R. Co., 31 N.E. 261, 134 N.Y. 15, 17 L.R.A. 359
58 C.J. p. 538 note 56.

4. N.Y.—Quimby v. Vanderbilt, 17 N.Y. 306, 72 Am.D. 469.

5. N.Y.—Scire v. American Export Lines, 93 N.Y.S.2d 457, 197 Misc. 422—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22—Garcin v. Compagnie Generale Transatlantique, 289 N.Y.S. 1075, 160 Misc. 687.
58 C.J. p. 539 note 58.

6. N.Y.—Scire v. American Export Lines, 93 N.Y.S.2d 457, 197 Misc. 422—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22—Garcin v. Compagnie Generale Transatlantique, 289 N.Y.S. 1075, 160 Misc. 687
58 C.J. p. 539 note 59.

7. N.Y.—Morgan v. Oceanic Steam

the ticket reads in the terms of a receipt reciting the receipt of so much money for passage on a particular vessel, at a certain time, and from one named port to another, it nevertheless imports a contract to supply those things for which it is recited the money has been paid.[8]

Contract of affreightment. A contract for the carriage of passengers by water has been said to be a contract of affreightment,[9] in the same manner as contracts of affreightment for the carriage of goods, considered supra §§ 108, 110. So, in analogy to the rule denying a lien on the vessel to the owner of cargo until it is laden on board or delivered to the master, as considered supra § 110, prospective passengers, who have purchased tickets for transportation but have not boarded the vessel are not entitled to a lien on the vessel for the breach of an executory contract of passage.[10] Likewise, in such a case a lien cannot be imposed on the vessel on the theory that it can be made liable in tort for the breach of a duty as a common carrier to fulfill a contractual duty to transport passengers,[11] or by the fact that passenger monies are used to secure supplies for the vessel and to pay the wages of the crew,[12] since it is the owner of the vessel, and not the vessel, as an entity, who is the common carrier.[13]

Construction. Passage contracts drawn by the carrier are construed most strongly against it.[14] In interpreting any one provision of the contract between the carrier and the passenger all other provisions of the contract must be considered.[15]

Failure or refusal to surrender ticket or pay fare. Where a passenger knows that he is to give up his ticket before leaving the vessel, if he does not give it up or pay his fare the owners of the vessel have a right to detain him for a reasonable time to investigate on the spot the circumstances of his case.[16]

(2) Purchase by Third Person for Passenger

Where one purchases and pays for a ticket to be used by another, it has been held that the carrier cannot inquire into the consideration and arrangements between the purchaser and passenger for whose benefit the contract is made.

Where one person purchases and pays for a ticket to be used by another, it has been held that the carrier cannot inquire into the consideration and arrangements between the purchaser and the passenger for whose benefit the contract is made,[17] and assert that as to the passenger the contract is nudum pactum.[18] If, in the purchase of a ticket by one person for another, a special agreement to make a stateroom reservation is entered into, the special arrangement is a part of the contract of carriage and inures to the benefit of the person for whom the ticket is purchased.[19]

Purchase in this country for emigrant abroad. If the papers, given to a friend or relative who purchases in this country passage for an emigrant abroad, provide only for a general right of passage and for repayment of the passage money if the emigrant fails to come, the emigrant on receiving such original papers may in the country of his residence surrender them for a contract ticket of a more definite nature which will determine the rights as between him and the carrier.[20] Where a steamship company undertakes in this country to sell tickets for passage from other countries, by forwarding such tickets to its agents at the port of embarkation, and fails to forward a ticket, purchased by a person in this country, to a passenger at a foreign port of embarkation, the passenger may recover in tort for the steamship company's breach of contract in negligently failing to forward the ticket.[21]

(3) Sale by Agents and Brokers

Representations or promises by a duly authorized agent in connection with the sale of a ticket for carriage of a passenger by water are usually binding on the owners of the vessel.

Representations or promises made by a duly authorized agent in connection with the sale of a ticket for passage on a vessel are binding on the owners of

Nav. Co, 224 N Y S 420, 130 Misc 570.

8. U S —Cobb v. Howard, D.C.N Y, 5 F.Cas No 2,925, affirmed, C.C, 5 F.Cas No.2,924.

9. U S.—Todd Shipyards Corp v The City of Athens, D.C.Md., 83 F Supp. 67.

10. U.S —Acker v. The City of Athens, C.A.Md, 177 F 2d 961—Todd Shipyards Corp. v The City of Athens, D C Md, 83 F Supp. 67.

11. U.S —Acker v The City of Athens, C.A.Md., 177 F.2d 961—Todd Shipyards Corp v. The City of Athens, D C.Md, 83 F Supp. 67.

12. U S.—Acker v The City of Athens, C A.Md., 177 F.2d 961—Todd Shipyards Corp. v. The City of Athens, D C Md, 83 F.Supp. 67.

13. U S.—Todd Shipyards Corp. v. The City of Athens, supra

14. Ill.—Mittlacher v. United American Lines, 233 Ill.App. 411.

15. N.Y —Goldarbeiter v. Cunard White Star Limited, 27 N.Y S 2d 920.

16. Mass —Standish v. Narragansett SS. Co, 111 Mass. 512, 15 Am R. 66.

17. Ala.—Central of Georgia R. Co v. Knight, 57 So 253, 3 Ala.App 436.

18. Ala.—Central of Georgia R. Co. v. Knight, supra.

19. Ala —Central of Georgia R. Co v Knight, supra.

20. Mass —O'Regan v Cunard SS. Co., 35 N.E. 1070, 160 Mass. 356, 39 Am S R 484

21. Iowa.—Zabron v Cunard SS Co, 131 N.W 18, 151 Iowa 345, 34 L.R A,N.S, 751.

the ship,[22] or on a railway company where its agent in connection with a contract for transportation by land enters into a contract for carriage on a connecting carrier by water,[23] unless there is in the contract an express provision exempting the carrier from responsibility for the statements of employees not in accordance with the terms of the contract.[24] Representations as to the route that will be followed, made by persons who are in fact selling tickets but are not the authorized agents of the vessel owner, form no part of the contract of carriage and do not bind the carrier.[25]

Responsibility of ticket agent or broker. A ticket agent or broker, who is not an agent for any steamship line, merely undertakes to apply for the passage sought,[26] and binds himself only for the genuineness of the tickets that he undertakes to sell [27] He does not undertake to transport the ticket buyer[28] or contract that the carrier will do so,[29] and is not liable to the ticket purchaser where there is no breach of the undertaking to apply for passage [30] Where the agreement between the ticket purchaser and agent is modified or replaced by a new agreement under which reservations are booked for another mode of transportation and such reservations are subsequently canceled by such purchaser, the agent is not liable for breach of contract.[31]

(4) Tickets and Contracts for Carriage over Connecting Lines

An owner of one of several steamship lines for the transportation of passengers, running in connection over several portions of a route, may contract as principal for the carriage of passengers over the whole route.

An owner of one of several steamship lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of the passenger over the whole route,[32] and such a contract may be established by the circumstances notwithstanding the fact that the passenger receives separate tickets for the different lines or vessels, which are signed by their separate agents.[33] A steamship company, which sells a round trip ticket for a voyage which includes side trips in automobiles owned by another company, which are arranged for and advertised as a part of the trip and paid for by the purchase price of the steamship ticket, may assume responsibility for the passenger's carriage on the side trips;[34] but no such responsibility will be imposed where the ticket contains an express provision that the selling company acts only as agent and accepts no responsibility beyond its own line.[35]

(5) Conditions in Tickets and Limitations on Use

Conditions and limitations in contracts for the carriage of passengers may be valid, and when placed in the body of the passage contract become binding on the passenger on his acceptance of the ticket with time to examine its contents.

Conditions and limitations in contracts for the carriage of passengers by water have been held valid,[36] and when placed in the body of a passage contract for an ocean voyage, so as to be a part thereof, they become binding on the passnger by his mere acceptance of the ticket within such a time as to give him an ample opportunity to examine its contents.[37] It is not necessary that the

22. U S —The Normannia, D C.N Y., 62 F. 469
58 C J. p 539 note 71

Accepting checks and failure to cancel tickets
Where the owner accepted the checks of the person who claimed to be the owner's agent and did not cancel tickets notwithstanding such owner discovered the invalidity of some of the checks before the ship sailed, he was held liable to purchasers for humiliation in attempting to collect for tickets when ship was in mid-ocean, taking return tickets away from them, and in detaining purchasers at port, and for inconvenience in getting other return tickets —Fenster v North German Lloyd, 284 N Y S 110, 246 App Div. 769

23. Ala —Central of Georgia R Co v Knight, 57 So. 253, 3 Ala.App 436

24. Mich —McWethy v Detroit, etc., R Co, 86 N W. 827, 127 Mich 333, 55 L.R.A. 306.

25. N Y —Mills v. Shult, 2 E.D Smith 139

26. N Y —Isaac v Thos Cook & Sons, Wagons-Lits, 45 N Y.S.2d 683

27. Minn —Elston v Fieldman, 58 N W 830, 57 Minn 70

28. Minn.—Elston v Fieldman, supra

29. Minn —Elston v. Fieldman, supra

30. N Y —Isaac v. Thos Cook & Sons, Wagons-Lits, 45 N Y S 2d 683

31. N Y —Isaac v Thos Cook & Sons, Wagons-Lits, supra

Substituting transportation by air "clipper"
A shipping agency was not liable for breach of contract to arrange for transportation on first available ship, where evidence showed that contract was modified or replaced by new agreement under which reservations were booked for air "clipper" transportation, which were later canceled by plaintiff —Isaac v Thos Cook & Sons, Wagons-Lits, supra.

32. N Y —Williams v Vanderbilt, 28 N Y 217, 84 Am D 333.
58 C J. p 540 note 78.

33. N.Y.—Williams v. Vanderbilt, supra
58 C J. p 540 note 79.

34. Mich —Thurston v. Northern Nav. Co, 171 N W. 423, 205 Mich 278.

35. Md —Stewart Taxi-Service Co v Spencer, 132 A. 153, 149 Md. 635

36. Mass —O'Flaherty v Cunard S. S Co., 183 N E. 712, 281 Mass 447.
N Y.—Translateur v. U S. Lines Co, 42 N Y.S.2d 114, 179 Misc 840, affirmed in part and reversed in part on other grounds 42 N.Y.S 2d 117, 179 Misc 843—Halpern v American Export Lines, 108 N.Y S 2d 177 —Goldarbeiter v. Cunard White Star Limited, 27 N.Y.S 2d 920.

37. U S —Foster v. Cunard White Star, C.C A N Y., 121 F 2d 12—Baron v. Compagnie Generale Transatlantique, C.C.A N.Y., 108 F

passenger have actual knowledge of such conditions or limitations[38] or that his attention be called to them.[39] The failure[40] or inability[41] of the passenger to read his ticket does not preclude his being bound by such conditions and limitations, provided they are not unlawful in content.[42] Conditions printed on the back of a passenger's contract ticket will bind a passenger in the same manner as those appearing on the face, if, on the face of the ticket and as a part of the contract, it is stated that the ticket is issued subject to the conditions printed on the back thereof,[43] or if sufficient reference to such conditions is made on the face of the ticket.[44] In the absence of a reference in the passage contract sufficient to incorporate as a part thereof conditions appearing on the back,[45] stipulations or conditions so printed form no part of the contract and do not bind the passenger unless his attention has been called to them or it is shown that he knew or had reason to know of their existence.[46] The binding effect of a provision, printed on the front of a ticket, imposing a limitation on the value of luggage is not, however, affected by the fact that a choice of rates available to the passenger for different valuations is printed on the back of the ticket[47] or the fact that such matter is not specifically called to his attention.[48] Although there is authority to the contrary,[49] a mere notice on the front of the ticket is not usually regarded as part of the contract,[50] and is not to be

2d 21—The Leviathan, C.C.A.N.Y., 72 F.2d 286—Horvath v. Cunard S.S. Co., D.C.N.Y., 103 F.Supp. 356—Rogers v. Furness, Withy & Co., D.C.N.Y., 103 F.Supp. 314—Cohn v. U.S. Lines Co., D.C.N.J., 84 F.Supp. 503.

Mass.—O'Flaherty v. Cunard, S.S. Co., 183 N.E. 712, 28 Mass. 447.

N.Y.—Reichman v. Compagnie Generale Transatlantique, 49 N.E.2d 474, 290 N.Y. 344, motion denied 50 N.E.2d 251, 290 N.Y. 872, certiorari denied 64 S.Ct. 83, 320 U.S. 771, 88 L.Ed. 461—Translateur v. U.S. Lines Co., 42 N.Y.S.2d 114, 179 Misc. 840, affirmed in part and reversed in part on other grounds 42 N.Y.S.2d 117, 179 Misc. 843—Rosenthal v. Compagnie Generale Transatlantique, 12 N.Y.S.2d 102, 170 Misc. 426—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22—Halpern v. American Export Lines, 108 N.Y.S.2d 177—Goldarbeiter v. Cunard White Star Limited, 27 N.Y.S.2d 920.

58 C.J. p. 540 note 84.

Minor

(1) Conditions and limitations in a ticket have been held binding on a passenger who is a minor.—The Leviathan, C.C.A.N.Y., 72 F.2d 286—The Finland, D.C.N.Y., 35 F.2d 47—Lee v. Swedish American Line, D.C. N.Y., 6 F.Supp. 342.

(2) This is so even though the ticket was purchased by the parents of a minor passenger.—The Finland, supra—Lee v. Swedish American Line, supra.

Separate or supplemental contract

A limitation of liability for loss of baggage printed on the ticket is no part of a separate or supplemental contract to transport such baggage so as to be binding on the passenger.—Wiener v. Compagnie Generale Transatlantique, C.C.A.N.Y., 61 F.2d 893.

38. U.S.—The Leviathan, C.C.A.N.Y., 72 F.2d 286—The City of Norfolk, D.C.Md., 13 F.Supp. 511.

58 C.J. p. 540 note 84 [b]

39. U.S.—Isthmian S.S. Co. v. McElligott, C.A.Ga., 177 F.2d 591—The Leviathan, C.C.A.N.Y., 72 F.2d 286—The City of Norfolk, D.C.Md., 13 F.Supp. 511.

58 C.J. p. 540 note 84 [c]

40. U.S.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21—Rogers v. Furness, Withy & Co., D.C.N.Y., 103 F.Supp. 314.

Mass.—O'Flaherty v. Cunard S.S. Co., 183 N.E. 712, 281 Mass. 447—Fonseca v. Cunard Steamship Co., 27 N.E. 665, 153 Mass. 553, 25 Am.S.R. 660, 12 L.R.A. 340.

N.Y.—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22—Garcin v. Compagnie Generale Transatlantique, 289 N.Y.S. 1075, 160 Misc. 687.

58 C.J. p. 540 note 84 [d]

41. U.S.—Horvath v. Cunard S.S. Co., D.C.N.Y., 103 F.Supp. 356.

N.Y.—Garcin v. Compagnie Generale Transatlantique, 289 N.Y.S. 1075, 160 Misc. 687.

58 C.J. p. 540 note 84 [e]

Language unknown to passenger

(1) The fact that the passenger's inability to read his ticket is due to its being written in English, which he does not understand, does not preclude operation of the text rule.

U.S.—Horvath v. Cunard S.S. Co., D.C.N.Y., 103 F.Supp. 356.

Mass.—Secoulsky v. Oceanic Steam Nav. Co., 112 N.E. 151, 223 Mass. 465.

N.Y.—Garcin v. Compagnie Generale Transatlantique, 289 N.Y.S. 1075, 160 Misc. 687.

(2) The passenger in such case is under a duty to have the ticket read or explained to him.—Garcin v. Compagnie Generale Transatlantique, supra.

(3) A passenger who does not understand English may not, however, be bound by conditions and limitations printed in English, in type which is almost microscopic and is obscured by other writing.—Osipuk v. Oceanic Steam Nav. Co., D.C.N.Y., 58 F.2d 673, affirmed, C.C.A., 64 F.2d 478.

42. U.S.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21—Rogers v. Furness, Withy & Co., D.C.N.Y., 103 F.Supp. 314.

43. N.Y.—Reichman v. Compagnie Generale Transatlantique, 49 N.E. 2d 474, 290 N.Y. 344, motion denied 50 N.E.2d 251, 290 N.Y. 872, certiorari denied 64 S.Ct. 83, 320 U.S. 771, 88 L.Ed. 461.

58 C.J. p. 541 note 85.

44. U.S.—Foster v. Cunard White Star, C.C.A.N.Y., 121 F.2d 12.

Reference held sufficient

U.S.—Foster v. Cunard White Star, supra—The City of Norfolk, D.C. Md., 13 F.Supp. 511.

N.Y.—Rosenthal v. Compagnie Generale Transatlantique, 12 N.Y.S.2d 102, 170 Misc. 426.

45. U.S.—The Kungsholm, C.C.A.N.Y., 86 F.2d 703—Bellocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale, C.C.A.N.Y., 84 F.2d 975—Maibrunn v. Hamburg-American S.S. Co., C.C.A.N.Y., 77 F.2d 304—Baer v. North German Lloyd, C.C.A.N.Y., 69 F.2d 88.

58 C.J. p. 541 note 87.

46. U.S.—Foster v. Cunard White Star, C.C.A.N.Y., 121 F.2d 12.

58 C.J. p. 541 note 88.

47. U.S.—The Leviathan, C.C.A.N.Y., 72 F.2d 286.

48. U.S.—The Leviathan, supra.

49. N.Y.—Kopetzky v. Cunard S.S. Co., 227 N.Y.S. 539, 131 Misc. 599.

50. U.S.—Maibrunn v. Hamburg-American S.S. Co., C.C.A.N.Y., 77 F.2d 304.

"Notice" on margin

A provision appearing on the mar-

binding on the passenger in the absence of its having been read by him, or called to his attention.[51]

Incorporation by reference to tariff schedules. A provision in a contract ticket that it is sold subject to the conditions of the lawfully published tariff of the steamship company incorporates as a part of the contract and makes binding on the passenger such conditions as are properly contained in a tariff schedule, published and filed, in compliance with statutory requirements.[52] Conditions or limitations contained in a tariff schedule cannot have this effect if they have not been adopted as a part of the contract of carriage,[53] if they have no relation to matters which may properly be inserted in the tariff,[54] or if the tariff has not been filed as required by law even though it has been published.[55]

Notice of intention to sail. A steamship company may properly require by condition in the ticket that before a passenger shall be entitled to passage he must give notice of his intention to embark a specified number of days in advance,[56] but noncompliance with a condition requiring notice of intention to sail to be given so many days in advance in order to obtain the reservation of a berth does not excuse the vessel owner from liability for failure to forward a ticket purchased in this country for a passenger abroad.[57]

Alterations in ticket. A provision in a ticket that the agent issuing it shall have no power to alter any of its provisions and that any alterations so made shall not be binding on the carrier is one that is designated for the benefit of the carrier, and the fact that an agent alters the port of destination as printed in the ticket cannot be relied on by the passenger to show that the contract, after it has been fully executed, is invalid and that limitations contained therein are not binding on the passenger.[58]

Exchange of tickets A steamship company may properly establish a rule requiring the passenger to appear at the company's office at the port of sailing within a reasonable time before departure and exchange the coupon previously received for a berth ticket.[59] If such a rule has not been complied with, even though it has not properly been brought to the attention of the passenger, an officer of the ship who refuses passage because of the lack of a berth reservation commits no wrong where by statute a ship is prohibited from carrying passengers for whom there are not berths[60] If such a rule is not printed in the literature or tickets handed to passengers, a steamship company will be held responsible for the consequences of the negligent conduct of its selling agents in informing passengers that the coupon first received entitles them to passage without further formalities.[61]

Redemption of unused ticket. In the absence of an express stipulation requiring the surrender or return of the unused ticket as a condition precedent to its redemption, it has been held that, under an agreement to redeem, the return of the ticket is not a condition precedent to recovery of the price paid,[62] but under an express provision requiring such surrender it is essential to a recovery.[63]

(6) Transferability

Unless forbidden by the contract, a passenger by water may assign or transfer his rights under his ticket.

gin in the body of the ticket but prefaced by the heading "Notice" has been held to form no part of the contract—Smith v. North German Lloyd SS Co, D C N.Y., 142 F. 1032, affirmed 151 F. 222, 80 C.C A 574.

51. U S—Maibrunn v. Hamburg-American S S Co, C.C.A N Y, 77 F 2d 304—Smith v. North German Lloyd SS. Co, D C N Y, 142 F. 1032, affirmed 151 F. 222, 80 C C A. 574

Travel bureau as agent of steamship company

Travel bureau from which passenger purchased ticket has been held to be steamship company's and not passenger's agent, with respect to binding effect of a notice on the face of the ticket—Maibrunn v Hamburg-American S S. Co., C.C.A.N.Y., 77 F. 2d 304.

52. U.S—The Virginia, D C Md, 266 F. 437.

53. Ill.—Bass v Chicago, Duluth & Georgian Bay Transit Co., 89 N.E 2d 430, 339 Ill.App. 246.

Mich.—Vanderberg v. Detroit, etc, Nav. Co, 186 N W. 477, 216 Mich 682.

54. U S.—Pacific SS Co. v. Cackette, C C A Or, 8 F.2d 259, certiorari denied 46 S Ct 203, 269 U S. 586, 70 L.Ed. 426
58 C.J p 541 note 93.

55. Mich—Vanderberg v Detroit, etc, Nav. Co, 186 N W. 477, 216 Mich 682.

56. N Y.—Rabinowitz v. Cunard SS Co., 119 N Y S. 625.

57. Iowa.—Zabron v. Cunard SS. Co, 131 N W 18, 151 Iowa 345, 34 L.R A.,N.S., 751.

58. Mass—Henderson v. Canadian Pac R Co., 155 N E 1, 258 Mass. 372.

59. Mo—Gosney v. San Francisco, etc., SS. Co, 164 S W. 162, 177 Mo App 323

60. Mo—Gosney v San Francisco, etc, SS. Co, supra

61. Mo—Gosney v. San Francisco, etc, SS Co, supra.

62. N.Y.—Maas v Scharbach, 34 N. Y S 234, 13 Misc 215.
10 C J p 700 note 84
Recovery of passage money generally, see infra § 202.

63. N.Y.—Kirschner v. Netherlands-American Steam Nav. Co., 170 N.Y. S 40.

Chief clerk

Where purchaser of steamship tickets, unable to use them, took matter up with the shipping company's chief clerk, who said he was manager, and promised to return money, although tickets were not produced, it was held that such purchaser, could not recover, where he failed to surrender the tickets, in view of express stipulation of contract that no one but general passenger agent had authority to modify contract, which expressly provided that ticket should be surrendered.—Kirschner v Netherlands-American Steam Nav. Co., supra.

Unless there is something in the contract to prohibit it, a passenger's rights under a ticket may be assigned or transferred to another,[64] and this may be done by delivery of the ticket for a valuable consideration without a written transfer.[65]

(7) What Law Governs

The nature, obligations, and construction of a contract for the conveyance of passengers by water are generally determined by the law of the place where the contract is made; the law of the place where the contract is to be performed governs as to performance of the contract.

The nature, obligations, and construction of a contract for the conveyance of passengers by water are, as a general rule, to be determined by the law of the place where the contract is made,[66] not that of the place where the performance of the contract is to be completed[67] or that of the shipowner's domicile.[68] The terms of a contract, which provides that it is to be construed under the laws of a specified place, are not to be construed as including penal provisions of the laws of such place.[69] Stipulations for exemption from liability, although valid by the law of a foreign country, which the contract states by its terms is to govern, are not enforceable in our courts if contrary to the public policy of this country, either where both vessel owner and passenger are citizens of the United States and the place of completion of the contract of carriage is within this country,[70] or where the contract is made in this country between a foreign steamship company and a passenger who is to be carried to a foreign port,[71] but apparently the rule is otherwise where a contract for carriage to this country is made in a foreign country between a foreign steamship company and passenger.[72]

Matters relating to the performance of a contract for carriage by water are governed by the law of the place where the contract is to be performed.[73]

§ 183. Performance of Contract or Duty to Transport

It is the primary duty of the owner of a vessel to see that a passenger is carried to, and safely landed at, the port of destination.

It is, in general, the primary duty of the vessel owner to see that a passenger is carried to, and safely landed at, the port of destination.[74] Nonperformance of a contract to transport may be excused by impossibility of performance due to conditions arising from a state of war,[75] particularly where the terms of the contract for passage make conditions arising from a state of war an excuse for nonperformance.[76] Under a clause excusing

64. U.S.—The Willamette Valley, D. C. Cal., 71 F. 712—Cobb v. Howard, D. C. N.Y., 5 F. Cas. No. 2,925, affirmed, C. C., 5 F. Cas. No. 2,924

65. U.S.—Cobb v. Howard, supra.

66. U.S.—Jansson v. Swedish American Line, C.A. Mass., 185 F.2d 212. N.Y.—Spiegel v. U. S. Lines Co., 37 N.Y.S.2d 31, 178 Misc. 993.
58 C.J. p. 542 note 4.

67. U.S.—Jansson v. Swedish American Line, C.A. Mass., 185 F.2d 212.
58 C.J. p. 542 note 5.

Suit in place where contract is to be completed

Fact that the passenger chooses to sue in the place where the contract is to be completed does not alter the text rule.—Jansson v. Swedish American Line, supra.

68. La.—Arayo v. Currel, 1 La. 528, 20 Am. D. 286.

69. U.S.—Pryce v. Swedish-American Line, D.C.N.Y., 30 F. Supp. 371

Civil rights law

The terms of contract providing for construction thereof under the laws of the state of New York are not to be construed as including penal provisions of civil rights law of that state.—Pryce v. Swedish-American Lines, supra.

70. U.S.—The Kensington, N.Y., 22 S.Ct. 102, 183 U.S. 263, 46 L.Ed. 190.

71. U.S.—Oceanic Steam Nav. Co. v. Corcoran, C.C.A.N.Y., 9 F.2d 724, 57 A.L.R. 163—The New England, D.C. Mass., 110 F. 415.

72. Mass.—O'Regan v. Cunard S.S. Co., 35 N.E. 1070, 160 Mass. 356, 39 Am.S.R. 484—Fonseca v. Cunard S.S. Co., 27 N.E. 665, 153 Mass. 553, 25 Am.S.R. 660, 12 L.R.A. 340.

73. N.Y.—Kassel v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 24 N.Y.S.2d 450, 177 Misc. 92, appeal denied 35 N.Y.S.2d 730, 264 App.Div. 859.

Refunds; recovery of deposits

(1) As far as provisions for refund of money paid for passage from a foreign country to the United States are to be performed in such foreign country, its law governs.—Translateur v. U. S. Lines Co., 42 N.Y.S.2d 117, 179 Misc. 843—Spiegel v. U. S. Lines Co., 37 N.Y.S.2d 31, 178 Misc. 993—Branderbit v. Hamburg-American Line, 31 N.Y.S.2d 588, affirmed 45 N.Y.S.2d 188, 266 App.Div. 1011.

(2) Under contract entitling one to refund in such foreign country or elsewhere, depending on where the demand therefor is made, where demand is made in New York, its law, as the place of performance, rather than that of the foreign country governs.—Kassel v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 24 N.Y.S.2d 450, 177 Misc. 92, appeal denied 35 N.Y.S.2d 730, 264 App.Div. 859.

(3) Where performance of contract to transport to the United States was prevented by our laws, the law of place of performance had no application in action to recover money deposited with steamship company in a foreign country for transportation and expenses.—Baer v. U. S. Lines Co., 43 N.Y.S.2d 212, 180 Misc. 456.

74. U.S.—Stone v. The Relampago, D.C. Fla., 23 F. Cas. No. 13,486.
Wash.—Smith v. North American Transp., etc., Co., 56 P. 372, 20 Wash. 580, 44 L.R.A. 557.
Duty and liability of carrier as to body of a passenger who dies at sea see Dead Bodies §§ 5, 8

75. N.Y.—Ornstein v. Compagnie Generale Transatlantique, 31 N.Y.S.2d 524, affirmed 52 N.Y.S.2d 243—Schostal v. Compagnie Generale Transatlantique, 27 N.Y.S.2d 688

76. N.Y.—Ornstein v. Compagnie Generale Transatlantique, 31 N.Y.S.2d 524, affirmed 52 N.Y.S.2d 243—Schostal v. Compagnie Generale Transatlantique, 22 N.Y.S.2d 345, reversed on other grounds 27 N.Y.S.2d 688.

nonperformance of a contract to transport when prevented by "restraint of princes," the action of a foreign government in removing a passenger from a vessel when it calls at a port on the way to his port of destination in another country, has been held to excuse nonperformance.[77]

Passport. In the absence of a contractual undertaking to do so, a carrier by water is not obligated to procure a passport for a passenger[78] and the fact that the carrier inspects a passenger's passport does not imply a contract to pass on the validity of such passport.[79]

Undesirable and too many passengers A vessel whose custom it is to carry steerage passengers commits no breach of contract or duty as to a first-class cabin passenger by the mere taking on of steerage passengers at a port where a contagious disease has broken out[80] Although the rule appears to be otherwise where the overcrowding is due to an extraordinary condition, such as an earthquake, and the excess number of passengers come on board against the wishes of the owners and officers of the vessel,[81] passengers are ordinarily entitled to demand that no more shall be carried than the vessel can reasonably accommodate,[82] and voluntary overcrowding of the vessel so as to result in insufficient and inadequate accommodations is a violation of the carrier's duty to carry safely and with proper accommodations,[83] even though after the voyage is under way the carrier does all that is within its power to furnish proper accommodations,[84] but a passenger who seeks passage after the vessel is already overcrowded, and is informed that because of that fact he cannot be given the usual accommodations, takes the risks of the inadequacy of the accommodations which are offered him and which he accepts[85] The fact that a vessel has obtained permission from inspectors to overcrowd the vessel, beyond the limits of its accommodations, has been held not to relieve the vessel owner from liability for damages resulting to passengers from an overcrowding of the vessel.[86]

§ 184. —— Commencement of Voyage; Vessel to Be Furnished

A contract calling for carriage on a particular vessel is not satisfied by an offer to furnish passage on another vessel. Contracts for carriage of passengers have been held to include a warranty of seaworthiness.

Under a contract for carriage by a particular vessel, it has been held that where it is wrecked and destroyed prior to the commencement of the voyage the carrier, in order to be entitled to any of the passage money received, must at least furnish another vessel equally as safe and with equal accommodations;[87] but it has also been held that a contract calling for carriage on a particular vessel is not satisfied by an offer to furnish passage on another vessel, although it is competent and safe.[88] On a failure to furnish the specific vessel within the time allotted by the contract the passenger is entitled to rescind and abandon the voyage,[89] but if, instead of rescinding, the passenger accepts transportation on another vessel, which the steamship company has arranged for, the passenger thereby ratifies the original contract and he remains bound by its terms.[90] When the vessel, on which the voyage is to be taken, is, without the knowledge of either party, completely destroyed at the time the contract of carriage is entered into, the only obligation on the part of the vessel owner, in the absence of an agreement to provide a substitute vessel, is to return the passage money with interest.[91]

Condition and seaworthiness of vessel. Although there is much to indicate that a contract for the carriage of passengers does not include an absolute implied warranty of the seaworthiness,[92] as is involved in an undertaking for the carriage of goods, considered supra § 140, it has been held that every contract for the transportation of passengers by sea contains an implied warranty on the part of the owner that the vessel is seaworthy, or that she will be made seaworthy before the voyage is proceeded on.[93] It is, at least, clear that liability will result from a failure to exercise due care to make

77. N Y —Halpern v American Export Lines, 108 N.Y S 2d 177

78. Mass —Doidge v Cunard S. S Co, 181 N E 244, 279 Mass 224

79. Mass —Doidge v. Cunard S. S Co, supra

80. U.S —The Normannia, D C N.Y, 62 F. 469.

81. U.S —The Charles Nelson, D C Wash, 149 F 846.
58 C J p 543 note 37.

82. U.S —Bailey v The Sonora, D C Cal, 2 F Cas No 746.

83. U S —The Valencia, D.C.Wash., 110 F 221, affirmed 117 F 68, 54 C C A 454—Bailey v. The Sonora, D.C.Cal, 2 F.Cas No 746

84. U.S —Bailey v. The Sonora, supra

85. U.S —Van Anda v. Northern Nav Co, Ill, 111 F. 765, 49 C C A 596, 55 L R A. 544.

86. U S —The Valencia, D C Wash, 110 F 221, affirmed 117 F 68, 54 C C A 454.
58 C J. p 544 note 42.

87. Wash —Turner v. Barneson, 60 P 54, 22 Wash. 78.

88. U.S —Cobb v. Howard, D.C.N.Y, 5 F.Cas No 2,925, affirmed, C.C., 5 F Cas No.2,924

89. U S —Cobb v. Howard, supra
N Y —Howard v Astor Mut. Ins. Co, 18 N.Y Super. 38.

90. N Y —Eggermont v. Cunard SS Co, Ltd, 119 N Y S 1110

91. N Y —Bonsteel v Vanderbilt, 21 Barb 26—Briggs v Vanderbilt, 19 Barb. 222.

92. U S —The Oregon, Wash, 133 F. 609, 68 C C A 603.

93. U.S.—Kulack v. The Pearl Jack,

the vessel seaworthy, as discussed infra § 193; and although passengers have purchased their tickets, and paid their passage money, they may nevertheless rescind their contracts and refuse to go to sea for the reason that they believe the vessel to be unseaworthy, unless on a survey the vessel is found to be staunch and properly equipped for the contemplated voyage.[94] The vessel must be provided with a crew adequate in number and competent to perform all their duties with reference to all the exigencies of the intended route.[95]

Time for, and delay in, commencement of voyage The commencement of the voyage, at the time provided for, is not excused by reason of the fact that the stress of weather has disabled the vessel from reaching the port of departure at the time provided for embarkment,[96] although it has been said that if the commencement of the voyage is delayed because the weather is so stormy as to make it unsafe to go to sea, there is no violation of the contract as to the time for commencement of the voyage.[97] Where the only time specified in the ticket is that the passage will take place within a particular month, the owner of the vessel has the whole of that month within which to furnish transportation to passengers,[98] but if passage on the vessel agreed on is not furnished within the month, passengers are not deprived of their cause of action for breach of contract because of the fact that before the month expires they cease to wait for the vessel and leave the port of embarkation by other modes of transportation.[99] Where, however, the passenger, before the lapse of the time allowed for the commencement of the voyage, determines not to go on the voyage, relying on his right to a return of the passage money, it has been held that he can recover only one half of such money[1] notwithstanding the vessel does not actually sail until after the time agreed on.[2]

Departure ahead of time. Ordinarily, a departure of the vessel before the time agreed on, resulting in the passenger's being left behind, constitutes a breach of contract for which damages may be recovered,[3] but a departure of a vessel before the time agreed gives no right of action to the holder of a ticket who is left behind where, before the time scheduled for sailing, the government inspector has forbidden the taking of any more passengers on the boat.[4]

Departure with visitors on board Friends and relatives who go aboard to assist passengers or bid them farewell are entitled to reasonable means and opportunity of leaving the boat before she starts,[5] and there is no presumption of law, that every person who goes on board does so as a passenger unless he notifies an officer to the contrary, which will relieve the carrier from its duties in this respect.[6] A person who has brought a passenger aboard to escort him to his cabin and pay his fare, and who has been assured by the clerk that he will have time to pay the passage money, is entitled to sufficient time to transact his business before the usual signals are given and the vessel started.[7]

§ 185. —— Ejection of Passengers

Ordinarily one accepted as a passenger aboard a vessel, after payment of fare, cannot, while behaving properly, be ejected before the contract of carriage has been performed.

As a general rule, a person who has come on board a vessel engaged as a common carrier of passengers in violation of no rules, has been accepted as a passenger, has paid his fare, and is behaving properly in all respects, cannot be rightfully expelled from the vessel before the contract of carriage has been performed.[8] The fact that such a passenger is threatened with almost certain death at the port of destination affords the master no justification, even though he acts with humane motives, in expelling the passenger and putting him on

D C Mich, 79 F Supp. 802, affirmed, C A, 187 F 2d 154
58 C J. p 543 note 22

Particular vessel held seaworthy
U S—The America, D.C N.Y, 35 F Supp. 413

94. U S—The Guardian, D C Wash, 89 F 998.

95. U S—Peninsular & Occidental S S Co v. N L R B, C C.A 5, 98 F 2d 411, certiorari denied N L R. B v Peninsular & Occidental S S Co, 59 S Ct. 248, 305 U.S. 653, 83 L Ed. 423.
58 C J p 543 note 25.

96. U S—Cobb v. Howard, C C.N.Y., 5 F Cas.No 2,924.
58 C.J. p 543 note 26.

97. U.S—Zellweger v The Robert Cooper, D C N Y, 30 F Cas No.18,207.

98. U S—Cobb v Howard, D.C N Y, 5 F Cas No 2,925, affirmed, C C, 5 F.Cas No 2,924.

99. U S—Cobb v. Howard, D.C N Y, 5 F.Cas No 2,925, affirmed, C.C., 5 F.Cas.No 2,924
58 C.J. p 543 note 28.

1. U S—Zellweger v. The Robert Cooper, D.C N.Y, 30 F Cas No 18,207.

2. U S.—Zellweger v. The Robert Cooper, supra

3. U.S.—The Zenobia, D C N.Y., 30 F Cas No.18,209, Abb Adm. 80.

4. Mass—Hughson v. Winthrop Steamboat Co, 64 N E 74, 181 Mass. 325, 58 L.R A 432

5. Ill—Keokuk Packet Co. v Henry, 50 Ill. 264

6. Ill—Keokuk Packet Co. v. Henry, supra

7. Mo.—Stoneseifer v. Sheble, 31 Mo. 243.

8. U.S—La Gascogne, D C N Y., 135 F 577.
58 C.J. p 544 note 44.

board another vessel which returns him to the port of departure.[9] Although a passenger has been guilty of misconduct on a former occasion, if he has come on board, has paid his fare, and is conducting himself in a decent and orderly manner, the carrier cannot deny him passage.[10] However, if a person who is so ill that he is not fit to travel without medical attention purchases an ordinary ticket from a steamship company without giving notice of his condition, depending wholly on the carrier to furnish medical aid, the carrier on discovering that fact, after the passenger has boarded the vessel, may remove him to the shore and refuse passage.[11] After a person who was a passenger has ceased to become such, by reason of his remaining on board the vessel an unreasonable time after its arrival, becoming in effect a trespasser, he may properly be ejected provided that no more force than is reasonably necessary is used to accomplish the ejection.[12] The carrier may eject from its vessel a passenger who persists in carrying on a business thereon in violation of the carrier's rules.[13]

Threat to eject; command to leave. A threat by a ship's officer to eject a passenger unless the passage money is paid, because of erroneous information that a check with which the passenger paid for his ticket is worthless, constitutes a breach of duty on the part of the carrier and gives rise to a cause of action for damages, even though the passenger is not actually ejected due to the fact that the fare is paid by a fellow passenger.[14] The leaving of a boat in compliance with an officer's command to that effect is equivalent to an ejection, and is not a voluntary departure from the boat.[15]

§ 186. —— Accommodations and Provisions

a. In general
b Quarters
c. Provisions
d. Medical service

a. In General

A contract for the carriage of passengers usually implies a right to reasonably suitable comforts, accommodations, and conveniences.

Unless there is an understanding to the contrary,[16] a contract for the carriage of passengers carries with it by implication a right to reasonably suitable comforts, accommodations, and conveniences.[17] In order to be reasonable and proper, the accommodations must be such as are usually afforded to passengers of a similar class,[18] on similar voyages,[19] and in similar vessels;[20] but as the passenger's contract also entitles him to such accommodations as are necessary to a reasonable degree of comfort, and to physical health and safety,[21] it is no justification that other vessels in the trade carry passengers in such numbers as to be inconsistent with their comfort or their health.[22]

Refusal to furnish. Refusal to recognize a passenger's rights to the class of accommodations to which his ticket entitles him gives rise to a cause of action in his favor,[23] and a person entitled to first-class accommodations does not forfeit his right to recover for refusal to supply proper accommodations by declining to accept an offer of first-class accommodations conditioned on a payment of the passage money a second time.[24] If a passenger, on coming aboard, is wrongfully refused the class of accommodations to which he is entitled, because of his race or color, and is told either to ac-

9. U.S.—Pearson v. Duane, Cal., 4 Wall. 605, 18 L.Ed. 447

10. Ky.—Reasor v. Paducah, etc., Ferry Co., 153 S.W. 222, 152 Ky. 220, 43 L.R.A.,N.S., 820.

11. Mass.—Connors v. Cunard S.S. Co., 90 N.E. 601, 204 Mass. 310, 134 Am.St.R. 662, 26 L.R.A.,N.S., 171, 17 Ann.Cas. 1051.

12. Wash.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149

Command of police officer

Under statute requiring that aid be given a public police officer on his lawful command, a purser who acts under the direct command of a police officer, and not as an officer of the boat, in ejecting one who has ceased to be a passenger and has become a trespasser does not, thereby, render the owner of the vessel liable.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149.

Assault or excessive force

The purser of a steamboat who willfully or wantonly assaulted a trespasser on the boat, who had become such by failing to leave within a reasonable time after landing, or who used more force in accomplishing the ejection than was reasonably necessary, was liable to such trespasser.—Duval v. Inland Nav. Co., supra.

13. U.S.—Barney v. The D. R. Martin, C.C.N.Y., 2 F.Cas.No.1,030, 11 Blatchf. 233
10 C.J. p. 731 note 9 [a].

14. U.S.—Austro-American S.S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873

15. Ky.—Reasor v. Paducah, etc., Ferry Co., 153 S.W. 222, 152 Ky. 220, 43 L.R.A.,N.S., 820

16. U.S.—Defrier v. The Nicaragua, D.C.Ala., 81 F. 745
58 C.J. p. 544 note 52.

17. U.S.—Defrier v. The Nicaragua, supra.
58 C.J. p. 544 note 53.

18. U.S.—The Valencia, D.C.Wash., 110 F. 221, affirmed 117 F. 68, 54 C.C.A. 454—Bailey v. The Sonora, D.C.Cal., 2 F.Cas.No. 746

19. U.S.—Bailey v. The Sonora, supra—Sparks v. The Sonora, D.C.Cal., 22 F.Cas.No. 13,212.

20. U.S.—Sparks v. The Sonora, supra.

21. U.S.—Sparks v. The Sonora, supra.

22. U.S.—Sparks v. The Sonora, supra.

23. U.S.—Gleason v. The Willamette Valley, D.C.Cal., 71 F. 712.

24. U.S.—Gleason v. The Willamette Valley, supra.

cept steerage passage or get off, the passenger need not leave the vessel in order to preserve a right of action,[25] but he may remain and insist on the accommodations to which he is entitled,[26] and having been informed that his rights will not be honored, he may, on being ordered to go into steerage quarters, refuse to surrender his ticket without forfeiting his right to recover for any injuries that may be sustained by reason of the breach of contract.[27]

Special reservations for officers. The officers of a vessel have a right to reserve a table for themselves in the dining saloon and may properly exclude a first-class passenger therefrom without regard to the necessity of their making such a reservation.[28]

Exchange of accommodations. A passenger who has contracted for accommodations of a certain type or class cannot, after he has come on board and found them somewhat unsuitable for his purposes, demand that they be exchanged for accommodations of a better class on payment of only the difference in price between the two classes of accommodation.[29]

Continuance and termination of duty to furnish A contract that a passenger will be supplied with good and sufficient food and lodging to the port of destination, and that such arrangement is to hold good in event of unavoidable accident or delay, places a duty on the carrier to see that sufficient food and suitable lodging are furnished during the time that a passenger is taken off and detained at a government quarantine station outside the port of destination,[30] and the carrier is not relieved from liability for neglect to furnish accommodations during such period by reason of a provision that it will not be liable for delay from "restraints of princes, rulers, and peoples."[31] After the arrival in the port of destination, the duty to furnish accommodations to passengers comes to an end.[32] Although passengers who have taken ill during the voyage are taken to a hospital to be cared for, the carrier is under no duty to pay for such expense;[33] and at the end of the voyage the vessel need not restrain and care for a sick person who has taken passage simply because his health will be endangered by leaving the vessel.[34]

b. Quarters

(1) Berths and staterooms
(2) Lower class and steerage quarters

(1) Berths and Staterooms

Berth and stateroom accommodations must be sold, until exhausted, without discrimination to applicants in the order in which they make their applications.

Berth and stateroom accommodations must be sold without discrimination to applicants in the order in which they are applied for until they are exhausted,[35] and if a passenger is refused a berth while others making later applications are supplied with them, the carrier may be held responsible.[36] On steamers running at night, a berth is a reasonable and proper accommodation,[37] and a carrier is liable for failure to furnish it, unless the fact that none can be had is made known to a passenger who chooses to ask for a berth when he buys his ticket.[38] The purchase of a first-class passage, which includes all night travel by vessel, carries with it the right to stateroom accommodations, where by custom and usage the passenger contracts for such accommodations when securing first-class passage.[39] Furthermore, if the comfortable and desirable staterooms are all disposed of, passengers who are paying the highest rate of fare must be informed of the nature of accommodations that can be afforded them, and be allowed to determine whether they will take the risk of such accommodations.[40] Where an express contract to furnish stateroom accommodations has been entered into, the failure to furnish such accommodations is a breach, irrespective of whether or not it was practicable to travel without such accommodations.[41] The exclusion of a passenger from a cabin or stateroom, for which he has contracted, renders the carrier lia-

25. U.S.—Billinger v. Clyde SS. Co., C.C.N.Y., 158 F. 511

26. U.S.—Billinger v. Clyde SS Co., supra.

27. U.S.—Billinger v. Clyde SS Co., supra

28. Mass.—Ellis v. Narragansett SS. Co., 111 Mass. 146.

29. N.Y.—Miller v. New Jersey Steam-Boat Co., 12 N.Y.S. 301, 58 Hun 424, affirmed 32 N.E. 645, 135 N.Y. 612
58 C.J. p. 546 note 65.

30. Wash.—Larsen v. Allan Line SS Co., 80 P. 181, 37 Wash. 555

31. Wash.—Larsen v. Allan Line SS Co., supra.

32. U.S.—Churchill v. United Fruit Co., D.C.Mass., 294 F. 400
La.—New Orleans v. The Windermere, 12 La.Ann. 84

33. La.—New Orleans v. The Windermere, supra.

34. U.S.—Churchill v. United Fruit Co., D.C.Mass., 294 F. 400

35. N.C.—Patterson v. Old Dominion SS. Co., 53 S.E. 224, 140 N.C. 412, 111 Am.St.R. 848, 5 L.R.A.,N.S., 1012

36. N.C.—Patterson v. Old Dominion SS Co., supra

37. N.C.—Patterson v. Old Dominion SS Co., supra.

38. N.C.—Patterson v. Old Dominion SS Co., supra.

39. Ala.—Central of Georgia R. Co. v. Knight, 57 So. 253, 3 Ala.App. 436.

40. U.S.—Sparks v. The Sonora, D.C. Cal., 22 F.Cas.No. 13,212

41. Ala.—Central of Georgia R. Co. v. Knight, 57 So. 253, 3 Ala.App. 436.

ble even though the passenger is informed, on coming aboard, that his cabin is unavailable and either to forego the voyage or do without such accommodations.[42] A passenger holding a ticket entitling him to a berth has no right to demand, without extra charge, an entire stateroom for himself;[43] but one who has contracted for the use of a cabin or stateroom has a right to have it sufficiently free from cargo that he can get into it,[44] or to have it in such a condition that it is a healthy and comfortable place in which to live;[45] and a woman first-class passenger does not receive the accommodations to which she is entitled if the stateroom is occupied by a boy of such an age that she cannot consistently with ordinary decency use the stateroom as a place to disrobe and sleep.[46]

(2) Lower Class and Steerage Quarters

Steerage or other lower class passengers, quartered as a group, are entitled to demand that proper measures be taken to keep their quarters reasonably clean and comfortable.

Steerage or other lower class passengers who are given certain quarters as a group are entitled to demand that all proper measures be taken to keep their quarters reasonably clean and comfortable.[47] Reasonable facilities for washing, and the like, must be afforded,[48] and female passengers of such groups have a right to require that bunks or berths be not assigned to them promiscuously, without adequate arrangements to secure privacy.[49] Lower class passengers are ordinarily entitled to the use of their quarters free from the inconvenience and risk of having freight,[50] or the baggage of first-class passengers[51] stored therein; but the mere fact that three or four dogs are kept in a steerage cabin has been held not to constitute such breach of steerage passengers' contract for passage as to entitle them to substantial damages.[52] In order to diminish the risk from freight piled in the room, the carrier cannot require that steerage passengers obey an arbitrary regulation requiring them to remain in their berths during the whole of the voyage or an unusual portion of it.[53] Unless there is a fair understanding to the contrary, an undertaking to carry a steerage passenger for a long voyage includes an obligation to furnish the passenger with a berth,[54] but when not contracted for, there is no duty to furnish such passengers with bedding or covers[55]

c. Provisions

In the absence of a special contract to the contrary, a common carrier by water must provide passengers with an adequate supply of wholesome food, and with water fit to drink, and such provisions must be sufficient to meet contigencies of an accident to the vessel.

In the absence of a special contract to the contrary, it is the duty of a common carrier by water to provide its passengers with an adequate supply of wholesome food,[56] and with water fit to drink and uncontaminated,[57] and such provisions must be sufficient to meet the contingencies of an accident to the vessel and the resulting delay in voyage, from whatever cause such accident and delay might arise.[58] If the food is sufficient in quantity, properly cooked, such as is usually furnished on the kind of voyage involved, and the passenger sustains no real suffering, he cannot complain because it is not as good as it might have been.[59]

d. Medical Service

There is no common-law duty to carry a physician or surgeon to provide medical service for passengers.

There is no common-law duty to carry a physician or surgeon for the treatment of passengers,[60] and, in the absence of some special agreement, if a person who is ill, without disclosing that fact, chooses to come on a vessel as a passenger, there is no duty to offer the sick passenger special care or medical treatment;[61] but as to a passenger who is injured during the voyage, there is a duty to see that his

42. La.—St Amand v Lizardi, 4 La 243

43. N C—Basnight v Norfolk, etc, R Co, 60 S E 899, 147 N C. 169.

44. La—St. Amand v. Lizardi, 4 La 243

45. U S—Sparks v The Sonora, D C Cal, 22 F Cas No 13,212.
58 C J p 546 note 81

46. N Y.—Lignante v Panama R Co, 131 N Y S 753, 147 App Div. 97.
58 C J. p 546 note 82.

47. U S—Northwestern SS Co. v Ransom, Wash, 174 F. 913, 99 C C A. 361, 20 Ann Cas 1015.
58 C J p 546 note 84

48. U.S—Bailey v The Sonora, D.C Cal., 2 F Cas No 746
58 C J p 546 note 85.

49. U S—Bailey v. The Sonora, supra.

50. U S—The Oriflamme, D C Or, 18 F.Cas No 10,572, 3 Sawy. 397

51. U S—Bailey v The Sonora, D C Cal, 2 F Cas No 746

52. U S—The Centennial, D C Cal, 131 F. 816

53. U S—The Oriflamme, D C Or, 18 F Cas No 10,572, 3 Sawy 397

54. U.S—The Oriflamme, supra.

55. U S—The Centennial, D C Cal, 131 F. 816—Defrier v. The Nicaragua, D.C.Ala, 81 F. 745.

56. U S—Northwestern SS Co v Ransom, Wash, 174 F 913, 99 C C A 361, 20 Ann Cas 1015.
58 C J p 546 note 92.

57. U.S.—Bailey v. The Sonora, D C. Cal, 2 F Cas No 746.
58 C J p 546 note 93.

58. U S—The Oregon, Wash., 133 F. 609, 68 C C A. 603

59. U.S—The President, D C.Cal, 92 F. 673

60. U S—The City of St. Louis, D C N Y., 238 F. 381.

61. U.S—Churchill v. United Fruit Co, D C Mass., 294 F. 400.

injuries receive such care as is reasonably practicable in view of the facilities available.[62]

§ 187. —— Interruptions and Abandonment of Voyage

Interruption or stoppage of the voyage because of unavoidable wreck or destruction of the vessel does not excuse nonperformance of the contract for carriage; but the owner of the vessel may be entitled to have the passengers wait a reasonable time for repairs or the providing of another mode of transportation

Unless the contract is otherwise than to transport to the port of destination,[63] an interruption or stoppage of the voyage at an intermediate point, because of unavoidable wreck or destruction of the vessel, does not excuse nonperformance of the contract, at least to the extent that the shipowner is not entitled to passage money, unless he pays or tenders to the passenger the expenses or means of proceeding to the port of destination.[64] If a voyage is interrupted by shipwreck or other unavoidable disaster to the vessel, the vessel owner is entitled to have the passengers wait a reasonable time until repairs can be made or another mode of transportation obtained;[65] and if the passengers by their own act deprive the captain of an election to repair and continue the voyage,[66] or fail to avail themselves of the opportunity to proceed on the voyage by other means provided,[67] the owner is entitled to retain any passage money paid; but if a voyage is interrupted or broken up in consequence of an original unseaworthiness of the vessel, the passenger need not wait for repairs to be made, or until another vessel is hired, but he may treat the contract as breached and rescind immediately.[68] If without destruction or injury of the vessel completion of the voyage becomes impossible because of some cause beyond the carrier's control, but which he should have anticipated, it is the duty of the vessel to retrace its course or to afford the passenger a free return to the port of departure.[69] To leave the passenger at another or intermediate port, under such circumstances, constitutes a breach of contract which will render the vessel owner liable for any damages which proximately result.[70] There is an entire failure to perform the contract of carriage if due to bad management a vessel having arrived at an intermediate port abandons the voyage and returns its passengers to the port of departure.[71]

§ 188. —— Transportation by Connecting Lines or Vessels

The owner of the initial line, contracting as a principal for the carriage of a passenger over connecting lines or vessels running in connection over different portions of the entire route, has the primary duty of seeing that the passenger is carried to the final port of destination.

Where different lines of vessels run in connection over different portions of an entire route of travel, and the owner of the initial line has contracted as principal for the conveyance of a passenger over the entire route, it becomes the primary duty of such carrier to see that the passenger is carried to the final port of destination.[72] The loss or destruction, by act of God, of the vessel of the connecting line which is to carry the passenger from one of the intermediate ports does not absolve the owner of the vessel making the initial carriage from all duty under his contract.[73] In such a situation the passenger cannot, without further concern, be left at the intermediate port, but it becomes the duty of the owner to offer substantially to perform his contract, if by the exercise of reasonable diligence he can procure another vessel to take the passenger on to his port of destination;[74] and a failure to supply another vessel when it can be had renders the owner liable for breach of contract;[75] but if the destroyed connecting vessel is replaced as soon as possible, by another equally seaworthy, the passengers have no cause of action for the delay in making the connection.[76] However, if it has been contracted that the passengers shall incur no extra

62. U S—Boston, etc, SS Co v Francis, Mass, 249 F 450, 162 C C. A. 16
58 C J p 546 note 99.

63. N.Y.—Watson v. Duykinck, 3 Johns. 335.

64. U S.—Howland v The Lavinia, D C Pa., 12 F Cas No 6,797, Pet Adm. 123.
58 C.J. p 546 note 2.

65. U S.—Stone v. Relampago, D C Fla, 23 F.Cas No.13,486
58 C J. p 546 note 3.

66. La —Marks v Nashville Marine & Fire Ins Co., 6 La.Ann. 126.

67. N Y—Detouches v. Peck, 9 Johns 210.

68. U S—Stone v. The Relampago, D C Fla, 23 F.Cas No 13,486
58 C J p 547 note 6.

69. U S.—West v The Uncle Sam, C. C Cal, 29 F Cas No 17,427, McAll 505
Wash—Smith v North American Transp, etc, Co, 56 P 372, 20 Wash. 580, 44 L R A. 557

70. U S.—West v The Uncle Sam, C. C Cal, 29 F Cas No 17,427, McAll 505.

71. Alaska—The Schooner Arthur B., 1 Alaska 403.

72. N Y—Williams v Vanderbilt, 28 N Y 217, 84 Am.D. 333.
58 C J. p 547 note 11

73. N.Y.—Williams v. Vanderbilt, supra—Ward v Vanderbilt, 4 Abb Dec 521, 1 Keyes 70, 34 How Pr 144.

74. N Y.—Williams v Vanderbilt, 28 N Y 217, 84 Am D 333—Ward v. Vanderbilt, 4 Abb Dec. 521, 1 Keyes 70, 34 How Pr 144

75. N.Y.—Williams v Vanderbilt, 28 N Y. 217, 84 Am D 333—Ward v. Vanderbilt, 4 Abb.Dec. 521, 1 Keyes 70, 34 How.Pr. 144

76. La.—Van Horn v. Templeton, 11 La.Ann. 52.

expenses and that they shall be allowed on board the connecting vessel immediately, a refusal to allow the passengers on board the substitute vessel, after it arrives in port will render the carrier responsible for expenses incurred by the passengers while remaining on shore.[77]

§ 189. —— Deviation

The owner of a vessel, in the absence of express contract, is not obligated to carry a passenger directly or by a particular route to the port of destination.

Unless the vessel owner has expressly contracted to do so, he is under no obligation to carry a passenger directly or by a particular route to the port of destination,[78] but where the contract provides for direct transportation from one port to another, or carriage by a particular route, a deviation therefrom constitutes a material breach of contract, rendering the owner liable, in any event, for a return of the passage money,[79] and for damage or injuries which proximately result from the breach.[80] However, liability for deviations cannot be imposed without regard to conditions and limitations contained in the contract of carriage on the ground that by a deviation the express contract is abrogated and the carrier becomes responsible as an insurer for the due performance of his duty to transport.[81]

§ 190. —— Going Ashore at Intermediate Ports

Under a special contract providing for the passenger going ashore at intermediate ports, a refusal to let him go ashore may constitute a breach of contract; passengers do not forfeit all their rights as passengers by going ashore at an intermediate port at which the vessel happens to stop.

Under a special contract for an excursion cruise, a refusal to let a passenger go ashore at a port at which it has been agreed a sight-seeing trip is to be given, may constitute a breach of contract on the part of the company that has contracted to furnish the passenger with the cruise.[82] Passengers who have purchased only a through passage from one port to another do not forfeit all their rights as passengers by going ashore at an intermediate port at which the vessel happens to stop,[83] and if passengers on being allowed to go ashore are informed by officers of the vessel that she will not sail until a specified time, they may hold the vessel responsible for damages if they are left behind by reason of the captain's changing his plans and sailing ahead of time without taking reasonable steps to give notice to the passengers ashore.[84]

§ 191. —— Stops and Landing at Port of Destination

The landing of a passenger is an essential part of the contract to transport, and the carrier is obligated to land the passenger at his port of destination.

The landing of a passenger is an essential part of the contract of transportation,[85] and it has been said that the carrier cannot, by stipulations to the effect that the landing shall not be a part of the voyage, exempt itself from liability for providing improper landing facilities to passengers.[86] At any rate, although it may be expressly agreed that a landing to passengers is not guaranteed and that they are to procure their own means of getting themselves and their stores ashore, the vessel remains under an obligation to wait at the port of destination a reasonable time to enable the passengers to procure boats to make their landing, unless an excuse is offered by an intervening act of God.[87] Where there are no intervening circumstances to afford an excuse, the carrier cannot, without breach of contract, carry its passengers past the port of destination agreed on and land them at another.[88] If the stress of the weather is such as to make it dangerous to do so, a carrier by water may be justifed in failing to land at one of its regular stops,[89] but in such a case the carrier comes under a duty to inform passengers headed for that port that the vessel will not stop there,[90] and if on the making of another landing a passenger is deceived into debarking by representations that it is his port of destination, the carrier will be responsible

77. La.—Van Horn v. Templeton, supra.

78. N.Y.—Mills v. Shult, 2 E.D. Smith 139.

79. U.S.—De Colange v. The Chateau Margaux, D.C.N.Y., 37 F. 157.

80. U.S.—West v. The Uncle Sam, D.C.Cal., 29 F.Cas.No. 17,427, McAll. 505.

81. U.S.—The Kronprinzessin Cecilie, Mass., 238 F. 668, 151 C.C.A. 518, certiorari denied Rantoul v. North German Lloyd, 37 S.Ct. 479, 243 U.S. 652, 653, 61 L.Ed. 947, reversed on other grounds, 37 S.Ct. 490, 244 U.S. 12, 61 L.Ed. 960.

82. U.S.—Raymond, etc., Co. v. Ebsary, C.C.A.N.Y., 9 F.2d 889. 58 C.J. p. 547 note 21.

83. Or.—Dice v. Willamette Transp., etc., Co., 8 Or. 60, 34 Am.R. 575.

84. U.S.—The Constantinople, D.C. N.Y., 15 F.2d 97.

85. U.S.—The Valencia, D.C.Wash., 110 F. 221, affirmed 117 F. 68, 54 C.C.A. 454. 58 C.J. p. 548 note 24.

86. U.S.—The Valencia, supra.

87. U.S.—The President, D.C.Cal., 92 F. 673.

88. U.S.—The Canadian, D.C.Mich., 5 F.Cas.No. 2,376, Brown Adm. 11. La.—McGloin v. Henderson, 6 La. 715.

89. U.S.—Lee Line Steamers v. Page, Tenn., 237 F. 57, 150 C.C.A. 259.

90. U.S.—Lee Line Steamers v. Page, supra.

for any injuries proximately resulting from its breach of duty.[91]

§ 192. Personal Safety and Liability for Injuries

An injury to a passenger on board a passenger ship, happening in consequence of negligence on the part of the owner, officers, or mariners of the vessel, is both a breach of the contract for transportation and a tort, entitling the injured person to compensation and to a lien therefor on the vessel. As a general rule, anyone, whether a corporation or individual, who has assumed the obligation of carrying the passenger safely to the port of destination is liable for injuries resulting from a breach of the contract of carriage.

An injury to a passenger on board a passenger ship, happening in consequence of negligence on the part of the owner, officers, or mariners of the vessel, is both a breach of the contract for transportation and a tort, entitling the injured person to compensation and to a lien therefor on the vessel.[92] Under a state statute making vessels navigating within the state liable for injuries inflicted on passengers by employees of the vessel, it has been held that, where the injury is inflicted within the state, the vessel is liable to the same extent as is the employee inflicting the injury;[93] but, where the wrongful act takes place outside the state, the passenger must show that the employee was acting within the scope of his employment when the act was committed.[94]

Companies or persons. As a general rule, anyone, whether corporation or individual, who has assumed the obligation of carrying the passenger safely to the port of destination is liable for injuries resulting from a breach of the contract of carriage.[95] Although a person may not own a vessel if it is in fact navigated by or for him, he may be held responsible for the acts of the employees, although he has no control over their hiring and discharge.[96] A part owner of a vessel, who benefits by its navigation, may be jointly or severally liable for the negligent acts of the employees of the vessel, even though he exercises no active control over its management.[97] In order that an owner may be liable it is not necessary that he should have had the vessel registered in his name.[98] However, the lessor of a steamboat, not being a quasi public corporation and having received no special privileges or benefits from the state, is not liable for injury to a passenger caused by the negligence of the lessee.[99]

A steamship company which has contracted as principal to furnish a passenger with a side trip in the auto of another company is liable for injuries sustained by a passenger because of the negligence of the servants of the latter company during side trip;[1] but where, on the face of a coupon ticket, entitling a passenger to a transfer between stations by a taxicab company, it is stated that the steamship company in selling it acts only as agent and does not accept responsibility beyond its own line, the selling company is not liable for injuries caused by the negligence of the taxi driver.[2]

The general agent of a vessel, who is neither the owner pro hac vice, nor a common carrier operating the vessel, nor the employer of the master or crew, is not liable for the tortious or negligent acts of members of the crew,[3] and, as a mere arranger of

91. U S —Lee Line Steamers v Page, supra.

92. U.S —The City of Panama, Wash, 101 U S 453, 25 L Ed 1061
58 C J p 550 note 53
Actions in rem against vessel see infra § 198.

93. Ill —The F. X Aubury, 28 Ill 412, 81 Am.D 292

94. Ohio —The Ocean v. Marshall, 11 Ohio St 379.

95. U S.—The City of Panama, Wash., 101 U S. 453, 25 L Ed 1061
58 C J. p 550 note 56

Charters

(1) Where the owner charters the vessel, as in the case of an excursion, and maintains control over the vessel and its employees, owner is liable;
U.S.—Morrison v Coombs, D C Me, 23 F Supp. 852, opinion adhered to 24 F.Supp. 366
Mich —Cuddy v. Horn, 10 N.W. 32, 46 Mich 596, 41 Am R. 178
N C —White v. Norfolk & S. R. Co., 20 S E 191, 115 N C 631, 44 Am.S R 489
Pa —McBride v. McNally, 89 A 1131, 243 Pa 206, 52 L R A,N S, 259.
10 C J p 879 note 41 [a]

(2) However where the charterer assumed full control of vessel and crew and is to receive the full proceeds of the voyage, owner is not liable for wrongful acts of crew during voyage —McDowell v Homer Ramsdell Transp. Co, 28 N Y S 821, 78 Hun 228.

(3) Furthermore, charter party for the carriage of cargo, which leaves the general control and operation of the vessel with the owner, does not render the charterer liable for injuries sustained by a passenger because of negligence of employees in management of the vessel —Deniff v McCormick, 210 P. 703, 105 Or. 697—, 58 C.J. p 550 note 56 [d] (3).

96. Minn —Fay v. Davidson, 13 Minn 523
58 C J p 550 note 57.

97. Minn —Fay v Davidson, supra.

Copartner held liable
U S —Kulack v. The Pearl Jack, D.C Mich, 79 F Supp 802, affirmed, C A, 178 F 2d 154

98. Minn.—Fay v. Davidson, 13 Minn. 523

99. N C —Phelps v. Windsor Steamboat Co, 42 S E 335, 131 N C. 12.

1. Mich —Thurston v Northern Nav Co, 171 N.W 423, 205 Mich. 278
Tickets and contracts for carriage over connecting lines see supra § 182

2. Md.—Stewart Taxi-Service Co. v. Spencer, 132 A. 153, 149 Md 635.

3. U S —Weade v. Dichmann, Wright & Pugh, Va., 69 S Ct 1326, 337 U S. 801, 93 L Ed. 1704—Infante v. Moore-McCormack Lines, D.C.Pa, 91 F Supp 71, motion denied 93 F Supp 239.
Liability of general agent generally see supra § 17
Liability of general agent for personal injuries to stevedores or longshoremen see supra § 85 b.

transportation under his duty to arrange for the transportation of passengers, such an agent does not incur the liability of a common carrier.[4]

Master of vessel. Not only is the master of a vessel personally liable for injuries resulting from his own misconduct,[5] but he is also responsible for injuries inflicted on passengers by the negligence of subordinate employees who are under his command.[6]

Law governing liability. It is the general maritime law, as understood and administered in the courts of this country in which the litigation is prosecuted, that governs in an action brought in an admiralty court of the United States to recover for injuries sustained by an American passenger on a foreign ship on the high seas.[7]

Defenses in general. According to some authorities the fact that a passenger is engaged in traveling in violation of a statute that prohibits travel on Sunday, at the time the injuries are sustained, is no defense to an action to recover for such injuries.[8] If a passenger is injured by a quarrelsome and fighting crew it is no defense to the carrier to show that such a class of men is usually employed on steamboats.[9] When the negligence of the vessel carrying a passenger has proximately resulted in a collision causing injury, it is no defense that negligence of the other vessel also contributed to the collision,[10] but, where the other vessel brings a limited liability proceeding in which the passenger is cited, and in such proceedings it is adjudged that the collision was due solely to the negligence of the petitioning vessel, such judgment is conclusive on the passenger and is a defense to a subsequent suit by him against the vessel on which he was being carried.[11] If a passenger is injured while coming on board, and because of that refuses to pay fare which the captain thereupon agrees not to charge, this does not operate as a settlement or release of the passenger's cause of action, for the injuries sustained, unless it is expressly shown that there was such an intention or understanding on his part.[12]

§ 193. —— Care Required and Liability in General

a. In general
b. Appliances, equipment, and condition of vessel
c. Boarding and discharge of passengers
d Wharves, docks, and approaches
e. Management and navigation of vessel

a. In General

(1) General rules
(2) Persons not passengers
(3) Passengers in forbidden quarters
(4) Duty to warn of dangers
(5) Protection against injuries by fellow passengers or other third persons
(6) Negligence and wrongs of vessel's employees

(1) General Rules

As a general rule, a vessel engaged as a common carrier of passengers must exercise as high a degree of care in taking a passenger on board, carrying him to the port of destination, and landing him safely as the means employed and the circumstances of the case will permit but the vessel is not an insurer of the safety of its passengers.

Although there are various expressions as to the degree of care required by a vessel in the transportation of its passengers,[13] it may probably be stated

4. U.S.—Weade v. Dichmann, Wright & Pugh, Va., 69 S.Ct. 1326, 337 U.S. 801, 93 L.Ed. 1704

5. La.—Keene v. Lizardi, 5 La. 431, 23 Am.D. 197.
58 C.J. p. 550 note 63
Liability of master for negligence or misconduct generally see supra § 70

6. N.Y.—Kennedy v. Ryall, 67 N.Y. 379.

7. U.S.—Rundell v. La Campagnie Generale Transatlantique, Ill., 100 F. 655, 40 C.C.A. 625, 49 L.R.A. 92
58 C.J. p. 551 note 65.
Operation of state statutes creating liability for wrongful death on vessels of state on high seas see Admiralty § 62.

8. N.Y.—Carroll v. Staten Island R. Co., 58 N.Y. 126, 17 Am.R. 221—Landers v. Staten Island R. Co., 13 Abb.Pr., N.S., 338, reversed on other grounds 53 N.Y. 450, 14 Abb.Pr., N.S., 346
Compliance with statutory regulations as defense to action for injuries negligently inflicted see supra § 177.
Contributory negligence as defense see infra § 194.
Liability for injuries to person violating Sunday statutes generally see the C.J.S. title Sunday § 39, also 60 C.J. p. 1131 note 98 et seq.

9. Ind.—Memphis, etc., Packet Co. v. Pikey, 40 N.E. 527, 142 Ind. 304

10. U.S.—Moses v. Hamburg-American Packet Co., D.C.N.Y., 88 F. 329
N.Y.—Jung v. Starin, 33 N.Y.S. 650, 12 Misc. 362

11. U.S.—The City of Boston, D.C. Mass., 159 F. 261.

12. U.S.—Union Packet Co. v. Clough, Wis., 20 Wall. 528, 22 L.Ed. 406

13. **High degree of care**
It is frequently stated that a carrier by water is bound to exercise a high degree of care for the safety of its passengers.
U.S.—Voltmann v. United Fruit Co., C.C.A.N.Y., 147 F.2d 514—Kvart v. Swedish American Line, C.C.A.N.Y., 126 F.2d 279—Moore v. American Scantic Line, C.C.A.N.Y., 121 F.2d 767—Bellocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sagaudo Navigazione Generale, C.C.A.N.Y., 84 F.2d 975—Demgard v. U.S., D.C.N.Y., 94 F.Supp. 309—Kulack v. The Peral Jack, D.C. Mich., 79 F.Supp. 802, affirmed, C

as a general rule that a vessel engaged as a common carrier of passengers must exercise as high a degree of care in taking a passenger on board, carrying him to the port of destination, and landing him safely as the means employed and the circumstances of the case will permit,[14] and, should the passenger, without negligence on his part, be injured by the failure of the carrier or its servants to exercise the degree of care required, damages may be recovered.[15]

Private carrier compared. Although a private carrier of passengers by water is under a duty to exercise a high degree of care,[16] a higher degree of care is imposed on a common carrier of passengers by water than may be imposed on a private carrier.[17]

Vessel not an insurer. A vessel carrying passengers is not absolutely liable for, or an insurer of, the safety of its passengers as a carrier of goods is for its cargo,[18] but it is responsible only for injuries which have been caused by the negligence of it or its servants,[19] and, hence, it is not liable for injuries caused by an accident which the proper degree of care, skill, and diligence could not anticipate or prevent.[20] Therefore, if without any negligence on the part of the vessel or its employees a passenger is injured because of the action of the sea or extreme weather conditions, the carrier is not liable.[21]

Passengers who do not pay fare The same degree of care must be exercised with respect to passengers being transported by small boat to the vessel for the purpose of taking passage and paying fare,[22] or passengers who have come on board with intention to take passage but have not yet paid their fare,[23] as must be exercised with regard to passengers who have paid their fare in advance. A person, being carried gratuitously under a pass or under a custom whereby masters of steamboats permit persons whose usual employment is on board such boats to be carried from place to place free of charge, is entitled at least to be protected from gross negligence on the part of the vessel's employees.[24] With respect to persons in distress who are gratuitously taken on board it has been held that the vessel is responsible only for injuries that are caused by gross neglect.[25]

A, 178 F 2d 154—Stevens v Colombian Mail S. S. Corp, D.C N Y, 15 F Supp 534
Wash—Aquino v. Alaska S S Co., 91 P 2d 1014, 199 Wash. 490
58 C J p 548 note 32 [c]

Highest degree of care

A carrier of passengers by water is held to the exercise of the highest degree of care—Peninsular & Occidental S S Co v N. L R B, C C A 5, 98 F.2d 411, certiorari denied N L R B v Peninsular & Occidental S S Co, 59 S Ct. 248, 305 U S 653, 83 L Ed 423—Pacific S S Co v Holt, C C A Or., 77 F 2d 192—Morrison v Coombs, D C Me, 23 F Supp 852, opinion adhered to 24 F Supp 366.
58 C J. p 548 note 32 [d]

Various expressions as to care

(1) Passenger on steamship was entitled to much higher degree of care than ordinary measure of care —Maibrunn v. Hamburg-American S S Co, C C A N Y, 77 F 2d 304

(2) Ferrying in winter requires exercise of utmost care to protect passengers —The Linseed King, D C N Y., 24 F 2d 967.

(3) Other statements see 58 C J. p 548 note 32 [a], [b], [e], [f].

Safety of passengers on a seagoing vessel is the first consideration—Aquino v Alaska S. S. Co, 91 P.2d 1014, 199 Wash 490.

Protection from crowds

Shipowner was required to exercise reasonable or ordinary care in performing his duty to protect passengers from crowds or overcrowding—River Excursion Co v Kuntz, 51 S W 2d 911, 244 Ky. 587.

14. U S—Moore v American Scantic Line, C C A N.Y, 121 F 2d 767.
58 C J p 548 note 33.

General rules

(1) Law which regulates the duties of carriers generally is, in the main, applicable to carriers by water, and the only differences are the conditions peculiar to the means and manner of transportation and certain statutory provisions.—Coney Island Co. v Brown, 162 S W 2d 785, 290 Ky 750

(2) Care required and liability of carrier generally see Carriers § 676 et seq

15. U S—Freund v The Chauncey M Depew, D C N.Y, 45 F Supp 263—Morrison v Coombs, D C Me, 23 F Supp 852, opinion adhered to 24 F Supp. 366.
58 C J p 548 note 34

16. U S—The Nereid, D C N J., 40 F Supp 736.

17. U S—Morrison v Coombs, D.C Me, 23 F Supp 852, opinion adhered to 24 F Supp 366.

18. U S—Moore v American Scantic Line, C C A N Y, 121 F 2d 767—Demgard v. U S, D C N Y, 94 F.Supp 309.
Wash—**Corpus Juris quoted in** Aquino v. Alaska S S. Co, 91 P.2d 1014, 1016, 199 Wash 490.
58 C J. p 548 note 35.

19. U S—Moore v. American Scantic Line, C C A N.Y, 121 F 2d 767
Wash—**Corpus Juris quoted in** Aquino v Alaska S S. Co., 91 P 2d 1014, 1017, 199 Wash 490.
58 C J. p 549 note 36

Disease contracted during passport detention

Steamship company's alleged negligence in failing to detect passport defect did not make it liable for passenger's death from disease contracted while detained at Ellis Island—Doidge v Cunard S. S Co, 181 N E 244, 279 Mass 224

20. Wash—**Corpus Juris quoted in** Aquino v Alaska S S. Co, 91 P 2d 1014, 1017, 199 Wash 490
58 C J p 549 note 37

21. U S—The Serpa Pinto, D C N.Y, 45 F Supp 255—Moses v. Compagnie Generale Transatlantique, D C N Y, 16 F Supp 197.
58 C J. p 551 note 75

22. U S—In re Kimball SS Co, Cal, 128 F 397, 63 C C A 139, 65 L.R A 84, certiorari denied 24 S Ct 859, 194 U S 638, 48 L Ed. 1162.

23. N Y—Cleveland v. New Jersey Steamboat Co., 68 N Y. 306—Bartlett v New York, etc, Transp Co, 8 N Y S. 309, 57 N Y Super. 348, affirmed 29 N E. 1033, 130 N.Y 659

24. U.S—Stevens v. Colombian Mail S. S. Corp, D.C N Y., 15 F.Supp. 534.
58 C.J. p 549 note 40.

25. U S—Boyce v. Anderson, Ky, 2 Pet. 150, 7 L Ed. 379.

Children and passengers under disability. Ordinarily, where the circumstances are such that dangers to children can more readily be anticipated, it seems that greater care may be required than with respect to adults;[26] but, where all customary and adequate precautions, as far as adult passengers are concerned, have been taken to guard against injuries from the vessel's machinery, and to provide additional safeguards would greatly interfere with operation, the vessel owner is under no duty to anticipate and prevent the possibility of accidents to infants incapable of caring for themselves and who are suffered by those in charge of them to roam about the ship.[27] Where an intoxicated passenger is taken on board, and to the knowledge of the vessel's employees he is in such a condition as to be unable to help himself, such care and assistance must be exercised for his safety as the situation reasonably requires,[28] and it is not sufficient to exercise only such care as would be required in the case of a sober passenger.[29] The intoxication of the passenger will not alone absolve the vessel from negligence,[30] as the mere fact that a passenger was intoxicated does not constitute contributory negligence, as discussed infra § 194.

Duty as to passenger overboard. After a passenger has fallen overboard, because of his own fault or otherwise, it is the duty of the master and crew to make every reasonable endeavor consistent with the safety of the ship and passengers to rescue the passenger as soon as his situation is discovered.[31] In addition, steamboats carrying passengers for hire are under a duty to be provided with such life saving appliances as are ordinarily requisite to save persons who have fallen overboard,[32] and, if because of negligence in having insufficient or defective means,[33] or in failing properly to man a boat sent to the aid of the imperiled passenger,[34] a rescue is not effected, which would otherwise have been accomplished, the vessel owner is liable for the passenger's drowning.[35]

(2) Persons Not Passengers

Persons, who are rightfully on the vessel but who are not passengers in the legal sense, have been regarded as invitees for whose safety ordinary care must be exercised.

Persons, who are rightfully on the vessel but who are not passengers in the legal sense, have been regarded as invitees for whose safety ordinary care must be exercised.[36] Thus, a person being carried by a vessel to a port where he is to perform some services for it may hold the vessel liable, at least, for injuries inflicted by cruel and improper treatment on the part of the ship's officers,[37] and employees of one vessel who are being transported on another vessel or tug, by virtue of a contract entered into by their employer, are invitees of the vessel on which they are being carried and entitled to the exercise of ordinary care and precaution for their safety.[38] Furthermore, it has been held that the vessel owner may be liable for injuries negligently inflicted on a person brought on board by employees in violation of the express command of the owner.[39]

Friends or relatives who, with the permission of or without objection on the part of the vessel owner, accompany passengers to the dock or on board the vessel are usually regarded as invitees or business visitors for whose safety ordinary care must be exercised,[40] although there is also some authority to

26. N.Y.—Kennedy v. Ryall, 67 N.Y. 379.
58 C.J. p. 549 note 46

27. U.S.—Kohn v. International Mercantile Marine Co., D.C.Pa., 180 F. 495—The Burgundia, D.C.N.Y., 29 F. 464.

28. Cal.—Doherty v. California Nav., etc., Co., 91 P. 419, 6 Cal.App. 131

29. Cal.—Doherty v. California Nav., etc., Co., supra

30. Wash.—Lang v. Puget Sound Nav. Co., 65 P.2d 1069, 189 Wash. 353

31. Ga.—Newton v. Seaboard Air-Line R., 87 S.E. 908, 17 Ga.App. 624
58 C.J. p. 554 note 24
Negligence of passenger in falling overboard as defense see infra § 194.

Vessel is not liable where passenger fell overboard due to his own negligence in sitting on bulwark, and everything reasonable and possible was done to rescue passenger and life-saving equipment was adequate and in proper condition.—The America, D.C.N.Y., 35 F.Supp. 413.

32. La.—Lobdell v. Bullitt, 13 La. 348, 33 Am.D. 567.
N.C.—Pate v. Tar Heel Steamboat Co., 62 S.E. 614, 148 N.C. 571

33. La.—Lobdell v. Bullitt, 13 La. 348, 33 Am.D. 567
N.C.—Pate v. Tar Heel Steamboat Co., 62 S.E. 614, 148 N.C. 571

34. N.C.—Pate v. Tar Heel Steamboat Co., supra.

35. La.—Lobdell v. Bullitt, 13 La. 348, 33 Am.D. 567.
N.C.—Pate v. Tar Heel Steamboat Co., 62 S.E. 614, 148 N.C. 571

36. U.S.—McCann v. Anchor Line, C.C.A.N.Y., 79 F.2d 338—The Vueltabajo, D.C.Ala., 163 F. 594—The City of Seattle, Wash., 150 F. 537, 80 C.C.A. 279, 10 L.R.A.,N.S., 969
N.Y.—Voirin v. Compagnie General Transatlantique, 270 N.Y.S. 643, 151 Misc. 498
58 C.J. p. 549 notes 44, 45

37. U.S.—The Vueltabajo, D.C.Ala., 163 F. 594.

38. U.S.—The Ross Coddington, D.C.N.Y., 40 F.2d 280
58 C.J. p. 549 note 44.
Employees as passengers on vessel contracted for by employer see supra § 176.

39. Tex.—Cook v. Houston Direct Nav. Co., 13 S.W. 475, 76 Tex. 353, 18 Am.S.R. 52.
58 C.J. p. 549 note 43.

40. U.S.—McCann v. Anchor Line, C.C.A.N.Y., 79 F.2d 338—The City of Seattle, Wash., 150 F. 537, 80 C.C.A. 279, 10 L.R.A.,N.S., 969.
N.Y.—Voirin v. Compagnie General Transatlantique, 270 N.Y.S. 643, 151 Misc. 498.
58 C.J. p. 549 note 45.

the contrary[41]

(3) Passengers in Forbidden Quarters

Even though a passenger, in being where he should not be, may in a sense be a trespasser, he is still a passenger, and the violation of his contract does not put an end to the duties which the carrier owes to him as such.

The presence of a passenger in a place where he should not be may not be wrongful,[42] and it has been stated that even though a passenger, in being where he should not be, may in a sense be a trespasser, he is still a passenger,[43] and the violation of his contract does not put an end to the duties which the carrier owes to him as such[44] While such a passenger is entitled to nothing that pertains to the class into which he has wrongfully intruded,[45] the duties owed to all passengers, arising out of the contract of carriage, do not disappear,[46] and the carrier must protect his safety as though he were in his proper class,[47] even though he masquerades as a passenger of another class.[48] It is, therefore, irrelevant to recovery whether the passenger had gone where he should not, provided his presence is known to the carrier and it neglects reasonably to protect him from injuries which he might suffer where he is[49] Thus, the fact that a passenger has innocently gone to a part of the vessel where he has no right to be does not cause a forfeiture of his right to be protected against the willful and wanton assaults of the vessel's servants;[50] but, where the injury has been caused by an asserted act of negligence, the fact that the passenger was in a place where he had no right to be and was not expected may be of importance in determining whether the proper degree of care was exercised for his safety.[51]

(4) Duty to Warn of Dangers

The vessel's duty to exercise care for the safety of passengers involves the duty of warning passengers of dangers which the ship's employees might reasonably anticipate and which are not readily apparent to passengers.

The vessel's duty to exercise care for the safety of passengers involves the duty of warning passengers of dangers which the ship's employees might reasonably anticipate and which are not readily apparent to passengers,[52] and the vessel will be liable for an injury that might well have been avoided had due warning been given[53] The duty to warn, however, does not extend to dangers which are as observable by, and obvious to, the passenger as to the ship's employees,[54] or to remote or possible dangers of which the passenger is aware.[55]

Sufficiency of warning. The warning should be given in such a manner as to bring home to the passengers an appreciation of the danger,[56] and, as the master is in supreme command of the vessel, he should make plain his orders for the safety of the passengers and see that they are carried out.[57]

Even if visitor is not invitee of boat, ocean liner owes duty to passenger's employee who came to bid goodbye not to do anything affirmatively to injure him, and could not escape liability for its active negligence in running into him with hand truck.—Voirin v Compagnie General Transatlantique, supra

41. Mass—Zaia v "Italia" Societa Anonyma Di Navigazione, 87 N E 2d 183, 324 Mass. 547, 11 A L.R 2d 1071.

Common-law principles applied
Since the maritime law has developed no rules for definition of duty of care owed by steamship company to person who goes on steamship to bid goodbye to a friend who is sailing as a passenger, or for determination of its breach, liability of steamship owner for injuries resulting to such person would be decided in accordance with common-law principles—Zaia v "Italia" Societa Anonyma Di Navigazione, supra.

42. **Reliance on statement of officer**
Second-class passenger suffering from seasickness was entitled to rely on statement of uniformed officer of ship directing him to deck reserved for first class passengers—Silverman v. Bermuda & West Indies S S Co, C C A N Y., 74 F.2d 683

43. U S—Silverman v Bermuda & West Indies S S Co, supra

44. U S—Silverman v Bermuda & West Indies S S Co, supra

Positive as well as negative duties
U S—Silverman v Bermuda & West Indies S. S. Co, supra.

45. U S—Silverman v Bermuda & West Indies S S Co, supra

46. U S—Silverman v Bermuda & West Indies S S Co, supra

47. U S—Silverman v. Bermuda & West Indies S S Co, supra.

48. U S—Silverman v. Bermuda & West Indies S S Co, supra.

49. U S—Silverman v Bermuda & West Indies S S Co, supra.

50. U S—New Jersey Steamboat Co v Brockett, N Y, 7 S.Ct 1039, 121 U S 637, 30 L Ed 1049
Tenn—Planters Packet Co. v. J. W. Cofer, 4 Tenn Civ.App 155

51. N Y.—Ganguzza v. Anchor Line, 89 N.Y.S 1049, 97 App Div. 352, affirmed 76 N E 1095, 184 N Y 545.

52. U S.—**Corpus Juris quoted in** Pacific S. S. Co. v. Holt, C.C.A Or, 77 F.2d 192, 197.
Conn—Parmelee v Hiller, 29 A.2d 586, 129 Conn 489
58 C J p 551 note 72

53. U S—**Corpus Juris quoted in** Pacific S S Co v Holt, C.C.A Or, 77 F.2d 192, 197.
58 C J p 551 note 73

Closing of porthole held sufficient warning
U S—Moses v. Compagnie Generale Transatlantique, D C N Y, 16 F Supp 197.

54. U S—**Corpus Juris quoted in** Pacific S S. Co, C C A.Or, 77 F 2d 192, 197—Moses v. Compagnie Generale Transatlantique, D C.N Y, 16 F Supp. 197.
Mass—Oliver v. New England S S. Co, 52 N E 2d 1, 315 Mass 151.
58 C.J p 551 note 74.

55. U S—The Winnipeg, D C Cal, 5 F Supp 469.

56. U.S—The Arabic, C.C.A.N.Y, 50 F.2d 96

57. U.S.—The Arabic, supra.

Inadequate warning
Remark by officer to passengers that they were looking for trouble if they were going to stay in a certain place, where he did not tarry to see whether they acted on his advice, was inadequate warning, since it can

The owner and operators of the vessel are not bound to advise the passengers of the specific risks they would incur in disregarding the warning.[58]

(5) Protection against Injuries by Fellow Passengers or Other Third Persons

The vessel may be liable for injuries to a passenger by the negligence or misconduct of fellow passengers or third persons where the vessel or its employees know or might reasonably anticipate the happening of such injury, and fail or neglect to take the proper precautions to prevent it.

The vessel and its employees are under a duty to use great care to protect passengers from the negligent and reckless acts of other passengers,[59] and, where the vessel or its employees know of a threatened injury by a fellow passenger or might reasonably anticipate the happening of such injury, and fail or neglect to take the proper precautions to prevent it, the carrier is liable therefor.[60] The liability of the vessel arises not alone from the fact that the passenger has been injured, but from the failure to afford him proper protection, and, hence, unless the vessel or its employees know or ought to know that danger from fellow passengers exists or is reasonably to be apprehended, and can, by the use of proper care, prevent the injury, the carrier is not liable.[61] Thus, if the carelessness of a fellow passenger is such that no danger from it can reasonably be apprehended, the vessel owner will not be liable for failure to obviate it.[62] Furthermore, the vessel is not liable where its employees have used all available means to prevent the injury to a passenger by the tort or misconduct of a fellow passenger.[63]

Third persons. The vessel is not liable to passengers for the unforeseen negligent or illegal acts of third persons, which could not reasonably have been anticipated or guarded against,[64] but it must take care to guard against the acts of third persons, which may reasonably be anticipated,[65] and, if the vessel has itself been negligent, liability is not excused by reason of the fact that the negligence of another vessel has contributed to the injury.[66]

Arrest of passengers by officials of local ports. The duty of a vessel to protect its passengers against the unlawful acts of third persons does not require that its officers interfere with an arrest, by public officials at the port of destination, of a passenger who is suspected of having committed a crime while the vessel was on the high seas, even though such officials act mistakenly and unlawfully.[67]

(6) Negligence and Wrongs of Vessel's Employees

Although there is no liability for conduct of employees which is not negligent or wrongful, the owner, the vessel, or the master is liable for any injury suffered by a passenger because of the negligent conduct of an employee in the course of his employment, and by the great weight of authority the owner or the vessel may be liable, under some circumstances, for acts of an employee outside the scope of his employment.

Although there is no liability for conduct of employees which is not negligent or wrongful,[68] for any injury suffered by a passenger because of the negligent conduct of an employee in the course of his employment on board the vessel the owner,[69]

scarcely be called an order.—The Arabic, supra

58. Use of swimming pool

Steamship owner and operators, having entirely forbidden use of swimming pool at a time when heavy seas were being encountered, were not bound to advise passengers of specific risks they would incur in entering pool at such time.—Erdman v. U. S., C C A N Y., 143 F.2d 198, certiorari denied 65 S Ct. 122, 323 U S 769, 89 L Ed 615.

59. U S.—Northern Commercial Co v Nestor, Alaska, 138 F 383, 70 C C A 523

58 C J p 551 note 76.

60. U S—Northern Commercial Co. v Nestor, supra

58 C J p 552 note 77

61. Wash—Aquino v Alaska S S Co., 91 P 2d 1014, 199 Wash 490.

Opportunity to prevent injury

Knowledge or opportunity to acquire knowledge must have existed for a period of time sufficient to permit the taking of steps for the protection of passengers.—River Excursion Co v Kuntz, 51 S W 2d 911, 244 Ky. 587

Overcrowding

Ky.—River Excursion Co v Kuntz, supra

N Y.—Preston v Hudson River Day Line, 27 N Y S 2d 597, 176 Misc 412, affirmed 32 N Y S 2d 132, 263 App Div. 814

Injury from dog

Steamship passenger was not improperly permitted to take his dog from its quarters in hold for purpose of exercising it on upper deck, and where dog was not known to be vicious, steamship could not be held liable on theory that passenger was its agent for injuries sustained by passenger when dog which had been negligently left tied to rail bit the passenger.—Aquino v. Alaska S. S. Co., 91 P.2d 1014, 199 Wash. 490.

62. U.S—Mulvana v. The Anchoria, N Y, 83 F. 847, 27 C.C.A 650.

58 C.J. p 552 note 78.

63. Md—Tall v. Baltimore Steam Packet Co, 44 A 1007, 90 Md. 248, 47 L.R A 120.

10 C J p 903 note 52 [a]

64. U S—The Lusitania, D C N Y, 251 F. 715

58 C J p 552 note 79

65. Mich—Anda v Chicago, etc, Transit Co, 204 N W 761, 231 Mich. 567.

66. U S—Moses v. Hamburg-American Packet Co, D C N Y, 88 F 329

N.Y—Jung v. Starin, 33 N Y S 650, 12 Misc. 362.

67. D C—Murphy v New York, etc, Mail SS Co, 273 F. 305, 50 App D C. 341

68. U S—The City of St. Louis, D C N.Y., 238 F. 381.

Damages recoverable against vessel or owner for willful assault by employee see infra § 202.

Liability for acts of connecting carrier's employees see supra § 192.

69. U S—Compagnie Generale Transatlantique v Bump, N.Y., 234

the vessel,[70] or the master[71] is liable. There is some authority for the view that the vessel owner is not liable for an injury caused by a willful or malicious act of an employee, which is done outside the scope of his employment,[72] but by the great weight of authority the contract of carriage imposes on the vessel and its owner the duty to see that the passenger is given absolute protection against the acts of employees on board, and liability for an injury by the act of an employee exists irrespective of whether the act was willful or malicious, and outside the scope of the employee's employment, as long as it was done during the discharge of the duty owed by the employer to the passenger.[73] Thus, the vessel owner has been held liable for wanton assaults on passengers[74] or for their wrongful arrest and imprisonment,[75] irrespective of whether the employee is acting to benefit his employer or because of malicious motives of his own, and also for injuries resulting because of a drunken officer forcing his way into the stateroom of a female passenger at night.[76]

It is not every assault by an employee on a passenger which gives rise to a cause of action against the vessel or its owner.[77] Employees may use such force as is reasonable and necessary to compel a passenger to comply with a valid regulation, and the carrier will not be liable for injuries caused by the use of such force,[78] although it will be liable if the force used is unreasonable and unnecessary.[79] The fact that a passenger has voluntarily engaged in a prior combat with an employee affords no justification for a subsequent assault made by the employee without participation on the part of the passenger.[80]

Threats, insults, and disrespectful treatment. Among other things which the contract of carriage places on those who are bound by it is the duty to see that passengers are accorded proper and respectful treatment by the officers and servants of the vessel, and are not made the object of insulting and humiliating language or conduct by such employees.[81] It has been said that female passengers especially are entitled to complete exemption from rude, indecent, or brutal behavior toward them by employees.[82]

Aid to helpless passengers. If the negligence of a vessel's servants places a passenger in a position in which he is unable to care for himself, the vessel owner is liable if the servants do not exercise care in extending the passenger such proper assistance as is required,[83] and, although a passenger, without fault on the part of the vessel,[84] or even by his own fault,[85] has got into a helpless condition, the ship's employees in attempting to aid him must use due care to avoid injury.

Liability for acts of particular types of employees. In general the liability for acts of employees extends not only to officers of the vessel,[86] but to all members of the crew.[87] However, if an employee of a steamboat in ejecting or arresting a passenger acts under the direct command of a police officer in a jurisdiction where there is a statute making it the duty of every person to aid in an arrest after being commanded to do so, the vessel owner is not responsible for the employee's conduct in obeying such a command.[88]

Physicians and surgeons. Apparently the vessel may be held liable where a ship's surgeon negli-

F 52, 148 C.C.A. 68, certiorari denied 37 S.Ct. 114, 242 U.S. 642, 61 L.Ed. 542
58 C.J. p. 552 note 85

70. U.S.—The City of Panama, Wash., 101 U.S. 453, 25 L.Ed. 1061
58 C.J. p. 552 note 86

71. N.Y.—Kennedy v. Ryall, 67 N.Y. 379.
58 C.J. p. 552 note 87.

72. N.Y.—Haack v. Fearing, 28 N.Y. Super. 528, 4 Abb. Pr., N.S., 297, 35 How. Pr. 459
58 C.J. p. 302 note 98 [a], p. 553 note 88

73. U.S.—New Jersey Steamboat Co. v. Brockett, N.Y., 7 S.Ct. 1039, 121 U.S. 637, 30 L.Ed. 1049.
58 C.J. p. 553 note 89.

74. U.S.—Pacific SS. Co. v. Sutton, C.C.A. Wash., 7 F.2d 579, certiorari denied 46 S.Ct. 202, 269 U.S. 586, 70 L.Ed. 425.
58 C.J. p. 553 note 90.

75. U.S.—Ragland v. Norfolk, etc., Steamboat Co., D.C. Va., 163 F. 376, modified on other grounds 169 F. 286, 94 C.C.A. 562
58 C.J. p. 553 note 91.

76. Ga.—Ocean SS. Co. v. Bassett, 127 S.E. 671, 33 Ga. App. 696

77. Mass.—Ellis v. Narragansett SS. Co., 111 Mass. 146

78. Mass.—Ellis v. Narragansett SS. Co., supra

79. U.S.—New Jersey Steamboat Co. v. Brockett, N.Y., 7 S.Ct. 1039, 121 U.S. 637, 30 L.Ed. 1049.

80. Wash.—Marks v. Alaska SS. Co., 127 P. 1101, 71 Wash. 167.

81. U.S.—Austro-American S.S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.
58 C.J. p. 553 note 97.

82. La.—Keene v. Lizardi, 5 La. 431, 25 Am.D. 197, 6 La. 315, 26 Am.D. 478.

83. N.Y.—Smith v. British, etc., Royal Mail Steam Packet Co., 86 N.Y. 408.
Medical care and assistance to passengers see supra § 186.

84. U.S.—Chicago, etc., SS. Co. v. Lynch, Ill., 201 F. 70, 119 C.C.A. 408.
58 C.J. p. 553 note 2

85. Cal.—Doherty v. California Nav., etc., Co., 91 P. 419, 6 Cal. App. 131.
58 C.J. p. 553 note 3.

86. Mass.—Bryant v. Rich, 106 Mass. 180, 8 Am.R. 311, affirmed 21 Wall. 41, 22 L.Ed. 476

87. U.S.—Ramjak v. Austro-American SS. Co., La., 186 F. 417, 108 C.C.A. 339, certiorari dismissed 33 S.Ct. 772, 229 U.S. 627, 57 L.Ed. 1357
58 C.J. p. 554 note 5.

88. Wash.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149.

gently fails to make any attempt to give an injured passenger proper treatment;[89] but it is the general rule that a physician or surgeon taken on board in compliance with a statutory command is not a servant or agent of the shipowner and the latter is not liable for the negligence of the former in treating a passenger, provided the duty of selecting a physician who is competent and duly qualified has been fulfilled.[90] The relationship of physician and patient must be created with the consent of the passenger in order that this rule may apply,[91] and a shipowner may be held responsible where a statutory physician, under orders of ship officers, compels a passenger to undergo an injurious examination against his wishes,[92] but not where a passenger by his conduct voluntarily submits to an operation.[93] It also seems to be the rule that a vessel owner is not responsible for negligent treatment by a physician or surgeon, carried as a matter of choice, provided the duty of selecting a reasonably competent man for that position has been duly fulfilled.[94] In the selection of a physician or surgeon only reasonable care and diligence need be exercised.[95] It is not necessary that he be of the highest skill and longest experience;[96] and this duty is sufficiently fulfilled when the physician's fitness is diligently inquired into and proper evidence of his qualifications is duly demanded and received.[97] The fact that the surgeon errs in his treatment does not prove that he was incompetent or that the steamship company was negligent in appointing him.[98]

Pilots. The fact that owners are bound to take a pilot, and that they are restricted in their choice to those pilots licensed by the government inspectors, does not exempt a vessel owner from liability for injuries caused by the negligence of the pilot in the navigation of the vessel.[99]

Stevedores. Although stevedores who have made a contract to load or unload a vessel are ordinarily regarded as exercising an independent employment so that the ship is not liable for their acts,[1] in handling the baggage of passengers, bringing it on board from the wharf, and placing it where the passenger desires in his compartment, stevedores are not exercising an independent employment,[2] but are performing a duty to passengers, which rests on the ship,[3] it is the duty of ship's officers to see that the task is so performed that risk of accident to persons on board is avoided,[4] and if, through want of care, stevedores are not prevented from using a companionway which is being used by passengers and their friends and injury results, the vessel is liable.[5]

b. Appliances, Equipment, and Condition of Vessel

At least due care must be exercised to see that the vessel is sufficiently seaworthy to withstand the foreseeable perils of the contemplated voyage, and all ordinary care and skill must be exercised to see that parts and appliances of the vessel intended to be used by passengers are in a safe condition for use.

At least due care must be exercised to see that the vessel is sufficiently seaworthy to withstand the foreseeable perils of the contemplated voyage.[6] All ordinary care and skill must be exercised to see that parts and appliances of the vessel intended to be used by passengers are in a safe condition for use,[7]

89. U.S.—The Korea Maru, Hawaii, 254 F 397, 165 C C A. 617
Duty to provide medical service:
In absence of statute see supra § 186.
Under statutory requirements see supra § 179.

90. U S —The Korea Maru, supra.
58 C J. p 554 note 14.

91. N Y —O'Rourke v Cunard SS Co, 154 N.Y.S. 29, 169 App Div. 943, affirmed 118 N E 1070, 222 N.Y. 574.

92. N Y.—O'Rourke v Cunard SS. Co, supra.

93. Mass —O'Brien v. Cunard SS Co, 28 N E 266, 154 Mass 272, 13 L R A. 329
58 C J p 554 note 17.

94. U.S.—Branch v. Compagnie Generale Transatlantique, D C.N Y., 11 F Supp. 832—The Great Northern, Hawaii, 251 F 826, 163 C C A 660.
58 C.J. p 554 note 18.

95. U.S —The Great Northern, supra
58 C J. p 554 note 19.

96. N Y —Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappy, 13 N E. 781, 107 N.Y 228, 1 Am S R 815

97. U.S —The Great Northern, Hawaii, 251 F. 826, 163 C.C A. 660

98. N.Y —Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappy, 13 N E 781, 107 N Y 228, 1 Am S R. 815.

99. U.S —Sherlock v. Alling, Ind., 93 U.S 99, 23 L Ed. 819.

1. U.S.—Unitus v The Dresden, D C Md., 62 F. 438.

2. U S —Unitus v. The Dresden, supra.

3. U.S —Unitus v. The Dresden, supra.

4. U.S.—Unitus v. The Dresden, supra.

5. U.S.—Unitus v. The Dresden, supra

6. U S.—The Linseed King, D.C N Y., 24 F 2d 967.
58 C.J. p 556 note 40.
Compliance with statutory regulations as to equipment as relieving from liability see supra § 177

7. U.S —**Corpus Juris quoted in** Pacific S S. Co v. Holt, C C A Or, 77 F 2d 192, 197—Henson v Fidelity & Columbia Trust Co, C.C A.Ky, 68 F 2d 144, rehearing denied 69 F 2d 778—Kulack v. The Pearl Jack, D C Mich, 79 F Supp 802, affirmed, C A, 178 F 2d 154
58 C J. p 556 note 41.

Passageways, gangways, etc., intended to be used by passengers on a seagoing vessel, should be kept clear of dangerous obstructions — Aquino v. Alaska S. S. Co., 91 P.2d 1014, 199 Wash. 490.

Repairs

Shipowners are exempt from liability when they exercise due diligence in selecting trustworthy, experienced, and capable persons to make repairs —Henson v. Fidelity & Columbia Trust Co, C C A Ky, 68 F 2d 144, rehearing denied 69 F 2d 778

but the mere fact that the appliances maintained by the vessel present a measure of peril does not necessarily import negligence.[8] It has been stated that the conveniences and safeguards required depend on the size and the character of the vessel.[9] In places where the presence of passengers is contemplated, proper precautions must be taken to guard against injuries likely to result from their natural mistakes due to ignorance as to the condition or construction of the vessel,[10] and it cannot be assumed that they are as familiar with the construction of vessels as experienced seamen;[11] but there is no duty to guard against accidents which result from an unanticipated use of a particular part of the vessel;[12] and only reasonable care, prudence, and diligence need be exercised in respect of matters which are not in themselves dangerous and which passengers have an opportunity to observe.[13]

Inspection. A vessel carrying a large number of passengers in the exercise of the responsibility resting on it must make some degree of inspection to see that the various parts and appointments of the vessel remain safe and are not put out of place or rendered dangerous by such ignorant or stupid persons as commonly might be anticipated among a large number of passengers.[14]

Customary and generally approved appliances and machinery. As a common carrier, a vessel engaged in the carriage of passengers is required to use well-known and approved appliances for the safety of passengers[15] Where the machinery and appliances of a vessel are such as have been in general use and found to be safe, it is generally held that their use is not negligence such as will render the carrier reasonsible for injuries sustained by a passenger from them,[16] but the fact that a vessel or its appliances are constructed in accordance with a standard that is fairly prevalent does not necessarily exclude the existence of negligence in construction since the use of a standard clearly dangerous may constitute negligence.[17]

Machinery and mechanical apparatus Before the voyage is commenced the mechanical apparatus of the vessel, which is necessary for its operation, must be placed in good condition so that passengers will not be injured by reason of the vessel's being helplessly stalled in the open sea.[18] In order to protect passengers against injuries that are likely to be the direct result of defects in machinery all precautions against danger, which have been practically tested and are of known value, must be adopted;[19] but the machinery need not be made of the "most perfect" material or constructed in the "most perfect" manner;[20] and, where a passenger has been injured by the explosion of a boiler, the fact that skillful manufacturers of machinery used in such ships did not use certain safety appliances, which science had made known and demonstrated to be useful, is not conclusive on the question of the vessel's negligence.[21] The owners of vessels used in

Berths

(1) Vessel must comply with passenger's reasonable request for suitable device to afford convenient access to berth, and where passenger requested footstool of custodian of cabin, vessel assumed responsibility for adequacy of stool to meet stated needs —The De Grasse, D C N Y, 58 F.2d 1019.

(2) If cabin steward could not procure stool which passenger sought for climbing into berth, steward should have relayed request to superior, and if vessel's agent assumed to decide passenger did not require lower stool to climb into berth, or that article supplied was adequate, vessel was liable for natural consequences.—The De Grasse, supra.

(3) Where a ladder to an upper berth is hanging in a place which appears to be safe, the carrier owes a duty to a passenger to warn him of the danger of using the ladder in that position, and to instruct him in the proper application of the ladder.—Pacific S. S. Co. v. Holt, C.C.A. Or., 77 F 2d 192.

(4) Other decisions with respect to berths see 58 C J p 556 note 41 [b]

Doors

Steamship company's failure to equip door of ship opening on deck with automatic controls to retard its motion in closing was held negligence as to passenger injured by door slamming on his fingers —Osipuk v Oceanic Steam Nav. Co, C.C.A.N.Y., 64 F 2d 478.

8. U.S —Kitsap County Transp. Co v Harvey, C C A Wash., 15 F 2d 166, 48 A.L R 1420.

9. Alaska —The Esterbeth, 8 Alaska 486.

Chamber or slop jar was held not required under circumstances —The Esterbeth, supra

10. U S —**Corpus Juris quoted in** Pacific S S. Co v. Holt, C C.A Or., 77 F.2d 192, 197.
58 C.J. p 557 note 42.

11. U.S.—**Corpus Juris quoted in** Pacific S. S. Co. v Holt, C.C A Or., 77 F.2d 192, 197—The Pilot Boy, D.C. Md., 23 F. 103.

12. U S —The Caracas, D C N.Y., 163 F. 662.

13. N Y.—Bruswitz v. Netherlands American Steam Nav. Co, 19 N Y. S. 75, 64 Hun 262.

14. Mass —Hanley v. Eastern SS Corp, 109 N E 167, 221 Mass. 125, Ann Cas 1917D 1034.

15. Mass —Rizzo v Winnisimet Co, 104 N E 363, 217 Mass. 19, Ann Cas 1915C 1003.

16. U S —Savage v. New York, etc, SS Co., N Y, 185 F. 778, 107 C C.A. 648.
58 C J. p 557 note 48.

Linoleum floor covering
Alaska —The Esterbeth, 8 Alaska 486.

17. U.S —Kitsap County Transp. Co v. Harvey, C C A Wash., 15 F 2d 166, 48 A.L.R. 1420.
58 C.J. p 557 note 49.

18. U.S —North Coast Lighterage Co v. Greenwood, Alaska, 162 F. 25, 89 C.C A. 65.

19. **Paddle wheel**
Mo —Yerkes v Keokuk Northern Line Packet Co., 7 Mo App. 265

20. Mo.—Yerkes v Keokuk Northern Line Packet Co, supra

21. N.Y.—Caldwell v. New Jersey Steamboat Co., 47 N Y. 282.

carrying passengers do not undertake that the machinery they employ is absolutely free from defects;[22] and, where all proper care has been exercised, there is no liability for injuries resulting from latent or undiscoverable defects in the machinery or mechanical equipment.[23] However, where the use of apparatus is such that dangerous consequences are likely to result from a defective condition, more than ordinary care must be exercised,[24] and in such a case the fact that a defective condition is not observed or apparent does not necessarily exclude negligence where there are means available, by careful examination or practical tests, to discover the cause of the infirmity in the defective appliance.[25] With respect to machinery which is not inherently dangerous only ordinary care, in view of the dangers to be apprehended, need be exercised,[26] but if there is a failure to exercise such care, and a defect results in injury to a passenger, the vessel is liable.[27]

Guard rails and chains around deck. All portions of the deck on which passengers are permitted to go must be reasonably guarded by chains, rails, or some other means, to prevent passengers from falling or slipping overboard.[28] A statutory regulation requiring ocean-going vessels to have lifeboats so placed and fitted that they can be launched in two minutes does not absolve the owner of such a vessel from his duty to see that the space between the ends of two lifeboats is protected by reasonably safe guard chains, although the space behind the boats must be left open;[29] or, if the only kind of guard consistent with the regulation is an insecure one, there is a duty to exclude passengers from the immediate neighborhood of the lifeboats.[30] Gangway openings may be sufficiently protected by the use of customary means which experience has proved to be safe;[31] and a failure to have all the guards completely in place immediately after the vessel leaves the dock does not show negligence where the opening is sufficiently guarded for ordinary purposes but a passenger is pushed overboard because of an unanticipated event,[32] but a complete failure to have the gangway gate set, at the time the vessel leaves the dock, is negligence which will render the vessel owner liable for injuries sustained by a passenger in being pushed overboard through the opening.[33]

Safety appliances. A vessel engaged in the carriage of passengers must be supplied with reasonably adequate life-saving appliances,[34] and in order to have a sufficient exercise of reasonable care for the safety of passengers it is necessary that appliances used for extinguishing fires be kept, at all times, in a condition for immediate service.[35]

c. Boarding and Discharge of Passengers

It is the duty of a carrier of passengers to maintain at all proper times a reasonably safe means for passengers to get on and off the vessel employed, and to provide employees to render such services as are necessary to get passengers safely aboard or on shore.

It is the duty of a carrier of passengers by water to maintain, at all proper times, a reasonably safe means for passengers to get on and off the vessel employed,[36] and to provide employees to render such services as are necessary to get passengers safely aboard or on shore.[37] This duty exists with respect to passengers who have already come aboard and are returning to perform some forgotten errand, as well as those coming on for the first time or those finally departing at the port of destination.[38]

Gangplanks. Narrowness and lack of guards or rails of any kind have been regarded as rendering a gangplank insufficient,[39] although, in cases where the use of such a gangplank has involved its being placed at a considerable angle, this latter fact has also been stressed as showing its insufficiency.[40]

22. U S—The Nederland, D C Pa., 7 F 926, affirmed, C.C., 14 F 63. 58 C J p 557 note 55

23. U S—The Nederland, supra. 58 C J p 557 note 56

24. N.Y—Miller v. Ocean SS. Co., 23 N E 462, 118 N Y 199.

25. N Y—Miller v. Ocean SS. Co., supra.

26. N Y—Ganguzza v Anchor Line, 89 N Y S. 1049, 97 App Div 352, affirmed 76 N.E 1095, 184 N Y. 545

27. U.S.—Mellquist v The Wasco, D C.Wash, 53 F 546

28. Mass—Hanley v Eastern SS Co., 109 N E. 167, 221 Mass 125, Ann Cas 1917D 1034.

29. Mass—Hanley v. Eastern SS Co, supra.

30. Mass—Hanley v. Eastern SS Co, supra.

31. N Y—Dougan v. Champlain Transp. Co., 56 N.Y. 1.

32. N Y—Cleveland v New Jersey Steamboat Co, 68 N Y 306.

33. N Y—Cleveland v. New Jersey Steamboat Co., 7 N Y St. 598

34. La—Lobdell v. Bullitt, 13 La 348, 33 Am D. 567.
Statutory regulations as to life-saving and other safety appliances see supra § 179.

35. U S—The Garden City, D C.N.Y, 26 F. 766.

36. U.S—Bellocchio v Italia Flotte Riunite Cosulich Line Lloyd Sagaudo Navigazione Generale, C.C A N. Y, 84 F 2d 975.
58 C J p 558 note 71.
Contributory negligence of passenger in getting on or off vessel see infra § 194

37. U S—The Ocracoke, D C Va., 159 F. 552.

38. U S—Hrebrik v. Carr, D.C.N.Y, 29 F. 298

39. U S—Hrebrik v. Carr, supra—The Anglo Norman, D C Cal, 1 F. Cas.No.393, 4 Sawy. 185.

40. U S—Burrows v. Lownsdale, Wash, 133 F. 250, 66 C.C.A. 650. Wash—Mawson v. Eagle Harbor Transp. Co, 268 P. 595, 148 Wash 258, 59 A.L R. 1352.

If, in the use of such a gangplank, a passenger falls off and is injured, the carrier is liable for the injuries sustained irrespective of the cause of the fall if a sufficient gangplank would have prevented the injury [41]

Securing gangplank or vessel. The carrier is not only liable for injuries resulting from a failure securely to fasten a gangplank in the first instance,[42] but also for those resulting from a negligent failure to refasten a gangplank after it has been made insecure by the act of a third person,[43] since there is a duty to see that a gangplank remains secure as well as fixing it that way at the outset.[44] Where passengers step directly from the vessel onto the dock, an insecure mooring of the vessel so as to permit it to swing away will render the vessel liable for injuries caused by a passenger's stepping in the opening which is occasioned.[45]

Use of lifeboats or tenders and assistance into them. If the rolling motion of a tender in which a passenger is about to embark from the vessel for shore is such as to be readily observable to him, and is not so great as to be dangerous to passengers apparently able to care for themselves, the vessel is not liable for injuries caused to the passenger by the rolling of the tender against him while he is attempting to step into it.[46] A seaman in assisting a passenger into a lifeboat need render, as to a normal appearing passenger, only such help as is usually needed by such persons as are apparently strong and able to care for themselves,[47] and if an apparently capable passenger feels the need of extra assistance he should ask for it.[48] If passengers overcrowd a small boat being used to carry passengers from shore to the vessel, it is the duty of the officer in charge to compel a sufficient number to get out or else refuse to start for the vessel until this is done;[49] and, if this is not done so that by reason of the overcrowding the boat capsizes on the way to the ship, the vessel owner is liable for injuries resulting to passengers [50]

d. Wharves, Docks, and Approaches

It is at least the duty of the owner of a vessel engaged in the carriage of passengers to keep in a reasonably safe condition the wharves, docks, or platforms on which passengers are invited for the purpose of waiting for, or going to, vessels.

Although it has been said that the high degree of care exacted of vessels with respect to the safety of passengers during the voyage does not extend to approaches used in taking passage,[51] and there is no liability for injuries where there has been no negligence,[52] it is at least the duty of the owner of a vessel engaged in the carriage of passengers to keep in a reasonably safe condition the wharves, docks, or platforms on which passengers are invited for the purpose of waiting for, or going to, vessels, and the owner is liable in damages for any injuries resulting to passengers because of a violation of this duty [53] Although a passenger has only a through ticket he does not forfeit his rights as a passenger by getting off at an intermediate port, and he may recover for injuries sustained by reason of the unsafe condition of a wharf at such port [54] Where a steamship company has provided a regular and safe approach to its dock, it is under no duty to maintain in a safe condition a short cut to the dock, which has been made by other persons, and which the company has never invited its passengers to use,[55] nor need it guard a passenger in using an ap-

41. U.S.—Burrows v. Lownsdale, Wash., 133 F. 250, 66 C.C.A. 650
58 C.J. p. 558 note 76

Unguarded gangplanks cannot be justified by custom.
U.S.—Burrows v. Lownsdale, supra
Wash.—Mawson v. Eagle Harbor Transp. Co., 268 P. 595, 148 Wash. 258.

42. Mass.—Parker v. Boston, etc., Steamboat Co., 109 Mass. 449.
Pa.—McBride v. McNally, 89 A. 1131, 243 Pa. 206, 52 L.R.A.,N.S., 259

43. Wash.—Croft v. Northwestern S.S. Co., 55 P. 42, 20 Wash. 175.

44. Wash.—Croft v. Northwestern S.S. Co., supra.

45. U.S.—The City of Portsmouth, D.C.Va., 125 F. 264.
Mass.—Rizzo v. Winnisimmet Co., 104 N.E. 363, 217 Mass. 19, Ann.Cas.1915C 1003.

46. U.S.—The Empress of Scotland, D.C.N.Y., 11 F.2d 783, affirmed, C.C.A., 24 F.2d 1018.

47. U.S.—Goode v. Oceanic Steam Nav. Co., N.Y., 251 F. 556, 163 C.C.A. 550

48. U.S.—Goode v. Oceanic Steam Nav. Co., supra

Assumption that passenger would exercise care
With respect to liability of ship to passenger, who was injured when crossing from lifeboat to motorboat for purpose of going ashore, steward, who was assisting passengers, had right to assume that passenger, who was apparently able to take care of himself, would exercise care of reasonably prudent man.—The Vulcania, D.C.Mass., 8 F.Supp. 300

49. U.S.—In re Kimball S.S. Co., Cal., 128 F. 397, 63 C.C.A. 139, 65 L.R.A. 84, certiorari denied 24 S.Ct. 859, 194 U.S. 638, 48 L.Ed. 1162.

50. U.S.—In re Kimball S.S. Co., D.C. Cal., 123 F. 838, reversed on other grounds 128 F. 397, 63 C.C.A. 139, 65 L.R.A. 84.

51. Mich.—Anda v. Chicago, etc., Transit Co., 204 N.W. 761, 231 Mich. 567

52. N.Y.—Murrain v. Wilson Line, 59 N.Y.S.2d 750, 270 App.Div. 372, affirmed 72 N.E.2d 29, 296 N.Y. 845, reargument denied 73 N.E.2d 572, 296 N.Y. 995
58 C.J. p. 559 note 87

53. Me.—Hutchins v. Penobscot Bay, etc., Steamboat Co., 86 A. 250, 110 Me. 369, Ann.Cas.1914D 132.
58 C.J. p. 559 note 88.

54. Or.—Dice v. Willamette Transp., etc., Co., 8 Or. 60, 34 Am.R. 575.
58 C.J. p. 559 note 89

55. Mich.—Woods v. White Star Line, 125 N.W. 396, 160 Mich. 540.
58 C.J. p. 559 note 90.

proach against the unforeseeable and negligent acts of third persons.[56]

e. Management and Navigation of Vessel

Unless exempted by statute, the owner of a vessel engaged in the carriage of passengers is under a duty to see that due care and precaution, for the safety of passengers, are exercised by those in charge of the management and navigation of the vessel, and the owner will be liable if a passenger is injured by any negligence either in management or navigation.

Unless exempted by statute, the owner of a vessel engaged in the carriage of passengers is under a duty to see that due care and precaution, for the safety of passengers, are exercised by those in charge of the management and navigation of the vessel, and the owner will be liable if a passenger is injured by any negligence either in management[57] or navigation.[58] Where navigation is beset by obvious or foreseeable perils, greater care in management and navigation of the vessel must be exercised than under ordinary circumstances;[59] but, although the captain of a passenger vessel which is navigating in waters made dangerous by the existence of conditions of warfare does not exactly follow the advice of the admiralty of his country as to the best method of avoiding the dangers involved, he cannot be deemed negligent in navigating the vessel if he uses his best judgment and adopts what, to one in his situation and with his skilled judgment, might well seem to be the proper course to pursue to secure the safety of those on board.[60] Statutory provisions exempting the owner from liability for damage or loss to merchandise or property resulting from faults or error in navigation where the owner has exercised due diligence to make the vessel seaworthy apply only as between the vessel and the cargo and do not relieve the owner from liability for injuries sustained by a passenger due to the negligent management or navigation of the vessel,[61] even though the vessel engages in the carriage of merchandise as well as the carriage of passengers.[62]

Radio reports of approaching storms. Since the development of modern methods of broadcasting reports of future weather conditions, the failure to foresee the approach of an unprecedented hurricane, and faultless navigation in view of the information at hand, do not relieve the vessel from liability for injuries caused to passengers by such a storm when advance information of the approach of the hurricane could have readily been obtained by radio broadcast, but is not, and with such information the course of the vessel could have been so directed as to avoid the injuries sustained.[63]

Disasters. Although a disaster has caused a vessel to sink without any fault on the part of those in charge of her, they are bound to use the utmost exertions in their power to avert injury from the impending peril, and the shipowner's liability for injuries that could have been avoided by such exertions continues until the passengers are safely landed;[64] but errors in judgment in an emergency are not necessarily negligence,[65] and for them the ves-

56. Mich.—Anda v. Chicago, etc., Transit Co., 204 N.W. 761, 231 Mich. 567.

57. U.S.—The Linseed King, D.C.N.Y., 24 F.2d 967
58 C.J. p. 555 note 30.

Violation of statutory provisions as to safeguards for the protection of passengers on a steamboat has been held negligence per se.—Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282.

58. U.S.—Morrison v. Coombs, D.C. Me., 23 F.Supp. 852, opinion adhered to 24 F.Supp. 366.
58 C.J. p. 555 note 31.

Collision with pier

Where steamship crossing river in broad daylight under normal weather and tide conditions collided with pier with such force as materially to damage pier and injure passengers, in the absence of some intervening cause or showing that collision was result of inevitable accident or that it could not have been avoided by exercising due care, collision was result of poor seamanship and claimant was liable for such damage as libelants, who were passengers on such vessel, sustained as result of the collision.—Freund v. The Chauncey M. Depew, D.C.N.Y., 45 F.Supp. 263.

Degree of care and skill

(1) In actions growing out of injuries sustained by passengers of steamship, the jury must determine with respect to navigation whether master was attentive to his duties and exercised his skill and best judgment under any given circumstance, and, in addition, they must be satisfied that master exercised a very high degree of care and skill in so doing.—Voltmann v. United Fruit Co., C.C.A.N.Y., 147 F.2d 514.

(2) Where ship rolled so heavily in a storm that passengers were injured and principal issue was whether, in view of what knowledge of storm and of prevailing weather conditions master of ship was shown to have had, he took requisite precaution for safety of passengers, the giving of a binding instruction which forbade the jury to find that ship was negligently navigated provided master fairly exercised his own judgment and skill was error.—Voltmann v. United Fruit Co., supra.

Sudden jerk or stop

A carrier by water may be liable for injuries to a passenger resulting from an unnecessary, unusual, and sudden jerking or stopping of a boat, so violent as to indicate negligence.—Coney Island Co. v. Brown, 162 S.W.2d 785, 290 Ky. 750.

59. U.S.—The Linseed King, D.C.N.Y., 24 F.2d 967.
58 C.J. p. 555 note 32.

60. U.S.—The Lusitania, D.C.N.Y., 251 F. 715

61. U.S.—The Havana, D.C.N.Y., 45 F.Supp. 244
58 C.J. p. 555 note 29.

62. U.S.—The Havana, supra.
58 C.J. p. 555 note 29.

63. U.S.—The Arabic, C.C.A.N.Y., 50 F.2d 96.
58 C.J. p. 556 note 34.
Statutory duty of passenger vessels to carry wireless and radio apparatus see supra § 179.

64. U.S.—The Erastus Corning, D.C. Conn., 158 F. 452.
58 C.J. p. 556 note 35.

65. U.S.—The Vestris, D.C.N.Y., 60 F.2d 273
58 C.J. p. 556 note 36.

sel will not be responsible if the employees in charge are generally competent.[66] However, it has been held that a delay in sending S. O. S. messages requesting assistance for a sinking vessel constituted negligence.[67]

Other vessel of same line. Where a company is running several boats on the same line as carriers of passengers, it cannot escape liability for injuries sustained by a passenger in a collision of two of the boats by reason of the fact that due care has been exercised in the management of the boat on which the passenger is being carried; but it must exercise the same degree of vigilance and care in the management of the other boats employed in the same business.[68]

§ 194. —— Passenger's Contributory Negligence or Assumption of Risk

a. In general
b. Acts in disregard of warning
c. Particular instances of contributory negligence

a. In General

It is the duty of a passenger on a vessel to exercise for his own safety such care as an ordinarily prudent man would under the same circumstances, and it is the generally accepted rule that, although there has been negligence on the part of the vessel or its employees which contributes to the injuries, if a failure of the passenger to exercise ordinary care is proximately connected with the injuries, he is guilty of contributory negligence which will defeat his recovery.

The general rule of carriers, as applied to the carriage of passengers by water, makes it the duty of a passenger on a vessel to exercise for his own safety such care as an ordinarily prudent man would under the same circumstances;[69] and it is the generally accepted rule that, although there has been negligence on the part of the vessel or its employees which contributes to the injuries, if a failure of the passenger to exercise ordinary care is proximately connected with the injuries, he is guilty of contributory negligence which will defeat his recovery.[70] This rule does not make it the duty of the passenger to see that he is in fact safe;[71] but he need use only ordinary means to secure the safety that would exist under ordinary circumstances, except in so far as he is bound to perceive that the circumstances are in fact extraordinary.[72]

Comparative negligence doctrine. By some authorities, where the contributory negligence of the passenger is slight, he has not assumed the risk of the danger, and is not willfully, grossly, or inexcusably at fault, and the fault of the vessel is clear, the fault on the part of the passenger does not preclude his recovery entirely, but results merely in a division of the damages.[73]

Assumption of risk A passenger does not assume the risk of injury from dangers of which he has no knowledge or which he has no reason to anticipate,[74] but a passenger who voluntarily goes to a part of the vessel where there is a danger, of which he has knowledge, or which is obvious, thereby assumes the risk of such danger and cannot recover for injuries occasioned thereby.[75]

Persons under disability. The fact that a passenger is suffering from weakness or other physical disability does not place him under a duty to exercise a higher degree of care for his own safety.[76] He need exercise only the ordinary degree of care suggested by the circumstances, although it may be that he must consider his physical disabilities as a part of the circumstances and govern his conduct with a view to them.[77] The care required of a

Life boats
(1) Use of life boat, in which hole was stoved while being launched, instead of launching another boat, was mistake in captain's judgment, for which owners were not liable.—The Vestris, supra
(2) Master of sinking ship was not negligent in deciding or attempting to launch port, instead of starboard, life boats while starboard rail was under water—The Vestris, supra.

66. U.S.—Gretschmann v. Fix, D.C. N.Y., 189 F. 716—The City of Boston, D.C.Mass., 159 F. 261.

67. U.S.—The Vestris, D.C.N.Y., 60 F.2d 273.

68. Ind.—Sherlock v. Alling, 44 Ind. 184.

69. U.S.—The Empress of Scotland, D.C.N.Y., 11 F.2d 783, affirmed, C.C.A., 24 F.2d 1018.
58 C.J. p 559 note 94.
Contributory negligence:
In general see Negligence §§ 116-173
Of passenger generally see Carriers § 774 et seq
Negligence of passenger as defeating recovery for loss of, or injury to, baggage see infra § 196.

70. U.S.—The Vulcania, D.C.Mass., 8 F.Supp. 300
58 C.J. p 559 note 95.

71. U.S.—Coggeshall Launch Co. v. Early, Cal., 248 F. 1, 160 C.C.A. 141.
N.Y.—Bartlett v. New York, etc., Transp. Co., 8 N.Y.S. 309, 57 N.Y. Super. 348, affirmed 29 N.E. 1033, 130 N.Y. 659

72. U.S.—Coggeshall Launch Co. v. Early, Cal., 248 F. 1, 160 C.C.A. 141.
N.Y.—Bartlett v. New York, etc., Transp. Co., 8 N.Y.S. 309, 57 N.Y. Super. 348, affirmed 29 N.E. 1033, 130 N.Y. 659

73. U.S.—The Tourist, D.C.Me., 295 F. 700.
58 C.J. p 560 note 98.

74. U.S.—The Tourist, supra.
58 C.J. p 560 note 99
Assumption of risk generally see Negligence § 174.

75. U.S.—The Great Northern, Hawaii, 251 F. 826, 163 C.C.A. 660.
58 C.J. p 560 note 1.

76. N.Y.—Bartlett v. New York, etc., Transp. Co., 8 N.Y.S. 309, 57 N.Y. Super. 348, affirmed 29 N.E. 1033, 130 N.Y. 659.

77. N.Y.—Bartlett v. New York, etc., Transp. Co., supra.

passenger who has voluntarily become intoxicated is the same as that of a passenger who is sober.[78] The mere fact that a passenger is intoxicated does not constitute contributory negligence,[79] but the fact of intoxication is a circumstance which may be considered in determining whether he exercised due care.[80]

The negligence of a child's parents or caretakers will not generally be imputed to the child so as to defeat his recovery for injuries caused him by the negligence of the vessel.[81] However, negligence on the part of an adult having charge of a child may tend to rebut the existence of negligence on the part of the vessel.[82]

Acts to avoid impending dangers. When a passenger in order to avoid an impending danger, occasioned by the carrier's negligence, does an act which as it subsequently develops contributes to the injury, such act does not constitute contributory negligence.[83]

Injury avoidable notwithstanding contributory negligence. Even where a passenger has been guilty of contributory negligence, such negligence will not defeat the action when it is shown that the vessel or its officers might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured passenger's negligence.[84]

b. Acts in Disregard of Warning

If a passenger disregards a warning, which has been so given that he has notice of it, he cannot recover for injuries caused by the danger against which he has been warned.

It is not contributory negligence for a passenger to go to, or remain in, a place of danger, where he does not know of the danger, it is not obvious to him, and he has received no warning of it;[85] and the mere fact that a warning has been given does not make the passenger guilty of contributory negligence where he does not hear the warning or is not informed of it,[86] or the warning is inadequate,[87] but if a passenger disregards a warning, which has been so given that he has notice of it, he cannot recover for injuries caused by the danger against which he has been warned.[88]

c. Particular Instances of Contributory Negligence

Various instances have been considered by the courts and have been held to constitute or not to constitute contributory negligence depending on the circumstances of the particular case.

Various instances have been considered by the courts and have been held to constitute or not to constitute contributory negligence depending on the circumstances of the particular case.[89] A passenger who remains on deck, after having observed that the windows inclosing the deck are likely to be broken by high and stormy seas, is guilty of contributory negligence as a matter of law for failing to remove to a place of safety.[90] So, also, there is contributory negligence where a passenger remains in a place where he is likely to be injured by the swinging of a gangplank after he has received a general warning of the danger and has had an opportunity to observe it;[91] where he refuses to leave a vessel which is about to sink;[92] where a passenger in playing on a railed-off portion of the deck, the dangers of which he has had an opportunity

78. Wash.—Lang v. Puget Sound Nav. Co., 65 P.2d 1069, 189 Wash. 353.

79. Wash.—Lang v. Puget Sound Nav. Co., supra.

80. Wash.—Lang v. Puget Sound Nav. Co., supra.

81. U.S.—The North Star, D.C.N.Y., 169 F. 711.

82. U.S.—The Burgundia, D.C.N.Y., 29 F. 464.
Care required for safety of children see supra § 193 a (1).

83. U.S.—Ladd v. Foster, D.C.Or., 31 F. 827, 12 Sawy. 547.

84. U.S.—In re Kimball S.S. Co., Cal., 128 F. 397, 63 C.C.A. 139, 65 L.R.A. 84.
58 C.J. p. 560 note 10.

85. U.S.—The Annie L. Vansciver, D.C.Va., 161 F. 640.
58 C.J. p. 560 note 7.

86. Mo.—Evers v. Wiggins Ferry Co., 92 S.W. 118, 116 Mo.App. 130.

87. U.S.—The Arabic, C.C.A.N.Y., 50 F.2d 96.

88. U.S.—Erdman v. U.S., C.C.A.N.Y., 143 F.2d 198, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615
58 C.J. p. 560 note 9.

89. **Acts or conduct held contributory negligence**
(1) Sitting on bulwark and falling overboard.—The America, D.C.N.Y., 35 F.Supp. 413.

(2) Opening porthole during storm.—Moses v. Compagnie Generale Transatlantique, D.C.N.Y., 16 F.Supp. 197.

Acts or conduct held not contributory negligence
(1) In general.—The Arabic, C.C.A.N.Y., 50 F.2d 96.—58 C.J. p. 561 note 11

(2) Sixteen-year old female passenger who, in pulling open door from deck into lounge and stepping over high sill, had her fingers caught when wind slammed door shut.—Osipuk v. Oceanic Steam Nav. Co., C.C.A.N.Y., 64 F.2d 478.

(3) A steamship passenger, while playing a game, under the supervision of ship's officers, on a deck set aside for recreational purposes, was justified in assuming that he could safely make such use of the deck until he realized or should as a prudent man have realized that it was unsafe for such purpose, with respect to liability of ship owner for injuries sustained when passenger tripped on a metal hatch coaming extending above the deck planking.—Kvart v. Swedish American Line, C.C.A.N.Y., 126 F.2d 279.

90. N.Y.—Morgan v. Oceanic Steam Nav. Co., 224 N.Y.S. 420, 130 Misc. 570

91. U.S.—The Tourist, D.C.Me., 265 F. 700.

92. Wis.—Freeman v. Engelmann Transp. Co., 36 Wis. 571.

to observe, steps back without looking into an uncovered hold close to the place where a mast comes through the floor of the deck,[93] or where a drunken passenger, without the knowledge of the vessel's employees, gets into a yawl which the vessel has in tow and then stumbles or slips into the water in an attempt to get back to the vessel.[94]

On the other hand, to take a particular position on the vessel is not contributory negligence where the danger of such a position is not so obvious or well-known that an ordinarily prudent man would hesitate to take it.[95] The mere fact that a passenger steps on a slippery deck does not establish contributory negligence in the absence of a showing that the passenger knew the deck was slippery.[96] A passenger is not precluded from recovering for an assault made on her in her stateroom by reason of the fact that she did not examine the bolt of a door to an adjoining room, through which the assailant entered, after every absence from the stateroom, when she had examined the bolt on first coming aboard and found it to be locked.[97]

Conduct preparatory to leaving vessel. Where the vessel has negligently constructed its seats on a raised platform above the aisle, a passenger who, in a moment of forgetfulness, in the haste of embarking, steps over the edge of such platform is not guilty of contributory negligence simply because he must have learned of the existence of the rise when he first entered his seat.[98] It is not necessarily contributory negligence for a passenger to leave his seat when the vessel is about to dock,[99] or to start descending a stair, at such time, without taking hold of the handrails,[1] where the injury results from the vessel's striking the landing with unusual violence. A passenger, who shortly after the vessel arrives at the port of destination goes on the main deck to look for baggage, for which no check has been given him, is not necessarily guilty of contributory negligence so as to bar recovery for injuries sustained by falling in a hatchway carelessly left uncovered, without sufficient lights or sign of warning.[2]

Boarding or getting off vessel. Where a proper and safe way has been provided for passengers to get on and off the vessel, a passenger who disregards such way and chooses another and more dangerous way, which is not intended for his use, is guilty of contributory negligence and cannot recover for injuries sustained in the use of such way.[3] It is also contributory negligence for a passenger who is alighting in broad daylight to step off the end of a gangplank without looking to see whether or not there is a step there.[4] The fact that a person who has come on board is deprived of a safe mode of landing by reason of the vessel's starting to leave without giving him a proper warning does not justify him in adopting another mode which is also dangerous.[5] In getting into a tender which has come alongside to take passengers ashore a passenger must exercise due care for his own safety,[6] and if he carelessly fails to watch the gunwale as he is about to step over it he cannot recover for injuries caused by the tender being bumped against his leg by a roll of the sea.[7]

A passenger who attempts to board or get off a vessel at the wrong place or time when there is a known custom to take passengers aboard at a different time and place,[8] or let them off at a different

93. Pa.—Toy v International Mercantile Marine Co., 61 Pa. Super. 499.

94. U.S.—Gretschmann v. Fix, D.C. N.Y., 189 F. 716

95. N.Y.—Miller v. Ocean S.S. Co., 23 N.E. 462, 118 N.Y. 199.
58 C.J. p. 561 note 17.

96. Tex.—Gillum v. New York, etc., SS. Co., Civ. App., 76 S.W. 232

97. U.S.—Compagnie Generale Transatlantique v. Rivers, N.Y., 211 F. 294, 127 C.C.A. 580, certiorari denied 34 S.Ct. 603, 232 U.S. 727, 58 L.Ed. 817.
Failure to lock stateroom as defeating recovery for lost baggage see infra § 196.

98. U.S.—Kitsap County Transp. Co. v. Harvey, C.C.A. Wash., 15 F.2d 166, 48 A.L.R. 420.

99. N.Y.—Snelling v. Brooklyn, etc., Ferry Co., 13 N.Y.S. 398, 59 Hun 619, affirmed 28 N.E. 250, 128 N.Y. 579

1. N.Y.—Bartlett v. New York, etc., Transp. Co., 8 N.Y.S. 309, 57 N.Y. Super. 348, affirmed 29 N.E. 1033, 130 N.Y. 659
58 C.J. p. 561 note 22.

2. Cal.—Bowman v. California Steam Nav. Co., 63 Cal. 181

3. U.S.—Plant Inv. Co. v. Cook, Fla., 85 F. 611, 29 C.C.A. 377—Graham v. Pennsylvania R. Co., C.C.N.J., 39 F. 596.

4. Wash.—Johnson v. Washington Route, 209 P. 1100, 121 Wash. 608

5. Ill.—Keokuk Packet Co. v. Henry, 50 Ill. 264.
58 C.J. p. 561 note 26.

6. U.S.—The Empress of Scotland, D.C.N.Y., 11 F.2d 783, affirmed, C.C.A., 24 F.2d 1018.

Want of due care

Passenger, who was injured by slipping on floor of motorboat, in crossing from lifeboat to motorboat for purpose of going ashore, could not recover where want of due care on passenger's part was sole contributing cause of his injuries.—The Vulcania, D.C.Mass., 8 F.Supp. 300.

7. U.S.—The Empress of Scotland, D.C.N.Y., 11 F.2d 783, affirmed, C.C.A., 24 F.2d 1018

8. U.S.—The Anglo Norman, D.C. Cal., 1 F.Cas.No. 393, 4 Sawy. 185

Boarding moving ship by accommodation ladder

Passenger injured in hazardous effort of boarding a moving ship offshore by means of accommodation ladder, which had not been lowered for special purpose of enabling him to board ship, without the knowledge, much less the supervision, of any officer or seaman, cannot recover as there is no breach of any duty owed to passenger.—Fetan v. Atlantic & Caribbean Steam Nav. Co., D.C. N.Y., 60 F.2d 328.

time,[9] is guilty of contributory negligence which precludes his recovery for injuries sustained in so attempting to get on or off the vessel.[10]

Although the apparent methods provided for getting on or off a vessel are obviously dangerous, the vessel or owner will be liable for injuries sustained by a passenger in attempting to use them if employees have given instructions to make the attempt,[11] or if the conduct of the vessel or its employees has been such as to mislead the passenger into believing that a temporary and dangerous method of getting ashore is the only one to be provided.[12] After a vessel has landed, the usual signals given that it has been made fast, and the chains in front of the passenger gates have been left down, a passenger has a right to assume that there is no open space between the vessel and the dock, and he is not guilty of contributory negligence for failing to look at the time he steps from the boat to the dock to see whether there is any opening.[13]

§ 195. —— Limitation of, or Exemption from, Liability

a. In general
b Notice of claim
c. Contractual limitation of time to sue

a. In General

Under admiralty and maritime law, ordinarily a stipulation in the contract of carriage exempting or relieving the vessel from liability for injuries caused by the negligence of itself or its servants is void and unenforceable, and by statute a carrier by water may be prohibited from contracting against liability for loss of life or bodily injury.

Although in England a steamship company engaged in the carriage of passengers can by stipulation in the contract of carriage relieve itself from liability for injuries caused by the negligence of itself or its servants,[14] where the contract of carriage is wholly maritime and properly of admiralty jurisdiction, admiralty or general maritime law as announced or developed by the courts of the United States, or as modified by statute, is the law which determines whether the contractual limitation of liability is valid,[15] and under such law ordinarily a stipulation in the contract of carriage exempting or relieving the vessel from liability for injuries caused by the negligence of itself or its servants is void and unenforceable against the injured passenger;[16] irrespective of whether or not a carrier by water can limit the extent of its liability for injuries caused by defects in the vessel or the negligence of the vessel's servants, such a provision is invalid if the amount of the limitation is unreasonable.[17]

In the absence of statutory prohibition,[18] it has been held that the vessel may, for a sufficient consideration passing to the passenger,[19] such as a reduction in rates,[20] stipulate for an exemption from liability for its negligence,[21] although as to a passenger for hire a contract limiting a vessel's liability for negligence is void unless the passenger is given the option of purchasing a ticket under which liability is unlimited.[22] It has also been held that stipulations in a free pass exempting the vessel from liability for injury occasioned by negligence, or providing that the passenger assumes all risk of injury, with qualifications, later appearing, as to degrees of negligence, have been held valid and binding on the passenger,[23] even though notice of

9. Ky.—Reed v. Covington, etc., Bridge Co., 28 S.W. 149, 16 Ky.L. 379

10. U.S.—The Anglo Norman, D.C. Cal., 1 F.Cas.No.393, 4 Sawy 185. Ky.—Reed v. Covington, etc., Bridge Co., 28 S.W. 149, 16 Ky.L. 379.

11. Mich.—Clinton v. Root, 58 Mich. 182, 55 Am.R. 671.

12. U.S.—The Ocracoke, D.C.Va., 159 F. 552

13. N.J.—Palmer v. New Jersey R. Co., 33 N.J.Law 90.

14. U.S.—Moses v. Hamburg-American Packet Co., D.C.N.Y., 88 F. 329.
58 C.J. p. 562 note 36.

15. U.S.—Jansson v. Swedish American Line, C.A.Mass., 185 F.2d 212.—Witte v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappiai, D.C.N.J., 96 F.Supp. 485.—Barndt v. Det Bergenske Dampskibsselskab, D.C.N.Y., 28 F.Supp. 815.

16. U.S.—The Arabic, C.C.A.N.Y., 50 F.2d 96.—Barndt v. Det Bergenske Dampskibsselskab, D.C.N.Y., 28 F. Supp. 815.
58 C.J. p. 562 note 37.
Stipulations exempting from, and limiting liability for, loss of baggage see infra § 197.
Validity of stipulations limiting or relieving liability of carriers in general see Carriers §§ 625-639

17. U.S.—Moses v. Hamburg-American Packet Co., D.C.N.Y., 88 F. 329.
58 C.J. p. 562 note 38.

18. U.S.—Moore v. American Scantic Line, D.C.N.Y., 30 F.Supp. 843, affirmed, C.C.A., 121 F.2d 767.

19. N.Y.—Murray v. Cunard S. S. Co., 193 N.Y.S. 220, 200 App.Div. 466, reversed on other grounds 139 N.E. 226, 235 N.Y. 162.

Consideration not shown

Mere statement in the ticket that "the price of passage hereunder has been fixed partly with reference to the liability assumed by the company as defined by this contract" is not of itself sufficient to show any consideration for an exemption from liability for the carrier's negligence.—Murray v. Cunard S. S. Co., supra

20. N.Y.—Murray v. Cunard S. S. Co., supra.

21. N.Y.—Murray v. Cunard S. S. Co., supra

22. **Reduced or alternative rates**

Steamship passenger will not be deemed to have assented to a stipulation in his ticket exempting the carrier from liability for injuries caused by the latter's negligence, where it is not shown that the ticket was sold at a reduced rate or that there was a higher rate the passenger could have paid to secure full protection.—Murray v. Cunard S. S. Co., supra.

23. U.S.—Stevens v. Colombian Mail S. S. Corp., D.C.N.Y., 15 F.Supp. 534.

such stipulation may not have been brought home to the passenger, as discussed supra § 182; and a pass with such a stipulation has been held not only to exempt the person who issues it, but also the person or company who owns the vessel,[24] although such a stipulation would not exempt the carrier from liability for injuries inflicted intentionally or wantonly.[25]

The provisions of statute, 46 U S.C A. § 183c, prohibiting a carrier by water from contracting against liability for loss of life or bodily injury are of general import,[26] and were enacted for the purpose of regulating the relationship between a common carrier of passengers and passengers with respect to the duties, obligations, and restrictions of the carrier in connection with the issuance of tickets and its liability to the passengers for safe passage thereunder,[27] and are declarative of a public policy on the subject.[28] Such provisions do not merely prohibit limitations as to the amount of liability but prohibit limitations as to liability.[29] Thus, where a ticket is expressly written subject to all provisions of named statutes, including statutory provisions governing the amount of liability, and on its face all limitations are expressly modified in accordance with the statutory requirements, limitations in the ticket on the liability to the passengers are either void because contrary to the statute,[30] or nonexistent because excluded by the express reference to the statute,[31] but such a statute has been held not to apply to private vessels operated by a federal agency under certain circumstances[32]

Where the law of the place where the contract is made governs, as where the contract for carriage to this country is made in a foreign country between a foreign steamship company and a passenger, as discussed supra § 182, it is only fair to require notice in the contract of passage that such passengers are entitled to receive, at the hands of the carrier, a lesser degree of care than those who travel on American ships.[33]

General rules applicable in statutory proceedings to limit liability, discussed infra §§ 239–257, apply in proceedings by the owner of a vessel for exoneration from liability for injury to a passenger.[34]

Me.—Rogers v. Kennebec Steamboat Co, 29 A. 1069, 86 Me. 261, 25 L R A. 491

Payment for berth and meals

Steamship passenger who traveled under pass containing condition that passenger would not hold carrier liable for injuries caused by negligence could not recover for injuries on ground that passenger paid for meals and berth, since conditions attached to pass were valid, and controlled all rights incidental to passage.—Stevens v Colombian Mail S S. Corp, D C N Y, 15 F Supp. 534.

24. U.S.—Stevens v. Colombian Mail S S. Corp, supra

25. U.S.—Stevens v Colombian Mail S. S. Corp, supra

Negligent medical treatment

Exemption contained in steamship pass providing that passenger would not hold carrier liable for injuries caused by negligence would not be a defense in action for negligent medical treatment by allied operating company's port surgeon who made physical examination of passenger in presence of one whom surgeon introduced as his assistant, but who allegedly was a claim agent.—Stevens v. Colombian Mail S. S. Corp., supra.

26. U S.—Moore v. American Scantic Line, D.C.N Y., 30 F Supp. 843, affirmed, C C.A., 121 F.2d 767.

Statute held not of special import

U.S.—Moore v. American Scantic Line, supra.

27. U.S.—Moore v. American Scantic Line, supra

28. U S—Moore v American Scantic Line, supra.

29. U S—Moore v American Scantic Line, supra.

30. U S—Moore v. American Scantic Line, C C A N Y, 121 F.2d 767.

31. U S—Moore v. American Scantic Line, supra

Where words "special rate" were printed on steamship ticket, but following blank space was not filled in and there was no reference to reduced fare in clause purporting to limit liability, court could not assume that reduced rate was given as ground for giving effect to limitation of liability.—Moore v American Scantic Line, C.C.A N.Y, 121 F. 2d 767.

32. **Statute suspended**

A covenant printed in a "Warship-ticket" by which passenger assumed all the risks of travel on a vessel being operated by the War Shipping Administration, which covenant was adopted by War Shipping Administrator pursuant to authority expressly conferred on him by the president under provisions of the War Powers Act, had effect of suspending statute prohibiting stipulations limiting a carrier's liability for negligence, notwithstanding passenger's injuries occurred after cessation of hostilities and no other means of transportation were available to him. —Arhstad v. U. S, D C Wash, 68 F. Supp. 823.

33. U S.—The De Grasse, D.C.N.Y., 58 F.2d 1019

Restricted obligation provision construed

Provision of contract of passage with respect to vessel's restricted obligations did not apply to act of negligence as between carrier and passenger unrelated to happening to vessel —The De Grasse, supra

34. **Burden of proof**

In proceeding by launch owner for exoneration from liability with respect to drowning of passenger taken to steamship by the launch when passenger fell from Jacob's ladder on side of steamship, claimant had burden of proving by preponderance of evidence that negligence of launch was cause of the injury.—Petition of Minerva Boat Co, D.C.N.Y., 92 F Supp. 694.

Weight and sufficiency of evidence

(1) Evidence was held to fail to establish that master of launch had been negligent either in failing to remain close at hand while passenger was climbing the Jacob's ladder or in failing to render prompt aid when passenger fell from the ladder.—Petition of Minerva Boat Co, supra,

(2) Evidence was held to establish that loss of all passengers on sinking of vessel was not attributable to any insufficiency of lifeboats, that failure to remove passengers from vessel before it sank to other vessels standing by was due to weather conditions and high seas, and that loss of all passengers on sinking of vessel was not due to insufficiency of manning.—The Princess Sophia,

b. Notice of Claim

The courts have generally recognized that a carrier by water, in the absence of constitutional or statutory prohibition, may legally enter into a contract of carriage with a passenger requiring the passenger to give written notice of his claim within a specified time in order to hold the carrier for personal injuries.

The courts have generally recognized that a carrier by water, in the absence of constitutional or statutory prohibition, may legally enter into a contract of carriage with a passenger requiring the passenger to give written notice of his claim within a specified time in order to hold the carrier for personal injuries,[35] and such a stipulation will be enforced providing the time for such notice is just, fair, and reasonable.[36] The fact that the injuries for which suit is brought have so disabled the passenger as to render prompt compliance impossible may cause the time limitation to be held unreasonable as to him.[37] Such limitations have their justification in the need of some safeguard to protect the carrier against frauds,[38] and are not against public policy,[39] and do not operate as a limitation of the liability of the carrier,[40] as they do not purport wholly or partially to exonerate the carrier from liability,[41] but simply regulate the manner and time of filing the claim,[42] and, hence, no independent consideration is necessary,[43] since, as long as such stipulations are reasonable, they are supported by the consideration supporting the contract of carriage.[44]

The statute, 46 U.S.C.A. § 183b, prescribing the minimum period of time for the giving of notice of a claim for loss of life or bodily injuries which may be inserted in the contract of carriage is one of general import,[45] and was enacted for the purpose of regulating the relationship between a common carrier and passengers with respect to the duties, obligations, and restrictions of the carrier in connection with the issuance of tickets and its liability to the passengers for safe passage thereunder.[46] It has been held that this statute creates a new public policy as to what is just, fair, and reasonable,[47] as it arbitrarily prescribes a minimum period of time for making a claim which may be provided for by the contract of carriage,[48] and renders ineffective a stipulation in the contract of carriage which requires the filing of a claim within a period less than that prescribed by the statute;[49] but where the provision of the contract of carriage as to notice of claim is in conformity with the statute, it is binding on the passenger.[50] Such statute has been construed as applying to claims for damages legally recoverable by reason of bodily in-

C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.

(3) Evidence was held to show fault in navigating ship in shoal waters, in face of approaching hurricane, because of failing to obtain radio bulletins, thus precluding shipowner from exoneration from liability to injured passengers.—The Arabic, C.C.A.N.Y., 50 F.2d 96.

(4) Evidence was held not to show motor-boat explosion was due to owners' act or omission or unseaworthiness, hence, owners were entitled to exoneration from liability.—The Wheeler-Shipyard Hull No. 304, D.C. N.Y., 1 F.Supp. 402.

Proceedings for exoneration from liability for personal injuries to persons on or about vessel see supra § 86 g.

35. U.S.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21—Blackwell v. Alaska S. S. Co., D.C.Wash., 1 F.2d 334.
Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.
58 C.J. p. 569 note 45.
Minority of passengers as affecting binding effect of conditions and limitations see supra § 182.

What law governs
The validity of clauses limiting the time for the filing of claims for injuries received by a passenger, which are properly of admiralty jurisdiction, is to be determined by admiralty law as announced by the courts of the United States.—Hubbard v. Matson Nav. Co., supra.

36. U.S.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21—Blackwell v. Alaska S. S. Co., D.C.Wash., 1 F.2d 334.
Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.
58 C.J. p. 569 note 45.

Time limit held reasonable
U.S.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21.

Time limit held unreasonable
U.S.—The Arabic, C.C.A.N.Y., 50 F.2d 96—Blackwell v. Alaska SS. Co., D.C.Wash., 1 F.2d 334—The Europa, D.C.N.Y., 6 F.Supp. 686.
Mass.—O'Flaherty v. Cunard S. S. Co., 183 N.E. 712, 281 Mass. 447.
58 C.J. p. 569 note 48 [b] (2)–(6).

37. U.S.—Oceanic Steam Nav. Co. v. Corcoran, C.C.A.N.Y., 9 F.2d 724, 57 A.L.R. 163.

38. N.Y.—Murray v. Cunard SS. Co., 139 N.E. 226, 235 N.Y. 162, 165, 26 A.L.R. 1371.
58 C.J. p. 569 note 48 [a].

39. U.S.—Blackwell v. Alaska S. S. Co., D.C.Wash., 1 F.2d 334.
Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

40. Cal.—Hubbard v. Matson Nav. Co., supra.

41. Cal.—Hubbard v. Matson Nav. Co., supra.

42. Cal.—Hubbard v. Matson Nav. Co., supra.

43. Cal.—Hubbard v. Matson Nav. Co., supra.

44. Cal.—Hubbard v. Matson Nav. Co., supra.

45. U.S.—Moore v. American Scantic Line, D.C.N.Y., 30 F.Supp. 843, affirmed, C.C.A., 121 F.2d 767.

46. U.S.—Moore v. American Scantic Line, supra.

47. U.S.—Moore v. American Scantic Line, supra.

48. U.S.—Moore v. American Scantic Line, supra.

49. U.S.—Moore v. American Scantic Line, C.C.A.N.Y., 121 F.2d 767.

50. U.S.—Witte v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappiai, D.C.N.J., 96 F.Supp. 485.

juries sustained by a passenger,[51] and has been held applicable to interstate voyages between domestic ports,[52] but such a provision, being prospective, does not apply to contracts entered into prior to its passage.[53] Furthermore, as such legislation supersedes state legislation on the subject, a limitation of the character under consideration in a contract of carriage which is in conformity with the statue is valid and enforceable, notwithstanding any state legislation to the contrary.[54]

Requisites and sufficiency of notice. There must be a substantial compliance with the provisions of the contract of carriage requiring notice within a specified time,[55] although technical and complete compliance is not always required.[56] Where a written notice is required, it has been held that such notice must be one showing that it is intended to fix rights.[57] Where the contract of carriage provides for giving written notice of claim within a specified time, it has been held that the institution of an action for the injuries within the time stipulated is a sufficient compliance[58] It has also been held that the fact that agents of the carrier have knowledge of the injury does not of itself excuse the failure of the passenger to comply with the provisions as to notice,[59] and an injured passenger is not excused from giving notice of his claim by reason of the fact that his injuries become aggravated after debarkation so as to increase the amount of his claim.[60]

On the other hand, it has been held that although the time allowed by the ticket for the giving of notices of claims is unreasonable and too short, this does not excuse the passenger from giving any notice at all.[61] In such a case the only right the passenger can claim is that the time limit be expanded to sustain the validity of a notice actually given within a reasonable time.[62] Therefore, if, in such a case, no notice at all has been given, no action can be maintained.[63]

Waiver. Stipulations as to notice are subject to defeat by waiver.[64] In general, agents authorized to receive claims or notices for damages have power to waive compliance with provisions of the contract of carriage requiring filing of claims or notices within a specified time,[65] but where the contract of carriage

51. U.S.—Burstein v. U. S., C.C.A.N.Y., 134 F.2d 89

Husband's claim for loss of services and medical expenses incurred because of injuries sustained by wife was a claim for "bodily injury" within statute forbidding shipowner to require a shorter time than six months for notice of claims for loss of life or bodily injury.—Burstein v. U. S., supra.

52. U.S.—Scheibel v. Agwilines, Inc., C.C.A.N.Y., 156 F.2d 636—Burstein v. U. S. Lines Co., C.C.A.N.Y., 134 F.2d 89.

53. Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399

54. U.S.—Scheibel v. Agwilines, Inc., C.C.A.N.Y., 156 F.2d 636

Preemption of field

Federal statute pertaining to time limitations that may be imposed by shipowners on giving notice of, or filing claims for, loss of life or bodily injury was a declaration of congressional policy as lawful contractual time limitations which preempts the field and which in the interest of uniformity should be construed to exclude state statutes of limitation —Scheibel v. Agwilines, Inc., supra

55. U.S.—Sutton v. Pacific SS. Co., D.C.Wash., 3 F.2d 72, affirmed, C.C.A., 7 F.2d 579, certiorari denied 46 S.Ct. 202, 269 U.S. 586, 70 L.Ed. 425

58 C.J. p. 569 note 49 [a] (2).

Receipt of notice

Provision of contract of transportation requiring written notice of any claim against steamship for injuries received by passenger to be "lodged with carrier" at certain address required receipt of such notice —The Kungsholm, C.C.A.N.Y., 86 F.2d 703

Notice held insufficient

(1) Passenger's letter not to hold accommodations for passenger on return voyage because steamer vibrated and because passenger had been injured was insufficient as a notice that passenger sending it intended to make a claim against the carrier for personal injuries.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21.

(2) Notice to physician of passenger's injury given by passenger for purpose of obtaining treatment for the injury, and not for purpose of making claim against steamship company for damages resulting from the injury, was not sufficient compliance with statute requiring such notice even if the physician was agent of the steamship company authorized to receive notice of claims —Brady v. Farley, D.C.N.Y., 27 F.Supp. 840.

56. U.S.—Sutton v. Pacific SS. Co., D.C.Wash., 3 F.2d 72, affirmed, C.C.A., 7 F.2d 579, certiorari denied 46 S.Ct. 202, 269 U.S. 586, 70 L.Ed 425.

58 C.J. p. 569 note 49 [a] (2).

57. Mass.—O'Flaherty v. Cunard S.S. Co., 183 N.E. 712, 281 Mass. 447.

Passenger's letter to steamship owner referring to accident was held not written notice of claim required by contract of carriage —O'Flaherty v. Cunard S.S. Co., supra

58. N.Y.—Rague v. Cunard S.S. Co., 249 N.Y.S. 622, 140 Misc. 419.

59. Mass.—O'Flaherty v. Cunard S.S. Co., 183 N.E. 712, 281 Mass. 447

60. N.Y.—Murray v. Cunard SS. Co., 139 N.E. 226, 235 N.Y. 162, 26 A.L.R. 1371.

58 C.J. p. 570 note 52

61. U.S.—The Finland, D.C.N.Y., 35 F.2d 47

58 C.J. p. 570 note 53.

62. U.S.—Hessler v. North German Lloyd, C.C.A.N.Y., 55 F.2d 927.

58 C.J. p. 570 note 54

63. U.S.—The Finland, D.C.N.Y., 35 F.2d 47

58 C.J. p. 570 note 55

64. Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

Oral waiver

Where steamship company's claim agent, when asked whether it was necessary to file any form of claim and if they had any forms, or not, answered "No," the "No" could reasonably apply to both parts of the question, resulting in oral waiver of provision requiring filing of claim for injuries within thirty days — Hubbard v. Matson Nav. Co., supra

65. Cal.—Hubbard v. Matson Nav. Co., supra.

provides that no agent or employee of the carrier has power to waive such provision, an agent or employee has no authority to waive the provision.[66]

c. Contractual Limitation of Time to Sue

In the absence of constitutional or statutory prohibition, it is usually held or recognized that a carrier by water and a passenger have a legal right to limit the time within which to sue, and such a limitation will be enforced where the contract period is reasonable.

In the absence of constitutional or statutory prohibition, it is usually held or recognized that a carrier by water and a passenger have a legal right to limit the time within which to sue,[67] and, where the contract period is reasonable, it will be enforced.[68] Stipulations of this character are not opposed to public policy,[69] and do not operate as a limitation of the liability of the carrier,[70] as they do not purport, either wholly or partially, to exonerate the carrier from liability,[71] but simply regulate the manner and time of bringing suit.[72] No independent consideration is necessary to support such a stipulation,[73] since, as long as it is reasonable, it is supported by the consideration supporting the contract of carriage.[74]

The right to agree on a limitation of time to sue has been given legislative recognition by the provisions of the federal statute, 46 U.S.C.A. § 183b, which prescribe a minimum period of limitation for the bringing of a suit for claims for death or bodily injury which may be inserted in the contract of carriage,[75] and where the contractual limitation is in conformity with this statute, failure to bring the action within the time fixed by the contractual provision bars relief.[76] The statute has been construed as applying to claims for damages legally recoverable by reason of bodily injuries sustained by a passenger,[77] and has been held applicable to interstate voyages between domestic ports,[78] but such provision, being prospective, does not apply to contracts entered into prior to its passage.[79] It has been held that a valid limitation in a contract of carriage requiring suit to be brought within a designated time in conformity with the statute is not affected by another limitation in the contract which is void because it is a violation of statutory provisions.[80] Furthermore, as such legislation supersedes state legislation on the subject, a limitation of the character under consideration in a contract of carriage which is in conformity with the statute is valid and enforceable, notwithstanding any state legislation to the contrary.[81] However, the statute

66. U.S.—Baron v. Compagnie Generale Transatlantique, C.C.A.N.Y., 108 F.2d 21

67. U.S.—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164
Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

What law governs
The validity of clauses limiting the time for bringing suit for injuries received by a passenger, which are properly of admiralty jurisdiction, is to be determined by admiralty law as announced by the courts of the United States or as modified by statute.—Hubbard v. Matson Nav. Co., supra.

68. U.S.—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164—Lee v. Swedish American Line, D.C.N.Y., 6 F.Supp. 342
Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399

69. Cal.—Hubbard v. Matson Nav. Co., supra.

Extension
Even if provision in passenger ticket contract that action for injuries sustained while aboard steamship must be brought within one year from date of injury could be extended so that such period would begin to run on return of passenger from abroad, where passenger did not bring action until almost twenty-five months after injury occurred and almost twenty months after return from abroad, it would be unreasonable to extend such provision for that period.—Horvath v. Cunard S. S. Co., D.C.N.Y., 103 F.Supp. 356.

Statutory suspension of limitation
Where an action by wife to recover for personal injuries and by husband for loss of services was brought against steamship company in federal court and action was dismissed for want of jurisdiction, complaint in action which was subsequently brought in state court was not subject to dismissal because action was not commenced within time limited by contract of passage, in view of statute permitting commencement of a new action after expiration of time limit for bringing action, where a former action was terminated because plaintiffs had mistaken their forum.—Gustafson v. A-B Svenska Amerika Linien, 14 N.Y.S.2d 905, 258 App.Div. 734.

70. Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399

71. Cal.—Hubbard v. Matson Nav. Co., supra.

72. Cal.—Hubbard v. Matson Nav. Co., supra.

73. Cal.—Hubbard v. Matson Nav. Co., supra.

74. Cal.—Hubbard v. Matson Nav. Co., supra.

75. U.S.—Foster v. Cunard White Star, C.C.A.N.Y., 121 F.2d 12—Horvath v. Cunard Steamship Co., D.C.N.Y., 103 F.Supp. 356—Witte v. N.V. Nederlandsch Amerikaansche Stoomvaart Maarschappiaj, D.C.N.J., 96 F.Supp. 485.

76. U.S.—Foster v. Cunard White Star, C.C.A.N.Y., 121 F.2d 12—Horvath v. Cunard Steamship Co., D.C.N.Y., 103 F.Supp. 356—Rogers v. Furness, Withy & Co., D.C.N.Y., 103 F.Supp. 314—Witte v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappiaj, D.C.N.J., 96 F.Supp. 485

77. U.S.—Burstein v. U. S., C.C.A.N.Y., 134 F.2d 89.

78. U.S.—Scheibel v. Agwilines, Inc., C.C.A.N.Y., 156 F.2d 636—Burstein v. U. S., C.C.A.N.Y., 134 F.2d 89.

79. Cal.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

80. U.S.—Foster v. Cunard White Star, C.C.A.N.Y., 121 F.2d 12.

81. U.S.—Scheibel v. Agwilines, Inc., C.C.A.N.Y., 156 F.2d 636.

Preemption of field
Federal statute pertaining to time limitations that may be imposed by shipowners for institution of suits

prescribing a minimum period for the institution of suit which may be incorporated in the contract of carriage does not operate as a statute of limitations,[82] and prohibit a court from entertaining an action on a foreign tort unless it is commenced within the statutory prescribed period.[83] In other words, the statute does not declare a public policy against allowing a suit to be filed after the expiration of the prescribed statutory period, if, by the law of the foreign country within whose territory the tort occurred and in which the ticket was issued, the passenger is not contractually bound by the provision requiring suit to be brought within the prescribed statutory period.[84]

Since the provisions which appear in the contract of carriage are binding on the passenger regardless of whether or not they are read, as discussed supra § 182, the lack of knowledge of a provision in the contract of carriage requiring the maintenance of suit within a specified time does not excuse the passenger from complying with it.[85] Whether the passenger is so physically incapacitated as to excuse him from complying with the provision depends on the circumstances of the particular case.[86]

Waiver and estoppel. Stipulations limiting the time in which suit may be brought are subject to defeat by waiver[87] or estoppel.[88] A waiver, in order to be effective, must be made by the carrier or its duly authorized agent.[89]

§ 196. Passengers' Baggage or Effects

a. In general
b. Liability for passenger's baggage or effects

a. In General

It is impliedly a part of the contract of carriage between a common carrier by water and a passenger that the former will carry for the latter his personal baggage, under reasonable limitations as to weight and value, without additional charge, and the carrier has a lien on the baggage for the charge of the transportation of the passenger and baggage.

It is impliedly a part of the contract between a common carrier by water and a passenger that the former will carry for the latter his personal baggage, under reasonable limitations as to weight and value, without additional charge, as the price paid for the ticket or transportation embraces compensation for the carriage of the baggage, and no special consideration need be paid.[90] In the absence of any valid and controlling law or regulation to the contrary, a carrier by water may make an extra charge for the value of baggage beyond a certain limit, for weight beyond a reasonable limit, or for the carriage of property not ordinarily regarded as baggage.[91] Such a transaction may be treated as a separate contract,[92] but the mere fact that over-

on claims for loss of life or bodily injury is a declaration of congressional policy as lawful contractual time limitations which preempts the field and which in the interest of uniformity should be construed to exclude state statutes of limitations — Scheibel v. Agwilines, Inc., supra.

82. U.S.—Jansson v Swedish American Line, C.A.Mass., 185 F.2d 212.

83. U.S.—Jansson v. Swedish American Line, supra.

84. U.S.—Jansson v. Swedish American Line, supra.

85. U.S.—Rogers v Furness, Withy & Co., D.C.N.Y., 103 F.Supp. 314.

86. Physical incapacity not shown
Where steamship passenger allegedly injured aboard ship was hospitalized and confined to bed for only a few days because of accident, and other treatments were received at doctors' offices, passenger was not so physically incapacitated as to excuse him from terms and conditions of passenger ticket contract requiring that actions for injuries be brought within one year from date of injury. —Horvath v. Cunard S.S. Co., D.C.N.Y., 103 F.Supp. 356.

87. Acts held not waiver
(1) An offer of settlement after contractual limitation period has elapsed is ineffective as a waiver of limitation —Scheibel v. Agwilines, Inc., C.C.A.N.Y., 156 F.2d 636.

(2) A provision, in steamship company's contract of passage, that suit for injuries must be brought within ninety days, was not waived by letter from company's claim agent, written long after the ninety days had expired, stating that investigation had disclosed contributory negligence and denying liability —Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

88. U.S.—Scheibel v. Agwilines, Inc., C.C.A.N.Y., 156 F.2d 636.

Estoppel held not shown
U.S.—Scheibel v. Agwilines, Inc., supra.

89. Claim agent of vessel had no authority to waive limitation period as set forth in passenger's ticket in light of ticket provision against waiver unless in writing signed by passenger traffic manager —Scheibel v Agwilines, Inc., supra

90. U.S.—The Elvira Harbeck, C.C.N.Y., 8 F.Cas.No.4,424, 2 Blatchf. 336.
N.Y.—Van Horn v. Kermit, 4 E.D. Smith 453.
Duties of carrier as to baggage generally see Carriers §§ 862–864.

91. U.S.—Isthmian S.S. Co v. McElligott, C.A.Ga., 177 F.2d 591—Taylor v. Isthmian S.S. Co., D.C.Ga., 85 F.Supp. 384
N.Y.—Kopetzky v. Cunard S.S. Co., 227 N.Y.S. 539, 131 Misc. 599—Glovinsky v Cunard S.S. Co., 26 N.Y.S. 751, 6 Misc. 388
Extra baggage and special contracts by carrier generally see Carriers § 865.

92. U.S.—Isthmian S.S. Co v. McElligott, C.A.Ga., 177 F.2d 591—Taylor v. Isthmian S.S. Co., D.C.Ga., 85 F.Supp. 384—La Bourgogne, 144 F. 781, 75 C.C.A. 647, affirmed 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973
N.Y.—Wassenberg v. Cunard S.S. Co., 28 N.Y.S. 520, 8 Misc. 78—Glovinsky v Cunard S.S. Co., 26 N.Y.S. 751, 6 Misc. 388

Receipt for payment of extra compensation for carriage of personal property of steamship passenger not intended for personal use on voyage and stored in magazine hatch constituted a sufficient "arrangement in writing" required by and contemplated under section of ticket contract providing for transportation of property under separate arrangement — Taylor v. Isthmian S.S. Co., D.C.Ga., 85 F.Supp. 384.

weight charges are paid does not convert the baggage into freight.[93]

Baggage checks. The usual baggage check delivered to a passenger on receiving his baggage in no sense embodies the contract of carriage between the passenger and the common carrier by water, but is a receipt merely, intended to afford evidence of ownership and for identifying the baggage.[94]

Lien on baggage. A common carrier by water has a lien on the baggage of a passenger for the entire charge of transportation of the passenger and baggage, and it is immaterial whether the baggage has been checked, if it is still in the possession of the carrier when it seeks to enforce its lien,[95] unless the carrier is estopped to assert the lien.[96]

b. Liability for Passenger's Baggage or Effects

(1) In general
(2) Property to which liability extends
(3) Baggage in passenger's custody or stateroom
(4) Passenger not accompanying baggage
(5) Theft or conversion
(6) Contributory negligence
(7) Commencement, continuance, and termination of liability

(1) In General

In the absence of statutory or contractual exemption or modification, the liability of a vessel or owner for the baggage of a passenger is that of an insurer if the baggage is lost, stolen, or injured, unless the proximate cause of the injury is an act of God or a peril of the sea.

In the absence of a statutory or contractual exemption or modification,[97] the liability of a vessel or owner for the baggage of a passenger is the same as that for merchandise or goods being carried for hire; hence, if baggage is lost, injured, or stolen, the liability is that of an insurer,[98] unless the proximate cause of the injury is an act of God or a peril of the sea,[99] or the negligence of the passenger himself, considered infra subdivision b (6) of this section

What law governs. The liability of the owner of the vessel for a passenger's baggage is generally governed by the law of the place where the contract of transportation was made.[1]

(2) Property to Which Liability Extends

A vessel's responsibility as an insurer extends only to such articles or property as properly come within the meaning of the term "baggage."

A vessel's responsibility as an insurer extends only to such articles or property as properly come within the meaning of the term "baggage."[2] As a

Special contract of affreightment

(1) Where passenger had not purchased railroad ticket when making special contract with ocean carrier for carrying trunk from New York to Paris, contract was held not strictissimi juris for carriage of "baggage," and was special contract of affreightment.—Wiener v. Compagnie Generale Transatlantique, C.C.A.N.Y., 61 F 2d 893

(2) Such a contract is not alteration of terms of ocean ticket forbidden by ticket.—Wiener v. Compagnie Generale Transatlantique, supra.

93. Ill.—Hamburg-American Packet Co. v Gattman, 20 N E 662, 127 Ill. 598.

94. U.S.—Wiener v. Compagnie Generale Transatlantique, C C A N Y, 61 F 2d 893

Checks and receipts generally see Carriers § 866.

95. N.Y.—Moskowitz v International Nav Co, 84 N Y S 297

96. N Y.—Moskowitz v. International Nav Co, supra

97. N Y.—Chamberlain v. Western Transp Co., 44 N Y 305, 4 Am.R 681.

Contractual limitation of, or exemption from, liability see infra § 197

Harter Act or Carriage Of Goods By Sea Act does not exempt an owner or vessel that has complied with the act from liability for injuries to, or loss of, passengers' baggage which has not been shipped as freight—The Havana, D C N Y, 45 F Supp. 244—58 C J p 562 note 40 [a]

98. U S.—McElligott v. Isthmian S S. Co., D.C Ga, 85 F Supp. 686, affirmed, C.A, 177 F 2d 591.

Ill.—Bass v. Chicago, Duluth & Georgian Bay Transit Co., 89 N.E 2d 430, 339 Ill.App. 246.

N Y.—Wheeler v. Oceanic Steam Navigation Co, 26 N.E 248, 125 N. Y 144, 21 Am S R. 729—Haskins v Canadian Pac S. S. Co, 270 N Y S. 147, 240 App Div. 377—Scire v American Export Lines, 93 N Y.S 2d 457, 197 Misc 422.

58 C J p 562 note 43.

Duties and liabilities of carriers in general with respect to baggage see Carriers § 867 et seq

Liability of baggage as to general average contribution see infra § 229

Liability of carrier for loss of, or injury to, cargo in general see supra § 125

Loss of, or injury to, passengers' baggage as general average loss see infra § 228.

99. U S.—The Empress of France, D C N.Y, 49 F 2d 291—Moses v Compagnie Generale Transatlantique, D C N.Y, 16 F Supp 197

N Y.—Wheeler v Oceanic Steam Navigation Co, 26 N.E. 248, 125 N.Y. 155, 21 Am.S R. 729—Haskins v Canadian Pac S S Co., 270 N.Y.S 147, 240 App Div. 377—Scire v American Export Lines, 93 N.Y.S 2d 457, 197 Misc. 422.

58 C J. p 562 note 44.

Act of God

(1) Act of God is some inevitable accident which cannot be prevented by human care, or foresight, but results from natural causes, such as lightning, tempests, floods, and inundations—The Empress of France, D.C.N.Y, 49 F.2d 291.

(2) Steamship company was not liable for salt water damage to passenger's trunk resulting from flooding of trunk room caused by unexpected and extraordinary wave.—The Empress of France, supra.

1. La.—Malpica v McKnown, 1 La 248, 20 Am D. 279.

Mass.—Fonseca v. Cunard S. S Co, 27 N E. 665, 153 Mass. 553, 25 Am. S R 660, 12 L.R.A. 340.

Law governing:

Validity of contractual stipulations see supra § 182.

Vessel owner's liability for personal injuries see supra § 192.

2. U S.—The Virginia, D C Md, 266 F 437.

58 C J. p 563 note 46.

What constitutes baggage in general see Carriers §§ 855–861.

general proposition this is regarded as including whatever articles a passenger usually takes with him for his own personal use, comfort, and convenience, according to the habits or wants of the particular class to which he belongs, either with respect to his immediate necessities or to the ultimate purpose of his journey.[3]

Proper "baggage" may include wearing apparel such as is necessary for the reasonable use of the passenger according to his circumstances and condition in life,[4] or even cloth in a reasonable amount which has been procured for making wearing apparel,[5] but it is not confined to such articles,[6] although an early case does contain a suggestion to this effect.[7] Under various circumstances "baggage" has been held to include jewelry and similar articles;[8] guns of a sportsman;[9] manuscripts of a professor or student,[10] price books of a traveling salesman;[11] extra lens for the camera of a newspaper photographer,[12] the necessary instruments of a traveling dentist;[13] and even the bedding[14] or household furnishings[15] of a steerage or immigrant passenger. Ordinarily it seems that valuable securities are not among the things which a passenger can reasonably be expected to carry on his journey;[16] but a vessel has been held responsible for the loss of liberty bonds where their rate of return is so low that the passenger cannot afford to keep them in a safety box and almost of necessity must carry them with him.[17]

A passenger is entitled to carry as a part of his baggage, and to hold the carrier responsible for, such an amount of money as is reasonably necessary to defray his expenses for the entire journey;[18] but for sums in excess of this,[19] or money carried merely for transportation or business purposes,[20] no responsibility is ordinarily assumed. Should the owner or master of the vessel gratuitously accept on deposit, and undertake to care for, money which a passenger is not entitled to carry as baggage, it seems that the owner thereby becomes responsible as a gratuitous bailee,[21] but a passenger cannot impose such responsibility on the owner by depositing the money with a clerk or other employee on the vessel, unless it is shown that the deposit was made in accordance with a well-known usage, or some authority given by the owner.[22]

Presents or property of others. The vessel owner's responsibility as an insurer ordinarily does not extend to articles intended as presents,[23] or property being carried by a passenger for the convenience of another person;[24] but the owner is responsible to a father for property which he is carrying in his trunk for a daughter who is traveling with him.[25]

Liability for, and effect of, concealment of improper baggage. Although the vessel owner may become responsible for property which a passenger cannot properly carry as baggage by reason of the making of an extra charge for its carriage,[26] or ac-

3. U.S.—Van Bergh v Cunard S. S Co, D.C N.Y., 40 F.2d 545.
58 C J. p 563 note 47.

4. U.S.—Van Bergh v. Cunard S. S Co, supra.
58 C.J. p 563 note 48.

5. N Y—Duffy v. Thompson, 4 E D Smith 178
58 C.J. p 563 note 49.

6. U.S.—Levensohn v. Cunard SS. Co, 162 Ill.App 421.

7. U S.—The Ionic, C C.N.Y, 13 F. Cas No.7,059, 5 Blatchf 538.

8. U.S.—Walsh v. The H M. Wright, D C La, 29 F Cas No 17,115, Newb Adm 494
58 C.J. p 563 note 52.

9. N Y.—Van Horn v. Kermit, 4 E D Smith 453.

10. U S—Wood v. Cunard SS. Co, N Y., 192 F. 293, 112 C.C.A. 551, 41 L.R A,N S, 371.

11. Wis.—Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am R 716.

12. U S.—The Virginia, D.C.Md, 266 F. 437.

13. Fla—Brock v. Gale, 14 Fla 523, 14 Am R. 356.

14. N.Y—Hirschsohn v Hamburg American Packet Co., 34 N Y Super 521.

15. Ill.—Levensohn v. Cunard SS Co, 162 Ill App. 421.
10 C J p 1193 note 48.

16. U S—The Virginia, D C Md, 266 F 437.

17. U S—The Virginia, supra.

18. U S—Walsh v. The H M Wright, D C La, 29 F Cas No.17,115, Newb Adm. 494.
58 C.J p 563 note 62

19. U S—The Virginia, D C Md, 266 F 437.
Ind—Doyle v. Kiser, 6 Ind 242.
58 C J p 563 note 63

20. La—Wilcox v. The Philadelphia, 9 La. 80, 29 Am.D. 436.
Mo—Whitmore v. The Caroline, 20 Mo. 513.

21. Tenn—Jenkins v. Motlow, 1 Sneed 248, 60 Am D. 154.
58 C.J. p 563 note 65.

22. La—Wilcox v. The Philadelphia, 9 La 80, 29 Am D. 436.
Mo—Whitmore v. The Caroline, 20 Mo 513.

23. U.S—The Ionic, C C N.Y., 13 F Cas No 7,059, 5 Blatchf. 538.
58 C.J. p 564 note 67.

24. Mass—Dunlap v. International Steamboat Co, 98 Mass. 371
58 C J. p 564 note 68.

25. Md.—Baltimore Steam Packet Co. v. Smith, 23 Md 402, 87 Am.D. 575

26. Ill—Hamburg-American Packet Co. v. Gattman, 20 N E. 662, 127 Ill. 598
N Y.—Glovinsky v. Cunard SS. Co, 26 N Y S. 751, 6 Misc 388.

Contents in nature of baggage
In passenger's action for loss of trunk between Havre and Paris against ocean carrier specially contracting to carry trunk from New York to Paris, defendant's liability was that of common carrier as far as trunk contents were in nature of baggage, and that of bailee as to different contents, unless defendant knew contents might be of different nature—Wiener v. Compagnie Generale Transatlantique, C.C.A N.Y., 61 F.2d 893.

cepting it as baggage with knowledge of its nature,[27] if, without the knowledge of the vessel or its employees, a passenger conceals with his proper baggage property which cannot be classified as such, it seems that for the latter property no responsibility whatsoever is assumed, not even for gross negligence.[28] Such a concealment, however, does not relieve the vessel from responsibility for that which is properly baggage and for a loss of this the passenger may still recover,[29] but, where a passenger who has money in his trunk, on being questioned about its contents, replies that it contains only clothing, the vessel is not liable for the loss of the trunk.[30]

(3) Baggage in Passenger's Custody or Stateroom

As a general rule the vessel is not liable for injuries to, or losses of, articles or baggage which the passenger retains in his exclusive control and possession, unless there has been negligence on the part of the vessel or its employees.

As a general rule the vessel is not liable for injuries to, or losses of, articles or baggage which the passenger retains in his exclusive control and possession, unless there has been negligence on the part of the vessel or its employees.[31] In a majority of jurisdictions this rule appears to have been extended to hand luggage which the passenger takes with him to his stateroom, and articles which he ordinarily wears about the person but on the particular occasion has deposited in the stateroom.[32] Negligence in failing to provide adequate locks or a sufficient watch for passengers in their staterooms will make the vessel owner liable for property stolen therefrom;[33] and the owner is liable if baggage which a passenger is entitled to take to his cabin is injured by reason of its being wrongfully excluded therefrom;[34] but, in the absence of negligence there is, under the majority rule, no liability.[35]

New York rule. In New York, when there is no regulation of which the passenger has notice requiring him to place his baggage elsewhere, the vessel owner is regarded as coming under a liability similar to that of an innkeeper for the personal baggage or articles of apparel that a passenger leaves in his stateroom, and he is responsible for loss or injury of such property unless caused by act of God or negligence of the passenger.[36] However, this liability does not arise until the baggage has actually been placed in the stateroom,[37] and, if baggage is lost when beside the passenger while he is waiting on deck to get a stateroom assigned him, the general rule as to liability for baggage in the custody of the passgener applies.[38]

Regulations forbidding baggage in stateroom. There are statements to the effect that a regulation forbidding a passenger, who has paid for a stateroom, from taking his baggage with him into it, except at his own risk, is unreasonable and invalid, as far as light baggage containing only articles needed for present use in travel is concerned;[39] and a duly posted notice in the stateroom that valuables be deposited with the purser does not deprive the passenger of his right to keep jewelry, or other articles of personal convenience that are constantly worn, in the stateroom.[40]

(4) Passenger Not Accompanying Baggage

Where, through the fault of the passenger, the baggage is not transported on the same vessel on which the passenger travels, but is placed on another vessel as freight for which the carrier is entitled to compensation, the vessel has been held liable as an insurer, but, where the baggage is forwarded at a later date without charge, it has been held that the vessel's liability is that of a gratuitous bailee only.

Where a passenger takes passage on one vessel, but his baggage does not reach him at the port of departure in time to go on that vessel, and as a

27. N.Y.—Glovinsky v. Cunard SS Co., 26 N.Y.S. 751, 6 Misc. 388

28. Mass.—Dunlap v. International Steamboat Co., 98 Mass. 371.
58 C.J. p. 564 note 72.

29. R.I.—Haddad v. Hartford, etc., Transp. Co., 94 A. 697, 38 R.I. 231

30. U.S.—The Ionic, C.C.N.Y., 13 F. Cas. No. 7,059, 5 Blatchf. 538.

31. U.S.—Defrier v. The Nicaragua, D.C. Ala., 81 F. 745
58 C.J. p. 565 note 75

32. U.S.—The R. E. Lee, D.C. Miss., 20 F. Cas. No. 11,690, 2 Abb. 49.
58 C.J. p. 564 note 76.

33. U.S.—The Western States, N.Y., 159 F. 354, 86 C.C.A. 354, certiorari denied 28 S. Ct. 762, 210 U.S. 433, 52 L.Ed. 1136.
58 C.J. p. 564 note 77.

34. La.—St. Amand v. Lizardi, 4 La. 243.

35. U.S.—Moses v. Compagnie Generale Transatlantique, D.C.N.Y., 16 F. Supp. 197
58 C.J. p. 564 note 79.

36. U.S.—Udell v. Hamburg-American Line, 253 N.Y.S. 209, 141 Misc. 754, affirmed 255 N.Y.S. 1011.
58 C.J. p. 564 note 80.
Negligence of passenger as defeating recovery for baggage stolen from stateroom see infra subdivision b (6) of this section.

Locking stateroom door

(1) Passenger was held not negligent in leaving fur coat in stateroom closet, where, after unsuccessful attempt to lock stateroom door, she called steward.—Udell v. Hamburg-American Line, supra.

(2) Passenger was held not negligent in closing door and going for key where one was not furnished so as to preclude recovery for theft of bag with money.—Lincoln v. New York & Cuba Mail S. S. Co., 62 N.Y.S. 1085, 30 Misc. 752.

37. N.Y.—Hessler v. Detroit, etc., Nav. Co., 170 N.Y.S. 513, 103 Misc. 551.

38. N.Y.—Hessler v. Detroit, etc., Nav. Co., supra.

39. N.Y.—Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. N.S., 229.

40. U.S.—The Munargo, D.C.N.Y., 33 F.2d 329.

consequence he sails without it, it being put on another vessel which gives a receipt or bill of lading for it, the situation becomes one of ordinary shipment of freight,[41] and the vessel becomes entitled to compensation and a lien therefor,[42] and is liable as an insurer, even though the compensation has not yet been paid,[43] but, if the baggage is forwarded at a later date without charge, the contract is one of bailment for the benefit of the passenger as bailor, and the vessel's liability is that of a gratuitous bailee only.[44] A refusal of passage to a passenger terminates the contract of carriage and, if the vessel sails, without giving the passenger a reasonable opportunity to remove his luggage, the shipowner is liable as a trespasser for carrying the baggage away.[45] If the passenger is left behind due to mistake, the master is, at least, liable for failure to exercise ordinary care for the safety of the passenger's baggage which remains on board.[46]

(5) Theft or Conversion

The vessel owner's liability as an insurer extends, for baggage in its exclusive possession, to all cases of theft, robbery, and embezzlement by any of the crew or by other persons, notwithstanding the carrier may have exercised every vigilance to prevent loss.

The vessel owner's liability as an insurer extends, for baggage in its exclusive possession, to all cases of theft, robbery, and embezzlement by any of the crew or by other persons, notwithstanding the carrier may have exercised every vigilance to prevent loss.[47] In addition, the absolute undertaking of a vessel to protect passengers against the misconduct of its own servants requires not only protection of the passenger in his person, but also in his possessions,[48] and the carrier is liable if an employee steals property from a passenger's stateroom,[49] or if out of spite one of the vessel's officers seizes a passenger's personal baggage and throws it into the sea.[50]

(6) Contributory Negligence

The contributory negligence of a passenger may defeat his right to recover for injury to, or loss of, baggage.

The vessel's liability does not extend to losses of, or injuries to, baggage, that are proximately caused by the negligence of the passenger himself,[51] but negligence on the part of the passenger does not excuse if the proximate cause is the negligence of the vessel or its employees.[52] Furthermore, where a vessel has obtained exclusive possession of a passenger's baggage, as where it is carried in the hold or a baggage room, and thereby becomes an insurer, contributory negligence of the passenger is no defense and is not to be considered.[53]

(7) Commencement, Continuance, and Termination of Liability

The liability of a vessel as an insurer for the baggage of a passenger commences when the baggage is delivered to, and accepted by, the carrier. Its liability continues until the baggage has been delivered to the passenger at the port of destination on demand made within a reasonable time.

The responsibility of a vessel, as an insurer for the baggage of a passenger, commences with the delivery of such baggage to, and the acceptance by, an agent authorized to receive baggage,[54] but not before.[55] If there has in fact been a delivery and an acceptance, the mere fact that no check or receipt is issued to the passenger is unimportant,[56] and, if baggage is accepted in advance of the time of sailing, but for the company's convenience is stored on the dock instead of being placed im-

41. U.S.—The Elvira Harbeck, C.C. N.Y., 8 F.Cas.No.4,424, 2 Blatchf. 336
Liability of carrier generally as to passenger not accompanying baggage see Carriers § 870

42. U.S.—The Elvira Harbeck, supra.

43. U.S.—The Elvira Harbeck, supra.

44. N.C.—Midgett v. Eastern Carolina Transp. Co., 104 S.E. 32, 180 N.C. 71.

45. Mass.—Holmes v. Doane, 3 Gray 328.

46. La.—Cosnier v. Golding, 6 Rob 297.
58 C.J. p 565 note 90.

47. U.S.—Smith v. North German Lloyd SS. Co., D.C.N.Y., 142 F. 1032, affirmed 151 F. 222, 80 C.C.A. 574.
58 C.J. p 565 note 93.

48. N.Y.—De Felice v. Compagnie Francaise De Navigation à Vapeur, 82 N.Y.S. 552, 83 App.Div. 73.

49. U.S.—The Western States, N.Y., 159 F. 354, 86 C.C.A. 354, certiorari denied 28 S.Ct. 762, 210 U.S. 433, 52 L.Ed. 1136—The Minnetonka, N.Y., 146 F. 509, 77 C.C.A. 217, certiorari denied 27 S.Ct. 777, 203 U.S. 589, 51 L.Ed. 330

50. N.Y.—De Felice v. Compagnie Francaise De Navigation à Vapeur, 82 N.Y.S. 552, 83 App.Div. 73.

51. U.S.—Moses v. Compagnie Generale Transatlantique, D.C.N.Y., 16 F.Supp. 197.
58 C.J. p 565 note 97.

52. N.Y.—Hart v. North German Lloyd SS. Co., 92 N.Y.S. 338, 46 Misc. 426, affirmed 95 N.Y.S. 733, 108 App.Div. 279.
58 C.J. p.565 note 98.

53. U.S.—Udell v. Hamburg-American Line, 253 N.Y.S. 209, 141 Misc. 754, affirmed 255 N.Y.S. 1011—Hessler v. Detroit & C. Nav. Co., 170 N.Y.S. 513, 103 Misc. 551

54. U.S.—Federal Ins. Co. v. U. S., C.C.A.N.Y., 60 F.2d 46.
58 C.J. p 565 note 99.
Commencement, continuation, and termination of liability as to carriers generally see Carriers §§ 880–883.
Transportation by tender
Where voyage commenced with transportation of baggage by tender, ocean carrier's liability as common carrier also began then.—Federal Ins. Co. v. U. S., C.C.A.N.Y., 60 F.2d 46.

55. U.S.—Lustig v. International Nav. Co., 78 N.Y.S. 885, 38 Misc. 802.
58 C.J. p 566 note 1.

56. Ill.—Haaga v. Austro-Americana Line, 173 Ill.App. 35.

mediately on the vessel, the liability of the carrier during such period of storage is that of an insurer and not that of a warehouseman.[57] Although it may be doubtful whether liability as an insurer attaches on an employee's undertaking to aid a passenger in carrying his personal luggage to his stateroom,[58] the vessel owner is at least liable for any injuries or losses that result from the negligence of the employee during the time he is assisting in taking the baggage to the stateroom.[59]

Continuance and termination of liability; delivery. Ordinarily the liability of a vessel for a passenger's baggage continues until it has been delivered to him at the port of destination on demand made within a reasonable time.[60] After the vessel has arrived in port the owner has a right to require that passengers remove their baggage within a reasonable time so as to discharge further responsibility for its safe-keeping,[61] and, where property is not removed before a reasonable time has elapsed, the vessel owner is thereafter liable only for losses caused by his negligence or that of his servants.[62] Where the passenger has died during the voyage, liability as an insurer is terminated by a delivery of the baggage at the port of destination to his personal representative.[63] Likewise, liability as an insurer is terminated by a delivery of the baggage to the immigration officials, where such is required by law;[64] and, where there is nothing to show a special contract to deliver a passenger's baggage to a particular place or city in the port of destination, the vessel discharges its responsibility by delivering the baggage to the place in the port of destination, fixed by the established usage and custom of the carrier.[65]

Connecting carrier. A carrier by water selling a through ticket and checking a passenger's baggage through to a point beyond its lines has been held to undertake, in the absence of an express stipulation to the contrary, to insure the safe delivery of such baggage at the point to which the ticket is sold,[66] and is, therefore, liable for loss of, or injury to, such baggage wherever it occurs, the connecting carriers being regarded only as its agents in transporting the baggage.[67]

§ 197. —— Limitation of, or Exemption from, Liability

A carrier by water may, by stipulation, limit or modify its liability as an insurer of baggage, and may, by stipulation, limit its liability to a certain amount, but it may not in general stipulate for exemption from all liability for injury to, or losses of, baggage resulting from its own negligence or that of its servants.

The general rule is that a carrier by water may, by stipulation, limit or modify its liability as an insurer of baggage,[68] but that it cannot stipulate for exemption from all liability for injury to, or losses of, baggage resulting from its own negligence or that of its servants.[69] Stipulations limiting liability to a certain sum, unless express valuation is declared and extra rates are paid, have been sustained in some cases,[70] and are not against public

57. Ill.—North German Lloyd SS Co. v. Bullen, 111 Ill.App. 426
58 C.J. p 566 note 3.

58. N.Y.—Holmes v. North German Lloyd SS Co., 77 N.E. 21, 184 N.Y. 280, 5 L.R.A.,N.S., 650.

59. N.Y.—Holmes v. North German Lloyd SS Co, supra.
58 C.J. p 566 note 5.

60. N.Y.—Gilhooly v. New York, etc, Steam Nav Co, 1 Daly 197
58 C.J. p 566 note 6.

61. N.Y.—Van Horn v. Kermit, 4 E.D. Smith 453

62. N.Y.—Van Horn v. Kermit, supra

63. La.—Walker v. Goslee, 11 La. Ann 389.
58 C.J. p 566 note 10.

64. N.Y.—Klein v. Hamburg American Packet Co, 3 Daly 390

65. N.Y.—Klein v. Hamburg American Packet Co, supra

66. U.S.—Maskos v. American S. S. Co., C.C.Pa., 11 F. 698.

Ocean carrier could act as common carrier for rail transportation of passenger's trunk beyond ocean carrier's line.—Wiener v. Compagnie Generale Transatlantique, C.C.A.N.Y., 61 F.2d 893.

67. U.S.—Maskos v. American S. S. Co., C.C.Pa., 11 F. 698.

68. U.S.—The City of Norfolk, D.C.Md., 13 F.Supp. 511—The Leviathan, D.C.N.Y., 4 F.Supp. 918, affirmed, C.C.A., 72 F.2d 286.
N.Y.—Scire v. American Export Lines, 93 N.Y.S. 457, 197 Misc. 422
58 C.J. p 566 note 16
Minority of passengers as affecting binding effect of conditions and limitations see supra § 182

69. U.S.—The City of Norfolk, D.C.Md., 13 F.Supp. 511.
N.Y.—Haskins v. Canadian Pac. S.S. Co, 270 N.Y.S. 147, 240 App.Div. 377—Scire v. American Export Lines, 93 N.Y.S.2d 457, 197 Misc. 422—Udell v. Hamburg-American Line, 253 N.Y.S. 209, 141 Misc. 754, affirmed 255 N.Y.S. 1011.
58 C.J. p 567 note 17.

Liability as bailee
Involved in the liability of a common carrier by water as an insurer of baggage is a lesser liability as bailee for hire, of no consequence while the greater liability exists, so that, when carrier ceases to be liable as carrier, it remains liable as bailee—Wheeler v. Oceanic Steam Navigation Co, 26 N.E. 248, 125 N.Y. 155, 21 Am.S.R. 729—Haskins v. Canadian Pac. S.S. Co., 270 N.Y.S. 147, 240 App.Div. 377—Scire v. American Export Lines, 93 N.Y.S.2d 457, 197 Misc. 422.

70. U.S.—White v. Anchor Line, D.C.N.Y., 53 F.2d 131—Cohn v. U.S. Lines, D.C.N.J., 84 F.Supp. 503—The City of Norfolk, D.C.Md., 13 F.Supp. 511—The Leviathan, D.C.N.Y., 4 F.Supp. 918, affirmed, C.C.A., 72 F.2d 286.
Mass.—Secoulsky v. Oceanic Steam Nav. Co, 112 N.E. 151, 223 Mass. 465.
58 C.J. p 567 note 18.

Liability measured by valuation
Where language of valuation clause on passenger ticket contains notice to passenger of agreed valuation or limitation, unless higher value is declared on baggage and increased compensation paid to ocean carrier, carrier's liability must be measured by ordinary valuation, since it has received only ordinary rate.—The Levi-

policy,[71] and have even been held to apply where the loss of baggage results from the negligence of the vessel's employees.[72] Such limitations, however, have been held unenforceable where the amount fixed is unreasonable,[73] or where the limitation is unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment,[74] although it has been stated that a limitation is not defeated by the fact that the passenger was not offered any real choice of rates and was not adequately informed that an alternative rate existed.[75]

In New York it has been made quite plain that a vessel owner can, by a clear and explicit stipulation, limit his liability even for losses of baggage occasioned by his negligence or that of his servants,[76] and the courts of that jurisdiction have quite uniformly enforced stipulations limiting liability to a certain amount, unless excess value is declared and extra rates paid.[77]

Construction and operation of limitation clauses Stipulations or conditions in the passage contract which profess to modify the vessel owner's liability for passengers' baggage are construed most strongly against the carrier,[78] and in the light of public policy,[79] and are held inoperative when not clearly applicable to the situation presented.[80] Although losses occasioned by negligence have been held covered by a stipulation which simply limits liability for baggage to a certain sum, unless the excess value is declared and extra rates paid,[81] there is some authority to the effect that negligence must be specifically mentioned before a clause exempting from liability will cover losses occurring from such cause,[82] and that general words such as "from any cause arising" might be limited to such extraordinary liabilities as carriers are under without fault or negligence on their part,[83] as every presumption is against an intention to contract for immunity from negligence,[84] and such contracts will not be so construed unless expressed in unequivocal terms.[85]

athan, D C N Y, 4 F.Supp 918, affirmed, C C.A., 72 F 2d 286

71. U S—Cohn v. U. S. Lines Co, D C N.J, 84 F.Supp 503—The City of Norfolk, D C Md, 13 F Supp. 511

72. U S—The Morro Castle, D C N. Y, 168 F 555—The Cretic, D C. Mass., 224 F 216.

73. U.S—Weinberger v. Compagnie Generale Transatlantique, D.C N.Y, 146 F. 516
58 C.J. p 567 note 20.

74. Ill—Bass v. Chicago, Duluth & Georgian Bay Transit Co, 89 N E 2d 430, 339 Ill App 246
58 C J p 567 note 21.

75. U S—Isthmian S S Co v McElligott, C.A.Ga, 177 F 2d 591.

76. N.Y.—Garcin v. Compagnie Generale Transatlantique, 289 N.Y.S 1075, 160 Misc 687—Watson v Hamburg American Line, 252 N Y. S 273, 140 Misc 519
58 C J p 567 note 22

77. N.Y—Reichman v Compagnie Generale Transatlantique, 49 N E 2d 474, 290 N Y. 344, motion denied 50 N.E 2d 251, 290 N.Y. 872, certiorari denied 64 S Ct 83, 320 U S 771, 88 L Ed 461—Haskins v. Canadian Pac S S. Co., 270 N Y S 147, 240 App.Div 377.
58 C J. p 567 note 23.

Conversion of property

Where steamship passage contract provided that fare for voyage was based partly on agreed maximum valuation of passenger's property taken on voyage, provision limiting carrier's liability for loss of such property to amount of such valuation applied, so as to bar recovery of additional sum as damages for conversion of property.—Reichman v. Compagnie Generale Transatlantique, 49 N E 2d 474, 290 N Y 344, motion denied 50 N E.2d 251, 290 N Y 872, certiorari denied 64 S.Ct. 83, 320 U S. 771, 88 L Ed. 461.

78. N.Y.—Holmes v. North German Lloyd SS Co., 77 N E 21, 184 N Y. 280, 5 L.R A.,N S, 650—Scire v. American Export Lines, 93 N.Y S 2d 457, 197 Misc. 422.

Carrier having prepared steamship ticket could not complain that provisions of ticket as to limited liability for baggage were not in accord with actual conditions—Watson v. Hamburg American Line, 252 N Y.S. 273, 140 Misc. 519

79. N.Y—Scire v American Export Lines, 93 N.Y.S 2d 457, 197 Misc 422.

Two contracts

Pursuant to text rule, the vessel should not be permitted to enter into two contracts with a passenger and place itself in a position where it could claim either was a binding agreement depending on circumstances and jurisdiction, and, hence, where passenger ticket for passage on vessel contained limitations as to liability of carrier for loss of baggage, receipts for baggage subsequently issued which were invalid because they purported to exempt carrier from all liability, supplanted original contract provision with respect to baggage and full value of lost baggage could be recovered from carrier by passengers.—Scire v. American Export Lines, supra.

80. **Limitation clause held applicable**
U S—Federal Ins. Co v. U. S., C C. A.N.Y., 60 F 2d 46.
N.Y—Reichman v Compagnie Generale Transatlantique, 49 N E 2d 474, 290 N Y 344, motion denied 50 N E 2d 251, 290 N.Y 872, certiorari denied 64 S.Ct. 83, 320 U.S. 771, 88 L.Ed 461.

Limitation clause held not applicable

(1) In general.
U S.—Isthmian S. S. Co. v McElligott, C A Ga, 177 F.2d 591—Taylor v. Isthmian S. S. Co, D C Ga., 85 F Supp 384.
N Y—Watson v. Hamburg American Line, 252 N Y S. 273, 140 Misc. 519.
58 C J. p 567 note 25.

(2) Steamship company's liability for loss of passenger's baggage which contained articles purchased by her en route was held not limited to sum stated in clause on her ticket, limiting company's liability to such amount unless excess value of baggage at place of embarkation be declared before embarkation.—Haskins v. Canadian Pac S. S. Co, 270 N.Y S 147, 240 App.Div 377.

81. N Y—Tewes v North German Lloyd SS. Co, 78 N E. 864, 186 N. Y. 151, 8 L.R A.,N.S., 199, 9 Ann Cas 909, followed in 78 N.E. 1113, 186 N.Y. 525.

82. Philippine—Bryan v. Eastern & Australian SS Co, Ltd., 28 Philippine 310.
58 C.J p 568 note 26.

83. N Y—Scire v. American Export Lines, 93 N.Y.S.2d 457, 197 Misc. 422.

84. N Y.—Scire v. American Export Lines, supra.

85. N Y.—Scire v. American Export Lines, supra.

Furthermore, where a special and independent contract is made for the carriage of excess baggage, limitations of liability expressed in the ticket place no limitation on the liability under the special contract.[86]

Notice of claim. In the absence of constitutional or statutory prohibition, provisions requiring a written notice of claim for loss of, or injuries to, baggage or effects are valid and are very generally upheld,[87] but, if such stipulations are unreasonable, they are void as against public policy.[88] There must be a substantial compliance with the contract requiring notice within a specified time.[89] Stipulations as to notice of claim may be waived,[90] but a waiver, in order to be effective, must be made by the carrier or its authorized agent.[91]

Contractual limitation as to time of bringing suit. In the absence of constitutional or statutory prohibition, it has been held that the parties have a legal right to agree on a limitation of time within which to sue,[92] and, where the contract period is reasonable, it will be enforced.[93]

§ 198. Actions

Under the maritime law a contract for the carriage of passengers imposes a lien on the vessel to secure its performance, and in case of a breach the passenger may bring an admiralty suit in rem for the enforcement of his lien. An action for money had and received is a proper form of action to recover passage money paid in advance. The passenger must ordinarily comply with valid conditions precedent before he can maintain a suit or action for the cause specified.

Under the maritime law a contract for the carriage of passengers imposes a lien on the vessel to secure its performance, in the same manner as does a contract for the carriage of mechandise on freight, and in case of breach the passenger may bring an admiralty suit in rem for the enforcement of his lien.[94] According to some authorities this liability attaches to the vessel as soon as the contract of carriage is entered into, and a suit in rem may be maintained, even though the breach occurs before the vessel has actually entered on performance of the contract.[95] Other cases, however, have established, what is probably the majority rule, that the vessel does not become liable until performance of the contract has been entered into by the receipt of the passenger, or his baggage, on board, and for breaches occurring before that time no suit in rem can be maintained.[96] One who is not a passenger cannot maintain a suit in rem against the vessel to recover damages arising from an assault by an officer of the vessel.[97] An action for money had and

Ambiguous contract

Contract between carrier and passengers of vessel for transportation of contents of baggage whose language was so ambiguous that it could not be construed as exempting carrier from liability for only its negligence, was void.—Scire v. American Export Lines, supra

86. U.S.—La Bourgogne, N.Y., 144 F. 781, 75 C.C.A. 647, affirmed 28 S. Ct. 664, 210 U.S. 95, 52 L.Ed. 973. 58 C.J. p. 568 note 31.

87. U.S.—Van Bergh v. Cunard S.S. Co., D.C.N.Y., 40 F.2d 545.
N.Y.—Rosenthal v. Compagnie Generale Transatlantique, 12 N.Y.S.2d 102, 170 Misc. 426.

Reasonableness of time

Where contract of passage signed by steamship passenger stated that shipowner should not be liable for loss of baggage unless written notice of claim be given within five days after passenger should be landed from the vessel and passenger discovered alleged loss within two days after landing and orally gave what knowledge he had of the loss to agent of shipowner, passenger could not contend that five days was an unreasonable time to require proof of loss in writing.—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22.

88. U.S.—Haskins v. Canadian Pac. S. S. Co., 270 N.Y.S. 147, 240 App. Div. 377

89. U.S.—The Minnetonka, N.Y., 146 F. 509, 77 C.C.A. 217, certiorari denied 27 S.Ct. 777, 203 U.S. 589, 51 L.Ed. 330.
58 C.J. p. 569 note 49 [a] (1).

Oral report

A steamship passenger who failed to comply with requirement in passage contract that written claim with respect to property be lodged with purser prior to passenger's leaving steamer, or lodged with carrier within a designated number of days after leaving steamer, was not entitled to recover from steamship company for damages to personal property, although he had reported the loss orally to purser who took notes on the claim.—Rosenthal v. Compagnie Generale Transatlantique, 12 N.Y.S.2d 102, 170 Misc. 426.

90. N.Y.—Haskins v. Canadian Pac. S. S. Co., 270 N.Y.S. 147, 240 App. Div. 377.

91. **Unidentified agent**

Where contract signed by steamship passenger provided that no agent or employee of shipowner should have authority to waive any of the provisions of the contract, provision requiring passenger to give written notice of loss of baggage within five days after having landed from vessel could not be waived by unidentified agent of shipowner to whom passenger telephoned notice of loss.—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22.

92. U.S.—Miller v. International Freighting Corp., D.C.N.Y., 97 F. Supp. 60.

93. U.S.—Miller v. International Freighting Corp., supra.

Period held reasonable

U.S.—Miller v. International Freighting Corp., supra.
58 C.J. p. 569 note 48 [b] (6).

Period held unreasonable

N.Y.—Kemelhor v. Furness, Withy & Co., 248 N.Y.S. 659, 139 Misc. 64.

94. U.S.—Walsh v. The H. M. Wright, D.C.La., 29 F.Cas.No. 17,115, Newb.Adm. 494—The Zenobia, D.C. N.Y., 30 F.Cas.No. 18,208, Abb.Adm. 48.
58 C.J. p. 568 note 36.
Election of passenger between suing in contract or tort see Actions § 49 e (5).
Jurisdiction in admiralty over contracts for carriage of passengers see Admiralty § 30 b.

95. U.S.—The Pacific, C.C.N.Y., 18 F.Cas.No. 10,643, 1 Blatchf. 569
58 C.J. p. 569 note 37.

96. U.S.—The Priscilla, N.Y., 114 F. 836, 52 C.C.A. 470.
58 C.J. p. 569 note 38.

97. U.S.—The Vueltabajo, D.C.Ala., 163 F. 594
58 C.J. p. 569 note 39.

received is a proper form of action to recover passage money paid in advance;[98] and trespass may be maintained where a passenger is refused passage and the vessel sails away with his baggage without giving him an opportunity to remove it,[99] although conversion will not lie against a vessel for negligence [1]

Statutory remedies against vessel. Some statutes make the vessel liable for any damages arising out of the breach of a contract for the transportation of persons [2] Under a statute providing that vessels navigating within the state shall be liable for injuries to passengers by officers of the boat, it has been held that the vessel stands as a substitute for the officer who commits the injury and that any action which could be maintained against the officer may be maintained against the vessel.[3]

Attachment. A passenger's claim for the loss of baggage is not a demand for a debt, but is a claim for unliquidated damages, and a foreign attachment will not lie to enforce such a claim where the existence of a debt is prerequisite.[4]

Jurisdiction. In accordance with the general rule discussed in Courts § 77, where a nonresident passenger sues a nonresident owner of a vessel for loss of baggage, a state court may in its discretion refuse to accept jurisdiction.[5]

Conditions precedent. Valid stipulations requiring passengers to give written notice of their claims within a specified time in order to hold the carrier liable because of personal injuries, as discussed supra § 195 b, loss of, or injuries to, baggage, considered supra § 197, or abandonment of the voyage, discussed infra § 202, form, if the time limit is reasonable, valid conditions precedent with which the passenger must ordinarily comply before he can maintain a suit or action for the cause specified.[6] The fact that the passenger is a minor, and that the ticket was purchased by his parents, does not relieve him from compliance with such a condition where the contract of carriage is relied on as the basis of the cause of action.[7]

According to some authorities the burden of proving compliance with such a condition is on the passenger, and it is not necessary for the vessel owner to plead noncompliance,[8] but according to other authorities a failure of defendant to set up the condition, or plead noncompliance, will cause the condition to be waived [9]

Parties. The transferee of a passage ticket can bring a suit in personam in his own name, in admiralty, for a breach of the contract contained in the ticket [10] A person checking baggage in connection with his transportation as passenger may bring an action for breach of contract with respect to such baggage, although he is not the real owner thereof.[11]

Process. The owner of a vessel, residing without the jurisdiction, cannot, in an action against him for injuries resulting from the improper conduct of the master toward a passenger, be brought into court by a service of citation on the master;[12] and a foreign and alien corporate owner of a vessel which maintains an office in a state for the mere solicitation of business, but has no property in the state and carries on no transportation therein, is not doing business in the state and jurisdiction cannot be had of such a corporation by service of a summons on the general agent in charge of the office in the state in a personal injury action by a passenger.[13]

§ 199. —— Pleading

The general rules as to pleadings in civil actions apply in an action by a passenger against a carrier by water.

The general rules as to pleading in civil actions apply in an action by a passenger against a carrier by water.[14] The complaint, in order to be sufficient,

98. Mass.—Brown v. Harris, 2 Gray 359.

99. Mass.—Holmes v. Doane, 3 Gray 328.

1. N.Y.—Wamsley v. Atlas S. S. Co., 61 N.E. 896, 168 N.Y. 533, 85 Am.St.R. 699

2. U.S.—The Shrewsbury, D.C.Ohio, 69 F. 1017
58 C.J. p. 569 note 40.

3. Ill.—The F. X. Aubury, 28 Ill. 412, 81 Am.D. 292.
58 C.J. p. 569 note 42.

4. Pa.—Fisher v. Cunard SS. Co., 19 Pa.Dist. 387.

5. N.Y.—Schlesinger v. Italian Line, Italia Societa Anonima Di Navigazione of Genoa, 103 N.Y.S.2d 922, 278 App.Div. 127, affirmed 106 N.E.2d 69, 303 N.Y. 994

6. U.S.—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164
Mass.—O'Flaherty v. Cunard S. S. Co., 183 N.E. 712, 281 Mass. 447
58 C.J. p. 569 note 48

7. U.S.—The Finland, D.C.N.Y., 35 F.2d 47

8. U.S.—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164
58 C.J. p. 570 note 56.

9. U.S.—Pacific SS. Co. v. Sutton, C.C.A.Wash., 7 F.2d 579, certiorari denied 46 S.Ct. 202, 269 U.S. 586, 70 L.Ed. 425.

10. U.S.—Cobb v. Howard, C.C.N.Y., 5 F.Cas.No. 2,924

11. Md.—Baltimore Steam Packet Co. v. Smith, 23 Md. 402, 87 Am.D. 575.

12. La.—Fellows v. High, 7 La.Ann. 451.

13. U.S.—Maxfield v. Canadian Pac. Ry. Co., C.C.A.Minn., 70 F.2d 982, certiorari denied 55 S.Ct. 140, 293 U.S. 610, 79 L.Ed. 700, rehearing denied 55 S.Ct. 212, 293 U.S. 632, 79 L.Ed. 717.

14. U.S.—Churchill v. United Fruit Co., D.C.Mass., 294 F. 400

must show a duty owing to plaintiff and a breach of that duty by defendant, resulting in injury to plaintiff.[15] If this is done, the complaint is sufficient,[16] but an allegation that plaintiff was "lawfully and rightfully" on the vessel at the time of an injury is insufficient to show the relationship of carrier and passenger and to charge defendant with the duties of such relationship;[17] and, in an action to recover the purchase price of a ticket, the petition does not sufficiently state a cause of action if it simply alleges that defendant has canceled the ticket and stopped passage, since it must be shown that the cancellation was wrongful and made under such circumstances that the law will impose an obligation on defendant to refund the purchase price.[18] In an action for damages sustained by reason of the explosion of a steamboat, alleged to have been caused by the negligence of the master and owners, an averment of strict compliance on the part of the proprietors with the requirements of statute, relating to steamboats, which creates a presumption of negligence from the bursting of a boiler, as discussed infra § 200 a (1), has been held to be insufficient as a defense, without the further allegation of care and a denial of negligence.[19]

Issues, proof, and variance. As in other civil actions the issues, in an action by a passenger against a carrier by water, are confined to those raised by the pleadings, and proof may be made of matters in issue.[20] Allegations as to the existence of a contract of carriage need not be sustained by proof of a formal contract, as the obligation of the carrier is implied from the undertaking to transport the passenger.[21] In an action to recover for refusal to transport, evidence that, under the immigration laws, the vessel could not properly transport the persons refused is inadmissible under a general denial, as the defense of illegality must be separately pleaded, unless the illegality is shown by the complaint or evidence of plaintiff.[22] Likewise, a general denial does not permit the admission of such evidence to show noncompliance with the terms of the ticket, since they constitute conditions subsequent, the breach of which must be separately pleaded.[23] In accordance with the general rules discussed in Negligence § 187 d (2), unless it appears that a general allegation is intended to cover other acts than those specially alleged, where there is an allegation of general negligence followed by allegations of specific negligence, the allegations of specific negligence supersede the allegation of general negligence,[24] and, if there is to be a recovery at all, it must be on the specific act or acts and not on the general allegation.[25] The fact that the evidence does not use the identical language of the complaint is not a material variance if from the evidence as a whole the jury may properly infer that the allegations are true.[26]

§ 200. —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

(1) Personal injury suits
(2) Suits for loss of, or injury to, baggage

(1) Personal Injury Suits

In an action to recover for personal injuries, the passenger has the burden of proving every fact essential to his cause of action.

In an action to recover for personal injuries, the passenger has the burden of proving every fact essential to his cause of action.[27] Thus, where a passenger seeks to hold a person or company personally liable for injuries caused by negligence in

15. U S—Churchill v. United Fruit Co, supra

16. Wash—Croft v. Northwestern SS Co, 55 P 42, 20 Wash. 175. 58 C J. p 570 note 62.

Foreign law

Where the stateroom of a passenger on a French vessel on the high seas was entered by a watchman and she was assaulted, it was not essential for her to recover against the steamship company that she plead and prove that the French law authorized a recovery under such circumstances—Compagnie Generale Transatlantique v. Rivers, N.Y, 211 F 294, 127 C C A. 580.

17. N Y—Van Loon v R Lawrence Smith, Inc, 163 N.Y S. 621, 176 App Div. 547.

18. U S—Rosen v. Netherlands American Steam Nav. Co., 174 N.Y. S 613

19. Ohio—Curran v. Cheeseman, 13 Ohio Dec 411.

20. U.S—The City of Panama, Wash, 101 U S. 453, 25 L Ed 1061—Wiener v. Compagnie Generale Transatlantique, C C A.N Y., 61 F 2d 893.
Alaska—The Estebeth, 8 Alaska 486
Mo—Munsey v. Eagle Packet Co., App, 50 S W.2d 754
N Y.—Rabinowitz v. Cunard SS Co, 119 N Y S 625.

21. U S—The City of Panama, Wash, 101 U S 453, 25 L Ed. 1061

22. N Y—Rabinowitz v. Cunard SS. Co, 119 N.Y.S. 625

23. N.Y.—Rabinowitz v. Cunard SS Co., supra.

24. Mo—Munsey v Eagle Packet Co, App, 50 S.W 2d 754.

Allegations held general

In action by passenger against steamship company, assignment that defendant negligently collided with, struck, and knocked down plaintiff was allegation of general negligence. —Munsey v Eagle Packet Co, supra.

25. Mo—Munsey v. Eagle Packet Co, supra.

26. Ga.—Kennedy v. Ocean SS. Co., 116 S E. 874, 29 Ga App. 737.

27. Alaska.—The Estebeth, 8 Alaska 486.

the management or operation of the vessel, the burden is on plaintiff to prove that defendant, at the time of the injuries, had such ownership or control of the vessel as would render him responsible.[28] Plaintiff cannot sustain his burden in this respect by a mere showing that defendant is a charterer of the vessel, since the primary presumption which attaches to such a showing is that the contract is simply one of affreightment, in which the general owners retain the control, management, and navigation of the vessel and the legal responsibility of ownership.[29] Furthermore the passenger has the burden of proving that there has been some negligence on the part of defendant,[30] which proximately caused the injury,[31] and, if the passenger fails to show that the accident happened as alleged, defendant is not bound to show the other ways in which the accident might have been caused.[32] Although the mere happening of an accident to the passenger is not proof of, or does not raise a presumption of, negligence on the part of the vessel,[33] and mere proof of injury to a passenger by causes not under the control of the carrier gives rise to no presumption of negligence on the part of the vessel,[34] if it is further shown that the injury resulted from something under the management or control of the vessel, and the circumstances are such that the injury could not well have happened without negligence on the part of defendant, the doctrine of res ipsa loquitur is applicable,[35] which raises a presumption of negligence or makes out a prima facie case in favor of the passenger,[36] which throws on defendant the burden of showing that there was a full exercise of the care required under the circumstances.[37] Where a passenger shows that he has been assaulted by an employee of the vessel, the burden of proving any matter set up by way of justification or defense rests on defendant.[38]

Where the passage ticket stipulated that the contract was to be governed by the laws of a foreign country, it is for the vessel to show its nonliability thereunder,[39] and if such passengers are entitled to receive a lesser degree of care than those who travel on American ships, it is only fair to require a showing to that effect by the carrier when called on to respond to a tort claim.[40]

Contributory negligence. According to some authorities the burden of proving freedom from contributory negligence is on the passenger,[41] but according to other authorities it is a defensive issue and the burden of proving it is on defendant.[42]

Statutory presumption. A statute providing that, in suits against steamship owners for injuries to person or property for injuries caused by the bursting of a boiler, the fact of bursting shall raise a presumption of negligence applies in a case where a passenger on one vessel is injured by the explosion of the boiler on another as well as where the person injured is a passenger on the vessel where the boiler explodes,[43] and casts on the owner of

28. U S—Kulack v The Pearl Jack, C A Mich, 178 F 2d 154
Or—Deniff v McCormick, 210 P. 703, 105 Or. 697.
Dismissal
Libel for injuries sustained while on board vessel under jurisdiction and control of United States would be dismissed as to corporation where passenger failed to offer any proof that corporation was in possession or control of vessel or any part of it at time of injury—Roeper v. U. S, D.C N Y, 85 F Supp. 864.

29. Or.—Deniff v. McCormick, 210 P. 703, 105 Or 697.

30. U S—Le Doux v. U. S Lines Co, D.C N.Y., 31 F Supp 608—Logue v. Cape Cod S. S Co, D C Mass., 30 F Supp 606—Moses v. Compagnie Generale Transatlantique, D C N Y., 16 F Supp. 197.
58 C J. p 570 note 70.
Burden of proof as to compliance with conditions precedent see supra § 198

31. U S—Erdman v. U. S., C.C.A.N. Y, 143 F.2d 198, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L Ed. 615.

32. U S—Le Doux v. U. S. Lines Co, D C.N Y., 31 F Supp 608

33. U S—Brady v. Farley, D C N Y, 27 F Supp. 840.

34. U S.—The Great Northern, Hawaii, 251 F 826, 163 C.C A. 660.
58 C J. p 570 note 71.

35. N Y—Watson v. Compagnie Generale Transatlantique, 264 N Y S. 570, 147 Misc 697.
Wash—Lang v Puget Sound Nav. Co., 65 P 2d 1069, 189 Wash. 353.
58 C J p 571 note 72.

36. N.Y—Watson v. Compagnie Generale Transatlantique, 264 N Y.S 570, 147 Misc. 697.
Wash.—Lang v. Puget Sound Nav. Co., 65 P.2d 1069, 189 Wash. 353.
58 C J. p 571 note 72.

37. U.S—Morrison v. Coombs, D.C. Me, 23 F.Supp. 852, opinion adhered to 24 F Supp 366
Wash.—Lang v. Puget Sound Nav. Co., 65 P.2d 1069, 189 Wash 353
58 C J. p 571 note 72.
Presumptions and burden of proof as to carriers in general see Carriers § 764.

38. Conn.—Levidow v. Starin, 60 A. 123, 77 Conn 600.
Mass.—Mountford v. Cunard SS. Co, 88 N E 782, 202 Mass. 345.

39. U S—The De Grasse, D C.N.Y., 58 F 2d 1019—Compagnie Generale Transatlantique v. Rivers, N.Y, 211 F 294, 127 C C A 580, certiorari denied 34 S Ct 603, 232 U S. 727, 58 L Ed. 817.

40. U.S—The De Grasse, D.C.N Y, 58 F.2d 1019

41. U.S—Gretschmann v. Fix, D.C. N Y, 189 F 716.

42. U.S—Coggeshall Launch Co. v. Early, Cal, 248 F. 1, 160 C C A. 141.
Tex—Gillum v. New York, etc., SS. Co., Civ.App, 76 S W 232.

43. U.S—The New World v. King, Cal., 16 How. 469, 14 L Ed 1019.
Minn—Fay v. Davidson, 13 Minn 523.
Conclusiveness of presumption
The presumption of negligence, arising from the fact of the explosion of the boiler of a steamboat, becomes conclusive when no hidden defect is shown to have existed, and the boiler is found to have been in an unsafe condition resulting from burning, which must have been done by the carelessness of the engineer.

the vessel the burden of showing that the accident was due to causes which human skill and foresight in the construction and management could not foresee or avert.[44]

(2) Suits for Loss of, or Injury to, Baggage

Generally, proof of the delivery of the baggage to the vessel in good condition, and a failure of the latter to deliver it, or that there was a loss of, or injury to, the baggage when delivered to the plaintiff establishes a prima facie case of negligence on the part of the vessel or its employees.

In a suit for the loss of, or injury to, baggage the passenger has, in the first instance, the burden of proving the essential elements of his cause of action,[45] such as the delivery of the baggage to the vessel or its employees,[46] and the fact of the loss or injury.[47] However, where the passenger shows a delivery of the baggage to the vessel in good condition, and a failure of the latter to deliver it, or that there was a loss of, or injury to, the baggage when delivered to him, he establishes a prima facie case of negligence on the part of the vessel or its employees which makes it incumbent on defendant to show freedom from negligence;[48] or, in cases where the liability is that of an insurer, that the loss or injury was the result of an act of God or inevitable accident,[49] and, although extraordinarily rough weather warrants a finding of damage to cargo or baggage by sea perils, provided proof of ordinary good stowage is first given by the ship, this preliminary burden is on the ship, and cannot rest in mere presumption.[50]

b. Admissibility

Competent, relevant, and material evidence is admissible in an action by a passenger against a carrier by water.

In an action by a passenger against a carrier by water, any evidence, if not otherwise incompetent, which is relevant and material is admissible,[51] while that which is irrelevant, immaterial, or incompetent is inadmissible.[52] Although a passage ticket issued to, and accepted by, the passenger is ordinarily admissible as showing the contract between the parties,[53] it is not the sole evidence of the contract of carriage,[54] and other evidence, such as representations in advertising circulars, and the like, may be introduced by the passenger to show what the contract really was;[55] but, where a ticket, collected by the vessel, has been lost, and the loss is not sufficiently accounted for, the carrier cannot impose on the passenger conditions and burdens contained in a form of contract offered in evidence and testified to as being the one generally used for trips such as those taken by plaintiff, since under such circumstances it will not be considered as the form of contract delivered to plaintiff.[56] Before a purported copy of a tariff schedule can be admitted in evidence, in order to prove that conditions and limitations contained therein form a part of the contract of carriage, there must first be competent evidence to show that the tariff schedule was properly filed.[57]

Admissions of the captain, as to the negligence of the steamship company or its employees in the construction or management of the vessel, are inadmissible as evidence against the steamship company, since the captain is employed only to navigate the vessel and such admissions are mere opinions outside the scope of his duty.[58]

—Dunlap v The Reliance, C C.Ga., 2 F 249, 4 Woods 420

Presumption held not rebutted

U S—The New World v King, Cal., 16 How 469, 14 L Ed. 1019.

44. N Y.—Caldwell v New Jersey Steamboat Co, 56 Barb 425, affirmed 47 N Y. 282

45. U.S—The Munargo, D C N Y, 33 F 2d 329—Moses v. Compagnie Generale Transatlantique, D C N Y, 16 F Supp. 197.

46. N Y—Lustig v. International Nav. Co, 78 N Y S 885, 38 Misc 802.

58 C.J p 571 note 80

Failure to prove vessel's possession

Shipper who failed to prove that his loss was suffered while trunk was in steamship company's possession under contract of carriage was not entitled to damages—Hirshman v. American President Lines, 87 N Y. S.2d 236.

47. U S—The Munargo, D.C.N.Y., 33 F 2d 329.

48. N.Y—Scire v. American Export Lines, 93 N.Y.S 2d 457, 197 Misc. 422

58 C J p 572 note 82.

Effect of specific allegations of negligence

In libel by passengers against steamship company for damages to personal belongings and effects, fact that passengers alleged two specific acts of negligence by steamship company did not place burden of proving negligence on passengers, especially where evidence supported finding of negligence—Isthmian S. S Co. v. McElligott, C.A Ga., 177 F.2d 591.

49. U S—The Majestic, N Y., 17 S Ct 597, 166 U S 375, 41 L Ed 1039.

50. U S—The Kensington, D C N Y., 88 F. 331, affirmed 94 F. 885, 36 C C A 533, reversed on other grounds 22 S Ct 102, 183 U S 263, 46 L Ed 190.

51. U.S—Pacific S S Co. v Holt, C. C A Or., 77 F.2d 192.

58 C.J. p 572 note 86.

52. U S—Silverman v. Bermuda & West Indies S S. Co., D.C N.Y, 12 F Supp 164

N.Y.—Baer v U. S Lines Co, 43 N. Y S 2d 212, 180 Misc 456

Ohio.—Cloke v Coney Island, 10 N. E 2d 1009, 56 Ohio App. 384.

58 C J. p 572 note 87

53. N.Y—Morgan v Oceanic Steam Nav. Co, 224 N Y S. 420, 130 Misc. 570.

54. Mich—Thurston v. Northern Nav. Co., 171 N.W. 423, 205 Mich 278.

55. Mich.—Thurston v. Northern Nav Co., supra

56. Mich—Vanderberg v. Detroit, etc., Nav. Co., 186 N W. 477, 216 Mich 682.

57. Mich.—Vanderberg v. Detroit, etc, Nav. Co, supra.

58. U.S.—Union Packet Co. v.

c. Weight and Sufficiency

The general rules as to the weight and sufficiency of evidence in civil actions are usually controlling in actions by passengers against vessels or their owners.

The general rules as to the weight and sufficiency of evidence in civil actions are usually controlling in actions by passengers against vessels or their owners.[59] Mere possession of a steamship ticket is not of itself sufficient evidence of an assignment by delivery to the holder.[60] An indorsement on an inspector's certificate that a vessel has supplied accommodations for an additional number of passengers cannot be accepted as sufficient evidence of that fact where other evidence shows conclusively that such accommodations were not provided.[61] Where a large number of passengers join in a suit in rem to recover damages for injuries alleged to have been received as passengers from causes which are common to all, and which may be established by the same evidence in respect of the claim of each libelant, it is not essential, in order to sustain a decree in favor of each, that his damages should be separately proved, or that all should testify.[62]

Testimony of seafaring witnesses. On questions as to whether the wind was blowing a gale or only a strong breeze, or whether the ocean was very rough or otherwise, the testimony of a seafaring witness is not entitled to any greater weight than that of any other person who has reached years of discretion, and who has observed the sea in different kinds of weather.[63]

§ 201. —— Trial

In an action by a passenger against a carrier by water questions of fact should be submitted to the jury under proper instructions from the court.

The general rules with respect to trials are applicable in actions brought by a passenger against a carrier by water.[64] Thus, questions of law are for the court, while questions of fact are for the jury.[65] In personal actions, whether there has been

Clough, Wis, 20 Wall 528, 22 L Ed 406
Pa—American SS Co v. Landreth, 102 Pa 131, 108 Pa. 264, 48 Am R 196.

59. U S—The America, D C N Y, 35 F Supp 413

Evidence held sufficient

(1) In general
U S—California Yacht Club of Los Angeles v. Johnson, C C A Cal, 65 F 2d 245—Wiener v. Compagnie Generale Transatlantique, C C A N Y, 61 F 2d 893—Demgard v U S, D C N Y, 94 F Supp. 309—Taylor v Isthmian S S Co, D.C Ga, 85 F Supp 384—Kulack v The Pearl Jack, 79 F Supp. 802, affirmed, C. A, 178 F 2d 154—Silverman v Bermuda & West Indies S S Co, D C N Y, 12 F Supp. 164.
Alaska—The Estebeth, 8 Alaska 486
Mass—Doidge v Cunard S S Co, 131 N E 244, 279 Mass 224.
58 C.J. p 573 note 95 [a].

(2) To show negligence—Isthmian S S Co. v McElligott, C A Ga, 177 F 2d 591—Roeper v. U. S, D C N.Y., 85 F.Supp. 864—Taylor v Isthmian S S Co., D C Ga., 85 F Supp 384—Kulack v The Pearl Jack, D.C Mich, 79 F Supp. 802, affirmed, C.A, 178 F. 2d 154—Batkiewicz v. Seas Shipping Co., D C N Y, 66 F.Supp 205
58 C.J. p 573 note 95 [a] (9)-(13), (15), (22), (23).

(3) To show absence of negligence
U S—Erdman v U. S, C C A N Y, 143 F.2d 198, certiorari denied 65 S Ct 122, 323 U S 769, 89 L Ed 615—Logue v Cape Cod S. S. Co, D C.Mass., 30 F Supp. 606—The Vulcania, D.C Mass., 8 F.Supp. 300—The Winnipeg, D C.Cal., 5 F Supp 463.
Alaska—The Estebeth, 8 Alaska 486
Cal—Magers v Deluxe Water Taxi Co, 68 P 2d 990, 21 Cal App.2d 316
N Y—Elesen v Steamer Americana, 13 N Y S 2d 240, 257 App Div 980, affirmed 25 N E 2d 982, 282 N Y 636
Wash—Aquino v Alaska S. S Co, 91 P.2d 1014, 199 Wash 490
58 C J. p 573 note 95 [a] (18), (19)

(4) To show negligence of passenger—Oliver v. New England S. S Co, 52 N.E 2d 1, 315 Mass. 151.

Evidence held insufficient

(1) In general
U S—Kulack v The Pearl Jack, C.A Mich, 178 F 2d 154
Mass—Zaia v. "Italia" Societa Anonyma Di Navigazione, 87 N E 2d 183, 324 Mass. 547, 11 A L R 2d 1071
58 C J p 573 note 95 [b].

(2) To show negligence.
U S—Erdman v. U S, C.C A N Y, 143 F.2d 198, certiorari denied 65 S Ct. 122, 323 U S. 769, 89 L Ed 615—Fetan v Atlantic & Caribbean Steam Nav Co, D C N.Y, 60 F 2d 328—Demgard v. U S, D C N Y., 94 F Supp. 309—The Nereid, D. C.N.J, 40 F Supp. 736—Le Doux v U. S Lines Co., D C N.Y, 31 F Supp 608—Logue v. Cape Cod S. S Co., D C Mass, 30 F Supp. 606—Brady v Farley, D C N Y, 27 F. Supp 840
Ky.—Coney Island Co. v. Brown, 162 S W 2d 785, 290 Ky 750
N Y—Preston v. Hudson River Day Line, 27 N Y S 2d 597, 176 Misc. 412, affirmed 32 N.Y.S 2d 132, 263 App. Div 814

(3) To support finding as to last clear chance.—Erdman v. U. S., C.C A.N.Y., 143 F 2d 198, certiorari denied 65 S.Ct 122, 323 U S. 769, 89 L Ed. 615

(4) To bring into operation res ipsa loquitur rule—Dann v Compagnie Generale Transatlantique, D C N.Y, 45 F.Supp. 225

60. U S—Cobb v Howard, D C N.Y., 5 F Cas No 2,925, affirmed, C C., 5 F Cas No 2,924

61. U S—The Valencia, D C.Wash, 110 F 221, affirmed 117 F. 68, 54 C C A 454.

62. U.S—The Oregon, Wash, 133 F 609, 68 C.C.A. 603

63. U S.—The President, D.C.Cal, 92 F. 673.

64. **Findings of fact and conclusions of law**

(1) In action for injuries sustained by steamship passenger when bitten by dog of fellow passenger, findings were held to support conclusion of law that steamship company was not liable—Aquino v Alaska S S. Co, 91 P 2d 1014, 199 Wash. 490.

(2) In passenger's libel for injuries sustained when motor of tender exploded, finding that managing officers of corporate owner had no proper or adequate system of inspection of motor by any person other than operator was held tantamount to finding that there was proper inspection by operator—California Yacht Club of Los Angeles v. Johnson, C C. A Cal, 65 F.2d 245.

65. U S—Voltmann v United Fruit Co, C.C.A.N Y, 147 F 2d 514.
58 C J p 574 note 3.

Direction of verdict

(1) In river boat passenger's action for injuries sustained in falling off a deck chair, conflicting evidence as to cause of accident and the ab-

negligence on the part of the vessel or its employees,[66] or contributory negligence on the part of the passenger,[67] is a question of fact for the jury, unless the evidence is so manifestly insufficient that a finding based thereon could not be sustained.[68] When it cannot be determined as a matter of law, the question of whether the injuries for which recovery is sought were proximately caused by the negligence or wrong of the vessel or its employees is ordinarily one for the jury.[69]

What constitutes baggage. Where recovery is sought for loss or injury of baggage, the question of whether any particular article or property may properly be deemed baggage, in view of the nature of the voyage, and the circumstances and condition of the passenger, is generally for the jury, under proper instructions from the court[70]

Instructions. Instructions, in actions by a passenger against a carrier by water, are governed by the rules applicable to instructions in civil actions generally.[71] Thus, on request, each party is ordinarily entitled to full instructions correctly stating the law covering his side of the case.[72] The instructions should deal only with the law, and the court should not charge the jury as to matters of fact.[73] Although requested, the court need not instruct on defenses not raised by defendant's answer,[74] or on matters which the evidence does not show to exist,[75] and, unless a requested instruction is entirely correct, and may properly be given without qualification or possibility of being misunderstood, there is no error in refusing it.[76]

sence of evidence that boat owner failed to do anything it should have done in the exercise of ordinary care was held to justify directed verdict for owner—Cloke v Coney Island, 10 N.E 2d 1009, 56 Ohio App. 384.

(2) In action for injuries to passenger who stumbled over water guard, evidence showed that water guard was properly incidental to the construction of steamship and free from defects, and that passenger had full knowledge of its existence and location and could have seen water guard if he had looked, and hence verdict should have been directed for shipowner—Oliver v. New England S S Co, 52 N.E 2d 1, 315 Mass 151

(3) Under evidence in action for loss of trunk between Havre and Paris, ocean carrier selling New York-Havre steamship ticket was held to have entered into special contract for carrying passenger's trunk from New York to Paris as principal, not agent of connecting rail carrier, rendering directed verdict for ocean carrier erroneous—Wiener v Compagnie Generale Transatlantique, C C A N Y, 61 F.2d 893

Value of wife's services

In passenger's action for injuries sustained while disembarking from steamship in which husband of passenger joined, suing for loss of wife's services, question whether wife's services were of value was for jury as going to ad damnum—Bellocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale, C C A N Y, 84 F 2d 975

Evidence held sufficient to require submission to jury

N Y.—Ward v Vanderbilt, 4 Abb Dec. 521, 1 Keyes 70, 34 How.Pr. 144

Evidence held insufficient to require submission to jury

U S—Baer v. North German Lloyd, C C.A N Y, 69 F 2d 88

58 C J. p 573 note 95 [b] (8).

66. U S—Kvart v. Swedish American Line, C.C A N Y, 126 F.2d 279—Moore v American Scantic Line, C C A N Y, 121 F 2d 767—Streckfus Steamers v. Shuttleworth, C C A.W.Va, 86 F 2d 327, rehearing denied 86 F 2d 1013, certiorari denied 57 S Ct 922, 301 U S 694, 81 L Ed 1350—Bellocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sagaudo Navigazione Generale, C C A N Y., 84 F 2d 975—Malbrunn v. Hamburg-American S S Co, C C A N Y, 77 F 2d 304.

Mo—Munsey v. Eagle Packet Co., App, 50 S W 2d 754.

58 C J p 574 note 4.

Evidence held sufficient to require submission to jury

U S—Weill v Compagnie Generale Transatlantique, C C A N.Y, 113 F. 2d 720, certiorari denied 61 S Ct 136, 311 U S. 697, 85 L Ed 452—Silverman v. Bermuda & West Indies S S. Co., C C.A.N.Y, 74 F.2d 683.

Wash—Lang v. Puget Sound Nav Co, 65 P 2d 1069, 189 Wash. 353

58 C J p 573 note 95 [a] (16), (17).

67. U S—Kvart v Swedish American Line, C C A N.Y, 126 F 2d 279—Moore v. American Scantic Line, C C.A N.Y., 121 F 2d 767—Pacific S S Co. v. Holt, C C.A.Or., 77 F 2d 192.

58 C.J p 574 note 5

Evidence held sufficient for submission to jury

Md.—Baltimore, etc, R Co. v Moon, 84 A. 536, 118 Md. 380

68. N.Y—Hughes v New Jersey Steamboat Co, 31 N Y.S. 1012, 11 Misc 65

69. U S—Pacific S S. Co. v. Holt, C. C A Or, 77 F 2d 192—Lee Line Steamers v. Page, Tenn, 237 F. 57, 150 C C A 259.

70. Fla—Brock v. Gale, 14 Fla 523, 14 Am R. 356

58 C J p 575 note 8

71. U S—Streckfus Steamers v. Shuttleworth, C C.A W Va, 86 F. 2d 327, rehearing denied 86 F 2d 1013, certiorari denied 57 S Ct 922, 301 U S 694, 81 L Ed 1350

N Y—Kaehler v. North American Lloyd, 46 N E 2d 342, 289 N.Y. 407.

72. Mass—Dodge v Boston, etc, SS. Co, 19 N E. 373, 148 Mass. 207, 12 Am S R 541, 2 L R A. 83.

58 C.J. p 575 note 10.

Instructions held proper and sufficient

U S—Pacific S S Co v. Holt, C C A. Or., 77 F 2d 192.

N.Y—Kaehler v North German Lloyd, 46 N E.2d 342, 289 N.Y. 407, motion denied 49 N.E.2d 620, 290 N Y 659.

Wash—Lang v. Puget Sound Nav. Co, 65 P.2d 1069, 189 Wash. 353.

58 C J p 575 note 10 [b].

Instructions held improper or erroneous

U.S—Voltmann v United Fruit Co., C C A N Y., 147 F 2d 514.

Ky—River Excursion Co. v. Kuntz, 51 S.W.2d 911, 244 Ky. 587.

73. Cal—Hampton v. Occidental, etc, SS Co, 73 P. 579, 139 Cal. 706

58 C.J. p 575 note 11.

Instruction held properly denied

U S—Streckfus Steamers v. Shuttleworth, C C.A W.Va, 86 F 2d 327, rehearing denied 86 F 2d 1013, certiorari denied 57 S Ct 922, 301 U.S. 694, 81 L Ed 1350.

74. Mass—Mountford v. Cunard SS Co, 88 N E 782, 202 Mass. 345

58 C J. p 575 note 12.

75. Wash—Lang v Puget Sound Nav. Co, 65 P.2d 1069, 189 Wash. 353.

58 C J. p 575 note 13.

76. U S—Coney Island Co. v. Dennan, Ohio, 149 F. 687, 79 C C A. 375.

58 C J. p 575 note 14.

§ 202. —— Damages; Recovery of Passage Money

a. Breach of contract or duty to transport
b Personal injuries
c. Delay, loss of, or injury to, baggage

a. Breach of Contract or Duty to Transport

Generally any failure of the carrier fully to perform its contract to transport entitles the passenger to recover any passage money which has been paid in advance. Where the failure to transport is due to inevitable accident or governmental action, the passage money is the only amount recoverable, but, if the breach consists in some voluntary act on the part of the carrier or its servants, items of damages which proximately result therefrom may be recovered.

While the rule applies only where the breach is of the precise contract for which the passage money has been paid,[77] unless the noncompletion of the transportation is due to the passenger's own conduct,[78] or the contract has liquidated the amount of damages recoverable,[79] practically any failure of the shipowner fully to perform his contract to transport entitles the passenger to recover any passage money that has been paid in advance,[80] even though the voyage is not completed because of destruction of the vessel by inevitable accident,[81] or not commenced because of acts of the government at the port of embarkation.[82] Where the failure to transport occurs at a foreign port of embarkation, the passenger is entitled to the return of his money at that port,[83] and, if suit for recovery is brought in this country, the rate of exchange has nothing to do with the matter, as the passenger has saved the exchange by coming to this country, and the recovery is of a sum representing in this country the amount which should have been returned to the passenger at the foreign port[84]

A moratorium or prohibition against withdrawal of bank accounts in the foreign country has been held to be no defense to an action in the United States to recover passage money which should have been refunded in the foreign port, if such prohibition does not render performance of the carrier's obligation impossible[85] Where the laws of a foreign country do not apply to a demand made in this country for a return of passage money, a recovery has been permitted notwithstanding restrictions in such foreign country requiring payment in local currency,[86] but, where all matters connected with performance of the contract of carriage are governed by the laws of a foreign country, a recovery of the passage money paid has been denied where the foreign law provides that a refund may be had only in a specific currency payable in the foreign country,[87] pursuant to a demand in the foreign

77. U.S.—Raymond, etc, Co. v. Ebsary, C C A N Y., 9 F.2d 889.
58 C J. p 575 note 17.
Performance of contract to transport see supra §§ 183–191.

78. La.—Marks v. Nashville M. & F Ins Co., 6 La.Ann. 126.
58 C J. p 575 note 18.

Failure to present for passage

Where passenger purchased passage on steamship operated by defendant from New York to Haifa, Palestine, but was removed from ship by Lebanese authorities at Beirut, Lebanon and failed to present himself at Beirut to continue voyage to Haifa, notwithstanding accommodations were available to him, whether passenger's failure to present himself for passage was voluntary or involuntary, default barred passenger from recovery of his passage money, and, where there was no difference in steamship passage rates between New York and Haifa, Palestine, and New York and Beirut, Lebanon, defendant carrier did not receive any excess compensation within federal statute providing that no carrier shall receive greater compensation than rates charged.—Halpern v American Export Lines, 108 N Y.S 2d 177.

79. La.—McGloin v. Henderson, 6 La. 715.
58 C J. p 575 note 19

80. U S.—The Valencia, D C.Wash., 110 F 221, affirmed 117 F 68, 54 C C A. 454.
58 C J p 575 note 20.

81. Mass.—Brown v Harris, 2 Gray 359.
58 C J. p 576 note 21.

82. U S.—Foster v Compagnie Française De Navigation à Vapeur, D.C N Y., 237 F. 858.

83. U S.—Foster v Compagnie Française De Navigation à Vapeur, supra.

84. U S.—Foster v Compagnie Française De Navigation à Vapeur, supra

85. U.S.—Foster v Compagnie Française De Navigation à Vapeur, supra

86. N Y.—Kassel v. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 24 N Y S.2d 450, 177 Misc 92, motion denied 35 N.Y.S 2d 730, 264 App Div. 859.

87. N Y.—Eck v N V. Nederlandsch Amerikaansche Stoomvaart Maatschappij, 52 N Y S 2d 367, 183 Misc. 691—Translateur v U S. Lines Co., 42 N Y.S 2d 117, 179 Misc. 843—Steinfink v. North German Lloyd S S. Co., 27 N Y S.2d 918, 176 Misc 413—Branderbit v Hamburg-American Line, 31 N Y.S 2d 588, affirmed 45 N Y.S 2d 188, 266 App. Div 1011—Ornstein v. Compagnie Generale Transatlantique, 31 N.Y. S 2d 524, affirmed 52 N Y S 2d 243.

Release of currency from foreign restrictions

(1) Where performance of steamship company's contract to transport plaintiff from Germany to United States was prevented by Neutrality Act and presidential proclamation, plaintiff was entitled to refund of money deposited with company in Germany for such transportation only upon proof that company had succeeded in freeing deposited money from restrictions of German law providing for refund only in Germany.—Baer v U. S Lines Co., 43 N. Y S 2d 212, 180 Misc. 456.

(2) Plaintiff seeking refund of money deposited with steamship company in Germany in accordance with German law providing for refund in Germany only had burden of proving that company had transferred plaintiff's reichsmarks to United States in dollars, and proof of withdrawal of reichsmarks exchanged for dollars which were transferred to United States did not cast on com-

country,[88] and such a law has been held to apply to "on board money."[89]

Where passage money paid in foreign money is recoverable in an action therefor, the amount recoverable must be reckoned according to the value of the foreign money in the currency of the forum,[90] and it has been held that no recovery may be had where foreign money in question is worthless [91] The value of foreign money is to be reckoned at the rate of exchange prevailing on the day of the breach.[92]

Notice of claim. In the absence of constitutional or statutory prohibition, provisions in the contract of carriage requiring a written notice of a claim for a refund to be given within a specified time after the voyage has been abandoned are valid and will be enforced.[93] However, since a contract of carriage is strictly construed against the carrier that prepared it, a provision of the contract requiring a written notice of claim within a specified time for damage in connection with the transportation is not applicable to an action by a passenger to recover the cost of passage where he failed to reach his destination,[94] although a provision of the contract of carriage requiring a written notice of claims under the ticket to be made within a specified time has been held applicable to an action to recover damages for the breach of the contract to carry where the voyage has been abandoned [95]

Other damages recoverable. If the failure to transport is due to inevitable accident or governmental action, and the vessel owner does all he can in performance of his contract, the passage money is the only amount recoverable, and no further sums can be had by way of damages.[96] If, however, the breach consists in some voluntary act on the part of the owner or his servants, and such damages proximately result therefrom, the passenger may recover compensation for loss of time,[97] expenses incurred in getting to the port of departure or port of destination,[98] and the expenses of living at an intermediate port[99] or the port of departure.[1] Likewise, a person who has come on board to transact business with a passenger, but is carried away without having been given an opportunity to go ashore, is entitled to damages amounting to the reasonable value of the time lost and expense incurred in being

pany burden of proof or of going forward with proof that plaintiff's reichsmarks were not similarly withdrawn—Baer v. U S Lines Co, supra.

Expected reimbursement

Expectation that United States government would require Germany to reimburse steamship company for all its property confiscated by reason of war furnished no ground for requiring company to refund money deposited with it in Germany subject to German law providing that refund could only be made in Germany —Baer v. U. S Lines Co, supra.

Refund contract

Where refund of unused ticket agreed to by owner of vessel was to be made in Germany and was not completed because German authorities did not fully approve it, the passenger could not recover on the refund contract and was entitled only to restitution of the consideration given for such contract.—Bleiweiss v Cunard White Star Limited, 34 N Y.S 2d 172.

88. U S —Translateur v U. S Lines Co, 42 N Y S 2d 114, 179 Misc 840, affirmed in part and reversed in part on other grounds 42 N Y S 2d 117, 179 Misc 843—Spiegel v. U. S. Lines Co., 37 N Y.S 2d 31, 178 Misc 993

89. N Y —Translateur v. U. S. Lines, 42 N.Y S 2d 117, 179 Misc 843

Foreign law held inapplicable

Where voyage from England to the United States was canceled by steamship company, German national who purchased steamship tickets in Germany with German money and who deposited "on board money" with the steamship company for use while on board steamship, was entitled to a refund of the on board money without having made any demand for the refund in Germany, since German law had no application —Spiegel v U. S Lines Co, 37 N Y.S 2d 31, 178 Misc 993

90. N.Y.—Spiegel v. U S Lines Co., supra—Rosenblueth v. N V Nederlandsch Amerikaansche Stoomvaart Maatschappij, 27 N Y.S 2d 922, affirmed 30 N Y.S.2d 843, 262 App Div. 1002, appeal denied 31 N.Y S 2d 666, 263 App Div 708.

91. N Y —Zimmern v. N V Nederlandsch Amerikaansche Stoomvaart Maatschappij, 28 N.Y.S 2d 824, 177 Misc 91.

92. N Y.—Baer v. U S Lines Co, 43 N Y S 2d 212, 180 Misc 456—Kassel v. N V Nederlandsch Amerikaansche Stoomvaart Maatschappij, 24 N.Y S 2d 450, 177 Misc 92, appeal denied 35 N Y S 2d 730, 264 App Div. 859.

93. N Y —Translateur v U S. Lines Co, 42 N.Y S 2d 114, 179 Misc. 840, affirmed in part and reversed in part on other grounds 42 N.Y.S 2d 117, 179 Misc. 843—Goldarbeiter v. Cunard White Star Limited, 27 N Y.S 2d 920.

94. N Y —Halpern v. American Export Lines, 108 N Y S 2d 177.

95. U S.—The Kronprinzessin Cecilie, Mass, 238 F 668, 151 C.C A. 518, reversed on other grounds North German Lloyd v. Guaranty Trust Co, 37 S Ct 490, 244 U S 12, 61 L Ed 960

58 C J p 569 note 47.

Time limit held reasonable

U S —The Kronprinzessin Cecilie, Mass, 238 F 668, 151 C C.A. 518, reversed on other grounds North German Lloyd v. Guaranty Trust Co, 37 S Ct 490, 244 U.S 12, 61 L Ed 960.

96. N.Y.—Baer v U. S Lines Co, 43 N Y S 2d 212, 180 Misc. 456—Ornstein v Compagnie Generale Transatlantique, 31 N Y.S 2d 524, affirmed 52 N.Y S 2d 243—Schostal v. Compagnie Generale Transatlantique, 27 N Y S.2d 688

58 C.J. p 576 note 26

97. U.S —The President, D C Cal, 92 F. 673

58 C.J p 576 note 27.

98. U S —La Gascogne, D.C.N.Y., 135 F 577

58 C.J. p 576 note 28.

99. U.S —West v The Uncle Sam, C C Cal, 29 F Cas No 17,427, McAll 505

58 C.J p 576 note 29.

1. U S.—La Gascogne, D C.N.Y., 135 F 577—The Zenobia, D C N.Y., 30 F.Cas.No.18,209, Abb Adm. 80.

58 C.J. p 576 note 30.

taken to, and returning from, the place at which he is finally put ashore.[2]

Damages may be recovered for sickness or physical injuries,[3] resulting losses and expenses,[4] and also any accompanying mental suffering,[5] where they are proximately caused by the vessel owner's breach of contract; but not where they are only remotely connected with the breach,[6] or where they are largely due to the passenger's own acts or want of care.[7] A passenger who has been wrongfully ejected,[8] or threatened with ejection unless he again pays his fare,[9] may recover damages for indignity or mental distress; but ordinarily no recovery can be had for mental suffering unaccompanied by physical injury or aggravating circumstances.[10] Discomfort, annoyance, or inconvenience is a proper subject of compensation for a breach in failing to furnish proper accommodations,[11] and in fixing the compensation for these elements it has been recognized that a distinction may properly be made because of sex.[12]

Special damages, resulting from peculiar circumstances, may be recovered where the carrier has been notified of such circumstances at the time the contract of carriage was entered into.[13]

Mitigating circumstances. In a suit by a passenger for wrongful ejection it may be shown in mitigation of damages that the passenger was guilty of misconduct on a former occasion,[14] and, if a passenger has been ejected because of humane motives, and to prevent him from coming to harm at the port of destination, the motives with which it is done mitigates the act and in such a case the damages must be small.[15]

Exemplary damages. If the master maliciously and wantonly keeps a person on board and carries him against his will, exemplary damages may be assessed against the master for his malicious conduct.[16]

Excessive damages. If the award made by a jury is so plainly excessive as to indicate that they were influenced by passion or prejudice, it may be set aside.[17]

b. Personal Injuries

Although there is authority to the contrary, it is generally held that, if the vessel owner has not authorized or ratified the act, he is not liable for exemplary damages where the passenger is injured by the malicious and wanton act of an employee.

Although there is authority to the contrary,[18] it is generally held that, if the vessel owner has not authorized or ratified the act, he is not liable for exemplary damages where a passenger is injured by the malicious and wanton act of an employee;[19] but a statute making the vessel liable for injuries done to passengers by officers of the vessel has been said to permit the recovery of punitive damages against the vessel.[20]

The principles governing compensatory damages for personal injuries are considered in Damages § 17 et seq, and the principles governing excessive or inadequate damages for personal injuries are considered in Damages § 198.

c. Delay, Loss of, or Injury to, Baggage

In the case of loss of baggage, the measure of damages is generally the actual value to the owner of the articles at the time of the loss. In the case of injury to personal property, the measure of damages is the difference between the market value of the property at the time of its delivery and its value after the damage in transit.

2. Mo.—Stoneseifer v. Sheble, 31 Mo 243.
3. U.S.—Lee Line Steamers v Page, Tenn, 237 F. 57, 150 C C A. 259
58 C.J p 577 note 32
4. U.S —Chicago, etc., Transit Co v. Moore, Mich, 259 F. 490, 170 C C A 466, certiorari denied 40 S Ct. 118, 251 U S. 553, 64 L Ed 411.
58 C.J. p 577 note 33
5. U S —Chicago, etc, Transit Co. v Moore, supra.
58 C J. p 577 note 34.
6. U S —Raymond, etc, Co v. Ebsary, C C A.N Y, 9 F.2d 889
58 C J. p 577 note 35
7. Mich —McWethy v Detroit, etc, R Co, 86 N.W. 827, 127 Mich 333, 55 L R A. 306
58 C.J. p 577 note 36
8. U S —La Gascogne, D C N.Y., 135 F., 577.
58 C.J. p 577 note 37.
9. U S —Austro-American SS Co. v Thomas, N.Y, 248 F 231, 160 C C.A. 309, L.R.A 1918D 873.
58 C.J. p 577 note 38
10. Iowa —Zabron v Cunard SS Co., 131 N W. 18, 151 Iowa 345, 34 L R A,N.S, 751.
58 C.J. p 577 note 39.
11. N Y —Lignante v. Panama R Co., 131 N.Y S. 753, 147 App Div 97.
58 C J. p 577 note 40.
12. U S —Bailey v The Sonora, D C Cal, 2 F Cas.No.746.
58 C.J p 578 note 41.
13. Ala —Central of Georgia R. Co v. Knight, 57 So. 253, 3 Ala.App. 436.
58 C.J. p 578 note 42.
14. Ky —Reasor v. Paducah, etc., Ferry Co., 153 S.W 222, 152 Ky. 220, 43 L.R A,N.S., 820.
15. U.S —Pearson v. Duane, Cal., 4 Wall 605, 18 L Ed. 447.
16. U S.—The Yankee v Gallagher, C C Cal, 30 F.Cas No.18,124, McAll. 467.
Mo —Stoneseifer v Sheble, 31 Mo. 243
17. U S.—New York, etc, SS. Co v Garcia, C C.A Puerto Rico, 16 F 2d 734
58 C.J p 578 note 46.
18. Tenn.—Planters Packet Co v. J. W Cofer, 4 Tenn.Civ A. 155.
58 C.J. p 578 note 55.
Exemplary damages generally see Damages §§ 117–127.
19. Cal.—Trabing v. California Nav., etc, Co, 53 P. 644, 121 Cal. 137.
58 C J p 578 note 56.
20. Ill.—The F. X. Aubury, 28 Ill 412, 81 Am D 292.
58 C.J. p 578 note 57.

The measure of damages for loss of baggage is generally the actual value to the owner of the articles constituting the baggage at the time of the loss [21] If the articles lost are curios, having no market value in the generally accepted sense, their value at the port of destination as shown by the opinions of experts may be taken as the proper measure of damages.[22] Where the article consists of a manuscript having a great, but not readily ascertainable, value to the owner, it has been held that the amount of damages should properly be based on the amount of time it would take the author to reproduce the manuscript.[23] It has been held that the measure of damages for injury to personal property of the passenger is the difference between the market value of the property at the time of its delivery to the carrier by water and its value after the damage in transit [24]

Special damages may be recovered for the loss or delay of baggage where the vessel owner or his agent has been informed of the special circumstances;[25] but not otherwise, unless the circumstances are such as might reasonably be supposed to have entered into the contemplation of the parties.[26]

X. DEMURRAGE

§ 203. Definitions and Distinctions

Demurrage is a sum agreed on to be paid as compensation for delay beyond a stipulated or reasonable time for loading or unloading a vessel; broadly, it is compensation recoverable for any improper detention.

Although demurrage has been said to be a mere name,[27] in its strict sense it is the compensation provided for in the contract of affreightment for the detention of the vessel beyond the time agreed on for loading or unloading;[28] a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading.[29] Essentially demurrage is a claim for damages for failure to accept delivery [30] In a broad sense, every improper detention of a vessel may be considered a demurrage, and compensation in that name may be obtained for it.[31] It has been said that demurrage is only an extended freight or reward to the vessel as compensation for earnings she is improperly caused to lose,[32] and can only be allowed where the loss is proved.[33] Demurrage has reference solely to compensation for the services of the vessel, and not to compensation paid by the vessel to the custodian to whom the goods are delivered pending their delivery to consignee or owner.[34]

Ordinary demurrage is a claim by the vessel or the owner of the vessel against the charterer or the cargo, or a claim by the charterer against some person failing to perform a maritime duty to the vessel.[35]

§ 204. Necessity, Sufficiency, and Construction of Contract in General

Demurrage in the strict sense must be stipulated for in the contract, but damages in the nature of demurrage

21. U.S.—The Minnetonka, N.Y., 146 F. 509, 77 C.C.A. 217, certiorari denied 27 S.Ct. 777, 203 U.S. 589, 51 L.Ed. 330.
Damages for loss, delay, or injury of baggage generally see Carriers §§ 902, 903.

22. U.S.—La Bourgogne, N.Y., 144 F. 781, 75 C.C.A. 647, affirmed 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973.

23. U.S.—Wood v. Cunard S.S. Co., N.Y., 192 F. 293, 112 C.C.A. 551, 41 L.R.A.,N.S., 371.

24. U.S.—McElligott v. Isthmian S.S. Co., D.C.Ga., 85 F.Supp. 686, affirmed, C.A., 177 F.2d 591.
Proof of damages
In libel by passengers against steamship company for damages to personal belongings and effects, proof of damages is sufficient if it fairly shows nature and character of goods, whether new or secondhand, and if second hand, affords a fair basis for arriving at loss caused by their complete destruction—Isthmian S.S. Co. v. McElligott, C.A.Ga., 177 F.2d 591.

25. Mich.—Vanderberg v. Detroit, etc., Nav. Co., 186 N.W. 477, 216 Mich. 682
58 C.J. p. 579 note 70.

26. Fla.—Brock v. Gale, 14 Fla. 523, 14 Am.R. 356.
58 C.J. p. 579 note 71

27. R.I.—Falkenburg v. Clark, 11 R.I. 278.

28. Ala.—Southern R. Co. v. Lewis, 51 So. 863, 165 Ala. 451
58 C.J. p. 580 note 77.

29. U.S.—Continental Grain Co. v. Armour Fertilizer Works, D.C.N.Y., 22 F.Supp. 49—Earn Line S.S. Co. v. Manati Sugar Co., C.C.A.N.Y., 269 F. 774
Demurrage charge
Although a demurrage charge is a sum agreed on as liquidated damages, damages are for delay, and they do not include every expense which might arise—Continental Grain Co. v. Armour Fertilizer Works, D.C.N.Y., 22 F.Supp. 49

30. U.S.—Little v. One Cargo of Lumber, D.C.Fla., 2 F.2d 608—The Kittegaun, D.C.Pa., 281 F. 886, affirmed, C.C.A., U.S. Shipping Board Emergency Fleet Corporation v. Banque Russo Asiatique, London, 286 F. 918.

31. U.S.—Continental Grain Co. v. Armour Fertilizer Works, D.C.N.Y., 22 F.Supp. 49
58 C.J. p. 580 note 78.

32. U.S.—Yone Suzuki v. Central Argentine Ry., C.C.A.N.Y., 27 F.2d 795—California & Eastern S.S. Co. v. 138,000 Feet of Lumber, D.C.Md., 23 F.2d 95
58 C.J. p. 580 note 79.

33. U.S.—The Conqueror, N.Y., 17 S.Ct. 510, 166 U.S. 110, 41 L.Ed. 937.
58 C.J. p. 580 note 80.

34. U.S.—California, etc., SS. Co. v. 138,000 Feet of Lumber, D.C.Md., 23 F.2d 95

35. U.S.—The Corfe Castle, D.C.N.Y., 221 F. 98.

are recoverable for breach of the implied obligation to load or unload with reasonable dispatch.

Liability for demurrage, using the word in its strictly technical sense, exists only when expressly stipulated for in the contract.[36] Using the term in its broader sense, damages in the nature of demurrage are recoverable for a breach of the implied obligation to load or unload the cargo with reasonable dispatch,[37] but only by the party to whom the duty is owed,[38] and only against one who is party to the shipping contract, and who, under its terms, is responsible to the shipowner for the delay.[39] Where the shipping contract as executed omits the demurrage clauses,[40] or where it provides for recovery of demurrage for delay for a limited period, and the detention extends beyond the contract limit,[41] recovery of damages for wrongful detention, independently of express contract, may be allowed. Neither demurrage under the contract[42] nor damages for detention[43] are recoverable where the terms of the contract expressly negative such liability; but it has been held that a charter party expressly excluding demurrage and a telegraphic order from the charterer to the consignee to unload promptly on arrival constitute an implied agreement of the parties that reasonable diligence would be exerted for the discharge of the cargo entitling the shipowner to damages for any detention beyond a reasonable time.[44]

Execution and validity. When an express contract is relied on as defining a charterer's liability for demurrage or as exempting him from it, it is essential to its validity that it be executed,[45] and with the mutual assent of the parties,[46] based on knowledge of its terms;[47] and any modification thereof, to be binding, must be by mutual assent.[48] The contract must be based on a legally sufficient consideration;[49] and if made through agents, it must be shown that they were duly authorized, or that the contract has been ratified expressly or by implication by the party whom it is sought to hold bound.[50]

Construction and effect in general. The general rule that effect will be given to the intent of the parties, as expressed in the words they have used in their contract, applies to shipping contracts in determining whether demurrage has been provided for therein, and, if so, under what conditions or restrictions recovery may be had.[51] Even where the contract provides for demurrage, such provisions will not be extended by construction beyond the clear purport of the language employed,[52] provisions for reductions in freight in certain contingencies not applying to demurrage,[53] provisions for demurrage under express contract not applying necessarily to an implied contract arising after termination of the express contract by circumstances which rendered its performance impossible,[54] provisions exempting the charterer from liability for delay not due to his fault not relieving him from liability for detention caused by failure to perform his covenants,[55] and provisions exempting from liability for delay or failure to perform his covenants, not covering delay or failure due to the party's willful neglect or fault.[56] The intention of the parties to an informal charter party, with respect to demurrage, may be gathered from the terms of a formal charter for a series of similar voyages.[57]

36. U.S.—Empire Transp. Co. v. Philadelphia, etc., Iron Co., Minn., 77 F. 919, 23 C.C.A. 564, 35 L.R.A. 623.
58 C.J. p. 580 note 83.

37. U.S.—Lehigh Valley Coal Co. v. Ionia Transp. Co., Minn., 174 F. 798, 98 C.C.A. 506.
58 C.J. p. 580 note 85.

38. U.S.—The Corfe Castle, D.C.N.Y., 221 F. 98.
58 C.J. p. 581 note 86.

39. U.S.—Ben Franklin Transp. Co. v. Federal Sugar Refining Co., N.Y., 242 F. 43, 154 C.C.A. 635.

40. N.Y.—Van Etten v. Newton, 31 N.E. 334, 134 N.Y. 143, 30 Am.S.R. 630.
58 C.J. p. 581 note 88.

41. N.Y.—Morse v. Pesant, 3 Abb. Dec. 321, 2 Keyes 16, 30 How.Pr. 591.

42. U.S.—Mitchell v. U.S., Ct.Cl., 96 U.S. 162, 24 L.Ed. 702.
58 C.J. p. 581 note 91.

43. Fla.—Pearson v. Grice, 8 Fla. 214.
58 C.J. p. 581 note 92.

44. U.S.—Philippine Trading Co. v. U.S., 47 Ct.Cl. 328.

45. U.S.—The Effna, D.C.N.Y., 28 F. 2d 282.

46. U.S.—Rackett v. Stickney, C.C. N.Y., 27 F. 878, 23 Blatchf. 566.

47. U.S.—Rackett v. Stickney, supra.
58 C.J. p. 581 note 96.

48. U.S.—Burns v. Burns, N.Y., 131 F. 238, 65 C.C.A. 224.
58 C.J. p. 581 note 97.

49. N.Y.—Clyde v. Wood, 179 N.Y.S. 252, 189 App.Div. 737.
58 C.J. p. 581 note 98.

50. U.S.—The Hamilton J. Mills, D.C.N.Y., 22 F. 790.
58 C.J. p. 581 note 99.

51. Free time.
Charter party fixing thirty days "free time" for whole venture and providing that demurrage would start at expiration of such period imposed risk of delay on owner for first thirty days and on charterer subsequent thereto, notwithstanding provision in printed portion of instrument making demurrage dependent on charterer's default.—James Hughes, Inc., v. Charles Dreifus Co., C.C.A.N.Y., 89 F. 2d 9.

52. U.S.—Durchmann v. Dunn, N.Y., 106 F. 950, 46 C.C.A. 62—The James Baird, D.C.Mass., 90 F. 669.

53. U.S.—Bowen v. Sizer, D.C.N.Y., 93 F. 227.
58 C.J. p. 581 note 5.

54. U.S.—The Spartan, D.C.N.Y., 25 F. 44.

55. U.S.—Sixteen Hundred Tons of Nitrate of Soda v. McLeod, Cal., 61 F. 849, 10 C.C.A. 115—Thacher v. Boston Gaslight Co., D.C.Mass., 23 F.Cas.No.13,850, 2 Lowell 361.

56. U.S.—Melloy v. Lehigh, etc., Coal Co., D.C.N.Y., 37 F. 377.

57. U.S.—Atwater Fuels v. Pocahontas Fuel Co., C.A.Mass., 185 F.2d 337.

Following the general rule of construction, words will be given their ordinary meaning[58] unless it appears from the context that a word has been used by the parties in a peculiar sense.[59] Inconsistent and conflicting clauses in a shipping contract must be construed so as to give effect to the intention of the parties as collected from the whole instrument.[60] A bill of lading supersedes and takes precedence over a prior parol agreement as to the rate of discharge, on the principle that preliminary negotiations are merged in a written contract,[61] but a bill of lading is itself subject to the charter party where the provisions of both are in conflict.[62] A bill of lading providing for loading demurrage, issued after the vessel is loaded, relates back and governs the liability of the shipper for the delay caused by him in loading, in the absence of other provisions to the contrary.[63]

§ 205. Liability of Charterer

a. In general
b. Termination of liability

a. In General

The shipper or charterer is primarily liable for demurrage regardless of the existence or nonexistence of an express contract, but not for delays for which he is not responsible, or where the contract relieves him of liability.

The shipper or charterer is primarily liable for demurrage, regardless of the existence or nonexistence of an express contract,[64] and where the delay is with respect to matters for which responsibility is placed on, or assumed by, the charterer, the liability is his,[65] but he is not liable where the delay is due to default in performance of a duty which under the agreement rests on the ship[66] or on a third person,[67] or to marine risks which the shipowner assumed;[68] nor is he liable for loss from detention in discharging cargo, where the carrier has assumed the risk of delay.[69] The charterer may agree to load or discharge within a fixed time even though the risk and expense of at least a part of the operation may remain on the shipowner.[70] The liability of the charterer for delay caused by act of the shipmaster is established by proof that the master was acting therein as agent for the charterer,[71] while no such liability exists if the master was acting as agent of the consignee.[72] A charterer's liability cannot be based on a mere expression of opinion in a letter written by him,[73] or on a charter party which was canceled before the delay arose.[74] Where the charterer subcharters the vessel to others, the latter become charterers within the meaning of the rule imposing liability for demurrage on charterers,[75] and are liable for damages for detention of the vessel due to their fault.[76] A charterer is not relieved of liability by the circumstance that the consignee is the owner of the goods, and, as such, takes part in the negotiations with the shipper as to the rate of freight,[77] or by the fact that the chartered vessel for delay of which demurrage is claimed was owned by the charterer and lent by him for a money consideration to the plaintiff to use with his own vessels.[78]

b. Termination of Liability

Where the charterer is primarily liable for demurrage, his liability is not terminated when the goods are delivered on ship, or when the goods are delivered to, and accepted by, the consignee; but charter parties usually contain a "cesser clause" providing that the charterer's liability shall cease as soon as the cargo shall have been shipped.

Where the contract between charterer or shipper and the shipowner places the primary liability for demurrage on the charterer, that liability is not

58. U.S.—Tweedie Trading Co. v Barry, N.Y., 205 F. 721, 124 C.C.A. 15
58 C.J. p 581 note 10
59. U.S.—The Nivose, D.C.Md., 291 F. 412, affirmed, C.C.A., Muller v. Plisson Steam Nav Co., 298 F. 1022, certiorari denied 45 S.Ct. 92, 266 U.S. 606, 69 L.Ed. 464.
58 C.J. p 582 note 11, p 192 note 43 [b]
60. U.S.—Hires Co. v. Puerto Rico International Corp., D.C.N.Y., 285 F. 645—The Iona, Tex., 80 F. 933, 26 C.C.A. 261.
61. U.S.—Brown v. Certain Tons of Coal, D.C.Mich., 34 F. 913
62. U.S.—Dall v. Stewart, C.C.A. Fla., 31 F.2d 44
63. N.Y.—Tweedie Trading Co. v. Craig, 144 N.Y.S. 64, 159 App.Div. 192.
64. Me.—Hall v. Barker, 64 Me. 339.
58 C.J. p 582 note 19.
65. U.S.—The Marpesia, C.C.A.N.Y., 292 F. 957.
58 C.J. p 582 note 24.
66. U.S.—West Hartlepool Steam Nav. Co. v. Virginia-Carolina Chemical Co., Ga., 164 F. 836, 90 C.C.A. 288
67. U.S.—The Schmidt, D.C.Pa., 27 F. 671.
68. U.S.—New Orleans-Belize Royal Mail, etc., SS Co. v. U.S., Ct.Cl., 36 S.Ct. 76, 239 U.S. 202, 60 L.Ed. 227.
69. U.S.—Baltimore SS Co. v. Koppel Industrial Car, etc., Co., C.C.A. Md., 299 F. 158
70. U.S.—The Eugenia, D.C.N.Y., 53 F.2d 1054.
71. U.S.—Hammett v. Chase, D.C.N.Y., 158 F. 203, affirmed 165 F. 1005, 91 C.C.A. 663.
72. U.S.—Seagar v. New York, etc., Mail SS Co., N.Y., 55 F. 324, affirmed 55 F. 880, 5 C.C.A. 290.
N.Y.—Robertson v. Bethune, 3 Johns. 342.
73. U.S.—Eleven Hundred Tons of Coal, C.C.Me., 12 F. 185.
74. U.S.—Morgan v. Garfield, etc., Coal Co., D.C.Mass., 113 F. 520
75. U.S.—Keyser v. Jurvelius, Fla., 122 F. 218, 58 C.C.A. 664
76. U.S.—Keyser v. Jurvelius, supra.
77. N.Y.—Van Etten v. Newton, 31 N.E. 334, 134 N.Y. 143, 30 Am.S.R. 630.
78. U.S.—Johnson Lighterage Co. v. U.S., 57 Ct.Cl. 238.

terminated when the goods are delivered on ship and the shipowner's lien attaches,[79] nor does it terminate even when the goods are delivered to the consignee and accepted by him, unless, and then only to the extent that, the charter party may provide for its termination.[80]

Cesser clause. A charter party commonly contains a stipulation known as a "cesser clause"[81] providing that the charterer's liability under the charter party shall cease as soon as the cargo shall have been shipped,[82] the general object of which is to free the charterer from responsibility at distant ports, arising from circumstances not within his control or subject to his supervision.[83] It is usually associated with a clause giving an absolute lien on the cargo in favor of the ship for freight and demurrage,[84] and the general construction of the two clauses together is to consider the intent of the parties to be that the ship shall look to her lien on the cargo for all claims arising after leaving the port of loading.[85] Where a charter party contains a clause for cesser of the liability of the charterer, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as not applicable to a liability with which the lien is not commensurate,[86] such as a claim for demurrage which accrued before loading,[87] demurrage charges to which the consignee is not made liable by the bill of lading,[88] or demurrage charges at the point of unloading where the ship was required so to discharge the cargo that the lien was lost,[89] but where liens for demurrage charges commensurate with the rights surrendered by the cesser clause, are given to the shipowner, the charterer's liability for such charges ceases.[90] If the language exempting the charterer is clear and explicit, he will be protected even against claims for prior delays at the place of loading as well as for claims at the place of discharge.[91] If the meaning of the charter in connection with the cesser clause is not clear, the court will construe it as not relieving the charterer from his stipulated liability for breaches incurred in loading,[92] and the charterer's liability for delay in loading continues notwithstanding a cesser clause, where other clauses in the contract expressly provide for a division of liability between the charterer for delay at port of loading and the consignee at port of discharge,[93] or where the cesser clause is printed and the parties have inserted in writing a provision inconsistent therewith to the effect that the charterer will have the cargo discharged within a fixed period.[94] In order to terminate liability there must have been compliance with the conditions of the cesser clause.[95] A cesser clause terminating the charterer's liability does not release the ship from responsibility, which she had assumed, to unload according to the custom of the port.[96]

Effect of identity of parties. The fact that the charterer and consignee are the same person does not affect the operation of the rule exempting the charterer from all personal liability under the cesser clause when a lien on the cargo is substituted therefor.[97]

79. U S—U S v. U. S Steel Products Co., D.C N Y, 27 F 2d 547—Davis v. Smokeless Fuel Co, N.Y., 196 F 753, 116 C C.A. 381, certiorari denied 33 S Ct. 777, 229 U S 617, 57 L Ed 1353.

80. U S—U. S. v. U. S. Steel Products Co., D C N.Y., 27 F.2d 547.

81. U S—Eisenhauer v De Belaunzaran, D.C.N Y, 26 F 784.

82. U S—Compania Anonima Maritima Union v Strachan Shipping Co., Ga, 261 F. 57, 171 C.C.A. 653.

Shipment was complete when cargo was on board and bills of lading delivered—The Maggie Moore, D.C. Md, 8 F. 620, 5 Hughes 287.

83. U.S—Eisenhauer v. De Belaunzaran, D C.N.Y., 26 F. 784.

84. U.S—Eisenhauer v. De Belaunzaran, supra.

There is no maritime or common-law lien for demurrage prior to loading.—Elvers v. Grace, Cal., 244 F. 705, 157 C.C.A. 153.

85. U.S—Eisenhauer v De Belaunzaran, D.C N.Y, 26 F. 784.

86. U S.—Dewar v. Mowinckel, Cal, 179 F 355, 102 C C A 539.
58 C J. p 583 note 45.

87. U S—Emmons Coal Min Corp v Ropner, C C A Pa, 31 F 2d 948, certiorari denied 50 S Ct 31, 280 U S 577, 74 L Ed 628—Lloyd Royal Belge v. American Coal Exporting Co, D C N Y., 23 F 2d 846—The Marpesia, C C A N.Y., 292 F. 957.

88. U S—Crossman v Burrill, N.Y, 21 S.Ct 38, 179 U S 100, 45 L Ed 106.

89. U S—Dewar v. Mowinckel, Cal., 179 F 355, 102 C C A 539.

90. U.S—The Arizpa, C C A Md, 63 F 2d 42, certiorari denied U. S. v. Consolidation Coal Co, 54 S Ct 66, 290 U S. 648, 78 L Ed 562.
58 C J. p 583 note 46.

91. U.S—Eisenhauer v De Belaunzaran, D C N.Y., 26 F. 784.

92. U.S—Elvers v. Grace, Cal., 244 F. 705, 157 C C A. 153.

93. U S—Hires Co. v. Puerto Rico International Corp, D.C N.Y., 285 F 645.

94. U S—Compania Anonima Maritima Union v Strachan Shipping Co, Ga, 261 F 57, 171 C C A 653.

95. U S—Schmidt v Keyser, Fla, 88 F 799, 32 C C A. 121.

96. U.S.—The Iona, Tex., 80 F. 933, 26 C.C A 261.

97. U S—The Arizpa, C C A Md, 63 F 2d 42, certiorari denied U. S v Consolidation Coal Co, 54 S Ct 66, 290 U S 648, 78 L Ed 562—Eisenhauer v De Belaunzaran, D C N.Y, 26 F. 784.

Receiver as consignee
"Consignee" required by charter party to pay demurrage in unloading meant receiver of goods at destination; hence shipper, although named as consignee in bill of lading, was not liable for demurrage—The Arizpa, C.C.A.Md, 63 F 2d 42, certiorari denied U. S. v Consolidation Coal Co., 54 S.Ct 66, 290 U S. 648, 78 L.Ed. 562.

§ 206. Liability of Consignee or Assignee of Bill of Lading

a. In general
b. Incorporation of terms of charter party in bill of lading

a. In General

In the absence of a contract imposing such liability, the consignee or his assignee ordinarily is not liable for demurrage before he has accepted the cargo, and he is not liable for demurrage after he has accepted the cargo unless the delay is clearly due to his fault, or unless he is the owner of the cargo.

Acceptance by the consignee of a cargo delivered under a bill of lading containing stipulations as to demurrage imposes on him a liability for any demurrage accruing under those stipulations,[98] even though the cargo was to be delivered free of all charges, and the consignee was not bound to accept it until they were paid.[99] Liability for demurrage under the stipulations is also imposed on an assignee or indorsee of the bill,[1] and the charterer's exemption from liability under the cesser clause does not inure to the assignee's benefit;[2] but such liability for demurrage is not imposed on a common carrier to whom the goods are delivered by the ship for forwarding to the consignee.[3] The rule imposing liability, in the absence of express contract, applicable to the freighter or shipper, does not apply to the consignee or his assignee before acceptance of the cargo,[4] and not afterward, except where the delay is clearly due to his fault;[5] but there is no doubt of the applicability of the rule imposing liability in the absence of contract to the consignee or person accepting the goods, when he is the owner thereof,[6] unless he is not at fault for the delay,[7] or has transferred his title to the goods to someone else, and given notice of the transfer to the master of the ship.[8] The consignee under the terms of his contract with the charterer may be liable to the charterer for such sums as the latter was compelled to pay for demurrage for delay caused by the consignee.[9]

In some instances the consignee has been made liable to the shipowner by estoppel,[10] but not by agreeing to advance funds to his vendor to cover cost of material, freight, and haulage, where the charter party was signed by the vendor alone;[11] and a person who buys cargo on board ship after her arrival, taking no transfer of the bill of lading or charter party, and having no knowledge of either, is bound only to the use of reasonable diligence in discharging in conformity with the custom of the port.[12]

Where by acceptance of the cargo or otherwise the consignee's liability has attached, he cannot relieve himself therefrom by subcontracts to others

98. U.S.—The Lake Galera, C C A.N. Y., 60 F.2d 876, certiorari denied Jamison v U. S, 53 S.Ct 314, 287 U S 670, 77 L Ed 578.
58 C.J. p 584 note 55.

As between consignee and buyer
A sale by cargo consignee on "cost and freight" basis was not a maritime contract, and hence, in shipowner's suit against consignee and buyer for loading demurrage, breach of such contract could not be basis of right of contribution between consignee and buyer, since admiralty had no jurisdiction of contract—The Lake Galera, C C A N Y., 60 F.2d 876, certiorari denied Jamison v. U S, 53 S Ct 314, 287 U S 670, 77 L Ed 578.

99. U S.—U S v. Ashcraft-Wilkinson Co, D C Ga, 18 F 2d 977, reversed on other grounds, C C.A, Ashcraft-Wilkinson Co. v. U S., 29 F.2d 961.

1. U S—The Lake Galeria, C C A N Y, 60 F 2d 876, certiorari denied Jamison v U S, 53 S Ct 314, 287 U S 670, 77 L Ed 578.
58 C.J. p 584 note 59.

Several shipments
Where consignee of two shipments indorsed bill of lading for one over to another person, indorsee was liable only for loading demurrage on shipment received by indorsee, and consignee only for demurrage on shipment received by consignee—The Lake Galera, C C A N Y, 60 F 2d 876, certiorari denied Jamison v. U. S, 53 S Ct. 314, 287 U S. 670, 77 L Ed. 578.

2. U S.—Yone Suzuki v. Central Argentine R Co, C C.A.N Y., 27 F. 2d 795, certiorari denied Central Argentine Ry v. Yone Suzuki, 49 S Ct. 178, 278 U S. 652, 73 L Ed. 563.

3. Conn—Miner v. Norwich, etc., R Co, 32 Conn 91.

4. N Y.—Conkling v. Brooklyn Lumber Co, 41 N.Y.S 801, 10 App Div. 404
58 C J. p 584 note 65.

5. U S—Kinsman Transit Co v 50,000 Bushels of Wheat ex Cargo The Henry Steinbrenner, D C N.Y, 51 F 2d 377.
58 C.J. p 584 note 66.

Diligence required
(1) Consignee of grain cargo required to unload vessel must exercise due diligence under circumstances and custom of port to discharge vessel as speedily as possible.—Kinsman Transit Co v 50,000 Bushels of Wheat ex Cargo The Henry Steinbrenner, supra—The A. A Augustus, D C.N Y, 2 F Supp 494

(2) What is reasonable delay in unloading ship depends on surrounding circumstances—Kinsman Transit Co. v. 50,000 Bushels of Wheat ex Cargo The Henry Steinbrenner, D.C N.Y., 51 F 2d 377.

(3) Consignee of grain cargo was negligent in delaying unloading, where port was congested, facilities for discharge of cargo were offered, and owner requested consignee who was care party to make use of facilities offered, which consignee refused—Kinsman Transit Co. v 50,000 Bushels of Wheat ex Cargo The Henry Steinbrenner, supra.

6. U.S—Crawford v. Mellor, D.C Pa, 1 F 638.
58 C.J p 584 note 68.

7. N.Y—Cross v. Beard, 26 N Y 85.

8. U S.—The Elida, D C.Pa, 31 F 420.

9. U.S.—Brooks v Hilton-Dodge Lumber Co., N.Y., 229 F. 708, 144 C.C.A 118.

10. U S—Taylor v. Fall River Ironworks, D.C N.Y., 124 F. 826—Irzo v. Perkins, D C N.Y., 10 F. 779.

11. U S.—Perkins v. Bethlehem Steel Corp., C.C.A.N J, 43 F.2d 334.

12. U S—Houge v. Woodruff, D.C.N. Y., 19 F. 136.

who do not act directly under the bill of lading,[13] or by claiming that the cargo was ordered for an undisclosed principal,[14] or that other cargo was shipped by the same vessel to other consignees.[15]

b. Incorporation of Terms of Charter Party in Bill of Lading

The consignee, or the assignee of the bill of lading, may become liable for demurrage where provisions therefor in the charter party are properly incorporated in the bill of lading.

Provisions in the charter party relating to demurrage are binding on the consignee or on the assignee or indorsee of the bill of lading only when referred to, and adopted in, the bill of lading.[16] Such adoption is effected when the bill of lading specifically refers to provisions in a charter party in such manner that such provisions are made a part thereof.[17] The phrases "paying freight as per charter party,"[18] "he or they paying freight for the said goods as per charter party, with primage and average accustomed,"[19] have been held to impose none of the stipulations of the charter party except such as pertain to the payment of freight, and not to render one who receives goods under the bill of lading liable for demurrage provided for in the charter.[20] A bill of lading, providing for the payment of freight and "all other conditions as per charter party" has been construed ejusdem generis as imposing on the consignee the payment of something more than freight, and including the obligation referred to in the charter party with respect to the rate of delivery and the payment of the demurrage specified, although not necessarily including an independent provision of the charter party relating to different subjects.[21] A fortiori, where a transaction is embodied in several bills of lading, and some of them impose liability for "freight and demurrage as provided in the charter party," and others state conditions of liability are to be as provided in charter party, liability for demurrage is imposed by the latter group on the consignee.[22] Exemption from contract liability for demurrage under the bill of lading does not exempt the consignee from liability for damages for detention resulting from his wrongful act.[23] The right to recover demurrage from the consignee and cargo receiver is not lost by failure to insist on a lien for demurrage where the charter provisions as to demurrage are incorporated in the bill of lading by reference.[24] A cesser clause creating a personal exemption in favor of the charterer is not made a part of the bill of lading by reference so as to give a consignee any rights thereunder.[25]

§ 207. Effect of Customs and Usages in General

The usage or custom of the port as to time for loading or unloading may become a part of the contract expressly or by implication.

The usage or custom of a port as to period allowed for loading or unloading a vessel is a part of the shipping contract and binding on the parties when expressly incorporated therein by reference,[26] or, when, in the absence of any express agreement controlling it, it becomes an implied term in whatever contract is made,[27] or has a bearing as evidence on the issue of negligence in loading or unloading in an action to recover damages for wrongful detention;[28] but where a contract in express terms provides its own rule of liability for demurrage, the contract rule prevails over any usage or custom of the port to the contrary.[29] Even where the contract expressly provides for loading or unloading according to the custom of the port, a specific contract provision allowing a certain number of days will prevail over a port custom to

13. U.S.—Neilsen v. Jesup, D.C.N.Y., 30 F. 138

14. R.I.—Falkenburg v. Clark, 11 R. I. 278.

15. N.Y.—Morse v. Pesant, 3 Abb. Dec. 321.

16. U.S.—Crossman v. Burrill, N.Y., 21 S.Ct. 38, 179 U.S. 100, 45 L.Ed. 106
58 C.J. p. 585 note 80.

17. U.S.—U.S. v. Ashcraft-Wilkinson Co., D.C.Ga., 18 F.2d 977, reversed on other grounds, C.C.A., Ashcraft-Wilkinson Co. v. U. S., 29 F.2d 961.
58 C.J. p. 585 note 81.

18. U.S.—Crossman v. Burrill, N.Y., 21 S.Ct. 38, 179 U.S. 100, 45 L.Ed. 106.

19. N.Y.—Dayton v. Parke, 37 N.E. 642, 142 N.Y. 391.

20. U.S.—Crossman v. Burrill, N.Y., 21 S.Ct. 38, 179 U.S. 100, 45 L.Ed. 106.

21. U.S.—Crossman v. Burrill, supra

22. U.S.—U. S. v. Sugarland Industries, D.C.Tex., 281 F. 239, affirmed, C.C.A., 296 F. 913, and certiorari denied 44 S.Ct. 461, 265 U.S. 587, 68 L.Ed. 1193.

23. U.S.—Crossman v. Burrill, N.Y., 21 S.Ct. 38, 179 U.S. 100, 45 L.Ed. 106.
N.Y.—Dayton v. Parke, 37 N.E. 642, 142 N.Y. 391.

24. U.S.—The Lake Galera, C.C.A.N.Y., 60 F.2d 876, certiorari denied Jamison v. U. S., 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 578.

25. U.S.—Yone Suzuki v. Central Argentine R. Co., C.C.A.N.Y., 27 F.2d 795, certiorari denied Central Argentine Ry. v. Yone Suzuki, 49 S.Ct. 178, 278 U.S. 652, 73 L.Ed. 563.

26. U.S.—Granger v. Stewart, Ga., 208 F. 410, 125 C.C.A. 622—Gilbert Transp. Co. v. Borden, Mass., 170 F. 706, 96 C.C.A. 26.

27. N.Y.—Tweedie Trading Co. v. Craig, 144 N.Y.S. 64, 159 App.Div. 192.
58 C.J. p. 586 note 98.

28. U.S.—Chiarello v. Central R. Co., N.Y., 256 F. 297, 167 C.C.A. 469.

29. U.S.—The Lake Galera, C.C.A. N.Y., 60 F.2d 876, certiorari denied Jamison v. U. S., 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 578—U.S. v. American Sugar Refining Co., D.C. N.Y., 28 F.2d 140.

the contrary;[30] but specific provisions for loading or unloading may be construed as having been made with reference to customs or usages not inconsistent therewith, and as being qualified or modified thereby.[31]

§ 208. What Delay Creates Liability

What specific delays impose liability for demurrage or damages in the nature of demurrage are discussed infra §§ 209–212

Examine Pocket Parts for later cases.

§ 209. —— In Loading

The charterer is liable for demurrage where he is responsible for delays in loading, either within the time specified by the contract, or within a reasonable time where the contract is silent on the subject.

Demurrage is recoverable for delay in loading the vessel,[32] subject to the terms of the shipping contract,[33] and to usages and conditions at particular ports which expressly or by implication are made a part of the shipping contract.[34] In the absence of a charter provision on the subject the loading must be accomplished with such reasonable promptitude as the situation and circumstances allow.[35] Thus, the right to recover exists where the delay is caused by the failure of the charterer to have the entire cargo ready for delivery at the port of loading,[36] and at a place convenient for loading directly into the ship,[37] by a variation in the character of cargo from that specified in the charter party,[38] by the failure of the charterer in his duty under the contract to provide the vessel a safe berth at which she can be loaded within a reasonable time,[39] by the failure of the charterer promptly to supply the requisite number of lighters to convey the cargo to the ship, where delivery by this means is contemplated;[40] or by delay in loading the cargo onto the vessel where the charter party places that duty on the charterer,[41] provisions that cargo should be loaded by the charterer into the ship yielding, however, to other provisions that it be delivered alongside within reach of the ship's tackles.[42] Under an agreement to furnish cargo as fast as the ship can receive it the charterer is not liable for delay where the nature of the cargo is such as to render a more rapid delivery impracticable.[43]

The charterer is not liable where the delay is caused by the vessel being compelled, without her fault, to wait her turn in loading according to the custom of the port,[44] but the rule is otherwise where provisions in the charter supersede the custom[45] or the act or default of the charterer prevents the ship loading in turn.[46]

§ 210. —— In Unloading

a Breach of express obligation
b. Breach of implied obligation

a. Breach of Express Obligation

(1) In general
(2) Dispatch
(3) Providing berth

(1) In General

The charterer or consignee may be held liable for delays in unloading under express provisions of the contract as to the time, place, and manner of unloading.

The plain and express provisions of the contract as to the time, place, and manner of unloading are

30. U.S.—Holman v. Gans SS. Line, N.Y., 186 F. 96, 108 C.C.A. 208
31. U.S.—Taisho Kaiun Kabushiki Kaisha v. Gano Moore Co., D.C. Del., 14 F.2d 985.
58 C.J. p. 586 note 3.
32. U.S.—Randall v. Sprague, Mass., 74 F. 247, 21 C.C.A. 334.
58 C.J. p. 586 note 8
33. U.S.—Corrigan v. Iroquois Furnace Co., Ill., 100 F. 870, 41 C.C.A. 102
58 C.J. p. 586 note 9, p. 587 note 12
34. U.S.—Taisho Kaiun Kabushiki Kaisha v. Gano Moore Co., D.C. Del., 14 F.2d 985.
58 C.J. p. 587 notes 10, 13.

Custom modified by contract

An agreement of owner in a charter party to load cargo according to custom of port is not governed by the custom of port as to time of loading, where the charter party allows a specified number of running lay days, Sundays, and holidays, even if used, excluded, for loading.—Holman v. Gans SS. Line, N.Y., 186 F. 96, 108 C.C.A. 208

35. U.S.—Williscroft v. Cargo of the Cyrenian, D.C.N.Y., 123 F. 169.
58 C.J. p. 587 note 11.
36. U.S.—Charles E. Hires Co. v. Puerto Rico International Corp., 285 F. 645.
58 C.J. p. 587 note 15.
37. N.Y.—Tweedie Trading Co. v. Craig, 144 N.Y.S. 64, 159 App.Div. 192.
38. U.S.—McCaldin v. Cargo of Scrap Iron, D.C.N.Y., 111 F. 411.
58 C.J. p. 587 note 19
39. U.S.—Hellenic Transport SS. Co. v. Archibald McNeil, etc., Co., D.C. Md., 273 F. 290.
58 C.J. p. 587 note 20.
40. U.S.—McCaldin v. Cargo of Scrap Iron, D.C.N.Y., 111 F. 411
41. U.S.—Grace v. Hansen, C.C.A. Wash., 273 F. 486.
N.Y.—Baldwin v. Sullivan Timber Co., 36 N.E. 1060, 142 N.Y. 279.
42. U.S.—Bahamas-Cuban Co. v. Southern Export Co., C.C.A.Fla., 298 F. 596.
43. U.S.—Uren v. Hagar, D.C.Pa., 95 F. 493—Eleven Hundred Tons of Coal, C.C.Me., 12 F. 185.
44. U.S.—Williscroft v. Cargo of the Cyrenian, D.C.N.Y., 123 F. 169
58 C.J. p. 588 note 27.

Phrase "in turn" or "in regular turn" construed

U.S.—Donnell v. Amoskeag Mfg. Co., N.H., 118 F. 10, 55 C.C.A. 178.
58 C.J. p. 588 note 27 [a].

45. U.S.—Constantine, etc., SS. Co. v. Auchinclos, N.Y., 161 F. 848, 88 C.C.A. 661, certiorari denied 29 S. Ct. 683, 212 U.S. 573, 53 L.Ed. 656.
58 C.J. p. 588 notes 27 [b] (1), (2).
46. U.S.—Bull v. U.S. Shipping Co., N.Y., 173 F. 46, 97 C.C.A. 364.
58 C.J. p. 588 notes 27 [b] (3), (4).

binding so as to render the charterer or consignee accepting the cargo liable in damages for delay caused by noncompliance,[47] and although they will not be construed as contemplating impossible things,[48] or as penalizing the consignee unless the case comes clearly within their terms,[49] their effect cannot be changed by usage and custom,[50] unless such custom is expressly made a part of the contract,[51] and then only to the extent that the custom applies.[52] The custom must not be unreasonable.[53] Clauses which are in effect merely permissive are not binding, when not in fact observed.[54] A construction of the contract, which has been acted on by the parties and which is in itself reasonable, will be sustained by the courts.[55] Where delay in unloading caused no actual loss, there can be no recovery.[56]

(2) Dispatch

Breach of an express provision relating to dispatch in unloading will render the charterer or consignee liable where he fails to receive the cargo as fast as the vessel can deliver it. A provision for unloading, employing the term "customary dispatch" or an equivalent term contemplates usual, rather than quick dispatch; but the meaning and effect given to quick dispatch attaches to the term "customary quick dispatch."

The charterer is liable in damages for a breach of an express provision of the contract relating to dispatch in unloading the vessel, and the words "dispatch," "prompt dispatch," or "quick dispatch," or equivalent words obligate the charterer to receive the cargo as fast as the vessel can deliver it,[57] and they are not in any way controlled by the rules, usages, or customs of the port,[58] such as a custom that the vessel shall take her turn at the wharf,[59] although it has been held that dispatch at a particular port is dependent on facilities at that port for unloading vessels.[60]

Customary dispatch The expressions "customary dispatch," or "customary time," or "customary discharge" contemplate usual, rather than quick, dispatch, and a contract containing such a provision is fulfilled if the vessel is afforded the customary facilities for speedy discharge at the port of destination,[61] or at the substituted port, where a substitution is made,[62] or contemplate reasonable diligence in an extemporized port where there is no custom.[63] The phrases "customary dispatch" or "customary time" include the lawful, reasonable, and well-known customs of the port of discharge which have to do with discharge of cargoes,[64] but they do not do away with the obligation of the charterer to provide a berth where the vessel may be promptly discharged,[65] or to use reasonable diligence in unload-

47. U.S.—Yone Suzuki v. Central Argentine R Co, C C A N Y, 27 F. 2d 795, certiorari denied Central Argentine Ry v Yone Suzuki, 49 S Ct. 178, 278 U.S. 652, 73 L Ed 563.
58 C J. p 588 note 29.

Intention of parties
Where contract between shipping company and grain company provided that in case of delay in unloading, certain demurrage would be payable a designated number of hours after arrival of grain at port, honesty of both parties was presumed, and grain company was charged with knowledge of fact that limitation was intended to protect shipping company against loss of use of its boats after expiration of agreed unloading period —Sarnia Steamships v. Continental Grain Co., C.C.A.Ill., 125 F.2d 362.

48. U.S —Tweedie Trading Co. v Pitch Pine Lumber Co, D C N Y., 156 F. 88
58 C J. p 588 note 30.

49. U.S.—Continental Coal Co v Bowne, R.I., 115 F. 945, 53 C.C.A. 427.

50. U S.—The Glenfinlas, N.Y., 48 F 758, 1 C.C.A. 85—Philadelphia, etc, R. Co. v. Northam, D.C.N.Y., 19 F Cas.No 11,090, 2 Ben. 1.

51. U.S.—Smith v. Sizer, D.C.N Y., 134 F. 928—Bertellote v. Part of Cargo of Brimstone, D.C.Md, 3 F. 661, 5 Hughes 201.

52. U.S.—Futterer v. Abenheim, C.C Pa, 9 F Cas No.5,164, 10 Phila. 225
58 C J. p 588 note 34.

53. U.S.—The Hartismere, D.C.Md, 18 F.Supp. 767.

Custom held unreasonable
Custom relied on by charterers and purchasers of cargo of sugar, in libel for demurrage, that standard for discharge was seven hundred tons per weather working day was unreasonable, even though custom had never been in litigation before and was old along entire Atlantic seaboard, where custom at port was confined virtually to purchaser's plant, since current conditions require more expeditious stevedoring —The Hartismere, supra.

54. U.S —Tweedie Trading Co. v. Strong, etc, Co, D C.N.Y., 157 F 304, reversed on other grounds 195 F. 929, 115 C C.A. 617.
58 C.J. p 589 note 35.

55. U.S —Smith v. New York Granite Paving Block Co., D C.N.Y., 56 F. 525, affirmed 56 F. 527, 5 C.C.A 672.

56. U.S —The Hartismere, D.C.Md., 18 F.Supp 767.

Provision for penalty for nonperformance
Libelants were not entitled to recover from purchaser of cargo for demurrage for unreasonable time consumed in unloading, in absence of proof of actual damage, under charter party provision referring to penalty for nonperformance, since "nonperformance" meant total failure to perform, that is, failure even to begin —The Hartismere, supra.

57. U.S.—Mitchell v. Langdon, D.C. Ill., 9 F. 472, 10 Biss. 527.
58 C J. p 589 notes 41, 42.

58. U.S —Mott v. Frost, D.C S C., 47 F 82—Sleeper v. Puig, C.C.N.Y., 22 F.Cas.No.12,941, 17 Blatchf. 36.

59. U S.—Ten Thousand and Eighty-Two Oak Ties, D.C.N.J, 87 F 935
58 C J. p 589 note 44.

60. U S.—Cargo of the Joseph W Brooks, D C N C., 122 F 881.

61. U.S.—Hinckley v Wilson Lumber Co, D.C Me., 205 F 974.
58 C J. p 589 note 53

62. U S.—Crowley v. Hurd, D.C. Mass, 172 F. 498.

63. U.S.—The Spartan, D.C N.Y, 25 F. 44.

64. U.S —Gates v. Ryan, D.C N.Y., 37 F. 154.
58 C.J. p 590 note 56.

65. U S —Leary v. Talbot, N.Y., 166 F. 914, 88 C C.A. 96.
58 C.J. p 590 note 57.

ing according to the terms of the charter party.[66] They do not include customs of the port which have their origin in the sale of cargoes,[67] or special usages of the charterer in his business as distinguished from the general customs of the port[68] The custom governing rate of discharge of a cargo applies to the vessel,[69] and the discharge cannot be accelerated over the customary rate by discharging the cargo into two or more lighters and claiming a right to discharge from each lighter at the vessel rate.[70] The word "customary" in such a provision relates not only to the method but also to the time of unloading[71]

Customary quick dispatch The meaning and effect given to "quick dispatch" attach to the term "customary quick dispatch"[72] as distinguished from the usual discharge[73] A provision for "quick dispatch as customary" has been construed to mean as quick dispatch as is customary at the port of delivery.[74]

(3) Providing Berth

A consignee on whom rests the duty under the contract to designate a berth for discharging is liable for failure or delay in providing a berth, or for any delay due to the fact that the wharf he selects is not suitable for the purpose.

Where by the terms of the charter party the charterer is to name the berth for discharging, he should be ready to receive the cargo when the vessel is ready to deliver,[75] even if she cannot do so because he has failed to name a berth,[76] or has named a berth to which she cannot get, or to which she is prevented from getting, through no fault of her own.[77] The consignee must designate a berth where such obligation is necessarily implied from other express provisions in the contract.[78] A consignee, on whom rests the duty under the contract to designate a berth, is liable for failure[79] or delay[80] in providing a berth, or in securing the necessary permit for the vessel to proceed to the wharf,[81] or for any delay due to the fact that the wharf which he selects is not suitable for the purpose,[82] or for delay arising from its crowded[83] or dangerous[84] condition, or from its being difficult to reach by the use of reasonable means,[85] or from following the directions of the consignee,[86] and a master may refuse a berth that is not suitable or safe for his vessel;[87] but the consignee may designate a single wharf or a specified berth at a large wharf,[88] and is not required to make more than one tender of a berth provided it is suitable.[89] Where the master takes the berth selected by the consignee, the consignee is liable for delay subsequently occurring if not due to the fault of the master.[90]

b. Breach of Implied Obligation

(1) Discharge within reasonable time
(2) Providing berth
(3) Facilities for discharge

(1) Discharge within Reasonable Time

Where the contract is silent as to the time of unloading and discharge, a vessel must be unloaded and discharged within a reasonable time.

One who charters a vessel, under a contract that is silent as to the time of unloading and discharge, contracts by implication that he will unload and dis-

66. U.S.—Williams v. Theobald, D.C. Cal., 15 F. 465.

67. U.S.—Milburn v. Thirty-Five Thousand Boxes of Oranges, etc., N.Y., 57 F. 236, 6 C.C.A. 317.

68. U.S.—In re Eleven Hundred Tons of Coal, C.C.Me., 12 F. 185.

69. U.S.—Dick Chiarello & Bros., Inc. v. Central R. Co., N.Y., 256 F. 297, 167 C.C.A. 469.

70. U.S.—Dick Chiarello & Bros., Inc. v. Central R. Co., supra

71. U.S.—The Hartismere, D.C.Md., 18 F. Supp. 767.

72. U.S.—Freeman v. Wellman, D.C. Mass., 67 F. 796—Harrison v. Smith, Pa., 67 F. 354, 14 C.C.A. 656

73. U.S.—Freeman v. Wellman, D.C. Mass., 69 F. 796.

74. N.Y.—Terjesen v. Carter, 9 Daly 193.

75. U.S.—The Edward T. Stotesbury, N.Y., 187 F. 111, 109 C.C.A. 31

76. U.S.—The Edward T. Stotesbury, supra.

77. U.S.—The Edward T. Stotesbury, supra

78. U.S.—Smith v. New York Granite Pav. Block Co., D.C.N.Y., 56 F. 525, affirmed 56 F. 527, 5 C.C.A. 672.
58 C.J. p. 590 note 66

79. U.S.—Compania Anonima Maritima Union v. Strachan Shipping Co., Ga., 261 F. 57, 171 C.C.A. 653.

80. U.S.—Kroller v. Delaware River Steel Co., C.C.A.Pa., 43 F.2d 476.
58 C.J. p. 590 note 68.

81. U.S.—Bell v. Stewart, C.C.A. Fla., 31 F.2d 44.

82. U.S.—Carroll v. Holway, D.C. Me., 158 F. 328.

83. U.S.—Brooks v. Hilton-Dodge Lumber Co., D.C.N.Y., 221 F. 265, modified on other grounds 229 F. 708, 144 C.C.A. 118.
58 C.J. p. 590 note 71.

84. U.S.—Carroll v. Holway, D.C.Me., 158 F. 328
58 C.J. p. 590 note 72.

85. U.S.—The Henry Sutton, D.C. Conn., 26 F. 923, affirmed, C.C., Manson v. New York, N. H. & H. R. Co., 31 F. 297, 24 Blatchf. 448—Clayton v. Four Hundred and Ten Tons of Coal, D.C.N.Y., 20 F. 799.

86. U.S.—The Henry Sutton, D.C. Conn., 26 F. 923, affirmed, C.C., Manson v. New York, N. H. & H. R. Co., 31 F. 297, 24 Blatchf. 448.

87. U.S.—Crowley v. Hurd, D.C. Mass., 172 F. 498—The Swallow, D.C.N.Y., 27 F. 316, affirmed, C.C., 30 F. 204.

88. U.S.—Davis v. Garfield, etc., Coal Co., D.C.Mass., 251 F. 743.

89. U.S.—McLaughlin v. Albany, etc., Iron, etc., Co., D.C.N.Y., 8 F. 447.

90. U.S.—Gronstadt v. Withoff, C.C. N.Y., 21 F. 253
Conn.—Lake v. Hurd, 38 Conn. 536.

charge her within a reasonable time,[91] even though the contract contains no stipulation as to demurrage;[92] and the master of the vessel, whenever his request for discharge of the cargo is declined,[93] or whenever he is dissatisfied with the rate of discharge,[94] may give notice, claiming demurrage unless discharge is completed within a reasonable time thereafter, and the consignee becomes liable if he fails to comply. Liability for delay beyond a reasonable time rests on the vendee of the consignee of the cargo where he unreasonably delays unloading.[95] What constitutes a reasonable time varies with the facilities of the port for discharging and the circumstances of the case,[96] and when the shipment is to a person having special conveniences,[97] or no special conveniences for unloading,[98] that fact enters into the contract and is considered in determining the question of reasonableness. It follows that a reasonable rate of discharge may not be the same at all wharves,[99] as for example, where the wharves at a port are not all equally convenient for the discharge of every sort of cargo.[1] Although it has been frequently stated that the obligation is to discharge in a reasonable time according to the custom of the port,[2] or, in some cases, by the custom of the trade, where the obligation to discharge is imposed on consignee or his vendee,[3] this has been qualified in other cases which hold it to mean that under ordinary circumstances the customary time becomes the reasonable time,[4] but that this test will not be employed when the circumstances are extraordinary, as the court will, in all instances, consider all the facts and circumstances, ordinary and extraordinary, which have a legitimate bearing on the question of the reasonableness of the time occupied.[5] Where reasonable time follows the custom of the port, the custom must not only be established and reasonable, but also certain and definite.[6]

(2) Providing Berth

Generally it is the duty of the charterer or the consignee to designate and provide a suitable berth for unloading within a reasonable time after arrival of the vessel.

In the absence of proof of custom where the agreement provides for discharge according to the custom of the port,[7] and in the absence of a specific agreement or usage to the contrary, it is the duty of the charterer or consignee, as the case may be, to designate and provide a suitable wharf or berth for the vessel within a reasonable time after her arrival, and he is liable for delay resulting from failure to do so,[8] although there is authority for the view that where the contract is silent the owner of the ship assumes to know the harbor and takes the risk of finding suitable dockage, depth of water, and discharging facilities.[9] An exception to the general rule has been said to exist in the case of a general ship carrying a mixed cargo.[10] Where the charterer or consignee has designated the berth, it is the duty of the master of the vessel to proceed to the place designated;[11] but having once berthed in the place designated, the owner of the cargo, in the absence of an established usage to the contrary, cannot change the berth except by paying the cost of the change and demurrage for delay occasioned thereby,[12] nor can he then interrupt the unloading without being charged with the delay caused[13] After designating an available discharging berth, the charterer or consignee is not liable for delay

91. U S—U. S Shipping Co v. U S, C C N.J., 146 F 914
58 C J p 590 note 80.

92. U.S—Eastern SS. Co. v. 170,-040⅝ Bushels of Wheat, etc, D C N Y, 1 F 2d 558, affirmed, C C A, Pioneer S. S. Co v. 92,680 Bushels of Wheat, 11 F 2d 1015.
58 C J p 591 note 81.

93. N Y—Scholl v. Albany, etc, Iron, etc, Co., 5 N.E 782, 101 N. Y. 602

94. U S—Young v One Hundred and Forty Thousand Hard Brick, D C N Y., 78 F 149.

95. N.Y—Ulster Brick Co v Murtha, etc, Co, 154 N Y.S. 834, 169 App Div. 151—Washburn v. Empire Brick, etc, Co, 137 N.Y.S 489, 152 App.Div. 563.

96. U.S—Acme Transit Co. v. 133,-000 Bushels of Wheat, D.C.N.Y., 243 F. 970.
58 C.J. p 591 note 86.

97. U S—Pioneer Fuel Co v McBrier, Minn, 84 F 495, 28 C C.A 466.

98. U S—Pioneer Fuel Co. v. McBrier, supra.

99. U S—The James Baird, D C Mass, 90 F. 669.

1. U S—The James Baird, supra.

2. U S—Bellatty v. Curtis, D C Mass, 41 F. 479.
58 C J. p 591 note 91.

3. U S—The Z. L Adams, D C N Y, 26 F. 655.

4. U S—McArthur Bros Co v. 622,-714 Feet of Lumber, D.C N Y, 131 F 389—Empire Transp. Co v. Philadelphia, etc, Coal, etc, Co., Minn., 77 F. 919, 23 C C.A. 564, 35 L.R.A. 623.

5. U S.—Ionia Transp Co. v. 2,098 Tons of Coal, D C.Wis., 128 F. 514, affirmed 135 F. 317, 67 C.C.A. 671, certiorari denied 25 S.Ct 799, 197 U.S 622, 49 L Ed 910.
58 C J. p 591 note 94

6. U S—The James Baird, D C.Mass, 90 F. 669
58 C J. p 591 note 96.

7. U.S—Bailey v. Manufacturers' Lumber Co, D C.N.Y, 224 F. 806.

8. U.S—The James H. Hoyt, D C. Mich, 299 F. 666
58 C.J p 591 note 99.

9. N Y—Jameson v. Sweeney, 66 N Y S 494, 32 Misc 645.

10. U S.—Teilman v. Plock, D.C.N. Y., 17 F 268.
58 C.J. p 591 note 3.

11. Conn—Hodgdon v New York, etc, R Co., 46 Conn 277, 33 Am R. 21.

12. U S—Gronn v Woodruff, D C.N Y, 19 F 143—Houge v. Woodruff, D C N.Y., 19 F. 136

13. U S—Symons v 10,466 Barrels of Cement, D C.Wash, 195 F 1017.

caused by the crowded condition of the dock or by the vessel being compelled to wait its turn, especially when such waiting is required by the custom of the port,[14] nor can the shipowner add to his rights by notifying the consignee that the cargo must be discharged within a specific period;[15] but there is authority for the view that in such cases the charterer takes the risk of delay beyond a reasonable time.[16]

(3) Facilities for Discharge

Failure to furnish adequate facilities for prompt discharge may render the shipper or other contracting party liable for delay in unloading.

Where there is no specific agreement on the subject, and no known custom of the port to the contrary, it is the duty of the shipper or other contracting party to be not only ready to receive the cargo on notice of the arrival of the vessel, but to receive it as delivered from the vessel,[17] providing lighters if he chooses to have the cargo discharged in that way.[18] If, however, there is a more expeditious method of discharging the cargo available to him than into vessels, he must adopt the quicker method.[19] The shipper must exercise reasonable diligence in furnishing sufficient dockage room and means for transportation away from the dock so that the cargo will not accumulate in such a way as to impede the delivery,[20] and must conform to the customs and usages of the port, when not inconsistent with the provisions of the charter party or bill of lading.[21] When he does conform to the custom of the port under such circumstances, he is excused for any delay occasioned thereby.[22]

§ 211. —— Between Loading and Unloading

In a proper case demurrage is recoverable for detention or delay of a vessel after loading and before unloading: and loss of the vessel on the voyage does not affect the right to recover accrued demurrage.

It has been held that demurrage is recoverable for a detention of the vessel after loading and before unloading which is not due to the fault of the master,[23] as, for example, where the delay is occasioned by overloading,[24] or by an attachment of a part of the cargo and unloading the attached goods when the vessel was ready to sail,[25] or by suspension of the voyage by the consignee,[26] or by failure of the charterer to procure clearance papers[27] or an export license[28] unless the failure was due to no fault of his,[29] or by delay because of disputes over the bill of lading presented in which the master was right and the charterer was wrong,[30] or by delay in towing the vessel out to sea after it is loaded, where the contract provides for such towage by the charterer.[31] Demurrage is not recoverable for delays due to maritime risks which the owner or master of the vessel has assumed.[32] A provision for the payment of towage by the charterer does not obligate him to furnish a towboat so as to render him liable for delay in procuring towage.[33] Demurrage is not recoverable under a contract impliedly incorporating a custom between the parties which contemplated delay without payment of demurrage,[34] as, for example, chartering and loading vessels with grain late in the autumn, and having them lay up during the winter.[35] Under a contract of affreightment the shipper is not liable for delay due to obstructions to navigation between ports.[36]

Effect of loss of vessel on accrued demurrage. Where the vessel is lost on the voyage, the right to recover demurrage accrued before the disaster is not affected,[37] as, for example, demurrage for extra

14. U.S.—The Convoy's Wheat, N.Y., 3 Wall. 225, 18 L.Ed 194.
58 C.J. p 591 note 7.

15. U.S.—The M. S. Bacon v. Erie, etc., Transp. Co., C.C.Pa., 3 F. 344, 17 F.Cas.No.9,898a.

16. U.S.—Esseltyne v. Elmore, C.C. Wis., 8 F.Cas.No.4,531, 7 Biss. 69

17. U.S.—Bowen v. Decker, D.C.N.Y., 18 F. 751.
58 C.J. p 592 note 10.

18. U.S.—Olivari v. Merchant, D.C. N.Y., 18 F. 554.

19. U.S.—The Favorite, D.C.Pa., 27 F. 474
58 C.J. p 592 note 12.

20. U.S.—Ottawa Transit Co. v. 261,000 Bushels of Wheat, D.C.N.Y., 260 F. 493.
58 C.J. p 592 note 13.

21. U.S.—Seager v. New York, etc., Mail S.S. Co., N.Y., 55 F. 880, 5 C.C.A. 290—Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, D.C.N.Y., 23 F. 727.

22. U.S.—The Elida, D.C.Pa., 31 F. 420.

23. U.S.—Shaw v. Folsom, D.C.N.Y., 38 F. 356, affirmed, C.C., 40 F. 511.
58 C.J. p 592 note 17.

24. U.S.—Shaw v. Folsom, supra.

25. N.Y.—Campbell v. Conner, 70 N.Y. 424.

26. U.S.—Reed v. Weld, D.C.Mass., 6 F. 304.

27. U.S.—The Cataluna, D.C.N.Y., 262 F. 212
58 C.J. p 592 note 21.

28. U.S.—The Marpesia, C.C.A.N.Y., 292 F. 957.

29. Mass.—Towle v. Kettell, 5 Cush. 18.

30. U.S.—The Alonzo, D.C.Me., 1 F. Cas.No.257, 1 Hask. 184—Balfour v. Wilkins, D.C.Or., 2 F.Cas.No.807, 5 Sawy. 429.

31. U.S.—Actieselskabet Barfod v. Hilton, etc., Lumber Co., D.C.Ga., 125 F. 137.

32. U.S.—Earn Line S.S. Co. v. Manati Sugar Co., C.C.A.N.Y., 269 F. 774.

33. U.S.—Keen v. Audenried, D.C.N.Y., 14 F.Cas.No.7,639, 5 Ben. 535

34. U.S.—Green v. Cargo of the Lewiston, D.C.N.Y., 77 F. 321.

35. U.S.—Green v. Cargo of the Lewiston, supra.

36. U.S.—Sun Oil Co. v. Atlantic Refining Co., D.C.Pa., 44 F.2d 848.

37. U.S.—The Caroline Al White, D.C.Pa., 5 F.Cas.No.2,421, 5 Phila., Pa., 112.

detention at an intermediate port which becomes absolutely due at such port.[38]

§ 212. —— Subsequent to Unloading

Completion of unloading terminates the liability of the consignee for demurrage.

On completion of the unloading, the liability of the consignee for demurrage terminates, and he is not responsible for any subsequent detention of the vessel.[39]

§ 213. Acts of Persons Other than Charterer

The liability of the charterer for acts of other persons which cause delay is discussed infra §§ 214, 215.

Examine Pocket Parts for later cases.

§ 214. —— Master and Shipowner

The charterer is not liable for delay caused by the wrongful, negligent, or unreasonable acts of the owner or master of the vessel or their agents.

The charterer is not liable for delay due to the wrongful, negligent, or unreasonable acts of the owner or master of the vessel, or any of their agents,[40] and this rule has been applied in cases presenting a variety of circumstances, including cases of delay caused by failure of the vessel to arrive on scheduled time[41] or to follow the direct route;[42] failure of the master to have the vessel in readiness to receive or discharge the cargo,[43] or to accept the towage offered;[44] an unjustified refusal to permit the consignee to unload;[45] refusal to berth at a suitable wharf selected by the charterer,[46] or delay in getting into the berth after it has been properly pointed out,[47] or delay after taking the berth in loading a cargo, ready to be loaded, and of such a nature that it could be loaded within the lay days,[48] or delay after taking the berth from failure to use the facilities available for unloading,[49] or to have sufficient equipment,[50] or to employ enough[51] or sufficiently competent[52] men to unload at the rate provided in the charter party; delay in requesting removal of a ship to facilitate loading;[53] errors of judgment in navigation;[54] negotiations entered into and disputes fostered by the master or shipowner,[55] such as an improper refusal to sign bills of lading;[56] or an improper demand for payment of freight charges and demurrage before discharge of the cargo,[57] or disagreement over selection of a stevedore where the charter party requires selection of one satisfactory to both parties;[58] and the absence of the master from the vessel while it was unloading.[59]

§ 215. —— Third Persons

Charterers may be liable for delays caused by acts of third persons under their control, but not otherwise. The liability of a charterer or consignee for delay due to strikes generally depends on whether the contract contains an exception for delay due to such cause.

With respect to other persons, it may be stated generally that the charterers are liable for delay caused by the acts or omissions of third persons within their control, such as agents,[60] but they are

38. U.S.—The Caroline A. White, supra.

39. N.Y.—Gabler v. McChesney, 70 N.Y.S. 195, 60 App Div. 590.

40. U.S.—The Convoy's Wheat, N.Y., 3 Wall. 225, 18 L.Ed. 194.
58 C.J. p 593 note 42.

41. U.S.—McArthur Bros. Co v 622,-714 Feet of Lumber, D.C.N.Y., 131 F. 389.
58 C.J. p 593 note 43.

42. U.S.—Nichols v. Tremlett, D.C. Mass., 18 F.Cas.No.10,247, 1 Sprague 361.
58 C.J. p 593 note 44.

43. U.S.—U. S. v. Bowring & Co., C.C.A.N.Y., 63 F.2d 224.
58 C.J. p 593 note 45.

Bunkers

With respect to demurrage, express warranty of fitness for voyage requires vessel at least to have adequate bunkers available when going to loading berth, and a charter clause permitting vessel to visit any port for coal or other supplies contemplates emergency during voyage and does not contradict warranty of fitness.—U. S. v. Bowring & Co., supra

44. U.S.—The Spartan, D.C.N.Y., 25 F. 44.

45. U.S.—Little v. One Cargo of Lumber, D.C.Fla., 2 F.2d 608.

46. U.S.—In re 2,000 Tons of Coal ex The Michigan, Mass., 135 F. 734, 68 C.C.A. 372—Robbins v. McDonald, D.C.Mass., 20 F.Cas.No.11,-884, 2 Lowell 140.

47. U.S.—Carroll v. Holway, D.C.Me., 158 F. 328.
58 C.J. p 593 note 50

48. Or.—Darling-Singer Lumber Co. v. Oriental Nav. Co., 272 P. 275, 127 Or. 655.

49. U.S.—Ashcraft-Wilkinson Co. v. U. S., C.C.A.Mass., 29 F.2d 961.

50. U.S.—Ashcraft-Wilkinson Co. v. U. S., supra.

51. U.S.—Bahamas-Cuban Co. v. Southern Export Co., C.C.A.Fla., 298 F. 596.
58 C.J. p 593 note 54.

52. U.S.—Ashcraft-Wilkinson Co. v. U. S., C.C.A.Mass., 29 F.2d 961.

53. U.S.—New York, etc., Mail SS. Co. v. Lamborn, C.C.A.N.Y., 13 F.2d 535.

54. U.S.—Cureton Lumber Co. v. Hammond Lumber Co., C.C.A.Fla., 29 F.2d 973.
58 C.J. p 593 note 57.

55. U.S.—Hansen v. American Trading Co., Me., 208 F. 884, 126 C.C.A. 44.
58 C.J. p 593 note 58.

56. U.S.—Wood v. Sewell, D.C.Pa., 128 F. 141, affirmed 135 F. 12, 67 C.C.A. 580.
58 C.J. p 594 note 59

57. U.S.—U. S. Shipping Board Emergency Fleet Corp. v. Banque Russo Asiatique, C.C.A.Pa., 286 F. 918.

58. U.S.—Portland Shipping Co. v. The Alex Gibson, D.C.Wash., 44 F. 371.

59. U.S.—Whitman v. Vanderbilt, N.Y., 75 F. 422, 21 C.C.A. 422.

60. U.S.—Sutton v. Housatonic R. Co., D.C.N.Y., 45 F. 507.
58 C.J. p 594 note 63.

not liable where such third persons are not within their control.[61]

Where the contract contains no exception for delay caused by strikes, a strike among the laborers usually employed to load or unload the ship does not excuse the delay resulting therefrom under an express contract for the loading or unloading of the ship within a specified number of days,[62] or where, in the absence of express stipulations as to time in unloading, a reasonable time is allowed.[63] However, an exception of delay caused by strikes is frequently incorporated in the demurrage clause of the contract, and, in such cases, the delay is excused when entirely attributable to a strike,[64] but not when the strike is only the remote cause.[65] The charterer is not deprived of his excuse by the fact that at the time the agreement was made the strike was in existence and he knew it, provided the master also knew it and proceeded to the berth without objection,[66] but he cannot excuse the delay where he could have arranged for the discharge of the cargo notwithstanding the strike.[67]

§ 216. Act of God or Vis Major

Whether the charterer or consignee is or is not liable for delay caused by act of God or vis major depends largely on the terms of the contract.

The rule is well established that where the freighter or charterer agrees absolutely to load or unload the ship within a specified number of days, the fact that subsequent events, such as natural causes or governmental restraints, render performance impossible, is immaterial;[68] but that where no time is mentioned in the contract, or where the contract provides in general terms against liability of the charterer for delay not due to his default, delay is excused when caused by political or naval disturbances,[69] bad weather,[70] fire,[71] an epidemic or quarantine,[72] or other causes beyond his control.[73] There is no liability when the cause of the delay is one of the natural causes or vis major expressly excepted by the terms of the charter party;[74] but the application of the rule is conditioned on the cause of the delay being within the terms of the exception,[75] and on its being the proximate cause of the delay.[76] Where the charterer knew the danger at the time the agreement was made and failed to provide therein against it, he will be taken to have assumed the risk of delay from such sources,[77] and, a fortiori, where, in case of known danger, the agreement in express terms provides for charterer's liability in case of detention caused thereby, the charterer becomes liable for such delay.[78] A charter provision that delay by reason of

61. U.S.—The James H Hoyt, D.C. Mich., 299 F 666
58 C.J. p 594 note 64.

62. U.S.—Continental Grain Co v. Armour Fertilizer Works, D C.N.Y., 22 F Supp 49.
58 C J. p 594 note 67.

Exception in demurrage clause
(1) The general strike exception clause in a charter party does not prevent the running of demurrage, but a similar phrase is necessary in conjunction with demurrage clause to free charterer from burden of paying demurrage when delay is due to strikes.—Continental Grain Co. v. Armour Fertilizer Works, supra.

(2) Under charter party stipulating demurrage only for detention by default, charterer may be liable for demurrage, even though detention was due to a strike or other cause for which he was not at fault, since "default" means failure to perform whatever charterer was bound to do without regard to how the failure came about, subject only to vis major doctrine.—Continental Grain Co. v Armour Fertilizer Works, supra.

63. U S.—Empire Transp. Co. v. Philadelphia, etc, Coal, etc, Co., Minn, 77 F. 919, 23 C C.A. 564, 35 L R A 623
58 C.J. p 595 note 68.

64. U.S.—U. S v. Coal Cargo of The Henry County, D C Pa., 11 F 2d 805, affirmed, C.C A., 11 F.2d 809, certiorari denied 47 S Ct 92, 273 U.S. 696, 71 L Ed 845
58 C.J. p 595 note 70.

Strike excusing delay
"Strike," when used in a charter party, means a strike against employers in the strict sense of the word, and not a mere neglect or refusal on the part of the men to work.—Hagerman v. Norton, Fla, 105 F 996, 46 C C.A. 1.—58 C J. p 595 note 69

65. U S.—U S. v Cargo of Linseed on Board The West Totant, D.C N. Y, 20 F 2d 199, affirmed, C.C A, U S v A Cargo of About 7,346 Tons of Linseed, 28 F 2d 1021.
58 C J. p 595 note 71.

66. U S.—U. S v. Russian Volunteer Fleet, D.C.N.Y., 22 F 2d 187.

67. U S.—Continental Grain Co v. Armour Fertilizer Works, D C N.Y., 22 F Supp. 49

68. U S.—Dougherty Co v. 2,471 Tons of Coal, etc, D C Mass, 278 F 799.
58 C J p 595 note 75.

69. U S.—Crossman v Burrill, N Y, 21 S Ct 38, 179 U.S. 100, 45 L Ed 106
58 C J. p 596 note 76.

70. U.S.—Sprague v. West, D.C.N. Y, 22 F Cas No 13,255, Abb Adm. 548.
58 C J p 596 note 77.

71. U S.—Paquette v. A Cargo of Lumber, D C N Y., 23 F 301

72. U S.—Coombs v. Nolan, D C N. Y, 6 F.Cas No 3,189, 7 Ben 301
58 C J p 596 note 79.

73. U S.—Hires Co. v. Porto Rico International Corp., D C N.Y, 285 F 645.
58 C J. p 596 note 80.

74. U S.—Cureton Lumber Co v. Hammond Lumber Co., C C.A.Fla, 29 F 2d 973
58 C J p 596 note 82.

75. U.S.—James Hughes, Inc. v. Charles Dreifus Co., C C A N.Y., 89 F 2d 9.
58 C J. p 596 note 83.

Occurrence during voyage
Exceptions in charter party excusing charterer for delay because of acts of God and accidents of rivers related to occurrences during voyage and did not excuse charterer from paying demurrage where severe cold prevented barge from breaking ground for voyage.—James Hughes, Inc. v. Charles Dreifus Co., supra.

76. U S.—Hughes v. J. S Hoskins Lumber Co., D.C.N J, 136 F. 435.

77. U S.—Inter-Coast SS Co v Seaboard Transp Co, C.C.A Mass, 291 F 13.
58 C J. p 597 note 85.

78. U S.—American Transp. Co. v. Swift, D.C.N.Y., 30 F.2d 159, af-

natural causes shall be excused does not apply to natural causes which merely prevent the cargo being brought to the port of shipment, but do not prevent its being loaded on the ship;[79] although the contrary has been held in a few cases where, by usage and necessity, the cargo was transported by rail or water to the place of loading.[80] Likewise, the owner of the vessel must bear the loss consequent on a delay of the vessel caused by natural causes before she reaches the wharf or other designated place for loading or unloading, and before the obligation of the charterer begins,[81] unless the vessel delays reaching the designated place for unloading at the request of the consignee.[82]

§ 217. Lay Days

a. In general
b. Commencement
c. Computation

a. In General

Generally charter parties stipulate for a certain number of days, called "lay days," during which the ship may be detained for loading or unloading without liability for demurrage.

The purpose of stipulating in the charter party for a certain number of days, called "lay days," for loading and discharging, is to allow the charterer that length of time during which he may detain the ship without paying for her use, and to make him liable for any detention thereafter.[83] In the absence of contract provision to the contrary, the lapse of the lay day period without the charterer furnishing cargo as agreed does not operate as a termination of the contract, but the ship must wait for the cargo a reasonable time thereafter, and for such time is entitled to demurrage in compensation[84]

Modification of lay days clause. In a proper case the lay days clause may be modified by the parties.[85]

b. Commencement

(1) In general
(2) Notice

(1) In General

The time when lay days commence may be controlled by the contract, or by the conduct of the parties or the custom of the port; and, in the absence of a contract or custom to the contrary, do not begin to run until the vessel is in actual readiness to load or unload.

Where the contract is express as to the time the lay days are to commence, it controls,[86] even though in other details the contract may be subsequently modified,[87] or the loading or discharging may actually begin before the stipulated time.[88] Where the contract does not expressly fix the commencement of the lay days, it may be fixed by the conduct of the parties,[89] or, in the absence of agreement or of any provisions therein conflicting with the custom, by the custom of the port.[90] In the absence of any conflicting custom or contract provisions, the lay days do not begin to run until the vessel is in actual readiness to load or discharge,[91] and, where it is provided that the vessel shall proceed to a certain specified wharf or jetty, or one to be selected by the charterer, the arrival of the ship at that wharf or jetty is a condition precedent to the commencement of the running of the time,[92] even though it subjects the vessel to an unreasonable

firmed, C.C.A., 32 F.2d 1013, certiorari denied 50 S.Ct. 39, 280 U.S. 592, 74 L.Ed. 640
58 C.J. p 597 note 86.

79. U.S.—Jonasen v. Keyser, Miss., 112 F. 443, 50 C.C.A. 334.
58 C.J. p 597 note 89

80. U.S.—Paterson v. Dakin, D.C. Ala., 31 F. 682.

81. U.S.—Kane v. Penney, D.C.N.Y., 5 F. 830
58 C.J. p 597 note 91.

82. U.S.—Manson v. New York, etc., R. Co., C.C.Conn., 31 F. 297, 24 Blatchf. 448.

83. N.Y.—New York, etc., SS. Co v. Lamborn, D.C.N.Y., 8 F.2d 382, modified on other grounds, C.C.A., 13 F.2d 535—Leary v. Talbot, N.Y., 160 F. 914, 88 C.C.A. 96.
36 C.J. p 971 note 99.

84. U.S.—Steger v. Orth, N.Y., 258 F. 619, 170 C.C.A. 73, certiorari denied 40 S.Ct. 11, 250 U.S. 663, 63 L.Ed. 1196.

85. **Modification by agent**
Managing agent for government's vessel confronted with emergency which might involve cancellation of charter was held authorized to modify lay days clause—U.S. v. Bowring & Co., C.C.A.N.Y., 63 F.2d 224.

Consideration
Charterer's abandoning right to dispatch money and to cancel if vessel were not tendered on particular date, was consideration for agreement to modify lay days clause.—U.S. v. Bowring & Co., supra.

86. U.S.—Yone Suzuki v. Central Argentine R., C.C.A.N.Y., 27 F.2d 795, certiorari denied Central Argentine Ry. v. Yone Suzuki, 49 S.Ct. 178, 278 U.S. 652, 73 L.Ed. 563.
58 C.J. p 597 note 98

87. U.S.—Reed v. Weld, D.C.Mass., 6 F. 304.
58 C.J. p 598 note 99.

88. U.S.—The Skomvaer, C.C.A.N.Y., 297 F. 746.
58 C.J. p 598 note 1.

89. U.S.—The Cyprus, D.C.N.Y., 20 F. 144.
58 C.J. p 598 note 3.

90. Md.—Barker v. Borzone, 48 Md. 474.
58 C.J. p 598 note 4.

91. U.S.—The Bellota, D.C.N.Y., 57 F.2d 264—The Lake Yelverton, C.C.A.Va., 300 F. 47
58 C.J. p 598 note 5.

"Ready to unload" means actually ready to discharge, as far as the vessel can be made ready by those controlling her.—New Ruperra SS. Co. v. 2,000 Tons of Coal, D.C.Mass., 124 F. 937, 938, affirmed 142 F. 402, 73 C.C.A. 502, 5 L.R.A.,N.S., 126, certiorari denied 26 S.Ct. 761, 201 U.S. 647, 50 L.Ed. 904

92. U.S.—Tweedie Trading Co. v. Barry, N.Y., 205 F. 721, 124 C.C.A. 15
58 C.J. p 598 note 6.

delay in waiting for its turn.[93] If the charterer or consignee, under duty to designate a berth, fails to do so, the lay days commence when the vessel is in readiness to discharge and has given notice thereof,[94] and, if the vessel is prevented from reaching the designated place through the active fault of the charterer, the days begin to count at the time she would have reached it, but for such fault;[95] but after the vessel gets into the dock, the fact that the crowded condition prevents her securing a fit place for discharging the cargo does not prevent the lay days from running.[96]

(2) Notice

Ordinarily notice of readiness to load or discharge must be given before the lay days commence to run.

Ordinarily, in addition to the ship proceeding to the place assigned, she must give formal notice of her readiness to proceed to an appropriate unloading place before her laying time begins,[97] but notice is unnecessary where the charterer is ready and the work begins at once,[98] or where the ship is chartered also for a homeward cargo, and the consignee after discharge of the outward cargo knows that the ship is ready to receive the homeward cargo,[99] or where the terms of the contract do not require it.[1] Where the contract of the parties so provides, notice of readiness to load is a condition precedent to any claim for demurrage.[2] Where it is needed, the notice, in order to be effective, must reach the shipper,[3] on a proper day,[4] but it need not be in any particular form.[5] In case of conflict between the charter party and the bill of lading as to who shall be given notice, the provisions of the charter party controls as between the shipowner and the charterer.[6] The notice becomes effective on lapse of the time named in the contract,[7] including Sundays and holidays,[8] or a reasonable time after it has been given,[9] but not until the ship is in actual readiness to proceed to an appropriate unloading place.[10]

c. Computation

(1) In general
(2) On basis of amount of cargo
(3) Separate computation for loading and unloading

(1) In General

The method of computing lay days is subject to control of contract provisions relative thereto, and generally whole days only are considered in the computation.

The method of computing lay days is subject to control of contract provisions relative thereto.[11] Where the contract simply mentions "days" or "running days"[12] and there is no custom to the contrary, all running or successive days are to be counted,[13] unless the contract excepts Sundays and holidays;[14] but where the phrase "working days" is used, all calendar days on which the law permits work to be done are intended. This excludes Sundays and legal holidays,[15] and excludes also days

93. U.S.—Anderson v Moore, Cal., 179 F 68, 102 C.C.A. 362.

94. U S—Mowinckel v. Dewar, D C Cal., 173 F 544, affirmed Dewar v. Mowinckel, 179 F. 355, 102 C C A. 539—Carbon Slate Co v Ennis, Pa., 114 F. 260, 52 C C.A. 146.

95. U S.—In re 2,098 Tons of Coal, Mass., 135 F. 317, 67 C C.A. 671, certiorari denied 25 S.Ct. 799, 197 U S 622, 49 L Ed. 910.
58 C.J. p 598 note 11.

96. U S.—Ewan v. Tredegar Co., D. C Va., 88 F. 703.

97. U S—U. S. v. F S Royster Guano Co, D C.Va., 288 F 92, modified on other grounds, C C.A., The Lake Yelverton, 300 F. 47.
58 C J. p 599 note 14.

98. U.S—Washington Marine Co v. Ranier Mill, etc., Co., D.C.Or., 198 F. 142.

99. U S.—Two Hundred and Sixty-Eight Logs of Cedar, D C Mass., 24 F Cas.No 14,295, 2 Lowell 378.

1. U S.—Holman v. Gans SS Line, N.Y., 186 F. 96, 108 C.C.A 208.

2. U S.—U. S. v. Bowring & Co., C. C A N Y., 63 F 2d 224—The Skomvaer, C.C.A.N.Y., 297 F. 746.

Requirement held not waived
With respect to demurrage, notice of vessel's readiness to load was not waived by requesting shipowner's agent to register vessel at coal pier and placing loading orders.—U. S. v. Bowring & Co., C.C.A.N Y., 63 F.2d 224.

3. U.S—The India and Owners v. Donald, Miss., 49 F. 76, 1 C.C A. 174.

Where there is no agent on hand at the port of discharge to receive the notice, it will not prevent the commencement of the running of the lay days.
U.S.—Hatton v. De Belaunzaran, D C. N.Y., 26 F. 780.
Va—Brown v. Ralston, 9 Leigh 532, 36 Va. 532.

4. U.S—Perry v. Spreckles' Sugar Refining Co., D C Pa., 110 F. 777.
58 C J. p 599 note 21.

5. U.S.—The Skomvaer, C.C.A.N.Y., 297 F. 746—Carroll v. Holway, D. C.Me, 158 F. 328.

6. U.S—Bell v. Stewart, C.C A.Fla., 31 F 2d 44.
58 C J. p 589 note 39 [a], p 599 note 20 [a].

7. U.S—Grace v. Hansen, C.C.A. Wash., 273 F. 486.

8. U S—U S v Gano-Moore Co., D. C.Pa., 35 F 2d 398.

9. U.S.—Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, D C.N.Y., 23 F. 727.
58 C.J. p 599 note 25.

10. U.S.—The Lake Yelverton, C.C. A.Va, 300 F. 47.
58 C.J. p 599 note 26.

11. U.S—U. S. v. Sugarland Industries, D.C.Tex., 281 F. 239, affirmed, C.C A., 296 F. 913, certiorari denied 44 S.Ct. 461, 265 U S. 587, 68 L.Ed. 1193.
58 C J. p 599 note 27.

12. **"Running days"** in maritime law mean whole of every day when ship is running, the days during which, if the ship were at sea, she would be running—The Eugenia, D.C.N.Y., 53 F.2d 1054.

13. U.S.—Hughes v. J. S. Hoskins Lumber Co., D.C.N.J., 136 F. 435
58 C.J. p 599 note 29.

14. U S—The Skomvaer, C.C A.N.Y., 297 F. 746.

15. U.S.—Hughes v. J. S. Hoskins Lumber Co, D C.N.J., 136 F. 435
58 C.J. p 599 note 32.

when work is prevented by order of the port authorities,[16] but not days occupied with tasks which it was the duty of the charterer under the charter party to perform,[17] or days subject to interruptions or accidents with respect to which the charterer assumed the risk,[18] or stormy days,[19] unless the expression "weather working days" is used.[20]

Lay days run continuously, in the absence of fault of the shipowner.[21] Days lost in loading or unloading for reasons beyond the charterer's control and within the terms of the exception clause are excluded,[22] but the exception clause will not be extended in its application beyond the terms of the contract provision which stipulates the kind of cargo to be carried.[23] In general, whole days only, and not hours or fractions of days, are considered in the computation,[24] but where the charter provides for a pro rata computation of demurrage and dispatch money for every part of a day it is to be calculated by hours and minutes.[25] Lay days may not be increased by misleading statements of the shipmaster as to the time which would be claimed for demurrage.[26]

(2) On Basis of Amount of Cargo

Where the contract so provides, lay days are computed on the basis of the loading or unloading of a stated amount of cargo each day.

Where the contract requires loading or unloading of a stated amount of cargo each day, the computation of lay days is made on that basis,[27] and working days only are counted, and Sundays and holidays are excluded.[28] Under such contracts, the lay days are computed on the amount of cargo actually loaded and stowed, and not that furnished to the vessel,[29] but, where the cargo is lumber, and a deduction in freight is made for that part of it which is dressed, a proportionately greater amount of it is required to be discharged during a day.[30] Provisions for lay days computed at a stated rate of discharge yield to other provisions requiring discharge of the vessel in turn and penalizing a violation by demurrage based on a required discharge at double the lay day rate for every day of wrongful delay.[31] Under some charter provisions and customs of the port demurrage may be computed on a working day of twenty-four working hours and a fewer number of hours worked will be counted as fractional parts of a day.[32]

(3) Separate Computation for Loading and Unloading

Unless otherwise provided by contract, lay days for loading and for unloading are computed separately.

The lay days for loading and discharging are considered separately, and not together,[33] unless the contract stipulates otherwise;[34] but, where a ship is unloaded at different ports, a loss of time at one port may be offset against a saving at another.[35]

§ 218. Waiver and Indemnity

Provisions for demurrage may be waived. One who is compelled to pay demurrage may recover it from the person primarily liable.

The provisions of the contract relating to demurrage or the right to demurrage after it has accrued may be waived,[36] and waiver by the master is effective to bind the ship.[37] Waiver can be estab-

16. N Y —Gabler v. McChesney, 70 N Y S 191, 60 App.Div. 583.
58 C J p 600 note 34.

17. U S —Wood v. Keyser, D.C.Cal., 84 F 688, affirmed 87 F. 1007, 31 C C.A. 358.
58 C.J. p 600 note 36.

18. U.S.—The Skomvaer, D.C N Y, 286 F. 711, modified on other grounds, C C.A., 297 F. 746.

19. U S.—The Skomvaer, C C A.N Y, 297 F. 746.

20. U S.—Pyman SS. Co. v. One Hundred Tons of Kainit, D.C.Ga., 164 F. 364.
58 C.J. p 600 notes 39, 40.

"Weather working day"

(1) "Weather working day" within charter party providing for lay days is day, otherwise a working day according to custom of port, on which weather permits loading —The Driebergen, C.C A Fla., 60 F.2d 367.

(2) "Weather working day" means a day, otherwise a working day, when the weather will reasonably permit the carrying on of the work contemplated —The India and Owners v. Donald, Miss, 49 F 76, 1 C C.A. 174.

21. U S.—The Eugenia, D C N.Y., 53 F.2d 1054.

22. U.S —Mazza v. J. G. White Engineering Co, D C N Y., 274 F. 990
58 C J. p 600 note 41.

23. U.S.—Kerr v. Schwaner, Or., 177 F. 659, 101 C.C A. 285
58 C.J p 600 note 42.

24. U.S —The Skomvaer, C.C.A.N Y., 297 F 746.
58 C J p 600 note 43

25. U.S —The Driebergen, C.C A.Fla., 60 F.2d 367.

26. U.S.—The Bellota, D C N.Y., 57 F.2d 264.

27. U.S.—The Eugenia, D.C.N.Y., 53 F.2d 1054
58 C.J. p 600 note 45.

28. U S.—The Olaf, D C.Pa., 248 F. 807—Wallace v. Cargo of 292,000 Feet of Pine Boards, D C.N.Y., 224 F. 993.

29. U.S.—The Assyria, Fla., 98 F. 316, 39 C.C A. 97.

30. U S.—Randolph v. Wiley, D.C.N Y., 118 F 77.

31. U S —Evans v. Blair, Me, 114 F. 616, 52 C C.A. 396.

32. U S —Weir v. Northwestern Commercial Co, D C.Wash., 134 F 991

33. U.S.—Bailey v. Manufacturers' Lumber Co, D C N Y., 224 F. 806
58 C J. p 601 note 53.

34. Pa —Duffy v. Miller, 1 Phila 334
58 C J. p 601 note 54.

35. U.S —South American Metal Co. v Kjoge, C.C A.Va, 12 F 2d 562.

36. U S.—In re Cargo of the Joseph W. Brooks, D C.N C., 122 F. 881
58 C.J. p 601 note 59.

37. Puerto Rico —H. T Hansen v. Nine Hundred and Ninety-Eight Tons of Coal, 6 Puerto Rico Fed. 394.

lished only on clear evidence.[38]

Indemnity. A person compelled to pay demurrage may recover it from the person primarily liable,[39] but only on clear proof that such demurrage has been or must be paid[40] and that responsibility therefor rests on the person from whom indemnity is sought;[41] and such person so primarily liable cannot escape liability by offering a release proved by the evidence to have been obtained from the master by duress.[42] A master can properly discontinue unloading until security for demurrage is given, only on giving timely notice to the charterer.[43] Where a bond to secure payment of demurrage is properly agreed to on a sufficient consideration, liability thereon is not affected by the fact that the bond is not signed until after the cargo is discharged.[44] Liability for interest under such bond is determinable by the law of the state where the bond was made and performable.[45]

§ 219. Collection of Claim

Questions relating to the collection of claims for demurrage, including the rate and amount, settlement, and actions for recovery are discussed infra §§ 220-222.

Examine Pocket Parts for later cases.

§ 220. —— Rate and Amount

a. Measure of damages
b. Computation of time

a. Measure of Damages

All damages for demurrage or in the nature of demurrage which a shipowner naturally and necessarily sustains by default of the shipper may be recovered; but the rate and amount of recovery may be controlled by stipulations in the contract.

All damages for demurrage or in the nature of demurrage which a shipowner naturally and necessarily sustains by the default of the shipper may be recovered;[46] but this recovery is limited to compensation for delays the risk of which are assumed by the charterer under the terms of his contract,[47] and is subject to deductions for delay resulting from the vessel's default,[48] or for failure of the vessel to take such measures as were reasonably available to mitigate the loss.[49] As a general rule, courts of admiralty have allowed the demurrage stipulated in contracts of charter party and bills of lading, except in cases where the loss of the shipowner has been shown to be less[50] or greater because extending beyond the demurrage period named in the contract,[51] in which case compensation for the further time is prima facie at the stipulated rate,[52] but gives way to an increased rate on evidence establishing that the earning capacity of the vessel is greater than it was figured at for the contract demurrage period.[53] Where the contract provides for demurrage at a specified rate for delay in unloading, the rate applies to each of several vessels delayed where each shipload was regarded as a cargo.[54]

Where no rate is stipulated,[55] or where the suit is to recover demurrage, not in a case where a cargo has been carried but where the charterer breached his contract by not supplying a cargo,[56] the amount recoverable is to be ascertained by the commissioner or by a jury on consideration of all the circumstances and of the real injury sustained by the shipowner. It has been held that, where there is an agreed rate of demurrage for vessels of that class, such rate controls,[57] unless the amount stipulated is in the nature of a penalty, and not

38. U S—Henningsen v. Watkins, D C.Va., 110 F 574.
58 C J. p 601 note 61.

39. U S—Snell v The Independence, D C N Y, 22 F Cas No 13,139, Gilp 140
N Y—Miner v Blume, 72 N Y.S 320, 64 App Div. 511.

40. U S—In re Wilkesbarre Coal, etc, Co, D C N Y, 29 F Cas No 17,661, 5 Ben 482

41. U.S—Furness v. Leyland Shipping Co, Mass, 134 F 815, 67 C C A. 461
58 C J p 601 note 64.

42. U S—Durchman v Dunn, D.C.N Y, 101 F 606

43. U S—In re Ten Thousand and Eighty-Two Oak Ties, D C N.J., 87 F. 935.

44. U.S.—Emmons Coal Min. Corp v. Ropner, C C A Pa., 31 F 2d 948, certiorari denied 50 S.Ct 31, 280 U S 577, 74 L.Ed 628

45. U S—Black Diamond SS Corp v Fidelity, etc, Co., D C Md., 33 F 2d 767

46. U S—Dampskibs Actieselskabet Sangstad v. Hines, D C Mass, 266 F 390, affirmed, C C A, 266 F. 502
58 C J. p 602 note 71

47. U S.—Hagan v. Cargo of Lumber, D C.N Y, 163 F 657.
58 C J. p 602 note 72

48. U S—Grace v. Hansen, C C A Wash., 273 F 486.
58 C J. p 602 note 73.

49. U S.—U. S v Sugarland Industries, C C A Tex, 296 F. 913, certiorari denied 44 S Ct. 461, 265 U S. 587, 68 L.Ed 1193.

50. U S.—New York, etc., R. Co. v. Church, C.C.A Mass., 58 F. 600, 7 C C A. 384
58 C.J. p 602 note 75.

51. U S—Jonasen v. Keyser, Miss, 112 F 443, 50 C C.A. 334

52. U.S.—Dewar v Mowinckel, Cal, 179 F. 355, 102 C C.A 539.

53. U S.—Maclay v. U S., 43 Ct.Cl. 90.

54. U S—Sarnia Steamships v Continental Grain Co., C C A.Ill, 125 F.2d 362

55. U.S—Simmons Transp Co v Alpha Portland Cement Co., D C N Y, 286 F. 955
58 C J. p 602 note 79.

56. Md.—Benson v. Atwood, 13 Md. 20, 71 Am D. 611
58 C.J. p 602 note 80.

57. U S.—Pendleton v. Northern Coal Co, D C Mass, 22 F.2d 317.
58 C.J. p 602 note 81.

liquidated damages.[58] Where there is no agreed rate, the shipowner is prima facie entitled to recover the probable net earnings of the vessel during the period of undue detention,[59] or gross earnings where it is shown that the expenses of the ship could not be decreased during the period of delay,[60] or where additions to, or deductions from, gross earnings are made for any difference in her expenses during the time of such delay.[61] A harbor rule regulating the rate of demurrage in cases where no rate is agreed on is not applicable where action is brought to recover damages for detention in the nature of demurrage.[62] Demurrage may include compensation of an interpreter at a foreign port,[63] cost of cablegrams to the shipper and consignee as to disputed matter,[64] the master's board bill during the delay at the port,[65] and protest fees[66] Purely speculative damages are not recoverable.[67] Interest is recoverable when the amount of demurrage is liquidated by contract.[68]

A demurrage rate stipulated in the charter party, while binding on the charterer, is not binding on the subcharterer[69] or consignee who accepts the cargo under a bill of lading without knowledge of the charter party, and under circumstances not charging him with knowledge thereof.[70]

b. Computation of Time

Demurrage commences to run after the expiration of the time allowed by contract for loading or unloading, or after a reasonable time where the contract is silent on the matter, and is recoverable for every day of detention thereafter.

Demurrage commences to run after the expiration of the time allowed by the contract for detention or for the purpose of loading or unloading, or, where there is no time specified, after the expiration of a reasonable time,[71] and is recoverable for every day of detention thereafter, with no exception of rainy days or Sundays,[72] unless such days fall within the period allowed for loading or unloading, in which case that period is extended and the demurrage period reduced pro tanto,[73] and in some cases it has been held that working days only are contemplated.[74] In computing the time, twenty-four hours are to be considered as a day,[75] and allowance of a full day's demurrage for detention of a ship during a substantial fraction of a day is proper[76] After demurrage has commenced to run, it will not be suspended by the occurrence of an event within the exceptions of the loading clause, so that a loss resulting from any such event, if it occurs after demurrage has commenced to run, falls on the charterer and not on the shipowner.[77] Delay at the port of call will not be counted in computation of demurrage, unless and until exhaustion of lay days at the port of destination.[78] Where the charter party does not limit the number of days a ship may be kept on demurrage, demurrage will run for a period that is reasonable under the circumstances.[79]

§ 221. —— Settlement

Claims for demurrage may in a proper case be settled by the parties or their agents.

Settlements made by the master will generally be held to be conclusive as to the owners,[80] especially where it is shown that the charterer and the shipowner ratified the settlement made between the charterer's agent and the master of the ship;[81] but negotiations on another matter not involving

58. U S—Bailey v. Manufacturers' Lumber Co, D.C N.Y, 224 F 806

59. U S.—The Gazelle, Md, 9 S.Ct 139, 128 U S 474, 32 L Ed 496.
58 C J. p 603 note 83.

Inquiry into subsequent period, beyond the period of detention, was not permissible—Huron Barge Co. v Turney, D.C.Ohio, 79 F. 109.

60. U S—Interlake SS. Co. v. 251,000 Bushels of No 2 Mixed Corn, D.C Mich, 18 F.2d 291.

61. U.S.—Tweedie Trading Co. v. Strong, etc, Co., N Y, 195 F. 929, 115 C C.A. 617.

62. U.S.—Chiarello v. Central R Co, D C N Y., 246 F. 327, affirmed 256 F. 297, 167 C.C.A. 469

63. U S.—The John Francis, D.C Ala, 184 F. 746.

64. U.S.—The John Francis, supra.

65. U.S.—The John Francis, supra.

66. U.S.—The John Francis, supra.

67. U.S—Maclay v U S, 43 Ct Cl. 90.

Loss of other cargo
The loss of an opportunity to carry a cargo for other persons is remote and speculative, and not direct, damages in a case of a vessel's detention —Maclay v. U S., supra

68. U S.—The Eugenia, D C N.Y, 53 F 2d 1054
58 C J. p 603 note 88.

69. U S.—Keyser v. Jurvelius, Fla., 122 F 218, 58 C C A. 664

70. U S—Solberg v Cargo of Steel Rails, D C Mass, 25 F 2d 125.

71. U S—Creighton v. Dilks, D.C Pa, 49 F. 107.
58 C.J. p 603 note 93.

72. U.S.—Bell v. Stewart, C.C.A.Fla., 31 F.2d 44.
58 C J. p 603 note 94.

73. U.S—Ocean Carriers Co v. A Cargo of Cork, C C.A.N.Y., 30 F.2d 288.

74. U S—The Mary E Taber, D.C. N Y, 16 F.Cas No 9,209, 1 Ben. 105
58 C J. p 603 note 96.

75. U.S—Hull v A Cargo of Pig Iron, etc, D C.N.Y, 37 F 124
N Y—Wiles v New York Cent., etc, R. Co., 4 Thomps & C. 264

76. U.S—F. S. Royster Guano Co. v U. S., C C.A Va, 18 F.2d 469.

77. U.S.—Berwind-White Coal Min. Co v. Solleveld, etc, Stoomvaart Maatschappij, C C.A Va., 11 F.2d 80.

78. U S—Earn Line SS Co. v. Manati Sugar Co., C.C.A.N.Y., 269 F. 774.

79. N Y.—Robbins v. Codman, 4 E. D.Smith 315

80. U S—South American Metal Co. v Kjoge, C C.A.Va, 12 F 2d 562.
58 C.J. p 604 note 4.

81. U S—South American Metal Co. v. Kjoge, supra.

the claim for demurrage will not have the effect of releasing such claim.[82] Payment under protest of demurrage charges claimed by the master after the cargo is on board is a payment under duress justifying action by the charterer to recover it back.[83]

Commission. Where the charter party provides that the charterer's agent shall attend to the ship's business at a foreign port on the customary terms, the collection of demurrage by him at the instance of the shipowner entitles the agent to the customary commission for such service at that port.[84]

§ 222. —— Actions

Claims for demurrage may be enforced by actions in personam, or by actions in rem where a lien exists.

Claims for demurrage and for damages in the nature of demurrage are enforceable by actions in personam[85] or, where a lien exists, by actions in rem.[86] Where liability is created by express contract, suit should be brought on the contract, and general assumpsit will lie,[87] and, where the action is for damages in the nature of demurrage, special assumpsit or other form of action in which the implied promise is specially pleaded is proper and necessary.[88] An action on a bill of lading for demurrage is an action on a contract within the meaning of a statute regulating the trial of actions on contracts[89]

Defenses and objections. Questions between the government shipowner and its operating agent, which in no way affect its readiness for service under the charter party, cannot be raised by the charterer as a defense to an action by the government for demurrage.[90] Where loss from delay has accrued, an action to recover therefor is not prematurely brought because the evidence of loss is not in possession of plaintiff at the time.[91] Delay in bringing the action is no defense if within the statutory limitation of time;[92] nor does delay constitute laches, where the claim was seasonably made, the rights of defendant were not prejudiced, and the delay was justified by circumstances.[93] Dispatch money due a charterer cannot be offset by a consignee against a claim for demurrage.[94]

Parties. Although, when the vessel is let on shares, the master is pro hac vice owner and entitled to sue,[95] the libel is properly filed in the name of the shipowner.[96]

Pleading. The complaint, declaration, or libel should state a cause of action in contract,[97] but should not include a statement of evidentiary matters.[98]

Evidence. Although libelant is entitled to the presumption that the judgment of the master as to the anchorage of the vessel during the loading was properly exercised,[99] the burden is on him to show facts which determine when lay days begin to run,[1] and the default of respondent in detaining the vessel beyond the time specified in the charter party or, where no time is specified, beyond the customary and reasonable time;[2] but when such detention is shown, it devolves on respondent to prove the vessel's responsibility,[3] or the circumstances which excuse the charterer or consignee from responsibility therefor;[4] and evidence of the circumstances excusing the delay is admissible;[5] but evidence is not admissible to establish facts which under the terms of the particular contract would not excuse

82. U.S.—Yone Suzuki v. Central Argentine Ry., D.C.N.Y., 19 F.2d 645, modified on other grounds, C.C.A., 27 F.2d 795, certiorari denied Central Argentine Ry. v. Yone Suzuki, 49 S.Ct. 178, 278 U.S. 652, 73 L.Ed. 563.
58 C.J. p. 604 note 6.

83. Or.—Darling-Singer Lumber Co. v. Oriental Nav. Co., 259 P. 420, 272 P. 275, 127 Or. 655

84. U.S.—The Monkshaven, D.C.Pa., 250 F. 1000.

85. U.S.—The William Marshall, D.C.Md., 29 F. 328.
1 C.J. p. 1272 note 76.
Jurisdiction see Admiralty § 93.

86. U.S.—Hawgood v. One Thousand Three Hundred and Ten Tons Coal, D.C.Wis., 21 F. 681
58 C.J. p. 604 note 12—1 C.J. p. 1272 note 77.

87. Conn.—Wordin v. Bemis, 32 Conn. 268, 85 Am.D. 255.

88. Conn.—Wordin v. Bemis, supra

89. Md.—Jones v. Freeman, 29 Md. 273

90. U.S.—U. S. v. Courtright-Dimmick Co., D.C.Pa., 28 F.2d 142.

91. N.Y.—Ulster Brick Co. v. Murtha, etc., Co., 154 N.Y.S. 834, 169 App. Div. 151.

92. U.S.—F. S. Royster Guano Co. v. U. S., C.C.A.Va., 18 F.2d 469.
58 C.J. p. 604 note 19.

93. U.S.—F. S. Royster Guano Co. v. U. S., supra
58 C.J. p. 604 note 20.

94. U.S.—The Lake Galera, C.C.A.N.Y., 60 F.2d 876, certiorari denied 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 578.

95. Conn.—Wordin v. Bemis, 32 Conn. 268, 85 Am.D. 255.
58 C.J. p. 604 note 22

96. U.S.—Sheppard v. Philadelphia Butchers' Ice Co., D.C.Pa., 21 F. Cas.No. 12,757, 3 Wkly.N.C., Pa., 565

97. N.Y.—Clyde v. Wood, 179 N.Y.S. 252, 189 App. Div. 737.
58 C.J. p. 604 note 26.

98. U.S.—Mott v. Frost, D.C.S.C., 45 F. 897.

99. U.S.—Three Hundred and Ninety-Three Tons of Guano, D.C.N.Y., 23 F.Cas.No.14,011, 6 Ben. 533.

1. U.S.—F. S. Royster Guano Co. v. U. S., C.C.A.Va., 18 F.2d 469.
58 C.J. p. 605 note 30.

2. U.S.—Kinsman Transit Co. v. 50,000 Bushels of Wheat ex Cargo The Henry Steinbrenner, D.C.N.Y., 51 F.2d 377.
58 C.J. p. 605 note 31.

3. U.S.—The Eugenia, D.C.N.Y., 53 F.2d 1054.
58 C.J. p. 605 note 32.

4. U.S.—The Eugenia, supra.
58 C.J. p. 605 note 33.

5. N.Y.—Starbird v. Barrons, 38 N.Y. 230, 7 Transcr.A. 232—Cross v. Beard, 26 N.Y. 85.

the delay.[6] In order to be entitled to recover, plaintiff or libelant must prove not only undue detention of the vessel, but also damage ensuing therefrom,[7] and to do this, he must present evidence of sufficient weight to establish both propositions.[8] Similarly, respondent having the burden of showing excuse from liability must do so by sufficient evidence.[9] Where there is ambiguity in the contract all material evidence is admissible to determine the reasonable meaning of the language as used and intended by the parties.[10]

Questions of fact. The question of whether there has been an unreasonable delay in loading or discharging is a question of fact.[11]

§ 223. Lien

The owner of a vessel has a maritime lien for demurrage on the cargo, enforceable in admiralty

It is well settled in the United States that the vessel owner has a maritime lien for demurrage on the cargo of a person responsible for a detention, enforceable in admiralty, regardless of the existence or nonexistence of an express contract for a lien or even for demurrage.[12] Such lien arises when the cargo is on board,[13] but not until then, and, in the absence of contract therefor, it does not cover demurrage incurred in loading,[14] and a cesser clause inapplicable to the loading demurrage will not operate to extend the lien thereto.[15] A contract giving the vessel a lien "for all freight, and demurrage," gives a lien for demurrage at either the port of loading or discharge.[16] This lien is lost by an unconditional delivery of the cargo to the claimant thereof,[17] but not by a discharge, accompanied by a claim of lien.[18]

XI. GENERAL AVERAGE

§ 224. Definition, Origin, Nature, and Elements

a. In general

b. Common adventure and peril, voluntary sacrifice or expenditure, and attainment of purpose

a. In General

General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifices of the ship or cargo to save the residue of the property or the lives of those on board from a common, impending peril, or for extraordinary sacrifices, expenses, or services necessarily incurred for the common benefit and safety of all.

General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifices of the ship or cargo,[19] in whole[20] or in part,[21] to save the residue of the property[22] or the lives of those on board[23] from a common[24] impending or imminent[25] peril, or for extraordinary[26] sacrifices,[27] expenses,[28] or services[29] necessarily incurred for

6. U.S.—Steamship Co. of 1912 v. C. H. Pearson, etc., Hardwood Co., C.C.A.N.Y., 30 F.2d 770
58 C.J. p. 605 note 35.

7. N.Y.—Dayton v. Parke, 37 N.E. 642, 142 N.Y. 391.
58 C.J. p. 605 note 36.

8. U.S.—The Joseph W. Brooks, D.C. N.C., 122 F. 881.
58 C.J. p. 605 note 37.
Evidence held sufficient
U.S.—The Anaconda, C.C.A.N.Y., 60 F.2d 898—The Eugenia, D.C.N.Y., 53 F.2d 1054—The Hartismere, D.C. Md., 18 F.Supp. 767—The A. A. Augustus, D.C.N.Y., 2 F.Supp. 494
58 C.J. p. 605 note 37 [a].

9. U.S.—The Eugenia, D.C.N.Y., 53 F.2d 1054.
58 C.J. p. 605 note 39.

10. U.S.—Sarnia Steamships v. Continental Grain Co., C.C.A.Ill., 125 F.2d 362.

11. U.S.—Fulton v. Blake, D.C.Ill., 9 F.Cas.No.5,153, 5 Biss. 371.
58 C.J. p. 606 note 43.

12. U.S.—Solberg v. Cargo of Steel Rails, D.C.Mass., 25 F.2d 125.
58 C.J. p. 606 note 46.

13. U.S.—Stepanovit v. Gillibrand, D.C.Conn., 22 F.Cas.No.13,360.

14. U.S.—Elvers v. Grace, Cal., 244 F. 705, 157 C.C.A. 153.

15. U.S.—Elvers v. Grace, supra.

16. U.S.—Yone Suzuki v. Central Argentine R. Co., D.C.N.Y., 275 F. 54

17. U.S.—Dewar v. Mowinckel, Cal., 179 F. 355, 102 C.C.A. 539.
58 C.J. p. 606 note 52.

18. U.S.—California, etc., SS. Co. v. 138,000 Feet of Lumber, D.C.Md., 23 F.2d 95.
58 C.J. p. 606 note 53.

19. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.
58 C.J. p. 607 notes 55, 56.
General average, loss in marine insurance see Insurance § 947.
"Collation," in maritime law, has been defined as contribution or average—Adams Gloss.—Loccen. De Jur. Mar. lib. ii. c. 8 § 1.

20. U.S.—The Strathdon, D.C.N.Y., 94 F. 206, affirmed 101 F. 600, 41 C.C.A. 515.

21. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 607 note 58.

22. U.S.—The Star of Hope, supra.
58 C.J. p. 607 note 59

23. U.S.—The Star of Hope, supra.
58 C.J. p. 607 note 60.

24. U.S.—The Strathdon, D.C.N.Y., 94 F. 206, affirmed 101 F. 600, 41 C.C.A. 515.

25. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.
58 C.J. p. 607 note 62

26. U.S.—Aktieselskabet Cuzco v. The Sucarseco, supra.
58 C.J. p. 607 note 63

27. U.S.—McAndrews v. Thatcher, N.Y., 3 Wall. 347, 18 L.Ed. 155.
Ky.—Louisville Underwriters v. Pence, 19 S.W. 10, 93 Ky. 96, 14 Ky. L. 21, 40 Am.St.R. 176.

28. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942
58 C.J. p. 607 note 65.

29. Conn.—Lyon v. Alvord, 18 Conn. 66.

the common benefit and safety of all the interests in the adventure.

The principle of contribution in general average is older than the common law [30] It is derived from the Rhodian law,[31] was adopted into the Roman jurisprudence, and thence entered into the general maritime law.[32] The rule appears to have been adopted into English law without the intervention of any statute.[33] It applies only to shipping,[34] and relates to contributions for losses, not distribution of profits.[35] Some authorities assert that it arises out of participation in a common venture, as discussed infra subsection b of this section, and depends on natural justice and an equity arising out of the relationship of the parties,[36] and not on the contract of carriage, as discussed infra § 231, while others hold, as also discussed infra § 231, that it arises out of the contract of affreightment, and that the obligation to contribute is implied by law.

The right to contribution rests on the principle that whatever is sacrificed for the common safety of the associated interests shall be made good by all the interests which were exposed to the common peril, and were saved from the common danger by the sacrifice.[37] The spirit and intendment of the law of contribution in general average are to place the persons interested, as near as may be, in the same relative position which they occupied before the peril was met,[38] and this object necessarily involves reciprocity of obligation and right,[39] with some exceptions,[40] as in the case of passengers' baggage, or jettison of deck cargo, as discussed infra § 228.

b. Common Adventure and Peril, Voluntary Sacrifice or Expenditure, and Attainment of Purpose

Liability in general average arises from participation in the common venture, and the principle is inapplicable between mere strangers. The three leading elements requisite to a case for general average contribution are that a condition of imminent peril, common to the ship and cargo, existed; that a voluntary sacrifice of property or an extraordinary expenditure to avert the general peril has been made; and that by that sacrifice or expense the safety of the other property has been secured.

Liability in general average arises from participation in the common venture.[41] The principle is inapplicable between mere strangers,[42] and is not applied except as between those engaged in a common maritime adventure.[43] A tug towing barges from one port to another is not bound up with them into a single maritime adventure, so as to be subject to the law of general average [44]

The three leading elements recognized and enforced by the Roman law as limitations and conditions requisite to a case for general average contribution, and since steadily adhered to by maritime

30. U.S.—The Roanoke, Wis., 59 F 161, 8 C.C.A 67.

31. U S.—Det Forenede Dampskibs Selskab v. Insurance Co. of North America, D C N.Y, 28 F 2d 449, affirmed, C C A., 31 F.2d 658—Sonsmith v The J. P. Donaldson, C.C Mich, 21 F 671.
58 C J. p 607 note 68.

32. U.S —Sonsmith v. The J. P. Donaldson, supra.
58 C J p 607 note 69

33. U.S —The Northern No 30, D C N C., 24 F 2d 975—The Roanoke, Wis, 59 F. 161, 8 C C.A 67.

34. U S —Ralli v Troop, N Y, 15 S Ct 657, 157 U S 386, 39 L Ed 742
58 C.J p 608 note 71

35. U S —Pacific Freighters Co. v St. Paul Fire & Marine Ins Co, C C A Cal, 109 F.2d 310.

36. U S —Pacific Freighters Co v St Paul Fire & Marine Ins Co, supra—Charles Pfizer & Co v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D C.N Y., 40 F Supp. 123
58 C J p 624 note 54.

37. U S —Pacific Freighters Co v. St Paul Fire & Marine Ins Co, C.C A Cal, 109 F 2d 310—Det Forenede Dampskibs Selskab v. Insurance Co of America, D.C N Y., 28 F 2d 449, affirmed, C C.A., 31 F.2d 658
58 C J. p 608 note 74.

Similar statements

(1) The essence of general average contribution is that extraordinary sacrifices made and expenses incurred for the common benefit and safety are to be borne proportionately by all who are interested.—The Jason, N.Y., 32 S.Ct 560, 225 U S 32, 56 L Ed 969—American Tobacco Co v The Katingo Hadjipatera, D C N.Y., 81 F Supp 438, modified on other grounds, C A, 194 F 2d 449, certiorari denied 72 S Ct. 1076, 343 U.S 978, 96 L Ed —.

(2) Other similar statements see 58 C J p 608 note 74 [a].

38. U S —Kohler & Chase v United American Lines, D.C N Y, 60 F 2d 530.
58 C J p 608 note 77

39. U S —The Strathdon, D C N Y, 94 F 206, affirmed 101 F 600, 41 C C A 515—Heye v. North German Lloyd, D C N.Y, 33 F 60, affirmed, C C, 36 F 705, 2 L R A. 287.

40. U S —The Strathdon, D.C N Y, 94 F 206, affirmed 101 F. 600, 41 C C A. 515—Heye v. North German Lloyd, D C.N.Y, 33 F. 60, affirmed, C.C, 36 F 705, 2 L R A 287.

Ordinary rule

While reciprocity of obligation and right is the ordinary rule in general average, it is merely a circumstance in the usual application of the rule and not an indispensable part of the principle on which the right is founded —Heye v. North German Lloyd, supra

41. U S —Charter Shipping Co. v. Bowring, N.Y, 50 S Ct. 400, 281 U. S. 515, 74 L Ed 1008—Canada Malting Co. v Paterson Steamships, D C N Y, 49 F 2d 802, reversed on other grounds, C.C A, 51 F 2d 1007, affirmed 52 S Ct 413, 285 U.S. 413, 76 L Ed 837—Charles Pfizer & Co v 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D.C N.Y., 40 F. Supp 123.

42. U S —Sonsmith v The J P. Donaldson, C C Mich., 21 F 671, reversed on other grounds The J P. McDonaldson, 17 S Ct 951, 167 U. S. 599, 42 L.Ed 292—The John Perkins, C C Mass, 13 F Cas.No.7,360

43. U S —The J. P Donaldson, Mich, 17 S Ct. 951, 167 U.S. 599, 42 L Ed. 292
58 C.J. p 608 note 82

44. U S.—The J. P. Donaldson, supra.

nations,[45] are that a condition of imminent peril, common to the ship and the cargo, existed;[46] that a voluntary sacrifice of property[47] or an extraordinary expenditure to avert the general peril[48] has been made, or, stated differently, that there has been a deliberate[49] or intentional[50] sacrifice of part of the ship or cargo; and that by that sacrifice or expense the safety of the other property has been secured.[51] The expense or consequence of an act or of a series of acts, or the loss occasioned by such acts, for the benefit of the ship alone,[52] or for the benefit of the cargo alone,[53] is not to be contributed for in general average. The acts must be for the common good.[54]

§ 225. Ordering General Average Act

a. Authority to order
b. Exercise of judgment

a. Authority to Order

A loss which gives rise to contribution in general average must have resulted from the will and act of the master or person in charge of the common adventure, and when such person determines on the general average act he is the agent for all parties interested.

A loss which gives rise to contribution in general average must have resulted from the will and act of the master of the ship, or of some other person charged with the control and protection of the common adventure,[55] and not from the act of a stranger,[56] whether private[57] or public,[58] unless such act is sanctioned[59] or participated in[60] by a person in charge of the vessel or cargo. When such person determines on the general average act, he is the agent for all parties interested;[61] his authority rests on the implied contract of the parties or on the duty imposed on him by law, as incident to his station and office, to meet the necessity created by the emergency,[62] or on the provisions contained in the bill of lading or contract of carriage.[63] A master ordering a general average act is under a duty to exercise reasonable diligence to ascertain its effects,[64] and, if due diligence would have disclosed its effects and shown damage or expense giving rise to a right to contribution, he is under a duty, as discussed infra § 233, to protect the interests entitled to such right.

b. Exercise of Judgment

With respect to ordering a general average act, ordinarily the course to be pursued rests in the master's sound discretion.

Ordinarily the course to be pursued rests in the master's sound discretion,[65] if he is a competent master, and an emergency existed calling for a decision whether a sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it is presumed, in the absence of proof to the contrary, that his decision was wisely and properly made.[66] There may be a choice of perils when there is no possibility of

45. U.S.—Columbian Ins. Co. v. Ashby, D.C., 13 Pet. 331, 10 L.Ed. 186.

46. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.
58 C.J. p. 608 note 85

47. U.S.—Aktieselskabet Cuzco v. The Sucarseco, supra.
58 C.J. p. 609 note 86.

48. U.S.—Aktieselskabet Cuzco v. The Sucarseco, supra.
Mass.—Emery v. Huntington, 109 Mass. 431, 12 Am.R. 725.
58 C.J. p. 609 note 88.

49. Mass.—Nickerson v. Tyson, 8 Mass. 467.
N.Y.—Lee v. Grinnell, 12 N.Y.Super. 400

50. U.S.—The Mary, D.C.Mass., 16 F. Cas.No. 9,188, 1 Sprague 17.
N.C.—Irving v. Glazier, 4 N.C. 406

51. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.
58 C.J. p. 609 note 93.

52. U.S.—Pacific Mail Steamship Co. v. New York, etc., Min. Co., N.Y., 74 F. 564, 20 C.C.A. 349.
58 C.J. p. 609 note 94.

53. N.Y.—Rogers v. Murray, 16 N.Y.Super. 357
58 C.J. p. 609 note 95.

54. U.S.—Pacific Mail SS. Co. v. New York, etc., Min. Co., N.Y., 74 F. 564, 20 C.C.A. 349.
58 C.J. p. 609 note 96.

55. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.
58 C.J. p. 610 note 97.

56. U.S.—Ralli v. Troop, N.Y., 15 S.Ct. 657, 157 U.S. 386, 39 L.Ed. 742.
Mass.—Wamsutta Mills v. Old Colony Steamboat Co., 137 Mass. 471, 50 Am.R. 325.

57. U.S.—Ralli v. Troop, N.Y., 15 S.Ct. 657, 157 U.S. 386, 39 L.Ed. 742

58. U.S.—Ralli v. Troop, supra.
58 C.J. p. 610 note 1.

59. U.S.—Minneapolis, etc., SS. Co. v. Manistee Transit Co., D.C.N.Y., 156 F. 424
58 C.J. p. 610 note 2.

60. U.S.—Minneapolis, etc., SS. Co. v. Manistee Transit Co., supra.

61. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942
58 C.J. p. 610 note 4

62. U.S.—Ralli v. Troop, N.Y., 15 S.Ct. 657, 157 U.S. 386, 39 L.Ed. 742
58 C.J. p. 610 note 4.

63. **The Jason clause** affords a means by agreement of the parties in the venture to give the master authority to act as agent for the cargo for the purpose of incurring general average expenses which he would not have had under the Harter Act.—The Toluma, C.C.A.N.Y., 72 F.2d 690, affirmed Aktieselskabet Cuzco v. The Sucarseco, 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942

64. U.S.—Dibrell Bros. v. Prince Line, C.C.A.N.Y., 58 F.2d 959.

65. U.S.—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C.C.A.N.Y., 92 F.2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 580.
58 C.J. p. 610 note 5.

66. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 610 note 6.

perfect safety,[67] or where inevitable danger is impending but may be met with different degrees of peril to life or property.[68] Consultation is demonstrative proof that the act was voluntary.[69] If it sufficiently appears that the act occasioning the loss was the result of reasonably sound judgment, it is enough, for in time of imminent danger immediate action may be necessary and delay may render consultation impracticable.[70]

§ 226. Perils, Acts, and Losses Giving Rise to General Average

a. In general
b. Unseaworthiness
c. Condition of, and particular danger to, property sacrificed

a. In General

All losses which arise in consequence of sacrifices made or extraordinary expense incurred for the preservation of the ship and cargo from imminent common peril during the voyage constitute charges in general average.

All losses which arise in consequence of sacrifices made or extraordinary expense incurred for the preservation of the ship and cargo from imminent common peril during the voyage constitute charges in general average,[71] and must be borne proportionately by all the interests which are benefited by them.[72] Sacrifices are often made in specie, as by casting overboard a part of the ship or of her cargo, or by voluntarily stranding both ship and cargo.[73] The payment by any party in interest of extraordinary expenses, or the appropriation of the ship's appliances to extraordinary use for the safety of the imperiled interests, is equally to be regarded and treated as sacrifices as discussed infra § 228. The danger encountered by the election of the master may be either of a different kind from the danger avoided, or of the same kind, but it must not be the very same danger, merely modified by acts of the master in the performance of his ordinary duty in the navigation or management of the vessel, so as to diminish its effects.[74] The question with respect to general average is not what was the extent of the danger, supposing the sacrifice to have been made, but what would the danger have been if the sacrifice had not been made.[75]

Imminence of peril. While the courts in some general average cases have used expressions indicating that it is essential that the property at risk be subject to an immediately impending danger, as discussed supra § 224, it has been held that the imminency of the peril is not the critical test,[76] and that if the danger be real and substantial, a sacrifice or expenditure made in good faith for the common interest is justified, even though the advent of any catastrophe may be distant or indeed unlikely.[77]

b. Unseaworthiness

In the absence of some reservation of the right, a ship or shipowner cannot maintain a claim for contribution as to sacrifices or expenses which result from the unseaworthiness of the vessel, and seaworthiness is determined when the ship breaks ground and is measured by fitness in all respects to fulfill the purposes of the voyage as then contemplated.

In the absence of some reservation of the right, as discussed infra § 232, a ship or a shipowner cannot maintain a claim for contribution as to sacrifices or expenses which result from the unseaworthiness of the vessel,[78] especially where the defects

67. U S—The Star of Hope, supra—Norwich, etc, Transp Co. v Insurance Co of North America, D C N.Y, 118 F 307, affirmed 129 F 1006, 64 C C A 610, certiorari denied 24 S Ct 859, 194 U S. 637, 48 L.Ed. 1161.

68. U S—Columbian Ins. Co v Ashby, D C., 13 Pet 331, 10 L.Ed 186—Rea v. Cutler, D C Mass, 20 F Cas No 11,599, 1 Sprague 135, reversed on other grounds Cutler v. Rae, 48 U S. 729, 12 L Ed 890.

69. Pa.—Sims v. Gurney, 4 Binn 513.

70. U S—Columbian Ins. Co v. Ashby, D C., 13 Pet. 331, 10 L Ed 186
Pa.—Sims v. Gurney, 4 Binn 513.

71. U S—Aktieselskabet Fido v Lloyd Braziliero, C C A N.Y, 283 F 62, certiorari denied 43 S.Ct. 97, 260 U S. 737, 67 L Ed. 489.
58 C.J. p 610 note 11.

72. U S—Ralli v. Troop, N Y, 15 S Ct 657, 157 U S. 386, 39 L Ed 742. 58 C J p 610 note 12.

73. U S—The Star of Hope, Cal., 9 Wall. 203, 19 L Ed. 638—Norwich, etc, Transp Co v. New Haven Security Ins. Co., N.Y., 129 F. 1006, 64 C C A. 610, certiorari denied 24 S Ct. 859, 194 U.S. 637, 48 L.Ed 1161.

74. Mass.—Emery v. Huntington, 109 Mass. 431, 12 Am R 725
Pa—Meech v. Robinson, 4 Whart 360, 34 Am D. 523.

75. U S.—Heye v. North German Lloyd, D.C N Y, 33 F. 60, affirmed, C.C, 36 F. 705, 2 L R A 287.

76. U.S—Navigazione Generale Italiana v Spencer Kellogg & Sons, C. C A.N.Y, 92 F.2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S Ct. 271, 302 U S. 751, 82 L Ed. 580.

77. U.S.—Navigazione Generale Italiana v Spencer Kellogg & Sons, C. C A.N Y, 92 F.2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S 751, 82 L Ed. 580

78. U S—Consumers Import Co. v. Kawasaki Kisen Kubushiki Kaisha, C.C.A.N.Y., 133 F 2d 781, affirmed Consumers Import Co v. Kabushiki Kaisha Kawaski Zoseejo, 64 S Ct. 15, 320 U.S. 249, 88 L Ed 30—The Glymont, C C.A.N.Y., 66 F.2d 617—Societa Anonima Cantiero Olivo v. Federal Ins Co, C.C A.N.Y., 62 F. 2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co, 53 S Ct 792, 289 U.S. 759, 77 L.Ed 1503—Charbonnier v. U. S., D.C S C, 45 F.2d 166, affirmed, C.C A, U. S. v. Charbonnier, 45 F.2d 174.
58 C J. p 610 note 13.

which caused the unseaworthiness were discoverable by due diligence.[79] Indeed, it has been held that there can be no recovery even though the defects which caused the unseaworthiness were not discoverable by due diligence,[80] and even though the ship or the shipowner has excused herself or himself from liability for breach of the contract of carriage, as discussed infra § 232. In this connection, "seaworthiness" is determined when the ship breaks ground[81] and is measured by her fitness in all respects to fulfill the purposes of the voyage as then contemplated,[82] and depends on the facts and circumstances in each particular case.[83] Thus, if the ship is unseaworthy at the inception of the voyage, the shipowner is not entitled to contribution in general average because of sacrifices or expenses made necessary by reason of such condition when she encounters the perils of the sea;[84] it is his duty to have the ship seaworthy when she breaks ground for the voyage, as discussed supra § 140, and expenses arising from a breach of that duty, although made necessary by some harbor peril causing damage in loading, cannot be made a general average charge against the cargo.[85] It has been held, however, that unseaworthiness does not relieve the cargo from the duty to contribute to sacrifices which do not arise because of the unseaworthiness.[86]

c. Condition of, and Particular Danger to, Property Sacrificed

In order to justify an allowance in general average, it does not make any difference that the danger was greatest to the property cast away, and the right to contribution is denied only in those circumstances in which the property sacrificed must inevitably, or at least in all reasonable probability, have been lost.

In order to justify an allowance in general average, it is not necessary that the particular property sacrificed should have been exposed to greater danger by encountering the loss than it would otherwise have been,[87] nor does it make any difference that the danger was greatest to the property cast away.[88] There is authority for the rule that, where, were it not for the voluntary destruction of part, the whole would certainly and unavoidably have been lost, no claim for contribution can be sustained,[89] but if there is a possibility of saving the ship and cargo, and a part is deliberately sacrificed in order to save the remainder, it is a case for general average.[90] According to what have been said to be the best considered cases[91] the right to contribution is denied only in those circumstances in which the property sacrificed must inevitably,[92] or at least in all reasonable probability,[93] have been lost, not through the common peril, but owing to some situation or condition peculiar to itself, and independent of the peril, and whether or not the vessel and the rest of the cargo survive.[94] On the other hand, if the special danger is only a circumstance in the common peril and the sacrifice had been made in saving the balance of the venture from the common

Shipper may assume that ship is fit to carry goods when it is offered for that purpose.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins Co, 53 S Ct 792, 289 U.S. 759, 77 L Ed. 1503

79. Test of steering held insufficient
Examination of telemotor steering apparatus on vessel without searching test was held insufficient to relieve owner of vessel of responsibility for failure of steering gear in view of prior difficulties with steering.—Erie & St Lawrence Corporation v. Barnes-Ames Co., D C N Y., 52 F.2d 217.

80. U.S.—Societa Anonima Cantiero Olivo v. Federal Ins Co., C C.A.N.Y, 62 F 2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct 792, 289 U S. 759, 77 L.Ed. 1503.

81. U.S.—Erie & St. Lawrence Corporation v. Barnes-Ames Co., D.C. N.Y., 52 F.2d 217.

Before commencement of the voyage the shipowner is under a duty to use due diligence to make the ship seaworthy.—American-West African Line v Socony Vacuum Corporation, D.C N.Y., 4 F Supp. 515

82. U S—Erie & St Lawrence Corporation v Barnes-Ames Co., D.C N.Y., 52 F.2d 217.

83. U.S.—Erie & St. Lawrence Corporation v. Barnes-Ames Co., supra

Particular deficiencies rendering ship unseaworthy
(1) Tail shaft unable to withstand usual gale and seas.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F 2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct 792, 289 U S 759, 77 L.Ed. 1503.

(2) Other deficiencies see 58 C.J. p 611 note 19 [a].

84. U.S.—Societa Anonima Cantiero Olivo v Federal Ins. Co, C C A. N.Y., 62 F 2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S Ct. 792, 289 U.S. 759, 77 L Ed 1503—American-West African Line v Socony Vacuum Corporation, D C N.Y., 4 F. Supp 515.
58 C J. p 611 note 19.

85. U S.—Bowring v. Thebaud, D C. N.Y, 42 F. 794, affirmed 56 F. 520, 5 C.C A 640

86. U S—Hurlbut v Turnure, D C. N.Y., 76 F 587, affirmed 81 F. 208, 26 C C A. 335.

87. Pa.—Sims v. Gurney, 4 Binn. 513.
58 C J. p 612 note 38.

88. U S—The Margarethe Blanca, D C Pa., 12 F. 728, affirmed, C.C, 14 F 59.
58 C J p 612 note 39

89. Me—Crockett v Dodge, 12 Me. 190, 28 Am.D 170
58 C J. p 612 note 40

90. Me—Crockett v Dodge, supra.

91. U.S—Heye v. North German Lloyd, D.C N.Y., 33 F 60, affirmed, C.C, 36 F 705, 2 L.R.A 287.

92. U.S—The Star of Hope, Cal., 9 Wall. 203, 19 L Ed 638.
58 C.J. p 612 note 42.

93. U S—Heye v. North German Lloyd, D.C.N Y, 33 F 60, affirmed, C.C, 36 F 705, 2 L R A 287

94. U.S.—Heye v. North German Lloyd, supra
58 C.J. p 612 note 44.

peril, contribution is allowed,[95] as where a portion of the ship's equipment has been displaced by the elements and, although of value, constitutes a special danger and is voluntarily sacrificed.[96]

§ 227. —— Perils and Losses Arising from Fault or Negligence

In the absence of statutory or contractual modification, no one is entitled to a contribution in general average, if the danger, to avert which the sacrifice was made or expense incurred, has arisen from a fault for which the claimant is responsible to the co-contributors, and a mere statutory release from liability does not give a right affirmatively to claim a general average contribution.

In the absence of statutory or contractual modification, as discussed infra § 232, no one is entitled to a contribution in general average, if the danger, to avert which the sacrifice was made or expense incurred, has arisen from a fault for which claimant has made himself, or is made by law, responsible to the co-contributors.[97] Under this principle the owner of the ship is not entitled to a general average contribution, where the loss is occasioned by the fault of the master or crew,[98] or where the owners are themselves at fault.[99] Release from liability for negligence when effected by statute, or more specifically the Harter Act, 46 U.S.C.A. § 192, does not mean that an obligation is laid on the cargo to contribute to general average,[1] and a shipowner is not permitted, apart from contract, affirmatively to claim, in an action brought by himself, a general average contribution to meet his own losses occasioned by faults in the navigation and management of the ship.[2] Thus, although the owners of a vessel have been adjudged exempt from liability for damage to the cargo resulting from a fire due to the negligence of one of the crew, under the Harter Act, on the ground that they exercised due diligence to make the vessel seaworthy and in fit condition for the voyage, and were without personal negligence or fault, they cannot maintain an affirmative action against the owners of the cargo for contribution in general average to the ship's loss.[3] On the other hand, where a cargo owner institutes an action to recover a general average contribution, it has been held that since the statute prevents a recovery of damages based on the alleged negligence of the shipowner, the cargo owner may not derive any benefit from such alleged negligence,[4] and that, under the rule of reciprocity of right and obligation, as discussed supra § 224, the adjustment should be made as if there were no negligence in the case.[5] The negligent navigation of the master cannot in any event afford a pretext for depriving those shippers whose goods have been sacrificed of their claim to a general average contribution from other shippers,[6] since they are not privy to the master's acts, and are under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault.[7]

95. U.S.—Heye v. North German Lloyd, supra
58 C.J. p. 612 note 45.

96. U.S.—The Mary Gibbs, D.C. Mass., 22 F. 463.
58 C.J. p. 612 note 46.

97. U.S.—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F. Supp. 515
58 C.J. p. 611 note 25.

98. U.S.—The Bartle Daly, C.C.A.N.Y., 58 F.2d 179—Merklen v. Johnson & Higgins, D.C.N.Y., 3 F. Supp. 897
58 C.J. p. 611 note 26

Under Italian Commercial Code, owner of vessel which strands as result of negligence of her officers in her navigation is not entitled to contribution in general average from her cargo toward expenses, and sacrifices arising out of cargo.—The Maria, D.C.N.Y., 15 F. Supp. 745.

Where collision is brought about by negligent navigation of both vessels, there is no obligation on cargo owner to contribute in general average to sacrifices or losses of carrier, in absence of express agreement to make contribution.—The Toluma, D.C.N.Y., 4 F. Supp. 344, modified on other grounds, C.C.A., 72 F.2d 690, affirmed Aktieselskabet Cuzco v. Sucarseco, 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

Stranding due to faulty navigation
No claim of stranded ship against cargo for contribution can be sustained if stranding was due to faulty navigation.—Corrado Societa Anonima Di Navigazione v. L. Mundet & Son, C.C.A.Pa., 91 F.2d 726, certiorari denied 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 581.

Bargee not negligent; reliance on tug
Bargee of outside barge was justified in relying on tug for instructions whether fasts of inside barge were sufficient, and barge owner, with respect to right to recover expenses for general average from cargo owner, where inside lines parted and barge stranded, was not at fault for failure to put out shore lines where nothing arose indicating new danger.—The Bartle Daly, C.C.A.N.Y., 58 F.2d 179.

99. U.S.—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C.C.A.N.Y., 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30.
58 C.J. p. 611 note 27

1. U.S.—May v. Hamburg-Amerikansche Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348
58 C.J. p. 403 note 29
Statutory exemption from liability under Harter Act generally see supra §§ 127–128

2. U.S.—Globe & Rutgers Fire Ins. Co. v. U.S., C.C.A.N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 511—Spang Chalfant & Co. v. Dimon S.S. Corporation, C.C.A.N.Y., 57 F.2d 965—Merklen v. Johnson & Higgins, D.C.N.Y., 3 F. Supp. 897.
58 C.J. p. 611 note 32

3. U.S.—The Strathdon, D.C.N.Y., 94 F. 206, affirmed 101 F. 600, 41 C.C.A. 515.

4. U.S.—The Mary F. Barrett, C.C.A.Pa., 279 F. 329
58 C.J. p. 611 note 33.

5. U.S.—The Strathdon, D.C.N.Y., 94 F. 206, affirmed 101 F. 600, 41 C.C.A. 515

6. U.S.—The Jason, N.Y., 32 S.Ct. 560, 225 U.S. 32, 56 L.Ed. 969.
58 C.J. p. 612 note 36.

7. U.S.—Pacific Mail S.S. Co. v. New York, etc., Min. Co., N.Y., 74 F. 564, 20 C.C.A. 349.

§ 228. —— Sacrifice or Extraordinary Expense

a. In general
b Property sacrificed
c. Baggage
d. Consequential damage resulting from acts of sacrifice
e. Collision
f. Fire and water damage
g. Stranding or running ashore
h. Jettison
i. Putting into port of refuge
j. Sale for vessel's necessities at port of refuge
k. Extraordinary expenses and services
l. Embargo, capture, and escaping capture

a. In General

Losses or damages arising from ordinary perils of the voyage do not give rise to claims in general average; nor do losses without design, but there need be no design to destroy or sacrifice any particular property.

Losses or damages arising from ordinary perils of the voyage do not give rise to claims in general average.[8] In view of the principle that there must be an intentional and voluntary sacrifice to avoid a common peril, as discussed supra § 224, a loss without design and as a mere incident of the voyage,[9] as where a ship is injured or disabled in a storm, without any voluntary sacrifice,[10] or founders or is shipwrecked, without design,[11] or requires repairs by reason of ordinary decay,[12] or is injured by reason of a swelling of the cargo from water entering through holes made by floating ice,[13] or is destroyed by an accidental fire,[14] is not the subject of general average. Losses which give rise to a claim in general average are usually divided into two classes, that is, those which arise from sacrifice of part of the ship or cargo, and those which arise from extraordinary expenses incurred for the common safety of ship, cargo, and freight.[15] There need be no design, however, to destroy or sacrifice any particular property[16] It is enough that there be a general design to pursue a particular course for the common safety, which results in loss[17] The design may be to save the very property which is lost.[18]

b. Property Sacrificed

There is no distinction as to the property sacrificed, and the right to general average extends to the loss of the ship, when the cargo is saved in whole or in part, as well as to the loss of the cargo when the ship is saved.

It follows from the Roman law that there is no distinction as to the property sacrificed, whether it be ship or cargo, a part or the whole,[19] the sole concern being that the sacrifice is voluntary to avert an imminent peril and that it is successful, as discussed supra § 224. The right to general average extends to the loss of the ship, when the cargo is saved in whole or in part, as well as to the loss of the cargo when the ship is saved.[20] Whether there are different contributory subjects does not affect general average.[21]

c. Baggage

Loss of, or injury to, passengers' baggage is the proper subject of contribution in general average, even though such baggage does not contribute in general average.

While reciprocity of obligation and right is the ordinary rule in general average, as discussed supra § 224, it is merely a circumstance in the usual application of the rule and not an indispensable part of the principle on which the right is founded, so that loss of, or injury to, passengers' baggage is the proper subject of contribution in general average,[22] even though such baggage does not contribute in general average, as discussed infra § 229.

d. Consequential Damage Resulting from Acts of Sacrifice

General average comprises all damages which were to be foreseen as the natural consequence of the first sacrifice.

8. U.S.—Ross v. The Active, Pa., 20 F.Cas.No 12,071, 2 Wash C.C. 226
9. U S —Columbian Ins Co of Alexandria v. Ashby & Stribling, D C, 38 U S. 331, 13 Pet. 331, 10 L Ed 186.
10. U S —Columbian Ins. Co. v. Ashby, supra
58 C J. p 613 note 50.
11. U S.—Columbian Ins Co v. Ashby, supra.
12. U.S.—Ross v. The Active, Pa., 20 F Cas.No 12,071, 2 Wash.C.C. 226
13. U.S.—Rathbone v. Fowler, C C.N. Y., 20 F.Cas.No.11,584, 6 Blatchf 294, affirmed Fowler v Rathbones, 12 Wall. 102, 20 L Ed 281.
14. Ohio —Minnesota Min. Co. v Chapman, 2 Ohio Dec., Reprint, 207, 2 West.L Month 75.
15. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L Ed 638—McAndrews v. Thatcher, N.Y., 3 Wall. 347, 18 L Ed. 155.
16. U.S —Barnard v. Adams, N.Y., 10 How. 270, 13 L Ed 417.
58 C J. p 613 note 57.
17. U.S.—The Roanoke, D C Wis., 46 F. 297, affirmed 59 F. 161, 8 C.C.A. 67.
18. U.S —The Roanoke, supra—Caze v Reilly, Pa., 5 F Cas No.2,538, 3 Wash C C 298.
19. U.S.—Columbian Ins Co. v. Ashby, D C., 13 Pet 331, 10 L Ed 186
20. U S —Barnard v Adams, N.Y., 10 How 270, 13 L Ed 417.
58 C.J. p 613 note 64.
21. U S —Gulf Refining Co. v. Universal Ins. Co., C.C.A.N Y, 32 F. 2d 555, certiorari denied Universal Ins Co. v. Gulf Refining Co, 50 S. Ct. 35, 280 U.S 584, 74 L Ed. 634.
22. U.S.—Heye v. North German Lloyd, D C.N.Y, 33 F 60, affirmed, C C., 36 F. 60, 2 L.R.A. 287.

General average comprises all damages or expenses which were to be foreseen as the natural consequence of the first sacrifice [23] In determining whether the loss is the result of a voluntary act it has been held that, if a loss follows as the natural and inevitable result of the original and involuntary cause of danger, such original cause of danger should be regarded as the proximate cause,[24] but where a voluntary act intervenes, which in itself is a cause of loss, such act being substituted for the original danger of loss with a design of saving, the substituted act should be regarded as the proximate cause for general average purposes [25] Thus, damage to the cargo caused by cutting away a mast for safety of the ship and cargo must be included in a general contribution.[26] So, damage to ice cargo by delay and the opening of the hold of the ship for the purpose of making repairs has been held to be the subject of general average allowance.[27]

e. Collision

Damage sustained by reason of inevitable collision is not ordinarily a subject for general average contribution.

Damage sustained by reason of an inevitable collision is not ordinarily a subject for general average contribution,[28] even though the loss is apportioned between the vessels,[29] and a voluntary sacrifice made by one vessel to avoid collision with another does not give rise to a claim for contribution from the other.[30]

f. Fire and Water Damage

Damage done by water, or by steam, or by scuttling the ship in order to extinguish a fire is the subject of general average contribution, and the cargo has been held liable to contribute in general average for fire damage to the ship, but damage to the cargo caused by fire or smoke has ben held not allowable in general average.

Damage done by water,[31] or by steam,[32] or by scuttling the ship,[33] in order to extinguish a fire, is the subject of contribution in general average. So a voluntary flooding of a compartment in order to permit pumps to eject water, resulting in damage to the cargo in the compartment, is a proper general average charge.[34] A voluntary flooding of a stranded ship in order to keep it from pounding to pieces is also a proper general average charge.[35] However, where water gets in through the ordinary perils of the sea the damage caused thereby is not allowed in general average.[36] Damage to cargo caused by fire[37] or smoke[38] has been held not allowable in general average. Likewise, injury to that part of the cargo which is afire, caused by water admitted to extinguish the fire, has been held not to be a general average loss.[39] On the other hand, cargo has been held liable to contribute in general average to the ship for the ship's damage and expense occasioned by fire,[40] unless the contract of affreightment bars recovery,[41] and it has been

23. U.S.—Patten v. Darling, C.C. Mass., 18 F.Cas.No.10,812, 1 Cliff. 254.

24. U.S.—Norwich, etc., Transp. Co. v. Insurance Co. of North America, N.Y., 129 F. 1006, 64 C.C.A. 610, certiorari denied 24 S.Ct. 859, 194 U.S. 637, 48 L.Ed. 1161.

25. U.S.—Norwich, etc., Transp. Co. v. Insurance Co. of North America, supra.
58 C.J. p. 613 note 75.

26. U.S.—The Mary, D.C.Mass., 16 F.Cas.No.9,188, 1 Sprague 17.
N.Y.—Maggrath v. Church, 1 Cai. 196, 2 Am.D. 173

27. Mass.—Libby v. Gage, 14 Allen 261.

28. U.S.—Peters v. Warren Ins. Co., C.C.Mass., 19 F.Cas.No.11,035, 3 Sumn. 389
58 C.J. p. 614 note 77.

29. U.S.—Peters v. Warren Ins. Co., supra—Peters v. Warren Ins. Co., C.C.Mass., 19 F.Cas.No.11,034, 1 Story 463.

30. U.S.—The John Perkins, C.C. Mass., 13 F.Cas.No.7,360.
58 C.J. p. 614 note 79.

31. U.S.—Ralli v. Troop, N.Y., 15 S. Ct. 657, 157 U.S. 386, 39 L.Ed. 742
58 C.J. p. 614 note 80.

32. U.S.—Reliance Marine Co. v. New York, etc., Mail SS. Co., N.Y., 77 F. 317, 23 C.C.A. 183, certiorari denied 17 S.Ct. 998, 165 U.S. 720, 41 L.Ed. 1184
Pa.—Nimick v. Holmes, 25 Pa. 366, 64 Am.D. 710.

33. U.S.—Ralli v. Troop, N.Y., 15 S. Ct. 657, 157 U.S. 386, 39 L.Ed. 742
58 C.J. p. 614 note 82.

34. U.S.—The Wordsworth, D.C.N.Y., 88 F. 313.
58 C.J. p. 614 note 83

35. U.S.—Pacific Mail SS. Co. v. New York, etc., Min. Co., N.Y., 74 F. 564, 20 C.C.A. 349—Pacific Mail SS. Co. v. Dupre, D.C.N.Y., 74 F. 250.

36. U.S.—Rathbone v. Fowler, C.C. N.Y., 20 F.Cas.No.11,584, 6 Blatchf. 294, affirmed Fowler v. Rathbones, 12 Wall. 102, 20 L.Ed. 281.
58 C.J. p. 614 note 86.

37. U.S.—Reliance Marine Ins. Co. v. New York, etc., Mail SS. Co., N.Y., 77 F. 317, 23 C.C.A. 183, certiorari denied 17 S.Ct. 998, 165 U.S. 720, 41 L.Ed. 1184.
58 C.J. p. 614 note 87.

38. U.S.—Reliance Marine Ins. Co. v. New York, etc., Mail SS. Co., supra
58 C.J. p. 614 note 88.

39. N.Y.—Lee v. Grinnell, 12 N.Y. Super. 400—Nelson v. Belmont, 12 N.Y. Super. 310, affirmed 21 N.Y. 36.

40. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, C.A.N.Y., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.

41. **Due diligence not exercised**
Where contract made recovery of general average conditional on exercise of due diligence and shipowner did not exercise due diligence to make ship seaworthy, the statute exempting shipowner from liability for loss by fire unless fire is caused by design or neglect of such owner does not entitle shipowner to recover in general average for loss occasioned by fire caused by unseaworthiness of ship, even though fire occurred without fault or privity of owner.—Globe & Rutgers Fire Ins. Co. v. U.S., C.C.A.N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 511—The Venice Maru, D.C.N.Y., 39 F.Supp. 349, affirmed, C.C.A., Consumers' Import Co. v. Kawasaki Kisen Kabushiki Kaisha, 133 F.2d 781, affirmed Consumers' Import Co. v. Kabushiki Kaisha Kawasaki Zosen-

held that sacrifices made to extinguish or prevent fires arising from the spontaneous combustion of the cargo constitute proper general average charges.[42]

g. Stranding or Running Ashore

Where a ship and cargo are exposed to a common danger and imminent peril by the accidental stranding of the vessel, the expense of saving them is a proper subject of contribution in general average, and, where the ship is voluntarily stranded or run ashore to avoid impending damage of shipwreck or other loss, the resulting loss is a general average charge.

Where a ship and cargo are exposed to a common danger and imminent peril by the accidental stranding of the vessel, the expense of saving them is a proper subject of contribution in general average[43] by the vessel, freight, and cargo, as discussed infra § 229, provided the vessel and cargo have been saved by the same series of measures taken for their safety during the continuance of the common peril which created the necessity for the sacrifices or expenditures.[44] However, if the stranding is due to negligent navigation, the vessel is not entitled, apart from contract, to contribution in general average from the cargo owners on account of salvage expenses, as discussed supra § 227, and if the object of the sacrifice is not attained and the ship is not got off no contribution is due.[45] Where the ship is voluntarily stranded or run ashore to avoid impending damage of shipwreck or other loss, the resulting loss is a general average charge,[46] even though the loss was probable[47] or inevitable,[48] provided, where the ship must go ashore, the place of stranding or running ashore was chosen.[49] While it has been held that, where a ship is voluntarily run ashore for the common good and is totally lost, the case is not one of general average,[50] the weight of authority is that such case is one of general average.[51]

h. Jettison

(1) In general
(2) Deck cargo

(1) In General

If goods are thrown overboard for the purpose of lightening the ship in time of common peril, the loss is to be made good by the contribution of all, and, under the rule governing general average sacrifices, there must have been a common imminent peril, a voluntary, intentional sacrifice, and a successful termination.

If goods are thrown overboard for the purpose of lightening the ship in time of common peril, the loss is to be made good by the contribution of all.[52] The rule of general average in the Rhodian law applied especially,[53] but not exclusively,[54] to instances of jettison, and controversies with respect to the allowance or adjustment of general average arose more frequently in the earlier cases where the sacrifice consisted of a jettison of a portion of the cargo than in respect of any other kind of disaster in navigation.[55] Under the rule governing general average sacrifices, there must have been a common imminent peril,[56] a voluntary,[57] intentional,[58] sacrifice, and a successful termination.[59]

jo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30

42. U.S.—Aktieselskabet Fido v. Lloyd Braziliero, C.C.A.N.Y., 283 F. 62, certiorari denied 43 S.Ct. 97, 260 U.S. 737, 67 L.Ed. 489.
58 C.J. p. 614 note 90.

43. U.S.—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C.C.A.N.Y., 92 F.2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 580.
58 C.J. p. 614 note 91.

Elements of general average act established

The danger that seams of stranded steamer's plating would open, master's realization of such peril, and intentional extraordinary use of steamer's engine machinery to drive her over bar into deeper water constituted elements of general average act.—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C.C.A.N.Y., 92 F.2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 580.

44. U.S.—McAndrews v. Thatcher, N.Y., 3 Wall. 347, 18 L.Ed. 155
58 C.J. p. 615 note 93.

45. N.Y.—Marshall v. Garner, 6 Barb. 394.
58 C.J. p. 615 note 95

46. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 615 note 97.

47. U.S.—Sturgess v. Cary, C.C. Mass., 23 F.Cas.No.13,572, 2 Curt. 59
Mass.—Reynolds v. Ocean Ins. Co., 22 Pick. 191, 33 Am.D. 727.
General rule as to probable loss see supra § 226.

48. U.S.—Barnard v. Adams, N.Y., 10 How. 270, 13 L.Ed. 417—Fitzpatrick v. Eight Hundred Bales of Cotton, D.C.N.Y., 9 F.Cas.No.4,843, 3 Ben. 42, affirmed, C.C., In re Eight Hundred Bales of Cotton, 8 F.Cas.No. 4,319, 8 Blatchf. 221.

49. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 615 note 1.

50. N.Y.—Bradhurst v. Columbian Ins. Co., 9 Johns. 9.
58 C.J. p. 615 note 2.

51. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 615 note 3.

52. U.S.—The Odysseus III, D.C.N.Y., 77 F.Supp. 297
58 C.J. p. 615 note 5.

53. U.S.—Ralli v. Troop, N.Y., 15 S.Ct. 657, 157 U.S. 386, 39 L.Ed. 742
58 C.J. p. 616 note 7.

54. U.S.—Ralli v. Troop, supra.
58 C.J. p. 616 note 8.

55. U.S.—Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.

56. U.S.—The Mary F. Barrett, C.C.A.Pa., 279 F. 329.
58 C.J. p. 616 note 11.

57. U.S.—The Mary F. Barrett, supra.

58. U.S.—Caze v. Reilly, Pa., 5 F.Cas.No.2,538, 3 Wash.C.C. 298.
58 C.J. p. 616 note 13.

59. U.S.—The Mary F. Barrett, C.C.A.Pa., 279 F. 329
58 C.J. p. 616 note 14.

If there be no imminent danger or necessity for the sacrifice, as if the jettison is made in a tranquil sea merely to lighten a ship too heavily laden, by the fault of the master, no contribution is due;[60] and if the object of the sacrifice is not attained, as if there be a jettison to prevent shipwreck, or to get the ship off the strand, and in either case, the object is not attained, no contribution is due.[61] It is not necessary, however that the goods shall have been thrown over with the intention of abandoning them,[62] since, if goods are exposed in barges[63] or on the beach[64] in order to float a stranded ship, and are lost or injured in consequence, the loss is regarded a proper general average charge.[65] So, also, the general rule, that where the person charged with control and protection of the common adventure determines on the general average act the emergency makes him the agent of all parties interested, as discussed supra § 225, applies to jettison.[66] The nature of the case imposes on the master the duty, and clothes him with the power, to judge and determine, on the facts before him, whether a jettison is necessary,[67] if he is a competent master, if an emergency actually existed calling for a decision whether to make a jettison of a part of the cargo, and if he appeared to arrive at his conclusion with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful.[68] Damage to the vessel incidental to the jettison is within the rule.[69]

(2) Deck Cargo

Ordinarily, the jettison of deck cargo does not give rise to a right to contribution in general average, although deck cargo is not exempt from contributing its share of the expense of a general average act.

Ordinarily, an exception to the general rule that general average contribution as to cargo or stores jettisoned is a proper charge exists in the case of jettison of deck cargo.[70] However, deck cargo is not exempt from contributing its share of the expense of a general average act.[71] This rule forms an exception to the general proposition that the intendment of general average contribution involves reciprocity of obligation and right.[72]

The foregoing rule is itself subject to qualification. The exception does not apply, by what has been said to be the weight of authority,[73] to those cases in which the carriage of cargo on deck is according to the custom and usage of the particular trade,[74] although there is also authority to the contrary,[75] nor does the exception apply to river craft.[76] Moreover, where a cargo is shipped on deck by agreement between the shipper and the vessel owner, the rule against the allowance of a deck cargo loss as general average does not apply so as to relieve the vessel or vessel owner from liability for contribution.[77] It has been held that the exception should be confined to sailing vessels,[78] since the reason for its application does not apply to vessels propelled by steam.[79] Likewise, the exception does not apply to the jettison of ship's property, usually carried on deck,[80] such as a boat.[81]

i. Putting into Port of Refuge

If a ship is in distress because of dangers of navigation, the act of putting into a port of refuge is a general average act.

If a ship is in distress because of dangers of navigation, the act of putting into a port of refuge is a general average act,[82] as where she has sprung

60. U.S.—Columbian Ins. Co v Ashby, D.C., 13 Pet 331, 10 L.Ed. 186
61. U.S.—Columbian Ins. Co. v. Ashby, supra—Caze v Reilly, Pa., 5 F Cas No 2,538, 3 Wash C.C. 298.
62. La.—Hennen v Monro, 4 Mart, N.S., 449.
Mass.—Whitteridge v. Norris, 6 Mass. 125
63. U.S.—Roberts v The Ocean Star, D.C Fla., 20 F Cas No 11,908.
N.Y.—Lewis v Williams, 1 N.Y Super. 474.
64. La.—Hennen v. Monro, 4 Mart., N.S., 449.
65. La.—Hennen v Monro, supra.
N.Y.—Lewis v. Williams, 1 N.Y.Super. 430.
66. U.S.—The Mary F. Barrett, C.C. A.Pa., 279 F. 329.
67. U.S.—Lawrence v. Minturn, Cal., 17 How. 100, 15 L.Ed. 58.
58 C.J. p 616 note 24.
68. U.S.—Dupont de Nemours v. Vance, La., 19 How. 162, 15 L.Ed 584—Lawrence v. Minturn, Cal., 17 How. 100, 15 L.Ed 58.
69. U.S.—Lange v. George D Emery Co., C.C.A.N.Y., 18 F.2d 744, certiorari denied Emery v. Lange, 48 S.Ct. 36, 275 U.S 540, 72 L.Ed 414.
70. U.S.—The Paragon, D.C.Me., 18 F.Cas.No.10,708, 1 Ware 326.
58 C.J. p 616 note 28.
71. N.Y.—Jones v. Bridge, 32 N.Y. Super. 431.
58 C.J. p 617 note 31.
72. U.S.—The Strathdon, D.C.N.Y., 94 F. 206, affirmed 101 F. 600, 41 C.C.A. 515.
73. U.S.—The William Gillum, D.C. Mass., 29 F.Cas.No 17,693, 2 Lowell 154.
Tex.—Meaher v. Lufkin, 21 Tex. 383.
74. U.S.—Lange v. George D. Emery Co., C.C.A.N.Y., 18 F.2d 744, certiorari denied Emery v. Lange, 48 S.Ct. 36, 275 U.S 540, 72 L.Ed. 414.
58 C.J. p 617 notes 34 [b], 36.
75. Me.—Sproat v. Donnell, 26 Me. 185, 45 Am.D. 103
58 C.J. p 617 note 37.
76. N.Y.—Harris v. Moody, 30 N.Y. 266, 86 Am.D. 375.
77. U.S.—Wood v. Phoenix Ins. Co., D.C.Pa., 1 F. 235
58 C.J. p 617 note 41.
78. Ill.—Gillett v Ellis, 11 Ill 579.
58 C.J. p 618 note 42.
79. N.Y.—Harris v. Moody, 30 N.Y. 266, 86 Am.D 375.
80. U.S.—The Santa Anna Maria, D.C.S.C., 49 F. 878.
81. N.Y.—Lenox v. United Ins. Co., 3 Johns Cas. 178.
82. U.S.—The Casey, D.C.N.Y., 39 F. 2d 136.
58 C.J. p 618 note 47.

a leak,[83] and requires repairs because of damages suffered in encountering such dangers.[84]

j. Sale for Vessel's Necessities at Port of Refuge

Where part of the cargo is sold to raise funds to pay for necessary repairs, such sacrifice may be the subject of general average.

Where injury is sustained by a course pursued for the common safety of the ship and cargo, and the master has neither means nor credit to enable him to make the necessary repairs to continue the voyage, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo to meet the necessity of raising the means to make the repairs, as discussed supra § 66, and such sacrifice is the subject of general average.[85] So, where a cargo is partly damaged and the master sells it for the good of the cargo and ship on the shipper's refusal to receive it, as discussed supra § 149, and the sale price is less than the true value, the loss is general average,[86] and, where the goods of one shipper are sold by the master for the ship's necessities, such shipper may have contribution from the other cargo owners and is not restricted to his remedy against the ship or shipowner.[87]

k. Extraordinary Expenses and Services

All extraordinary expenses reasonably incurred in saving a vessel and her cargo from common peril resulting from the dangers of navigation encountered during the voyage are the subject of general average.

All extraordinary expenses reasonably incurred in saving a vessel and her cargo from common peril resulting from the dangers of navigation encountered during the voyage are the subject of general average.[88]

Expenses going to, at, and leaving port of refuge. It is well settled[89] that, when a vessel is disabled at sea and puts into a port of refuge for repair, the ordinary expenses incurred,[90] including every expense necessarily incurred during the detention, for the benefit of all concerned,[91] and in making such temporary repairs as are necessary to remove the inability of the vessel to proceed on her voyage,[92] are proper subjects of contribution So, charges of entering the port,[93] pilotage,[94] port charges;[95] quarantine dues;[96] dockage;[97] wharfage,[98] surveys on ship and cargo,[99] diver's charges;[1] expense with respect to unloading, storing, and reloading cargo;[2] fuel used during the time at the port of refuge;[3] the necessary expense of forwarding the cargo when such a course was one of the measures properly adopted for the safety of the joint venture, as discussed infra § 230; lighterage,[4] expense of pumping in order to keep ship afloat until repaired;[5] hire of anchors, cables, boats, and all other apparatus required for the purpose of making the repairs,[6] customhouse,[7] consul,[8] and notary,[9] fees; and the expense of leaving the

83. U S —The Brewster, D C Cal., 95 F. 1000.

84. U.S —The Zarembo, D C N.Y., 44 F Supp 915, affirmed, C C A, Balfour, Guthrie & Co v. American-West African Line, 136 F.2d 320, certiorari denied Balfour Guthrie & Co. v. The Zarembo, 64 S Ct 437, 32 U S. 804, 88 L.Ed. 486.
58 C.J. p 618 note 49.

85. U S —The Star of Hope, Cal, 9 Wall 203, 19 L Ed 638.
58 C.J p 618 note 53.

86. U S —The Brewster, D C Cal, 95 F. 1000.

87. U S —The Leonidas, D C N Y, 15 F Cas No 8,262, Olcott 12.
58 C J. p 618 note 56

88. U S —American Tobacco Co. v The Katingo Hadjipatera, D.C N Y, 81 F.Supp 438, modified on other grounds, C A., 194 F 2d 449.
58 C J p 618 note 57

Delay due to accident

Where interruption of voyage was not caused by unseaworthiness of vessel or by negligence of her owner, losses of shipper resulting from accident to machinery and consequent delay of voyage were the proper subject of general average —The Plow City, D.C.Pa., 23 F Supp. 548.

89. U S —The Joseph Farwell, D.C Ala, 31 F 844.
La —Hassam v. St Louis Perpetual Ins. Co, 7 La Ann 11, 56 Am.D 591.

90. U S —The Star of Hope, Cal, 9 Wall. 203, 19 L Ed 638
58 C J p 618 note 60.

91. U.S —U S. v Los Angeles Soap Co, C C A Cal, 83 F.2d 875.
58 C J. p 619 note 61.

92. U S —Hobson v Lord, N.Y., 92 U S 397, 23 L Ed 613.
58 C J p 619 note 62

93. U S —The Joseph Farwell, D C Ala, 31 F 844
58 C J. p 619 note 64

94. U S —The Joseph Farwell, supra
58 C J. p 619 note 65

95. U S —The Star of Hope, Cal., 9 Wall 203, 19 L Ed 638.
58 C J. p 619 note 66.

96. U S —The Joseph Farwell, D.C Ala, 31 F. 844.
S C.—Wightman v Macadam, 4 S C.L 230.

97. U S.—The Joseph Farwell, D.C. Ala, 31 F. 844

98. U.S.—The Joseph Farwell, supra
58 C J. p 619 note 69.

99. U S —The Star of Hope, Cal., 9 Wall. 203, 19 L Ed. 638
58 C J p 619 note 70.

1. U S —Roberts v The Ocean Star, D C Fla, 20 F.Cas No 11,908.

2. U S.—The Star of Hope, Cal., 9 Wall. 203, 19 L Ed 638.
58 C.J p 619 note 72.

3. U.S.—U S. v. Los Angeles Soap Co, C C.A.Cal, 83 F.2d 875
58 C J. p 619 note 73.

4. Mass —Orrock v. Commonwealth Ins. Co., 21 Pick. 456, 32 Am.D. 271

5. U.S —The Star of Hope, Cal, 9 Wall. 203, 19 L.Ed. 638—Roberts v The Ocean Star, D C Fla, 20 F. Cas No 11,908

6. U S —The Star of Hope, Cal, 9 Wall. 203, 19 L Ed. 638.

7. U S.—Roberts v. The Ocean Star, D C Fla., 20 F.Cas No.11,908

8. Mass.—Orrock v. Commonwealth Ins. Co., 21 Pick. 456, 32 Am D. 271.

9. U S.—Roberts v The Ocean Star, D C Fla., 20 F.Cas No 11,908.

port[10] are proper general average charges. However, expenses not incurred for the safety of all interests are not general average charges.[11] Likewise, expenses incurred in order to make repairs beyond what are reasonably necessary for that purpose are not regarded as general average.[12] Expenses incurred after putting in at a port of refuge in the expectation of continuing the voyage are not allowed as general average where the voyage is abandoned.[13] The performance of the ordinary duty of repair does not give rise to general average.[14]

Towage and salvage. Towage incurred for the purpose of taking the ship into a port of refuge for repairs because of a general average act or damage is a proper subject of general average.[15] However, towage incurred to take the vessel from the port of refuge to her port of destination is not a proper general average charge,[16] where it is unreasonable and unnecessary.[17] Salvage charges voluntarily incurred for common benefit are proper subjects of general average.[18]

Wages and provisions. With respect to wages and provisions of the master, officers, and crew during delay in a port of refuge for the purpose of repairs, it is well settled that such charges are allowed as general average,[19] commencing when the vessel alters her course for the purpose of putting into a port of refuge,[20] and continuing over the entire period of detention for repairs until the ship is ready to resume her voyage,[21] if proper diligence is employed in making the repairs.[22]

Commissions. The owners of the vessel may reasonably be allowed a commission based on usage and custom for collecting the general average.[23] However, neither the master's commission on disbursements[24] nor the premium of exchange on the amount expended at the port of refuge[25] is the subject of general average.

l. Embargo, Capture, and Escaping Capture

While the expenses of detention by embargo are not allowed as general average, sacrifice or loss incurred in escaping capture are the subject of general average.

While the expenses of detention by embargo are not allowed as general average,[26] sacrifice or loss incurred in escaping capture,[27] as where the ship is run ashore and part of the cargo is saved,[28] or part of the cargo is thrown overboard and the ship is thereby enabled to escape,[29] or a boat is set adrift at night to mislead the enemy,[30] and the costs and expenses incurred for the purpose of procuring the release of a captured vessel,[31] or during the detention of the captured vessel,[32] are the subjects of general average; but, it seems, not expenses incurred in a proceeding against the cargo only.[33]

§ 229. Liability to Contribute and Right to Contribution

The obligation to contribute in general average rests on the vessel, the cargo, the freight, and the owners of such interests, but there is no contribution from those whose lives have been saved.

The obligation to contribute in general average rests on the vessel,[34] and such obligation like-

10. Hawaii—The Philomela, 1 Hawaii 177.

11. S.C.—Wightman v. Macadam, 4 S.C.L. 230.
Outlays for benefit of one interest as chargeable to that interest see supra § 224.

12. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638—The Queen, D.C.N.Y., 28 F. 755.

13. U.S.—The Joseph Farwell, D.C. Ala., 31 F. 844.
58 C.J. p. 620 note 86.

14. U.S.—Van Den Toorn v. Leeming, D.C.N.Y., 70 F. 251, affirmed 79 F. 107, 24 C.C.A. 461

15. U.S.—Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638
58 C.J. p. 620 note 96.

16. N.Y.—Swan v. Chandler, 36 Hun 192.
58 C.J. p. 620 note 98.

17. U.S.—Shoe v. Craig, D.C.Pa., 189 F. 227, modified on other grounds 194 F. 678, 115 C.C.A. 72—In re Nine Hundred and Twenty-Eight Barrels of Salt, D.C.Ill., 18 F.Cas. No.10,272, 2 Biss. 319.

18. U.S.—The Jason, N.Y., 178 F. 414, 101 C.C.A. 628
58 C.J. p. 620 note 2.

19. U.S.—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875
58 C.J. p. 621 notes 6, 7.

20. U.S.—The Joseph Farwell, D.C. Ala., 31 F. 844.
58 C.J. p. 621 note 8.

21. U.S.—Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 621 note 9.

22. U.S.—The Star of Hope, supra—The Joseph Farwell, D.C.Ala., 31 F. 844.

23. U.S.—Barnard v. Adams, N.Y., 10 How. 270, 13 L.Ed. 417.
58 C.J. p. 621 note 14.

24. Mass.—Dodge v. Union Marine Ins. Co., 17 Mass. 471.

25. Mass.—Dodge v. Union Marine Ins. Co., supra.

26. N.Y.—McBride v. Marine Ins. Co., 7 Johns. 431.
58 C.J. p. 621 note 17.

27. Mass.—Emery v. Huntington, 109 Mass. 431, 12 Am.R. 725.
58 C.J. p. 621 note 18.

28. U.S.—Columbian Ins. Co. v. Ashby, D.C., 13 Pet. 331, 10 L.Ed. 186.
Mass.—Emery v. Huntington, 109 Mass. 431, 12 Am.R. 725.

29. U.S.—Barnard v. Adams, N.Y., 10 How. 270, 13 L.Ed. 417.
58 C.J. p. 622 note 20.

30. Mass.—Emery v. Huntington, 109 Mass. 431, 12 Am.R. 725.

31. U.S.—Woods v. Olsen, La., 99 F. 451, 39 C.C.A. 595
58 C.J. p. 622 note 23.

32. U.S.—Hurtin v. Phœnix Ins. Co., Pa., 12 F.Cas.No.6,941, 1 Wash.C.C. 400
58 C.J. p. 622 note 24

33. U.S.—Peters v. Warren Ins. Co., C.C.Mass., 19 F.Cas.No.11,034, 1 Story 463.
58 C.J. p. 622 note 25.

34. U.S.—The Emilia S. De Perez, D.C.Md., 22 F.2d 585.
58 C.J. p. 622 note 26.
Liability of government; free cargo. Where the government carries private cargo on one of its Army transports constituting a part of its armed forces and used only as a public

wise, rests on the cargo,[35] the freight,[36] and the owners of such interests.[37] All property which is saved contributes,[38] except such as is attached to the persons of passengers,[39] or baggage in daily use by them,[40] and provisions;[41] and the property sacrificed, on its value as ascertained, contributes in common with that which is saved.[42] There is no contribution from those whose lives have been saved,[43] and seaman's wages are not subject to general average contribution.[44]

When right accrues. The right to contribution accrues if and when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement are a suit in rem or a suit in personam.[45]

§ 230. —— Separation of Interests and Termination of Danger

The liability of every portion of the cargo to contribute to general average continues until it has been completely separated from the rest of the cargo, and from the whole adventure, so as to leave no community of interest remaining.

The liability of every portion of the cargo to contribute to general average continues until it has been completely separated from the rest of the cargo, and from the whole adventure, so as to leave no community of interest remaining.[46] When the common danger has ceased to exist, no further sacrifice can be the subject of a general average contribution,[47] and, when the community of interest between the ship and cargo has been destroyed by a separation of the cargo from the ship, liability of the cargo to contribute in general average in favor of the ship is at an end.[48] In the application of this rule it has been held that cargo, although actually separated from the imperiled ship, may still, for the purpose of average, be constructively within it.[49] Separation may be made while the rest of the property is still in danger, and not rescued from the common peril.[50] The delivery of a part of the cargo to its owner at any time before the peril has occurred will discharge it from liability to contribute for a subsequent loss;[51] but, although the rule has been criticised,[52] it has been held that after measures have been commenced to avert a common peril, there can be no such separation of any portion of the property from the residue as will exempt it from contribution to the entire loss.[53]

Transshipment. Expense of transshipment at a port of refuge is not allowed in general average where the master reships in order to earn the original freight,[54] but the expense of transshipping the cargo, as a measure adopted to avoid a peril to the joint adventure, is a general average charge against the interests saved.[55]

vessel, it is subject to the rule of general average, and this is true notwithstanding such cargo was being carried free of hire—Atlantic Mut Ins. Co. v. U. S, 80 Ct Cl. 11, reversed on other grounds U. S. v. Atlantic Mut. Ins Co, 56 S.Ct 889, 298 U.S. 483, 80 L.Ed 1296.

35. U.S—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C C A N Y., 92 F 2d 41, certiorari denied Spencer Kellogg & Sons v Navigazione Generale Italiana, 58 S Ct. 271, 302 U.S 751, 82 L.Ed 580
58 C J p 622 note 27.

36. U.S—Pacific Freighters Co. v. St. Paul Fire & Marine Ins Co, C.C A.Cal, 109 F 2d 310.
58 C.J. p 622 note 28.

37. Conn.—Lyon v. Alvord, 18 Conn. 66.
58 C.J. p 622 note 29.

38. N.Y.—Harris v. Moody, 30 N.Y 266, 86 Am.D. 375.
58 C.J. p 623 note 30.

39. N.Y—Harris v. Moody, supra.

40. U.S—Heye v. North German Lloyd, D.C N Y., 33 F 60, affirmed, C C, 36 F 705, 2 L.R A. 287.
58 C.J. p 623 note 32.

41. U.S.—Heye v. North German Lloyd, supra.
58 C.J. p 623 note 33.

42. N Y.—Nelson v. Belmont, 21 N Y. 36—Lee v. Grinnell, 12 N.Y.Super 400.

43. N.Y—Harris v. Moody, 30 N.Y 266, 86 Am.D. 375.
58 C.J. p 623 note 35.

44. U.S.—Utpadel v. Fears, D C. Mass., 28 F Cas No 16,808, 1 Sprague 559
58 C.J. p 623 note 36.

45. U.S.—U. S v. Atlantic Mut. Ins Co, Ct Cl, 56 S.Ct. 889, 298 U S 483, 80 L Ed. 1296.

46. U.S.—Willcox v. Weil, D.C.N.Y, 24 F 2d 587.
58 C.J. p 623 note 37.

47. U S.—The Ann D. Richardson, D.C N Y., 1 F.Cas No 410, Abb Adm. 499, affirmed, C.C., 1 F.Cas.No.411, 1 Blatchf 358 note

48. U S—McAndrews v. Thatcher, N Y, 3 Wall. 347, 18 L.Ed 155.
58 C J. p 623 note 40.

49. U.S.—Reliance Marine Ins. Co. v. New York, etc., Mail SS. Co, N.Y., 77 F. 317, 23 C.C.A. 183, certiorari denied 17 S.Ct. 998, 165 U.S. 720, 41 L.Ed. 1184.
58 C.J. p 623 note 44.

English decisions not in complete accord

In the application of this rule the English and American decisions are not in complete accord and the tendency of the English decisions, it is said, is in favor of a strict adherence to the idea that contribution should cease when common danger has ceased, and that the danger to the saved cargo is to be regarded as ceasing when it is taken ashore to a place of safety—Reliance Marine Ins. Co v. New York, etc., Mail SS. Co, supra—58 C J. p 623 note 43.

Services of underwriters denied

Claim of cargo underwriter for services and expenses in protecting underwriter's interests after disaster was properly excluded in adjustment of general average.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F 2d 530.

50. N.Y—Nelson v. Belmont, 21 N. Y. 36.

51. N Y.—Nelson v Belmont, supra.
58 C J p 624 note 46.

52. N Y—Nelson v. Belmont, supra.
58 C.J. p 624 note 47 [a].

53. Pa—Bevan v. U S. Bank, 4 Whart. 301, 33 Am.D. 64.
58 C.J p 624 note 47.

54. U S.—The L'Amerique, D.C.N.Y, 35 F. 835.
58 C J. p 624 note 49.

55. U.S.—Mitchell Transp Co. v. Patterson, C.C Tenn., 22 F. 49.
58 C.J. p 624 note 50.

§ 231. —— Effect of Contract in General

Some authorities, but not others, hold that the right to, and liability for, contribution in general average, grows out of, and depends on, a contract implied by law from the relationship created by the contract of affreightment.

In some cases it has been held or recognized that the right to, and liability for, contribution in general average grows out of, and depends on, a contract implied by law from the relationship created by the contract of affreightment,[56] under which distinct properties of several persons are placed in a community of interest in a joint adventure,[57] and that the law will imply a contract from the relationship of the parties for the purpose of providing a remedy.[58] According to other authorities the right to, and liability for, contribution in general average is not based on the contract of carriage,[59] but arises out of participation in a common venture and depends on natural justice and an equity arising out of the relationship of the parties, as discussed supra § 224.

Ratification. Where consignees accept delivery, they must be deemed to ratify a general average agreement executed by agents as a necessary inducement to the delivery.[60]

§ 232. —— Contractual Enlargement or Limitation of, and Exeption from, Liability

Generally speaking, the parties to a shipping contract may by their contract enlarge or limit their liability to contribute to the general average or the reciprocal right to contribution, and, by virtue of the Harter Act, a clause or stipulation providing for general average liability notwithstanding negligence in navigation or management is valid, when it admits the shipowner to share in the general average only under circumstances where by the Harter Act he is relieved of responsibility.

Generally speaking, the parties to a shipping contract may by their contract enlarge or limit their liability to contribute to the general average or the reciprocal right to contribution.[61] However, limitations or exemptions of the carrier's liability under the contract of carriage have been held to relate solely to the liability of the carrier as such and not to affect his liability[62] or right to contribution[63] in general average.

At one time it was against the policy of the law

56. U.S.—Ralli v. Troop, N.Y., 15 S. Ct. 657, 157 U.S. 386, 39 L.Ed. 742. 58 C.J. p. 624 note 51.

57. Mass.—Whitteridge v. Norris, 6 Mass. 125.

58. U.S.—Ralli v. Troop, N.Y., 15 S. Ct. 657, 157 U.S. 386, 39 L.Ed. 742. 58 C.J. p. 625 note 55.

59. U.S.—Canada Malting Co. v. Patterson Steamships, D.C.N.Y., 49 F. 2d 802, reversed on other grounds, C.C.A., 51 F.2d 1007, affirmed 52 S. Ct. 413, 285 U.S. 413, 76 L.Ed. 837—Charles Pfizer & Co. v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D.C.N.Y., 40 F.Supp. 123. 58 C.J. p. 624 note 53.

60. U.S.—Johnson v. Charles F. Garrigues Co., C.C.A.N.Y., 30 F.2d 251. 58 C.J. p. 625 note 56.

61. U.S.—Globe & Rutgers Fire Ins. Co. v. U. S., C.C.A.N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 511—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C.C.A.N.Y., 92 F. 2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 580—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503.
58 C.J. p. 625 note 57.

Contract held to concede liability for general average.—Royal Ins. Co. v. Compania Trasatlantica Espanola, D.C.N.Y., 57 F.2d 288.

Agreement as to sum payable, if any, does not amount to an agreement to pay a general average contribution.—Corrado Societa Anonima Di Navigazione v. L. Mundet & Son, C.C.A.Pa., 91 F.2d 726, certiorari denied 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 581.

Provisions of charter party controlling over bills of lading

Where charter party provided for general average in accordance with specified rules and also provided that owner's bills of lading might be employed conjointly with the charter, provided they were not contrary thereto, provisions in the charter party as to general average were controlling over conflicting provisions in the owner's bills of lading.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503.

Breach of loading provision relieving cargo not shown

A ship's failure to cross sand bar because of wrong signal as to depth of water, rather than negligence in loading, was not breach of provision that ship should not be loaded with more than could reasonably be expected to be carried over bar, and, hence, did not relieve cargo owner from liability for contribution in general average.—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C.C.A.N.Y., 92 F.2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 580.

An agreement to sell at intermediate port, if possible, to prevent further loss, cargo which had become wet in extinguishing fire, loss to be made good in general average, to which underwriters assented in so far as interested, reserved both question of whether shipowner possessed right to enforce a settlement in general average and also question of whether amount stated by adjusters as due from cargo was correctly computed, and under circumstances did not constitute an agreement to settle all disputes by that method and to abandon all defenses.—Globe & Rutgers Fire Ins. Co. v. U. S., C.C.A.N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 511.

62. U.S.—Dibrell Bros. v. Prince Line, C.C.A.N.Y., 58 F.2d 959. 58 C.J. p. 625 notes 58, 59

Clauses requiring notice of claims for damages to goods before removal thereof from ship, do not extend to claims for general average contribution, and no distinction may reasonably be drawn between vessel's or saved cargo's share of general average contribution.—Dibrell Bros. v. Prince Line, supra.

63. U.S.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503.

to permit a shipowner to contract with the cargo owners for a participation in general average contribution growing out of the negligence of his master and crew,[64] but, by virtue of the Harter Act, 46 U.S.C.A. §§ 191–195, a clause or stipulation in a shipper's document providing for general average liability notwithstanding negligence in navigation or management is valid,[65] when it admits the shipowner to share in the general average only under circumstances where by the Harter Act he is relieved from responsibility,[66] and such clause or stipulation has generally become known as a "Jason" clause.[67] Conversely, a clause or stipulation which admits the shipowner to share in the general average under circumstances where by the Harter Act he is not relieved of responsibility is invalid and does not entitle him to contribution.[68] It has been stated that a Jason clause in no way changes the essential features of general average contributions,[69] and that its effect is to invest the master with authority and responsibility to act directly for cargo with respect to cargo's duty to contribute in general average.[70] A shipowner will not be entitled to contributions in general average notwithstanding acts of negligence before the commencement of the voyage, in preparation therefor, as such acts do not relate to management of the vessel within the meaning of a Jason clause.[71] It is a condition precedent to liability under the Jason clause that the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped, and supplied,[72] and it has been held that liability will not attach if such condition has not been com-

64. U.S.—The Jason, N.Y., 32 S.Ct. 560, 225 U.S. 32, 56 L.Ed. 969—The Maria, D.C.N.Y., 15 F.Supp. 745.

65. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N.Y., 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348—U.S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Merklen v. Johnson & Higgins, D.C.N.Y., 3 F.Supp. 897.

58 C.J. p. 625 note 64.

66. U.S.—The Jason, N.Y., 32 S.Ct. 560, 225 U.S. 32, 56 L.Ed. 969—The Maria, D.C.N.Y., 15 F.Supp. 745—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F.Supp. 515.

67. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942—Charbonnier v. U.S., D.C.S.C., 45 F.2d 166, affirmed, C.C.A., U.S. v. Charbonnier, 45 F.2d 174—Merklen v. Johnson & Higgins, D.C.N.Y., 3 F.Supp. 897.

68. U.S.—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F.Supp. 515.

Negligent loading before voyage

Provision incorporating rule which relieves vessel or owner from negligence at port of loading before commencement of voyage would be invalid under the provisions of the Harter Act.—American-West African Line v. Socony Vacuum Corporation, supra.

The Harter Act applies to contract between carrier and shipper, but not to charter party by which ship is demised, with respect to validity of clause or stipulation admitting owner to share in general average under circumstances where by act he is not relieved of responsibility.—American-West African Line v. Socony Vacuum Corporation, supra.

69. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

"It must still appear that voluntary and successful sacrifices have been made or extraordinary expenses incurred on behalf of those interested in the adventure in order to avert a common peril, with resulting benefit to the adventure upon which the burden of such sacrifices and expenses appropriately rests."—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 470, 294 U.S. 394, 79 L.Ed. 942.

General liability under maritime law

Cargo's liability to contribute in general average under Jason clause is no less a general liability imposed by maritime law than it was when a general average situation was created as matter of law by circumstances occurring on a voyage.—The Toluma, C.C.A.N.Y., 72 F.2d 690, affirmed Aktieselskabet Cuzco v. The Sucarseco, 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

Master was under no duty to sacrifice shipowner's property to save cargo subject to Jason clause.—The Toluma, C.C.A.N.Y., 72 F.2d 690, affirmed Aktieselskabet Cuzco v. The Sucarseco, 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

Rights of cargo against noncarrying ship are not diminished by a Jason clause.—The Toluma, C.C.A.N.Y., 72 F.2d 690, affirmed Aktieselskabet Cuzco v. The Sucarseco, 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

70. U.S.—Aktieselskabet Cuzco v. The Sucarseco, N.Y., 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

71. U.S.—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F.Supp. 515.

Movement of vessel from one berth to another in same harbor was not "commencement of voyage," so as to entitle vessel owner to contribution in general average.—American-West African Line v. Socony Vacuum Corporation, supra.

72. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, N.Y., 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C.C.A.N.Y., 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawaski Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30—Globe & Rutgers Fire Ins. Co. v. U.S., C.C.A.N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 511—The West Arrow, C.C.A.N.Y., 80 F.2d 853—The Glymont, C.C.A.N.Y., 66 F.2d 617—U.S. v. Charbonnier, C.C.A.S.C., 45 F.2d 174—The Louise, D.C.Md., 58 F.Supp. 445—The Heddernheim, D.C.N.Y., 39 F.Supp. 558—The Maria, D.C.N.Y., 15 F.Supp. 745—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F.Supp. 515—Merklen v. Johnson & Higgins, D.C.N.Y., 3 F.Supp. 897.

Owner needlessly sending out crippled vessel is not entitled to exemption from liability at cost of owners of cargo under general average clause if perils thus enlarged cause ship to become stranded.—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, C.C.A.N.Y., 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348.

Duty not delegable

Charterer's duty to exercise due diligence to make ship seaworthy was not delegable.—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C.C.A.N.Y., 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawaski Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30.

Bill of lading without due diligence provision

Bill of lading providing for general average contributions, without due diligence provision, should be construed as requiring payment of general average for damage resulting from negligence in navigation, pro-

plied with even though there is no causal connection between such failure to comply and the danger, damage, or disaster that resulted in the loss.[73] On the other hand, where such condition is complied with, the cargo owner is under a duty to contribute to expenses and sacrifices occurring as a result of negligence in the management or operation of the ship,[74] and may thus be required to contribute to expenses resulting from the stranding of the ship due to faulty navigation[75] However, where as a result of such stranding the ship is rendered unseaworthy and the shipowner decides to have the ship complete its trip, any failure to discover the unseaworthiness of the ship as a result of the first stranding is not an error of navigation or management, but is a failure to fulfill the condition on which the right to contribution depends.[76]

A charterer is not released from liability to contribute by reason of a stipulation in the charter that his liability shall cease on the happening of a certain event.[77] An arrangement for procuring the submission of a statement in general average does not normally prevent questioning either the existence or the amount of the general average obligation.[78]

§ 233. Adjustment and Enforcement

a. In general
b. Place and time of adjustment
c. Interest
d. Validity and effect of adjustment or statement
e. Effect of payment

a. In General

It is the duty of the master to cause an average adjustment to be made. Remedies which the ship, cargo, and freight interests may be able to enforce against third persons cannot affect the value of the interests as to general average liability.

A master ordering a general average act is under a duty to exercise reasonable diligence to ascertain its effects, as discussed supra § 225, and, if due diligence would have disclosed its effects and shown damage or expenses giving rise to a right to contribution, he is under a duty to protect the interests entitled to such right.[79] It is the duty of the master to cause an average adjustment to be made[80] and to hold the property saved until the shares of the owners toward the average contribution are paid or secured, as discussed infra § 237. Remedies

vided owner exercised due diligence to make vessel seaworthy.—May v Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, C C A.N.Y., 54 S. Ct 162, 290 U S. 333, 78 L.Ed 348.

Unseaworthiness caused by improper stowage

Under bills of lading providing for contributions in general average by cargo owners if charterer shall have exercised due diligence in making ship seaworthy, if stowage of ship was such as made a fire likely, ship was unseaworthy—Consumers Import Co v. Kawasaki Kisen Kabushiki Kaisha, C C.A.N Y., 133 F 2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawaski Zosenjo, 64 S Ct 15, 320 U.S 249, 88 L Ed. 30.

Owner not relieved by bill of lading

The provision in bills of lading that "If the shipowner shall have exercised due diligence to make the steamer . . . seaworthy . . . in case of . . . damage . . . resulting from accident . . . or from unseaworthiness . . . if the . . . unseaworthiness was not discoverable by the exercise of due diligence" the cargo should contribute in general average would not be construed by reason of use of word "accident" as requiring contribution in general average to losses although due diligence has not been used to make ship seaworthy.—Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha, C C.A.N.Y., 133 F.2d 781, affirmed Consumers Import Co v. Kabushiki Kaisha Kawaski Zosenjo, 64 S.Ct 15, 320 U.S 249, 88 L.Ed. 30.

73. U S—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, C C.A N Y., 54 S Ct. 162, 290 U.S. 333, 78 L Ed 348—Merklen v Johnson & Higgins, D.C N.Y., 3 F. Supp. 897

Construction of Harter Act not binding

Whatever may be the rule as to the construction of the Harter Act with respect to the necessity of a causal connection between a failure to exercise due diligence as to seaworthiness and the loss or damage involved, the case is not necessarily the same with a contract voluntarily entered into between the shipper and carrier framed in language similar to the condition precedent in the statute.—Merklen v. Johnson & Higgins, supra.

However, in the Italian courts, as the Jason clause is interpreted, if the vessel is unfit but that condition has no relation to the disaster, the vessel owner may secure contribution from the cargo—The Maria, D C N Y., 15 F.Supp. 745.

74. U S—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, N Y., 54 S Ct. 162, 290 U. S. 333, 78 L Ed 348.

Fire damage caused by fault of master

U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y, 81 F.Supp. 438, modified on other grounds, C A, 194 F.2d 449, certiorari denied 72 S.Ct 1076, 343 U S. 978, 96 L Ed —.

Insufficient fuel not error in management

With respect to liability in general average for towing when fuel became exhausted, failure to take on sufficient fuel when steamship, undertaking voyage by stages, refueled for last time was not "default or error in navigation or management" within Jason clause—The Glymont, C C.A.N.Y, 66 F.2d 617.

75. U.S—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, N Y., 54 S.Ct. 162, 290 U. S. 333, 78 L Ed 348.

76. U.S.—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, supra

77. Mass.—Marwick v. Rogers, 39 N. E 780, 163 Mass 50, 47 Am S R. 436.

78. U S.—Globe & Rutgers Fire Ins. Co. v. U. S, C C A N Y., 105 F 2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L Ed. 511.

79. U S.—Dibrell Bros. v. Prince Line, C C.A N.Y., 58 F 2d 959.

80. U.S.—The Emilia S. De Perez, D. C Md., 22 F.2d 585.
58 C J. p 626 note 67.

Statement is not adjustment

The preparation of a general average statement is not the adjustment of general average.—The Nesco, D.C. N.Y., 47 F.2d 643.

which the ship, cargo, and freight interests may be able to enforce against third persons cannot affect the value of the interests as to general average liability.[81]

b. Place and Time of Adjustment

The place of adjustment of general average is a question of convenience, and may be controlled by contractual provisions, and it has been stated that the contribution owing is payable when the property rescued is taken to its destination.

The place of adjustment of general average is a question of convenience rather than of theory or duty,[82] and may be controlled by contractual provisions.[83] It has been stated that the contribution owing is payable when the property rescued is taken to its destination.[84] It has been the practice to have the adjustment prepared at the port of destination;[85] but, when the voyage is broken up and ended and a final separation between vessel and cargo has taken place, it is common practice to have it made up at the port where the adventure comes to an end.[86]

c. Interest

Interest may be allowed on the amount of a general average contribution.

Interest may be allowed on the amount of a general average contribution.[87] Parties entitled to a return of deposits wrongfully exacted by a shipowner to secure general average contributions have been held entitled to recover interest thereon from the date of collection,[88] even though the shipowner earned no interest thereon,[89] and, where a deposit is properly required, but more is demanded than is necessary, it has been held that interest may be recovered on the amount of overpayment from the date of the statement of general average.[90]

A waiver of the right to interest will not be presumed from the fact that the general average adjustment was not made up at the outward port of destination.[91]

d. Validity and Effect of Adjustment or Statement

In the ordinary course a general average statement is merely the shipowner's version of the account between the parties, and, in the absence of an agreement otherwise providing, is not conclusive, although it will generally be taken as the proper basis for determining the rights of the parties in subsequent litigation in the absence of fraud, error, or unfairness.

Generally speaking, a general average statement must be viewed as an ex parte document,[92] and, when made by average adjusters, it is not an award made on a submission to arbitrators.[93] In the ordinary course, it is merely the shipowner's version of the account as between the parties.[94] However, the shipper or the consignee may by agreement make the statement of the shipowner or adjusters conclusive,[95] although, in the absence of such agreement, it is not conclusive,[96] or even prima

81. U.S.—The Andree, D.C.N.Y., 41 F.2d 812, reversed on other grounds, C.C.A., 47 F.2d 874, certiorari dismissed Green Star S.S. Co. v. Armour & Co., 57 S.Ct. 756, 296 U.S. 668
58 C.J. p. 626 note 69.

82. U.S.—The Eliza Lines, C.C. Mass., 102 F. 184, affirmed 114 F. 307, 52 C.C.A. 195, reversed on other grounds 26 S.Ct. 8, 199 U.S. 119, 50 L.Ed. 115.
58 C.J. p. 626 note 70.

83. **Where bill of lading incorporated customs and usages of specified port,** adjustment in that port for cargo destined for various other ports was not improper.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530

84. U.S.—The Toluma, C.C.A.N.Y., 72 F.2d 690, affirmed 55 S.Ct. 467, 294 U.S. 394, 79 L.Ed. 942.

85. U.S.—The Salvore, C.C.A.N.Y., 60 F.2d 683, certiorari denied U.S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S.Ct. 117, 287 U.S. 653, 77 L.Ed. 565.
58 C.J. p. 626 note 71.

86. U.S.—National Board of Marine Underwriters v. Melchers, D.C.Pa., 45 F. 643
58 C.J. p. 626 note 72.

87. Pa.—Sims v. Willing, 8 Serg. & R. 103
58 C.J. p. 629 note 29.

88. U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853—The Venice Maru, D.C.N.Y., 39 F.Supp. 349, affirmed, C.C.A., Consumers Import Co. v. Kawasaki Kisen Kubushiki Kaisha, 133 F.2d 781, affirmed Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 64 S.Ct. 15, 320 U.S. 249, 88 L.Ed. 30.

89. U.S.—The West Arrow, C.C.A.N.Y., 80 F.2d 853.

90. U.S.—Royal Ins. Co. v. Compania Trasatlantica Espanola, D.C.N.Y., 57 F.2d 288

91. U.S.—The Mary, D.C.Mass., 16 F.Cas.No. 9,189, 1 Sprague 51.

92. U.S.—The Nesco, D.C.N.Y., 47 F.2d 643

93. U.S.—The Alpin, D.C.N.Y., 23 F. 815.

94. U.S.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530.

95. N.Y.—Rebora v. British & Foreign Marine Ins. Co., 180 N.E. 90, 258 N.Y. 379, motion denied 182 N.E. 157, 259 N.Y. 507

Statement held conclusive on insurance company which guaranteed consignees' agreement to pay in accordance with adjusters' statement and not to oppose it in any way.—Rebora v. British & Foreign Marine Ins. Co., supra.

In the absence of a successful attack on any item, a cargo owner's agreement to pay whatever adjusters found due as general average contribution should be enforced.—Navigazione Generale Italiana v. Spencer Kellogg & Sons, C.C.N.Y., 92 F.2d 41, certiorari denied Spencer Kellog & Sons v. Navigazione Generale Italiana, 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 580.

96. U.S.—The Nesco, D.C.N.Y., 47 F.2d 643.
58 C.J. p. 629 note 32.

Adjustment by court not res judicata
Where application is made to a court of competent jurisdiction to make an adjustment of general average and the court appoints average adjusters to act in the matter and the issue as to the seaworthiness of the vessel is never presented to, or considered by, the adjusters or the court

facie proof of the amount claimed to be due.[97] Nevertheless, an average adjustment will generally be taken as the proper basis for determining the rights of the parties in subsequent litigation between them, in the absence of fraud, error, or unfairness.[98] An average statement put out by the shipowner or by average adjusters whom he has employed is an admission on the shipowner's part that the cargo owner is entitled to the sum shown due him in that statement,[99] and it has been held that it will be conclusive between the owner of the ship and the owner of the cargo to the extent that the former will be bound to deliver the goods on payment or tender according to the adjustment.[1] When a case of general average is settled in a foreign port where it should be settled, the adjustment will be conclusive as to the items as well as the apportionment thereof, on the various interests, although it may be different from that which the law of the home port would have required.[2]

e. Effect of Payment

Money voluntarily paid on a claim for general average cannot be recovered back, but it has been held that the fact that a contribution in general average has been paid does not preclude the one paying it from recovering it when equitable considerations require the repayment.

Money voluntarily paid on a claim for general average cannot be recovered back,[3] but, if money is paid under protest to the master in order to obtain possession of cargo held on an unfounded claim of general average, it may be recovered back.[4] Since a general average adjustment is not analogous to an account stated,[5] it has been held that the fact that a contribution in general average has been paid does not preclude the one paying from recovering it when equitable considerations require the repayment.[6] When a deposit is made to secure a general average contribution, it has been held that liability to repay the amount of an overpayment arises ex contractu on the date when the general average is stated and apportioned.[7]

§ 234. —— What Law Governs

In the absence of a controlling agreement to the contrary, ordinarily the average is computed and adjusted according to the law of the port of discharge, that is, the port of destination, or the port where the adventure is actually terminated.

In the absence of a controlling agreement to the contrary,[8] ordinarily the average is computed and adjusted according to the law of the port of discharge,[9] that is, the port of destination,[10] or, when the voyage is broken up and abandoned, the port where the adventure is actually terminated.[11] Where there are special contract provisions limiting or modifying the application of this law, the extent and effect of these provisions cannot be determined apart from consideration of the rule limited, that is, without consideration of the law of the port of destination.[12] The general maritime law governs as far as it determines the rules of apportionment, where the parties have contracted for an adjustment in accordance with the laws and usage of

except in a purely ex parte and very casual manner and the adjusters gave the cargo owners no notice of their intention to consider the question and no notice of application for approval and confirmation of the report of the adjusters was ever given to the owners or consignees of the cargo in question, the determination of such court that the vessel was seaworthy will not be deemed res judicata of that issue in subsequent proceedings in another court by the cargo owners to recover the value of the cargo lost, based on unseaworthiness of the vessel—The Maria, D C Va., 20 F.Supp. 284.

97. U S—The Nesco, D C.N.Y., 47 F.2d 643.

98. Ill.—Gillett v Ellis, 11 Ill. 579.
58 C.J p 629 note 33.

Certificate of value
Certificate of general average adjusters as to value of vessel should not be disturbed, even though insurance carried would warrant possible inference of higher valuation—Kohler & Chase v United American Lines, D C.N.Y., 60 F 2d 530.

99. U S—Kohler & Chase v United American Lines, supra.

1. Me—Thornton v. U S. Insurance Co., 12 Me. 150

2. Pa—McLoon v. Cummings, 73 Pa 98
58 C J p 629 note 35.

3. U S—Phipps v The Nicanor, C C N Y, 44 F. 504
58 C J p 631 note 52

4. U S—Martin v. The Agathe, D.C Ala., 71 F. 528
Me—Chamberlain v. Reed, 13 Me. 357, 29 Am D 506.

5. U S—Ralli v Societa Anonima di Navigazione a Vapore G L. Premuda, D C N Y, 222 F 994

6. U.S—Ralli v. Societa Anonima di Navigazione a Vapore G. L Premuda, supra.
58 C.J p 631 note 55

7. U.S—Royal Ins Co v Compania Trasatlantica Espanola, D C. N.Y, 57 F.2d 288

8. U S—Charter Shipping Co. v Bowring, N.Y, 50 S Ct 400, 281 U S 515, 74 L Ed 1008—The Southern Prince, D C N Y, 47 F Supp 470—Charles Pfizer & Co. v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D C N Y., 40 F Supp 123

9. Me—Thornton v. U. S. Insurance Co, 12 Me. 150
58 C J. p 626 note 73

10. U S—Canada Malting Co. v. Paterson Steamships, D.C N Y, 49 F. 2d 802, affirmed C C A., 51 F.2d 1007, affirmed 52 S Ct. 413, 285 U. S 413, 76 L Ed. 837—The Southern Prince, D C N Y., 47 F.Supp. 470—Charles Pfizer & Co. v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D C N.Y, 40 F.Supp. 123
58 C.J p 626 note 74.

Contract executed in port of destination for general average contribution was construable in light of law of that port—Royal Ins Co v Compania Trasatlantica Espanola, D. C.N Y., 57 F 2d 288.

11. U.S—National Board of Marine Underwriters v. Melchers, D C.Pa., 45 F. 643
58 C J. p 626 note 75.

12. U S—Charter Shipping Co. v. Bowring, N Y., 50 S Ct 400, 281 U S 515, 74 L Ed 1008—The Southern Prince, D.C N.Y., 47 F.Supp. 470.

a state in which there are no statutes or practice under them different from the general maritime law of the country,[13] but a different valid custom or law will, in such case, control.[14]

§ 235. —— Basis and Mode of Adjustment

a. In general
b. As to cargo
c. As to vessel
d. As to freight
e. Amount paid in limited liability proceedings

a. In General

The parties to a shipping contract may by agreement fix the basis and mode of adjustment, and generally speaking the problem of average adjustment is one of exact reimbursement and proportionately equal contributions as between vessel, cargo, and freight, the owners of the several interests being bound to make contributions in the proportion of the value of their interests.

The parties to a shipping contract may by agreement fix the basis and mode of adjustment of a general average,[15] and a provision under which the parties bind themselves to arbitration as to general average is not unlawful.[16] Generally speaking, the problem of average adjustment is always one of exact reimbursement and proportionately equal contributions as between vessel, cargo, and freight.[17] The owners of the several interests in the joint adventure are bound to make contribution in the proportion of the value of their interests.[18] The basis of valuation may be fixed by agreement of the parties[19] In the absence of such agreement, however, there is some diversity of opinion as to the basis of valuations in general average.[20] It has been declared that an average adjuster must be allowed some leeway in fixing values.[21] The contribution is to be paid in the currency of the country in which the voyage terminated,[22] and at such rate of exchange as will give exact reimbursement.[23]

Costs and expenses of adjustment. Proper costs and expenses incurred with respect to a general average adjustment are chargeable to the general average fund.[24]

Designation of adjuster. Even though a general average agreement designates a particular adjuster, an adjustment made by another competent adjuster is not objectionable in the absence of any showing of prejudice resulting from the change in adjusters.[25]

b. As to Cargo

The whole value of the portion of the cargo sacrificed is not to be replaced, but only as much as will put the owner in as good position as if, instead of his property, other of equal value had been destroyed, and, in the absence of an agreement otherwise providing, the general rule is that the value of the cargo is taken as of the time and place of discharge.

Since the spirit and intendment of the law of contribution in general average are to place the persons interested, as near as may be, in the same relative position which they occupied before the peril was met, as discussed supra § 224, the whole value of the portion of the cargo sacrificed is not to be replaced, but only as much as will put the

13. U S —The L'Amerique, D C.N.Y., 35 F 835

14. U.S.—The L'Amerique, supra.
58 C J. p 627 note 77.

15. U.S —Navigazione Generale Italiana v. Spencer Kellogg & Sons, C C.A N Y, 92 F 2d 41, certiorari denied Spencer Kellogg & Sons v. Navigazione Generale Italiana, 58 S Ct 271, 302 U.S 751, 82 L Ed 580—Kohler & Chase v United American Lines, D C N.Y, 60 F 2d 530—Charles Pfizer & Co. v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D C.N.Y., 40 F Supp. 123—Corrado Societa Anonima Dinavagazione v. L. Mundet Sons, D C Pa., 18 F Supp 37, affirmed, C C.A, Corrado Societa Anonima di Navigazione v. L Mundet & Son, 91 F.2d 726, certiorari denied 58 S Ct. 271, 302 U.S. 751, 82 L.Ed. 581.

16. **Provision for arbitration in a foreign country**
U S —Charles Pfizer & Co v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D.C.N.Y., 40 F.Supp. 123.

Consignee has no stronger position than consignor as respects binding effect of arbitration agreement contained in bill of lading —Charles Pfizer & Co v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, supra.

17. U S —Det Forenede Dampskibs Selskab v. Insurance Co of North America, D.C N Y, 28 F 2d 449, affirmed, C C A, 31 F 2d 658, certiorari denied 50 S Ct 28, 280 U S 571, 74 L Ed 623.

The equitable principle that equity implies equality, equal fairness, and honesty on all sides should control — Pacific Freighters Co v. St Paul Fire & Marine Ins. Co., C.C A Cal., 109 F. 2d 310

18. U S.—Aktieselskabet Cuzco v. The Sucarseco, N Y, 55 S Ct 467, 294 U S 394, 79 L Ed. 942—Pacific Freighters Co v. St Paul Fire & Marine Ins. Co., C.C.A Cal., 109 F 2d 310.
58 C J. p 627 note 78.

19. U S.—Kohler & Chase v. United American Lines, D C.N.Y., 60 F.2d 530.

20. U S.—Mutual Safety Ins Co v The George, D C.N Y., 17 F.Cas.No. 9,982, Olcott 157.
Valuation:
As to cargo see infra subdivision b of this section.
As to vessel see infra subdivision c of this section

21. U S —Kohler & Chase v. United American Lines, D.C N.Y., 60 F 2d 530

22. U.S —Det Forenede Dampskibs Selskab v Insurance Co. of North America, D C N.Y, 28 F 2d 449, affirmed, C.C A, 31 F 2d 658, certiorari denied 50 S Ct 28, 280 U S 571, 74 L.Ed 623.

23. U S —Det Forenede Dampskibs Selskab v Insurance Co of North America, supra.
58 C J. p 627 note 81.

24. U S —Kohler & Chase v United American Lines, D C N Y, 7 F. Supp. 819

25. U S —Kohler & Chase v. United American Lines, D C.N.Y., 60 F.2d 530.

owner in as good a position as if, instead of his property, other of equal value had been destroyed, and this is effected in the calculation by making the owner of the property sacrificed a party to the contribution in respect of the amount to be contributed.[26] The basis of valuation of the cargo in general average may be fixed by agreement of the parties.[27] In the absence of such agreement, while it has been held that in computing contributory values for the purpose of a general average adjustment the value of the cargo is to be taken at its first cost, or invoice price, and charges at the port of departure,[28] the general rule is that the value of the cargo is taken as of the time and place of discharge,[29] such as the port of destination,[30] and, where property is lost, at the price it would have brought at that port.[31] If the goods are sold at the place to which the apportionment relates, the amount of the proceeds is the basis on which their value is fixed,[32] and, if damaged goods are sold, the difference between the sale price and the valuation of the goods when sound is the amount to be allowed.[33] In the absence of better proof, the damage to the cargo to be allowed for may be ascertained by a comparison of the proceeds of sale with the invoice cost,[34] or, if the vessel has arrived at her port of destination, with its value at such port.[35] If the ship is unable to return to port or to reach an intermediate port, the cargo contributes at its invoice value, deducting therefrom salvage and other necessary expenses incurred in consequence of the wreck.[36] In case of total loss of the ship voluntarily stranded for the safety of the cargo, all the property exposed to the risk must contribute, and be contributed for at its value, when the sacrifice was made.[37] So, in the case of jettison, the value of the goods thrown overboard is taken at the prime cost or original value if the vessel does not arrive,[38] or at their value at the port of destination if she does arrive.[39]

c. As to Vessel

In the absence of an agreement otherwise providing, the basis of the valuation of the vessel in general average has been held to be her market value, and, if the ship arrives, her value is to be taken as it exists at the time of arrival at the place where the voyage terminates, otherwise as it was at the port of departure, or, in the case of stranding, her value at the time of stranding is determined without regard to her then peril.

The basis of the valuation of the vessel in general average may be controlled by agreement of the parties,[40] and, in the absence of such agreement, it has been held that the market value is controlling.[41] If the ship arrives, her value is to be taken as it exists at the time of the arrival at the place where the voyage terminates,[42] otherwise as it was at the port of departure,[43] or, in the case of stranding, her value at the time stranding is determined on without regard to her then peril,[44] estimated at the sum named in the policy of insurance,[45] or at

26. U.S.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530.

27. U.S.—Kohler & Chase v. United American Lines, supra.

Variance not objectionable

An adjustment made in part on the basis of market value, rather than in accordance with the method agreed on, is not objectionable in the absence of a showing that the objector was prejudiced or damaged by reason of this method of valuation—Kohler & Chase v. United American Lines, supra.

28. N.Y.—Leavenworth v. Delafield, 1 Cai. 573, 2 Am.D. 201.
58 C.J. p. 627 note 82.

29. U.S.—British, etc., Marine Ins. Co. v. Maldonado, Cal., 182 F. 744, 106 C.C.A. 122, certiorari denied 31 S.Ct. 724, 220 U.S. 622, 55 L.Ed. 613.
58 C.J. p. 627 note 83.

30. U.S.—Shoe v. Craig, D.C.Pa., 189 F. 227, modified on other grounds 194 F. 678, 115 C.C.A. 72.
58 C.J. p. 627 note 84.

31. U.S.—The Mary, D.C.Mass., 16 F. Cas. No. 9,189, 1 Sprague 51.
58 C.J. p. 627 note 85.

32. U.S.—Mutual Safety Ins. Co. v. The George, D.C.N.Y., 17 F. Cas. No. 9,981, Olcott 89.
58 C.J. p. 627 note 86.

33. N.Y.—Lee v. Grinnell, 12 N.Y. Super. 400.

Services and expenditures of underwriters in protecting goods after disaster have been held not to be deductible from the sale price.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530.

34. N.Y.—Lee v. Grinnell, 12 N.Y. Super. 400.

35. N.Y.—Lee v. Grinnell, supra.

36. N.Y.—Lee v. Grinnell, supra.

37. U.S.—Mutual Safety Ins. Co. v. Cargo of The George, D.C.N.Y., 17 F.Cas.No.9,982, Olcott 157.

38. U.S.—Rogers v. Mechanics' Ins. Co., C.C.Mass., 20 F. Cas. No. 12,017, 2 Story 173.
58 C.J. p. 627 note 92.

39. U.S.—Rogers v. Mechanics' Ins. Co., supra.
58 C.J. p. 628 note 93.

40. **Invoice value provision inapplicable to vessel**

An agreement that the amount made good in general average and the contributing values are to be based on the "invoice value" plus a designated percentage has been held inapplicable to the valuation of the vessel.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530.

41. U.S.—Kohler & Chase v. United American Lines, supra.

42. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 628 note 94.

43. U.S.—Mutual Safety Ins. Co. v. Cargo of The George, D.C.N.Y., 17 F.Cas.No.9,982, Olcott 157.
58 C.J. p. 628 note 95.

44. U.S.—Eight Hundred Bales of Cotton, C.C.N.Y., 8 F.Cas.No. 4,319, 8 Blatchf. 221.

45. U.S.—The Star of Hope, Cal., 9 Wall. 203, 19 L.Ed. 638.
58 C.J. p. 628 note 97.

Only auxiliary evidence

(1) It has been held, however, that while, as between the parties to the policy, the value of the vessel in the policy may be taken, as against cargo owners, such evidence is only auxiliary and the value must be established in the ordinary way.—Mutual Safety Ins. Co. v. Cargo of The George, D.C.N.Y., 17 F.Cas.No. 9,981, Olcott 89—Mutual Safety Ins. Co. v.

the valuation given in invoices and bills of lading,[46] making reasonable allowance for wear and tear on the voyage up to the time of the disaster.[47] The owners contribute according to her value and the net amount of her earnings for the voyage.[48] If the ship has encountered particular average damage prior to the general average sacrifice, that will be deducted from her value just before the general average sacrifice took place,[49] and, if the voyage is terminated at an intermediate port because of injuries sustained by the cargo, the charges of repairing the vessel subsequently may be referred to for the purpose of determining the value of the injuries sustained by her for the common benefit[50] Since the owners of a cargo are liable to contribute in general average for masts, spars, rigging, etc, cut away for the purpose of saving the vessel and cargo, as discussed supra § 228 h, the value of such material should be estimated as the value at the time they were cut away,[51] that is, as if it had been recovered from the sea and stowed in safety on board the vessel.[52]

d. As to Freight

The amount of freight due on cargo is deducted therefrom in determining its value, but, if freight has been paid in advance or secured absolutely, although only part of the cargo is delivered in consequence of a lawful jettison, the shipper or consignee is not disallowed freight in the average adjustment, and it has been held that the cost of earning the freight saved is deducted.

The cargo owners contribute according to the value thereof at the port of delivery, as discussed supra subdivision b of this section, after deducting freight due thereon,[53] and the cargo lost is taken at the price it would have brought at the port of destination, less the amount of freight thereon.[54] When freight is not payable on goods not delivered, as discussed supra § 160, in proving the foreign value the owner of goods jettisoned must deduct any expense from their value which the jettison has saved him,[55] including freight,[56] but in that case the whole freight on the jettisoned goods is allowed to the master[57] On the other hand, where part of the cargo has been sacrificed, contribution is made to the vessel on total freight lost, which also contributes, as discussed supra § 229, and if, under the terms of a charter party, the freight has been paid in advance or secured absolutely, although only a part of the cargo is delivered in consequence of a lawful jettison, the shipper or consignee is not disallowed freight in the average adjustment,[58] but may prove both the value of the goods and the freight paid or secured[59] The cost of earning the freight saved is deducted,[60] and, under statutes[61] and rules adopted at some ports,[62] the contributory value of freight has been taken at a prescribed percentage of that contracted to be paid. Where part of the cargo is jettisoned and the vessel is enabled to carry new cargo and does so, if the net new freight exceeds the general average expense, it has been held that there has in fact been no loss and no contribution is due from anyone,[63] and, if the general average expense exceeds the amount of the net new freight, then only the amount of the excess should be apportioned among the contributing interests.[64]

Round voyage. Where one gross sum is to be paid under charter party as freight for a round voyage out and home, and a general average sacri-

Cargo of The George, D C.N Y, 17 F. Cas No.9,982, Olcott 157.

(2) The certificate of competent adjusters as to the value of the vessel is far superior to a possible inference that might be drawn from the amount of insurance carried — Kohler & Chase v United American Lines, D.C N.Y, 60 F 2d 530

46. U.S —Mutual Safety Ins Co v Cargo of The George, D C.N.Y, 17 F.Cas.No.9,981, Olcott 89—Mutual Safety Ins. Co v. Cargo of The George, D.C N.Y., 17 F.Cas.No 9,982, Olcott 157.

47. U.S —Mutual Safety Ins Co v Cargo of The George, D C.N.Y., 17 F Cas No 9,982, Olcott 157.
58 C.J. p 628 note 99.

48. Ill.—Gillett v Ellis, 11 Ill. 579.
58 C.J. p 628 note 1.

49. U.S.—The Eliza Lines, C.C Mass, 102 F. 184, affirmed, 114 F 307, 52 C.C A , 195, reheard 132 F 242, 65 C C.A. 538, and reversed on other grounds 26 S Ct. 8, 199 U S 119, 50 L Ed 115
58 C J. p 628 note 3.

50. U S —The Ann D Richardson, D C.N Y., 1 F Cas No 410, Abb Adm 499, affirmed, C C., 1 F.Cas No.411, 1 Blatchf 358 note
58 C J p 628 note 4.

51. La.—Teetzman v Clamageran, 2 La. 195, 22 Am D 127

52. U S.—The Mary Gibbs, D.C Mass., 22 F. 463.

53. Ill —Gillett v Ellis, 11 Ill. 579
58 C.J. p 628 note 9

54. Ill —Gillett v. Ellis, supra

55. U.S —Christie v Davis Coal, etc, Co, D C N Y., 95 F. 837, affirmed 110 F. 1006, 49 C C A. 170.

56. U S.—Christie v. Davis Coal, etc., Co, supra.

57. U.S —Christie v. Davis Coal, etc, Co, supra.

58. U.S —British, etc, Marine Ins. Co. v. Maldonado, Cal., 182 F. 744, 106 C C A 122, certiorari denied 31 S Ct. 724, 220 U S 622, 55 L Ed. 613 —Christie v. Davis Coal, etc., Co., D C N Y, 95 F 837, affirmed 110 F. 1006, 49 C.C.A 170.

59. U S —Christie v. Davis Coal, etc, Co, supra.

60. U S —Humphreys v Union Ins. Co, C C Mass., 12 F Cas.No.6,871, 3 Mason 429
58 C J p 629 note 20.

61. U.S —Minor v. Commercial Union Assur Co., D C Cal., 58 F. 801.
58 C.J. p 629 note 21.

62. U.S —Humphreys v. Union Ins Co, C C Mass, 12 F Cas No 6,871, 3 Mason 429.
58 C.J p 629 note 22.

63. U.S —Pacific Freighters Co v. St Paul Fire & Marine Ins Co, C. C.A Cal, 109 F 2d 310.

64. U.S.—Pacific Freighters Co. v. St Paul Fire & Marine Ins. Co., supra.

fice occurs on the outward voyage, the whole freight must contribute.[65]

e. Amount Paid in Limited Liability Proceedings

A distribution under a decree in limited liability proceedings and a general average adjustment relate to different subjects, and the amount paid under the decree is properly reapportioned in general average.

A distribution under a decree in limited liability proceedings, as discussed infra § 256, and a general average adjustment relate to different subjects,[66] and the amount paid under the decree is properly reapportioned in general average.[67]

§ 236. —— Lien

When a general average sacrifice is made or expense incurred, the property saved is subject to a lien for contribution, and such lien is a jus in re, but the lien on cargo is dependent on possession.

When a general average sacrifice is made or expense incurred, the property saved is subject to a lien for contribution.[68] Thus, there is a lien on the goods for general average contributions due in respect of them,[69] and cargo owners have a lien for general average.[70] Such lien is a jus in re, a property interest in the property affected, adhering to it wherever it may go,[71] and, if the lien is lost through no fault of the holder, he is entitled to compensation therefor.[72] The lien on cargo is dependent on possession[73] and is lost by its delivery to the owner or consignee.[74] The lien is not necessarily lost as against a subsequent mortgagee by a delay in asserting the claim.[75]

§ 237. —— Exacting Bond or Security

All property saved may be retained until the shares of the owners toward average contributions are paid or secured, and the usual method of enforcing the claim for contribution is by requiring a deposit of money or the execution of a bond.

All property saved may be retained until the shares of the owners toward the average contribution are paid[76] or secured.[77] Indeed, it is the duty of the master to hold the property until such shares are paid or secured,[78] at least in cases where due diligence to ascertain the effects of the general average act would have disclosed damage or expenses giving rise to a right to contribution,[79] and for breach of this duty the shipowner may be held liable.[80] The usual method of enforcing the claim for such contribution is by requiring a deposit of money[81] or the execution of an average bond before delivery,[82] and the latter is the more common

65. U S—The Mary, D C Mass, 16 F Cas No 9,188, 1 Sprague 17.

66. U S—Pacific Mail SS Co. v New York, etc, Min. Co., N.Y., 74 F. 564, 20 C.C.A. 349.

67. U.S.—Pacific Mail SS Co. v New York, etc, Min. Co., supra.
58 C J. p 629 note 28.

68. U.S.—The Andree, C C.A.N.Y., 47 F 2d 874, certiorari dismissed Green Star S S Co v Armour & Co, 57 S.Ct 756, 296 U.S 668.
58 C J. p 630 note 36.
Priority as between bottomry bond lien and claim for general average see supra § 98

69. U S—Dibrell Bros. v. Prince Line, D C N.Y, 52 F 2d 792, affirmed, C C A, 58 F 2d 959.
58 C J p 630 note 37.
Primary charge on cargo interests
Expenses incurred by master as agent for cargo subject to Jason clause for benefit of entire cargo after safety of venture has been imperiled are primary charge on all cargo interests whose property is rescued from danger—The Toluma, C C A.N Y, 72 F 2d 690, affirmed Aktieselskabet Cuzco v. The Sucarseco, 55 S Ct 467, 294 U S 394, 79 L.Ed 942.

70. U.S.—Dibrell Bros. v. Prince Line, D.C N Y., 52 F 2d 792, affirmed, C C A, 58 F 2d 959—The Andree, C C A N.Y., 47 F 2d 874, certiorari dismissed Green Star S. S. Co. v. Armour & Co., 57 S Ct 756, 296 U.S. 668—The Odysseus III, D C Fla., 77 F Supp 297.
58 C.J. p 630 note 38

71. U S.—The Andree, C C A N Y., 47 F 2d 874, certiorari dismissed Green Star S S. Co. v. Armour & Co, 57 S Ct 756, 296 U S 668.

72. U S.—The Andree, C C A N Y, 47 F 2d 874, certiorari dismissed Green Star S S. Co. v. Armour & Co, 57 S.Ct 756, 296 U.S 668
Lien held to attach to damages awarded the vessel because of her loss in a collision—The Andree, C C A.N Y, 47 F.2d 874, certiorari dismissed Green Star S S Co. v Armour & Co, 57 S Ct 756, 296 U.S. 668

73. U S—Det Forenede Dampskibs Selskab v. Insurance Co of North America, C.C.A N Y., 31 F.2d 658, certiorari denied 50 S.Ct 28, 280 U.S 571, 74 L Ed. 623.
58 C J p 630 note 40.

74. U S—Cutler v Rae, Mass, 7 How 729, 12 L Ed 890.
58 C J. p 630 note 41.

75. U S—The Allianca, D.C.N.Y, 64 F 871, affirmed 79 F. 989, 25 C.C A 292.
58 C J. p 630 note 42.

76. U S—Dupont de Nemours v Vance, La, 19 How. 162, 15 L Ed 584
58 C J. p 630 note 43.

77. U S—Charles Pfizer & Co v 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D C.N Y., 40 F Supp. 123
58 C J p 630 note 44.

78. U S—Atlantic Mut. Ins. Co v. U. S, 80 Ct Cl. 11, reversed on other grounds U. S. v Atlantic Mut Ins Co, 56 S Ct. 889, 298 U.S. 483, 80 L.Ed. 1296.
58 C.J. p 626 note 68.

79. U S—Dibrell Bros. v. Prince Line, C C A N Y, 58 F.2d 959
Master pouring water into hold to extinguish fire was bound to protect damaged cargo's right to general average contribution by exacting security before surrendering sound cargo, if due diligence would have disclosed damage.—Dibrell Bros v Prince Line, supra.

80. U.S.—Dibrell Bros. v. Prince Line, supra—Atlantic Mut Ins Co v. U. S., 80 Ct Cl 11, reversed on other grounds U S v. Atlantic Mut. Ins. Co, 56 S Ct 889, 298 U. S. 483, 80 L Ed. 1296

81. Mo.—Berry Coal, etc, Co. v Chicago, etc, R. Co., 92 S W. 714, 116 Mo App 214.
58 C J. p 630 note 45.

82. U S.—Corrado Societa Anonima Dinavigazione v. L. Mundet Sons, D C Pa, 18 F Supp 37, affirmed, C. C A., Corrado Societa Anonima di Navigazione v L. Mundet & Son, 91 F 2d 726, certiorari denied 58 S Ct 271, 302 U S. 751, 82 L.Ed 581.
58 C.J. p 631 note 46.

practice.[83] Such bond may be required by reason of contractual provisions,[84] and the form of bond demanded must be strictly in accordance with the terms of such provisions and the rights arising thereunder.[85] The bond should not impose unreasonable terms or conditions which exclude the methods afforded by law for determining the existence and extent of liability.[86] Parties who voluntarily avail themselves of average bonds to obtain possession are bound by the obligations so assumed.[87] A person is not precluded by the execution of a general average bond or other security from defending against any general average liability.[88] An agreement executed as security for the payment of an average contribution and intended to take the place of the lien therefor has been held to give the person asserting his rights thereunder no greater rights than he would have had if he were asserting his lien.[89]

§ 238. —— Action or Suit to Enforce

Each owner of goods sacrificed may enforce his general average contribution claim against the owners of the ship and cargo by direct action at law, and the shipowner may also maintain an action against cargo for contribution, and equity has jurisdiction to enforce a claim for contribution.

Each owner of goods sacrificed may enforce his general average contribution claim against the owners of the ship[90] and cargo[91] by direct action at law, and the common-law courts have jurisdiction to enforce the promise by the owner of goods which is implied on their delivery to him.[92] The shipowner may also maintain an action against the cargo for contribution[93] If the master fails to perform the duty of retaining the cargo until the amount payable by each contributor is paid or secured, as discussed supra § 237, an action to recover the amount of the average lies in favor of those entitled to contribution against the master,[94] the ship,[95] or her owners.[96] Equity also has jurisdiction to enforce a claim for contribution.[97] An action or suit may be maintained to recover the excess amount of a general average deposit.[98] In a proper case an action will lie to compel an accounting by general average adjusters of their acts as such.[99]

Time to sue. Actions relating to average contributions must be seasonably commenced.[1] With respect to the time for commencement of an action in personam to recover a general average contribution, it has been held that such right of action accrues when a general average statement is prepared and issued by the shipowner.[2]

Parties. In an action to compel contribution, an objection that there are other owners subject to the claim cannot avail unless the plea discloses the omitted parties.[3] A time charterer who issued bills of lading has a right to recover general average.[4] There may be an election as to the party to be sued[5] General average adjusters have been held to

83. Mo.—Berry Coal, etc., Co v. Chicago, etc., R Co, 92 S W. 714, 116 Mo App. 214.

84. U.S.—Charles Pfizer & Co. v 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, D.C N Y, 40 F.Supp. 123.

85. U S.—Charles Pfizer & Co. v. 912 Bags of Tartar and 58 Bags of Uva Ursi Leaves, supra.

86. U S.—Wellman v. Morse, Mass., 76 F 573, 22 C C.A 318.
58 C J. p 631 note 49.

87. U S.—Morse v. Pomroy Coal Co., D C R I, 75 F 428—The John M Chambers, C.C La., 24 F. 383

88. U S.—Globe v Rutgers Fire Ins. Co. v U. S., C C.A N.Y., 105 F 2d 160, certiorari denied 60 S Ct 175, 308 U S 611, 84 L.Ed. 511—Corrado Societa Anonima Dinavagazione v L Mundet Sons, D.C Pa, 18 F. Supp 37, affirmed, C C A, Corrado Societa Anonima di Navigazione v L. Mundet & Son, 91 F 2d 726, certiorari denied 58 S Ct. 271, 302 U S. 751, 82 L Ed. 581.
58 C J. p 631 note 51.

89. U.S.—Corrado Societa Anonima Dinavagazione v. L. Mundet Sons, D C Pa., 18 F.Supp. 37, affirmed, C C A., Corrado Societa Anonima di Navigazione v L. Mundet & Son, 91 F 2d 726, certiorari denied 58 S.Ct. 271, 302 U S. 751, 82 L Ed. 581.

90. U S.—The Plow City, D C.Pa., 23 F Supp 548.
58 C J. p 631 note 58.
Jurisdiction of admiralty courts over claims for contribution in general average see Admiralty § 32

91. Mass.—Marwick v. Rogers, 39 N. E. 780, 163 Mass. 50, 47 Am S R 436.
58 C J p 631 note 59.

92. Mich.—Backus v. Coyne, 35 Mich. 5.
58 C J. p 631 note 60.

93. Mass.—Marwick v. Rogers, 39 N.E 780, 163 Mass 50, 47 Am S R. 436

94. U.S.—The Santa Ana, Wash., 154 F. 800, 84 C C A 312—Heye v. North German Lloyd, D C N Y, 33 F. 60, affirmed, C C, 36 F 705.

95. U S.—Heye v. North German Lloyd, supra.

96. U S.—Dibrell Bros. v. Prince Line, C.C A N.Y, 58 F 2d 959.
58 C J. p 632 note 66.

97. U S.—Sturgess v. Cary, C C. Mass, 23 F.Cas No.13,572, 2 Curt. 59
58 C J p 632 note 67.

98. U S.—Hoskyn & Co v. Silver Line, D C N Y, 63 F Supp 452, affirmed, C.C A., 143 F 2d 462, certiorari denied 65 S Ct. 116, 323 U.S. 767, 89 L Ed 613

99. N Y.—Susquehanna Silk Mills v. Rebora, 189 N.E 687, 263 N Y. 539.

1. **Libelants held not barred by laches**
U S.—Kohler & Chase v United American Lines, D C N Y., 60 F 2d 530

2. U S.—The Alliance, D C.N.Y, 64 F 871—Atlantic Mutual Ins Co v U. S, 80 Ct Cl. 11, reversed on other grounds U S. v Atlantic Mut Ins Co, 56 S Ct. 889, 298 U S. 483, 80 L Ed. 1296.

3. La.—Hennen v. Monro, 4 Mart, N S, 449.

4. U S.—Compagnie Francaise de Navigation a Vapeur v Bonnasse, D C N Y., 15 F.2d 203.

5. U S.—Johnson v. Charles F. Garrigues Co, C.C A N.Y, 30 F.2d 251.
58 C.J. p 632 note 72.

have the right and duty to pursue recalcitrant general average debtors in appropriate proceedings.[6]

Set-off. Persons obligated to make a general average contribution to the shipowner may offset the amount thereof by valid claims against the shipowner.[7]

Pleading. General rules of pleading have been applied in actions or suits to enforce a general average adjustment.[8] Where, in an action by cargo consignees on a bill of lading for failure to deliver part of the cargo, the shipowners in their answer offer to pay contribution in general average as to the cargo jettisoned and that sold, recovery may be had.[9] It has been stated that it is better pleading in a general average case for libelants to state separately in short articles all the steps leading up to the statement of the general average by the adjusters, including all such allegations as are necessary to establish the statement as a valid statement of general average under the circumstances involved.[10]

Evidence. Libelant has the burden of proving his right to general average contribution[11] by a fair preponderance of the evidence.[12] On the other hand, the burden of proving the defense alleged rests on defendant.[13] A party carrying the burden of proof as to a particular matter may start with a presumption in his favor,[14] such as a presumption that the vessel was seaworthy,[15] but it has been held that such a presumption does not shift the burden of proof on the issue,[16] although there is also authority to the contrary.[17] Where, shortly after leaving port, the vessel, without encountering any stress of weather or unusual perils of the sea, becomes so disabled that it is obliged to put into a port of refuge, it has been held that a presumption arises of unseaworthiness when she sailed;[18] but, where the general average bond contains a recital that the ship had "encountered strong winds

6. Expenses incurred are apportioned over interests of general average creditors—Susquehanna Silk Mills v Rebora, 263 N.Y.S. 858, 238 App Div. 100, reversed on other grounds 189 N.E. 687, 263 N.Y. 539.

7. U.S.—Balfour, Guthrie & Co. v. American-West African Line, C.C.A.N.Y., 136 F.2d 320, certiorari denied 64 S.Ct. 437, 320 U.S. 804, 88 L.Ed. 486—Colton v. New York, etc., SS. Co., D.C.N.Y., 17 F.2d 208.

8. Complaint held to state cause of action against adjusters for accounting

N.Y.—Susquehanna Silk Mills v. Rebora, 189 N.E. 687, 263 N.Y. 539

Surplusage

Allegations in the libel as to unseaworthiness and negligence may be disregarded as surplusage—The Eugenia J. Diacakis, D.C.N.Y., 22 F. 2d 461.

9. U.S.—The Wiley Smith, D.C.N.Y., 29 F.Cas.No.17,657, 6 Ben. 195.

10. U.S.—The Nesco, D.C.N.Y., 47 F. 2d 643.

Reason for practice

When a general average claim is pleaded in the manner stated in the text, it is probable that more admissions would be made by respondent than when the pleading is general—The Nesco, supra.

11. U.S.—Compania Trasatlantica v Charles Pfizer & Co., D.C.N.Y., 96 F.Supp. 217.

58 C.J. p. 632 note 78

Libelant asserting that general average is too small has burden of proof—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530.

Libelant asserting adjusters' fees are excessive has burden of proof—Kohler & Chase v. United American Lines, supra.

Seaworthiness or diligence to discover seaworthiness

(1) Where the shipowners sue the cargo owners or their guarantors for general average contribution, it has been held that they must prove that the ship was seaworthy.—The Glymont, C.C.A.N.Y., 66 F.2d 617—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503—The Consort, D.C.N.Y., 49 F.2d 406—The Maria, D.C.N.Y., 15 F.Supp. 745—58 C.J. p. 632 note 78 [a] (6).

(2) It has been held that the owner must show due care or diligence to make it seaworthy—May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, N.Y., 54 S.Ct. 162, 290 U.S. 333, 78 L.Ed. 348—Globe & Rutgers Fire Ins. Co. v. U. S., C.C.A. N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 511—The Lewis H. Goward, D.C.N.Y., 34 F.2d 791—The Maria, D.C.N.Y., 15 F. Supp. 745—American-West African Line v. Socony Vacuum Corporation, D.C.N.Y., 4 F.Supp. 515.

(3) However, it has also been held that defendant has the burden of proving unseaworthiness.—Broadnax v. Cheraw, etc., R. Co., 27 A. 412, 157 Pa. 140

12. U.S.—Compania Trasatlantica v. Charles Pfizer & Co., D.C.N.Y., 96 F.Supp. 217

58 C.J. p. 632 note 79.

Fair weight of evidence

U.S.—The Willbabco, D.C.N.Y., 52 F. 2d 997.

13. U.S.—Kohler & Chase v. United American Lines, D.C.N.Y., 60 F.2d 530.

58 C.J. p. 632 note 80.

Fault of vessel

In libel for general average by vessel, shipper must establish that vessel was at fault—Spang Chalfant & Co. v. Dimon S.S. Corporation, C.C.A.N.Y., 57 F.2d 965—Gregory v. Orrall, C.C.Mass., 8 F. 287.

14. U.S.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503.

Command of bargee

In an action against a lighter for average contribution, it will be presumed that the vessel was in command of the bargee on board—The Moran No. 16, C.C.A.N.Y., 40 F.2d 466.

15. U.S.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503.

16. U.S.—Societa Anonima Cantiero Olivo v. Federal Ins. Co., C.C.A.N.Y., 62 F.2d 769, certiorari denied Societa Anonima Cantiere Olivo v. Federal Ins. Co., 53 S.Ct. 792, 289 U.S. 759, 77 L.Ed. 1503.

17. Pa.—Broadnax v. Cheraw, etc., R. Co., 27 A. 412, 157 Pa. 140.

58 C.J. p. 632 note 81.

18. Pa.—Broadnax v. Cheraw, etc., R. Co., supra

58 C.J. p. 632 note 83.

and a heavy sea, which caused the vessel to labor severely," libelant is entitled to a prima facie presumption that the ship was seaworthy at the commencement of the voyage.[19]

General rules of evidence governing the admissibility,[20] and the weight and sufficiency,[21] of evidence have been applied in actions of this character.

Trial. The general rule that all questions of fact are to be decided by the jury or the court acting as the trier of fact applies in actions relating to general average contribution.[22] A decree for general average contribution cannot be entered in favor of cargo owners not parties to the record,[23] and the defect is not cured by the alleged failure of the shipowner to obtain security from such cargo owners[24] or to have a general average statement.[25]

Dismissal Where proper grounds therefor exist, an action or suit to enforce a general average claim may be dismissed.[26]

Costs. General rules governing the awarding of costs have been applied.[27] It has been held that one seeking a proper general average adjustment should bear the costs of the suit unless the amount finally awarded to him is greater than the amount theretofore tendered with interest.[28]

XII. STATUTORY LIMITATION OF SHIPOWNER'S LIABILITY

§ 239. In General

The right of a shipowner to limit his liability depends on statute. The purposes of the federal statute providing for limited liability are to encourage investments in shipbuilding and shipping and afford an opportunity for the determination of claims against the vessel and its owner; and it should be liberally construed and applied so as to give effect to such purposes.

Except in so far as the parties may agree to a limitation of liability in their contract or the bill of lading, as discussed supra §§ 131–138, the right of

19. U S —Franklin Sugar Refining Co v Funch, Pa., 73 F. 844, 20 C. C A. 61
58 C J. p 633 note 84.

20. Pa —Broadnax v Cheraw, etc, R Co, 27 A 412, 157 Pa. 140.
58 C J. p 633 note 85.

Admission of evidence as to insurance was not prejudicial, where subject was introduced by libelants, and underwriter's representative testified. —Kohler & Chase v. United American Lines, D.C N.Y, 60 F 2d 530.

21. U S —Grace v. The Mauna Loa, D C N Y., 76 F. 829.
58 C J p 633 notes 86, 87.

Evidence held sufficient

(1) In general —The Bellingham, D C N J., 49 F 2d 442, reversed in part on other grounds, C C.A , 57 F 2d 1015, and affirmed in part A C. Monk & Co. v. U. S, 57 F.2d 1018—The Bartle Daly, D C.N.Y, 45 F 2d 603, reversed on other grounds, C C.A , 58 F.2d 179—58 C J. p 633 note 87 [a].

(2) To show that vessel was in seaworthy condition —U. S. v. Los Angeles Soap Co, C C A Cal, 83 F.2d 875—Sweeney v. Thompson, C C La., 39 F. 121.

(3) To show due diligence in making ship seaworthy.—The Zarembo, D C.N.Y., 44 F.Supp. 915, affirmed, C. C A., Balfour, Guthrie & Co v. American-West African Line, 136 F 2d 320, certiorari denied Balfour, Guthrie & Co. v. The Zarembo, 64 S.Ct. 437, 32 U.S. 804, 88 L Ed. 486.

(4) To show lack of due diligence in making vessel seaworthy.—Globe & Rutgers Fire Ins. Co. v. U. S., C C A.N.Y., 105 F.2d 160, certiorari denied 60 S Ct 175, 308 U S. 611, 84 L Ed. 511—The Glymont, C C A N Y, 66 F.2d 617—The Consort, D C N Y, 49 F.2d 406.

(5) To show that disaster to vessel was due to failure of steering apparatus, not to faulty navigation.—Erie & St Lawrence Corporation v. Barnes-Ames Co., D.C N Y., 52 F.2d 217.

(6) To show that ship departed with insufficient fuel.—The Glymont, supra.

Evidence held insufficient

(1) In general —The Bartle Daly, D C N Y, 45 F.2d 603, reversed on other grounds, C C A., 58 F 2d 179—58 C J. p 633 note 87 [b].

(2) To show seaworthiness —Erie & St. Lawrence Corporation v Barnes-Ames Co., D C N Y., 52 F.2d 217.

(3) To show due diligence in making ship seaworthy.—May v Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N Y., 54 S.Ct 162, 290 U.S 333, 78 L Ed 348—Erie & St Lawrence Corporation v. Barnes-Ames Co., D C N Y, 52 F 2d 217.

(4) To show unseaworthiness — Spang Chalfant & Co v. Dimon S. S. Corporation, C C.A N Y, 57 F 2d 965.

(5) To show that improper application of rules in making adjustment did not affect the amount claimed — Compania Trasatlantica v. Charles Pfizer & Co., D C N.Y., 96 F Supp. 217

(6) To show that loss resulted from peril of sea.—The Willbabco, D C.N Y., 52 F 2d 997

(7) To show that vessel was at fault.—Spang Chalfant & Co. v. Dimon S S Corporation, C C.A N Y., 57 F 2d 965

22. U S.—Willcox v. Weil, D C.N.Y, 24 F 2d 587
58 C J p 633 note 89

Expert testimony estimating fuel consumption

With respect to liability in general average for towing necessitated by depletion of fuel, where two experts testified that a vessel's normal fuel requirements are based on the average of her past performances plus a certain percentage without consideration of the conditions to be expected on the particular voyage and one testified that his practice was to take into consideration the wind, weather, and currents he would expect to meet in the particular voyage, there was no error on the part of the court, sitting as a trier of fact, in determining that the vessel's requirements should be calculated with respect to conditions to be expected on a particular voyage plus the higher percentage of surplus used by one of the experts — The Glymont, C.C A N Y., 66 F.2d 617.

23. U S —The Ernestina, Puerto Rico, 259 F 772, 170 C.C.A. 572.

24. U.S.—The Ernestina, supra.

25. U.S —The Ernestina, supra.

26. **Suit held properly dismissed under evidence**
U.S —Globe & Rutgers Fire Ins. Co. v. U. S., C C.A.N.Y., 105 F.2d 160, certiorari denied 60 S.Ct. 175, 308 U S. 611, 84 L.Ed. 511.

27. **Awarding costs against government held improper.**—Globe & Rutgers Fire Ins Co. v. U. S., supra.

28. U.S —The Plow City, D.C.Pa., 23 F.Supp. 548.

the owner of a vessel to limit his liability is dependent on statute.[29] Although the federal statute providing for the limited liability of vessel owners, 46 U.S.C.A. § 181 et seq, adopts or is based on the general maritime law,[30] the statute,[31] and not the general maritime law,[32] must be interpreted and administered in determining questions as to such limitation of liability. The statute is a part of the maritime code or laws of the United States.[33]

Validity of statutes. The power of congress to grant the right of limitation of liability exists under the constitutional power of congress to regulate commerce;[34] but it rests also on the power derived from the admiralty clause of the federal Constitution,[35] and not, therefore, alone on the power to regulate commerce.[36] This has been held to be true both as to the original act of 1851[37] and the amendments thereto[38]

Repugnancy as to other provisions or ordinances. In case of repugnancy between state constitutional or statutory provisions,[39] or municipal ordinances,[40] and the federal statutes providing for limitation of liability, the federal statutes control. The federal statute requiring the marking of wrecks, discussed in Navigable Waters § 45 c, is not restricted by the statute providing for the limitation of liability.[41]

Purposes of statute The purposes of the federal statute providing for limited liability, which is based on sound public policy,[42] are to encourage investments in shipbuilding and shipping[43] and to afford an opportunity for the determination of claims against the vessel and the owner.[44] Stated more specifically, its purposes are to encourage shipbuilding[45] and the employment of vessels in navigation,

29. U.S—Standard Wholesale Phosphate & Acid Works v Travelers Ins. Co, C C.A.Md., 107 F 2d 373—Petition of Wheeler, D C N Y., 51 F. 2d 374—General Seafoods Corp v. J S. Packard Dredging Co., D C. Mass., 40 F.Supp. 1015
58 C J. p 633 note 94.
Exoneration or exemption from liability to passenger or shipper by:
Contract see supra §§ 131–138, 195, 197.
Harter Act see supra §§ 127, 128, 193, 196.
General liability of vessel or owner for damages caused by negligence see supra § 76 b.
Under English law
U S—The Scotland, N.Y., 105 U S 24, 26 L.Ed 1001

30. U.S.—Just v. Chambers, Fla., 61 S Ct 687, 312 U.S 383, 668, 85 L Ed 903—Rautbord v. Ehmann, C A Ill, 190 F.2d 533—Cushing v. Texas & P Ry. Co., D C.La., 99 F Supp. 681
58 C J p 633 note 96.
History and operation of original legislation and amendments
U S—The Main v. Williams, Md, 14 S Ct 486, 152 U S 122, 38 L Ed 381
58 C J p 633 notes 99, 1, p 634 note 2

History of English legislation
U.S—The Main v Williams, supra.
58 C J. p 634 note 4 [a]

31. U.S—The Scotland, N.Y., 105 U S. 24, 26 L Ed 1001

32. U.S—The Scotland, supra.
58 C.J. p 633 note 98

33. U.S.—Ex parte Garnett, Ga., 11 S Ct. 840, 141 U S 1, 35 L Ed. 631.
58 C J. p 634 note 3.

34. U S—Providence, etc, Steamship Co. v. Hill Mfg Co., Mass, 3 S Ct 379, 617, 109 U.S 578, 589, 27 L Ed 1038
58 C J p 634 note 9.

35. U S—Hartford Accident, etc, Co. v. Southern Pac Co, Tex., 47 S Ct. 357, 273 U.S 207, 71 L.Ed 612.
58 C J p 634 note 10.

36. U S—Ex parte Garnett, Ga, 11 S Ct. 840, 141 U.S. 1, 35 L Ed 631.
58 C.J. p 634 note 11.

37. U.S—The Garden City, D.C N Y, 26 F 766

38. U S—The No. 6, N Y, 241 F 69, 154 C C A. 69, certiorari denied 37 S Ct. 745, 244 U.S. 659, 61 L Ed. 1375.

39. U.S—The Central States, D.C N.Y, 9 F.Supp 934.
58 C J. p 634 note 15.
Prohibition against limitation in death action
A state constitutional provision prohibiting limitation of amount of recovery for injuries resulting in death cannot be set up against the federal acts limiting liability of the owner of a ship, including one used in inland navigation, to the value of his interest therein, for any injury by collision or any act done without his privity or knowledge—Loughin v McCaulley, 40 A. 1020, 186 Pa. 517, 65 Am S R 872, 48 L R.A 33.

40. U S—In re Highland Nav. Corp., D C.N Y, 24 F 2d 582, affirmed, C C A, 29 F 2d 37
Va.—Hagan v Richmond, 52 S E 385, 104 Va 723, 3 L R A,N.S, 1120

41. U S.—The Snug Harbor, D.C. N Y, 53 F 2d 407.

42. U.S—In re Jacobson, D.C.Tex, 52 F.2d 179.

43. U.S—Coryell v. Phipps, Fla, 63 S Ct. 291, 317 U S 406, 87 L Ed 363—Just v. Chambers, Fla., 61 S Ct. 687, 312 U S 383, 668, 85 L.Ed 903—Rautbord v Ehmann, C.A.Ill, 190 F.2d 533—Great Lakes Dredge & Dock Co v. Lynch, C A Ohio, 173 F.2d 281—In re Jacobson, D C Tex, 52 F 2d 179—Cushing v. Texas & P Ry. Co, D.C.La, 99 F Supp. 681, reversed on other grounds, C A, Cushing v Maryland Casualty Co, 198 F 2d 536—Petition of Tracy, D C N.Y, 92 F.Supp 706, affirmed, C.A, 194 F.2d 362—The S. & H No. 7, D C N.Y., 24 F.Supp. 1009
58 C J p 634 note 17.

44. U S—Coryell v. Phipps, Fla, 63 S Ct 291, 317 U.S 406, 87 L.Ed. 363.
Complete disposition
(1) The statutory provision for limitation of liability in admiralty looks to a complete disposition of what may be a many cornered controversy.—Just v. Chambers, Fla, 61 S Ct 687, 312 U S 383, 668, 85 L Ed 903—Rautbord v Ehmann, C A. Ill, 190 F.2d 533—Petition of Tracy, D C N Y, 86 F Supp. 306—The Panuco, D C N Y, 47 F.Supp 249.

(2) One of the objects of limitation of liability statutes is to bring into concourse a multiplicity of claims arising from same event and to avoid successive trials in which issue of negligence is the same—The Four Sisters, D.C.Mass, 75 F. Supp 399.

45. U S.—American Car & Foundry Co. v Brassert, Ill, 53 S Ct 618, 289 U S. 261, 77 L Ed 1162—Scheibel v. Agwilines, Inc., C C A.N.Y., 156 F 2d 636—In re Jacobson, D C. Tex, 52 F 2d 179—Kulack v. The Pearl Jack, D C Mich, 79 F Supp. 802, affirmed, C A, 178 F.2d 154—The Trim Too, D C Mass, 39 F. Supp. 271—The Mattie, D.C N.Y., 38 F.Supp. 745, affirmed, C.C A., Jacobus Grauwiller Co v. Reichert, 136 F.2d 904—The Mist-Chief, D.C. R.I, 57 F.2d 875.
58 C.J. p 634 note 17.

commerce, and trade,[46] and, in this connection, to induce the investment of funds[47] by exempting the investor from loss in excess of the fund which he is willing to risk in the enterprise[48] as represented, in general, by the vessel concerned,[49] and thus to place the United States on a like footing with other countries in respect of the merchant marine.[50] The purpose of the statute, moreover, is to provide a shipowner with a method not only of limiting his liability, but also of protecting himself against loss by providing himself with insurance.[51] However, the purpose of the statute was not concerned with the construction of vessels as a mere enterprise of manufacture, which itself is not a maritime activity;[52] nor is it the object of the statute and the proceeding pursuant to it to preclude injured persons from pursuing any remedy open to them against others.[53]

Construction and application of statute in general. The statute should be and has been broadly and liberally construed and applied so as to achieve its purpose;[54] and in this connection it should, in general, be fairly and liberally construed and applied in favor of the vessel owner.[55] However, this liberality of construction cannot be extended so that express conditions laid down by the statute are waived or ignored,[56] and it should not be so construed as to extend the statute beyond its purposes.[57] Moreover, this rule of liberal construc-

46. U S —The Mist-Chief, supra—Kulack v The Pearl Jack, D C. Mich, 79 F Supp 802, affirmed, C A, 178 F 2d 154—The Trillora II, D C S C, 76 F Supp. 50—The Mattie, D C N Y, 38 F Supp 745, affirmed, C C A, Jacobus Grauwiller Co v. Reichert, 136 F.2d 904—The Maine, D C Md, 28 F Supp 578, affirmed, C C A, Standard Wholesale Phosphate & Acid Works v Travelers Ins Co, 107 F.2d 373.
58 C J p 634 note 18.

Other statements

(1) To protect and encourage maritime commerce —Standard Wholesale Phosphate & Acid Works v Travelers Ins. Co, C.C.A Md, 107 F 2d 373

(2) To promote the increase of number of ships and prevent discouragements to merchants and others from being interested in and concerned therein —The Trim Too, D C Mass, 39 F Supp. 271

47. U S —American Car & Foundry Co v Brassert, Ill, 53 S Ct. 618, 289 U S 261, 77 L Ed 1162—In re Jacobson, D C Tex, 52 F 2d 179—The Trim Too, D C Mass, 39 F Supp 271
58 C J. p 634 note 19.

48. U.S —Cushing v Maryland Casualty Co, C A La, 198 F.2d 536—Petition of Moran Transp Corp, C A N Y, 185 F 2d 386, certiorari denied Moran Transp Corp. v Mellino's Adm'x, 71 S Ct 573, 340 U.S 953, 95 L Ed 687—In re Jacobson, D.C Tex, 52 F 2d 179—The Trim Too, D C Mass, 39 F Supp. 271
58 C.J. p 634 note 20

49. U.S.—The Fred E. Hasler, C C.A. N.Y., 65 F 2d 589—Petition of Tracy, D C N Y, 92 F Supp. 706, affirmed, C A, 194 F 2d 362—The Mattie, D C N Y, 38 F Supp 745, affirmed, C C A., Jacobus Grauwiller Co. v Reichert, 136 F.2d 904.
58 C J. p 635 note 21.

50. U.S.—The Mist-Chief, D.C.R I, 57 F 2d 875—The Trim Too, D.C Mass., 39 F.Supp. 271—Dollins v. Pan-American Grace Airways, D C. N Y., 27 F Supp 487.
58 C J. p 635 note 22.

51. U S.—Cushing v. Texas & P. Ry Co, D C La, 99 F.Supp 681, reversed on other grounds C A, Cushing v. Maryland Casualty Co, 198 F.2d 536.
Insurance as not required to be surrendered for benefit of claimants see infra § 242 b
"Not only is capital encouraged to come into the merchant marine but a method is provided by which that capital may be replenished after losses resulting from the perils of the sea"—Cushing v. Texas & P Ry. Co, D C La, 99 F Supp 681, 684, reversed on other grounds, C A, Cushing v. Maryland Casualty Co, 198 F.2d 536.

52. U S —American Car & Foundry Co v. Brassert, Ill, 53 S.Ct. 618, 289 U S 261, 77 L Ed 1162.

53. U S.—Cushing v. Maryland Casualty Co., C A.La, 198 F.2d 536

54. U S —Coryell v Phipps, Fla, 63 S Ct. 291, 317 U S 406, 87 L Ed. 363—Just v Chambers, Fla., 61 S Ct 687, 312 U S 383, 668, 85 L Ed. 903—Larsen v. Northland Transp. Co, Wash, 54 S Ct. 584, 292 U S. 20, 78 L Ed 1096—Rautbord v Ehmann, C A.Ill, 190 F 2d 533—Great Lakes Dredge & Dock Co. v Lynch, C A Ohio, 173 F 2d 281—The Severance, C C A N C, 152 F 2d 916, certiorari denied Stone v. Diamond S. S Transp Corp, 66 S Ct 1344, 328 U S 853, 90 L Ed. 1626—The E Madison Hall, C.C A Md, 140 F.2d 589, certiorari denied 64 S Ct 1159, 322 U S 748, 88 L Ed 1579—Standard Wholesale Phosphate & Acid Works v Travelers Ins Co, C C A.Md, 107 F.2d 373—Petition of Tracy, D.C.N.Y., 92 F.Supp. 706, affirmed, C A, 194 F 2d 362—Petition of Tracy, D.C.N.Y., 86 F.Supp. 306—Moran Towing & Transp. Co v U. S, D.C N Y., 80 F Supp. 623—Kulack v The Pearl Jack, D.C Mich, 79 F.Supp 802, affirmed, C A, 178 F 2d 154—The Panuco, D C N Y, 47 F Supp 249—Cantey v McLain Line, D.C N Y, 40 F. Supp 887—The Iowa, D C.Or, 34 F Supp. 843.
58 C J p 635 note 23
Construction of English statutes see 58 C.J. p 635 notes 35–37.

55. U S —Scheibel v Agwilines, Inc, C C A N Y, 156 F 2d 636—The Chickie, C C.A.Pa, 141 F.2d 80—California Yacht Club of Los Angeles v. Johnson, C C A Cal, 65 F 2d 245 —**Corpus Juris cited in** The Princess Sophia, C C A Wash, 61 F 2d 339, 354, certiorari denied Brace v. Canadian Pac. R Co., 53 S Ct 396, 288 U S. 604, 77 L Ed 980—The Mist-Chief, D C.R I, 57 F 2d 875—Petition of Wheeler, D C N.Y, 51 F.2d 374—Petition of Tracy, D C. N Y, 92 F Supp 706, affirmed, C.A., 194 F 2d 362.
58 C J. p 635 note 25

56. U S —Standard Wholesale Phosphate & Acid Works v. Travelers Ins Co, C.C A Md., 107 F.2d 373.
"Limiting as it does the common-law doctrine of responsibility for the acts of servants and agents, this statute makes a very valuable concession, neither to be frittered away by undue restrictions upon it nor to be incontinently allowed except upon full compliance with the conditions of the grant"—In re Jacobson, D C. Tex, 52 F 2d 179, 180.

57. U.S —Kulack v. The Pearl Jack, D C Mich, 79 F.Supp. 802, affirmed, C A, 178 F.2d 154.

Liability of owner for negligence

Statute providing for limitation of vessel owner's liability was enacted for purpose of encouraging shipbuilding and employment of ships in commerce, and therefore should not be so construed as to permit owner of small speedboat, carrying passengers for hire on inland waters, to escape liability for his negligence or negligence of his copartner and agent —Kulack v. The Pearl Jack, supra.

tion and application is subject to certain limitations in respect of the extent of the owner's liability under the statute, as discussed infra § 242 b, d, and, according to one view, only requires that the limitation shall not be denied on purely technical or for insufficient reasons;[58] and liberality of enforcement should not be carried to an extent which will deprive cargo owners and passengers of that degree of care on the part of those owning and operating vessels which their safety demands and to which they are entitled.[59] The statute must be given a sensible construction;[60] and a literal application, which would lead to an absurd consequence, should be avoided whenever a reasonable application can be given, consistent with the legislative purpose.[61] The fact that the value of the vessel is small and that limiting the liability to such amount may be unfortunate in its effect does not prevent the application of the statute in a proper case.[62]

Construing statutes together. The various statutes relating to the limitation of the liability of shipowners are in pari materia[63] So also, the original federal Limitation of Liability Act and the amendments thereto are in pari materia[64] and must be construed together.[65]

Prospective operation only. Statutes making substantial changes in the right accorded by prior statutes with respect to the limitation of liability of a shipowner should be accorded only prospective operation with respect to such changes,[66] at least where a legislative intent for retroactivity does not appear,[67] and should not be applied to rights or causes of action existing at the time of their enactment.[68]

Existence of liability as essential. The federal statute does not impose liability, but merely limits a liability assumed already to exist on other grounds.[69] In fact, the whole doctrine of limitations of liability presupposes that a liability exists which is to be limited, so that if no liability exists there is nothing to limit[70]

Effect of insurance. The right to limit liability is not affected by the fact that the vessel has been insured and the insurance has been paid or become payable.[71]

Proceedings in rem or in personam. The statutory provision for limitation of liability applies to proceedings in rem against the ship,[72] as well as to proceedings in personam against the owner,[73] and the limitation extends to the owner's property as well as to his person;[74] and the right of the owner of a vessel to limit his liability cannot be frustrated by the mere failure of the injured person to file a libel in rem or to allege liability on the part of the vessel.[75]

§ 240. Vessels Included; Place of Navigation

The right to limitation of liability under the federal statutes applies, except as to certain provisions thereof, to all vessels, regardless of size, purpose, or place of navigation; and it may apply to foreign vessels, in favor of foreign owners, even though the injury and resultant liability occur on the high seas or in foreign waters.

Under the federal statute relating to limited liability, 46 U S C.A § 188, the privileges granted apply to all vessels.[76] Thus the right to limita-

58. U S.—Phillips v. Clyde SS. Co., C C A.Md, 17 F 2d 250.

59. U S.—The Santa Rosa, D C.Cal., 249 F 160.

60. U S.—Paladini v Flink, C.C A Cal, 26 F 2d 21, affirmed 49 S Ct 255, 279 U S. 59, 73 L Ed. 713.

61. U S.—Paladini v. Flink, supra.

62. U S —Petition of Liebler, D.C N Y., 19 F Supp 829.

63. U.S —The Philip J. Kenny, D C N J, 57 F.2d 337.

Statute as to liability for debts

The statute limiting the owner's liability to the amount of his interest in the vessel and freight pending and the statute limiting the owner's liability for debts to the proportion of the debts that his share of the vessel bears to the whole are in pari materia.—The Philip J. Kenny, supra.

64. U S.—Richardson v. Harmon, Ohio, 32 S Ct. 27, 222 U.S. 96, 56 L Ed. 110

58 C.J. p 635 note 33.

65. U.S —Richardson v. Harmon, supra

58 C J. p 635 note 34.

66. U S —The Fred Smartley, Jr, C C A.Va., 108 F 2d 603, certiorari denied S C Loveland, Inc v. Pennsylvania Sugar Co, 60 S Ct. 724, 309 U S. 683, 84 L Ed. 1027

67. U.S.—The Pocahontas, D.C.N.J, 20 F.Supp. 1004

68. U.S —The Fred Smartley, Jr, C C A Va., 108 F.2d 603, certiorari denied S. C Loveland, Inc. v. Pennsylvania Sugar Co, 60 S.Ct. 724, 309 U S. 683, 84 L.Ed 1027—The Pocahontas, D.C N.J., 20 F.Supp 1004.

69. U.S —Oceanic Steam Nav. Co v Mellor, 34 S Ct. 754, 233 U S. 718, 58 L.Ed 1171, L.R A 1916B 637.

58 C J. p 635 note 31

70. U S —The 84-H, C.C.A N.Y., 296 F. 427, certiorari denied Randolph v. Bouker Contr. Co, 44 S.Ct. 454, 264 U S. 596, 68 L Ed 867.

Determination of issues where existence of liability as well as right to limit involved see infra § 256

71. U.S —The Pere Marquette 18, D C Wis, 203 F 127—Wattson v Marks, D C Pa, 29 F Cas No 17,296.

Insurance as not interest in vessel see infra § 242 b.

72. U.S.—Just v Chambers, Fla, 61 S Ct. 687, 312 U S. 383, 668, 85 L Ed. 903—Rautbord v. Ehmann, C A.Ill., 190 F.2d 533.

73. U S.—Just v. Chambers, Fla, 61 S Ct. 687, 312 U S. 383, 668, 85 L.Ed. 903—Rautbord v. Ehmann, C.A Ill., 190 F 2d 533.

74. U S.—Just v. Chambers, Fla., 61 S Ct. 687, 312 U.S. 383, 668, 85 L. Ed 903—Rautbord v. Ehmann, C A. Ill., 190 F.2d 533.

75. U.S —The Severance, C C.A N Y., 152 F.2d 916, certiorari denied Stone v. Diamond S. S Transp. Corp, 66 S.Ct. 1344, 328 U.S. 853; 90 L.Ed 1626.

76. U.S.—Petition of Liebler, D.C. N.Y., 19 F.Supp. 829.

tion of liability is not based on the question of the size of the craft;[77] nor is it material to what purposes the vessels are put;[78] and the statute includes pleasure craft.[79] Indeed, a "wreck" has been held to be a "vessel" within the statute providing for limitation of liability.[80] On the other hand, the applicability of the statute to certain water craft or structures has been denied.[81]

Vessels within increased liability provisions. The statute as amended in 1935, 46 U.S.C.A. § 183, subd. (b)–(f), providing for increased liability under certain circumstances, is applicable only to "seagoing vessels" as that term is expressly limited by the statute and construed by the courts.[82]

Place of navigation of vessel. The statute providing for limited liability applies to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters;[83] and the vessel need not be one engaged in maritime commerce.[84]

Vessel not on voyage. The fact that the vessel was not actually engaged in a voyage at the time the liability was incurred does not prevent the application of the statute;[85] and the statute applies to a vessel at a dock in her home port[86] or while laid up for the winter.[87]

Foreign vessels. The federal statute providing for limited liability applies to foreign vessels,[88] in

Prior provisions

(1) While the act in its original form by express provision did not apply to any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation, the broad view has been expressed that by the amendment of 1886, by which the operation of the act was greatly extended to include all seagoing vessels and also all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters, congress intended to grant the privilege of limiting liability in respect of all water craft —The Muriel, D.C.Wash., 25 F.2d 505—58 C.J. p. 635 note 45

(2) The validity of such amendment has been upheld—Ex parte Garnett, Ga., 11 S.Ct. 840, 141 U.S. 1, 35 L.Ed. 631.

(3) The amendment had no retroactive operation—Chappell v. Bradshaw, C.C.Md., 35 F. 923—58 C.J. p. 635 note 41 [a].

(4) The original act was not repealed by the amendment of 1884—Chappell v. Bradshaw, supra.

(5) Even prior to the amendment of 1886, the act was applied to a tugboat towing a vessel engaged in interstate commerce—In re Vessel Owners' Towing Co., D.C.Ill., 26 F. 169.

"Vessel" defined by statute

Under the statutory statement of rules of construction defining the word "vessel" as including an artificial contrivance used, or "capable" of being used, as a means of transportation on water, 1 U.S.C.A. § 3, "capable" is to be read as "practically capable."—Petition of Kansas City Bridge Co., D.C.Mo., 19 F.Supp. 419.

Particular contrivances held "vessels"

(1) Barge—The Martha R. Grimes, D.C.N.Y., 49 F.Supp. 591

(2) Floating crane.—The O'Boyle No. 1, D.C.N.Y., 64 F.Supp. 378.

(3) Wooden motor yacht—The Trim Too, D.C.Mass., 39 F.Supp. 271

(4) A boat which was a floating movable boarding and rooming house, maintained and operated by bridge company for its employees, and was intended to be and was moved from place to place on river—Petition of Kansas City Bridge Co., D.C.Mo., 19 F.Supp. 419.

(5) Other contrivances see 58 C.J. p. 635 note 45 [a]

77. U.S.—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829.

Particular craft held within statute

(1) Motorboat.—Fiege v. Hurley, C.C.A.Ky., 89 F.2d 575—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829

(2) Eighteen-foot ferryboat propelled by oars—Grays Landing Ferry Co. v. Stone, C.C.A.Pa., 46 F.2d 394

78. U.S.—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829

79. U.S.—Petition of Liebler, supra. 58 C.J. p. 636 note 48.

Prior to amendment of 1886, the Limited Liability Act did not permit limitation of liability in respect of pleasure craft—The Mamie, D.C.Mich., 5 F. 813, affirmed, C.C., 8 F. 367—58 C.J. p. 636 note 47.

80. U.S.—The Snug Harbor, D.C.N.Y., 46 F.2d 143—The Central States, D.C.N.Y., 9 F.Supp. 934. 58 C.J. p. 635 note 43

81. U.S.—Evansville, etc., Packet Co. v. Chero Cola Bottling Co., Ind., 46 S.Ct. 379, 271 U.S. 19, 70 L.Ed. 805. 58 C.J. p. 636 note 46.

82. U.S.—Petition of Panama Transport Co., D.C.N.Y., 73 F.Supp. 716.

The term "tank vessel," as used in statute excluding that type of vessel from the term "seagoing vessel" in provision for increase in liability of owner of a seagoing vessel when value of owner's interest in vessel and cargo does not equal sixty dollars a ton, refers to tank vessels of the river or harbor type.—Petition of Panama Transport Co., supra.

83. U.S.—Monongahela River Cons. Coal, etc., Co. v. Hurst, Tenn., 200 F. 711, 119 C.C.A. 127. 58 C.J. p. 637 note 57

Prior provisions of act

U.S.—The Sears, D.C.N.Y., 8 F. 365. 58 C.J. p. 636 notes 53–56.

Waters referred to in such statute comprise all the waters to which the admiralty jurisdiction extends—In re Eastern Dredging Co., D.C.Mass., 138 F. 942—58 C.J. p. 637 note 58.

Statute held valid

U.S.—Ex parte Garnett, Ga., 11 S.Ct. 840, 141 U.S. 1, 35 L.Ed. 631. 58 C.J. p. 637 notes 59, 60

84. U.S.—Kulack v. The Pearl Jack, D.C.Mich., 79 F.Supp. 802, affirmed, C.A., 178 F.2d 154—The Trim Too, D.C.Mass., 39 F.Supp. 271—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829

Vessel engaged in coastwise shipping was within operation of statute. —The Wichita Falls, D.C.Tex., 15 F.Supp. 612

85. U.S.—Lehigh Valley R. Co. v. Jones, C.C.A.N.J., 50 F.2d 828. 58 C.J. p. 637 note 61.

86. U.S.—In re Michigan SS. Co., D.C.Cal., 133 F. 577, reversed on other grounds 144 F. 788, 75 C.C.A. 518, certiorari denied 27 S.Ct. 782, 203 U.S. 593, 51 L.Ed. 332.

87. U.S.—In re Great Lakes Transit Corporation, D.C.Ohio, 53 F.2d 1022, affirmed, C.C.A., 63 F.2d 849—The Trim Too, D.C.Mass., 39 F.Supp. 271.

88. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980. 58 C.J. p. 637 note 64.

Jurisdiction of proceeding to limit liability of foreign vessel see infra § 250.

favor of foreign owners,[89] where the enforcement, and limitation, of liability, are sought in the courts of this country, even where the liability or claims arise from a collision occurring on the high seas,[90] or in the territorial waters of a country to which neither of the colliding vessels belongs,[91] or where only one vessel is involved in a disaster on the high seas.[92] In such case the statutes of the United States, and not the law of the country of the vessel, in respect of which liability is sought, is applied,[93] even though there is no showing as to what, if any, is the law of such country,[94] and even though it appears that the law of such country provides for limitation on terms and conditions different from those prescribed by the laws of the United States.[95] It has been held or recognized that the rule permitting the application of the laws of the United States applies as well when it operates in favor of, as when it operates against, the foreign vessel or its owner.[96]

§ 241. Persons Entitled to Benefit of Limitation

The rights and benefits of the federal statute providing for limited liability inure only to owners; but the term "owners" includes a charterer who mans, victuals, and navigates a vessel at his own expense or procurement.

While the term "owner" as used in the federal statute, 46 U.S.C.A. § 183, limiting the liability of the owner of a vessel to the amount or value of the interest of such owner in such vessel and her freight then pending, is taken in a broad and popular sense, in order not to defeat the manifest intent of the statute,[97] the rule is, except with respect to charterers, that the rights and benefits of the statute inure only to owners,[98] and to such owners only as fall within the description of the statute.[99] Accordingly, in order to avail himself of the right granted by the statute, the shipowner must bring himself within the terms fixed by the statute.[1]

Vendor retaining title as security. A vendor retaining title to a vessel solely for the purpose of securing his purchase price is not, prior to default, liable as owner for the acts of the vendee or of the master and crew, within the scope of the statute,[2] and a manufacturer so retaining legal title is not entitled to the limitation of liability for injuries and damages resulting from neglect in the manufacture of the vessel.[3]

Part owners. Under the federal statute, 46 U.S.C.A. § 189, providing that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and that the aggregate liabilities of all the owners of a vessel on account thereof shall not exceed the value of such vessel and freight pending, the right of less than all owners to claim limitation has been recognized or upheld,[4] and the fact that one of several owners is not entitled to claim the benefit of the

Application of English and Canadian statutes to foreign vessels

U.S.—The Scotland, N.Y., 105 U.S. 24, 26 L.Ed. 1001.
58 C.J. p. 637 note 73, p. 638 notes 74-77.

89. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—The Mandu, D.C.N.Y., 20 F. Supp. 820.
58 C.J. p. 637 note 65.

90. U.S.—Deslions v. La Compagnie Generale Transatlantique, N.Y., 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973.
58 C.J. p. 637 note 66.

91. U.S.—Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, D.C.N.Y., 27 F.2d 1002.

92. U.S.—Oceanic Steam Nav. Co. v. Mellor, 34 S.Ct. 754, 233 U.S. 718, 58 L.Ed. 1171, L.R.A.1916B 637.
58 C.J. p. 637 note 68.

93. U.S.—Oceanic Steam Nav. Co. v. Mellor, supra.
58 C.J. p. 637 note 69.

94. U.S.—Oceanic Steam Nav. Co. v. Mellor, supra.
58 C.J. p. 637 note 70.

95. U.S.—Oceanic Steam Nav. Co. v. Mellor, supra.

96. U.S.—The Scotland, N.Y., 105 U.S. 24, 26 L.Ed. 1001.
58 C.J. p. 637 note 72.

97. U.S.—Flink v. Paladini, Cal., 49 S.Ct. 255, 279 U.S. 59, 73 L.Ed. 613.
Foreign owner see supra § 240.
Waiver of benefit see infra § 249.

Administratrix of estate of owner

Where administratrix of estate of owner of fishing vessel who had died before vessel was involved in collision was not in privity with navigation of vessel at time of collision, administratrix was entitled to decree limiting her liability as administratrix to value of the remnants, strippings and wreckage of the vessel and her pending freight immediately following sinking of the vessel.—Rainbow Fisheries v. Jacobsen, D.C.Mass., 82 F.Supp. 584.

98. U.S.—Shamrock Towing Co. v. Fichter Steel Corp., C.C.A.N.Y., 155 F.2d 69—The Irving F. Ross, D.C.Mass., 8 F.2d 313—Petition of Martin, D.C.Pa., 102 F.Supp. 43.

Statute held inapplicable to towing contractor, from whom barge owner sought to recover damages caused by negligent operation of another's tug by owner thereof.—State ex rel. Mitchell v. U.S. Fidelity & Guaranty Co., 24 P.2d 1037, 144 Or. 535.

99. U.S.—The Maria and Elizabeth, D.C.N.J., 11 F. 520.

1. U.S.—Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., C.C.A.Md., 107 F.2d 373—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—General Seafoods Corp. v. J.S. Packard Dredging Co., D.C.Mass., 40 F.Supp. 1015.

2. U.S.—American Car & Foundry Co. v. Brassert, Ill., 53 S.Ct. 618, 289 U.S. 261, 77 L.Ed. 1162.

3. U.S.—American Car & Foundry Co. v. Brassert, supra.
Purpose of statute as not concerned with manufacture of vessel see supra § 239.

4. U.S.—The Paraiso, D.C.Wash., 226 F. 966.
58 C.J. p. 638 note 90.
Rights and liabilities of part owners generally see supra § 16.

statute does not of itself prevent another owner from claiming the benefit.[5]

Corporations and corporate stockholders. In a proper case a corporation is entitled to the benefit of the federal statute providing for the limitation of liability of vessel owners.[6] Moreover, in applying the rule that the statute should be liberally construed, and that the word "owner" must be taken in a popular sense in order not to defeat the legislative purpose, it has been held that stockholders of a corporation to which the vessel in question belonged may be regarded as owners within the meaning, and therefore entitled to claim the benefit, of the statute.[7]

The United States, as the owner of a vessel, has been held to be entitled to limit its liability for damages for delay and failure to transport cargo to the value of the vessel.[8]

Insurer. An underwriter to whom a stranded vessel has been abandoned as a total loss is an "owner" within the meaning of the act.[9]

Effect of charter or lack thereof. Under an express provision of the federal statute, 46 U.S.C.A. § 186, that the charterer of any vessel in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the act, a charterer who comes within the scope of the provision is entitled to limit his liability,[10] but one who does not man, victual, and navigate the vessel involved, at his own expense or procurement, may not claim the benefit of the act.[11] On the other hand, the fact that one not the owner of a vessel mans, victuals, and navigates her does not entitle him to limitation of liability unless he is a charterer;[12] nor is a mere bailee entitled to limitation of liability.[13] In any event, the right of the owners to proceed under the act exists even though they

5. U.S.—De Esmoris v. Whitney, etc., Shipping Co., D.C.Ala., 39 F.2d 191.
58 C.J. p. 638 note 91.

6. Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114.
58 C.J. p. 638 note 93.

7. Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, supra.
58 C.J. p. 638 note 96.

8. U.S.—Hudson Trading Co. v. U.S., C.C.A.N.J., 28 F.2d 744.

9. U.S.—Craig v. Continental Ins. Co., Mich., 12 S.Ct. 97, 141 U.S. 638, 35 L.Ed. 886.

10. U.S.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S.S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.
58 C.J. p. 638 notes 1, 2.

Amount of value surrendered

A charterer wishing to be treated as an owner pro hac vice in order to limit his liability must stand in the shoes of the owner in respect of the amount of value surrendered.—Petition of McAllister Bros., D.C.N.Y., 96 F.Supp. 575.

Charterer of barge

The provision applies to barges; and the original charterer of a barge alone who employed a barge captain whose wages he continued to pay and subchartered the barge accompanied by barge captain to railroad company was an "owner" of barge within provision, since such barge was manned and navigated by captain procured by charterer who was entitled to limitation of liability where he was without knowledge or privity as to negligent acts of barge captain causing injuries.—The Martha R. Grimes, D.C.N.Y., 49 F.Supp. 591.

United States held chartered owner

Where United States took boat into Coast Guard for duration of war pursuant to written offer and acceptance referred to as a license, which provided that boat might be relinquished at any time and boat was used and manned, government became owner pro hac vice and was entitled to maintain admiralty proceedings to limit liability arising out of explosion and fire to the same extent as one specifically designated a charter owner.—Austerberry v. U.S., C.A. Mich., 169 F.2d 583.

Director general of railroads has been treated as a charterer of a vessel taken over for operation in connection with a railroad system, and, as such, entitled to claim the benefit of the Limited Liability Act in a proper case.—The Virginia, D.C.Md., 264 F. 986, affirmed, C.C.A., Hines v. Butler, 278 F. 877, certiorari denied 42 S.Ct. 185, 257 U.S. 659, 66 L.Ed. 421.

11. U.S.—Shamrock Towing Co. v. Fichter Steel Corp., C.C.A.N.Y., 155 F.2d 69.—The Martha R. Grimes, D.C.N.Y., 49 F.Supp. 591.—The James Horan, D.C.N.J., 10 F.Supp. 28, affirmed, C.C.A., 78 F.2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corp., 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.
58 C.J. p. 639 note 3.

Payment to owner held insufficient

Charterer of barge was held not entitled to limitation of liability on ground that charterer procured manning and victualing of barge by paying owner who in turn furnished and paid crew.—The James Horan, D.C.N.J., 10 F.Supp. 28, affirmed, C.C.A., 78 F.2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corp., 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

12. U.S.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S.S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.—Jones & Laughlin Steel Corporation v. Vang, C.C.A. Pa., 73 F.2d 88, certiorari dismissed 55 S.Ct. 406, 294 U.S. 735, 79 L.Ed. 1263.
"Charter party" defined see supra § 26

Operator held not charterer

Where operator of a towing company had no express charter party covering use of tug in his possession, owner of tug was incompetent, no charter money had been paid to his guardian, and no charter party had been approved by court, operator of towing line was not the charterer of the tug so as to be entitled to limitation of liability for damage.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied, Stone v. Diamond S.S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.

13. U.S.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S.S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.—Jones & Laughlin Steel Corporation v. Vang, C.C.A. Pa., 73 F.2d 88, certiorari dismissed 55 S.Ct. 406, 294 U.S. 735, 79 L.Ed. 1263.

had so let the vessel that the charterers became owners pro hac vice.[14]

§ 242. Extent of Liability and Compensation Fund

a. In general
b. Items and vessels included in compensation fund
c. Computation of value
d. Freight pending
e Interest
f. Under Carriage of Goods by Sea Act

a. In General

Except in so far as provision is made for increased liability in certain instances, the liability of a shipowner under the federal statute is limited to the value of his interest in the vessel and her pending freight. Under a provision to that effect, the liability of a part owner is limited to his proportionate share of the liability or debt.

Under the federal statute providing for limited liability, 46 U.S.C.A. § 183, the liability of the owner of a vessel, who is entitled to the benefit of the act, may not exceed the amount or value of the interest of such owner in such vessel, and her freight then pending,[15] except in so far as special provision is made for increased liability. The measure of liability is the same whether the vessel and freight are transferred or whether their value is paid into court for apportionment.[16]

Total loss. Except where the special provision for increased liability is applicable, in a case of total loss an owner will in substance be entirely discharged from losses occurring on the voyage in respect of which the owner is entitled to limitation,[17] even though the actual damage to, or loss of, the goods to be carried,[18] as in the case of theft,[19] took place before the destruction of the vessel.

Provision for increased liability. Under the amendment of 1935, 46 U.S.C.A. § 183, subds. (b)–(f), the amount of the owner's liability, as based on the value of the owner's interest in the vessel, may, where such amount is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than a specified amount per ton of the vessel's tonnage, be increased to such specified amount.[20]

Distinct interests in vessel. The provision of the federal statute, 46 U.S.C.A. § 189, that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities which his individual share of the vessel bears to the whole, and that the aggregate liabilities of all the owners on account thereof shall not exceed the value of such vessel and freight pending, relieves part owners, who are entitled to the benefit of the statute, from liability in solido[21] for the liabilities or debts of each other,[22] leaving them liable only for their proportionate shares of the liability or debt;[23] and it also confines the liability of each part owner entitled to the limitation to his individual interest in the vessel and her freight,[24] subject to the rules as to the liability of a part owner as to his personal contract, discussed infra § 243 b (1), and as to his privity or knowledge, discussed infra § 244 a.

Division of loss. When both vessels are at fault for a collision, the general rule that the damage is to be divided equally between them and a decree made for one half the difference between their respective losses in favor of one who has suffered most, so as to equalize the burden, discussed in Collision § 186, is first given effect,[25] and the amount so arrived at is treated as the unlimited liability of the owner against whom the decree is given to the owner of the other vessel, and the former's claim

14. U S —The Nat E Sutton, D.C N.Y, 42 F 2d 229
58 C J p 638 note 99.
Owner not in control
Statute does not confine right of limitation to an owner who directs and controls operation of vessel.—Petition of Anthony O'Boyle, Inc, D.C N Y., 51 F Supp. 430.

15. U.S —The Aloha, D.C Wash, 56 F 2d 647—The C. F Coughlin, D.C N.Y, 25 F.Supp. 649—Hockley v Eastern Transp. Co., D C Md., 9 F. Supp. 411—The Kearny, D.C N Y., 3 F Supp. 718—The Lotta, D.C S.C., 150 F. 219.

16. U S.—In re Norwich, etc., Transp. Co., C C.N.Y, 18 F Cas No. 10,362, affirmed 6 S Ct. 1150, 118 U.S. 468, 30 L.Ed. 134.
Apportionment in general see infra § 256.

17. U S —Norwich, etc, Transp. Co. v. Wright, Conn, 13 Wall. 104, 20 L.Ed. 585
58 C.J. p 639 note 11.
Abandonment or surrender in the case of total loss see infra § 247.

18. U.S.—Wattson v. Marks, D.C. Pa., 29 F.Cas.No.17,296

19. U.S.—Wattson v. Marks, supra.

20. U S.—Petition of Panama Transport Co, D.C.N.Y., 73 F Supp. 716.
Vessels within increased liability provisions see supra § 240.

21. U.S.—De Esmoris v. Whitney, etc, Shipping Co., D.C.Ala., 39 F.2d 191.
58 C.J. p 639 note 21.
Right of part owners to limit liability in general see supra § 241.

22. U.S.—Cook v. Smith, Pa., 187 F. 538, 109 C.C.A. 304.
58 C.J. p 639 note 22.

23. U S.—Whitcomb v. Emerson, D. C.Mass., 50 F. 128.

24. U.S.—Richardson v. Harmon, Ohio, 32 S.Ct. 27, 222 U.S. 96, 56 L.Ed. 110.
58 C.J. p 640 note 24.

25. U.S.—The Cassimir, D.C.N.Y, 55 F Supp. 822, affirmed, C C.A., Cuba Distilling Co. v. Grace Line, Inc., 143 F.2d 499, certiorari denied 65 S.Ct. 271, 323 U S. 782, 89 L.Ed. 624.
58 C.J. p 640 note 28.

for limitation is to be made in respect of such amount,[26] even though the other vessel is lost.[27]

b. Items and Vessels Included in Compensation Fund

The federal statute providing for limited liability should not receive too narrow a construction as to the items which constitute the compensation fund. Ship's stores and equipment, and damages recoverable for injury to the vessel, are included; but neither insurance on the vessel nor cargo is included. Generally, where one of several vessels owned by the same person is at fault, only such vessel is to be included.

Notwithstanding the general rule that the federal statute relating to limited liability is to be liberally construed in favor of the shipowner, discussed supra § 239, the view has been taken that it should not receive a narrow construction with respect to the items which constitute the compensation fund,[28] in other words, the statute is to be liberally construed against the shipowner in respect of what constitutes the "interest" of the owner, or the "value" of the "interest" of the owner, in the vessel,[29] so as to cover what the owners have at risk for the object of adventure.[30]

Ship's stores or equipment. Under the statute, ship's stores on board for the purpose of the voyage have been included in the value of the vessel,[31] but the view has been taken that the whaling equipment, provisions, and supplies of a whaling ship are not within the meaning of the words "ship or vessel," as used in the statute.[32] The court has denied the inclusion of the value of a dummy engine which had not been used and was not intended for use in navigating the vessel;[33] but it has been held that there should be included a traveling steam hoist or derrick which was mounted upon a fuel scow, in respect of which limitation was sought, specially designed to be used with such a hoist, although the hoist had no connection with the navigation of the scow.[34]

Damages incurred or claimed by owner of vessel. The damages recovered or recoverable by the owner from another vessel or her owner for injury to the vessel in collision, in respect of which limitation is sought, constitute an interest in, and stand in the place of, the vessel, and are included in the value which must be surrendered,[35] even though the vessel, in respect of which limitation is sought, is not a total loss.[36] So also the owner's right of action based on alleged negligence which caused a fire on the vessel is to be included[37] However, the owner is entitled to deduct from the amount of such damages the reasonable legal expenses incurred in recovering them.[38]

Insurance. Insurance effected by the owners on the vessel and her freight is not an "interest in such vessel and freight" which they are bound to surrender for the benefit of claimants for injuries.[39]

Cargo on the vessel, which belongs to the owner, is not included.[40]

Several vessels owned by person seeking limitation. Under the federal statute, where only one of several vessels, owned by the same person, is at fault, the general rule is that only the vessel which is at fault is to be included.[41] Where, however, two vessels of the same owner are at fault, the

26. U.S.—The Cassimir, D.C.N.Y., 55 F.Supp. 822, affirmed, C.C.A., Cuba Distilling Co. v. Grace Line, Inc., 143 F.2d 499, certiorari denied 65 S.Ct. 271, 323 U.S. 782, 89 L.Ed. 624.
58 C.J. p. 640 note 29.

27. U.S.—The Cassimir, D.C.N.Y., 55 F.Supp. 822, affirmed, C.C.A., Cuba Distilling Co. v. Grace Line, Inc., 143 F.2d 499, certiorari denied 65 S.Ct. 271, 323 U.S. 782, 89 L.Ed. 624.
58 C.J. p. 640 note 30.

28. U.S.—Petition of Navigazione Libera Triestina, D.C.N.Y., 34 F.2d 150.

29. U.S.—Phillips v. Clyde SS. Co., C.C.A.Md., 17 F.2d 250.

30. U.S.—The Buffalo, N.Y., 154 F. 815, 83 C.C.A. 531.

31. U.S.—The Walter A. Luckenbach, C.C.A.Cal., 14 F.2d 100, and certiorari denied Luckenbach S.S. Co. v. Union Oil Co., 47 S.Ct. 335, 273 U.S. 741, 71 L.Ed. 868.
58 C.J. p. 640 note 36.

32. U.S.—Swift v. Brownell, C.C. Mass., 23 F.Cas.No. 13,695, Holmes 467.

33. U.S.—The C. H. Northam, D.C. Mass., 181 F. 983

34. U.S.—The Buffalo, N.Y., 154 F. 815, 83 C.C.A. 531.

35. U.S.—The Bleakley No. 76, D.C. N.Y., 56 F.2d 1037.
58 C.J. p. 640 note 41.

36. U.S.—Phillips v. Clyde SS. Co., C.C.A.Md., 17 F.2d 250.

37. U.S.—Petition of Navigazione Libera Triestina, D.C.N.Y., 34 F.2d 150
58 C.J. p. 640 note 43.

38. U.S.—The Bleakley No. 76, D.C. N.Y., 56 F.2d 1037.
58 C.J. p. 640 note 41 [b].

39. U.S.—The Princess Sophia, C.C. A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—Cushing v. Texas & P. Ry. Co., D.C.La., 99 F.Supp. 681, reversed on other grounds, C.A., Cushing v. Maryland Casualty Co., 198 F.2d 536
58 C.J. p. 640 note 44.

40. U.S.—The Bristol, D.C.N.Y., 29 F. 867.

41. U.S.—Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern District Terminal, N.Y., 40 S.Ct. 66, 251 U.S. 48, 64 L.Ed. 130
58 C.J. p. 641 note 47.

Landing craft and mother vessel
Where libelant's fishing vessel and tow were damaged by swells caused by landing craft operated in harbor as pool vessel to ferry personnel of navy attack transport, and United States had no contractual or employer-employee relationship to libelant, United States was entitled to limit liability, if any, to value of landing craft notwithstanding craft was assigned to and carried aboard mother vessel as part of its equipment—Goggin v. U. S., D.C.Cal., 79 F.Supp. 812.

owner is liable to the extent of the value of both.[42] While the view has been taken that, where several vessels of the same owner are engaged in a joint operation when an injury due directly to the fault of one occurred, the value of all the vessels is to be included,[43] the correct rule seems to be that the mere fact of joint operation does not necessarily require the inclusion of the value of all vessels of the same owner engaged in the joint operation,[44] the true test being whether or not a particular vessel was at fault.[45] While it has been held that where several vessels in a flotilla are at fault, only the value of those at fault, and not of the entire flotilla, is to be included,[46] it has also been held that under some circumstances a tug and its barges together may be regarded as "one vessel" within the rule,[47] particularly where the claim is for the loss of cargo on one of several barges fastened to a tug, the tug and the several barges together constituting the effective instrumentality selected by the owner for the transportation of the cargo.[48]

c. Computation of Value

(1) In general
(2) Determination as of what time and place
(3) Additions and deductions

(1) In General

Where an owner elects to retain his vessel, the extent of his liability is governed by the appraised value of the vessel, as determined by market value, or by other methods in the absence of market value.

Where the owner who seeks to limit his liability elects to retain the vessel and to pay into court, or to give security for the appraised amount or value of such vessel, as discussed infra § 248, the appraised value or amount governs in determining the extent of liability if liability is shown.[49] In arriving at the value of a vessel for limitation purposes, if the vessel has a market value, that value, ordinarily, is the one to be taken,[50] or it is, at least, entitled to considerable weight,[51] and the market value is to be determined by such factors as contemporaneous sales of comparable vessels[52] Where, however, a vessel has no real market value, as such, other methods of arriving at value must be used[53] While the cost of reproduction at the date of valuation ordinarily may be considered,[54] it is not the sole determinant,[55] and certainly book value and reconstruction cost out of all proportion to the market value may properly be disregarded.[56]

The price received by the owner at a sale of the vessel has been taken as the measure of liability in the absence of a showing that the price was not fair and reasonable;[57] and where the vessel in question was abandoned to the underwriters, after standing, the amount realized by the underwriters from the sale of the wreck has been regarded as the proper measure of the value of the ship for the purpose of the act.[58] Valuations placed on a vessel in transfer tax proceedings and related transactions may properly be disregarded.[59]

42. U.S.—The Alvah H. Boushell, C.C.A.Va., 38 F.2d 980, certiorari denied 50 S.Ct. 349, 281 U.S. 743, 74 L.Ed 1156
58 C.J. p 641 note 48.

43. U.S.—Thompson Towing, etc., Assoc v. McGregor, Mich., 207 F. 209, 124 C.C.A. 479.
58 C.J. p 641 note 49.

44. U.S.—The Erie Lighter 108, D.C. N.J., 250 F. 490—The W. G. Mason, N.Y., 142 F. 913, 74 C.C.A. 83.

45. U.S.—Liverpool, etc., Steam Nav. Co. v. Brooklyn Eastern District Terminal, N.Y., 40 S.Ct. 66, 251 U.S. 48, 64 L.Ed. 130.
58 C.J. p 641 note 51.

46. U.S.—Hockley v. Eastern Transp. Co., D.C.Md., 9 F.Supp. 411

Barge sunk with cargo and tug towing barge were held "vessel," to value of which owner's liability was limited, as against contention that "vessel" included all barges in flotilla which belonged to owner of sunken barge and tug—Hockley v. Eastern Transp. Co., supra.

47. U.S.—The Carroll, D.C.Md., 60 F.2d 985

48. U.S.—The Anastasia, D.C.Va., 11 F.Supp. 314, remanded on other grounds, C.C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011.

49. U.S.—The Natrona, D.C.Pa., 25 F.2d 507

Determination of value held proper
U.S.—The Port Covington, D.C.Pa., 57 F.Supp. 114.

50. U.S.—The Natrona, D.C.Pa., 25 F.2d 507.
58 C.J. p 641 note 57.

51. U.S.—The Steel Inventor, D.C. N.Y., 36 F.2d 399

52. U.S.—The Black Eagle, C.C.A. N.Y., 87 F.2d 891.

Group sales as inaccurate measure
In proceeding for limitation of or exoneration from liability, in determining amount to be awarded for damage to a scow, evidence of group sales is not an accurate measure of sale price of a single vessel—The Russell No. 5, D.C.N.Y., 32 F.Supp. 582.

53. U.S.—The Black Eagle, C.C.A. N.Y., 87 F.2d 891.
58 C.J. p 641 note 60.

54. U.S.—The Black Eagle, supra—The Russell No. 5, D.C.N.Y., 32 F. Supp. 582.

55. U.S.—The Russell No. 5, supra

56. U.S.—The Black Eagle, C.C.A. N.Y., 87 F.2d 891.
U.S.—The Steel Inventor, D.C.N.Y., 36 F.2d 399

57. U.S.—The Ethelstan, D.C.Fla., 246 F. 187.

58. U.S.—Thommessen v. Whitwill, N.Y., 6 S.Ct. 1172, 118 U.S. 520, 30 L.Ed. 156.

59. U.S.—The Russell No. 5, D.C. N.Y., 32 F.Supp. 582.

Reason for rule
Such figures are not realistic, for it must be generally recognized that a valuation for tax purposes is motivated by quite a different rationale than that which governs a market appraisal of the thing damaged.—The Russell No. 5, supra.

(2) Determination as of What Time and Place

The value of the owner's interest in the vessel is taken as it exists after the loss, that is, as of the time when and place where the voyage was terminated or broken up.

The value of the owner's interest is taken as it exists after the loss[60] The exact time of estimating the value of the vessel is the termination of the voyage on which the liability is incurred or the loss is sustained, in respect of which the limitation of liability is sought.[61] If the ship is lost at sea or the voyage is otherwise broken up before arriving at the port of destination, the voyage is considered as terminated, for the purpose of fixing the owner's liability, at the time of her loss[62] or of the breaking up of the voyage.[63] So if the vessel is sunk or stranded, and the voyage thus terminated before the actual end of the trip, the owner's liability is measured by the value of the vessel in her sunken[64] or stranded[65] condition; and, where the vessel was destroyed by fire, the scrap value of the vessel at the place where the fire occurred is to be taken for limitation purposes.[66] So it has been held that, where a vessel was disabled in a collision, the measure to be used is her value in her disabled condition at the place of collision notwithstanding she is subsequently taken to a place of safety by salvors;[67] but there is authority for the view that, in this connection, where a vessel was disabled, but reached her place of destination, with the aid of salvors or others, and delivered her cargo,[68] or part of her cargo,[69] the voyage terminated when she arrived at that place within the meaning of the foregoing rules.

Notice of termination of voyage. Where a vessel returns to port because of damage to the ship, it has been held that the shipowner may, with respect to the claim of the owner of the cargo which was also damaged, terminate the voyage at any time after he discovered he was entitled to limit his liability,[70] by giving the cargo owner notice of his abandonment of the voyage,[71] thereby fixing the time at which the value of the vessel will be determined for limitation purposes;[72] and the shipowner is not required to increase the value of the ship, by making repairs, before declaring the voyage terminated.[73]

Delay or failure to transport cargo. A cargo owner's measure of damages for delay or failure, on the part of the United States, as the owner of a vessel, to transport cargo has been held to be limited to the value of the vessel at the time the libel is filed.[74]

(3) Additions and Deductions

Whether there should be added to the value of a vessel the added value due to salvage services or repairs, or whether there should be deducted from a subsequent sound value the expense of salvage or repairs, depends on the time and place of the termination of the voyage. Outstanding liens have not been deducted in determining the value of the owner's interest.

In view of the fact that value is to be determined at the time and place of the termination of the voyage, the determination of the question as to the inclusion in the value of the added value due to salvage services or to repairs, or as to the deduction,

60. U S —Cushing v Texas & P. Ry. Co, D C.La., 99 F Supp 681, reversed on other grounds, C A, Cushing v. Maryland Casualty Co, 198 F 2d 536—The Chickie, D.C.Pa., 54 F.Supp 19.
58 C.J p 642 note 67

Under early English statutes, the value, in respect of which limitation was allowed, was the value before the accident—Cushing v. Texas & P. Ry Co, D C La, 99 F Supp 681, reversed on other grounds, C A., Cushing v Maryland Casualty Co, 198 F 2d 536—58 C J p 642 note 66.

61. U S.—In re W. E Hedger Co, C C.A N Y, 59 F 2d 982—The C F Coughlin, D C N Y, 25 F Supp 649—Hockley v Eastern Transp Co, D.C Md, 9 F Supp. 411
58 C.J p 642 note 68.

Time for surrender of vessel see infra § 247

62. U.S.—The City of Norwich, N.Y., 6 S.Ct 1150, 118 U.S 468, 30 L Ed 134—Hockley v Eastern Transp Co, D.C.Md, 9 F Supp. 411—In re Meyer, D C Cal, 74 F. 881.

63. U S —The C. F Coughlin, D C N.Y, 25 F Supp. 649—Hockley v Eastern Transp Co., D.C Md, 9 F.Supp 411
58 C.J p 642 note 70

64. U S —The City of Norwich, N Y., 6 S Ct. 1150, 118 U S 468, 30 L Ed 134.

65. U S —The Great Western, N.Y, 6 S Ct. 1172, 118 U S. 520, 30 L Ed 156
58 C J. p 642 note 72.

66. U S —The C. F. Coughlin, D.C N.Y., 25 F Supp. 649.

67. U S —Boston Marine Ins Co. v. Metropolitan Redwood Lumber Co, Cal., 197 F 703, 117 C.C A 97.
58 C J. p 642 note 73.

68. U S —The H. F Dimock, D C N Y., 186 F. 662

69. U S —The Anna, D.C.S.C., 47 F 525.

70. U S —Rice Growers Ass'n of Cal v Rederiaktiebolaget Frode, C A. Cal, 176 F.2d 401, certiorari denied 70 S.Ct. 159, 338 U.S 878, 94 L.Ed 539.

Reason for termination

Where cargo owner seeks to recover damages to cargo in excess of value of vessel damaged by fire, vessel owner's termination of voyage is not ineffective merely because owner states that action is taken pursuant to bill of lading rather than for purpose of claiming limitation of liability —Rice Growers Ass'n of Cal v. Rederiaktiebolaget Frode, supra.

Filing of limitation petition held not condition precedent

U S —Rice Growers Ass'n of Cal. v. Rederiaktiebolaget Frode, supra.

71. U.S.—Rice Growers Ass'n of Cal. v Rederiaktiebolaget Frode, supra

Delay in giving notice held not unreasonable

U.S.—Rice Growers Ass'n of Cal v. Rederiaktiebolaget Frode, supra

72. U S.—Rice Growers Ass'n of Cal v Rederiaktiebolaget Frode, supra

73. U S —Rice Growers Ass'n of Cal. v. Rederiaktiebolaget Frode, supra.

74. U.S.—Hudson Trading Co. v. U. S., C.C A.N.J., 28 F.2d 744.

from a subsequent sound value, of the expense of salvage or repairs, depends on the time and place of such termination.[75] Thus the liability of the owner of a vessel which sank before the destined termination of the voyage, whose liability is measured by the value of the vessel in her sunken condition, is not extended or increased by the fact that the vessel is raised and repaired;[76] and it has also been held that the value of a stranded vessel is not affected by the result of any subsequent salvage operation, whether undertaken by the owner or others.[77] Although there is authority to the contrary,[78] it has been held that there must be deducted, from the value of the vessel, after being brought into port in her disabled condition, the expense of salvage,[79] and also an allowance for the risks affecting the probability of her rescue.[80] Certain other deductions have been refused;[81] but, where the knockdown or junk value is taken as the basis of value, the total value of the material contained in the vessel, less the total expense of breaking her up and getting the material out, is the proper method of valuation.[82]

Liens. The view has been taken that outstanding liens are in general not to be deducted in determining the value of the owner's interest.[83]

Determining value of repairs. In a proceeding for limitation of liability arising out of an accident which occurred a long time before the proceeding, deductions from the present value of the vessel on account of additions made since the accident should be made at their present value, and not at their cost, in appraising the value at the time of the accident.[84]

Absence of evidence as to valuation of parts. A separate allowance for spare parts, added to the value of the vessel, is required to be deducted where there is no evidence of valuation of such parts.[85]

d. Freight Pending

Under the provision of the federal statute limiting the liability of the owner of a vessel to the value of his interest therein and freight then pending, the phrase "freight then pending," which should not be given a narrow construction, means the earnings, of the voyage on which the liabilities in issue arose, as of the time when the voyage terminated or was broken up.

As to what is "freight" or "freight then pending," within the meaning of the federal statute, 46 U.S C.A. § 183 a, which provides that the liability of an owner, entitled to the benefit of the act, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending, the view has been taken that, notwithstanding the general rule that the statute is to be given a liberal construction favorable to the shipowner, discussed supra § 239, the term should not be given a narrow construction,[86] and that in general the word "freight" means earnings.[87] It includes fares for passengers[88] and the earnings of the vessel in transporting the goods of her owner.[89]

In determining the meaning of the phrase "freight then pending," such provision is to be treated as in pari materia, and to be construed, with the provision of the act for the apportionment of compensation among various claimants,[90] and, as so construed, means the freight pending for the voyage on which the liabilities involved in the limitation

75. U S—The City of Norwich, N Y., 6 S Ct 1150, 118 U S 468, 30 L Ed. 134
58 C J. p 642 note 78.

76. U S—The City of Norwich, supra.

77. U S—Pacific Coast Co v. Reynolds, Cal., 114 F 877, 52 C C A. 497, certiorari denied 23 S Ct. 841, 187 U S 640, 47 L Ed 345—The Abbie C Stubbs, D C Me., 28 F. 719
58 C J p 642 note 81

78. U S—The H. F Dimock, D C N. Y., 186 F 662
58 C J p 643 note 82.

79. U S—Boston Marine Ins Co. v. Metropolitan Redwood Lumber Co., Cal., 197 F 703, 117 C C A. 97

80. U.S.—Boston Marine Ins. Co v. Metropolitan Redwood Lumber Co., supra.

81. U S—The Steel Inventor, D.C N Y., 36 F.2d 399.
58 C J. p 643 note 85.

82. U.S—The C. H. Northam, D C Mass., 181 F. 985.

83. U S—The Leonard Richards, D. C.N J., 41 F 818.
58 C J p 643 note 87.

84. U S—The Captain Jack, D.C Conn., 162 F. 808.

85. U.S—The Black Eagle, C.C A.N. Y., 87 F.2d 891

86. U.S.—Deslions v. La Compagnie Generale Transatlantique, N Y., 28 S Ct. 664, 210 U S 95, 52 L Ed. 973
58 C J. p 643 note 93

87. U.S.—The Carson, C C A.Cal., 104 F 2d 762, certiorari denied Union Dredging Co v Brashear, 60 S Ct 120, 308 U S. 591, 84 L Ed 494—The Black Eagle, C C.A N Y., 87 F 2d 891—The C F Coughlin, D C N Y., 25 F Supp 649—Hockley v Eastern Transp. Co., D C Md., 9 F.Supp 411
58 C J p 643 note 94
Insurance on vessel and freight not included as interest to be surrendered see supra subdivision b of this section

Particular items included
Where bill of lading describes in freight to be prepaid, charges for landing fee, manifest fee, handling and wharfage, such items are to be included in the pending freight in limitation proceeding, in absence of any showing that items are not for services by vessel owner to the cargo—Rice Growers Ass'n of Cal v Rederiaktiebolaget Frode, C.A.Cal., 176 F.2d 401, certiorari denied 70 S. Ct. 159, 338 U S 878, 94 L.Ed 539.

88. U.S.—The Main v Williams, Md., 14 S.Ct. 486, 152 U S 122, 38 L Ed. 381
58 C J. p 643 note 95.

89. U.S.—The Eureka No 32, D C N. Y., 108 F. 672—Allen v MacKay, D C.Mass., 1 F Cas No.228, 1 Sprague 219.

90. U S.—Deslions v. La Compagnie Generale Transatlantique, N.Y., 28 S.Ct. 664, 210 U.S. 95, 52 L Ed 973.
Apportionment of compensation among claimants see infra § 256.

proceeding arose;[91] and, in accordance with the rule as to the time as of which value is to be determined, the freight pending includes the earnings as of the termination of the voyage or the time when the voyage is broken up[92] Accordingly, the words "freight pending" include freight,[93] including passage money,[94] prepaid at the port of departure, which the owner need not refund, as well as all freight subsequently earned,[95] and it includes also freight earned at the end of the voyage for cargo on board at the time of a collision,[96] and also demurrage due at the termination of the voyage[97]

Salvage Freight pending ordinarily does not include salvage earned during the voyage,[98] but where the salvage service is the sole purpose of the voyage it has been held that the value of the salvage services is to be included.[99]

Whaling or fishing voyage. While the view has been taken that there is not any "freight pending" on a whaling voyage, within the meaning of the act,[1] it has been laid down that, in the case of a fishing vessel, the season's cruising is to be counted as a single voyage, and the earnings for the whole season's fishing are, equally with the vessel, liable for debts contracted on the vessel's account.[2]

Different vessels earning freight. The fact that a vessel of the same owner has earned part of the freight on a through shipment does not require such owner to account for more than that share of the freight which was earned by the vessel at fault;[3] but where the vessel at fault is capable of earning the freight the facts that the cargo was transferred to another vessel of the same owner and that delivery was made by such vessel do not relieve the owner from accounting for the freight so earned.[4]

Part interest in freight. Where a vessel is sailed by the master, who is not one of the owners, on half shares, the interest of the owners in the freight, which must be surrendered, is one half of their interest in the freight[5]

Deductions. Since the interest of the owners in a vessel and her freight then pending is intended to include their entire interest or investment in the adventure, they are not entitled to make any deduction from the gross amount of freight[6] and passage money[7] pending, on account of any expenses incurred for the voyage; or any deduction for ex-

91. U S —Deslions v. La Compagnie Generale Transatlantique, supra.
58 C J. p 643 note 99

Return trip as distinct voyage
Where vessel, under contract with United States to carry mail to foreign ports and to carry undelivered mail and empty mail bags on return trip without additional charge, figured in collision on return trip, payment for carrying mail was held not "freight then pending" on return voyage, to be surrendered in limitation proceedings, since voyages were distinct, and payment was for services on outward voyage only —The Black Eagle, C C A N.Y., 87 F.2d 891

92. U S —Rice Growers Ass'n of Cal. v Rederiaktiebolaget Frode, C A. Cal, 176 F.2d 401, certiorari denied 70 S.Ct 159, 338 U S. 878, 94 L Ed 539—The C F Coughlin, D C N Y., 25 F Supp 649

Freight not earned
Generally, if the voyage is broken up, resulting in no freight being earned, the owner is not liable for freight —Hockley v. Eastern Transp Co., D C Md, 9 F Supp. 411—58 C J. p 643 note 1 [a].

93. U S —The San Simeon, C C A N Y, 63 F.2d 798, certiorari denied Pacific Atlantic S. S. Co. v. Mooremack Gulf Lines, 54 S.Ct. 61, 290 U S. 643, 78 L Ed. 558.
58 C J. p 643 note 1.

94. U S.—Deslions v. La Compagnie Generale Transatlantique, N.Y, 28 S Ct 664, 210 U S 95, 52 L Ed 973
58 C J. p 643 note 2

95. U S —The Main v Williams, Md, 14 S.Ct. 486, 152 U S. 122, 38 L Ed 381

Freight due from claimant as part of fund
In shipowner's proceeding for limitation of liability to charterer of ship for loss of, and damage to, cargo and to recover from charterer a balance allegedly due for freight, where charterer owed owner for freight, and damages accruing to charterer by reason of stranding of ship after ship deviated from its agreed voyage would exceed freight owed to owner, decree would be entered in favor of owner for freight due and owing and providing that such sum should be surrendered by owner as part of limitation fund — The Tregenna, D C.N Y, 35 F Supp 118, reversed on other grounds, C C A, Farr v. Hain S S Co., 121 F 2d 940

96. U S —The Abbie C. Stubbs, D C Mass, 28 F 719

97. U S —The Giles Loring, D C.Me, 48 F 463.

98. U S —In re Meyer, D.C Cal, 74 F 881.

99. U S —The Captain Jack, D.C Conn., 162 F. 808.
58 C.J. p. 644 note 7.

1. U.S.—Swift v Brownell, C.C. Mass, 23 F Cas No 13,695, Holmes 467.

2. U S —Whitcomb v. Emerson, D C. Mass, 50 F. 128
58 C.J. p 644 note 9.

3. U.S —Ralli v New York, etc, SS. Co., N Y, 154 F. 286, 83 C C A. 290.

Tug towing several barges
Where barge towed by tug sank with cargo, owner's liability for "freight then pending" was limited to what sunken barge would have earned under charter-party if voyage had been completed, and did not include earnings of tug arising from towing of other barges to their destination in flotilla.—Hockley v. Eastern Transp Co, D C Md, 9 F.Supp. 411.

4. U S.—Ralli v New York, etc, SS. Co, N Y, 154 F. 286, 83 C C A 290.
58 C J. p 644 note 11

5. U S —In re Wright, D C N Y., 30 F Cas No 18,066, 10 Ben. 14.

6. U S —The Abbie C. Stubbs, D C. Mass, 28 F. 719
58 C J p 644 note 13
Additions and deductions in computing value of vessel generally see supra subdivision c (3) of this section

Expenses of completing voyage after the accident may not be deducted from the gross freight earned — In re W. E Hedger Co, C.C A N Y, 59 F.2d 982.

7. U S —The Jane Gray, D.C.Wash., 99 F. 582.

penditures for provisions or for wages of the crew,[8] except extraordinary expenses, if any, which were incurred after the disaster for the purpose of earning the freight, which latter may be deducted from the gross freight earned to arrive at the value of the freight within the meaning of the act.[9] Accordingly, the owner may not deduct from passage money the amount given by him to passengers, after the disaster, which the owner was under no obligation to give to them.[10]

e. Interest

In general, whether interest is payable on any amount due from the owner seeking limitation depends on the circumstances of each case, and rests largely in the discretion of the court passing on the matter.

Except as the rule may be affected by an admiralty rule providing for the payment of interest,[11] whether or not interest is payable on any amount due from the owner who seeks limitation depends on the circumstances of each case,[12] and rests largely in the discretion of the court which passes on the matter,[13] and, while interest on the limitation value or fund has been allowed,[14] where the petitioner had the use of the vessel during the entire period of the litigation,[15] the fact that the damage claimants were partly responsible for delay in the litigation has been considered in determining the interest period.[16] An owner who surrenders a vessel for the purpose of limiting liability ordinarily cannot be required to add interest on her appraised value from the time the liability was incurred, although he has long delayed the surrender;[17] but, where the owner delayed the filing of his petition and the surrender of the vessel until after a judgment against him in a state court, he has been required to pay interest on the value of the vessel from the date of such judgment[18] as a condition to a restraining order in respect of the proceeding in the state court.[19] Where a shipowner in a suit in personam sets up his statutory limitation of liability in his answer, but the vessel is not surrendered, or an appraisement had or bond given, he may be required to pay interest on the value of the vessel as it was at the time of, or immediately after, the injury sued for.[20]

Stipulation for interest. If a bond is given as a substitute for surrender, the court may properly require the inclusion of a stipulation for interest[21] from its date;[22] and such stipulation for value is binding.[23] In the absence of any provision for interest, in the stipulation or bond, interest on the appraised value has been denied,[24] except that the owners have been held personally liable for interest from the date of final decree until the decision of the appeal therefrom, during which the fund was withheld.[25]

f. Under Carriage of Goods by Sea Act

Under the Carriage of Goods by Sea Act, liability for any loss or damage to or in connection with the transportation of goods may not exceed five hundred dollars per package, or per customary freight unit, unless the nature and value of such goods have been declared by the shipper, but either party may enlarge his responsibility or waive any immunities he may have under the statute.

8. U S —The José E More, C C.N.Y., 37 F 122
58 C J p 644 note 15.

9. U S.—The José E More, supra.
58 C J p 644 note 16.

10. U.S —Pacific Coast Co. v. Reynolds, Cal, 114 F. 877, 52 C.C.A 497, certiorari denied 23 S.Ct. 841, 187 U S 640, 47 L Ed 345.
58 C J p 644 note 17

11. U S.—The Fairwill, D.C Va, 56 F Supp 887

Purpose of amendment to admiralty rule providing for appraisement of owner's interest in vessel and giving of stipulation for payment of appraised value by providing for payment of "interest at rate of six per cent per annum from the date of said stipulation" was to take from the courts discretion on question of allowing interest, and to fix a rate of interest and when it should commence to run —The Fairwill, supra.

When interest to begin to run

Under admiralty rule providing for due appraisement of owner's interest in vessel and giving of stipulation for payment of appraised value as substitute for surrender of vessel in proceeding by owner for limitation of liability, "with interest at rate of six per cent per annum from the date of said stipulation," interest should run on amount of the ex parte appraisal from date of the ad interim stipulation rather than from date of the collision, and interest on amount of the adjudicated appraisal should run from date of the stipulation instead of from date of the ad interim stipulation —The Fairwill, supra.

12. U S —The Scotland, N.Y, 6 S Ct 1174, 118 U S. 507, 30 L Ed 153

13. U S —Petition of Buckeye S. S Co, D C Ohio, 93 F Supp 818.
58 C J. p 644 note 20

14. U S.—The Perry G Walker, D C. N Y, 216 F. 423
58 C J p 644 note 21.

Date from which interest to be computed

The general rule is that interest on damages should be computed from the date of collision or from the date when payment for necessary repairs was actually made, but, where the date of payment for necessary repairs is not established, interest should be computed from the date when stipulations as to damages were made —Petition of Buckeye S. S. Co, D C.Ohio, 93 F Supp. 818.

15. U S —The Steel Inventor, D C N.Y, 36 F 2d 399.

16. U S —The Perry G. Walker, D C. N.Y., 216 F. 423.

17. U S —The Battler, D C Pa, 58 F 704.

18. U S —The Victor, D C N.Y., 1 F Supp 931

19. U S —The T. W Wellington, D C N Y, 235 F. 728

20. U S —Smith v. Booth, D.C N.Y., 112 F. 553.

21. U.S —The Battler, D.C.Pa, 58 F. 704—In re Harris, N Y., 57 F. 243, 6 C C.A. 320.

22. U S.—In re Harris, supra.

23. U S —In re Harris, supra.
58 C J p 645 note 28.

24. U.S.—The H. F Dimock, Mass., 77 F. 226, 23 C C A. 123.

25. U.S.—The H. F. Dimock, supra.

Under the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304 (5), which has been held to be as much a part of a bill of lading as though physically placed therein by agreement of the parties,[26] neither the carrier nor the ship is liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding five hundred dollars per package,[27] or, in the case of goods not shipped in packages, per customary freight unit,[28] unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading,[29] but, under an express provision of the statute, in no event is the carrier to be liable for more than the amount of damage actually sustained.[30] In the case of a disassembled machine, the limitation value may, depending on the manner of packing and shipping, be computed on some parts of the machine as packages, and on other parts as customary freight units.[31]

Either party may enlarge his responsibility or waive any immunities he may have under the statute;[32] and, under a provision of the statute to that effect, a carrier may by agreement fix some amount other than that specified in the statute as its limit of liability, provided such agreed maximum is no less than the figure specified in the statute.[33] It

26. U S —Shackman v. Cunard White Star, D C.N.Y, 31 F Supp 948.

27. U.S —Pan-Am Trade & Credit Corp v The Campfire, C C A.N.Y., 156 F 2d 603, certiorari denied Waterman S S Corp. v Pan-American Trade Credit Corp., 67 S Ct 194, 329 U S 774, 91 L Ed. 666

Particular items regarded as "packages"

(1) Large pieces of machinery which were shipped on skids, not cased or crated, were "packages" within limitation of liability provisions of statute —Middle East Agency v. The John B Waterman, D C.N Y., 86 F.Supp. 487

(2) An unboxed motortruck was a "package" within the statute, where the contract of carriage in effect stipulated that the truck was to be so regarded —The Margaret Lykes, D.C.La, 57 F.Supp. 466

28. U.S —Waterman S. S. Corp. v. U. S. Smelting, Refining & Min. Co, C.C A La., 155 F.2d 687, certiorari denied 67 S Ct. 115, 329 U.S 761, 91 L Ed. 656.

What constitutes "customary freight unit"

"Customary freight unit," within statute, refers to the unit of quantity, weight, or measurement of the cargo customarily used as the basis for calculation of freight rate to be charged —Waterman S S. Corp. v. U. S Smelting, Refining & Min. Co, supra—The Bill, D C Md, 55 F Supp. 780.

Particular quantities, weights, or measurements

(1) The statute limited a carrier's liability for loss of oil shipped in bulk under a bill of lading specifying freight charges of "$22 per 1,000 kilos" on the basis of $500 for each 1,000 kilograms of oil.—The Bill, supra.

(2) One shipping by steamship a giant amusement crane in 126 pieces, each of which was carefully weighed, measured, and described in schedule attached to clean bill of lading, was not limited to recovery of $500 from shipowner for damages to crane in course of transportation, even though freight charged was lump sum on bill of lading, but each piece was subject separately to such limitation, in absence of showing of custom to the contrary in charging freight on or shipping such cranes —Stirnimann v The San Diego, C C.A N Y, 148 F 2d 141.

(3) Where eleven tractors were shipped uncrated, limitation liability of carrier as to each tractor was $4,270, or 8.54 freight units of 40 cubic feet each multiplied by $500.— Middle East Agency v The John B Waterman, D C.N.Y, 86 F.Supp. 487.

(4) An unboxed motortruck was a "freight unit" within meaning of the statute —The Margaret Lykes, D.C La., 57 F.Supp. 466

Statute was held inapplicable to loss of structural steel which was not in packages and which was shipped under a bill of lading which did not contain any statement as to value of the merchandise, but which provided for a tariff rate of 64 cents per hundred pounds where $500 multiplied by each 100 pounds of steel would produce a sum far greater than the damages allowed —Waterman S S Corp v. U. S. Smelting, Refining & Min. Co, C C A.La., 155 F.2d 687, certiorari denied 67 S Ct 115, 329 U.S 761, 91 L Ed 656.

29. U S —Pan-Am Trade & Credit Corp. v. The Campfire, C C A.N Y, 156 F.2d 603, certiorari denied Waterman S S Corp. v. Pan-American Trade & Credit Corp., 67 S Ct 194, 329 U S. 774, 91 L Ed. 666

No duty to declare value

If shipper is willing to bear the risk of loss in excess of $500 per package, he is privileged to ship at the normal rate, and owes carrier no duty to declare the value of goods and pay a higher rate —Pan-Am Trade & Credit Corp. v. The Campfire, C.C.A N.Y., 156 F.2d 603, certiorari denied Waterman S. S. Corp v. Pan-American Trade & Credit Corp., 67 S Ct. 194, 329 U S. 774, 91 L.Ed. 666

30. U S —The Steel Inventor, D C. Md, 35 F.Supp. 986.

Statute held not measure of liability

Provisions of Carriage of Goods by Sea Act constitute "limitations of liability" rather than a "measure of liability" which is more particularly the function of a true valuation clause.—The Steel Inventor, supra.

Where there is a partial loss, a recovery is permitted for loss or damage actually sustained, the amount recoverable, however, not to be greater than the statutory limit of $500.— Pan-Am Trade & Credit Corp. v The Campfire, D C.N.Y., 64 F.Supp 179, affirmed, C C.A., 156 F.2d 603, certiorari denied Waterman S. S Corp v. Pan-American Trade & Credit Corp, 67 S Ct. 194, 329 U.S 774, 91 L Ed. 666.

31. U S —Middle East Agency v. The John B Waterman, D.C.N Y., 86 F.Supp 487

32. U S —Shackman v. Cunard White Star, D C N.Y., 31 F Supp. 948.

Provision in bill of lading held ineffective

Under provision in Carriage of Goods by Sea Act limiting liability of carrier for loss to $500 per package unless value of goods has been declared, to which reference was made in bill of lading, where value of raw fur skins had not been declared, liability of carrier for nondelivery of two packages of an alleged value of over $18,000 with interest was limited to $500 per package, notwithstanding additional provision in bill of lading that, in event of claims for short delivery when vessel reached destination, price should be market price at port of destination —Shackman v. Cunard White Star, supra.

33. U S —The Steel Inventor, D.C. Md, 35 F.Supp 986

Agreement held repugnant to statute

Provision in bill of lading under-

has been recognized that a deviation may deprive the carrier of the benefits of the statutory limitations of liability.[34]

§ 243. Liabilities Subject to Limitation

a. In general
b. Particular liabilities or causes of liability

a. In General

The federal statute relating to limited liability extends to liability for practically every kind of loss, damage, and injury resulting from the acts of the master or crew; but each voyage must be treated, in respect of its own particular losses and hazards, as a separate venture.

Subject to the rules as to the privity or knowledge of the owner, discussed infra § 244, the federal statute, 46 U.S.C.A. § 183 et seq, relating to limited liability extends to liability for practically every kind of loss, damage, and injury resulting from the acts of the master or crew.[35] However, a claim for a tort for which no liability exists against, or in respect of, a vessel is not subject to limitation.[36]

Liabilities arising during single voyage. Under the federal statute, each voyage or trip, each separate journey, must be treated, in respect of its own particular losses and hazards, as a separate venture;[37] and, where the owner has failed to seek limitation in respect of liabilities on certain voyages, he may not include such liabilities in a proceeding in respect of a subsequent voyage;[38] nor may he include liabilities arising after a particular voyage, in respect of which voyage limitation is sought.[39]

b. Particular Liabilities or Causes of Liability

(1) Liability based on contract
(2) Injuries or obligations to, or losses of, employees
(3) Other liabilities or causes of liability

(1) Liability Based on Contract

While the federal statute providing for limited liability permits limitation with respect to debts and liabilities ex contractu, it does not apply to the owner's liability on his own or personal contract; this exception applies to warranties of seaworthiness, whether express or implied.

The federal statute, 46 U.S.C.A. §§ 183, 189, applies and permits limitation with respect to debts and liabilities ex contractu incurred without the knowledge or privity of the owner.[40] The statute, however, does not permit limitation of the owner's liability on his own or personal contract,[41] even such as relates to the voyage,[42] and even though the breach of the contract is without the owner's priv-

taking to limit maximum liability of carrier to invoice cost is substantially repugnant to statute as applied to case where current market price of cargo at time and place of delivery exceeded invoice cost, but $500 per package greatly exceeded either invoice cost or market price of packages involved—The Steel Inventor, supra.

34. U.S.—Shackman v. Cunard White Star, D.C.N.Y., 31 F.Supp 948

Facts held not to constitute deviation

U.S.—Shackman v. Cunard White Star, supra

35. U.S.—The Clarence P. Howland, C.C.A.N.Y., 6 F.2d 791
58 C.J. p 645 notes 33, 34

36. U.S.—The Laforrest L. Simmons, D.C.Mass., 276 F. 61.
58 C.J. p 645 note 36

37. U.S.—The Snug Harbor, D.C.N.Y., 53 F.2d 407
58 C.J. p 645 note 38.

38. U.S.—The Puritan, D.C.Ill., 94 F. 365.
58 C.J. p 645 note 39.

39. U.S.—The Pelotas, D.C.La., 21 F.2d 236.
58 C.J. p 645 note 40.

40. U.S.—Richardson v. Harmon, Ohio, 32 S.Ct. 27, 222 U.S. 96, 56 L.Ed. 110
58 C.J. p 647 note 85

41. U.S.—Coryell v. Phipps, Fla., 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363—Cullen Fuel Co. v. W. E. Hedger, Inc., N.Y., 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189—American Car & Foundry Co. v. Brassert, Ill., 53 S.Ct. 618, 289 U.S. 261, 77 L.Ed. 1162—The Nat Sutton, C.C.A.N.Y., 62 F.2d 787, amended on other grounds In re W. E. Hedger Co., 63 F.2d 1021—The Philip J. Kenny, D.C.N.J., 57 F.2d 337—The Snug Harbor, D.C.N.Y., 53 F.2d 407—The Linseed King, D.C.N.Y., 48 F.2d 311, affirmed, C.C.A., In re Spencer Kellogg & Sons, 52 F.2d 129, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903—Hockley v. Eastern Transp. Co., D.C.Md., 10 F.Supp. 908.
58 C.J. p 648 note 86.

"The liability that the Act of Congress designs to limit is that which the law imputes to the shipowner by reason of his relation to the ship, her master and crew, not that liability which he voluntarily assumes by express contract"—Petition of Hutchinson, D.C.N.Y., 28 F.Supp. 519, 520.

A shipowner's promise to hospital to pay bills of persons injured on ship was his "personal contract," that is, a contract made by him as distinguished from one imputed to him by law as to liability for acts of others by reason of his ownership of the ship, and as such was not within the protection afforded the shipowner by the statute providing for limitation of liability—Petition of Hutchinson, supra.

Authority of employee to make contract

Company's personal obligations should be determined by authority of one making contract to transact that business, and not by importance of his official positions, and if established routine gives subordinate of transit corporation authority to make personal contract, corporation cannot insist that only more important officials should bind it to personal obligations; accordingly, since employee who accepted order for barge was a "manager" of corporation within rule that contracts of corporate "managers" are personal to corporation, latter was held not entitled to limitation of liability where barge sank while loaded.—The Fred E. Hasler, C.C.A.N.Y., 65 F.2d 589

42. U.S.—In re Nieder, D.C.Wash., 11 F.2d 417.

ity or knowledge,[43] and this rule applies to a contract which the owner has expressly authorized[44] or has ratified.[45] On the other hand, it has been held that the right to limit liability should not be abridged unless by agreement of the person entitled to the benefits of the statute;[46] that, by a "personal contract," as here used, is meant a contract made by the person or corporation to be bound as distinguished from one imputed to such person or corporation,[47] and that the limited liability statute should not be cut down from its intended effect by too liberal an attribution of contracts to owners as personally theirs.[48] Moreover, the view has been taken that the mere fact that the owner personally makes the contract does not prevent the limitation of liability for damage or injury arising from a breach of a stipulation in such contract, not within the owner's privity or knowledge;[49] and that the term "personal contract" has been limited to those of the nature of warranties where the obligation was to be performed by the obligor personally,[50] and does not necessarily include a promise which involves the future conduct of the promisor,[51] or include promises to do acts necessarily performed through the intervention of others.[52] In any event, an owner's personal contract will not preclude his right to limitation of liability where the contract expressly provides that the shipments are subject to the limitation of liability statute.[53]

Warranty of seaworthiness. Under the rule that the statute does not permit limitation of liability on a personal contract, limitation has been held not to be permissible with respect to a warranty of seaworthiness, whether express[54] or implied,[55] and

43. U S—Interlake Iron Corp v Gartland S S Co, C C A Mich, 121 F 2d 267, certiorari denied Gartland S S Co v Interlake Iron Corp, 62 S.Ct. 181, 314 U.S 681, 86 L Ed 545—In re Great Lakes Transit Corp, C C A Ohio, 81 F 2d 441—Hockley v Eastern Transp. Co., D C Md, 10 F Supp 908

44. U S—The Nat Sutton, C C A N. Y., 62 F 2d 787, amended on other grounds In re W. E Hedger Co., 63 F.2d 1021.

58 C.J p 648 note 88.

45. U S—American Warehouse, etc, Co v. Davison Lumber Co, N.Y., 240 F 126, 153 C C.A 162, certiorari denied 37 S Ct 405, 243 U S 643, 61 L.Ed. 944.

58 C J p 648 note 89.

46. U S.—The S & H No 7, D C.N. Y, 24 F.Supp. 1009.

47. U.S—Benner Line v Pendleton, N.Y., 217 F. 497, 133 C C A 349, affirmed 38 S Ct 330, 246 U S 353, 62 L.Ed. 770.

48. U S—Capitol Transportation Co. v Cambria Steel Co, Mich, 39 S. Ct 292, 249 U S 334, 63 L Ed 631—The S & H No 7, D C N Y, 24 F. Supp. 1009—The Fred E Hasler, D C N.Y., 2 F.Supp. 45, reversed on other grounds, C C.A., 65 F 2d 589.

49. U S.—The Soerstad, D C N.Y., 257 F. 130.

58 C J. p 648 note 91.

50. U S—The No. 34, C C.A N Y, 25 F 2d 602, certiorari denied L Boyers' Sons Co v Hogan, 49 S.Ct 11, 278 U.S 606, 73 L Ed. 533—The S & H No. 7, D.C.N Y, 24 F Supp. 1009—Hockley v Eastern Transp. Co., D.C.Md, 10 F Supp 908

Charter party held not personal contract

U.S—The Temple Bar, D.C.Md., 45 F. Supp. 608, affirmed, C.C.A., 137 F.2d 293.

51. U S—The Soerstad, D C N Y., 257 F. 130

58 C J p 648 note 93

52. U S—The S & H. No. 7, D.C.N. Y, 24 F Supp 1009.

58 C J p 649 note 94.

Time of breaking ground as controlling

"With regard to matters of fitting the ship for the voyage in the home port (where the personal contract is made as in this case) the vessel owner has actual personal control or opportunities therefor, . . . while with respect to matters happening after the voyage is begun, it is necessarily contemplated by both parties that these must be performed by agents of the owner, beyond his personal control The dividing line, therefore, between what losses may be limited and what may not will ordinarily be marked by the time of breaking ground on the voyage"—Hockley v Eastern Transp. Co, D.C Md, 10 F Supp. 908, 915.

53. U.S—The Yungay, D.C.N.Y., 58 F.2d 352.

54. U.S—Coryell v Phipps, Fla, 63 S Ct 291, 317 U.S. 406, 87 L.Ed 363—Cullen Fuel Co v W E Hedger, Inc, N Y, 54 S.Ct 10, 290 U S. 82, 78 L Ed 189—Shamrock Towing Co. v Fichter Steel Corp, C.C.A N Y., 155 F 2d 69—W. E Hedger Transp. Corp. v Gallotta, C.C A N. Y, 145 F.2d 870—New England S. S Co v. Howard, C.C.A N Y, 130 F 2d 354—Hockley v. Eastern Transp. Co., D C.Md., 10 F.Supp 908

58 C.J. p 648 note 86 [a]

55. U.S—Coryell v Phipps, Fla., 63 S Ct. 291, 317 U S. 406, 87 L Ed. 363—Cullen Fuel Co. v. W. E. Hedger, Inc, 54 S Ct. 10, 290 U.S. 82, 78 L. Ed. 189—W R. Grace & Co v Charleston Lighterage & Transfer Co., C.A S C, 193 F.2d 539—Shamrock Towing Co v. Fichter Steel Corp, C.C.A N Y, 155 F.2d 69—W. E. Hedger Transp Corp. v Gallotta, C C A.N.Y., 145 F.2d 370—Interlake Iron Corp. v. Gartland S S Co, C C.A Mich., 121 F 2d 267, certiorari denied Gartland S. S Co. v Interlake Iron Corp, 62 S Ct. 181, 314 U S 681, 86 L Ed 545—The Fred Smartley, Jr, C C A.Va, 108 F 2d 603, certiorari denied S C. Loveland, Inc v Pennsylvania Sugar Co, 60 S.Ct 724, 309 U.S 683, 84 L Ed 1027—In re Great Lakes Transit Corp, C C A Ohio, 81 F 2d 441—The Fred E. Hasler, C.C A N. Y., 65 F.2d 589—American Agr. Chemical Co v O'Donnell Transp. Co., D C N Y, 62 F Supp 239—The Steel Inventor, D C Md., 35 F.Supp. 986—The Anastasia, D C Va., 11 F. Supp 314, remanded on other grounds, C C A., Southern Transp. Co v. Knickerbocker Fuel Co, 79 F.2d 1011—Hockley v. Eastern Transp Co, D.C Md, 10 F.Supp. 908—The Emergency, D.C.N.Y, 9 F.Supp 484

58 C.J. p 648 note 86 [b].

Rule limited to acts by obligor personally

Implied contracts of seaworthiness, in suits on personal contract of owner, are limited to those in nature of warranties where obligation was to be performed by obligor personally, and are not extended to promises to do acts necessarily performed through intervention of others—The Eastland, C.C.A.Ill, 78 F.2d 984, certiorari denied Bishop v St. Joseph-Chicago S S. Co., 56 S.Ct. 442, 297 U. S. 703, 80 L Ed 992—The Fred E Hasler, C.C.A N Y, 65 F.2d 589.

Authority of employee to make contract

Where employee had authority to enter into contract to furnish barge, which implied warranty of seaworthiness, owner was bound by such im-

even though the breach of such warranty is without the owner's privity or knowledge,[56] since privity and knowledge are imputed to an owner in the case of a personal contract containing an express[57] or implied,[58] warranty of seaworthiness.

Effect of charter. The mere fact that a charterer of a vessel, in respect of which limitation is sought, has by contract assumed a personal responsibility in respect of the claim or damage involved does not prevent the owner from limiting liability.[59]

Part owner. Notwithstanding the provision of the statute, 46 U.S.C.A. § 189, which, in a proper case, relieves part owners from liability in solido and which also confines the liability of each part owner to his individual interest in the vessel and her freight, a part owner may not limit his liability to his proportionate share of the debt or obligation,[60] or to the value of his share of the vessel and freight,[61] in the case of liability on his personal contract; and this rule applies to a contract which he has expressly authorized[62] or has ratified,[63] and to a contract entered into by one part owner, acting for all and intending to bind all.[64] On the other hand, it has been held or recognized that the statute applies where limitation is sought by one part owner who was not a party to the contract,[65] or where the contract was made by the master under his general authority to bind the owners;[66] and a part owner may, in a proper case, limit his liability to his share of the vessel where the contract was made by another part owner.[67]

(2) Injuries or Obligations to, or Losses of, Employees

The federal statute permits limitation in liability for injuries to, or losses of, seamen or other employees on the vessel generally; but a claim for wages, or a compensation award, is not subject to limitation

The federal statute, 46 U.S.C.A. § 183 et seq, permits limitation in respect of liability for injuries to seamen or other persons employed on the vessel, in respect of which limitation is sought,[68] and, since the Merchant Marine Act of 1920, 46 U.S.C.A. § 688, governing the enforcement of claims based on personal injury to, or death of, a seaman, did not repeal the statute in so far as such statute permits limitation in respect of such claims,[69] limitation may be had, in a proper case, of a liability, the enforcement of which is sought under the Merchant Marine Act.[70] So also, limitation has been permitted in respect of the loss of the personal effects of the master of a scow.[71]

Wages. By virtue of an express prohibition in the statute, 46 U.S.C.A. § 189, applicable to persons employed by the owners, a claim for a seaman's wages is not subject to limitation,[72] and a part owner may not limit his liability in respect of the master's wages,[73] even though another owner, who is owner pro hac vice, is ultimately liable for the whole amount.[74]

Workmen's compensation acts. A shipowner's liability to pay workmen's compensation awards is not subject to limitation, either by virtue of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 948, expressly so providing,[75] or on the theory that liability to pay com-

plied warranty.—The Fred E. Hasler, supra.

56. U.S.—Hockley v. Eastern Transp. Co., D.C.Md., 10 F.Supp. 908.

57. U.S.—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S.C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027.

58. U.S.—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S.C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027.

59. U.S.—The E. S. Atwood, C.C.A.N.Y., 289 F. 737.
58 C.J. p. 649 note 95.

60. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522.
58 C.J. p. 649 note 97.

61. U.S.—American Warehouse, etc., Co. v. Davison Lumber Co., N.Y., 240 F. 126, 153 C.C.A. 162, certiorari denied 37 S.Ct. 405, 243 U.S. 643, 61 L.Ed. 944—Douse v. Sargent, D.C.N.Y., 48 F. 695.

62. U.S.—McPhail v. Williams, D.C.Mass., 41 F. 61.
58 C.J. p. 649 note 99.

63. U.S.—American Warehouse, etc., Co. v. Davison Lumber Co., N.Y., 240 F. 126, 153 C.C.A. 162, certiorari denied 37 S.Ct. 405, 243 U.S. 643, 61 L.Ed. 944.
58 C.J. p. 649 note 1.

64. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522.

65. U.S.—Warner v. Boyer, D.C.Pa., 74 F. 873.
58 C.J. p. 649 note 3.

66. U.S.—Warner v. Boyer, supra.
N.Y.—Hanschell v. Swan, 51 N.Y.S. 42, 23 Misc. 304.
58 C.J. p. 649 note 4.

67. U.S.—Douse v. Sargent, D.C.N.Y., 48 F. 695.

68. U.S.—The Oloha, C.C.A.Wash., 35 F.2d 447.
58 C.J. p. 650 note 21.

69. U.S.—In re East River Towing Co., N.Y., 45 S.Ct. 114, 266 U.S. 355, 69 L.Ed. 324.
58 C.J. p. 650 note 23.

70. U.S.—The William A. McKenney, D.C.Mass., 41 F.2d 754.
58 C.J. p. 651 note 24.

71. U.S.—The Oneida, C.C.A.N.Y., 282 F. 238.
58 C.J. p. 651 note 33.

72. U.S.—In re Castrian S.S. Co., D.C.N.Y., 290 F. 397.

73. U.S.—Douse v. Sargent, D.C.N.Y., 48 F. 695.

74. U.S.—Douse v. Sargent, supra.

75. U.S.—The Linseed King, D.C.N.Y., 48 F.2d 311, affirmed, C.C.A., In re Spencer Kellogg & Sons, 52 F.2d 129, reversed on other grounds: The Linseed King, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903.

pensation awards under certain compensation acts arises from the employer's personal contract.[76]

Transportation. Limitation has been denied in respect of the claim of seamen for transportation to the home port, where they are prematurely discharged.[77]

(3) Other Liabilities or Causes of Liability

The applicability of the federal statute providing for limited liability has been adjudicated with respect to various liabilities.

The applicability of the federal statute providing for limited liability has been adjudicated with respect to various liabilities.[78]

Statutory liability of stockholders. Stockholders of a corporation, to which the vessel involved belongs, may, under the federal statute, limit their direct liability for the debts and liability of the corporation, imposed on them by state constitutional provision;[79] and the effect of the statute in this respect may not be avoided on the theory that their liability under such constitution is an independent one voluntarily assumed by contract.[80]

Nonmaritime torts The federal statute with respect to limited liability extends to an owner's liability for nonmaritime torts, committed without the privity or knowledge of the owner,[81] and the constitutionality of the statute in this respect has been upheld.[82] The limited liability legislation does not, however, extend protection against loss occasioned by the contact of the vessel with a pile structure, constructed by the owner of the vessel, attached to the land but extending into navigable waters without due precautions to guard against accidents, in the absence of any neglect or want of care on the part of those on the vessel.[83]

Sunken vessel; obstruction of navigation. The right to limit liability arising from the sinking of a vessel, which results in obstructing navigation, has been recognized or upheld.[84] So the right of an owner of a vessel, which had sunk and was an obstruction to navigation, to limit liability in respect of an action by a state or municipality to recover the cost of raising and removing the vessel, has been recognized where the owner had not assumed liability in the matter,[85] notwithstanding a state statute or municipal ordinance imposes the cost of removal on the owner.[86] The right to a limitation of liability applies to a claim for damage to realty by reason of the failure to remove a sunken vessel from land under water,[87] even though the case is not an admiralty cause and is tried in a state court.[88]

Improper navigation. Under the statute, in general, the owner may limit his liability in respect of damages or injuries resulting from faults of navigation of those in charge of the vessel.[89]

76. U.S.—The Linseed King, D.C.N.Y., 48 F.2d 411, affirmed, C.C.A., In re Spencer Kellogg & Sons, 52 F.2d 129, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903.

77. U.S.—In re Murphy, D.C.Ala., 27 F.2d 908, reversed on other grounds, C.C.A., Virginia-Carolina Chemical Corporation v. Murphy, 32 F.2d 87
58 C.J. p. 651 note 32.

78. U.S.—In re Starin, D.C.N.Y., 124 F. 101.

A claim in favor of the United States is subject to limitation—U.S. v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, N.Y., 212 F. 40, 128 C.C.A. 496, L.R.A.1917C 1103—58 C.J. p. 645 note 42

Claim for repayment of freight

A claim for the repayment of freight money paid in advance, but not earned by reason of the failure of the ship to deliver the cargo, is not one of the claims in respect of which limitation may be had—In re Liverpool, etc., Steam Co., D.C.N.Y., 3 F. 168.

Costs of action to enforce liability

The liability of a person, who seeks limitation, for the costs of a prior action against him to enforce the liability, is not, it has been held, subject to limitation—In re Starin, D.C.N.Y., 124 F. 101—58 C.J. p. 652 note 46.

79. U.S.—Flink v. Paladini, Cal., 49 S.Ct. 255, 279 U.S. 59, 73 L.Ed. 613.

80. U.S.—Flink v. Paladini, supra.

81. U.S.—Just v. Chambers, Fla., 61 S.Ct. 687, 312 U.S. 383, 668, 85 L.Ed. 903—The Trim Too, D.C.Mass., 39 F.Supp. 271—The City of Bangor, D.C.Mass., 13 F.Supp. 648.
58 C.J. p. 646 note 52

Rule held otherwise prior to amendment of 1884

U.S.—Goodrich v. Gagnon, C.C.Wis., 36 F. 123.
58 C.J. p. 646 notes 49–51.

82. U.S.—The Steam Dredge No. 6, D.C.N.Y., 222 F. 576, affirmed 241 F. 69, 154 C.C.A. 69, certiorari denied Standard Gas Light Co. v. Packard Co., 37 S.Ct. 745, 244 U.S. 659, 61 L.Ed. 1375

83. La.—Darrall v. Southern Pac. Co., 17 So. 884, 47 La.Ann. 1455

84. U.S.—The Irving F. Ross, D.C.Mass., 8 F.2d 313.
58 C.J. p. 646 note 56.

Obstruction of wharf

Liability of owner of sunken vessel for obstruction of wharf was one to which limited liability act applied.—The City of Bangor, D.C.Mass., 13 F.Supp. 648

85. U.S.—The Central States, D.C.N.Y., 9 F.Supp. 934.
58 C.J. p. 646 note 57.

86. U.S.—The Central States, supra.
58 C.J. p. 646 note 57 [a].

87. N.Y.—In re Wheeler's Will, 76 N.Y.S.2d 159, 191 Misc. 33.

Raising of vessel not required

Owners are not required to raise a vessel which sinks at the pier but may abandon it and limit their liability—In re Wheeler's Will, supra.

88. N.Y.—In re Wheeler's Will, supra.

89. U.S.—In re Mexican-American, etc., SS. Corp., D.C.La., 34 F.2d 674, affirmed, C.C.A., Arroz Milling Co. v. Mexican-American Fruit & Steamship Corporation, 42 F.2d 1012, certiorari denied Marshall Hall Milling Co. v. Mexican-American Fruit & Steamship Corporation, 51 S.Ct. 87, 282 U.S. 885, 75 L.Ed. 780.
58 C.J. p. 646 note 59.
Privity or knowledge with respect to fault in management or navigation of vessel see infra § 244 d.

Collision. The right of a person, otherwise entitled, to limit liability in respect of loss or damage arising from collision includes loss or damage to cargo on the vessel, as to which limitation is sought,[90] damage to other vessels[91] and their cargoes,[92] and personal injuries,[93] including death,[94] suffered by a passenger as a result of a collision, caused in part by the negligence of the officers of the vessel of the carrier.[95]

Personal injuries and death. The limited liability statute permits limitation in respect of personal injury,[96] and injuries resulting in death,[97] notwithstanding the statutory provisions as to apportionment among claimants and as to the transfer to trustees of the interest in the vessel and freight apparently refer to injuries to, and loss of, property.[98] Where an action is brought under the statute, 46 U.S.C.A. § 764, providing that, whenever a right of action is granted by the law of any foreign state because of death by wrongful act on the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect of the amount for which recovery is authorized, notwithstanding United States statutes to the contrary, the limitation of liability statute does not apply.[99]

Injuries to, and losses of, passengers. The statute permits limitation in respect of liability for personal injuries to passengers,[1] including personal injuries resulting in death,[2] whether the liability is based on the general admiralty law or on a federal or a state statute.[3] Likewise limitation in respect of loss of baggage is permitted by the act.[4] However, in cases coming within the provision of the statute, 46 U.S.C.A. § 491, providing for the liability of the owner for the full amount of damage to passengers or their baggage on steam vessels, resulting from neglect or failure to comply with statutory provisions for insurance of the safety of such vessels, or from certain known defects, the right to claim limitation in respect of injuries to, or death of, passengers, or in respect of loss

90. U S—Norwich, etc., Transp Co. v. Wright, Conn., 13 Wall. 104, 20 L Ed. 585—In re Norwich, etc, Transp Co, C.C N Y, 18 F Cas No 10,362, 17 Blatchf. 221, affirmed Place v. Norwich & N Y Transp Co, 6 S Ct 1150, 118 U S. 468, 30 L Ed 134.

91. U S—Norwich, etc, Transp Co v. Wright, Conn., 13 Wall 104, 20 L Ed. 585

58 C J. p 647 note 68.

92. U S—Norwich, etc, Transp. Co. v. Wright, supra

58 C J p 647 note 69

93. U S.—In re Norwich, etc, Transp. Co, C C N Y., 18 F Cas No 10,362, 17 Blatchf 221, affirmed The City of Norwich, 6 S Ct 1150, 118 U S 468, 30 L Ed. 134

94. U S.—The City of Rome, D C N. Y, 24 F.2d 729, affirmed, C C A, Ocean S S. Co. of Savannah v. U S, 38 F 2d 782—The Alola, D.C.Va, 228 F 1006.

95. U S—The San Rafael, D C.Cal, 134 F 749, reversed on other grounds 141 F 270, 72 C C A 388, certiorari denied 26 S Ct. 756, 200 U S 619, 50 L.Ed 623.

58 C J p 647 note 72.

96. U S—Just v Chambers, Fla., 61 S Ct. 687, 312 U S 383, 668, 85 L Ed 903—Rautbord v. Ehmann, C A Ill., 190 F 2d 533—The W D Anderson, C C A Pa, 94 F 2d 377, certiorari denied Atlantic Refining Co. v. Smith, 58 S Ct 764, 303 U S 658, 82 L Ed 1117—The Princess Sophia, C C A. Wash, 61 F 2d 339, certiorari denied Brace v. Canadian Pac R. Co, 53 S Ct. 396, 288 U.S 604, 77 L.Ed 980.

Cal—A Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal 114.

N Y.—De Pinto v O'Donnell Transp Co, 40 N Y.S 2d 218, 180 Misc 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N.Y.S 2d 414, 266 App.Div. 1002, reargument denied 45 N Y.S 2d 929, 267 App Div 760, reversed on other grounds 55 N E 2d 855, 293 N.Y 32

58 C J p 647 note 78.

Shooting during longshoreman strike

U S—The Wichita Falls, D C.Tex, 15 F Supp 612.

97. U S—Just v Chambers, Fla, 61 S Ct. 687, 312 U S. 383, 668, 85 L Ed 903—Rautbord v. Ehmann, C. A Ill, 190 F.2d 533—The W. D Anderson, C C.A Pa., 94 F 2d 377, certiorari denied Atlantic Refining Co. v. Smith, 58 S Ct 764, 303 U S 658, 82 L Ed 1117—The Princess Sophia, C C A Wash, 61 F 2d 339, certiorari denied Brace v Canadian Pac R Co, 53 S Ct. 396, 288 U S 604, 77 L Ed. 980

Cal.—A. Paladini, Inc, v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114

N Y.—De Pinto v O'Donnell Transp. Co, 40 N Y.S 2d 218, 180 Misc 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N Y S 2d 414, 266 App Div. 1002, reargument denied 45 N Y.S 2d 929, 267 App Div 760, reversed on other grounds 55 N E 2d 855, 293 N.Y. 32

58 C.J. p 647 note 79.

98. R I—Rounds v Providence, etc SS Co, 14 R I 344.

58 C J p 647 note 82

Apportionment in general see infra § 256.

Transfer to trustee in general see infra § 247.

99. U.S—The Vestris, D.C.N.Y, 58 F.2d 847

Suit required to be in admiralty

The right to sue under such statute without limitation of liability is applicable only to suits in admiralty, and admiralty is exclusive forum in which plaintiff may assert his rights. —Egan v. Donaldson Atlantic Line, D C N Y, 37 F Supp 909.

1. U S—The Princess Sophia, C C.A. Wash, 61 F 2d 339, certiorari denied Brace v Canadian Pac. R Co, 53 S Ct 396, 288 U.S 604, 77 L.Ed. 980.

58 C J. p 649 note 9.

2. U.S—The Princess Sophia, C C A. Wash, 61 F 2d 339, certiorari denied Brace v Canadian Pac R Co., 53 S Ct 396, 288 U S 604, 77 L Ed. 980

58 C J. p 649 note 10

3. U.S.—The City of Columbus, D C Mass, 22 F. 460

58 C.J. p 650 note 11.

4. U.S.—In re Mexican-American, etc., Corp., D C.La, 34 F 2d 674, affirmed, C.C A, Arroz Milling Co v. Mexican-American Fruit & Steamship Corporation, 42 F 2d. 1012, certiorari denied Marshall Hall Milling Co v Mexican-American Fruit & Steamship Corporation, 51 S.Ct. 87, 282 U.S. 885, 75. L Ed 780

58 C.J. p 650 note 12.

of, or injury to, their baggage has been denied.[5] Nevertheless, such statute in terms imposing full liability does not affect limitation in respect of claims for personal injuries, including injuries resulting in death,[6] or for loss of, or injury to, baggage,[7] involving conditions to which such statute does not apply, and a like rule applies in respect of the statute rendering an owner liable if the person in command of a steamer navigating a river elects to proceed after a warning that further navigation is unsafe.[8]

Loss of, or injury to, property on vessel. The right to limit liability has been held to apply to cases of loss of, or injury to, property,[9] such as cargo on the vessel.[10] The statute also applies in respect of an unjustifiable sale of cargo by the master in a foreign country after his vessel has been condemned as unseaworthy.[11] Notwithstanding the owner of a vessel may not claim exemption from liability under the statute providing, in substance, that no owner of a vessel shall be liable for any loss or damage which may happen to any merchandise on board such vessel, by reason or by means of fire happening to, or on board, the vessel, unless such fire is caused by the design or neglect of such owner, discussed supra § 129, the circumstances may be such as to permit limitation, under the limited liability statute, in respect of loss of, or damage to, cargo by fire on the vessel.[12]

Liability of tug for injury to, or loss of, tow and cargo of tow. The statute permits the limitation of the liability of the owner of a tug for the loss of, or injury to, the tow,[13] or the cargo on the tow,[14] as where the injury or loss resulted solely from negligence of employees of the owner, in charge of the tug.[15] The liability of the owner of a towing company for negligence in furnishing an incompetent tug for a towing job, thereby causing loss, is such a liability as comes within the statute providing for limitation of liability,[16] notwithstanding no negligence is claimed on the part of the tug or anyone on board at the time of the collision,[17] since the negligence of the owner should be imputed to the tug, which would thereby be an offending vessel to be surrendered, and within the statute.[18]

§ 244. Privity or Knowledge and Personal Acts or Omissions of Person Seeking Limitation

a In general
b Persons acting for owner generally
c. Seaworthiness, equipment, and manning
d. Management and navigation; deviation; fire

a. In General

Limitation of liability may not be had under the limited liability statute if the owner is chargeable with privity or knowledge, or is guilty of fault or neglect, as to a matter which actually contributes to the damage or injury in respect of which limitation is sought.

In view of the fact that, by the terms of the federal statute, 46 U.S.C.A. § 183 a, the limitation of liability is provided for in respect of acts, matters, etc., done, occasioned, or incurred without the privity or knowledge of the owner, limitation may not be had if the owner is chargeable with privity or knowledge within the meaning of the statute.[19] Accordingly, where the owner received

5. U.S.—Hines v. Butler, C.C.A.Md., 278 F. 877, certiorari denied 42 S.Ct. 185, 257 U.S. 659, 66 L.Ed. 421.
58 C.J. p. 650 note 15

6. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.
58 C.J. p. 650 note 16.

7. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—Petition of Canadian Pac. R. Co., D.C.Wash., 278 F. 180.

8. U.S.—The Longfellow, Ohio, 104 F. 360, 45 C.C.A. 379.

9. U.S.—Butler v. Boston & Savannah Steamship Co., Mass., 9 S.Ct. 612, 130 U.S. 527, 32 L.Ed. 1017—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.

10. U.S.—In re McDonald Transp. Co., D.C.Mass., 4 F.2d 1010.
58 C.J. p. 651 notes 36, 37.
Secondary liability of owner of chartered ship
U.S.—American Tobacco Co. v. The Katingo Hadjipatera, C.A.N.Y., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.

11. U.S.—The Giles Loring, D.C.Me., 48 F. 463.
58 C.J. p. 651 note 35.

12. U.S.—Hines v. Butler, C.C.A.Md., 278 F. 877, certiorari denied 42 S.Ct. 185, 257 U.S. 659, 66 L.Ed. 421.
58 C.J. p. 651 note 39

13. U.S.—The Richard F. Young, D.C.Va., 245 F. 499.
58 C.J. p. 651 note 41.
Liability of tower for damage to tow or cargo generally see the C.J.S. title Towage, §§ 34-96, also 63 C.J. p. 22 note 50-p. 79 note 28.

14. U.S.—The Mahanoy, C.C.A.N.Y., 273 F. 668, certiorari denied 42 S.Ct. 272, 258 U.S. 618, 66 L.Ed. 794—The Richard F. Young, D.C.Va., 245 F. 499

15. U.S.—Bronx Barge Corp. v. Connelly Transp. Corp., C.C.A.S.C., 35 F.2d 294.
58 C.J. p. 651 note 43.

16. U.S.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S. S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626

17. U.S.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S. S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.

18. U.S.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S. S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.

19. U.S.—The Marguerite, C.C.A.Wis., 140 F.2d 491—In re Great

notice that a vessel had broken adrift and was causing damage, he has been held not to be entitled to the limitation of liability as to the damage done after such notice.[20] Where, however, the act or omission which causes the loss is without the privity or knowledge of the owner, he is entitled to the limitation of liability;[21] and the owner of a boat operated by another is entitled to limitation of liability even though the damages were occasioned by the fault or negligence of the operator, provided the incident giving rise thereto was without the privity or knowledge of such owner.[22] In fact, the owner of a boat operated by another is entitled to exoneration from all liability for damages occasioned without fault or negligence on the part of the operator.[23]

Liberal construction of statute. The general rule that the statute should be construed liberally in favor of the owner who seeks limitation in order to effectuate the purposes of the statute, discussed supra § 239, has been applied in determining whether or not the damage or injury occurred with the privity or knowledge, or resulted from the personal fault, of the owner.[24]

Personal fault or neglect of owner. Since the liability limited by the federal statute is an imputed liability,[25] that is, a liability imputed by law by reason of the ownership of the vessel,[26] the owner remains liable without limitation for his own fault or neglect,[27] or, as discussed supra § 243 b (1), for his own contracts. In other words, the statute applies only when the owner of the vessel is sought to be made liable for the fault of some person other than himself.[28] In fact, it has been held that it is the purpose of the statute to protect the owner from the consequences of the acts, con-

Lakes Transit Corp., C C A Ohio, 81 F.2d 441—The Vestris, D C N Y, 60 F 2d 273—The Yungay, D C N Y, 58 F 2d 352—In re Pennsylvania R Co, C C.A N Y, 48 F 2d 559, certiorari denied James McWilliams Blue Line, Inc., v Pennsylvania R. Co, 52 S Ct 21, 284 U S 640, 76 L Ed 544—W R Grace & Co. v. Charleston Lighterage & Transfer Co, D C.S C, 98 F Supp 256, affirmed in part and reversed in part on other grounds, C.A., 193 F 2d 539—The Mattie, D C N.Y., 38 F Supp 745, affirmed, C.C A, Jacobus Grauwiller Co. v Reichert, 136 F 2d 904

Cal—A. Paladini, Inc, v Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal 114

58 C.J p 652 notes 47, 48.

Paramount inquiry, in proceedings by owner of vessel for limitation of liability, is with respect to privity or knowledge of owner of defect, condition, or other cause of injury or damage—The Mist-Chief, D C. R I, 57 F 2d 875

Shooting by guards during longshoreman strike was held to be with full knowledge of owner—The Wichita Falls, D C Tex, 15 F Supp 612

Telephonic communication

Owner of tug whose office was in telephone communication with tugboat captain before tug set out on rough sea could not, in seeking to limit liability, successfully plead absence of privity or knowledge of insufficiency of lines—The Robert H Smith, D C N Y., 3 F Supp 531.

20. U S—In re Pennsylvania R Co, C C A.N Y, 48 F.2d 559, certiorari denied James McWilliams Blue Line, Inc., v. Pennsylvania R Co, 52 S Ct. 21, 284 U S. 640, 76 L.Ed 544.

21. U S—Commercial Molasses Corp v New York Tank Barge Corp, N Y., 62 S Ct 156, 314 U S 104, 86 L Ed 89—Shamrock Towing Co v Fichter Steel Corp, C C A.N Y, 155 F.2d 69—Continental Ins Co v. Sabine Towing Co, C C.A.Tex, 117 F 2d 694, certiorari denied Sabine Towing Co v Continental Ins. Co, 61 S.Ct. 1111, 313 U S 588, 85 L Ed 1543—The Carson, C.C A Cal, 104 F 2d 762, certiorari denied Union Dredging Co. v Brashear, 60 S.Ct 120, 308 U.S 591, 84 L Ed. 494—The South Coast, C C A Cal, 71 F 2d 891, certiorari denied Willey v Hobbs, Wall & Co, 55 S Ct. 347, 293 U S 627, 79 L Ed 713—The Snug Harbor, D.C N Y, 53 F 2d 407—In re Pennsylvania R Co, C C A N.Y, 48 F 2d 559, certiorari denied James McWilliams Blue Line, Inc., v. Pennsylvania R. Co, 52 S Ct 21, 284 U S. 640, 76 L Ed 544—Indian Ridge Canning Co v The Captain Nick, D C La, 98 F Supp 664—The Hindoo, D C.N Y, 74 F Supp 145—In re Defense Plant, D C.Tenn, 58 F Supp. 931—The Tregenna, D C N.Y, 35 F Supp 118, reversed on other grounds Farr v Hain S S Co., 121 F 2d 940—The Mary T Tracy, D C N Y, 298 F 528, decree reversed on other grounds, C.C A, 8 F 2d 591

22. U S—Rautbord v. Ehmann, C A. Ill, 190 F 2d 533—Petition of Martin, D C Pa, 102 F Supp 43.

23. U S—Rautbord v. Ehmann, C A. Ill., 190 F.2d 533—In re Defense Plant Corp, D C.Tenn, 58 F Supp. 931

24. U S—The North Star, D C Mass., 3 F.2d 1010

58 C J p 652 note 53.

Caution in finding privity

The limited liability statute should not be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners—Capitol Transportation Co. v Cambria Steel Co, Mich, 39 S Ct 292, 249 U S 334, 63 L Ed. 631—The Fred E. Hasler, D C N.Y, 2 F Supp. 45, reversed on other grounds, C C A, 65 F 2d 589.

25. U S—American Car & Foundry Co v. Brassert, Ill., 53 S Ct. 618, 289 U S. 261, 77 L Ed. 1162.

26. U.S.—American Car & Foundry Co v. Brassert, supra.

27. U.S—American Car & Foundry Co v Brassert, supra—Henson v. Fidelity & Columbia Trust Co, C.C A.Ky, 68 F 2d 144, rehearing denied, C C A, 69 F 2d 778—The Nat Sutton, C C A N.Y, 62 F 2d 787, amended on other grounds In re W E. Hedger Co, 63 F 2d 1021—The Snug Harbor, D C N Y, 53 F 2d 407—The Inga, D C N Y, 33 F Supp 122—The Pegeen, D C.Cal, 14 F Supp. 748—Hockley v Eastern Transp Co, D.C.Md, 10 F. Supp. 908.

N.Y—King v. Liotti, 76 N.Y.S 2d 98, 190 Misc 652.

58 C J. p 652 note 51.

Under French statute limiting liability

U.S—Accinanto, Limited v. Cosmopolitan Shipping Co, D.C Md., 100 F Supp 826.

Owner held at fault or negligent

U.S—U. S v. Eastern Transp Co, C C A N.Y, 59 F.2d 984—The Ernie Miller, D.C.La., 71 F Supp. 806—The Cleveco, D C Ohio, 59 F Supp. 71, affirmed, C C.A, 154 F 2d 605.

58 C J p 652 note 51 [a].

28. U.S.—Henson v. Fidelity & Columbia Trust Co., D C.N.Y, 3 F. Supp. 950, affirmed, C C.A., 68 F 2d 144, rehearing denied 69 F 2d 778.

tractual or tortious, of the master, crew, or agent, when the vessel is not under his control,[29] or from the consequences of accidents and disasters not due to his personal neglect or default,[30] and not to protect him from the consequences of his own acts or neglect.[31]

What constitutes "privity or knowledge" generally. In the phrase "privity or knowledge," as used in the federal statute, "privity" has been defined as some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury,[32] and "knowledge" has been defined as some personal knowledge or means of knowledge of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it.[33] Such "knowledge" or "privity," in order to defeat the right to limit liability, must be not merely constructive but in a measure actual,[34] that is, actual, in the sense of knowledge or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them;[35] and the necessity for the presence or existence of personal concurrence or participation,[36] or of personal knowledge or means of knowledge,[37] has frequently been asserted. Negligence of itself does not necessarily establish the existence on the part of the owner of a vessel of privity or knowledge,[38] although, it has been said, there may be negligence which will[39] Privity like knowledge turns on the facts of each particular case.[40]

"Privity" or "knowledge" of corporation. A corporation may be charged with "privity" or "knowledge,"[41] or what may be regarded as its personal fault,[42] which will prevent limitation under the statute, by the acts or knowledge of its managing officers, as considered infra subdivision b of this section. On the other hand, the corporation may be without privity or knowledge of conditions and so entitled to the benefit of the statute.[43]

29. U.S.—The Fred E Hasler, C.C A.N.Y., 65 F.2d 589, 590, 591—The Snug Harbor, D.C.N.Y., 53 F 2d 407—In re Jacobson, D C Tex., 52 F. 2d 179—The Mattie, D C N.Y., 38 F Supp. 745, affirmed, C C.A., Jacobus Grauwiller Co v. Reichert, 136 F 2d 904—Hockley v. Eastern Transp. Co, D.C.Md., 10 F.Supp. 908.

30. U.S.—The Maine, D C Md, 28 F. Supp 578, affirmed, C.C A, Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F 2d 373.

31. U.S—The Snug Harbor, D C N Y, 53 F 2d 407—Hockley v. Eastern Transp. Co, D C Md, 10 F. Supp 908.

32. U.S—Coryell v. Phipps, Fla, 63 S Ct. 291, 317 U.S 406, 87 L Ed 363—Continental Ins Co. v. Sabine Towing Co, C C.A Tex, 117 F.2d 694, certiorari denied Sabine Towing Co. v. Continental Ins Co, 61 S.Ct. 1111, 313 U.S 588, 85 L Ed 1543—The South Coast, C C A.Cal, 71 F.2d 891, certiorari denied Willey v. Hobbs, Wall & Co, 55 S Ct 347, 293 U.S. 627, 79 L Ed 713—The Carroll, D.C Md., 60 F 2d 985—The Yungay, D C.N.Y, 58 F.2d 352—The Ruth Conway, D.C.Md, 75 F.Supp. 514, affirmed, C.A., Harbor Towing Corp. v. Parker, 171 F 2d 416, certiorari denied 69 S Ct 1050, 337 U S. 907, 93 L.Ed 1720—The Chickie, D.C.Pa, 54 F.Supp. 19—The Mattie, D C N Y, 38 F Supp 745, affirmed, C.C.A., Jacobus Grauwiller Co. v. Reichert, 136 F.2d 904—Petition of Liebler, D C.N.Y., 19 F Supp. 829

N Y—De Pinto v O'Donnell Transp Co., 40 N.Y.S 2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N Y S 2d 414, 266 App Div. 1002, reargument denied 45 N Y S 2d 929, 267 App Div 760, reversed on other grounds 55 N E 2d 855, 293 N Y 32
58 C J p 653 note 65.

33. U.S—The Cleveco, C C A Ohio, 154 F.2d 605—The South Coast, C.C A Cal., 71 F 2d 891, certiorari denied Willey v. Hobbs, Wall & Co, 55 S Ct 347, 293 U.S. 627, 79 L Ed 713—The Carroll, D C Md, 60 F 2d 985—The Snug Harbor, D C.N Y, 53 F.2d 407—The Ruth Conway, D C Md, 75 F Supp 514, affirmed, C A., Harbor Towing Corp. v. Parker, 171 F 2d 416, certiorari denied 69 S Ct 1050, 337 U S 907, 93 L Ed. 1720—The Chickie, D C Pa., 54 F.Supp 19—Petition of Liebler, D C N.Y, 19 F Supp 829.

N.Y—De Pinto v. O'Donnell Transp. Co, 40 N.Y.S 2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N Y S 2d 929, 267 App Div 760, reversed on other grounds 55 N E 2d 855, 293 N Y. 32.
58 C J p 653 note 65

34. U.S—Rautbord v Ehmann, C A. Ill., 190 F 2d 533—The Marguerite, C.C A Wis, 140 F 2d 491—The Mattie, D C N Y, 38 F Supp 745, affirmed, C.C.A, Jacobus Grauwiller Co v Reichert, 136 F.2d 904—Petition of Liebler, D C N.Y., 19 F, Supp. 829.
58 C.J p 653 note 66.

35. U.S.—The Oneida, C C.A.N Y, 282 F. 238—The Colima, D C N.Y., 82 F. 665.

36. U.S.—Rautbord v. Ehmann, C.A Ill., 190 F 2d 533—The Marguerite, C.C.A.Wis., 140 F.2d 491.
58 C J p 653 note 68.

37. N Y.—De Pinto v. O'Donnell Transp Co, 40 N Y.S 2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N Y S 2d 414, 266 App Div. 1002, reargument denied 45 N Y.S 2d 929, 267 App Div. 760, reversed on other grounds 55 N E 2d 855, 293 N Y 32
58 C J p 653 note 69.

38. U.S—The South Coast, C C.A. Cal, 71 F 2d 891, certiorari denied Willey v. Hobbs, Wall & Co., 55 S.Ct 347, 293 U S 627, 79 L Ed. 713—The Carroll, D C Md, 60 F 2d 985—Petition of Liebler, D C N.Y, 19 F Supp 829—Hockley v Eastern Transp. Co, D.C Md., 10 F Supp 908—The P. F Martin, D.C Va., 5 F Supp. 501.
58 C J. p 653 note 70.

39. U S.—The Virginia, D C Md, 264 F 986, affirmed, C.C A., Hines v. Butler, 278 F 877, certiorari denied 42 S.Ct 185, 257 U.S. 659, 66 L Ed 421

40. U S—Coryell v Phipps, Fla., 63 S Ct 291, 317 U.S 406, 87 L Ed 363—Austerberry v. U S., C.A. Mich, 169 F 2d 583—The Marguerite, C.C A Wis., 140 F.2d 491.

41. U S—The New York Marine, No 10, D.C N.Y., 25 F.Supp 847, affirmed, C C A., 109 F.2d 564.
58 C.J p 653 note 73
Right of corporation to limit liability in general see supra § 241.

42. U.S—The Capt Jack, D.C.Conn, 169 F. 455.
58 C J. p 654 note 74.

43. U S—Wessel v. Charleston

Causes of damage or injury. The privity or knowledge which will defeat the right of limitation must be in respect of a matter which actually contributes to the damage or injury in respect of which limitation is sought;[44] and the rule applies in respect of an alleged personal default of the owner.[45] Accordingly, privity or knowledge in respect of certain negligent acts does not defeat limitation where other negligent acts were the sole proximate cause of the loss or injury;[46] but where the privity or knowledge is in respect of a matter which is a concurrent, and not the sole, cause, limitation may not be had.[47]

Rights and status of part owner. There is authority for the view that the knowledge or privity of one part owner is not necessarily the knowledge or privity of another part owner, under the statute,[48] and also that a part owner, notwithstanding his privity or knowledge, is liable only for that proportionate share of the total liability which his individual share bears to the whole.[49]

Question of law and fact. The question as to the existence of privity or knowledge is primarily a question of fact.[50]

b. Persons Acting for Owner Generally

The knowledge, privity, or fault which will preclude limitation of liability by an owner may be that of some one having general authority to act for him and bind him, as in the case of officials of a government agency acting for the government, or the managing officers or agents of a corporation.

While it has been held that the knowledge or privity which will defeat the right to limitation must be in a measure actual, as discussed supra subdivision a of this section, it has also been held that the knowledge of a fault is not required to be actual,[51] but may be imputed if someone in charge for the owner had general authority to act for him and by the exercise of ordinary care could have discovered the fault.[52] In other words, the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity to the owner for the acts or knowledge of such subordinate.[53] Thus, it has been held that the negligence or knowledge of the partner of the owner is imputable to the owner and within the privity or knowledge of the owner so as to preclude the limitation of liability.[54]

On the other hand, knowledge will not be imputed to the owners of a vessel seeking limitation of liability unless such knowledge is by one who can bind his principal.[55] Thus, mere negligent acts or omissions of the owner's agents or employees are insufficient to fasten unlimited liability on the owner;[56] and the privity or knowledge of an ordinary sailor, agent, or employee as a general rule will not be imputed to the owner.[57] Moreover, the

Lighterage, etc., Co., D.C.S.C., 25 F.2d 126.

58 C.J. p. 654 note 75.

44. U.S.—The E. Madison Hall, C.C.A.Md., 140 F.2d 589, certiorari denied 64 S.Ct. 1159, 322 U.S. 748, 88 L.Ed. 1579—The Marguerite, C.C.A. Wis., 140 F.2d 491—The City of Rome, D.C.N.Y., 24 F.2d 729, affirmed, C.C.A., Ocean S. S. Co of Savannah v. U. S., 38 F.2d 782.

58 C.J. p. 652 note 55.

45. U.S.—The North Star, N.Y., 255 F. 955, 167 C.C.A. 247.

58 C.J. p. 653 note 56.

46. U.S.—Bronx Barge Corp v. Connelly Transp. Corp., C.C.A.S.C., 35 F.2d 294

58 C.J. p. 653 note 57.

47. U.S.—The Linseed King, D.C. N.Y., 24 F.2d 967—The Capt Jack, D.C.Conn., 169 F. 455

48. U.S.—In re Meyer, D.C.Cal., 74 F. 881.

58 C.J. p. 653 notes 60, 61.

49. U.S.—In re Meyer, supra.

50. U.S.—Boston Towboat Co v. Darrow-Mann Co., C.C.A.Mass., 276 F. 778, certiorari denied 42 S.Ct. 272, 258 U.S. 620, 66 L.Ed. 794.

51. U.S.—In re Great Lakes Transit Corp., C.C.A.Ohio, 81 F.2d 441.

52. U.S.—In re Great Lakes Transit Corp., supra.

Knowledge of general superintendent

Charterer of pile driver was bound by general superintendent's knowledge of unseaworthiness of pile driver, and was not entitled to limitation of liability.—In re New York Dock Co., C.C.A.N.Y., 61 F.2d 777.

53. U.S.—The Trillora II, D.C.S.C., 76 F.Supp. 50.

Delegation of full authority

Where owner of vessel expressly delegates full authority to act for and in his behalf to an agent, owner is bound by acts of agent and will be held in privity with knowledge of agent—The Trillora II, supra.

Management intrusted to son

Where operator of towing company intrusted the management of the business to his son who directed that a certain tug, which the son knew was too small for the undertaking, be used to tow steamship, and collision with piling of bridge occurred on journey, the operator was not entitled to limitation of liability.—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v Diamond S. S. Transp Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626.

54. U.S.—Kulack v. The Pearl Jack, D.C.Mich., 79 F.Supp. 802, affirmed, C.A., 178 F.2d 154—The Chickie, D.C.Pa., 54 F.Supp. 19.

Application limited to partnership, not individuals

Finding that operating partner in river transportation company knew of such facts leading to damages claimed by owner of dredge struck by loose barge, which such company's steamboat was chartered to tow, so as to preclude finding that partnership was without privity or knowledge of such facts and require denial of petition by partnership and such partner to limit their liability, bound only such partner and partnership assets, not copartner, who had no personal knowledge of operation of boat and took no part therein or in events leading to action for damages.—The Chickie, D.C.Pa., 54 F.Supp. 21, reversed on other grounds, C.C.A., 141 F.2d 80.

55. U.S.—The Marguerite, C.C.A. Wis., 140 F.2d 491—In re New York Dock Co., C.C.A.N.Y., 61 F.2d 777.

56. U.S.—The Pegeen, D.C.Cal., 14 F.Supp. 748.

57. U.S.—The Marguerite, C.C.A. Wis., 140 F.2d 491.

N.Y.—De Pinto v. O'Donnell Transp Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified on other

owner is not deprived of the benefit of the statute by the existence of the privity or knowledge of the master,[58] nor is the default of the master attributable to the shipowner.[59] However, the owner may not escape liability by giving the managerial functions to an employed person acting as his agent;[60] and as far as privity and knowledge are concerned, such an agent is his alter ego.[61]

Officials of government agency. The privity and knowledge of the officials of a government agency may in a proper case be chargeable to the government.[62]

Officers, agents, or employees of corporation. In the case of a vessel owned by a corporation, the "privity," "knowledge," or fault of a managing officer or agent of the corporation may be the "privity," "knowledge," or fault of the owner within the meaning of the statute, and sufficient to prevent limitation;[63] and, in this connection, the corporation is charged with knowledge of what the managing officer or agent should have known had he exercised due diligence.[64] While it has frequently been laid down in broad terms that the "privity" or "knowledge" which will defeat a corporation's right to limit liability must be the privity or knowledge of the managing officer or officers,[65] or of some managing officer or agent,[66] the test apparently is the extent of the authority of the person with whose "privity," "knowledge," or fault it is sought to charge the corporation;[67] and it is not necessary that such person should be a chief executive officer of the corporation,[68] or, according to some cases, even a corporate officer in the technical sense.[69] In

grounds In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed on other grounds 55 N.E.2d 855, 293 N.Y. 32

58. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.

58 C.J. p. 652 note 54.

59. U.S.—American Tobacco Co. v. The Katingo Hadjipatera, supra.

60. U.S.—The Silver Palm, C.C.A.Cal., 94 F.2d 776.

61. U.S.—The Silver Palm, supra.

62. U.S.—The City of Brunswick, D.C.Mass., 6 F.Supp. 597.

Merchant Fleet Corporation

Privity and knowledge of officials of Merchant Fleet Corporation concerning deviation and failure to exercise due diligence to make vessel seaworthy were chargeable to government, precluding limitation of liability for loss of cargo.—The City of Brunswick, supra.

63. U.S.—The Cleveco, C.C.A.Ohio, 154 F.2d 605—The Marguerite, C.C.A.Wis., 140 F.2d 491—The Silver Palm, C.C.A.Cal., 94 F.2d 776—The New Berne, C.C.A.Va., 80 F.2d 244—In re Spencer Kellogg & Sons, C.C.A.N.Y., 52 F.2d 129, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903—In re Pennsylvania R. Co., C.C.A.N.Y., 48 F.2d 559, certiorari denied James McWilliams Blue Line, Inc., v. Pennsylvania R. Co., 52 S.Ct. 21, 284 U.S. 640, 76 L.Ed. 544—American Agr. Chemical Co. v. O'Donnell Transp. Co., D.C.N.Y., 62 F.Supp. 239—The James Horan, D.C.N.J., 10 F.Supp. 28, affirmed, C.C.A., 78 F.2d 870, and certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corp., 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441—The Emergency, D.C.N.Y., 9 F.Supp. 484.

Cal.—A Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed on other grounds 55 N.E.2d 855, 293 N.Y. 32

58 C.J. p. 654 note 77.

Limitation held precluded

(1) Position and authority of factory manager rendered his privity or knowledge that of corporation, making it chargeable with negligence in not taking measures required by weather conditions for safety of workmen being carried on corporation's motorboat.—The Linseed King, N.Y., 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903.

(2) The knowledge of hirer of crews for corporation chartering tug and of corporation's agent that tug deckhand was incompetent was attributable to corporation, where hirer and agent had managerial functions.—The New York Marine, No. 10, D.C.N.Y., 25 F.Supp. 847, affirmed, C.C.A., 109 F.2d 564.

(3) Where port engineer in charge made no serious repairs to tug without consulting managing officers of corporate owner, and vessel was equipped by him under officers' supervision and with their approval, managing officers, and, hence, the owner, were privy to any negligence connected therewith.—Sabine Towing Co. v. Brennan, C.C.A.Tex., 72 F.2d 490, certiorari denied 55 S.Ct. 141, 293 U.S. 611, 79 L.Ed. 701, rehearing denied 55 S.Ct. 212, 293 U.S. 632, 79 L.Ed. 717.

(4) Charterer of barge was not entitled to limitation of liability for damage caused solely by negligent act of managing agent of charterer's plant in ordering to be cut adrift a barge which had been struck by lightning.—The James Horan, C.C.A.N.J., 78 F.2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

64. U.S.—Chesapeake Lighterage, etc., Co. v. Baltimore Copper Smelting, etc., Co., C.C.A.Md., 40 F.2d 394.

58 C.J. p. 654 note 78.

65. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—The Carroll, D.C.Md., 60 F.2d 985—The Mattie, D.C.N.Y., 38 F.Supp. 745, affirmed, C.C.A., Jacobus Grauwiller Co. v. Reichert, 136 F.2d 904—The Horaisan Maru, D.C.N.Y., 5 F.Supp. 311, reversed on other grounds, C.C.A., Yokohama Specie Bank v. Mitsui & Co., 73 F.2d 526, certiorari denied 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684.

58 C.J. p. 654 note 79.

66. U.S.—The City of Bangor, D.C.Mass., 13 F.Supp. 648.

67. U.S.—In re Spencer Kellogg & Sons, C.C.A.N.Y., 52 F.2d 129, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903—The Horaisan Maru, D.C.N.Y., 5 F.Supp. 311, reversed on other grounds, C.C.A., Yokohama Specie Bank v. Mitsui & Co., 73 F.2d 526, certiorari denied 55 S.Ct. 648, 295 U.S. 736, 79 L.Ed. 1684.

58 C.J. p. 654 note 80.

68. U.S.—The Erie Lighter 108, D.C.N.J., 250 F. 490.

58 C.J. p. 654 note 81.

69. U.S.—The Horaisan Maru, D.C.N.Y., 5 F.Supp. 311, reversed on

any event, however, the "privity" or "knowledge" imputable to the corporation must be that of the managing officers or supervising agents of the corporation,[70] or someone entitled to represent it in the premises;[71] and, usually at least, the "knowledge" or "privity" of ordinary servants, employees, or agents,[72] including a master of a vessel,[73] is not sufficient to prevent limitation. So a corporation is chargeable with knowledge of the existence of defects, or becomes privy to acts of negligence causing them, only when persons representing the corporation in such capacities as to speak for it are guilty of some negligence or omission to maintain the vessel in a seaworthy condition.[74]

c. Seaworthiness, Equipment, and Manning

A shipowner may not limit his liability for injury or damage caused or contributed to by his failure to furnish a seaworthy vessel, properly equipped, and properly manned, where such deficiency existed with his privity or knowledge, but the owner has the right to delegate such duty to a competent person.

Even in the absence of any question as to the breach of an express warranty of seaworthiness by the owner, discussed supra § 243 b (1), the general rule is that an owner may not limit his liability arising from unseaworthiness which existed with his privity or knowledge within the meaning of the statute,[75] and the restriction on the right of limitation extends to liability for the owner's personal failure to furnish a vessel which is seaworthy[76] and properly equipped.[77] Thus, it has been held

other grounds, C C A, Yokohama Specie Bank v Mitsui & Co, 73 F 2d 526, certiorari denied 55 S Ct. 648, 295 U S. 736, 79 L Ed. 1684.
58 C J p 655 note 82

70. U.S—The South Coast, C.C A Cal., 71 F 2d 891, certiorari denied Willey v Hobbs, Wall & Co, 55 S.Ct 347, 293 U S 627, 79 L Ed 713—**Corpus Juris quoted in** California Yacht Club of Los Angeles v Johnson, C C.A.Cal., 65 F 2d 245, 247—Wessel v Charleston Lighterage, etc, Co., D.C S C, 25 F 2d 126—The Horaisan Maru, D C N.Y., 5 F Supp. 311, reversed on other grounds, C C A, Yokohama Specie Bank v. Mitsui & Co, 73 F 2d 526, certiorari denied 55 S Ct 648, 295 U S 736, 79 L Ed 1684

A "managing officer" is one to whom corporate owner has committed general management or superintendence of the whole or a particular part of its business—The Marguerite, C C.A.Wis, 140 F.2d 491

71. U S—The South Coast, C.C A Cal, 71 F 2d 891, certiorari denied Willey v Hobbs, Wall & Co, 55 S Ct 347, 293 U.S 627, 79 L Ed. 713—**Corpus Juris quoted in** California Yacht Club of Los Angeles v Johnson, C C A Cal, 65 F 2d 245, 247
58 C J. p 655 note 84

72. U S—**Corpus Juris quoted in** California Yacht Club of Los Angeles v. Johnson, C C A Cal, 65 F.2d 245, 247—The City of Bangor, D C Mass., 13 F Supp 648—The P. F. Martin, D C Va, 5 F Supp. 501—The Horaisan Maru, D C N.Y., 5 F.Supp 311, reversed on other grounds, C C A, Yokohama Specie Bank v. Mitsui & Co, 73 F 2d 526, certiorari denied 55 S Ct. 648, 295 U S. 736, 79 L Ed 1684
N.Y—De Pinto v O'Donnell Transp Co, 40 N Y S 2d 218, 180 Misc 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N Y S 2d 414, 266 App Div 1002, reargument denied 45 N Y S.2d 929, 267 App Div. 760, reversed on other grounds 55 N.E 2d 855, 293 N.Y 32
58 C J. p 655 note 85.

Local freight and passenger agent was not "managing agent" of corporate shipowner within limitation of liability statute—The Princess Sophia, C C A Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac R Co., 53 S.Ct. 396, 288 U.S. 604, 77 L Ed 980.

Caretaker and operator of tender
In passenger's libel for injuries sustained when motor of tender exploded, caretaker and operator in sole charge of tender was not "managing officer or agent" of corporate owner so as to render owner, seeking limitation of liability, chargeable with operator's knowledge of alleged defect in motor—California Yacht Club of Los Angeles v. Johnson, C.C.A.Cal, 65 F 2d 245.

73. U S—The Carson, C.C A.Cal, 104 F 2d 762, certiorari denied Union Dredging Co v. Brashear, 60 S Ct 120, 308 U S. 591, 84 L Ed 494—**Corpus Juris quoted in** California Yacht Club of Los Angeles v. Johnson, C C A Cal, 65 F 2d 245, 247—The City of Bangor, D C Mass, 13 F Supp 648—The Horaisan Maru, D C N Y., 5 F Supp. 311, reversed on other grounds, C C A, Yokohama Specie Bank v. Mitsui & Co., 73 F 2d 526, certiorari denied 55 S Ct. 648, 295 U S 736, 79 L Ed 1684
N.Y—De Pinto v. O'Donnell Transp Co, 40 N.Y S 2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N Y S 2d 414, 266 App.Div. 1002, reargument denied 45 N Y.S 2d 929, 267 App.Div. 760, reversed on other grounds 55 N E 2d 855, 293 N.Y. 32
58 C.J. p 655 note 86.

74. U S—In re Eastern Transp. Co., D.C.Md, 37 F 2d 355.
58 C.J p 655 note 87.

75. U S—The Cleveco, C C.A Ohio, 154 F.2d 605—Dexter-Carpenter Coal Co. v. New York, O. & W Ry. Co, D.C N Y., 50 F.2d 270—The Northern No. 29, D C.N.Y., 15 F Supp 543, reversed on other grounds, C C A., Flat-Top Fuel Co v. Martin, 85 F.2d 39, certiorari denied 57 S Ct 110, 299 U S 585, 81 L Ed 431—The Pegeen, D C Cal, 14 F Supp 748—The Horaisan Maru, D C.N.Y, 5 F Supp 311, reversed on other grounds, C C.A, Yokohama Specie Bank v. Mitsui & Co, 73 F 2d 526, certiorari denied 55 S Ct 648, 295 U S 736, 79 L.Ed. 1684.
58 C J. p 655 note 90.

76. U S—W. R. Grace & Co v. Charleston Lighterage & Transfer Co, C.A S C, 193 F 2d 539—The Cleveco, C C A.Ohio, 154 F 2d 605—The Trillora II, D C S C, 76 F. Supp. 50—The Mary M, D C N.Y, 73 F.Supp. 674—The Pegeen, D C. Cal, 14 F.Supp. 748.
58 C J. p 655 note 91

77. U.S—The Trillora II, D C.S C., 76 F.Supp. 50.

Adequate tow lines
U.S.—The Russell No 5, D.C.N Y, 26 F.Supp. 575, affirmed, C C A, In re Newtown Creek Towing Co, 104 F.2d 1018.

Radio receiver
Tugs in waters of Long Island Sound are not required to be equipped with a radio receiving set.—The Russell No. 5, D C N.Y., 26 F. Supp. 575, affirmed, C C A, In re Newtown Creek Towing Co., 104 F.2d 1018.

Barometer
Where tug was not equipped with barometer, the master was required to make inquiry about prospective weather conditions from available sources—The Russell No. 5, D C.N

that, in order to permit limitation for liability arising from unseaworthiness or improper equipment, it must appear that the owner exercised due diligence to furnish a seaworthy vessel[78] or proper equipment,[79] and that his failure to exercise due diligence to ascertain the condition of the vessel is sufficient to defeat limitation.[80] However, it has also been held that the statute does not make the exercise of due diligence in making the vessel seaworthy a condition of the right to the limitation of liability,[81] since it refers to the right to immunity under the Harter Act, as discussed supra § 127. In this connection, where the unseaworthy condition of a vessel would be shown by a proper examination,[82] or where serious structural defects had existed for an extended period,[83] her owner is ordinarily chargeable with knowledge of her condition. Moreover, it has been held that if the shipowner knew of some defect or characteristic of the ship which would affect the manner in which it would be operated, his failure to disclose such fact may preclude his claiming limitation of liability for damage caused as a result thereof.[84]

On the other hand, the right of the owner to limit liability, in cases other than those involving express warranties, has been recognized or upheld where the unseaworthiness was not within the privity or knowledge, and was not the personal fault, of the owner,[85] and, where the owner has exer-

Y., 26 F.Supp. 575, affirmed, C.C.A., In re Newtown Creek Towing Co., 104 F.2d 1018.

78. N.C.—Brinson v. Norfolk Southern R. Co., 86 S.E. 371, 169 N.C. 425.

Owner's mere purchase of ship and delivery thereof to master does not entitle him to limit liability for injuries to passenger resulting from defect in structure or equipment of vessel.—The Princess Sophia, C.C.A. Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.

Owner held not to have exercised due diligence

(1) In general.—The O'Boyle No. 1, D.C.N.Y., 64 F.Supp. 378—The Anastasia, D.C.N.Y., 11 F.Supp. 314, remanded on other grounds, C.C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011.

(2) Failure to have lower part of scow recaulked for fifteen years was failure to exercise reasonable care, rendering owner responsible for damages resulting when scow capsized.—The Emergency, D.C.N.Y., 9 F.Supp. 484.

Lack of diligence, which forfeits limitation of liability, must be personal to the owner.—Flat-Top Fuel Co. v. Martin, C.C.A.N.Y., 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.

Owner held to have exercised personal diligence

Owner of vessel who relies on experienced and reputedly efficient master for inspection of vessel before loading and who has vessel dry docked for overhauling at reasonable intervals has exercised "personal diligence" which will entitle him to limitation of liability for loss of cargo.—Flat-Top Fuel Co. v. Martin, supra.

79. U.S.—Petition of Sinclair Nav. Co., D.C.N.Y., 27 F.2d 606.
58 C.J. p. 655 note 93.

Vessel held properly equipped

U.S.—Noble v. Moore-McCormack Lines, D.C.Mass., 96 F.Supp. 369.

80. U.S.—The Malcolm Baxter, Jr., D.C.N.Y., 55 F.2d 312, reversed on other grounds, C.C.A., 20 F.2d 304, affirmed, 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901—The Cullen No. 32, D.C.N.Y., 45 F.2d 859, affirmed and modified on other grounds, C.C.A., 62 F.2d 168, affirmed 54 S.Ct. 10, 290 U.S. 82, 78 L.Ed. 189.

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed on other grounds 55 N.E.2d 855, 293 N.Y. 32.
58 C.J. p. 655 note 94.

Failure to inspect after damage

U.S.—The O'Boyle No. 1, D.C.N.Y., 64 F.Supp. 378.

Unseaworthiness due to general decay

Where general decay causes unseaworthiness and inability to withstand ordinary service, owner's lack of knowledge can mean only that owner did not inspect vessel or provide regular inspection.—Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co., D.C.N.Y., 50 F.2d 270.

Vessel under personal supervision of owner

(1) A loss is not occasioned without the knowledge or privity of the shipowner, when it arises from his personal neglect to inform himself of the defective condition of his vessel, the vessel being under his immediate personal supervision.—The Republic, N.Y., 61 F. 109, 9 C.C.A. 386.

(2) Where proper inspection of yacht would have revealed defective condition of exhaust pipes from which carbon monoxide gas escaped into stateroom, and owner of yacht was himself present and in charge, the owner, because of failure to make an inspection, was not entitled to limitation of liability for injuries from carbon monoxide poisoning sustained by passengers.—The Friendship II, C.C.A.Fla., 113 F.2d 105, reversed on other grounds 61 S.Ct. 687, 312 U.S. 333, 668, 85 L.Ed. 903.

81. U.S.—Southern Pac. Co. v. U. S., C.C.A.N.Y., 72 F.2d 212.

Loss caused by negligence of engineer

Statute limiting liability of owner of vessel for loss occasioned without privity or knowledge of owner was held applicable and to limit liability of shipowner to those suffering loss from capsizing and sinking of steamer which occurred by reason of negligence of engineer in charge of operation of her water ballast tanks, since statute did not make exercise of due diligence in making vessel seaworthy condition of limiting liability.—The Eastland, C.C.A.Ill., 78 F.2d 934, certiorari denied Bishop v. St. Joseph-Chicago S. S. Co., 56 S.Ct. 442, 297 U.S. 703, 80 L.Ed. 992.

82. U.S.—Chesapeake Lighterage, etc., Co. v. Baltimore Copper Smelting, etc., Co., C.C.A.Md., 40 F.2d 394.
58 C.J. p. 656 note 95.

83. N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App. Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed on other grounds 55 N.E.2d 855, 293 N.Y. 32.
58 C.J. p. 656 note 96.

84. U.S.—The Silverpalm, D.C.Cal., 13 F.Supp. 212, affirmed in part and reversed in part on other grounds, C.C.A., The Silver Palm, 94 F.2d 776.

85. U.S.—The Carroll, D.C.Md., 60 F.2d 985—The Yungay, D.C.N.Y., 58 F.2d 352—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272—The Ariel, D.C.N.Y., 33 F.Supp. 573, affirmed, C.C.A., 119 F.2d 866—The

cised due diligence to provide a seaworthy vessel, he may claim the benefit of the statute[86] where a loss afterward occurs, without privity or knowledge on his part, from some secret defect in the ship or its equipments, which could not have been discovered or avoided by the exercise of due care on his part.[87] So, if the vessel is in a condition, when she sails, to encounter the ordinary perils of her voyage, this is sufficient to make her seaworthy, so that if loss is due to the mistake or carelessness of the captain, without the fault, knowledge, or privity of the owners, the latter are entitled to limitation of liability.[88] However, it has been held that even though the unseaworthiness develops after the ship has left her home port limitation of liability may be precluded on the ground of privity or knowledge, where the facts constituting the defect were made known to the owner and the owner could have communicated with the vessel.[89] Failure to make proper use of equipment furnished, in the course of a voyage, is regarded as a fault of the crew and not of the owner and does not prevent limitation of liability in respect of such failure.[90] So, where the duty to furnish certain equipment has been regarded as that of the master, the right of the owner to limit liability arising from a violation of such duty has been recognized.[91] The mere fact that a vessel is old fashioned and antiquated does not make it unseaworthy so as to bar limitation of liability.[92]

Manning of vessel; sufficiency and presence of crew. Failure to furnish a sufficient crew, in respect of which the owner is chargeable with privity or knowledge, may be ground for refusing limitation,[93] and the owner is in privity with a loss which occurs by reason of failure to exercise due care in selecting a competent master and crew and his failure is ground for refusal of limitation.[94] If, however, the owner exercises due care in the selection of the master and crew and a loss subsequently occurs without actual privity or knowledge on the part of such owner, through the negligence of the master or crew, the owner's liability may be the subject of limitation,[95] notwithstanding it appears

Pegeen, D.C.Cal., 14 F.Supp 748—The City of Bangor, D.C.Mass., 13 F.Supp 648.
58 C.J. p. 656 note 99

Conformity to requirements as to boilers

Where shipowner was guided by directions, and sought to conform to requirements, of United States inspectors who inspected boiler, and ship was lost when boiler allegedly exploded, owner was entitled to limitation of liability, since any defect in boiler would be without privity or knowledge of owner.—The South Coast, C.C.A.Cal., 71 F.2d 891, certiorari denied Willey v. Hobbs, Wall & Co., 55 S.Ct. 347, 293 U.S. 627, 79 L.Ed. 713

Vessel becoming unseaworthy after breaking ground

U.S.—New Orleans Coal & Bisso Towboat Co v. U.S., C.C.A.La., 86 F.2d 53, rehearing denied 86 F.2d 1008, certiorari denied St. Paul Fire & Marine Ins. Co. v. New Orleans Coal & Bisso Towboat Co., 57 S.Ct. 669, 300 U.S. 676, 81 L.Ed 881, and Louisiana Nat. Bank of Baton Rouge v New Orleans Coal & Bisso Towboat Co., 57 S.Ct. 669, 300 U.S. 676, 81 L.Ed 881, amended on other grounds, C.C.A., New Orleans Coal & Bisso Towboat Co v. U.S., 89 F.2d 967.

86. U.S.—The City of Camden, C.C.A.N.J., 292 F. 93.
58 C.J. p. 656 note 1.

87. U.S.—Wessel v. Charleston Lighterage, etc., Co., D.C.S.C., 25 F.2d 126
58 C.J. p. 656 note 2.

88. U.S.—In re Meyer, D.C.Cal., 74 F. 881

89. U.S.—Hockley v. Eastern Transp. Co., D.C.Md., 10 F.Supp 908.

Overloading

Limitation of liability for cargo loss in sinking of barge due to unseaworthiness caused by overloading would not be permitted, regardless of whether loss was caused by breach of personal contract, where there was opportunity for telegraphic communication between barge captain, who supervised loading, and owners' office, figures of draft were mailed to office before voyage, and barge was within reach of executive officers for a day after they had presumably received notice of draft, since facts justified finding of unseaworthiness with owner's privity or knowledge.—Hockley v. Eastern Transp. Co., supra.

90. U.S.—The Jane Grey, D.C.Wash., 99 F. 582.
58 C.J. p. 656 note 4.

91. U.S.—The Jane Grey, supra.
58 C.J. p. 656 note 5.

92. U.S.—The Mattie, D.C.N.Y., 38 F.Supp. 745.

93. U.S.—The Linseed King, D.C.N.Y., 24 F.2d 967.
58 C.J. p. 657 note 15.

Owner's direction to proceed without pilot

U.S.—Petition of W. E. Valliant & Co., D.C.Md., 50 F.Supp 746, affirmed, C.C.A., The E. Madison Hall, 140 F.2d 589, certiorari denied W. E. Valliant Co v. Rayanier, Inc., 64 S.Ct. 1159, 322 U.S. 748, 88 L.Ed 1579

No ipso facto culpability

With respect to right to limitation of liability, a charterer of a tug is not ipso facto culpable for hiring a green deckhand whose incompetence is a contributing cause of a collision—The New York Marine No. 10, C.C.A.N.Y., 109 F.2d 564.

94. U.S.—The Trillora II, D.C.S.C., 76 F.Supp 50—The Ruth Conway, D.C.Md., 75 F.Supp 514—The Big Chief, D.C.Mo., 75 F.Supp 496—The New York Marine No 10, D.C.N.Y., 25 F.Supp 847, affirmed C.C.A., 109 F.2d 564
58 C.J. p. 657 note 12.

95. U.S.—Coryell v. Phipps, Fla., 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed 363—Petition of Tracy, D.C.N.Y., 92 F.Supp. 706, affirmed, C.A., 194 F.2d 362—The Trillora II, D.C.S.C., 76 F.Supp. 50—The Big Chief, D.C.Mo., 75 F.Supp 496
58 C.J. p. 657 note 13.

Motor boat operated by owner's minor son

Motor boat owner was entitled to have his liability, for injuries sustained by individual who was struck by petitioner's boat while it was being operated by petitioner's minor son, limited to value of boat, notwithstanding operation of boat had been intrusted to boat owner's thirteen and one-half year old son, where son was experienced and thoroughly trained operator and there was no basis for finding or imputing negligence of son to boat owner—Rautbord v. Ehmann, C.A.Ill., 190 F.2d 533.

after the event that the master did not possess sufficient knowledge to enable him to avoid the danger which he encounters[96] Moreover, the absence of the master or pilot or some other competent person from the vessel without the privity and knowledge of the owner will not prevent limitation of liability,[97] notwithstanding such absence constituted negligence on the part of the vessel,[98] and the accident might not have happened had such person been on board.[99] While it has been held that the owner of barges, who knew or should have known that notwithstanding his instructions to the contrary barge captains were likely to leave their barges at night, may not claim limitation in respect of loss or damage resulting from the fact that a barge captain left his barge,[1] the failure to have men on board, or in certain parts of, the vessel does not of itself prevent limitation where such failure was not the fault of the owner and he was not privy to, and had no knowledge of, such fault,[2] and did not violate any duty of the owner.[3]

Expert knowledge. The owner, in order to discharge his duty in respect of seaworthiness, equipment, and manning, so that he may limit his liability, need not acquaint himself with the science of navigation or acquire expert knowledge concerning the vessel or its equipment or manning, nor need he designate a person as an intermediary between himself and the master, who has such knowledge.[4]

Part owners. While part owners of a vessel may be chargeable with privity or knowledge in respect of failure to procure and equip a seaworthy vessel so as to prevent limitation of their liability,[5] the fact that a part owner or owners are so chargeable does not prevent limitation of liability by part owners who are not chargeable with privity or knowledge.[6]

Cause of damage or injury. The right of limitation is not defeated by the fact that the owner is privy to, or has knowledge of, some defect or default in respect of equipment or seaworthiness, where such defect or default did not contribute to the damage or injury in respect of which limitation is sought[7] On the other hand, unseaworthiness, in respect of which the owner is chargeable with knowledge or privity, will prevent his claiming the benefit of the limitation act although it is merely a concurrent and not the sole cause of the damage or injury.[8] Similarly, the fact that the vessel was temporarily shorthanded, with the knowledge or privity of the owner,[9] or that there was a failure to have men on board, or in certain parts of, the vessel,[10] will not preclude limitation where such fact did not in any way cause or contribute to the damage or injury.

Delegation of duty. In the absence of an express warranty of seaworthiness, the right of the owner to delegate to a competent person his duty to inspect a vessel or to render her seaworthy,[11] to pro-

96 U.S.—The Murrell, D.C.Mass., 200 F. 826.

97. U.S.—The T. K. Bentley, D.C.N.Y., 7 F.Supp 565—Scheffler v. Moran Towing & Transportation Co., D.C.N.Y., 4 F.Supp. 255, reversed on other grounds, C.C.A., 68 F.2d 11

98. U.S.—The T. K. Bentley, D.C.N.Y., 7 F.Supp 565

99. U.S.—The T. K. Bentley, supra

1. U.S.—Boston Towboat Co. v. Darrow-Mann Co., C.C.A.Mass., 276 F. 778, certiorari denied 42 S.Ct. 272, 258 U.S. 620, 66 L.Ed. 794

2. U.S.—U. S. v. Carroll Towing Co., C.C.A.N.Y., 159 F.2d 169, rehearing denied 160 F.2d 482—The George W. Roby, Mich., 111 F. 601, 49 C.C.A. 481.

3. U.S.—In re Highland Nav. Corp., D.C.N.Y., 24 F.2d 582, affirmed, C.C.A., Petition of Highlands Navigation Corporation, 29 F.2d 37.
58 C.J. p. 657 note 18

4. U.S.—Boston Mar. Ins. Co. v. Metropolitan Redwood Lumber Co., Cal., 197 F. 703, 117 C.C.A. 97.

5. U.S.—Christopher v. Grueby, C.C.A.Mass., 40 F.2d 8.

6. U.S.—Christopher v. Grueby, supra.

7. U.S.—The El Sol, D.C.N.Y., 45 F.2d 852, affirmed, C.C.A., Southern Pac. Co. v. U. S., 72 F.2d 212—Petition of Sheridan, D.C.Me., 50 F.Supp. 779—The Aakre, D.C.N.Y., 31 F.Supp. 8, affirmed C.C.A., 122 F.2d 469—The Robert H. Smith, D.C.N.Y., 3 F.Supp 531.
58 C.J. p. 656 note 7

Shipowner's violation of statute prescribing life-saving appliances placed burden on him of showing violation could not have caused wrecking of vessel, but did not of itself defeat right to limitation of liability—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980

Lack of communication system

Where the proximate cause of loss of steamship was not lack of communication system to emergency steering gear but the negligence of the master, failure of owner of steamship to comply with order of board of supervising inspectors requiring such a communication system would not preclude limitation of liability, because this violation did not contribute or could not have contributed to the loss—The Iowa, D.C.Or., 34 F.Supp 843.

8. U.S.—The Anastasia, D.C.Va., 11 F.Supp 314, remanded on other grounds, C.C.A., Southern Transp. Co. v. Knickerbocker Fuel Co., 79 F.2d 1011
58 C.J. p. 657 note 8.

Causal connection held to exist

There was causal connection between maintenance of scow in unseaworthy condition and damages brought about by her capsizing.—The Emergency, D.C.N.Y., 9 F.Supp. 484.

9. U.S.—The El Sol, D.C.N.Y., 45 F.2d 852, affirmed, C.C.A., Southern Pac. Co. v. U. S., 72 F.2d 212.

10. U.S.—In re Highland Nav. Corp., D.C.N.Y., 24 F.2d 582, affirmed, C.C.A., Petition of Highlands Navigation Corporation, 29 F.2d 37.

11. U.S.—Coryell v. Phipps, Fla., 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363—Flat-Top Fuel Co. v. Martin, C.C.A.N.Y., 85 F.2d 39, certiorari denied 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431—The Yungay, D.C.N.Y., 58 F.2d 352—The Chehaw, D.C.N.Y., 54 F.2d 645.
58 C.J. p. 657 note 21.

vide the proper equipment,[12] or properly to man the vessel,[13] without the owner's losing his right to limit his liability, in respect of loss or damage resulting from the failure of the person so selected properly to perform his duty, has been recognized. In this connection, however, due care must be exercised in the selection of a competent agent,[14] and the owner may be personally charged with a loss resulting from the incompetent act or omission of an agent, so as to prevent limitation, where the owner failed to exercise due care in the selection.[15]

d. Management and Navigation; Deviation; Fire

Faults in respect of the operation of the vessel, including faults of navigation are not ordinarily regarded as the personal fault of the owner and he is not usually chargeable with privity or knowledge thereof so as to prevent limitation of liability An owner who directs or is chargeable with privity as to deviation may not claim limitation.

Where the owner has performed his duty as to furnishing a competent master and crew, faults in respect of the operation of the vessel,[16] including faults of navigation,[17] are not ordinarily regarded as the personal fault of the owner, and the owner is not usually chargeable with privity or knowledge of such faults[18] so as to prevent limitation of liability under the federal statute, 46 U.S.C.A. § 183 et seq.

It has been stated in broad terms that in order to warrant holding an owner personally at fault for a master's error in navigation at sea, so as to prevent limitation, it must appear either that the owner was in reality in command of the vessel,[19] or that the negligent acts were ordered or directed by him,[20] and the mere fact that the owner is aboard,[21] or that he is master of,[22] the vessel, does not make him privy to, or charge him with knowledge of, a fault causing a collision, so as to prevent limitation. The mere fact that the owner does not issue special instructions for the navigation of his vessel does not prevent limitation of liability arising from improper navigation;[23] and an owner who has performed his duty in respect of the selection of a competent master and crew, has given proper instructions in respect of rules for the operation and navigation of the vessel, and has not knowingly encouraged or tolerated a violation of such instructions and rules, may limit his liability for loss or damage resulting from a violation of such instructions and rules.[24] However, the failure of the owner to give certain instructions, and enforce their obedience, with respect to a dangerous device aboard the vessel may preclude the owner

Personal duty

It has been held, however, that owners' duty to see that ship is seaworthy and equipment safe is personal duty, and owners cannot escape responsibility by delegating performance —In re Jacobson, D.C.Tex., 52 F.2d 179—Christopher v. Grueby, C.C.A.Mass., 40 F.2d 8

12. U.S.—The Maria, C.C.A.Va., 91 F.2d 819—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.
58 C.J. p. 657 note 22

13. U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—Petition of Sheridan, D.C.Me., 50 F.Supp. 779.
58 C.J. p. 657 note 23

14. U.S.—The Capt. Jack, D.C.Conn., 169 F. 455

15. U.S.—In re Michigan S.S. Co., D.C.Cal., 144 F. 788, 75 C.C.A. 518

16. U.S.—Rautbord v. Ehmann, C.A.Ill., 190 F.2d 533—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—Petition of U. S., D.C.N.Y., 69 F.Supp. 538—The O'Boyle No. 1, D.C.N.Y., 64 F.Supp. 378—The City of Bangor, D.C.Mass., 13 F.Supp. 648.
58 C.J. p. 658 note 30

17. U.S.—The Edward E. Loomis, C.C.A.N.Y., 86 F.2d 705—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—The William J. Riddle, D.C.N.Y., 102 F.Supp. 884—The Iowa, D.C.Or., 34 F.Supp. 843—The McLain No. 2, D.C.N.Y., 32 F.Supp. 222
58 C.J. p. 658 note 31.
Right to limit liability arising from improper navigation in general see supra § 243 b (3).

18. U.S.—The Edward E. Loomis, C.C.A.N.Y., 86 F.2d 705—The Chehaw, D.C.N.Y., 54 F.2d 645—Petition of U. S., D.C.N.Y., 69 F.Supp. 538—The Iowa, D.C.Or., 34 F.Supp. 843—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829.
58 C.J. p. 658 note 32.

19. U.S.—The North Star, D.C.Mass., 3 F.2d 1010.

20. U.S.—The North Star, supra.

Directing departure in storm

Owner, notwithstanding absence when vessel sailed, was held responsible therefor, where he was present on preceding day when storm warnings were given and emphasized urgency of departure—In re Jacobson, D.C.Tex., 52 F.2d 179.

21. U.S.—The Maria and Elizabeth, D.C.N.J., 12 F. 627

Managing agent aboard

U.S.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.

22. U.S.—The Maria and Elizabeth, D.C.N.Y., 12 F. 627
58 C.J. p. 658 note 37.

23. U.S.—In re The Murrell, D.C.Mass., 200 F. 826—In re Rapid Transit Ferry Co., D.C.N.Y., 124 F. 786, affirmed 154 F. 182, 83 C.C.A. 276, certiorari denied 28 S.Ct. 255, 207 U.S. 586, 52 L.Ed. 352.

24. U.S.—U. S. v. City of New York, D.C.N.Y., 8 F.2d 270.
58 C.J. p. 658 note 39.

Knowledge of custom

Where river tug owner placed captain in complete charge and relied on captain's best judgment, fact that improper manner of placing lookout according to custom known to owner contributed to collision was held not such "privity or knowledge" by owner as to prevent limitation of liability—The G. K. Wentworth, C.C.A.Or., 67 F.2d 965.

from claiming limitation of liability as to damage caused as a result thereof.[25]

While there is authority apparently to the contrary,[26] the view has been taken that the owner's knowledge of the master's custom negligently to navigate his vessel may charge the owner with privity and knowledge in respect of the master's negligent act, in accordance with such custom, which resulted in loss or injury;[27] and, in general, where a negligent practice is frequent and long-continued the owners may be chargeable with knowledge of it.[28] Knowledge of the owner of an intended negligent act of the master may prevent limitation in respect of loss or injury resulting from such negligence of the master;[29] and a like rule, preventing limitation, applies where the owner directs or performs a negligent act[30] or where by wireless he controls the method of rescuing a stranded vessel,[31] and of transferring the passengers from such vessel.[32] In a proper case, permitting a ship to go out on its regular trip in dangerous weather may be a fault precluding a limitation of liability,[33] and, under some circumstances, this may be so even though the owner had instructed his pilot to avoid pressing forward under the specified conditions.[34]

Delegation of duties. Where the owner of a vessel has properly delegated duties with respect to her management to a competent person, something more is required in establishing knowledge and privity as to violations of statutes or regulations than mere negligence as to discovering whether or not those duties have properly been carried out;[35] and some degree of actual knowledge or participation must be brought home to the owner.[36]

Cause of injury or loss. The fact that the owner is chargeable with privity or knowledge in respect of certain negligent acts of the master does not prevent limitation of liability where other negligent acts of the master, in respect of which the owner

25. U S—Gunnarson v. Robert Jacob, Inc., C C A N Y, 94 F 2d 170, certiorari denied Robert Jacob, Inc v Gunnarson, 58 S Ct 764, 303 U S 660, 82 L Ed 1119, rehearing denied 58 S.Ct 948, 304 U.S. 588, 82 L Ed 1548.

Installation of gas tank

Where protane gas was used on yacht for cooking purposes and it was essential, in order to prevent gas from leaking, not to cut copper threading of throat in tank containing gas, but captain in installing new tank crossed threading and set gas leaking, yacht owner, guilty of negligence in failing properly to instruct captain and to enforce obedience, could not limit liability for captain's death caused by explosion of gas, since owner was necessarily privy to the fault—Gunnarson v Robert Jacob, Inc, C C A N Y, 94 F 2d 170, certiorari denied Robert Jacob, Inc v Gunnarson, 58 S Ct 764, 303 U S 660, 82 L Ed 1119, rehearing denied 58 S Ct. 948, 304 U S 588, 82 L Ed 1548

26. U S—The North Star, D C Mass, 3 F 2d 1010
58 C J p 659 note 40.

27. U S—The Santa Rosa, D C Cal, 249 F 160.
58 C J p 659 note 41

Facts held not to charge owner with knowledge

A shipowner seeking limitation of liability was not charged with knowledge of custom of running at excessive speed in fog because, by comparison of contemporaneous entries of deck and engine room logbook owner might have determined that vessels were operating at excessive speed, where engine room logs were mere hourly summarizations of original entries in engine room bell books, or scratch logs showing number of counter revolutions between order changing speed or stopping or reversing and the succeeding order—The Silver Palm, C C A Cal, 94 F.2d 776

28. U S—The Vestris, D C N.Y., 60 F.2d 273

Practice shown by ship's logs

U S—The Vestris, D C.N.Y., 60 F 2d 273.

29. U S—Texas, etc, SS. Co. v Parker, C C A Tex, 263 F 864, certiorari denied 40 S Ct 485, 253 U S 488, 64 L Ed. 1026.
58 C J p 659 note 42.

30. U S—The Brinton, D C N Y, 35 F 2d 543, reversed on other grounds, C C A, In re Pennsylvania R Co, 48 F 2d 559, certiorari denied James McWilliams Blue Line v. Pennsylvania R Co, 52 S Ct 21, 284 U S 640, 76 L Ed 544—In re Jeremiah Smith & Sons, Inc, Conn., 193 F 395, 113 C C A 391.

Violation of three-watch requirement

In vessel owner's proceeding for limitation of liability for loss of cargo of vessel wrecked while being navigated in violation of statute imposing three-watch requirement for mates, under evidence disclosing that during entire voyage navigation of vessel was in violation of statute by act of owner's management, and that violation was participated in by pilot acting as substitute mate as an agent commanded by the owner, there was both privity and knowledge on part of owner.—The Denali, C.C.A Wash., 105 F 2d 413, adhered to 112 F 2d 952, certiorari denied Alaska S S Co. v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U S. 687, 85 L Ed 444.

31. U S—The Santa Rosa, D.C.Cal., 249 F. 160

32. U S—The Santa Rosa, supra.

33. U S—In re Spencer Kellogg & Sons, C.C A N Y, 52 F 2d 129, reversed on other grounds The Linseed King, 52 S Ct. 450, 285 U S. 502, 76 L Ed 903.

34. U S—In re Spencer Kellogg & Sons, C C A N Y, 52 F 2d 129, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U S. 502, 76 L Ed 903.

35. U S—**Corpus Juris quoted in** The G K Wentworth, C.C A Or, 67 F 2d 965, 967—The Princess Sophia, C C A Wash., 61 F 2d 339, certiorari denied Brace v Canadian Pac. R Co, 53 S Ct. 396, 288 U S. 604, 77 L Ed 980—American-Hawaiian S S Co v Pacific S. S Co, C C A Wash, 41 F.2d 718, certiorari denied Mailliard & Schmiedell v. Pacific S. S Co, 51 S Ct. 79, 282 U. S 874, 75 L Ed 772—**Corpus Juris cited in** Petition of Liebler, D.C N. Y, 19 F Supp 829, 833.

Right to rely on master

Owner of river tug was entitled to rely on observance of rules of navigation by competent master—The G. K Wentworth, C C A Or, 67 F.2d 965

36. U S—**Corpus Juris quoted in** The G. K Wentworth, C.C A Or., 67 F 2d 965, 967—The Princess Sophia, C C A Wash., 61 F 2d 339, certiorari denied Brace v. Canadian Pac R. Co., 53 S Ct. 396, 288 U S. 604, 77 L.Ed. 980—American-Hawaiian SS Co. v. Pacific SS. Co., C C A Wash, 41 F 2d 718, certiorari denied Mailliard & Schmiedell v Pacific S. S Co, 51 S.Ct. 79, 282 U S. 874, 75 L Ed. 772.

is not chargeable with privity or knowledge, were the proximate cause of the loss or injury.[37]

Deviation. An owner who directs,[38] or who otherwise is chargeable with privity in respect of,[39] an unlawful deviation may not claim limitation in respect of the resultant loss or damage; but the privity or knowledge of one part owner, in respect of a deviation, does not prevent another part owner from claiming the benefit of the act[40]

Fire on vessel causing loss of, or injury to, merchandise. In respect of limitation of liability for the loss or destruction of cargo by fire the courts have distinguished between the phrase "privity or knowledge" as used in the act providing for limitation of liability, and the word "neglect" as used in the statute exempting the owner from liability for loss or damage to merchandise on the vessel, caused by fire happening to or on the vessel, unless such fire is caused by the design or neglect of the owner;[41] and the view generally taken is that, notwithstanding the negligence of the owner which would prevent his obtaining the benefit of the last mentioned statute, he may be without "privity or knowledge" and therefore entitled to the benefit of the limited liability act.[42] However, the limitations may not be allowed where the owner is not without "privity or knowledge" within the meaning of the limited liability act.[43]

§ 245. Proceedings to Obtain Limitation

a. In general
b. Purpose of proceeding; affirmative claim
c. Number and amount of claims

a. In General

Proceedings for the limitation of a shipowner's liability are entirely statutory; but details of the procedure are regulated by supreme court rules.

Proceedings for the limitation of the liability of a shipowner are entirely statutory.[44] The statutes do not contain provisions, complete in all details, for the method of procedure by which the benefit of the limited liability act may be claimed,[45] and the supreme court has, in the exercise of its powers, promulgated rules regulating the procedure,[46] which rules a district court is bound to obey.[47] The rules are not intended to restrict the rights of persons claiming the benefit of the limited liability act but to aid them.[48]

It has been held that a determination of the right to limit liability should not be allowed outside the limitation proceedings,[49] particularly at the in-

37. U S—Bronx Barge Corp v. Connelly Transp. Corp, C.C.A.S.C., 35 F.2d 294.
58 C.J. p 659 note 48.

38. U S—The Pelotas, C.C.A.La., 66 F.2d 75.
Deviation and effect thereof generally see supra § 144.

Right of cargo owner to claim deviation
Fact that cargo owners claimed possession of cargo delivered at destination and filed libels for damages for cargo lost, destroyed, or damaged was held not to preclude them from claiming deviation to prevent shipowner from obtaining limitation of liability—The Pelotas, supra.

Acts held not to constitute deviation within rule
U S—The Salvore, D.C.N.Y., 52 F.2d 278, affirmed, C.C.A., 60 F.2d 683, certiorari denied U. S. Steel Products Co. v. Navigazione Libera Triestina Societa Anonima, 53 S. Ct. 117, 287 U.S. 653, 77 L.Ed 565.

39. U.S.—The Frederick Luckenbach, D.C.N.Y., 15 F.2d 241.
58 C.J. p 659 note 50

40. U S—In re Meyer, D.C.Cal., 74 F. 881.

41. U.S.—Providence, etc, SS Co v Hill Mfg. Co, Mass, 3 S.Ct 379, 617, 109 U.S. 578, 27 L.Ed 1038—The Salvore, D.C.N.Y, 60 F.2d 683, certiorari denied U. S. Steel Products Co v Navigazione Libera Triestina Societa Anonima, 53 S.Ct 117, 287 U.S 653, 77 L.Ed 565
Exemption under fire statute in general see supra § 129

42. U S—Providence, etc., SS. Co. v Hill Mfg Co, Mass, 3 S.Ct 379, 617, 109 U.S. 578, 27 L.Ed 1038
58 C.J p 659 note 54

43. U.S—Arkell v U. S, C.C.A.N.Y., 13 F.2d 555, certiorari denied U. S v. Arkell & Douglas, 47 S.Ct. 243, 273 U.S. 735, 71 L.Ed 865—The Doris Kellogg, D.C.N.Y, 18 F.Supp. 159, affirmed, C.C.A, In re Kellogg S. S. Corp., 94 F.2d 1015.

44. U S—Petition of Goulandris, D.C.N.Y., 50 F.Supp 452, affirmed, C.C.A, 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co, 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed 1584—The Maine, D.C.Md, 28 F.Supp. 578, affirmed, C.C.A., Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co, 107 F.2d 373.

Effect of failure to comply with statute
Where petitioner for limitation of liability fails to comply with provisions of statute by failing to deposit with court sum equal to value of his interest in boat, give approved security therefor, or transfer interest to trustee, as provided for in statute, petition cannot be granted—The Chickie, D.C.Pa., 54 F.Supp. 19.

Special statutory proceeding
U S—The Eastland, C.C.A.Ill., 78 F.2d 984, certiorari denied Bishop v. St. Joseph-Chicago S. S Co, 56 S. Ct. 442, 297 U.S. 703, 80 L.Ed 992.

45. U S—Providence, etc, SS Co v. Hill Mfg Co, Mass, 3 S.Ct. 379, 617, 109 U.S 578, 27 L.Ed. 1038—Norwich, etc, Transp. Co. v. Wright, Conn, 13 Wall 104, 20 L. Ed 585.

46. U.S—The Eastland, C.C.A.Ill., 78 F.2d 984, certiorari denied Bishop v. St Joseph-Chicago S S Co., 56 S.Ct 442, 297 U.S 703, 80 L.Ed. 992—Petition of Wheeler, D.C.N.Y., 51 F.2d 374
58 C.J. p 660 note 58.

47. U.S—Petition of Wheeler, D.C. N.Y, 51 F.2d 374

48. U S—The Scotland, N.Y., 105 U.S. 24, 26 L.Ed. 1001.

49. U S—The Quarrington Court, C.C.A.N.Y, 102 F.2d 916, certiorari denied Court Line v. Isthmian S S. Co, 59 S.Ct 1043, 307 U.S. 645, 83 L.Ed. 1525.

Claim of charterer to indemnity from owner because of owner's breach of warranties contained in charter party and because of matters for which owner had assumed liability under the charter was not outside the scope of the limitation act.—The Quarrington Court, C.C.A.N.Y., 102 F.2d 916, certiorari denied Court Line

stance of an owner who invoked the proceeding for his own benefit,[50] but with this holding should be contrasted holdings as to the right to claim limitation by answer in a suit to enforce a claim, as discussed infra § 254 b, and it has been held that an owner may, if he chooses, forego his remedy of having the extent of his liability decided exclusively in a limitation proceeding.[51] The right of damage claimants to bring suits in state courts cannot operate to deprive the vessel owners of the right to limit their liability for losses comprehended within the federal statute.[52]

A proceeding to limit liability does not presuppose any preëxisting res of which the court is to take possession;[53] the res is created by the petitioner,[54] particularly when he does not surrender the vessel to a trustee for sale, but posts a stipulation for her value.[55]

Under the admiralty practice, a libelant bringing limitation proceedings cannot set up against the United States, in the proceedings, an affirmative claim for the libelant's collision damages,[56] even though he has to defend in such proceedings the claim of the United States for its own collision damages.[57]

A proceeding to limit liability may be maintained either where the libel is in rem against the vessel[58] or where it is in personam against the owner,[59] and the fact that no property has been attached in libels by certain damage claimants does not prevent limitation in respect of these claims where such libels assert claims against the vessel involved.[60] It is not necessary, however, that suits or actions in admiralty to enforce damage claims should have been commenced in order to authorize the maintenance of a proceeding to limit liability in respect of such claims.[61]

What law governs. The procedural steps in an action for limitation of liability are governed by the law of the forum;[62] the statutes permitting limitation are regarded as relating to remedy, and the law of the forum controls.[63] In a proceeding to limit the liabilities of the owner and the charterer of a vessel arising out of a collision in foreign waters between their vessel and a vessel of another foreign country, where the limit of liability differs under United States law and that of the country in whose waters the collision took place, the question of what law governs the substantive limit of liability should be determined in advance of proof of individual claims.[64] In a proceeding by a ship-

v Isthmian S. S Co, 59 S Ct. 1043, 307 U.S 645, 83 L Ed. 1525

50. U S —The Quarrington Court, C. C A N Y, 102 F 2d 916, certiorari denied Court Line v Isthmian S. S. Co, 59 S Ct 1043, 307 U S 645, 83 L.Ed 1525.

51. U S —The Quarrington Court, D C N.Y, 25 F Supp. 665

Arbitration with one claimant
U.S.—The Quarrington Court, D.C.N. Y., 25 F.Supp. 665.

52. Cal.—A. Paladini, Inc, v Superior Court in and for City and County of San Francisco, 21 P 2d 941, 218 Cal 114.

53. U.S —In re Putnam, C C A N.Y, 55 F 2d 73, certiorari denied Putnam v Christie, 52 S Ct 641, 286 U S 558, 76 L Ed. 1292.

54. U.S —In re Putnam, C C.A.N Y., 55 F 2d 73, certiorari denied Putnam v Christie, 52 S Ct. 641, 286 U. S. 558, 76 L.Ed. 1292.

55. U S.—In re Putnam, C.C A N Y., 55 F 2d 73, certiorari denied Putnam v Christie, 52 S Ct. 641, 286 U S. 558, 76 L.Ed 1292
Stipulation for value generally see infra § 248.
Surrender of vessel generally see infra § 247.

56. U.S —The Eglantine, D.C La, 38 F.Supp 658, reversed on other grounds U. S. v. Clyde Mallory Lines, 127 F.2d 569, affirmed Clyde-Mallory Lines v The Eglantine, 63 S Ct 294, 317 U S 395, 87 L Ed. 355.

57. U S —The Eglantine, D.C La, 38 F Supp 658, reversed on other grounds U S v. Clyde Mallory Lines, 127 F 2d 569, affirmed Clyde-Mallory Lines v The Eglantine, 63 S Ct. 294, 317 U S 395, 87 L.Ed 355.

58. U S.—The City of Norwich, N Y., 6 S Ct. 1150, 118 U.S. 468, 30 L Ed 134.
58 C.J. p 660 note 61.

59. U.S.—Hartford Accident, etc., Co v. Southern Pac. Co, Tex, 47 S Ct. 357, 273 U S. 207, 71 L Ed 612—The Rochester, D.C.N.Y, 230 F. 519.

60. U S —The Rochester, supra.

61. U.S —In re Pennsylvania R. Co., C.C A N.Y., 48 F 2d 559, certiorari denied James McWilliams Blue Line, Inc., v. Pennsylvania R. Co, 52 S.Ct 21, 284 U.S 640, 76 L Ed 544.
58 C.J. p 660 note 64.
Time for commencing proceeding and waiver or loss of right see infra § 249.

62. U.S —Petition of Canada S. S Lines, D.C Ohio, 94 F.Supp. 322.

Time of determining applicable law
In action for exoneration from, or limitation of, possible liability arising out of steamship fire in Canada, a determination of whether Canadian or American law was applicable was not required to be made prior to filing of claims, where it was likely that there would be a trial on issue of right to limitation, and question of what law should apply would be determined at such trial before proof of damages, and maximum amount for which company would be liable was greater under Canadian than under American law.—Petition of Canada S S. Lines, supra.

International Convention relating to limitation of liability does not govern forum if it merely provides procedural machinery by which claims otherwise created are brought into concourse and scaled down to proportionate share of a limited fund. —Black Diamond S S Corp. v. Robert Stewart & Sons, N.Y., 69 S.Ct. 622, 336 U S. 386, 93 L Ed. 754, amended on other grounds 69 S.Ct. 1490.

63. U.S —The Mandu, C C A.N.Y., 102 F.2d 459—Royal Mail Steam Packet Co v. Companhia de Navegaco Lloyd Brasileiro, D.C.N.Y., 31 F.2d 757.

French statute held inapplicable
U S.—Accinanto, Limited v. Cosmopolitan Shipping Co., D.C.Md, 100 F.Supp. 826.

64. U S.—Black Diamond S. S. Corp v Robert Stewart & Sons, N.Y, 69 S Ct. 622, 336 U.S 386, 93 L Ed 754, amended on other grounds 69 S. Ct. 1490.

owner of one foreign country for limitation of liability for a collision with a vessel of another foreign country in territorial waters of the former country, the substantive rights of the parties are governed by the law of the former country.[65] In such a proceeding, where the two countries have adopted the Brussels Convention, recourse to that law is proper in order to ascertain the quantum of damages permitted in connection with the wrong involved.[66]

In a proceeding in admiralty by a shipowner seeking limitation of liability for injuries from an explosion, on the ground that it resulted solely from the negligence of the injured persons' employer as an independent contractor, the law of the state in which the explosion took place, while the vessel was in drydock, has been held to govern.[67]

Parties. The right secured to a corporation shipowner to limit its liability and the corresponding right in the stockholders as to their several personal liabilities do not include the right in either to compel the other to become a party to a federal limitation suit;[68] and the corporation is not a necessary party to such a suit brought by the stockholders to limit their personal stockholders' liabilities.[69]

Bond not required of United States as owner Under the statutes governing proceedings in admiralty, the United States, as the owner of a vessel involved in a collision, is not required to give a bond as a prerequisite to securing a limitation of its liability.[70]

b. Purpose of Proceeding; Affirmative Claim

The purpose of the proceeding, in addition to limiting the owner's liability to the true value of his interest in the vessel, is to marshal all claims, or bring them into concourse, and settle every dispute in one action.

The purpose of the limitation proceeding is to limit the liability of the owner to the true value of his interest in the vessel;[71] but the purpose is not merely to limit liability,[72] but to bring all claims into concourse and settle every dispute in one action.[73] The statutory proceeding is intended and designed for the marshaling of all claims against the vessel and owner,[74] and for the purpose of their complete and final disposition, whether limitation ultimately is or is not granted.[75]

The prevention of a multiplicity of suits has been held to be one of the reasons for the institution of a limitation proceeding.[76] On the other hand, it has been held that the purpose of limitation proceedings is not to prevent a multiplicity of suits,[77] but, in an equitable fashion, to provide a marshaling of assets and the distribution, pro rata, of an inadequate fund among claimants, none of whom can be paid in full.[78]

65. U.S.—The Mandu, D.C.N.Y., 15 F. Supp. 627.

66. U.S.—The Mandu, supra.

Domestic public policy

(1) Domestic public policy was not contravened by Brussels Convention, which should therefore be enforced in so far as governing amount of damages, even though such convention makes liability to innocent cargo owners proportionate to degree of fault—The Mandu, supra

(2) Court could not refuse to apply Brussels Convention, fixing liability if both vessels in a collision were at fault, on ground that it was against public policy of United States, notwithstanding United States laws provided different rules—The Mandu, C.C.A.N.Y., 102 F.2d 459.

67. U.S.—The W. D. Anderson, D.C. Pa., 17 F.Supp. 754, affirmed, C.C.A., 94 F.2d 377, certiorari denied Atlantic Refining Co. v. Smith, 58 S.Ct. 764, 303 U.S. 658, 82 L.Ed. 1117.

68. Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114.

Intervention and bringing in new parties see infra § 252.

Persons entitled to benefit of limitation see supra § 241.

69. Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, supra.

70. U.S.—The El Sol, D.C.N.Y., 45 F.2d 852, affirmed, C.C.A., Southern Pac. Co. v. U. S., 72 F.2d 212

Collision with foreign vessel in foreign waters

U.S.—Black Diamond S.S. Corp. v. Robert Stewart & Sons, N.Y., 69 S.Ct. 622, 336 U.S. 386, 93 L.Ed. 754, amended on other grounds 69 S.Ct. 1490

71. U.S.—The Kearny, D.C.N.Y., 3 F.Supp. 718, 721

"No unnecessary surrounding circumstances should be permitted which might affect the ascertainment of such true value"—The Kearny, supra

Integral part of proceeding

Admiralty procedure for ascertainment of value of owner's interest in vessel is integral part of proceeding for limitation of liability, and differs from submission of such question to jury—The Kearny, supra.

72. U.S.—The Quarrington Court, C.C.A.N.Y., 102 F.2d 916, certiorari denied Court Line v. Isthmian S.S. Co., 59 S.Ct. 1043, 307 U.S. 645, 83 L.Ed. 1525.

73. U.S.—The Quarrington Court, C.C.A.N.Y., 102 F.2d 916, certiorari denied Court Line v. Isthmian S.S. Co., 59 S.Ct. 1043, 307 U.S. 645, 83 L.Ed. 1525.

74. U.S.—Petition of Canada S.S. Lines, D.C.Ohio, 93 F.Supp. 549

75. U.S.—Petition of Canada S.S. Lines, supra.

76. U.S.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., C.C.A.N.Y., 57 F.2d 176—Petition of Tracy, D.C.N.Y., 86 F.Supp. 306

77. U.S.—Petition of Moran Transp. Corp., C.A.N.Y., 185 F.2d 386, certiorari denied Moran Transp. Corp. v. Mellini's Adm'x, 71 S.Ct. 573, 340 U.S. 953, 95 L.Ed. 687.

78. U.S.—Petition of Moran Transp. Corp., C.A.N.Y., 185 F.2d 386, certiorari denied Moran Transp. Corp. v. Mellini's Adm'x, 71 S.Ct. 573, 340 U.S. 953, 95 L.Ed. 687.

Apportionment and distribution of compensation fund see infra § 256 d.

c. Number and Amount of Claims

Limitation of liability may be had in a proceeding therefor even though there is only a single damage claim. The petition will not lie where the amount of the claim or claims is less than the value of the vessel or freight, or the owner's interest therein, but will lie where there is a probability or possibility of claims exceeding such value.

While in some cases the right to maintain a separate or independent proceeding to limit liability where there is only one claim has been denied,[79] on the ground that in such case the benefit of the statute may be taken by defense in an action on the claim,[80] it is now well settled that the limitation may be had in a separate or independent proceeding for that purpose even though there is only a single damage claim,[81] provided it is large enough,[82] notwithstanding the related statutory provisions as to apportionment and the transfer of the interest in the vessel and freight to a trustee apparently contemplate a plurality of claims.[83]

Amount. It has been held or recognized that a single claim for an amount less than the value of the petitioner's interest in the freight or cargo will not authorize a petition for limitation,[84] and, where the aggregate amount of the claims is concededly less than the value of the vessel and freight, a petition to limit liability will not lie[85] merely to bring all claims into concourse and thus to avoid a multiplicity of suits.[86] A petition to limit liability will lie, however, where there is a probability, or possibility, of claims in excess of the value of the vessel and freight,[87] or in excess of the fund available for the satisfaction of the claims,[88] or even, it has been held, unless it appears beyond question either from the petition or elsewhere, that the aggregate of the claims is less than the value of the vessel and freight.[89]

§ 246. —— Form and Nature of Proceeding

A proceeding for limiting liability is sui generis, and essentially equitable; it may partake of the character of suits in personam and in rem.

The owner of a vessel may maintain a separate or independent proceeding to claim the benefit of the federal statute providing for limited liability,[90] and a proper method to claim such benefit is by libel or petition filed in the district court by the owner,[91] although, as discussed infra § 254 b, the right

79. U S —The Eureka No. 32, D.C N Y, 108 F 672
58 C J. p 661 note 85.

80. U S —The Eureka No. 32, supra —The Rosa, D C.Mass, 53 F 132

81. U S —Larsen v. Northland Transp Co, Wash, 54 S Ct 584, 292 U S 20, 78 L Ed 1096—Langnes v. Green, Wash, 51 S Ct 243, 282 U.S. 531, 75 L.Ed 520—Algoma Central & Hudson Bay Ry. Co. v Great Lakes Transit Corp, C C A. N Y, 86 F Supp 708—The Vera III, D C N Y, 24 F.Supp. 421—The Mandu, D C.N Y, 20 F Supp 820.
58 C J. p 661 note 88.

Order noting defaults of other claimants injured on ship did not determine that there was but one claimant in limitation proceedings —The Lake Ellendale, D C N Y., 53 F. 2d 415

82. U.S.—The Kearny, D.C N Y., 3 F.Supp. 718.

83. U S —White v. Island Transp. Co, Wash, 34 S Ct 589, 233 U S 346, 58 L Ed 993
58 C J. p 661 note 91.

84. U.S —The Aquitania, C C A.N.Y., 20 F.2d 457.
58 C J. p 661 note 92.
Dismissal where claims less than value of vessel and freight see infra § 256.

85. U S —Petition of Moran Transp Corp., C A.N Y., 185 F 2d 386, certiorari denied Moran Transp Corp. v. Mellini's Adm'x, 71 S.Ct. 573, 340 U S. 953, 95 L Ed. 687—The Kearny, D.C N Y, 3 F.Supp 718.
58 C J. p 661 note 93

Denial without prejudice
Where aggregate of two claims filed in answer to petition did not approximate value of vessel and cargo, petition would be denied without prejudice, but would be retained as a pending case to the end that application might be again made for limitation in event that action in state court by one of the claimants under the Jones Act dictated the necessity of such action —In re Trawler Gudrun, Inc, D C Mass, 101 F Supp. 586.

86. U S —Petition of Moran Transp Corp, C A N Y., 185 F 2d 386, certiorari denied Moran Transp. Corp v Mellini's Adm'x, 71 S Ct. 573, 340 U S 953, 95 L Ed 687—The Aquitania, C C A N Y., 20 F.2d 457

Challenge of limitation privilege
As long as claimant does not challenge privilege of limiting liability, shipowner may not draw an action against him into admiralty court in limitation proceedings, when there is only a single claim, even though it is greater than value of vessel, but with that exception limitation proceedings will lie only when a concourse is necessary in order to distribute an inadequate fund —Curtis Bay Towing Co. v Tug Kevin Moran, Inc, C C A N Y., 159 F.2d 273.

87. U S —The Tug Kevin Moran, Inc, D C N Y., 67 F Supp. 265.
58 C J p 662 note 95.

88. U.S —Black Diamond S. S Corp v. Robert Stewart & Sons, N.Y, 69 S Ct 622, 336 U S 386, 93 L Ed 754, amended on other grounds 69 S Ct 1490

89. U S —The George W. Fields, D. C.N Y, 237 F 403.
58 C J p 662 note 96

90. U S.—The Chickie, C C A Pa., 141 F.2d 80—Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro, D C N.Y., 27 F. 2d 1002—In re Moran Bros Contracting Co, D C N Y., 1 F Supp. 932—Thomassen v. Whitwell, D C N Y, 23 F Cas No.13,930, 9 Ben. 458
Courts having jurisdiction of separate proceeding see infra § 250.

Admiralty suit rendering separate proceeding improper
Where only suit brought in United States against owner of vessel and steamship company, as "bareboat" charterer, arising out of collision in Belgian waters of their vessel with British vessel, was in admiralty, the right to limit liability could be tried therein, and a separate limitation proceeding by owner and charterer was not proper.—U. S v. Robert Steward & Sons, Limited, C C.A N Y, 167 F.2d 308, reversed on other grounds Black Diamond S S. Corp. v Robert Stewart & Sons, 69 S Ct. 622, 336 U.S. 386, 93 L Ed. 754, amended on other grounds 69 S Ct. 1490.

91. U S —The Chickie, C.C A Pa, 141 F 2d 80—Moran Towing & Transp.

to claim the benefit of the statute by answer in a suit to enforce a claim has been recognized. A proceeding by one damage claimant in behalf of all to obtain the relief afforded by the act may be maintained.[92]

A proceeding for the limitation of liability is sui generis.[93] It is not a determination of a cause of action,[94] but is merely a determination of whether or not the petitioner is entitled to limit his liability for causes of action which have been adjudicated,[95] it is to discover whether or not an owner or a charterer is entitled to the benefits of the statute.[96] While a proceeding to obtain the benefit of the limited liability act is not strictly an action in rem, but partakes rather of the character of a suit in personam,[97] and is not an action against the vessel and her freight except when they are surrendered to a trustee,[98] where the petitioner for limitation has filed a stipulation for value, the jurisdiction of the admiralty court attaches both in rem and in personam by reason of the res put into the hands of the court by the petitioner.[99] The statute provides a method by which damage claimants may be brought into concourse,[1] and the proceeding by petition or libel to limit petitioner's or libelant's liability is essentially an equitable proceeding,[2] partaking of the features of a bill to prevent or enjoin multiplicity of suits,[3] a bill in the nature of an interpleader,[4] and a creditor's bill or suit.[5] The proceeding for limitation of liability has been declared different from the ordinary admiralty suit[6] in that in such proceeding the court of admiralty has power to grant an injunction and by way thereof to bring into the admiralty court litigants who do not have claims which are strictly admiralty claims.[7] Limitation proceedings are not merely auxiliaries to the distribution of an inadequate fund among a number of claimants.[8]

§ 247. —— Surrender or Abandonment of Vessel and Pending Freight

a In general
b Form and sufficiency
c. Control and custody, and effect of failure to surrender

a. In General

Except where he pays the value of his interest into court or files a stipulation therefor, an owner seeking limitation of liability by an independent proceeding must surrender the vessel and her pending freight.

Co v. U S, D C N Y., 80 F Supp 623—Cantey v McLain Line, D C N.Y, 40 F Supp 887
N Y —De Pinto v O'Donnell Transp Co., 40 N Y S 2d 218, 180 Misc. 649, affirmed and modified In re De Pinto's Estate, 45 N Y S 2d 414, 266 App Div 1002, reargument denied 45 N.Y S 2d 929, 267 App Div 760, reversed 55 N E 2d 855, 293 N.Y. 32
58 C.J. p 660 notes 72, 73.

92. U S —The H F. Dimock, D.C N Y., 52 F 598, mandamus dismissed In re Morrison, 13 S Ct. 246, 147 U.S 14, 37 L Ed. 60

93. U S —Robinson v States S. S Co, C C A.Or, 81 F.2d 744—The City of Norwich, D C N Y, 5 F Cas No 2,762, 6 Ben. 330, affirmed, C C, 18 F Cas No 10,362, affirmed 6 S Ct 1150, 118 U S. 468, 30 L Ed 134

Two separate issues may be presented by such a proceeding one is whether petitioner may take from the claimants their right to proceed at common law with jury trial, the other is based on the right of common-law action of the claimants against petitioner expressly given by statute for death claims —Robinson v States S S Co, C C A Or, 81 F 2d 744.

94. U.S —The James Horan, D.C N. J., 10 F Supp 28, affirmed, C.C A, 78 F 2d 870, certiorari denied Warner-Quinlan Co v Swan-Finch Oil Corp, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

95. U S —The James Horan, D C N. J, 10 F.Supp. 28, affirmed, C C A., 78 F.2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corp, 56 S Ct. 142, 296 U.S 621, 80 L Ed. 441.

96. U S.—The James Horan, D.C N. J, 10 F Supp 28, affirmed, C C A, 78 F 2d 870, certiorari denied Warner-Quinlan Co. v Swan-Finch Oil Corp, 56 S.Ct. 142, 296 U.S 621, 80 L Ed 441.

97. U.S —The City of Norwich, D C N Y, 5 F Cas No.2,762, 6 Ben 330, affirmed, C C, 18 F.Cas No.10,362, affirmed 6 S Ct. 1150, 118 U.S. 468, 30 L Ed. 134

98. U.S.—In re Morrison, N Y., 13 S Ct. 246, 147 U S 14, 37 L.Ed. 60
58 C J. p 660 notes 76, 77.

99. U.S.—Hartford Accident, etc, Co. v. Southern Pac Co, Tex, 47 S Ct 357, 273 U S 207, 71 L Ed 612—The Panuco, D C N.Y., 47 F.Supp 249.

1. U S —Hartford Accident, etc., Co. v. Southern Pac. Co, Tex, 47 S Ct. 357, 273 U.S. 207, 71 L Ed 612—The Princess Sophia, D C.Wash, 36 F.2d 591.

2. U S.—Rice Growers' Ass'n of Cal. v. Rederiaktiebolaget Frode, C A.9, 171 F 2d 662—Petition of Texas Co, D C N Y., 81 F.Supp. 758—In re Curtis Bay Towing Co. of Pa, D C Pa, 63 F Supp. 72.
58 C J. p 661 note 81.

"All the ease with which rights can be adjusted in equity is intended to be given in the proceeding. It is the administration of equity in an admiralty court"—Hartford Accident, etc, Co. v. Southern Pac. Co, Tex, 47 S Ct. 357, 359, 273 U.S 207, 71 L.Ed. 612—The Panuco, D C N. Y., 47 F Supp 249, 250.

Stipulation for value instead of surrender

Where ship against which libel was filed was not surrendered, but stipulation for value of ship took ship's place, subsequent proceeding by shipowner for limitation or exoneration of liability was in nature of equitable action.—The Mandu, D C N.Y., 20 F Supp. 820.

3. U.S —The Panuco, D.C.N.Y., 47 F. Supp. 249.
58 C J. p 661 note 82.

4. U S.—The Panuco, supra.
58 C.J. p 661 note 83

5. U S —The Panuco, supra.
58 C J p 661 note 84.

6. U.S.—Just v. Chambers, Fla, 61 S Ct. 687, 312 U.S. 383, 85 L.Ed. 903.

7. U.S —Hartford Accident, etc., Co. v. Southern Pac Co., Tex., 47 S. Ct. 357, 273 U S. 207, 71 L Ed. 612.
Injunction against other proceedings see infra § 251 b.

8. U S —Curtis Bay Towing Co v. Tug Kevin Moran, Inc., C.C.A.N. Y., 159 F.2d 273.

The privilege of limiting liability is granted the owner of an offending vessel on condition that he surrender the value of his interest in the vessel and her freight then pending.[9] So, in a separate or independent proceeding for limitation of liability, the vessel at fault and her pending freight must be surrendered,[10] or, as discussed infra § 248, the value paid into court or a stipulation therefor given; but in order to claim the limitation by answer in a suit or action by damage claimants against the owner it is not necessary to surrender or abandon the vessel and freight[11] or, as discussed infra § 248, to pay the proceeds or value into court.

The right of surrender or transfer under the provision of the limited liability act, 46 U.S C.A. § 185, that it shall be deemed a sufficient compliance with the act, if the owner shall transfer his interest in the vessel and freight, for the benefit of damage claimants, to a trustee appointed by the court, may be exercised by the owner notwithstanding his interest in the vessel and freight may have been diminished in value by the collision or other casualty during the voyage[12] or may be a total loss.[13] The fact that the owner, after the collision and before surrendering the vessel to a trustee, replaces the steering wheel and part of the steering gear is not ground for dismissing the petition for limitation.[14] The power of the trustee to enforce a claim for damages in favor of the owner who seeks limitation, transferred to the trustee for the benefit of the damage claimants in the limitation proceeding, has been recognized.[15]

A charterer, in order to limit his liability, must surrender the vessel and freight pending at the end of the voyage, or their value.[16]

b. Form and Sufficiency

(1) In general

(2) Several vessels of same owner

(1) In General

Actual transfer of the vessel is not essential, but the equivalent thereof, as by payment of the value of the owner's interest into court or giving a stipulation therefor, may be acceptable. The transfer must be of the owner's interest as of the time of completing the voyage during which the injury occurred.

Notwithstanding the statutory provision for the transfer, for the benefit of damage claimants, of the vessel and freight, as discussed supra subdivision a of this section, the operation of the act is not confined to cases of actual transfer in accordance with the express terms of such provision,[17] but includes cases in which what is required or done is equivalent to such transfer;[18] and under one of the admiralty rules it is optional with one who seeks to limit his liability either to surrender the vessel and freight to a trustee appointed by the court, or, as directed by the court, to pay into court the appraised amount or value of his interest in the vessel and freight or to give a stipulation with surety for such amount or value.[19] In case of total loss, no formal abandonment is necessary to entitle the owners to the benefit of the act[20] One who seeks limitation is required to surrender only his own interest in the vessel.[21]

Claim of owner for damages. An owner who seeks limitation of liability must assign to the trustee, for damage claimants' benefit, a right of action against a shipwright for negligence causing injury to the vessel, out of which injury the liability of the owner arose[22]

Surrender free from liens. The owner must surrender the vessel free from liens accrued subsequently to the voyage on which losses have occur-

9. U.S.—In re W. E Hedger Co, C C A N Y, 59 F.2d 982.

Measurement of owner's interest in freight

Sum collected as freight by tug owner without interest in cargo-carrying barges necessarily measures interest in freight with respect to limitation, in absence of showing that others are entitled to share in freight.—In re W. E. Hedger Co, supra.

10. U.S.—The Kearny, D C N.Y, 3 F Supp. 718.
58 C.J. p 662 notes 97, 1.

11. U S.—The City of Norwich, N Y, 6 S Ct. 1150, 118 U.S. 468, 30 L Ed. 134
58 C.J. p 662 note 4.

Right to claim limitation by answer generally see infra § 254 b.

12. U S —Norwich, etc, Transp. Co. v Wright, Conn., 13 Wall. 104, 20 L Ed 585.

13. U.S.—Norwich, etc, Transp Co. v. Wright, supra
58 C.J p 662 note 99.
Extent of liability in case of total loss see supra § 242

14. U S —The Mattie, D.C.N.Y, 34 F Supp. 856

15. U S.—Petition of Navigazione Libera Triestina, D C N.Y., 34 F 2d 150

16. U S —The Fort Bragg, D.C.Cal, 6 F Supp 13.

17. U.S —Petition of Wheeler, D.C N Y, 51 F 2d 374
58 C.J. p 662 note 8.

18. U S.—In re Morrison, N Y., 13 S Ct 246, 147 U S. 14, 37 L Ed 60—Providence, etc, SS. Co. v Hill Mfg Co., Mass, 3 S Ct 379, 617, 109 U.S 578, 27 L.Ed 1038.

19. U S —Petition of Wheeler, D C N.Y, 51 F 2d 374.
58 C.J p 662 note 10.

Effect of election

Such an election has been held irrevocable —The Ontario No. 1, C.C.A N Y., 80 F.2d 85.

20. U.S —The Peshtigo, D.C Mich., 19 F Cas.No 11,018, 2 Flipp. 466.

21. U S —In re O'Donnell, C C.A.N. Y, 26 F 2d 334.

22. U.S.—Petition of Navigazione Libera Triestina, D C.N.Y., 34 F. 2d 150.

red,[23] and, according to one view, free from liens accruing prior to such voyage.[24]

Time for surrender or transfer. The statute, 46 U.S.C.A. § 185, and Admiralty Rules, rule 51, 28 U.S.C.A., have been construed as requiring the surrender or transfer to be made within six months after a claimant shall have given the owner of the vessel written notice of claim.[25] The transfer must be of the interest of the owner as of the time of the completion of the voyage during which the injury or loss in respect of which limitation is sought occurred,[26] or, if there is no voyage, within a reasonable time,[27] and there is not a compliance with the statutory requirements if, at the time of the attempted surrender, the vessel is less valuable than she was on the date as of which surrender should have been made.[28] Subject to the foregoing rules, the right to surrender is not lost by a mere delay in making the surrender[29] or by giving a stipulation for value in a suit in rem against the vessel,[30] and she may be surrendered before or after a verdict settling the responsibility for the claim in respect of which limitation is sought.[31]

(2) Several Vessels of Same Owner

A person seeking limitation of liability must surrender all of his vessels which were at fault for the particular damage or injury involved.

A vessel of an owner who seeks limitation of liability, which was not at fault, need not be surrendered merely because such vessel was involved in the occurrence from which the liability arose[32] or because she was in the vicinity.[33] On the other hand, all vessels which are owned by the person who seeks to limit his liability and which were at fault for the particular damage or injury involved must be surrendered.[34] In some cases the view has been taken that vessels engaged in the same operation, under one common direction, are to be treated as one vessel and that all must be surrendered,[35] and a like rule, requiring the surrender of both vessels where one of such vessels wholly depends on the other for propulsion, has been recognized;[36] but there is authority for the view that the mere fact that the offending vessel depends on a tug for propulsion does not require the surrender of the tug.[37]

The vessels which are to be surrendered are those devoted to the performance of the contract at the

23. U.S.—The Leonard Richards, D.C.N.J., 41 F. 818
Deduction of amount of liens in determining interest subject to liability see supra § 242

24. U.S.—The U. S. Grant, D.C.N.Y., 45 F. 642.

25. U.S.—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584.
Interest on value in case of delay see supra § 242
Time for commencing proceedings generally see infra § 249

26. U.S.—The West Hartland, C.C.A.Wash., 2 F.2d 834.
58 C.J. p. 663 note 24

27. U.S.—The Passaic, D.C.N.Y., 190 F. 644, affirmed 204 F. 266, 122 C.C.A. 466

28. U.S.—The Puritan, D.C.Ill., 94 F. 365
58 C.J. p. 663 note 26.

Depreciation through owner's fault
Shipowner entitled to limitation of liability cannot be held personally liable for falling off in value of vessel between time of collision and time of surrender unless depreciation is due to shipowner's fault; where such loss in value was due to delay in surrender, shipowner was personally liable for such loss, with legal interest from date of decree determining vessel's liability.—The G. K. Wentworth, C.C.A.Or., 67 F.2d 965

29. U.S.—The Defender, D.C.Wash., 214 F. 316
58 C.J. p. 663 note 27.

30. U.S.—The Rose Culkin, D.C.N.Y., 52 F.2d 328

31. U.S.—In re P. Sanford Ross, Inc., D.C.N.Y., 196 F. 921, reversed on other grounds 204 F. 248, 122 C.C.A. 516.

32. U.S.—Liverpool, etc., Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal, N.Y., 40 S.Ct. 66, 251 U.S. 48, 64 L.Ed. 130.
58 C.J. p. 662 note 14
Extent of liability where several vessels involved see supra § 242

33. U.S.—The Sunbeam, N.Y., 195 F. 468, 115 C.C.A. 370—The Bordentown, D.C.N.Y., 40 F. 682

34. U.S.—U. S. v. The Australia Star, C.A.N.Y., 172 F.2d 472, certiorari denied 70 S.Ct. 69, 338 U.S. 823, 94 L.Ed. 499—The Bowling Green, D.C.N.Y., 11 F.Supp. 109, affirmed, C.C.A., Cyarnikow Rionda Co. v. Ellerman & Bucknall S. S. Co., 81 F.2d 1017
58 C.J. p. 663 note 16.

Reason for rule
All those vessels which share in the execution of the venture are collectively "such vessel" within the statute.—Standard Dredging Co. v. Kristiansen, C.C.A.N.Y., 67 F.2d 548, 551, certiorari denied Standard Dredging Co. v. Kristiansen, 54 S.Ct. 372, 290 U.S. 704, 78 L.Ed. 605.

Tug and barge in tow thereof
U.S.—Sabine Towing Co. v. Brennan, C.C.A.Tex., 72 F.2d 490, certiorari denied 55 S.Ct. 141, 293 U.S. 611, 79 L.Ed. 701, rehearing denied 55 S.Ct. 212, 293 U.S. 632, 79 L.Ed. 717.

35. U.S.—Sacramento Navigation Co. v. Salz, Cal., 47 S.Ct. 368, 273 U.S. 326, 71 L.Ed. 663.
58 C.J. p. 663 note 17

Separation of barge and dredge engaged in single venture was immaterial in determining whether both should be surrendered, where seaman employed on dredge was injured on chartered barge used as tender to supply oil to dredge; barge and dredge were single vessel subject to surrender.—Standard Dredging Co. v. Kristiansen, C.C.A.N.Y., 67 F.2d 548, certiorari denied Standard Dredging Co. v. Kristiansen, 54 S.Ct. 372, 290 U.S. 704, 78 L.Ed. 605.

36. U.S.—The Capt. Jack, D.C.Conn., 169 F. 455
58 C.J. p. 663 note 18.

Tugboat and ferry barge lashed thereto
U.S.—The Big Chief, D.C.Mo., 75 F. Supp. 496

37. U.S.—The Steam Dredge No. 6, D.C.N.Y., 222 F. 576, affirmed 241 F. 69, 154 C.C.A. 69, certiorari denied Standard Gas Light Co. v. Packard Co., 37 S.Ct. 745, 244 U.S. 659, 61 L.Ed. 1375.
58 C.J. p. 663 note 19.

particular time when the fault which causes the loss is committed;[38] so all the vessels used successively in performing a contract are not to be deemed collectively one vessel for purposes of surrender.[39]

c. Control and Custody, and Effect of Failure to Surrender

The court may, by its process or order, secure or seize a vessel or wreckage involved in limitation proceedings.

The court may direct the marshal to take the vessel and wreckage into his custody,[40] and where shipowners who have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, and have secured a stay of proceedings by libelants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may, by its own process, or its own order, seize the other vessel and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition.[41] Failure to surrender pending freight to the trustee does not necessitate a refusal to allow limitation of liability, where there is an honest controversy as to whether there was any pending freight to be surrendered and there is no question as to the solvency of the owner.[42] Where the petitioner contumaciously refuses to put the court in actual or constructive possession of the fund to be distributed, it seems that relief may properly be withheld, and the petition for limitation of liability dismissed.[43]

§ 248. —— Stipulation for Value or Payment into Court

a. In general
b. Amount
c. Appraisement

a. In General

A stipulation for the value of the owner's interest in the vessel and freight, or payment of such value into court, is a sufficient compliance with the limitation of liability statute.

A stipulation for the appraised value of the owner's interest in the vessel and freight, in respect of which limitation is sought,[44] or the payment into court of such value,[45] is equivalent to the transfer which, under the terms of a provision of the limitation of liability act, is a compliance with the act, as discussed supra § 247, and a stipulation stands in the place of the vessel and her freight,[46] although the statute provides in terms only for the transfer of the vessel, the validity of a stipulation, in accordance with the admiralty rule, as a substitute for the surrender of the vessel is beyond question.[47] In order to claim the limitation by answer in a suit or action by damage claimants against the owner, it is not necessary to pay the proceeds or value into court,[48] or, as discussed supra § 247, to surrender or abandon the vessel and freight. A plaintiff suing a shipowner in a state court and recovering judgment cannot sue on, or have recourse to, the stipulation previously filed by the shipowner in proceedings for the limitation of liability brought by him in the federal court.[49]

Time for deposit. The statute, 46 U.S.C.A. § 185, and Admiralty Rules, rule 51, 28 U.S.C.A., have been construed as requiring the deposit to be made within six months after a claimant shall have given the owner of the vessel written notice of claim.[50]

Filing an ad interim stipulation pending due appraisement, although not specifically provided for in the Admiralty Rules, is authorized practice.[51]

38. U.S.—The George W. Pratt, C.C.A.N.Y., 76 F.2d 902.

39. U.S.—The George W. Pratt, supra

Completion of part of contract by other vessels

Liability was limited to value of interest in tug which caused sinking of barge, as against contention that two other vessels engaged in performing contract should be surrendered, where other vessels completed their part of contract before tug took barge out of main tow.—The George W. Pratt, supra

40. U.S.—The John Bramall, D.C.N.Y., 13 F.Cas.No 7,334, 10 Ben. 495

41. U.S.—Oregon, etc., R. Co. v. Balfour, Or., 90 F. 295, 33 C.C.A. 57, appeal dismissed 21 S.Ct. 28, 179 U.S. 55, 45 L.Ed. 82.
58 C.J. p. 664 note 31.

42. U.S.—Deslions v. La Compagnie Generale Transatlantique, N.Y., 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973

43. U.S.—Deslions v. La Compagnie Generale Transatlantique, supra

44. U.S.—The Kearny, D.C.N.Y., 3 F.Supp. 718.
58 C.J. p. 664 note 34

45. U.S.—The Kearny, supra.
58 C.J. p. 664 note 35

46. U.S.—Hartford Accident, etc., Co. v. Southern Pac. Co., Tex., 47 S.Ct. 357, 273 U.S. 207, 71 L.Ed. 612
58 C.J. p. 664 note 37.

47. U.S.—The Ontario No. 1, C.C.A.N.Y., 80 F.2d 85.

48. U.S.—The Great Western, N.Y., 6 S.Ct. 1172, 118 U.S. 520, 30 L.Ed. 156
58 C.J. p. 662 note 5
Right to claim limitation by answer generally see infra § 254 b

49. U.S.—Green v. Langnes, C.C.A.Wash., 82 F.2d 926.

Reason for rule

The stipulation was not given to secure payment or satisfaction of any common-law judgment.—Green v. Langnes, supra.

50. U.S.—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584
Time for commencing proceedings generally see infra § 249

51. U.S.—The Rapel, D.C.N.Y., 78 F.

Irrevocable election. An owner who, after due appraisement of the vessel, gives a stipulation for the payment of its value cannot thereafter elect to transfer the vessel.[52]

Where several persons seeks to limit their liability it is not required that the stipulation should be to answer for any liability or default which may be found against any of the petitioners.[53]

b. Amount

The amount of the stipulation, depending on the value of petitioner's interest, ordinarily is determined by the value of the vessel at the end of the voyage during which liability occurred. Value, for the purpose of payment into court, may be determined by appraisement, sale under court order, or fair private sale by the owner.

The amount for which the stipulation is given depends on the value of the petitioner's interest, determined by rules set forth supra § 242, which measure the extent of petitioner's liability, and ordinarily the amount is determined by the value of the vessel at the end of the voyage during which the liability accrued.[54] The preferable methods of determining value, for the purpose of payment into court, are by appraisement[55] or by sale under order of the court;[56] but these methods are not exclusive,[57] and the price obtained on a fair, private sale by the owner may be taken as the correct amount.[58] Under one of the admiralty rules, where a vessel has already been libeled and sold, the proceeds represent the vessel for the purposes of such rules, but the price realized at a marshal's sale of the vessel, although prima facie fixing the value for which a stipulation will be required,[59] is not conclusive,[60] and the court, on cause shown, may require a stipulation for the fair value as proved.[61]

Limitation sought by several persons. Where several persons, who have distinct interests, seek to limit their liability in respect of the same vessel, each should be required to give a stipulation for, or to pay into court, where one of these methods of transfer is selected, the amount of the value of his several interest,[62] but no more.[63]

c. Appraisement

An ex parte appraisement of the amount or value of an owner's interest is not void, and may be sufficient for some purposes, although not for others; and a reappraisement may be ordered. The claimants may waive appraisement.

Under Admiralty Rules, rule 51, 28 U.S.C.A., which provides for an appraisement of the amount or value of the owner's interest in the vessel and freight, in respect of which limitation is sought, as a preliminary to an order for the payment of such amount or value into court, or for the giving of a stipulation for such amount or value, the appraisement is a substitute for a sale.[64] Notice to damage

Supp 78—In re Wright & Cobb Lighterage Co, D.C.N.Y., 2 F.Supp. 268.

58 C.J. p 664 note 37 [a], p 665 note 58 [a]

Date of depositing or filing

Fact that filing date of ad interim stipulation for value was later than six months after claim was received by petitioner did not justify a denial of petition, where stipulation was seasonably deposited with court and fact that it was not immediately approved by judge and formally filed with clerk was no fault of petitioner—The O'Boyle No. 1, D.C.N.Y., 64 F.Supp. 378.

52. U.S.—The Ontario No. 1, C.C.A. N.Y., 80 F.2d 85

Ex parte appraisement

Ex parte appraisement, determined on affidavits, on basis of which owner gave ad interim stipulation and obtained injunction against damage claimants, constituted due appraisement and a final and irrevocable election to give security instead of surrendering vessel.—The Ontario No. 1, supra.

Order for cancellation of stipulation held improper

U.S.—The Ontario No. 1, supra.

53. U.S.—The Paraiso, D.C.Wash., 226 F. 966.

54. U.S.—The Americana, D.C.Cal., 230 F. 853—The U. S. Grant, D.C. N.Y., 45 F. 642.

Increase in value after collision

Owner of vessel could not be compelled to give security for increase of value in res subsequent to collision—The Arminda, D.C.N.Y., 51 F.2d 604.

Additional security held properly required—Petition of Panama Transport Co, D.C.N.Y., 73 F.Supp. 716

Charterer

(1) Where charterer sought to limit any possible liability in respect of fault growing out of operation of vessel, but deposited only charterer's interest and not value of vessel, the petition for limitation would be dismissed unless the fund should be increased to include value of vessel—Petition of McAllister Bros, D.C.N.Y., 96 F.Supp. 575.

(2) Where limit of liability of charterer of vessel arising out of collision in Belgian waters between its ship and foreign steamer was only three hundred twenty-five thousand dollars if Belgian law governed substantive limit of liability, but was value of ship and its freight, about one million dollars, if United States law governed, and choice of governing law presented knotty problem, district court, if it should find Belgian law controlling, should provide for contingency of appellate review, by requiring charterer to post bond for value of ship and freight as exercise of its power to preserve status quo pending appeal—Black Diamond S.S. Corp. v. Robert Stewart & Sons, N.Y., 69 S.Ct. 622, 336 U.S. 386, 93 L.Ed. 754, amended on other grounds 69 S.Ct. 1490.

55. U.S.—The Ethelstan, D.C.Fla., 246 F. 187.

56. U.S.—The Ethelstan, supra.

57. U.S.—The Ethelstan, supra.

58. U.S.—The Ethelstan, supra.

59. U.S.—The U. S. Grant, D.C.N.Y., 45 F. 642.

60. U.S.—The U. S. Grant, supra.

61. U.S.—The U. S. Grant, supra.

62. U.S.—The Paraiso, D.C.Wash., 226 F. 966.

63. U.S.—The Paraiso, supra. 58 C.J. p. 664 note 51.

64. U.S.—The Natrona, D.C.Pa., 25 F.2d 507.

creditors of an appraisement is not necessary, and an ex parte appraisement is not void,[65] and such ex parte appraisement, and the taking of the stipulation thereupon, are, at most, irregularities which the district court can correct.[66] So an ex parte appraisement has been held sufficient to constitute an election barring petitioner from surrendering the vessel to a trustee,[67] but not such a due appraisement as to relieve petitioner of the burden of going forward with evidence of the value of his interest in the vessel and her pending freight.[68] It has also been held that an ex parte appraisement constitutes due appraisement only if the parties are given an opportunity subsequently to be heard,[69] so that the court has power to order a reappraisement on motion therefor by a claimant,[70] and "due appraisement" has been held intended to mean an appraisement made on a reference or in some other formal way which would give all interested parties an opportunity to be heard.[71] A prior appraisement of the vessel in connection with claims in respect of which limitation is sought, and the giving of a stipulation, pursuant to which the vessel was released, do not prevent a reappraisement in the limitation proceeding.[72] The court may, under certain conditions, adopt the valuation of the vessel made in a prior suit against the owner who seeks limitation,[73] and the damage claimants may waive an appraisement[74] and acquiesce in the shipowner's statement of the value of the vessel and the freight.[75]

§ 249. —— Time for Commencing Proceedings; Waiver or Loss of Right

a. Time for commencing proceedings
b. Waiver or loss of right

a. Time for Commencing Proceedings

Under the statute a petition for limitation of liability must be filed within six months after a claimant gives the owner written notice of a claim. In order to start the running of the period, the notice must be such as to inform the owner of the claimant's intention to look to the owner for damages, and must be notice of a claim of a kind subject to limitation of liability.

The owner of a vessel may, before he is sued, institute appropriate proceedings in a court of competent jurisdiction in order to obtain the benefit of the limited liability act.[76]

Prior to the amendment of 1936, 46 U.S.C.A. § 185, whereby the owner of the vessel is required to file his petition for limitation of liability within six months after a claimant shall have given to, or filed with, such owner written notice of a claim, no time limit existed for bringing such a petition,[77] the owner might wait until after judgment was had against him,[78] and it was held that, after suit brought on certain claims, the owner might maintain proceedings to limit liability in respect of such claims until decree or judgment therefor was satisfied.[79]

The purpose of the amendment was to cut down the rights and privileges of the owner,[80] by setting a time limit where none existed before,[81] and to

65. U.S.—Morrison v. U. S. District Ct., N.Y., 13 S.Ct. 246, 147 U.S. 14, 37 L.Ed. 60.

66. U.S.—Morrison v. U. S. District Ct., supra.

67. U.S.—The Ontario No. 1, C.C.A. N.Y., 80 F.2d 85.

68. U.S.—The Rapel, D.C.N.Y., 78 F.Supp. 78.

69. U.S.—The Gale, D.C.Mass., 22 F.Supp. 748.

70. U.S.—The Gale, supra.
58 C.J. p. 665 note 56 [a].

71. U.S.—The Fairwill, D.C.Va., 56 F.Supp. 887.

72. U.S.—The City of Norwich, N. Y., 6 S.Ct. 1150, 118 U.S. 468, 30 L.Ed. 134.
58 C.J. p. 665 note 56.

73. U.S.—The Benefactor, N.Y., 103 U.S. 239, 26 L.Ed. 351.
58 C.J. p. 665 note 57.

74. U.S.—Hartford Acc., etc., Co. v. Southern Pac. Co., C.C.A.Tex., 3 F.2d 923, affirmed 47 S.Ct. 357, 273 U.S. 207, 71 L.Ed. 612.
58 C.J. p. 665 note 58.

75. U.S.—Hartford Acc., etc., Co. v. Southern Pac. Co., supra.

76. U.S.—The Alcyone, D.C.N.Y., 50 F.2d 186, reversed on other grounds, C.C.A., In re Putnam, 55 F.2d 73, certiorari denied Putnam v. Christie, 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.
58 C.J. p. 665 note 59.

77. U.S.—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S. C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—General Seafoods Corp. v. J. S. Packard Dredging Co., D.C.Mass., 40 F.Supp. 1015—The Irving, D.C.N.Y., 33 F.Supp. 59—Petition of Hutchinson, D.C.N.Y., 28 F.Supp. 519.

78. U.S.—Larsen v. Northland, Wash., Transportation Co., 54 S.Ct. 584, 292 U.S. 20, 78 L.Ed. 1096—Petition of Goulandris, C.C.A.N.Y., 140 F.2d 780, certiorari denied 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S. C. Loveland, Inc., v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027

79. U.S.—The Benefactor, N.Y., 103 U.S. 239, 26 L.Ed. 351.
58 C.J. p. 665 note 60

80. U.S.—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—General Seafoods Corp. v. J. S. Packard Dredging Co., D.C.Mass., 40 F.Supp. 1015—The Bright, D.C.Md., 38 F.Supp. 574, affirmed, C.C.A., 124 F.2d 45—The Irving, D.C.N.Y., 33 F.Supp. 59—Petition of Hutchinson, D.C.N.Y., 28 F.Supp. 519—The Grasselli Chemical Co. No. 4, D.C.N.Y., 20 F.Supp. 394.

81. U.S.—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—The Bright,

require him to act promptly if he desires to limit his liability.[82] A petition not filed within the time so permitted by law will be dismissed,[83] since in such circumstances the admiralty court is without jurisdiction.[84] Likewise, a proceeding has been held not timely commenced where the petition, although filed in time, is not accompanied by a deposit of a sum equal to the owner's interest, or approved security, or a transfer of such interest to a trustee, but merely asks the court to act, as to such matters, "upon further application of the petitioners."[85]

The statute should be given a reasonable interpretation.[86] While notice of claim need not be in any particular form,[87] and no statutory form of claim or notice of claim is required,[88] the notice must be such as to inform the owner of the claimant's intention to look to the owner for damages.[89] Mere knowledge of an accident, on the part of the owner of a vessel,[90] or information given orally by

D.C.Md., 38 F.Supp. 574, affirmed, C.C.A., 124 F.2d 45—The Grasselli Chemical Co. No. 4, D.C.N.Y., 20 F.Supp. 394.

Time for pleading limitation by answer see infra § 254 b.

82. U.S.—Petition of Goulandris, C.C.A.N.Y., 140 F.2d 780, certiorari denied 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S. C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027—The Irving, D.C.N.Y., 33 F.Supp. 59—Grasselli Chemical Co. No. 4, D.C.N.Y., 20 F.Supp. 394.

83. U.S.—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S. C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 309 U.S. 683, 84 L.Ed. 1027—Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., C.C.A.Md., 107 F.2d 373—The Irving, D.C.N.Y., 28 F.Supp. 585, affirmed, C.C.A., Conners Marine Co. v. U. S. Gypsum Co., 107 F.2d 1011.

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed 55 N.E.2d 855, 293 N.Y. 32.

A compensation insurance carrier for the employer of an injured employee is a "claimant" within the statute.—Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., C.C.A.Md., 107 F.2d 373.

"May" in amendment held to mean "must"

U.S.—Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., C.C.A.Md., 107 F.2d 373—Petition of Goulandris, D.C.N.Y., 50 F.Supp. 452, affirmed, C.C.A., 140 F.2d 780, certiorari denied Goulandris v. American Tobacco Co., 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584—Cantey v. McLain Line, D.C.N.Y., 40 F.Supp. 887.

Issuance of new monitions

Where petitioner had failed to comply with admiralty rule by reason of certain omissions in monitions and defective notice, subsequent issuance of new monitions more than six months after filing petition did not have effect of commencement of new limitation action, barred by six-month limitation period.—Petition of Canada S.S. Lines, D.C.Ohio, 93 F.Supp. 549.

84. U.S.—The Maine, D.C.Md., 28 F.Supp. 578, affirmed, C.C.A., Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F.2d 373.

85. U.S.—Petition of Goulandris, C.C.A.N.Y., 140 F.2d 780, 782, certiorari denied 64 S.Ct. 1268, 322 U.S. 755, 88 L.Ed. 1584.

"In reality what the petitioners did amounted to no more than filing with the court a notice of their intention at some future time to initiate a proceeding for limitation of liability."—Petition of Goulandris, supra.

86. U.S.—The Ariel, D.C.N.Y., 30 F.Supp. 110.

Effect on rights at time of enactment

Failure of congress, in enacting statute, to make exception with respect to existing rights, raised strong presumption that congress intended to make no exception. Ruling that six months' period ran from passage of statute, where claim was filed prior to enactment of statute, did not give statute retroactive effect, since limitation did not divest vested rights but merely limited time within which existing rights could be asserted.—The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, certiorari denied S. C. Loveland, Inc. v. Pennsylvania Sugar Co., 60 S.Ct. 724, 209 U.S. 683, 84 L.Ed. 1027.

87. U.S.—Petition of Anthony O'Boyle, Inc., D.C.N.Y., 51 F.Supp. 430.

Amount of damages claimed

(1) A statement of the amount of damages claimed is not essential.—The Irving, D.C.N.Y., 28 F.Supp. 585, affirmed, C.C.A., Conners Marine Co. v. U. S. Gypsum Co., 107 F.2d 1011.

(2) "Clearly a notice of claim contemplates something less definite as to amount demanded than the claim itself."—The Maine, D.C.Md., 28 F.Supp. 578, 581, affirmed, C.C.A., Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F.2d 373.

88. U.S.—Petition of Hutchinson, D.C.N.Y., 28 F.Supp. 519.

89. U.S.—Petition of Anthony O'Boyle, Inc., D.C.N.Y., 51 F.Supp. 430.

Communications held to constitute sufficient notices

(1) Letter by claimant informing shipowner that five hundred fifty tons of plaster were a total loss and that shipowner would be held liable for all damage sustained through sinking of barge.—The Irving, D.C.N.Y., 28 F.Supp. 585, affirmed, C.C.A., Conners Marine Co. v. U. S. Gypsum Co., 107 F.2d 1011.

(2) Letters written to barge owner by compensation insurance carrier for employer of injured employees notifying owner of carrier's right of subrogation to such claims as injured employees might have against owner.—Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., C.C.A.Md., 107 F.2d 373.

(3) Letter mailed to owner of vessel in attempted compliance with statute was not defective as a notice of claim because it was not addressed to the owner in his true name, where letter was addressed to owner's place of business and owner received letter in due course and admitted sole ownership.—The Maine, D.C.Md., 28 F.Supp. 578, affirmed, C.C.A., Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F.2d 373.

Communications held insufficient to constitute notices

(1) Letter from wife of injured deckhand and longshoreman to shipowner, written in Norwegian and reciting that he needed money and pay and was in hospital "and I hope I get what he is asking for."—The Belleville, D.C.N.Y., 35 F.Supp. 934.

(2) Notice of claim from anonymous claimants.—The Ariel, D.C.N.Y., 30 F.Supp. 110.

(3) Notice by claimant to his employer's insurance carrier under the Longshoremen's Compensation Act, which insurer also carried liability insurance for petitioner.—Petition of Anthony O'Boyle, Inc., D.C.N.Y., 51 F.Supp. 430.

90. U.S.—Petition of Anthony O'Boyle, Inc., supra—Petition of Hutchinson, D.C.N.Y., 28 F.Supp. 519.

a third person,[91] or even by a claimant,[92] likewise does not start the running of the statutory period; but the filing of a libel does,[93] as does the commencement of a suit in a state court.[94]

A notice which starts the running of the period must be notice of a claim of a kind subject to limitation of liability,[95] in other words, in order that a notice of claim may be effective, under the statute, it must be made by one who claims damages for something for which the owner of the vessel may possibly limit his liability in accordance with the limitation statute and the admiralty rules[96] On the giving of notice of a claim, the statutory period starts running as to all claims arising out of the particular accident;[97] and an owner who fails to file his petition within six months after receiving notice of the first claim loses the right of limitation as to all subsequent claims as well, even though he files within six months after receiving notice of such subsequent claims.[98]

Affidavit of ownership. Where an owner files a petition for limitation within the statutory period, the fact that his affidavit of ownership is not filed within that period does not invalidate the petition.[99]

Laches. On the issue of laches, the shipowner is not required to claim limitation of liability until a liability on his part is established.[1]

b. Waiver or Loss of Right

The right to claim limitation of liability may be waived; but various acts, omissions, or delays on the part of the owner of the vessel, such as delay in instituting the limitation proceedings or in surrendering the vessel, have been held not to constitute, or result in, such waiver or loss.

The right to claim limitation of liability is a personal one which may be waived by the person entitled to claim the right,[2] and this rule applies to a part owner[3] The owner does not, however, waive or lose his right to maintain a proceeding to limit liability merely by delay in surrendering the vessel,[4] by failing to institute such proceeding until after the commencement of actions in personam[5] or in rem[6] to enforce claims, in respect of which limitation is sought, or by contesting liability in such actions,[7] even though there are final judgments or decrees for plaintiffs, after trial or hearing on the merits,[8] in actions either in personam[9] or in rem,[10] at least where the question as to limitation was not raised or litigated in the prior action[11] An owner or charterer, by failing to claim limitation by answer to a suit in a state court, does not waive the right to bring a proceeding for limitation in the federal court after judgment against him, for damages, in the state court,[12] notwithstanding there is only one claimant[13] So also, the owner does not waive or lose the right to claim limitation by giving

91. U S —Petition of Hutchinson, supra.

92. U S.—Petition of Hutchinson, supra.

93. U S —The Belleville, D C.N Y., 35 F.Supp. 934.

Date of filing original libel, not amended libel, is date when six-month period begins —The Joseph O'Donnell, D.C N Y., 37 F.Supp 120

94. U S —Petition of Spearin, Preston & Burrows, Inc., C A N Y, 190 F 2d 684.

95. U S —Petition of Spearin, Preston & Burrows, Inc, supra.

A claim of expenses is not subject to limitation, within this rule —Petition of Spearin, Preston & Burrows, Inc, supra.

96. U S —Petition of Hutchinson, D C.N Y, 28 F Supp 519.

Promise to pay hospital

Shipowner's promise to hospital to pay bills of persons injured on ship and subsequent letter by hospital to shipowner requesting payment of such bills was not notice of claim by a claimant under the statute, since liability on promise to pay bills was not liability which could be limited under statute, and hence hospital was not a claimant.—Petition of Hutchinson, supra.

97. U S —The Grasselli Chemical Co. No 4, D C N Y., 20 F.Supp 394

98. U S —The Grasselli Chemical Co No 4, supra

99. U S —The Chickie, D.C Pa, 39 F Supp. 200

1. U S —In re Moran Bros Contracting Co, D C N Y., 1 F Supp 932
Laches in pleading limitation by answer see infra § 254 b.

2. U S.—Cook v. Smith, Pa, 187 F 538, 109 C C.A. 304
58 C J p 665 note 61.

3. U S.—Cook v Smith, supra.
58 C J. p 665 note 62

4. U S.—The West Hartland, D C Wash, 295 F 547, affirmed, C.C A, 2 F.2d 834—The Defender, D C Wash, 214 F 316.
Time as of which surrender made in general see supra § 247 b (1)

5. U S —In re Meyer, D C Cal., 74 F. 881
58 C J p 665 note 64.

6. U S —The Benefactor, N Y., 103 U.S 239, 26 L Ed 351—The City of Norwich, D.C N Y, 5 F.Cas No. 2,762, 6 Ben 330, affirmed, C.C A, 18 F.Cas No 10,362, affirmed 6 S Ct. 1150, 118 U.S 468, 30 L Ed 134.

7. U S.—The Benefactor, N.Y., 103 U.S 239, 26 L Ed 351.
58 C.J. p 665 note 66.

8. U S —The Victor, D C N Y, 1 F Supp 931—The T W. Wellington, D C.N.Y., 235 F 728
58 C J p 665 notes 67, 68.

9. U.S —Gleason v. Duffy, Ind, 116 F. 298, 54 C.C A. 100.
58 C J. p 665 note 67.

10. U S —New York, etc, SS Co v Mount, N Y, 103 U S 239, 26 L Ed. 351.
58 C J p 665 note 68.

11. U S —Monongahela River Cons Coal, etc., Co v. Hurst, Tenn., 200 F 711, 119 C.C A. 127.
58 C J p 665 note 69.

12. U S —Larsen v. Northland Transp. Co, Wash, 54 S Ct 584, 292 U S 20, 78 L.Ed 1096—The Fort Bragg, D C Cal, 6 F Supp 13

Effect of defense or compromise

An owner may defend an independent suit brought against him before a limitation proceeding is begun, or may compromise a claim under like circumstances, and still require all claimants to establish their rights in the limitation proceeding.—The Quarrington Court, C.C A N Y, 102 F.2d 916, certiorari denied Court Line v. Isthmian S. S Co., 59 S Ct 1043, 307 U S 645, 83 L Ed 1525

13. U S —Larsen v. Northland Transp Co., Wash., 54 S Ct. 584, 292 U.S. 20, 78 L Ed 1096.

an undertaking or stipulation for the release of the vessel in a suit in rem against her[14] or by giving a supersedeas bond on appeal.[15] Proceedings for a limitation of liability, if not instituted until after a party has obtained satisfaction of his demand, are ineffectual as to him,[16] but the delay of the petitioner in this respect does not affect his rights as to limitation in respect of claims which have not been satisfied.[17]

A stipulation for the introduction of evidence of certain facts and for limitation on the introduction of evidence of other facts, in an action which might be brought in a state court against the owner, which contains nothing to prevent the presentation of any defense or the owner's proceeding to limit his liability, does not prevent a subsequent proceeding by such owner to limit his liability.[18] A bill of lading issued by a railroad company providing that if any part of the property shall be carried by water such carriage shall be subject to the conditions in the bill of lading, and providing also that no carrier shall be liable for loss or damages by causes beyond its control or by fire, does not operate to prevent the application of the limitation of liability act when the property is destroyed by fire on a barge.[19]

§ 250. —— Jurisdiction and Venue

a. In general
b. Foreign vessel
c. Method of acquiring jurisdiction
d. Loss or ouster of jurisdiction
e. District in which proceeding brought

a. In General

A proceeding for the limitation of a shipowner's liability is exclusively within the admiralty jurisdiction of the district court; such jurisdiction extends to all matters properly involved in the proceeding, and to the giving of complete relief.

The operation of the limited liability act, which, as appears supra § 239, is a part of the maritime code of the United States, is coextensive with the territorial operation of the general admiralty and maritime jurisdiction[20] and applies so as to give jurisdiction to the admiralty court notwithstanding the injury sued for happened within the technical limits of a county of a state,[21] or that the liability, enforcement of which is sought, arose from a state statute[22] or from the law of a foreign country.[23] The jurisdiction of the courts of the United States as courts of admiralty may properly be invoked where limitation under the act is sought by petition or libel,[24] and admiralty has exclusive jurisdiction of such a proceeding.[25] Original jurisdiction of admiralty in respect to this matter is exercised by the district court,[26] and, under the

14. U.S.—The Rose Culkin, D C N Y, 52 F 328.
58 C J p 665 note 70.

15. U S—The Victor, D C N Y., 1 F Supp 931—The T W Wellington, D C N.Y, 235 F. 728.
58 C.J. p 666 note 71.

16. U S—New York, etc, S. S Co v. Mount, N Y, 103 U.S 239, 26 L.Ed 351.

A return of the money should not be compelled—New York, etc., S. S Co v Mount, supra.

17. U S—The Benefactor, N Y, 103 U S 239, 26 L Ed. 351.

18. U S—The Hoffmans, D C.N Y, 171 F 455

19. U S—The Hoffmans, supra.

20. U S—Butler v Boston, etc, SS Co, Mass, 9 S Ct. 612, 130 U S. 527, 32 L Ed 1017
58 C J p 666 note 79
Effect of limitation of liability act on admiralty jurisdiction generally see Admiralty § 9.

Presence of vessel subject to surrender or appraisal
Limitation statutes do not require that there be within district vessel subject to control of court which can be surrendered, appraised, or transferred—The Snug Harbor, D.C N Y., 46 F.2d 143.

American and foreign owners
Jurisdiction of district court of petition for limitation of liability by Canadian owner of boat sunk in collision with American boat, owned by citizen of United States, in American waters was possible only if definitely authorized by acts of congress, supplemented by rules in admiralty—The W C Franz, D C N.Y., 14 F Supp. 102, affirmed, C C A, Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transit Corp., 86 F 2d 708.

21. U S—Butler v Boston, etc, SS Co, Mass, 9 S.Ct. 612, 130 U.S. 527, 32 L Ed 1017
58 C J. p 666 note 80.

22. U.S.—Butler v. Boston, etc., SS. Co, supra
58 C.J. p 666 note 81.

23. U S—Desliions v La Compagnie Generale Transatlantique, N Y., 28 S Ct 664, 210 U S 95, 52 L Ed. 973
58 C.J. p 666 note 82

24. U S.—Petition of Canada S S Lines, D C Ohio, 93 F Supp 549—In re Goodrich Transp. Co, D.C Wis., 26 F. 713.
58 C J p 666 note 83.

Jurisdictional question not presented
Contention that injury to seaman was due to negligence within vessel owner's knowledge and privity did not present question of admiralty court's jurisdiction of petition to limit liability—Langnes v Green, Wash, 51 S Ct 243, 282 U S. 531, 75 L Ed 520

25. U S—Ex parte Green, Wash, 52 S Ct. 602, 286 U.S. 437, 76 L.Ed 1212—Great Lakes Dredge & Dock Co. v. Lynch, C A Ohio, 173 F 2d 281—In re Great Lakes Transit Corporation, C C A Ohio, 63 F 2d 849—The Quarrington Court, D C N Y, 25 F.Supp 665—The Fort Bragg, D.C Cal., 6 F Supp 13
58 C.J p 666 note 84—1 C.J. p 1284 note 97.

26. U S—The Big Chief, D C Mo, 75 F Supp. 496—The Pelham, D C N Y, 69 F Supp 586—The Vera III, D C N.Y, 24 F Supp. 421.
58 C.J. p 666 note 85—1 C.J. p 1283 note 96.

Any district court of competent jurisdiction
U.S—The W. C. Franz, D C N Y., 14 F Supp. 102, affirmed, C.C A, Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transit Corp., 86 F.2d 708

Jurisdiction in rem and in personam
The jurisdiction of the admiralty court attaches in rem and in personam by reason of the custody of the res put by the petitioner into its

authorities, this jurisdiction is exclusive[27] in respect of all matters properly involved in the proceedings,[28] and where the necessary basis of jurisdiction exists it is the duty of the district court in admiralty to take jurisdiction.[29] On the other hand, where a condition precedent to the right to invoke the benefits of the statute has not been met, the admiralty court is without jurisdiction;[30] and it has been held that where a damage claimant objects to the jurisdiction of the court in the limitation proceedings and has elected to proceed in another forum to enforce his claim, the jurisdiction of the district court in the limitation proceedings depends on the right of the petitioner to limit his liability.[31] Where the jurisdiction of a court is assailed in a motion to dismiss incorporated in the answer, the decision must rest on the allegations of the petition as amended.[32]

Necessity that damage claims be within jurisdiction. While the view has been expressed by the supreme court of the United States that the district court cannot take jurisdiction in admiralty of a petition for limitation of liability where it would not have cognizance in admiralty, originally, of the cause of action involved,[33] the decision appears to have been limited by a case decided after the amendment of the limited liability act extending its operation to claims for nonmaritime torts;[34] and the jurisdiction of the district court of a petition or libel in admiralty to limit liability in respect of claims for nonmaritime torts is now recognized.[35] There is, however, authority for the view that if a damage claim has by federal statute been exempted from the operation of the limited liability act and, therefore, is not within the jurisdiction of the court in a limitation proceeding, the lack of jurisdiction may not be waived or cured by consent.[36]

Complete relief. An admiralty court, in a pro-

hands—Hartford Accident, etc, Co v Southern Pac Co, Tex, 47 S Ct. 357, 273 U S 207, 71 L Ed 612—Petition of Goulandris, C C.A N.Y, 140 F 2d 780, certiorari denied 64 S Ct 1268, 322 U.S 755, 88 L Ed 1584.

Collision between foreign ships in foreign harbor

U S—The Mandu, D C N.Y., 20 F. Supp. 820.

27. U.S—Stark v Texas Co, C C.A Fla, 88 F 2d 182—The Norco, C C. A.Wash., 66 F 2d 651, affirmed 54 S Ct 584, 292 U S 20, 78 L Ed 1096—The Vera III, D C N Y, 24 F. Supp 421—The Fort Bragg, D.C Cal, 6 F Supp. 13.

Cal—A Paladini, Inc., v Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal 114.

58 C J. p 666 note 86—1 C J. p 1284 note 97.

Requirement that every claimant appear

Where owner filed petition for limitation, every claimant was bound to come into proceeding, whether living within or without district, and jurisdiction of district court was exclusive—The W C. Franz, D C N Y, 14 F Supp 102, affirmed, C.C.A., Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transit Corp, 86 F 2d 708.

State court

(1) A state court does not have jurisdiction of a proceeding by petition for limitation of liability under the statute—Ex parte Green, Wash, 52 S Ct 602, 286 U.S 437, 76 L.Ed. 1212—The Norco, C C.A Wash, 66 F. 2d 651, affirmed 54 S Ct. 584, 292 U S 20, 78 L.Ed. 1096—58 C.J. p 666 note 86 [b].

(2) However, in seaman's action for injury, state court, in exercise of common-law powers, was competent to entertain shipowner's claim for limitation of liability—Langnes v. Green, Wash, 51 S Ct 243, 282 U S. 531, 75 L Ed 520

(3) Interposition of claim to limitation as defense in action in state court see infra § 254 b

28. U S—The Quarrington Court, C.C A.N Y, 102 F 2d 916, certiorari denied Court Line v Isthmian S. S Co., 59 S Ct. 1043, 307 U S 645, 83 L Ed 1525—The Norco, C C A Wash., 66 F 2d 651, affirmed 54 S Ct 584, 292 U S 20, 78 L Ed 1096.

58 C.J p 667 note 87.

Disputes between owner and charterer

U S—The Quarrington Court, C C A. N Y, 102 F.2d 916, certiorari denied Court Line v Isthmian S S Co., 59 S.Ct. 1043, 307 U S. 645, 83 L Ed 1525.

Establishment of claim in limitation proceedings

Claimant who brought action in state court for maritime loss could contest federal court limitation proceedings and establish his claim therein.—Stark v. Texas Co., C C A Fla, 88 F 2d 182

Right to jury trial secondary

Owner's right to limitation of liability in admiralty is dominant over right of injured person to jury trial, where right to limit liability is contested—The Kearny, D C N.Y., 3 F Supp 718

Petition filed after claimants obtain judgment

Admiralty court, determining that petition to limit liability was not within act, would not maintain jurisdiction for further proceedings, or continue order restraining prosecution of other proceedings relating to subject matter until appellate courts had disposed of case, where petition was not filed until after claimants had obtained judgment against petitioner in common-law court—The James Horan, D C N J, 10 F Supp 363, affirmed, C C A, 78 F 2d 870, certiorari denied Warner-Quinlan Co v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U S. 621, 80 L Ed. 441.

29. U.S—The Victoria, D C.Wash, 3 F.2d 330.

58 C.J. p 667 note 88.

30. U.S—The Maine, D C Md., 28 F Supp 578, affirmed, C C A., Standard Wholesale Phosphate & Acid Works v Travelers Ins. Co., 107 F 2d 373

31. U S—The Aloha, C.C A.Wash, 35 F.2d 447, reversed on other grounds Langnes v. Green, 51 S Ct. 243, 282 U.S 531, 75 L Ed. 520.

58 C J. p 667 note 89.

32. U S—The Trim Too, D.C Mass, 39 F Supp. 271

33. U S.—Ex parte Phenix Ins. Co, Wis, 7 S.Ct 25, 118 U.S. 610, 30 L Ed. 274.

58 C J p 667 note 90.

34. U.S—Richardson v Harmon, Ohio, 32 S Ct. 27, 222 U.S. 96, 56 L Ed 110.

1 C J. p 1284 note 98.

Application of act to liability for nonmaritime torts see supra § 243.

35. U S.—Richardson v. Harmon, supra.

58 C J. p 667 note 93.

36. U.S—The Passaic, D C N Y, 190 F. 644, affirmed 204 F 266, 122 C.C A. 466.

58 C.J. p 667 note 94.

ceeding for the limitation of liability, has jurisdiction to do equity to claimants by affording a complete remedy regardless of limitation.[37] So, where an admiralty court has taken jurisdiction and brought all claimants into concourse, in denying a petition for limitation of liability, it should give complete relief,[38] the court should proceed to adjudicate all claims in the manner of a court of equity and render judgment both in rem and against the owner in personam.[39]

b. Foreign Vessel

Admiralty courts have jurisdiction of a proceeding to limit the liability of a foreign vessel.

The admiralty courts of the United States have jurisdiction of a proceeding to limit liability in respect of the alleged liability of a foreign vessel,[40] even though such liability arose out of an occurrence on the high seas[41] or in the territorial waters of a country to which neither of the vessels involved belonged.[42]

c. Method of Acquiring Jurisdiction

Filing a libel or petition for limitation, with the offer of a stipulation for value, confers jurisdiction of the proceeding.

In general, the filing of a libel or petition for limitation by the owner, with the offer to give a stipulation for value, confers jurisdiction of the proceeding,[43] and surrender of the vessel and the pending freight and the issuance of monition give the court jurisdiction of the property or funds,[44] but not, it has been held, of persons holding claims.[45] It is not necessary to the jurisdiction of the district court, however, that all the requirements of Admiralty Rules, rule 51, 28 U.S.C.A., be met,[46] or that the court should have possession of the vessel or her proceeds, or of a fund representing the proceeds, over which the court has obtained control through the exercise of its ordinary jurisdiction.[47]

d. Loss or Ouster of Jurisdiction

Duly obtained jurisdiction has been held not ousted or lost by, or because of, various subsequent developments, such as subsequent irregularity of procedure.

In general, the question as to the jurisdiction of the court in respect of a proceeding to limit liability must be determined by the jurisdictional facts as they existed at the time the court assumed jurisdiction.[48] Accordingly, where the court has duly obtained jurisdiction, such jurisdiction is not ousted or lost by, or because of, any subsequent irregularity of procedure,[49] the fact that a damage claimant

37. U.S.—Just v. Chambers, Fla., 61 S.Ct. 687, 312 U.S. 383, 668, 85 L.Ed. 903—Hartford Accident, etc., Co. v. Southern Pac. Co., Tex., 47 S.Ct. 357, 273 U.S. 207, 71 L.Ed. 612—The Chickie, C.C.A.Pa., 141 F.2d 80—The Cleveco, D.C.Ohio, 59 F.Supp. 71, affirmed, C.C.A., 154 F.2d 605

Proceeding as equitable see supra § 246

Relief generally see infra § 256

Matter of discretion

Whether federal court should retain jurisdiction of limitation proceeding and dispose of entire case, including seaman's right to recover for injuries involved in state court action, was matter of discretion, not of jurisdiction.—Langnes v. Green, Wash., 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520.

Admiralty rules with respect to proceedings under act limiting liability contemplate proof of all claims and making of such defenses as owners choose in contesting their liability for losses.—The James Horan, D.C.N.J., 10 F.Supp. 363, affirmed, C.C.A., 78 F.2d 870, and certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

38. U.S.—The Linseed King, N.Y., 52 S.Ct. 450, 285 U.S. 502—The James Horan, D.C.N.J., 10 F.Supp. 363, affirmed, C.C.A., 78 F.2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

39. U.S.—Just v. Chambers, Fla., 61 S.Ct. 687, 312 U.S. 383, 85 L.Ed. 903—The Chickie, C.C.A.Pa., 141 F.2d 80—Petition of Union Castle Mail S.S. Co., D.C.N.Y., 35 F.Supp. 458—The James Horan, D.C.N.J., 10 F.Supp. 363, affirmed, C.C.A., 78 F.2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441

Admiralty court has exclusive jurisdiction to adjudicate filed claims and render judgment in rem and in personam, even if claimants defeat petition for limitation of liability.—In re Liverpool, Brazil & River Plate Steam Nav. Co., D.C.N.Y., 49 F.2d 947, modified on other grounds, C.C.A., Petition of Liverpool, Brazil & River Plate Steam Nav. Co., 57 F.2d 176

40. U.S.—The Mandu, D.C.N.Y., 20 F.Supp. 820

58 C.J. p. 668 note 98

Right to limit liability in respect of foreign vessels in general see supra § 240

41. U.S.—Oceanic Steam Nav. Co. v. Mellor, 34 S.Ct. 754, 233 U.S. 718, 58 L.Ed. 1171.

42. U.S.—Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, D.C.N.Y., 27 F.2d 1002.

43. U.S.—In re Morrison, N.Y., 13 S.Ct. 246, 147 U.S. 14, 37 L.Ed. 60—Petition of Canada S.S. Lines, D.C. Ohio, 93 F.Supp. 549.

Stipulation in general see supra § 248.

Failure to pay fee, transfer res, or issue monition

Where shipowners filed petition for limitation of liability but did not pay filing fee, and there was no transfer of a res to a trustee, and no monition ever issued, petition had no legally operative effect.—The Chickie, C.C.A.Pa., 141 F.2d 80.

44. U.S.—The Princess Sophia, D.C.Wash., 36 F.2d 591

45. U.S.—The Princess Sophia, supra.

58 C.J. p. 668 note 4.

46. U.S.—Petition of Canada S.S. Lines, D.C.Ohio, 93 F.Supp. 549

47. U.S.—The City of Norwich, D.C.N.Y., 5 F.Cas.No.2,762, 6 Ben. 330, affirmed, C.C.A., 18 F.Cas.No.10,362, affirmed 6 S.Ct. 1150, 118 U.S. 468, 30 L.Ed. 134

58 C.J. p. 668 note 5.

48. U.S.—The Tolchester, D.C.Md., 42 F. 180

58 C.J. p. 668 note 6.

49. U.S.—Morrison v. U.S. District Ct., N.Y., 13 S.Ct. 246, 147 U.S. 14,

takes issue with what is alleged in the petition,[50] a subsequent reduction of the amount of the claims to an amount not in excess of, or less than, the appraised value of the vessel and freight,[51] or a recovery by a claimant of less than the stipulated value of the vessel, where his original claim was greater than its value.[52] So the district court does not lose jurisdiction by allowing a vessel, after the giving of a stipulation for her value under the admiralty rule, to go into another district in the ordinary course of her business.[53]

Jurisdiction to determine claims. When the jurisdiction of a court of admiralty has attached through a petition for limitation, the jurisdiction to determine claims is not lost merely because the owner of the vessel fails to establish his right to limitation.[54]

e. District in Which Proceeding Brought

Provision is made in the admiralty rules with respect to the district in which limitation proceedings should be brought.

Apart from any rule on the subject, any district court having custody and control of a vessel, or having it within its district so that custody can be acquired by its process, has jurisdiction of proceedings by the owner for limitation of liability.[55] Under the Admiralty Rules, rule 54, 28 U.S.C.A., the owner is required to bring a proceeding to limit his liability in the district court where the vessel has been libeled to answer for a loss or damage in respect of which limitation is sought.[56] Where the vessel has been libeled in several districts, for different claims arising from the some occurrence, a petition for limitation of liability may be filed in either district,[57] unless the libel in the district in which limitation is sought was filed collusively and merely for the purpose of conferring jurisdiction of the limitation proceeding.[58] While the propriety of bringing the limitation proceeding in the district in which the owner has been sued, if no libel has been filed against the vessel, has been recognized,[59] there is a conflict of opinion as to whether, in such case, the limitation proceeding must be brought in the district in which the owner is sued. According to one view, the limitation proceeding must be brought in the district in which the owner is sued, if he be sued in a federal court and in only one district,[60] but, in other cases, without recognizing any distinction based on the particular court, state or federal, in which a prior action or prior actions were brought, or the bringing of actions in several districts, the right of the owner to bring the limitation proceedings in the district where the vessel may be,[61] or in the district where the action against the owner has been brought,[62] has been recognized. Where the vessel has not been libeled and an action against the owner has not been brought, the proceeding may properly be instituted in any district where the vessel may be.[63]

Wrecked or stranded vessel. A district court has been held without jurisdiction of a proceeding to limit the liability of the owner of a vessel sunk in a collision, where the owner of the other vessel does not sue but merely petitions for limitation of his own liability in that district,[64] since a petition for limitation of liability is not a suit within the admiralty rule authorizing such a petition where a ship is not libeled in any district in which the owner may be sued.[65] Likewise, a district court has been

37 L.Ed. 60—Petition of Canada S. S. Lines, D.C.Ohio, 93 F.Supp. 549

Requirements of admiralty rules

Jurisdiction is not lost by omission of some requirement of the admiralty rules, but proceedings to contest limitation cannot go forward until and unless there is a compliance with Admiralty Rules, rule 51.—Petition of Canada S. S. Lines, supra.

50. U.S.—White v. Island Transp. Co., Wash., 34 S.Ct. 589, 233 U.S. 346, 58 L.Ed. 993—Butler v. Boston, etc., SS. Co., Mass., 9 S.Ct. 612, 130 U.S. 527, 32 L.Ed. 1017.

51. U.S.—The John K. Gilkinson, D.C.N.Y., 156 F. 868—The Tolchester, D.C.Md., 42 F. 180.

52. U.S.—Briggs v. Day, D.C.N.Y., 21 F. 727.

53. U.S.—Morrison v. U. S. District Ct., N.Y., 13 S.Ct. 246, 147 U.S. 14, 37 L.Ed. 60.

54. U.S.—Just v. Chambers, Fla., 61 S.Ct. 687, 312 U.S. 383, 668, 85 L.Ed. 903—The Cleveco, D.C.Ohio, 59 F.Supp. 71, affirmed, C.C.A., 154 F.2d 605—Petition of Union Castle Mail S. S. Co., D.C.N.Y., 35 F.Supp. 458—The Maine, D.C.Md., 28 F.Supp. 578, affirmed, C.C.A., Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F.2d 373—The Wichita Falls, D.C.Tex., 15 F.Supp. 612

Death claims

U.S.—In re Taylor, D.C.Mo., 82 F.Supp. 268

55. U.S.—In re Louisville, etc., Packet Co., D.C.Ky., 223 F. 185

56. U.S.—The Enterprise, D.C.Pa., 196 F. 404

58 C.J. p. 668 notes 13, 14

57. U.S.—The Katahdin, D.C.N.Y., 293 F. 824

58. U.S.—The Katahdin, supra

58 C.J. p. 668 note 16

59. U.S.—Strong v. Holmes, Alaska, 238 F. 554, 151 C.C.A. 490.

58 C.J. p. 668 note 18.

60. U.S.—In re Butcher, D.C.Tex., 52 F.Supp. 385.

Rule prior to amendment

U.S.—Providence, etc., SS. Co. v. Hill Mfg. Co., Mass., 3 S.Ct. 379, 109 U.S. 578, 27 L.Ed. 1038

58 C.J. p. 669 notes 19 [a], 20.

61. U.S.—Petition of Wheeler, D.C.N.Y., 51 F.2d 374

58 C.J. p. 669 note 22

62. U.S.—Petition of Wheeler, supra—The John K. Gilkinson, D.C.N.Y., 156 F. 868, 150 F. 454.

63. U.S.—In re Morrison, N.Y., 13 S.Ct. 246, 147 U.S. 14, 37 L.Ed. 60.

58 C.J. p. 669 note 24.

64. U.S.—Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transit Corp., C.C.A.N.Y., 86 F.2d 708.

65. U.S.—Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transit Corp., supra.

held to have jurisdiction where substantially all the strippings and wreckage of a wrecked vessel, together with the proceeds of the sale of her gasoline tanks, are brought into the district before an action for damages was commenced, although a small portion of such strippings and wreckage remains in another district.[66] The proceeding may be instituted in a district where a fund or claim equitably representing the lost vessel, in respect of which limitation is sought, is in litigation, although the petitioners reside in another district.[67] Prior to the amendment of the admiralty rule in 1889, and when the rule provided only for cases in which the vessel was libeled or the owner was sued, it was held that the district court of the district in which a vessel was stranded and the wreckage was had jurisdiction, where no libel had been filed or suit brought,[68] and where a vessel was sunk and no action was brought by damage claimants, it was held that a district court of a particular district could entertain jurisdiction, where the remnants had been transferred to the trustee appointed by such court.[69]

§ 251. —— Effect on, and Enjoining, Other Proceedings

a. In general
b. Enjoining other proceedings

a. In General

Proceedings to limit liability supersede other proceedings on the claims involved, and the latter proceedings should be stayed.

Proceedings to limit the liability of a vessel supersede other proceedings on claims against the owner or vessel involved in the limitation proceeding;[70] and, on a proper showing of the pendency of the limitation proceedings, such other proceedings should be stayed[71] Where the owner has taken appropriate proceedings to obtain the benefit of the act, a person injured is barred from maintaining a separate action subsequently brought, on a claim to which the limitation act applies.[72]

Annulment and dismissal of other proceedings. The institution of the limitation proceeding does not put an end to other proceedings previously instituted.[73] So the view has been taken that, where there has not been due compliance, by the petitioner for limitation, with requirements as to surrender or stipulation for value, pending proceedings are not necessarily stayed,[74] and there has apparently been a recognition of the right to institute new proceedings pending the filing of the petition for limitation and the surrender to a trustee and the issuance of monition.[75] Proceedings instituted after the commencement of the limitation proceedings[76] and the issuance of an injunction[77] have been dismissed. If limitation of liability is decreed, pending suits or actions on damage claims, which have been stayed, should be dismissed.[78]

Staying limitation proceeding. The question whether a limitation proceeding should be stayed so as to permit arbitration to be had, pursuant to the charter party, rests in the sound discretion of the district court[79]

66. U S —Petition of Wheeler, D C. N Y, 51 F 2d 374.

Reason for rule

"Vessel," within rule conferring jurisdiction of petition for limitation on court of district where "vessel" is, consists of substantially all of strippings, wreckage, and proceeds of wreck, taking small portion thereof into district would not give court thereof jurisdiction.—Petition of Wheeler, supra

67. U S —In re Leonard, D C N.Y., 14 F 53

68. U S —The John Bramall, D C. N Y., 13 F.Cas No 7,334, 10 Ben 495.

69. U S —Ex parte Slayton, 105 U.S 451, 26 L.Ed 1066
58 C.J. p 669 note 26.

70. U S.—Metropolitan Redwood Lumber Co v Doe, Cal, 32 S Ct 275, 223 U S 365, 56 L Ed. 473.
58 C.J. p 669 note 28.

Steps affecting fund

After limitation proceeding has begun, steps outside that proceeding which would affect the fund should not be allowed, since they would involve a negation of one of the important purposes of such proceeding and well established practice —The Quarrington Court, C C.A N.Y., 102 F.2d 916, certiorari denied Court Line v Isthmian S. S Co., 59 S Ct. 1043, 307 U.S. 645, 83 L Ed. 1525.

71. U S —The Quarrington Court, D C N Y, 25 F.Supp 665—The Vera III, D.C N Y., 24 F.Supp 421—The Mandu, D.C N Y., 20 F.Supp. 820.
58 C J. p 669 note 29

"The effect of the federal limitation proceeding is not to remove the cause once and for all from the state court to the federal court, but merely to stay further proceedings in state court actions"—A. Paladini, Inc, v Superior Court in and for City and County of San Francisco, 21 P.2d 941, 944, 218 Cal. 114.

Proceedings by stockholders of corporation owning ship to limit their statutory liability did not stay state court action against corporation based on its independent liability.—A. Paladini, Inc, v. Superior Court in and for City and County of San Francisco, supra.

72. U S —Butler v Boston, etc, Steamship Co., Mass, 9 S Ct. 612, 130 U S. 527, 32 L.Ed 1017.
58 C J p 670 note 30.

73. U S —The Salvore, C.C.A.N.Y, 36 F 2d 712
58 C J. p 670 note 31.

74. U S —The Americana, D C.Cal., 230 F. 853.

75. U.S —Huasteca Petroleum Co v Cia. de Navegacao Lloyd Brasileiro, D C.N Y, 297 F 318
58 C J. p 670 note 33.

76. U S.—Black v. Southern Pac. Co., C C.Cal, 39 F 565
58 C.J. p 670 note 34

77. U.S.—The H F. Dimock, D.C. N.Y., 52 F 598, mandamus denied In re Morrison, 13 S Ct 246, 147 U.S. 14, 37 L Ed 60.
58 C.J. p 670 note 35.

78. U S.—Huasteca Petroleum Co. v. Cia de Navegacao Lloyd Brasileiro, D C N.Y., 297 F. 318.
58 C J. p 670 note 36.

79. U.S.—Postal S. S. Co. v. Interna-

b. Enjoining Other Proceedings

With some qualifications, injunction may issue against independent proceedings or suits on claims as to which limitation proceedings have been begun. As equity may require, such injunction may be granted on condition, refused, modified, or dissolved.

While the limitation proceeding and monition issued therein constitute in effect a statutory injunction,[80] and it is not necessary that an injunction should issue,[81] an injunction may issue to restrain separate or independent proceedings on claims in respect of which limitation is sought,[82] including suits in a state court;[83] but if only one claim is filed in the limitation proceeding the independent action should not be restrained,[84] since limitation of liability may be obtained by proper pleading in the independent action.[85] Further, an admiralty court having jurisdiction of a limitation proceeding will not, where the right to limitation is shown not to exist, defeat the rights of claimants to proceed in actions in personam where common-law remedies may be applied,[86] so, claimants brought into a limitation proceeding after a determination that they are not subject to limitation should no longer be enjoined from proceeding with their actions.[87] Also, where the aggregate of claims against the owner and charterer is much less than the value of the vessel and pending freight, and, as far as can be seen, there are no additional claims and no reasonable prospect that the fund will ever be exhausted, an injunction against the maintenance of a separate or independent proceeding may be denied.[88]

tional Freighting Corp, C.C.A.La., 133 F.2d 10

Discretion held not abused in staying proceeding—Postal S. S. Co. v. International Freighting Corp, supra.

80. U.S.—In re Great Lakes Transit Corporation, C.C.A.Ohio, 63 F.2d 849

Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114

58 C.J. p. 670 note 38

Proceeding as exclusive

Proceeding to limit liability is exclusive—The James Horan, D.C. N.Y., 10 F.Supp. 363, affirmed, C.C.A., 78 F.2d 870, and certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

81. Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114.

58 C.J. p. 670 note 39.

82. U.S.—Petition of Union Castle Mail S. S. Co., D.C.N.Y., 35 F.Supp. 458—The James Horan, D.C.N.Y., 10 F.Supp. 363, affirmed, C.C.A., 78 F.2d 870, and certiorari denied Warner Quinlan Co. v. Swan-Finch Oil Corporation, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441

58 C.J. p. 670 note 40—1 C.J. p. 1284 note 97 [b].

Admiralty Rules, rule 51, 28 U.S.C.A., is designed to permit an order of district court, having jurisdiction of a limitation proceeding, to restrain further prosecution of all suits against owners of vessel in respect of any claim subject to limitation in proceedings before the court—Petition of Tracy, D.C.N.Y., 86 F.Supp. 306—58 C.J. p. 670 note 40 [f]

Claims growing out of one collision

In proceeding to limit liability, admiralty court can grant an injunction and bring all litigants before it and in one proceeding settle all matters, where the claims grew out of one collision—In re Taylor, D.C.Mo., 82 F.Supp. 268

83. U.S.—Ex parte Green, Wash., 52 S.Ct. 602, 286 U.S. 437, 76 L.Ed. 1212—Petition of Tracy, D.C.N.Y., 86 F.Supp. 306—The Pelham, D.C. N.Y., 69 F.Supp. 586—The Vera III, D.C.N.Y., 24 F.Supp. 421—In re Moran Bros. Contracting Co., D.C. N.Y., 1 F.Supp. 932

Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114.

58 C.J. p. 670 note 41

Concession by litigant as to right to limit liability

(1) Admiralty court erred in enjoining injured employee from continuing action in state court unless he would concede that employer was entitled to limit its liability, but such error was waived when employee's proctor repeatedly stated at trial that he was willing to have admiralty court decide the issues—Petition of Spearin, Preston & Burrows, Inc., C.A.N.Y., 190 F.2d 684

(2) Deckhand will be permitted to prosecute common-law action for personal injuries on filing acknowledged consent to vessel owner's right to limitation of liability and right to have value of owner's interest in vessel determined in accordance with procedure of admiralty court—The Kearny, D.C.N.Y., 3 F.Supp. 718.

Charterer as within limitation statute

Whether charterer was within scope of statute permitting limitation only on part of certain charterers was question of fact which would not be decided on motions of longshoreman, in limitation proceeding by charterer and by owner, to dissolve injunction restraining longshoreman from proceeding with state court action against charterer for personal injury.—Petition of McAllister Bros., D.C.N.Y., 96 F.Supp. 575.

84. U.S.—In re Putnam, C.C.A.N.Y., 55 F.2d 73, certiorari denied Putnam v. Christie, 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292—Petition of M. P. Howlette, Inc., D.C.N.Y., 75 F.Supp. 438.

Number of claims generally see supra § 245 c

Claim of insurance carrier which had paid compensation to injured longshoreman against vessel was a derivative one obtained by subrogation, and was not one independent of longshoreman's claim, within text rule.—Petition of M. P. Howlette, Inc., supra.

Claim exceeding value of vessel

Where only one claim could arise, owner petitioning for limited liability was not entitled to injunction forbidding all actions against him, and fact that original claim exceeded value of vessel was immaterial—In re Putnam, C.C.A.N.Y., 55 F.2d 73, certiorari denied Putnam v. Christie, 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.

Consent to right to limitation

Single claimant, who offered to file duly acknowledged consent to owner's right to limitation, was permitted to proceed with prior suit in state court—The American Transport, D.C.N.Y., 23 F.Supp. 583.

85. U.S.—Petition of M. P. Howlette, Inc., D.C.N.Y., 75 F.Supp. 438

Pleading limitation generally see infra § 254 b.

86. U.S.—The Silver Palm, C.C.A. Cal., 94 F.2d 776—Petition of Liverpool, Brazil & River Plate Steam Nav. Co, C.C.A.N.Y., 57 F.2d 176.

87. U.S.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., supra.

88. U.S.—Curtis Bay Towing Co. v. Tug Kevin Moran, Inc., C.C.A.N.Y., 159 F.2d 273.

An injunction granted in proceedings for limitation restraining further prosecution of pending actions for damages is in effect a removal of such actions into the admiralty court,[89] where they are to be considered as continued for all purposes of the statute of limitations.[90]

Refusal, modification, or dissolution of injunction, or conditional injunction. In view of the fact that the proceeding is in effect an equitable proceeding, as discussed supra § 246, the court may refuse an injunction against other proceedings,[91] may grant an injunction on condition,[92] may modify an existing injunction,[93] or may dissolve an injunction,[94] where equity and justice require such refusal, conditional injunction, modification, or dissolution, whether an injunction should be dissolved[95] or modified[96] rests in the sound discretion of the admiralty court.

§ 252. —— Notice and Filing and Withdrawing Claims; Intervention and Bringing in Parties

a. Notice of limitation proceedings
b. Filing and withdrawal of claims
c. Intervention and bringing in parties

a. Notice of Limitation Proceedings

Personal notice of a limitation proceeding to claimants, in the district where it is brought, has not been required, but an ex parte application may be denied where substantial or novel questions are at stake.

It is not necessary, in order to sustain a proceeding to limit liability, that claimants should have been served personally with notice thereof in the district in which the proceeding is brought[97] or that the court should retain possession of the vessel until such claimants appear.[98] A damage claimant in default is not entitled to notice of further steps in the proceeding.[99] On the other hand, an ex parte application by the owner for the limitation of his liability, without notice to claimants, has been denied where substantial questions are at stake and novel questions of law are involved in the application.[1]

Admiralty rules; failure to comply strictly. Admiralty rules relating to the limitation of liability and providing for procedural methods of notice were intended to preserve the rights of persons having actual or potential claims against petitioner,[2] and failure to follow explicitly the provisions of such rules does not, as to those whose rights are in no way prejudiced, denied, or barred, result in the

Remote chance
Petition for limitation was permitted to stand on remote chance that other claims might appear which would make a concourse proper.—Curtis Bay Towing Co v. Tug Kevin Moran, Inc, supra.

89. U S —Union Steamboat Co. v. Chaffin, Ill, 204 F 412, 122 C C A 598, certiorari denied 33 S Ct 778, 229 U S. 620, 57 L Ed 1354

90. U.S.—Union Steamboat Co v. Chaffin, supra

Death action
Restraining order against bringing actions for death, except by claim in proceeding in which owner of vessel asked limitation of liability, did not enlarge statutory period within which death action must be brought —The Princess Sophia, D C Wash, 35 F 2d 736, rehearing denied 36 F 2d 591

91. U S —Curtis Bay Towing Co v Tug Kevin Moran, Inc, C C A N Y, 159 F 2d 273—The Salvore, C.C A N Y, 36 F 2d 712

92. U S —Churchill v The British America, D C N Y, 5 F.Cas.No 2,715, 9 Ben 516.
58 C.J p 671 note 45.

93. U.S —Petition of Liverpool, Brazil & River Plate Steam Nav. Co, C C.A N.Y, 57 F 2d 176—In re Trawler Gudrun, Inc., D C.Mass, 101 F Supp 586
58 C.J p 671 note 46.

Modification to permit arbitration held proper —Postal S S Co v International Freighting Corp, C C A La, 133 F 2d 10

Where fund is inadequate solely as to single claim of claimant bringing suit in state court, injunction was properly modified so as to avoid invoking limitation statute to deprive claimant of trial by jury or to compel him to liquidate the face amount of his claim in the federal court, a forum he did not choose.—Petition of Moran Transp. Corp, C A N Y, 185 F 2d 386, certiorari denied Moran Transp. Corp v Mellino's Adm'x, 71 S Ct 573, 340 U S. 953, 95 L Ed 687

Modification on vacation held properly denied
U S —The Pelham, D C.N Y, 69 F Supp. 586

94. U S —The Salvore, C C A N.Y, 36 F 2d 712
58 C J. p 671 note 47.

Injunction dissolved on condition that plaintiff in independent action stipulate that limitation fund was correct in amount —Petition of McAllister Bros., D C N Y., 96 F Supp 575

Dissolution order held not ambiguous
U S —The Helen L, C C A.Wash, 109 F 2d 884.

95. U S —The Kearny, D C N Y, 3 F.Supp. 718

Dissolution held not abuse of discretion
U S.—The Helen L, C C A.Wash, 109 F.2d 884

96. U S —The Kearny, D C N Y, 3 F Supp 718.

97. U S —Morrison v. U. S District Ct, N Y., 13 S Ct 246, 147 U S. 14, 37 L Ed. 60

98. U S.—Morrison v. U. S District Ct, supra.

99. U S —The Hewitt, D.C N Y., 15 F.2d 857.

1. U S —The No 5 Motor Lifeboat, D C N.Y., 57 F Supp 624.

2. U S —Petition of Canada S. S. Lines, D C Ohio, 93 F Supp. 549

Amendment not jurisdictional; service by publication
Amendments providing for notice of monition to every person having claim against vessel or petitioner arising out of voyage or trip on which claims sought to be limited arose, and publication thereof, are not jurisdictional in nature, nor do they provide for service of process by publication —Petition of Canada S. S Lines, supra.

failure of the entire proceeding or render it a nullity from the beginning,[3] but only stays the contest as to liability until a new monition is issued and the requirements as to notice met.[4]

b. Filing and Withdrawal of Claims

(1) In general
(2) Time for filing

(1) In General

Claims in limitation proceedings must be made by persons competent to sue, and must be sufficiently stated; a claim may be withdrawn on payment of costs.

A claim, in a proceeding for the limitation of liability, has been said to be somewhat similar to a brief libel,[5] and claimant must be competent to sue, whether as a plaintiff or as a libelant.[6] Ownership of a claim based on an absolute assignment has been recognized notwithstanding the assignment was made for purposes of collection.[7] The claims of several claimants may be required to be stated separately,[8] and claims briefly stating that the vessel's negligence caused specified damage to real and personal property, and personal injuries, including loss of wages and amounts expended for medical services, etc., have been held sufficient unless objection thereto is duly made.[9] Ordinarily a damage claimant, who, with notice of the proceeding, fails to present a claim which is within the purview of the limited liability act, may not thereafter maintain a suit to enforce such claim.[10] A claim by the owner of one of two vessels, both of which have been held at fault for a collision, for contribution for liability to a third person may be presented in a limitation proceeding brought by the owner of the other of such vessels, where the liability arose out of such collision,[11] even though such third person has lost his right to present his claim in such limitation proceeding by failure to present it in time.[12] Where a petition for limitation of liability is denied, the interlocutory decree will not bar claimants who were in default in presenting their claims,[13] and they will be afforded the right to apply to excuse the default for good and sufficient cause;[14] but those still in default on the entry of the final judgment will be barred.[15] Where a shipowner is the lessee of a pier on which fire breaks out in cargo discharged from the vessel, claimants for damage to goods on the pier and in lighters awaiting shipment to the vessel must assert their claims in the owner's proceeding for limitation of liability,[16] and may not prosecute a separate proceeding against him as such lessee.[17]

Notice of claim as affecting the time within which an owner may commence limitation proceedings is discussed supra § 249.

Withdrawal of claims. A damage claimant, in a proceeding for limitation of liability, has been held entitled to withdraw his claim on payment of taxable costs.[18]

(2) Time for Filing

Claims in limitation proceedings must be filed within the time fixed by statute, and the filing thereof may be

3. U.S.—Petition of Canada S. S Lines, supra

4. U.S.—Petition of Canada S. S Lines, supra

Petition and stipulation as provided by statute

Where petitioner did not comply with notification procedure set forth in admiralty rule, but his petition and stipulation were filed as provided by statute, thereby giving court jurisdiction although there was defective notice to some claimants, petitioner was entitled to issue new notice and to an issuance of new monitions in accordance with rule relating to limitation.—Petition of Canada S S Lines, supra

5. U.S.—The No 17, D.C.N.Y., 2 F Supp. 48.

6. U.S.—The Mandu, D.C.N.Y., 20 F Supp 820.

Marine insurer held not real party in interest and therefore without capacity to file claim.—The Mandu, supra.

Foreign administrator

Exceptions of shipowner seeking limitation of liability were properly sustained as to claims prosecuted by foreign administrator.—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980.

7. U.S.—The Mandu, C.C.A.N.Y., 102 F.2d 459.

8. U.S.—The Roxen, D.C.N.Y., 7 F Supp 195.

9. U.S.—The No. 17, D.C.N.Y., 2 F. Supp. 48.

Request for details granted

Request by petitioner that each claim state claimant's address, date of injury, nature, location, and rental value of property allegedly damaged, extent of personal injury, and amount of doctors' bills, was reasonable and granted.—The No 17, supra.

10. U.S.—U. S. v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, N.Y., 212 F. 40, 128 C.C.A. 496, L.R.A.1917C 1103.

11. U.S.—In re Eastern Dredging Co., D.C.Mass., 182 F. 179.

12. U.S.—In re Eastern Dredging Co., supra.

13. U.S.—Petition of Union Castle Mail S. S. Co., D.C.N.Y., 35 F.Supp. 458

14. U.S.—Petition of Union Castle Mail S. S. Co., supra.

15. U.S.—Petition of Union Castle Mail S. S. Co., supra.

16. U.S.—The Panuco, D.C.N.Y., 47 F.Supp. 249

Contingent claim

Where one injured in fire involving vessel and dock sued dock owner alone in state court, and elected not to file a claim in limitation proceeding by owner of vessel, dock owner under state law, would have no right of contribution against owner of vessel based on state court judgment against dock owner, and hence was not entitled to file a contingent claim in limitation proceeding.—Petition of Chester A. Poling, Inc., D.C.N.Y., 51 F.Supp. 375.

17. U.S.—The Panuco, D.C.N.Y., 47 F.Supp. 249.

18. U.S.—The Titanic, N.Y., 225 F. 747, 141 C.C.A. 19.

barred by laches, although the courts have discretion to permit late filing.

The filing of a petition for the limitation of liability does not stop the running of a statute of limitations applying to the filing of claims,[19] and a notice of claim given to the owner of the vessel is not the filing of a claim in the limitation proceedings, with respect to the timeliness of such filing.[20] The filing of a claim may be barred by laches,[21] but where there is no showing that any time limit had been set for presentation of claims and the petitioner himself has delayed the filing of the petition and the taking of evidence for an extended period, the court may properly refuse to sustain the claim of laches of claimants in presenting their claims.[22] The purpose of the amendment of June 21, 1948, to Admiralty Rules, rule 51, 28 U.S.C.A., was to prevent default for failure of claimants to file claims.[23] Ordinarily the trial judge has discretion, in a limitation proceeding, to permit the filing of later claims,[24] at least as long as the fund has not been entirely distributed or a final decree entered.[25] So, in such a proceeding, the court has discretionary power to permit the filing of a claim for damages after the expiration of the time fixed in the monition, in a proper case,[26] although a claim ordinarily is to be treated as barred if not presented within the time so fixed,[27] and the burden is on the claimant to prove good cause for the failure to file within the time fixed.[28] Where, after the notice, a damage claimant has elected not to present his claim, the court may refuse to permit a subsequent presentation,[29] and if the proceedings have been terminated, as far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims.[30] Where the appellate court orders that a judgment dismissing claims provide that it is without prejudice to the filing of claims by representatives properly appointed, the trial court is without discretion to refuse the filing of claims on the ground of the expiration of the monition period.[31]

Enforcement of claims after dismissal of limitation proceeding. The order of the court fixing or limiting the time within which claims may be filed is not a bar to the prosecution of an action within the period limited by statute if the limitation proceeding should be dismissed.[32]

c. Intervention and Bringing in Parties

Intervention has been permitted in limitation proceedings, as has, in some circumstances, although not in others, the bringing in of new parties.

Where the owner of a vessel seeks limitation of liability in respect of a collision in which cargo was lost or injured, the owner of the cargo may intervene in such proceeding to assert a claim against the owner of the other vessel involved in the collision, where the owner of such other vessel has

19. U.S.—In re Agwi Nav. Co., C.C.A.N.Y., 89 F.2d 11—The Princess Sophia, C.C.A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac. R. Co., 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—Petition of Companhia De Navegacao Lloyd Brasileiro, D.C.N.Y., 21 F.Supp. 372, reversed on other grounds, C.C.A., The Mandu, 102 F.2d 459

20. U.S.—In re Agwi Nav. Co., C.C.A.N.Y., 89 F.2d 11.

21. U.S.—The Mandu, C.C.A.N.Y., 102 F.2d 459

Eight years after collision
U.S.—The Mandu, supra.

Administrator held barred by long delay—In re Agwi Nav. Co., C.C.A. N.Y., 89 F.2d 11.

22. U.S.—Union Steamboat Co. v. Chaffin, Ill., 204 F. 412, 122 C.C.A. 598, certiorari denied 33 S.Ct. 778, 229 U.S. 620, 57 L.Ed. 1354

23. U.S.—Petition of Canada S.S. Lines, D.C.Ohio, 93 F.Supp. 549

24. U.S.—Petition of U.S., C.A.N.Y., 172 F.2d 355.

Circumstances justifying extension of time
Where sole claimant was not real party in interest, but marine insurers had paid substantial loss arising out of collision involved and merits of controversy relating to liability had not been determined, on shipowner's seeking to withdraw his petition for limitation of liability, court would retain jurisdiction and give claimant time within which to file valid claim before dismissing claim and allowing shipowner to withdraw—The Mandu, D.C.N.Y., 20 F.Supp. 820.

25. U.S.—Petition of U.S., C.A.N.Y., 172 F.2d 355.

26. U.S.—Meyer v. New England Fish Co. of Oregon, C.C.A.Wash., 136 F.2d 315, certiorari denied 64 S.Ct. 83, 320 U.S. 771, 88 L.Ed. 461—The James Sheridan, D.C.Pa., 73 F.Supp. 739
58 C.J. p. 671 note 52

Allowance of late filing held abuse of discretion
U.S.—Petition of Chester A. Poling, Inc., D.C.N.Y., 51 F.Supp. 375.

Denial of right to file held erroneous
U.S.—Meyer v. New England Fish Co. of Oregon, C.C.A.Wash., 136 F.2d 315, certiorari denied 64 S.Ct. 83, 320 U.S. 771, 88 L.Ed. 461

Motion to file nunc pro tunc held properly denied—The Navemar, D.C.N.Y., 49 F.Supp. 68

27. U.S.—The James Sheridan, D.C.Pa., 73 F.Supp. 739

28. U.S.—The James Sheridan, supra.

Illness and inadvertence of prior counsel did not show such good cause as would entitle administratrix to file claim nunc pro tunc more than six months after final date for filing claims and almost one year after administratrix became aware of her rights—The James Sheridan, supra.

29. U.S.—In re Eastern Dredging Co., D.C.Mass., 159 F. 549.

30. U.S.—Dowdell v. U.S. District Ct., Cal., 139 F. 444, 71 C.C.A. 288. 58 C.J. p. 671 note 54.

31. U.S.—Meyer v. New England Fish Co. of Oregon, C.C.A.Wash., 136 F.2d 315, certiorari denied 64 S.Ct. 83, 320 U.S. 771, 88 L.Ed. 461.

32. U.S.—The Victoria, D.C.Wash., 3 F.2d 330.

filed a claim in the limitation proceeding and both vessels were held at fault.[33] The petitioner in a limitation proceeding may bring in on motion the owner of another vessel to defend against claims presented in such proceeding where both vessels have been held liable for a collision from which the claims arose,[34] but the impleading of the owner of another vessel for the purpose of securing indemnification or contribution from such vessel and its owner has not been permitted,[35] and a claimant has been held not entitled to implead a third person alleged to be jointly liable with petitioner.[36] The substitution of a local adminstrator for a foreign administrator making claims has been held properly denied.[37]

§ 253. —— Consolidation of Proceedings

Consolidation of proceedings or actions involving limitation of liability may be allowed where only one decision is required or the rights of no party will be prejudiced, but may be denied where the rights of the parties can be secured by continuing the separate proceedings.

A motion to consolidate proceedings for limitation of liability commenced independently by the owners of each of two vessels in collision may properly be denied where the rights of the parties can be secured by continuing the separate proceedings,[38] but limitation proceedings and other proceedings or actions may be consolidated where only one decision is required[39] or where no prejudice will result to the substantive rights of any of the parties.[40]

§ 254. —— Pleading, Proof, Issues, and Variance

a. Petition or libel for limitation
b. Pleading limitation by answer
c. Damage claimant's pleading
d. Interrogatories
e. Issues or matters to be litigated; proof and variance

a. Petition or Libel for Limitation

A petition or libel for limitation of liability must contain allegations sufficient to show a right thereto; it is subject to amendment or exception.

The petition or libel in which limitation of liability is sought should contain a statement of facts under which the limitation is claimed,[41] that is, facts sufficient to show that petitioner or libelant is entitled to limitation,[42] including allegations of facts sufficient to show that the limited liability act applies to petitioner or libelant.[43] The limitation claimed must, of necessity, be the value of the vessel and her pending freight;[44] and, where petition-

33. U S —In re U S Steel Products Co, C C A N Y, 24 F 2d 657
58 C J. p 672 note 61.
Parties generally see supra § 245.

34. U S —The City of Boston, D C. Mass, 182 F 171.

35. U S —Petition of Texas Co, D.C. N.Y, 81 F Supp. 758

36. U S —Department of Highways of State of La v Jahncke Service, C A La., 174 F 2d 894.

37. U S —The Princess Sophia, C.C. A Wash, 61 F 2d 339, certiorari denied Brace v Canadian Pac. R. Co, 53 S Ct 396, 288 U S 604, 77 L.Ed. 980

38. U.S —The City of Boston, D C. Mass, 182 F 171.
Consolidation of proceedings in admiralty in general see Admiralty § 77.

39. U S.—The Russell No. 5, D.C. N.Y, 26 F Supp. 575, affirmed, C C.A, In re Newtown Creek Towing Co., 104 F 2d 1018.

Settling liability and limitation questions

(1) Where there is a plurality of claims, admiralty court will hear petition for limitation of liability and order removal of all cases from state courts into a consolidated action in admiralty tribunal and will then settle both liability and limitations questions involved, but the advantages of consolidation or concourse should be claimed by shipowner and burden is not on claimants to secure such advantage to the shipowner — The Four Sisters, D.C Mass, 75 F Supp 399

(2) Bringing claims into concourse as purpose of proceeding see supra § 245

40. U.S —The Bleakley No. 76, D C. N.Y, 56 F.2d 1037.

41. U S.—The Aquitania, C C.A N Y, 20 F 2d 457.
58 C.J. p 672 note 68.

Requirements stated

All that owner need allege and prove in proceeding to limit liability is that he has been sued for some loss, damage, or injury done, occasioned, or incurred without his privity or knowledge and that he wishes to claim the benefit of limitation of liability.—Colonial Sand & Stone Co v. Muscelli, C C.A.N Y, 151 F 2d 884 —58 C J. p 672 note 69 [a].

Existence of contract; conformed copy

A petition alleging the existence of a certain contract was not objectionable where a conformed copy of the contract was submitted.—The S. & H. No. 7, D C N.Y., 24 F Supp. 1009.

Claimant not real party in interest

Where position of claimant, interposing exceptions, was that of underwriter and subrogee as to certain cargo losses and assignee of other underwriters who paid losses to cargo owners, owner's petition and objection setting up contention that claimant was not real party in interest and that whatever amounts claimant paid to its insureds were payments of only parts of losses were proper and sufficient.—The Mandu, D C N.Y., 15 F.Supp 627.

42. U S.—The Aloha, C C A.Wash, 35 F 2d 447, reversed on other grounds 51 S Ct. 243, 282 U.S 531, 75 L Ed 52
58 C J. p 672 note 69

Manning, victualing, and navigating at own expense

Under statute requiring an allegation that the party seeking exoneration from, or limitation of, liability must allege that he manned, victualed, and navigated the vessel at his own expense, petition alleging that tug was controlled and operated by charterer, its agent, servants, and employees, was not objectionable.—The S & H. No. 7, D.C.N.Y., 24 F Supp 1009.

43. U.S —Petition of Du Pont de Nemours, D C.N Y., 18 F 2d 782, affirmed, C.C A., 19 F 2d 354.
58 C.J. p 672 note 70.

44. U.S —The Aquitania, C C A.N.Y, 20 F.2d 457.
58 C.J. p 672 note 71.

er elects to surrender, should, according to one view, show that his interest, which it is proposed to surrender, is equal in value to the value of the vessel at the end of the voyage involved,[45] and should contain an offer to surrender the pending freight.[46] The petition invites no decision on the claim against petitioner.[47] In view of the fact that limitation may be sought in respect of a single claim against petitioner or libelant in the limitation proceeding, as discussed supra § 245 c, the petition to limit liability and to restrain the prosecution of other actions need not show the existence, or probability of existence, of more than one claim,[48] and the petition need not allege that the claims against the vessel are in excess of her value, in order to found jurisdiction in the district court to entertain the proceeding,[49] nor need it fully set forth all pending suits in respect of matters set forth in the petition and all suits relating to the voyage in question.[50] If there is more than one claim, defendant-owner can confine his aggregate liability on all the claims to the single value of the vessel, or his interest therein, only by the petition prescribed by the statute.[51]

Amendment. The libel or petition may be amended.[52]

Objection. An objection to the petition should be presented in the form of an exception,[53] although objection by motion to dismiss may be recognized.[54] Such an exception is in the nature of a demurrer,[55] and on such exception the allegations of the petition must be taken as true.[56] A court, in passing on an exception to an article of a petition, is concerned solely with the sufficiency of the article as pleaded,[57] and must ignore the factual dispute with respect thereto.[58]

Insufficient petition standing as application for release on bail. Where it has been held that an application made for the limitation of liability of a shipowner to the value of the vessel and freight does not present facts entitling the application to be considered under the limited liability statute, it may nevertheless be treated as an application for release of the vessel on bail, addressed to the ordinary discretion of the court.[59]

Pleading as to nonliability. Where petitioner or libelant reserves the right to contest the question as to liability, he may either answer claimant's allegations, tending to show liability, by a counter statement of facts, consistent with the petition,[60] or he may adopt the allegations of the petition in respect of freedom from liability, for the purpose of the issue.[61]

Withdrawal of petition. Where the charterer of a barge voluntarily filed an answer, claiming limitation of liability, and a cross libel for detention of the barge in a suit in rem for damage to cargo on the barge, his dismissal, without leave, of his cross libel does not have the effect of withdrawing his petition to limit liability.[62]

45. U S —The Defender, D C Wash., 214 F 316
58 C J p 672 note 72.

46. U S —In re Castrian SS. Co., D C N Y., 290 F. 397.

47. U S —Colonial Sand & Stone Co v Muscelli, C C A N Y, 151 F 2d 884, 885
"Logically that issue comes later i e after the claimant files a claim, if he ever does. We must not be misled by the fact that all the issues may for convenience be tried at one time"—Colonial Sand & Stone Co v. Muscelli, supra

48. U S —The Muriel, D C Wash., 25 F 2d 505
58 C J p 672 note 75.

49. U S —The George W. Fields, D C N Y, 237 F. 403
58 C.J p 672 note 76

50. U S —Petition of Navigazione Libera Triestina, D C.N Y, 33 F.2d 967, reversed on other grounds, C C A, The Salvore, 36 F.2d 712.

51. U S.—The West Point, D.C.Va., 83 F Supp 680

52. U.S.—The John Bramall, D.C N Y., 13 F Cas No 7,334, 10 Ben 495
58 C J. p 673 note 78.
Charterer as owner
A petition filed by charterer was held insufficient, with leave to amend, for failure to allege that charterer might be deemed to be an owner within statute governing limitation of liability—The American Transport, D C.N.Y, 23 F.Supp 583.

53. U.S —The American Transport, supra
Who may except; effect of filing claim
Where monition was issued against all persons asserting claims against steamship company arising out of fire, directing such persons to file claims with court-appointed commissioner, a person filing claim and answer to petition could except to petition, notwithstanding such person had not filed claim with commissioner—Petition of Canada S. S Lines, D C Ohio, 94 F Supp. 322.
Exceptive allegations as to time of filing petition
The judge may, in his discretion, permit filing of exceptive allegations for purpose of raising question of whether petition was filed within required period—Standard Wholesale Phosphate & Acid Works v Travelers Ins Co, C C A Md, 107 F 2d 373.

54. U S —The American Transport, D C.N.Y., 23 F.Supp 583

55. U S —The Mandu, D C N.Y., 15 F.Supp. 627

56. U S —U. S. v. Robert Steward & Sons, Limited, C C A N Y, 167 F 2d 308, reversed on other grounds Black Diamond S. S Corp v Robert Steward & Sons, 69 S Ct 622, 336 U S 386, 93 L Ed 754, amended on other grounds 69 S Ct 1490 —The Mandu, D C N.Y., 15 F Supp. 627

57. U S —The Mandu, supra.

58. U S —The Mandu, supra

59. U S.—Place v The City of Norwich, D.C N Y., 19 F Cas No.11,202, 1 Ben. 89.

60. U S —In re Davidson SS. Co., D C Wis, 133 F. 411

61. U.S.—In re Davidson SS. Co., supra

62. U.S —The Nettie Moore, D C. Md, 270 F. 1005.

b. Pleading Limitation by Answer

The limited liability act may be availed of by answer in a suit to enforce a claim as to which the defendant seeks to limit his liability. Under most authorities, the statutory limitation of time for filing a petition for limitation does not apply to an answer pleading limitation as a defense.

The right to claim the benefit of the limited liability act by answer in a suit to enforce a claim in respect of which defendant seeks to limit his liability,[63] even in an action in a state court[64] where there is only one possible claimant and one owner,[65] has been upheld or recognized. Where there is a multiplicity of claims, making the claim for limitation by answer is not ordinarily sufficient to realize the full benefit of the act.[66] When an owner pleads limitation of liability by answer alone, the personal liability on the claim thus answered cannot exceed the value of the owner's interest in the vessel.[67] If there is more than one claim, and defendant-owner uses the answer, instead of the statutory petition, to raise the defense of limitation, he may be held personally liable on each claim to the extent of the value of his ship or his interest in her[68]

Time for pleading limitation. There has been said to be a decided[69] conflict of opinion as to whether the limitation of time provided for in the amendment of 1936, 46 U.S.C.A. § 185, whereby the owner of a vessel is required to file his petition for limitation of liability within six months after a claimant shall have given to, or filed with, such owner written notice of claim, applies to a defense of limitation of liability pleaded by answer in a suit to enforce a claim.[70] According to most authorities, the amendment does not so apply,[71] and such defense may be raised, although the six-months period has expired,[72] the rules of civil procedure for district courts controlling as to the time for filing an answer asserting such defense.[73] So, an amendment to an answer has been allowed, in order to assert such defense, even after the expiration of the statutory period, in the absence of laches,[74] although an amendment has been disallowed, after such expiration, under circumstances constituting laches[75] Other authority has held the

63. U.S.—Southern Pac. Co. v. U. S., C.C.A.N.Y., 72 F.2d 212—The West Point, D.C.Va., 83 F.Supp. 680—Moran Towing & Transp. Co. v. U. S., D.C.N.Y., 80 F.Supp. 623—General Seafoods Corporation v. J. S. Packard Dredging Co., D.C.Mass., 40 F.Supp. 1015—Cantey v. McLain Line, D.C.N.Y., 40 F.Supp. 887—Coryell v. Pilkington, D.C.Fla., 39 F.Supp. 142, affirmed, C.C.A., Coryell v. Phipps, 128 F.2d 702, affirmed 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363—The Bright, D.C.Md., 38 F.Supp. 574, affirmed, C.C.A., 124 F.2d 45

58 C.J. p. 660 note 66.

Action in rem

The text rule is followed, even though libelant's action is solely in rem.—The Chickie, C.C.A.Pa., 141 F.2d 80.

Effect of statute as to time for filing petition

The statutory amendment providing that owner "may" petition for limitation of liability within six months of receipt of written notice of claim did not take away from him the right to raise issue of limitation in answer.—Carpenter v. Mary R. Mullins, Inc., D.C.Mass., 33 F.Supp. 10.

64. N.Y.—In re Wheeler's Will, 76 N.Y.S.2d 159, 191 Misc. 33

58 C.J. p. 660 note 67.

Amendment of answer to plead limitation allowed

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed 55 N.E.2d 855, 293 N.Y. 32

65. U.S.—Langnes v. Green, Wash., 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520—In re Moran Bros. Contracting Co., D.C.N.Y., 1 F.Supp. 932.

58 C.J. p. 660 note 68

Independent proceeding as to single claim see supra § 245 c.

66. U.S.—Providence, etc., SS. Co. v. Hill Mfg. Co., Mass., 3 S.Ct. 379, 617, 109 U.S. 578, 27 L.Ed. 1038.

Independent proceeding see supra § 246

67. U.S.—The West Point, D.C.Va., 83 F.Supp. 680

68. U.S.—The West Point, supra.

Consolidation of libels

Where two libels were filed in same court and consolidated, and the owner of launch valued at twelve thousand dollars, pleaded limitation of liability by answer alone, total liability of the owner was not limited to twelve thousand dollars on both claims as would have been the case had the owner filed a petition for limitation of liability, and it was then too late for the owner to file such a petition.—The West Point, supra.

69. U.S.—Cantey v. McLain Line, D.C.N.Y., 40 F.Supp. 887

70. U.S.—The Chickie, C.C.A.Pa., 141 F.2d 80

Time for commencing proceedings generally see supra § 249

71. U.S.—The Chickie, supra—Moran Towing & Transp. Co. v. U. S., D.C.N.Y., 80 F.Supp. 623—De Cruz v. Hiering, D.C.N.J., 69 F.Supp. 397—The Chickie, D.C.Pa., 39 F.Supp. 200—Coryell v. Pilkington, D.C.Fla., 39 F.Supp. 142, affirmed, C.C.A., Coryell v. Phipps, 128 F.2d 702, affirmed 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363.

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed 55 N.E.2d 855, 293 N.Y. 32

"This amendment . . . did not . . . create any limitation of time when the issue might be raised by answer under Section 183 Congress, by these amendments, obviously intended that the six months' limitation applied only to the remedy by petition"—Cantey v. McLain Line, D.C.N.Y., 40 F.Supp. 887, 888

72. U.S.—The Chickie, C.C.A.Pa., 141 F.2d 80—De Cruz v. Hiering, D.C.N.J., 69 F.Supp. 397—Carpenter v. Mary R. Mullins, Inc., D.C. Mass., 33 F.Supp. 10.

73. U.S.—Carpenter v. Mary R. Mullins, Inc., supra.

74. U.S.—Cantey v. McLain Line, D.C.N.Y., 40 F.Supp. 887.

75. U.S.—General Seafoods Corp. v. J. S. Packard Dredging Co., D.C. Mass., 40 F.Supp. 1015—The Irving, D.C.N.Y., 33 F.Supp. 59.

Motion filed over four years after filing of original answer

U.S.—General Seafoods Corp. v. J.,

six-months time limitation applicable to an answer setting up the defense of limitation of liability.[76]

c. Damage Claimant's Pleading

The pleading of a damage claimant in a limitation proceeding must contain allegations sufficient to meet the claim for limitation.

The pleading of a damage claimant in a limitation proceeding serves two purposes, namely, an answer to the petition, and a claim of liability which will attach to the vessel, if surrendered, or to the stipulation for value.[77] Claimant has a right to file an answer,[78] and may, by suitable allegations and in accordance with the admiralty rules, state facts by reason of which the right to limitation of liability should be denied.[79] It seems to be generally recognized that, in respect of those matters which petitioner or libelant in the limitation proceeding must allege and prove, in order to entitle him to a limitation of liability, a denial in claimant's answer of knowledge or information in respect of such matters is sufficient,[80] and there is authority for the view that, in order to raise an issue as to such matters, no denial in the answer is necessary.[81] Verification on information and belief of an answer alleging foreign law cannot be regarded as an affidavit in proof of such law.[82] While there is authority to the contrary,[83] the view has been taken that a mere positive or general denial of the allegations of the petition or libel as to the essentials of the right to limit liability is not sufficient,[84] and that, where such a denial is made, the answer should contain also allegations of the specific facts which show that petitioner is chargeable with personal fault.[85]

Liability of petitioner. Where petitioner or libelant reserves, in his petition, the right to contest liability, according to some cases, the damage claimant's pleading is in the nature of a libel,[86] must treat the question as to liability independently of the question and pleading as to the right to limit liability,[87] and must state a cause of action,[88] but there is also authority to the contrary.[89]

Right to file pleading. Under Admiralty Rules, rule 51, 28 U.S.C.A., which provides that any person who shall have presented his claim to the commissioner under oath may answer the libel or petition and contest the right of the owner to the exemption or limitation claimed, it has been held that claimant cannot, without so presenting his claim, file an answer,[90] but the right of one cited by monition to file exceptions to the libel or petition, without filing a claim, has been recognized.[91]

Effect of delay in filing. The fact that the answer to the petition was not formally filed with the clerk until the day on which the trial of the issues began is not prejudicial to petitioner where petitioner had long been apprised of the contents of the answer and knew exactly what he would have to meet by way of defense on the trial.[92]

Amendment. The court may permit an amendment of damage claimant's pleading in a proper case.[93]

S. Packard Dredging Co., D.C. Mass., 40 F.Supp. 1015.

Motion filed after final decree on mandate on decision of circuit court of appeals was entered was dismissed as not timely filed.—The Irving, D.C.N.Y., 33 F.Supp. 59.

76. U.S.—The Joseph O'Donnell, D.C.N.Y., 37 F.Supp. 120

77. U.S.—The SS. Hewitt, D.C.N.Y., 284 F. 911
58 C.J. p. 673 note 85.

Petitioner's right to receive answer
Petitioner, as owner of tug involved in collision, was entitled to have owner of other vessel answer its petition, so that in limitation proceeding wherein owner of other vessel sought allowance of his claim, court could adjudicate as between petitioner and such owner the question of who was at fault.—Petition of Texas Co., D.C.N.Y., 81 F.Supp. 758.

78. U.S.—The Denali, D.C.Wash., 13 F.Supp. 686

Invitation from owner to be on vessel
Answers and claims for wrongful death were held sufficient to charge invitation from owner, through agent, to deceased persons to be on board vessel.—The Brilliant, D.C. Fla., 49 F.2d 388.

79. U.S.—The Denali, D.C.Wash., 13 F.Supp. 686.

Exceptions to answers sustained for failure to conform to admiralty rules.—The Denali, supra.

80. U.S.—In re Companhia de Navegacao Lloyd Brasileiro, D.C.La., 7 F.2d 238.
58 C.J. p. 673 note 87.

81. U.S.—The Murrell, D.C.Mass., 188 F. 727.
58 C.J. p. 673 note 88.

82. U.S.—The Silverpalm, C.C.A.Cal., 79 F.2d 598.

83. U.S.—In re Companhia de Navegacao Lloyd Brasileiro, D.C.La., 7 F.2d 238.
58 C.J. p. 673 note 89.

84. U.S.—In re Davidson SS. Co., D.C.Wis., 133 F. 411.
58 C.J. p. 673 note 90.

85. U.S.—In re The Pere Marquette 18, D.C.Wis., 203 F. 127.
58 C.J. p. 673 note 91

86. U.S.—In re The Pere Marquette 18, supra—In re Davidson SS. Co., D.C.Wis., 133 F. 411.

87. U.S.—In re The Pere Marquette 18, D.C.Wis., 203 F. 127.
58 C.J. p. 673 note 94.

88. U.S.—In re Davidson SS. Co., D.C.Wis., 133 F. 511.
58 C.J. p. 673 note 95.

89. U.S.—In re Companhia de Navegacao Lloyd Brasileiro, D.C.La., 7 F.2d 238
58 C.J. p. 674 note 96.

90. U.S.—In re Providence, etc., SS. Co., D.C.N.Y., 20 F.Cas.No.11,452, 6 Ben. 258
58 C.J. p. 674 note 98.

91. U.S.—Du Pont de Nemours v. Bentley, C.C.A.N.Y., 19 F.2d 354.
58 C.J. p. 674 note 99.

92. U.S.—The O'Boyle No. 1, D.C. N.Y., 64 F.Supp. 378.

93. U.S.—In re The Hamilton, N.Y., 146 F. 724, 77 C.C.A. 150, affirmed

d. Interrogatories

In accordance with the general rules governing interrogatories in admiralty cases, a petitioner for limitation of liability, or a damage claimant, may be permitted to attach, or propound, proper interrogatories.

Under Admiralty Rules, rule 31, 28 U.S.C.A., petitioner or libelant in a limitation proceeding may attach interrogatories to be answered by a damage claimant,[94] or may be permitted by the court by amendment to attach interrogatories,[95] and a damage claimant may also propound proper interrogatories to support his answer as a claim.[96] Interrogatories must, however, be confined to evidence in support of the case of the party presenting them;[97] and since, as discussed infra § 255 b, the burden of showing lack of privity and knowledge is on petitioner, interrogatories merely dealing with privity or knowledge, and proffered by a damage claimant, should not, in general, be sustained.[98] Interrogatories by a damage claimant should not be sustained where they are not pertinent to the issues,[99] or are not necessary,[1] or are premature.[2]

Answers to interrogatories. A proper interrogatory should be answered directly and not by reference to the petition for limitation or to the ship's log.[3] Whether the answers to interrogatories are admissible, and their legal effect, should be determined by the court at the trial;[4] and on a motion to direct petitioner to answer, it is sufficient if the answers would be permissible under any circumstances that might reasonably arise.[5]

e. Issues or Matters to Be Litigated; Proof and Variance

In proceedings for limitation of liability, the petitioner, in addition to the question of the right to limitation, may litigate the question of any liability, unless it has already been determined. General rules as to variance in admiralty apply.

In addition to the question as to the right to limit liability, which question is necessarily involved,[6] petitioners for limitation of liability may litigate in the same proceeding the question whether there is any liability,[7] provided that question has not already been decided.[8] Where, however, the liability of petitioner,[9] including the amount of the damages,[10] has been determined by a prior judgment or

Old Dominion SS Co. v. Gilmore, 28 S.Ct. 133, 207 U.S. 398, 52 L.Ed. 264.
58 C.J. p 674 note 1.

94. U.S.—The Murrell, D.C.Mass., 188 F. 727.
58 C.J. p 674 note 4
Interrogatories in admiralty suits in general see Admiralty § 123.

95. U.S.—The Murrell, supra.

96. U.S.—The SS. Hewitt, D.C.N.Y., 284 F. 911.

Assumption of burden
Claimant opposed to limitation of liability, in order to file interrogatories, must assume a burden.—The Denali, D.C.Wash., 13 F.Supp. 686

Documents as subject matter of litigation
Claimants may interrogate petitioner regarding documents forming the subject matter of the litigation.—The Princess Sophia, D.C.Wash., 269 F. 651

Exceptions to interrogatories were sustained for failure to conform to admiralty rules.—The Denali, D.C.Wash., 13 F.Supp. 686.

Total loss of ship
Answering claimant may propound interrogatories, in support of his claim, even though the ship was a total loss, since the court has jurisdiction to adjudicate his claim and to enforce it in personam in the event limitation is denied.—The Santiago, D.C.N.Y., 21 F.2d 78.

97. U.S.—The SS. Hewitt, D.C.N.Y., 284 F. 911.

Speed; pitch and revolutions of propeller
Where claimant alleged that petitioner's ship was proceeding at dangerous rate of speed, interrogatories calling for pitch of propeller and number of revolutions of propeller per minute were proper.—The Black Eagle, D.C.N.Y., 8 F.Supp. 277.

Value of vessel
Where petitioner alleged that value of his vessel did not exceed a certain amount, market value of vessel was test, if it could be shown by proper evidence, but if no market value could be established, other evidence was admissible, so that claimant's interrogatories which would furnish such other evidence were proper.—The Black Eagle, supra.

98. U.S.—Petition of Navigazione Libera Triestina, D.C.N.Y., 34 F.2d 152.—The SS. Hewitt, D.C.N.Y., 284 F. 911.

99. U.S.—In re Knickerbocker Steamboat Co., D.C.N.Y., 136 F. 956
58 C.J. p 674 note 10.

Right to limitation
Respondents are not entitled to file interrogatories going to question of libelant's right to limitation, the burden of establishing which is on him.—The S. S. Hewitt, D.C.N.Y., 284 F. 911.

Letters, telegrams, etc.
While claimants may interrogate petitioner regarding documents forming the subject matter of the limitation, letters, telegrams, etc., between petitioner and its officers, agents, etc., are not an issue within such rule.—The Princess Sophia, D.C.Wash., 269 F. 651

1. U.S.—Petition of Navigazione Libera Triestina, D.C.N.Y., 34 F.2d 152
58 C.J. p 674 note 11.

2. **Interrogatories held not premature**
Where petitioner alleged that value of vessel did not exceed a certain amount, claimant's interrogatories concerning value of vessel were not improper as premature because interrogatories called for information in support of his allegations as to value of vessel for which stipulation must be given, which was preliminary to other issue.—The Black Eagle, D.C.N.Y., 8 F.Supp. 277.

3. U.S.—The Black Eagle, supra.

4. U.S.—The Black Eagle, supra.

5. U.S.—The Black Eagle, supra.

6. U.S.—The Rochester, D.C.N.Y., 230 F. 519

7. U.S.—Hartford Accident, etc., Co. v. Southern Pac. Co., Tex., 47 S.Ct. 357, 273 U.S. 207, 71 L.Ed. 612.
58 C.J. p 674 note 14.

8. U.S.—Providence, etc., SS. Co. v. Hill Mfg. Co., Mass., 3 S.Ct. 379, 617, 109 U.S. 578, 27 L.Ed. 1038.—The Benefactor, N.Y., 103 U.S. 239, 26 L.Ed. 466.

9. U.S.—Norwich, etc., Transp. Co. v. Wright, Conn., 13 Wall. 104, 20 L.Ed. 585.
58 C.J. p 675 note 16

10. U.S.—Monongahela River Consol. Coal, etc., Co. v. Hurst, Tenn., 200 F. 711, 119 C.C.A. 127.
58 C.J. p 675 note 17.

decree which is res judicata, petitioner may not contest his liability in the limitation proceeding; but the question as to privity or knowledge of petitioner, as affecting his right to limit his liability, remains for determination.[11]

Issues between parties other than petitioner. The course of the proceeding may be such as to raise for decision issues between parties to the proceeding other than the owner who seeks to limit his liability.[12]

Proof. It has been laid down in general terms that it is not necessary for petitioner to prove that the claims against the vessel are in excess of her value, in order to found jurisdiction in the district court to entertain the proceeding.[13] A failure to comply with the steamboat inspection law may be invoked to prove that a shipowner is not entitled to a limitation of liability, although it is not set up in the pleading of the parties, to the proceeding for limitation.[14] In respect of whether there is any liability, the view has been taken that claimant is required to prove a cause of action as in an original suit.[15] Where petitioner calls on a claimant to admit certain facts, and after claimant's responses thereto are stricken the case goes on to trial without further response from claimant, both petitioner and the trial court have the right to treat the request as admitted.[16]

Variance. General rules as to variance in admiralty suits, as discussed in Admiralty § 131, apply in a proceeding to limit liability.[17]

§ 255. —— Evidence

a. Presumptions; res ipsa loquitur
b. Burden of proof
c. Admissibility
d. Weight and sufficiency

a. Presumptions; Res Ipsa Loquitur

General rules as to presumptions in civil proceedings have been applied in limitation proceedings. In a proper case the doctrine of res ipsa loquitur will be applied.

General rules as to presumptions in civil proceedings have been applied in proceedings to limit liability.[18] The rule, or doctrine, of res ipsa loquitur has been applied in determining the cause of the injury in respect of which limitation is sought;[19] but the doctrine will not be applied unless the

11. U S —In re P Sanford Ross, N Y, 204 F 248, 122 C C A. 516.

12. U S.—The Adah, D.C N Y, 245 F. 378

13. U.S —The George W. Fields, D C N.Y, 237 F 403.
58 C J p 675 note 24
Number and amount of claims generally see supra § 245 c

14. U.S.—The Annie Faxon, Wash, 75 F 312, 21 C.C A. 366.

15. U S —In re Davidson SS. Co, D C Wis, 133 F. 411.
58 C.J. p 675 note 26.

16. U S —Rautbord v. Ehmann, C.A. Ill, 190 F.2d 533

17. U S —The John K. Gilkinson, D C N Y, 156 F 868
58 C J. p 675 note 28.

18. U S —The Iowa, D C Or, 34 F. Supp 843
58 C J. p 675 note 30.

Seaworthiness

(1) In general —The William Nelson, D C N Y., 296 F 553—58 C.J. p 675 note 30 [a]

(2) The unexplained sinking of a vessel raises a presumption of unseaworthiness —Sabine Towing Co. v. Brennan, C C A Tex, 72 F 2d 490, certiorari denied 55 S Ct 141, 293 U S 611, 79 L.Ed 701, rehearing denied 55 S Ct 212, 293 U S 632, 79 L Ed. 717

(3) The sinking of a vessel while being properly handled, without undue stress of weather or other known external cause, is presumptively due to unseaworthiness.—Petition of Erlandsen, D C.Wash, 51 F Supp 921

(4) Presumption of unseaworthiness arises only when vessel sinks from unknown causes under such circumstances that nothing but unseaworthiness can explain accident —The Carroll, D C Md, 60 F 2d 985 —In re Eastern Transp Co, D C. Md, 37 F 2d 355, modified on other grounds, C C.A., The Calvert, 51 F.2d 494.

(5) Presumption of unseaworthiness at inception of voyage arises in case vessel becomes unseaworthy during voyage, but such presumption may be overcome by evidence showing perils of sea from which it is reasonable to assume that vessel sprang leak —The Carroll, supra

(6) There was no presumption of unseaworthiness of barge when conditions showed contact with some obstruction —In re Eastern Transp Co, supra

(7) Fact that scow capsized in slip in smooth water and without external contact raised presumption of unseaworthiness —The Emergency, D C N Y, 9 F Supp. 484.

Negligence

(1) Unexplained sinking of barge raised presumption of negligence — Flat-Top Fuel Co. v. Martin, C C A N Y., 85 F 2d 39, certiorari denied 57 S Ct 110, 299 U.S 585, 81 L Ed 437

(2) Happening of accident to barge towed by tug did not in itself raise presumption of negligence on part of tug —The Carroll, D C.Md., 60 F.2d 985

Violation of statute

(1) Where a tug left port without a second deckhand and lack was admitted to be a statutory fault, it would be presumed that fault was a contributory cause of collision —The New York Marine No 10, C C A N Y, 109 F 2d 564.

(2) Where vessel owner has privity or knowledge of violation of statutes affecting navigation of vessel, it is presumed that fault is at least a contributing cause to loss.—The E Madison Hall, C C A Md, 140 F 2d 589, certiorari denied 64 S Ct. 1159, 322 U.S. 748, 88 L Ed 1579

(3) Where the statutory three-watch requirement for mates on certain vessels was violated, and the owner was affirmatively found to be privy to the violation, he could not escape application of presumption that violation was cause of wreck, by compelling the injured persons to litigate their claims in a limitation proceeding —The Denali, C C A Wash, 112 F 2d 952, certiorari denied Alaska S S Co. v. Pacific Coast Coal Co, 61 S Ct 65, 311 U S. 687, 85 L Ed 444.

19. U S —Leathem Smith-Putnam Nav Co. v. Osby, C.C A Ill., 79 F 2d 280, certiorari denied Leathem Smith-Putnam Nav Co v. Osby, 56 S.Ct. 370, 296 U.S. 653, 80 L.Ed. 465
58 C.J. p 675 note 32.

cause of the injury is such as in the ordinary course of things does not happen if those who have management or control of the vessel use proper care.[20]

b. Burden of Proof

A petitioner seeking limitation of liability has the burden of proving his right thereto; a damage claimant has the burden of proving liability and establishing his claim.

On the issue of the right to limit liability, the burden of proof is on petitioner or libelant who seeks limitation,[21] he has the burden of proving compliance with the conditions which entitle him to limit liability,[22] including the burden of proving that the act or omission on which liability is based was without his knowledge or privity,[23] and that the damage was not caused by any fault of his own.[24] These rules apply where the question as to

20. U.S.—Petition of McAllister, D.C.N.Y., 53 F.2d 495

21. U.S.—New England S.S. Co. v. Howard, C.C.A.N.Y., 130 F.2d 354—In re Pennsylvania R. Co., C.C.A.N.Y., 48 F.2d 559, certiorari denied James McWilliams Blue Line, Inc., v. Pennsylvania R. Co., 52 S.Ct. 21, 284 U.S. 640, 76 L.Ed. 544—Middle East Agency v. The John B. Waterman, D.C.N.Y., 86 F.Supp. 487—The Mattie, D.C.N.Y., 38 F.Supp. 745, affirmed, C.C.A., Jacobus Grauwiller Co. v. Reichert, 136 F.2d 904—The Vera III, D.C.N.Y., 24 F.Supp. 421—The Mandu, D.C.N.Y., 20 F.Supp. 820—The Denali, D.C.Wash., 13 F.Supp. 686

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified on other grounds, In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed on other grounds 55 N.E.2d 855, 293 N.Y. 32

58 C.J. p. 676 note 33.

Acceptance of affirmative

Where petitioner begins by putting in his proof, he must anticipate what claimant will prove and show himself not to be privy to all possible faults open under the pleadings, and in such case, petitioner accepts an affirmative, but only for as long as claimant has not declared his position.—Southern Pac. Co. v. U.S., C.C.A.N.Y., 72 F.2d 212

Intervening negligence

Petitioners had burden of showing intervening negligence breaking causal connection between collision and loss.—The Algonquin, D.C.N.Y., 6 F.Supp. 644, affirmed, C.C.A., 70 F.2d 335.

Assumption of obligation of common carrier

The burden rests on shipowner who has assumed the obligation of a common carrier to show that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary bailee but because he is a special type of bailee who has assumed the obligation of an insurer.—Commercial Molasses Corp. v. New York Tank Barge Corp., N.Y., 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 89.

Absence of licensed master

Where a diesel engine tug does not have a licensed master and the facts disclose that, for safe navigation, under particular circumstances, a more powerful tug should have been used, a heavier burden rests on owner seeking limitation than otherwise would, even though such tugs, in particular kind of service involved, are not required to have a licensed master.—The Ruth Conway, D.C.Md., 75 F.Supp. 514, affirmed, C.A., Harbor Towing Corp. v. Parker, 171 F.2d 416, certiorari denied 69 S.Ct. 1050, 337 U.S. 907, 93 L.Ed. 1720.

Chartering of scow

Owner of scow, in proceeding to limit liability, need not prove identity of charterer, but only that scow was in fact chartered.—Moran Towing & Transportation Co. v. Sunset Lighterage Corporation, C.C.A.N.Y., 62 F.2d 761

22. U.S.—In re W. E. Hedger Co., C.C.A.N.Y., 59 F.2d 982—The Maine, D.C.Md., 28 F.Supp. 578, affirmed, C.C.A., Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F.2d 373

Claimant's answer immaterial

Petitioner has burden to show strict compliance with every provision of law before limitation may be granted, irrespective of answer of any claimant.—The Denali, D.C.Wash., 13 F.Supp. 686

23. U.S.—Coryell v. Phipps, Fla., 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363—Petition of U.S., C.A.N.Y., 178 F.2d 243—Austerberry v. U.S., C.A.Mich., 169 F.2d 583—The Severance, C.C.A.N.C., 152 F.2d 916, certiorari denied Stone v. Diamond S.S. Transp. Corp., 66 S.Ct. 1344, 328 U.S. 853, 90 L.Ed. 1626—The E. Madison Hall, C.C.A.Md., 140 F.2d 589, certiorari denied 64 S.Ct. 1159, 322 U.S. 748, 88 L.Ed. 1579—The Marguerite, C.C.A.Wis., 140 F.2d 491—The Denali, C.C.A.Wash., 112 F.2d 952, certiorari denied Alaska S.S. Co. v. Pacific Coast Coal Co., 61 S.Ct. 65, 311 U.S. 687, 85 L.Ed. 444—The Silver Palm, C.C.A.Cal., 94 F.2d 776—Southern Pac. Co. v. U.S., C.C.A.N.Y., 72 F.2d 212—The Vestris, D.C.N.Y., 60 F.2d 273—U.S. v. Eastern Transp. Co., C.C.A.N.Y., 59 F.2d 984—The Yungay, D.C.N.Y., 58 F.2d 352—Petition of Reliance Marine Transp. & Const. Corp., D.C.Conn., 89 F.Supp. 272—American Tobacco Co. v. The Katingo Hadjipetera, D.C.N.Y., 81 F.Supp. 438, modified on other grounds, C.A., 194 F.2d 449, certiorari denied 72 S.Ct. 1076, 343 U.S. 978, 96 L.Ed. ——.—Kulack v. The Pearl Jack, D.C.Mich., 79 F.Supp. 802, affirmed, C.A., 178 F.2d 154—The Big Chief, D.C.Mo., 75 F.Supp. 496—The Inga, D.C.N.Y., 33 F.Supp. 122—Petition of Liebler, D.C.N.Y., 19 F.Supp. 829—The City of Brunswick, D.C.Mass., 6 F.Supp. 597

N.Y.—De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218, 180 Misc. 649, affirmed and modified on other grounds, In re De Pinto's Estate, 45 N.Y.S.2d 414, 266 App.Div. 1002, reargument denied 45 N.Y.S.2d 929, 267 App.Div. 760, reversed on other grounds 55 N.E.2d 855, 293 N.Y. 32

58 C.J. p. 676 note 34.

24. U.S.—The City of Bangor, D.C.Mass., 13 F.Supp. 648

Violations of statutory regulations

(1) Burden of exonerating vessel for violating duty to keep proper lookout was on petitioner.—The Wyomissing, C.C.A.N.J., 72 F.2d 834.

(2) Petitioner for limitation of liability in collision had burden to show that statutory faults could not have contributed to collision.—The Edward E. Loomis, C.C.A.N.Y., 86 F.2d 705.

(3) Burden was on tug to show that violations of statutory regulations dealing with use of searchlight and tow lines could not have been the cause of the collision.—The Ernie Miller, D.C.La., 71 F.Supp. 806.

(4) Burden was on barges to show that violation of statutory regulations by failure to have a full complement in crews could not have contributed to collision, and not whether it did so contribute to it.—Martin Marine Transp. Co. v. U.S., C.A.Va., 183 F.2d 676.

(5) Burden is on petitioner to show that statutory fault of lack of second deckhand was not a contributory cause of collision.—The New York Marine No. 10, C.C.A.N.Y., 109 F.2d 564.

(6) Where owner of vessel has privity or knowledge of violation of

the right to limit liability depends on the determination of issues as to seaworthiness[25] or proper equipment and supplies,[26] or as to the competency of the persons who manned the vessel.[27] Where, however, petitioner by his evidence makes out a prima facie case of lack of privity or knowledge, the burden of evidence to show privity or knowledge shifts to the damage claimant;[28] and in certain cases the petitioner's case may be aided by presumptions, as discussed supra subdivision a of this section, which will shift to the damage claimant the burden of evidence.[29] Where a vessel whose owner is seeking limitation was plainly at fault in a collision with another, whose owner is also seeking limitation, any doubt should be resolved in the latter vessel's favor, unless it was also at fault.[30]

Value of petitioner's interest. Petitioner in a limitation proceeding must show the value of his interest in the vessel and her pending freight.[31]

Liability. With respect to the burden of proof as to liability, a damage claimant is in the position of a libelant or plaintiff,[32] and has the burden of proving facts to show such liability,[33] or the extent

statutes affecting navigation thereof, he must bear burden of showing not merely that fault probably was not, but also that it could not have been, a contributing cause of disaster.—The E. Madison Hall, C C A Md, 140 F 2d 589, certiorari denied 64 S Ct 1159, 322 U.S 748, 88 L Ed 1579

(7) If a ship strands while being navigated by a mate whose hours on watch were longer than safety statute permitted, the burden of proof is on the owner of the vessel privy to the navigation to show that the violation was not a direct or contributing cause to the stranding.—The Denali, C C.A Wash, 112 F 2d 952, certiorari denied Alaska S. S Co v Pacific Coast Coal Co, 61 S.Ct. 65, 311 U S. 687, 85 L.Ed 444

(8) In such circumstances, burden also rested on owner to show that its privity in, and knowledge of, violation of statute could not have contributed to the stranding of the vessel.—The Denali, C.C A.Wash, 105 F 2d 413, adhered to on rehearing 112 F.2d 952, certiorari denied Alaska S S Co v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U S. 687, 85 L Ed 444

25. U S—May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, N Y., 54 S Ct 162, 290 U S 333, 78 L Ed 348—The Cleveco, C.C A Ohio, 154 F 2d 605—New Orleans Coal & Bisso Towboat Co. v. U. S, C C A La., 86 F 2d 53, rehearing denied 86 F.2d 1008, certiorari denied St Paul Fire & Marine Ins. Co. v. New Orleans Coal & Bisso Towboat Co, 57 S Ct 669, 300 U S. 676, 81 L Ed 881, and Louisiana Nat Bank of Baton Rouge v. New Orleans Coal & Bisso Towboat Co, 57 S Ct 669, 300 U S 676, 81 L Ed. 881, amended on other grounds, C C. A, 89 F 2d 967—Henson v Fidelity & Columbia Trust Co, C.C.A Ky, 68 F 2d 144, rehearing denied, C.C A, 69 F 2d 778—The Carroll, D C Md, 60 F 2d 985—In re Jacobson, D C Tex, 52 F 2d 179—Dexter-Carpenter Coal Co. v New York, O & W Ry. Co, D C N Y, 50 F 2d 270—In re Eastern Transp. Co, D C Md, 37 F.2d 355, modified on other grounds, C C.A, The Calvert, 51 F.2d 494—The Horaisan Maru, D C N Y, 5 F Supp. 311, reversed on other grounds, C.C A, Yokohama Specie Bank v. Mitsui & Co, 73 F 2d 526, certiorari denied 55 S Ct. 648, 295 U S. 736, 79 L.Ed. 1684.
58 C.J. p 676 note 35

Vessel as common carrier

Burden of proving seaworthiness rests on vessel when it is a common carrier or has assumed the obligation of a common carrier.—Commercial Molasses Corp. v. New York Tank Barge Corp, N.Y., 62 S Ct. 156, 314 U S. 104, 86 L Ed 89.

Repairs on old vessel

Where barge is visibly old and unseaworthy, proof by owner that repairs were made several months before sinking and that his carpenter performed minor jobs on boats is insufficient to limit liability—Dexter-Carpenter Coal Co v New York, O & W Ry. Co., D C.N Y., 50 F 2d 270.

Privity or knowledge

(1) In general.—In re Jacobson, D C Tex, 52 F 2d 179—Dexter-Carpenter Coal Co. v New York, O & W Ry. Co, D C N Y, 50 F 2d 270—58 C J. p 676 note 35 [a].

(2) If claimants establish causal connection between unseaworthiness of barge and its sinking, burden shifts to owner, seeking limitation of liability, to establish that unseaworthiness was not with his privity or knowledge—The Carroll, D.C.Md, 60 F 2d 985—Petition of Sheridan, D C.Me, 50 F.Supp 779

(3) The burden is on an owner of vessel seeking limitation of liability to prove lack of knowledge or of means of knowledge on his part, or that of his marine superintendent, that his vessel was unseaworthy, so, it is not necessary, in such proceeding, for claimants to prove knowledge or means of knowledge on part of owner that vessel was unseaworthy—The Cleveco, C.C.A Ohio, 154 F 2d 605.

26. U.S—The Miami, D C N.Y., 43 F.2d 562
58 C J p 676 note 35.

27. U.S.—Eastern SS. Corp. v. Great Lakes Dredge, etc., Co, Mass, 256 F. 497, 168 C C A. 3, certiorari dismissed 40 S Ct. 8, 250 U.S. 676, 63 L Ed. 1202.
58 C J. p 676 note 36.

Privity

In order to be entitled to limitation, owner intrusting manning of vessel to subordinates must prove he was not privy to master's failure to secure proper and requisite number of qualified seamen—The Princess Sophia, C.C A Wash, 61 F 2d 339, certiorari denied Brace v Canadian Pac R Co, 53 S Ct 396, 288 U S. 604, 77 L Ed 980

28. U.S—The Rambler, C.C A N.Y, 290 F. 791
58 C J. p 676 note 37.

Promulgation of, or departure from, safety rules

Shipowner having promulgated ample rules with respect to matters relating to safety of passengers, burden of proving that rules were not promulgated in good faith, or willful departure therefrom countenanced by shipowner seeking limitation of liability, was on claimants.—The Princess Sophia, C C A.Wash., 61 F.2d 339, certiorari denied Brace v. Canadian Pac R. Co, 53 S Ct 396, 288 U S 604, 77 L.Ed 980—58 C J. p 676 note 37 [a]

29. U S—In re Meyer, D C Cal., 74 F. 881
58 C J p 676 note 39.

30. U S—The Barbara, D.C Mass, 62 F Supp 265.

31. U S—In re W E. Hedger Co, C C A N Y, 59 F 2d 982—The Rapel, D C N.Y, 78 F Supp. 78.

32. U S—The St. Louis, D C N.Y, 35 F.2d 741, affirmed, C.C.A., 35 F 2d 742
58 C.J. p 676 note 40.

33. U.S—Petition of McAllister, D.C.N.Y., 53 F.2d 495—The Vera III, D.C N.Y, 24 F Supp. 421.
58 C J. p 676 note 41.

Negligence

U.S—Cruse v Sabine Transp. Co., C.C.A Tex, 88 F 2d 298, certiorari denied 58 S Ct. 20, 302 U.S. 701, 82 L Ed. 541, rehearing denied 58 S Ct. 134, 302 U.S. 775, 82 L Ed. 600—New Orleans Coal & Bisso Towboat Co. v. U. S, C.C A La, 86 F.2d

thereof,[34] or, in other words, to establish his claim.[35] Claimant must show a causal connection between wrong and damage in order to impose liability;[36] so, if the seaworthiness of the vessel is not established, the claimant must prove causal connection between unseaworthiness and the sinking or collision.[37]

As in the case of an independent proceeding to establish liability for loss of cargo, as discussed supra § 154, where nondelivery is shown, the burden of evidence shifts to the owner of the vessel.[38]

c. Admissibility

General rules as to the admissibility of evidence in admiralty suits have been applied in limitation proceedings

General rules as to the admissibility of evidence in admiralty suits have been applied in proceedings to limit liability [39]

d. Weight and Sufficiency

General rules governing the weight and sufficiency of evidence in admiralty suits apply in proceedings to limit liability. A controverted damage claim must be established by a preponderance of evidence.

General rules as to the weight and sufficiency of evidence in admiralty suits apply in proceedings to limit liability.[40] With respect to the unseaworthiness of a vessel, where the defect is one likely to

53, rehearing denied 86 F 2d 1008, certiorari denied St. Paul Fire & Marine Ins Co v New Orleans Coal & Bisso Towboat Co, 57 S Ct. 669, 300 U S 676, 81 L Ed 881, and Louisiana Nat Bank of Baton Rouge v New Orleans Coal & Bisso Towboat Co, 57 S Ct 669, 300 U S 676, 81 L Ed 881, amended on other grounds, C C A, 89 F 2d 967—The Carroll, D C Md, 60 F 2d 985—Petition of Great Lakes Towing Co, D.C Minn, 79 F Supp 1, affirmed, C.A, Reiss S S. Co v Great Lakes Towing Co, 177 F 2d 681—The Big Chief, D C Mo, 75 F Supp. 496—The Cleveland, D C. N.Y., 54 F Supp. 819, affirmed, C.C.A., Petition of Pennsylvania R Co., 141 F 2d 1020—The Hygrade No. 18, D C Mass, 41 F Supp 304.

Unseaworthiness

U S.—Commercial Molasses Corp v. New York Tank Barge Corp, N Y, 62 S Ct 156, 314 U S. 104, 86 L Ed 89—Petition of Howard, D C N.Y, 53 F Supp 556.

Error of judgment and lack of ordinary prudence

U S —The Carroll, D C Md., 60 F.2d 985.

Owner's design or neglect

U S —The Sandgate Castle, D.C.N Y, 30 F Supp 344

Fault after knowledge

In railroad's proceedings to limit liability, claimants, as owners of barges bailed to railroad, had burden to show railroad's fault after knowledge that barges had broken adrift. —In re Pennsylvania R Co, C.C A N Y, 48 F.2d 559, certiorari denied James McWilliams Blue Line, Inc, v Pennsylvania R. Co., 52 S Ct. 21, 284 U.S 640, 76 L Ed. 544.

34. U.S.—The Vera III, D C N.Y, 24 F.Supp. 421—The Mandu, D.C. N.Y., 20 F Supp. 820.

35. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp, N.Y, 62 S Ct. 156, 314 U.S. 104, 86 L.Ed. 89.
58 C.J. p 676 note 42.

Petitioner's connection with tort or contract

In proceedings for limitation of liability, claimant of damages must prove definite tort or contract and petitioner's connection therewith — Southern Pac Co. v U S., C C.A. N Y, 72 F 2d 212

Cause of explosion

U S —The Doris Kellogg, D C.N Y, 18 F Supp 159, affirmed, C.C A, In re Kellogg S S Corp, 94 F 2d 1015

Willful departure from rules as to personnel

Claimants had burden of proving that government rules and regulations directing employment of licensed marine personnel, or otherwise qualified people, to man vessel were willfully departed from to knowledge of government representatives —In re U. S, D.C N.Y., 82 F Supp 730, affirmed in part and modified in part on other grounds, C.A, Petition of U. S., 178 F 2d 243

36. U S —In re Eastern Transp Co, D C Md, 37 F.2d 355, modified on other grounds, C C A., The Calvert, 51 F 2d 494

37. U S —The Carroll, D.C Md, 60 F 2d 985—In re Eastern Transp Co., D.C.Md, 37 F 2d 355, modified on other grounds, C C A, The Calvert, 51 F 2d 494—Petition of Sheridan, D C Me, 50 F Supp 779

38. U S —In re Companhia de Navegacao Lloyd Brasileiro, D C.La., 7 F 2d 238

39. U.S —The Benefactor, N.Y., 103 U S 239, 26 L.Ed 351.
58 C.J. p 676 note 46.

Parol evidence as to deviation

Evidence that shippers had knowledge of master's or shipowner's intention to deviate for purpose of delivering certain cargo at port off ship's customary course was inadmissible, as an attempt to vary bills of lading by parol —The Pelotas, C C.A.La., 66 F.2d 75.

British statute and regulations requiring load line marks on vessels leaving British ports may and should be considered in determining whether vessel so marked was overloaded on voyage from American port, even though inapplicable thereto —The Vestris, D.C N Y., 60 F 2d 273

40. U S —Farr v. Haln S S Co, C.C.A N Y., 121 F 2d 940
58 C J p 676 note 48.

Evidence held sufficient to show particular matters

U S.—The Vestris, D C N.Y., 60 F.2d 273—In re W E Hedger Co., C C. A N Y, 59 F 2d 982

Evidence held insufficient to show particular matters

U S —The Princess Sophia, C.C A. Wash, 61 F 2d 339, certiorari denied Brace v Canadian Pac R. Co, 53 S.Ct 396, 288 U S 604, 77 L Ed. 980.

Right to limitation in general

(1) Evidence held sufficient to show that petitioner was entitled to limitation of liability —Rautbord v. Ehmann, C A Ill, 190 F.2d 533—The Yungay, D.C N Y, 58 F.2d 352—The Silvanus, D C La, 56 F.2d 257, affirmed, C C A, Nederlandsche Indische Tankstoomboot Maats v. Standard Oil Co, 66 F 2d 113—Petition of Reliance Marine Transp. & Const. Corp., D C Conn., 89 F Supp. 272—In re Defense Plant Corp., D.C. Tenn., 58 F.Supp. 931—The Cleveland, D C.N Y, 54 F.Supp. 819, affirmed, C C.A, Petition of Pennsylvania R Co., 141 F.2d 1020—The Republic No. 5, D.C.N Y, 44 F Supp. 665—The Mattie, D.C N Y., 38 F Supp. 745, affirmed, C C.A., Jacobus Grauwiller Co v. Reichart, 136 F 2d 904 —The Spare Time II, D.C.N.Y., 36 F Supp. 642—The Belleville, D.C. N.Y., 35 F Supp. 934—Petition of Liebler, D.C N Y, 19 F.Supp 829— The P. F Martin, D.C Va., 5 F Supp. 501—53 C.J. p 676 note 48 [a]

(2) Evidence held not to warrant limitation of liability.—Martin Marine Transp. Co v. U. S., C A.Va., 183 F.2d 676—Harbor Towing Corp v. Parker, C.A.Md., 171 F.2d 416, certiorari denied 69 S Ct. 1050, 337 U.S. 907, 93 L.Ed. 1720—Austerberry v. U.

escape attention on a fairly good inspection, very slight evidence, on behalf of the petitioner, is sufficient at the outset to cover the element of lack of privity or knowledge,[41] but in respect of patent defects the petitioner must give stronger evidence of want of privity or knowledge.[42] Evidence of prior occasions on which the vessel stranded has little probative effect, and will support no inference of unseaworthiness, without more particular evidence of the causes.[43] Where the vessel, in respect of which limitation is sought, was lost, and there is no evidence as to how the loss occurred, the petitioner, on proving the vessel's seaworthiness, at the commencement of the voyage, is prima facie entitled to limit liability.[44] Proof that a tug was seaworthy, that no officer of the corporation owning it was on board, and that the master was competent makes a prima facie case for limitation of liability for the loss of a barge towed by the tug.[45]

General rules as to sufficiency apply in respect of the sufficiency of evidence bearing on the question as to the privity or knowledge of the petitioner,[46]

S, C A Mich, 169 F 2d 583—Hutchinson v. Dickie, C C A Ohio, 162 F 2d 103, certiorari denied 68 S Ct 208, 332 U S. 830, 92 L Ed 404—New England S S. Co v. Howard, C C A N Y, 130 F 2d 354—The New York Marine No 10, C C A.N Y, 109 F 2d 564—The Silver Palm, C C A Cal, 94 F 2d 776—The Vestris, D C N Y, 60 F 2d 273—The Ernie Miller, D C La., 71 F Supp 806—The Russell No 5, D C N Y, 26 F Supp 575, affirmed, C.C.A., In re Newtown Creek Towing Co, 104 F.2d 1018

(3) Evidence held to justify denial of limitation of liability resulting from loss of vessel and cargo because of fire, on ground that owner's neglect to have vessel in seaworthy condition was proximate cause of fire.—The Sandgate Castle, D C N Y, 30 F Supp 344.

Personal liability or contract of owner

(1) Evidence that collision occurred because tug's master failed to make enough allowance for the tide was insufficient to charge owner of tug personally.—Jacobus Grauwiller Co. v Reichert, C C A N Y, 136 F.2d 904

(2) Evidence held to show that shipping contract was vessel owner's personal contract.—In re Great Lakes Transit Corp., C.C.A.Ohio, 81 F 2d 441

Decision by impressions of witnesses

Limitation of liability must be decided, not by extraneous knowledge or by inferences, but by what the witnesses who are heard and seen by the court say and the impressions that they make on the court.—The Ruth Conway, D C Md, 75 F Supp 514, affirmed, C A, Harbor Towing Corp v Parker, 171 F 2d 416, certiorari denied 69 S Ct 1050, 337 U S. 907, 93 L Ed 1720.

Uncontradicted and not inherently improbable testimony will be accepted by court as true.—The Trenton, D.C N Y, 92 F.Supp 833, affirmed, C C.A., In re O'Brien Bros, 101 F 2d 1017.

Judgment of those at scene of collison has greater weight than critics' opinions after event.—The Algonquin, D C N Y, 6 F Supp 644, affirmed, C C A, 70 F 2d 335.

Positive and negative testimony

Positive testimony of witnesses for tug owner tending to show that towed barge struck some submerged object could not be arbitrarily disregarded because of negative testimony of opposing witnesses that they felt no jar.—New Orleans Coal & Bisso Towboat Co v U S, C C A La, 86 F 2d 53, rehearing denied 86 F 2d 1008, certiorari denied St Paul Fire & Marine Ins Co v New Orleans Coal & Bisso Towboat Co, 57 S Ct. 669, 300 U.S 676, 81 L Ed 881, and Louisiana Nat. Bank of Baton Rouge v New Orleans Coal & Bisso Towboat Co., 57 S Ct 669, 300 U S 676, 81 L Ed 881, amended on other grounds, C C.A., 89 F 2d 967.

Testimony as to sound signals in fog must be considered with its weakness in mind, especially where many vessels of outbound convoy were surrounded by fog and were near turning point.—Petition of North Atlantic Transport Co, D C N Y, 80 F.Supp. 308

Certificates

(1) Inspection certificate held evidence bearing on question of due care, but not more, and not evidence of tug's stability when no tests thereof were made.—Sabine Towing Co v. Brennan, C.C A Tex, 72 F.2d 490, certiorari denied 55 S Ct 141, 293 U S. 611, 79 L.Ed. 701, rehearing denied, 55 S Ct 212, 293 U.S 632, 79 L Ed. 717.

(2) Certificates of surveyors and inspectors as to condition of vessel are to be valued in the light of what actual facts disclosed.—The Doris Kellogg, D.C N Y, 18 F Supp. 159, affirmed, C C.A, In re Kellogg S S Corp, 94 F 2d 1015.

41. U.S.—Quinlan v Pew, Mass, 56 F. 111, 5 C C A. 438

42. U S—Quinlan v Pew, supra. 58 C J p 677 note 50

43. U.S—The Aakre, C.C.A N Y, 122 F 2d 469, certiorari denied Waterman v. The Aakre, 62 S Ct. 360, 314 U S 690, 86 L.Ed 552

44. U S—The Suduffco, D C N Y., 33 F 2d 775.

45. U S—The George W. Pratt, C. C A N Y, 76 F 2d 902

46. U S—The Annie Faxon, Wash, 75 F 312, 21 C C A 366.
58 C J. p 677 note 52.

Privity or knowledge held shown, or lack of privity or knowledge held not shown

U S—Austerberry v U S, C A Mich, 169 F 2d 583—The Marguerite, C C A Wis, 140 F 2d 491—The Silver Palm, C.C A Cal, 94 F 2d 776—The Vestris, D C N Y., 60 F.2d 273—The Ernie Miller, D C La, 71 F Supp 806—The Silverpalm, D C Cal, 13 F Supp 212, affirmed, C C A, 94 F 2d 776.

N Y—De Pinto v O'Donnell Transp Co, 40 N Y S 2d 218, 180 Misc 649, affirmed and modified on other grounds In re De Pinto's Estate, 45 N Y S.2d 414, 266 App Div. 1002, reargument denied 45 N Y S 2d 929, 267 App Div 760, reversed on other grounds 55 N E 2d 855, 293 N Y 32

58 C J. p 677 notes 52 [a] (5)–(7), [d], [f], 54 [a] (3) [b], 55 [a] (3)

Privity or knowledge held not shown generally, or lack of privity or knowledge held shown.—Coryell v Phipps, Fla, 63 S.Ct 291, 317 U S 406, 87 L Ed 363—Petition of Tracy, D C N Y, 92 F Supp 706, affirmed, C A 194 F 2d 362—American Tobacco Co. v The Katingo Hadjipetura, D C N.Y, 81 F.Supp. 438, modified on other grounds, C A., 194 F 2d 449—In re Defense Plant Corp, D C Tenn, 58 F.Supp. 931—The Mattie, D.C N.Y, 38 F.Supp 745, affirmed, C C A, Jacobus Grauwiller Co v. Reichert, 136 F 2d 904—The Spare Time II, D C N Y., 36 F Supp 642—The Iowa, D C Or, 34 F Supp. 843—58 C J. p 677 notes 52 [a] (1)–(4), [c], 55 [b] (2)–(4)

Unseaworthy condition

(1) Evidence held to show that owner, through its president and general manager, knew of unseaworthy condition.—The New Berne, C C A.Va, 80 F.2d 244

(2) Other evidence held to show privity or knowledge, or to fail to show absence thereof.—The Cleveco, C C A Ohio, 154 F.2d 605—In re Jacobson, D.C.Tex., 52 F 2d 179—58 C.

and on questions as to negligence[47] or fault,[48] and, | likewise, on questions as to the seaworthiness,[49]

J. p 677 note 53 [a] (6), [b] (3), (4), [c]

(3) Evidence held to show want of privity or knowledge—Wessel v Charleston Lighterage, etc, Co, D C S C, 25 F.2d 126—58 C.J. p 677 note 53 [a] (5), [b] (5)

Improper manning; incompetence

(1) Evidence held to show that improperly manned vessel was allowed to sail with the privity and knowledge of the owner.—Petition of United States, C A.N.Y, 178 F 2d 243.

(2) Evidence held to justify imputation of knowledge of captain's incompetency to owner of vessel—Harbor Towing Corp v. Parker, C A Md, 171 F 2d 416, certiorari denied 69 S Ct. 1050, 337 U S. 907, 93 L Ed 1720

Negligence in operation

(1) Evidence supported finding that negligence in operating motorboat carrying workmen was with factory manager's, and therefore with corporation's, privity or knowledge—The Linseed King, N Y, 52 S Ct. 450, 285 U.S 502, 76 L Ed. 903.

(2) Evidence established that owners of ferry either had knowledge of, or were privy to, negligence consisting of failure to have proper lookout on ferry.—The Big Chief, D.C Mo., 75 F.Supp. 496

Violation of statute

Evidence held insufficient to meet owner's burden of proving that he lacked privity and knowledge of navigation by mate in violation of safety statute limiting number of hours on watch—The Denali, C C A Wash, 112 F 2d 952, certiorari denied Alaska S S Co. v. Pacific Coast Coal Co., 61 S Ct. 65, 311 U.S. 687, 85 L Ed 444

47. Negligence of owner

Evidence held sufficient to show freedom of owner from negligence or insufficient to show negligence of owner—Rautbord v Ehmann, C.A. Ill., 190 F 2d 533—Flat-Top Fuel Co v. Martin, C C.A N.Y., 85 F 2d 39, certiorari denied 57 S Ct 110, 299 U S. 585, 81 L Ed 431—The Silvanus, D. C La., 56 F 2d 257, affirmed, C C A, Nederlandsche Indische Tankstoomboot Maats v. Standard Oil Co, 66 F. 2d 113—Petition of Pennsylvania R Co., D C N Y, 44 F Supp 617—The Doris Kellogg, D C N Y, 18 F Supp 159, affirmed, C C A, In re Kellogg, S. S. Corp, 94 F 2d 1015.

Negligence of master

(1) Evidence held sufficient to show that master was guilty of negligence proximately causing loss of ship.—The Iowa, D.C.Or, 34 F Supp. 843.

(2) Evidence held to establish negligence of sinking ship's captain in failing to summon ships to her assistance five or six hours before sending S. O S messages—The Vestris, D C N Y, 60 F 2d 273.

(3) Evidence held insufficient to show negligence of master.—The Carroll, D C.Md, 60 F 2d 985—Petition of Martin, D C Pa, 102 F Supp. 43

(4) Evidence held insufficient to show habitual negligence of master—Petition of Tracy, C A N Y, 194 F 2d 362—The George W. Pratt, C.C A N.Y, 76 F 2d 902

Intervening negligence

Evidence warranted finding that master of disabled ship did everything that could be expected in emergency and that no intervening negligence broke causal connection between collision and loss of cargo and personal effects—The Algonquin, C C A N Y, 70 F.2d 335.

Sailing without officer

Evidence held to sustain finding that vessel's sailing with first assistant engineer missing was not a contributing cause of collision, and, hence, did not preclude owner from obtaining limitation of liability.—Southern Pac Co. v. U. S, C.C A N Y, 72 F 2d 212

48. Evidence held sufficient

(1) To establish that damage resulting from collision was not caused or contributed to by fault of owner of vessel.—The Silvanus, D C.La, 56 F 2d 257, affirmed, C C A, Nederlandsche Indische Tankstoomboot Maats v Standard Oil Co, 66 F 2d 113

(2) To establish that faults of speed and course which were chargeable to vessel contributed to collision.—Petition of North Atlantic Transport Co, D C.N Y, 80 F Supp 308

(3) To establish that ship had not anchored outside temporary anchorage grounds while awaiting quarantine, so as to obstruct navigation of dredge which collided with ship—Petition of Liverpool, Brazil & River Plate Steam Nav. Co, D C N.Y, 7 F.Supp. 107.

(4) To establish that faults of one of two vessels involved in collision were four times as serious in degree as those of other vessel.—The Mandu, C C A.N.Y., 114 F 2d 361, certiorari denied Great American Ins. Co v. Companhia de Navegacao Lloyd Brasileiro, 61 S Ct 397, 311 U.S 715, 85 L Ed. 466, and Companhia de Navegacao Lloyd Brasileiro v Great American Ins Co., 61 S Ct 397, 311 U.S 715, 85 L Ed 466.

Evidence held insufficient

U S—The Mandu, C C.A.N.Y, 114 F 2d 361, certiorari denied Great American Ins Co v. Companhia de Navegacao Lloyd Brasileiro, 61 S Ct. 397, 311 U.S. 715, 85 L Ed. 466, and Companhia de Navegacao Lloyd Brasileiro v Great American Ins Co, 61 S Ct 397, 311 U S 715, 85 L Ed 466—The Denali, C.C. A Wash, 105 F 2d 413, adhered to 112 F 2d 952, certiorari denied Alaska S S Co. v Pacific Coast Coal Co, 61 S Ct. 65, 311 U S. 687, 84 L Ed 444

49. Evidence held sufficient

(1) In general—The Aakre, D.C N Y, 31 F Supp. 8, affirmed, C.C A, 122 F 2d 469, certiorari denied Waterman v. The Aakre, 62 S.Ct. 360, 314 U.S 690, 86 L Ed 552—The City of Bangor, D C Mass, 13 F Supp 648—The City of Camden, C C A N J, 292 F. 180—58 C.J. p 677 note 53 [a] (4)–(6)

(2) To show seaworthiness of vessel at beginning of voyage—New Orleans Coal & Bisso Towboat Co. v U S, C C A La., 86 F.2d 53, rehearing denied 86 F 2d 1008, certiorari denied St Paul Fire & Marine Ins Co v New Orleans Coal & Bisso Towboat Co, 57 S.Ct 669, 300 U.S. 676, 81 L Ed 881, and Louisiana Nat Bank of Baton Rouge v. New Orleans Coal & Bisso Towboat Co., 57 S Ct. 669, 300 U S 676, 81 L Ed. 881, amended on other grounds, C C A, 89 F.2d 967—The South Coast, C.C A Cal., 71 F 2d 891, certiorari denied Willey v. Hobbs, Wall & Co, 55 S Ct 347, 293 U S. 627, 79 L Ed 713—Spencer Kellogg & Sons v Buckeye S S. Co., C C.A Ohio, 70 F 2d 146, certiorari denied 55 S Ct. 74, 293 U S. 562, 79 L. Ed 663—The Carroll, D.C.Md, 60 F 2d 985—Petition of North Atlantic Transport Co., D.C N Y, 80 F.Supp. 308—Petition of Erlandsen, D C. Wash, 51 F Supp 921—Petition of Sheridan, D.C Me, 50 F Supp 779—The Republic No 5, D C N Y, 44 F. Supp 665—The Mattie, D C.N Y., 38 F.Supp. 745, affirmed, C C A, Jacobus Grauwiller Co v. Reichert, 136 F.2d 904—The Aakre, D C N Y., 31 F Supp 8, affirmed, C C A, 122 F 2d 469, certiorari denied Waterman v. The Aakre, 62 S Ct 360, 314 U.S. 690, 86 L Ed 552—58 C J. p 677 note 53 [a] (3).

(3) To show unseaworthiness of vessel—The Cleveco, C.C A Ohio, 154 F 2d 605—The New Berne, C C A. Va, 80 F 2d 244—The T J Hooper, C C A N Y, 60 F.2d 737, certiorari denied Eastern Transp Co v Northern Barge Corp, 53 S Ct 220, 287 U S 662, 77 L Ed. 571—The Malcolm Baxter, Jr, D C.N Y., 55 F.2d 312, reversed on other grounds, C C A, 20 F.2d 304, affirmed Republic of France v. French Overseas Corporation, 48 S Ct 516, 277 U S 323, 72 L Ed 901—The Commerce, D C.N Y, 46 F Supp. 360, affirmed, C.C A., New England S. S Co v. Howard, 130 F 2d 354—The Emergency, D.C.N.Y., 9 F Supp. 484—The Robert H Smith, D C N.Y., 3 F Supp 531—58 C.J. p 677 note 53 [a] (1), (2).

handling,[50] equipment,[51] lighting,[52] supplying,[53] stowing and fitting,[54] or manning,[55] or the cause of loss, stranding, or injury[56] of the vessel, the

Evidence held insufficient

(1) In general.—Yokohama Specie Bank v. Mitsui & Co., C C.A N Y., 73 F 2d 526, certiorari denied 55 S.Ct 648, 295 U S. 736, 79 L Ed 1684—In re Reichert Towing Line, N Y., 251 F 214, 163 C C.A. 370, certiorari denied 248 U S 565, 39 S Ct. 9, 63 L Ed 424 —58 C.J. p 677 note 53 [b].

(2) To show unseaworthiness of vessel generally.—Spencer Kellogg & Sons v. Buckeye S S Co, C.C.A.Ohio, 70 F.2d 146, certiorari denied 55 S Ct. 74, 293 U S 562, 79 L Ed 663—The M M. O'Brien, D C N Y., 60 F.2d 976

(3) To rebut presumption of unseaworthiness—Sabine Towing Co. v. Brennan, C.C A.Tex, 72 F.2d 490, certiorari denied 55 S Ct. 141, 293 U S 611, 79 L.Ed 701, rehearing denied 55 S Ct. 212, 293 U.S 632, 79 L.Ed 717.

(4) To show unseaworthiness on ground of deficiency in compass book of entries on compass deviations.—The Aakre, C C A N Y. 122 F 2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U.S. 690, 86 L Ed. 552.

Where master undertakes to pay for repairing abandoned vessel under profit-sharing arrangement with owner, clearest proof that everything necessary was done is essential—In re Jacobson, D C.Tex., 52 F 2d 179.

Certificates of ship's condition must be valued and read in light of actual conditions in determining her seaworthiness at time of sailing—The Vestris, D C N.Y., 60 F.2d 273.

50. Evidence held sufficient

(1) To show proper or efficient handling of vessel.—The South Coast, C C.A Cal, 71 F 2d 891, certiorari denied Willey v Hobbs, Wall & Co., 55 S Ct 347, 293 U S. 627, 79 L Ed 713 —Petition of Sheridan, D.C.Me., 50 F Supp. 779.

(2) To establish that vessel which sank made substantial compliance with convoy routing instructions as to speed.—Petition of North Atlantic Transport Co., D C.N.Y, 80 F Supp 308.

51. Evidence held sufficient

(1) In general—The Temple Bar, C C A.Md, 137 F 2d 293—The Carroll, D C Md, 60 F 2d 985—The Martha R Grimes, D C N Y, 49 F.Supp. 591—The Russell No. 5, D.C N Y, 26 F Supp 575, affirmed, C C A., In re Newtown Creek Towing Co., 104 F 2d 1018.

(2) To show that vessel was properly or efficiently equipped—The South Coast, C C A Cal, 71 F.2d 891, certiorari denied Willey v. Hobbs, Wall & Co., 55 S Ct 347, 293 U S 627, 79 L.Ed 713—The Republic No. 5, D C.N Y., 44 F Supp 665—58 C J p 677 note 54 [a] (1), (2)

(3) To show that vessel carried sufficient number of seaworthy and properly equipped life boats—The Vestris, D C N.Y, 60 F 2d 273

(4) To establish that compasses were good ones and had been properly adjusted and had a plus or easterly deviation not exceeding three degrees on the vessel's course—The Aakre, D C N Y, 31 F Supp 8, affirmed, C C A., 122 F 2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U S. 690, 86 L Ed 552

52. Evidence held sufficient

To show that vessel had proper and sufficient lights showing—Petition of Sheridan, D C.Me, 50 F Supp. 779

53. Evidence held sufficient

To show that vessel was properly supplied when she sailed—The Aakre, D C N Y, 31 F Supp 8, affirmed, C C.A, 122 F 2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U.S. 690, 86 L Ed 552.

54. Evidence held sufficient

To show that vessel was properly and efficiently stowed and fitted for the voyage.—The South Coast, C C A Cal., 71 F.2d 891, certiorari denied Willey v Hobbs, Wall & Co, 55 S Ct 347, 293 U S. 627, 79 L Ed. 713.

55. U S—Eastern SS. Corp. v. Great Lakes Dredge, etc., Co., Mass, 256 F. 497, 168 C C A. 3, certiorari dismissed 40 S Ct 8, 250 U S 676, 63 L Ed. 1202.

58 C J. p 677 note 55

Evidence held sufficient

(1) To show that vessel was properly manned.—The South Coast, C C A Cal., 71 F.2d 891, certiorari denied Willey v. Hobbs, Wall & Co, 55 S Ct. 347, 293 U S. 627, 79 L Ed 713—The Republic No. 5, D.C N Y., 44 F Supp 665—The Aakre, D.C.N.Y., 31 F Supp 8, affirmed, C C A, 122 F 2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U S 690, 86 L.Ed 552—Petition of Canadian Pac. R. Co, D.C Wash, 278 F 180

(2) To show that vessel was properly officered—The South Coast, C C A Cal., 71 F 2d 891, certiorari denied Willey v. Hobbs, Wall & Co, 55 S Ct 347, 293 U S 627, 79 L Ed. 713—The Republic No. 5, D C N Y, 44 F Supp 665—58 C J. p 677 note 55 [a] (2).

(3) To show that vessel was not properly manned—Petition of United States, C A.N.Y., 178 F 2d 243

(4) To establish the incompetence of a captain in charge of vessel.—Harbor Towing Corp v Parker, C A Md, 171 F.2d 416, certiorari denied 69 S Ct 1050, 337 U S. 907, 93 L Ed. 1720

(5) To establish that tug captain was not incompetent—The Carroll, D C.Md, 60 F 2d 985—58 C.J. p 677 note 55 [a] (2)

56. U S—The Doris Kellogg, D C N. Y., 18 F.Supp 159, affirmed, C C A, In re Kellogg S. S Corp., 94 F.2d 1015.

58 C J p 676 note 48 [c].

Evidence held sufficient

To show particular causes of loss.—The Temple Bar, C C A Md., 137 F. 2d 293—The Princess Sophia, C.C.A. Wash, 61 F 2d 339, certiorari denied Brace v. Canadian Pac. R Co., 53 S Ct 396, 288 U.S 604, 77 L Ed 980—The Vestris, D C N Y, 60 F 2d 273—The Yungay, D C.N Y., 58 F 2d 352—Petition of Pennsylvania R Co., D. C N Y, 44 F Supp. 617.

The finding of the commissioner who heard the testimony and saw the witnesses was of great weight on exceptions to his report—The Iowa, D C Or, 34 F.Supp. 843.

Unseaworthiness

Evidence held sufficient to show that loss was due to unseaworthiness of vessel—The Cleveco, C C A Ohio, 154 F 2d 605—In re Jacobson, D C Tex, 52 F 2d 179—The Calvert, C C. A.Md, 51 F 2d 494—The Emergency, D C N.Y, 9 F.Supp. 484.

Perils of the sea; weather

(1) Evidence held to show loss through perils of sea,—The Ariel, C. C.A N Y, 119 F.2d 866.

(2) Evidence held to show that loss did not result from peril of sea or from extraordinary weather.—The Cleveco, C.C A.Ohio, 154 F 2d 605—The Vestris, D.C N Y, 60 F 2d 273

(3) Evidence that weather when tug sank was such as could ordinarily be expected at that season did not establish that vessels were lost because of perils of the sea, although storm following sinking of tug overwhelmed barge—The Cleveco, D.C Ohio, 59 F Supp. 71, affirmed, C C A., 154 F.2d 605

Violation of statute or order

(1) Evidence held sufficient.—The Aakre, C C.A.N Y., 122 F 2d 469, certiorari denied Waterman v. The Aakre, 62 S Ct 360, 314 U S 690, 86 L.Ed. 552—The Iowa, D C Or, 34 F. Supp. 843

(2) Evidence held insufficient—The E Madison Hall, C.C.A Md., 140 F. 2d 589, certiorari denied 64 S Ct 1159, 322 U.S. 748, 88 L Ed. 1579—The New York Marine No 10, C C A.N Y., 109 F 2d 564—The Denali, C.C A.Wash., 105 F 2d 413, adhered to 112 F.2d 952, certiorari denied Alaska S. S Co. v. Pacific Coast Coal Co, 61 S Ct. 65, 311 U.S. 687, 85 L.Ed. 444.

cause of a person's injury or death,[57] the cause of an injury to a pier,[58] the value of a vessel in damaged condition,[59] or the ownership of the vessel [60]

Liability. Where a damage claim is controverted, claimant must establish the claim by a fair[61] preponderance of evidence [62]

§ 256. —— Determination of Issues, Relief, and Decree

a. In general
b. Determination of merits of claim
c. Decree
d. Apportionment and distribution of compensation fund

a. In General

Where an issue as to liability is involved, ordinarily the proper procedure is first to determine whether there is any liability, and, if liability is found to exist, then to determine whether the petitioner is entitled to limit his liability.

Where an issue as to liability is involved, ordinarily the proper procedure is first to determine whether there is any liability, and, if liability is found to exist, then to determine whether petitioner is entitled to limit his liability,[63] but there is

Error of navigation

(1) Evidence held to establish that stranding was due entirely to error of navigation on part of officer of vessel, and was not caused or contributed to, and could not have been caused by, deviation in compass or failure to record all compass deviations in compass book—The Aakre, D C N Y., 31 F Supp 8, affirmed, C.C A., 122 F 2d 469, certiorari denied Waterman v The Aakre, 62 S Ct. 360, 314 U S 690, 86 L Ed 552

(2) Evidence held to establish that loss was caused by faulty navigation by master, for which carrier was not responsible under statute—The Temple Bar, C C A Md, 137 F.2d 293.

Failure to maintain proper lookout held shown to be sole and proximate cause of collision—Petition of Sheridan, D.C.Me, 50 F Supp 779.

57. Evidence held sufficient

U S.—The New Berne, C C A Va, 80 F 2d 244—Leathem Smith-Putnam Nav Co v. Osby, C C A Ill, 79 F 2d 280, certiorari denied Leathem Smith-Putnam Nav Co v Osby, 56 S.Ct. 370, 296 U.S. 653, 80 L Ed 465.

Evidence held insufficient

U S.—Leathem Smith-Putnam Nav Co. v. Osby, C C A.Ill, 79 F 2d 280, certiorari denied Leathem Smith-Putnam Nav Co v Osby, 56 S.Ct 370, 296 U S. 653, 80 L Ed. 465—Petition of McAllister, D.C.N.Y., 53 F.2d 495

58. Evidence held to establish that collision between vessel and pier was not due to fault of other vessel seeking limitation of liability—Petition **of Lehigh Valley R. Co**, D C.N.Y, 88 F.Supp. 545.

59. Evidence held sufficient

To establish value.—Petition of Buckeye S S. Co., D.C.Ohio, 93 F. Supp. 818

60. Evidence held sufficient

U.S—In re Great Lakes Transit Corp, C.C A.Ohio, 81 F.2d 441—The Milwaukee, D C Wis, 48 F 2d 842.

61. U.S—Petition of McAllister, D. C.N.Y., 53 F.2d 495.

62. U S—Anderson v. Alaska SS. Co., C C.A Wash, 22 F 2d 532.

Evidence held sufficient

(1) To show liability generally.—The William A. McKenney, D C.Mass, 41 F 2d 754.

(2) To show negligence—The Marguerite, C C A Wis, 140 F 2d 491—The Big Chief, D C Mo, 75 F.Supp 496

(3) To establish that a properly posted lookout on ferry could have avoided a collision, that tugboat was negligent in not having a lookout in proper place to meet demands of rules of navigation, and that such failure was a contributing cause of collision—The Big Chief, supra.

(4) To show that claimant stevedore injured by turning of ladder exercised reasonable caution under the circumstances—The Martha R Grimes, D C N Y., 49 F.Supp. 591.

Evidence held insufficient

(1) In general—In re Pennsylvania R. Co, C C A N Y, 48 F.2d 559, reversing, D C, The Brinton, 35 F 2d 543, and certiorari denied James McWilliams Blue Line, Inc, v. Pennsylvania R Co, 52 S Ct. 21, 284 U.S 640, 76 L Ed. 544—In re Panama Transp. Co, D C N Y., 98 F Supp 114, affirmed, C A, Petition of Panama Transport Co., 195 F 2d 104—Petition of Great Lakes Towing Co., D.C. Minn, 79 F Supp 1, affirmed, C A, Reiss S. S. Co. v. Great Lakes Towing Co, 177 F 2d 681

(2) To show liability generally.—The Mist-Chief, D C.R I, 57 F.2d 875—Petition of McAllister, D C N Y, 53 F.2d 495—Petition of Howard, D C N.Y, 53 F Supp 556—The Belleville, D.C N.Y., 35 F Supp. 934—58 C.J. p 678 note 57 [b].

(3) To show negligence of owner—Cruse v. Sabine Transp. Co., C C.A. Tex, 88 F.2d 298, certiorari denied 58 S.Ct. 20, 302 U.S. 701, 82 L Ed. 541, rehearing denied 58 S.Ct. 134, 302 U. S. 775, 82 L Ed 600—The C. G. R. 180, D.C.Mich., 70 F Supp 975—The Wyomissing, D.C N J., 2 F Supp. 954, affirmed, C.C.A., 72 F.2d 834.

(4) To show actionable negligence on part of officials of corporate owner—The Carroll, D C.Md, 60 F 2d 985.

(5) To establish that petitioner's or vessel's negligence caused disaster or accident—New Orleans Coal & Bisso Towboat Co v U. S, C C A La, 86 F 2d 53, rehearing denied 86 F 2d 1008, certiorari denied St Paul Fire & Marine Ins Co v. New Orleans Coal & Bisso Towboat Co, 57 S.Ct. 669, 300 U S. 676, 81 L Ed. 881, and Louisiana Nat Bank of Baton Rouge v New Orleans & Bisso Towboat Co., 57 S Ct 669, 300 U S 676, 81 L Ed. 881, amended on other grounds, C.C. A., 89 F.2d 967—Petition of Great Lakes Towing Co, D.C.Minn., 79 F. Supp 1, affirmed, C A., Reiss S. B. Co. v Great Lakes Towing Co., 177 F.2d 681.

(6) To sustain burden of showing unseaworthiness—Commercial Molasses Corp v New York Tank Barge Corp, N Y., 62 S Ct 156, 314 U.S. 104, 86 L Ed. 89.

63. U S—Rautbord v. Ehmann, C.A. Ill, 190 F 2d 533
58 C J p 678 note 59.
Right to contest liability see supra § 254 e

Arbitration before trial of limitation issue

In vessel owner's proceeding for exoneration from, or limitation of, liability to charterer for damage arising from sinking of barge, petitioner's motion for trial of issue of limitation of liability before arbitration of question of petitioner's liability vel non under provision in charter party must be denied—The Ben, D.C. La., 51 F.Supp. 357.

Admission of right to limitation

Where action was instituted in state court to recover for injuries, owner of vessel filed petition in federal court to limit liability, and injured parties claimed that they had a right to a jury trial of their cause, if injured parties admitted owner's right to limit liability they could establish amount of liability in the state court with a jury, but, if they

authority for a different order of procedure where the damage claimant challenges the jurisdiction of the court and it is apparent from the pleading or evidence that petitioner is not entitled to limit his liability.[64] While, where the issue as to liability is involved, the denial of the right to limit liability does not require a dismissal of the proceedings where the damage claimants do not seek dismissal,[65] it has been held or recognized that where the damage claimants object to the jurisdiction of the court in the limitation proceeding and it appears from the allegations of the pleading, or from the evidence, that the owner has no right to limit his liability, the proceedings should be dismissed for lack of jurisdiction.[66] Where no liability is found, the proceeding is at an end,[67] and the view has been taken that where, in such case, the petition prays for an adjudication that the owner is not liable, the petition should be granted in this respect[68] and not dismissed.[69] While the failure of libelant or petitioner strictly to follow the procedure outlined in the statutory provisions and admiralty rules does not require a dismissal of the petition,[70] where the owner surrendered only one of two vessels owned by him, both of which were at fault for the collision in respect of which limitation was sought, it has been held that the petition should be denied and dismissed.[71] In a limitation proceeding, the court will not determine petitioner's liability and right to limitation before passing on an appraisal of the vessel and stipulation for value and the issuance of monition.[72]

Questions of law or fact. The question whether petitioner is at fault because he permitted the operation of the vessel by his minor child has been held a question of law rather than of fact.[73]

Right to additional security. Claimants brought into a limitation proceeding have been held not entitled to additional security, after a determination that they are not subject to limitation.[74]

Withdrawal of petition. Where petitioner seeks to withdraw his petition for limitation of liability, the proceedings will not be dismissed as a matter of right on his request if it appears that claimant may be prejudiced by such a dismissal.[75]

Findings by court or commissioner. A finding by a court that the cause of accident has been left in doubt means that the evidence as to whether or not a vessel sank because of unseaworthiness was so evenly matched that the judge could come to no conclusion on the issue;[76] although negative in form, the finding is as much a finding as an affirmative one, and is to be respected as such.[77] In considering exceptions to the findings of a commissioner, in a limitation proceeding, such findings are presumptively correct;[78] they are not to be disturbed unless

did not admit such right, they were required to remain in federal court where owner's right could be first determined.—The Vera III, D.C.N.Y., 24 F.Supp. 421.

64. U.S.—The Aloha, C.C.A.Wash., 35 F.2d 447, reversed on other grounds 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 52
58 C.J. p. 678 note 60

65. U.S.—Hartford Accident, etc., Co. v. Southern Pac. Co., Tex., 47 S.Ct. 357, 273 U.S. 207, 71 L.Ed. 612.
58 C.J. p. 678 note 61

66. U.S.—The Erie Lighter 108, D.C.N.J., 250 F. 490.
58 C.J. p. 678 note 62.

Where amount of single claim involved is less than value of vessel and there are no other claims, dismissal of the proceeding is proper in a case in which claimant has brought an action in a state court to enforce liability.—Shipowners' etc., Tugboat Co. v. Hammond Lumber Co., Or., 251 F. 266, 163 C.C.A. 422, Shipowners', etc., Tug Boat Co. v. Hammond Lumber Co., Cal., 218 F. 161, 134 C.C.A. 575, certiorari denied 35 S.Ct. 938, 238 U.S. 633, 59 L.Ed. 1498.

67. U.S.—Rautbord v. Ehmann, C.A.Ill., 190 F.2d 533.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., C.C.A.N.Y., 57 F.2d 176
58 C.J. p. 678 note 63.

68. U.S.—Quinlan v. Pew, Mass., 56 F. 111, 5 C.C.A. 438
58 C.J. p. 678 note 64.

69. U.S.—The 84-H, C.C.A.N.Y., 296 F. 427, certiorari denied Randolph v. Bouker Contracting Co., 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 867

70. U.S.—The Ethelstan, D.C.Fla., 246 F. 187.

71. U.S.—The San Rafael, Cal., 141 F. 270, 72 C.C.A. 388, certiorari denied 26 S.Ct. 756, 200 U.S. 619, 50 L.Ed. 623

72. U.S.—The Klotawah, D.C.N.Y., 210 F. 677.
58 C.J. p. 679 note 68.

73. U.S.—Rautbord v. Ehmann, C.A.Ill., 190 F.2d 533.

74. U.S.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., C.C.A.N.Y., 57 F.2d 176.

Limited application of admiralty rule Admiralty rule authorizing additional security in limitation proceeding is applicable only where amount of stipulation given or value of vessel and pending freight have been understated.—Petition of Liverpool, Brazil & River Plate Steam Nav. Co., supra.

75. U.S.—In re Curtis Bay Towing Co. of Pa., D.C.Pa., 63 F.Supp. 72.

Stipulation not required of claimant On such attempted withdrawal, court would not compel claimant to enter into stipulation with petitioner that petitioner would not take advantage of bar of statute of limitations in common-law action against petitioner, and that certain interrogatories and answers might be transferred to common-law action, and claimant would not be deprived of any advantage that he might have gained by reason of petitioner's action in commencing the limitation proceedings.—In re Curtis Bay Towing Co. of Pa., supra.

76. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., C.C.A.N.Y., 114 F.2d 248, affirmed 61 S.Ct. 840, 313 U.S. 541, 85 L.Ed. 1510, rehearing granted 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, and affirmed 62 S.Ct. 156, 314 U.S. 104, 86 L.Ed. 83.

77. U.S.—Commercial Molasses Corp. v. New York Tank Barge Corp., supra.

78. U.S.—Petition of Buckeye S. S. Co., D.C.Ohio, 93 F.Supp. 818.

clearly erroneous,[79] and the party who excepts to the commissioner's conclusions has the burden of proving that he was mistaken therein.[80] A motion to require the commissioner to make certain findings in a proceeding for limitation of liability has been denied, on the ground that the matters were irrelevant.[81] The use of the word "accident" in the report of a special commissioner, where the sole issue before him was the value of petitioner's vessel, has been held not to constitute harmful error.[82]

Reopening proceedings. Where the proceedings for limitation have been terminated, as far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims.[83] A motion to reopen the proceedings, for additional evidence, should be denied where the additional evidence sought to be adduced after trial is in no sense newly discovered and is not made to appear likely to affect the result, and the failure to adduce it on the trial appears to have been due to the neglect, if not the design, of counsel for the moving party.[84]

Payment of claims; set-off. Where the owner of a vessel involved in a collision seeks limitation of liability, claims against him should not be paid until the collision claim of his vessel has been adjudicated and fixed, so that in case of recovery by him his damages may be set off against the claims of the other vessed;[85] and set-off has likewise been permitted in other circumstances.[86]

b. Determination of Merits of Claim

Where liability is found to exist, the court may determine the rights of the various damage claimants, on the merits, including the amount of damages, even though the right to limit liability is denied. The court will not consider individual claims until it has determined the question of liability affecting all claimants alike.

The filing of claims and the proof of claims are two distinct procedural steps which are often separated in point of time by the trial of the issues of petitioner's right to limitation of liability.[87] If claimants contest the right of petitioner to limitation, it is customary to hold in abeyance the question of proof of damages by the claimant,[88] and only after it has been determined that petitioner is entitled to limit his liability does the proceeding go to the commissioner for full proof of claimant's damages.[89] A decree declaring a ship to be in fault and fixing the damages which the respective parties sustain is res judicata and, until reversed, must stand as the basis for determining their pro rata share of the fund substituted by stipulation for the ship and freight.[90] Where the question of liability is involved in the limitation proceeding and liability is found to exist, the court may, subject to the rules discussed supra subdivision a of this section, determine the rights of the various damage claimants, on the merits,[91] including the amount of the damages,[92] even though the right

79. U S —Petition of Buckeye S. S. Co, supra.

80. U S —Petition of Buckeye S S Co, supra—The Perry G Walker, D C N Y, 216 F. 423.

81. U S.—The Titanic, D C.N Y, 204 F. 298
58 C J p 679 note 69

82. U S —The Port Covington, D C Pa., 57 F.Supp 114.

83. U.S —Dowdell v. U S. District Court, Cal, 139 F. 444, 71 C C.A. 288

Remedy by independent suit
If for any reason the decree is not binding on such claimants, their remedy is by an independent suit — Dowdell v. U. S. District Court, supra.

84. U S —The Suduffco, D C N.Y., 33 F 2d 775

85. U.S.—The Roxen, D C N.Y., 7 F. Supp. 195.

86. Contribution between owners of vessels
In proceeding by owner of tug for limitation of liability arising out of collision between tug and a fishing vessel, court would adjudicate the issue of fault as between owners, and if both vessels were found to have been at fault, claim of owner of fishing vessel would be allowed at only half his damage, and as against that half, petitioner could set off by way of contribution one half the amount petitioner would have to pay to other claimants in the proceeding —Petition of Texas Co, D C N Y, 81 F.Supp 758.

87. U S.—Petition of Canada S. S Lines, D.C Ohio, 94 F Supp. 322
Filing of claims generally see supra § 252 b.

88. U S —Petition of Canada S. S. Lines, supra.

89. U S —Petition of Canada S. S Lines, supra

Passengers' claims
If petitioner's right to limit liability arising out of collision between its vessel and another is established, and it is shown that both vessels were at fault, passenger claimants would be entitled to allowance of full amount of their claims as proved against petitioner in limitation proceedings, as a joint tort feasor.—Petition of Texas Co, D C N.Y., 81 F. Supp. 758.

90. U.S.—New York, etc, SS. Co v. Mount, N.Y, 103 U S. 239, 26 L Ed. 351.

91. U S —Petition of Liverpool, Brazil & River Plate Steam Nav. Co, C.C.A N Y, 57 F 2d 176.
58 C J. p 679 note 72.

Claim allowed under "knock-for-knock" agreement
U.S.—Petition of Panama Transport Co, C.A.N.Y., 172 F.2d 351.

Death on the High Seas Act, 46 U.S C A. §§ 761–768, held properly used as a guide in determining the validity and value of each claim, even though the question of fault was not in the case because of a settlement agreement —In re Panama Transp. Co., D.C N.Y., 98 F Supp 114, affirmed, C.A., Petition of Panama Transport Co., 195 F 2d 104.

92. U S.—The Russell No. 5, D.C.N. Y., 32 F.Supp. 582—The Erie Lighter 108, D.C N J., 250 F. 490

Basis of determination
In proceeding for limitation of liability, the determination of damages to be awarded for injury to a vessel

to limit liability is denied,[93] and in this respect the court applies, it seems, substantially the same rules as would be applied in an independent proceeding by the damage claimants.[94] The court will not enter on the consideration of individual claims until it has determined the question of liability affecting all claimants alike.[95]

Claims against the estate of the owner of a vessel may, in a proper case, be heard and determined.[96]

c. Decree

The decree in a proceeding for limitation of liability should conform to the rights of the petitioner and the claimants and the circumstances presented; it may be in personam against the petitioner or in rem against the res or substituted fund.

The court may, in a proper case, enter judgment in personam against petitioner for limitation of liability[97] and also a judgment in rem against the res or substituted fund,[98] and, even where there is no res in the possession of the court, the court may impose personal liability on petitioner.[99] Where, however, there is no res in court and the circumstances are such as to prevent a judgment in personam, no relief may be afforded the damage claimants.[1] Where both the right to limit liability and the existence of liability are at issue, if liability is found to exist and loss or damage is shown, which was not occasioned or incurred with the knowledge or privity of the owner, limitation of liability should be decreed.[2] A charterer entitled to limitation will be held liable only in the amount of his bond,[3] and the claimant may have judgment for a deficiency against a subcharterer not entitled to limitation.[4] Where the issue as to liability is involved, on denying the right to limit liability, if the damage claimants do not seek dismissal, the court may, in the limitation proceeding, grant complete relief to the damage claimants[5] by judgment against the res or fund in court[6] and distribution thereof among the damage claimants entitled thereto,[7] and by a personal judgment against petitioner for any deficiency.[8] Parties to a proceeding for limitation of liability who voluntarily appear or, after they are brought in, whether or not rightfully, join issue with petitioner and between themselves, and litigate questions of liability, are bound by the decree.[9]

Power of court as to decree; vacation or modification. After the entry of its decree in a limitation proceeding, the power of the admiralty court with respect to it is at an end;[10] but it has also been held that the court's power to modify[11] or

is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts—The Russell No 5, D C N Y, 32 F Supp. 582.

Claim for cost of lightering was disallowed—Petition of Buckeye S S Co, D C.Ohio, 93 F Supp 818.

Expense of salvaging barge and cargo was allowed to charterer in full.—Conners Marine Co. v. Pennsylvania R Co, D C N.Y., 66 F Supp 396, reversed on other grounds, C C A, 159 F 2d 169, rehearing denied 160 F 2d 482.

Prior payments by owner to claimants, under disability and death benefit plan, were improperly taken into consideration in determining amount of award to such claimants, where owner, in contributing to the fund, did not request a credit for such sums paid—In re Panama Transp. Co., D C N Y., 98 F.Supp 114, affirmed, C A, Petition of Panama Transport Co, 195 F 2d 104.

93. U.S—Petition of Liverpool, Brazil & River Plate Steam Nav. Co, C.C.A.N Y, 57 F 2d 176.
58 C J p 679 note 74

Reference to commissioner held proper

Reference of case to commissioner for determination of amount of damage to cargo, after dismissing petition for limitation of liability and adjudging liability against owner, was proper.—In re Great Lakes Transit Corp., C.C A Ohio, 81 F 2d 441

94. U S—The Virginia, D C Md, 266 F. 437.

95. U S—The No 17, D.C N.Y., 2 F. Supp 48.

96. U.S—Just v. Chambers, Fla, 61 S.Ct. 687, 312 U S 383, 668, 85 L Ed 903.

Death on the High Seas Act was held not applicable—Just v. Chambers, supra.

97. U S—Hartford Acc, etc, Co v. Southern Pac. Co, Tex, 47 S Ct 357, 273 U S 207, 71 L Ed 612—Stark v Texas Co, C.C A Fla., 88 F 2d 182

98. U S.—Hartford Acc, etc, Co v Southern Pac. Co, Tex., 47 S Ct 357, 273 U.S 207, 71 L.Ed 612—Stark v. Texas Co., C.C A.Fla, 88 F 2d 182.

99. U S.—In re Statler, D C N Y, 31 F 2d 767, affirmed, C C A, 36 F.2d 1021, certiorari denied Guile v Statler, 50 S Ct. 355, 281 U S. 752, 74 L Ed. 1163.

1. U.S—In re Statler, D C N.Y, affirmed, C.C A., 36 F 2d 1021, certiorari denied Guile v. Statler, 50 S.Ct. 355, 281 U S 752, 74 L Ed. 1163.
58 C J. p 679 note 79.

2. U S—The 84-H, C.C A N.Y, 296 F. 427, certiorari denied Randolph v. Bouker Contracting Co, 44 S.Ct. 454, 264 U S 596, 68 L Ed 867

3. U S—The Martha R. Grimes, D. C N.Y, 49 F Supp 591.

4. U S—The Martha R Grimes, supra.

5. U S—Just v. Chambers, Fla, 61 S Ct 687, 312 U.S 383, 668, 85 L. Ed 903—Hartford Acc, etc, Co v. Southern Pac. Co., Tex., 47 S Ct. 357, 273 U.S 207, 71 L.Ed. 612.

6. U S—Just v. Chambers, Fla, 61 S.Ct. 687, 312 U.S. 383, 668, 85 L. Ed. 903
58 C J p 679 note 82.

7. U S—Just v. Chambers, supra—Hartford Acc., etc, Co. v. Southern Pac Co., Tex, 47 S Ct 357, 273 U.S. 207, 71 L.Ed 612.

8. U S—Just v. Chambers, Fla, 61 S.Ct. 687, 312 U S 383, 668, 85 L. Ed 903—Hartford Acc., etc, Co v. Southern Pac. Co, Tex, 47 S Ct. 357, 273 U S 207, 71 L.Ed. 612.

9. U S—The Adah, N.Y., 258 F. 377, 169 C.C.A. 393.

10. U.S—The James Horan, D.C N. J., 10 F.Supp 363, affirmed, C C.A., 78 F 2d 870, certiorari denied Warner-Quinlan Co. v. Swan-Finch Oil Corporation, 56 S Ct. 142, 296 U.S. 621, 80 L.Ed. 441.

11. U.S.—The Hewitt, D.C.N.Y., 15 F.2d 857.

vacate[12] a final decree ceases at the expiration of ninety days.

d. Apportionment and Distribution of Compensation Fund

The compensation fund is to be distributed among the persons holding established claims, the claimants sharing pro rata if the fund is insufficient to satisfy the demands against it. The question of preference out of the fund is to be determined in the limitation proceeding, and not by the owner of the vessel.

The admiralty court has jurisdiction of the fund representing the value of the vessel,[13] and of the enforcement of claims on that fund,[14] as auxiliary and incidental to its jurisdiction of the main subject. The compensation fund is to be distributed among the persons holding established claims, to which admiralty does not deny existence,[15] whether or not the claims are liens in admiralty.[16] If the fund is insufficient to satisfy the demands against it, claimants must share pro rata,[17] certain costs and expenses of the proceeding to limit the liability of the shipowner being first paid out of the fund, as discussed infra § 257 b. Where limitation of liability has been denied as to some claims and allowed as to others, and petitioner is solvent, the claims as to which limitation is denied are not paid out of the limitation fund,[18] and only those claims as to which limitation is allowed are payable out of such fund.[19] Ordinarily, at least, petitioner has no concern with respect to the apportionment of the fund.[20]

Preference or priority. The question of preference out of the fund is one to be determined in the limitation proceeding.[21] The view has been taken that, under the provision of the limited liability act, 46 U.S.C.A. § 184, that, if the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, the persons injured shall receive compensation in proportion to their respective losses, the rule that all claimants are to share pro rata applies in general, irrespective of their claims to priority as lien claimants or otherwise,[22] notwithstanding the admiralty rule which provides that the fund in court, or secured, or the proceeds of the vessel and freight, shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed, saving, however, to all parties any priority to which they may be legally entitled.[23] On the other hand, it has been held that a damage claimant for loss of cargo on a vessel, which was partly at fault for the collision which caused the loss, is entitled to a preference, in the distribution of a fund arising from the limitation of the liability of the other vessel, over the claim of the owners of the first mentioned vessel;[24] and under such admiralty rule an amount recoverable by a damage claimant who is liable to other damage claimants for loss or injury arising out of the collision involved in the limitation proceedings is applicable to the claims of such other damage claimants.[25] Holders of maritime liens of the same class are entitled to pro rata distribution, without regard to the dates of issuing process or obtaining decrees, unless their rights have been forfeited.[26] The owner of a vessel in respect of which limitation is sought cannot determine for himself the priority of claims on the fund representing his liability under the limited liability act,[27] and, where he has set up his claim to limitation by answer in a suit against him, the fact that he has voluntarily paid out parts of the fund in discharge of liens supposed to be superior to the claim on which the suit against him

12. U.S.—The Hewitt, supra—The Thomas E. Moran, D.C.N.Y., 2 F. Supp. 40.

13. U.S.—In re Goodrich Transp. Co., D.C.Wis., 26 F. 713.
Extent of liability and compensation fund generally see supra § 242.
Jurisdiction of proceedings to obtain limitation see supra § 250.

14. U.S.—In re Goodrich Transp. Co., supra.

15. U.S.—Hartford Acc., etc., Co. v. Southern Pac. Co., Tex., 47 S.Ct. 357, 273 U.S. 207, 71 L.Ed. 612

16. U.S.—Hartford Acc., etc., Co. v. Southern Pac. Co., supra—The Hamilton, N.Y., 28 S.Ct. 133, 207 U.S. 398, 52 L.Ed. 264.

17. U.S.—Butler v. Boston, etc., SS. Co., Mass., 9 S.Ct. 612, 130 U.S. 527, 32 L.Ed. 1017.
58 C.J. p. 680 note 89.

Judgment as basis for pro rata division
Judgment on verdict in common-law action against owner of vessel stands as judgment creditor's basis for pro rata division when fund realized in proceeding to limit owner's liability is distributed.—The Kearney, D.C.N.Y., 3 F.Supp. 718.

18. U.S.—The Virginia, D.C.Md., 266 F. 437

19. U.S.—The Virginia, supra.
58 C.J. p. 680 note 92

20. U.S.—The Princess Sophia, D.C. Wash., 35 F.2d 736, rehearing denied 36 F.2d 591.
58 C.J. p. 680 note 93.

21. U.S.—Metropolitan Redwood Lumber Co. v. Doe, Cal., 32 S.Ct. 275, 223 U.S. 365, 56 L.Ed. 473.

22. U.S.—The Catskill, D.C.N.Y., 95 F. 700.
58 C.J. p. 680 note 96.

23. U.S.—Boston Mar. Ins. Co. v. Metropolitan Redwood Lumber Co., Cal., 197 F. 703, 117 C.C.A. 97.
58 C.J. p. 680 note 98.

24. U.S.—The George W. Roby, Mich., 111 F. 601, 49 C.C.A. 481
58 C.J. p. 680 note 99.

25. U.S.—The Mauch Chunk, D.C.N.Y., 139 F. 747, affirmed 154 F. 182, 83 C.C.A. 276, certiorari denied 28 S.Ct. 255, 207 U.S. 586, 52 L.Ed. 352—The Catskill, D.C.N.Y., 95 F. 700.

26. U.S.—The Battler, D.C.Pa., 67 F. 251, reversed on other grounds 72 F. 543, 19 C.C.A. 12, certiorari denied 16 S.Ct. 1204, 163 U.S. 697, 41 L.Ed. 319.

27. U.S.—The Giles Loring, D.C.Me., 48 F. 463.

is based does not reduce his liability to discharge such claim to the full extent of the fund as it originally existed.[28]

Death claims; government's claim. Claims for the deaths of members of the crew of a government vessel, sunk by another vessel, have been held prior to the claim of the government for damage to its vessel;[29] and the fact that the government is not liable for the deaths is immaterial in this connection.[30]

§ 257. —— Review, Fees, and Costs

a. Review
b. Fees and costs

a. Review

General principles governing review in admiralty have been applied to proceedings for limitation of liability, as to such matters as appealability of orders or decrees, parties to appeal, and harmless error.

An order in a limitation proceeding which is not a final decree or an interlocutory decree determining the rights and liabilities of the parties is not appealable,[31] but an interlocutory order enjoining the litigation of claims in any other tribunal has been held appealable.[32] Where the substantial and only question, in the limitation proceeding, was as to the power of the district court to render a personal judgment or decree against the company having the custody, control, and management of the vessel at the time of the accident, an appeal was held not to lie to the circuit court of appeals.[33]

On appeal from a decree in admiralty in a proceeding for limitation of liability, the trial is de novo,[34] and the court of appeals has power not only to correct error in the decree, but to make such disposition of the case as justice may require at the time of the appeal.[35] The court sits in equity on such an appeal,[36] and may give to one of several claimants whose aggregate claims are less than the fund the right to maintain separate actions.[37] The reviewing court will be bound by a finding of the lower court which is not clearly erroneous,[38] and, where a special commissioner or master has heard and seen the witnesses and examined all of the exhibits, and the court has affirmed his findings, his findings of fact are conclusive on the court if there is any substantial evidence to support them.[39] A reviewing court will accept a valuation of petitioner's vessel, approved in the court below on the basis of the opinions of experts, where there is some evidence justifying such valuation.[40] Where the evidence in the limitation proceedings was all taken out of court, the reviewing court is not required to give effect to the presumption usually arising from the fact that the trial court sees and hears the witnesses,[41] and is at liberty to draw its own conclusions from the evidence in the record.[42]

28. U.S.—The Giles Loring, supra

29. U S —The City of Rome, D.C.N Y., 48 F 2d 333

30. U S —The City of Rome, supra

31. **Orders or decrees held not appealable**

(1) Order staying a limitation proceeding and modifying an earlier injunction against any other legal proceeding so as to permit arbitration — Postal S S. Co. v International Freighting Corp, C C.A La, 133 F.2d 10

(2) Interlocutory decree overruling a motion to dismiss the petition and refusing to set aside an order restraining the prosecution of a suit for damages in the state court — Stark v. Texas Co., C.C.A.Fla., 88 F. 2d 182

32. U S —Rice Growers Ass'n of Cal. v Rederiaktiebolaget Frode, C A.9, 171 F 2d 662.

33. U S —The Annie Faxon, Wash, 87 F 961, 31 C C A. 325.

34. U S —The Carson, C.C A Cal, 104 F 2d 762, certiorari denied Union Dredging Co v Brashear, 60 S Ct 120, 308 U S. 591, 84 L Ed 494.

Interlocutory decree

U S.—Rice Growers Ass'n of Cal v Rederiaktiebolaget Frode, C A 9, 171 F 2d 662.

35. U.S —Rice Growers' Ass'n of Cal v. Rederiaktiebolaget Frode, supra.

Remand

On court of appeals determining that dismissal of petition to limit liability was proper because bond posted by charterer was inadequate, remand to district court in order to give charterer an opportunity to file a larger bond would have been a better course than affirmance of dismissal of petition, in view of the six-month limitation on proceeding under statute, since defect was not jurisdictional —Black Diamond S S. Corp v. Robert Stewart & Sons, N Y, 69 S Ct 622, 336 U S. 386, 93 L Ed 754, amended on other grounds 69 S Ct 1490

36. U S —Rice Growers Ass'n of Cal v. Rederiaktiebolaget Frode, C A 9, 171 F 2d 662.

37. U.S.—Rice Growers' Ass'n of Cal. v. Rederiaktiebolaget Frode, supra.

38. U S.—Commercial Molasses Corp. v. New York Tank Barge Corp, C C A.N.Y, 114 F.2d 248, affirmed 61 S Ct 840, 313 U S 541, 85 L Ed 1510, vacated 61 S Ct 938, 331 U S. 596, 85 L.Ed. 1550, affirmed 62 S.Ct. 156, 314 U S. 104, 86 L Ed 83.

39. U.S —The Eastland, C C A Ill, 78 F 2d 984, certiorari denied Bishop v. St Joseph-Chicago S S Co, 56 S Ct 442, 297 U S. 703, 80 L Ed 992.

40. U S —The Black Eagle, C C.A.N Y, 87 F 2d 891.

41. U S —New Orleans Coal & Bisso Towboat Co. v U S, C.C.A La, 86 F 2d 53, rehearing denied 86 F 2d 1008, certiorari denied St. Paul Fire & Marine Ins Co. v New Orleans Coal & Bisso Towboat Co, 57 S.Ct. 669, 300 U S. 676, 81 L Ed 881, and Louisiana Nat Bank of Baton Rouge v New Orleans Coal & Bisso Towboat Co, 57 S Ct 669, 300 U.S 676, 81 L Ed. 881, and amended on other grounds, C C A, 89 F 2d 967

42. U.S.—New Orleans Coal & Bisso Towboat Co v. U S, C C A La, 86 F 2d 53, rehearing denied 86 F 2d 1008, certiorari denied St Paul Fire & Marine Ins Co v New Orleans Coal & Bisso Towboat Co, 57 S Ct. 669, 300 U S 676, 81 L Ed 881, and Louisiana Nat. Bank of Baton Rouge v New Orleans Coal & Bisso Towboat Co., 57 S Ct 669, 300 U S. 676, 81 L Ed. 881, and

Appeal to supreme court. Proceedings to limit liability have been held admiralty cases within the meaning of a statute making the judgments or decrees of the circuit court of appeals, now the court of appeals, in admiralty cases final, and not appealable to the supreme court;[43] but the decisions in such cases may be brought up for review by the supreme court by certiorari.[44]

Parties to appeal; notice. Where two or more parties, having distinct and several claims against the owner of a vessel, are brought into one proceeding for the limitation of his liability, the decree awarding different sums to the different claimants is several as to them, and any of such claimants may appeal from such decree without making the others parties to the appeal[45] or notifying them thereof.[46]

Harmless error. The decision of the lower court will not be reversed where the error committed was harmless.[47]

b. Fees and Costs

The award of costs in limitation proceedings is generally within the discretion of the court. The expenses of administration are to be paid out of the fund before distribution; the petitioner must bear the expense of availing himself of the benefit of the limited liability act; and the costs of contesting any issue, as between the petitioner and claimants, fall on the losing party.

The general rule in admiralty suits that the award of costs is within the discretion of the court, as discussed in Admiralty § 196 b, applies in a proceeding to limit liability.[48] The fees of the commissioner appointed to make an appraisal and to report on claims are part of the costs.[49]

Docket fees. While there is authority to the effect that, where there are several damage claimants petitioner is entitled to but one docket fee,[50] other authorities hold that he is entitled to a docket fee from each,[51] on the ground that each of the claimants, if successful, might have charged a docket fee against petitioner.[52] While it has been held that each person claiming and recovering damages is entitled to a separate proctor's fee,[53] there is authority for the view that a proctor who represents several claimants who recover is entitled to but one docket fee.[54]

Fund or person chargeable. The admiralty rule providing for the distribution of the fund, after payment of costs and expenses, appears to have been given rather a broad construction in some of the early cases, in respect of the costs and expenses payable out of the fund before distribution,[55] but the rule now generally applied is that ordinarily payments to be made out of the fund are the expenses of administration.[56] Petitioner must bear the expenses which he has incurred for the purpose of availing himself of the benefit of the limited liability act,[57] and has been required, as a mat-

amended on other grounds, C.C.A., 89 F.2d 967.

43. U.S.—Oregon R., etc., Co. v. Balfour, Or., 21 S.Ct. 28, 179 U.S. 55, 45 L.Ed. 82.

44. **Findings** of intermediate court as to the examination and fitness of the vessel would not be disturbed where supported by evidence.—Coryell v. Phipps, Fla., 63 S.Ct. 291, 317 U.S. 406, 87 L.Ed. 363.

Concurrent findings by district court and circuit court of appeals would be accepted by supreme court.—Coryell v. Phipps, supra.

45. U.S.—The Columbia, Or., 73 F. 226, 19 C.C.A. 436.

46. U.S.—The Columbia, supra.

47. U.S.—U. S. Gypsum Co. v. Conners Marine Co., C.C.A.N.Y., 119 F.2d 689.—Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., C.C.A.Md., 107 F.2d 373.

48. U.S.—The S. C. L. No. 9, C.C.A. Pa., 114 F.2d 964.
58 C.J. p. 681 notes 10, 11.

Decree of limitation affirmed without costs
U.S.—The S. C. L. No. 9, supra.

Costs on grant of petition and dismissal of libel
Where owner's petition was consolidated with libel against him for damage to cargo and the petition was granted and libel dismissed, petitioner was entitled to costs on both granting of petition and dismissal of libel, but could tax disbursements only in one proceeding.—The Aakre, D.C.N.Y., 31 F.Supp. 8, affirmed, C.C.A., 122 F.2d 469.

49. U.S.—Indra Line v. Palmetto Phosphate Co., Va., 239 F. 94, 152 C.C.A. 144.

Fees held reasonable or not excessive
(1) $2,000 for determination of value of vessel in damaged condition and of each claimant's damages.—Petition of Buckeye S. S. Co., D.C.Ohio, 93 F.Supp. 818.

(2) $1,000.—The Port Covington, D.C.Pa., 57 F.Supp. 114.

(3) $400.—The Caledonia, D.C.N.Y., 3 F.Supp. 753, affirmed, C.C.A., Standard Dredging Co. v. Kristiansen, 67 F.2d 548, certiorari denied 54 S.Ct. 372, 290 U.S. 704, 78 L.Ed. 605.

50. U.S.—In re Excelsior Coal Co., D.C.N.Y., 136 F. 271, affirmed 142 F. 724, 74 C.C.A. 56.

51. U.S.—The Aakre, C.C.A.N.Y., 122 F.2d 469, certiorari denied Waterman v. The Aakre, 62 S.Ct. 360, 314 U.S. 690, 86 L.Ed. 552.
58 C.J. p. 681 note 14.

52. U.S.—The Aakre, C.C.A.N.Y., 122 F.2d 469, certiorari denied Waterman v. The Aakre, 62 S.Ct. 360, 314 U.S. 690, 86 L.Ed. 552.

53. U.S.—In re Excelsior Coal Co., D.C.N.Y., 136 F. 271, affirmed 142 F. 724, 74 C.C.A. 56.

54. U.S.—Boston Mar. Ins. Co. v. Metropolitan Redwood Lumber Co., Cal., 197 F. 703, 117 C.C.A. 97.

55. U.S.—In re Norwich, etc., Transp. Co., D.C.N.Y., 18 F.Cas.No. 10,361, 10 Ben. 193.
58 C.J. p. 681 note 19.

Clerk's commission on proceeds of sale
U.S.—The Vernon, D.C.Mich., 36 F. 113.

Marshal held not entitled to commission
U.S.—The Vernon, supra.

56. U.S.—The W. A. Sherman, N.Y., 167 F. 976, 93 C.C.A. 228.
58 C.J. p. 681 note 20.

57. U.S.—Martin Marine Transp. Co. v. Jakobson & Peterson, C.C.A.N.Y., 135 F.2d 325.
58 C.J. p. 681 note 21.

ter of usual procedure, to bear the burden of the costs of the limitation proceeding,[58] and to pay the appraisers' fees;[59] but the expenses incurred by him in defending the suits brought in other courts have been held taxable against claimants.[60] In general, if any issue is contested in the proceeding between petitioner and claimants, or any claimant, the costs should fall on the losing party,[61] including the issue as to the right to limitation,[62] or as to the liability of petitioner,[63] and all such costs should be taxed without referring to the fund or its existence.[64] In a proceeding for limitation of liability, as between the commissioner and petitioner, petitioner is primarily liable for the fees of the commissioner.[65]

Security for costs. Contesting damage claimants in a proceeding for limitation of liability must give security for costs,[66] especially where the vessel in respect of which limitation is sought is a total loss,[67] unless relieved from doing so on a proper showing of inability because of poverty[68] or on some other recognized ground.[69]

Costs in other suits. Payment of the costs of claimant in an action in a state court against the person seeking limitation of liability is not a condition to the maintenance by the latter of proceedings for limitation;[70] but in case of undue delay in commencing a limitation proceeding, ordinarily relief should not be granted except on condition of compensating damage claimant for any costs and expenses he may have incurred by reason of the delay,[71] and an owner seeking limitation of liability after the recovery of judgment on the claim against which limitation is sought has been required to pay the costs of the trial and the appeal.[72] The injunction granted in a proceeding to limit the liability of a shipowner, restraining the prosecution of suits pending against the shipowner, should not prohibit the collection of the taxable costs in such suits.[73] The limited liability act does not release the owners from the payment of costs in the district court beyond the amount of the stipulation filed therefor in a suit against the vessel to enforce liability, if they appear and make defense;[74] nor did such statute relieve the owners from the payment of the costs taxable in the circuit court or of interest in the nature of damages occasioned by the appeal, where, prior to the abolition of the circuit court, the owners appealed to such court.[75]

Items included

(1) Cost of filing petition, and stipulations for costs and value, premium, if any, for stipulations, expense of appraisal or of bill of sale transferring the vessel, commissioner's report on appraisal, expert fees, etc., were properly included as expenses which petitioner was required to bear—Martin Marine Transp Co v. Jakobson & Peterson, C.C.A.N.Y., 135 F 2d 325—58 C J. p 681 note 21 [a].

(2) Cost of bond for obtaining release of vessel in limitation proceedings was properly disallowed in determining recovery under decree dividing damages—The Walter A. Luckenbach, C C A.Cal, 14 F.2d 100, certiorari denied Luckenbach S S Co v. Union Oil Co, 47 S Ct 335, 273 U S 741, 71 L Ed. 868.

58. U S—The Port Covington, D.C Pa, 57 F.Supp 114.

59. U S—Spencer, Kellogg & Sons v. Buckeye S S. Co, C.C A Ohio, 70 F.2d 146, certiorari denied 55 S Ct. 74, 293 U S. 562, 79 L Ed 663.

60. U S.—Spencer, Kellogg & Sons v Buckeye S S Co, supra.

61. U.S.—The W A. Sherman, N.Y, 167 F 976, 93 C.C A. 228.
58 C J. p 681 note 22.

62. U.S.—Martin Marine Transp. Co. v. Jakobson & Peterson, C C A N.Y., 135 F 2d 325
58 C J. p 681 note 23.

Costs of contest; publication of citation

Only the costs of contest are chargeable to party unsuccessfully contesting right to limit liability; publication of citation in proceeding for limitation was part of costs of administration of proceeding and not cost of its contest, and, hence, not chargeable to party unsuccessfully contesting right to limit liability—The South Coast, D C.Cal., 7 F Supp 727

Right to exoneration

(1) In proceeding for limitation, petitioner who was entitled to decree of exoneration could also recover costs—Petition of Lehigh Valley R Co, D.C.N Y., 88 F Supp. 545.

(2) In proceeding for exoneration from, or limitation of, liability for death of lighter's engineer, claimant having failed to establish liability, shipowners entitled to exoneration were not entitled to costs—In re McAllister, D C.N.Y., 53 F 2d 495

63. U S—The Longfellow, Ohio, 104 F. 360, 45 C C.A 379.
58 C.J p 681 note 24.

Costs as to particular claim

A losing claimant should be taxed only with the costs which arise with respect to his claim—C J Dick Towing Co v. The Leo, D C Tex., 98 F. Supp. 455.

64. U S—The H. F. Dimock, Mass., 77 F. 226, 23 C.C.A. 123.

65. U S—Indra Line v Palmetto Phosphate Co., Va, 239 F 94, 152 C C A 144

66. U S.—The Pere Marquette 18, D. C Wis, 203 F 127.

67. U S—Raymond v La Compagnie Generale, C C.N Y., 90 F. 105.

68. U S—The Pere Marquette 18, D. C.Wis, 203 F. 127—Raymond v. La Compagnie Generale, C.C N Y., 90 F. 105.

69. U.S—The Pere Marquette 18, D. C Wis, 203 F. 127.

70. U S—The Fort Bragg, D C Cal., 6 F.Supp 13

71. U S.—The Benefactor, 103 U.S. 239, 26 L Ed 351.
58 C J. p 682 note 34.

72. U.S—The Victor, D.C.N Y., 1 F. Supp. 931—The T. W. Wellington, D C N Y, 235 F 728.

73. U S—In re Norwich, etc., Transp. Co., D C.N Y, 18 F Cas.No. 10,361, 10 Ben. 193

74. U.S—The Wanata, N Y., 95 U.S. 600, 24 L Ed 461

75. U.S.—The Wanata, supra.

XIII. WRECK

§ 258. Definitions, Nature, and Distinctions

Strictly, the word "wreck" applies only to property cast on shore, more broadly, it is that which has been rendered useless or irrecoverable by peril of the sea, and, loosely, is used for shipwrecked goods in general.

The meaning of the word "wreck" has been said to have been passed on in many cases arising under maritime law,[76] and in such cases the word has a technical significance.[77] "Wreck" has been defined to be such goods as after a shipwreck are cast on land by the sea and left there,[78] and as the ruins of a ship which has been stranded or dashed on a shelf, rock, or lee shore by tempestuous weather,[79] and, in general, in a strict sense, the term "wreck" or "wrecks" applies only to property cast on the shore[80] So, goods are not wrecks in a strict sense as long as they remain afloat in the sea in the jurisdiction of admiralty,[81] and, thus, none of the goods coming under the definition of flotsam, jetsam, or lagan, or ligan, as separately defined in this work, can be called or claimed "wreck" as long as they remain on the sea;[82] but, if they are cast on the land by the sea, they then become wreck.[83] More broadly, however, "wreck" has been defined as that which has been rendered useless or irrecoverable by peril of the sea,[84] and in a loose sense the term is used for shipwrecked goods in general,[85] and in this sense it includes flotsam, jetsam, and ligan, which are subjects of admiralty jurisdiction.[86] The word "wreck" has been said to be descriptive of a vessel which is a total loss, and may be abandoned by the owner[87]

"Lost" distinguished. The term "lost" has been distinguished from "wrecked."[88]

§ 259. Right of Property

Title may be acquired to a wrecked vessel or its cargo by taking possession thereof after abandonment by the owner, but not in the absence of such abandonment.

By the common law of England a wreck belonged to the crown until reclaimed by its rightful owner,[89] which had to be within a year and a day; otherwise it belonged to the crown absolutely, the year and a day beginning to run from the day the goods were actually taken and seized by the finder[90] In the United States, however, this rule of the common law has not been accepted, at least to its full extent[91] While the view has been expressed that no length of time will divest the owner of property found derelict on the sea,[92] and that the owner of a vessel, sunk in navigable waters, does not lose his property rights therein, unless he abandons such rights,[93] it has been laid down in general terms that a wrecked vessel, after abandonment, has no owner,[94] and it has been held or recognized that property in a sunken vessel and her cargo may be lost by abandonment[95] so that a person subsequently

76. Mass.—Aurnhammer v Brotherhood Accident Co, 146 N E 47, 48, 250 Mass 567.

77. Mass.—Aurnhammer v Brotherhood Accident Co, supra.

78. N.Y.—Baker v Hoag, 7 N.Y 555, 558, 59 Am D 431, 3 Seld 45.
58 C J. p 682 note 39.

79. Pa.—Respublica v. Le Caze, 1 Yeates 55, 59
58 C J. p 682 note 40.

80. Mass.—Chase v Corcoran, 106 Mass 286
58 C J p 682 note 41.

A boat cast ashore by the sea is a wreck, in the strictest legal sense.—Proctor v Adams, 113 Mass. 376, 18 Am R. 500

81. N.Y.—Baker v. Hoag, 7 N.Y 555, 558, 59 Am D 431, 3 Seld. 45.

82. Pa.—Lacaze v State, Add. 59, 64.

83. Pa.—Lacaze v State, supra.

84. Pa.—Gibson v Jessup, etc, Paper Co, 15 Phila 447.
58 C J. p 682 note 48.

85. Pa.—Lacaze v. State, Add. 59, 64, 65

86. Pa.—Lacaze v. State, supra.

87. Mass.—Aurnhammer v Brotherhood Accident Co, 146 N E. 47, 48, 250 Mass 567.

Meaning limited to maritime matters

"This particular meaning of the term 'wrecking' is not given to it, so far as we are aware, except in maritime decisions, or in decisions arising under marine insurance, and kindred cases."—Aurnhammer v Brotherhood Accident Co., 146 N E. 47, 48, 250 Mass 567.

88. Mo.—Collard v Eddy, 17 Mo 354.
58 C J p 683 note 51.

89. N Y.—Baker v Hoag, 7 N.Y. 555, 59 Am D. 431, 3 Seld. 45
58 C.J. p 683 note 53.

90. U.S.—Murphy v. Dunham, D C. Mich., 38 F 503.
58 C J. p 683 note 54.

91. U S.—U. S. v Tyndale, Mass, 116 F. 820, 54 C.C.A 324.
58 C J. p 683 note 56.

92. U.S.—Wilkie v. Two Hundred and Five Boxes of Sugar, D.C.S C, 29 F.Cas No.17,662, Bee 82.
58 C.J p 683 note 58.

93. Ala.—De Bardeleben Coal Co. v. Cox, 76 So. 409, 16 Ala.App. 172, certiorari denied 76 So 911, 200 Ala 553
58 C J. p 683 note 59.
Abandonment of wreck affecting duty to remove from navigable waters see Navigable Waters § 45 b.

Abandonment not shown

Failure to raise sunken vessel for approximately fifteen years and failure to replace buoy anchored over vessel when it disappeared were not abandonment terminating owner's rights in vessel as against private claimant.—The Port Hunter, D C. Mass, 6 F Supp 1009.

94. U S.—In re Highland Nav. Corp., D.C.N Y, 24 F 2d 582, affirmed Petition of Highlands Nav. Corporation, C C.A., 29 F.2d 37.

95. Ark.—Eads v. Brazelton, 22 Ark. 499, 74 Am.D 88.
58 C J. p 683 note 61.

Question for jury

Whether wreck and engine were abandoned by the owner was question of fact for jury.—Williamson v. Mennella, 290 N.Y.S. 645, 248 App Div. 911.

Abandonment by salvage company held shown.—Steinbraker v. Crouse, 182 A. 448, 169 Md 453.

taking possession may acquire title.[96] The owner of a wrecked vessel on a desert island has been held to have no title to a small vessel built from the remnants, as the only means of escape from the island,[97] and, where the owner of a vessel sunk by collision recovers the full value of the vessel in a suit in admiralty on the ground that the vessel is a total loss, and is actually paid the amount decreed, title to the submerged vessel passes to the party who pays the amount of the decree.[98]

A purchaser of vessels or goods wrecked or abandoned, at a sale made according to municipal regulations of the country where found, divests previous titles.[99]

§ 260. Protection and Sale and Application of Proceeds

Under some state statutes officers are named to care for and sell wrecks and apply the proceeds. Admiralty has jurisdiction to order the sale of a wrecked ship, on the master's application.

Under statutes in the several states, officers, variously designated, are named, whose duty it is to care for wrecks,[1] and, after specified steps, to sell them and apply the proceeds as provided in the statutes.[2] Admiralty has jurisdiction to order the sale of a wrecked ship, on the master's application,[3] and the general rule as to the conclusiveness of a decree of a foreign admiralty court applies in the case of a decree ordering the sale of wrecks and property left derelict.[4] Under the Canadian statute, the owner of a vessel which has become a wreck and is a menace to navigation is required to remove the wreck at his own expense,[5] and, if he fails to do so, the government is authorized to bring about the removal and to charge the expenses to the owner.[6]

The duty to mark a wreck in navigable waters is discussed in Navigable Waters § 45 c. The amount of the award for salvage rendered to derelict property, and the disposition of derelict property in salvage proceedings, are considered in Salvage § 128.

§ 261. Injuries to Wreck

The owner of a wreck may recover for willful or negligent injury thereto.

The owner of a wreck may recover for unnecessary injury, willful or negligent, thereto,[7] as by another vessel.[8]

§ 262. Offenses

A statute making it punishable to steal property from, or destroy property belonging to, a wrecked vessel does not apply to property abandoned by the owners.

Under some statutes it is punishable to steal, plunder, or destroy property from, or belonging to, a wrecked or stranded vessel.[9] Under such a statute it has been regarded as a felony for the master of a ship to embezzle money belonging to the ship, on deserting it when stranded;[10] but it has been held that such a statute does not apply to property which has been abandoned by the owners.[11]

96. N.Y.—Williamson v Mennella, 290 N Y S 645, 248 App Div. 911.
58 C.J. p 683 note 62.

Removal of scrap
Md.—Steinbraker v Crouse, 182 A 448, 169 Md. 453.

Rights not acquired by placing marker
Claimant acquired no property rights in derelict steamship by floating barrel over it and depositing therein document which recited that former owner had abandoned derelict and had failed to keep markers or buoys thereover and asserted that claimant was placing his marker over vessel as indicating his ownership.—The Port Hunter, D C Mass., 6 F Supp. 1009.

97. U S.—The Holder Borden, D C Mass., 12 F.Cas No.6,600, 1 Sprague 144.

98. U S.—Fox v The Lucy A. Blossom, D C N.Y., 9 F Cas No 5,013.

99. N.Y.—Grant v. McLaughlin, 1 Johns 34
58 C J. p 683 note 65.

1. N C.—Etheridge v. Jones, 30 N C. 100
58 C J. p 683 notes 67–70.

2. U.S.—The Margaretta, D C N Y., 29 F 324
58 C J p 684 note 71.

3. U.S.—The Tilton, C C Mass., 23 F. Cas No 14,054, 5 Mason 465.
58 C J p 684 note 73.

4. N.Y.—Grant v. McLachlin, 4 Johns 34

5. U S.—White Star S. S Co. v. North British & Mercantile Ins Co., D C Mich., 48 F Supp 808

6. U.S.—White Star S. S Co v North British & Mercantile Ins. Co., supra.

7. Ala.—De Bardeleben Coal Co v. Cox, 76 So. 409, 16 Ala App 172, certiorari denied 76 So 911, 200 Ala. 553.
58 C.J. p 684 note 75.
Injury when obstructing navigable waters see Navigable Waters § 45 d.

8. U S.—The Brinton, N Y., 66 F. 71, 13 C C A. 331.
58 C J. p 684 note 76.

9. U S.—U S v. Stone, C.C Tenn., 8 F 232
58 C J. p 684 note 77.
Offenses against shipping and navigation laws generally see supra § 12.

10. U S.—U. S v. Pitman, D C Mass., 27 F Cas No 16,051, 1 Sprague 196

11. U S.—U S. v Smiley, C.C Cal., 27 F Cas.No 16,317, 6 Sawy 640
Right of property after abandonment see supra § 259.

SHIPSIDE. The ordinary signification of the word in a railroad company's bill of lading for shipment to a certain point "shipside" is a direction to deliver the shipment at some wharf accessible to its track.[1]

SHIPWRECK. Admiralty jurisdiction over shipwrecked property is treated in Admiralty § 22. Recovery of wages by shipwrecked seamen is discussed in Seamen § 76. Wrecks are treated generally in Shipping §§ 258–262. See also the titles Collision and Salvage.

SHIRE. The word is derived from the Saxon, and signifies a circuit or portion of the realm into which the whole land is divided for the better government thereof and the more easy administration of justice.[2] It has the same meaning as "county" see Counties § 1 b.

SHIRR or SHIR. To pucker or draw up (a fabric or a part of a fabric) by means of parallel gathering-threads.[3]

Shirred. A technical term of doubtful origin,[4] meaning wrinkled or contracted.[5]

SHOCHET. A Jewish religious official, certified in writing by one or more rabbis as being qualified to slaughter animals in accordance with the ritual requirements and precepts of the Jewish Orthodox faith.[6] Shochtim, the plural of "shochet,"[7] are the only persons qualified to slaughter animals in accordance with Jewish dietary laws.[8]

SHOCK.

The noun[9] "shock" has a number of meanings.[10]

In agriculture, the term "shock" designates a group of sheaves of grain placed standing in the field with the stalk-ends down, and so arranged as to shed the rain as completely as possible, in order to permit the grain to dry and ripen before housing;[11] the small collection and arrangement of a few sheaves together, in the field, in such a manner as to protect them against the weather for a few days, until the farmer has time to gather them into his barn or place them in the large conical pile called a stack.[12]

In a physical sense,[13] the word "shock" is defined as meaning a blow, impact, collision, concussion, or violent shake or jar;[14] a violent collision of bodies, or the concussion caused by it;[15] the collision or concussion of two physical bodies striking together;[16] a sudden striking or dashing together or against something.[17]

The word "shock" is frequently used with reference to person, and as so used is broadly defined as meaning a sudden agitation of the physical or mental sensibilities;[18] a sudden agitation of body or mind.[19] Thus a shock may affect the body or mind,[20] and it may be referred to as "corporeal" when it affects the vital powers, and "psychical" when it affects the emotions of the mind.[21]

"Shock" is sometimes defined as meaning a sudden agitation of the mind;[22] sudden and violent agitation of the mental and emotional sensibilities;[23]

1. N C—Lee v. St Louis, etc, R Co, 48 S E 809, 136 N.C 533, 536
58 C J p 685 note 13.

2. Fla—State v. Dickenson, 33 So 514, 519, 44 Fla 623, 60 L R A 539, 1 Ann.Cas. 122.

3. Century D.

4. U.S—Day v Stellman, C C Md, 7 F.Cas No 3,690, 1 Fish Pat Cas 487
58 C J. p 685 note 27.

Phrases employing the word "shirred" and as to which more recent adjudications have not been found see 58 C J p 685 note 33–p 686 note 35.

5. U S—Day v Stellman, C C Md, 7 F Cas No 3,690, 1 Fish.Pat.Cas 487.

6. N Y—Mayer Bros Poultry Farms v Meltzer, 80 N Y S 2d 874, 877, 274 App Div. 169.

7. N Y—Mayer Bros. Poultry Farms v. Meltzer, supra.

8. U S—Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v U. S, N Y, 54 S Ct 396, 397, 291 U S. 293, 78 L Ed 804

9. Tenn—Provident Life & Accident Ins. Co. v. Campbell, 79 S W.2d 292, 295, 18 Tenn.App 452.

10. Wis—Pankopf v. Hinkley, 123 N.W. 625, 626, 141 Wis 146, 24 L R A.,N.S., 1159.

11. Century D.

12. Cal—People v. Doyle, 110 P. 458, 459, 13 Cal App. 611
Ohio.—Denbow v. State, 18 Ohio St 11, 12
58 C J p 686 note 63.

13. Tenn—Provident Life & Accident Ins Co. v Campbell, 79 S W 2d 292, 295, 18 Tenn App 452

14. Tenn—Provident Life & Accident Ins Co v. Campbell, supra.

15. Tenn.—Provident Life & Accident Ins. Co. v Campbell, supra.

16. Wis—Pankopf v. Hinkley, 123 N.W 625, 626, 141 Wis. 146, 24 L.R A.,N S, 1159.

17. Tenn.—Provident Life & Accident Ins Co v. Campbell, 79 S W. 2d 292, 295, 18 Tenn.App. 452

18. Tenn.—Provident Life & Accident Ins Co v. Campbell, supra.

Phrases employing the term as a noun and as to which there have been no recent adjudications see 58 C J. p 686 notes 60–62, 66, 67.

19. U S—Haile's Curator v. Texas & P. R Co, La., 60 F. 557, 559, 9 C C. A 134, 23 L R A 774.

20. U S.—Haile's Curator v Texas & P R Co, supra.

21. Or—Maynard v. Oregon R. Co, 72 P 590, 593, 43 Or 63

Shock resulting from concussion is called "corporeal," but almost the same class of symptoms can be produced by great emotion, and this form of shock is called "psychical."—Maynard v. Oregon R. Co., supra

22. Tenn.—Provident Life & Accident Ins Co v Campbell, 79 S.W. 2d 292, 295, 18 Tenn App. 452.

23. Kan.—Vera v Swift & Co., 56 P 2d 96, 100, 143 Kan 593.

startling emotion, as the shock of a painful discovery, or a shock of grief or joy.[24] However, the term may mean simply a surprised or disgusted state of the emotions, which momentarily disappears.[25]

The term "shock" is frequently employed in a pathological or medical sense,[26] and in its pathological sense it means an abnormal condition, either of mind or of body, or of both mind and body.[27] In its medical or pathological sense the term is defined as meaning a sudden depression of the vital forces of the entire body, or part of it, marking some profound impression produced on the nervous system, as by severe injury, a surgical operation, profound emotion, or the like;[28] a sudden depression of the vital functions, due to the nervous exhaustion following an injury or a sudden violent emotion, resulting either in immediate death or in prolonged prostration;[29] a state of profound depression of the vital processes of the body characterized by pallor, rapid but weak pulse, rapid and shallow respiration, restlessness, anxiety or mental dullness, and sometimes nausea or vomiting;[30] a state of profound depression of the vital processes resulting from wounds, hemorrhage, crushing injuries, blows, etc.;[31] a condition of profound prostration of voluntary and involuntary functions, of acute onset, caused by trauma, surgical operation, or excessive sudden emotional disturbance (mental shock);[32] a prostration of the bodily functions, as from sudden injury or mental disturbance.[33]

The noun "shock" has been distinguished from "concussion" see 15 C J.S. p 806 note 6, and "fright" see 37 C J.S. p 1382 note 10.

Shock as an element of damages see the index to the title Damages.

As a verb, "shock" is defined as meaning to offend the sensibilities of someone; to strike with surprise, terror, horror or disgust;[34] to cause to tremble, to recoil; to stun.[35]

SHODDY. Fiber remanufactured of shredded rags of stocking, yarns, flannels, and other soft woolen fabrics;[36] the refuse thrown off in the shearing or finishing of woolen cloths.[37] It has been distinguished from "mungo" see 61 C.J.S. p 945 note 66.

SHOE. An outer covering or dress for the human foot, usually distinguished from a boot by not reaching above the ankle, generally made of leather, but sometimes of cloth, india-rubber, wood, or other material.[38] A shoe ordinarily is composed of uppers, soles, and heels, sewed or otherwise joined together in such manner as to constitute an article of apparel for the feet.[39] The term has been distinguished from "boot" see 11 C.J.S. p 523 note 38, "moccasin" see 58 C.J.S. p 838 note 31, and "shoe-upper."[40]

The word "shoe" has other meanings, and as applied to a clincher tire it means the outer cover which attaches to the rim and serves to protect and retain the inflated inner tube on the rim.[41]

Phrases employing the term are set out in the note.[42]

24. Tenn—Provident Life & Accident Ins Co. v. Campbell, 79 S W. 2d 292, 295, 18 Tenn App 452.

25. Wis—Pankopf v. Hinkley, 123 N W 625, 626, 141 Wis. 146, 24 L R A ,N S., 1159.

26. Kan—Vera v. Swift & Co., 56 P 2d 96, 100, 143 Kan 593.
Tenn—Provident Life & Accident Ins Co v Campbell, 79 S W 2d 292, 295, 18 Tenn App 452.
Wis—Pankopf v Hinkley, 123 N W. 625, 626, 141 Wis 146, 24 L R A.,N S, 1159

27. Wis—Pankopf v. Hinkley, supra

28. Tenn—Provident Life & Accident Ins Co v Campbell, 79 S W 2d 292, 295, 18 Tenn App. 452.
Similarly stated
"Shock," briefly defined, is an "insult" to the nervous system—Lumbermen's Mut. Casualty Co v. Branham, D.C.Md., 48 F Supp 141, 143

29. Or—Maynard v Oregon R Co, 72 P. 590, 593, 43 Or 63

30. Kan—Vera v Swift & Co., 56 P 2d 96, 100, 143 Kan 593.
The total blood volume is reduced, the blood pressure is low, and the temperature is subnormal—Vera v Swift & Co, supra.

31. Mo—Landman v. John Hancock Mut Life Ins. Co, App, 211 S.W 2d 530, 534.

32. Wis—Pankopf v. Hinkley, 123 N W 625, 626, 141 Wis 146, 24 L R A ,N S., 1159.

33. Tenn—Provident Life & Accident Ins Co v Campbell, 79 S W 2d 292, 295, 18 Tenn App. 452

34. U S.—Cole v. Loew's Incorporated, D C Cal, 8 F R D 508, 514.
Phrases employing the term as a verb and as to which there have been no recent adjudications see 58 C.J. p 686 note 70—p 687 note 75

35. Mo—Mangold v. Bacon, 141 S W 650, 653, 237 Mo 496

36. U S.—U S v Castle & Overton, Inc, 18 C.C.P A, Customs, 21, 22

37. U.S—Lennig v. Maxwell, C C N Y., 15 F Cas No 8,243, 3 Blatchf. 125, 126.
58 C J p 687 note 77.

38. New Standard D.

39. La.—Ricks v Board of Assessors, 10 So 202, 43 La Ann 1075
Similarly stated
A foot covering having a separate outer sole attached, whose upper is of two distinct parts—W Bickford Co v Merrill, C C A Me, 268 F. 540, 542—58 C J. p 687 note 78.

40. La.—Ricks v Board of Assessors, 10 So 202, 43 La Ann. 1075
58 C.J. p 687 note 84

41. U S—Boston Woven Hose & Rubber Co v Pennsylvania Rubber Co, C C Mass, 156 F 787, 788
"Clincher tire" see 14 C J S p 1275 note 10.

42. Phrases
(1) "Brake shoe" defined see 11 C. J.S p 764 note 1.

(2) "Ornamented shoe buckles" as subject to tariff see Customs Duties § 34.

(3) "Shoe leather" as exempt from tariff see Customs Duties § 73.

(4) "Shoe machinery" as exempt from tariff see Customs Duties § 64.

SHOOK. A box knocked down and not nailed up; articles of wood, cut by machinery from sawed planks, and fashioned into shapes and sizes suitable for making boxes, by the simple process of nailing them together; lumber cut into suitable shapes and sizes for boxes and put into bundles.[43] The term may be used to designate a set of boards for a sugar box; a set of staves sufficient in number for one hogshead, cask, barrel, and the like, trimmed and ready to be put together.[44]

SHOOT. In one sense, the word "shoot" is defined as meaning to let fly, or cause to be driven, with force, as an arrow, bullet, or other missile, from a bow, sling, gun, or the like;[45] to discharge.[46]

In a slightly different sense, the word "shoot" means to strike with anything shot,[47] and this is said to be an established definition of the term.[48] In the same sense "shoot" is defined as meaning to hit with a missile;[49] to hit, wound, or kill, with a missile discharged from a weapon;[50] to kill or wound with a firearm;[51] and the term generally implies the use of a firearm,[52] and it is frequently employed in the sense of "kill."[53]

As applied to motion, the word "shoot," in common understanding, means to move with great velocity,[54] and when the object so moving has weight it necessarily implies force.[55]

"Shoot," in connection with the game of craps, is defined in Gaming § 1 d; and the words "shoot" and "shooting" in mining terminology are defined in Mines and Minerals § 3 h. The shooting of animals as constituting cruelty is discussed in Animals §§ 70, 72; and shooting at or in trains, cars, and engines as an offense see Railroads § 1009. For other specific references see the indexes to the titles Assault and Battery, Indictments and Informations, and Homicide; and consult the Descriptive-Word Index.

Phrases employing the term are set out in the note.[56]

SHOOTER. In general, one who, or that which, shoots.[57]

SHOP.

As a noun. The word "shop" appears to be derived from the old high German "schopf" or "scopf" which meant a building without a front wall.[58] It is a term of various significance,[59] and has many definitions,[60] and it may have different meanings when used with different texts.[61] In its popular, as well as in its legal, meaning, the term is not confined to a workshop,[62] but neither is it confined to a store,[63] and it may include both a store and a workshop.[64]

Expressing the workshop concept, the word "shop" is defined as meaning a building inside of which a mechanic carries on his work;[65] a building in which mechanics work;[66] a building in which an

(5) "Shoe-treeing devices" as subject to tariff see Customs Duties § 34.

(6) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 687 notes 85–89.

43. La.—Washburn v. New Orleans, 9 So. 37, 39, 43 La.Ann. 226.
58 C.J. p 687 notes 1, 3

44. U S.—U S v Dominici, N.Y., 78 F. 334, 335, 24 C C A. 116.
58 C J p 687 note 6

45. Okl.—Flowers v. State, 111 P 675, 676, 4 Okl.Cr. 320

46. Okl.—Flowers v State, supra

47. S D.—State v Swenson, 99 N.W. 1114, 1115, 18 S.D 196.

48. S D.—State v. Swenson, supra.

49. S.D.—State v. Swenson, supra

50. La.—State v. Manuel, 95 So. 263, 264, 153 La. 7.
58 C.J. p 688 note 14 [a].

The missile meant in such cases is the arrow, bullet, or ball intended to be discharged, and to strike the object aimed at.—State v. Manuel, supra.

51. S D.—State v. Swenson, 99 N.W 1114, 1115, 18 S D. 196.

52. Fla.—Shumake v State, 105 So 314, 315, 90 Fla 133

53. Minn.—Bader v New Amsterdam Casualty Co., 112 N W 1065, 1066, 102 Minn 186, 120 Am S R. 613
Wis.—Winn v State, 52 N W 775, 778, 82 Wis 571.

54. Pa.—McNulty v Joseph Horne Co., 148 A 105, 106, 298 Pa. 244

55. Pa.—McNulty v. Joseph Horne Co., supra.

56. **Phrases**

(1) "Did shoot" embraces the weapon, the load, the discharge, and the act of discharging, and it is so meant and understood by courts, counsel, jurors, and witnesses.—Deen v. State, 122 P 941, 942, 7 Okl.Cr 150.—58 C J p 689 note 43.

(2) "Shooting a person," in its usual sense, means that the person was hit by the substance with which the gun or pistol was loaded.—Voght v. State, 43 N E 1049, 1051, 145 Ind. 12.—58 C.J. p 688 note 33 [a]

(3) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 688 notes 21–24, 28–40, p 689 notes 44, 45, 66, 67.

57. Webster New Int D
As a mining term see Mines and Minerals § 3 h.

58. Eng.—Clayton v. Le Roy, [1911] 2 K B 1031, 1045.

59. Mass.—Commonwealth v Moriarity, 40 N E 2d 307, 308, 311 Mass. 116.—Boston Loan Co v City of Boston, 137 Mass. 332, 336.

60. La.—State v. Garon, 109 So 530, 532, 161 La. 867

61. Mass.—Commonwealth v. Moriarty, 40 N.E 2d 307, 308, 309, 311 Mass. 116

62. Mass.—Commonwealth v Moriarty, supra.
58 C J p 689 note 75

63. Mass.—Commonwealth v. Moriarty, supra.

64. Mass.—Commonwealth v Moriarty, supra.—Boston Loan Co. v. Boston, 137 Mass. 332, 336.

65. U.S.—Chicago, R I & P. R Co. v. Denver & R. G. R. Co., C C Colo., 45 F 304, 314.
"Sweatshop" defined see the C.J.S. definition Sweatshop post.

66. N H.—State v. Canney, 19 N.H. 135, 137.

artisan carries on his business, or laborers, workmen, or mechanics, by the use of tools or machinery, manufacture, alter or repair articles of trade;[67] a small establishment, or a room, department, or building devoted to a particular line in a factory or large establishment, in which mechanics or artisans work, as, a shoe shop, a car shop, a machine shop;[68] a place in which a mechanic pursues his trade;[69] a place where any mechanic art is carried on[70] or where some mechanic art is practiced;[71] a place of manufacture or repair.[72]

The word "shop" may denote a place where goods are sold,[73] a place, building, or room in which things are sold;[74] and, expressing this concept, the term is defined as meaning a place kept and used for the sale of goods;[75] a place where goods are sold by retail;[76] a building or an apartment in which goods, wares, drugs, etc., are sold at retail.[77] A shop, however, is a place not only for selling but also for storing goods.[78]

Since the word "shop" may include both a store and a workshop as stated supra p 1265 note 64, the term is sometimes defined as meaning a building in which mechanics labor or work, and where they keep,[79] or sometimes keep,[80] their manufactures for sale; any building or room used for carrying on any trade or business adapted to be carried on in a building or room and employing a stock in trade.[81]

The word "shop" is sometimes defined as meaning a store;[82] a store kept for the sale of goods;[83] and the terms "shop" and "store" have been held to be synonymous.[84] However, the terms have also been distinguished,[85] and in distinguishing them it has been said that they cannot be deemed to be equivalents or of the same legal import.[86]

"Shop" has been held to be synonymous with, or equivalent to, "storehouse,"[87] and "warehouse"

67. Or—State v Hanlon, 48 P. 353, 354, 32 Or 95.
58 C J p 690 note 79

68. La—State v Garon, 105 So 47, 48, 158 La 1014.

Similarly defined

A small establishment, room, department, or building devoted to a particular line, in which mechanics work, as a car shop, machine shop—State v Garon, 109 So. 530, 533, 161 La. 867.

69. Ala—Sparrenberger v. State, 53 Ala 481, 483, 25 Am R 643
La—State v Garon, 109 So. 530, 532, 161 La 867.

70. N H—State v Canney, 19 N H 135, 137
Or—State v Hanlon, 48 P. 353, 354, 32 Or 95, 101

71. Mass.—Hittinger v. Westford, 135 Mass 258, 262

72. Ill.—People v Farrell, 181 N E 703, 704, 349 Ill 129
58 C J p 690 note 88

Similarly defined

A room where manufactures of some kind are carried on.—McNab v McGrath, 5 U C.Q B O S (Ont) 516, 521—58 C J p 690 note 90.

73. Mass—Hittinger v. Westford, 135 Mass 258, 262.
58 C J. p 691 note 29

74. Fla—Salomon v Pioneer Co-op Co, 21 Fla. 374, 384, 58 Am R 667.
La—State v Garon, 109 So 530, 532, 161 La. 867.

75. Mass—Commonwealth v Moriarty, 40 N.E 2d 307, 309, 311 Mass 116
58 C.J p 691 note 24

Similarly defined

(1) A place where anything is sold.—Barth v State, 18 Conn 432, 440.

(2) A place where things are publicly sold—McNab v. McGrath, 5 U. C Q B O.S (Ont) 516, 520

(3) Any room or building where any kind of article of traffic is sold—Richards v. Washington F & M Ins Co, 27 N W. 586, 588, 60 Mich 420

(4) A place for the sale of articles, or goods, stored and brought there for the purpose of being sold—Regina v Sanders, 9 C & P. 79, 38 E C L 58, 173 Reprint 748—58 C J. p 691 note 23

(5) A place for the purpose of containing merchandise for sale protected from the weather—State v. Canney, 19 N H 135, 137.

(6) A building in which goods are offered openly for sale—State v. Sandy, 25 N C 570, 574

76. Mass—Commonwealth v. Annis, 15 Gray 197, 199
58 C J. p 691 note 30.

Similarly defined

(1) A retail establishment.—Gordon Hotels, Ltd v London County, [1916] 2 K B. 27, 33.

(2) A building, or a room or suite of rooms, appropriated to the selling of wares at retail—State v. Sprague, 50 S W. 901, 903, 149 Mo 409.

(3) A structure or room in which goods are kept and sold at retail—State v Hanlon, 48 P 353, 354, 32 Or 95—58 C J p 692 note 42.

77. U.S—Standard Oil Co. v Green, D C Iowa, 34 F Supp. 30, 34.
58 C.J p 691 note 15.

Similarly defined

(1) A house or building in which small quantities of goods, wares, or drugs, and the like are sold.—State v. Morgan, 3 S.E 927, 928, 98 N C. 641.

(2) A building in which goods, wares, or merchandise are sold at retail—State v. Hanlon, 48 P. 353, 354, 32 Or 95.

The English "shop" is the building itself, as distinguished from a place of sale which is open, like a "stall"—Richards v. Washington F & M Ins Co., 27 N W. 586, 60 Mich 420, 425

78. Eng—Pope v Whalley, 6 B & S 303, 313, 118 E C L 303, 122 Reprint 1208.
58 C J p 691 note 25

79. Ind.—State v. O'Connell, 26 Ind 266, 267
La.—State v. Garon, 109 So 530, 533, 161 La. 867.

80. N C—State v Morgan, 3 S E 927, 928, 98 N C. 641
Or—State v Hanlon, 48 P. 353, 354, 32 Or. 95

81. La.—State v Garon, 109 So. 530, 532, 161 La. 867.
Mass—Boston Loan Co. v. Boston, 137 Mass. 332, 336.

82. La—State v. Garon, 109 So 530, 533, 161 La. 867.
58 C.J. p 692 note 40.

83. Conn.—Barth v State, 18 Conn. 432, 440.

84. Ark—Petty v. State, 22 S W. 654, 655, 58 Ark. 1.
58 C J p 692 note 40 [b], p 693 note 53—60 C J. p 118 note 12 [b], [c].

85. Fla—Salomon v Pioneer Co-op Co, 21 Fla. 374, 384, 58 Am R 667.
N.J—Jackson v. Lane, 59 A 2d 662, 673, 142 N.J Eq 193
58 C J p 692 note 40 [a], [c], p 693 note 53 [b], [c]—60 C.J. p 118 note 12 [a].

86. Or—State v. Hanlon, 48 P. 353, 354, 32 Or. 95.

87. N.C—State v. Sandy, 25 N.C. 570, 573.
58 C.J. p 693 note 54.

see the C.J S title Warehousemen and Safe Depositaries § 1, also 58 C.J p 693 note 55.

It has been compared with, or distinguished from, "garage" see Motor Vehicles § 715, and "stall,"[88] and has been held not to be included within the meaning of the term "restaurant" see Innkeepers § 1 b.

As a verb. The term "shop" is defined as meaning to visit shops for the purpose of purchasing or inspecting goods.[89]

Phrases employing the term are set out in the note.[90]

SHOPBOOK RULE. See the title index to Evidence.

SHOPKEEPER. One who keeps a shop for the sale of goods; a trader who sells goods in a shop or by retail, in distinction from a merchant, or one who sells by wholesale.[91] The term has been held synonymous with "tradesman,"[92] and it has been distinguished from "dealer" see 25 C.J.S. p 1043 note 10, and "merchant" see 57 C.J.S. p 1064 note 71.

SHORE. While it has been said that "shore" is a word of doubtful meaning,[93] it has also been said that the word has a well-understood,[94] and a well-defined legal[95] meaning, although it is subject to construction by the terms of the instrument in which employed and the surrounding circumstances.[96]

The word "shore" in its strict sense,[97] and as used in England,[98] belongs to,[99] or is reserved for,[1] the ocean, and, correctly speaking, applies only to the land adjacent to the sea or other tidal waters,[2] and is strictly applicable only to the space on a tidal river,[3] sea,[4] or lake.[5] That is, it must be such land as is affected by the tide,[6] since, precisely defined, the term is not appropriate to land on the side of water that is not affected by the ebb and flow of the tide.[7]

The word does not have such a limited meaning in America,[8] and in both the United States and Canada[9] it is applied to nontidal water,[10] and is loosely[11] used with reference to nontidal[12] fresh[13]

88. Mich.—Richards v. Washington F & M Ins. Co., 27 N.W. 586, 588, 60 Mich. 420.

89. Webster New Int.D.

"In common parlance, in speaking of going to places, known by no other names than stores, to purchase goods, we speak of going a shopping."—State v. Smith, 5 La.Ann 340, 341.

90. **Phrases**

(1) "Shop assistant" as used in the English Shop Acts see the definition Assistant

(2) "Shop card" as a railroad term for a card placed upon crippled cars to denote that they have been injured and are to be taken to the shops for repair see Railroads § 1 r.

(3) "Shop right" to inventions generally see Patents § 246, of employer to employee's invention see Master and Servant § 73 d.

(4) "Shop spliced," a term used in the structural steel industry to describe fabricated steel pieces such as girders, and the like, when they are manufactured and shipped in one piece.—Green-Beekman Constr. Co. v. McClintic-Marshall Co, 272 P 420, 422, 134 Okl. 60. Distinguished from "field spliced" see 36 C.J.S p 747 note 86

(5) "Shop steward" as an officer of a labor union see the C.J.S title Trade Unions § 22, also 58 C.J. p 690 note 2.

(6) Other phrases as to which more recent adjudications have not been found see 58 C J p 690 notes 91–98, 2–6, p 691 notes 7, 8, p 693 note 56–p 694 note 70.

91. N.H.—State v Cohen, 63 A. 928, 929, 73 N.H. 543.

92. N.H.—White Mountain Fur Co v. Whitefield, 91 A. 870, 871, 77 N H 340.
58 C.J. p 694 note 88

93. Mass.—Haskell v Friend, 81 N. E 962, 963, 196 Mass 198.
58 C J p 695 note 93

94. Mich.—La Porte v Menacon, 190 N.W 655, 656, 220 Mich. 684.
58 C.J p 695 note 95

95. Ala.—Mobile Dry-Docks Co v Mobile, 40 So 205, 208, 146 Ala 198, 3 L.R.A.,N.S., 822, 9 Ann Cas 1229
58 C J p 695 note 94.

96. U S.—Commonwealth of Massachusetts v. State of New York, 46 S Ct 357, 362, 271 U.S. 65, 70 L Ed. 838.
58 C.J. p 695 note 96.

97. N.Y.—Starr v. Child, 20 Wend. 149, 153.

98. Mich.—La Porte v Menacon, 190 N.W 655, 656, 220 Mich 684

99. N.Y.—Starr v. Child, 20 Wend 149, 153.

1. Mich.—La Porte v. Menacon, 190 N.W 655, 656, 220 Mich. 684.

2. Mich.—La Porte v. Menacon, supra.
58 C.J. p 695 note 4.

3. Ill.—Peoria v Central Nat. Bank, 79 N.E. 296, 300, 224 Ill. 43, 12 L.R.A.,N.S, 687
Mich.—La Porte v Menacon, 190 N.W 655, 656, 220 Mich 684.

4. Mich.—La Porte v. Menacon, supra.

5. Mich.—La Porte v. Menacon, supra.

6. Or.—Bay City Land Co v Craig, 43 P. 911, 912, 72 Or. 31—Andrus v Knott, 8 P. 763, 12 Or. 503

Flats are not "shore" unless the tide ebbs and flows over them—Humble Oil & Refining Co v. Sun Oil Co, C.A.Tex, 190 F.2d 191, 194, 195.

7. U.S.—Humble Oil & Refining Co. v Sun Oil Co, supra

8. Mich.—La Porte v. Menacon, 190 N.W. 655, 656, 220 Mich. 684

9. Mich.—La Porte v. Menacon, supra.

10. Minn.—Schaller v Town of Florence, 259 N.W. 529, 534, 193 Minn 604.
58 C.J p 697 notes 34–52.

Fresh water
Ill.—Peoria v Central Nat Bank, 79 N.E 296, 300, 224 Ill. 43, 12 L.R.A., N.S, 687.

11. Mich.—La Porte v Menacon, 190 N.W. 655, 656, 220 Mich. 684

12. Me.—Morrison v. Skowhegan First Nat. Bank, 33 A. 782, 784, 88 Me. 155, 160.

13. Mich.—La Porte v Menacon, 190 N.W. 655, 656, 220 Mich. 684.
58 C.J. p 697 note 35.

water, rivers,[14] lakes,[15] or ponds.[16] However, it has been said that technically,[17] and generally,[18] the term has application only to large bodies of water, and is not applied to land contiguous to a small stream.[19]

Various statements have been made by the courts as to how far in the direction of the land, and how far in the direction of the water, the shore may be considered to extend It is generally recognized that the shore is a band of land with two margins, an inner or landward margin, and an outer or seaward margin;[20] and that the inner or landward margin corresponds with high-water mark, and the outer or seaward margin corresponds with low-water mark,[21] and the definitions of the term which are set out in following paragraphs are generally to the effect that it encompasses the land between high- and low-water mark. In a popular or extended sense, however, the word "shore" is not limited to the land between high and low water,[22] and it may refer to the land near the border of the sea, or of a great lake, to an indefinite extent.[23]

Under the common law, the shore extends in a landward direction only as far as the ordinary tides flow,[24] that is, the daily tides,[25] and is not determined by the high spring tides, or tides caused by an unusual combination of circumstances.[26] However, even in common-law jurisdictions the word "shore" in common parlance is often used with a more extensive meaning, taking in all that extensive belt of waste ground or strand, shingles, and rock liable to the action of every kind of tide,[27] but in legal intendment no more of this tract is shore than that portion which lies between high- and low-water mark at ordinary tides.[28]

The civil-law rule as to the landward extent of the shore of the sea or other tidal water is not the same as the common-law rule. The rule of the civil law is that the shore extends to the line of the highest tide,[29] that is, as far as the highest waves reach,[30] in winter.

14. Cal.—Freeman v. Bellegarde, 41 P. 289, 291, 108 Cal 179, 49 Am S R 76
58 C J. p 697 note 35

15. Wis.—C Beck Co v City of Milwaukee, 120 N.W 293, 296, 139 Wis 340, 131 Am S R 106.
58 C J p 697 note 36

16. Cal.—Freeman v. Bellegarde, 41 P 289, 291, 108 Cal. 179, 49 Am S.R 76

17. N Y.—Child v. Starr, 4 Hill 369, 380.
58 C.J. p 695 note 2.

18. Fla.—Axline v. Shaw, 17 So. 411, 413, 35 Fla. 305, 28 L.R A 391.

19. Del.—Harlan & Hollingsworth Co v. Paschall, 5 Del Ch. 435, 464

20. Me.—Sinford v. Watts, 122 A 573, 574, 123 Me 230

"The shore of a pond, being the space between high and low water, necessarily has two sides, a high water side and a low water side"
Me.—Stevens v King, 76 Me. 197, 199, 49 Am.R 609
Or.—Richards v. Page Inv. Co, 228 P 937, 944, 112 Or. 507.

21. Me.—Sinford v. Watts, 122 A 573, 574, 123 Me 230.

22. N J.—Morris, etc, R Co. v Hudson Tunnel R Co, 38 N J Law 548, 553.

23. Del.—Harlan, etc, Co v. Paschall, 5 Del.Ch 435, 464
58 C.J. p 695 note 3.

24. U.S.—Borax Consolidated v City of Los Angeles, Cal, 56 S Ct. 23, 29, 296 U S. 10, 80 L Ed. 9
Or.—Bay City Land Co. v. Craig, 143 P. 911, 913, 72 Or. 31.

Mean high tide
U S.—Humble Oil & Refining Co v Sun Oil Co, C A Tex, 190 F.2d 191, 195

25. U.S.—Borax Consolidated v. City of Los Angeles, Cal, 56 S Ct. 23, 29, 296 U S. 10, 80 L Ed. 9

26. Or.—Bay City Land Co v. Craig, 143 P 911, 913, 72 Or 31.
58 C J p 696 note 18 [b].

Similarly expressed
The shore of the sea landwards is, in the absence of particular usage, prima facie limited by the line of the medium high tide between the spring tides and the neap tides; or, in other words, the shore is that area which for four days in every week, or for the most part of the year, is reached and covered by the tides. As this line will vary as the sea recedes from or encroaches on the land, so the boundaries of the shore will vary with the recession or encroachments of the sea. Land above this line, though overflowed by high spring and extraordinary tides, is not shore.—Wood v. Maitland, 8 N Y.S.2d 146, 151, 169 Misc. 484.

27. N.Y.—Wood v. Maitland, supra
Or.—Bay City Land Co. v. Craig, 143 P. 911, 912, 72 Or. 31.

28. N.Y.—Wood v. Maitland, 8 N.Y S 2d 146, 151, 169 Misc 484.
Or.—Bay City Land Co. v. Craig, 143 P 911, 912, 72 Or 31.

29. U S.—Humble Oil & Refining Co v. Sun Oil Co., C A.Tex., 190 F.2d 191, 195.
Tex.—Galveston v. Menard, 23 Tex 349, 398.

30. U S.—Borax Consolidated v City of Los Angeles, Cal, 56 S Ct. 23, 29, 296 U.S. 10, 80 L Ed. 9.
Cal.—Bolsa Land Co v. Vaqueros Major Oil Co, 76 P 2d 519, 521, 25 Cal.App 2d 75.

Under the civil law of Spain, the shore of the sea took in all that part which was covered by water, whether in the winter or in the summer.—Sullivan v Richardson, 14 So. 692, 708, 33 Fla 1

Basic law of Spain and Mexico
"Since the common law was adopted in Texas after the grants were issued, the boundary between the sea and the upland must be determined in accordance with the principles announced in Las Siete Partidas, the basic law of Spain and Mexico, which defines the shore of the sea as all the ground 'which is covered with the water of the latter at high tide during the whole year, whether in winter or in summer.'"
—Humble Oil & Refining Co v. Sun Oil Co, C A.Tex, 190 F.2d 191, 194, 195.

Civil-law rule explained
"In Borax Consolidated v. City of Los Angeles, 296 U.S 10, at page 22, 56 S.Ct. 23, 29, 80 L.Ed 9, the court said. 'By the civil law, the shore extends as far as the highest waves reach in winter. [citing] Inst lib. 2, tit. 1, § 3; Dig. lib 50, tit. 16, § 112'; but we are governed on this point by state rather than federal decisions. Moreover, the original of the Institutes is: *Est autem littus maris, quatenus hibernus, fluctus maximus excurrit,* which may be literally translated: 'However, the shore of the sea in the fourth quarter or winter is where the highest wave extends.' According to the Digest, the Latin is: *Littus publicum est eatenus qua maxime fluctus*

Both in civil-law countries and in common-law countries the seaward boundary of the shore is the low-tide line,[31] and, while it has been indicated that this boundary is the ordinary low-water mark,[32] and it has been said that by the common law the shore is confined to the flux and reflux of the sea at ordinary tides,[33] it has been stated that actually the shore extends in a seaward direction to the line of the lowest tide.[34]

When the word "shore" is used with reference to land unaffected by the tide, in determining how far from the water's edge the shore begins, it has been said that in the absence of any banks or other highlands to mark the boundary, the only definite line the shore has is the water's edge,[35] and it is the edge of the water at low-water mark.[36]

The word "shore" is defined as meaning the space, land, or ground which lies between ordinary high- and low-water mark.[37] The land lying between the high-water and the low-water mark at ordinary tides;[38] the space or land between high- and low-water mark;[39] the space between high and low tide;[40] the land over which the daily tides ebb and flow;[41] that part of the land covered by water in its greatest ordinary flux;[42] the land which is

exaestuat, which literally translated is 'The public shore extends up to where the highest wave boils up or foams' The reference is not to waves or sea water in a storm but in an estuary, or exit to the sea, as when the water boils up where the tide meets the current of a river The word *exaestuat* is from *exaestuo, are, avi, atum* (from which the English word aestuary is derived), it illustrates the danger from different versions in translations Compare the law of Scotland, whereby the mouth of a river, *ostium fluminis*, comprehends the whole space between the lowest ebb and the highest flood mark (meaning the lowest ebb and highest flood of the tide). The ordinance of Louis XIV provides. 'All the space which is covered and discovered by the new and full moon, and as far as the tide extends at the high *flood* of March [emphasis supplied], shall be reputed to be the seashore' There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind. There are vestiges of hurricane floods for fifty miles or more inland from Beaumont to Brownsville; and the shore of Texas would be cut into fantastic shapes by these overflows if wind-driven waters extended its upland boundary in low places, while the high ground on each side showed no evidence of such overflows. The tide is another matter, there is nothing erratic about it The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons, or other circumstances . . . The tide delimits the shore, and is no respecter of the conflict of laws" —Humble Oil & Refining Co v. Sun Oil Co., supra.

31. U S.—Humble Oil & Refining Co. v. Sun Oil Co., supra.

32. U S.—Borax Consolidated v. City of Los Angeles, Cal., 56 S.Ct. 23, 29, 296 U.S. 10, 80 L Ed. 9—U. S v Stewart, C C A Cal, 121 F 2d 705, 709
Ill —Peoria v Central Nat Bank, 79 N E. 296, 300, 224 Ill 43, L.R A., N S, 687
Mich —La Porte v Menacon, 190 N.W 655, 656, 220 Mich. 684
58 C J p 695 note 8

Mean low tide is the outer extent of the shore —Humble Oil & Refining Co v. Sun Oil Co., 190 F 2d 191, 195.

33. U S —Borax Consolidated v City of Los Angeles, Cal, 56 S Ct. 23, 296 U S 10, 80 L Ed 9.
Cal —Bolsa Land Co v. Vaqueros Major Oil Co, 76 P 2d 519, 521, 25 Cal App 2d 75.

34. Or —Bay City Land Co v. Craig, 143 P 911, 912, 72 Or. 31
"Low tide" as term which may be applied to lower low tide, mean low tide, mean lower low tide, or extreme low tide see 54 C J S p 883 note 17

Right of access to water

In England the shore belongs to the king, but the reason for limiting the king's title to medium high tide does not apply to limit that of the subject to medium low tide. The reason for extending the title of the riparian owner to low water is to preserve his access to the water, and he must therefore have a right to go until he reaches the water even at its lowest ebb.—Bay City Land Co v. Craig, 143 P. 911, 912, 72 Or. 31

35. Mich —La Porte v. Menacon, 190 N.W. 655, 656, 220 Mich. 684

36. N Y.—People v. Kyser, 138 N.Y.S 801, 802, 78 Misc 68—Child v. Starr, 4 Hill 369, 376.

37. U S —Borax Consolidated v. City of Los Angeles, Cal, 56 S Ct 23, 29, 296 U S. 10, 80 L Ed. 9—U S v Stewart, C C.A.Cal, 121 F 2d 705, 709
Ill.—Peoria v Central Nat Bank, 79 N E. 296, 300, 224 Ill. 43, L.R.A., N S., 687
Mich —La Porte v Menacon, 190 N W. 655, 656, 220 Mich. 684.
Or.—Bay City Land Co v Craig, 143 P 911, 912, 72 Or 31
58 C J. p 695 note 8.

Similarly defined

Under the common-law rule, the shore is that strip of land between mean low-tide and mean high-tide, which is ascertained at any place from average height of water at that place over a considerable period of time —Humble Oil & Refining Co v. Sun Oil Co, C A Tex, 190 F.2d 191, 194, 195.

38. Or —Bay City Land Co v Craig, 143 P. 911, 913, 72 Or 31.

39. Mass.—Commonwealth v Inhabitants of Charlestown, 1 Pick. 180, 182, 11 Am D. 161.
Or —Bay City Land Co v. Craig, 143 P 911, 913, 72 Or 31.
58 C.J. p 696 note 26, p 697 note 49.

As applied to tidal waters

Md —Wood v Hildebrand, 42 A 2d 919, 921, 185 Md 56
Minn —Schaller v Town of Florence, 259 N W 529, 534, 193 Minn 604.

40. U S —The Gulfport, D C.Ala., 243 F 676, 679.

41. U S —Borax Consolidated v. City of Los Angeles, Cal, 56 S.Ct 23, 29, 296 U S. 10, 80 L.Ed 9—U S v Pacheco, Cal, 2 Wall 587, 590, 17 L Ed 865—U S v. Stewart, C C. A Cal, 121 F.2d 705, 709.

Similarly defined

(1) That space which is alternately covered and exposed by the flow and ebb of the tide.—Morrison v. Skowhegan First Nat Bank, 33 A. 782, 783, 88 Me. 155.

(2) That portion of the land at the water's edge which is daily covered and daily left bare by the rising and falling of the tides —Axline v. Shaw, 17 So 411, 413, 35 Fla 305, 28 L R A. 391.

42. Cal —United Land Assoc v. Knight, 23 P. 267, 24 P. 818, 821, 85 Cal 448.
58 C J. p 696 note 10.

Similarly defined

(1) That portion of the land which is alternately covered by the water and left bare by the flux and reflux

periodically covered and uncovered by the tide;[43] that space of land which is alternately covered and left dry by the rising and falling of the tide;[44] the space or ground over which the tide ebbs and flows and is bounded by the high and low water marks.[45] The word "shore" is further defined as meaning the land on the margin[46] or the side[47] of the sea or a lake or river; the edge or margin of land;[48] the water's edge[49] at low-water mark;[50] the coast or land adjacent to the ocean, or sea, or a large lake or river;[51] the "litus maris;"[52] the beach.[53]

When applied to a river, the term "shore" means the river's banks above the low-water mark,[54] that band,[55] bank,[56] or margin[57] of a river which lies between the high- and low-water marks, the bank of the river,[58] or that portion of the bank which touches the margin of the stream at low water;[59] and it has been said that, in the commonly accepted use of the word, the shore of a river is the land adjacent to the water line.[60] While the word "shore" is sometimes defined as meaning the actual, as well as the nominal, bed of a river,[61] it is also defined as meaning that part of the bed lying between the top of the bank and that part of the bed where the water actually flows, and which, as the water rises or falls is land or water.[62]

The word "shore" has been held to be synonymous with "bank" see Navigable Waters § 88, "beach" see 10 C.J.S. p 217 note 98, "flats" see Boundaries § 4, "strand,"[63] and "tidelands."[64]

"Shore" has been compared with, or distinguished from, "flat" see 36 C.J.S. p 1023 note 25, "harbor" see 39 C.J.S. p 774 note 56, and "water."[65]

The word "shore" is treated in various connections throughout this work, particular reference being made to Boundaries § 31, Counties § 15, and Navigable Waters § 88. See also the definition Seashore 79 C.J.S. p 929 notes 2–14. For other specific references consult the Descriptive-Word Index.

Phrases employing the word "shore" are set out in the note.[66]

SHORE-OWNER. The owner of the lands above and adjoining the shore line.[67]

of the tide—Child v. Starr, 4 Hill, N.Y., 369, 375.

(2) That part between ordinary high and low-water marks, alternately covered and left bare by the ordinary flux and reflux of the tides—Leary v. Jersey City, C.C.N.J., 189 F. 419, 428.

43. Cal.—Freeman v. Bellegarde, 41 P. 289, 291, 108 Cal. 179, 49 Am. S.R. 76.
58 C.J. p. 696 note 23.

44. Ala.—Mobile Dry-Docks Co. v. Mobile, 40 So. 205, 208, 146 Ala. 198, 3 L.R.A.,N.S., 822, 9 Ann. Cas. 1229
Or.—Elliott v. Stewart, 14 P. 416, 417, 15 Or. 259.
58 C.J. p. 696 note 13.

45. Mich.—La Porte v. Menacon, 190 N.W. 655, 656, 220 Mich. 684
58 C.J. p. 696 note 27.

46. Ala.—Mobile Dry-Docks Co. v. Mobile, 40 So. 205, 208, 146 Ala. 198, 3 L.R.A.,N.S., 822
Or.—Elliott v. Stewart, 14 P. 416, 417, 15 Or. 259

47. Conn.—Mather v. Chapman, 40 Conn. 382, 400, 16 Am. R. 46.

48. N.Y.—People v. Kyser, 138 N.Y.S. 801, 803, 78 Misc. 68.

49. U.S.—Commonwealth of Massachusetts v. State of New York, 46 S.Ct. 357, 362, 271 U.S. 65, 70 L.Ed. 838
58 C.J. p. 697 note 51.

50. U.S.—Commonwealth of Massachusetts v. State of New York, 46 S.Ct. 357, 362, 271 U.S. 65, 70 L.Ed. 838.

N.Y.—People v. Kyser, 138 N.Y.S. 801, 802, 78 Misc. 68

51. Fla.—Axline v. Shaw, 17 So. 411, 413, 35 Fla. 305, 28 L.R.A. 391
58 C.J. p. 695 note 97.

The coast of the sea
Del.—Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 463
Me.—Littlefield v. Littlefield, 28 Me. 180, 184.

52. N.B.—Doe v. Hill, 7 N.B. 587, 589

53. Ala.—Mobile Dry-Docks Co. v. Mobile, 40 So. 205, 208, 146 Ala. 198, 3 L.R.A.,N.S., 822, 9 Ann. Cas. 1229
58 C.J. p. 696 note 20, p. 697 note 42

54. N.Y.—Child v. Starr, 4 Hill 369, 376.

The shore of a stream is the pebbly, sandy, or rocky space between the bank and the low-water mark—McCullough v. Wainright, 14 Pa. 171, 174.

55. Del.—Harlan, etc., Co. v. Paschall, 5 Del. Ch. 435, 464.

56. Or.—Sun Dial Ranch v. May Land Co., 119 P. 758, 762, 61 Or. 205

57. Del.—Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 464
Or.—Sun Dial Ranch v. May Land Co., 119 P. 758, 762, 61 Or. 205.

Similarly defined
The space between the margin of the water at a low stage and the banks which contain it at its greatest flow—Alabama v. Georgia, Ala. & Ga., 23 How., U.S., 505, 513, 16 L.Ed. 556—58 C.J. p. 697 note 50.

58. Del.—Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 463.

59. Ill.—Peoria v. Central Nat. Bank, 79 N.E. 296, 300, 224 Ill. 43, 12 L.R.A.,N.S., 687
58 C.J. p. 697 note 39

60. Pa.—Lacy v. Green, 84 Pa. 514, 519.
58 C.J. p. 697 note 47.

61. Or.—Sun Dial Ranch v. May Land Co., 119 P. 758, 762, 61 Or. 205.

62. Del.—Harlan, etc., Co. v. Paschall, 5 Del. Ch. 435, 463.

63. N.Y.—Stillman v. Burnfeind, 47 N.Y.S. 280, 281, 21 App. Div. 13.

64. Or.—Bay City Land Co. v. Craig, 143 P. 911, 912, 72 Or. 31.

65. Fla.—Axline v. Shaw, 17 So. 411, 413, 35 Fla. 305, 28 L.R.A. 391.
58 C.J. p. 698 note 69.

66. **Shore line**
(1) The space between the high-water and low-water mark.—Schaller v. Town of Florence, 259 N.W. 529, 534, 193 Minn. 604.

(2) It does not mean the meander line, but it usually means, in connection with fresh water rivers, the low-water mark.—Schaller v. Town of Florence, supra.

Other phrases employing the word and as to which more recent adjudications have not been found see 58 C.J. p. 696 note 28–p. 697 notes 33, 53–p. 698 notes 60, 72–76.

67. N.J.—Morris Canal, etc., Co. v. Brown, 27 N.J. Law 13, 17.

SHORT. The term "short" is defined as meaning not long from end to end; of brief length; not tall;[68] and in this sense it is distinguished from "long" see 54 C.J.S. p 795 note 32.

"Short" is also defined as meaning not coming up to a measure, standard, requirement, or the like, or to something regarded as such; as an account which is short of the truth; lacking in what is due.[69] A statement that a person is "short" in his accounts as constituting an imputation of crime to support an action for defamation see Libel and Slander § 68.

The word "short" is a term of the stock and produce exchanges, and implies that a person has less of the commodity than may be necessary to meet demands and obligations as stated in Gaming § 1 h.

Phrases employing the word are set out in the note.[70]

SHORTAGE. A deficiency or deficit;[71] the amount by which anything is deficient or short,[72] any deficiency in a quantity warranted.[73]

"Shortage" is a word of general signification,[74] and it may include a deficiency which is without personal fault, or one which is the result of fault or crime.[75] It does not necessarily imply a criminal act,[76] but may have reference merely to a discrepancy resulting from carelessness or unintentional error,[77] or to a situation where a person, in a position of trust, has on hand less assets than he should have.[78]

A statement that a shortage exists in a person's accounts as constituting an imputation of crime sufficient to support an action for defamation see Libel and Slander § 68.

SHORTEN. To make short or shorter in measure or time; to reduce or diminish in amount, quantity, or extent.[79] It has been said that the word implies the opposite of abolition.[80]

SHORTLY. In point of time, it is a relative term,[81] and means in a short or brief time or manner; presently; quickly; soon;[82] within a reasonable time.[83] It has been said that "shortly" used in relation to "simultaneously," is measured by hours or days rather than by weeks.[84]

SHORTSIGHTED. Not able to discern far into the future, not appreciative or mindful of results or future needs; lacking foresight.[85] It has been distinguished from "prudent" see 73 C.J.S. p 273 note 33.

68. Webster New Int D.

69. Webster New Int D.

70. Phrases

(1) "Short cause" defined see the C J S title Trial § 33, also 58 C J. p 698 note 81.

(2) "Short circuit" see Electricity § 1 b.

(3) "Short form decision" see Courts § 181 a

(4) "Short homestead" see the title index to Homesteads

(5) "Short rate" as used in cancellation clause of insurance policy see Insurance § 460 a

(6) "Short sale" defined see Gaming § 1 h; within provision of income tax law see the title index to Internal Revenue

(7) "Short shipped" see Shipping § 113

(8) "Short summons" defined see Process § 1 f (2).

(9) "Short swing" as a term used in the postal service to denote an interval between trips see Post Office § 12 b (2).

(10) "Short yearlings" in stockmen's phraseology are cattle about or approximately near one year of age—Sparks v. Paris Deposit Bank, 74 S W. 185, 115 Ky. 461, 24 Ky L 2333—58 C.J. p 699 note 99.

(11) Other phrases employing the term and as to which more recent adjudications have not been found see 58 C.J. p 699 notes 88, 89, 1–10, p 700 notes 24–29

71. U S.—U. S. Fidelity & Guaranty Co v State of Oklahoma ex rel Shull, C C A Okl, 43 F 2d 532, 536.
Md—Continental Oil Co. v. Horsey, 3 A.2d 476, 477, 175 Md 609.

Similarly defined

A deficiency, shortcoming, or deficit.—Black Diamond Fuel Co. v Billstein, 258 N.W. 806, 807, 65 N D 363

72. Md—Continental Oil Co. v. Horsey, 3 A 2d 476, 477, 175 Md 609.

Phrases employing the term and as to which more recent adjudications have not been found see 58 C J p 700 notes 37–39.

73. Ga.—Parker v. Barlow, 21 S E 213, 215, 93 Ga. 700.
58 C J. p 700 note 32

74. Md—Continental Oil Co v Horsey, 3 A.2d 476, 477, 175 Md 609

75. Md—Continental Oil Co. v Horsey, supra.

76. U.S—U. S Fidelity & Guaranty Co v. State of Oklahoma ex rel Shull, C C.A Okl, 43 F.2d 532, 536

Does not necessarily impute larceny, embezzlement, or crime of any kind.—Black Diamond Fuel Co. v. Billstein, 258 N W. 806, 807, 65 N.D 363.

77. U.S—Grand Union Tea Co. v Lord, Va, 231 F 390, 395, 145 C C A 384, Ann Cas.1918C 1118.
Okl—Thomas v. McShan, 225 P. 713, 714, 99 Okl 88.

78. U S—U. S Fidelity & Guaranty Co v. State of Oklahoma ex rel. Shull, C C A.Okl, 43 F.2d 532, 536.

79. Webster New Int.D

80. Iowa—Peterson v. Pratt, 167 N.W. 101, 102, 183 Iowa 462

81. N.J—Shippee v. Shippee, 195 A 728, 729, 122 N J.Eq. 570.
Vt—Chittenden County Trust Co v Hurd, 106 A. 564, 565, 93 Vt. 71.

Relativity exemplified

"Jefferson was president shortly after Washington; only four years intervened A football team makes a touchdown shortly after the game started, perhaps five minutes"—Shippee v Shippee, 195 A. 728, 729, 122 N J Eq 570.

82. Vt.—Chittenden County Trust Co. v. Hurd, 106 A. 564, 565, 93 Vt. 71.

83. Ga.—Cincinnati Glass, etc, Co v. Stephens, 60 S.E. 360, 361, 3 Ga App. 766.

84. N.J.—Shippee v Shippee, 195 A 728, 729, 122 N J.Eq 570.

85. Webster New Int.D.

SHOT. A projectile, particularly a solid ball or bullet that is not intended to fit the bore of a piece;[86] also, such projectiles collectively.[87]

The term "shots" has been held to be interchangeable or synonymous with "bullets" see 12 C.J S. p 558 note 40.

SHOTGUN. See the C.J S. title Weapons § 1, also 58 C.J. p 701 notes 72–76.

SHOULD. See Shall ante p 139 note 47–p 140 note 78.

SHOULDER. The dictionaries give various definitions of the word "shoulder,"[88] such as a prominent or projecting part below the top,[89] and, in man, the laterally projecting part of the body, each side of the base of the neck, formed by the bones and joints by which the arm is connected with the trunk and by the muscles covering them.[90] In connection with tires, the somewhat angular portions at the margins of the crown are called "shoulders."[91]

The term "shoulder" has been distinguished from "top."[92]

SHOVE. To push along, as on a surface; urge along by force, whether directly or by indirect means.[93] It has been held synonymous with "push" see 73 C.J.S. p 1264 note 49, and it has been compared with, or distinguished from, "carry" see 13 C.J.S. p 1764 note 17, "convey" see 18 C.J.S. p 87 note 42, "draw" see 28 C.J.S. p 488 note 18, "move" see 61 C.J.S. p 943 note 32, and "transport."[94]

SHOVELER. The term is defined generally as meaning a laborer who works with a shovel.[95] It is also used in coal mining terminology to describe a man whose duty it is to remove the coal, after it has been blown down, by loading it into cars for transportation to the mouth of the mine, as stated in Mines and Minerals § 3 h.

SHOW. As a noun, the word "show" is defined in the C.J.S. title Theaters and Shows § 1, also 62 C.J. p 841 note 16 as meaning a sight or spectacle; an exhibition; a pageant; a play.

The verb "show" has various meanings depending on the context in which it is used.[96] It is defined as meaning to present to view;[97] to exhibit;[98] to display,[99] to disclose;[1] to make known;[2] to reveal;[3] to relate;[4] to tell.[5]

"Show" is also defined as meaning to explain;[6] to teach; inform; instruct;[7] to make apparent or

86. Va.—Green v. Commonwealth, 94 S E. 940, 941, 122 Va. 862.

Phrases

(1) "Like a shot," a colloquial expression, signifying quickly, instantaneously, see 53 C.J S. p 885 note 81

(2) "Single shot" as a mining term defined see Mines and Minerals § 3 h.

(3) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 701 notes 66–70.

87. Va.—Green v. Commonwealth, 94 S E 940, 941, 122 Va 862

88. U S.—Imperial Bottle Cap & Mach Co v. Crown Cork & Seal Co, Md, 139 F. 312, 324, 325, 71 C C A 442

89. U S.—Imperial Bottle Cap & Mach Co v. Crown Cork & Seal Co, supra

Phrases as to which more recent adjudications have not been found see 58 C.J p 701 notes 79, 80

90. Webster New Int.D

The most prominent part of the shoulder is formed by the acromion process of the scapula covered by the deltoid muscle—Webster New Int D.

91. U S—Gamble-Skogmo v Paul E Hawkinson Co, C C A Minn., 98 F.2d 37, 38

92. U.S.—Imperial Bottle Cap & Mach. Co. v. Crown Cork & Seal Co, Md, 139 F. 312, 324, 71 C.C A 442.

93. New Standard D

"Shoving the Y" as an expression used with respect to making up a train see Railroads § 1 r.

94. U S—Chicago, R. I. & P R Co v. Petroleum Refining Co, D C.Ky, 39 F 2d 629, 630

Mich—Langford v. Rogers, 270 N W 692, 694, 278 Mich. 310

95. Ariz—Capital Const Co v Industrial Commission, 146 P 2d 902, 903, 61 Ariz 214.

Held not a shoveler

It would be just as sound to call a person who moves a piano, a pianist, as to call a person who helps to move a steam shovel, a shoveler.—Capital Const. Co. v. Industrial Commission, supra.

96. U S—Kenyon v. Crane, 120 F 2d 380, 384, 385, 28 C C.P.A., Patents, 1208.

97. Wyo—Cheyenne First Nat. Bank v Swan, 23 P. 743, 746, 3 Wyo 356 58 C J p 702 note 96.

Similarly defined

(1) To bring into view or to attention—McMillian v. McLane, 88 N.E 2d 114, 115, 338 Ill App. 514.

(2) To place in sight—Chapin v State, 296 S.W. 1095, 1105, 107 Tex Cr. 477.

(3) To cause to see

Pa—Continental Illustrating Co. v. City Transfer Co, 10 Pa Dist. & Co. 91, 92

Wyo—Cheyenne First Nat. Bank v. Swan, 23 P 743, 746, 3 Wyo. 356

98. U S—Kenyon v. Crane, 120 F.2d 380, 385, 28 C C P A., Patents, 1208. 58 C J. p 702 note 95.

99. U.S—Kenyon v Crane, supra.

Tex.—Chapin v. State, 296 S W. 1095, 1105, 107 Tex Cr. 477.

1. U.S.—Kenyon v. Crane, supra

Tex—Chapin v State, 296 S W. 1095, 1105, 107 Tex.Cr 477.

2. U.S—Kenyon v. Crane, supra.

3. U S—Kenyon v. Crane, supra

Tex—Chapin v State, 296 S.W. 1095, 1105, 107 Tex Cr 477.

4. Ill—McMillian v. McLane, 88 N E 2d 114, 115, 338 Ill App. 514.

5. Ill—McMillian v. McLane, supra.

Tex—Chapin v State, 296 S W. 1095, 1099, 1105, 107 Tex Cr. 477.

6. Tex.—Chapin v. State, supra.

Similarly defined

(1) To explain something—Kenyon v. Crane, 120 F 2d 380, 385, 28 C.C.P.A., Patents, 1208.

(2) To give the reason and explanation of—Cheyenne First Nat. Bank v. Swan, 23 P. 743, 746, 3 Wyo. 356—58 C J. p 702 note 98.

7. U.S.—Kenyon v. Crane, supra.

clear[8] by evidence,[9] testimony,[10] or reasoning;[11] to prove;[12] to demonstrate,[13] to manifest;[14] to evince;[15] to indicate;[16] to reasonably satisfy.[17]

The word "show" is further defined as meaning to make known the way[18] to (a person);[19] hence, to direct; guide; usher;[20] conduct.[21]

The term has various other significations, and it may also mean to bestow or confer,[22] or it may mean to give indication of by record; as, a clock shows the hour; industrials show an advance.[23]

"Show" has been held equivalent to, or synonymous with, "betoken" see 10 C.J.S. p 348 note 81.51, "demonstrate" see 26 C.J.S. p 708 note 78, "divulge" see 27 C.J.S. p 1306 note 1.50, "escort" see 30 C.J.S. p 1190 note 5.50, "evidence" see 31 C.J.S. p 477 note 86, "indicate" see 42 C.J.S. p 823 note 7, "lead" see 52 C.J.S. p 1033 note 76, "manifest" see 55 C.J.S. p 662 note 58, "prove" see 73 C.J.S. p 264 note 35, "reasonably satisfy" see 75 C.J.S. p 638 note 7, and "represent" see 77 C.J.S. p 260 note 20.

"Show" has been compared with, or distinguished from, "allege" see 3 C.J.S. p 884 note 72.1, "aver" see 7 C.J.S. p 1305 note 88, "establish" see 30 C.J.S. p 1232 note 41.2, "indicate" see 42 C.J.S. p 823 note 9, and "state."[24]

"Showing," the present participle[25] of the verb "show," has various meanings depending on the context in which it is used.[26] It has been distinguished from "stating."[27]

"Shown," the past participle[28] of the verb "show," is defined as meaning pointed out or made known by evidence;[29] proved;[30] proven.[31] It has been held synonymous with "established" see 30 C.J.S. p 1231 note 36.2, and "proven" see 73 C.J.S. p 265 note 38

Phrases employing the word "show" are set out in the note.[32]

SHOWERING. A manner of watering stock during transportation, usually done by holding a pipe from an elevated tank with one end flattened, so that the water is thrown through the openings in the cars as they slowly pass, thereby sprinkling and cooling the animals within.[33]

8. U.S.—Kenyon v. Crane, supra.
Ill.—Hughes v. Medendorp, 13 N.E. 2d 1015, 1017, 294 Ill.App. 424
Pa.—Sears v. Birbeck, 184 A. 6, 9, 321 Pa. 375
58 C.J. p 702 note 99.
Similarly defined
To make apparent or clear, either to the eye or to the understanding, or to both, by display, by evidence, by illustration, or by other means—Kenyon v. Crane, supra

9. U.S.—Kenyon v. Crane, supra
Ill.—Hughes v. Medendorp, 13 N.E. 2d 1015, 1017, 294 Ill.App. 424
Pa.—Sears v. Birbeck, 184 A. 6, 9, 321 Pa. 375
58 C.J. p. 702 note 1.
Similarly defined
To constitute evidence or proof of—Kenyon v. Crane, supra

10. U.S.—Kenyon v. Crane, supra
Pa.—Sears v. Birbeck, 184 A. 6, 9, 321 Pa. 375.
58 C.J. p 702 note 2.

11. U.S.—Kenyon v. Crane, supra.
Pa.—Sears v. Birbeck, 184 A. 6, 9, 321 Pa. 375
58 C.J. p 702 note 3.

12. U.S.—Kenyon v. Crane, supra.
Ill.—McMillian v. McLane, 88 N.E. 2d 114, 115, 338 Ill.App. 514.
Pa.—Sears v. Birbeck, 184 A. 6, 9, 321 Pa. 375.
58 C.J. p 702 note 7.
To prove by evidence
N.Y.—Spalding v. Spalding, 3 How. Pr. 297, 301
Pa.—Continental Illustrating Co. v. City Transfer Co., 10 Pa.Dist. & Co. 91, 92.

13. U.S.—Kenyon v. Crane, 28 C.C.A., Patents, 1208.
Pa.—Sears v. Birbeck, 184 A. 6, 9, 321 Pa. 375.

14. Wyo.—Cheyenne First Nat. Bank v. Swan, 23 P. 743, 746, 3 Wyo. 356.
58 C.J. p 702 note 5

15. Pa.—Continental Illustrating Co. v. City Transfer Co., 10 Pa.Dist. & Co. 91, 92
Wyo.—Cheyenne First Nat. Bank v. Swan, 23 P. 743, 746, 3 Wyo. 356

16. U.S.—Kenyon v. Crane, supra.

17. Ill.—Hughes v. Medendorp, 13 N.E. 2d 1015, 1017, 294 Ill.App. 424

18. U.S.—Kenyon v. Crane, supra
Tex.—Chapin v. State, 296 S.W. 1095, 1105, 107 Tex.Cr. 477

19. U.S.—Kenyon v. Crane, supra

20. U.S.—Kenyon v. Crane, supra.
Tex.—Chapin v. State, 296 S.W. 1095, 1105, 107 Tex.Cr. 477

21. U.S.—Kenyon v. Crane, supra.

22. Tex.—Chapin v. State, 296 S.W. 1095, 1105, 107 Tex.Cr. 477.

23. U.S.—Kenyon v. Crane, supra.

24. Tex.—Chapin v. State, 296 S.W. 1095, 1099, 107 Tex.Cr. 477.
58 C.J. p 703 note 24.

25. Webster New Int.D.
Phrases employing "showing" and as to which more recent adjudications have not been found see 58 C.J. p 704 notes 31–35.

26. U.S.—Kenyon v. Crane, supra.

27. Cal.—Nelson v. Superior Court in and for City and County of San Francisco, 73 P.2d 232, 234, 9 Cal.2d 729.
58 C.J. p 703 note 24 [c].

28. Webster New Int.D.
Phrases employing the word "shown" and as to which more recent adjudications have not been found see 58 C.J. p 704 notes 40–46.

29. Pa.—Commonwealth v. Delfino, 102 A. 949, 952, 259 Pa. 272.

30. Cal.—People v. Davenport, 110 P. 318, 320, 13 Cal.App. 632.
58 C.J. p 704 note 38.

31. Iowa.—State v. Crofford, 110 N.W. 921, 925, 133 Iowa 478.
58 C.J. p 704 note 39.

32. Phrases
(1) "Order to show cause" as an order requiring a party to appear and show cause why a certain thing should not be done or permitted see Motions and Orders § 20

(2) "Show window."—Liebes v. U.S. Casualty Co., 211 P. 842, 843, 59 Cal.App. 758

(3) Other phrases employing the word "show" and as to which more recent adjudications have not been found see 58 C.J. p 703 notes 25–30.

33. Iowa.—Peck v. Chicago, etc., R. Co., 115 N.W. 1113, 1114, 138 Iowa 187, 128 Am.S.R. 185, 16 L.R.A., N.S., 883.
58 C.J. p 704 note 50
Duty of carrier to shower overheated animals during transportation see Carriers § 63 b.

SHRED. To cut or tear into small pieces; to cut or tear pieces from; to tear, cut, or separate into small irregular or jagged strips or pieces; reduce to long and narrow fragments, as fibrous material.[34]

SHRINES. Images or statues of virgins, saints, martyrs, etc.[35]

SHRINKING. A stage in the manufacture of felt for making hats.[36]

SHRUB. A low, small plant, whose branches grow directly from the earth without any supporting trunk or stem.[37]

SHUNPIKE. A road intended to furnish a way of evading a tollgate and constructed for that special purpose.[38]

SHUT. To bring into such position as to close an opening or aperture; close, as a door, gate, lid, or valve; to prohibit from entering; deny admission to; bar out.[39]

Shut down. The term is commonly used in relation to manufacturing plants, as meaning idle[40] or inoperative,[41] and as referring to the stopping of the machinery and the mechanism in general by which the manufacture is effected.[42]

Provisions for the avoidance of policies of fire insurance if the business or manufactory be shut down for a stated period are treated in Insurance § 554.

SHUTTLE GUARD. A device in general use in cotton mills which prevents the shuttle from flying up, while the loom is in operation; it is a steel rod fixed to the "reed cap," directly over the shuttle as it passes from side to side of the loom.[43]

SHY. To start suddenly aside through fright or suspicion; said especially of horses; to swerve from the path being pursued to the right or left.[44]

SHYSTER. The word "shyster" is defined as meaning one who carries on any business, especially legal business, in a mean[45] and dishonest[46] way; one without professional honor;[47] a trickish knave;[48] a pettifogger;[49] and it is said to be an epithet so understood by people generally.[50]

SI. A Latin word meaning "if."[51] It is the introductory word of a number of phrases, maxims, and writs.[52]

SIASSUETIS MEDERI POSSIS, NOVA NON SUNT TENTANDA. See 58 C.J. p 706 note 95.

SIC. A Latin word meaning "in such manner;" "so;" "thus."[53]

Maxims

Sic utere tuo ut alienum non lædas. An ancient,[54] maxim of the common law,[55] meaning "So use your

34. U S—W R Grace & Co v. U S, 19 C C P A, Customs, 326, 329.

35. Pa—Commonwealth v. Gombert, 11 Pa.Dist. 435, 439.

36. U.S—United States Hat Machinery Corporation v Boesch Mfg Co, C C A.Conn, 108 F.2d 417, 418

37. Miss—Clay v Postal Tel. Cable Co, 11 So. 658, 659, 70 Miss 406.
58 C J p 704 note 52.

38. Tenn.—Clarksville, etc, Turnp Co v Clarksville, Ch A., 36 S.W 979, 982

39. New Standard D.

40. U S—Tillamook Lumbering Co v Liverpool & London & Globe Ins. Co, C C Or, 175 F 508, 510
58 C.J p 705 note 71.

41. U S—Tillamook Lumbering Co v. Liverpool & London & Globe Ins. Co, supra.
58 C.J. p 705 note 72.

42. Wash—Brehm Lumber Co v Svea Ins Co, 79 P 34, 35, 36 Wash 520 68 L R A 109
58 C.J. p 705 note 73.

43. Ga—Vinson v Willingham Cotton Mills, 58 S.E 413, 2 Ga App. 53

44. Tex—San Antonio Mach, etc, Co v McKinley, Civ.App, 239 S W. 340, 342

45. Neb—Moore v State, 23 N W 2d 552, 557, 147 Neb 390

Phrases as to which more recent adjudications have not been found see 58 C J p 706 notes 86, 87

46. Neb—Moore v. State, 23 N W 2d 552, 557, 147 Neb. 390.
58 C.J. p 706 note 84

47. Neb—Moore v. State, supra.

48. Minn—Gribble v Pioneer Press Co, 25 N.W 710, 34 Minn 342.
Mont—Nolan v Standard Pub Co, 216 P 571, 574, 67 Mont 212

49. Neb.—Moore v. State, 23 N W 2d 552, 557, 147 Neb 390.

50. Neb—Moore v. State, supra

51. Mass—Markey v Smith, 16 N E 2d 20, 23, 301 Mass 64.

52. **Phrases** see 58 C J. p 706 note 90

Maxims see 58 C J. p 706 notes 91–94, p 714 note 89, p 732 notes 5, 6, p 733 note 54, p 739 notes 58, 61, 63–70, p 740 note 85.

Writs see 58 C J. p 739 notes 59, 71.

53. Black L D

Sic subscribitur
"So it is subscribed" In Scotch practice, formal words at the end of depositions, immediately preceding the signature—Black L D.

54. U S—Merced Dredging Co v. Merced County, D C.Cal, 67 F. Supp 598, 607.
Ala.—Beam v Birmingham Slag Co, 10 So 2d 162, 166, 243 Ala 313
N C—Barger v. Barringer, 66 S E. 439, 442, 151 N C. 433, 25 L R A, N.S, 831, 16 Ann Cas 472
Va—G. L. Webster Co v Steelman, 1 S E 2d 305, 315, 172 Va 342

55. U S—State Road Department of Fla v U S, D C Fla, 85 F Supp 489, 500—Merced Dredging Co. v. Merced County, D C Cal, 67 F. Supp 598, 607
N.C—Barger v Barringer, 66 S E. 439, 442, 151 N C. 433, 25 L R.A, N S, 831, 16 Ann Cas. 472

Founded on teachings of Jesus Christ
The maxim "is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.' Freely trans-

own as not to injure another's property."[56]

The maxim limits the use of property,[57] and voices the well-settled rule of the common law that a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury is responsible for the natural and probable consequences of his act to any person injured who is not himself in default.[58] It is a corollary of this maxim that everyone shall investigate, inspect, and test the instrumentalities maintained by him, guided in so doing by the knowledge that common experience offers with respect to the possibility of peril,[59] but this does not require that every peril, including such as are latent or hidden, need be discovered,[60] and the maxim should be so restricted in its application as not to restrain an owner of property from a prudent and reasonable exercise of his right of dominion.[61] The maxim applies to corporations as well as to individuals.[62]

This maxim has been called honorable[63] and just,[64] humane and venerable,[65] and at the present time as important for the protection of the rights of society and of the individual as it has been during the centuries it has been recognized and followed by courts of justice,[66] and it has been said that any departure from it would be subversive of fundamental private rights.[67] However, it has also been the subject of criticism,[68] and courts have recognized

lated, it enjoins that every person in the use of his own property should avoid injury to his neighbor as much as possible No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion"—Barger v Barringer, supra.

56. Ark—Eddy v. Thornton, 170 S W 2d 995, 996, 205 Ark 843—Moore v. Wallis, 86 S W 2d 1111, 1112, 191 Ark 551.
Other form of maxim see "Ita utere tuo ut alienum non lædas" 48 C J S p 787 note 89.

Similarly expressed

(1) One must use his own property so as not to injure that of another.
U S—State Road Department of Fla v U. S, D C Fla., 85 F Supp. 489, 500
Ohio—Crino v. City of Campbell, 41 N E 2d 583, 585, 68 Ohio App 391.

(2) Use your own property in such a manner as not to injure that of another.
Ala—Tennessee Coal, Iron & R. Co v. Hartline, 11 So 2d 833, 839, 244 Ala. 116
Fla—McInerney v. Ervin, 46 So 2d 458, 463

(3) Every person so use his own property as not to injure that of another.—Merced Dredging Co v Merced County, D.C Cal., 67 F.Supp 598, 607.

(4) So use your own as not to work hurt to another.—Beam v. Birmingham Slag Co., 10 So 2d 162, 166, 243 Ala 313

(5) So use your own property that you do not injure another—G L. Webster Co. v. Steelman, 1 S E 2d 305, 315, 172 Va. 342.

(6) So use your property as not to injure the rights of another—State v. James, 145 S W 2d 783, 786, 177 Tenn. 21.

(7) One's enjoyment and use of his own property should be such as not to injure the rights of another in his property—E Rauh & Sons Fertilizer Co. v. Shreffler, C C.A Ohio, 139 F 2d 38, 41.

(8) One cannot use his own property so as to injure the rights of others, nor can he use it in such a manner as to offend against public morality, health, or peace and good order"—People v New York Carbonic Acid Gas Co, 90 N E 441, 448, 196 N.Y 421

57. Ark—Eddy v. Thornton, 170 S W 2d 995, 996, 205 Ark. 843—Moore v Wallis, 86 S W 2d 1111, 1112, 191 Ark. 551.

58. Ky—Shell v Town of Evarts, 178 S W 2d 32, 33, 35, 296 Ky. 602
Liability does not rest on privity of contract, but on the duty of every man so to use his own property as not to injure the person or property of others—Shell v. Town of Evarts, supra.

59. Ala—Housing Authority of Birmingham Dist v Morris, 14 So 2d 527, 534, 244 Ala. 557.

60. Ala—Housing Authority of Birmingham Dist v. Morris, supra.

Obligation to ascertain peril

No man is an insurer of the safety of others, but if common experience has demonstrated that dangers lurk in the method adopted or in the instrumentality maintained by a person he rests under the obligation of ascertaining the peril and taking precautions to avoid injury therefrom—Housing Authority of Birmingham Dist v Morris, supra.

61. Ind—Lake Shore & M S. Ry Co v. Chicago, L S & S B Ry Co., 92 N E 989, 990, 48 Ind.App 584.
N M.—Hale v Farmers Electric Membership Corporation, 99 P 2d 454, 457, 44 N M 131

62. Ky—Shell v Town of Evarts, 178 S W 2d 32, 35, 296 Ky 602.

63. Va—G L Webster Co v Steelman, 1 S E 2d 305, 315, 172 Va 342

64. Ky—Shell v Town of Evarts, 178 S W 2d 32, 35, 296 Ky. 602

65. N.C—Barger v Barringer, 66 S E 439, 442, 151 N C. 433, 25 L R A,N.S, 831, 16 Ann Cas. 472

66. Va—G L Webster Co v. Steelman, 1 S E 2d 305, 315, 172 Va. 342.

67. Va—G. L Webster Co v. Steelman, supra

68. **Criticism expressed**

(1) "Perhaps no legal phrase is cited more frequently than Sic utere, etc It is not uncommon for judges to decide important cases without practically giving any reason save the quotation of this maxim, which is evidently regarded by the court as affording, by its very terms, a satisfactory ratio decidendi. Yet in the vast majority of cases this use of the phrase is utterly fallacious"—Hale v Farmers Electric Membership Corporation, 99 P.2d 454, 456, 44 N.M 131.

(2) "The maxim Sic utere tuo ut alienum non lædas, is iterated and reiterated in our books, and yet there is scarcely an aphorism known to the law the true application of which is more vague and undefined Interpreted literally it would enjoin a man against any use of his own property which in its consequences might injuriously affect the interest of others; but no such legal principle ever existed While, therefore, Sic utere tuo, etc., may be a very good moral precept, it is utterly useless as a legal maxim. It determines no right, it defines no obligation."
N.M.—Hale v Farmers Electrical Membership Corporation, supra
N.Y—Auburn & Cato Plank Road Co. v. Douglass, 9 N Y. 444, 445.

(3) "The maxim Sic utere tuo ut alienum non lædas, as commonly

that it does not present a hard-and-fast rule to be generally employed.[69] The maxim has been applied in a number of cases.[70]

Sic utere tuo ut alienum non lædas is the basis of the principles governing the use of property as discussed in Property § 13 b(2) (b), and is at the foundation of the law of nuisances as stated in Nuisances § 8.

The general rule that a person must so use his own property as not to injure others is stated in Negligence § 4 b(2) (a), and is referred to in its various specific applications throughout the title, as in § 74 where it is applied to real property.

Other maxims. "Sic" as the first word of other maxims as to which there have been no recent applications see 58 C.J. p 706 notes 1, 2.

SICK. Affected with disease;[71] affected with diseases of any kind;[72] ill; indisposed; not in heath;[73] weak; ailing; diseased; disordered;[74] affected with, or attended by, nausea, inclined or inclining to vomit.[75]

In a somewhat different sense, "sick" is defined as meaning having a strong dislike, disgust with, of, as to be sick of flattery, to be sick of a country life.[76]

The term is sometimes used as a prefix to certain nouns such as bay, berth, bungalow, bunk, chamber, allowance, book, club, cookery, etc., as meaning appropriate or given up to, occupied by one or more persons in a state of illness; of or pertaining to, connected with, persons suffering from illness.[77]

The word "sick" is used interchangeably with "sickness," and is practically of the same import.[78]

translated (So use your own as not to injure another's), is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes But, strictly, even then, it can mean only, 'So use your own that you do no legal damage to another's' Legal damage, actionable injury, results only from an unlawful act This maxim also assumes that the injury results from an unlawful act, and paraphrased means no more than 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act,' or 'Injury from an unlawful act is actionable' This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful It amounts to no more than the truism An unlawful act is unlawful This is a mere begging of the question, it assumes the very point in controversy, and cannot be taken as a ratio decidendi"

N M —Hale v Farmers Electric Membership Corporation, supra.

Tenn.—Payne v W & A R R Co., 13 Lea 507, 527.

(4) "The plaintiffs lean heavily on the maxim Sic utere tuo ut alienum non lædas This maxim, so often cited as the governing principle of decisions, affords little, if any, aid in the determination of the rights of parties in litigation. If it be taken to mean any injury to another by the use of one's own, it is not true, and, if it means legal injury, it is simply a restatement of what has already been determined, 'The maxim, Sic utere tuo ut alienum non lædas, is mere verbiage A party may damage the property of another where the law permits, and he may not where the law prohibits so that the maxim can never be applied till the law is ascertained, and, when it is, the maxim is superfluous' Erle, J, in Bonomi v. Backhouse, El Bl. & El 622, p. 643; 2 Austin, Jur (3rd) 795, 829. The maxim is undoubtedly a sound moral precept expressing an ideal never fully attained in the social state."

N M —Hale v. Farmers Electric Membership Corporation, supra

R.I —Rose v. Socony-Vacuum Corporation, 173 A. 627, 629, 54 R.I 411

69. U S —E Rauh & Sons Fertilizer Co v Shreffler, C C A Ohio, 139 F 2d 38, 41.

70. Ga —Asphalt Products Co v Marable, 16 S E 2d 771, 773, 65 Ga App. 877

Pa —Harris v. Lewistown Trust Co, 191 A 34, 38, 326 Pa. 145, 110 A L R. 749

58 C J p 708 note 72 [b].

The leading case applying the maxim is the early case of Rylands v Fletcher, L R, 3, H L., 330—E Rauh & Sons Fertilizer Co. v. Shreffler, C C A Ohio, 139 F 2d 38, 41.

71. Kan —State v. Douglas, 260 P 655, 657, 124 Kan 482.

N C.—Glenn v. Gate City Life Ins Co, 18 S E 2d 113, 115, 220 N C 672.

Incapacitation

One is not ordinarily considered sick who performs his usual occupation, although some organ of the body may be affected; he is regarded as sick when that diseased condition has advanced far enough to incapacitate him.—Leftwich v. Inter-Ocean Casualty Co., 17 S E.2d 209, 212, 123 W Va. 577—Milam v. Norwich Union Indemnity Co, 149 S.E 668, 669, 107 W.Va. 574.

72. N.J —Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben Soc., 181 A. 631, 632, 13 N.J Misc. 822.

58 C.J. p 706 note 8.

Bodily injury excluded

"You would say that a man was sick of a fever, but you would never say that he was sick of a broken leg. Although a party may have lost some limb, yet he may be in perfect health, and although he may be disabled from manual labor in consequence of such loss it cannot be said that he is either 'ill' or 'sick'"

N.J.—Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben Soc, supra.

N Y.—Kelly v. Ancient Order of Hibernians, 9 Daly 289, 291

73. N J —Fazekas v Perth Amboy Holy Mary Roman Catholic Sick Ben Soc, 181 A. 631, 632, 13 N J. Misc. 822

58 C J. p 706 note 11.

74. Kan —State v. Douglas, 260 P. 655, 657, 124 Kan. 482.

75. N J.—Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben Soc, 181 A 631, 632, 13 N.J. Misc 822.

N Y —Kelly v. Ancient Order of Hibernians, 9 Daly 289, 291.

Nauseating

Eng —Regina v. Huddersfield, 7 E & B 794, 797, 90 E C L. 794, 119 Reprint 1441.

76. N.J.—Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben Soc, 181 A 631, 632, 13 N J. Misc 822

N.Y —Kelly v Ancient Order of Hibernians, 9 Daly 289, 291.

Disgusted

Eng —Regina v Huddersfield, 7 E & B. 794, 797, 90 E C L 794, 119 Reprint 1441.

77. Cal.—Nelson v. Dean, 168 P 2d 16, 19, 27 Cal.2d 873.

78. Ala —McAllister v. State, 181 So 511, 513, 28 Ala App. 213.

Phrases employing the term are set out in the note.[79]

SICKNESS. The term "sickness" is said to have a well-defined meaning,[80] and signifies a disease;[81] a malady;[82] a particular kind of disorder;[83] any morbid condition of the body which for the time being hinders and prevents the organs from normally discharging their several functions;[84] any affection of the body which deprives it temporarily of the power to fulfill its usual functions.[85]

It is also defined as meaning the state of being sick or diseased;[86] the state of being sick or suffering from disease;[87] a diseased condition of the system,[88] illness;[89] ill health.[90]

"Sickness" is further defined as meaning a disordered, distracted, or enfeebled state of anything.[91]

The word "sickness" has been defined by the application of definitions of the term "sick" as meaning affected with disease;[92] affected with disease of any sort;[93] not in good health;[94] ill;[95] indisposed.[96]

Under the scientific, technical definitions of "sickness" the disability must arise from a pathological condition and affect the organs of the human system,[97] but construed according to common understanding "sickness" is considered merely as a condition interfering with the usual avocations.[98] The term has been held not to mean a trifling illness, or an occasional physical disturbance resulting from accidental causes not permanent in their effects, or a temporary illness which readily yields to professional treatment and leaves no permanent injury or disorder calculated or having a tendency to shorten life.[99] Sickness is either such as affects the body generally or only some part of it,[1] and, under some circumstances, is deemed to be an act of God.[2]

In the subjoined notes, examples are given of

79. Phrases
(1) "Sick benefits" see the title index to Insurance, sub verbo "Mutual benefit insurance"
(2) "Sick leave" defined see 52 C J.S. p 1036 note 19
(3) Other phrases as to which more recent adjudications have not been found see 58 C J. p 707 notes 19–35.

80. Me—Beaudoin v La Societe St. Jean Baptiste, 102 A. 234, 116 Me 428, L R A 1918B 641.

81. Ala—McAllister v State, 181 So 511, 513, 28 Ala App 213
N J.—Fazekas v. Perth Amboy Holy Mary Roman Catholic Ben Soc, 181 A. 631, 632, 13 N.J Misc 822
58 C J p 707 note 40.
Phrases employing the term and as to which more recent adjudications have not been found see 58 C J. p 708 notes 58–64.

82. Ala.—McAllister v State, 181 So 511, 513, 28 Ala App. 213.
N.J.—Fazekas v Perth Amboy Holy Mary Roman Catholic Ben Soc, 181 A. 631, 632, 13 N J.Misc 822
58 C J p 707 note 41.

83. Neb—Kane v Chicago, etc, R. Co, 132 N.W. 920, 921, 90 Neb 112, 36 L R.A.,N S., 1145, Ann Cas.1913A 764.

84. Ala—National Casualty Co v. Hudson, 21 So.2d 568, 570, 32 Ala. App 69.
Ga.—American Life Ins. Co. of Birmingham, Ala. v. Stone, 50 S E.2d 231, 234, 78 Ga App. 98—Martin v Waycross Coca-Cola Bottling Co., 89 S E 495, 496, 18 Ga App. 226.
Tex.—Coca Cola Bottling Co. v. Heckman, Civ.App., 113 S.W.2d 201, 203.

Similarly defined
A morbid state arising from a diseased body—Regina v Huddersfield, 7 E & B 794, 799, 90 E C L 794, 119 Reprint 1441

85. Ala—National Casualty Co v Hudson, 21 So 2d 568, 570, 32 Ala App 69
Ga—American Life Ins Co of Birmingham, Ala. v Stone, 50 S E 2d 231, 233, 78 Ga.App 98
Mont—Murray Hospital v. Angrove, 10 P.2d 577, 582, 92 Mont 101
Tex—Coca Cola Bottling Co v. Heckman, Civ App, 113 S W 2d 201, 203
58 C.J. p 707 note 45

86. Ala—McAllister v State, 181 So 511, 513, 28 Ala App 213.
N J—Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben Soc, 181 A. 631, 632, 13 N J.Misc 822
N.Y—Kelly v Ancient Order of Hibernians, 9 Daly 289, 291.

87. Neb—Kane v Chicago, etc, R Co, 132 N W. 920, 921, 90 Neb 112, 36 L.R.A ,N S., 1145, Ann Cas.1913A 764.

88. N.Y.—Kelly v Ancient Order of Hibernians, 9 Daly 289, 291.

89. Ind—National Live Stock Ins Co. v Bartlow, 110 N E 224, 226, 60 Ind App. 233.
Neb—Kane v Chicago, etc, R. Co, 132 N W 920, 921, 90 Neb. 112, 36 L R A ,N S., 1145, Ann Cas.1913A 764.

90. Neb—Kane v. Chicago, etc., R. Co., supra

91. Neb—Kane v Chicago, etc, R. Co, supra.

92. Ala—McAllister v. State, 181 So. 511, 513, 28 Ala App. 213.

93. Mont—Murray Hospital v. Angrove, 10 P 2d 577, 581, 92 Mont 101.

94. Mont—Murray Hospital v. Angrove, supra

95. Ala—McAllister v State, 181 So 511, 513, 28 Ala.App 213
Mont—Murray Hospital v. Angrove, 10 P 2d 577, 581, 92 Mont. 101.

96. Ala—McAllister v. State, 181 So. 511, 513, 28 Ala App 213

97. Mont—Murray Hospital v. Angrove, 10 P.2d 577, 581, 92 Mont. 101.
Applies solely to a diseased condition of the organs of the human system
N J—Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben. Soc, 181 A. 631, 632, 13 N J Misc. 822
N Y—Kelly v Ancient Order of Hibernians, 9 Daly 289, 292

98. Mont—Murray Hospital v. Angrove, 10 P 2d 577, 582, 92 Mont. 101.
W Va—Leftwich v. Inter-Ocean Casualty Co, 17 S E 2d 209, 212, 123 W.Va 577
58 C.J. p 707 note 39.

99. W Va—Stockton v. Continental L Ins Co., 141 S.E. 878, 879, 105 W Va. 240—Logan v. Provident Sav L Assur Soc., 50 S E. 529, 533, 57 W Va 384.

1. Cal.—Doody v Davie, 246 P. 339, 340, 77 Cal App 310
Mont.—Murray Hospital v. Angrove, 10 P.2d 577, 582, 92 Mont 101.

2. N.Y—Gaynor v. Jonas, 93 N.Y S. 287, 288, 104 App.Div. 35.

what the term has been held to include[3] or not to include.[4]

"Sickness" has been held equivalent to, or synonymous with, "ailment" see 3 C.J.S. p 506 note 97 2, "disease" see 27 C J.S. p 143 note 85, "illness" see 42 C.J.S. p 385 note 59, and "sick" see supra p 1276 note 78.

It has been distinguished from "disease" see 27 C.J.S. p 144 note 90.

References to the term "sickness" in connection with mutual benefit insurance are made in the title index to Insurance, sub verbo "Mutual benefit insurance."

SICUT. A Latin word meaning "as."[5] It is the introductory word of a number of phrases and maxims.[6]

SIDE. The term "side" has many meanings,[7] and whether one meaning or another is intended depends entirely on the context.[8]

The word is often used to express the idea of a line, edge, or surface,[9] and it may be used of all the bounding surfaces of an object,[10] and in this sense is defined as meaning the margin, edge, verge, or border of a surface;[11] any one of the bounding lines of a surface;[12] the bounding line of a geometrical figure,[13] one of the two terminal surfaces, margins, or lines of an object.[14]

However, the term "side" may not always refer to the border or edge,[15] nor does it always include the marginal parts of a surface,[16] and it may be used as exclusive of parts that may be called top, bottom, edge, or end, etc.[17] It may refer to any part or position viewed as opposite to, or contrasted with, another,[18] and it is sometimes used to express the half or part lying on one side or the other of a central line, either actual or imaginary, drawn through a body;[19] one-half of the body (human or otherwise), considered as opposite to the other half,[20] especially one of the halves of the body lying on either side of the mesial plane, that is, of a plane passing from front to back through the spine.[21]

"Side" is also defined as the position of a person or party regarded as opposed to another person or party.[22]

With reference to courts, "side" means a province or field of jurisdiction.[23]

The word "side" has been distinguished from "edge" see 28 C.J.S. p 829 note 2, "end" see 30

3. Held to include
(1) Diseases of the eyes—Glenn v Gate City Life Ins Co, 18 S E 2d 113, 115, 220 N C. 672—58 C J. p 708 note 56 [a], [b].

(2) Injury, in its popular significance—Murray Hospital v Angrove, 10 P 2d 577, 582, 92 Mont. 101—58 C. J. p 708 note 56 [c].

(3) Insanity
La—Lewis v Liberty Industrial Life Ins. Co, 170 So. 4, 5, 185 La 589, 107 A L R 286.
Mont—Murray Hospital v. Angrove, supra
58 C J p 708 note 56 [d]

(4) Other examples see 58 C.J. p 708 note 56 [e]-[g]

4. Held not to include
(1) Bodily injury unless the general health is impaired—Fazekas v. Perth Amboy Holy Mary Roman Catholic Sick Ben Soc, 181 A. 631, 632, 13 N J Misc 822—58 C.J p 708 note 57 [a] (3).

(2) Pregnancy.—M u t u a l Benefit Health & Accident Ass'n v United Casualty Co, C C A Mass, 142 F 2d 390, 394—58 C J. p 708 note 57 [a] (6).

(3) Other examples see 58 C J p 708 note 57 [a] (1), (2), (4), (5), (7).

5. Burrill L.D

6. Phrases see 58 C.J. p 708 note 69 **Maxims** see 58 C J p 708 notes 70, 71, p 710 notes 73–75.

7. N Y.—White v Knickerbocker Ice Co., 172 N E 452, 454, 254 N Y 152.

8. Ill—Winslow v. Cooper, 104 Ill 235, 243
N Y—White v Knickerbocker Ice Co, 172 N E 452, 454, 254 N.Y 152

9. Ill—Winslow v. Cooper, 104 Ill 235, 243.

10. U S—Koerner v. Deuther, C C N Y., 143 F 544, 545.
58 C J p 710 note 79

11. Ill—People v. Ohio, etc, R Co, 21 Ill App. 23, 27
Me.—Parkman v Freeman, 117 A 301, 302, 121 Me. 341

12. Me—Parkman v. Freeman, supra.
58 C J. p 710 note 80

13. Ill—People v Ohio, etc, R Co, 21 Ill App. 23, 27
Neb—Badura v Lyons, 23 N.W.2d 678, 682, 147 Neb. 442

As, the side of a field, square, river, road, etc.
Neb—Badura v. Lyons, supra.

14. Me—Parkman v Freeman, 117 A 301, 302, 121 Me 341.

15. N.Y—White v Knickerbocker Ice Co., 172 N E 452, 454, 254 N.Y. 152.

16. U S—Koerner v Deuther, C C.N Y, 143 F 544, 545.
58 C J p 711 note 89.

17. U S—Koerner v. Deuther, supra

18. N Y—White v. Knickerbocker, Ice Co, 172 N E 452, 454, 254 N Y. 152.

19. Ill—Winslow v. Cooper, 104 Ill. 235, 243

Construed as meaning "half"
Ill.—Winslow v Cooper, supra.

20. Ill—Winslow v Cooper, supra

21. Ill—Winslow v Cooper, supra
58 C.J. p 711 note 12.

22. Webster New Int.D.

In litigation, the word "side" in the ordinary case means a plaintiff side or a defendant side—Carr v. Davis, 199 N W. 237, 239, 159 Minn. 485.

23. Black L D.
Jurisdiction of courts generally see Courts §§ 15–119, see also Admiralty §§ 5–69, and Equity §§ 7–18.

Thus the same court is said to have different sides; an admiralty court may have an "instance side," distinct from its powers as a prize court, the "crown side," (criminal jurisdiction) is to be distinguished from the "plea side," (civil jurisdiction;) the same court may have an "equity side" and a "law side."—Black L.D

C.J.S. p 241 note 65, and "front" see 37 C.J.S. p 1386 note 82.

Phrases employing the term are set out in the note.[24]

SIDE-KICKER. A coined expression which is said never to have been accorded the dignity of a place in the dictionaries and to be without any standing in lexicology. As a matter of common knowledge, it is not an uncommon expression in the vernacular of the street and is often used in colloquial conversation; and it may with equal propriety express a social relationship between the parties to whom it is applied or convey the idea that they are business partners or have business interests in common.[25]

SIDEMEN. Members of an orchestra other than the leader.[26]

SIDEROSIS. That type of pneumoconiosis which is due to the inhalation of metallic dust.[27]

SIDEWALK. While it has been said that the term "sidewalk" has a definite[28] and well-understood[29] meaning, it has also been stated that the word is a comprehensive one,[30] and that it has no strict legal interpretation, and its meaning and import must be governed by facts showing the limits and extent of the same in the street where it is located.[31]

A sidewalk is a part of the street,[32] and it is that part of a street or highway which is intended for use by pedestrians.[33] It is usually constructed as a part of the street at or along the side of the part thereof especially designed and constructed for the passage of vehicles and animals,[34] and there is often, if not generally, a gutter, which also constitutes a portion of the street, between such parts.[35] When

24. Phrases

(1) "Side-bar rule;" in English practice, there are some rules which the courts authorize their officers to grant as a matter of course without formal application being made to them in open court, and these are technically termed "side-bar rules," because formerly they were moved for by the attorneys at the side bar in court, such, for instance, was the rule to plead, which was an order or command of the court requiring a defendant to plead within a specified number of days. Such also were the rules to reply, rejoin, and many others, the granting of which depended on settled rules of practice rather than on the discretion of the courts, all of which have been rendered unnecessary by statutory changes—Black L D

(2) "Side head" is the name applied to two of the four operating units of a "sticker machine" in a planing mill, they are blocks of iron or steel, on two corners of which are set knives, and they are attached to a short shaft with a pulley on which is the belt running to the power pulley, they operate on the strips of rough lumber, and turn it out at the rear of the machine in the shape of finished molding.—Gardner v. Paine Lumber Co, 101 N W 700, 702, 123 Wis. 338—58 C.J. p 712 note 25.

(3) "Side line" as a term of commercial usage see 54 C J S. p 560 notes 16, 17; see also Boundaries §§ 35 c, 43, and the title index to Mines and Minerals.

(4) "Side set" see ante p 2 note 24.

(5) "Side track" defined see Railroads § 1 p.

(6) Other phrases as to which more recent adjudications have not been found see 58 C J. p 711 notes 91–9, 17–21, p 712 notes 35–38.

25. Cal—Spoon v. Sheldon, 151 P 150, 152, 27 Cal App. 765.
58 C.J. p 712 note 41

26. U S—Williams v. U. S, D.C.Ill., 38 F Supp 536, 541

27. Minn—Golden v. Lerch Bros., 300 N W. 207, 210, 211 Minn 30
"Pneumoconiosis" defined see 72 C.J S. p 158 notes 61–75.
"Silicosis" defined see Post.

28. Mass—Salisbury v. Andrews, 19 Pick 250, 258

29. Ind—Wabash R Co. v De Hart, 65 N.E. 192, 193, 32 Ind.App. 62
Iowa—Central Life Assur Soc v City of Des Moines, 171 N.W. 31, 32, 185 Iowa 573
Mo—Woodson v. Metropolitan St R Co, 123 S W 820, 824, 224 Mo 685, 30 L R A,N.S, 931, 20 Ann.Cas. 1039.
Tenn—Blackburn v Dillon, 225 S W 2d 46, 47, 189 Tenn 240

30. Neb—City of Ord v. Nash, 69 N.W. 964, 965, 50 Neb. 335.

31. N.Y—Porter v. Waring, 69 N.Y. 250, 253, 2 Abb N Cas 230
Pa—Callahan v. A. Wishart & Sons Co, 76 A 2d 386, 388, 365 Pa 498
Similarly stated
The word "sidewalk" has no strict legal interpretation, and what constitutes the sidewalk as contradistinguished from the street must be determined from the facts.—Woodson v. Metropolitan St. R Co., 123 S W 820, 824, 224 Mo 685, 30 L R A.,N.S, 931, 20 Ann Cas. 1039.

32. Colo.—Denver Public Works v. Hayden, 56 P. 201, 204, 13 Colo App 36
Iowa—Central Life Assur. Soc. v. City of Des Moines, 171 N.W. 31, 32, 185 Iowa 573.
Mass—Dickenson v. Worcester, 138 Mass 555, 562.
Mont—Headley v Hammond Bldg, 33 P 2d 574, 576, 97 Mont 243, 93 A L R 794
Ohio—Pitzer v Sears, Roebuck & Co, 31 N E 2d 450, 452, 66 Ohio App. 35

We understand, ex vi termini, that a part of the street is meant.
Ind—Wabash R Co v. De Hart, 65 N E 192, 193, 32 Ind App. 62
Iowa—Central Life Assur. Soc. v. City of Des Moines, 171 N W 31, 32, 185 Iowa 573
Mo—Woodson v Metropolitan St R Co, 123 S.W 820, 824, 224 Mo. 685, 30 L R A,N S., 931, 20 Ann.Cas. 1039.
Tenn—Blackburn v Dillon, 225 S.W. 2d 46, 47, 189 Tenn 240

33. Ga—Hancock v Rush, 183 S E. 554, 561, 181 Ga 587.

34. Ind—Wabash R. Co. v. De Hart, 65 N E 192, 193, 32 Ind App 62
Iowa—Central Life Assur. Soc v. City of Des Moines, 171 N.W 31, 32, 185 Iowa 573.
Mo—Woodson v. Metropolitan St R Co, 123 S.W 820, 824, 224 Mo. 685, 30 L.R A,N S, 931, 20 Ann Cas. 1039.
Tenn.—Blackburn v Dillon, 225 S.W. 2d 46, 47, 189 Tenn. 240.

35. Ind.—Wabash R. Co. v. De Hart, 65 N E. 192, 193, 32 Ind.App 62.
Iowa.—Central Life Assur. Soc v. City of Des Moines, 171 N W 31, 32, 185 Iowa 573
Mo.—Woodson v. Metropolitan St R Co., 123 S.W. 820, 824, 224 Mo 685, 30 L R A.,N.S., 931, 20 Ann Cas. 1039.
Tenn.—Blackburn v. Dillon, 225 S.W. 2d 46, 47, 189 Tenn. 240.

the sidewalk is spoken of as being on a specific side of a designated street, it is understood to be a part so reserved of that street at or along the specific side of the roadway.[36]

While a sidewalk is constructed somewhat differently from other portions of the street which are used by animals and vehicles, generally,[37] the word "sidewalk" does not mean a walk or way constructed of any particular kind of material or in any special manner,[38] and a sidewalk does not necessarily consist of a walk made of boards or a place paved or otherwise improved for the use of foot passengers.[39]

The word "sidewalk" is variously defined as meaning that part of the street assigned to the use of pedestrians;[40] that part of the street upon either side thereof that has been arranged for foot passengers, and not intended for use by vehicles and horsemen;[41] that portion of the street usually devoted to pedestrian travel;[42] that portion of a highway which has been set apart for pedestrians as distinguished from that which is used by vehicles;[43] that part of a street of a municipality which has been set apart and is used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles;[44] that part of a street which the municipal[45] or town[46] authorities have prepared[47] or set apart[48] for the use of pedestrians; the space between the property line and the street curbing, set apart for that purpose,[49] a place set apart at the side of the street for the use of that portion of the public that travels on foot.[50]

"Sidewalk" is also defined as meaning the public way, generally somewhat raised, especially intended for pedestrians and adapted for their use;[51] a raised way for foot passengers at the side of a street or road;[52] a footway for passengers at the side of a street or road;[53] a footwalk by the side of

36. Ind.—Wabash R. Co. v. De Hart, 65 N.E. 192, 193, 32 Ind. App. 62.
Iowa.—Central Life Assur. Soc. v. City of Des Moines, 171 N.W. 31, 32, 185 Iowa 573.
Mo.—Woodson v. Metropolitan St. R. Co., 123 S.W. 820, 824, 224 Mo. 685, 30 L.R.A.,N.S., 931, 20 Ann. Cas. 1039.
Tenn.—Blackburn v. Dillon, 225 S.W. 2d 46, 47, 189 Tenn. 240.

37. Iowa.—Central Life Assur. Soc. v. City of Des Moines, 171 N.W. 31, 32, 185 Iowa 573.
It is paved differently, that the public may be better served by maintaining the two portions of the way separately.—Central Life Assur. Soc. v. City of Des Moines, supra.

38. Minn.—Graham v. Albert Lea, 50 N.W. 1108, 1109, 48 Minn. 201.

39. Okl.—City of Duncan v. Woods, 151 P.2d 923, 925, 194 Okl. 371.—City of Oklahoma City v. Meyers, 46 P. 552, 557, 4 Okl. 686.
Pa.—Callahan v. A. Wishart & Sons Co., 76 A.2d 386, 388, 365 Pa. 498.

40. Ala.—Birmingham v. Shirley, 96 So. 214, 215, 209 Ala. 305.
Similarly defined
(1) That part of a public street or highway designed for the use of pedestrians.—Hancock v. Rush, 183 S.E. 554, 561, 181 Ga. 587.

(2) That part of the street intended only for pedestrians.—Little Rock v. Fitzgerald, 28 S.W. 32, 33, 59 Ark. 494, 28 L.R.A. 496.

(3) That part of the street exclusively reserved for pedestrians.—Central L. Assur. Soc. v. Des Moines, 171 N.W. 31, 32, 185 Iowa 573.

41. Mo.—Woodson v. Metropolitan St. R. Co., 123 S.W. 820, 824, 224 Mo. 685, 30 L.R.A.,N.S., 931, 20 Ann. Cas. 1039.—Murray v. St. Louis Public Service Co., App., 201 S.W. 2d 775, 779.
Phrases
(1) "Sidewalk space" defined as the space from the lot line to the curb.—Chicago Cold Storage Warehouse Co. v. People, 127 Ill. App. 179, 182.

(2) Other phrases as to which more recent adjudications have not been found see 58 C.J. p. 713 notes 81–83.

42. Ohio.—Pitzer v. Sears, Roebuck & Co., 31 N.E.2d 450, 452, 66 Ohio App. 35.
Similarly defined
(1) That portion of the street set aside for the exclusive use of pedestrians.—Streeter v. Breckenridge, 23 Mo. App. 244, 250.

(2) A portion of a public highway appropriated to pedestrians only.—Chicago v. Noonan, 121 Ill. App. 185, 188.

(3) That portion of the public highway which is set apart by dedication, ordinance, or otherwise, for the use of pedestrians.—Ord v. Nash, 69 N.W. 964, 965, 50 Neb. 335.

43. Pa.—McCormick v. Allegheny County, 106 A. 203, 204, 263 Pa. 146.

44. Minn.—Graham v. Albert Lea, 50 N.W. 1108, 1109, 48 Minn. 201.

45. Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 281, 394 Ill. 248.—Kohlhof v. Chicago, 61 N.E. 446, 192 Ill. 249, 85 Am.S.R. 335.

46. N.C.—Ham v. City of Durham, 170 S.E. 137, 138, 205 N.C. 107.—Hester v. Durham Tract Co., 50 S.E. 711, 713, 138 N.C. 288, 1 L.R.A., N.S., 981.

47. Ill.—Kohlhof v. Chicago, 61 N.E. 446, 192 Ill. 249, 85 Am.S.R. 335.

48. Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 281, 394 Ill. 248.
N.C.—Ham v. City of Durham, 170 S.E. 137, 138, 205 N.C. 107.—Hester v. Durham Tract. Co., 50 S.E. 711, 713, 138 N.C. 288, 1 L.R.A.,N.S., 981.

49. Ky.—Holmes v. Heeter, 142 S.W. 210, 211, 146 Ky. 52, 38 L.R.A.,N.S., 935.
Similarly stated
The space left on the side of a street and usually along its borders and inside of the curbing for foot passengers.—Asphalt & Granitoid Constr. Co. v. Haeussler, Mo. App., 80 S.W. 5, 7.

50. Okl.—City of Duncan v. Woods, 151 P.2d 923, 925, 194 Okl. 371.—City of Oklahoma City v. Meyers, 46 P. 552, 557, 4 Okl. 686.
Pa.—Callahan v. A. Wishart & Sons Co., 76 A.2d 386, 388, 365 Pa. 498.

51. Ind.—Wabash R. Co. v. De Hart, 65 N.E. 192, 193, 32 Ind. App. 62.
Iowa.—Central Life Assur. Soc. v. City of Des Moines, 171 N.W. 31, 32, 185 Iowa 573.
Mo.—Woodson v. Metropolitan St. R. Co., 123 S.W. 820, 824, 224 Mo. 685, 30 L.R.A.,N.S., 931, 20 Ann. Cas. 1039.
Tenn.—Blackburn v. Dillon, 225 S.W. 2d 46, 47, 189 Tenn. 240.
Similarly defined
A public way, especially intended for pedestrians.—Russo v. Pueblo, 168 P. 649, 650, 63 Colo. 519.

52. Colo.—Denver Public Works v. Hayden, 56 P. 201, 204, 13 Colo. App. 36.
58 C.J. p. 713 note 63.

53. Ind.—Marion Trust Co. v. Indianapolis, 75 N.E. 834, 836, 37 Ind. App. 672.

a street or road;[54] a walk along a highway;[55] a way for foot passengers;[56] a foot pavement.[57]

It has been said that the word "sidewalk," taken in its ordinary and familiar acceptation, with regard to its general and popular use, does not include driveways,[58] and neither does it include a path constructed for the use and convenience of bicycle riders, and which has never been designated, set apart, or used as a sidewalk.[59] However, the term "sidewalk" may include a dirt approach to a bridge, with a stone wall on each side, stringers laid on the dirt, and a plank walk laid on the stringers for foot passengers,[60] and it may include a space on the side of a public bridge reserved for use of pedestrians crossing a river between two streets.[61] Where a sidewalk has become unsuitable, another part of the street, made constant use of by the public for foot passage, may become a sidewalk, within the usual meaning of the term.[62]

"Sidewalk" has been distinguished from "crosswalk" see 25 C.J.S. p 12 note 60, although a street crossing may be considered in a sense as a part of the sidewalk;[63] "sidewalk" has also been distinguished from "pavement" see 70 C.J.S. p 185 note 36.

Sidewalks are treated in various connections throughout this work, and for specific references consult the indexes to the titles Highways, Landlord and Tenant, Motor Vehicles, and Municipal Corporations. See also the Descriptive-Word Index.

SIDING. As a railroad term see Railroads § 1 k.

SIERRA. A bridge of mountains and craggy rocks with a serrated or irregular outline.[64]

SIGHT. The word "sight" is defined as meaning the power of seeing; the faculty of vision or of perceiving objects;[65] also, act of seeing; perception of objects by the instrumentality of the eyes; view.[66] Sight is a sense,[67] one of the five senses with which man is endowed by nature,[68] and it is not an organ.[69]

SIGHT-SEEING BUS. See the index to the title Motor Vehicles.

SIGILLUM. A Latin term; in old English law, a seal; originally and properly a seal impressed upon wax.[70] It is synonymous with "signum."[71]

As the first word of a maxim as to which there have been no recent applications see 58 C.J. p 714 note 2.

54. Colo.—Denver Public Works v Hayden, 56 P 201, 204, 13 Colo App 36

55. N.Y.—People v Meyer, 56 N.Y S 1097, 1099, 26 Misc. 117, 14 N.Y Cr. 57.

56. Colo.—Russo v Pueblo, 168 P 649, 650, 63 Colo. 519.
Mass.—Salisbury v. Andrews, 19 Pick. 250, 258.

57. Colo.—Denver Public Works v Hayden, 56 P 201, 204, 13 Colo App 36.
Kan.—Challiss v. Parker, 11 Kan. 384, 391
N.Y.—Porter v. Waring, 51 How Pr 295, 296

Similarly defined

(1) A paved way.—Asphalt & Granitoid Constr Co v Haeussler, Mo. App., 80 S W. 5, 7

(2) A pavement.—Little Rock v Fitzgerald, 28 S W. 32, 33, 59 Ark 494, 28 L.R A 496.

(3) A paved or otherwise prepared way for pedestrians in a town, separated from the roadway by a curb or gutter.—Denver Public Works v. Hayden, 56 P. 201, 204, 13 Colo App 36.

(4) A pavement or something in the nature of a pavement, laid or constructed on the portion of the street set apart for travelers on foot.—Denver Public Works v. Hayden, supra

58. Ill.—City of Elmhurst v. Buettgen, 68 N E.2d 278, 282, 394 Ill. 248

59. N Y.—Schell v. Town of German Flats, 108 N.Y S 219, 220, 123 App Div 197.

60. Mich.—Saunders v. Gun Plains Tp., 42 N W. 1088, 76 Mich 182.

61. Tex.—San Antonio v. Haynes, Civ App., 5 S W 2d 205, 207.

62. Iowa.—Rea v. Sioux City, 103 N W 949, 950, 127 Iowa 615.

63. Va.—Richmond v. Schonberger, 68 S E 284, 285, 111 Va 168, 29 L. R A.,N.S., 180

64. Webster New Int D

"**The natural meaning** of the term 'sierra' would seem to point to a great mountain chain, rather than to a range of hills parallel to it and separated from it, except at one point where the two ranges are connected by a narrow ridge or divide."—U S v. Fossat, D.C.Cal., 25 F.Cas No 15,139, Hoffm Land Cas. 376.

65. U.S.—Stewart v Home Life Ins. Co of New York, D.C.Colo., 29 F Supp. 834, 835.
Me.—Tracey v Standard Acc. Ins. Co., 109 A. 490, 494, 119 Me. 131, 9 A.L R. 521.
Miss.—Locomotive Engineers' Mut Life & Acc. Ins. Co. v. Meeks, 127 So 699, 703, 157 Miss 97.

Phrases

(1) "Sight draft" see the title index to Bills and Notes.

(2) Other phrases as to more recent adjudications have not been found see 58 C J p 714 notes 93–95, 97, 98

66. U S.—Stewart v. Home Life Ins. Co of New York, D.C.Colo., 29 F. Supp 834, 835
Me.—Tracey v Standard Acc. Ins. Co., 109 A. 490, 494, 119 Me 131, 9 A L R 521.
Miss.—Locomotive Engineers' Mut. Life & Acc Ins Co. v Meeks, 127 So. 699, 703, 157 Miss. 97.

Similarly defined

The power of perception of external objects through the eye.—Texas Employers Ins Ass'n v. Thrash, Tex Civ App., 136 S W.2d 905, 908

67. Tex.—Texas Employers Ins. Ass'n v. Thrash, supra.

68. U.S.—Stewart v. Home Life Ins Co. of New York, D.C Colo., 29 F. Supp. 834, 835.

69. Tex.—Texas Employers Ins. Ass'n v. Thrash, Civ App., 136 S.W 2d 905, 908.

70. Black L.D.

71. S C.—Relph v. Gist, 15 S C.L. 267, 270
58 C J. p 714 note 1.

SIGN. The word "sign" has a number of meanings.[72]

As a noun, it is defined as meaning a lettered board, or other conspicuous notice,[73] placed on or before a building, room, shop, or office to advertise the business there transacted, or the name of the person or firm there conducting it;[74] an inscribed board, plate, space, or the like serving for information, guidance, advertisement, etc., as on or before a building or a place of business, or along a street or road;[75] an inscription or representation to indicate a place of business;[76] a token; emblem;[77] a publicly displayed token or notice;[78] an arbitrary mark; symbol;[79] a signum.[80] In a different sense, it is defined as meaning a pantomimic gesture.[81]

The noun "sign" has been held synonymous with "lettering" see 52 C.J.S. p 1054 note 2, and it has been distinguished from "signal."[82]

The verb "to sign" is defined and distinguished from "to subscribe" in Signatures § 1, and reference is there made to phrases employing the word "sign" as a verb.

SIGNAL. The noun "signal" is defined as meaning a sign made to give notice of something, as of a command or danger;[83] a sign, event, or watchword which has been agreed on as the occasion of concerted action; that which incites to action; an initial cause or impulse.[84] It has been distinguished from "sign" see supra note 82.

The verb "signal" is defined as meaning to communicate by means of an understood sign.[85]

Many of the rules of navigation which are designed to prevent marine collisions provide for the giving of signals, either visible or audible or both. These rules specify the signals which shall be given in particular situations, as when a vessel is enshrouded by fog, or when a vessel is engaged in fishing, or in towing, or is at anchor, or is in distress, and are treated in their various aspects in the title Collision; and for specific references see the index to that title.

Reasonable care in the operation of a motor vehicle may require that a motorist give warning signals of his approach as stated in Motor Vehicles § 288 a, and a considerable part of automobile law deals with the signals which are required and the liability which attaches when such signals are not given or are given improperly; and for specific references see the title index.

In railroad terminology a "signal" is the doing of some act whereby notice or warning is given, such as ringing a bell, blowing a whistle, waving a lantern, or shooting a torpedo as stated in Railroads § 1 *l*, and various railroad signals are there defined. For other references see the title index.

Signals are treated in various other titles through-

72. Kan.—Coleman v. St Louis-San Francisco R. Co., 286 P. 254, 257, 130 Kan. 325
As a railroad term see Railroads § 1 r.

Various meanings
U.S.—Diederich v. W. Schneider Wholesale Wine & Liquor Co., Mo., 195 F. 35, 38, 115 C.C.A. 37

73. Ga.—Pullman Co. v. Carter, 6 S.E.2d 351, 355, 61 Ga.App. 543.
Kan.—Coleman v. St. Louis-San Francisco R. Co., 286 P. 254, 257, 130 Kan. 325.
Tex.—State Board of Dental Examiners v. Bickham, Civ.App., 203 S.W.2d 563, 567.

"Stop sign"
(1) A traffic sign or signal requiring all traffic to stop before entering into or crossing an intersection—Sweet v. Awtrey, 28 S.E.2d 154, 161, 70 Ga.App. 334.

(2) By common usage, the term has acquired the meaning of a legally erected and maintained traffic signal.
Ga.—Sweet v. Awtrey, supra
N.Y.—Meadows v. Lewis, 257 N.Y.S. 137, 139, 235 App.Div. 243.

Other phrases
(1) "Skeletonized sign" defined as a hollow sign with steel sides and glass letters.—Berkau v. Little Rock, 298 S.W. 514, 515, 174 Ark. 1145

(2) "Sky sign," any letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction, supported or attached wholly or in part over or above any wall, building, or structure—People v. Murphy, 113 N.Y.S. 855, 857, 129 App.Div. 260. Distinguished from "building" see 12 C.J.S. p. 382 note 53.

(3) Additional phrases as to which more recent adjudications have not been found see 58 C.J. p. 714 note 11-13

74. Kan.—Coleman v. St. Louis-San Francisco R. Co., 286 P. 254, 257, 130 Kan. 325.
Tex.—State Board of Dental Examiners v. Bickham, Civ.App., 203 S.W.2d 563, 567.

75. Tex.—State Board of Dental Examiners v. Bickham, supra.

76. U.S.—Diederich v. W. Schneider Wholesale Wine & Liquor Co., Mo., 195 F. 35, 38, 115 C.C.A. 37.

77. U.S.—Diederich v. W. Schneider Wholesale Wine & Liquor Co., supra

78. Ga.—Pullman Co. v. Carter, 6 S.E.2d 351, 355, 61 Ga.App. 543
Kan.—Coleman v. St. Louis-San Francisco R. Co., 286 P. 254, 257, 130 Kan. 325
Tex.—State Board of Dental Examiners v. Bickham, Civ.App., 203 S.W. 2d 563, 567.

79. U.S.—Diederich v. W. Schneider Wholesale Wine & Liquor Co., Mo., 195 F. 35, 38, 115 C.C.A. 37.

80. N.J.—In re Bullivant, 88 A. 1093, 1094, 82 N.J.Eq. 340, 51 L.R.A.,N.S., 169, Ann.Cas. 1915C 72.

81. U.S.—Diederich v. W. Schneider Wholesale Wine & Liquor Co., Mo. 195 F. 35, 38, 115 C.C.A. 37

82. Kan.—Coleman v. St. Louis-San Francisco R. Co., 286 P. 254, 257, 130 Kan. 325.

83. Kan.—Coleman v. St. Louis-San Francisco R. Co., 286 P. 254, 257, 130 Kan. 325.

84. Kan.—Coleman v. St. Louis-San Francisco R. Co., supra.

85. Cal.—Nilson v. Oakland Tract. Co., 101 P. 413, 415, 10 Cal.App. 103.

out this work and reference is made to the indexes to the titles Carriers and Master and Servant. See also Mines and Minerals § 3 h.

Phrases employing the term are set out in the note.[86]

SIGNATURE. The term, as indicating whatever mark, symbol, or device one may choose to employ as representative of himself, is treated in Signatures § 1 et seq.

Signature within the meaning of the statute of frauds, see Frauds, Statute of §§ 201–215, and in connection with the execution of wills see the C.J.S. title Wills §§ 169–177, also 68 C.J. p 652 note 42–p 668 note 59.

In bookbinding, the word "signature" is defined as meaning a sheet of paper to be folded into four, eight, or sixteen pages.[87]

86. Phrases

(1) "Signal flag" as equivalent to "burgee" see 12 C J S. p 561 note 12

(2) "Signal of distress" described as a request for assistance see 27 C.J S p 362 note 93.1.

(3) "Traffic signals" see the indexes to the titles Highways and Motor Vehicles, and Municipal Corporations sub verbo "Streets or other public ways."

(4) Other phrases as to which more recent adjudications have not been found see 58 C J. p 715 notes 38, 39, 42–45

87. Iowa—State v. Young, 110 N. W. 292, 294, 134 Iowa 505, 13 Ann. Cas. 345.

SIGNATURES

This Title includes names of parties to instruments in writing, affixed to such instruments to give them validity or authenticate them, necessity, making and sufficiency thereof in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Definition, necessity, purpose, and intent—p 1284
2. Requisites and validity—p 1286
3. —— Use of initials and abbreviations—p 1288
4. —— Mark as signature—p 1289
5. —— By hand of party—p 1291
6. —— By hand of another—p 1291
7. —— Mode of affixing—p 1292
8. —— Evidence—p 1294
9. —— Official signatures—p 1295

See also descriptive word index in the back of this Volume

§ 1. Definition, Necessity, Purpose, and Intent

a. Definitions and distinctions
b. Necessity
c. Purpose and intent

a. Definitions and Distinctions

The word "sign," used as a verb, may be defined to mean to affix a signature; to ratify by hand or seal; to subscribe in one's own handwriting. The word "signature" may be defined as a name, mark, or sign affixed to, or made on, an instrument or document in token of knowledge, approval, acceptance, or obligation.

The verb "to sign" is defined as meaning "to affix a signature to,[1] to ratify by hand or seal,[2] to subscribe in one's own handwriting;"[3] to show or declare assent, or attention, by some sign or mark;[4] to write one's name on paper, or to show or declare assent or attestation by some sign or mark,[5] and, as applied to a written instrument, ordinarily it indicates the signing with one's own hand.[6] A signature has also been defined as the act of putting down a person's name at the end of an instrument to attest its validity,[7] any mark or sign made on an instrument or document in token of knowledge, approval, acceptance, or obligation;[8] and also as whatever mark, symbol, or device one may choose to employ as representative of himself.[9] Stated in greater detail, in legal contemplation "to sign" means to attach a name or cause it to be attached by any of the known methods of impress-

1. D C—McGrady v. Munsey Trust Co, Mun.App, 32 A.2d 106.
Okl—City of Muskogee v. Senter, 96 P 2d 534, 536, 186 Okl 174
Tex—Zaruba v Schumaker, Civ App, 178 S W 2d 542, 543.
58 C.J p 718 note 1.
"Countersign" defined see the definition Countersign 20 C J.S pp 743, 744.

Phrases using word "sign" or "signed"
Ill.—Bamberger v Barbour, 167 N.E 122, 335 Ill. 458
58 C.J. p 714 note 16–p 715 note 29.

2. Tex.—Zaruba v Schumaker, Civ. App., 178 S W 2d 542, 543.
58 C.J. p 718 note 1.

3. Me.—Wamesit Nat. Bank v. Merriam, 96 A 740, 741, 114 Me. 437.
Tex—Zaruba v. Schumaker, Civ App., 178 S W 2d 542, 543.
58 C J. p 718 notes 1, 3.

4. N Y—Davis v. Shields, 26 Wend 341, 356

5. N Y—James v. Patten, 6 N.Y. 9, 13, 55 Am D 376.
58 C J. p 718 note 4.

6. Ga—Hansen v Owens, 64 S E 800, 803, 132 Ga 648.
58 C J p 718 note 5.

7. S C—Smith v. Greenville County, 199 S E 416, 419, 188 S C. 349.
58 C.J. p 718 note 8.

End of instrument
The ordinary legal meaning of the word "signature" is that the person's name has been written at the end of the instrument—Ashbrook v. Roberts, 82 Ky. 298, 301, 62 Ky.L. 317.

8. Cal.—In re Manchester's Estate, 163 P. 358, 360, 174 Cal 417, L R A. 1917D 629, Ann Cas.1918B 227—In re Walker, 42 P. 815, 816, 110 Cal. 387, 52 Am S R. 104, 30 L R.A 460—Weiner v. Mullaney, 140 P.2d 704, 712, 59 Cal App 2d 620.
Tex—Bustillos v State, 213 S.W.2d 837, 841, 152 Tex.Cr. 275.

9. U.S—Joseph Denunzio Fruit Co. v. Crane, D C Cal, 79 F Supp. 117, 128, affirmed, C A., 188 F.2d 569, certiorari denied 72 S.Ct. 37, 342 U S 820, 96 L Ed ——.
58 C.J. p 718 note 9.

ing the name on paper with the intention of signing it.[10]

A signature consists both of the act of writing the person's name and of the intention of thereby finally authenticating the instrument.[11]

While by long usage and custom "signature" has come generally to mean the name of a person written by himself, his autograph,[12] that signification is derivative, and is not inherent in the word itself.[13]

Other terms compared or distinguished. The words "subscribe" and "sign," are to be distinguished,[14] as are also the words "subscribed" and "signed."[15] The word "sign," used as a verb, and forms thereof, generally have a more comprehensive meaning than the word "subscribe" and forms thereof.[16] "To sign" applies to every species of written authentication, while "to subscribe" indicates the making of a particular kind of signature.[17] At common law an instrument might be "signed" by placing the signature anywhere on it, but "subscribing" a writing means, generally, a signature at the end or bottom thereof.[18] However, under some circumstances the words "signed" and "subscribed" have been regarded as interchangeable,[19] and the word "subscribe" or "subscribed" has been held to mean "sign" or "signed,"[20] and the word "signed" has been construed to mean "subscribed."[21]

A distinction in meaning has been recognized between "execute" and "sign,"[22] between "executed" and "signed,"[23] and between "execution" and "signing"[24] or "signature,"[25] but under some circumstances "executed" has been regarded as synonymous with "signed"[26] or "signature,"[27] and "execution" has been regarded as synonymous with

10. Ky.—Pardue v. Webb, 70 S.W. 2d 665, 666, 253 Ky. 838.
S. C.—Smith v. Greenville County, 199 S.E. 416, 418, 188 S.C. 349.
58 C.J. p. 718 note 6.

In primary sense

(1) "To sign" is to make any mark
Cal.—In re Manchester's Estate, 163 P. 358, 360, 174 Cal. 417, L.R.A. 1917D 629, Ann.Cas.1918B 227—In re Walker, 42 P. 815, 816, 110 Cal. 387, 52 Am.S.R. 104, 30 L.R.A. 460—Weiner v. Mullaney, 140 P.2d 704, 712, 59 Cal.App.2d 620.
Tex.—Bustillos v. State, 213 S.W.2d 837, 841, 152 Tex.Cr. 275.

(2) "To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation."
Cal.—In re Manchester's Estate, supra—In re Walker, supra—Weiner v. Mullaney, supra.
Tex.—Bustillos v. State, supra.
58 C.J. p. 718 note 6 [a].

11. Ark.—Lee v. Vaughan's Seed Store, 141 S.W. 496, 498, 101 Ark. 68, 37 L.R.A.,N.S., 352.
58 C.J. p. 718 note 7.

Similar definitions

(1) The term "signature" includes any memorandum, mark, or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.
U.S.—Joseph Denunzio Fruit Co. v. Crane, D.C.Cal., 79 F.Supp. 117, 128, affirmed, C.A., 188 F.2d 569, certiorari denied 72 S.Ct. 37, 342 U.S. 820, 96 L.Ed. ——.
N.Y.—In re Romaniw's Will, 295 N.Y.S. 925, 933, 163 Misc. 481.

(2) Other similar definitions.
Okl.—Boyer v. State, 97 P.2d 779, 786, 68 Okl.Cr. 220—Moss v. Arnold, 75 P.2d 491, 501, 63 Okl.Cr. 343.
Or.—Toon v. Wapinitia Irr. Co., 243 P. 554, 557, 117 Or. 374.
58 C.J. p. 718 note 7 [a].

"Signing consists both of the act of writing a person's name and the intention in doing this to execute [or] authenticate"—U.S. Fidelity, etc., Co. v. Siegmann, 91 N.W. 473, 474, 87 Minn. 175.

12. Cal.—In re Walker, 42 P. 815, 816, 110 Cal. 387, 52 Am.S.R. 104, 30 L.R.A. 460.
58 C.J. p. 718 note 10.

13. Cal.—In re Walker, supra.

14. Miss.—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388—Armstrong v. Walton, 62 So. 173, 175, 105 Miss. 337, 46 L.R.A.,N.S., 552, Ann.Cas.1916E 137.

15. Miss.—In re George's Estate, 45 So.2d 571, 572—Baker v. Baker's Estate, 24 So.2d 841, 843, 199 Miss. 388—Better v. Hirsch, 76 So. 555, 556, 115 Miss. 614.
Or.—Commercial Credit Corporation v. Marden, 62 P.2d 573, 576, 578, 155 Or. 29, 112 A.L.R. 931.

16. Ind.—Hamilton v. State, 2 N.E. 299, 300, 103 Ind. 96, 53 Am.R. 491.
58 C.J. p. 718 note 13 [a] (1), (3).
"Subscribe" defined as a verb see the C.J.S. definition Subscribe, also 60 C.J. p. 838 note 2—p. 840 note 42.

17. N.Y.—James v. Patten, 6 N.Y. 9, 55 Am.D. 376.

18. Ky.—Terrell v. Commonwealth, 240 S.W. 81, 194 Ky. 608.
N.Y.—Davis v. Shields, 26 Wend. 341, 358—Miller v. Pelletier, 4 Edw. 102, 106—Matter of Strong, 15 N.Y.S. 104, 2 Conn.Surr. 574.
58 C.J. p. 718 note 13.
Location of signature generally see infra § 2 b.

19. Cal.—California Canneries Co. v. Scatena, 49 P. 462, 117 Cal. 447—In re Walker's Estate, 42 P. 815, 110 Cal. 387, 30 L.R.A. 460, 52 Am.S.R. 104.
Neb.—Myers v. Moore, 110 N.W. 989, 990, 78 Neb. 448.

20. Neb.—Myers v. Moore, supra.
58 C.J. p. 719 note 14.

21. Tex.—Wade v. State, 2 S.W. 594, 22 Tex.App. 256.
58 C.J. p. 719 note 14 [a].

22. Me.—Wamesit Nat. Bank v. Merriam, 96 A. 740, 741, 114 Me. 437.

Distinction stated

"To 'sign' one must subscribe in his own handwriting, to 'execute' he may use the hand of another."—Wamesit Nat. Bank v. Merriam, supra.

23. Me.—Wamesit Nat. Bank v. Merriam, supra.
23 C.J. p. 279 note 60 [a].

24. N.Y.—Hayes v. Ammon, 85 N.Y.S. 607, 608, 90 App.Div. 604.

Distinction stated

"Execution implies complete execution—signing, sealing, and delivery—whereas signing implies only one of the steps towards execution."—Hayes v. Ammon, supra.

25. Me.—Wamesit Nat. Bank v. Merriam, 96 A. 740, 741, 114 Me. 437.

26. N.Y.—In re Livingston, 115 N.Y.S. 269, 270, 62 Misc. 334.
W.Va.—Bensimer v. Fell, 12 S.E. 1078, 1084, 35 W.Va. 15, 31, 29 Am.S.R. 774.
Wis.—Nielson v. Schuckman, 11 N.W. 44, 46, 53 Wis. 638, 643.
23 C.J. p. 279 note 60 [a] (2).

27. Wis.—Nielson v. Schuckman, 11 N.W. 44, 46, 53 Wis. 638.

"signed,"[28] "signing,"[29] or "signature."[30]

An indorsement may be equivalent to a signature.[31]

b. Necessity

In the absence of a statutory requirement of signature, a party to an instrument or document may be bound by it even though he has not affixed his signature.

Instruments not required to be in writing or signed by the parties may be binding if accepted by the parties although not signed.[32] In the absence of a statutory requirement of signature, it is not essential to the validity of a sealed instrument that the obligor sign it; sealing it is sufficient.[33] When a signature is essential to the validity of an instrument, an acknowledgment is not a substitute therefor, or proof that it has been signed.[34]

c. Purpose and Intent

A signature is affixed to a writing for the purpose of authenticating it and for the purpose and with the intent that the signer shall be bound by the writing.

The signature to a writing is placed there for the purpose of authenticating it[35] or to give notice of its source,[36] and for the purpose and with the intent that the individual signing the writing shall be bound thereby.[37]

§ 2. Requisites and Validity

a. In general
b. Location
c. Adoption of signature

a. In General

Generally, if there is a requirement that an instrument shall be signed or subscribed, it is sufficient if the signature is affixed in any manner which is commonly used. In the absence of statute providing otherwise, a person may use as his signature any character, symbol, figures, designation, or name other than his own, provided such form is used as a substitute for the name of such person.

Where an instrument is required to be signed, it is usually sufficient if the signature is affixed in any manner which is commonly used,[38] and a like rule applies when subscription is required.[39] Variance between signature and name in body of instrument is not necessarily fatal to the validity of the instrument.[40]

As a general rule and in the absence of a statute providing otherwise, a person may use any character,[41] symbol,[42] figures,[43] or designation[44] he thinks proper to adopt as a signature, and be bound thereby, provided it is used as a substitute for his name.[45] A person may also use a fictitious name,[46] a firm name,[47] or the name of another;[48] and a signature used by a person may be sufficient to give validity to an instrument even though it is illegi-

28. Wis.—Nielson v. Schuckman, supra.

29. Cal.—Knowles v Murphy, 40 P. 111, 113, 107 Cal 107—King v. Tarabino, 199 P. 890, 893, 35 Cal. App. 157
23 C J. p 279 note 60 [a] (4).

30. Cal—King v Tarabino, supra
Wis—Nielson v. Schuckman, 11 N.W 44, 46, 53 Wis 638.

31. N Y—People v. Chapman, 4 Park Cr 56, 58.
58 C J p 718 note 9 [b].

32. Ga—Delaware Ins. Co v. Pennsylvania F Ins Co., 55 S E. 330, 126 Ga 380, 7 Ann.Cas. 1134
58 C J. p 719 note 15

33. Miss—State v. Martin, 56 Miss. 108
58 C J. p 719 note 16.

34. Miss—Jones v. Gurlie, 61 Miss 423.

35. Iowa—Town of Grundy Center v Marion, 1 N.W.2d 677, 231 Iowa 425.
Minn.—Brown v State Automobile Ins. Ass'n of Des Moines, Iowa, 12 N.W 2d 712, 216 Minn. 329.
N.Y.—Dorian Holding, etc, Corp v Brunswick Terminal, etc, Securities Co, 245 N Y S 410, 230 App Div. 514.
58 C.J. p 719 note 18.

36. Iowa—Town of Grundy Center v. Marion, 1 N W.2d 677, 231 Iowa 425.

37. Ky—Pontrich v. Neimann, 271 S W 1049, 208 Ky. 715.
58 C J p 719 note 19, p 720 note 20

38. Ky.—W. J. Fell Co. v. Elswick, 240 S W. 373, 194 Ky. 641.
58 C.J. p 720 note 22

39. Wis.—Mezchen v. More, 11 N W 534, 54 Wis 214.
58 C J. p 720 note 23.

40. Mich—Torrans v. Hicks, 32 Mich. 307.

41. Ark.—**Corpus Juris quoted in** Walker v. Emrich, 206 S W 2d 769, 770, 212 Ark 598.
Pa—**Corpus Juris quoted in** Tomilio v. Pisco, 187 A. 86, 89, 123 Pa. Super 423.
58 C J. p 720 note 25.

42. Ark.—**Corpus Juris quoted in** Walker v. Emrich, 206 S W 2d 769, 770, 212 Ark 598
Pa—**Corpus Juris quoted in** Tomilio v. Pisco, 187 A. 86, 89, 123 Pa Super 423.
58 C.J p 720 note 26.

43. Ark—**Corpus Juris quoted in** Walker v Emrich, 206 S.W.2d 769, 770, 212 Ark 598
Pa—**Corpus Juris quoted in** Tomilio v. Pisco, 187 A. 86, 89, 123 Pa. Super. 423.
58 C J. p 720 note 27.

44. Ark—**Corpus Juris quoted in** 206 S W 2d 769, 770, 212 Ark 598.
Pa—**Corpus Juris quoted in** Tomilio v. Pisco, 187 A. 86, 89, 123 Pa Super 423
58 C J. p 720 note 28.

45. Ark—**Corpus Juris quoted in** Walker v. Emrich, 206 S.W 2d 769, 770, 212 Ark 598.
Pa—**Corpus Juris quoted in** Tomilio v. Pisco, 187 A. 86, 89, 123 Pa. Super 423.
58 C J. p 721 note 29.

46. Ark—**Corpus Juris quoted in** Walker v. Emrich, 206 S W 2d 769, 770, 212 Ark 598.
58 C J p 721 note 30—45 C.J. p 376 note 4.

47. Ark.—**Corpus Juris quoted in** Walker v. Emrich, 206 S W.2d 769, 770, 212 Ark 598.
58 C J. p 721 note 31.

48. Ark.—**Corpus Juris quoted in** Walker v. Emrich, 206 S.W.2d 769, 770, 212 Ark 598.
Mo.—Radley v Meek, 165 S.W. 1192, 178 Mo App 238.
45 C.J. p 376 note 4.

ble.[49] It is not necessary that the entire name should be written,[50] and the insertion in, or the omission from, a signature of a middle name is immaterial.[51] A form of signature prescribed by statute is not exclusive of any other method legally sufficient to accomplish the same result.[52] The fact that the word "signed" is inserted before a signature does not render the signature insufficient.[53]

By whom made A signature may be made by the purported signer himself, as shown infra § 5, or through someone duly authorized by him,[54] but but the name of a person attached to a paper does not make it his act and deed unless he put it there himself or caused or permitted it to be put there by another.[55] Under a statute requiring an instrument to be signed in person,[56] or using similar words,[57] the signature must be made by the person's own hand or by another at his request and in his presence, and previous authority or subsequent ratification is not sufficient.[58]

b. Location

The usual place of a signature is at the end of the matter or instrument which is to be authenticated or attested, and it is sometimes essential that the signature should be so placed; but generally, in the absence of statutory requirement as to location, a signature placed in any part of the instrument is sufficient.

The usual place for a signature is at the end of the matter or instrument which is to be authenticated or attested;[59] it is proper to place the signature at the end,[60] and it is sometimes necessary to do so,[61] as, for example, according to some authorities, where a statute provides that an instrument or writing shall be subscribed,[62] although there is authority for the view that, under some statutes providing that an instrument shall be subscribed, it is not essential that the signature should be affixed at the end.[63]

Generally, in the absence of a statutory requirement as to the location of a signature, the place of a signature on a writing is not controlling,[64] it is not necessary that the signature appear at the end of the instrument,[65] and the signature may be sufficient if the name of the person whose signature is required is placed by him in any part of the instrument,[66] according to the decisions on the ques-

49. Pa.—Tomilio v. Pisco, 187 A. 86, 123 Pa Super 423.
58 C.J p 721 note 33

50. N.Y.—**Corpus Juris quoted in** Wagner v. Chemical Bank & Trust Co., 276 N.Y.S. 717, 719, 154 Misc. 123.
58 C.J. p 721 note 34.

51. Ala.—Williams v State, 31 So 2d 590, 33 Ala App 119, affirmed 31 So 2d 592, 249 Ala. 432

52. Ky.—Pardue v. Webb, 70 S.W 2d 665, 253 Ky 838.
58 C J p 721 note 35.

53. Cal.—People v. Crane, 87 P. 239, 4 Cal App 142
58 C J p 725 note 87

54. Ala.—Mayhall v. Hyde, 113 So 490, 22 Ala App. 109, certiorari denied 113 So 492, 216 Ala 428.
58 C.J p 726 note 95.
Signature by hand of another see infra § 6.

55. Ariz.—Lally v. Cash, 164 P. 443, 18 Ariz. 574.

56. Mass.—Commonwealth v. Connelly, 40 N.E 862, 163 Mass. 539.
58 C J p 726 note 97

57. Wis.—Mericle v. Mulks, 1 Wis 366.
58 C J. p 726 note 98.

58. Mass.—Commonwealth v. Connelly, 40 N E 862, 163 Mass 539
Wis.—Mericle v. Mulks, 1 Wis. 366.

59. Ga.—Delaware Ins Co. v Pennsylvania F Ins. Co., 55 S E. 330, 126 Ga. 380, 7 Ann Cas 1134
Ky.—Ashbrook v. Roberts, 82 Ky. 298, 62 Ky L. 317.
Minn.—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, 12 N.W.2d 712, 216 Minn 329.

60. U.S.—**Corpus Juris cited in** U S. v. Railway Express Agency, 28 C C P A. 314, 325.
58 C J. p 725 note 81.
Signature to affidavit below jurat see Affidavits § 20 a (2) (b).

61. N J.—Pincers v. Robertson, 24 N.J.Eq. 348.
Sufficiency of signature
Under statute requiring signature at end or close of a writing, if a signature be sufficiently near the end of a writing as to afford a reasonable inference that the signer intended to indicate that all he wished to authenticate and to which he proposed to be bound had been fully and completely expressed, such a signature will satisfy the statute.—Gentry v Gentry, 293 S W 1094, 219 Ky. 569

62. Ind.—Wild Cat Branch v. Ball, 45 Ind 213.
N.Y.—James v. Patten, 6 N.Y. 9, 55 Am D 376
Tex.—Lawson v. Dawson, 53 S W 64, 21 Tex.Civ App 361
Name in body of instrument
Where a statute requires that an instrument be subscribed, the name in the body of the instrument is not sufficient.—Wild Cat Branch v. Ball, 45 Ind. 213—58 C.J. p 726 note 93.

63. Neb.—Dollarhide v. James, 186 N W. 989, 107 Neb 624—Myers v. Moore, 110 N W. 989, 78 Neb. 448.
"Sign" and "subscribe" compared and distinguished see supra § 1 a.

64. Minn.—Brown v. State Automobile Ins. Ass'n of Des Moines, Iowa, 12 N.W 2d 712, 216 Minn. 329.
Pa.—Old Forge Borough v Foley Estate, 67 Pa.Super 125.

65. U.S.—**Corpus Juris cited in** U. S. v. Railway Express Agency, 28 C C P.A 314, 325.
Iowa.—**Corpus Juris cited in** Town of Grundy Center v Marion, 1 N. W.2d 677, 680, 231 Iowa 425.
Pa.—**Corpus Juris quoted in** Tomilio v. Pisco, 187 A. 86, 89, 123 Pa. Super 423—Old Forge Borough v. Foley, 67 Pa Super. 125.
58 C J p 724 note 77

Where a statute requires signing only, generally it is not essential that the signature should be placed at the end of the instrument or writing.—Devereux v. McMahon, 12 S E. 902, 108 N C. 134, 12 L R A. 205—58 C J. p 724 note 77 [c].

If statute does not require instrument to be subscribed, generally it is not essential that the signature be placed at the end.—In re Williams' Will, 66 S.E 2d 902, 234 N C. 228.

66. U S.—**Corpus Juris cited in** U. S v. Railway Express Agency, 28 C.C P.A 314, 325.
Minn.—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, 12 N.W 2d 712, 216 Minn. 329.
Pa.—Old Forge Borough v. Foley Estate, 67 Pa Super. 125.
58 C.J. p 724 note 77

Unless statute requires that signature be subscribed, signature may be placed anywhere on instrument.

tion, for the purpose of authenticating it,[67] as at the head[68] or in the body[69] of the instrument, or if it is written across the face of a document,[70] or even if it is placed on another statement or writing accompanying the instrument.[71]

A signature placed between two parts of an instrument may apply to the whole instrument if it is shown to have been so intended.[72] Where, however, written or printed matter appears below the signature,[73] on the back of the instrument,[74] or on separate sheets of paper,[75] a signature authenticates only the matter intended by the parties to be included as part of the instrument, and it is essential that the intention should be manifested either by express reference or by internal evidence in the writings involved from which an inference of intention follows.[76]

Where a person intends to sign as a witness to an instrument, but signs it in the place for the principal to sign, the fact that he signed as a witness may be shown.[77] Likewise, where a signer intends to sign as a principal but signs in the place of a witness, that fact may be shown.[78]

Location of mark used as signature is discussed infra § 4 b.

c. Adoption of Signature

In the absence of a statute providing otherwise, a person may adopt a signature made for him by another or a signature made by him on a previous occasion.

In the absence of a statute providing otherwise, a person may adopt a signature written for him by another,[79] by subsequent approval and ratification,[80] and a signature written in the absence of a person may be adopted even when forged.[81] A signature purposely made by a person on a previous occasion may be adopted for a new writing then made, with the same effect as though made anew.[82]

§ 3. —— Use of Initials and Abbreviations

An instrument may be properly signed where only the initial letter or letters of the Christian or given name or names are used with the surname, where only the full surname is used, where only the Christian or given name is used, or even where initials only are used, if a fuller signature is not required or contemplated under the particular circumstances.

If a fuller signature is not required or contemplated under the particular circumstances, an instrument is properly signed, even though only the initial letter or letters of the Christian or given name or names, with the full surname, are used,[83]

—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, 12 N.W. 2d 712, 216 Minn 329.

67. U.S.—**Corpus Juris cited in** U. S. v. Railway Express Agency, 28 C.C.P.A. 314, 325
Minn.—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, 12 N.W 2d 712, 216 Minn 329.
Pa.—Old Forge Borough v. Foley Estate, 67 Pa Super. 125.
58 C J. p 725 note 78.

68. U S.—**Corpus Juris cited in** U. S. v Railway Express Agency, 28 C.C.P A. 314, 325.
Minn.—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, 12 N W 2d 712, 216 Minn. 329.
Wash.—Wright v Seattle Grocery Co, 177 P 818, 105 Wash 383.
58 C J p 725 note 79

69. U S.—**Corpus Juris cited in** U S v Railway Express Agency, 28 C C P A 314, 325.
Minn.—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, 12 N W 2d 712, 216 Minn 329.
58 C J p 725 note 80

70. Cal.—California Canneries Co v. Scatena, 49 P 462, 117 Cal 447

71. N Y.—Connor v. Acme Engineering, etc, Co, 132 N Y S. 782, 148 App Div 518
58 C J p 725 note 83

72. Pa.—**Corpus Juris quoted in** Tomillo v. Pisco, 187 A. 86, 89, 123 Pa.Super. 423.
58 C.J. p 725 note 85.

73. Minn.—Brown v State Automobile Ins. Ass'n of Des Moines, Iowa, 12 N W.2d 712, 216 Minn 329

74. Minn.—Brown v. State Automobile Ins Ass'n of Des Moines, Iowa, supra

75. Minn.—Brown v State Automobile Ins Ass'n of Des Moines, Iowa, supra

76. Minn.—Brown v. State Automobile Ins. Ass'n of Des Moines, Iowa, supra

77. Minn.—U. S. Fidelity, etc, Co v. Siegmann, 91 N.W. 473, 87 Minn 175
N Y.—Palmer v. Stephens, 1 Den. 471.

78. Mass.—Richardson v Boynton, 12 Allen 138, 90 Am.D 141.
58 C J p 725 note 89.

79. U.S.—J. & S Ferguson v. Lyle, C.C A Fla, 267 F. 817
Cal.—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v Case-Swayne Co, 167 P.2d 523, 526, 73 Cal App 2d 815.
Ky.—Pardue v. Webb, 70 S.W.2d 665, 253 Ky 838
Nev.—Picetti v. Orcio, 58 P 2d 1046, 57 Nev 52, approved on rehearing 67 P.2d 315, 57 Nev. 52
Wyo.—**Corpus Juris quoted in** Rowray v. Casper Mut Building & Loan Ass'n, 45 P 2d 7, 12, 48 Wyo. 290
58 C.J. p 728 note 25.

Acts constituting adoption
Where person whose name signature purported to be voluntarily stated that signature was his, in presence of other contracting party, who acted to his detriment on faith of such statement, signature was adopted.—Rowray v. Casper Mut Building & Loan Ass'n, 45 P 2d 7, 48 Wyo. 290.

80. Cal.—Kadota Fig Ass'n of Producers v. Case-Swayne Co., 167 P 2d 523, 73 Cal App 2d 815.

81. Cal.—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v Case-Swayne Co, 167 P 2d 523, 526, 73 Cal.App 2d 815.
Tex.—Mondragon v. Mondragon, 257 S W. 215, 113 Tex. 404—Stout v. Oliveira, Civ App., 153 S.W.2d 590, error refused
Utah.—**Corpus Juris cited in** N M Long Co v. Kenwood Co., 39 P.2d 1088, 1090, 85 Utah 524.

Signature not adopted
Utah.—N. M Long Co. v. Kenwood Co, 39 P 2d 1088, 85 Utah 524

82. Ky.—Pontrich v. Niemann, 271 S.W 1049, 208 Ky 715.
Wis.—McAbee v Gerarden, 204 N W. 484, 187 Wis 397

83. Ind.—Pittsburgh, C, C & St. L Ry Co. v Gregg, 102 N.E. 961, 181 Ind. 42
Iowa.—**Corpus Juris quoted in** Greenland v. Carter, 258 N W. 678, 680, 219 Iowa 369
Mich.—**Corpus Juris cited in** People ex rel Wright v. Kelly, 293 N.W. 865, 869, 294 Mich 503.
58 C.J. p 721 note 37.

or only the full surname,[84] or only the Christian or given name of the person signing,[85] is used.

Signature may be by contraction of the real name.[86] A signature may be made by the use of initials only[87] unless it is contemplated that the usual and complete name should be used.[88] Initials alone, if used as a signature, are as efficacious as a signature as the whole name at length.[89] A signature may be sufficient where the title of the signer is abbreviated.[90]

§ 4. —— Mark as Signature

a. In general
b Sufficiency

a. In General

Generally, in the absence of a statute providing otherwise, a signature may be made by the use of a mark where the signer is unable to write his name, or even, according to some authorities, where he is capable of writing.

"Mark," as a signature, has been defined as a character, usually a cross, made as a substitute for a signature by one who cannot write.[91] Generally, in the absence of a statute providing otherwise, signature may be made by the use of a mark,[92] where the signer is unable to write his name,[93] as, for example, where, notwithstanding he knows how to write, he is physically unable to write.[94] According to some authorities, a mark may be used as a signature even though the person making it is capable of writing.[95] When an instrument is signed in this manner the person is bound as effectually as though he had written his full name to it.[96]

The term "signature" is defined by some statutes as inclusive of a mark by a person who cannot write,[97] or by an illiterate or infirm person,[98] and a signature made by mark in the manner provided for is sufficient.[99] Under some statutes, if a written signature is required and the signer is unable to write, the signature should be by his mark.[1]

Where a signature is by a mark, the mark itself, made by the person whose signature it is to become,[2] and not his name written near the mark,[3] is the signature.

b. Sufficiency

(1) In general
(2) Attestation

(1) In General

In the absence of statute otherwise providing, it is immaterial by whom the name accompanying the mark

84. Iowa.—**Corpus Juris quoted in** Greenland v Carter, 258 N W. 678, 680, 219 Iowa 369
58 C.J. p 721 note 38

85. Iowa.—**Corpus Juris quoted in** Greenland v. Carter, 258 N W. 678, 680, 219 Iowa 369
58 C.J. p 721 note 39.

Full name appearing elsewhere in instrument
Ind.—Zann v Haller, 71 Ind. 136, 36 Am R. 193

86. Iowa.—**Corpus Juris quoted in** Greenland v. Carter, 258 N W. 678, 680, 219 Iowa 369.

87. Ind.—Brown v. Grzeskowiak, 101 N E.2d 639, dissenting opinion 102 N E 2d 372
Iowa.—**Corpus Juris quoted in** Greenland v Carter, 258 N W. 678, 680, 219 Iowa 369
58 C.J. p 721 note 40.

88. Iowa.—**Corpus Juris quoted in** Greenland v Carter, 258 N.W. 678, 680, 219 Iowa 369.
58 C J. p 721 note 41

89. Iowa.—**Corpus Juris quoted in** Greenland v. Carter, 258 N.W 678, 680, 219 Iowa 369
58 C.J. p 721 note 42.

90. Iowa.—**Corpus Juris quoted in** Greenland v. Carter, 258 N.W. 678, 680, 219 Iowa 369.
58 C.J. p 721 note 44.

91. Webster New Int.D.
Other definition
"A mark for a name or signature is the sign of a cross made in a little space left between the Christian name and surname, and the word 'his' is usually written above the mark and the word 'mark' below it."
Ky.—Staples v Bedford Loan, etc., Bank, 83 S W. 403, 98 Ky. 451, 17 Ky L 1035
Pa.—In re Kelly's Estate, 160 A 454, 455, 306 Pa 551

92. Ky.—Conley v Coburn, 179 S W 2d 668, 297 Ky 292.
Tex.—Bustillos v State, 213 S.W.2d 837, 152 Tex Cr. 275
58 C J p 721 note 45, p 722 note 46, p 718 note 9 [a].

Intent to be bound
Signature by mark is a valid signature where it is intended by the one so signing that he is to be thereby bound by the instrument so signed.—Sterba v. Lienhard, Ohio App., 95 N.E 2d 12.

Adoption of signature
Making cross between Christian name and surname and between words "his mark" evidences adopting of signature and assent to document.—In re Kelly's Estate, 160 A. 454, 306 Pa. 551.

93. Cal.—Kadota Fig Ass'n of Producers v Case-Swayne Co., 167 P. 2d 528, 73 Cal App 2d 515.

Ky.—Conley v. Coburn, 179 S W.2d 668, 297 Ky 292.
La.—Mirandona Bros. v. Danos, App., 56 So.2d 159
58 C.J. p 721 note 45.

94. Cal.—In re Guilfoyle, 31 P. 553, 96 Cal. 598, 22 L.R.A. 370
58 C J. p 721 note 45, p 722 note 47.

95. Ga.—Neill v Hill, 123 S E 30, 32 Ga App 381.
58 C J. p 722 note 47.

96. Ky.—Conley v Coburn, 179 S W. 2d 668, 297 Ky 202
58 C J. p 722 note 48.

97. Ky.—Terry v Johnson, 60 S.W. 300, 109 Ky 589, 22 Ky L. 1210.

98. Ga.—Gillis v. Gillis, 23 S E. 107, 108, 96 Ga. 1, 51 Am S.R. 121, 30 L R A. 143.

99. Ky.—Terry v. Johnson, 60 S W. 300, 109 Ky. 589, 22 Ky.L 1210.
58 C.J. p 722 note 50

1. Mass.—Irving v. Goodimate Co., 70 N E.2d 414, 320 Mass. 454, 171 A.L R. 326

2. Ga.—Gillis v. Gillis, 23 S E. 107, 96 Ga. 1, 51 Am.S.R. 121, 30 L R A 143.
58 C.J. p 722 note 51.

3. Ky.—Staples v Bedford Loan, etc., Bank, 33 S W 403, 98 Ky. 451, 17 Ky.L. 1035.
58 C.J. p 722 note 51.

is written, and a signature by mark may be sufficient, notwithstanding the name accompanying the mark is written incorrectly, the wrong name is written, no name accompanying the mark is affixed, or words indicating that the mark is intended as such are omitted.

In the absence of statute otherwise providing, it is immaterial by whom the name of the person accompanying the mark is written,[4] and the full name of a party accompanying a mark made by him may be written by the obligee on the instrument.[5] The signature is not necessarily rendered insufficient by the fact that the full name written by another and accompanying the mark is written incorrectly,[6] the fact that a wrong name is written there,[7] or by the fact that words indicating that it is intended as a mark are omitted,[8] at least where the full name accompanying the mark is written in the presence and at the request of the party.[9] In the absence of a statute requiring a name to accompany the mark, the validity of the mark as a signature is not affected by the fact that no name accompanies it.[10]

Location. When a mark is used as a signature, it may be placed wherever the ordinary signature could be placed,[11] and, where the name must accompany the mark, the fact that the mark and the name are not in immediate proximity is immaterial.[12]

(2) Attestation

A signature by mark may be valid at common law, although it is not attested by a witness. Under some statutes providing for attestation it has been held that a signature by mark which is not witnessed in the manner provided is not valid, but under other statutes the view has been taken that the method provided by statute is not exclusive and that the effect of compliance therewith is only to establish prima facie the genuineness of the signature.

A signature by mark, although not attested by a witness, may be valid at common law.[13] Some statutes require attestation of a signature by mark but an instrument which is not included within the terms or scope of the statute may be signed by mark without attestation.[14] A signature which meets the statutory requirements as to attestation is sufficient.[15]

Under some statutes providing for the method of witnessing a signature by mark, the view has been taken that, in the absence of compliance with the statute, the instrument is not signed,[16] and that it is essential to the validity of a signature by mark that it be witnessed in the manner provided,[17] except where the instrument is acknowledged before an officer competent to take acknowledgments,[18] or where certain documents are executed before a judicial officer.[19] These rules have been applied or recognized with respect to a statute providing that a signature or subscription includes a mark when the person cannot write and his name is written near the mark by a person who writes his own name as a witness,[20] and it has been held that, under such statute, in the absence of any recognized exception, it is essential that the person who writes the name of the signer by mark should also write his own name as witness.[21]

Under other statutes the view has been taken that the method provided by the statute for proving the signature by mark of a person who cannot write is not exclusive,[22] and that the effect of compliance with the statute is only to establish prima facie the genuineness of the signature without other proof of signing;[23] in the absence of compliance with the statute a mark is not a prima facie sig-

4. Ala.—Johnson v. Davis, 10 So. 911, 95 Ala. 293
Mark made by hand of another than purported signer see infra § 6.

5. Ala.—McGowan v. Collins, 46 So. 228, 154 Ala. 299.
58 C.J. p. 722 note 53.

6. W.Va.—Bachinsky v. Federal Coal, etc., Co., 90 S.E. 227, 78 W.Va. 721
58 C.J. p. 723 note 54

7. Ala.—Bailey v. Bailey, 35 Ala. 687
58 C.J. p. 723 note 55

8. N.C.—Sellers v. Sellers, 3 S.E. 917, 98 N.C. 13
58 C.J. p. 723 note 56

9. Ala.—Harwell v. Zimmerman, 47 So. 722, 157 Ala. 473

10. Tex.—Bustillos v. State, 213 S.W.2d 837, 152 Tex.Cr. 275.
58 C.J. p. 723 note 58.

11. Ga.—Horton v. Murden, 43 S.E. 786, 117 Ga. 72

12. Cal.—In re Guilfoyle, 31 P. 553, 98 Cal. 598, 22 L.R.A. 370.
58 C.J. p. 726 note 92.

13. Ark.—Henry v. Union Sawmill Co., 287 S.W. 203, 171 Ark. 1023.
58 C.J. p. 723 note 59.

14. Ky.—Love v. Gibbs, 117 S.W.2d 987, 273 Ky. 775.
58 C.J. p. 723 note 61 [a].

15. U.S.—Kessel v. Austin Min. Co., C.C.Nev., 144 F. 859.
58 C.J. p. 724 note 70.

16. Ala.—Flowers v. Bitting, 45 Ala. 448
58 C.J. p. 723 note 61.

17. Okl.—Walker Bond & Co. v. Purifier, 124 P. 322, 32 Okl. 844.
58 C.J. p. 723 note 61.

18. Idaho.—Hailey First Nat. Bank v. Glenn, 77 P. 623, 10 Idaho 224, 109 Am.S.R. 204.
58 C.J. p. 723 note 62, 724 note 66 [a]
Acknowledgment as equivalent of attestation in general see Acknowledgments § 30.

19. Okl.—Walker Bond & Co. v. Purifier, 124 P. 322, 32 Okl. 844.
58 C.J. p. 723 note 62

20. Okl.—Walker Bond & Co. v. Purifier, supra.

21. Okl.—Walker Bond & Co. v. Purifier, supra.

22. Ark.—Naill v. Kirby, 257 S.W. 735, 162 Ark. 140
Ky.—Vanover v. Murphy, 15 S.W. 61, 12 Ky.L. 733
58 C.J. p. 724 note 68
Method of proof generally see infra § 8 b.

23. Ark.—Naill v. Kirby, 257 S.W. 735, 162 Ark. 140—Ward v. Stark, 121 S.W. 382, 91 Ark. 268.

nature,[24] unless properly acknowledged before an officer authorized to take acknowledgments,[25] and, hence, the mere presentation of a signature not so witnessed or acknowledged is not evidence of its validity.[26]

Under a statute providing for a signing by mark to be witnessed, the obligee in an instrument may be a competent witness where the obligor signs by mark,[27] but there is some authority to the contrary.[28] It has been held that an agent of the obligee having no present pecuniary interest in the instrument may become the attesting witness required by statute[29] Where a statute requires that an attesting witness shall be able to write and shall write his own name, it has been held that a mark cannot be used as a signature by the witness.[30]

§ 5. —— By Hand of Party

A signature may be made by the hand of the purported signer either by his unaided efforts or with the aid of another.

A signature may be made by the hand of the person whose signature it purports to be,[31] either by his own unaided efforts,[32] or with the aid of another,[33] as, for example, where such other, with the signer's consent, guides the latter's pen or pencil[34] Where the maker of an instrument in signing his name is assisted by another person guiding or steadying his hand, the signature thus made is the act of the maker and not the act of the person assisting him.[35]

Under some statutes, if a written signature is required and the signer is able to write, the signature must be in the signer's own handwriting[36]

§ 6. —— By Hand of Another

Generally, in the absence of a statute providing otherwise, a signature may be made for a person by the hand of another who acts in the presence of such person at his direction or request or with his acquiescence.

Generally, a signature may be made for a person by the hand of another,[37] acting in the presence of such person,[38] and at his direction,[39] or request,[40] or with his acquiescence,[41] unless a statute provides otherwise.[42] A signature so made

24. Ark.—Henry v. Union Sawmill Co., 287 S.W. 203, 171 Ark. 1023.
58 C.J. p. 723 note 64.

25. Ark.—Ward v. Stark, 121 S.W. 382, 91 Ark. 268
58 C.J. p. 724 note 66

26. Ky.—Vanover v. Murphy, 15 S.W. 61, 62, 12 Ky.L. 733.
58 C.J. p. 724 note 67

27. Ark.—Dawkins v. Petteys, 181 S.W. 901, 121 Ark. 498.
58 C.J. p. 724 note 71.

28. Okl.—Sivils v. Taylor, 69 P. 867, 12 Okl. 47
58 C.J. p. 724 note 72.

29. Ala.—Mayhall v. Hyde, 113 So. 490, 22 Ala. App. 109, certiorari denied 113 So. 492, 216 Ala. 428.

30. Ala.—Stewart v. Beard, 69 Ala. 470

31. Cal.—Kadota Fig Ass'n of Producers v. Case-Swayne Co., 167 P.2d 523, 73 Cal. App. 2d 815.
58 C.J. p. 726 notes 1, 2.

32. N.C.—State v. Abernethy, 130 S.E. 619, 190 N.C. 768
58 C.J. p. 726 note 1.

33. Cal.—Rich v. Ervin, 194 P.2d 809, 86 Cal. App. 2d 386
Me.—In re Cox' Will, 29 A.2d 281, 139 Me. 261

34. Cal.—Harris v. Harris, 59 Cal. 620.
58 C.J. p. 726 note 2

35. Ark.—Vines v. Clingfost, 21 Ark. 309.
58 C.J. p. 726 note 4.

36. Mass.—Irving v. Goodimate Co., 70 N.E.2d 414, 320 Mass. 454, 171 A.L.R. 326.

37. Cal.—Rich v. Ervin, 194 P.2d 809, 86 Cal. App. 2d 386—Kadota Fig Ass'n of Producers v. Case-Swayne Co., 167 P.2d 523, 73 Cal. App. 2d 815
D.C.—McGrady v. Munsey Trust Co., Mun. App., 32 A.2d 106.
Ga.—Johnson v. Rushing, 16 S.E.2d 502, 65 Ga. App. 793—East Point Lumber Co. v. Chandler, 167 S.E. 787, 48 Ga. App. 361.
Ky.—Prichard v. Kitchen, 242 S.W. 2d 988—Widick v. Pursifull, 187 S.W.2d 447, 229 Ky. 773—Conley v. Coburn, 179 S.W.2d 668, 297 Ky. 292
La.—**Corpus Juris quoted in** Waggoner v. Grant Parish Police Jury, 14 So. 2d 855, 858, 203 La. 1071—**Corpus Juris cited in** Morlet v. Maus, App., 170 So. 392, 394.
Or.—Howard v. Hartford Fire Ins. Co. of Hartford, Conn., 144 P. 450, 77 Or. 341
Tex.—Stout v. Olivera, Civ. App., 153 S.W.2d 590, error refused.
Wyo.—**Corpus Juris cited in** Rowray v. Casper Mut. Building & Loan Ass'n, 45 P.2d 7, 12, 28 Wyo. 290
58 C.J. p. 726 note 5

38. Cal.—Rich v. Ervin, 194 P.2d 809, 86 Cal. App. 2d 386.
D.C.—McGrady v. Munsey Trust Co., Mun. App., 32 A.2d 106
Ga.—Johnson v. Rushing, 16 S.E.2d 502, 65 Ga. App. 793—East Point Lumber Co. v. Chandler, 167 S.E. 787, 48 Ga. App. 361
Ky.—Prichard v. Kitchen, 242 S.W. 2d 988—Widick v. Pursifull, 187 S.W.2d 447, 229 Ky. 773.
La.—**Corpus Juris quoted in** Waggoner v. Grant Parish Police Jury, 14 So. 2d 855, 858, 203 La. 1071—**Corpus Juris cited in** Morlet v. Maus, App., 170 So. 392, 394
Wyo.—**Corpus Juris cited in** Rowray v. Casper Mut. Building & Loan Ass'n, 45 P.2d 7, 12, 48 Wyo. 290.
58 C.J. p. 727 note 6.

39. D.C.—McGrady v. Munsey Trust Co., Mun. App., 32 A.2d 106.
Ga.—Johnson v. Rushing, 16 S.E.2d 502, 65 Ga. App. 793.
Ky.—Prichard v. Kitchen, 242 S.W. 2d 988—Widick v. Pursifull, 187 S.W.2d 447, 229 Ky. 773—Conley v. Coburn, 179 S.W.2d 668, 297 Ky. 292
La.—**Corpus Juris quoted in** Waggoner v. Grant Parish Police Jury, 14 So. 2d 855, 858, 203 La. 1071.
Wyo.—**Corpus Juris cited in** Rowray v. Casper Mut. Building & Loan Ass'n, 45 P.2d 7, 12, 48 Wyo. 290.
58 C.J. p. 727 note 7.

40. Cal.—Rich v. Ervin, 194 P.2d 809, 86 Cal. App. 2d 386
Ga.—East Point Lumber Co. v. Chandler, 167 S.E. 787, 48 Ga. App. 361
La.—**Corpus Juris quoted in** Waggoner v. Grant Parish Police Jury, 14 So. 2d 855, 858, 203 La. 1071.
Wyo.—**Corpus Juris cited in** Rowray v. Casper Mut. Building & Loan Ass'n, 45 P.2d 7, 12, 48 Wyo. 290.
58 C.J. p. 727 note 8.

41. Ga.—Wyatt v. Walton Guano Co., 40 S.E. 237, 114 Ga. 375
La.—**Corpus Juris quoted in** Waggoner v. Grant Parish Police Jury, 14 So. 2d 855, 858, 203 La. 1071.

42. La.—**Corpus Juris quoted in** Waggoner v. Grant Parish Police

becomes the signature of the person for whom it is made,[43] and it has the same validity as though written by him.[44] Such mode of signing is sufficient for a sealed instrument, even though the party affixing the signature does not have authority to do so under seal.[45] Where a signature is made in this manner the person writing the name is regarded as a mere instrumentality, by which the person whose signature is written exercises his own discretion and acts for himself,[46] and not through an agent.[47] So a mark made for a person at his direction may be regarded as his signature.[48]

The writing of a name or the making of a mark by one other than the person whose signature the name or mark purports to be may constitute a sufficient signature of such person, where he touches the pen or pencil used in the process while the purported signature is being made,[49] but the touching of the pen or pencil is not essential to the validity of the signature.[50] It is not necessary under all circumstances that the signature of a person made by the hand of another at the request of such person should be made in the presence of such person.[51] The fact that a mark does not accompany a name written by the hand of another does not affect the validity of the signature[52]

By obligee for obligor. There is authority to the effect that neither of the contracting parties can act for the other in making signatures,[53] and that an obligee is incompetent to subscribe for an illiterate obligor,[54] but it has been held that the agent of the obligee having no present pecuniary interests in the instrument,[55] or a merely nominal obligee,[56] may act for the obligor in signing an instrument. The view has been taken that the rule that an obligee is incompetent to sign for the obligor applies only when the instrument is required to be in writing and signed by the parties,[57] and that one contracting party may sign for another where the signature is not required by statute.[58]

Signing through agent A signature may be made through an authorized agent.[59]

§ 7. —— Mode of Affixing

Generally, in the absence of a statute otherwise providing, a signature may be affixed by writing by hand, by printing, by stamping, or by various other means.

In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many

Jury, 14 So 2d 855, 858, 203 La. 1071

Wyo.—**Corpus Juris cited in** Rowray v. Casper Mut Building & Loan Ass'n, 45 P.2d 7, 12, 48 Wyo 290

58 C.J. p 727 note 10.

43. Ky.—Prichard v. Kitchen, 242 S W.2d 988—Widick v. Pursifull, 187 S W.2d 447, 229 Ky. 773.

La—Coats v Guaranty Bank & Trust Co, 141 So 41, 174 La 503.

Pa.—Callahan v. Potelunas, Com.Pl., 40 Luz.Leg Reg 78.

58 C.J p 727 note 11.

44. Ga.—Johnson v. Rushing, 16 S E 2d 502, 65 Ga App 793.

Ky—Prichard v. Kitchen, 242 S W 2d 988—Widick v Pursifull, 187 S W 2d 447, 229 Ky 773—Conley v Coburn, 179 S W.2d 668, 297 Ky 292

La—**Corpus Juris quoted in** Waggoner v Grant Parish Police Jury, 14 So 2d 855, 858, 203 La 1071—Coats v Guaranty Bank & Trust Co, 141 So 41, 174 La. 503—Prudential Ins Co of America v. Johnson, App., 176 So 625.

Wyo—**Corpus Juris cited in** Rowray v. Casper Mut Building & Loan Ass'n, 45 P 2d 7, 12, 48 Wyo 290

58 C J. p 727 note 11.

45. Mass.—Gardner v Gardner, 5 Cush. 483, 52 Am D. 740.

58 C J. p 728 note 12.

46. La.—**Corpus Juris cited in** Morlet v Maus, App, 170 So. 392, 394

Wyo—**Corpus Juris cited in** Rowray v Casper Mut. Building & Loan Ass'n, 45 P 2d 7, 12, 48 Wyo 290.

58 C J p 728 note 13.

47. Ga—Johnson v Rushing, 16 S E 2d 502, 65 Ga App 793.

La—**Corpus Juris cited in** Morlet v. Maus, App, 170 So 392, 394

58 C J p 728 notes 13, 14

48. N C—Sellers v. Sellers, 3 S E 917, 98 N C. 13.

49. Wis—McAbee v. Gerarden, 204 N.W. 484, 187 Wis 399.

58 C J. p 726 note 3

Touching pen and making mark

Person authorizing another in his presence to sign instrument for him and touching pen and making his mark makes such other's act his own —East Point Lumber Co v. Chandler, 167 S E 787, 48 Ga App 361

50. Ga—East Point Lumber Co. v. Chandler, supra

58 C J. p 726 note 3 [a].

Charge held not misleading

A charge that person authorizing another in his presence to sign instrument for him and touching pen and making his mark makes such other's act his own was held not erroneous, as misleading jury to believe that person authorizing signing must touch pen—East Point Lumber Co. v Chandler, supra.

51. Cal—Kadota Fig Ass'n of Producers v. Case-Swayne Co, 167 P. 2d 523, 73 Cal App 2d 815.

Request or authorization by telephone

The rule stated in the text was recognized where the request or authorization to sign was communicated by telephone.—Kadota Fig Ass'n of Producers v. Case-Swayne Co, supra

52. Ala—Wright v. Forgy, 28 So. 198, 126 Ala 389

Ky—Slater v. Hatfield, 242 S.W. 618, 195 Ky. 281.

53. Ala—Hamilton v. Adams, 108 So 1, 214 Ala 440.

58 C J. p 728 note 17.

54. Ala—Hamilton v. Adams, supra.

55. Ala—Mayhold v Hyde, 113 So. 490, 22 Ala App 109, certiorari denied 113 So. 492, 216 Ala. 428.

58 C J p 728 note 19.

56. Vt—Haven v. Hobbs, 1 Vt. 238, 18 Am.D. 678

57. Ind—Crow v Carter, 31 N.E. 937, 5 Ind App 169.

58. Ind.—Crow v. Carter, supra

59. La—**Corpus Juris quoted in** Morlet v Maus, App., 170 So. 392, 394

58 C.J. p 728 note 23.

different ways.[60] It may be written by hand,[61] and, generally, in the absence of a statute otherwise providing, it may be printed,[62] stamped,[63] typewritten,[64] engraved,[65] photographed,[66] or cut from one instrument and attached to another.[67] A signature

60. D C—McGrady v Munsey Trust Co, Mun App, 32 A 2d 106

Importance of method

"The method of affixing the signature would not seem important, if the intention is that it constitute the true signature of the maker"—McGrady v Munsey Trust Co., supra

Requirement that instrument be "signed"

Under a statute requiring that an instrument shall be signed, "'signing' does not necessarily mean a written signature, as distinguished from a signature by mark, by print, by stamp, or by the hand of another," notwithstanding a statutory provision that, when the written signature of a person is required by law, it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark—Assessors of Boston v Neal, 40 N E 2d 893, 898, 311 Mass 192—Finnegan v Lucy, 32 N.E 656, 658, 157 Mass. 439.

61. U S.—Joseph Denunzio Fruit Co v Crane, D.C.Cal, 79 F Supp. 117, affirmed, C A, 188 F 2d 569, certiorari denied 72 S Ct 37, 342 U.S. 820, 96 L Ed —.

Ariz—**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz 290

Cal—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v Case-Swayne Co, 167 P.2d 523, 526, 73 Cal App 2d 815

Okl—**Corpus Juris quoted in** Boyer v State, 97 P 2d 779, 786, 68 Okl Cr 220—**Corpus Juris quoted in** Moss v Arnold, 75 P 2d 491, 501, 63 Okl.Cr 343

S C—**Corpus Juris quoted in** Smith v. Greenville County, 199 S.E 416, 418, 188 S C 349

58 C J p 729 note 28.

62. U S—Joseph Denunzio Fruit Co. v. Crane, D C Cal, 79 F Supp 117, affirmed, C A, 188 F 2d 569, certiorari denied 72 S Ct 37, 342 U.S. 820, 96 L Ed —.

Ariz.—**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz 290.

Ark—Lesser-Goldman Cotton Co v Hembree, 259 S.W 5, 163 Ark. 88—Leach v. Bald Knob State Bank, 259 S W. 3, 163 Ark 91.

Cal—Felt v. L B Frederick Co, 206 P 2d 676, 92 Cal App.2d 157—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v. Case-Swayne Co, 167 P 2d 523, 526, 73 Cal App 2d 815—Weiner v Mullaney, 140 P.2d 704, 59 Cal App.2d 620.

Mich—People ex rel. Wright v Kelly, 293 N W 865, 294 Mich. 503.

Ohio—State ex rel. Drucker v Reichle, App, 81 N E 2d 735

Okl—**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl Cr 220—**Corpus Juris quoted in** Moss v. Arnold, 75 P 2d 491, 501, 63 Okl Cr 343.

Or—Toon v. Wapinitia Irr. Co, 243 P. 554, 117 Or 374

S.C.—**Corpus Juris quoted in** Smith v Greenville County, 199 S E. 416, 418, 188 S C 349.

Wash—Wright v. Seattle Grocery Co, 177 P 818, 105 Wash 383

Wyo—**Corpus Juris cited in** Rowray v Casper Mut Building & Loan Ass'n, 45 P 2d 7, 12, 48 Wyo 290

58 C J p 729 note 29.

Printed handwriting of signer

Mich—People ex rel Wright v Kelly, 293 N W 865, 294 Mich 503

63. Ariz—**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz 290

Cal—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v Case-Swayne Co, 167 P 2d 523, 526, 73 Cal App 2d 815—Weiner v Mullaney, 140 P 2d 704, 59 Cal App 2d 620.

D C—Packard v. U S, Mun App, 77 A.2d 19—McGrady v Munsey Trust Co, Mun.App, 32 A 2d 106

Ohio—State ex rel Drucker v Reichle, App, 81 N E 2d 735

Okl—**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl Cr. 220—**Corpus Juris quoted in** Moss v Arnold, 75 P 2d 491, 501, 63 Okl Cr. 343.

S C.—**Corpus Juris quoted in** Smith v. Greenville County, 199 S E. 416, 418, 188 S.C. 349

Wyo—**Corpus Juris cited in** Rowray v Casper Mut Building & Loan Ass'n, 45 P.2d 7, 12, 48 Wyo 290.

58 C.J p 729 note 30.

Rubber stamp

Cal—Weiner v Mullaney, 140 P 2d 704, 59 Cal.App 2d 620.

D C—McGrady v. Munsey Trust Co, Mun App, 32 A 2d 106.

N M—Costilla Estates Dev Co v Mascarenas, 267 P 74, 33 N M 356

Okl—Boyer v. State, 97 P 2d 779, 68 Okl Cr. 220—Moss v. Arnold, 75 P 2d 491, 63 Okl Cr 343

Tex—Stout v. Oliveira, Civ.App, 153 S W 2d 590, error refused

64. U S.—Joseph Denunzio Fruit Co. v. Crane, D C Cal, 79 F Supp. 117, affirmed, C A., 188 F.2d 569, certiorari denied 72 S Ct. 37, 342 U S 820, 96 L Ed —.

Ariz—**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz. 290

Cal—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v. Case-Swayne Co, 167 P.2d 523, 526, 73 Cal App 2d 815—Weiner v Mullaney, 140 P 2d 704, 59 Cal App 2d 620

D C—Packard v U S., Mun App, 77 A 2d 19

Idaho—**Corpus Juris cited in** Roddy v State, 135 P 2d 298, 64 Idaho 653

Mass—Assessors of Boston v Neal, 40 N E 2d 893, 311 Mass 192.

Okl—**Corpus Juris quoted in** Boyer v State, 97 P 2d 779, 786, 68 Okl Cr. 220—**Corpus Juris quoted in** Moss v. Arnold, 75 P 2d 491, 501, 63 Okl Cr 343

S C—**Corpus Juris quoted in** Smith v Greenville County, 199 S E 416, 418, 188 S C. 349

Tex.—Zaruba v. Schumaker, Civ App, 178 S W 2d 542—Stout v Oliveira, Civ App, 153 S W 2d 590, error refused

Wyo—**Corpus Juris cited in** Rowray v Casper Mut Building & Loan Ass'n, 45 P 2d 7, 12, 48 Wyo. 290.

58 C J. p 729 note 31.

65. U S—Joseph Denunzio Fruit Co v Crane, D C Cal, 79 F Supp. 117, affirmed, C A, 188 F.2d 569, certiorari denied 72 S Ct. 37, 342 U S. 820, 96 L Ed —

Ariz—**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz 290.

Cal—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v Case-Swayne Co, 167 P.2d 523, 526, 73 Cal App.2d 815

Okl—**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl. Cr. 220—**Corpus Juris quoted in** Moss v Arnold, 75 P.2d 491, 501, 63 Okl Cr. 343.

S.C.—**Corpus Juris quoted in** Smith v. Greenville County, 199 S.E 416, 418, 188 S C 349

58 C J. p 729 note 32

66. U S—Joseph Denunzio Fruit Co. v Crane, D C Cal, 79 F Supp, 117, affirmed, C A., 188 F.2d 569, certiorari denied 72 S Ct. 37, 342 U.S 820, 96 L Ed. —.

Ariz.—**Corpus Juris quoted in** Maricopa County v Osborn, 136 P.2d 270, 274, 60 Ariz 290.

Cal—**Corpus Juris cited in** Kadota Fig Ass'n of Producers v Case-Swayne Co., 167 P.2d 523, 526, 73 Cal App 2d 815.

Ill—Weston v. Myers, 33 Ill. 424.

Okl—**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl. Cr. 220—**Corpus Juris quoted in** Moss v. Arnold, 75 P 2d 491, 501, 63 Okl Cr. 343.

S.C—**Corpus Juris quoted in** Smith v Greenville County, 199 S.E. 416, 418, 188 S.C 349.

67. U.S—Joseph Denunzio Fruit Co.

lithographed on an instrument by a party may be sufficient for the purpose of signing it,[68] and it has been held or recognized that it is immaterial with what kind of an instrument a signature is made.[69]

Facsimile signature of a person may be a genuine signature.[70]

Signature with lead pencil may be sufficient.[71]

§ 8. —— Evidence

There may be a presumption that a written signature on an instrument was written by the purported signer himself, and, where there is a presumption that an instrument was duly signed, one who alleges want of due signature has the burden to prove his claim. The genuineness of a signature may be proved by evidence.

There may be a presumption that a written signature on an instrument was written by the purported signer himself,[72] and a person's act in signing his name to an instrument raises the presumption that he intends thereby to authenticate the instrument.[73]

Where there is a presumption that an instrument was duly signed, one who alleges want of due signature has the burden to prove his claim.[74]

When a signature is shown not to be in the handwriting of the person whose signature it purports to be, the law will not presume other affirmative facts which would have made the signature binding, but the existence of such facts is a matter of proof.[75] Where a purported signature is in the hand of another than the purported signer, one who alleges the effectiveness of the signature has the burden to prove that it was written under such circumstances as to show the intent of the purported signer to authenticate the instrument.[76] A signature by mark must be proved as any other signature,[77] and, ordinarily, one who alleges a signature by mark has the burden of proof.[78]

Admissibility The appearance of the writing of a signature may be considered in determining its genuineness,[79] and the fact that a signature appears to be written with pen and ink is some evidence as to its genuineness.[80] Evidence that a purported signer could not write is admissible to show that the purported signature is a forgery.[81] Where the signature of a subscriber to an instrument was written by a third person, parol admissions of the party whose name is signed are admissible as tending to show that it was done by his authority.[82]

Signature by mark may be proved to be genuine by testimony of witnesses to the making of the

v Crane, D C Cal, 79 F Supp. 117, affirmed, C A, 188 F 2d 569, certiorari denied 72 S Ct. 37, 342 U.S. 820, 96 L Ed ——.
Ariz —**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz. 290.
Iowa —Lee County v. Welsing, 30 N. W 481, 70 Iowa 198
Okl —**Corpus Juris quoted in** Boyer v. State, 97 P.2d 779, 786, 68 Okl Cr. 220—**Corpus Juris quoted in** Moss v Arnold, 75 P.2d 491, 501, 63 Okl Cr 343.
S.C.—**Corpus Juris quoted in** Smith v. Greenville County, 199 S E. 416, 418, 188 S.C 349

68. U S —Joseph Denunzio Fruit Co. v Crane, D C Cal, 79 F Supp 117, affirmed, C A, 188 F.2d 569, certiorari denied 72 S.Ct. 37, 342 U S. 820, 96 L Ed ——.
Ariz —**Corpus Juris quoted in** Maricopa County v Osborn, 136 P.2d 270, 274, 60 Ariz. 290.
Cal —Weiner v Mullaney, 140 P.2d 704, 59 Cal.App 2d 620
Okl —**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl. Cr. 220—**Corpus Juris quoted in** Moss v. Arnold, 75 P.2d 491, 501, 63 Okl Cr. 343.
S.C —**Corpus Juris quoted in** Smith v Greenville County, 199 S E 416, 418, 188 S C. 349.
58 C J p 729 note 35.

69. U.S —Joseph Denunzio Fruit Co v Crane, D C Cal, 79 F.Supp 117, affirmed, C A., 188 F 2d 569, certiorari denied 72 S Ct 37, 342 U S 820, 96 L Ed ——.
Ariz —**Corpus Juris quoted in** Maricopa County v Osborn, 136 P 2d 270, 274, 60 Ariz. 290
Iowa.—Drefahl v. Security Sav Bank, 107 N W. 179, 132 Iowa 563
Okl.—**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl Cr. 220—**Corpus Juris quoted in** Moss v. Arnold, 75 P 2d 491, 501, 63 Okl Cr. 343 .
S C —**Corpus Juris quoted in** Smith v. Greenville County, 199 S E 416, 418, 188 S C 349

70. Ariz —Maricopa County v Osborn, 136 P 2d 270, 60 Ariz 290
D C —McGrady v Munsey Trust Co., Mun App, 32 A 2d 106.
Ohio.—State ex rel Drucker v. Reichle, App, 81 N E 2d 735.
Okl —**Corpus Juris quoted in** Boyer v. State, 97 P 2d 779, 786, 68 Okl. Cr 220—**Corpus Juris quoted in** Moss v. Arnold, 75 P 2d 491, 501, 63 Okl Cr 343
S C —Smith v Greenville County, 199 S E 416, 188 S C 349.
58 C J. p 730 note 38

71. Mo —Kleine v. Kleine, 219 S W 610, 281 Mo 317, 8 A.L R 1335.
58 C.J p 730 note 37.

72. Ky —Ledford v. Hubbard, 292 S W. 345, 219 Ky 9.

Presumptive evidence of due subscription
A signature in which the signer used the initials of his Christian name was presumptive evidence of subscription —Payne v. June, 92 Ind. 252.

73. Ky.—Ledford v Hubbard, 292 S. W 345, 219 Ky. 9

74. Ind —Payne v. June, 92 Ind 252.

75. Ga —Hansen v. Owens, 64 S E 800, 132 Ga 648.

76. Ky —Ledford v Hubbard, 292 S.W. 345, 219 Ky 9.
58 C J. p 730 note 40

77. Ohio —Peoples Bank, etc, Co. v. Cereguti, 21 Ohio Cir Ct, N S, 38.
58 C.J. p 730 note 42.

78. Ky —Conley v Coburn, 179 S W. 2d 668, 297 Ky 292—Commonwealth v Campbell, 45 S.W. 89, 20 Ky L. 54.
Ohio —Peoples Bank, etc, Co v. Cereguti, 21 Ohio Cir Ct, N S, 38.

79. Neb —Burr v Finch, 136 N W. 72, 91 Neb. 417.

80. Neb.—Burr v. Finch, supra

81. Ga.—Hansen v. Owens, 64 S E 800, 132 Ga 648

82. Minn —Pottgieser v. Dorn, 16 Minn. 204
Tex.—Houston, etc, R Co. v Chandler, 51 Tex. 416.

mark,[83] and an instrument executed by a mark may be proved by the testimony of one who witnessed it, whether or not he was named as a subscribing witness.[84] Testimony to the effect that the purported signer habitually used a mark instead of an ordinary signature,[85] or tending to establish some peculiarity in the mark itself,[86] or evidence that the mark was acknowledged by the maker as his mark,[87] is admissible to prove the genuineness of a signature by mark. When a signature by mark not attested in the manner provided for by statute is regarded only as not being a prima facie signature, other evidence of the execution of the mark than that provided for by statute may be offered for the purpose of proving its genuineness.[88]

Weight and sufficiency. The mere fact that a person's name is attached to an instrument is not sufficient proof of its genuineness.[89] Circumstantial evidence that a party could write and was always accustomed to writing his name is not sufficient to overcome direct and positive evidence that in a particular instance the signing was by mark.[90] Under some circumstances, an oath by a purported signer verifying an instrument containing a mark and the certificate of the duly authorized officer before whom the oath was taken may be sufficient proof of the genuineness of the mark.[91]

Where the ultimate question is the genuineness of a signature by mark and a subscribing witness is out of the state, proof of the handwriting of such witness has been regarded as sufficient,[92] and a like rule has been applied when the subscribing witnesses to a signature by a mark are dead.[93] The view has been expressed, however, that proof of the handwriting of such witness is not sufficient if he is within the state.[94]

Denial of genuineness of a signature by a subscribing witness is not conclusive evidence that the signature is not genuine or sufficient,[95] and a question of fact remains as to whether or not the signature is genuine or sufficient.[96]

§ 9. —— Official Signatures

While in some instances the use only of the initials of a public officer as a signature has been regarded as sufficient, it has been held or recognized that, under some circumstances at least, the surname is an essential part of an official signature and that the use of mere initials is not sufficient in legal proceedings.

While in some instances the use only of the initials of a public officer as a signature has been regarded as sufficient,[97] it has been held or recognized that, under some circumstances at least, the surname is an essential part of an official signature,[98] preceded by the initials or full given name,[99] and that mere initials are not a signature in legal proceedings.[1] A signing by the surname in full and the Christian name by its initials is generally sufficient in official signatures.[2] The fact that the name of an officer is near the word "countersigned" on a paper signed by several officers does not render the signature insufficient.[3] The official character or title of the signer may be abbreviated.[4]

By whom made. It has been held that signatures made by public officers in their official capacities to certain documents which the law requires to be signed by them must be made by the officers themselves and cannot be made by another in the presence and at their direction,[5] but the sufficiency of a signature made for an officer by another in the

83. N C—Devereux v McMahon, 12 S E 902, 108 N C 134, 12 L R A 205
58 C.J. p 730 note 48.

84. S C—Matheson v Caribo, 709 S. E 102, 117 S C 291, 17 A L R. 1263
58 C.J p 730 notes 48 [a], 49.

85. N C—Devereux v McMahon, 12 S.E 902, 108 N C 134, 12 L R A. 205

86. N C.—State v Byrd, 93 N C. 624.
58 C J. p 730 note 52.

87. N C—State v Byrd, supra

88. Ark—Henry v. Union Sawmill Co, 287 S W 203, 171 Ark. 1023
58 C J. p 730 note 56.

89. Ariz—Lally v. Cash, 164 P. 443, 18 Ariz. 574.

90. Ga—Neill v. Hill, 123 S E. 30, 32 Ga.App. 381.
58 C.J. p 731 note 57.

91. Nev.—State v Depoister, 25 P. 1000, 21 Nev 107.
58 C.J. p 731 note 58.

92. S C.—Shiver v Johnson, 4 S C L 397.

93. La.—Chaffe v. Cupp, 5 La.Ann 684.
58 C J. p 731 note 60.

94. S.C—Shiver v. Johnson, 4 S C L 397.
58 C.J. p 731 note 59 [a].

95. S C.—Matheson v Caribo, 109 S. E 102, 117 S C. 291, 17 A L R. 1263
Tex—Southwest Bitulithic Co v. Martinez, 143 S W.2d 116, 135 Tex. 347.

96. Tex.—Southwest Bitulithic Co. v. Martinez, supra.

97. Ind—Brown v. Grzeskowiak, 101 N E.2d 639, dissenting opinion 102 N.E 2d 372
Tex—McCharen v. Mead, Civ.App., 275 S W 117—Turner v. Teller, Civ. App, 275 S W. 115.

98. Ky—Johnson v. Caddell, 63 S. W 2d 810, 250 Ky. 640.

99. N Y.—Smith v. Geiger, 95 N E. 706, 202 N Y 306, rehearing denied 96 N E. 1130, 203 N.Y. 546.
58 C.J. p 731 note 62

1. Ky—Johnson v Caddell, 63 S W. 2d 810, 250 Ky 640.
58 C.J. p 731 note 63

2. Ind—Old Wayne Mut. L. Assoc v McDonough, 73 N E 703, 164 Ind 321.
58 C J p 731 note 64

3. Ill—Gurnee v. Chicago, 40 Ill. 165.

4. Ind.—Hawkins v. State, 36 N.E. 419, 136 Ind 630
58 C.J. p 731 note 65

5. Me.—Chapman v. Limerick, 56 Me. 390.
58 C.J. p 731 note 66.

officer's presence and at his direction, has been recognized.[6]

Mode of affixing. While the view has been taken that, under some circumstances at least, the typewritten name of an officer on an official document is not sufficient to constitute a signature,[7] and a like view has been taken as to the use of a facsimile signature produced by a rubber stamp,[8] it has been held or recognized that, under some circumstances, an officer may sign by means of a facsimile signature,[9] of an autographed signature stamp,[10] of a rubber stamp,[11] or of a typewriter.[12]

SIGNBOARD. A board for or bearing a notice or sign.[1]

SIGNIFY. To make known[2] by signs or words;[3] express; communicate; announce; declare.[4] It has been held to be synonymous with, or equivalent to, "indicate" see 42 C.J.S. p 883 note 8.

SIGNING. See Signatures § 1.

SIGNUM. A Latin term, employed in the Roman and civil law to signify a sign; a mark, a seal; the seal of an instrument.[5] The term is also employed to denote a species of proof.[6]

In Saxon law, the word "signum" denoted the sign of a cross prefixed as a sign of assent and approbation to a charter or deed.[7]

"Signum" has been held to be synonymous with "sigillum" see ante p 1281 note 71.

SILD. A Norwegian word said to be synonymous with "herring."[8]

SILENCE. The state of a person who does not speak, or of one who refrains from speaking.[9]

"Silence" has been distinguished from "concealment" see 15 C.J.S. p 795 note 26.1, and "suppression of fact" see 35 C.J.S. p 386 note 37.

The general rule as set out in Fraud § 15 is that mere silence is not representation, but an exception to this rule exists where the circumstances impose on a person a duty to speak and he deliberately remains silent, as stated in Fraud § 16. For other references to the treatment of silence in connection with the law of fraud see the index to the title Fraud; and see Fraudulent Conveyances § 351.

Where a person, on being accused of crime, with full liberty to speak, remains silent, his silence is relevant as tending to show his guilt as stated in Criminal Law § 734 Admissions by silence as admissible in civil actions see Evidnce §§ 294–297.

Silence is treated in various connections in the law of agency and in the law of estoppel, and for specific references see the indexes to the titles Agency and Estoppel. For other specific references consult the Descriptive-Word Index.

"Cone of silence" as an aeronautical term is discussed in Aerial Navigation § 2.

SILENTIUM IN SENATU EST VITIUM. See 58 C.J. p 732 note 10.

SILENT LEGES INTER ARMA.[10]

SILHOUETTE. Originally a portrait in black or some other uniform tint, sometimes varied as to the hair or other parts by lighter lines or a lightening of shade, showing the profile as cast by a candle on a sheet of paper, hence any opaque portrait, design, or image in profile; a representation of the outline of an object filled in with a black color; a profile portrait in black, such as a shadow appears

6. Ky—Pardue v Webb, 70 S.W 2d 665, 253 Ky 838
58 C J. p 726 note 98 [a].

7. Pa—Sechrist v York R. Co, 26 Pa Dist. 658.
58 C.J p 731 note 68.

8. Ohio—State ex rel Drucker v. Reichle, App, 81 N E 2d 735

9. Ariz—Maricopa County v Osborn, 136 P 2d 270, 60 Ariz 290.
D C.—McGrady v Munsey Trust Co, Mun App., 32 A 2d 106
S.C.—Smith v. Greenville County, 199 S E 416, 188 S C. 349.

10. S C.—Smith v. Greenville County, supra.

11. D C—McGrady v. Munsey Trust Co., Mun App, 32 A 2d 106.
N M—Costilla Estates Dev Co v Mascarenas, 267 P. 74, 33 N M 356
Okl—Boyer v State, 97 P 2d 779, 68 Okl Cr 220—Moss v Arnold, 75 P 2d 491, 63 Okl.Cr 343

12. D C—Packard v. U S., App, 77 A 2d 19

1. Ga—Pullman Co v. Carter, 6 S E 2d 351, 355, 61 Ga App 543.

2. Me—Goodwin v. Hodgkins, 77 A 711, 712, 107 Me 170.
58 C.J p 732 note 2.

3. Wash—State v. Klein, 162 P 52, 53, 94 Wash. 212.

4. Wash—State v. Klein, supra.

5. Black L D.

6. Black L D.

7. Black L.D

8. U S—Reiss v. U S., C C N Y, 113 F 1001.
"Herring" defined see 39 C J S. p 897 note 77.

9. Black L.D

10. A maxim meaning "The power of law is suspended during war."—Black L D.
"The Ciceronian maxim"
La—Smith v Stewart, 21 La Ann. 67, 68, 99 Am D 709.
Applied in
Ohio—Pennywit v Foote, 27 Ohio St. 600, 629, 22 Am R. 340.

to be; a shadowgraph, a shadow picture which may be made by photographic process or cut out of a piece of black paper with scissors.[11]

SILICA. In chemistry, silicon dioxide or silicic anhydride, SiO_2, occurring naturally in crystalline form as quartz, tridymite, etc. and in amorphous form as opal. Sand is impure silica.[12] It is also referred to as a silicic acid in a state of purity.[13] Silica is said to occur in two forms, "free" and "combined,"[14] and, as stated post p 1299 note 56, it is only free silica which can cause silicosis

SILICATE. In chemistry, a salt of silicic acid.[15]

SILICIOUS MARL. See 55 C.J.S. p 802 note 43.

SILICIUM. The name formerly applied to silicon, when it was classed with the metals.[16]

SILICON. A dark, nut-brown, elementary substance, destitute of metallic lustre, and a nonconductor of electricity; the base of silax or silica.[17]

SILICOSIS. An insidious, subtle,[18] progressive,[19] specific,[20] chronic,[21] disease[22] of the lungs.[23] Silicosis is sometimes called a pathological condition,[24] a chronic condition of the lungs,[25] a latent, chronic process,[26] and it is defined generally as a fibrotic condition of the lungs due to prolonged inhalation and accumulation of minute particles of dust containing free silica;[27] a deposit of particles of silica in the tissues; specifically a chronic fibroid condition of the lungs or bronchial lymphatic glands, produced by inhalation of minute particles of silica.[28]

Silicosis is a form of pneumoconiosis,[29] and medically it is known as "pneumonoconiosis," or more

11. Mo.—Frankel v German Tyrolean Alps Co., 97 S.W. 961, 962, 121 Mo.App. 51.
58 C.J. p 732 note 17.

12. Ohio—McKee v New Idea, App., 44 N.E.2d 697, 708
Silica as included in meaning of term "mineral" see Mines and Minerals § 2 b (8).

Silica gel
A hard transparent substance with ultra-microscopic pores possessing ability to absorb moisture from the air making it useful as a desiccant. It has other commercial uses where absorptive purposes are desired and where catalysts are useful, as in oil refining—Davison Chemical Corp v Joliet Chemicals, C.A.Ill., 179 F.2d 793, 794.

13. N.Y.—Electro-Silicon Co v. Hazard, 29 Hun 369, 373.

14. Ky.—Coburn v North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

15. New Standard D.

"Silicate of soda" is an inorganic material and not a plastic or thermoplastic as the term is generally understood—Sunlite Mfg. Co v. Clarvan Corporation, D.C.Wis., 73 F Supp. 938, 941.

16. U.S.—Electric Smelting & Aluminum Co. v. Carborundum Co., Pa., 102 F. 618, 620, 42 C.C.A. 537.
58 C.J. p 732 note 26.

17. N.Y.—Electro-Silicon Co. v. Hazard, 29 Hun 369, 373.

"Silicon carbide" is a substance formed by fusing a mixture of carbon and sand or silica in an electric furnace at a very high temperature It is used as an abrasive and refractory—Metz v. Quarkertown Stove Works, 39 A.2d 534, 536, 156 Pa.Super. 70.

18. Ind.—In re Jefferies, 14 N.E.2d 751, 753, 105 Ind.App 349.

19. Mass.—Gustafson's Case, 21 N.E.2d 961, 962, 303 Mass. 397.

Progressive in nature
Ind.—In re Jefferies, 14 N.E.2d 751, 753, 105 Ind.App. 349

Progressive nature explained
Silicosis is a progressive disease, the lung changes continuing to develop for one or two years after complete removal of the individual from the silica hazard, this advance probably due to continued chemical action of the silica stored in the lung tissue.
N.M.—Aranbula v Banner Min. Co., 161 P.2d 867, 872, 49 N.M. 253
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384

20. Mich.—Mercatante v Michigan Steel Casting Co., 31 N.W.2d 712, 320 Mich. 542

21. Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30

22. U.S.—Galeota v. United States Gypsum Co., C.C.A.N.Y., 123 F.2d 947, 948—Pieczonka v Pullman Co., C.C.A.N.Y., 89 F.2d 353, 354.
Cal.—Marsh v. Industrial Accident Commission, 18 P.2d 933, 934, 217 Cal. 338, 86 A.L.R. 563—Morrison v. Industrial Accident Commission, 109 P.2d 767, 768, 42 Cal.App.2d 685
Ind.—In re Jefferies, 14 N.E.2d 751, 753, 105 Ind.App. 349
Mass.—Gustafson's Case, 21 N.E.2d 961, 962, 303 Mass. 397.
Mo.—Urie v. Thompson, 210 S.W.2d 93, 103, 357 Mo. 738—Wurst, v. American Car & Foundry Co., App., 103 S.W.2d 6, 16.
Neb.—Svoboda v. Mandler, 275 N.W. 599, 600, 133 Neb. 433
N.M.—Arahbula v. Banner Min. Co., 161 P.2d 867, 868, 869, 49 N.M. 253.
Ohio.—McKee v New Idea, App., 44 N.E.2d 697, 708

Dust disease
Mich.—Mercatante v Michigan Steel Casting Co., 31 N.W.2d 712, 320 Mich. 542.

23. U.S.—Pieczonka v Pullman Co., C.C.A.N.Y., 89 F.2d 353, 354.
Cal.—Marsh v Industrial Accident Commission, 18 P.2d 933, 934, 217 Cal. 338, 86 A.L.R. 563—Morrison v Industrial Accident Commission, 109 P.2d 767, 768, 42 Cal.App.2d 685.
Neb.—Svoboda v Mandler, 275 N.W. 599, 600, 133 Neb. 433.

24. Ind.—Carnegie-Illinois Steel Corporation v. Pokopac, 44 N.E.2d 522, 523, 112 Ind.App. 544

25. Mich.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254

26. Mich.—Krzewinski v Robert Gage Coal Co., 7 N.W.2d 223, 225, 304 Mich. 63
Utah.—Uta-Carbon Coal Co v. Industrial Commission, 140 P.2d 649, 652, 104 Utah 567.

27. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

28. Cal.—Argonaut Mining Co v Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492
Minn.—Golden v Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30.
Bronchitis resulting from inhalation of silica dust as form of silicosis and as such an occupational disease see 12 C.J.S. p 372 note 16.

29. Idaho.—Brown v. St Joseph Lead Co., 87 P.2d 1000, 1004, 60 Idaho 49.
Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30
Ohio.—McKee v New Idea, App., 44 N.E.2d 697, 708.

simply as "pneumoconiosis silicosis."[30] It is also known as "stonecutter's disease,"[31] and it has been recognized for many years under the appellation of "stonecutter's consumption."[32]

It is well known[33] that silicosis is an occupational disease,[34] and is considered to be a typical illustration of an occupational disease,[35] since it is not a disease to which workmen would be equally exposed outside the place of employment,[36] and usually it is contracted under circumstances concerning which the employer should be fully and accurately informed.[37] However, it is only comparatively recently that it has been recognized as an occupational disease to which persons other than stonecutters may be subject by reason of their inhalation of silicate or quartz dust.[38]

Silicosis is prevalent among employees in mines, potteries, stone and slate factories,[39] and in file-cutting and metal grinding enterprises,[40] where the air is permeated with minute particles of stone, quartz, slate, or metal dust which is inhaled to the detriment of the tissues, glands, and lungs.[41]

Silicosis is not an injury by accident;[42] it is not a germ disease,[43] and is neither transmissible nor infectious.[44]

Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash 2d 384.

Variant spellings

There are variant spellings of the generic term used to cover all dust diseases of the lungs, including silicosis; see 72 C.J.S. p 158 notes 61–75.

"Siderosis" as that type of pneumoconiosis which is due to inhalation of metallic dust see ante p 1279 note 27.

30. Cal.—Marsh v. Industrial Accident Commission, 18 P.2d 933, 934, 217 Cal. 338, 86 A.L.R. 563—Morrison v. Industrial Accident Commission, 109 P.2d 767, 768, 42 Cal.App. 2d 685.

31. Mass.—Gustafson's Case, 21 N.E. 2d 961, 963, 303 Mass 397
Neb.—Svoboda v. Mandler, 275 N.W. 599, 600, 133 Neb 433.

32. Ohio—McKee v. New Idea, App., 44 N.E.2d 697, 708.

33. N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 652, 104 Utah 567

Similarly expressed

(1) "That silicosis is universally treated as an occupational disease, is shown by reference to cases dealing with the subject."—Nolley v. Diamond Coal Co., 165 S.W.2d 841, 842, 291 Ky. 849.

(2) "Silicosis meets every phase of the definition of an occupational disease as heretofore defined by this court."—Aranbula v. Banner Min. Co., 161 P.2d 867, 869, 49 N.M. 253.

34. U.S.—Cason v. American Brake Shoe & Foundry Co., D.C.Colo., 32 F.Supp. 680, 682.
Ariz.—In re Mitchell, 150 P.2d 355, 359, 61 Ariz. 436
Cal.—Marsh v. Industrial Accident Commission, 18 P.2d 933, 934, 217 Cal. 338, 86 A.L.R. 563—Morrison v. Industrial Accident Commission, 109 P.2d 767, 768, 42 Cal.App. 2d 685
Md.—State, to Use of Wilson v. North East Fire Brick Co., 24 A.2d 287, 288, 180 Md 367
Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn 30
Mo.—Urie v. Thompson, 176 S.W.2d 471, 476, 352 Mo. 211
Neb.—Svoboda v. Mandler, 275 N.W. 599, 600, 133 Neb 433
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 868, 49 N.M. 253
N.Y.—Barrencotto v. Cocker Saw Co., 194 N.E. 61, 64, 266 N.Y. 139
Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 420, 332 Pa. 507
Utah—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 652, 104 Utah 567.
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384
W.Va.—Hodges v. Workmen's Compensation Com'r, 17 S.E.2d 450, 452, 123 W.Va. 563
"Occupational disease" see 67 C.J.S. p 77 note 57—p 82 note 6

Held not an occupational disease

Silicosis is not an occupational disease, since it does not result from the ordinary and generally known risks inherent and incident to employment in the mining industry.—Woodward Iron Co. v. Minyard, C.A.Ala., 170 F.2d 508, 510.

35. Mo.—Bolosino v. Laclede-Christy Clay Products Co., App., 124 S.W.2d 581, 583.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253

36. Utah—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

37. W.Va.—Hodges v. Workmen's Compensation Com'r, 17 S.E.2d 450, 452, 123 W.Va. 563.

38. Ohio.—McKee v. New Idea, App., 44 N.E.2d 697, 708

39. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

Miners working in tunnels

Cal.—Marsh v. Industrial Accident Commission, 18 P.2d 933, 934, 217 Cal. 338, 86 A.L.R. 563—Morrison v. Industrial Accident Commission, 109 P.2d 767, 768, 42 Cal.App.2d 685

40. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.

41. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253
Utah—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 652, 104 Utah 567.

42. N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 868, 49 N.M. 253

Disease not an accident

"His employer's subjection of . . . [the employee] to work in an unventilated, dust-filled workroom was all along intentional and usual. It was the cause of his disease. The latter was a fibroid condition of his lungs, insidiously started and slowly continued through the chronic to the fatal stage, by his inhalation, through long hours of many working days, year after year, of minute airborne particles of silica dust. Such a cause defies reasonable inclusion in any reasonable definition of accident. Accidents do not and cannot take years in the happening."—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Miss 30

43. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

Similarly expressed

Silicosis does not result from infection by germ or bacillus.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30.

44. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

The contributing cause of silicosis is well known to the medical profession,[45] and it is known to be caused by, or to result from, breathing into the lungs particles of silica[46] or quartz[47] dust,[48] or sand particles,[49] and over a more or less long period of time as stated infra note 64. These particles lodge on the lining membrane and by chemicalization pass through the lining, causing the formation of nodules,[50] and resulting in tissue damage,[51] and a chemical[52] destruction of the lung tissue,[53] the lung injury being caused by the chemical action of the silica particle, rather than the mechanical irritation.[54]

Silica occurs in two forms, "free" and "combined" as stated ante p 1297 note 14, but silicosis is due to the inhalation of free silica or dust containing free silica,[55] and it is only free silica which can cause silicosis.[56]

It is stated supra note 50 that the particles which are breathed into the lungs cause the formation of nodules, and the rapidity with which these nodules increase in size and density depends on factors such as the individual's physical characteristics, his economic situation, and the duration and intensity of exposure.[57] Thus the incurring and development of silicosis depends somewhat on the constitution of the person, and somewhat on the conditions under which he works,[58] and the rate at which silicosis develops under the same conditions varies with different persons,[59] and it has been said that some persons appear to be immune to the disease.[60] However, a large proportion of those who are engaged in pursuits where the air is permeated with minute particles of stone, quartz, slate, or metal dust are susceptible to silicosis.[61]

45. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.

Known in the mining industry
Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.

46. U.S.—Galeota v. United States Gypsum Co., C.C.A.N.Y., 123 F.2d 947, 948.
Cal.—Marsh v. Industrial Accident Commission, 18 P.2d 933, 934, 217 Cal. 338, 86 A.L.R. 563—Morrison v. Industrial Accident Commission, 109 P.2d 767, 768, 42 Cal.App.2d 685.
Ind.—Carnegie-Illinois Steel Corporation v. Pokopac, 44 N.E.2d 522, 523, 112 Ind.App. 544.
Mich.—Krzewinski v. Robert Gage Coal Co., 7 N.W.2d 223, 224, 304 Mich. 63—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 152, 291 Mich. 254.
Mo.—Wurst v. American Car & Foundry Co., App., 103 S.W.2d 6, 16.
Ohio—McKee v. New Idea, App., 44 N.E.2d 697, 708.

Air containing silica (SiO_2)
Ind.—In re Jefferies, 14 N.E.2d 751, 753, 105 Ind.App. 349.

Silicon dioxide dust
Utah—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

47. Ohio—McKee v. New Idea, App., 44 N.E.2d 697, 708.

48. Sharp particles of dust
Neb.—Svoboda v. Mandler, 275 N.W. 599, 600, 133 Neb. 433.

Dust of stone, sand, or flint
Idaho—Brown v. St. Joseph Lead Co., 87 P.2d 1000, 1004, 60 Idaho 49.

49. U.S.—Galeota v. United States Gypsum Co., C.C.A.N.Y., 123 F.2d 947, 948.

50. Mich.—Krzewinski v. Robert Gage Coal Co., 7 N.W.2d 223, 224, 304 Mich. 63.
Mich.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 152, 291 Mich. 254.

51. Mich.—Krzewinski v. Robert Gage Coal Co., 7 N.W.2d 223, 224, 304 Mich. 63—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 152, 291 Mich. 254.

52. U.S.—Galeota v. United States Gypsum Co., C.C.A.N.Y., 123 F.2d 947, 948.

53. U.S.—Galeota v. United States Gypsum Co., supra.
Mass.—Gustafson's Case, 21 N.E.2d 961, 962, 303 Mass. 397.

54. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

Chemical action described
(1) A chemical action leads nature in self-defense to build a wall of fibre around the poison. An increasing number of these fibrous lumps, called nodules, gradually block off the blood supply and finally the air-passageways.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

(2) Silica dust inflicts injury to the lungs, not because of the physical properties of the individual particles, as the hard, sharp particles of quartz and carborundum; but its danger lies purely in its poisonous chemical action. Because of this, it causes tiny areas of necrosis in the walls of the lymph spaces of the alveoli in which it is deposited, at which necrotic points, by ways of healing, there develop fibrosis and a proliferation of the surrounding epithelial cells, the latter explaining the nodule formation.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 872, 49 N.M. 253.
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384.

55. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.
Mich.—Mercatante v. Michigan Steel Casting Co., 31 N.W.2d 712, 713, 320 Mich. 542.

56. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

57. Mich.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

58. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah.—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

59. Mich.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

60. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah.—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

61. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah.—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

It is known that the relationship of the dust concentration and the duration of exposure are important etiological factors of silicosis,[62] and, while the course of the disease may be rapid or gradual,[63] it is generally recognized that the inhalation of the harmful dust or particles must be over a more or less long period of time,[64] since the disease usually[65] requires a long period for its development,[66] but it is not certain how many particles must lodge, or over what period of time, to cause the disease,[67] since these two factors are reciprocal variants.[68] The size of the particles is also a factor to be considered since in order to cause silicosis the silica must be present in the air in particles small enough to enter the finer air spaces of the lungs, and only particles which are less than ten microns in diameter are harmful.[69]

Silicosis is evidenced by pathological changes in the lung structure attributable to the effects of the inhalation of harmful dusts over a long period of time,[70] and it is characterized anatomically by generalized fibrotic changes and the development of military nodulation in both lungs,[71] and clinically,[72] by shortness of breath,[73] and also characterized

62. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

63. Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah.—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

64. Mo.—Urie v. Thompson, 210 S.W.2d 98, 106, 357 Mo. 738.—Bolosino v. Laclede-Christy Clay Products Co., App., 124 S.W.2d 581, 583
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253
Utah.—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

65. Period of development

(1) Medical authorities state that it usually takes seven or more years of exposure to silica dust for the worker to contract the disease. A few cases have been known to develop in as short a period as one and one-half years, but these were under extreme and unusual conditions. The disease may have developed to such an extent that it is susceptible of diagnosis by an experienced doctor with the aid of X-ray and yet the objective symptoms may be so slight that the victim may be entirely unconscious of having contracted the disease.—Pocahontas Corp. v. Richardson, 42 S.E.2d 260, 262, 186 Va. 367.

(2) The course of the disease sometimes extends over a period of several years before the victim is finally disabled for the performance of manual labor.
Cal.—Argonaut Mining Co. v. Industrial Accident Commission, 70 P.2d 216, 219, 21 Cal.App.2d 492.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.
Utah.—Uta-Carbon Coal Co. v. Industrial Commission, 140 P.2d 649, 653, 104 Utah 567.

(3) The course of the disease of silicosis sometimes extends over a period of twenty years or more.—Argonaut Mining Co. v. Industrial Accident Commission, supra.

(4) Experience shows that the average time of exposure and development into a disability to be ten years.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

(5) It develops slowly and inexorably, symptoms are latent and may not appear until long after X-ray signs of silicosis are demonstrable, oftentimes years after the employment ceases. Because of the insidious and progressive nature of the disease the worker is usually unaware of it and his physician frequently overlooks it.—Ruffertshafer v. Robert Gage Coal Co., supra.

(6) It is evident that in most, if not all, cases the symptoms of the disease do not manifest themselves until after a long period of exposure to silica dust and that an individual may not become aware of any disability until long after he has ceased work.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384.

(7) "Chronic diseases, such as silicosis, have an insidious and always unrecognized beginning. They progress slowly for a long period, without suspicion of their presence."—Golden v. Lerch Bros., 300 N.W. 207, 211, 211 Minn. 30.

66. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.

67. Mich.—Krzewinski v. Robert Gage Coal Co., 7 N.W.2d 223, 224, 304 Mich. 63.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

Intensity of dust concentration

"'In general it may be said that in individuals working in dust containing 5,000,000 particles of pure silica per cubic foot it would require from five to twenty years for the development of demonstrable silicosis. . . . Concentrations of dust in which there are more than 100,000,000 particles per cubic foot of air are extremely hazardous, and this has been called by Cummings the "secondary threshold," a value above which silicosis might be expected to develop with great rapidity. Under such conditions nodular fibrosis might occur in as short a time as two years. As a general rule from fifteen to twenty years working exposure to fifteen or twenty million particles of pure crystalline silica are required to produce demonstrable silicosis.' Cecil, Textbook of Medicine (4th Ed.), p. 884."—Ruffertshafer v. Robert Gage Coal Co., supra.

68. Mich.—Krzewinski v. Robert Gage Coal Co., 7 N.W.2d 233, 234, 304 Mich. 63.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

69. Ky.—Coburn v. North American Refractories Co., 174 S.W.2d 757, 763, 295 Ky. 566.
Micron as equivalent to $\frac{1}{25,000}$ of an inch see the C.J.S. title Weights and Measures § 1.

Size of particles described

The tiny particles which are breathed into the lungs are too fine to be seen even with a good microscope.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

70. Mo.—Urie v. Thompson, 210 S.W.2d 98, 103, 357 Mo. 738.—Bolosino v. Laclede-Christy Clay Products Co., App., 124 S.W.2d 581, 583.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 871, 49 N.M. 253.

71. Ind.—In re Jefferies, 14 N.E.2d 751, 753, 105 Ind.App. 349.

72. Ind.—In re Jefferies, supra.

Clinical symptoms

N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 872, 49 N.M. 253.
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384.

73. Ind.—In re Jefferies, 14 N.E.2d 751, 753, 105 Ind.App. 349.
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 872, 49 N.M. 253.
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384.

The shortness of breath seldom reaches a degree sufficient to dis-

by decreased chest expansion,[74] lessened capacity for work,[75] absence of fever,[76] increased susceptibility to tuberculosis,[77] and some or all of these symptoms may be present.[78] These symptoms are due to nodular fibrosis rather evenly distributed throughout both lungs, which reduces the lung air space and lessens the elasticity of the pulmonary tissues.[79] There are also certain characteristic X-ray findings or changes.[80]

The authorities usually attempt to divide silicosis into three[81] or four[82] stages.

Silicosis is an incurable disease,[83] and there is no treatment for it.[84] All hope to stem the disease lies in preventive measures to decrease the concentration of dust in plants where the disease is a hazard.[85] Not only is the disease incurable, but, if continued, it is fatal.[86] Distressing shortness of breath and finally plain suffocation may result from silicosis,[87] but the disease predisposes to tuberculosis,[88] and tuberculosis is quite frequently a complication of silicosis.[89] It has been said that three fourths of the people afflicted with silicosis die from tuberculosis, fifteen per cent die from pneumonia; enlarged hearts from attempting to force blood through hardening arteries complete the story.[90]

SILK. The fine, soft thread produced by various species of caterpillars; and hence thread spun, or cloth woven, from the above-named material.[91] In

turb the patient, except when sudden violent exercise by creating a sudden demand for large amounts of oxygen causes dyspnea. The dizziness, general weakness, and headache often mentioned as symptoms of silicosis are indirect results of this dyspnea. —Henson v Department of Labor and Industries, supra.

74. Ind.—In re Jefferies, 14 N E 2d 751, 753, 105 Ind App 349
N M.—Aranbula v Banner Min Co., 161 P.2d 867, 872, 49 N.M 253
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash.2d 384

75. U S.—Galeota v. United States Gypsum Co., C C A N Y., 123 F.2d 947, 948
Ind.—In re Jefferies, 14 N E.2d 751, 753, 105 Ind App 349
N.M.—Aranbula v. Banner Min. Co., 161 P.2d 867, 872, 49 N M. 253
Wash.—Henson v Department of Labor and Industries, 130 P 2d 885, 886, 15 Wash 2d 384.

76. U.S.—Galeota v. United States Gypsum Co., C C.A.N.Y., 123 F 2d 947, 948.
Ind.—In re Jefferies, 14 N.E 2d 751, 753, 105 Ind.App 349
Wash.—Henson v Department of Labor and Industries, 130 P 2d 885, 886, 15 Wash 2d 384

77. U.S.—Galeota v. United States Gypsum Co., C C A N.Y, 123 F.2d 947, 948.
Ind.—In re Jefferies, 14 N E.2d 751, 753, 105 Ind.App. 349

78. Ind.—In re Jefferies, supra

79. N M.—Aranbula v. Banner Min Co, 161 P 2d 867, 872, 49 N.M 253
Wash.—Henson v. Department of Labor and Industries, 130 P.2d 885, 886, 15 Wash 2d 384.

80. U.S.—Galeota v. United States Gypsum Co., C.C.A.N.Y., 123 F.2d 947, 948.
Ind.—In re Jefferies, 14 N E 2d 751, 753, 105 Ind.App 349

81. Ky.—Coburn v. North American Refractories Co, 174 S.W.2d 757, 763, 295 Ky 566.

Three stages

"According to the medical authorities, the disease is divided into first, second, and third stages 'The symptoms of uncomplicated first-stage silicosis are few and often indefinite. The man may apparently be quite well and his working capacity not noticeably impaired Slight shortness of breath on exertion and some unproductive cough, often with recurrent colds, are the most usual symptoms The man may have a little less ability to expand his chest than formerly, and the elasticity of the chest may be slightly impaired The earliest specific indication of the presence of silicosis is the radiographic appearance, consisting of generalized arborization throughout both lung fields with more or less small, discrete mottling.' The symptoms of the second stage are usually as follows: 'A definite shortness of breath on exertion is usually found, and pains in the chest are a frequent complaint A dry morning cough is often present, sometimes with vomiting; and recurrent colds are more frequent Even then the man's appearance may be healthy, but he is dyspneic on exertion, he cannot work as well as formerly, his chest expansion is noticeably decreased, the movement being sluggish and diminished in elasticity. The characteristic radiographic appearance is a generalized medium-sized mottling throughout both lung fields. The shadows of the individual nodules are for the most part discrete and well-defined on a background of fibrous arborization, but there may be here and there larger but limited opacities due to irregular pleural thickening or to a localized aggregation of nodules.' Report of Committee on Pneumoconiosis and Committee on Standard Practices in Compensation of Occupational Diseases of the American Public Health Association. See Bulletin 400, Bureau of Mines, United States Department of the Interior"—Pocahontas Corp. v Richardson, 42 S E 2d 260, 262, 186 Va 367

82. Ky.—Coburn v North American Refractories Co, 174 S W 2d 757, 763, 295 Ky 566.

83. U S.—Galeota v. United States Gypsum Co., C C A.N.Y, 123 F 2d 947, 948—Pieczonka v Pullman Co, C C A N Y, 89 F 2d 353, 354.

In its incipiency, silicosis is not incurable.—Argonaut Mining Co v. Industrial Accident Commission, 70 P 2d 216, 219, 21 Cal App 2d 492

84. Idaho.—Howard v. Texas Owyhee Mining & Development Co, 115 P 2d 749, 751, 753, 754, 62 Idaho 707

85. Idaho.—Howard v. Texas Owyhee Mining & Development Co, supra.

86. U.S.—Pieczonka v Pullman Co, C.C.A.N.Y., 89 F 2d 353, 354.

87. Mich.—Ruffertshafer v. Robert Gage Coal Co, 289 N.W. 151, 153, 291 Mich 254

88. Mich.—Ruffertshafer v. Robert Gage Coal Co, supra.

89. Mich.—Mercatante v. Michigan Steel Casting Co, 31 N.W 2d 712, 713, 320 Mich 542

Similarly expressed

Silicosis follows a definite course, with a period of onslaught, then increasing severity in which the normal lung tissue is gradually replaced by fibrous or scar tissue over each particle of dust lodged in the lung, and military tuberculosis usually ensues, together with other complications, before death occurs.—Svoboda v Mandler, 275 N.W. 599, 600, 133 Neb. 433

90. Mich.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 153, 291 Mich. 254.

91. Cal.—Lowder v. Union Transfer Co, 250 P. 703, 704, 79 Cal App. 598.

its widest and most comprehensive sense the word denotes the substance or material which comes from the raw silk, whatever be its quality.[92]

Silk and silk goods as subject to, or exempt from, tariff provisions see Customs Duties §§ 43, 70.

SILL. A horizontal member forming the foundation or part of the foundation of a structure of any kind.[93]

As used in railroad terminology, the word "sill" and the term "sill step" are defined in Railroads § 1 r.

SILO. A receptacle intended to preserve and store forage in edible condition, to be used during the winter and the spring;[94] a structure or vat for the storage of fodder harvested from the field and for its conversion into ensilage to be used for food for live stock.[95] A silo is a part of the regular equipment of most farms which support any considerable amount of stock and is an important instrument in the ordinary process of husbandry.[96]

SILT. Mud, or fine earth, deposited from running or standing water.[97]

SILVER. A white metallic element, sonorous, ductile, very malleable, and capable of a high degree of polish.[98] The term is employed also in referring to a medium of exchange in use in this country.[99]

SIMILAR. The word "similar" is a qualifying adjective,[1] and is derived from the Latin "similis," meaning "like."[2] It is a word of common use,[3] and not a legal term,[4] but it has received frequent and extended attention from the courts.[5]

By reason of the fact that the word "similar" has in use and according to lexicographers two distinct meanings,[6] both of which have been recognized by the courts,[7] the dictionary definitions are said to be unsatisfactory,[8] and, since the word is ambiguous[9] and has no inflexible content,[10] the meaning it conveys to the mind of the ordinary reader usually is a question for the jury to determine.[11]

As ordinarily used, the word "similar" implies an allowance for some degree of difference,[12] and a reference to some standard of comparison, itself determined by the context.[13] Thus the word is often used to denote partial resemblance,[14] and is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness, to some

92. Can.—Wilman v. Great Northern R. Co, 16 R & Can Tr.Cas. 395, 399.
"Crape" not identical see 21 C.J S p 1036 note 96.
Phrases employing the word and as to which more recent adjudications have not been found see 58 C J. p 733 notes 31–36.

93. New Standard D.

94. U S—Ryder v. Schlichter, Pa, 126 F 487, 61 C C A. 469.

95. Mass—Moulton v. Building Inspector of Milton, 43 N E 2d 662, 664, 312 Mass 195.

96. Mass—Moulton v. Building Inspector of Milton, supra

97. La—State v. New Orleans Water Works Co, 31 So. 395, 401, 107 La. 1.

98. Webster New Int D.
Phrases
(1) "Silver-bearing ore" see Mines and Minerals § 2 b (5).
(2) "Silver coin" see 14 C J S. p 1314 note 95
(3) "Silver Purchase Act" see the index to Internal Revenue.
(4) "Sterling silver" is an alloy of silver and copper, in certain proportions, the proportion of copper being only seventy five parts in a thousand—State v. Nelson, 60 A. 589, 590, 27 R.I. 31.
(5) Other phrases as to which more recent adjudications have not been found see 58 C J p 733 notes 49–52

99. Ark—Cook v. State, 196 S.W. 922, 924, 130 Ark 90

1. N J.—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 126, 133 N J.Law 485.

2. Ala—State ex rel. Sigsbee v City of Birmingham, 48 So. 843, 845, 160 Ala. 196.
Ga.—**Corpus Juris quoted in** State Revenue Commission v. National Biscuit Co, 175 S E 368, 375, 179 Ga 90.

3. Ohio—Board of Education of Ross Tp. v. Board of Education of Silvercreek Tp, 185 N.E. 207, 44 Ohio App. 335.

4. Tex—Bell Pub Co. v. Garrett Engineering Co., 170 S W.2d 197, 207, 141 Tex. 51.

5. U S—Japan Import Co v. U S, Cust. & Pat App, 86 F.2d 124, 131—Japan Import Co. v. U. S, 24 C.C P A.,Customs, 167, 176.

6. Ga—**Corpus Juris quoted in** State Revenue Commission v National Biscuit Co, 175 S E. 368, 375, 179 Ga 90.
Me—Stowell v. Blanchard, 119 A. 866, 868, 122 Me. 368

7. Ga—**Corpus Juris quoted in** State Revenue Commission v National Biscuit Co., 175 S E 368, 375, 179 Ga. 90
Me—Stowell v. Blanchard, 119 A. 866, 868, 122 Me 368

8. Ga—**Corpus Juris quoted in** State Revenue Commission v. National Biscuit Co, 175 S.E 368, 375, 179 Ga. 90.
Pa—Drucker v. Potruch, 29 Pa.Dist. 989, 992.

9. Tex—Bell Pub Co. v. Garrett Engineering Co, 170 S.W.2d 197, 207, 141 Tex. 51.

10. U S—Rothkopf v. Lowry & Co., C C A.N.Y, 148 F 2d 517, 519.

11. Tex.—Bell Pub Co. v. Garrett Engineering Co, 170 S.W 2d 197, 207, 141 Tex 51.

12. Conn—McLaughlin v. Poucher, 17 A 2d 767, 770, 127 Conn 441
Wyo.—Texas Co. v. Siefried, 147 P. 2d 837, 846, 60 Wyo 142.
Things which are similar may differ in many respects.—Wassenich v. City and County of Denver, 186 P. 533, 536, 67 Colo 456

13. U.S—Rothkopf v Lowry & Co., C C A.N.Y., 148 F 2d 517, 519
Otherwise expressed
"A thing cannot, strictly speaking, be similar to itself."—Rhode Island Hospital Trust Co. v. Olney, 13 A. 118, 119, 16 R I. 184.

14. Tex—Orr v. Wright, Civ.App., 45 S.W. 629, 634.
58 C.J p 734 note 70.

other thing.[15] In this, its primary, sense,[16] the word "similar" is frequently,[17] and judicially,[18] defined as meaning nearly corresponding;[19] resembling in many respects;[20] somewhat like;[21] having[22] or bearing[23] a general likeness; and this is said to be the usual signification,[24] and the generally accepted definition,[25] of the term, and the meaning usually assigned by the courts.[26]

The word "similar" is further defined in this sense as meaning like,[27] but not exactly the same,[28] or not completely identical;[29] in some ways[30] or respects[31] identical; of like characteristics, nature,

15. N J.—Fletcher v. Interstate Chemical Co, 110 A. 709, 710, 94 N J Law 332
S C—Baitary v Ilderton, 52 S E 2d 417, 418, 214 S C 357.

16. Ill—Rubenstein v. Firemen's Fund Ins Co, 90 N E 2d 289, 291, 339 Ill App 404

17. Ala.—State ex rel Sigsbee v. City of Birmingham, 48 So 843, 845, 160 Ala. 196

18. Pa.—In re Bonsall's Estate, 135 A. 724, 725, 288 Pa 39
Wyo—Texas Co v. Siefried, 147 P.2d 837, 846, 60 Wyo 142

19. U.S—Tedesco v. U. S., C.C.A. Or., 118 F.2d 737, 741—Raynor v. U. S., C C.A.Ind, 89 F 2d 469, 471—Japan Import Co v. U S, Cust. & Pat App, 86 F.2d 124, 131—Japan Import Co v. U S., 24 C C P A, Customs, 167, 176—U. S v. Irving Massin & Bros, 16 Ct Cust App 19, 23
Conn.—McLaughlin v Poucher, 17 A. 2d 767, 770, 127 Conn 441.
Ill—Rubenstein v. Firemen's Fund Ins. Co., 90 N E 2d 289, 291, 339 Ill.App 404.
Ind.—Department of Ins of Ind. v Noblesville Brother-Sisterhood, 72 N.E.2d 240, 243, 117 Ind App. 527
Ky.—Kentucky Utilities Co v. City of Paris, 179 S W.2d 676, 679, 297 Ky. 440
N J—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 126, 133 N.J Law 485
Ohio—Board of Education of Ross Tp v Board of Education of Silvercreek Tp, 185 N.E. 207, 208, 44 Ohio App 335.
Vt.—Vermont Accident Ins. Co v Burns, 40 A 2d 707, 710, 114 Vt 143.
Wyo—Texas Co. v. Siefried, 147 P.2d 837, 846, 60 Wyo 142.
58 C J. p 734 note 73.

Phrases employing the word "similar" and as to which more recent adjudications have not been found see 58 C J. p 734 notes 77-96

20. U S—Ambrosia Brewing Co v. Bowles, Em App, 147 F 2d 550, 552—Tedesco v. U. S, C C A.Or, 118 F.2d 737, 741—Raynor v. U. S, C C.A Ind, 89 F 2d 469, 471—Japan Import Co v. U. S, Cust & Pat App., 86 F.2d 124, 131—Japan Import Co. v. U. S., 24 C C.P.A, Customs, 167, 176—U. S v Irving Massin & Bros., 16 Ct.Cust App 19, 23.
Conn.—McLaughlin v. Poucher, 17 A 2d 767, 770, 127 Conn. 441.
Ill—Rubenstein v. Firemen's Fund Ins Co., 90 N E 2d 289, 291, 339 Ill App. 404.
Ind—Department of Ins of Ind. v Noblesville Brother-Sisterhood, 72 N E 2d 240, 243, 117 Ind App. 527
N.J—Piaget-Del Corp v Kulik, 45 A 2d 125, 126, 133 N J Law 485.
Ohio—Board of Education of Ross Tp v Board of Education of Silvercreek Tp, 185 N E. 207, 208, 44 Ohio App 335
Vt—Vermont Accident Ins. Co v. Burns, 40 A.2d 707, 710, 114 Vt 143
Wyo—Texas Co v Siefried, 147 P.2d 837, 846, 60 Wyo 142.
58 C J p 734 note 73.

21. U S.—U. S. v. Raynor, Ind., 58 S.Ct 353, 356, 302 U.S 540, 82 L. Ed. 413—Tedesco v. U. S, C C A Or, 118 F 2d 737, 741—Raynor v U. S., C C A.Ind, 89 F 2d 469, 471—Japan Import Co. v U S, Cust. & Pat App, 86 F.2d 124, 131—Japan Import Co v. U S., 24 C C P A, Customs, 167, 176—U. S. v. Irving Massin & Bros., 16 Ct Cust App. 19, 23.
Conn.—McLaughlin v. Poucher, 17 A. 2d 767, 770, 127 Conn 441.
Ill.—Rubenstein v Firemen's Fund Ins Co, 90 N E.2d 289, 291, 339 Ill App 404
Ind—Department of Ins. of Ind. v. Noblesville Brother-Sisterhood, 72 N E 2d 240, 243, 117 Ind App. 527.
Ohio—Board of Education of Ross Tp v. Board of Education of Silvercreek Tp, 185 N E. 207, 208, 44 Ohio App. 335.
Vt—Vermont Accident Ins Co. v. Burns, 40 A 2d 707, 710, 114 Vt. 143.
Wyo—Texas Co v. Siefried, 147 P 2d 837, 846, 60 Wyo 142.
58 C J p 734 note 73.

22. U S—Ambrosia Brewing Co. v Bowles, Em App, 147 F.2d 550, 552—Tedesco v U. S., C.C A Or., 118 F.2d 737, 741.
Conn.—McLaughlin v. Poucher, 17 A. 2d 767, 770, 127 Conn. 441
Ill.—Rubenstein v. Firemen's Fund Ins. Co., 90 N E 2d 289, 291, 339 Ill.App. 404.
Ind—Department of Ins. of Ind. v Noblesville Brother-Sisterhood, 72 N.E 2d 240, 243, 117 Ind App. 527
Ky.—Kentucky Utilities Co. v. City of Paris, 179 S.W.2d 676, 679, 297 Ky. 440.
N.J—Piaget-Del Corp v. Kulik, 45 A.2d 125, 126, 133 N.J.Law 485.
Vt—Vermont Accident Ins Co v. Burns, 40 A.2d 707, 710, 114 Vt. 143
Wash—Paul v Stanley, 12 P 2d 401, 404, 168 Wash 371.
Wyo.—Texas Co v. Siefried, 147 P. 2d 837, 846 60 Wyo. 142.
58 C J. p 734 note 73

23. U S—Japan Import Co. v. U S, Cust & Pat App, 86 F 2d 124, 131—Japan Import Co v. U. S, 24 C.C P A, Customs, 167, 176—U S v Irving Massin & Bros., 16 Ct Cust App. 19, 23.

24. Conn—McLaughlin v. Poucher, 17 A 2d 767, 770, 127 Conn. 441.
Wyo.—Texas Co. v. Siefried, 147 P. 2d 837, 846, 60 Wyo. 142.

25. U S—Ambrosia Brewing Co. v. Bowles, Em App., 147 F.2d 550, 552

26. Ky.—Neff v. Gas & Electric Shop, 22 S W 2d 265, 267, 232 Ky 66.

27. U S—U. S. v Raynor, Ind., 58 S Ct. 353, 356, 302 U S. 540, 82 L Ed. 413—Raynor v U S, C.C.A Ind, 89 F 2d 469, 471.
Ala.—State ex rel. Sigsbee v City of Birmingham, 48 So. 843, 845, 160 Ala. 196
Ga—**Corpus Juris quoted in** State Revenue Commission v National Biscuit Co, 175 S E. 368, 375, 179 Ga. 90.
Ohio—Board of Education of Ross Tp. v. Board of Education of Silvercreek Tp., 185 N E 207, 208, 44 Ohio App. 335.
Wash—**Corpus Juris quoted in** Port Angeles Savings & Loan Ass'n v Warner, 63 P.2d 355, 358, 188 Wash. 686.

28. U S—U. S. v. Raynor, Ind., 58 S Ct. 353, 356, 302 U S 540, 82 L Ed 413—Raynor v. U. S, C.C.A. Ind, 89 F 2d 469, 471.
Not exactly alike
U S—U. S v. Raynor, Ind., 58 S Ct 353, 356, 302 U S. 540, 82 L.Ed 413

29. Ohio—Board of Education of Ross Tp v. Board of Education of Silvercreek Tp, 185 N E 207, 208, 44 Ohio App. 335.

30. Ohio—Board of Education of Ross Tp. v. Board of Education of Silvercreek Tp., supra

31. Pa—Drucker v. Potruch, 29 Pa Dist. 989, 992.

or degree;[32] of the same scope, order, or purpose;[33] having characteristics in common;[34] like in form, appearance, size, qualities, relations, etc.;[35] analogous.[36] It is also defined as meaning having a resemblance;[37] resembling;[38] with more or less resemblance;[39] having a more or less marked resemblance[40] or correspondence[41] to each other[42] or one another[43] or to something else;[44] bearing resemblance to one another or to something else.[45]

As defined in the preceding paragraphs, the word "similar" does not have the significance of, or mean, the same,[46] or identical,[47] or precisely alike;[48] and it does not mean identical in form and substance,[49] and it has been said that generally the word "similar" does not mean identical or exactly alike.[50] However, at times the word "similar" is construed as meaning the same or identical,[51] and it is often used to denote sameness in all essential particulars.[52] Thus the word "similar" is defined as meaning exactly alike;[53] precisely alike;[54] precisely like;[55] exactly corresponding;[56] identical;[57] resembling in all respects.[58]

32. Ohio—Board of Education of Ross Tp v Board of Education of Silvercreek Tp, 185 N E 207, 44 Ohio App. 335.

Otherwise defined

(1) Of the same nature—Raynor v. U. S, C C.A Ind, 89 F 2d 469, 471

(2) Of a like nature or kind—In re Bonsall's Estate, 135 A. 724, 725, 288 Pa 39.

(3) Being like in quality, nature, degree, purpose, or other characteristics, but not the same or identical—In re Bonsall's Estate, supra.

33. Ohio.—Board of Education of Ross Tp. v Board of Education of Silvercreek Tp, 185 N E 207, 44 Ohio App. 335.

34. Mont.—State ex rel. City of Butte v Weston, 74 P. 415, 418, 29 Mont. 125

Ohio—Board of Education of Ross Tp. v. Board of Education of Silvercreek Tp, 185 N.E 207, 208, 44 Ohio App 335

54 C J. p 734 note 74.

35. Ohio—Board of Education of Ross Tp v Board of Education of Silvercreek Tp, supra.

54 C.J p 734 note 74.

36. U S—Raynor v U. S., C.C.A.Ind, 89 F 2d 469, 471.

37. Ala—State ex rel. Sigsbee v City of Birmingham, 48 So 843, 845, 160 Ala 196.

Ga—**Corpus Juris quoted in** State Revenue Commission v. National Biscuit Co, 175 S.E 368, 375, 179 Ga 90

Ill—City of Chicago v Vaccarro, 97 N E 2d 766, 773, 408 Ill 587—Forest Preserve Dist of Cook County v Lehmann Estate, 58 N E 2d 538, 544, 388 Ill 416

Wash—**Corpus Juris quoted in** Port Angeles Savings & Loan Ass'n v Warner, 63 P 2d 355, 358, 188 Wash 686.

38. Ala—State ex rel. Sigsbee v City of Birmingham, 48 So 843, 845, 160 Ala 196.

Ga.—**Corpus Juris quoted in** State Revenue Commission v National Biscuit Co, 175 S.E 368, 375, 179 Ga. 90.

Wash—**Corpus Juris quoted in** Port Angeles Savings & Loan Ass'n v Warner, 63 P 2d 355, 358, 188 Wash 686.

Resembling closely

Pa.—Drucker v. Potruch, 29 Pa.Dist 989, 992

39. Pa—In re Bonsall's Estate, 135 A 724, 725, 288 Pa 39.

Wyo—Texas Co v Siefried, 147 P 2d 837, 846, 60 Wyo 142.

40. Ala—State ex rel Sigsbee v City of Birmingham, 48 So 843, 845, 160 Ala 196.

Having a marked resemblance or likeness

Pa—In re Bonsall's Estate, 135 A 724, 725, 288 Pa. 39.

41. U S—Raynor v. U. S, C.C A Ind, 89 F 2d 469, 471.

42. Ohio—Board of Education of Ross Tp v. Board of Education of Silvercreek Tp, 185 N.E 207, 208, 44 Ohio App. 335

Pa—Drucker v. Potruch, 29 Pa Dist 989, 992

43. U S—Raynor v U. S., C C A Ind, 89 F.2d 469, 471.

Ohio—Board of Education of Ross Tp. v Board of Education of Silvercreek Tp, 185 N.E. 207, 208, 44 Ohio App. 335.

Pa—Drucker v. Potruch, 29 Pa Dist 989, 992.

44. U.S—Raynor v. U. S, C.C A.Ind, 89 F.2d 469, 471.

45. Ohio—Board of Education of Ross Tp v Board of Education of Silvercreek Tp., 185 N.E. 207, 44 Ohio App. 335

Otherwise defined

(1) Bearing a resemblance—State ex rel Sigsbee v. City of Birmingham, 48 So. 843, 845, 160 Ala 196

(2) Bearing resemblance to something else—In re Bonsall's Estate, 135 A 724, 725, 288 Pa 39.

(3) Bearing a resemblance, as to something implied or specified.—Drucker v. Potruch, 29 Pa Dist 989, 992.

46. Vt—Vermont Accident Ins Co v. Burns, 40 A 2d 707, 710, 114 Vt 143—Fidelity & Deposit Co. v. Brown, 104 A. 234, 236, 92 Vt. 390.

As not meaning the same

"Accurately speaking, 'similar' does not mean the same; in fact, it would mean that while it resembled, it was not the same"—Mitchell v. McCullough, 12 Ohio Cir Ct. 763, 764, 4 Ohio Cir Dec. 471

47. Ill—City of Chicago v. Vaccarro, 97 N E 2d 766, 773, 408 Ill 587—Forest Preserve Dist. of Cook County v Lehmann Estate, 58 N. E 2d 538, 544, 388 Ill. 416

Vt—Vermont Accident Ins. Co. v. Burns, 40 A 2d 707, 710, 114 Vt. 143—Fidelity & Deposit Co v. Brown, 104 A 234, 236, 92 Vt 390

48. Pa—In re Bonsall's Estate, 135 A. 724, 725, 288 Pa 39

Wyo—Texas Co v Siefried, 147 P. 2d 837, 846, 60 Wyo 142.

49. Mont—State ex rel. City of Butte v Weston, 74 P. 415, 418, 29 Mont. 125

50. N J—Fletcher v. Interstate Chemical Co, 110 A. 709, 710, 94 N. J.Law 332.

51. Conn.—McLaughlin v. Poucher, 17 A.2d 767, 770, 127 Conn 441.

Wyo—Texas Co. v Siefried, 147 P. 2d 837, 846, 60 Wyo 142

52. Tex—Orr v. Wright, Civ App, 45 S W. 629, 634

58 C.J p 733 note 62.

53. N J—Fletcher v. Interstate Chemical Co, 110 A. 709, 710, 94 N.J Law 332.

58 C.J p 733 note 63.

54. Pa.—Drucker v. Potruch, 29 Pa. Dist 989, 992

Tex.—Orr v Wright, Civ App., 45 S. W 629, 634.

58 C J. p 734 note 66

55. Ky—Commonwealth v. Nance, 165 S W. 423, 424, 158 Ky 444.

58 C J. p 734 note 67.

56. Okl.—Checotah Commercial Nat. Bank v. Phillips, 160 P. 920, 921, 61 Okl. 179

58 C.J. p 733 note 64.

57. Ky.—Neff v. Gas & Electric Shop, 22 S W 2d 265, 267, 232 Ky. 66.

N J—Fletcher v. Interstate Chemical Co, 110 A 709, 710, 94 N J.Law 332.

58. Mo.—Frankel v. German Tyro-

It has also been said that the word "similar" connotes homogeneity,[59] and means homogeneous; uniform.[60]

"Similar" has been held to be equivalent to, or synonymous with, "like" see 53 C.J.S. p 885 note 80, and "same" see 78 C.J.S. p 578 note 12.

It has been compared with, or distinguished from, "equivalent" see 30 C J.S. p 1132 note 12, and "same" see 78 C.J S. p 578 note 13.

SIMILARITY. The courts have frequently stated that similarity is not identity, but resemblance between different things,[61] and similarity does not mean identical, but having a resemblance,[62] and it has even been said that it includes only the idea of casual likeness.[63]

SIMILITER. A Latin term meaning likewise; the like.[64]

In pleading, it is the name of the short formula used either at the end of pleadings or by itself, expressive of the acceptance of an issue of fact by the opposite party; otherwise termed a "joinder of issue,"[65] and treated in this connection in Pleading § 513.

SIMILITUDE. The word is derived from the Latin "similitudo,"[66] and means likeness in constitution, qualities, or appearance; similarity; resemblance.[67]

SIMILITUDO. As the first word of a maxim as to which there have been no recent applications see 58 C.J. p 735 note 10.

SIMONIA. As the first word of a maxim as to which there have been no recent applications see 58 C.J. p 735 note 11.

SIMONY. In English ecclesiastical law the crime of buying or selling ecclesiastical preferment or the corrupt presentation of anyone to an ecclesiastical benefice for money or reward,[68] of which the common law does not take notice to punish it.[69]

SIMPLE. Pure; unmixed; not compounded; not aggravated; not evidenced by sealed writing or record.[70] It has been held to be synonymous with "mere" see 57 C.J. p 1067 note 25.

Phrases employing the word are set out in the note,[71] and for additional phrases as to which more recent adjudications have not been found see 58 C.J. p 735 notes 19–35.

SIMPLEX. Simple; single; pure; unqualified.[72]

As the first word of maxims as to which there have been no recent applications see 58 C J. p 735 notes 39, 40.

SIMPLICITAS. As the first word of a maxim as to which there have been no recent applications see 58 C.J. p 735 note 41.

SIMPLY. Absolutely; without qualification.[73] It has been held to be synonymous with "alone" see

lean Alps Co, 97 S.W. 961, 962, 121 Mo App. 51, 56.
58 C J. p 734 note 69.

59. N J.—Piaget-Del Corp. v Kulik, 45 A 2d 125, 126, 133 N J Law 485

60. Ga.—**Corpus Juris quoted in** State Revenue Commission v National Biscuit Co, 175 S.E 368, 375, 179 Ga. 90.
Ind.—Department of Ins of Ind v Noblesville Brother-Sisterhood, 72 N E.2d 240, 243, 117 Ind App 527.
Wash.—**Corpus Juris quoted in** Port Angeles Savings & Loan Ass'n v. Warner, 63 P.2d 355, 358, 188 Wash 686.
58 C.J p 733 note 61.

61. U S—U S. v Raynor, Ind, 58 S.Ct. 353, 356, 302 U.S. 540, 82 L Ed 413
Ala.—State ex rel. Sigsbee v City of Birmingham, 48 So 843, 845, 160 Ala 196.
Ill.—Rubenstein v. Firemen's Fund Ins Co., 90 N.E 2d 289, 291, 339 Ill.App 404.
Wyo.—Texas Co. v. Siefried, 147 P 2d 837, 847, 60 Wyo 142.
58 C.J. p 734 note 98.

Otherwise expressed
The term denotes a general likeness, an approximation, something less than absolute identity.—State of New York v. U. S., D.C N Y., 98 F. Supp 855, 860

62. Colo.—Wassenich v. City and County of Denver, 186 P. 533, 536, 67 Colo. 456

63. Ohio—Mitchell v. McCullough, 12 Ohio Cir.Ct. 763, 764, 4 Ohio Cir. Dec. 471.

64. Black L.D.

65. Black L D.

66. Me.—State v McKenzie, 42 Me 392, 394

67. Century D.

Phrases employing the word and as to which more recent adjudications have not been found see 58 C. J p 735 notes 7–9.

68. Neb.—State v Buswell, 58 N.W. 728, 731, 40 Neb 158, 24 L.R.A. 68.
58 C.J. p 735 note 12.

69. D.C.—Satterlee v. Williams, 20 App.D.C. 393, 412.

70. Black L.D.

71. **Phrases**
(1) "Simple addition" see 1 C J.S. p 1455 note 3 1.
(2) "Simple assault" and "simple assault and battery" see Assault and Battery §§ 1, 57.
(3) "Simple contract" see Contracts § 10
(4) "Simple interest" see Interest § 1.
(5) "Simple larceny" see Larceny § 1 a.
(6) "Simple sentence" see 79 C.J S. p 1041 note 81
(7) "Simple tools and appliances" see the index to the title Master and Servant
(8) "Simple trust" see the C.J S. title Trusts § 17, also 65 C J. p 227 notes 5–9

72. Black L D.
Simplex obligatio
A single obligation; a bond without a condition.—Black L.D.—58 C.J p 735 note 38.

73. Nev.—Peardon v. Peardon, 201 P.2d 309, 328, 65 Nev. 717.

3 C.J.S. p 894 note 48, "merely" see 57 C.J.S. p 1067 note 34, and "solely."[74]

SIMULATE. The courts, in interpreting the word "simulate," have given to it a definition which corresponds with that of the lexicographers,[75] and it has been taken to mean the assumption by someone or something of an appearance which is feigned, false, deceptive, or counterfeit.[76] It is defined as meaning to assume the mere appearance of, without the reality;[77] to assume the signs or indications of falsely; to counterfeit; feign; imitate.[78]

Simulated. Counterfeited; feigned; pretended.[79]

SIMULATION. A simulation is a sham, a myth;[80] a feigned, pretended act; one which assumes the appearance without the reality;[81] the act of simulating, or assuming an appearance which is feigned, or not true; counterfeiting.[82]

A transaction which involves some consideration,[83] even though inadequate,[84] is not a simulation.

In French law, a simulation is collusion; a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction in which they engage.[85]

SIMULTANEOUS. A word of comparison[86] signifying that two or more occurrences or happenings are identical in time,[87] and defined to mean taking place or operating at the same time.[88] It has been distinguished from "contemporaneous" see 16 C.J.S. p 1526 note 19.

Applied to machinery, the word has some elasticity[89] and does not necessarily imply absolute synchronism[90] from beginning to end.[91]

SIMULTANEOUSLY. In its strict sense the word "simultaneously" means at precisely the same instant.[92] The word also means at the same time,[93] and it may have this meaning when used in its strict sense,[94] or when used in a broader sense,[95] and when used in its broad sense it does not mean at the same instant, but at substantially the same time,[96] and it does not require absolute synchronism

74. Nev.—Peardon v. Peardon, supra

75. U.S.—U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 671.

76. U.S.—U. S. v. Peppa, supra.

77. U.S.—**Corpus Juris cited in** U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 670, 671.
58 C.J. p 735 note 43.

78. U.S.—**Corpus Juris cited in** U. S. v. Peppa, supra.
Kan.—Harryman v. Harryman, 144 P. 262, 265, 93 Kan. 223, Ann.Cas.1915B 369.

Similarly defined
To assume falsely the appearance or signs of (anything); to feign, pretend, counterfeit, imitate; to profess or suggest (anything) falsely, to have the external features of.—U. S. v. Peppa, D.C.Cal., 13 F.Supp. 669, 670, 671.

79. Ala.—Cartwright v. Bamberger, 8 So. 264, 266, 90 Ala. 405.

Phrases
(1) "Simulated contract" defined see Fraudulent Conveyances § 100
(2) "Simulated sale" defined see Fraudulent Conveyances § 100.

80. La.—Bank of Baldwin v. Broussard, 120 So. 637, 638, 10 La.App. 801.

81. U.S.—Gayle v. Jones, D.C.La., 63 F.Supp. 481, 484.
La.—Freeman v. Woods, App., 1 So.2d 134, 136.
58 C.J. p 736 note 50.

82. Kan.—Harryman v. Harryman, 144 P. 262, 265, 93 Kan. 223, Ann.Cas.1915B 369.

83. La.—Bank of Abbeville & Trust Co. v. Lyons, 168 So. 513, 514, 185 La. 117.

Payment of antecedent debts
U.S.—Caster v. Miller, D.C.La., 39 F. Supp. 120, 123, 124

A mortgage to secure an antecedent debt is not a simulation.—Gast v. Gast, 3 So.2d 173, 174, 197 La. 1043

84. La.—Harman v. Defatta, 162 So. 44, 46, 182 La. 463.

85. La.—Sere v. Darby, 43 So. 255, 258, 118 La. 619

86. U.S.—Brush Electric Co. v. Western Electric Co., C.C.Ill., 69 F. 240, 244.
Cal.—Thomas v. Anderson, 215 P.2d 478, 481, 96 Cal.App.2d 371.

87. U.S.—Brush Electric Co. v. Western Electric Co., C.C.Ill., 69 F. 240, 244
Cal.—Thomas v. Anderson, 215 P.2d 478, 481, 96 Cal.App.2d 371.
"Simultaneous approach" as applied to vehicles meeting at intersections see Motor Vehicles §§ 363 b, 364

Similarly expressed
"Simultaneous" denotes agreement in the same point or instant of time, as, the two shots were simultaneous.—In re Pusey-Maynes-Breish Co., D.C.Pa., 37 F.Supp. 316, 321.

Substantially or relatively simultaneous
Events may be substantially or relatively simultaneous without being absolutely so.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 1030, 48 Ariz. 552

88. Neb.—Securities Credit Corp. v. Pindell, 44 N.W.2d 501, 507, 153 Neb. 298

89. U.S.—Westinghouse Mach. Co. v. C. & G. Cooper Co., C.C.A.Ohio, 245 F. 463, 468

90. U.S.—Highland Glass Co. v. Schmertz Wire Glass Co., Pa., 178 F. 944, 963, 102 C.C.A. 316.
58 C.J. p 736 note 57.

91. U.S.—Westinghouse Mach. Co. v. C. & G. Cooper Co., C.C.A.Ohio, 245 F. 463, 468.

92. Cal.—Thomas v. Anderson, 215 P.2d 478, 481, 96 Cal.App.2d 371.
Ill.—American Trust, etc., Co. v. Eckhardt, 162 N.E. 843, 846, 331 Ill. 261
Wash.—In re Searl's Estate, 186 P. 2d 913, 918, 29 Wash.2d 230, 173 A.L.R. 1247.

93. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 1030, 48 Ariz. 552.
Cal.—Thomas v. Anderson, 215 P.2d 478, 481, 96 Cal.App.2d 371.
58 C.J. p 736 note 62.

Phrases employing the word and as to which more recent adjudications have not been found see 58 C.J. p 736 notes 65, 66

94. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 1030, 48 Ariz. 552.

95. Cal.—Thomas v. Anderson, 215 P.2d 478, 481, 96 Cal.App.2d 371.

96. Cal.—Thomas v. Anderson, supra.
Vt.—Cloyes v. Middlebury Electric Co., 66 A. 1039, 1042, 80 Vt. 109, 11 L.R.A.,N.S., 693.

from beginning to end.[97] When the word is used to describe the operation of parts of a machine it can readily be construed to mean that the parts operate unitedly, harmoniously, and in concord.[98]

"Simultaneously" has been distinguished from "at once" see At, 7 C.J.S. p 160 note 64, and "shortly" see ante p 1271 note 84.

SINCE. The proper[99] and primary[1] signification of the word "since" is after;[2] from the time that.[3] It is also defined as meaning from the time of;[4] from a definite past time until now.[5]

The word "since" is further defined as meaning during or within the time after; ever after, or at a time after; from and after the time, occurrence, or existence of;[6] and it has been said that this is the meaning of the word when used as a preposition.[7]

"Since" is also defined as meaning in the time passed, counting backward from the present; before this or now; from any time forward to the present.[8]

In its appropriate sense,[9] the word "since" includes the whole period between an event and the present time,[10] and, while it denotes during the whole time after an event, it may denote any particular time during that period.[11]

When the word "since" is used with reference to a certain date it ordinarily does not include that date.[12]

The decisions are not in accord as to whether the word "since" may properly be used to denote future time. On the one hand, it has been said that "since" necessarily refers to something past, and never extends into the future,[13] while on the other hand it is said that the word "since" is not always limited in meaning to the time between the present and a certain past event, or to a space of time between two certain events, for it sometimes reaches beyond the present and embraces future time.[14]

"Since" has been held to be synonymous with "subsequent,"[15] but it has also been pointed out that there is a distinction between the terms.[16]

SINCERE. Being in reality as in appearance; not assumed, feigned, or pretended; real; true; genuine.[17] It has been held to be synonymous with "true."[18]

SINE. A Latin word meaning "without."[19] It is the first word of various Latin phrases.[20]

97. Ariz.—American Surety Co of New York v Mosher, 64 P 2d 1025, 1030, 48 Ariz. 552.

98. U S.—E. J. Manville Mach Co v. Excelsior Needle Co, Conn., 167 F. 538, 540, 93 C.C.A 216.

99. U S —In re Rosenfeld, D C N J., 20 F.Cas No.12,058—In re Cretiew, D C.N Y., 6 F.Cas.No 3,390

1. U S —In re Cretiew, supra.

2. Kan.—Keller v. Keller, 247 P. 433, 435, 121 Kan. 520, 49 A L R. 113.
58 C.J. p 736 note 68.

Phrases employing the word "since" and as to which more recent adjudications have not been found see 58 C.J. p 737 notes 83–85

3. U.S —In re Cretiew, D.C N.Y., 6 F Cas No 3,390.
Minn —Lawver v Great Northern R Co., 105 N.W. 1129, 97 Minn. 36.

4. U.S.—In re Rosenfeld, D C N J., 20 F.Cas No 12,058, 2 Nat.Bankr Reg. 116.

5. Cal.—Ex parte McGee, 85 P 2d 135, 136, 29 Cal App 2d 648
Iowa —Kelley v. Creston Buick Sales Co., 34 N.W 2d 598, 600, 239 Iowa 1236.

6. Kan —Keller v. Keller, 247 P. 433, 435, 121 Kan. 520, 49 A.L R. 113'
W.Va.—State v. Mathews, 69 S E 644, 650, 68 W.Va. 89.

7. Kan —Keller v. Keller, 247 P. 433, 435, 121 Kan, 520, 49 A.L.R. 113,
W Va —State v Mathews, 69 S E. 644, 650, 68 W.Va. 89.

8. Mich —Smith v. State Auditors, 48 N W 627, 85 Mich. 407.

9. U S —In re Rosenfeld, D C N J., 20 F Cas.No 12,058—In re Cretiew, D C N.Y, 6 F.Cas No 3,390.

10. U S.—In re Rosenfeld, D.C N.J., 20 F Cas No 12,058—In re Cretiew, D C.N Y., 6 F Cas No 3,390.

Similarly expressed
"Since" covers the intervening period from the happening of an event to the present time —Murray v. Teape, 211 P.2d 1012, 1013, 202 Okl 234.

11. U S —In re Cretiew, D C.N.Y., 6 F.Cas No.3,390.

12. Minn.—Lawver v. Great Northern R. Co., 105 N W. 1129, 97 Minn 36.
58 C J. p 737 note 82.

13. Mich.—Smith v. State Auditors, 48 N.W. 627, 85 Mich 407.

14. Kan —Keller v Keller, 247 P 433, 435, 121 Kan 520, 49 A.L R 113.
W Va —State v. Mathews, 69 S E 644, 650, 68 W.Va. 89.

15. Okl —Murray v Teape, 211 P.2d 1012, 1013, 202 Okl. 234.

16. U.S —In re Cretiew, D.C N.Y., 6 F Cas.No.3,390.

Similar but not identical
"These words, although similar in meaning, are not identical."—In re Rosenfeld, D C.N.J., 20 F.Cas No.12,-058.

17. New Standard D

18. U.S —Zolintakis v. Equitable Life Assur. Soc of United States, C C A Utah, 108 F 2d 902, 905—Zolintakis v Equitable Life Assur. Soc of United States, C.C.A Utah, 97 F.2d 583, 587—Sentinel Life Ins. Co. v. Blackmer, C C.A.Colo., 77 F. 2d 347, 352
65 C.J p 179 note 28.

19. Black L D.

20. **Sine qua non**
(1) Literally, "Without which not" That without which the thing cannot be, an indispensable requisite or condition.—Black L D.

(2) In some instances the question of proximate cause or causal connection is approached by stating the rule as follows: "But for the defendant's act the consequence in question would not have occurred." That test is called the "sine qua non" or "but for" rule, and is of service in making a test for a causal connection — Hayes Freight Lines v. Wilson, 77 N. E.2d 580, 582, 226 Ind. 1.

Other phrases
(1) "Sine animo revertendi," without the intention of returning.—Black L D.

(2) "Sine assensu capituli," without the consent of the chapter. In

As the first word of a maxim as to which there have been no recent applications see 58 C.J. p 737 note 90.

SINECURE. An office which has revenue without employment.[21]

SINGER. A term which, eo nomine, has come to be suggestive not merely of the manufacturer, but of sewing machines of a certain mechanism, character or quality;[22] a machine manufactured by the Singer Company.[23]

SINGLE.

As a noun, that which is single in any sense of the word.[24]

In the plural, reeled filaments of raw silk twisted to give them firmness, but not doubled.[25]

As an adjective. One only; being a unit; alone; detached; one which is abstracted from others;[26] also unmarried, or not having been married.[27] In this latter sense it has been compared with "discovert" see 27 C.J.S. p 2 note 97.

The word "single" is also sometimes construed to signify principal or dominating.[28]

Phrases employing the word are set out in the note,[29] and for additional phrases as to which more recent adjudications have not been found see 58 C.J. p 737 note 98–p 738 note 39.

SINGULAR. Each; individual.[30]

SINGULI IN SOLIDUM TENENTUR. See 58 C.J. p 738 note 43.

SINK. To descend; to go down.[31]

SINKING. The act or process of one who or that which sinks; that which is depressed or sunken; in architecture, a hollow or a socket.[32] It has been held to be synonymous with "depression" see 26 C.J.S. p 977 note 59.

The term "sinking fund" is defined generally in the definition Fund, 37 C.J.S. p 1404 notes 37–45, and reference is there made to the titles throughout this work wherein the term is specifically treated.

old English practice, a writ which lay where a dean, bishop, prebendary, abbot, prior, or master of a hospital aliened the lands holden in the right of his house, abbey, or priory, without the consent of the chapter; in which cases his successor might have this writ.—Black L D

(3) "Sine consideratione curiæ," without the judgment of the court—Black L D.

(4) "Sine decreto;" without the authority of a judge—Black L.D

(5) "Sine die;" without day; without assigning a day for a further meeting or hearing; hence, a final adjournment; the final dismissal of a cause—Black L D.

(6) "Sine hoc quod," without this, that A technical phrase in old pleading, of the same import with the phrase "absque hoc quod."—Black L D

(7) "Sine numero;" without stint or limit A term applied to common. —Black L D

(8) "Sine prole;" without issue. Used in genealogical tables, and often abbreviated into "s.p."—Black L D

21. Eng.—Faulkner v. Upper Boddington, 3 C B N.S 412, 417, 91 E.C L. 412.

22. Ohio.—Brill v. Singer Mfg. Co., 41 Ohio St. 127, 134, 52 Am R. 74.
58 C.J. p 737 note 93.

23. Eng.—Singer Mfg. Co. v. Wilson, 2 Ch.D. 434, 459.

24. U.S.—U S. v Straus & Co., 2 Ct Cust App 395, 396, 397

25. U S.—U S. v Straus & Co., supra.

More particularly described

The twisted threads of silk made of single strands of the raw silk as wound from the cocoon When simply cleaned and wound, the silk is called "dumb singles," and is used for making bandana handkerchiefs, and, after bleaching, for gauze and similar fabrics When wound, cleaned, and thrown, the silk is termed "thrown singles," and is used for ribbons and common silks When wound, cleaned, doubled, and thrown, and twisted in one direction, it becomes "tram" When wound, cleaned, spun, doubled, and thrown, so that it resembles the strand of rope, it is called "organzine," and is used for warp.—U. S v. Straus & Co, supra.

26. Mont.—State ex rel Nelson v Board of Com'rs of Yellowstone County, 109 P.2d 1106, 1107, 111 Mont. 395—State ex rel Turner v. Patch, 210 P. 748, 750, 64 Mont. 565.

27. Pa.—Appeal of Davison, 1 Mona 185, 188
58 C.J. p 737 note 96.

When applied to a woman, "single," in its strict literal sense, means without a husband; but in its ordinary sense, and as used in common parlance, it denotes a class; those who have never married, as distinguished from married women and widows—Lashley v. Lashley, 48 N.C. 414, 415.

Under some statutes only a mother who is a "single woman" may institute bastardy proceedings, and the construction of this term as used in such statutes is treated in Bastards § 51.

28. Mich.—Attorney General v. Marx, 168 N W. 1005, 1006, 203 Mich 331.
58 C J. p 737 note 97.

29. **Phrases**

(1) "Single bond" see Bonds § 1.

(2) "Single creditor" see 21 C.J.S. p 1054 note 73.

(3) "Single-entry bookkeeping system" see 11 C J S p 522 note 33.

(4) "Single publication rule" as a rule of limitations applicable to actions for defamation see Libel and Slander § 156

(5) "Single purpose" see 73 C.J.S. p 1261 note 97.

(6) "Single shot" as a mining term see Mines and Minerals § 3 h

(7) "Single tax" is the system of land tenure and taxation advocated by Henry George.—Brocker v. Ware, 29 A 2d 591, 594, 17 Del.Ch 32.

30. Webster New Int.D.
58 C.J. p 738 note 42.

31. Mont.—Osterholm v. Boston, etc., Cons. Copper, etc., Min. Co., 107 P. 499, 503, 40 Mont. 508 (given as definition of sinking).
58 C.J. p 738 note 44.

32. New Standard D.

SINTER. To become or cause to become a coherent mass by heating without thoroughly melting.[33]

SINUS. A channel for the passage of blood, which has not the coats of an ordinary blood-vessel; such are the blood-passages in the gravid uterus or those in the cerebral meninges.[34] Also, a hollow in bone or other tissue; antrum.[35]

The term is also applied to a fistula or tract leading to a suppurating cavity.[36]

SIPING. To ooze or distil very gently as liquids do through a cask which is not quite tight.[37]

SIRUP; SYRUP. The word "sirup" is defined generally as meaning a thick, sweet liquid;[38] and, more specifically, as any concentrated, more or less viscid aqueous solution of sugar;[39] a saturated solution of sugar in water,[40] often combined with some medicinal substance, or flavored, as with the juice of fruits, for use in confections, cookery, or the preparation of beverages;[41] a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar.[42] Hence any concentrated, more or less viscid, aqueous solution of sugar, either without admixture, as the simple sirup of pharmacy, or variously flavored or medicated, or obtained in an incompletely refined state, as in the manufacture of cane sugar or of glucose;[43] a solution of sugar in water, made according to an official formula, whether simple, flavored, or medicated with some special therapeutic or compound.[44]

As defined by the United States Department of Agriculture, "sirup" is the product obtained by purifying and evaporating the juice of a sugar producing plant without removing any of the sugar.[45]

As commonly and properly understood and applied to articles of food for table use, "sirup" has an accepted meaning, as designating articles of food which are in common use as table sirups.[46]

"Sirup," as used in a freight tariff, as an addendum to "molasses," has a narrower meaning than that of a saturated solution of sugar in water, often combined with some medicinal substance or flavored, as with the juice of fruits, for use in confections, cookery, or the preparation of beverages;[47] it includes only food sirups in competition as such with molasses, and does not include a sirup used merely as the basis for a beverage.[48]

There are a large number of sirups, each of which is named from that ingredient which gives it flavor or character, and the word "sirup" is necessarily qualified by that of the substance, or one or more of the substances, which distinguish it to the taste or give it its medicinal property.[49]

33. U.S.—Silica Products Co v. Haydite Co., D C Ill, 42 F.2d 861, 864.

The term "sintered" describes a condition in which material becomes coherent through partial fusion.—In re Jewett, 136 F.2d 726, 727, 30 C.C P.A., Patents, 1112.

34. Stedman Med D.

35. Stedman Med.D.

36. Stedman Med.D.

Similarly expressed

The word "sinus" means a tract leading from the outside into a portion of a wound.—Tallon v. Spellman, 19 N.E.2d 33, 34, 302 Mass. 179

37. Eng.—McNab v. Robertson, [1897] A.C. 129, 138, 61 J.P. 468, 66 L.J.P.C. 27, 75 L.T.Rep., N.S., 666

38. U.S.—California Fig Syrup Co v. Frederick Stearns & Co., Mich., 67 F. 1008, 1011, affirmed 73 F. 812, 815, 20 C.C.A. 22, 33 L.R.A. 56

39. U.S.—Application of Erickson, 171 F.2d 307, 309, 36 C.C.P.A., Patents, 734.

40. U.S.—Northcutt v. Loesch, Cust. & Pat App., 44 F.2d 859, 861. 58 C.J. p. 739 note 74—60 C.J. p. 1204 note 46.

41. U.S.—California Fig Syrup Co. v. Frederick Stearns & Co., Mich., 73 F. 812, 815, 20 C.C.A. 22, 33 L.R.A. 56—California Fig Syrup Co. v. Stearns, C.C.Mich., 67 F. 1008, 1011. Ala.—Louisville, etc., R. Co. v. Lime Cola Bottling Co., 101 So. 678, 212 Ala. 52.

42. U.S.—California Fig Syrup Co. v. Frederick Stearns & Co., Mich., 73 F. 812, 816, 20 C.C.A. 22, 33 L.R.A. 56—California Fig Syrup Co. v. Stearns, C.C.Mich., 67 F. 1008, 1011. 58 C.J. p. 739 note 73.

43. U.S.—Northcutt v. Loesch, Cust. & Pat App., 44 F.2d 859, 861. 58 C.J. p. 739 note 73.

44. U.S.—California Fig Syrup Co. v. Frederick Stearns & Co., Mich., 73 F. 812, 815, 20 C.C.A. 22, 33 L.R.A. 56.

45. Mich.—People v. Harris, 97 N.W. 402, 403, 135 Mich. 136.

46. Wis.—McDermott v. State, 126 N.W. 888, 892, 143 Wis. 18, 21 Ann. Cas. 1315.

47. Ala.—Louisville & N. R. Co. v. Lime Cola Bottling Co., 101 So. 678, 212 Ala. 52.

48. Ala.—Louisville, etc., R. Co. v. Lime Cola Bottling Co., supra.

49. U.S.—California Fig-Syrup Co v. Stearns, C.C.Mich., 67 F. 1008, 1011.

Kinds

(1) "Cane syrup" is syrup obtained from cane by purifying and evaporating the juice without removing any of the sugar.—People v. Harris, 97 N.W. 402, 403, 135 Mich. 136.

(2) "Corn sirup" see 18 C.J.S. p. 284 note 89

(3) "Maple syrup" see 55 C.J.S. p. 707 notes 29–31

(4) "Sorghum syrup" is syrup obtained from sorghum.—People v. Harris, supra.

(5) "Syrup of aconite" is a mixture of tincture of fresh aconite root one part, with syrup nine parts.—California Fig-Syrup Co. v. Frederick Stearns & Co., Mich., 73 F. 812, 815, 20 C.C.A. 22, 33 L.R.A. 56.

(6) "Syrup of almond" is sweet almond ten parts, bitter almond three parts, sugar fifty parts, orange flower water five parts, water to make one hundred parts.—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(7) "Syrup of althaea" is althaea four parts, sugar sixty parts, water to make one hundred parts.—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(8) "Syrup of citric acid" is citric acid eight parts, water eight parts, spirit of lemon four parts, syrup nine

SISTER. The popular and ordinary meaning of the word "sister" is well-settled and definite,[50] and the term is defined as meaning a female born of the same parents;[51] a female whose parents are the same as those of another person;[52] a woman who has the same father and mother with another, or one of them only;[53] a female person considered in her relation to another person having the same parents,[54] or one parent in common.[55]

If both parents are the same the woman is simply called "sister,"[56] or "whole sister;"[57] if but one parent is the same she is called "half sister."[58]

Thus the word "sister" embraces a sister of the half blood as well as of the whole blood.[59]

The term has been construed as not including a person adopted by decedent's parents[60] or a sister-in-law.[61]

"Sister" is the correlative of "brother" as stated in 12 C.J.S. p 373 note 22.

Provision for the payment of insurance benefits to the sisters of deceased soldiers was not made under the War Risk Insurance Act, but was made under the National Service Life Insurance Act, and decisions under both acts on this point are treated in Army and Navy § 85 b(2)(b).

SISTER-HOOK. See Clip Hooks, 15 C.J.S. p 1275 notes 15, 16.

SIT. The verb "sit" is defined generally as meaning to have or keep a seat or good seat upon; to place on a seat; to rest, as upon a chair or other support, with the body bent at the hips, and the spine nearly vertical; rest upon the haunches; take or occupy a seat.[62]

In a more specific sense, the word "sit" means to hold court;[63] to hold a session, as of a court;[64] to preside, or do any act of a judicial nature.[65]

SITE. A plot of ground suitable or set apart for some specific use;[66] a seat or ground plot.[67]

The term does not of itself necessarily mean a place or tract of land fixed by definite boundaries;[68]

hundred and eighty parts—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(9) "Syrup of figs," as used to describe a medical preparation, has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig, and possibly other ingredients, in which, however, the medicinal property of the fig is the active and chief element.—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(10) "Syrup of garlic" is fresh garlic fifteen parts, sugar sixty parts, dilute acetic acid forty parts.—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(11) Syrup of gum arabic is mucilage of acacia twenty-five parts, syrup seventy-five parts—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(12) "Syrup of ipecac" is fluid extract of ipecac five parts, syrup ninety-five parts.—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(13) "Syrup of rhubarb" is rhubarb ninety parts, cinnamon eighteen parts, potassium carbonate six parts, sugar six hundred parts, water to make one thousand parts—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(14) Syrup of squill is vinegar of squill forty parts, sugar sixty parts, with water.—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

(15) Syrup of wild cherry is wild cherry bark powdered twelve parts, sugar sixty parts, glycerine five parts, water to make one hundred parts—California Fig-Syrup Co. v. Frederick Stearns & Co., supra.

50. Tex.—Woodmen of the World Life Ins. Soc. v. Carrizales, Civ. App., 159 S.W.2d 536, 537.

51. N.Y.—Wood v. Mitcham, 92 N.Y. 375, 379.
58 C.J. p 739 note 76.

52. N.Y.—Wood v. Mitcham, supra.

53. N.Y.—Wood v. Mitcham, supra.—Wood v. Mitchell, 61 How. Pr. 48, 52.
Similarly defined
"A female who has the same parents with another person, or who has one of them only."—Anderson v. Bell, 39 N.E. 735, 736, 140 Ind. 375, 29 L.R.A. 541.

54. Colo.—People v. Elliff, 219 P. 224, 225, 74 Colo. 81.
Iowa.—State v. Lamb, 227 N.W. 830, 832, 209 Iowa 132.
Tex.—Woodmen of the World Life Ins. Soc. v. Carrizales, Civ. App., 159 S.W.2d 536, 537.

55. Colo.—People v. Elliff, 219 P. 224, 225, 74 Colo. 81.
Iowa.—State v. Lamb, 227 N.W. 830, 831, 209 Iowa 132.

56. N.Y.—Wood v. Mitcham, 92 N.Y. 375, 379.—Wood v. Mitchell, 61 How. Pr. 48, 52.

57. Colo.—People v. Elliff, 219 P. 224, 225, 74 Colo. 81.
Iowa.—State v. Lamb, 227 N.W. 830, 832, 209 Iowa 132.

58. Colo.—People v. Elliff, 219 P. 224, 225, 74 Colo. 81.
Iowa.—State v. Lamb, 227 N.W. 830, 832, 209 Iowa 132.
N.Y.—Wood v. Mitcham, 92 N.Y. 375, 379.—Wood v. Mitchell, 61 How. Pr. 48, 52.

59. U.S.—Modern Woodmen of America v. Barnes, D.C. Minn., 61 F. Supp. 660, 663.

60. N.Y.—In re Benson, 163 N.Y.S. 670, 671, 99 Misc. 222.

61. Del.—Stiegler v. Hibbert, 147 A. 252, 253, 17 Del. Ch. 32.

62. New Standard D.

63. Ga.—Allen v. State, 29 S.E. 470, 471, 102 Ga. 619.

64. Ga.—Allen v. State, supra.
Or.—Russell v. Crook County Ct., 146 P. 806, 808, 75 Or. 168.

65. Or.—Russell v. Crook County Ct., supra.

66. Eng.—Victoria v. Our Lord's Church, 22 B.C. 174, 175.
Phrases employing the word "site" and as to which more recent adjudications have not been found see 58 C.J. p 740 notes 98, 99.

67. U.S.—Miller v. Alliance Ins. Co. of Boston, C.C.N.Y., 7 F. 649, 651, 19 Blatchf. 308.

68. N.D.—Petersburg School Dist. v. Peterson, 103 N.W. 756, 758, 14 N.D. 344.
58 C.J. p 740 note 96.
Townsite see Public Lands § 57.

and it may be used in respect of both buildings and offices.[69]

SIT FINIS LITIUM, INTEREST REIPUBLICÆ. See 47 C.J.S. p 82 note 10.

SIT FINIS RERUM. See 47 C.J.S. p 82 note 10.

SITIO DE GANADO MAYOR. A technical Spanish and Mexican legal term, well established, defined and known as a section or township in the surveys of the United States.[70] It is a square league,[71] a square, the four sides of which each measure five thousand varas.[72]

SITTING. The word "sitting" as a noun is defined generally as meaning the act or position of one who sits; hence, a seat. Also, the locality of a seat; a specific place allotted to a seat-holder, whether at church or any other form of public meeting or entertainment.[73]

In a more specific sense the word "sitting" means an official or public meeting or series of meetings of any permanent or regularly constituted body; an official session.[74] The term is used in this connection with reference to courts to denote a session of the court for a day, or to signify a term of the court, as stated in Courts § 147.

"Sitting" is also a gaming term, and as such is defined in Gaming § 1i.

SITUATE. To have a situs, a place or position; kept;[75] to give a specific position to; fix a site for;[76] to place in a certain position[77]

The word "situate" has various other significations, and it may mean having a fixed place or relative position;[78] and it also means residing, dwelling;[79] and the word is further defined as meaning subject to definite conditions or circumstances.[80]

Situated. The word "situated" is defined as meaning located;[81] permanently fixed;[82] being in a relative position;[83] having a site,[84] situation,[85] or location,[86] placed with regard to its surroundings.[87]

69. N Y—Stanton v Essex County, 96 N.Y.S 840, 842, 48 Misc. 415
58 C J. p 740 note 97

70. Ariz—U. S v. Cameron, 21 P. 177, 178, 3 Ariz. 100.

71. U S—U. S. v Sutherland, Cal., 19 How 363, 364, 15 L Ed. 666.
58 C.J p 740 note 4.

72. Ariz—U. S. v. Cameron, 21 P. 177, 178, 3 Ariz 100
"The distance from the center of each 'sito' to each of its sides should be measured directly to the cardinal points of the horizon, and should be 2,500 'varas.' "—U S. v. Cameron, supra.

73. New Standard D.

74. New Standard D.
"Session" as meaning "sitting" see 79 C J S. p 1145 note 73–p 1146 note 75.

75. Tex—**Corpus Juris quoted in** General Exchange Ins. Corporation v. Bell, Civ App, 138 S W.2d 129, 130
58 C.J. p 741 note 7.
Phrases employing the word "situate" and as to which more recent adjudications have not been found see 58 C.J. p 741 notes 9, 10.

76. N.Y.—Century Ins Co. v Glidden Buick Corporation, 20 N.Y.S.2d 108, 111, 174 Misc. 149

77. N.Y—Century Ins. Co. v. Glidden Buick Corporation, supra.

78. N.Y.—Century Ins Co. v Glidden Buick Corporation, supra.
According to dictionary, this meaning is rare.—Century Ins. Co v. Glidden Buick Corporation, supra.

79. N Y—Century Ins Co v. Glidden Buick Corporation, supra
According to dictionary, this meaning is archaic—Century Ins Co. v. Glidden Buick Corporation, supra.

80. N Y—Century Ins. Co. v. Glidden Buick Corporation, supra.

81. Mo—Yellow Mfg. Acceptance Corporation v Rogers, 142 S.W.2d 888, 892, 893, 235 Mo.App 96
N.C—Montague Bros v W C. Shepherd Co, 58 S E 2d 118, 121, 231 N C 551—Universal C I T Credit Corp v Walters, 53 S E 2d 520, 522, 230 N C 443
Okl—Oklahoma City v. District Court of Thirteenth Judicial Dist, 32 P 2d 318, 319, 168 Okl. 235, 93 A L.R. 489.
Tex—**Corpus Juris quoted in** General Exchange Ins. Corporation v. Bell, Civ App, 138 S W 2d 129, 130.
58 C J p 741 note 11

82. Mo.—Yellow Mfg. Acceptance Corporation v. Rogers, 142 S W 2d 888, 892, 235 Mo.App 96.
N.C—Universal C I T. Credit Corp v Walters, 53 S E 2d 520, 522, 230 N C 443.
Okl—Oklahoma City v. District Court of Thirteenth Judicial Dist, 32 P 2d 318, 319, 168 Okl. 235, 93 A.L.R. 489.

83. Mo—Yellow Mfg. Acceptance Corporation v. Rogers, 142 S W 2d 888, 891, 892, 235 Mo App 96
Okl.—Oklahoma City v. District Court of Thirteenth Judicial Dist., 32 P 2d 318, 319, 168 Okl. 235, 93 A. L.R. 489

84. Mo.—Yellow Mfg. Acceptance Corporation v Rogers, 142 S.W.2d 888, 891, 235 Mo App. 96.
Nev—Flyge v Flynn, 166 P.2d 539, 554, 63 Nev 201.
N C—Montague Bros v. W C. Shepherd Co., 58 S E 2d 118, 121, 231 N. C 551—Universal C. I. T Credit Corp. v. Walters, 53 S E 2d 520, 522, 230 N C 443
Okl.—Oklahoma City v. District Court of Thirteenth Judicial Dist., 32 P 2d 318, 319, 168 Okl 235, 93 A.L R 489.

85. Mo—Yellow Mfg Acceptance Corporation v. Rogers, 142 S W 2d 888, 891, 235 Mo App. 96.
N C—Universal C. I T Credit Corp. v. Walters, 53 S.E 2d 520, 522, 230 N C 443.
Okl.—Oklahoma City v. District Court of Thirteenth Judicial Dist, 32 P 2d 318, 319, 168 Okl. 235, 93 A L R. 489.

86. Mo—Yellow Mfg Acceptance Corporation v Rogers, 142 S W 2d 888, 891, 235 Mo App. 96.
Nev—Flyge v Flynn, 166 P 2d 539, 554, 63 Nev 201.
N C—Montague Bros. v. W C Shepherd Co, 58 S E 2d 118, 121, 231 N.C 551—Universal C I T Credit Corp. v Walters, 53 S E 2d 520, 522, 230 N.C. 443.
Okl—Oklahoma City v. District Court of Thirteenth Judicial Dist, 32 P 2d 318, 319, 168 Okl. 235, 93 A L.R. 489.

87. Tex—**Corpus Juris quoted in** General Exchange Ins Corporation v. Bell, Civ.App, 138 S.W 2d 129, 130.
58 C.J. p 741 note 11.

The word "situated" clearly implies some element of permanency,[88] and contemplates more than mere temporary presence,[89] and connotes a more or less permanent location or situs,[90] and it has been said that by a long line of authorities the word at least includes residence.[91]

SITUATION. The state of being placed; posture;[92] position as regards conditions and circumstances; state; condition.[93]

"Situation" has been held to be synonymous with "office" see Officers § 1 a, "position" see 72 C J.S. p 231 note 56, and "situs,"[94] and it has been compared with, or distinguished from, "cause" see 14 C.J.S. p 42 note 5.

SITUS. The word "situs" is defined as meaning site;[95] situation;[96] location;[97] the place where a thing is.[98] While it is said that permanency of location is not required to fix situs,[99] yet the term does import fixedness of location.[1]

In its natural signification, the word "situs" is applicable only to landed estates which are really fixed and immovable.[2] Strictly speaking, personal property cannot be said to have a situs; it is situated wherever it may happen to be for the time being.[3] It has been said that the word "situs," in the case of intangibles, now signifies power or jurisdiction over such intangibles rather than its old connotation of location.[4] However, the word "situs" is applied conventionally to personal property,[5] and in many instances and for many reasons it is necessary to ascertain the situs of such property. In any situation concerning personal property where more than one jurisdiction is or may be involved, the law which governs may depend on the situs of the property, and, since this is essentially a question of conflicting jurisdictions, the subject is treated generally in Conflict of Laws § 18, and specifically in various titles throughout this work under the heading "What law governs."

For taxation purposes it is frequently necessary to determine the situs of personal property since, as stated in the C.J S title Taxation § 114, also 61 C.J. p 223 notes 97, 98, in order to be taxable, personal property must have a taxable situs within the state, either actual or constructive.

Statutes frequently require that chattel mortgages, mechanics' liens, conditional sales contracts, and other instruments of a similar nature shall be recorded in the place where the property is situated or has its situs, and what constitutes the situs of the property or the place where the property is situated within the meaning of such statutes is treated with respect to chattel mortgages in Chattel Mortgages § 151, and with respect to mechanics' liens in Mechanics' Liens § 138, and with respect to conditional sales contracts in Sales § 584 c 1.

It sometimes is necessary to determine the situs

88. Mo.—Yellow Mfg Acceptance Corporation v. Rogers, 142 S W 2d 888, 892, 235 Mo App. 96

89. Neb—Security Mut. Life Ins. Co. v Ress, 106 N W. 1037, 1039, 76 Neb 141
N C—**Corpus Juris quoted in** Montague Bros v W. C. Shepherd Co., 58 S E 2d 118, 121, 231 N.C. 551.
Tex—**Corpus Juris quoted in** General Exchange Ins Corporation v Bell, Civ App, 138 S W 2d 129, 130

90. Cal—Brock & Co. v Board of Sup'rs of Los Angeles County, 65 P 2d 791, 793, 8 Cal 2d 286, 110 A L R 700.
Mo—Yellow Mfg Acceptance Corporation v Rogers, 142 S W 2d 888, 892, 235 Mo App 96.
N.C.—Universal C. I T. Credit Corp v Walters, 53 S E 2d 520, 522, 230 N.C. 443.

91. Cal.—Bohn v Better Biscuits, 78 P.2d 1177, 1180, 26 Cal App 2d 61.

92. N.C.—Jones v. Tuck, 48 N.C 202, 205.
58 C.J. p 741 note 15
Phrases
(1) "Dangerous situation" within the meaning of the "last clear chance doctrine" see Negligence § 137 c.
(2) "Situation in life" as synonymous with "condition in life" see 15 C J S. p 813 note 93.

93. Ill—Bellomy v Bruce, 25 N E 2d 428, 433, 434, 303 Ill App 349.

94. Mo—Yellow Mfg Acceptance Corporation v. Rogers, 142 S W 2d 888, 892, 235 Mo.App. 96

95. Okl—In re Wise, 206 P 2d 218, 220, 201 Okl 395.
Tex—**Corpus Juris quoted in** General Exchange Ins Corporation v. Bell, Civ App., 138 S W.2d 129, 130.
58 C.J p 741 note 18.

96. Okl—In re Wise, 206 P 2d 218, 220, 201 Okl. 395.
Tex—**Corpus Juris quoted in** General Exchange Ins. Corporation v. Bell, Civ.App, 138 S.W 2d 129, 130.
58 C J p 741 note 19.

97. Okl—In re Wise, 206 P 2d 218, 220, 222, 201 Okl 395.
Tex—**Corpus Juris quoted in** General Exchange Ins. Corporation v. Bell, Civ.App, 138 S W 2d 129, 130.
58 C.J p 741 note 17.

98. Okl—In re Wise, 206 P.2d 218, 220, 201 Okl 395
Tex—**Corpus Juris quoted in** General Exchange Ins Corporation v Bell, Civ.App, 138 S W 2d 129, 130
58 C J. p 741 note 20.

99. Tex—**Corpus Juris quoted in** General Exchange Ins Corporation v. Bell, Civ.App, 138 S W.2d 129, 130—Dallas v Gulf, etc, R Co, Civ.App, 1 S W 2d 497, 499.

1. Or—Callender Nav. Co v. Pomeroy, 122 P 758, 761, 61 Or 343.
Tex—**Corpus Juris quoted in** General Exchange Ins Corporation v. Bell, Civ App, 138 S W 2d 129, 130—Zanes v. Mercantile Bank & Trust Co of Texas, Civ App., 49 S W.2d 922, 926.

2. Or.—Callender Nav. Co. v. Pomeroy, 122 P. 758, 761, 61 Or. 343.
Tex.—Zanes v Mercantile Bank & Trust Co of Texas, Civ.App., 49 S. W 2d 922, 926.

3. Pa—Allegheny Co v Gibson, 90 Pa 397, 421, 35 Am R 670
Tex.—Logan v Ludwick, Civ.App, 283 S.W. 548, 551

4. Ariz—Kelly v. Bastedo, 220 P.2d 1069, 1073, 70 Ariz. 371.

5. Tex.—Zanes v. Mercantile Bank & Trust Co. of Texas, Civ.App., 49 S.W.2d 922, 926.
58 C.J. p 741 note 23.

of personal property for reasons of venue, since actions involving such property frequently are required to be brought in the county where the property is situated. This subject is treated generally in the C J.S. title Venue §§ 47–50, also 67 C.J. p 72 note 27–p 75 note 81. The subject is treated more specifically in the various titles throughout this work, and, by way of illustration, in some jurisdictions statutes provide that a suit against an insurance company for loss of, or damage to, personal property be brought in the county where the insured property is situated, and what constitutes the county where such property is situated within the meaning of such statutes is treated in Insurance § 1252.

For other specific applications and specific uses of the term see the indexes to the various titles and consult the Descriptive-Word Index.

"Situs" has been held to be synonymous with "situation" see ante p 1312 note 94, and has been held not synonymous with "residence" see 77 C.J.S. p 305 note 48.

SIVE. As the first word of a maxim as to which there have been no recent applications see 58 C.J. p 741 note 25.

SIX. One more than five; twice three.[6]

SIXTY. Six times ten; fifty-nine and one more; threescore.[7]

SIZE. To cover, stiffen, or glaze, with size; to prepare with size.[8]

SIZER. In the candy manufacturing business, a machine consisting of an arrangement of rollers through which caramel candy is run in slabs to reduce it to a uniform thickness.[9]

SKAG. A term applied to a length of chain on a barge to be dropped overboard to steady her in navigating narrow channels.[10]

SKATE. The word "skate" has been held to include both roller and ice skates, as well as the several varieties of each.[11]

SKELETON. As an adjective, consisting of, or resembling, a skeleton.[12]

SKELPING TONGS. A term used to describe tongs for either skelping or butt welding.[13]

SKIAGRAPH. A picture of the interior of the object portrayed;[14] an X-ray photograph.[15] It is sometimes spelled "sciagraph."[16]

The distinction between photographs and skiagraphs is discussed in 70 C.J.S. p 698 note 56.

SKIASCOPE. The skiascope, sometimes called a "retinoscope," is a small circular mirror, plane or slightly concave, which reflects a beam of light into the pupil of the eye. Slight horizontal or vertical movements of the instrument produce a shadow which travels across the pupil in the same or in the opposite direction to the movement of the skiascope, according to the state of the refraction. The examiner looks through a small circular opening in the center of the mirror. Trial lenses are now placed before the eye until one is found which neutralizes or reverses the direction in which the shadow moves. This lens indicates the refractive condition at a particular meridian and enables the examiner to ascertain the amount not only of corneal but also of lenticular astigmatism.[17]

6. Webster New Int.D.

Phrases

(1) "6–10s," when applied to prunes, means that prunes are to be hermetically sealed in 10-pound cans, each holding approximately a gallon, packed six to the case.—National Grocery Co. v. Pratt-Low Preserving Co., 17 P.2d 51, 52, 170 Wash 575.

(2) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 741 notes 27–32.

7. Webster New Int D

Phrases employing the word and as to which more recent adjudications have not been found see 58 C.J. p 741 notes 34, 35

8. Webster New Int D.

Sizing

(1) "The plain meaning of sizing is to cover or glaze the surface of an article. That is the common meaning of the term as defined by all the lexicographers"—Application of McNamara, 166 F.2d 948, 952, 35 C C.P A., Patents, 1041

(2) In the manufacture of hats, one of the stages is known as "sizing," and consists of still further shrinking the "bat" or felt fabric out of which the hat is made until it gets to the proper size for a hat—United States Hat Machinery Corporation v. Boesch Mfg. Co., C C.A Conn., 108 F. 2d 417, 418.

9. Wis—Kowalski v. American Candy Co., 151 N.W. 805, 806, 160 Wis 341.

10. U S—The Lutcher Brown, C.C.A. Tex., 41 F 2d 176.

11. U.S.—Samuel Winslow Skate Mfg Co. v. U. S., Ct.Cl., 50 F.2d 299, 302.

12. Webster New Int.D.

Phrases

(1) "Skeleton bill of exceptions" see Appeal and Error § 821.

(2) "Skeleton track" see Railroads § 1 p.

13. U S—National Tube Co. v. Spang, Chalfant & Co., C.C Pa., 132 F 318, 320

14. Tex—Texas Emp. Ins. Ass'n v. Crow, 221 S.W.2d 235, 237, 148 Tex. 113, 10 A L R 2d 913.

15. Ind—Aspy v. Botkins, 66 N E. 462, 463, 160 Ind. 170.

16. Ind.—Aspy v. Botkins, supra.

17. Ala.—Hampton v. Brackin's Jewelry & Optical Co., 186 So. 173, 178, 237 Ala. 212.

SKID. As a noun, a small contrivance used for handling heavy articles under many conditions.[18]

The verb "skid," and the participial form "skidding," as used in connection with the operation of an automobile, are defined in Motor Vehicles § 289.

SKIDOO BELL. See Mines and Minerals § 3 h.

SKILL. It has been said that "skill" is not a static term,[19] and that there are different degrees of skill.[20]

The term is defined as meaning the familiar knowledge of any art or science, united with readiness and dexterity in execution or performance, or in the application of the art or science to practical purposes.[21] In its broadest signification the term includes every subject susceptible of special and peculiar knowledge derived from experience,[22] and it is not necessarily limited only to mechanical or professional knowledge,[23] and is equally applicable to a chemist as to a mechanic, and to a laboratory as to a work-bench.[24]

While the word "skill" may, it does not necessarily, or even usually, include the idea of care or diligence.[25]

Persons performing the duties of agent, broker, factor, or trustee are required to exercise a certain degree of skill, and in this connection see Agency §§ 155–161, Brokers § 26, Factors § 20, and the C.J.S. title Trusts § 247, also 65 C.J. p 648 note 9–p 650 note 28.

A person of sufficient skill in a particular field of endeavor may be permitted, in a proper case, to testify as an expert witness, and the skill which is required to qualify a person as an expert witness is treated with reference to civil actions in Evidence § 457, and with reference to criminal actions in Criminal Law § 858 c.

It is stated in Gaming § 1 b (2) that the law recognizes a difference between games of skill and games of chance, games of skill usually being lawful, while gambling by any species of game of chance is generally considered unlawful.

The word "skill" is treated in various other connections throughout this work and reference is made to the indexes to the titles Attorney and Client, Master and Servant, and Physicians and Surgeons. For other specific references consult the Descriptive-Word Index.

SKILLED. Having skill; expert; skillful.[26]

SKILLFUL. Having ability in a specified direction; experienced; practiced.[27]

SKIL-SAW. A power-driven woodworking machine.[28]

SKIMMED MILK. See 57 C.J.S. p 1113 notes 4–7.

SKIN. The outermost layer, or surface, of anything.[29]

"Skin" is the name of a card game as stated in Gaming § 1 b (3).

SKIP. In building and construction parlance, a wooden box in which concrete, mixed, is transported to the place of deposit.[30] The term is also applied to a part of a concrete mixer, the container in which the materials to be mixed are placed and raised to the body of the mixer.[31]

"Retinoscope" defined see 77 C J S p 329 note 31

18. Mo —Beckman v. Anheuser-Busch Brewing Assoc., 72 S.W. 710, 711, 98 Mo App 555.
58 C J p 742 note 45.
"Skidding tongs" is the name of a device which grapples an object in the same manner as ordinary ice tongs —Gordon v Ballard Lumber Co., 128 P 1053, 71 Wash. 430.

19. U.S —Safway Steel Scaffolds Co of Wisconsin v Patent Scaffolding Co, C C A Ill, 110 F 2d 1008, 1011

20. Or —Holland v Rhoades, 106 P 779, 780, 56 Or 206

21. Ga —Akridge v Noble, 41 S E 78, 80, 114 Ga 949.
58 C.J. p 742 note 50.

22. Wis.—Schwantes v. State, 106 N. W. 237, 247, 127 Wis 160.

23. Wis —Schwantes v. State, supra

24. D C —Minnesota Mining & Manufacturing Co v. Coe, 99 F 2d 986, 989, 69 App D.C 217.

25. Tex —Graham v. Gautier, 21 Tex 111, 119.

26. Webster New Int D.
"Skilled witness" see Evidence § 456

27. Or.—Holland v Rhoades, 106 P. 779, 780, 56 Or. 206.
Phrases employing the word and as to which more recent adjudications have not been found see 58 C J. p 742 notes 65–67.

28. La —Zumo v. Cavin, App., 43 So 2d 92, 93.

29. Webster New Int D.
In the fur trade, the word "skins" is employed to denote skins which are chiefly valuable for the skin, as distinguished from skins which are chiefly valuable for the fur.
U S.—Seeberger v. Schlesinger, Ill., 14 S.Ct 729, 731, 152 U.S. 581, 585, 38 L Ed. 560
N Y —Astor v. Union Ins. Co., 7 Cow. 202, 214
"Hides" distinguished see 39 C J S. p 898 note 97.
Phrases
(1) "Skin fire" see 36 C.J.S. p 806 note 36
(2) Other phrases as to which more recent adjudications have not been found see 58 C J. p 743 notes 72–75

30. U S —U. S. for Use of Hudson River Stone Supply Co. v. Venable Constr. Co, C.C.Ga., 124 F. 267, 270

31. Cal —Meyer v. Tobin, 4 P.2d 542, 214 Cal. 135.

SKIPPERAGE. When a fishing vessel operates on the "lay" system or on shares, a certain share is paid to the owner of the vessel, and the owner pays to the captain if the captain is not the owner, one-fifth of this share, and this one-fifth is called "skipperage."[32]

SKOAL; SKOL. A Danish and Norwegian word,[33] used as an exclamation pledging health in drinking; a salutation or toasting by crying "Skoal."[34]

SKYLARK. A colloquial term meaning to engage in a frolic; have hilarious or boisterous sport.[35]

"Skylarking" in an automobile see Motor Vehicles § 399(4) c; as preventing recovery under the Federal Employers' Liability Act see Master and Servant § 355 d. An injury to an employee does not ordinarily arise out of the employment where it results from skylarking in which the employee takes an active part, as stated in the C.J.S. title Workmen's Compensation Acts § 225, also 71 C.J. p 681 note 19–p 685 note 37.

SKYLIGHT. A window, usually glazed, facing skyward.[36]

SLAB. A comparatively thick plate or slice of anything.[37]

In concrete construction, a slab is that portion of the structure underneath and supporting the floor and extending between the beams and girders.[38]

"Slab" has been distinguished from "beam" see 10 C.J.S. p 218 note 29, and "sheet" see 80 C.J.S. p 143 note 48.

SLACK. The word "slack," as a noun, means the part of anything which hangs loose without strain.[39] As a verb, to slacken in speed, force, activity, etc.; to slow up; to relax tension.[40] As an adjective, not using due diligence, care, or dispatch; remiss; inattentive; negligent; also, characterized by slowness, sluggishness, or lack of energy; also, relaxed; not tight, tense, or taut; loose.[41]

It has been held to be synonymous with "loose" see 54 C.J.S. p 797 note 68.

SLACKAGE. Weight lost by leakage.[42]

SLACKEN. To lose rapidly; to become more slow.[43]

SLACKER. One who avoids or neglects a duty or responsibility; specifically, a person who shirks a duty or obligation to his country, especially in time of war, as by attempting to evade military service;[44] and more specifically a person derelict in the performance of his duty toward his country in the First World War.[45]

SLAG; SLAGGING. See Mines and Minerals § 3 h.

SLANDER. See Libel and Slander § 1 et seq.

SLANDER OF PROPERTY OR TITLE. See Libel and Slander §§ 269–280.

SLANG. Colloquial words and phrases which have originated in the cant or rude speech of the vagabond or unlettered classes, or, belonging in form to standard speech, have acquired or have had given them restricted, capricious, or extravagantly metaphorical meanings, and are regarded as vulgar or inelegant.[46]

32. U.S.—The Dirigo First, D.C. Mass., 60 F.Supp. 675—O'Hara Vessels v. Hassett, D.C.Mass., 60 F. Supp. 672, 673.

33. U.S.—Skol Co. v. Olson, Cust & Pat.App., 151 F.2d 200, 203.

Origin of word

The word "skoal" comes from the Viking word meaning "skull." The Viking warrior, when he killed his opponent, would scoop out the skull and use it as a drinking cup, and this became a word used by warriors in drinking to the good health of others. —Skol Co. v. Olson, supra.

34. U.S.—Skol Co. v. Olson, supra.

35. New Standard D.

36. N.Y.—Murray v. Eisfeldt, 182 N. Y.S. 181, 182.

Not a door

N.Y.—Murray v. Eisfeldt, supra.

37. Webster New Int.D.

Piece of steel 15 feet long, 4 feet 2 inches wide, 6½ inches thick, and weighing over 6 tons, with a geometrical design engraved on one side, a completed article ready for use in the manufacture of glass, is a "slab" and cannot be regarded as a sheet or plate.—Theo. W. Morris & Co. v. U. S., N.Y., 174 F. 656, 657, 98 C.C.A. 410

Slabs as not subject to a lien under a statute giving a lien on logs and timber see Logs and Logging § 72 a.

38. Cal.—Soule v. Northern Constr. Co., 165 P. 21, 22, 33 Cal.App. 300.

39. Webster New Int.D.

40. Webster New Int.D.

41. Webster New Int.D.

Phrases

(1) "Slack action" as a railroad term see Railroads § 1 r.

(2) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 743 notes 88, 89.

42. U.S.—Scarburgh v. Compania Sud-Americana De Vapores, C.A.N. Y., 174 F.2d 423, 424.

43. Mont.—Badovinac v. Northern Pac. R. Co., 104 P. 543, 544, 39 Mont. 454

44. Ala.—Choctaw Coal, etc., Co. v. Lillich, 86 So. 383, 385, 204 Ala. 533, 11 A.L.R. 1014

45. U.S.—Dimmitt v. Breakey, C.C.A. Tex., 267 F. 792
58 C.J. p 743 note 93.

46. Century D.
Judicial notice of slang see Evidence § 67.

"There is no real difference in kind between the processes of slang and those of legitimate speech. Slang is only the rude luxuriance of the un-

SLANTING. Oblique, sloping.[47]

SLATE. While in a technical sense the term refers exclusively to the structural formation of the rock, without any reference to its chemical constituents, in its popular and general sense the term refers to rocks containing clay, argillaceous rocks, of whatever structural formation,—the argillaceous quality being the characteristic, without regard to structural formation.[48]

SLAUGHTER. To kill wantonly or savagely, especially in large numbers; massacre; also, to kill for the market; butcher.[49]

Slaughtering. The term "slaughtering," as customarily used in the meat packing industry,[50] denotes the whole killing operation,[51] and slaughtering ends when animal life is extinct.[52]

The operation which precedes slaughtering is "handling" see 39 C.J.S. p 771 note 78, and the operation which follows is "dressing" see 28 C.J.S. p 490.

Slaughterhouse. A house where beasts are slaughtered for market;[53] an abattoir.[54] Strictly speaking, the term may include any place where animals are killed.[55]

Cross references. The regulation by municipalities of slaughtering and slaughterhouses is treated in Municipal Corporations § 219. Slaughtering and slaughterhouses as nuisances see Nuisances § 34, and see the title index. Statutes granting exclusive privilege of conducting slaughterhouse as not violative of constitutional guaranty as to privileges and immunities see Constitutional Law § 473. As to whether such statutes, and ordinances of a similar nature, are objectionable on the ground that a monopoly is created see Monopolies § 6. For other specific references see the index to the title Animals, and consult the Descriptive-Word Index.

SLAVE. In the broadest sense, one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition.[56]

cared-for soil, knowing not the hand of the gardener"—State v Sheridan, 93 P. 656, 658, 14 Idaho 222, 15 L R A.,N S, 497.

47. Webster New Int D

Used in describing a condition the term is relative, and except by comparison not of much value in a case dealing with the condition of a crosswalk.—O'Donnell v. Butte, 211 P. 190, 196, 65 Mont. 463, 32 A L.R 1284

48. U S.—Plastic Slate-Roofing Joint-Stock Co v. Moore, C C R I., 19 F Cas No.11,209, Holmes 167, 168.

Phrases

(1) "Slate clay" see 14 C J.S p 1197 note 98 1.

(2) "Slate rock" see 77 C.J.S. p 537 note 30.

(3) "Slate shifter" see Mines and Minerals § 3 h.

(4) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 744 notes 4, 5, 8.

49. New Standard D.

50. U S.—Fleming v. Swift & Co, D.C.Ill, 41 F Supp. 825, 828.

51. U S.—Shain v. Armour & Co, D. C Ky., 50 F Supp. 907, 911—Fleming v. Swift & Co, D.C Ill., 41 F Supp. 825, 828.

52. U S.—Shain v. Armour & Co, D C Ky, 50 F.Supp 907, 911—Fleming v. Swift & Co, D C.Ill., 41 F. Supp. 825, 828.

53. La.—Thibaut v. Hebert, 12 So. 931, 932, 45 La Ann 838

"Slaughterhouse business" see 12 C. J S. p 804 note 59 1.

Similarly defined

A building where beasts are butchered for the market.—Baura v Thomasma, 32 N.W.2d 369, 371, 321 Mich. 139

54. Mich.—Baura v. Thomasma, supra.

55. W.Va.—Williams v. Schehl, 100 S E. 280, 282, 84 W Va. 499.

58 C.J. p 744 note 14.

56. U.S.—Hodges v. U. S., Ark., 27 S Ct 6, 9, 203 U.S. 1, 17, 27, 51 L.Ed. 65

"Slave" defined as property see Slavery § 1.

SLAVES

This Title includes persons held as property by others; nature, origin, legality, and abolition of slavery; the slave trade; property in slaves, and incidental rights, duties, and liabilities, and transfers of slave property; reclamation of fugitive slaves; regulation of slaves, freedmen, and free negroes, incident to the existence of slavery, and violations of such regulations; disabilities of slaves and their descendants arising from their condition of servitude; offenses by or against slaves; and manumission, emancipation, and proceedings to obtain or establish freedom.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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2 —— Slave trade—p 1318
3. Who were slaves or subject to be made slaves—p 1319
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§ 1. Definitions, and Nature, Origin, and Legality of Slavery

a. Definitions
b. Nature, origin, and legality of slavery

a. Definitions

A slave has been defined as a person who is wholly subject to the will of another; a person who is the chattel or property of another and is wholly subject to his will. Slavery is defined as the state of entire subjection of one person to the will of another; a condition of enforced compulsory service of one to another.

A slave has been defined as a person who is wholly subject to the will of another, one who has no freedom of action but whose person and services are wholly under the control of another;[1] a person who is the chattel or property of another and is wholly subject to his will.[2]

Master has been defined as one who has another or others under his immediate control, a lord paramount or employer of slaves.[3]

The term "overseer," with reference to slaves, has been defined as a person who, as the agent or employee of another, has a right to command the obedience, and is entitled to the services, of the slave placed under his charge,[4] a person who superintends and manages the slaves of others, and directs their labors.[5]

Slavery is defined as the state of entire subjection of one person to the will of another;[6] a condition of enforced compulsory service of one to another.[7] The term implies the relationship of two persons in the character of master and slave.[8]

1. U.S.—U. S. v. Ingalls, D C Cal., 73 F Supp. 76, 78.
R.I.—Anderson v. Salant, 96 A. 425, 428, 38 R.I. 468.
2. R.I.—Anderson v. Salant, supra
Support of pauper slaves see Paupers § 65.
3. Century D.
4. Miss.—Scott v. State, 31 Miss. 473, 479.
5. Ala.—In re State, 39 Ala 367, 374.
6. U.S.—U. S. v. Ingalls, D.C.Cal., 73 F.Supp. 76, 79.
58 C.J. p 746 note 1.
Peonage defined see Peonage § 1.
7. U S.—Hodgers v. U. S, Ark., 27 S Ct. 6, 8, 203 U.S. 1, 51 L Ed. 65 —U. S. v. Ingalls, D C Cal., 73 F. Supp. 76, 79.
8. Va.—De Lacy v. Antoine, 7 Leigh 438, 445, 34 Va. 438, 445.

b. Nature, Origin, and Legality of Slavery

The law of African slavery in the United States was a system of customary law. While slavery was largely a matter of municipal regulation, to the extent that the Constitution of the United States recognized a property in slaves, the institution of slavery was a political institution.

Our American law of African slavery was a system of customary law, that is, of rules and principles applicable to the institution, at first introduced and observed by the people in their practical dealing with the subject, and subsequently recognized by the courts as the grounds of judicial decision. Very few of these principles were the result of written law, but had been developed from time to time by the actual working of the system in the several slave states, and successively adopted by the courts as they had been found by experience to be proper and effective in making the institution answer the purpose for which it existed,[9] and it was held that slavery could legally exist without any positive law authorizing it, its very existence in fact being presumptive evidence of its legality.[10] While slavery as between the separate states was largely a matter of municipal regulation,[11] and by the law of nations no state was bound to recognize slavery in another state, it being a matter of comity,[12] to the extent that the Constitution of the United States recognized a property in slaves, the institution of slavery was a political institution.[13]

Our system resembled that of the Romans rather than the villeinage of the ancient common law, and the courts have looked to the Roman rather than to the old common law of England for rules applicable to it,[14] and the common law of England was held to be inapplicable to the institution of slavery except to protect the rights of masters, for African slavery never existed in the island of Great Britain by the common law, by statute, or by the law of nations.[15] Under the Roman law slavery could originate in three ways, namely, by birth, when the mother was a slave; by captivity, in war, and by the voluntary sale of himself, as a slave, by a freeman, over the age of twenty, for the sake of sharing the price.[16] In the United States slavery by captivity in war was unknown[17] except in the instance of Indians taken in war, as discussed infra § 3 a, and a free negro could not sell himself into slavery,[18] the chief means of perpetuating slavery being by birth, as considered infra § 3 a.

§ 2. —— Slave Trade

Although the slave trade was in some states recognized as a lawful commerce under the law of nations, statutes prohibiting the trade were enacted in many states and by the federal government.

Although the slave trade was in some states recognized as a lawful commerce under the law of nations, and that law was held obligatory on the states unless repudiated by treaty or positive law,[19] persons imported as slaves contrary to law, against their will, were still subject to federal control, although mingled with persons in the states;[20] and in many states statutes were passed prohibiting slave trade and the importation of slaves, and sometimes rendering a slave free on his importation.[21]

Acts were passed by the federal government making the engaging in the slave trade an indictable offense against the United States, and forfeiting the vessel.[22] The acts prohibited not merely the transportation of slaves, but the being employed in the business of the slave trade or serving on such a voyage,[23] or fitting vessels for use in the trade,[24] and it was unlawful to hold, sell, or dispose of an African illegally brought into the country from any foreign kingdom, place, or country;[25] engaging in such commerce was under certain circumstances

9. Mo.—Douglass v. Ritchie, 24 Mo. 177

10. Mo.—Charlotte v. Chouteau, 25 Mo. 465.
58 C.J. p. 746 note 6.

11. U.S.—Miller v. McQuerry, C.C. Ohio, 17 F. Cas. No. 9,583, 5 McLean 469
58 C.J. p. 746 note 7.

12. U.S.—Prigg v. Pennsylvania, Pa., 16 Pet. 539, 10 L. Ed. 1060

13. Cal.—In re Perkins, 2 Cal. 424
48 C.J. p. 746 note 9.
Property in slaves see infra § 4.

14. Mo.—Douglass v. Ritchie, 24 Mo. 177.
58 C.J. p. 746 note 10.

15. Ga.—Neal v. Farmer, 9 Ga. 555

16. Tex.—Westbrook v. Mitchell, 24 Tex. 560
58 C.J. p. 747 note 12.

17. Tex.—Westbrook v. State, 24 Tex. 563.

18. Tex.—Westbrook v. State, supra
58 C.J. p. 747 note 15.

19. Ga.—Neal v. Farmer, 9 Ga. 555.

20. U.S.—U. S. v. Gould, D.C. Ala., 25 F. Cas. No. 15,239.

21. Va.—Betty v. Horton, 5 Leigh 615, 32 Va. 615.
58 C.J. p. 747 note 19

22. U.S.—U. S. v. Morris, N.Y., 14 Pet. 464, 10 L. Ed. 543.
58 C.J. p. 747 note 20

Landing slave in territory permitting importation
An early federal statute providing for the forfeiture of a vessel from which a person of color was landed in a port of a state which by law had prohibited the admission or importation of slaves did not apply to the landing of a slave in the territory of Orleans, where the legislature of such territory had not prohibited the admission or importation of such a person.—The Amiable Lucy, La., 6 Cranch, 330, 3 L. Ed. 239.

23. U.S.—In re Charge to Grand Jury, C.C.D.C., 30 F. Cas. No. 18,269a, 3 Phila. 527.
58 C.J. p. 747 note 21.

24. U.S.—In re Charge to Grand Jury, supra
58 C.J. p. 747 note 22.

25. U.S.—U. S. v. Haun, C.C. Ala., 26 F. Cas. No. 15,329.

made piracy by federal statutes, as discussed in Piracy § 1 b (2). The acts were not, however, intended to apply to cases where slaves were carried from one foreign port to another as passengers and not for sale,[26] and they were not applicable to negroes domiciled in the United States and brought back to the United States after a temporary absence.[27] One held in slavery in a foreign country who became free by being brought into the United States in violation of statute, and afterward remained in the service of his previous owner, both owner and slave believing that the latter had not obtained his freedom, could not recover compensation for such service on an implied promise, but only on an express promise, to pay.[28]

§ 3. Who Were Slaves or Subject to Be Made Slaves

a. In general
b. Evidence of status

a. In General

What persons were slaves or subject to be made such depended largely on the provisions of regulatory statutes. Generally, the children of mothers who were slaves were also slaves.

Slavery being the subject of statutory regulation in some jurisdictions, what persons were slaves or subject to be made such depended largely on the construction of those statutes.[29] The children of a slave followed the condition of the mother at the time of the birth, according to the maxim, partus sequitur ventrem,[30] and the law did not contemplate that any number of crosses between the negro and the white should emancipate the offspring of the slave.[31] Conversely, the child of a free woman was free,[32] and where a female slave was emancipated, with a reservation that her future increase should be slaves, such reservation was void, and the woman and her increase were absolutely free.[33] In some jurisdictions statutes were operative which rendered free children born after the passage of the statute.[34]

Although some cases seemed to lean to a different doctrine,[35] it was generally held that children born of a slave mother entitled to or promised her freedom at the end of a fixed time were born slaves and so continued even after the mother obtained her freedom,[36] and the issue of manumitted slaves born after the manumission, before the period of its taking full effect, were slaves for life,[37] and the cases in which children, born before their mothers' right to freedom accrued, have been adjudged to be free, were said to be so decided, not because of a prospective gift or bequest of freedom to the mothers, but because of some clause in the instrument being construed as extending the gift or bequest of freedom to the children themselves.[38]

Where a person was born free, no length of illegal and usurped dominion over him could make him a slave,[39] and although a free negro sold his services by deed for ninety-nine years, for a valuable consideration, he did not thereby cease to be a free man.[40] A father could not hold his own children in slavery, or sell them as slaves, although he might have rescued them from the condition of slavery.[41]

b. Evidence of Status

In slave states color indicating African descent gave rise to a presumption that the person was a slave. On an issue of slavery or freedom the general rules of evidence have been applied.

In slave states color indicating African descent gave rise to a presumption that the person was a slave.[42] Every negro was prima facie to be con-

26. U.S.—Tryphenia v. Harrison, Pa., 24 F.Cas.No.14,209, 1 Wash.C.C. 522—U. S. v. Kennedy, Pa., 26 F.Cas. No. 15,525, 4 Wash. C. C. 91.

27. U. S.—U. S. v. The Ohio, D.C. La., 27 F.Cas.No.15,914, Newb. Adm. 409
58 C.J. p. 747 note 26

28. U. S.—Curranee v. McQueen, C.C., 6 F.Cas.No.3,488, 2 Paine 109

29. Ill.—Boon v. Juliet, 2 Ill. 258
58 C.J. p. 747 note 28.

Indians

(1) In some jurisdictions under the early condition of the law Indians might be slaves.—State v. Van Waggoner, 6 N.J.Law 374—58 C.J. p. 747 note 28 [d].

(2) Under a very early statute in Virginia, subsequently repealed, it was provided that Indians at war with this country when taken prisoners became slaves, and under this statute many Indians were made slaves and their descendants followed their state.—Jenkins v. Tom, 1 Wash. 123, 1 Va. 123

30. Del.—Jones v. Wootten, 1 Del. 77
58 C.J. p. 748 notes 29, 32

31. La.—Morrison v. White, 16 La. Ann. 100.
Va.—Scott v. Raub, 14 S.E. 178, 88 Va. 721

32. Ohio.—Tom v. Daily, 4 Ohio 368

33. Va.—Fulton v. Shaw, 4 Rand. 597, 25 Va. 597

34. Mo.—Merry v. Tiffin, 1 Mo. 725.
58 C.J. p. 748 note 37.

35. Tenn.—Harris v. Clarissa, 6 Yerg. 227
58 C.J. p. 748 note 31

36. Ala.—Sidney v. White, 12 Ala. 728.
58 C.J. p. 748 note 32

37. U. S.—McCutchen v. Marshall, Tenn., 8 Pet. 220, 8 L.Ed. 923
58 C.J. p. 748 note 33

38. Va.—Taylor v. Cullins, 12 Gratt. 394, 53 Va. 394.

39. N.C.—Bookfield v. Stanton, 51 N.C. 156
58 C.J. p. 748 note 38.

40. N.C.—Casey v. Robards, 60 N.C. 434

41. Del.—Wilson v. Waples, 3 Del. 270—Tindal v. Hudson, 2 Del. 441.

42. Ark.—Daniel v. Guy, 19 Ark. 121. Tenn.—**Corpus Juris cited in** Phoenix

sidered as a slave and the property of somebody, and he who acted in respect of him, as if he were a free man, acted at his peril, and the burden of proof was on him to show that the negro was not a slave, or at least to show such circumstances as would rebut the presumption arising from color,[43] possession of, and acts of ownership over, a colored person, were regarded as prima facie evidence of slavery and ownership.[44] This, however, was not the rule in nonslave states or states in which, generally, colored persons were not held as slaves, and in these every person, although colored, was prima facie presumed to be free,[45] and a negro was presumed to be free, although purchased as a slave, if the purchase was made in a state in which slavery was not tolerated, unless it was shown that he had previously inhabited one in which it was.[46]

A deed or act of manumission of a slave might be presumed from such acts of the master as afforded a sufficient ground for the presumption,[47] as where the master allowed him to act as a freeman without molestation for many years;[48] but the rule was that the presumption of a deed of manumission must be founded on acts inconsistent with a state of slavery, known to the owner, and which could only be accounted for on a supposition that he intended to free his slave.[49] A deed of emancipation, executed in a state where slavery did not exist, was prima facie good, and entitled the negroes to freedom wherever they went; and the proof of its invalidity must come from those who disputed the act and attempted to hold against it.[50]

On an issue of slavery or freedom the general rules of evidence,[51] including rules as to admissibility[52] and weight and sufficiency[53] of evidence, have been applied.

§ 4. Property in Slaves

a. General nature; rights and duties of master
b. Transfer
c. Loaning and hiring

a. General Nature; Rights and Duties of Master

Slaves were considered as property and were recognized as such by the Constitution of the United States. The master had the right to use such means as were necessary in enforcing his authority, but he was under a legal obligation to supply the necessary wants of the slave and to protect and preserve his life.

Slaves were considered as property[54] and were recognized as such by the Constitution of the United States.[55] For some purposes in some states they were considered as real property,[56] particularly for purposes of descent, as discussed in Descent and Distribution § 9; but the law, which to some extent imparted to slaves the fictitious quality of realty, for most purposes, and to a greater extent, considered them personalty.[57] Slaves were subject to attachment.[58]

The master's property in his slave was sui generis, the slave being considered in the law in many respects in the light of a human being entitled to the law's protection.[59] Thus, although unconditional submission on the part of the slave was due to the lawful authority of the master, and the master might therefore use just such force and means in reducing his rebellious slave to lawful submission to his authority as were necessary to effect his purpose,

Ins. Co. v. Jordan, 184 S W 2d 721, 727, 28 Tenn App 11.
58 C J. p 748 note 41.

Birth prior to abolition of slavery
There is a presumption that a negro who was born in a slave state prior to abolition of slavery was a slave —Phœnix Ins Co v. Jordan, 184 S.W 2d 721, 28 Tenn.App. 11.

43. U.S —Mandeville v. Cookenderfer, D C, 16 F Cas No.9,009, 3 Cranch C C 257.

44. N Y —Trongott v Byers, 5 Cow 480
58 C J p 749 note 43.

45. Ill.—Kinney v Cook, 4 Ill. 232.
58 C J. p 749 note 44.

46. La.—Forsyth v. Nash, 4 Mart. 385.

47. Mo.—Lewis v Hart, 33 Mo. 535

48. N.C.—Bookfield v. Stanton, 51 N. C. 156.
58 C J. p 749 note 47.

49. Md —Burke v. Negro Joe, 6 Gill & J. 136.
58 C.J. p 749 note 48.

50. Tenn —Blackmore v. Phill, 7 Yerg 452

51. U.S —Johnson v. Tompkins, C C Pa, 13 F Cas No 7,416, Baldw. 571.
58 C J. p 749 note 51.

52. N.C —Bookfield v. Stanton, 51 N C 156
58 C.J. p 749 note 52.

53. Ark.—Gary v Stevenson, 19 Ark. 580
58 C.J. p 749 note 53.

54. Ala —Rose v. Pearson, 41 Ala 687
58 C.J. p 750 note 54.

55. Cal.—In re Perkins, 2 Cal. 424

56. Ky —Sneed v. Ewing, 5 J.J. Marsh 460, 22 Am D. 41.
50 C J. p 768 note 89 [a] (1).

57. Ky —Beaty v. Judy, 1 Dana 101.
58 C J. p 750 note 58.

In Louisiana
(1) Slaves were classed in law as immovables —Hyams v. Smith, 6 La. Ann 362—50 C.J. p 768 note 89 [a] (2)

(2) They were not, however, real estate —Girard v. New Orleans, 2 La. Ann 897.

(3) The view was expressed that slaves in Louisiana, being immovables under the law of Louisiana, passed as real estate, although by the law of the domicile of the owner slaves were personalty.—McCollum v. Smith, Meigs, Tenn, 342, 33 Am.D 147.

58. Ky.—Weathers v. Mudd, 12 B. Mon. 112—Plumpton v. Cook, 2 A. K Marsh. 450.

59. Ky.—Craig v. Lee, 14 B.Mon. 119.

even to the destruction of the life or limb of the slave,[60] he might not deprive the slave of life or limb unless impelled to such an act by necessity;[61] and he had no right to inflict on him such cruel and inhuman punishment, even with the purpose of securing service and obedience, as must result in death as a consequence of the punishment inflicted.[62] Likewise, the law did not subject the female slave to an involuntary and illicit connection with her master, and it would protect her against such a misfortune.[63] The owner of a slave was under a legal obligation to supply his necessary wants and to protect and preserve his life,[64] and this duty terminated only with the termination of the slave's life.[65]

An action would lie by the owner against one who held his slave wrongfully,[66] or enticed,[67] harbored, or concealed,[68] or rescued[69] him, or who aided or allowed him to escape,[70] and trespass or other appropriate action would lie for the master against one who beat, injured, or caused the death of his slave.[71] In some jurisdictions it was made a criminal offense, generally felony, to steal, kidnap, or harbor or conceal a slave with the intent to deprive the owner of his possession.[72]

The responsibility of a common carrier in transporting slaves was of the nature of that assumed in carrying passengers, and not goods or property; if loss occurred, the carrier was responsible only for negligence or unskillfulness.[73] Carriers were liable in many states, under statute, to the master of a slave for taking him as a passenger without his owner's consent or unaccompanied by the owner, and thus aiding his escape,[74] and in some cases the carrier was liable to fine and imprisonment.[75]

b. Transfer

Slaves could be transferred by will, gift, or sale, and they could also be mortgaged or pledged as security.

Slaves could be transferred by will,[76] or by gift,[77] which under some statutes was sufficient if by parol accompanied by delivery,[78] but which might be in writing,[79] and in some instances must have been, in writing, and recorded, or accompanied by

60. Ala.—Dave v. State, 22 Ala. 23
58 C.J. p. 750 note 60.

61. Miss.—Oliver v. State, 39 Miss. 526.
58 C.J. p. 750 note 61.

62. Ky.—Craig v. Lee, 14 B. Mon. 119

63. La.—Vail v. Bird, 6 La. Ann. 223

64. S.C.—Fairchild v. Bell, 4 S.C.L. 129, 3 Am.D. 702.
58 C.J. p. 750 note 64.

65. La.—Baker v. Tabor, 7 La. Ann. 556

66. Ky.—Gentry v. Barnett, 6 T.B. Mon. 113.
58 C.J. p. 750 note 66.

Proceeding to enforce trust
An answer, in proceeding to enforce trust against persons claiming under purchases from the trustee, that defendant purchased and paid for the slaves in good faith without any notice, in fact or in law, of complainant's claim, or of any claim or interest in conflict with the absolute ownership of his vendor, is sufficiently explicit.—Wyse v. Dandridge, 35 Miss. 672, 72 Am.D. 149.

67. Ga.—Dacy v. Gay, 16 Ga. 203.
58 C.J. p. 751 note 67.

68. Ala.—Kennedy v. McArthur, 5 Ala. 151.
58 C.J. p. 751 note 68.

69. U.S.—Giltner v. Gorham, C.C. Mich., 10 F.Cas.No.5,453, 4 McLean 402.
58 C.J. p. 751 note 69.

70. Va.—Burley v. Griffith, 8 Leigh 442, 35 Va. 442
58 C.J. p. 751 note 70.

71. Miss.—Lamar v. Williams, 39 Miss. 342.
58 C.J. p. 751 note 71.

72. Ala.—Spivey v. State, 26 Ala. 90.—Spencer v. State, 20 Ala. 24.
58 C.J. p. 751 note 72.

73. La.—Folse v. New Orleans Coast, etc., Transp. Co., 19 La. Ann. 199
Tenn.—Scruggs v. Davis, 3 Head 664
Carriage on vessel
Whether or not slaves, being carried on a vessel for a reward paid by their owners, are passengers, they at least do not occupy the category of ordinary cargo and the rule with respect to passengers applies to the extent that the vessel owner is not liable as an insurer for their injury or death.—Boyce v. Anderson, Ky., 2 Pet. 150, 7 L.Ed. 379.—58 C.J. p. 548 note 35 [a].

74. Ga.—South Western R. Co. v. Pickett, 36 Ga. 85.
58 C.J. p. 751 note 74.—10 C.J. p. 357 note 93 [a] (2).

75. La.—Botts v. Cochrane, 4 La. Ann. 35.

76. N.C.—Millsaps v. McLean, 60 N.C. 80.
58 C.J. p. 752 note 77.
Testamentary gift of remainder
Where there was a testamentary gift of a slave for the remainder of his life after he had attained a specified age, the right of the remainderman was vested and was not merely a chose in action.—Pitts v. Curtis, 4 Ala. 350.
Construction of will
N.C.—Millsaps v. McLean, 60 N.C. 80.—Lane v. Bennett, 56 N.C. 390.—Young v. Young, 56 N.C. 216.—Lawrence v. Mitchell, 48 N.C. 190.

77. Mo.—Pemberton v. Pemberton, 22 Mo. 338
58 C.J. p. 752 note 78.
Future increase of female slave
(1) The owner of a female slave could by deed give such slave to one person and the future increase of such slave to another.—Bank v. Marksberry, 3 Litt., Ky., 276.

(2) The view was taken, however, that where the owner of a female slave, by parol, gave such slave to a person, with the express understanding that the first child born to such slave should belong to another, the gift to such other was invalid.—Hynson v. Terry, 1 Ark. 83.

78. Mo.—Pemberton v. Pemberton, 22 Mo. 338.
58 C.J. p. 752 note 79.
Sufficiency of delivery
The placing of the hand of a slave by a parent into that of his child, with the declaration that he gave the slave to her, when done with that intent, constituted a sufficient delivery.—Ivey v. Owens, 28 Ala. 641.

79. Ala.—Twelves v. Nevill, 39 Ala. 175.
58 C.J. p. 752 note 80.

actual delivery.[80] Slaves could also be mortgaged[81] or pledged as security for a debt.[82]

Slaves could be sold,[83] under some statutes, by sale and delivery without deed or writing,[84] but under other statutes a deed or writing was necessary,[85] and it was required to be recorded in order to have effect against third persons,[86] but not as between the parties.[87] The general rules governing warranties, latent defects, and rescission of sales applied.[88] An attempted sale of a person as a slave after slavery was abolished was an absolute nullity;[89] but no retroactive force was attributed to the subsequent emancipation of slaves and abolition of slavery, so as to make a prior sale unlawful.[90]

Under some statutes, the peaceable possession of slaves for a specified period was sufficient to give the possessor the right of property in such slaves.[91]

c. Loaning and Hiring

The loaning or hiring out of a slave was permissible.

Slaves could be lent[92] or hired out[93] in like manner as other chattels, and the hiring might similarly be rescinded or terminated.[94] The borrower or hirer was responsible for loss[95] or conversion[96] of the slave, or for wrongfully chastising or injuring,[97] or killing, or causing the death of,[98] the slave; and the hirer was responsible for the hire of the slave and for breach of his contract of hiring in like manner as in any case of hiring of chattels.[99]

§ 5. Fugitive Slave Laws

Statutes known generally as fugitive slave laws had as their object the prevention of the escape of slaves and the reclamation of fugitive slaves.

In some states statutes were enacted known generally as fugitive slave laws having for an object the prevention of the escape of slaves and their reclamation, and the punishment of those who aided or assisted a slave to escape or harbored him.[1] Furthermore, the United States Constitution guaranteed to the owner of an escaped slave the right of reclamation,[2] and the Constitution did not leave the enforcement of the provisions for the reclamation of slaves solely with the states, but it vested that power in the federal government.[3] Thus, similar statutes were passed by the federal government, the principal ones in 1793 and 1850, the latter known

80. Ky.—Overfield v. Sutton, 1 Metc 621
58 C.J. p 752 note 81.

Validity without registration

(1) If deed of gift of slaves was not registered, as the law directed, it would be void as against creditors of, or purchasers from, the donor—Williams v Walton, 8 Yerg, Tenn., 387, 29 Am D. 122.

(2) As between the parties to such deed, the gift was good without registration—Williams v. Walton, supra.

81. Mo—Dean v. Davis, 12 Mo 112.
58 C.J. p 752 note 82

82. N C.—Houton v Holliday, 6 N. C. 111, 5 Am D. 522

83. U.S—Osborn v Nicholson, Ark, 13 Wall. 654, 20 L Ed. 689.
58 C J. p 752 note 83

84. Tex—Castleman v. Sherry, 42 Tex 59.
58 C J p 753 note 84.

Alteration of bill of sale

Since bill of sale was not necessary in order to pass title to a slave, an alteration of the date of a bill of sale of a slave had no effect on the title of a bona fide purchaser without notice from the vendee—Davis v Loftin, 6 Tex. 489

85. La—Barbin v. Gaspard, 15 La Ann 539
58 C J. p 753 note 85.

86. La—Armistead v. Bowden, 5 La 263, 25 Am D. 178
58 C.J p 753 notes 86, 85 [a].

87. Ala—Goodwin v. Morgan, 1 Stew. 278
58 C.J. p 753 note 85 [a].

88. S C—Charleston v. Cohen, 29 S C L 408—Mitchell v Dubose, 8 S C L 360
58 C J p 753 note 88.

89. La—Fenn v. Carr, 19 La Ann. 106.
58 C J. p 753 note 89.

90. N.C—Harrell v. Watson, 63 N C 454.
58 C.J. p 753 note 90.

91. Ark—Spencer v. McDonald, 22 Ark. 466

Adverse possession was essential under the statute.—Spencer v. McDonald, supra.

Possession under loan as affecting title

Mo—Cook v Clippard, 12 Mo. 379.
2 C.J. p 286 note 38 [a], [b].

92. Tenn—Hallum v. Yourie, 1 Sneed 369.
58 C J p 753 note 91.

93. Ark—Rheubottom v. Sadler, 19 Ark 491
58 C J p 753 note 92.

Nature of interest of owner or bailor

Where a slave was in the possession of a bailee for hire, the interest of the owner was that of property in possession and not a mere chose in action.—Magee v. Toland, 8 Port., Ala., 36.

94. Miss—Trotter v. McCall, 26 Miss. 410
58 C J p 754 note 94—6 C.J. p 1145 note 96 [a]

95. La—Beverley v. The Empire, 15 La Ann 432
58 C J p 754 note 95.

96. Tenn.—Bedford v. Flowers, 11 Humphr 242
58 C.J. p 754 note 96.

97. Mo—Peters v. Clause, 37 Mo 337
58 C J. p 754 note 97.

98. Miss—Wallace v. Seales, 36 Miss. 53.
58 C J p 754 note 98.

99. Ala.—Nelson v. Bondurant, 26 Ala 341.
Ga.—Brooks v Cook, 20 Ga. 87.
58 C.J. p 754 note 99.

1. Cal—In re Perkins, 2 Cal. 424.
58 C.J. p 755 note 1.

"Harbor and secrete"

The term "harbor and secrete," applied to the crime, created by statute, of harboring and secreting slaves, was construed not only to include the act of harboring and secreting the slaves, but also to include the intent to defraud the owner of his property.—Eells v. People, 5 Ill. 498, 509.

2. Ohio.—Ex parte Bushnell, 9 Ohio St 77.

3. U.S—Miller v. McQuerry, C C Ohio, 17 F.Cas.No.9,583, 5 McLean 469.

specifically as The Fugitive Slave Law,[4] and these were held not repugnant to the Constitution;[5] and, indeed, in many instances, the state laws facilitating the recapture of fugitive slaves found within the limits of that state were held void because they assumed to legislate on subject matter over which congress had exclusive jurisdiction,[6] although similar acts not in conflict with the United States legislation were upheld.[7]

The citizen of a slave state had a right, under the Constitution and laws of the Union, to have his fugitive slave delivered on claim being made, and no state could defeat or obstruct this right,[8] and no person had a right to oppose the master in reclaiming his slave, or to demand proof of his property.[9] Under the Constitution the master or his agent had a right to seize, without warrant, his slave in any state where he might be found, if he could do so without a breach of the peace,[10] using as much force as was necessary to carry him back to his residence,[11] or he could enforce his right in the appropriate court by warrant and commitment or certificate.[12] Some statutes provided for the sale of apprehended fugitive slaves after a stated period and on publication of their commitment, the sale being for the benefit of the owner and to pay for the slave's keep.[13]

§ 6. Regulation of Slaves, Freedmen, and Other Negroes

In some states special statutes pertaining to registration or regulation of slaves or free negroes were enacted, and some statutes prohibited immigration of free negroes or importation of slaves into the state.

By statute in some states the slave was required to be registered,[14] slave patrols were authorized with police power over slaves,[15] and an overseer was required on slave plantations if there were more than a specified number of slaves there.[16] Slaves and free negroes were very generally prohibited from carrying arms.[17] Under some statutes it was a criminal offense to trade or deal with a slave without his master's consent,[18] to sell him intoxicants, as discussed in Intoxicating Liquors § 257; to incite in slaves a spirit of insurrection, rebellion, conspiracy, or discontent,[19] or to permit slaves to go at large and hire themselves out or to engage in business.[20] The power conferred on municipal authorities to provide for licensing and regulating drays did not empower such authorities to prohibit the driving of drays by slaves.[21]

Some statutes were enacted to prevent the immigration of free negroes into the several states, and making the coming into the state a penal offense,[22] and the importation of slaves into many of the states was a punishable offense even though from one state to another,[23] since the provision of the United States Constitution which restrained congress from prohibiting the importation of slaves did not apply to the state governments.[24]

4. U.S.—Norris v. Crocker, Ind., 13 How. 429, 14 L.Ed 210.
58 C.J. p 755 note 5.

5. U.S.—Ableman v. Booth, Wis., 21 How. 506, 16 L.Ed 169.
58 C.J. p 755 note 6.

6. Ind.—Donnell v. State, 3 Ind. 480.
58 C.J. p 755 note 7.

7. N.H.—In re Opinion of Justices, 41 N.H. 553.
Ohio—Ex parte Ammons, 34 Ohio St. 518.

8. U.S.—Miller v. McQuerry, C.C. Ohio, 17 F.Cas.No.9,583, 5 McLean 469.
58 C.J. p 755 note 9.

9. U.S.—Johnson v. Tompkins, C.C. Pa., 13 F.Cas.No.7,416, Baldw. 571.
Ky.—Reeder v. Anderson, 4 Dana 193.

10. U.S.—Prigg v. Pennsylvania, Pa., 16 Pet. 539, 10 L.Ed. 1060.
58 C.J. p 755 note 11.

11. U.S.—Johnson v. Tompkins, C.C. Pa., 13 F.Cas.No.7,416, Baldw. 571.

12. U.S.—Ex parte Davis, D.C.N.Y., 7 F.Cas.No.3,613.
58 C.J. p 755 note 13.

13. La.—Landry v. Klopman, 13 La. Ann. 345
58 C.J. p 755 note 14.

14. U.S.—Butler v. Hopper, Pa., 4 F. Cas.No.2,241, 1 Wash.C.C. 499.
58 C.J. p 756 note 19.

15. S.C.—Graham v. Bell, 10 S.C.L. 278, 9 Am.D. 687
58 C.J. p 756 note 20.

16. Ala.—Molett v. State, 33 Ala. 408
58 C.J. p 756 note 21.

17. N.C.—State v. Hannibal, 51 N.C. 57.
58 C.J. p 756 note 22.

18. Ga.—Stringfield v. State, 25 Ga. 474.
58 C.J. p 756 note 23.

Statutes construed

Ala.—Shuttleworth v. State, 35 Ala. 415
Ky.—Barnett v. Powell, Litt.Sel.Cas. 409.
11 C.J. p 955 note 32 [d]—12 C.J. p 154 note 74 [a], [b].

19. Ala.—State v. McDonald, 4 Port. 449.
58 C.J. p 756 note 25.

20. N.C.—State v. Brown, 60 N.C. 448.
58 C.J. p 756 note 26

21. Mo.—St. Louis v. Hempstead, 4 Mo. 242.

22. Ga.—Ponder v. Cox, 26 Ga. 485.
58 C.J. p 756 note 15.

23. Ky.—Commonwealth v. Young, 7 B.Mon. 1.
58 C.J. p 756 note 16.

24. U.S.—Butler v. Hopper, Pa., 4 F. Cas.No.2,241, 1 Wash.C.C. 499.

Construction of constitutional provision

(1) The constitutional provision that the migration or importation of such persons as any of the states shall think proper to admit shall not be prohibited by the congress prior to 1808 had exclusive reference to persons of the African race and to the different conditions of such persons with respect to freedom and slavery.—People v. Compagnie Générale Transatlantique, N.Y., 2 S.Ct. 87, 89, 107 U.S. 59, 27 L.Ed. 383.

(2) Within the meaning of such provision, when the free black man came to this country he migrated.—

§ 7. Status and Civil Rights and Liabilities

a. In general
b. Rights of property of slaves
c. Inheritance from or through slaves
d. Contracts by or with slaves
e. Torts by slaves
f. Actions by or against slaves

a. In General

Generally, a slave had no civil, social, or political rights or capacity, except those conferred on him by statute.

Subject to certain qualifications or limitations, in accordance with the general rule stated supra § 4 a, a slave in all relations and in all matters was regarded by the law as property;[25] he had no civil, social, or political rights or capacity whatever, except such as were bestowed on him by statute,[26] and every attempt to extend to a slave positive rights was held to be an attempt to reconcile inherent contradictions, for, in the very nature of things, he was held subject to despotism.[27]

b. Rights of Property of Slaves

As a general rule, a slave could not acquire or hold title to property or any interest therein.

While the right of a slave to take property under the provisions of a particular statute was recognized,[28] with respect to property rights the general rule was that the possession of the slave was the possession of the master, and any property which the former acquired belonged to the latter,[29] and a slave could acquire no rights under a deed which either a court of law or of equity could enforce.[30] A devise or bequest to a slave was very generally held to be void,[31] and a bequest or devise in trust for a slave was not enforced for his benefit, but the bequest lapsed and fell into the general residuum of the estate for distribution,[32] a slave could not inherit,[33] and his owner could not derive title to any property bequeathed or devised to a slave.[34] In some cases a legacy given to a slave was held not void, but it could not be recovered from the executor by the slave or his master, and it escheated to the state.[35]

The view was taken that a conveyance to a white person and to a slave, on the payment of the purchase price by the slave, transferred legal title to the white person which he held in trust for the slave who would be entitled to enforce his rights as cestui que trust on acquiring his freedom.[36]

c. Inheritance from or through Slaves

Generally, there was no right of inheritance from or through slaves.

While the view was taken that property which a slave, whose marriage was validated by statute, was authorized to take by a particular statute might pass by inheritance to his children,[37] generally, persons in slavery were incapable of contracting marriage, as shown in Marriage § 14, and the offspring of such persons had no inheritable blood,[38] in the

People v. Compagnie Générale Transatlantique, supra.

(3) When a slave came he was imported.—People v. Compagnie Générale Transatlantique, supra.

25. Fla.—Forsyth v. Perry, 5 Fla. 337.
La.—Marshall v. Watrigant, 13 La. Ann. 619

26. Ga.—Bryan v. Walton, 14 Ga. 185
Md.—State v. Van Lear, 5 Md. 91.

27. S.C.—Ex parte Boylston, 33 S.C. L. 41.

28. N.Y.—Jackson v. Lervey, 5 Cow. 397.
58 C.J. p. 757 note 37.

29. Ala.—Devaughn v. Heath, 37 Ala. 595
58 C.J. p. 757 note 33.

30. Md.—State v. Van Lear, 5 Md. 91.

31. Ky.—Jackson v. Collins, 16 B. Mon. 214.
58 C.J. p. 757 note 35
Manumission or emancipation by will see infra § 10 a.

32. Ky.—Taylor v. Embry, 16 B. Mon. 340
58 C.J. p. 757 note 36.

In Alabama

(1) The view was expressed, in a case which was decided after the abolition of slavery, that a testamentary gift in trust for the benefit of slaves of the testator was not void, where there was no attempt by the testator to emancipate such slaves.—Marsh's Adm'r v. Richardson's Adm'r, 49 Ala. 430.

(2) In earlier cases, however, it was held or recognized that a testamentary gift in trust for the benefit of slaves of the testator, whom he, by his will, attempted to emancipate, was invalid.—Pool v. Harrison, 18 Ala. 514.—58 C.J. p. 757 note 36.

33. Ga.—Woods v. Pearce, 68 Ga. 160
58 C.J. p. 757 note 38.

34. Ky.—Graves v. Allan, 13 B. Mon. 190.
58 C.J. p. 757 note 39.

35. S.C.—Fable v. Brown, 11 S.C. Eq. 378.

36. Miss.—Leiper v. Hoffman, 26 Miss. 615.

37. N.Y.—Jackson v. Lervey, 5 Cow. 397.

38. Ala.—Cantelyou v. Doe ex dem. Hood, 56 Ala. 519.
Okl.—In re McDade, 218 P. 532, 95 Okl. 120
58 C.J. p. 757 note 44.

Status of offspring

(1) The view has been expressed that the children of a slave marriage or cohabitation were not in law bastards, but were generally regarded merely as not having the right of inheritance, their parents not being husband and wife by contract under law, and slaves not being legally competent to contract marriages.—Christopher v. Mungen, 55 So. 273, 61 Fla. 513.—7 C.J. p. 939 note 16 [c].

(2) In Tennessee, however, it has been stated that persons born of parents while in slavery were regarded as bastards.—Cole v. Taylor, 177 S.W. 61, 132 Tenn. 92.—Phœnix Ins. Co. v. Jordan, 184 S.W.2d 721, 28 Tenn. App. 11.

(3) In some earlier cases in Tennessee, the view was taken that the children of a slave marriage entered into with the consent of the own-

absence of a legitimatizing statute passed subsequent to emancipation, or unless the parties to such marriage lived and cohabited as man and wife at the time of or after emancipation [39] The children of a slave, born during slavery, were not such heirs as would prevent the escheat of his property in the event of his death intestate after he had obtained his freedom,[40] but after their emancipation inheritance could be had through slaves,[41] and the issue of a slave marriage, although the parents died before the emancipation, were lawful heirs of their father.[42]

d. Contracts by or with Slaves

A slave could not contract without the consent of his master.

A slave could not contract, and an attempted contract neither imposed obligations nor conferred rights on either party,[43] unless made with the consent of his master,[44] and a contract made by a slave could not be enforced on his becoming a freedman.[45] However, where a slave was permitted by his owner to exercise his own discretion in the employment of his time, acting really as a freeman, it was held that such owner could not recover from a third person the proceeds of property which the slave had acquired, and which had come into the hands of such third person as the agent of a slave.[46] A master could not compel performance of a contract made by a slave with a third person.[47]

e. Torts by Slaves

In the absence of a statute providing otherwise, a master was not liable for injuries resulting from acts of his slave, unless the slave was acting in the course of the employment by the master or under his authority or direction.

In the absence of a statute providing otherwise, the owner of a slave was not answerable for a willful and unauthorized trespass committed by his slave,[48] or for injuries caused by the negligent conduct of the slave while not acting in his employment or under his authority,[49] and the converse of both rules was also true.[50] If a slave committed a wrong for his master's benefit, but not at his command or request, and the master afterward ratified it, the master was liable,[51] but in some states the master might exonerate himself by surrendering the slave to the injured person.[52]

The view was taken that, while the hirer of a slave was not liable for the act of the slave which was willful, and not negligent or unskillful,[53] the hirer might be liable for injuries resulting from the negligence or unskillfulness of the slave while he was engaged in the functions or duties intrusted to him by the hirer.[54]

f. Actions by or against Slaves

A slave could not be a party in any civil action except an action to establish his freedom.

A slave could not be a party in any civil action either as plaintiff or defendant, except when he had to claim or prove his freedom.[55]

§ 8. Crimes and Offenses by or against Slaves

a. Crimes and offenses of slaves
b. Offenses against slaves

a. Crimes and Offenses of Slaves

Slaves were regarded as persons by the criminal law and were legally punishable for their crimes.

Slaves were treated as persons by the criminal law,[56] and were legally punishable for their crimes.[57] Slaves were thus punishable for assault

er were not illegitimate—Brown v. Cheatham, 17 S W. 1033, 91 Tenn 97—Andrews v. Page, 3 Heisk. 653.

39. Okl.—In re McDade, 218 P. 532, 95 Okl. 120.
58 C.J. p 757 note 45.

40. Ala.—Malinda v. Gardner, 24 Ala. 719.
58 C.J. p 757 note 46.

41. Ky.—Jackson v. Collins, 16 B Mon. 214.
58 C.J. p 758 note 47.

42. Ohio.—Morris v. Williams, 39 Ohio St. 554.

43. Ky.—Bigstaff v. Lumkins, 16 S. W. 449, 13 Ky.L. 248.
58 C J. p 758 note 49.

44. Md.—Hall v. Mullin, 5 Harr. & J. 190.
58 C.J. p 758 note 50.

45. U S.—Crease v. Parker, D C., 6 F Cas No 3,376, 1 Cranch C C 448, 6 F Cas No 3,377, 1 Cranch C C 506.
Ky.—Lucy v. Denham, 4 T B Mon 167.

46. N C.—Barker v. Swain, 57 N C. 220.

47. S.C.—Gregg v. Thompson, 9 S C. L. 331.

48. Ark.—McConnell v. Hardeman, 15 Ark 151
58 C J. p 758 note 54.

49. Ala.—Cawthorn v. Deas, 2 Port 276.
58 C.J. p 758 note 55.

50. Tenn.—Wilkins v. Gilmore, 2 Humphr 140.
58 C J. p 758 note 56.

51. Ky.—Caldwell v. Sacra, Litt.Sel Cas. 118, 12 Am.D. 285.

52. La.—Fitzgerald v. Ferguson, 11 La Ann. 396
1 C J. p 5 note 12—58 C.J. p 758 note 58.

53. La.—Gaillardet v. Demaries, 18 La. 490

54. La.—Gaillardet v. Demaries, supra—Fitzgerald v. Ferguson, 11 La. Ann 396.

55. Md.—State v. Van Lear, 5 Md 91.
58 C J. p 758 note 59.
Actions or proceedings to obtain freedom see infra § 9 b.
Judgment against slave was held null and void.—Wood v. Ward, C.C. Ohio, 30 F.Cas.No.17,966, 2 Flipp 336—58 C.J. p 758 note 59 [b].

56. Tex.—Nix v. State, 13 Tex. 575
58 C J. p 758 note 61.

57. Fla.—Luke v. State, 5 Fla. 185.
58 C.J. p 758 note 62.

and battery,[58] larceny,[59] mayhem,[60] rape,[61] and homicide.[62] However, the slave undoubtedly had the natural right of self-preservation or self-defense,[63] although certain facts which as between whites might excuse or mitigate the offense did not so operate in the case of slaves,[64] and it was no justification of a slave, indicted for a criminal offense, that it was committed by his master's command.[65] In some states criminal statutes were enacted specially applicable to slaves.[66] For an offense committed when a slave, a man could not be legally convicted and punished as a freeman.[67]

Concealing or carrying away slave charged with capital crime. By some statutes it was made an offense for the owner or person in charge of a slave who was charged with any capital crime to conceal or carry away such slave so that the slave could not be brought to punishment.[68]

Competency of jurors. A person whose only interest in slaves consisted of an undistributed share of an estate composed of slaves was not a slaveholder within the terms of a statute requiring a certain proportion of the jurors to be slaveholders on the trial of slaves for a capital offense.[69]

Punishment; indemnification of owner. The punishment of slaves was in general severer than the punishment of whites for like offenses.[70] When slaves committed crimes and were prosecuted in the name of the state, they were regarded as accountable beings, and not as things, and they might be punished as the law directed, irrespective of the wishes of the master,[71] since, when a slave committed a crime, the private rights of the master yielded to the superior rights of the state, and he could not legally obstruct his arrest, or assist his escape,[72] although, under some statutes, the master was entitled to compensation for the loss of the slave.[73] A slave convicted of manslaughter might be punished by burning in the hand and whipping,[74] and murder[75] or attempted murder[76] was punishable by death; a slave accessory before the fact to murder was liable to the death penalty.[77] A slave convicted of murder was put to death in the same manner as a white person.[78]

b. Offenses against Slaves

An offense against the life or limb of a slave was punishable as a criminal offense.

Although slaves were for most purposes regarded as property, their lives and safety were guarded and they were entitled to the protection of the criminal law, and an offense against their life or limb was punishable criminally.[79] Thus, assault and battery of a slave was a criminal offense,[80] and it was a criminal offense cruelly and inhumanly to cut, slash, beat, or ill-treat a slave,[81] to inflict other cruel or unusual punishment,[82] to neglect to provide proper food, clothes, or shelter,[83] or to kill him unjustifiably.[84] If the offense was dismemberment, the indictment was for mayhem, and if it was a killing, the indictment was for murder;[85] but a simple assault and battery on a slave was not an indictable offense, and such an assault, even with intent to murder him, was not an offense at common law,[86] although the owner of a slave who beat him cruelly,

58. Ark.—Bone v. State, 18 Ark. 109
58 C.J. p. 758 note 63.

59. Ky.—Munford v. Taylor, 2 Metc. 599
58 C.J. p. 758 note 64.

Taking master's goods
A slave might commit larceny by feloniously taking his master's goods.—Oxford v. State, 33 Ala. 416.

60. Ala.—State v. Abram, 10 Ala. 928
S.C.—State v. Nicholas, 33 S.C.L. 278

61. La.—State v. Bill, 8 Rob. 527.

62. Ala.—Isham v. State, 38 Ala. 213
58 C.J. p. 758 note 67.

63. Ala.—Dave v. State, 22 Ala. 23.

64. N.C.—State v. Jarrott, 23 N.C. 76.
58 C.J. p. 759 note 69.

65. Ark.—Sarah v. State, 18 Ark. 114.

66. Fla.—Frances v. State, 6 Fla. 306.
58 C.J. p. 759 note 71.

67. Ky.—Owens v. Commonwealth, 2 Duv. 349.

68. **"Charged with any capital offense,"** as contemplated by the statute, meant a charge made in legal form, that is, that legal proceedings had been instituted before the slave was concealed or carried away.—State v. Duncan, 9 Port., Ala., 260.

69. Ala.—Spence v. State, 17 Ala. 192.

70. Ala.—Isham v. State, 38 Ala. 213.
58 C.J. p. 759 note 73.

71. La.—McDowell v. Couch, 6 La. Ann. 365—State v. Dick, 4 La.Ann. 182.

72. Miss.—Doughty v. Owen, 24 Miss. 404.

73. La.—State v. Dick, 10 La.Ann. 461.

74. U.S.—U. S. v. Clark, D.C., 25 F. Cas.No.14,802, 2 Cranch C.C. 620
58 C.J. p. 759 note 77.

75. Ky.—Hamilton v. Auditor, 14 B. Mon. 230.

76. Ga.—Sarah v. State, 28 Ga. 576.
Ky.—Commonwealth v. Anthony, 2 Metc. 399.

77. Ga.—Thornton v. State, 25 Ga. 301.

78. Ark.—Charles v. State, 11 Ark. 389.

79. Tex.—Nix v. State, 13 Tex. 575.
58 C.J. p. 759 note 83.

80. U.S.—U. S. v. Butler, D.C., 25 F. Cas.No. 14,697, 1 Cranch C.C. 373.
N.C.—State v. Hale, 9 N.C. 582.

81. Mo.—State v. Peters, 28 Mo. 241
58 C.J. p. 759 note 85.

82. Ala.—Eskridge v. State, 25 Ala. 30—Turnipseed v. State, 6 Ala. 664.

83. Ala.—Cheek v. State, 38 Ala. 227.
S.C.—State v. Bowen, 34 S.C.L. 573.

84. Ga.—Camp v. State, 25 Ga. 689.
29 C.J. p. 1049 note 20, 58 C.J. p. 759 note 88.

85. Ala.—State v. Coleman, 5 Port. 32.

86. U.S.—U. S. v. Lloyd, D.C., 26 F. Cas.No.15,617, 4 Cranch C.C. 468.

and exposed him, so beaten, to public view, was guilty of a misdemeanor even at common law.[87] An indictment would lie against any person who removed or attempted to remove from the state any slave having a suit pending for freedom.[88]

§ 9. Right to, and Proceedings for, Freedom in General

a. In general
b. Actions or proceedings to obtain freedom

a. In General

Among the methods by which a slave could be rendered free were purchase, prescription, want of registration as required by statute, exportation from, or importation into, the state in violation of statute, or illegal sale of the slave.

In some states failure to register slaves under the statute had the effect of freeing them,[89] in others they could become free by purchase,[90] and in some freedom was allowed to be acquired by prescription[91] if the master knew of the slave's place of residence during the period of prescription.[92] A slave could not become partially free.[93]

Removal from state; invalid importation or sale. In some states statutes were enacted prohibiting the exportation or removal of slaves from the state, and under these, in the event of such removal, the slave became free, at least if the owner participated in the exportation,[94] while under other statutes slaves brought into the several states to reside or for sale in violation of, or noncompliance with, laws governing importation were free.[95] The statutes did not generally apply to slaves brought in by travelers or temporary sojourners,[96] but a traveler bringing slaves into a state was required to pursue his journey with no unnecessary delay.[97] In some jurisdictions the presence of a slave in a free state with the master's consent created per se the condition of freedom,[98] and under some,[99] but not all,[1] statutes, a slave became free by merely being transported through the state. The owner could in some instances bring the slave into the state on taking a statutory oath.[2] In some jurisdictions illegal sales of slaves entitled them to their freedom.[3]

b. Actions or Proceedings to Obtain Freedom

The method of enforcing freedom provided for in the statutes was required to be strictly followed.

The method of enforcing the right to freedom provided for in the statutes was required to be strictly followed.[4] In some states an action of assumpsit for services rendered might be maintained by a person claimed as a slave, for the purpose of trying the question of freedom,[5] or trespass in the nature of ravishment of ward,[6] or bill in equity.[7] The cases relating to jurisdiction and venue,[8] procedure,[9] right to sue and leave of court,[10] parties,[11] pleadings,[12] or trial, judgment, or review[13] are of little more than historical interest.

The general rule was that a slave on securing his freedom was not entitled to damages or to recover for his services while held as a slave[14] unless he showed that defendant knew, or had good reason to believe, that he was a free man.[15]

87. U.S.—U. S. v. Cross, D C., 25 F Cas.No.14,894, 4 Cranch C C. 603—U. S. v. Lloyd, D C., 26 F Cas.No 15,618, 4 Cranch C C. 470.

88. Ky—Commonwealth v. Stout, 7 B.Mon. 247

89. U.S—Respublica v. Betsey, Pa., 1 Dall 469, 1 L Ed. 227.
58 C.J. p 760 note 93.

90. U S—Letty v. Lowe, D C., 15 F Cas No 8,285, 2 Cranch C.C. 634.

91. La.—Eulalie v. Long, 11 La Ann. 463.
58 C.J. p 760 note 95.

92. Md—Wilson v. Barnet, 8 Gill & J. 159.

93. La—Francois v. Lobrano, 10 Rob. 450.

94. N.Y.—Hart v. Cleis, 8 Johns. 41.
58 C J. p 760 note 98.

95. Va.—Betty v. Horton, 5 Leigh 615, 32 Va. 615.
58 C.J. p 760 note 99.

96. Pa—Butler v. Delaplaine, 7 Serg. & R 378.
58 C.J. p 760 note 2.

97. Cal.—Ex parte Archy, 9 Cal. 147

98. Mo—Milly v. Smith, 2 Mo. 171
58 C J. p 760 note 4.

99. N.Y—Lemmon v. People, 26 Barb. 270, affirmed 20 N Y. 562.

1. Ill—Willard v. People, 5 Ill. 461.

2. U.S—Butler v Duvall, D.C, 4 F Cas No.2,239, 4 Cranch C C. 167.
58 C J. p 760 note 7.

3. N Y—Skinner v. Fleet, 14 Johns 263—Caesar v Peabody, 11 Johns 68.

4. Ga—Cone v Force, 31 Ga. 328.
58 C.J p 760 note 9
Habeas corpus to establish freedom see Habeas Corpus § 50.

5. Ill.—Jarrot v. Jarrot, 7 Ill 1.

6. S C—Huger v. Barnwell, 39 S C L 273—Brister v. Wesner, 26 S C L 135.

7. Tenn—Stephenson v Harrison, 3 Head 728—Doran v. Brazelton, 2 Swan 149.

8. Ark—Aramynta v. Woodruff, 7 Ark. 422.
58 C.J. p 761 note 14.

9. Ga—Knight v. Hardeman, 17 Ga. 253.
58 C.J. p 761 note 15.

10. Ky—Henry v. Nunn, 11 B Mon. 239
58 C.J. p 761 note 16.
Suit by guardian
In some jurisdictions the slave was required to sue by a guardian.—Susan v. Wells, 5 S C.L. 11

11. Tex—Moore v. Minerva, 17 Tex. 20
58 C.J p 761 note 17.

12. Tex—Moore v. Minerva, supra.
58 C J p 761 note 18

13. N.C—Scott v. Williams, 12 N.C. 376.
58 C J p 761 note 19.

14. Ky.—Hundley v. Perry, 7 Dana 359
58 C.J. p 761 note 20.

15. Ky—Hundley v Perry, supra.
58 C.J. p 761 note 21.

§ 10. Manumission, Emancipation, and Abolition of Slavery

a. Manumission
b. Emancipation; abolition of slavery

a. Manumission

(1) In general
(2) Status and rights of manumitted slaves

(1) In General

Under some statutes manumission of a slave by his owner was permitted but under other statutes it was forbidden or strictly limited.

"Manumission" has been defined as the act of liberating a slave from bondage and giving him freedom.[16] The right of owners to manumit their slaves was dependent on statute, and under some statutes manumission was permitted[17] if the legislature or court assented,[18] while under other statutes it was forbidden or strictly limited.[19] The statutes were generally held to prohibit only the manumission of slaves within the state and to permit the sending of slaves out of the state to be manumitted,[20] and the owner of slaves might voluntarily take them to another state and emancipate and leave them there.[21]

In accordance with statutory provisions, a bequest to slaves or a direction or trust in a will for their emancipation was void,[22] and it was held that a slave could not be the cestui que trust of his own freedom, under a bequest of freedom, where a direct emancipation of the slave by will would be invalid;[23] but under other statutes the highly prized devise or bequest of freedom was permissible,[24] and manumission could be by deed or will,[25] although, if by deed, the deed was usually required to be acknowledged, proved in court, or recorded.[26] Some laws even permitted the slave to contract with his master for his freedom.[27] An owner of a slave, by voluntarily putting him as a substitute into the federal army in 1864, thereby emancipated him by his own act, and the slave thereby became free.[28]

Even where manumission was allowed the law sometimes permitted manumission only of such slaves as could work and gain a livelihood and often required security for their support, although the requirement of security was only a police regulation not affecting their freedom.[29] In order to accomplish a manumission of a slave the owner thereof was required to conform strictly to the formalities prescribed, otherwise the act was void,[30] and in some states slaves could not be manumitted to the prejudice of existing creditors.[31] The usual judicial proceeding for manumission was on petition by the master to the county court or to a magistrate.[32] In some states the slave could elect to accept or reject the act of manumission,[33] but in other states it was held that no consent by the slave was necessary to the gift of freedom,[34] and no right of election was recognized.[35]

(2) Status and Rights of Manumitted Slaves

While the manumission of a slave by the owner did not confer citizenship, a manumitted slave generally acquired the right to take and to hold property.

The status of manumitted slaves and slaves having the inchoate right of freedom was a condition sui generis regulated by statutes in the several

16. Black L D.
Term considered or applied
U S —Fenwick v Chapman, D C., 9 Pet, 461, 9 L Ed. 193.
38 C.J p 900 note 6 [a].

17. Md —Tongue v. Crissy, 7 Md 453.
58 C J. p 761 note 23.

18. Tenn —Abram v. Johnson, 1 Head 120
58 C J p 762 note 27.

19. Ga —Lamb v. Girtman, 26 Ga. 625—Smithwick v. Evans, 24 Ga. 461
Miss —Mitchell v. Wells, 37 Miss 235.
58 C J. p 761 note 24
Statute held not retroactive
Ala.—Jones v Jones, 37 Ala 646.

20. Miss —Leiper v. Hoffman, 26 Miss. 615.
58 C.J. p 762 note 32.

21. Miss.—Berry v. Alsop, 45 Miss. 1.
58 C J. p 762 note 33.

22. N C —Dunlap v. Ingram, 57 N.C 178.
58 C J. p 761 note 25.
After termination of life estate
The bequest of freedom to a slave after the determination of a life estate in the slave was invalid.—Alston v Coleman, 7 Ala. 795

23. Ala —Trotter v. Blocker, 6 Port. 269.

24. Ky —Graves v. Allan, 13 B Mon 190
58 C.J. p 761 note 23

25. N.C.—Cox v. Williams, 39 N.C. 15

26. Ky.—Smith v. Adam, 18 B Mon. 685
58 C J p 762 note 29.

27. La —Virginia v. Himel, 10 La. Ann 185—Trahan v. Trahan, 8 La. Ann. 455.

28. Ky —Payne v. Richardson, 4 Bush 207.

29. Md.—Anderson v. Baily, 8 Gill & J 32.
58 C J p 762 note 34.

30. La —State v Baillio, 15 La Ann. 555
58 C J p 762 note 35.

31. Ky —Chambers v. Davis, 15 B. Mon. 522
58 C.J. p 762 note 36.

32. N C.—Jarman v. Humphrey, 51 N.C. 28.
58 C.J. p 762 note 40.

33. N.C.—Redding v. Long, 57 N.C 216.
58 C.J. p 762 note 38.

34. Md —Tongue v. Crissy, 7 Md. 453.

35. Va —Bailey v. Poindexter, 14 Gratt. 132, 55 Va 132.
58 C.J. p 762 note 39.

states.[36] Manumission did not confer citizenship or any of its incidents,[37] since the emancipation of a slave was regarded merely as a donation to him of his value.[38] A slave with inchoate right to freedom had the right to own and possess property,[39] and a slave who was emancipated might hold lands.[40] A devise to emancipated slaves by their former master,[41] or a devise in trust for them,[42] was valid, as was also a bequest or devise to a slave to take effect when emancipated,[43] and a bequest of property for the benefit of slaves directed to be removed to a foreign country for the purpose of their manumission was held good as a bequest to charitable uses.[44]

A slave who had acquired the right of freedom at a future time was from that time capable of receiving property by testament or donation, and it was held that the property must be preserved for him and administered by a trustee in order to be delivered in kind when his emancipation should take place.[45] A slave who was emancipated by will and was hired out by the executor was held entitled to the amount of his hire from the date of the death of the testator.[46]

Even after emancipation, the master was bound not only to protect, but also to maintain, an emancipated slave when such slave was no longer able to maintain himself.[47]

b. Emancipation; Abolition of Slavery

In the United States slavery has been abolished by various state and federal laws.

In the United States slavery was abolished and slaves emancipated both by state[48] and federal[49] laws. In some states the emancipation proclamation of 1863 was regarded simply as an advertisement of what would be a sure consequence of conquest; it did not, either in law or fact, emancipate the slaves at that time,[50] and was regarded as a war measure which had no operative effect until carried into execution by force of arms.[51] According to this view, it did not take effect to destroy property in slaves except so far as it was carried into effect, in the various portions of the territory described in it, by the actual suppression of hostility.[52] The act emancipating slaves in the hostile states was constitutional, as the United States and the confederate states were at that time belligerent powers, and by the law of nations a belligerent party is justified in resorting to any measure to strengthen itself or weaken its adversary.[53]

The Thirteenth Amendment to the United States Constitution, abolishing slavery, equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude;[54] and a custom which prevailed among the uncivilized tribes of Indians in Alaska, whereby slaves were bought, sold, and held in servitude against their will, and subjected to ill-treatment at the pleasure of the owner, was held contrary to the Thirteenth Amendment and to the civil rights bill of 1866.[55] The Thirteenth Amendment did not remove all the former disabilities of the slave,[56] and it was mainly for that reason that the Fourteenth Amendment was adopted.[57] When the state as parens patriae in a proper case through its constituted officers or agencies takes under its control an infant, the law authorizing such child to be bound to service under proper restrictions is not a violation of those provisions of the constitutions of the state and of the United States which prohibit slavery and involuntary servitude, except as a punishment for crime after conviction thereof.[58]

36. Md.—Rozier v. Holliday, 8 Md. 381.
58 C.J. p 762 note 41.

37. Ga.—Bryan v. Walton, 14 Ga 185.

38. La.—Prudence v. Bermodi, 1 La. 234.

39. Ala.—Malinda v. Gardner, 24 Ala. 719
Tenn.—Jameson v. McCoy, 5 Heisk 108.

40. Ala.—Tannis v. Doe, 21 Ala. 449.
58 C.J. p 762 note 45.

41. U.S.—Mathews v. Springer, C.C. Miss., 16 F. Cas. No. 9,277, 2 Abb. 283.

42. Md.—Brown's Lessee v. Brown, 12 Md. 87.

43. N.C.—Robinson v. McIver, 63 N. C. 645
58 C.J. p 762 note 47.

44. N.C.—Cameron v. Raleigh, 36 N. C. 436.

45. La.—Succession of Chappel, 17 La. Ann. 174.

46. N.C.—Lane v. Bennett, 56 N.C. 390

47. La.—Baker v. Tabor, 7 La. Ann. 556.

48. Conn.—Jackson v. Bulloch, 12 Conn. 38.
58 C.J. p 763 note 51.

49. Mo.—Erwin v. Nolan, 217 S.W. 837, 280 Mo. 401.
58 C.J. p 763 note 52

50. S.C.—Pickett v. Wilkins, 34 S.C. Eq. 366.
58 C.J. p 763 note 53.

51. Ala.—McElvain v. Mudd, 44 Ala. 48, 4 Am. R. 106
58 C.J. p 763 note 54.

52. Ark.—Graves v. Pinchback, 1 S. W. 682, 47 Ark. 470.
58 C.J. p 763 note 55

53. N.C.—Buie v. Parker, 63 N.C. 131

54. U.S.—Butchers Benev. Assoc. v. Crescent City Livestock Landing, etc., Co., La., 16 Wall. 36, 21 L. Ed. 394
Peonage generally see Peonage § 1 et seq.

55. U.S.—In re Sah Quah, D.C. Alaska, 31 F. 327.

56. Miss.—Donnell v. State, 48 Miss. 661, 12 Am. R. 375.
11 C.J. p 802 note 20.

57. Cal.—Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. R. 136.

58. Ga.—Kennedy v. Meara, 56 S.E. 243, 127 Ga. 68, 9 Ann. Cas. 396.

In becoming freedmen, slaves became "persons," and were punishable under the criminal law for all offenses committed by them in such personal status;[59] and a freedman of legal age might commence proceedings to enforce in the state courts any existing legal or equitable right, created in his favor while he was a slave, that did not then contravene the policy or violate the laws of the state.[60] After the abolition of slavery, all obligations given as the evidence of contracts relating thereto became null and void,[61] and the emancipation act necessarily annulled the laws under which contracts relating to the ownership of slaves were previously enforced,[62] but the liability of a person to pay the value of slaves wrongfully appropriated was not affected by the fact of the subsequent abolition of slavery.[63]

Statute prohibiting persuasion or inducement to slavery. Under express provisions of a federal statute, it is a criminal offense to entice, persuade, or induce another person to go to a place with intent that such other person be held as a slave.[64]

§ 11. Legitimizing Issue

Statutes have legitimized the issue of slave marriages and have rendered children of such marriages capable of inheriting. The status of legitimacy of a child of a slave marriage fixed by the laws of one jurisdiction follows the person and should be sustained in every state to which he may go.

The amendment to the United States Constitution which abolished slavery did not have the effect of legitimizing the issue of slave marriages,[65] but statutes were enacted legitimizing the recognized offspring of negroes who had cohabited as man and wife[66] The purpose of such statutes is to validate customary slave marriages and to render children of such marriages capable of inheriting,[67] and it has been held that they should be liberally construed in order to carry out the beneficent public policy of the state,[68] although one claiming the benefit of their provisions must bring himself within the terms thereof.[69] Children of slaves who, after their emancipation, failed to recognize or consummate the previous customary marriage, as provided by such statutes, were held to occupy the legal position of bastards.[70]

A statute providing that the presumption of legitimacy can be disputed only by the husband or wife or the descendants of one or both of them has no application to the issue of slave marriages.[71] A statute which provides that the issue of all marriages null in law are legitimate has been held not to apply to the issue of slave marriages,[72] although there is authority to the contrary.[73] A statute with respect to the legitimizing of the offspring of marriages between colored people does not affect the right of an illegitimate child to inherit from another illegitimate child of the same mother.[74] Although the children of a slave marriage are to be regarded as illegitimate, they may, under the operation of general statutes, be capable of inheriting and transmitting an inheritance on the part of their mother in like manner as if they had been legitimate.[75]

59. Ala.—Ferdinand v. State, 39 Ala. 706.
58 C.J. p 763 note 60

60. Ga.—Green v Anderson, 38 Ga 655.

61. La—Rodriquez v Bienvenu, 22 La Ann. 300, 2 Am R 728.

62. La—Wainwright v. Bridges, 19 La Ann 234
58 C J p 764 note 63

63. Miss—Calhoun v. Burnett, 40 Miss 599.

64. U S—U S v. Ingalls, D C Cal, 73 F Supp 76

Evidence held sufficient for conviction
U S.—U S v. Ingalls, supra.

65. Okl—In re McDade, 218 P. 532, 95 Okl. 120

66. Ky—Rankin v. Dunn, 49 S W.2d 1018, 243 Ky. 784
58 C.J. p 764 note 68
Statutes legalizing cohabitation between slaves before emancipation see Marriage § 40.

Validity of statute

It was competent for legislature to enact statute providing that issue of slave marriages and their descendants may inherit or transmit property the same as white persons, in view of fact that statute deals wholly with property and its devolution in the state and is not in derogation of any contract rights, since statute was not intended to disturb vested property rights.—Mostilla v. Ash, 176 So 356, 234 Ala. 626.

Declaration of intention to live as man and wife

Ky—Thomas v. McBeth's Adm'r, 82 S.W 2d 790, 259 Ky. 484—Rankin v Dunn, 49 S W 2d 1018, 243 Ky. 784

67. Fla—Christopher v. Mungen, 63 So 923, 66 Fla. 467.
58 C.J. p 765 note 69.

68. Tenn—Carver v Maxwell, 71 S W 752, 110 Tenn. 75.
58 C J. p 765 note 70.

69. Ark—Wilson v. Biles, 287 S W 373, 171 Ark. 912
58 C J. p 765 note 71

Right of inheritance held established
Ala—Mostilla v. Ash, 176 So. 356, 234 Ala. 626.
Ky—Thomas v. McBeth's Adm'r, 82 S W 2d 790, 259 Ky 484—Rankin v. Dunn, 49 S.W 2d 1018, 243 Ky. 784.
La.—Anderson v Thomas, 141 So. 441, 174 La. 721.
58 C J. p 765 note 71 [e].

70. Ky—Allen v. Allen, 8 Bush 490.

71. Okl.—In re McDade, 218 P 352, 95 Okl. 120.

72. Okl.—In re McDade, supra.
Va—Lemons v. Harris, 80 S E 740, 115 Va. 809

73. Cal.—McMillan v. Greer, 259 P. 995, 85 Cal App. 558.
58 C.J. p 766 note 74.

74. Tenn.—McCline v Ridley, 183 S. W. 736, 134 Tenn. 164

75. Tenn.—Tigert v. Wells, 183 S.W. 737, 134 Tenn 144.
58 C.J. p 768 note 2.

Apart from statutes, in some jurisdictions, it has been held that slaves who had had the bona fide intent to assume, with the consent of their masters, the relationship of husband and wife and had carried out such intent by living together as such could by their simple choice evidenced by living together after emancipation obtain for themselves and confer on their children all of the benefits of a marriage lawful in its origin.[76] However, where marriages between free white persons and free people of color are prohibited by statute, such persons cannot, by an attempted marriage and acknowledgment, legitimatize children previously born to them.[77] It has been held that, on the emancipation of the children of a slave as a result of the war of secession, their heritable blood was restored, and they were consequently entitled to inherit the estate of their father, who died a freedman,[78] but the view has been taken that the offspring of slave marriages which terminated before the emancipation of the parties thereto could not inherit.[79]

What law governs. The status of legitimacy of a child of a slave marriage fixed by the laws of one jurisdiction follows the person, and should be sustained in every state to which he may go,[80] although the rule must yield to the policy of the state of adoption as far as inheritance is concerned.[81] A statute legalizing the cohabitation of former slaves and legitimizing their issue has no extraterritorial effect,[82] and operates only on those living within the state.[83] The right of a child of a former slave to inherit is to be determined by the law in force at the time of the death of the ancestor.[84]

In order that the law of a foreign state be recognized as to the legitimacy of the issue of a slave marriage, it must be clear and convincing.[85] The fact that persons to whom the statute does not apply because of their nonresidence at the time as of which it speaks subsequently become residents of the state does not render the statute applicable.[86] A statute providing that the offspring of marriages null in law shall be regarded as legitimate has, however, been held to render legitimate the child of slave parents, although such child was illegitimate in the state of its birth.[87]

Retroactive effect of statutes. Where a statute of the character under consideration applies only to those at the time cohabiting in the relationship of husband and wife, it is necessary that the cohabitation exist at the time of the taking effect of the statute,[88] although, if the persons are then cohabiting, the relationship is recognized from its commencement, and its issue legitimated.[89] However, under statutes validating slave marriages generally and legitimating their issue, it is not necessary that the relationship shall have continued up until the time of the enactment of the statute.[90]

Cohabitation as husband and wife. Under a statute legitimizing the children of slave parents living together in good faith as man and wife at the time of the birth of such children, there must be the similitude in form of a ceremonial of common-law marriage,[91] and the offspring of mere casual cohabitation are not legitimate,[92] although if a slave lived at different times in good faith with different women and while so living children were born of them, all would be legitimized.[93]

Right to dissolve or abandon marriage. Where the relationship between slaves living together as husband and wife is rendered legally effective and binding under statutes of this character, neither party, nor both acting in concert, can by abandonment or other act dissolve the bond of the preexist-

76. Okl.—In re Pratt's Estate, 16 P. 2d 104, 160 Okl. 256, 83 A.L.R. 1319.
58 C.J. p 766 note 76.

77. La.—Delpit v. Canal Bank, etc., Co., 78 So. 565, 143 La. 298.

78. Ala.—Stikes v. Swanson, 44 Ala. 633.
38 C.J. p 1290 note 25.

79. Fla.—Williams v. Kimball, 16 So. 783, 35 Fla. 49, 48 Am.S.R. 238, 26 L.R.A. 746.

80. Tenn.—Cole v. Taylor, 177 S.W. 61, 132 Tenn. 92.

81. Tenn.—Cole v. Taylor, supra

82. Ark.—Meekins v. Meekins, 275 S.W. 337, 169 Ark. 265.

83. Ark.—Meekins v. Meekins, supra

84. Ga.—White v. Ross, 40 Ga. 339.
58 C.J. p 767 note 91.

85. Tenn.—Napier v. Church, 177 S.W. 56, 132 Tenn. 111.

86. Tenn.—Rhea v. Redus, 7 Tenn. App. 478
58 C.J. p 766 note 86.

87. Cal.—McMillan v. Greer, 259 P. 995, 85 Cal.App. 558.
58 C.J. p 766 note 87.

88. Ala.—Cantelou v. Doe ex dem. Hood, 56 Ala. 519.
Miss.—Malone v. Pope, 196 So. 319, 189 Miss. 46.
57 C.J. p 766 note 88.

Burden of proof to show cohabitation when statute or constitutional provision became effective was on person claiming under such statute or constitutional provision.—Malone v. Pope, supra.

89. N.C.—Croom v. Whitehead, 93 S.E. 854, 174 N.C. 305.

90. Va.—Francis v. Tazewell, 91 S.E. 202, 120 Va. 319.
58 C.J. p 766 note 90

91. Mo.—Wiley v. Harlow, 202 S.W. 533, 274 Mo. 170
58 C.J. p 767 note 92.

Concubinage

Under some statutes, children are not to be regarded as the legitimate children of their father, if the father and mother had merely conhabited in a state of concubinage.—Watson v. Ellerbe, 57 S.E. 855, 77 S.C. 232—38 C.J. p 1290 note 26, 58 C.J. p 767 note 92 [d]

92. N.C.—Spaugh v. Hartman, 64 S.E. 198, 150 N.C. 454.
58 C.J. p 767 note 93.

93. Mo.—Wiley v. Harlow, 202 S.W. 533, 274 Mo. 170.

ng marriage,[94] and neither party, while such marriage remains undissolved, can contract a valid marriage with another.[95]

Collateral inheritance. A statute providing that slaves who within the state had lived together as man and wife should be regarded as lawfully married and that the children of such slave marriages should be legitimately entitled to an inheritance in any property of the parents has been construed as not extending any right of inheritance beyond the lineal descendants of parents,[96] and under such construction a woman born in slavery under a slave marriage who with her brother was legitimized by the laws of another state could not inherit from her deceased brother as to property within the state.[97] Some statutes have, however, extended the right to inherit from collateral kindred to legitimate children of parties to a slave marriage which was validated by statute.[98]

SLAY. To kill.[1]

S. L. C. or S. L. & C. As an abbreviation for "shipper's load and count" see 1 C.J.S. p 276 note 5.

SLEEP. A state of repose or quiescence, occurring periodically in man and animals, characterized by complete or partial unconsciousness, relaxed condition of body, and general diminution of vital functions; also, a dormant or quiet condition; any condition of inactivity, torpor, or rest.[2]

SLEIGH. A vehicle on runners for transporting persons or goods on snow and ice.[3]

SLEUTH. The word "sleuth" has a well-defined meaning,[4] and it is defined to mean the track of an animal as it may be known by the scent;[5] the track of man or beast as followed[6] or as known[7] by the scent.

It is used colloquially to mean a detective.[8]

SLICE. As a noun, and in its ordinary use, the word "slice" signifies an indeterminate part or portion, with a variable significance meaning more or less.[9] It is never used as an exact measure.[10]

Although lexicographers define the verb as meaning to cut into parts,[11] it is said that the other

94. Va.—Francis v. Tazewell, 91 S. E. 202, 120 Va. 319

95. Ala.—Carter v. Gaines, 87 So. 109, 204 Ala. 640.
58 C.J. p 767 note 96.

96. Tenn.—Cole v. Taylor, 177 S.W. 61, 132 Tenn. 92
58 C.J. p 767 note 97.

97. Tenn.—Cole v. Taylor, supra.

98. Tenn.—Wallace v. Berry, 6 Tenn. App. 248.

Contest of will of collateral kindred

(1) The legitimate children of the parties to a slave marriage which was validated by statute had the right to contest the will of an uncle.—Wallace v. Berry, supra.

(2) An illegitimate child of one of the parties to such marriage did not, however, have such right.—Wallace v. Berry, supra.

Comprehensive effect of statute

The statute extends the right of collateral inheritance to the kindred of any deceased negro, just as under other laws it is given to the kindred of white persons, provided such kindred are of legitimate descent; the statute is so comprehensive that it includes all negroes of legitimate birth who are collateral kindred of a deceased negro.—Wallace v. Berry, supra.

1. Mich.—People v. McArron, 79 N.W. 944, 945, 121 Mich. 1.
58 C.J. p 768 note 2.

2. New Standard D.

Chief phenomena of ordinary healthy sleep described

Firstly, there is diminution and then loss of conscious recognition of ordinary stimuli, such as would ordinarily attract our attention, whether these stimuli be derived from the outer world or from within the sleeper's own organism. There is also, as consciousness is becoming blunted, a characteristic and indescribable sense of well-being. Voluntary movements become languid and ultimately cease and the muscles of the limbs relax. Meanwhile there develops double ptosis or drooping of the eyelids, the pupils contract, the respiratory movements become slower and deeper, the pulse is slowed, the cutaneous vessels dilate to a slight extent and the general temperature of the body falls, whilst many processes of metabolism, such as those of digestion and of certain secretions are retarded.

Conn.—Bushnell v. Bushnell, 131 A. 432, 434, 435, 103 Conn. 583.
Iowa.—Kaplan v. Kaplan, 239 N.W. 682, 685, 213 Iowa 646.

Phrases

(1) "Sleeping cars" see the title index to Carriers.

(2) "Sleeping on rights" see Equity § 100.

(3) "Sleeping partners" see the title index to Partnership, sub verbo "Dormant or secret partners."

3. N.Y.—Vadney v. United Tract Co., 183 N.Y.S. 926, 929, 193 App. Div. 329
58 C.J. p 768 note 10.

Phrases as to which more recent adjudications have not been found see 58 C.J. p 768 notes 11, 12.

4. N.Y.—Munro v. Beadle, 2 N.Y.S. 314.
58 C.J. p 768 note 16.

Similarly stated

The word "sleuth," in ordinary language, has a defined meaning.—Munro v. Smith, 2 N.Y.S. 313.

5. N.Y.—Munro v. Beadle, 8 N.Y.S. 414, 415, 55 Hun 312.

6. N.Y.—Munro v. Beadle, 2 N.Y.S. 314.

7. N.Y.—Munro v. Smith, 2 N.Y.S. 313.

8. Webster New Int.D.
"Detective" defined see Detectives § 1.

9. Mass.—Read v. McKeague, 147 N.E. 585, 252 Mass. 162.

10. Mass.—Read v. McKeague, supra.
58 C.J. p 769 note 23.

11. N.Y.—Selchow v. Baker, 11 Daly 353, 357.

definitions, namely, "to cut into pieces broad and flat," and "to cut off a thin, broad piece," accord better with popular usage.[12]

In golf, used both as noun and verb, the word refers to, or describes, a shot that goes to the right, and is contrasted with "hook."[13]

"Sliced" is the past participle of the verb "slice."[14]

SLICK. Slippery,[15] smooth, with a slippery or greasy smoothness;[16] sleeked over with oil, or the like.[17]

In the vernacular of the range, a "slick" is an unbranded horse.[18]

SLIDING SCALE. As a term used in connection with the regulation of rates see Public Utilities § 25.

SLIGHT, SLIGHTER and SLIGHTEST. The word "slight" is of rather indeterminate meaning.[19] It usually implies unimportance or insignificance,[20] and is defined as meaning unimportant;[21] inconsiderable.[22]

"Slighter," in the comparative degree, has been held to mean less.[23]

"Slightest," in the superlative degree, has been held to mean very slight.[24]

SLIMES. As a mining term see Mines and Minerals § 3 h.

SLINGSHOT. A boy's toy or catapult.[25] It has been distinguished from "slungshot" see the C.J.S. title Weapons § 1.

SLIP. The word "slip," as a noun, in one sense means the act of slipping; a sudden slide, as of the feet.[26]

The term is employed in connection with blast furnace operations to denote the fall of the material caked or incrusted in the stack of the furnace, occasioned by the combustion and settling of the molten mass below, producing an explosion by which gas, ore, limestone and other materials are blown out at the top.[27]

In coal mining, a "slip" is a break or cleavage in the continuity of the slate structure of the roof of a "room" in a coal mine, as stated in Mines and Minerals § 3 h.

An opening between two pieces of land or wharves or a small dock is sometimes referred to as a "slip" as stated in the C.J.S. title Wharves § 1, also 68 C J. p 205 notes 55, 56.

The term "slip" is also applied to that part of a police court which is divided off from the other parts of the court for the prisoner to stand in, and is frequently called the "dock."[28]

The word "slip" has various other meanings, and it may denote a bit of paper, usually an oblong strip;[29] and the term is also applied to a woman's undergarment.[30]

As a verb, "slip" is defined as meaning to cause to move smoothly and easily; cause to slide; put on or off easily, as something loose.[31]

12. N.Y.—Selchow v Baker, supra

13. Mo —Page v Unterreiner, App, 106 S.W 2d 528, 532.

14. Webster New Int.D.

Phrases employing "sliced" and as to which more recent adjudications have not been found see 58 C.J. p 769 notes 26–29.

15. Mo —McCall v B Nugent Bros Dry Goods Co, 236 S W. 324, 327

16. Mo.—Perringer v Lynn Food Co., App, 148 S W 2d 601, 610.
58 C J. p 769 note 32

17. Tex.—Adair v Houston Nat Bank, Civ.App., 203 S.W 2d 782, 785.

18. N.D —State v. Thompson, 277 N W. 1, 2, 68 N D 98.
"Slick ear" as applied to a horse, alleged to have been stolen, has been said to mean that the real ownership was unknown, see 28 C.J.S p 608 note 22.

19. U S —Moxley v. Hertz, Ill., 30 S.Ct 305, 308, 216 U.S. 344, 54 L.Ed. 510.

20. U S —Moxley v. Hertz, supra.
58 C.J. p 769 note 41.

Phrases

(1) "Slight diligence" defined as that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances see Negligence § 14.

(2) "Slight negligence" defined as the want of, or failure to exercise, great or extraordinary care and diligence see Negligence § 8 b.

(3) Other phrases as to which more recent adjudications have not been found see 58 C J p 769 note 42–p 770 note 49.

21. Wis —Janesville v. Carpenter, 46 N.W 128, 131, 77 Wis. 288, 20 Am S R. 123, 8 L R.A. 808.

22. Wis —Janesville v. Carpenter, supra.

23. Wis.—Boucher v. Wisconsin Cent. R. Co., 123 N W. 913, 917, 141 Wis. 160.

24. Ga —Bowman v. Bowman, 55 S. E 2d 298, 308, 205 Ga. 796—Deans v Deans, 156 S E 691, 699, 171 Ga 664

Phrases employing the word "slightest" and as to which more recent adjudications have not been found see 58 C J, p 770 notes 54–57.

25. Cal —People v. Mulherin, 35 P.2d 174, 175, 140 Cal.App. 212.

26. New Standard D.

27. Pa —Sullivan v. Jones, etc., Steel Co, 57 A. 1065, 1066, 208 Pa. 540, 66 L.R.A. 712.
58 C J p 770 note 60.

28. Black L.D.

29. New Standard D.
Slip or rider attached to insurance policies see Insurance §§ 260, 287, 300

30. U S —Sussberg & Feinberg v. Triangle Underwear Corporation, D C N.Y., 19 F Supp. 859.

31. New Standard D.

SLIPPERY. Having such smoothness of surface as to cause slipping or sliding; not affording firm footing or secure hold.[32]

When used as descriptive of a person, the word "slippery" has the well-understood meaning[33] that the person to whom it is applied cannot be depended on or trusted, that he is dishonest and is apt to play one false.[34]

SLIPSHOD. The word "slipshod" imports negligence,[35] and is defined as meaning exceedingly careless or slovenly; lacking in exactness or precision.[36]

SLIT. The noun "slit" is defined as meaning a long cut or incision; also, any long, very narrow opening, as a fissure, cleft, a narrow aperture or window, etc.[37] When used in relation to optics it means a narrow opening through which the light is admitted, as to the eye or prisms or a spectroscope.[38]

As a verb "slit" is defined as meaning to cut; to cut lengthwise; to cut into long pieces or strips; to cut or make a long fissure; to rend, to split.[39] It has been distinguished from "bite" see 11 C.J.S. p 351 note 9.

SLIVER. A slender piece, as of wood, cut or rent off lengthwise; a splinter; a sharp edge on a board or a piece of lumber.[40]

Corded textile fibers drawn into a fleecy strand.[41] In the rope-making art, hemp fibers, when combed, lying straight in a pack, parallel with one another and not twisted are called a "sliver,"[42] and a sliver when drawn and spun becomes "yarn."[43]

SLOP. As a noun, a liquid which has been slopped, as on a floor; a wet place; waste and dirty water; liquid refuse, as from a house; and as a verb, to cause to dash over; spill[44]

As a nautical or colloquial term, "slop" means cheap, ready-made clothing,[45] and what is known as the "slop chest" statute, 46 U.S.C.A. § 670, is construed in Seamen § 47, and set-off of "slop chest" purchases in seaman's libel for wages is treated in Seamen § 132.

SLOPE. As a noun, an oblique direction; obliquity; slant; especially, a direction downward[46]

As a verb, to bend down; direct obliquely; incline; slant.[47]

SLOT. A narrow aperture for some object to pass through.[48]

SLOUGH. A term used in the Western States in reference to rivers, meaning a channel diverging from the main channel, and returning into it again at a lower point;[49] an arm of the stream separating islands from the mainland,[50] or which in times of unusual water falls serve as an outlet for waters overflowing from the river;[51] sometimes called "swales."[52]

32. Century D

Used in describing a condition the term is relative, and, except by comparison, not of much value in a case dealing with the condition of a crosswalk—O'Donnell v City of Butte, 211 P. 190, 196, 65 Mont 463, 32 A.L.R 1284.

Phrases as to which more recent adjudications have not been found see 58 C.J. p 771 notes 70, 71

33. Minn.—Peterson v Western Union Tel. Co, 67 N.W. 646, 647, 65 Minn 18, 33 L.R.A 302

34. Minn.—Peterson v. Western Union Tel. Co, supra
58 C.J. p 771 note 73.

35. Minn.—High v Supreme Lodge of the World, Loyal Order of Moose, 7 N.W.2d 675, 679, 214 Minn 164, 144 A.L.R. 810.

36. Webster New Int.D.

37. Webster New Int.D.

38. U.S.—In re Bowman, Cust. & Pat.App, 70 F.2d 904, 905

39. Or.—State v. Cody, 23 P. 891, 896, 18 Or. 506.

Phrases employing the term as a verb and as to which more recent adjudications have not been found see 58 C.J. p 771 notes 89, 90.

40. New Standard D.

41. New Standard D.

42. U.S.—Lawson v Whitlock Cordage Co., C.C.A.N.J., 60 F.2d 362.
"Ramie sliver" similar in material, quality, texture, and use to "cotton sliver" see 20 C.J.S. p 714 note 57.

43. U.S.—Lawson v. Whitlock Cordage Co., C.C.A.N.J., 60 F.2d 362.

44. New Standard D.

Phrases

(1) "Slop-fed hogs" see 40 C.J.S. p 405 note 23

(2) "Slop-over current" see Electricity § 1 b

(3) "Slop-over energy" see Electricity § 1 b.

45. New Standard D

46. Ill.—Woods v New York, C. & St. L. R. Co, 88 N.E.2d 740, 742, 339 Ill.App 132.
As a mining term see Mines and Minerals § 3 h.

An incline is a slope.—Woods v. New York, C. & St. L. R. Co, 88 N.E.2d 740, 742, 339 Ill.App. 132.

47. Ill.—Woods v. New York, C. & St. L. R. Co, supra

48. Webster New Int.D.

Phrases

(1) "Slot machine" see the title index to Gaming

(2) "Slot rails" defined as those which form the sides of the slot or orifice through which passes the shank of the grip used in the operation of a cable see the C.J.S. title Street Railroads § 1, also 58 C.J. p 772 note 98.

49. Wis.—Black River Imp. Co. v. La Crosse Boom, etc, Co., 11 N.W. 443, 449, 54 Wis. 659, 41 Am.R. 66. 58 C.J. p 772 note 3.

50. Iowa.—Dunlieth, etc, Bridge Co. v Dubuque County, 8 N.W. 443, 446, 55 Iowa 558.

51. U.S.—Hagge v. Kansas City S. R. Co., C.C.Mo, 104 F. 391, 392

52. Mo.—St. Louis, etc, R. Co. v Schneider, 30 Mo.App. 620, 623.
58 C.J. p 772 note 6.

A slough has been held to be a watercourse see the C.J.S. title Waters § 2, also 67 C.J. p 676 note 35.

SLOW. As an adjective, having relatively small velocity; moving but a short distance in a long time, not quick in action.[53] It has been distinguished from "prompt" see 73 C.J.S. p 131 note 55.

As a verb, to make slow or slower; retard the speed or movement of.[54]

SLOWLY. It has been said that the word has a relative meaning,[55] and is a relative term when applied to a moving object, and must be measured according to the ordinary speed of the person or thing in question.[56] It is defined as meaning in a slow manner, as not quickly, fast, rapidly, early, rashly, or readily; tardily.[57]

"Slowly" is an antonym of "quickly" see 74 C.J.S. p 5 note 94, and "rapidly" see 75 C.J.S. p 606 note 4.

SLUDGE. Muddy or pasty refuse of various kinds; refuse, acid, or alkali from the refining of petroleum; slime of ores.[58] The term is used also to designate the plate covering an opening in a boiler for removal of sediment,[59] also, the sediment.[60]

SLUE. As a mining term see Mines and Minerals § 3 h.

SLUG. As used in the printing trade, a slug is a thick lead.[61]

SLUGGISH. Having little motion; slow; having little power of motion; inactive; torpid; habitually idle and lazy; slothful.[62] It is an antonym of "prompt" see 73 C.J.S. p 131 note 55.

SLUICE. A channel or an opening through which water flows.[63]

In connection with the floating of logs, "sluice" and related terms are treated in Logs and Logging § 1 e.

SLUICEWAY. An artificial channel made to draw off water, either naturally or artificially collected.[64]

In connection with the floating of logs, it is defined in Logs and Logging § 1 e as the opening in a splash dam through which the logs pass.

SLUM. The word "slum" has a well-defined meaning, and is applicable to sections of almost every city or town of proportions.[65] It is usually understood to mean a squalid, dirty street or quarter of a city, town, or village, ordinarily inhabited by the very poor, destitute, or criminal classes,[66] with overcrowding as usually a prevailing characteristic.[67] The word is comparatively recent and is of doubtful origin, and it has been doubtfully connected with a dialectal use of the word "slump" in the sense of a marshy place.[68]

SLUNGSHOT. The word "slungshot" is defined in the C.J.S. title Weapons § 1, also 58 C.J. p 773 note 57–p 774 note 62, as a ball of shot or metal covered with leather, and a band of elastic or leather, attached to such ball, and made so that the

53. New Standard D

Phrases

(1) "Slow combustion" see 15 C J S p 242 note 82.

(2) "Slow paper" distinguished from "doubtful paper" see 28 C J.S. p 60 note 18.

54. New Standard D.

Phrases

(1) "Slow up" a train means to diminish its speed.—Louisville, etc, R Co v. McKenna, 13 Lea, Tenn., 280, 288—58 C.J. p 772 note 15 [b]

(2) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 772 notes 18, 19.

55. Mo.—Ohio v. Metropolitan St R. Co, 103 S.W 142, 143, 125 Mo.App. 710

56. Mo —Dawson v. St. Louis Transit Co, 76 S W. 689, 691, 102 Mo.App. 277.
58 C.J. p 772 note 22.

57. Webster New Int.D.

"Moving slowly"

Mo —Dawson v St. Louis Transit Co, 76 S W. 689, 691, 102 Mo.App. 277.
58 C J. p 772 note 25.

58. U S —Warner-Quinlan Co. v. U. S., C C A.N J, 273 F. 503, 505.
58 C J. p 773 note 28.

59. U S —Warner-Quinlan Co. v. U. S, supra.

60. U S —Warner-Quinlan Co. v. U. S, supra.

61. U S.—Lanston Monotype Mach. Co v. Pittsburgh Type Founders Co, D C Del., 276 F. 921.
58 C J. p 773 note 33.

62. New Standard D.

63. Vt —Herrick v. Holland, 77 A 6, 11, 83 Vt 502.
58 C.J. p 773 note 37.

64. N.H.—Drew v. Bow, 65 A. 831. 74 N.H. 147
58 C J. p 773 note 51.

65. Fla —Marvin v. Housing Authority of Jacksonville, 183 So. 145, 150, 133 Fla 590

Ky.—Spahn v Stewart, 103 S.W.2d 651, 655, 268 Ky. 97.

The word is harsh and objectionable to the æsthetic ear.

Fla —Marvin v. Housing Authority of Jacksonville, 183 So. 145, 150, 133 Fla 590

Ky —Spahn v Stewart, 103 S.W.2d 651, 655, 268 Ky. 97.

66. Fla —Marvin v. Housing Authority of Jacksonville, 183 So. 145, 150, 133 Fla 590.

Ky.—Spahn v. Stewart, 103 S W.2d 651, 655, 268 Ky. 97.

67. Fla —Marvin v. Housing Authority of Jacksonville, 183 So. 145, 150, 133 Fla. 590.

Ky.—Spahn v. Stewart, 103 S W.2d 651, 655, 268 Ky. 97.

68. Fla —Marvin v. Housing Authority of Jacksonville, 183 So 145, 150, 133 Fla 590.

Ky.—Spahn v. Stewart, 103 S.W.2d 651, 655, 268 Ky 97.

ame can be attached to the wrist or arm of a person.

SLUSH. A colloquial expression for a mixture of snow and water.[69]

"Slush fund," as a term denoting money collected or spent for corrupt purposes such as lobbying or the like, see 37 C.J.S. p 1405 note 48.1.

SLUSHING. In construction, the process of filling up the interstices of a brick wall accomplished by the pouring in of a very thin mortar, so as to run into the spaces and fill them.[70]

SLUT. The word "slut" is often used as a name of contempt for a woman, and formerly also for a man,[71] and when applied to a woman it may be employed as meaning a careless, lazy woman;[72] an untidy woman;[73] a woman who is uncleanly as regards her person or her house;[74] a slattern;[75] a bold or impudent girl; a hussy; a woman of low or loose character;[76] and, in a lighter sense, a young woman; a jade; a wench.[77]

The term is also defined as meaning an awkward person, animal, or thing,[78] and when applied to animals means a female dog; a bitch.[79]

The word "slut," in its common meaning, has been held not to impute a charge of crime[80] or want of chastity.[81]

It is stated in Libel and Slander § 30 that as a general rule it is not actionable to call a woman a "slut," although it may be if it is intended to impute whoredom.

SLY. Artfully dextrous in doing things secretly; cunning in evading notice or detection; done with or marked by artful secrecy.[82]

SMALL. Generally, the word "small" is a comparative term,[83] denoting things of little size as compared with other things of the same class,[84] and depending for its significance on the circumstances of the particular case under consideration.[85] It is defined as meaning comparatively less than another or than a standard in dimensions or amount; diminutive; little.[86]

SMALLPOX. Variola, an acute eruptive contagious disease marked at the onset by chills, high fever, backache, and headache; in from two to five days the constitutional symptoms subside and the eruption appears; this at first papular, the papules become vesicles, and the latter pustules, the vesicles are umbilicated; the pustules dry and form scabs which on falling off leave a permanent marking of the skin *(pock-marks)*. The average incubation period is eight to fourteen days.[87]

SMART MONEY. See Damages § 2.

SMELL. To perceive by means of the nose and its olfactory nerves; perceive the odor or perfume of; scent.[88]

69. Me.—Maxfield v. Maine Cent. R. Co., 60 A. 710, 711, 100 Me. 79, 81.

70. Wis.—Laycock v. Parker, 79 N. W. 327, 330, 103 Wis. 161.
58 C.J. p. 774 note 65.
As a mining term see Mines and Minerals § 3 h.

71. Kan.—Cooper v. Seaverns, 105 P. 509, 510, 81 Kan. 267, 135 Am. S. R. 359, 25 L.R.A., N.S., 517.

72. Kan.—Cooper v. Seaverns, supra.
Phrases as to which more recent adjudications have not been found see 58 C.J. p. 774 notes 83–87.

73. Ill.—Roby v. Murphy, 27 Ill. App. 394, 398.
Kan.—Cooper v. Seaverns, 105 P. 509, 510, 81 Kan. 267, 135 Am. S. R. 359, 25 L.R.A., N.S., 517.

74. Kan.—Cooper v. Seaverns, 105 P. 509, 510, 81 Kan. 267, 135 Am. S. R. 359, 25 L.R.A., N.S., 517.

75. Ill.—Roby v. Murphy, 27 Ill. App. 394, 398.
Kan.—Cooper v. Seaverns, 105 P. 509, 510, 81 Kan. 267, 135 Am. S. R. 359, 25 L.R.A., N.S., 517.

76. Ont.—Quillman v. Stuart, 36 Ont. L. 474, 30 Dom. L.R. 381, 388, 10 Ont. W.N. 96.

77. Kan.—Cooper v. Seaverns, 105 P. 509, 510, 81 Kan. 267, 135 Am. S.R. 359, 25 L.R.A., N.S., 517.

78. Kan.—Cooper v. Seaverns, supra.

79. Kan.—Cooper v. Seaverns, supra.
58 C.J. p. 774 note 68.

80. Ill.—Roby v. Murphy, 27 Ill. App. 394, 398.
Kan.—Cooper v. Seaverns, 105 P. 509, 510, 81 Kan. 267, 135 Am. S.R. 359, 25 L.R.A., N.S., 517.

81. Kan.—Cooper v. Seaverns, supra.
58 C.J. p. 774 note 82.

82. Ga.—Cannon v. Merry, 42 S.E. 274, 275, 116 Ga. 291.

83. Ill.—Gage v. Chicago, 66 N.E. 374, 376, 201 Ill. 93.
Iowa.—Gardner v. Kiburz, 168 N.W. 814, 817, 184 Iowa 1268.
A relative term.
N.H.—Morrison v. Johnson, 29 A.2d 132, 133, 29 N.H. 132.

84. Ill.—Gage v. Chicago, 66 N.E. 374, 376, 201 Ill. 93.

85. Iowa.—Gardner v. Kiburz, 168 N.W. 814, 817, 184 Iowa 1268.
58 C.J. p. 774 note 96.

86. New Standard D.
Phrases employing the word and as to which more recent adjudications have not been found see 58 C.J. p. 775 notes 97–9.

87. Stedman Med.D.
Power of:
Local authorities to require vaccination of children as condition to being admitted to public schools although smallpox is not prevalent or its outbreak apprehended see Schools and School Districts § 453.
Public authorities to require vaccination against smallpox see Health § 14.

88. New Standard D.
"Smell the land"
In sailor terminology, an expression used to describe the approach of a vessel too near the bank or bottom.
—The Alexander Folsom, Ohio, 52 F. 403, 413, 3 C.C.A. 165.

SMELLER. One who smells (anything).[89]

SMELTING. See Mines and Minerals § 3 f.

SMOKE. The visible exhalation, vapor, or substance which escapes or is expelled from a burning body, especially from burning vegetable matter, as wood, coal, peat, or the like;[90] fine particles of solid matter finely diffused through the air.[91] It has been distinguished from "gas" see 38 C.J.S. p 614 note 18.

The power of a municipal corporation to regulate and control the emission of smoke is discussed in Municipal Corporations § 298. Smoke as a nuisance, generally, see Nuisances § 23 e, and consult also the title index.

As a general rule, the owner of property abutting on a street on which a railroad is constructed, or otherwise situated near the line of a road, or near any other public improvement, is entitled to compensation for the injury caused by smoke necessarily incident to the proper operation of the railroad or other work, see Eminent Domain § 171.

SMOKEHOUSE. A building in which meats or fish are cured by smoking; also, one in which smoked meats are stored.[92]

SMOKELESS. Making or having little or no smoke; as, smokeless cartridges, smokeless powder.[93]

SMOKER. One who or that which smokes.[94]

The term is also applied to a gathering of men.[95]

SMOLDERING. Being in a state of suppressed activity; quiet but not dead.[96]

SMOOTH. A relative term which does not lend itself to precise and exact definition, and the meaning to be given to it must be drawn from the circumstances under which it is used.[97]

As a verb, "smooth" is defined as meaning to make smooth or even on the surface; cause to lie evenly; remove roughness or wrinkles from.[98]

As an adjective, "smooth" is defined as meaning having a surface without projections or irregularities readily perceptible; not rough; continuously even.[99]

SMOTHER. The term "smother" is defined as meaning to stifle;[1] to suffocate;[2] to suffocate by the prevention of breathing;[3] to suffocate by stopping the exterior air passages to the lungs;[4] to deprive of life by suffocation;[5] to kill, murder, etc., by depriving of air.[6] It has been said that to the ordinary person who is without knowledge of medical terminology the word "smother" would mean to deprive of air, to prevent the entrance of air into the lungs by either external or internal stoppage of the air passages.[7]

"Smother" has been held synonymous with "suffocate,"[8] and has been distinguished from "strangle."[9]

SMUGGLE; SMUGGLING. See Customs Duties § 248.

89. New Standard D.
See also Intoxicating Liquors § 19.

90. Minn.—St Paul v Haughro, 100 N W. 470, 471, 93 Minn. 59, 106 Am. S.R 427, 66 L.R.A. 441, 2 Ann Cas. 580.

Phrases

(1) "Smoking tobacco" is tobacco suitable for smoking purposes and so used —American Tobacco Co. v. Polacsek, C C.N Y, 170 F 117, 119—58 C.J. p 776 note 35.

(2) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 776 notes 23–25, 27, 28

91. Or.—Stuart v. Occidental Life Ins. Co., 68 P 2d 1037, 1042, 156 Or 522.

Similarly defined

Matter in the solid state finely diffused through the air.—Birss v. Order United Commercial Travelers, 190 N.W. 486, 487, 109 Neb. 226.

92. Ala —Wait v State, 13 So 584, 99 Ala. 164.
58 C.J p 776 notes 32, 33

93. Webster New Int D.
"Smokeless coal" defined see Mines and Minerals § 2 b (1)

94. Webster New Int D
"Smoker's articles" as subject to tariff see Customs Duties § 45 g

95. Pa —Commonwealth v Abdo, 60 A 2d 419, 420, 162 Pa Super. 622

96. Kan —Sun Ins. Office v Western Woolen-Mill Co, 82 P 513, 517, 72 Kan 41.

"Smoldering fire"
Kan —Sun Ins Co. v. Western Woolen-Mill Co, supra

97. Ind —Kandea v Inland Amusement Co., 41 N E 2d 795, 796, 220 Ind 219.

The word might properly be applied to a macadam highway or to a piece of tooled machinery milled to the millionth of an inch.—Kandea v Inland Amusement Co, supra.

98. New Standard D.

99. New Standard D

1. Ga —Lanier v. State, 80 S.E 5, 7, 141 Ga 17

2. Ga —Lanier v State, supra.

3. Cal.—Thomas v. Seaside Memorial Hospital of Long Beach, 183 P. 2d 288, 294, 80 Cal.App 2d 841

4. Ga —Lanier v. State, 80 S E. 5, 7, 141 Ga. 17.

5. Cal —Thomas v Seaside Memorial Hospital of Long Beach, 183 P. 2d 288, 294, 80 Cal App 2d 841.

Similarly defined
To destroy the life of by suffocation.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

6. Cal.—Thomas v. Seaside Memorial Hospital of Long Beach, supra.

7. Cal —Thomas v. Seaside Memorial Hospital of Long Beach, supra.

8. Cal —Thomas v. Seaside Memorial Hospital of Long Beach, supra

9. Ga —Lanier v. State, 80 S.E. 5, 7, 141 Ga. 17.

SNAG POLE. See Fish § 30.

SNAP. The term "snap" is defined in one sense as meaning any fastener or other device which closes or springs into place with a snapping sound, as a snap-hook or the metal fastener of a pocketbook.[10]

The word is also applied to a tool used to receive the blows of the sledge in riveting the plates of metal beams, consisting of a lump of steel, shaped somewhat like the head of a small sledge; also called a "set."[11]

SNAPPER. See Mines and Minerals § 3 h.

SNAPSHOT. In photography, a photograph made automatically in a very short interval, such as one twenty-fifth of a second, usually with a hand camera.[12]

In railroading, it is a condition of the air brakes which causes the brakes to go into emergency, when they are put on for an ordinary stop, as stated in Railroads § 1 r.

SNATCH BLOCK. See Block 11 C.J.S. p 365 notes 66, 67.

SNEAK. As a noun, a mean, sneaking fellow.[13]

As a verb, to behave with meanness, servility; to crouch; to truckle; also to creep or steal away privately; to hide, especially in a mean and covertly manner; to withdraw meanly, as a person afraid, or ashamed to be seen.[14]

Sneaking. Crouching; deficient in openness and courage; marked by cowardly concealment; mean; servile.[15]

SNELLEN FORMULA. A test recognized by the medical profession for measuring visual acuity.[16]

SNOOKER. As a game played with balls and cues on a pool table see Gaming § 1 b (3).

SNOW. The aqueous vapor of the atmosphere precipitated in a crystalline form, and falling to the earth in flakes, each flake consisting of a distinct crystal, or more commonly of combinations of separate crystals.[17]

The liability of a landlord for injuries resulting from snow accumulations is discussed in Landlord and Tenant § 417 d; the tenant's liability is treated in § 440 c. For references to the liability of a municipality see the index to the title Municipal Corporations.

For other particular applications and specific uses of the word "snow" consult the Descriptive-Word Index.

SNOWFLAKE. In its common and ordinary sense, a word understood to be descriptive of whiteness, lightness, and purity.[18]

The fundamental rule that a term or mark merely descriptive of the subject to which it is applied cannot be a technical trade-mark or trade-name is stated in the C.J.S. title Trade-Marks, Trade-Names, and Unfair Competition § 33, also 63 C.J. p 346 note 90.

SNUB. A sudden checking, as of a running rope or cable.[19]

SNUFF. As ordinarily understood it is tobacco which has been fermented, powdered, or pulverized, and is primarily intended to be taken by the nose, but may also be taken in the mouth for absorption by the gums without mastication.[20]

Regulations prohibiting the sale of snuff are treated in Health § 28.

SO. While the word "so" may be used as a conjunction or as an interjection,[21] it is more commonly used as an adverb,[22] and as an adverb it is defined as meaning in the same manner;[23] as has been

10. U.S.—U S v. Murphy & Co., 13 Ct Cust App 456, 461.

11. Kan.—Gillaspie v. United Iron Works Co., 90 P. 760, 761, 76 Kan 70

12. Webster New Int D.

13. N Y.—Byrnes v Mathews, 12 N Y St. 74, 82.
58 C.J. p 778 note 92

14. N.Y.—Byrnes v. Mathews, supra

15. N.Y.—Byrnes v. Mathews, supra

16. Minn.—Livingston v St. Paul Hydraulic Hoist Co., 279 N.W 829, 830, 203 Minn. 62.

"In conducting the test, use is made of a chart with a series of lines of letters of various sizes. The line marked '20' is made up of letters of a size to subtend an angle of 5 per cent. when placed 20 feet from the eye. If the letters on the 20 line can be read by a person at 20 feet, his vision is 20/20 When letters of a smaller size can be read at the same distance, the vision is better than normal. When letters of a larger size are required to be read at the same distance, the vision is below normal"—Livingston v. St. Paul Hydraulic Hoist Co., supra.

The Snellen Chart is used as the standard in rating eye losses—Livingston v. St. Paul Hydraulic Hoist Co., supra.

17. Century D.

18. Ga.—Larrabee v. Lewis, 67 Ga. 561, 564, 44 Am R. 735.
58 C.J. p 779 note 6.

19. Webster New Int D.

Phrases

(1) "Snubbing in" as a mining term see Mines and Minerals § 3 h

(2) "Snub ropes" see 77 C J.S. p 539 note 67.

20. U.S.—Weyman-Bruton Co. v. Ladd, C C A N D., 231 F. 898, 902.
58 C.J. p 779 note 11

21. New Standard D.

22. Wash.—Blanton v. State, 24 P. 439, 440, 1 Wash 265.

23. Wash.—Blanton v. State, supra.

stated; in this or that condition or state; under these circumstances;[24] in this way[25] with reflex reference to something just asserted.[26] This is said to be the ordinary way the word is understood.[27]

"So" is further defined to mean therefore[28] or thereupon[29]

The word "so" is expressive of the idea of logical sequence,[30] and it is understood as being the equivalent of "hence" or "therefore" whenever what follows is an illustration of, or conclusion from, what has gone before.[31] The term may be employed as referring to something previously mentioned in an instrument.[32]

SOAKAGE. The term as used in the laws and regulations relating to withdrawal of liquors from bonded warehouses means the spirits which in course of time in the warehouse have been absorbed by the staves of the barrel containing it.[33]

SOAP. Any compound formed by the union of a fatty acid with a base and used as a detergent;[34] any of the compounds of alkali with oil or fat which are known and used in the arts under that name;[35] the potassium salts of the fatty acids.[36]

The term is not limited in common understanding to solid combinations of fatty solid with a base used as a detergent, but has been broadened to include soaps in liquid form.[37]

SOAPSTONE. See Mines and Minerals § 2 b (8).

SOBER. In its common and usual signification,[38] the word "sober" means moderate in, or abstinent from, the use of intoxicating liquors;[39] temperate in the use of spirituous liquors;[40] not overpowered by spirituous liquors.[41]

The term "sober" is synonymous with "abstemious,"[42] "abstinent,"[43] "temperate,"[44] and "unintoxicated."[45]

Its antonyms are "drunk" and "drunken" see 28 C.J.S. p 539 note 26, "intemperate" see 46 C.J.S. p 1102 note 48, and "intoxicated" see 48 C.J.S. p 121 note 72 50.

Statutes in some jurisdictions require that a juror be "sober," and what constitutes sobriety within the meaning of such statutes is treated in Juries § 134.

SOBERNESS. The state or character of being sober, in any sense of the word; sobriety.[46] It has

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Similarly defined

(1) In like manner.—Chesapeake, etc., R. Co. v. Patton, 9 W.Va. 648, 656

(2) In this manner—Fuqua v. Mobile, 121 So. 696, 697, 219 Ala 1

24. Wash.—Blanton v State, 24 P 439, 440, 1 Wash. 265

25. Ala—Fuqua v Mobile, 121 So 696, 697, 219 Ala 1
Wash.—Blanton v State, 24 P 439, 440, 441, 1 Wash 265.

26. Wash—Blanton v State, supra.

27. Wash—Blanton v State, supra

28. Wash T—Leonard v. Territory, 7 P 872, 876, 2 Wash T. 381

Phrases employing the term and as to which more recent adjudications have not been found see 58 C J p 779 note 25–p 781 notes 72, 77–79

29. Tex—Noah v. Glenn, Civ App., 83 S W 2d 382, 383.

30. Wash.T.—Leonard v. Territory, 7 P. 872, 876, 2 Wash T 381

31. Ind.—Clem v. State, 33 Ind. 418, 431.

32. Colo—Kephart v. Buddecke, 80 P. 501, 503, 20 Colo.App. 546.
58 C.J. p 779 note 20

33. U.S.—Bernheim Distilling Co v. Mayes, D C Ky., 268 F. 629, 630.
58 C.J. p 781 note 80

34. U S—U S. v. Farbenfabriken of Elberfeld Co., 3 Ct Cust App 358, 360.

Soap as subject to tariff see Customs Duties § 32.

Phrases

(1) "Soap pencil" see 70 C.J.S. p 420 note 3

(2) "Soap stock;" the resultant product of the treatment of crude cotton seed oil with caustic soda solution in the process of refining.—Temple Cotton Oil Co v Southern Cotton Oil Co, 3 S W.2d 673, 674, 176 Ark. 17.

(3) "Toilet soap" is a soap used as a detergent for cleansing purposes only—Park v. U. S, C C N.Y, 66 F. 731.

35. U.S—Buckan v. McKesson, C.C N Y, 7 F 100, 103, 18 Blatchf 485

36. U S—Lorenz v Colgate-Palmolive-Peet Co., D C N J., 34 F.Supp 315, 317.

These salts are the result of the treatment of animal and vegetable fats with lye (the alkaline carbonates, soda or potash, combined with quick lime or caustic alkalies dissolved in water).—Lorenz v. Colgate-Palmolive-Peet Co, supra.

Chemical process described

"If these equations are studied they will be found to run on common lines, and further they show an exchange of constituents between the products which take part in the reaction; the acid portion of the fat combines with the basic metal of the alkali to form the soap, while the basic constituent of the fat, the glyceryl, C_3H_5, takes the hydroxyl, HO, of the alkali to form glycerin, or, as the chemist prefers to term it, glycerol, which is thus set free."—Lorenz v. Colgate-Palmolive-Peet Co., supra.

37. U S—U S. v Farbenfabriken of Elberfeld Co, 3 Ct Cust.App 358, 360

38. La—American Cigar Co v Fabacher, 100 So. 299, 300, 156 La. 182
58 C J. p 782 note 96

39. La—American Cigar Co. v. Fabacher, supra.

Phrases as to which more recent adjudications have not been found see 58 C J p 782 notes 7–9

40. U.S—Wolf v. Mutual Ben. L Ins Co., C C Ohio, 30 F.Cas No 17,925a.

41. U.S—Wolf v. Mutual Ben. L Ins. Co, supra.

42. La—American Cigar Co v. Fabacher, 100 So. 299, 300, 156 La. 182.

43. La.—American Cigar Co. v. Fabacher, supra.

44. La—American Cigar Co. v. Fabacher, supra.

45. La—American Cigar Co. v. Fabacher, supra.

46. Century D.

been said that it is doubtful whether the term is susceptible of any accurate definition for practical purposes, and that it sufficiently defines itself.[47]

SOBRANTE. A Spanish word literally meaning "remainder;"[48] and, in a Mexican land grant, the technical term for surplus.[49]

SOBRE. A Spanish preposition having various significations, the general idea conveyed to the mind being that of something over or above or upon another.[50] It is defined as meaning above; over; at the top; upon;[51] also, near something else, but with a greater elevation and power.[52]

SOBRIETY. The state or quality of being sober.[53] It has been said that the moderate, temperate use of intoxicating liquors is consistent with sobriety.[54]

SOCAGE. A species of tenure, in England, whereby the tenant held certain lands in consideration of certain inferior services of husbandry to be performed by him to the lord of the fee. In its most general and extensive signification, a tenure by any certain and determinate service. In this sense it is by the ancient writers constantly put in opposition to tenure by chivalry or knight-service, where the render was precarious and uncertain.[55]

SOCAGER. A tenant by socage.[56]

SOCAGIUM IDEM EST QUOD SERVITIUM SOCÆ. See 58 C.J. p 782 note 26.

SO-CALLED. Commonly named; thus termed.[57] It implies doubt as to the correctness or propriety of so designating the person or thing.[58]

SOCIAL. The adjective "social" is defined as meaning that is spent, taken, enjoyed, etc., in the company of one's friends or equals; as agreeable social relations.[59]

It has been held synonymous with "fraternal" see 37 C.J S. p 198 note 22, and it has been distinguished from "educational" see 28 C.J.S. p 834 note 97.

47. Ark.—Midland Valley R. Co v Hamilton, 104 S W. 540, 542, 84 Ark 81.
58 C J. p 782 note 11.

48. Escriche Diccionario.

49. U.S.—U S v San Jacinto Tin Co, Cal, 8 S Ct. 850, 865, 125 U.S 273, 31 L Ed. 747.

50. Tex.—Ruis v Chambers, 15 Tex 586, 592

51. Tex.—Ruis v. Chambers, supra

Sobre-juezes
In Spanish law, superior judges.—Black L D.

52. Tex.—Ruis v. Chambers, 15 Tex 586, 592
58 C J. p 782 note 18

53. Webster New Int D.

54. U.S.—Brockway v. Mutual Ben L Ins Co, C C Pa., 9 F 249, 253

55. Black L.D

Socage is of two sorts, free socage, where the services are not only certain, but honorable, and villein socage, where the services, though certain, are of baser nature Such as hold by the former tenure are also called in Glanvil and other authors by the name of "liberi sokemanni," or tenants in free socage By the statute 12 Car. 2, c 24, all the tenures by knight-service were, with one or two immaterial exceptions, converted into free and common socage.—Black Law D.

56. Black L D

57. Va.—Alphonse Custodis Chimney Const. Co v. Molina, 32 S E 2d 726, 728, 183 Va. 512.

58. Va.—Alphonse Custodis Chimney Const. Co. v Molina, supra.

59. U.S.—California State Auto Ass'n v Smyth, D C.Cal., 77 F.Supp 131, 133.
58 C J. p 782 note 28.

Phrases

(1) "Social club" defined generally see Clubs § 1; within Internal Revenue Code, 26 U.S C A. §§ 1710–1712, imposing tax on dues, and on membership and initiation fees, see Internal Revenue § 531.

(2) "Social enjoyment" see 30 C J. S p 255 note 79.

(3) "Social insurance" see Insurance § 48

(4) "Social rights" distinguished from "civil rights" see Civil Rights § 2

(5) "Social science" see 79 C.J S. p 456 note 13.

(6) "Social settlement" see 80 C.J. S. p 126 notes 88–91.

(7) Other phrases as to which more recent adjudications have not been found see 58 C.J. p 783 note 55—p 784 note 63.

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SET.

page 1

—As a Noun.

1. Similarly defined

(1) A "set" is a number of things of the same or similar kind ordinarily used together, a collection of articles which naturally complement each other—Karcher v Philadelphia Fire & Marine Ins Co, 108 A 2d 638, 640, 32 N J Super 496

—Phrases.

Set apart.

13. Or—Benedict v Lee, 256 P 2d 507, 512, 198 Or 378

To separate from the rest

Or—Benedict v Lee, 256 P 2d 507, 512, 198 Or 378

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Set up.

21. Not referring to something in existence

"Set up" does not refer to something already in existence but means to bring into being, to create, to originate, or to set up—Adams v Adams, 58 N W 2d 172, 181, 156 Neb 778

Other phrases:

24. Other phrases employing the word "set"

(1) "Set forth" and "set out" ordinarily mean to recite or narrate facts or circumstances, to describe or to incorporate—Castleberry v Evatt, 67 N E 2d 861, 864, 147 Ohio St 30, 167 A L R 198

Ohio—Moore v Foreacher, 105 N E 2d 80, 82, 91 Ohio App. 28.

(2) Ohio—Miller v City of Cleveland, 146 N E 2d 178, 182

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N J.—Gibbins v. Kosuga, 296 A.2d 557, 121 N J Super 252

Pa.—Swan v Malishiski, 47 Luz L Reg 35—Topelski v Universal South Side Autos, Inc, 180 A 2d 414, 407 Pa. 339.

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3. Whether against plaintiff or another defendant

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7. Tex.—C.J.S. cited in E. E. Farrow Co. v U S Nat. Bank of Omaha, Civ App., 358 S W.2d 934, 935, err. ref. no rev. err.

8. Mass.—E. H. Hinds, Inc. v. Coolidge Bank & Trust Co, 372 N.E.2d 259, 6 Mass.App 5

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(3) Other instances

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83. Defendant as plaintiff

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§ 9. —— Compensation

89. La—Tolbird v Cooper, 143 So 2d 80, 243 La 306

91. Other definitions

(3) La—Wadlington v Barron, App, 91 So 2d 448

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94. La—Tolbird v Cooper, 143 So 2d 80, 243 La 306—Long v Matthews, App, 186 So 2d 868, writ ref 187 So 2d 739, 249 La 576

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§ 10. —— Synonymity of, and Distinctions Between Terms

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15. Ala—Hewlett v. John Blue Emp Federal Credit Union, 344 So 2d 505, cert den Ex parte Hewlett, Civ., 344 So 2d 509

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34. Vt—Templeton Const Co v Kelly, 296 A 2d 242, 130 Vt 420

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N Y—Pekofsky v State, 180 N Y S 2d 930, 15 Misc 2d 358—Goldberg v Rothman, 322 N Y S 2d 931, 66 Misc 2d 981

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38. Colo—Corbin Douglass, Inc v Kelley, 472 P 2d 764, 28 Colo App 369

In some jurisdictions, all distinctions between set-off, recoupment and counterclaim are abolished.[39.5]

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87. Limitations on right to set-off

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27. Ga—City Stores Co v Henderson, 156 S E 2d 818, 116 Ga App 114

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59. N J—Hudson City Contracting Co v Jersey City Incinerator Authority, 111 A 2d 385, 17 N J 297

61. Injunction

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75. In action on note

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76. Cal—Bank of America Nat Trust & Sav Ass'n v Lamb Finance Co, 303 P 2d 86, 145 C A 2d 702.

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77. U S—R L Pohlman Co. v Keystone Consol. Industries, Inc, D C Mo, 399 F Supp 330

Ga—Burns Brick Co v Adams, 127 S E 2d 26, 106 Ga App 416—General Acceptance Corp v Nix Ford, Inc., 129 S E 2d 202, 107 Ga App. 32

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Neb—Midwest Laundry Equipment Corp v Berg, 119 N W 2d 509, 174 Neb. 747

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80. Loan counterclaimable against claim for overtime

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83. Md —Great Atlantic & Pac Tea Co v Royal Crown Bottling Co , 220 A 2d 598, 243 Md 280

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95. Me —Inhabitants of Town of Milo v Milo Water Co , 163 A 163, 131 Me 372

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3. Not limited to contracts

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6. Ga —Hayes v O'Shield Buick Co , 94 S E 2d 44, 94 Ga App 177

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32. N.M —Skarda v. Davis, 491 P 2d 1153, 83 N M 342, app after remand 505 P.2d 1220, 84 N.M. 544

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D C —Rubewa Products Co v Watson's Quality Turkey Products, Inc , App , 242 A 2d 609, app after remand 294 A 2d 378

§ 23. Nature of Indebtedness or Liability in General

34. Defendant may set off, etc.

Idaho—Treasure Valley Foods, Inc v J-M Poultry Packing Co , 564 P 2d 978, 98 Idaho 366

35. Fla —Jones-Mahoney Corp v C A Fielland, Inc , App , 114 So 2d 18

Neb —Tilden Bank v Retzlaff, 199 N W 2d 734, 188 Neb 834

W Va —State ex rel West Virginia Truck Stop, Inc v Belcher, 192 S E 2d 229, 156 W Va 183

Particular counterclaims held proper

(1) Ga —McLendon v Galloway, 116 S E 2d 208, 216 Ga 261

Pa —Firstenberg v Bennett, 45 Del Co 261—Atlas Credit Corp v Dolbow, 165 A 2d 704, 193 Pa Super 649

Counterclaim may be any cause of action in favor of defendant

N Y —Village of Lindenhurst v Merhige, 226 N Y S 2d 660

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36. La —Synder v Synder, App , 152 So 2d 246, application den 154 So 2d 767, 244 La 896—Moore v Guillot, App , 197 So 2d 384

39. La —D'Asaro v Contonio, App , 73 So 2d 41, transf 66 So 2d 572, 223 La 624

40. Vt —Templeton Const Co v Kelly, 296 A 2d 242, 130 Vt 420

Alimony obligation of husband

Cal —Williams v Williams, 87 Cal Rptr 754, 8 C A 3d 636

41. Ga —Georgia Machinery Co v Auburn Mach Works, Inc , 120 S E 2d 28, 103 Ga App 574

N Y —National Telefilm Associates, Inc v Pamandia Productions, Inc , 344 N Y S 2d 418, 42 A D 2d 514

S C —Mullins Hospital v Squires, 104 S E 2d 161, 233 S C 186

43. N M —Gawlick v American Builders Supply, Inc , App , 519 P 2d 313, 86 N M 77

47. N Y —David J Hodder & Son, Inc v Pennetto, 223 N Y S 2d 685, 32 Misc 2d 764

§ 24. Tendency to Defeat or Diminish Plaintiff's Claim

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50. Ala —Givens v General Motors Acceptance Corp , Civ , 324 So 2d 277, 56 Ala App 561

Cal —Royal Indem Co v Security Truck Lines, 27 Cal Rptr 858, 212 C A 2d 61—Olson v Sacramento County, 79 Cal Rptr 140, 274 C A 2d 316

51. N Y —Grady v Balmain, 280 N Y S 2d 956, 28 A D 2d 702

§ 25. Subsisting Right of Action of Defendant

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65. U S —Churchill v. Anderson, D.C Ky , 128 F.Supp 425—C.J.S. cited in Flying Tiger Line, Inc v U.S , 170 F Supp 422, 425, 145 Ct Cl 1

Ga —Chavala Co-op , Inc., v Hortman, 92 S.E 2d 236, 93 Ga App. 505

Ill —Reinhard v Reinhard, 153 N E 2d 285, 19 Ill. App 2d 223—Bergman and Lefkow Ins Agency v Flash Cab Co , 249 N E 2d 729, 110 Ill App 2d 415

Miss —C.J S cited in Clarke County Co-op , (AAL) v. Read, 139 So 2d 639, 641, 243 Miss 879

Mo —Grapette Co v Grapette Bottling Co , App , 286 S W 2d 34

N M —Cruzan v Franklin Stores Corp , 380 P 2d 190, 72 N M 42

Neb —Weller v Putnam, 171 N W 2d 767, 184 Neb 692

N Y —Termini v John Arthur Exhibitions, Inc , 169 N Y S 2d 584, 9 Misc 2d 557, 833, affd 173 N Y S 2d 243, 5 A D 2d 973, app den 175 N Y S 2d 150, 6 A D 2d 689, motion dism 179 N Y S 2d 860, 5 N Y 2d 767, 154 N E 2d 139

Wash —Sparkman and McLean Income Fund v Wald, 520 P 2d 173, 10 Wash App 765

Equitable setoff

Tenn —Combustion Engineering Co v McFarland, 349 S W 2d 138, 209 Tenn 75

66. Tenn —Combustion Engineering Co v McFarland, 349 S W 2d 138, 209 Tenn 75

67. U S —C J S. cited in Flying Tiger Line, Inc v U S , 170 F Supp 422, 425, 145 Ct Cl 1

Cal —Baker v Littman, 292 P 2d 595, 138 C A.2d 510—O'Callaghan v Southern Pac Co , 20 Cal Rptr 708, 202 C A 2d 364

Mo —Prentzler v Schneider, 411 S W 2d 135

N H —Phinney v Levine, 381 A 2d 735, 117 N H 968

N Y —Third Manhattan Corp v Consolidated Elec Meter Co , 238 N Y S 2d 913, 18 A D 2d 1055—Arthur Venneri Co v Central Heating & Plumbing Co , 242 N Y S 2d 812, 40 Misc 2d 125

Utah—State By and Through Road Commission v Parker, 368 P 2d 585, 13 Utah 2d 65

Va —Petrus v Robbins, 80 S E 2d 543, 195 Va 861, revd on oth grds 83 S E 2d 408, 196 Va 332

Litigation expenses

N Y —Johnson v General Mut Ins Co , 246 N E 2d 713, 24 N Y 2d 42, 298 N Y S 2d 937

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71. U S —Westinghouse Elec Supply Co v Fidelity & Deposit Co of Maryland, C A Pa , 560 F 2d 1109

Okl —Brown v Holden, 410 P d 5. 3

§ 26. —— Void or Unenforceable Claims

76. U S —In re Texoil Service Co , D C Tex , 122 F Supp 276—C.J S. cited in Flying Tiger Line, Inc v U S , 170 F Supp. 422, 425, 145 Ct Cl 1

Cal —Franck v J J Sugarman-Rudolph Co , 251 P 2d 949, 40 C 2d 81

N Y —Valentino v State, 355 N Y S 2d 212, 44 A D.2d 338, op after remand 367 N.Y.S 2d 593, 48 A D 2d 15

§ 27. —— Claims Nonexistent at Commencement of Action in General

88. Ga —Powell v Barker, 101 S E 2d 113, 96 Ga App 592—Metro Chrysler-Plymouth, Inc v Pearce, 175 S E 2d 910, 121 Ga App 835

N.H —Petition of Leon Keyser, Inc , 96 A 2d 551, 98 N H 198, 37 A.L R 2d 845

S C —Brock v Mason, 103 S E 2d 423, 233 S.C 40

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89. Mo —Zickel v Knell, 210 S W.2d 59, 357 Mo. 678, 3 A L R 2d 1304

S C —Smart v Charleston Mobile Homes, Inc., 239 S E 2d 78, 269 S C 588.

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La —Udell, Inc v Ascot Oils, Inc , App , 177 So 2d 178—Chas. A. Kaufman Co v Gregory, App , 178 So 2d 300, writ ref 179 So 2d 273, 248 La 431—Viera v Kwik Home Services Inc , App , 266 So 2d 732, writ ref 268 So 2d 258, 263 La 368

93. Ark —Troxler v Spencer, 270 S W 2d 936, 223 Ark. 919

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Ga—Monumental Properties, Inc v Johnson, 220 S E 2d 55, 136 Ga App 39, app after remand 232 S E 2d 644, 141 Ga App 151, app after remand 242 S E 2d 296, 144 Ga App 750

§ 28. —— Inchoate and Contingent Claims

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14. N Y—Fehlhaber Corp v State, 419 N Y S 2d 773, 69 A D 2d 362

15. Ala—Ex parte Stember, 77 So 2d 351, 262 Ala 56

D C—Yellowitz v J H Marshall & Associates, Inc, App, 284 A 2d 665

La—Pittman Const Co v Housing Authority of New Orleans, App, 169 So 2d 122, writ ref 170 So 2d 865, 247 La 343, 344, and 170 So 2d 866, 247 La 346, 347, 348

N Y—Termini v John Arthur Exhibitions, Inc, 169 N Y S 2d 584, 9 Misc 2d 557, 833, affd 173 N Y S 2d 243, 5 A D 2d 973, app den 175 N Y S 2d 150, 6 A D 2d 689, motion dism 179 N Y S 2d 860, 5 N Y 2d 767, 154 N E 2d 139

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Litigation expenses

N Y—Johnson v General Mut Ins Co, 246 N E 2d 713, 24 N Y 2d 42, 298 N Y S 2d 937

16. N Y—Termini v John Arthur Exhibitions, Inc, 169 N Y S 2d 584, 9 Misc 2d 557, 833, affd 173 N Y S 2d 243, 5 A D 2d 973, app den 175 N Y. S 2d 150, 6 A D 2d 689, motion dism 179 N Y S 2d 860, 5 N Y 2d 767, 154 N E 2d 139—Viola v Scandore, 195 N Y S 2d 361, affd 196 N Y S 2d 558, 9 A D 2d 922

§ 29. —— Claims not Yet Due at Commencement of Action

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19. U S—Liberty Sav Ass'n v Sun Bank of Jacksonville, C A Ill, 572 F 2d 591—In re Cohn, Bkrtcy Mass, 11 B R 611

Cal—Pavlovich v Neidhardt, 275 P 2d 836, 128 C A 2d 559

La—Ben C Penn and Son v Thompsons Packers, Inc, App, 169 So 2d 259

Neb—McGerr v Beals, 145 N W 2d 579, 180 Neb 767

N H—Petition of Leon Keyser, Inc, 96 A 2d 551, 98 N H 198, 37 A L R 2d 845

N Y—Termini v John Arthur Exhibitions, Inc, 169 N.Y.S 2d 584, 9 Misc 2d 557, 833, affd 173 N Y S 2d 243, 5 A D 2d 973, app den 175 N Y S 2d 150, 6 A D 2d 689, motion dism 179 N Y S 2d 860, 5 N Y 2d 767, 154 N.E 2d 139

Ohio—Walter v National City Bank of Cleveland, 330 N E.2d 425, 42 Ohio St 2d 524, 71 O O 2d 513

Wis.—Mattek v Hoffmann, 76 N W 2d 300, 272 Wis 503, 57 A L R 2d 696—Application of Manson, 130 N W 2d 182, 24 Wis.2d 673

Due and payable

(2) Other cases.

Cal—Haines v Fisher, 305 P 2d 124, 147 C A 2d 415

Miss.—Clarke County Co-op, (AAL) v Read, 139 So.2d 639, 243 Miss 879

Only accrued interest recoverable

Ga—Chavala Co-op, Inc v. Hortman, 92 S E 2d 236, 93 Ga App 505

20. Conn—Nuclo v Associated Realty Corp, 158 A 2d 604, 22 Conn Sup 21

Ind—Trout v. Brown, 123 N E 2d 647, 125 Ind App 381

Neb—Weller v Putnam, 171 N.W 2d 767, 184 Neb. 692

N Y—Viola v Scandore, 195 N Y S 2d 361, affd 196 N Y S 2d 558, 9 A D 2d 922

Wis—Mattek v Hoffmann, 76 N W 2d 300, 272 Wis 503, 57 A L R 2d 696

Adjudication of a fact still necessary

Utah—Salt Lake City v Utah Lake Farmers Ass'n, 286 P 2d 773, 4 Utah 2d 14

21. La—McDaniel v Rumore, App, 110 So 2d 860—Long v Matthews, App, 186 So 2d 868, writ ref 187 So 2d 739, 249 La 576

23. La—Thomas v Mobley, App, 118 So 2d 476

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26. N Y—Champlain Milk Products, Inc v M E Franks, Inc, 275 N Y S 2d 172, 26 A D 2d 988

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44. Insolvency immaterial

N Y—Champlain Milk Products, Inc v M E Franks, Inc, 267 N Y S 2d 582, 49 Misc 2d 299, revd on oth grds 275 N Y S 2d 172, 26 A D 2d 988

§ 30. —— Pendency of Another Action Relating to Same Claim

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59. Ohio—Secrest v Standard Oil Co, 194 N E 2d 68, 118 Ohio App 270

60. La—Fontenot v Benoit, App, 128 So 2d 815

§ 33. Arising Out of Same Transaction

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Iowa—Capitol City Drywall Corp v C G Smith Const Co, Inc, 270 N W 2d 608

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74. U S—In re Shoppers Paradise, Inc, Bkrtcy N Y, 8 B R 271

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Conn—Peter Cascio Nursery, Inc v Green Acres, Inc, Cir A D, 216 A 2d 856, 3 Conn Cir 424

§ 34. —— Recoupment

75. U S—U S v Frank, D C N Y, 207 F Supp 216

Ala—Hewlett v John Blue Emp Federal Credit Union, 344 So 2d 505, cert den Ex parte Hewlett, Civ, 344 So 2d 509

Ariz—Nogales Service Center v Atlantic Richfield Co, App, 582 P 2d 642, 119 Ariz 552, cert den 99 S Ct 318, 439 U S 930, 58 L Ed 2d 323

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N J—Atlantic City Hospital v Finkle, 265 A 2d 853, 110 N J Super 435

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R I—Di Chiaro v Spirito, 150 A 2d 637, 89 R I 50

S C—Tuloka Affiliates, Inc v Moore, 268 S E 2d 293, 275 S C 199

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W Va—Wood Coal Co v Little Beaver Min Corp, 116 S E 2d 394, 145 W Va 653

Purpose of requirement

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76. U S—Old Colony Regional Vocational Technical High School Dist v New England Constructors, Inc, D C Mass, 443 F Supp 882, affd C A, 588 F 2d 817

Ill—Williams v Johnson, 130 N E 2d 123, 8 Ill App 2d 99—Bogdan v Ausema, 179 N E 2d 401, 33 Ill App 2d 294

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77. D C—McGovern v Martz, D C, 182 F Supp 343

La—Jacobs v Calcasieu Frozen Foods, Inc, App, 118 So 2d 145

Neb—Mobil Oil Corp v Grantham, 265 N W 2d 669, 200 Neb 782

78. Recoupment held properly allowable

Mich—American Airlines, Inc v Shell Oil Co, 94 N W 2d 214, 355 Mich 151

Recoupment held properly denied

U S—American Training Service, Inc v Commerce Union Bank, D C Tenn, 415 F Supp 1101, affd, C A, 612 F 2d 580

Hawaii—Mayer v Alexander & Baldwin, Inc, 532 P 2d 1007, 56 Haw 195

La—Loeblick v Garnier, App, 113 So 2d 95

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81. Hawaii—Mayer v Alexander & Baldwin, Inc, 532 P 2d 1007, 56 Haw 195

85. U S—Montgomery Ward & Co v Robert Cagle Bldg Co, D C Tex, 265 F Supp 469

95. Ala—Scroggins v Alabama Gas Corp, 158 So 2d 90, 275 Ala 650

Ga—Housing Authority of City of Carrollton v Ayers, 88 S.E 2d 368, 211 Ga. 728.

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99. Ga—Harwick v Webb, 86 S E 2d 361, 91 Ga App 542

Mo—Freeman Contracting Co v. Lefferdink, App., 419 S W.2d 266—Edmonds v. Stratton, App, 457 S W 2d 228

1. Ohio—Dick Kelchner Excavating, Inc v Gene Zimmerman, Inc, 264 N E 2d 918, 25 Ohio Misc 133

5. Wyo—Lukens v Goit, 430 P 2d 607

10. Fair rental value

R I—Di Chiaro v Spirito, 150 A 2d 637, 89 R I 50

§ 35. —— Set-Off

17. Cal—Baldwin Contracting Co. v Carl M Buck Bldg Co, 23 Cal.Rptr 483, 206 C A 2d 171

W Va—Johns-Manville Sales Corp v Connelly, 108 S E 2d 836, 144 W Va 498

Wyo—Summerlin v Robinson Transp Co, 427 P 2d 859.

Set off not allowed

U S—Columbia Gas Transmission Corp v Larry H. Wright, Inc, D C Ohio, 443 F Supp 14

Cal—Barnhill v Robert Saunders & Co, 177 Cal Rptr 803, 125 C A 3d 1

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N Y—Comtec Trading Corp v. Mutual Marketing Associates of New York, Inc, 392 N Y S 2d 649, 56 A D 2d 803.

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Or —Montgomery v Wadsworth Plumbing & Heating Co, Inc, 564 P 2d 703, 278 Or 455

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18. U S —U S v Southern Cal Edison Co, D C Cal, 229 F Supp 268

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N J —Atlantic City Hospital v Finkle, 265 A 2d 853, 110 N J Super 435

N Y —Rochester-Genesee Regional Transp Dist, Inc v Trans World Airlines, Inc, 383 N Y S 2d 856, 86 Misc 2d 1011

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Wash —Ski Acres Development Co v Douglas G Gorman, Inc, 508 P 2d 1381, 8 Wash App 775

Tort claim set off against contract claim

Ga —Ben L O'Callaghan Co v Bond Supply Co, Inc, 225 S E 2d 774, 138 Ga App 186

19. Ga —Dixie Home Builders, Inc v Waldrip, 246 S E 2d 471, 146 Ga App 464

Mass —Grozier v Post Pub Co, 172 N E 2d 266, 342 Mass 97

S C —Carolina Mechanical Contractors, Inc v Yeargin Const. Co, Inc., 198 S E 2d 224, 261 S C 1.

Particular claims held properly set off

(4) U S —Seaboard Machinery Corp v Bethlehem Steel Co, D C Fla, 145 F Supp 285—Evans Products Co. v Veneers, Inc, D C Mo, 332 F Supp 1199

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Particular claims held properly set off

(3) U S.—U.S. for Use and Benefit of H & S Industries, Inc v F D Rich Co, Inc, C A.Ind., 525 F 2d 760—Southern Illinois Stone Co v Universal Engineering Corp, D.C Mo., 446 F.Supp 900 Affd in part, revd in part on oth grds C.A, 592 F.2d 446

Cal —Ely v. Bottini, 3 Cal Rptr 756, 179 C A 2d 287

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21. U S —Quittner v Los Angeles Steel Casting Co, C A Cal, 202 F 2d 814

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§ 36. —— Counterclaim

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28. Miss —Carruth v Easterling, 150 So 2d 852, 247 Miss 364

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29. Ohio—Johnson v Sargent, 163 N E 2d 401, 109 Ohio App 16

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(2) Other statements

Fla —Jones-Mahoney Corp v C A Fielland, Inc, App, 114 So 2d 18

N C —General Tire & Rubber Co v Distributors, Inc, 111 S E 2d 614, 251 N C 406

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31. N C —Perfecting Service Co. v Product Development & Sales Co, 136 S E 2d 56, 261 N C 660

32. Iowa—In re Hoelscher's Estate, 87 N W 2d 446, 249 Iowa 444

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33 Neb —Tilden Bank v Retzlaff, 199 N W 2d 734, 188 Neb 834

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36. Okl —Myers v Vance, 406 P 2d 996

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S C —Bank of Augusta v Satcher Motor Co, 152 S E 2d 676, 249 S C 53.

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40. Cal —Stephans v Herman, 37 Cal Rptr 746, 225 C A.2d 671

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N Y —Mt Zion Baptist Church of Port Chester, Inc v Brown, 189 N Y S.2d 589, 23 Misc 2d 28—Norry v Land, 254 N Y S 2d 176, 44 Misc 2d 556

N D —Mahanna v Westland Oil Co, 107 N W 2d 353

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(2) Other statements

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N C —General Tire & Rubber Co v Distributors, Inc, 111 S E 2d 614, 251 N C 406

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44. N H —Van Miller v Hutchins, 384 A 2d 791, 118 N H 204

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49. Iowa—Harrington v. Polk County Federal Sav & Loan Ass'n of Des Moines, 196 N W 2d 543

61. Ohio—Sylvester v Evans, 160 N E 2d 142, 109 Ohio App 211

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S C—Few v Few, 122 S E 2d 829, 239 S C 321

70. Fla—Manning v Clark, 71 So 2d 508—Hardrives Co v East Coast Asphalt Corp, App, 166 So 2d 810

N C—First Nat Life Ins Co v Falconer, 158 S E 2d 793, 272 N C 702

Pa—Lech v Smith, 53 Sch L R 30—Hutchins v W Earl Bothwell, Inc, 39 West 17

S C—Gause v Jones, 85 S E 2d 402, 226 S C 390

Particular claims properly interposed

(6) Ariz—Technical Air Products, Inc v Sheridan-Gray, Inc, 445 P 2d 426, 103 Ariz 450

Fla—Barrett v Pickard, 85 So 2d 630

Ga—Howard Concrete Pipe Co v Cohen, 229 S E 2d 8, 139 Ga App 491

Ill—N Flyer & Son, Inc v Aronson, 163 N E 2d 241, 23 Ill App 2d 369

Mo—Church v Richfer Corp, 618 S W 2d 29

N J—New Jersey Highway Authority v Renner, 114 A 2d 555, 18 N J 485

N Y—Termini v John Arthur Exhibitions, Inc, 169 N Y S 2d 584, 9 Misc 2d 557, 833, affd 173 N Y S 2d 243, 5 A D 2d 973, app den 175 N Y S 2d 150, 6 A D 2d 689, motion dism 179 N Y S 2d 860, 5 N Y 2d 767, 154 N E 2d 139

N C—Burton v Dixon, 131 S E 2d 27, 259 N C 473

Ohio—Slick Airways, Inc v Reinert, 175 N E 2d 844, 114 Ohio App 124

Okl—Perrault v Holland, 360 P 2d 240

Or—State ex rel Nagel v Crookham, 680 P 2d 652, 297 Or 20

Pa—Atlas Credit Corp v Dolbow, 165 A 2d 704, 193 Pa Super 649

S C—Few v Few, 122 S E 2d 829, 239 S C 321—Norwood v Bryant, 172 S E 2d 108, 253 S C 551

S D—Bolzer v Hamilton, 103 N W 2d 183, 78 S D 388

Utah—Salt Lake City v Utah Lake Farmers Ass'n, 286 P 2d 773, 4 Utah 2d 14

71. Ga—Alexander v Citizens & Southern Nat Bank, 92 S E 2d 16, 212 Ga 295

Miss—Byars v Austin, 218 So 2d 11

N Y—Axiom Market Research Bureau, Inc v Times Mirror Magazine, Inc, 433 N Y S 2d 523, 107 Misc 2d 118

Pa—Chandler v Bashline, 25 D & C 2d 17—Davis v D'Ambrosio, 13 Chest 401

Particular claims not properly interposed

(5) Other claims

U S.—Redman Industries, Inc v Tower Properties, Inc, D C Ga, 517 F Supp 144

Conn—Russo v Harnett, 419 A 2d 351, 36 Conn Sup 315.

Ill.—People v Hoskins, 284 N E 2d 60, 5 Ill App 3d 831

Mich.—Peerless Woolen Mills v Chicago Garment Co, 79 N W 2d 500, 347 Mich 326

Pa—Glenruadh Ass'n, Inc, v Schuyler, 41 Erie 32—Ryer v Kiser, 72 York 44—Hirsch v Lingo, 20 D & C 2d 689—Keystate Ins Agency, Inc v Lebowitz, 80 Montg 265

S C—Southeastern Concrete Products Co v Powell Const. Co, 146 S E.2d 872, 247 S C. 279

72. S.C.—Insurance Financial Services, S E 2d 113, 275 S.C 155.

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74. Md.—E. J. Smith Const Co v Burton, 277 A.2d 84, 262 Md. 62.

N J—Friedlander v Gross, 164 A 2d 761, 63 N J Super 470

77. Pa—Wallace v Knudsen, 105 P L J 190

86. Idaho—John Hoene Implement, Inc v Peters, 327 P 2d 362, 80 Idaho 160

Ill—Midland Sporting Goods Co v Ferguson, 167 N E 2d 437, 25 Ill App 2d 477

Mich—Pacific Coast Capital Corp v Research to Realty, Inc, 225 N W 2d 177, 57 Mich App 75

88. Okl—Maupin v Ralston Purina Co, 395 P 2d 562

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91. Pa—Schmerling v Morrison, 79 Montg 226

"Allow" in statute construed as "permit"

S C—Collins v Johnson, 130 S E 2d 185, 242 S C 112

93. Okl—Sullivan v Wheeler, App, 566 P 2d 160

§ 37. —— Reconvention and Compensation

3. Claims held proper to reconvene

(1) La—Juneau v Laborde, 82 So 2d 693, 228 La 410—Muldrow v Jones, App, 85 So 2d 711—Texas Gas Transmission Corp v Gagnard, App, 223 So 2d 233

(4) Other claims

La—Cox v Cashio, App, 96 So 2d 872

Right to assert boundary action not unqualified

La—McDaniels v Miller, App, 136 So 2d 763

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5. La—Thomas v Thomas, App, 63 So 2d 468

Particular reconventional demands

(3) Other instances

La—Cox v Cashio, App, 96 So 2d 872

Reconvention permitted irrespective of domicile of parties

La—Viera v Kwik Home Services, Inc, App, 266 So 2d 732, writ ref 268 So 2d 258, 263 La 368

8. La—Lewis Hardware Co v Gremillion, App, 65 So 2d 807

§ 38. Connection with Subject of Action

14. Ga—Brewer v Williams, 80 S E 2d 190, 210 Ga 341

N C—Standard Amusement Co v Tarkington, 101 S E 2d 398, 247 N C 444

Tex—Skidmore v Cook, Civ App, 417 S W 2d 79, err dism

§ 39. —— Recoupment

16. Ala—Cooper v Reaves, 365 So 2d 670

Ga—Burton v Campbell Coal Co, 97 S E 2d 924, 95 Ga App 338

Va—City of Richmond v chesapeake & Potomac Tel Co of Va, 140 S E 2d 683, 205 Va 919

§ 40. —— Counterclaim

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18. U S—Matter of Penn Central Transp Co, D C Pa, 419 F Supp 1376

Ind—Trout v Brown, 123 N E 2d 647, 125 Ind App 381

Neb—Tilden Bank v Retzlaff, 199 N W 2d 734, 188 Neb 834

N Y—Sunshine v Rochester Independent Packers Co, Inc, 409 N Y S 2d 463, 64 A D 2d 1009

N.C—King v Libbey, 116 S E 2d 339, 253 N C 188

Okl—Perrault v Holland, 360 P 2d 240

19. Wis—Bolton v Chicago Title & Trust Co, 221 N W 2d 911, 64 Wis 2d 714

New facts, etc.

Ind—Moore v Boxman, 245 N E 2d 866, 144 Ind App 252

20. Conn—Boies v Matthies, Super, 178 A 2d 865, 23 Conn Sup 168

Ind—Trout v Brown, 123 N E 2d 647, 125 Ind App 381—Moore v Boxman, 245 N E 2d 866, 144 Ind App 252

21. Miss—Byars v Austin, 218 So 2d 11

Pa—Rossi v Gehris Motors, Inc, 83 Pa Dist & Co 88, 39 Del Co Leg J 149—Ross v Duzik, 27 Northumb L J 160—Hirsch v Lingo, 20 D & C 2d 689

Compulsive counterclaim

D C—Owens v Tiber Island Condominium Ass'n, App, 373 A 2d 890

23. N Y—Edelman v Edelman, 386 N Y S 2d 331, 88 Misc 2d 156

25. Conn—Nuclo v Associated Realty Corp, 158 A 2d 604, 22 Conn Sup 21

Okl—Barnett v Bodley, 348 P 2d 502

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26. Cal—Felix v Workmen's Compensation Appeals Bd, 116 Cal Rptr 345, 41 C A 3d 759

Conn—Seymour Water Co v Horischak, 181 A 2d 112, 149 Conn 435

Ga—Mickel v Pickett, 247 S E 2d 82, 241 Ga 528

Kan—Doss v McClelland, 348 P 2d 837, 186 Kan 173

Miss—Cappaert v Bierman, 339 So 2d 1355

N Y—Kennedy v Schnell, 136 N Y S 2d 912—Ames v Knobler, 241 N Y S 2d 697, 19 A D 2d 705, affd 200 N E 2d 772, 14 N Y 2d 879, 252 N Y.S 2d 86

N C—East Coast Oil Co v Fair, 164 S E 2d 482, 3 N C App 175—Watson v Carr, 166 S E 2d 503, 4 N C App 287, app after remand 175 S E 2d 733, 9 N C App 217

Ohio—Secrest v Standard Oil Co, 194 N E 2d 68, 118 Ohio App 270

Okl—Becker v State ex rel Department of Public Welfare, 312 P 2d 935

Pa—Ross v Duzik, 27 Northumb L J 160

S C—Carolina Mechanical Contractors, Inc v Yeargin Const Co, Inc, 198 S E 2d 224, 261 S C 1

Wis—Guschl v Schmidt, 63 N W 2d 759, 266 Wis 410

27. N C—Kersey v Smith, 114 S E 2d 117, 252 N C 468

31. U S—Slaff v Slaff, D C N Y, 151 F.Supp 124

Colo—Bohlender v Oster, 439 P 2d 999, 165 Colo 164.

Conn—Boies v Matthies, Super, 178 A 2d 865, 23 Conn Sup 168

Del—Wilderman v Wilderman, Ch, 315 A 2d 610

D C—Baylor v Bortolussi, App, 194 A 2d 653.

Ohio—Gronbach v Millar, App, 144 N E 2d 307.

Pa—Pizor v Palumbo, 137 A 2d 279, 391 Pa. 146

Wis—Bolton v Chicago Title & Trust Co, 221 N.W 2d 911, 64 Wis 2d 714

Particular claims

(7) Other claims

Conn—Nuclo v Associated Realty Corp, 158 A 2d 604, 22 Conn.Sup. 21

Ill—Pleasure Driveway and Park Dist of Peoria v Kurek, 325 N E 2d 650, 27 Ill App 3d 60

Miss—Irby v. Citizens Nat Bank of Meridian, 121 So 2d 118, 239 Miss 64

Neb.—Weller v Putnam, 171 N W 2d 767, 184 Neb 692.

N.H—Varney v General Enolam, Inc, 257 A 2d 11, 109 N H 514

N C—Kersey v Smith, 114 S E 2d 117, 252 N C 468

32. Fla—Du Pont Plaza, Inc v Samuel Kipnis Family Foundation, App, 132 So 2d 352

N J—Galler v Slurzberg, 92 A 2d 89, 22 N J Super 477

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33. Cal —Royal Indem Co v Security Truck Lines, 27 Cal Rptr 858, 212 C A 2d 61

34. N.Y —Moser v Fieland, 158 N Y S 2d 1020, 5 Misc 2d 937

43. N C —Wrenn v Graham, 74 S E 2d 232, 236 N C 719

Other statement of rule

N C —Watson v Carr, 166 S E 2d 503, 4 N C App 287, app after remand 175 S E 2d 733, 9 N C App 217

44. Okl —Abbott v McCoy, 254 P 2d 997, 208 Okl 224

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52. Conn —United Const Workers v H O Canfield Co, 116 A 2d 914, 19 Conn Sup 450

S C.—Gause v Jones, 85 S E 2d 402, 226 S C 390

60. La —C.J.S. quoted in Cox v Cashio, App, 96 So 2d 872, 876

§ 41. Character of Claim as on Contract or in Tort

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63. Ark —Ramsay v Roberts, 403 S W 2d 57, 240 Ark 943

65. Ga.—Gillespie v Georgian Finance & Inv Corp, 147 S.E 2d 465, 113 Ga App 134

66. Ga —Heard v. Melin, 131 S E 2d 131, 107 Ga App 772—Gillespie v Georgian Finance & Inv Corp., 147 S.E 2d 465, 113 Ga.App 134

71. Cal —Sylvester v Soulsburg, 60 Cal Rptr 218, 252 C A.2d 185

72. Ga.—Gillespie v Georgian Finance & Inv Corp, 147 S.E 2d 465, 113 Ga App 134

73. Ga —Gillespie v. Georgian Finance & Inv Corp, 147 S.E 2d 465, 113 Ga App 134

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79. Ga —Bennett v Stroupe, 157 S E 2d 161, 116 Ga.App 265

95. Ga —Powell v Barker, 101 S E 2d 113, 96 Ga App. 592—Heard v Melin, 131 S E.2d 131, 107 Ga.App 772—Gillespie v Georgian Finance & Inv Corp, 147 S E.2d 465, 113 Ga.App. 134

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1. Ga —Gordy Tire Co v Dayton Rubber Co., 114 S.E.2d 529, 216 Ga. 83

La.—Calvert Fire Ins Co v Lewis, 93 So 2d 194, 231 La 859

Nature of opposing claims

(1) Ga.—Altman v Florida-Georgia Tractor Co, 122 S E 2d 88, 217 Ga 292—Gillespie v Georgian Finance & Inv Corp, 147 S E 2d 465, 113 Ga App 134.

2. Okl.—Maupin v. Ralston Purina Co, 395 P.2d 562

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22. Ga.—Altman v Florida-Georgia Tractor Co, 122 S.E.2d 88, 217 Ga 292.

23. Ga.—Altman v Florida-Georgia Tractor Co, 122 S E.2d 88, 217 Ga 292—Thomas v Adrian Finance Corp., 138 S E 2d 685, 110 Ga App 424—Gillespie v Georgian Finance & Inv Corp, 147 S E.2d 465, 113 Ga.App 134

24. Ga.—Altman v Florida-Georgia Tractor Co, 122 S.E.2d 88, 217 Ga. 292—Thomas v Adrian Finance Corp., 138 S E 2d 685, 110 Ga App. 424—Gillespie v. Georgian Finance & Inv Corp, 147 S.E.2d 465, 113 Ga App 134

26. Ga —Brewer v Williams, 80 S E 2d 190, 210 Ga 341

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35. Ill —Williams v Johnson, 130 N E 2d 123, 8 Ill App 2d 99

36. U S —Riverside Memorial Mausoleum, Inc v UMET Trust, C A Pa, 581 F 2d 62

Ga —Dixie Home Builders, Inc v Waldrip, 246 S E 2d 471, 146 Ga App 464

43. Fla —Du Pont Plaza, Inc v Samuel Kipnis Family Foundation, App, 132 So 2d 352

45. N C —Commercial Credit Corp v Robeson Motors, 90 S E 2d 886, 243 N C 326, 54 A L R 2d 1337—General Tire & Rubber Co v Distributors, Inc, 111 S E 2d 614, 251 N C 406

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54. Okl —Pearce v Plumer, 250 P 2d 846, 207 Okl 499

63. Ga —Watson v Davis, 103 S E 2d 182, 97 Ga App 378—Larisey v Hill, 159 S E 2d 443, 117 Ga App 152, app after remand 165 S E 2d 315, 118 Ga App 699

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64. U S —Northeast Airlines, Inc v World Airways, Inc, D C Mass, 262 F Supp 316

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Neb —Tilden Bank v Retzlaff, 199 N W 2d 734, 188 Neb 834

N C —First Nat Life Ins Co v Falconer, 158 S E 2d 793, 272 N C 702

Pa —Girard Discount Co v Layton, 36 D & C 2d 560, 53 Del Co 125—King's Equipment Leasing, Inc v Stricker's Bldg Blocks, 80 York 45

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(1) Pa —Buckwalter, Inc v Betts, 71 Montg 193—Baldini v Kuholski, 42 Erie 20—McConnell & Breiden v Lee Templeton Motor Co, 68 Montg Co 215

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67. Pa —Girard Discount Co v. Layton, 36 D & C 2d 560, 53 Del Co. 125

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71. Conn —Springfield-De Witt Gardens, Inc v Wood, 125 A 2d 488, 143 Conn 708

72. Conn —Springfield-De Witt Gardens, Inc v Wood, 125 A 2d 488, 143 Conn 708.

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81. Tex —Frost v De Bogory, Civ App., 291 S W 2d 414

92. Neb —Benes v Matulka, 157 N W 2d 382, 182 Neb 744

93. Ind —Jones v Castor, 214 N E.2d 180, 140 Ind App 342

94. N.Y —Halpern v Hindin, 141 N Y.S 2d 799

97. Mo —Bauer v Rutter, App, 256 S W.2d 294

§ 42. Liquidated and Unliquidated Demands

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N Y —124 Ferry St Realty Corp v Lefkowitz, 448 N Y S 2d 802, 86 A D 2d 928

23. U S —U S for Use and Benefit of A & W Concrete & Bldg Materials, Inc v A P Johnson Contractor, Inc, D C La, 225 F Supp 727

26. U S —Stanley v Clark, D C N H, 159 F Supp 65

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Ill —Olin Mathieson Chemical Corp v J J Wuellner & Sons, Inc, 218 N E 2d 823, 72 Ill App 2d 488

Va —City of Richmond v Chesapeake & Potomac Tel Co of Va, 140 S E 2d 683, 205 Va 919

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30. U S —Industrial Equipment & Marine Services, Inc v M/V Mr Gus, D C Tex, 333 F Supp 578—Maheu v Hughes Tool Co., C A Cal, 569 F 2d 459

Ariz —Nutter v Occidental Petroleum Land & Development Corp, App, 573 P 2d 532, 117 Ariz 458

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Mo —Edmonds v Stratton, App, 457 S W 2d 228

N Y —Termini v John Arthur Exhibitions, Inc, 169 N Y S 2d 584, 9 Misc 2d 557, 833, affd 173 N Y S 2d 243, 5 A D.2d 973, app den 175 N.Y S 2d 150, 6 A D 2d 689, motion dism 179 N Y S 2d 860, 5 N Y 2d 767, 154 N E 2d 139

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35. Set off allowed before computation of interest

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58. Cal —Hauger v Gates, 269 P 2d 609, 42 C 2d 752—Sausser v Barrack, 266 P 2d 231, 123 C A 2d Supp 948

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§ 43. —— What Constitutes

68. La—C J.S. black letter summary quoted in Olinde Hardware & Supply Co, Inc v Ramsey, App, 98 So 2d 835, 843

73. U S—Allis-Chalmers Corp v Philadelphia Elec Co, D C Pa, 64 F R D 135, app dism, vac and remd, C A, 521 F 2d 360

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88. La—C.J S. quoted in Olinde Hardware & Supply Co v Ramsey, App, 98 So 2d 835, 843

§ 44. Legal and Equitable Claims or Demands

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38. Va—City of Richmond v Chesapeake & Potomac Tel Co of Va, 140 S E 2d 683, 205 Va 919

44. Fla—Du Pont Plaza, Inc v Samuel Kipnis Family Foundation, App, 132 So 2d 352

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46. Cal—Fibreboard Paper Products Corp v East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, 39 Cal Rptr 64, 227 C A 2d 675

47. Cal—Fibreboard Paper Products Corp v East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, 39 Cal Rptr 64, 227 C A 2d 675

48. Or—Chadwick v Lakeview Mfg Co, 301 P 2d 1042, 208 Or 452—Nielsen v Ferrenburg, 431 P 2d 841, 247 Or 605

§ 45. Secured Claims

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61. Wash—Topline Equipment, Inc v Stan Witty Land, Inc, 639 P 2d 825, 31 Wash App 86

§ 48. Parties to, and Mutuality of, Cross Demands

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N H—In re Estate of Borkowski, 410 A 2d 1121, 120 N H 54

N Y—C.J S black letter summary quoted in Diesel Motors Co, Inc v Kaye, 345 N Y S 2d 870, 875, 74 Misc 2d 302

N C—C.J S. cited in In re Battery King Mfg Co, 83 S E 2d 490, 493, 240 N C 586

S C—Palmetto Production Credit Ass'n v Willson, 183 S E 2d 565, 257 S C 13

Tenn—Julian Engineering Co v R J & C W Fletcher, Inc, 253 S W 2d 743, 194 Tenn 542

Tex—Frost v De Bogory, Civ App, 291 S W 2d 414

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80. U S—Zion v Sentry Safety Control Corp, C A Pa, 258 F 2d 31—Bulasky v Federal Deposit Ins Corp, C A Cal, 442 F 2d 341

Cal—Eistrat v Humiston, 324 P 2d 957, 160 C A 2d 89

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La—Ben C Penn and Son v Thompsons Packers, Inc, App, 169 So 2d 259

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N Y—Drake v Pierce Butler Radiator Corp, 116 N Y S 2d 712, 202 Misc 935, 943

S C—South Carolina Nat Bank, Greenville v Hammond, 198 S E 2d 123, 260 S C 622

Tex—Longhorn Flying Club, Inc v Dragoo, Civ App, 464 S W 2d 189, err ref no rev err

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84. U S—Plant v Blazer Financial Services, Inc of Georgia, C A Ga, 598 F 2d 1357, 51 A L R Fed 493, reh den 605 F 2d 555

Ind—Powers v Ellis, 108 N E 2d 132, 231 Ind 273

88. Pa—Barium Steel Corp v Wiley, 108 A 2d 336, 379 Pa 38

90. Pa—Expan Const v Mariotti, 16 Law L J 125

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93. **Set-off not appropriate**

N Y—Baker v Baker, 233 N Y S 2d 741, 17 A D 2d 924

In other actions or proceedings by the wife against the husband, a set-off has been denied [94.5]

94.5. Cal—Williams v Williams, 87 Cal Rptr 754, 8 C A 3d 636

In other actions by the husband against the wife a set-off has been denied [95.1]

95.1 Mass—Peteros v Peteros, 104 N E 2d 149, 328 Mass 416

96. Ark—Martin v Romes, 462 S W 2d 460, 249 Ark 927

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D C—Sears, Roebuck & Co v Goudie, App, 290 A 2d 826, cert den 93 S Ct 523, 409 U.S 1049, 34 L Ed 2d 501

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97. Ala—Corona v Southern Guaranty Ins Co, Inc, 314 So 2d 61, 294 Ala 184

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N Y—F H Loeffler Co, Inc v Port, 337 N Y S 2d 570, 40 A D 2d 900

S C—White v Jackson, 166 S E 2d 211, 252 S C 274

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9. Fla—Stark v Marshall, 67 So 2d 235

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20. Ga—Peckham v Metro Steel Co, 191 S E 2d 559, 126 Ga App 685

22. U S—Lewis v Benedict Coal Corp, C A Penn, 259 F 2d 346, cert gr 79 S Ct 581, 359 U S 905, 3 L Ed 2d 570

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28. N Y—Ruzicka v Rager, 111 N E 2d 878, 305 N Y 191, 39 A L R 2d 288

29. Ga—Peckham v Metro Steel Co, 191 S E 2d 559, 126 Ga App 685

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34. La—Pringle-Associated Mortg Corp v Cox, 246 So 2d 841, 258 La 499

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37. N.Y.—City of Utica v Gold Medal Packing Corp, 283 N Y S 2d 603, 54 Misc 2d 721, mod on oth grds 297 N Y S 2d 166, 31 A D 2d 730

38. Cal—Dabney v Shippey, 115 Cal.Rptr 526, 40 C.A 3d 990

Corporation has no set off against plaintiff in stockholder's derivative action

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40. N Y—Aschkenasy v Teichman, 210 N Y S 2d 593, 12 A D 2d 904

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60. Plaintiff suing both individually and as administrator

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71. Debt extinguished by confusion

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Equitable estoppel held not to justify offset—Broaddus v Gresham, 26 S E 2d 33, 181 Va 725

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6. N Y—Schultz v. Wilson, 297 N Y S 2d 478, 59 Misc 2d 14

Tex—Brook Mays Organ Co, Inc v Sondock, Civ App, 551 S W 2d 160, err ref no rev err

8. N C—King v Libbey, 116 S E 2d 339, 253 N C 188.

Pa—Firstenberg v Bennett, 45 Del Co 261

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10. U S—Federal Deposit Ins Corp v Mademoiselle of Cal, C A Cal, 379 F 2d 660

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98. S C—White v Jackson, 166 S E 2d 211, 252 S C 274

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28. N Y—Goldberg v Rothman, 322 N Y S 2d 931, 66 Misc 2d 981

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86. N Y—Frank v Amicale Yarns, Inc, 148 N Y S 2d 727

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13. Prohibition applicable only to counterclaims in nature of set off

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(3) Amendment held not to bar counterclaims in nature of recoupment

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35. U S—Skinner v W T Grant Co, C.A La, 642 F 2d 981.

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58. N Y—Segal Lock & Hardware Co v Markey, 124 N Y S.2d 181

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71. Cal.—Koffman v. Modern-Imperial Co, 48 Cal Rptr 492, 239 C A 2d 135

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6. Kan.—Security State Bank of Great Bend v Midwest Foundry, 277 P.2d 629, 177 Kan 151, 51 A L R 2d 882

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38. US—Commerce Mfg Co v Blue Jeans Corp, D C N C, 146 F Supp 15—Susi v Belle Acton Stables, Inc, D C N Y, 261 F Supp 219—Browning v Swift & Co, C A Wis, 388 F 2d 78

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39. US—US v Industrial Crane & Mfg Corp, C A Ala, 492 F 2d 772

44. US—Commerce Mfg Co v Blue Jeans Corp, D C N C, 146 F Supp 15

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US—Baker v National City Bank of Cleveland, D C Ohio, 387 F Supp 1137, affd, C A, 511 F 2d 1016

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47. US—Saxis S S Co v Multifacs Intern Traders, Inc, C A N Y, 375 F 2d 577

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69. US—Harrison v Bloomfield Bldg Industries, Inc, C A Tenn, 435 F 2d 1192

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8. US—American Training Service, Inc v Commerce Union Bank, D C Tenn, 415 F Supp 1101, affd, C A, 612 F 2d 580

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§ 56. Availability of Assigned Claim as against Assigned Cause of Action

21. Unliquidated demand

(2) Other instances

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24. S.C—Gambrell v Cox, 157 S E 2d 233, 250 S.C 228.

§ 57. Waiver of Objections

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44. Or—Glaser v Slate Const. Co, 251 P 2d 441, 196 Or. 625—Chadwick v Lakeview Mfg Co, 301 P 2d 1042, 208 Or 452.

Va—Jetco, Inc v. Bank of Va, 165 S E 2d 276, 209 Va 482.

Also, an objection to a counterclaim may be waived by failure to either demur thereto or object to the introduction of evidence thereunder.[46.5]

46.5. Or—Chadwick v Lakeview Mfg Co, 301 P 2d 1042, 208 Or. 452

§ 58. Compensation Between Cross Demands in General

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49 US—Rayco Mfg Co v Dunn, D C Ill, 234 F Supp 593—In re Lehigh & H R Ry Co, 468 F 2d 430

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N J—Four-G Corp v Ruta, 131 A 2d 566, 45 N J Super 128, revd on oth grds 138 A 2d 18, 25 N J 503

N Y—In re General Assignment for Benefit of Creditors of Tiffany Lingerie, Inc, 208 N Y S 2d 471, 28 Misc 2d 96

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Mont—Agrilease, Inc v Gray, 566 P 2d 1114, 173 Mont 151

50. Cal—Murchison v Murchison, 33 Cal Rptr 285, 219 C A 2d 600

La—Lewis Chevrolet Co v Whitener, App, 122 So 2d 880—Cefalu v N Cefalu Co, App, 253 So 2d 547—Cox v W M Heroman & Co, Inc, 298 So 2d 848

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Cal—Murchison v Murchison, 33 Cal Rptr 285, 219 C A 2d 600

51. Iowa—National Equipment Rental, Ltd v Estherville Ford, Inc, 313 N W 2d 538

N J—Deerhurst Estates v Meadow Homes, Inc, 165 A 2d 543, 64 N J Super 134, on remand 176 A 2d 555, 71 N J Super 255

52. Ind—Ertel v Radio Corp of America, 354 N E 2d 783, 171 Ind App 51.

N M—Jones v McWood Corp, 418 P 2d 56, 76 N M 709

53. Ala—Southern Metal Treating Co v Goodner, 125 So 2d 268, 271 Ala 510

54. Ariz—Pacific Guano Co v Pinal County Land Co, 399 P 2d 122, 1 Ariz App 34

N Y—Miller v Bristol Tool & Forging Corp, 142 N Y S 2d 828—Casale v August Bohl Contracting Co, 275 N Y S 2d 140, 26 A D 2d 974

56. D C—Matthew A Welch & Sons, Inc v Bird, D C App, 193 A 2d 736

Mont—Swecker v Badura, 377 P 2d 752, 141 Mont 329

58. Ill—Williams v Johnson, 130 N E 2d 123, 8 Ill App 2d 99

Tex—Expinoza v Victoria Bank & Trust Co, Civ App, 572 S W 2d 816, err ref no rev err

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61. US—US v Ameco Electronic Corp, D C N Y, 224 F Supp 783

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La—Standard Roofing Co, Inc v Ragusa Bros, Inc, App., 338 So 2d 119

Wis—Bunde v Badger Carpet Dyers, Inc, 55 N W 2d 869, 262 Wis 621

62. La—Cefalu v N Cefalu Co, App, 253 So 2d 547

69. N J—C.J.S. cited in Hobson Const. Co, Inc v Max Drill, Inc, 385 A 2d 1256, 1258, 158 N J Super 263

71. Ohio—Betz v Timmons, 199 N E 2d 22, 119 Ohio App 239.

72. D C—Valanos v Telecode Corp, Mun App, 138 A 2d 388

Ill—Williams v Johnson, 130 N E 2d 123, 8 Ill App 2d 99

N.Y—In re General Assignment for Benefit of Creditors of Tiffany Lingerie Inc, 208 N.Y S 2d 471, 28 Misc 2d 96

74. Kan—Phelps Dodge Copper Products Corp v Alpha Const Co, 455 P 2d 555, 203 Kan 591

75. Colo—York Plumbing & Heating Co v Grossman Inv Co, 443 P 2d 986, 166 Colo 382

N J—Deerhurst Estates v Meadow Homes, Inc, 165 A 2d 543, 64 N J Super 134, on remand 176 A 2d 555, 71 N J Super 255

76. Character of plaintiff's claim unchanged by pleading

Cal—California Lettuce Growers v Union Sugar Co, 289 P 2d 785, 45 C 2d 474, 49 A L R 2d 496

78. N J—Deerhurst Estates v Meadow Homes, Inc, 165 A 2d 543, 64 N J Super 134, on remand 176 A 2d 555, 71 N J Super 255

§ 59. Election of Defendant to Interpose Cross Demand or Bring Independent Action

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82. US—Texas Gulf Citrus and Cattle Co v Kelley, C A Ark, 591 F 2d 439

Ala—Eatman v Goodson, 78 So 2d 625, 262 Ala 242

Del—In re Arthur Treacher's Fish & Chips of Ft Lauderdale, Inc, Ch, 386 A 2d 1162

Ga—P & J Truck Lines, Inc v Canal Ins Co, 251 S E 2d 72, 148 Ga App 3

Ind—Brademas v Carriage House of Mishawaka II, App, 413 N E 2d 991

La—Union Service & Maintenance Co, Inc v Powell, 393 So 2d 94

Mo—Harris v Nola, App, 537 S W 2d 636

N J—Middlesex Concrete Products & Excavating Corp v Borough of Carteret in Middlesex County, 113 A 2d 821, 35 N J Super. 226

R I—Turner v Domestic Inv & Loan Corp, 375 A 2d 956, 119 R I 29

Tex—Fox v Fox, Civ App, 526 S W 2d 180

Utah—National Sur Corp v Christiansen Bros, Inc, 511 P 2d 731, 29 Utah 2d 460

Counterclaim not barred

Ala—Arata v Gustin, Civ App, 410 So 2d 102

N C—Stines v Satterwhite, 294 S E.2d 324, 58 N C App 608

Wyo—Opheim v United Mobile Homes, Inc, 511 P 2d 1289

Res judicata

Ark—Bowen v Danna, 632 S.W 2d 234, 4 Ark App 232

Ga—First Federal Sav & Loan Ass'n of Detroit v I T S R E, Ltd, 285 S E 2d 593, 159 Ga.App 861

Ill—Block & Co, Inc v Storm Printing Co, 351 N E 2d 271, 40 Ill App 3d 92

Actions not required to be joined

Ind—Criss v Johnson, 348 N E 2d 63, 169 Ind App 306

Mo—Brown v Harrison, App, 637 S W 2d 145

N C—Curlings v Macemore, 290 S E 2d 725, 57 N.C App 200

Cross claim as permissive

Hawaii—Thomas v State, 562 P 2d 425, 57 Haw 639

Under some statutes or court rules, counterclaims may be mandatory or compulsory.[82.5]

82.5. Ariz—Di Orio v City of Scottsdale, 408 P 2d 849, 2 Ariz App 329

Ark—May v Exxon Corp, 512 S W 2d 11, 256 Ark 865.

Cal—Bewley v Riggs, 68 Cal Rptr 520, 262 C A 2d 188—Dunzweiler v Superior Court of Alameda County, 73 Cal Rptr 331, 267 C A 2d 569

Fla—City of Miami Beach v Ellis, App, 279 So 2d 335.

Ga—Georgia Power Co v Jones, 178 S E 2d 265, 122 Ga App 614

Mo—Laclede Gas Co. v Solon Gershman, Inc, App., 539 S W 2d 574

N C—vanDooren v vanDooren, 246 S E 2d 20, 37 N C App 333, cert den 248 S E 2d 258, 295 N C 653

R I—Grasso v Byrd, 417 A 2d 911

Tex—Andel v Eastman Kodak Co, Civ App, 400 S W 2d 584

Distinction between judicial and nonjudicial actions

Mo—Westoak Realty & Inv, Inc v Hernandez, App, 682 S W 2d 120

Purpose of rule

Ariz—O'Brien v Scottsdale Discount Corp, 482 P 2d 473, 14 Ariz App 224

Ark—Smith v Cruthis, 499 S W 2d 852, 255 Ark 217

D C—District of Columbia v Morris, App, 367 A 2d 571

Hawaii—Bailey v State, 552 P 2d 365, 57 Haw 144

Iowa—Employers Mut Cas Co v Hanshaw, 176 N W 2d 653—Harrington v Polk County Federal Sav & Loan Ass'n of Des Moines, 196 N W 2d 543

Nev—Great Western Land & Cattle Corp v Sixth Judicial Dist Court, 467 P 2d 1019, 86 Nev 282

N J—Wm Blanchard Co v Beach Concrete Co, Inc, 375 A 2d 675, 150 N J Super 277

R I—Abedon v Providence Redevelopment Agency, 348 A 2d 720, 115 R I 512

S D—Olawsky v Clausen, 212 N W 2d 653, 87 S D 578

Tex—Chem-Gas Engineers, Inc v Texas Asphalt & Refining Co, Civ App, 398 S W 2d 143—Western Inn Corp v Heyl, Civ App, 452 S W 2d 752, err ref no rev err

Statute construed

Ark—Farm Bureau Mut Ins Co of Arkansas, Inc v Robinson, 562 S W 2d 53, 262 Ark 850

Cal—Manning v Wymer, 78 Cal Rptr 600, 273 C A 2d 519—Ranchers Bank v Pressman, 97 Cal Rptr 78, 19 C A 3d 612

Ga—Blease v Blease, 235 S E 2d 21, 238 Ga 651

Ill—Keith v B & B Builders Supply, Inc, 428 N E 2d 1194, 57 Ill Dec 514, 101 Ill App 3d 1123

Ind—Hunter v Milhous, 305 N E 2d 448, 159 Ind App 105

Kan—Haysville State Bank v Hauserman, 594 P 2d 172, 225 Kan 671

N C—Faggart v Biggers, 197 S E 2d 75, 18 N C App 366, cert den 198 S E 2d 721, 283 N C 752

N J—Wm Blanchard Co v Beach Concrete Co, Inc, 375 A 2d 675, 150 N J Super 277

Okl—Meyer v Vance, 406 P 2d 996

Exemptions from rule

U S—Conney v Erickson, D C Wis, 251 F Supp 986

Ga—Harbin Lumber Co, Inc v Fowler, 222 S E 2d 878, 137 Ga App 90

Mo—Prentzler v Schneider, 411 S W 2d 135

Pa—Oak Lane Shopping Center, Inc v Flame, 398 A 2d 721, 264 Pa Super 9

R I—Lemieux v American Universal Ins Co, 360 A 2d 540, 116 R I 685

Tex—Prassel Const Co v Van Delden Const Co, Civ App, 562 S W 2d 542, err ref no rev err

Counterclaims which are compulsory

U S.—Edwards v Arkansas Power & Light Co, C A Ark., 683 F 2d 1149

Ala—Redmond v Harrelson, 355 So 2d 356.

Ariz—O'Brien v Scottsdale Discount Corp, 482 P 2d 473, 14 Ariz App 224—Slonsky v Hunter, 496 P 2d 874, 17 Ariz App 231

Cal—Ranchers Bank v Pressman, 97 Cal Rptr 78, 19 C.A 3d 612

Colo.—Visual Factor, Inc v. Sinclair, 441 P 2d 643, 166 Colo 22—Corbin Douglass, Inc v Kelley, 472 P 2d 764, 28 Colo App 369

D.C.—Owens v Tiber Island Condominium Ass'n, App, 373 A 2d 890

Fla—Ocean Ridge Development Corp. v. Quality Plastering, Inc, App, 247 So 2d 72—McDonald Air Conditioning v 1041 Corp, App., 251 So.2d 319—Stone v. Pembroke Lakes Trailer Park, Inc, App, 268 So 2d 400—Evans v Parker, App 1 Dist, 440 So 2d 640

Ga—Blount v Kicklighter, 186 S E 2d 543, 125 Ga App 159

Hawaii—Marks v Marks, 465 P 2d 996, 51 Haw 548

Ind—Middelkamp v Hanewich, 364 N E 2d 1024, 173 Ind App 571

Iowa—Employers Mut Cas Co v Hanshaw, 176 N W 2d 653—Harrington v Polk County Federal Sav & Loan Ass'n of Des Moines, 196 N W 2d 543

Ky—Ecker v Clark, 428 S W 2d 620

Mich—Sahn v Brisson's Estate, 204 N W 2d 692, 43 Mich App 666

Mo—Harris v Nola, App, 537 S W 2d 636

N J—Wm Blanchard Co v Beach Concrete Co, Inc, 375 A 2d 675, 150 N J Super 277

N C—Powell Mfg Co, Inc v Harrington Mfg Co, Inc, 226 S E 2d 173, 30 N C App 97, cert allowed and app dism 228 S E 2d 454, 290 N C 662, app dism 97 S Ct 722, 429 U S 1031, 50 L Ed 2d 743

N D—Graven v Backus, 163 N W 2d 320—Leo Lumber Co v Williams, 191 N W 2d 573

Ohio—Sapp v Azar, 373 N E 2d 397, 53 Ohio App 2d 277, 7 O O 3d 332—Geauga Truck & Implement Co v Juskiewicz, 457 N E 2d 827, 9 Ohio St 3d 12, 9 O B R 61

R I—Duffy v Mollo, 400 A 2d 263, 121 R I 480

Tenn—Quelette v Whittemore, App, 627 S W 2d 681

Tex—Western Inn Corp v Heyl, Civ App, 452 S W 2d 752, err ref no rev err—Price v Couch, 462 S W 2d 556—Burris v Kurtz, Civ App, 462 S W 2d 347, err ref no rev err

W Va—Carper v Kanawha Banking & Trust Co, 207 S E 2d 897, 157 W Va 477

Counterclaims not compulsory

U S—Cox v Miles, C A N J, 420 F 2d 279—Sood v Advanced Computer Techniques Corp, D C Va, 308 F Supp 239—Bryant Elec Co, Inc v Joe Ramero Tile Co, Inc, D C Va, 84 F R D 120

Ala—Maxcy v Twilley, 271 So 2d 243, 289 Ala 681

Ariz—Patrick v Associated Drygoods Corp (Goldwater's Division), 509 P 2d 1043, 20 Ariz App 6

Ark—Bowen v Danna, 632 S W 2d 234, 4 Ark App 232

Cal—Manning v Wymer, 78 Cal Rptr 600, 273 C A 2d 519

Colo—Bohlender v Oster, 439 P 2d 999, 165 Colo 164—Beathune v Cain, 494 P 2d 603, 30 Colo App 321

Fla—Bratcher v Wronkowski, App 5 Dist 417 So 2d 1132, rev den 424 So 2d 760

Ga—Watts v Kundtz, 197 S E 2d 859, 128 Ga App 797

Ind—Whipple v Dickey, App, 401 N E 2d 787

Iowa—Associated Grocers of Iowa Co-op, Inc v West, 297 N W 2d 103

Kan—Stanturf v Quality Dodge, Inc, 596 P 2d 1247, 3 Kan App 485

Md—Murphy v Board of County Com'rs, 284 A 2d 261, 13 Md App 497

Mass—Volpe Const Co, Inc v Trustees of Tufts College, 294 N E 2d 476, 1 Mass App 38

Minn—Mickelson v Rosenberg, 190 N W.2d 82, 291 Minn 176

Mont—Citizens State Bank v Duus, 459 P 2d 696, 154 Mont 18

N C—Faggart v Biggers, 197 S E 2d 75, 18 N C App 366, cert den 198 S E 2d 721, 283 N C 752

Ohio—Harley E Rouda & Co v Springtime Co, 359 N E 2d 450, 49 Ohio App 2d 49, 3 O O 3d 116

Or—Burlington Northern Inc v Lester, 617 P 2d 906, 48 Or App 579

Pa—Martin v Poole, 336 A.2d 363, 232 Pa Super 263

S C—Stanley v United Ins Co of America, 258 S E 2d 432, 273 S C 626

S D—Staab v Skoglund, 234 N W 2d 45, 89 S D 470

Tenn—Houseboating Corp of America v Marshall, 553 S W 2d 588

Tex—Security State Bank and Trust v Craighead, Civ App, 440 S W 2d 701, err ref no rev err—Rowland v Prappas, Civ App, 491 S W 2d 179, err ref no rev err

Vt—First Nat Bank of Boston v Avtek, Inc, 360 A 2d 80, 134 Vt 392

Wash—Nautilus, Inc v Transamerica Title Ins Co of Washington, 534 P 2d 1388, 13 Wash App 345

Waiver

Fla—Russell's Custom Home Repair, Inc v O'Donnells Auto Service, App 2 Dist, 411 So 2d 356

Ga—Kitchens v Lowe, 228 S E 2d 923, 139 Ga App 526

Ind—Monroe v Strecker, 355 N E 2d 418, 171 Ind App 100—Gumz v Starke County Farm Bureau Co-op Ass'n, Inc, 395 N E 2d 257, 271 Ind 694

Ohio—Rosenberg v Gattarello, 359 N E 2d 467, 49 Ohio App 2d 87, 3 O O 3d 151

83. Must be affirmatively pleaded

Ala—Brooks v Peoples Nat Bank of Huntsville, 414 So 2d 917

Tex—Hemphill v Greater Houston Bank, Civ App, 537 S W 2d 124

§ 60. Admission of Plaintiff's Cause of Action

90. Ala—Davis v Evans, 74 So 2d 705, 261 Ala 548, 48 A L R 2d 740

94. Ala—Jackson v Cantrell, App, 61 So 2d 459

La—Pillsbury Mills, Inc v Chehardy, 90 So 2d 797, 231 La 111

Minn—O'Brien v Kemper, 149 N W 2d 487, 276 Minn 202

Set-off held not a waiver of general issue or plaintiff's failure to prove cause of action

R I—Stern & Co, Inc, of Rhode Island v J P Brady Co, 115 A 2d 523, 83 R I 246

95. Ala—Davis v Evans, 74 So 2d 705, 261 Ala 548, 48 A L R 2d 740

5. Minn—Carlson v Cohen, 223 N W 2d 810, 302 Minn 531

7. La—Tolbird v Cooper, 143 So 2d 80, 243 La 306

8. La—Wadlington v Barron, App, 91 So 2d 448

9. La—Wadlington v Barron, App, 91 So 2d 448

§ 61. Right to Judgment for Excess Over Plaintiff's Cause of Action

Library References

Set-Off and Counterclaim ⇐59.

13. U S.—L W Foster Sportswear Co v U S, D C Pa, 145 F Supp. 148—U S for Use and Benefit of Greenville Equipment Co v U S Cas Co, D C Del, 218 F Supp 653—Multivision Northwest, Inc v Jerrold Electronics Corp, D C Ga, 356 F Supp 207

Del—Floyd v Ballenger, Super, 258 A 2d 911.

Md—District Agency Co v Suburban Delivery Service, Inc, 167 A 2d 874, 224 Md 364

N Y—Title Guarantee & Trust Co v Hicks, 127 N Y S 2d 340, 283 App.Div. 723, rearg. and app den. 129 N.Y S 2d 776, 283 App Div 874.

Or—Rogue River Management Co v Shaw, 411 P 2d 440, 243 Or 54

Va—City of Richmond v Chesapeake & Potomac Tel Co of Va, 140 S E 2d 683, 205 Va 919

W.Va—Ballengee v Whitlock, 74 S E 2d 780, 138 W Va 58.

14. U S—Stanley v Clark, D C N.H, 159 F Supp 65

Cal—Nelson v. Spence, 6 Cal Rptr 312, 182 C A 2d 493

Iowa—Kaltoft v Nielsen, 106 N W 2d 597, 252 Iowa 249

Mich—Lewis v Zukerman, 98 N W 2d 566, 357 Mich. 326

N H —Varney v General Enolam, Inc, 257 A 2d 11, 109 N H 514

17. N Y —C.J S quoted in Schenck v Coordinated Coverage Corp, 376 N Y S 2d 131, 134, 50 A D 2d 50

Or —Rogue River Management Co v Shaw, 411 P 2d 440, 243 Or 54

18. U S —Lewis v Benedict Coal Corp, Tenn, 80 S Ct 489, 361 U S 459, 4 L Ed 2d 442

Mo —Edmonds v Stratton, App, 457 S W 2d 228

Vt —Franklin County Realty Corp v Cunnius, 252 A 2d 524, 127 Vt 452

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27. N Y —Miller v Bristol Tool & Forging Corp, 142 N Y S 2d 828

28. U S —Multivision Northwest, Inc v Jerrold Electronics Corp, D C Ga, 356 F Supp 207

Cal —C J.S quoted in Bewley v Riggs, 68 Cal Rptr 520, 522, 262 C A 2d 188

Ga —Seagraves v Nunnelly, 108 S E 2d 737, 99 Ga App 420

Ill —C J.S. cited in Tri-County Grain Terminal Co v Swift & Co, 254 N E 2d 311, 316, 118 Ill App 2d 313

Ky —Mikkelsen v Fischer, 347 S W 2d 525

Mo —MFA Co-op Ass'n of Ash Grove v Elliott, App, 479 S W 2d 129

29. N Y —Lipman v New York Herald Tribune, 114 N Y S 2d 7

In action for damages for breach of contract for sale of land, purchaser's deposit may be offset against the damages awarded, but if the damages awarded are less than the amount of the deposit the purchaser may not recover the difference, since he was never entitled to recover any part of said deposit.[33 5]

33.5. Ky —Graves v Winer, 351 S W.2d 193

43. La —Webb v Hammond, App., 144 So 2d 283

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48. U S —Marley v U S, 423 F 2d 324, 191 Ct Cl 205

50. U S —C.J.S cited in Riverside Park Realty Co v Federal Deposit Ins Corp, D C Tenn, 465 F Supp 305, 316

Mo —C.J.S. quoted in Standard Insulation & Window Co v Dorrell, App, 309 S W 2d 701, 704

N C —C.J.S. quoted in Standard Amusement Co v Tarkington, 101 S E 2d 398, 404, 247 N C 444

§ 62. Abandonment or Withdrawal of Cross Demand

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65. Mo.—Jordan v Ebert, App, 387 S W 2d 255

Mo.—Jordan v Ebert, App, 387 S W 2d 255

Neb —Harbert v Mueller, 58 N W 2d 221, 156 Neb 838.

Tex —Metal Enterprises, Inc v Don Love, Inc, Civ App, 562 S W.2d 892, err ref no rev err

Absence of findings as to counterclaim

Mo.—Scheid v. Pinkham, App., 394 S W 2d 570, transf to, Sup., 395 S W 2d 166

66. Notice necessary

Mo —Ray Nolting Oldsmobile Co v 66 Watson Development Co., App., 518 S.W.2d 167

69. Severance held not withdrawal

Tex —McGuire v. Commercial Union Ins Co of New York, 431 S.W 2d 347

70. Neb —Harbert v Mueller, supra, n. 66

Under some statutes, a motion for directed verdict or dismissal may be made by defendant without withdrawing drawing a counterclaim or cross-petition.[71 5]

71.5. Neb —Edmunds v Ripley, 112 N W 2d 385, 172 Neb 797

72. U S —Edward B Marks Music Corp v Borst Music Pub Co, D C N J, 110 F Supp 913—Anderson v Phoenix Products Co, D C Wis, 127 F Supp 732, affd, C A, 226 F 2d 191—Walt Disney Productions v Fred A Niles Communication Center, Inc, D C Ill, 253 F Supp 1, affd in part and revd in part, C A, 369 F 2d 230

Mo —Palmer v Lasswell, App, 279 S W 2d 535, transf, Sup, 287 S W 2d 822

77 Abandonment

La —James v Travelers Indem Co, App, 247 So 2d 210, writ ref 249 So 2d 205, 259 La 67

SETTLE.

6. Pay or compromise

Or —Radcliffe v Franklin Nat Ins Co of N Y, 298 P 2d 1002, 1006, 208 Or 1

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14. U S —M T Reed Const Co v Virginia Metal Products Corp, C A Miss, 213 F 2d 337, 338

19. Or —Sorenson v Bowen, 263 P 2d 766, 768, 199 Or 607

20. Or —Sorenson v Bowen, supra, n 19

33. U S —M T Reed Const Co v Virginia Metal Products Corp, C A Miss, 213 F 2d 337, 338

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Settled.

58. Applied to legal proceedings or disputes

The word "settled", as applied to legal proceedings or disputes between men, means an adjustment of differences or accounts, or a coming to an agreement —Schechter v Rosen, 168 N Y S 2d 825, 827, 8 Misc 2d 635

SETTLEMENT.

65. Similarly defined

(1) "Settlement" is an act or process of adjusting, determining, or composing doubts or differences —Sorenson v Bowen, 263 P 2d 766, 768, 199 Or 607

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77. N Y —Schwartz v Equitable Life Assur Soc of U S, 167 N Y S 2d 660, 662, 9 Misc 2d 27

79. Similarly stated

Pa —Com v Erdenheim Farms Co, 55 Dauph Co 17

SEVER.

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6. Similarly defined

(1) Disunite, dissociate, to open, to cut or break open or apart —Huff v Vulcan Life & Acc Ins Co, 206 So.2d 861, 863, 281 Ala 615

SEVERABLE.

10. Tex —Standard Oil Co of Tex v. Transport Ins Co, Civ App., 324 S W.2d 331, 334, revd on oth grds, Sup, 337 S W 2d 284.

Similarly defined

(1) The word severable means capable of being divided into legal independent rights or obligations —Standard Oil Co of Tex v Transport Ins. Co, Tex Civ App, 324 S W 2d 331, 334, revd on oth grds, Sup, 337 S.W 2d 284

SEVERAL.

17. Mo —Walton v U S. Steel Corp, 362 S W 2d 617, 625

20. N J —Goldstein v. Continental Baking Co, 100 A 2d 337, 339, 28 N J Super 55

SEVERALLY.

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43. U S —C.J.S. quoted in Phillips Petroleum Company v McIlroy, D.C Tex, 178 F Supp 107, 113

44. U S —C J S quoted in Phillips Petroleum Company v McIlroy, D C Tex, 178 F Supp 107, 113

45. U S —C J.S. quoted in Phillips Petroleum Company v McIlroy, D C Tex, 178 F Supp 107, 113

46. U S —C J.S quoted in Phillips Petroleum Company v McIlroy, D C Tex, 178 F Supp 107, 113

N J —C J S cited in Vogel v Red Star Express Lines, 180 A 2d 351, 356, 73 N J Super 534

47. U S —C.J S quoted in Phillips Petroleum Company v McIlroy, D C Tex, 178 F Supp 107, 113

N J —C J.S. cited in Vogel v Red Star Express Lines, 180 A 2d 351, 356, 73 N J Super 534

48. U S —C.J S. quoted in Phillips Petroleum Company v McIlroy, D C Tex, 178 F Supp 107, 113

N J —C J S. cited in Vogel v Red Star Express Lines, 180 A 2d 351, 356, 73 N J Super 534

49. U S —C J S quoted in Phillips Petroleum Company v McIlroy, D C Tex, 178 F Supp 107, 113

SEVERANCE.

50. C J.S. quoted in Metzler v American Casualty Co of Reading, Pa, D C Ark, 137 F Supp 320, 323, 324

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51. C.J S. quoted in Metzler v American Casualty Co of Reading, Pa, D C Ark, 137 F Supp 320, 323, 324

52. C.J.S quoted in Metzler v American Casualty Co of Reading, Pa, supra, n 51

SEVERE.

54. Severe emotional distress

(1) Held to mean emotional distress of such substantial quantity or enduring quality that no reasonable man in civilized society should be expected to endure it —Fletcher v Western Nat Life Ins Co, 89 Cal Rptr 78, 90, 10 C A 3d 376, 47 A L R 3d 286

(2) It may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry —Fletcher v Western Nat Life Ins Co, 89 Cal Rptr 78, 90, 10 C A 3d 376, 47 A L R 3d 286

SEW.

55. U S —Dolliff & Co v U S, Cust Ct, 319 F Supp 1392, 1396

56. Sewed shoe

A "sewed shoe" is a shoe in which the upper is attached to the sole by stitching —Dolliff & Co. v U S, Cust Ct, 319 F Supp 1392, 1396

SEWAGE or SEWERAGE.

59. Phrases

(1a) "Sewerage system" within statute relating to issuance by municipalities of revenue bonds to finance construction of sewerage systems includes necessary incidental storm water sewers —Conner v City of Elmhurst, 190 N E 2d 760, 763, 28 Ill 2d 221

65. Okl —C.J.S. quoted in Oklahoma City v Boggs, 463 P 2d 977, 980

66. Okl —C.J.S. quoted in Oklahoma City v Boggs, 463 P 2d 977, 980

67. Okl —C.J.S. quoted in Oklahoma City v Boggs, 463 P 2d 977, 980

68. Okl —C.J.S quoted in Oklahoma City v Boggs, 463 P 2d 977, 980

SEWER.

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85. N D —C.J.S. cited in Kirkham, Michael & Associates v City of Minot, 122 N W 2d 862, 863, 864

88. N D—C J.S. cited in Kirkham, Michael & Associates v City of Minot, 122 N W 2d 862, 863, 864

92. N D—C.J S cited in Kirkham, Michael & Associates v City of Minot, 122 N W 2d 862, 863, 864

93. N D—C.J.S. cited in Kirkham, Michael & Associate v City of Minot, 122 N W 2d 862, 863, 864

94. N D—C.J.S. cited in Kirkham, Michael & Associates v City of Minot, 122 N W 2d 862, 863, 864

95. N D—C J.S. cited in Kirkham, Michael & Associates v City of Minot, 122 N W 2d 862, 863, 864

Cesspool not a sewer

Kan—McWilliams v Barnes, 242 P 2d 1063, 1066, 172 Kan 701

96. N D—C.J.S. cited in Kirkham, Michael & Associates v City of Minot, 122 N W 2d 862, 863, 864

Okl—Oklahoma City v Boggs, 463 P 2d 977, 980

97. Okl—Oklahoma City v Boggs, 463 P 2d 977, 980—Oklahoma City v Boggs, Okl, 463 P 2d 977, 980

1. Okl—Oklahoma City v Boggs, 463 P 2d 977, 980

3. Similarly defined

(2) A "sewer" is a drain or passage for purpose of carrying off water, filth and excreta—State ex rel Steers v Holovachka, 142 N E 2d 593, 601, 236 Ind 565

(3) In its modern concept, word "sewer" connotes a subterranean conduit or channel to carry off water or refuse Reutner v. Vouga, Mo App, 367 S W 2d 34, 39

(4) A "sewer" is an artificial water course for draining surface waters away from streets—DiLorenzo v Village of Endicott, 333 N Y S 2d 456, 458, 70 Misc 2d 159

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4. Okl—Oklahoma City v Boggs, 463 P 2d 977, 980

In its modern concept, a sewer is not a ditch

Mo—Reutner v Vouga, App, 367 S W 2d 34, 39

Ditch or surface drain

Okl—Oklahoma City v Boggs, Okl, 463 P 2d 977, 980

5. Surface drain

Okl—Oklahoma City v Boggs, 463 P 2d 977, 980

13. Okl—Oklahoma City v Boggs, 463 P 2d 977, 980

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Other phrases:

22. Phrases

(5) "Sewer cleaning ball" is rubber ball with fins placed in water lines at water wells and washed through lines for distance of approximately five or six miles to plant.—Cheney v Georgia-Pacific Paper Corp, 371 S W 2d 843, 848, 237 Ark 161

(6) "Sewer service" is the ignominious practice of filing false affidavits of service—Velazquez v Thompson, C A N Y, 451 F 2d 202, 204

SEXUAL.

31. Sexual conduct

Term "sexual conduct" includes acts of masturbation, homosexuality, sexual intercourse, or physical contact of the person's clothed or unclothed genitals, public area, buttocks or, if such person be a female, breast—People v. Block, 337 N Y.S 2d 153, 158, 71 Misc 2d 714

SHACK.

A hut, shanty, or a small roughly built house.[28 50]

28.50. Iowa—Jones v Beiber, 103 N W 2d 364, 366, 251 Iowa 969

SHADY. As used with reference to the character or reputation of a person, "shady" means equivocal as regards merit or morality; unreliable; disreputable.[30 50]

30.50. N C.—Badame v Lampke, 89 S E 2d 466, 468, 242 N C 755

SHAFT.

31. Other phrases

(1) "Shaft alley" is a tunnel leading from the stern of vessel to the engine room—India Supply Mission v S S Valiant Effort, D C N Y, 283 F Supp 1011, 1012

(2) "Shaft alley bulkhead" is the water-tight bulkhead separating vessel's shaft alley from the engine room—India Supply Mission v S S Valiant Effort, D C N Y, 283 F Supp 1011, 1012

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SHAGGING. The process of picking up and returning golf balls which have been driven from a practice tee.[48 50]

48.50. Mass—Pouliot v Black, 170 N E 2d 709, 710, 341 Mass 531

SHAKE.

49. Layman's term for delirium tremens

Term "shakes" means layman's conception of early delirium tremens or delirium tremens themselves or a marked hang-over effect after an alcoholic debauch—Googe v U S, D C N Y, 101 F Supp 830, 834

51. Shaking of box to intermingle contents where drawing of lots is involved—Dimon v Ehrlich, 234 A 2d 419, 422, 97 N J Super 83

SHALL.

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70. Okl—Crouch v State, 214 P 747, 748, 23 Okl Cr 325

71. "Will" has not same imperative force

Mo—State v Hilsabeck, 34 S W 38, 40, 132 Mo 348

Expressing Time

77. U S—Sawyer v Taylor, D C Colo, 225 F Supp 555, 557

N J—Terracciona v Magee, 148 A 2d 68, 53 N J Super 557

80. Tex—Goldman v State, Civ App, 277 S W 2d 217, 221

Prospective operation

(1) It is a cardinal rule that the word "shall" connotes prospective operation and cannot embrace events which have already occurred.—Terracciona v Magee, 148 A 2d 68, 74, 53 N J Super 557—Hannan v Employers Commercial Union Ins Co, 285 A 2d 83, 85, 117 N J.Super 485

(2) Other statements

U S—Summers v Skibs A/S Myken, D C Pa, 191 F Supp 929, 930, 931

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87. Beginning as of current date

D C—Local Lodge No 1417, Intern Ass'n of Machinists, AFL-CIO v N L R B., C A, 296 F 2d 357, 358, 111 U S.App D C 235

Expressing Mandate, Obligation, Permission or Direction

In general.

90. Va—Andrews v Shepherd, 111 S.E 2d 279, 281, 282, 201 Va 412

Compulsory, peremptory, imperative, or mandatory sense

91. Cal—People v Municipal Court of Oxnard-Port Hueneme Judicial Dist, Ventura County, 303 P 2d 375, 382, 145 C A 2d 767

92. Cal—People v Municipal Court of Oxnard-Port Hueneme Judicial Dist, Ventura County, 303 P 2d 375, 382, 145 C.A 2d 767—People v Municipal Court for Los Angeles Judicial Dist, 197 Cal Rptr 204, 206, 149 C A 3d 951

Iowa—Gibson v Winterset Community School Dist, 138 N W 2d 112, 115, 258 Iowa 440

Ky—C.J.S cited in Stanfield v Willoughby, 286 S W 2d 908

Md—Maryland Medical Service, Inc v Carber, 209 A 2d 582, 589, 238 Md 466

Ohio—Dennison v Dennison, 134 N E 2d 574, 576, 165 Ohio St 146

Okl—In re Vrooman's Estate, 240 P 2d 754, 756, 206 Okl 8

Tenn—Stubbs v State, 393 S W 2d 150, 154, 216 Tenn 567

Wyo—York v North Central Gas Co, 237 P 2d 845, 848, 69 Wyo 98

Plain and ordinary sense

Ind—Sherrard v Board of Com'rs of Fulton County, 278 N E 2d 307, 309, 151 Ind App 127

93. Cal—People v Municipal Court of Oxnard-Port Hueneme Judicial Dist, Ventura County, 303 P 2d 375, 382, 145 C A 2d 767—Walker v Los Angeles County, 12 Cal Rptr 671, 675, 361 P 2d 247, 55 C 2d 626—People v Adams, 99 Cal Rptr 122, 124, 21 C A 3d 972

Ky—C J.S. cited in Stanfield v Willoughby, supra, n 92

Okl—In re Vrooman's Estate, supra, n 92

95. U S—Munger v U S, D C Ala, 154 F Supp 417, 423—Pittman Const Co v Housing Authority of Opelousas, D C La, 167 F Supp 517, 523—Peoples Securities Co v Securities and Exchange Commission, C A 5, 289 F 2d 268, 274—U S v Machado, D C Cal, 306 F Supp 995, 997

Ala—Morgan v State, 194 So 2d 820, 823, 280 Ala 414

Conn—Burke v Rosenthal, 232 A 2d 508, 510, 27 Conn Sup 141

Ind—American Vitrified Products Co, v Public Service Commission, App, 176 N E 2d 145, 153

Ky—C.J S. cited in Stanfield v Willoughby, supra, n 92

Minn—Independent School Dist No 561 Pennington and Marshall Counties v Independent School Dist No 35 and Independent School Dist No 438 Beltrami and Marshall Counties, 170 N W 2d 433, 440, 284 Minn 426

Pa—Division 85, Amalgamated Transit Union v. Port Authority of Allegheny County, 208 A 2d 271, 272, 273, 417 Pa 299

R I—Carpenter v Smith, 89 A 2d 168, 172, 173, 79 R I 326

W Va—Crusenberry v Norfolk & W Ry Co, W.Va, 180 S E 2d 219, 222

Wyo—York v North Central Gas Co, supra, n 92

96. U S—Munger v U S, D.C Ala, 154 F Supp 417, 423—Cohen v Mayer, D C N J, 199 F Supp 331, 332—Minden Beef Co v Cost of Living Council, D C Neb, 362 F.Supp 298, 305

Ala—Morgan v State, 194 So 2d 820, 823, 280 Ala 414

Ark—Arkansas State Highway Commission v Mabry, 315 S W 2d 900, 905, 229 Ark. 261

Cal—People v Municipal Court of Oxnard-Port Hueneme Judicial Dist, Ventura County, 303 P 2d 375, 382, 145 C A 2d 767—Walker v Los Angeles County, 12 Cal Rptr 671, 675, 361 P.2d 247, 55 C 2d 626—Cannizzo v Guarantee Ins Co., 53 Cal.Rptr 657, 658, 245 C.A.2d 70—C.J.S. cited in Blue Cross of Northern California v. Cory, 174 Cal.Rptr 901, 907, 120 C.A.3d 723.

Fla—Brooks v. Anastasia Mosquito Control Dist, App, 148 So 2d 64, 66—Neal v Bryant, Fla, 149 So 2d 529, 532, 97 A L.R.2d 819—Lomelo v Mayo, App, 204 So 2d 550, 553, 554—United Bonding Ins Co v Tuggle, App, 216 So.2d 80, 81—Palm Springs General Hospital, Inc, of Hialeah v State Farm Mut Auto Ins Co, App, 218 So 2d 793, 798—Florida Tallow Corp v Bryan, App, 237 So 2d 308, 309.

Ill—Myers v Pink, 191 N E 2d 659, 664, 42 Ill.App 2d 230, 7 A L R 3d 619

Ind—American Vitrified Products Co v Public Service Commission, App, 176 N E.2d 145, 153—Johnson v Johnson, App 1 Dist, 460 N.E 2d 978, 979

Ky—C.J.S. cited in Stanfield v. Willoughby, supra, n. 92.

La —In re Tutorship of Woodard, App, 216 So 2d 132, 134

Md —Resnick v Board of Sup'rs of Elections of Baltimore City, 222 A 2d 385, 389, 244 Md 55—Ginnavan v Silverstone, Md, 229 A 2d 124, 127, 246 Md 500

Mich —Mackie v Jones, 145 N W 2d 231, 233, 4 Mich App 420—McLogan v Craig, 174 N W 2d 166, 168, 20 Mich App 497

Minn —Independent School Dist No 561 Pennington and Marshall Counties v Independent School Dist No 438 Beltrami and Marshall Counties, 170 N W 2d 433, 440, 284 Minn 426

Mo —C J S cited in Saigh ex rel Anheuser-Busch, Inc v Busch, 396 S W 2d 9, 24—Sho-Me Power Corp v City of Mountain Grove, Mo App, 467 S W 2d 109, 112

N J —Harvey v Board of Chosen Freeholders of Essex County, 153 A 2d 10, 16, 30 N J 381—Kohler v Barnes, 301 A 2d 474, 480, 123 N J Super 69

N Y —Mulligan v Murphy, 241 N Y S 2d 529, 534, 19 A D 2d 218—People v Ricken, 287 N Y S 2d 118, 119, 29 A D 2d 192

N D —Northwestern Bell Tel Co v Wentz, 103 N W 2d 245, 254

Ohio—Dennison v Dennison, 134 N E 2d 574, 576, 165 Ohio St 146—Stephan v State Veterinary Medical Bd, 173 N E 2d 389, 390, 113 Ohio App 538—Singer Sewing Mach Co v Puckett, 197 N E 2d 353, 356, 176 Ohio St 32

Okl —Ethridge v State, Cr, 418 P 2d 95, 101

Pa —Delaware County v Com, Dept of Public Welfare, 383 A 2d 240, 242, 34 Pa Cmwlth 165

Tex —State Bd of Ins v Betts, 315 S W 2d 279, 281, 158 Tex 612—Jaynes v Lee, Civ App, 306 S W 2d 182, 185—Brinkley v State, 320 S W 2d 855, 856, 167 Tex Cr R 472—Enloe v Barfield, Tex Civ App, 415 S W 2d 721, 722—Lewis v Jacksonville Building and Loan Ass'n, 540 S W 2d 307, 310

Utah—State v Zeimer, 347 P 2d 1111, 1113, 10 Utah 2d 45, 79 A L R 2d 821

Va —Schmidt v City of Richmond, 142 S E 2d 573, 578, 206 Va 211

W Va.—Terry v Sencindiver, 171 S E 2d 480, 483, 153 W Va. 651—Crusenberry v Norfolk & W Ry Co, 180 S E 2d 219, 222

Wis —City of Wauwatosa v Milwaukee County, 125 N W 2d 386, 389, 390, 22 Wis 2d 184—State v Christopherson, 153 N W 2d 631, 637, 36 Wis 2d 574

Frequently repeated

It is well established that "shall" is not permissive but mandatory in its usual connotation, especially when frequently repeated —Page v Board of Liquor Control, Ohio Com Pl., 121 N E 2d 125, 128

Must

Cal —People v Municipal Court for Los Angeles Judicial Dist, 197 Cal Rptr 204, 206, 149 C A 3d 951

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98. N J —Lehmann v Kanane, 201 A 2d 84, 87, 84 N.J.Super 117.

S.D —Dunker v Brown County Bd. of Ed, S D, 121 N W.2d 10, 14, 80 S.D 193

Wis —Scanlon v City of Menasha, 114 N W 2d 791, 795, 16 Wis 2d 437.

Usual and correct signification

Mass.—Assessors of Springfield v New England Tel & Tel. Co., 112 N.E.2d 260, 262, 330 Mass 198

99. U.S —Munger v U.S, D.C Ala, 154 F Supp 417, 423

Fla.—United Bonding Ins. Co v Tuggle, App, 216 So.2d 80, 81

2. Va —C.J.S. quoted in Andrews v Shepherd, 111 S.E.2d 279, 281, 282, 201 Va. 412

W.Va.—C.J.S. cited in State ex rel. Trent v Sims, 77 S E 2d 122, 136, 138 W Va 244

3. Ga —Spivey v. Mayson, 186 S E 2d 154, 155, 124 Ga App 775

Va —C.J.S. quoted in Andrews v Shepherd, supra, n. 2.

W.Va.—C.J.S. cited in State ex rel Trent v Sims, supra, n 2

4 D C —Brown v Southall Realty Co, App, 237 A 2d 834, 837—Boyden v Commissioner of Patents, 441 F 2d 1041, 1043, 142 U S App D C 351

Va —C J.S quoted in Andrews v Shepherd, supra, n 2

5. Va —C J S. quoted in Andrews v Shepherd, supra, n 2

Mandatory duty

U S —Sheftic v Boles, D C W Va, 295 F Supp 1347, 1348

In legal connotation the word "shall" is accepted as a mandate calling for compliance —State ex rel Scott v Kirkpatrick, Mo, 484 S W 2d 161, 164

6. U S —U S v Machado, D C Cal, 306 F Supp 995, 997

Cal —People v Municipal Court for Los Angeles Judicial Dist, 197 Cal Rptr 204, 206, 149 C A 3d 951

Mass —Johnson v District Atty for the Northern Dist, 172 N E 2d 703, 705, 342 Mass 212

Tex —Jaynes v Lee, Civ App, 306 S W 2d 182, 185

Va —C.J.S quoted in Andrews v Shepherd, supra, n 2

7. U S —Pittman Const Co v Housing Authority of Opelousas, D C La, 167 F Supp 517, 523

Iowa—Consolidated Freightways Corp of Del v Nicholas, 137 N W 2d 900, 904

N Y —Akers Motor Lines, Inc v City of New York, 339 N Y S 2d 514, 516, 72 Misc 2d 751

Va —C J S. quoted in Andrews v Shepherd, supra, n 2

W Va —C J S cited in State ex rel Trent v Sims, supra, n 2

8. R I —Carpenter v Smith, R I, 89 A 2d 168, 175, 79 R I 326

Va —C J.S. quoted in Andrews v Shepherd, supra, n 2

W Va —C J.S cited in State ex rel Trent v Sims, supra, n 2

General rule

(1) "Shall", when used in connection with duty imposed, is mandatory and excludes idea of discretion —C.J.S. cited in In re Mann, W Va, 154 S E 2d 860, 864, 151 W Va 644

9. Va —C J S quoted in Andrews v Shepherd, supra, n 2

W Va —C.J.S. cited in State ex rel Trent v Sims, supra, n 2

10. Iowa—Schmidt v Abbott, 156 N W 2d 649, 651, 261 Iowa 886

Va —C.J S. quoted in Andrews v Shepherd, supra, n 2

W Va —C.J.S. cited in State ex rel Trent v Sims, supra, n 2

11. Va —C.J.S. quoted in Andrews v Shepherd, supra, n 2

W Va —C.J.S cited in State ex rel Trent v Sims, supra, n 2

12. Va —C.J S. quoted in Andrews v Shepherd, supra, n 2

W Va —C.J.S. cited in State ex rel Trent v Sims, supra, n 2

13. Va —C.J.S quoted in Andrews v Shepherd, supra, n 2

W Va —C.J S cited in State ex rel Trent v Sims, supra, n 2

14. Va —C.J S. quoted in Andrews v Shepherd, supra, n 2

W Va —C.J S. cited in State ex rel Trent v Sims, supra, n 2

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20. The word "shall" appearing in a statute does not have an exclusive, fixed or inviolate connotation and has been construed as meaning both "must" and "may", depending upon legislative intent —Cooper v Hinrichs, 140 N E 2d 293, 295, 10 Ill 2d 269

Okl —Oklahoma Alcoholic Beverage Control Bd v Moss, 509 P.2d 666, 668

26. Compulsion and obligation

Mo —Capoferri v Upham, App, 456 S W 2d 793

31. N Y —Ignatow v Dakin, 176 N Y.S 2d 129, 134, 13 Misc 2d 670—Ehrenberg v Persons, 185 N Y S 2d 369, 371, 8 A D 2d 18

32. U S —U S v Raines, D C Ga, 203 F Supp 147, 150

N Y —Kessler v Hunter, 280 N Y S 2d 474, 475, 53 Misc 2d 965

Pa —Earhart v Board of Sup'rs of West Cocalico Tp, 296 A 2d 284, 286, 6 Pa Cmwlth 455

33. Generally limits exercise of discretion

W Va —State v Carduff, 93 S E 2d 502, 512, 142 W Va 18—State v Gory, 93 S E.2d 535, 142 W Va 56—State ex rel Bd of Ed of County of Kanawha v Melton, 198 S E 2d 130, 157 W Va 154

37. U S —Wilshire Oil Co of Cal v Costello, C A Cal, 348 F 2d 241, 243

Ark —Arkansas State Highway Commission v Mabry, 315 S W 2d 900, 905, 229 Ark 261

Md —Pressley v Warden, Md House of Correction, Md, 219 A 2d 25, 26, 242 Md 405—James v State, 288 A 2d 644, 650, 14 Md App 689

N H —New Castle v Rand, N H, 148 A 2d 658, 661, 102 N H 16

N Y —People v DeJesus, 250 N Y S 2d 317, 322, 21 A D 2d 236—Kessler v Hunter, 280 N Y S 2d 474, 475, 53 Misc 2d 965

Ohio—Poe v Sheehan, 151 N E 2d 660, 666, 106 Ohio App 413—Keenan v Young, 195 N E 2d 382, 385, 386, 119 Ohio App 233

Pa —Com v Kowell, 228 A 2d 50, 52, 209 Pa Super 386—Delaware County v Com, Dept of Public Welfare, 383 A 2d 240, 242, 34 Pa Cmwlth 165

Tex —Chisholm v Bewley Mills, 287 S W 2d 943, 945, 946, 155 Tex 400—Brinkley v State, 320 S W 2d 855, 856, 167 Tex Cr R 472—Lewis v Jacksonville Building and Loan Ass'n, 540 S W 2d 307, 310

38. U S —Parrott v Cary, D C Colo, 234 F Supp 572, 574

Fla —Lomelo v Mayo, App, 204 So 2d 550, 552—Palm Springs General Hospital, Inc, of Hialeah v State Farm Mut Auto Ins Co, App, 218 So 2d 793, 798

N Y —Rinaldi v Pact Realty Corp, 286 N Y S 2d 897, 901, 55 Misc 2d 978

Ohio—Keenan v Young, 195 N E 2d 382, 385, 386, 119 Ohio App 233—State v Herbert, 358 N E 2d 1090, 1092, 49 Ohio St 2d 88, 3 O O 3d 51

Pa —Weiner v Hospital Service Plan of Lehigh Val, 144 A 2d 575, 577, 187 Pa Super 244

Tex —Brinkley v State, 320 S W 2d 855, 856, 167 Tex Cr R 472

39. Conn —State v Doe, 178 A 2d 271, 277, 149 Conn 216—Hopkins v Hamden Bd of Ed, 289 A 2d 914, 918, 29 Conn Sup 397

D C —Kraft v Board of Ed for Dist of Col, D.C, 247 F Supp 21, 24

Ill —Cooper v Hinrichs, 140 N E 2d 293, 295, 10 Ill 2d 269

Mo —C J.S cited in Collier v Roth, 468 S W 2d 57, 59, app after remand 515 S W 2d 829

N D —Northwestern Bell Tel Co v Wentz, 103 N W 2d 245, 254

41. Ark —Arkansas State Highway Commission v Mabry, 315 S W.2d 900, 905, 229 Ark 261

As against government word "shall" is construed as "may" unless contrary intention is clearly manifest —Burke v Rosenthal, 232 A 2d 508, 510, 27 Conn Sup 141

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50. Mo —Williams v Kaestner, App, 332 S W 2d 21, 27

51. Mo —Williams v Kaestner, App, 332 S W 2d 21, 27

Should

54. Vt —Hannon v Myrick, 111 A 2d 729, 731, 118 Vt. 428

Wash —State v La Porte, 365 P 2d 24, 29, 58 Wash 2d 816

Obligation in various degrees

Or —Baldassarre v West Oregon Lumber Co, 239 P.2d 839, 842, 193 Or 556

SHALL

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56. To be bound

Mo—State v Bruton, 383 S W 2d 525, 529

62. Or—Baldassarre v West Oregon Lumber Co, supra, n 54

63. Or—Baldassarre v West Oregon Lumber Co, supra, n 54

Obligation in various degrees

(1) "Should" means obligation in various degrees, usually milder than ought—Magnuson v Grand Forks County, N D, 97 N W 2d 622, 624

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76. N Y—Correll v Costello, 404 N Y S 2d 836, 837, 94 Misc 2d 397

SHANKING.

87. To shank means to strike golf ball with shaft instead of face of club—Kelly v Forester, Ky, 311 S W 2d 547, 548

SHAPE.

88. Shape up

The system for hiring longshoremen is known as the "shape up", under such system hundreds of longshoremen present themselves daily for work, and those needed are hired from such labor pool—T Hogan Corp v Unemployment Compensation Bd of Review, 156 A 2d 546, 548, 191 Pa Super 289

Traffic signs

Word "shape" as used in statutes governing specifications of traffic and regulatory signs describes sign and not message thereon—Weinstein v City of Newark, 241 A 2d 478, 486, 100 N J Super 199

89. Flat sheet metal is not a "shape" as that word is used in the steel industry—T D Downing Co v U S, Cust Ct, 282 F Supp 801, 807

SHARE.

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Phrases:

98. Mo—C.J.S cited in Ragsdale v Tom-Boy, Inc, App, 317 S W 2d 679, 686

99. Mo—C.J.S. cited in Ragsdale v Tom-Boy, Inc, App, 317 S W 2d 679, 686

1. Mo—C.J.S. cited in Ragsdale v Tom-Boy, Inc, App, 317 S W 2d 678, 686

3. Mo—C.J.S. cited in Ragsdale v Tom-Boy, Inc, App, 317 S W 2d 679, 686

4. Mo—C.J.S. cited in Ragsdale v Tom-Boy, Inc, App, 317 S W 2d 679, 686

6. Phrases

(1) Ill—Bolon v Dains, 203 N E 2d 293, 296, 54 Ill App 2d 64

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SHEAVE.

29. Mo—McTurman v Bell, Mo App, 398 S W 2d 465, 467, 468

SHED An unsubstantial structure created for a temporary purpose.[31 50]

31.50. Pa—Easton v. Washington County Ins Co, 137 A 2d 332, 335, 336, 391 Pa 28

Similarly defined

(1) Shed means a slight structure built for shelter or storage, a lean-to or separate building open in front, an outbuilding, a hut, as a wagon shed, a small building slightly constructed and of simple form usually one-story high and often with front or front and sides open generally, a large open structure for temporary storage of goods as a shed on a wharf, a railway shed—Easton v. Washington County Ins Co, 137 A 2d 332, 335, 336, 391 Pa 28

Not basement

The word "sheds" is in no sense suggestive of basements of a concrete and frmae building, even though the basement may be open on one side—Easton v. Washington County Ins Co, 137 A 2d 332, 335, 336, 391 Pa 28

SHEET.

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Phrases

49. Phrases

(5) "Dry sheet" is a kind of felt material applied to a roof prior to laying of shingles—Srader v Pecos Const Co, 378 P 2d 364, 365, 71 N M 320

SHELL.

51. "Shell home" as meaning a semifinished house

Miss—Bevis Const Co v Kittrell, 139 So 2d 375, 378, 243 Miss 549

SHERIFFS AND CONSTABLES

§ 1. Sheriff

Library References

Sheriffs and Constables ⇐1.

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1. Ala—Fuller v State, 115 So 2d 110, 40 Ala App 297, cert den 115 So 2d 118, cert den 115 So 2d 118, 269 Ala 657, cert den 80 S Ct 380, 361 U S 936, 4 L Ed 2d 358

Sheriff held to be

(2) Md—Scott v State, 231 A 2d 728, 1 Md App 481

N J—Caldaro v Ferber, 180 A 2d 705, 74 N J Super 128, revd on oth grds 188 A.2d 576, 39 N J 314

Tenn—White v Davidson County, 360 S W 2d 15, 210 Tenn 456

Va—Hilton v Amburgey, 96 S E 2d 151, 198 Va 727

(3) Colo—City and County of Denver v Rinker, 366 P 2d 548, 148 Colo 441

Fla—Johnson v Wilson, 336 So 2d 651

Ga—Employees Retirement System v Lewis, 136 S E 2d 518, 109 Ga App 476

Mo—State on Inf of Dalton ex rel Shepley v Gamble, 280 S W 2d 656, 365 Mo 215

(4) N Y—Isereau v State, 139 N Y S 2d 739, 207 Misc 665, affd 160 N Y S 2d 839, 3 A D 2d 813, and 160 N Y S 2d 840, 3 A D 2d 812

(6) Other matters

N Y—Reck v Onondaga County, 273 N Y S 2d 146, 51 Misc 2d 259

State officer

Fla—Beard v Hambrick, 396 So 2d 708 disapproving Johnson v Wilson, 336 So 2d 651

(3) Other matters

Md—Baumgartner v State, 319 A 2d 592, 21 Md App 251

Mass—Opinion of the Justices, 233 N.E 2d 906, 353 Mass 785

County officer for purpose of particular statute

N J—Application of Burlington County Bd of Chosen Freeholders, 491 A 2d 631, 99 N J 90, rejecting Doyle v County of Warren, 15 N J Misc 434, 192 A 390, Shusted v Coyle, 139 N J Super 314, 353 A 2d 562

Office held ministerial in nature

Md—Crosse v Board of Sup'rs of Elections of Baltimore City, 221 A 2d 431, 243 Md 555

Sheriff not within police officer's bill of rights

Fla—Evans v Hardcastle, App, 339 So 2d 1150

2. U S—Liquifin Aktiengesellschaft v Brennan, D C N Y, 446 F Supp 914

Cal—U S Overseas Airlines v Alameda County, 45 Cal Rptr 337, 235 C A 2d 348

Mo—State ex rel Cunningham v Leavitt, App, 271 S W 2d 63

N J—Ritter v Castellini, 414 A 2d 614, 173 N J Super 509

N Y—Reck v Onondaga County, 273 N Y S 2d 146, 51 Misc 2d 259

Not judicial officer

Mass—Opinion of the Justices, 233 N E 2d 906, 353 Mass 785

3. Ga—Yancey v State, 107 S E 2d 265, 98 Ga App 797

N Y—Reck v Onondaga County, 273 N Y S 2d 146, 51 Misc 2d 259

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5. Fla—Dade County v Kelly, 153 So 2d 822

Abolition by charter prohibited

Tenn—Metropolitan Government of Nashville and Davidson County v Poe, 383 S W 2d 265, 215 Tenn 53

6. Ala—C J S. cited in Freeman v Purvis, 400 So 2d 389, 392

§ 2. Deputy Sheriff; Undersheriff

10. Colo—Bailey v Clausen, 557 P 2d 1207, 192 Colo 297

Fla—Evans v Hardcastle, App, 339 So 2d 1150

There can be no deputy of a deputy

W Va—Wheeler v Exline, 147 S E 2d 404, 150 W Va 481

11. Ark—Hensley v Holder, 307 S W 2d 794, 228 Ark 401

Fla—Blackburn v Brorein, 70 So 2d 293

La—Mitchell v James, App, 182 So 2d 144—Richardson v Heyd in and for Orleans Parish, App, 278 So 2d 167

Minn—Zillgitt v Goodhue County Bd of Com'rs, 202 N W 2d 378, 295 Minn 9

Deputy sheriff held to be

(5) La—State v Mayeux, 81 So 2d 426, 228 La 6—Phillips v State Through Dept of Transp and Development, App, 400 So 2d 1091, writ den, Sup, 401 So 2d 1195, writ not considered 403 So 2d 70.

(6) Employee of county

Cal—Singleton v Bonnesen, 280 P 2d 481, 131 C A 2d 327

(7) Public officer.

Ga—Employees Retirement System v Lewis, 136 S E 2d 518, 109 Ga App 476

Deputy sheriff held not to be

(1) U S—Howard v Ward County, D C.N D, 418 F Supp 494

Ga—Johnson v U S Fidelity & Guaranty Co, 91 S E 2d 779, 93 Ga App 336

(2) Ga—Employees Retirement System v. Lewis, 136 S E 2d 518, 109 Ga App 476

Employer and employee

(2) Dual relation

Ga—Johnson v U S Fidelity & Guaranty Co, 91 S E 2d 779, 93 Ga App 336

(3) Limited relationship

Ga—Johnson v U S. Fidelity & Guaranty Co., 91 S E 2d 779, 93 Ga App 336

(4) U S—Slack v Bishop, D.C.La, 444 F Supp. 1161

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15. Ill—C J S. cited in Winnebago County v Industrial Commission, 234 N E.2d 781, 783, 39 Ill 2d 260.

N Y—Farley v Stone, 140 N Y S 2d 579, 207 Misc. 934, mod 160 N Y S 2d 810—Isereau v Stone, 140 N.Y S 2d 582, 207 Misc 938

17. Undersheriff distinguished

Mont.—Holly v Preuss, 564 P 2d 1303, 172 Mont 422.

20. N H—Daniels v Hanson, 342 A 2d 644, 115 N H 445

21. N H—Daniels v Hanson, 342 A.2d 644, 115 N H 445

§ 3. Constable

22. N H —C J.S. cited in State v Grant, 216 A 2d 790, 791, 107 N H 1

N J —C.J.S. cited in State v Thyfault, 297 A 2d 873, 878, 121 N J Super 487, affd 315 A 2d 424, 126 N J Super 459

Constable held to be:

(2) Tenn —Glasgow v Fox, 383 S W 2d 9, 214 Tenn 656

(3) Ministerial officer of court

U S —Harriatt v Lillo, D C N J, 452 F Supp 421

County officer

(1) Mo —State on Inf of Dalton ex rel Shepley v Gamble, 280 S W 2d 656, 365 Mo 215—State ex rel O'Brien v Roos, 397 S W 2d 578

Change in boundaries of precincts

Tex —Commissioners Court of Harris County v Moore, Civ App, 525 S W 2d 926

23. La —Bradford v City of Shreveport, App, 294 So 2d 855, writ issued, Sup, 299 So 2d 351, two cases

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26. Tenn —Glasgow v Fox, 383 S W 2d 9, 214 Tenn 656—Banks v Jenkins, 449 S W 2d 712, 224 Tenn 23

Office not constitutional in nature

Ala —In re Ingram, 356 So 2d 618

27. Mich —Bernard v Johnson, 303 N W 2d 924, 104 Mich App 37

§ 4. In General

29. Ga —Employees Retirement System v Lewis, 136 S E 2d 518, 109 Ga App 476

30. Contest

Tenn —Southall v Billings, 375 S.W 2d 844, 213 Tenn 280

Election void

Ky —Woods v Mills, 503 S W 2d 706

§ 5. Duty to Serve

Library References

Modern Legal Forms Ch 16, Bonds

§ 6. Eligibility

Library References

Modern Legal Forms Ch 16, Bonds.

33. U S —Goforth v Poythress, C A Ga, 638 F 2d 27

Statute held unconstitutional

Fla —Blackburn v Brorein, 70 So 2d 293

Held eligible

Md —Crosse v Board of Sup'rs of Elections of Baltimore City, 221 A 2d 431, 243 Md 555

35. Md —Crosse v Board of Sup'rs of Elections of Baltimore City, 221 A.2d 431, 243 Md 555

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41. Ala —James v. Thompson, 392 So 2d 1178

Ky.—Woods v Mills, 503 S.W 2d 706

Where particular disqualification for office is specified by statute, disqualification cannot be had for reasons not so specified.[46 5]

46.5. Promise of protection to certain persons

Tenn —Mathis v Young, 291 S.W.2d 592, 200 Tenn 168

52. N M.—Stephens v Myers, 690 P 2d 444, 102 N.M. 1.

54. Ky.—English v. English, 539 S W 2d 279.

59. Rule applied to deputy

W Va —State ex rel Duke v O'Brien, 117 S E 2d 353, 145 W Va 600—Copley v Chambers, 123 S E 2d 232, 146 W Va 674—Wheeler v Exline, 147 S E 2d 404, 150 W Va 481

60. Rule applied to deputy

W Va —State ex rel Duke v O'Brien, 117 S E 2d 353, 145 W Va 600

61. Rule applied to deputy

W Va —State ex rel Zickefoose v West, 116 S E 2d 398, 145 W Va 498

§ 7. Commission and Qualification

Library References

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76. Wash —State ex rel Zempel v Twitchell, 367 P 2d 985, 59 Wash 2d 419

W Va —State ex rel Dingess v Scaggs, 195 S E 2d 724, 156 W Va 588

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85. U S —Waters v McClary, C A Tenn, 344 F 2d 75, 15 A L R 3d 1183

W Va —State ex rel Dingess v Scaggs, 195 S E 2d 724, 156 W Va 588

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7. La —Brown v Edwards, App, 321 So 2d 394

14. Or —Fowler v Donnelly, 358 P 2d 485, 225 Or 287, 85 A L R 2d 452

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42. Ky —Russell County Bd of Ed v Leach, 157 S W 2d 70, 288 Ky. 769

§ 8. Term of Office, Holding Over, and Vacancies

Library References

Sheriffs and Constables ⇐5.

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45. Cal —Doran v Biscailuz, 274 P 2d 691, 128 C A 2d 55

Ind —Pommerehn v Sauley, 117 N E 2d 556, 233 Ind 140

N J —Shusted v Coyle, 353 A 2d 562, 139 N J Super 314

N Y —Janof v Koch, 413 N Y S 2d 404, 67 A D 2d 862

W Va —State ex rel Rushford v Meador, 267 S E 2d 169, 165 W Va 48

46. N Y —Enders v Rossi, 358 N Y S 2d 782, 45 A D 2d 447

47. Effective date

Idaho—Haile v Foote, 409 P 2d 409, 90 Idaho 261

50. Idaho—Haile v Foote, 409 P 2d 409, 90 Idaho 261

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68. Ohio—State ex rel Trago v Evans, 141 N E 2d 665, 166 Ohio St 269

70. Tex —Parker v Nobles, 496 S W 2d 921

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82. Ohio—State ex rel Trago v Evans, 141 N E.2d 665, 166 Ohio St 269

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3. Pa.—Petition for Appointment of Tenny, 12 Cumb 63

5. Ark —McCraw v. Pate, 494 S.W 2d 94, 254 Ark 357

Mass —Opinion of the Justices, 233 N E 2d 906, 353 Mass 785

6. Ohio—State ex rel Trago v Evans, 141 N E 2d 665, 166 Ohio St 269

7. Pa —Petition for Appointment of Tenny, 12 Cumb 63

8. Tex —Stockwell v Garcia, Civ App, 325 S W 2d 405, err ref no rev err

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18 Tex —Stockwell v Garcia, Civ App, 325 S W 2d 405, err ref no rev err

19. W Va —Miller v Burley, 187 S E 2d 803, 155 W Va 681

21. Death after qualification

Ala —McRae v State ex rel Hyche, 112 So 2d 487, 269 Ala 241, 75 A L R 2d 1270

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32. Held validly elected

Wyo —In re Romer, 436 P 2d 956

41. Idaho—Fitzpatrick v Welch, 527 P 2d 313, 96 Idaho 280

46. Conviction of willful neglect of duty

Wash —State ex rel Zempel v Twitchell, 367 P 2d 985, 59 Wash 2d 419

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53. S C —State ex rel Thompson v Seigler, 94 S E 2d 231, 230 S C 115

§ 9. Resignation, Abandonment, Forfeiture, Suspension, or Reinstatement

55. N Y —Delaney v Del Bello, 437 N Y S 2d 405, 81 A D 2d 566

§ 10. —— Removal and Proceedings Therefor

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67. Ga —Employees Retirement System v Lewis, 136 S E 2d 518, 109 Ga App 476

Utah—Obray v Malmberg, 484 P 2d 160, 26 Utah 2d 17

69. S C —State ex rel Thompson v Seigler, 94 S E 2d 231, 230 S C 115

72. Va —Com ex rel Davis v Malbon, 78 S E 2d 683, 195 Va 368

74. Va —Com ex rel Davis v Malbon, supra, n 72

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75. Ky —Cornett v Chandler, 307 S W 2d 918

80 Colo —People v Enlow, 310 P 2d 539, 135 Colo 249

Wash —Janovich v Herron, 592 P 2d 1096, 91 Wash 2d 767

Appointing relative within fourth degree

Mo —State ex inf Roberts v Buckley, 533 S W 2d 551

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98. Mo —State ex inf Dalton v Mosley, 286 S W 2d 721, 365 Mo 711—State ex inf Eagleton v Elliott, 380 S W 2d 929

11. Colo —People v Enlow, 310 P 2d 539, 135 Colo 249

Ga —Cole v Holland, 132 S E 2d 657, 219 Ga 227

Kan —State ex rel Ferguson v Robinson, 394 P 2d 48, 193 Kan 480.

Mo —State ex inf Danforth v Orton, 465 S W.2d 618, cert den 92 S Ct 90, 404 U S 852, 30 L Ed 2d 92

Tex —Sullivan v State, Civ App, 572 S W 2d 778, err ref no rev err

Misconduct not shown

N H —In re Ash, 311 A.2d 304, 113 N H 583

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19. Ky —Cornett v Chandler, 307 S W 2d 918

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Mo—State ex inf Dalton v Mosley, 286 S W 2d 721, 365 Mo 711—Parker v Sherman, 456 S W 2d 577

29. Ala—State ex rel Mullis v Mathews, 66 So 2d 105, 259 Ala 125

30. Kan—State ex rel Ferguson v Robinson, 394 P 2d 48, 193 Kan 480

35. Removal erroneous

Ky—Moore v Fields, 535 S W 2d 67

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42. Ala—State ex rel Mullis v Mathews, 66 So 2d 105, 259 Ala 125

46. Ky—Cornett v Chandler, 307 S W 2d 918

N.J—Shusted v Coyle, 353 A 2d 562, 139 N J Super 314

Jurisdiction

Tex—State ex rel Dishman v Gary, 359 S W 2d 456, 163 Tex 565

61. Objection to sufficiency of notice held waived

R I—Dunder v Scuncio, 134 A 2d 400, 86 R I 370

Hearing properly held

Miss—State ex rel Patterson v Board of Sup'rs of Prentiss County, 105 So 2d 154, 234 Miss 26

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Illegal acts by a sheriff are not justified on the ground that other officers committed the same acts.[76 5]

76.5. Ga—Cole v Holland, 132 S E 2d 657, 219 Ga 227

77. Ala—State ex rel Mullis v Mathews, 66 So 2d 105, 259 Ala 125

81. Fla—Crowder v State ex rel Baker, App, 285 So 2d 33

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95. Ala—State ex rel. Mullis v Mathews, 66 So 2d 105, 259 Ala 125

Va—Com. ex rel Davis v Malbon, 78 S E 2d 683, 195 Va 368

98. Ga—Cole v Holland, 132 S E 2d 657, 219 Ga 227

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6. Evidence held sufficient

Ga—Cole v Holland, 132 S E 2d 657, 219 Ga 227

R I—Dunder v Scuncio, 134 A 2d 400, 86 R I 370

Evidence held insufficient

N Y—Frauman v Mancuso, 289 N.Y S 2d 1011, 30 A D 2d 108, motion den 241 N E 2d 742, 22 N Y 2d 895, 294 N Y S 2d 537, affd 249 N E 2d 474, 24 N Y 2d 891, 301 N Y S 2d 633

Va—Com ex rel Davis v Malbon, 78 S E 2d 683, 195 Va 368

9. Va—Com ex rel Davis v Malbon, supra, n 6

10. Ala—State ex rel Mullis v Mathews, 66 So 2d 105, 259 Ala 125

18. Va—Com ex rel Davis v Malbon, supra, n 6

Other particular instructions have been held proper or not erroneous.[18 5]

18.5. Ga—Cole v Holland, 132 S E.2d 657, 219 Ga 227

The sufficiency of particular judgments, decisions or orders has been passed upon by the courts.[20 5]

20.5. Judgment, decision or order upheld

Miss—State ex rel Patterson v Board of Sup'rs of Prentiss County, 105 So 2d 154, 234 Miss 26

N Y—Frauman v Mancuso, 289 N Y S.2d 1011, 30 A D 2d 108, motion den 241 N E 2d 742, 22 N Y 2d 895, 294 N Y S 2d 537, affd 249 N E 2d 474, 24 N Y 2d 891, 301 N Y S 2d 633

R I—Dunder v Scuncio, 134 A 2d 400, 86 R I 370

§ 13. Election or Appointment

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70. Statute construed

La—Davenport v Hardy, 349 So 2d 858

§ 14. Eligibility

Library References

Modern Legal Forms Ch. 16, Bonds.

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4. Canon of Judicial Ethics

Ohio—Cincinnati Bar Ass'n v Heitzler, 291 N E 2d 477, 32 Ohio St 2d 214, 57 A L R 3d 1134, cert den 93 S Ct 2149, 411 U S 967, 36 L Ed 2d 687

§ 15. Qualification

Library References

Modern Legal Forms Ch 16, Bonds.

15. Ill—People v Zahn, 161 N E 2d 265, 17 Ill 2d 271

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23. Pa—Appointment of Brosha, 31 D & C 2d 467, 9 Lycoming 50

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64. Not required to file another bond

Tex—Maxon v Franz, Civ App, 525 S W 2d 714, err ref no rev err

§ 16. Term of Office, Holding Over, and Vacancies

74. Change of boundaries

Tex—Maxon v Franz, Civ.App, 525 S W 2d 714, err ref no rev err

77. La—Davenport v Hardy, 349 So 2d 858

Tex—El Paso County v Telles, Civ App, 586 S W 2d 155

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99. La—Grimble v Avoyelles, Parish Police Jury, App, 212 So 2d 496

§ 17. Resignation, Abandonment, Forfeiture, Suspension, or Removal

18. Fla—State ex rel Shevin v Stone, 279 So 2d 17

§ 18. —— Removal and Proceedings Therefor

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30. Removal at will

Mich—Szymanski v Alpena Tp, 161 N W 2d 417, 11 Mich App 387

31. Pa—Com ex rel Specter v Rotherman, 40 D & C 2d 637

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41. Pa—Com ex rel Woodward v Alberts, 107 P L J 291

In the case of a statutory impeachment proceeding statutory requirements must be complied with.[51 1]

51.1. Commencement and conclusion

Ala—State ex rel Mullis v Mathews, 66 So 2d 105, 259 Ala 125

§ 21. In general; Delegation of Powers

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Sheriffs are required to make comprehensive use of their departments' surplus manpower in cases of temporary need and emergency.[73 5]

73.5. N J—Caldaro v Ferber, 188 A 2d 576, 39 N J 314

75. Mont—Holly v Preuss, 564 P 2d 1303, 172 Mont 422

§ 22. Appointment

Library References

Sheriffs and Constables ⇐15, 18.

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77. Cal—Litzius v Whitmore, 84 Cal Rptr 340, 4 C A 3d 244

Fla—Evans v Hardcastle, App, 339 So 2d 1150

Ga—Warren v Walton, 202 S E 2d 405, 231 Ga 495

La—Boyer v St Amant, App, 364 So 2d 1338, writ den, Sup, 365 So 2d 1108

N Y—Reck v Onondaga County, 273 N Y S 2d 146, 51 Misc 2d 259

78. U S—Tanner v McCall, C A Fla, 625 F 2d 1183, reh den 629 F 2d 1350, cert den 101 S Ct 1975, 451 U S 907, 68 L Ed 2d 295

Ga—Gay v Healan, 77 S E 2d 47, 88 Ga App. 533—Warren v Walton, 202 S E 2d 405, 231 Ga 495

Iowa—Smith v Newell, 117 N W 2d 883, 254 Iowa 496

N H—Daniels v Hanson, 342 A 2d 644, 115 N H. 445

Tenn—Metropolitan Government of Nashville and Davidson County v Poe, 383 S W.2d 265, 215 Tenn 53

W.Va—Hockman v Tucker County Court, 75 S.E 2d 82, 138 W.Va 132

Effect of veterans' preference acts

Wash.—State ex rel Day v King County, 312 P 2d 637, 50 Wash 2d 427

Statutes construed

La—Civil Service Commission of City of New Orleans v Foti, 349 So 2d 305

N Y—Ratner v Michaels, 179 N Y S 2d 188, 12 Misc 2d 165

Okl—Smith v State, Cr, 510 P 2d 962.

W Va—State ex rel Dingess v Scaggs, 195 S E.2d 724, 156 W Va 588

Statutes valid

Tenn—Sapp v State ex rel Nipper, 524 S W 2d 652

79. Fla—Szell v Lamar, App 5 Dist, 414 So 2d 276

84. Ariz—State v Stago, 312 P 2d 160, 82 Ariz 285

Fla—Evans v Hardcastle, App, 339 So 2d 1150

Wyo—Pfister v Niobrara County, 557 P 2d 735

Appointed not hired

Wyo—Pfister v Niobrara County, 557 P 2d 735

86. Ark—Parker v. Adkins, 266 S.W.2d 799, 223 Ark 455

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97. Liability of sheriff for deputies immaterial

Colo—City and County of Denver v Rinker, 366 P 2d 548, 148 Colo 441.

10. Pa—Petition of Turner, 18 D & C.2d 429, 76 Montg 157

W Va—Hockman v Tucker County Court, 75 S E 2d 82, 138 W Va 132—State ex rel Christian v St Clair, 166 S E 2d 785, 153 W Va 1

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13. U S.—Smith v Hill, D C Utah, 510 F Supp. 767

15. Ariz—State v Stago, 312 P.2d 160, 82 Ariz 285

Okl—Murphy v State, 245 P 2d 741, 95 Okl Cr 333

W Va —Mozingo v Barnhart, 285 S E 2d 497

22. Pa —Appointment of Deputy Constable for Jenner Tp, Somerset County, Pa, 21 Som 47

23. Pa —In re Appointment of Deputy Constables for Mount Carmel Tp, Northumberland County, Pa, 33 Northumb L J 23

28. Fla —Walker v Pendarvis, 132 So 2d 186

30. Pa —Application of Forti, 24 D & C 2d 198—In re Appointment of Deputy Constables for Mount Carmel Tp, Northumberland County, Pa, 33 NorthumbL J 23—Appointment of Deputy Constable for Jenner Tp, Somerset County, Pa, 21 Som 47

Right to make inquiry

Fla —Walker v Pendarvis, 132 So 2d 186

§ 23. Number of Deputies

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32. U S —Smith v Hill, D C Utah, 510 F Supp 767

33. Neb —Grace v Douglas County, 134 N W 2d 818, 178 Neb 690

N C —Moss v Alexander, 116 S E 2d 797, 253 N C 362

Undersheriff included

Mont —Holly v Preuss, 564 P 2d 1303, 172 Mont 422

Statute invalid

Ga —Bussell v Youngblood, 238 S E 2d 89, 239 Ga 553

§ 24. Eligibility

46. U S —Kapson v Kubath, D C Mich, 165 F Supp 542

N Y —Myles v Phillips, 448 N Y S 2d 31, 87 A D 2d 614, affd 440 N E 2d 536, 57 N Y 2d 692, 454 N Y S 2d 536

§ 25. Qualification

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53. Cal —Gobel v San Luis Obispo County, 141 Cal Rptr. 288, 74 C A 3d 94

Fla —Fraternal Order of Police Lodge 92 v Freeman, App, 372 So 2d 945

N Y —Freund v Department of Personnel of City of New York, 341 N Y S 2d 740, 73 Misc 2d 218—Torrisi v Personnel Officer of Westchester County, 400 N Y S 2d 577, 60 A D 2d 847

Wash —Green v Cowlitz County Civil Service Commission, Cowlitz County, 577 P 2d 141, 19 Wash App 210

Regulation of hair style and facial appearance

N Y —Connelly v Amico, 340 N Y S 2d 156, 72 Misc.2d 644, affd 353 N Y.S 2d 1021, 43 A D 2d 1016

56. Fla —Holloway v State, 342 So.2d 966

61. Conn —Zanks v Fluckiger, 171 A 2d 86, 22 Conn Sup 311

Deputy constable

Tex —Rhoden v. Booth, Civ.App, 344 S W 2d 481, err ref no rev err.

Bond not required of deputy

W.Va —Wheeler v Exline, 147 S E 2d 404, 150 W.Va 481.

§ 26. Term of Office; Resignation and Removal

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82. U S —Tanner v McCall, C A.Fla., 625 F.2d 1183, reh den 629 F 2d 1350, cert den 101 S Ct 1975, 451 U.S 907, 68 L.Ed.2d 295

Mich —Eaton County Deputy Sheriffs Ass'n v Smith, 195 N W 2d 12, 37 Mich App. 427

N.Y —Cirasuolo v Hasenauer, 407 N Y S 2d 357, 64 A.D.2d 860

W Va.—State ex rel Christian v St Clair, 166 S.E.2d 785, 153 W Va. 1

Wis —Cross v Soderbeck, 288 N W 2d 779, 94 Wis 2d 331

Right to secure reappointment

Cal —Litzius v Whitmore, 84 Cal Rptr 340, 4 C A 3d 344

Purpose of non-tenure

Mont —Holly v Preuss, 564 P 2d 1303, 172 Mont 422

Not entitled to pretermination hearing

Cal —Bell v Duffy, 168 Cal Rptr 753, 111 C A 3d 643

Fla —Evans v Hardcastle, App, 339 So 2d 1150

83. N Y —Cafiso v Gross, 332 N Y S 2d 676, 39 A D 2d 773

Wash —State ex rel Day v King County, 312 P 2d 637, 50 Wash 2d 427

86. U S —Ramey v Harber, D C Va, 431 F Supp 657, affd in part, revd in part on oth grds C A, 589 F 2d 753, cert den 99 S Ct 2823, 442 U S 910, 61 L Ed 2d 275

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96. Unauthorized leave of absence

Ala —Lockridge v Etowah County Com'n, Civ App, 460 So 2d 1361

98. Effect of resignation

Wis —Becker v Spieker, 62 N W 2d 715, 265 Wis 605

2. U S —Tanner v McCall, D C Fla, 441 F Supp 503

Cal —People v Hulburt, 142 Cal Rptr 190, 75 C A 3d 404

Ga —Warren v Walton, 202 S E 2d 405, 231 Ga 495

N J —Board of Chosen Freeholders, Bergen County v Miller, 367 A 2d 451, 145 N J Super 222

N Y —Cirasuolo v Hasenauer, 407 N Y S 2d 357, 64 A D 2d 860

Pa —Fair v Delaney, 385 A 2d 601, 35 Pa Cmwlth 103

W Va —Hall v Protan, 195 S E 2d 380, 156 W Va 562

Approval by court

Pa —In re Jacob Horivitz, 27 Dist R 578—In re Revocation of Appointment of Deputy Constable, 13 D & C 2d 301, 19 Beaver 149—In re Page, 205 A 2d 637, 205 Pa Super 12

3. U S —Hopkins v Dolinger, D C Va, 453 F Supp 59

La —Boyer v St Amant, App, 364 So 2d 1338, writ den, Sup, 365 So 2d 1108

S C —Rhodes v Smith, 254 S E 2d 49, 273 S C. 13

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6. U S —Barrett v Thomas, C A Tex, 649 F 2d 1193, reh den 656 F 2d 700, cert den 102 S Ct 1969, 456 U S 925, 72 L Ed 2d 440, and 102 S Ct 1992, 456 U S 936, 72 L Ed 2d 455

Cal —Rigsby v Civil Service Commission of Los Angeles County, 115 Cal Rptr 490, 39 C.A 3d 696

Ill —Fruhling v Champaign County, 420 N E 2d 1066, 51 Ill Dec 508, 95 Ill App 3d 409

Mich —Locke v Macomb County, 187 N W 2d 500, 31 Mich App 22, affd 199 N W 2d 166, 387 Mich 634—Locke v Macomb County, 199 N W 2d 166, 387 Mich 634

S D —General Drivers and Helpers Union v Brown County, 269 N W 2d 795

Limitations

Ala —Jefferson County v Reach, 368 So 2d 250

Mich —Werner v Macomb County Civil Service Commission, 258 N W 2d 549, 77 Mich App 533

7. U S.—Tanner v McCall, D C Fla, 425 F Supp 257

Fla —Johnson v Wilson, App., 336 So 2d 651

Minn —General Drivers, Local No. 346 v Aitkin County Bd, 320 N W 2d 695

Deputies not "policymakers"

U.S.—Ramey v Harber, D C Va, 431 F Supp 657, affd in part, revd in part on oth grds. C A, 589 F 2d 753, cert den 99 S Ct 2823, 442 U S. 910, 61 L Ed.2d 275

8. U S —Ramey v Harber, D C Va, 431 F.Supp. 657, affd in part, revd in part on oth grds C A, 589 F 2d 753, cert den 99 S Ct 2823, 442 U S 910, 61 L Ed 2d 275

Fla —Ison v Zimmerman, 372 So 2d 431

Mo —Linkogel v Baker Protective Services, Inc, App, 626 S W 2d 380, app after remand 659 S W 2d 300

N Y —Sirles v Cordary, 374 N Y S 2d 793, 49 A D 2d 330, affd 358 N E 2d 1038, 40 N Y 2d 950, 390 N Y S 2d 413

9. Ga —Warren v Walton, 202 S E 2d 405, 231 Ga 495

Undersheriff

Mont —Holly v Preuss, 564 P 2d 1303, 172 Mont 422

The operation of a system of patronage, as applied to deputy sheriffs who are performing in a satisfactory manner in a nonpolicymaking and nonconfidential capacity and who are refused consideration for reappointment, upon the election of a successor to the sheriff who appointed them, solely because of their political beliefs and affiliations, is constitutionally invalid.[95]

9.5. U S —Elrod v Burns, 96 S Ct 2673, 427 U S 347, 49 L Ed 2d 547

11. U S —Funn v Winston, C A Va, 612 F 2d 880

Ill —Batley v Kendall County Sheriff's Dept Merit Commission, Kendall County Ill, 425 N E 2d 1201, 55 Ill Dec 28, 99 Ill App 3d 622

Mont —Erickson v Fisher, 554 P 2d 1336, 170 Mont 491

Cause for removal not shown

U S —Lontine v VanCleave, C A Colo, 483 F 2d 966

Polygraph test

Ariz —Eshelman v Blubaum, App, 560 P 2d 1283, 114 Ariz 376

Mich —Cyrus v Calhoun County Sheriff, 271 N W 2d 249, 85 Mich App 397

Substantial evidence

N Y —Suchocki v Amico, 390 N Y S 2d 286, 55 A D 2d 814

Reinstatement denied

Mont —Erickson v Fisher, 554 P 2d 1336, 170 Mont 491

Budget cut

N Y —Mitchell v Yates County Sheriff's Dept, 405 N Y S 2d 238, 94 Misc 2d 724

12. Cal —Titus v Los Angeles County Civil Service Commission, 181 Cal Rptr 699, 130 C A 3d 357

N Y —Suchocki v Amico, 390 N Y S 2d 286, 55 A D 2d 814

Incompetence not shown

Wash —Eiden v Snohomish County Civil Service Commission, 533 P 2d 426, 13 Wash App 32

Causes enumerated by statute

Mont —Erickson v Fisher, 554 P 2d 1336, 170 Mont 491

13. Pa —In re Page, 205 A.2d 637, 205 Pa Super 12

14. U S —Sherman v City of Richmond, D C Va, 543 F Supp 447

Fla —Szell v Lamar, App 5 Dist, 414 So 2d 276

19. Ind.—Pope v Marion County Sheriff's Merit Bd, 301 N.E.2d 386, 157 Ind App 636

N Y —Cirasuolo v Hasenauer, 407 N Y S 2d 357, 64 A D 2d 860

Consent to amendment

La —Jarrell v Criminal Sheriff Dept, App, 297 So.2d 549.

Insufficient compliance

Ill —Zurek v Cook County Police and Corrections Merit Bd., 356 N E 2d 1079, 1 Ill Dec 797, 42 Ill App 3d 1044

La —Jarrell v Criminal Sheriff Dept, App, 297 So.2d 549

20. Ill—Zook v Hedrick, 367 N E 2d 1356, 10 Ill Dec 590, 52 Ill App 3d 736

N Y—Ronayne v Lombard, 400 N Y S 2d 693, 92 Misc 2d 538

Evidence

Ind—Pope v Marion County Sheriff's Merit Bd, 301 N E 2d 386, 157 Ind App 636

Mich—Werner v Macomb County Civil Service Commission, 258 N W 2d 549, 77 Mich App 533

Minn—Matter of Setchell, 261 N W 2d 354, cert den 98 S Ct. 2821, 436 U S 926, 56 L Ed 2d 769

Mont—Erickson v Fisher, 554 P 2d 1336, 170 Mont 491

N Y—Cirasuolo v Hasenauer, 407 N Y S 2d 357, 64 A D 2d 860

Hearing officer

N Y—Cirasuolo v Hasenauer, 107 N Y S 2d 357, 64 A D 2d 860

Although, a hearing is not required for the suspension of a deputy sheriff where the suspension is for less than a stated amount of time,[20 5] it has been held that a deputy sheriff who is so suspended is entitled to an administrative review of his suspension in court where the mechanism of departmental review is not available.[20 10]

20.5. Ill—McCoy v Brown, 427 N E 2d 619, 56 Ill Dec 424, 100 Ill App 3d 988

20.10. Refusal to follow order

Ill—Wagner v Kramer, 2 Dist, 465 N E 2d 547, 80 Ill Dec 435, 125 Ill App 3d 12, affd and remd 484 N E 2d 1073, 92 Ill Dec 218, 108 Ill 2d 413, declining to follow McCoy v Brown, 100 Ill App 3d 988, 56 Ill Dec 424, 427 N E 2d 619

23. Ala—Jefferson County v Reach, 368 So 2d 250

24. No authority to assess transcript costs

Ill—Zurek v Cook County Police and Corrections Merit Bd, 356 N E 2d 1079, 1 Ill Dec 797, 42 Ill App 3d 1044

Judicial review

Ind—Wolfcale v Wells County, 364 N E 2d 1023, 173 Ind App 569

Me—Colby v York County Com'rs, 442 A 2d 544

Ohio—State ex rel Moore v Sanders, 418 N E 2d 1339, 65 Ohio St 2d 72, 19 O O 3d 264

§ 27. Title to, and Possession of, Office

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29. Cal.—Valentine v Contra Costa County, 10 Cal Rptr 500, 188 C A 2d 515

§ 28. De Facto Deputies

40. Ind—Carty v State, App, 421 N E 2d 1151

Usurper

W Va—Wheeler v Exline, 147 S E 2d 404, 150 W Va 481

41. Neb—Anderson v Bituminous Cas Co, 52 N.W 2d 814, 155 Neb 590

No formal appointment

W Va—Wheeler v Exline, 147 S E.2d 404, 150 W.Va 481

43. Ala—Johnson v State, Cr.App., 406 So 2d 1063, writ den, Sup, 406 So 2d 1066

Ariz—State v Stago, 312 P 2d 160, 82 Ariz 285

44. Ky—Call v Com, 482 S W.2d 770, mod on oth grds 492 S.W.2d 195

W Va.—Wheeler v. Exline, 147 S E 2d 404, 150 W Va 481

46. Under instructions and control

Ariz—State v Ovens, 422 P 2d 719, 4 Ariz App 591.

49. Ala—C.J.S. cited in Malone v State, Cr App, 406 So 2d 1060, 1062, writ den, Sup, 406 So 2d 1066

Okl—State v Smith, Cr, 320 P 2d 719

Deputy sheriff held not de facto officer

Conn—Zanks v Fluckiger, 171 A 2d 86, 22 Conn Sup 311

§ 29. Special Deputies and Persons Specially Authorized

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52. U S—Slack v Bishop, D C La, 444 F Supp 1161

Neb—Anderson v Bituminous Cas Co, 52 N W 2d 814, 155 Neb 590—Henning v City of Hebron, 183 N W 2d 756, 186 Neb 381

Tenn—General Truck Sales, Inc v Simmons, 343 S W 2d 884, 208 Tenn 51

W Va—Hockman v Tucker County Court, 75 S E 2d 82, 138 W Va 132

63. Miss—Galloway v Brown, 93 So 2d 459, 230 Miss 471

§ 30. Bailiffs, Keepers, Clerks, and Other Assistants and Employees

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14. U S—Wilson v Kelley, D C Ga, 294 F Supp 1005, affd 89 S Ct. 477, 393 U S 266, 21 L Ed.2d 425

Sheriff held "employer" within terms of statute

Iowa—Smith v Newell, 117 N W 2d 883, 254 Iowa 496

Public employment contract

N Y—Reese v Lombard, 366 N Y S 2d 493, 47 A D 2d 327

16. Wash—Massie v Brown, 527 P 2d 476, 84 Wash 2d 490

22. Cal—Litzius v Whitmore, 84 Cal Rptr 340, 4 C A 3d 244

Vt.—Town of Stowe v Lamoille County, 362 A 2d 159, 134 Vt 402

Held not county employees

Ga—Employees Retirement System v Lewis, 136 S.E 2d 518, 109 Ga.App 476

Reasonable standards of appearance

Ga—Trotter v Cobb County Civil Service Bd, 190 S E 2d 792, 126 Ga App 278

Deputy jailors

Ga—Warren v Walton, 202 S E 2d 405, 231 Ga App. 495

Dismissal

Cal—Pipkin v Board of Sup'rs of Shasta County, 147 Cal Rptr 502, 82 C A 3d 652

25. N Y—Smack v Pattison, 436 N.Y S 2d 787, 80 A.D 2d 874

Discharge for facial appearance invalid

N Y.—Connelly v Amico, 340 N Y S 2d 156, 72 Misc 2d 644, affd 353 N Y S 2d 1021, 43 A D.2d 1016

Nevertheless, the constitutionality of the removal and replacement, by sheriffs, of various employees has been adjudicated.[26 5]

26.5. U S—Whited v Fields, D C Va, 581 F Supp. 1444

§ 33. —— Elisors

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Qualifications

Cal—People v Saugstad, 21 Cal Rptr 740, 203 C A 2d 536

49. Inherent power

Fla—Petition of Stoll, App, 309 So 2d 190

§ 34. Posse Comitatus

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62. U S—Scott v Vandiver, C A 5 C, 476 F 2d 238

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80. Md—Scott v State, 231 A 728, 1 Md App 481

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(2) Other statements

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83. Ala—Jones v Conway, 125 So 2d 517, 271 Ala 525—Rodgers v Meredith, 146 So 2d 308, 274 Ala 179

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49. Authority not established

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11. Colo—People v Green, 514 P 2d 769, 183 Colo 25

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14. Not on court's own motion

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43. Directive held valid

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51. Ala —State ex rel Mullis v Mathews, 66 So 2d 105, 259 Ala 125

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58. N H —State v Grant, 216 A 2d 790, 107 N H 1

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59. N J —C.J.S. cited in State v Vigiliano, 202 A 2d 657, 661, 43 N.J 44

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33. N Y—Fraiman v Mancuso, 289 N Y S 2d 1011, 30 A D 2d 108, motion den 241 N E 2d 742, 22 N Y 2d 895, 294 N Y S 2d 537, affd 249 N E 2d 474, 24 N Y 2d 891, 301 N Y S 2d 633

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50.5. Tex—Hilts v State, Cr, 476 S W 2d 283

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54.5. Fla—Nelson v Traer, App, 188 So 2d 65

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59. N Y—City of Newburgh v Orange County, 430 N Y S 2d 537, 105 Misc 2d 986, mod on oth grds 444 N Y S.2d 713, 85 A D.2d 591

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42. Neb—C J.S cited in Jeffres v Countryside Homes of Lincoln, Inc, 333 N W 2d 754, 761, 214 Neb 104, app after remand 367 N W 2d 728, 220 Neb 26

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50. U S—Godwin v Williams, D C Tex, 293 F Supp 770

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Ohio—C.J.S. cited in Reckman v. Keiter, 164 N E 2d 448, 458, 109 Ohio App 81

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52.5 Failure to arrest intoxicated motorist judgmental or discretionary

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53. U S—Slack v Bishop, D C La., 444 F Supp 1161

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La—Jenkins v Jefferson Parish Sheriff's Office, App, 385 So 2d 578, aff in part, rev in part on oth grds, 402 So 2d 669

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N Y—Foyster v Tutuska, 270 N Y S 2d 535, 25 A D 2d 940

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55. U S—Slack v Bishop, D C La, 444 F Supp 1161

56. U S—Smith v Mosier, D C Mich, 148 F Supp 638

N Y—Isereau v Stone, 160 N Y S 2d 336, 3 A D 2d 243

60. Negligence action not precluded by liability insurance policy

Ga—Keener v Kimble, 317 S E 2d 900, 170 Ga App 674

64. N Y—Isereau v Stone, 140 N Y S 2d 585, 207 Misc 941

§ 54. —— Effect of Directions or Interference of Party or Attorney

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90. Ark—555, Inc v Barlow, App, 623 S W 2d 843, 3 Ark App 139

La—Moses v American Sec Bank of Ville Platte, App, 222 So 2d 899

Mo—C J S. cited in State ex rel Mather v Carnes, App, 551 S W 2d 272, 286

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15. Mo—C J.S cited in State ex rel Mather v Carnes, App, 551 S W 2d 272, 286

§ 55. Liability for Acts or Omissions of Deputies

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20. U S—Taylor v Gibson, C A Ala., 529 F 2d 709

Tenn—State ex rel Coffelt v Hartford Acc & Indem Co, 314 S W 2d 161, 44 Tenn App 405

Utah—Bowman v Hayward, 262 P 2d 957, 1 Utah 2d 131

Respondeat superior liability not imposed by statute validating deputies' acts

Ill—De Correvant v Lohman, 228 N E 2d 592, 84 Ill App 2d 221

21. Fla—Mendez v Blackburn, 226 So 2d 340

Mo—Jones v Buckley, 425 S W 2d 204

N Y—Isereau v Stone, 140 N Y S 2d 585, 207 Misc 941, affd in part on oth grds 160 N Y S 2d 336, 3 A D.2d 243

One person

U S—Whited v. Fields, D C Va, 581 F Supp 1444

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24. Mich—Bridgman v Bunker, 162 N W 2d 310, 12 Mich App. 44—Dudley v Bell, 213 N W.2d 805, 50 Mich App 678

Liability shifted to county

N Y—Hex Bldg Corp v Lepeck Const, 2 Dept, 482 N Y S 2d 510, 104 A D 2d 231

Hiring of vicious deputy

Mich—Bayer v Almstadt, 185 N W 2d 40, 29 Mich App 171

Respondeat superior inapplicable

U S—Sandlin v Pearsall, D C Tenn, 427 F Supp 494

25. Bond or insurance as limitation on liability

La.—Andry v Parish of Orleans, App, 309 So 2d 814, app after remand 358 So 2d 334

26. U S—Middleton v Pearman, D C, 305 F Supp 1203—Madison v Gerstein, C A Fla, 440 F 2d 338—Hesselgesser v Reilly, C A Wash, 440 F 2d 901—Scott v Vandiver, C A S C, 476 F 2d 238—Williams v U S, D C La, 353 F Supp 1226—Tanner v McCall, C A Fla, 625 F 2d 1183, reh den 629 F 2d 1350, cert den 101 S Ct 1975, 451 U S 907, 68 L Ed 2d 295

Colo—McCartney v Foster, 374 P 2d 704, 150 Colo 537

Fla—Waters v Dade County, App, 169 So 2d 505

Kan—Duran v Mission Mortuary, 258 P 2d 241, 174 Kan 565—Monroe v Darr, 520 P 2d 1197, 214 Kan 426, app after remand 559 P 2d 322, 221 Kan 281

La—Polizzi v Trist, App, 154 So 2d 84

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N Y—Isereau v Stone, supra, n 21—Edwards v Onondaga County, 240 N Y S 2d 789, 39 Misc 2d 443—Reck v Onondaga County, 273 N Y S 2d 146, 51 Misc 2d 259

N D—C.J.S. cited in Renner v J Gruman Steel Co, 147 N W 2d 663, 671

Ohio—Reckman v Keiter, 164 N E 2d 448, 109 Ohio App 81

Pa—In re Page, 205 A 2d 637, 205 Pa Super 12

Tenn—Jones v State, for Use of Coffey, 253 S W 2d 740, 194 Tenn 534—State ex rel Coffelt v Hartford Acc & Indem Co, 314 S W 2d 161, 44 Tenn App 405

W Va—Mozingo v Barnhart, 285 S E 2d 497

Basis of liability

(1) Cal—Reynolds v Lerman, 292 P 2d 559, 138 C A 2d 586

Ohio—Huth v Woodard, 161 N E 2d 230, 108 Ohio App 135

Unsalaried auxiliary deputy

La—Curry v Iberville Parish Sheriff's Office, App, 405 So 2d 1387, writ den, Sup, 410 So 2d 1130 and 1135

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33. Fla—Posey v Starr, App, 208 So 2d 287

Ohio—State v Harland, 112 N E 2d 682, 94 Ohio App 293.

37. U S—Salter v Tillman, D C Ala, 420 F Supp 5

Fla—Waters v Dade County, App, 169 So 2d 505—Mendez v Blackburn, 226 So 2d 340

Kan—Monroe v Darr, 520 P 2d 1197, 214 Kan 426, app after remand 559 P 2d 322, 221 Kan 281

Apparent authority abused

La.—Sullivan v Quick, App 3 Cir, 465 So 2d 254, writ den. 467 So.2d 1134

However, a sheriff is not required to pay for attorney fees and costs of one of his deputies out of public funds.[37.5]

37.5 Fla—Florida Police Benev Ass'n, Inc v Miller, App. 5 Dist, 464 So 2d 236, review den 475 So.2d 694

38. U S—Lewis v Brautigam, C A Fla, 227 F 2d 124

Kan—Monroe v Darr, 520 P 2d 1197, 214 Kan 426, app. after remand 559 P 2d 322, 221 Kan 281

N Y—Sheridan v. Major, 225 N Y.S 2d 267, 15 A D 2d 870

39. Distinction between "virtue of office" and "color of office" abolished in Tennessee

U S—Waters v McClary, C A Tenn, 344 F 2d 75, 15 A L R 3d 1183

41. Ga—Chadwick v Stewart, 94 S E 2d 502, 94 Ga App 329

N M—C.J S cited in Karr v Dow, App, 507 P 2d 455, 84 N M 708, cert den 507 P 2d 443, 457, 84 N M 696

43. N Y—Barr v Albany County, 415 N Y S 2d 471, 69 A D 2d 914, mod on oth grds 406 N E 2d 481, 50 N Y 2d 247, 428 N Y S 2d 665

Employment under civil service system

Or—Barendrecht v Clark, 426 P 2d 445, 246 Or 535

44. Or—Hammons v Schrunk, 305 P 2d 405, 209 Or 127

46. U S—Madison v Gerstein, C A Fla, 440 F 2d 338

Colo—Johnson v Enlow, 286 P 2d 630, 132 Colo 101

N Y—Isereau v Stone, 160 N Y S 2d 336, 3 A D 2d 243—Kawar v Martin, 206 N Y S 2d 62, 25 Misc 2d 3, affd 210 N Y S 2d 68, 12 A D 2d 876—Foyster v Tutuska, 270 N Y S 2d 535, 25 A D 2d 940—George v Erie County, 322 N Y S 2d 278, 66 Misc 2d 871

Tenn—Rogers v Anderson, 580 S W 2d 782

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52. Sheriff held not liable for acts of personnel

N Y—Paolucci v Dutchess County, 324 N Y S 2d 452, 67 Misc 2d 479

53. U S—Rundle v Madigan, D C Cal, 356 F Supp 1048

56. Fla—Mendez v Blackburn, App, 205 So 2d 697, decision quashed, Sup, 226 So 2d 340

58. U S—Williams v Thomas, D C Tex, 511 F Supp 535

La—Andry v Parish of Orleans, App, 309 So 2d 814, app after remand 358 So 2d 334

Utah—Bowman v Hayward, 262 P 2d 957, 1 Utah 2d 131

62. U S—Tatum v Houser, C A Mo, 642 F 2d 253

N Y—Wilson v Sponable, 439 N Y S 2d 549, 81 A D 2d 1

63. Ala—Roberts v Meeks, 397 So 2d 111

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68 N Y—Rager v McCloskey, 111 N E 2d 214, 305 N Y 75

76. N D—Renner v J Gruman Steel Co, 147 N W 2d 663

84. Tenn—Harris v Dobson-Tankard Co, 298 S W 2d 28, 41 Tenn App 642

92. U S—Salter v Tillman, D C Ala, 420 F Supp 5

Ill—J P Miller Artesian Well Co v Cook County, 352 N E 2d 372, 39 Ill App 3d 1020

La—LeJeune v Allstate Ins Co, App, 356 So 2d 537, writ not considered, Sup, 358 So 2d 950, am on oth grds & remd 365 So 2d 471, on remand, App, 373 So 2d 212

N Y—Barr v Albany County, 406 N.E 2d 481, 50 N Y 2d 247, 428 N Y S 2d 665

Ohio—Reckman v Keiter, 164 N E 2d 448, 109 Ohio App 81

Unauthorized unofficial acts, etc.

U S—Williams v Thomas, D C Tex, 511 F Supp 535

Tex—Workman v Freeman, Civ App, 279 S W 2d 486, affd 289 S W 2d 910, 155 Tex 474

Usurpation of power

Fla—Mendez v Blackburn, App., 205 So 2d 697, decision quashed, Sup, 226 So 2d 340

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93. Ga—Gay v Healan, 77 S E 2d 47, 88 Ga App 533

94. La—Jackson v Steen, App, 92 So 2d 280

95. U S—Whirl v Kern, C A Tex, 407 F.2d 781, cert den. 90 S Ct 210, 396 U S 901, 24 L.Ed 2d 177

Constable not liable for unauthorized or unratified acts of deputy

Tex—Rhoden v Booth, Civ App, 344 S W 2d 481, err ref no rev err

7. Fla—Mendez v Blackburn, App, 205 So 2d 697, decision quashed, Sup, 226 So 2d 340

Ill—De Correvant v Lohman, 228 N E 2d 592, 84 Ill App 2d 221

8. Colo—Johnson v Enlow, 286 P 2d 630, 132 Colo 101

N Y—Barr v Albany County, 406 N E 2d 481, 50 N Y 2d 247, 428 N Y S 2d 665

Tenn—O'Neal v DeKalb County, 531 S W 2d 296

9. U S—Fults v Pearsall, D C Tenn, 408 F Supp 1164

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10. Mich—Bayer v Almstadt, 185 N W 2d 40, 29 Mich App 171

19. Ohio—Reckman v Keiter, 164 N E 2d 448, 109 Ohio App 81

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27. U S—Salter v Tillman, D C Ala, 420 F Supp 5

32. Torts

Fla—Parker v Robertson, App, 360 So 2d 785

§ 56. Defaults in General

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45. U S—Standard Acc Ins Co v Lohman, C A Ill, 295 F 2d 261

N D—Renner v J Gruman Steel Co, 147 N W 2d 663

Tex—U M & M Credit Corp v Doss, Civ App, 452 S W 2d 45, err ref. no rev err

46. Nev—Fireman's Fund Ins Co v Shawcross, 442 P 2d 907, 84 Nev 446

47. N H—Demers v Bisbee, 211 A 2d 416, 106 N H 354

§ 58. —— Failure to Arrest Defendant

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70. Ariz—Massengill v Yuma County, 456 P 2d 376, 104 Ariz 518, 41 A L R 3d 692

§ 60. Relief From Liability

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83. Cal.—Hayward Lumber & Inv Co v Biscailuz, 306 P 2d 6, 47 C A 2d 716

Nev—Fireman's Fund Ins Co v Shawcross, 442 P 2d 907, 84 Nev 446

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46. Tex—Rankin v Belvin, Civ App., 507 S W 2d 908, err ref no rev. err

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51. Tex—Rankin v Belvin, Civ App., 507 S W 2d 908, err ref no rev. err

58. La—Daquano v Brady, App, 242 So.2d 302

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8. Mo—C.J S. cited in State ex rel Mather v Carnes, App, 551 S W.2d 272, 285

N D—C.J S. black letter summary quoted in Renner v. J Gruman Steel Co., 147 N W 2d 663, 672

Process properly served

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11. U S—Fleming v McEnany, C A.Vt., 491 F 2d 1353.

§ 62. Wrongful Acts Committed in Execution of Process

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42. Abuse of process not shown

Pa —Testa v Dorchak, 41 D & C 2d 759, 47 Wash Co 89

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63. Ala —Weldon v State, 97 So 2d 825, 39 Ala App 286

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75. Conn —Chapel-High Corp v Cavallaro, 106 A 2d 720, 141 Conn 407

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76. La —Liberty Mut Ins Co v Grant Parish Sheriff's Dept, App, 350 So 2d 236, writ den Sup, 352 So 2d 235

Mass —Tourles v Hall, 168 N E 2d 505, 341 Mass 299

Mo —State ex rel Rueseler Motor Co v Klaus, App, 263 S W 2d 71

N Y —Schneider v Sachs Quality Stores, Inc, 197 N Y S 2d 894, 23 Misc 2d 4

78. Fla —Smith v Moore, App, 336 So 2d 145

Ill —Quinn v Larson, 222 N E 2d 239, 77 Ill App 2d 240

§ 64. Acts or Omissions Constituting Wrongful Levy or Seizure

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88. U S —Steinpreis v Shook, C A Md, 377 F 2d 282, cert den 88 S Ct 811, 389 U S 1057, 19 L Ed 2d 858

Mont —Wheeler v Moe, 515 P 2d 679, 163 Mont 154

N D —Renner v J Gruman Steel Co, 147 N W 2d 663

Okl —Gripe v Walker, 389 P 2d 484

89. Ga —Minhinnett v. Jackson, 164 S E 96, 45 Ga App 207

95. Ga —Reese v Bice, 74 S E 2d 476, 87 Ga App 519

§ 66. —— Property Not Subject to Levy

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6. No constructive notice shown

Cal —Agnew v Cronin, 306 P 2d 527, 148 C A 2d 117

§ 67. —— Property Subject to Lien or Encumbrance

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43. Sheriff's refusal to levy writ not justified by fact of mortgage on property

Tex —U.M. & M Credit Corp v Doss, Civ App, 452 S W 2d 45, err ref. no rev err

§ 68. —— Property Belonging to Third Person

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85. Okl —Phillips v Barker, 269 P.2d 337

Wash.—Bowman v. Waldt, 513 P.2d 559, 9 Wash App 562.

Sheriff not granted immunity

Ala —Kemp's Wrecker Service v Grassland Sod Co, Inc, Civ App, 404 So 2d 348

86. N Y —Teddy's Drive In, Inc v Cohen, 388 N Y S 2d 20, 54 A D 2d 898 Affd 390 N E 2d 290, 47 N Y 2d 79, 416 N Y S 2d 782

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14. N Y —C J S cited in Teddy's Drive In Inc, Alexander E Cohen, et al 388 N Y S 2d 20, 22, 54 A D 2d 898 Affd 390 N E 2d 290, 47 N Y 2d 79, 416 N Y S 2d 782

15. Conn —C.J S. cited in Burritt v Plate, 481 A 2d 425, 426, 40 Conn Supp 103

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31. Tex —Motor Truck Sales Co v Hauck, Civ App, 388 S W 2d 214, err ref no rev err

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§ 69. —— Matters Relating to Mode, Time, and Sufficiency of Levy in General

68. N Y —Bryant v Trutnel Realty Corp, 193 N Y S 2d 533, 22 Misc 2d 712

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§ 70. —— Excessive Levy

81. Mich —C.J S cited in Spectrum Mfg Corp v Bank of Lansing, 324 N W 2d 523, 525, 118 Mich App 25

§ 73. Extent of Liability

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51. N C —McDowell v Davis, 235 S E 2d 896, 33 N C App 529, app dism 237 S E 2d 848, 293 N C 360

§ 78. Loss of, or Injury to, Property

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43. U S —Ray v City Bank & Trust Co of Natchez, Miss, D C Ohio, 358 F Supp 630

Ga —Southern Finance Co v Glaze, 160 S E 2d 268, 117 Ga App 249

Wash —Mickelson v Williams, 312 P 2d 656, 50 Wash 2d 402

44. Mich —Schwartz v Irons, 145 N W 2d 357, 4 Mich App 628

Miss —Merchants Nat. Bank of Mobile v Navarrette, 247 So 2d 702

S D —Schievelbein v Boos, 54 N W 2d 172, 74 S D 428

Wash —Mickelson v Williams, 312 P 2d 656, 50 Wash 2d 402

47. La —Bickham Motors, Inc v Crain, App, 185 So 2d 271

Mo —State ex rel. and to Use of Williams v Feld Chevrolet, Inc, App., 403 S W 2d 672

N J —Ritter v Castellini, 414 A 2d 614, 173 N J Super 509

Wash —Mickelson v Williams, 312 P 2d 656, 50 Wash.2d 402

Failure to guard, keep, or protect

(4) Other cases

Cal —Reynolds v Lerman, 292 P 2d 559, 138 C A 2d 586

Idaho—Garren v Butigan, 539 P.2d 259, 96 Idaho 906

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U S —Kapson v Kubath, D C Mich, 165 F Supp 542

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50. Colo —Christensen v Hoover, 643 P 2d 525

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68. Tenn —Harris v Dobson-Tankard Co, 298 S W 2d 28, 41 Tenn App 642

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Colo —Christensen v Hoover, 643 P 2d 525

69. U S —Ray v City Bank & Trust Co of Natchez, Miss, D C Ohio, 358 F Supp 630

74. N Y —Marcado v Weinheim, 436 N Y S 2d 973, 108 Misc 2d 81

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5. Release of property third party

U S —Kapson v Kubath, D C Mich, 165 F Supp 542

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9. N Y —General Motors Acceptance Corp v Combs, 223 N Y S 2d 289, 33 Misc 2d 659

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A sheriff is under no duty to protect the property for either the purchaser or his assignee [44.5]

44.5. Caveat emptor rule applicable

Pa —Prince v Reilly, 12 D & C 2d 315, 74 Montg 128, 49 Mun 275

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63. Property properly sold

U S —Allstate Finance Corp v Zimmerman, C A Fla, 330 F 2d 740

§ 87. Invalid or Irregular Sale

71. Cal —Imperial Metal Finishing Co v Luminous Ceilings West, Inc, 75 Cal Rptr 661, 270 C A 2d 390

Fla —Flagship State Bank of Jacksonville v Carantzas, App, 352 So 2d 1259

N Y —Bryant v Trutnel Realty Corp, 193 N Y S 2d 533, 22 Misc 2d 712

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74. Purpose of statute

N Y —Preston Farms, Inc v Nacri, 345 N Y S 2d 696, 42 A D 2d 668

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25. Sheriff's duty to conduct sale as provided by law

Ala —Sterling v Colvard, 225 So 2d 790, 284 Ala 378

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A sheriff who fails to appoint a qualified and competent appraiser in violation of a statute will be held liable.[61.5]

61.5 Appraiser unqualified

La —Citizens Bank of Ville Platte v American Druggists Ins Co, App 3 Cir, 471 So 2d 1119

62. Mass —Tourles v Hall, 168 N E 2d 505, 341 Mass 299

63. Mass —Tourles v Hall, 168 N E 2d 505, 341 Mass 299

66. Failure to object to sheriff's improprieties in sale held not waiver

Ala —Sterling v Colvard, 225 So 2d 790, 284 Ala 378

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74. Ga —Associates Financial Services Co, Inc v. Johnson, 197 S E 2d 764, 128 Ga App 712

Mo —Watkins v Floyd, App, 492 S W 2d 865

77. Tex —Acrey v Henslee, Civ App, 279 S W 2d 925

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87. N.H—Wurm v John J Reilly, Inc, 163 A 2d 13, 102 N H 558, 86 A L R 2d 286

§ 88. Failure to Sell

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95. Mo—State ex rel Lyons v Maryland Cas Co, 278 S W 2d 754

Mont—Stokke v Graham, 281 P 2d 1025, 129 Mont 96

1. Ark—555, Inc v Barlow, App, 623 S W 2d 843, 3 Ark App 139

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10. Ky—McKenzie v Com for Use and Benefit of Hicks, 373 S W 2d 595

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32. N Y—General Motors Acceptance Corp v Combs, 223 N Y S 2d 289, 33 Misc 2d 659

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70. Mo—State ex rel Lyons v Maryland Cas Co, 278 S W 2d 754

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80. U S—Koehring Co v Hyde Const Co, C A Wis, 424 F 2d 1200

Cal—National Auto & Cas Ins Co v Pitchess, 110 Cal Rptr 649, 35 C A 3d 62

Pa—Chester Housing Authority v Handy, 46 Del Co 100

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5. Pa—North Philadelphia Federal Saving & Loan Ass'n v Thornton, 81 Pa Dist & Co 122

§ 93. Distribution of Proceeds of Sale

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59. Ohio—Lang v Oil City Refiners, Inc, App, 141 N E 2d 474

§ 94. —— Relief From Liability

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72. Cal—Beverley v Biscailuz, 270 P 2d 522, 125 C A 2d 515

§ 95. Failure or Refusal to Pay Over Money

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86. Ohio—Lang v Oil City Refiners, Inc, App, 141 N E 2d 474

Pa—Chester Housing Authority v Handy, 46 Del Co 100

§ 96. —— Particular Matters Affecting Liability

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91. Ohio—Lang v Oil City Refiners, Inc, App, 141 N E.2d 474

92. Cal—Hunydee v Strand, 29 Cal Rptr 647, 214 C A.2d 685

98. Del.—Riverview Cemetery Co of Wilmington v Burczyk, Super, 144 A 2d 406, 1 Storey 247

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12. Ohio—C.J.S. black letter summary quoted in Lang v Oil City Refiners, Inc, App, 141 N E 2d 474, 477

§ 99. Failure to Take Bond

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34. Effect of failure to procure bond for own protection

Del—Rock v Antoine's, Inc, 197 A 2d 737, 7 Storey 164

§ 101. Acceptance of Insufficient or Defective Bond

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53. Miss—C J S. quoted in McKenzie v Curet, 313 So 2d 396, 398

Vt—Mason v Chase, 111 A 2d 246, 118 Vt 369

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Vt—Mason v Chase, 126 A 2d 89, 119 Vt 283

56. Miss—C J S. quoted at length in McKenzie v Curet, 313 So 2d 396, 398

61 Miss—C J S quoted in McKenzie v Curet, 313 So 2d 396, 398

62. Miss—C J S. quoted in McKenzie v Curet, 313 So 2d 396, 398

§ 110. Failure to Make, or Delay in Making, Return

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41. Miss—Bonds v Bonds, 453 So 2d 1020

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49. La—Walker v Scanlon, App, 153 So 2d 570

§ 111. —— Relief from Liability

52. Conn—Chapel-High Corp v Cavallaro, 106 A 2d 720, 141 Conn 407

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La—Walker v Scanlon, App, 153 So 2d 570

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76. Ark—Hamilton v Pan Am Southern Corp, 378 S W 2d 652, 238 Ark 38

§ 114. False Return

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38. U S—Maxwell v Hixson, D C Tenn, 383 F Supp 320, affd 96 S Ct 1656, 425 U S 927, 48 L Ed 2d 170

Ariz—C.J.S cited in Marsh v Hawkins, 437 P 2d 978, 980, 7 Ariz App 226, 31 A L R 3d 1383

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N Y—Heredia v Contino, 360 N Y S 2d 144, 79 Misc 2d 222

N C—Crowder v Jenkins, 180 S E 2d 482, 11 N C App 57

Pa—Kane v Travis, 92 A 2d 902, 172 Pa Super 220

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Mo—Douglas v Hoeh, App, 595 S W 2d 434, app after remand 622 S W 2d 765

41. Mo—State ex rel Moore v Morant, App, 266 S W 2d 723

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43. Mo—State ex rel Moore v Morant, App, 266 S W 2d 723

50 Pa—Miller v Carr, 292 A 2d 423, 221 Pa Super 306

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84. Liability on bond

Mo—Moore v Securities Credit Co, App, 475 S W 2d 430

§ 117. Liabilities as to Prisoners or Convicts

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2. U S—Alberti v Sheriff of Harris County, Texas, D C Tex, 406 F Supp 649

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Kan—C J.S quoted at length in Bukaty v Berglund, 294 P 2d 228, 234, 179 Kan 259

Mont—Pretty On Top v City of Hardin, 597 P 2d 58, 182 Mont 311

3. U S—State of Miss for Use of Derrow v Durham, C A Miss, 444 F 2d 152—Dean v Gladney, D C Tex, 451 F Supp 1313, affd in part, revd in part on oth grds, C A, 621 F 2d 1331, cert den 101 S Ct 1521, 450 U S 983, 67 L Ed 2d 819—Daniels v Gilbreath, C A Okl, 668 F 2d 477

Miss—Farmer v State for Use of Russell, 79 So 2d 528, 224 Miss 96

S D—C J.S. cited in Blakey v Boos, 153 N W 2d 305, 307, 83 S D 1

Transporting prisoner

Ga—Chadwick v Stewart, 94 S E 2d 502, 94 Ga App 329

Ordinary care

Ohio—Justice v Rose, 146 N E 2d 162, affd 144 N E 2d 303, 102 Ohio App 482

Negligent omission

U S—Miller v Jones, C A Tex, 534 F 2d 1178

Ill—Bush v Babb, 162 N E 2d 594, 23 Ill App 2d 285

Held not insurers of safety of prisoners

Ill—Kelly v Ogilvie, 220 N E 2d 174, 35 Ill 2d 297

Mo—Miller v Owsley, 422 S W 2d 39

Sheriff held not liable

Fla—Guice v Enfinger, App, 389 So 2d 270

La—Rhodus v City-Parish Government of City of Baton Rouge, App, 253 So 2d 537, application not considered, 255 So 2d 354, 260 La 129

Sovereign immunity doctrine

Fla—White v County of Palm Beach, App, 404 So 2d 123

4. Ill—Holda v Kane County, 410 N E 2d 552, 43 Ill Dec 552, 88 Ill App 3d 522

Iowa—Moore v Murphy, 119 N W 2d 759, 254 Iowa 969

La—Jackson v Steen, App, 92 So 2d 280—C.J.S. cited in Franks v City of Alexandria, 128 So 2d 310, 316

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S D—Blakey v Boos, 153 N W 2d 305, 83 S D 1

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N Y—LaVigne v Allen, 321 N Y S 2d 179, 36 A D 2d 981

5. Mo—State ex rel Wilkins v Markway, 353 S W 2d 727

Great deal of latitude afforded prison officials

La—Myles v Falkenstein, App, 317 So 2d 292

6. U S—Williams v U.S, D C La, 353 F Supp 1226

Miss—Farmer v State for Use of Russell, 79 So 2d 528, 224 Miss 96

N C—State ex rel Williams v Adams, 219 S E 2d 198, 288 N C 501

Not liable

Ill—Madden v Kuehn, 372 N E 2d 1131, 14 Ill Dec 852, 56 Ill App 3d 997

N C—Foust v Hughes, 204 S E 2d 230, 21 N C App 268, cert den 205 S E 2d 722, 285 N.C 589.

9. La—Polizzi v Trist, App., 154 So 2d 84.

10. Actual knowledge necessary

Ohio—Justice v Rose, 146 N E 2d 162, affd 144 N E 2d 303, 102 Ohio App 482

Corrupt and malicious motives necessary
Ill —Thiele v Kennedy, 309 N E 2d 394, 18 Ill App 3d 465

§ 118. Escape

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According to other authorities, however, sovereign immunity protects a sheriff from liability for damages resulting from the escape of a prisoner.[19 5]

19.5. Fla —Ursin v Law Enforcement Ins Co, Ltd, App 2 Dist, 450 So 2d 1282, approved 469 So 2d 1382, disagreeing with Smith v Department of Corrections, 432 So 2d 1338

23. Md —Baumgartner v State, 319 A 2d 592, 21 Md App 251

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57. W Va —City of McMechen ex rel Willey v Fidelity & Cas Co of N Y, 116 S E 2d 388, 145 W Va 660

58. Fla —Posey v Starr, App, 208 So 2d 287

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70. Okl —Ames v. Strain, 301 P 2d 641

81. Kan.—Monroe v. Darr, 559 P 2d 322, 221 Kan. 281

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82. U.S —C.J.S. cited in Thompson v Baker, D C Ark., 133 F Supp 247, 253—Rhodes v Houston, D C Neb., 202 F Supp 624, affd., C.A., 309 F 2d 959, cert den 83 S Ct 724, 372 U S. 909, 9 L Ed 2d 719, cert. den 86 S Ct 1282, 383 U S 971, 17 L Ed 2d 311, motion den 258 F Supp 546—Brother's Distributing Co, Inc. v Heidtman, D C.Fla, 354 F.Supp 203, affd, C A, 480 F 2d 922.

Cal —Laubisch v Roberdo, 277 P 2d 9, 43 C 2d 702—Herndon v Marin County, App, 102 Cal Rptr 221, 25 C A 3d 933

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La —Conques v Fuselier, App, 327 So 2d 180

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83. U S —Thompson v Baker, D C Ark, 133 F Supp 247

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96. Mich —C.J S cited in Reinecke v Sheehy, 209 N W 2d 460, 465, 47 Mich App 250

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20. N C —Brogden Produce Co v Stanley, 148 S E 2d 689, 267 N C 608

21. N C —Brogden Produce Co v Stanley, 148 S E 2d 689, 267 N C 608

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32. Fla —O'Brien v Food Fair Stores, North Dade, Inc, App, 155 So 2d 836

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74. N D —Renner v J Gruman Steel Co, 147 N W 2d 663

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76. Ky —Hodge v Sharpe, 287 S W 2d 596

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83. Cal —Culbertson v Santa Clara County, 67 Cal Rptr 752, 261 C A 2d 274

Mich —C.J S. cited in Reinecke v Sheehy, 209 N W 2d 460, 466, 47 Mich App 250

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85. Mich —Reinecke v Sheehy, 209 N W 2d 460, 47 Mich App 250

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86. U S —Haigh v Snidow, D C Cal, 231 F Supp 324

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5. Constable
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8. Cal —Vallindras v Massachusetts Bonding & Ins Co, 265 P 2d 907, 42 C 2d 149

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57. N Y —Schneider v Sachs Quality Stores, Inc, 197 N Y S 2d 894, 23 Misc 2d 4

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61. Tex —Rankin v Belvin, Civ App, 507 S W 2d 908, err ref no rev err

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62. Persons who may object to want of indemnity
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§ 130. Express and Implied Promises to Furnish Indemnity

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§ 131. When Indemnity Becomes Effective

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77. N Y —In re Gilbert, 127 N Y S 2d 530, 204 Misc. 787

§ 137. Liabilities of Indemnitors

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82. Miss—U S Fidelity & Guaranty Co v State for Use and Benefit of Stringfellow, 182 So 2d 919, 254 Miss 812

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21. Or—Barendrecht v Clark, 419 P 2d 603, 244 Or 524

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9. La—Liberty Mut Ins Co v Grant Parish Sheriff's Dept, App, 350 So 2d 236, writ den Sup, 352 So 2d 235
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16. Fla—Broxson v Donald S Lavigne, Inc, App, 153 So 2d 343

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(3) Sheriff of county is not separate "unit of government" under statute against which suit should be brought and recovery allowed in that sheriff has no authority to levy an ad valorem tax for purposes of paying judgment awarded against him or his department—Brazoria County v Radtke, Civ App, 566 S W 2d 326, err ref no rev err

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46. Mo—Parker v Sherman, 456 S W 2d 577

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70. N C—C J S cited in Mica Industries, Inc v Penland, 107 S E 2d 120, 123, 249 N C 602

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23. U S—Beard v Stephens, C A Ala, 372 F 2d 685

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57. Ill—Dear v Locke, 262 N E 2d 27, 128 Ill App 2d 356

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58. Cal—Jones v Shears, 299 P 2d 986, 143 C A.2d 360
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59. Mo—State ex rel Rueseler Motor Co v Klaus, App, 263 S W 2d 71

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(2) Other instances
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60. Cal—Reynolds v Lerman, 292 P 2d 559, 138 C A 2d 586

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67. N Y—Freedom Discount Corp v McMahon, 331 N Y S 2d 489, 38 A D 2d 947
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77. Fla—Willard v Barry, 152 So 411, 113 Fla 402
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86. U S—Brown v U S, D C Ark, 342 F Supp 987, affd in part, revd in part on oth grds, C A, 486 F 2d 284, on remand 374 F Supp 723

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2. U S—Gilpin v Tack, D C Ark, 256 F Supp 562—Mulligan v Schlachter, C A Mich, 389 F 2d 231—Brown v U S, C A Ark, 486 F 2d 284, on remand 374 F Supp 723
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36. "Necessary" held not to mean "indispensable"
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38. Dismissal of sheriff error
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76. Cause of action held stated
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(1) Fla—Posey v Starr, App, 208 So 2d 287
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(2) N Y—Farley v Stone, 140 N Y S.2d 579, 207 Misc 934, mod on oth grds 160 N Y S 2d 340, 3 A D 2d 810
(3) Cal—Campbell v Rayburn, 276 P.2d 671, 129 C A 2d 232—Rubinow v San Bernardino County, 336 P 2d 968, 169 C A 2d 67
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Ill—Kelly v Ogilvie, 212 N E 2d 279, 64 Ill App 2d 144, affd 220 N E 2d 174, 35 Ill 2d 297—Kelly v Ogilvie, 220 N E 2d 174, 35 Ill 2d 297
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N Y—Isereau v Stone, 140 N Y S.2d 582, 207 Misc 938—Kawar v Martin, 206 N Y S 2d 62, 25 Misc 2d 3, affd 210 N Y S 2d 68, 12 A D.2d 876
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21. Ga—Gay v Laurens County, 124 S E 2d 81, 217 Ga 594

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§ 159. Presumptions and Burden of Proof

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81. Or —Hammons v Schrunk, 305 P 2d 405, 209 Or 127

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38.5. Assault

Neb —Sperry v Greiner, 122 N W 2d 463, 175 Neb 524

39. Neb —Sperry v Greiner, 122 N W 2d 463, 175 Neb 524

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Or.—Roskop v Trent, 443 P 2d 174, 250 Or 397

41. Or —Hammons v Schrunk, 305 P 2d 405, 209 Or 127.

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60. Or —Hammons v Schrunk, 305 P 2d 405, 209 Or 127

§ 161. Weight and Sufficiency of Evidence

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95. Evidence held insufficient

(1) Tex —Kern v Cook, 287 S W 2d 174, 155 Tex 360

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7. Mass —Tourles v. Hall, 168 N E 2d 505, 341 Mass 299.

10. Excessive use of force in execution of warrant

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16. Evidence held sufficient

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20. U.S.—Kapson v Kubath, D C.Mich, 165 F Supp 542.

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33. Tenn —Hall v State ex rel Norman, 10 Tenn App 287

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(1) Ga —Reese v Bice, 74 S E 2d 476, 87 Ga App 519

Ky —McKenzie v Com for Use and Benefit of Hicks, 373 S W 2d 595

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(1) U S —Kapson v Kubath, D C Mich, 165 F Supp 542

Colo —McMillan v Hammond, 404 P 2d 549, 158 Colo 40

Mass —Tourles v Hall, 168 N E 2d 505, 341 Mass 299

35. Evidence held sufficient

U S —Kapson v Kubath, D C Mich, 165 F Supp 542

38. Ala —Giles v Wilkins, 84 So 2d 120, 263 Ala 690

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53. Mass —Tourles v Hall, 168 N E 2d 505, 341 Mass 299

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S D —Blakey v Boos, 153 N W 2d 305, 83 S D 1

54. Ark —Hamilton v Pan Am Southern Corp, 378 S W 2d 652, 238 Ark 38

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Mo —Moore v Securities Credit Co, App, 475 S W 2d 430

N H —Demers v Bisbee, 211 A 2d 416, 106 N H 354

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(3) Or —Hammons v Schrunk, 305 P 2d 405, 209 Or 127

(14) Exercise of ordinary care under circumstances

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70. Instructions held proper or improperly refused

(1) Mo —State ex rel Miser v Hay, 328 S W 2d 672

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86. Liable for amount of judgment

Tex —Rankin v Belvin, Civ App, 507 S W 2d 908, err ref no rev err

§ 164. Damages

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1. Cal —Reynolds v Lerman, 292 P 2d 559, 138 C A 2d 586

Ohio—Lang v Oil City Refiners, Inc, App, 141 N E 2d 474

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7 Tex —Henry S Miller Co v Evans, 452 S W 2d 426

§ 166. —— Punitive or Exemplary Damages

13. U S —Kapson v Kubath, D C Mich, 165 F Supp 542

16. Ariz —Boies v Cole, 407 P 2d 917, 99 Ariz 198

19. Ariz —Dogarin v Connor, 433 P 2d 653, 6 Ariz App 473

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24. Utah—Bowman v Hayward, 262 P 2d 957, 1 Utah 2d 131

Costs may be taxable against a sheriff in other actions.[27.5]

27.5. Judgment against sheriff in his official capacity

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Liability for costs where sheriff liable for nominal damages

Tex —Henry S. Miller Co v Evans, 452 S W.2d 426

§ 168. Availability of Remedy and Persons Entitled Thereto

35. S D —Sherman v Upton, Inc, 242 N W 2d 666, 90 S D 467

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49. Ga —A A Parker Produce, Inc v Mercer, 145 S E 2d 237, 221 Ga 449

55. Sheriff not subject to amercement

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31. Venue statute held inapplicable

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66. Designation as party not required

Mo —First Nat Bank in Chester v Conner, App, 485 S W 2d 667

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96. S D.—Sherman v Upton, Inc, 242 N W 2d 666, 90 S D 467

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N D.—C.J.S black letter summary cited in Crown Cork & Seal Co v. Barnes, 153 N W 2d 89, 91

35. Commencement of proceedings

Tex —Dallas Joint Stock Land Bank of Dallas v Randerson, 127 N W 2d 593, revd on oth grds 147 S W 2d 769, 136 Tex 91

On appeal from an order sustaining a demurrer to a pleading styled a "motion for judgment against the sheriff

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and sureties," the inquiry is limited to an examination of the form and nature of the pleading, and damages properly recoverable thereunder.[38 5]

38.5. Tex—Dallas Joint Stock Land Bank of Dallas v Randerson, 127 S W 2d 593, revd on oth grds 147 S W 2d 769, 136 Tex 91

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43. Kan—C.J.S cited in Kirkpatrick v Ault, 258 P 2d 262, 267, 174 Kan 701

Okl—Fletcher v Royse, 257 P 2d 507, 208 Okl 467

48. N C—Brogdon Produce Co v Stanley, 148 S E 2d 689, 267 N C 608

50. Miss—Bowers v Conn, 85 So 2d 583, 226 Miss 832

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51. Ark—Hamilton v Pan Am Southern Corp, 378 S W 2d 652, 238 Ark 38

52. Miss—Bowers v Conn, 85 So 2d 583, 226 Miss 832

53. Circumstances held sufficient to work exemption

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57. N C—Rollins v Gibson, 235 S E 2d 159, 293 N C 73

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63. Cal—Glidden v Wills, 289 P 2d 55, 136 C A 2d 596

65. What constitutes "false return"

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68. Cal—Glidden v Wills, 289 P 2d 55, 136 C A 2d 596

72. Nev—Hall v Adair, 249 P 2d 231, 69 Nev 267

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1. N C—Brogden Produce Co v Stanley, 148 S E 2d 689, 267 N C 608.

2. N J.—Vitale v Hotel California, Inc, 446 A 2d 880, 184 N J Super 512, affd 455 A 2d 508, 187 N.J.Super 464.

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61. Okl.—Fletcher v. Royse, 257 P 2d 507, 208 Okl 467

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94. N.D.—Crown Cork & Seal Co v. Barnes, 153 N W 2d 89

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46. N J—Vitale v Hotel California, Inc, 446 A 2d 880, 184 N J Super 512, affd 455 A 2d 508, 187 N J Super 464

47 Kan—C.J.S. cited in Kirkpatrick v Ault, 258 P 2d 262, 267, 174 Kan 701

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52. Evidence held insufficient

Kan—Kirkpatrickk v Ault, 258 P 2d 262, 174 Kan 701

64. N C—Brogden Produce Co v Stanley, 148 S E 2d 689, 267 N C 608

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74. Vacation denied

N C—Brogden Produce Co v Stanley, 148 S E 2d 689, 267 N C 608

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79. U S—C J.S cited in Waters v Bates, D C Tenn, 227 F Supp 462, 466, affd, C A, 344 F 2d 75, 15 A L R 3d 1183

80. Tenn—Garner v State ex rel Askins, 266 S W 2d 358, 37 Tenn App 510

81. Mo—Miller v Owsley, 422 S W 2d 39

Tenn—State ex rel Coffelt v Hartford Acc & Indem Co, 314 S W 2d 161, 44 Tenn App 405

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82. Ariz—Dogarin v Connor, 433 P 2d 653, 6 Ariz App 473

La—Brown v Edwards, App, 321 So 2d 394

85. U S—Waters v McClary, C A Tenn, 344 F 2d 75, 15 A L R 3d 1183

Nev—Hill v Thomas, 270 P.2d 179, 70 Nev 389

86. Tenn—State ex rel Harbin v Dunn, 282 S W 2d 203, 39 Tenn App 190

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99. Mo—State ex rel Wilkins v Markway, 353 S W 2d 727

4. U S—Quinnette v Garland, D C Cal, 277 F Supp 999

8. Ky—National Sur, Corp v Morgan County, 440 S W 2d 791

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42. Not an automobile liability policy

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43. Tenn—State ex rel Harbin v Dunn, 282 S W 2d 203, 39 Tenn App 190

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47. Acts held done under color of office, etc.

(2) Other cases

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49. U S—Waters v Bates, D C Tenn, 227 F Supp 462, affd, C A, 349 F 2d 75, 15 A L R 3d 1183

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4. Ariz—Dogarin v Connor, 433 P 2d 653, 6 Ariz App 473

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Tenn—Harris v Dobson-Tankard Co, 298 S W 2d 28, 41 Tenn App 642—State ex rel Coffelt v Hartford Acc & Indem Co, 314 S W 2d 161, 44 Tenn App 405

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(2) Other instances

Kan—Monroe v Darr, 559 P 2d 322, 221 Kan 281

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(2) Other instances

Utah—Bowman v Hayward, 262 P 2d 957, 1 Utah 2d 131

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And this rule applies even though the deputies are deputies de facto[5]

5. Ga—Powell v Fidelity & Deposit Co of Maryland, 163 S E 239, 45 Ga App 88

8. Kan—C J S. cited in Libby v Schmidt, 298 P 2d 298, 300, 179 Kan 683

Tenn—Grundy County v Dyer, 546 S W 2d 577

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(1) U S—Waters v Bates, D C Tenn, 227 F Supp 462, affd, C A, 344 F 2d 75, 15 A L R 3d 1183

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(4) Other cases

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11. U S—Czap v Marshall, C A Wis., 315 F 2d 766, cert den 84 S Ct 348, 375 U S 942, 11 L Ed 2d 273

Miss—Wittmann v Harrod, 152 So 2d 717, 246 Miss 832

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W Va—State ex rel Copley v Carey, 91 S E 2d 461, 141 W Va 540

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21. Mo—State ex rel Rueseler Motor Co v. Klaus, App, 263 S W 2d 71.

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34. Tenn—Garner v State ex rel. Askins, 266 S W 2d 358, 37 Tenn App 510.

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47. Md—State, to Use of Hill v Fidelity & Deposit Co. of Md, 88 A 2d 457, 200 Md 194

Miss—Poole v Brunt, 338 So 2d 991

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Mo—Dancer v Chenault, App, 527 S W 2d 714

48. Ariz.—Dogarin v Connor, 433 P 2d 653, 6 Ariz. App 473

Md—State, to Use of Hill v Fidelity & Deposit Co of Md, supra, n 47

49. Ariz—C J S. cited in Dogarin v Connor, 433 P.2d 653, 658, 6 Ariz.App. 473

Tenn—State ex rel Coffelt v. Hartford Acc. & Indem Co, 314 S W 2d 161, 44 Tenn App 405

51. Held not entitled to recover full amount of creditor's judgment

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62. Fla—Worden v Hunt, App, 147 So 2d 548

64. U S—Rolen v Rauhuff, D C Tenn, 315 F Supp 935

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87. U S—Smith v Sinclair, D C Okl, 424 F Supp 1108

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9. U S—Whirl v Kern, C A Tex, 407 F 2d 781, cert den 90 S Ct 210, 396 U S 901, 24 L Ed 2d 177

Ga.—Meeks v Douglas, 133 S E 2d 768, 108 Ga App 424

Md—State, to Use of Hill v Fidelity & Deposit Co of Md, 88 A 2d 457, 200 Md 194

Tenn—State ex rel Harbin v Dunn, 282 S W 2d 203, 39 Tenn App 190

Failure to appraise judgment debtor of exemptions

Mo—Dancer v Chenault, App, 527 S W 2d 714

11. La—Brown v Edwards, App, 321 So 2d 394

12. U S—Harvey v American Emp Ins Co of Boston, Mass, D.C La, 143 F Supp 732, affd, C A, 241 F 2d 817

Miss—King v Kelly, 137 So 2d 808, 243 Miss 160

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68. Mo.—Underwood v Underwood, 463 S W 2d 915

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35. Ala—Sterling v Colvard, 225 So 2d 790, 284 Ala 378.

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30. Md—State, to Use of Hill v Fidelity & Deposit Co of Md, 88 A 2d 457, 200 Md 194

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42. Miss—King v Kelly, 137 So 2d 808, 243 Miss 160

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51. Ga—Washburn v Foster, 73 S E 2d 240, 87 Ga App 132

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24. Miss—Farmer v State for Use of Russell, 79 So 2d 528, 224 Miss 96

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44. Ariz—Dogarin v Connor, 433 P 2d 653, 6 Ariz App 473

46. Ariz—Dogarin v Connor, 433 P 2d 653, 6 Ariz App 473

47. Tenn—State ex rel Harbin v Dunn, 282 S.W 2d 203, 39 Tenn App. 190

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68. Tenn—Jones v Bozeman, 321 S W.2d 832, 45 Tenn App 141

70. Conn—MacDonald v Standard Acc Ins Co, Super, 111 A 2d 347, 19 Conn Sup 257

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6. Particular matters held not defenses

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11. Statute held inapplicable under circumstances

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12. Ark—Atkinson v Means, 477 S W 2d 178, 252 Ark 8

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27. Va—Childress v Fidelity & Cas Co of N Y, 72 S E 2d 349, 194 Va. 191, 35 A L R 2d 1

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54. Ala—Dixon v American Liberty Ins Co, 332 So 2d 719

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63. Conn—MacDonald v Standard Acc Ins Co, Super, 111 A 2d 347, 19 Conn Sup 257

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89. U S—State of Tenn ex rel Davis v Hartman, D C Tenn, 306 F Supp 610

91. Ga—Masters v Pardue, 86 S E 2d 704, 91 Ga App 684, affd 88 S E 2d 385, 211 Ga 772

95. Ga—National Sur Corp v Boney, 110 S E 2d 406, 215 Ga 271, conf to 111 S E 2d 130, 100 Ga App 330

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31. Complaint held insufficient

Ark—Hensley v Holder, 307 S W 2d 794, 228 Ark 401

33. Tex—Trigg v Blakemore, Civ App, 387 S W 2d 465, err ref no rev err

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64. Md—State, to Use of Hill v Fidelity & Deposit Co of Md, 88 A 2d 457, 200 Md 194

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69. Pleadings held sufficient

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71. Tex—Trigg v Blakemore, Civ App, 387 S W 2d 465, err ref no rev err

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79. Pleadings held sufficient

(3) Other pleadings

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87. U S—Alberty v Western Sur Co, C A Okl, 249 F 2d 537

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40. Tex—U M & M Credit Corp v Doss, Civ App, 452 S W 2d 45, err ref no rev err

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58. Mo—State ex rel Ratliff v Morant, App, 271 S.W 2d 230

62. Ga—Turner v Maryland Cas Co, 122 S E 2d 479, 104 Ga App 693

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84. Conn.—MacDonald v Standard Acc Ins Co, Super., 111 A 2d 347, 19 Conn.Sup 257

95. Mo—State ex rel. Rueseler Motor Co. v Klaus, App, 281 S W 2d 543

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3. Conn—MacDonald v Standard Acc Ins. Co, Super., 111 A 2d 347, 19 Conn Sup 257

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Ga—Turner v Maryland Cas Co, 122 S E 2d 479, 104 Ga App 693

4. Tex—Rhoden v Booth, Civ App, 344 S W 2d 481, err ref no rev err

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(4) Other matters

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19. Mo—State ex rel Rueseler Motor Co v Klaus, App, 263 S W 2d 71—State ex rel Rueseler Motor Co v Klaus, App, 281 S W 2d 543

20. Tenn—Harris v Dobson-Tankard Co, 298 S W 2d 28, 41 Tenn App 642

22. Mo—State ex rel Moore v Morant, App, 266 S W 2d 723

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25. Evidence held sufficient

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N D—Schell v Collis, 83 N W 2d 422

27. Tex—Rhoden v Booth, Civ App, 344 S W 2d 481, err ref no rev err

28. Ariz—Boies v Cole, 407 P 2d 917, 99 Ariz 198

Tenn—Jones v State, for Use of Coffey, 253 S W 2d 740, 194 Tenn 534

30. U S—Harvey v American Emp Ins Co of Boston, Mass, C A La, 241 F 2d 817

Ky—Com for Use and Benefit of Letcher County v Collins, 341 S W 2d 73

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Nev—Fireman's Fund Ins Co v Shawcross, 442 P 2d 907, 84 Nev 446

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Ala—Giles v Wilkins, 84 So 2d 120, 263 Ala 690

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50. Ind—State ex rel Langdon Hospital, Inc v Indemnity Ins Co of North America, 211 N E 2d 322, 138 Ind App 492

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52. Miss—State for Use of Smith v Broom, 58 So 2d 32

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Miss—Nichols v Vandevander, 79 So 2d 271, 223 Miss 852

Okl—Rich v Reynolds, 277 P 2d 985

55. Instructions held not inconsistent

Ind—Travelers Indem Co of Hartford, Conn v State ex rel Favre, App, 290 N E 2d 456

56. Mo—State ex rel Moore v Morant, supra, n 50

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Mo—State ex rel Rueseler Motor Co v Klaus, App, 281 S W 2d 543

62. Directed verdict held erroneous

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Utah—Bowman v Hayward, 262 P 2d 957, 1 Utah 2d 131

Award held not excessive

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21. Miss—Daniel v McNeel, 74 So 2d 753, 221 Miss 666

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25. Ariz—Boies v Cole, 407 P 2d 917, 99 Ariz 198

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26. U S—McDaniel v Carroll, C A Tenn, 457 F 2d 968, cert. den 93 S Ct 897, 409 U.S 1106, 34 L Ed 2d 687

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30. Mo—State ex rel Moore v Morant, App, 266 S W 2d 723

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39.5. Mont—Line v Tait, 155 P.2d 752, 116 Mont 571

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42. Cal—People v Mulin, 17 Cal Rptr 516, 197 C A 2d 479

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64. Iowa—State v Moritz, 293 N W 2d 235

67. N Y—Reck v Onondaga County, 273 N Y.S 2d 146, 51 Misc 2d 259

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70. Defenses

(2) Matters held no defense

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72. N J —State v Lombardo, 90 A 2d 39, 20 N J Super 317

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(1) La —State v Fitzgerald, 179 So 2d 906, 248 La 487

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86. Evidence held sufficient

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Pa —Com v Green, 9 Lycoming 159, affd 211 A 2d 5, 205 Pa Super. 539.

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73. N Y.—Personeni v Aquino, 174 N.Y S.2d 22, 5 A.D 2d 616, affd 187 N Y S.2d 764, 6 N.Y 2d 35, 159 N E.2d 559.

75. Mich —Szymanski v. Alpena Tp., 161 N.W 2d 417, 11 Mich.App. 387

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77. Ala —Hamilton v Autauga County, 268 So 2d 30, 289 Ala. 419

Ga —Warren v. Walton, 202 S E 2d 405, 231 Ga 495

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79. Budget

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80 U S —Liquifin Aktiengesellschaft v Brennan, D C N Y, 446 F Supp 914

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81. Ala —Allen v Walker County, 199 So 2d 854, 281 Ala 156

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82. Tenn —Overton County v State ex rel Hale, 588 S W 2d 282

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82.5. It is incumbent on sheriff to submit cost of insurance and request appropriation therefor

La —Rohli v City of New Orleans, App, 100 So 2d 301

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La —Rohli v City of New Orleans, App, 100 So 2d 301

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84. Neb —State ex rel Tomka v Janing, 158 N W 2d 213, 183 Neb 76

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19. Cal —Longshore v Ventura County, 157 Cal Rptr 706, 598 P 2d 866, 25 C 3d 14.

20. N J —International Broth of Elec Workers, Local No. 1470 v Gillen, 416 A.2d 446, 174 N.J Super 326

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22. Cal —Neeley v Board of Retirement of Fresno County, 111 Cal Rptr 841, 36 C A 3d 815—San Mateo County v Workers' Compensation Appeals Bd, 184 Cal Rptr 240, 133 C A 3d 737

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29. Tenn —Carter v Jett, 370 S W 2d 576, 51 Tenn App 560

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38. N Y —Finkelstein v Cohen, 226 N Y S 2d 766, 31 Misc 2d 967

39. N Y —Finkelstein v Cohen, 226 N Y S 2d 766, 31 Misc 2d 967

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40. Miss —Ellington v State, 366 So 2d 1077

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51. Tex —Vondy v Commissioners Court of Uvalde County, 620 S W 2d 104.

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54. Salary held unreasonable

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55. Minn —Vanderhyde v Dodge County, 255 N W 2d 39.

57. Ky —Board of Ed of Mason County v Collins, 259 S W 2d 17—Harlan v Sawyers, 290 S W 2d 488

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Cal —Moeser v San Diego County, 38 Cal Rptr 813, 227 C A 2d 563

58. Ineffective prior to approval date of statute

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63. Service of process not voided

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67. Ga —Howell v Muscogee County, 125 S E 2d 139, 105 Ga App 515

68. Ga —Howell v Muscogee County, 125 S E 2d 139, 105 Ga App 515

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25. Iowa—Smith v Newell, 117 N W 2d 883, 254 Iowa 496

Eligibility for disability retirement benefits shown

Cal —Minor v Sonoma County Emp Retirement Bd, 126 Cal Rptr 16, 53 C A 3d 540

N Y —Chayut v Levitt, 385 N Y S 2d 856, 53 A D 2d 322, app after remand 416 N Y S 2d 386, 70 A.D 2d 701

Eligibility for retirement benefits not shown

Fla —Walker v State, Division of Retirement, App, 360 So 2d 1291—Shepard v Department of Administration, Division of Retirement, App, 361 So 2d 208.

Ga.—Russell v Odum, 269 S.E 2d 27, 154 Ga App 547

N Y —New York State Deputies' Ass'n, Inc v New York State Civil Service Commission, 393 N Y S 2d 177, 57 A D 2d 550.

Workmen's compensation

Wash —Hunter v Department of Labor and Industries, 576 P 2d 69, 19 Wash.App 473.

28. Ariz.—Eshelman v. Blubaum, App, 560 P 2d 1283, 114 Ariz 376

Cal —Stafford v Los Angeles County Emp Retirement Bd, 270 P.2d 12, 42 C 2d 795

W Va —State ex rel Christian v St Clair, 166 S E 2d 785, 153 W.Va. 1.

29. Ga —Vandiver v Carlin, 123 S E 2d 548, 217 Ga. 515

30. Ill —Fruhling v Champaign County, 420 N E 2d 1066, 51 Ill Dec 508, 95 Ill App 3d 409

34. La —Anderson v State, App, 363 So 2d 728, writ den, Sup, 364 So 2d 600

Neb —Grace v Douglas County, 134 N W 2d 818, 178 Neb 690

Minimum fixed by statute

Ala —Mitchell v Mobile County, 313 So 2d 172, 294 Ala 130

Statute construed

Ala —Shelby County Commission v Smith, 372 So 2d 1092

35. Neb —Grace v Douglas County, 134 N W 2d 818, 178 Neb 690

Pa —Simon v Del Vitto, 403 A 2d 1335, 43 Pa Cmwlth 402

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38. Ga —Warren v Walton, 202 S E 2d 405, 231 Ga 495

W Va —State ex rel Christian v St Clair, 166 S E 2d 785, 153 W Va 1—State ex rel Cooke v Jarrell, 177 S E 2d 214, 154 W Va 542

39. Neb —Grace v Douglas County, 134 N W 2d 818, 178 Neb 690

N J —Scancarella v Department of Civil Service, 93 A 2d 637, 24 N J Super 65

Overtime

Cal —Wilson v Santa Clara County, 137 Cal Rptr 78, 68 C A 3d 78

Nev —Rusk v Whitmire, 541 P 2d 1097, 91 Nev 689

41. Ill —Scutt v LaSalle County Bd, 423 N E 2d 213, 53 Ill Dec 21, 97 Ill App 3d 181

45. Cal —Collins v Los Angeles County, Sheriff's Dept, 126 Cal Rptr. 541, 55 C A 3d 594

52. Iowa—Smith v Newell, 117 N W 2d 883, 254 Iowa 496

53. Neb —Anderson v Bituminous Cas Co, 52 N W 2d 814, 155 Neb 590

56. Fla —Walker v Pendarvis, 132 So 2d 186

§ 226. Service of Process, Notices, etc., in General

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61. N J —Schlesinger v Smith, 376 A 2d 1236, 151 N J Super 264

Pa —Jones v Lennox, 85 Pa Dist & Co 136—Rhodes Gasoline and Oil Service v Marra, 10 D & C.2d 187, 34 North 74—Dando v Bucks County, 13 Bucks 139

62. N J —East Brunswick Bd of Ed v East Brunswick Ed Ass'n, 273 A 2d 600, 113 N J Super 268

§ 229. —— Search for, or Arrest or Pursuit of, Persons Charged with Crime

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90. Ga —Sikes v Charlton County, 119 S E 2d 59, 103 Ga App 251

Held entitled to compensation for each writ

Pa —Com v Felton, 20 D & C 2d 664

92. Pa —Com v Brown, 4 D & C.2d 42, 5 Lycoming 87

§ 231. —— Commitment, Custody, and Discharge of Prisoners

3. Ga —Gill v Decatur County, 201 S E 2d 21, 129 Ga App 697.

§ 235. —— Attachment and Execution

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39. N Y —Crown Mfg Co v United Piece Dye Works, 162 N Y S 2d 223, 7 Misc 2d 105—National State Bank of Newark v Garan, 233 N Y S 2d 866, 36 Misc 2d 659

40. Statute construed

Ala —Hawley Fuel Corp v Burgess Mining & Const Corp, 283 So 2d 603, 291 Ala 546

Ill —DeBruyn v Elrod, 418 N E 2d 413, 49 Ill Dec 559, 84 Ill 2d 128, app after remand 459 N E 2d 971, 76 Ill Dec 836, 121 Ill App 3d 290

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43. U S —Liquifin Aktiengesellschaft v Brennan, D C N Y, 446 F Supp 914

N Y —Zimmerman v Engel, 114 N Y S 2d 293—Personeni v Aquino, 187 N Y S 2d 764, 6 N Y 2d 35, 159 N E 2d 559

44. N Y —Personeni v Aquino, 187 N Y S 2d 764, 6 N Y 2d 35, 159 N E 2d 559

45. N Y —Crown Mfg Co v United Piece Dye Works, 162 N Y S 2d 223, 7 Misc 2d 105—National State Bank of Newark v Garan, 233 N Y S 2d 866, 36 Misc 2d 659

53. Md —Martin G Imbach, Inc v Deegan, 117 A 2d 864, 208 Md 115

56. "Seizure" held not made

Md —Martin G Imbach, Inc v Deegan, 117 A 2d 864, 208 Md 115

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59. N Y —McCloskey v Chemical Corn Exchange Bank, 153 N Y S 2d 187, 2 Misc 2d 281—Manni v Shirtcraft Co, 161 N Y S 2d 257, 6 Misc 2d 925.

65. N Y —Bedford Hills Concrete Products Corp v Borrello, 236 N Y S.2d 601, 38 Misc 2d 43

71. N Y —Manni v Shirtcraft Co, 161 N Y S 2d 257, 6 Misc 2d 925—Seymour Mfg Co v Tarnopol, 187 N Y S 2d 494, 20 Misc 2d 210

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75. N J —International Broth of Elec Workers, Local No 1470 v Gillen, 416 A.2d 446, 174 N J Super 326

76. Md —Martin G Imbach, Inc v Deegan, 117 A 2d 864, 208 Md 115.

§ 238. Custody and Care of Property

87. La —Pitre v Talley, App, 205 So 2d 818, writ ref 208 So 2d 317, two cases, 251 La 1030

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1. La —Pitre v Talley, App, 205 So 2d 818, writ ref 208 So 2d 317, two cases, 251 La 1030

S C —Bank Repossessions v Mobile America Corp, 235 S E 2d 709, 268 S C 622

§ 239. Sales

6. Ill.—DeBruyn v Elrod, 418 N E 2d 413, 49 Ill Dec 559, 84 Ill 2d 128, app after remand 459 N E 2d 971, 76 Ill.Dec 836, 121 Ill App.3d 290

13. U S —Pennsylvania Bank & Trust Co v. Hanisek, D C.Pa., 426 F Supp 410.

§ 240. Collection and Payment of Money

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23. N.Y —Nevada Bank of Commerce v. 43rd St Estates Corp, 328 N Y S 2d 565, 38 A D 2d 227, revd. 304 N E 2d 372, 33 N Y 2d 706, 349 N Y. S 2d 676

Settlement

N Y —Morris v Morris, 252 N Y S 2d 641, 43 Misc 2d 854

No claim to interest on investment of funds

La.—Amiss v State, App, 340 So 2d 1085

24. N Y.—Kolbert v. Katto, 134 N Y.S.2d 127—Morris v Morris, 252 N Y.S 2d 641, 43 Misc 2d 854

29. N Y—Finkelstein v Cohen, 226 N Y S 2d 766, 31 Misc 2d 967

Right to poundage held purely statutory

N Y—Personeni v Aquino, 187 N Y S 2d 764, 6 N Y 2d 35, 159 N E 2d 559—Seymour Mfg Co v Tarnopol, 187 N Y S 2d 494, 20 Misc 2d 210—McCloskey v Boyles, 201 N Y S 2d 988, 26 Misc 2d 74

Lack of physical custody of property, etc.

U S—Eastern Metal Products Corp v Landers of Arkansas, Inc, D C N Y, 188 F Supp 616—In re International Distributing Export Co, D C N Y, 219 F Supp 412

Settlement between parties

(4) Pa—Metropolitan Life Ins Co v Erie Commerce Bldg Corp, 41 D & C 2d 668, 50 Erie 27

(5) Other statements

U S—Eastern Metal Products Corp v Landers of Arkansas, Inc, D C N Y, 188 F Supp 616

N Y—Wartels v County Asphalt, Inc, 330 N Y S 2d 752, 69 Misc 2d 979, affd 340 N Y S 2d 1009, 41 A D 2d 705

Accrued right to poundage unaffected by subsequent vacation of levy

N Y—H L Hoffman & Co v Polarad Electronics Corp, 208 N Y S 2d 404, 26 Misc 2d 68—Gazerwitz v. Adrian, 293 N Y S 2d 441, 57 Misc 2d 748

Right to poundage not prejudiced by non-appearance in third-party proceeding

N Y.—National State Bank of Newark v Garan, 233 N.Y S 2d 866, 36 Misc 2d 659

One set of fees

N Y—Bedford Hills Concrete Products Corp v Borrello, 236 N Y S 2d 601, 38 Misc 2d 43

Date for ascertaining value of attached property

N Y—Hollister v Hollister, 305 N Y S 2d 447, 33 A.D 2d 821

30. U S—Knapp v McFarland, C A N Y, 462 F 2d 935

N Y—Cummins Diesel Sales Corp v Atomic Carriers, Inc, 207 N Y S 2d 479

Redemption of property precludes commission

Neb—Mumch v Hull, 149 N W 2d 527, 181 Neb 571

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31. U S—Eastern Metal Products Corp v Landers of Arkansas, Inc., D C N Y., 188 F Supp 616

N Y—Gilman v. Sandow, 220 N Y S 2d 644, 29 Misc 2d 1078—Standardbred Owners Ass'n v Yonkers Raceway, Inc., 252 N Y S 2d 969, 44 Misc.2d 37.

Statutory vacation of execution provision inapplicable

N Y—Personeni v Aquino, 174 N Y S 2d 22, 5 A D 2d 616, affd 187 N Y S 2d 764, 6 N Y 2d 35, 159 N E 2d 559

Statutory prohibition

U.S—Knapp v McFarland, C.A N Y, 462 F 2d 935.

32. N Y.—Personeni v. Aquino, 174 N Y S 2d 22, 5 A.D.2d 616, affd 187 N Y S 2d 764, 6 N Y 2d 559—Standardbred Owners Ass'n v Yonkers Raceway, Inc, 252 N.Y.S 2d 969, 44 Misc 2d 37

33. N Y—American Broadcasting-Paramount Theatres, Inc. v E & E K. Enterprises, Inc, 231 N Y.S 2d 633, affd. 238 N.Y.S.2d 663, 18 A D.2d 975

Garnishee execution

(3) Other matters

N.Y.—Morris v. Morris, 252 N.Y S 2d 641, 43 Misc 2d 854.

§ 241. Attendance at Court

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47. Illegal exaction

Ark.—Thomas v Williford, 534 S W.2d 2, 259 Ark 354

55. Ga—Sikes v Charlton County, 119 S E 2d 59, 103 Ga App 251

§ 245. Copies of Writs and Processes

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86. Furnishing copies of accident reports upheld where not regulated by statute—State ex rel Robusky v Chicko, 230 N E 2d 134, 11 Ohio App 2d 235, revd on oth grds 244 N E 2d 478, 17 Ohio St 2d 1

§ 247. Disbursements and Expenses

Library References

Sheriffs and Constables ⇐64.

89. Pa—Dando v Bucks County, 13 Bucks 139

90. Housing allowance not authorized

Colo—Van Cleave v Board of County Com'rs of Adams County, 518 P 2d 1371, 33 Colo App 227

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91. Ga—Lewis v Gay, 109 S E 2d 268, 215 Ga 90

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11. Md—Buckeye Development Corp v Brown & Shilling, Inc, 220 A.2d 922, 243 Md 224

19. Wis—Bablitch and Bablitch v Lincoln County, 263 N W 2d 218, 82 Wis 2d 574

§ 248. —— Transportation or Traveling Expenses

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42. Ark—Searcy County v Holder, 516 S W 2d 901, 257 Ark 435

52. Mo—Myers v Buchanan County, App, 493 S W 2d 696

§ 251. Mileage

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87. Pa—Smith v Delaware County, 28 D & C 2d 443, 50 Del Co 100—Glass v Reilly, 215 A 2d 649, 419 Pa. 547

99. Ky—Funk v Milliken, 317 S W 2d 499

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18. Neb—State ex rel Tomka v Janing, 158 N W 2d 213, 183 Neb 76.

20. Pa—Com v Brown, 4 D & C 2d 42, 5 Lycoming 87

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25. Ga—Lewis v Gay, 109 S E 2d 268, 215 Ga 90

30. Ky—Funk v Milliken, 317 S.W 2d 499.

31. Pa—Com v Brown, 4 D & C 2d 42, 5 Lycoming 87

§ 252. In General

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39. U S—Liquifin Aktiengesellschaft v. Brennan, D C N Y., 446 F Supp. 914

Third party

N Y—National State Bank of Newark v Garan, 233 N Y S 2d 866, 36 Misc.2d 659

45. N Y.—Zimmerman v Engel, 114 N Y S 2d 293

55. N Y—Zimmerman v. Engel, supra, n 43—Seymour Mfg Co v Tarnopol, 187 N Y.S 2d 494, 20 Misc 2d 210.

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61. N.Y—Manni v Shirtcraft Co., 161 N Y S 2d 257, 6 Misc 2d 925—Jewelry Realty Corp v Newport Associates, Inc., 314 N Y S.2d 787, 64 Misc 2d 409

68. U S—Knapp v McFarland, C A N Y, 462 F 2d 935

Md—Martin G Imbach, Inc v Deegan, 117 A 2d 864, 208 Md 115

N Y—In re Pearson's Estate, 340 N Y S 2d 119, 72 Misc 2d 995

§ 253. County or State

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95. Cal—Tracy v Fresno County, 270 P 2d 57, 125 C A 2d 52

City

Utah—Salt Lake City v Salt Lake County, 568 P 2d 738

96. Vt—Town of Stowe v Lamoille County, 362 A 2d 159, 134 Vt 402

99. Tenn—Metropolitan Government of Nashville and Davidson County v Poe, 383 S W 2d 265, 215 Tenn 53

1. Vt—Town of Stowe v Lamoille County, 362 A 2d 159, 134 Vt 402

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9. Ga—Employees Retirement System v Lewis, 136 S E 2d 518, 109 Ga App 476

10. Ala—Odom v Court of County Com'rs, 132 So 2d 247, 272 Ala 417

16. W Va—State ex rel Ward v Raleigh County Court, 76 S E 2d 579, 138 W Va 551

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22. County held liable for fees and expenses

(3) Pa—Northampton County v West, 28 Pa 173

23. County held not liable for fees and expenses

(3) Pa—Dougherty v Cumberland County, 26 Pa Super 610

§ 254. In General

34. Statutory requirement as to signature to fee bills held directory

Ky—Fannin v Davis, 385 S W 2d 321

37. N Y—Manni v Shirtcraft Co, 161 N Y S 2d 257, 6 Misc 2d 925

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38. N Y—Manni v Shirtcraft Co, 161 N Y S.2d 257, 6 Misc.2d 925

49. N Y—Manni v Shirtcraft Co, 161 N Y S 2d 257, 6 Misc 2d 925

51. N Y—H L Hoffman & Co v Polarad Electronics Corp, 208 N Y S.2d 404, 26 Misc 2d 68

53. N Y—Jewelry Realty Corp v Newport Associates, Inc, 314 N Y S 2d 787, 64 Misc 2d 409

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74. Ga—Lewis v Gay, 109 S E 2d 268, 215 Ga 90

§ 255. Actions For Fees and Expenses

92. Cal—Wilson v Santa Clara County, 137 Cal Rptr 78, 68 C A 3d 78

La—Bye v Giarrusso, App, 321 So 2d 58.

Minn—Zillgitt v. Goodhue County Bd of Com'rs, 202 N W 2d 378, 295 Minn 9

N Y—Seymour Mfg Co v. Tarnopol, 187 N Y S 2d 494, 20 Misc 2d 210

W Va—Hall v Protan, 210 S E 2d 475, 158 W Va 276

Wis—State ex rel Schilling v. Baird, 222 N W 2d 666, 65 Wis 2d 394

Recovery of monies collected during time invalid salary statute was in force

Ga—Laurens County v Gay, 161 S E 2d 906, 117 Ga App 793

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93. N Y—Seymour Mfg Co v Tarnopol, 187 N Y S 2d 494, 20 Misc 2d 210

94. Okl—Bell v National Collection System, 269 P 2d 992

96. Suit untimely

La—State ex rel Jeanise v Waguespack, 312 So 2d 865

7. Ga—Lewis v Gay, 109 S E 2d 268, 215 Ga 90

8. Wis—State ex rel Klinger v Baird, 202 N W 2d 31, 56 Wis 2d 460, app after remand 222 N W 2d 666, 65 Wis 2d 394

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11. Pleading held sufficient

(2) Other pleadings

Ga—Gay v Laurens County, 124 S E 2d 81, 217 Ga 594

22. Evidence held sufficient

(1) Ind—Janisch v La Porte County, 315 N E 2d 387, 161 Ind App 226

Mont—Bucher v Fraser, 354 P 2d 1042, 138 Mont 83

N M—Brown v Jimerson, 619 P 2d 1235, 95 N M 191

(2) Mont—Bucher v Fraser, 354 P 2d 1042, 138 Mont 83

Evidence held insufficient

Cal—LaDeaux v Alameda County, 63 Cal Rptr 796, 256 C A 2d 261

Burden of proof

Ind—Janisch v La Porte County, 315 N E 2d 387, 161 Ind App 226

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§ 256. Time for Payment

24. N Y—Jewelry Realty Corp v Newport Associates, Inc, 314 N Y S 2d 787, 64 Misc 2d 409

§ 257. Lien

35. N Y—Seymour Mfg Co v Tarnopol, 187 N Y S 2d 494, 20 Misc 2d 210

§ 258. Right of County to Recover Back

Library References

Sheriffs and Constables ⇐76

49. Colo—Van Cleave v Board of County Com'rs of Adams County, 518 P 2d 1371, 33 Colo.App 227

N Y—Fraiman v Mancuso, 289 N Y S 2d 1011, 30 A D 2d 108, motion den 241 N E 2d 742, 22 N Y 2d 895, 294 N Y S 2d 537, affd 249 N E 2d 474, 24 N Y 2d 891, 301 N Y S 2d 633

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Money paid in compliance with statute

Ky—Fannin v Davis, 385 S W 2d 321

54. Ark—Hensley v Holder, 307 S W 2d 794, 228 Ark 401

§ 259. Right of Private Individual to Recover Back

59. Md.—Martin G Imbach, Inc v Deegan, 117 A 2d 864, 208 Md 115

62. Ill—DeBruyn v Elrod, 418 N E 2d 413, 49 Ill Dec 559, 84 Ill 2d 128, app after remand 459 N E 2d 971, 76 Ill Dec 836, 121 Ill App 3d 290

Not proper party

R I.—C.C Plumb Mixes, Inc v. Stone, 272, A 2d 152, 108 R I. 75.

§ 260. Accounting for, and Payment of, Receipts of Office to County or State

69. U.S.—Liquifin Aktiengesellschaft v Brennan, D C.N.Y., 446 F Supp 914

Ohio—State ex rel Robusky v Chicko, 244 N E 2d 478, 17 Ohio St 2d 1

Wash—Whatcom County v Reynolds, 620 P 2d 544, 27 Wash App 880

Illegal exaction shown

Ark—Thomas v Williford, 534 S W 2d 2, 259 Ark 354

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84. Mo—State ex rel St Louis County v Kelly, 377 S W 2d 328

Constable as trustee

Mo—St Louis County v Litzinger, 372 S W 2d 880

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98. Ga—Howell v Muscogee County, 125 S E 2d 139, 105 Ga App 515

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29. Evidence held insufficient

Ga—Gay v Lewis, 114 S E 2d 155, 101 Ga App 387

SHIELD The term is also used to denote a felon's use of an innocent person by force as a potential protection against retaliation [3 1]

3.1. N J—A "shield" is a felon's use of an innocent person by force as a potential protection against retaliation—State v Kress, 253 A 2d 481, 485, 105 N J Super 514

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SHIMS Thin metal plates designed to be inserted between engine bearing and bearing holder so as to compensate for wear in bearing, thus reducing oil consumption in worn engine.[10 50]

10.50. D C—Watson v Allen, C A, 254 F 2d 342, 347, 103 U S App D C 5

SHINE To emit rays of light; to be bright by reflection of light [10 60]

10.60. N Y—People on Complaint of Feierstein v Messing, 274 N Y S 2d 463, 465, 51 Misc 2d 1000

As a noun, "shine" means brightness caused by the emission of light.[10 61]

10.61. N Y—People on Complaint of Feierstein v Messing, 274 N Y S 2d 463, 465, 51 Misc 2d 1000

SHIP.

As a verb.

21. Ark—C.J.S. cited in Cargill, Inc v Thibault Milling Co, 328 S W 2d 362, 364

22. Similarly defined

Verb "ship" means to be cause to be transported, to place or receive on board of a ship for transportation by water, cause to embark—Atchison, T. & S F Ry Co v Erman-Howell Division of Luria Steel & Trading Corp., D.C Ill, 279 F Supp 625, 627.

23. Ark—C.J.S. cited in Cargill, Inc v Thibault Milling Co, 328 S W 2d 362, 364.

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31. Ark—C.J.S. cited in Cargill, Inc v Thibault Milling Co, 328 S W 2d 362, 364

33. Ark—C.J.S. cited in Cargill, Inc. v Thibault Milling Co, 328 S W 2d 362, 364

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Shipbuilding joiner. One who fits and joins the interior furnishings to the hull of a ship.[58 5]

58.5. U S—In re Frigitemp Corp, D.C N Y, 24 B R 209, 212

SHIPMENT.

63. Defined in two basic ways

U S—Atchison, T & S F Ry Co v Erman-Howell Division of Luria Steel & Trading Corp, D C Ill, 279 F Supp 625, 627

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69. U S—Atchison, T & S F Ry Co v Erman-Howell Division of Luria Steel & Trading Corp, D C Ill, 279 F Supp 625, 631

75. U S—Atchison, T & S F Ry Co v Erman-Howell Division of Luria Steel & Trading Corp, D C Ill, 279 F Supp 625, 627

85. Similarly defined

(1) A commodity, consignment, or cargo shipped

U S—Atchison, T & S F Ry Co, v Erman-Howell Division of Luria Steel & Trading Corp, D C Ill, 279 F Supp 625, 627

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SHIPPER.

2. U S—Atchison, T & S F Ry Co v Erman-Howell Division of Luria Steel & Trading Corp, D C Ill, 279 F Supp 625, 627

Similarly defined

(1) Consignor, shipping clerk, the receiver of goods or cargo, consignee—Atchison, T & S F. Ry Co v Erman-Howell Division of Luria Steel & Trading Corp, D C Ill, 279 F Supp 625, 627

SHIPPING

In view of the adoption in many jurisdictions of the Uniform Commercial Code, which is applicable to transactions entered into and events occurring after the date it becomes effective in a particular jurisdiction, its provisions should be examined in connection with the use of this title.

New Federal Rules of Evidence, effective in 1975, have been adopted governing generally the proceedings in the courts of the United States and before United States Magistrates; and applicable generally, among other matters, to maritime proceedings and cases. These Rules should be examined in connection with the use of this title.

§ 2. Regulation in General

Library References

Shipping ⇐3.

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15. U S—Spirt v. Bechtel, D C.N Y, 129 F.Supp. 872, revd. in part on oth. grds, C A, 232 F 2d 241—Tsakonites v Transpacific Carriers Corp, D C N Y., 246 F Supp 634, affd., C.A, 368 F 2d 426, cert den 87 S Ct 1348, 386 U S 1007, 18 L Ed 2d 434—Afran Transport Co v U S, D C N.Y, 309 F Supp 650, affd, C A., 435 F 2d 213. Cert den 92 S Ct 72, 404 U.S 872, 30 L Ed 2d 116—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

Subjection to laws and treaties

(3) Other matters.

U S—McCulloch v Sociedad Nacional de Marineros de Honduras, App. D C & N.Y, 83 S.Ct 671, 372 U S. 10, 9 L Ed.2d 547

18. Foreign registry concept as fiction

Cal—Shell Oil Co v State Bd of Equalization, 51 Cal Rptr 524, 414 P.2d 820, 64 C 2d 713, app dism 87 S Ct 973, 386 U S 211, 17 L Ed 2d 870

19. U S—Mitchell v Independent Ice & Cold Storage Co, C A Fla, 294 F 2d 186, cert den 82 S Ct 394, 368 U S 952, 7 L Ed 2d 386

Statute authorizing inspection of vessels valid

U S—U S v One (1) 43 Foot Sailing Vessel, etc, C A Fla, 538 F 2d 694

20. U S—Lauritzen v Larsen, N Y, 73 S Ct 921, 345 U S 571, 97 L Ed 1254—Payne v SS Tropic Breeze, C A Puerto Rico, 423 F 2d 236, cert den 91 S Ct 363, 400 U S 964, 27 L Ed 2d 383

21. Ill—People v Roe, 270 N E 2d 27, 48 Ill 2d 380

Mass—City of New Bedford v New Bedford, Woods Hole, Martha's Vineyard & Nantucket S S Authority, 114 N E 2d 553, 330 Mass 422—City of New Bedford v New Bedford Woods Hole, Martha's Vineyard and Nantucket S S Authority, 148 N E 2d 637, 336 Mass 651, app dism 79 S Ct 95, 358 U S 53, 3 L Ed 2d 46—Town of Barnstable v Woods Hole, Martha's Vineyard and Nantucket S S Authority, 180 N E 2d 440, 343 Mass 674—National Shawmut Bank of Boston v Woods Hole, Martha's Vineyard and Nantucket S S Authority, 279 N E 2d 898, 361 Mass 219

Ohio—State ex rel McElroy v City of Akron, 181 N E 2d 26, 173 Ohio St 189, app dism 83 S Ct 145, 371 U S 35, 9 L Ed 2d 113.

Wis—Menzer v Village of Elkhart Lake, 186 N W 2d 290, 51 Wis 2d 70

Power of regulation limited

Mass—City of New Bedford v New Bedford, Woods Hole, Martha's Vineyard & Nantucket S S Authority, 107 N E 2d 513, 329 Mass 243

N Y—Presco v. di Francesca, 338 N Y S 2d 286, 72 Misc 2d 128

Statute construed

Cal—Golden Gate Scenic S S Lines, Inc v Public Utilities Commission, 19 Cal Rptr 657, 369 P 2d 257, 57 C 2d 373

D C—States Marine Intern, Inc v Peterson, C A, 518 F.2d 1070, 171 U S App.D C 132, cert den 96 S Ct 1108, two cases, 424 U S 912, 47 L Ed 2d 316.

Waterfront Commission of New York Harbor

N.Y—Waterfront Commission of New York Harbor v Cunard S S Co, 234 N Y S.2d 900, 18 A D 2d 620

Rules and regulations

D C—Petersen v. Head Const. Co, D C, 367 F Supp 1072.

Ky—Lovern v. Brown, 390 S W 2d 448

Ohio—State v. Ruebusch, 189 N E.2d 870, 174 Ohio St. 422—Long v Division of Watercraft, Dept of Natural Resources, 195 N.E 2d 128, 118 Ohio App 369

State audits

Mass—Com v Woods Hole, Martha's Vineyard and Nantucket S S Authority, 227 N E 2d 357, 352 Mass 617

Statute valid

Ill—Titus v Texas Co, 303 N E 2d 361, 55 Ill 2d 437

Me.—Portland Pipe Line Corp v. Environmental Imp Commission, 307 A.2d 1, app dism. 94 S.Ct 532, two cases, 414 U S. 1035, 38 L Ed 2d 326.

Wis.—State v. Jackman, 211 N W.2d 480, 60 Wis 2d 700

Competitive bidding

Mass.—Douglas v. Woods Hole, Martha's Vineyard and Nantucket S.S Authority, 319 N.E 2d 892, 366 Mass. 459

22. D C—Pacific Far East Line, Inc. v. U.S., C A., 255 F.2d 182, 103 U S.App D C. 104, cert den 79 S Ct. 97, 358 U S 866, 3 L Ed 2d 98—Isbrandtsen Co. v Federal Maritime Bd, D C, 159 F Supp 884—Pacific Seafarers, Inc v Pacific Far East Line, Inc, C A., 404 F 2d 804, 131 U.S App D C 226, cert den 89 S Ct 872, 393 U S. 1093, 21 L Ed 2d 784, on remand 48 F.R.D 347.

N Y—Silvera v Safra, 361 N Y S 2d 250, 79 Misc 2d 919

Administrative rules and regulations

D C—Alcoa S S Co v Federal Maritime Commission, C A, 348 F 2d 756, 1121 U S App D C 144

Coast Guard rules

U S—Central Stikstof Verkoopkantoor, N V v Alabama State Docks Dept, C A Ala, 415 F 2d 452

N M—Wreyford v Arnold, 477 P 2d 332, 82 N M 156

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23. U S—Pacific Far East Line, Inc v Federal Maritime Bd, C A, 275 F 2d 184, 107 U S App D C 155, cert den 80 S Ct 1597, two cases, 363 U S 827, 4 L Ed 2d 1523—U S v Stephen Bros Line, C A Fla, 384 F 2d 118

27. Documentation procedure

D C—Manhattan Tankers, Inc v Dole, D C, 596 F Supp 974

Matters relating to ship subsidies under the Merchant Marine Act have been considered by the courts.[29.5]

29.5. U S—Safir v Gulick, D C N Y, 297 F Supp 630—Safir v Gibson, D C N Y, 330 F Supp 225

Operating differential subsidy

U S—Oceanic S S Co v U S, 165 Ct Cl 217—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169—States S S Co v U S, 428 F 2d 832, 192 Ct Cl 795

D C—New York & Cuba Mail S S Co v Weeks, C A, 254 F 2d 349, 103 U S.App D C 12

Purpose

U S—Matson Nav Co v Connor, D C Cal, 258 F Supp 144, affd, C A, 394 F 2d 514, cert den 89 S Ct 482, 393 U S 998, 21 L Ed 2d 463—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

Proration

U S—Matson Nav Co v Connor, D C Cal, 258 F Supp 144, affd, C A, 394 F 2d 514, cert den 89 S Ct 482, 393 U S 998, 21 L Ed 2d 463

Discretion

U S—Matson Nav Co v Connor, D C Cal, 258 F Supp 144, affd, C A, 394 F 2d 514, cert den 89 S Ct 482, 393 U S 998, 21 L Ed 2d 463—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169—Moore-McCormack Lines, Inc v U S, 413 F.2d 568, 188 Ct Cl 644

Standard of substantial competitive advantage

U S—Matson Nav Co v Connor, D C Cal, 258 F.Supp 144, affd, C A, 394 F 2d 514, cert den 89 S Ct 482, 393 U S 998, 21 L Ed 2d 463

Matters considered

U S—Matson Nav. Co v Connor, D C Cal, 258 F Supp 144, affd, C A, 394 F 2d 514, cert den 89 S Ct 482, 393 U S 998, 21 L Ed 2d 463—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

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U.S—Matson Nav Co v Connor, D C Cal, 258 F Supp 144, affd, C A, 394 F 2d 514, cert den 89 S Ct 482, 393 U.S. 998, 21 L Ed 2d 463—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

Liability for construction change orders

U S—Sun Shipbuilding & Dry Dock Co v U.S, 393 F 2d 807, 183 Ct Cl 358—Lykes-Youngstown Corp v U.S, 420 F 2d 735, 190 Ct.Cl 348, cert den 91 S.Ct. 102, 400 U.S 865, 27 L Ed 2d 104

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U S—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

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U S—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

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U S—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

Change of accounting procedure

U S—Pacific Far East Line, Inc v U S, 394 F 2d 990, 184 Ct Cl 169

Duty of commission to recover subsidies paid to lines engaging in discrimination

U S—Safir v Gibson, C A N Y, 417 F 2d 972

Hearing as to adequacy of existing service

D C—Sea-Land Service, Inc v Connor, C A, 418 F 2d 1142, 135 U S App D C 306

Duty of Secretary of Commerce

D C—Sea-Land Service, Inc v Connor, C A, 418 F 2d 1142, 135 U S App D C 306

Standing to challenge order of district court

D C—Sea-Land Service, Inc v Connor, C A, 418 F 2d 1142, 135 U S App D C 306

Judicial review of determinations of subsidy board

U S—Moore-McCormack Lines, Inc v U S, 413 F 2d 568, 188 Ct Cl 644—Safir v Gibson, C A N Y, 432 F 2d 137, cert den 91 S Ct 57, 400 U S 850, 27 L Ed 2d 88, cert den 91 S Ct 241, 400 U S 942, 27 L Ed 2d 246

Vessels not entitled to tax benefits under Act

U S—United New York Sandy Hook Pilots Ass'n v Stans, C A N Y, 470 F 2d 1176, cert den 93 S Ct 2272, 411 U S 987, 36 L Ed 2d 965

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D C—American Maritime Ass'n v Stans, C A, 485 F 2d 765, 157 U S App D C 394

30. U S—Trinidad Corp v American S S Owners Mut Protection & Indem Ass'n, C A N Y, 229 F 2d 57, cert den 76 S Ct 1032, 351 U S 966, 100 L Ed 1486—Petition of Boat Demand, Inc, D C Mass, 160 F Supp 833—Spiller v Thomas M Lowe, Jr, & Associates, Inc, D C Ark, 328 F Supp 54, affd, C A, 466 F 2d 903

D C—New York & Cuba Mail S S Co v Weeks, C A, 254 F 2d 349, 103 U S App D C 12

Vessel under construction

U S—Trussell v Litton Systems, Inc, C A Miss, 753 F 2d 366

"Work punt" not vessel for Jones Act purposes

U S—Bernard v Binnings Const Co, Inc, C A La, 741 F 2d 824

Dragline marsh buggy not "vessel"

La—Melancon v Lassin Amphibious Equipment, Inc, App 4 Cir, 469 So 2d 6, writ den 474 So 2d 1309

"Vessel" may be more than means of transportation on water

U S—Guilbeau v Falcon Seaboard Drilling Co, D C La, 215 F Supp 909

Oil well drilling platform held not vessel

U S—Johnson v Noble Drilling Co, D C La, 264 F Supp 104—Freeman v Aetna Cas & Sur Co, C A La, 398 F 2d 808

Platform held not "vessel"

U S—Ocean Drilling & Exploration Co v Berry Bros Oilfield Service, Inc, C.A La, 377 F 2d 511, cert den 88 S Ct 102, 389 U S 849, 19 L Ed 2d 118—Cook v Belden Concrete Products, Inc, C A La, 472 F 2d 999, reh. den 472 F 2d 1405, cert den 94 S Ct 175, 414 U S 868, 38 L Ed 2d 116

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U S—Empire Seafoods, Inc v Anderson, C A Fla, 398 F 2d 204, cert den 89 S Ct 449, 393 U S 983, 21 L Ed 2d 444.

Effect of damage

U S—Advance Welding Co v M/V Corra D, D C La, 299 F Supp 736.

Floating dry dock held not "vessel"

U S—Keller v Dravo Corp, D C La., 441 F 2d 1239, cert den 92 S Ct 679, 404 U S 1017, 30 L Ed 2d 665—Cook v. Belden Concrete Products, Inc, C A

La, 472 F 2d 999, reh den 472 F 2d 1405, cert den 94 S Ct 175, 414 U S 868, 38 L Ed 2d 116

Submersible drilling barge held "vessel"

U S—Rogers v Gracey-Hellums Corp, D C La, 331 F Supp 1287, affd 442 F 2d 1196—Blackwell v Whelass Drilling Co, D C La, 333 F Supp 839, affd, 461 F 2d 847, 848—Cook v Belden Concrete Products, Inc, C A La, 472 F 2d 999, reh den 472 F 2d 1405, cert den 94 S Ct 175, 414 U S 868, 38 L Ed 2d 116

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N Y—Application of Ba Bas Barge, Inc, 343 N Y S 2d 3, 73 Misc 2d 680

Federal Ship Mortgage Act

N.Y—Application of Ba Bas Barge, Inc, 343 N Y S.2d 3, 73 Misc 2d 680

Raft not ship for Jones Act purposes

U S—Powers v Bethlehem Steel Corp, D C Mass, 343 F Supp 17, affd, C A, 477 F 2d 643, reh den 483 F 2d 963, cert den 94 S Ct 160, 414 U S 856, 38 L Ed 2d 106

Tractor trailer transporting structure over frozen lake not vessel

U S—Provost v Huber, C A Minn, 594 F 2d 717

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32. U S—Mach v Pennsylvania R Co, D C Pa, 207 F Supp 233, affd, C A, 317 F 2d 761—Chenevert v Clinch Drilling Co, D C La, 273 F Supp 943—Blair v U S Steel Corp, D C.Pa., 312 F Supp 293, affd, C A, 444 F 2d 1390, cert den 92 S Ct 681, 404 U.S 1018, 30 L Ed 2d 666, reh den 92 S Ct 938, 405 U S 948, 30 L Ed 2d 818

La—Perry v Baltimore Contractors, Inc, App, 202 So 2d 694, writ ref 204 So 2d 579, 251 La 405, cert den 88 S Ct 1419, 390 U S 1028, 20 L Ed 2d 285

N Y—Application of Ba Bas Barge, Inc, 343 N Y S 2d 3, 73 Misc 2d 680

34. U S—The Alice M Guthrie, D C Va, 257 F 472, 474

As a matter of law a windsurfer is not a "vessel" or "watercraft".[35 5]

35.5 Ill—People v Heiple, 3 Dist, 478 N E 2d 1388, 88 Ill Dec 662, 133 Ill App 3d 583

§ 3. Registry, Enrollment, and License

36. U S—C.J.S. cited in R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066, 1070

Requirement of registration within power of United States

U S—Mitchell v Independent Ice & Cold Storage Co, C.A Fla, 294 F 2d 186, cert den 82 S Ct 394, 368 U S 952, 7 L Ed 2d 386

Scope of Act

U S—Com of Puerto Rico v Sea-Land Service, Inc, D C Puerto Rico, 349 F Supp 964

37. Registry may be questioned only by registering state

U.S—Lauritzen v Larsen, N Y, 73 S.Ct. 921, 345 U S 571, 97 L.Ed 1254—Volkenburg v Nederland-Amerik. Stoomv Maats C A Mass, 336 F 2d 480

A "numbered vessel" is one that has been registered with the United States Coast Guard and assigned a number.[37 5]

37.5. Wash.—Matthews v Richmond, 525 P 2d 810, 11 Wash.App 703.

39. Retention of status without action concerning documentation

U.S.—U S. v. Correa, C A Fla, 750 F 2d 1475

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65. U S—Puamier v Barge BT 1793, D C Va, 395 F Supp 1019

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71. U S—Pacific Shrimp Co v U S, Dept of Transp, D C Wash, 375 F Supp 1036

75. U S—U S v Tito Campanella Societa Di Navigazione, C A Va, 217 F 2d 751

Only American built ships eligible

U S—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066

Yacht documented as pleasure vessel

U S—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066

83. Safety inspection not necessary

Wis—State v Jackman, 211 N W 2d 480, 60 Wis 2d 700

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93. U S—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066

Transfer to foreign registry

U S—Clapp v U S, 117 F Supp 576, 127 Ct Cl 505, cert den 75 S Ct 55, 348 U S 834, 99 L Ed 658—Eastport Steamship Corp v U S, 157 Ct Cl 802—Eastport S S Corp v U S, Ct Cl, 372 F 2d 1002, 178 Ct Cl 599

1. Construction of provision

U S—Walter E Heller & Co v M/V Mr Ed, D C La, 270 F Supp 830

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13. U S—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066

14. U S—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066

16. U S—Pacific Shrimp Co v U S, Dept of Transp, D C Wash, 375 F Supp 1036

19 U S—R C Craig Limited v Ships of Sea Inc, D.C Ga, 345 F Supp 1066

A municipality may require licensing of motor boats within its jurisdiction[21 5]

21.5. Boat for hire docked in municipal yacht basin

N J—Borough of Brielle v Zeigler, 179 A 2d 789, 73 N J Super 352

A state may require licensing of vessels within its jurisdiction.[21 10]

21.10. Federal method of calculating tonnage adopted

Mass—Woods Hole, Martha's Vineyard and Nantucket S S Authority v Baxter, 208 N E 2d 218, 349 Mass 288

Particular provisions of statute construed

Mass—Woods Hole, Martha's Vineyard and Nantucket S S Authority v Baxter, 208 N E 2d 218, 349 Mass 288.

Vessel held within licensing statute

Mass.—Woods Hole, Martha's Vineyard and Nantucket S S Authority v. Baxter, 208 N E 2d 218, 349 Mass 288

Okl—Blair v Board of Regents for Oklahoma Agr. and Mechanical Colleges for and on Behalf of Oklahoma State University of Agr and Applied Sciences, 421 P 2d 228

Police power

N H—Opinion of the Justices, 290 A 2d 869, 112 N H. 166

Fees

Me—Portland Pipe Line Corp v Environmental Imp Commission, 307 A 2d 1, app. dism 94 S Ct 532, two cases, 414 U S 1035, 38 L Ed 2d 326.

N H—Opinion of the Justices, 290 A 2d 869, 112 N H 166

Wis—State v Jackman, 211 N W 2d 480, 60 Wis 2d 700

Fines

N H—Opinion of the Justices, 290 A 2d 869, 112 N H 166

Safety regulations

Wis—State v Jackman, 211 N W 2d 480, 60 Wis 2d 700

A federal statute requiring licensing of vessels engaged in wrecking and imposing the condition that they be sufficiently equipped for saving property shipwrecked and in distress has been judicially construed.[21 15]

21.15. Requirement of evidence to show proper equipment

U S—In re Andrews, D C Fla, 266 F Supp 162—In re Marine Archaeological Enterprises, Inc, D C Fla, 280 F Supp 477

Not applicable to vessel used to recover relics from ocean floor

U S—In re Andrews, D C Fla, 266 F.Supp 162

Not applicable to corporate owner of vessel

U S—In re Marine Archaeological Enterprises, Inc, D C Fla, 280 F Supp 477

22. U S—McDevitt v Gunn, D C Pa, 182 F Supp 335

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36. Renationalized vessel prohibited from carrying passengers

U S—Gillentine v McKeand, C A Mass, 426 F 2d 717

Only American built ships eligible

U S—R C Craig Limited v Ships of Sea Inc, D C Ga., 345 F Supp 1066.

37. Rebuilt vessels

U S—Marine Carriers Corp v Fowler, C A.N Y, 429 F 2d 702, cert den 91 S Ct 581, 400 U S. 1020, 27 L.Ed 2d 631

D C—Pennsylvania R Co v Dillon, C A., 335 F.2d 292, 118 U S App D C 257, cert den 85 S Ct 437, 379 U S 945, 13 L Ed 2d 543

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54. Sale to foreign national

U S—R C Craig Limited v. Ships of Sea Inc, D C. Ga, 345 F Supp 1066.

56. U S.—R C Craig Limited v. Ships of Sea Inc, D C Ga, 345 F Supp 1066.

§ 4. Taxes, Duties, Dues and Port Charges

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68. Mich—Gregory Boat Co. v. City of Detroit, 195 N W 2d 290, 37 Mich.App. 673

Ohio—State ex rel McElroy v. City of Akron, 181 N E.2d 26, 173 Ohio St 189, app dism 83 S Ct 145, 371 U S 35, 9 L Ed 2d 113

Houseboats excepted under licensing statute

Idaho—Prudente v Nechanicky, 367 P.2d 568, 84 Idaho 42.

License fee required by ordinance to operate motor boat within municipality must not be unreasonable.[69 5]

69.5. Held unreasonable

N J—Borough of Brielle v. Zeigler, 179 A 2d 789, 73 N.J Super. 352

§ 5. Inspection, Equipment, Personnel, and Rules of Inspectors

Library References

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Research Note

The Liability of the United States under the Suits In Admiralty Act is discussed in C.J.S United States § 118

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4. U S—Geotechnical Corp of Del v Pure Oil Co, C A La, 196 F 2d 199, cert den 73 S Ct 165, 344 U S 874, 97 L Ed 676, and 73 S Ct 175, 344 U S 879, 97 L Ed 681

Purpose of legislation

U S—Huron Portland Cement Co v City of Detroit, Mich, Mich, 80 S Ct 813, 362 U S 440, 4 L Ed 2d 852—Pacific Shrimp Co v U S, Dept of Transp, D C Wash, 375 F Supp 1036

Liberal construction

(2) Other matters

U S—State of Tex v Seatrain Intern, S A, C A Tex, 518 F 2d 175

Powers and duties of Coast Guard

U.S—Wellington Transp Co v U S, C A Mich, 481 F 2d 108

Power of federal district courts to impose rules

U S—U S v Ira S Bushey & Sons, Inc, D C Vt, 363 F Supp 110, affd, C A, 487 F 2d 1393, cert den 94 S Ct 3182, 417 U S 976, 41 L Ed 2d 1146

6. U S—China Union Lines, Limited v A O. Anderson & Co, C A Tex, 364 F 2d 769, cert den 87 S Ct 955, two cases, 956, 386 U S 933, 17 L Ed 2d 805, reh den 87 S Ct 1301, 386 U S 999, 18 L Ed.2d 353, and 87 S Ct 1302, 386 U S 1000, 18 L Ed 2d 353, reh den 88 S Ct 1015, two cases, 390 U S. 974, 19 L Ed 2d 1191—Burgess v M/V Tamano, D C Me, 373 F Supp 839

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U S—Skibs A/S Dalfonn v S/T Alabama, C A N Y, 373 F 2d 101

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U S—Skibs A/S Gylfe v Hyman-Michaels Co, D C Mich, 304 F Supp 1204, affd, C A, 438 F 2d 803, cert den 92 S Ct 73, 404 U.S 831, 30 L Ed 2d 61

Effect of Coast Guard anchorage permits

Cal.—Marin County v Roberts, 84 Cal.Rptr. 425, 4 C.A 3d 480

Effect of cargo bureau contract to survey cargo

U S—Skibs A/S Gylfe v Hyman-Michaels, Co, D C. Mich, 304 F Supp 1204, affd, C A, 438 F 2d 803, cert den 92 S Ct. 73, 404 U S 831, 30 L Ed 2d 61

7. U.S—Frederick Snare Corp v Moran Towing & Transp Co, D C N.Y, 195 F Supp 639

D C—Cargo Carriers v Snyder, D.C, 104 F Supp 258, affd, C A, 206 F 2d 488, 93 U S App D C 45

8. D.C—Cargo Carriers v. Snyder, supra, n 7

9. Compensation to officers, directors or employees

U S.—Spirit v Bechtel, C.A.N Y, 232 F.2d 241.

10. Requirement of two licensed mates

U S—Gulfcoast Transit Co v. Smith, C A La, 432 F 2d 80

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An ordinance relating to welding or burning aboard ships, and requiring fire fighting equipment to be available, has been held not in conflict with federal law.[15.5]

15.5. U S.—Albina Engine & Mach Works, Inc v Hershey Chocolate Corp, C A Or, 295 F 2d 619

16. Okl—Harris v State ex rel Oklahoma Planning & Resources Bd, 251 P 2d 799, 207 Okl 589

Determination by the inspecting officer of the need for repairs may be considered as dispositive of the matter without an appeal to a higher officer.[20.5]

20.5. U S—Skibs A/S Dalfonn v S/T Alabama, C A N Y, 373 F 2d 101

21. U S—Petition of Wood, D C Mo, 145 F Supp 848, affd, C A, 245 F 2d 306 Dominguez v Schooner Brindicate, D C Puerto Rico, 204 F Supp 817—Petition of U S, D C Mass, 255 F Supp 737, affd in part and set aside in part on oth grds, C A, 372 F 2d 189, cert den 88 S Ct 48 and 88 S Ct 52—Armstrong v Chambers and Kennedy, D C Tex, 340 F Supp 1220, affd in part, revd in part on oth grds, C A, 499 F 2d 263, reh den 512 F 2d 1061, cert dism 96 S Ct 163, 423 U S 886, 46 L Ed 2d 118

State statute inapplicable to windsurfers

Ill—People v Heiple, 3 Dist, 478 N E 2d 1388, 88 Ill Dec 662, 133 Ill App 3d 583

Identification of small boats

D C—Garelick Mfg Co v Dillon, C A, 313 F 2d 899, 114 U S App D C 218

Coast Guard not obligated to rig vessel for towing

U S—Dreher v U S, D C Cal, 375 F Supp 1061

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25. D C—Cargo Carriers v Snyder, supra, n 7

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U S—Bryant v Rucker, D C Ala, 111 F Supp 309

Vessel included

U S—Pacific Shrimp Co v U S, Dept of Transp, D C Wash, 375 F Supp 1036

28. Duty imposed on Coast Guard

U S—U S v Gahagan Dredging Corp, C A N Y, 289 F 2d 639

Derrick barge

U S—Frederick Snare Corp v Moran Towing & Transp Co, D C N Y, 195 F Supp 639

29. U S—U S v Gahagan Dredging Corp, C A N Y, 289 F 2d 639

D C—Cargo Carriers, Inc v Humphrey, C A, 206 F 2d 488, 93 U S App D C 45

§ 6. Licensing and Discipline of Personnel

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39. Radiotelegraph operators on merchant marine vessels

(1) Statute requiring licensing held valid

D C—Homer v Richmond, C A, 292 F 2d 719, 110 U S App D C 226

(2) Radiotelegraph operator license required

D C—Homer v Richmond, C A, 292 F 2d 719, 110 U S.App D C 226

(3) Matters considered in granting license

D C—Homer v Richmond, C A, 292 F 2d 719, 110 U S App D C 226

Administrative regulation held invalid

U S—U.S v Silva, D C Cal, 272 F Supp 46

License improperly withheld

U S—Schneider v Smith, Wash, 88 S Ct 682, 390 U S 17, 19 L Ed 2d 799.

40. U S—McHoney v Marine Nav Co, C A S C, 233 F 2d 769, cert den 77 S Ct 231, 352 U S 930, 1 L.Ed 2d 165

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U S—Harris v Smith, C A N Y, 418 F 2d 899—Colucci v Carpenter, D.C N Y, 47 F R D 549.

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U S—Harris v Smith, C A N Y, 418 F 2d 899

44. Administrative Procedure Act

U S—Van Teslaar v Bender, D C Md, 365 F Supp 1007

48. Regulation permitting voluntary surrender of license held valid

U S—Word v U S, D C Ala, 223 F Supp 614

53. Exhaustion of administrative remedies held necessary

U S—Cabales v U S, D C N Y, 300 F Supp 1323, affd, C A, 412 F 2d 1187—Colucci v Carpenter, D C N Y, 47 F R D 549

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61. Absence of other adequate remedy

U S—Word v U S, D C Ala, 223 F Supp 614

Jurisdiction held to exist

U S—Rechany v Roland, D C N Y, 235 F Supp 79

62 U S—Word v U S, D C Ala, 223 F Supp 614—Ingham v Smith, D C N Y, 274 F Supp 137

Error of judgment

U S—Rechany v Roland, D C N Y, 235 F Supp 79

Evidence

U S—Rechany v Roland, D C N Y, 235 F Supp 79—Jennings v Smith, D C N Y, 280 F Supp 1022—Wheatley v Shields, D C N Y, 292 F Supp 608—Hendry v U S, C A N Y, 418 F 2d 774

Remand to commandant

U S—McBride v Smith, C A N Y, 405 F 2d 1057

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U S—Soderback v Siler, C A Or, 610 F 2d 643

§ 7. Filing Manifest and Obtaining Clearance of Vessels

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74. Coast Guard order closing harbor area

U S.—U S v Aarons, C A Conn, 310 F 2d 341

75. U S—Royal Holland Lloyd v U S 73 Ct Cl 722

§ 9. War Time or Emergency Control

Library References

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83. Duty of captain of the port in case of dangerous cargo

U S—Skibs A/S Gylfe v Hyman-Michaels Co, D C Mich, 304 F Supp 1204, affd, C A, 438 F 2d 803, cert den 92 S Ct 73, 404 U S 831, 30 L Ed 2d 61

85. Statute construed

U S—A H. Bull S S Co v U S, C A N Y, 208 F 2d 888

86. U S—Royal Holland Lloyd v U S 73 Ct Cl 722

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95. U S—De La Rama S S Co v U S, D C N Y, 98 F Supp 514, revd on oth grds, C A, 198 F 2d 182, revd on oth grds 73 S Ct 381, 344 U S 386, 97 L Ed 422—U S Lines Co v U.S, 124 F Supp 375, 129 Ct Cl 466, cert den. 75 S Ct 364, 348 U S 942, 99 L Ed 738

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N.Y—De La Rama S S. Co v U S, supra.

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U S—Electric Ferries, Inc v U S, 137 Ct Cl 400

97. U S—De La Rama S S Co v U S, supra, n 95

99. U S—Panama Transport Co v U S, D C N Y, 155 F Supp 699, affd C A, 253 F 2d 758

3. U S—Panama Transport Co v. U S, D C N Y, 155 F Supp 699, affd, C A, 253 F 2d 758

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U S—Esso Standard Oil Co v U S, D C N Y, 122 F Supp 109, affd, C A, 221 F 2d 805

4. US—Standard Oil Co of NJ v US, DCNY, 121 F Supp 770—Esso Standard Oil Co v US, DCNY, 122 F Supp 109, affd, CA, 221 F 2d 805

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7. US—De La Rama SS Co v US, DCNY, 98 F Supp 514, revd on oth grds, CA, 198 F 2d 182, revd on oth grds 73 S Ct 381, 344 U S 386, 97 L.Ed 422

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US—De La Rama SS Co v US, DCNY, 198 F 2d 182, revd 73 S Ct 381, 344 US 386, 97 L Ed 422

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US—De La Rama SS Co v US, supra

8. US—De La Rama SS Co v US, supra, n 7

Impossibility of adjusting claim before running of limitations

US—De La Rama SS. Co v US, supra, n 7

9. US—De La Rama SS Co v US, supra, n 7

11. US—De La Rama SS Co v US, supra, n 11

12. US—De La Rama SS Co v US, supra, n 7

14. Who entitled to compensation

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17. US—American-Hawaiian SS Co v US, 124 F Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed 766

23. US—De La Rama SS Co v US, CANY, 206 F 2d 651

26. US—American-Hawaiian SS Co v US, 124 F Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed 766

28. US—De La Rama SS Co v US, supra, n 23—Cavalliotis v US, 127 F Supp 191, 130 Ct Cl 615—Spreckels v US, 63 Ct Cl 64—Tropical Shipping Co v US, 121 Ct Cl 111—Gibbs Corp v US, 127 Ct Cl 280

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29. US—De La Rama SS Co v US, supra, n 23—Gartland S S Co v US, 98 F Supp 587, 120 Ct Cl 176—Cavalliotis v US, 127 F Supp 191, 130 Ct Cl 615

Interest recoverable by owner of vessel

U.S—Baltimore Steam Packet Co v US, 81 F Supp 711, 112 Ct Cl 448—Baltimore Steam Packet Co v US, 81 F Supp 713, 112 Ct Cl 469—Baltimore Steam Packet Co v US, 81 F Supp 715, 112 Ct Cl 458—Boardfoot v US, 82 F Supp 514, 113 Ct Cl 280—Pontin Boat Corp v US, 89 F Supp 685, 116 Ct Cl 488—American Dredging Co v US, 120 Ct Cl 243—Tropical Shipping Co v US., 121 Ct Cl 111—Gibbs Corp v US, 127 Ct Cl 280

34. Evidence held insufficient to establish market value

US—American Dredging Co v US., 120 Ct Cl 243—City of Philadelphia v US, 121 Ct Cl 300—American-Hawaiian S S Co v US, 124 F.Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed 766

35. US—R T C No Eleven Corp v US, 122 Ct Cl 56

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40. U.S—De La Rama S S Co v US, CANY, 206 F 2d 651

41. US—R T C No Eleven Corp v US, 122 Ct Cl 56

42. US—Gartland S S Co v US, 98 F Supp 587, 120 Ct.Cl. 176—Schaefer v US, 121 Ct.Cl 869

Individual factors held entitled to consideration under circumstances

(4) US—American-Hawaiian S S Co v US, 124 F Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed 766

(8) US—American Dredging Co v US, 120 Ct Cl 243—R T C No Eleven Corp v US, 122 Ct Cl 56

(9) US—R T C No Eleven Corp v US, 122 Ct Cl 56

Particular factors held not entitled to consideration under circumstances

(12) Other factors—American-Hawaiian S S Co v US, 124 F Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed 766

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43. Evidence held to establish no deductible enhancement

US—Smith-Douglas Co v US, 116 F Supp 570, 126 Ct Cl 758, cert den 75 S Ct 24, 25, 348 U S 815, 99 L Ed 643—R T C No Eleven Corp v US, 122 Ct Cl 56—American-Hawaiian S S Co v US, 124 F Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed 766

45. US—American Dredging Co v US, 120 Ct Cl 243

48. Evidence as to probability of taking

(2) US—Cors v US, 75 F Supp 235, 110 Ct Cl 66, cert den 69 S Ct 479, revd on oth grds, 69 S Ct 1086, 337 U S 325, 93 L Ed 1392

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56. Disposition after judgment

US—American-Hawaiian S S Co v US, 124 F Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U.S. 863, 100 L Ed 2d 766

Petition held timely filed

US—Gibbs Corp v US, 127 Ct Cl 280

In such case of dissatisfaction with the offer, the vessel owner may reject the offer, elect to take 75 per cent., and bring suit for the balance deemed just compensation.[57.1] Interest is recoverable on such balance from the date of taking to the date of payment or tender by the defendant;[57.2] and for delay in payment of the 75 per cent award required by statute, unless the fault of the plaintiff is the cause of the delay.[57.3] A statutory duty of the government to return requisitioned vessels in original condition may be replaced by a contract provision, in which case the sole remedy is under the contract.[57.4]

57.1. Plaintiff held entitled to recover

US—Jacobson v US, 118 Ct Cl 327—Nicholson Transit Co v US, 118 Ct Cl 344—Copper River Packing Co v US, 118 Ct.Cl 561—Nicholson Transit Co v US, 118 Ct Cl 344—R T C No Eleven Corp v US, 122 Ct Cl 56—Guy v US, 123 Ct Cl 658—Schaefer v US, 121 Ct Cl 869—City of Philadelphia v US, 121 Ct Cl 300—American-Hawaiian S.S. Co v U S, 124 F.Supp 378, 129 Ct Cl 365, cert den 76 S Ct 103, 106, 350 U S 863, 100 L Ed. 766

57.2. US—Henjes v US, 87 F Supp 780, 115 Ct Cl 264, cert den 70 S Ct 1022, 339 U S 978, 94 L Ed 1382—Jacobson v U S, 118 Ct Cl 327—Nicholson Transit Co v U.S, 118 Ct Cl. 344—R T C No Eleven Corp v. U.S, 122 Ct Cl 56—Guy v U S, 123 Ct Cl 658—Schaefer v U S, 121 Ct Cl 869—City of Philadelphia v. U S, 121 Ct.Cl 300—American-Hawaiian S.S Co v U S, 124 F Supp 378, 129 Ct.Cl 365, cert den. 76 S Ct 103, 106, 350 U.S 863, 100 L.Ed 766

Interest allowed to date of judgment in absence of tender payment or approval—Copper River Packing Co v U S, 118 Ct Cl 561

57.3. US—Henjes v U S, 87 F Supp 780, 115 Ct Cl 264, cert den 70 S Ct 1022, 339 U S 978, 94 L Ed 1382—Jacobson v U S, 118 Ct Cl 327—Guy v U S, 123 Ct Cl 658

Interest to date of judgment not allowed

U S—Copper River Packing Co v U S, 118 Ct Cl 561

57.4. US—M & J Tracy, Inc v U S, 111 F Supp 956, 125 Ct Cl 70, cert den 74 S Ct 68, 346 U S 854, 98 L Ed 368

§ 10. Status, Powers, and Duties of Administrative Officers

Library References

Shipping ⇐3½, 4.

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97. US—Burton v U.S, D C N Y, 109 F Supp. 139—N M Paterson & Sons, Limited v City of Chicago, D C Ill, 209 F Supp 576, revd on oth grds, C A, 324 F 2d 254

D C—U S v Niarchos, D C, 125 F Supp 214—Alcoa S S Co v Federal Maritime Commission, C A, 348 F 2d 756, 121 U S App D C 144

Operating subsidies

D C—American President Lines v Federal Maritime Bd, D C, 112 F.Supp 346

Domestic operations of subsidized foreign commerce carrier

U S—Seatrain Lines, Inc, v Hodges, C A, 320 F 2d 737, 116 U S App D C 15

Arrival and departure of vessels

U S—In re Pacific Far East Line, Inc, D C.Cal, 314 F Supp 1339, affd, C A, 472 F 2d 1382

1. U.S—U S v Silva, D.C Cal, 272 F Supp 46

Opinion of counsel

U S—Spirt v Bechtel, C.A N Y, 232 F 2d 241.

State administrative bodies may regulate intra-state shipping or provide for public transportation by water between points in the state,[4.5] but they may not exceed their statutory powers.[4.10]

4.5. Cal—Golden Gate Scenic S S Lines, Inc v Public Utilities Commission, 19 Cal Rptr 657, 369 P 2d 257, 57 C 2d 373.

Mass—Town of Barnstable v. Woods Hole, Martha's Vineyard and Nantucket S S Authority, 180 N E.2d 440, 343 Mass 674

4.10. Ga—Stewart v. Stephens, 166 S E.2d 890, 225 Ga 185, conf to 168 S E 2d 325, 119 Ga App 629

Mass—Town of Barnstable v Woods Hole, Martha's Vineyard and Nantucket S.S Authority, 180 N E 2d 440, 343 Mass 674.

Requirement of certificate of convenience and necessity for sight-seeing vessel was beyond power of commission

Cal—Golden Gate Scenic S S Lines, Inc. v Public Utilities Commission, 19 Cal Rptr. 657, 369 P 2d 257, 57 C 2d 373

Regulation held not unreasonable

Ohio—Long v Division of Watercraft, Dept of Natural Resources, 195 N E 2d 128, 118 Ohio App. 369.

§ 11. Penalties and Forfeitures for Violations of Regulations

Library References

Shipping ⇐16.

Barron and Holtzoff, Federal Practice and Procedure § 82.

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10. US—US v The Terry E Buchanan, D C N Y, 138 F Supp 754

13. US—US v The Terry E Buchanan, D C N Y, 138 F Supp 754

It has been held that a statutory penalty for noncompliance with a statute should not be assessed during the time the validity of the statute was being judicially tested.[14 5]

14.5. Dual-rate shipping contracts

US—US v Pacific Coast European Conference, C A Cal, 451 F 2d 712

Right to contest

US—US v Pacific Coast European Conference, C A Cal, 451 F 2d 712

Final disposition

US—US v Pacific Coast European Conference, C A Cal, 451 F 2d 712

17. US—US v Tito Campanella Societa Di Navigazione, C A.Va, 217 F 2d 751

18. US—US v Anchor Line, Limited, D C N Y, 257 F.Supp 99

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20. U.S.—US v M/V Mary E Stapp, D C Tex, 335 F.Supp 975

Common carriers by water are subject to civil penalties or forfeiture for noncompliance with tariff regulations of federal statutes.[23 5]

23.5. US—U.S v Seatrain Lines, Inc, D C N Y, 370 F.Supp 483

Relinquishing possession at destination before all freight charges paid

U.S—Barlett-Collins Co v. Surinam Nav Co, C A Okl., 381 F 2d 546

Failure to file appropriate tariffs

US—US v. Stephen Bros Line, C A Fla., 384 F 2d 118

Lesser compensation

U.S.—U S. v Pan Am. Mail Line, Inc, D.C N.Y, 359 F.Supp 728

30. U.S—U.S v The Martin, D.C Ill, 198 F Supp 171, affd, C A, 313 F.2d 851—U.S v. Tug Otto, D C Tex, 296 F.Supp. 1130, affd. C A., 404 F 2d 54

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64. U.S.—U.S. v The Meacham, D C.Va, 107 F.Supp. 997, affd., C.A, 207 F.2d 535, cert. gr. 74 S.Ct. 631, 347 U.S. 932, 98 L.Ed. 1083, cert. dism 75 S.Ct. 17.

Forfeiture of proceeds of sale not intended

U.S.—Chemical Bank New York Trust Co. v. S S. Westhampton, D.C.Md., 268 F.Supp. 169

68. U.S.—U.S. v. The Meacham, supra, n. 64.

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73. Statute not applicable

D.C.—U.S. v. Niarchos, D.C., 125 F.Supp. 214.

75. U.S.—Meacham Corp. v. U.S., C.A.Va., 207 F.2d 535, cert. gr 74 S.Ct. 631, 347 U.S. 932, 98 L.Ed. 1083, cert. dism. 75 S.Ct. 17, 348 U.S. 801, 99 L.Ed. 633.

80. U.S.—Meacham Corp. v. U.S., supra, n. 75.

Statute not applicable

U.S.—U.S. v. Tito Campanella Societa Di Navigazione, C.A.Va., 217 F.2d 751.

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19. U.S.—U.S. v. American Gas Screw Franz Joseph, D C.Alaska, 210 F.Supp. 581.

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28. US—US v 1500 Cords, More or Less, Jackpine Pulpwood, C A Wis, 204 F 2d 760

Pulpwood raft not subject to forfeiture—US v 1500 Cords, More or Less, Jackpine Pulpwood, D C Wis, 108 F Supp 224, affd, C A, 204 F 2d 760

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38. US—US v The Meacham, D C Va, 107 F Supp 997, affd, C A, 207 F 2d 535, cert gr 74 S Ct 631, 347 U S 932, 98 L Ed 1083, cert dism 75 S Ct 17

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51. D C—Moore v US, C A, 302 F 2d 918, 112 U S App D C 333

52. Statute inapplicable

D C—Moore v US, C A, 302 F 2d 918, 112 U S App D C 333

56. US—Meacham Corp v U S, C A Va, 207 F 2d 535, cert gr 74 S Ct 631, 347 U S 932, 98 L Ed 1083, cert dism 75 S Ct 17, 348 U S 801, 99 L Ed 633

Jurisdiction

US—US v Pan Am Mail Line, Inc, D C N Y, 359 F Supp 728

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59. Informer's fee

US—US v M/V Mary E Stapp, D C Tex, 335 F Supp 975

61. US—US v The Wm E Voyce, Jr, D C Md, 194 F Supp 895

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72. No set-offs allowed

US—US v The Meacham, 107 F Supp 997, affd, C A, 207 F 2d 535 Cert gr 74 S Ct 631, 347 U S 932, 98 L Ed 2d 1083, cert dism 75 S Ct 17

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86. N J—State v Cale, 88 A 2d 529, 19 N J Super 397

87. U S—Meacham Corp v U S, C A Va, 207 F 2d 535, cert gr 74 S Ct 631, 347 U S 932, 98 L Ed 1083, cert. dism 75 S Ct 17, 348 U S. 801, 99 L Ed. 633.

90. U S—Meacham Corp v U S, supra, n. 87

§ 12. Offenses Against Shipping and Navigation Laws

Library References

Shipping ⇐17.

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24. U.S.—US v McHugh, D.C Pa, 103 F.Supp 740

N Y—People v. Hart, 133 N.Y S.2d 98, 203 Misc 490

Okl—Speegle v State, Cr, 512 P.2d 205.

Motorboat Act

(4) Not restricted to motorboats but applies to sail boats as well.

U S.—US v. Meckling, D.C.Md, 141 F Supp. 608.

(5) Word "negligent" under Act defined

U.S.—US v Meckling, D C.Md., 141 F Supp. 608,

(6) Evidence held sufficient.

U.S.—U S. v Meckling, D.C.Md., 141 F.Supp. 608—U.S. v. Norfolk, Baltimore & Carolina Line, Inc., C.A.Va., 382 F.2d 208.

(7) Evidence held insufficient.

U.S.—U S. v. Meckling, D.C.Md., 141 F Supp. 608—U.S. v. Adams, C.A.Pa., 376 F.2d 459.

(8) Instructions held proper.

U.S.—U.S v. Adams, C.A.Pa., 376 F.2d 459.

(9) Necessity for lookout.

U.S.—U.S. v. Adams, C.A.Pa., 376 F.2d 459.

(10) Presumptions.

U S.—U.S. v. Norfolk, Baltimore & Carolina Line, Inc., C.A.Va., 382 F.2d 208.

(11) Findings

U S—U S v Burns, C A Cal, 441 F 2d 544

State Motor Boat Law

Pa—Com v Case, 21 D & C 2d 34—Com v Kraynak, 25 Beaver 133—Com v Denmark, 41 D & C 2d 391

Matters determining violation

N Y—People v Gorman, 232 N Y S 2d 889, 36 Misc 2d 568

Evidence

Ga—Jordan v State, 146 S E 2d 530, 112 Ga App 822

N Y—People v Gorman, 232 N Y S 2d 889, 36 Misc 2d 568—People v Cummings, 233 N Y S 2d 724, 36 Misc 2d 800

Pa—Harger v Com, Dept of Transp, 330 A 2d 883, 17 Pa Cmwlth 142

Sufficiency of indictment

Ga—Jordan v State, 146 S E 2d 530, 112 Ga App 822

Question of fact

Ala—Richardson v State, 191 So 2d 251, 43 Ala App 412

Not misdemeanor

Ga—Burmaster v State, 213 S E 2d 650, 233 Ga 753

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Possession of dangerous weapons on shipboard is a statutory offense.[27 5]

27.5. Useful tool

U S—Fall v Esso Standard Oil Co, C A Fla, 297 F 2d 411, cert den 83 S Ct 24, 371 U S. 814, 9 L Ed 2d 55

Time of determination of character

U S—Fall v Esso Standard Oil Co, C A Fla, 297 F 2d 411, cert den 83 S.Ct 24, 371 U S 814, 9 L Ed 2d 55

Whether instrument is dangerous is question for jury

U S—Fall v Esso Standard Oil Co, C A Fla, 297 F 2d 411, cert den 83 S Ct 24, 371 U S 814, 9 L Ed 2d 55

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53. US—US v McHugh, supra, n 24.

§ 14. Title under Contract for Building Vessel

Library References

Modern Legal Forms Ch. 63, Ships and Vessels.

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The Uniform Commercial Code is applicable to determine when title passes under a contract for construction of a boat in the absence of any provisions in the contract to the contrary.[1 5]

1.5. Place of contract

U S.—Silver v. Sloop Silver Cloud, D.C N Y., 259 F.Supp. 187.

Contract providing for passage of title

U.S.—Silver v. Sloop Silver Cloud, D.C N Y., 259 F Supp. 187.

Provision held inapplicable

U.S.—Silver v. Sloop Silver Cloud, D C.N.Y, 259 F.Supp 187.

Contract construed

U.S.—Silver v. Sloop Silver Cloud, D.C N Y., 259 F.Supp. 187.

§ 15. Evidence of Title

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21. Evidence held sufficient

La—Prevost v Bergeron, App, 70 So 2d 401—Ybarzabal v Stipelcovich, App, 135 So 2d 312

Evidence held insufficient

N Y—Asprea v Royal Indem Co, 269 N Y S 2d 280, 25 A D 2d 763

28. U S—Puamier v Barge BT 1793, D C Va, 395 F Supp 1019

32. U S—Puamier v Barge BT 1793, D C Va, 395 F Supp 1019

La—Prevost v Bergeron, supra, n 21

§ 17. Managing Owner or Ship's Husband

Library References

Modern Legal Forms Ch. 63, Ships and Vessels.

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18. Mutual interdependence on credit of owner and agent

U S—Compagnia Marittima La Empresa, S A v Pickard, C A Fla, 320 F 2d 829

24. Agreement, and operation thereunder

U S—Romero v Garcia & Diaz, Inc, C A N Y, 286 F 2d 347, cert den 81 S Ct 905, 365 U S 869, 5 L Ed 2d 860

Agent acts on ship-to-ship basis

U S—Alcalde v The Los Mayas, D C Va, 184 F Supp 873

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33. U S—Hinkins S S Agency v. Freighters, Inc, D C Cal, 351 F Supp 373, affd, C A, 498 F 2d 411

Burden of proof

N Y—Coumoutsis v Central Am S S Agency, Inc, 171 N Y S 2d 308, 11 Misc 2d 787

Repatriation of seamen

N Y—Coumoutsis v Central Am S S Agency, Inc, 171 N Y S 2d 308, 11 Misc 2d 787

44. Liability to suit terminates

U S—Leith v The Rocroi, D C Tex, 203 F Supp 48

49. U S—Victory Carriers, Inc v U S, 467 F 2d 1334, 199 Ct Cl 410

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61. U.S.—Goff & Page Co v The Fortune, D C Va, 182 F Supp 242

No authority for repairs

U S—Dorn v. Balfour, Guthrie & Co, C A Cal, 262 F 2d 48, cert den 79 S Ct 1436, 360 U S 918, 3 L Ed 2d 1534

67. U.S.—U.S Lines Co v U S, 145 F Supp 749, 136 Ct Cl 719

69. La.—Ybarzabal v Stipelcovich, App, 135 So 2d 312

§ 18. Sales

Library References

Shipping ⇐24 et seq.

Modern Legal Forms Ch 54, Powers of Attorney.

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77. U S.—R C Craig Limited v Ships of Sea Inc, D.C.Ga, 345 F.Supp 1066.

Statute governing sale to persons not citizens

U S.—Meacham Corp v. U.S, C A.Va, 207 F 2d 535, cert gr 74 S.Ct 631, 347 U.S 932, 98 L.Ed. 1083, cert. dism 75 S Ct 17, 348 U S. 801, 99 L Ed—U S v. Tito Campanella Societa Di Navigazione, C A Va, 217 F 2d 751—U S v The Lake George, D C Del, 123 F Supp 216, app dism, C A, 224 F 2d 117

D C—U S v Onassis, D C, 125 F Supp 190—U S v Niarchos, D C, 125 F Supp 214

N Y—Silvera v Safra, 361 N Y S 2d 250, 79 Misc 2d 919

Restrictions on resale to foreign buyer of vessel purchased from Maritime Commission

U S—Eastport S S Corp v U S, Ct Cl, 372 F 2d 1002, 178 Ct Cl 599

78. U S—Choy v Bouchelle, C A Virgin Islands, 436 F 2d 319

La—Tripod Boats, Inc v George Engine Co, App, 170 So 2d 238

"Center of gravity" rule held applicable

N Y—Cosmopolitan Equities, Inc v Pacific Seafarers, Inc, 246 N Y S 2d 412, 41 Misc 2d 772

Uniform commercial code

Alaska—Prince v LeVan, 486 P 2d 959

84. U S—Derecktor v U S, 128 F Supp 136, 129 Ct Cl 103, cert gr 75 S Ct 336, 348 U S 926, 99 L Ed 725, cert dism 76 S Ct 37, 350 U S 802, 100 L Ed 722

Judicial modification or cancellation for buyer's fraud

U S—Merrill-Stevens Dry Dock Co v M/V "Laissez Faire", C A Fla, 421 F 2d 430

Uniform commercial code applicable

Alaska—Prince v LeVan, 486 P 2d 959

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93. Wash—Brown v VanTuyl, 242 P 2d 1021, 40 Wash 2d 364

§ 19. —— Requisites and Validity in General

3. Cal—Security Pac Nat Bank v Goodman, 100 Cal Rptr 763, 24 C A 3d 131

Conditions precedent

N J—Cohn v Fisher, 287 A 2d 222, 118 N J Super 286, 264 Md 562

Ships held "goods" within Uniform Commercial Code

U'S—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066—Puamier v Barge BT 1793, D C Va, 395 F Supp 1019

5. U S—Orient Mid-East Great Lakes Service v International Export Lines, Limited, D C Md, 207 F Supp 127, revd on oth grds, C A, 315 F 2d 519

La—Manuel v Shaheen, App, 316 So.2d 878

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8. Inculpatory clause unenforceable

U S—Stevens Institute of Technology v U.S, D.C N Y, 396 F Supp 986

9. U S—Cuttyhunk Boat Lines v The Pendleton, D C Mass, 119 F.Supp 608, affd., C A, 213 F 2d 542

11. Seller must deliver all transferable documentation

U.S—R.C Craig Limited v Ships of Sea Inc, D C Ga., 345 F Supp 1066

§ 20. —— Bill of Sale or Other Writing

Library References

Modern Legal Forms Ch. 63, Ships and Vessels.

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28. Rights of assignee

U S—In re Troy, C A Ohio, 490 F.2d 1061

31. U.S—Esso Nederland N V. v U.S, 151 F Supp. 285, 138 Ct.Cl 451—Saturn Trading & Transp Co v Boston Metals Corp, D C Md., 178 F Supp 95, affd, C A, 278 F 2d 331

Language used as trade talk

Fla—Keating v DeArment, App, 193 So 2d 694

Instruments construed with reference to each other

Fla—Fraser v Lewis, App, 187 So 2d 684

§ 21. —— Delivery of Vessel

36. Cal—Herrmann v Fireman's Fund Ins Co, 274 P 2d 501, 127 C A 2d 560

§ 22. —— Warranties

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53. U S—Voytovich v Bangor Punta Operations, Inc, C A Ohio, 494 F 2d 1208

Alaska—Prince v LeVan, 486 P 2d 959

Implied warranty of fitness

U S—McKee v Brunswick Corp, C A Ill, 354 F 2d 577

56. U S—Owens v Anderson, D C Alaska, 101 F Supp 32, 13 Alaska 455, revd on oth grds, C A, 205 F 2d 940, 14 Alaska 353

Fla—Keating v DeArment, App, 193 So 2d 694

Sufficiency of evidence

(1) Since the publication of Corpus Juris Secundum Owens v Anderson, D C Alaska, 101 F Supp 32 has been reversed on the ground that neither express nor implied warranty existed—Owens v Anderson, C A, 205 F 2d 940, 14 Alaska 353

(2) U S—Owens v Anderson, supra

(3) Other evidence.—Overseas Nav Corp v U S, 129 F Supp 206, 131 Ct Cl 70

Damages

U S—Owens v Anderson, supra

57. U S—Anderson v Owens, C A Alaska, 205 F 2d 940, 14 Alaska 353 Stating Washington law—Wilken v Holland, C A.Md, 343 F 2d 147

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71. U S—Owens v Anderson, supra, n 56

Condition as earlier warranted

U S—Owens v Anderson, supra, n 56

§ 23. —— Rights and Liabilities of Parties

72. U S—Esso Nederland N.V. v U S, 151 F Supp 285, 138 Ct Cl 451—Manuel Rodriguez Trading Corp v U.S, 153 F Supp 442, 139 Ct Cl 564, cert den 78 S Ct 560, 562, 356 U S 902, 2 L Ed 2d 579—Layton Industries, Inc v Sport Fishing Cruiser Gladiator, D C Mass, 263 F Supp 356

Md—Compania De Astral, S.A v Boston Metals Co, 107 A 2d 357, 205 Md 237, 49 A L R 2d 646, cert den 75 S Ct 365, 348 U S 943, 99 L Ed 738—Compania De Astral, S.A v Boston Metals Co, 108 A 2d 372, 205 Md. 237.

Setting upset price

U S.—Overseas Nav Corp v U S, 129 F Supp 206, 131 Ct Cl 70

Federal Arbitration Act

U S—Reynolds Jamaica Mines, Limited v La Societe Navale Caennaise, C.A Va., 239 F 2d 689

Anticipatory repudiation

U S.—R C. Craig Limited v Ships of Sea Inc, D C. Ga, 345 F.Supp 1066

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In the absence of a showing that another bidder had been prejudiced, a federal commission is entitled to waive any informality in connection with the submission of a particular bid on a

tanker being sold by the commission [93 1]

93.1. U S—Overseas Nav Corp v U S, 129 F Supp 206, 131 Ct Cl 70

98. Cal—Herrmann v Fireman's Fund Ins Co, 274 P 2d 501, 127 C A 2d 560

N J—Cohn v Fisher, 287 A 2d 222, 118 N J Super 286, 264 Md 562

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3. La—Thomas Jordan, Inc v Ralph, App, 97 So 2d 504

5. La—Madere v Sharp, 89 So 2d 214, 230 La 723—Thomas Jordan, Inc v Ralph, App, 97 So 2d 504

Wash—Brown v VanTuyl, 242 P 2d 1021, 40 Wash 2d 364

Reconventional demand not supported

La—Rogers v Labarama, Inc, App, 233 So 2d 348

7. N Y—Neri v Retail Marine Corp, 285 N E 2d 311, 30 N Y 2d 393, 334 N Y S 2d 165

13. What law governs

Vt—General Acceptance Corp v Lyons, 215 A 2d 513, 125 Vt 332

15. Waiver of right to deficiency

Vt—General Acceptance Corp v Lyons, 215 A 2d 513, 125 Vt 332

20. U S—Puamier v. Barge BT 1793, D C Va, 395 F Supp 1019

Duty of successful bidder to take possession

U S—Rossville Salvage Corp v S E Graham Co, C A Pa, 319 F 2d 391

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21. U S—Tri-Continental Financial Corp v. Tropical Marine Enterprises, Inc, D C Fla, 164 F Supp 1, affd, C.A, 265 F 2d 619

36. U S—Kane v Motor Vessel Leda, D C La, 355 F.Supp 796, affd, C.A., 491 F 2d 899, reh den 493 F 2d 1405, two cases, cert. den 95 S Ct 120, 419 U S 865, 42 L.Ed 2d 102

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A buyer in undisturbed possession may not suspend payment on the ground of unmerchantable title.[44 1]

44.1. La.—Southwest Steel Corp. v. Jumonville, 81 So 2d 875, 228 La. 240.

57. Held bona fide purchaser

U.S.—U S. v. The Richard J. Moran, D.C.Me, 201 F.Supp 570.

Ownership determined

U S.—Puamier v Barge BT 1793, D.C.Va., 395 F Supp 1019.

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23. Wash.—Brown v VanTuyl, supra, n. 5

62. Damages not recoverable

La.—Hoffman v. All Star Ins Corp., App., 288 So.2d 388, writ ref., Sup., 290 So 2d 909.

65. U S.—Puamier v. Barge BT 1793, D.C Va, 395 F.Supp 1019.

Del.—Falcon Tankers, Inc v. Litton Systems, Inc, Super., 300 A.2d 231.

66. Tender of benefits doctrine

Wash.—Gooden v. Hunter, 344 P.2d 723.

Award reasonable

U.S.—Voytovich v. Bangor Punta Operations, Inc., C.A.Ohio, 494 F.2d 1208.

67. Reduction in purchase price

La.—Poor v. Hemenway, 60 So.2d 310, 221 La. 770.

68. Cal.—Canepa v. Sun Pacific, 272 P.2d 860, 126 C.A.2d 706.

La.—Hoffman v. All Star Ins. Corp., App., 288 So.2d 388, writ ref., Sup, 290 So.2d 909.

N.C.—Sawyer v. Wright, 149 S E.2d 873, 268 N.C. 163

Wash—Gooden v Hunter, 355 P 2d 20, 56 Wash 2d 617

69. Ability to restore to status quo

La—Poor v Hemenway, supra, n 67

70. La—Roche v Broussard, App, 252 So 2d 690

71. Mutual mistake not shown

U S—Anderson Bros Corp v O'Meara, C A Tex, 306 F 2d 672

Unilateral mistake not ground for equitable relief

U S—Anderson Bros Corp v O'Meara, C A Tex, 306 F 2d 672

73. La—Madere v Sharp, 89 So 2d 214 230 La 723

76. Complaint held insufficient

U S—Ocean Machinery Corp v U S, D C N Y, 175 F Supp 288

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77. La—La Grange Realty, Inc v Sheen, App, 93 So 2d 711

Evidence held sufficient

U S—Anderson Bros Corp v O'Meara, C A Tex, 306 F 2d 672

Cal—Harper v Silver, 19 Cal Rptr 78, 200 C A 2d 103—Horrell v Lakewood Marina, Inc, 83 Cal Rptr 701, 3 C A 3d 506

Fla—Keating v DeArment, App, 193 So 2d 694

La—Poor v Hemenway, supra, n 67

N C—Salem v Flowers, 216 S E 2d 392, 26 N C App 504

Pa—Schneider v Patterson, 227 A 2d 925, 209 Pa Super 265

Wash—Gooden v Hunter, 344 P 2d 723—Gooden v Hunter, 355 P 2d 20, 56 Wash 2d 617

Wis—Leiske v. Baudhuin Yacht Harbor, Inc, 89 N W 2d 794, 4 Wis 2d 188

Burden of proof

Wis—Leiske v Baudhuin Yacht Harbor, Inc, 89 N W 2d 794, 4 Wis 2d 188

Evidence held admissible

Wis—Leiske v. Baudhuin Yacht Harbor, Inc, 89 N.W 2d 794, 4 Wis.2d 188

Admissibility of evidence

Fla.—Sokoloff v. Corinto S S Co, App, 225 So 2d 554

78. Questions for court or jury

(2) Other questions

U.S—Gillentine v McKeand, C A Mass, 426 F 2d 717

Tex—Reynolds Bros, Inc v Dodson, Civ.App., 380 S W 2d 678.

Instruction held improper

U S—Gillentine v McKeand, C A Mass, 426 F 2d 717

Findings held erroneous

Alaska—Prince v. LeVan, 486 P 2d 959

The usual rules also govern with respect to limitations of actions [78 5]

78.5. Actions in redhibition

La.—Tripod Boats, Inc. v. George Engine Co, App, 170 So 2d 238

§ 24. Mortgages and Hypothecations

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Modern Legal Forms Ch. 63, Ships and Vessels.

80. U.S.—First Nat. Bank & Trust Co. of Escanaba v. Oil Screw Olive L. Moore Barge Wiltranco, D C Mich., 379 F.Supp. 1382, affd., C.A., 521 F.2d 1401, three cases.

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98. U.S—Bergren v. Davis, D.C.Conn, 287 F.Supp. 52

Uniform commercial code

Or—Security Bank of Or v Levens, 480 P 2d 706, 257 Or 630

1. U S—U S v American Gas Screw Franz Joseph, D C Alaska, 210 F Supp 581—U S v Oil Screw Ken, Jr, D C La, 275 F Supp 792—Nat G Harrison Overseas Corp v American Barge Sun Coaster, C A Fla, 475 F 2d 504

3. D C—Rederiaktierbolaget v Compania De Navegacion Anne, S A, D C Canal Zone, 139 F Supp 327

4. Modified by Bankruptcy Act dealing with maritime commission liens

U S—Northwest Marine Works v U S, C A Cal, 307 F 2d 537

5. U S—Atlantic Steamer Supply Co v The Tradewind, D C Md, 153 F Supp 354—First Nat Bank & Trust Co of Vicksburg, Miss v The Seneca, D C La, 179 F Supp 847, affd, C A, 287 F 2d 366—Merchants & Marine Bank v The T E Welles, C A Miss, 289 F 2d 188—U S v American Gas Screw Franz Joseph, D C Alaska, 210 F Supp 581—Tropicana Shipping, S A v Empresa Nacional "Elcano" de la Marina Mercante, C A La, 366 F 2d 729—Walter E Heller & Co v M/V Mr Ed, D C La, 270 F Supp 830—J Ray McDermott & Co v Vessel Morning Star, C A Tex, 457 F 2d 815, cert den 93 S Ct 271, 409 U S 948, 34 L Ed 2d 218, and 93 S Ct 292, 409 U S 948, 34 L Ed 2d 218—R C Craig Limited v Ships of Sea Inc, D C Ga, 345 F Supp 1066

Attraction of capital

(1) U S—Pierside Terminal Operators, Inc v M/V Floridian, D C Va., 374 F Supp 27, revd on oth grds, C A, 529 F 2d 221, on remand D C, 423 F.Supp 962

(2) U S.—U S v Oil Screw Ken, Jr, D C La, 275 F Supp 792

Purpose of 1954 amendment

U S—Brandon v S S Denton, C A Tex, 302 F 2d 404

D C—Rederiaktierbolaget v Compania De Navegacion Anne, S A, D C Canal Zone, 139 F Supp 327

What constitutes preferred mortgage within statute

U S—Chemical Bank New York Trust Co v. S S Westhampton, C A Md, 358 F 2d 574, cert den 87 S Ct 228, 385 U.S 921, 17 L Ed 2d 145—Nat G Harrison Overseas Corp v American Barge Sun Coaster, C.A Fla, 475 F 2d 504.

Citizenship as factor

U S—Chemical Bank New York Trust Co v S S. Westhampton, C A Md, 358 F.2d 574, cert. den 87 S Ct. 228, 385 U S 921, 17 L Ed 2d 145

6. "Owner" held not to include equitable or "economic" owner

U S—Diaz v The Seathunder, D C Md, 191 F Supp 807

8. U S.—J Ray McDermott & Co v Vessel Morning Star, C A Tex, 457 F 2d 815, cert. den 93 S Ct 271, 409 U S 948, 34 L Ed 2d 218, and 93 S Ct 292, 409 U.S 948, 34 L.Ed 218

Act as amended in 1954 is not limited to only American mortgagees

D C.—Rederiaktierbolaget v Compania De Navegacion Anne, S A., D.C Canal Zone, 139 F Supp 327

Act as amended in 1954 operates retrospectively

D C.—Rederiaktierbolaget v Compania De Navegacion Anne, S.A, D.C.Canal Zone, 139 F.Supp. 327.

Meaning of language used

U.S.—Chemical Bank New York Trust Co. v. S.S. Westhampton, C.A.Md., 231 F.Supp. 284, affd, C A., 358 F.2d 574, cert. den. 87 S.Ct. 228, 385 U.S 921, 17 L.Ed.2d 145

"Bond issue" defined and construed

U.S—Chemical Bank New York Trust Co. v S.S Westhampton, C.A Md., 358 F.2d 574, cert den. 87 S.Ct. 228, 385 U.S. 921, 17 L Ed.2d 145

11. Provision requiring approval of Secretary of Commerce not limited to periods of war and national emergency.

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U S —Jackson v Inland Oil & Transport Co , C A La , 318 F 2d 802

Approval of Secretary of Commerce requirement held ministerial

U S —Marine Mart, Inc v O/S Miss Darla Dawn, D C Tex , 273 F Supp 353

12. Foreign built vessels not eligible, unless used exclusively as pleasure vessel

U S —R C Craig Limited v Ships of Sea Inc , D C Ga , 345 F Supp 1066

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14. U S —First Suffolk Nat Bank of Huntington v The Air Brant, D C N Y , 125 F Supp 709

16. Disclosure in writing

U S —Pascagoula Dock Station v Merchants and Marine Bank, C A Miss , 271 F 2d 53

20. U S —Southland Financial Corp v Oil Screw Mary Evelyn, D C La , 248 F Supp 520

Holder of mortgage need not be entirely divorced from any business relations with mortgagee trustee

U S —Moon Engineering Co v American S S Valiant Power, D C Va , 214 F Supp 555

21. U S —Gulf Coast Marine Ways v The J R Hardee, D C Tex , 107 F Supp 379

Citizenship

(2) Other matters

U S —Barnouw v S S Ozark, C A Tex , 304 F 2d 717, cert den 83 S Ct 291, 371 U S 923, 9 L Ed 2d 231—Moon Engineering Co v American S S Valiant Power, D C Va , 214 F Supp 555

Amount and date of maturity indorsed on documents

U S —Port Welcome Cruises, Inc v S S Bay Belle, D C Md , 215 F Supp 72 Affd , C A , 324 F 2d 954

Substantial compliance

U S —Lake Jackson State Bank v Oil Screw Kingfish Too, D C Tex , 240 F Supp 450

Affidavit of good faith

(1) Held valid

U S —Lake Jackson State Bank v Oil Screw Kingfish Too, D C Tex , 240 F Supp 450

(2) Statutory requirement strictly construed

U S —Lake Jackson State Bank v Oil Screw Kingfish Too, D C Tex , 240 F Supp 450

Consideration

U S —Southland Financial Corp v Oil Screw Mary Evelyn, D.C La , 248 F Supp 520

United States may be mortgagee

U S —Pierside Terminal Operators, Inc v M/V Floridian, D C Va , 374 F Supp 27

23. Exhibition

U.S —Pascagoula Dock Station v Merchants and Marine Bank, C A Miss , 271 F 2d 53

24. U S —Pascagoula Dock Station v Merchants and Marine Bank, C.A Mass , 271 F 2d 53

Segregation purposes of Act

U S —Port Welcome Cruises, Inc v S S Bay Belle, D C.Md , 215 F.Supp. 72 Affd , C A , 324 F 2d 954.

Noncompliance not shown

U.S —Port Welcome Cruises, Inc v S S Bay Belle, D C.Md , 215 F Supp 72 Affd , C A , 324 F 2d 954

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25. U S.—Pascagoula Dock Station v Merchants and Marine Bank, C.A.Miss , 271 F 2d 53

31. Record not required as to foreign vessel —Murphy v. Bankers Commercial Corp, D C N Y , 111 F.Supp. 608.

40. Continued operation after libel authorized by Ship Mortgage Act

U.S.—U.S v The Audrey II, D.C Cal., 185 F Supp 777

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45. U S —J Ray McDermott & Co v Vessel Morning Star, C A Tex , 431 F 2d 714, reh 457 F 2d 815, cert den 93 S Ct 271, 292, 409 U S 948, 34 L Ed 2d 218

Fla —Capital Nat Bank of Miami v Chancellor Properties, Inc , App , 291 So 2d 35

Held not to operate as preferred maritime lien

U S —U S v F/V Golden Dawn, D C N Y , 222 F Supp 186

Rights and liabilities of bondholders and trustee under mortgage trust indenture

U S —Chemical Bank New York Trust Co v S S Westhampton, C A Md , 358 F 2d 574, cert den 87 S Ct 228, 385 U S 921, 17 L Ed 2d 145

Construction against mortgagee

U S —Payne v SS Tropic Breeze, C A Puerto Rico, 412 F 2d 707, app after remand 456 F 2d 137

46. U S —Ocean Machinery Corp v U S , D C N Y , 175 F Supp 288

Property held not covered

U S —First Safe Deposit Nat Bank of New Bedford v The North Star, D C Mass , 185 F Supp 815—U S v F/V Golden Dawn, D C N Y , 222 F Supp 186 —C I T Corp v Oil Screw Peggy, C A La , 424 F 2d 767

Property of others appurtenant to ship conveyed

U S —Payne v SS Tropic Breeze, C A Puerto Rico, 412 F 2d 707, app after remand 456 F 2d 137

47. U S —Walter E Heller & Co v M/V Mr Ed, D C La , 270 F Supp 830—U S v Oil Screws Ken, Jr , D C La , 275 F Supp 792—Rainbow Line, Inc v M/V Tequila, C A N Y , 480 F 2d 1024

52. U S —Gulf Coast Marine Ways v The J R Hardee, D C Tex , 107 F Supp 379—U S v Oil Screws Ken, Jr , D C La , 275 F Supp 792

Vessel not included in classes specified

U S —Jackson v Inland Oil & Transport Co , C A La , 318 F 2d 802

53. U S —Pascagoula Dock Station v Merchants and Marine Bank, C A Miss , 271 F 2d 53—Brandon v S S Denton, C A Tex , 302 F 2d 404—United Virginia Bank/Citizens and Marine v Oil Screw Sea Queen, D C Va , 343 F Supp 1020

Act as amended in 1954 held not to divest substantive rights previously acquired

D C —Rederiaktiebolaget v Compania De Navegacion Anne, S A , D C Canal Zone, 139 F Supp 327

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58. U S —Port Welcome Cruises, Inc v S S Bay Belle, D C Md , 215 F Supp 72, affd , C A , 324 F 2d 954—R C Craig Limited v Ships of Sea Inc , D C Ga , 345 F Supp 1066

Principle that shipbuilding contract not maritime lien inapplicable

U S —State of Israel v Motor Vessel Nili, D C Fla., 318 F Supp 1196, affd , C A., 435 F 2d 242, cert den. 91 S Ct 1232, 401 U S 994, 28 L.Ed 2d 532

59. Foreign mortgage

U S —State of Israle v Motor Vessel Nili, D C Fla , 318 F Supp 1196, affd , C A , 435 F 2d 242, cert den 91 S Ct 1232, 401 U S 994, 28 L Ed 2d 532

61. Statutory presumption of fraud where transferor insolvent inapplicable

U S —Mastan Co v Steinberg, C A.N J., 418 F 2d 177, stating New York law, cert. den 397 U S 1009, 25 L Ed 2d 422

70. U S —Moon Engineering Co v The Valiant Power, D.C Va , 193 F Supp 460

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76. Laches held to subordinate lien for wharfage

U S —Florida Bahamas Lines, Limited v. Steel Barge Star 800 of Nassau, C.A Fla., 433 F 2d 1243

78. Mortgagee as trustee

U S —Moon Engineering Co v American S S Valiant Power, D C Va , 214 F Supp 555

Conveyance of property as part of consideration

U S —Port Welcome Cruises, Inc v S S Bay Belle, D C Md , 215 F Supp 72 Affd , C A , 324 F 2d 954

82. Replevin action

Fla —Butler v Mirabelli, App , 179 So 2d 868

85. Action for damages for violation of Ship Mortgage Act

U S —Hughes v National Shawmut Bank of Boston, D C Mass , 212 F Supp 100

No duty to sue

U S —U S v Fishing Vessel Mary Ann, C A Tex , 466 F 2d 63, cert den 93 S Ct 1365, 410 U S 929, 35 L Ed 2d 590

92. U S —Barnouw v S S Ozark, C A Tex , 304 F 2d 717, cert den 63 S Ct 291, 371 U S 923, 9 L Ed 2d 231

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10. Taking of possession does not exhaust mortgagee's remedies

U S —Port Welcome Cruises, Inc v S S Bay Belle, D C Md , 215 F Supp 72 Affd , C A , 324 F 2d 954

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17. Duty to compensate owner for use of vessel

U S —Challenger, Inc v Durno, C A Tex , 227 F 2d 918

21. Wages

U S —Challenger, Inc v Durno, C A Tex , 227 F 2d 918

23. Priority of mortgage lien over lien for labor and materials

U S —Florida Yacht Brokers, Inc v Yacht Huckster, D C Fla , 249 F Supp 371

28. U S —Merrill-Stevens Dry Dock Co v M/V "Laissez Faire", C A Fla , 421 F 2d 430

Charges not essential to preservation of the res as security

U S —Challenger, Inc v Durno, C A Tex , 227 F 2d 918

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37. Mortgagee may appear as claimant

U S.—North Am. Continental Co v The El Cuis, D C N Y , 107 F Supp. 436

Execution sale expressly made subject to mortgage

U S —Bergren v Davis, D C Conn , 287 F.Supp 52

45. Suit in rem in admiralty

(1) U S —Pierside Terminal Operators, Inc v M/V Floridian, D C Va., 374 F Supp 27, revd on oth grds., C A , 529 F.2d 221, on remand D C , 423 F Supp 962

(4) Power of court to grant deficiency judgment.

U S.—J Ray McDermott & Co. v Vessel Morning Star, C.A.Tex , 431 F.2d 714, reh. 457 F.2d 815, cert. den. 93 S Ct 271, 292, 409 U S 948, 34 L Ed 2d 218

(5) Process.

Wash —Petrich v McDonald, 266 P 2d 1047, 44 Wash.2d 211

Intervention denied

U S —Schaaf v S S North American, C A Pa , 368 F 2d 925

Application of ship mortgage act to foreign mortgages

U.S —Payne v SS Tropic Breeze, C A Puerto Rico, 423 F 2d 236, cert. den 91 S Ct 363, 400 U.S. 964, 27 L Ed.2d 383—State of Israel v. Motor Vessel Nili, D C Fla , 318 F.Supp 1196, affd , C.A., 435 F 2d 242, cert den 91 S.Ct 1232, 401 U.S 994, 28 L Ed.2d 532—Rainbow Line, Inc. v. M/V Tequila,

D C N Y, 341 F Supp 459, affd, C A, 480 F 2d 1024

Intervention permitted

U S —Lykes Bros S S Co v S S Centerville, D C Tex, 326 F Supp 601

Motion to set sale aside

U S —Golden v Oil Screw Frank T Shearman, C A Va, 455 F 2d 133, cert den 92 S Ct 2495, 408 U S 924, 33 L Ed 2d 335

Deficiency judgment

U S —J Ray McDermott & Co v Vessel Morning Star, C A Tex, 457 F 2d 815, cert den 93 S Ct 271, 409 U S 948, 34 L Ed 2d 218, and 93 S Ct 292, 409 U S 948, 34 L Ed 2d 218

46. U S —U S v Fishing Vessel Mary Ann, D C Tex, 330 F Supp 1102, affd, C A, 466 F 2d 63, cert den 93 S Ct 1365, 410 U S 929, 35 L Ed.2d 590

Question of laches not governed by local statutory limitations

U S —U S v American Gas Screw Franz Joseph, D C Alaska, 210 F Supp 581

Rights of conditional seller of equipment against purchasing mortgagee

U S —Merrill-Stevens Dry Dock Co v M/V "Laissez Faire", C A Fla, 421 F 2d 430

Local law as to propriety of deficiency judgment applied

U S —J Ray McDermott & Co v Vessel Morning Star, C.A Tex, 431 F 2d 714, reh 457 F 2d 815, cert den 93 S Ct 271, 292, 409 U S 948, 34 L Ed 2d 218

Right of United States as holder of recorded assignments

U S —U S. v Fishing Vessel Pan Alaska, D C Alaska, 315 F Supp 1005.

47. U.S —Application of Suttmeier, D C N Y, 112 F Supp 196

Intervening libel held sufficient

D C —Rederiaktiebolaget v Compania De Navegacion Anne, S A, D C Canal Zone, 139 F Supp 327

Issue

U S —Barnouw v. S S. Ozark, C A Tex, 304 F 2d 717, cert den 83 S Ct 291, 371 U S 923, 9 L Ed 2d 231

48. U S —Mastan Co v Steinberg, C A N J, 418 F 2d 177, cert den 90 S Ct 1238, 397 U S 1009, 25 L.Ed.2d 422—State of Israel v Motor Vessel Nili, D C.Fla, 318 F.Supp 1196, affd., C A, 435 F 2d 242, cert den. 91 S Ct 1232, 401 U S 994, 28 L Ed 2d 532—First Nat Bank of Lafayette v The King Fish, D C La, 173 F Supp 367—Chemical Bank New York Trust Co, v. S S. Westhampton, D C.Md, 231 F.Supp. 284, affd, C A, 358 F 2d 574, cert den 87 S.Ct. 228, 385 U S 921, 17 L Ed 2d 145—Tropicana Shipping, S.A v Empresa Nacional "Elcano" de la Marina Mercante, C.A La., 366 F 2d 729

Burden of proof

(2) Other matters.

U S —Barnouw v S S. Ozark, C A Tex., 304 F 2d 717, cert den. 83 S Ct, 291, 371 U S 923, 9 L Ed 2d 231.

Action held not barred by laches

U.S.—U.S. v. American Gas Screw Franz Joseph, D C Alaska, 210 F.Supp. 581

Right of mortgage bondholder to initiate foreclosure

U.S.—Chemical Bank New York Trust Co. v S.S Westhampton, C.A Md, 358 F.2d 574, cert den 87 S.Ct. 228, 385 U S. 921, 17 L Ed.2d 145

Right of accommodated mortgagee against accommodating mortgagor

U S —Ridings v. Motor Vessel Effort, C.A N Y, 387 F.2d 888, app after remand 434 F 2d 183.

Preliminary matters determinable

U S —Ridings v Motor Vessel Effort, C A.N.Y., 387 F 2d 888, app after remand 434 F.2d 183.

Rights of bona fide purchaser

U S —Ridings v Motor Vessel Effort, C A N Y, 387 F 2d 888, app after remand 434 F 2d 183

Failure of consideration as defense

U S —Bergren v Davis, D C Conn, 287 F Supp 52

49. Findings and conclusions

U S —Reddington v Burg, C A Mass, 316 F 2d 184—Tropicana Shipping, S A v Empresa Nacional "Elcano" de la Marina Mercante, C A La, 366 F 2d 729

Confirmation of sale

U S —J Ray McDermott & Co v Vessel Morning Star, 457 F 2d 815, cert den 93 S Ct 271, 409 U S 948, 34 L Ed 2d 218, and 93 S Ct 292, 409 U S 948, 34 L Ed 2d 218

Intervention

U S —First Nat Bank & Trust Co of Escanaba v Oil Screw Olive L Moore Barge Wiltranco, D C Mich, 379 F Supp 1382, affd, C A, 521 F 2d 1401, three cases

50. Notice of election to accelerate

U S —State of Israel v Motor Vessel Nili, D C Fla, 318 F Supp 1196, affd, C A, 435 F 2d 242, cert den 91 S Ct 1232, 401 U S 994, 28 L Ed 2d 532

The courts have passed upon claims asserting equitable mortgages on vessels.[50.5]

50.5. Wash —Koster v Wingard, 314 P 2d 928, 50 Wash 2d 855

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52. Fine held not lien against proceeds of sale

U S —Maryland Intern, S A v The Panargy I, D C N Y, 201 F Supp 600

54. Foreclosure of preferred ship mortgage by United States; excess of sale price over bid price not credited to mortgagor

U S —U.S v Fishing Vessel Mary Ann, C A Tex, 466 F 2d 63, cert den 93 S Ct 1365, 410 U S 929, 35 L Ed 2d 590.

55. Proceeding for appointment properly brought

U S —Northwest Marine Works v U S, C A Cal, 307 F 2d 537

Intervention

U S —Northwest Marine Works v u S, C A Cal, 307 F 2d 537

Statute construed

U S —Northwest Marine Works v U S, C A Cal, 307 F 2d 537

Continued operation at risk of mortgagee

U S —Northwest Marine Works v U S, C A Cal, 307 F.2d 537

62. The purpose of such requirement, etc.

(2) Other statements

U S —Port Welcome Cruises, Inc v S S Bay Belle, D C M d., 215 F Supp 72 Affd, C A, 324 F 2d 954

Where proceeding is for enforcement of mortgage lien, and not suit on note secured by mortgage, it is maturity date of mortgage which controls

U S —Port Welcome Cruises, Inc. v S S Bay Belle, D C Md, 215 F Supp 72 Affd, C A., 324 F 2d 954

§ 25. Recording Conveyances and Mortgages

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75. Provision in Ship Mortgage Act held mere registry requirement

U S —Jackson v Inland Oil & Transport Co, C A La, 318 F 2d 802.

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86. U S —Morton v Browne, D C Puerto Rico, 311 F Supp 1315, affd, C A, 438 F 2d 1205

89. U S —Walter E Heller & Co v. M/V Mr Ed, D C La, 270 F Supp 830

91. U S —Jackson v Inland Oil & Transport Co, C A La, 318 F 2d 802

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3. U S —Walter E Heller & Co v M/V Mr Ed, D C La, 270 F Supp 830

7 46 U S C A § 17, was repealed in 1980

16. Or —Security Bank of Or v Levens, 480 P 2d 706, 257 Or 630

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24. Invalid mortgage not made preferred mortgage by recording

U S —Bergren v Davis, D C Conn, 287 F Supp 52

§ 26. Definitions and Distinctions

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45. U S —Michael v SS Thanasis, D C Cal, 311 F Supp 170

47. Similar definitions

(2) U S —Dorsey v State Mut Life Assur. Co of Worcester, Mass, D C Ga, 238 F Supp 391, affd, C A, 357 F 2d 600—Jefferson Chemical Co v M/T Grena, C A Tex, 413 F 2d 864

Contracts held charter parties

(3) U S —Calmar S S Corp v U S, D C N Y, 103 F Supp 243, revd on oth grds, C A, 197 F 2d 795, vac on oth grds 73 S Ct 733, 345 U S 446, 97 L Ed 1140, and 73 S Ct 739, 345 U S 427, 97 L Ed 1125, reh den 73 S Ct 1110, 345 U S 971, 97 L Ed 1388, conf to 209 F 2d 852, affd, 209 F 2d 852

Lessor of vessel held not demise charterer

U S.—Chandler Leasing Division, Pepsico Service Industries Leasing Corp v Florida-Vanderbilt Development Corp, C A Fla, 464 F 2d 267, cert den 93 S Ct 527, 409 U S 1041, 34 L Ed 2d 491

48. La —Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A L R 2d 1218

A time charter is a renting of cargo space and in no way transfers control of the ship or crew to the charterer.[48.5]

48.5. U S —Buthusien v Central Gulf S S Corp, D C Pa, 217 F Supp 903—Klishewich v Mediterranean Agencies, Inc, D C N Y, 302 F Supp 712

Cal —Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

Time charter otherwise defined

U S —Habrat v U S, D C Pa, 310 F Supp 618

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53. Not a "sale"

U S —Neubros Corp v Northwestern Nat Ins Co, D C N Y., 359 F Supp 310

§ 28. Validity and Formation of Contract Generally

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68. U S —B H Inc v Anthony M Meyerstein, Inc, D C N.Y, 149 F Supp 219—Eastern Marine Corp v Fukaya Trading Co., S A, C A La., 364 F 2d 80, cert den 87 S Ct 508, 385 U S 971, 17 L Ed 2d 435—Christman v Maristella Compania Naviera, D C N Y, 349 F Supp 845, affd, C A, 468 F 2d 620

Sharing of expenses does not constitute charter agreement

US—Travelers Indem Co v Gulf Weighing Corp, D C La, 352 F Supp 335

70. US—J B Effenson Co v Three Bays Corp, C A Fla, 238 F 2d 611—Aetna Ins Co v Director General of India Supply Mission, D C N Y, 289 F Supp 273

Provision held illegal

US—Metal Transport Corp v Compania Nat Naviera, S A, D C N Y, 268 F Supp 456

72. US—Travelers Indem Co v Gulf Weighing Corp, D C La, 352 F Supp 335

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75. US—Crain Bros v Wieman & Ward Co, D C Pa, 126 F Supp 675, mod on oth grds, C A, 223 F 2d 256

82. Written contract contemplated

US—Orient Mid-East Great Lakes Service v International Export Lines, Limited, C A Md, 315 F 2d 519

83. US—Gardner v The Calvert, C A N J, 253 F 2d 395, cert den 78 S Ct 997, 356 US 960, 2 L Ed 2d 1067

86. US—C J S cited in Eskine v United Barge Co, C A La, 484 F 2d 1194, 1196

88. US—Interocean Shipping Co v National Shipping & Trading Corp, C A N Y, 523 F 2d 527

89. US—Orient Mid-East Great Lakes Service v International Export Lines, Limited, C A Md, 315 F 2d 519

90. La—Mermelstein v Schwab, App, 64 So 2d 37

93. Acceptance of counteroffer held a counteroffer

US—Orient Mid-East Great Lakes Service v International Export Lines, Limited, C A Md, 315 F 2d 519

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In the trade "fixtures" are oral agreements between a ship broker and a cargo broker, on the terms of the charter, including broker's commissions, which, when reduced to writing, constitute charters [55]

5.5. US—D C Andrews & Co v US, 292 F 2d 280, 154 Ct Cl 460

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15. US—Amicizia Societa Navegazione v Chilean Nitrate & Iodine Sales Corp, D C N Y, 184 F Supp 116, affd, C A, 277 F 2d 805, cert den 80 S Ct 1612, 363 US 843, 4 L Ed 2d 1727

§ 29. Charters by Agents or Brokers

21. U.S.—Cargo Ships El Yam, Limited v Stearns & Foster Co, D C N Y, 149 F Supp. 754.

23. U.S.—Interocean Shipping Co v. National Shipping & Trading Corp., C.A.N Y, 523 F 2d 527

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36. U.S—Cargo Ships El Yam, Limited v. Stearns & Foster Co., D.C.N.Y., 149 F.Supp 754

38. N Y.—Cargo Ships El Yam, Limited v. Stearns & Foster Co., D C.N.Y., 149 F Supp. 754.

80. Approval by National Shipping Authority condition precedent

U S.—D.C. Andrews & Co. v. U.S., 292 F.2d 280, 154 Ct.Cl. 460

§ 30. Subcharters and Assignments of Charters

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65. US—Ocean Cargo Lines, Limited v North Atlantic Marine Co, D C N Y, 227 F Supp 872

68. US—American Renaissance Lines, Inc v Saxis S S Co, C A N Y, 502 F 2d 674

Assumption of obligations and privileges of disponent owner

US—Import Export Steel Corp v Mississippi Valley Barge Line Co, C A N Y, 351 F 2d 503, reh den 356 F 2d 109

70. US—Saxis S S Co v Multifacs Intern Traders, Inc, C A N Y, 375 F 2d 577

72. US—Loreto Compania Naviera, S A v Bradley and Baker, C A Miss, 382 F 2d 980

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78. US—Shamrock Towing Co v Hughes Bros, Inc, D C N Y, 197 F Supp 397—American Renaissance Lines, Inc v Saxis S S Co, C A N Y, 502 F 2d 674

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16. Nature of agreement

US—Applewhaite v The Sunprincess, D C N J, 136 F Supp 769

17. US—Instituto Cubano De Estabilizacion Del Azucar v The Driller, D C N Y, 148 F Supp 739

§ 31. Modification and Termination of Charter

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47. US—Supreme Foods v Mayo Canulette, D C La, 120 F Supp 55—Schirmer Stevedoring Co v Seaboard Stevedoring Corp, C A Cal, 306 F 2d 188

48. US—US v M/V Marilena, P, C.A Va, 433 F.2d 164

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54. US—Navios Corp v The Ulysses II, D C Md, 161 F Supp 932, affd, C A, 260 F 2d 959

62. Cause required for termination

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64. Reasons for breach irrelevant

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66. U S.—Marine Chartering Co. v Schirmer Stevedoring Co, D C Cal, 194 F Supp 488.

68. U S—Pan Cargo Shipping Corp. v U S, C.A N Y, 373 F.2d 525, cert den. 88 S Ct 51, 389 U S. 836, 19 L Ed.2d 98

70. U.S.—U S v M/V Marilena P, C A Va, 433 F 2d 164.

71. U S.—Commercial Metals Co. v International Union Marine Corp., D C.N.Y, 294 F Supp. 570

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72. U S.—Diana Compania Maritime, S.A. of Panama v. Subfreights of S.S. Admiralty Flyer, D.C.N.Y., 280 F.Supp. 607.

73. U.S.—Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., C.A.Cal., 306 F.2d 188—Ocean Cargo Lines, Limited v. North Atlantic Marine Co., D C.N Y, 227 F.Supp 872

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Fla—Potashnick-Badgett Dredging Inc v Whitfield, App, 269 So 2d 36

1. US—Coastal States Petrochemical Co v Montpelier Tanker Co, D C Tex, 321 F Supp 212

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US—Michael v SS Thanasis, D C Cal, 311 F Supp 170—Marubeni-Iida (America), Inc v Toko Kaiun Kabushiki Kaisha, D C Tex., 327 F Supp 519

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2. US—Fox v The Giuseppe Mazzini, D C N Y, 110 F Supp. 212

3. US—Valdesa Compania Naviera, S A v Frota Nacional de Petroleiros, C A N.J., 348 F 2d 33—Marine Transport Lines, Inc v Publicker Intern, Inc, D.C Pa, 303 F Supp 423.

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6. Place of performance as governing performance

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7. La—Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A L R 2d 1218

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13. U.S.—Pennsylvania R. Co v McAllister Bros., Inc., D C N Y, 137 F 2d 788, affd, C.A, 240 F 2d 423—Cia De Navegacion Fruco, S.A v. M/S Heinz Horn, D C.Ala., 233 F.Supp 637, affd. in part, revd in part, on oth. grds., C.A. 404 F.2d 422, cert. den 89 S.Ct. 1272, 394 U.S 943, 22 L.Ed.2d 477—Michael v. S.S. Thanasis, D.C.Cal., 311 F.Supp. 170—Moore-McCormack Lines, Inc. v. U.S., D.C.N Y., 338 F.Supp. 1061.

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16. U S—States Marine Corp of Del v Victory Carriers, Inc, C A Cal, 272 F 2d 463—Ghidden Co v Hellenic Lines, Limited, C A N Y, 275 F 2d 253, on remand, D C, 207 F Supp 262, affd 315 F 2d 162—Texas & New Orleans Barge Line, Inc v Tug Patsy H, D C La, 279 F Supp 697

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17. U S—Cia De Navegacion Fruco, S A v M/S Heinz Horn, D C Ala, 233 F Supp 637, affd in part, revd in part, on oth grds, C A, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

20. Bareboat charter not sale

U S—Texas & New Orleans Barge Line, Inc v Tug Patsy H, D C La, 279 F Supp 697

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24. U S—Navios Corp v The Ulysses II, D C Md, 161 F Supp 932, affd, C A, 260 F 2d 959

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U S—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

27. U S—Cooper v Pinedo, C A Fla, 212 F 2d 137—Navios Corp v The Ulysses II, D C Md, 161 F Supp 932, affd, C A, 260 F 2d 959

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58. U S—Navios Corp v The Ulysses II, D C Md, 161 F Supp 932, affd, C A, 260 F 2d 959—Johnson Barge Co v Mid-Valley, Inc, D C Tex, 243 F.Supp 234

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61. U.S—U.S. v M/V Marilena P, C A Va, 433 F 2d 164

62. U.S—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

65. U.S.—Cia. Estrella Blanca, Ltda. v. S S Nictric, D.C Or, 247 F Supp 161, affd, C A, 368 F.2d 575—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986—Coastal States Petrochemical Co v Montpelier Tanker Co, D C Tex, 321 F Supp 212

66. U S—Cia Estrella Blanca, Ltda v S S Nictric, D C.Or, 247 F Supp 161, affd, C A., 368 F 2d 575

68. U.S—Kane v Motor Vessel Leda, D C La, 355 F Supp. 796, affd, C.A, 491 F 2d 899, reh den 493 F.2d 1405, two cases, cert. den 95 S Ct 120, 419 U S. 865, 42 L Ed 2d 102

69. U.S—Navios Corp v The Ulysses II, D C.Md, 161 F.Supp. 932, affd., C A, 260 F 2d 959.

73. U S—Navios Corp. v. The Ulysses II, D.C.Md, 161 F Supp. 932, affd., C A., 260 F 2d 959

74. U.S—Navios Corp. v The Ulysses II, D C Md, 161 F.Supp 932, affd, C A, 260 F 2d 959.

79. U S.—Mayronne Drilling Mud, Chemical & Engineering Service v. Thomas Jordan, Inc., D.C La., 117 F Supp 86, affd., C A, 214 F.2d 410

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80. U.S.—Thomas Jordan, Inc v. Mayronne Drilling Mud, Chemical and Engineering Service, C.A.La, 214 F 2d 410.

84. U S—Bergan v. International Freighting Corp., C A.N.Y., 254 F.2d 231

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U S—Randolph v Waterman S S Corp, D C Pa, 166 F Supp 732—Guzman v Pichirilo, Puerto Rico, 82 S Ct 1095, 369 U S 698, 8 L Ed 2d 205—Mondella v S S Elie V, D C N Y, 223 F Supp 390

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85. Particular terms and clauses construed

(16) U S—Bergan v International Freighting Corp, C A N Y, 254 F 2d 231—F Jacobus Transp Co v Gallagher Bros Sand & Gravel Corp, D C N Y, 161 F Supp 507—Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corp, D C N Y, 194 F Supp 161—Eastern Marine Corp v Fukaya Trading Co, S A, C A La, 364 F 2d 80, cert den 87 S Ct 508, 385 U S 971, 17 L Ed 2d 435—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986

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94. U S—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986

4. U S—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986

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12. U S—Dalzell v The St Nicholas, D C N Y, 109 F Supp 595

18. U S—Albert E Reed & Co. v M/S Thackeray, D C Fla, 232 F Supp 748—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L.Ed 2d 246

20. U S—Chilean Nitrate Sales Corp v The Nortuna, D C N Y, 128 F Supp 938

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21. Subcharter construed

U S—Import Export Steel Corp v Mississippi Valley Barge Line Co, C A N Y, 351 F 2d 503, reh den 356 F 2d 109

23. U S—Production Steel Co of Ill v S S Francois L D, D.C N Y, 294 F Supp 200

26. U S.—Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corp, D C N Y, 194 F Supp 161

28. U.S—Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corp, D C N Y., 194 F Supp 161—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319.

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39. U S—Travis v Poseidon Lines, D C Ill, 203 F Supp 129

40. U S—Son Shipping Co v De Fosse & Tanghe, C.A N Y, 199 F 2d 687—Production Steel Co. of Ill v S S Francois L D, D C N Y., 294 F Supp 200

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47. U S—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd in part on oth grds, C A, 461 F 2d 1009

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65. U S—Konstantinidis v S S Tarsus, D C N Y, 248 F Supp 280, affd, C A, 354 F 2d 240

66. U S—Eastern Marine Corp v Fukaya Trading Co, S A, C A La, 364 F 2d 80, cert den 87 S Ct 508, 385 U S 971, 17 L Ed 2d 435—Harbor Island Spa, Inc v Norwegian America Line A/S, D C N Y, 314 F Supp 471—Interocean Shipping Co v National Shipping & Trading Corp, C A N Y, 462 F 2d 673, app after remand 523 F 2d 527

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U S—Greenwich Marine, Inc v S S Alexandra, C A N Y, 339 F 2d 901

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67. U S—Iron Mines Co of Venezuela v S S Cosmic, D C N Y, 268 F Supp 749

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72. Discovery of issues not involved in arbitration

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73. US—Miletic v Holm and Wonsild, D C N Y, 294 F Supp 772—Michael v SS Thanasis, D C Cal, 311 F Supp 170—Kurt Orban Co v S S Clymenia, D C N Y, 318 F Supp 1387—Oregon Lumber Export Co v Tohto Shipping Co, D C Wash, 53 F R D 351

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74. US—Fox v The Giuseppe Mazzini, D C N Y, 110 F Supp 212—Dover S S Co v Summit Indus Corp, D C N Y, 148 F Supp 206—Petition of Conquistador Cia Naviera, S A, D C N Y, 165 F Supp 38—Lowry & Co v S S Le Moyne D'Iberville, D C N Y, 253 F Supp 396, app dism, C A, 372 F 2d 123—Interocean Shipping Co v National Shipping & Trading Corp, C A N Y, 462 F 2d 673, app after remand 523 F 2d 527

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75. US—Associated Metals & Minerals Corp v S S Mihalis Angelos, D C N Y, 234 F Supp 236—Import Export Steel Corp v Mississippi Valley Barge Line Co, C A N Y, 351 F 2d 503, reh den 356 F 2d 109—Chatham Shipping Co v Fertex S S Corp, C A N Y, 352 F 2d 291—Eastern Marine Corp. v Fukaya Trading Co, S A, C A La, 364 F.2d 80, cert den 87 S Ct 508, 385 U S 971, 17 L Ed 2d 435—Mitsubishi Shoji Kaisha Limited v M S Galini, D C Tex, 323 F Supp 79

N Y—First Nat Oil Corp v Arrieta, 151 N Y S 2d 309, 2 Misc 2d 225, affd 157 N.Y S 2d 313, 2 A D 2d 590, rearg and app den 159 N Y S 2d 673, 3 A.D 2d 672, app dism 163 N Y S 2d 604, 2 N Y 2d 992, 143 N E 2d 341—Greene Steel & Wire Co v F W Hartmann & Co, 235 N Y S 2d 238, affd. 247 N Y S 2d 1008, 20 A D 2d 683, motion dism 198 N E 2d 914, 14 N Y 2d 688, 249 N Y S 2d 886

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76. US—Petition of Ropner Shipping Co., supra, n 75—Farr & Co v Cia Intercontinental De Navegacion De Cuba, S A, C A.N.Y, 243 F 2d 342—Hidick v. Orion Shipping & Trading Co, D C N.Y., 157 F Supp 477—Robert Lawrence Co v Devonshire Fabrics, Inc, C.A N Y., 271 F.2d 402, cert. gr. 80 S Ct. 682, 362 U S 909, 4 L Ed 2d 618, cert. dism 81 S Ct 27, 364 U S 801, 5 L.Ed 2d 37—Petition of Kinoshita & Co., C A.N.Y., 287 F 2d 951—Greenwich Marine, Inc. v. S.S Alexandra, C.A N.Y., 339 F.2d 901.

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77. U.S.—Farr Whitlock Dixon & Co. v. S.S. General Tsakalotos, D.C.N.Y., 244 F.Supp. 544—Production Steel Co. of Ill. v. S.S. Francois L D., D.C. N Y, 294 F Supp 200—Interocean Shipping Co v National Shipping & Trading Corp, C A N Y, 462 F 2d 673, app after remand 523 F 2d 527

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78. US—Farr & Co v Cia Intercontinental De Navegacion De Cuba, S A, C A N Y, 243 F 2d 342—Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corp, D C N Y, 194 F Supp 161—Texas San Juan Oil Corp v An-Son Offshore Drilling Co, D C N Y, 194 F Supp 396

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79. US—Instituto Cubano De Estabilizacion Del Azucar v The Firbranch, D.C N Y, 130 F Supp 170

N Y—Greene Steel & Wire Co v. F W Hartmann & Co, 235 N Y S 2d 238, affd 247 N.Y S 2d 1008, 20 A D 2d 683, motion dism 198 N E 2d 914, 14 N Y 2d 688, 249 N Y S 2d 886

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80. US—Instituto Cubano De Estabilizacion Del Azucar v The Firbranch, supra, n. 79—Petition of Dover S S Co., D.C N Y, 143 F.Supp. 738—Taiwan Nav Co v Seven Seas Merchants Corp, D C N Y, 172 F.Supp. 721—Lobo & Co. v Plymouth Nav Co. of Monrovia, D.C N Y, 187 F Supp 859—Greenwich Marine, Inc. v. S S. Alexandra, D.C.N.Y., 225 F Supp 671, affd., C A., 339 F.2d 901—Import Export Steel Corp v Mississippi Val. Barge Line Co, D.C.N.Y., 245 F Supp. 249, affd. in part, revd. in part on oth. grds, C A, 351 F.2d 503, reh den., C.A, 356 F 2d 109—Vainqueur Corp v. Lamborn & Co, D.C.N.Y., 305 F.Supp. 1007.

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81. U.S—San Martine Compania De Navegacion, S A v. Saguenay Terminals Limited, C.A.Hawaii, 293 F.2d 796—Oinoussian S.S. Corp of Panama v. Sabre Shipping Corp, D.C.N.Y., 224 F.Supp. 807—Farr Whitlock Dixon & Co. v S.S. General Tsakalotos, D C N Y, 244 F Supp. 544—Eastern Marine Corp. v. Fukaya Trading Co, S.A., C.A. La., 364 F.2d 80, cert. den. 87 S.Ct. 508, 385 U.S. 971, 17 L Ed.2d 435.

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82. US—Harbor Island Spa, Inc v Norwegian American Line A/S, D C N Y., 314 F Supp 471—Fukaya Trading Co, S A v Eastern Marine Corp, D C La, 322 F Supp 278

N Y—First Nat Oil Corp v Arrieta, 151 N Y S 2d 309, 2 Misc 2d 225, affd 157 N Y S 2d 313, 2 A D 2d 590, rearg and app den 159 N Y S 2d 673, 3 A D 2d 672, app dism 163 N Y S.2d 604, 2 N Y 2d 992, 143 N E 2d 341—Cocotos S S of Panama, S A v Hugo Neu Corp, 193 N Y S 2d 321, 20 Misc 2d 607

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(2) Personam award confirmed in rem against vessel

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83. US—Western Canada S S Co v. Cia. De Nav San Leonardo, D C N.Y, 105 F Supp. 452.

Held party

U.S.—Rainbow Line, Inc v M/V Tequila, D.C N.Y., 341 F Supp. 459, affd, C.A., 480 F.2d 1024.

85. US—Theofano Maritime Co., Limited v 9,551-19 Long Tons of Chrome Ore on Board The Aliakmon, D C.Md., 122 F.Supp. 853—Aegean (Shipbrokers) Limited v Henriksen's Rederi A/S, D C.Mass., 165 F.Supp. 939—Petition of Steamship Co of 1949, D C N.Y., 167 F.Supp 189—U.S. v. Cia. Naviera Continental, S.A, D.C.N Y, 202 F.Supp 698—Lowry & Co. v. S S. Le Moyne D'Ibervillie, D.C.N.Y., 253 F.Supp 396, app. dism., C.A., 372 F.2d 123—Federal Commerce & Nav. Co. v. Kanematsu-Gosho, Limited, C.A. N.Y., 457 F.2d 387.

N.Y.—A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co., 255 N.E.2d 774, 25 N.Y.2d 576, 307 N.Y.S.2d 660, cert. den. 90 S.Ct. 1844, 398 U S. 939, 26 L.Ed.2d 272—Vigo S S. Corp. v. Marship Corp. of Monrovia, 257 N E 2d 624, 26 N.Y.2d 157, 309 N.Y.S.2d 165, motion den 261 N.E.2d 112, 27 N.Y.2d 535, 312 N.Y.S.2d 1003, cert den 91 S.Ct. 36, 400 U S. 819, 27 L.Ed.2d 46.

Particular matters held subject to arbitration under agreement

(6) U.S.—Trafalgar Shipping Co. v International Mill Co., C.A N.Y, 401 F.2d 568—Miletic v. Holm and Wonsild, D.C.N.Y., 294 F.Supp. 772—Michael v. S S Thanasis, D.C.Cal., 311 F Supp. 170—Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance Et

D'Armement, D C N Y, 314 F Supp 439, affd in part, revd in part on oth grds, C A, 451 F 2d 727, cert den 92 S Ct 1609, 406 U S 906, 31 L Ed 2d 816—Harbor Island Spa, Inc v Norwegian America Line A/S, D C N Y, 314 F Supp 471—Kurt Orban Co v S S Clymenia, D C N Y, 318 F Supp 1387

N Y—A/S J Ludwig Mowinckels Rederi v Dow Chemical Co, 297 N Y S 2d 1011, 31 A D 2d 372, affd, 255 N E 2d 774, 25 N Y 2d 576, 307 N Y S 2d 660, cert den 90 S Ct 1844, 398 U S 939, 26 L Ed 2d 272

Matters held not subject to arbitration

U S—Petition of Kinoshita & Co., C A N Y, 287 F 2d 951—Savannah Sugar Refining Corp v S S Hudson Deep, D C N Y, 288 F Supp 181

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91. U S—Son Shipping Co v DeFosse & Tanghe, D C N Y, 96 F Supp 595, revd on oth grds, C A, 199 F 2d 687

Cargo damage

U S—Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corp, D C N Y, 194 F Supp 161

92. Incorporation by reference

U S—Lowry v. Co v S S Le Moyne D'Iberville, D C N Y, 253 F Supp 396, app dism, C A, 372 F 2d 123

93. U S—Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corp, D C N Y, 194 F Supp 161—U S v Cia Naviera Continental, S A, D C N Y, 202 F Supp 698

94. However, an express reference to and incorporation of all terms and conditions of a charter party includes an arbitration clause

U S—Son Shipping Co v De Fosse & Tanghe, C A, 199 F 2d 687—Cia Naviera Somelga, S A v M Golodetz & Co, D C Md, 189 F.Supp 90—Lowry & Co v. S S Nadir, D C N Y, 223 F Supp 871—Kurt Orban Co v S S Clymenia, D C N Y, 318 F Supp 1387

95. U S—Cargo Carriers v Erie & St Lawrence Corp, D.C N Y, 105 F.Supp 638—Empresa Maritima De Transportes, S.A v Transatlantic & Pac Corp, D C N.Y, 200 F Supp 520—Demsey & Associates, Inc v Steamship Sea Star, C A N.Y, 461 F 2d 1009

N Y—Smith v. Polar Cia De Navegacion, Ltda, 181 N Y S 2d 368, 15 Misc 2d 301.

Issue joined on merits

(2) Other statements

U S—Tskalotos Nav. Corp v Sonaco, Sociedad Internacional De Comercio S.A., D C N Y, 259 F Supp 210—Sulphur Export Corp v Carribean Clipper Lines, Inc., D C La, 277 F Supp 632

Particular acts held to constitute waiver

U.S.—Demsey & Associates, Inc v Steamship Sea Star, D C N.Y, 321 F Supp. 663, affd in part, revd in part on oth. grds C A, 461 F 2d 1009

Particular acts held not to constitute waiver

U S—Graig Shipping Co. v. Midland Overseas Shipping Corp., D C N Y, 259 F Supp. 929—Carcich v Rederi A/B Nordie, C A N Y, 389 F 2d 692

N Y—Terminal Auxiliar Maritima, S.A v Winkler Credit Corp, 189 N.Y.S 2d 655, 6 N Y 2d 294, 160 N.E 2d 526

Laches

U.S—Petition of Nortuna Shipping Co, C.A N Y, 231 F 2d 528, cert den 76 S Ct. 1028, 351 U S 964, 100 L.Ed. 1484—Sociedad Armadora Aristomenis Panama, S A. v. Union Des Consommateurs De Ferrailles De France, D C N Y, 244 F Supp 653

Determination of question of waiver

U.S.—Lowry & Co. v. S.S. Le Moyne D'Iberville, D C N Y., 253 F Supp 396, app dism., C A, 372 F 2d 123—Graig Shipping Co v Midland Overseas Shipping Corp, D C N.Y, 259 F Supp. 929.

Waiver determined by court

U S—Tskalotos Nav Corp v Sonaco, Sociedad Internacional De Comercio S A, D C N Y, 259 F Supp 210

97 U S—Farr & Co v Cia Intercontinental De Navegacion De Cuba, S A, C A N Y, 243 F 2d 342—Chatham Shipping Co v Fertex S S Corp, C A N Y, 352 F 2d 291—Commercial Metals Co v International Union Marine Corp, D C N Y, 294 F Supp 570

98. U S—Instituto Cubano De Estabilizacion Del Azucar v The Firbranch, D C N Y, 130 F Supp 170—Chatham Shipping Co v Fertex S S Corp, D C N Y, 239 F Supp 114, affd, C A, 352 F 2d 291

99. U S—Michael v S S Thanasis, D C Cal, 311 F Supp 170

1. U S—Son Shipping Co v De Fosse & Tanghe, C A N Y, 199 F 2d 687—Petition of Nortuna Shipping Co, C A N Y, 231 F 2d 528, cert den 76 S Ct 1028, 351 U S 964, 100 L Ed 1484

Statute of Limitations

U S—Petition of Nortuna Shipping Co, C A N Y, 231 F 2d 528, cert den 76 S Ct 1028, 351 U S 964, 100 L Ed 1484

3. U S—Dover S S Co v Summit Indus Corp, D C N Y, 148 F Supp 206

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6. N Y—Sociedad Maritima San Nicolas, S A v Pangalante Compania Naviera, S A, 248 N Y S 2d 143, 21 A D 2d 43

§ 34. Charterer as Owner Pro Hac Vice

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8. U S—Guzman v Pichirilo, Puerto Rico, 82 S Ct 1095, 369 U S 698, 8 L Ed 2d 205—Lopez v Atlanta-Schiffahrts—G M B H, D C Puerto Rico, 259 F Supp 949

9. U S—Travis v Poseidon Lines, D C Ill, 203 F Supp 129

13. U S—Fitzgerald v A L Burbank & Co, C A N Y, 451 F 2d 670

Fla—Potashnick-Badgett Dredging Inc v Whitfield, App, 269 So 2d 36

14. U S—Fitzgerald v A L Burbank & Co, C A N Y, 451 F 2d 670

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16. U S—F Jacobus Transp Co v Gallagher Bros Sand & Gravel Corp, D C N Y, 161 F Supp 507—Leotta v The Esparta, D C N Y, 188 F Supp 168—Guzman v Pichirilo, Puerto Rico, 82 S Ct. 1095, 369 U S 698, 8 L Ed 2d 205—Travis v Poseidon Lines, D C Ill, 203 F Supp 129—Reed v S S Yaka, Pa, 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101—Lopez v Atlanta-Schiffahrts-G M B H D C Puerto Rico, 259 F Supp 949—B W King, Inc v Consolidated Iron & Metal Co, D C N Y, 310 F Supp 471—Fitzgerald v. A L Burbank & Co, C A N Y, 451 F 2d 670

Cal—Apodoca v. Schiffahrtsgesellschaft De Vries & Co, 18 Cal Rptr 869, 199 C A 2d 605

Fla—Potashnick-Badgett Dredging Inc v Whitfield, App, 269 So 2d 36

Wash—Peterson v McDonald, 480 P 2d 774, 4 Wash App 99

17. U S—Ruiz Pichirilo v Maysonet Guzman, C A Puerto Rico, 290 F 2d 812, revd on oth grds 82 S Ct 1095, 369 U S. 698, 8 L Ed 2d 205

18. U S—Allen N Spooner & Son, Inc v Connecticut Fire Ins Co, D C N Y, 206 F Supp 495, revd on oth grds, C A, 314 F.2d 753, cert den 84 S Ct 56, 375 U S 819, 11 L Ed 2d 54.

19. U S—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216—Miller v Union Barge Line Corp, D C Pa, 299 F Supp 718

Fla—Potashnick-Badgett Dredging Inc v Whitfield, App, 269 So 2d 36

24. U S—Randolph v Waterman S S Corp, D C Pa, 166 F Supp 732—Petition of Shaver Transp Co, D C Or, 287 F Supp 339

Wash—Peterson v McDonald, 480 P 2d 774, 4 Wash App 99

Demise charter is bailment

U S—McDonough Const Co v H B Fowler & Co, D C La, 281 F Supp 90

25 U S—Reed v Steamship Yaka, C A Pa, 307 F 2d 203, revd on oth grds 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101

29. U S—Pope & Talbot v Hawn, Pa, 74 S Ct 202, 346 U S 406, 98 L Ed 143—Automobile Ins Co of Hartford, Conn v United Fruit Co, D C N Y, 122 F Supp 238, affd, C A, 224 F 2d 72, cert den 76 S Ct 138, 350 U S 885, 100 L Ed 780—Saridis v S S Paramarina, D C Va, 216 F Supp 794—Klushewich v Mediterranean Agencies, Inc, D C N Y, 302 F Supp 712

Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

Fla—Potashnick-Badgett Dredging Inc v Whitfield, App, 269 So 2d 36

N Y—Mazzella v Pittston Stevedoring Corp, 135 N Y S 2d 169, 284 App Div 984

Wash—Peterson v McDonald, 480 P 2d 774, 4 Wash App 99

Demise need not be of bare boat

U S—Ruiz Pichirilo v Maysonet Guzman, C A Puerto Rico, 290 F 2d 812, revd on oth grds 82 S Ct 1095, 369 U S 698, 8 L Ed 2d 205

30. Time charter

U S—Cia Estrella Blanca, Ltda v S.S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

31. U S—Grillea v U S, C A N Y, 229 F 2d 687—Guzman v Pichirilo, Puerto Rico, 82 S Ct 1095, 369 U S 698, 8 L Ed 2d 205

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32. U S—Pure Oil Co v M/V Caribbean, D C La, 235 F Supp 299, affd, C A, 37 F 2d 121

Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

33. U S—Travis v. Poseidon Lines, D C Ill, 203 F.Supp 129

34. U S—Saridis v S S Paramarina, D C Va, 216 F Supp 794

40. Fla—C.J.S. cited in Potashnick-Badgett Dredging, Inc v Whitfield, App, 269 So 2d 36, 43

42. U S—Saridis v S S Paramarina, D C Va, 216 F Supp 794

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64. Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

65. Cal—Apodoca v Schiffahrtsgesellschaft De Vries & Co, App, 18 Cal Rptr 869, 199 C A 2d 605

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93. Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

96. U S—Bergan v International Freighting Corp, C A N Y, 254 F 2d 231

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37. U S.—C.J.S cited in Pacific Vegetable Oil Corp v M/S Norse Commander, D C Tex, 264 F Supp 625, 627—Coastal States Petrochemical Co v Montpelier Tanker Co, D C Tex, 321 F Supp 212.

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38. US—Coastal States Petrochemical Co v Montpelier Tanker Co, D C Tex, 321 F Supp 212

40. US—C.J.S. cited in Pacific Vegetable Oil Corp v M/S Norse Commander, D C Tex, 264 F Supp 625.

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52. Arrangement as bare-boat charter rather than time charter

US—American Cement Corp v Healy Tibbitts Const Co, D C Cal, 249 F Supp 891, affd, C A, 371 F 2d 525

56. US—B W King, Inc v Consolidated Iron & Metal Co, D C N Y, 310 F Supp 471

58. US—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

Agreement making shipowner's employees or stevedore charterer's sub-employees

US—Bergan v International Freighting Corp, C A N Y, 254 F 2d 231—Mondella v S S Elie V, D C N Y, 223 F Supp 390

59. US—Mondella v S S Elie V, D C N Y, 223 F Supp 390

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65. Wash—Peterson v McDonald, 480 P 2d 774, 4 Wash App 99

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91. US—Wyche v Oldendorff, D C Va, 284 F Supp 575

93. US—Grillea v U S, C A N Y, 232 F 2d 919—Gural v Terry Contracting, Inc, D C N Y, 178 F Supp 766—US v Barge CBC 603, D C La, 233 F Supp 85

Charterer not liable for injury

US—Randolph v Waterman S S Corp, D C Pa, 166 F Supp 732—Mondella v S S Elie V, D C N Y, 223 F Supp 390—Wyche v Oldendorff, D C Va, 284 F Supp 575

N Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, 107 N Ed 2d 463, 304 N Y 314

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94. Fla—Rountree v A P Moller S S Co, App, 218 So 2d 771

96. US—Petition of Rice, C A N Y, 294 F 2d 272

98. US—Hoodye v Bruusgaard Krosterud Skibs A/S Drammen, Norway, D C Tex, 197 F Supp 697—Buthusien v Central Gulf S S Corp, D C Pa, 217 F Supp 903—Habrat v US, D C Pa, 310 F Supp 618

Cal—Apodoca v Schiffahrtsgesellschaft De Vries & Co, App, 18 Cal Rptr 869, 199 C A 2d 605

99. US—Habrat v US, D C Pa, 310 F Supp 618

Time charterer not liable to injured owner

US—Delta Engineering Corp v Scott, C A La, 322 F 2d 11, reh den 325 F 2d 432, cert den 84 S Ct 1164, 377 U S 905, 12 L Ed 2d 176

4. US—Mickle v The Henriette Wilhelmine Schulte, D C Cal, 188 F Supp 77

5. US—Hawn v. Pope & Talbot, Inc, C A Pa, 198 F 2d 800, affd 74 S Ct 202, 346 U S 406, 98 L Ed 143

6. US—Pennsylvania R Co v McAllister Bros, Inc, D C N Y, 137 F Supp 788, affd, C.A, 240 F 2d 423—Blair v U S Steel Corp, C A Pa, 444 F 2d 1390, cert den 92 S Ct 681, 404 U S 1018, 30 L Ed 2d 666, reh den 92 S Ct 938, 405 U S 948, 30 L Ed.2d 818.

Cal.—Apodoca v. Schiffahrtsgesellschaft De Vries & Co, App, 18 Cal.Rptr 869, 199 C.A 2d 605

N Y—McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 107 N E 2d 463, 304 N Y 314

7. US—Haskins v Point Towing Co, C A Pa, 421 F 2d 532, cert den 91 S Ct 68, 400 U S 834, 27 L Ed 2d 66

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8. Duty of due care

US—Delta Engineering Corp v Scott, C A La, 322 F 2d 11, reh den 325 F 2d 432, cert den 84 S Ct 1164, 377 U S 905, 12 L Ed 2d 176

12. N Y—Gambello v Eastport S S Corp, 117 N Y S 2d 824

No indemnity from charterer

13. Indemnification of charterer for expenses

US—D/S Ove Skou v Hebert, C A Tex, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139

Indemnification of charterer for counsel fees

US—D/S Ove Skou v Hebert, C A Tex, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139

A charterer may, of course, agree to assume the duty to indemnify the shipowner for injury,[15.5] depending on the intent of the parties.[15.10] and under appropriate circumstances the obligation to so indemnify may not be implied as a fact.[15.15]

15.5. US—Drago v A/S Inger, D C N Y, 194 F Supp 398, affd, C A, 305 F 2d 139, cert den 83 S Ct 292, 371 U S 925, 9 L Ed 2d 232

15.10. US—Drago v A/S Inger, D C N Y, 194 F Supp 398, affd, C A, 305 F 2d 139, cert den 83 S Ct 292, 371 U S 925, 9 L Ed 2d 232

15.15. US—Miletic v Holm and Wonsild, D C N Y, 294 F Supp 772

Contract of indemnity not implied

US—Drago v A/S Inger, D C N Y, 194 F.Supp 398, affd, C A, 305 F 2d 139, cert den 83 S Ct 292, 371 U S 925, 9 L Ed 2d 232—D/S Ove Skou v Hebert, C A Tex, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139

18. US—Reed v S S Yaka, Pa, 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101

20. US—Mickle v The Henriette Wilhelmine Schulte, D C Cal, 188 F Supp 77—Reed v S S Yaka, Pa, 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101—Miculka v American Mail Line, Limited, D C Or, 229 F Supp 665

21. US—Pennsylvania R Co v McAllister Bros Inc, D C N Y, 137 F Supp 788, affd, C A, 240 F 2d 423—Hertel v American Export Lines, Inc, D C N Y, 225 F Supp 703—Miller v Union Barge Line Corp, D C Pa, 299 F Supp 718

22. Contributory negligence, etc.

(2) Other matters

US—Hawn v Pope & Talbot, Inc, C A Pa, 198 F 2d 800, affd 74 S Ct 202, 346 U S 406, 98 L Ed 143

23 U.S—Mickle v The Henriette Wilhelmine Schulte, D C Cal, 188 F Supp 77—Habrat v US, D C Pa, 310 F Supp 618

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36. US—Rice v New York Trap Rock Corp, D C N Y, 198 F Supp 346, affd, C A, 294 F 2d 272

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54. US—Leotta v The Esparta, D C N Y, 188 F Supp 168

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55. Warranty not abrogated

US—Iligan Intern Corp. v. S S John Weyerhaeuser, D.C N Y, 372 F Supp 859, affd, C.A., 507 F 2d 68, cert den 95 S Ct 1954, 421 U S 965, 44 L Ed 2d 452

58. US—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den. 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246—National Marine Service, Inc v C J Thibodeaux & Co, D C Tex, 380 F Supp 1076, affd, C A, 501 F 2d 940

59. US—Hunt Tool Co v Southern Towing & Salvage Co, D C La, 275 F Supp 139

60. Wash—Peterson v McDonald, 480 P 2d 774, 4 Wash App 99

62. US—Pacific Atlantic S S Co v US, D C Or, 120 F Supp 753—McMillan Welding and Mach Works v General Towing Co, D C La, 247 F Supp 402

§ 36. Seaworthiness, Fitness and Capacity of Vessel

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71. US—Solet v M/V Capt H V Dufrene, D C. La, 303 F Supp 980—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

Cal—Gagne v Bertran, 275 P 2d 15, 43 C 2d 481

Seaworthiness

US—Reed v Steamship Yaka, C A Pa, 307 F 2d 203, revd on oth grds 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101—Mondella v. S S Elie V, D C N Y, 223 F Supp 390—Coca Cola Co, Tenco Division v S S Norholt, D C N Y, 333 F.Supp 946—Trans-Amazonica Iquitos, S.A v Georgia S S Co, D C Ga., 335 F Supp 935—Great Am Ins Co v Bureau Veritas, D.C N Y, 338 F.Supp 999, affd, C A, 478 F 2d 235

73. U.S—Dalzell v The St Nicholas, supra, n 71

78. US—Reed v S S Yaka, Pa, 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101—Mondella v S S Elie V, D.C.N Y, 223 F Supp 390—Wyche v Oldendorff, D C Va, 284 F Supp. 575—Solet v M/V Capt H V Dufrene, D C La, 303 F.Supp 980

81. US—Samincorp v S S Rivadeluna, D C Del, 276 F Supp 251

82. US—Horn v Cia de Navegacion Fruco, S A., C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477—Nichimen Co. v M V Farland, C A N Y., 462 F 2d 319.

83. U.S.—Demsey & Associates, Inc. v Steamship Sea Star, C A N Y., 461 F.2d 1009.

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86. US—Solet v M/V Capt H V. Dufrene, D C La, 303 F Supp 980—Neubros Corp. v. Northwestern Nat. Ins. Co, D C N Y, 359 F.Supp 310

87. US—Sousa v. Motor Vessel Caniba, D.C Mass, 360 F.Supp 971

90. US—Dow Chemical Co v Dixie Carriers, Inc, D C Tex, 330 F.Supp. 1304, affd, C A., 463 F.2d 120, cert den 93 S Ct. 525, 409 U S 1040, 34 L Ed 2d 490

93. Charterer not liable

US—Hamilton v Canal Barge Co, Inc, D.C La, 395 F Supp 978

98. Waiver not shown

US—Thomas Jordan, Inc v Mayronne Drilling Mud, Chemical and Engineering Service, C A.La, 214 F 2d 410—Kelly v Pennsylvania R Co, D C N Y., 139 F Supp 658

Waiver shown

US—McAllister Lighterage Line, Inc. v Insurance Co. of North America, C A N Y, 244 F.2d 867, cert den 78 S Ct 123, 355 U S 872, 2 L Ed 2d 77, and 78 S.Ct 123, 355 U S 871, 2 L.Ed 2d 76.

99. U S—Thomas Jordan, Inc v Mayronne Drilling Mud, Chemical and Engineering Service, C A La, 214 F 2d 410

2. U S—Neubros Corp v Northwestern Nat Ins Co, D C N Y, 359 F Supp 310

Leaks necessitating pumping does not constitute unseaworthiness

U S—Petition of Mahoney, D C N H, 255 F Supp 310

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5. U S—Grace Lines, Inc v Central Gulf S S Corp, C A La, 416 F 2d 977, cert den 90 S Ct 1843, 398 U S 939, 26 L Ed 2d 271

6. U S—McAllister Lighterage Line, Inc v Insurance Co of North America, D C N Y, 143 F Supp 697, revd on oth grds, C A, 244 F 2d 867, cert den 78 S Ct 123, 355 U S 872, 2 L Ed 2d 77, and 78 S Ct 123, 355 U S 871, 2 L Ed 2d 76

Vessel held unseaworthy

U S—McAllister Lighterage Line, Inc v Insurance Co of North America, C A N Y, 244 F 2d 867, cert den 78 S Ct 123, 355 U S 872, 2 L Ed 2d 77, and 78 S Ct 123, 355 U S 871, 2 L Ed 2d 76—Samincorp v S S Rivadeluna, D C Del, 276 F Supp 251

10. Wooden barge with slight leakage not unseaworthy

U S—American Cement Corp v Healy Tibbitts Const Co, D C Cal, 249 F Supp 891, affd, C A, 371 F 2d 525

17. U S—Berti v Compagnie De Navigation Cyprien Fabre, C A N Y, 213 F 2d 397

Agents of charterer

U.S—Selcamerica, Inc v S S Barberbrook, D C N Y, 390 F Supp 462

18. U S—Armstrong v Chambers and Kennedy, D C Tex, 340 F.Supp 1220 Affd. in part, revd in part on oth grds, C A, 499 F 2d 263, reh den 512 F 2d 1061, cert dism 96 S Ct 163, 423 U S 886, 46 L Ed 2d 118

21. Owner not liable

La—H B "Buster" Hughes, Inc v Bernard, App, 306 So 2d 785, affd, cause remd, Sup, 318 So 2d 9, app after remand, App, 355 So 2d 1027

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30. U S—Horn v. Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L.Ed.2d 477—Neubros Corp v Northwestern Nat Ins. Co, D C N Y, 359 F.Supp 310

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53. U S—Kerr-McGee Corp v Law, C A Va, 479 F 2d 61

54. U S.—Grillea v U S, C A N.Y., 229 F 2d 687

N Y—Gambello v Eastport, S S Corp, 117 N Y S 2d 824

Duty of owner

U.S—Petition of Shaver Transp Co, D.C Or., 287 F.Supp 339

Unseaworthiness created by negligence of charterer

U S.—Petition of Shaver Transp. Co, D C.Or., 287 F.Supp. 339

55. Obligation held not relieved

U S—McAllister Lighterage Line, Inc. v. Insurance Co of North America, C A.N.Y., 244 F 2d 867, cert den. 78 S Ct. 123, 355 U.S. 872, 2 L Ed.2d 77, and 78 S.Ct 123, 355 U S 871, 2 L Ed 2d 76.

Bareboat charter

U.S.—Solet v. M/V Capt H V Dufrene, D C.La, 303 F.Supp. 980

Doctrine operable seaward of gangplank

U.S.—Yochim v. Lykes Bros S S Co, Inc., D.C.La., 444 F Supp 6.

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59. U S—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C A, 277 F 2d 161—Ramos v Beauregard, Inc, C A Puerto Rico, 423 F 2d 916, cert den 91 S Ct 101, 400 U S 865, 27 L Ed 2d 104

61. U S—Kerr-McGee Corp v Law, C A Va, 479 F 2d 61

64. U S—Nichimen Co v M V Farland, 462 F 2d 319

67. U S—Todd Shipyards Corp v Lee & Simmons, Inc, D C N Y, 109 F Supp 442

75. Duty owed to workman on ship

U S—Hawn v Pope & Talbot, Inc, C A Pa, 198 F 2d 800, affd 74 S Ct 202, 346 U S 406, 98 L Ed 143

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78. Ship not engaged in foreign commerce by agreement

U S—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

79. U S—U S v M/V Marilena P, C A Va, 433 F 2d 164

82. U S—Ionion S S Co of Athens v United Distillers of America, Inc, C A La, 236 F 2d 78

83. U S—Ionion S S Co of Athens v United Distillers of America, Inc, C A La, 236 F 2d 78

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88. U S—Solet v M/V Capt H V Dufrene, D C La, 303 F Supp 980

Hidden defects

U S—Rothman v U-Steer-It, Inc, C A Fla, 247 F 2d 803

Not favored

U S—Neubros Corp v. Northwestern Nat Ins Co, D C N Y, 359 F Supp 310

89. Waiver not shown

U S—Neubros Corp v Northwestern Nat Ins Co, D C N.Y, 359 F Supp 310

91. U S—Mayronne Drilling Mud, Chemical & Engineering Service v Thomas Jordan, Inc, D C La, 117 F Supp 86, affd, C A, 214 F 2d 410

95. Not diligence in obtaining certificate of seaworthiness

U S—Petition of Southern Transp Co, D C Va, 211 F Supp 940

Doubt resolved against owner

U S—Petition of Southern Transp Co, D.C Va, 211 F Supp 940

96. U S—Mayronne Drilling Mud, Chemical & Engineering Service v Thomas Jordan, Inc, supra, n 91—United Distillers of America v The Ionian Pioneer, D C La, 130 F Supp 647, affd, C A, 236 F 2d 78

§ 37. Readiness and Dispatch of Vessel

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77. U S—West Africa Nav, Limited of Monrovia v Ore & Ferro Corp, D C N Y, 199 F Supp 771

§ 39. Voyage

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34. Deviation held not shown

U S—American Trading & Production Corp v Shell Intern Marine Limited, C A N Y, 453 F 2d 939

Deviation from the anticipated route has been held not to justify the shipper charging a greater rate.[50.5]

50.5. Closing of Suez Canal

U S—American Trading & Production Corp v Shell International Marine, Limited, D C N Y, 343 F Supp 91

Doctrine of frustration of commercial impracticability held inapplicable

U S—American Trading & Production Corp v Shell International Marine, Limited, D C N Y, 343 F Supp 91

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Where master is placed in dilemma by charterer's breach of contract in directing vessel to unsafe port, entire burden of responsibility for safety of vessel cannot be shifted to master[60.5]

60.5. U S—American President Lines, Limited v U S, D C Cal, 208 F Supp 573

§ 40. Receiving and Discharging Cargo

61. U S—Revel v American Export Lines, Inc D C Va, 162 F Supp 279, motion den, C A, 262 F 2d 122, affd 266 F 2d 82

62. U S—De Van v Pennsylvania R Co, D C Pa, 167 F Supp 336—Dow Chemical Co v S S Giovanella D'Amico, D C N Y, 297 F Supp 699—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

63. U S—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, D C N Y, 149 F Supp 122, affd, C A, 253 F 2d 785—Mondella v S S Elie V, D C N Y, 223 F Supp 390—International Drilling Co, N V v M/V Donefs, D C Tex, 291 F Supp 479

64. U S—Saridis v S S Paramarina, D C Va, 216 F Supp 794—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

65. U S—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009—Nichimen Co. v M V Farland, C A N Y, 462 F 2d 319

66. U S—Palazzolo v Pan-Atlantic S S Corp, C A N Y, 211 F 2d 277, affd 76 S Ct 232, 350 U S 124, 100 L Ed 133

69. U S—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, C A N Y, 253 F 2d 785

71. U S—Grace Lines, Inc v Central Gulf S S Corp, C A La, 416 F 2d 977, cert den 90 S Ct 1843, 398 U S 939, 26 L Ed 2d 271

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75. U S—Curtis v A Garcia y Cia, Ltda, C A Pa, 241 F 2d 30—Spearman v Sterling S S Co, D C Pa, 171 F Supp 287—Cia De Navegacion Fruco, S A v M/S Heinz Horn, D C Ala, 233 F Supp 637, affd in part, revd in part on oth grds, C A, 404 F 2d 422, cert den. 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

N Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, 107 N E 2d 463, 304 N Y 314

76. U S—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L.Ed 2d 477

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96. U S—Mondella v. S.S Elie V, D C N Y, 223 F Supp 390—International Drilling Co, N V v M/V Donefs, D C Tex, 291 F Supp 479—In re Complaint and Petition of International Marine Development Corp, C A Miss, 451 F 2d 763

1. U S—U.S. v. Atlantic Refining Co, D C N J., 112 F Supp 76

12. U S—Paliaga v Luckenbach S S Co, C A N Y, 301 F 2d 403

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14. U S—Ray v Compania Naviera Continental, S A, D C Md, 203 F Supp 206

Implied warranty of performance

US—American Export Lines v Norfolk Shipbuilding & Drydock Corp, C A Va, 336 F 2d 525—Pacific Far East Line v California Stevedore & Ballast Co., D C Cal, 238 F Supp 956—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

15. US—Crumady v The Joachim Hendrik Fisser, N J, 79 S.Ct 445, 358 U S 423, 3 L Ed 2d 413, on remd, D C, 176 F Supp 595, affd, C A, 272 F 2d 396

18. US—Ray v Compania Naviera Continental, S A, D C Md, 203 F Supp 206

§ 41. Expenses

Library References

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21. US—Warner v The Bear, D C Alaska, 126 F Supp 529, 15 Alaska 370—Skibs A/S Awilco v Standard Fruit Co, D C La, 228 F Supp 927, affd 327 F 2d 668

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The terms of the charter party govern as to whether the shipowner or the charterer is responsible for other expenses.[34 5]

34.5. Use tax

La.—Offshore Transp Corp v Continental Oil Co, App, 158 So 2d 254

Cost of engines

US—Kane v Motor Vessel Leda, D C La, 355 F Supp 796, affd, C A, 491 F 2d 899, reh den 493 F 2d 1405, two cases, cert den 95 S Ct 120, 419 U S 865, 42 L Ed 2d 102

Canadian income taxes

US—American Marine & Machinery Co v Consumers' Gas Co, D C Tenn, 379 F Supp 82

38. US—A/S Acadia v Curtis Bay Towing Co of Pa, D C Pa, 304 F Supp 1050

42. US—Federal Commerce & Nav Co v U S, D C N Y, 305 F Supp 1025

53. Charge held export tax and not wharfage charge

US—Sociedad Armadora Aristomenis Panama, S A v 5020 Long Tons of Raw Sugar, C A Pa, 223 F 2d 417

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65. US—Cooper Stevedoring of La, Inc v Alter Co, D C La, 230 F Supp 991

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79. US—Liberty Nav & Trading Co v Konoshita & Co, Limited, Tokyo, D C N Y, 178 F Supp 729, mod on oth grds, C A, 285 F 2d 343, cert den 81 S.Ct 1904, 366 U S 949, 6 L Ed 2d 1242

§ 42. Charter Money and Other Compensation

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2. US—Edison S S Corp v. Eastern Minerals, Inc, D C Mass, 167 F Supp 601

3. Right to layover time

U.S—D R Kincaid, Limited v Trans-Pacific Towing, Inc, D C Hawaii, 246 F Supp 685, revd on oth grds and remd, C.A, 367 F.2d 857

12. U.S.—In re North Atlantic & Gulf S S Co, D C N Y, 204 F.Supp 899. Affd, C A, 320 F 2d 628—Gulf Oil Corp v Panama Canal Co, D C Canal Zone, 335 F.Supp. 406, mod on oth grds, C A, 481 F 2d 561.

La—Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A L R 2d 1218

Where charterer does not rescind charter party, owner is entitled to charter hire while vessel is tied up by charterer.[17 5]

17.5. US—Cia De Navegacion Fruco, S A v M/S Heinz Horn, D C Ala, 233 F Supp 637, affd in part, revd in part, on oth grds, C A, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

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24. Right to layover time abandoned

US—D R Kincaid, Limited v Trans-Pacific Towing, Inc, C A Hawaii, 367 F 2d 857

29. D C—Transatlantic Financing Corp v U.S, C A, 363 F 2d 312, 124 U S App D C 183

§ 43. —— Amount and Rate

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41. US—B H Inc v Anthony M Meyerstein, Inc, D C N Y, 149 F Supp 219—Edison S S Corp v Eastern Minerals, Inc, D C Mass, 167 F Supp 601—Peterson v S S Wahcondah, D C La, 235 F Supp 698—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575—American Trading & Production Corp v Shell Intern Marine Limited, C A N Y, 453 F 2d 939

La—Houma Towing Co, Inc v Bayou Marine Corp, App, 289 So 2d 222, writ den, Sup, 293 So 2d 168

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51. US—Marine Equipment, Inc v Martin, D C La, 184 F Supp 111

56. Tex—Stovall v Taylor Exploration Co, Civ App, 347 S W 2d 729

67. US—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

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84. US—American President Lines, Limited v U S, C A Cal, 338 F 2d 962—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

Tex—Walter E Heller & Co v Allen, Civ App, 412 S W 2d 712, err ref no rev err

87. US—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899, affd, C A, 320 F 2d 628—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

Prepayments given on expectation of offsetting against freight not treated as loans

US—Marine Traders, Inc v Seasons Nav Corp, C A N Y, 422 F 2d 804

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88 US—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

91. US—U S v. M/V Marilena P, C A Va, 433 F 2d 164

1. US—Nichimen Co v MV Farland, D C N Y, 333 F Supp 691, mod on oth grds, C A, 462 F 2d 319

§ 44. —— Time and Manner of Payment

6. US—Edison S S Corp v Eastern Minerals, Inc, D C Mass, 167 F Supp 601—Ocean Cargo Lines, Limited v North Atlantic Marine Co, D C N Y, 227 F Supp 872

Rent payable until end of stipulated term and return of vessel

US—Ohio Val Engineering Co v Barges OVE 102 and 103, D C La, 214 F Supp 784

8. US—Moore-McCormack Lines, Inc v The Esso Camden, D C N Y, 141 F Supp 742, revd in part on oth grds, C A, 244 F 2d 198, cert den 78 S Ct 29, 355 U S 822, 2 L Ed 2d 37

§ 45. —— Lien

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14. US—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899, affd, C A, 320 F 2d 628—Luckenbach Overseas Corp v S S Audrey J Luckenbach, D C N Y, 232 F Supp 572—Diana Compania Maritime, S A of Panama v Subfreights of S S Admiralty Flyer, D C N Y, 280 F Supp 607

15. US—In re Bauer S S Corp, D C N Y, 167 F Supp 909—Bienvenido Shipping Co v Subfreights of The Andora, D C N Y, 168 F Supp 127—Toro Shipping Corp v Bacon-McMillan Veneer Mfg. Co, C A Ala, 364 F 2d 928

Time when lien attaches

(2) Other holdings

US—Cooper Stevedoring Co v Luckenbach Overseas Corp, D.C N Y, 231 F Supp 258

Lien of subcharter measures extent of owner's lien, if any

US—Loreto Compania Naviera, S A v Bradley and Baker, C A Miss, 382 F 2d 980

By force of law

US—Atlantic Richfield Co v Good Hope Refineries, C A Fla, 604 F 2d 865

19. US—In re North Atlantic & Gulf S S Co, D C. N Y, 204 F Supp 899, affd, C A, 320 F 2d 628—Marine Traders, Inc v Seasons Nav Corp, C A N Y, 422 F 2d 804

21. US—In re North Atlantic & Gulf S.S Co, D C N Y, 204 F Supp 899 Affd., C A, 320 F 2d 628

22. US—Beverly Hills Nat Bank & Trust Co v Compania De Navegacione Almirante S A., Panama, C A Cal, 437 F 2d 301, cert den 91 S Ct 2173, 402 U S 996, 29 L Ed 2d 161

25. Time when lien attaches

US—In re North Atlantic & Gulf S S Co, D C N.Y., 204 F Supp 899, affd, C A, 320 F 2d 628—Diana Compania Maritime, S A of Panama v. Subfreights of S S Admiralty Flyer, D C.N Y, 280 F.Supp 607

Charterer's lien subject to owner's

U.S—Diana Compania Maritime, S A of Panama v Subfreights of S S Admiralty Flyer, D C.N Y, 280 F Supp 607

27. US—In re North Atlantic & Gulf S S. Co., D C. N Y., 204 F Supp 899 Affd., C.A., 320 F.2d 628—Toro Shipping Corp v. Bacon-McMillan Veneer Mfg. Co, C A.Ala., 364 F 2d 928.

28. US—Luckenbach Overseas Corp. v S S Audrey J Luckenbach, D.C N.Y., 232 F Supp 572

31. U.S—Ariate Compania Naviera, S A v Commonwealth Tankship Owners, Limited, D C N.Y, 310 F.Supp. 416

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32. US—Marine Traders, Inc v Seasons Nav Corp., C A.N.Y, 422 F 2d 804

33. US—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899 Affd, C.A, 320 F 2d 628—Schilling v A/S D/S Dannebrog, C A N.Y, 320 F 2d 628—Diana Compania Maritime, S A. of Panama v Subfreights of S S Admiralty Flyer, D C N Y, 280 F Supp 607

34. US—Union Industrielle Et Maritime v. Nimpex Intern, Inc, C.A Ill., 459 F.2d 926

37. US—Diana Compania Maritime, S.A. of Panama v Subfreights of S S. Admiralty Flyer, D C N Y., 280 F Supp 607

42. U S—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899 Affd, C A, 320 F 2d 628

Unconditional parting with possession of goods, etc.

U S—Beverly Hills Nat Bank & Trust Co v Compania De Navegacione Almirante S A, Panama, C A Cal, 437 F 2d 301, cert den 91 S Ct 2173, 402 U S 996, 29 L Ed 2d 161

Waiver not shown

U S—Luckenbach Overseas Corp v S S Audrey J Luckenbach, D C N Y, 232 F Supp 572

49. U S—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899, affd, C A, 320 F 2d 628

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56. U S—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899 Affd, C A, 320 F 2d 628

§ 47. —— By Owner or Master

60. U S—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

61. U S—Saxis S S. Co v Multifacs Intern Traders, Inc, C A N Y, 375 F 2d 577

62. U S—Strathmore Shipping Co v Coastal Oil Co, C A N Y, 243 F 2d 97, cert den 78 S Ct 58, 355 U S 836, 2 L Ed 2d 47—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct. 1272, 394 U S 943, 22 L Ed 2d 477

63. U S—Dover S S Co v Summit Indus Corp, D C N Y, 148 F Supp 206

Facts held to constitute breach by owner or master

(3) U S.—Pan Cargo Shipping Corp v U S, D C N.Y, 234 F Supp 623, affd, C A, 373 F 2d 525, cert den 88 S Ct 51, 389 U S 836, 19 L Ed 2d 98—Loreto Compania Naviera, S A v Bradley and Baker, C A Miss, 382 F 2d 980—Sulphur Export Corp v Carribean Clipper Lines, Inc, D C La, 277 F Supp 632.

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67. U S—American Trading & Production Corp v Shell Intern Marine Limited, C A.N Y, 453 F 2d 939—Christman v Maristella Compania Naviera, D C.N Y, 349 F Supp 845, affd, C.A, 468 F 2d 620

68. D C—Transatlantic Financing Corp v U S, C A., 363 F 2d 312, 124 U S App D C 183

69. U.S—Pan Cargo Shipping Corp v U S, D C N Y, 234 F Supp. 623, affd, C A, 373 F 2d 525, cert. den 88 S Ct. 51, 389 U S. 836, 19 L Ed 2d 98—Chatham Shipping Co v. Fertex S.S Corp, C.A N.Y, 352 F.2d 291

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83. U S—Dominica Min Co. v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C.A, 433 F.2d 986

Reduction of damages

U.S.—Glidden Co. v Hellenic Lines, Limited, D.C N.Y., 207 F Supp. 262, affd., C A, 315 F.2d 162

84. U S.—Glidden Co. v. Hellenic Lines, Limited, D C N.Y., 207 F.Supp 262, affd., C.A., 315 F 2d 162.

Matters of which owner not liable

U S—Dominica Min. Co. v. Port Everglades Towing Co., D.C.Fla., 318 F Supp 500, affd, C A, 433 F.2d 986

85. U.S.—Glidden Co v Hellenic Lines, Limited, D C N Y, 207 F Supp. 262, affd., C A, 315 F 2d 162.

86. U S—Glidden Co. v Hellenic Lines, Limited, D.C.N Y., 207 F.Supp. 262, affd., C.A., 315 F 2d 162.

87. U.S—Glidden Co. v Hellenic Lines, Limited, D C.N.Y., 207 F.Supp 262, affd., C A., 315 F 2d 162.

90. Profit of wrongdoing owner recoverable where breach deliberate

U S—Commercial Metals Co v International Union Marine Corp, D C N Y, 318 F Supp 1334

91. U S—Glidden Co v Hellenic Lines, Limited, D C N Y, 207 F Supp 262, affd, C A, 315 F 2d 162—Commercial Metals Co v International Union Marine Corp, D C N Y, 318 F Supp 1334

92. U S—Glidden Co v Hellenic Lines, Limited, D C N Y, 207 F Supp 262, affd, C A, 315 F 2d 162

97. U S—Commercial Metals Co v International Union Marine Corp, D C N Y, 318 F Supp 1334

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98. U S—Glidden Co v Hellenic Lines, Limited, D C N Y, 207 F Supp 262, affd, C A, 315 F 2d 162

2. D C—Transatlantic Financing Corp v U S, C A, 363 F 2d 312, 124 U S App D C 183

3. U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 315 F 2d 162

5. U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 315 F 2d 162

6. U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 315 F 2d 162

Where the charter party provides that damages shall include costs of collection, the charterer has been held entitled to recover a reasonable attorney's fee.[12.5]

12.5. U S—Sulphur Export Corp v Carribean Clipper Lines, Inc, D C La, 277 F Supp 632

§ 48. —— By Charterer

15. U S—Kirk v Arc S S Co, D C N Y, 21 F R D 293—Johnson Barge Co v Mid-Valley, Inc, D C Tex, 243 F Supp 234—Allison v Cosmos S S Corp, D C Wash, 331 F Supp 1319

Safe place for discharge of cargo

(2) Other matters

U S—American President Lines, Limited v U S, D C Cal, 208 F Supp 573

Charters held breached

U S—Ariate Compania Naviera, S A. v Commonwealth Tankship Owners, Limited, D C N Y, 310 F Supp 416

La—Ittmann v Graver Tank & Mfg Co, App, 187 So 2d 535

Seaworthiness

U S—Georgia-Pacific Corp v Motorship Marilyn L, D C Va, 331 F Supp. 776

Anticipatory breach held not shown

U S—Christman v Maristella Compania Naviera, D C N Y, 349 F Supp 845, affd, C A, 468 F 2d 620

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20. U S—Glidden Co v Hellenic Lines, Limited, D C N Y, 182 F Supp 172, revd on oth grds, C A, 275 F 2d 253, on remand, D C, 207 F Supp 262, affd 315 F 2d 162—Pan Cargo Shipping Corp v U S, C A N Y, 373 F 2d 525, cert den. 88 S Ct 51, 389 U.S 836, 19 L.Ed 2d 98

25. La.—Ittmann v Graver Tank & Mfg Co., App, 187 So 2d 535

26. U S—American President Lines, Limited v U S, D.C Cal., 208 F Supp 573

27. U S—Moran Towing Corp v M A Gammino Const Co, C A.R I, 363 F.2d 108, on remand, D C, 292 F.Supp 134, affd in part remanded 409 F.2d 917

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36. La—Ittmann v Graver Tank & Mfg Co, App, 187 So.2d 535

37. U S—Aaby v States Marine Corp, D C N Y, 107 F Supp. 484

38. U S—Aaby v States Marine Corp, D C N Y, 107 F Supp 484—Chandler Leasing Division, Pepsico Service Industries Leasing Corp v Florida-Vanderbilt Development Corp, C A Fla, 464 F 2d 267, cert den 93 S Ct 527, 409 U S 1041, 34 L Ed 2d 491

40. U S—Liberty Nav & Trading Co v Kinoshita & Co, Limited, Tokyo, C A N Y, 285 F 2d 343, cert den 81 S Ct 1904, 366 U S 949, 6 L Ed 2d 1242

50. U S—Chandler Leasing Division, Pepsico Service Industries Leasing Corp v Florida-Vanderbilt Development Corp, C A Fla, 464 F 2d 267, cert den 93 S Ct 527, 409 U S 1041, 54 L Ed.2d 491

51. U S—Liberty Nav & Trading Co v Kinoshita & Co, Limited, Tokyo, C A N Y, 285 F 2d 343, cert den 81 S Ct 1904, 366 U S 949, 6 L Ed 2d 1242

Demurrage not consequential damages

U S—Earn Line S S Co v Manati Sugar Co, C C A. N Y, 269 F 774—Cia Estrella Blanca, Ltda v S S Nictnc, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

Default in rental payments

U S—Texas & New Orleans Barge Line, Inc v Tug Patsy H, D C La, 279 F Supp 697

Tex—Walter E Heller & Co v Allen, Civ App, 412 S W 2d 712, err ref no rev err

52. U S—Liberty Nav & Trading Co v Kinoshita & Co, Limited, Tokyo, C A N Y, 285 F 2d 343, cert den 81 S Ct 1904, 366 U S 949, 6 L Ed 2d 1242

53. Amount contributed by substitute charter, although operated at overall loss, should be credited

U S—Liberty Nav & Trading Co v Kinoshita & Co, Limited, Tokyo, C A N Y, 285 F 2d 343, cert den 81 S Ct 1904, 366 U S 949, 6 L Ed 2d 1242

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56. U S—C.J.S. quoted at length in Johnson Barge Co v Mid-Valley, Inc, D C Tex, 243 F Supp 234, 236

§ 49. —— Lien

64. U S—In re Bauer S S Corp., D C N Y, 167 F Supp 909—Rainbow Line, Inc v M/V Tequila, D.C N.Y, 341 F Supp 459, affd, C A, 480 F 2d 1024—Rainbow Line, Inc v M/V Tequila, C A N Y, 480 F 2d 1024

Lien for fuel on board at time of turnback

U S—Schilling v A/S D/S Dannebrog, C A N Y 320 F 2d 628

68. U S—Rainbow Line, Inc v M/V Tequila C A N Y, 480 F 2d 1024

§ 50. Loss of, or Injury to, Cargo

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74. U S—U S v Steamship Wabash, D C N Y, 331 F Supp 145—Coca Cola Co, Tenco Division v S S Norholt, D C N Y, 333 F Supp 946

75. U S—Petition of Reliance Marine Transp & Const Corp, C A.Conn., 206 F 2d 240—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, D C N Y., 149 F Supp 122, affd, C A, 253 F 2d 785—R T Jones Lumber Co v Roen S S Co, D C N Y, 158 F Supp 304, affd, C A, 270 F 2d 456—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd. in part on oth grds, C A, 461 F 2d 1009—Trans-Amazonica Iquitos, S A v Georgia S S Co, D C Ga, 335 F Supp 935—Atlantic Banana Co v M V "Calanca", D C N Y, 342 F Supp 447 Affd, C A, 489 F 2d 752, and 489 F 2d 752

No liability in absence of unseaworthiness or negligence

U.S—American Cement Corp v Healy Tibbitts Const Co, D C Cal, 249 F Supp 891, affd, C A, 371 F 2d 525

77. US—Esso Standard Oil Co v The Kaposia, DCNY, 148 F Supp 899, affd, CA, 259 F 2d 486

79. US—Bilkay Holding Corp v Consolidated Iron & Metal Co, DCNY, 330 F Supp 1313—P T Perusahaan Pelayaran Samudera Trikora Lloyd v Salzachtal, DCNY, 373 F Supp 267

83. US—Union Carbide & Carbon Corp v The Walter Raleigh, DCNY, 109 F Supp 781, affd, CA, 200 F 2d 908—Georgia-Pacific Corp v Motorship Marilyn L, DCVa., 331 F Supp 776

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90. US—Horn v Cia de Navegacion Fruco, SA, CA Ala, 404 F 2d 422, cert den, 89 S Ct 1272, 394 U.S 943, 22 L Ed 2n 477

3. US—Cooper v Pinedo, CA Fla, 212 F 2d 137—Hercules Powder Co v Commercial Transport Corp, DC Ill, 270 F Supp 676—Calcasieu Chemical Corp v Canal Barge Co, CA Ill, 404 F 2d 1227

Contractual restriction of liability

US—Karobi Lumber Co v SS Norco, DC Ala, 249 F Supp 324, affd, CA, 397 F 2d 570

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4. US—Ionion S S Co of Athens v United Distillers of America, Inc, CA La, 236 F 2d 78—Petition of S C Loveland Co, DC Pa, 170 F Supp 786—Samincorp v SS Rivadeluna, DC Del, 276 F Supp 251

15. Public policy of U.S. applied

US—J B Effenson Co v Three Bays Corp, CA Fla, 238 F 2d 611

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19. US—Esso Standard Oil Co v The Kaposia, DCNY, 148 F Supp 899, affd, CA, 259 F 2d 486—Coca Cola Co, Tenco Division v SS Norholt, DCNY, 333 F Supp 946

Measure of damages

US—Samincorp v SS Rivadeluna, DC Del, 276 F Supp 251

Weather conditions

US—Georgia-Pacific Corp v Motorship Marilyn L, DC Va, 331 F Supp 776

21. Salvage costs

US—California & Hawaiian Sugar Co v Columbia SS Co, Inc, DC La, 391 F Supp 894, affd, CA, 510 F 2d 542

§ 52. Loss of, or Injury to, Vessel

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39. US.—Dalzell v. The St Nicholas, DCNY, 109 F Supp 595—F Jacobus Transp Co v Gallagher Bros Sand & Gravel Corp, DCNY, 161 F.Supp 507

La—Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A.L R.2d 1218—Dufrene v Ledoux, App, 285 So.2d 302.

Law of bailment applies

U.S.—Marine Equipment, Inc v Martin, DC.La, 184 F.Supp. 111.

40. US.—Treakle v Pocahontas SS Co, DC Va, 273 F Supp 608, affd, CA, 406 F.2d 412—General Motors Corp. v Pennsylvania R Co, DC N.Y, 357 F Supp 646, affd, CA, 506 F 2d 1395, two cases.

41. U.S.—Moran Towing Corp v. M A Gammino Const. Co, C.A R I., 363 F 2d 108, on remand, D C., 292 F.Supp 134, affd. in part remanded 409 F.2d 917.

42. U.S.—Conners-Standard Marine Corp v. Marine Fuel Transfer Corp, D C N.Y., 135 F.Supp 365—Gural v Terry Contracting, Inc, DCNY, 178 F Supp 766

43. US—McDonough Const Co v H B Fowler & Co, DC La, 281 F Supp 90—Wisconsin Barge Line, Inc v Coastal Marine Transport Co, DC La, 285 F Supp 264, affd, CA, 414 F 2d 872—Bilkay Holding Corp v Consolidated Iron & Metal Co, DCNY, 330 F Supp 1313

Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

Partnership charterer

La—Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A L R 2d 1218

Critical issue in placing liability is control

US—Willamette-Western Corp v Columbia Pac Towing Co, CA Or, 466 F 2d 1390

Warranty under safe berth clause

US—Venore Transp Co v Oswego Shipping Corp, DCNY, 363 F Supp 1366, mod on oth grds, CA, 498 F 2d 469, cert den 95 S Ct 313, 419 US 998, 42 L Ed 2d 272

44. US—James McWilliams Blue Line v Esso Standard Oil Co, DCNY, 123 F Supp 824—Conners-Standard Marine Corp v Marine Fuel Transfer Corp, DCNY, 135 F Supp 365—McAllister Lighterage Line, Inc v Insurance Co of North America, CA NY, 244 F 2d 867, cert den 78 S Ct 123, 355 US 872, 2 L Ed 2d 77, and 78 S Ct 123, 355 US 871, 2 L Ed 2d 76—James McWilliams Blue Line, Inc v Esso Standard Oil Co, C.A.N Y, 245 F 2d 84—Gural v Terry Contracting, Inc, DCNY, 178 F Supp 766—Stoufflet v Cenac Towing Co, DC La, 236 F Supp 198, affd, CA, 356 F 2d 984

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45. US—Petition of Metropolitan Sand & Gravel Corp, DCNY, 170 F Supp 675—Shamrock Towing Co v Schiavone-Bonomo Corp, DC NY, 173 F Supp 39, affd, CA, 275 F 2d 338

46. US—Choctaw Transp. Co v Ford Const Co, DC Miss, 193 F Supp 922—Neubros Corp v. Northwestern Nat Ins Co, DCNY, 359 F Supp 310

Prima facie liability

US—Conners-Standard Marine Corp v Marine Fuel Transfer Corp, DCNY, 135 F Supp 365

47. US—Exner Sand & Gravel Corp v Petterson Lighterage & Towing Corp, CA NY, 258 F 2d 1—Noel v Isbrandtsen Co, DC Va, 179 F Supp. 325, affd, CA, 287 F 2d 783, cert den. 81 S Ct 1944, 366 US 975, 6 L Ed 2d 1264

Weather conditions

(3) Other cases

US—Conners-Standard Marine Corp v Marine Fuel Transfer Corp, DCNY, 135 F Supp 365—Tanker Hygrade No 2, Inc v Barge Lines, Inc, CA NY, 250 F 2d 678

48. US—People of State of Cal v The Jules Fribourg, DC Cal, 140 F Supp 333—Noel v Isbrandtsen Co, DC Va, 179 F Supp 325, affd, CA, 287 F 2d 783, cert den 81 S Ct 1944, 366 US 975, 6 L Ed 2d 1264—Powell & Minnock Brick Works, Inc. v Callanan Road Imp Co, DCNY, 210 F.Supp 114

Charterer liable for one half of damages

US—Crain Bros., Inc v Wieman & Ward Co, CA Pa, 223 F 2d 256—Moran Towing Corp v M. A Gammino Const Co, CA.R I, 409 F 2d 917

51. US—Dalzell v The St Nicholas, DCNY, 109 F Supp 595—North River Barge Line v Chile SS Co, CA NY, 213 F 2d 882—Venore Transp Co v Oswego Shipping Corp, DCNY., 363 F Supp 1366, mod on oth grds, CA, 498 F 2d 469, cert den 95 S Ct 313, 419 US 998, 42 L Ed 2d 272

55. US—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, DCNY, 149 F Supp 122, affd, CA, 253 F 2d 785—Serrano v US Lines Co, DCNY, 238 F Supp 383

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67. US—Metropolitan Sand & Gravel Corp v The Dwyer No 25, DCNY, 130 F Supp 172

Overruled case

Any intimation in Alaska Coast Co v Alaska Barge Co, 140 P 334, 79 Wash 216, L R A 1915C, 423, mod on reh 143 P 461, 82 Wash 697, L R A 1915C, 428 that Washington has adopted the rule of absolute liability is explicitly overruled—St Paul Fire & Marine Ins Co v Chas H Lilly Co, 295 P 2d 299, 48 Wash 2d 528

69. US—Metropolitan Sand & Gravel Corp v The Dwyer No 25, DCNY, 130 F Supp 172

Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

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73. Subcharterer

Cal—Assistance, Inc v Teledyne Industries, Inc, 112 Cal Rptr 418, 37 C A 3d 644

75. US—Allied Chemical & Dye Corp v Tug Christine Moran, CA NY, 303 F 2d 197

76. US—Russello v George D Gratsos Shipping Co, DCNY, 179 F Supp 159—Dow Chemical Co v Dixie Carriers, Inc, CA Tex, 463 F 2d 120, cert den 93 S Ct 525, 409 US 1040, 34 L Ed 2d 490

77. US—Dow Chemical Co v Dixie Carriers, Inc, CA Tex, 463 F 2d 120, cert den 93 S Ct 525, 409 US 1040, 34 L Ed 2d 490

79. Inadequate moorings

US—Trade & Transport, Inc v Caribbean SS Co, SA, DC Tex, 384 F Supp 782, affd in part, revd in part on oth grds, CA, 521 F 2d 229

83. US—Federal Commerce & Nav Co v US, DCNY, 305 F Supp 1025

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90. US—Hudson Valley Lightweight Aggregate Corp v. Windsor Bldg & Supply Co, DCNY, 309 F Supp 1274, affd, CA, 446 F 2d 750—Western Corp v Columbia Pac Towing Co, CA Or, 466 F 2d 1390.

Tex.—C.J.S. quoted at length in Clary Towing Co v Thomas Jordan, Inc, Civ App, 449 S W 2d 306, 308, err ref no rev err

91. US—Segrave Transp Co v Eskay Coal & Fuel Co, CA NY, 205 F.2d 257—Tanker Hydgrade No 2, Inc v Barge Lines, Inc, CA NY, 250 F 2d 678—Moran Transp Corp. v. New York Trap Rock Corp, DCNY, 194 F Supp 599—Stoufflet v. Cenac Towing Co, DC La, 236 F Supp 198, affd, CA., 356 F 2d 984

Act of charterer held not negligent

US—Hudson Valley Lightweight Aggregate Corp v Windsor Bldg & Supply Co, D.C.N.Y, 309 F Supp 1274, affd, CA, 446 F.2d 750.

92. US—North River Barge Line v Chile SS Co., DCNY, 111 F Supp 895, affd., CA, 213 F 2d 882—Todd Shipyards Corp v Moran Towing & Transp Co, D.C.N.Y, 140 F Supp 107, affd, CA, 247 F 2d 626—Shamrock Towing Co v Hughes Bros, Inc, D.C.N.Y, 197 F.Supp 397

93. US—Moran Transp. Corp. v New York Trap Rock Corp., D.C.N Y, 194 F.Supp 599—Shamrock Towing Co v Hughes Bros., Inc, D C N Y, 197 F Supp 397

95. US—American Cement Corp. v Healy Tibbitts Const Co, D C Cal, 249 F Supp. 891, affd, C.A, 371 F 2d 525.

96. US—American Cement Corp. v Healy Tibbitts Const Co, D.C Cal, 249 F Supp. 891, affd, C A., 371 F 2d 525.

98. US—Marine Equipment, Inc v Martin, D.C. La, 184 F.Supp. 111

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13. U.S.—Dampskibsaktieselskabet Den Norske Afrika og Australielinie v Intalco Aluminum Corp., D C Wash, 306 F Supp. 170, affd, C A, 457 F 2d

889, cert den 93 S Ct 466, 409 U S 1024, 34 L Ed 2d 316

Breach of contract by purchaser of cargo to provide safe berth for vessel is ground for liability for grounding of vessel.[16 5]

16.5. Affreightment contract provision held not to relieve from liability

U S—Paragon Oil Co v Republic Tankers, S A, C A N Y, 310 F 2d 169, cert den 83 S Ct 1092, 372 U S 967, 10 L Ed 2d 130, reh den 83 S Ct 1536, 373 U S 947, 10 L Ed 2d 703

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17. U S—North River Barge Line v Chile S S Co, C A N Y, 213 F 2d 882—Metropolitan Sand & Gravel Corp v The Dwyer No 25, D C N Y, 130 F Supp 172—Moore-McCormack Lines, Inc v McMahon, C A N Y, 235 F 2d 142—Petition of Metropolitan Sand & Gravel Corp, D C N Y, 170 F Supp 675

19. U S—McAllister Lighterage Line, Inc v S/S Steel Age, D C N Y, 306 F Supp 19

Purchaser warranting safe berth to charterer

U S—Paragon Oil Co v Republic Tankers, S A, C A N Y, 310 F 2d 169, cert den 83 S Ct 1092, 372 U.S 967, 10 L Ed 2d 130, reh den 83 S Ct 1536, 373 U S 947, 10 L Ed 2d 703

20. U S—Cram Bros v Wieman & Ward Co, D C Pa, 126 F Supp 675, mod on oth grds, C A, 223 F 2d 256

22. U S—Valdesa Compania Naviera, S A v Frota Nacional de Petroleiros, C A N J, 348 F 2d 33—Moran Towing Corp v M A. Gammino Const Co, C A R I, 409 F 2d 917

Damages divided

U S—Ore Carriers of Liberia, Inc v. Navigen Co, C A N Y, 435 F 2d 549

23. La—Mermelstein v Schwab, App, 64 So 2d 37

Reduction by savings from postponement of annual drydocking

U.S—Valdesa Compania Naviera, S A v Frota Nacional de Petroleiros, C A N J, 348 F 2d 33

24. U S—Aaby v. States Marine Corp, D C N Y, 107 F.Supp 484

25. U S—Valdesa Compania Naviera, S A v Frota Nacional de Petroleiros, C.A N J, 348 F 2d 33

Delay incident to repairs

(2) Other matters

U.S.—Moran Towing Corp v M A Gammino Const Co, D C R.I, 292 F Supp 134, affd in part, and remd, C A, 409 F 2d 917.

28. U S.—McAllister Lighterage Line Inc v Insurance Co. of North America, C A N.Y, 244 F 2d 867, cert den. 78 S Ct 123, 355 U S 872, 2 L Ed 2d 77, and 78 S Ct 123, 355 U.S 871, 2 L Ed 2d 76.

29. U.S—Stoufflet v Cenac Towing Co, D C.La, 236 F Supp 198, affd., C A, 356 F 2d 984.

30. U S—McAllister Lighterage Line, Inc v Insurance Co. of North America, C A N.Y, 244 F 2d 867, cert. den 78 S Ct. 123, 355 U.S. 872, 2 L Ed.2d 77, and 78 S.Ct. 123, 355 U S. 871, 2 L Ed.2d 76—Stoufflet v Cenac Towing Co, D.C La, 236 F.Supp 198, affd, C A, 356 F 2d 984.

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44. Violation of safe berth clause

U.S.—Paragon Oil Co v Republic Tankers, S A., C A N.Y., 310 F.2d 169, cert den 83 S.Ct 1092, 372 U.S. 967, 10 L.Ed.2d 130, reh. den. 83 S.Ct. 1536, 373 U S. 947, 10 L.Ed.2d 703.

48. U.S—Stoufflet v Cenac Towing Co., D.C La, 236 F.Supp 198, affd, C.A., 356 F 2d 984.

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53. U.S.—Stoufflet v Cenac Towing Co, D.C La, 236 F Supp. 198, affd., C.A, 356 F.2d 984

§ 53. Charter by Government

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55. Must be in writing

D C—U S v American Renaissance Lines, Inc, C A, 494 F 2d 1059, 161 U S App D C 140, cert den 95 S Ct 495, 419 U S 1020, 42 L Ed 2d 294

57. U S—Eastern S S Lines v U S, 112 F Supp 167, 125 Ct Cl 422—A H Bull S S Co v U S, C A N Y, 208 F 2d 888

58. U S—Atlantic Carriers v U S, D C N Y, 131 F Supp 1

D C—Transatlantic Financing Corp v U S, C A, 363 F 2d 312, 124 U S App D C 183

59. Effect of statutes

U S—A H Bull S S Co v U S, D C N Y, 105 F Supp 474, affd, C A, 208 F 2d 888—Massachusetts Trustees of Eastern Gas and Fuel Associates v U S, Mass, 84 S Ct 1236, 377 U S 235, 12 L Ed 2d 268

D C—American Maritime Ass'n v Stans, D C, 329 F Supp 1179, affd, C A, 485 F 2d 765, 157 U S App D C 394

61. Demise charter

(2) Other matters

U S—Everett S S Corp, S/A v Liberty Nav & Trading Co, Inc, C A Cal, 486 F 2d 462, cert den 94 S Ct 1563, 415 U S 977, 39 L Ed 2d 872

Charterer held not estopped

U S—U S v Moore-McCormack Lines, C A Md, 308 F 2d 866, cert den 83 S Ct 937, 372 U S 944, 9 L Ed 2d 969

Charter rate less than world market rate allowed

U S—Black Diamond S S Corp v U S, D C Md, 233 F Supp 373, revd on oth grds, C A, 351 F 2d 387, cert den 86 S Ct 894, 383 U S 910, 15 L Ed 2d 665

62. U S—U S v Wessel, Duval & Co, D C N Y, 115 F Supp 678

Statute construed

U S—U S v Moore-McCormack Lines, Inc, C A Md, 308 F 2d 866, cert den 83 S Ct. 937, 372 U S 944, 9 L Ed 2d 969

63. Termination; subcharters

U S—Massachusetts Trustees of Eastern Gas and Fuel Associates v. U S, Mass, 84 S Ct 1236, 377 U S 235, 12 L Ed 2d 268

64. U S—U.S v The South Star, D C N Y, 115 F Supp 102, affd, C A, 210 F 2d 44—American Mail Line, Limited v U S, D C Wash, 213 F Supp 152

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66. U S—A H Bull S S Co v U S, C A N Y, 208 F 2d 888—Sword Line, Inc v U S, C A N Y, 228 F 2d 344, adhered to, C.A, 230 F 2d 75, affd 76 S Ct. 1047, 351 U S 976, 100 L Ed 1493—Dichman, Wright & Pugh, Inc. v U S, D C N Y, 144 F Supp 922—American President Lines, Limited v. U.S, C.A Del, 265 F 2d 552

Claim of duress

U S—Richfield Oil Corp v U S, C A Cal, 207 F.2d 864

Construction as to duration

U.S—Western Canada S S Co. v U S, C A Wash, 245 F.2d 921.

75. U S—Eastern S S Lines v. U S, 112 F Supp 167, 125 Ct Cl 422

81. U S—American Trading & Production Corp v U S., D C Md, 172 F Supp 165—U S v. Isthmian S S Co, D C.N.Y, 222 F Supp 464

83. U S—Eastern S.S Lines v U S, supra, n 75

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90. Under Merchant Ship Sales Act

U S—American President Lines, Limited v U S, D C Cal, 224 F Supp 187, affd in part and revd. in part on oth grds, C A, 338 F 2d 962—U S v Eastport S S Corp, C A N Y, 332 F 2d 789—Black Diamond S S Corp v U S, C A Md, 351 F 2d 387, cert den 86 S Ct 894, 383 U S 910, 15 L Ed 2d 665

Under Merchant Marine Act

U S—U S v East Harbor Trading Corp, D C N Y, 190 F Supp 245—American Mail Line, Limited v U S, D C Wash, 213 F Supp 152—U S v Eastport S S Corp, D C N Y, 216 F Supp 649, affd, C A, 332 F 2d 789, Supplemented, D C, 232 F Supp 137—Massachusetts Trustees of Eastern Gas and Fuel Associates v U S, Mass, 84 S Ct 1236, 377 U S 235, 12 L Ed 2d 268—American President Lines, Limited v U S, D C Cal, 224 F Supp 187, affd in part and revd in part on oth grds, C A, 338 F 2d 962—U S v Eastport S S Corp, C A N Y, 332 F 2d 789—Black Diamond S S Corp v U S, C A Md, 351 F 2d 387, cert den 86 S Ct 894, 383 U S 910, 15 L Ed 2d 665

96. U S—American President Lines, Limited v U S, D C Cal, 208 F Supp 573

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10. Insurance for full value

U S—Calmar S S Corp v U S, D C N Y, 103 F Supp 243, revd on oth grds, C A, 197 F 2d 795, vac on oth grds 73 S Ct 733, 345 U S 446, 97 L Ed 1140, and 73 S Ct 739, 345 U S 427, 97 L Ed 1125, reh den 73 S Ct 1110, 345 U S 971, 97 L Ed 1388, conf to 209 F 2d 852, affd, 209 F 2d 852

12. U S—Eastern S S Lines v U S, 112 F Supp 167, 125 Ct Cl 422—Pan Cargo Shipping Corp v U S, D C N Y, 180 F Supp 8

§ 54. Rights and Liabilities of Third Persons

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22. U S—Moore-McCormack Lines, Inc v U S, D C N Y, 338 F Supp 1061

Where a vessel owner is engaged in business of leasing boats which are to be steered by the charterer, no stipulation in the lease between owner and charterer to which guests of charterer are not parties can bind them to any attempted waiver of their rights to damages for negligence of the owner, if otherwise liable.[25 5]

25.5. U S—Rothman v U-Steer-It, Inc, C A Fla, 247 F 2d 803

Other matters relating to the liability of the owner and charterer for injuries to third persons resulting from unseaworthiness of the vessel have been adjudicated [25 10]

25.10. U S—Dow Chemical Co v Dixie Carriers, Inc, D.C Tex, 330 F Supp 1304, affd, C A, 463 F 2d 120, cert den 93 S Ct 525, 409 U S 1040, 34 L Ed 2d 490—Hamilton v Canal Barge Co, Inc, D C La, 395 F Supp 978

Time charter

U S—Klishewich v Mediterranean Agencies, Inc, D C N Y, 302 F Supp 712

Bareboat charter

U S—Grigsby v Coastal Marine Service of Tex., Inc, C A La, 412 F 2d 1011, cert dism 90 S Ct 612, 396 U S 1032, 24 L Ed 2d 531, and 90 S Ct 612, 396 U S 1033, 24 L.Ed 2d 531, and 90 S Ct 613, 396 U S 1033, 24 L Ed 2d 531, on remand 317

F Supp 1113—Puamier v Barge BT 1793, D C Va, 395 F Supp 1019

The primary liability for damage to a submerged underground cable caused during an offshore drilling operation was on the demise charterer of the ship, and not upon the owner of the ship where unseaworthiness of the vessel was not established.[25 15]

25.15. U S—Offshore Tel Co v M/V Waterbuck, D C La, 465 F Supp 1160

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30. U S—Jones v The Flying Clipper, D C N Y, 116 F Supp 386

§ 56. Actions

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17. U S—B H Inc v Anthony M Meyerstein, Inc, D C N Y, 149 F Supp 219—Neubros Corp v Northwestern Nat Ins Co, D C N Y, 359 F Supp 310

Necessity of resorting to administrative remedies

U S—Wessel, Duval & Co v U S, D C N Y, 126 F Supp 79—Hidick v Orion Shipping & Trading Co, D C N Y, 157 F Supp 477

Action for damages for breach

U S—Ore Carriers of Liberia, Inc v Navigen Corp, D C N Y, 332 F Supp 72, affd 435 F 2d 549, am on oth grds 305 F Supp 895—Louisiana Sulphur Carriers, Inc v Gulf Resources & Chemical Corp, D C Del, 53 F R D 458—Christman v Marisella Compania Naviera, D C N Y, 349 F Supp 845, affd, C A, 468 F 2d 620

La—Ittmann v Graver Tank & Mfg Co, App, 187 So 2d 535

Conditions precedent

La—Ittmann v Graver Tank & Mfg Co, App, 187 So 2d 535

20. U S—Geotechnical Corp of Del v Pure Oil Co, C A La, 196 F 2d 199, cert den 73 S Ct 165, 344 U S 874, 97 L Ed 676, and 73 S Ct 175, 344 U S 879, 97 L Ed 681

21. U S—Atlantic Carriers v U S, D C N Y, 131 F Supp 1—American Mail Line, Limited v U S, D C Wash, 213 F Supp 152—Pan-Atlantic S S Corp v U S, D C Del, 245 F Supp 731—Federal Commerce & Nav Co v U S, D C N Y, 305 F Supp 1025

22. U S—Reed v S S Yaka, Pa, 83 S Ct 1349, 373 U S 410, 10 L Ed 2d 448, reh den 84 S Ct 27, 375 U S 872, 11 L Ed 2d 101

26. U.S—Wessel, Duval & Co v U.S, D C N Y, 126 F.Supp 79—American President Lines, Limited v U S, D.C Del, 162 F.Supp 732, affd, C A, 265 F.2d 552—U S v Eastport S S. Corp, D C N Y, 232 F Supp 137—American Oil Co v S S *Ionian Challenger*, C A N Y, 366 F 2d 509—American Oil Co v S S Ionian Challenger, D C N Y., 257 F Supp 540, decree affd C A, 366 F 2d 509—Minex v International Trading Co of Va., D.C.Va., 303 F Supp 205—Lopez v Atlanta-Schiffahrts G.M.B.H, D C Puerto Rico, 259 F.Supp 949—In re Barracuda Tanker Corp, C A N Y, 409 F.2d 1013

29. U S.—Cooper v Pinedo, C A Fla, 212 F 2d 137—Atlantic Banana Co. v M V "Calanca", D C N Y., 342 F.Supp 447, affd., C A, 489 F 2d 752, and 489 F 2d 752.

Filing of limitation of liability proceeding

U S.—Pure Oil Co. v. Geotechnical Corp of Del, D C. La., 94 F Supp 866, affd, C A., 196 F 2d 199, cert den 73 S Ct 165, 344 U.S 874, 97 L.Ed 676, and 73 S.Ct 175, 344 U S. 879, 97 L Ed 681

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43. U S—Worldwide Carriers, Limited v Aris S S Co, D C N Y, 301 F Supp 70—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329

44. Negligence

(2) Specific acts of negligence must be set forth with particularity

U S—F Jacobus Transp Co v Gallagher Bros Sand & Gravel Corp, D C N Y, 161 F Supp 507

(3) Other matters

U S—Marine Equipment, Inc v Martin, D C La, 184 F Supp 111—Ohio Val Engineering Co v Barges OVE 102 and 103, D C La, 214 F Supp 784

Allegations held sufficient

(1) U S—Marine Leasing Services, Inc v S & W Barge Lines, Inc, D C Miss, 42 F R D 659

Allegations held insufficient

U S—Greenwich Marine, Inc v S S Alexandra, D C N Y, 225 F Supp 671, affd, C A, 339 F 2d 901

La—Mermelstein v Schwab, App, 64 So 2d 37

46. Exception and exceptive allegation unavailable to time charterer

U S—North Am Steel Products Corp v The Andros Mentor, D C N Y, 194 F Supp 394

48. U S—Conners-Standard Marine Corp v Oil Transfer Corp, D C N Y, 120 F Supp 180

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50. U S—Texas & New Orleans Barge Line, Inc v Tug Patsy H, D C La, 279 F Supp 697

54. U S—Pacific Micronesian Lines, Inc v New Zealand Ins Co, C A Guam, 366 F 2d 333

58. U S—Strathmore Shipping Co v Coastal Oil Co, C A N Y, 243 F 2d 97, cert den 78 S Ct 58, 355 U S 836, 2 L Ed 2d 47—Fitzgerald v A L Burbank & Co, C A N Y, 451 F 2d 670

59. U S—Fisser v International Bank, D C N Y, 175 F Supp 305—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

Particular matters

(8) U S—Coastal States Petrochemical Co v Montpelier Tanker Co, D C Tex, 321 F Supp 212

Fla—Potashnick-Badgett Dredging Inc v Whitfield, App, 269 So 2d 36

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60. U S—Cooper v Pinedo, C A Fla, 212 F 2d 137—Ionion S S Co of Athens v United Distillers of America, Inc, C A La, 236 F 2d 78—Hampton Roads Carriers, Inc v Allied Chemical Corp, C A Va, 329 F 2d 387, cert den 85 S Ct 78, 379 U S 839, 13 L Ed 2d 46

61. U S—Conners-Standard Marine Corp v Oil Transfer Corp, supra, n 59

62. U S—Worldwide Carriers, Limited v Aris S S Co, D C.N.Y, 301 F Supp 70

66. U S—Ohio Val Engineering Co v Barges OVE 102 and 103, D C La, 214 F.Supp, 784

67. U S—McDonough Const Co v H B Fowler & Co, D C La, 281 F.Supp 90—Hudson Val. Lightweight Aggregate Corp v Windsor Bldg. & Supply Co., C.A N.Y., 446 F 2d 750

68. U S—Marine Equipment, Inc v Martin, D C La, 184 F.Supp 111—Stoufflet v Cenac Towing Co, D C La, 236 F Supp. 198, affd., C.A, 356 F 2d 984—Hudson Val Lightweight Aggregate Corp v Windsor Bldg & Supply Co, C A N Y, 446 F 2d 750

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69. U.S—Dalzell v The St. Nicholas, D.C N Y, 109 F Supp 595—Kelly v Pennsylvania R. Co, D C N Y, 139 F Supp 658—Tanker Hygrade No. 2, Inc v. Barge Lines, Inc, D.C.N.Y., 148 F Supp 177, affd, C A, 250 F 2d 678—Tanker Hygrade No 2, Inc v Barge Lines, Inc., C A.N Y, 250 F 2d 678—Marine Equipment, Inc v Martin, D C La, 184 F Supp 111—Petition of Rice, C A N Y, 294 F 2d 272—Ohio Val Engineering Co v Barges OVE 102 and 103, D C La, 214 F Supp 784—Stoufflet v Cenac Towing Co, D C La, 236 F Supp 198 Affd, C A, 356 F 2d 984—Hudson Valley Lightweight Aggregate Corp v Windsor Bldg & Supply Co, D C N Y, 309 F Supp 1274, affd, C A, 446 F 2d 750

La—Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A L R 2d 1218

73. U S—American Cement Corp v Healy Tibbitts Const Co, D C Cal, 249 F Supp 891, affd, C A, 371 F 2d 525

75. U S—B W King, Inc v Consolidated Iron & Metal Co, D C N Y, 310 F Supp 471

76. U S—Stoufflet v Cenac Towing Co, D C La, 236 F Supp 198, affd, C A, 356 F 2d 984

78. U S.—Red Star Barge Line, Inc v Luria Bros & Co, D C N Y, 116 F Supp 656

79. U S—Petition of Rice, C A N Y, 294 F 2d 272

81. U S—Rice v New York Trap Rock Corp, D C N Y, 198 F Supp 346, affd, C A, 294 F 2d 272

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86. Circumstances not raising presumption of negligence

U S—Pure Oil Co v Geotechnical Corp of Del, D C La, 94 F Supp 866, affd, C A, 196 F 2d 199, cert den 73 S Ct 165, 344 U S 874, 97 L Ed 676, and 73 S Ct 175, 344 U S 879, 97 L Ed 681

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93. U S—United Distillers of America v The Ionian Pioneer, D C La, 130 F Supp 647, affd, C A, 236 F 2d 78—American Cement Corp v Healy Tibbitts Const Co, D C Cal, 249 F Supp 891, affd, C A, 371 F 2d 525

95. U S—U S v. Wessel, Duval & Co, D C N Y, 123 F Supp 318

96. U S—Ionion S S Co of Athens v United Distillers of America, Inc, C A La., 236 F 2d 78—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, D C N Y, 149 F Supp 122, affd, C A, 253 F 2d 785

99. U S—Grillea v U S, C A N Y, 229 F 2d 687—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

Burden to show due diligence

U S.—U S v M/V Marilena P, C A Va, 433 F 2d 164

3. U S.—Ionion S S Co of Athens v United Distillers of America, Inc, C A La, 236 F 2d 78.

4. U S—Cooper v Pinedo, C A Fla, 212 F 2d 137

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7. Evidence held admissible

(4) Other matters

Tex—Clary Towing Co v Thomas Jordan, Inc, Civ App, 449 S W.2d 306, err ref no rev. err

10. Evidence held sufficient

(1) U S—Coastal States Petrochemical Co v Montpelier Tanker Co, D.C.Tex., 321 F Supp 212

(2) U S.—Moran Towing Corp v M A Gammino Const Co., C.A.R.I., 363 F 2d 108, on remand, D C, 292 F Supp 134, affd. in part remanded 409 F 2d 917.

N.Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, 107 N E 2d 463, 304 N.Y. 314

(4) U S—Ohio Val Engineering Co. v Barges OVE 102 and 103, D C La, 214 F.Supp 784

(6) U.S—Exner Sand & Gravel Corp v. Petterson Lighterage & Towing Corp., C A N Y, 258 F.2d 1

(7) U S—Hunt Tool Co v. Southern Towing & Salvage Co., D C.La, 275 F Supp 139

(9) U.S.—Hunt Tool Co v. Southern Towing & Salvage Co, D C.La., 275 F Supp. 139

(10) U S—Paragon Oil Co v Republic Tankers, S A, C A N.Y, 310 F 2d 169, cert den 83 S Ct. 1092, 372 U S. 967, 10 L.Ed.2d 130, reh. den 83 S Ct 1536, 373 U.S 947, 10 L Ed.2d 703.

(17) U S.—B. W King, Inc v Consolidated Iron & Metal Co, D C.N.Y, 310 F.Supp. 471.

La—H B "Buster" Hughes, Inc v Bernard, App, 306 So 2d 785, affd, cause remd, Sup, 318 So 2d 9, app after remand, App, 355 So 2d 1027

Evidence held insufficient

(1) U S—Ulster Oil Transp Corp v The H A Meldrum, C A N Y, 229 F 2d 568

(2) N Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, supra

(3) U S—Conners-Standard Marine Corp v Oil Transfer Corp, supra—Petition of Rice, C A N Y, 294 F 2d 272

(11) U S—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986

La—Rojas v Robin, 90 So 2d 58, 230 La 1096, 65 A L R 2d 1218—Offshore Transp Corp v Continental Oil Co, App, 158 So 2d 254

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11. Evidence held sufficient

U S—Scott v Isbrandtsen Co, C A Va, 327 F 2d 113

13. Evidence held sufficient

U S—Dalzell v The St Nicholas, D C N Y, 109 F Supp 595

15. Evidence held sufficient

(1) U S—American Cement Corp v Healy Tibbitts Const. Co, D C Cal, 249 F Supp 891, affd, C A, 371 F.2d 525.

(3) U S—U S v M/V Marilena P, C A Va, 433 F 2d 164

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16. Evidence held sufficient

(1) U S—Ionion S S. Co of Athens v United Distillers of America, Inc, C.A La, 236 F 2d 78

(3) Other evidence—Ionion S S Co of Athens v United Distillers of America, Inc, C A La, 236 F 2d 78—U S v Bull S S Line, C A N Y, 274 F 2d 877

Evidence held insufficient to show unseaworthiness

U S.—U S v Wessel, Duval & Co, D C N Y, 123 F Supp 318

18. U S—McAllister Lighterage Line, Inc v Insurance Co of North America, D C N Y, 143 F Supp 697, revd on oth. grds, C A, 244 F 2d 867, cert den 78 S Ct 123, 355 U.S 872, 2 L.Ed 2d 77, and 78 S Ct. 123, 355 U.S 871, 2 L Ed 2d 76.

27. U S—Hawn v Pope & Talbot, Inc, C A Pa, 198 F 2d 800, affd 74 S Ct 202, 346 U S 406, 98 L.Ed 143

Tex—Clary Towing Co v Thomas Jordan, Inc, Civ App, 449 S W.2d 306, err ref no rev err

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32. U S.—Scott v Isbrandtsen Co, C A Va, 327 F 2d 113

35. U S—Hawn v. Pope & Talbot, Inc, supra, n 27—Paragon Oil Co v. Republic Tankers, S A, C.A.N.Y., 310 F.2d 169, cert den 83 S Ct 1092, 372 U S 967, 10 L Ed 2d 130, reh den 83 S Ct 1536, 373 U S 947, 10 L Ed.2d 703.

Primary and secondary decrees

U.S—James McWilliams Blue Line, Inc v. Esso Standard Oil Co., D.C N.Y, 145 F Supp 392, mod, C A, 245 F 2d 84.

43. U.S—Gardner v The Calvert, C A.N J, 253 F.2d 395, cert den. 78 S.Ct 997, 356 U S 960, 2 L Ed 2d 1067—McMillan Welding and Mach Works v General Towing Co., D C La, 247 F.Supp 402.

45. U.S.—Hawn v Pope & Talbot, Inc, supra, n 27

Review of decision of administrative board

U S—American President Lines, Limited v U.S, D C Cal, 208 F Supp. 573

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57. U S—Kennerson v Jane R, Inc, D C Tex, 274 F Supp 28

60. U S—Dupree v U S, 141 F Supp 773, 136 Ct Cl 57

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74. U S—Dupree v U S, Ct Cl, 141 F Supp 773, 136 Ct Cl 57

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17. U S—Avera v Florida Towing Corp, C A Fla, 322 F 2d 155

18. U S—Petition of American Dredging Co, D C Pa, 141 F Supp 582, affd, C A, 235 F 2d 618, cert gr 77 S Ct 356, 352 U S 965, 1 L Ed 2d 320, revd on oth grds 78 S Ct 394, 355 U S 426, 2 L Ed 2d 382

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29. U S—Russell v States S S Co, D C Or, 376 F Supp 233

30. Paternal responsibilities

(4) Other statements

U S—Mroz v Dravo Corp, D C Pa, 293 F Supp 499, affd, C A, 429 F 2d 1156

§ 63. —— As Agent for Owners or Charterers

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36. U S—Leith v Oil Transport Co, D C Pa, 210 F Supp 877, affd, C A, 321 F 2d 591—Farmer v O/S Fluffy D, D C Tex., 220 F Supp 917—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

37. U S—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

40. U S—Fay v U S., D C N Y, 22 F R D 28

46. U S—Cox v Esso Shipping Co, C A Tex, 247 F 2d 629

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56. U S—Epstein v Corporation Peruana de Vapores, D C N Y, 325 F Supp 535

59. U S—J F McNamara Corp v Motor Tanker Tabriz, D C Minn, 209 F Supp 212

66. U.S—Epstein v Corporation Peruana de Vapores, D C N Y, 325 F Supp 535

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83. U S—Instituto Cubano De Estabilizacion Del Azucar v The Golden West, C A N Y., 246 F 2d 802, cert den 78 S Ct 152, 355 U S 884, 2 L Ed 2d 114

88. U.S—Shamrock Towing Co v Schiavone-Bonomo Corp, D C N Y, 173 F Supp 39, affd, C A, 275 F 2d 338.

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37. U S—Bishop v U S, D C La, 308 F Supp 228, affd, C A, 437 F 2d 449

38. U S—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or., 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216—Central R Co of N J v Tug Marie J Turecamo, D C N Y, 238 F Supp 145—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329

Minn—C J.S cited in Lange v Nelson-Ryan Flight Service, Inc, 108 N W.2d 428, 433, 259 Minn 460

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U S—U S v S S Soya Atlantic, D C Md, 213 F Supp 7

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(7) No power to bind employer by consent to assumption of control by third party

U S—Hutton Co v Arrow Builders Supply Corp, D C N Y, 265 F Supp 689, decree affd 371 F 2d 944

40. Independent contractors

U S—Universe Tankships, Inc v Pyrate Tank Cleaners, Inc, D C N Y, 152 F Supp 903

44. U S—U S v Atlantic Refining Co, D C N J, 112 F Supp 76—Hartford Acc & Indem Co v Gulf Refining Co, C A La, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52

46. U S—Barbey Packing Corp v The Stavros, D C Or, 169 F Supp 897

47. U S—Spokane, P & S Ry Co v The Fairport, Or, 116 F Supp 549—U S v The Westervelt, D C N Y, 135 F Supp 596—Barbey Packing Corp v The Stavros, D C Or, 169 F Supp 897

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48. Duty as continuous

U S—U S v Harrison, C A Cal, 245 F 2d 911

51. U S—Williamson v Roen S S Co, D C Wis, 149 F Supp 787

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50. U S—Payne v S S Tropic Breeze, D C Puerto Rico, 293 F Supp 425, affd in part, revd in part on oth grds, C A, 423 F 2d 236, cert den 91 S Ct 363, 400 U S 964, 27 L Ed 2d 383

53. Cal—Sharpe v. Arabian Am Oil Co, 244 P 2d 83, 111 C A 2d 99

54. Particular contract construed

Fla—Trans World Marine Corp v Threlkeld, App, 240 So 2d 314

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3. U S—Bromfield Mfg Co v The Brown, Smith & Jones, D C Mass, 117 F Supp 630—Kennerson v Jane R, Inc, D C Tex, 274 F Supp 28

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(1) U S—Barber v Motor Vessel "Blue Cat", C A Fla, 372 F 2d 626

6. U S—Payne v S S Tropic Breeze, D C Puerto Rico, 293 F Supp 425, affd in part, revd in part on oth grds, C A, 423 F 2d 236, cert den 91 S Ct 363, 400 U S 964, 27 L Ed 2d 383

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13. Agreement as to governing law applied

U S—Payne v S S Tropic Breeze, D C Puerto Rico, 274 F Supp 324, revd on oth grds, C A, 412 F 2d 707

15. U S—Payne v SS Tropic Breeze, C A Puerto Rico, 423 F 2d 236, cert den 91 S Ct 363, 400 U S 964, 27 L Ed 2d 383

20. U S—Crain v American Waterways Corp, D.C Pa, 143 F.Supp 256

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33. U S—Petition of Canal Barge Co, D C Miss, 323 F Supp 805, affd in part, revd in part on oth grds, C A, 480 F 2d 11, op am on oth grds 513 F 2d 911, cert den 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60

Liability determined by common law principles

U S—Trexler v Tug Raven, D C Va, 290 F Supp 429, revd on oth grds, C A, 419 F 2d 536, cert den 90 S Ct 1843, 398 U S 938, 26 L Ed 2d 271

Master held not liable in absence of negligence

U S—Trexler v Tug Raven, D C Va, 290 F Supp 429, revd on oth grds, C A, 419 F 2d 536, cert den 90 S Ct 1843, 398 U S 938, 26 L Ed 2d 271

34. U S—State of Or By and Through State Highway Commission v Tug Go-Getter, D C Or, 299 F Supp 269, mod in part on oth grds, affd in part, revd in part on oth grds, C A, 468 F 2d 1270

37. U S—Boudoin v J Ray McDermott & Co, D C La, 176 F Supp 900, revd on oth grds, C A, 281 F 2d 81—Esso Standard Oil S A v S S Gasbras Sul, C A N Y, 387 F 2d 573, cert den 88 S Ct 1808, 391 U S 914, 20 L Ed 2d 653

38. U S—Farmer v O/S Fluffy D, D C Tex, 220 F Supp 917

48. U S—Republic of China v National Union Fire Ins Co of Pittsburgh, D C Md, 151 F Supp 211, affd in part and revd in part on oth grds, C A., 254 F 2d 177, cert den 79 S Ct 38, 358 U S 823, 3 L Ed 2d 64—Rich v Naviera Vacuba, S A, D C Va, 197 F Supp 710, affd, C A, 295 F 2d 24

49. U S—National Union Fire Ins Co of Pittsburgh v Republic of China, C A Md, 254 F 2d 177, cert den 79 S Ct 38, 358 U S 823, 3 L Ed 2d 64

51. Minn—C.J.S cited in Lange v Nelson-Ryan Flight Service, Inc, 108 N W 2d 428, 433, 259 Minn 460

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53. U S—Chesapeake Bay Bridge and Tunnel Dist v Lauritzen, C A Va, 404 F 2d 1001—Petition of Canal Barge Co, D C Miss, 323 F Supp 805, affd in part, revd in part on oth grds, C A, 480 F 2d 11, op am on oth grds 513 F 2d 911, cert den 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60

54. U S—Latex Const Co v Jacksonville Shipyards, Inc, C A 5 C, 442 F.2d 450

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72. Failure to keep vessel insured

U S—Morton v Browne, D C Puerto Rico, 311 F Supp 1315, affd, C A, 438 F 2d 1205

80. U S—Dupree v U S, 141 F Supp 773, 136 Ct Cl 57

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8. U S—Barber v Motor Vessel "Blue Cat", C A Fla, 372 F 2d 626

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12. U.S—Petition of U S, D C.N.Y, 105 F Supp 353, remd. on oth grds C A, 201 F 2d 281

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25. U S—Pettus v Grace Line, Inc, C A N Y, 305 F 2d 151—American Export Lines v Norfolk Shipbuilding & Drydock Corp, C A Va, 336 F 2d 525—Port of Tacoma v S S Duval, D C Wash, 242 F Supp 886, affd, C A, 364 F 2d 615—Sicula Oceanica, S A v Wilmar Marine Engineering & Sales Corp, C A La, 413 F 2d 1332—Brock v Baroid Division of National Lead Co, D C La, 339 F Supp 728

La—Duet v Kiffe, 269 So 2d 534

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(1) U S—Truesdell v Delta Marine Drilling Co, D C La, 301 F Supp 1008—J Ray McDermott & Co v Vessel Morning Star, C A Tex, 431 F 2d 714, reh 457 F 2d 815, cert den 93 S Ct 271, 292, 409 U S 948, 34 L Ed 2d 218—Choy v Bouchelle, C A Virgin Islands, 436 F 2d 319—Finkel v Challenger Marine Corp, D C Fla, 316 F Supp 549

N Y—Padovano v Dampskibsselskabet Torm, A/S, 313 N Y S 2d 284, 35 A D 2d 542

(3) U S—Remington Rand, Inc v U S, D C N Y, 98 F Supp 334, affd, C A, 202 F 2d 276

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Wash—Puget Sound Marina, Inc v Jorgensen, 475 P 2d 919, 3 Wash App 476

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U S—Great Am Ins Co v Bureau Veritas, D C N Y, 338 F Supp 999 Affd, C A, 478 F 2d 235

27. U S—Parfait v Jahncke Service, Inc, D C La, 347 F Supp 485, affd in part, revd in part on oth grds, C A, 484 F 2d 296, cert. den 94 S Ct 1485, two cases, 415 U S 957, 39 L Ed 2d 572

La—Towboats, Inc v General Equipment & Iron Works, Inc, App, 280 So 2d 840, writ den 283 So 2d 769

29. U S—Cia Maritima Del Nervion v James J Flanagan Shipping Corp, Stevedore Division, C A Tex, 308 F 2d 120

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U S—Truesdell v Delta Marine Drilling Co, D C La, 301 F Supp 1008—U S Lines Co v Maritime Shipcleaning & Maintenance Co, D C Pa, 317 F Supp 639

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U S—Dugas v Pelican Const Co, Inc, C A La, 481 F 2d 773, cert den 94 S Ct. 724, 414 U S 1093, 38 L Ed 2d 550

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37. U S—Warner v The Bear, D C Alaska, 126 F Supp 529, 15 Alaska 370—Thomas Jordan, Inc v McMillan Welding and Mach Works, C A La, 374 F 2d 508, cert den 88 S Ct 71, 389 U S 826, 19 L Ed.2d 81

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(3) Other matters

U S—Beach Salvage Corp of Fla v The Cap't. Tom, D C Fla, 201 F Supp 479

39. Ala—Waterman S S Corp v State, 124 So 2d 65, 271 Ala 441

40. U S—Jernigan v Lay Barge Delta Five, D C Tex, 296 F Supp 127, affd, C A, 423 F 2d 1327

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(4) Other matters

U S—Pennsylvania R Co v U S., 70 F Supp 595, 108 Ct Cl 419

42. U.S—McMillan Welding and Mach Works v. General Towing Co., D C La, 247 F Supp. 402.

Evidence supported determination that charterer was not authorized

U S—Kane v Motor Vessel Leda, C A La, 491 F 2d 899, reh den 493 F 2d 1405, two cases, cert den 95 S Ct 120, 419 U.S 865, 42 L Ed 2d 102

43. U S—Warner v The Bear, D C Alaska, 126 F Supp 529, 15 Alaska 370—Marine Lumber Co v The Alma, D C Va, 199 F Supp 719

47. U S—Pontin Lighterage Co v American Export Lines, D C N Y, 126 F Supp 824, affd, C A, 228 F 2d 623—Lambros Seaplane Base v The Batory, C A N Y, 215 F 2d 228—Wilmar Marine Engineering & Sales Corp v M/V Perseo, D C La, 278 F Supp 345

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(2) Other matters

U S—Sea Trade Corp v Bethlehem Steel Co, Shipbuilding Division, C A N Y, 305 F 2d 131—Midwest Marine, Inc v Sturgeon Bay Shipbuilding & Dry Dock Co, D C Wis, 247 F Supp 283—United New York Sandy Hook Pilots Ass'n v Rodermond Industries, Inc, C A N J, 394 F 2d 65—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds, C A, 427 F 2d 244—Young v Clear Lake Yacht Basin, Inc, D C Tex, 337 F Supp 1305, affd, C A, 473 F 2d 1389, cert den 94 S Ct 158, 414 U.S 856, 38 L Ed 2d 106—U S for Use of Westinghouse Elec Corp v Marietta Mfg Co, D C W Va, 339 F Supp 18

La—Diesel Engine Repairs, Inc v Point Landing, Inc, App, 291 So 2d 793

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U S—Booth S S Co. v Meier & Oelhof Co., C A N Y, 262 F.2d 310—Midwest Marine, Inc. v Sturgeon Bay Shipbuilding & Dry Dock Co., D C Wis., 247 F Supp 283

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U S—Alcoa S S Co. v Charles Ferran & Co, C A La, 383 F 2d 46, cert den 89 S.Ct 111, 393 U S 836, 21 L Ed 2d 107

48. U S—The Hygrade No. 24 v The Dynamic, D C. N Y, 143 F Supp 634—Albina Engine & Mach Works, Inc v Hershey Chocolate Corp, C.A.Or., 295 F 2d 619—Arundel Corp v Charleston Shipyards, Inc, D C S C, 207 F Supp 514—J F McNamara Corp v Motor Tanker Tabriz, D C. Minn, 209 F Supp 212—Johnson's Branford Boat Yard, Inc v Yacht Altair, D.C.Conn, 260 F Supp 841

La—Blue Streak Enterprises v Cherrie, App., 263 So 2d 734—Bert's Boat Works, Inc v. Cuccia, App., 278 So 2d 134.

Particular contracts construed

U S—Bromfield Mfg Co v The Brown, Smith & Jones, D C Mass, 117 F Supp 630—Wilmar Marine Engineering & Sales Corp. v. M/V Perseo, D.C La, 278 F.Supp 345.

La—Marine Chartering (Gulf) Ltd. v. Boland Mach. & Mfg Co, Inc, App., 273 So.2d 316.

Limitation of liability upheld

U S—Alcoa S.S Co v. Charles Ferran & Co, C A La, 383 F 2d 46, cert. den. 89 S.Ct 111, 393 U S 836, 21 L Ed.2d 107.

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U.S—Savannah Ship Repair Co. v Helenic Lines, Limited, D C.Ga, 305 F Supp 438

Not contract of adhesion

U S—Andrew Martin Marine Corp v Stork-Werkspoor Diesel B V, D C.La, 480 F Supp 1270

49. U S—Bromfield Mfg Co v. The Brown, Smith & Jones, supra, n 48—Dog River Boat Service, Inc. v The Frances D., D C.Ala, 192 F Supp 759—Diaz v Western Ventures, Inc., D.C Fla, 331 F Supp 1296, affd, C.A, 467 F.2d 1361, cert den. 93 S Ct. 1445, 410 U.S 967, 35 L.Ed.2d 702.

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(2) Other matters

US—Liberian Carriers, Inc v Tampa Ship Repair & Dry Dock Co, C A N Y, 301 F 2d 462, cert den 83 S Ct 40, 371 U S 822, 9 L Ed 2d 62

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US—First Safe Deposit Nat Bank of New Bedford v The North Star, D C Mass, 185 F Supp 815—Charleston Shipyards, Inc v The Poling Bros V, D C S C, 188 F Supp 71

Particular contracts construed

US—Liberian Carriers, Inc v Tampa Ship Repair & Dry Dock Co, C A N Y, 301 F 2d 462, cert den 83 S Ct 40, 371 U S 822, 9 L Ed 2d 62

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US—H & H Ship Service Co v, Weyerhaeuser Line, C A Cal, 382 F 2d 711—Houston-New Orleans, Inc v Page Engineering Co, D C La, 353 F Supp 890

Cal—Standard Oil Co of Cal v Intrepid, Inc, 102 Cal Rptr 604, 26 C A 3d 135

La—Blue Streak Enterprises v Cherrie, App, 263 So 2d 734

50. Time extension

US—Huffman Towing, Inc v Mainstream Shipyard & Supply, Inc, D C Miss, 388 F Supp 1362

51. US—Drago v A/S Inger, C A N Y, 305 F 2d 139, cert den 83 S Ct 292, 371 U S 925, 9 L Ed 2d 232—Arundel Corp v Charleston Shipyards, Inc., D C S C, 207 F Supp 514—Midwest Marine, Inc. v Sturgeon Bay Shipbuilding & Dry Dock Co, D C Wis, 247 F Supp 283—Antilles Shipping Co v Texaco, Inc, D C N Y, 321 F Supp 166

Contractor liable for negligence

US—Hershey Chocolate Corp v The Robert Luckenbach, D C Or., 184 F.Supp 134, affd., C A, 295 F 2d 619—Houston-New Orleans, Inc v Page Engineering Co, D C La, 353 F Supp 890

La—Lumbermens Mut Cas Co v Starr, App, 258 So 2d 385

Breach of warranty

U.S—Garner v. Cities Service Tankers Corp, C A Ala, 456 F.2d 476—Houston-New Orleans, Inc v Page Engineering Co., D C La, 353 F Supp. 890—Hurdich v. R.C.A. Corp, D.C N Y, 359 F Supp 122, affd, C A, 503 F 2d 397

Independent contractor held not liable

US—Young v Clear Lake Yacht Basin, Inc, D C Tex, 337 F.Supp 1305, affd, C A., 473 F 2d 1389, cert den 94 S.Ct. 158, 414 U.S. 856, 38 L Ed 2d 106.

Liability for negligence held not shown

US—Young v Clear Lake Yacht Basin, Inc, D.C Tex, 337 F.Supp 1305, affd, C A., 473 F 2d 1389, cert den. 94 S Ct 158, 414 U.S 856, 38 L Ed 2d 106.

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52. U S.—Glen Cove Marina, Inc v Vessel Little Jennie, D.C.N.Y, 269 F Supp. 877—Huffman Towing, Inc v. Mainstream Shipyard & Supply, Inc, D.C Miss, 388 F Supp 1362

56. U S.—Warner v. The Bear, D C Alaska, 130 F.Supp. 549, 15 Alaska 527—National Marine Service, Inc v. C J. Thibodeaux & Co, C.A.Tex., 501 F.2d 940

58. U S—Epstein v. Corporacion Peruana de Vapores, D C N.Y, 325 F.Supp 535

60. Person unlawfully taking it from owner after wreck

U.S.—F E. Grauwiller Transp Co. v King, D C N.Y, 131 F Supp 630, affd., C.A, 229 F 2d 153.

63. Corporation

US—F. E. Grauwiller Transp Co v King, D.C N Y, 131 F Supp. 630, affd., C.A., 229 F.2d 153—Gardner v. The Calvert, C.A N J, 253 F 2d 395, cert den. 78 S Ct. 997, 356 U S. 960, 2 L Ed 2d 1067—McMillan Welding and Mach Works v General Towing Co, D C La, 247 F Supp 402

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68. U S—The Edmond J Moran v The Harold Reinauer, G A N Y, 221 F 2d 396—Albina Engine & Mach Works, Inc v Hershey Chocolate Corp, C A Or, 295 F 2d 619

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U S—Alcoa S S Co v Charles Ferran & Co, D C La, 242 F Supp 962, reh 251 F Supp 823, affd, C A, 383 F 2d 46, cert den 89 S Ct 111, 393 U S 836, 21 L Ed 2d 107

Cal—D'Aquisto v Campbell Industries, 209 Cal Rptr 108, 162 C A 3d 1208

Failure to instruct concerning product installation

U S—Conticarriers & Terminals, Inc v Borg-Warner Corp, D C Mo, 593 F Supp 400

Avoidable consequences doctrine

U S—Alcoa S S Co v Charles Ferran & Co, D C La, 251 F Supp 823, affd, C A, 383 F 2d 46—Alcoa S S Co v Charles Ferran & Co, C A La, 383 F 2d 46, cert den 89 S Ct 111, 393 U S 836, 21 L Ed 2d 107

Limitation of liability agreement

U S—Alcoa S S Co v Charles Ferran & Co, D C La, 251 F Supp 823, affd, C A, 383 F 2d 46

Grounds for recovery held not to exist

U S—Philadelphia Elec Co v Curtis Bay Towing Co of Pa, D C Pa, 260 F Supp 505, affd, C A, 390 F 2d 125

Recovery held not dependent on status of vessel

U S—Boston Fish Market Corp v Universal Ins Co, C A Mass, 388 F 2d 773

Liability of United States for change in position of buoy

U S—Standard Dredging Corp v S S Syra, D C Md, 290 F Supp 260.

Amount of recovery

U S—Western Transp Co. v Pac-Mar Service, Inc, C A Or, 547 F 2d 97.

69. U S—Griffin v Hunt Tool Co, D C La, 286 F Supp. 402, affd, C A, 412 F 2d 328

Wash—Christensen v Columbia Acceptance Corp, 402 P 2d 497, 66 Wash 2d 347

Private pleasure craft

U S—Finkel v Challenger Marine Corp, D C Fla, 316 F Supp 549

70. U.S.—Alcoa S S Co v Charles Ferran & Co, D C La, 242 F Supp 962, reh 251 F Supp 823, affd, C A, 383 F 2d 46, cert den 89 S Ct 111, 393 U.S 836, 21 L Ed 2d 107

71. U S—Russell, Poling & Co v U S, D C N.Y, 151 F Supp 11, affd, C A, 252 F 2d 167—Indian Towing Co v U S, D C La, 182 F Supp 264, affd, C.A, 276 F 2d 300, cert den 81 S Ct 56, 364 U S 821, 5 L.Ed 2d 51

Whether a ship is a "public" or "merchant" vessel must be determined by reference to the nature of the services rendered.[71.5]

71.5. Services rendered at time of asserted claim

U.S—Petition of Oskar Tiedemann & Co, D C Del, 236 F Supp. 895, revd on oth grds and remd in part, C A., 367 F 2d 498, op supp. 367 F 2d 505, cert den. 87 S.Ct 953, 386 U S 932, 17 L Ed 2d 805, cert den 87 S Ct. 957, 386 U S 932, 17 L Ed 2d 805, reh den 87 S.Ct 1303, 386 U S 1000, 18 L Ed 2d 354

72. N Y—Salmond v Isbrandtsen Co, 144 N Y S 2d 578, 286 App Div 1015, cert den 76 S Ct 1033, 351 U S 968, 100 L Ed 1487

In other instances the principles of maritime law as declared by federal courts have been applied[73.5]

73.5. U S—Nye v A/S D/S Svendborg, D C N Y, 358 F Supp 145, affd in part, revd in part on oth grds, C A, 501 F 2d 376, cert den 95 S Ct 1356, 420 U S 964, 43 L Ed 2d 442, reh den 95 S Ct 1971, 421 U S 972, 44 L Ed 2d 464—Hite v Maritime Overseas Corp, D C Tex, 380 F Supp 222

Cal—Sea-Land Service, Inc v Matson Terminal Co, 61 Cal Rptr 756, 253 C A 2d 885

Maritime law inapplicable

U S—Watson v D/S A/S Idaho, D C Pa, 359 F Supp 496

The owner or charterer is not liable for results of an explosion where there was no prior knowledge of possibility of such an explosion[78.5]

78.5. U S—Republic of France v U S, C A Tex, 290 F 2d 395, cert den 82 S Ct 644, 645, 369 U S 804, 7 L Ed 2d 550

79 U S—Hartford Acc & Indem Co v Gulf Refining Co, D C La, 127 F Supp 469, affd in part and revd in part, on oth grds, C A, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52—Henderson v Reading Co, D C Pa, 150 F Supp 437—U S v Pinckney, D C Ga, 150 F Supp 790—Machillo v New York Cent R Co, D C N Y, 200 F Supp 805—Miculka v American Mail Line, Limited, D C Or, 229 F Supp 665—U S v Barge CBC 603, D C La, 233 F Supp 85—Zubrod v Associated Metals & Minerals Trade Co, D C Pa, 243 F Supp 340—Solet v M/V Capt H V Dufrene, D C La, 303 F Supp 980

N Y—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514

Regardless of any contract, etc.

Ohio—McCormick v Henry Boats, Inc, 228 N E 2d 344, 11 Ohio App 2d 43

Irrespective of personal liability, etc.

U S—Ohio Val Engineering Co v Barges OVE 102 and 103, D C La, 214 F Supp 784

Limitations of liability applied to cargo only

U S—Esso Standard Oil, S A v The Sabrina, D C Canal Zone, 154 F Supp 720

No right of action for violation of safety standards provisions imposing penal liability

U S—Godinez v Jones, D C Puerto Rico, 179 F Supp 135.

Vessels engaged in common venture

U S—Petition of U S Dredging Corp, D C N Y, 213 F Supp 780

Fault without violation of statute

U S—Couch v Bowman, D C Tenn, 263 F Supp 714

Maritime tort

La—Pellegrin v. Fidelity & Cas Co of New York, App., 193 So 2d 392

Recovery over denied

U S—Philadelphia Elec Co v Curtis Bay Towing Co of Pa, D C Pa, 260 F Supp 505, affd, C A, 390 F 2d 125

Liability for nonnegligent unseaworthiness

U S—Grigsby v Coastal Marine Service of Tex, Inc, C A La, 412 F 2d 1011, cert dism 90 S Ct 612, 396 U S 1032, 24 L Ed 2d 531, and 90 S Ct 612, 396 U S 1033, 24 L Ed 2d 531, and 90 S Ct 613, 396 U S 1033, 24 L Ed 2d 531, on remand 317 F Supp 1113

Wash.—Sprague v Snug Harbor Marina, Inc, 534 P.2d 583, 13 Wash App 246

Seaworthiness inapplicable to oil spill

US—State of Md, Dept of Natural Resources v Amerada Hess Corp, D C.Md, 350 F Supp 1060, motion den 356 F Supp 975

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80. US—United Geophysical Co v Vola, C A La, 231 F 2d 816—Twery v Houseboat Jilly's Yen, D C Fla, 267 F Supp 722

81. US—Patapsco Scrap Corp v Maryland Shipbuilding & Drydock Co, C A Md, 268 F 2d 817—Sea Trade Corp v Bethlehem Steel Co, Shipbuilding Division, C A N Y, 305 F 2d 131—Petition of Binstock, D C N Y, 213 F Supp 909, affd, C A, 330 F 2d 267—Thomas v Peninsular & Oriental Steam Nav Co, D C Pa, 246 F Supp 592—Couch v Bowman, D C Tenn, 263 F Supp 714—Croley v Matson Nav Co, D C Ala, 313 F Supp 555, revd, C A, 434 F 2d 73, adhered to 439 F 2d 788

N Y—Colban v Petterson Lighterage & Towing Corp, 279 N Y S 2d 735, 19 N Y S 2d 794, 226 N E 2d 541

Vessel as entity not capable of committing tort

U S.—Noel v Isbrandtsen Co, C A Va, 287 F 2d 783, cert den 81 S Ct 1944, 366 U S 975, 6 L Ed 2d 1264

Warranty of seaworthiness inapplicable to damage by fire

U S—Holloway Concrete Products Co v Beltz-Beatty, Inc, C A Fla, 293 F 2d 474

"Operating negligence"

U S—Lasseigne v Nigerian Gulf Oil Co, D C Del, 397 F Supp 465

Actual or constructive knowledge essential

U S—King v Deutsche-Dampfs-Ges, D C N Y, 397 F Supp 618

82. US—People of State of Cal v The Jules Fribourg, D C Cal, 140 F Supp 333—Sea Trade Corp v Bethlehem Steel Co, Shipbuilding Division, C A N Y, 305 F 2d 131

Independent contracting salvor

U S—American Independent Oil Co v M S Alkaid, D C N Y, 289 F Supp 329

85. US—Oil Transfer Corp v The Cree, D C N Y, 121 F Supp 873, affd, C A, 224 F 2d 849

86. US—Young v Clear Lake Yacht Basin, Inc, D C Tex, 337 F Supp 1305, affd., C A, 473 F 2d 1389, cert den 94 S Ct 158, 414 U S 856, 38 L Ed 2d 106

Contributory negligence not shown

U S—U S v Barge CBC 603, D C La, 233 F Supp 85—Petition of U S., D C N C, 303 F Supp 1282

87. US—Shiver v Burnside Terminal Co, D C La, 392 F Supp 1078

N Y—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514

89. U.S—Sanford Bros Boats, Inc v Vidrine, C A La, 412 F 2d 958—White v Rimrock Tidelands, Inc, C A La, 414 F.2d 1336—Brattoli v Kheel, D C N Y, 302 F Supp 745

Negligence held shown

La—Percle v. Ordoyne, App, 150 So 2d 902, writ ref 152 So 2d 561, 244 La 464

91. U.S.—O F Nelson & Co v U S, C C A Cal, 149 F 2d 692, foll 149 F 2d 815 and 149 F 2d 816, motion den 169 F 2d 833 Motion den 169 F 2d 833—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc.2d 514—Lopez v Grace Line, D C Cal, 302 F Supp. 753

Cal.—Longfellow v. Mexican Vessel Presidente Miguel Aleman, 111 Cal.Rptr 643, 36 C A.3d 508

Hiring dangerous crew member breaches seaworthiness duty

U.S—Deakle v John E Graham & Sons, C A 1 (Ala), 756 F 2d 821, reh. den. 763 F.2d 419

Stable and proper construction

U S—Glen Southern Shipping Corp v. Norfolk Towing Corp., D.C.Va, 135 F Supp 146

Lack of information held not a defense

U S—Glen Southern Shipping Corp v Norfolk Towing Corp, D C Va, 135 F Supp 146

Reasonable fitness sufficient

U S—St Claire v Mid-Continent Barge Lines Co, D C Minn, 249 F Supp 938—Hill v Flota Mercante Grancolombiana, S A, D C La, 267 F Supp 380 Affd 405 F 2d 878, cert den 89 S Ct 1995, 395 U S 934, 23 L Ed 2d 449—In re Brown & Root Marine Operators, Inc, D C Tex, 267 F Supp 588, affd, C A, 377 F 2d 724

Cal—Davis v Matson Nav Co, 68 Cal Rptr 434, 262 C A 2d 25

Vessel insufficiently or defectively equipped

U S—Waldron v Moore-McCormack Lines, Inc, N Y, 87 S Ct 1410, 386 U S 724, 18 L Ed 2d 482

Lack of adequate safety equipment as unseaworthiness

U S—White v Rimrock Tidelands, Inc, C A La, 414 F 2d 1336

92. Liability held not shown

U S—Tim v American President Lines, Limited, C A Cal, 409 F 2d 385

Imputed negligence. The doctrine of imputed negligence applies in admiralty.[92.5]

92.5. U S—Drewery v Daspit Bros Marine Divers, Inc, C A La, 317 F 2d 425

§ 77. —— Negligent Management or Navigation

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93. U S—Strom v Anderson, D.C N Y., 114 F Supp 767—Tracy Towing Line v City of Jersey City, D C N J, 105 F Supp 910—Northern Petroleum Tank S S Co v City of New York, D C N Y, 181 F Supp 192, mod on oth grds., C A, 282 F.2d 120—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963—Rogers v Tallman & Mack Fish & Trap Co, D C R I, 234 F Supp 358—Petition of Mahoney, D C N H, 255 F Supp 310—Couch v Bowman, D C Tenn, 263 F Supp 714—Armstrong v Chambers and Kennedy, D.C Tex, 340 F Supp 1220, affd in part, revd in part on oth grds, C A, 499 F 2d 263, reh den 572 F 2d 1061, cert dism. 96 S Ct 163, 423 U S 886, 46 L Ed 2d 118

Proximate cause

(2) Held not shown

U S—Oil Transfer Corp v The Cree, C A N Y, 224 F 2d 849—Ohio River Co v Continental Grain Co, D C Ill, 352 F Supp 505

(3) Other matters

U S—Derby Co v. A L Mechling Barge Lines, Inc, D C La, 258 F Supp 206, affd, C A, 399 F 2d 304

Fla—Jowanowitch v Florida Power & Light Co, App, 277 So 2d 799

Acts constituting negligence

U S—American President Lines, Limited v Towboat Seneca, C A N Y, 261 F Supp 800, affd., C.A., 384 F 2d 511—In re Cenac Towing Co, D C La, 276 F Supp 317, affd., C A., 404 F 2d 698—Cenac Towing Co v Keystone Shipping Co, C A.La, 404 F 2d 698

Negligence and unseaworthiness distinguished

U S—Petition of U S, D C N C, 303 F Supp 1282—Williams v Shipping Corp of India, Ltd, D.C.Ga, 354 F.Supp 626

Speed boat deemed "dangerous instrumentality"

U.S—Green v Ross, D C.Fla, 338 F Supp 365, affd, C A, 481 F 2d 102 Cert den 94 S Ct 577, 414 U S 1068, 38 L Ed 2d 473

94. U S—Lewis v Maritime Overseas Corp, D C Or, 163 F Supp 453—A/S Skaugaas (I M Skaugen) v T/T P W Thirtle, D C Md, 227 F Supp 281 Affd, C A, 345 F 2d 275, cert den 86 S Ct 292, 382 U S 918, 15 L Ed 2d 233

Conn—R & H Development Co v Diesel Tanker, J A Martin, Inc, Cir A D, 203 A 2d 766, 2 Conn Cir 622

Charter immaterial

U S—McWilliams Dredging Co v U S, D C La, 105 F Supp 582

Forcing vessel to run aground to avoid collision

U S—Moran Towing & Transp Co v Conners-Standard Marine Corp, C A N Y, 285 F 2d 368, 86 A L R 2d 1227

Water skier

U S—Kaiser v Traveler's Ins Co, D C La, 359 F Supp 90, affd, C A, 487 F 2d 1300, reh den 496 F 2d 531

Cal—Press v Lyford, 111 Cal Rptr 817, 36 C A 3d 986

Ga—Sanders v Griffin, 215 S E 2d 720, 134 Ga App 689

Iowa—Pfeiffer v Weiland, 226 N W 2d 218

No liability

U S—Dreher v U S, D C Cal, 375 F Supp 1061

95. U S—Kaiser v Traveler's Ins Co, D C La, 359 F Supp 90, affd, C A, 487 F 2d 1300, reh den 496 F 2d 531

96. Vessels held not liable

(4) Other vessels

U S—American Independent Oil Co v. M S. Alkaid, D C.N Y, 289 F Supp 329—Dreher v U S, D C Cal, 375 F Supp 1061

Mich—Torrez v Willett, 115 N W 2d 393, 366 Mich 465

Motorboat laws

Fla—Rountree v. A. P Moller S.S Co, App, 218 So 2d 771

"Operator" defined

Iowa—Pfeiffer v Weiland, 226 N W 2d 218

97. U S—Maroceano Compania Naviera S A. of Panama v City of Los Angeles, D C Cal, 193 F Supp 529—Placid Oil Co S S Willowpool, D C Tex., 214 F Supp 449—Helgesen v. U S, D.C.N Y., 275 F Supp 789—In re Cenac Towing Co, D C La, 276 F Supp 317, affd, C A, 404 F 2d 698—Dalldorf v Higgerson-Buchanan, Inc, C A Va, 402 F 2d 419—Nosal v Calmar S.S. Corp, D.C.Pa, 339 F Supp. 1235, affd, C.A, 475 F 2d 1395

Mass—Ellingsgard v Silver, 223 N E 2d 813, 352 Mass 34

Mich—Torrez v Willett, 115 N.W 2d 393, 366 Mich 465

N Y—Deuel v. Russell, 256 N.Y S 2d 836, 23 A.D 2d 614

Wash.—Tompkins v. Gering, 391 P.2d 957, 64 Wash 2d 389

99. U S—Williamson v. The Carolina, D C N.C, 158 F Supp. 417—Board of Com'rs of Port of New Orleans v M/V Agelos Michael, D C La, 390 F Supp. 1012

1. U S.—Oil Transfer Corp. v Westchester Ferry Corp, D C N Y., 173 F.Supp. 637

2. U S—Chesapeake & O Ry Co v Cleveland Tankers, D C Mich, 121 F Supp 830—Deep Sea Tankers, Limited v The Long Branch, C.A.N.Y, 258 F 2d 757, cert den 79 S Ct 316, 358 U.S 933, 3 L Ed 2d 305, and 79 S Ct 320, 358 U S 934, 3 L Ed 2d 305, reh den 79 S Ct. 578, 359 U.S 921, 3 L Ed.2d 583—Patterson Terminals, Inc v. S.S Johannes Frans, D.C.Pa, 209 F.Supp. 705—Armstrong v Chambers and Kennedy, D C Tex., 340 F.Supp 1220, affd. in part. revd in part on oth. grds., C A., 499 F.2d 263, reh den. 512 F 2d 1061, cert dism 96 S Ct 163, 423 U.S. 886, 46 L.Ed 2d 118

Conn.—R & H Development Co v. Diesel Tanker, J. A. Martin, Inc, Cir.A.D., 203 A 2d 766, 2 Conn.Cir. 622

NY—People v Cummings, 233 NYS2d 724, 36 Misc 2d 800

Operator of pleasure boat

La—Roy v Swayze, App, 194 So 2d 109, writ ref 195 So 2d 644, 250 La 369

Duties regarding furnishing crew

US—Petition of US, DCNC, 303 F Supp 1282—Lemar Towing Co, Inc v Fireman's Fund Ins Co, DC La, 352 F Supp 652, affd, CA, 471 F 2d 609, reh den 478 F 2d 1402, cert den 94 S Ct 292, 414 US 976, 38 L Ed 2d 219

Lookout

US—Frost v Gallup, DC RI, 329 F Supp 310

Absolute duty

US—Greene v Vantage SS Corp, CA Va, 466 F 2d 159

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3. US.—N M Patterson & Sons, Limited v City of Chicago, D.C Ill, 209 F Supp 576, revd on oth grds, CA, 324 F 2d 254—Patterson Terminals, Inc v SS Johannes Frans, DC Pa, 209 F Supp 705—In re International Marine Development Corp., DC Miss, 328 F Supp. 1316, affd, CA, 451 F 2d 763, affd, 463 F 2d 238

NY—People v Cummings, 233 NYS 2d 724, 36 Misc 2d 800

Failure to maintain proper lookout

US—Anthony v International Paper Co, CA SC, 289 F 2d 574—US v The Martin, DC Ill, 198 F Supp 171, affd, CA, 313 F 2d 851

Conn—R & H Development Co v Diesel Tanker, J A Martin, Inc, Cir A D, 203 A 2d 766, 2 Conn Cir 622

Mo—Nakos v Dean, App, 417 S W 2d 680

NC—Williams v McSwain, 102 S E 2d 464, 248 N C 13

Storm warnings

US—US v The Westervelt, DC NY, 135 F Supp 596

Emergency

U.S—Pennsylvania R Co v The Marie Leonhardt, D.C.Pa., 202 F.Supp 368 Affd., CA, 320 F 2d 262—Petition of Trawler Snoopy, Inc., DC Me, 268 F Supp. 951.

Use of anchors

US—Petition of Kinsman Transit Co, CA NY, 338 F 2d 708, cert den. 85 S Ct. 1026, 380 US 944, 13 L.Ed 2d 963

Failure to use radar

US.—In re Cenac Towing Co, D.C.La, 276 F Supp 317, affd, C.A, 404 F 2d 698.

Starboard hand rule

US—Geophysical Service, Inc v F/V Tempest, DC Tex, 293 F Supp 179

4. U.S.—Petition of American Dredging Co, DC Pa, 141 F.Supp 582, affd, C.A., 235 F.2d 618, cert gr 77 S Ct 356, 352 U.S 965, 1 L.Ed 2d 320, revd on oth grds 78 S Ct. 394, 355 U.S 426, 2 L Ed.2d 382—Metzger v S S Kirsten Torm, DC Md, 245 F Supp 227—Tebbs v Baker-Whiteley Towing Co, DC Md., 271 F Supp 529. Affd, C.A, 407 F 2d 1055—American Zinc Co v Foster, D.C.Miss, 313 F Supp. 671, mod on oth. grds., C.A, 441 F.2d 1100, cert. den 92 S Ct 99, 404 U.S. 855, 30 L Ed 2d 95.

Conn—R & H Development Co v. Diesel Tanker, J A. Martin, Inc., Cir A.D., 203 A.2d 766, 2 Conn Cir 622.

Tug leaving towed barge

(2) Other matters.

U.S.—U.S v. Powell Bros Barge No 128, DC Fla., 249 F Supp. 553

Measure of care

U.S.—Boudoin v. J. Ray McDermott & Co, CA La, 281 F 2d 81—Petition of Trawler Snoopy, Inc, D.C.Me, 268 F Supp 951

Ark—Parker v. Price, 411 S W.2d 12, 241 Ark 940

Care as to swimmer

W Va—Nugen v Hildebrand, 114 S E 2d 896, 145 W Va 420

Mistake in judgment

US—Boudoin v J Ray McDermott & Co, CA La, 281 F 2d 81

Working dredge

US—Dredge Cartegena v T/T P W Thurtle, CA Md, 345 F 2d 275, cert den 86 S Ct 292, 382 US 918, 15 L Ed 2d 233

Submarine structures

US—Atlantic Pipe Line Co v Dredge Philadelphia, DC Pa, 247 F Supp 857, affd, CA, 366 F 2d 780

Reasonable care

US—Dreher v US, DC Cal, 375 F Supp 1061

7 US—In re Midland Enterprises, Inc, DC Ohio, 296 F Supp 1356

8. US—Williamson v The Carolina, DC NC, 158 F Supp 417—Anthony v International Paper Co, CA SC, 289 F 2d 574—O'Donnell Transp Co v M/V Maryland Trader, DC NY, 228 F Supp 903—Scott-Paine v Motortanker V L Keegan II, CA NY, 339 F 2d 422

Conn—R & H Development Co v Diesel Tanker, J A Martin, Inc, Cir A D, 203 A 2d 766, 2 Conn Cir 622

Mich—Torrez v Willett, 115 N W 2d 393, 366 Mich 465

9. US—Williamson v The Carolina, DC NC, 158 F Supp 417

Conn—R & H Development Co v Diesel Tanker, J A Martin, Inc, Cir A D, 203 A 2d 766, 2 Conn Cir 622

Position of running lights on injured vessel held immaterial

US—Indian Towing Co v The Lyons Creek, DC La, 187 F Supp 774, affd, CA, 293 F 2d 107, cert den 82 S Ct 951, 369 US 861, 8 L Ed 2d 19

Wave wash case governed by admiralty law

US—Neilson-Moran Marine Corp v US, DC SC, 239 F Supp 94.

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10. Conn—R & H Development Co v Diesel Tanker, J A Martin, Inc, Cir A D, 203 A 2d 766, 2 Conn Cir 622

11. US—Dufrene v The Diversity, DC La, 163 F Supp 331, affd, CA, 272 F 2d 880—Indian Towing Co v The Lyons Creek, DC La, 187 F Supp 774, affd., CA, 293 F 2d 107, cert den 82 S Ct 951, 369 US 861, 8 L Ed 2d 19—Byrd v Belcher, DC Tenn., 203 F Supp 645—O'Donnell Transp Co v M/V Maryland Trader, DC NY, 228 F Supp 903

Conn—R & H Development Co v Diesel Tanker, J A Martin, Inc, Cir A D, 203 A 2d 766, 2 Conn Cir 622

12 US—Dufrene v The Diversity, DC La, 163 F Supp 331, affd, CA, 272 F 2d 880

19. US—Williamson v. The Carolina, DC NC, 158 F Supp 417—Moran v The Georgie May, DC Fla, 164 F Supp 881—US v Vereen, DC SC, 236 F Supp 1018

20. US—Moran v The Georgie May, DC Fla, 164 F.Supp 881.

Negligence not shown

US.—Scott-Paine v Motortanker V L Keegan II, CA NY, 339 F 2d 422

23. US—Moran v The Georgie May, DC Fla, 164 F Supp 881

24. US—Williamson v The Carolina, DC NC, 158 F Supp 417

Damage not caused by violation of rules

US—Lowery v Hudson River Day Line, DC NY, 132 F Supp. 629, affd, CA, 249 F 2d 656

Contributory negligence not shown

US—Couch v Bowman, DC Tenn, 263 F Supp 714

25. US—Williamson v The Carolina, DC NC, 158 F Supp 417—Moran v The Georgie May, DC Fla, 164 F Supp 881

26. US—Williamson v The Carolina, DC NC, 158 F Supp 417

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28. US—Monsanto Co v Edwards Towing Corp, DC Mo, 318 F Supp 13

29. US—O'Donnell Transp Co v M/V Maryland Trader, DC NY, 228 F Supp 903

32. **In extremis rule inapplicable**

US—Michigan Bell Tel Co v Copper Range R Co, DC Mich, 355 F 2d 678

Matters held not proximate cause

US—Petition of Potomac Sand & Gravel Co, DC Md, 253 F Supp 268

Acts held to constitute negligence

US—Petition of Potomac Sand & Gravel Co, DC Md, 253 F Supp 268

35. US—Diamond State Tel Co v Atlantic Refining Co, CA Pa, 205 F 2d 402—US v Powell Bros Barge No 128, DC Fla, 249 F Supp 553

Pa—Bell Tel Co of Pa v Dravo Corp, 88 A 2d 737, 371 Pa 98

36. US—Essex County Elec Co v The Godafoss, 129 F Supp 657

Failure of cable-laying vessel to display proper lights

US—Diamond State Tel Co v Atlantic Refining Co, CA Pa, 205 F 2d 402

40. US—Merritt-Chapman & Scott Corp v Cornell SS Co, CA NY, 265 F 2d 537—Gartland SS Co v Elgin, J & E Ry Co, CA Ill, 277 F 2d 382—N M Paterson & Sons, Limited v City of Chicago, DC Ill, 209 F Supp 576, revd on oth grds, C.A, 324 F 2d 254—Southern Pac Co v Commercial Transport Corp, DC La, 249 F Supp 377—US v Powell Bros Barge No 128, DC Fla, 249 F Supp 553—Empire Seafoods, Inc v Anderson, C A Fla, 398 F 2d 204, cert den 89 S Ct 449, 393 US 983, 21 L Ed 2d 444—Petition of Canal Barge Co, DC Miss, 323 F Supp 805, affd in part, revd in part on oth grds, CA, 480 F 2d 11, op am on oth grds 513 F 2d 911, cert den 96 S Ct 71, two cases, 423 US 840, 46 L Ed 2d 60—Dow Chemical Co v Dixie Carriers, Inc, DC Tex, 330 F Supp 1304, affd, C.A, 463 F 2d 120, cert den 93 S Ct 525, 409 US 1040, 34 L.Ed 2d 490

41. US—C.J.S. quoted in State Road Dept of Fla v Gulf States Marine & Min Co, DC Fla, 168 F Supp 242, 244, affd, CA, 269 F 2d 83—Penn Central Co v Buckley & Co, DC NJ, 293 F Supp 653, affd, CA, 415 F 2d 762—C.J.S. quoted in Sabine Towing & Transp Co v St Joe Paper Co, DC Fla, 297 F Supp 748, 751

Narrow channel rule inapplicable

US—Pennsylvania R Co v SS Marie Leonhardt, CA Pa, 320 F 2d 262

44. **Last clear chance doctrine inapplicable**

US—Pennsylvania R Co v The Marie Leonhardt, DC Pa, 202 F Supp 368 Affd, CA, 320 F 2d 262

Manner of signal

US—Pennsylvania R Co v SS Marie Leonhardt, CA Pa, 320 F 2d 262—US v Sabine Towing & Transp Co, DC La, 289 F Supp 250

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46. US—Hudson County v The Chancellor, DC NJ, 121 F Supp 29—Petition of Kinsman Transit Co, CA NY, 338 F 2d 708, cert den 85 S Ct 1026, 380 US 944, 13 L Ed 2d 963—Chesapeake Bay Bridge and Tunnel Dist v Oil Screw Prince, DC Va, 298 F Supp 881

Standards applicable in absence of statutory violation

US—Pennsylvania R Co v The Marie Leonhardt, D C Pa, 202 F Supp 368 Affd, C A, 320 F 2d 262

Statute valid

US—Molinos de Puerto Rico, Inc v Sheridan Towing Co, D C Puerto Rico, 62 F R D 172

47. US—Pennsylvania R Co v The Marie Leonhardt, D C Pa, 202 F Supp 368, affd, C A, 320 F 2d 262—N M Paterson & Sons, Limited v City of Chicago, D C Ill, 209 F Supp 576, revd on oth grds, C A, 324 F 2d 254

48. US—Empire Seafoods, Inc v Anderson, C A Fla., 398 F 2d 204, cert den 89 S Ct 449, 393 US 983, 21 L Ed 2d 444

50. US—South Carolina State Highway Dept v The Fort Fetterman, D C S C, 177 F Supp 76, affd, C A, 278 F 2d 921—International Terminal Operating Co v Naviera Aznar, S A, D C N Y, 198 F Supp 214—Chesapeake Bay Bridge and Tunnel Dist v Oil Screw Prince, D C Va, 298 F Supp 881—State of Or By and Through State Highway Commission v Tug Go-Getter, D C Or, 299 F Supp 269, mod in part on oth grds, affd in part, revd in part on oth grds, C A, 468 F 2d 1270—In re Great Lakes Towing Co, D C Ill, 348 F Supp 549, affd, C A, 505 F 2d 579

Similarly, recovery may be had for injury to a canal lock[51 5]

51.5. US—Hill v George Engine Co, D C La, 190 F Supp 417—Logan Charter Service, Inc v Cargill, Inc, C A Minn, 373 F 2d 54

In addition, the United States may recover for injuries to other structures caused by the negligence of a vessel colliding therewith.[51 10]

51.10. Navigational light

US—US v M/V Martin, C A Ill, 313 F 2d 851

Buoy

US—American President Lines, Limited v Towboat Seneca, D C N Y, 261 F Supp 800, affd, C A, 384 F 2d 511—US v Tug Otto, D C Tex, 296 F Supp 1130, affd C A, 404 F 2d 54

52. Tex—William B Patton Towing Co v Spiller, Civ App, 440 S W 2d 869

Absence of sea terminal owner's mooring master does not constitute negligence in maintenance of terminal.[52 5]

52.5. US—Esso Standard Oil S A v S S Gasbras Sul, D C N Y, 239 F Supp 212, revd on oth grds, C A, 387 F 2d 573, cert den 88 S Ct 1808, 391 U S 914, 20 L Ed 2d 653

53. US—Cabins Tanker Industries, Inc v The Rio Maracana, D C Va, 182 F Supp 811, affd., C A, 285 F 2d 592, cert den 81 S Ct 1902, 366 U S 948, 6 L Ed 2d 1241—International Terminal Operating Co v Naviera Aznar, S A, D C N Y, 198 F Supp 214—Sabine Towing & Transp Co v St Joe Paper Co, D C Fla, 297 F Supp 748

Where pilot not employee of owner

US—People of State of Cal v The Jules Fribourg, D.C.Cal., 140 F.Supp 333

55. US—Louisville & N R Co v The Commander, D.C Ala, 199 F Supp 217—Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, C A Va, 404 F 2d 1001—Sabine Towing & Transp Co v St Joe Paper Co, D C Fla, 297 F Supp 748—Prevatt v M/V Diana, D C Fla., 322 F Supp 1025

56. US.—McWilliams Dredging Co. v U S, D C La, 105 F Supp 582—Prevatt v. M/V Diana, D C Fla, 322 F.Supp. 1025.

57. US—U.S v. S.S. President Van Buren, C.A Cal., 490 F.2d 504.

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58. US—Chesapeake Bay Bridge and Tunnel Dist v Lauritzen, C A Va, 404 F 2d 1001

59. Negligence not imputed from lack of license

US—US v The Martin, D C Ill, 198 F Supp 171, affd, C A, 313 F 2d 851

No statutory fault

US—Ohio River Co v Continental Grain Co, D C Ill, 352 F Supp 505

§ 78. —— Misconduct of Master or Crew

60. US—McMahan v The Panamolga, D C Md, 127 F Supp 659—Sociedad De Transportes Maritimos, S A v Panama Canal Co, D C Canal Zone, 163 F Supp 151, affd, C A, 272 F 2d 726—Hiernaux v M/V Queen City, D C Pa, 244 F Supp 511—Tebbs v Baker-Whiteley Towing Co, D C Md, 271 F Supp 529, affd, C A, 407 F 2d 1055—State of Or By and Through State Highway Commission v Tug Go-Getter, D C Or, 299 F Supp 269, mod in part on oth grds, affd in part, revd in part on oth grds, C A, 468 F 2d 1270—Blanchard v American Commercial Barge Line Co, D C La, 343 F Supp 920, affd, C A, 468 F 2d 950—Hanover Ins Co v Liberian Oceanway Corp, D C Puerto Rico, 398 F Supp 104

Fla—Rountree v A P Moller S S Co, App, 218 So 2d 771

La—Board of Com'rs of Port of New Orleans v Gypsum Transp, Limited, App, 263 So 2d 385, writ den 266 So 2d 442, 262 La 1155

Negligence of crew

US—Bultema Dock & Dredge Co v S S David P Thompson, D C Mich, 252 F Supp 881—Price v S S Yaracuy, C A La, 378 F 2d 156, on remand, D C, 306 F Supp 638—Mendoza v A/S J Ludwig Mowinckels Reders, D C N Y, 293 F Supp 1319

Tugboat master

US—Reederei Franz Hagen v Diesel Tug Resolute, D C Md, 400 F Supp 680

65. US—Gardner v National Bulk Carriers, Inc, D C Va, 190 F Supp 143 Revd on oth grds, C A, 310 F 2d 284, 91 A L R 2d 1023, cert den 83 S Ct 728, 372 U S 913, 9 L.Ed 2d 721

§ 79. —— Persons Liable

US—**C.J.S. black letter summary quoted in** St Hilaire Moye v Henderson, D C Ark, 364 F Supp 1286, 1295, affd, C A, 496 F.2d 973, cert den 95 S Ct 151, 419 U S 884, 42 L Ed 2d 125

71. US—Geo W Rogers Const Corp v U S, D C N Y, 118 F Supp 927—Bisso v Inland Waterways Corp, La, 75 S Ct 629, 349 U S 85, 99 L Ed 911—People of State of Cal v The Jules Fribourg, D C Cal, 140 F Supp 333—Armstrong v Chambers and Kennedy, D C Tex., 340 F Supp 1220, affd. in part, revd in part on oth grds, C A, 499 F 2d 263, reh. den 512 F 2d 1061, cert dism 96 S Ct 163, 423 U S 886, 46 L Ed 2d 118

Wash—Ginnis v Southerland, 313 P 2d 675, 50 Wash 2d 557

General agent held not liable

US—Atlantic Coast Line R Co v Agwilines, Inc, C A Fla, 195 F 2d 459

No contribution

US—Davis v American President Lines, D C Cal., 106 F Supp 729—Allen v States Marine Corp of Del, D C N Y, 132 F.Supp 146—Ammesmaki v Interlake S S Co, C A Ill, 342 F 2d 627—Coggins v James W Elwell & Co, Inc, D C Pa, 356 F Supp 612.

Finding of insurability held not warranty of seaworthiness

US—Young v Clea Lake Yacht Basin, Inc, D C Tex, 337 F Supp 1305, affd, C A., 473 F 2d 1389, cert den 94 S Ct 158, 414 U.S 856, 38 L.Ed 2d 106.

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72. US—US v Bissett-Berman Corp, C A Cal, 481 F 2d 764—St Hilaire Moye v Henderson, D C Ark, 364 F Supp 1286, affd, C A, 496 F 2d 973, cert den 95 S Ct 151, 419 U S 884, 42 L Ed 2d 125

Corporation permitting use by vacationing employee

N C—Jackson v Mauney, 132 S E 2d 899, 260 N C 388

Liability for conduct of bargee

US—Hutton Co v Arrow Builders Supply Corp, C A N Y, 371 F 2d 944

73. US—People of State of Cal v The Jules Fribourg, D C Cal, 140 F Supp 333

76. US—Cooper Stevedoring Co v Fritz Kopke, Inc, Tex, 94 S Ct 2174, 417 U S 106, 40 L Ed 2d 694

"Dominant mind doctrine"

La—Department of Highways v Southern Shipbuilding Corp, App, 217 So 2d 497, writ ref 219 So 2d 515, 253 La 740

Contribution permitted

US—US v Standard Oil Co of California, C A Cal, 495 F 2d 911

§ 80. —— Lien

78. Lien not preventable by charter

US—Diaz v The Seathunder, D C Md, 191 F Supp 807

§ 81. Actions and Other Proceedings

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95. US—Weyerhaeuser S S Co v Nacirema Operating Co, N Y, 78 S Ct 438, 355 U S 563, 2 L Ed 2d 491—J F McNamara Corp v. Motor Tanker Tabriz, D C Minn, 209 F.Supp. 212—Petition of Trawler Weymouth, Inc, D.C Mass, 223 F Supp 161

N Y—Padovano v Dampskibsselskabet Torm, A/S, 313 N.Y S 2d 284, 35 A D 2d 542

In rem or in personam

(2) Vessel cannot escape action in rem because of a bareboat charter.

US—Reed v. S S Yaka, Pa, 83 S Ct 1349, 373 U.S 410, 10 L Ed.2d 448, reh den 84 S Ct. 27, 375 U S 872, 11 L Ed.2d 101—Lopez v. Atlanta-Schiffahrts—G M B H, D C Puerto Rico, 259 F.Supp. 949.

(3) Other matters

US—Santiago v Hermanos, D C Puerto Rico, 255 F.Supp 932—In re Midland Enterprises, Inc, D C. Ohio, 296 F.Supp. 1356

97. US—Louisville & N R Co. v Arrow Transp Co, D C Ala, 170 F.Supp 597

Wash—Jensen v Arntzen, 406 P 2d 954, 67 Wash 2d 202.

98. U.S—Goltzman v Rougeot, D C La, 122 F Supp. 700.

Pa—Summers v Skibs, 32 D & C 2d 550

Operation of substituted service statute

US—Summers v Skibs A/S Myken, D.C Pa, 184 F Supp 745, affd, C A, 296 F.2d 548—Summers v Skibs A/S Myken, D C Pa, 191 F.Supp. 929, affd, C A, 296 F 2d 548—Leport v White River Barge Line, D.C Pa, 215 F Supp. 220, affd, C.A., 315 F.2d 129

2. US—Gulf Oil Corp. v U.S, D C Pa, 140 F Supp 504.

Affirmative defenses

Fla—Jowanowitch v Florida Power & Light Co, App., 277 So.2d 799

3. US—US v. Matson Nav Co, C.A Or., 201 F 2d 610

N Y —Atlantic Steamers Supply Co v Kulukundis, 307 N Y S 2d 275, 33 A D 2d 999

Complaint held sufficient

Ohio—Allan v. Mergard, 187 N E 2d 27, 174 Ohio St 132

4. Fla—Rountree v A P Moller S S Co, App, 218 So 2d 771

Contributory negligence

U S—Greene v Vantage S S Corp, C A Va, 466 F 2d 159

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9. U S—Smith v Acadia Overseas Freighters, D C Pa, 104 F Supp 793, vac on oth grds, C A, 202 F 2d 141—Salaky v The Atlas Barge No 3, C A N Y, 208 F 2d 174—Old Dominion Stevedoring Corp v U S, D C Va, 130 F Supp 662

11. U S—Madison v Matson Nav Co, D C Cal, 103 F Supp 749—Midland S S Line, Inc v The Arkansas, C A Ohio, 232 F 2d 81—Russell, Poling & Co v Conners Standard Marine Corp, C A N Y, 252 F 2d 167—Midwest Marine, Inc v Sturgeon Bay Shipbuilding & Dry Dock Co, D C Wis, 247 F Supp 283—Esso Standard Oil S A v S S Gasbras Sul, C A N Y, 387 F 2d 573, cert den 88 S Ct. 1808, 391 U S 914, 20 L Ed 2d 653—Antilles Shipping Co v Texaco, Inc, D C N Y, 321 F Supp 166

Mass—Ellingsgard v Silver, 223 N E 2d 813, 352 Mass 34.

Pa—General Painting Co v Charles Zubik & Sons, Inc, 107 P L J 351

12. U S—Old Dominion Stevedoring Corp v U S, supra, n 9—Russell, Poling & Co v Conners Standard Marine Corp, C A N Y, 252 F 2d 167—Holloway Concrete Products Co v Beltz-Beatty, Inc, C A Fla, 293 F 2d 474

13. U S.—Wabash R Co v The Irene Chotin, D C La, 175 F Supp. 709—O'Donnell Transp Co v M/V Maryland Trader, D C N.Y., 228 F Supp 903—Southern Pac Co v Commercial Transport Corp, D C La, 249 F Supp 377

14. U.S—Drake v. Inland Waterways Corp., D C Mo, 111 F.Supp 891—Gulf Oil Corp v The Patsy Chotin, D C Ky, 131 F.Supp. 489

Rule inapplicable under evidence

U S.—Southern Pac Co v U.S., D C La, 250 F Supp 912.

15. U S—Drake v Inland Waterways Corp, D C Mo, 111 F.Supp. 891—Candiano v Moore-McCormack Lines, Inc, D C N Y, 251 F.Supp 654, affd, C A, 382 F 2d 961, reh den 386 F 2d 444, cert. den 88 S Ct 1416, 390 U.S 1027, 20 L Ed.2d 284—U S v Tug Otto, D C Tex, 296 F Supp 1130, affd C A, 404 F 2d 54

16. U S—Patterson Oil Terminals, Inc v The Port Covington, D C.Pa, 109 F.Supp 953, affd, C A, 205 F 2d 694—Williamson v The Carolina, D C N C, 158 F Supp 417—Guzman v Pichirilo, Puerto Rico, 82 S.Ct 1095, 369 U S. 698, 8 L.Ed 2d 205—Chevron Oil Co v M/V New Yorker, D C La., 297 F Supp 412—Choy v Bouchelle, C.A Virgin Islands, 436 F.2d 319.

Pa—General Painting Co v. Charles Zubik & Sons, Inc, 107 P L.J 351

Inevitable accident

(2) Other instances.

U S—Brown & Root Marine Operators, Inc v. Zapata Off-Shore Co, C A.Tex, 377 F 2d 724—Ernest Const Co. v Tug Commodore, D C.Ala, 294 F Supp 15—Petition of Canal Barge Co, D.C. Miss., 323 F.Supp 805, affd in part, revd in part on oth. grds., C.A, 480 F.2d 11, op am on oth grds, 513 F 2d 911, cert den. 96 S Ct 71, two cases, 423 U S 840, 46 L Ed.2d 60

(3) Other statements.

U.S—Massman-Drake v Towboat M/V Hugh C. Blaske, D.C.La., 289 F.Supp 700.

Intervening cause

U S—U S v Barge CBC 603, D C.La, 233 F.Supp 85

Libelant violating statutory rule

U S—U S v Sabine Towing & Transp Co, D C La, 289 F Supp 250

Regulation held not statutory rule

U S—Afran Transport Co v U S, C A N Y, 435 F 2d 213, cert den 92 S Ct 72, 404 U S 872, 30 L Ed 2d 116

17. U S—Boudoin v J Ray McDermott & Co, D C La, 176 F Supp 900, revd on oth grds, C A, 281 F 2d 81—Patterson Terminals, Inc v S S Johannes Frans, D C Pa, 209 F Supp 705—Sulphur Terminals Co v Pelican Marine Carriers, Inc, D C La, 281 F Supp 570—Petition of Canal Barge Co, D C Miss, 323 F Supp 805, affd in part, revd in part on oth grds, C A, 480 F 2d 11, op am on oth grds, 513 F 2d 911, cert den 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60

18. U S—Smith v Acadia Overseas Freighters, D C Pa, 104 F Supp 793, vac on oth grds, C A, 202 F 2d 141—Wilson v Societa Italiana de Armamento (Sidarma), D C La, 279 F Supp 945, affd, C A, 409 F 2d 484

Collision with drawbridge

U S—U S v Sabine Towing & Transp Co, D C La, 289 F Supp 250

U S—Dow Chemical Co v Dixie Carriers, Inc, D C Tex, 330 F Supp 1304, affd, C A, 463 F 2d 120, cert den 93 S Ct 525, 409 U S 1040, 34 L Ed 2d 490

Facts justifying application of doctrine

(2) Other facts

La—Department of Highways v Schwabe, App, 79 So 2d 752

Doctrine held inapplicable

U S—Russell, Poling & Co v Conners Standard Marine Corp, C A N Y, 252 F 2d 167—Indian Towing Co v U S, C A La, 276 F 2d 300, cert den 81 S Ct 56, 364 U S 821, 5 L Ed 2d 51—Sea Trade Corp v Bethlehem Steel Co, Shipbuilding Division, C A N Y., 305 F 2d 131

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20. U S—Transcontinental Gas Pipe Line Corp v Mobile Drilling Barge or Vessel Mr Charlie, D C La, 294 F Supp. 1025, affd. in part, revd in part on oth grds, C A., 424 F 2d 684, cert den 91 S Ct 65, 400 U S 832, 27 L Ed 2d 64—Chevron Oil Co v M/V New Yorker, D C La, 297 F Supp. 412—Allied Chemical Corp v Edmundson Towing Co, D C La, 320 F Supp 448—Petition of Canal Barge Co, D C Miss, 323 F Supp 805, affd in part, revd in part on oth grds, C A, 480 F 2d 11, op am on oth grds. 513 F 2d 911, cert. den 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60—Louisville & N R Co v M/V Ciudad De Turbo, D C Ala, 330 F Supp 769—Dow Chemical Co v Dixie Carriers, Inc, D C Tex, 330 F Supp 1304, affd, C A, 463 F 2d 120, cert den 93 S Ct 525, 409 U S 1040, 34 L Ed 2d 490

Pa—General Painting Co v Charle-Zubik & Sons, Inc, 107 P L J 351.

Presumption inapplicable to collision with drawbridge not timely opened

U S.—Pennsylvania R Co v. The Marie Leonhardt, D.C.Pa., 202 F Supp. 368 Affd, C A, 320 F 2d 263

Collision with bridge

U S.—Kansas City Bridge Co v M/V Ole Miss, D C Miss, 215 F Supp 658—South Carolina State Highway Dept v Jack Neilson, Inc, D C.La, 289 F.Supp 239

21. U S.—Southern Pac Co v. U S, D.C La, 250 F Supp 912

22. U S—U S v The Martin, 198 F Supp 171, affd, C.A, 313 F 2d 851—Rawls Bros Contractors, Inc v U S, D.C Fla., 251 F Supp 47

24. U S—O'Donnell Transp Co v M/V Maryland Trader, D C N Y, 228 F Supp 903

26. U S.—Brown & Root Marine Operators, Inc v Zapata Off-Shore Co, C A Tex, 377 F 2d 724—Ernest Const Co v Tug Commodore, D C Ala 294 F Supp 15

27. U S—P Dougherty Co v U S, D C Del, 97 F Supp 287, revd on oth grds, C A, 207 F 2d 626, cert. den 74 S Ct 476, 347 U S 912, 98 L Ed 1068—Pennsylvania R Co v S S Marie Leonhardt, C A Pa, 320 F 2d 262—St Louis-San Francisco Ry Co v Motor Vessel D Mark, D C Ala, 243 F Supp 689—Sabine Towing & Transp Co v St Joe Paper Co, D C Fla, 297 F Supp 748

Sufficiency of rebuttal evidence

(3) Other matters

U S—Southern Pac Co v U S, D C La, 250 F Supp 912

28. U S—Louisville & N R Co v The Commander, D C Ala, 199 F Supp 217

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30. U S—Shelly Tractor & Equipment Co v The Boots, D C N C, 140 F Supp 425—Merritt-Chapman & Scott Corp v Cornell S S Co, C A N Y, 265 F 2d 537—Kansas City Bridge Co v M/V Ole Miss, D C Miss, 215 F Supp 658—Albanese v N V Nederl Amerik Stoomv Maats, D C N Y, 279 F Supp 635

Evidence held admissible

U S—Davis v Parkhill-Goodloe Co, C A Fla, 302 F 2d 489—Bryant v Partenreederei-Ernest Russ, C A Md, 330 F 2d 185—Scott-Paine v Motortanker V L Keegan II, C A N Y, 339 F 2d 422

Mass—Ellingsgard v Silver, 223 N E 2d 813, 352 Mass 34

31. Evidence held sufficient

(1) U S—Pure Oil Co v Bethlehem Steel Co, C A Tex, 391 F 2d 249—J F McNamara Corp v Motor Tanker Tabriz, D C Minn, 209 F Supp 212—Wilmar Marine Engineering & Sales Corp v M/V Perseo, D C La, 278 F Supp 345—Melanson Co v Hupp Corp, D C N J, 282 F Supp 859, affd C A, 391 F 2d 902—Geophysical Service, Inc v F/V Tempest, D C Tex, 293 F Supp 179—Savannah Ship Repair Co v Hellenic Lines Limited, D C Ga, 305 F Supp 438—M S I Shipping Co v Dade Drydock Corp., C A Fla, 431 F 2d 634—Cottle v Gallup, C A R I, 432 F 2d 43

Cal.—Sausalito Shipbuilding Co v La Rocca, 247 P 2d 425, 112 C A 2d 812

U S—Maritime Overseas Corp v Puerto Rico Drydock & Marine Terminals, Inc, C A Puerto Rico, 391 F 2d 1010

(2) U S—Falmouth Marine Railways, Inc v. Yacht Jim Bea, D C Mass, 304 F Supp 352

N Y—McGraw-Edison Co v Trinidad Corp, 309 N Y S 2d 26, 34 A D 2d 528

(4) U S—Shelly Tractor & Equipment Co v The Boots, D C N C, 140 F Supp 425—Charleston Shipyards, Inc v The Poling Bros V, D C S C, 188 F Supp 71—J F McNamara Corp v Motor Tanker Tabriz, D C Minn, 209 F Supp 212

Evidence held insufficient

(1) U S—Remington Rand, Inc v U S, D C N Y, 98 F Supp 334, affd, C A, 202 F 2d 276—McMillan Welding and Mach Works v General Towing Co, D.C La, 247 F Supp 402

(2) U S—Falmouth Marine Railways, Inc v Yacht Jim Bea, D C Mass, 304 F Supp 352

(3) U S—U S Lines Co v Maritime Shipcleaning & Maintenance Co, D C Pa, 317 F Supp 639—Antilles Shipping Co v Texaco, Inc, D C N Y, 321 F Supp 166

La—Babin v Lykes Bros. S S Co, App, 94 So 2d 715

32. Evidence held sufficient

(1) U S—Dog River Boat Service Inc v The Frances D, D C Ala, 192 F Supp 759

33. U S—Salaky v The Atlas Barge No 3, C A N Y, 208 F.2d 174

Evidence held sufficient

(1) U S—U S v Tug Otto, D C Tex, 296 F Supp 1130, affd, C A, 404 F.2d 54—Chevron Oil Co v M/V New Yorker, D C La, 297 F Supp 412—Griffin v Hunt Tool Co, C A La, 412 F 2d 328—Southern Pac Co v Alamo Chemical Transp Co, D C La, 300

F Supp 1002—Petition of Canal Barge Co, D C Miss, 323 F Supp 805, affd in part, revd in part on oth grds, C A, 480 F 2d 11, op am on oth. grds, 513 F 2d 911, cert den 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60

La—Department of Highways v Schwabe, App, 79 So 2d 752—Department of Highways v Southern Shipbuilding Corp, App, 217 So 2d 497, writ ref 219 So 2d 515, 253 La 740

Pa—General Painting Co v Charles Zubik & Sons, Inc, 107 P L J 351

Wash—Christensen v Columbia Acceptance Corp, 402 P 2d 497, 66 Wash 2d 347

(2) U S—Salaky v Atlas Tank Processing Corp, 120 F Supp 225

(4) U S—In re Brown & Root Marine Operators, Inc, D C Tex, 267 F Supp 588, affd, C A, 377 F 2d 724

(5) U.S—South Carolina State Highway Dept v Jack Neilson, Inc, D C La, 289 F Supp 239

Fla—Belcher Towing Co v Board of County Com'rs of Dade County, App, 233 So 2d 456

(6) U S—Massman-Drake v Towboat M/V Hugh C Blaske, D C La, 289 F Supp 700

(7) U S—Pennsylvania R Co v The Marie Leonhardt, D C Pa, 202 F Supp 368, affd, C A, 320 F 2d 262—Crescent Towing & Salvage Co v Dixilyn Drilling Corp, C.A Miss, 329 F 2d 754

(8) U S—Twenty Grand Towing, Inc v Dufrene, C A La, 272 F 2d 880

(10) U S—U.S v Sabine Towing & Transp Co, D C La, 289 F Supp 250

(11) U S—Hudson County v The Chancellor, D C N J, 121 F Supp 29—Oil Transfer Corp v The Cree, C A N Y, 224 F 2d 849—Merritt-Chapman & Scott Corp v Cornell S S Co, C A N Y, 265 F 2d 537—Trinidad Corp v Indian Towing Co, C A La, 293 F 2d 107, cert den 82 S Ct 951, 369 U S 861, 8 L Ed 2d 19—City of New York v McAllister Bros, Inc, C A N Y, 299 F 2d 227—Pennsylvania R Co v S S Marie Leonhardt, C A Pa, 320 F 2d 262—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963—Scott-Paine v Motortanker V L Keegan II, C A N Y, 339 F 2d 422—Michigan Bell Tel Co v Copper Range R Co, C A Mich, 355 F 2d 678—American President Lines, Limited v Towboat Seneca, C A N Y, 384 F 2d 511

Evidence held insufficient

(1) U S—U S v The Westervelt, 135 F Supp 596—Neilson-Moran Marine Corp v U S, D C S C, 239 F Supp 94—Esso Standard Oil S A v S S Gasbras Sul, C A N Y, 387 F 2d 573, cert den 88 S Ct 1808, 391 U S 914, 20 L Ed 2d 653

(3) U S—State Road Dept of Fla v Gulf States Marine & Min Co, D C Fla, 168 F Supp 242, affd, C A, 269 F 2d 83

Fla—Belcher Towing Co v Board of County Com'rs of Dade County, App, 233 So 2d 456

(8) U S—Essex County Elec Co v The Godafoss, 129 F Supp 657—American President Lines, Limited v Towboat Seneca, D C N Y, 261 F Supp 800, affd, C A, 384 F 2d 511—Esso Standard Oil S A v S S Gasbras Sul, C A N Y, 387 F 2d 573, cert den 88 S Ct 1808, 391 U S 914, 20 L Ed 2d 653

Mass—Ellingsgard v Silver, 223 N E 2d 813, 352 Mass 34

N Y.—Calderone v R & C Homes, Inc, 291 N Y S 2d 818, 30 A D 2d 662, affd 269 N E 2d 38, 28 N Y.2d 642, 320 N Y S 2d 250

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35. U S—Wabash R Co v The Irene Chotin, D C La, 175 F Supp 709

38. U.S—Ernest Const. Co v Tug Commodore, D C Ala, 294 F Supp 15

Evidence held sufficient

U.S—Esso Standard Oil, S A v The Sabrina, D C Canal Zone, 154 F Supp 720—Southern Pac Co v U.S., D C La., 250 F Supp 912

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44. U S.—Cottle v. Gallup, C.A.R I, 432 F.2d 43

Fla.—Hallbauer v. Hawley, App, 101 So.2d 52.

Motion for directed verdict

(1) Motion granted

U S—Marine Towing Co v Fairbanks, Morse & Co, D C Pa, 225 F Supp 467

(2) Motion denied

U S—Marine Towing Co v Fairbanks, Morse & Co, D C Pa, 225 F Supp 467

45. U S—Shelkofsky v Broughton, C A Fla, 388 F 2d 977

W Va—Nugen v Hildebrand, 114 S E 2d 896, 145 W Va 420

Whether proper lookout maintained

U S—Anthony v International Paper Co, C A S C, 289 F 2d 574

Ark—Parker v Price, 411 S W 2d 12, 241 Ark 940

Whether particular vessel was offender

Ill—Saltzman v Heineman, 253 N E 2d 520, 116 Ill App 2d 189

48. W Va—Nugen v Hildebrand, 114 S E 2d 896, 145 W Va 420

Last clear chance

U S—Pennsylvania R Co v S S Marie Leonhardt, C A Pa, 320 F 2d 262

49. W Va—Nugen v Hildebrand, 114 S E 2d 896, 145 W Va 420

50 U S—Smith v Acadia Overseas Freighters, supra, n 9

Wash—Bishop v Alaska S S Co, 404 P 2d 990, 66 Wash 2d 704

53. Failure to instruct held error

U S—Anthony v International Paper Co, C A S C, 289 F 2d 574

Instruction properly refused

U S—Anthony v International Paper Co, C A S C, 289 F 2d 574

Ark—Parker v Price, 411 S W 2d 12, 241 Ark 940

Instruction held erroneous

U S—J Ray McDermott & Co v Vessel Morning Star, C A Tex, 431 F 2d 714, reh 457 F 2d 815, cert den 93 S Ct 271, 292, 409 U S 948, 34 L Ed 2d 218

Ga—Stewart v Stephens, 166 S E 2d 890, 225 Ga 185, conf to 168 S E 2d 325, 119 Ga App 629

54. Evidence held to sustain finding

U S—Shaver Transp Co v Alaska Freight Lines, Inc, C A Wash, 315 F 2d 97

If evidence is strong enough, an officer can be found, from his handling of a single situation, to have been incompetent, and the court can make a finding that his employment was a breach of warranty of seaworthiness, without proof of anything else either of his record as a seaman, his background, his training or his personal qualities.[54.5]

54.5. U S—Petition of American Dredging Co, D.C Pa, 141 F Supp 582, affd., C A, 235 F 2d 618, cert gr 77 S Ct 356, 352 U S 965, 1 L Ed 2d 320, revd on oth grds 78 S Ct. 394, 355 U.S 426, 2 L Ed 2d 382

55. U S—Anderson v. Owens, C A Alaska, 205 F 2d 940, 14 Alaska 353—U.S v Pinckney, D C Ga, 150 F Supp 790—Atlantic Refining Co v Matson Nav Co, C A Pa, 253 F 2d 777—Williamson v The Carolina, D C N C, 158 F Supp 417—Merritt-Chapman & Scott Corp v Cornell S S Co., C A N Y, 265 F 2d 537—U S v The Martin, D C Ill, 198 F Supp 171, affd, C A, 313 F 2d 851—J Ray McDermott & Co v S S Egero, C A La, 453 F 2d 1202—Louisville & N R Co v. M/V Ciudad De Turbo, D C Ala, 330 F Supp 769

N Y—Transpacific S S Co v Marine Office of America, 163 N Y S 2d 171, 6 Misc 2d 881

Cost of repairing bridge

U S—Seaboard Air Line R Co v Marine Industries, Inc, D C S C, 237 F Supp 10

Damages based on loss of net earnings held not excessive

Wash—Christensen v Columbia Acceptance Corp, 402 P 2d 497, 66 Wash 2d 347

Repairs

U S—Bleakley Transp Co v Colonial Sand & Stone Co, C A N Y, 245 F 2d 576—Ernest Const Co v Tug Commodore, D C Ala, 294 F Supp 15

Rule of equal division held applicable to collision from mutual fault

U S—N M Paterson & Sons, Limited v City of Chicago, C A Ill, 324 F 2d 254

Cost of reproduction less depreciation

U S—Rawls Bros Contractors, Inc v U S, D C Fla, 251 F Supp 47—U S v Tug Otto, D C Tex, 296 F Supp 1130, affd, C A, 404 F 2d 54—Elgin, J & E Ry Co v American Commercial Line, Inc, D C Ill, 317 F Supp 175

Lost profit of oil well damaged

U S—Continental Oil Co v S S Electra, C A Tex, 431 F 2d 391, cert den 91 S.Ct 925, 401 U S 937, 28 L Ed.2d 216

Punitive damages

U S—St Hilaire Moye v Henderson, D C Ark, 364 F Supp 1286, affd, C A, 496 F 2d 973, cert den 95 S Ct 151, 419 U S 884, 42 L Ed 2d 125

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56. U S—Williamson v The Carolina, D C N C, 158 F Supp 417—Cascadia Lumber Co v Double T Indus, Inc, D C Or, 162 F Supp. 478

57. U S—Williamson v The Carolina, D C N C, 158 F Supp 417—Shaver Transp Co v Alaska Freight Lines, Inc, C A Wash, 315 F 2d 97—Petition of Kinsman Transit Co, C A N Y., 338 F 2d 708, cert. den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963—N M Paterson & Sons, Limited v City of Chicago, 209 F Supp 576, revd on oth. grds, C A, 321 F 2d 254

58. Apportionment

U S—Rawls Bros Contractors, Inc v U S, D.C Fla, 251 F Supp 47

A seaman may not recover for loss of prospective earnings resulting from negligent damage to a ship on which he is employed.[59.5]

59.5. U S—Casado v Schooner Pilgrim, Inc., D C Mass, 171 F Supp 78—Petition of Clipper Fishing Corp, D.C.Mass., 194 F Supp. 827.

Matters relating to the damages recoverable by the owner of a vessel for breach of contract have been adjudicated.[63.5]

63.5. U S—Sicula Oceanica, S A v Wilmar Marine Engineering & Sales Corp., C A.La, 413 F.2d 1332—Cottle v. Gallup, C A R I, 432 F.2d 43.

§ 82. Drydock Companies

Library References

Shipping ⇐87½.

64. U S—Stegemann v Miami Beach Boat Slips, C A. Fla, 213 F 2d 561—Coastal Drydock Corp v U S, D C N Y, 158 F.Supp 425

Bailor-bailee relationship

U.S.—Erlbacher v Republic Homes Corp. C A Mo, 263 F 2d 217

65. U S.—Calmes v Hyman, D C La, 113 F Supp 240

Presumption of negligence

(1) U S—Erlbacher v Republic Homes Corp, C A. Mo, 263 F 2d 217

(3) Other matters

U S—Mayer Boat Works, Inc v. Bright Marine Basin, Inc, D C N Y., 265 F.Supp. 352

Liability to cargo owner

US—Newport News Shipbuilding & Drydock Co v US, CA Va, 226 F 2d 137

Burden of proof

US—Erlbacher v Republic Homes Corp, CA Mo, 263 F 2d 217—Harrison Bros Drydock & Repair Yard, Inc v Atkins, DC Ala, 193 F Supp 386

Evidence held sufficient

US—Erlbacher v Republic Homes Corp, CA Mo, 236 F 2d 217—Harrison Bros Drydock & Repair Yard, Inc v Atkins, DC Ala, 193 F Supp 386—Mayer Boat Works, Inc v Bright Marine Basin, Inc, DC NY, 265 F Supp 352

Damages

US—Harrison Bros Drydock & Repair Yard, Inc v Atkins, DC Ala, 193 F Supp 386

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76. US.—Filipek v Moore-McCormack Lines, Inc, DC NY, 156 F Supp 854, affd, CA, 258 F 2d 734, cert den 79 S Ct 605, 359 US 927, 3 L Ed 2d 629—Williams v The Richard De Larrinaga, DC Va, 180 F Supp 6, affd, CA, 287 F 2d 732—Clevenger v Star Fish & Oyster Co, CA Ala, 325 F 2d 397—Chervy v Peninsular & Oriental Steam Nav Co, DC Cal, 243 F Supp 654, affd, CA, 364 F 2d 908, cert den 87 S Ct 714, 385 US 1007, 17 L Ed 2d 546

Navigation

U.S—Rogers v US, CA Fla, 452 F 2d 1149—Powers v. Bethlehem Steel Corp, CA Mass, 477 F 2d 643, reh den, CA, 483 F.2d 963, cert den 94 S Ct 160, 414 U.S. 856, 38 L Ed 2d 106

77. US—Petition of Boat Demand, Inc, DC Mass, 160 F Supp. 833—Yost v General Elec Co, DC NY., 173 F Supp 630—Course v Pacific Inland Nav. Co, DC Or., 234 F Supp 676, affd, CA, 368 F 2d 540, cert. den. 87 S Ct 1029, 386 US 963, 18 L.Ed.2d 112—Ferguson v Erie R Co, D.C.N.Y, 235 F Supp 72

La.—Pellegrin v. Fidelity & Cas. Co of New York, App., 193 So 2d 392.

Wash.—Zukowsky v. Brown, 488 P 2d 269, 79 Wash 2d 586

Seaworthiness

U.S—Pimion v. Mississippi Shipping Co., DC La, 156 F.Supp. 652—Wyborski v Bristol City Line of Steamships, Limited, D.C Md, 191 F Supp 884—Petition of US, DC Or, 216 F Supp 775—Mills v. Mitsubishi Shipping Co, CA.Tex, 358 F.2d 609, cert den. 87 S Ct. 1474, 386 U.S 1036, 18 L.Ed.2d 600—Adams v. US, C.A Cal., 393 F 2d 903—Hanks v. California Co, D.C La., 280 F Supp 730—James v. S S Jaladhan, D.C.La, 288 F Supp. 527—Solet v M/V Capt H V Dufrene, D.C.La, 303 F Supp. 980—Garner v Cities Service Tankers Corp., C A Ala, 456 F 2d 476—Tucker v Calmar S.S. Corp, C.A.Md, 457 F 2d 440, on remand, DC, 356 f.Supp. 709

Cal.—Davis v Matson Nav. Co, 68 Cal Rptr. 434, 262 C.a 2d 25

Mass.—Bono v Ocean Wave, Inc, 215 N.E 2d 666, 350 Mass. 470.

Seaworthiness inapplicable to fireman

U.S.—McDaniel v. The Lisholt, D.C.N.Y., 180 F.Supp. 24, affd, C.A., 282 F.2d 816, cert. den. 81 S Ct. 694, 365 U.S 814, 5 L.Ed.2d 692

Proximate cause

Wash—Adler v University Boat Mart, Inc., 387 P 2d 509, 63 Wash.2d 334.

Seaworthiness relative term

U.S.—Lemar Towing Co, Inc v. Fireman's Fund Ins Co., D.C.La, 352 F.Supp. 652, affd., CA, 471 F.2d 609, reh. den. 478 F 2d 1402, cert den. 94 S Ct 292, 414 U.S 976, 38 L.Ed.2d 219.

78. U.S—Rodriguez v. Coastal Ship Corp, D C.N.Y., 210 F.Supp. 38.

Negligence under doctrine of seaworthiness

US—Waldron v Moore-McCormack Lines, CA NY, 356 F 2d 247, revd on oth grds 87 S Ct 1410, 386 US 724, 18 L Ed 2d 482—Lemar Towing Co, Inc v Fireman's Fund Ins Co, DC La, 352 F Supp 652, affd, CA, 471 F 2d 609, reh den 478 F 2d 1402, cert den 94 S Ct 292, 414 US 976, 38 L Ed 2d 219

Negligence under doctrine of unseaworthiness

US—Adams v US, CA Cal, 393 F 2d 903—Hanks v California Co, DC La, 280 F Supp 730

Cal—Carlson v Pacific Far East Lines, 105 Cal Rptr 885, 29 CA 3d 883

Notice held insufficient

US—Hanks v California Co, DC La, 280 F Supp 730

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79. Fla—Jowanowitch v Florida Power & Light Co, App, 277 So 2d 799

Indemnity under implied warranty of workmanlike service not extended to noncontractual nonservice relationships

US—Schwartz v Compagnie General Transatlantique, CA NY, 405 F 2d 270

80. US—Ruhe v North German Lloyd Line, DC NY, 177 F Supp 368

82. US—McMahan v The Panamolga, DC Md, 127 F Supp 659—Mosely v US, DC Va, 271 F Supp 777—Theodories v Hercules Nav Co, CA La, 448 F 2d 701

85. US—Vessella v US, CA Va, 405 F 2d 599

Fla—Burton v Varner, App, 296 So 2d 641, 71 A L R 3d 1014

Matters considered

US—Hill v Pioneer S.S Co, DC Ohio, 134 F Supp 366, affd, CA, 227 F 2d 262

87. US—Fisher v US Lines Co., DC Pa, 198 F Supp 815

90. US—Bennett v The Mormacteal, DC NY, 160 F Supp 840, affd, CA, 254 F 2d 138, cert den 79 S Ct 26, 358 US 817, 3 L Ed 2d 59

91. U.S—Hanks v California Co, DC La, 280 F Supp. 730

Joint liability and contribution

(2) Other matters

U.S—Petition of Marine Mercante Nicaraguense, S A, DC NY., 248 F.Supp 15, mod on oth grds, CA, 364 F.2d 118, cert den 87 S Ct 710, 385 US 1005, 17 L Ed 2d 544, reh den 87 S Ct 851, 386 U S. 929, 17 L Ed 2d 803

Not liable

Fla—Burton v Varner, App, 296 So 2d 641, 71 A L R 3d 1014

92. US—Stallworth v McFarland, DC La, 350 F Supp 920, affd., CA, 493 F 2d 1354

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94. NY—Colban v Petterson Lighterage & Towing Corp, 264 N Y S 2d 403, 24 A D 2d 870, motion den 214 N E 2d 785, 17 N Y 2d 506, 267 N Y S 2d 507, affd 226 N.E 2d 541, 19 N Y 2d 794, 279 N.Y S 2d 735.

96. Warranty of seaworthiness

U.S.—Pimion v Mississippi Shipping Co., DC La, 156 F Supp. 652.

§ 84. Particular Classes of Persons

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1. U.S.—Kermarec v Compagnie Generale Transatlantique, NY, 79 S Ct. 406, 358 US 625, 3 L Ed.2d 550—Hugev v Dampskisaktieselskabet International, D.C.Cal., 170 F Supp 601 Affd., C.A., 274 F 2d 875, cert den 80 S Ct 1237, 363 U.S 803, 4 L Ed 2d 1147—Kissinger v US, DC N.Y., 176 F Supp 828—Chervy v. Peninsular & Oriental Steam Nav. Co, C.A Cal., 364 F.2d 908, cert den 87 S Ct 714, 385 U S 1007, 17 L Ed 2d 546—Federal Marine Terminals, Inc v Burnside Shipping Co, Ill, 89 S Ct 1144, 394 U S 404, 22 L Ed 2d 371—Dennis v Central Gulf S S Corp, D C La, 323 F Supp 943, affd, C A, 453 F 2d 137, cert den 93 S Ct 286, 409 U S 948, 34 L Ed 2d 218—Brennan v Matson Nav Co, D C Cal, 345 F Supp 1179

Wash—Zukowsky v Brown, 488 P 2d 269, 79 Wash 2d 586

Duty to swimmer

(2) Other matters

La—Roy v Swayze, App, 194 So 2d 109, writ ref 195 So 2d 644, 250 La 369

Duty to anticipate invitee's acts

La—Barrilleaux v Noble Drilling Corp, App, 160 So 2d 319

Violation of regulations or rules

US—Olsen v New York Cent R Co, DC NY, 232 F Supp 28, affd, CA, 341 F 2d 233

Negligence not shown

US—Sherman v US, DC Wis, 283 F Supp 760

2. US—Kissinger v US, DC NY, 176 F Supp 828

No right to sue on warranty of seaworthiness

US—Stewart v Steamer Blue Trader, C A Mass, 428 F 2d 361

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3. Persons held invitees

(1) US—Rothman v U-Steer-It, Inc, CA Fla, 247 F 2d 803—Kissinger v US, DC NY, 176 F Supp 828

La—Pellegrin v Fidelity & Cas Co of New York, App, 193 So 2d 392

(4) Social guest on houseboat

Fla—Judy v Belk, App, 181 So 2d 694

Implied invitation

US—Johnson v Mobile Towing & Wrecking Co, DC Ala, 224 F Supp 811, affd, CA, 339 F 2d 205

Termination of invitation

La—Barrilleaux v Noble Drilling Corp, App, 160 So 2d 319

5. US—Filipek v Moore-McCormack Lines, Inc, DC NY, 156 F Supp 854, affd, CA, 258 F 2d 734, cert den 79 S Ct 605, 359 US 927, 3 L Ed 2d 629

6. La.—Pellegrin v Fidelity & Cas Co of New York, App, 193 So 2d 392

8. La—Pellegrin v Fidelity & Cas Co of New York, App, 193 So.2d 392

9. La—Pellegrin v Fidelity & Cas Co of New York, App, 193 So 2d 392

11. US—Chervy v Peninsular & Oriental Steam Nav Co, CA Cal, 364 F 2d 908, cert. den 87 S Ct. 714, 385 US 1007, 17 L Ed 2d 546

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18. US—Isaacson v Jones, CA Wash, 216 F 2d 599

Falling or stepping into open hatch

La—Pellegrin v Fidelity & Cas Co of New York, App, 193 So 2d 392

Comparative negligence

La—Pellegrin v Fidelity & Cas. Co of New York, App, 193 So 2d 392.

Swimmer

La—Roy v Swayze, App, 194 So 2d 109, writ ref 195 So 2d 644, 250 La 369

19. US—Kermarec v Compagnie Generale Transatlantique, NY, 79 S Ct 406, 358 US 625, 3 L Ed 2d 550

20. Risk not assumed

(2) Other cases

US—Isaacson v Jones, 216 F.2d 599

A shipowner may be exonerated from liability to a shipboard visitor for

ordinary acts of negligence by exculpatory provisions in the boarding pass.[21.5]

21.5. U S—Chervy v Peninsular & Oriental Steam Nav Co, D C Cal, 243 F Supp 654, affd, C A, 364 F 2d 908, cert den 87 S Ct 714, 385 U S 1007, 17 L Ed 2d 546

22. U S—Johnson v Mobile Towing & Wrecking Co, D C Ala, 224 F Supp 811, affd, C A, 339 F 2d 205

23. U S—Johnson v Mobile Towing & Wrecking Co, D C Ala, 224 F Supp 811, affd, C A, 339 F 2d 205

Tex—Vassallo v Nederl-Amerik Stoomv Maats Holland, 344 S W 2d 421, 162 Tex 52

24. U S—Johnson v Mobile Towing & Wrecking Co, D C Ala, 224 F Supp 811, affd, C A 339 F 2d 205—Johnson v Mobile Towing & Wrecking Co, C A Ala, 339 F 2d 205

La—Barrilleaux v Noble Drilling Corp, App, 160 So 2d 319

25. U S—Johnson v Mobile Towing & Wrecking Co, D.C Ala, 224 F Supp 811, affd, C A, 339 F 2d 205

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30. However, it has been held that the owner of a ship owes to all who are on board for purposes not inimical to his legitimate interest, including a licensee, the duty of exercising reasonable care under the circumstances of each case—Kermarec v Compagnie Generale Trans-atlantique, N Y, 79 S Ct 406, 358 U S 625, 3 L Ed 2d 550—Farmer v O/S Fluffy D, D C Tex, 220 F Supp 917—Sherman v U S, D C Wis, 283 F Supp 269

Wash—Zukowsky v Brown, 488 P 2d 269, 79 Wash 2d 586

34. Trespasser's negligence as sole proximate cause of injury

La—Barrilleaux v Noble Drilling Corp, App, 160 So 2d 319

37. U S—Brennan v Matson Nav Co, D C Cal, 345 F Supp 1179.

38. U S—Ruhe v North German Lloyd Line, D C N Y, 177 F Supp 368—White v U S, C A Va, 400 F 2d 74—Brennan v Matson Nav Co, D C Cal, 345 F Supp 1179

39. U S—McCown v Humble Oil & Refining Co, C A Va, 405 F 2d 596, cert den 89 S Ct 1996, 395 U S 934, 23 L Ed 2d 449—Hartzog v Head Line Co, Inc, D C Ill, 358 F Supp 960—Powers v Bethlehem Steel Corp, C A Mass, 477 F 2d 643, reh den, C A, 483 F 2d 963, cert den 94 S Ct 160, 414 U S 856, 38 L Ed 2d 106

Unseaworthiness of vessel

U S—Pimon v Mississippi Shipping Co, D C La, 156 F Supp 652—Desiano v Norddeutscher Lloyd, D.C N Y, 301 F Supp 241—Solet v M/V Capt H V Dufrene, D C La, 303 F Supp 980

Warranty of seaworthiness

U S.—Biggs v Norfolk Dredging Co, C A Va, 360 F 2d 360

42. U S—Ruhe v North German Lloyd Line, D C N Y, 177 F Supp 368.

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Liability over. A contractor may be liable over to a shipowner for a breach of warranty of workmanlike performance which results in injuries to one of its employees.[44.5]

44.5. U.S.—Mortensen v A/S Glittre, C.A N Y, 348 F.2d 383

Freight forwarder

U S—La Capria v Compagnie Maritime Belge, D.C N Y, 286 F.Supp. 980, affd in part revd in part on oth. grds, C.A, 427 F 2d 244.

46. U.S.—Dennis v. Central Gulf S S Corp, D C La, 323 F Supp. 943, affd, C A., 453 F.2d 137, cert den 93 S.Ct. 286, 409 U.S. 948, 34 L.Ed.2d 218.

47. Doctrine of indemnity not applied

U S—Schwartz v Compagnie General Transatlantique, C A N Y, 405 F 2d 270

57. Contributory negligence held not shown

U S—Dennis v Central Gulf S S Corp, D C La, 323 F Supp 943, affd, C A, 453 F 2d 137, cert den 93 S Ct 286, 409 U S 948, 34 L Ed 2d 218

59. U S—Allen v U S, D C Pa, 178 F Supp 21

N C—Williams v McSwain, 102 S E 2d 464, 248 N C 13

Volunteer

U S—Lee v Pure Oil Co, C A Tenn, 218 F 2d 711

Docking pilot

U S—Pennsylvania R Co v The Beatrice, C A N Y, 275 F 2d 209

Fireman

U S—McDaniel v The Lisholt, C A N Y, 282 F 2d 816, cert den 81 S Ct 694, 365 U S 814, 5 L Ed 2d 692

§ 85. —— Stevedores or Other Independent Contractors or Their Employees

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61. U S—Valerio v American President Lines, D C N Y, 112 F Supp 202

N Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, 107 N E 2d 463, 304 N Y 314

"Business guest"

U S—Lester v U S, D C N Y., 127 F Supp 413, revd on oth grds, C A, 234 F 2d 625, cert gr 77 S Ct 130, 352 U S 889, 1 L Ed 2d 85, cert dism 77 S Ct 384, 352 U S 983, 1 L Ed 2d 366—Guzman v S S Robin Mowbray, D C N Y, 288 F.Supp 943

63. U S—Armstrong v. Chambers and Kennedy, D C Tex, 340 F Supp 1220, affd in part, revd in part on oth grds, C A, 499 F 2d 263, reh den 512 F 2d 1061, cert dism 96 S Ct 163, 423 U S. 886, 46 L Ed 2d 118

Coast Guard regulation fixing standard of care construed and applied

U S—Marshall v Isthmian Lines, Inc., C A Tex, 334 F 2d 131—Anderson v S S Gulf Trader, D C La, 287 F Supp 783, affd, C A, 415 F.2d 316

Negligence standard under statute

U S—Bess v Agromar Line, C A S C, 518 F 2d 738

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65. U S—Petterson v Alaska S S Co., C A Wash, 205 F 2d 478, affd 74 S Ct 601, 347 U S 396, 98 L Ed 798, reh den 74 S Ct 848, 347 U S 994, 98 L Ed 1127—Phipps v N V. Nederlandsche Amerikaansche Stoomvart, Maats, C A.Or., 259 F 2d 143—Lewis v Maritime Overseas Corp, D C Or, 163 F Supp 453—Sloan v The Alcoa Pennant, D C Ala, 168 F Supp 571

66. U S—Hanks v California Co, D C La., 280 F Supp 730—Savard v. Marine Contracting, Inc, D C Conn, 296 F.Supp 1171.

Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

67. U S—Skibinski v Waterman S S Corp, D.C. N Y., 242 F.Supp 290, affd, C A., 360 F 2d 539, cert den 87 S Ct 2027, 387 U S. 921, 18 L.Ed 2d 975—St Claire v Mid-Continent Barge Lines Co, D C Minn., 249 F Supp 938—Baum v. U S, C A Fla, 427 F 2d 215, cert den 91 S Ct. 175, 400 U S. 916, 27 L Ed 2d 155

No in rem liability of vessel

U S—Farnum v S/S Oslofjord, D C N.Y, 220 F.Supp 199—Mosely v U.S, D C Va, 271 F Supp 777

68. U S.—Hartzog v Head Line Co, Inc, D C Ill, 358 F Supp 960—Lassiter v U S Lines, Inc, D C Va, 370 F.Supp 427.

69. U S—Valerio v American President Lines, D C N Y, 112 F Supp 202—Hagans v Ellerman & Bucknall S S Co, C A Pa, 318 F 2d 563—Allen v Union Barge Line Corp, D C La, 239 F Supp 1004, affd, C A, 361 F 2d 217, cert den 87 S Ct 713, 385 U S 1006, 17 L Ed 2d 545—Lusich v Bloomfield S S Co, C A La, 355 F 2d 770—Antoine v Lake Charles Stevedores, Inc, D C Fla, 249 F Supp 290, affd, C A, 376 F 2d 443 Cert den 88 S Ct 145, 389 U S 869, 19 L Ed 2d 146—Ramos v Beauregard, Inc, C A Puerto Rico, 423 F 2d 916, cert den 91 S Ct 101, 400 U S 865, 27 L Ed 2d 104—Chestnut v U S, D C Pa, 333 F Supp 969, affd, C A, 474 F 2d 1338

70. U S—Lucibello v Pope & Talbot, D C Pa, 103 F Supp 411, affd, C A, 206 F 2d 784—Crawford v Pope & Talbot, D C Pa, 103 F Supp 414, affd, C A, 206 F 2d 784—Blankenship v Ellerman's Wilson Line, New York, Inc, D C Md, 159 F Supp 479 Revd on oth grds, C A, 265 F 2d 455—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L Ed 2d 1082—Williams v Pennsylvania R Co, C A N Y, 313 F 2d 203, on remand, D C, 267 F Supp 495—Spann v Lauritzen, C A Pa, 344 F 2d 204, cert den 86 S Ct 386, 382 U S 938, 15 L Ed 2d 348, reh den 86 S Ct 531, 382 U S 1000, 15 L Ed 2d 489

Protection comparable to that of crewmen

U S—Giddens v Isbrandtsen Co, C A Va, 355 F 2d 125

71. U S—Kulukundis v Strand, C A Or, 202 F 2d 708—Fireman's Fund Indem Co v U S, D C Fla, 110 F Supp 937, affd, C A, 211 F 2d 773, cert den 75 S Ct 79, 348 U S 855, 99 L Ed 673—Testa v Moore-McCormack Lines, Inc, D C N Y, 229 F Supp 154—Hopson v M/V Karl Grammerstorf, D C.La., 330 F Supp 1260—Brinkley v H/f Eimskipafelag Islands, D C Va, 334 F.Supp 1185

72. U S—Allen v U S, D C Pa, 178 F.Supp 21—Knox v U S Lines Co, D.C Pa, 201 F.Supp 131, affd, C A, 320 F 2d 247—Antoine v Lake Charles Stevedores, Inc, D.C.La, 249 F Supp 290, affd., C A, 376 F 2d 443 cert den 88 S Ct. 145, 389 U S 869, 19 L Ed 2d 146—Tembladar v Hamburg-American Lines, C A.Cal., 368 F 2d 365—Mascuilli v U S, C A Pa, 411 F 2d 867, on remand, D C, 343 F Supp 439, revd on oth grds 483 F 2d 81—Usner v Luckenbach Overseas Corp, La, 91 S Ct 514, 400 U S. 494, 27 L.Ed 2d 562, reh. den 91 S Ct 1247, 401 U S. 1015, 28 L.Ed.2d 552—Siderewicz v. Enso-Gutzeit O/Y, C A Conn, 453 F.2d 1094, cert. den. 92 S.Ct 2441, 407 U.S 912, 32 L Ed 2d 686—Brinkley v H/f Eimskipafelag Islands, D.C.Va., 334 F.Supp 1185—Kyzar v Vale Do Ri Doce Navegacai, S A, C A La, 464 F 2d 285, cert den. 93 S Ct. 1367, 410 U.S. 929, 35 L.Ed 2d 591.

Shipowner's employees not fellow servant of third party employees

U S—Mahramas v. American Export Isbrandtsen Lines, Inc., C.A N.Y, 475 F.2d 165

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85. U S—Holley v. The Manfred Stansfield, D C.Va, 165 F Supp. 660, revd on oth. grds, C A., 269 F 2d 317, cert den 80 S.Ct 154, 361 U S 883, 4 L Ed 2d 119, on remand 186 F.Supp 212

Md—Frazier v Waterman S S. Corp, 112 A 2d 221, 206 Md 434

N Y—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514

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U S—Barca v. Matson Nav Co., D C.La., 211 F Supp 840—Amato v Cie Maritime Belge (Lloyd Royal) S.A, D C.N Y., 212 F Supp 330—Porter v American Export Lines, Inc., C.A.Pa, 387 F 2d 409

Tex—Archey v Nederlandsch-Amerikaansche Stoomvaart Maatschappij (Holland-America Line), Civ. App., 354 S W.2d 688, err ref no rev err., cert. den 83 S.Ct 299, 371 U.S. 929, 9 L.Ed.2d 236.

88. U S—Vessella v U S, C A Va, 405 F 2d 599—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds, C A, 427 F 2d 244—Mendoza v A/S J Ludwig Mowinckels Rederi, D C N Y, 293 F Supp 1319—Bagrowski v American Export Isbrandtsen Lines, Inc, C A Wis, 440 F 2d 502—Brock v Baroid Division of National Lead Co, D C La, 339 F Supp 728

Cal—Sea-Land Service, Inc v Matson Terminal Co, 61 Cal Rptr 756, 253 C A 2d 885

Rule applicable to a vessel in port as well as at sea

U S—Ross v The Zeeland, D C Va, 143 F Supp 656, mod on oth grds, C.A, 240 F 2d 820

Where dangerous operation to be undertaken

U S—Halecki v United New York and New Jersey Sandy Hook Pilots Ass'n, C A N Y, 282 F 2d 137, cert den 81 S Ct 461, 364 U S 941, 5 L Ed 2d 372

Stowage area

U S.—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347

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89. U S—Davis v Associated Pipe Line Contractors, Inc, D C La, 305 F Supp 1345, affd, C A, 418 F 2d 920, cert den 90 S Ct 1119, 397 U S 988, 25 L.Ed 2d 396—Nye v A/S D/S Svendborg, C A N Y, 501 F 2d 376, cert den 95 S Ct 1356, 420 U S 964, 43 L Ed.2d 442, reh den 95 S Ct 1971, 421 U S 972, 44 L Ed 2d 464

Ladders

U S—Caudill v Victory Carriers, Inc, D C Va, 149 F Supp 11

Elevators

U.S—De Thomas v Delta S S Lines, Inc, D C Puerto Rico, 58 F.R D. 335.

Appurtenances of vessel

U.S—Romero Reyes v Marine Enterprises, Inc, C A Puerto Rico, 494 F 2d 866

90. U.S.—Pedersen v The Bulklube, D C.N Y, 170 F Supp. 462, affd, C A, 274 F 2d 824, cert den 81 S Ct 44, 364 U.S 814, 5 L Ed 2d 46

Tex—Nederlandsch-Amerikaanache-Stoomvaart-Maatschappij, Holland-America Line v Vassallo, Civ App, 365 S W.2d 650, err ref. no rev. err, cert den. 84 S Ct 443, 375 U S 952, 11 L Ed.2d 313

Reasonable care shown

U S—Deffes v. Federal Barge Lines, Inc., D C La, 229 F Supp. 719, revd on oth grds, C.A, 361 F 2d 422, cert. den. 87 S Ct 503, 504, two cases, 385 U.S. 969, 17 L.Ed 2d 433

Ship's hold

U S.—La Capria v. Compagnie Maritime Belge, D C N.Y., 286 F.Supp. 980, affd in part, revd in part on oth. grds., C.A., 427 F.2d 244.

91. U.S.—Hebert v. California Oil Co, D C La., 280 F.Supp. 754—White v. U S, C.A.Va, 400 F 2d 74—Neal v Saga Shipping Co., C.A Tex., 407 F 2d 481, cert den. 89 S Ct 2143, 395 U S 986, 23 L.Ed.2d 775, reh den 90 S.Ct. 45, 396 U.S 871, 21 L.Ed 2d 129—La Capria v Compagnie Maritime Belge, D.C.N.Y. 286 F.Supp 980, affd in part, revd in part on oth grds., C.A, 427 F.2d 244—Guzman v. S.S. Robin Mowbray, D.C.N.Y., 288 F.Supp. 948.

Md.—Smith v. Hercules Co, 104 A.2d 590, 204 Md. 379.

N Y.—Cardinal v. State, 109 N.Y S.2d 818, 279 App Div. 326, mod. on other grounds 107 N.E 2d 569, 304 N Y 400, cert. den. 73 S.Ct. 729, 345 U.S. 918, 97 L.Ed. 1351, motion den 108 N.E.2d 400, 304 N.Y. 732, motion den. 109 N.E 2d 885, 304 N.Y 875—Radom v. Isthmian S.S Co., 162 N Y.S 2d 281, 32 Misc.2d 150.

Wash—Vogel v. Alaska S.S. Co., 419 P 2d 141, 69 Wash.2d 497

Injury by gas

(2) Other injuries.

U S—Morani v Agatha Fisheries, Inc, D C Mass, 213 F Supp 257—Misurella v Isthmian Lines, Inc, D C N Y, 215 F Supp 857, affd, C A, 328 F 2d 40—Lowe v Vessel Madrid, D C Fla, 210 F Supp 826

Injury caused by improper stowage of cargo

(1) U S—Reddick v McAllister Lighterage Line, Inc, D C N Y, 158 F Supp 326, affd in part and revd in part on oth grds, C A, 258 F 2d 297—Splosna-Plovba v Garcia, C A Cal, 390 F 2d 41—LaFleur v M S Maule, D C La, 349 F Supp 1318, affd 467 F 2d 944

Care in discharging cargo

U S—Beard v Ellerman Lines, Limited, C A Pa, 289 F 2d 201—Hroncich v American President Lines, Limited, C A N J, 334 F 2d 282

Unseaworthiness not necessarily present

U S—Knox v U S Lines Co, D C Pa, 201 F Supp 131, affd, C A, 320 F 2d 247

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92. U S—Brabazon v Belships Co, supra, n 88—Lukasiewicz v Moore-McCormack Lines, D C N Y, 104 F Supp 572—Feinman v A H Bull S S Co, C A Pa, 216 F 2d 393—Lahde v Soc Armadora Del Norte, C A Wash, 220 F 2d 357, cert den 76 S Ct 53, 350 U S 825, 100 L Ed 737—McMahan v The Panamolga, D C Md, 127 F Supp 659—Connolly v Weyerhaeuser S S Co, C A N Y, 236 F 2d 848, cert gr 77 S Ct 596, 352 U S 1030, 1 L Ed 598, revd on oth grds 78 S Ct 438, 355 U S 563, 2 L Ed 2d 491—Williams v Lehigh Val R Co, D C N Y, 151 F Supp 809—Amato v U S, D C N Y, 167 F Supp 929—Merrill v The Cuaco, D C Or, 189 F Supp 321—Thompson v Calmar S S Corp, C A Pa, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184—Marshall v Isthmian Lines, Inc, C A.Tex, 334 F 2d 131—Venable v A/S Det Forenede Dampskibsselskab, C A.Va, 399 F 2d 347—Davis v Associated Pipe Line Contractors, Inc, D C La, 305 F Supp 1345, affd, C A, 418 F 2d 920, cert den 90 S Ct 1119, 397 U S 988, 25 L Ed 2d 396—Pellegrino v A H Bull S.S Co, D C N Y, 309 F Supp 839

93. U S—McMahan v The Panamolga, D C Md, 127 F Supp 659

Effect of safety and health regulations

U.S—Provenza v American Export Lines, C.A Md., Inc, 324 F 2d 660, cert den 84 S Ct 970, 376 U S 952, 11 L Ed 2d 971—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347—Anderson v S S Gulf Trader, D C La, 287 F.Supp 783, affd, C A, 415 F 2d 316—Manning v M/V "Sea Road", C A Fla, 417 F 2d 603

94. U S—Noel v Isbrandtsen Co, D C Va, 179 F Supp 325, affd., C A, 287 F 2d 783, cert den 81 S Ct. 1944, 366 U S 975, 6 L Ed 2d 1264—Morrell v U S, C A Cal, 297 F 2d 662, cert den 82 S Ct 615, 370 U S 960, 8 L Ed 2d 826—Hopson v. M/V Karl Grammerstorf, D C La, 330 F Supp 1260

Cal.—Vittone v American President Lines, 39 Cal Rptr 758, 228 C A 2d 689

95. U.S—Osnovitz v U S, C A Pa, 204 F 2d 654—Royal Mail Lines, Limited v Peck, C A Cal, 269 F 2d 857—Union Carbide Corp v Goett, C A.W Va, 278 F 2d 319, cert den 81 S.Ct 64, 364 U.S. 826, 5 L Ed 2d 55—Hooper v Terminal S.S Co, C A N Y., 296 F.2d 281, cert. den 82 S Ct 874, 369 U S 843, 7 L Ed 2d 847, reh den 82 S Ct 1156, 369 U S 891, 8 L Ed 2d 291—Machullo v New York Cent R. Co., D C N Y, 200 F.Supp 805—Guarracino v. Luckenbach S S Co., C A N.J, 333 F.2d 646, cert den 85 S Ct 439, 379 U S 946, 13 L Ed 2d 543—McKinney v U S, D.C.Wash, 255 F.Supp 714, affd, C A, 368 F 2d 542—C.J.S. cited in Slaughter v S S Ronde, D C Ga, 390 F Supp. 637, 645, affd., C.A, 509 F 2d 973.

Cal—Guillory v American President Lines, Limited, 40 Cal.Rptr 796, 230 C.A 2d 296

96. U.S—Filipek v. Moore-McCormack Lines, Inc, C.A N.Y, 258 F 2d 734, cert. den 79 S.Ct. 605, 359 U S 927, 3 L Ed 2d 629—West v U S, Pa, 80 S Ct 189, 361 U S 118, 4 L Ed 2d 161—Hurst v Central Gulf S S Corp, D C La., 267 F Supp 65

97. U S—Freitas v Pacific-Atlantic S S Co, C A Cal, 218 F 2d 562—McMahan v The Panamolga, D C Md, 127 F Supp 659—Phipps v N V Nederlandsche Amerikaansche Stoomvart, Maats, C A Or, 259 F 2d 143—Mesle v Kea S S Corp, C A Pa, 260 F 2d 747, cert den 79 S Ct 875, 359 U S 966, 3 L Ed 2d 834—Grzybowski to Use of Traveler's Ins Co v Arrow Barge Co, D C Md, 177 F Supp 568 Revd on oth grds, C A, 283 F 2d 481—Billeci v U S, C A Cal, 298 F 2d 703—Scott v Isbrandtsen Co, C A Va, 327 F 2d 113—Luna v Kawasaki Kisen Kaisha, Limited, D C Pa, 245 F Supp 152—Marshall v Ove Skou Rederi A/S, D C Ala, 246 F Supp 703, revd on oth grds, C A, 378 F 2d 193, cert den 88 S Ct 86, 389 U S 828, 19 L Ed 2d 84—Hurst v Central Gulf S S Corp, D C La, 267 F Supp 65

N Y—Clark v Iceland S S Co, 179 N Y S 2d 708, 6 A D 2d 544, rearg and app den 182 N Y S 2d 295, 7 A D 2d 837

Particular acts not negligence per se

U S—Hill v Pioneer S S Co, D C Ohio, 134 F Supp 366, affd, C A, 227 F 2d 262

"Unavoidable accident" and "accident-free vessel" distinguished

U S—Lowry v A/S D/S Svendborg, C A Pa, 396 F 2d 850

98. U S—Calderola v Cunard S S Co, C A N Y, 279 F 2d 475, cert den 81 S Ct 172, 364 U S 884, 5 L Ed 2d 104

The application to ship owners of safety regulations issued by the Secretary of Labor has been considered [98.5]

98.5. Requirement as to securing beam or pontoon

U S—U S v Grace Lines, Inc, D C N Y, 221 F Supp 339

"Bulling"

U S—Martin v N V Koninklijke Nederlandsche Stoomboot Maatschappij, D C Tex, 264 F Supp 412

Safety of flooring

U S—Manning v M/V "Sea Road", C A Fla, 417 F 2d 603

99. U S—Osnovitz v U S, D C Pa, 103 F.Supp 238, affd, C A, 204 F 2d 654—McDonald v U.S, C A N J, 321 F 2d 437, cert den 84 S Ct 487, 375 U S 969, 11 L Ed 2d 417—Van Horn v Gulf Atlantic Towing Corp, C A Va, 388 F 2d 636—Chestnut v U S, D C Pa, 333 F Supp 969, affd, C A, 474 F 2d 1338

Duty to control unloading not extended to details of work

U S—McQuiston v Freighters & Tankers S S Co, D C La, 217 F Supp 701, affd, C A, 327 F 2d 746

1. U S—Moye v Sioux City & New Orleans Barge Lines, Inc, C A Miss., 402 F 2d 238, cert den 89 S Ct 1757, 395 U S 913, 23 L Ed 2d 226, reh den 89 S Ct 2141, 395 U S 987, 23 L Ed 2d 777—Wilson v Societa Italiana de Armamento (Sidarma), C A La, 409 F 2d 484—Parker v Cargill, Inc, C A La, 417 F 2d 772, cert. den 90 S Ct 1089, 397 U.S 973, 25 L Ed 2d 267—Chestnut v U S, D C Pa., 333 F Supp 969, affd, C A., 474 F 2d 1338—Mock v. Upper Mississippi Towing Co, D C La., 336 F Supp 468

N Y—Salmond v. Isbrandtsen Co, 144 N Y.S 2d 578, 286 App Div 1015, cert den 76 S Ct 1033, 351 U S 968, 100 L.Ed. 1487.

Wash—Tarabochia v Johnson Line, Inc, 440 P 2d 187, 73 Wash 2d 751

Knowledge of dangerous practice

(2) Other instances

U.S—Ferrante v. Swedish Am Lines, C A N J, 331 F.2d 571, cert den 85 S Ct 10, 379 U S 801, 13

L Ed 2d 20—Price v S S Yaracuy, C A La, 378 F 2d 156, on remand, D C, 306 F Supp 638—Casbon v Waterman S S Corp, D C La, 274 F Supp 481, affd, C A, 417 F 2d 1040

No duty to provide safe place to work under statute

U S—Croshaw v Koninklijke Nedlloyd, B V Rijswijk, D C Or, 398 F Supp 1224

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2. U S—Allen v U S, D C Pa, 178 F Supp 21—Reed v Bank Lines, Limited, D C La, 285 F Supp 808

Factors enumerated

U S—Frasca v Prudential-Grace Lines, Inc, D C Md, 394 F Supp 1092

3. U S—West v U S, Pa., 80 S Ct 189, 361 U S 118, 4 L Ed 2d 161—Lyons v Empressa Hondurena De Vapores, S A, C A N Y, 273 F 2d 317, cert den 80 S Ct 879, 362 U S 963, 4 L Ed 2d 877—McKnight v N M Paterson & Sons, Limited, D C Ohio, 181 F Supp 434, affd, C A, 286 F 2d 250, cert den 82 S Ct 189, 368 U S 913, 7 L Ed 2d 130—Speese v U S, C A N J, 440 F 2d 1164, cert den 92 S Ct 82, 404 U S 833, 30 L Ed 2d 63

4. U S—Pioneer S S Co v Hill, C A Ohio, 227 F 2d 262—McKnight v N M Paterson & Sons, Limited, D C Ohio, 181 F Supp 434, affd, C A, 286 F 2d 250, cert den 82 S Ct 189, 368 U S 913, 7 L Ed 2d 130

Circumstances showing control in owner

(2) Other circumstances

U S—Tallmon v Toko Kaium K K Kobe, D C Or, 278 F Supp 452

5. U S—McMahan v The Panamolga, D C Md, 127 F Supp 659—Hernandez v The Nancy Lykes, D C Puerto Rico, 175 F Supp 829—Boleski v American Export Lines, Inc, C A Md, 385 F 2d 69—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165

Imputation of negligence

U S—Deffes v Federal Barge Lines, Inc, D C La, 229 F Supp. 719, revd on oth grds, C A, 361 F 2d 422, cert den 87 S Ct 503, 504, two cases, 385 U S 969, 17 L Ed 2d 433

Res ipsa loquitur inapplicable

U S—Ianuzzi v South African Marine Corp, Ltd, C A N Y, 510 F 2d 950

7. U S.—Drlik v Imperial Oil Limited, D C Ohio, 141 F Supp 388, mod on oth grds, C A, 234 F 2d 4, cert den 77 S Ct 261, 352 U S 941, 1 L Ed 2d 236—La Capria v Compagnie Maritime Belge, D C N Y, 286 F.Supp 980, affd in part, revd in part on oth grds, C A, 427 F 2d 244

Conditional requirement not fulfilled

U.S—Amador v A/S J Ludwig Mowinckels Rederi, C A.N Y., 224 F 2d 437, cert den 76 S Ct 179, 350 U.S 901, 100 L Ed 791

8. U.S.—Simpson v Royal Rotterdam Lloyd, D C Va, 225 F Supp 947—La Capria v. Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd. in part on oth grds., C.A, 427 F 2d 244

9. U.S—Holley v The Manfred Stansfield, D C Va, 186 F.Supp 212—Caputo v Kheel, D C N Y, 291 F.Supp. 804.

10. U S—Filipek v Moore-McCormack Lines, Inc, C A.N.Y., 258 F.2d 734, cert den 79 S Ct 605, 359 U S. 927, 3 L Ed 2d 629—Pisano v. S S Benny Skou, C.A N.Y, 346 F.2d 993, cert den 86 S.Ct 389, 382 U.S 938, 15 L.Ed 2d 349.

11. U.S.—Romero Reyes v Marine Enterprises, Inc, C.A.Puerto Rico, 494 F.2d 866.

No inspection required by stevedore company

U.S—Mack v. U.S., D C Mass., 105 F.Supp 149—Johnson v Warrier & Gulf Navigation Co., C A Tex, 516 F.2d 73.

12. U S—Amato v U S, D C N Y, 167 F Supp 929—Nicroli v Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibs-Aktieselskab, C A N Y, 332 F 2d 651—Quadrino v S S Theron, D C N Y, 323 F Supp 1037, affd, C A, 436 F 2d 959

13. U S—Mack v U S, supra, n 11—McMahan v The Panamolga, supra, n 5—Hill v Pioneer S S Co, D C Ohio, 134 F Supp 366, affd, C A, 227 F 2d 262—Hugev v Dampskisaktieselskabet International, D C Cal, 170 F Supp 601, affd, C A, 274 F 2d 875, cert den 80 S Ct 1237, 363 U S 803, 4 L Ed 2d 1147—Fitzmaurice v Calmar S S Corp, D C Pa, 198 F Supp 304—Olah v S S Jaladurga, C A Va, 343 F 2d 457—Evans v Pan Am Tankers Corp, D C Va, 261 F Supp 633—Van Horn v Gulf Atlantic Towing Corp, C A Va, 388 F 2d 636—Sheehan v Moore-McCormack Lines, Inc, C A N Y, 441 F 2d 360—Quadrino v S S Theron, D C N Y, 323 F Supp 1037, affd, C A, 436 F 2d 959

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14. U S—Hill v Pioneer S S Co, D C Ohio, 134 F Supp 366, affd, C A, 227 F 2d 262

15. U S—Silver v American Export Isbrandtsen Lines, Inc, D C Va, 310 F Supp 681

16. U S—Hugev v Dampskisaktieselskabet International, D C Cal, 170 F Supp 601, affd, C A, 274 F 2d 875, cert den 80 S Ct 1237, 363 U S 803, 4 L Ed 2d 1147

22. U S—Osnovitz v U S, D C Pa, 103 F Supp 238, affd, C A, 204 F 2d 654

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38. U S—Godfrey v U S, D C Cal, 248 F Supp 273

40. U S—Lahde v Soc Armadora Del Norte, C A Wash, 220 F 2d 357, cert den 76 S Ct 53, 350 U S 825, 100 L Ed 737—Pacific Far East Lines, Inc v Williams, C A Cal, 234 F 2d 378, cert den 77 S Ct 96, 352 U S 871, 1 L Ed 2d 76

44. **Duty to exercise reasonable care**

U S—Croshaw v Koninklijke Nedlloyd B V Rijswijk, D C Or., 398 F Supp 1224

48. U S—Kleveland v U S, C A N Y, 345 F 2d 134

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49. U S—Kleveland v U S, C A N Y, 345 F 2d 134—Carrillo v Samaett Westbulk, D C Puerto Rico, 385 F Supp 119, affd in part, vac in part on oth. grds, C A, 514 F 2d 1214, cert den 96 S Ct 445, 423 U S 1014, 46 L Ed 2d 385

55. U S—Hurst v Central Gulf S.S Corp, D C La, 267 F Supp 65—Hill v Flota Mercante Grancolombiana, S A, D C La, 267 F Supp 380, affd 405 F 2d 878, cert den 89 S Ct 1995, 395 U S 934, 23 L Ed 2d 449

Equipment included

U S—Romero Reyes v Marine Enterprises, Inc, C A Puerto Rico, 494 F 2d 866

56. U S—Mesle v Kea S S Corp, C A Pa, 260 F 2d 747, cert. den 79 S Ct 875, 359 U S 966, 3 L.Ed.2d 834—De Van v Pennsylvania R Co, D.C.Pa, 167 F Supp. 336—Yost v General Elec Co, D.C N Y, 173 F Supp 630—Cooper v D/S A/S Progress, D.C Pa., 188 F Supp 578—Morrell v U S., C.A Cal, 297 F.2d 662, cert den 82 S Ct. 1615, 370 U.S 960, 8 L.Ed 2d 826—Billeci v U S, C A Cal, 298 F 2d 703

58. U S—Wyborski v Bristol City Line of Steamships, Limited, D C.Md., 191 F Supp 884—Billeci v U S, C A Cal, 298 F 2d 703

Cal—Vittone v American President Lines, 39 Cal Rptr. 758, 228 C A 2d 689

59. U S—Klimaszewski v Pacific-Atlantic S S Co., C A Pa, 246 F 2d 875—Considine v Black Diamond S S Corp, D C Mass, 163 F Supp 109—De Van v Pennsylvania R Co, D C Pa, 167 F Supp 336—Williams v Pennsylvania R Co, C A.N Y, 313 F 2d 203, on remand, D C., 267 F Supp 495—Byrd v American Export Isbrandtsen Lines, Inc, D C.Pa, 300 F Supp 1207

Or—Dewey v A F Klaveness & Co, A/S, 379 P 2d 560, 233 Or 515

Tex—Nederlandsch-Amerikaanasche-Stoomvaart-Maatschappij, Holland-America Line v Vassallo, Civ App, 365 S W 2d 650, err ref no rev err, cert den 84 S Ct 443, 375 U S 952, 11 L Ed 2d 313

60. U S—Gallagher v U S, Lines Co, C A N Y, 206 F 2d 177, cert den 74 S Ct 221, 346 U S 897, 98 L Ed 398, reh den 74 S Ct 375, 346 U S 940, 98 L Ed 427—Muller v Lykes Bros S S Co, D C La, 337 F Supp 700, affd, C A, 468 F 2d 951

61. U S—Brabazon v Belships Co, Limited, Skibs A/S, C A Pa, 202 F 2d 904—West v U S, Pa, 80 S Ct 189, 361 U S 118, 4 L Ed 2d 161—Fox v The Moremacwind, D C Va, 182 F Supp 7, affd, C A, 285 F 2d 222—Billeci v U S, C A Cal, 298 F 2d 703—Pellegrino v A H Bull S S Co, D C N Y, 309 F Supp 839—Tucker v Calmar S S Corp, C A Md, 457 F 2d 440, on remand, D C, 356 F Supp 709

62 U S—Cowan v Inland Waterways Corp, D C Ill, 121 F Supp 683—Rodriguez v The Angelina, D C Puerto Rico, 177 F Supp. 242—Smith v M/V Gisna, D C Ala, 238 F Supp 91, affd, C A, 362 F 2d 164—Luna v Kawasaki Kisen Kaisha, Limited, D C Pa, 245 F Supp 152

63. U S—Gallagher v U S Lines Co, supra, n 60—De Van v Pennsylvania R Co, D C Pa, 167 F Supp 336—Hill v American President Lines, Limited, D.C Va, 194 F Supp 885—McQuiston v Freighters & Tankers S S Co, C A La, 327 F 2d 746

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64. U S—Babnick v The Mount Athos, D C.Wash, 122 F.Supp 68—De Van v Pennsylvania R Co., D C Pa, 167 F Supp 336—Royal Mail Lines, Limited v Peck, C A Cal, 269 F.2d 857—Beeler v. Alaska Aggregate Corp, C A.Or, 336 F 2d 108, cert den 85 S Ct 719, 379 U S 1000, 13 L Ed 2d 701—Gaeta v Compagnie Maritime Belge (Lloyd Royal) S A, D C N Y, 359 F Supp 493

65. U S—Arena v. Luckenbach S S Co., C.A Mass, 279 F 2d 186, cert den 81 S.Ct. 222, 364 U S. 895, 5 L Ed 2d 189

67. U S—McQuiston v. Freighters & Tankers S S Co, D C La, 217 F Supp 701, affd, C A, 327 F 2d 746

68. U.S—Signore v The Ferngulf, D C N Y, 103 F.Supp 677—Forkin v. Furness Withy & Co, C A N Y, 323 F 2d 638

69. U S—Rodriguez v The Angelina, D.C.Puerto Rico, 177 F Supp 242.

71. U S—Fredericks v. American Export Lines, C A. N Y, 227 F 2d 450, cert den. 76 S Ct. 475, 350 U S 989, 100 L Ed 855—Arena v. Luckenbach S S Co, C A Mass, 279 F 2d 186, cert. den. 81 S Ct 222, 364 U S 895, 5 L Ed.2d 189—Sherbin v S. G Embiricos, Ltd, D.C La, 200 F.Supp 874—McQuiston v. Freighters & Tankers S S Co., D C La, 217 F Supp 701, affd., C A, 327 F 2d 746.

72. **Duty of inspection of shore-based machinery used by but not under control of shipowner**

U S.—Roper v. U.S., C A.Va, 282 F.2d 413, affd 82 S Ct 5, 368 U.S 20, 7 L.Ed.2d 1

73. U S.—Yost v General Elec. Co, D C.N Y, 173 F Supp 630

75. U S—Weigel v The Belgrano, D C Or., 188 F Supp 605, revd on oth grds, C A, 299 F.2d 897, vac. in part on oth grds 302 F.2d 730, cert. den 83 S Ct 49, 371 U S. 830, 9 L Ed.2d 67, reh. den 83 S Ct. 205, 371 U.S 906, 9 L.Ed 2d 168, reh 313 F 2d 423, cert den 83 S Ct 1292, 373 U S 904, 10 L Ed 2d 199, reh. den 84 S Ct. 26, 375 U.S 871, 11 L Ed.2d 101

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80. U.S.—Slan v A/S Det Danske-Franske D/S, C A La, 479 F.2d 288—Ianuzzi v South African Marine Corp, Ltd, C A N Y, 510 F.2d 950.

81. U S—Di Salvo v Cunard S S Co, D C N Y, 171 F Supp 813

83. U S—Fireman's Fund Indem Co v U S, C A Fla, 211 F 2d 773, cert den 75 S Ct 79, 348 U S 855, 99 L Ed 673—Moore-McCormack Lines, Inc v Maryland Ship Ceiling Co, C A Md, 311 F 2d 663—Course v Pacific Inland Nav Co, D C Or, 234 F Supp 676, affd, C A, 368 F 2d 540, cert den 87 S Ct 1029, 386 U S 963, 18 L Ed 2d 112—Grigsby v Coastal Marine Service of Tex, Inc, C A La, 412 F 2d 1011, cert dism 90 S Ct 612, 396 U S 1032, 24 L Ed 2d 531, and 90 S Ct 612, 396 U S 1033, 24 L Ed 2d 531, and 90 S Ct 613, 396 U S. 1033, 24 L Ed 2d 531, on remand 317 F Supp 1113—Frasca v S/S Safina E Ismail, C A Md, 413 F 2d 259—Hall v Moveable Offshore, Inc, C A Tex, 455 F 2d 633, cert den 93 S Ct 60, 409 U S 850, 34 L Ed 2d 93

84. U S—Drlik v Imperial Oil Limited, D C Ohio, 141 F.Supp 388, mod on oth grds, C A, 234 F 2d 4, cert den 77 S Ct 261, 352 U S 941, 1 L Ed 2d 236

86. However, etc.

La—Washington v T Smith & Son, App, 68 So 2d 337.

87. U S—Doyle v Bethlehem Steel Corp, C A Tex, 504 F 2d 911

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89. U S—Barber S S Lines v Quinn Bros, D C Mass, 104 F Supp 78—Allen v States Marine Corp. of Del, D C N Y, 132 F Supp 146—Williams v Lehigh Val R Co, D C N Y, 151 F Supp. 809—Cia Maritima Del Nervion v James J Flanagan Shipping Corp, Stevedore Division, C.A Tex, 308 F 2d 120—Bostrom v Astro Crecido Cia, Nav S A, C.A Mass., 477 F 2d 718

90. Implied obligation or warranty

U.S.—Thompson v. Trent Maritime Co, C A Pa, 353 F 2d 632—Matson Terminals, Inc v Caldwell, C A.Cal., 354 F.2d 681—Arista Cia DeVapores, S A. v Howard Terminal, D C.Cal., 247 F Supp 710, revd on oth grds, C A, 372 F 2d 152

91. U.S.—Crumady v The Joachim Hendrik Fisser, D.C N.J., 142 F Supp 389, revd on oth grds, C.A, 249 F.2d 818, revd on oth grds 79 S Ct 445, 358 U S 423, 3 L Ed.2d 413, on remand 176 F.Supp 595, affd. 272 F 2d 396—Waterman S S Corp. v Dugan & McNamara, Inc., U S.Pa, 81 S Ct. 200, 364 U S. 421, 5 L.Ed 2d 169—Cia Maritima Del Nervion v. James J. Flanagan Shipping Corp, Stevedore Division, C.A Tex, 308 F 2d 120—American Export Lines, Inc v Atlantic & Gulf Stevedores, Inc., D C Va., 205 F Supp 316, revd on oth grds., C.A, 313 F.2d 414, cert den. 83 S.Ct. 1525, 373 U S 924, 10 L Ed 2d 422—Nicholl v Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibs-Aktieselskab, D C N Y, 210 F.Supp. 93, affd, C A., 332 F 2d 651

N.Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, 107 N.E.2d 463, 304 N Y 314

92. U.S—Cia Maritima Del Nervion v James J Flanagan Shipping Corp, Stevedore Division, C A Tex, 308 F.2d 120—Lopez v Grace Line, D C Cal, 302 F Supp 753.

N.Y—Cruz v. American Export Lines, Inc., 1 Dept, 484 N Y S 2d 816, 106 A.D.2d 6

Elements of liability of non-employing stevedore to longshoremen

U.S.—Hartnett v. Reiss S.S Co, C A N Y., 421 F 2d 1011, cert. den 91 S.Ct. 49, 400 U.S 852, 27 L.Ed 2d 90

Liability of a stevedoring contractor to a charterer under a contract of indemnity is determined by the contract terms.[92.5]

92.5. Expenses and attorney's fees not covered

U.S—Hill v. American President Lines, Limited, D C Va., 194 F.Supp 885

Expenses and attorneys' fees included

U S—Grayson v Cordial Shipping Co, C A Ill, 496 F 2d 710

93. U S—Guihano v U S, D C N Y, 117 F Supp 610—Grenawalt v South African Marine Corp, D C N Y, 130 F Supp 432, affd, C A, 243 F 2d 575—Phipps v N V Nederlandsche Amerikaansche Stoomvart, Maats, C A Or, 259 F 2d 143—Nicholl v Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibs-Aktieselskab, D C N Y, 210 F Supp 93, affd, C A, 332 F 2d 651—Caputo v Kheel, D C N Y, 291 F Supp 804—Passantino v States Marine Lines, Inc, D C N Y, 299 F Supp 1252—Theodories v Hercules Nav Co, C A La, 448 F 2d 701—Miller v A/B Svenska Amerika Linien, C A Pa, 454 F 2d 1094—Muller v Lykes Bros S S Co, D C La, 337 F Supp 700, affd, C A, 468 F 2d 951

Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

Actions for wrongful death

U S—Graham v A Lusi, Limited, C A Fla, 206 F 2d 223—Chevis v Luckenbach Overseas Corp, D C Tex, 228 F Supp 642—Neal v Saga Shipping Co, C A Tex, 407 F 2d 481, cert den 89 S Ct 2143, 395 U S 986, 23 L Ed 2d 775, reh den 90 S Ct 45, 396 U S 871, 24 L Ed 2d 129

94. U S—Guarracino v Luckenbach S S Co, C A N Y, 333 F 2d 646, cert den 85 S Ct 439, 379 U S 946, 13 L Ed 2d 543—Napolitano v Compania Sud Americana De Vapores, C A N Y, 421 F 2d 382—Denny v Jugoslavenska Oceanska Plov, Kotor Yugoslavia, C A La, 455 F 2d 1277—Rivera v Reden A/B Nordstjernan, C A Puerto Rico, 456 F 2d 970, cert den 93 S Ct 124, 409 U S 876, 34 L Ed 2d 128

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95. U S—Brabazon v Belships Co, D C Pa, 103 F Supp 592, affd, C A, 202 F 2d 904—Pisano v S S Benny Skou, D C N Y, 220 F Supp 901, affd, C A, 346 F 2d 993, cert den 86 S Ct 389, 382 U S 938, 15 L Ed 2d 349—Robinson v M/V Merc Trader, C A La, 477 F 2d 1331

96. U S.—Crawford v Pope & Talbot, Inc., C A Pa, 206 F 2d 784—Berti v Compagnie De Navigation Cyprien Fabre, C A N Y, 213 F 2d 397—Peduto v U S, D.C N Y, 158 F Supp. 484—Charleville v Compania Navigacion Castro Riva S A Panama, R.P, D C La, 201 F Supp 115—Ballwanz v. Isthmian Lines, Inc, C A Md, 319 F 2d 457, cert den 84 S Ct 1136, 376 U S 970, 12 L Ed 2d 84—Radisich v Westfal Larsen & Co, A/S, D C Cal, 228 F Supp 1021—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S.Ct 212, 404 U S 883, 30 L Ed 2d 165

Accepted or customary practice held no excuse

U S—Reed v Bank Lines, Limited, D C La, 285 F Supp 808

No comparative negligence when customary procedure followed

U S—Torres v Hamburg-Amerika Linie, D.C Puerto Rico, 353 F.Supp 1276

97. U S—Britt v Corporacion Peruana De Vapores, C.A.Tex, 506 F 2d 927

1. U.S—Waterman S S Corp v. Brady-Hamilton Stevedore Co, D C.Or, 243 F Supp 298

2. U.S—Brabazon v Belships Co, D C Pa, 103 F.Supp 592, affd., C.A., 202 F 2d 904—Mancini v U S, D C.N.Y, 115 F Supp 605—Ferrigno v Ocean Transport Limited, D.C N Y, 201 F.Supp 173, revd. on oth grds., C.A., 309 F 2d 445—Smith v U S, C A Va, 336 F 2d 165—Manning v M/V "Sea Road", C A Fla, 417 F 2d 603

Futility of warning superiors

U.S—Guerrero v American President Lines, Ltd, D C N Y., 394 F Supp 333

3. U.S—Knox v U.S Lines Co, D C Pa., 201 F.Supp 131, affd, C A, 320 F 2d 247—Seitz v The Captantonis, D C Or, 203 F Supp 723—La-Bolle v. Nitto Line, D C Cal, 268 F Supp 16—Davis v Associated Pipe Line Contractors, Inc, D C La, 305 F Supp 1345, affd, C A, 418 F 2d 920, cert den 90 S Ct 1119, 397 U S 988, 25 L Ed 2d 396—Crum v Holloway Gravel Co, Inc, App, 273 So 2d 566, writ ref 276 So 2d 701

No contributory negligence shown

U S—Rapko v Transportacion Maritima Mexicana, S A, D C Pa, 276 F Supp 961—Putman v M/V Mathilde Bolten, D C Md, 298 F Supp 660—Lettsome v U S, C A Fla, 411 F 2d 917, app after remand 434 F 2d 907, app after remand 453 F 2d 395—Grigsby v Coastal Marine Service of Tex, Inc, C A La, 412 F 2d 1011, cert dism 90 S Ct 612, 396 U S 1032, 24 L Ed 2d 531, and 90 S Ct 612, 396 U S 1033, 24 L Ed 2d 531, and 90 S Ct 613, 396 U S 1033, 24 L Ed 2d 531, on remand 317 F Supp 1113—Lopez v Grace Line, D C Cal, 302 F Supp 753—Jackson v Lloyd Brasileiro Patrimonio Nacional, D C Tex, 324 F Supp 556—Brock v Baroid Division of National Lead Co, D C La, 339 F Supp 728

5. U S—Santomarco v U S, C A N Y, 277 F 2d 255, cert den 81 S Ct 59, 364 U S 823, 5 L Ed 2d 52—Testa v Moore-McCormack Lines, Inc, D C N Y, 229 F Supp 154—Hebert v California Oil Co, D C La, 280 F Supp 754—Burrage v Flota Mercante Grancolombiana, S A, C A La, 431 F 2d 1229

N Y—Radom v Isthmian S S Co, 162 N Y S 2d 281, 32 Misc 2d 150

7. U S—Pellegrino v A H Bull S S Co, D C N Y, 309 F Supp 839—Denenea v Shipping Enterprise Corp, C A La, 486 F 2d 549

No contributory negligence shown

U S—Ferrigno v Ocean Transport Limited, D C N Y, 201 F Supp 173, revd on oth grds, C A, 309 F 2d 445—Allen v Union Barge Line Corp, D C La, 239 F Supp 1004, affd, C A, 361 F 2d 217, cert den 87 S Ct 713, 385 U S 1006, 17 L Ed 2d 545—Rosa v A/S D/S Svendborg, D C N Y, 291 F Supp 84

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9. U S—Kulukundis v Strand, C A Or, 202 F 2d 708—Manning v M/V "Sea Road", C A Fla, 417 F 2d 603

11. U S—Fireman's Fund Indem Co v U S, D C. Fla, 110 F Supp 937, affd, C A, 211 F.2d 773, cert den 75 S Ct 79, 348 U.S 855, 99 L Ed 637

12. U S—Curtis v A Garcia y Cia, Ltda, C A Pa, 241 F 2d 30

13. U S—Jones v Moore-McCormack Line, Inc, D C N Y, 291 F Supp 888

14. U S—Read v U S, C A Pa, 201 F 2d 758—Kulukundis v Strand, C A Or, 202 F 2d 708—Imperial Oil, Limited v Drlik, C A Ohio, 234 F 2d 4, cert den 77 S Ct 261, 352 U S 941, 1 L Ed 2d 236—Brisco v American President Lines, Limited, D C Cal, 325 F Supp 1259—Rivera v Reden A/B Nordstjernan, C A Puerto Rico, 456 F 2d 970, cert den 93 S Ct 124, 409 U S 876, 34 L Ed 2d 128

16. U S—Blankenship v Ellerman's Wilson Line, D C Md, New York, Inc, 159 F Supp 479, revd on oth grds, C A, 265 F 2d 455

17. U S—Drlik v Imperial Oil Limited, D C Ohio, 141 F Supp 388, mod on oth grds, C A, 234 F 2d 4, cert den 77 S Ct 261, 352 U S 941, 1 L Ed 2d 236—Rivera v. Reden A/B Nordstjernan, C A Puerto Rico, 456 F 2d 970, cert den 93 S Ct 124, 409 U S 876, 34 L Ed 2d 128

Doctrine inapplicable

U S—Britt v Corporacion Peruana, De Vapores, C A Tex, 506 F 2d 927

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18. U S—Smith v U S, C A Va, 336 F 2d 165—Olah v S S Jaladurga, D C Va, 230 F Supp 161, revd on oth grds, C A, 343 F 2d 457—Sousa v Motor Vessel Caribia, D C Mass, 360 F Supp 971

Risk not assumed as matter of law

U.S—Grindville v American-Hawaiian S S Co, C A Pa, 224 F 2d 746

Spaces between cargo

U S—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347

20. U S—Johnson v Partrederiet Brovigtank, D C N Y, 202 F Supp 859—Lowe v California Co, D C La, 296 F Supp 1264

21. U S—Trenkle v Compagnie Generale Transatlantique, D C Cal, 179 F Supp 795—Davis v Associated Pipe Line Contractors, Inc, D C La, 305 F Supp 1345, affd, C A, 418 F 2d 920, cert den 90 S Ct 1119, 397 U S 988, 25 L Ed 2d 396

Shipowner and stevedoring contractor

(1) U S—Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, C A Or, 336 F 2d 124, cert den 85 S Ct 668, 379 U S 973, 13 L Ed 2d 565—Smith v U S, C A Va, 336 F 2d 165

23. U S—Union Sulphur & Oil Corp v W J Jones & Son, C A Or, 195 F 2d 93—Hartford Acc & Indem Co v Gulf Refining Co, D C La, 127 F Supp 469, affd in part and revd in part on oth grds, C A., 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52—Amerocean S S Co v Copp, C A Wash, 245 F 2d 291—Dingler v Halcyon Lijn N V, D C Pa, 305 F Supp 1

24. U S—Sessions v Fritz Kopke, Inc, C A Tex, 479 F 2d 1041, affd 94 S Ct 2174, 417 U S 106, 40 L Ed 2d 694—Hurdich v R C A Corp, D C N Y, 359 F Supp 1222, affd, C A, 503 F 2d 397

Not entitled to offset

U S—Croshaw v Koninklijke Nedlloyd B V Rijswijk, D C Or, 398 F Supp 1224

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25. U S—Hartford Acc & Indem Co v Gulf Refining Co, D C La, 127 F Supp 469, affd in part and revd in part on oth grds, C A, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52—Hagans v Farrell Lines, Inc, C A Pa, 237 F 2d 477—Trygstad v States Marine Corp, D C Or, 150 F Supp 556

26. U S—King v Waterman S S Corp C A Pa, 272 F 2d 823, revd on oth grds 81 S Ct 200, 364 U S 421, 5 L Ed 2d 169—Nelson-Moran Marine Corp v U S, D C S C, 239 F Supp 94—Jackson v Lloyd Brasileiro Patrimonio Nacional, D C Tex, 324 F Supp 556

28. U S—Dugas v Pelican Const Co, Inc, C A La, 481 F 2d 773, cert den 94 S Ct 724, 414 U S 1093, 38 L Ed 2d 550

29. U S—Reder A/B Nordstjernan v Crescent Wharf & Warehouse Co, C A Cal, 372 F 2d 674—Jarka Corp of New England v U S Lines Co, C A Mass, 387 F 2d 436—Bertino v Polish Ocean Line, C A N Y, 402 F 2d 863—McLaughlin v Trelleborgs Angfartygs A/B, C A N Y, 408 F 2d 1334, cert den 89 S Ct 2020, 395 U S 946, 23 L.Ed 2d 464—Truesdell v Delta Marine Drilling Co., D C La, 301 F Supp 1008—La Capria v Compagnie Maritime Belge, C A N Y, 427 F 2d 244—Shaw v Lauritzen, C.A Pa, 428 F 2d 247—Bagrowski v American Export Isbrandtsen Lines, Inc., C A Wis, 440 F 2d 502—Garner v Cities Service Tankers Corp, C A Ala, 456 F 2d 476

N.Y—December v Victory Carriers, Inc, 159 N Y S 2d 1006, 6 Misc 2d 167

Shipowner allowed indemnity

(2) Other matters

U.S.—Brattoli v Kheel, D C N.Y, 302 F Supp 745

Relational duty

U S.—Hagans v Farrell Lines, Inc, C A Pa, 237 F 2d 477.

Reimbursement of shipowner for attorneys fees

(1) Allowed.

U S.—Crosson v. N.V Stoomvaart Mij "Nederland", C.A.N.Y., 409 F 2d 865—Brattoli v. Kheel, D.C. N.Y., 302 F Supp. 745—Pellegrino v. A. H Bull S S. Co., D.C N.Y., 309 F Supp 839—Brinkley v H/f Eimskipafelag Islands, D C Va, 334 F Supp 1185

(2) Disallowed

U S—Deans v Kihlstrom, D C Va, 197 F Supp 339

(3) Allowed as to fees for defense, not as to fees for impleading and showing liability of indemnitor

U S—Caswell v Koninklyke Nederlandsche Stoomboot Maalschappy, N V, D C Tex, 223 F Supp 102—Spann v Lauritzen, D C Pa, 272 F Supp 689

Cal—Isthmian Lines, Inc v Schirmer Stevedoring Co, 63 Cal Rptr 458, 255 C A 2d 607

(4) Other matters

U S—Duvernay v Alcoa S S Co, D C La, 217 F Supp 698—Torres v Compania Trasatlantica Espanola, S A, D C Puerto Rico, 261 F Supp 105

Costs and expenses of shipowner

U S—Torres v Compania Trasatlantica Espanola, S A, D C Puerto Rico, 261 F Supp 105—Crosson v N V Stoomvaart MIJ Nederland, D C N Y, 266 F Supp 409, affd, C A, 409 F 2d 865—Gilchrist v Mitsui Sempaku K K, C A.Pa, 405 F 2d 763, cert den 89 S Ct 1195, 394 U S 920, 22 L Ed 2d 453—Robertson v The Sanyo Maru, D C La, 298 F Supp 931, affd in part, remd in part 424 F 2d 520, cert den 91 S Ct 59, 400 U S 854, 27 L Ed 2d 91—Pellegrino v A H Bull S S Co, D C N Y, 309 F Supp 839—McInnis v Hamburg Am Lines, D C Cal, 317 F Supp 1395—Smith v Olsen & Ugelstad, D C Mich, 324 F Supp 578

N Y—Melnyk v U S Lines, Co, 315 N Y S 2d 85, 35 A D 2d 152

Action held premature

U S—U S v Northern Metal Co, D C Pa, 227 F Supp 396

Third party beneficiary of stevedore's warranty of performance

U S—Pacific Far East Line v California Stevedore & Ballast Co, D C.Cal, 238 F Supp 956—Watson v Gulf Stevedore Corp, C A Tex, 374 F 2d 946, cert den 88 S Ct 286, 389 U S 927, 19 L Ed 2d 277

Knowledge of defect by stevedore company

U S—Gerking v Furness, Withy & Co, D C Wash, 251 F Supp 781—U S Lines Co v Jarka Corp of New England, D C Mass, 265 F Supp 811, mod on oth grds, C A, 387 F 2d 436—Lattin v Flota Mercante Grancolombiana, S A, D C Tex, 290 F Supp 893—Delaneuville v Simonsen, C A La, 437 F 2d 597

Cal—Flores v Pacific Island Transport 57 Cal Rptr 73, 248 C A 2d 812, cert den 88 S Ct 96, 389 U S 831, 19 L Ed.2d 88

Proximate cause

U S—Gilchrist v Mitsui Sempaku K.K, D.C Pa, 266 F Supp 961, affd in part, revd in part on oth grds, C A, 405 F 2d 763, cert. den 89 S Ct 1195, 394 U S. 920, 22 L.Ed 2d 453—Yamashita-Shinnihon Kisen, K K Tokyo v W J Jones & Son, Inc, C A Or, 474 F 2d 847

Uniform application of indemnity rules required

U S—A/S J Ludwig Mowinckels Rederi v Commercial Stevedoring Co., C A N Y., 256 F 2d 227, cert dism 79 S Ct. 9, 358 U S 801, 3 L Ed 2d 49—Crosson v N V Stoomvaart MIJ Nederland, D C N Y, 266 F Supp 409, affd, C A, 409 F 2d 865

Lack of knowledge of defect by stevedore

U S—Simpson Timber Co v Parks, C A Or, 390 F 2d 353, cert den 89 S Ct 126, 130, two cases, 393 U S 858, 21 L.Ed 2d 127

Vouching-in held not applicable

U S—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A.Pa, 444 F 2d 727, on remand, 324 F Supp 786

Violation of longshoring regulation

U S—Greene v Vantage S.S Corp., C A Va, 466 F.2d 159

Effect of statutory amendments

U S—Griffith v Wheeling Pittsburg Steel Corp., C A Pa., 521 F 2d 31, cert den 96 S Ct 785, 423 U S 1054, 46 L Ed 2d 643

The stevedoring contractor may be liable over to the shipowner where the company failed to perform its obligation to discharge the cargo in a workmanlike manner and with reasonable safety to persons and property;[29 5] but a failure of the stevedoring company to inspect the vessel before sending its men aboard does not constitute a breach of the implied warranty[29 10] The presence of an express warranty does not extinguish this implied warranty[29 15]

29.5. U S—Metropolitan Stevedore Co v Dampskisaktieselskabet Intern, C A Cal, 274 F 2d 875, cert den 80 S Ct 1237, 363 U S 803, 4 L Ed 2d 1147—Drago v A/S Inger, C A N Y, 305 F 2d 139, cert den 83 S Ct 292, 371 U S 925, 9 L Ed 2d 232—Cia Maritima Del Nervion v James J Flanagan Shipping Corp, Stevedore Division, C A Tex, 308 F 2d 120—Damanti v A/S Inger, C A N Y, 314 F 2d 395, cert den 84 S Ct 46, 375 U S 834, 11 L Ed 2d 64—De Palma v South African Marine Corp, D C.N Y, 206 F Supp 274—Isthmian Lines, Inc v Canadian Stevedoring Co, D C Or, 216 F Supp 856—Grace Lines, Inc v Port Everglades Terminal Co, C A Fla, 324 F 2d 699—Gainar v S S Longview Victory, D C Va, 226 F Supp. 912, affd, C A, 338 F 2d 959 On remand 242 F Supp 96—Matthews v Compania Anonima Venezolano de Navegacion, D C La, 234 F Supp 553, affd, C A, 371 F 2d 971, cert den. 88 S Ct 37, 389 U.S 820, 19 L Ed 2d 71—Gerking v Furness, Withy & Co, D C Wash, 251 F.Supp 781—Compania Anonima Venezolano de Navegacion v Matthews, C A La, 371 F 2d 971, cert den 88 S Ct 37, 389 U.S 820, 19 L Ed 2d 71—Watson v Gulf Stevedore Corp, C A Tex, 374 F 2d 946, cert den 88 S.Ct 286, 389 U S 927, 19 L Ed 2d 277—Hill v Flota Mercante Grancolombiana, S A, D.C La, 267 F Supp 380, affd 405 F.2d 878, cert den 89 S.Ct 1995, 395 U S 934, 23 L Ed.2d 449—United New York Sandy Hook Pilots Ass'n v Rodermond Industries, Inc, C A N J, 394 F 2d 65—Bertino v. Polish Ocean Line, C A N Y, 402 F 2d 863—Pellegrino v A H Bull S S Co, D.C N Y., 309 F Supp 839—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co., C A Pa, 444 F 2d 727, on remand, 342 F Supp 786—Atlantic & Gulf Stevedores, Inc v Skibs A/S Danmotor, D C.Tex, 342 F Supp 837

Cal—Sea-Land Service, Inc v. Matson Terminal Co, 61 Cal Rptr. 756, 253 C.A 2d 885

Action based on contract

(1) Action is based on contract rather than tort

U S—Indemnity Ins. Co of North America v. California Stevedore & Ballast Co., C A.Cal, 307 F 2d 513—Lowe v Vessel Madrid, D.C Fla, 210 F.Supp 826—Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, Or, 84 S Ct 748, 376 U.S. 315, 11 L Ed.2d 732, on remand C A., 336 F.2d 124, cert. den 85 S Ct. 668, 379 U S 973, 13 L.Ed.2d 565—Ring v Motor Vessel Cape Clear, D.C.Cal, 226 F Supp 709—Quadrino v. S S Theron, D.C.N.Y, 323 F Supp 1037, affd, C A, 436 F.2d 959.

(2) Negligence of stevedore as pertinent only in so far as breach of contract is concerned

U S—Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, Or, 84 S Ct 748, 376 U.S 315, 11 L Ed 2d 732, on remand C A, 336 F 2d 124, cert den. 85 S Ct 668, 379 U S 973, 13 L Ed.2d 565

Tex.—Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij, Holland-America Line v Vassallo, Civ App, 365 S W 2d 650, err. ref no rev. err

(3) Furnishing of defective equipment is not such a breach of contract on part of ship owner as to forfeit right to indemnity.

U S—Williams v Ocean Transport Lines, Inc., C.A Pa, 425 F.2d 1183

Tex —Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij, Holland-America Line v Vassallo, Civ App, 365 S W 2d 650, err ref no rev err, cert den 84 S Ct 443, 375 U S 952, 11 L Ed 2d 313

(4) Failure to stop stevedoring operation after discovering or having notice that winch on ship was defective precluded ship owner's recovery of indemnity

Tex —Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij, Holland-America Line v Vassallo, Civ App, 365 S W 2d 650, err ref no rev err, cert den 84 S Ct 443, 375 U S 952, 11 L Ed 2d 313

(5) Breach of implied warranty may occur regardless of stevedore's negligence

U S —Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, Or, 84 S Ct 748, 376 U S 315, 11 L Ed 2d 732, on remand C A, 336 F 2d 124, cert den. 85 S Ct 668, 379 U S 973, 13 L Ed 2d 565—Pacific Far East Line, Inc v Jones Stevedoring Co, C A Cal, 346 F 2d 642, cert den 86 S Ct 293, 382 U S 919, 15 L Ed 2d 233—Burrage v Flota Mercante Grancolombiana, S A, C A La, 431 F 2d 1229—Plaisance v Shell Oil Co, D C La, 323 F Supp 654—Quadrino v S S Theron, D.C N Y, 323 F Supp 1037, affd, C A, 436 F 2d 959

(6) Other matters

U S.—Smith v U S, C A Va, 336 F 2d 165—Gilchrist v Mitsui Sempaku K K, D C Pa, 266 F Supp 961, affd. in part, revd in part on oth grds, C A, 405 F 2d 763, cert den 89 S.Ct 1195, 394 U S 920, 22 L Ed 2d 453—Hartnett v Reiss S S Co, C A N Y, 421 F 2d 1011, cert den 91 S Ct 49, 400 U.S 852, 27 L Ed 2d 90—Kewasaki Kisen, K.K v Detroit Harbor Terminals, Inc, D C Mich, 339 F Supp 115

Change in ownership of vessel

U.S.—Lowe v Vessel Madrid, D C Fla, 210 F Supp 826.

Negligence of stevedore's employees sole proximate cause

U.S —American Export Lines, Inc v Atlantic & Gulf Stevedores, Inc., C.A Va, 313 F 2d 414, cert den 83 S.Ct. 1525, 373 U S 924, 10 L Ed.2d 422

Scope of warranty

U.S —Olin Mathieson Chemical Corp v United Stevedoring Division, States Marine Lines, Inc, D C Tex, 317 F Supp 1373, affd, C A, 432 F 2d 1234—Johnson v. Excelsior Shipping Co., D C Ala, 319 F.Supp 986—Plaisance v. Shell Oil Co., D.C La, 323 F Supp. 654—Quadrino v S S. Theron, D C. N Y., 323 F.Supp. 1037, affd, C A, 436 F 2d 959—Kaminski v A/B Svenska Ostasiatiska Kompaniet, C.A Pa., 445 F 2d 398—Whisenant v. Brewster-Bartle Offshore Co, C A La, 446 F 2d 394

Cal —Flores v. Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C.A.2d 812, cert den 88 S.Ct. 96, 389 U S. 831, 19 L.Ed.2d 88.

Shipowner held not so blameworthy as to bar indemnity

U.S —Williams v. Pennsylvania R Co, C.A.N Y, 313 F.2d 203, on remand, D.C, 267 F Supp 495—Simpson v. Royal Rotterdam Lloyd, D.C N Y., 225 F Supp. 947—Guidry v. Texaco, Inc, C A Tex., 430 F 2d 781—Jackson v. Lloyd Brasileirs Patrimonio Nacional, D.C.Tex., 324 F Supp 556

U.S —Parker v. U.S., D.C.Or., 223 F.Supp. 647

Zone of responsibility may extend beyond those in direct contractual relationship.

U.S.—DeGioia v. U S Lines Co., C.A.N.Y., 304 F.2d 421—Di Paola v International Terminal Operating Co, D.C.N.Y., 294 F Supp. 736, remd, C.A., 418 F.2d 906, on remand 311 F.Supp. 685.

Shipowner's conduct may preclude recovery

U.S.—Weyerhaeuser S.S. Co. v. Nacirema Operating Co, 78 S Ct. 438, 355 U.S. 563, 2 L Ed 2d 491—Southern Stevedoring & Contracting Co v Hellenic Lines, Limited, C.A Tex., 388 F 2d 267—Burns v. Cunard S.S. Co., C A.N.Y., 404 F 2d 60, cert den 89 S Ct. 993, 393 U.S 1117, 22 L Ed 2d 122—Dunn v Ove Skou Rederi A/S, D.C Pa., 45 F.R D. 18—Grigsby v Coastal Marine Service of Tex., Inc., C A.La., 412 F.2d 1011, cert dism 90 S.Ct 612, 396 U S. 1032, 24 L Ed.2d 531, and 90 S Ct 612, 396 U S 1033, 24 L Ed 2d 531, and 90 S Ct 613, 396 U S 1033, 24 L Ed 2d 531, on remand 317 F Supp 1113—Olin Mathieson Chemical Corp v United Stevedoring Division, States Marine Lines, Inc, D C Tex, 317 F Supp 1373, affd, C A, 432 F 2d 1234

Shipowner's negligence not fatal to recovery

U S —Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, Or, 84 S Ct 748, 376 U S 315, 11 L Ed 2d 732, on remand, C A, 336 F 2d 124, cert den 85 S Ct 668, 379 U S 973, 13 L Ed 2d 565—Kaminski v A/B Svenska Ostasiatiska Kompaniet, C A Pa, 445 F 2d 398

Cal —Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C A 2d 812, cert den 88 S Ct 96, 389 U S 831, 19 L Ed 2d 88—Marincovich v Oriana, Inc, 91 Cal Rptr 417, 13 C A 3d 146

Implied warranty held breached

U S —Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, Or, 84 S Ct 748, 376 U S 315, 11 L Ed 2d 732, on remand, C A, 336 F 2d 124, cert den 85 S Ct 668, 379 U S 973, 13 L Ed 2d 565—Sanchez v Lubeck Line A G, D C N Y, 318 F Supp 821—N M Paterson and Sons Limited v Nicholson Cleveland Terminal Co, D C Ohio, 323 F Supp 913—Smith v Olsen & Ugelstad, D C Mich, 324 F Supp 578—Chinese Maritime Trust, Limited v Carolina Shipping Co, C A S C, 456 F 2d 192

Tex —Rorie v City of Galveston, 471 S W 2d 789, cert den 92 S Ct 1250, two cases, 405 U S 988, 31 L.Ed 2d 454

Attorney's fees, costs and disbursements

U S —Miller v A/B Svenska Amerika Linien, C A Pa, 454 F 2d 1094—Grayson v Management & Shipping Transport, Inc, D C Ala, 330 F Supp 30—Tate v A/B Svenska Amerika Linein, D C La, 331 F Supp 854, affd, C A, 435 F 2d 172

Longshoreman's negligence imputed to stevedore

U S —D/S Ove Skou v Hebert, C A.Tex, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139—Reed v. Bank Lines, Limited, D C La, 285 F Supp 808—Hirstius v Hess Terminal Corp, D C La, 286 F Supp 566—Hartnett v Reiss S S. Co, C A.N Y, 421 F 2d 1011, cert den 91 S.Ct 49, 400 U.S 852, 27 L Ed.2d 90—Johnson v Excelsior Shipping Co, D C Ala, 319 F.Supp 986—U S Lines, Inc v Jarka Corp of Baltimore, 444 F.2d 26

Apportionment of damages among stevedores

U S —D/S Ove Skou v Hebert, C A Tex, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139

Failure to make inspection

U.S —D/S Ove Skou v Hebert, C A Tex, 365 F 2d 341, cert den. 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139—Southern Stevedoring & Contracting Co v Hellenic Lines, Limited, C A Tex, 388 F 2d 267—Pellegrino v A H Bull S S Co, D C N Y, 309 F Supp. 839

Latent defect

U.S —Gilchrist v Mitsui Sempaku K K, D C Pa, 266 F Supp 961, affd in part, revd. in part on oth grds., C.A, 405 F 2d 763, cert den 89 S Ct 1195, 394 U S. 920, 22 L Ed 2d 453—Borm v Cunard S S Co, Ltd., D C.Tex, 367 F.Supp 389

No recovery allowed

U S.—Jones v. N V Nederlandsch-Amerikaansche Stoomvaart Maatschappij, C A Pa, 374 F 2d 189, cert. den 87 S.Ct 2114, 388 U.S. 911, 18 L Ed 2d 1349—Morales v Dampskibs A/S Flint, D C N Y, 264 F Supp. 829, affd, C A, 370 F 2d 569—Martin v N V Koninklyke Nederlandsche Stoomboot Maatschappij, D.C Tex, 264 F Supp 412—Albanese v. N V Nederl Amerik Stoomv. Maats, D C N Y, 279 F.Supp 635—International Terminal Operating Co v. N.V Nederl. Amerik Stoomv Maats, N.Y, 89 S Ct 53, 393 U S 74, 21 L Ed 2d 58, am 89 S.Ct. 482, 393 U.S 995, 21 L Ed 2d 461—Bertino v Polish Ocean Line, C A N Y, 402 F 2d 863—Vaccaro v Alcoa S S Co, C A N Y, 405 F 2d 1133—Roselli v Shell Oil Co, D C La, 293 F Supp 1395—Scott v SS Ciudad De Ibague, C A La, 426 F 2d 1105—U S Lines Co v Maritime Shipcleaning & Maintenance Co, D C Pa, 317 F Supp 639—Plaisance v Shell Oil Co, D C La, 323 F Supp 654—Quadrino v S S Theron, D C N Y, 323 F Supp 1037, affd, C A, 436 F 2d 959—Pesce v Skips A/S Herstein, D C N Y, 324 F Supp 554—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A Pa, 444 F 2d 727, on remand, 342 F Supp 786—General Const Co v Umpqua River Nav Co, C A Or, 458 F 2d 1186

Waiver

U S —McCross v Ratnakar Shipping Co, D C Md, 265 F Supp 827

Effect of workmen's compensation law

U S —McCross v Ratnakar Shipping Co, D C Md, 265 F Supp 827—Schwartz v Compagnie General Transatlantique, D C N Y, 285 F Supp 473, affd, C A, 405 F 2d 270

Preliminary inspection

U S —Victory Carriers, Inc v Stockton Stevedoring Co, C A Cal, 388 F 2d 955

Visual examination

U S —Carroll v Frontera Compania Naviera, S A, C A Pa, 390 F 2d 311

U S —Mortensen v A/S Glittre, C A N Y, 348 F 2d 383—H & H Ship Service Co v Weyerhaeuser Line, C A Cal, 382 F 2d 711—Victory Carriers, Inc v Stockton Stevedoring Co, C A Cal, 388 F.2d 955—Villain & Fassio E Compagnia v Atlantic & Gulf Stevedores, Inc, D C Va, 283 F.Supp 725

Implied warranty held not to cover relationship of contractor to owner of fixed drilling platform

U S —Taylor v Fishing Tools, Inc, D C La, 274 F Supp 666

Shipowner's potential liability sufficient basis for indemnification

U S —Reed v Bank Lines, Limited, D C La, 285 F Supp 808—Hirstius v Hess Terminal Corp, D C La, 286 F Supp 566—Johnson v Excelsior Shipping Co, D.C Ala, 319 F Supp 986—N M Paterson and Sons Limited v Nicholson Cleveland Terminal Co, D C Ohio, 323 F Supp 913

Nature of right

U S —Feliciano v Compania Trasatlantica Espanola, S A, C A Puerto Rico, 411 F 2d 976—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A Pa, 444 F 2d 727, on remand, 342 F Supp 786

Federal maritime law governs contract

U S —Feliciano v Compania Trasatlantica Espanola, S A, C A Puerto Rico, 411 F 2d 976

Stevedore entitled to attorney's fees, costs and expenses

U S —Quadrino v. S S Theron, D C N Y, 323 F Supp 1037, affd, C A, 438 F 2d 959

Settlement

U S —Johnson v Excelsior Shipping Co, D C Ala, 319 F Supp 986

Not virtually absolute

U S —Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A Pa, 444 F 2d 727, on remand, 342 F Supp 786

Burden of proof

U S —Borm v Cunard S S Co, Ltd, D C Tex, 367 F Supp 389

Doctrine inapplicable to injury to seaman at sea

U S —Smith & Kelly Co v S/S Concordia TADJ, C A Ga, 718 F 2d 1022

29.10. U S —T Smith & Son, Inc v Skibs A/S Hassel, C A La, 362 F 2d 745

Grain on deck

U S —Orlando v Prudential S S Corp, C A N Y, 313 F 2d 822

Effect of stevedore's employees' knowledge of dangerous condition

US—Nicholi v Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibs-Aktieselskab, CA NY, 332 F 2d 651—T Smith & Son, Inc v Skibs A/S Hassel, CA La, 362 F 2d 745—Lattin v Flota Mercante Grancolombiana SA, DC Tex, 290 F Supp 893

Cursory inspection

US—Vaccaro v Alcoa SS Co, CA NY, 405 F 2d 1133—Delaneuville v Simonsen, CA La, 437 F 2d 597—Olin Mathieson Chemical Corp v United Stevedoring Division, States Marine Lines, Inc, DC Tex, 317 F Supp 1373, affd, CA, 432 F 2d 1234—Hardy v US, DC NC, 322 F Supp 660—Quadrino v SS Theron, DC NY, 323 F Supp 1037, affd, CA, 436 F 2d 959

Cal—Flores v Pacific Island Transport Lines, 57 Cal Rptr. 73, 248 CA 2d 812, cert den 88 S Ct 96, 389 US 831, 19 L Ed 2d 88

Inspection for latent defects not required

US—Vaccaro v Alcoa SS Co, CA NY, 405 F 2d 1133—Scott v SS Ciudad De Ibague, CA La, 426 F 2d 1105—Quadrino v SS Theron, DC NY, 323 F Supp 1037, affd, CA, 436 F 2d 959

Cal—Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 CA 2d 812, cert den 88 S Ct 96, 389 US 831, 19 L Ed 2d 88

Stevedore's knowledge of dangerous condition

US—Brock v Coral Drilling, Inc, CA La, 477 F 2d 211

29.15. US—Isthmian Lines, Inc v Canadian Stevedoring Co, DC Or, 216 F Supp 856—States SS Co v Portland Stevedoring Co, DC Or, 216 F Supp 934—Massa v CA Venezuelan Navigacion, CA NY, 332 F 2d 779, cert den 85 S Ct 262, 379 US 914, 13 L Ed 2d 186—Caputo v Khell, DC NY, 291 F Supp 804

Express indemnity clause in contract between stevedore and consignee

US—Drago v A/S Inger, CA NY, 305 F 2d 139, cert den 83 S Ct 292, 371 US 925, 9 L Ed 2d 232

Provision against implied warranty

US—Brattoli v Kheel, DC NY, 302 F Supp 745

Disclaimer of liability provision

US—Brattoli v Kheel, DC NY, 302 F Supp 745

A stevedore's implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment.[29.20] Issue of breach of stevedore's implied warranty does not turn on whether stevedore knew or should have known that his equipment was safe but on whether equipment was in fact safe and fit for its intended use.[29.25]

29.20. US—Italia Societa per Azioni de Navigazione v Oregon Stevedoring Co, Or, 84 S Ct. 748, 376 U.S 315, 11 L Ed 2d 732, on remand, CA, 336 F 2d 124, cert den 85 S Ct 668, 379 U S 973, 13 L.Ed 2d 565—Parfait v Jahncke Service, Inc, CA La., 484 F 2d 296, cert den 94 S Ct 1485, two cases, 415 U.S 957, 39 L Ed 2d 572

29.25. U.S—Italia Societa per Azioni de Navigazione v Oregon Stevedoring Co, Or., 84 S Ct 748, 376 US 315, 11 L.Ed 2d 732, on remand, C.A, 336 F.2d 124, cert. den 85 S.Ct 668, 379 U S 973, 13 L Ed 2d 565.

Defective ship's equipment

U.S.—Olin Mathieson Chemical Corp v United Stevedoring Division, States Marine Lines, Inc, DC Tex., 317 F Supp. 1373, affd, CA., 432 F 2d 1234

30. U.S—Cook v. The Wasaborg, D.C Or, 189 F.Supp 464—Lamazza v. US, DC.NY, 190 F Supp. 692—West Africa Nav, Limited v. Nacirema Operating Co., D.C.Pa., 191 F.Supp 131—McNamara v. Weichsel Dampschifffahrts AG Kiel, Germany, CA NY, 293 F 2d 900—Drago v A/S Inger, DC NY, 194 F Supp 398, affd, CA, 305 F 2d 139, cert den 83 S Ct 292, 371 US 925, 9 L Ed 2d 232—Nordeutsher Lloyd, Brennan v Brady-Hamilton Stevedore Co, DC Or, 195 F Supp 680—Johnson v Partrederiet Brovigtank, DC NY, 202 F Supp 859—Misurella v Isthmian Lines, Inc, DC NY, 215 F Supp 857, affd, CA, 328 F 2d 40—McNamara v Weichsel Dampfschifffahrts AG Kiel, Germany, CA NY, 339 F 2d 475—Pacific Far East Line v California Stevedore & Ballast Co, DC Cal, 238 F Supp 956—Waterman SS Corp v Brady-Hamilton Stevedore Co, DC Or, 243 F Supp 298—La Capria v Compagnie Maritime Belge, CA NY, 427 F 2d 244—Shaw v Lauritzen, CA Pa, 428 F 2d 247—Evans v Overseas Maritime Co, DC SC, 330 F Supp 654, affd, CA, 451 F 2d 188—Brock v Baroid Division of National Lead Co, DC La, 339 F Supp 728

Fla—Home Ins Co v Southport Terminals, Inc, App, 240 So 2d 525

Matters held no defense

US—States SS Co v Portland Stevedoring Co, DC Or, 222 F Supp 136—T Smith & Son, Inc v Skibs A/S Hassel, CA La, 362 F 2d 745—LaBolle v Nitto Line, DC Cal, 268 F Supp 16

Knowledge of defect by stevedore

US—Mosley v Cia Mar Adra SA, CA NY, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S. 933, 17 L Ed 2d 213—T Smith & Son, Inc v Skibs A/S Hassel, CA La, 362 F 2d 745—Old Dominion Stevedoring Corp v Polskie Linie Oceaniczne, CA Va, 386 F 2d 193—Victory Carriers, Inc v Stockton Stevedoring Co, CA Cal, 388 F 2d 955—Olin Mathieson Chemical Corp v United Stevedoring Division, States Marine Lines, Inc, DC Tex, 317 F Supp 1373, affd, CA, 432 F 2d 1234—Grayson v Management & Shipping Transport, Inc, DC Ala, 330 F Supp 30.

Expenses for defending appeal

(1) Recovery allowed

US—Old Dominion Stevedoring Corp v Polskie Linie Oceaniczne, CA Va, 386 F 2d 193

(2) Recovery not allowed

US—Old Dominion Stevedoring Corp v Polskie Linie Oceaniczne, CA Va, 386 F 2d 193

31. US—Pope & Talbot v Hawn, Pa, 74 S Ct 202, 346 US 406, 98 L Ed 143—Seawright v A Garcia Y Cia, Ltd, DC Pa, 138 F Supp 881, affd, CA, 241 F 2d 30—Trygstad v States Marine Corp, D.C Or, 150 F Supp. 556—Amerocean SS Co v Copp, CA Wash, 245 F 2d 291—Johnson v Partrederiet Brovigtank, DC NY, 202 F Supp 859—Ray v Compania Naviera Continental, SA, DC Md, 203 F Supp 206—Matthews v Compania Anonima Venezolano de Navegacion, D.C.La, 234 F Supp 553, affd, CA, 371 F 2d 971, cert den 88 S.Ct 37, 389 US 820, 19 L Ed 2d 71—Jones v S.S Jesse Lykes, DC Tex, 253 F Supp 368—McNeil v. Lehigh Valley R Co, CA NY, 387 F 2d 623, cert den 88 S Ct 1638, 390 US 1040, 20 L.Ed 2d 302—Hebert v California Oil Co, D.C La, 280 F Supp 754—McLaughlin v Trelleborgs Angfartygs A/B, CA NY, 408 F 2d 1334, cert den. 89 S Ct 2020, 395 U S 946, 23 L Ed 2d 464

Where negligent acts were similar in character, etc.

US—Chevis v Luckenbach Overseas Corp, DC Tex, 228 F Supp 642

What conduct precludes recovery

US—States SS Co v Portland Stevedoring Co, DC Or, 222 F Supp 136.

Recovery not necessarily barred

US—McNamara v Weichsel Dampshiffahrts AG Kiel, Germany, CA NY., 293 F 2d 900—Drago v A/S Inger, DC NY, 194 F Supp. 398, affd, CA, 305 F 2d 139, cert. den. 83 S Ct 292, 371 US 925, 9 L Ed 2d 232—Gilchrist v Mitsui Sempaku K K, D.C Pa, 266 F.Supp 961, affd in part, revd in part on oth grds, C.A, 405 F 2d 763, cert den 89 S Ct 1195, 394 U S 920, 22 L Ed 2d 453—Price v SS Yaracuy, D C La, 306 F Supp 638

32. US—Scott v SS Ciudad Ibaque, DC La, 285 F Supp 613, affd, CA, 426 F 2d 1105—Waterman SS Corp, v Casbon, CA La, 417 F 2d 1040—Williamson v Compania Anonima Venezolana De Navigacion (Venezuelan Line), CA NY, 446 F 2d 1339, cert den 92 S Ct 739, 404 U S 1059, 30 L Ed 2d 746

Last clear change doctrine inapplicable

US—Hudson SS Co v Ayala Colon, CA Puerto Rico, 314 F 2d 44

33. US—Brown v American-Hawaiian SS. Co, CA Pa, 211 F 2d 16—Weyerhaeuser SS Co v Nacirema Operating Co, NY, 78 S Ct 438, 355 US 563, 2 L Ed 2d 491—Mangone v Moore-McCormack Lines, Inc, DC NY, 152 F Supp 848—King v Waterman SS Corp, CA Pa, 272 F 2d 823, revd on oth grds 81 S Ct 200, 364 US 421, 5 L Ed 2d 169—D'Agosta v Royal Netherlands SS Co, CA NY, 301 F 2d 105—Paliaga v Luckenbach SS Co, CA NY, 301 F 2d 403—Ray v Compania Naviera Continental, SA, DC Md, 203 F Supp 206—Pettus v Grace Line, Inc, CA NY, 305 F 2d 151—Ferrigno v Ocean Transport Limited, CA NY, 309 F 2d 445—Simmons v Gulf & South Am SS. Co, DC La, 260 F Supp 525, affd, CA, 394 F 2d 504—Caputo v Kheel, DC NY, 291 F Supp 804—Roselli v Shell Oil Co, DC La, 293 F Supp. 1395—Capozziello v Brasileiro, CA NY, 443 F 2d 1155

Pa—Lloyd v Victory Carriers, Inc, 167 A 2d 689, 402 Pa 484

Settlement by shipowner held reasonable and based on potential liability

US—California Stevedore & Ballast Co v Pan-Atlantic SS Corp, CA Cal, 291 F 2d 252

What law governs

US—A/S Ludwig Mowinckels Rederi v Commercial Stevedoring Co, 256 F 2d 227, cert dism 79 S Ct 9, 358 US 801, 3 L Ed 2d 49—Gonzales v Pennsylvania R Co, DC NY, 183 F Supp 779—Ferrigno v Ocean Transport Limited, DC N.Y, 201 F Supp. 173, revd on oth grds, CA, 309 F 2d 445—Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co, Or., 84 S Ct. 748, 376 U S 315, 11 L Ed 2d 732, on remand, C.A., 336 F.2d 124, cert den 85 S Ct 668, 379 U.S 973, 13 L Ed 2d 565—Gerking v. Furness, Withy & Co, DC Wash, 251 F.Supp 781—Crosson v N V Stoomvaart MIJ Nederland, D.C N.Y., 266 F Supp. 409, affd, CA, 409 F.2d 865

Elimination of known risk

US—Mosley v. Cia Mar. Adra SA, DC N Y., 257 F Supp 30, affirmed 362 F.2d 118, cert den. 87 S.Ct 292, 296, 385 U S. 933, 17 L.Ed.2d 213.

Implied warranty not excluded

US—Sanchez v Lubeck Linie A G., DC.N.Y, 318 F Supp 821

34. U S.—Mancini v. U.S., D.C.N.Y., 115 F Supp. 605—Compania Anonima Venezolana De Navegacion v. Cottman Co, D.C Md, 145 F Supp 761—Williams v. Lehigh Val R Co, DC NY, 151 F Supp. 809—Hugev v Dampskisaktieselskabet International, DC Cal, 170 F.Supp 601, affd., CA., 274 F.2d 875, cert den 80 S Ct 1237, 363 U S. 803, 4 L.Ed.2d 1147—Pena v A/S Dovrefjell, DC NY, 176 F.Supp 677—D'Agosta v Royal Netherlands S.S. Co, C.A N.Y, 301 F 2d 105—Paliaga v Luckenbach S.S. Co., C.A NY, 301 F 2d 403—Ray v. Compania Naviera Continental, S.A, DC Md., 203 F Supp. 206—Ferrigno v. Ocean Transport Limited, CA.N.Y., 309 F 2d 445—American Export Lines, Inc v Atlantic & Gulf Stevedores, Inc, D.C Va, 205 F.Supp 316, revd. on oth grds., C.A., 313 F.2d 414, cert. den. 83 S Ct. 1525, 373 U.S. 924, 10 L.Ed 2d 422—Simpson v Royal Rotterdam Lloyd, DC N.Y., 225 F Supp 947—McNamara v Weichsel Dampfschiffahrts AG Kiel, Germany, C.A N.Y, 339 F 2d 475—Roselli v Shell Oil Co., D.C La., 293 F Supp. 1395—Mitsui & Co. (U.S.A.) v Toko

Kaiun Kabushiki Kaisha, D C Tex, 342 F Supp 14

Cal—Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C A 2d 812, cert den 88 S Ct 96, 19 L Ed 2d 831, 19 L Ed 2d 88

Contract construed

U S—U S v Harrison, C A Cal, 245 F 2d 911

Indemnification of shipowner for attorneys fees

U S—Nicroli v Den Norske Afrika–Og Australielinie Wilhelmsens Dampskibs–Aktieselskab, C A N Y, 332 F.2d 651—Guarracino v Luckenbach S S Co, C A N Y, 333 F 2d 646, cert den 85 S Ct 439, 379 U S 946, 13 L Ed 2d 543—Hill v Flota Mercante Grancolombiana, S A, D C La, 267 F Supp 380, affd 405 F 2d 878, cert den 89 S Ct 1995, 395 U S 934, 23 L Ed 2d 449—S S Lena Luckenbach v Walsh Stevedoring Co, C A Miss, 395 F 2d 217

Indemnification of shipowner for expenses

U S—Calderone v Naviera Vacuba S/A, C A N Y, 325 F 2d 76, mod on oth grds 328 F 2d 578—Calderone v Naviera Vacuba S/A, C A N Y, 328 F 2d 578—Nicroli v Den Norske Afrika–Og Australielinie Wilhelmsens Dampskibs–Aktieselskab, C A N.Y., 332 F 2d 651—Massa v C A Venezuelan Navigacion, C A N.Y, 332 F 2d 779, cert den 85 S Ct. 262, 379 U S 914, 13 L.Ed 2d 186—Guarracino v. Luckenbach S S Co, C A N Y, 333 F 2d 646, cert. den. 85 S.Ct. 439, 379 U S 946, 13 L Ed.2d 543—American Export Lines v Norfolk Shipbuilding & Drydock Corp., C.A Va, 336 F 2d 525—Hill v Flota Mercante Grancolombiana, S.A, D.C.La., 267 F Supp 380, affd 405 F 2d 878, cert den 89 S Ct 1995, 395 U S 934, 23 L.Ed.2d 449

Agreement not in violation of public policy

U.S—Lloyd v. Jones Stevedoring Co, C A Cal, 490 F 2d 648

35. U.S.—DeGioia v. U.S Lines Co, C A N Y, 304 F 2d 421—Hebert v California Oil Co., D C La, 280 F.Supp 754—Ianuzzi v South African Marine Corp, Ltd, C.A N.Y, 510 F 2d 950

N.Y.—Radom v. Isthmian S S Co, 162 N Y S 2d 281, 32 Misc.2d 150

Effect of Longshoremens Compensation Act

U.S.—Hagans v Farrell Lines, Inc., C A Pa, 237 F 2d 477—Leotta v. The Esparta, D C N Y., 188 F.Supp 168—Sandoval v Mitsui Sempaku K K Tokyo, D C.Canal Zone, 288 F Supp. 377, op supp. 316 F.Supp 237, affd. in part, revd. in part on oth. grds., C.A., 460 F.2d 1163

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36. U S.—Jones v. S S. Jesse Lykes, D.C Tex., 253 F.Supp. 368—Gresham v Calmar S.S Corp., C A Fla., 414 F.2d 799.

Contributory negligence of injured employee no bar

U.S.—Shenker v. U.S., C.A N.Y., 322 F.2d 622, cert den. 84 S.Ct. 659, 376 U.S 907, 11 L.Ed 2d 606—Arista Cia DeVapores, S.A v. Howard Terminal, C.A.Cal., 372 F.2d 152

37. U.S.—States S S. Co v. Rothschild Intern. Stevedoring Co., C A.Wash., 205 F.2d 253—Shannon v U.S., D.C.N.Y., 119 F.Supp. 706, revd. on oth grds, C.A., 235 F.2d 457—Ryan Stevedoring Co v. Pan-Atlantic S.S. Corp., N.Y, 76 S Ct. 232, 350 U.S. 124, 100 L.Ed. 133—Santomarco v U.S, C A.N.Y., 277 F.2d 255, cert. den. 81 S Ct. 59, 364 U.S. 823, 5 L.Ed.2d 52

38. U.S.—DeGioia v. U.S Lines Co., C.A.N.Y, 304 F.2d 421—De Palma v South African Marine Corp., D.C.N Y., 206 F.Supp 274

39. N.Y.—Centino v. Isbrandtsen Co, 216 N.Y S.2d 433, 13 A.D.2d 977, revd on oth. grds 180 N.E.2d 914, 11 N.Y.2d 690, 225 N.Y S.2d 761, cert. den. 82 S.Ct. 1258, 370 U.S 912, 8 L Ed 2d 405.

"Hold harmless" clause inapplicable

U.S.—Waterman S S. Corp v Brady–Hamilton Stevedore Co., D C.Or., 243 F Supp. 298.

40. U.S—Anderson v. S.S. Gulf Trader, D.C.La, 287 F.Supp. 783, affd., C.A., 415 F.2d 316—Williams v Ocean Transport Lines, Inc, C A Pa, 425 F 2d 1183—Silver v American Export Isbrandtsen Lines, Inc, D C Va, 310 F Supp 681—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246—Di Paola v International Terminal Operating Co, D C N Y, 311 F Supp 685—Blair v U S Steel Corp, D C Pa, 312 F Supp 293, affd, C A, 444 F 2d 1390, cert den 92 S Ct 681, 404 U S 1018, 30 L Ed 2d 666, reh den 92 S Ct 938, 405 U S 948, 30 L Ed 2d 818—McNeil v A/S Havbor, D C Pa, 326 F Supp 226, motion gr on reconsideration 339 F Supp 1264—Rivera v Rederi A/B Nordstjernan, C A Puerto Rico, 456 F 2d 970, cert den 93 S Ct 124, 409 U S 876, 34 L Ed 2d 128—Atlantic & Gulf Stevedores, Inc v Skibs A/S Danmotor, D C Tex, 342 F Supp 837

Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819—Green v City of Los Angeles, App, 115 Cal Rptr 685, 40 C A 3d 819

Or—Lang v Coastwise Line, 294 P 2d 341, 206 Or 667

Tex—Vassallo v Nederl–Amerik Stoomv Maats Holland, 344 S W 2d 421, 162 Tex 52

Wash—Vogel v Alaska S S Co, 419 P 2d 141, 69 Wash 2d 497

Implied from relationship of parties

U S—Reynolds v Royal Mail Lines, Limited, D C Cal, 147 F Supp 223, affd, C A, 254 F 2d 55, cert den 79 S Ct 28, 358 U S 818, 3 L Ed 2d 59

Not applicable to one not performing work

U S—Kermarec v Compagnie Generale Transatlantique, N Y, 79 S Ct 406, 358 U S 625, 3 L Ed 2d 550

Duty not extended to stevedore company employing longshoreman

U S—Mickle v The Henriette Wilhelmine Schulte, D C Cal, 188 F.Supp 77

U.S—Nordeutsher Lloyd, Brennan v Brady–Hamilton Stevedore Co, D C Or, 195 F Supp 680

Test of right to protection

U S—Fitzmaurice v Calmar S S Corp, D C Pa, 198 F.Supp. 304—Partridge v. Pope & Talbot, Inc, D C Cal, 257 F Supp 456—McCown v Humble Oil & Refining Co, C A Va, 405 F 2d 596, cert den. 89 S Ct 1996, 395 U S 934, 23 L Ed 2d 449—Olvera v Michalos, D C Tex, 307 F Supp 9—Brisco v. American President Lines, Limited, D C Cal, 325 F.Supp 1259.

N Y—Licari v Isbrandtsen Co, 296 N Y S 2d 924, 31 A D 2d 791

Drydocked vessel not within doctrine

U S—Warren v Pacific Inland Nav Co, D C.Or, 204 F Supp. 31—McQuaid v U S, C A N J, 337 F 2d 483—Madden v U.S, D C Mass, 259 F Supp 663—Evans v Pan Am Tankers Corp, D C Va, 261 F Supp. 633—Van Horn v Gulf Atlantic Towing Corp, C A Va, 388 F.2d 636—White v U S, C A Va, 400 F 2d 74—Baum v U S, C A Fla, 427 F 2d 215, cert. den 91 S Ct 175, 400 U S 916, 27 L Ed 2d 155

Cal.—Pollock v Standard Oil Co of Cal, 42 Cal Rptr 128, 231 C A 2d 714

Wash—Bishop v Alaska S.S Co, 404 P 2d 990, 66 Wash 2d 704

Not extended to maritime worker's relatives

U S.—Igneri v Cie. de Transports Oceaniques, C A N.Y, 323 F.2d 257, cert. den. 84 S Ct 965, 376 U.S 949, 11 L.Ed.2d 969

Doctrine not rigidly construed

U S.—Spann v Lauritzen, C A Pa., 344 F.2d 204, cert den. 86 S Ct 386, 382 U S 938, 15 L Ed 2d 348, reh den. 86 S Ct. 531, 382 U.S. 1000, 15 L Ed 2d 489

Drydocked vessel held in navigation

U.S.—Hilton v. Aegean S S. Co, D C.Or., 239 F Supp 268.

Warehouse services not protected

U.S.—Daniel v. Skibs A/S Hilda Knudsen, D C Pa, 253 F.Supp 758, affd., C.A, 368 F 2d 178, cert den. 87 S Ct. 1304, 386 U S. 990, 18 L Ed.2d 335

Longshoremen not in service of vessel not covered

U S—Daniel v Skibs A/S Hilda Knudsen, C A Pa, 368 F 2d 178, cert den 87 S Ct 1304, 386 U S 990, 18 L Ed 2d 335—Noble v Lehigh Val R Co, C A N Y, 388 F 2d 532

Matters considered to determine if vessel is in navigation

U S—Lupo v Consolidated Mariners, Inc, D C N Y, 261 F Supp 450

Trade customs not standard of seaworthiness

U S—Carroll v Frontera Compania Naviera, S A, D C Pa, 258 F Supp 747, affd in part and revd in part on oth grds, C A, 390 F 2d 311—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347—Putman v M/V Mathilde Bolten, D C Md, 298 F Supp 660—Davis v Associated Pipe Line Contractors, Inc, D C La, 305 F Supp 1345, affd, C A, 418 F 2d 920, cert den 90 S Ct 1119, 397 U S 988, 25 L Ed 2d 396

Drydocked vessel not in navigation

U S—Madden v U S, D C Mass, 259 F Supp 663—Guenard v U S, D C La, 278 F Supp 310

Applicable only to vessels in navigation

(1) Reason for rule

U S—Rogers v M/V Ralph Bollinger, D C La, 279 F Supp 92

(2) Test of navigation

U S—Roper v U S, Va, 82 S Ct 5, 368 U S 20, 7 L Ed 2d 1—Rogers v M/V Ralph Bollinger, D C La, 279 F Supp 92—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246—Erwin v Lykes Bros S S Co, C A La, 472 F 2d 1217

(3) Vessel held not in navigation

U S—Rogers v M/V Ralph Bollinger, D C La, 279 F Supp 92—McCown v Humble Oil & Refining Co, D C Va, 293 F Supp 444, affd, C.A, 405 F 2d 596, cert den 89 S Ct. 1996, 395 U S 934, 23 L Ed 2d 449—Dean v U S, C A Cal, 418 F 2d 1236, cert den. 90 S Ct 1695, 398 U S 905, 26 L Ed 2d 64—Watz v Zapata Off-Shore Co, C A Tex, 431 F.2d 100, app after remand 500 F 2d 628

(4) Vessel held in navigation

U S—Martin v Jones, D C La, 296 F.Supp 878—Peck v U S Steel Corp, D C Minn, 315 F Supp 905, affd, C A, 446 F 2d 891, cert den 92 S Ct. 682, 404 U S 1019, 30 L.Ed 2d 667

No warranty to freight forwarder

U S—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part, C A, 427 F 2d 244

Walkway or gangway affixed to shore not vessel

U S—Bowen v Union Concrete Pipe Co, D C W Va, 299 F Supp 1109

Special purpose craft as "vessels" subject to doctrine

U S—Peck v U S Steel Corp, D C Minn, 315 F Supp 905, affd, C A, 446 F 2d 891, cert den 92 S Ct 682, 404 U S 1019, 30 L Ed.2d 667

Repairs to vessel

U S—Waganer v Sea-Land Service, Inc, C.A Ala, 486 F 2d 955—Romero v Bethlehem Steel Corp, D C Tex, 368 F.Supp 890, affd, C A, 515 F 2d 1249

41. U S.—Usner v Luckenbach Overseas Corp, La, 91 S.Ct 514, 400 U.S 494, 27 L Ed 2d 562, reh den 91 S.Ct 1247, 401 U.S 1015, 28 L Ed 2d 552—La Capria v Compagnie Maritime Belge, C A N Y, 427 F 2d 244—Grayson v Management & Shipping Transport, Inc, D C Ala, 330 F Supp 30—Nosal v Calmar S S Corp, D C Pa, 339 F Supp 1235—Smith v Olsen and Ugelstad, C A Mich, 459 F 2d 915, cert den 93 S Ct 526, 409 U S 1040, 34 L.Ed 2d 490—Mungin v Calmar S S. Corp, D.C.Md, 342 F Supp 479—Atlantic & Gulf Stevedores, Inc v Skibs A/S Danmotor, D.C Tex, 342 F Supp 837

Cal.—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819—Davis v Matson Nav Co, 68 Cal Rptr 434, 262 C A 2d 25, affd, C A, 475 F.2d 1395

Md—Frazier v Waterman S S Corp, 112 A 2d 221, 206 Md 434

N Y—Berquist v Erie R Co., 169 N Y S 2d 411, 10 Misc.2d 521, affd 183 N Y S 2d 1005, 7 A D 2d 926, rearg den 185 N Y S 2d 520, 8 A D 2d 615, app den 187 N Y S 2d 987—Giambrone v Israel America Line, Inc, 208 N Y S 2d 215, 26 Misc 2d 593—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514

Tex—Benton v Wheless Drilling Co, Civ App, 440 S W 2d 373, err ref no rev err

Wash—Vogel v Alaska S S Co, 419 P 2d 141, 69 Wash 2d 497

Stevedore is seaman, etc.

U S—Vastano v Partownership Brovigtank, D C N Y, 158 F Supp 477—Flowers v Savannah Mach & Foundry Co, C A Ga, 310 F 2d 135—Scott v Isbrandtsen Co, C A Va, 327 F 2d 113—Bryant v Partenreederei-Ernest Russ, C A Md, 330 F 2d 185—Peck v U S Steel Corp, D C Minn, 315 F Supp 905, affd, C A, 446 F 2d 891, cert den 92 S Ct 682, 404 U S 1019, 30 L Ed 2d 667

(2) Other matters

U S—Li Mandri v Brasileiro, C A N Y, 316 F 2d 3—Huff v Matson Nav Co., D C Cal, 225 F Supp 72, revd on oth grds, C A, 338 F 2d 205, cert den 85 S Ct 1026, 380 U S 943, 13 L Ed 2d 963

Fla—Moragne v State Marine Lines, Inc, 211 So 2d 161

Longshoremen on pier, etc.

U S—Litwinowicz v Weyerhaeuser S S Co, D C Pa, 179 F Supp 812—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L Ed 2d 1082—Thompson v Calmar S S Corp, D C Pa, 216 F Supp 234, affd, C A, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184—Hagans v Ellerman & Bucknall S S Co, C A Pa, 318 F 2d 563—Thompson v Calmar S S Corp, C A Pa, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184—Manson v Weyerhaeuser S S Co, D C Pa, 229 F Supp 569—Skibinski v Waterman S S Corp, D C N Y, 242 F.Supp 290, affd, C A, 360 F 2d 539, cert den 87 S Ct 2027, 387 U S 921, 18 L Ed 2d 975—Gebhard v S S Hawaiian Legislator, D C Cal, 284 F Supp 634—Johnson v Venezuelan Line S S Co, D C La, 314 F Supp 1403—Sydnor v Villain & Fassio e Compania Internazionale di Genova Societa Riunite di Navigazione, S p A, D C Md, 323 F Supp 850—Brisco v American President Lines, Limited, D C Cal, 325 F Supp 1259—McNeil v A/S Habtor, D C Pa, 326 F Supp 226, motion gr reconsideration 339 F Supp 1264

(2) Rule not limited by Extension of Admiralty Jurisdiction Act

U.S—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S.Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct. 1863, 374 U.S 858, 10 L Ed 2d 1082

(3) Doctrine inapplicable on completion of unloading

U S.—Drumgold v Plovba D C Va, 260 F Supp 983

Recovery for wrongful death under state statute

(2) Other cases

U.S.—Tallmon v. Toko Kaiun K K Kobe, D C Or, 278 F.Supp. 452

Proximate cause necessary

U.S.—Williams v Lykes Bros S S Co, D.C La, 132 F.Supp. 732—Fox v The Moremacwind, D.C Va, 182 F.Supp 7, affd., C A, 285 F 2d 222—Hurst v Central Gulf S S. Corp, D.C.La, 267 F.Supp 65—Robichaux v Kerr McGee Oil Industries, Inc, D.C.La., 317 F.Supp. 587—Sanchez v Lubeck Linie A G., D C.N Y, 318 F Supp 821—Earles v Union Barge Line Corp., D.C Pa., 321 F Supp 1329—Hardy v U.S., D.C N C, 322 F.Supp 660.

Dead and deactivated vessel not within doctrine

U S—Roper v. U.S, C.A Va, 282 F 2d 413, affd 82 S Ct 5, 368 U S. 20, 7 L Ed 2d 1.

Doctrine applicable to vessel in Puerto Rican waters

U S—Waterman S S Corp v Rodriguez, C A Puerto Rico, 290 F 2d 175—Santiago v Hermanos, D C Puerto Rico, 255 F Supp 932

Injury to stevedore on shore

U S—Massa v C A Venezuelan Navigacion, C A N Y, 298 F 2d 239

Ship and owner liable

U S—Lowe v Vessel Madrid, D C Fla, 210 F Supp 826

Owner not liable for unseaworthiness of another vessel

U S—Williams v Pennsylvania R Co, C A N Y, 313 F 2d 203, on remand, D C, 267 F Supp 495

Liability of owners in personam and ship in rem

U S—Farnum v S/S Oslofjord, D C N Y, 220 F Supp 199—Thomas v Peterson Marine Service, Inc, C A La, 411 F 2d 592, cert den 90 S Ct 562, 396 U S 1006, 24 L Ed 2d 499

Dead ship doctrine inapplicable

U S—Parker v U S, D C Or, 223 F Supp 647

Reasonable scope of longshoreman's activity

U S—Barnes v Rederi A/B Fredrika, 177 F Supp 617—Rich v Ellerman C A Va, 350 F 2d 865, cert den. 86 S Ct 895, 383 U S 910, 15 L Ed 2d 665

Liability under demise charter

U S—Blair v U S Steel Corp, D C Pa, 312 F Supp 293, affd, C A, 444 F 2d 1390, cert den 92 S Ct 681, 404 U S 1018, 30 L Ed 2d 666, reh den 92 S Ct 938, 405 U S 948, 30 L Ed 2d 818

Widow's action for wrongful death under general maritime law

U S—Moragne v States Marine Lines, Inc, Fla, 90 S Ct 1772, 398 U S 375, 26 L Ed 2d 339, on remand, C A, 446 F 2d 906

Distance from ship as not precluding application

U S—Olvera v Michalos, D C Tex, 307 F Supp 9

A longshoreman is not entitled to assert an unseaworthiness claim with respect to injuries sustained on land merely because he was engaged in the process of loading or unloading a vessel.[41.5]

41.5. U S—Victory Carriers, Inc v Law, Ala, 92 S Ct 418, 404 U S 203, 30 L Ed 2d 383, reh. den 92 S Ct 731, 404 U S 1064, 30 L Ed 2d 753—Torres v Hamburg-Amerika Linie, D C Puerto Rico, 353 F Supp. 1276

N Y—Mannerini v Orpheus Marine Transport Corp, 341 N Y S 2d 315, 41 A D 2d 709

42. U S—Johnson v Venezuelan Line S S Co, D C La, 314 F Supp 1403

43. U S—Brattoli v Kheel, D C N Y, 302 F Supp 745—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A.Pa, 444 F 2d 727, on remand, 342 F.Supp 786

Cal—O'Hey v. Matson Nav Co, 288 P 2d 81, 135 C A 2d 819—Vittone v American President Lines, 39 Cal.Rptr 758, 228 C.A 2d 689

Fla—Moragne v State Marine Lines, Inc, 211 So 2d 161

N Y—Giambrone v. Israel America Line, Inc, 208 N Y S 2d 215, 26 Misc 2d 593.

Or—Kinney v. General Const Co., 435 P 2d 297, 248 Or 500

"Fault" and "negligence" under statute

U.S.—Compania Trasatlantica Espanola, S A v. Melendez Torres, C A Puerto Rico, 358 F 2d 209

Standard is reasonable fitness

U S—Carroll v. Frontera Compania Naviera, S A., C A Pa, 390 F 2d 311—Passantino v States Marine Lines, Inc., D C N Y, 299 F Supp. 1252—Tate v A/B Svenska Amerika Linein, D C La, 331 F Supp 854, affd, C A, 435 F 2d 172

Absolute duty not owed to stevedore

U S—Federal Marine Terminals, Inc v Burnside Shipping Co, Ill, 89 S Ct. 1144, 394 U S 404, 22 L Ed 2d 371

Absolute duty

U S—Grayson v Cordial Shipping Co, C A Ill, 496 F 2d 710

44 U S—Tate v A/B Svenska Amerika Linein, D C La, 331 F Supp 854, affd, C A., 435 F 2d 172

Cal—Pollock v Standard Oil Co of Cal., 42 Cal Rptr 128, 231 C.A 2d 714

La—Blow v Compagnie Maritime Belge (Lloyd Royal) S A, C A Va, 395 F 2d 74

Tex—Benton v Wheless Drilling Co, Civ App, 440 S W 2d 373, err ref no rev err

Proof of owner's negligence, etc.

U S—Price v S S Yaracuy, C A La, 378 F 2d 156, on remand D C, 306 F Supp 638

Actual or constructive knowledge of condition not essential

U S—Merrill v The Cuaco, D C Or, 189 F Supp 321—Johnson v Partrederiet Brovigtank, D C N Y, 202 F Supp 859—Ballwanz v Isthmian Lines, Inc, C A Md, 319 F 2d 457, cert den 84 S Ct 1136, 376 U S 970, 12 L Ed 2d 84—Thompson v Calmar S S Corp, C A Pa, 331 F.2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184—Boleski v American Export Lines, Inc, C A Md, 385 F 2d 69

Cal—Davis v Matson Nav. Co, App, 68 Cal Rptr 434

Claim governed by tort law

U S—Dawson v. Fernley & Eger, D C.Va, 196 F Supp 816

Claim maritime in nature

U S—McCross v Ratnakar Shipping Co, D C Md, 265 F Supp 827—Milin v U.S Lines, Inc, 291 N E 2d 144, 31 N Y 2d 336, 338 N Y.S 2d 905

Unseaworthiness distinguished from negligence

U S—Price v S S Yaracuy, C A La, 378 F.2d 156, on remand, D.C, 306 F Supp 638—Marshall v Ove Skou Rederi A/S, C A Ala, 378 F 2d 193, cert den 88 S Ct 86, 389 U S 828, 19 L Ed 2d 84—Robertson v The Sanyo Maru, D C.La, 298 F Supp 931, affd in part, remd in part 424 F 2d 520, cert den 91 S Ct 59, 400 U S. 854, 27 L Ed 2d 91

"Operational negligence" and "unseaworthiness" equivalent

U.S—Alexander v Bethlehem Steel Corp., C.A N Y, 382 F 2d 963, cert den 89 S.Ct 717, 393 U.S 1064, 21 L Ed 2d 707—Mendoza v A/S J Ludwig Mowinckels Rederi, D C.N Y, 293 F.Supp. 1319—Blair v U S Steel Corp, D.C.Pa., 312 F Supp. 293, affd., C A, 444 F.2d 1390, cert. den. 92 S.Ct 681, 404 U S. 1018, 30 L Ed.2d 666, reh den 92 S.Ct 938, 405 U.S 948, 30 L.Ed 2d 818.

Operational negligence and unseaworthiness held not synonymous

U.S—Reed v. MV Foylebank, C A.La., 415, F 2d 838, cert den. 90 S.Ct 909, 397 U.S. 910, 25 L Ed 2d 91, reh den 90 S Ct 1256, 397 U S. 1030, 25 L.Ed 2d 543—Santiny v. Coastal Boat Operators, Inc, C.A.La, 438 F.2d 976.

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45. U S—Lee v Pure Oil Co., C.A Tenn, 218 F.2d 711—Dawson v. Fernley & Eger, D C Va., 196 F Supp 816—Calderone v. Naviera Vacuba S/A, D C.N.Y., 204 F.Supp. 783, affd, C A, 325 F 2d 76, mod on oth grds 328 F 2d 578—Ring v. Motor Vessel Cape Clear, D C Cal, 226 F Supp. 709—Luna v. Kawasaki Kisen Kaisha, Limited, D C Pa., 245 F Supp. 152—Simmons v. Gulf & South Am S S Co., D.C.La., 260 F.Supp. 525, affd., C A, 394 F.2d 504

Humanitarian doctrine

US—Carrillo v Samaeit Westbulk, D C Puerto Rico, 385 F Supp 119, affd in part, vac in part on oth grds, C A, 514 F 2d 1214, cert den 96 S Ct 445, 423 U S 1014, 46 L Ed 2d 385

46. US—Brabazon v Belships Co, Limited, Skibs A/S, C A Pa, 202 F 2d 904—Thorson v Inland Nav Co, C A Or, 270 F 2d 432, 77 A L R 2d 825—Coggins v James W Elwell & Co, Inc, D C Pa, 356 F Supp 612

Wash—Bishop v Alaska S S Co, 404 P 2d 990, 66 Wash 2d 704

Person other than owner, having custody and operational control of vessel

US—Blair v U S Steel Corp, D C Pa, 312 F Supp 293, affd, C A, 444 F 2d 1390, cert den 92 S Ct 681, 404 U S 1018, 30 L Ed 2d 666, reh den 92 S Ct 938, 405 U S. 948, 30 L.Ed 2d 818

47. US—Skipper v Amerind Shipping Corp, D C La, 230 F Supp 253—Chamberlain v Shaver Transp Co, D C Or, 263 F Supp 47—Hurst v Central Gulf S S Corp, D C La, 267 F Supp 65—Bellomy v Union Concrete Pipe Co, D C W Va, 297 F.Supp 261, affd, C A, 420 F 2d 1382, cert den 91 S Ct 144, 400 U S 904, 27 L Ed 2d 142—Ramos v Beauregard, Inc, C A Puerto Rico, 423 F 2d 916, cert den 91 S Ct 101, 400 U S 865, 27 L Ed 2d 104—Bowen v Union Concrete Pipe Co, D C W Va, 299 F Supp 1109

Cal—Pollock v Standard Oil Co of Cal, 42 Cal Rptr 128, 231 C A 2d 714—Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C A 2d 812, cert den 88 S Ct 96, 389 U S 831, 19 L Ed 2d 88

Duty is absolute and continuous, etc.

(2) Other instances.

US.—Fireman's Fund Indem Co v U S, C A Ala., 211 F 2d 773, cert den. 75 S.Ct 79, 348 U S 855, 99 L Ed 673—U.S. v Harrison, C A Cal., 245 F 2d 911—Merrill v. The Cuaco, D C.Or, 189 F Supp 321—Rawson v Calmar, S S. Corp, C A.Wash, 304 F 2d 202—Rodriguez v. Coastal Ship Corp, D.C N Y, 210 F.Supp. 38—Misurella v. Isthmian Lines, Inc., D C.N.Y., 215 F.Supp. 857, affd., C A, 328 F 2d 40—Ballwanz v. Isthmian Lines, Inc, C.A Md., 319 F 2d 457, cert. den. 84 S Ct 1136, 376 U.S 970, 12 L Ed.2d 84—Scott v. Isbrandtsen Co., C.A Va., 327 F 2d 113—Blassingill v Waterman S.S Corp., C A.Cal., 336 F 2d 367—Luna v Kawasaki Kisen Kaisha, Limited, D C.Pa., 245 F.Supp 152—Abruzzo v. U.S, D.C.N.Y., 254 F.Supp 134—Wilson v. Societa Italiana de Armamento (Sidarma), D C La., 279 F Supp. 945, affd., C A., 409 F.2d 484—Tim v. American President Lines, Limited, C A Cal, 409 F 2d 385

Improper stowage of cargo not transitory condition

U.S—Gindville v. American-Hawaiian S.S. Co., C A Pa., 224 F.2d 746.

Authority to alter condition of cargo by contractor of no consequence

Cal.—O'Hey v. Matson Nav Co., 288 P.2d 81, 135 C.A 2d 819.

Liability for temporary unseaworthiness

U.S.—Scott v. Isbrandtsen Co., C.A.Va., 327 F 2d 113—Usner v. Luckenbach Overseas Corp., La., 91 S.Ct. 514, 400 U.S. 494, 27 L Ed 2d 562, reh den. 91 S Ct. 1247, 401 U.S. 1015, 28 L Ed.2d 552.

Liability may be concurrent with that of stevedoring company for breach of warranty

US—McInnis v. Hamburg Am Lines, D.C.Cal., 317 F.Supp. 1395

48. U.S.—Smith v. Olsen and Ugelstad, C.A.Mich., 459 F.2d 915, cert. den. 93 S Ct. 526, 409 U.S. 1040, 34 L.Ed.2d 490.

Cal.—Vittone v. American President Lines, 39 Cal.Rptr. 758, 228 C.A.2d 689—Pollock v. Standard Oil Co of Cal., 42 Cal.Rptr 128, 231 C A.2d 714—Standard Oil Co. of Cal. v. Intrepid, Inc, 102 Cal.Rptr. 604, 26 C.A.3d 135.

N.Y—Berquist v Erie R. Co., 169 N.Y.S.2d 411, 10 Misc.2d 521, affd 183 N.Y S.2d 1005, 7 A D 2d 926, rearg den 185 N Y S 2d 520, 8 A D 2d 615, app den 187 N Y S 2d 987

Wash—Bishop v Alaska S S Co, 404 P 2d 990, 66 Wash 2d 704

Appliances and equipment furnished by stevedoring contractor

US—Mosley v Cia Mar Adra, S A, C A N Y, 314 F 2d 223, cert den 84 S Ct 52, 375 U S 835, 11 L Ed 2d 65, and 84 S Ct 73, 375 U S 829, 11 L Ed 2d 61—Huff v Matson Nav Co, C A Cal, 338 F 2d 205, cert den 85 S Ct 1026, 380 U S 943, 13 L Ed 2d 963—Pellegrino v A H Bull S S Co, D C N Y, 309 F Supp 839—Chagois v Lykes Bros S S Co, C A La, 432 F 2d 388, vac on oth grds 92 S Ct 667, 404 U S 1009, 30 L Ed 2d 656, on remand 457 F 2d 343, cert den 93 S Ct 451, 409 U S 1012, 34 L Ed 2d 306—McNeil v A/S Habtor, D C Pa, 326 F Supp 226, motion gr, on reconsideration 339 F Supp 1264

49. US.—Giuliano v US, D C N Y, 117 F Supp 610—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514—Konmklyke Nederlandsche Stoomboot Maalschappy, N V, Royal Netherlands S S Co v Strachan Shipping Co, C A Tex, 304 F 2d 545—Carroll v Frontera Compania Naviera, S A, C A Pa, 390 F 2d 311—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds, C A, 427 F 2d 244.

50. US—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246

N Y—McCoy v American Israeli Shipping Co, Inc, 344 N Y S 2d 707, 42 A D 2d 12, affd 310 N E 2d 541, 34 N Y 2d 569, 354 N Y S 2d 944

Duty of stevedore to point out unseaworthy conditions

US—Nordeutsher Lloyd, Brennan v Brady-Hamilton Stevedore Co, D C Or., 195 F Supp 680—Ballwanz v Isthmian Lines, Inc., C A Md, 319 F 2d 457, cert den 84 S Ct 1136, 376 U S 970, 12 L Ed 2d 84

Cal—Sea-Land Service, Inc v Matson Terminal Co, 61 Cal Rptr 756, 253 C.A 2d 885

Barge in custody of ship repairer

US.—Hurst v Point Landing, Inc, D C La, 212 F Supp. 160.

No duty as to pier where right of control absent

US.—Hagans v. Ellerman & Bucknall S S Co, C A Pa, 318 F 2d 563

51. U.S—Moye v Sioux City & New Orleans Barge Lines, Inc, C A Miss, 402 F 2d 238, cert den 89 S.Ct 1759, 395 U S 913, 23 L Ed 2d 226, reh den 89 S Ct 2141, 395 U S 987, 23 L Ed 2d 777—Reed v MV Foylebank, C A La, 415 F 2d 838, cert den 90 S Ct 909, 397 U.S 910, 25 L.Ed.2d 91, reh. den 90 S Ct 1256, 397 U S 1030, 25 L Ed 2d 543—Patterson v Humble Oil & Refining Co, C A La, 423 F 2d 883, cert den 91 S Ct 863, 401 U S 922, 27 L Ed 2d 826, reh den 91 S Ct 1364, 402 U S 924, 28 L Ed 2d 665

Negligent handling of properly stowed cargo

US—Knox v. U S Lines Co, D C Pa., 186 F Supp 668, app dism, C A, 294 F 2d 354

Extent of immunity from liability

US—Stark v U.S., C A.La, 413 F 2d 253

52. U S.—Griffin v. Scott Paper Co., D C Pa, 219 F.Supp 41—Simpson v. Royal Rotterdam Lloyd, D.C Va, 225 F Supp 947—Radsich v Westfal Larsen & Co, A/S, D C Cal, 228 F Supp. 1021—Nicroli v Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibs-Aktieselskab, C A N Y, 332 F 2d 651—Beeler v Alaska Aggregate Corp, C A Or, 336 F.2d 108, cert den 85 S Ct 719, 379 U S 1000, 13 L Ed 2d 701—Smith v U S, C A Va, 336 F 2d 165—Spann v Lauritzen, C A Pa, 344 F 2d 204, cert. den 86 S Ct 386, 382 U S 938, 15 L.Ed.2d 348, reh den. 86 S Ct. 531, 382 U S. 1000, 15 L Ed 2d 489—Matthews v Compania Anonima Venezolano de Navegacion, D C La, 234 F.Supp 553, affd, C A., 371 F.2d 971, cert den. 88 S Ct. 37, 389 U.S 820, 19 L Ed 2d 71—Skibinski v. Waterman S S Corp, C A N Y, 360 F 2d 539, cert den. 87 S.Ct 2027, 387 U S 921, 18 L Ed 2d 975—Waterman S S Corp v Brady-Hamilton Stevedore Co, D C Or, 243 F Supp 298—Metzger v S S Kirsten Torm, D C Md, 245 F Supp 227—Candiano v Moore-McCormack Lines, Inc, D C N Y, 251 F Supp 654, affd, C A, 382 F 2d 961, reh den 386 F 2d 444, cert den 88 S Ct 1416, 390 U S 1027, 20 L Ed 2d 284—U S Lines Co v King, C A Va, 363 F 2d 658—D/S Ove Skou v Hebert, C A Tex, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139—Crescent Wharf & Warehouse v Compania Naviera De Baja California, C A Cal, 366 F 2d 714—Chaney v City of Galveston, C A Tex, 368 F 2d 774—Chamberlain v Shaver Transp Co, D C Or, 263 F Supp 47—Cates v U S, D C Fla, 308 F Supp 199, mod on oth grds, C A, 451 F 2d 411—Usner v Luckenbach Overseas Corp, La, 91 S Ct 514, 400 U.S 494, 27 L Ed 2d 562, reh den 91 S Ct 1247, 401 U S 1015, 28 L Ed 2d 552—U S Lines Co v Maritime Shipcleaning & Maintenance Co, D C Pa, 317 F Supp 639—Olin Mathieson Chemical Corp v United Stevedoring Division, States Marine Lines, Inc, D C Tex, 317 F Supp 1373, affd, C A, 432 F 2d 1234—Hardy v U S, D C N C, 322 F Supp 660—Muller v Lykes Bros S S Co, D C La, 337 F Supp 700, affd, C A, 468 F 2d 951—Atlantic & Gulf Stevedores, Inc v Skibs A/S Danmotor, D C Tex, 342 F Supp 837

Cal—Vittone v American President Lines, 39 Cal Rptr 758, 228 C A 2d 689—Carlson v Pacific Far East Lines, 105 Cal Rptr 885, 29 C A 3d 883.

Minn—Sorenson v Cargill, Inc, 163 N.W 2d 59, 281 Minn 480

N Y—Berquist v Erie R Co, 169 N Y S 2d 411, 10 Misc 2d 521, affd 183 N Y S 2d 1005, 7 A.D 2d 926, rearg den 185 N Y S 2d 520, 8 A D 2d 615, app den 187 N Y S 2d 987—Giambrone v Israel America Line, Inc, 208 N Y S 2d 215, 26 Misc 2d 593—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514—Buljanovic v Grace Lines, Inc, 295 N Y S 2d 552, 31 A D.2d 614

Or—Lang v Coastwise Line, 294 P 2d 341, 206 Or 667

Wash—Bishop v Alaska S S Co, 404 P 2d 990, 66 Wash 2d 704—Vogel v Alaska S S Co, 419 P 2d 141, 69 Wash.2d 497

Hatch beam

US—Chevis v Luckenbach Overseas Corp, D C Tex, 228 F Supp 642—Jones S S Jesse Lykes, D C.Tex, 253 F Supp 368—Greene v Vantage S S Corp, C A.Va, 466 F 2d 159

Winch

US—Torres Cruz v Hudson, S S Co, D C Puerto Rico, 206 F Supp 216, affd, C A, 314 F 2d 44—Mills v Mitsubishi Shipping Co, C A Tex, 358 F 2d 609, cert den 87 S Ct 1474, 386 U S 1036, 18 L Ed 2d 600—Rosa v A/S D/S Svendborg, D C N Y, 291 F Supp 84—Jackson v. Lloyd Brasileirs Patrimonio Nacional, D C Tex, 324 F Supp 556

Inadequate lights

US—Mollica v Compania Sud-Americana De Vapores (Chilean Line), C A N Y, 202 F 2d 25, cert den 73 S.Ct 952, 345 U.S 965, 97 L Ed 1384—Brabazon v. Belships Co, Limited, Skibs A/S, C A Pa, 202 F 2d 904—Crawford v Pope & Talbot, Inc, C A Pa., 206 F 2d 784—Mosley v. Cia Mar Adra, S A, C A.N Y., 314 F 2d 223, cert den 84 S Ct 52, 375 U S 835, 11 L Ed 2d 65, and 84 S.Ct 73, 375 U S 829, 11 L Ed 2d 61—Mosley v Cia Mar Adra S A, C A.N.Y, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S 933, 17 L Ed 2d 213—Blair v U S, Steel Corp, D C Pa, 312 F Supp 293, affd, C A, 444 F.2d 1390, cert den. 92 S Ct 681, 404 U S 1018, 30 L Ed 2d 666, reh den 92 S Ct 938, 405 U S 948, 30 L.Ed 2d 818

Defect in supporting stanchion

US—Williams v Lykes Bros S S Co, D C La, 132 F Supp 732

Passageways

Cal—O'Hey v Matson Nav Co, 288 P.2d 81, 135 C A 2d 819

Reasonably safe

US—Robertson v The Sanyo Maru, D C La, 298 F Supp 931, affd in part, remd in part 424 F 2d 520, cert den 91 S Ct 59, 400 U S 854, 27 L Ed 2d 91

Tex—Benton v Wheless Drilling Co, Civ App, 440 S W 2d 373, err ref no rev err

Wash—Tarabochia v Johnson Line, Inc, 440 P 2d 187, 73 Wash 2d 751

Seaworthiness held relative concept

US—Lester v U S, C A N Y, 234 F 2d 625, cert gr 77 S Ct 130, 352 U S 889, 1 L Ed 2d 85, cert dism 77 S Ct 384, 352 U S 983, 1 L Ed 2d 366—Rodriguez v Coastal Ship Corp, D C N Y, 210 F Supp 38—Farnum v S/S Oslofjord, D C N Y, 220 F Supp 199—Mosley v Cia Mar Adra, S A, C A N Y, 314 F 2d 223, cert den 84 S Ct 52, 375 U S 835, 11 L Ed 2d 65, and 84 S Ct 73, 375 U S 829, 11 L Ed 2d 61—Skibinski v Waterman S S Corp, D C N Y, 242 F Supp 290, affd, C A, 360 F 2d 539 Cert den 87 S Ct 2027, 387 U S 921, 18 L Ed 2d 975

Wet deck does not render ship unseaworthy

US—Santamaria v The Othem, C A N Y, 272 F 2d 280—Testa v Moore-McCormack Lines, Inc, D C N Y, 229 F Supp 154

Ladders

US—Calderola v Cunard S S Co, C A N Y, 279 F 2d 475, cert den 81 S Ct 172, 364 U S 884, 5 L Ed 2d 104—Ferrigno v Ocean Transport Limited, D C N Y, 201 F Supp 173, revd on oth grds, C A, 309 F 2d 445—Sciarrillo v S S Fred Christensen, D C N Y, 206 F Supp 182—Guarracino v Luckenbach S S Co, C A N Y, 333 F 2d 646, cert den 85 S Ct 439, 379 U S 946, 13 L Ed 2d 543

Temporary unseaworthiness

(1) Doctrine held applicable

US—Calderola v Cunard S S Co, C A N Y, 279 F 2d 475, cert den 81 S Ct 172, 364 U S 884, 5 L Ed 2d 104—Billeci v U S, C A Cal, 298 F 2d 703—Sullivan v U S, D C N Y, 203 F Supp 496—Massa v C A Venezuelan Navigacion, D C N Y, 209 F Supp 404, affd in part and revd in part on oth grds, C A, 332 F 2d 779, cert den 85 S Ct 262, 379 U S 914, 13 L Ed 2d 186—Luna v Kawasaki Kisen Kaisha, Limited, D C Pa, 245 F Supp 152—Lunsford v Bethlehem Steel Corp, D C Md, 269 F Supp 570—Hanks v California Co, D C La, 280 F Supp 730

Tex—Benton v Wheless Drilling Co, Civ App, 440 S W 2d 373, err ref no rev err

(2) Doctrine held not applicable

US—McMahan v The Panamolga, D C Md, 127 F Supp 659—Ventre v Oetker, D C N Y, 214 F Supp 659—Rogers v U S, C A Fla, 452 F 2d 1149—Robinson v Showa Kaiun K K, C A La, 451 F 2d 688

(3) Other matters

U S—Bryant v. Partenreederei-Ernest Russ, C A Md, 330 F.2d 185—Williams v Arrow S S Corp., D C Va., 218 F Supp 595—Blair v U S Steel Corp, D C Pa, 312 F Supp 293, affd., C A, 444 F 2d 1390, cert den 92 S.Ct 681, 404 U S. 1018, 30 L Ed.2d 666, reh den 92 S Ct 938, 405 U.S 948, 30 L Ed 2d 818—Sydnor v Villain & Fassio e Compania Internazionale di Genova Societa Riunite di Navigazione, S p A, D C Md, 323 F Supp 850

Adequate crew and proper equipment

U S—Machillo v. New York Cent R Co, D C N Y, 200 F Supp. 805—Giaraffa v Moore-McCormack Lines, Inc, D C N Y., 270 F.Supp 342—Moschi v S.S. Edgar F Luckenbach, D C.La, 295 F Supp 849, affd, C.A., 424 F 2d 1060

Fumigated grain does not render ship unseaworthy

U.S.—Morales v. City of Galveston, C.A.Tex., 291 F 2d 97, affd. 82 S.Ct 1226, 370 U.S 165, 8 L.Ed.2d 412, reh den. 83 S.Ct. 16, 371 U S. 853, 9 L.Ed 2d 93.

Defective cargo containers

U S—U S Atlantic & Gulf Stevedores, Inc v Ellerman Lines, Ltd, Pa, 82 S Ct 780, 369 U S 355, 7 L Ed 2d 798, reh den 82 S Ct 1137, 369 U S 882, 8 L Ed 2d 284, motion den 83 S Ct 15, 371 U S 803, 9 L Ed 2d 51—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L Ed 2d 1082—Noble v Lehigh Val R Co, C A N Y, 388 F 2d 532—Simpson Timber Co v Parks, C A Or, 390 F 2d 353, cert den 89 S Ct 126, 393 U S 858, 21 L Ed 2d 127, and 89 S Ct 130, 393 U S 858, 21 L Ed 2d 127—Williamson v Compania Anonima Venezolana De Navigacion (Venezuelan Line), C A N Y, 446 F 2d 1339, cert den 92 S Ct 739, 404 U S 1059, 30 L Ed 2d 746

Or—Epton v American Mail Line, Limited, 474 P 2d 516, 256 Or 532

Leaky ship is unseaworthy

U S—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L Ed 2d 1082

Stowage of cargo

U S—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L.Ed 2d 1082—Lowe v Vessel Madrid, D C Fla, 210 F Supp 826—Simpson v Royal Rotterdam Lloyd, D C Va, 225 F Supp 947—Hroncich v American President Lines, Limited, C A N J, 334 F 2d 282—Mosley v Cia Mar Adra S A, C A N Y, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S 933, 17 L Ed 2d 213—Belships Co v Bilbao, C A Cal, 390 F 2d 642—Scott v S S Ciudad Ibaque, D C La, 285 F Supp 613, affd, C A, 426 F 2d 1105—Anderson v S S Gulf Trader, D C La, 287 F Supp 783, affd, C A, 415 F 2d 316—Passantino v States Marine Lines, Inc, D C N Y, 299 F Supp 1252—Blair v U S Steel Corp, D C Pa, 312 F Supp 293, affd, C A., 444 F 2d 1390, cert den 92 S.Ct 681, 404 U S 1018, 30 L Ed 2d 666, reh den 92 S Ct. 938, 405 U S 948, 30 L Ed 2d 818

Violation of safety regulations

U S—Deffes v Federal Barge Lines, Inc, D.C La, 229 F Supp 719, revd on oth grds, C A, 361 F 2d 422, cert den 87 S Ct 503, 504, two cases, 385 U S 969, 17 L Ed 2d 433—Tallmon v Toko Kaium K K Kobe, D C Or, 278 F Supp 452—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347—Manning v M/V "Sea Road", C A Fla, 417 F 2d 603—Earles v Union Barge Line Corp, D C Pa., 321 F Supp. 1329—Smith v Olsen & Ugelstad, D C Mich, 324 F Supp 578—McNeil v A/S Habtor, D C Pa, 326 F Supp 226, motion gr, reconsideration 339 F Supp 1264—James v Sea-Land Service, Inc, C A.Ala, 456 F 2d 221—Greene v Vantage S S Corp, C A Va, 466 F 2d 159

Improper stowage only one cause

U S—Hagans v Ellerman & Bucknall S S Co, C A Pa, 318 F 2d 563

Furnishing gear not fit for purpose

Or—Brown v Westfal-Larsen & Co., 383 P 2d 1003, 235 Or 64

Equipment on pier not attached to vessel not included

U S—Forkin v. Furness Withy & Co., C A N.Y, 323 F 2d 638—Penoro v Rederi A/B Disa, C A N Y, 422 F 2d 392—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246—Sydnor v Villain & Fassio e Compania Internazionale di Genova Societa Riunite di Navigazione, S p A, D C Md., 323 F Supp 850

Use of ship's gear though not aboard ship

Or—Brown v Westfal-Larsen & Co, 383 P.2d 1003, 235 Or 64

Physical character of equipment considered

U S—Spann v Lauritzen, D.C Pa, 237 F Supp 569, revd on oth grds, C.A., 344 F.2d 204—Hanks v California Co, D C.La, 280 F Supp 730

Effect of availability of proper equipment

U S—Reed v MV Foylebank, C A La, 415 F 2d 838, cert den 90 S Ct 909, 397 U S 910, 25 L Ed 2d 91, reh den 90 S Ct 1256, 397 U S 1030, 25 L Ed 2d 543

Cal—Vittone v American President Lines, 39 Cal Rptr 758, 228 C A 2d 689

Oil from winches

U S—Haynes v Rederi A/S Aladdin, D C Tex, 254 F Supp 185, affd, C A, 362 F 2d 345, cert den 87 S Ct 731, 385 U S 1020, 17 L Ed 2d 557

Appurtenances

U S—Abruzzo v U S, D C N Y, 254 F Supp 134—Tanzi v Deutsche Dampfschiffahrts-Gesellschaft Hansa v International Terminal Operating Co, Inc, D C N Y, 355 F Supp 432

Defective construction or design

U S—Abruzzo v U S, D C N Y, 254 F Supp 134

Patent or latent defect

U S—Norfleet v Isthmian Lines, Inc, C A N Y, 355 F 2d 359

Protection measured by functions

U S—Barnes v Rederi A/B Fredrika, C A Va, 350 F 2d 865, cert den 86 S Ct 895, 383 U S 910, 15 L Ed 2d 665

Loading of cargo

U S—Morales v City of Galveston, Tex, 82 S Ct 1226, 370 U S 165, 8 L Ed 2d 412, reh den 83 S Ct 16, 371 U S 853, 9 L Ed 2d 93—Luna v Kawasaki Kisen Kaisha, Limited, D.C Pa, 245 F Supp 152—Mosley v Cia. Mar Adra S A, C A N Y, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S 933, 17 L Ed 2d 213—Bowen v Union Concrete Pipe Co, D C W Va, 299 F Supp 1109—Silver v American Export Isbrandtsen Lines, Inc, D C Va., 310 F Supp 681—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A., 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165—Tucker v Calmar S S Corp, C A Md, 457 F 2d 440, on remand, D C., 356 F Supp 709—Evans v Overseas Maritime Co, D C S C, 330 F.Supp 654, affd, C A., 451 F 2d 188—Varlack v Mitsui O S K Lines, K K, D C Pa, 333 F Supp. 1233

Unloading of cargo

U S—Siderewicz v Enso-Gutzeit O/Y, C.A Conn., 453 F 2d 1094, cert den 92 S Ct 2441, 407 U.S. 912, 32 L Ed 2d 686—Mock v Upper Mississippi Towing Co, D C La, 336 F Supp 468

Being forced to work in close quarters not sufficient

U S—Luna v Kawasaki Kisen Kaisha, Limited, D.C Pa, 245 F Supp 152—Wilson v. Societa Italiana de Armamento (Sidarma), D C La., 279 F Supp. 945, affd, C A, 409 F.2d 484—Wilson v. Societa Italiana de Armamento (Sidarma), C.A.La, 409 F 2d 484

Absence of, or defective, dunnage

U S—Boutte v M/V Malay Maru, C A.La., 370 F.2d 906—Hurst v Central Gulf S.S. Corp., D.C La., 267 F Supp 65—Mendoza v. A/S J. Ludwig Mowinckels Rederi, D.C.N.Y, 293 F Supp 1319

Loading tackle

U.S.—U S. Lines Co. v King, C.A.Va, 363 F 2d 658—Daniel v. Skibs A/S Hilda Knudsen, C A Pa, 368 F.2d 178, cert den 87 S.Ct. 1304, 386 U S. 990, 18 L Ed 2d 335

Bulldozer

U S.—Tallmon v Toko Kaium K K Kobe, D C.Or, 278 F Supp 452.

Seaworthiness of cargo not warranted

U.S.—Noble v Lehigh Val. R. Co, C.A N.Y., 388 F.2d 532—Bell v. Nihonkai Kisen, K K Tokyo, D.C Or, 204 F.Supp. 230—Carabellese v. Naviera Aznar, S.A, C.A N Y., 285 F 2d 355, cert. den. 81 S.Ct. 907, 365 U S 872, 5 L Ed.2d 862

Steel band on cargo crate

U S.—Reed v Bank Lines, Limited, D C.La, 285 F Supp 808

Loading tackle

US—Gebhard v S S Hawaiian Legislator, D C Cal, 284 F Supp 634, revd on oth grds, C A, 425 F 2d 1303

Machine constituting essential part of loading process

US—Olvera v Michalos, D C Tex, 307 F Supp 9

Dangerous gases in hold

US—McInnis v Hamburg Am Lines, D C Cal, 317 F Supp 1395

Metal bands securing cargo

US—Evans v Overseas Maritime Co, D C S C, 330 F Supp 654, affd, C A, 451 F 2d 188

Isolated act of negligence not unseaworthiness

US—Smith v Olsen and Ugelstad, C A Mich, 459 F 2d 915, cert den 93 S Ct 526, 409 U S 1040, 34 L Ed 2d 490—Kyzar v Vale Do Ri Doce Navegacai, S A, C A La, 464 F 2d 285, cert den 93 S Ct 1367, 410 U S 929, 35 L Ed 2d 591

Held not appurtenances

US—Bryant v National Transport Corp, C A Pa, 467 F 2d 139

Hatch cover

U.S.—Sousa v Motor Vessel Caribia, D C Mass, 360 F.Supp 971.

Gangway

US—Romero Reyes v Marine Enterprises, Inc, C A Puerto Rico, 494 F 2d 866

Measure of liability, under doctrine of seaworthiness, of vessel owner to shore-based employees is the same as that to seamen at sea and that is whether the vessel is fit for the purpose for which she is being used.[52 5] Various other matters have been considered as rendering ship unseaworthy or as possibly constituting unseaworthiness.[52 10]

52.5. U.S—Lester v. U.S, C.A.N.Y, 234 F 2d 625, cert. gr 77 S.Ct 130, 352 U S. 889, 1 L.Ed 2d 85, cert dism. 77 S.Ct. 384, 352 U.S. 983, 1 L Ed 2d 366—Crumady v The Joachim Hendrik Fisser, D C N.J., 142 F.Supp 389, revd. on oth grds, C.A., 249 F.2d 818, revd on oth. grds. 79 S Ct. 445, 358 U.S 423, 3 L Ed.2d 413, on remand 176 F.Supp 595, affd. 272 F 2d 396—Knox v. U S. Lines Co., C A.Pa, 320 F 2d 247—Provenza v American Export Lines, Inc, C A.Md, 324 F 2d 660, cert den. 84 S.Ct. 970, 376 U S 952, 11 L.Ed 2d 971—Crass v. M/V Manitou, C A.Ill, 325 F.2d 129, cert. den. 84 S.Ct 1137, 376 U.S. 970, 12 L Ed.2d 85—McQuiston v. Freighters & Tankers S.S Co., D.C.La., 217 F.Supp 701, affd, C A., 327 F 2d 746—Farnum v S/S Oslofjord, D C.N.Y., 220 F Supp. 199—Wilson v Societa Italiana de Armamento (Sidarma), D C La, 279 F.Supp 945, affd., C.A, 409 F 2d 484—Jones v Moore-McCormack Line, Inc., D.C.N Y., 291 F.Supp. 888—Lundy v Isthmian Lines, Inc., C A Va., 423 F.2d 913—Pellegrino v. A H. Bull S S. Co., D.C.N.Y., 309 F.Supp. 839—Silver v. American Export Isbrandtsen Lines, Inc, D C.Va., 310 F.Supp. 681—Murphy v. National Bulk Carriers, Inc., D.C.Pa., 310 F.Supp. 1246.

Trade custom not controlling

U.S.—Silver v. American Export Isbrandtsen Lines, Inc, D.C.Va., 310 F.Supp. 681—Parker v. S/S Dorothe Olendorff, C.A La, 483 F 2d 375, cert. den. 94 S Ct. 1609, 416 U.S. 905, 40 L.Ed 2d 110

52.10. U.S.—Marshall v. Ove Skou Rederi A/S, C.A Ala., 378 F.2d 193, cert. den. 88 S.Ct 86, 389 U S 828, 19 L.Ed.2d 84—Taylor v. S.S. Helen Lykes, D.C.La., 268 F.Supp. 932, affd, C A., 402 F.2d 777—Giaraffa v. Moore-McCormack Lines, Inc, D.C.N Y., 270 F.Supp. 342—Casbon v. Waterman S S Corp, D.C.La., 274 F.Supp. 481—Affd., C A., 417 F 2d 1040—Rapko v. Transportacion Maritima Mexicana, S A., D.C.Pa, 276 F.Supp 961—Bertino v Polish Ocean Line, C.A N.Y, 402 F 2d 863—Martin v Jones, D C La, 296 F Supp 878—Rapisardi v United Fruit Co, D C N Y, 300 F Supp 942—Williamson v Compania Anonima Venezolana De Navigacion (Venezuelan Line), C A N Y, 446 F 2d 1339, cert den 92 S Ct 739, 404 U S 1059, 30 L Ed 2d 746—Rogers v U S, C A Fla, 452 F 2d 1149—Grayson v Management & Shipping Transport, Inc, D C Ala, 330 F Supp 30—Varlack v Mitsui O S K Lines, K K, D C Pa, 333 F Supp 1233

Unseaworthiness may be created by the acts of longshoremen on board the ship,[55 5] but the warranty of seaworthiness does not extend to the negligent use of seaworthy appliances by longshoremen at the very time the injury is sustained.[55 10]

55.5. US—Grillea v U S, C A N Y, 232 F 2d 919—Alexander v Meiji Kaiun K K, D C.La, 195 F Supp 831, affd, C A, 311 F 2d 385—Lowe v Vessel Madrid, D C Fla, 210 F Supp 826—Nicrolı v Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibs-Aktieselskab, C A N Y, 332 F 2d 651—Skipper v Amerind Shipping Corp, D C La, 230 F Supp 253—Norfleet v Isthmian Lines, Inc, C A N Y, 355 F 2d 359—Skibinski v Waterman S S Corp, D C N Y, 242 F Supp 290, affd, C A, 360 F 2d 539 Cert den 87 S Ct 2027, 387 U S 921, 18 L Ed 2d 975—Luna v Kawasaki Kisen Kaisha, Limited, D C Pa, 245 F Supp 152—Antoine v Lake Charles Stevedores, Inc, D C La, 249 F.Supp 290, affd, C A, 376 F 2d 443 cert den 88 S Ct 145, 389 U S 869, 19 L Ed 2d 146—Robichaux v Kerr McGee Oil Industries, Inc, C A La, 376 F 2d 447, on remand, D C, 317 F Supp 587—Wilson v Societa Italiana de Armamento (Sidarma), D C La, 279 F Supp 945, affd, C A, 409 F 2d 484—Blow v Compagnie Maritime Belge (Lloyd Royal) S A, C A Va, 395 F 2d 74—Anderson v S S Gulf Trader, D C La, 287 F Supp 783, affd., C A, 415 F 2d 316—Pellegrino v A H Bull S S Co, D C N Y, 309 F Supp 839—N M Paterson and Sons Limited v Nicholson Cleveland Terminal Co, D C Ohio, 323 F Supp 913—Varlack v Mitsui O S K Lines, K.K, D C Pa, 333 F Supp 1233

Condition created by injured longshoreman

US—Holley v The Manfred Stansfield, D C Va, 186 F Supp 212—Smith v Lauritzen, D C Pa, 201 F Supp 663—McInnis v Hamburg Am Lines, D C Cal, 317 F Supp 1395

Existence of dangerous condition permitted

US—Ventre v Oetker, D C N Y, 214 F.Supp 659

Attack by fellow employee

US—Clevenger v Star Fish & Oyster Co, C A Ala, 325 F 2d 397.

Acts of fellow servants

US—Skibinski v. Waterman S S Corp., C A N Y., 360 F 2d 539, cert den 87 S Ct 2027, 387 U S 921, 18 L Ed 2d 975—Candiano v Moore-McCormack Lines, Inc, C A N.Y., 382 F.2d 961, reh den 386 F.2d 444, reh den 88 S Ct 1416, 390 U.S 1027, 20 L Ed 2d 284—Sandoval v Mitsui Sempaku K K. Tokyo, D C Canal Zone, 288 F Supp 377, op supp 316 F Supp. 237, affd in part, revd in part on oth. grds, C A., 460 F.2d 1163—Rosa v A/S D/S Svendborg, D C N Y, 291 F Supp. 84

Improper use of sound equipment

US—Skibinski v. Waterman S S Corp, C.A N Y, 360 F.2d 539, cert den 87 S.Ct. 2027, 387 U S 921, 18 L.Ed 2d 975—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347—Cleary v U S Lines Co., D C.N Y, 287 F Supp 601, affd, C A, 411 F 2d 1009—Robertson v The Sanyo Maru, D.C.La, 298 F Supp 931, affd. in part, remd in part on oth grds 424 F 2d 520, cert den 91 S Ct 59, 400 U S. 854, 27 L.Ed 2d 91—Cleary v U S Lines Co., C.A N Y, 411 F.2d 1009—Sanchez v Lubeck Linie A G., D C.N Y., 318 F Supp 821.

Tex—Benton v Wheless Drilling Co, Civ App, 440 S W 2d 373, err ref no rev err

Longshoreman's negligence

US—Knox v U S Lines Co, D C Pa, 186 F Supp 668, app dism, C A, 294 F 2d 354—Nuzzo v Rederi, A/S Wallenco, Stockholm, Sweden, 304 F 2d 506—Massa v C A Venezuelan Navigacion, D C N Y, 209 F Supp 404, affd in part and revd in part on oth grds, C A, 332 F 2d 779, cert den 85 S Ct 262, 379 U S 914, 13 L Ed 2d 186—Thompson v Calmar S S Corp, C A Pa, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184—Ferrante v Swedish Am Lines, C A N J, 331 F 2d 571, cert den 85 S Ct 10, 379 U S 801, 13 L Ed 2d 20—Carroll v Frontera Compania Naviera, S A, C A Pa, 390 F 2d 311

Unsafe plan of operation

US—Cleary v U S Lines Co, D C N Y, 287 F Supp 601, affd, C A, 411 F 2d 1009

Operational negligence

US—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part, on oth grds, C A, 427 F 2d 244—Lundy v Isthmian Lines, Inc, C A Va, 423 F 2d 913—Silver v American Export Isbrandtsen Lines, Inc, D C Va, 310 F Supp 681—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165—Smith v Olsen & Ugelstad, D C Mich, 324 F Supp 578

55.10. US—Billeci v U S, C A Cal, 298 F 2d 703—Massa v C A Venezuelan Navigacion, D C N Y, 209 F Supp 404, affd in part and revd in part on oth grds, C A, 332 F 2d 779, cert den 85 S Ct 262, 379 U S 914, 13 L Ed 2d 186—Thomas v Java Pac Lines (Royal Rotterdam Lloyd), D C La, 212 F Supp 85—Ventre v Oetker, D C N Y, 214 F Supp 659—Burgess v Farrell Lines, Inc, D C Md, 215 F Supp 319, affd, C A, 335 F 2d 885, cert den 85 S Ct 729, 379 U S 1004, 13 L Ed 2d 706—McQuiston v Freighters & Tankers S S Co, D C La, 217 F Supp 701, affd, C A, 327 F 2d 746—Norfleet v Isthmian Lines, Inc, C A N Y, 355 F 2d 359—Skibinski v Waterman S S Corp, C A N Y, 360 F 2d 539, cert den 87 S Ct 2027, 387 U S 921, 18 L Ed 975—St Claire v Mid-Continent Barge Lines Co, D C Minn, 249 F Supp 938—Antoine v Lake Charles Stevedores, Inc, C A La, 376 F 2d 443, cert den 88 S Ct 145, 389 U S 869, 19 L Ed 2d 146—Robichaux v Kerr McGee Oil Industries, Inc, C A La., 376 F 2d 447, on remand, D C, 317 F.Supp 587—Taylor v S S Helen Lykes, C A La, 402 F 2d 777—Reed v Bank Lines, Limited, D C La., 285 F Supp 808—Timpson v M/S Ecuador Maru, C A La, 425 F 2d 1209—Johnson v Excelsior Shipping Co, D C Ala, 319 F Supp 986

Or—Brown v Westfal-Larsen & Co, 383 P 2d 1003, 235 Or 64

Carelessness of fellow employee

U S.—Thomas v Java Pac Lines (Royal Rotterdam Lloyd), D C La, 212 F Supp 85—Beeler v Foss Launch & Tug Co, D C Or, 224 F Supp 814—Dugas v Nippon Yusen Kaisha, C A La, 378 F 2d 271, cert den 88 S Ct 592, 389 U S 1021, 19 L Ed 2d 667—Taylor v S S Helen Lykes, D C La, 268 F Supp 932, affd, C A, 402 F 2d 777—Patterson v Esso Jamestown, D C La, 274 F Supp 854—Lundy v Isthmian Lines, Inc, C A Va, 423 F 2d 913

Improper use of sound equipment

US—Nicholson v Aurora Shipping Corp, D.C Tex, 278 F Supp 272

Doctrine of "instant unseaworthiness"

US—Alaska S.S Co v Garcia, C A Wash, 378 F 2d 153

Instantaneous unseaworthiness held ground for recovery

U.S—Sandoval v Mitsui Sempaku K K Tokyo, D C Canal Zone, 288 F Supp 377, op supp 316 F Supp 237, affd in part, revd in part on oth. grds, C A, 460 F.2d 1163

Joint negligence of injured workman and fellow servant

U S—Robertson v The Sanyo Maru, 424 F 2d 520, cert den 91 S Ct 59, 400 U S 854, 27 L Ed 2d 91

Instant unseaworthiness held not ground for recovery

U S—Williams v Shipping Corp of India, Ltd, D C Ga, 354 F Supp 626

Condition preceding repairs

U S—Corrao v M/V Act III, D C Fla, 359 F Supp 1160

56. U S—Boutte v M/V Malay Maru, C A La, 370 F 2d 906—Morales v Dampskibs A/S Flint, D C N Y., 264 F Supp. 829, affd, C A, 370 F 2d 569—Gilchrist v Mitsui Sempaku K K, D C Pa, 266 F Supp 961, affd in part, revd in part on oth grds., C A, 405 F 2d 763, cert den 89 S Ct 1195, 394 U S 920, 22 L Ed 2d 453—Hill v Flota Mercante Grancolombiana, S A, D C La, 267 F Supp 380, affd 405 F 2d 878, cert den 89 S Ct 1995, 395 U S 934, 23 L Ed.2d 449—Marshall v Ove Skou Rederi A/S, C A Ala, 378 F 2d 193, cert den 88 S Ct 86, 389 U S. 828, 19 L Ed 2d 84—Chagois v Lykes Bros S S. Co., C A La, 457 F 2d 343, cert den 93 S Ct 451, 409 U S 1012, 34 L Ed 2d 306

Cal—O'Hey v. Matson Nav Co, 288 P 2d 81, 135 C.A 2d 819

Piece work pay

U S—Rodriguez v The Angelina, D C Puerto Rico, 177 F Supp 242

Accident free vessel not required

U S.—Pisano v S S Benny Skou, C A N Y, 346 F 2d 993, cert den 86 S Ct 389, 382 U S 938, 15 L Ed 2d 349—Skibinski v Waterman S S Corp, D C.N Y, 242 F.Supp 290, affd, C A, 360 F 2d 539, cert den 87 S Ct 2027, 387 U S 921, 18 L Ed.2d 975—Hurst v Central Gulf S S Corp, D C La, 267 F Supp 65—Putman v. M/V Mathilde Bolten, D C Md, 298 F Supp 660

Unused proper equipment no excuse

U S—Mosley v Cia Mar Adra S A, C A N Y, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S 933, 17 L.Ed.2d 213

Places where person may reasonably go

U S—Grayson v Cordial Shipping Co, C A Ill, 496 F.2d 710

A recovery for unseaworthiness is not warranted for operational negligence even of a master or crewman, provided he is competent.[56.5]

56.5. U S—Burgess v Farrell Lines, Inc, D C Md, 215 F Supp 319, affd, C A, 335 F 2d 885, cert den 85 S Ct 729, 379 U S 1004, 13 L Ed 2d 706—Reed v Bank Lines, Limited, D C La, 285 F Supp 808—Duncan v. Transeastern Shipping Corp, C A La, 413 F 2d 1023—Franklin v Doric Shipping & Trading Corp, D C La, 357 F Supp 1132, affd., C.A, 477 F 2d 594.

Operational negligence held ground for recovery

U.S—Venable v. A/S Det Forenede Dampskibsselskab, C A.Va., 399 F 2d 347

57. U.S—Manhat v. U.S, C.A N Y, 220 F 2d 143, cert den. 75 S Ct 900, 349 U S 967, 99 L.Ed 1288—Babnick v The Mount Athos, D C Wash, 122 F Supp. 68—Reynolds v Royal Mail Lines, Limited, C.A.Cal, 254 F 2d 55, cert den. 79 S Ct. 28—Thorson v Inland Nav Co., C A Or, 270 F.2d 432, 77 A L R 2d 825—Oblatore v U S, D C.N Y., 181 F Supp 825, affd, C A, 289 F 2d 400, cert den. 82 S Ct. 132, 368 U S 881, 7 L.Ed 2d 81—Carabellese v. Naviera Aznar, S A, C A N.Y, 285 F 2d 355, cert den 81 S Ct 907, 365 U S 872, 5 L.Ed 2d 862—Kent v Shell Oil Co., C A.La, 286 F.2d 746—Williams v The Richard De Larrinaga, C.A Va, 287 F.2d 732—Billeci v. U.S., 185 F.Supp 711, affd., C A, 298 F 2d 703—Green v. Skibs A/S Mandeville, D.C S.C, 186 F Supp 459, motion den 188 F Supp 65, affd, C.A, 292 F 2d 393—Morrell v U S, D C Cal, 193 F Supp 705, affd, C A, 297 F 2d 662, cert den 82 S Ct 1615, 370 U S 960, 8 L Ed 2d 826—Morales v City of Galveston, Tex, Tex, 82 S Ct 1226, 370 U S 165, 8 L Ed 2d 412, reh den 83 S Ct 16—Rawson v Calmar S S Corp, C A Wash, 304 F 2d 202—Williams v Arrow S S Corp, D C Va, 218 F Supp 595—Luckenbach Overseas Corp v Usner, C A La, 413 F 2d 984, affd 91 S Ct 514, 400 U S 494, 27 L Ed 2d 562, reh den 91 S Ct 1247, 401 U S 1015, 28 L Ed 2d 552—Passantino v States Marine Lines, Inc, D C N Y, 299 F Supp 1252—Lopez v Grace Line, D C Cal, 302 F Supp 753

Injury sustained on dock over which vessel owner had no control

U S—Brinkley v Nippon Yusen Kaisha, D C Va, 343 F Supp 1070

58. Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

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59. U S—Berge v National Bulk Carriers, Inc, D C N Y, 148 F Supp 608, affd 251 F 2d 717, cert den 78 S Ct 994, 356 U S 958, 2 L Ed 2d 1066, reh den 79 S Ct 14, 358 U S 860, 3 L Ed 2d 95—West v U S, Pa, 80 S Ct 189, 361 U S 118, 4 L Ed 2d 161

N Y—Johnsen v McAllister Lighterage Lines, Inc, 190 N Y S 2d 117, 8 A D 2d 831—Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514

Whether vessel in navigation of key significance

U S—Latus v U S, D C N Y, 170 F Supp. 837, affd, C A, 277 F 2d 264, cert den 81 S Ct 65, 364 U S 827, 5 L Ed 2d 55—Latus v U S, C A N Y, 277 F 2d 264, cert den 81 S Ct 65—Noel v Isbrandtsen Co, D C Va, 179 F Supp 325, affd, C A, 287 F 2d 783, cert den 81 S Ct 1944, 366 U S 975, 6 L Ed 2d 1264—Roper v U.S, Va, 82 S Ct 5, 368 U S 20, 7 L Ed 2d 1—McDonald v U S., C.A N J, 321 F 2d 437, cert den 84 S Ct 487, 375 U S 969, 11 L Ed 2d 417—Johnson v Oil Transport Co, C A Ala, 440 F 2d 109, reh den. 445 F.2d 1402, cert den 92 S Ct 109, 404 U S 868, 30 L Ed 2d 111, reh den 92 S Ct 309, 404 U S. 961, 30 L Ed 2d 280—Moore v Ashland Oil & Refining Co, D C W Va, 322 F.Supp 637—Rogers v U S, C A Fla, 452 F 2d 1149—Chestnut v U S, D C. Pa, 333 F Supp 969, affd, C A, 474 F.2d 1338

Wash—Bishop v Alaska S.S Co., 404 P 2d 990, 66 Wash 2d 704

Warranty not divided into fragments

U S—Latus v U S, C A N.Y., 277 F 2d 264, cert den 81 S Ct 65, 364 U S 827, 5 L Ed 2d 55.

Warranty held to attach when vessel used as completed

U S—Peck v U S Steel Corp, D C Minn, 315 F Supp 905, affd, C A, 446 F 2d 891, cert den 92 S Ct 682, 404 U S 1019, 30 L Ed.2d 667.

Matters considered

U S—Rogers v U S., C A Fla, 452 F 2d 1149—Chestnut v U S, D C Pa, 333 F Supp 969, affd, C A, 474 F 2d 1338

60. U S.—Partridge v Pope & Talbot, Inc, D C Cal, 257 F Supp. 456—Drumbold v. Plovba, D C Va, 260 F Supp 983—Mosely v. U S., D C Va., 271 F Supp 777—Schwartz v Compagnie General Transatlantique, C A N Y, 405 F 2d 270—Murphy v National Bulk Carriers, Inc, D.C.Pa, 310 F Supp 1246—Johnson v Oil Transport Co, C A Ala, 440 F 2d 109, reh den 445 F 2d 1402, cert den 92 S Ct 109, 404 U.S 868, 30 L.Ed 2d 111, reh den 92 S Ct 309, 404 U S 961, 30 L.Ed 2d 280—Young v Chevron Oil Co, D C.La., 314 F Supp 1278—Cannida v. Central Gulf S.S Corp, D C.Pa, 317 F Supp 873, affd, C A, 452 F 2d 949—Delome v Union Barge Line Co., C A Tex, 444 F 2d 225, cert. den 92 S Ct 534, 404 U S 995, 30 L Ed 2d 547—Williams v. Avondale Shipyards, Inc, C A La, 452 F 2d 955.

Employee of contract repairman

U.S—Keller v Dravo Corp, C A La, 441 F 2d 1239, cert den 92 S Ct 679, 404 U S. 1017, 30 L Ed 2d 665.

Cleaner of boilers and tanks

U S—Crawford v Pope & Talbot, Inc, C A Pa, 206 F 2d 784

Painter

U S—Latus v U S, D C N Y, 170 F Supp 837, affd, C A, 277 F 2d 264, cert den 81 S Ct 65, 364 U S 827, 5 L Ed 2d 55

Shipyard rigger

U S—Raidy v U S, D C Md, 153 F Supp 777, affd, C A, 252 F 2d 117, cert den 78 S Ct 1136, 356 U S 973, 2 L Ed 2d 1147—Pedersen v The Bulklube, D C N Y, 170 F Supp 462 Affd, C A, 274 F 2d 824, cert den 81 S Ct 44, 364 U S 814, 5 L Ed 2d 46—Huber v U S, D C Cal, 177 F Supp 617—In re Smith-Rice No 4, D C Cal, 323 F Supp 44

Shore-side machinist making repairs on vessel

U S—Berryhill v Pacific Far East Line, D C Cal, 138 F Supp 859, affd, C A, 238 F 2d 385, cert den 77 S Ct 1400, 354 U S 938, 1 L Ed 2d 1537

Preparing "mothballed" ship for service

U S—West v U S, C A Pa, 256 F 2d 671, affd 80 S Ct 189, 361 U S 118, 4 L Ed 2d 161—Bishop v U S, D C N Y, 173 F Supp 273—Latus v U S., C A N Y, 277 F 2d 264, cert den 81 S Ct 65, 364 U S 827, 5 L Ed 2d 55

During inspection of restoration work

U S—Latus v U S, C A N Y, 277 F 2d 264, cert den 81 S Ct 65

Lineman

U S—Fematt v Nedlloyd Line, D.C Cal, 191 F Supp. 907.

Deactivated ship under control of contractor

U S—Moon v U S, D C N.Y, 197 F Supp 406.

Deactivation or major repairs

U.S—Bielawski v. American Export Lines, D.C Va., 220 F.Supp 265, affd, C.A, 336 F 2d 525

Construction of new vessel

U.S—Alfred v MV Margaret Lykes, C.A.La, 398 F 2d 684

Employee of shipbuilder

U S—Bryant v National Transport Corp, C A Pa, 467 F 2d 139

Movie extras

U S—Bullis v Twentieth Century-Fox Film Corp, C A Hawaii, 474 F 2d 392

60. Welder

U S—Hollister v Luke Const Co., C.A La, 517 F 2d 920.

61. U S—Manera v. U.S, D C N.Y., 124 F.Supp. 226—Berryhill v. Pacific Far East Line, Inc., C.A Cal, 238 F 2d 385, cert den 77 S Ct. 1400, 354 U.S. 938, 1 L Ed 2d 1537—Kissinger v. U.S., D C N Y, 176 F Supp. 828.

62. U S.—Rapisardi v United Fruit Co, D C.N.Y., 300 F Supp. 942—Rogers v U.S, C A Fla., 452 F 2d 1149—Mock v Upper Mississippi Towing Co, D C La, 336 F.Supp 468—Brock v Baroid Division of National Lead Co, D.C La., 339 F Supp 728—Armstrong v Chambers and Kennedy, D C.Tex., 340 F.Supp 1220, affd in part, revd. in part on oth. grds, C A, 499 F 2d 263, reh den. 512 F 2d 1061, cert dism 96 S.Ct 163, 423 U S 886, 46 L.Ed 2d 118—Atlantic & Gulf Stevedores, Inc v Skibs A/S Danmotor, D.C Tex, 342 F Supp. 837—Evans v J Ray McDermott, Inc, D C La, 342 F Supp 1390

Cleaner

(2) Other cases.

U.S—Torres v The Kastor, C.A.N.Y, 227 F.2d 664—Giaraffa v Moore-McCormack Lines, Inc., D.C N.Y., 270 F.Supp 342

Watchman

U S—Ross v. The Zeeland, C.A.Va., 240 F.2d 820

Employee of shoreside repairmen

U.S—Morrell v U.S., D C Cal., 193 F Supp. 705, affd, C.A, 297 F 2d 662 Cert. den. 82 S Ct. 1615, 370 U S. 960, 8 L.Ed 2d 826—Shaver Transp Co v

Chamberlain, C A Or, 399 F 2d 893—Rogers v U S, C A Fla, 452 F 2d 1149

Marine diver

U S—Smith v Brown & Root Marine Operators, Inc, D C La, 243 F Supp 130, affd, C A, 376 F 2d 852

Employee of caterer

U S—Hanks v California Co, D C La, 280 F Supp 730

Fixed platform

U S—Callahan v Cheramie Boats, Inc, D C La, 383 F Supp 1217

63. U S—Caudill v Victory Carriers, Inc, D C Va, 149 F Supp 11—Lopez v Grace Line, D C Cal, 302 F Supp 753—Burns v Anchor-Wate Co, C A La, 469 F 2d 730

Carpenter

U.S.—Fox v The Moremacwind, C A Va, 285 F 2d 222.

Panama Canal Company lineman

U.S.—Sandoval v Mitsui Sempaku K K Tokyo, D C Canal Zone, 288 F Supp 377, op supp 316 F Supp 237, affd in part, revd in part on oth grds., C A, 460 F 2d 1163

Person injured unloading ship while on offshore drilling platform

U.S.—Mullins v. Chevron Oil Co, D C La, 344 F.Supp 1063.

64. U S—Rogers v U S, C.A.Fla, 452 F 2d 1149—Chestnut v U S, D C Pa., 333 F Supp. 969, affd, C A, 474 F 2d 1338—Brock v Baroid Division of National Lead Co, D C La, 339 F Supp 728

Wash.—Bishop v Alaska S S Co, 404 P 2d 990, 66 Wash 2d 704

Liability dependent on scope of work

U.S—McDonald v. U S, C A N J, 321 F 2d 437, cert. den 84 S Ct 487, 375 U S 969, 11 L Ed 2d 417—Skibinski v Waterman S.S. Corp., D C N Y, 242 F Supp. 290, affd, C A, 360 F 2d 539, cert den. 87 S.Ct. 2027, 387 U S. 921, 18 L.Ed.2d 975—McCown v Humble Oil & Refining Co, C.A Va, 405 F 2d 596, cert. den 89 S Ct 1996, 395 U S 934, 23 L Ed.2d 449—Vessella v U S, C A Va, 405 F.2d 599—Mendoza v. A/S J Ludwig Mowinckels Rederi, D.C.N.Y., 293 F Supp 1319—Martin v. Jones, D.C.La., 296 F.Supp 878—Moore v Ashland Oil & Refining Co, D.C.W.Va, 322 F.Supp. 637—In re Smith-Rice No 4, D C Cal, 323 F.Supp 44.

Matters considered

U.S.—Hilton v. Aegean S S. Co., D C Or, 239 F.Supp 268—Allen v. Union Barge Line Corp, D.C.La., 239 F.Supp. 1004, affd., C.A., 361 F 2d 217. Cert. den. 87 S.Ct. 713, 385 U.S. 1006, 17 L Ed 2d 545

Test of application where vessel being repaired in shipyard

U.S—Watz v. Zapata Off-Shore Co, C.A Tex, 431 F.2d 100, app. after remand 500 F.2d 628

Improvements undertaken by a shipowner do not constitute an implied admission that, without such improvement, the vessel is structurally defective and unseaworthy, particularly when the question involved is the unseaworthiness of the vessel while in dry dock and with respect to persons who, it is contemplated, will effect the improvement.[64.5]

64.5. Vessel held not unseaworthy

U.S.—Lester v U.S., C.A.N.Y., 234 F.2d 625, cert gr 77 S Ct 130, 352 U S. 889, 1 L.Ed 2d 85, cert. dism. 77 S.Ct. 384, 352 U.S. 983, 1 L.Ed.2d 366

65. U.S.—Seitz v. The Captantonis, D.C.Or., 203 F.Supp. 723—Haynes v Rederi A/S Aladdin, C A.Tex., 362 F 2d 345, cert den 87 S.Ct. 731, 385 U.S. 1020, 17 L.Ed.2d 557—Antoine v. Lake Charles Stevedores, Inc., C.A La, 376 F.2d 443, cert den 88 S Ct 145, 389 U S 869, 19 L Ed 2d 146—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165

Cal—Pollock v Standard Oil Co of Cal, 42 Cal Rptr 128, 231 C A 2d 714

In action in state court

Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

Wash—Tarabochia v Johnson Line, Inc, 440 P 2d 187, 73 Wash 2d 751

66. U S—Imperial Oil, Limited v Drlik, C A Ohio, 234 F 2d 4, cert den 77 S Ct 261, 352 U S 941, 1 L Ed 2d 236—Pinion v Mississippi Shipping Co, D C La, 156 F Supp 652—Kelley v A H Bull S S Co, D C Me, 160 F Supp 262—W J Jones & Son, Inc v Calmar S S Corp, C A Or, 284 F 2d 499—Bryant v Partenreederei-Ernest Russ, C A Md, 330 F 2d 185—Radisich v Westfal Larsen & Co, A/S, D C Cal, 228 F Supp 1021—Jones v S S Jesse Lykes, D C Tex, 253 F Supp 368—Temblador v Hamburg-American Lines, C A Cal, 368 F 2d 365—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165

Cal—Pollock v Standard Oil Co of Cal, 42 Cal Rptr 128, 231 C A.2d 714

67. U S—Wyborski v Bristol City Line of Steamships, Limited, D C Md, 191 F Supp 884

68. U S—Matson Terminals, Inc v Caldwell, C A Cal, 354 F 2d 681—Taylor v Rederi A/S Volo, D C Pa, 249 F Supp 326, revd on oth grds, C A, 374 F 2d 545—Candiano v Moore-McCormack Lines, Inc, D C N Y, 251 F Supp 654, affd, C A, 382 F 2d 961, reh den 386 F 2d 444, cert den 88 S Ct 1416, 390 U S 1027, 20 L Ed 2d 284—Dziedzina v Dolphin Tanker Corp, C A Pa, 361 F 2d 120—LaBolle v Nitto Line, D C Cal, 268 F Supp 16—Lunsford v Bethlehem Steel Corp, D.C Md, 269 F.Supp 570—Nicholson v Aurora Shipping Corp, D C Tex, 278 F Supp 272—Judith Ann Liberian Transport Corp v Crawford, C A Or, 399 F.2d 924

Attorneys fees and expenses

(1) Not recoverable from stevedore under implied indemnity contract by shipowner who was held not liable for damages

U S.—Hill v American President Lines, Limited, D C Va, 194 F Supp 885

(2) Held recoverable

U S—Pacific Far East Line v. California Stevedore & Ballast Co, D C Cal, 238 F Supp 956—McGee v M S Meiyyusan Maru, D C La, 239 F Supp 170—Allen v. Union Barge Line Corp, D C La, 239 F.Supp 1004, affd, C A, 361 F 2d 217, cert den 87 S Ct 713, 385 U S 1006, 17 L Ed 2d 545—McLean v Prudential S.S Co, D C Va, 36 F R D 421—Hardy v U S., D.C N C, 322 F Supp 660—Smith v Olsen & Ugelstad, D C.Mich., 324 F Supp 578

Where longshoreman's claim settled

U S—U.S Lines Co v Nacirema Operating Co, D C Mass., 215 F Supp 627

Continuing to work under unseaworthy condition insufficient

U S—Thompson v Trent Maritime Co., D.C.Pa., 222 F Supp 221, motion den, C.A, 343 F 2d 200—Jackson v. Lloyd Brasileira Patrimonio Nacional, D.C Tex, 324 F Supp 556

Duty to remedy unseaworthy condition or have ship remedy it

U.S—Pacific Far East Line v California Stevedore & Ballast Co, D C.Cal., 238 F Supp 956—Compania Trasatlantica Espanola, S A. v Melendez Torres, C.A Puerto Rico, 358 F 2d 209—Brock v Coral Drilling, Inc., C A La, 477 F 2d 211

Indemnity denied if stevedore misled by shipowner

U S—Pacific Far East Line v California Stevedore & Ballast Co, D C Cal, 238 F Supp 956

Knowledge of stevedore of unsafe and unseaworthy condition

U S—Pacific Far East Line v California Stevedore & Ballast Co, D C Cal, 238 F Supp 956—Mosley v Cia Mar Adra S A, D C N Y, 257 F Supp 30, affd, C A, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S 933, 17 L Ed 2d 213—Old Dominion Stevedoring Corp v Polskie Linie Oceaniczne, C A Va, 386 F 2d 193—Villain & Fassio E Compagnia v Atlantic & Gulf Stevedores, Inc, D C Va, 283 F Supp 725—Jackson v Lloyd Brasileira Patrimonio Nacional, D C Tex, 324 F Supp 556

Last clear chance

U S—Pacific Far East Line v California Stevedore & Ballast Co, D C Cal, 238 F Supp 956

Latent defects

U S—D'Amico v Lloyd Brasileiro Patrimonio Nacional, C A N Y, 354 F 2d 33—Lamar v Admiral Shipping Corp, C A Fla, 476 F 2d 300

Implied warranty

U S—Thompson v Trent Maritime Co, C A Pa, 353 F 2d 632—Boldurian v A/B Svenska Amerika Linien, D C Pa, 246 F Supp 413—U S Lines Co v King, C A Va, 363 F 2d 658—N M Paterson and Sons Limited v Nicholson Cleveland Terminal Co, D C Ohio, 323 F Supp 913

Indemnity shared by all negligent employers

U S—Stranahan v A/S Atlantica and Tinfos Papirfabrik, C A Or, 471 F 2d 369, cert den 93 S Ct 2293, 412 U S 906, 36 L Ed 2d 971, app after remand 521 F 2d 700

Effect of contract on apportionment

U S—Stranahan v A/S Atlantica and Tinfos Papirfabrik, C A Or, 471 F 2d 369, cert den 93 S Ct 2293, 412 U S 906, 36 L Ed 2d 971, app after remand 521 F 2d 700

Liability of time charterer

U S—Stranahan v A/S Atlantica and Tinfos Papirfabrik, C A Or, 471 F 2d 369, cert den 93 S Ct 2293, 412 U S 906, 36 L Ed 2d 971, app after remand 521 F 2d 700

Scope of warranty

U S—Lamar v Admiral Shipping Corp, C A Fla, 476 F 2d 300

Duty to do job properly and safely

U S—Lamar v Admiral Shipping Corp, C A Fla, 476 F 2d 300

§ 86. Actions

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69. U S—Lahde v Soc Armadora Del Norte, C A Wash, 220 F 2d 357, cert den 76 S Ct 53, 350 U S 825, 100 L Ed 737—Watson v Gulf Stevedore Corp, C A Tex, 374 F 2d 946, cert den 88 S.Ct 286, 389 U S 927, 19 L Ed 2d 277

Md—Frazier v Waterman S S Corp, 112 A 2d 221, 206 Md 434

Difference between libels in admiralty and actions at law

U S—McCross v Ratnakar Shipping Co, D C Md, 265 F Supp 827

Remedy against vessel held cumulative

Ohio—McCormick v Henry Boats, Inc, 228 N E 2d 344, 11 Ohio App 2d 43.

Claim based on unseaworthiness may be asserted in rem or in personam

U S—Manning v M/V "Sea Road", C A Fla, 417 F 2d 603—Rao v Hillman Barge & Const Co, D C Pa, 326 F Supp 1091, affd, C A, 467 F 2d 1276

Libel against vessel improper absent personal liability of owner or charterer

US—Ramos v Beauregard, Inc, C A Puerto Rico, 423 F 2d 916, cert den 91 S Ct 101, 400 U S 865, 27 L Ed 2d 104

When a stevedore chooses a state court as a forum he subjects himself to its practice insofar as it does not deprive him of substantive rights and remedies accorded him by maritime law or any federal statute.[71.5]

71.5. Tex—Archey v Nederlandsch-Amerikaansche Stoomvaart Maatschappij (Holland-America Line), Civ App, 354 S W 2d 688, err ref no rev err, cert den 83 S Ct 299, 371 U S 929, 9 L.Ed 2d 236

Libel by shipowner incurring expenses in preparation for suit brought by injured employee of stevedore, against stevedore for indemnity is not premature even though filed prior to determination of employee's suit[71.10]

71.10. U S—Ellerman Lines, Limited v Atlantic & Gulf Stevedores, Inc, C A Pa, 339 F 2d 673, cert den 86 S Ct 23, 382 U S 812, 15 L Ed 2d 60

72. U S—Carslund v U S, D C Cal, 88 F Supp 105—Naglis v U S Lines Co, D C Pa, 250 F Supp 955—Byrd v M/V Yozgat, C A Fla, 420 F 2d 954—Muller v Lykes Bros S S Co, D C La, 337 F Supp 700, affd, C A, 468 F 2d 951

Applicability of limitations or laches

(2) Other matters

US—Giddens v Isbrandtsen Co, C.A Va, 355 F 2d 125—Ingravallo v Pool Shipping Co, D C N Y, 247 F Supp 394—White v U S. Lines Co, D C Md, 254 F Supp 480—Brattoli v Kheel, D C N Y, 302 F Supp 745

Action held barred by laches

US—Delgado v The Malula, C A Fla., 291 F 2d 420—White v U S Lines Co, D C Md, 254 F Supp 480—Ortega v Compagnie Generale Transatlantique, D C Cal, 258 F Supp 430—Carlantonio v Mariehamns Reden A/S Gustaf Erikson, D C Pa, 294 F Supp 874

Burden of showing facts negativing delay on plaintiff

US—Raines v John I Hay Co, D C Ill, 194 F Supp 706—Riddick v Baltimore Steam Packet Co, C.A Va, 374 F.2d 870—Carlantonio v Mariehamns Reden A/S Gustaf Erikson, D C Pa, 294 F.Supp 874

Ignorance of rights held not to excuse delay

U.S.—Shannon v Steamship Ulua, D C La, 285 F.Supp 16.

74. U S—Vega v The Malula, C A Fla, 291 F 2d 415—Peck v. U S Steel Corp, D C Minn, 315 F.Supp 905, affd, C.A, 446 F 2d 891, cert den 92 S Ct 682, 404 U S 1019, 30 L Ed 2d 667

75. U.S.—Oroz v American President Lines, Limited, C A N.Y., 259 F 2d 636, cert den 79 S Ct 584, 259 U S. 908, 3 L Ed 2d 572—Dawson v Fernley & Eger, D C Va, 196 F Supp 816—Barca v Matson Nav. Co, D C La, 211 F Supp. 840—Mazzella v Pan Oceanica A/S Panama, D.C N Y., 232 F.Supp 29—Peck v U S Steel Corp, D.C Minn., 315 F Supp. 905, affd, C A, 446 F 2d 891, cert den 92 S Ct. 682, 404 U S. 1019, 30 L Ed 2d 667.

Complaint held not barred by laches

(2) Other complaints—Henderson v Cargill, Inc, D.C Pa, 128 F Supp. 119—Seals v State Marine Lines, Inc., D.C La, 188 F.Supp 398—Fematt v Nedlloyd Line, D.C.Cal., 191 F.Supp 907—Caruana v Belgian Line, Inc., D.C N.Y., 210 F Supp 607—Antolas v Ministere de La Marine Marchande, D C.N.Y, 214 F Supp 296—Amato v. Cie Maritime Belge (Lloyd Royal) S A., D.C N Y, 212 F.Supp. 330—Figueroa v. Esso Standard Oil Co, D.C.N Y., 231 F Supp. 168

Complaint held barred by laches

US—Oroz v American President Lines, Limited, D C N Y, 154 F Supp 241, affd, C A, 259 F 2d 636, cert den 79 S Ct 584, 359 U S 908, 3 L Ed 2d 572—Davis v Nelson, C A Va, 285 F 2d 214—Judge v Johnston Warren Lines, Limited, D C Mass, 205 F Supp 700—Shannon v Steamship Ulua, D C La, 285 F Supp 16—Anapol v Reading Co, D C Pa, 294 F Supp 429

Use of local limitation statute as guide

US—Caruana v Belgian Line, Inc, D C N Y, 210 F Supp 607—Amato v Cie Maritime Belge (Lloyd Royal) S A, D C N Y, 212 F Supp 330

76. US—Considine v Black Diamond S S Corp, D C Mass, 163 F Supp 109—Di Benedetto v Moller S S Co, D C N Y, 186 F Supp 228—Johnson v Partrederiet Brovigtank, D C N Y, 202 F Supp 859—Travis v Poseidon Lines, D C Ill, 203 F Supp 129—McLean v Prudential S S Co, D C Va, 36 F R D 421

77. US—Atlantic & Gulf Stevedores, Inc v Ellerman Lines, Limited, Pa, 82 S Ct. 780, 369 U S 355, 7 L Ed 2d 798, reh den 82 S Ct 1137, 369 U S 882, 8 L Ed 2d 284, motion den 83 S Ct 15, 371 U S 803, 9 L Ed 2d 51—American Export Lines, Inc v Atlantic & Gulf Stevedores, Inc, D C Va, 205 F Supp 316, revd on oth grds C A, 313 F 2d 414, cert den 83 S Ct 1525, 373 U S 924, 10 L Ed 2d 422—Price v S S Yaracuy, D C La, 306 F Supp 638

Third-party complaint dismissed

US—Scotto v Reder A/B Frederika, D C N Y, 258 F Supp 771

Action for unseaworthiness against employer-shipowner-stevedore

US—Shannon v Steamship Ulua, D C.La, 285 F Supp 16

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79. U S.—Lukasiewicz v Moore-McCormack Lines, supra, n 29—Lahde v The Theogennitor, D C Wash, 107 F Supp 664—Lewis v Maritime Overseas Corp, D C Or, 163 F Supp 453

Defenses

US—Hagans v Farrell Lines, Inc, C A Pa, 237 F 2d 477—Neal v Lykes Bros S S Co, C.A Tex, 306 F 2d 313

Negligence count against shipowner properly dismissed

US—Lawlor v Socony-Vacuum Oil Co, C A N Y, 275 F 2d 599, 84 A L R 2d 613, cert den 80 S Ct 1614, 363 U S. 844, 4 L Ed 2d 1728

Amendments

US—Casey v California Stevedore & Ballast Co, D.C Cal, 300 F Supp 687

80. U S—Lahde v Soc Armadora Del Norte, C A. Wash, 220 F 2d 357, cert. den 76 S Ct 53, 350 U S 825, 100 L Ed. 737—Aldridge v States Marine Corp of Del, C.A Cal, 265 F 2d 554, cert den 80 S Ct 53, 361 U.S 814, 4 L Ed 2d 61

Complaint held insufficient

US—White v American Barge Lines, D C Pa, 127 F Supp. 637.

Complaint held sufficient

US—Perkins v. Union Barge Line Corp, C A.Ohio, 373 F 2d 714—Savard v Marine Contracting, Inc, D C Conn, 296 F Supp 1171—Raskin v Marchesini, Inc., C A N Y, 437 F 2d 563—Brisco v American President Lines, Limited, D.C.Cal, 325 F Supp 1259

86. U S—Mosley v Cia. Mar Adra S A, C A.N Y, 362 F 2d 118, cert den 87 S Ct. 292, 296, 385 U S 933, 17 L Ed 2d 213.

Matters to be proved

US—Davis v Nelson, C A Va, 285 F.2d 214

87. U.S—Hall v Moveable Offshore, Inc, C.A Tex, 455 F 2d 633, cert. den 93 S.Ct 60, 409 U S 850, 34 L Ed 2d 93—Brinkley v. H/f Eimskipafelag Islands, D.C Va, 334 F Supp 1185

88. U S—Henderson v Cargill, Inc, D C Pa, 128 F Supp 119—White v U S Lines Co, D C Md, 254 F Supp 480

Inference of knowledge

US—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L Ed 2d 1082

Collision with stationary object

US—Petition of M & J Tracy, Inc, C A N J, 422 F 2d 929—Elgin, J & E Ry Co v American Commercial Line, Inc, D C Ill, 317 F Supp 175—Petition of M/V Elaine Jones, C A Miss, 480 F 2d 11, op am on oth grds 513 F 2d 911, cert den 91 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60

92. U S—Dorn v Balfour, Guthrie & Co, C A Cal, 262 F 2d 48, cert den 79 S Ct 1436, 360 U S 918, 3 L Ed 2d 1534—Partenweederei, MS Belgrano v Weigel, C A Or, 299 F 2d 897, vac in part on oth grds 302 F 2d 730, cert den 83 S Ct 49, 371 U S 830, reh den 83 S Ct 205, 371 U S 906, 9 L Ed 2d 168, reh 313 F 2d 423, cert den 83 S Ct 1292, 373 U S 904, 10 L Ed 2d 199, 83 S Ct 49, reh den 84 S Ct 26, 375 U S 871, 11 L Ed 2d 101—Judge v Johnston Warren Lines, Limited, D C Mass, 205 F Supp 700—Simmons v Ore Nav Corp, D C Md, 213 F Supp 752—Petition of Marina Mercante Nicaraguense, S A, D C N Y, 248 F Supp 15, decree mod on oth grds, C A, 364 F.2d 118, cert. den 87 S.Ct 710, 385 U S 1005, 17 L Ed 2d 544, reh den 87 S Ct 851, 386 U S 929, 17 L Ed 2d 303—Brattoli v Kheel, D C N Y, 302 F Supp 745—Chestnut v U S, D C Pa, 333 F.Supp. 969, affd, C A, 474 F 2d 1338

Recovery on strength of case, not weakness of defendants

U.S.—Russo v. U S, C A N Y., 228 F.2d 317, on remd 183 F Supp 673

Damages

US—Candiano v. Moore-McCormack Lines, Inc, D C N Y, 251 F Supp 654, affd, C A., 382 F 2d 961, reh den 386 F 2d 444, cert den 88 S Ct. 1416, 390 U S. 1027, 20 L Ed 2d 284.

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93. U S—McDonald v. Dingwall Shipping Co, D C Tex, 135 F Supp. 374—McDaniel v The Lisholt, C A N Y, 282 F 2d 816, cert den. 81 S Ct. 694, 365 U S 814, 5 L Ed 2d 692—McQuiston v. Freighters & Tankers S S Co, D C La., 217 F Supp 701, affd, C A, 327 F 2d 746—Antoine v Lake Charles Stevedores, Inc., D C La., 249 F Supp 290, affd, C A, 376 F.2d 443, cert. den 88 S Ct 145, 389 U S 869, 19 L Ed 2d 146—Nosal v Calmar S.S. Corp, D.C Pa., 339 F.Supp. 1235. Affd., C.A., 475 F.2d 1395.

Appliances, equipment, and tackle

US—Affatati v The Havfalk, D.C.N.Y., 146 F Supp 49, affd, C.A, 238 F.2d 388.

94. U S—McDaniel v. The Lisholt, C.A.N Y, 282 F 2d 816, cert den. 81 S.Ct 694, 365 U.S. 814, 5 L.Ed.2d 692—Machillo v. New York Cent R Co., D.C N Y, 200 F.Supp 805—McQuiston v Freighters & Tankers S.S. Co, D C La, 217 F.Supp 701, affd., C.A., 327 F 2d 746—Pacific Far East Line, Inc v Jones Stevedoring Co, C.A Cal., 346 F.2d 642, cert. den. 86 S.Ct 293, 382 U.S 919, 15 L.Ed 2d 233—Antoine v Lake Charles Stevedores, Inc, D C.La., 249 F Supp. 290, affd., C A, 376 F 2d 443, cert den 88 S.Ct 145, 389 U S 869, 19 L Ed.2d 146

96. U S—Trenkle v. Compagnie Generale Transatlantique, D.C Cal, 179 F Supp. 795—Boudoin v. J. Ray McDermott & Co, C.A La, 281 F.2d 81—Candiano v Moore-McCormack Line, Inc, D.C. N Y, 251 F Supp. 654, affd, C A., 382 F 2d 961, reh den. 386 F 2d 444, cert den 88 S Ct. 1416, 390 U S. 1027, 20 L Ed 2d 284—Giaraffa v. Moore-McCormack Lines, Inc., D.C.N.Y., 270 F Supp. 342—Mendoza v. A/S J Ludwig Mowinckels Rederi, D C N.Y., 293 F.Supp. 1319—Humble Oil & Refining Co v. Philadelphia Ship Maintenance Co., C A Pa., 444 F.2d 727, on re-

mand, 342 F Supp 786—Armstrong v Chambers and Kennedy, D C Tex, 340 F Supp 1220, affd in part revd in part on oth grds, C A, 499 F 2d 263, reh den 512 F 2d 1061, cert dism 96 S Ct 163, 423 U S 886, 46 L Ed 2d 118

Laches

U S—Giddens v Isbrandtsen Co, C A Va, 355 F 2d 125

Contributory negligence

U S—Guzman v S S Robin Mowbray, D C N Y, 288 F Supp 948—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds, C A, 427 F 2d 244

98. U S—Geotechnical Corp of Del v Pure Oil Co, C A La, 196 F 2d 199, cert den 73 S Ct 165, 344 U S 874, 97 L Ed 676, and 73 S Ct 175, 344 U S 879, 97 L Ed 681—Somma v Ocean S S Co, D C N Y, 104 F Supp 595—Palomino v Winck, D C N Y, 222 F Supp 985—Scott v SS Ciudad De Ibague, C A La, 426 F 2d 1105

99. U S—Furness, Withy & Co v Carter, C A Wash, 281 F.2d 264, 1 A L R 3d 636—Scott v S S Ciudad Ibaque, D C La, 285 F Supp 613 Affd, C A, 426 F.2d 1105—State of Or By and Through State Highway Commission v Tug Go-Getter, D C Or, 299 F Supp 269, mod in part on oth. grds., affd in part, revd in part on oth grds., C A, 468 F 2d 1270

N Y.—Parsons v State, 295 N Y.S.2d 383, 31 A D 2d 596.

Wash—Zukowsky v. Brown, 488 P 2d 269, 79 Wash 2d 586.

Doctrine held inapplicable

(1) U.S—Manhat v U S., C A N Y, 220 F 2d 143, cert. den 75 S Ct 900, 349 U.S 966, 99 L Ed 1288—Radovich v Cunard S S Co, C A N Y., 364 F 2d 149

Shipowner-stevedore action for indemnity

U.S.—Scott v. SS Ciudad De Ibague, C A La, 426 F 2d 1105

Breakaway as showing prima facie negligence of moving vessel

U S—Monsanto Co v. Edwards Towing Corp, D C Mo., 318 F Supp 13

1. U.S.—Scott v. S S. Ciudad Ibaque, D C La, 285 F.Supp. 613, affd, C A., 426 F.2d 1105—State of Or. By and Through State Highway Commission v. Tug Go-Getter, D.C.Or., 299 F Supp 269, mod in part on oth grds, affd in part, revd in part on oth grds, C A, 468 F 2d 1270

2. U.S—Bowser v. Lloyd Brasileiro S S. Co, C A La., 417 F 2d 779

3. U.S.—Skipper v. Amerind Shipping Corp, D C La, 230 F Supp 253—Logan v Empresa Limeas Maritimas Argentinas, C.A.Mass, 353 F 2d 373, cert. den 86 S.Ct 1276, 383 U S 970, 16 L.Ed.2d 310—Antoine v Lake Charles Stevedores, Inc, D.C.La, 249 F Supp. 290, affd., C.A., 376 F.2d 443, cert den. 88 S Ct 145, 389 U.S. 869, 19 L.Ed.2d 146—McCown v. Humble Oil & Refining Co, C.A.Va., 405 F.2d 596, cert. den. 89 S Ct 1996, 395 U.S 934, 23 L.Ed.2d 449—Reed v Bank Lines, Limited, D C La, 285 F.Supp 808—Hopson v. M/V Karl Grammerstorf, D.C.La., 330 F.Supp. 1260.

Md.—Smith v. Hercules Co., 104 A.2d 590, 204 Md. 379.

Presumptions

U.S.—Titus v. The Santorini, D C.Or, 152 F.Supp. 63, affd., C.A., 258 F.2d 352—Walston v Lambertsen, C.A Wash, 349 F.2d 660, cert den. 86 S Ct 553, 382 U.S. 980, 15 L.Ed.2d 470—Scott v. S.S. Ciudad Ibaque, D.C.La., 285 F.Supp. 613, affd., C.A, 426 F.2d 1105—Jackson v S S. Kings Point, D C.La., 276 F.Supp. 451

Protected one

U.S.—Huber v. U S., D.C.Cal., 177 F.Supp. 617

Proximate cause of injury

U.S.—McQuiston v. Freighters & Tankers S S Co, D.C.La, 217 F.Supp. 701, affd., C.A., 327 F.2d 746

Unseaworthiness not established by mere happening of accident

U S—Luna v Kawasaki Kisen Kaisha, Limited, D C Cal, 245 F Supp 152

Proof of negligence unnecessary

U S—Blow v Compagnie Maritime Belge (Lloyd Royal) S A, C A Va, 395 F 2d 74

Burden on owner of vessel under bare-boat charter

U S—Guzman v Pirchirilo, Puerto Rico, 82 S Ct 1095, 369 U S 698, 8 L Ed 2d 205—Miller v Union Barge Line Corp, D C Pa, 299 F Supp 718

Burden on owner to show seaworthiness

U S—City of New York v Morania No 12, Inc, D C N Y, 357 F Supp 234

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4. U S—Ferrigno v Ocean Transport Limited, C A N Y, 309 F 2d 445—Damanti v A/S Inger, C A N Y, 314 F 2d 395, cert den 84 S Ct 46, 375 U S 834, 11 L Ed 2d 64

In separate action against employer

U S—American Export Lines, Inc v Atlantic & Gulf Stevedores, Inc, C A Va, 313 F 2d 414, cert den 83 S Ct 1525, 373 U S 924, 10 L Ed 2d 422

5. U S—Berti v Compagnie De Navigation Cyprien Fabre, C A N Y, 213 F.2d 397—Bailey v Kawasaki-Kisen, K K, C A La, 455 F 2d 392, app after remand 478 F 2d 939

Evidence held admissible

(4) U S—Moore-McCormack Lines, Inc v Maryland Ship Ceiling Co, C A Md, 311 F 2d 663—Thompson v. Calmar S S Corp, D C Pa, 216 F Supp 234, affd, C A, 331 F 2d 657, cert den 85 S Ct 259, 379 U.S 913, 13 L Ed 2d 184—Provenza v American Export Lines, Inc, C A Md, 314 F 2d 660, cert den 84 S Ct 970, 376 U S 952, 11 L Ed 2d 971—Barnes v Rederi A/B Fredrika, C A Va, 350 F 2d 865, cert den 86 S Ct. 895, 383 U S 910, 15 L Ed 2d 665—Albanese v N V Nederl Amerik Stoomv Maats, D C N Y, 279 F Supp 635—Earles v Union Barge Line Corp, D C Pa, 321 F Supp 1329

Md—Frazier v Waterman S S Corp, 112 A 2d 221, 206 Md 434

Wash—Vogel v Alaska S.S Co, 419 P 2d 141, 69 Wash 2d 497—Cresap v Pacific Inland Nav Co, 469 P.2d 950, 2 Wash.App 548, affd, 478 P 2d 223, 78 Wash 2d 563

Evidence held inadmissible

(3) U.S—Phipps v N V. Nederlandsche Amerikaansche Stoomvart, Maats, C A Or, 259 F 2d 143—Thompson v. Calmar S S Corp, C.A Pa, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184

Minn.—Sorenson v. Cargill, Inc., 163 N W 2d 59, 281 Minn 480

Exclusion held not prejudicial

U.S—Manhat v. U.S., C.A N Y., 220 F 2d 143, cert den 75 S Ct 900, 349 U S 966, 99 L Ed 1288

Conditions subsequent to accident

U S—Cardali v A/S Glittre, C A N Y, 360 F 2d 271

Safety regulations relevant

Wash—Cresap v Pacific Inland Nav Co, 478 P 2d 223, 78 Wash 2d 563.

8. U S—Isaacson v Jones, C A Wash, 216 F 2d 599—Koivunen v States Line, C A Or, 371 F.2d 781—Perkins v. Union Barge Line Corp., C.A Ohio, 373 F 2d 714—Patterson v Esso Jamestown, D.C La., 274 F Supp 854—Mendoza v. A/S J Ludwig Mowinckels Rederi, D.C.N Y, 293 F Supp. 1319.

Evidence held sufficient

(3) Other evidence

U.S.—Drake v. E. I DuPont deNemours & Co., C A. Tex, 432 F.2d 276—Brisco v American President Lines, Limited, D C.Cal, 325 F Supp 1259

Minn.—Sorenson v Cargill, Inc, 163 N W 2d 59, 281 Minn. 480

Wash—Adler v. University Boat Mart, Inc., 387 P 2d 509, 63 Wash 2d 334.

Evidence held insufficient

(1) U S—Seitz v The Captantonis, D C Or, 203 F Supp 723

(3) Other evidence

U S—Brattoli v Kheel, D C N Y, 302 F Supp 745—Daniels Towing Service, Inc v Nat Harrison Associates, Inc, D C Fla, 303 F Supp 1065, affd, C A, 432 F 2d 103

9. Evidence held sufficient

U S—Lanciotti v Matson Nav Co, D C Cal, 132 F Supp 812

Absolute certainty not required

U S—Brattoli v Kheel, D C N Y, 302 F Supp 745

10. U S—McDonald v Dingwall Shipping Co, D C Tex, 135 F Supp 374—Esposito v The Fernbay, D C N Y, 168 F Supp 568—Wilson v Societa Italiana de Armamento (Sidarma), D C Cal, 279 F Supp 945, affd, C A, 409 F 2d 484

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11. U S—Mendoza v A/S J Ludwig Mowinckels Rederi, D C N Y, 293 F Supp 1319

Evidence held insufficient

(2) U S—Sheckard v Empresa Nacional Elcano, S A, D C N Y, 191 F Supp 289

Evidence held sufficient

U S—U S Lines Co v King, C A Va, 363 F 2d 658—Wilson v Societa Italiana de Armamento (Sidarma), D C Cal, 279 F Supp 945, affd, C A, 409 F 2d 484

12. Evidence held sufficient

(1) U S—American Commercial Lines, Inc v Eusay, C A La, 395 F 2d 717—Lettsome v U S, C A Fla, 411 F 2d 917, app after remand 434 F 2d 907, app after remand 453 F 2d 395—Cleary v U S Lines Co, C A N Y, 411 F 2d 1009—Brattoli v Kheel, D C N Y, 302 F Supp 745—Stewart v Steamer Blue Trader, C A Mass, 428 F 2d 361—Horton v Horton, Inc v T/S J E Dyer, C A Tex, 428 F 2d 1131, cert den 91 S Ct 461, 400 U S 993, 27 L Ed 2d 441—Smith v Olsen & Ugelstad, D C Mich, 324 F Supp 578

Alaska—Taylor v Alaska Rivers Nav Co, 391 P 2d 15

Or—Lang v Coastwise Line, 294 P 2d 341, 206 Or 667

(2) U S—Greene v Skibs A/S Mandeville, D C S C, 186 F Supp 459, motion den 188 F Supp 65, affd, C A, 292 F 2d 393—Green v Skibs A/S Mandeville, D C S C, 188 F Supp 65—Massa v C A Venezuelan Navigacion, D C N Y, 209 F Supp 404, affd in part and revd in part on oth grds, C A, 332 F 2d 779, cert den 85 S Ct 262, 379 U S 914, 13 L Ed 2d 186

(3) U S—Machillo v New York Cent R Co, D C N Y, 200 F Supp 805—DiBello v Rederi A/B Svenska Lloyd, C A N Y, 371 F 2d 559

Evidence held insufficient

(1) U S—Lowe v California Co, D C La, 296 F Supp 1264—Hines v Bristol City Line, C A Pa, 422 F 2d 668

(2) U S—Wilson v Societa Italiana de Armamento (Sidarma), D.C Cal, 279 F Supp 945, affd, C A, 409 F 2d 484

13. U S—Royal Mail Lines, Limited v Peck, C A Cal, 269 F 2d 857

Evidence held sufficient

U S—Pedersen v The Bulklube, D C N.Y, 170 F Supp 462, affd, C A, 274 F 2d 824, cert den 81 S Ct 44, 364 U S 814, 5 L Ed.2d 46

(1) Miss—Ingalls Shipbuilding Corp v McDougald, 228 So 2d 365

Evidence held insufficient

U S.—Abruzzo v U S, D C N Y, 254 F Supp 134

Injury to longshoreman or stevedores

(1) U.S.—Waterman S S. Corp v Casbon, C A La, 417 F 2d 1040—Hartnett v Reiss S S Co, C A N Y, 421 F 2d 1011, cert den 91 S Ct. 49, 400 U S 852, 27 L Ed.2d 90—Domeracki v Humble Oil & Refining Co D C.Pa, 312 F Supp 374, affd., C A, 443 F 2d 1245, cert. den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165

Cal.—Davis v Matson Nav Co, 68 Cal Rptr 434, 262 C A 2d 25.

(2) U S —Pereda v Grace Line, Inc, 248 N Y S 2d 835, 25 A D 2d 873—Wilson v Societa Italiana de Armamento (Sidarma), C A La, 409 F 2d 484—Bowser v Lloyd Brasileiro S S Co, C A La, 417 F 2d 779

(3) U S —Hugev v Dampskisaktieselskabet International, D C Cal, 170 F Supp 601, affd, C A, 274 F 2d 875, cert den 80 S Ct 1237, 363 U S 803, 4 L Ed 2d 1147

(4) U S—Osnovitz v U S, D C Pa, 103 F Supp 238, affd, C A, 204 F 2d 654

(7) Other matters

U S—Abruzzo v U S, D C N Y, 254 F Supp 134

Hatches

(1) U S —Purcell v Waterman S S Corp, C A N Y, 221 F 2d 953—Waterman S S Corp v Brady-Hamilton Stevedore Co, D C Or, 243 F Supp 298

Cal —O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

14. Evidence held insufficient

U S—Giuliano v U S, D C N Y, 117 F Supp 610

N Y—Clark v Iceland S S Co, 179 N Y S 2d 708, 6 A D 2d 544, rearg and app den 182 N Y S 2d 295, 7 A D 2d 837

15. Evidence held sufficient

U S—Read v U S, C A Pa, 201 F 2d 758

Evidence held insufficient

U S—St Claire v Mid-Continent Barge Lines Co, D C Minn, 249 F Supp 938

Injury to longshoremen or stevedores

(1) U S —Brabazon v Belships Co, Limited, Skibs A/S, C A Pa, 202 F 2d 904—Hagans v Farrell Lines, Inc, C A Pa, 237 F 2d 477—Bellisano v U S., C A N J, 245 F 2d 869—American Export Lines, Inc v Revel, C A Va, 266 F 2d 82—De Van v Pennsylvania R Co, D C Pa, 167 F Supp 336—Ray v Compania Naviera Continental, S A, D C Md, 203 F Supp 206—Rodriguez v Coastal Ship Corp, D C N Y, 210 F Supp 38—Martin v N V Koninklyke Nederlandsche Stoomboot Maatschappij, D C Tex, 264 F Supp 412

(2) U S —Affatati v The Havfalk, D C N Y, 146 F Supp 49, affd, C A, 238 F 2d 388—Hansen v Pacific Far East Line, Inc, D C Cal, 209 F Supp 685—Burgess v Farrell Lines, Inc, D C Md, 215 F Supp 319, affd, C A, 335 F 2d 885, cert den 85 S Ct 729, 379 U S 1004, 13 L Ed 2d 706—Robinson v Victory Carriers, Inc, D C N C, 307 F Supp 578

Coast guard regulations as evidence of due care

U S —Delta Engineering Corp v Scott, C A La, 322 F 2d 11, reh den 325 F 2d 432, cert den 84 S Ct 1164, 377 U S 905, 12 L Ed 2d 176

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16. U S —Farnum v S/S Oslofjord, D C N.Y, 220 F Supp 199—Jones v Moore-McCormack Line, Inc, D C N Y, 291 F Supp 888

Miss —Ingalls Shipbuilding Corp v McDougald, 228 So 2d 365

Evidence held sufficient

U S.—Scott v S S Ciudad Ibaque, D C La, 285 F Supp 613, affd, C A, 426 F 2d 1105—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245 Cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165

N Y —Colban v Petterson Lighterage & Towing Corp, 279 N Y.S 2d 735, 19 N Y 2d 794, 226 N E 2d 541

Evidence held insufficient

U S —Charleville v Compania Navigacion Castro Riva S A Panama, R P, D C La, 201 F Supp 115

Injury to longshoremen and stevedores

(1) U S —Martin v N V Koninklyke Nederlandsche Stoomboot Maatschappij, D C Tex, 264 F.Supp 412—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds C A, 427 F 2d 244

N.Y —Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc.2d 514

(2) U S.—Osnovitz v U.S, supra, n 13—U S v Luehr, C.A.Cal, 208 F 2d 138—Mancini v U S, D.C N Y, 115 F.Supp 605—Grenawalt v South African Marine Corp.% d.c n y, 130 f's/upp 432, affd, C A, 243 F 2d 575—Gomez v The Dorothy, D C Puerto Rico, 183 F Supp 499—Grant v Cia Anonima Venezolana de Navegacion, C A La, 343 F 2d 757

18. Evidence held insufficient

U S —Scott v S S Ciudad Ibaque, D C La, 285 F Supp 613, affd, C A, 426 F 2d 1105

19. U S —Caputo v Kheel, D C N Y, 291 F Supp 804—Reed v MV Foylebank, C A La, 415 F 2d 838, cert den 90 S Ct 909, 397 U S 910, 25 L Ed 2d 91, reh den 90 S Ct 1256, 397 U S 1030, 25 L Ed 2d 543—Hudnick v American Export Lines, Inc, D C Pa, 321 F Supp 1182—Smith v Olsen & Ugelstad, D C Mich, 324 F Supp 578

Wash —Cresap v Pacific Inland Nav Co, 478 P 2d 223, 78 Wash 2d 563

20. U S —Lowry v A/S D/S Svendborg, C A Pa, 396 F 2d 850—La Capria Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds, C.A, 427 F 2d 244—Mendoza v A/S J Ludwig Mowinckels Rederi, D C N Y, 293 F Supp 1319—Rapisardi v United Fruit Co, D C N Y, 300 F Supp 942

Fall from ladder

Wash —Cresap v Pacific Inland Nav Co, 469 P 2d 950, 2 Wash App 548 Affd, 478 P 2d 223, 78 Wash 2d 563

Fall through hatch

Cal —O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

21. U S —Henderson v Reading Co, D C Pa, 150 F Supp 437—Lewis v Maritime Overseas Corp, D C Or, 163 F Supp 453—Amato v U S, D C N Y, 167 F Supp 929—Gomez v The Dorothy, D C Puerto Rico, 183 F.Supp 499—Cook v The Wasaborg, D C Or, 189 F Supp 464—Lamazza v U S, D C N Y, 190 F Supp 692—Ray v Compania Naviera Continental, S A, D C.Md, 203 F Supp 206—Neal v Lykes Bros. S.S Co, C A Tex., 306 F 2d 313—Skibinski v Waterman S S. Corp, C A N Y, 360 F.2d 539, cert den 87 S Ct 2027, 387 U S 921, 18 L Ed 2d 975—Candiano v Moore-McCormack Lines, Inc., D C N Y, 251 F Supp 654, affd, C A, 382 F 2d 961, reh den 386 F 2d 444, cert den. 88 S Ct 1416, 390 U.S 1027, 20 L Ed 2d 284—Haynes v Rederi A/S Aladdin, D C Tex, 254 F Supp 185, affd, C A, 362 F 2d 345, cert den 87 S Ct 731, 385 U.S 1020, 17 L Ed 2d 557—Guld & South Am S S Co v Simmons, C A La, 394 F 2d 504—American Commercial Lines, Inc v Eusay, C A La, 395 F.2d 717—Rapisardi v United Fruit Co, D C N Y, 300 F Supp 942

La —Perry v Baltimore Contractors, Inc, 202 So 2d 694, writ ref 204 So 2d 579, 251 La 405, cert den 88 S Ct 1419, 390 U S 1028, 20 L Ed 2d 285

N Y —Thompson v Erie R Co, 227 N Y S 2d 80, 33 Misc 2d 514

Fall through hatch

(2) U S —Moore v The American, D C N Y., 146 F Supp 69—Massaro v U S Lines Co, C A Pa., 307 F 2d 299

Not contributing factor in accident

Cal —Flores v Pacific Island Transport Lines, 57 Cal. Rptr 73, 248 C A 2d 812, cert. den 88 S Ct. 96, 389 U S 831, 19 L Ed 2d 88

22. U S —Isaacson v Jones, C A Wash, 216 F 2d 599—Wilson v Societa Italiana de Armanento (Sidarma), C A.La, 409 F 2d 484—Scott v S S Ciudad Ibaque, D C La., 285 F Supp 613, affd, C A, 426 F 2d 1105

Tex —William B Patton Towing Co v Spiller, Civ App, 440 S W 2d 869

23. U S —McNeil v Lehigh Valley R Co, C A N Y, 387 F 2d 623, cert den 88 S Ct 1638, 390 U S 1040, 20 L Ed.2d 302—Kelly v S S. Tyson Lykes, D C La, 283 F.Supp 277—Shaver Transp Co v Chamberlain, C.A.Or, 399 F 2d 893—Scott v S S Ciudad Ibaque, D.C La, 285 F Supp 613, affd, C A, 426 F 2d 1105—Dillon v M. S Oriental Inventor, C A.La, 426 F 2d 977, cert den 91 S Ct 140—Rapisardi v United Fruit Co, D.C N Y, 300 F Supp 942—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165—Burrage v Flota Mercante Grancolombiana, S A, C A La, 431 F 2d 1229—Stein v Sea-Land Services, Inc, C A La, 440 F 2d 1181

Cal —Davis v Matson Nav Co, 68 Cal Rptr 434, 262 C A 2d 25

Minn —Sorenson v Cargill, Ind, 163 N W 2d 59, 281 Minn 480

N Y —Coppa v Royal Netherlands S.S Co, 128 N Y S 2d 662, 283 App Div 807

Fall through hatch

U S —Hebert v D/S Ove Skou, D C Tex, 232 F Supp 277, affd in part and revd in part on oth grds, C A, 365 F 2d 341, cert den 91 S Ct 139, 400 U S 902, 27 L Ed 2d 139—Waterman S S Corp v Brady-Hamilton Stevedore Co, D C Or, 243 F Supp 298

24. U S —Patterson v Esso Jamestown, D C La, 274 F Supp 854—Wilson v Societa Italiana de Armamento (Sidarma), D C Cal, 279 F Supp 945 Affd, C A, 409 F 2d 484—Henley v Wheless Drilling Co, C A La, 396 F 2d 503—Hill v Flota Mercante Grancolombiana, S A, C A La, 405 F 2d 878, cert den 89 S Ct 1995, 395 U S. 934, 23 L Ed 2d 449—Shannon v Steamship Ulua, D C La, 285 F Supp. 16—Lettsome v U S, C A Fla, 411 F 2d 917, app after remand 434 F 2d 907, app after remand 453 F 2d 395—Robinson v Victory Carriers, Inc, D C N C., 307 F.Supp 578—Wheeler v Lykes Bros S S Co, C.A La, 431 F.2d 570, cert. den 91 S Ct. 1376, 402 U S 922, 28 L Ed 2d 661—Robichaux v Kerr McGee Oil Industries, Inc, D C La, 317 F.Supp 587—Smith v Olsen & Ugelstad, D.C Mich, 324 F Supp 578

N Y —Salmond v Isbrandtsen Co, 144 N Y S 2d 578, 286 App Div 1015, cert den 76 S Ct. 1033, 351 U S 968, 100 L Ed. 1487—Parsons v State, 295 N Y S 2d 383, 31 A D 2d 596

Fall through hatch

U S —Pignataro v. Waterman S.S. Corp, C A N.Y, 194 F 2d 404, cert den. 73 S.Ct. 32, 344 U S 829, 97 L.Ed. 645—Hines v Bristol City Line, C A Pa, 422 F 2d 668

Mere happening of accidents

U S —Tanzi v Deutsche Dampfschiffahrts-Gesellschaft Hansa v International Terminal Operating Co., Inc, D.C N Y, 355 F.Supp 432

25. U S —Ondato v Standard Oil Co, C.A.N Y., 210 F 2d 233—Ignatyuk v. Tramp Chartering Corp, D C N Y, 133 F Supp. 854, affd., C A, 250 F 2d 198—Henderson v Reading Co., D C Pa., 150 F Supp 437—Revel v. American Export Lines, Inc, D C Va., 162 F Supp. 279, motion den, C A., 262 F 2d 122, affd 266 F 2d 82—Hightower v Matson Nav Co, D.C.Cal, 178 F.Supp 424—Wyborski v Bristol City Line of Steamships, Limited, D C Md, 191 F.Supp 884—Thompson v. Calmar S S. Corp, C.A Pa., 331 F 2d 657, cert den 85 S Ct 259, 379 U.S. 913, 13 L Ed.2d 184—Compania Anonima Venezolano de Navegacion v. Matthews, C A.La, 371 F 2d 971, cert. den 88 S.Ct 37, 389 U.S. 820, 19 L.Ed 2d 71—Splosna-Plovba v Garcia, C A Cal., 390 F 2d 41—Scott v. S.S. Ciudad Ibaque, D C La, 285 F.Supp. 613, affd, C A., 426 F.2d 1105—Simpson v Knut Knutsen, O A S., D C Cal., 296 F Supp. 1308, affd in part, remd in part, C.A., 444 F.2d 523—Domeracki v Humble Oil & Refining Co, D C.Pa, 312 F.Supp 374, affd, C.A, 443 F.2d 1245, cert den 92 S Ct 212, 404 U.S 883, 30 L Ed 2d 165

Cal —O'Hey v. Matson Nav Co, 288 P.2d 81, 135 C A.2d 819—Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C A.2d 812, cert. den. 88 S.Ct 96, 389 U.S. 831, 19 L.Ed.2d 88

Evidence held to show unseaworthiness not cause of injury

U.S —Fox v The Moremacwind, C A.Va., 285 F.2d 222—Wilson v Societa Italiana de Armamento (Sidarma), D C Cal., 279 F.Supp 945, affd, C.A, 409 F 2d 484—Debose v. MS Loppersum, C.A.La., 438

F 2d 642, cert den 92 S Ct 196, 404 U S 885, 30 L Ed 2d 168

Evidence held insufficient

U S —Hill v American President Lines, Limited, D C Va, 194 F Supp 885—Hudson S S Co v Ayala Colon, C A Puerto Rico, 314 F 2d 44—Morani v Agatha Fisheries, Inc, D C Mass, 213 F Supp 257—Burgess v Farrell Lines, Inc, D C Md, 215 F Supp 319, affd, C A, 335 F 2d 885, cert den 85 S Ct 729, 379 U S 1004, 13 L Ed 2d 706—U S Lines Co v Nacirema Operating Co, D C Mass, 215 F Supp 627—Farnum v S/S Oslofjord, D C N Y, 220 F Supp 199

26. U S —Reddick v McAllister Lighterage Line, Inc, C A N Y., 258 F.2d 297, cert den 79 S Ct 235, 358 U S 908, 3 L Ed.2d 229

Evidence held sufficient

(3) To show other matters

U S —Scott v SS Ciudad De Ibague, C A La, 426 F 2d 1105

Evidence held insufficient

U S —Wujek v Compania Sud Americana De Vapores, D C Md, 224 F Supp 853—Jones v N V Nederlandsch-Amerikaansche Stoomvaart Maatschappij, C A.Pa., 374 F 2d 189, cert den 87 S Ct 2114, 388 U S. 911, 18 L Ed 2d 1349—Maillard v American Export Isbrandtsen Lines, Inc, C.A N Y, 406 F 2d 322.

27. U S —McKinley v Skibs A/S Arizona, D C Pa, 286 F Supp 691

Evidence held sufficient

U S.—Albanese v N V Nederl Amerik Stoomv Maats., D C N Y, 279 F Supp 635—Dunn v Ove Skou Reders A/S, D C Pa., 45 F R D 18

(2) To show freedom from negligence

U.S.—Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co, C.A Md, 311 F 2d 663—Scott v S S Ciudad Ibaque, D C.La, 285 F.Supp. 613, affd, C A., 426 F 2d 1105—Waterman S S Corp v Casbon, C.A.La, 417 F.2d 1040

(3) To show fault of defendant precluding indemnity

U.S —Drake v. E I DuPont deNemours & Co, C A Tex., 432 F 2d 276

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28. U.S —Moran v. The Georgie May, D C Fla, 164 F Supp 881—Marshall v Isthmian Lines, Inc, C.A Tex, 334 F 2d 131—Lecklikner v. Transandina Compania-Naviera, S A, C A Pa., 390 F 2d 179—Poller v Thorden Lines A/B, D C Pa, 336 F.Supp. 1231

Deferment of issue

U.S.—Francese v. U.S., D C N Y, 229 F Supp 10

Interrogatories

U.S —Boldurian v. A/B Svenska Amerika Linien, D C Pa., 246 F.Supp. 413.

Rehearing

U.S.—Jones v. N.V Nederlandsch-Amerikaansche Stoomvaart Maatschappij, C.A.Pa, 374 F.2d 189, cert den. 87 S.Ct. 2114, 388 U.S. 911, 18 L Ed.2d 1349.

New trial

U.S.—Peterson v. Calmar S.S. Corp, D C Pa., 296 F.Supp. 8.

29. U.S.—Carroll v. Frontera Compania Naviera, S.A., D.C.Pa., 258 F.Supp 747, affd. in part and revd. in part on oth. grds., C.A, 390 F 2d 311—Naglis v. Waterman S S. Corp, C A Pa, 390 F.2d 178—Napolitano v Compania Sud Americana De Vapores, C.A.N Y, 421 F.2d 382—Telfair v Zim Israel Nav. Co, C A Fla, 428 F 2d 127, cert den 91 S.Ct. 568, two cases, 400 U.S. 1009, 27 L.Ed.2d 622—Shaw v. Lauritzen, C A.Pa., 428 F.2d 247—Rivers v. Angf. A/B Tirfing, C A.Fla, 450 F 2d 12—Grayson v. Management & Shipping Transport, Inc, D.C.Ala, 330 F.Supp. 30.

Cal.—Sea-Land Service, Inc v Matson Terminal Co, 61 Cal.Rptr. 756, 253 C A.2d 885.

Ohio—Allan v. Mergard, 187 N.E.2d 27, 174 Ohio St. 132.

Or —Brown v Westfal-Larsen & Co, 383 P 2d 1003, 235 Or 64

Status of injured person

(3) Other matters

Cal —Smith v Union Oil Co, 50 Cal Rptr 499, 241 C A 2d 338, cert den 87 S Ct 291, 385 U S 931, 17 L Ed 2d 213

Question whether conduct of shipowner foreclosed indemnity

U S —McNamara v Weichsel Dampfschiffahrts AG Kiel, Germany, C A N Y, 293 F 2d 900—Albanese v N V Nederl Amerik Stoomv Maats, D C N Y, 279 F Supp 635—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A Pa, 444 F 2d 727, on remand, 342 F Supp 786

Seaworthiness

U S —Jefferson v Taiyo Katun, K K, C A Tex, 310 F 2d 582, cert den 83 S Ct 1091, 372 U S 967, 10 L Ed 2d 130—Thompson v Calmar S S Corp, D C Pa, 216 F Supp 234, affd, C A, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L Ed 2d 184

Cal —Pollock v Standard Oil Co of Cal, 42 Cal Rptr 128, 231 C A 2d 714

N Y —Milin v U S Lines, Inc, 291 N E 2d 144, 31 N Y 2d 336, 338 N Y S 2d 905

Whether vessel is out of navigation

Cal —Pollock v Standard Oil Co of Cal, 42 Cal Rptr 128, 231 C A 2d 714

Failure or refusal to direct verdict held proper

U S —Logan v Empresa Lineas Maritimas Argentinas, C A Mass, 353 F 2d 373, cert den 86 S Ct 1276, 383 U S 970, 16 L Ed 2d 310—Boldurian v A/B Svenska Amerika Linien, D C Pa, 246 F Supp 413 —Judith Ann Liberian Transport Corp v Crawford, C A Or, 399 F 2d 924.

Breach of warranty by stevedore

U S —Albanese v N V Nederl Amerik Stoomv Maats, D.C N Y, 279 F Supp 635—Delaneuville v Simonsen, C A.La, 437 F 2d 597—Humble Oil & Refining Co v Philadelphia Ship Maintenance Co, C A Pa, 444 F.2d 727, on remand, 342 F Supp 786—Evans v Carolina Shipping Co, C A S C, 451 F 2d 188—Evans v Overseas Maritime Co., D C S C, 330 F Supp 654, affd, C A, 451 F 2d 188.

Effect of health and safety regulations

U.S —Venable v A/S Forenede Dampskibsselskab, C.A Va, 399 F 2d 347

Navigational status of vessel

U S —Delome v Union Barge Line Co, C A Tex, 444 F 2d 225, cert den 92 S Ct 534, 404 U S 995, 30 L Ed 2d 547

Status of employee

U S —Powers v Bethlehem Steel Corp, C A Mass., 477 F 2d 643, reh den, C A, 483 F.2d 963, cert den 94 S Ct 160, 414 U S 856, 38 L Ed 2d 106

30. U S —Mollica v Compania Sud-Americana De Vapores (Chilean Line), C A N.Y, 202 F 2d 25, cert. den 73 S Ct 952, 345 U S 965, 97 L.Ed 1384—United New York & New Jersey Sandy Hook Pilots Ass'n v Halecki, N J & N Y, 79 S.Ct. 517, 358 U.S 613, 3 L Ed.2d 541—Litwinowicz v Weyerhaeuser S S Co., D C Pa, 179 F Supp. 812—Hagans v Ellerman & Bucknall S S Co., C A Pa, 318 F 2d 563—Grace Lines, Inc v Port Everglades Terminal Co, C.A Fla, 324 F 2d 699—Parker v. U S, D C Or, 223 F Supp 647—Marshall v. Isthmian Lines, Inc., C.A Tex., 334 F.2d 131—Compania Trasatlantica Espanola, S A v. Melendez Torres, C A Puerto Rico, 358 F 2d 209—Price v S S Yaracuy, C.A La., 378 F 2d 156, on remand, D.C, 306 F.Supp 638—Naglis v Waterman S.S Corp, C A Pa, 390 F 2d 178—Hartnett v. Reiss S.S. Co., C A N Y, 421 F 2d 1011, cert den 91 S Ct 49, 400 U S 852, 27 L.Ed 2d 90—Branch v. Schumann, C A Fla, 445 F.2d 175—Nosal v. Calmar S.S Corp, D C Pa, 339 F Supp. 1235, affd., C.A, 475 F.2d 1395

Mich.—Torrez v. Willett, 115 N W 2d 393, 366 Mich. 465

Negligence of impleaded employer

U S —Hodgson v Lloyd Brasileiro Patrimonio Nacional, C A Pa, 294 F 2d 32, cert den 82 S Ct 931, 369 U S 848, 8 L Ed 2d 8—Cia Maritima Del Nervion v James J Flanagan Shipping Corp, Stevedore Division, C A Tex, 308 F 2d 120—Close v Calmar S S Corp, D C Pa, 44 F R D 398, affd, C A, 417 F 2d 264

31. U S —Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347

33. U S —Kulukundis v Strand, C A Or, 202 F 2d 708

Cal —Sea-Land Service, Inc v Matson Terminal Co, 61 Cal Rptr 756, 253 C A 2d 885

34. U S —McHoney v Marine Nav, Co, D C S C, 137 F Supp 263, affd, C A, 233 F 2d 769, cert den 77 S Ct 231—Fisher v U S Lines Co, D C Pa, 198 F Supp 815—Domeracki v Humble Oil & Refining Co, D C Pa, 312 F Supp 374, affd, C A, 443 F 2d 1245, cert den 92 S Ct 212, 404 U S 883, 30 L Ed 2d 165—Siderewicz v Enso-Gutzeit O/Y, C A Conn, 453 F 2d 1094, cert den 92 S Ct 2441, 407 U S 912, 32 L Ed 2d 686

Mo —Kiburz v Loc-Wood Boat & Motors, Inc, 356 S W 2d 882

35. U S —Ondato v Standard Oil Co, C A N Y, 210 F 2d 233—A H Bull S S Co v Ligon, 285 F 2d 936, 88 A L R 2d 479—Rivera v Reders A/B Nordstjernan, C A Puerto Rico, 456 F 2d 970, cert den 93 S Ct 124, 409 U S 876, 34 L Ed 2d 128

Evidence held insufficient to go to jury

U S —Freitas v Pacific-Atlantic S S Co, C A Cal, 218 F 2d 562—Filipek v Moore-McCormack Lines, Inc, C A N Y, 258 F 2d 734, cert den 79 S Ct 605, 359 U S 927, 3 L Ed 2d 629—Kent v Shell Oil Co, C A La, 286 F 2d 746—Logan v A/S Havtor, C A Va, 328 F 2d 84—McCall v States Marine Lines, Inc, C A La, 378 F 2d 366—Hines v Bristol City Line (Canada) Limited, D C Pa., 301 F Supp 1394, affd, C A, 422 F 2d 668

Md —Frazier v Waterman S S Corp, 112 A 2d 221, 206 Md 434

N Y —Milin v U S Lines, Inc, 291 N E 2d 144, 31 N Y 2d 336, 338 N Y S 2d 905

Evidence held sufficient to go to jury

U S —Moore-McCormack Lines, Inc v Maryland Ship Ceiling Co, C A Md, 311 F 2d 663—Blow v Compagnie Maritime Belge (Lloyd Royal) S A, C A Va, 395 F 2d 74

Prerequisites for submission on last clear chance

U S -Melton v O F Shearer & Sons, Inc, C A Ky, 436 F 2d 22

36. U S —McCown v Humble Oil & Refining Co, C A Va, 405 F 2d 596, cert den 89 S Ct 1996, 395 U S 934, 23 L Ed 2d 449.

N Y.—Colban v Petterson Lighterage & Towing Corp, 279 N.Y S 2d 735, 19 N Y 2d 794, 226 N.E 2d 541

Tex —Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij, Holland-America Line v Vassallo, Civ App, 365 S W 2d 650, err. ref no rev err Cert den 84 S Ct 443, 375 U S 952, 11 L Ed 2d 313

Direction of verdict against owner held proper

U.S —D'Amico v Lloyd Brasileiro Patrimonio Nationale, C A N Y, 354 F 2d 33

U S —U S Lines Co v King, C A Va, 363 F 2d 658—Redovich v Cunard S S Co, C A N Y, 364 F 2d 149

37. Cross claim

U S —Hartnett v Reiss S S. Co, C A N Y, 421 F 2d 1011, cert. den 91 S Ct 49, 400 U S 852, 27 L Ed 2d 90

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39. U.S —Nosal v Calmar S S Corp, D C Pa, 339 F Supp 1235, affd, C A., 475 F 2d 1395—Lee v Kisen, C A La, 475 F 2d 1251

41. U S —Pioneer S S Co v Hill, C A Ohio, 227 F 2d 262—Rich v Ellerman & Bucknall S S Co, C A N Y, 278 F 2d 704—Cooper v D/S A/S

Progress, D C Pa, 188 F Supp 578—Delpit v Nocuba Shipping Co, C A La, 302 F 2d 835, cert den 83 S Ct 262, 371 U S 915, 9 L Ed 2d 173—Fitzgerald v Polish Ocean Lines, C A Md, 337 F 2d 376—Companio Trasatlantica Espanola, S A v Melendez Torres, C A Puerto Rico, 358 F 2d 209—Lettsome v U S, C A Fla, 411 F 2d 917, app after remand 434 F 2d 907, app after remand 453 F 2d 395—Hartnett v Reiss S S Co, C A N Y, 421 F 2d 1011, cert den 91 S Ct 49, 400 U S 852, 27 L Ed 2d 90

Cal—Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C A 2d 812, cert den 88 S Ct 96, 389 U S 831, 19 L Ed 2d 88

Mo—Nakos v Dean, App, 417 S W 2d 680

Wash—Vogel v Alaska S S Co, 419 P 2d 141, 69 Wash 2d 497—Cresap v Pacific Inland Nav Co, 469 P 2d 950, 2 Wash App 548, affd, 478 P 2d 223, 78 Wash 2d 563

Matters considered

U S—Burrage v Flota Mercante Grancolombiana, S A, C A La, 431 F 2d 1229

43. N Y—Colban v Petterson Lighterage & Towing Corp, 264 N Y S 2d 403, 24 A D.2d 870, motion den 214 N E 2d 785, 17 N Y 2d 506, 267 N Y S 2d 507, affd 226 N E 2d 541, 19 N Y 2d 794, 279 N Y S 2d 735

Choosing of dangerous passage

(2) Other instances

U S—Palermo v Luckenbach S S Co, N Y, 78 S Ct 1, 355 U S 20, 2 L Ed 2d 3, reh den 78 S.Ct 147, 355 U S 886, 2 L Ed 2d 116, am 78 S Ct 337, 355 U S 910, 2 L Ed 2d 271

44. U S—Cowan v Inland Waterways Corp, D C Ill., 121 F Supp 683—Wojciechowski v States Marine Corp of Del., D C Md, 155 F Supp 874—Scott v Isbrandtsen Co, C A Va, 327 F 2d 113—Williams v Arrow S S Corp., D C Va, 218 F Supp 595—Barnes v Rederi A/B Fredrika, C A Va, 350 F.2d 865, cert den 86 S Ct 895, 383 U S. 910, 15 L Ed 2d 665—Mills v Mitsubishi Shipping Co, C A Tex., 358 F 2d 609, cert den 87 S Ct 1474, 386 U S 1036, 18 L Ed 2d 600—U S Lines Co v Williams, C A Fla, 365 F 2d 332—Fenton v A/S Glittre, C A N Y, 370 F 2d 146, cert den 87 S Ct 2077, 387 U S 944, 18 L Ed 2d 1331—Mosley v Cia Mar Adra S A, D C N Y, 257 F Supp 30, affd, C A, 362 F 2d 118, cert den 87 S Ct 292, 296, 385 U S 933, 17 L Ed 2d 213—Satchell v Svenska Ostasiatiska Kompaniet, C A Va, 385 F 2d 76—Naglis v. Waterman, S S Corp, C A Pa, 390 F 2d 178—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F 2d 347—Lundy v Isthmian Lines, Inc, C A Va, 423 F 2d 913

Or—Lang v Coastwise Line, 294 P 2d 341, 206 Or 667

Wash—Cresap v Pacific Inland Nav Co, 469 P 2d 950, 2 Wash App 548 Affd, 478 P 2d 223, 78 Wash 2d 563—Cresap v Pacific Inland Nav. Co, 478 P 2d 223, 78 Wash 2d 563

Evidence held sufficient for jury

U S—Fatovic v Nederlandsch-Amerikaansche Stoomvaart, Maatschappij, C A N.J., 275 F 2d 188—Massa v C A Venezuelan Navigacion, C A N Y, 298 F 2d 239

Evidence held insufficient for jury

U S—Fatovic v Nederlandsch-Amerikaansche Stoomvaart, Maatschappij, C A N J, 275 F 2d 188

45. U.S—Hagans v Ellerman & Bucknall S S Co, C A.Pa, 318 F 2d 563—Barnes v Rederi A/B Fredrika, C.A Va, 350 F 2d 865, cert. den 86 S.Ct. 895, 383 U S 910, 15 L Ed.2d 665

However, seaworthiness is not submissible where worker is shown not to have been doing traditional seaman's work.

U S—Murphy v National Bulk Carriers, Inc, D C Pa, 310 F Supp 1246.

46. U S—Berti v Compagnie De Navigation Cyprien Fabre, C A N Y., 213 F 2d 397—Marshall v Isthmian Lines, Inc, C.A Tex, 334 F.2d 131—Norfleet v. Isthmian Lines, Inc., C A N Y., 355 F 2d 359—U S Lines Co. v. Williams, C.A Fla, 365 F 2d 332—DiBello v Rederi A/B Svenska Lloyd, C A N Y, 371 F 2d 559—Koivunen v States Line, C A Or, 371 F 2d 781—Gilchrist v Mitsui Sempaku K K, C A Pa, 405 F 2d 763, cert den 89 S Ct 1195, 394 U S 920, 22 L Ed 2d 453—Shaw v Lauritzen, C A Pa, 428 F 2d 247

Cal—Flores v Pacific Island Transport Lines, 57 Cal Rptr 73, 248 C A 2d 812, cert den 88 S Ct 96, 389 U S 831, 19 L Ed 2d 88

N C—Ormond v Crampton, 191 S E 2d 405, 16 N C App 88, 67 A L R 3d 754, cert den 192 S E 2d 194, 282 N C 304

Safety and health regulations

U S—Provenza v American Export Lines, Inc, C A Md, 324 F 2d 660, cert den 84 S Ct 970, 376 U S 952, 11 L Ed 2d 971—De Thomas v Delta S S Lines, Inc, D C Puerto Rico, 58 F R D 335

Wash—Cresap v Pacific Inland Nav Co, 469 P 2d 950, 2 Wash App 548 Affd, 478 P 2d 223, 78 Wash 2d 563—Cresap v Pacific Inland Nav Co, 478 P 2d 223, 78 Wash 2d 563

47. U S—Provenza v American Export Lines, Inc, C A Md, 324 F 2d 660, cert den 84 S Ct 970, 376 U S 952, 11 L Ed 2d 971—Blassingill v Waterman S S Corp, C A Cal, 336 F 2d 367—McQuaid v U S, C A N J, 337 F 2d 483

Wash—Cresap v Pacific Inland Nav Co, 469 P 2d 950, 2 Wash App 548 Affd, 478 P.2d 223, 78 Wash 2d 563

48. U S—Edwards v Steinns, C A Va, 207 F 2d 734—Macartney v Compagnie Generale Transatlantique, C A Or, 253 F 2d 529—Pope & Talbot, Inc v Cordray, C A Wash, 258 F 2d 214—Norfleet v Isthmian Lines, Inc C A.N Y, 355 F 2d 359—Dziedzina v Dolphin Tanker Corp, C A Pa, 361 F.2d 120

Instructions held erroneous

U S—U S Lines Co v Williams, C.A.Fla., 365 F 2d 332—Raderi A/B Nordstjernan v Crescent Wharf & Warehouse Co., C A.Cal., 372 F 2d 674—Carroll v Frontera Compania Navviera, S A, C A Pa, 390 F 2d 311—Lowry v A/S D/S Svendborg, C A Pa, 396 F 2d 850—Judith Ann Liberian Transport Corp v Crawford, C A Or, 399 F 2d 924

Cal—Sea-Land Service, Inc v Matson Terminal Co, 61 Cal.Rptr 756, 253 C A 2d 885

Requested instructions held improperly refused

U S—McKinley v Skibs A/S Arizona, D C.Pa., 286 F.Supp 691

Cal—Sea-Land Service, Inc v Matson Terminal Co, 61 Cal Rptr 756, 253 C A 2d 885

Instructions held proper

U S—Gilchrist v Mitsui Sempaku K K, C.A Pa, 405 F 2d 763, cert den 89 S Ct 1195, 394 U S. 920, 22 L Ed 2d 453—Duncan v Transeastern Shipping Corp, C A La, 413 F 2d 1023—Hartnett v. Reiss S S Co., C.A.N.Y, 421 F 2d 1011, cert. den 91 S Ct 49, 400 U S. 852, 27 L Ed 2d 90.

Wash—Vogel v Alaska S S Co, 419 P 2d 141, 69 Wash 2d 497

Instructions as to seaworthiness held not erroneous

U.S—Spano v N. V Koninklijke Rotterdamsche Lloyd, C A.N Y., 472 F 2d 33.

Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A.2d 819

Wash—Tarabochia v Johnson Line, Inc, 440 P 2d 187, 73 Wash 2d 751.

Instructions held too favorable to shipowner

Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C A 2d 819

Requested instructions held properly refused

U S—Franske D/S, C A La, 479 F.2d 288

Tex—Archey v Nederlandsch-Amerikaansche Stoomvaart Maatschappij (Holland-America Line), Civ App, 354 S W.2d 688, err ref no rev err., cert den 83 S Ct 299, 371 U S 929, 9 L Ed 2d 236

Contributory negligence

(2) Other instructions

U S—Sizemore v U S Lines Co, D C Pa, 213 F Supp 76, affd, C A, 323 F 2d 774—Almaraz v Universal Marine Corp, C A Or, 472 F 2d 123

Instructions distinguishing operational negligence and unseaworthiness held improper

U S—Venable v A/S Det Forenede Dampskibsselskab, C A Va, 399 F.2d 347

Instructions as to seaworthiness held erroneous

U S—Moore v South African Marine Corp, Ltd, C A Ala, 469 F 2d 280

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49. U S—Berti v Compagnie De Navigation Cyprien Fabre, C A N Y, 213 F 2d 397—Macartney v Compagnie Generale Transatlantique, C A Or., 253 F 2d 529—Kyzar v Vale Do Ri Doce Navegacai, S A, C A La, 464 F 2d 285, cert den 93 S Ct 1367, 410 U S 929, 35 L Ed 2d 591

Wash—Vogel v Alaska S S Co, 419 P 2d 141, 69 Wash 2d 497

Instruction held not misleading

U S—Moore-McCormack Lines, Inc v Maryland Ship Ceiling Co, C A Md, 311 F 2d 663

Instructions not inconsistent

U S—Santiago Martinez v Compagnie Generale Transatlantique, C A.Puerto Rico, 517 F.2d 371, cert den 96 S.Ct. 773, 423 U S 1048, 46 L Ed 2d 636

51. Wash—Zukowsky v Brown, 488 P 2d 269, 79 Wash 2d 586

52. U S—Weyerhaeuser S S Co v Nacirema Operating Co, N Y, 78 S.Ct 438, 355 U S. 563, 2 L Ed 2d 491—Royal Mail Lines, Limited v Peck, C A.Cal., 269 F 2d 857—Furness, Withy & Co v. Carter, C.A Wash, 281 F 2d 264, 1 A L R 3d 636—Roper v U S, C A Va, 282 F 2d 413, affd 82 S Ct 5, 368 U.S 20, 7 L.Ed 2d 1—Drago v A/S Inger, D.C.N Y., 194 F.Supp 398, affd., C A, 305 F 2d 139, cert den. 83 S Ct 292, 371 U S 925, 9 L Ed 2d 232—Damanti v A/S Inger, C A.N Y, 314 F 2d 395, cert. den 84 S Ct 46, 375 U.S. 834, 11 L.Ed 2d 64—P C Pfeiffer Co. v Bill, C A Tex, 332 F 2d 526—Fitzgerald v Polish Ocean Lines, C A Md., 337 F.2d 376—Pisano v. S S Benny Skou, C A.N Y., 346 F 2d 993, cert den 86 S Ct 389, 382 U S 938, 15 L Ed.2d 349—Compania Anonima Venezolano de Navegacion v Matthews, C.A La, 371 F 2d 971, cert den 88 S Ct. 37, 389 U S. 820, 19 L.Ed 2d 71—Robichaux v Kerr McGee Oil Industries, Inc, C A La., 376 F 2d 447, on remand, D C, 317 F Supp 587—Albanese v. N V Nederl. Amerik Stoomv Maats., D C N Y, 279 F Supp. 635—White v. U.S, C A.Va, 400 F 2d 74—Vaccaro v Alcoa S S. Co, C A.N Y, 405 F.2d 1133—Guidry v. Texaco, Inc., C A Tex, 430 F 2d 781—Humble Oil & Refining Co v. Philadelphia Ship Maintenance Co, C A Pa, 444 F.2d 727, on remand, 342 F.Supp 786.

Md.—Smith v Hercules Co, 104 A.2d 590, 204 Md. 379.

Minn—Sorenson v Cargill, Inc., 163 N W.2d 59, 281 Minn. 480

N Y—Miner v. Sherman, 211 N Y S.2d 558, 12 A D.2d 1001

Consistency of verdicts

(2) Other matters

U.S—Lyons v. United Fruit Co, D C N Y, 170 F Supp. 261, affd, C A, 273 F 2d 317, cert. den. 80 S.Ct 879, 362 U S 963, 4 L.Ed 2d 877—Jefferson v. Tayio Katun, K K, C A Tex., 310 F 2d 582, cert den 83 S.Ct. 1091, 372 U S 967, 10 L Ed 2d 130—Ballwanz v Isthmian, Lines, Inc., C A Md, 319 F 2d 457, cert den 84 S Ct. 1136, 376 U S. 970, 12 L Ed 2d 84.

Special verdicts and interrogatories

(2) Other matters.

U.S.—Waterman S S Corp v David, C A.La, 353 F 2d 660, cert den 86 S Ct. 1863, 384 U.S. 972, 16 L Ed 2d 683

Findings held not in conflict

U S—Massaro v U.S. Lines Co., C A.Pa., 307 F 2d 299—Crescent Wharf & Warehouse v. Compania

Naviera De Baja California, C A Cal, 366 F 2d 714

inding not contrary to evidence

S—Bennett v U S Lines Co, D C Pa, 216 F Supp 462—U S v Alaska S S Co, C A Wash, 491 F 2d 1147

3. U S—Trygstad v States Marine Corp, D C Or, 150 F Supp 556—Gutierrez v Waterman S S Corp, Puerto Rico, 83 S Ct 1185, 373 U S 206, 10 L Ed 2d 297, reh den 83 S Ct 1863, 374 U S 858, 10 L Ed 2d 1082—Cities Service Oil Co v Arundel Corp, C A N Y, 337 F 2d 842, cert den 85 S Ct 1449, 381 U S 905, 14 L Ed 2d 286

Judgments. General rules relating to judgments in civil actions are applicable.[54.5]

4.5. Judgment denying indemnity

S—Royal Mail Lines, Limited v Peck, C A Cal, 269 F 2d 857

nterest from date of final judgment

S—Caputo v U.S. Lines Co, C A N Y, 311 F 2d 413, cert den 83 S Ct 1871, 374 U S 833, 10 L Ed 2d 1055

udgment granting indemnity amended

.S.—Calderone v Naviera Vacuba S/A, C A N Y, 328 F 2d 578

upport by findings

.S—Royal Netherlands S S Co v Strachan Shipping Co, C A Tex, 362 F 2d 691, cert den 87 S Ct 708, 710, 385 U S 1004, 17 L Ed 2d 543

ummary judgment precluded by fact issues

.S.—Olvera v Michalos, D.C Tex., 307 F Supp 9

5. U S—Palermo v Luckenbach S S Co, C A N Y, 253 F 2d 724—Dawson v Fernley & Eger, D C Va, 196 F Supp 816—Patterson Terminals, Inc v. S S. Johannes Frans, D C.Pa, 209 F Supp 705—Simpson v. Knut Knutsen, O A.S, D C.Cal, 296 F Supp. 1308, affd in part, remd in part, C A, 444 F.2d 523—State of Or. By and Through State Highway Commission v Tug Go-Getter, D.C.Or., 299 F Supp. 269, mod in part on oth. grds., affd. in part, revd in part on oth grds, C.A., 468 F.2d 1270

wards held proper

I.S—Clark v Symonette Shipyards, Limited, C A Fla, 330 F.2d 554

unitive damages

I.S.—U S. Steel Corp. v. Fuhrman, C.A Ohio, 407 F 2d 1143, cert. den. 90 S.Ct 2162, four cases, 398 U S 958, 26 L Ed 2d 542.

6. U.S.—Patterson Terminals, Inc. v S. S. Johannes Frans, D.C Pa., 209 F Supp 705

7. U S—Denny v Jugoslavenska Oceanska Plov, Kotor Yugoslavia, C A.La., 455 F.2d 1277.

al.—Isthmian Lines, Inc. v. Schirmer Stevedoring Co, 63 Cal Rptr 458, 255 C A 2d 607.

Wash.—Vogel v. Alaska S.S. Co, 419 P 2d 141, 69 Wash.2d 497.

Particular elements of damages

(5) Other matters.

U.S.—Patterson Terminals, Inc. v. S.S Johannes Frans, D.C.Pa., 209 F.Supp. 705—T Smith & Son, Inc v Skibs A/S Hassel, C.A.La., 362 F 2d 745.

Equal division inapplicable

U.S—Petition of Marina Mercante Nicaraguense, S A, C.A N.Y., 364 F.2d 118, cert. den. 87 S.Ct 710, 385 U.S. 1005, 17 L.Ed.2d 544, reh. den. 87 S Ct. 851, 386 U.S. 929, 17 L.Ed 2d 803.

Division of damages between two stevedores

U.S—Hartnett v. Reiss S.S. Co., C.A N.Y, 421 F.2d 1011, cert. den. 91 S Ct 49, 400 U.S. 852, 27 L Ed.2d 90.

General rules of damages are applicable in indemnity action by shipowner against stevedore.[58.5]

58.5. Expense in defending employee's suit is an element of damages

U S—Ellerman Lines, Limited v Atlantic & Gulf Stevedores, Inc, C A Pa, 339 F 2d 673, cert den 86 S Ct 23, 382 U S 812, 15 L Ed 2d 60—Sousa v Motor Vessel Caribia, D C Mass, 360 F Supp 971

Reasonable settlement as basis for indemnification

U S—U S Lines Co v Jarka Corp of New England, D C Mass, 265 F Supp 811, mod on oth grds, C A, 387 F 2d 436

Attorney's fees held reasonable

U S—U S Lines Co v Jarka Corp of New England, D C Mass, 265 F Supp 811, mod on oth grds, C A, 387 F 2d 436

59. U S—Read v U S, C A Pa, 201 F 2d 758—Palermo v Luckenbach, S S Co, N Y, 78 S Ct 1, 355 U S 20, 2 L Ed 2d 3, reh den 78 S Ct 147, 355 U S 886, 2 L Ed 2d 116, am 78 S Ct 337, 355 U S 910, 2 L Ed 2d 271—Merrill v The Cuaco, D C Or, 189 F Supp 321—Haynes v Reder A/S Aladdin, D C Tex, 254 F.Supp 185, affd, C A, 362 F 2d 345, cert den 87 S Ct 731, 385 U S 1020, 17 L Ed 2d 557—Arista Cia DeVapores, S A v Howard Terminal, C A Cal, 372 F 2d 152—Antoine v Lake Charles Stevedores, Inc, C A La, 376 F 2d 443, cert den 88 S Ct 145, 389 U S 869, 19 L Ed 2d 146—Desiano v Norddeutscher Lloyd, D C N Y, 301 F Supp 241—Davis v Associated Pipe Line Contractors, Inc, D C La, 305 F Supp 1345, affd, C A, 418 F 2d 920, cert den 90 S Ct 1119, 397 U S 988, 25 L Ed 2d 396

Contributory negligence not shown

U S—Adams v U S., C A Cal, 393 F 2d 903—Sanchez v Lubeck Line A G, D C N Y, 318 F Supp 821

Violation of safety regulations by defendant

U S—Phipps v S S Santa Maria, C A La, 418 F 2d 615

60. Cal—O'Hey v Matson Nav Co, 288 P 2d 81, 135 C.A 2d 819—Davis v Matson Nav Co, 68 Cal Rptr 434, 262 C A 2d 25

N Y—Giambrone v Israel America Line, Inc, 208 N Y S 2d 215, 26 Misc 2d 593

Consolidations and mergers

U S—Matson Nav Co v Federal Maritime Commission, C A Cal, 405 F 2d 796

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61. Sufficiency of evidence

(1) U S—Petition of M. & J Tracy, Inc, C A N J, 422 F 2d 929

Under Federal Rules of Civil Procedure

Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F, 28 U S C A, as added in 1966, provides for the procedure in actions by a shipowner for exoneration from liability.

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62. U S—Grillea v U S, C A N Y, 232 F 2d 919—Leotta v The Esparta, D C N.Y, 188 F Supp 168

§ 90. Requisites, Validity, and Construction of Bond

Library References

Modern Legal Forms Ch. 63, Ships and Vessels.

§ 101. Status as Common Carrier

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5. Other or similar definitions

(5) Further definitions

U S—Morrisey v S S A & J. Faith, D C Ohio, 252 F Supp 54.

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7. U.S.—Potash Co of Canada Ltd v M/V Raleigh, D C Canal Zone, 361 F.Supp 120.

8. Regular trips between same points

U S—U S v Stephen Bros Line, C A Fla, 384 F 2d 118

9. U S—U S v Stephen Bros Line, C A Fla, 384 F 2d 118

10. U S—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

Same principles applied to land carriers applied to carriers by water

U S—Semon v Royal Indem Co, C A La, 279 F 2d 737

12. U S—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

14. U S—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54—U S v Stephen Bros Line, C A Fla, 384 F 2d 118

22. U S—In re Complaint and Petition of International Marine Development Corp, C A Miss, 451 F 2d 763—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

"Ocean tramp"

U S—U S v Stephen Bros Line, C A Fla, 384 F.2d 118

§ 102. Duty to Receive and Transport Property, and Provide Facilities

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36. U S—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

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55. Facilities for loading and unloading

U S—Baltimore & O R Co v U.S, C A, 201 F 2d 795

§ 103. Statutory Regulation Generally

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58. 49 U S C A §§ 901-923 are now 49 U S C A § 10541, et seq

59. U S—Santiago v Sea-Land Service, Inc, D C Puerto Rico, 366 F Supp 1309

D C—Swift & Co v Federal Maritime Commission, 306 F 2d 277, 113 U S App D C 117—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C A, 361 F 2d 80, 124 U S App D C 63

Carriage of Goods by Sea Act

U S—R L Pritchard & Co, Inc v Steamship Hellenic Laurel, D.C N.Y, 342 F Supp 388

60. Purpose

U S—Carnation Co v Pacific Westbound Conference, C A Cal., 336 F 2d 650, revd on oth grds 86 S Ct 781, 383 U S 213, 932, 15 L Ed.2d 709—Chemical Bank New York Trust Co v S S Westhampton, C A Md, 358 F 2d 574, cert den 87 S Ct 228, 385 U S 921, 17 L Ed 2d 145—Federal Maritime Commission v DeSmedt, C.A N Y, 366 F 2d 464, cert den 87 S Ct 513, 385 U S 974, 17 L Ed.2d 437

Award of interest for violation held discretionary

N Y—Dampskibsselskabet Torm A/S v P L Thomas Paper Co., 274 N.Y S 2d 601, 26 A D 2d 347.

Elimination of competition improper

U S—Federal Maritime Commission v Aktiebolaget Svenska Amerika Linien (Swedish Am Line), Dist Col, 88 S.Ct 1005, 390 U S 238, 19 L Ed 2d 1071

Filing of agreements

U S—Volkswagenwerk Aktiengesellschaft v Federal Maritime Commission, Dist Col, 88 S Ct 929, 390 U S 261, 19 L.Ed.2d 1090, am on oth grds 88 S Ct 2049, 392 U.S 901, 20 L Ed 2d 1361

Unjust or unreasonable regulations or practices

US—Volkswagenwerk Aktiengesellschaft v Federal Maritime Commission, Dist Col, 88 S Ct 929, 390 US 261, 19 L Ed 2d 1090, am on oth grds 88 S Ct 2049, 392 US 901, 20 L Ed 2d 1361—Safir v Gibson, C A N Y, 432 F 2d 137, cert den 91 S Ct 57, 400 US 850, 27 L Ed 2d 88, cert den 91 S Ct 241, 400 US 942, 27 L Ed 2d 246

Aim of Merchant Marine Act

D C—American Maritime Ass'n v Stans, D C, 329 F Supp 1179, affd, C A, 485 F 2d 765, 157 US App D C 394

61. US—Federal Maritime Bd v Isbrandtsen Co, App D C, 78 S Ct 851, 356 US 481, 2 L Ed 2d 926—Greater Baton Rouge Port Commission v US, C A, 287 F 2d 86, reh den 293 F 2d 959, cert den 82 S Ct 600, 368 US 985, 7 L Ed 2d 523—Ludlow Corp v DeSmedt, D C N Y, 249 F Supp 496, affd, C A, 366 F 2d 464 Cert den 87 S Ct. 513, 385 US 974, 17 L Ed 2d 437

63. Concurrent jurisdiction held not violative of statute

D C—Alabama Great Southern R Co v Federal Maritime Commission, C A, 379 F 2d 100, 126 US App D C 323

65. US—Pennsylvania R Co v US, D C N J, 124 F Supp 52

69. US—Federal Maritime Bd v Isbrandtsen Co, App D C, 78 S Ct 851, 356 US 481, 2 L Ed 2d 926—Brown & Williamson Tobacco Corp v The Anghyra, D C Va, 157 F Supp 737, affd in part and revd in part on oth grds, C A, 277 F 2d 9, cert den 81 S Ct 168, 364 US 879, 5 L Ed 2d 102—U.S. v Peninsular & Occidental S S Co, D C N.Y, 208 F Supp 957—Port of Tacoma v S S Duval, D C.Wash, 242 F Supp 886, affd, C A, 364 F 2d 615—Bird v S S Fortuna, D C Mass, 262 F.Supp 24

Tex—Rorie v City of Galveston, 471 S W 2d 789, cert. den 92 S Ct 1250, two cases 405 US 988, 31 L Ed 2d 454

Foreign flag carriers as subject to action in United States courts for violating statute

US—US v Anchor Line, Limited, D C N Y, 232 F Supp 379

Foreign owned shipping lines engaged in American commerce

US—Armement Deppe, S A v US, C A La, 399 F 2d 794, cert den 89 S Ct 870, 393 US 1094, 21 L Ed 2d 785

70. Wis—Star Line Trucking Corp v Department of Industry, Labor and Human Relations, 325 N W 2d 872, 878, 109 Wis 2d 266

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76. Puerto Rico statute construed

US.—Com of Puerto Rico v Sea-Land Service, Inc, D.C Puerto Rico, 349 F Supp 964

77. US—River Plate and Brazil Conferences et al v Pressed Steel Car Co, D C N Y, 124 F Supp 88, affd, C A., 227 F 2d 60—American Union Transport v River Plate & Brazil Conferences, D C N Y, 126 F Supp 91, affd., C A, 222 F 2d 369—U S. v. American Union Transport, Inc, D C N J, 232 F.Supp 700

Or—Pacific Westbound Conference v. Leval & Co, 269 P.2d 541, 201 Or. 390, cert den. 75 S Ct 217, 348 U S. 897, 99 L Ed 704

Procedure under statute

U S.—Alaska S.S Co v Federal Maritime Commission, C A.Wash, 356 F 2d 59

"Working capital" considered

D C.—Government of Guam v Federal Maritime Commission, C.A., 365 F.2d 515, 124 U.S App D C 324, cert den 87 S.Ct 704, 385 US 1002, 17 L Ed 2d 542.

Injunction

US—Delaware River Port Authority v. U.S. Lines, Inc, D.C.Pa, 331 F.Supp 441

Hearing

D C—Com of Puerto Rico v Federal Maritime Commission, C A, 468 F 2d 872, 152 US App D C 28

Not subject to judicial review

US—State of Alaska v Federal Maritime Commission, C A, 600 F 2d 214

78. Constructive notice of terms and provisions of tariffs

Cal—Aspen Pictures, Inc v Oceanic S S Co, 306 P 2d 933, 148 C A 2d 238, cert den, 77 S Ct 1381, 354 U S 926, 1 L Ed 2d 1436

Compliance with statute

D C—International Packers, Limited v Federal Maritime Commission, C A, 356 F 2d 808, 123 US App D C 55

Concealed discount rate held unlawful

N Y—Dampskibsselskabet Torm A/S v P L Thomas Paper Co, 274 N Y S 2d 601, 26 A D 2d 347

Approval of absorbing of freight charges held not shown

US—Delaware River Port Authority v US Lines, Inc, D C Pa, 331 F Supp 441

The federal statute, 46 U.S C.A § 815, makes it unlawful for any person, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means, to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.[78 5] This provision covers the situation where the carrier was deceived and the situation where the effect of the transaction was that the shipper obtained transportation at less than applicable rates in such a manner that its competitors were unaware of what had transpired.[78 10]

78.5. N Y—Dampskibsselskabet Torm A/S v P L Thomas Paper Co, 262 N Y S 2d 575, 47 Misc.2d 298, mod on oth grds. 274 N Y S.2d 601, 26 A D 2d 347

Purpose of statute

D C—Hohenberg Bros. Co v. Federal Maritime Commission, 316 F 2d 381, 114 US App D C 380.

78.10. Unwarranted refund held "unjust or unfair device or means"

D C—Hohenberg Bros Co v Federal Maritime Commission, 316 F.2d 381, 114 US App D.C 380

Shipper held liable for full amount

N Y—Dampskibsselskabet Torm A/S v P. L Thomas Paper Co, 262 N Y S 2d 575, 47 Misc 2d 298, mod on oth grds 274 N Y S 2d 601, 26 A D 2d 347

79. US—Anglo Canadian Shipping Co v US, C A, 264 F 2d 405

Purpose of amendment

US—City of Nome v Alaska S S Co, D C Alaska, 321 F Supp 1063

Construction of tariff

US—US v Pan Am Mail Line, Inc, D C N Y, 359 F Supp 728.

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83. US—Compania Anonima Venezolana De Navegacion v. A J Perez Export Co, C A La., 303 F 2d 692, cert den 83 S Ct 321, 371 U.S 942, 9 L.Ed.2d 276.

Withdrawal of approval or requiring modification

D C—Empire State Highway Transp Ass'n, Inc v Federal Maritime Bd, C A, 291 F 2d 336, 110 U S.App D C 208, cert den 82 S Ct. 360, 368 U S 931, 7 L Ed 2d 194—Pacific Coast European Conference v Federal Maritime Commission, C A, 376 F 2d 785, 126 U S App D C 230—Outward Continental North Pac Freight Conference v Federal Maritime Commission, C A, 385 F 2d 981, 128 U S App D C 199

Approval of agreement

(1) In general

US—Trans-Pacific Freight Conference of Japan v Federal Maritime Commission, C A Cal., 314 F 2d 928—American Export and Isbrandtsen Lines v Federal Maritime Commission, C A Cal, 334 F 2d 185—Sabre Shipping Corp v American President Lines, Limited, D C N Y, 285 F Supp 949, cert den, C A, 407 F 2d 173, cert den 89 S Ct 1774, 395 U S 922, 23 L Ed 2d 239—Pacific Westbound Conference v Federal Maritime Commission, C A La, 440 F 2d 1303, cert den 92 S Ct 202, 404 US 881, 30 L Ed 2d 162—Board of Com'rs of Port of New Orleans v Federal Maritime Commission, C A La, 440 F 2d 1312

(2) Silence is not approval

D C—Kempner v Federal Maritime Commission, C A, 313 F 2d 586, 114 U S App D C 195, cert. den 84 S Ct 42, 375 U S 813, 11 L Ed 2d 48, and 84 S Ct 51, 375 U S 813, 11 L Ed 2d 48

Dual rates

US—Federal Maritime Commission v Australia/U S Atlantic and Gulf Conference, A/S Atlanttrafik, D C N Y, 337 F Supp 1032

D.C—Kempner v Federal Maritime Commission, C A, 313 F 2d 586, 114 U.S App.D C. 195, cert den. 84 S Ct 42, 375 U S 813, 11 L Ed 2d 48, and 84 S Ct 51, 375 U S. 813, 11 L.Ed 2d 48—Pacific Coast European Conference v U.S, C A, 350 F 2d 197, cert den 86 S Ct 433, 382 U S 958, 15 L Ed 2d 362—American Export Isbrandsten Lines, Inc. v Federal Maritime Commission, C A, 380 F 2d 609, 127 U.S App D C. 62.

Fines

US—Trans-Pacific Freight Conference of Japan v Federal Maritime Commission, C A Cal, 314 F 2d 928

Measure of damages

D C—States Marine Lines, Inc v Federal Maritime Commission, 313 F.2d 906, 114 U.S App D C 225, cert. den. 83 S.Ct. 1872, 374 U.S 831, 10 L Ed 2d 1054.

Grounds for disapproval

D C—Aktiebolaget Svenska Amerika Linien (Swedish-American Line) v. Federal Maritime Commission, C A, 351 F 2d 756, 122 U S App D C 59, app after remand 372 F 2d 932, 125 U.S App D C 359, revd on oth grds 88 S.Ct 1005, 390 U S 238, 19 L Ed 2d 1071

"Steamship conference" defined

US—Ludlow Corp v DeSmedt, D C.N Y, 249 F Supp 496, affd, C A, 366 F 2d 464, cert den. 87 S Ct 513, 385 U.S 974, 17 L.Ed 2d 437

Authority to disapprove agreement affecting rates

US—Federal Maritime Commission v New York Terminal Conference, C A N Y., 373 F.2d 424

Unanimity in rate making not proscribed

D C—U S. Atlantic and Gulf/Australia-New Zealand Conference v. Federal Maritime Commission, C A, 364 F.2d 696, 124 U S App.D C 303

Provision requiring consent of entire conference improper under Shipping Act

D C—U S Atlantic and Gulf/Australia-New Zealand Conference v Federal Maritime Commission, C A., 364 F 2d 696, 124 U S App D.C. 303

Agreements departing from tariff rates not illegal per se

D C—City of Los Angeles v. Federal Maritime Commission, C A, 385 F 2d 678, 128 U S.App D.C. 156.

Commission order for conference held not improper

D.C—American Export-Isbtandtsen Lines, Inc. v. Federal Maritime Commission, C A D.C., 417 F 2d 749, 135 U S App D C 181.

Strict enforcement

US—Gilbert Imported Hardwoods, Inc v 245 Packages of Guatambu Squares, More or Less, C A Ala , 508 F 2d 1116

84. 49 U S C A §§ 901–923 are now 49 U S C A § 10541 et seq

Federal Maritime Commission

US—Trans-Pacific Freight Conference of Japan v Federal Maritime Commission, C A Cal , 314 F 2d 928—Alaska S S Co v Federal Maritime Commission, C A Wash , 344 F 2d 810—Maddock & Miller, Inc v Mayer China Co, D C N Y , 241 F Supp 306 Revd on oth grds , C A , 365 F 2d 98—Pacific Coast European Conference v U S , C A , 350 F 2d 197, cert den. 86 S Ct 433, 382 U S 958, 15 L Ed 2d 362—Federal Maritime Commission v New York Terminal Conference, D C N Y , 262 F Supp 225, affd , C A , 373 F 2d 424—Volkswagenwerk Aktiengesellschaft v Federal Maritime Commission, Dist Col , 88 S Ct 929, 390 U S 261, 19 L Ed 2d 1090, am on oth grds 88 S Ct 2049, 392 U S 901, 20 L Ed 2d 1361—Federal Maritime Commission v Aktiebolaget Svenska Amerika Linien (Swedish Am Line), Dist Col , 88 S Ct 1005, 390 U S 238, 19 L Ed 2d 1071—Matson Nav Co v. Federal Maritime Commission, C A Cal , 405 F 2d 796—Safir v Gulick, D C N Y , 297 F.Supp. 630—Sabre Shipping, Corp. v American President Lines, Limited, D C.N Y , 298 F Supp. 1339—Port of New York Authority v Federal Maritime Commission, C A La , 429 F 2d 663, cert den 91 S Ct 867, 401 U S 909, 27 L Ed.2d 806—IML Seatransit, Limited v U S , D C Cal , 323 F Supp 562

D C—Sea-Land Service, Inc v Federal Maritime Commission, C A , 404 F 2d 824, 131 U.S App D C. 246—Orient Mid-East Lines, Inc v. Cooperative for Am. Relief Everywhere, Inc , C A , 410 F 2d 1006, 133 U S App D C 307—American Export-Isbrandtsen Lines, Inc. v Federal Maritime Commission, C A , 444 F 2d 824, 143 U S App.D C 366.

Promulgation of rules

D C—American President Lines, Limited v Federal Maritime Commission, 316 F 2d 419, 114 U S App D C 418—Government of Guam v Federal Maritime Commission, C A , 329 F.2d 251, 117 U S App.D C. 296—Federal Maritime Commission v Anglo-Canadian Shipping Co , C.A Cal , 335 F 2d 255—New York Foreign Freight Forwarders & Brokers Ass'n v. Federal Maritime Commission, C A N.Y., 337 F 2d 289, cert den. 85 S Ct 893, 380 U S. 910, 13 L Ed.2d 797, and 85 S.Ct. 902, 380 U S. 914, 13 L Ed.2d 800—Pacific Coast European Conference v Federal Maritime Commission, C.A., 376 F.2d 785, 126 U S.App.D C. 230.

Rules held valid

D.C.—New York Foreign Freight Forwarders and Brokers Ass'n v. Federal Maritime Commission, C.A , 384 F.2d 979, 128 U.S.App.D.C 10—Outward Continental North Pac Freight Conference v Federal Maritime Commission, C.A , 385 F 2d 981, 128 U.S.App.D.C. 199.

Detention rules

D.C.—American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission, C.A., 444 F.2d 824, 143 U.S.App.D.C. 366.

Expansive interpretation

D.C.—Transamerican Trailer Transport, Inc. v. Federal Maritime Commission, C.A , 492 F.2d 617, 160 U.S App.D.C. 351.

85. U.S.—American Union Transport v. River Plate & Brazil Conferences, D.C N.Y., 126 F.Supp. 91, affd., C.A., 222 F 2d 369—Federal Maritime Bd v. Isbrandtsen Co., App.D.C , 78 S.Ct. 851, 356 U.S. 481, 2 L.Ed.2d 926—Rivoli Trucking Corp. v. American Export Lines, Inc., D.C.N.Y , 167 F.Supp. 937—Rivoli Trucking Corp. v. New York Shipping Ass'n, D.C N Y., 167 F.Supp. 940—Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, C A.Cal , 314 F.2d 928—Orleans Materials & Equipment Co v. Isthmian Lines, Inc., D.C.La., 213 F.Supp. 325, order withdrawn 218 F.Supp. 322—Carnation Co. v. Pacific Westbound Conference, C A Cal , 336 F 2d 650, revd on oth grds 86 S Ct 781, 383 U S 213, 932, 15 L Ed 2d 709, 851—Maddock & Miller, Inc v U S Lines, C A N Y , 365 F 2d 98—Buchanan v Fowler, C A Fla , 381 F 2d 7—Matson Nav Co v Federal Maritime Commission, C A Cal , 405 F 2d 796

D C—Alabama Great Southern R Co v Federal Maritime Commission, C A , 379 F 2d 100, 126 U S App D C 323—Outward Continental North Pac Freight Conference v Federal Maritime Commission, C A , 385 F 2d 981, 128 U S App D C 199

Mass—Bay State Stevedoring Co v Boston & M R , 165 N E 2d 84, 340 Mass 512

N Y—Rivoli Trucking Corp v American Export Lines, Inc , 185 N Y S 2d 684, 17 Misc 2d 569—Pasch v Chemoleum Corp , 210 N Y S 2d 738, 26 Misc 2d 925, affd 214 N Y S 2d 644, 13 A D 2d 470, app gr 218 N Y S 2d 47, 9 N Y 2d 965, 176 N E 2d 502

Doctrine held inapplicable

U S—River Plate and Brazil Conferences v Pressed Steel Car Co , C A N Y , 227 F 2d 60

Arbitration clause held not deprivation of commission's jurisdiction

U S—Joseph Amelar, Inc v Far East Conference, Am Arbitration Ass'n, D C N Y , 229 F Supp 450

86. U S.—Federal Maritime Bd v Isbrandtsen Co , App D C , 78 S Ct 851, 356 U S 481, 2 L Ed 2d 926—New York Foreign Freight Forwarders & Brokers Ass'n v Federal Maritime Commission, C A N Y , 337 F 2d 289, cert den 85 S Ct 893, 380 U S 910, 13 L Ed 2d 797, and 85 S Ct 902, 380 U S 914, 13 L Ed 2d 800—Ludlow Corp v DeSmedt, D C N Y., 249 F.Supp 496, affd , C A , 366 F 2d 464 Cert den 87 S Ct 513, 385 U S 974, 17 L Ed 2d 437—Port of New York Authority v Federal Maritime Commission, C A La , 429 F 2d 663, cert den 91 S Ct 867, 401 U S 909, 27 L Ed 2d 806

Antitrust principles must be considered antitrust matters

D C—Latin America/Pacific Coast S A Conference v Federal Maritime Commission, C A , 465 F 2d 542, 150 U S App.D C 362, cert den 93 S Ct 269, 409 U.S 967, 34 L Ed.2d 234

87. D C—Swift & Co v Federal Maritime Commission, 306 F 2d 277, 113 U S.App D C 117—North Atlantic Westbound Freight Ass'n v Federal Maritime Commission, C A , 397 F 2d 683, 130 U S App D C. 122—Calcutta East Coast of India and East Pakistan U S A Conference v. Federal Maritime Commission, C A , 399 F 2d 994, 130 U S App D C 261

Port equalization rule

U S—Port of New York Authority v Federal Maritime Commission, C A La , 429 F 2d 663, cert den. 91 S Ct 867, 401 U S 907, 27 L Ed 2d 806

88. U.S.—Anglo Canadian Shipping Co v U S , C.A , 264 F 2d 405—Federal Maritime Commission v Caragher, C.A N Y , 364 F 2d 709—Federal Maritime Commission v New York Terminal Conference, D.C N Y , 262 F.Supp 225, affd., C A , 373 F 2d 424

Matters considered

(3) Other matters

D C.—Flota Mercante Grancolombiana, S A v. Federal Maritime Commission, C.A., 302 F 2d 887, 112 U.S.App.D C 302—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C.A , 375 F 2d 335, 126 U S.App D C 159—States Marine Lines, Inc v Federal Maritime Commission, C A , 376 F 2d 230, 126 U S.App.D C 187—City of Los Angeles v. Federal Maritime Commission, C A , 385 F.2d 678, 128 U S App.D C 156

Assessment of benefits

D.C —Volkswagenwerk Aktiengesellschaft v Federal Maritime Commission, C A., 371 F 2d 747, 124 U.S App.D C 282, revd. on oth. grds. 88 S Ct 929, 390 U S 261, 19 L.Ed.2d 1090, am. 88 S Ct 2049, 392 U S. 901, 20 L Ed.2d 1361

89. D C—Swift & Co v Federal Maritime Commission, 306 F 2d 277, 113 U S App D C 117

Tex—Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co , Civ App , 507 S W 2d 892, err ref no rev err

Held proper

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A , 302 F 2d 887, 112 U S App D C 302—Pacific Coast European Conference v Federal Maritime Commission, C A , 376 F 2d 785, 126 U S App D C 230

Interest

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A , 302 F 2d 887, 112 U S App D C 302

Not arbitrary or unreasonable

U S—Pacific Westbound Conference v U S , C A , 332 F 2d 49

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A , 302 F 2d 887, 112 U S App D C 302—Government of Guam v Federal Maritime Commission, C A , 329 F 2d 251, 117 U S App D C 296—Pacific Far East Line, Inc v Federal Maritime Commission, C A , 410 F 2d 257, 133 U S App D C 269

General orders under rule making power held improper

D C—American President Lines, Limited v Federal Maritime Bd , C A , 317 F 2d 887, 115 U S App D C 187

Effect of examiner's decision

D C—Alcoa S S Co v Federal Maritime Commission, C A , 321 F 2d 756, 116 U S App D C 143

Approval of pooling agreement held not improper

D C—Alcoa S S Co v Federal Maritime Commission, C A , 321 F 2d 756, 116 U S App D C 143

Payment of reparations

U S—Consolo v Federal Maritime Commission, Dist Col , 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C , 373 F.2d 674

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A , 373 F 2d 674, 126 U S App D C 14

Cease and desist order

D C—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C A , 375 F 2d 335, 126 U S App D C 159

Order held improper

D.C —Calcutta East Coast of India and East Pakistan U S A Conference v Federal Maritime Commission, C A , 399 F 2d 994, 130 U S App D C 261

Abuse of discretion

U S—Transamerican Trailer Transport, Inc v Federal Maritime Commission, C A , 494 F 2d 314

Review of discretion limited

U S—Transamerican Trailer Transport, Inc v. Federal Maritime Commission, C A , 494 F 2d 314

Under the act the Federal Maritime Board has jurisdiction over wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water,[89.5] and agreements relating to maritime facilities and services, such as stevedoring, wharfage, and dockage activities are subject to the approval of the Board.[89.10]

89.5. U S—Greater Baton Rouge Port Commission v U S , C A , 287 F 2d 86, reh den 293 F 2d 959, cert. den 82 S Ct 600, 368 U S 985, 7 L Ed 2d 523

89.10. U S—Greater Baton Rouge Post Commission v U S , C A , 287 F 2d 86, reh den 293 F 2d 959, cert den 82 S Ct 600, 368 U S 985, 7 L Ed 2d 523

Necessity of hearing

D C—Marine Space Enclosures, Inc v Federal Maritime Commission, C A, 420 F 2d 577, 137 U S App D C 9

Change of burden of wharf demurrage in case of strike of longshoremen

U S—Port of Boston Marine Terminal Ass'n v Rederiaktiebolaget Transatlantic, 91 S Ct 203, 400 U S 62, 27 L Ed 2d 203

Notice and opportunity to be heard

U S—Port of Boston Marine Terminal Ass'n v Rederiaktiebolaget Transatlantic, 91 S Ct 203, 400 U S 62, 27 L Ed 2d 203

90. U S—Delaware River Port Authority v Transamerican Trailer Transport, Inc, C A Pa, 501 F 2d 917

Mass—Bay State Stevedoring Co v Boston & M R, 165 N E 2d 84, 340 Mass 512

N Y—River Plate and Brazil Conferences et al v Pressed Steel Car Co, D C N Y, 124 F Supp 88, affd, C A, 227 F 2d 60

The statutory authority of the Federal Maritime Commission under the Shipping Act to approve merger agreements has been judicially considered.[90 5]

90.5. Authority granted

U S—Matson Navigation Co v Federal Maritime Commission, C A Cal, 405 F 2d 796

Authority denied

U S—U S v R J Reynolds Tobacco Co, D C N J, 325 F Supp 656, cert den 93 S Ct 1434, 410 U S 964, 35 L Ed 2d 706—Federal Maritime Commission v Seatrain Line, Inc, Dist Col, 93 S Ct 1773, 411 U.S 726, 36 L.Ed 2d 620—Seatrain Lines, Inc v Federal Maritime Commission, C A, 460 F 2d 932, 148 U S App D C 424, affd 93 S Ct 1773, 411 U S 726, 36 L Ed 2d 620

The section of the Shipping Act providing that merger or acquisition agreements approved by the Commission are exempt from antitrust laws has been construed.[90 10]

90.10. Provision held ambiguous in scope

U S—Federal Maritime Commission v Seatrain Line, Inc, Dist Col, 93 S Ct 1773, 411 U S 726, 36 L Ed.2d 620

Antitrust liability imposed on acquisitions with no ongoing responsibilities

U S—Federal Maritime Commission v Seatrain Line, Inc, Dist Col, 93 S Ct 1773, 411 U S 726, 36 L Ed 2d 620

Antitrust principals must be considered

U S—Federal Maritime Commission v Seatrain Line, Inc., Dist.Col, 93 S Ct 1773, 411 U S 726, 36 L Ed 2d 620

Final comprehensive category held catchall provision

U S—Federal Maritime Commission v Seatrain Line, Inc, Dist.Col, 93 S Ct 1773, 411 U S 726, 36 L Ed.2d 620

Application of principle of ejusdem generis

U.S—Federal Maritime Commission v Seatrain Line, Inc, Dist Col, 93 S Ct 1773, 411 U S 726, 36 L.Ed 2d 620

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91. Orders held fatally defective

D.C.—Hellenic Lines Limited v. Federal Maritime Bd, C.A., 295 F 2d 138, 111 U S.App D.C 151—Montship Lines, Limited v. Federal Maritime Bd, C.A, 295 F 2d 147, 111 U S App D C 160.

Notice of proposed issuance of order not required

D C—Montship Lines, Limited v Federal Maritime Bd, C A, 295 F 2d 147, 111 U S App D C 160

Order held adequately definite

U S—Far East Conference v Federal Maritime Commission, C A, 337 F 2d 146, 85 S Ct 704, two cases, 705, 379 U S 991, 13 L Ed 2d 611

Order held valid

U S—Pacific Coast European Conference v Federal Maritime Commission, C A, 359 F 2d 416

D C—Far East Conference v Federal Maritime Commission, C A, 337 F 2d 146, 85 S Ct 704, two cases, 705, 379 U S 991, 13 L Ed 2d 611—Alabama Great Southern R Co v Federal Maritime Commission, C A, 379 F 2d 100, 126 U S App D C 323

Under such statutory authority, the Maritime Board may require a carrier or other person subject to the act to file a copy of every contract, or a memorandum of an oral contract, involving water-borne commerce, including copies of contracts that are outside the United States, although such omnibus disclosure might include secret arrangements between carriers or a carrier and another person whether or not such person was subject to the act[91 5]

91.5. D C—Montship Lines, Limited v Federal Maritime Bd, 295 F 2d 147, 111 U S App D C 160—Seatrain Lines, Inc v Federal Maritime Commission, C A, 460 F.2d 932, 148 U S App.D C 424, affd 93 S Ct 1773, 411 U.S 726, 36 L Ed 2d 620

92. U S—Staten Island Loaders v Waterfront Commission of New York Harbor, D C N Y, 117 F Supp 308

Water carrier permit

Me—In re General Marine Const Corp, 272 A 2d 353

Shipping conferences. The validity and construction of self-policing agreements or systems adopted by shipping conferences and approved by the Federal Maritime Commission have been judicially considered.[93 5]

Such an agreement or system must provide for fair treatment of all the members of the conference.[93 10]

93.5. U S—Trans-Pacific Freight Conference of Japan v Federal Maritime Commission, C A Cal., 314 F.2d 928—Federal Maritime Commission v. New York Terminal Conference, C A N Y, 373 F 2d 424—American Export Isbrandtsen Lines, Inc v Federal Maritime Commission, C A, 409 F 2d 1258

D C—States Marine Lines, Inc v. Federal Maritime Commission, C A, 376 F 2d 230, 126 U S App D C 187

Arbitration clause upheld

U S—Joseph Amelar, Inc v Far East Conference, Am Arbitration Ass'n, D C N Y, 229 F Supp 450

Compulsory amendment of agreement held proper procedure

D C—Outward Continental North Pac Freight Conference v Federal Maritime Commission, C A, 385 F 2d 981, 128 U S App D C 199

Retroactivity before approval by Commission prohibited

D.C—Pacific Coast European Conference v Federal Maritime Commission, C A, 439 F 2d 514, 142 U S App D.C 4, cert. den 91 S Ct 990, 401 U S. 967, 28 L Ed 2d 541

Supplementary agreements need approval

U S—Pacific Westbound Conference v Federal Maritime Commission, C A La, 440 F 2d 1303, cert den 92 S Ct 202, 404 U S 881, 30 L Ed 2d 162

Discretion

D C—Farrell Lines, Inc v Federal Maritime Commission, C A, 475 F 2d 1332, 155 U S App D C 63

Jurisdiction retained to modify or terminate agreement if unfairness appears

D C—Farrell Lines, Inc v Federal Maritime Commission, C A, 475 F 2d 1332, 155 U S App D C 63

93.10. D C—States Marine Lines, Inc v Federal Maritime Commission, C A, 376 F 2d 230, 126 U S App D C 187

Affirmative conference action required

D C—Pacific Coast European Conference v Federal Maritime Commission, C A, 439 F 2d 514, 142 U S App D C 4, cert den 91 S Ct 990, 401 U S 967, 28 L Ed 2d 541

Self-policing procedures applied retroactively

D C—Pacific Coast European Conference v Federal Maritime Commission, C A, 439 F 2d 514, 142 U S App D C 4, cert den 91 S Ct 990, 401 U S 967, 28 L Ed.2d 541

94. Rule governing time for motion for reconsideration waived

D C—Montship Lines, Limited v Federal Maritime Bd, C A, 295 F 2d 147, 111 U S App.D C. 160

Reopening proceeding

D C—Anchor Line Limited v Federal Maritime Commission, C A, 299 F 2d 124, 112 U S App D C 40, cert den 82 S Ct 1563, 370 U S 922, 8 L Ed.2d 503

Issues

U S—Pacific Queen Fisheries v Symes, C A Wash., 307 F 2d 700, cert den 83 S.Ct 721, 372 U S. 907, 9 L Ed 2d 717

Proof in rate investigation proceedings

U S.—Alaska S S Co. v Federal Maritime Commission, C A.Wash., 344 F 2d 810.

D C.—Com of Puerto Rico v Federal Maritime Commission, C.A, 468 F.2d 872, 152 U.S.App D.C. 28.

95. Notice of hearing

U S—Pacific Coast European Conference v U S, C A, 350 F.2d 197, cert. den 86 S.Ct 433, 382 U S 958, 15 L Ed 2d 362

Consolidated hearing

U S—Pacific Coast European Conference v. U.S, C.A, 350 F 2d 197, cert den 86 S.Ct. 433, 382 U S 958, 15 L Ed 2d 362

Consolidated report

U S—Pacific Coast European Conference v U S., C.A., 350 F 2d 197, cert. den 86 S.Ct 433, 382 U S 958, 15 L Ed 2d 362

Notice of suspension of increased rates held insufficient

U S—Alaska S S. Co v Federal Maritime Commission, C.A Alaska, 362 F.2d 406.

Sufficiency of hearing

D C—Persian Gulf Outward Freight Conference v. Federal Maritime Commission, C A, 375 F.2d 335, 126 U S App.D.C 159—City of Los Angeles v. Federal Maritime Commission, C A, 388 F 2d 582, 128 U S.App.D C 326—City of Portland, Or v. Federal Maritime Commission, 433 F 2d 502, 139 U S App D.C 344.

Reopening proceeding

D C—City of Los Angeles v. Federal Maritime Commission, C A, 385 F 2d 678, 128 U.S.App.D C 156—City of Portland, Or. v Federal Maritime Commission, 433 F.2d 502, 139 U S.App.D C. 344

Matters relating to the issuance and service of a subpoena or of a subpoena duces tecum to compel attendance of witnesses and the production of documents and other evidence relating to

an investigation have been adjudicated,[95.5] including the authority of an examiner of the board to issue and sign a subpoena duces tecum.[95.10]

95.5. U.S.—Lee v Federal Maritime Bd., C.A. Wash., 284 F.2d 577—Federal Maritime Commission v Caragher, D.C.N.Y., 243 F.Supp 136, remd., C.A., 364 F.2d 709—Ludlow Corp v DeSmedt, D.C.N.Y., 249 F.Supp 496, affd., C.A., 366 F.2d 464, cert. den. 87 S.Ct. 513, 385 U.S. 974, 17 L.Ed.2d 437—Federal Maritime Commission v Transoceanic Terminal Corp., D.C.Ill., 252 F.Supp 743—Federal Maritime Commission v Caragher, C.A.N.Y., 364 F.2d 709—Federal Maritime Commission v New York Terminal Conference, C.A.N.Y., 373 F.2d 424—Federal Maritime Commission v New York Terminal Conference, D.C.N.Y., 262 F.Supp 225, affd., C.A., 373 F.2d 424—Federal Maritime Commission v. Zim Israel Nav Co., D.C.N.Y., 263 F.Supp 618—Port of New York Authority v Federal Maritime Commission, C.A.La., 429 F.2d 663, cert. den. 91 S.Ct. 867, 401 U.S. 909, 27 L.Ed.2d 806

Matters relevant to investigation

U.S.—Federal Maritime Commission v DeSmedt, C.A.N.Y., 366 F.2d 464, cert. den. 87 S.Ct. 513, 385 U.S. 974, 17 L.Ed.2d 437

95.10. U.S.—Lee v Federal Maritime Bd., C.A. Wash., 284 F.2d 577—Federal Maritime Commission v. New York Terminal Conference, D.C.N.Y., 262 F.Supp. 225, affd., C.A., 373 F.2d 424

Failure to comply not automatically enforced by court as contempt

U.S.—Federal Maritime Commission v DeSmedt, D.C.N.Y., 268 F.Supp. 972

96. U.S.—Anglo-Canadian Shipping Co v Federal Maritime Commission, C.A., 310 F.2d 606—Orleans Materials & Equipment Co v Isthmian Lines, Inc., D.C.La., 213 F.Supp 325, order withdrawn 218 F.Supp. 322—Maldonado v Sea-Land Service, Inc., D.C.Puerto Rico, 240 F.Supp 581—Maddock & Miller, Inc v Mayer China Co., D.C.N.Y., 241 F.Supp 306, revd on oth. grds., C.A., 365 F.2d 98—Maddock & Miller, Inc v U.S. Lines, C.A.N.Y., 365 F.2d 98—Buchanan v Fowler, C.A.Fla., 381 F.2d 7

D.C.—Pacific Seafarers, Inc. v Pacific Far East Line, Inc., C.A., 404 F.2d 804, 131 U.S.App.D.C. 226, cert. den. 89 S.Ct. 872, 393 U.S. 1093, 21 L.Ed.2d 784, on remand 48 F.R.D. 347

Stay

U.S.—Carlos Crespo Trucking Service, Inc. v. Sea-Land Service, Inc., D.C.Puerto Rico, 260 F.Supp. 858

Issue not requiring prior determination by commission

N.Y.—Dampskibsselskabet Torm A/S v P. L. Thomas Paper Co., 274 N.Y.S.2d 601, 26 A.D.2d 347

Various matters with respect to a show-cause proceeding before the Maritime Commission to declare a port equalization rule unlawful and strike it from the freight tariff have been adjudicated.[98.5]

98.5. Necessity for complying with rules governing formal complaints

U.S.—American Export and Isbrandtsen Lines v Federal Maritime Commission, C.A.Cal., 334 F.2d 185.

Necessity for evidentiary hearing

U.S.—American Export and Isbrandtsen Lines v. Federal Maritime Commission, C.A.Cal., 334 F.2d 185—Port of New York Authority v. Federal Maritime Commission, C.A.La., 429 F.2d 670, cert. den. 91 S.Ct. 867, 401 U.S. 909, 27 L.Ed.2d 806.

Notice of intervention

U.S.—American Export and Isbrandtsen Lines v. Federal Maritime Commission, C.A.Cal., 334 F.2d 185.

Notice of order denying motion to dismiss

U.S.—American Export and Isbrandtsen Lines v Federal Maritime Commission, C.A.Cal., 334 F.2d 185

Sufficiency of order

U.S.—American Export and Isbrandtsen Lines v Federal Maritime Commission, C.A.Cal., 334 F.2d 185

Other matters

U.S.—American Export and Isbrandtsen Lines v Federal Maritime Commission, C.A.Cal., 334 F.2d 185

99. Persons entitled to seek relief

U.S.—Federal Maritime Commission v Zim Israel Nav Co., D.C.N.Y., 263 F.Supp 618

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The equitable power of the court to suspend operation of a tariff by injunction pending the completion of an inquiry by the Maritime Board concerning such tariff is a discretionary one to be exercised only after a balance of the harms the injunction might do to the opposing parties.[3.5]

3.5. U.S.—U.S. Trucking Corp v American Export Lines, Inc., D.C.N.Y., 146 F.Supp 924, rearg. gr. 148 F.Supp 61

Evidence held sufficient to justify injunction

U.S.—U.S. Trucking Corp v American Export Lines, Inc., D.C.N.Y., 146 F.Supp 924, rearg. gr. 148 F.Supp 61

Temporary injunction not granted

U.S.—U.S. Trucking Corp v American Export Lines, Inc., D.C.N.Y., 146 F.Supp 924, rearg. gr. 148 F.Supp 61—Federal Maritime Commission v Atlantic & Gulf/Panama Canal Zone, D.C.N.Y., 241 F.Supp 766

Opportunity for filing affidavits

U.S.—U.S. Trucking Corp. v American Export Lines, Inc., D.C.N.Y., 148 F.Supp 61

Clerical errors in original order of board due to inadvertence may be corrected by issuance of subsequent order.[4.5]

4.5. D.C.—Royal Netherlands S.S. Co v Federal Maritime Bd., 304 F.2d 938, 113 U.S.App.D.C. 62

The Maritime Commission must, in issuing a conclusory order, comply with the Administrative Procedure Act, 5 U.S.C.A. § 1007(b), requiring findings and supporting reasons for findings.[4.10]

4.10. U.S.—Anglo-Canadian Shipping Co. v Federal Maritime Commission, C.A., 310 F.2d 606

Determination in rate investigation may be reopened

U.S.—Alaska S.S. Co. v. Federal Maritime Commission, C.A.Wash., 344 F.2d 810

Jurisdiction to make finding

U.S.—Trans-Pacific Freight Conference of Japan v Federal Maritime Commission, C.A.Cal., 314 F.2d 928.

Requirements not applicable to rule making proceeding

U.S.—Pacific Coast European Conference v U.S., C.A., 350 F.2d 197, cert. den. 86 S.Ct. 433, 382 U.S. 958, 15 L.Ed.2d 362.

5. U.S.—Rivoli Trucking Corp v New York Shipping Ass'n, D.C.N.Y., 167 F.Supp. 943—Pacific Westbound Conference v. U.S., C.A., 332 F.2d 49—Federal Maritime Commission v. Caragher, C.A.N.Y., 364 F.2d 709—Federal Maritime Commission v Australia/U.S. Atlantic and Gulf Conference, A/S Atlanttrafik, D.C.N.Y., 337 F.Supp 1032

D.C.—Isbrandtsen Co v U.S., C.A., 211 F.2d 51, 93 U.S.App.D.C. 293, cert. den. 74 S.Ct. 852, two cases, 347 U.S. 990, 98 L.Ed. 1124—Trans-Pacific Freight Conference of Japan v Federal Maritime Bd., C.A., 302 F.2d 875, 112 U.S.App.D.C. 290

Effect of invoking jurisdiction

U.S.—River Plate and Brazil Conferences v Pressed Steel Car Co., C.A.N.Y., 227 F.2d 60

Enforcement of subpoena duces tecum issued by examiner of board

U.S.—Lee v Federal Maritime Bd., C.A.Wash., 284 F.2d 577—Federal Maritime Commission v Transoceanic Terminal Corp., D.C.Ill., 252 F.Supp 743—Federal Maritime Commission v New York Terminal Conference, D.C.N.Y., 262 F.Supp 225, affd., C.A., 373 F.2d 424—Federal Maritime Commission v Zim Israel Nav Co., D.C.N.Y., 263 F.Supp 618

Order not violated

U.S.—Federal Maritime Commission v Maersk Line, D.C.N.Y., 243 F.Supp 561

Rule to show cause

U.S.—Federal Maritime Commission v Transoceanic Terminal Corp., D.C.Ill., 252 F.Supp 743

Enforcement by "other process"

U.S.—Federal Maritime Commission v Transoceanic Terminal Corp., D.C.Ill., 252 F.Supp 743

Action held filed in due time

N.Y.—Dampskibsselskabet Torm A/S v P. L. Thomas Paper Co., 274 N.Y.S.2d 601, 26 A.D.2d 347

6. U.S.—D.L. Piazza Co v West Coast Line, D.C.Ill., 119 F.Supp 937—Northwest Marine Terminals Ass'n v Federal Maritime Bd., C.A., 218 F.2d 815—Federal Maritime Bd v Isbrandtsen Co., App.D.C., 78 S.Ct. 851, 356 U.S. 481, 2 L.Ed.2d 926—Rivoli Trucking Corp v New York Shipping Ass'n, D.C.N.Y., 167 F.Supp 943—Matson Nav Co v Federal Maritime Commission, C.A.Cal., 405 F.2d 796

D.C.—Isbrandtsen Co v U.S., C.A., 211 F.2d 51, 93 U.S.App.D.C. 293, cert. den. 74 S.Ct. 852, two cases, 347 U.S. 990, 98 L.Ed. 1124—Pacific Far East Line, Inc v Federal Maritime Bd., C.A., 275 F.2d 184, 107 U.S.App.D.C. 155, cert. den. 80 S.Ct. 1597, two cases, 363 U.S. 827, 4 L.Ed.2d 1523—Government of Guam v Federal Maritime Commission, C.A., 329 F.2d 251, 117 U.S.App.D.C. 296—New York Foreign Freight Forwarders and Brokers Ass'n v Federal Maritime Commission, C.A., 384 F.2d 979, 128 U.S.App.D.C. 10

Jurisdiction

D.C.—Montship Lines, Limited v Federal Maritime Bd., C.A., 295 F.2d 147, 111 U.S.App.D.C. 160

Petition for review held timely

D.C.—Montship Lines, Limited v Federal Maritime Bd., C.A., 295 F.2d 147, 111 U.S.App.D.C. 160

Orders exceeding statutory authority

(2) Other orders

U.S.—Delaware River Port Authority v U.S. Lines, Inc., D.C.Pa., 331 F.Supp 441

D.C.—Trans-Pacific Freight Conference of Japan v Federal Maritime Bd., C.A., 302 F.2d 875, 112 U.S.App.D.C. 290

Appeal dismissed as frivolous

U.S.—Pacific Westbound Conference v U.S., C.A., 332 F.2d 49

Requirement of finality necessary

U.S.—New York Shipping Ass'n, Inc v Federal Maritime Commission, C.A., 495 F.2d 1215, cert. den. 95 S.Ct. 224, 419 U.S. 964, 42 L.Ed.2d 178, cert. den. 95 S.Ct. 224, 419 U.S. 964, 42 L.Ed.2d 178

7. Matter peculiarly of public concern

U.S.—Safir v Gulick, D.C.N.Y., 297 F.Supp 630

9. U.S.—Pacific Westbound Conference v U.S., C.A., 332 F.2d 49.

Discretion abused

U.S.—State of Tex v Seatrain Intern., S.A., C.A.Tex., 518 F.2d 175

Various matters relating to the review of orders of the Maritime Commission by the Court of Appeals have been considered by the courts [95]

9.5. Jurisdiction of Court of Appeals under Administrative Orders Review Act

U S—Consolo v Federal Maritime Commission, Dist Col, 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D.C 14

Reparations order

U S—Consolo v Federal Maritime Commission, Dist Col, 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 373 F 2d 674, 126 U S App D C 14

Shipper's rights contrasted with carrier's rights

U S—Consolo v Federal Maritime Commission, Dist Col, 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C., 373 F 2d 674, 126 U S App D C 14

Procedure

U S—Consolo v Federal Maritime Commission, Dist Col, 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14

Further review by Supreme Court

U S—Consolo v Federal Maritime Commission, Dist Col, 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14

Finding held unwarranted

U S—American Export Isbrandtsen Lines, Inc v Federal Maritime Commission, C A, 409 F 2d 1258

"Report"

D C—Sea-Land Service, Inc v Federal Maritime Commission, C A, 402 F 2d 631, 131 U S App D C 80

Matter held not ripe for review

D C—Sea-Land Service, Inc v Federal Maritime Commission, C A, 402 F 2d 631, 131 U S App D C 80

Showing required for stay of order

D C—North Atlantic Westbound Freight Ass'n v Federal Maritime Commission, C A, 397 F 2d 683, 130 U S App D C 122—City of Portland, Or v Federal Maritime Commission, 433 F 2d 502, 139 U S App D C 344

Matters considered on stay application

D C—North Atlantic Westbound Freight Ass'n v Federal Maritime Commission, C A, 397 F 2d 683, 130 U S App D C 122

Commission's view of merits as indicating public interest

D C—North Atlantic Westbound Freight Ass'n v Federal Maritime Commission, C A, 397 F 2d 683, 130 U S App D C 122

Record held insufficient

D C—North Atlantic Westbound Freight Ass'n v Federal Maritime Commission, C A, 397 F 2d 683, 130 U S.App D C 122

Standing to object to approval of agreement without hearing

D C—Marine Space Enclosures, Inc v Federal Maritime Commission, C A., 420 F 2d 577, 137 U S App.D C 9.

Effect of running of time for review

U.S—Port of Boston Marine Terminal Ass'n v Rederiaktiebolaget Transatlantic, 91 S.Ct 203, 400 U S 62, 27 L Ed 2d 203

Scope and extent of review

D C.—Latin America/Pacific Coast S S Conference v Federal Maritime Commission, C A, 465 F 2d 542, 150 U.S App D C. 362, cert. den 93 S.Ct 269, 409 U.S 967, 34 L.Ed 2d 234

10. Intervention by carriers

D C—Montship Lines, Limited v Federal Maritime Bd, C A, 295 F 2d 147, 111 U S App D C 160

United States as party required

U S—Board of Com'rs of Port of New Orleans v Pacific Westbound Conference, C A La, 378 F 2d 56

Presentation of grounds for review before agency. A contention which was not raised before the commission will not be considered by the reviewing court where no compelling reason appears for considering it.[115]

11.5. U S—Wilsey, Bennett Co v Federal Maritime Commission, C A Cal, 315 F 2d 374—Ludlow Corp v DeSmedt, D C N Y, 249 F Supp 496, affd, C A, 366 F 2d 464, cert den 87 S Ct 513, 385 U S 974, 17 L Ed 2d 437

D C—Anchor Line Limited v Federal Maritime Commission, C A, 299 F 2d 124, 112 U S App D C 40, cert den 82 S Ct 1563, 370 U S 922, 8 L Ed 2d 503

12. U S—Grace Line, Inc v Federal Maritime Bd, C A, 263 F 2d 709—C Tennant & Sons, Inc v New York Terminal Conference, D C N Y, 299 F Supp 796

D C—Alabama Great Southern R Co v Federal Maritime Commission, C A, 379 F 2d 100, 126 U S App D C 323—American Export Isbrandtsen Lines, Inc v Federal Maritime Commission, C A, 380 F 2d 609, 127 U S App D C 62—South Atlantic & Caribbean Line, Inc v Federal Maritime Commission, C A, 424 F 2d 941, 138 U S App D C 28

Jurisdiction

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 302 F 2d 887, 112 U S App D.C 302

Record

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 302 F 2d 887, 112 U S App D C 302

Questions of law

D C—Flota Mercante Grancolombiana, S A. v Federal Maritime Commission, C A, 302 F 2d 887, 112 U S App.D C 302.

Allocation method not prima facie evidence of proper method

U S—Alaska S S Co v Federal Maritime Commission, C A Wash, 344 F 2d 810

Reasons for agency action considered

U S—Alaska S S Co. v Federal Maritime Commission, C A Wash, 344 F 2d 810

Review of findings

D C—Aktiebolaget Svenska Amerika Linien (Swedish-American Line) v Federal Maritime Commission, C.A, 351 F 2d 756, 122 U S App D C 59, app after remand 372 F 2d 932, 125 U S App.D C 359, revd on oth grds 88 S Ct 1005, 390 U S 238, 19 L Ed 2d 1071—U S Atlantic and Gulf/Australia-New Zealand Conference v Federal Maritime Commission, C.A, 364 P 2d 696, 124 U S App D C 303

Remand

D C—Aktiebolaget Svenska Amerika Linien (Swedish-American Line) v Federal Maritime Commission, C A, 351 F 2d 756, 122 U S App D C 59, app after remand 372 F.2d 932, 125 U S App D.C 359, revd on oth grds. 88 S Ct 1005, 390 U.S 238, 19 L.Ed 2d 1071—Government of Guam v Federal Maritime Commission, C A, 365 F.2d 515, 124 U.S App D C 324, cert den 87 S Ct 704, 385 U S 1002, 17 L Ed 2d 542—North Atlantic Westbound Freight Ass'n v. Federal Maritime Commission, C A, 404 F 2d 803, 131 U S App D C 225

Decision of examiner entitled to serious consideration

D C—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C A, 361 F 2d 80, 124 U S App D C 63

Concurrence by majority of commissioners

D C—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C A, 361 F 2d 80, 124 U S App D C 63

Manner of review

D C—Transamerican Trailer Transport, Inc v Federal Maritime Commission, C A, 492 F 2d 617, 160 U S App D C 351

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13. U S—Grace Line, Inc v Federal Maritime Bd., C A, 263 F 2d 709—Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien (Swedish Am Line), Dist Col, 88 S Ct 1005, 390 U S 238, 19 L Ed 2d 1071—Fall River Line Pier, Inc v International Trading Corp of Virginia, C A Mass, 399 F 2d 413

D C—States Marine Lines, Inc. v Federal Maritime Commission, 313 F 2d 906, 114 U S App D C 225, cert den 83 S Ct 1872, 374 U S 831, 10 L Ed 2d 1054—U S Atlantic and Gulf/Australia-New Zealand Conference v Federal Maritime Commission, C A, 364 F 2d 696, 124 U S.App.D C 303

Burden on petitioner to overcome presumption of correctness

D C—City of Los Angeles v. Federal Maritime Commission, C A, 385 F.2d 678, 128 U S App D C 156

New evidence

D C—Transamerican Trailer Transport, Inc v Federal Maritime Commission, C.A., 492 F 2d 617, 160 U S App D C 351

14. U S—Federal Maritime Bd v Isbrandtsen Co, App.D C., 78 S Ct 851, 356 U S. 481, 2 L Ed 2d 926—Greater Baton Rouge Port Commission v U.S, C A., 287 F.2d 86, reh den. 293 F 2d 959, cert den 82 S.Ct 600, 368 U.S. 985, 7 L Ed.2d 523—Fall River Line Pier, Inc v. International Trading Corp of Virginia, C A Mass, 399 F.2d 413.

D C—American Union Transport, Inc v. U.S., C A, 257 F 2d 607, 103 U S App.D C. 229, cert den 79 S Ct 46, 358 U S 828, 3 L Ed.2d 67.

Evidence held sufficient

(4) Other instances

U S—Stockton Port Dist v. Federal Maritime Commission, C A.Cal, 369 F.2d 380, cert. den 87 S.Ct 1479, 386 U S 1031, 18 L Ed.2d 592—C Tennant & Sons, Inc v New York Terminal Conference, D C N Y, 299 F Supp 796—Port of New York Authority v Federal Maritime Commission, C A La, 429 F 2d 663, cert den 91 S.Ct 867, 401 U S 909, 27 L Ed 2d 806

D C—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C A., 361 F 2d 80, 124 U S.App D C 63—U.S. Atlantic and Gulf/Australia-New Zealand Conference v Federal Maritime Commission, C A, 364 F 2d 696, 124 U S App D.C 303—Flota Mercante Grancolombiana, S.A. v. Federal Maritime Commission, C.A, 373 F 2d 674, 126 U S App.D.C 14

Evidence held insufficient

U S—Anglo-Canadian Shipping Co v Federal Maritime Commission, C A, 310 F 2d 606—C. Tennant & Sons, Inc v New York Terminal Conference, D C N Y, 299 F Supp 796.

D.C—Royal Netherlands S.S Co v Federal Maritime Bd, 304 F 2d 938, 113 U.S App.D C 62—U.S. Atlantic and Gulf/Australia-New Zealand Conference v Federal Maritime Commission, C.A, 364 F 2d 696, 124 U S.App D.C 303—Aktiebolaget Svenska Amerika Linien (Swedish Am. Line) v Federal Maritime Commission, C A, 372 F.2d 932, 125 U S.App D C 352

15. D C—Government of Guam v. Federal Maritime Commission, C A., 329 F 2d 251, 117 U S App D C 296

16. US—D L Piazza Co v West Coast Line, C A N Y, 210 F 2d 947, cert den 75 S Ct 42, 348 U S 839, 99 L Ed 661—Continental Can Co v U S, C A, 272 F 2d 312

D C—American Union Transport, Inc v U S, C A, 257 F 2d 607, 103 U S.App D C 229, cert den 79 S Ct 46, 358 U S 828, 3 L Ed 2d 67—Benson v U S, C A, 263 F 2d 899, 105 U S App D C 62—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 302 F 2d 887, 112 U S App D C 302—Government of Guam v Federal Maritime Commission, C A, 365 F 2d 515, 124 U S App D C 324, cert den 87 S Ct 704, 385 U S 1002, 17 L Ed 2d 542—Persian Gulf Outward Freight Conference v Federal Maritime Commission, C A, 375 F 2d 335, 126 U S App D C 159—American Export-Isbrandtsen Lines, Inc v Federal Maritime Commission, C A, 389 F 2d 962, 129 U S.App D C 1.

17. D C—Government of Guam v Federal Maritime Commission, C A, 365 F 2d 515, 124 U S App D C 324, cert den 87 S Ct 704, 385 U S 1002, 17 L Ed 2d 542.

Remand

U.S.—Com of Puerto Rico v Federal Maritime Bd, C A., 288 F 2d 419, 110 U S App D C 17—Alaska S S Co v Federal Maritime Commission, C A Wash., 344 F 2d 810—Volkswagenwerk Aktiengesellschaft v Federal Maritime Commission, Dist Col, 88 S Ct 929, 390 U S 261, 19 L Ed 2d 1090, am. on oth grds 88 S Ct 2649, 392 U S 901, 20 L.Ed.2d 1361

D.C—Pacific Far East Line, Inc v Federal Maritime Bd, C A, 275 F 2d 184, 107 U S App D C 155, cert den 80 S Ct. 1597, two cases, 363 U S 827, 4 L Ed 2d 1523—Government of Guam v Federal Maritime Commission, C A, 329 F 2d 251, 117 U S App D C 296

Only final orders of the Maritime Board are reviewable.[17 5]

17.5. Order held not "final order"

U.S—Howard Terminal v U S, C A, 239 F 2d 336

Order held final

D C.—Trans-Pacific Freight Conference of Japan v Federal Maritime Bd., C A, 302 F 2d 875, 112 U S App D C 290.

The reviewing court will not dismiss an appeal for a defect in parties, but in a proper case it will, of its own initiative, permit an amendment so as to remedy such defect.[17 10]

17.10. Petitioners not incorporated within court's jurisdiction

U.S—Anglo Canadian Shipping Co v U S., C A, 238 F 2d 18.

Under statutory provision providing that the courts may set aside, suspend or determine the validity of final orders of the board, orders with are not final are not appealable.[17 15]

17.15. Order held not final

D C—Associated Banning Co v. U S., C.A, 247 F.2d 557, 101 U S App.D.C 151.

§ 104. Discrimination

Library References

Shipping ⇐101, 103.

18. Retaliatory contract

D.C—Isbrandtsen Co. v. U.S, C A, 239 F 2d 933, 99 U S.App.D.C 312, affd. 78 S.Ct 851, 356 U S. 481, 2 L Ed.2d 926.

19. U.S.—Grace Line, Inc. v. Federal Maritime Bd, C.A., 280 F.2d 790, cert den 81 S.Ct. 380, 364 U.S. 933, 5 L Ed.2d 365.

Prohibition not limited to agreements between American and foreign lines

U S—Safir v Gibson, C A N Y, 417 F 2d 972

21. D C—Royal Netherlands S S Co v Federal Maritime Bd, 304 F 2d 938, 113 U S App D C 62

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25. U S—Federal Maritime Commission v Zim Israel Nav Co, D C N Y, 263 F Supp 618

Loss of profits

U S—Consolo v Federal Maritime Commission, Dist Col, 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 373 F 2d 674, 126 U S App D C 14

27. U S—Federal Maritime Bd v Isbrandtsen Co, App D C, 78 S Ct 851, 356 U S 481, 2 L Ed 2d 926—U S v Pan Am Mail Line, Inc, D C N Y, 359 F Supp 728

Unlawful unless impact unsubstantial

U S—Isbrandtsen Co v U S, C A, 239 F 2d 933, 99 U S App.D C 312, affd. 78 S Ct 851, 356 U S 481, 2 L Ed 2d 926

Effect on government-financed shipments

U S—U S v Bloomfield S S Co, C A Tex, 359 F 2d 506, cert den 87 S.Ct 709, 385 U S 1004, 17 L Ed 2d 543

28. D C—American Union Transport, Inc v U S, C A, 257 F 2d 607, 103 U S App D C 229, cert den 79 S Ct 46, 358 U S 828, 3 L Ed 2d 67—Royal Netherlands S S Co v Federal Maritime Bd, 304 F 2d 938, 113 U S App D C 62

Volume rates discount not inherently unlawful

D C—American Export Isbrandtsen Lines, Inc v Federal Maritime Commission, C A, 380 F 2d 609, 127 U S App D C 62

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29. U S—American Export Isbrandtsen Lines, Inc v Federal Maritime Commission, C A, 409 F 2d 1258

33. U S—River Plate and Brazil Conferences v Pressed Steel Car Co, C A N Y, 227 F 2d 60—Federal Maritime Bd v Isbrandtsen Co, App D C, 78 S Ct 851, 356 U S 481, 2 L Ed 2d 926

Any infirmity in such a contract has been cured by amendment of the Shipping Act,[33 5] and various other matters relating to the effect of such statutory amendment have been adjudicated.[33 10]

33.5 N Y—Pasch v Chemoleum Corp, 210 N Y S 2d 738, 26 Misc 2d 925, affd 214 N Y S.2d 644, 13 A D 2d 470, app gr 218 N Y S 2d 47, 9 N Y.2d 965, 176 N E 2d 502

33.10. N Y—Pasch v Chemoleum Corp, 209 N Y S 2d 191, 26 Misc 2d 918, affd 214 N Y S 2d 644, 645, 13 A.D.2d 470, rearg. den 215 N Y S 2d 1011, 13 A.D 2d 623, app gr. 218 N Y S 2d 47, 9 N.Y 2d 965, 176 N E 2d 502

36. Freight forwarder

U.S—Norman G. Jensen, Inc v Federal Maritime Commission, C A., 497 F.2d 1053.

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38. D C—Isbrandtsen Co v U S, C A, 239 F 2d 933, 99 U S.App D C 312, affd. 78 S Ct 851, 356 U S 481, 2 L.Ed 2d 926.

Unjust discrimination as to cargo space

U S.—Grace Line, Inc v. Federal Maritime Bd, C A, 280 F 2d 790, cert. den 81 S Ct 380, 364 U S 933, 5 L.Ed.2d 365.

39. U S—Anglo Canadian Shipping Co v U S., C A, 264 F.2d 405

Exclusive primary jurisdiction

U S—Carnation Co v Pacific Westbound Conference, C A Cal, 336 F 2d 650, revd on oth grds 86 S Ct 781, 383 U S 213, 932, 15 L Ed 2d 709, 851

41. U S—Baltimore & O R Co v U S, C A, 201 F 2d 795

42. U S—Carnation Co v Pacific Westbound Conference, Cal, 86 S Ct 781, 383 U S 213, 932, 15 L Ed 2d 709

Interest from date of filing complaint

D C—States Marine Lines, Inc v Federal Maritime Commission, 313 F 2d 906, 114 U S App D C 225, cert den 83 S Ct 1872, 374 U S 831, 10 L Ed 2d 1054

Equitable considerations

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 342 F 2d 924, 119 U S App D C 345, revd on oth grds 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14

Grant of reparations is discretionary

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 342 F 2d 924, 119 U S App D C 345, revd on oth grds 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 373 F 2d 674, 126 U S App D C 14

43. U S—D L Piazza Co v West Coast Line, D C Ill, 119 F Supp 937

Law not necessarily settled by unappealed valid decision

D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 342 F 2d 924, 119 U S App D C 345, revd on oth grds 86 S Ct 1018, 383 U S 607, 16 L Ed 2d 131, on remand, C A D C, 373 F 2d 674, 126 U S App D C 14

44. U S—D L Piazza Co v West Coast Line, supra, n 43

D C—Isbrandtsen Co v U S, C A, 239 F 2d 933, 99 U S App D C 312, affd 78 S Ct 851, 356 U S 481, 2 L Ed 2d 926

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45. D C—Pacific Far East Line, Inc v U S, C A, 246 F 2d 711, 101 U S App D C 24

54. D C—Flota Mercante Grancolombiana, S A v Federal Maritime Commission, C A, 373 F 2d 674, 126 U S App D C 14

Actions may be barred by delay.[54 5]

54.5. More than two years

U S—Brown & Williamson Tobacco Corp v The Anghyra, D C Va, 157 F Supp 737, affd in part and revd in part on oth grds, C A, 277 F.2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102

§ 105. Damage to Vessel from Loading or Discharging Cargo

55. U S.—Shamrock Towing Co v Schiavone-Bonomo Corp, C A N Y, 275 F 2d 338

Indemnity agreement

U S—Callanan Road Imp Co v Cayuga Const Corp, D C N Y, 321 F Supp 1317, affd, C A, 437 F 2d 456

56. U S—Ferrante v Swedish Am Lines, C A N J, 331 F 2d 571, cert den 85 S Ct 10, 379 U S 801, 13 L.Ed.2d 20—Thompson v Calmer S S Corp, C A Pa, 331 F 2d 657, cert den 85 S Ct 259, 379 U S 913, 13 L.Ed.2d 184

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58. U.S—Nat G Harrison Overseas Corp v American Tug Titan, C A Fla, 516 F 2d 89, mod on oth grds 520 F 2d 1104

59. Effect of negligence as not wear and tear even though anticipated

U.S.—Moran Towing Corp v. M A Gammino Const Co, C A R I, 363 F 2d 108, on remand, D C, 292 F Supp 134, affd in part remanded 409 F 2d 917

60. U S—Shamrock Towing Co v Hughes Bros, Inc, D.C N Y, 197 F Supp 397

61. U S—Ferrante v Swedish Am Lines, C A N J, 331 F.2d 571, cert den 85 S Ct 10, 379 U S 801, 13 L Ed 2d 20

65. Prior unseaworthiness of vessel

U S.—Companio Prospero S A v Old Dominion Stevedoring Corp., D C Va, 309 F Supp 1082.

68. U S—Ware v Cia De Navegacion Andes, S A, D.C Va, 180 F Supp 939—Arrow Transp Co v Cooper Stevedoring Co, D C Ala, 184 F Supp 666—De Palma v South African Marine Corp, D C N Y, 206 F Supp 274—Waterman S S Corp v Brady-Hamilton Stevedore Co, D C Or, 243 F Supp 298—Villain & Fassio E Compagnia v Atlantic & Gulf Stevedores, Inc, D C Va, 283 F Supp 725—Judith Ann Liberian Transport Corp v Crawford, C A Or, 399 F 2d 924

Security company

U S—Toyomenka, Inc v S S Tosharu Maru, D C N Y, 392 F Supp 450, revd on oth grds, C A, 523 F 2d 518

69. U S—North Atlantic & Gulf S S Co v New Orleans Stevedoring Co, D C La, 111 F Supp 413, affd, C A, 213 F 2d 859—Pacific Far East Line, Inc v Jones Stevedoring Co, C A Cal, 346 F 2d 642, cert den 86 S.Ct 293, 382 U S 919, 15 L Ed 2d 233—Smith v Brown & Root Marine Operators, Inc, D C La, 243 F Supp 130, affd, C A, 376 F 2d 852—Waterman S S Corp v Brady-Hamilton Stevedore Co, D C Or, 243 F Supp 298—Hardy v U S, D C N C, 322 F Supp 660

70. Custom no excuse for negligence

U S—Arrow Transp Co v Cooper Stevedoring Co, D C Ala, 184 F Supp 666—La Capria v Compagnie Maritime Belge, D C N Y, 286 F Supp 980, affd in part, revd in part on oth grds, C A, 427 F 2d 244

71. U S—North Atlantic & Gulf S S Co v New Orleans Stevedoring Co, supra, n 69—U S v Bull S S Line, C A N Y, 274 F 2d 877—C J.S. cited in Arrow Transportation Co v Cooper Stevedoring Co, D C Ala, 184 F Supp 666, 668—Dampskibsaktieselskabet Den Norske Afrika og Australieline v Intalco Aluminum Corp, D C Wash, 306 F Supp 170, affd, C A, 457 F.2d 889, cert den 93 S Ct 166, 409 U S 1024, 34 L Ed 2d 316—Southern Stevedoring Co v S S Hellenic Wave, D C Tex, 322 F Supp 641—Evans v. Carolina Shipping Co, C A S C, 451 F 2d 188

No liability when expert advice sought after and it is followed

U S.—A/S J Ludwig Mowinckels Rederi v Accinanto Limited, C A Md, 199 F 2d 134, cert den 73 S Ct 1129, 345 U S 992, 97 L Ed 1400

Warranty of workmanlike service

U S—Judith Ann Liberian Transport Corp v Crawford, C A Or, 399 F 2d 924—McKinley v Skibs A/S Arizona, D C Pa, 286 F Supp 691—Stein Hall & Co, Inc v S.S Concordia Viking, C A N.Y., 494 F 2d 287

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73. U S—Reed v Bank Lines, Limited, D C La, 285 F.Supp 808—Dunn v Ove Skou Rederi A/S, D C.Pa, 45 F R D 18.

74. U.S—Old Dominion Stevedoring Corp v U.S, D C Va., 130 F.Supp 662

78. U S—U S v Bull S S. Line, C A N Y, 274 F 2d 877.

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86. U S.—Ware v. Cia De Navegacion Andes, S A, D C.Va., 180 F Supp. 939

89. U S—du Pont de Nemours Intern. S A v S S Mormacvega, D C N Y, 367 F Supp 793 affd, C A, 493 F 2d 97

Tex—Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co, Civ App, 507 S W 2d 892, err ref nó rev err

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97. U S—W E Hedger Transp Corp v United Fruit Co, C A N Y, 198 F 2d 376, cert den 73 S Ct 275, 344 U S 896, 97 L Ed 692

4. U S—Seagrave Transp Co v Eskay Coal & Fuel Co, D C N Y, 106 F Supp 687, mod on oth grds, C A, 205 F 2d 257

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8. Negligence not shown

U S—Dampskibsaktieselskabet Den Norske Afrika og Australieline v Intalco Aluminum Corp, D C Wash, 306 F Supp 170, affd, C A, 457 F 2d 889, cert den 93 S Ct 466, 409 U S 1024, 34 L Ed 2d 316

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29. U S—Skibs A/S Gylfe v Hyman-Michaels Co, C A Mich, 438 F 2d 803, cert den 92 S Ct 73, 404 U S 831, 30 L Ed 2d 61

Persons entitled to sue

U S—McDonough Const Co v H B Fowler & Co, D C La, 281 F Supp 90

Laches not shown

U S—McDonough Const Co v H B Fowler & Co, D C La, 281 F Supp 90

32. Res ipsa loquitur doctrine applicable

U S—Great Eastern Fuel Co. v Tanker Hygrade No 26, Inc, D C N Y, 196 F.Supp 342.

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51. Evidence held sufficient

(8) U S—Arrow Transp Co v Cooper Stevedoring Co, D C Ala, 184 F Supp. 666—McDonough Const Co v H B Fowler & Co, D.C La, 281 F Supp 90—Skibs A/S Gylfe v Hyman-Michaels Co, D C Mich, 304 F Supp 1204, affd, C A, 438 F 2d 803, cert den 92 S Ct 73, 404 U S 831, 30 L Ed 2d 61—Companio Prospero S A v Old Dominion Stevedoring Corp, D C Va, 309 F Supp 1082—Callanan Road Imp. Co v Cayuga Const Corp, D C.N Y, 321 F Supp. 1317, affd, C A, 437 F 2d 456

Evidence held insufficient generally

U S—American Commercial Lines, Inc v Silver Creek Coal Co, C.A Ill, 393 F.2d 178—Dampskibsaktieselskabet Den Norske Afrika og Australieline v Intalco Aluminum Corp, D C Wash, 306 F Supp 170, affd, C A, 457 F 2d 889, cert den 93 S Ct 466, 409 U S 1024, 34 L Ed 2d 316—Callanan Road Imp Co v Cayuga Const Corp, D C N Y, 321 F Supp 1317, affd, C.A, 437 F.2d 456

Tex—Maurice Pincoffs Co v Southern Stevedoring Co, Inc, 489 S.W 2d 277.

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52. Evidence held insufficient

U S—Ingram Barge Co v West Lake Quarry & Material Co, Inc, D C.Mo, 357 F Supp 624, affd, C A, 489 F 2d 760

54. Evidence held sufficient

U S—W E Hedger Transp Corp v United Fruit Co, C A N Y, 198 F 2d 376, cert. den 73 S Ct 275, 344 U S 896, 97 L Ed 692—Arrow Transp Co v Cooper Stevedoring Co., D C Ala, 184 F Supp 666—La Capria v Compagnie Maritime Belge, D C N Y, 286 F.Supp 980, affd in part, revd in part on oth grds, C A., 427 F 2d 244

Evidence held insufficient

U S—Companio Prospero S A v Old Dominion Stevedoring Corp, D C Va, 309 F Supp 1082—Ingram Barge Co v West Lake Quarry & Material Co, Inc, D C Mo, 357 F Supp 624, affd, C A, 489 F 2d 760

55. U S—Dampskibsaktieselskabet Den Norske Afrika og Australieline v Intalco Aluminum Corp, D C Wash, 306 F Supp 170, affd, C A, 457 F 2d 889, cert den 93 S Ct 466, 409 U S 1024, 34 L Ed 2d 316—Dampskibsaktieselskabet v Bellingham Stevedoring Co, C A Wash, 457 F 2d 889, cert den 93 S Ct 466, 409 U S 1024, 34 L Ed 2d 316

58. Questions for court and jury

U S—Hampton Roads Carriers, Inc v Allied Chemical Corp, C A Va, 329 F.2d 387, cert den 85 S Ct 78, 379 U S 839, 13 L Ed 2d 46

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59. Damages for loss of use

U S—Dampskibsaktieselskabet Den Norske Afrika og Australieline v Intalco Aluminum Corp, D C Wash, 306 F Supp 170, affd, C A, 457 F 2d 889, cert den 93 S Ct 466, 409 U S 1024, 34 L Ed 2d 316

Damages held not proved

U S—Ingram Barge Co v West Lake Quarry & Material Co, Inc, D C Mo, 357 F Supp 624, affd, C A, 489 F 2d 760

61. U S—Callanan Road Imp Co v Cayuga Const Corp, D C N Y, 321 F Supp 1317, affd, C.A, 437 F 2d 456

71. Rule applicable to suits on law side of federal court

U S—W E Hedger Transp Corp. v United Fruit Co, supra, n 54

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73. U S.—Pure Oil Co v. M/V Caribbean, D.C La, 235 F.Supp 299, affd, C A, 370 F 2d 121—Peterson v S S Wahcondah, D C La, 235 F Supp 698

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74. D C—States Marine Lines, Inc v. Federal Maritime Commission, 313 F 2d 906, 114 U S App D C 225, cert. den 83 S Ct 1872, 374 U.S 831, 10 L Ed 2d 1054

Relationship of bailor-bailee

U S—Pure Oil Co v M/V Caribbean, D.C.La., 235 F Supp 299, affd, C A, 370 F 2d 121—Stein Hall & Co, Inc v S.S. Concordia Viking, C A N Y, 494 F 2d 287

Carrier bears same relation to government as to private shipper

U S—U.S v S S. Claiborne, D.C.Ala, 252 F Supp 897

75. U S—Thyssen Steel Corp v S S Adonis, D C N Y, 364 F.Supp 1332

Agreement determines rights and obligations

U S.—Pure Oil Co v M/V Caribbean, D.C La, 370 F.2d 121

76. U.S—Mississippi Val Barge Line Co v. Inland Waterways Shippers Ass'n, Inc, C A Mo, 289 F 2d 374, cert. den. 82 S Ct 123, 368 U S 876, 7 L Ed 2d 77—Agrico Chemical Co v M/V Ben W Martin, C.A Miss, 664 F 2d 85, reh. den 669 F.2d 733

82. U S—Peterson v S S Wahcondah, D C La., 235 F Supp 698

"Fishyback service" is movement of highway trailers by barge.[82.5]

82.5. U S.—Atchison, T & S.F. Ry. Co v U.S., D C.Ill, 244 F Supp 955, revd on oth. grds. 87 S Ct 1608, 387 U.S. 397, 18 L Ed.2d 847, affd. 87 S.Ct 2094, 388 U S 445, 18 L.Ed.2d 1307, reh. den. 88 S Ct. 11, 12, 389 U.S. 889, 19 L Ed 2d 197

83. U S—P D Marchessini & Co (New York) v. H W Robinson Co, D C.N Y, 287 F.Supp 728—In

re Complaint and Petition of International Marine Development Corp, C A Miss, 451 F 2d 763

84. U S—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170.

"Booking"

U S—P D Marchessini & Co (New York) v H W Robinson & Co, D C N Y, 287 F Supp 728

Usual practice to have contracts in written form

U S—Atlantic Banana Co v M V "Calanca", D C N Y, 342 F Supp 447 Affd, C A, 489 F 2d 752, two cases

85. U S—Atlantic Banana Co v M V "Calanca", D C N Y, 342 F.Supp 447. Affd, C.A, 489 F 2d 752, two cases

Acceptance may be consequence of conduct

U S—General Motors Corp v Pennsylvania R Co, D C N.Y, 357 F Supp 646, affd, C A, 506 F 2d 1395, two cases.

86. Sufficient consideration

(2) Other instances

U.S.—U.S v American Trading Co of San Francisco, D.C Cal, 138 F.Supp 536.

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98. U S—U S Ore Corp v Commercial Transport Corp, D.C La, 369 F Supp 792.

3. U S.—Tenneco Oil Co v Tug Tony, D C.Tex, 324 F Supp 834

Public policy contravened

N Y.—Hellenic Lines Limited v Chemoleum Corp, 321 N Y S.2d 399, 36 A.D 2d 944, app dism 279 N.E 2d 602, 29 N Y 2d 904, 328 N Y S 2d 858

Agreement not contrary to public policy

U.S.—Fluor Western, Inc. v G & H Offshore Towing Co, C A Tex., 447 F 2d 35, cert den 92 S Ct. 959, 405 U S 922, 30 L Ed 2d 793—Baker Oil Tools, Inc v. Delta S S. Lines, Inc, D C.Tex, 387 F Supp 617, affd. C.A, 562 F 2d 938, reh den. 571 F.2d 978, and 577 F 2d 1134, two cases

4. Engagement in both contract and common carriage

U.S.—Fall River Line Pier, Inc. v. International Trading Corp of Virginia, C.A.Mass, 399 F 2d 413.

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Approval by Maritime Commission

(2) Not required for tariff.

U S.—Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc, D.C.Tex., 387 F.Supp. 617, affd C A., 562 F.2d 938, reh den. 571 F.2d 978, and 577 F.2d 1134, two cases.

8. Incorporation of Carriage of Goods by Sea Act

U.S.—Com. of Puerto Rico v Sea-Land Service, Inc, D.C Puerto Rico, 349 F.Supp. 964.

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16. U S—American Smelting & Refining Co v Navicra Andes Peruana, S A., D.C Cal., 208 F Supp 164. Affd., C.A., 327 F.2d 581.

18. U.S.—Sociedad Armadora Aristomenis Panama, S.A. v. 5,020 Long Tons of Raw Sugar, D C.Pa, 122 F.Supp 892, affd, C.A., 223 F.2d 417—Gulf Atlantic Towing Corp. v. Dickerson, Inc., C A Fla., 271 F.2d 542—Associated Metals & Minerals Corp. v. 4,000 Odd Tons of Magnesium, D.C Md, 339 F.Supp. 513

D.C.—American Union Transport, Inc. v. U.S, C.A, 257 F.2d 607, 103 U.S.App.D.C 229, cert den 79 S.Ct. 46, 358 U.S. 828, 3 L Ed.2d 67.

Contract construed

Ill.—Garcia Intern. Corp. v Cosmos Shipping Co., 262 N.E.2d 811, 129 Ill.App.2d 140

N.Y.—Luria Bros. & Co., Inc. v. Associated Metals & Minerals Corp, 343 N.Y.S.2d 152, 73 Misc 2d 937

Unconsenting party not bound

U.S.—Stein Hall & Co., Inc. v. S.S. Concordia Viking, C.A.N.Y, 494 F.2d 287.

31. Practical construction by parties

U S—St Ioannis Shipping Corp v Zidell Explorations, Inc, D C Or, 222 F Supp 299, affd, C A, 336 F 2d 194

Or—Sause Bros Ocean Towing Co, Inc v Gunderson, Inc, 510 P 2d 541, 265 Or 568

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34. U S—Mitsui & Co (U S A) v Toko Kaiun Kabushiki Kaisha, D C Tex, 342 F Supp 14

35. U S—Haroco Co v The Tai Shan, D C N Y, 111 F Supp 638, affd, C A, 218 F 2d 822

42. U S—Krawill Machinery Corp v Robert C Herd & Co, D C Md, 145 F Supp 554

45 Strict liability

U S—Sanderlin v Old Dominion Stevedoring Corp, C A Va, 385 F 2d 79, on remand, D C, 281 F Supp 1015

Courts reluctant to expand scope of warranty

U S—Central Stikstof Verkoopkanter, N V v Walsh Stevedoring, Co, C A Ala, 380 F 2d 523

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Other matters relating to the implied warranties of the shipper have been adjudicated [54.5]

54.5. U S—Luckenbach S S. Co v Coast Mfg & Supply Co, D C N Y, 185 F Supp 910

Consignee

Mere consignee cannot be held to implied warranty that goods had been properly packaged for shipment

U S—Atkins, Kroll & Co v Nedlloyd Line, D C Cal, 210 F Supp 315

61. U S—Robin Hood Flour Mills, Limited v Bahama Pearl Co, D C N Y, 318 F Supp 1286

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71. U S.—Michael v S S Thanasis, D C Cal, 311 F Supp 170

72. U S—Jefferson Chemical Co v M/T Grena, C.A Tex, 413 F 2d 864—Potash Co of Canada Ltd v M/V Raleigh, D C Canal Zone, 361 F Supp 120

73. U S.—Pacific Micronesian Lines, Inc. v New Zealand Ins Co, C A Guam, 366 F 2d 333, app after remand 397 F 2d 236—Blanchard Lumber Co v S S. Anthony II, D C N Y, 259 F Supp 857

Locus contractus as not necessarily governing

U.S.—San Rafael Compania Naviera, S A. v American Smelting & Refining Co, C A.Cal., 327 F 2d 581

75. U S.—Hellenic Lines, Limited v. Embassy of Pakistan, D.C N.Y, 307 F Supp 947, affd in part, revd. in part on oth grds, C A, 467 F 2d 1150—Michael v S S Thanasis, D C Cal, 311 F Supp 170.

76. U S—Hellenic Lines, Limited v Embassy of Pakistan, D C N Y, 307 F Supp 947, affd in part, revd in part on oth grds, C A, 467 F 2d 1150—Michael v. S S Thanasis, D C.Cal, 311 F Supp 170

77. U S—Cerro De Pasco Copper Corp v Knut Knutsen O A.S., D C N Y, 94 F Supp 60, affd, C.A, 187 F 2d 990

81. U.S.—General Motors Overseas Operation, Division of General Motors Corp. v S S Goettingen, D C N Y., 225 F.Supp. 902—Kurt Orban Co v S.S Clymenia, D.C.N Y, 318 F Supp 1387

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Other presumptions have been held applicable [86.5]

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3. U S.—Michael v S S Thanasis, D C Cal, 311 F.Supp 170

§ 108. —— Performance and Breach in General

7. U S—Hartford Acc & Indem Co v Gulf Refining Co, D C La, 127 F Supp 469, affd in part and revd in part on oth grds, C A, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52—Reden A/B Pulp v Republic Chemical Corp, D C N Y, 161 F Supp 726, affd, C A, 274 F 2d 428

8. U S—Associated Metals & Minerals Corp v 4,000 Odd Tons of Magnesium, D C Md, 339 F Supp 513

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16. U S—U S Ore Corp v Commercial Transport Corp, D C La, 369 F Supp 792

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34. U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 275 F 2d 253, on remand, D C, 207 F Supp 262, affd 315 F 2d 162

37. U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 275 F 2d 253, on remand, D C, 207 F Supp 262, affd 315 F 2d 162

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84. Sufficiency of evidence

U.S.—Hellenic Lines Limited v Gulf Oil Corp, C A N Y, 340 F 2d 398—D R Kincaid, Limited v Trans-Pacific Towing, Inc, D C Hawaii, 246 F Supp 685, revd on oth grds and remd, C A, 367 F 2d 857—United Purveyors, Inc v Motor Vessel New Yorker, D C Fla, 250 F Supp 102—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

N Y—Isbrandtsen Co v Lyncroft Grain Corp, 166 N Y S 2d 721, 8 Misc 2d 521

Prima facie case

U S—Hellenic Lines Limited v Gulf Oil Corp, C A N Y, 340 F 2d 398

85. N Y—Isbrandtsen Co v Lyncroft Grain Corp, 166 N Y S 2d 721, 8 Misc 2d 521

General rules apply as to other procedural matters.[87.5]

87.5. Parties

N Y—Isbrandtsen Co v Lyncroft Grain Corp, 166 N Y S 2d 721, 8 Misc 2d 521

Limitations

U S—States S S Co v American Smelting & Refining Co, C A Cal, 339 F 2d 66, cert den 85 S Ct 1109, 380 U S 964, 14 L Ed 2d 155

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90. U S—Gulf Atlantic Towing Corp v Dickerson, Inc, C A Fla, 271 F 2d 542—Associated Metals & Minerals Corp v 4,000 Odd Tons of Magnesium, D C Md, 339 F Supp 513

8. U S—Associated Metals & Minerals Corp v 4,000 Odd Tons of Magnesium, D C Md, 339 F Supp 513.

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21. Cal—Isbrandtsen Co v Producers Cotton Oil Co, 322 P 2d 1005, 158 C A 2d 712

25. Cal—Isbrandtsen Co v Producers Cotton Oil Co, 322 P.2d 1005, 158 C A 2d 712

Mitigation of damages. The carrier should mitigate damages by obtaining substitute cargo.[26.5]

26.5. Cal—Isbrandtsen Co v Producers Cotton Oil Co, 322 P 2d 1005, 158 C A 2d 712

Incidental expenses awarded

N.Y—Isbrandtsen Co v Lyncroft Grain Corp, 166 N Y S 2d 721, 8 Misc 2d 521

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30. US—Continental Grain Co v American Commercial Barge Line Co, C A Ill, 332 F 2d 26—E T Barwick Mills, Inc v Hellenic Lines Limited, D C Ga, 331 F Supp 161, affd, C A, 472 F 2d 1406

Tex—C.J.S. cited in Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co, Civ App, 507 S W 2d 892, 897, err ref no rev err

31. US—E T Barwick Mills, Inc v Hellenic Lines Limited, D C Ga, 331 F Supp 161, affd, C A, 472 F.2d 1406

Taking of a receipt, etc.

(2) Other matters

N Y—Chase Manhattan Bank v Nissho Pacific Corp, A D, 254 N Y S 2d 571, 22 A D 2d 215, affd 212 N E 2d 897, 16 N Y 2d 999, 265 N Y S 2d 660

Actual placement on deck not necessary

Tex—Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co, Civ App, 507 S W 2d 892, err ref no rev err

32. Effect of mate's receipt as evidence or document of title

Brower v Peabody, 13 N Y 121, 2 Abb Pr 211, 11 How Pr 492—R L Rothstein Corp v Kerr S S Co, 251 N Y S 2d 81, 21 A D 2d 463

§ 110. —— Lien of Shipper

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54. US—US v S S Lucie Schulte, D C N Y, 227 F Supp 583, revd on oth grds, C A, 343 F 2d 897

55. US—US v S S Lucie Schulte, D C N Y, 227 F Supp 583, revd on oth grds, C A, 343 F 2d 897

59. US—San Juan Trading Co v The Marmex, D C Puerto Rico, 107 F Supp 253, affd, C A, 212 F 2d 206, cert den 75 S Ct 36, 348 U S 822, 99 L Ed 648

§ 111. Bills of Lading

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70. US—General Motors Corp v The Olancho, D.C N Y, 115 F Supp 107 Affd, C A, 220 F 2d 278—Maurice Pincoffs Co v Southern Stevedoring Co, Civ App, 472 S W 2d 841, err gr.

Md—Tellez v Canton R Co, 129 A 2d 809, 212 Md 423.

71. US—Jefferson Chemical Co v M/T Grena, D.C Tex, 292 F Supp 500, affd in part, revd in part on oth grds, C A., 413 F 2d 864

N Y.—Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y S 2d 571, 22 A D.2d 215, affd 212 N E 2d 897, 16 N Y 2d 999, 265 N Y S 2d 660

Discrepancies should be noted

US—Stein Hall & Co, Inc v S S Concordia Viking, C.A N.Y, 494 F 2d 287

Negotiable instrument

U S.—Amoco Overseas Co v S T Avenger, D C N Y, 387 F Supp 589.

72. U.S.—U.S v Wessel, Duval & Co, D C N Y, 115 F Supp 678—Jones v The Flying Clipper, D C.N Y, 116 F.Supp 386

73. U.S—United Distillers of America v. The Ionian Pioneer, D.C.La., 130 F Supp 647, affd, C A, 236 F 2d 78—Michael v. S S Thanasis, D C Cal, 311 F.Supp. 170

Contract of carriage

US—Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F Supp 814, affd, C A, 480 F 2d 669

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78. US—Atlantic Banana Co v M V "Calanca", D C N Y, 342 F Supp 447 Affd, C A, 489 F 2d 752, two cases—Iligan Intern Corp v S S John Weyerhaeuser, D C N Y, 372 F Supp 859, affd, C A, 507 F 2d 68, cert den 95 S Ct 1954, 421 U S 965, 44 L.Ed 2d 452

79. US—US v Wessel, Duval & Co, D C N Y, 115 F Supp 678

85. US—C.J S cited in Bank of America Nat Trust & Sav Ass'n v Liberty Nat Bank & Trust Co of Oklahoma City, D C Okl, 116 F Supp 233, 238, affd, C A, 218 F 2d 831

86. Bill with no reference to loading on deck

US—Encyclopaedia Britannica, Inc v SS Hong Kong Producer, D C N Y, 297 F Supp 984, revd on oth grds, C A, 422 F 2d 7

87. Unclean bill of lading

US—Bank of America Nat Trust & Sav Ass'n v Liberty Nat Bank & Trust Co of Oklahoma City, D C Okl, 116 F Supp 233, affd, C A, 218 F 2d 831

88. US—Jones v The Flying Clipper, D C N Y, 116 F Supp 386

Prima facie evidence of good condition of cargo

US—US v Central Gulf S S Corp, C A La, 517 F 2d 687

N Y—Great Atlantic & Pacific Tea Co v Lloyd Brasileiro (Patrimonio Nacional), 237 N Y S 2d 764, 37 Misc 2d 1058.

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89. On demand of shipper

N Y—Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y S 2d 571, 22 A D 2d 215, affd 212 N E 2d 897, 16 N Y 2d 999, 265 N Y S 2d 660

90. US—Toho Bussan Kaisha, Limited v American President Lines, Limited, C A N Y, 265 F 2d 418, 76 A L R 2d 1344

Failure to issue or deliver held not negligence

US—Quaker Oats Co v United Fruit Co, C A La, 230 F.2d 676

Issuance or delivery after commencement of strike held proper

US—Badhwar v Colorado Fuel & Iron Co, D C N Y, 138 F Supp 595, affd, C A, 245 F 2d 903, cert den 78 S Ct 95, 355 U.S 862, 2 L Ed 2d 68

94. Issuance on completion of tally

US—Atlantic Banana Co v. M.V "Calanca", D C. N Y, 342 F Supp 447 Affd, C A, 489 F.2d 752, two cases

3. N.Y—Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y.S.2d 571, 22 A D 2d 215, affd 212 N.E 2d 897, 16 N Y 2d 999, 265 N.Y.S 2d 660

20. US—Aljassim v S S South Star, D.C N Y, 323 F Supp 918.

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34. US—International Drilling Co, N V v. M/V Dorniefs, D C Tex, 291 F.Supp 479—Tube Products of India v Steamship Rio Grande, D C.N Y, 334 F Supp 1039.

35. US—Petition of US, D C N Y, 105 F Supp 353, remd on oth grds, C A., 201 F 2d 281

Other matters relating to the liability of the owner of a chartered vessel, where the bill of lading was not signed by the master, have been adjudicated.[77.5]

37.5. Damages resulting from deviation

US—United Nations Children's Fund v S S Nordstern, D C N Y, 251 F Supp 833

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42. US—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd in part on oth grds, C A, 461 F 2d 1009—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

§ 113. —— Validity, Construction, Operation and Effect

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45. US—Mitsui & Co (U S A) v Toko Kaiun Kabushiki Kaisha, D C Tex, 342 F Supp 14

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US—A M Collins & Co v Panama R Co, Canal Zone, 197 F 2d 893, cert den 73 S Ct 168, 344 U S 875, 97 L Ed 677—Spanish Am Skin Co v The Ferngulf, C A N Y., 242 F 2d 551—Surrendra (Overseas) Private, Limited v S S Hellenic Hero, D C N Y, 213 F Supp 97, affd, C A, 324 F 2d 955—Karobi Lumber Co v. S S Norco, D C Ala, 249 F Supp 324, affd, C.A, 397 F 2d 570—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd. in part on oth grds, C A, 461 F 2d 1009

46. US—Karobi Lumber Co v S S Norco, D C Ala, 249 F Supp 324, affd, C A, 397 F 2d 570

Government bill of lading

US—US. v S S Mormacteal, D C N Y, 213 F Supp 149

47. U.S.—Zifferer v Atlantic Lines, Limited, D C Puerto Rico, 278 F.Supp. 736—International Drilling Co, N V v M/V Dorniefs, D C.Tex, 291 F Supp 479—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F.Supp. 617.

48. U.S.—F Badrena E. Hijo, Inc. v. The Rio Iguazu, D C.La., 182 F.Supp. 885

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55. Rule applied to subsequent receipt

N Y—Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y.S 2d 571, 22 A D 2d 215, affd 212 N.E 2d 897, 16 N Y 2d 999, 265 N.Y S 2d 660.

56. Not prima facie evidence

US—Miles Metal Corp. v M. S. Havjo, C.A N Y, 494 F 2d 563

62. US—Karabagui v. The Shickshinny, D.C N Y., 123 F Supp 99, affd., C.A., 227 F 2d 348—E Hubschman & Sons v. The Black Condor, D C. N Y, 130 F.Supp 320—Pannell v The American Flyer, D.C N.Y, 157 F Supp. 422, mod. on oth grds, C A, 263 F 2d 497, cert. den. 79 S.Ct. 1151, 359 U S 1013, 3 L.Ed. 1037—Import Export Steel Corp v Mississippi Valley Barge Line Co., C.A N.Y, 351 F 2d 503, reh. den 356 F.2d 109—Carle & Montanari, Inc. v American Export Isbrandtsen Lines, Inc., D.C.N Y., 275 F Supp 76, affd, C A, 386 F 2d 839, cert. den. 88 S Ct 1263, 390 U S 1013, 20 L.Ed 2d 162—Michael v S S Thanasis, D C.Cal, 311 F Supp 170—Marubeni-Iida (America), Inc. v Toko Kaiun Kabushiki Kaisha, D C.Tex., 327 F.Supp. 519—Trans-Amazonica Iquitos, S A. v. Georgia S.S Co., D.C Ga., 335 F.Supp 935

Words of general significance

US—American Cyanamid Co. v. Booth S S. Co., D.C N Y., 99 F Supp. 232, affd, C.A., 195 F.2d 529

Same rules as to government as with individual

US.—U.S v. S.S. Claiborne, D C Ala., 252 F Supp. 897

Number of separate units received from shipper

US—Standard Electrica, S A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, C.A.N.Y., 375 F.2d 943, cert. den. 88 S.Ct. 97, 389 U.S. 831, 19 L Ed 2d 89

Acceptance may be by conduct

US—General Motors Corp v Pennsylvania R Co, D C N Y, 357 F Supp 646, affd, C A, 506 F 2d 1395, two cases

63. US—Joseph L Wilmotte & Co v Cobelfret Lines, S P R L, D C Fla, 289 F Supp 601—Mitsui & Co (U S A v Toko Kaiun Kabushiki Kaisha, D C Tex, 342 F Supp 14

64. US—Feuer v Booth S S Co, C A N Y, 195 F 2d 529—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 300 F 2d 41—International Drilling Co, N V v M/V Doriefs, D C Tex, 291 F Supp 479

Arbitration

US—Amoco Overseas Co v S T Avenger, D C N Y, 387 F Supp 589

65. US—Nichimen Co v MV Farland, D C N Y, 333 F Supp 691, mod on oth grds, C A, 462 F 2d 319

66. U.S.—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

67. US—Connell Bros Co (Canada) v Sevenseas Trading & S S Co, S A, D C Cal, 111 F Supp 227, revd on oth grds, C A, 220 F 2d 511

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72. US—Hellenic Lines, Limited v Embassy of Pakistan, D.C.N Y, 307 F Supp. 947, affd in part, revd in part on oth grds, C A, 467 F 2d 1150—Hellenic Lines, Ltd v Embassy of Pakistan, C A N Y, 467 F.2d 1150

74. U.S—General Motors Corp. v S S Mormacoak, D.C.N Y, 327 F Supp. 666, affd, C A, 451 F 2d 24.

76. US—E Hubschman & Sons v. The Black Condor, D C.N Y., 130 F.Supp. 320—Leather's Best, Inc v. S S Mormaclynx, D C N Y, 313 F Supp 1373, affd. in part, revd in part on oth. grds., C A, 451 F.2d 800, on remand 346 F Supp 962

77. US—Mamiye Bros v Barber S.S Lines, Inc, D.C N.Y., 241 F.Supp 99, affd., C A, 360 F 2d 774, cert den 87 S Ct 80, 385 US 835, 17 L.Ed 2d 70—Encyclopaedia Britannica, Inc. v S S Hong Kong Producer, C A N Y, 422 F 2d 7

79. Typewritten clause held to negate implied assent to modification

U.S.—Hellenic Lines, Ltd. v. Embassy of Pakistan, C.A N Y., 467 F 2d 1150.

81. Carrier not estopped from showing damage was of preshipment origin

U S.—Tokio Marine & Fire Ins. Co v Retla S.S. Co, C.A Cal, 426 F.2d 1372.

82. U.S.—Levatino v. General Steam Nav Co, Limited, of Greece, D.C.N.Y., 170 F.Supp. 756—Luckenbach S S Co. v. Coast Mfg. & Supply Co, D.C.N.Y., 185 F Supp. 910

Pa.—Panama Canal Co v Stockard & Co., 137 A.2d 793, 391 Pa 374.

Rust clause

U.S.—Tokio Marine & Fire Ins Co v Retla S.S Co., C.A.Cal., 426 F.2d 1372.

Provision limiting recourse to courts strictly construed

U.S—Bernard Screen Printing Corp. v Meyer Line, C.A.N.Y., 464 F.2d 934 cert. den. 93 S Ct 966, 410 U.S 910 35 L.Ed.2d 272.

CIF term allocates risk of loss

U.S.—Cummins Sales & Service, Inc. v. London & Overseas Ins Co., C.A.Tex, 476 F.2d 498, reh. den. 478 F.2d 1402, cert. den 94 S.Ct. 359, 414 U.S. 1003, 38 L.Ed.2d 239.

Choice of forum clause enforced if reasonable

U.S.—Fireman's Fund American Ins Companies v Puerto Rican Forwarding Co., Inc, C.A.Puerto Rico, 492 F.2d 1294

Limiting recourse to special court not invalid

U.S.—Fireman's Fund American Ins. Companies v. Puerto Rican Forwarding Co, Inc., C.A Puerto Rico, 492 F.2d 1294.

83. Clause not rendered invalid by statute

US—Tokio Marine & Fire Ins Co v Retla S S Co, C A Cal, 426 F 2d 1372

84. US—Orient Ins Co v Flota Mercante del Estado, D C La, 102 F Supp 729, affd, C A, 198 F 2d 740

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85. US—Orient Ins Co v Flota Mercante del Estado, supra, n 84—Continex, Inc v The Flying Independent, D C N Y, 106 F Supp 319—San Juan Trading Co v The Marmex, D C Puerto Rico, 107 F Supp 253, affd, C A, 212 F 2d 206, cert den 75 S Ct 36, 348 US 822, 99 L Ed 648—Caterpillar Overseas, S A v S/S Havtroll, D C N Y, 333 F Supp 783—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

N Y—McFall v Compagnie Maritime Belge (Lloyd Royal) S A, 107 N E 2d 463, 304 N Y 314

86. US—Continex, Inc v The Flying Independent, supra, n 85—Granadaisa Foods, Inc v Compania De Navegacao Carregadores Acoreanos, D C N Y, 139 F Supp 538—E T Barwick Mills, Inc v Hellenic Lines, Limited, D C Ga, 331 F Supp 161, affd, C A, 472 F 2d 1406

Mass—Plastileather Corp v Aetna Cas & Sur Co, 280 N E 2d 402, 361 Mass 356

87. US—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

94. Particular provisions construed

US—Banco Para El Comercio Exterior De Cuba v The Ruth Ann, D C Puerto Rico, 192 F Supp 607

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97. Arbitration clause

US—Coastal States Trading, Inc v Zenith Nav S A, D C N Y, 446 F Supp 330

99. US—US v. Cia Naviera Continental, S A, D C N Y, 202 F.Supp 698

Arbitration clause

U.S—Michael v S S. Thanasis, D C Cal, 311 F Supp 170.

8. US—Spanish-American Skin Co v The M S Ferngulf, D C.N Y, 143 F Supp 345, affd, C A, 242 F 2d 551—California Packing Corp v The Empire State, D C.Cal, 180 F Supp 19, remd, C A, 310 F 2d 206—Hellenic Lines, Limited v Embassy of Pakistan, D C N Y, 307 F Supp 947, affd in part, revd in part on oth. grds, C A, 467 F 2d 1150—Leather's Best, Inc v S S Mormaclynx, C A N Y, 451 F 2d 800, on remand, 346 F Supp 962

Tex—Rhinetubes, Inc. v Norddeutscher Lloyd, Civ App., 335 S W 2d 269, err ref no rev err

Incorporation of statutory provisions

US—R L Pritchard & Co, Inc. v Steamship Hellenic Laurel, D C.N Y, 342 F Supp 388

11. Delivery receipt

US—Quaker Oats Co v United Fruit Co, C.A La, 230 F 2d 676

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16. Held not merged

U S.—Aljassim v S.S. South Star, D C N Y, 323 F.Supp 918

18. Pa—Panama Canal Co v Stockard & Co, 137 A.2d 793, 391 Pa 374

Bill of lading for ocean carriage continues to govern parties' relationship after discharge of cargo.[235]

23.5. U.S.—David Crystal, Inc v Cunard S S Co., C A.N Y., 339 F 2d 295, cert. den 85 S Ct. 1339, 1340, 380 U.S 976, 14 L Ed 2d 271.

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30. Third party beneficiary

U.S.—Dorsid Trading Co v Steamship Fletero, D C Tex., 342 F.Supp. 1

32. US—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551

33. US—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551

36. US—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345 affd, C A, 242 F 2d 551

37. Charterer signing for undisclosed principal held liable

US—The Falkefjell v Arnold Bernstein Shipping Co, C A N Y, 223 F 2d 820

42. US—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551

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49. US—S M Wolff Co v The Exima, D C N Y, 200 F Supp 809

53. US—Diethelm & Co v The Flying Trader, D C N Y, 141 F Supp 271, affd, C A, 244 F 2d 542

Estoppel inapplicable in suit by shipper

US—Portland Fish Co v States S S Co, C A Or, 510 F 2d 628

57. US—Portland Fish Co v States S S Co, C A Or, 510 F 2d 628

59. US—Mackey v US, C A N Y, 197 F 2d 241

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70. Clean bill of lading

(2) Held to create presumption that cargo was in good condition at the time of loading

US—Otis McAllister Export Corp v Grancolombiana (New York), Inc, D C La, 216 F Supp 756—Samincorp South Am Minerals & Merchandise Corp v S S Cornwall, D C Md, 240 F Supp 327—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

N Y—Greene Steel & Wire Co v F W Hartmann & Co, 299 N Y S 2d 654, 32 A D 2d 538

(3) Other matters

US—Levatino Co v S S Norefjell, D C N Y, 231 F Supp 307—Samincorp South Am. Minerals & Merchandise Corp v S S Cornwall, D C Md, 240 F Supp 327—Cummins Sales & Service, Inc v London & Overseas Ins. Co, C A Tex, 476 F 2d 498, reh den 478 F 2d 1402, cert den 94 S Ct 359, 414 U S 1003, 38 L Ed 2d 239

N Y—M Paquet & Co, Inc v Dart Containerline Co, Ltd, 343 N Y S 2d 446, 74 Misc 2d 352

71. US—N Wagman & Co v U S Lines Co, D C Pa, 104 F Supp 189—Fidelis Fisheries, Limited v Thorden, D C N Y, 142 F Supp 798—F Badrena E Hijo, Inc v The Rio Iguazu D C La, 182 F Supp 885

72. US—California Packing Corp v The P & T Voyager, D C Cal, 180 F Supp 108—Levatino Co v S S Norefjell, D C N Y, 231 F.Supp 307—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009—Portland Fish Co v States S S Co, C A Or, 510 F 2d 628

73. US—Empresa Central Mercantil De Representacoes, Ltda v Republic of the US of Brazil, C A N Y, 257 F 2d 747

74. US—Portland Fish Co. v States S S Co, C A Or, 510 F 2d 628

75. U.S.—Continex, Inc v The Flying Independent, D C N Y, 106 F Supp 319—Hecht, Levis & Kahn, Inc v S S Javanese Prince, D C N Y, 210 F Supp 236—Tupman Thurlow Co, Inc v S S Cap Castillo, C A N Y, 490 F.2d 302

As to purchaser of bill

US—Copco Steel & Engineering Co v The Alwaki, D C N Y, 131 F Supp 332—Plata Am Trading, Inc v Lancashire, 214 N Y S 2d 43, 29 Misc 2d 246

Clean bill of lading

US—Holden v S S Kendall Fish, D C La, 212 F Supp 106—Demsey & Associates, Inc v Steam-

ship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd in part on oth grds, C A, 461 F 2d 1009—Cummins Sales & Service, Inc v London & Overseas Ins Co, C A Tex, 476 F 2d 498, reh den 478 F 2d 1402, cert den 94 S Ct 359, 414 U S 1003, 38 L Ed 2d 239

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76. U S—Groban v S S Pegu, D C N Y, 331 F.Supp 883, affd, C A, 456 F 2d 685—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

81. N Y—Freedman v Norddeutscher Lloyd, 199 N.Y S 2d 709, 22 Misc 2d 397

83. Held not estoppel with respect to other matters

U S—M S. Cowen Co v American President Lines, Limited, D C Cal, 167 F Supp 838

§ 114. —— Negotiability and Transfer

88. N Y—Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y S 2d 571, 22 A D 2d 215, affd 212 N E 2d 897, 16 N Y 2d 999, 265 N.Y S 2d 660

91. U S—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551

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6. Payment of goods

U S—Freedman v The Concordia Star, D C N Y, 147 F Supp 537, revd on oth grds, C A, 250 F 2d 867

§ 115. Transhipping and Forwarding

Library References

Shipping ⇐112.

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12. Services of broker and freight forwarder distinguished

D C—American Union Transport, Inc v U S, C A, 257 F 2d 607, 103 U S App D C 229, cert den 79 S Ct 46, 358 U S 828, 3 L Ed 2d 67

25. U S—E Hubschman & Sons v The Black Condor, D C N Y, 130 F Supp 320

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29. U S—In re Complaint and Petition of International Marine Development Corp, C A Miss, 451 F 2d 763.

42. Transshipment "at ship's expense"

U S—Surrendra (Overseas) Private, Limited v S S Hellenic Hero, D C.N Y, 213 F Supp 97, affd, C A, 324 F.2d 955

§ 117. Delivery

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45. U.S—Baltimore & O R Co v U S, C A, 201 F 2d 795—David Crystal Inc v Cunard S S Co, D.C N Y., 223 F Supp 273, affd, C A, 339 F 2d 295, cert. den 85 S Ct 1339, 1340, 380 U S. 976, 14 L.Ed 2d 271

Fla—Commercial Trading Co v Coordinated Caribbean Transport, Inc, App, 178 So 2d 890

§ 118. —— Mode and Place

49. U.S.—Hellenic Lines, Limited v. Director General of India Supply Mission for and on Behalf of Union of India, C.A.N.Y, 452 F 2d 810

Discharge of goods onto lighter

U S.—Caterpillar Overseas, S.A v. S S Expeditor, C A N Y., 318 F.2d 720, cert den 84 S.Ct 347.

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65 U S—Miami Structural Iron Corp v Cie Nationale Belge De T M, C A Fla, 224 F 2d 566—Calcot, Limited v Isbrandtsen Co, C A Puerto Rico, 318 F 2d 669—David Crystal Inc v Cunard S S Co, D C N Y, 223 F Supp 273, affd, C A, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271—J Kinderman and Sons v Nippon Yusen Kaisha Lines, D C Pa, 322 F Supp 939

Tender for delivery

D C—American President Lines, Limited v Federal Maritime Bd, C A, 317 F 2d 887, 115 U S App D C 187

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81. Delivery to warehouse at agent's direction

Fla—Commercial Trading Co v Coordinated Caribbean Transport, Inc, App, 178 So 2d 890

84. U S—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 300 F 2d 41—Caterpillar Overseas, S A v S S Expeditor, C A N Y, 318 F 2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272—Levatino Co v American President Lines, Limited, C A N Y, 337 F 2d 729

85. U S—Levatino Co v American President Lines, Limited, C A N Y, 337 F 2d 729—Levatino Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd., C A, 337 F 2d 729

N Y—J M Rodriquez & Co v Moore-McCormack Lines, Inc, 329 N Y S 2d 388, 38 A D 2d 341

87. U S—J Kinderman and Sons v Nippon Yusen Kaisha Lines, D C Pa, 322 F Supp 939

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95. U S—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986

§ 119. —— To Whom Made; Misdelivery

10. U S—Zajicek v. United Fruit Co, C A Canal Zone, 459 F 2d 395

Carrier absolutely liable for misdelivery

U S—David Crystal, Inc v Cunard S.S Co., C.A N Y, 339 F 2d 295, cert. den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271

11. U S—David Crystal Inc v Cunard S S Co, D C N Y, 223 F Supp 273 Affd, C A., 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271

13. N Y—Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y S 2d 571, 22 A.D 2d 215, affd 212 N E 2d 897, 16 N Y.2d 999, 265 N Y S 2d 660

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17. No proportionment of fault

U S—David Crystal Inc v Cunard S S Co, D C N Y, 223 F Supp. 273, affd, C A, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271

Absence of negligence of shipper's broker

U S—David Crystal Inc v Cunard S S Co., D C N Y, 223 F Supp 273, affd, C.A., 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U.S 976, 14 L Ed.2d 271

Negligence of buyer's customs broker

U S—David Crystal, Inc v Cunard S.S. Co, C.A N Y, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271

Loss of cargo occasioned by presentation of forged documents is a "misdelivery" rather than a "theft".[18.5]

18.5. U S—David Crystal, Inc v Cunard S S. Co, C.A N Y, 339 F 2d 295, cert den 85 S.Ct 1339, 1340, 380 U S. 976, 14 L Ed 2d 271

§ 120. —— Failure or Refusal to Deliver

20. U S—N Wagman & Co v Bakke, D C Pa, 105 F Supp 814—Automobile Ins Co of Hartford, Conn v United Fruit Co, D C N Y, 122 F Supp 238, affd, C A, 224 F 2d 72, cert den 76 S Ct 138, 350 U S 885, 100 L Ed 780—La Territorial De Seguros, S P v Shepard S S Co, D C N Y, 124 F Supp 287—Surrendra (Overseas) Private, Limited v S S Hellenic Hero, D C N Y, 213 F Supp 97, affd, C A, 324 F 2d 955

What law governs

U S—David Crystal Inc v Cunard S S Co, D C N Y, 223 F Supp 273, affd, C A, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271

Measure of damages

N Y—J M Rodriquez & Co v Moore-McCormack Lines, Inc, 329 N Y S.2d 388, 38 A D 2d 341

21. U S—Kroll v Silver Line, Limited, D C Cal, 116 F Supp 443—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, affd, C A, 410 F 2d 1006, 133 U S App D.C 307

Strike

N.Y—J M Rodriquez & Co v Moore-McCormack Lines, Inc, 329 N Y.S 2d 388, 38 A D 2d 341

25. U S—La Territorial De Seguros, S P v Shepard S S Co, D C N Y., 124 F Supp 287

27. U.S—Hellyer v Nippon Yesen Kaisya, D C N Y, 130 F Supp 209

§ 121. —— Failure or Refusal to Receive

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30. U S—Commercio Transito Internazionale, Limited v. Lykes Bros S S. Co., C A N.Y, 243 F 2d 683

§ 122. —— Short Delivery

43. U.S—Hershey Chocolate Corp. v The Mars, D C Pa, 172 F Supp 321 affd, C A, 273 F 2d 617—American Tobacco Co v. Goulandris, D.C N Y, 173 F Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds, 306 F.2d 426—Holden v. S.S Kendall Fish, D C.La., 212 F Supp 106.

47. U S.—Dal Intern Trading Co v The Milton J. Foreman, D C N.Y., 171 F.Supp. 794.

§ 123. Deviation and Delay

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52. Mo.—Bunge Corp. v Valley Line Supply & Equipment Co, 480 S.W.2d 859

55. U S—C.J.S. cited in Sanders v Meyerstein, D C N C, 124 F Supp 77, 83.

Waiver

U S—Hellenic Lines, Ltd v. U S., C A N Y., 512 F 2d 1196

63. U.S—Atlantic Mut. Ins Co. v Poseidon Schiffahrt, D C Ill, 206 F Supp 15, affd, C.A., 313 F 2d 872, cert den 84 S.Ct 56, 375 U.S. 819, 11 L Ed.2d 53

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72. Accepting cargo after commencement of strike held not negligence

U S.—Badhwar v. Colorado Fuel & Iron Co., D.C.N.Y., 138 F.Supp 595, affd., C.A., 245 F.2d 903, cert den. 78 S.Ct 95, 355 U.S. 862, 2 L.Ed.2d 68.

Strike held not to absolve shipper who misrepresented cargo's status

D C—Page Communications Engineers, Inc v Hellenic Lines, Ltd , D C , 356 F Supp 456, affd , C A , 497 F 2d 684, 162 U S App D C 97

73. D C—Page Communications Engineers, Inc v Hellenic Lines, Ltd , D C , 356 F Supp 456, affd , C A , 497 F 2d 684, 162 U S App D C 97

82. U S—Brown & Williamson Tobacco Corp v The Anghyra, D C Va , 157 F Supp 737, affd in part and revd in part on oth grds , C A , 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102.

§ 124. Remedies of Shipper

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95. U S.—Mississippi Val Barge Line Co v Bulk Carriers, Limited, D.C.N Y , 249 F Supp 743

97. U S—Hellyer v Nippon Yesen Kaisya, D C N Y , 130 F Supp. 209

D C—Page Communications Engineers, Inc v Hellenic Lines, Ltd., D.C , 356 F Supp 456, affd , C A , 497 F 2d 684, 162 U.S App D C 97

Other rules relating to actions by shippers against carriers by water for breach of duty to transport and deliver have been adjudicated.[99.1]

99.1. Limitation of actions

U.S —Hellyer v Nippon Yesen Kaisya, D C N Y , 130 F Supp 209—Badhwar v Colorado Fuel & Iron Corp , C A.N Y , 245 F.2d 903, cert. den 78 S Ct 92, 355 U S 862, 2 L.Ed.2d 68.

Adjudication necessary

D C.—Page Communications Engineers, Inc. v Hellenic Lines, Ltd , D.C , 356 F.Supp. 456, affd., C A , 497 F.2d 684, 162 U S App.D C 97

1. Expense not proximately caused by nondelivery not recoverable

D C.—Page Communications Engineers, Inc. v Hellenic Lines, Ltd , D.C., 356 F Supp 456, affd., C A , 497 F.2d 684, 162 U.S.App D.C 97

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12. Liability in tort for damages proximately caused

D.C.—Page Communications Engineers, Inc v Hellenic Lines, Ltd., D.C , 356 F.Supp. 456, affd , C A., 497 F.2d 684, 162 U.S.App D.C. 97

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18. U.S.—Atlantic Mut. Ins. Co. v Poseidon Schiffahrt, G.m.b.H., C.A.Ill., 313 F 2d 872, cert den 84 S.Ct. 56, 375 U.S. 819, 11 L.Ed 2d 53—Santiago v. Sea-Land Service, Inc., D.C.Puerto Rico, 366 F.Supp. 1309.

§ 125. Liability of Carrier in General

Library References

Shipping ⇐120 et seq.

33. U.S.—Remington Rand, Inc v U.S., D C N.Y., 98 F.Supp. 334, affd., C.A., 202 F.2d 276—Automobile Ins. Co of Hartford, Conn v United Fruit Co., D.C.N.Y., 122 F.Supp. 238, affd., C.A., 224 F.2d 72, cert. den. 76 S.Ct. 138, 350 U S 885, 100 L.Ed. 780—Karabagui v. The Shickahinny, D.C N.Y., 123 F.Supp. 99, affd., C A., 227 F.2d 348—Freedman v. The Concordia Star, D.C.N.Y , 147 F.Supp. 537, revd. on oth. grds., C.A., 250 F.2d 867—American Tobacco Co. v. Goulandris, D.C. N.Y., 173 F.Supp. 140, affd., C.A., 281 F.2d 179, affd. in part and revd. in part on oth. grds. 306 F.2d 426—Holden v. S.S. Kendall Fish, D.C.La , 212 F.Supp. 106—Caterpillar Overseas, S.A v S.S Expeditor, C.A.N.Y., 318 F.2d 720, cert. den. 84 S.Ct. 347, 375 U.S. 942, 11 L.Ed.2d 272—Gesellschaft Fur Getreidenhandel Ag. v. SS Texas, D.C La., 318 F.Supp. 599—Asbestos Corp. Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y , 345 F Supp 814, affd , C A , 480 F 2d 669

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc , D C , 284 F Supp 34 Affd , C A , 410 F 2d 1006, 133 U S App D C 307

N Y—Teneria El Popo v Home Ins Co , 136 N Y S 2d 574, 207 Misc 84

Tex —Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co , Civ App , 507 S W 2d 892, err ref no rev err

Liability transcends liability as bailee

N Y—Joseph Resnick Co v Nippon Yusen Kaisha, 241 N Y S 2d 134, 39 Misc 2d 513

Contamination

U S—Naphtha Solvents Co v Esso Standard Oil Co , D C La , 221 F Supp 796

What law governs

N Y—Joseph Resnick Co v Nippon Yusen Kaisha, 241 N Y S 2d 134, 39 Misc 2d 513

Impending strike

U S—British West Indies Produce Inc v S/S Atlantic Clipper, D C N Y , 353 F Supp 548

Unseaworthiness claim existing against ship

U S—Pryor v American President Lines, C A Md , 520 F 2d 974, cert den 96 S Ct. 787, 423 U S 1055, 46 L Ed 2d 644

Goods stolen by employees of stevedore

U S—Travelers Indem Co v M S. Kiso Maru, D C N Y , 471 F Supp 898

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34. U S—United Distillers of America v The Ionian Pioneer, D C La , 130 F Supp 647, affd , C A , 236 F 2d 78

N Y.—Stein Hall & Co v Sealand Dock & Terminal Corp , 149 N.Y S 2d 537, 2 Misc 2d 727

35. U S—U S v Mississippi Val Barge Line Co , C.A Mo., 285 F 2d 381

Liability without fault

U S—Schroeder Bros , Inc. v The Saturnia, C A N Y , 226 F.2d 147

36. U.S —United Distillers of America v The Ionian Pioneer, D C.La., 130 F.Supp 647, affd , C A , 236 F 2d 78

37. U S—Sociedad Armadora Aristomenis Panama, S A. v. 5,020 Long Tons of Raw Sugar, D.C Pa , 122 F Supp 892, affd , C A., 223 F 2d 417—Alaska Native Industries Co-op. Ass'n v U.S , D C Wash , 206 F Supp. 767—Compania Maritima del Nervion v Amerop Commodities Corp , D C La , 237 F Supp 73—American Independent Oil Co v M. S Alkaid, D C.N.Y., 289 F Supp. 329—Sears, Roebuck & Co v American President Lines, Limited, D C.Cal , 345 F Supp 395

N.Y —Luria Bros & Co , Inc v. Associated Metals & Minerals Corp., 343 N Y S 2d 152, 73 Misc 2d 937

38. U S —Schroeder Bros , Inc v The Saturnia, C.A. N Y , 226 F 2d 147.

N Y.—Greene Steel & Wire Co v. F W Hartmann & Co , 299 N Y.S 2d 654, 32 A D 2d 538

41. U.S —Thorne, Neale & Co v Reading Co , C C A.N.Y., 87 F 2d 694, cert den 58 S Ct 10, 302 U.S. 690, 82 L Ed. 333—Bouchard Transp Co v Reading Co., 87 F.2d 694, cert den. 58 S.Ct 10, 302 U S. 690, 82 L.Ed. 533—Copco Steel & Engineering Co v. The Prins Frederik Hendrik, D C Mich., 129 F.Supp. 469—Etablissements Edouard Materne, S.A v. The Leerdam, D C N.Y , 143 F Supp. 367—Allied Chemical Corp v. Gulf Atlantic Towing Corp , D.C.Va , 244 F.Supp 2

N.Y —Luria Bros. & Co , Inc v Associated Metals & Minerals Corp , 343 N Y S 2d 152, 73 Misc 2d 937

Carrier held not negligent

(3) Other matters.

U.S.—A/S J. Ludwig Mowinckels Rederi v Accinanto, Limited, C.A.Md., 199 F 2d 134, cert. den 73 S Ct 1129, 345 U.S. 992, 97 L.Ed. 1400—Quaker Oats Co. v. United Fruit Co , C A La., 230 F 2d 676.

43. U S—Dow Chemical Co v S S Giovanella D'Amico, D C N Y , 297 F Supp 699

44. Goods susceptible to damage by sea water

U S—Hecht, Levis & Kahn, Inc v S S Javanese Prince, D C N Y , 210 F Supp 236

46. U S—Accinanto, Limited v Cosmopolitan Shipping Co , D C Md , 99 F Supp 261, affd in part, revd on oth grds in part, C A , 199 F 2d 134, cert den 73 S Ct 1129, 345 U S 992, 97 L Ed 1400—Atlantic Banana Co v M V "Calanca", D C N Y , 342 F Supp 447, affd , C A , 489 F 2d 752, and 489 F 2d 752

47. U S —Remington Rand, Inc v American Export Lines, D C N Y , 132 F Supp 129

N Y —McFall v Compagnie Maritime Belge (Lloyd Royal) S A , 107 N E 2d 463, 304 N Y 314

Matters irrelevant to general knowledge

U S —Accinanto, Limited v Cosmopolitan Shipping Co , supra, n 46

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48. U S —McMahan v The Panamolga, D C Md , 127 F Supp 659—Verbeeck v Black Diamond S S Corp , C A N Y , 269 F 2d 68, cert den 80 S Ct 374, two cases, 361 U S 934, 4 L Ed 2d 355—Searoad Shipping Co v E I duPont de Nemours & Co , C A Fla , 361 F 2d 833, cert den 87 S Ct 511, 385 U S 973, 17 L Ed 2d 436

Duty to inspect

U S—U S v Central Gulf S S Corp , C A La , 517 F 2d 687

56. U S —F Badrena E Hijo, Inc v The Rio Iguazu, D C La , 182 F Supp 885—du Pont de Nemours Intern S A v S S Mormacvega, D C N Y , 367 F Supp 793, affd , C A., 493 F 2d 97

Contributory negligence not shown

U S —Richard Const Co v Monongahela & Ohio Dredging Co , D C Pa , 284 F Supp 290, mod on oth grds , C A , 407 F 2d 1170

Assumption of risk not shown

U S —Richard Const Co v Monongahela & Ohio Dredging Co , D C Pa , 284 F Supp 290, mod on oth grds , C A , 407 F 2d 1170

57. Owner held not negligent

U S —American Independent Oil Co v M S Alkaid, D C N Y , 289 F Supp 329

58. U S —Hecht, Levis & Kahn, Inc v Isthmian S S Co , D C N Y , 149 F Supp 373—F Badrena E Hijo, Inc v The Rio Iguazu, D C La , 182 F Supp 885—Pan Am Trade Development Corp v M/V Helga Howaldt, D C Fla., 257 F Supp 721—Demsey & Associates, Inc v Steamship Sea Star, C A N Y , 461 F 2d 1009

60. N Y —McFall v Compagnie Maritime Belge (Lloyd Royal) S A , 107 N E 2d 463, 304 N Y 314

61. U S —New York Cent R Co v New York, N H & H R Co , C A N Y , 275 F 2d 865

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69. U S—J Howard Smith, Inc v S S Maranon, C A N Y , 501 F 2d 1275, cert. den 95 S Ct 1399, 420 U.S 975, 43 L Ed 2d 655

71. U S —Molinos de Puerto Rico, Inc v Sheridan Towing Co , D C.Puerto Rico, 62 F R D 172

73. Tex —Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co , Civ App , 507 S W 2d 892, err ref no rev err

76. U S —Spanish-American Skin Co v. The M S Ferngulf, D C.N Y , 143 F Supp 345, affd , C A , 242 F 2d 551

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81. U S.—McMahan v The Panamolga, D C Md , 127 F Supp 659

Tex —Jugoslavenska Oceanska Plovidba v Gulf Atlantic Warehouse Co , Civ App , 507 S W 2d 892, err ref no rev. err

88. U S —Mamiye Bros. v. Barber S S Lines, Inc , D.C.N Y , 241 F Supp 99 Affd , C A , 360 F 2d

774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70

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7. N Y—Joseph Resnick Co v Nippon Yusen Kaisha, 241 N Y S 2d 134, 39 Misc 2d 513

8. U S—Levatino Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd, C A, 337 F 2d 729—Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99, affd, C A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—British West Indies Produce Inc v S/S Atlantic Clipper, D C N Y, 353 F Supp 548

9. U S—Diethelm & Co v The Flying Trader, D C N Y, 141 F Supp 271, affd, C A, 244 F 2d 542

Heavy seas to be expected

U S—New Rotterdam Ins Co v S S Loppersum, D C N Y, 215 F Supp 563

19. U S—Lekas & Drivas, Inc v Goulandris, C A N Y, 306 F 2d 426

§ 126. Statutory Exemptions from Liability

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22. Liability as insurer, etc

U S.—Accinanto, Limited v Cosmopolitan Shipping Co, D C Md, 99 F Supp 261, affd in part, revd on oth grds in part, C A, 199 F 2d 134, cert den 73 S Ct 1129, 345 U S 992, 97 L Ed 1400

24. Prima facie evidence

U S—Tessler Bros (B C) Ltd v Italpacific Line, C A Cal, 494 F 2d 438

38. U S—U S v Atlantic Mut Ins Co, N Y, 72 S Ct 666, 343 U S 236, 96 L Ed 907—Jefferson Chemical Co v M/T Grena, D C Tex, 292 F Supp 500, affd in part, revd in part on oth grds, C A, 413 F 2d 864—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

Exemption not personal

U S—A M Collins & Co v Panama R Co, C A Canal Zone, 197 F 2d 893, cert den 73 S Ct 168, 344 U S 875, 97 L Ed 677

Statute applicable where part of vessel chartered

U S—Pacific Vegetable Oil Corp v M/S Norse Commander, D C Tex, 264 F Supp 625

Act held applicable to charterer as carrier

U S—Joseph L Wilmotte & Co v Cobelfret Lines, S P R L, D C Fla, 289 F Supp. 601

Liability limitation of act held inapplicable

D C—Page Communications Engineers, Inc v Hellenic Lines, Ltd, D C, 356 F Supp 456, affd, C A, 497 F 2d 684, 162 U S App D C 97

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39. U S—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551—Owens-Illinois Glass Co v American Coastal Lines, Inc, D C N Y, 222 F Supp 923

Not purpose to unduly limit liability for just claims

U S—Hartford Fire Ins Co v Pacific Far East Line, Inc., C A Cal, 491 F 2d 960, cert den 95 S Ct 134, 419 U S 873, 42 L.Ed 2d 112

40. U.S.—Serrano v U S Lines Co, D.C N Y, 238 F Supp 383

Other statements of purpose

U S—Morrisey v S S A & J Faith, D C.Ohio, 252 F Supp 54.—Standard Electrica, S A v Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, C.A N.Y, 175 F 2d 943, cert den 88 S Ct 97, 189 U S 831, 19 L Ed 2d 89—Joseph L Wilmotte & Co v. Cobelfret Lines, S P.R L, D C Fla, 289 F Supp 601 - Jefferson Chemical Co v M/T Grena, D C Tex, 292 F Supp 500, affd in part, revd in part on oth grds, C A, 413 F 2d 864—Encyclopaedia Britannica, Inc v S S Hong Kong Producer, C A N Y, 422 F 2d 7—Leather's Best, Inc v S S Mormaclynx, D C N Y, 313 F Supp 1373, affd in part, revd in part on oth grds, C A, 451 F 2d 800, on remand 346 F Supp 962

Shipper's knowledge of charter

U S—Joseph L Wilmotte & Co v Cobelfret Lines, S P R L, D C Fla, 289 F Supp 601

41. U S—Robert C Herd & Co v Krawill Machinery Corp, Md, 79 S Ct 766, 359 U S 297, 3 L Ed 2d 820—Encyclopaedia Britannica, Inc v S S Hong Kong Producer, C A N Y, 422 F 2d 7

42. U S—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551—Inter-American Foods, Inc v Coordinated Caribbean Transport, Inc, D C Fla, 313 F Supp 1334

One of the purposes of the Carriage of Goods by Sea Act is to provide a prima facie description of the goods not merely as between the shipper and the carrier, but also for the benefit of any third party relying on the bill of lading.[43.5]

43.5. U S—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551

46. U S—Horn v Ca de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

47 U S—Wilbur-Ellis Co v M/V Captayannis, D C Or, 306 F Supp 866, affd, C A, 451 F 2d 973, cert den 92 S Ct 962, 405 U S 923, 30 L Ed 2d 794

50. U S—Du Pont de Nemours Intern S A v S S Mormacvega, C A N Y, 497 F 2d 97

Act held applicable both of its own force and by reference

U S—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

51. U S—Petition of Isbrandtsen Co, C A N Y, 201 F 2d 281—Empacadora Puertorriquena De Carnes, Inc v Alterman Transport Line, Inc, D C Puerto Rico, 303 F Supp 474—Magnum Marine v Kenosha Auto Transport Corp, C A Fla, 481 F 2d 933, reh den 481 F 2d 1403, three cases.

Lighters used for harbor transportation not included

U S—Remington Rand, Inc. v American Export Lines, D.C N Y, 132 F Supp 129—Isthmian S S Co v California Spray-Chemical Corp, C A Cal., 290 F 2d 486, mod on oth. grds 330 F 2d 41—Caterpillar Overseas, S.A. v S S Expeditor, D C.N Y, 210 F Supp 478, revd. on oth grds, C A, 318 F.2d 720, cert den 84 S Ct. 347, 375 U S 942, 11 L Ed 2d 272

52. U S—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F Supp. 857—Empacadora Puertorriquena De Carnes, Inc v Alterman Transport Line, Inc, D C.Puerto Rico, 303 F.Supp 474—General Motors Corp v S S Mormacoak, D C N Y, 327 F Supp. 666, affd, C.A, 451 F.2d 24

Provision for carriage on deck at carrier's option insufficient

U S—Encyclopaedia Britannica, Inc v S S. Hong Kong Producer, C A N Y, 422 F 2d 7

56. Cal.—Aspen Pictures, Inc v Oceanic S S. Co, 306 P 2d 933, 148 C A 2d 238, cert den 77 S.Ct 1381, 354 U S 926, 1 L Ed 2d 1436

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There have been adjudications as to what constitutes a freight unit to which the limitation of liability applies.[57.5]

57.5. Cardboard carton rather than sealed trailer

U S—Inter-American Foods, Inc v Co-ordinated Caribbean Transport, Inc, D C Fla, 313 F Supp 1334

Individual bales rather than sealed container in which bales shipped

U S—Leather's Best, Inc v S S Mormaclynx, D C N Y, 313 F Supp 1373, affd in part, revd in part on oth grds, C A, 451 F 2d 800, on remand 346 F Supp 962

What constitutes a "package"

U S—Luddhese v Malabe Shipping Co, Inc, D C Puerto Rico, 351 F Supp 588—Hartford Fire Ins Co v Pacific Far East Line, Inc, C A Cal, 491 F 2d 960, cert den 95 S Ct 134, 419 U S 873, 42 L Ed 2d 112

58. U S—Zifferer v Atlantic Lines, Limited, D C Puerto Rico, 278 F Supp 736—Eutectic Corp v M/V Gudmundra, D C N Y, 367 F Supp 681—De Laval Turbine, Inc v West India Industries, Inc, C A Virgin Islands, 502 F 2d 259

N Y—David Crystal, Inc v Cunard S S. Co, D C N Y, 223 F Supp 273 Affd, C A, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271

Actual sea transit required

U S—Remington Rand, Inc v American Export Lines, D C N Y, 132 F.Supp 129

What constitutes "proper delivery"

U S—Consolidated Cork Corp v Jugoslavenska Linijska Plovidba, D C N Y, 318 F.Supp 1209

The Carriage of Goods by Sea Act may continue to apply after the cargo has been lifted off the ship and has been deposited on the pier.[58.5]

58.5. Prior to normal time for consignee to pick up cargo

U S—Leather's Best, Inc v S S Mormaclynx, D C N Y., 313 F Supp 1373, affd. in part, revd in part on oth grds., C A, 451 F 2d 800, on remand 346 F Supp 962

59. U S—Remington Rand, Inc v American Export Lines, D C N Y, 132 F Supp 129—Krawill Machinery Corp v Robert C Herd & Co, D C.Md, 145 F Supp. 554

60. U S—Zifferer v. Atlantic Lines, Limited, D C Puerto Rico, 278 F.Supp 736—Marubeni-Iida (America), Inc. v Toko Kaiun Kabushiki Kaisha, D.C Tex, 327 F.Supp. 519.

Rule held same although no bill of lading issued

U S.—Krawill Machinery Corp v. Robert C. Herd & Co, D C Md, 145 F Supp. 554.

61. Cargo held not discharged while being unloaded onto lighter

U S.—Hoegh Lines v. Green Truck Sales, Inc, C.A Cal, 298 F 2d 240, cert den. 83 S.Ct 31, 371 U S 817, 9 L Ed 2d 58.

§ 127. —— In Case of Seaworthiness of Vessel or Exercise of Diligence with Respect Thereto in General

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73. U.S—Isthmian S.S. Co v California Spray-Chemical Corp, C A Cal, 300 F.2d 41.

74. U S.—Toho Bussan Kaisha, Limited v. American President Lines, Limited, D C N Y, 155 F.Supp. 886, affd., C.A., 265 F 2d 418, 76 A.L R.2d 1344.

77. U.S—River Terminals Corp v. Southwestern Sugar & Molasses Co., C.A.La., 253 F.2d 922, remd. 79 S Ct. 1210, 360 U.S 411, 3 L.Ed.2d 1334

78. Statute construed

US—Matter of Grace Line, Inc, D C N Y, 397 F Supp 1258, affirmed 517 F 2d 404

79. US—Isbrandtsen Co v Federal Ins Co, D C N Y, 113 F Supp 357, affd, C A, 205 F 2d 679, cert den 74 S Ct 106, 346 U S 866, 98 L Ed 377—Mahan v The Panamolga, D C Md, 127 F Supp 659—United Distillers of America v The Ionian Pioneer, D C La, 130 F Supp 647, affd, C A, 236 F 2d 78

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88. Departure from moorings in complete readiness for sailing required

US.—Zander & Co. v. Mississippi Shipping Co, D C La, 171 F Supp 184, revd on oth grds, C A, 270 F 2d 345, app dism. 80 S Ct 212, 361 U S 115, 4 L Ed 2d 148, 238, conf to, C.A, 273 F 2d 618, recalled in part 273 F 2d 618.

89. For particular cargo, voyage begins when vessel departs from port where such cargo is taken aboard

U.S.—Zander & Co v Mississippi Shipping Co, D C La, 171 F.Supp 184, revd on oth grds, C A, 270 F.2d 345, app dism 80 S Ct. 212, 361 U S 115, 4 L Ed 2d 148, 238, conf to, C.A, 273 F 2d 618, recalled in part 273 F.2d 618

91. US—Standard Oil Co (N J.) v Anglo-Mexican Petroleum Corp, D C N Y, 112 F Supp 630—Isbrandtsen Co. v. Federal Ins Co., D.C.N.Y, 113 F.Supp. 357, affd., C A, 205 F.2d 679, cert den 74 S.Ct. 106, 346 U S. 866, 98 L Ed. 377.

92. U S.—Union Carbide & Carbon Corp v The Walter Raleigh, D C N Y, 109 F.Supp 781, affd, C.A, 200 F 2d 908—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den. 89 S Ct. 1272, 394 U S. 943, 22 L Ed 2d 477—Atlantic Banana Co. v M.V "Calanca", D C N Y., 342 F.Supp. 447, affd, C A., 489 F.2d 752, and 489 F 2d 752

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93. U S—Union Carbide & Carbon Corp. v The Walter Raleigh, supra, n 92.

94. U.S.—Standard Oil Co (N.J.) v. Anglo-Mexican Petroleum Corp., supra, n. 91.

1. U.S—Commercial Transp. Corp v. Martin Oil Service, Inc., C.A.Ill., 374 F.2d 813—Demsey & Associates, Inc. v. Steamship Sea Star, D C.N Y., 321 F.Supp 663, affd. in part, revd. in part on oth. grds., C.A, 461 F.2d 1009.

2. U S—Federazione Italiana Dei Corsorzi Agrari v Mandask Compania De Vapores, S A., C.A.N.Y, 388 F.2d 434, cert den 89 S.Ct. 92, 393 U.S. 828, 21 L.Ed.2d 99.

3. U.S.—Hartford Acc & Indem. Co. v Gulf Refining Co., C.A.La., 230 F.2d 346, cert. den 77 S.Ct. 49, 352 U.S 832, 1 L Ed.2d 52.

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9. U.S.—Federazione Italiana Dei Corsorzi Agrari v Mandask Compania De Vapores, S.A, C.A N Y, 388 F.2d 434, cert. den 89 S.Ct. 92, 393 U.S 828, 21 L.Ed.2d 99—California & Hawaiian Sugar Refining Corp. v. Winco Tankers, Inc., D.C.La, 278 F.Supp. 648.

17. U.S.—Commerce Oil Corp. v. Dixie Carriers, Inc., C.A.La., 252 F.2d 386.

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19. U.S.—Alaska Native Industries Co-op. Ass'n v. U.S., D.C.Wash, 206 F.Supp. 767.

21. Ship held unseaworthy

(4) U.S.—Morrisey v. S.S A. & J. Faith, D.C.Ohio, 252 F.Supp. 54.

Due diligence held not properly exercised

(7) U.S.—California & Hawaiian Sugar Refining Corp. v. Winco Tankers, Inc., D.C.La., 278 F.Supp 648.

22. U S—California Packing Corp v The Empire State, D C Cal, 180 F Supp 19, remd, C A, 310 F 2d 206

26 U S—California & Hawaiian Sugar Refining Corp v Winco Tankers, Inc, D C La, 278 F Supp 648

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36. U S—Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99 Affd, C A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70

Cal—Aspen Pictures, Inc v Oceanic S S Co, 306 P 2d 933, 148 C A 2d 238, cert den, 77 S Ct 1381, 354 U S 926, 1 L Ed 2d 1436

40. U S—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 290 F 2d 486, mod on oth grds 300 F 2d 41—Caterpillar Overseas, S A v S S Expeditor, D C N Y, 210 F Supp 478, revd, on oth grds, C A, 318 F 2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272—Caterpillar Overseas, S A v S S Expeditor, C A N Y, 318 F 2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272—Mamive Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99, affd, C A., 360 F 2d 774 Cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—Zifferer v Atlantic Lines, Limited, D C Puerto Rico, 278 F Supp 736—Leather's Best, Inc v S S Mormaclynx, D C N Y, 313 F Supp 1373, affd in part, revd in part on oth grds, C.A, 451 F 2d 800, on remand 346 F Supp 962—J Kinderman and Sons v Nippon Yusen Kaisha Lines, D C Pa, 322 F Supp 939

It has been stated that the Harter Act is the law applicable to the period from receipt of goods to the time of actual loading.[40.5]

40.5. U S—Zifferer v Atlantic Lines, Limited, D C Puerto Rico, 278 F Supp 736

42. U S.—Commercial Transp Corp v Martin Oil Service, Inc, C A Ill, 374 F 2d 813—In re Marine Sulphur Queen, C A N Y, 460 F.2d 89, cert den 93 S Ct. 318, 326, 409 U.S 982, 34 L.Ed 2d 246

Harter Act not self-executing

U S—Brown & Root, Inc v American Home Assur Co, C A.Tex., 353 F 2d 113, cert den 86 S Ct 1465, 384 U S. 943, 16 L Ed.2d 541

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54. U S—Commerce Oil Corp v The DXE-78, D C La, 156 F Supp. 256, affd, C A, 252 F 2d 386

59. U S—Commercial Transp Corp v Martin Oil Service, Inc, C A Ill, 374 F.2d 813

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66. Not extended to stevedores

U S.—Krawill Machinery Corp v Robert C Herd & Co, D.C Md, 145 F Supp 554

73. Liability for damage actually caused

U.S—St Ioannis Shipping Corp v Zidell Explorations, Inc, D C Or, 222 F.Supp 299, affd., C A, 336 F.2d 194

Repudiation of contract

U S.—Iligan Intern, Corp. v S S John Weyerhaeuser, D C.N Y., 372 F Supp 859, affd, C A, 507 F.2d 68, cert den. 95 S.Ct. 1954, 421 U.S 965, 44 L Ed.2d 452

§ 128. —— Causes of Loss or Damage Within Exemption

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80. U.S.—Petition of U.S., D C N.Y., 105 F Supp 353, remd. on oth grds, C.A., 201 F.2d 281—Pannell v. The American Flyer, D.C.N.Y., 157 F.Supp. 422, mod on oth. grds, C.A, 263 F 2d 497, cert den 79 S.Ct. 1151, 359 U.S 1013, 3 L Ed 2d 1037—Copco Steel & Engineering Co v The Prins Willen Van Oranje, D C Mich, 159 F Supp 79—Serrano v U S Lines Co, D C N Y, 238 F Supp 383—United Purveyors, Inc v Motor Vessel New Yorker, D C Fla, 250 F Supp 102—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302

Insufficiency of packing

(2) Other cases—Copco Steel & Engineering Co v The Prins Frederik Hendrik, D C Mich, 129 F Supp 469—Insurance Co of North America v S S Flying Trader, D C N Y, 306 F Supp 221

81. U S—Daido Line v Thomas P Gonzalez Corp, C A Cal, 299 F 2d 669—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F Supp 857

Particular acts held not negligence under strike exception

U S—Badhwar v Colorado Fuel & Iron Corp, D C N Y, 138 F Supp 595, affd, C A, 245 F 2d 903, cert den 78 S Ct 95, 355 U S 862, 2 L Ed 2d 68

82. U S—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763—United Purveyors, Inc v Motor Vessel New Yorker, D C Fla, 250 F Supp 102—Jefferson Chemical Co v M/T Grena, D C Tex, 292 F Supp 500, affd in part, revd in part on oth grds, C A, 413 F 2d 864

83. U S—Toho Bussan Kaisha, Limited v American President Lines, Limited, D C N Y, 155 F Supp 886, affd, C A, 265 F 2d 418, 76 A L R 2d 1344—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963

84. Duty of care despite strike

U S—U S v Lykes Bros S S Co, Inc, C A Tex, 511 F 2d 218

85. U S—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

87 U S—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

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91. U S—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, D C N Y, 149 F Supp 122, affd, C A, 253 F 2d 785—National Sugar Refining Co v Motorship Las Villas, D C La, 225 F Supp 686—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477—Sears, Roebuck & Co v American President Lines, Limited, D C Cal, 345 F Supp 395

92 U S—Peter Paul, Inc v The Christer Salen, D C N Y, 152 F Supp 410, affd, C A, 258 F 2d 901, cert den 79 S.Ct 586, 359 U S 910, 3 L Ed 2d 574—Federazione Italiana dei Consorzi Agrari v Mandask Compania de Vapores, S.A, C A N Y, 342 F 2d 215—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302

Ship held unseaworthy

(5) Other cases

US—R T Jones Lumber Co v. Roen S S Co, D C N Y, 158 F Supp 304 Affd, C A, 270 F 2d 456—Petition of Waterman S S Corp, D C Cal, 265 F Supp. 595, affd, C A, 414 F 2d 724.

93. U.S—Zander & Co v Mississippi Shipping Co, D.C La., 171 F Supp 184, revd on oth grds, C A, 270 F 2d 345, app dism 80 S Ct 212, 361 U.S 115, 4 L Ed 2d 148, 238, conf to, C A., 273 F.2d 618, recalled in part 273 F 2d 618—Morrisey v S S.A. & J Faith, D C Ohio, 252 F Supp 54—Petition of Waterman S.S Corp, D C Cal, 265 F Supp. 595, affd, C A., 414 F 2d 724

94. Standards or requirements

U S—Union Carbide & Carbon Corp. v The Walter Raleigh, supra, n 92

Defect corrected on spot does not render ship unseaworthy

U.S.—Union Carbide & Carbon Corp. v The Walter Raleigh, supra, n 92

96. US—Zander & Co v Mississippi Shipping Co, D C La, 171 F Supp 184, revd on oth grds, C A, 270 F 2d 345, app dism 80 S Ct 212, 361 U S 115, 4 L Ed 2d 148, 238, conf to, C A, 273 F 2d 618, recalled in part 273 F 2d 618—Sears, Roebuck & Co v American President Lines, Limited, D C Cal, 345 F Supp 395

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1. US—Standard Oil Co (N J) v Anglo-Mexican Petroleum Corp, D C N Y, 112 F Supp 630

2. US—Standard Oil Co (N J) v Anglo-Mexican Petroleum Corp, supra, n 1

Acts held not to constitute due diligence

US—Remington Rand, Inc v American Export Lines, D C N Y, 132 F Supp 129—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part on oth grds, 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99

Requirements of due diligence held satisfied

US—National Sugar Refining Co v Motorship Las Villas, D C La, 225 F Supp 686

4. US—General Motors Corp v The Olancho, D C N Y, 115 F Supp 107 Affd, C A, 220 F 2d 278

5. US—Standard Oil Co (N J) v Anglo-Mexican Petroleum Corp, supra, n 1—States S S Co v U S, C A Or, 259 F 2d 458, cert den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, reh den 79 S Ct 579, 359 U S 921, 3 L Ed 2d 583—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part on oth grds, 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99

Loading of dangerous cargo

(2) However, since the publication of Corpus Juris Secundum Accinanto, Limited v Cosmopolitan Shipping Co, D C Md, 99 F Supp 261 has been reversed—A/S J Ludwig Mowinckels Rederi v Accinanto, Limited, C A Md, 199 F 2d 134, cert den. 73 S Ct 1129, 345 U S 992, 97 L Ed 1400

9. US—Union Carbide & Carbon Corp v The Walter Raleigh, supra, n 5—Standard Oil Co (N J) v Anglo-Mexican Petroleum Corp, D C N Y, 112 F Supp 630—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302

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18. U.S—General Foods Corp, Maxwell House Division v The Mormacsurf, C A N Y, 276 F 2d 722, cert den 81 S Ct 58, 364 U S 822, 5 L Ed 2d 52—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert. den 84 S Ct 1222, 377 U S 924, 12 L.Ed 2d 216—John Penny & Sons, Limited v M/V Swivel, D.C Mass., 266 F Supp 302—Wilbur-Ellis Co v M/V Captayannis "S", C A Or, 451 F.2d 973, cert den 92 S Ct 962, 405 U S 923, 30 L Ed 2d 794

Statute inapplicable to lighters

U.S.—Isthmian S S Co v California Spray-Chemical Corp., C A Cal, 300 F 2d 41

20. U.S—Hershey Chocolate Corp. v. The Mars, D C Pa, 172 F Supp 321, affd., C A, 273 F 2d 617—American Metal Co v M/V Belleville, D C N.Y., 284 F.Supp 1002.

Exemption now unconditional

US—American Tobacco Co. v Goulandris, D C N Y, 173 F Supp. 140, affd., C A, 281 F.2d 179, affd in part and revd. in part on oth. grds 306 F 2d 426—Firestone Synthetic Fibers Co—Division of Firestone Tire & Rubber Co. v. M/S Black Heron, C.A N.Y., 324 F 2d 835.

21. U S.—American Tobacco Co v Goulandris, D C N Y., 173 F Supp 140, affd, C A., 281 F.2d 179, affd. in part and revd in part on oth grds. 306 F 2d 426—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329

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29. **Seaworthiness irrelevant**

US—Sarantex Shipping Co v Wilbur-Ellis Co, D C Or, 391 F Supp 884

31. **No general congressional policy of liability in all cases exists**

US—Southwestern Sugar & Molasses Co v River Terminals Corp, La, 79 S Ct 1210, 360 U S 411, 3 L Ed 2d 1334

33 US—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426

38. US—Hartford Acc & Indem Co v Gulf Refining Co, D C La, 127 F Supp 469, affd in part and revd in part on oth grds, C A, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52

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56. US—Leon Bernstein Co v Wilhelmsen, C A La, 232 F 2d 771—Commerce Oil Corp v Dixie Carriers, Inc, C A La, 252 F 2d 386—Commerce Oil Corp v The DXE-78, D C La, 156 F Supp 256, affd, C A, 252 F 2d 386

59. US—Asbestos Corp Ltd v Compagnie De Navigation Fraissinet et Cyprien Fabre, C A N Y, 480 F 2d 669

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73. US—Presidents of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216

76. US—American Independent Oil Co. v M. S Alkaid, D C N Y, 289 F Supp. 329

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79. US—Blanchard Lumber Co v S S Anthony II, D.C N Y, 259 F Supp 857

80. **Carrier liable if loss avoidable by skill and diligence**

US—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

81. US—Mamiye Bros v Barber S S Lines, Inc, D C N.Y, 241 F Supp 99. Affd, C.A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70

82. US—Mamiye Bros v Barber S.S Lines, Inc, D C N.Y, 241 F.Supp 99 Affd, C.A, 360 F 2d 774, cert. den 87 S.Ct. 80, 385 U.S 835, 17 L.Ed 2d 70

85. US—New Rotterdam Ins Co v S S Loppersum, D C N.Y, 215 F.Supp 563.

86. US—Mamiye Bros v Barber S S Lines, Inc, D.C N Y, 241 F Supp 99. Affd, C.A., 360 F 2d 774, cert den. 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—Blanchard Lumber Co v S.S Anthony II, D C N Y., 259 F Supp 857

Foreseeability as test

US—New Rotterdam Ins Co v S S Loppersum, D C N Y, 215 F Supp 563

88. US—American Independent Oil Co. v M S Alkaid, D C N Y, 289 F.Supp 329

90. US—R T Jones Lumber Co v Roen S S Co, C A N Y, 270 F.2d 456—Freedman & Slater, Inc. v M V Tofevo, D C N Y, 222 F.Supp 964

Rough seas

U.S.—Etablissements Edouard Materne, S A v The Leerdam, D C N Y, 143 F.Supp 367

Force 11 winds

US—Nichimen Co. v. MV Farland, D C N Y, 333 F Supp 691, mod. on oth grds, C A, 462 F 2d 319

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94. US—New Rotterdam Ins Co v S S Loppersum, D C N Y, 215 F Supp 563

96. US—Nichimen Co v MV Farland, D C N Y, 333 F Supp 691, mod on oth grds, C A, 462 F 2d 319

5. US—California Packing Corp v The Empire State, D C Cal, 180 F Supp 19, remd, C A, 310 F 2d 206—California Packing Corp v The P & T Voyager, D C Cal, 180 F Supp 108—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp, C A Fla, 316 F 2d 163

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10. **Seizure through fault of owner**

US—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

11. **Carriage of Goods by Sea Act**

US—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

12. US—American Independent Oil Co v M S Alkaid, D C N Y, 289 F Supp 329

15. US—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140 Affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426

16. US—Copco Steel & Engineering Co v The Prins Frederik Hendrik, D C Mich, 129 F Supp 469—Kupfermann v U S, C A N Y, 227 F 2d 348

17. US—Union Carbide & Carbon Corp. v The Walter Raleigh, supra, n 5—General Motors Corp v The Olancho, supra, n 4

18. U.S—Union Carbide & Carbon Corp v The Walter Raleigh, supra, n. 5

Defect in metal

(1) US—Ernest Const Co v. Tug Commodore, D C.Ala, 294 F Supp 15

Additional constructions of "latent defect"

US—National Sugar Refining Co v Motorship Las Villas, D C La., 225 F Supp. 686

Defect held not latent

US—Dods Shipping Limited of Nassau, N P v Karobi Lumber Co., C.A Ala., 397 F 2d 570

§ 129. —— Based on Absence of Owner's Design or Neglect with Respect to Fire

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22. US—A/S J. Ludwig Mowinckels Rederi v. Accinanto, Limited, C.A Md, 199 F.2d 134, cert. den 73 S.Ct 1129, 345 U S 992, 97 L.Ed. 1400—Burdines, Inc v Pan-Atlantic S.S. Corp, C A Fla., 199 F 2d 571—Fidelity-Phenix Fire Ins Co of N.Y. v Flota Mercante Del Estado, C.A.La., 205 F.2d 886, cert den 74 S Ct 275, 346 U.S 915, 98 L.Ed 411—Automobile Ins Co. of Hartford, Conn. v United Fruit Co., D.C.N Y., 122 F Supp 238, affd, C A., 224 F.2d 72, cert den. 76 S Ct 138, 350 U.S 885, 100 L.Ed 780—Schroeder Bros. v. The Saturnia, D.C.N.Y., 123 F Supp 282, affd., C.A, 226 F 2d 147—La Territorial De Seguros, S.P. v. Shepard S.S. Co., D.C.N Y., 124 F Supp. 287—American Tobacco Co v Goulandris, D.C.N Y, 173 F.Supp. 140, affd., C.A, 281 F.2d 179, affd in part and revd in part on oth. grds. 306 F 2d 426—Hershey Chocolate Corp. v. The Robert Luckenbach, D C.Or., 184 F.Supp. 134, affd, C A., 295 F.2d 619—L Skalney Basket Co v. S S Radnik, C.A.N.Y, 312 F.2d 177—Federazione Italiana Dei Consorzi Agrari v. Mandask Compania De Vapores, S A., D.C.N.Y., 284 F.Supp. 356, affd in part, revd. in part on oth. grds., 388 F 2d 434, cert. den. 89 S Ct 92, 393 U S. 828, 21 L.Ed.2d 99.

Fire statute not applicable in limitation proceeding in absence of claim for loss by fire

U S —Republic of France v U S, C A Tex, 290 F 2d 395, cert den 82 S Ct 644, 645, 369 U S 804, 7 L Ed 2d 550

Compliance with Safety of Life at Sea Convention held not to exempt owner

U S —Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F Supp 814, affd, C A, 480 F 2d 669

"Design or neglect" personal to owner

U S —Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F Supp 814, affd, C A, 480 F 2d 669

29. U S —Petition of U S, D C N Y, 105 F Supp 353, remd on oth grds, C A, 201 F 2d 281

Also, the fire statute is not conditioned on compliance with other statutes or regulations [35.1]

35.1. U S —Automobile Ins Co v United Fruit Co, C A N Y, 224 F 2d 72, cert den 76 S Ct 138, 350 U S 885, 100 L Ed 780

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40. U.S —Eutectic Corp v M/V Gudmundra, D C N Y, 367 F Supp 681

41. U.S —R L Pritchard & Co, Inc v Steamship Hellenic Laurel, D C N.Y, 342 F Supp 388

52. U.S.—Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, D C.La, 102 F Supp 861, affd., C A., 205 F.2d 886, cert den. 74 S Ct 275, 346 U S 915, 98 L Ed 411—Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y., 345 F.Supp 814, affd, C A, 480 F 2d 669.

53. U S.—Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, D C La, supra, n. 52—Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, C A La, 205 F 2d 886, cert den 74 S Ct. 275, 346 U S. 915, 98 L.Ed 2d 411—China Union Lines, Limited v A O. Andersen & Co, C A.Tex, 364 F 2d 769, cert den 87 S Ct 955, two cases, 956, 386 U S. 933, 17 L Ed.2d 805, reh den 87 S Ct 1301, 386 U S 999, 18 L.Ed.2d 353, and 87 S.Ct 1302, 386 U S 1000, 18 L Ed.2d 353, reh. den. 88 S.Ct 1015, two cases, 390 U S. 974, 19 L.Ed 2d 1191—Asbestos Corp. Limited v. Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F.Supp 814, affd, C.A, 480 F 2d 669

54. U S —Hershey Chocolate Corp. v. The Robert Luckenbach, D C.Or., 184 F Supp 134, affd, C A., 295 F 2d 619

55. U S —Hershey Chocolate Corp. v The Robert Luckenbach, D.C.Or., 184 F Supp. 134, affd, C.A., 295 F.2d 619.

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57. U S —Verbeeck v Black Diamond S S Corp., C.A.N.Y., 269 F.2d 68, cert. den 80 S Ct 374, two cases, 361 U.S. 934, 4 L Ed 2d 355—Petition of Midwest Towing Co., D C Ill., 203 F Supp 727, affd., C.A., 317 F.2d 270

58. U.S.—Fidelity-Phenix Fire Ins Co. of N Y v Flota Mercante Del Estado, D.C La, 102 F.Supp 861, affd., C.A., 205 F.2d 886, cert. den 74 S.Ct. 346 U.S. 915, 98 L.Ed. 411—In re Liberty Shipping Corp, Motor Ship Don Jose Figueras, C.A Wash., 509 F.2d 1249.

61. U.S.—Fidelity-Phenix Fire Ins. Co. of N.Y v Flota Mercante Del Estado, supra, n. 52—American Mail Line, Limited v. Tokyo Marine & Fire Ins. Co., C.A.Wash., 270 F.2d 499—Asbestos Corp. Limited v. Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F Supp 814, affd., C.A., 480 F.2d 669.

Failure to provide all-night watchman

U.S.—Petition of J. E. Brenneman Co., C.A Pa., 322 F.2d 846.

62. U.S —Hartford Acc. & Indem. Co. v Gulf Refining Co., C A.La., 230 F 2d 346, cert. den 77 S Ct 49, 352 U S. 832, 1 L.Ed.2d 52—Hershey Chocolate Corp v The Robert Luckenbach, D C Or, 184 F Supp 134, affd, C A, 295 F 2d 619

65. U S —Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, D C La, 102 F Supp 861, affd, C A, 205 F 2d 886, cert den 74 S Ct 275, 346 U S 915, 98 L Ed 411

66. U S —Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado supra, n 65

67. U S —Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, supra, n 65

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70. U S —A/S J Ludwig Mowinckels Rederi v Accinanto, Limited, C A Md, 199 F 2d 134, cert den 73 S Ct 1129, 345 U S 992, 97 L Ed 1400—Accinanto, Limited v Cosmopolitan Shipping Co, D C Md, 99 F Supp 261, affd in part, revd on oth grds in part, C A, 199 F 2d 134, cert den 73 S Ct 1129, 345 U S 992, 97 L Ed 1400

71. U S —Hartford Acc & Indem Co v Gulf Refining Co, C A La, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52

74. U S —Gosho Co v The Pelican State, D C N Y, 151 F Supp 780

75 U S —Gosho Co v The Pelican State, D C N Y, 151 F Supp 780—Albina Engine & Mach Works, Inc v Hershey Chocolate Corp, C A Or, 295 F 2d 619.

78. U S —A/S J Ludwig Mowinckels Rederi v Accinanto, Limited, supra, n 70

80. U S —Verbeeck v Black Diamond S S Corp, C A N Y, 269 F 2d 68, cert den 80 S Ct 374, two cases, 361 U S 934, 4 L Ed.2d 355—Gesellschaft Fur Getreidenhandel Ag v S S Texas, D C La, 318 F Supp 599

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81. U S —A/S J Ludwig Mowinckels Rederi v Accinanto, Limited, supra, n 70

82. U S —Haroco Co v The Tai Shan, D C N Y, 111 F Supp 638, affd, C A, 218 F 2d 822

88. U S —Accinanto, Limited v. Cosmopolitan Shipping Co., supra, n 70

94. Vessels of foreign registry within statute

U S —Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprian Fabre, D C N Y, 345 F.Supp 814, affd, C A, 480 F 2d 669

§ 131. Limitation of Liability by Contract or Bill of Lading

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11. U S —U S v The South Star, D C N Y, 115 F Supp 102, affd, C A, 210 F 2d 44—Crain Bros v Wieman & Ward Co, D C Pa, 126 F Supp 675, mod on oth grds, C.A., 223 F 2d 256—Virgin Islands Corp v. Merwin Lighterage Co, D C Virgin Islands, 177 F Supp. 810

Right of stevedore to claim limitation

U S —Krawill Machinery Corp. v Robert C Herd & Co., D C Md, 145 F Supp 554—Cabot Corp. v S S. Mormacscan, D C N Y, 298 F Supp 1171, affd, C.A, 441 F.2d 476, cert den 92 S Ct 104, 404 U S 855, 30 L Ed 2d 96—Tessler Bros (B C) Ltd. v Italpacific Line, C A Cal, 494 F 2d 438

N.Y —Ford Motor Co v Jaka Corp., 134 N Y S 2d 52

Waiver of claim for negligence shown

U S.—Allied Chemical Corp v Gulf Atlantic Towing Corp., D C Va, 244 F.Supp 2.

Only parties to bill of lading bound

U S.—U S v. Waterman S S Corp., C A Ala, 471 F 2d 186

12. U S.—Tessler Bros (B C) Ltd v Italpacific Line, C.A Cal, 494 F 2d 438

Consignee

U.S.—U.S Ore Corp v Commercial Transport Corp, D C La., 369 F Supp 792

14 U S —Baker Oil Tools, Inc v Delta S S Lines, Inc, D C Tex, 387 F Supp 617, affd C A, 562 F 2d 938, reh den 571 F 2d 978, and 577 F 2d 1134, two cases

16. U S —Petition of Reliance Marine Transp & Const Corp, C A Conn, 206 F 2d 240—Remington Rand, Inc v American Export Lines, D C N Y, 132 F Supp 129—Pannell v U S Lines Co, C A N Y, 263 F 2d 497, cert den 79 S Ct 1151, 359 U S 1013, 3 L Ed 2d 1037—Petition of Moore-McCormack Lines, Inc, D C N Y, 164 F Supp 198, affd, C A, 272 F 2d 873, reh den 276 F 2d 676, cert den 80 S Ct 1079, two cases, 362 U S 990, 4 L Ed 2d 1023—General Motors Corp v Moore-McCormack Lines, Inc, C A N Y, 451 F 2d 24

Tex —Rhinetubes, Inc v Norddeutscher Lloyd, Civ App, 335 S W 2d 269, err ref no rev err

17. U S —J B Effenson Co v Three Bays Corp, C A Fla, 238 F 2d 611—Seacrest Mach Corp v S S Tiber, C A Ga, 450 F 2d 285

19. U S —Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99 Affd, C A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—Karobi Lumber Co v S S Norco, D C Ala, 249 F Supp 324, affd, C A, 397 F.2d 570—Dods Shipping Limited of Nassau, N P v Karobi Lumber Co, C A Ala, 397 F 2d 570

20. U S —Petition of Isbrandtsen Co, C A N Y, 201 F 2d 281—S M Wolff Co v The Exiria, D C N Y, 200 F Supp 809

21. U S —Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99 Affd, C A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70

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25. Provisions construed

(2) Other provisions

U.S —Federal Ins Co v American Export Lines, D C N Y, 113 F Supp 540—Petition of Petterson Lighterage & Towing Corp, D C N Y, 154 F Supp 461, affd, C A, 253 F 2d 952—General Motors Corp v Moore-McCormack Lines, Inc, C A N Y, 451 F 2d 24—Bernard Screen Printing Corp v Meyer Line, D C N Y, 328 F Supp 288, affd, C A, 464 F 2d 934, cert den 93 S Ct 966, 410 U S 910, 35 L Ed 2d 1272

26. U S —Robert C Herd & Co v Krawill Machinery Corp, Md, 79 S Ct 766, 359 U.S 297, 3 L Ed 2d 820—India Supply Mission v S S Overseas Joyce, D C N Y, 246 F Supp 536—Bernard Screen Printing Corp v Meyer Line, C A N Y, 464 F 2d 934, cert den 93 S Ct 966, 410 U S 910, 35 L Ed 2d 272

27 U S —Virgin Islands Corp v Merwin Lighterage Co, D C Virgin Islands, 177 F Supp 810—Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99, affd, C A, 360 F 2d 774 cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—Allied Chemical Corp v Gulf Atlantic Towing Corp, D C Va, 244 F Supp 2

28. U S —Robert C Herd & Co v Krawill Machinery Corp, Md, 79 S Ct 766, 359 U S 297, 3 L Ed 2d 820—Cabot Corp v S S Mormacscan, C A N Y, 441 F 2d 476, cert den 92 S Ct 104, 404 U S 855, 30 L Ed 2d 96—Leather's Best, Inc v S S Mormaclynx, D C N Y, 313 F Supp 1373, affd in part, revd in part on oth grds, C A, 451 F 2d 800, on remand 346 F Supp. 962—Bernard Screen Printing Corp. v Meyer Line, D C N Y, 328 F Supp 288, affd, C A, 464 F.2d 934, cert den 93 S Ct 966, 410 U S 910, 35 L Ed 2d 1272

34. U S —General Traffic Service Co v The Cape San Martin, D C N Y, 108 F Supp 174

36. Fraudulent misrepresentations

U S —Toho Bussan Kaisha, Limited v American President Lines, Limited, D C N Y, 155 F Supp 886, affd, C A, 265 F 2d 418, 76 A L R 2d 1344

42. U S —Hearty v Ragunda, D C N Y, 114 F Supp 869

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45. U S—Hartford Acc & Indem Co v Gulf Refining Co, C A La, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52

N.Y—C.J.S. cited in Kuehne & Nagel, Inc v Baiden, 330 N E 2d 624, 627, 36 N Y 2d 539, 369 N Y S 2d 667

47. U S—Hartford Acc & Indem Co v Gulf Refining Co, D C La, 127 F Supp 469, affd in part and revd in part on oth grds, C A, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52

51. U S—Jones v The Flying Clipper, D C N Y, 116 F Supp 386—Atlantic Mut Ins Co v Poseidon Schiffahrt, D C Ill, 206 F Supp 15, affd, C A, 313 F 2d 872, cert den 84 S Ct 56, 375 U S 819, 11 L Ed 2d 53

58. U S—Petition of Isbrandtsen Co, C A N Y, 201 F 2d 281

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66. U S—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

71. **Due diligence exercised**

U S—Ilgan Intern Corp v S S John Weyerhaeuser, D C N Y, 372 F Supp 859, affd, C A, 507 F 2d 68, cert den 95 S.Ct 1954, 421 U S 965, 44 L Ed 2d 452

§ 132. —— Power to Limit

75. U S—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

Cal—Aspen Pictures, Inc v Oceanic S S Co, 306 P 2d 933, 148 C A 2d 238, cert den, 77 S Ct 1381, 354 U S 926, 1 L Ed 2d 1436

76. U S—Levatino v General Steam Nav Co, Limited, of Greece, D C N Y, N Y, 170 F Supp 756—Aetna Ins. Co v The Satrustegui, D C Puerto Rico, 171 F Supp 33, reconsideration den 174 F Supp 934—Hercules Powder Co v Commercial Transport Corp, D C Ill, 270 F Supp 676

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77. U S—Norman v Waterman S S Corp, D C Ala, 105 F Supp 590—Southwestern Sugar & Molasses Co v River Terminals Corp, La, 79 S Ct 1210, 360 U S 411, 3 L Ed 2d 1334—Norjac Trading Corp v The Mathilda Thorden, D C Pa, 173 F Supp 23—Mississippi Val Barge Line Co v Inland Waterways Shippers Ass'n, Inc, C A Mo, 289 F 2d 374, cert den 82 S Ct 123, 368 U S 876, 7 L Ed 2d 77—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 290 F 2d 486, mod on oth grds 300 F 2d 41—Luckenbach S S Co v U S, C A N Y., 315 F 2d 598—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F Supp 857

78. U S—Aetna Ins Co v The Satrustegui, D C. Puerto Rico, 171 F Supp 33, reconsideration den 174 F Supp 934

79. U.S—River Terminals Corp v Southwestern Sugar & Molasses Co, C A La, 253 F 2d 922, remd. 79 S.Ct 1210, 360 U S 411, 3 L Ed 2d 1334—Miles Metal Corp v M S Havjo, C A N.Y, 494 F 2d 563

83. U S—A M Collins & Co v Panama R Co, C A Canal Zone, 197 F.2d 893, cert den 73 S Ct 168, 344 U S. 875, 97 L Ed 677—Spanish-American Skin Co v. The M S Ferngulf, D C N Y, 143 F.Supp. 345, affd, C A., 242 F 2d 551—Horn v Cia de Navegacion Fruco, S A, C A Ala., 404 F.2d 422, cert. den. 89 S Ct 1272, 394 U S 943, 22 L Ed.2d 477—Secrest Mach Corp v. SS "Tiber", D C.Ga., 324 F.Supp 671, affd, C A., 450 F.2d 285.

Printed provision of bill of lading

U.S.—Pannell v. The American Flyer, D C N Y, 157 F.Supp. 422, mod. on oth grds., C.A., 263 F 2d 497, cert. den. 79 S.Ct. 1151, 359 U.S 1013, 3 L.Ed 2d 1037

Short form bill of lading sufficient

U S—Luddhese v Malabe Shipping Co, Inc, D C Puerto Rico, 351 F Supp 588

84. U S—Spanish-American Skin Co v The M S Ferngulf, D C N Y, 143 F Supp 345, affd, C A, 242 F 2d 551—Pannell v The American Flyer, D C N Y, 157 F Supp 422, mod on oth grds, C A, 263 F 2d 497, cert den 79 S Ct 1151, 359 U S 1013, 3 L Ed 2d 1037—David Crystal, Inc v Cunard S S Co, D C N Y, 223 F Supp 273 Affd, C A, 339 F 2d 295, 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271—Holden v S S Kendall Fish, D C La, 262 F Supp 862, affd, C A, 395 F 2d 910

Both-to-Blame clause, etc.

(2) Other cases

U S—U S v Atlantic Mut Ins Co, U S N Y, 72 S Ct 666, 343 U S 236, 96 L Ed 907

Where the terms of the bill of lading express an intent to extend limitation to bailees or carriers the limitation will apply to those acting in that capacity notwithstanding that the bill made no specific reference to the type of job those entities or individuals were engaged in.[84.5]

84.5 Stevedore as bailee

U S—Generali v. D'Amico, C.A 11 (Fla), 766 F 2d 485, disagreeing with De Laval Turbine, Inc v West India Indus, Inc, 502 F 2d 259

85. U.S—Isthmian S S Co. v California Spray-Chemical Corp, C A Cal, 300 F 2d 41

86. U S—Zajicek v United Fruit Co, C A Canal Zone, 459 F 2d 395—Sommer Corp v Panama Canal Co, D C Canal Zone, 329 F Supp 1187, mod on oth grds 475 F 2d 292

90. U S—David Crystal, Inc. v Cunard S.S Co, C A N Y, 339 F 2d 295, cert. den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed.2d 271—Levatino Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd, C A, 337 F 2d 729

91. U S—Kerr-McGee Corp v Law, C A Va, 479 F 2d 61—U S Ore Corp v Commercial Transport Corp, D.C La, 369 F Supp 792

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94. U S—U S v Atlantic Mut Ins Co, N Y, 72 S Ct 666, 343 U.S 236, 96 L Ed 907—American Independent Oil Co v M S Alkaid, D C N Y, 289 F.Supp. 329.

95. U S.—U S v Atlantic Mut Ins. Co, supra, n 84

Noncarrier

U S—Grace Line, Inc v Todd Shipyards Corp, C A Cal, 500 F 2d 361.

97. U S—Cabot Corp v S S. Mormacscan, C A N Y, 441 F 2d 476, cert. den 92 S Ct 104, 404 U S 855, 30 L Ed 2d 96

99. **Held not contrary to public policy**

U S—Allied Chemical Corp v Gulf Atlantic Towing Corp, D.C.Va, 244 F Supp 2

2. U S—The Mamor, D C N Y, 56 F.Supp. 435—Van Camp Sea Food Co v Pacific-Atlantic S S Co., D C Pa., 122 F Supp 163

3. U.S—Caterpillar Overseas, S A v S S Expeditor, C A N Y, 318 F 2d 720, cert den. 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272—Blanchard Lumber Co. v S S Anthony II, D C N Y, 259 F Supp 857—Levatino Co v M/S Helvig Torm, D.C N Y, 295 F Supp. 725.

Invalidity under Carriage of Goods by Sea Act

U S.—General Motors Overseas Operation, Division of General Motors Corp v S S Goettingen, D.C N.Y, 225 F.Supp 902—Encyclopaedia Britannica, Inc v. S S. Hong Kong Producer, C A N.Y, 422 F 2d 7

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9. U S—Mississippi Val Barge Line Co v Inland Waterways Shippers Ass'n, Inc, C A Mo, 289 F 2d 374, cert den 82 S Ct 123, 368 U S 876, 7 L Ed 2d 77—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 300 F 2d 41

"Proper delivery" construed

U S—Caterpillar Overseas, S A v S S Expeditor, C A N Y, 318 F 2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272

Determination of proper delivery

U S—Calcot, Limited v Isbrandtsen Co, C A Puerto Rico, 318 F 2d 669

14. U S—Alaska Native Industries Co-op Ass'n v U S, D C Wash, 206 F Supp 767

15. U S—Alaska Native Industries Co-op Ass'n v U S, D C Wash, 206 F Supp 767

19. U S—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F Supp 857

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20. U S—Derby Co. v A L Mechling Barge Lines, Inc, D C.La, 258 F.Supp 206, affd, C A, 399 F 2d 304

§ 133. —— Particular Risks or Causes of Loss in General

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29. U S—Spanish Am Skin Co v. The Ferngulf, C A.N Y, 242 F 2d 551—David Crystal, Inc v Cunard S S Co, D C N Y, 223 F Supp 273 Affd, C A, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S. 976, 14 L Ed 2d 271—D R. Kincaid, Limited v Trans-Pacific Towing, Inc, D C Hawaii, 246 F supp 685, revd on oth grds and remd, C A, 367 F.2d 857—Horn v. Cia de Navegacion Fruco, S A., C.A Ala, 404 F 2d 422, cert den 89 S.Ct. 1272, 394 U.S 943, 22 L Ed 2d 477—Leather's Best, Inc v. Tidewater Terminal, Inc, D C N Y., 346 F Supp 962

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(2) Other instances

U S—Commerce Oil Corp v The DXE-78, D C.La, 156 F Supp. 256, affd, C A., 252 F.2d 386

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38. **Breakage of barrels**

U S—Orient Ins Co. v. Flota Mercante del Estado, D C La, 102 F Supp 729, affd, C A, 198 F.2d 740

44. U S—C J. Dick Towing Co. v. The Leo, C.A Tex, 202 F 2d 850

50. U S—Levatino v. General Steam Nav. Co, Limited, of Greece, D C.N.Y., 170 F.Supp. 756

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65. U S—Badhwar v Colorado Fuel & Iron Corp, D.C N Y., 138 F Supp. 595, affd, C.A, 245 F 2d 903, cert den 78 S Ct 95, 355 U S 862, 2 L.Ed 2d 68

Included as part of published tariff

Cal—Aspen Pictures, Inc. v. Oceanic S.S. Co, 306 P 2d 933, 148 C A.2d 238, cert den, 77 S Ct. 1381, 354 U.S. 926, 1 L Ed.2d 1436

Provision strictly construed

N Y.—J M. Rodriguez & Co., Inc. v. Moore-McCormack Lines, Inc, 299 N E.2d 243, 32 N.Y 2d 425, 345 N Y.S.2d 993.

68. U S.—Schroeder Bros. v. The Saturnia, D C N.Y., 123 F.Supp 282, affd., C A, 226 F 2d 147

N Y.—J M Rodriguez & Co., Inc v. Moore-McCormack Lines, Inc., 299 N.E.2d 243, 32 N Y 2d 425, 345 N.Y S 2d 993.

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27. U.S.—Hartford Acc. & Indem. Co v. Gulf Refining Co., D.C.La, 127 F.Supp. 469, affd. in part

and revd in part on oth grds, C A, 230 F 2d 346, cert den 77 S Ct 49, 352 U S 832, 1 L Ed 2d 52—Remington Rand, Inc v American Export Lines, D C N Y, 132 F Supp 129

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40. U S—Levatino Co v American President Lines, Limited, C A N Y, 337 F 2d 729

48. U S—Tenneco Oil Co v Tug Tony, D C Tex, 324 F Supp 834

52. U S—Hellyer v Nippon Yesen Kaisya, D C N Y, 130 F Supp 209

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84. Effect of Harter Act

U S—Caterpillar Overseas, S A v S S Expeditor, D C N Y, 210 F Supp 478, revd on oth grds, C A, 318 F 2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272

96. U S—Remington Rand, Inc v U S, D C N Y, 98 F Supp 334, affd, C A, 202 F 2d 276

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9. U S—R. T Jones Lumber Co v Roen S S. Co, C A.N Y, 270 F 2d 456—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

11. U.S.—J Gerber & Co v S S Sabine Howaldt, C A N Y, 487 F 2d 580

12. U S—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

13. U S—J. Gerber & Co v S.S. Sabine Howaldt, C A N Y, 437 F 2d 580

16. U S—R T Jones Lumber Co v Roen S S Co, C A N.Y, 270 F.2d 456—Reisman v New Hampshire Fire Ins Co, C A Fla., 312 F 2d 17—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F.2d 580—Georgia-Pacific Corp v Motorship Marilyn L, D C Va, 331 F Supp 776

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(1) U S—R T Jones Lumber Co v Roen S.S Co, C A.Wis, 213 F 2d 370

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37. "Errors of navigation" included

U S—In re Gulf & Midlands Barge Line, Inc, C A La, 509 F 2d 713

38. U.S—American Independent Oil Co v. M S Alkaid, D C N Y, 289 F Supp 329

39. U.S.—Allen N Spooner & Son, Inc v Connecticut Fire Ins Co, C.A N Y, 314 F 2d 753, cert den 84 S.Ct 56, 375 U S. 819, 11 L.Ed 2d 54—In re Gulf & Midlands Barge Line, Inc, C A La, 509 F.2d 713

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57. Only when all available and reasonable precautions taken

U.S.—California Packing Corp v. States Marine Corp of Del., D.C Cal., 187 F.Supp. 540

60. U S.—General Foods Corp. v. U.S, D C N Y., 104 F Supp 629.

62. U.S.—J. Gerber & Co. v. S.S. Sabine Howaldt, C.A.N Y, 437 F 2d 580

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91. U.S.—J. Gerber & Co v S S Sabine Howaldt, C.A N Y., 437 F 2d 580.

§ 135. —— Stipulations as to Notice of Loss or Claim

4. U.S.—Federal Ins Co. v American Export Lines, D.C.La, 109 F.Supp 819—Nashiwa v. Matson Nav. Co., D C Hawaii, 116 F.Supp 897

5. U S.—Grace Line, Inc. v Todd Shipyards Corp, C.A.Cal., 500 F 2d 361

Public policy

U S—U S v The South Star, D C N Y, 115 F Supp 102, affd, C A, 210 F 2d 44

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7. N Y—Victor M Calderon Co v Luckenbach S S Co, 154 N Y S 2d 726

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23. U S—Howmet Corp v Tokyo Shipping Co, D C Del, 318 F Supp 658

45. Tex—Rhinetubes, Inc v Norddeutscher Lloyd, Civ App, 335 S W 2d 269, err ref no rev err

Prima facie evidence of delivery

U S—Empire Aluminum Corp v SS Korendijk, D C Ga, 391 F Supp 402

46. Tex—Corbamex, S A v Republic Carloading & Distributing Co, Civ App, 378 S W 2d 938, err ref no rev err

48. U S—Delaware Steel Co v Calmar S S Corp, C A Pa, 378 F 2d 386

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53. U S—Dorsid Trading Co v Steamship Fletero, D C Tex, 342 F Supp 1

Claim held insufficient

Tex—Corbamex, S A, v Republic Carloading & Distributing Co, Civ App, 378 S W 2d 938, err ref no rev err

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66. U S—Weyerhaeuser Sales Co v The Cynthia Olson, D C Cal, 131 F Supp 148—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 290 F 2d 486, mod on oth. grds 300 F 2d 41

74. U.S—U S v Gulf Puerto Rico Lines, Inc, C A Puerto Rico, 492 F 2d 1249.

§ 136. —— Limitations Tolling Time for Suit

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80. U S—U S v Wessel, Duval & Co, D C N Y, 123 F Supp 318—Medina v South Atlantic & Caribbean Line, Inc, D C.Puerto Rico, 342 F Supp 498

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U S—Esso Standard Oil Co v The Kaposia, D C N Y, 148 F Supp 899, affd, C A., 259 F 2d 486

Incorporation of statutory provision

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N Y—Albert v Isbrandtsen Co, 160 N Y.S 2d 772, 7 Misc.2d 67, app dism 214 N Y.S 2d 236, 12 A D 2d 581

Application of limitation to United States

(1) Limitation held reasonable

U S—U S v S S Claiborne, D C Ala, 252 F Supp 897

(2) Limitation held valid and binding

U S—U S v S S Claiborne, D.C Ala, 252 F Supp 897—U.S v. Panama City Port Authority, D C Fla, 361 F.Supp. 466

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83. N Y—United Merchants & Manufacturers, Inc v U S Lines Co., 126 N Y.S 2d 560, 204 Misc 989

85. U S—Koppers Co v Newtex S.S Corp, D C N.Y, 122 F Supp 151.

86. N Y—Victor M. Calderon Co v Luckenbach S S Co, 154 N Y.S 2d 726

Arbitration

U S—Office of Supply Government of Republic of Korea v New York Nav Co, Inc, C A.N Y, 469 F 2d 377

89. Periods of limitation held reasonable

U S—Government of Indonesia v The General San Martin, D C N Y, 114 F Supp 289

96. U S—Government of Indonesia v The General San Martin, supra, n 89

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99. U S—U S v The South Star, C A N Y, 210 F 2d 44—Federal Ins Co v American Export Lines, D C N Y, 113 F Supp 540—Sable v Amerind Shipping Corp, D C Ala, 181 F Supp 656

N Y—United Merchants & Manufacturers, Inc v U S Lines Co, 126 N Y S 2d 560, 204 Misc 989—Victor M Calderon Co v Luckenbach S S Co, 154 N Y S 2d 726—Leo Hess, Intern Corp v Isthmian S S. Co, 170 N Y S 2d 705, 5 A D 2d 250, rearg and app den 173 N Y S 2d 985, 5 A D 2d 982

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U S—Grace Line, Inc v U S, D C N Y, 144 F Supp 548, affd., C A, 255 F 2d 810

2. U S—Burdines, Inc v Pan-Atlantic S S Corp, C A Fla, 199 F 2d 571—Cities Service Oil Co v The Champoeg, D C N Y, 108 F Supp 189, affd, C A, 203 F 2d 716—Universal Am Corp v S S Hoegh Drake, D C N Y, 264 F Supp 747—Empacadora Puertorriquena De Carnes, Inc v Alterman Transport Line, Inc, D C Puerto Rico, 303 F Supp 474

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U S—Weinstock Hermanos & Cia Ltda v American Aniline & Extract Co, D C Pa, 285 F Supp 424, app dism, C.A, 406 F 2d 1327

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U S—Koppers Co v Newtex S S Corp, D C N Y, 122 F Supp 151—Insurance Co of North America v The S S Exminster, D C N Y, 127 F Supp 541

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§ 137. —— Limitations as to Value

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U S—Pannell v The American Flyer, D C N Y, 157 F Supp 422, mod on oth grds, C A, 263 F 2d 497, cert den 79 S Ct 1151, 359 U S 1013, 3 L Ed 2d 1037—Caterpillar Americas Co v S S Sea Roads, D C. Fla, 231 F Supp 647, affd, C A, 364 F 2d 829—Holden v S S Kendall Fish, C A La, 395 F 2d 910—Nichimen Co v M V Farland, C A N Y, 462 F 2d 319

Statute construed

U S—Robert C Herd & Co v Krawill Machinery Corp, Md, 79 S Ct 766, 359 U S 297, 3 L Ed 2d 820—Sommer Corp v Panama Canal Co, C A Canal Zone, 475 F 2d 292.

"Package" construed

U S—Gulf Italia Co v American Export Lines, Inc, C A N Y., 263 F 2d 135, cert den 79 S Ct 1285, 360 U.S 902, 3 L Ed 2d 1254—Pannell v U S Lines Co, C A N Y, 263 F 2d 497, cert den 79 S Ct. 1151, 359 U S 1013, 3 L Ed 2d 1037—Caterpillar Americas Co v S S Sea Roads, D C Fla, 231 F.Supp 647, affd, C A, 364 F 2d 829—Aluminios Pozuelo Limited v S S Navigator, D C N Y, 277 F Supp 1008, affd, C A, 407 F 2d 152—Leather's Best, Inc v S S Mormaclynx, C A N Y, 451 F 2d 800, on remand, 346 F Supp 962

N Y—Primary Industries Corp v Barber Lines A/S, 357 N Y S 2d 375, 78 Misc 2d 603

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8. U S—Otis McAllister & Co v Skibs, a/s Marie Bakke, C A Cal, 260 F 2d 181, cert den 79 S Ct 584, 359 U S. 915, 3 L Ed 2d 576—David Crystal, Inc v Cunard S S Co, C A N Y, 339 F 2d 295, cert den 85 S Ct 1339, 1340, 380 U S 976, 14 L Ed 2d 271.

9. U S—Holden v S S Kendall Fish, D C La, 262 F Supp. 862, affd, C A, 395 F 2d 910

10. U S—Nassau Glass Co v Noel Roberts, Limited, D C Fla, 249 F Supp 116—Sommer Corp v Panama Canal Co, C A Canal Zone, 475 F 2d 292

Provision referring to legislation ineffective to invoke limitation

U.S—DB Trade Intern, Inc v Astramar, D C Ill, 592 F Supp 1215

12. U S—Petition of Isbrandtsen Co, C A N Y, 201 F 2d 281—John Deere & Co v Mississippi Shipping Co, D C La, 170 F Supp 479—General Motors Corp v Pennsylvania R Co, D C N Y, 357 F Supp 646, affd, C A, 506 F 2d 1395, two cases

Provision extending shipowner's liability limitation to third parties upheld

U S—Carle & Montanari, Inc v American Export Isbrandtsen Lines, Inc, D C N Y, 275 F Supp 76, affd, C A, 386 F 2d 839, cert den 88 S Ct 1263, 390 U S 1013, 20 L.Ed 2d 162

13. U S—Berkshire Knitting Mills v Moore-McCormack Lines, Inc, D C N Y, 265 F Supp 846

Failure to declare value

U.S—General Motors Corp. v Moore-McCormack Lines, Inc, C A N Y, 451 F 2d 24

14. U S—Gulf Italia Co v Exiria, D C N Y, 160 F Supp 956, 160 F Supp 956, affd, C A, 263 F 2d 135, cert den 79 S Ct 1285, 360 U S 902, 3 L Ed 2d 1254—Sommer Corp v Panama Canal Co, C A Canal Zone, 475 F 2d 292

17. U S—Tessler Bros (B C) Ltd v. Italpacific Line, C A Cal, 494 F 2d 438

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U S—Baker Oil Tools, Inc v Delta S S Lines, Inc, D C Tex, 387 F Supp 617, affd, C A, 562 F 2d 938, reh den 571 F 2d 978 and 577 F 2d 1134, two cases

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19. U.S—Bernard Screen Printing Corp v Meyer Line, C A N Y, 464 F 2d 934, cert den 93 S Ct 966, 410 U S 910, 35 L Ed 2d 272

30. U.S—Sommer Corp v Panama Canal Co, C A Canal Zone, 475 F 2d 292

35. U S.—Petition of Isbrandtsen Co, supra, n 12—Gulf Italia Co v Exiria, D.C N Y, 160 F Supp 956, affd, C A, 263 F 2d 135, cert den 79 S Ct 1285, 360 U S 902, 3 L Ed 2d 1254

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37. U S.—Petition of Isbrandtsen Co, C A N Y, 201 F.2d 281—Berkshire Knitting Mills v Moore-McCormack Lines, Inc, D.C N Y, 265 F.Supp 846

42. U.S—Autobuses Modernos, S.A v. The Federal Mariner, D C.Pa, 125 F Supp 780—Pannell v. The American Flyer, D C N Y, 157 F Supp 422, mod. on oth. grds, C A., 263 F 2d 497, cert den 79 S.Ct. 1151, 359 U S. 1013, 3 L Ed 2d 1037—Folgner v. Italian Line, D.C.Canal Zone, 383 F.Supp. 816.

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48. U.S.—Green Truck Sales, Inc. v. Hoegh Lines, D.C.Cal., 179 F.Supp 562

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54. U S—Isbrandtsen Co v Federal Ins Co, D C N Y, 113 F Supp 357, affd, C A, 205 F 2d 679, cert den 74 S Ct 106, 346 U S 866, 98 L Ed 377—Federal Ins Co v American Export Lines, D C N Y, 113 F Supp 540

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(2) Other matters

U S—Otis McAllister & Co v Skibs, a/s Marie Bakke, C A Cal, 260 F 2d 181, cert den 79 S Ct 584, 359 U S 915, 3 L Ed 2d 576—Holden v S S Kendall Fish, D C La, 262 F Supp 862, affd, C A, 395 F 2d 910—British West Indies Produce Inc v S/S Atlantic Clipper, D C N Y, 353 F Supp 548

§ 140. Unseaworthiness and Unfitness of Vessel

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57. U S—O F Nelson & Co v U S, C C A Cal, 149 F 2d 692, foll 149 F 2d 815 and 149 F 2d 816, motion den 169 F 2d 833—Commercial Transp Corp v Martin Oil Service, Inc, C A Ill, 374 F 2d 813—In re Marine Sulphur Transport Corp, D C N Y, 312 F.Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246—Atlantic Banana Co v M V "Calanca", D C N Y, 342 F Supp 447, affd, C A, 489 F 2d 752, and 489 F 2d 752—Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F.Supp 814, affd, C A, 480 F 2d 669

58. U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert. den. 95 S Ct 1447, 420 U S. 1005, 43 L.Ed 2d 763

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59. U S—Seitz v The Captantonis, D C Or, 203 F Supp 723—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth. grds, C A, 460 F 2d 89, cert den 93 S.Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

60. U.S.—Ionion S.S Co of Athens v. United Distillers of America, Inc, C A La, 236 F 2d 78.

61. U.S.—Iligan Intern Corp v. S S John Weyerhaeuser, D C N Y, 372 F Supp 859, affd, C A, 507 F 2d 68, cert den 95 S Ct 1954, 421 U S 965, 44 L.Ed 2d 452

62. U S.—Petition of Reliance Marine Transp. & Const Corp, C A Conn, 206 F.2d 240—Newport News Shipbuilding & Drydock Co v U.S., C A. Va., 226 F.2d 137—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, D C N Y, 149 F.Supp. 122, affd, C.A., 253 F 2d 785—Petition of Petterson Lighterage & Towing Corp, D C N Y, 154 F Supp 461, affd, C A., 253 F 2d 952—American Tobacco Co v Goulandris, D C N Y, 173 F.Supp. 140 Affd, C.A, 281 F 2d 179, affd in part and revd in part on oth grds. 306 F.2d 426—New York Cent R Co v New York, N H & H R Co, C A N Y, 275 F 2d 865—Alaska Native Industries Co-op. Ass'n v U S., D C Wash., 206 F.Supp 767—Derby Co. v A. L Mechling Barge Lines, Inc, D.C La., 258 F.Supp. 206, affd, C A., 399 F 2d 304—Horn v Cia de Navegacion Fruco, S A, C A.Ala, 404 F.2d 422, cert. den. 89 S Ct 1272, 394 U.S 943, 22 L Ed 2d 477

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63. U S—J C Penney Co v The American Exp Co, supra, n 58

N Y—Luria Bros & Co, Inc v Associated Metals & Minerals Corp, 343 N Y S 2d 152, 73 Misc 2d 937

Examination and testing by experienced surveyor

U S—Margarine Verkaufsunion G m B H v M T G C Brovig, D C N Y, 318 F Supp 977

65. U S—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329—Atlantic Banana Co v M V "Calanca", D C N Y, 342 F Supp 447, affd, C A, 489 F 2d 752, and 489 F 2d 752

66. U S—Peter Paul, Inc v Reden A/B Pulp, C A N Y, 258 F 2d 901, cert den 79 S Ct 586, 359 U S 910, 3 L Ed 2d 574—National Sugar Refining Co v Motorship Las Villas, D C La, 225 F Supp 686—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329

67. U S—Ionion S.S Co of Athens v United Distillers of America, Inc, C A La, 236 F 2d 78

72. U S—Empire-Park Square Lumber Co v Manhattan Lighterage Corp, C A N.Y, 252 F 2d 165—Monsanto Chemical Co v No 3 Bull Towing Co, C A Tenn, 326 F 2d 18, cert den 84 S Ct 1631, 377 U S 954, 12 L Ed 2d 497—Derby Co v A L. Mechling Barge Lines, Inc., D C La, 258 F Supp 206, affd, C A, 399 F 2d 304

Implied from relationship of parties

U S—Reynolds v Royal Mail Lines, Limited, D C Cal, 147 F Supp. 223 Affd, C.A, 254 F 2d 55, cert den 79 S Ct 28, 358 U.S 818, 3 L.Ed 2d 59

Basis of warranty

U S—Waldron v. Moore-McCormack Lines, Inc, C A N Y., 356 F.2d 247, revd on oth grds 87 S Ct 1410, 386 U S 724, 18 L Ed 2d 482

Extending to buyer

N Y—Luria Bros & Co, Inc. v Associated Metals & Minerals Corp, 343 N Y S 2d 152, 73 Misc 2d 937

74. U S—Derby Co. v A. L Mechling Barge Lines, Inc, D C.La, 258 F Supp 206, affd, C A, 399 F 2d 304

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76. U S.—Gardner v Panama Canal Co, D C Canal Zone, 115 F Supp 687

77. U.S.—Spann v Lauritzen, C.A Pa, 344 F 2d 204, cert. den. 86 S.Ct 386, 382 U.S 938, 15 L Ed 2d 348, reh den 86 S.Ct 531, 382 U S. 1000, 15 L Ed 2d 489—Petition of Long, C.A.N Y, 439 F.2d 109

78. N Y—Luria Bros. & Co., Inc. v Associated Metals & Minerals Corp, 343 N.Y S 2d 152, 73 Misc 2d 937

83. U S.—Director General of India Supply Mission for and on Behalf of President of Union of India v. Steamship Janet Quinn, D C.N Y, 335 F Supp 1329—Iligan Intern. Corp. v. S.S John Weyerhaeuser, D.C N Y., 372 F Supp. 859, affd., C.A., 507 F.2d 68, cert. den 95 S.Ct 1954, 421 U.S 965, 44 L Ed 2d 452.

84. U.S.—Morrisey v. S S A. & J. Faith, D C Ohio, 252 F.Supp. 54.

85. U.S—R. T. Jones Lumber Co. v. Roen S.S. Co., D C N Y., 158 F Supp. 304 affd., C A, 270 F.2d 456—A.L Mechling Barge Lines, Inc. v Derby Co, C.A.La, 399 F.2d 304

88. U S—Morrisey v. S.S.A & J. Faith, D.C.Ohio, 252 F Supp 54

89. U S—President of India By and Through Director of India Supply Mission v West Coast S S. Co, D C Or, 213 F.Supp. 352, affd., C.A., 327 F.2d 638, cert den. 84 S Ct 1222, 377 U.S. 924, 12 L.Ed 2d 216.

93. U S—Gainar v S S Longview Victory, D C Va, 226 F Supp 912, affd, C A., 338 F 2d 959, on remand 242 F Supp 96

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96. U S—American Mail Line Ltd v US, D C Wash, 377 F Supp 657

98. U S—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

99. U S—Continental Ins Co v U S, C A N Y, 195 F 2d 527—Mackey v U S, C A N Y, 197 F 2d 241—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216—Walker v Harris, C A La, 335 F 2d 185, cert den 85 S Ct 326, 379 U S 930, 13 L Ed 2d 342—Marshall v Ove Skou Rederi A/S, C A Ala, 378 F 2d 193, cert den 88 S Ct 86, 389 U S 828, 19 L Ed 2d 84

1. U S—Petition of Reliance Marine Transp & Const Corp., C A.Conn, 206 F 2d 240—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct. 1222, 377 U S 924, 12 L Ed 2d 216—Smith v. M/V Gisna, D C Ala, 238 F Supp 91, affd, C A, 362 F 2d 164—Union Carbide & Carbon Corp v The Walter Raleigh, D C N Y, 109 F.Supp 781, affd, C.A, 200 F 2d 908

Other statements of seaworthiness

(3) Additional statements

U.S.—R. T Jones Lumber Co v. Roen S S Co., C A N.Y., 270 F 2d 456—Green v Skibs A/S Mandeville, D.C.S C, 188 F.Supp 65—Walker v Harris, C A La., 335 F 2d 185, cert den. 85 S Ct 326, 379 U.S 930, 13 L.Ed.2d 342—John Penny & Sons, Limited v. M/V Swivel, D.C.Mass, 266 F Supp 302—J. Gerber & Co v S S Sabine Howaldt, C A.N.Y., 437 F 2d 580

Criterion of seaworthiness

(1) U.S.—Marshall v. Ove Skou Rederi A/S, C A. Ala., 378 F 2d 193, cert. den. 88 S Ct 86, 389 U.S. 828, 19 L.Ed.2d 84—Doughty v Nebel Towing Co, D C La., 270 F Supp. 957

(7) U S.—Hydaburg Co-op Ass'n v. Alaska S S Co, C.A.Wash., 404 F.2d 151

Vessel held unseaworthy

(1) U.S.—Andros Shipping Co. v. Panama Canal Co., D.C.Canal Zone, 184 F Supp. 246, affd., C.A., 298 F.2d 720—Commercial Transp Corp. v. Martin Oil Service, Inc., C.A.Ill., 374 F.2d 813—Alexander v. Bethlehem Steel Corp., C.A.N.Y, 382 F 2d 963, cert den 89 S.Ct. 717, 393 U.S. 1064, 21 L.Ed.2d 707

Vessel held seaworthy

U.S.—Fireman's Fund Indem. Co. v. U S, C A Fla., 211 F.2d 773, cert. den. 75 S Ct. 79, 348 U.S. 855, 99 L.Ed. 673—California & Hawaiian Sugar Co v Columbia S S Co., Inc., D.C.La., 391 F Supp. 894, affd., C.A., 510 F 2d 542.

Fitness in hull and gear

U.S.—Amador v. A/S J Ludwig Mowinckels Rederi, C.A.N.Y., 224 F.2d 437, cert den 76 S Ct. 179, 350 U.S. 901, 100 L Ed. 791.

Absence of radar or loran equipment did not render vessel unseaworthy.

U.S.—President of India By and Through Director of India Supply Mission v. West Coast S.S. Co., C.A. Or., 327 F.2d 638, cert. den 84 S.Ct 1222, 377 U.S. 924, 12 L.Ed.2d 216

Out-of-date navigation chart held not to render vessel unseaworthy

U.S.—Director General of India Supply Mission for and on Behalf of President of Union of India v. Steamship Janet Quinn, D.C.N.Y., 335 F.Supp. 1329.

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3. U.S.—California & Hawaiian Sugar Refining Corp. v. Winco Tankers, Inc, D.C.La., 273 F.Supp 648—Atlantic Banana Co. v. M. V. "Calanca", D C.N.Y., 342 F.Supp. 447, affd., C.A., 489 F 2d 752, and 489 F.2d 752.

4. U S—Petition of Reliance Marine Transp & Const Corp, C A Conn, 206 F 2d 240—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54—Miles v States Marine Lines, Inc, D C Tex, 325 F Supp 1370

5. U S—Berti v Compagnie De Navigation Cyprien Fabre, C A N Y, 213 F 2d 397—Spann v Lauritzen, C A Pa, 344 F 2d 204, cert den 86 S Ct 386, 382 U S 938, 15 L Ed 2d 348, reh den 86 S Ct 531, 382 U S 1000, 15 L Ed 2d 489—Karobi Lumber Co v S S Norco, D C Ala, 249 F Supp 324, affd, C A, 397 F 2d 570—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

7. U S—California & Hawaiian Sugar Co v Columbia S S Co, Inc, D C La, 391 F Supp 894, affd, C A, 510 F 2d 542

Defect in container in which goods are shipped will constitute unseaworthiness.[55]

5.5. U S.—Serrano v U S Lines Co, D C N Y, 238 F Supp 383

8. U S—Monsanto Chemical Co v No 3 Bull Towing Co, C A Tenn, 326 F 2d 18, cert den 84 S Ct 1631, 377 U S 954, 12 L Ed 2d 497—Walker v Harris, C.A La, 335 F2d 185, cert den 85 S Ct 326, 379 U S 930, 13 L Ed 2d 342

Location of firefighting equipment

U S—Asbestos Corp Limited v Compagnie De Navigation Fraissinet et Cyprien Fabre, D C N Y, 345 F Supp 814, affd, C.A, 480 F 2d 669

10. U S—Dillon v M S Oriental Inventor, C A La, 426 F 2d 977, 91 S Ct 140—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

Ventilation

(2) U S—Gainar v S S Longview Victory, D C Va, 226 F Supp 912, affd, C A, 338 F 2d 959, on remand 242 F Supp. 96.

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11. U S—Union Carbide & Carbon Corp v U S, C.A N Y, 200 F 2d 908

15. Usage is not inevitable standard

U S.—Coleman v. Jahncke Service Inc, C A La, 341 F 2d 956, reh. den 348 F 2d 868, cert dism in part 86 S.Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct. 538, 382 U S 974, 15 L.Ed 2d 465.

16. U S.—California & Hawaiian Sugar Refining Corp v. Winco Tankers, Inc, D C La, 278 F.Supp 648

17. "Latent defect" defined

U S—Reisman v New Hampshire Fire Ins Co, C A Fla, 312 F 2d 17

18. U S.—Union Carbide & Carbon Corp v The Walter Raleigh, supra, n 1—U S v Wessel, Duval & Co, D C N Y, 123 F Supp 318

19. U S.—J C Penney Co v American Exp Co, D C N Y, 102 F Supp 742, affd, C A, 201 F 2d 846

23. U S—Palazzolo v. Pan-Atlantic S S Corp, C A N Y, 211 F.2d 277, affd 76 S Ct 232, 350 U S 124, 100 L Ed 133—Rich v Ellerman & Bucknall S.S Co, C A N.Y., 278 F 2d 704—Fitzmaurice v Calmar S.S. Corp., D C.Pa, 198 F Supp. 304—Alaska Native Industries Co-op Ass'n v U.S, D.C.Wash, 206 F Supp 767—Blanchard Lumber Co. v S S Anthony II, D C N.Y, 259 F Supp. 857

24. U S.—Alaska Native Industries Co-op Ass'n v U.S, D.C.Wash, 206 F Supp 767

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28. U S—Andros Shipping Co v Panama Canal Co, D.C.Canal Zone, 184 F.Supp. 246, affd, C A., 298 F.2d 720.

29. U S.—Alaska Native Industries Co-op. Ass'n v. U S, D C.Wash, 206 F Supp. 767—American Commercial Lines, Inc. v Silver Creek Coal Co, C.A Ill, 393 F.2d 178

31. U S—Price v S S Yaracuy, C A La, 378 F 2d 156, on remand, D C, 306 F Supp 638—Petition of Canal Barge Co, D C Miss, 323 F Supp 805, affd in part, revd in part on oth grds, C A, 480 F 2d 11, op am on oth grds, 513 F 2d 911, cert den 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60

Owner not liable where master selected has usual certificates and good recommendations

U S—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329

Inadequate crew

U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032 Cert den 95 S Ct 1447, 420 U S 1005, 43 L Ed 2d 763

33. U S—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den. 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477—American Mail Line Ltd v U S, D C Wash, 377 F Supp 657

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42. U S—Isbrandtsen Co v Federal Ins Co, 113 F Supp 357, affd, C A, 205 F 2d 679, cert den 74 S Ct 106, 346 U S 866, 98 L Ed 397—General Motors Corp v The Olancho, D C N Y, 115 F Supp 107, affd, C A, 220 F 2d 278—Brown & Williamson Tobacco Corp v The Anghyra, D C Va, 157 F Supp 737, affd in part and revd in part on oth grds, C A, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102—California & Hawaiian Sugar Refining Corp v Winco Tankers, Inc, D C La, 278 F Supp 648

43. U S—Union Carbide & Carbon Corp v The Walter Raleigh, D C N Y, 109 F Supp 781, affd, C A, 200 F 2d 908

44. U S—General Motors Corp v The Olancho, D C N Y, 115 F Supp 107, affd, C A, 220 F 2d 278—India Supply Mission v S S Valiant Effort, D C N Y, 283 F Supp 1011

45. U S—J C Penney Co v American Exp Co, supra, n 19

No warranty of ship's seaworthiness attaches to a "dead ship" not in navigation.[465]

46.5. U S—Kleveland v U S, C A N Y, 345 F 2d 134

§ 141. Improper Stowage

Library References

Shipping ⇐123(1-5).

48. U S—Brown & Williamson Tobacco Corp v The Anghyra, D C Va, 157 F Supp 737, affd in part and revd in part on oth grds, C.A, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102—California Packing Corp. v The P & T Voyager, D C Cal, 180 F Supp 108—Inland Waterways Shippers Ass'n, Inc v Mississippi Val Barge Line Co, D C Mo., 194 F Supp. 818, app dism, C A., 289 F 2d 374, cert den 82 S Ct. 123, 368 U S 876, 7 L Ed 2d 77—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F Supp 857—Interstate Steel Corp v S.S Crystal Gem, D C N Y., 317 F Supp. 112—Georgia-Pacific Corp v Motorship Marilyn L, D C.Va, 331 F Supp 776

Nondelegable duty

U S—Nichimen Co. v M V Farland, C A N Y, 462 F 2d 319

49. U S—Schroeder Bros. v The Saturnia, D C N Y., 123 F Supp 282, affd., C A, 226 F 2d 147.

50. U S—General Foods Corp v. U S, D.C N Y, 104 F Supp 629—Karabagu v The Shuckshinny, D C N Y, 123 F Supp 99, affd, C.A, 227 F 2d 348—Amador v A/S J Ludwig Mowinckels Rederi, C A N Y, 224 F 2d 437, cert den 76 S.Ct 179, 350 U S 901, 100 L Ed 791—Schroeder

Bros, Inc v The Saturnia, C A N Y, 226 F 2d 147—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763—Verbeeck v Black Diamond S S Corp, C A N Y, 269 F 2d 68, cert den 80 S Ct 374, two cases, 361 U S 934, 4 L Ed 2d 355—New Rotterdam Ins Co v S S Loppersum, D C N Y, 215 F Supp 563—Levatino Co v S S Norefjell, D C N Y, 231 F Supp 307—Cia De Navegacion Fruco, S A v M/S Heinz Horn, D C Ala, 233 F Supp 637, affd in part, revd in part on oth grds, C A, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

Stowage held not bad or negligent

(6) U S—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477

Stowage held bad or negligent

(7) U S—Petition of Isbrandtsen Co, C A N Y, 201 F.2d 281—Konfort, S A v The Santo Cerro, D C N Y, 190 F Supp 1—Uddo & Taormina Co v Levant Line, D C La, 194 F Supp 615—Freedman Freedman & Slater, Inc v. M V Tofevo, D C N Y, 222 F Supp 964

Improper stowage not a conversion

U S—Petition of Isbrandtsen Co, supra

Overloading held no defense

U S—Ocean Commercial Co v The Polykarp, D C N Y, 134 F Supp 834

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51. U S—China Union Lines, Limited v A O Andersen & Co, C A Tex, 364 F 2d 769, cert den 87 S Ct 955, two cases, 956, 386 U S 933, 17 L Ed 2d 805, reh den 87 S Ct 1301, 386 U S 999, 18 L Ed 2d 353, and 87 S Ct 1302, 386 U S 1000, 18 L Ed 2d 353, reh den 88 S Ct 1015, two cases, 390 U S 974, 19 L Ed 2d 1191

53. U S—Pryor v American President Lines, C A Md, 520 F 2d 974, cert den 96 S Ct 787, 423 U S 1055, 46 L Ed 2d 644

56. U S—Daido Line v Thomas P Gonzalez Corp, C A Cal, 299 F 2d 669

59. U S—Georgia-Pacific Corp v Motorship Marilyn L, D.C Va, 331 F Supp. 776

60. U S—General Foods Corp v U S, supra, n 50—Diethelm & Co v The Flying Trader, D C N Y., 141 F Supp 271, affd, C A, 244 F 2d 542—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763

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63. U S—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F Supp 857

66. U S—R T Jones Lumber Co v Roen S S Co, C.A N Y, 270 F 2d 456

72. U S—Etablissements Edouard Materne, S A v The Leerdam, D C N Y, 143 F Supp 367

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73. U.S.—Etablissements Edouard Materne, S A v The Leerdam, D C N Y., 143 F.Supp 367

77. U.S.—Automobile Ins Co. of Hartford, Conn v United Fruit Co, D C N.Y, 122 F Supp. 238, affd., C A., 224 F 2d 72, cert. den 76 S Ct. 138, 350 U.S. 885, 100 L.Ed. 780

80. U S.—du Pont de Nemours Intern S.A. v S.S Mormacvega, D.C N Y, 367 F Supp 793, affd., C.A, 493 F 2d 97.

81. Liability despite consent

N Y.—Kuehne & Nagel, Inc v Baiden, 330 N E 2d 624, 36 N.Y.2d 539, 369 N.Y S.2d 667

82. U S—Green Truck Sales, Inc. v. Hoegh Lines, D.C.Cal, 179 F.Supp. 362—Searoad Shipping Co v. E. I. duPont de Nemours & Co, C A.Fla, 361 F.2d 833, cert. den 87 S Ct 511, 385 U.S. 973, 17 L Ed.2d 436—DuPont De Nemours Intern. S.A v S.S Mormacvega, D.C.N.Y, 312 F.Supp. 122

Abrogation of contract

U S—Thyssen Inc v S/S Fortune Star, D C N Y, 596 F Supp 865, affd in part, revd in part 777 F 2d 57

Acknowledgment of loading under Coast Guard supervision does not constitute consent

U S—Searoad Shipping Co v E I duPont de Nemours & Co, C A Fla, 361 F 2d 833, cert den 87 S Ct 511, 385 U S 973, 17 L Ed 2d 436

84. Bill of lading option waived by carrier

U S—Encyclopaedia Britannica, Inc v SS Hong Kong Producer, C A N Y, 422 F 2d 7

86. U S—Encyclopaedia Britannica, Inc v SS Hong Kong Producer, C A N Y, 422 F 2d 7

87. U S—Searoad Shipping Co v E I duPont de Nemours & Co, C A Fla, 361 F 2d 833, cert den 87 S Ct 511, 385 U S 973, 17 L Ed 2d 436

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92. U S—General Traffic Service Co v The Cape San Martin, D C N Y, 108 F Supp 174

95. U S—Pryor v American President Lines, C A Md, 520 F 2d 974, cert den 96 S Ct 787, 423 U S 1055, 46 L Ed 2d 644

96. U S—Virgin Islands Corp v Merwin Lighterage Co, C A Virgin Islands, 251 F 2d 872, cert den 78 S Ct 1369, 357 U S 929, 2 L Ed 2d 1372, on remand, D C, 177 F Supp 810

1. U S—Schroeder Bros v The Saturnia, D C N Y, 123 F Supp 282, affd, C A, 226 F 2d 147

2. U S—Hurst v Central Gulf S.S Corp, D.C La, 267 F Supp 65

§ 142. Improper Loading or Handling

5. U S—Brown & Williamson Tobacco Corp. v The Anghyra, D C Va, 157 F Supp 737, affd. in part and revd in part, on oth grds, C A, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102—Inland Waterways Shippers Ass'n, Inc v Mississippi Val Barge Line Co, D C Mo, 194 F Supp 818, app. dism, C A, 289 F 2d 374, cert den 82 S Ct 123, 368 U.S. 876, 7 L Ed 2d 77—Union Marine & General Ins Co v American Export Lines, Inc, D C N Y, 274 F Supp 123—McAllister Lighterage Line, Inc v S/S Steel Age, D.C N Y, 306 F.Supp 19—Interstate Steel Corp v S S Crystal Gem, D C N.Y, 317 F Supp 112.

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6. U S—Brown & Williamson Tobacco Corp v. The Anghyra, D C Va, 157 F Supp. 737, affd in part and revd in part on oth grds, C A, 277 F 2d 9, cert den 81 S Ct 168, 364 U S. 879, 5 L.Ed 2d 102—Petition of Moore-McCormack Lines, Inc, D C N Y, 164 F.Supp 198, affd, C A., 272 F 2d 873, reh den 276 F 2d 676, cert den. 80 S Ct 1079, two cases, 362 U S. 990, 4 L Ed 2d 1023—Shamrock Towing Co v. Schiavone-Bonomo Corp, D C N Y., 173 F Supp 39, affd, C A, 275 F 2d 338—Hellenic Lines Limited v Brown & Williamson, Tobacco Corp., C A Va, 277 F.2d 9, cert. den 81 S.Ct 168, 364 U S. 879, 5 L Ed.2d 102—Hunt Food & Industries, Inc v Matson Nav Co, D.C La., 249 F Supp. 572.

Failure to load held not negligent

U S—Quaker Oats Co v United Fruit Co, C.A La, 230 F 2d 676

Marine unloading arm

U S.—Drachenberg v. Canal Barge Co., Inc., C A La., 571 F.2d 912, app after remand 621 F.2d 760, reh. den 626 F.2d 172.

7. U.S.—Andros Shipping Co. v Panama Canal Co, D C Canal Zone, 184 F.Supp 246, affd, C.A., 298 F 2d 720

9. U S.—U S. v The South Star, D.C.N Y., 115 F.Supp. 102, affd, C A, 210 F 2d 44—Levatino Co v M/S Helvig Torm, D.C N Y., 295 F Supp 725

12. Standard of care required

(3) Other matters

U S—Petition of Moore-McCormack Lines, Inc, D C N Y, 164 F Supp 198, affd, C A, 272 F 2d 873, reh den 276 F 2d 676, cert den 80 S Ct 1079, two cases, 362 U S 990, 4 L Ed 2d 1023

13. U S—Nuzzo v Reder, A/S Wallenco, Stockholm, Sweden, C A N Y, 304 F 2d 506

15. U S—Daido Line v Thomas P Gonzalez Corp, C A Cal, 299 F 2d 669—Hunt Food & Industries, Inc v Matson Nav Co, D C La, 249 F Supp 572

Stevedores. In loading cargo a stevedore is under a duty of workmanlike performance.[17 5] He is under a duty to make at least a reasonable, if only cursory, inspection of equipment furnished by the shipowner for loading of cargo,[17 10] and if it is apparent on cursory inspection that the equipment might not be adequate, he should take steps to make closer inspection to insure its fitness [17 15]

17.5. Contractual duty

U S—Southern Stevedoring & Contracting Co v Hellenic Lines, Limited, C A Tex, 388 F 2d 267

Negligence as question of fact

U S—Southern Stevedoring & Contracting Co v Hellenic Lines, Limited, C A Tex, 388 F 2d 267

17.10. U S—Southern Stevedoring & Contracting Co v. Hellenic Lines, Limited, C A Tex, 388 F 2d 267

17.15. U S—Southern Stevedoring & Contracting Co v Hellenic Lines, Limited, C A Tex, 388 F 2d 267.

§ 143. Negligent Management or Navigation

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18. U S.—In re Grace Line, Inc, C.A.N Y., 517 F 2d 404.

Error in navigation

U.S.—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N.Y, 335 F Supp 1329

19. U.S —Andros Shipping Co v. Panama Canal Co, D C Canal Zone, 184 F.Supp 246, affd, C.A, 298 F 2d 720—Alaska Native Industries Co-op Ass'n v U S, D C Wash, 206 F.Supp. 767—Cia De Navegacion Fruco, S A. v. M/S Heinz Horn, D.C. Ala., 233 F Supp 637, affd in part, revd in part on oth grds, C A., 404 F 2d 422, cert. den. 89 S Ct 1272, 394 U S 943, 22 L Ed 2d 477.

A tug, etc.

(2) Where the fault lies with public authorities, the tug is not liable.—Ford Motor Co v. Manhattan Lighterage Corp, C.C A N Y, 97 F.2d 577

Fault must contribute to stranding

U S.—Afran Transport Co. v. U S, D C N Y, 309 F Supp 650, affd., C.A, 435 F.2d 213, cert den. 92 S Ct. 72, 404 U.S. 872, 30 L.Ed.2d 116.

Orders of pilot no excuse

U S—Insurance Co. of North America v S.S Flying Trader, D C N Y., 306 F.Supp. 221.

21. U S—Phillips Petroleum Co v Koch Ellis Marine Contractors, Inc, D.C La, 118 F Supp 940—Alaska Native Industries Co-op Ass'n v U S., D C Wash., 206 F Supp. 767.

Availability of sailing directions

U S—California & Hawaiian Sugar Co v Columbia S S Co, Inc., D C La., 391 F.Supp 894, affd, C.A, 510 F.2d 542.

§ 144. Deviation

Library References

Shipping ⇐125.

28. N Y—C J S cited in Dave Levine & Co v Wolf's Package Depot, 138 N Y S 2d 427, 432, 29 Misc 2d 1085, affd 150 N Y S 2d 543, 1 A D 2d 874, app den 151 N Y S 2d 601, 1 A D 2d 949

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32. U S—International Drilling Co, N V v M/V Doriefs, D C Tex, 291 F Supp 479

Damage limit

U S—Iligan Integrated Steel Mills, Inc S S John Weyerhaeuser, C A N.Y, 507 F 2d 68, cert den 95 S Ct 1954, 421 U S 965, 44 L Ed 2d 452

33. U S—Feuer v Booth S S Co, C A N Y, 195 F 2d 529—U S v Wessel, Duval & Co, D C N Y, 115 F Supp 678—Jones v The Flying Clipper, D C N Y, 116 F Supp 386

35. Not unreasonable deviation

U.S—Iligan Intern Corp v S S John Weyerhaeuser, D C N Y, 372 F Supp 859, affd, C A, 507 F 2d 68, cert den 95 S Ct 1954, 421 U S 965, 44 L Ed 2d 452

36. U S—Dosenbruch v. American Export Isbrandtsen Lines, Inc, D C.N Y, 357 F Supp 982, affd C A, 543 F 2d 967, cert den 97 S Ct 353, 429 U S 939, 50 L Ed.2d 308

38. U S—Atlantic Mut Ins Co v Poseidon Schiffahrt, G.m b.H., C A Ill, 313 F 2d 872, cert den 84 S Ct. 56, 375 U S. 819, 11 L.Ed 2d 53—Du Pont de Nemours Intern S A v S S Mormacvega, C.A N Y, 497 F 2d 97

45. U S—C.J S. cited in U S v Wessel, Duval & Co, D C N Y, 115 F.Supp 678, 684

46. U S—Haroco Co v The Tai Shan, D C N Y, 111 F Supp 638, affd, C A, 218 F 2d 822—Atlantic Mut Ins Co. v Poseidon Schiffahrt, G m b H., C.A Ill, 313 F 2d 872, cert den. 84 S Ct 56, 375 U S. 819, 11 L.Ed 2d 53—American Metal Co v M/V Belleville, D.C.N.Y, 284 F.Supp 1002

Deviation held unreasonable

U.S.—United Nations Children's Fund v S.S Nordstern, D C N.Y., 251 F.Supp. 833

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51. U.S.—Atlantic Mut Ins Co v Poseidon Schiffahrt, D.C.Ill., 206 F Supp. 15, affd., C A, 313 F.2d 872, cert. den 84 S Ct. 56, 375 U S. 819, 11 L.Ed.2d 53

62. D.C.—Transatlantic Financing Corp v U S, C.A., 363 F.2d 312, 124 U.S App D C 183

Duty of performance not excused

U.S.—Hellenic Lines, Ltd. v. U.S., C A.N.Y., 512 F 2d 1196.

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77. U.S.—Surrendra (Overseas) Private, Limited v. S.S. Hellenic Hero, D.C.N.Y, 213 F.Supp. 97, affd., C.A., 324 F.2d 955—Kroll v Silver Line, Limited, D C.Cal., 116 F Supp. 443.

80. Congestion at port of destination

U.S.—Surrendra (Overseas) Private, Limited v. S S Hellenic Hero, D C N.Y, 213 F Supp. 97, affd., C.A., 324 F.2d 955

81. U.S.—Surrendra (Overseas) Private, Limited v S.S. Hellenic Hero, D.C.N.Y., 213 F Supp. 97, affd., C.A., 324 F.2d 955.

84. U.S.—Haroco Co. v. The Tai Shan, D.C.N.Y., 111 F.Supp. 638, affd., C.A., 218 F.2d 822.

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81. U.S.—Kroll v. Silver Line, Limited, supra, n. 77

91. U.S.—Kroll v. Silver Line, Limited, supra, n 77.

95. U.S.—Union Carbide & Carbon Corp. v. The Walter Raleigh, D.C.N.Y., 109 F.Supp. 781, affd., C.A., 200 F.2d 908.

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2. U S.—Feuer v. Booth S S. Co., C.A.N.Y, 195 F 2d 529.

3. U.S.—Hellenic Lines, Ltd. v. U.S., C.A.N.Y, 512 F.2d 1196.

5 U S—Hellenic Lines, Ltd v U S, C A N Y, 512 F 2d 1196

10. Ports held substantially on course

U S—Feuer v Booth S S Co, supra, n 2—Haroco Co v The Tai Shan, D C N Y, 111 F Supp 638, affd, C A, 218 F 2d 822

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30 Effect of subsequent events after deviation

U S—Banco Para El Comercio Exterior De Cuba v The Ruth Ann, D C Puerto Rico, 192 F Supp 607

31. U S—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426—American Metal Co v M/V Belleville, D C N Y, 284 F Supp 1002

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44. U S—Banco Para El Comercio Exterior De Cuba v The Ruth Ann, D C Puerto Rico, 192 F Supp 607

58. U S—L W & P Armstrong, Inc v The Mormacmar, C A N Y, 196 F 2d 752

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68. U S—Atlantic Mut Ins Co v Poseidon Schiffahrt, G m b H, C A Ill, 313 F 2d 872, cert den 84 S Ct 56, 375 U S 819, 11 L Ed 2d 53—Surrendra (Overseas) Private, Limited v S S Hellenic Hero, D C N Y, 213 F.Supp 97, affd, C A, 324 F 2d 955

70. U S—Hellyer v Nippon Yesen Kaisya, D C N Y, 130 F Supp 209

72. U S—Petition of Isbrandtsen Co, C A N Y, 201 F 2d 281—Jones v The Flying Clipper, D C N Y, 116 F Supp 386—Searoad Shipping Co v E I. duPont de Nemours & Co, C A Fla, 361 F 2d 833, cert den 87 S.Ct 511, 385 U S 973, 17 L Ed.2d 436

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76. U S.—Jones v The Flying Clipper, D C N.Y., 116 F Supp 386

Where under-deck stowage specified

U S—Encyclopaedia Britannica, Inc v S S Hong Kong Producer, C.A N Y, 422 F 2d 7

Reasonable deviation

U.S—Du Pont de Nemours Intern S.A v S S Mormacvega, C A N.Y, 497 F.2d 97

§ 145. Delay

89. U S—International Drilling Co., N V v M/V Doriefs, D C Tex, 291 F Supp 479

N Y—United Merchants & Manufacturers, Inc. v U.S Lines Co, 126 N Y.S 2d 560, 204 Misc 989

§ 146. Discharge of Cargo

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4. U S—North Am Smelting Co. v Moller S S Co, C.A.Pa., 204 F.2d 384—Levatino v General Steam Nav Co., Limited, of Greece, D C N.Y, 170 F.Supp 756—Inland Waterways Shippers Ass'n, Inc. v. Mississippi Val. Barge Line Co, D.C.Mo, 194 F.Supp. 818, app. dism., C.A., 289 F 2d 374, cert. den. 82 S.Ct. 123, 368 U S. 876, 7 L.Ed 2d 77—Mamiye Bros. v. Barber S S Lines, Inc., D C N.Y, 241 F Supp 99, affd, C A., 360 F 2d 774 Cert. den 87 S Ct. 80, 385 U S. 835, 17 L.Ed.2d 70—Union Marine & General Ins. Co v American Export barber S.S Lines, Inc, D C N Y., 241 123—American Independent Oil Co v M. S Alkaid, D.C N.Y, 289 F Supp. 329

Reasonable care exercised

U S.—North Am. Smelting Co v. Moller S S Co, supra

Regulation as to "loading" held inapplicable as to "unloading"

U S—McHoney v Marine Nav Co, C A S C, 233 F 2d 769, cert den 77 S Ct 231, 352 U S 930, 1 L Ed 2d 165

5. U S—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

6. U S—Alaska Native Industries Co-op Ass'n v U S, D C Wash, ?? F Supp 767—Levatino Co v American President Lines, Limited, C A N Y, 337 F 2d 729—Levatino Co v S S Norefjell, D C N Y, 231 F Supp 307—American Independent Oil Co v M S Alkaid, D C N Y, 289 F Supp 329—Levatino Co v M/S Helvig Torm, D C N Y, 295 F Supp 725

Negligence of carrier held not shown

U S—Mamiye Bros v Barber S S Line, Inc, C A N Y, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70

Negligence of stevedore held chargeable against charterer

U S—Interstate Steel Corp v S S Crystal Gem, D.C N Y, 317 F Supp 112

7. U S—Caterpillar Overseas, S A v S S Expeditor, C A N Y, 318 F.2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272—Central Trading Corp v M V Dong Myung, D C N Y, 361 F Supp 302

9. Loss during time contractor's duties assumed by cargo owner

U S—Stauffer Chemical Co v Brunson, C A Ala, 380 F 2d 174, app after remand 409 F 2d 1327

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11. Liability of consignee

U S—James H Rhodes & Co v U S Lighterage Corp, C A N Y, 98 F 2d 770

12. U S—Carrier Corp v Furness, Withy & Co, D C Pa, 131 F Supp 19

13. U S—Sanders v Henry C Eastburn & Son, D C Del, 104 F Supp 211

§ 147. Loss or Injury after Discharge or Tender

In unloading cargo a stevedore is under a duty of workmanlike performance.[14.5]

14.5. U S—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd in part on oth grds, C A, 461 F 2d 1009

15 U S—North Am Smelting Co v Moller S S Co., C A Pa, 204 F 2d 384—Calcot, Limited v Isbrandtsen Co, C A Puerto Rico, 318 F 2d 669

Ill—Garcia Intern Corp v Cosmos Shipping Co, 262 N E 2d 811, 129 Ill App 2d 140

Discharge at dock

U S—Sable v Amerind Shipping Corp, D C Ala, 181 F Supp 656

16. U S—National Distillers Products Corp v Companhia Nacional de Navegacao, D C Pa, 107 F Supp 65—Fabbri Co v Universal Shipping Corp, D.C N Y, 310 F Supp 964—Eutectic Corp v M/V Gudmundra, D C N Y, 367 F Supp 681

Vessel held liable as insurer

N Y—Stein Hall & Co v Sealand Dock & Terminal Corp, 149 N Y.S 2d 537, 2 Misc 2d 727

Failure to adhere to local ordinance

U S—R L. Pritchard & Co, Inc v. Steamship Hellenic Laurel, D C N.Y., 342 F Supp 388

Impending strike no excuse

U S.—British West Indies Produce Inc v. S/S Atlantic Clipper, D C N Y, 353 F Supp 548

Liability for theft

U S—Cameco, Inc v S S Am Legion, C A N Y, 514 F 2d 1291

17. U S—David Crystal, Inc v Cunard S S. Co, C A N Y, 339 F 2d 295, cert den 85 S Ct 1339,

1340, 380 U S 976, 14 L Ed 2d 271—Levatino Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd, C A, 337 F 2d 729—Fabbri Co v Universal Shipping Corp, D C N Y, 310 F Supp 964—Royal Typewriter Co, Division Litton Business Systems, Inc v M/V Kulmerland, D C N Y, 346 F Supp 1019, affd, C A, 483 F 2d 645

20. U S—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

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22. U S—R L Pritchard & Co, Inc v Steamship Hellenic Laurel, D C N Y, 342 F Supp 388

23. U S—Levatine Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd, C A, 337 F 2d 729—Consolidated Cork Corp v Jugoslavenska Linijska Plovidba, D C N Y, 318 F Supp 1209

Forecast held not notice of unprecedented flood

N Y—Joseph Resnick Co v Nippon Yusen Kaisha, 241 N Y S 2d 134, 39 Misc 2d 513

24. U S—Levatine Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd, C A, 337 F 2d 729—Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99, affd, C A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—Leather's Best, Inc v S S Mormaclynx, C A N Y, 451 F 2d 800, on remand, 346 F Supp 962—Louis Furth, Inc v S S Srbija, D C N Y, 330 F Supp 305

28. U S—Grover-Ferguson Co v A/S Ivarans Reder, D C Pa, 171 F Supp 766—Mamiye Bros v Barber S S Lines, Inc, D C N Y, 241 F Supp 99 Affd, C A, 360 F 2d 774, cert den 87 S Ct 80, 385 U S 835, 17 L Ed 2d 70—J Kinderman and Sons v Nippon Yusen Kaisha Lines, D C Pa, 322 F Supp 939

§ 148. Proximate Cause

32. U S—Universal Leaf Tobacco Co of China v Bank Line, Limited, D C N Y, 115 F Supp 353—The YFNX-6, D C Md, 156 F Supp 325, affd, C A, 262 F 2d 559—Hugev v Dampskisaktieselskabet International, D C Cal, 170 F Supp 601, affd, C A, 274 F 2d 875, cert den 80 S Ct 1237, 363 U S 803, 4 L Ed 2d 1147—Levatino Co v American President Lines, Limited, D C N Y, 233 F Supp 697, affd, C A, 337 F 2d 729

Negligence in routing

U S—J C Penney Co v American Exp. Co, D C N Y, 102 F Supp 742, affd, C A, 201 F 2d 846

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33. U S—Lekas & Drivas, Inc v Goulandris, C A N Y, 306 F 2d 426

34. U S—Union Carbide & Carbon Corp. v The Walter Raleigh, D C N Y, 109 F Supp 781, affd, C.A, 200 F 2d 908

35. U S—Stein v U S Lines Co, D C N Y, 132 F Supp 334

§ 149. Duties of Carrier After Disaster or Injury to Cargo

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50. U.S.—Thomas Jordan, Inc v Mayronne Drilling Mud, Chemical and Engineering Service, C A La., 214 F.2d 410.

51. U S—U.S v Lykes Bros S S Co, Inc, C A Tex, 511 F 2d 218.

53. U S.—Levatino Co v. American President Lines, Limited, D C.N.Y., 233 F Supp 697, affd, C A., 337 F 2d 729

54. U.S.—Lekas & Drivas, Inc v Goulandris, C.A N.Y, 306 F.2d 426—U.S v Lykes Bros S S. Co, Inc., C.A Tex., 511 F 2d 218

§ 150. Actions for Damages

Library References

Shipping ⇐132(1) et seq.

58. Suit in admiralty or law

U S—State Establishment for Agr Product Trading v M/V Wesermunde, C A 11 (Fla), 770 F 2d 987, declining to follow Gave Shipping Co, S A v Parcel Tankers, Inc, 634 F 2d 1156, Tradax Ltd v Holendrecht, 550 F 2d 1337

59. Breach of warranty held tort

U S—Oroz v American President Lines, Limited, C A N Y, 259 F 2d 636, cert den 79 S Ct 584, 359 U S 908, 3 L Ed 2d 572

Violation of duty to equate bargaining power of carrier and shipper as sounding in tort

U S—Morrisey v S S A & J Faith, D C Ohio, 252 F Supp 54

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A statute providing for substituted service on non-resident owners in any suit arising out of any accident within the waters of the state applies to an action for damage to goods based on breach of a contract of carriage.[67 5]

67.5. U S—Royston Distributors, Inc v I-S Master Skibs-A/S Golden West, D C Pa, 218 F Supp 230

Where an agent, in the absence of the owner of the cargo asserts his principal's right of action, he must have his principal's consent to and authority for suit.[72 5]

72.5. U S—Fisser v International Bank, 164 F Supp. 826

77. U S—Van Camp Sea Food Co v Pacific-Atlantic S S Co, D C Pa, 122 F Supp 163—Commercio Transito Internazionale, Limited v Lykes Bros S S Co, C.A N Y, 243 F 2d 683—J Aron & Co v The Askvin, C A N Y, 267 F 2d 276—U S v Cia Naviera Continental, S A, D C N Y, 202 F Supp 698—U S. v S.S Mormacteal, D C N Y, 213 F Supp 149—Petition of Tugboat Dalzellea, Inc, D C N Y, 254 F Supp 298—Gulf Puerto Rico Lines v Maicera Criolla, Inc, D C Puerto Rico, 309 F Supp. 539—Marubeni-Lida (America), Inc v Toko Kaiun Kabushiki Kaisha, D C Tex, 327 F Supp 519

N Y—Albert v Isbrandtsen Co, 160 N Y S 2d 772, 7 Misc 2d 67, app dism 214 N Y S 2d 236, 12 A D 2d 581

Carriage of Goods by Sea Act

U S—Western Gear Corp v. State Marine Lines, Inc, C A Wash, 362 F.2d 328—Michelena & Co v. American Export & Isbrandtsen Lines, Inc, D C. Puerto Rico, 258 F.Supp. 479—American Tobacco Co v. Transport Corp, D C Va, 277 F Supp 457—Zajicek v United Fruit Co, C A Canal Zone, 459 F.2d 395

Cal—Francosteel Corp v N. V Nederlandsch Amerikaansche, Stoomvart-Maatschappij, 57 Cal Rptr 867, 249 C A 2d 880, cert den 88 S Ct 293, 389 U S 931, 19 L Ed 2d 282

N J—Bottom Line Imports v Korea Shipping Corp., 436 A 2d 978, 181 N J Super 172

N Y—Leo Hess Intem Corp v Isthmian S S Co, 170 N.Y S 2d 705, 5 A D.2d 250, rearg. and app. den. 173 N Y.S 2d 985, 5 A D 2d 982—National Federation of Coffee Growers of Columbia v. Isbrandtsen Co, 185 N Y S.2d 392, 17 Misc 2d 113—J. M. Rodriquez Inc, 329 N.Y S 2d 388, 38 A D 2d 341

Actions held barred

U S.—Badhwar v. Colorado Fuel & Iron Co, D C.N Y, 138 F Supp 595, affd., C A, 245 F.2d 903, cert den 78 S.Ct. 95, 355 U S. 862, 2 L Ed.2d 68—Schwabach Coffee Co v S S Suriname, D C La., 271 F Supp. 960—Zifferer v Atlantic Lines, Limited, D C Puerto Rico, 278 F.Supp 736

What constitutes "delivery" for purpose of commencing statutory period

U S—American Hoesch, Inc v S S Aubade, D C S C, 316 F Supp 1193—National Packaging Corp v Nippon Yusen Kaisha (N Y K Line), D C Cal, 354 F Supp 986

Provision held inapplicable

N Y—Middle East Export Co v Concordia Line, Skibs A/S Hilda Knudson, 314 N Y S 2d 390, 64 Misc 2d 270 Mod on oth grds 336 N Y S 2d 217, 71 Misc 2d 365

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78. N Y—Victor M Calderon Co v Luckenbach S S Co, 154 N Y S 2d 726

Lack of diligence in prosecution

U S—Howmet Corp v Tokyo Shipping Co, D C Del, 318 F Supp 658—Fireman's Ins Co of Newark, New Jersey v Gulf Puerto Rico Lines, Inc, D C Puerto Rico, 349 F Supp 952

Consolidation Libels in personam against the shipping line and in rem against the vessel may properly be consolidated.[82 5]

82.5. U S.—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp, C A Fla, 316 F 2d 163

84. Defense not allowed

U S—Schroeder Bros v The Saturnia, D C N Y, 123 F Supp 282, affd, C A, 226 F 2d 147

Other matters have been held not to constitute defense [92 10]

92.10. Possible settlement until time for suit elapses

U S—Fireman's Ins Co of Newark, New Jersey v Gulf Puerto Rico Lines, Inc, D C Puerto Rico, 349 F Supp 952

§ 151. —— Persons Entitled to Sue

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96. U S.—Gulf Atlantic Transp. Co v Becker County Sand & Gravel Co, D C N C, 122 F.Supp 13—Southwestern Sugar & Molasses Co. v River Terminals Corp, D C.La, 153 F Supp 923, revd on oth grds, C A, 253 F 2d 922, remd 79 S Ct 1210, 360 U S 411, 3 L Ed 2d 1334, David Crystal, Inc v Cunard S.S Co, D.C.N Y, 223 F Supp 273, affd., C A., 339 F 2d 295, cert den 85 S Ct. 1339, 1340, 380 U.S 976, 14 L Ed 2d 271—Levatino Co v M/S Helvig Torm, D.C N Y, 295 F Supp. 725—American Zinc Co v Foster, D C Miss., 313 F.Supp. 671, mod on oth. grds, C A, 441 F 2d 1100, cert den. 92 S Ct 99, 404 U S 855, 30 L Ed 2d 95.

97. U S—Federal Ins Co. v American Export Lines, D C.N Y, 113 F.Supp. 540—M. W Zack Metal Co v. The Birmingham City, C.A.N Y., 291 F 2d 451—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp, C.A Fla, 316 F 2d 163—Central R Co. of N J v Tug Marie J Turecamo, D.C N Y, 238 F Supp 145

Only party to contract

U.S.—Atlantic Banana Co. v. M. V "Calanca", D C. N Y., 342 F.Supp. 447, affd., C A., 489 F 2d 752, and 489 F 2d 752

99. No right of intervention

U S—Industria E. Comercio De Minerios, S.A. v Nova Genuesis Societa Per Azioni Per L'Industria Et Il Commercio Marittimo, D C Va., 172 F Supp 569, am on oth. grds. 197 F.Supp 699, affd., C.A., 310 F 2d 811

1. U S.—Holden v S S Kendall Fish, D C.La, 212 F Supp. 106

2. U S—The Liberty No 4, D C Ohio, 7 F. 226.

4. U S—Fisser v. International Bank, D C.N Y., 164 F Supp 826—New Hampshire Fire Ins. Co. v. The Perla, 84 F.Supp. 715

5. U S—Levatino Co v M/S Helvig Torm, 295 F Supp 725

13. U S—U S v Cia Naviera Continental, S A, D C N Y, 202 F Supp 698

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15. U S—Levatino Co v M/S Helvig Torm, D C N Y, 295 F Supp 725—Fabbri Co v Universal Shipping Corp, D C N Y, 310 F Supp 964

A shipper, after having parted with title to the goods, may not sue the carrier as trustee for the consignee [20.5]

20.5. U S—Farbwerke Hoeschst A G v M/V "Don Nicky," C A Canal Zone, 589 F 2d 795

21. U S—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 290 F 2d 486, mod on oth grds 300 F 2d 41—Owens-Illinois Glass Co v American Coastal Lines, Inc, D C N Y, 222 F Supp 923

§ 152. —— Persons or Vessels Liable

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27. U S—Trans-Amazonica Iquitos, S A v Georgia S S Co, D C Ga, 335 F.Supp 935—Southern Block & Pipe Corp v. M/V Adonis, D C Va, 341 F Supp 879, affd, C A, 457 F 2d 924

N Y—Societe Metallurgica Italiana v Grace Line, Inc, 163 N Y S 2d 688, 9 Misc 2d 358

63 C.J. p 85 note 9.

29. U S—American Tobacco Co v Goulandris, D.C N Y, 173 F Supp 140, affd, C.A., 281 F.2d 179, affd. in part and revd. in part on oth grds 306 F.2d 426—International Drilling Co, N V v M/V Doriefs, D.C Tex., 291 F Supp 479—Interstate Steel Corp v. S S. Crystal Gem D C N.Y., 317 F Supp. 112—Demsey & Associates, Inc v Steamship Sea Star, C.A N.Y, 461 F.2d 1009.

Unauthorized issuance of bill of lading

U S—Demsey & Associates, Inc v. Steamship Sea Star, D.C.N.Y, 321 F.Supp. 663, affd. in part, revd. in part on oth. grds., C A, 461 F.2d 1009—Associated Metals & Minerals Corp. v S.S. Portoria, C A Tex., 484 F 2d 460

30. U.S.—Autobuses Modernos, S A. v. The Federal Mariner, D C.Pa., 125 F Supp. 780—Alaska Native Industries Co-op. Ass'n v. U.S, D.C.Wash, 206 F.Supp. 767—Aljassim v S S. South Star, D C.N.Y., 323 F.Supp. 918.

Shipper not liable for contribution

U.S.—Asiatic Petroleum Corp. v. S S. Am. Trader, D.C.N.Y., 354 F Supp. 389.

32. U.S.—Higgins, Inc v Tex-O-Kan Flour Mills Co., C.A.La., 274 F.2d 263—Orient Mid-East Lines v. Albert E Bowen, Inc, C A.N Y, 458 F.2d 572—Zajicek v. United Fruit Co., C.A Canal Zone, 459 F.2d 395—Tube Products of India v. Steamship Rio Grande, D.C.N.Y, 334 F.Supp 1039—Trans-Amazonica Iquitos, S.A v. Georgia S.S. Co., D.C.Ga., 335 F.Supp 935.

Time charterer

U.S.—A/S Brovanor v. Central Gulf S.S Corp., D.C N.Y., 323 F.Supp. 1029—Bunge Corp. v. Republic of U.S. of Brazil, D.C.La., 353 F.Supp. 64.

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35. Owner and charterer having close corporate relation

U.S.—In re Marine Sulphur Transport Corp, D.C.N Y., 312 F.Supp 1081, affd. in part, revd. in part on oth. grds, C.A., 460 F.2d 89, cert. den. 93 S.Ct 318, 326, 409 U.S. 982, 34 L.Ed.2d 246.

Where cargo is lost by reason of the sinking of the carrier, and the sinking is due to the joint negligence of the carrier and a colliding tanker, the cargo claimants are entitled to recover from the tanker all provable damages where the carrier is exonerated by reason of the contract of carriage and statute.[40.5]

40.5. U S—In re Pacific Far East Line, Inc, D C Cal, 314 F Supp 1339, affd, C A, 472 F 2d 1382

41. U S—Instituto Cubano De Estabilizacion Del Azucar v The Golden West, C A N Y, 246 F 2d 802, cert den 78 S Ct 152, 355 U S 884, 2 L Ed 2d 114—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp, C A Fla, 316 F 2d 163—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

43. U S—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

48. U S—General Foods Corp v U S, D C N Y, 104 F Supp 629

Forwarding agent

(1) U S—J C Penney Co v American Exp Co, supra, n 32

(2) U S—J C Penney Co v American Exp Co, supra, n 32

Shipping agent not liable

U S—Gulf Puerto Rico Lines v Maicera Criolla, Inc, D C Puerto Rico, 309 F Supp 539—Medina v South Atlantic & Carribbean Line, Inc, D C Puerto Rico, 342 F Supp 498

A ship discharges its duty of care to cargo when it accepts the offer of reputable salvor and turns control of ship and cargo over to the salvor [48.5]

48.5. U S—American Independent Oil Co v M S alkaid, D C N Y, 289 F Supp 329

49. U S—International Drilling Co, N V v M/V Doriefs, D C Tex, 291 F Supp 479

Agent not liable where plaintiff had notice of principal

U S—Robin Hood Flour Mills, Limited v Bahama Pearl Co, D C N Y, 318 F Supp 1286

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50. U S.—Accinanto, Limited v Cosmopolitan Shipping Co, D C Md., 99 F Supp 261, affd in part, revd on oth grds. in part, C A., 199 F 2d 134, cert den 73 S Ct 1129, 345 U S 992, 97 L Ed 1400

Disclosure of principal held sufficient

U S—Accinanto, Limited v Cosmopolitan Shipping Co, supra

51. U.S—American Zinc Co v Foster, D C Miss, 313 F Supp 671, mod on oth grds, C A, 441 F 2d 1100, cert. den. 92 S.Ct 99, 404 U S 855, 30 L Ed 2d 95

57. Joint liability with recovery over

U.S—Sir William Reardon Smith & Sons, Limited v San Pedro D C Tex, 226 F Supp 879, affd., C A, 328 F 2d 623

58. 63 C J. p 64 note 66

Tug held entitled to exoneration

U S—Petition of Southern Transp Co, D C Va, 211 F.Supp. 940.

65. Failure to inspect lighter

U.S—Petition of Petterson Lighterage & Towing Corp, D C N Y., 154 F.Supp 461, affd, C.A, 253 F 2d 952.

66. U.S.—Standard Brands, Inc v. The Radja, D C Cal, 114 F Supp 456

67. U S—A M Collins & Co v Panama R Co, C A Canal Zone, 197 F 2d 893, cert den 73 S Ct 168, 344 U.S. 875, 97 L Ed 677—New Orleans Stevedoring Co. v North Atlantic & Gulf S S Co, C.A.La., 213 F.2d 859—Krawill Machinery Corp. v. Robert C. Herd & Co., D C Md, 155 F Supp 296, affd, C A., 256 F.2d 946, cert gr, 79 S Ct 61, 358 U S 812, 3 L Ed 2d 56—Hugev v Dampskisaktieselskabet International, D C Cal, 170 F Supp 601, affd, C A, 274 F 2d 875, cert den 80 S Ct 1237, 363 U S 803, 4 L Ed.2d 1147—Shamrock Towing Co v Schiavone-Bonomo Corp, D C N Y, 173 F Supp 39, affd, C A, 275 F 2d 338—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd in part on oth grds, C A, 461 F 2d 1009—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009

Contractual limitation to physical damage resulting from negligence

U S—Centraal Stikstof Verkoopkanter, N V v Walsh Stevedoring Co, C A Ala, 380 F 2d 523

As between stevedore and vessel owner

U S—Consolidated Cork Corp v Jugoslavenska Linijska Plovidba, D C N Y, 318 F Supp 1209

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Under the Carriage of Goods by Sea Act, a stevedore can never be sued directly for cargo loss since he is not a shipper, consignee, or carrier designated in the statute.[72.5]

72.5. U.S—Marubeni-Iida (America), Inc v Toko Kaiun Kabushiki Kaisha, D C Tex, 327 F Supp 519

78. Noncompliance with Coast Guard regulation

U S—Hershey Chocolate Corp v The Robert Luckenbach, D C Or, 184 F Supp 134, affd, C A, 295 F 2d 619

§ 153. —— Pleading

79. U S—Nashiwa v Matson Nav Co, D C Hawaii, 116 F Supp 897—Leather's Best, Inc v S S Mormaclynx, C A N Y, 451 F 2d 800, on remand, 346 F Supp 962

N Y.—Albert v Isbrandtsen Co, 160 N Y S 2d 772, 7 Misc 2d 67, app dism 214 N Y S 2d 236, 12 A D 2d 581

Libel held sufficient

U S—Hearty v Ragunda, D C N Y, 114 F Supp 869—Southwestern Sugar & Molasses Co v The Eliza Jane Nicholson, D C N Y, 126 F Supp 666

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2. U S—Hearty v Ragunda, D C N Y, 114 F Supp 869—Horizon Ins Co v Kinsman Marine Transit Co, D C Ohio, 256 F Supp 9

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9. U S—B Turecamo Towing Corporation v U.S, C C A N Y, 125 F 2d 1001

13. U S—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140 Affd, C A., 281 F 2d 179, affd. in part and revd in part on oth grds 306 F 2d 426

14. U S—Copco Steel & Engineering Co v. The Prins Willem Van Oranje, D C Mich, 159 F Supp 79—Fisser v International Bank, D C N Y, 164 F Supp 826—National Interocean Corp v Emmons Coal Mining Co, D.C Pa., 270 F 997

16. U S—Horizon Ins. Co v Kinsman Marine Transit Co, D.C Ohio, 256 F Supp 9

§ 154. —— Presumptions and Burden of Proof

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34. U S—O F Nelson & Co v U S, C C.A Cal, 149 F 2d 692, foll 149 F 2d 815 and 149 F 2d 816, motion den 169 F 2d 833

Presumption of shipment in good order on delivery to second ship held inapplicable

U S.—F Badrena E Hijo, Inc v The Rio Iguazu, D C La , 182 F Supp 885

Presumption that statutory fault contributed to accident

U S.—Afran Transport Co v U S , D C N Y , 309 F Supp 650, affd , C A , 435 F 2d 213, cert den 92 S.Ct 72, 404 U S 872, 30 L Ed 2d 116

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46. U S—O F Nelson & Co v U S , C C A Cal , 149 F 2d 692, foll 149 F 2d 815 and 149 F 2d 816, motion den 169 F 2d 833—United Distillers of America v The Ionian Pioneer, D C La , 130 F Supp 647, affd , C A , 236 F 2d 78—Toho Bussan Kaisha, Limited v American President Lines, Limited, C A N Y , 265 F 2d 418, 76 A L R 2d 1344—Lekas & Drivas, Inc v Goulandris, C A N Y , 306 F 2d 426—Naphtha Solvents Co v Esso Standard Oil Co , D C La , 221 F Supp 796 —In re Marine Sulphur Queen, C A N Y , 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 782, 34 L.Ed 2d 246

N Y —Greene Steel & Wire Co v F W Hartmann & Co , 299 N Y S 2d 654, 32 A D 2d 538

Proof of ownership

U S —Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp , C A Fla , 316 F 2d 163.

48. U S —Nichimen Co v M V. Farland, C A N Y , 462 F 2d 319—Asbestos Corp Limited v. Compagnie De Navigation Fraissinet et Cyprien Fabre, D C.N Y , 345 F Supp 814, affd , C A , 480 F 2d 669

Burden of production

U S —Leather's Best, Inc v S S. Mormaclynx, C.A N Y , 451 F 2d 800, on remand, 346 F Supp 962

49. U S.—General Motors Corp v. The Olancho, supra, n 48

Not necessary to prove reasonable facilities to inspect and tally shipment

Tex —Rhinetubes, Inc v Norddeutscher Lloyd, Civ App , 335 S W 2d 269, err ref no rev err

51. U S —Copco Steel & Engineering Co v The Prins Frederik Hendrik, D C.Mich , 129 F Supp 469

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54. U S—Swedish Am Line v Evans Products Co., C A Va , 431 F 2d 869—Margarine Verkaufsunion G m.B H v. M T G C Brovig, D C N Y., 318 F Supp. 977

Mo —Bunge Corp. v Valley Line Supply & Equipment Co , 480 S W 2d 859

Inferences as to inspection of vessel

U S.—Petition of Petterson Lighterage & Towing Corp., D C.N Y , 154 F Supp 461, affd , C A , 253 F 2d 952.

Prima facie case

U S.—F. Badrena E Hijo, Inc v The Rio Iguazu, D C La., 182 F.Supp. 885—Daido Line v Thomas P. Gonzalez Corp , C A Cal., 299 F.2d 669

Inferences from failure to take written exception within certain time

N.Y.—M Paquet & Co , Inc v. Dart Containerline Co , Ltd., 343 N.Y.S.2d 446, 74 Misc 2d 352

55. U.S.—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A , D C N Y., 284 F.Supp. 356, affd. in part, revd. in part, 388 F.2d 434, cert. den 89 S.Ct. 92, 393 U S 828, 21 L.Ed.2d 99

N.Y.—Teneria El Popo v. Home Ins. Co., 136 N Y.S 2d 574, 207 Misc. 84

56. U S.—Lekas & Drivas, Inc. v. Goulandris, C A. N.Y., 306 F 2d 426—India Supply Mission v S S Valiant Effort, D.C.N.Y., 283 F.Supp 1011.

N.Y.—Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro Patrimonio Nacional, 234 N Y.S.2d 243, 36 Misc.2d 821.

58. U S —Otis McAllister Export Corp v Grancolombiana (New York), Inc , D C La , 216 F Supp 756

N Y —Joseph Resnick Co v Nippon Yusen Kaisha, 241 N Y S 2d 134, 39 Misc 2d 513

59. U S —H W St John & Co v The Flying Spray, D C N Y , 149 F Supp 737—Otis McAllister Export Corp v Grancolombiana (New York), Inc , D C La , 216 F Supp 756

61. U S —Copco Steel & Engineering Co v The Prins Willem Van Oranje, D C Mich , 159 F Supp 79

66. U S —Karabagui v The Shickshinny, D C N Y , 123 F Supp 99, affd , C A , 227 F 2d 348

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70. Md —C J S cited in Orient Overseas Line v Globemaster Balti , Inc , 365 A 2d 325, 338, 33 Md App 372

N Y —Plata Am Trading, Inc v Lancashire, 214 N Y S 2d 43, 29 Misc 2d 246

73. N Y —Societe Metallurgica Italiana v Grace Line, Inc , 163 N Y S 2d 688, 9 Misc 2d 358

74. N Y —Plata Am Trading, Inc v Lancashire, 214 N Y S 2d 43, 29 Misc 2d 246

75. Md —C J S cited in Orient Overseas Line v Globemaster Balti , Inc , 365 A 2d 325, 338, 33 Md App 372

82. U S —J Gerber & Co v Holland-Amerika Lijn, D C La , 261 F Supp 893—Margarine Verkaufsunion G m B H. v M T G C Brovig, D C.N Y , 318 F Supp 977

N Y —Gillespie & Co of N Y v Coptinental Ins Co , 176 N Y S 2d 146, 14 Misc 2d 110

Internal condition not revealed by external appearance

U S —Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp , C A Fla , 316 F 2d 163

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84. U S —Nichimen Co v M V Farland, D C.N Y., 333 F Supp 691, mod on oth grds , C.A , 462 F 2d 319

85. U S —J Gerber & Co v. Holland-Amerika Lijn, D C La , 261 F.Supp 893

N Y —Gillespie & Co of N Y. v. Continental Ins Co , 176 N Y S.2d 146, 14 Misc 2d 110—Mamiye Bros. v Barber S S. Lines, Inc., D C.N.Y., 241 F.Supp 99, affd , C A , 360 F 2d 774 Cert den. 87 S Ct 80, 385 U S 833, 17 L Ed 2d 70

86. N.Y —Teneria El Popo v Home Ins Co., 136 N Y S 2d 574, 207 Misc. 84.

87. U.S —Kupfermann v. U S , C A N Y , 227 F.2d 348—E. T Barwick Mills, Inc v Hellenic Lines, Limited, D C Ga , 331 F Supp 161, affd , C A , 472 F.2d 1406.

89. U S.—Hecht, Levis & Kahn, Inc v. The President Buchanan, C A.N.Y , 236 F.2d 627.

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96. U S —Karobi Lumber Co v S S Norco, D C Ala , 249 F.Supp 324, affd , C.A , 397 F.2d 576—Interstate Steel Corp v S.S Crystal Gem, D.C. N Y , 317 F Supp 112

Sweat damage

U.S —California Packing Corp v States Marine Corp of Del , D.C.Cal , 187 F.Supp 540

Two concurring causes

U.S —Bunge Corp, v Alcoa S.S Co., D C.N.Y , 133 F Supp 311.

97. U S.—J Gerber & Co , v S S. Sabine Howaldt, C A.N Y., 437 F.2d 580.

98. U.S —Hunt Foods & Industries, Inc v. Matson Nav. Co., D.C.La , 249 F.Supp 572—John Penny & Sons, Limited v M/V Swivel, D.C Mass., 266 F.Supp 302—Levatino Co v. M/S Helving Torm, D C N Y., 293 F Supp. 725—McAllister Lighterage Line, Inc. v. S/S Steel Age, D.C.N Y , 306 F.Supp. 19—Insurance Co. of North America v. S S. Flying Trader, D.C.N.Y., 306 F.Supp 221—J Gerber & Co v S S Sabine Howaldt, C A N Y , 437 F 2d 580—Demsey & Associates, Inc v Steamship Sea Star, D C N Y , 321 F Supp 663, affd in part, revd in part on oth grds , C A , 461 F 2d 1009

Inadequacy of packing

N Y —Great Atlantic & Pacific Tea Co , v Lloyd Brasileiro (Patrimonio Nacional), 237 N Y S 2d 764, 37 Misc 2d 1058

1. U S —Orient Ins Co v Flota Mercante del Estado, D C La., 102 F Supp 729, affd , C A , 198 F 2d 740

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6. U S —O F Nelson & Co v U.S , C C A Cal , 149 F 2d 692, foll 149 F 2d 815 and 149 F 2d 816, motion denied 169 F 2d 833—Schroeder Bros v The Saturnia, D C N Y , 123 F Supp 282, affd , C A , 226 F 2d 147—Esso Standard Oil Co v The Kaposia, D C N Y , 148 F Supp 899 Affd , C A , 259 F 2d 486—Consolidated Cork Corp v Jugoslavenska Linijska Plovidba, D C N Y , 318 F Supp 1209

7. U S —Afran Transport Co v U S , D C N Y , 309 F Supp 650, affd , C A , 435 F 2d 213, cert den 92 S Ct 72, 404 U S 872, 30 L Ed 2d 116

9. U.S —Goltzman v. Rougeot, D C La , 122 F Supp 700

10. U S —Hunt Foods & Industries, Inc v Matson Nav Co , D C La., 249 F Supp 572—Commercial Transp Corp v Martin Oil Service, Inc , C A Ill , 374 F 2d 813

Pennsylvania doctrine applicable

U S —Andros Shipping Co v Panama Canal Co , C A Canal Zone, 298 F 2d 720

11. U S —Bunge Corp v Alcoa S S Co , D C N Y , 133 F Supp 311—Diethelm & Co v The Flying Trader, D.C N Y , 141 F Supp. 271, affd , C A , 244 F 2d 542—Cia De Navegacion Fruco, S A v M/S Heinz Horn, D C Ala , 233 F Supp 637, affd in part, revd in part on oth grds., C.A , 404 F 2d 422, cert den. 89 S.Ct 1272, 394 U S. 943, 22 L Ed.2d 477—Commercial Transp Corp v Martin Oil Service, Inc., C A Ill , 374 F.2d 813—Horn v Cia de Navegacion Fruco, S.A., C A Ala , 404 F 2d 422, cert den 89 S.Ct. 1272, 394 U S. 943, 22 L Ed.2d 477—Encyclopaedia Brittanica, Inc v S S Hong Kong Producer, C A N Y , 422 F.2d 7.

14. U.S —U S v Mississippi Val Barge Line Co , C.A Mo , 285 F 2d 381—Isthmian S.S Co. v. California Spray-Chemical Corp , C A Cal , 290 F 2d 486, mod on oth grds 300 F.2d 41—Afran Transport Co v U.S , D C.N.Y , 309 F.Supp 650, affd., C A., 435 F 2d 213, cert. den 92 S Ct 72, 404 U S 872, 30 L.Ed 2d 116.

Presumption from alteration of ship's logs

U S —Andros Shipping Co v. Panama Canal Co , D C Canal Zone, 184 F.Supp 246, affd , C A., 298 F 2d 720

15. U S —Copco Steel & Engineering Co v The Alwaki, D.C N Y., 131 F.Supp 332

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18. Cal.—Aspen Pictures, Inc. v. Oceanic S.S. Co , 306 P 2d 933, 148 C A 2d 238, cert den , 77 S Ct. 1381, 354 U.S. 926, 1 L Ed.2d 1436.

N Y.—Joseph Resnick Co. v Nippon Yusen Kaisha, 241 N Y S 2d 134, 39 Misc 2d 513.

Unseaworthiness

U S.—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Maru, C.A.N Y , 459 F 2d 1370, cert den. 93 S.Ct 898, 409 U S. 1115, 34 L.Ed 2d 699.

19. U S —In re Marine Sulphur Transport Corp., D.C N Y , 312 F Supp. 1081, affd in part, revd in part on oth grds., C.A , 460 F.2d 89, cert. den. 93 S.Ct. 318, 326, 409 U.S. 982, 34 L Ed 2d 246—J Gerber & Co v. S S. Sabine Howaldt, C.A.N.Y , 437 F.2d 580.

22. N Y.—Joseph Resnick Co v. Nippon Yusen Kaisha, 241 N.Y.S 2d 134, 39 Misc.2d 513, applying federal law.

23. U S—Levatino Co v M/S Helvig Torm, D C N Y, 295 F Supp 725

25. U S—Nichimen Co v MV Farland, D C N Y, 333 F Supp 691, mod on oth grds, C A, 462 F 2d 319

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31. U S—American Tobacco Co v Goulandris, C A N Y, 281 F 2d 179

38. U.S—Petition of U S, D C N Y, 105 F Supp 353, remd on oth grds, C A, 201 F 2d 281—Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, D C La, 102 F Supp 861, affd, C A, 205 F 2d 886, cert den 74 S Ct 275, 346 U S. 915, 98 L Ed. 411—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds. 306 F 2d 426—Asbestos Corp Ltd v Compagnie De Navigation Fraissinet et Cyprien Fabre, C A N Y, 480 F 2d 669

41. U S—North Am. Smelting Co v Moller S S Co, D C Pa, 103 F Supp 447, revd on oth grds, C A., 204 F 2d 384

45. U S—Sears, Roebuck & Co v American President Lines, Limited, D C Cal, 345 F Supp 395

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48. U.S—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140, affd, C A., 281 F 2d 179, affd. in part and revd in part on oth grds 306 F.2d 426—Firestone Synthetic Fibers Co—Division of Firestone Tire & Rubber Co. v. M/S Black Heron, C A N Y, 324 F 2d 835—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Maru, C A N Y., 459 F 2d 1370, cert. den 93 S Ct 898, 409 U.S 1115, 34 L Ed 2d 699.

50. U S.—National Sugar Refining Co v Motorship Las Villas, D C.La, 225 F Supp 686

Prima facie due diligence

U.S.—American Tobacco Co. v Goulandris, D C N Y, 173 F Supp 140, affd., C A., 281 F.2d 179, affd in part and revd in part on oth grds 306 F 2d 426

51. U.S—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D.C.N.Y, 335 F Supp 1329.

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53. U S.—In re Marine Sulphur Transport Corp, D.C.N.Y, 312 F Supp 1081, affd. in part, revd in part on oth grds., C.A., 460 F.2d 89, cert den. 93 S.Ct. 318, 326, 409 U.S. 982, 34 L.Ed 2d 246—Trans-Amazonica Iquitos, S A. v Georgia S.S Co, D.C Ga., 335 F Supp. 935.

60. **Where improper loading is eliminated, etc.**

(2) Other matters.

U.S.—R. D. Wood Co. v. Phoenix Steel Corp, C.A Pa, 327 F.2d 921

61. U.S.—Reisman v New Hampshire Fire Ins Co, C.A.Fla., 312 F.2d 17—R. D. Wood Co. v Phoenix Steel Corp., C.A Pa, 327 F.2d 921—South, Inc. v. Moran Towing & Transp. Co, C.A.N Y, 360 F.2d 1002—Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania De Vapores, S A., C.A.N Y., 388 F.2d 434, cert. den. 89 S.Ct 92, 393 U.S. 828, 21 L.Ed.2d 99.

N.Y.—Luria Bros & Co., Inc. v Associated Metals & Minerals Corp., 343 N.Y.S.2d 152, 73 Misc.2d 937

62. U.S.—Trans-Amazonica Iquitos, S A. v Georgia S S Co, D C Ga., 335 F.Supp. 935

64. U.S.—Petition of Petterson Lighterage & Towing Corp., D.C.N.Y., 154 F.Supp. 461, affd., C.A, 253 F.2d 952—Caterpillar Overseas, S A. v. S S Expeditor, C.A N.Y., 318 F.2d 720, cert den. 84 S Ct. 347, 375 U.S. 942, 11 L.Ed.2d 272.

65. U.S.—Phillips Petroleum Co. v. Koch Ellis Marine Contractors, Inc., D.C.La., 118 F.Supp. 940

Presumption held not rebutted

N.Y.—Luria Bros. & Co., Inc. v. Associated Metals & Minerals Corp., 343 N.Y.S.2d 152, 73 Misc 2d 937.

66 U S—Central R Co of N J v Tug Marie J Turecamo, D C N Y, 238 F Supp 145

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67. U S—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

68. U S—Eliz Salzman Tobacco Co v S S Mormacwind, C A N Y, 371 F 2d 537

71. U S—Manhattan Fruit Export Corp v Royal Netherlands S S Co, D C N Y, 175 F Supp 771, revd on oth grds, C A, 271 F 2d 607, cert den 80 S Ct 1249, 363 U S 812, 4 L Ed 2d 1154

73. U S—Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, C A La, 205 F 2d 886, cert den 74 S Ct 275, 346 U S 915, 98 L Ed 411

Nor does the carrier have the burden of proving that it exercised due diligence in providing a seaworthy ship in order to invoke the fire defense statute.[73 5]

73.5. U S—Westinghouse Elec Corp v M/V Leslie Lykes, C A La, 734 F 2d 199, reh den 739 F 2d 633, two cases, cert den 105 S Ct 577, 83 L Ed 2d 516

There is, however, authority to the contrary [73 10]

73.10. U S—Sunkist Growers, Inc v Adelaide Shipping Lines, Ltd, 603 F 2d 1327, cert den 100 S Ct 659, 444 U S 1012, 62 L Ed 2d 640

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80. U S—Konfort, S A v The Santo Cerro, D C N Y, 190 F Supp 1—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

81. U S—Konfort, S A v The Santo Cerro, D C N Y., 193 F.Supp 1

85. U S—California Packing Corp v The Empire State, D C Cal, 180 F Supp 19, remd, C A, 310 F 2d 206

89. **Presumption of unseaworthiness**

U S—Jefferson Chemical Co v M/T Grena, C A Tex, 413 F.2d 864

94. **Usual and customary route presumed**

D C—Transatlantic Financing Corp v U S, C A, 363 F 2d 312, 124 U.S App D C 183

95. U.S—Haroco Co. v The Tai Shan, D C N Y, 111 F Supp. 638, affd, C.A, 218 F.2d 822—Banco Para El Comercio Exterior De Cuba v The Ruth Ann, D C Puerto Rico, 192 F Supp 607—Surrendra (Overseas) Private, Limited v S S Hellenic Hero, D.C N Y, 213 F Supp. 97, affd, C A, 324 F 2d 955—P & E Shipping Corp v Empresa Cubana Exportadora E Importadora de Alimentos, C.A Puerto Rico, 335 F 2d 678

Statutory presumption absorbs inconsistent provision of bill

U.S—E C L. Sporting Goods v U S Lines, Inc, D C Mass, 317 F Supp. 1245

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98. U.S—C.A. Articulos Nacionales de Goma Gomaven v. M/V Aragua, C.A 5 (La), 756 F 2d 1156.

4. U.S—Virgin Islands Corp. v Merwin Lighterage Co, C.A Virgin Islands, 251 F.2d 872, cert den 78 S Ct. 1369, 357 U S 929, 2 L Ed 2d 1372, on remand, D C, 177 F Supp 810

11. U.S—Hampton Roads Carriers, Inc v Allied Chemical Corp., C A Va., 329 F 2d 387, cert den 85 S Ct 78 379 U S. 839, 13 L.Ed 2d 46

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14. U S—Royston Distributors, Inc v. Moore-McCormack Lines, Inc, D C Pa, 252 F Supp 480—Interstate Steel Corp. v S S Crystal Gem, D C N Y, 317 F.Supp. 112

16. **Burden on carrier**

U S—Empresa Central Mercantil De Representacoes, Ltda v Republic of the U S of Brazil, C A N Y, 257 F 2d 747—Zander & Co v Mississippi Shipping Co, D C La, 171 F Supp 184, revd on oth grds, C A, 270 F 2d 345, app dism 80 S Ct 212, 361 U S 115, 4 L Ed 2d 148, 238, conf to, C A, 273 F 2d 618, recalled in part 273 F 2d 618

22. U S—Miami Structural Iron Corp v Cie Nationale Belge De T M, C A Fla, 224 F 2d 566—Manhattan Fruit Export Corp v Royal Netherlands S S Co, D C N Y, 175 F Supp 771, revd on oth grds, C A, 271 F 2d 607, cert den 80 S Ct 1249, 363 U S 812, 4 L Ed 2d 1154—Otis McAllister Export Corp v Grancolombiana (New York), Inc, D C La, 216 F Supp 756

23. U S—Manhattan Fruit Export Corp v Royal Netherlands S S Co, D C N Y, 175 F Supp 771, revd on oth grds, C A, 271 F 2d 607, cert den 80 S Ct 1249, 363 U S 812, 4 L Ed 2d 1154—M W Zack Metal Co v The Birmingham City, C A N Y, 291 F 2d 451

§ 155. —— Admissibility of Evidence

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28 U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 275 F 2d 253, on remand, D C, 207 F Supp 262, affd 315 F 2d 162—Aunt Mid, Inc v Fjell-Oranje Lines, C A Ill, 458 F 2d 712, cert den 93 S Ct 130, 409 U S 877, 34 L Ed 2d 131

Cal—Aspen Pictures, Inc v Oceanic S S Co, 306 P 2d 933, 148 C A 2d 238, cert den, 77 S Ct 1381, 354 U S 926, 1 L Ed 2d 1436

Expert testimony

U S—Esso Standard Oil Co v The Kaposia, C A N Y, 259 F 2d 486

Use of cost records for repair of automobiles

U S—Royston Distributors, Inc v Moore-McCormack Lines, Inc, D C Pa, 252 F Supp 480

29. U S—Aunt Mid, Inc v Fjell-Oranje Lines, C A Ill, 458 F 2d 712, cert den 93 S Ct 130, 409 U S 877, 34 L Ed 2d 131

30. U S—U S v Westchester Fire Ins Co of N Y, D C N Y, 154 F Supp 827

32. Tex—Maurice Pincoffs Co v Southern Stevedoring Co, Civ App, 472 S W 2d 841, err gr

33. U S—Union Carbide & Carbon Corp v The Walter Raleigh, D C N Y, 109 F Supp 781, affd, C A, 200 F 2d 908

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51. U S—Petition of U S, D C N Y, 105 F Supp 353, remd on oth grds, C A, 201 F 2d 281

§ 156. —— Weight and Sufficiency of Evidence

Library References

Shipping ⇐132(5) et seq.

59. U S—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, C A N Y, 253 F 2d 785—Levatino Co v S S Noefjell, D C N Y, 231 F Supp 307

Evidence held sufficient

(1) U.S—Isbrandtsen Co v Tuteur & Co, C A La, 267 F 2d 310—California Packing Corp v The P & T Voyager, D C Cal, 180 F Supp 108

(2) U S—Stauffer Chemical Co v Brunson, C A Ala, 380 F 2d 174, app after remand 409 F 2d 1327

(3) Other evidence

U S—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

Evidence held insufficient

(3) Other evidence

U S—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp. 352—Hunt Foods & Industries, Inc v Matson Nav Co, D C La, 249 F Supp

572—International Drilling Co, N V v M/V Dorlefs, D C Tex, 291 F Supp 479

Proximate cause

U S—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216—President of India By and Through Director of India Supply Mission v West Coast S S Co, C A Or, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216

60. U S—U S v Central Gulf S S Corp, C A La, 517 F 2d 687

61. U.S—U S v Lykes Bros S S Co, C A La, 432 F 2d 1076—E T Barwick Mills, Inc v Hellenic Lines, Limited, D C Ga, 331 F Supp 161, affd, C A, 472 F 2d 1406—Nichimen Co v MV Farland, D C N Y, 333 F Supp 691, mod on oth grds, C A, 462 F 2d 319

Bill of lading

(2) Other matters

U S—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F Supp 663, affd in part, revd in part on oth grds, C A, 461 F 2d 1009—Bunge Corp v Republic of U S of Brazil, D C La, 353 F Supp 64

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64. U.S—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A., D C N Y, 284 F Supp 356, affd in part, revd in part, 388 F 2d 434, cert den 89 S Ct 92, 393 U.S 828, 21 L Ed 2d 99

67. U S—Glidden Co v Hellenic Lines, Limited, C A N Y, 275 F 2d 253, on remand, D C, 207 F Supp 262, affd 315 F 2d 162—Tex-O-Kan Mills Co v Higgins, Inc, D C La, 174 F Supp 198, affd, C A, 274 F 2d 263—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 300 F 2d 41

Ill.—Garcia Intern Corp v Cosmos Shipping Co, 262 N.E 2d 811, 129 Ill App 2d 140

68. U S.—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140 Affd, C A, 281 F 2d 179, affd. in part and revd in part on oth grds 306 F 2d 426.

Evidence held sufficient

(2) La—Neuss Hesslein & Co v Louisville & N R Co, App., 50 So 2d 855, annulled in part, affd in part, 59 So 2d 195, 221 La 296

69. Evidence held sufficient

(1) U S—Travelers Ins Co v S S Hermine, D C Ohio, 325 F Supp 420

71. Evidence held sufficient

(2) U.S.—Accinanto, Limited v Cosmopolitan Shipping Co, D C Md, 99 F Supp 261, affd in part, revd on oth grds. in part, C A, 199 F 2d 134, cert den 73 S Ct 1129, 344 U.S—Haroco Co v The Tai Shan, D.C.N Y., 111 F Supp 638, affd, C A, 218 F 2d 822

Damage from deviation

(2) Other matters

U.S.—Haroco Co v The Tai Shan, D C N Y, 111 F.Supp. 638, affd, C A, 218 F.2d 822—World Wide S.S. Co. v India Supply Mission, D C N Y, 316 F Supp 190

Evidence held insufficient

U.S.—P & E Shipping Corp v Empresa Cubana Exportadora E Importadora de Alimentos, C A Puerto Rico, 335 F 2d 678.

Rebuttal of presumption of unreasonableness

U.S—E C L. Sporting Goods v U.S Lines, Inc., D C Mass, 317 F.Supp. 1245

72. U.S.—Goltzman v Rougeot, D C La, 122 F.Supp 700—Schroeder Bros. v The Saturnia, D.C N Y, 123 F.Supp. 282, affd., C A, 226 F.2d 147.

Evidence held sufficient

(1) U.S.—U.S v. Central Gulf S.S. Corp., D C.La., 321 F.Supp. 945, affd, C.A, 456 F 2d 1281.

N Y—Luna Bros & Co, Inc v Associated Metals & Minerals Corp, 343 N Y S 2d 152, 73 Misc 2d 937

Tenn—Parish & Parish Min Co v Serodino, Inc, 372 S W 2d 433, 52 Tenn App 196

(2) U S—Eastern Gas & Fuel Associates v Martin Marine Transp Co, C A Pa, 190 F 2d 394—F Badrena E Hijo, Inc v The Rio Iguazu, D C La, 182 F Supp 885—Swedish Am Line v Evans Products Co, C A Va, 431 F 2d 869

(4) Other evidence—New Orleans Stevedoring Co v North Atlantic & Gulf S S Co., C A La, 213 F 2d 859—Krawill Machinery Corp v Robert C Herd & Co, D C Md, 145 F Supp 554—U S v Bull S S Line, D C N Y, 146 F Supp 210, affd, C A, 274 F 2d 877—American Independent Oil Co v M S Alkaid, D C N Y, 289 F Supp 329

Evidence held insufficient

(1) U S—Lekas & Drivas, Inc v Goulandris, C A N Y, 306 F 2d 426—Regal Fibers, Inc v Holland Am Line, D C Pa, 302 F Supp 953—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

(2) U S—The R Lenahan, Jr, C C A N Y, 48 F 2d 110, cert den 52 S Ct 13, 284 U S 629, 76 L Ed 536—Afram Transport Co v U S, D C N Y, 309 F Supp 650, affd, C A, 435 F 2d 213, cert den 92 S Ct 72, 404 U S 872, 30 L Ed 2d 116

Repair

(2) Other instances

U S—Peter Paul, Inc. v The Christer Salen, D C N Y, 152 F Supp 410, affd, C A, 258 F.2d 901, cert den 79 S Ct 586, 359 U S 910, 3 L Ed 2d 574

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74. Evidence held sufficient to exonerate carrier

U S—Grandaisa Foods, Inc v. Compania De Navegacao Carregadores Acoreanos, D C N Y, 139 F Supp 538—Stauffer Chemical Co v Brunson, C A Ala., 409 F.2d 1327—Insurance Co of North America S S Flying Trader, D C N Y, 306 F.Supp 221.

Evidence held insufficient to exonerate carrier

U S—Caterpillar Overseas, S A v S S Expeditor, C.A N Y, 318 F 2d 720, cert den 84 S Ct 347, 375 U S 942, 11 L Ed 2d 272

75. U S—National Distillers Products Corp. v Companhia Nacional de Navegacao, D C.Pa., 107 F Supp 65—Cities Service Oil Co v. The Champoeg, D C N Y., 108 F.Supp 189, affd, C A, 203 F 2d 716—F Badrena E Hijo, Inc v. The Rio Iguazu, D.C La, 182 F Supp. 885—M W Zack Metal Co v S S. Birmingham City, C A N Y, 311 F 2d 334, cert den 84 S Ct 50, 375 U S 816, 11 L Ed 2d 51—Dorsid Trading Co. v Steamship Fletero, D C Tex., 342 F Supp 1.

76. U S.—Karabagu v The Shickshinny, D C N Y., 123 F Supp 99, affd., C A, 227 F 2d 348—Copco Steel & Engineering Co. v The Alwaki, D.C N Y, 131 F.Supp 332—Spanish Am Skin Co v. The Ferngulf, C A.N Y, 242 F 2d 551—H W St John & Co v The Flying Spray, 149 F Supp 737—Holden v. S.S Kendall Fish, D.C La, 212 F Supp 106.

Evidence held insufficient

U S—Pacific Vegetable Oil Corp v. M/S Norse Commander, D C Tex, 264 F Supp. 625

N Y.—Great Atlantic & Pacific Tea Co. v Lloyd Brasileiro (Patrimonio Nacional), 237 N Y.S 2d 764, 37 Misc 2d 1058

77. U S—F Badrena E Hijo, Inc v. The Rio Iguazu, D C La, 182 F Supp 885

N Y—Teneria El Popo v Home Ins Co, 136 N Y.S 2d 574, 207 Misc 84.

78. U.S—Dorsid Trading Co v. Steamship Rose, D C Tex, 343 F.Supp. 617.

79. U S—Cummins Sales & Service, Inc. v. London & Overseas Ins. Co, C.A Tex, 476 F.2d 498, reh. den 478 F.2d 1402, cert den 94 S Ct 359, 414 U S. 1003, 38 L.Ed 2d 239.

Evidence held sufficient

(1) U S—Copco Steel & Engineering Co v The Prins Willem Van Oranje, D.C.Mich, 159 F.Supp 79—Levatino Co v S S Norefjell, D C N Y, 231 F Supp 307

(4) To establish other matters

U S—Monsanto Chemical Co v No 3 Bull Towing Co, C A Tenn, 326 F 2d 18, cert den 84 S Ct 1631, 377 U S 954, 12 L Ed 2d 497—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

Evidence held insufficient

U S—National Distillers Products Corp v Companhia Nacional de Navegacao, D C Pa, 107 F Supp 65

Surveyor's estimate

U S—Empresa Central Mercantil De Representacoes, Limited v Republic of the United States of Brazil, D C N Y, 147 F Supp 778, affd, C A, 257 F 2d 747

80. U S—Luigi Serra, Inc v S S Francesco C, C A N Y, 379 F 2d 540—India Supply Mission v S S Valiant Effort, D C N Y, 283 F Supp 1011—Richard Const Co v Monongahela & Ohio Dredging Co, D C.Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170—Southern Stevedoring Co v S S Hellenic Wave, D C Tex, 322 F.Supp 641

Mo—Bunge Corp v Valley Line Supply & Equipment Co, 480 S W 2d 859

Evidence held sufficient to show damage by sea water

U S—Konfort, S A v The Santo Cerro, D C N Y, 190 F Supp 1

Evidence held insufficient

(2) U S—Otis McAllister Export Corp v Grancolombiana (New York), Inc, D C La., 216 F.Supp 756

(5) Other evidence

U S.—Brown & Williamson Tobacco Corp. v The Anghyra, D C Va., 157 F Supp 737, affd in part and revd in part on oth grds., C A, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102—Naphtha Solvents Co v Esso Standard Oil Co, D C La, 221 F Supp 796—Commercial Transp Corp v. Martin Oil Service, Inc., C A.Ill, 374 F 2d 813—American Independent Oil Co v M. S Alkaid, D C.N.Y., 289 F.Supp 329

81. Evidence held sufficient to show proper notice

U S.—Isthmian S S. Co v California Spray-Chemical Corp, C A Cal, 290 F 2d 486, mod on oth. grds 300 F 2d 41

Evidence held insufficient to show proper notice

U.S—Miami Structural Iron Corp v. Cie Nationale Belge De T M, C.A.Fla, 224 F.2d 566.

82. U.S.—Hecht, Levis & Kahn, Inc. v The President Buchanan, C A.N Y, 236 F 2d 627.

Evidence held sufficient

(1) U S—California Packing Corp. v. States Marine Corp of Del, D C.Cal, 187 F.Supp. 540—Inland Waterways Shippers Ass'n, Inc. v Mississippi Val Barge Line Co, D C.Mo., 194 F Supp 818, app. dism., C A., 289 F.2d 374, cert den 82 S.Ct 123, 368 U.S. 876, 7 L Ed.2d 77—Levatino Co v. M/S Helvig Torm, D C N Y, 295 F.Supp 725—U S v. Central Gulf S S. Corp, D C La, 321 F.Supp. 945, affd., C A., 456 F 2d 1281

(3) Copco Steel & Engineering Co. v. The Alwaki, D C.N Y, 131 F.Supp. 332.

(4) U S.—Copco Steel & Engineering Co v. The Alwaki, D.C.N Y, 131 F Supp. 332

(6) Other cases

U S—Hecht, Levis & Kahn, Inc. v. Isthmian S S Co., D C.N.Y, 149 F.Supp. 373—Lekas & Drivas, Inc. v Goulandris, C.A.N Y., 306 F 2d 426—Tri-Valley Packing Ass'n v. States Marine Corp. of Del, C.A Cal, 310 F 2d 891.

Evidence held insufficient

(1) U S—N Wagman & Co. v. U.S. Lines Co., supra, n 72—Copco Steel & Engineering Co. v The Alwaki, D.C.N.Y., 131 F.Supp 332—M S. Cowen Co. v. American President Lines, Limited, D C.Cal., 167 F Supp. 838—F Badrena E. Hijo, Inc. v. The Rio Iguazu, D.C.La, 182 F Supp 885—S. M. Wolff Co. v. The Exiria, D C N Y, 200 F.Supp 809—J Gerber &

Co v Holland Amerika Lijn, D C La, 261 F Supp 893

N Y—Gillespie & Co of N Y v Continental Ins Co, 176 N Y S 2d 146, 14 Misc 2d 110

(3) N Y—Teneria El Popo v Home Ins Co, 136 N Y S 2d 574, 207 Misc 84

(5) Other matters

U S—Koyo Intern Inc v S S Ootmarsum, D C N Y, 234 F Supp 424

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83. U S—Hecht, Levis & Kahn, Inc v Isthmian S S Co, D C N Y, 149 F Supp 373

Evidence held insufficient to overcome presumption

U S—Kupfermann v U S, C A N Y, 227 F 2d 348—California Packing Corp v The Empire State, D.C Cal, 180 F Supp 19, remd, C A, 310 F 2d 206

84. U S—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v. Mondial United Corp, C A Fla, 316 F 2d 163

85. U S—Stein v U S Lines Co, D C.N Y, 132 F Supp 334—Tuteur & Co v The Ittersum, D C La, 162 F.Supp 788, affd, C A, 267 F 2d 310—Continental Grain Co v. American Commercial Barge Line Co, C A Ill, 332 F 2d 26—Eliz Salzman Tobacco Co. v S S Mormacwind, C A N.Y, 371 F 2d 537

86. U S.—Hecht, Levis & Kahn, Inc. v Isthmian S S Co, D C N Y, 149 F.Supp 373—F Badrena E Hijo, Inc v The Rio Iguazu, D C La, 182 F.Supp 885—Levatino Co v M/S Telvig Torm, D.C N Y, 295 F Supp 725

Evidence not sufficient when goods not discernible

U S.—Copco Steel & Engineering Co. v The Alwaki, D C N Y., 131 F.Supp 332

88. U S—Dow Chemical Co. v. S.S Giovanella D'Amico, D.C.N Y, 297 F.Supp 699

89. U S.—Etablissements Edouard Materne, S.A v The Leerdam, D.C N Y., 143 F.Supp 367—Hecht, Levis & Kahn, Inc v Isthmian S.S Co, D C N Y., 149 F.Supp 373—Central R Co of N J. v Jules S Sottnek Co, C.A.N.Y., 258 F.2d 85, cert den. 79 S.Ct. 588, 359 U.S. 913, 3 L.Ed 2d 574

Evidence held sufficient

(2) U S.—Tuteur & Co. v. The Ittersum, D.C La., 162 F.Supp. 788, affd., C.A, 267 F.2d 310—Inland Waterways Shippers Ass'n, Inc. v. Mississippi Val Barge Line Co, D.C.Mo, 194 F.Supp. 818, app. dism, C.A., 289 F.2d 374, cert. den. 82 S.Ct 123, 368 U S 876, 7 L Ed.2d 77—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A. v Mondial United Corp, C.A Fla., 316 F 2d 163.

(3) Other matters.

U.S.—General Traffic Service Co. v The Cape San Martin, D.C.N.Y., 108 F.Supp 174—Petition of Skibs A/S Jolund, C.A N Y., 250 F.2d 777, cert. den. 78 S.Ct 772, 773, 356 U.S 933, 2 L Ed.2d 763.

Evidence held insufficient

(1) U.S.—Copco Steel & Engineering Co v The Alwaki, D.C.N.Y, 131 F.Supp. 332—Diethelm & Co v The Flying Trader, D C.N.Y., 141 F Supp 271, affd., C.A., 244 F.2d 542—California Packing Corp. v. The Empire State, D.C.Cal., 180 F.Supp. 19, remd, C A, 310 F.2d 206.

N.Y.—Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro (Patrimonio Nacional), 237 N.Y.S.2d 764, 37 Misc 2d 1058.

(3) Other matters.

U.S.—Schroeder Bros., Inc. v. The Saturnia, C.A.N.Y, 226 F.2d 147—Petition of Skibs A/S Jolund, C A. N.Y., 250 F.2d 777, cert. den. 78 S.Ct. 772, 356 U.S. 933, 2 L.Ed.2d 763—Brown & Williamson Tobacco Corp. v. The Anghyra, D.C Va., 157 F.Supp. 737, affd. in part and revd. in part on oth grds., C.A., 277 F.2d 9, cert. den. 81 S.Ct. 168, 364 U.S. 879, 5 L.Ed.2d 102

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90. U S—Continex, Inc v The Flying Independent, D C N Y, 106 F Supp 319—Pittston Marine Corp v H A Brassert & Co, D C N Y, 171 F Supp 763—Hohenstein v S M H Trading Corp, C A Ga, 382 F 2d 530

Evidence held sufficient

(1) U S—Shamrock Towing Co v Schiavone-Bonomo Corp, D C N Y, 173 F Supp 39, affd, C A, 275 F 2d 338—Hecht, Levis & Kahn, Inc v S S Javanese Prince, D C N Y, 210 F Supp 236—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

N Y—Continex, Inc v The Flying Independent, supra

Evidence held insufficient to show overloading

U S—Margarine Verkaufsunion G m B H v M T G C Brovig, D C N Y, 318 F Supp 977

91. Evidence held sufficient

(1) U S—Luigi Serra, Inc v S S Francesco C, C A N Y, 379 F 2d 540—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F 2d 422, cert den 89 S Ct 1272, 394 U S. 943, 22 L Ed 2d 477

(2) U S—S M Wolff Co v The Exiria, D C N Y, 200 F Supp 809

Evidence held insufficient

(1) U S—Hecht, Levis & Kahn, Inc v Isthmian S S Co, D C N Y, 149 F Supp 373.

(3) Other matters

U S—Searoad Shipping Co v E I duPont de Nemours & Co, C A Fla, 361 F 2d 833, cert den 87 S Ct 511, 385 U S 973, 17 L Ed 2d 436—Blanchard Lumber Co v S S Anthony II, D C N Y, 259 F.Supp 857

92. U S—Schroeder Bros v The Saturnia, D C N Y, 123 F Supp 282, affd, C A, 226 F 2d 147

Evidence held sufficient to establish damage from improper ventilation

U S—General Foods Corp v U S, supra, n 82—American Tobacco Co v Goulandris, D C N Y, 173 F.Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426—California Packing Corp v States Marine Corp of Del, D C Cal, 187 F Supp 540—Daido Line v Thomas P Gonzalez Corp, C A Cal, 299 F 2d 669—Eliz Salzman Tobacco Co v S S Mormacwind, C A N Y, 371 F 2d 537

93. U S.—Fidelis Fisheries, Limited v Thorden, D C N Y, 142 F Supp 798—Norjac Trading Corp v The Mathilda Thorden, D C Pa, 173 F Supp 23—Manhattan Fruit Export Corp v Royal Netherlands S S Co., C.A., 271 F 2d 607, cert den 80 S.Ct. 1249, 363 U S 812, 4 L.Ed 2d 1154—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F.2d 422, cert den 89 S Ct 1272, 394 U S. 943, 22 L Ed 2d 477

94. U S—Demsey & Associates, Inc v Steamship Sea Star, C A N Y, 461 F 2d 1009—Royal Typewriter Co, Division Litton Business Systems, Inc v M/V Kulmerland, D C N.Y., 346 F Supp 1019, affd, C A, 483 F 2d 645

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95. U S.—Manhattan Fruit Export Corp v Royal Netherlands S.S. Co, D C N.Y., 175 F Supp 771, revd. on oth grds, C.A, 271 F 2d 607, cert den 80 S Ct 1249, 363 U S. 812, 4 L Ed.2d 1154

N Y—Greene Steel & Wire Co v F W. Hartmann & Co., 299 N.Y S.2d 654, 32 A D.2d 538—M. Paquet & Co, Inc v Dart Containerline Co., Ltd, 343 N.Y.S 2d 446, 74 Misc.2d 352

98. U.S—Margarine Verkaufsunion G.m B.H v M.T.G.C. Brovig, D.C.N Y, 318 F Supp 977.

Preponderance of evidence

U.S—States Marine Corp of Del v. Producers Co-op Packing Co., C.A.Cal., 310 F 2d 206

99. U.S.—Fagundes Sucena & Cia v Mississippi Shipping Co, D.C.La., 108 F Supp 918—J. A Folger & Co. v United Fruit Co., D C.La, 170 F Supp 933, revd. on oth. grds., C A, 270 F.2d 666, cert den. 80 S.Ct. 682, 362 U S 911, 4 L Ed.2d 619

4. U S—Hellenic Lines Limited v Brown & Williamson Tobacco Corp, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102

5. U S—Hellenic Lines Limited v Brown & Williamson Tobacco Corp, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102

6. U S—Palmer Distributing Corp v The American Counselor, D C N Y, 158 F Supp 264

7. U S—R T Jones Lumber Co v Roen S S Co, C A N Y, 270 F 2d 456

9. U S—Brown & Williamson Tobacco Corp v The Anghyra, D C Va, 157 F Supp 737, affd in part and revd in part on oth grds, C A, 277 F 2d 9, cert den 81 S Ct 168, 364 U S 879, 5 L Ed 2d 102—Pan Am Trade Development Corp v M/V Helga Howaldt, D C Fla, 257 F Supp 721

Rust

U S—Dorsid Trading Co v Steamship Rose, D C Tex, 343 F Supp 617

10. U S—R T Jones Lumber Co v Roen S S Co, C A Wis, 213 F 2d 370—Chiswick Products, Limited v S S Stolt Avance, C A Tex, 387 F 2d 645

11. U S—Commerce Oil Corp v The DXE-78, D.C La, 156 F Supp 256, affd, C A, 252 F 2d 386—Insurance Co of North America v. S S Flying Trader, D C N Y, 306 F Supp 221—Wilbur-Ellis Co v M/V Captayannis, D C Or, 306 F Supp 866, affd, C A, 451 F 2d 973, cert den 92 S Ct 962, 405 U S 923, 30 L Ed 2d 794—Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Maru, C A N Y, 459 F 2d 1370, cert den 93 S Ct 898, 409 U S 115, 34 L Ed 2d 699

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12. U S—Orient Ins Co v. Flota Mercante del Estado, D C La, 102 F Supp 729, affd, C A, 198 F 2d 740—San Juan Trading Co v The Marmex, D C Puerto Rico, 107 F Supp 253, affd, C A, 212 F 2d 206, cert den 75 S Ct 36, 348 U S 822, 99 L Ed 648—Bunge Corp v Alcoa S S Co, D C N Y, 133 F Supp 311—Palmer Distributing Corp v The American Counselor, D C N Y, 158 F Supp 264—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302

Strike

U.S—Schroeder Bros, Inc v The Saturnia, C A N Y, 226 F 2d 147

13. U S—J C Penney Co v American Exp Co, D C N Y, 102 F Supp 742, affd, C A, 201 F 2d 846—Continex, Inc v The Flying Independent, D C N Y, 106 F Supp 319—Weyerhaeuser Sales Co v The Cynthia Olson, D C Cal, 131 F Supp 148—Government of Pakistan, Ministry of Food and Agriculture v The Ionian Trader, D C N Y, 173 F Supp 29, affd, C A, 279 F 2d 471—Freedman & Slater, Inc v M. V Tofevo, D.C N Y, 222 F Supp 964—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302—J Gerber & Co v S S Sabine Howaldt, C A N.Y, 437 F 2d 580

14. U S—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp. 302

15. U S—Petition of Isbrandtsen Co, C A N Y, 201 F 2d 281—Hartford Acc & Indem Co v Gulf Refining Co, C A La, 230 F 2d 346, cert den 77 S Ct. 49, 352 U S 832, 1 L.Ed 2d 52—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U.S 933, 2 L Ed 2d 763—American Mail Line, Limited v Tokyo Marine & Fire Ins Co, C A Wash, 270 F 2d 499—Commercial Transp. Corp v Martin Oil Service, Inc, C.A.Ill., 374 F 2d 813—Old Colony Ins Co v. S.S Southern Star, D C Or, 280 F Supp 189

Since the publication of Corpus Juris Secundum Accinanto, Limited v Cosmopolitan Shipping Co, D C Md, 99 F Supp 261 has been reversed—A/S Ludwig Mowinckels Rederi v Accinanto, Limited, C A Md, 199 F.2d 134, cert den 73 S.Ct 1129, 345 U S 992, 97 L.Ed 1400

16. U S—American Tobacco Co v Goulandris, D C N Y, 173 F.Supp. 140, affd, C A, 281 F 2d 179,

affd in part and revd in part on oth grds 306 F 2d 426.

Spontaneous combustion

U S —Fidelity-Phenix Fire Ins Co of N Y v Flota Mercante Del Estado, supra

17. U S —In re G.b R M S Caldas, D C Pa, 350 F Supp 566, affd, C A, 485 F 2d 678, and 680

Other matters have been considered.[18.5]

18.5. Evidence held to show freedom from negligence

U S —Hershey Chocolate Corp v The Robert Luckenbach, D C Or, 184 F Supp 134, affd, C A, 295 F 2d 619

Negligence of independent contractor established

U S —Hershey Chocolate Corp v The Robert Luckenbach, D C Or, 184 F Supp 134, affd, C A, 295 F 2d 619

Evidence sufficient to show fire not producing explosion or causing opening in hull

U S —Federazione Italiana Dei Corsorzi Agrari v Mandask Compania De Vapores, S A, C A N Y, 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99.

19. U S —Petterson Lighterage & Towing Corp v Belgian Line, Inc, C A N Y, 253 F 2d 952—Shamrock Towing Co v Schiavone-Bonomo Corp, D C N Y, 173 F Supp 39, affd, C A, 275 F 2d 338—American Metal Co v M/V Belleville, D C N Y, 284 F Supp 1002

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20. U S —Universal Leaf Tobacco Co of China v Bank Line, Limited, D C N Y, 115 F Supp 353

22. U S —Standard Oil Co (N J) v Anglo-Mexican Petroleum Corp, D C N Y, 112 F Supp 630—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216—John Penny & Sons, Limited v M/V Swivel, D C Mass, 266 F Supp 302

25. U S —Hampton Roads Carriers, Inc v Allied Chemical Corp, C A Va, 329 F 2d 387, cert den 85 S Ct 78, 379 U S 839, 13 L Ed 2d 46

33. U S —President of India By and Through Director of India Supply Mission v West Coast S S Co, D C.Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct. 1222, 377 U.S. 924, 12 L Ed 2d 216

38. U S —Firestone Synthetic Fibers Co —Division of Firestone Tire & Rubber Co v M/S Black Heron, C A N Y., 324 F 2d 835—Hampton Roads Carriers, Inc v Allied Chemical Corp, C A Va, 329 F 2d 387, cert den 85 S Ct 78, 379 U S 839, 13 L.Ed 2d 46—India Supply Mission v S S Valiant Effort, D.C N Y, 283 F Supp 1011—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

N.Y.—Luria Bros & Co, Inc v Associated Metals & Minerals Corp, 343 N Y S 2d 152, 73 Misc 2d 937

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39. Failure to equip with radar and loran

U S.—President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct. 1222, 377 U S 924, 12 L Ed 2d 216

40. U.S —Blanchard Lumber Co v S S Anthony II, D C.N.Y, 259 F Supp 857—Dods Shipping Limited of Nassau, N P v. Karobi Lumber Co, C A Ala., 397 F 2d 570—Hydaburg Co-op Ass'n v Alaska S S. Co, C A Wash, 404 F.2d 151—Sears, Roebuck & Co. v American President Lines, Limited, D.C Cal, 345 F Supp. 395

41. U.S.—Tex-O-Kan Mills Co. v. Higgins, Inc, D.C.La, 174 F.Supp 198, affd., C A, 274 F 2d 263

42. U S —Crain Bros v Wieman & Ward Co, D C Pa, 126 F Supp 675, mod on oth grds, C A, 223 F 2d 256—Connecticut Adamant Plaster Co v James McWilliams Blue Line, Inc, D C N Y, 149 F Supp 122, affd, C A, 253 F 2d 785—Government of Pakistan, Ministry of Food and Agriculture v The Ionian Trader, D C N Y, 173 F Supp 29, affd, C A, 279 F 2d 471—R T Jones Lumber Co v Roen S S Co, C A N Y, 270 F 2d 456—Alaska Native Industries Co-op Ass'n v U S, D C Wash, 206 F Supp 767—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part, 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99

Evidence held sufficient

U S —Weyerhaeuser Sales Co v The Cynthia Olson, D C Cal, 131 F Supp 148

N Y —Luria Bros. & Co, Inc v Associated Metals & Minerals Corp, 343 N Y S 2d 152, 73 Misc 2d 937

43. U S —India Supply Mission v S S Valiant Effort, D C N Y, 283 F Supp 1011—Wilbur-Ellis Co v M/V Captayannis, D C Or, 306 F Supp 866 Affd, C A, 451 F.2d 973, cert den 92 S Ct 962, 405 U S 923, 30 L Ed 2d 794

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44. U S —In re Marine Sulphur Transport Corp, D.C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

Evidence held sufficient

(1) U S —Margarine Verkaufsunion G m B H v M T G C Brovig, D C N Y, 318 F Supp 977.

(2) U S —Potash Import & Chemical Co v M/S Klaus Oldendorff, C A Va., 422 F 2d 818, cert den 91 S Ct 57, 400 U S 829, 27 L Ed 2d 58

Evidence held insufficient

(1) U S —Union Carbide & Carbon Corp v U S, C A N Y, 200 F 2d 908—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part on oth grds, 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99

45. U S —O F. Nelson & Co v U S., C C A Cal., 149 F 2d 692, foll 149 F 2d 815 and 149 F 2d 816, motion denied 169 F 2d 833

48. U S —Compagnie De Navigation Fraissinet & Cyprien Fabre, S.A v Mondial United Corp., C A Fla, 316 F 2d 163

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59. U S —Director General of India Supply Mission for and on Behalf of President of Union of India v Steamship Janet Quinn, D C N Y, 335 F Supp 1329.

Delay in judgment to allow further hearing

U S —Royston Distributors, Inc v Moore-McCormack Lines, Inc, D C.Pa, 252 F Supp 480

61. Cal —Aspen Pictures, Inc v Oceanic S S Co, App, 306 P.2d 933, 148 C A 2d 238, cert den 77 S Ct 1381, 354 U.S 926, 1 L.Ed.2d 1436

62. U.S —M W Zack Metal Co. v The Birmingham City, C.A N Y, 291 F 2d 451—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp., C A Fla, 316 F 2d 163

Findings held irreconcilable

U S —Federazione Italiana dei Consorzi Agrari v Mandask Compania de Vapores, C A N Y., S A., 342 F 2d 215

64. U.S —M W Zack Metal Co v S S Birmingham City, C.A N Y., 311 F 2d 334, cert. den. 84 S Ct 50, 375 U.S. 816, 11 L Ed 2d 51

66. U S —Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U.S 933, 2 L Ed.2d 763

Cal —Aspen Pictures, Inc v Oceanic S S Co, 306 P 2d 933, 148 C.A 2d 238, cert den 77 S.Ct. 1381, 354 U S. 926, 1 L Ed 2d 1436.

68. U S —Continental Ins. Co v U S, C A N Y, 195 F 2d 527—U S v Central Gulf S S Corp, C A La, 517 F 2d 687

69. U S —Flota Mercante Del Estado v Orient Ins Co, C A La, 198 F 2d 740—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp, C A Fla, 316 F 2d 163

Improper stowage

U S —Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763

70. U S —President of India By and Through Director of India Supply Mission v West Coast S S Co, D C Or, 213 F Supp 352, affd, C A, 327 F 2d 638, cert den 84 S Ct 1222, 377 U S 924, 12 L Ed 2d 216

73. U S —R T Jones Lumber Co v. Roen S S Co, C A Wis, 213 F 2d 370—States Marine Corp of Del v Producers Co-op Packing Co, C A Cal, 310 F 2d 206

§ 158. —— Extent of Liability and Damages in General

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77. U S —C.J.S. cited in Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp. 290, 295, mod on oth grds, C A, 407 F 2d 1170—Horn v Cia de Navegacion Fruco, S A, C A Ala, 404 F.2d 422, cert den 89 S Ct 1272, 394 U S 943, 22 L Ed.2d 477—Demsey & Associates, Inc v Steamship Sea Star, D C N Y, 321 F.Supp 663, affd in part, revd. in part on oth grds, C A, 461 F 2d 1009—U S v Central Gulf S S Corp, D.C La, 321 F Supp. 945, affd, C A, 456 F.2d 1281—Demsey & Associates, Inc v. Steamship Sea Star, C A N Y, 461 F.2d 1009

N Y —Teneria El Popo v Home Ins. Co, 136 N Y S 2d 574, 207 Misc 84—Transpacific S S Co v. Marine Office of America, 163 N Y S 2d 171, 6 Misc 2d 881

Tenn —Parish & Parish Min Co v. Serodino, Inc, 372 S W 2d 433, 52 Tenn.App. 196

Damages assessed at cost

U S —National Distillers Products Corp. v Companhia Nacional de Navegacao, supra

Computation held proper

U S —Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp., C.A Fla, 316 F.2d 163

Protection against double recovery

U S —Eliz Salzman Tobacco Co. v S S. Mormacwind, C.A.N Y, 371 F.2d 537.

Punitive damages not justified

U S —In re Marine Sulphur Transport Corp., D.C N Y, 312 F.Supp. 1081, affd in part, revd in part on oth grds., C A., 460 F.2d 89, cert. den. 93 S Ct 318, 326, 409 U S. 982, 34 L Ed 2d 246

Constructive not a total loss

U.S.—Cummins Sales & Service, Inc v London & Overseas Ins Co, C.A.Tex, 476 F 2d 498, reh den. 478 F.2d 1402, cert den 94 S Ct 359, 414 U.S 1003, 38 L.Ed.2d 239.

78. U S.—Holden v. S.S Kendall Fish, C A.La., 395 F 2d 910

79. N Y.—Greene Steel & Wire Co v F. W Hartmann & Co, 299 N.Y S.2d 654, 32 A D 2d 538

82. N.Y —Chevron Oil Co v Atlas Oil Co of Utica, 280 N Y S 2d 731, 28 A.D 2d 644.

Expenses after arrival

U S —United Purveyors, Inc v. Motor Vessel New Yorker, D C Fla, 250 F.Supp 102

85. U S.—Norman v. Waterman S S. Corp, D C Ala, 105 F Supp. 590—Goltzman v. Rougeot, D C.La., 122 F.Supp 700—Empresa Central Mercantil De Representacoes, Ltda. v. Republic of the U S of Brazil, C A.N Y., 257 F.2d 747—Trans-Amazoni-

ca Iquitos, S A v Georgia, S S Co, D C Ga, 335 F Supp 935

The invoice value, etc.

U S—Holden v S S Kendall Fish, D C La, 262 F Supp 862, affd, C A, 395 F 2d 910

Price paid at public sale not considered

U S—Richard Const Co. v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

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87. Cost of repairs

U S—Royston Distributors, Inc v Moore-McCormack Lines, Inc, D C Pa, 252 F Supp 480—Cummins Sales & Service, Inc v London & Overseas Ins Co, C A Tex, 476 F 2d 498, reh den 478 F 2d 1402, cert. den. 94 S Ct 359, 414 U S 1003, 38 L Ed 2d 239

88. U S—Cargill, Inc. v The Frank A Lowery, D C N.Y., 159 F Supp 133, affd, C A, 251 F 2d 845, cert den 78 S Ct 917, 356 U S. 951, 2 L Ed 2d 845

N Y—J. M Rodriguez & Co, Inc v Moore-McCormack Lines, Inc, 299 N E 2d 243, 32 N Y 2d 425, 345 N.Y S.2d 993

89. Ascertainment by survey

U.S—Konfort, S A v The Santo Cerro, D C N Y, 190 F Supp 1

91. U S—Walter v The Canadarago, C C A N Y, 129 F.2d 97.

92. U S—Fabbri Co v. Universal Shipping Corp, D.C N Y., 310 F Supp 964.

93. N Y.—Chui v. Barber S.S. Lines, Inc, 347 N Y S 2d 225, 75 Misc 2d 154

95. U S—A Levatino & Sons Fruit & Produce Inc. v Steamship Athinai, D C N Y, 388 F Supp 888

Replacement cost liability for useless goods

U S.—Boaung Industrial Co v M V Aegis Sonic, D C N.Y, 590 F.Supp 908

97. U S—La Territorial De Seguros, S.P v. Shepard S S Co., D.C.N.Y., 124 F.Supp 287—Royal Typewriter Co., Division Litton Business Systems, Inc. v M/V Kulmerland, D C N Y, 346 F Supp 1019, affd., C A, 483 F.2d 645—Tessler Bros (B C) Ltd v Italpacific Line, C.A Cal., 494 F 2d 438

98. U.S —Emmco Ins. Co. v. Wallenius Caribbean Line, S A., C.A.Fla., 492 F 2d 508

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7. U.S.—R. T. Jones Lumber Co v Roen S.S. Co, C.A.N.Y., 270 F.2d 456—J A Folger & Co. v United Fruit Co., D.C.La, 170 F.Supp. 933, revd on oth. grds., C.A, 270 F 2d 666, cert. den. 80 S.Ct. 682, 362 U.S. 911, 4 L.Ed.2d 619—Atlantic Mut. Ins Co v. Poseidon Schiffahrt, G.m b H., C.A.Ill., 313 F 2d 872, cert. den. 84 S.Ct 56, 375 U S. 819, 11 L Ed.2d 53—Holden v. S S. Kendall Fish, D.C.La., 262 F Supp 862, affd., C A, 395 F.2d 910—Holden v. S.S Kendall Fish, C A La, 395 F.2d 910.

Time period

U.S.—Granite & Quartzite Centre Inc v M/S Virma, D C.Ga., 374 F.Supp. 1124.

8. U.S.—Daido Line v. Thomas P. Gonzalez Corp., C.A.Cal., 299 F.2d 669—Atlantic Mut. Ins Co. v Poseidon Schiffahrt, G.m.b.H., C.A.Ill., 313 F 2d 872, cert. den. 84 S.Ct. 56, 375 U.S. 819, 11 L.Ed.2d 53—Richard Const. Co. v Monongahela & Ohio Dredging Co., C.A.Pa., 407 F 2d 1170—Encyclopaedia Britannica, Inc. v S.S. Hong Kong Producer, C.A N.Y., 422 F.2d 7

Imperfect measure of damages not complainable

U.S.—Empresa Central Mercantil De Representacoes, Limited v. Republic of the United States of Brazil, D.C.N.Y., 147 F.Supp. 778, affd., C.A., 257 F.2d 747—Monsanto Chemical Co. v. No. 3 Bull Towing Co, C.A.Tenn., 326 F.2d 18, cert den. 84 S.Ct. 1631, 377 U.S. 954, 12 L.Ed.2d 497.

Rule not altered by statutory limitation of liability to damage actually sustained

U S—Interstate Steel Corp v S S Crystal Gem, D C N Y, 317 F Supp 112

Retail value

U S—Santiago v Sea-Land Service, Inc, D C Puerto Rico, 366 F Supp 1309

9. U S—Empresa Central Mercantil De Representacoes, Limited v Republic of the United States of Brazil, D C N Y, 147 F Supp 778, affd, C A, 257 F 2d 747

10. U S—Santiago v Sea-Land Service, Inc, D C Puerto Rico, 366 F Supp 1309

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23. U S—American Smelting & Refining Co v Black Diamond S S Corp, D C N Y, 188 F Supp 790

Tenn—Parish & Parish Min Co v Serodino, Inc, 372 S W 2d 433, 52 Tenn App 196

25. U S—Santiago v Sea-Land Service, Inc, D C Puerto Rico, 366 F Supp 1309

26. Where principal not fixed until eve of payment

U S—American Smelting & Refining Co v Black Diamond S S Corp, D C N Y, 188 F Supp 790

Delay in trial not precluding allowance

U S—American Smelting & Refining Co v Black Diamond S.S Corp, D C N Y, 188 F Supp 790

Interest allowed during appeal

U S—American Smelting & Refining Co v Black Diamond S S Corp, D C N Y, 188 F Supp 790

28. U S—Santiago v Sea-Land Service, Inc, D C Puerto Rico, 366 F Supp 1309

Under the circumstances in a particular case it has been held that interest should accrue from the date that the mandate came down [31.5]

31.5. U.S—Virgin Islands Corp. v Merwin Lighterage Co, D C Virgin Islands, 177 F.Supp 810

32. U S—Virgin Islands Corp v Merwin Lighterage Co, D C.Virgin Islands, 177 F Supp 810

4% rather than 6%

U S—American Smelting & Refining Co v Black Diamond S S Corp, D C N Y, 188 F Supp 790

35. U S—Consolidated Cork Corp v Jugoslavenska Linijska Plovidba, D C N Y., 318 F Supp 1209—Aljassim v S S South Star, D.C N Y, 323 F Supp 918—Nissho-Iwai Co, Ltd v Star Bulk Shipping Co, C A.Wash, 503 F 2d 596—C.J.S. cited in Dixie Plywodd Co v S S Federal Lakes, D C La, 404 F.Supp 461, 467, affd, C A, 525 F 2d 691, cert. den 96 S Ct. 2174, 425 U S 974, 48 L Ed 2d 798

Tex—Strachan Shipping Co v Petty Geophysical Engineering Co, Civ App., 369 S W.2d 526, err ref no rev err

Fee of surveyor not allowable

U.S.—Swedish Am Line v Evans Products Co, C A Va., 431 F 2d 869

Cost of professional adjusters

U S—Master Shipping Agency, Inc. v M S. Farida, C.A.N Y., 571 F 2d 131

37. U.S.—Standard Brands, Inc v The Radja, D C Cal., 114 F.Supp. 456—Aljassim v. S.S South Star, D C.N.Y., 323 F Supp 918—Santiago v Sea-Land Service, Inc, D C Puerto Rico, 366 F Supp 1309.

Estimate of cost of repairs

U S—Interstate Steel Corp. v. S.S Crystal Gem, D C. N.Y, 317 F Supp 112.

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49. Sale of undamaged goods

U S.—La Territorial De Seguros, S P. v Shepard S S Co, D.C.N.Y, 124 F.Supp 287

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64. U S—The Kookaburra, C C A N Y, 69 F 2d 71—Willis v Tugs Tramp and Mars, D C Va, 216 F Supp 901—Hellenic Lines, Ltd v U S, C A N Y, 512 F 2d 1196

Tug and tow

(1) U S—James H Rhodes & Co v U S Lighterage Corp, C C A N Y, 98 F 2d 770—The Vale Royal, D C Md, 51 F Supp 412—Houma Well Service, Inc v Tug Capt O'Brien, D C La, 312 F Supp 257

Barge owner and charterer

U S—Crain Bros, Inc v Wieman & Ward Co, C A Pa, 223 F 2d 256

Carrier and salvor

U S—American Independent Oil Co v M S Alkaid, D C N Y, 289 F Supp 329

Joint and several liability imposed where apportionment of damages impossible

U S—Sears, Roebuck & Co v American President Lines, Limited, D C Cal, 345 F Supp 395

65. U S—Commercial Transp Corp v Martin Oil Service, Inc, C A Ill, 374 F 2d 813—Bilkay Holding Corp v Consolidated Iron & Metal Co, D C N Y, 330 F Supp 1313

68. U S—J Gerber & Co v S S Sabine Howaldt, C A N Y, 437 F 2d 580

Vacation of decree may under certain circumstances be proper.[72.5]

72.5. U S—Compagnie De Navigation Fraissinet & Cyprien Fabre, S A v Mondial United Corp, C A Fla, 316 F 2d 163

§ 159. —— Lien

73. U S—San Juan Trading Co v The Marmex, D C Puerto Rico, 107 F Supp 253, affd, C A, 212 F 2d 206, cert den 75 S Ct 36, 348 U S 822, 99 L Ed 648—Pacific Vegetable Oil Corp v M/S Norse Commander, D C Tex, 264 F Supp 625—International Drilling Co, N V v M/V Doriefs, D C Tex, 291 F Supp 479

No lien on monies of prepaid freight

U S—Galban Lobo Trading Co S/A v The Diponegaro, D C N Y, 103 F Supp 452.

Lien strictly construed

U S—U S v S S Lucie Schulte, D C N Y, 227 F Supp 583, revd on oth grds, C A, 343 F 2d 897

Basis of lien

U S—British West Indies Produce Inc v S/S Atlantic Clipper, D C N Y, 353 F Supp 548

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76. U S—San Juan Trading Co v. The Marmex, D C Puerto Rico, 107 F Supp 253, affd, C A, 212 F 2d 206, cert den. 75 S.Ct 36, 348 U S 822, 99 L Ed 648

77. U S—Continental Grain Co v Toko Lines, D C La, 333 F Supp 1349

83. Secret lien

U S—U.S v S S Lucie Schulte, D C N Y, 227 F Supp 583, revd on oth. grds, C A, 343 F 2d 897

94. Suit by subcharterer

U S—Pacific Vegetable Oil Corp v M/S Norse Commander, D C Tex, 264 F Supp 625.

§ 160. Right to Freight

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96. Meaning of term "freight"

(1) U.S—Continental Ore Corp v U S, 423 F 2d 1248, 191 Ct Cl 100

(5) Other meanings

U.S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y., 181 F Supp 165—Peterson v S S Wahcondah, D C.La, 235 F Supp 698

3. U S—U S v Waterman S S Corp, C A Ala, 397 F 2d 577—Trans-Oceanic Peace Corp v India Supply Mission, D C N Y, 325 F Supp 474

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, affd, C A., 410 F 2d 1006, 133 U S App.D C 307

Duty of seaway authority to notify of closing date

D C—Orient Mid-East Lines, Inc v Cooperative for Am Relief Everywhere, Inc, C A, 410 F 2d 1006, 133 U S App D C 307

4. U S—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

5. U S—Richard Const Co v Monongahela & Ohio Dredging Co, D C Pa, 284 F Supp 290, mod on oth grds, C A, 407 F 2d 1170

6. U S—Hirsch Lumber Co v Weyerhaeuser S S Co, C A N Y, 233 F 2d 791, cert den 77 S Ct 102, 352 U S 880, 1 L Ed 2d 80—Schirmer Stevedoring Co v Seaboard Stevedoring Corp, C A Cal, 306 F 2d 188—U S v Waterman S S Corp, C.A Ala, 397 F 2d 577—Trans-Oceanic Peace Corp v India Supply Mission, D C N Y, 325 F Supp 474

Exemption from liability clause ineffective

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, Affd, C A, 410 F 2d 1006, 133 U S App D C 307

Reasoned judgment required under exculpatory clause

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34

Agreement necessary

U.S—T J Stevenson & Co, Inc v 81,193 Bags of Flour, D C Ala, 449 F Supp 84, aff in part, rev in part on oth. grds, C.A, 629 F 2d 338, reh den 651 F.2d 779, and 651 F.2d 779

7. **Intention to vary general rule not shown**

U S—U S v Waterman S S Corp, C A Ala., 397 F 2d 577

The carrier will not be granted protection under an exculpatory clause in a bill of lading or a prepaid freight clause in a charter party with regard to freight where the voyage becomes frustrated through his fault.[75]

7.5. U S—Merchants Corp of America v 9655 Long Tons, More or Less, of No 2 Yellow Milo, D C Tex, 238 F Supp 572.

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F.Supp 34, affd, C A, 410 F 2d 1006, 133 U S App.D C 307

11. U.S—Trans-Oceanic Peace Corp v. India Supply Mission, D C.N.Y, 325 F Supp. 474

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15. D C.—Orient Mid-East Lines, Inc. v Cooperative for American Relief Everywhere, Inc, D C, 284 F.Supp. 34, affd, C A, 410 F 2d 1006, 133 U S App D C. 307.

17. U S—Cargo & Tankship Management Corp. v India Supply Mission, C A.N Y, 336 F 2d 416

Protection under an exculpatory clause establishing liability for freight regardless of actual delivery will not be granted a carrier who makes a deviation where the risks encountered are known to him at the commencement of the voyage,[175] and the deviation is found to be unreasonable.[1710]

17.5. D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, affd, C A, 410 F 2d 1006, 133 U S App D C 307

17.10. D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp. 34, affd, C A, 410 F 2d 1006, 133 U S App D C 307

18. U S—U S v American Trading Co of San Francisco, D C Cal, 138 F Supp 536

Payment of full freight by United States held not unlawful

U S—U S v American Trading Co of San Francisco, D C Cal, 138 F Supp 536

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26. U S—American Foreign S S Corp v 9,000 Tons of Manganese Ore, D C N J, 109 F Supp 765

34. U S—Hellenic Lines, Ltd v U S, C A N Y, 512 F 2d 1196

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43. U S—Bull-Insular Line, Inc v National Sugar Refining Co, D C Pa, 180 F Supp 216—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C A, 277 F 2d 161

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46. U S—Aetna Ins Co v Director General of India Supply Mission, D C N Y, 289 F Supp 273

§ 161. Amount and Rate

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63. U S—Diacon-Zadeh v. Devlet Denizyollari, D C Pa, 127 F Supp 446—Anglo Canadian Shipping Co v U S, C A, 264 F 2d 405—Gulf Atlantic Towing Corp v Dickerson, Inc, C A Fla, 271 F 2d 542—U S v Garcia & Diaz, Inc, C.A N Y, 291 F 2d 242—Cia. Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd., C A, 368 F 2d 575—U S v Lykes Bros S S Co, Inc, D C La, 353 F Supp 1151.

D C—American Export Isbrandtsen Lines, Inc v. Federal Maritime Commission, C A, 380 F 2d 609, 127 U S App D C 62

Carrier not estopped from recovery of full lawful charges

U.S—Puerto Rico Marine Management, Inc v Molac Imports, Inc, D C Puerto Rico, 594 F Supp 648

Claim for additional freight properly disallowed

U S—Sociedad Armadora Aristomenis Panama, S A v 5020 Long Tons of Raw Sugar, C A.Pa., 223 F 2d 417—Transatlantic Financing Corp v. U S, D C, 259 F Supp. 725—Hellenic Lines, Ltd v U S, C A N Y., 512 F.2d 1196

Affected by degree of responsibility

Cal—Aspen Pictures, Inc v Oceanic S S. Co, 306 P 2d 933, 148 C A 2d 238, cert. den 77 S Ct 1381, 354 U S 926, 1 L.Ed 2d 1436

Classification

U S—Continental Can Co v. U S, C A, 272 F 2d 312

Contract held not to bind government to ship at rate higher than commercial rate

U S—U.S Lines Co v U S., C A.N Y., 324 F 2d 97

Arbitration clause

U S—Joseph Amelar, Inc v Far East Conference, Am Arbitration Ass'n, D C.N Y, 229 F Supp 450

No breach

U S.—U.S v Prudential-Grace Lines, Inc, D C N Y, 375 F Supp 919

Published tariff for services actually provided

U.S—Union Barge Line Corp v United Rental Equipment Co, Inc, D C Md, 378 F.Supp 752

68. U S—Isthmian S S Co v California Spray-Chemical Corp, C A Cal, 300 F 2d 41—U S v T Smith & Son, Inc, D C La, 258 F Supp 117

70. U S—Bartlett-Collins Co v Surinam Nav Co, C A Okl, 381 F 2d 546

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, affd, C A, 410 F 2d 1006, 133 U S App D C 307

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77. **Additional freight disallowed**

D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, Affd, C A, 410 F 2d 1006, 133 U S App D C 307

Delay beyond the control of either party does not entitle the carrier to extra compensation.[785]

78.5. D C—Transatlantic Financing Corp v U S, D C, 259 F Supp 725

83. U S—Richard Const Co v Monongahela & Ohio Dredging Co, C A Pa, 407 F 2d 1170—Trans-Oceanic Peace Corp v India Supply Mission, D C N Y, 325 F Supp 474

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13. U S—American Smelting & Refining Co v Naviera Anders Peruana, S A, D C Cal, 208 F Supp 164, affd, C A, 327 F.2d 581—United Fruit Co v U S, 165 Ct Cl 598

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Storage on ship

D.C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc., D C, 284 F Supp 34, affd, C A, 410 F 2d 1006, 133 U S App D C 307

16. U S—Isthmian S S. Co v U S, C A N.Y, 255 F 2d 816, affd in part and revd in part on oth grds 79 S.Ct 857, 359 U S 314, 3 L Ed 2d 845—American Smelting & Refining Co v Naviera Andes Peruana, S A, D C Cal, 208 F.Supp 164, affd, C A, 327 F.2d 581

20. U S.—Bull-Insular Line, Inc v National Sugar Refining Co., D C Pa., 180 F Supp 216.

21. U S—American Smelting & Refining Co v Naviera Andes Peruana S A., D.C Cal, 208 F Supp 164, affd, C.A., 327 F 2d 581—San Rafael Compania Naviera, S.A. v. American Smelting & Refining Co, C.A Cal., 327 F.2d 581

Damages properly refused

U S—Gilbert Imported Hardwoods, Inc. v 245 Packages of Guatambu Squares, More or Less, C A Ala, 508 F 2d 1116

§ 164. Payment and Tender

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38. U.S.—Alcoa S S. Co v. Comfort Spring Corp, D C.Md., 170 F Supp. 548

§ 165. —— Persons Liable

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43. U S—Compania Anonima Venezolana De Navegacion v. Mandry, D C.La., 171 F Supp 290

N Y—Alcoa S S Co. v Graver Tank & Mfg. Co, 124 N Y S 2d 77.

Connecting carrier held not liable

U.S—General Motors Corp. v Pennsylvania R Co, D.C N Y, 357 F Supp 646, affd, C A, 506 F 2d 1395, two cases.

Agreement placing initial obligations upon consignee

U S.—I/S Stavborg (O H Meling, Manager) v National Metal Converters, Inc., C A.N Y, 500 F 2d 424

Alcoa S S Co v Comfort Spring Corp, 1, 170 F Supp 548

Hellenic Lines Limited v Alexander Pach, 2 N Y S 2d 660, 20 Misc 2d 170

gh there is authority to the 555 some courts have held that . forwarder is liable for the of a freight tariff where the aid the tariff to the forwarder forwarder failed to pay the he amount due, even where er issued the bill of lading to 'arder marked "freight pre-

—Strachan Shipping Co v Dresser Indus- ic, C A La., 701 F 2d 483

—Compania Sud Americana de Vapores v : Caribbean Shipping Co, D C Fla, 587 410

—— To Whom Payable

' of law to insure payment to carriers arges

t—Collins Co v. Surinam Nav Co, C A 1 F 2d 546

from shipper who paid defaulting der held not required by statute

l Lines Inc v Titan Indus Corp, D C 16 F Supp 1348, affd, C A, 419 F 2d 835, 1. 90 S Ct 1365, 397 U S 1042, 25 L Ed 2d

Compania Anonima Venezolana De Nave- v A J. Perez Export Co., C.A.La., 303 2, cert den 83 S Ct. 321, 371 U S 942, 9 l 276—Diana Compania Maritime, S A of 1 v. Subfreights of S.S. Admiralty Flyer, Y., 280 F.Supp. 607

American Exp Co v Utah Feathers, 504 , 29 Utah 2d 5

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N H. Shipping Corp. v. Freights of The Hause, D.C N.Y, 181 F Supp 165.

thdrawn before freight due

e Chartering Co. v. Schirmer Stevedoring C.Cal., 194 F.Supp 488.

—— Advantage Freight and Recovery Back Thereof, and Recovery of Overcharges

Schirmer Stevedoring Co v Seaboard Ste- g Corp., C.A Cal., 306 F.2d 188—Cuban c Sugar Sales Corp v Marine Midland Co. of New York, D.C.N.Y., 207 F.Supp.

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id to refund

Intern. Corp. v. S.S. John Weyerhaeuser, Y., 372 F.Supp. 859, affd., C.A, 507 F 2d t. den. 95 S Ct. 1954, 421 U S. 965, 44 l 452.

Channel Lumber Co. v. Weyerhaeuser S S .A.N.Y., 244 F.2d 211.

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U.S. v. S.S. Lucie Schulte, D.C.N.Y., 227 s. 583, revd. on oth. grds, C.A., 343 F.2d

Action by government based on certificate of carrier

U S—U S v Garcia & Diaz, Inc, C A N Y, 291 F 2d 242

Government-financed shipments

U S—U S v Bloomfield S S Co, C A Tex, 359 F 2d 506, cert den 87 S Ct 709, 385 U S 1004, 17 L Ed 2d 543

§ 168. Assignment or Hypothecation

87. U S—American Smelting & Refining Co v Naviera Andes Peruana, S A, D C Cal, 208 F Supp 164, affd, C A, 327 F 2d 581

Assignee stands in no better shoes than assignor

U S—Merchants Corp of America v 9655 Long Tons, More or Less, of No 2 Yellow Milo, D C Tex, 238 F Supp 572

Assignor's rights subordinate to owner of vessel

U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

89. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

Assignment held without right

(2) Other matters

U.S—American Smelting & Refining Co v Naviera Andes Peruana, S A, D.C Cal, 208 F Supp 164, affd, C A., 327 F 2d 581

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4. U S—U S v Waterman S S Corp, C A Ala, 471 F 2d 186

5. **Application of contract limitation to United States**

(1) Limitation held valid and binding

U S.—U S v S S Claiborne, D C Ala, 252 F Supp 897.

(2) Held not unreasonable

U S—U S. v S S Claiborne, D C Ala, 252 F Supp 897

6. U S—Stralla v Connell Bros Co (Canada) Limited, C A Cal., 220 F 2d 511—U S v Waterman S S Corp, C.A Ala, 471 F 2d 186

Set-offs not constituting sufficient defense of payment

U S—Grace Line, Inc v U S, D C N Y, 144 F Supp 548, affd., C A, 255 F 2d 810.

Allegations held sufficient to state cause of action

U S—Isthmian S S Co v U S, D C N Y, 191 F Supp 335

8. U S—Stralla v Connell Bros Co (Canada) Limited, C A Cal, 220 F 2d 511

Cause of loss

(2) Other causes

U.S—Southeastern Oil Florida v U S, 115 F Supp 198, 127 Ct Cl 480

10. U.S—Stralla v Connell Bros Co. (Canada) Limited, C.A.Cal, 220 F 2d 511—Sociedad Armadora Aristomenis Panama, S A v. 5020 Long Tons of Raw Sugar, C.A Pa., 223 F.2d 417

Evidence held sufficient

U.S.—Hirsch Lumber Co. v. Weyerhaeuser S S Co, C.A.N.Y, 233 F.2d 791, cert den 77 S Ct 102, 352 U.S. 880, 1 L.Ed.2d 80—Rederi A/B Pulp v Republic Chemical Corp, D.C N.Y., 161 F Supp 726, affd., C.A., 274 F.2d 428—Rederi A/B Pulp v Republic Chemical Corp, C A N Y, 274 F 2d 428—Schirmer Stevedoring Co v. Seaboard Stevedoring Corp., C.A Cal., 306 F 2d 188

Evidence held insufficient

U.S.—Southeastern Oil Florida v U S, supra, n 8—Sociedad Armadora Aristomenis Panama, S A v 5,020 Long Tons of Raw Sugar, D.C.Pa, 122 F.Supp. 892, affd, C A, 223 F 2d 417—U S v American Trading Co of San Francisco, D C Cal, 138 F Supp 536

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11. **Rehearing not warranted**

U S—Bartlett-Collins Co v Surinam Nav Co, C A Okl, 381 F 2d 546

§ 170. Lien

Library References

Shipping ⇐154.

12. D C—Orient Mid-East Lines, Inc v Cooperative for American Relief Everywhere, Inc, D C, 284 F Supp 34, affd, C A, 410 F 2d 1006, 133 U S App D C 307

13. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

14. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165—In re North Atlantic & Gulf S S Co, D C N Y, 204 F Supp 899, affd, C A, 320 F 2d 628—Diana Compania Maritime, S A of Panama v Subfreights of S S Admiralty Flyer, D C N Y, 280 F Supp 607—Beverly Hills Nat Bank & Trust Co v Compania De Navegacione Almirante S A, Panama, C A Cal, 437 F 2d 301, cert den 91 S Ct 2173, 402 U S 996, 29 L Ed 2d 161

Priority

(3) Other matters

U S—American Smelting & Refining Co v Naviera Andes Peruana, S A, D C Cal, 208 F Supp 164, affd, C A, 327 F 2d 581—Luckenbach Overseas Corp v S S Audrey J Luckenbach, D C N Y, 232 F Supp 572.

16 **Cargo owned by United States**

U S—U S v American Trading Co of San Francisco, D C Cal, 138 F Supp 536

18. U S—N H Shipping Corp v Freights of the Jackie Hause, D C N Y, 181 F Supp 165

22. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

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The lien attaches to the proceeds of the sale of the property.[24 5]

24.5. U S—Bank of British North America v Freights, etc, of The Hutton, N Y, 137 F 534, 70 C C A 118—In re Bauer S S Corp, D.C N Y, 167 F Supp 909

27. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

29. U S—Beverly Hills Nat Bank & Trust Co v Compania De Navegacione Almirante S A, Panama, C A Cal, 437 F 2d 301, cert den 91 S Ct 2173, 402 U S 996, 29 L Ed 2d 161

43. U S—Marine Chartering Co v Schirmer Stevedoring Co, D C Cal, 194 F Supp 488—Ocean Cargo Lines, Limited v North Atlantic Marine Co, D C N Y, 227 F Supp 872—Luckenbach Overseas Corp v S S Audrey J Luckenbach, D C N Y, 232 F Supp 572

Matters held not to prevent lien against ship

U S—U S v S S Lucie Schulte, C A N Y, 343 F 2d 897—Dods Shipping Limited of Nassau, N P v Karobi Lumber Co, C A Ala, 397 F 2d 570

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52. U S—Beverly Hills Nat Bank & Trust Co v Compania De Navegacione Almirante S A, Panama, C A Cal, 437 F.2d 301, cert den 91 S Ct 2173, 402 U S 996, 29 L Ed 2d 161

58. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

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66. U S—N H Shipping Corp v Freights of The Jackie Hause, D C N Y, 181 F Supp 165

§ 174. In general

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95. U.S—C.J.S. quoted at length in Semon v Royal Indem Co, C A La, 279 F 2d 737, 739

Vessel held not private carrier

Hawaii—Cozine v Hawaiian Catamaran, Limited, 412 P 2d 669, 49 Haw 77, reh den 414 P 2d 428, 49 Haw 267

96. Persons held not common carriers

U S—Semon v Royal Indem Co, C A La, 279 F 2d 737

§ 176. —— Who are Passengers

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Library References

Modern Legal Forms Ch. 66, Tickets.

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23. U S.—Chervy v Peninsular & Oriental Steam Nav Co, D C Cal, 243 F Supp 654, affd, C A, 364 F 2d 908, cert den 87 S Ct 714, 385 U S 1007, 17 L Ed 2d 546

25. When passenger leaves ship

U S—Chervy v Peninsular & Oriental Steam Nav Co, D C.Cal, 243 F Supp 654, affd, C A, 364 F 2d 908, cert den 87 S Ct 714, 385 U S 1007, 17 L Ed 2d 546

§ 177. Statutory Regulation

29. U S—In re Dearborn Marine Service, Inc, C A Tex, 499 F 2d 263, reh. den 512 F 2d 1061, cert dism 96 S.Ct 163, 423 U S 886, 46 L Ed 2d 118

Regulation by ordinance

Fla—Excursions, Inc v City of Miami, 60 So 2d 161

State Public Service Commission held without authority to regulate

Utah—Williams v Public Service Commission, 442 P 2d 920, 21 Utah 2d 155

32. U S—Fidelity & Cas Co of New York v C/B Mr Kim, C A La, 345 F.2d 45

§ 179. —— Particular Matters of Regulation

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Other matters relating to radio installations on vessels carrying passengers for hire have been adjudicated.[68.5]

68.5. Held not within statutory exemptions

U S—Delaware, L. & W R Co v F C C, C A., 272 F.2d 706.

§ 180. —— Penalties, Forfeitures, and Liabilities for Violation

page 1090

91. U S.—Petition of Wood, D C Mo, 145 F Supp 848, affd., C.A., 245 F.2d 306

§ 181. —— Offenses

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63. N Y—Kurtz v. Adams, 141 N Y S 2d 77

§ 182. Fares, Tickets, and Special Contracts

Library References

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Modern Legal Forms Ch. 66, Tickets.

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3. U S—Furr v Societa Italiana Transporti Marittimi, Genoa, Italy, D C N Y, 162 F Supp 645

5. U S—Mulvihill v Furness, Withy & Co, D C N Y, 136 F Supp 201—Abbasciano v Home Lines Agency, Inc, D C Mass, 144 F Supp 235

N Y—Bernstein v Zim Israel Nav Co, 220 N Y S 2d 709, 31 Misc 2d 811—Santore v American Export Lines, Inc, 235 N Y S 2d 887, affd 241 N Y S 2d 184, 19 A D 2d 633

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14. U S—Mulvihill v Furness, Withy & Co, D C N Y, 136 F Supp 201

La—Calzavara v Biehl & Co, App, 220 So 2d 552

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37. U S—Anschul v Sitmar Cruises, Inc, D C Ill, 67 F R D 455, app dism C A, 544 F 2d 1364, cert den 97 S Ct 272, 429 U S 907, 50 L Ed 2d 189

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38. U S—McCaffrey v Cunard S S Co, D C N Y, 139 F Supp 472, citing British law

40. U S—Fricke v Isbrandtsen Co, D C N Y, 151 F Supp 465

41. U S—Fricke v Isbrandtsen Co, D C N Y, 151 F Supp 465

42. U S—Mulvihill v Furness, Withy & Co, D C N Y, 136 F Supp 201

N Y—Rasmussen v Gdynia America Lines, Limited, 126 N Y S 2d 872

46. U S—Azrak v Panama Canal Co, D.C N Y, 117 F Supp 334—Miller v. Lykes Bros S S Co, Inc, C A Fla, 467 F 2d 464

49. U S—Mulvihill v Furness, Withy & Co, D C N Y, 136 F Supp 201.

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51. U S—Silverstri v Italia Societa Per Azioni Di Navigazione, C A N Y, 388 F 2d 11

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66. U S.—Toohill v Cunard S S Co, D C Mass, 130 F Supp. 128—Mulvihill v Furness, Withy & Co, D C.N Y, 136 F Supp. 201—McCaffrey v Cunard S S Co, D C.N Y, 139 F Supp 472—Lawlor v Incres Nassau S S Line, Inc., D C.Mass., 161 F Supp 764—Pisacane v. Italia Societa Per Azioni Di Navigazione, D C N.Y, 219 F Supp 424

U.S. law provision in foreign contract not controlling

U.S.—Fricke v. Isbrandtsen Co, D.C.N.Y, 151 F Supp 465.

Matters to be considered in determining what law governs

U S—Caruso v Italian Line, D.C.N.Y., 184 F Supp 862

69. U S—Siegelman v Cunard White Star Limited, C A N.Y., 221 F 2d 189—Greenwald v. Cunard Steam-Ship Co, D.C.N.Y., 162 F Supp 250—Born v Norwegian America Line, Inc, D C.N.Y, 173 F Supp. 33.

N Y.—Amsterdam v. Compania Naviera Estrella De Plata, S A Panama, R P, 190 N Y S 2d 604, 8 A D 2d 947.

71. U S—Mulvihill v Furness, Withy & Co, D C N.Y, 136 F.Supp. 201

72. U S.—Caruso v Italian Line, D.C N Y., 184 F Supp 862.

73. U S.—Wendell v. Holland-America Line, D.C. N.Y, 30 F R D. 162

Unless foreign law not pleaded or cited

N Y.—Mangrelli v. Italian Line, 144 N.Y.S 2d 570, 208 Misc. 685

§ 184. —— Commencement of Voyage; Vessel to be Furnished

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92. U S—Gardner v Panama Canal Co, D C Canal Zone, 115 F Supp 687—Petition of Nueces County, Tex, Road Dist No 4, D C Tex, 174 F Supp 846—Noel v United Aircraft Corp, D C Del, 204 F Supp 929—Ardoin v Union Oil Co of Cal, D C La, 226 F Supp 192—Aronowitz v Molero, D C La, 273 F Supp 226

Guest passenger

U S—Nuccio v Royal Indem Co, D C La, 280 F Supp 468, affd, C A, 415 F 2d 228

Doctrine not extended to passengers or guests

U S—Isham v Pacific Far East Line, Inc, C A Guam, 476 F 2d 835—Luna v Star of India, D C Cal, 356 F Supp 59

93. La—Ratcliff v United Services Auto Ass'n, App, 180 So 2d 58, writ ref 180 So 2d 541, 248 La 528

§ 186. —— Accommodations and Provisions

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17. U S—Haffel v U S Lines Co, D C N Y, 114 F Supp 443

Disclaimer of seaworthiness warranty immaterial

U S—Kornberg v Carnival Cruise Lines, Inc, C A Fla, 741 F 2d 1332, cert den 105 S Ct 1357, 84 L Ed 2d 379

23. Damages

N.Y—Bucholtz v Sirotkin Travel Ltd, 343 N Y S.2d 438, 74 Misc 2d 180, affd, 303 N Y.S 2d 415, 80 Misc 2d 333

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60. U S—C J.S. cited in Gamble v The New Bedford, D C R I, 111 F Supp 811—Nietes v American President Lines, Limited, D C Cal, 188 F Supp 219

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62. Deviation to procure medical assistance

U S—Gamble v The New Bedford, D C R.I, 111 F.Supp 8

A ship carrying no physician or surgeon may have the duty to change course and put in at the nearest port, according to the gravity of the illness of the passenger.[62.5]

62.5. U S.—Nietes v. American President Lines, Limited, D C Cal., 188 F.Supp 219

64. N Y—Owens v Italia Societa Per Azione Navigazione-Genova, 334 N Y S.2d 789, 70 Misc.2d 719, affd. 347 N Y.S.2d 431, 75 Misc.2d 104.

§ 192. Personal Safety and Liability for Injuries

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92. U S—Fidelity & Cas Co. of New York v. C/B Mr. Kim, C.A La., 345 F 2d 45.

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7. U S—Caruso v Italian Line, D.C.N.Y., 184 F.Supp 862

N.Y.—Sundberg v Aktiebolaget Svenska Amerika Linien, 163 N Y.S.2d 253, 6 Misc.2d 1069—Woolf v Reed, 243 N Y.S.2d 542, 19 A.D.2d 814

§ 193. —— Care Required and Liability in General

Library References

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Modern Legal Forms Ch. 66, Tickets.

. U S—Ludena v The Santa Luisa, D C N Y, 112 F Supp 401

gh degree of care

S—Talton v U S Lines Co, D C N Y, 203 F Supp 17—McCormick Shipping Corp v Stratt, C A Fla, 322 F 2d 648—Rechany v Roland, D C N Y, 235 F Supp 79—Alpert v Zim Lines, C A N Y, 370 F 2d 115—Summers v Motor Ship Big Ron Tom, D C S C, 262 F Supp 400—Stewart v George W Davis & Sons, Inc, D C Fla, 340 F Supp 643

waii—Cozine v Hawaiian Catamaran, Limited, 412 P 2d 669, 49 Haw 77, reh den 414 P 2d 428, 49 Haw 267

ghest degree of care

S—Petition of Wood, D C Mo, 145 F Supp 848, affd, C A, 245 F 2d 306

a.—McCormick Shipping Corp v Warner, App, 129 So 2d 448.

C—Jackson v Stancil, 116 S E 2d 817, 253 N C 291

arious expressions as to care

S.—Fidelity & Cas Co of New York v C/B Mr Kim, C A La, 345 F 2d 45

a—Cashell v. Hart, App, 143 So 2d 559

(3) U S—Aronowitz v Molero, D C La, 273 Supp 226—Weddle v. West, D.C Wash, 275 F Supp 5—Traub v. Holland-America Line, D C N Y, 278 Supp. 814.

igher degree of care than for safety of cargo

(3) U.S—Petition of Skibs A/S Jolund, D C N.Y, 4 F Supp 47, revd on oth grds, C A, 250 F 2d 777, rt den 78 S Ct. 772, 356 U S 933, 2 L.Ed 2d 763, rt. den. 78 S.Ct. 773, 356 U.S. 933, 2 L Ed 2d 763

ue care

.Y.—Johnson v Home Lines, Inc, 266 N Y S 2d 582, 48 Misc 2d 1090

easonable care

.S—Urian v. Milstead, C A.Mo., 473 F 2d 948

a.—Roberts v Tidex, Inc, App, 251 So 2d 509, writ den., 253 So 2d 224, 259 La. 905.

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4. U.S.—Gardner v. Panama Canal Co., D C.Canal Zone, 115 F.Supp 687—Levinowitz v Cunard White Star, Limited, D C.N.Y., 129 F.Supp. 555—Allen v. Matson Nav. Co, C.A Cal, 255 F.2d 273—Marshall v. Westfal-Larsen & Co., C.A.Cal, 259 F.2d 575—Stanga v. McCormick Shipping Corp, C.A La., 268 F.2d 544.

Mass.—Hennigan v. Nantasket Boat Line, Inc, 110 N.E.2d 323, 329 Mass. 690

17. N C.—Jackson v Stancil, 116 S.E 817, 253 N C. 291.

18. U.S.—Marshall v. Westfal-Larsen & Co, C.A Cal., 259 F.2d 575—Talton v. U.S. Lines Co, D.C.N.Y., 203 F.Supp. 17—Noel v. United Aircraft Corp., D.C.Del., 204 F Supp 929—McCormick Shipping Corp v. Stratt, C.A.Fla, 322 F.2d 648—Summers v. Motor Ship Big Ron Tom, D C S.C, 262 F.Supp. 400—Aronowitz v Molero, D.C.La., 273 F.Supp. 226—Stewart v. George W Davis & Sons, Inc., D.C.Fla, 340 F Supp. 643

Fla.—McCormick Shipping Corp. v. Warner, App., 129 So.2d 448.

N.Y.—Dumont v. American Export Lines, 137 N.Y S.2d 896.

19. U.S.—Haffel v. U.S. Lines Co., D.C N.Y., 114 F Supp. 443—Noel v. United Aircraft Corp., D.C. Del., 204 F.Supp. 929—Gertz v. McCarty, C.A. Or., 450 F.2d 1104.

Fla.—Cashell v. Hart, App., 143 So.2d 559

20. U.S.—Hawthorne v. Holland-America Line, D C. Mass., 160 F.Supp. 836

21 Cal—Carrick v Pound, 81 Cal Rptr 234, 276 C A 2d 689

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31. U S—Petition of Trans-Pacific Fishing & Packing Co, D C Wash, 152 F Supp 44

36. U S—Nuccio v Royal Indem Co, D C La, 280 F Supp 468, affd, C A, 415 F 2d 228—Theodories v Hercules Nav Co, C A La, 448 F 2d 701—Travelers Indem Co v Gulf Weighing Corp, D C La, 352 F Supp 335

40. Mich—White's Estate v Beauchamp, 82 N W 2d 472, 348 Mich 159

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52. N Y—C J S quoted in Gerrish v Panama Canal Co, 166 N Y S 2d 258, 262, 7 Misc 2d 719, mod on oth grds 170 N Y S 2d 991, 5 A D 2d 818

N C—Kale v Daugherty, 174 S E 2d 846, 8 N C App 417

No duty to warn under circumstances

U S—Summers v Motor Ship Big Ron Tom, D C S C, 262 F Supp 400

53 U.S—Summers v Motor Ship Big Ron Tom, D C S C, 262 F Supp 400

N Y—Gerrish v Panama Canal Co, 166 N Y S 2d 258, 7 Misc 2d 719, mod on oth grds 170 N Y S 2d 991, 5 A D 2d 818

54. U S—Aronowitz v Molero, D C La, 273 F Supp 226—Urian v Milstead, D C Mo, 340 F Supp 213, affd, C A, 473 F 2d 948

56 U S—Stewart v George W Davis & Sons, Inc, D C Fla, 340 F Supp 643

Presence of unanchored chairs as implied invitation

U S—The Arabic, C C A N Y, 50 F 2d 96

N.Y—Gerrish v Panama Canal Co, 166 N Y S 2d 258, 7 Misc 2d 719, mod on oth grds 170 N Y S 2d 991, 5 A D 2d 818

57. N Y—Gerrish v Panama Canal Co, 166 N Y S 2d 258, 7 Misc 2d 719, mod on oth grds 170 N Y.S 2d 991, 5 A D 2d 818.

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59. Mass—Hennigan v Nantasket Boat Line, Inc, 110 N E.2d 323, 329 Mass 690

60. Mass—Quigley v. Wilson Line of Mass, Inc, 154 N E 2d 77, 338 Mass 125, 77 A L R.2d 499

65. Duty to protect passenger from criminal attack

Fla.—Holland America Cruises, Inc. v. Underwood, App 2 Dist, 470 So 2d 19

69. U S.—Haffel v U S Lines Co, D C N Y, 114 F Supp 443

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81. N.Y—Landy v Norwegian America Line Agency, Inc, 274 N Y S 2d 687, 26 A D.2d 923

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90. U S—Amdur v Zim Israel Nav. Co, D C N Y, 310 F.Supp 1033

94. What law governs

U S.—Amdur v. Zim Israel Nav Co, D C.N Y., 310 F.Supp. 1033.

95. U.S.—Nietes v. American President Lines, Limited, D.C Cal, 188 F.Supp. 219,

Where a ship's physician or nurse is in regular employment as a member of the crew the shipowner may in a proper case be held liable for negligent treatment under the doctrine of respondent superior.[98.5]

98.5. U.S—Nietes v. American President Lines, Limited, D C Cal, 188 F.Supp 219

6. N Y.—Dresner v Riviera Ass'n, 161 N.Y S 2d 701, 6 Misc.2d 901

7. U S—Brown v Duncan, D C La, 199 F Supp 399

N Y—Dresner v Riviera Ass'n, 161 N Y S 2d 701, 6 Misc 2d 901

Doors

(2) Other cases

U S—Ludena v The Santa Luisa, D C N Y, 112 F Supp 401—Hovis v The P and G Boat Store, D C Mo, 183 F Supp 810

Guest-passenger

U S—Travelers Indem Co v Gulf Weighing Corp, D C La, 352 F Supp 335

La—Ratcliff v United Services Auto Ass'n, App, 180 So 2d 58, writ ref 180 So 2d 541, 248 La. 528

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8. U S—Garnder v Panama Canal Co, D C Canal Zone, 115 F Supp 687—Rohde v N V Nederlandsch Amerikaansche Stoomvart Maatschappij, D C N Y, 156 F Supp 309—Talton v U S Lines Co, D C N Y, 203 F Supp 17

13. U S—Levinowitz v Cunard White Star, Limited, D C N Y, 129 F Supp 555

14. N C—Kale v Daugherty, 174 S E 2d 846, 8 N C App 417

Owner bound by what it should have known

U S—McCormick Shipping Corp v Stratt, C A Fla, 322 F 2d 648

16. U S—Gardner v Panama Canal Co, supra, n 8

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36. U S—Webster v Davis, D C Cal, 109 F Supp 149—Marshall v Westfal-Larsen & Co, C A Cal, 259 F 2d 575—Isham v Pacific Far East Lines, Inc, C A Guam, 476 F 2d 835

La—Roberts v Tidex, Inc, App, 251 So 2d 509, writ den, 253 So 2d 224, 259 La 905

37. U S—Nygren v American Boat Cartage, Inc, C A N Y, 290 F 2d 547

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46. No liability on theory of duty to provide proper and safe transportation between ship and shore

U S—Isham v. Pacific Far East Line, Inc, C A Guam, 476 F 2d 835

47. U S—Lawlor v Incres Nassau S S Line Inc, D C Mass, 161 F Supp 764

53. U S—Lawlor v Incres Nassau S S Line, Inc, D C Mass, 161 F Supp 764

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58. U S—Petition of Wood, D C Mo, 145 F Supp 848, affd, C A, 245 F 2d 306—Fidelity & Cas Co of New York v C/B Mr Kim, C A La, 345 F 2d 45—Travelers Indem Co v Gulf Weighing Corp, D C La, 352 F Supp 335

59. N Y.—C.J.S. quoted in Gerrish v Panama Canal Co, 166 N Y S 2d 258, 262, 7 Misc 2d 719, mod on oth grds 170 N Y S 2d 991, 5 A D 2d 818

§ 194. —— Passenger's Contributory Negligence or Assumption of Risk

Library References

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69. U S—Webster v Davis, D C Cal, 109 F Supp 149

La—Benjamin v Southern Farm Bureau Cas Ins Co, App, 264 So.2d 251, writ den 266 So 2d 431, 262 La 1122

N Y—Dumont v American Export Lines, 137 N Y S 2d 896.

Wash—Zukowsky v Brown, 459 P 2d 964, 1 Wash App 94, cause remd 488 P 2d 269, 79 Wash 2d 586

70. Idaho—Stuchbery v Harper, 390 P 2d 303, 87 Idaho 12,

72. Idaho—Stuchbery v Harper, 390 P 2d 303, 87 Idaho 12

73. U S—Webster v Davis, supra, n 69—Dean v Chesapeake Bay Ferry Dist, D C Va, 158 F Supp 408—Nygren v American Boat Cartage, Inc, C A N Y, 290 F 2d 547

Fla—Cashell v Hart, App, 143 So.2d 559

74. La—Percle v Ordoyne, App, 150 So 2d 902, writ ref 152 So 2d 561, 244 La 464

Disembarking

U S—Urian v Milstead, C A Mo, 473 F 2d 948

75. U S—Aronowitz v Molero, D C La, 273 F Supp 226

Ohio—Tipton v Day, App, 154 N E 2d 174

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89. **Acts or conduct held contributory negligence**

(3) Other acts or conduct

U S—Scheiner v St Jovite, D C Cal, 180 F Supp 452—Stewart v George W Davis & Sons, Inc, D C Fla, 340 F Supp 643

Ky—Denham v Steamer Avalon, Inc, 261 S W 2d 291

Acts or conduct held not contributory negligence

(1) U S—Urian v Milstead, D C Mo, 340 F Supp 213, affd, C A, 473 F 2d 948

La—Percle v Ordoyne, App, 150 So 2d 902, writ ref 152 So 2d 561, 244 La 464—Roberts v Tidex, Inc, 251 So 2d 509, writ den, 253 So 2d 224, 259 La 905

Neb—Reed v Reed, 153 N W 2d 356, 182 Neb 136

(1) Wash—Zukowsky v Brown, 459 P 2d 964, 1 Wash App 94, cause remd 488 P 2d 269, 79 Wash 2d 586

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6. U S—Nygren v American Boat Cartage, Inc, C A N Y, 290 F 2d 547

§ 195. —— Limitation of, or Exemption from, Liability

Library References

Shipping ⇐166(2).

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15. U S—Mulvihill v Furness, Withy & Co, D C N.Y, 136 F Supp 201—Petition of Nueces County, Tex, Road Dist No. 4, D.C Tex, 174 F Supp 846

Statutory limitation held applicable

U.S—Petition of Porter, D C Tex, 272 F Supp 282

Statutory limitation held inapplicable

U S.—Weddle v. West, D C Wash, 275 F Supp 165

Defense of limitation of liability not considered

La—Roberts v Tidex, Inc, App, 251 So 2d 509, writ den., 253 So 2d 224, 259 La. 905

16. U S—Rosenthal v Compagnie Generale Transatlantique, D C N Y, 14 F R D 33, reargument 14 F.R D 336—Hawthorne v. Holland-America Line, D.C Mass., 160 F.Supp 836—Lawton v Incres Nassau S S Line, Inc, D C Mass., 161 F.Supp 764—Nuccio v Royal Indemnity Co, D C La., 280 F.Supp 468, affd, C A, 415 F 2d 228

N Y.—Johnson v Home Lines, Inc., 266 N Y S 2d 582, 48 Misc 2d 1090.

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27. U.S.—Chervy v. Peninsular & Oriental Steam Nav Co, D.C.Cal., 243 F Supp 654, affd, C.A., 364 F.2d 908. Cert den 87 S Ct 714, 385 U S 1007, 17 L.Ed.2d 546

A provision in a ticket limiting the responsibility of the carrier to the period during which a passenger is on board has no effect on his rights not to be injured by the negligence of the carrier's employees when he is no longer a passenger.[33 5]

33 5. U S—Shulman v Compagnie Generale Transatlantique, D C N Y, 152 F Supp 833

34. U S—Petition of Central R Co of N J, D C N Y, 121 F Supp 813—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763

Burden of proof

(2) Other cases

U S—Petition of Skibs A/S Jolund, D C N Y, 144 F Supp 47, revd on oth grds, C A, 250 F 2d 777, cert den 78 S Ct 772, 356 U S 933, 2 L Ed 2d 763, cert den 78 S Ct 773, 356 U S 933, 2 L Ed 2d 763

Under Federal Rules of Civil Procedure

Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F, 28 U S C A, as added in 1966, provides for the procedure in actions by a shipowner for exoneration from liability

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35. U S—Lipton v National Hellenic Am Lines, D C N Y, 294 F Supp 308

36. N Y—Bernstein v Zim Israel Nav Co, 220 N Y S 2d 709, 31 Misc 2d 811

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67. U S—Siegelman v Cunard White Star Limited, C A N Y, 221 F 2d 189—Toohill v. Cunard S S Co, D C Mass, 130 F Supp 128—Burd v Compagnie Generale Transatlantique, D C N Y., 157 F Supp 52

Particular limitations held valid

U S—Mulvihill v Furness, Withy & Co, D C N.Y, 136 F Supp 201

Limitation provision in ticket

U S—Axelrod v Incres Line Agency, Inc, D C N Y, 243 F Supp 149, revd on oth grds and remd, C A, 363 F 2d 531—Silvestri v Italia Societa Per Azioni Di Navigazione, C A N Y, 388 F 2d 11—Miller v Lykes Bros S S Co, Inc, C A Fla, 467 F 2d 464

N Y—Owens v Italia Societa Per Azione Navigazione-Genova, 334 N Y S 2d 789, 70 Misc 2d 719, affd 347 N Y S 2d 431, 75 Misc 2d 104

68. U S—Greenwald v Cunard Steam-Ship Co, D.C N Y, 162 F Supp 250

La—C J.S. cited in Calzavara v Biehl & Co, App, 220 So 2d 552, 554

N Y—Bernstein v Zim Israel Nav Co, 220 N Y S 2d 709, 31 Misc 2d 811—Santore v American Export Lines, Inc, 235 N Y S 2d 887, affd 241 N Y S 2d 184, 19 A D 2d 633

69. N Y—Mangrelli v Italian Line, 144 N Y S.2d 570, 208 Misc. 685

75. U S—Furr v. Societa Italiana Transporti Marittimi, Genoa, Italy, D C N Y, 162 F.Supp. 645—Caruso v. Italian Line, D C N Y., 184 F.Supp 862—Schwartz v. S S Nassau, D.C.N.Y., 223 F Supp 374, affd, C.A, 345 F.2d 465, cert. den 86 S.Ct 294, 382, U.S. 919, 15 L Ed.2d 234—Loomis v SS Santa Rosa, C A.Wash., 447 F 2d 105, cert. den 92 S Ct 711, 404 U.S 1038, 30 L Ed 2d 729—Ager v D/S A/S Den Norske Afrika-Og Australselskab Wilhemlsens Dampskibsaktieselskab, D C. N.Y., 336 F.Supp 1187

Fla.—C.J.S. quoted at length in Foresman v Easters S S Corp, App, 177 So.2d 887, 889

Purpose of statute

U S—Mulvihill v. Furness, Withy & Co, D.C.N Y., 136 F Supp 201—Barrette v Home Lines, Inc., D C.N.Y, 168 F Supp. 141.

Failure to have contract

N.Y.—Ayoub v. Moore-McCormack Lines, Inc, 191 N.Y S.2d 411, 17 Misc 2d 519

Limitation contrary to statute held invalid

N Y—Glusman v U S Lines Co, 241 N Y S 2d 960, 39 Misc 2d 845

Purpose

U S—Schwartz v S S Nassau, C A N Y, 345 F 2d 465

Liberally construed in shipowner's favor

U S—Safir v Compagnie Generale Transatlantique, D C N Y, 241 F Supp 501

Extension of time for suit by infant

N Y—Powell v Compagnie Generale Transatlantique, Limited, 263 N Y S 2d 17, 47 Misc 2d 670

76. U S—Mulvihill v Furness, Withy & Co, D C N Y., 136 F Supp 201—Abbasciano v Home Lines Agency, Inc, D C Mass, 144 F Supp 235—Mitchell v American Export Lines, D C N Y, 191 F Supp 145—Schwartz v S S Nassau, C A N Y, 345 F 2d 465—Miller v Lykes Bros S S Co, Inc, C A Fla, 467 F 2d 464

Action by passenger's husband held not barred

N Y—Mangrelli v Italian Line, 144 N Y S 2d 570, 208 Misc 685

Receipt of notice of claim immaterial

U S—Vaci v Swedish American Line, D C Pa, 200 F Supp 207

80. **Entire clause held invalid**

U S—Barrette v Home Lines, Inc, D C N Y, 168 F Supp 141

81. U S—Schwartz v S.S Nassau, C A N Y, 345 F 2d 465, cert den 86 S Ct 294, 382 U S 919, 15 L Ed 2d 234

N Y—Lerner v Karageorgis Lines, Inc, 1 Dept, 485 N Y S 2d 532, 108 A D 2d 648

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84. U S—Greenwald v. Cunard Steam-Ship Co, D C N.Y., 162 F Supp 250

85. U S.—Toohill v Cunard S S Co, D C Mass, 130 F Supp. 128—Lweitsky v Matson Nav Co., D C N Y, 134 F Supp 441—Mulvihill v. Furness, Withy & Co, D C N.Y, 136 F Supp 201—Geller v Holland-America Line, C A N Y, 298 F 2d 618, cert den 82 S Ct 1256, 370 U.S 909, 8 L Ed 2d 403—Vaci v Swedish American Line, D.C Pa, 200 F Supp. 207—Schwartz v S S Nassau, D C N Y, 223 F Supp 374, affd, C A, 345 F 2d 465, cert den 86 S.Ct 294, 382 U.S. 919, 15 L Ed.2d 234

Under Norwegian law

U.S—Born v. Norwegian America Line, Inc, D C N Y, 173 F Supp 33

Action held not barred

U S.—Stapp v. Italian-American Lines, Inc, D C.N Y, 181 F.Supp 579

86. U S.—Mayer v Zim Israel Nav Co., D C N Y., 177 F Supp. 69.

87. **Acts held not waiver**

(1) U.S—Siegelman v Cunard White Star Limited, C A.N Y, 221 F.2d 189.

(3) Other matters

U S—Axelrod v. Incres Line Agency, Inc., D C.N Y, 243 F Supp. 149, revd on oth grds and remd., C A., 363 F 2d 531

Fla.—Foresman v Eastern S S Corp, App, 177 So 2d 887

88. U S—Axelrod v Incres S.S. Co, C A N Y., 363 F 2d 531.

Estoppel held not shown

U S—Siegelman v Cunard White Star Limited, C.A N Y, 221 F 2d 189—Born v Norwegian America Line, Inc, D.C N.Y., 173 F.Supp. 33.

Fla—Foresman v Eastern S.S Corp., App., 177 So.2d 887.

§ 196. Liability for Passengers' Baggage or Effects

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97. Negligence standard

US—Travelers Indem Co v Gulf Weighing Corp, D.C La, 352 F Supp 335

§ 197. —— Limitation of, or Exemption from, Liability

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Modern Legal Forms Ch. 66, Tickets.

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§ 198. Actions

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96. Either contract or tort action

NY—Amsterdam v Compania Naviera Estrella De Plata, S A Panama, R P, 190 N Y S 2d 604, 8 A D 2d 947—Woolf v Reed, 236 N Y S.2d 117, 38 Misc 2d 285, revd on oth grds 243 N Y S 2d 542, 19 A D.2d 814

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15. Allegations held sufficient

U.S—Nietes v American President Lines, Limited, D.C.Cal., 188 F.Supp. 219

Fla.—Cashell v Hart, App, 143 So 2d 559

Allegations held insufficient

US—Nietes v American President Lines, Limited, D.C.Cal, 188 F.Supp. 219

NY.—Woolf v. Reed, 243 N Y.S 2d 542, 19 A D 2d 814.

16. U.S.—Haffel v U S Lines Co, D.C.N.Y, 114 F Supp 443

Foreign law

(2) Other matters

US.—Rosenthal v Compagnie Generale Transatlantique, 14 F.R D. 33, rearg gr. 14 F R.D. 336—Siegelman v Cunard White Star Limited, C A N.Y, 221 F.2d 189.

19. Defense stricken as superfluous

U.S—Rosenthal v. Compagnie Generale Transatlantique, supra, n 16.

20. U.S.—Archawski v. Hantoti, C.A.N.Y., 239 F 2d 806, cert den. 77 S.Ct. 1283, 353 U S 984, 1 L.Ed.2d 1142

27. U.S—Haffel v. U.S. Lines Co, supra, n 16

Invalidity of limitation of action clause

N.Y.—Mangrelli v. Italian Line, 144 N.Y.S.2d 570, 208 Misc. 685

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28. Ky.—Denham v. Steamer Avalon, Inc., 261 S.W.2d 291.

§ 200. —— Evidence

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30. U.S.—Hamilton v The Nassau, D.C N.Y., 131 F.Supp. 125—Scheiner v. St. Jovite, D.C Cal, 180 F.Supp. 452—Summers v. Motor Ship Big Ron Tom, D.C.S C., 262 F Supp. 400—Aronowitz v Molero, D.C.La., 273 F.Supp. 226—Nuccio v. Royal Indem. Co., D.C.La., 280 F.Supp. 468, affd., C.A., 415 F.2d 228.

35. U.S —Allen v. Matson Nav. Co., C.A.Cal, 255 F.2d 273.

Hawaii—Cozine v Hawaiian Catamaran, Limited, 412 P 2d 669, 49 Haw 77, reh den 414 P 2d 428, 49 Haw 267

Doctrine held inapplicable

U S—Talton v U S Lines Co, D C N Y, 203 F Supp 17

Cal—Lockhart v Martin, 324 P 2d 340, 159 C A 2d 760—Carrick v Pound, 81 Cal Rptr 234, 276 C A 2d 689

Wash—Zukowsky v Brown, 459 P 2d 964, 1 Wash App 94, cause remd 488 P 2d 269, 79 Wash 2d 586

39. U S—Rosenthal v Compagnie Generale Transatlantique, D C N Y, 14 F R D 33, rearg gr 14 F R D 336

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51 U S—Gardner v Panama Canal Co, D C Canal Zone, 115 F Supp 687

Expert testimony unnecessary

Hawaii—Cozine v Hawaiian Catamaran, Limited, 412 P 2d 669, 49 Haw 77, reh den 414 P 2d 428, 49 Haw 267

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59. U S—Gamble v The New Bedford, D C R I, 111 F Supp 8

Mass—Hennigan v Nantasket Boat Line, Inc, 110 N E 2d 323, 329 Mass 690

N C—Barefoot v Trask, 210 S E 2d 272, 24 N C App 301

Evidence held sufficient

(1) U S—Webster v Davis, D.C Cal, 109 F Supp 149—Gardner v Panama Canal Co, supra, n 51—Van Nieuwenhove v Cunard S S Co, C A Ill, 216 F 2d 31—Hamilton v The Nassau, D.C N Y, 131 F Supp 125—Archawski v Hantoti, C A N.Y, 239 F 2d 806, cert den 77 S Ct 1283, 353 U S 984, 1 L Ed 2d 1142—Kaplan v. Hammer, D C N.Y, 161 F Supp 625—Moore-McCormack Lines, Inc v Russak, C A Wash, 266 F 2d 573—Katz v Cie Generale Transatlantique, C A Va, 271 F 2d 590—Crowley v S S Arcadia, D C Cal., 244 F Supp 597—Traub v Holland-America Line, D C N Y, 278 F Supp 814—Nuccio v Royal Indem. Co, C.A La, 415 F.2d 228

La—Ratcliff v. United Services Auto Ass'n, App, 180 So 2d 58, writ ref 180 So 2d 541, 248 La 528

N Y—Gerrish v Panama Canal Co, 166 N Y S 2d 258, 7 Misc 2d 719, mod on oth grds 170 N Y S 2d 991, 5 A D 2d 818—Saltzman v U S Lines Co, 190 N Y S 2d 133, 8 A.D 2d 846, app den 191 N Y S 2d 154, 9 A D 2d 628—Johnson v Home Lines, Inc, 266 N Y S 2d 582, 48 Misc 2d 1090

Wash—Washburn v Ensley, 335 P 2d 471, 53 Wash 2d 570

(2) U S—McCormick Shipping Corp v Stratt, C A Fla, 322 F 2d 648—American President Lines, Limited v Lundstrom, C A Or, 323 F 2d 817, 8 A L R 3d 646—Traub v. Holland-America Line, D C N.Y, 278 F Supp 814—Nuccio v Royal Indem Co, D C La, 280 F.Supp 468, affd, C A, 415 F 2d 228

Mass—Quigley v. Wilson Line of Mass, Inc, 154 N.E 2d 77, 338 Mass 125, 77 A L R 2d 499

(3) U.S.—Gamble v The New Bedford, D C R I, 111 F.Supp 8—Ludena v. The Santa Luisa, D C, 112 F Supp 401—Hawthorne v. Holland-America Line, D.C Mass, 160 F Supp. 836—Byrd v Belcher, D.C Tenn, 203 F Supp 645—Weddle v West, D C.Wash., 275 F.Supp 165.

(4) U.S.—Hawthorne v Holland-America Line, D C Mass., 160 F Supp. 836—Marshall v Westfal-Larsen & Co, C.A Cal., 259 F.2d 575—Summers v Motor Ship Big Ron Tom, D.C S C., 262 F Supp. 400—Menin v Wilner, C.A.Fla., 424 F 2d 1058

(5) To show other matters

La—Percle v. Ordoyne, App, 150 So 2d 902, writ ref 152 So.2d 561, 244 La. 464

Evidence held insufficient

(1) U.S.—Petition of Wood, D C.Mo., 145 F Supp 848, affd, C A., 245 F.2d 306—Talton v U.S Lines Co, D.C N.Y., 203 F Supp. 17—Pickett v. Nelseco Nav. Co, D.C.Conn., 270 F Supp. 682—Nuccio v Royal Indem Co, D C La, 280 F Supp 468, affd, C A, 415 F 2d 228

La—Ratcliff v United Services Auto Ass'n, App, 180 So 2d 58, writ ref 180 So 2d 541, 248 La 528

(2) U S—Gamble v The New Bedford, supra—Levinowitz v Cunard White Star, Limited, D C N.Y, 129 F Supp 555—Summers v Motor Ship Big Ron Tom, D C S C, 262 F Supp 400

Fla—McCormick Shipping Corp v Warner, App, 129 So 2d 448

N Y—Dumont v American Export Lines, 137 N Y S 2d 896

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65. Hawaii—Cozine v Hawaiian Catamaran, Limited 412 P 2d 669, 49 Haw 77, reh den 414 P 2d 428 49 Haw 267

Ohio—Tipton v Day, App, 154 N E 2d 174

Direction of verdict

(4) Other cases

U S—McCaffrey v Cunard S S Co, D C N Y, 139 F Supp 472

Evidence held sufficient to require submission to jury

U S—McCaffrey v Cunard, S S Co, D C N Y, 139 F Supp 472, citing British law—Seaboard Properties, Inc v Bunchman, C A Fla, 278 F 2d 679

Mass—Hennigan v Nantasket Boat Line, Inc, 110 N E 2d 323, 329 Mass 690

N Y—Amsterdam v Compania Naviera Estrella De Plata, S A Panama, R P, 190 N Y S 2d 604, 8 A D 2d 947

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66. U S—Hamilton v The Nassau, D C N Y, 131 F Supp 125—N V Stoomvaart Maatschappij "Nederland" v Throner, C A Fla, 345 F 2d 472

Neb—Reed v Reed, 153 N W 2d 356, 182 Neb 136

Wash—Washburn v Ensley, 335 P 2d 171, 53 Wash 2d 570

Evidence held sufficient to require submission to jury

U S—Allen v Matson Nav Co, C A Cal, 255 F 2d 273—Lawlor v Incres Nassau S S Line, Inc, D C Mass, 161 F Supp 764

Fla—Cashell v Hart, App, 143 So 2d 559

Mich—White's Estate v Beauchamp, 82 N W 2d 472, 348 Mich 159

N C—Gilreath v Silverman, 95 S.E 2d 107, 245 N C 51

67. Wash—Washburn v Ensley, 335 P 2d 471, 53 Wash 2d 570

Evidence held sufficient for submission to jury

Idaho—Stuchbery v Harper, 390 P 2d 303, 87 Idaho 12

68. Cal—Lockhart v Martin, 324 P 2d 340, 156 C A 2d 760

71. Mich—Britten v Updyke, 98 N W 2d 660, 357 Mich 466

72. Instructions held proper and sufficient

N C—Kale v Daugherty, 174 S E 2d 846, 8 N C App 417

Wash.—Washburn v Ensley, 335 P 2d 471, 53 Wash 2d 570

75. Wash—Zukowsky v Brown, 459 P 2d 964, 1 Wash App. 94, cause remd 488 P 2d 269, 79 Wash.2d 586

Instruction on foreseeability in breach of common carrier duty unnecessary

Fla—Holland America Cruises, Inc v. Underwood, App 2 Dist, 470 So 2d 19

76. Idaho—Stuchbery v Harper, 390 P 2d 303, 87 Idaho 12

§ 202. —— Damages; Recovery of Passage Money

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80. N Y.—Owens v Italia Societa Per Azione Navigazione-Genova, 334 N Y S 2d 789, 70 Misc 2d 719, affd. 347 N Y S 2d 431, 75 Misc 2d 104

81. N Y—C.J S. cited in Owens v Italia Societa Per Azione Navigazione-Genova, 334 N Y S 2d 789, 793, 70 Misc 2d 719, affd 347 N Y S 2d 431, 75 Misc 2d 104

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93. U S—Lipton v National Hellenic Am Lines, D C N Y, 294 F Supp 308

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4. U S—Crowley v S S Arcadia, D C Cal, 244 F Supp 597

6. U S—Crowley v S S Arcadia, D C Cal, 244 F Supp 597

A passenger may not recover for maintenance and cure, or for wages, in an action for personal injuries [20.5]

20.5. U S—Vaci v Swedish American Line, D C Pa, 200 F Supp 207

§ 203. Definitions and Distinctions

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28. U S—In re American Anthracite & Bituminous Coal Corp, D C N Y, 171 F Supp 377, affd, C A, 280 F 2d 119—Gloria S S Co v India Supply Mission, D.C N Y, 288 F.Supp 674—Skou v U S, 478 F 2d 343, app after remand 526 F 2d 293

Extention of freight charges

U S—Gulf Puerto Rico Lines, Inc v Associated Food Co, Inc, D C Puerto Rico, 366 F Supp 631

29. U S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D C N Y, 319 F Supp. 821, affd, C A, 452 F 2d 810

31. U S—Cia. Estrella Blanca, Ltda v S.S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

32. U S—Pennsylvania R Co v Moore-McCormack Lines, Inc, C.A N Y, 370 F 2d 430

33. U S—The Nyland, D C Md, 164 F Supp 741

§ 204. Necessity, Sufficiency, and Construction of Contract in General

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37. U S—Gulf Puerto Rico Lines, Inc v Associated Food Co, Inc., D C Puerto Rico, 366 F Supp 631

39. U.S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D.C.N.Y, 319 F.Supp 821 Affd., C A, 452 F 2d 810.

42. U S—Hellenic Lines, Ltd v. Embassy of Pakistan, C A N Y., 467 F 2d 1150

Under inconsistent bill of lading provision

U.S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D.C N Y, 319 F Supp 821, affd, C A, 452 F.2d 810

43. U.S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D.C N Y, 319 F Supp. 821, affd, C.A., 452 F 2d 810

48. U.S.—Hellenic Lines, Limited v. Director General of India Supply Mission for and on Behalf of Union of India, D C N Y, 319 F Supp 821 Affd, C A, 452 F 2d 810

51. U S,—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C A, 277 F 2d 161—Hellenic Lines, Ltd v Embassy of Pakistan, C A N Y, 467 F 2d 1150—Gulf Puerto Rico Lines, Inc v Associated Food Co, Inc, D C Puerto Rico, 366 F Supp 631

Strict construction against drafter

Or—Sause Bros Ocean Towing Co, Inc v Gunderson, Inc, 510 P 2d 541, 265 Or 568

52. U S—Gulf Puerto Rico Lines, Inc v Associated Food Co, Inc, D C Puerto Rico, 366 F Supp 631

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60. U S—Christman v Maristella Compania Naviera, D C N Y, 349 F Supp 845, affd, C A, 468 F 2d 620

Typewritten provisions prevail over printed provisions

U S—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

§ 205. Liability of Charterer

64 U S—Sociedad Armadora Aristomenis Panama, S A v 5020 Long Tons of Raw Sugar, C A Pa, 223 F 2d 417—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C A, 277 F 2d 161—Pennsylvania R Co v Moore-McCormack Lines, Inc, C A N Y, 370 F 2d 430—Associated Metals & Minerals Corp v 4,000 Odd Tons of Magnesium, D C.Md, 339 F Supp 513

Carrier held not entitled to demurrage

N Y—Isbrandtsen Co v Lyncroft Grain Corp, 166 N Y S 2d 721, 8 Misc 2d 521

Pier operator entitled to demurrage

N Y—Gelmart Knitting Mills, Inc. v Islanders Marine Terminal Corp, 340 N Y S 2d 442, 72 Misc 2d 623

65. U S—U S v Atlantic Refining Co, D C N J, 112 F Supp 76—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C.A, 277 F 2d 161—Cargo & Tankship Management Corp v India Supply Mission, C A N Y, 336 F 2d 416—Gulf Puerto Rico Lines, Inc v Associated Food Co, Inc, D C Puerto Rico, 366 F Supp. 631

75. U S—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C A., 277 F 2d 161.

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32. U S—Intercontinental Transp. Co v India Supply Mission, D C N Y, 261 F Supp 757

33. U S—Intercontinental Transp Co v India Supply Mission, D C.N Y, 261 F Supp 757—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F.Supp 500, affd, C A, 433 F 2d 986

Or—Sause Bros. Ocean Towing Co., Inc v Gunderson, Inc, 510 P.2d 541, 265 Or 568.

34 U S—Intercontinental Transp Co v India Supply Mission, D C N Y, 261 F Supp. 757

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47. U.S—Cia Estrella Blanca, Ltda v. S S Nictric, D C Or, 247 F.Supp 161, affd, C.A, 368 F 2d 575—Intercontinental Transp Co v. India Supply Mission, D C N.Y, 261 F Supp 757

Or—Sause Bros Ocean Towing Co, Inc v Gunderson, Inc, 510 P 2d 541, 265 Or 568

Wash—Wilson v Elwin, 338 P 2d 762, 54 Wash.2d 196.

Notice of arrival required

U.S—St Ioannis Shipping Corp v Zidell Explorations, Inc, C A Or., 336 F 2d 194

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U S—St Ioannis Shipping Corp v Zidell Explorations, Inc, D C Or, 222 F Supp 299, affd, C A, 336 F 2d 194

No liability bill of lading provision inconsistent with contract

U S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D C N Y, 319 F Supp 821, affd, C A, 452 F 2d 810

Provision held not binding

U S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, C A N Y, 452 F 2d 810

Provisions not in violation of Carriage of Goods by Sea Act

U S—Hellenic Lines, Ltd v. Embassy of Pakistan, C A N Y, 467 F 2d 1150

48. U S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D C N Y, 319 F Supp 821, affd, C A, 452 F 2d 810

49. U S—St Ioannis Shipping Corp v Zidell Explorations, Inc, C A Or, 336 F 2d 194

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U S—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, C A N Y, 452 F 2d 810

50. U S—Hellenic Lines, Ltd v Embassy of Pakistan, C A N Y, 467 F 2d 1150

61. U S—Hellenic Lines, Ltd v Embassy of Pakistan, C A N Y, 467 F 2d 1150

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80. **No liability where contract contains "no demurrage" provision**

U S—Hellenic Lines, Ltd v Embassy of Pakistan, C A N Y., 467 F.2d 1150

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91. U S—Skibsaktieselskapet Siljestad, v U.S., Ct Cl, 180 F Supp. 957, 149 Ct.Cl 141—Hellenic Lines, Limited v Embassy of Pakistan, D.C N Y, 307 F Supp 947 applying English law Affd in part, revd in part on oth grds, C.A, 467 F.2d 1150—Hellenic Lines, Ltd v. Embassy of Pakistan, C.A N Y., 467 F 2d 1150

96. U S—Hellenic Lines, Ltd v. Embassy of Pakistan, C A N Y., 467 F.2d 1150

Application to consignee's self-imposed inability

U S—Hellenic Lines, Limited v. Embassy of Pakistan, D C N Y, 307 F Supp 947 Applying English law, affd in part, revd. in part on oth grds, C A, 467 F 2d 1150

2. Consignee not liable for reasonable delay resulting from own acts due to usual custom

U S—Hellenic Lines, Limited v Embassy of Pakistan, D.C N.Y., 307 F Supp. 947, stating English law, affd in part, revd in part on oth. grds., C A., 467 F.2d 1150

8. U.S.—Bull-Insular Line, Inc v. National Sugar Refining Co, D.C Pa, 180 F.Supp 216.

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17. U S—Dominica Min. Co v Port Everglades Towing Co, D C Fla, 318 F Supp. 500, affd., C A., 433 F 2d 986

No liability under provision for discharge at risk and expense of vessel

U S.—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D.C.N Y., 319 F Supp. 821, affd., C.A., 452 F.2d 810

23. U S.—Asiatic Petroleum Corp. v. S.S. Am. Trader, D C N Y., 354 F Supp. 389.

§ 214. —— Master and Shipowner

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40. U S—U S v Atlantic Refining Co, D C N J, 112 F Supp 76—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D C N Y, 182 F Supp 258, affd, C A, 277 F 2d 161

Unloading at different ports held not unreasonable

U S—St Ioannis Shipping Corp v Zidell Explorations, Inc, D C Or, 222 F Supp 299, affd, C A, 336 F 2d 194

Held not cause for delay

U S—Pennsylvania R Co v Moore-McCormack Lines, Inc, C A N Y, 370 F 2d 430

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62. U S—Pennsylvania R Co v Moore-McCormack Lines, Inc, C A N Y, 370 F 2d 430

63. U S—Compagnia Di Navigazione Mauritius Rome v. Kulukundis, D C N Y, 182 F Supp 258, affd, C A, 277 F 2d 161

67. U S—U S v Atlantic Refining Co, D C N J, 112 F Supp 76

§ 216. Act of God or Vis Major

74. U.S.—U S v Atlantic Refining Co, supra, n 67—Compagnia Di Navigazione Mauritius Rome v Kulukundis, D.C N Y, 182 F Supp 258, affd, C.A, 277 F 2d 161—Pennsylvania R Co v Moore-McCormack Lines, Inc, C A N Y, 370 F.2d 430

Strike not excusable

U.S.—U S. v Atlantic Refining Co, D C N J., 112 F.Supp. 76—Pennsylvania R. Co v Moore-McCormack Lines, Inc., C.A N Y, 370 F 2d 430.

75. **Occurrence during voyage**

(2) Delay caused by collision with underwater object

Or—Sause Bros Ocean Towing Co, Inc. v Gunderson, Inc, 510 P 2d 541, 265 Or 568

§ 217. Lay Days

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83. U.S.—Pennsylvania R Co v Moore-McCormack Lines, Inc, C.A.N Y, 370 F 2d 430—Gloria S S Co. v India Supply Mission, D.C N.Y, 288 F.Supp. 674

Or.—Sause Bros. Ocean Towing Co, Inc v. Gunderson, Inc., 510 P.2d 541, 265 Or 568

Discharge allowance credit

U.S.—Associated Metals & Minerals Corp v 4,000 Odd Tons of Magnesium, D.C Md, 339 F Supp 513

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U.S—Christman v. Maristella Compania Naviera, D C N.Y., 349 F Supp. 845, affd, C A, 468 F.2d 620

91. U.S.—Pan Cargo Shipping Corp. v. U S, D C N.Y, 234 F.Supp 623, affd, C A, 373 F 2d 525, cert. den. 88 S Ct 81, 389 U S 836, 19 L Ed 2d 98.

Or.—Sause Bros. Ocean Towing Co., Inc. v Gunderson, Inc., 510 P.2d 541, 265 Or. 568.

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98. U.S.—St. Ioannis Shipping Corp. v Zidell Explorations, Inc., D.C.Or., 222 F.Supp. 299, affd., C.A., 336 F.2d 194

2. U.S.—St. Ioannis Shipping Corp. v. Zidell Explorations, Inc, D.C.Or., 222 F.Supp. 299, affd., C.A., 336 F 2d 194—Pan Cargo Shipping Corp. v. U.S, D.C.N.Y., 234 F.Supp. 623, affd., C A., 373 F 2d 525, cert. den. 88 S.Ct. 51, 389 U.S. 836, 19 L.Ed.2d 98.

7. **Ship in port but not in berth**

U.S.—St. Ioannis Shipping Corp. v. Zidell Explorations, Inc., D.C Or., 222 F.Supp. 299, affd, C.A, 336 F.2d 194.

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§ 218. Waiver and Indemnity

41. U S—C J S quoted at length in Hickman, Williams & Co v Ingram Coal Co, D C Tenn, 601 F Supp 5, 6

§ 220. —— Rate and Amount

46. U S—Skou v U S, C A Fla, 478 F 2d 343, app after remand 526 F 2d 293

Plaintiff bound by his own records

U S—Anthony O'Boyle, Inc v The Robin Hood, D C N Y, 134 F Supp 271

Market value

U S—Hellenic Lines, Ltd v Embassy of Pakistan, C A N Y, 467 F 2d 1150

47. U S—Gloria S S Co v India Supply Mission, D C N Y, 288 F Supp 674

51. **Contract held controlling**

U S—Gloria S S Co v India Supply Mission, D C N Y, 288 F Supp 674

57. U S—Bull-Insular Line, Inc v National Sugar Refining Co, D C Pa, 180 F Supp 216—Pennsylvania R Co v Moore-McCormack Lines, Inc, C A N Y, 370 F 2d 430.

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59. U S—The Nyland, D C Md., 164 F Supp 741—Skou v U S, C A Fla, 478 F 2d 343, app after remand 526 F 2d 293

71. U S—Skibs A/S Awilco v Standard Fruit Co, D C La., 228 F Supp 927, affd 327 F 2d 668

Damages resulting from failure to discharge continuously

U S—Hellenic Lines, Limited v Embassy of Pakistan, D C N Y, 307 F Supp 947, affd in part, revd in part on oth grds, C A, 467 F 2d 1150

72. U S—Cia Estrella Blanca, Ltda v S S Nictric, D C Or, 247 F Supp 161, affd, C A, 368 F 2d 575

§ 222. —— Actions

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Matters relating to the law which governs in actions for demurrage have been adjudicated.[89.5]

89.5. State conflict of law rule applied in federal district court

U S—Marine Transport Lines, Inc v Publicker Intern Inc, D C Pa, 303 F Supp 423

Other matters have been held to be or not to be defenses.[94.5]

94.5. Doctrine of deviation not defense

U S—St Ioannis Shipping Corp v Zidell Explorations, Inc., D.C.Or, 222 F Supp 299, affd, C A, 336 F 2d 194.

97. **Counterclaim proper**

U S—Union Barge Line Corp v Carter Const Co, Inc, D.C.Ark, 56 F R D. 634.

2. U.S.—Skou v. U.S., C.A.Fla, 478 F.2d 343, app. after remand 526 F.2d 293.

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8. U.S.—Sociedad Armadora Aristomenis Panama, S.A v. 5,020 Long Tons of Raw Sugar, D C.Pa, 122 F.Supp. 892, affd., C A, 223 F.2d 417

Evidence held sufficient

U.S—U.S v. Atlantic Refining Co, D.C.N.J., 112 F.Supp. 76—St. Ioannis Shipping Corp v Zidell Explorations, Inc., D.C Or., 222 F Supp. 299, affd, C.A., 336 F.2d 194—St Ioannis Shipping Corp v Zidell Explorations, Inc, C.A.Or, 336 F.2d 194—Cia. Estrella Blanca, Ltda v. S S Nictric, D C Or, 247 F.Supp. 161, affd., C.A., 368 F.2d 575—Marine Transport Lines, Inc v Publicker Intern Inc, D C Pa, 303 F Supp 423

Evidence held insufficient

U S—Bull-Insular Line, Inc v National Sugar Refining Co, D C Pa, 180 F Supp 216—Hellenic Lines, Limited v Director General of India Supply Mission for and on Behalf of Union of India, D C N Y, 319 F Supp 821 Affd, C A., 452 F 2d 810

9. U S—Marine Transport Lines, Inc v Publicker Intern Inc, D C Pa, 303 F Supp 423

Matters relating to the propriety of the actions of the trial court have been adjudicated.[11.5]

11.5. Action held error

Or—Sause Bros Ocean Towing Co, Inc v Gunderson, Inc, 510 P 2d 541, 265 Or 568

§ 223. Lien

12. **Effect of exercise of lien**

U S—Dominica Min Co v Port Everglades Towing Co, D C Fla, 318 F Supp 500, affd, C A, 433 F 2d 986

A lien for demurrage is possessory in nature [18.5]

18.5. U S—Atlantic Richfield Co v Good Hope Refineries, Inc, C A Fla, 604 F 2d 865

§ 224. Definition, Origin, Nature, and Elements

19. U S—S C Loveland Co v U S, D C Pa, 207 F Supp 450

22. U S—S C Loveland Co v U S, D C Pa., 207 F Supp 450

26. U S—S C Loveland Co v U S, D C Pa, 207 F Supp. 450

28. U S—S C Loveland Co v U S, D C Pa, 207 F Supp 450

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30. U S—Nicaraguan Long Leaf Pine Lumber Co v Moody, C A Fla, 211 F 2d 715

32. U S—Cia Atlantica Pacifica, S A v Humble Oil & Refining Co, D C Md, 274 F Supp 884

33. U S—Argyll Shipping Co v. Hanover Ins. Co, D C N Y, 297 F Supp 125

34. U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert den. 95 S.Ct 1447, 420 U S 1005, 43 L Ed.2d 763

37. U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F.2d 1032, cert den 95 S Ct 1447, 420 U S 1005, 43 L.Ed 2d 763.

43. U S.—Nicaraguan Long Leaf Pine Lumber Co v Moody, supra, n 30

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46. U.S—Legnos v M/V Olga Jacob, C.A Fla., 498 F.2d 666, reh den 503 F 2d 567, three cases, 568, app. after remand 535 F 2d 857, reh den. 540 F 2d 1085

54. U.S—Cia. Atlantica Pacifica, S A v Humble Oil & Refining Co, D C Md, 274 F Supp. 884

§ 225. Ordering General Average Act

56. U S—Tampa Tugs & Towing, Inc v M/V Sandanger, D C Cal, 242 F Supp 576

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70. U S—Todd Shipyards Corp v U S, D C N Y, 391 F Supp 588

§ 226. Perils, Acts, and Losses Giving Rise to General Average

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71. U S—Peter Paul, Inc v The Christer Salen, D C N Y, 152 F Supp 410, affd, C A, 258 F 2d 901, cert den 79 S Ct 586, 359 U S 910, 3 L Ed 2d 574

N Y—Transpacific S S Co v Marine Office of America, 163 N Y S 2d 171, 6 Misc 2d 881

Wide range of losses covered

U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert den 95 S Ct 1447, 420 U S 1005, 43 L Ed 2d 763

77. U S—U S v Wessel, Duval & Co, D C N Y, 123 F Supp 318—Todd Shipyards Corp v U S, D C N Y, 391 F Supp 588

78. U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert den 95 S Ct 1447, 420 U S 1005, 43 L Ed 2d 763—American Mail Line Ltd v U S, D C Wash, 377 F Supp 657

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79. U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert den 95 S Ct 1447, 420 U S 1005, 43 L Ed 2d 763

83. U S—Waldie v The Peter C Gallagher, C C A N Y, 125 F 2d 568

Position of peril necessary

U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert den 95 S Ct 1447, 420 U S 1005, 43 L Ed 2d 763

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98. U S—Gemini Nav, Inc v Philipp Bros Division of Minerals & Chemicals Philipp Corp, C A N Y, 499 F 2d 745

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U S—World Wide S S Co v India Supply Mission, D C N.Y, 316 F Supp 190

99. U.S.—Gesellschaft Fur Getreidenhandel Ag. v. SS Texas, D C La, 318 F Supp 599

4. U S—Orient Mid-East Lines, Inc v Shipment of Rice on Board S S Orient Transporter, C A Tex, 496 F 2d 1032, cert den 95 S Ct 1447, 420 U S 1005, 43 L.Ed.2d 763

§ 228. —— Sacrifice or Extraordinary Expense

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28. Costs held recoverable

U.S—Compania Punta Alta, S A v. Dalzell, D.C N Y, 162 F Supp 926

31. U.S—American Tobacco Co v Goulandris, D C N Y, 173 F.Supp 140 Affd, C A., 281 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426

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42. U.S.—Orient Mid-East Lines, Inc v. Shipment of Rice on Board S.S. Orient Transporter, C A Tex, 496 F.2d 1032, cert. den 95 S Ct. 1447, 420 U S 1005, 43 L Ed 2d 763

44. U.S.—U.S. v Wessel, Duval & Co, D C.N Y, 123 F Supp 318.

46. U.S.—Tampa Tugs & Towing, Inc. v. M/V Sandanger, D C.Cal., 242 F.Supp 576.

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74. U S—Nicaraguan Long Leaf Pine Lumber Co v Moody, C A Fla, 211 F 2d 715

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88. Interest on expense

U S—Oliver J Olson & Co v American S S Marine Leopard, C A Cal, 356 F 2d 728

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34. Insurer

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35. U S—In re G b R M S Caldas, D C Pa, 350 F Supp 566, affd, C A 485 F 2d 678, and 680

37. U S—Sarantex Shipping Co v Wilbur-Ellis Co, D C Or, 391 F Supp 884

45. U S—Liman v India Supply Mission, D C N Y, 381 F Supp 368

§ 230. —— Separation of Interests and Termination of Danger

49. U S—Tampa Tugs & Towing, Inc v M/V Sandanger, D C Cal, 242 F.Supp 576

50. U S—S C Loveland Co v U S, D C Pa, 207 F Supp 450

§ 232. —— Contractual Enlargement or Limitation of, and Exemption From, Liability

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61. U.S—J Howard Smith, Inc v S S Maranon, C A N.Y., 501 F 2d 1275, cert den 95 S Ct 1399, 420 U.S 975, 43 L Ed 2d 655

62. U.S—Nicaraguan Long Leaf Pine Lumber Co v Moody, C A.Fla, 211 F 2d 715

63. U S—Isbrandtsen Co v Federal Ins. Co, D C N Y, 113 F Supp 357, affd, C A, 205 F 2d 679, cert den 74 S Ct 106, 346 U S 866, 98 L Ed 377

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66. U S—American Mail Line, Limited v Toyko Marine & Fire Ins Co, C A.Wash, 270 F 2d 499

67. U S—Cia Atlantica Pacifica, S A. v Humble Oil & Refining Co, D.C.Md, 274 F.Supp 884.

72. U S—Standard Oil Co (N J) v Anglo-Mexican Petroleum Corp, D.C N.Y, 112 F Supp 630

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74. U S—Sarantex Shipping Co v Wilbur-Ellis Co, D C Or, 391 F Supp 884

78. U S—Cia Atlantica Pacifica, S A v. Humble Oil & Refining Co, D C Md., 274 F.Supp 884

§ 233. Adjustment and Enforcement

80. U S—American Tobacco Co v Goulandris, D C N Y, 173 F Supp 140, affd, C A, 280 F 2d 179, affd in part and revd in part on oth grds 306 F 2d 426

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92. U S—Cia. Atlantica Pacifica, S.A v Humble Oil & Refining Co, D C Md, 274 F Supp 884

93. U S.—Cia. Atlantica Pacifica, S A. v Humble Oil & Refining Co, D.C Md, 274 F Supp. 884

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U S.—Empire Stevedoring Co. v Oceanic Adjusters, Limited, D C N Y, 315 F.Supp 921

94. U.S.—Empire Stevedoring Co v. Oceanic Adjusters, Limited, D.C.N.Y., 315 F.Supp 921

95. U S—Cia Atlantica Pacifica, S A v Humble Oil & Refining Co, D C Md, 274 F Supp 884

96. U S—Cia Atlantica Pacifica, S A v Humble Oil & Refining Co, D C Md, 274 F Supp 884

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10. U S—Argyll Shipping Co v Hanover Ins Co, D C N Y, 297 F Supp 125

§ 235. —— Basis and Mode of Adjustment

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17. U S—Nicaraguan Long Leaf Pine Lumber Co v Moody, C A Fla, 211 F 2d 715

Fiduciary duty runs in favor of ship, freight and cargo interests only

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18. N Y—Transpacific S S Co v Marine Office of America, 163 N Y S 2d 171, 6 Misc 2d 881

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68. N Y—Transpacific S S. Co v Marine Office of America, 163 N Y S.2d 171, 6 Misc 2d 881

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73. U S—Sarantex Shipping Co v Wilbur-Ellis Co, D C Or., 391 F Supp 884.

§ 237. —— Exacting Bond or Security

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U S—U S v Ohio Val. Co., Inc., C A Ind, 510 F 2d 1184

87. U S—Sarantex Shipping Co v Wilbur-Ellis Co, D C Or., 391 F Supp. 884

89. U S—St Paul Fire & Marine Ins Co v The Motomar, C A N Y, 211 F 2d 690

§ 238. —— Action or Suit to Enforce

90. U.S—States Marine Corp. of Del. v U S, D.C N Y., 120 F Supp. 585

93. U S—Gulf Oil Corp v. U.S., D.C N Y, 121 F Supp 937—American Tobacco Co. v. Goulandris, D C N.Y, 173 F.Supp. 140, affd, C A, 281 F 2d 179, affd in part and revd. in part on oth. grds 306 F 2d 426

1. U S—Argyll Shipping Co v. Hanover Ins Co., D C.N.Y., 297 F Supp. 125—Liman v. India Supply Mission, D C N Y., 381 F Supp 368

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11. Seaworthiness or diligence to discover seaworthiness

(2) U.S—Cia Atlantica Pacifica, S.A. v Humble Oil & Refining Co, D C.Md, 274 F.Supp. 884.

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21. U S—Standard Oil Co. (N J.) v. Anglo-Mexican Petroleum Corp, D.C.N Y, 112 F.Supp. 630—Prudential S.S. Corp v U.S., C.A, 220 F.2d 655—Cia. Atlantica Pacifica, S A v. Humble Oil & Refining Co, D.C Md, 274 F.Supp. 884.

Evidence held sufficient

(1) U S—World Wide S S Co v India Supply Mission, D C N Y, 316 F Supp 190

Evidence held insufficient

(1) U S—Schade v National Sur Corp, D C N Y, 186 F Supp 423, affd, C A, 288 F 2d 106

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29. U S—Petition of Southern S S Co, D C Del, 132 F Supp 316—Empire Seafoods, Inc v Anderson, C A Fla, 398 F 2d 204, cert den 89 S Ct 449, 393 U S 983, 21 L Ed 2d 444

30. U S—British Transport Commission v U S, Va, 77 S Ct 1103, 354 U S 129, 1 L Ed 2d 1234

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U S.—Doran v. Lee, D C Pa, 287 F Supp 807

31. Limitation of liability only privilege afforded shipowner

U S—Beal v. Waltz, C A Fla, 309 F 2d 721

Statute providing for the limited liability of vessel owners is in derogation of the common law doctrine of respondeat superior.[33 5]

33.5. U.S—Ohio River Co v. City of Wheeling, D C W Va, 225 F Supp 733

Statute limiting liability of shipowner is in derogation of common-law rights and remedies.[33 10]

33.10. U.S—In re Independent Towing Co, D C.La, 242 F Supp 950—Rowe v U.S Fidelity & Guaranty Co, C A Va, 375 F.2d 215.

34. U S—Murray v New York Cent R Co., C A N Y, 287 F.2d 152, 87 A.L.R.2d 681, cert den. 81 S.Ct 1674, 366 U S 945, 6 L Ed 2d 856

39. U.S.—Olympic Towing Corp. v Nebel Towing Co, C.A La., 419 F.2d 230, cert den. 90 S Ct 1120, 397 U.S. 989, 25 L.Ed.2d 396

42. U.S.—Petition of Southern S S Co, D C Del., 132 F Supp 316.

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U.S.—In re Panoceanic Tankers Corp., D C N.Y., 332 F.Supp. 313.

43. U.S.—Petition of Wood, D C.N Y., 124 F.Supp. 540, affd., C.A, 230 F.2d 197—Petition of U S, D C Del., 155 F.Supp. 714, affd., C A, 259 F 2d 608—Petition of U.S., C.A Del., 259 F.2d 608—Petition of Reading, D C N.Y, 169 F.Supp 165, affd, C.A., 271 F 2d 959—In re Moore, D.C Mich., 278 F.Supp. 228, remd, C A., 409 F 2d 1013—Petition of Zebroid Trawling Corp., C.A Mass., 428 F 2d 226—In re Stephens, D.C Ga., 341 F.Supp 1404.

44. U.S.—Petition of Lake Tankers Corp., C.A N.Y, 232 F.2d 573, adhered to 235 F.2d 783, affd. 77 S.Ct. 1269, 354 U S. 147, 1 L.Ed 2d 1246, reh. den. 77 S.Ct. 1421, 354 U.S. 945, 1 L.Ed.2d 1543—Anderson v. Nadon, C.A.Or., 360 F 2d 53

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(2) U.S.—Petition of Bloomfield S.S. Co., C.A.N Y., 422 F.2d 728.

(3) Consolidation in one action to permit disposition of all claims.

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45. U.S.—Petition of Southern S S. Co., D.C.Del, 132 F.Supp. 316.

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46. U.S.—Petition of Texas Co, C.A.N.Y., 213 F.2d 479, cert. den. 75 S.Ct. 52, 348 U.S. 829, 99 L.Ed. 653, petition den, C A, 220 F 2d 744—In re Panoceanic Tankers Corp, D C N Y, 332 F Supp 313

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(1) U S—Steuart Inv Co v Bauer Dredging Const Co, D C Md, 323 F Supp 907

(3) Additional statements

U S—In re Independent Towing Co, D C La, 242 F Supp 950—In re Barracuda Tanker Corp, D C N Y, 281 F Supp 228, remd, C A, 409 F 2d 1013

48. U S—Lake Tankers Corp v Henn, N Y, 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543

50. U S—Petition of Southern S S Co, D C Del, 132 F Supp 316—George v Beavark, Inc, C A Ark, 402 F 2d 977

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U S—Blunk v Wilson Line of Washington, Inc, D C Ohio, 341 F Supp 1345

54. U S—Petition of Southern S S Co, D C Del, 132 F Supp 316—Lake Tankers Corp v. Henn, N Y, 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543—Petition of U S, D C Del, 155 F Supp 714, affd, C A, 259 F 2d 608

55. U S—Petition of J E Brenneman Co, D C Pa, 157 F Supp 295

56. U S—Petition of The A C Dodge, Inc, C A N Y, 282 F.2d 86

57. U S—Petition of Southern S S Co, D C Del, 132 F Supp 316—In re Chinese Maritime Trust, Ltd, D C N Y, 361 F Supp 1175, affd, C A, 478 F 2d 1357, cert den 94 S Ct 894, 414 U S 1143, 39 L Ed 2d 98

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(2) Other instances

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59. U S—Oliver J Olson & Co v American S S Marine Leopard, C A Cal, 356 F 2d 728

65. U S—In re Chinese Maritime Trust, Ltd, C A N Y, 478 F 2d 1357, cert. den 94 S Ct 894, 414 U S 1143, 39 L.Ed 2d 98

71. U S.—Torres v Interstate Fire & Cas Co, D C Puerto Rico, 275 F Supp 784—Pettus v Jones & Laughlin Steel Corp, D C Pa, 322 F Supp 1078

§ 240. Vessels Included; Place of Navigation

76. U S—Timur Fishing Corp v Cap'n Bill, Inc, D C Mass, 160 F Supp 563—Deep Sea Tankers, Limited v The Long Branch, C A N Y, 258 F 2d 757, cert den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, and 79 S Ct 320, 358 U S 934, 3 L Ed.2d 305, reh den 79 S.Ct 578, 359 U.S 921, 3 L Ed 2d 583—In re Moore, D C Mich, 278 F Supp 260

"Vessel" defined by statute

U.S.—In re U S Air Force Texas Tower No 4 D C N Y., 203 F Supp. 215

Particular contrivances held "vessels"

(1) U.S.—In re Midland Enterprises, Inc., D C.Ohio, 296 F.Supp. 1356—Pettus v. Jones & Laughlin Steel Corp., D.C.Pa, 322 F Supp. 1078

(5) U.S—In re Midland Enterprises, Inc, D C Ohio, 296 F.Supp 1356

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U S.—In re U.S. Air Force Texas Tower No 4, D.C N Y., 203 F.Supp. 215.

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U.S—Petition of Bloomfield S.S. Co, D C N Y, 298 F.Supp. 1239, affd., C A., 422 F 2d 728

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77. U S.—Petition of Colonial Trust Co, D.C Conn, 124 F.Supp. 73.

79. U S—Petition of Landi, D C N Y, 194 F Supp 353—Petition of Klarman, D C Conn, 295 F Supp 1021—Application of Theisen, D C N Y, 349 F Supp 737

However, the Limitation Act applicable to damage arising from collision with commercial vessel has been held not to apply to pleasure boats.[79 5]

79.5 U S—Complaint of Tracey, D C Mass, 608 F Supp 263

81. U S—Petition of Bogan, D C N J, 103 F Supp 755

82. U S—Petition of Bogan, supra, n 81

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(2) Other statements

U S—Petition of The A C Dodge, Inc, D C N Y, 173 F Supp 906, affd, C A, 282 F 2d 86—Petition of The A C Dodge, Inc, C A N Y, 282 F 2d 86

83. Vessel on non-navigable water not included

U S—In re Builders Supply Co, D C Iowa, 278 F Supp 254

85. U S—Petition of Colonial Trust Co, D C Conn, 124 F Supp 73

§ 241. Persons Entitled to Benefit of Limitation

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93. Foreign law applied

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97. U S—Petition of Colonial Trust Co, D C Conn, 124 F Supp 73—Petition of Hocking, D C N J, 158 F Supp 620—In re Barracuda Tanker Corp, D C N Y., 281 F Supp 228, remd, C A, 409 F 2d 1013—Complaint of Harbor Towing Corp, D C Md, 335 F Supp 1150

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U S—Guillot v Cenac Towing Co, C A La, 366 F 2d 898

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U S—Corrao v M/V Act III, D C Fla, 359 F Supp 1160

98. U S—Tracy Towing Line v City of Jersey City, D C N J, 105 F Supp 910—In re The Trojan, D C Cal, 167 F Supp 576—Admiral Towing Co v Woolen, C A Cal, 290 F 2d 641—In re Independent Towing Co, D C La., 242 F.Supp 950—In re Barracuda Tanker Corp, D C.N Y, 281 F Supp 228, remd, C A, 409 F 2d 1013

Fuel oil owner

U S—Complaint of Harbor Towing Corp, D C Md, 335 F Supp. 1150

99. U S—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S. 933, 2 L Ed 2d 763—Petition of U S, D C Del, 155 F.Supp 714, affd, C A. 259 F 2d 608—American Tobacco Co. v Goulandris, D C N Y, 173 F Supp 140, affd, C A, 281 F 2d 179, affd in part and revd in part on oth grds. 306 F 2d 426—Petition of Oskar Tiedemann & Co, D C Del, 179 F Supp 227, motion den 183 F Supp 129, affd, C A, 289 F 2d 237—Brown & Root, Inc v American Home Assur Co, C A Tex, 353 F 2d 113, cert den 86 S Ct 1465, 384 U S 943, 16 L Ed 2d 541—Petition of Marina Mercante Nicaraguense, S A, D C N Y, 248 F Supp 15, mod on oth grds, C A., 364 F 2d 118, cert den 87 S Ct 710, 385 U S 1005, 17 L Ed 2d 544, reh den 87 S Ct 851, 386 U S 929, 17 L Ed 2d 803

1. U S—Puamier v Barge BT 1793, D C Va., 395 F Supp 1019

Mortgagee held owner

U.S—Admiral Towing Co v Woolen, C A Cal, 290 F 2d 641

Operator deemed owner

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5. U.S—Cusumano v The Curlew, D C Mass, 105 F Supp 428

8. US—In re The Trojan, D C Cal, 167 F Supp 576—Kutger v U S, D C Fla, 169 F Supp 104—US v Sandra & Dennis Fishing Corp, C A Mass., 372 F 2d 189, cert den 88 S Ct 48, 52, 389 U S 836, 19 L.Ed 2d 98

9. US—Complaint of Harber Towing Corp, D C Md, 335 F Supp 1150

Limitation is not available to an insurer of the vessel owner when the insurer is sued pursuant to a state direct action statute.[9 5]

9.5. US—In re Sincere Nav Corp, D C La, 317 F Supp 1

Matters held not to make limitation applicable

US—Olympic Towing Corp v Nebel Towing Co, C.A.La, 419 F.2d 230, cert den 90 S Ct. 1120, 397 U S 989, 25 L Ed 2d 396

10. US—F Jacobus Transp Co v Gallagher Bros Sand & Gravel Corp, D C N Y, 161 F Supp 507—Petition of U S, C A Del, 259 F 2d 608

Purpose of statute

US—In re Barracuda Tanker Corp, D C N Y, 281 F Supp 228, remd, C A, 409 F 2d 1013

11. US—Petition of Skibs A/S Jolund, C.A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763—In re Barracuda Tanker Corp, D C N Y, 281 F Supp 228, remd, C A, 409 F 2d 1013—In re Barracuda Tanker Corp, C A N.Y, 409 F 2d 1013—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L.Ed 2d 246

13. US—F Jacobus Transp Co v Gallagher Bros Sand & Gravel Corp, D C N Y, 161 F Supp 507

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14. US—Petition of U S, C A Del, 259 F 2d 608—Rice v New York Trap Rock Corp, D.C N.Y, 198 F Supp 346, affd, C A, 294 F 2d 272

§ 242. Extent of Liability and Compensation Fund

15. U S.—Webster v Davis, D C Cal, 109 F Supp 149—Petition of Wood, D C N Y, 124 F Supp 540, affd, C A, 230 F 2d 197—Landry v Steamship Mut Underwriting Ass'n, D C Mass, 177 F Supp 142, affd, C A, 281 F 2d 482—Pennell v Read, C A Fla, 309 F.2d 455—Guillot v Cenac Towing Co., C A.La., 366 F.2d 898—Petition of Bloomfield S S. Co., D.C N Y, 298 F Supp 1239, affd, C.A, 422 F 2d 728—Blunk v Wilson Line of Washington, Inc., D C Ohio, 341 F Supp 1345

16. U.S—Petition of Zebroid Trawling Corp., C.A. Mass, 428 F 2d 226

20. US—US v S.S. Helena, D C La, 295 F Supp 610

$60 per ton fund

US—Oliver J Olson & Co v American S S Marine Leopard, C A.Cal., 356 F 2d 728

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Indemnity contribution claim not included

U.S.—Guillot v Cenac Towing Co, C.A La, 366 F 2d 898.

39. U.S.—Petition of Sheridan, D.C.N Y., 226 F Supp. 136—In re Pacific Inland Nav Co, D C Hawaii, 263 F.Supp 915—Petition of Chadade S.S. Co., D.C.Fla, 266 F Supp 517

41. US—Petition of Lake Tankers Corp, C A N Y, 232 F 2d 573, adhered to 235 F 2d 783, affd 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543

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42. US—Murray v New York Cent R Co, C A N Y, 287 F 2d 152, 87 A L R 2d 681, cert den 81 S Ct 1674, 366 U S 945, 6 L Ed 2d 856

58. US—Petition of Indiana Farm Bureau Co-op Ass'n, D C.Ill, 235 F Supp 800

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61. US—Petition of Bloomfield S S Co, D C N Y, 298 F Supp 1239, affd, C A, 422 F 2d 728—Petition of Zebroid Trawling Corp, C A Mass, 428 F 2d 226

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75. US—In re Pacific Inland Nav Co, D C Hawaii, 263 F Supp 915—Petition of Bloomfield S S Co, C A N Y, 422 F 2d 728—Petition of Bloomfield S S Co, D C N Y, 298 F Supp 1239, affd, C A, 422 F 2d 728

83. US—Petition of Zebroid Trawling Corp, C A Mass, 428 F 2d 226

87. US—The William J Riddle, D C N Y, 111 F Supp 657—In re Barracuda Tanker Corp, D C N Y, 281 F Supp 228, remd, C A, 409 F 2d 1013

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91. US—In re Pacific Inland Nav Co, D C Hawaii, 263 F Supp 915—Petition of Bloomfield S S Co, D C N Y, 298 F Supp 1239, affd, C A, 422 F 2d 728

92. US—The William J Riddle, supra, n 87

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27. US—Caterpillar Americas Co v S S Sea Roads, D C Fla, 231 F Supp 647, affd, C A, 364 F 2d 829

Particular items regarded as packages

(3) Other items.

US—Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, C A N Y, 375 F 2d 943, cert den 88 S Ct 97, 389 U S. 831, 19 L.Ed 2d 89—Standard Electrica, S A v Columbus Lines, Inc, D C N Y, 262 F Supp 343, affd, C A., 375 F.2d 943, cert den. 88 S Ct 97, 389 U S 831, 19 L Ed.2d 89—Aluminios Pozuelo Limited v S S Navigator, C A.N Y, 407 F 2d 152

Characterizations of items by shipper and carrier

US—Standard Electrica, S A v Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, C A N.Y, 375 F 2d 943, cert den 88 S Ct 97, 389 U S. 831, 19 L Ed.2d 89

Particular quantities, weights or measurements

(5) Other matters.

US—Freedman & Slater, Inc v M. V Tofevo, D C N Y, 222 F Supp 964

Not a "package"

US.—General Motors Corp v. S S Mormacoak, D C N Y., 327 F Supp 666, affd, C A, 451 F 2d 24

Inapplicable to stevedore

US—Southern Stevedoring Co v. S.S. Hellenic Wave, D.C Tex, 322 F Supp. 641.

28. U S.—Aluminios Pozuelo Limited v S.S. Navigator, C A N.Y, 407 F 2d 152

Particular quantities, weights, or measurements

(5) U S.—General Motors Corp v. S.S. Mormacoak, D C N.Y, 327 F.Supp. 666, affd, C.A, 451 F 2d 24.

29. U S—Aluminios Pozuelo Limited v. S.S. Navigator, C A.N.Y., 407 F 2d 152

30. Construction and operation of provision

U.S.—Eliz Salzman Tobacco Co. v S.S. Mormacwind, C.A N Y, 371 F 2d 537—Holden v. S.S. Kendall Fish, D C La, 262 F Supp 862, affd, C A, 395 F 2d 910

Under the statute, the methods of limiting liability of packaged and non-packaged goods are mutually exclusive.[30 5]

30.5. US—Mitsbishi Intern Corp v S S Palmetto State, C A N Y, 311 F 2d 382, 94 A L R 2d 1412, cert den 83 S Ct 1523, 373 U S 922, 10 L Ed 2d 422—Standard Electrica, S A v Columbus Lines, Inc, D C N Y, 262 F Supp 343, affd, C A, 375 F 2d 943, cert den 88 S Ct 97, 389 U S 831, 19 L Ed 2d 89

An article completely enclosed in one box prepared for shipment constitutes a "package." [30 10]

30.10. US—Mitsbishi Intern Corp v S S Palmetto State, C A N Y, 311 F 2d 382, 94 A L R 2d 1412, cert den 83 S Ct 1523, 373 U S 922, 10 L Ed 2d 422

The five hundred dollar limitation applies to a cross-claim for contribution asserted by the packager of goods to be shipped.[31 5]

31.5. US—E M S Industrie S A v Polskie Towarzystwo Okretowe, D C N Y 608 F Supp 1133.

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34. U.S—Jones v The Flying Clipper, D.C N Y, 116 F.Supp 386

Deviation held not to deprive carrier of benefit of statute

US—Atlantic Mut Ins Co v Poseidon Schiffahrt, G.m b.H., C A Ill, 313 F 2d 872, cert den 84 S Ct. 56, 375 U S 819, 11 L Ed 2d 53

§ 243. Liabilities Subject to Limitation

35. U S—Petition of The A. C. Dodge, Inc, D C N Y, 173 F Supp 906, affd, C.A, 282 F 2d 86—Petition of Mahoney, D C.N H, 255 F Supp 310—Complaint of Harbor Towing Corp, D C Md, 335 F.Supp 1150—State of Or By and Through State Highway Commission v. Tug Go-Getter, C A Or, 468 F.2d 1270

36. U S—Petition of Cherokee Trawler Corp, D.C. Va, 157 F.Supp. 414—F. Jacobus Transp. Co v. Gallagher Bros Sand & Gravel Corp., D C N Y, 161 F Supp 507—Petition of U S., D C Mass, 255 F Supp 737, affd in part and set aside in part on oth. grds., C A., 372 F 2d 189, cert. den 88 S Ct 48, 52, 389 U S. 836, 19 L.Ed 2d 98—Petition of Trawler Snoopy, Inc., D.C.Me., 268 F Supp 951—In re Smith-Rice No 4, D C Cal., 323 F Supp 44.

37. U.S—In re Moore, D.C.Mich, 278 F.Supp 260—Petition of Zebroid Trawling Corp., C.A.Mass., 428 F.2d 226

38. U.S—Petition of Zebroid Trawling Corp., C A Mass., 428 F.2d 226

41. U S.—Petition of J. E. Brenneman Co, C A.Pa., 322 F.2d 846—Wyandotte Transp Co v U.S., La, 88 S Ct 379, 389 U S. 191, 19 L.Ed 2d 407—Steuart Inv. Co. v. Bauer Dredging Const Co., D C.Md, 323 F.Supp. 907.

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48. U.S.—Steuart Inv. Co. v Bauer Dredging Const. Co., D C.Md, 323 F.Supp 907

54. U.S.—Steuart Inv Co. v. Bauer Dredging Const. Co., D C Md, 323 F Supp 907.

55. U.S—Walker v. Harris, C.A La., 335 F 2d 185, cert den. 85 S.Ct. 326, 379 U.S 930, 13 L Ed 2d 342—Steuart Inv. Co. v Bauer Dredging Const. Co, D C.Md, 323 F.Supp. 907.

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58. U S—China Union Lines, Limited v A O Andersen & Co, C A Tex, 364 F 2d 769, cert den 87 S Ct 955, two cases, 956, 386 U S 933, 17 L Ed 2d 805, reh den 87 S Ct 1301, 386 U S 999, 18 L Ed 2d 353, and 87 S Ct 1302, 386 U S 1000, 18 L Ed 2d 353, reh den 88 S Ct 1015, two cases, 390 U S 974, 19 L Ed 2d 1191

68. U S—Petition of Wood, C A N Y, 230 F 2d 197—Hudgins v Mockingbird, Inc, D C Va, 282 F Supp 367.

69. U S—Petition of Kahului R Co, D C Hawaii, 214 F Supp 789

70. U S—Petition of Oskar Tiedemann & Co, C A Del, 367 F 2d 498, cert den 87 S Ct 953, 957, 386 U S 932, 17 L Ed 2d 805, reh den 87 S Ct 1303, 386 U S 1000, 18 L Ed 2d 354

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78. U S—Petition of Midwest Towing Co, D C Ill, 203 F Supp 727, affd, C A, 317 F 2d 270—U S v Sandra & Dennis Fishing Corp, C A Mass, 372 F 2d 189, cert den 88 S Ct 48, 52, 389 U S 836, 19 L Ed 2d 98—In re Chinese Maritime Trust, Ltd, C A N Y., 478 F 2d 1357, cert den 94 S Ct 894, 414 U S 1143, 39 L Ed 2d 98

Me—Portland Pipe Line Corp v Environmental Imp Commission, 307 A 2d 1, app dism 94 S Ct 532, two cases, 414 U S 1035, 38 L Ed 2d 326

Action for maintenance and cure not subject to limitation

U S—Hugney v Consolidation Coal Co, D C Pa, 345 F Supp. 1079

81. U.S.—Wong v. Utah Home Fire Ins Co, D C Hawaii, 167 F Supp 230—Guillot v Cenac Towing Co, C A.La., 366 F 2d 898.

The owner of a vessel which, due to its own negligence in part, was sunk in a navigable channel thereby obstructing it, is not entitled to a limitation of its liability to the United States for wreck removal.[88.5]

88.5. U.S—In re Pacific Far East Line, Inc., D C Cal., 314 F.Supp 1339, affd., C A., 472 F 2d 1382—In re Scranton Industries, Inc, D C N Y., 358 F.Supp 7.

89. U.S.—Murray v New York Cent. R Co, C.A N Y., 287 F 2d 152, 87 A.L.R 2d 681, cert. den 81 S Ct. 1674, 366 U.S 945, 6 L Ed.2d 856—U.S v Sandra & Dennis Fishing Corp, C.A.Mass, 372 F.2d 189, cert. den 88 S.Ct. 48, 52, 389 U.S 836, 19 L.Ed.2d 98.

Owner not entitled to exoneration

U.S.—Petition of Canal Barge Co., D C Miss, 323 F.Supp. 805, affd. in part, revd. in part on oth grds, C.A., 480 F.2d 11, op. am. on oth grds 513 F.2d 911, cert. den. 96 S.Ct. 71, two cases, 423 U.S 840, 46 L.Ed.2d 60.

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91. U.S.—U.S v. The Holland, D C.Md., 151 F.Supp. 772

96. U.S.—In re The Trojan, D.C.Cal, 167 F.Supp. 576—Petition of Shaver Transp. Co., D C Or., 287 F.Supp. 339.

97. U.S.—Petition of Marina Mercante Nicaraguense, S.A., C A.N.Y., 364 F.2d 118, cert. den. 87 S.Ct 710, 385 U S. 1005, 17 L.Ed 2d 544, reh den. 87 S.Ct. 851, 386 U.S 929, 17 L.Ed.2d 803.

§ 244. Privity of Knowledge and Personal Acts or Omissions of Person Seeking Limitation

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19. U S—Doughty v Nebel Towing Co, D C La, 270 F Supp 957—Sylve v E W Gravolet Canning Co, D C La, 278 F Supp 669—Fecht v Makowski, C A Fla, 406 F 2d 721—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part on oth grds 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99—Petition of Long, D C N Y, 285 F Supp 857, affd, C A, 439 F 2d 109—Nuccio v Royal Indem Co, C A La, 415 F 2d 228—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246—In re Parham, D C Ark, 336 F Supp 748

Qualification of doctrine of respondeat superior

U S—Coleman v Jahncke Service, Inc, C A La, 341 F 2d 956, reh den 348 F 2d 868, cert dism in part 86 S Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L Ed 2d 465

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21. U S—Petition of New York Trap Rock Corp, D C N Y, 172 F Supp 638—Moore-McCormack Lines, Inc v Armco Steel Corp, C A N Y, 272 F 2d 873, reh den 276 F 2d 676, cert den 80 S Ct 1079, two cases, 362 U S 990, 4 L Ed 2d 1023—Holloway Concrete Products Co v Beltz-Beatty, Inc, C A Fla, 293 F 2d 474—Moran Towing & Transp Co v M/S Hoperange, D C La, 226 F Supp 1018 Affd, C A, 345 F 2d 451—Petition of Howser, D C N C, 227 F Supp 81—Shaver Transp Co v Chamberlain, C A Or, 399 F 2d 893—Petition of Bloomfield S S Co, C A N Y, 422 F 2d 728—In re Smith-Rie No. 4, D C Cal, 323 F Supp 44

27 U S—Petition of Follett, D C Tex, 172 F Supp 304—Wyandotte Transp Co v U S, La, 88 S Ct 379, 389 U S 191, 19 L Ed 2d 407—Nuccio v Royal Indem Co., C A La, 415 F.2d 228

Owner held at fault or negligent

U S—Petition of Sause Bros Ocean Towing Co, D C Or, 193 F Supp 14—Walker v. Harris, C A La, 335 F 2d 185, cert den 85 S Ct 326, 379 U S 930, 13 L Ed 2d 342—Monsanto Co v St Louis Investments, Inc, D C Mo, 350 F.Supp. 502

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31. U S.—In re Black Sea S.S Co, D C Canal Zone, 382 F.Supp 907.

32. U S—Greater New Orleans Expressway Commission v Tug Claribel, D C La, 222 F Supp 521, affd, C A, 341 F 2d 956, reh den 348 F 2d 868 Cert dism in part 86 S.Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L.Ed 2d 465—Doughty v Nebel Towing Co, D C.La, 270 F Supp 957—Sylve v E W Gravolet Canning Co, D C La, 278 F Supp 669—Fecht v. Makowski, C A Fla, 406 F 2d 721

33. U.S—Petition of U S, D C N Y, 105 F Supp 353, remd on oth grds., C A, 201 F 2d 281—States S.S Co v U S, C A.Or., 259 F 2d 458, cert. den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, reh. den. 79 S Ct 579, 359 U.S 921, 3 L.Ed 2d 583—Petition of Henry Du Bois' Sons Co., D.C.N.Y, 189 F.Supp 400—Petition of Sause Bros. Ocean Towing Co, D C Or, 193 F Supp 14—Avera v. Florida Towing Corp., C A Fla, 322 F.2d 155—Greater New Orleans Expressway Commission v Tug Claribel, D C La, 222 F Supp 521, affd., C A, 341 F 2d 956, reh. den. 348 F 2d 868, cert. dism. in part 86 S.Ct 525, 382 U S 967, 15 L.Ed.2d 463, cert. den in part 86 S Ct 538, 382 U.S. 974, 15 L Ed 2d 465—China Union Lines, Limited v A O Andersen & Co, C A Tex, 364 F 2d 769, cert. den 87 S Ct 955, two cases, 956, 386 U.S 933, 17 L Ed 2d 805, reh den 87 S Ct 1301, 386 U S 999, 18 L Ed 2d 353, and 87 S Ct. 1302, 386 U.S 1000, 18 L Ed 2d 353, reh den 88 S.Ct 1015, 390 U.S 974, 19 L Ed.2d 1191—McNeil v Lehigh Valley R Co, C A.N Y, 387 F 2d 623, cert den 88 S Ct 1638, 390 U S 1040, 20 L Ed 2d 302—Sylve v E W Gravolet Canning Co, D C La, 278 F Supp 669—In re Parham, D C Ark, 336 F Supp 748

34. U S—Rice v New York Trap Rock Corp, D C N Y, 198 F Supp 346, affd, C A, 294 F 2d 272

35. U S—Blackler v F Jacobus Transp Co, C A N Y, 243 F 2d 733

Phrase held term of art meaning complicity in fault

U S—Petition of U S Dredging Corp, D C N Y, 213 F Supp 780—Petition of Read, D C Fla, 224 F Supp 241—Empire Seafoods, Inc v Anderson, C A Fla, 398 F 2d 204, cert den 89 S Ct 449, 393 U S 983, 21 L Ed 2d 444

36. U S—Rice v New York Trap Rock Corp, D C N Y, 198 F Supp 346, affd, C A, 294 F 2d 272

39. U S—Petition of Long, D C N Y, 293 F Supp 172, affd, C A, 439 F 2d 109—In re Parham, D C Ark, 336 F Supp 748

40. U S—Petition of S C Loveland Co, D C Pa, 170 F Supp 786—Monsanto Co v St Louis Investments, Inc, D C Mo, 350 F Supp 502

41 U S—Hamilton v Canal Barge Co, Inc, D C La, 395 F Supp 978

43. U S—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963

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50. U S—Gibboney v Wright, C A Fla, 517 F 2d 1054

52. U S—Derby Co v A L Mechling Barge Lines, Inc, D C La, 258 F Supp 206, affd, C A, 399 F 2d 304—Petition of Long, D C N Y, 293 F Supp 172, affd, C A, 439 F 2d 109—U S v Standard Oil Co of California, C A Cal, 495 F 2d 911

53. U S—Petition of Bogan, supra, n 19—Petition of U S Dredging Corp, D C N Y, 225 F Supp 730—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246—U S v Standard Oil Co of California, C A Cal, 495 F 2d 911

55. U S—Admiral Towing Co v Woolen, C A Cal, 290 F 2d 641—Petition of Clinton, D C Mass, 195 F Supp 165

Acts of operating agent as binding on United States

U S—Petition of U S, D C N C, 303 F Supp 1282

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62. U S—Northern Petroleum Tank S S Co v City of New York, C A N Y, 282 F 2d 120

Government subject to same standards as private corporation

U S—U S v Standard Oil Co of California, C A Cal, 495 F 2d 911

63. U S—Doughty v Nebel Towing Co, D C La, 270 F Supp 957—Hudgins v Mockingbird, Inc, D C Va, 282 F Supp 367

Limitation held precluded

(5) Other matters precluding limitation

U S—Petition of Henry Du Bois' Sons Co, D C N Y, 189 F Supp 400—Petition of Sause Bros Ocean Towing Co, D C Or, 193 F Supp 14—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963

Duty to enforce compliance with instructions

U S—Avera v Florida Towing Corp, C A Fla, 322 F 2d 155

64. U S—Petition of Henry Du Bois' Sons Co, D C N Y., 189 F Supp 400—Coleman v Jahncke Service, Inc, C A La, 341 F 2d 956, reh den 348 F 2d 868, cert dism. in part 86 S Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct

538, 382 U.S 974, 15 L Ed 2d 465—Petition of Risdal & Anderson, Inc, D C Mass, 248 F Supp 928—Shaver Transp Co v Chamberlain, C A Or, 399 F 2d 893

Subsequent actions as showing nature of prior activity

U S—Avera v Florida Towing Corp, C A Fla, 322 F 2d 155

66. Marine superintendent

U S.—Greater New Orleans Expressway Commission v Tug Claribel, D C La, 222 F Supp 521, affd, C A, 341 F 2d 956, reh den 348 F 2d 868, cert dism in part 86 S Ct 525, 382 U.S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L Ed 2d 465—Coleman v Jahncke Service, Inc, C A La, 341 F 2d 956, reh den 348 F 2d 868, cert dism in part 86 S Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L Ed 2d 465

67. U S—Petition of Sause Bros Ocean Towing Co, D C Or, 193 F Supp 14

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73. U S—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963

74. U S—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part on oth grds 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99.

75. U S—Midwest Towing Co. v Anderson, C A Ill, 317 F 2d 270—Rowe v. Brooks, C A Va, 329 F 2d 35—Sylve v E W Gravolet Canning Co, D.C La, 278 F Supp 669—Daniels v Trawler Sea-Rambler, D C Va, 294 F Supp 228.

Demise charterer

U.S—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

76. U S—Petition of Kahului R Co, D.C Hawaii, 214 F Supp 789—Rowe v Brooks, C A Va, 329 F 2d 35

77. Faulty compass

U S—Greater New Orleans Expressway Commission v. Tug Claribel, D C La, 222 F Supp 521, affd, C.A, 341 F 2d 956, reh den 348 F 2d 868, cert dism in part 86 S Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L Ed 2d 465

Defective fathometer

U S.—Petition of Waterman S S Corp, D.C Cal, 265 F Supp 595, affd, C A, 414 F 2d 724—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724

Inherently unsafe fuel system

U S—Sylve v E W Gravolet Canning Co, D C La, 278 F Supp 669

FCC certification held no substitute for compliance with statutory requirements

U.S—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724

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78. U.S.—Petition of Midwest Towing Co, D C Ill, 203 F.Supp. 727, affd, C A, 317 F 2d 270

80. U S—Doughty v Nebel Towing Co, D C La, 270 F Supp 957—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724

81. U.S.—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S.A, D.C N Y, 284 F Supp. 356, affd. in part, revd. in part on oth grds. 388 F.2d 434, cert den. 89 S.Ct 92, 393 U S 828, 21 L.Ed.2d 99

82. U S.—Petition of Boat Demand, Inc, D C Mass., 160 F.Supp 833.

85. U.S.—Petition of Oskar Tiedemann & Co, D C Del., 179 F.Supp. 227, motion den 183 F Supp. 129, affd., C.A, 289 F 2d 237—Petition of Binstock, D.C.N.Y., 213 F.Supp 909, affd., C A, 330 F.2d 267—Petition of Read, D C Fla., 224 F Supp 241—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724

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86. Radar

U S—Timur Fishing Corp v Cap'n Bill, Inc, D C Mass, 160 F Supp 563

88. U S—Timur Fishing Corp v Cap'n Bill, Inc, D C Mass, 160 F Supp 563

89. Overloading

(2) Other matters

U S—Petition of Long, D C N Y, 293 F Supp 172, affd, C A, 439 F 2d 109—Petition of Long, C A N Y, 439 F 2d 109

93. U S—Greater New Orleans Expressway Commission v Tug Claribel, D C La., 222 F Supp 521, affd, C A, 241 F 2d 956, reh den 348 F 2d 868 Cert dism in part 86 S.Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L Ed 2d 465—Sylve v E W Gravolet Canning Co, D C La, 278 F Supp 669

94. U S—Admiral Towing Co v Woolen, C A Cal, 290 F 2d 641—Petition of Tug Management Corp, D C Pa, 330 F Supp 486

95. U S—Timur Fishing Corp v Cap'n Bill, Inc, D C Mass, 160 F Supp 563

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9. U S—Petition of Diesel Tanker A C Dodge, Inc, D C N Y, 133 F Supp 510, affd, C A, 234 F 2d 374, cert den 77 S Ct 227, 228, 352 U S 928, 1 L.Ed 2d 163, cert den. 77 S Ct 228, 352 U S 929, 1 L.Ed 2d 164.

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16. U S—McDonald v The 204, D C Ala., 194 F Supp 383—Petition of Marina Mercante Nicaraguense, S A, D C N Y, 248 F Supp 15, mod. on oth grds, C A, 364 F.2d 118, cert den 87 S Ct 710, 385 U.S 1005, 17 L Ed 2d 544, reh den 87 S Ct 851, 386 U S 929, 17 L Ed 2d 803

17. U S—The William J Riddle, D C.N Y, 102 F Supp 884, affd., C A, 200 F 2d 608

19. U S—Petition of Howser, D.C N C, 227 F Supp 81

20. Directing departure in storm

(2) Other instances

U S—Loc-Wood Boat & Motors, Inc v Rockwell, C A Mo, 245 F.2d 306

21. U S.—Oliver J Olson & Co v Luckenbach S S. Co, C A Cal., 279 F 2d 662, cert. den 81 S Ct 171, 364 U.S. 881, 5 L Ed 2d 103—Petition of Klarman, D C Conn., 295 F Supp. 1021

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25. U S—Waterman S S Corp v Gay Cottons, C A Cal, 414 F.2d 724

29. U S—State of Or By and Through State Highway Commission v Tug Go-Getter, D C.Or., 299 F.Supp 269, mod. in part on oth grds. affd in part, revd. in part on oth grds., C.A, 468 F 2d 1270

Negligent omission

U S—Petition of Canal Barge Co., D.C.Miss, 323 F Supp. 805, affd in part, revd in part on oth grds, C.A., 480 F 2d 11, op am on oth grds. 513 F 2d 911, cert. den. 96 S Ct 71, two cases, 423 U S 840, 46 L Ed 2d 60.

30. U S—Petition of Landi, D.C.N Y., 194 F Supp 353—State of Or By and Through State Highway Commission v Tug Go-Getter, D.C.Or., 299 F Supp 269, mod. in part on oth grds., affd in part, revd. in part on oth grds, C.A., 468 F.2d 1270

35. Degree of control as affected by scope of operation

U S—Avera v. Florida Towing Corp., C.A Fla, 322 F.2d 155.

36. U S.—Avera v Florida Towing Corp., C A Fla., 322 F 2d 155

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37. Other negligence as cause

U S—Petition of Landi, D C N Y, 194 F Supp 353

§ 245. Proceedings to Obtain Limitation

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44. Limitation of liability defined

U S—Odegard v E Quist, Inc, D C N Y, 199 F Supp 449

Posting of security held not required

U S—In re Panoceanic Tankers Corp, D C N.Y, 332 F Supp 313

45. U S—In re Panoceanic Tankers Corp, D C N Y, 332 F Supp 313

47. Dismissal not warranted

U S—In re Barracuda Tanker Corp, D C N Y, 281 F Supp 228, remd, C A, 409 F 2d 1013

The Federal Rules of Civil Procedure now make provision with respect to the procedure in actions by a shipowner for exoneration from a limitation of liability.[47.5]

47.5. U S—In re Pacific Far East Line, Inc., D C Cal, 43 F R D. 283—In re McAninch, D C Tex, 392 F Supp. 96

Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F, 28 U.S C A., as added in 1966

48. U S.—Petition of U S, C A Del, 367 F 2d 505, cert den. 87 S.Ct. 953, 386 U S 932, 17 L Ed 2d 805

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51. U.S.—Blunk v Wilson Line of Washington, Inc., D C Ohio, 341 F.Supp. 1345

52. U S.—Lake Tankers Corp v Henn, N Y., 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed.2d 1543.

A bond may be required of a private shipowner.[61.5]

61.5. U.S.—In re Alva S.S Co., D.C.N Y, 262 F.Supp 328.

64. Foreign statute substantive in nature

U S—Petition of Chadade S.S. Co, D.C.Fla., 266 F Supp 517

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65. U S—Petition of Chadade S S Co., D C.Fla, 266 F.Supp 517.

Maritime law governs in limitation of liability proceedings.[66.5]

66.5. U.S—Petition of New York Trap Rock Corp, 172 F.Supp. 638.

Other cases relating to parties in proceedings for the limitation of liability of a shipowner have been adjudicated.[69.5]

69.5. Substitution

U.S.—Loc-Wood Boat & Motors, Inc v Rockwell, C A.Mo, 245 F.2d 306

Claimants as real parties in interest

U.S.—Petition of J. E Brenneman Co, C A.Pa., 312 F 2d 271

Issue not waived

U.S.—Petition of J. E Brenneman Co., C.A.Pa., 312 F 2d 271.

Effect of loan receipt transaction with insurer

US—Petition of J E Brenneman Co, C A Pa, 322 F 2d 846

Charterer held not proper party in shipowner's proceeding

US—In re G b R M S Caldas, D C Pa, 350 F Supp 566, affd, C A, 485 F 2d 678, and 680

70. US—In re William J Riddle, D C N Y, 111 F Supp 657

71. US—Lake Tankers Corp v Henn, N Y, 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543—Petition of U S, C A Del, 367 F 2d 505, cert den 87 S Ct 953, 386 U S 932, 17 L Ed 2d 805

3. US—New Jersey Barging Corp v T A D Jones & Co, D C N Y, 135 F Supp 97—Petition of American M A R C, Inc, D C Cal, 224 F Supp 573—Petition of Indiana Farm Bureau Co-op Ass'n, D C Ill, 235 F Supp 800

4. US—Petition of Boraks, D C Mass, 142 F Supp 364—Petition of Indiana Farm Bureau Co-op Ass'n, D C Ill, 235 F Supp 800

5. U.S.—Petition of Trinidad Corp, D C Va, 238 F Supp 928

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1. U S.—Petition of Republic of (South) Korea, D C Or, 175 F Supp 732

5. US—Petition of Trinidad Corp, C.A N Y, 229 F.2d 423—Petition of Canal Barge Co, D C Miss, 323 F.Supp. 805, affd in part, revd in part on oth grds, C.A., 480 F 2d 11, op am on oth grds 513 F.2d 911, cert den. 96 S Ct. 71, two cases, 423 U S 840, 46 L.Ed.2d 60.

6. U S.—Petition of Trinidad, Corp, C A N Y, 229 F.2d 423—Petition of Trawler Weymouth, Inc., D.C Mass., 223 F.Supp 161

8. **Preliminary determination of adequacy, matters considered, effect of findings**

J.S.—Petition of Trinidad Corp, C.A N Y., 229 F 2d 423.

§ 246. —— Form and Nature of Proceeding

0. U.S —Petition of Allen N. Spooner & Sons, Inc., C.A N Y, 253 F 2d 584, cert dism. 79 S.Ct 9, 358 U.S. 30, 3 L Ed.2d 48—In re Great Lakes Towing Co, D C.Ohio, 395 F Supp 810

1. U.S —J. Ray McDermott & Co v Hunt Oil Co, C.A La., 262 F.2d 127.

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7. U.S.—In re Independent Towing Co, D.C La, 242 F.Supp. 950.

9. U.S.—Petition of A/S J. Ludwig Mowinckels Rederi, D C N.Y., 268 F.Supp 682, affd C A, 422 F.2d 728

1. U.S.—American Tobacco Co v The Katingo Hadjipatera, C.A.N Y., 211 F.2d 666, cert. den. 75 S.Ct 48, 348 U S. 828, 99 L.Ed 653—Petition of Trinidad Corp., C A.N.Y, 229 F.2d 423—In re Lady D, C.A.Mich, 416 F.2d 454

2. U.S.—Moore-McCormack Lines, Inc. v. Richardson, C.A.N.Y., 295 F 2d 583, 96 A.L R.2d 1085, cert. den. 82 S.Ct. 606, 368 U.S. 989, 7 L.Ed.2d 526, cert. den. 82 S Ct. 1577, 370 U.S. 937, 8 L.Ed.2d 806, reh. den 82 S.Ct 1580, 370 U.S 965, 8 L.Ed.2d 835—Petition of A/S J. Ludwig Mowinckels Rederi, D.C.N.Y., 268 F.Supp. 682, affd. C.A., 422 F.2d 728—In re Unterweser Reederei, Gmbh, D.C.Fla., 296 F.Supp. 733, affd, C.A., 428 F.2d 888, adopted 446 F.2d 907 Vac. on oth. grds. 92 S.Ct. 1907, 407 U.S. 1, 32 L.Ed.2d 513, mand. conf. to 464 F.2d 1395—In re Midland Enterprises, Inc., D.C.Ohio, 296 F.Supp. 1356.

7. **Power to enjoin persons within jurisdiction as to foreign activity**

U.S.—Petition of Bloomfield S.S. Co., C.A.N.Y., 422 F 2d 728.

§ 247. —— Surrender or Abandonment of Vessel and Pending Freight

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9. US—Petition of U S Dredging Corp, C A N Y, 264 F 2d 339, cert den 79 S Ct 1452, 360 U S 932, 3 L Ed 2d 1545—Wong v Utah Home Fire Ins Co, D C Hawaii, 167 F Supp 230

"Unit of limitation" inapplicable to vessels

US—Petition of Western Transp Co, D C Or, 194 F Supp 834

Barge and tug

US—Trexler v Tug Raven, D C Va, 290 F Supp 429, revd on oth grds, C A, 419 F 2d 536, cert den 90 S Ct 1843, 398 U S 938, 26 L Ed 2d 271

Value of containers included

US—In re Pacific Far East Line, Inc, D C Cal, 314 F Supp 1339, affd, C A, 472 F 2d 1382

10. US—In re Oil Transport Co, D C La, 178 F Supp 48, revd on oth grds, C A, 278 F 2d 464, vac 81 S Ct 911, 365 U S 768, 6 L Ed 2d 83

11. US—Federazione Italiana Dei Consozi Agrari v Mandask Compania de Vapores, S A, D C N Y, 223 F Supp 206, affd in part and revd in part on oth grds, C A, 342 F 2d 215

The transfer carries with it all rights of action directly representative of the vessel.[15 5]

15.5. US—Petition of Catalina Island Sightseeing Lines, D C Cal, 184 F Supp 842

16. US—Avera v Florida Towing Corp, C A Fla, 322 F 2d 155

22. **Surrender of other claims not required**

US—Petition of Western Transp Co, D C Or, 194 F Supp 834.

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32. US—Deep Sea Tankers, Limited v The Ling Branch, C.A N Y, 258 F 2d 757, cert den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, and 79 S Ct 320, 358 U S 934, 3 L Ed 2d 305, reh den 79 S.Ct 578, 359 U S 921, 3 L Ed 2d 583—Petition of Western Transp Co, D C Or, 194 F Supp 834—In re Midland Enterprises, Inc, D C Ohio, 296 F Supp 1356—Steuart Inv Co v Bauer Dredging Const Co, D C Md, 323 F Supp 907

N Y—Rank v Colonial Sand & Stone Co, 331 N Y S 2d 290, 69 Misc 2d 749, affd 342 N Y S 2d 639, 41 A D 2d 805

34. US—Petition of Lake Tankers Corp, D C N Y, 132 F Supp 504—Deep Sea Tankers, Limited v The Long Branch, C.A N Y, 258 F 2d 757, cert den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, and 79 S Ct 320, 358 U S 934, 3 L Ed 2d 305, reh den 79 S Ct. 578, 359 U S 921, 3 L Ed 2d 583—Petition of U S Dredging Corp, C A N Y, 264 F 2d 339, cert den 79 S Ct 1452, 360 U S 932, 3 L Ed 2d 1545—In re Brown & Root Marine Operators, Inc., D.C Tex, 267 F Supp 588, affd., C.A., 377 F.2d 724

Tug and barge in tow thereof

U.S.—Steuart Inv. Co v Bauer Dredging Const. Co, D.C Md., 323 F.Supp 907

Tort liability

In proceeding for limitation of liability based on violation of duty involving tort liability, owner is required to surrender only offending vessel

US—Petition of U S. Dredging Corp, D C N Y, 213 F Supp 780—Steuart Inv Co v. Bauer Dredging Const. Co, D.C Md., 323 F.Supp 907—In re American Commercial Lines, Inc, D C Ky, 353 F.Supp 872.

(2) Barge held separate from its tug

US—In re American Commercial Lines, Inc, D C Ky, 353 F Supp 872

35. US—Steuart Inv Co v Bauer Dredging Const Co, D C Md, 323 F Supp 907

N Y—Rank v Colonial Sand & Stone Co, 331 N Y S 2d 290, 69 Misc 2d 749, affd 342 N Y S 2d 639, 41 A D 2d 805

Not treated as unit until fault determined

US—Petition of Lake Tankers Corp, D C N Y, 132 F Supp 504

Where both vessels at fault

US—Petition of U S Dredging Corp, D C N Y, 213 F Supp 780

Surrender of all vessels forming "flotilla" required

US—Brown & Root Marine Operators, Inc v Zapata Off-Shore Co, C A Tex, 377 F 2d 724

Flotilla rule held inapplicable

US—In re American Commercial Lines, Inc, D C Ky, 353 F Supp 872

36. US—Steuart Inv Co v Bauer Dredging Const Co, D C Md, 323 F Supp 907

37. US—Petition of U S Dredging Corp, D C N Y, 213 F Supp 780

Value of guilty vessel alone

US—Petition of Lake Tankers Corp, D C N Y., 132 F Supp 504

Mere allegation of no effect

US—Petition of Lake Tankers Corp, D C N Y, 132 F Supp 504

Absence of common ownership

US—Petition of Sheridan, D C N Y, 226 F Supp 136

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38. US—Petition of Western Transp. Co, D C Or, 194 F Supp 834—Petition of U S Dredging Corp, D C N Y, 213 F Supp 780—Brown & Root Marine Operators, Inc v Zapata Off-Shore Co, C A Tex, 377 F 2d 724—Steuart Inv Co v Bauer Dredging Const Co, D C Md, 323 F Supp 907—Cross Contracting Co v Law, C A Fla, 454 F 2d 408, cert den 92 S Ct. 1610, 406 U S. 906, 31 L Ed 2d 816

N Y—Rank v Colonial Sand & Stone Co, 331 N Y S 2d 290, 69 Misc 2d 749, affd, 342 N Y S 2d 639, 41 A D 2d 805

Contractual relationship necessary

US—In re American Commercial Lines, Inc, D C Ky, 353 F Supp 872

§ 248. —— Stipulation for Value or Payment into Court

45. US—Wong v Utah Home Fire Ins Co., D C Hawaii, 167 F Supp 230

48. US—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 223 F Supp 206, affd in part and revd in part on oth grds, C A, 342 F 2d 215

50. US—Petition of A/S J Ludwig Mowinckels Rederi, D C N Y, 268 F Supp 682, affd C A, 422 F 2d 728

51. US—Petition of Wills Lines, Inc, C A N Y, 251 F.2d 306, cert den 78 S Ct 782, 356 U S 939, 2 L Ed 2d 814—Petition of Western Transp Co, D C.Or, 194 F.Supp 834—Rice v New York Trap Rock Corp, 198 F.Supp 346, affd, C A., D C N Y, 294 F 2d 272

Value of interest not necessarily determined

US—Petition of Lake Tankers Corp, D C N.Y, 132 F Supp. 504.

Defect held not jurisdictional

US—Petition of A/S J Ludwig Mowinckels Rederi, D C N Y, 268 F.Supp 682, affd. C A, 422 F.2d 728

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54. Increase in fund to $60 per ton

U.S.—In re Panoceanic Tankers Corp, D C N Y, 332 F Supp 313

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74. U S—In re Barracuda Tanker Corp, D C N Y, 281 F Supp. 228, remd, C A, 409 F 2d 1013

§ 249. —— Time for Commencing Proceedings; Waiver or Loss of Right

76. U S—Petition of Wood, D C N Y, 124 F Supp 540, affd, C A, 230 F 2d 197—Petition of Southern S S Co, D C Del, 132 F Supp 316

77. U S—Cantwell v Meade, D C N Y, 120 F Supp 406

81. New right not created

U S—Petition of Southern S S Co, D C Del, 132 F Supp. 316

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82. U S—Cantwell v Meade, supra, n 77—Deep Sea Tankers, Limited v The Long Branch, C A N Y, 258 F 2d 757, cert den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, reh. den 79 S Ct 578, 359 U S 921, 3 L Ed 2d 583

Additional purposes

U S—Petition of American M A R C, Inc, D C Cal, 224 F Supp 573

83. U S—Petition of Donnelly, C A Ohio, 230 F 2d 169—Diamond v Beutel, C A Fla, 247 F 2d 604—Petition of American M A R C, Inc, D C Cal, 224 F Supp 573—Ohio River Co v City of Wheeling, D C W Va, 225 F Supp 733

86. Parents held "claimants" within statute

U S.—Petition of Donnelly, D C Ohio, 138 F Supp 823

89. U S—Petition of J E Brenneman Co, D C Pa, 157 F Supp 295

Communications held to constitute sufficient notices

(4) Other communications

U S—Diamond v Beutel, C A Fla, 247 F 2d 604

Communications held insufficient to constitute notices

(4) Other communications

U S—Petition of American M A R C, Inc, D.C Cal, 224 F Supp 573

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92. U.S.—Petition of J E Brenneman Co, D.C Pa., 157 F Supp 295

95. U.S—Petition of American M A R C, Inc, D C Cal, 224 F Supp 573

97. U S—Petition of American M A R.C, Inc, D.C Cal, 224 F Supp 573—Petition of A/S J Ludwig Mowinckels Rederi, D.C N Y, 268 F Supp 682, affd. C A, 422 F 2d 728.

1. U.S—Hudgins v. Gregory, C A.Va, 219 F.2d 255.

8. Or—Cooper v Allison, 412 P 2d 356, 243 Or. 179

§ 250. —— Jurisdiction and Venue

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20. U.S.—Petition of Madsen, D C N Y, 187 F Supp 411—Guillot v. Cenac Towing Co, C.A La, 366 F 2d 898.

Transfer of proceedings

U.S.—Petition of Backman, D.C.Del, 122 F.Supp 896—Petition of Clipper Fishing Corp, D C N Y, 168 F.Supp. 130.

Sufficiency of fund

U.S.—Petition of Lake Tankers Corp, C.A.N.Y., 232 F.2d 573, adhered to 238 F.2d 783, affd. 77 S.Ct. 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543—Petition of Trawler Weymouth, Inc, D C Mass, 223 F Supp 161—In re Central R Co of New Jersey, C A N J, 469 F 2d 857, cert den 93 S Ct 1900, 411 U S 938, 36 L Ed 2d 399

Inadequate fund

U S—In re Central R Co of New Jersey, C A N J, 469 F 2d 857, cert den 93 S Ct 1900, 411 U S 938, 36 L Ed 2d 399

21. Multiplicity of claims stemming from maritime catastrophe

U S—McKeithen v S S Frosta, D C La, 426 F Supp 307

24. U S—Petition of Colonial Trust Co, D C Conn, 124 F Supp 73—Petition of A/S J Ludwig Mowinckels Rederi, 268 F Supp 682, affd C A, 422 F 2d 728

25. U S—Petition of Wood, C A N Y, 230 F 2d 197—Petition of Kahului R Co, D C Hawaii, 214 F Supp 789—Petition of A/S J Ludwig Mowinckels Rederi, D C N Y, 268 F Supp 682, affd C A, 422 F 2d 728—Doughty v Nebel Towing Co, D C La, 270 F Supp 957

26. U S—J Ray McDermott & Co v Hunt Oil Co, C A La, 262 F.2d 127—Petition of New York Trap Rock Corp, D C N Y, 172 F Supp 638—Anderson v Nadon, C A Or, 360 F 2d 53

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27. U S—Guillot v Cenac Towing Co, C A La, 366 F 2d 898

State court

(2) U S—Petition of Humble Oil & Refining Co, D C Tex, 210 F Supp 638, affd, C A, 311 F 2d 576

(4) Other matters

U S—Petition of Humble Oil & Refining Co, D C Tex, 210 F Supp 638, affd, C A, 311 F 2d 576

Or.—Cooper v Allison, 4123 P 2d 356, 243 Or 179

30. U S—Petition of Howser, D C N C, 227 F Supp. 81.

31. U S—Petition of Trinidad Corp, D.C Va, 238 F Supp 928

Where the commencement of a suit to limit liability is a purely defensive measure, without prudent alternative, further reliance on a forum selection clause in a contract, is not precluded.[32.5]

32.5. U S—M/S Bremen v. Zapata Off-Shore Co, Fla., 92 S Ct 1907, 407 U.S. 1, 32 L.Ed 2d 513, conf to 464 F 2d 1395

34. U S—Tracy Towing Line v City of Jersey City, D C N J., 105 F Supp 910.

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37. U S—Petition of Indiana Farm Bureau Co-op Ass'n, D C Ill, 235 F Supp 800—Petition of A/S J Ludwig Mowinckels Rederi, D C N Y, 268 F Supp 682, affd. C A., 422 F.2d 728.

Matter of discretion

(2) As to priority of venue

U S—Petition of Southern S S Co, D C Del., 132 F Supp. 316.

(3) Other matters

U.S—Famiano v Enyeart, C.A.Ind., 398 F.2d 661, cert. den 89 S Ct. 627, 393 F.Supp 1356.

38. U.S—Petition of Southern S S Co, D C Del, 132 F Supp 316—In re Midland Enterprises, Inc, D C Ohio, 296 U S 1020, 21 L.Ed 2d 564

39. U.S.—In re Midland Enterprises, Inc, D C Ohio, 296 F.Supp. 1356.

Limitation raised by way of defense

U.S.—Famiano v. Enyeart, C.A.Ind., 398 F.2d 661, cert. den. 89 S Ct 627, 393 U S 1020, 21 L.Ed 2d 564.

41. U S—The Mandu, C C A N Y, 102 F 2d 459—Petition of Chadade S S Co, D C Fla, 266 F Supp 517

43. U S—Pennell v Read, C A Fla, 309 F 2d 455

48. Motion to transfer cause properly denied

U S—Petition of Southern S S Co, D C Del, 132 F Supp 316

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51. U S—Petition of Trinidad Corp, C A N Y, 229 F 2d 423

54. U S—Petition of A/S J Ludwig Mowinckels Rederi, D C N Y, 268 F Supp 682, affd C A, 422 F 2d 728—In re Midland Enterprises, Inc, D C Ohio, 296 F Supp 1356

55. U S—Petition of Southern S S Co, D.C Del, 132 F Supp 316—Petition of Clipper Fishing Corp, D C N Y, 168 F Supp 130—In re Chinese Maritime Trust, Ltd, D C N Y, 361 F Supp 1175, affirmed 478 F 2d 1357, cert den 94 S Ct 894, 414 U S 1143, 39 L Ed 2d 98

Grounds held insufficient to require transfer

U S—New Jersey Barging Corp v T A D Jones & Co, D C N Y, 135 F Supp. 97

Simultaneous proceedings in two districts not permitted

U S—Petition of Russell Bros Towing Co, D C N Y, 199 F Supp 442

56. U S—Petition of Oskar Tiedemann & Co, D C Del, 159 F Supp 470, motion den, C A, 253 F 2d 233, affd 259 F 2d 605—Petition of Oskar Tiedemann & Co, C A Del, 259 F 2d 605

No priority or choice of venue unless libel antedates proceeding

U.S—Petition of Southern S S Co, D.C.Del, 132 F Supp 316

Vessel required to be seized and taken into control of court

U.S.—Petition of Russell Bros Towing Co, D C N Y, 199 F Supp 442

Transfer of venue for convenience

U S—In re U S Coast Guard Vessel CG-95321, D.C N H, 221 F Supp 163

57. U S—Petition of Texas Co., C A N Y, 213 F 2d 479, cert. den 75 S.Ct 52, 348 U.S 829, 99 L.Ed 623, petition den, C.A, 220 F 2d 744—Petition of Oskar Tiedemann & Co., C A.Del., 259 F 2d 605.

Proceeding not transferred

U S—Petition of Baker-Whiteley Towing Co., D C Md, 145 F Supp 904—Petition of Alamo Chemical Transp Co, D.C.Tex, 323 F.Supp. 789

59. Actual jurisdiction of person of owner not required

U.S—Petition of Russell Bros. Towing Co, D C.N.Y, 199 F Supp 442

61. U.S—Petition of Russell Bros Towing Co, D C N.Y, 199 F.Supp 442—In re Bloomfield S.S. Co., D C La., 227 F Supp. 615, affd., C.A., 363 F.2d 872, cert den. 87 S.Ct. 864, 386 U S. 913, 17 L.Ed 2d 785

Statute allowing transfer held inapplicable

U S—New Jersey Barging Corp v T.A D. Jones & Co, D C N Y., 135 F.Supp 97.

62. U.S—Petition of Diesel-Tanker A.C Dodge, D.C.N.Y., 117 F.Supp. 216.

A charter of the vessel need not institute the proceedings in the district where the owner has been sued.[63.5]

63.5. U.S.—Petition of Russell Bros. Towing Co., D.C.N Y., 199 F.Supp. 442

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66. U.S.—Petition of Trinidad Corp., D.C.Va., 238 F Supp 928.

§ 251. —— Effect on, and Enjoining Other Proceedings

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70. U S —Petition of Southern S S Co , D C Del , 132 F Supp 316—Lake Tankers Corp v Henn N Y , 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543

.imitation-before-direct-action principle

J S —Alcoa S S Co v Charles Ferran & Co , D C La , 251 F.Supp 823, affd , C A , 383 F 2d 46

)irect action permitting suit against insurer

J S —Ema v Compagnie Generale Trasatlantique, D C Puerto Rico, 353 F Supp 1286

'1. U S —Petition of Trinidad Corp , C A N Y , 229 F 2d 423—Petition of Wood, C A N Y , 230 F 2d 197—Coleman v Jahncke Service, Inc , C A La , 341 F 2d 956, 348 F 2d 868

)r —Cooper v Allison, 412 P 2d 356, 243 Or 179

Showing held insufficient

J S —Texas Gulf Sulphur Co v Blue Stack Towing Co , C.A Fla , 313 F 2d 359

72. U.S —New Jersey Barging Corp v T A D Jones & Co , D C N Y , 135 F Supp 97—In re Moore, D.C Mich , 278 F.Supp. 260.

73. U S.—Petition of Texas Co , C A N Y , 213 F 2d 479, cert den 75 S.Ct 52, 348 U S 829, 99 L Ed 653, petition den , C.A , 220 F.2d 744—In re Victory Towing Co., D C Miss., 219 F Supp. 119

77. U S —Forty-Nine Transfer Corp v The Mormacpride, D.C.N Y , 199 F.Supp 446

Extraterritorial effect of limitation judgments. A limitation judgment does not have an extraterritorial effect and claimants who abstain from filing damage claims against vessel owners in United States courts are free to pursue actions in foreign tribunals.[79.5]

79.5. U S —Matter of Bowoon Sangsa Co , Ltd , C A. Guam, 720 F.2d 595

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In a proper case a restraining order, entered in limitation proceedings, may be lifted to enable a claimant to proceed in the forum of his choice.[80.1]

80.1. U.S —Petition of Marsuerte Compania Naviera, S.A., D.C.N Y , 252 F.Supp. 279

Where petitioner in limitation proceedings is fully protected

(1) Restraining order was lifted to permit proceeding in a state court.

U.S.—Petition of Lake Tankers Corp., D.C.N Y , 137 F.Supp. 311, mod on oth grds., C A., 232 F 2d 573, adhered to 235 F.2d 783, affd. 77 S.Ct. 1269, 354 U.S 147, 1 L Ed 2d 1246, reh den. 77 S Ct 1421, 354 U.S. 945, 1 L.Ed.2d 1543—Petition of Trawler Weymouth, Inc , D C Mass , 223 F Supp 161.

(2) The federal district court, however, retained jurisdiction of limitation proceedings in event petitioner's right to limit liability should be questioned.

U.S.—Petition of Lake Tankers Corp., D.C.N.Y., 137 F.Supp 311, mod. on oth. grds., C.A., 232 F.2d 573, adhered to 235 F.2d 783, affd. 77 S.Ct. 1269, 354 U.S. 147, 1 L.Ed.2d 1246, reh. den. 77 S.Ct. 1421, 354 U.S. 945, 1 L.Ed.2d 1543.

Effect of permitted state court proceeding on issues in limitation proceeding

U.S.—Avera v. Florida Towing Corp., C A.Fla., 322 F.2d 155.

81. U S.—Petition of A/S J. Ludwig Mowinckels Rederi, D.C.N.Y., 268 F.Supp 682, affd. C.A., 422 F.2d 728.

82. U S —Petition of Wood, C A N Y , 230 F 2d 197 —Petition of Reading, D C N Y , 169 F Supp 165, affd , C A , 271 F 2d 959—Diacon-Zadeh v Demyzoylari, C A Pa , 196 F 2d 491—Guillot v Cenac Towing Co , C A La , 366 F 2d 898—Torres v Interstate Fire & Cas Co , D C Puerto Rico, 275 F Supp 784—In re Underweser Reederei, Gmbh, D C Fla , 296 F Supp 733, affd , C A , 428 F 2d 888, adopted 446 F 2d 907, vac on oth grds 92 S Ct 1907, 407 U S 1, 32 L Ed 2d 513, mand conf to 464 F 2d 1395—In re Unterweser Reederei, GMBH, C A Fla , 428 F 2d 888, op adopted 446 F 2d 907, vac on oth grds 92 S Ct 1907, 407 U S 1, 32 L Ed 2d 513, mand conf to 464 F 2d 1395

83. **Concession by litigant as to right to limit liability**

(3) Other cases

U S —George J Waldie Towing Co v Ricca, C A N Y , 227 F 2d 900

Not violation of statute prohibiting federal court injunction of state proceedings generally

U S —Beal v Waltz, C A Fla , 309 F 2d 721

84. U S —Petition of Republic of (South) Korea, D C Or , 175 F Supp 732—Humble Oil & Refining Co v M/V John E Coon, D C La , 207 F Supp 45—In re Bloomfield S S Co , D C La , 227 F Supp 615, affd , C A , 363 F 2d 872, cert den 87 S Ct 864, 386 U S 913, 19 L Ed 2d 785—Petition of A/S J Ludwig Mowinckels Reder, D C N Y , 268 F Supp 682, affd C A , 422 F 2d 728

86. U S —Lake Tankers' Corp v Henn, N Y , 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543—Star Brick Corp v Johnson, C A N Y , 262 F 2d 251—Petition of Follett, D C Tex , 172 F Supp 304—Pershing Auto Rentals, Inc v Gaffney, C A.Fla , 279 F 2d 546—Moore-McCormack Lines, Inc v Richardson, C A N Y , 295 F 2d 583, 96 A L R 2d 1085, cert den 82 S Ct 606, 368 U S 989, 7 L Ed 2d 526, cert den 82 S Ct 1577, 370 U S 937, 8 L Ed.2d 806, reh. den 82 S Ct 1580, 370 U S 965, 8 L.Ed 2d 835

87. U S —Petition of Follett, D C Tex , 172 F Supp 304—Fecht v Makowski, C A Fla , 406 F 2d 721 —In re Sincere Nav Corp , D C La , 317 F Supp 1.

88. U.S —Pershing Auto Rentals, Inc v Gaffney, C A Fla , 279 F.2d 546

Waiver by claimant of right to challenge settlements

U S —Petition of Trinidad Corp , C A N Y , 229 F 2d 423—Petition of Texas Co , D C N Y , 116 F Supp 915, affd , C A , 213 F 2d 479, cert den 75 S Ct 52, 348 U S 829, 99 L Ed 653, petition den 220 F 2d 744—Petition of Poling Holding Corp , D C N Y , 120 F Supp 890—Petition of Texas Co , C.A , 220 F 2d 744

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90. U S.—Petition of Wood, C A N Y., 230 F.2d 197.

91. U.S —Guillot v. Cenac Towing Co , C A La , 366 F 2d 898—Petition of A/S J. Ludwig Mowinckels Reder, D C N Y., 268 F.Supp 682, affd C A , 422 F 2d 728—Petition of Bloomfield S.S. Co , C A N.Y., 422 F.2d 728.

Offensive weapon

Shipowner cannot, by injunction, turn limitation proceedings into offensive weapon.

U.S.—Beal v. Waltz, C.A.Fla., 309 F 2d 721.

92. U.S.—China Union Lines, Limited v A O Andersen & Co , C.A Tex., 364 F 2d 769, cert. den 87 S.Ct. 955, two cases, 956, 386 U S. 933, 17 L.Ed.2d 805, reh. den. 87 S Ct. 1301, 386 U.S 999, 18 L.Ed.2d 353, and 87 S Ct 1302, 386 U.S. 1000, 18 L.Ed.2d 353, reh den 88 S.Ct 1015, 390 U.S. 974, 19 L Ed 2d 1191—Guillot v. Cenac Towing Co., C.A La., 366 F.2d 898—Petition of A/S J. Ludwig Mowinckels Reder, D.C N Y , 268 F.Supp 682, affd C A , 422 F.2d 728

93. U S —Petition of Lake Tankers Corp , C A N.Y , 232 F 2d 573, adhered to 235 F 2d 783, affd 77 S Ct 1269, 354 U S 147, 1 L Ed 2d 1246, reh den 77 S Ct 1421, 354 U S 945, 1 L Ed 2d 1543—Petition of U S , D C N C , 237 F Supp 434, affd , C A , 346 F 2d 449, cert den 86 S Ct. 163, 382 U S 878, 15 L Ed 2d 119—Mecom v Shell Oil Co , C A La , 376 F 2d 31—In re Lady D, C A Mich , 416 F 2d 454

Preliminary determination as to adequacy of fund

U S —Petition of Trinidad Corp , C A N Y , 229 F 2d 423

Modification on condition

U S —Petition of Trinidad Corp , C A N Y , 229 F 2d 423

Modification not permitted where claims exceed fund

U S —Pershing Auto Rentals, Inc v Gaffney, C A Fla., 279 F 2d 546

Modification not permitted under circumstances

U S —Petition of Read, D C Fla , 200 F Supp 504, affd , C A , 309 F 2d 455

94. U S —The A C Dodge v J M Carras, Inc , C A N Y , 218 F 2d 911—Petition of Wood, C A N.Y , 230 F 2d 197

Motion or proper pleading necessary

U S —Petition of Southern S S Co , D C Del , 132 F Supp 316

Motions on other grounds not precluded by order reversing modification

U S —Petition of Trinidad Corp , C A N Y , 229 F 2d 423

95. U S —Petition of Boraks, D C Mass , 142 F Supp 364

§ 252. —— Notice and Filing and Withdrawing Claims; Intervention and Bringing in Parties

97. **Notice of claim held shown**

U S —Petition of Allen N Spooner & Sons, Inc , D C N Y , 148 F Supp 181 Affd , C A , 253 F.2d 584, cert dism 79 S Ct 9, 358 U S 30, 3 L Ed.2d 48

1. U S —Petition of Trinidad Corp , D C Va , 238 F Supp 928

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21. U S —Greater New Orleans Expressway Commission v Tug Claribel, D C La , 222 F Supp 521, affd , C A , 342 F 2d 956, reh den. 348 F 2d 868 Cert dism in part 86 S Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den in part 86 S Ct 538, 382 U S 974, 15 L Ed 2d 465.

24. U S —Petition of Flinchum, D C Md., 303 F Supp. 971—Parham v Pelegrin, C A Ark , 468 F 2d 719 —In re Industrial Transp Corp , D C N Y , 344 F Supp 1311

Discretion held not abused

U S —Texas Gulf Sulphur Co v Blue Stack Towing Co , C A Fla , 313 F 2d 359

Other advantages

U S —Texas Gulf Sulphur Co v Blue Stack Towing Co., C A Fla., 313 F 2d 359

25. **Rights of parties not adversely affected**

U S —In re Industrial Transp Corp , D C N Y , 344 F Supp 1311

26. U S —Petition of Wood, D C N Y., 124 F Supp 540, affd., C A , 230 F 2d 197—Petition of Vermillion Towing Corp , D C Va., 227 F Supp 933

Denial of right to file held erroneous

U S —Jappinen v Canada S S Lines, Limited, C A Ohio, 417 F 2d 189

27. U S —Petition of Esso Shipping Co , D C.Tex , 121 F Supp 837—Texas Gulf Sulphur Co v Blue Stack Towing Co , C A.Fla., 313 F 2d 359

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33. Cross libel permitted

US—Moore-McCormack Lines, Inc v McMahon, C.A N Y, 235 F 2d 142

The parties to a limitation proceeding have the right to avail themselves of normal third-party practice and procedure.[33 5]

33.5. US—Petition of Sandra & Dennis Fishing Corp, D C Mass, 227 F Supp 620—Petition of Klarman, D C Conn, 270 F Supp 1001

§ 253. —— Consolidation of Proceedings

38. U.S—Petition of Healing & Son, Inc, D C N J, 124 F Supp 46

Severance of issues not required

US—In re Alva S S Co, D C N Y, 262 F Supp 328

39. US—Petition of Moore-McCormack Lines, Inc, D.C N Y, 147 F Supp 816—Val Marine Corp v Costas, C A N Y, 256 F 2d 911—Pennell v Read, C A Fla, 309 F 2d 455—Texas Gulf Sulphur Co v Blue Stack Towing Co, C A Fla, 313 F 2d 359

§ 254. —— Pleading, Proof, Issues, and Variance

Library References

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41. US—Petition of Wood, D C N Y, 124 F Supp 540, affd, C A, 230 F 2d 197—Blackler v F Jacobus Transp Co, C A N Y, 243 F 2d 733—Petition of Tanker Hygrade No 18, Inc, D C N Y, 172 F Supp 500—Petition of New York Trap Rock Corp, D C N Y, 172 F Supp 638—Petition of A/S J. Ludwig Mowinckels Rederi, D C N Y., 268 F.Supp 682, affd. C A, 422 F 2d 728

Requirements stated

US—Petition of Russell, D C N Y, 188 F Supp 101

Absence of copy of charter party agreement

U.S.—In re Barracuda Tanker Corp, D C N.Y, 281 F Supp 228, remd, C A, 409 F 2d 1013

42. US—Star Brick Corp v Johnson, C A N Y, 262 F 2d 251—Petition of Follett, D C Tex, 172 F Supp 304—Petition of Tanker Hygrade No 18, Inc, D C N Y, 172 F Supp 500

Petition held insufficient

U.S.—Petition of U.S, D.C Mass, 255 F Supp 737, affd. in part and set aside in part on oth grds, C.A., 372 F 2d 189, cert den 88 S.Ct. 48, 52, 389 U.S. 836, 19 L Ed 2d 98

The Federal Rules of Civil Procedure set forth the specific requirements of the complaint.[43 5]

43.5. Federal Rules of Civil Procedure, Supplemental Admiralty and Maritime Rule F, 28 U S C A.

Motion for more definite statement granted

U.S.—In re Twenty Grand Offshore, Inc., D C Fla, 313 F.Supp. 851

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47. U.S.—Petition of U S, C.A Del., 367 F.2d 505, cert den. 87 S Ct 953, 386 U S 932, 17 L Ed.2d 805.

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63. U.S.—Kutger v. U S., D C Fla., 169 F.Supp 104—Federazione Italiana Dei Consorzi Agrari v. Mandask Compania De Vapores, S A, D C N.Y., 223 F.Supp. 206, affd in part and revd in part on oth. grds., C.A., 342 F.2d 215—Ohio River Co. v. City of Wheeling, D.C W.Va, 225 F.Supp 733—Petition of Indiana Farm Bureau Co-op. Ass'n, D.C.Ill., 235 F Supp. 800—Federazione Italiana Dei Consorzi Agrari v Mandask Compania De Vapores, S A, D C N Y, 284 F Supp 356, affd in part, revd in part on oth grds 388 F 2d 434, cert den 89 S Ct 92, 393 U S 828, 21 L Ed 2d 99—In re Twenty Grand Offshore, Inc, D C Fla, 313 F Supp 851—Baham v Atlantic, Gulf & Pac Co, D C Pa, 333 F Supp 680

It is provided in the Federal Rules of Civil Procedure, that if a claimant in a limitation of liability proceeding desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the complaint unless his claim has included an answer [65 5]

65.5. Federal Rules of Civil Procedure, Supplemental Admiralty and Maritime Rule F(5), 28 U S C A

66. Single answer to multiple claims not prejudicial

US—Blunk v Wilson Line of Washington, Inc, D C Ohio, 341 F Supp 1345

71. US—Deep Sea Tankers, Limited v The Long Branch, C A N Y, 258 F 2d 757, cert den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, reh den 79 S Ct 578, 359 U S 921, 3 L Ed 2d 583—Murray v New York Cent R Co, D C N Y, 171 F Supp 80—Murray v New York Cent R Co, C A N Y, 287 F 2d 152, 87 A L R 2d 681, cert den 81 S Ct 1674, 366 U S 945, 6 L Ed 2d 856

72. US—Yates v Dann, D C Del, 167 F Supp 882—Kutger v. U S, D C Fla, 169 F Supp 104—Odegard v E Quist, Inc, D C N Y, 199 F Supp 449—Baham v Atlantic, Gulf & Pac Co, D C Pa, 333 F Supp 680

74. US—Baham v Atlantic, Gulf & Pac Co, D C Pa, 333 F.Supp 680

75. U S.—Odegard v E Quist, Inc, D.C N Y., 199 F Supp 449

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77. Petitioner's right to receive answer

(2) Other cases

U.S—New Jersey Barging Corp v T.A D Jones & Co, D C N Y, 135 F Supp. 97

92. Order extending time to file answer held proper

U.S—Petition of A/S J Ludwig Mowinckels Rederi, D C N.Y, 268 F Supp 682, affd C.A, 422 F 2d 728

93. U S.—Petition of A/S J Ludwig Mowinckels Rederi, D C N Y, 268 F Supp 682, affd. C A., 422 F 2d 728

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1. US—Petition of Moore-McCormack Lines, Inc., D C N Y, 147 F Supp 816

§ 255. —— Evidence

Library References

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18. Seaworthiness

(1) U S.—Walker v Harris, C A.La, 335 F 2d 185, cert den 85 S.Ct. 326, 379 U S 930, 13 L.Ed 2d 342—Walston v. Lambertsen, C A Wash, 349 F 2d 660, cert. den 86 S Ct. 553, 382 U S. 980, 15 L Ed.2d 470.

(2) U S—In re Marine Sulphur Transport Corp., D C N.Y., 312 F.Supp. 1081, affd in part, revd. in part on oth grds., C.A, 460 F 2d 89, cert den 93 S.Ct. 318, 326, 409 U.S 982, 34 L.Ed.2d 246

Negligence

(3) Other matters

U S—In re G.b.R.M S Caldas, D C Pa, 350 F.Supp 566, affd., C.A, 485 F.2d 678, 680.

N.Y—Petition of Rice, C A N.Y, 294 F 2d 272.

19. U S—Petition of Bogan, D C N J, 103 F Supp 755—In re Sasser, D C Ga, 314 F Supp 847—In re Parham, D C Ark, 336 F Supp 748

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21. U S—In re Sasser, D C Ga, 314 F Supp 847

22. U S—Petition of Bogan, supra, n 19—Petition of U S, D C N Y, 105 F Supp 353, remd on oth grds, C A, 201 F 2d 281—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724

23. U S—Hudgins v Mockingbird, Inc, D C Va, 282 F Supp 367—Petition of Long, D C N Y, 295 F Supp 857, affd, C A, 439 F 2d 109—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd. in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246—In re Parham, D C Ark, 336 F Supp 748—In re Marine Sulphur Queen, C A N Y, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

24. U S—Petition of S C Loveland Co, D C Pa, 170 F Supp 786

Violations of statutory regulations

(6) U S—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

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25. U S—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp. 1081, affd in part, revd in part on oth grds, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246—Petition of Long, C A N Y, 439 F 2d 109

Privity or knowledge

(1) U S—States S S Co v U S, C A.Or, 259 F 2d 458, cert. den 79 S Ct 316, 358 U S 933, 3 L Ed 2d 305, reh den 79 S Ct 579, 359 U S 921, 3 L Ed 2d 583—Navegacion Castro Riva, S A of Panama v The Nordholm, D C La, 178 F Supp., 736, affd, C A, 287 F 2d 398—Application of Theisen, D C N Y, 349 F Supp. 737

28. U S—In re Black Sea S S Co, D C Canal Zone, 382 F.Supp 907

29. U.S.—Gosnell v U S., C A Md, 262 F 2d 559—Verbeeck v Black Diamond S.S Corp, C A N Y, 269 F 2d 68, cert den 80 S Ct 374, 361 U S 934, 4 L.Ed 2d 355, cert den. 80 S Ct 374, 361 U.S. 934, 4 L.Ed 2d 355—Petition of Binstock, D C N Y, 213 F.Supp. 909, affd., C A, 330 F 2d 267.

33. U S—Petition of Bogan, supra, n 19—In re Ballantrae, Inc., D.C.N.J, 104 F.Supp 1, affd., C A, 208 F 2d 346—Petition of U S., supra, n 22—Petition of Clinton, D C.Mass, 195 F Supp. 165—Petition of Trawler Snoopy, Inc, D.C.Me, 268 F Supp 951—Petition of Long, D C N.Y., 293 F Supp 172, affd, C A, 439 F.2d 109—Petition of U.S, D C N C., 303 F Supp 1282—In re Marine Sulphur Transport Corp, D.C N.Y, 312 F.Supp. 1081, affd. in part, revd in part on oth. grds, C A., 460 F 2d 89, cert den 93 S.Ct 318, 326, 409 U S 982, 34 L.Ed.2d 246.

Negligence

U.S—Walston v Lambertsen, C.A Wash, 349 F 2d 660, cert den 86 S Ct 553, 382 U.S. 980, 15 L.Ed 2d 470—In re Parham, D.C Ark, 336 F Supp. 748

Unseaworthiness

U S.—Walston v Lambertsen, C A.Wash., 349 F.2d 660, cert. den. 86 S.Ct. 553, 382 U S. 980, 15 L.Ed.2d 470—U S. v. Soriano, C.A.Wash, 366 F 2d 699

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35. U S—Petition of U.S., supra, n. 22—Petition of Boat Demand, Inc, D.C.Mass., 174 F.Supp. 668.

Burden held not satisfied

U.S—In re G b.R.M.S. Caldas, D.C.Pa., 350 F.Supp 566, affd, C.A, 485 F.2d 678, 680

36. U S.—The YFNX-6, D C.Md., 156 F Supp 325, affd, C.A, 262 F.2d 559—U.S. v. Soriano, C.A Wash., 366 F.2d 699—Northern Fishing & Trad-

ing Co, Inc v Grabowski, C A Wash, 477 F 2d 1267, cert den 94 S Ct 597, 414 U S 1079, 38 L Ed 2d 485

Loss by fire

Claimants in shipowner's action for exoneration from or limitation of liability for damage to cargo because of fire aboard ship failed to carry burden of showing that alleged failure to have certain types of fire fighting equipment on board or their improper placement caused the loss by fire 46 U S C A §§ 182, 183

U S—In re G b R M S Caldas, D C Pa, 350 F Supp 566, affd C A, 485 F 2d 678, 680

39. U S—Petition of Reliance Marine Transp & Const Corp, supra, n 25

40. U S.—In re Ballantrae, Inc, supra, n 33

Evidence held sufficient to show particular matters

U S—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724—Petition of U S., D C N C, 303 F.Supp 1282

Evidence held insufficient to show particular matters

U.S—Petition of Oskar Tiedemann & Co, D C Del, 179 F Supp 227, motion den 183 F Supp 129, affd, C.A., 289 F 2d 237

Right to limitation in general

(1) U S—Griffith v Gardner, C.A Cal, 196 F 2d 698—British Transport Commission v U S., C A Va, 230 F.2d 139, cert den 77 S Ct 60, 352 U.S 838, 1 L.Ed 2d 56, affd 77 S Ct 1103, 354 U.S. 129, 1 L Ed 2d 1234—Timur Fishing Corp v Cap'n Bill, Inc, D.C Mass., 160 F.Supp 563—Petition of Clinton, D C Mass., 195 F.Supp 165—Walston v Lambertsen, C A Wash, 349 F 2d 660, cert. den. 86 S Ct 553, 382 U S 980, 15 L.Ed 2d 470

(2) U.S.—Rooney v Nuta, C A.Fla, 267 F 2d 142, cert. den 80 S Ct. 156, 361 U S 884, 4 L Ed.2d 120

(4) Other evidence.

U.S.—Navegacion Castro Riva, S A. of Panama v. The Nordholm, D C La, 178 F.Supp. 736, affd., C A, 287 F.2d 398

Preponderance of evidence

U.S.—Petition of Potomac San & Gravel Co, D C.Md, 253 F Supp. 268.

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45. U.S—Petition of Val Marine Corp., D C N Y, 145 F.Supp. 551.

46. Privity or knowledge held shown, etc.

U.S—Moran Towing & Transp Co. v M/S Hoperange, D.C.La., 226 F.Supp. 1018, affd., C.A., 345 F.2d 451—Olympic Towing Corp. v. Nebel Towing Co, C A.La., 419 F.2d 230, cert. den. 90 S.Ct 1120, 397 U.S. 989, 25 L.Ed.2d 396.

Privity or knowledge held not shown, etc.

U.S.—Petition of Hocking, D.C.N.J., 158 F Supp. 620—Moore McCormack Lines, Inc. v. Armco Steel Corp., C.A.N.Y., 272 F 2d 873, reh. den. 276 F 2d 676, cert. den. 80 S Ct 1079, two cases, 362 U S 990, 4 L Ed.2d 1023—Petition of Read, D.C.Fla., 224 F.Supp 241—Petition of U.S Dredging Corp, D.C.N.Y., 225 F.Supp. 730

Unseaworthy condition

(3) U.S.—Hudgins v. Mockingbird, Inc., D.C Va., 282 F.Supp. 367.

Improper manning; incompetence

(1) U.S.—Petition of Diesel Tanker A.C. Dodge, Inc., D.C.N Y., 133 F.Supp. 510, affd., C.A., 234 F.2d 374, cert. den. 77 S.Ct. 227, 228, 352 U.S. 928, 1 L.Ed.2d 163, cert. den. 77 S.Ct. 228, 352 U.S. 929, 1 L Ed 2d 164.

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47. U.S.—In re Marine Sulphur Transport Corp., D.C.N.Y., 312 F.Supp 1081, affd. in part, revd. in part on oth. grds., C.A, 460 F.2d 89, cert. den. 93 S.Ct. 318, 409 U.S. 982, 34 L.Ed.2d 246

Negligence of owner

U.S.—Petition of Read, D.C.Fla, 224 F.Supp. 241

(2) Evidence held sufficient to show negligence of owner

U S—Petition of Wood, D C Mo, 145 F Supp 848, affd, C A, 245 F 2d 306—Petition of Trawler Snoopy, Inc, D C Me, 268 F Supp 951—Loc-Wood Boat & Motors, Inc v Rockwell, C A Mo, 245 F 2d 306—Petition of Trans-Pacific Fishing & Packing Co, D C Wash, 152 F Supp 44

Negligence of master

(1) U S—Petition of Wood, D C Mo, 145 F Supp 848, affd, C A, 245 F 2d 306—Loc-Wood Boat & Motors, Inc v Rockwell, C A Mo, 245 F 2d 306—Empire Seafoods, Inc v Anderson, C A Fla, 398 F 2d 204, cert den 89 S Ct 449, 393 U S 983, 21 L Ed 2d 444

(3) U S—Petition of Diesel Tanker A C Dodge, Inc, C A N Y, 234 F 2d 374, cert den 77 S Ct 227, 352 U S 928, 1 L Ed 2d 163 and 77 S Ct 228, 352 U S 929, 1 L Ed 2d 164—Petition of the A C Dodge, Inc, D C N Y, 173 F.Supp 906, affd, C A, 282 F 2d 86

(5) Other instances

U S—Petition of Trans-Pacific Fishing & Packing Co, D C Wash, 152 F Supp 44

Concurrent negligence of owner and operator

U S—Petition of Oskar Tiedemann & Co, C A Del, 289 F 2d 237

48. Evidence held sufficient

(1) U S—Petition of U S, 131 F Supp 712, affd in part and revd in part on oth grds, C A, 230 F 2d 139, cert. den 77 S Ct 60, 352 U S 838, 1 L Ed 2d 56, affd 77 S Ct 1103, 354 U S 129, 1 L Ed 2d 1234—Oliver J Olson & Co. v The Marine Leopard, D C Cal, 152 F.Supp 197, affd, C A, 279 F 2d 662, cert den 81 S Ct 171, 364 U S 881, 5 L Ed 2d 103—Petition of Read, D C Fla, 224 F Supp 241

(5) To show that both vessels were at fault

U.S—Pearson v Heiser, C A Cal, 411 F 2d 616

(6) Other matters

U S—Cenac Towing Co. v Keystone Shipping Co, C A La, 404 F 2d 698

Evidence held insufficient

U.S—Petition of Diesel Tanker A C Dodge, Inc, D C N Y., 133 F Supp 510, affd., C A, 234 F 2d 374, cert. den. 77 S.Ct 227, 228, 352 U S 928, 1 L Ed 2d 163, cert den 77 S Ct 228, 352 U S 929, 1 L.Ed 2d 164—Petition of Binstock, D C N.Y, 213 F Supp 909, affd, C A, 330 F 2d 267

49. U S.—Petition of Central R Co of N J, D C N Y, 121 F Supp. 813

Evidence held sufficient

(1) U S—The Ballantrae, C A N J, 208 F 2d 346—Petition of Trans-Pacific Fishing & Packing Co, D C Wash, 152 F Supp 44—Petition of Shaver Transp Co, D.C Or, 287 F Supp 339

(2) U S.—Petition of Shaver Transp Co, D C Or, 287 F Supp 339

(3) U S—Petition of Long, C A N Y, 439 F.2d 109

Evidence held insufficient

(1) U S—Petition of Trawler Snoopy, Inc, D C Me, 268 F Supp 951

(2) U.S—Petition of Cherokee Trawler Corp, D C, 157 F Supp 414

(3) U S.—In re Marine Sulphur Transport Corp, D C N Y., 312 F Supp. 1081, affd in part, revd in part, C A, 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed.2d 246

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50. Evidence held sufficient

(1) U.S.—Petition of Reliance Marine Transp & Const Corp, C A.Conn., 206 F 2d 240.

(2) U S—Petition of Wood, D C Mo, 145 F Supp 848, affd, C.A, 245 F 2d 306

(3) Other cases

U S—Petition of Diesel Tanker A C Dodge, Inc, D C N Y., 133 F.Supp. 510, affd., C A, 234 F 2d 374, cert den 77 S Ct. 227, 228, 352 U S 928, 1 L Ed 2d 163, cert den 77 S Ct 228, 352 U S 929, 1 L.Ed 2d 164—In re Oil Transport Co, D C La, 178 F.Supp 48, revd on oth grds, C A., 278 F.2d 464, vac 81 S Ct 911, 365 U S 768, 6 L.Ed 2d 83—Petition of Oskar Tiedemann & Co, C.A Del, 289 F 2d 237

51. Evidence held sufficient

(1) U S—Petition of Trans-Pacific Fishing & Packing Co, D C Wash, 152 F Supp 44

55. Evidence held sufficient

(1) U S—Hudgins v Gregory, C A Va, 219 F 2d 255—Petition of Wood, D C Mo, 145 F Supp 848, affd, C A, 245 F 2d 306—Petition of Oskar Tiedemann & Co, D C Del, 179 F Supp 227, motion den 183 F Supp 129, affd, C A, 289 F 2d 237—Petition of Bloomfield S S Co, C A N Y, 422 F 2d 728

(6) To show no causal relation between undermanning and navigation

U S—Petition of Oskar Tiedemann & Co, C A Del, 289 F 2d 237

56. U S—Petition of Skibs A/S Jolund, D C N Y, 164 F Supp 12, revd on oth grds, C A, 269 F 2d 68, cert den 80 S Ct 374, two cases, 361 U S 934, 4 L Ed 2d 355

Evidence held sufficient

U S—Petition of Landi, D C N Y, 194 F Supp 353—Coleman v Jahncke Service, Inc, C A La, 341 F 2d 956, reh den 348 F 2d 868, cert dism in part 86 S Ct 525, 382 U S 967, 15 L Ed 2d 463, cert den 86 S Ct 538, 382 U S 974, 15 L Ed.2d 465

(2) Other matters

U S—U S v Soriano, C A Wash, 366 F 2d 699

Unseaworthiness

U S—Petition of Moore-McCormack Lines, Inc, D C N Y, 164 F Supp 198, affd, C A, 272 F 2d 873, reh den 276 F 2d 676, cert den 80 S Ct 1079, two cases, 362 U S 990, 4 L Ed 2d 1023—Petition of Nueces County, Tex., Road Dist No 4, D C Tex, 174 F Supp 846—In re Oil Transport Co, D C La, 178 F Supp 48, revd on oth grds, C A, 278 F 2d 464, vac. 81 S Ct 911, 365 U S. 768, 6 L Ed 2d 83

Perils of the sea; weather

(2) U S—In re Marine Sulphur Transport Corp, D C N Y, 312 F Supp 1081 Affd in part, revd in part on oth grds, C A 460 F 2d 89, cert den 93 S Ct 318, 326, 409 U S 982, 34 L Ed 2d 246

Evidence held insufficient

U S—Holloway Concrete Products Co v Beltz-Beatty, Inc, C A Fla, 293 F 2d 474

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57. Evidence held sufficient

U S—The Ballantrae, supra, n 49—Petition of Trans-Pacific Fishing & Packing Co, D C.Wash, 152 F Supp 44

58. U S—Tracy Towing Line v City of Jersey City, D C N J, 105 F Supp 910—Petition of J E Brenneman Co, C A Pa, 322 F 2d 846

59. Evidence held sufficient

(2) To sustain claim to extent of damages

U S—Petition of Banks, D C N Y, 133 F Supp 276

60. Evidence held sufficient

U S—Webster v Davis, D C Cal, 109 F Supp 149

62. Evidence held sufficient

(2) U S.—Petition of U S, supra, n 22

Evidence held insufficient

(1) U S—In re G b R M S Caldas, D C Pa, 350 F Supp 566, affd, C A, 485 F 2d 678, 680

§ 256. —— Determination of Issues, Relief, and Decree

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63. U S.—Petition of Wood, D C N Y, 124 F Supp 540, affd, C A, 230 F 2d 197—Singer v Dorr, D C La, 38 F R D 167—Petition of Trawler Snoopy, Inc, D C Me, 268 F Supp 951

Order of proof

U S—Petition of Moore-McCormack Lines, Inc, D C N Y, 147 F Supp 816

Hearing

U S—Petition of Russell, D C N Y, 188 F Supp 101

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64. U S—Petition of Robertson, D C Mass, 163 F Supp 242

67. U S—Petition of Atlass, C A Ill, 350 F 2d 592, cert den 86 S Ct 551, 556, 382 U S 988, 15 L Ed 2d 476, reh den 86 S Ct 884, 383 U S 923, 15 L Ed 2d 679, motion den 86 S Ct 1336, 384 U S 914, 16 L Ed 2d 368, reh den 86 S Ct 1336, 384 U S 914, 16 L Ed 2d 368

Other matters have been held to present questions for the trier of fact.[73 5]

73.5. Whether negligence was proximate cause of loss for trier of fact

U S—Petition of Skibs A/S Jolund, C A N Y, 250 F 2d 777, cert den 78 S Ct 772, 773, 356 U S 933, 2 L Ed 2d 763

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79. U S—Slaten v Hopemount Shipping Co, C A La., 345 F 2d 451

83. Remedy by independent suit

U S—Petition of Long, D C N Y, 295 F Supp 857, affd, C A, 439 F 2d 109

86. U S—British Transport Commission v U S, Va, 77 S Ct 1103, 354 U S 129, 1 L Ed 2d 1234

88. U S—Petition of New Jersey Barging Corp (Del), D C N Y, 168 F Supp 925—Petition of Gulf Oil Corp, D C N Y, 172 F Supp. 911

89. U S—Petition of New Jersey Barging Corp (Del), D C N Y, 168 F Supp 925

90. U S—Petition of Poling Holding Corp, D C N Y., 120 F Supp 890

92. U.S—Petition of Southern S S Co, D C Del, 135 F Supp 358—Petition of Sause Bros Ocean Towing Co, D C Or, 193 F Supp. 14

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93. U S.—Petition of Sause Bros Ocean Towing Co, D C Or, 193 F.Supp 14

5. U.S—Petition of Gulf Oil Corp, D.C N Y, 172 F Supp 911

9. U S—Petition of Oskar Tiedemann & Co, C A Del, 367 F 2d 498, cert den 87 S Ct 953, 957, 386 U S 932, 17 L Ed 2d 805, reh den 87 S Ct 1303, 386 U.S 1000, 18 L Ed 2d 354

An order or decree in a limitation of liability proceeding is given mere domestic and not international recognition.[9 5]

9.5. U S—In re Bloomfield S S Co, D.C La., 227 F.Supp. 615, affd, C A, 363 F 2d 872, cert den. 87 S Ct 864, 386 U S. 913, 19 L Ed 2d 785

10. U.S—Petition of Oskar Tiedemann & Co, C.A Del., 367 F 2d 498, cert den 87 S Ct. 953, 957, 386 U.S 932, 17 L Ed.2d 805, reh den 87 S.Ct 1303 386 U S. 1000, 18 L Ed 2d 354

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15. U.S.—Petition of Marina Mercante Nicaraguense, S A., D.C.N.Y, 248 F Supp 15, mod on oth grds., C.A., 364 F.2d 118, cert. den 87 S Ct 710, 385 U.S 1005, 17 L.Ed 2d 544, reh den. 82 S Ct 851, 386 U S 929, 17 L Ed 2d 803—Petition of Oskar Tiedemann & Co., C A Del., 367 F 2d 498, cert. den. 87 S.Ct 953, 957, 386 U S 932, 17 L.Ed.2d 805, reh den 87 S.Ct 1303, 386 U S. 1000, 18 L.Ed.2d 354—In re S.S. Tropic Breeze, C.A.Puerto Rico, 456 F.2d 137.

17. U.S.—Petition of Wood, D.C.N.Y., 124 F Supp. 540, affd., C.A., 230 F.2d 197—Petition of Lake Tankers Corp, D.C N.Y., 132 F.Supp 504—Petition of Kinsman Transit Co, C.A.N.Y, 338 F.2d 708, cert. den. 85 S.Ct. 1026, 380 U.S. 944, 13 L.Ed.2d 963.

18. U S—Moore-McCormack Lines, Inc v Richardson, C A N Y, 295 F 2d 583, 96 A L R 2d 1085, cert den 82 S Ct 606, 368 U S 989, 7 L Ed 2d 526, cert den 82 S Ct 1577, 370 U S 937, 8 L Ed 2d 806, reh den 82 S Ct 1580, 370 U S 965, 8 L Ed 2d 835

Time of payment

U S—Petition of Trinidad Corp, C A N Y, 229 F 2d 423

23. U S—Petition of Kinsman Transit Co, C A N Y, 338 F 2d 708, cert den 85 S Ct 1026, 380 U S 944, 13 L Ed 2d 963

§ 257. —— Review, Fees, and Costs

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Death claims are entitled to priority.[30 5]

30.5. U S—Petition of Marina Mercante Nicaraguense, S A, C A N Y, 364 F 2d 118, cert den 87 S Ct 710, 385 U S 1005, 17 L Ed 2d 544, reh den 87 S Ct 851, 386 U S 929, 17 L Ed.2d 803

31. Orders or decrees held not appealable

(3) Other orders or decrees

U S—World Tradeways Shipping, Limited v Nimpex Intern, Inc, C A N Y, 373 F 2d 860, cert den 88 S Ct 228, 389 U S 901, 19 L Ed 2d 224

32. U S.—Petition of Texas Co, C A N Y, 213 F 2d 479, cert den 75 S Ct 52, 348 U S 829, 99 L Ed 653, petition den C A, 220 F 2d 744—The A.C Dodge v J M Carras, Inc, C A N Y, 218 F 2d 911—Petition of Oskar Tiedemann & Co, C A Del, 253 F2d 233—World Tradeways Shipping, Limited v Nimpex Intern, Inc, C A.N Y, 373 F 2d 860, cert den 88 S Ct 228, 389 U S. 901, 19 L Ed 2d 224

Order modifying injunction held appealable

U S—Pershing Auto Rentals, Inc v. Gaffney, C.A Fla, 279 F 2d 546

34. Estoppel against petitioner

U S—Admiral Towing Co v Woolen, C A Cal, 290 F 2d 641

35. U S.—Raulbord v Ehmann, C A Ill., 197 F.2d 323

Affirmed

U S—Federazione Italiana dei Consorzi Agrari v. Mandask Compania de Vapores, S A, C.A N.Y., 342 F 2d 215

Scope of review

U.S—Waterman S S Corp v Gay Cottons, C A Cal, 414 F 2d 724

38. U.S—Gosnell v U.S, C.A Md, 262 F 2d 559—Admiral Towing Co. v Woolen, C.A Cal, 290 F 2d 641—Avera v Florida Towing Corp, C A Fla, 322 F.2d 155.

Evidence viewed favorably for claimants

U.S—Loc-Wood Boat & Motors, Inc. v Rockwell, C A Mo, 245 F 2d 306.

Decree interlocutory for purpose of appeal held res judicata on issue of liability

U S—Republic of France v. U S, C A Tex, 290 F.2d 395, cert den. 82 S.Ct. 644, 645, 369 U.S 804, 7 L Ed.2d 550.

40. U S.—Petition of New Jersey Barging Corp. (Del.), D.C N Y, 168 F Supp 925.

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48. U.S.—Petition of S.C. Loveland Co, D C.Pa., 170 F.Supp. 786—Petition of Bave, D C.Pa, 201 F.Supp 824, app. dism., C.A., 314 F.2d 335.

Counsel fees allowed

U.S.—Petition of Southern S.S. Co., D.C.Del, 135 F.Supp. 358.

Interest

U S—China Union Lines, Limited v A O Andersen & Co, C A Tex, 364 F 2d 769, cert den 87 S Ct 955, two cases, 956, 386 U S 933, 17 L Ed 2d 805, reh den 87 S Ct 1301, 386 U S 999, 18 L Ed 2d 353, and 87 S Ct 1302, 386 U S 1000, 18 L Ed 2d 353, reh den 88 S Ct 1015, 390 U S 974, 19 L Ed 2d 1191

57. U S—C J Dick Towing Co v The Leo, C A Tex, 202 F 2d 850—American Tobacco Co v The Katingo Hadjipatera, D C N Y, 115 F Supp 269, affd, C A, 211 F 2d 666, cert den 75 S Ct 48, 348 U S 828, 99 L Ed 653

Items included

(3) Other items

U S—Moore-McCormack Lines, Inc v Richardson, C A N Y, 295 F 2d 583, 96 A L R 2d 1085, cert den 82 S Ct 606, 368 U S 989, 7 L Ed 2d 526, cert den 82 S Ct 1577, 370 U S 937, 8 L Ed 2d 806, reh den 82 S Ct 1580, 370 U S 965, 8 L Ed 2d 835

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59. U S—American Tobacco Co v The Katingo Hadjipatera, supra, n 57

63. Costs as to particular claim

U S—C J Dick Towing Co v The Leo, D C Tex, 98 F Supp 455, affd, C A, 202 F 2d 850

64. U S—Petition of Kinsman Transit Co, 338 F 2d 708

§ 258. Definitions, Nature, and Distinctions

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79. N C—C.J.S. quoted in State ex rel Bruton v Flying "W" Enterprises, Inc, 160 S E 2d 482, 490, 273 N C 399

§ 259. Right of Property

Library References

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89. U S—Platoro Ltd., Inc v Unidentified Remains of a Vessel, D C.Tex., 371 F.Supp 356

90. U S—Platoro Ltd, Inc v. Unidentified Remains of a Vessel, D C Tex, 371 F Supp 356

N C—C.J.S. cited in State ex rel. Bruton v Flying "W" Enterprises, Inc., 160 S E 2d 482, 490, 273 N.C 399.

91. Statute held not to abrogate state's sovereign right

Fla—State By and Through Ervin v Massachusetts Co, 95 So 2d 902, 63 A L.R 2d 1360, cert den 78 S.Ct 147, 355 U.S. 881, 2 L Ed.2d 112

N C—State ex rel Bruton v. Flying "W" Enterprises, Inc., 160 S E.2d 482, 273 N.C 399

93. U S—Wiggins v. 1100 Tons, More or Less, of Italian Marble, D C Va., 186 F Supp 452 U S. v. Cargo Salvage Corp, D.C N Y, 228 F Supp 145

Abandonment not shown

(2) Other cases

U S—F. E Grauwiller Transp. Co v. The Jeanne, C A N.Y., 229 F.2d 153.

Evidence established abandonment

U.S.—Nippon Shosen Kaisha, K K v U S., D C.Cal, 238 F Supp. 55

Fla—Howard v Sharlin, 61 So.2d 181

Evidence held to show taking possession without consent of owner

U.S—F. E. Grauwiller Transp. Co v. King, D C.N.Y, 131 F.Supp. 630, affd., C.A., 229 F.2d 153.

Abandonment held voluntary

U S—Nippon Shosen Kaisha, K K. v. U.S., D C.Cal., 238 F.Supp. 55.

94. U.S.—Petition of Boat Demand, Inc., D.C Mass, 174 F Supp. 668.

95. N.C.—State ex rel Bruton v. Flying "W" Enterprises, Inc., 160 S.E 2d 482, 273 N.C. 399

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96. U S—Wiggins v 1100 Tons, More or Less, of Italian Marble, D C Va, 186 F Supp 452—Rickard v Pringle, D C N Y, 293 F Supp 981

Fla—Howard v Sharlin, supra, n 93

Loss of ownership of a vessel through the operation of the doctrine of constructive total loss is not regained by salvaging the vessel.[96 5]

96.5. U S—Continental Ins Co v Clayton Hardtop Skiff No NJ 2281 B, C A N J, 367 F 2d 230

Where state has possessory right or title to wrecked vessel and cargo, unauthorized person who goes on vessel and removes objects therefrom may be considered trespasser [96 10]

96.10. N C—State ex rel Bruton v Flying "W" Enterprises, Inc, 160 S E 2d 482, 273 N C 399

Bona fide salvor held not interloper or trespasser

U.S.—Rickard v Pringle, D C N Y, 293 F.Supp 981

§ 260. Protection and Sale and Application of Proceeds

1. Right of officer to compensation

U S.—Wiggins v 1100 Tons, More or Less, of Italian Marble, D C Va, 186 F Supp 452

§ 261. Injuries to Wreck

7. Liability not shown

U S.—Three Rivers Rock Co v. M/V Martin, D C Mo, 401 F.Supp. 15.

8. Evidence

U.S.—Three Rivers Rock Co v M/V Martin, D.C Mo., 401 F Supp. 15.

SHOCHET.

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6. Similarly expressed

(1) A "shochet" is the Hebrew name for a ritual slaughterer of cattle according to ancient Jewish law and tradition.—Potash v. Bonaccurso, 117 A.2d 803, 804, 179 Pa.Super. 582.

SHOCK.

18. Tex.—Texas & P Ry. Co. v Moore, Civ.App, 329 S.W.2d 293, 298, err ref. no rev err

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28. Similarly stated

Tex—Texas & R. Ry. Co v Moore, supra, n 18

30. Tex.—Texas & P. Ry Co v. Moore, supra, n. 18

31. Condition which follows trauma

Tex—Texas & P. Ry. Co. v. Moore, supra, n 18

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SHOP.

As a noun.

page 1266

70. Similarly expressed

The word "shop" does not necessarily mean a place where things are offered for sale but it may be a place where a particular kind of work is done.

La.—Poynter v. Fidelity & Cas. Co. of N.Y., App., 140 So.2d 42, 46.

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Phrases.

90. Other phrases

(1) "Shopping center" see the C J S definition Center

SHOPKEEPER.

92. U S—In re Cote, 6 Fed Cas No 3,267, 2 Low 374, 14 N B R 503

63 C J p 695 note 50[b]

SHOPLIFTING See Larceny § 1.

SHOPPER. The word, in one sense, is used to denote a newspaper containing principally advertising. The paper, also called a "throwaway," is distributed free, and without request, at doorways.[92 50]

92.50. U S—Union Leader Corp v Newspapers of New England, Inc, C A Mass, 284 F 2d 582, 583

SHORE.

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37. R I—Waldman v Town of Barrington, 227 A 2d 592, 595, 102 R I 14

Wash—Wilson v Howard, 486 P 2d 1172, 1178, 5 Wash.App 169

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50. In precise modern usage, the term "shore" denotes line of low-water mark along mainland, while term "coast" denotes line of shore plus line where inland waters meet open sea—U S v States of La, Tex, Miss, Ala and Fla, Ala, Fla, La., Miss and Tex., 80 S Ct 961, 997, 363 U S 1, 121, 4 L Ed 2d 1025, 1096

Phrases:

66. Additional phrases

(1) "Shore leave" as a right of a merchant seaman see Seamen § 13. See also Seamen §§ 173d, 191d(1)

SHORE SCLEROSCOPE An instrument which measures the hardness of work in arbitrary terms of elasticity.[67 40]

67.40. Instrument described

A diamond-tipped hammer is allowed to drop from a known height on material to be tested, and, as the hammer strikes the material, the hammer rebounds, and the harder the substance, the greater the rebound, and the height of rebound is measured on a scale and serves as an arbitrary index of hardness—Application of Touvay, Cust. & Pat App., 264 F 2d 901, 902, 46 CCPA 823

SHORING. Placing a wall of boards along each vertical side of a ditch, and holding these walls apart by jacks or by 4×4's.[67 50]

67.50. Mo—Dulley v Berkley, 304 S W 2d 878, 881

SHORT.

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68. Short time as meaning a few weeks

Mass.—Townsend v. Wood, 174 N E 2d 420, 421, 342 Mass 481, 90 A.L R 2d 684

69. Court file

When court file is "short", it means that the file cannot be found—Mutual Truck Parts Co. v. Nelson, 216 N.E.2d 301, 303, 69 Ill App 2d 30

SHORTLY.

82. Kan.—Garrison v. St. Louis & S.F. Ry. Co, 271 P 2d 307, 311, 176 Kan. 548

SHOULDER.

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90. Not part of arm

Ga—Gentry v Georgia Cas & Sur Co, 131 S E 2d 788, 790, 107 Ga App 888

Shrug of the shoulders is an expression of indifference or a lack of interest—People v Brooks, 289 N E 2d 207, 217, 7 Ill App 3d 767

SHOW.

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8. Ohio—In re Walker's Estate, 120 N E 2d 432, 435, 161 Ohio St 564

9. Ohio—In re Walker's Estate, supra, n 8

12. Ohio—In re Walker's Estate, supra, n 8

29. Similarly defined

"Showing" means an act of presenting or bringing to view or notice

N J—Cuna v Board of Fire Com'rs, Avenel, 182 A 2d 397, 399, 75 N J Super 152

SHOWER One who accompanies a jury to the scene of a view and calls the attention of the jurors to the specific objects to be noted.[32 50]

32.50. U S—Snyder v Com of Mass, Mass, 54 S Ct 330, 291 U S 97, 78 L Ed 674, 90 A L R 575

SHOWUP. The term "showup" is sometimes used interchangeably with "lineup", and is also used to refer to a situation where one suspect is shown by himself to a witness.[32 70]

32.70. N M—State v Samora, App, 490 P 2d 480, 481, 83 N M 222

SHRINE.

A shrine is a place or object hallowed from its history or association.[35 1]

35.1. Other definitions

U S—Acme Marble & Granite Co v U S Cust Ct., 324 F Supp 503, 506

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SHYSTER.

46. Ohio—Shapiro v Kilgore Cleaning & Storage Co, 156 N E 2d 866, 870, 108 Ohio App 402

47. Ohio—Shapiro v Kilgore Cleaning & Storage Co, 156 N E 2d 866, 870, 108 Ohio App. 402

49. Ohio—Shapiro v Kilgore Cleaning & Storage Co, 156 N E 2d 866, 870, 108 Ohio App 402

SIC.

Maxims

Sic utere tuo ut alienum non lædas.

55. N Y—Meltex, Inc v Livingston, 145 N Y S 2d 858, 866, 208 Misc 1033.

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56. U S—C.J.S. cited in Gainey v Folkman, D C Ariz, 114 F Supp 231, 232

Ind—Chapman v Barnett, 169 N E 2d 212, 214, 131 Ind App. 30

La—Town of Jackson v Mounger Motors, Inc, App, 98 So 2d 697, 699

N.J—Sans v. Ramsey Golf & Country Club, Inc, 141 A 2d 335, 338, 50 N J Super 127

N M—Middle Rio Grande Water Users Ass'n v Middle Rio Grande Conservancy Dist, 258 P 2d 391, 405, 57 N M 287

N D—Lemer v Koble, 86 N W 2d 44, 46

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